

Encyclopedia of
**AMERICAN
CIVIL LIBERTIES**

Volume 1

A – F

Index

Paul Finkelman

Editor

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For Judge Avern Cohn, a friend of legal history and civil liberties.

CONTENTS

Editorial Board	ix
Contributors	xi
Alphabetical List of Entries	xxv
Thematic List of Entries	xli
Introduction	lvii
Entries A to Z	1
Index	II

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A

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- Abington Township School District v. Schempp, 374 U.S. 203 (1963)
- Abolitionist Movement
- Abolitionists
- Aboud v. Detroit Board of Education, 431 U.S. 209 (1977)
- Abortion
- Abortion Laws and the Establishment Clause
- Abortion Protest Cases
- Abrams v. United States, 250 U.S. 616 (1919)
- Absolutism and Free Speech
- Abu Ghraib
- Academic Freedom
- Access to Government Operations Information
- Access to Judicial Records
- Access to Prisons
- Accommodation of Religion
- Accomplice Confessions
- Act Up
- Acton, Lord John
- Actual Malice Standard
- Administrative Searches and Seizures
- Adolescent Family Life Act
- Affirmative Action
- Agostini v. Felton, 521 U.S. 203 (1997)
- Aguilar v. Felton, 473 U.S. 402 (1985)
- Airport Searches
- Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983)
- Alcorta v. Texas, 355 U.S. 28 (1957)
- Alien and Sedition Acts (1798)
- Aliens, Civil Liberties of
- County of Allegheny v. ACLU, 492 U.S. 573 (1989)
- Allen v. Illinois, 478 U.S. 364 (1986)
- Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, 391 U.S. 308 (1968)
- Ambach v. Norwick, 441 U.S. 68 (1979)
- America Online
- American Anti-Slavery Society
- American Booksellers Association, Inc., et al. v. Hudnut, 771 F. 2nd 323 (1985)
- American Civil Liberties Union
- American Communications Association v. Douds, 339 U.S. 382 (1950)
- American Indian Religious Freedom Act of 1978
- American Revolution
- Americans United for Separation of Church and State
- Amish and Religious Liberty
- Amnesty International
- Amsterdam, Anthony G.
- Anders v. California, 386 U.S. 738 (1967)
- Anne Hutchinson Trial
- Anonymity and Free Speech
- Anonymity in On-line Communication
- Anslinger, Harry Jacob
- Anthony, Susan B.
- Anti-Abolitionist Gag Rules
- Anti-Abortion Protest and Freedom of Speech
- Anti-Anarchy and Anti-Syndicalism Statutes
- Anti-Defamation League of B’nai B’rith
- Antidiscrimination Laws
- Antipolygamy Laws
- Apodaca v. Oregon, 406 U.S. 404 (1972)
- Application of First Amendment to States
- Apprendi v. New Jersey, 530 U.S. 466 (2000)
- Appropriation of Name or Likeness
- Aptheker v. Secretary of State, 378 U.S. 500 (1964)
- Arizona v. Fulminante, 499 U.S. 279 (1991)
- Arizona v. Hicks, 480 U.S. 321 (1987)
- Arizona v. Youngblood, 488 U.S. 51 (1988)
- Arraignment and Probable Cause Hearing
- Arrest
- Arrest Warrants
- Arrest without a Warrant
- Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002)
- Ashcroft, John

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Assisted Suicide
Asylum, Refugees and the Convention against Torture
Atheism
Automobile Searches
Autopsies and Free Exercise Beliefs

B

Bache, Benjamin Franklin
Bad Tendency Test
Bail
Balancing Approach to Free Speech
Balancing Test
Baldus Study (Capital Punishment)
Baldwin, Roger
Ballew v. Georgia, 435 U.S. 223 (1978)
Ballot Initiatives
Baltimore City Department of Social Services v. Bouknight, 493 U.S. 549 (1990)
Baptists in Early America
Barclay v. Florida, 463 U.S. 939 (1983)
Barefoote v. Estelle, 463 U.S. 880 (1983)
Barenblatt v. United States, 360 U.S. 109 (1959)
Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991)
Barron v. Baltimore, 32 U.S. 243 (1833)
Bartkus v. Illinois, 359 U.S. 121 (1959)
Bartnicki v. Vopper, 532 U.S. 514 (2001)
Bates v. State Bar of Arizona, 433 U.S. 350 (1969)
Batson v. Kentucky, 476 U.S. 79 (1986)
Beal v. Doe, 432 U.S. 438 (1977)
Beauharnais v. Illinois, 343 U.S. 250 (1952)
Becker Amendment
Belief–Action Distinction in Free Exercise Clause History
Belle Terre v. Boraas, 416 U.S. 1 (1974)
Bellis v. United States, 417 U.S. 85 (1974)
Bellotti v. Baird, 443 U.S. 622 (1979)
Benton v. Maryland, 395 U.S. 784 (1969)
Berger v. New York, 388 U.S. 41 (1967)
Berkemer v. McCarty, 468 U.S. 420 (1984)
Bethel School District v. Fraser, 478 U.S. 675 (1986)
Betts v. Brady, 316 U.S. 455 (1942)
Bible in American Law
Bible Reading in Public Schools, History of before and after *Abington School District v. Schempp*
Biddle, Francis Beverly
Bill of Attainder
Bills of Rights in Early State Constitutions
Bill of Rights: Adoption of
Bill of Rights: Structure
Bingham, John Armor
Birth Control
Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971)
Blackledge v. Perry, 417 U.S. 21 (1974)
Blacklisting
Blackstone and Common-Law Prohibition on Prior Restraints
Blaine Amendment
Bloody Tenet of Persecution for Cause of Conscience, Discussed in a Conference between Truth and Peace, The
Blue Wall of Silence
Board of Education of the Westside Community Schools v. Mergens, 496 U.S. 226 (1990)
Board of Education v. Allen, 392 U.S. 236 (1968)
Board of Education v. Earls, 536 U.S. 822 (2002) (Students)
Board of Education v. Pico, 457 U.S. 853 (1982)
Board of Education, Kiryas Joel School District v. Grumet, 512 U.S. 687 (1994)
Bob Jones University v. United States, 461 U.S. 574 (1983)
City of Boerne v. Flores, 521 U.S. 507 (1997)
Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983)
Bond v. Floyd, 385 U.S. 116 (1966)
Book Banning and Book Removals
Bordenkircher v. Hayes, 434 U.S. 357 (1978)
Bork, Robert Heron
Boston Massacre Trial (1770)
Bowen v. American Hospital Association, 476 U.S. 610 (1986)
Bowen v. Kendrick, 487 U.S. 589 (1988)
Bowen v. Roy, 476 U.S. 693 (1986)
Bowers v. Hardwick, 478 U.S. 186 (1986)
Boy Scouts of America v. Dale, 530 U.S. 640 (2000)
Boyd v. United States, 116 U.S. 616 (1886)
Boykin v. Alabama, 395 U.S. 238, 242 (1969)
Bradfield v. Roberts, 175 U.S. 291 (1899)
Brady v. Maryland, 373 U.S. 83 (1963)
Brandeis, Louis Dembitz
Brandenburg Incitement Test
Brandenburg v. Ohio, 395 U.S. 444 (1969)
Branti v. Finkel, 445 U.S. 507 (1980)
Branzburg v. Hayes, 408 U.S. 665 (1972)
Braswell v. United States, 487 U.S. 99 (1988)
Bray v. Alexandria Women's Health Clinic, 506 U.S. 263 (1993)
Breithaupt v. Abram, 352 U.S. 432 (1957)
Brewer v. Williams, 430 U.S. 387 (1977)
Breyer, Stephen Gerald
Broadcast Regulation
Brooks v. Tennessee, 406 U.S. 605 (1972)
Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar, 377 U.S. 1 (1964)

Brown v. Board of Education, 347 U.S. 483 (1954)
 Brown v. Mississippi, 279 U.S. 278 (1936)
 Bruce, Lenny
 Bryan, William Jennings
 Bryant, Anita
 Buchanan v. Kentucky, 483 U.S. 402 (1987)
 Buchanan v. Warley, 245 U.S. 60 (1917)
 Buck v. Bell, 274 U.S. 200 (1927)
 Buckley v. Valeo, 424 U.S. 1 (1976)
 Bullington v. Missouri, 451 U.S. 430 (1981)
 Burdeau v. McDowell, 256 U.S. 465 (1921)
 Burden of Proof: Overview
 Burger Court
 Burger, Warren E.
 Burke, Edmund
 Burks v. United States, 437 U.S. 1 (1978)
 Burton, Justice Harold
 Butler v. McKellar, 494 U.S. 407 (1990)
 Butler, Pierce
 Byers v. Edmondson, 712 So.2d 681 (1999) (“Natural Born Killers” Case)

C

Cable Television Regulation
 Cain v. Kentucky, 387 U.S. 319 (1970)
 Calder v. Bull, 3 U.S. 386 (1798)
 Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974)
 Calhoun, John Caldwell
 California v. Acevedo, 500 U.S. 565 (1991)
 California v. Greenwood, 486 U.S. 35 (1988)
 California v. LaRue, 409 U.S. 109 (1972)
 California v. Ramos, 459 U.S. 1301 (1982)
 California v. Trombetta, 467 U.S. 479 (1984)
 Camara v. Municipal Court of the City and County of San Francisco, 387 U.S. 523 (1967)
 Cameras in the Courtroom
 Campaign Finance Reform, No. 1021
 Campus Hate Speech Codes
 Cantwell v. Connecticut, 310 U.S. 296 (1940)
 Capital Punishment
 Capital Punishment and Race Discrimination
 Capital Punishment and Resentencing
 Capital Punishment and Sentencing
 Capital Punishment and the Equal Protection Clause Cases
 Capital Punishment and the Right of Appeal
 Capital Punishment for Felony Murder
 Capital Punishment Held Not Cruel and Unusual Punishment under Certain Guidelines
 Capital Punishment Reversed

Capital Punishment: Antiterrorism and Effective Death Penalty Act of 1996
 Capital Punishment: Due Process Limits
 Capital Punishment: Eighth Amendment Limits
 Capital Punishment: Execution of Innocents
 Capital Punishment: History and Politics
 Capital Punishment: Lynching
 Capital Punishment: Methods of Execution
 Capital Punishment: Proportionality
 Capitol Square Review and Advisory Board v. Pinette, 515 U.S. 753 (1995)
 Captive Audiences and Free Speech
 Cardozo, Benjamin
 Carey v. Population Services International, 431 U.S. 678 (1977)
 Carolene Products v. U.S., 304 U.S. 144 (1938)
 Carroll v. United States, 267 U.S. 132 (1925)
 Categorical Approach to Free Speech
 Catholics and Religious Liberty
 Catt, Carrie Chapman
 Central Hudson Gas and Electric Corp. v. Public Service Commission of New York, 447 U.S. 557 (1980)
 Central Intelligence Agency
 Ceremonial Deism
 Chae Chan Ping v. U.S., 130 U.S. 581 (1889) and Chinese Exclusion Act
 Chafee, Zechariah, Jr.
 Chain Gangs
 Chambers v. Florida, 309 U.S. 227 (1940)
 Chambers v. Mississippi, 410 U.S. 284 (1973)
 Chambers, Whittaker
 Chandler v. Florida, 449 U.S. 560 (1981)
 Chandler v. Miller 520 U.S. 305 (1997) (candidates)
 Chaplains: Legislative
 Chaplains: Military
 Charitable Choice
 Chase Court
 Chase, Samuel
 Chavez, Cesar
 Checkpoints (Roadblocks)
 Chemerinsky, Erwin
 Chessman, Caryl
 Chicago Seven Trial
 Chicago v. Morales, 527 U.S. 41 (1999)
 Child Custody and Adoption
 Child Custody and Foster Care
 Child Pornography
 Children and the First Amendment
 Chimel v. California, 395 U.S. 752 (1969)
 Christian Coalition
 Church of Scientology and Religious Liberty
 Church of the Holy Trinity v. United States, 143 U.S. 457 (1892)

ALPHABETICAL LIST OF ENTRIES

- Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993)
Church of the New Song and Religious Liberty
Church Property after the American Revolution
Cicenia v. LaGay, 357 U.S. 504 (1958)
Cincinnati v. Discovery Network, Inc., 507 U.S. 14 (1993)
Citizenship
Civil Asset Forfeiture
Civil Death
Civil Religion
Civil Rights Act of 1866
Civil Rights Act of 1875
Civil Rights Act of 1964
Civil Rights Cases, 109 U.S. 3 (1883)
Civil Rights Laws and Freedom of Speech
Civilian Complaint Review Boards
Clark, Ramsey
Clark, Tom Campbell
Classified Information
Clear and Present Danger Test
Cloning
Coerced Confessions/Police Interrogations
Cohen v. California, 403 U.S. 15 (1971)
Cohen v. Cowles Media Company, 501 U.S. 663 (1991)
Cohn, Roy
Coker v. Georgia, 433 U.S. 584 (1977)
Colautti v. Franklin, 439 U.S. 379 (1979)
Coleman v. Thompson, 501 U.S. 722 (1991)
Collateral Consequences
Colonial Charters and Codes
Colorado Republican Federal Campaign Committee v. Federal Election Commission, 518 U.S. 604 (1996)
Colorado v. Connelly, 479 U.S. 157 (1986)
Commercial Speech
Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756 (1973)
Committee for Public Education and Religious Liberty v. Regan, 444 U.S. 646 (1980)
Common Law or Statute
Communications Decency Act (1996)
Communism and the Cold War
Communist Party
Company Towns and Freedom of Speech
Compelling State Interest
Compulsory Vaccination
Comstock, Anthony
Concept of “Christian Nation” in American Jurisprudence
Confrontation and Compulsory Process
Confrontation Clause
Congressional Protection of Privacy
Connally v. Georgia, 429 U.S. 245 (1977)
Connor, Eugene “Bull”
Conscientious Objection, the Free Exercise Clause
Conspiracy
Constitution of 1787
Constitution Overseas
Constitutional Amendment Permitting School Prayer
Constitutional Convention of 1787
Content-Based Regulation of Speech
Content-Neutral Regulation of Speech
Coolidge v. New Hampshire, 403 U.S. 443 (1971)
Copyright Law and Free Exercise
Corporation of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987)
Corrigan v. Buckley, 271 U.S. 323 (1926)
Corruption of Blood
Counselman v. Hitchcock, 142 U.S. 547 (1892)
County and City Seals with Religious Content
Covington, Hayden
Cox v. Louisiana, 379 U.S. 536 (1965)
Cox v. New Hampshire, 312 U.S. 569 (1941)
Coy v. Iowa, 487 U.S. 1012 (1988)
Crane v. Johnson, 242 U.S. 339 (1917)
Crane v. Kentucky, 476 U.S. 683 (1986)
Creationism and Intelligent Design
Criminal Conspiracy
Criminal Law/Civil Liberties and Noncitizens in the United States
Criminalization of Civil Wrongs
Cromwell, Oliver
Cross Burning
Cruel and Unusual Punishment (VIII)
Cruel and Unusual Punishment Generally
Cruzan v. Missouri, 497 U.S. 261 (1990)
Cuban Interdiction
Cultural Defense
- ## D
- Dandridge v. Williams, 397 U.S. 471 (1971)
Darrow, Clarence
Davis v. Alaska, 415 U.S. 308 (1974)
Davis v. Beason, 133 U.S. 333 (1890)
Dawson, Joseph Martin
Days of Religious Observance as National or State Holidays
Debs, Eugene V.
Debs v. United States, 249 U.S. 211 (1919)
Debtor’s Prisons
Declaration of Independence
Defamation and Free Speech
Defense of Marriage Act
Defense, Right to Present
Defiance of the Court’s Ban on School Prayer

Defining Religion
 DeJonge v. Oregon, 299 U.S. 353 (1937)
 Delaware v. Prouse, 440 U.S. 648 (1979)
 Demonstrations and Sit-Ins
 Denaturalization
 Dennis v. United States, 341 U.S. 494 (1951)
 Department of Homeland Security
 Dershowitz, Alan
 Designated Public Forums
 DeWitt, General John
 Dial-a-Porn
 Dickerson v. United States, 530 U.S. 428 (2000)
 Dies, Martin
 Disciplining Lawyers for Speaking about
 Pending Cases
 Disciplining Public Employees for Expressive
 Activity
 Discovery Materials in Court Proceedings
 Discrimination by Religious Entities That Receive
 Government Funds
 Discriminatory Prosecution
 Disestablishment of State Churches in the Late
 Eighteenth Century and Early Nineteenth Century
 Diversity Immigration Program
 DNA and Innocence
 DNA Testing
 Doe v. Bolton, 410 U.S. 179 (1973)
 Domestic Violence
 Don't Ask, Don't Tell
 Double Jeopardy (V): Early History,
 Background, Framing
 Double Jeopardy: Modern History
 Douglas v. California, 372 U.S. 353 (1963)
 Douglas, William Orville
 Douglass, Frederick
 Draft Card Burning
 Dred Scott v. Sandford, 60 U.S. 393 (1857)
 Drug Testing
 Drugs, Religion, and Law
 Dual Citizenship
 Due Process
 Due Process in Immigration
 Due Process of Law (V and XIV)
 Duncan v. Louisiana, 391 U.S. 145 (1968)
 Dusky v. U.S., 362 U.S. 402 (1960)
 Duty to Obey Court Orders
 DWI
 Dworkin, Andrea

E

Economic Regulation
 Economic Rights in the Constitution

Edwards v. Aguillard, 482 U.S. 578 (1987)
 Edwards v. Arizona, 451 U.S. 477 (1981)
 Edwards v. California, 314 U.S. 160 (1941)
 Edwards v. South Carolina, 372 U.S. 229 (1963)
 Eisenstadt v. Baird, 405 U.S. 438 (1972)
 Eldred v. Ashcroft, 537 U.S. 186 (2001)
 Electric Chair as Cruel and Unusual Punishment
 Electronic Surveillance, Technology Monitoring, and
 Dog Sniffs
 Elk Grove Unified School District v. Newdow, 542
 U.S. 1 (2004)
 Ellsworth Court
 Elrod v. Burns, 427 U.S. 347 (1976)
 Emancipation Proclamation (1863)
 Emergency, Civil Liberties in
 Emerson, Thomas Irwin
 Employment Division, Department of Human
 Resources v. Smith, 494 U.S. 872 (1990)
 Engel v. Vitale, 370 U.S. 421 (1962)
 English Bill of Rights, 1689
 English Toleration Act
 English Tradition of Civil Liberties
 Entrapment and "Stings"
 Entrapment by Estoppel
 Epperson v. Arkansas, 393 U.S. 97 (1968)
 Equal Access Act
 Equal Protection Clause and Religious Freedom
 Equal Protection of Law (XIV)
 Equal Rights Amendment
 City of Erie v. Pap's A.M., 529 U.S. 277 (2000)
 Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975)
 Escobedo v. Illinois, 378 U.S. 478 (1964)
 Establishment Clause (I): History, Background,
 Framing
 Establishment Clause Doctrine: Supreme Court
 Jurisprudence
 Establishment Clause: Theories of Interpretation
 Establishment of Religion and Free Exercise Clauses
 Estate of Thornton v. Caldor, 472 U.S. 703 (1985)
 Estelle v. Smith, 451 U.S. 454 (1980)
 Estelle v. Williams, 425 U.S. 501 (1975)
 Estes, Billie Sol
 Eugenic Sterilization
 Euthanasia
 Evers, Medgar Wiley
 Everson v. Board of Education, 330 U.S. 1 (1947)
 Ex Parte Milligan, 71 U.S. 2 (1866)
 Ex Parte Vallandigham, 28 F.CAS. 874 (1863)
 Ex Post Facto Clause
 Exclusionary Rule
 Exemplars
 Exemptions for Religion Contained in Regulatory
 Statutes
 Expatriation
 Extradition

ALPHABETICAL LIST OF ENTRIES

Extremist Groups and Civil Liberties
Eyewitness Identification

F

Fair Credit Reporting Act, 84 Stat. 1127 (1970)
Fair Labor Standards Act and Religion
Fair Use Doctrine and First Amendment
Fairness Doctrine
False Confessions
False Light Invasion of Privacy
Falwell, Jerry
Family Unity for Noncitizens
Family Values Movement
FCC v. League of Women Voters, 468 U.S. 364 (1984)
FCC v. Pacifica Foundation, 438 U.S. 726 (1978)
Federal Communications Commission
Federalization of Criminal Law
Feiner v. New York, 340 U.S. 315 (1951)
Felon Disenfranchisement
Fiallo v. Bell, 430 U.S. 787 (1977)
Field, Stephen J.
Fighting Words and Free Speech
First Amendment and PACs
Fisher v. United States, 425 U.S. 391 (1976)
Flag Salute Cases
Flag Burning
Flast v. Cohen, 392 U.S. 83 (1968)
Florida Star v. B.J.F., 491 U.S. 524 (1989)
Florida v. Jimeno, 500 U.S. 248 (1991)
Florida v. Riley, 488 U.S. 445 (1989)
Florida v. Royer, 460 U.S. 491 (1983)
Florida v. White, 526 U.S. 559 (1999)
Flynt, Larry
Follett v. Town of McCormick, S.C., 321 U.S. 573 (1944)
Fong Yue Ting v. United States, 149 U.S. 698 (1893)
Forced Speech
Fortas, Abe
Fourteenth Amendment
44 Liquormart v. Rhode Island, 517 U.S. 484 (1996)
France v. United States, 164 U.S. 676 (1897)
Francis v. Franklin, 471 U.S. 307 (1985)
Frank, John P.
Frankfurter, Felix
Franklin, Benjamin
Free Exercise Clause (I): History, Background, Framing
Free Exercise Clause Doctrine: Supreme Court Jurisprudence
Free Press/Fair Trial
Free Speech in Private Corporations

Freedom of Access to Clinic Entrances (FACE) Act, 108 Stat. 694 (1994)
Freedom of Association
Freedom of Contract
Freedom of Expression in the International Context
Freedom of Information Act (1966)
Freedom of Information and Sunshine Laws
Freedom of Speech and Press under the Constitution: Early History, 1791–1917
Freedom of Speech and Press: Nineteenth Century
Freedom of Speech Extended to Corporations
Freedom of Speech in Broadcasting
Freedom of Speech: Modern Period (1917 – Present)
Freedom of the Press: Modern Period (1917 – Present)
Freund, Paul A.
Frisbie v. Collins, 342 U.S. 519 (1952)
Frisby v. Schultz, 487 U.S. 474 (1988)
Fruit of the Poisonous Tree
Fuller Court
Furman v. Georgia, 408 U.S. 238 (1972)
FW/PBS, Inc. v. City of Dallas, 493 U.S. 215 (1990)

G

Gag Orders in Judicial Proceedings
Gag Rule
Gang Ordinances
Gardner v. Florida, 430 U.S. 349 (1977)
Garrison, William Lloyd
Gay and Lesbian Rights
General Warrants
Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991)
Gerstein v. Pugh, 420 U.S. 103 (1975)
Gertz v. Robert Welch Inc., 418 U.S. 323 (1974)
Gibson v. Florida Legislative Investigation Committee, 372 U.S. 539 (1961)
Giddings, Joshua Reed
Gideon, Clarence Earl
Gideon v. Wainwright, 372 U.S. 335 (1963)
Giglio v. United States, 405 U.S. 150 (1972)
Gilmore, Gary
Ginsberg v. New York, 390 U.S. 629 (1968)
Ginsburg, Ruth Bader
Ginzberg v. United States, 343 U.S. 463 (1966)
Gitlow v. New York 268 U.S. 652 (1925)
Glorious Revolution
Godfrey v. Georgia, 446 U.S. 420 (1980)
Godinez v. Moran, 509 U.S. 389 (1993)
Goldberg v. Kelly, 397 U.S. 254 (1970)
Goldberg, Arthur J.
Goldman v. Weinberger, 475 U.S. 503 (1986)

Good News Club v. Milford Central School, 533 U.S. 98 (2001)
 Government Funding of Speech
 Government Speech
 Graham v. Commissioner of Internal Revenue, 490 U.S. 680 (1989)
 Grand Jury
 Grand Jury in Colonial America
 Grand Jury Indictment (V)
 Grand Jury Investigation and Indictment
 Grant's General Orders #11 (1862) (expelling Jews)
 Green v. Georgia, 442 U.S. 95 (1979)
 Gregg v. Georgia, 428 U.S. 153 (1976)
 Griffin v. California, 380 U.S. 609 (1965)
 Griffin v. Illinois, 351 U.S. 12 (1956)
 Griffin v. Wisconsin, 483 U.S. 868 (1987)
 Griswold v. Connecticut, 381 U.S. 479 (1965)
 Grosjean v. American Press Co., 297 U.S. 233 (1936)
 Group Libel
 Guantanamo Bay, Enemy Combatants, Post 9/11
 Guided Discretion Statutes
 Guilty but Mentally Ill
 Guilty Plea
 Gun Control/Anti-Gun Control

H

H.L. v. Matheson, 450 U.S. 398 (1981)
 Habeas Corpus Act of 1679
 Habeas Corpus in Colonial America
 Habeas Corpus: Modern History
 Hague v. C.I.O., 307 U.S. 496 (1939)
 Hague, Frank
 Haig v. Agee, 453 U.S. 280 (1981)
 Hale v. Henkel, 201 U.S. 370 (1906)
 Hamdi v. Rumsfeld, 542 U.S. 507 (2004)
 Hamilton, Alexander
 Hamilton, Andrew
 Hand, (Billings) Learned
 Harisiades v. Shaughnessy, 342 U.S. 580 (1952)
 Harlan, John Marshall, the Elder
 Harlan, John Marshall, II
 Harmelin v. Michigan, 501 U.S. 957 (1991)
 Harmless Error
 Harper v. Virginia State Board of Elections, 383 U.S. 663 (1966)
 Harris v. McRae, 448 U.S. 297 (1980)
 Harris v. New York, 401 U.S. 222 (1971)
 Hatch Act
 Hate Crime Laws
 Hate Crimes
 Hate Speech
 Hays, Will H.

Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988)
 Hearsay Evidence
 Heckler's Veto Problem in Free Speech
 Helms Amendment (1989)
 Helper, Hinton
 Hentoff, Nat
 Herbert v. Lando, 441 U.S. 153 (1979)
 Hernandez v. Commissioner of Internal Revenue, 490 U.S. 680 (1989)
 Herrera v. Collins, 506 U.S. 390 (1993)
 Hess v. Indiana, 414 U.S. 105 (1973)
 Hester v. United States, 265 U.S. 445 (1924)
 Hip-Hop and Rap Music
 Hiss, Alger
 History and Its Role in Supreme Court Decision
 Making on Religion
 Hoffa v. United States, 385 U.S. 293 (1966)
 Holland v. Illinois, 493 U.S. 474 (1990)
 Holmes, Oliver Wendell, Jr.
 Homosexuality and Immigration
 Hoover, J. Edgar
 Hopt v. Utah, 110 U.S. 574 (1884)
 Hostile Environment and Employment
 Discrimination Issues and Free Speech
 Houchins v. KQED, Inc., 438 U.S. 1 (1978)
 House Un-American Activities Committee
 Hudson v. Louisiana, 450 U.S. 40 (1981)
 Hudson v. Palmer, 468 U.S. 517 (1984)
 Hughes Court
 Hughes, Charles Evans
 Hunt v. McNair, 413 U.S. 734 (1973)
 Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston, 515 U.S. 557 (1995)
 Hurtado v. California, 110 U.S. 516 (1884)
 Hustler Magazine v. Falwell, 485 U.S. 46 (1988)
 Hutchinson v. Proxmire, 443 U.S. 111 (1979)

I

Ideological and Security-Based Exclusion
 and Deportation
 Illegitimacy and Immigration
 Illinois v. Gates, 462 U.S. 213 (1983)
 Illinois v. Krull, 480 U.S. 340 (1987)
 Illinois v. Perkins, 496 U.S. 292 (1990)
 Illinois v. Wardlow, 528 U.S. 119 (2000)
 Immigration and Marriage Fraud Amendments
 of 1986
 Immigration and Nationality Act Amendments
 of 1965
 Immigration and Naturalization Service v. Chadha,
 462 U.S. 919 (1983)

ALPHABETICAL LIST OF ENTRIES

Immigration and Naturalization Service v.
Lopez-Mendoza, 468 U.S. 1032 (1984)
Impartial Decisionmaker
Implied Rights
Incorporation Doctrine
Incorporation Doctrine and Free Speech
Indefinite Detention
City of Indianapolis v. Edmond, 531 U.S. 32 (2000)
Indian Bill of Rights
Ineffective Assistance of Counsel
Infliction of Emotional Distress and
First Amendment
In re Gault, 387 U.S. 1 (1967)
In re Griffiths, 413 U.S. 717 (1973)
In re Winship, 397 U.S. 358 (1970)
Insanity Defense
Intellectual Influences on Free Speech Law
Intellectual Property and the First Amendment
Intelligence Identities Protection Act (1982)
Intermediate Scrutiny Test in Free Speech Cases
Internet and Civil Liberties
Internet and Intellectual Property
Internet Filtering at Libraries and Free Speech
Interstate Commerce
Intrusion
Invasion of Privacy and Free Speech
Invidious Discrimination

J

Jackson v. Denno, 378 U.S. 368 (1964)
Jackson v. Indiana, 406 U.S. 715 (1972)
Jackson v. Virginia, 443 U.S. 307 (1979)
Jackson, Andrew
Jackson, Robert H.
Jacobellis v. Ohio, 378 U.S. 184 (1964)
Jacobson v. Massachusetts, 197 U.S. 11 (1905)
Jacobson v. United States, 503 U.S. 540 (1992)
Jailhouse Informants
Jamison v. Texas, 318 U.S. 413 (1943)
Japanese Internment Cases
Jay Court
Jefferson, Thomas
Jehovah's Witnesses and Religious Liberty
Jenkins v. Georgia, 418 U.S. 152 (1974)
Jews and Religious Liberty
Jimmy Swaggart Ministries v. Board of Equalization
of California, 493 U.S. 378 (1990)
John Birch Society
Johnson, Frank Minis, Jr.
Johnson, Lyndon Baines
Jones v. Wolf, 443 U.S. 595 (1979)
Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952)

Journalism and Sources
Judicial Bias
Judicial Proceedings and References to the Deity
Judicial Resolution of Church Property Disputes
Judicial Review
Jurek v. Texas, 428 U.S. 262 (1976)
Jurisdiction of the Federal Courts
Jury Nullification
Jury Nullification in Capital Punishment
Jury Selection and Voir Dire
Jury Trial
Jury Trial Right
Jury Trials and Race
Justice, William Wayne

K

Kamisar, Yale
Katz v. United States, 389 U.S. 347 (1967)
Kaufman, Irving Robert
Kendall, Amos
Kennedy, Anthony McLeod
Kent v. Dulles, 357 U.S. 116 (1957)
Kentucky and Virginia Resolves
Kevorkian, Jack
King, Martin Luther, Jr.
Kingsley International Pictures Corporation v.
Regents of the University of New York, 360 U.S.
684 (1959)
Kirby v. Illinois, 406 U.S. 682 (1972)
Kleindienst v. Mandel, 408 U.S. 753 (1972)
Klopfer v. North Carolina, 386 U.S. 213 (1967)
Kois v. Wisconsin, 408 U.S. 229 (1972)
Kolender v. Lawson, 461 U.S. 352 (1983)
Konigsberg v. State Bar of California, 336 U.S.
36 (1961)
Ku Klux Klan
Kunstler, William M.
Kyles v. Whitley, 514 U.S. 419 (1995)
Kyllo v. United States, 533 U.S. 27 (2001)

L

La Follette, Robert Marion, Sr.
Lambda Legal Defense and Education Fund
Lambert v. California, 355 U.S. 255 (1957)
Lambert v. Wicklund, 520 U.S. 292 (1997)
Lamb's Chapel v. Center Moriches Union Free
School District, 508 U.S. 384 (1993)
Lanzetta v. New Jersey, 306 U.S. 451 (1939)
Late Corporation of the Church of Jesus Christ of
Latter Day Saints v. United States, 136 U.S. 1 (1890)

Lawrence v. Texas, 539 U.S. 558 (2003)
 Lawyer Advertising
 Lee v. Weisman, 505 U.S. 577 (1992)
 Legal Aid Society of New York
 Legal Realists
 Legal Services Corporation v. Valesquez, 531 U.S. 533 (2001)
 Legion of Decency
 Legislative Prayer
 Legislators' Freedom of Speech
 Leland v. Oregon, 343 U.S. 790 (1952)
 Lemon Test
 Leyra v. Denno, 347 U.S. 556 (1954)
 Lilborne, John (Freeborn John)
 Lilly v. Virginia, 527 U.S. 116 (1999)
 Limitations on Clergy Holding Office
 Limited Public Forums
 Lincoln, Abraham
 Line-Ups
 City of Littleton v. Z.J. Gifts D-4, L.L.C. (2004)
 Lloyd Corporation v. Tanner, 407 U.S. 551 (1972)
 Loan Association v. Topeka, 87 U.S. 655 (1875)
 Lochner v. New York, 198 U.S. 45 (1905)
 Locke v. Davey, 540 U.S. 712 (2004)
 Locke, John
 Lockett v. Ohio, 438 U.S. 586 (1978)
 Lockhart v. McCree, 476 U.S. 162 (1986)
 Log Cabin Republicans
 Lo-Ji Sales, Inc. v. New York, 442 U.S. 319 (1979)
 Long, Huey Pierce
 Los Angeles v. Lyons, 461 U.S. 95 (1983)
 Lovejoy, Elijah
 Loving v. Virginia, 388 U.S. 1 (1967)
 Low Value Speech
 Lynch v. Donnelly, 465 U.S. 668 (1984)
 Lyng v. Northwest Indian Cemetery Protective Association, 485 U.S. 439 (1988)
 Lynumn v. Illinois, 372 U.S. 528 (1963)

M

Mabry v. Johnson, 467 U.S. 352 (1984)
 MacKinnon, Catharine
 Madison, James
 Madison's Remonstrance (1785)
 Madsen v. Women's Health Center, 512 U.S. 753 (1994)
 Magna Carta
 Maher v. Roe, 432 U.S. 464 (1977)
 Mallory v. United States, 354 U.S. 499 (1957)
 Mandatory Death Sentences Unconstitutional
 Mandatory Minimum Sentences
 Mann Act
 Manson v. Brathwaite, 432 U.S. 98 (1977)

Manual Enterprises, Inc. v. Day, 370 U.S. 478 (1962)
 Mapp v. Ohio, 367 U.S. 643 (1961)
 Marbury v. Madison, 5 U.S. 137 (1803)
 Marches and Demonstrations
 Marchetti v. United States, 390 U.S. 39 (1968)
 Marital Rape
 Marketplace of Ideas Theory
 Marriage, History of
 Marsh v. Chambers, 463 U.S. 783 (1983)
 Marshall Court
 Marshall, John
 Marshall, Thurgood
 Martin v. Ohio, 480 U.S. 228 (1987)
 Maryland Toleration Act (1649)
 Maryland v. Buie, 494 U.S. 325 (1990)
 Maryland v. Craig, 497 U.S. 836 (1990)
 Mason, George
 Massachusetts Body of Liberties of 1641
 Masses Publishing Company v. Patten, 244 U.S. 535 (1917)
 Massiah v. United States, 377 U.S. 201 (1964)
 Material Witnesses
 Mathis v. United States, 391 U.S. 1 (1968)
 Matters of Public Concern Standard in Free Speech Cases
 McCarran-Walter Act of 1952
 McCarthy, Joseph
 McCleskey v. Kemp, 481 U.S. 277 (1987)
 McCollum v. Board of Education, 333 U.S. 203 (1948)
 McCorvey, Norma (Jane Roe)
 McCulloch v. Maryland, 17 U.S. 316 (1819)
 McDaniel v. Paty, 435 U.S. 618 (1978)
 McGautha v. California, 402 U.S. 183 (1971)
 McGowen v. Maryland, 366 U.S. 420 (1961)
 McKeiver v. Pennsylvania, 403 U.S. 528 (1971)
 McLaughlin v. Florida, 379 U.S. 184 (1964)
 McNabb v. United States, 318 U.S. 332 (1943)
 McReynolds, James C.
 Media Access to Information
 Media Access to Judicial Proceedings
 Media Access to Military Operations
 Media Liability for Causing Physical Harm
 Meese, Edwin, III
 Megan's Law (Felon Registration)
 Meiklejohn, Alexander
 Menna v. New York, 423 U.S. 61 (1975)
 Mentally Ill
 Metro-Goldwyn-Mayer Studios (MGM) v. Grokster, 545 U.S. (2005)
 Meyer v. Nebraska, 262 U.S. 390 (1923)
 Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974)
 Michigan Department of State Police v. Sitz, 496 U.S. 444 (1990)

ALPHABETICAL LIST OF ENTRIES

Michigan v. DeFillippo, 443 U.S. 31 (1979)
 Michigan v. Lucas, 500 U.S. 145 (1991)
 Michigan v. Mosley, 423 U.S. 96 (1975)
 Michigan v. Summers, 452 U.S. 692 (1981)
 Military Law
 Military Tribunals
 Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990)
 Mill, John Stuart
 Miller Test
 Miller v. California, 413 U.S. 15 (1973)
 Mills v. Alabama, 384 U.S. 214 (1966)
 Mincey v. Arizona, 437 U.S. 385 (1978)
 Minnesota v. Dickerson, 508 U.S. 366 (1993)
 Minnesota v. Olson, 495 U.S. 91 (1990)
 Miranda v. Arizona, 384 U.S. 436 (1966)
 Miranda Warning
 Miranda, Ernesto Arturo
 Miscegenation Laws
 Mishkin v. New York, 383 U.S. 502 (1966)
 Mistretta v. United States, 488 U.S. 361 (1989)
 Mitchell v. Helms, 463 U.S. 793 (2000)
 Mitchell, John
 Modern Political and Legal Philosophy, Civil Liberties in
 Moment of Silence Statutes
 Monroe v. Pape, 365 U.S. 167 (1961)
 Montesquieu
 Mooney v. Holohan, 294 U.S. 103 (1935)
 Moore v. East Cleveland, 431 U.S. 494 (1977)
 Moran v. Burbine, 475 U.S. 412 (1986)
 Mormons and Religious Liberty
 Motes v. United States, 178 U.S. 458 (1900)
 Movie Ratings and Censorship
 Mozert v. Hawkins County Board of Education, 827 F. 2d 1058 (1987)
 Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977)
 Mueller v. Allen, 463 U.S. 388 (1983)
 Mullaney v. Wilbur, 421 U.S. 684 (1975)
 Murphy, Frank
 Murray, John Courtney
 Museums and Expression
 Muslims and Religious Liberties
 Mutual Film Corporation v. Industrial Commission of Ohio, 236 U.S. 230 (1915)

N

NAACP v. Alabama Ex Rel. Patterson, 357 U.S. 449 (1958)
 NAACP v. Button, 371 U.S. 415 (1963)
 Naim v. Naim, 875 E. 2nd 749 (Va. 1955); 350 U.S.

891 (1955); 350 U.S. 985 (1956)
 Napue v. Illinois, 360 U.S. 264 (1959)
 Nardone v. United States, 308 U.S. 338 (1939)
 National Abortion Rights Action League (NARAL)
 National Association for the Advancement of Colored People (NAACP)
 National Endowment for the Arts v. Finley, 118 S. Ct 2168 (1998)
 National Labor Relations Board
 National Motto “In God We Trust”
 National Organization for Women
 National Origins Quota System
 National Rifle Association (NRA)
 National Security
 National Security and Freedom of Speech
 National Security Prior Restraints
 National Treasury Employee Union v. Von Raab, 489 U.S. 656 (1989)
 Native Americans and Religious Liberty
 Natural Law, Eighteenth-Century Understanding
 Near v. Minnesota, 283 U.S. 697 (1931)
 Nebbia v. New York, 291 U.S. 502 (1934)
 Nebraska Press Association v. Stuart, 427 U.S. 539 (1976)
 Neutral Reportage Doctrine
 New Deal and Civil Liberties
 New Hampshire Constitution of 1784
 New Jersey v. T.L.O., 469 U.S. 325 (1985)
 New Right
 New York Ex. Rel. Bryant v. Zimmerman, 278 U.S. 63 (1928)
 New York Times Co. v. Sullivan, 376 U.S. 254 (1964)
 New York Times Co. v. United States, 403 U.S. 713 (1971)
 New York v. Belton, 453 U.S. 454 (1981)
 New York v. Ferber, 458 U.S. 747 (1982)
 New York v. Quarles, 467 U.S. 649 (1984)
 Newsroom Searches
 9/11 and the War on Terrorism
 Ninth Amendment
 Nix v. Williams, 467 U.S. 431, 104 (1984)
 Nixon, Richard Milhous
 NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979)
 No Coercion Test
 No Endorsement Test
 Noncitizens and Civil Liberties
 Noncitizens and the Franchise
 Noncitizens and Land Ownership
 Non-Preferentialism
 North Carolina Constitution of 1776
 North Carolina v. Alford, 400 U.S. 25 (1970)
 North Carolina v. Pearce, 395 U.S. 711 (1969)

O

O'Brien Content-Neutral Free Speech Test
 O'Brien Formula
 Obscenity
 Obscenity in History
 O'Connor, Sandra Day
 O'Connor v. Ortega, 480 U.S. 709 (1987)
 Ohio v. Robinette, 519 U.S. 33 (1996)
 Olmstead v. United States, 277 U.S. 438 (1928)
 O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987)
 Omnibus Crime Control and Safe Streets Act of 1968
 (92 Stat. 3795)
 On Lee v. United States, 343 U.S. 747 (1952)
 Open Fields
 Operation Rescue
 Oregon's Death with Dignity Act (1994)
 Orozco v. Texas, 394 U.S. 324 (1969)
 Osborne v. Ohio, 495 U.S. 103 (1990)
 Otis, James
 Overbreadth Doctrine

P

Pacifists and Naturalization
 Paine, Thomas
 Palmer, A. Mitchell
 Papachristou v. City of Jacksonville, 405 U.S.
 156 (1972)
 Pardon and Commutation
 Paris Adult Theatre v. Slaton, 413 U.S. 49 (1973)
 Patriot Act
 Patterson v. New York, 432 U.S. 197 (1977)
 Paul v. Davis, 424 U.S. 693 (1976)
 Payton v. New York, 445 U.S. 573 (1980)
 Pell v. Procunier, 417 U.S. 817 (1974)
 Penn, William
 Pennsylvania v. Scott, 524 U.S. 357 (1998)
 Penumbras
 Personal Liberty Laws
 Petition Campaign
 Petition of Right (1628)
 Philadelphia Newspapers, Inc. v. Hepps, 475 U.S.
 767 (1986)
 Phillips, Wendell
 Philosophy and Theory of Freedom of Expression
 Physician-Assisted Suicide
 Pickering v. Board of Education, 391 U.S. 563 (1968)
 Picketing
 Pierce v. Society of Sisters, 268 U.S. 510 (1925)
 Plain View
 Planned Parenthood ("Nuremburg Files") Litigation

Planned Parenthood of Missouri v. Danforth, 428
 U.S. 52 (1976)
 Planned Parenthood v. Ashcroft, 462 U.S. 476 (1983)
 Planned Parenthood v. Casey, 112 S.Ct. 2791 (1992)
 Plea Bargaining
 Pledge of Allegiance ("Under God")
 Pledge of Allegiance and the First Amendment
 Plenary Power Doctrine
 Plessy v. Ferguson, 163 U.S. 537 (1896)
 Plyler v. Doe, 457 U.S. 202 (1982)
 Poe v. Ullman, 367 U.S. 497 (1961)
 Poelker v. Doe, 432 U.S. 59 (1977)
 Police Investigation Commissions
 Police Power of the State
 Political Correctness and Free Speech
 Political Patronage and the First Amendment
 Politics and Money
 Pope v. Illinois, 481 U.S. 497 (1987)
 Posadas de Puerto Rico Association v. Tourism
 Company of Puerto Rico, 478 U.S. 328 (1986)
 Powell v. Alabama, 287 U.S. 45 (1932)
 Powell v. Texas, 392 U.S. 514 (1968)
 Powell, Lewis Franklin, Jr.
 Prayer in Public Schools
 Preferred Position
 Prejean, Sister Helen
 Press Clause (I): Framing and History from Colonial
 Period up to Early National Period
 Preventative Detention
 Prince v. Massachusetts, 321 U.S. 158 (1944)
 Prior Restraints
 Prison Population Growth
 Prisoners and Free Exercise Clause Rights
 Prisoners and Freedom of Speech
 Privacy
 Privacy Protection Act, 94 Stat. 1879 (1980)
 Privacy, Theories of
 Private Discriminatory Association
 Private Police
 Private Possession of Obscenity in the Home
 Private Religious Speech on Public Property
 Privileges and Immunities (XIV)
 Probable Cause
 Professional Advertising
 Profiling (including DWB)
 Profit v. Florida, 428 U.S. 242 (1976)
 Prohibition
 Proof beyond a Reasonable Doubt
 Proportional Punishment
 Proportionality Reviews
 Public Figures
 Public Forum Doctrines
 Public/Nonpublic Forums Distinction
 Public Officials
 Public School Curricula and Free Exercise Claims

ALPHABETICAL LIST OF ENTRIES

Public Trial
Public Vulgarity and Free Speech
Pulley v. Harris, 465 U.S. 37 (1984)
Puritans

Q

Quakers and Religious Liberty
Quartering of Troops (III)
Quick Bear v. Leupp, 210 U.S. 50 (1908)
Quinlan, Karen Ann

R

Rabe v. Washington, 405 U.S. 313 (1972)
Race and Criminal Justice
Race and Immigration
Raley v. Ohio, 360 U.S. 423 (1959)
Rankin v. McPherson, 483 U.S. 378 (1987)
Rape: Naming Victim
Rastafarians and the Free Exercise of Religion
Ratification Debate, Civil Liberties in
Rauh, Joseph L., Jr.
R.A.V. v. City of St. Paul, 505 U.S. 377 (1992)
Rawlings v. Kentucky, 448 U.S. 98 (1980)
Rawls, John Bordley
Reapportionment
Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969)
Red Scare of the Early 1920s
Redrup v. New York, 386 U.S. 767 (1967)
Refusal of Medical Treatment and Religious Beliefs
Regents of University of California v. Bakke, 438 U.S. 265 (1978)
Regina v. Hicklin, L.R. 2 Q.B. 360 (1868)
Rehnquist Court
Rehnquist, William H.
Reid v. Covert, 354 U.S. 1 (1957)
Reid v. Georgia, 448 U.S. 438 (1980)
Release Time from Public Schools (For Religious Purposes)
Religion in Nineteenth-Century Public Education (Includes “Bible Wars”)
Religion in “Public Square” Debate
Religion in Public Universities
Religion in the Workplace
Religious Freedom in the Military
Religious Freedom Restoration Act
Religious Garb in Courtrooms and Classrooms
Religious Land Use and Institutionalized Persons Act of 2000

Religious Liberty under Eighteenth-Century State Constitutions
Religious Symbols on Public Property
Religious Tests for Officeholding (Article 6, Cl. 3)
Removal to Federal Court
Reno v. ACLU, 521 U.S. 844 (1997)
Reno, Janet
Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986)
Reporter’s Privilege
Reproductive Freedom
Restricting Actions of Legal Services Lawyers
Restrictive Covenants
Retained Rights (Ninth Amendment)
Retribution
Reynolds v. United States, 98 U.S. 145 (1878)
Rhode Island v. Innis, 446 U.S. 291 (1980)
Rice v. Paladin Press (“Hit Man” Case), 940 F.Supp. 836 (D.Md. 1996)
Richards v. Wisconsin, 520 U.S. 385 (1997)
Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980)
Ricketts v. Adamson, 483 U.S. 1 (1987)
RICO
Riggins v. Nevada, 504 U.S. 127 (1992)
Right of Access to Criminal Trials
Right of Privacy
Right to Bear Arms (II)
Right to Counsel
Right to Counsel (VI)
Right to Know
Right to Petition
Right to Reply and Right of the Press
Right to Travel
Right to Vote for Individuals with Disabilities
Right v. Privilege Distinction
Rights of the Accused
Ripeness in Free Speech Cases
County of Riverside v. McLaughlin, 500 U.S. 44 (1991)
Rizzo v. Goode, 423 U.S. 362 (1976)
Roberts v. United States Jaycees, 468 U.S. 609 (1984)
Roberts, Owen Josephus
Robinson v. California, 370 U.S. 660 (1962)
Rochin v. California, 342 U.S. 165 (1952)
Rock v. Arkansas, 483 U.S. 44 (1987)
Roe v. Wade, 410 U.S. 113 (1973)
Roemer v. Maryland Board of Public Works, 426 U.S. 736 (1976)
Romer v. Evans, 517 U.S. 620 (1996)
Roosevelt, Franklin Delano
Rorty, Richard
Rosales-Lopez v. United States, 451 U.S. 182 (1981)
Rose v. Locke, 423 U.S. 48 (1975)
Rosenberg, Julius and Ethel

Rosenberger v. Rector and Visitors of the University of Virginia, 515 U.S. 819 (1995)
 Ross v. Moffitt, 417 U.S. 600 (1974)
 Rotary International v. Rotary Club of Duarte, 481 U.S. 537 (1987)
 Roth v. United States, 354 U.S. 476 (1957)
 Roviato v. United States, 353 U.S. 53 (1957)
 Rowan v. United States Post Office Department, No. 399, 397 U.S. 728 (1970)
 Ruby Ridge Incident
 Rule of Law
 Rush, Benjamin
 Rust v. Sullivan, 500 U.S. 173 (1991)
 Rutan v. Republican Party of Illinois, 497 U.S. 62 (1990)
 Rutledge, Wiley Blount, Jr.
 Ryan, George

S

Sacco and Vanzetti
 Saenz v. Roe, 526 U.S. 489 (1999)
 Salvation Army and Religious Liberty
 Same-Sex Adoption
 Same-Sex Marriage Legalization
 Same-Sex Unions
 Sandstrom v. Montana, 442 U.S. 510 (1979)
 Sanger, Margaret Higgins
 Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978)
 Santa Fe Independent School District v. Doe, 530 U.S. 290 (2000)
 Santobello v. New York, 404 U.S. 257 (1971)
 Satire and Parody and the First Amendment
 Saxbe v. Washington Post, 417 U.S. 817 (1974)
 Scales v. United States, 367 U.S. 203 (1961)
 Scalia, Antonin
 Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981)
 Schall v. Martin, 467 U.S. 253 (1984)
 Schenck v. United States, 249 U.S. 47 (1919)
 Schlafly, Phyllis Stewart
 Schmerber v. California, 384 U.S. 757 (1966)
 Schneckloth v. Bustamonte, 412 U.S. 218 (1973)
 School District of the City of Grand Rapids v. Ball, 473 U.S. 373 (1985)
 School Vouchers
 Scopes Trial
 Scottsboro Trials
 Sealed Documents in Court Proceedings
 Search (General Definition)
 Search Warrants
 Secondary Effects Doctrine
 Secular Humanism and the Public Schools
 Secular Purpose

Seditious Libel
 Segregation
 Seizures
 Selective Draft Law Cases (1918), Selective Service Act of 1917
 Self-Defense
 Self-Fulfillment Theory of Free Speech
 Self-Governance and Free Speech
 Self-Incrimination (V): Historical Background
 Self-Incrimination: Miranda and Evolution
 Self-Representation at Trial
 Sentencing Guidelines
 Sentencing Reform Act
 Servicemembers Legal Defense Network
 Seventh Day Adventists and Religious Liberty
 Sex and Criminal Justice
 Sex and Immigration
 Shapiro v. Thompson, 394 U.S. 618 (1969)
 Shaughnessey v. United States ex rel. Mezei, 345 U.S. 206 (1953)
 Shaw, Lemuel
 Shelley v. Kraemer, 334 U.S. 1 (1948)
 Shepard, Matthew
 Sherbert v. Verner, 374 U.S. 398 (1963)
 Sherman Act
 Sherman, Roger
 Shield Laws
 Shopping Centers and Freedom of Speech
 Sicurella v. United States, 348 U.S. 385 (1955)
 Simopoulos v. Virginia, 462 U.S. 506 (1983)
 Sincerity of Religious Belief
 Singer v. United States, 380 U.S. 24 (1965)
 Skinner v. Oklahoma, 316 U.S. 535 (1942)
 Skinner v. Railway Labor Executives' Association, 489 U.S. 602 (1989)
 SLAPP Suits (Strategic Lawsuits against Public Participation)
 Slaughterhouse Cases, 83 U.S. (16 Wall.) 36 (1873)
 Slavery
 Slavery and Civil Liberties
 Smith Act
 Smith v. California, 361 U.S. 147 (1959)
 Smith v. Organization of Foster Families, 431 U.S. 816 (1977)
 Snake-Handling Sects and Religious Liberty
 Snapp v. United States, 444 U.S. 507 (1980)
 Sodomy Laws
 Solem v. Helm, 463 U.S. 277 (1983)
 Son of Sam Laws
 Sorrells v. U.S., 287 U.S. 435 (1932)
 Souter, David Hackett
 South Dakota v. Opperman, 428 U.S. 364 (1976)
 Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975)
 Southern Center for Human Rights

ALPHABETICAL LIST OF ENTRIES

Southern Poverty Law Center
 Spano v. New York, 360 U.S. 315 (1959)
 Spaziano v. Florida, 468 U.S. 447 (1984)
 Speech and Education
 Speech and Its Relation to Violence
 Speech of Government Employees
 Speech versus Conduct Distinction
 Speedy Trial
 Spying on Citizens
 Standing in Free Speech Cases
 Stanley v. Georgia, 394 U.S. 557 (1969)
 Stanton, Elizabeth Cady
 Staples v. United States, 511 U.S. 600 (1994)
 Stare Decisis
 State Action Doctrine
 State Aid to Religious Schools
 State and Federal Regulation of Immigration
 State Constitution, Privacy Provisions
 State Constitutional Distinctions
 State Constitutions and Civil Liberties
 State Constitutions, Modern History, Civil
 Liberties under
 State Courts
 State Regulation of Religious Schools
 State Religious Freedom Statutes
 Status Offenses
 Statutory Rape
 Stay of Execution
 Stem Cell Research/Research using Fetal Tissue
 Stenberg v. Carhart, 530 U.S. 914 (2000)
 Stevens, John Paul
 Stewart, Potter
 Stone Court
 Stone v. Graham, 449 U.S. 39 (1980)
 Stone, Harlan Fiske
 Stonewall Riot
 Stop and Frisk
 Storey, Moorfield
 Story, Joseph
 Strict Liability
 Strossen, Nadine
 Student Activity Fees and Free Speech
 Student Speech in Public Schools
 Subpoenas to Reporters
 Substantive Due Process
 Sumner, Charles
 Sunday Closing Cases and Laws
 Sunday Mail
 Supremacy Clause in Article VI of the Constitution
 Suspended Right of Habeas Corpus
 Swain v. Alabama, 380 U.S. 202 (1965)
 S. Warren and L. Brandeis, "The Right to Privacy,"
 4 Harvard L. Rev. 193 (1890)
 Swearinger v. United States, 161 U.S. 446 (1896)
 Symbolic Speech

T

Taft Court
 Taft–Hartley Act of 1947
 Taft, William Howard
 Takings Clause (V)
 Taney Court
 Tax Exemptions for Religious Groups and Clergy
 Taxpayer Standing to Challenge Establishment
 Clause Violations
 Taylor v. Illinois, 484 U.S. 400 (1988)
 Taylor v. Louisiana, 419 U.S. 522 (1975)
 Teacher Speech in Public Schools
 Teaching "Creation Science" in the Public Schools
 Teaching Evolution in the Public Schools
 Ten Commandments on Display in Public Buildings
 Tennessee v. Garner, 471 U.S. 1 (1985)
 Terrorism and Civil Liberties
 Terry v. Ohio, 392 U.S. 1 (1968)
 Test Oath Cases
 Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989)
 Theories of Civil Liberties
 Theories of Civil Liberties, International
 Theories of Free Speech Protection
 Theories of Punishment
 Thirteenth Amendment
 Thomas, Clarence
 Thornburgh v. Abbott, 490 U.S. 401 (1989)
 Thornburgh v. American College of Obstetricians
 and Gynecologists, 476 U.S. 747 (1986)
 Threats and Free Speech
 Three Strikes/Proportionality
 Tibbs v. Florida, 457 U.S. 31 (1982)
 Tileston v. Ullman, 318 U.S. 44 (1943)
 Tilton v. Richardson, 403 U.S. 672 (1971)
 Time, Inc. v. Hill, 385 U.S. 374 (1967)
 Time, Place, and Manner Rule
 Tinker v. Des Moines School District, 393 U.S.
 503 (1969)
 Title VII and Religious Exemptions
 Tony and Susan Alamo Foundation v. Secretary of
 Labor, 471 U.S. 290 (1985)
 Torcaso v. Watkins, 367 U.S. 488 (1961)
 Trademarks and the Establishment Clause
 Traditional Public Forums
 Treason
 Treason Clause
 Trial in Civil Cases (VII)
 Trial of the Seven Bishops, 12 Howell's State Trials
 183 (1688)
 Tribe, Laurence H.
 Trop v. Dulles, 356 U.S. 86 (1958)
 Turner Broadcasting Sys., Inc. v. FCC (Turner I), 512
 U.S. 622 (1994); 520 U.S. 180 (1997) (Turner II)

Turner v. Safley, 482 U.S. 78 (1987)
Two-Tiered Theory of Freedom of Speech

U

Ulster County Court v. Allen, 442 U.S. 140 (1979)
Unconstitutional Conditions
Undocumented Migrants
United Nations Subcommittee on Freedom of
Information and of the Press
United States v. 12 200-Foot Reels of Super 8mm.
Film, 413 U.S. 123 (1973)
United States v. 37 Photographs, 402 U.S. 363 (1971)
United States v. 92 Buena Vista Avenue, 507 U.S.
111 (1993)
United States v. Agurs, 427 U.S. 97 (1976)
United States v. Ash, 413 U.S. 300 (1973)
United States v. Balsys, 524 U.S. 666 (1998)
United States v. Brignoni-Ponce, 422 U.S. 873 (1975)
United States v. Calandra, 414 U.S. 338 (1974)
United States v. Cruikshank, 92 U.S. 542 (1876)
United States v. Dionisio, 410 U.S. 1 (1973)
United States v. Grimaud, 220 U.S. 506 (1911)
United States v. Havens, 446 U.S. 620 (1980)
United States v. Kahriger, 345 U.S. 22 (1953)
United States v. Lee, 455 U.S. 252 (1982)
United States v. Leon, 468 U.S. 897 (1984)
United States v. Lovasco, 431 U.S. 783 (1977)
United States v. Lovett, 328 U.S. 303 (1946)
United States v. Miller 307 U.S. 174 (1939)
United States v. Miller, 425 U.S. 435 (1976)
United States v. O'Brien, 391 U.S. 367 (1968)
United States v. One Book Entitled "Ulysses," 72 E.
2d 705 (1934)
United States v. Playboy Entertainment Group, 529
U.S. 803 (2000)
United States v. Ramirez, 523 U.S. 65 (1998)
United States v. Reidel, 402 U.S. 351 (1971)
United States v. Robinson, 414 U.S. 218 (1973)
United States v. Schoon, 971 F.2d 193 (9th Cir. 1991)
United States v. Schwimmer, 279 U.S. 644 (1929)
United States v. Seeger, 380 U.S. 163 (1965)
United States v. Tateo, 377 U.S. 463 (1964)
United States v. The Progressive, Inc., 467 F. Supp.
990 (W.D. Wis. 1979)
United States v. United States District Court, 407
U.S. 297 (1972)
United States v. Verdugo-Urquidez, 494 U.S.
259 (1990)
United States v. Wade, 388 U.S. 218 (1967)
United States v. Washington, 431 U.S. 181 (1977)
United States v. Watson, 423 U.S. 411 (1976)
Universities and Public Forums

University of Wisconsin v. Southworth, 529 U.S.
217 (2000)
Urofsky v. Gilmore, 216 F.3d 401 (4th Cir. 2000)

V

Vagrancy Laws
Vagueness and Overbreadth in Criminal Statutes
Vagueness Doctrine
Valentine v. Chrestensen, 316 U.S. 52 (1942)
Vance v. Universal Amusement Co., Inc., 445 U.S.
208 (1980)
Vernonia School District v. Acton, 515 U.S.
646 (1995)
Vice Products and Commercial Speech
Victim Impact Statements
Victimless Crimes
Victims' Rights
Vidal v. Girard's Executor, 43 U.S. 127 (1844)
Video Privacy Protection Act (1980)
Viewpoint Discrimination in Free Speech Cases
Vinson Court
Vinson, Fred Moore
Virginia Charter of 1606
Virginia Declaration of Rights (1776)
Virginia State Board of Pharmacy v. Virginia Citizens
Consumer Council, Inc., 425 U.S. 748 (1976)
Virginia v. Black, 123 S.Ct. 1536 (2003)
Void for Vagueness
Voting Rights (Compound)
Voting Rights Act of 1965

W

Waco/Branch Davidians
Waite Court
Walker, David
Wall of Separation
Wallace v. Jaffree, 472 U.S. 38 (1985)
Walz v. Tax Commission of the City of New York,
397 U.S. 664 (1970)
War on Drugs
Warden v. Hayden, 387 U.S. 294 (1967)
Warrant Clause (IV)
Warrantless Searches
Warren Court
Warren, Earl
Wartime Legislation
Washington v. Glucksberg, 521 U.S. 702 (1997)
Washington v. Texas, 388 U.S. 14 (1967)
Watson v. Jones, 80 U.S. (13 Wall.) 679 (1872)

ALPHABETICAL LIST OF ENTRIES

Watts v. United States, 394 U.S. 705 (1969)
Webb v. Texas, 409 U.S. 95 (1972)
Webster v. Reproductive Health Services, 492 U.S. 490 (1989)
Weddington, Sarah Ragle
Weeks v. United States, 232 U.S. 383 (1914)
Weems v. United States, 217 U.S. 349 (1910)
Welch, Joseph N.
Wells-Barnett, Ida Bell
West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943)
Whistleblowers
White Court
White, Byron Raymond
Whitney v. California, 274 U.S. 357 (1927)
William Penn's Case (1670)
Williams, Roger
Wilson v. Layne, 526 U.S. 603 (1999)
Wilson, Woodrow
Wiretapping Laws
Wisconsin v. Mitchell, 508 U.S. 476 (1993)
Wisconsin v. Yoder, 406 U.S. 205 (1972)
Witters v. Washington Department of Services for the Blind, 474 U.S. 481 (1986)
Wolf v. Colorado, 338 U.S. 25 (1949)
Wolman v. Walter, 433 U.S. 229 (1977)
Wong Sun v. United States, 371 U.S. 471 (1963)
World War I, Civil Liberties in
World War II, Civil Liberties in
Writs of Assistance Act

Wyman v. James, 400 U.S. 309 (1971)
Wyoming v. Houghton, 526 U.S. 295 (1999)

Y

Yates v. United States, 354 U.S. 298 (1957)
Young v. American Mini Theatres, Inc. 427 U.S. 50 (1976)
Younger v. Harris, 401 U.S. 37 (1971)

Z

Zablocki v. Redhail, 434 U.S. 374 (1978)
Zacchini v. Scripps Howard Broadcasting Company, 433 U.S. 562 (1977)
Zelman v. Simmons-Harris, 536 U.S. 639 (2002)
Zenger Trial (1735)
Zobrest v. Catalina Foothills School District, 509 U.S. 1 (1993)
Zoning and Religious Entities
Zoning Laws and "Adult" Businesses Dealing with Sex
Zoning Laws and Freedom of Speech
Zorach v. Clauson, 343 U.S. 306 (1952)
Zurcher v. Stanford Daily, 436 U.S. 547 (1978)

THEMATIC LIST OF ENTRIES

Organizations and Government Bodies

Act Up
America Online
American Anti-Slavery Society
American Civil Liberties Union
Americans United for Separation of Church
and State
Amish and Religious Liberty
Amnesty International
Anti-Defamation League of B'nai B'rith
Burger Court
Catholics and Religious Liberty
Central Intelligence Agency
Christian Coalition
Church of Scientology and Religious Liberty
Church of the New Song and Religious Liberty
Communist Party
Department of Homeland Security
Equal Rights Amendment
Fair Labor Standards Act and Religion
Federal Communications Commission
House Un-American Activities Committee
John Birch Society
Ku Klux Klan
Lambda Legal Defense and Education Fund
Legal Aid Society of New York
Legion of Decency
Log Cabin Republicans
Mormons and Religious Liberty
National Abortion Rights Action League (NARAL)
National Association for the Advancement of
Colored People (NAACP)
National Labor Relations Board
National Organization for Women
National Rifle Association (NRA)
Operation Rescue
Private Discriminatory Association
Puritans
Quakers and Religious Liberty
Servicemembers Legal Defense Network

Seventh Day Adventists and Religious Liberty
Southern Center for Human Rights
Southern Poverty Law Center
Warren Court

Legislation and Legislative Action, Statutes, and Acts

Abortion Laws and the Establishment Clause
Adolescent Family Life Act
Alien and Sedition Acts (1798)
American Indian Religious Freedom Act of 1978
Anti-Anarchy and Anti-Syndicalism Statutes
Antipolygamy Laws
Becker Amendment
Bills of Rights in Early State Constitutions
Bill of Rights: Structure
Blaine Amendment
Broadcast Regulation
Cable Television Regulation
Campaign Finance Reform, No. 1021
Civil Rights Act of 1866
Civil Rights Act of 1875
Civil Rights Act of 1964
Communications Decency Act (1996)
Constitutional Amendment Permitting
School Prayer
Defense of Marriage Act
Don't Ask, Don't Tell
English Toleration Act
Equal Access Act
Equal Protection Clause and Religious Freedom
Fair Credit Reporting Act, 84 Stat. 1127 (1970)
Fair Labor Standards Act and Religion
Freedom of Access to Clinic Entrances (FACE) Act,
108 Stat. 694 (1994)
Freedom of Information Act (1966)
Freedom of Information and Sunshine Laws
Gag Rule
Guided Discretion Statutes

THEMATIC LIST OF ENTRIES

Hatch Act
Hate Crime Laws
Helms Amendment (1989)
Immigration and Marriage Fraud Amendments of 1986
Immigration and Nationality Act Amendments of 1965
Indian Bill of Rights
Intelligence Identities Protection Act (1982)
Mann Act
Maryland Toleration Act (1649)
McCarran–Walter Act of 1952
Megan’s Law (Felon Registration)
Military Law
Moment of Silence Statutes
Omnibus Crime Control and Safe Streets Act of 1968 (92 Stat. 3795)
Oregon’s Death with Dignity Act (1994)
Patriot Act
Petition of Right (1628)
Privacy Protection Act, 94 Stat. 1879 (1980)
Religious Freedom Restoration Act
Selective Draft Law Cases (1918), Selective Service Act of 1917
Sentencing Reform Act
Sherman Act
Smith Act
Son of Sam Laws
State Religious Freedom Statutes
Taft–Hartley Act of 1947
Vagrancy Laws
Video Privacy Protection Act (1980)
Void for Vagueness
Voting Rights Act of 1965
Wiretapping Laws
Writs of Assistance Act

Historical Overview

Aliens, Civil Liberties of
Arrest
Atheism
Belief–Action Distinction in Free Exercise Clause History
Bible Reading in Public Schools, History of before and after *Abington School District v. Schempp*
Bill of Rights: Adoption of
Blackstone and Common-Law Prohibition on Prior Restraints
Book Banning and Book Removals
Capital Punishment
Capital Punishment: History and Politics

Chase Court
Children and the First Amendment
Church Property after the American Revolution
Civil Rights Cases, 109 U.S. 3 (1883)
Civil Rights Laws and Freedom of Speech
Communism and the Cold War
Company Towns and Freedom of Speech
Cruel and Unusual Punishment (VIII)
Declaration of Independence
Defamation and Free Speech
Demonstrations and Sit-Ins
Disestablishment of State Churches in the Late Eighteenth Century and Early Nineteenth Century
Diversity Immigration Program
Domestic Violence
Double Jeopardy (V): Early History, Background, Framing
Double Jeopardy: Modern History
Due Process of Law (V and XIV)
Economic Regulation
Economic Rights in the Constitution
Ellsworth Court
English Bill of Rights, 1689
English Tradition of Civil Liberties
Equal Protection of Law (XIV)
Establishment Clause (I): History, Background, Framing
Establishment of Religion and Free Exercise Clauses
Exemptions
Extremist Groups and Civil Liberties
Fair Use Doctrine and First Amendment
Federalization of Criminal Law
Flag Salute Cases
Fourteenth Amendment
Free Exercise Clause (I): History, Background, Framing
Free Press/Fair Trial
Freedom of Speech and Press under the Constitution: Early History, 1791–1917
Freedom of Speech and Press: Nineteenth Century
Freedom of Speech Extended to Corporations
Freedom of Speech in Broadcasting
Freedom of Speech: Modern Period (1917–Present)
Freedom of the Press: Modern Period (1917–Present)
Fuller Court
Gay and Lesbian Rights
Grand Jury
Grand Jury Indictment (V)
Grand Jury Investigation and Indictment
Habeas Corpus: Modern History
Hughes Court
Insanity Defense
Intellectual Influences on Free Speech Law

Internet and Civil Liberties
 Japanese Internment Cases
 Jay Court
 Judicial Review
 Jury Nullification in Capital Punishment
 Jury Trial
 Jury Trials and Race
 Madison's Remonstrance (1785)
 Magna Carta
 Marriage, History of
 Marshall Court
 Miscegenation Laws
 Modern Political and Legal Philosophy, Civil
 Liberties in
 New Deal and Civil Liberties
 New Hampshire Constitution of 1784
 Noncitizens and Civil Liberties
 Non-Preferentialism
 North Carolina Constitution of 1776
 Obscenity in History
 Personal Liberty Laws
 Press Clause (I): Framing and History from Colonial
 Period up to Early National Period
 Privacy
 Privileges and Immunities (XIV)
 Proof beyond a Reasonable Doubt
 Quartering of Troops (III)
 Race and Criminal Justice
 Race and Immigration
 Ratification Debate, Civil Liberties in
 Rehnquist Court
 Religious Liberty under Eighteenth Century
 State Constitutions
 Religious Tests for Officeholding (Article 6, Cl. 3)
 Retained Rights (IX)
 Right to Bear Arms (II)
 Right to Counsel (VI)
 Same-Sex Marriage Legalization
 Segregation
 Self-Incrimination (V): Historical Background
 Self-Representation at Trial
 Sentencing Guidelines
 Sex and Criminal Justice
 Sex and Immigration
 Slavery and Civil Liberties
 Sodomy Laws
 Speech and Education
 Stare Decisis
 State Constitution, Privacy Provisions
 State Constitutions and Civil Liberties
 State Constitutions, Modern History, Civil
 Liberties under
 State Courts
 State Regulation of Religious Schools
 Stone Court

Substantive Due Process
 Sunday Closing Cases and Laws
 Supremacy Clause in Article VI of the Constitution
 Taft Court
 Takings Clause (V)
 Taney Court
 Tax Exemptions for Religious Groups and Clergy
 Teaching Evolution in the Public Schools
 Thirteenth Amendment
 Treason
 Trial in Civil Cases (VII)
 Vinson Court
 Voting Rights (Compound)
 Waite Court
 Warrant Clause (IV)
 Wartime Legislation
 White Court
 World War I, Civil Liberties in
 World War II, Civil Liberties in

Biography

Acton, Lord John
 Amsterdam, Anthony G.
 Anslinger, Harry Jacob
 Anthony, Susan B.
 Ashcroft, John
 Bache, Benjamin Franklin
 Baldwin, Roger
 Biddle, Francis Beverly
 Bingham, John Armor
 Bork, Robert Heron
 Brandeis, Louis Dembitz
 Breyer, Stephen Gerald
 Bruce, Lenny
 Bryan, William Jennings
 Bryant, Anita
 Burger, Warren E.
 Burke, Edmund
 Burton, Justice Harold
 Butler, Pierce
 Calhoun, John Caldwell
 Cardozo, Benjamin
 Catt, Carrie Chapman
 Chafee, Zechariah, Jr.
 Chambers, Whittaker
 Chase, Samuel
 Chavez, Cesar
 Chemerinsky, Erwin
 Chessman, Caryl
 Clark, Ramsey
 Clark, Tom Campbell

THEMATIC LIST OF ENTRIES

Cohn, Roy	Kevorkian, Jack
Comstock, Anthony	King, Martin Luther, Jr.
Connor, Eugene "Bull"	Kunstler, William M.
Covington, Hayden	La Follette, Robert Marion, Sr.
Cromwell, Oliver	Lilborne, John (Freeborn John)
Darrow, Clarence	Lincoln, Abraham
Dawson, Joseph Martin	Locke, John
Debs, Eugene V.	Long, Huey Pierce
Dees, Morris	Lovejoy, Elijah
Dershowitz, Alan	MacKinnon, Catharine
DeWitt, General John	Madison, James
Dies, Martin	Marshall, John
Douglas, William Orville	Marshall, Thurgood
Douglass, Frederick	Mason, George
Dworkin, Andrea	McCarthy, Joseph
Emerson, Thomas Irwin	McCorvey, Norma (Jane Roe)
Estes, Billie Sol	McReynolds, James C.
Evers, Medgar Wiley	Meese, Edwin, III
Falwell, Jerry	Meiklejohn, Alexander
Field, Stephen J.	Mill, John Stuart
Flynt, Larry	Miranda, Ernesto Arturo
Fortas, Abe	Mitchell, John
Frank, John P.	Montesquieu
Frankfurter, Felix	Murphy, Frank
Franklin, Benjamin	Murray, John Courtney
Freund, Paul A.	Nixon, Richard Milhaus
Garrison, William Lloyd	O'Connor, Sandra Day
Giddings, Joshua Reed	Otis, James
Gideon, Clarence Earl	Paine, Thomas
Gilmore, Gary	Palmer, A. Mitchell
Ginsburg, Ruth Bader	Penn, William
Goldberg, Arthur J.	Phillips, Wendell
Hague, Frank	Powell, Lewis Franklin, Jr.
Hamilton, Alexander	Prejean, Sister Helen
Hamilton, Andrew	Quinlan, Karen Ann
Hand, (Billings) Learned	Rauh, Joseph L., Jr.
Harlan, John Marshall, the Elder	Rawls, John Bordley
Harlan, John Marshall, II	Rehnquist, William H.
Hays, Will H.	Reno, Janet
Helper, Hinton	Roberts, Owen Josephus
Hentoff, Nat	Roosevelt, Franklin Delano
Hiss, Alger	Rorty, Richard
Holmes, Oliver Wendell, Jr.	Rosenberg, Julius and Ethel
Hoover, J. Edgar	Rush, Benjamin
Hughes, Charles Evans	Rutledge, Wiley Blount, Jr.
Jackson, Andrew	Ryan, George
Jackson, Robert H.	Sanger, Margaret Higgins
Jefferson, Thomas	Scalia, Antonin
Johnson, Frank, Minis, Jr.	Schlafly, Phyllis Stewart
Johnson, Lyndon Baines	Shaw, Lemuel
Justice, William Wayne	Shepard, Matthew
Kamisar, Yale	Sherman, Roger
Kaufman, Irving Robert	Souter, David Hackett
Kendall, Amos	Stanton, Elizabeth Cady
Kennedy, Anthony McLeod	Stevens, John Paul

Stewart, Potter
 Stone, Harlan Fiske
 Storey, Moorfield
 Story, Joseph
 Strossen, Nadine
 Sumner, Charles
 Taft, William Howard
 Thomas, Clarence
 Tribe, Laurence H.
 Vinson, Fred Moore
 Walker, David
 Warren, Earl
 Weddington, Sarah Ragle
 Welch, Joseph N.
 Wells-Barnett, Ida Bell
 White, Byron Raymond
 Williams, Roger
 Wilson, Woodrow

Cases

- A Book Named “John Cleland’s Memoirs of a Women of Pleasure” v. Massachusetts, 383 U.S. 413 (1966)
 Abington Township School District v. Schempp, 374 U.S. 203 (1963)
 Aboud v. Detroit Board of Education, 431 U.S. 209 (1977)
 Abortion Protest Cases
 Abrams v. United States, 250 U.S. 616 (1919)
 Agostini v. Felton, 521 U.S. 203 (1997)
 Aguilar v. Felton, 473 U.S. 402 (1985)
 Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983)
 Alcorta v. Texas, 355 U.S. 28 (1957)
 County of Allegheny v. ACLU, 492 U.S. 573 (1989)
 Allen v. Illinois, 478 U.S. 364 (1986)
 Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, 391 U.S. 308 (1968)
 Ambach v. Norwick, 441 U.S. 68 (1979)
 American Booksellers Association, Inc., et al. v. Hudnut, 771 F. 2nd 323 (1985)
 American Communications Association v. Douds, 339 U.S. 382 (1950)
 Anders v. California, 386 U.S. 738 (1967)
 Apodaca v. Oregon, 406 U.S. 404 (1972)
 Apprendi v. New Jersey, 530 U.S. 466 (2000)
 Aptheker v. Secretary of State, 378 U.S. 500 (1964)
 Arizona v. Fulminante, 499 U.S. 279 (1991)
 Arizona v. Hicks, 480 U.S. 321 (1987)
 Arizona v. Youngblood, 488 U.S. 51 (1988)
 Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002)
 Ballew v. Georgia, 435 U.S. 223 (1978)
 Baltimore City Department of Social Services v. Bouknight, 493 U.S. 549 (1990)
 Barclay v. Florida, 463 U.S. 939 (1983)
 Barefoote v. Estelle, 463 U.S. 880 (1983)
 Barenblatt v. United States, 360 U.S. 109 (1959)
 Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991)
 Barron v. Baltimore, 32 U.S. 243 (1833)
 Bartkus v. Illinois, 359 U.S. 121 (1959)
 Bartnicki v. Vopper, 532 U.S. 514 (2001)
 Bates v. State Bar of Arizona, 433 U.S. 350 (1969)
 Batson v. Kentucky, 476 U.S. 79 (1986)
 Beal v. Doe, 432 U.S. 438 (1977)
 Beauharnais v. Illinois, 343 U.S. 250 (1952)
 Belle Terre v. Boraas, 416 U.S. 1 (1974)
 Bellis v. United States, 417 U.S. 85 (1974)
 Bellotti v. Baird, 443 U.S. 622 (1979)
 Benton v. Maryland, 395 U.S. 784 (1969)
 Berger v. New York, 388 U.S. 41 (1967)
 Berkemer v. McCarty, 468 U.S. 420 (1984)
 Bethel School District v. Fraser, 478 U.S. 675 (1986)
 Betts v. Brady, 316 U.S. 455 (1942)
 Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971)
 Blackledge v. Perry, 417 U.S. 21 (1974)
 Board of Education of the Westside Community Schools v. Mergens, 496 U.S. 226 (1990)
 Board of Education v. Allen, 392 U.S. 236 (1968)
 Board of Education v. Earls, 536 U.S. 822 (2002) (Students)
 Board of Education v. Pico, 457 U.S. 853 (1982)
 Board of Education, Kiryas Joel School District v. Grumet, 512 U.S. 687 (1994)
 Bob Jones University v. United States, 461 U.S. 574 (1983)
 City of Boerne v. Flores, 521 U.S. 507 (1997)
 Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983)
 Bond v. Floyd, 385 U.S. 116 (1966)
 Bordenkircher v. Hayes, 434 U.S. 357 (1978)
 Bowen v. American Hospital Association, 476 U.S. 610 (1986)
 Bowen v. Kendrick, 487 U.S. 589 (1988)
 Bowen v. Roy, 476 U.S. 693 (1986) (Social Security Number)
 Bowers v. Hardwick, 478 U.S. 186 (1986)
 Boy Scouts of America v. Dale, 530 U.S. 640 (2000)
 Boyd v. United States, 116 U.S. 616 (1886)
 Boykin v. Alabama, 395 U.S. 238 (1969)
 Bradfield v. Roberts, 175 U.S. 291 (1899)
 Brady v. Maryland, 373 U.S. 83 (1963)
 Brandenburg v. Ohio, 395 U.S. 444 (1969)
 Branti v. Finkel, 445 U.S. 507 (1980)
 Branzburg v. Hayes, 408 U.S. 665 (1972)
 Braswell v. United States, 487 U.S. 99 (1988)

THEMATIC LIST OF ENTRIES

- Bray v. Alexandria Women's Health Clinic, 506 U.S. 263 (1993)
- Breithaupt v. Abram, 352 U.S. 432 (1957)
- Brewer v. Williams, 430 U.S. 387 (1977)
- Brooks v. Tennessee, 406 U.S. 605 (1972)
- Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia, 377 U.S. 1 (1964)
- Brown v. Board of Education, 347 U.S. 483 (1954)
- Brown v. Mississippi, 279 U.S. 278 (1936)
- Buchanan v. Kentucky, 483 U.S. 402 (1987)
- Buchanan v. Warley, 245 U.S. 60 (1917)
- Buck v. Bell, 274 U.S. 200 (1927)
- Buckley v. Valeo, 424 U.S. 1 (1976)
- Bullington v. Missouri, 451 U.S. 430 (1981)
- Burdeau v. McDowell, 256 U.S. 465 (1921)
- Burks v. United States, 437 U.S. 1 (1978)
- Butler v. McKellar, 494 U.S. 407 (1990)
- Byers v. Edmondson, 712 So.2d 681 (1999) ("Natural Born Killers" Case)
- Cain v. Kentucky, 387 U.S. 319 (1970)
- Calder v. Bull, 3 U.S. 386 (1798)
- Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974)
- California v. Acevedo, 500 U.S. 565 (1991)
- California v. Greenwood, 486 U.S. 35 (1988)
- California v. LaRue, 409 U.S. 109 (1972)
- California v. Ramos, 459 U.S. 1301 (1982)
- California v. Trombetta, 467 U.S. 479 (1984)
- Camara v. Municipal Court of the City and County of San Francisco, 387 U.S. 523 (1967)
- Cantwell v. Connecticut, 310 U.S. 296 (1940)
- Capitol Square Review and Advisory Board v. Pinette, 515 U.S. 753 (1995)
- Carey v. Population Services International, 431 U.S. 678 (1977)
- Carolene Products v. U.S., 304 U.S. 144 (1938)
- Carroll v. United States, 267 U.S. 132 (1925)
- Central Hudson Gas and Electric Corp. v. Public Service Commission of New York, 447 U.S. 557 (1980)
- Chae Chan Ping v. U.S., 130 U.S. 581 (1889) and Chinese Exclusion Act
- Chambers v. Florida, 309 U.S. 227 (1940)
- Chambers v. Mississippi, 410 U.S. 284 (1973)
- Chandler v. Florida, 449 U.S. 560 (1981)
- Chandler v. Miller 520 U.S. 305 (1997) (Candidates)
- Chicago v. Morales, 527 U.S. 41 (1999)
- Chimel v. California, 395 U.S. 752 (1969)
- Church of the Holy Trinity v. United States, 143 U.S. 457 (1892)
- Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993)
- Cicenia v. LaGay, 357 U.S. 504 (1958)
- Cincinnati v. Discovery Network, Inc., 507 U.S. 14 (1993)
- Cohen v. California, 403 U.S. 15 (1971)
- Cohen v. Cowles Media Company, 501 U.S. 663 (1991)
- Coker v. Georgia, 433 U.S. 584 (1977)
- Colautti v. Franklin, 439 U.S. 379 (1979)
- Coleman v. Thompson, 501 U.S. 722 (1991)
- Colorado Republican Federal Campaign Committee v. Federal Election Commission, 518 U.S. 604 (1996)
- Colorado v. Connelly, 479 U.S. 157 (1986)
- Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756 (1973)
- Committee for Public Education and Religious Liberty v. Regan, 444 U.S. 646 (1980)
- Connally v. Georgia, 429 U.S. 245 (1977)
- Coolidge v. New Hampshire, 403 U.S. 443 (1971)
- Corporation of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987)
- Corrigan v. Buckley, 271 U.S. 323 (1926)
- Counselman v. Hitchcock, 142 U.S. 547 (1892)
- Cox v. Louisiana, 379 U.S. 536 (1965)
- Cox v. New Hampshire, 312 U.S. 569 (1941)
- Coy v. Iowa, 487 U.S. 1012 (1988)
- Crane v. Johnson, 242 U.S. 339 (1917)
- Crane v. Kentucky, 476 U.S. 683 (1986)
- Cruzan v. Missouri, 497 U.S. 261 (1990)
- Dandridge v. Williams, 397 U.S. 471 (1971)
- Davis v. Alaska, 415 U.S. 308 (1974)
- Davis v. Beason, 133 U.S. 333 (1890)
- Debs v. United States, 249 U.S. 211 (1919)
- DeJonge v. Oregon, 299 U.S. 353 (1937)
- Delaware v. Prouse, 440 U.S. 648 (1979)
- Dennis v. United States, 341 U.S. 494 (1951)
- Dickerson v. United States, 530 U.S. 428 (2000)
- Doe v. Bolton, 410 U.S. 179 (1973)
- Douglas v. California, 372 U.S. 353 (1963)
- Dred Scott v. Sandford, 60 U.S. 393 (1857)
- Duncan v. Louisiana, 391 U.S. 145 (1968)
- Dusky v. U.S., 362 U.S. 402 (1960)
- Edwards v. Aguillard, 482 U.S. 578 (1987)
- Edwards v. Arizona, 451 U.S. 477 (1981)
- Edwards v. California, 314 U.S. 160 (1941)
- Edwards v. South Carolina, 372 U.S. 229 (1963)
- Eisenstadt v. Baird, 405 U.S. 438 (1972)
- Eldred v. Ashcroft, 537 U.S. 186 (2001)
- Elk Grove Unified School District v. Newdow, 542 U.S. 1 (2004)
- Elrod v. Burns, 427 U.S. 347 (1976)
- Employment Division, Department of Human Resources v. Smith, 494 U.S. 872 (1990)
- Engel v. Vitale, 370 U.S. 421 (1962)
- Epperson v. Arkansas, 393 U.S. 97 (1968)
- City of Erie v. Pap's A.M., 529 U.S. 277 (2000)
- Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975)

- Escobedo v. Illinois, 378 U.S. 478 (1964)
 Estate of Thornton v. Caldor, 472 U.S. 703 (1985)
 Estelle v. Smith, 451 U.S. 454 (1980)
 Estelle v. Williams, 425 U.S. 501 (1975)
 Everson v. Board of Education, 330 U.S. 1 (1947)
 Ex Parte Milligan, 71 U.S. 2 (1866)
 Ex Parte Vallandigham, 28 F.CAS 874
 FCC v. League of Women Voters, 468 U.S. 364 (1984)
 FCC v. Pacifica Foundation, 438 U.S. 726 (1978)
 Feiner v. New York, 340 U.S. 315 (1951)
 Fiallo v. Bell, 430 U.S. 787 (1977)
 Fisher v. United States, 425 U.S. 391 (1976)
 Flast v. Cohen, 392 U.S. 83 (1968)
 Florida v. Jimeno, 500 U.S. 248 (1991)
 Florida v. Riley, 488 U.S. 445 (1989)
 Florida v. Royer, 460 U.S. 491 (1983)
 Florida v. White, 526 U.S. 559 (1999)
 Florida Star v. B.J.F., 491 U.S. 524 (1989)
 Follett v. Town of McCormick, S.C., 321 U.S. 573 (1944)
 Fong Yue Ting v. United States, 149 U.S. 698 (1893)
 44 Liquormart v. Rhode Island, 517 U.S. 484 (1996)
 France v. United States, 164 U.S. 676 (1897)
 Francis v. Franklin, 471 U.S. 307 (1985)
 Frisbie v. Collins, 342 U.S. 519 (1952)
 Frisby v. Schultz, 487 U.S. 474 (1988)
 Furman v. Georgia, 408 U.S. 238 (1972)
 FW/PBS, Inc. v. City of Dallas, 493 U.S. 215 (1990)
 Gardner v. Florida, 430 U.S. 349 (1977)
 Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991)
 Gerstein v. Pugh, 420 U.S. 103 (1975)
 Gertz v. Robert Welch Inc., 418 U.S. 323 (1974)
 Gibson v. Florida Legislative Investigation Committee, 372 U.S. 539 (1961)
 Gideon v. Wainwright, 372 U.S. 335 (1963)
 Giglio v. United States, 405 U.S. 150 (1972)
 Ginsberg v. New York, 390 U.S. 629 (1968)
 Ginzberg v. United States, 343 U.S. 463 (1966)
 Gitlow v. New York 268 U.S. 652 (1925)
 Godfrey v. Georgia, 446 U.S. 420 (1980)
 Godinez v. Moran, 509 U.S. 389 (1993)
 Goldberg v. Kelly, 397 U.S. 254 (1970)
 Goldman v. Weinberger, 475 U.S. 503 (1986)
 Good News Club v. Milford Central School, 533 U.S. 98 (2001)
 Graham v. Commissioner of Internal Revenue, 490 U.S. 680 (1989)
 Green v. Georgia, 442 U.S. 95 (1979)
 Gregg v. Georgia, 428 U.S. 153 (1976)
 Griffin v. California, 380 U.S. 609 (1965)
 Griffin v. Illinois, 351 U.S. 12 (1956)
 Griffin v. Wisconsin, 483 U.S. 868 (1987)
 Griswold v. Connecticut, 381 U.S. 479 (1965)
 Grosjean v. American Press Co., 297 U.S. 233 (1936)
 H.L. v. Matheson, 450 U.S. 398 (1981)
 Hague v. C.I.O., 307 U.S. 496 (1939)
 Haig v. Agee, 453 U.S. 280 (1981)
 Hale v. Henkel, 201 U.S. 370 (1906)
 Hamdi v. Rumsfeld, 542 U.S. 507 (2004)
 Harisiades v. Shaughnessy, 342 U.S. 580 (1952)
 Harmelin v. Michigan, 501 U.S. 957 (1991)
 Harper v. Virginia State Board of Elections, 383 U.S. 663 (1966)
 Harris v. McRae, 448 U.S. 297 (1980)
 Harris v. New York, 401 U.S. 222 (1971)
 Hazelwood School District v. Kuhlmeier, 484 U.S. 620 (1988)
 Herbert v. Lando, 441 U.S. 153 (1979)
 Hernandez v. Commissioner of Internal Revenue, 490 U.S. 680 (1989)
 Herrera v. Collins, 506 U.S. 390 (1993)
 Hess v. Indiana, 414 U.S. 105 (1973)
 Hester v. United States, 265 U.S. 445 (1924)
 Hoffa v. United States, 385 U.S. 293 (1966)
 Holland v. Illinois, 493 U.S. 474 (1990)
 Hopt v. Utah, 110 U.S. 574 (1884)
 Houchins v. KQED, Inc., 438 U.S. 1 (1978)
 Hudson v. Louisiana, 450 U.S. 40 (1981)
 Hudson v. Palmer, 468 U.S. 517 (1984)
 Hunt v. McNair, 413 U.S. 734 (1973)
 Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston, 515 U.S. 557 (1995)
 Hurtado v. California, 110 U.S. 516 (1884)
 Hustler Magazine v. Falwell, 485 U.S. 46 (1988)
 Hutchinson v. Proxmire, 443 U.S. 111 (1979)
 Illinois v. Gates, 462 U.S. 213 (1983)
 Illinois v. Krull, 480 U.S. 340 (1987)
 Illinois v. Perkins, 496 U.S. 292 (1990)
 Illinois v. Wardlow, 528 U.S. 119 (2000)
 Immigration and Naturalization Service v. Chadha, 462 U.S. 919 (1983)
 Immigration and Naturalization Service v. Lopez-Mendoza, 468 U.S. 1032 (1984)
 City of Indianapolis v. Edmond, 531 U.S. 32 (2000)
 In re Gault, 387 U.S. 1 (1967)
 In re Griffiths, 413 U.S. 717 (1973)
 In re Winship, 397 U.S. 358 (1970)
 Jackson v. Denno, 378 U.S. 368 (1964)
 Jackson v. Indiana, 406 U.S. 715 (1972)
 Jackson v. Virginia, 443 U.S. 307 (1979)
 Jacobellis v. Ohio, 378 U.S. 184 (1964)
 Jacobson v. Massachusetts, 197 U.S. 11 (1905)
 Jacobson v. United States, 503 U.S. 540 (1992)
 Jamison v. Texas, 318 U.S. 413 (1943)
 Jenkins v. Georgia, 418 U.S. 152 (1974)
 Jimmy Swaggart Ministries v. Board of Equalization of California, 493 U.S. 378 (1990)
 Jones v. Wolf, 443 U.S. 595 (1979)
 Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952)
 Jurek v. Texas, 428 U.S. 262 (1976)

THEMATIC LIST OF ENTRIES

- Katz v. United States, 389 U.S. 347 (1967)
 Kent v. Dulles, 357 U.S. 116 (1957)
 Kingsley International Pictures Corporation v. Regents of the University of New York, 360 U.S. 684 (1959)
 Kirby v. Illinois, 406 U.S. 682 (1972)
 Kleindienst v. Mandel, 408 U.S. 753 (1972)
 Klopfer v. North Carolina, 386 U.S. 213 (1967)
 Kois v. Wisconsin, 408 U.S. 229 (1972)
 Kolender v. Lawson, 461 U.S. 352 (1983)
 Konigsberg v. State Bar of California, 336 U.S. 36 (1961)
 Kyles v. Whitley, 514 U.S. 419 (1995)
 Kyllo v. United States, 533 U.S. 27 (2001)
 Lambert v. California, 355 U.S. 255 (1957)
 Lambert v. Wicklund, 520 U.S. 292 (1997)
 Lamb's Chapel v. Center Moriches Union Free School District, 508 U.S. 384 (1993)
 Lanzetta v. New Jersey, 306 U.S. 451 (1939)
 Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1 (1890)
 Lawrence v. Texas, 539 U.S. 558 (2003)
 Lee v. Weisman, 505 U.S. 577 (1992)
 Legal Services Corporation v. Valesquez, 531 U.S. 533 (2001)
 Leland v. Oregon, 343 U.S. 790 (1952)
 Leyra v. Denno, 347 U.S. 556 (1954)
 Lilly v. Virginia, 527 U.S. 116 (1999)
 City of Littleton v. Z.J. Gifts D-4, L.L.C. (2004)
 Lloyd Corporation v. Tanner, 407 U.S. 551 (1972)
 Loan Association v. Topeka, 87 U.S. 655 (1875)
 Lochner v. New York, 198 U.S. 45 (1905)
 Locke v. Davey, 540 U.S. 712 (2004)
 Lockett v. Ohio, 438 U.S. 586 (1978)
 Lockhart v. McCree, 476 U.S. 162 (1986)
 Lo-Ji Sales, Inc. v. New York, 442 U.S. 319 (1979)
 Los Angeles v. Lyons, 461 U.S. 95 (1983)
 Loving v. Virginia, 388 U.S. 1 (1967)
 Lynch v. Donnelly, 465 U.S. 668 (1984)
 Lyng v. Northwest Indian Cemetery Protective Association, 485 U.S. 439 (1988)
 Lynumn v. Illinois, 372 U.S. 528 (1963)
 Mabry v. Johnson, 467 U.S. 532 (1984)
 Madsen v. Women's Health Center, 512 U.S. 753 (1994)
 Maher v. Roe, 432 U.S. 464 (1977)
 Mallory v. United States, 354 U.S. 449 (1957)
 Manson v. Brathwaite, 432 U.S. 98 (1977)
 Manual Enterprises Inc. v. Day, 370 U.S. 478 (1962)
 Mapp v. Ohio, 367 U.S. 643 (1961)
 Marbury v. Madison, 5 U.S. 137 (1803)
 Marchetti v. United States, 390 U.S. 39 (1968)
 Marsh v. Chambers, 463 U.S. 783 (1983)
 Martin v. Ohio, 480 U.S. 228 (1987)
 Maryland v. Buie, 494 U.S. 325 (1990)
 Maryland v. Craig, 497 U.S. 836 (1990)
 Masses Publishing Company v. Patten, 244 U.S. 535 (1917)
 Massiah v. United States, 377 U.S. 201 (1964)
 Mathis v. United States, 391 U.S. 1 (1968)
 McCleskey v. Kemp, 481 U.S. 277 (1987)
 McCollum v. Board of Education, 333 U.S. 203 (1948)
 McCulloch v. Maryland, 17 U.S. 316 (1819)
 McDaniel v. Paty, 435 U.S. 618 (1978)
 McGautha v. California, 402 U.S. 183 (1971)
 McGowen v. Maryland, 366 U.S. 420 (1961)
 McKeiver v. Pennsylvania, 403 U.S. 528 (1971)
 McLaughlin v. Florida, 379 U.S. 184 (1964)
 McNabb v. United States, 318 U.S. 332 (1943)
 Menna v. New York, 423 U.S. 61 (1975)
 Metro-Goldwyn-Mayer Studios (MGM) v. Grokster, 545 U.S. (2005)
 Meyer v. Nebraska, 262 U.S. 390 (1923)
 Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974)
 Michigan Department of State Police v. Sitz, 496 U.S. 444 (1990)
 Michigan v. DeFillippo, 443 U.S. 31 (1979)
 Michigan v. Lucas, 500 U.S. 145 (1991)
 Michigan v. Mosley, 423 U.S. 96 (1975)
 Michigan v. Summers, 452 U.S. 692 (1981)
 Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990)
 Miller v. California, 413 U.S. 15 (1973)
 Mills v. Alabama, 384 U.S. 214 (1966)
 Mincey v. Arizona, 437 U.S. 385 (1978)
 Minnesota v. Dickerson, 508 U.S. 366 (1993)
 Minnesota v. Olson, 495 U.S. 91 (1990)
 Miranda v. Arizona, 384 U.S. 436 (1966)
 Mishkin v. New York, 383 U.S. 502 (1966)
 Mistretta v. United States, 488 U.S. 361 (1989)
 Mitchell v. Helms, 463 U.S. 793 (2000)
 Monroe v. Pape, 365 U.S. 167 (1961)
 Mooney v. Holohan, 294 U.S. 103 (1935)
 Moore v. East Cleveland, 431 U.S. 494 (1977)
 Moran v. Burbine, 475 U.S. 412 (1986)
 Motes v. United States, 178 U.S. 458 (1900)
 Mozert v. Hawkins County Board of Education, 827 F. 2d 1058 (1987)
 Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977)
 Mueller v. Allen, 463 U.S. 388 (1983)
 Mullaney v. Wilbur, 421 U.S. 684 (1975)
 Mutual Film Corporation v. Industrial Commission of Ohio, 236 U.S. 230 (1915)
 NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958)
 NAACP v. Button, 371 U.S. 415 (1963)
 Naim v. Naim, 875 E. 2nd 749 (Va. 1955); 350 U.S. 891 (1955); 350 U.S. 985 (1956)
 Napue v. Illinois, 360 U.S. 264 (1959)

- Nardone v. United States, 308 U.S. 338 (1939)
 National Endowment for the Arts v. Finley, 118 S. Ct 2168 (1998)
 National Treasury Employee Union v. Von Raab, 489 U.S. 656 (1989)
 Near v. Minnesota, 283 U.S. 697 (1931)
 Nebbia v. New York, 291 U.S. 502 (1934)
 Nebraska Press Association v. Stuart, 427 U.S. 539 (1976)
 New Jersey v. T.L.O., 469 U.S. 325 (1985)
 New York Ex. Rel. Bryant v. Zimmerman, 278 U.S. 63 (1928)
 New York Times Co. v. Sullivan, 376 U.S. 254 (1964)
 New York Times Co. v. United States, 403 U.S. 713 (1971)
 New York v. Belton, 453 U.S. 454 (1981)
 New York v. Ferber, 458 U.S. 747 (1982)
 New York v. Quarles, 467 U.S. 649 (1984)
 Nix v. Williams, 467 U.S. 431, 104 (1984)
 NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979)
 North Carolina v. Alford, 400 U.S. 25 (1970)
 North Carolina v. Pearce, 395 U.S. 711 (1969)
 O'Connor v. Ortega, 480 U.S. 709 (1987)
 Ohio v. Robinette, 519 U.S. 33 (1996)
 Olmstead v. United States, 277 U.S. 438 (1928)
 O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987)
 On Lee v. United States, 343 U.S. 747 (1952)
 Orozco v. Texas, 394 U.S. 324 (1969)
 Osborne v. Ohio, 495 U.S. 103 (1990)
 Papachristou v. City of Jacksonville, 405 U.S. 156 (1972)
 Paris Adult Theatre v. Slaton, 413 U.S. 49 (1973)
 Patterson v. New York, 432 U.S. 197 (1977)
 Paul v. Davis, 424 U.S. 693 (1976)
 Payton v. New York, 445 U.S. 573 (1980)
 Pell v. Procunier, 417 U.S. 817 (1974)
 Pennsylvania v. Scott, 524 U.S. 357 (1998)
 Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986)
 Pickering v. Board of Education, 391 U.S. 563 (1968)
 Pierce v. Society of Sisters, 268 U.S. 510 (1925)
 Planned Parenthood of Missouri v. Danforth, 428 U.S. 52 (1976)
 Planned Parenthood v. Ashcroft, 462 U.S. 476 (1983)
 Planned Parenthood v. Casey, 112 S.Ct. 2791 (1992)
 Plessy v. Ferguson, 163 U.S. 537 (1896)
 Plyler v. Doe, 457 U.S. 202 (1982)
 Poe v. Ullman, 367 U.S. 497 (1961)
 Poelker v. Doe, 432 U.S. 59 (1977)
 Pope v. Illinois, 481 U.S. 497 (1987)
 Posadas de Puerto Rico Association v. Tourism Company of Puerto Rico, 478 U.S. 328 (1986)
 Powell v. Alabama, 287 U.S. 45 (1932)
 Powell v. Texas, 392 U.S. 514 (1968)
 Prince v. Massachusetts, 321 U.S. 158 (1944)
 Profitt v. Florida, 428 U.S. 242 (1976)
 Pulley v. Harris, 465 U.S. 37 (1984)
 Quick Bear v. Leupp, 210 U.S. 50 (1908)
 Rabe v. Washington, 405 U.S. 313 (1972)
 Raley v. Ohio, 360 U.S. 423 (1959)
 Rankin v. McPherson, 483 U.S. 378 (1987)
 R.A.V. v. City of St. Paul, 505 U.S. 377 (1992)
 Rawlings v. Kentucky, 448 U.S. 98 (1980)
 Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969)
 Redrup v. New York, 386 U.S. 767 (1967)
 Regents of University of California v. Bakke, 438 U.S. 265 (1978)
 Regina v. Hicklin, L.R. 2 Q.B. 360 (1868)
 Reid v. Covert, 354 U.S. 1 (1957)
 Reid v. Georgia, 448 U.S. 438 (1980)
 Reno v. ACLU, 521 U.S. 844 (1997)
 Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986)
 Reynolds v. United States, 98 U.S. 145 (1878)
 Rhode Island v. Innis, 446 U.S. 291 (1980)
 Rice v. Paladin Press ("Hit Man" Case), 940 F. Supp. 836 (D. Md. 1996)
 Richards v. Wisconsin, 520 U.S. 385 (1997)
 Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980)
 Ricketts v. Adamson, 483 U.S. 1 (1987)
 Riggins v. Nevada, 504 U.S. 127 (1992)
 County of Riverside v. McLaughlin, 500 U.S. 44 (1991)
 Rizzo v. Goode, 423 U.S. 362 (1976)
 Roberts v. United States Jaycees, 468 U.S. 609 (1984)
 Robinson v. California, 370 U.S. 660 (1962)
 Rochin v. California, 342 U.S. 165 (1952)
 Rock v. Arkansas, 483 U.S. 44 (1987)
 Roe v. Wade, 410 U.S. 113 (1973)
 Roemer v. Maryland Board of Public Works, 426 U.S. 736 (1976)
 Romer v. Evans, 517 U.S. 620 (1996)
 Rosales-Lopez v. United States, 451 U.S. 182 (1981)
 Rose v. Locke, 423 U.S. 48 (1975)
 Rosenberger v. Rector and Visitors of the University of Virginia, 515 U.S. 819 (1995)
 Ross v. Moffitt, 417 U.S. 600 (1974)
 Rotary International v. Rotary Club of Duarte, 481 U.S. 537 (1987)
 Roth v. United States, 354 U.S. 476 (1957)
 Roviario v. United States, 353 U.S. 53 (1957)
 Rowan v. United States Post Office Department, No. 399, 397 U.S. 728 (1970)
 Rust v. Sullivan, 500 U.S. 173 (1991)
 Rutan v. Republican Party of Illinois, 497 U.S. 62 (1990)
 Saenz v. Roe, 526 U.S. 489 (1999)
 Sandstrom v. Montana, 442 U.S. 510 (1979)

THEMATIC LIST OF ENTRIES

- Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978)
 Santa Fe Independent School District v. Doe, 530 U.S. 290 (2000)
 Santobello v. New York, 404 U.S. 257 (1971)
 Saxbe v. Washington Post, 417 U.S. 817 (1974)
 Scales v. United States, 367 U.S. 203 (1961)
 Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981)
 Schall v. Martin, 467 U.S. 253 (1984)
 Schenck v. United States, 249 U.S. 47 (1919)
 Schmerber v. California, 384 U.S. 757 (1966)
 Schneekloth v. Bustamonte, 412 U.S. 218 (1973)
 School District of the City of Grand Rapids v. Ball, 473 U.S. 373 (1985)
 Shapiro v. Thompson, 394 U.S. 618 (1969)
 Shaughnessey v. United States Ex Rel. Mezei, 345 U.S. 206 (1953)
 Shelley v. Kraemer, 334 U.S. 1 (1948)
 Sherbert v. Verner, 374 U.S. 398 (1963)
 Sicurella v. United States, 348 U.S. 385 (1955)
 Simopoulos v. Virginia, 462 U.S. 506 (1983)
 Singer v. United States, 380 U.S. 24 (1965)
 Skinner v. Oklahoma, 316 U.S. 535 (1942)
 Skinner v. Railway Labor Executives' Association, 489 U.S. 602 (1989)
 Slaughterhouse Cases, 83 U.S. (16 Wall.) 36 (1873)
 Smith v. California, 361 U.S. 147 (1959)
 Smith v. Organization of Foster Families, 431 U.S. 816 (1977)
 Snapp v. United States, 444 U.S. 507 (1980)
 Solem v. Helm, 463 U.S. 277 (1983)
 Sorrells v. U.S., 287 U.S. 435 (1932)
 South Dakota v. Opperman, 428 U.S. 364 (1976)
 Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975)
 Spano v. New York, 360 U.S. 315 (1959)
 Spaziano v. Florida, 468 U.S. 447 (1984)
 Stanley v. Georgia, 394 U.S. 557 (1969)
 Staples v. United States, 511 U.S. 600 (1994)
 Stenberg v. Carhart, 530 U.S. 914 (2000)
 Stone v. Graham, 449 U.S. 39 (1980)
 Swain v. Alabama, 380 U.S. 202 (1965)
 Swearingin v. United States, 161 U.S. 446 (1896)
 Taylor v. Illinois, 484 U.S. 400 (1988)
 Taylor v. Louisiana, 419 U.S. 522 (1975)
 Tennessee v. Garner, 471 U.S. 1 (1985)
 Terry v. Ohio, 392 U.S. 1 (1968)
 Test Oath Cases
 Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989)
 Thornburgh v. Abbott, 490 U.S. 401 (1989)
 Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986)
 Tibbs v. Florida, 457 U.S. 31 (1982)
 Tileston v. Ullman, 318 U.S. 44 (1943)
 Tilton v. Richardson, 403 U.S. 672 (1971)
 Time, Inc. v. Hill, 385 U.S. 374 (1967)
 Tinker v. Des Moines School District, 393 U.S. 503 (1969)
 Tony and Susan Alamo Foundation v. Secretary of Labor, 471 U.S. 290 (1985)
 Torcaso v. Watkins, 367 U.S. 488 (1961)
 Trop v. Dulles, 356 U.S. 86 (1958)
 Turner Broadcasting Sys., Inc. v. FCC (Turner I), 512 U.S. 622 (1994), 520 U.S. 180 (1997) (Turner II)
 Turner v. Safley, 482 U.S. 78 (1987)
 Ulster County Court v. Allen, 442 U.S. 140 (1979)
 United States v. 12 200-Foot Reels of Super 8mm. Film, 413 U.S. 123 (1973)
 United States v. 37 Photographs, 402 U.S. 363 (1971)
 United States v. 92 Buena Vista Avenue, 507 U.S. 111 (1993)
 United States v. Agurs, 427 U.S. 97 (1976)
 United States v. Ash, 413 U.S. 300 (1973)
 United States v. Balsys, 524 U.S. 666 (1998)
 United States v. Brignoni-Ponce, 422 U.S. 873 (1975)
 United States v. Calandra, 414 U.S. 338 (1974)
 United States v. Cruikshank, 92 U.S. 542 (1876)
 United States v. Dionisio, 410 U.S. 1 (1973)
 United States v. Grimaud, 220 U.S. 506 (1911)
 United States v. Havens, 446 U.S. 620 (1980)
 United States v. Kahriger, 345 U.S. 22 (1953)
 United States v. Lee, 455 U.S. 252 (1982)
 United States v. Leon, 468 U.S. 897 (1984)
 United States v. Lovasco, 431 U.S. 783 (1977)
 United States v. Lovett, 328 U.S. 303 (1946)
 United States v. Miller 307 U.S. 174 (1939)
 United States v. Miller, 425 U.S. 435 (1976)
 United States v. O'Brien, 391 U.S. 367 (1968)
 United States v. One Book Entitled "Ulysses," 72 E. 2nd 705 (1934)
 United States v. Playboy Entertainment Group, 529 U.S. 803 (2000)
 United States v. Ramirez, 523 U.S. 65 (1998)
 United States v. Reidel, 402 U.S. 351 (1971)
 United States v. Robinson, 414 U.S. 218 (1973)
 United States v. Schoon, 971 F.2d 193 (9th Cir. 1991)
 United States v. Schwimmer, 279 U.S. 644 (1929)
 United States v. Seeger, 380 U.S. 163 (1965)
 United States v. Tateo, 377 U.S. 463 (1964)
 United States v. The Progressive, Inc., 467 F. Supp. 990 (W.D. Wis. 1979)
 United States v. United States District Court, 407 U.S. 297 (1972)
 United States v. Verdugo-Urquidez, 494 U.S. 259 (1990)
 United States v. Wade, 388 U.S. 218 (1967)
 United States v. Washington, 431 U.S. 181 (1977)
 United States v. Watson, 423 U.S. 411 (1976)
 University of Wisconsin v. Southworth, 529 U.S. 217 (2000)
 Urofsky v. Gilmore, 216 F.3d 401 (4th Cir. 2000)

Valentine v. Chrestensen, 316 U.S. 52 (1942)
 Vance v. Universal Amusement Co., Inc. 445 U.S.
 208 (1980)
 Vernonia School District v. Acton, 515 U.S. 646 (1995)
 Vidal v. Girard's Executor, 43 U.S. 127 (1844)
 Virginia State Board of Pharmacy v. Virginia Citizens
 Consumer Council, Inc., 425 U.S. 748 (1976)
 Virginia v. Black, 123 S.Ct. 1536 (2003)
 Wallace v. Jaffree, 472 U.S. 38 (1985)
 Walz v. Tax Commission of the City of New York,
 397 U.S. 664 (1970)
 Warden v. Hayden, 387 U.S. 294 (1967)
 Washington v. Glucksberg, 521 U.S. 702 (1997)
 Washington v. Texas, 388 U.S. 14 (1967)
 Watson v. Jones, 80 U.S. 679 (1872)
 Watts v. United States, 394 U.S. 705 (1969)
 Webb v. Texas, 409 U.S. 95 (1972)
 Webster v. Reproductive Health Services, 492 U.S.
 490 (1989)
 Weeks v. United States, 232 U.S. 383 (1914)
 Weems v. United States, 217 U.S. 349 (1910)
 West Virginia Board of Education v. Barnette, 319
 U.S. 624 (1943)
 Whitney v. California, 274 U.S. 357 (1927)
 William Penn's Case
 Wilson v. Layne, 526 U.S. 603 (1999)
 Wisconsin v. Mitchell, 508 U.S. 476 (1993)
 Wisconsin v. Yoder, 406 U.S. 205 (1972)
 Witters v. Washington Department of Services for the
 Blind, 474 U.S. 481 (1986)
 Wolf v. Colorado, 338 U.S. 25 (1949)
 Wolman v. Walter, 433 U.S. 229 (1977)
 Wong Sun v. United States, 371 U.S. 471 (1963)
 Wyman v. James, 400 U.S. 309 (1971)
 Wyoming v. Houghton, 526 U.S. 295 (1999)
 Yates v. United States, 354 U.S. 298 (1957)
 Young v. American Mini Theatres, Inc., 427 U.S.
 50 (1976)
 Younger v. Harris, 401 U.S. 37 (1971)
 Zablocki v. Redhail, 434 U.S. 374 (1978)
 Zacchini v. Scripps Howard Broadcasting Company,
 433 U.S. 562 (1977)
 Zelman v. Simmons-Harris, 536 U.S. 639 (2002)
 Zobrest v. Catalina Foothills School District, 509
 U.S. 1 (1993)
 Zorach v. Clauson, 343 U.S. 306 (1952)
 Zurcher v. Stanford Daily, 436 U.S. 547 (1978)

Themes, Issues, Concepts, and Events

Abolitionist Movement
 Abolitionists
 Abortion

Absolutism and Free Speech
 Abu Ghraib
 Academic Freedom
 Access to Government Operations Information
 Access to Judicial Records
 Access to Prisons
 Accommodation of Religion
 Accomplice Confessions
 Actual Malice Standard
 Administrative Searches and Seizures
 Affirmative Action
 Airport Searches
 American Revolution
 Anne Hutchinson Trial
 Anonymity and Free Speech
 Anonymity in Online Communication
 Anti-Abolitionist Gag Rules
 Anti-Abortion Protest and Freedom of Speech
 Antidiscrimination Laws
 Application of First Amendment to States
 Appropriation of Name or Likeness
 Arraignment and Probable Cause Hearing
 Arrest Warrants
 Arrest without a Warrant
 Assisted Suicide
 Asylum, Refugees and the Convention
 Against Torture
 Automobile Searches
 Autopsies and Free Exercise Beliefs
 Bad Tendency Test
 Bail
 Balancing Approach to Free Speech
 Balancing Test
 Baldus Study (Capital Punishment)
 Ballot Initiatives
 Baptists in Early America
 Bible in American Law
 Bill of Attainder
 Birth Control
 Blacklisting
 Bloody Tenent of Persecution for Cause of
 Conscience, Discussed in a Conference between
 Truth and Peace, The
 Blue Wall of Silence
 Boston Massacre Trial
 Brandenburg Incitement Test
 Burden of Proof: Overview
 Cameras in the Courtroom
 Campus Hate Speech Codes
 Capital Punishment and Race Discrimination
 Capital Punishment and Resentencing
 Capital Punishment and the Equal Protection
 Clause Cases
 Capital Punishment and Sentencing
 Capital Punishment and the Right of Appeal

THEMATIC LIST OF ENTRIES

Capital Punishment for Felony Murder	Criminal Conspiracy
Capital Punishment Held Not Cruel and Unusual Punishment under Certain Guidelines	Criminal Law/Civil Liberties and Noncitizens in the United States
Capital Punishment Reversed	Criminalization of Civil Wrongs
Capital Punishment: Antiterrorism and Effective Death Penalty Act of 1996	Cross-Burning
Capital Punishment: Due Process Limits	Cruel and Unusual Punishment Generally
Capital Punishment: Eighth Amendment Limits	Cuban Interdiction
Capital Punishment: Execution of Innocents	Cultural Defense
Capital Punishment: Lynching	Days of Religious Observance as National or State Holidays
Capital Punishment: Methods of Execution	Debtor's Prisons
Capital Punishment: Proportionality	Defense, Right to Present
Captive Audiences and Free Speech	Defiance of the Court's Ban on School Prayer
Categorical Approach to Free Speech	Defining Religion
Ceremonial Deism	Denaturalization
Chain Gangs	Designated Public Forums
Chaplains—Legislative	Dial-a-Porn
Chaplains—Military	Disciplining Lawyers for Speaking about Pending Cases
Charitable Choice	Disciplining Public Employees for Expressive Activity
Checkpoints (Roadblocks)	Discovery Materials in Court Proceedings
Chicago Seven Trial	Discrimination by Religious Entities That Receive Government Funds
Child Custody and Adoption	Discriminatory Prosecution
Child Custody and Foster Care	DNA and Innocence
Child Pornography	DNA Testing
Citizenship	Draft Card Burning
Civil Asset Forfeiture	Drug Testing
Civil Death	Drugs, Religion, and Law
Civil Religion	Dual Citizenship
Civilian Complaint Review Boards	Due Process
Classified Information	Due Process in Immigration
Clear and Present Danger Test	Duty to Obey Court Orders
Cloning	DWI
Coerced Confessions/Police Interrogation	Electric Chair as Cruel and Unusual Punishment
Collateral Consequences	Electronic Surveillance, Technology Monitoring, and Dog Sniffs
Colonial Charters and Codes	Emancipation Proclamation (1863)
Commercial Speech	Emergency, Civil Liberties in
Common Law or Statute	Entrapment and "Stings"
Compelling State Interest	Entrapment by Estoppel
Compulsory Vaccination	Establishment Clause Doctrine: Supreme Court Jurisprudence
Concept of "Christian Nation" in American Jurisprudence	Establishment Clause: Theories of Interpretation
Confrontation and Compulsory Process	Eugenic Sterilization
Confrontation Clause	Euthanasia
Congressional Protection of Privacy	Ex Post Facto Clause
Conscientious Objection, the Free Exercise Clause	Exclusionary Rule
Conspiracy	Exemptions for Religion Contained in Regulatory Statutes
Constitution of 1787	Expatriation
Constitution Overseas	Extradition
Constitutional Convention of 1787	Eyewitness Identification
Content-Based Regulation of Speech	Fairness Doctrine
Content-Neutral Regulation of Speech	False Confessions
Copyright Law and Free Exercise	
Corruption of Blood	
County and City Seals with Religious Content	
Creationism and Intelligent Design	

THEMATIC LIST OF ENTRIES

<p>False Light Invasion of Privacy</p> <p>Family Unity for Noncitizens</p> <p>Family Values Movement</p> <p>Felon Disenfranchisement</p> <p>Fighting Words and Free Speech</p> <p>First Amendment and PACs</p> <p>Flag Burning</p> <p>Forced Speech</p> <p>Free Exercise Clause Doctrine: Supreme Court Jurisprudence</p> <p>Free Speech in Private Corporations</p> <p>Freedom of Association</p> <p>Freedom of Contract</p> <p>Freedom of Expression in the International Context</p> <p>Fruit of the Poisonous Tree</p> <p>Gag Orders in Judicial Proceedings</p> <p>Gang Ordinances</p> <p>General Warrants</p> <p>Glorious Revolution</p> <p>Government Funding of Speech</p> <p>Government Speech</p> <p>Grand Jury in Colonial America</p> <p>Grant's General Orders #11 (1862) (Expelling Jews)</p> <p>Group Libel</p> <p>Guantanamo Bay, Enemy Combatants, Post 9/11</p> <p>Guilty But Mentally Ill</p> <p>Guilty Plea</p> <p>Gun Control/Anti-Gun Control</p> <p>Habeas Corpus Act of 1679</p> <p>Habeas Corpus in Colonial America</p> <p>Harmless Error</p> <p>Hate Crimes</p> <p>Hate Speech</p> <p>Hearsay Evidence</p> <p>Heckler's Veto Problem in Free Speech</p> <p>Hip-Hop and Rap Music</p> <p>History and Its Role in Supreme Court Decision Making on Religion</p> <p>Homosexuality and Immigration</p> <p>Hostile Environment and Employment Discrimination Issues and Free Speech</p> <p>Ideological and Security-Based Exclusion and Deportation</p> <p>Illegitimacy and Immigration</p> <p>Impartial Decisionmaker</p> <p>Implied Rights</p> <p>Incorporation Doctrine</p> <p>Incorporation Doctrine and Free Speech</p> <p>Indefinite Detention</p> <p>Ineffective Assistance of Counsel</p> <p>Infliction of Emotional Distress and First Amendment</p> <p>Intellectual Property and the First Amendment</p> <p>Intermediate Scrutiny Test in Free Speech Cases</p> <p>Internet and Intellectual Property</p>	<p>Internet Filtering at Libraries and Free Speech</p> <p>Interstate Commerce</p> <p>Intrusion</p> <p>Invasion of Privacy and Free Speech</p> <p>Invidious Discrimination</p> <p>Jailhouse Informants</p> <p>Jehovah's Witnesses and Religious Liberty</p> <p>Jews and Religious Liberty</p> <p>Journalism and Sources</p> <p>Judicial Bias</p> <p>Judicial Proceedings and References to the Deity</p> <p>Judicial Resolution of Church Property Disputes</p> <p>Jurisdiction of the Federal Courts</p> <p>Jury Nullification</p> <p>Jury Selection and Voir Dire</p> <p>Jury Trial Right</p> <p>Kentucky and Virginia Resolves</p> <p>Lawyer Advertising</p> <p>Legal Realists</p> <p>Legislative Prayer</p> <p>Legislators' Freedom of Speech</p> <p>Lemon Test</p> <p>Limitations on Clergy Holding Office</p> <p>Limited Public Forums</p> <p>Line-Ups</p> <p>Low Value Speech</p> <p>Mandatory Death Sentences Unconstitutional</p> <p>Mandatory Minimum Sentences</p> <p>Marches and Demonstrations</p> <p>Marital Rape</p> <p>Marketplace of Ideas Theory</p> <p>Massachusetts Body of Liberties of 1641</p> <p>Material Witnesses</p> <p>Matters of Public Concern Standard in Free Speech Cases</p> <p>Media Access to Information</p> <p>Media Access to Judicial Proceedings</p> <p>Media Access to Military Operations</p> <p>Media Liability for Causing Physical Harm</p> <p>Mentally Ill</p> <p>Military Tribunals</p> <p>Miller Test</p> <p>Miranda Warning</p> <p>Movie Ratings and Censorship</p> <p>Museums and Expression</p> <p>Muslims and Religious Liberties</p> <p>National Motto "In God We Trust"</p> <p>National Origins Quota System</p> <p>National Security</p> <p>National Security and Freedom of Speech</p> <p>National Security Prior Restraints</p> <p>Native Americans and Religious Liberty</p> <p>Natural Law, Eighteenth-Century Understanding</p> <p>Neutral Reportage Doctrine</p> <p>New Right</p>
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THEMATIC LIST OF ENTRIES

Newsroom Searches
9/11 and the War on Terrorism
Ninth Amendment
No Coercion Test
No Endorsement Test
Noncitizens and the Franchise
Noncitizens and Land Ownership
Non-Preferentialism
O'Brien Content-Neutral Free Speech Test
O'Brien Formula
Obscenity
Open Fields
Overbreadth Doctrine
Pacifists and Naturalization
Pardon and Commutation
Penumbras
Petition Campaign
Philosophy and Theory of Freedom of Expression
Physician-Assisted Suicide
Picketing
Plain View
Planned Parenthood ("Nuremburg Files") Litigation
Plea Bargaining
Pledge of Allegiance ("Under God")
Pledge of Allegiance and the First Amendment
Plenary Power Doctrine
Police Investigation Commissions
Police Power of the State
Political Correctness and Free Speech
Political Patronage and the First Amendment
Politics and Money
Prayer in Public Schools
Preferred Position
Preventative Detention
Prior Restraints
Prison Population Growth
Prisoners and Free Exercise Clause Rights
Prisoners and Freedom of Speech
Privacy, Theories of
Private Police
Private Possession of Obscenity in the Home
Private Religious Speech on Public Property
Probable Cause
Professional Advertising
Profiling (Including DWB)
Prohibition
Proportional Punishment
Proportionality Reviews
Public Figures
Public Forum Doctrines
Public/Nonpublic Forums Distinction
Public Officials
Public School Curricula and Free Exercise Claims
Public Trial
Public Vulgarly and Free Speech
Rape: Naming Victim
Rastafarians and the Free Exercise of Religion
Reapportionment
Red Scare of the Early 1920s
Refusal of Medical Treatment and Religious Beliefs
Release Time from Public Schools (For Religious Purposes)
Religion in Nineteenth-Century Public Education (Includes "Bible Wars")
Religion in "Public Square" Debate
Religion in Public Universities
Religion in the Workplace
Religious Freedom in the Military
Religious Garb in Courtrooms and Classrooms
Religious Land Use and Institutionalized Persons Act of 2000
Religious Symbols on Public Property
Removal to Federal Court
Reporter's Privilege
Reproductive Freedom
Restricting Actions of Legal Services Lawyers
Restrictive Covenants
Retribution
RICO
Right of Access to Criminal Trials
Right of Privacy
Right to Counsel
Right to Know
Right to Petition
Right to Reply and Right of the Press
Right to Travel
Right to Vote for Individuals with Disabilities
Right v. Privilege Distinction
Rights of the Accused
Ripeness in Free Speech Cases
Ruby Ridge Incident
Rule of Law
S. Warren and L. Brandeis, "The Right to Privacy," 4 Harvard L. Rev. 193 (1890)
Sacco and Vanzetti
Salvation Army and Religious Liberty
Same-Sex Adoption
Same-Sex Unions
Satire and Parody and the First Amendment
School Vouchers
Scopes Trial
Scottsboro Trials
Sealed Documents in Court Proceedings
Search (General Definition)
Search Warrants
Secondary Effects Doctrine
Secular Purpose
Seditious Libel
Seizures
Self-Defense

THEMATIC LIST OF ENTRIES

<p>Self-Fulfillment Theory of Free Speech Self-Governance and Free Speech Self-Incrimination: Miranda and Evolution Shield Laws Shopping Centers and Freedom of Speech Sincerity of Religious Belief SLAPP Suits (Strategic Lawsuits against Public Participation) Slavery Snake-Handling Sects and Religious Liberty Speech and Its Relation to Violence Speech of Government Employees Speech versus Conduct Distinction Speedy Trial Spying on Citizens Standing in Free Speech Cases State Action Doctrine State Aid to Religious Schools State and Federal Regulation of Immigration State Constitutional Distinctions Status Offenses Statutory Rape Stay of Execution Stem Cell Research/Research Using Fetal Tissue Stonewall Riot Stop and Frisk Strict Liability Student Activity Fees and Free Speech Student Speech in Public Schools Subpoenas to Reporters Sunday Mail Suspended Right of Habeas Corpus Symbolic Speech Taxpayer Standing to Challenge Establishment Clause Violations Teacher Speech in Public Schools Teaching “Creation Science” in the Public Schools Ten Commandments on Display in Public Buildings Terrorism and Civil Liberties</p>	<p>Theories of Civil Liberties Theories of Civil Liberties, International Theories of Free Speech Protection Theories of Punishment Threats and Free Speech Three Strikes/Proportionality Time, Place, and Manner Rule Title VII and Religious Exemptions Trademarks and the Establishment Clause Traditional Public Forums Treason Clause Trial of the Seven Bishops, 12 Havell’s State Trials 183 (1688) Two-Tiered Theory of Freedom of Speech Unconstitutional Conditions Undocumented Migrants United Nations Subcommittee on Freedom of Information and of the Press Universities and Public Forums Vagueness and Overbreadth in Criminal Statutes Vagueness Doctrine Vice Products and Commercial Speech Victim Impact Statements Victimless Crimes Victims’ Rights Viewpoint Discrimination in Free Speech Cases Virginia Charter of 1606 Virginia Declaration of Rights (1776) Waco/Branch Davidians Wall of Separation War on Drugs Warrantless Searches Whistleblowers Zenger Trial (1735) Zoning and Religious Entities Zoning Laws and “Adult” Businesses Dealing with Sex Zoning Laws and Freedom of Speech</p>
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INTRODUCTION

The story of America is, in part, the story of civil liberties. The early settlers of Massachusetts, the Plymouth separatists—remembered as the Pilgrims—and the Massachusetts Bay Puritans came to America seeking freedom of religious worship. This was a civil liberty they sought for themselves, although not for others in their community. But by the end of the 1640s, Rhode Island offered substantial religious toleration for people of all faiths while Maryland offered toleration for most Christians. New Amsterdam would later develop a regime of toleration while Pennsylvania and South Carolina would begin as colonies open to people of all faiths. While Europeans continued to slaughter each other over matters of faith, Americans, even in the most rigid colonies, developed a sense of toleration. This was the first step towards a culture of liberties and civil liberties. Instances of religious persecution—hanging of Quakers in Boston or witches in Salem—proved to be lessons to other Americans on why civil liberties mattered.

Political struggles in the colonies helped Americans develop a growing sense of liberty. The trial of the printer John Peter Zenger in 1736 for his attacks on the governor of New York did not alter the law of libel in England or America. But the case did highlight the importance of due process, the grand jury indictment, and an impartial jury to the cause of liberty. Zenger had clearly embarrassed the governor and his administration, and under the law of the time that amounted to seditious libel. However, the grand jury refused to indict the printer, in part because what he said was substantially true. The prosecutor charged Zenger by information, bypassing the grand jury and, in the process, teaching Americans the importance of the grand jury as a buffer between the state and the individual. The prosecutor then tried to stack the jury while the judge disbarred Zenger's lawyers. Good lawyering by an appointed counsel, a clever strategy by Zenger's supporters, and an impartial jury ultimately led to an acquittal. The lesson for the colonists was that due process protections were central to a free people and civil liberties were necessary to protect the governed from the government.

The Revolutionary Era brought new civil liberties concerns. In 1776, Americans complained that the King denied them due process and fair trials. During the Revolution, Americans worried about freedom the press, bills of attainder, and the problems of creating a free society without spinning into anarchy; and about creating a stable society that avoided becoming a tyranny. Constitutional government, a bill of rights, and an expanded suffrage were designed to prevent both evils by creating stability and liberty.

Since the adoption of the Bill of Rights in 1791, Americans have often debated the meaning of civil liberties. In the 1790s, Congress passed the Fugitive Slave Law of 1793 and the Sedition Act of 1798, both of which seemed to violate provisions of the Bill of Rights. The Supreme Court did not consider the constitutionality of the first law until 1842 and never considered the constitutionality of the Sedition Act. By 1812, however, the political process and accepted political and social norms eliminated seditious libel from the American landscape, until Congress revived it during World War I. The antebellum crisis led to debates over abolitionist speech and petitions to Congress. Slavery itself was, of course, the worst violation of civil liberties in American history. But slave owners argued that their civil liberties prevented the national government from taking their property—freeing their slaves—without just compensation. The Civil War raised new questions about free speech, the suspension of habeas corpus, and the right to free slaves. The aftermath of the war led to loyalty oaths, the suspension of habeas corpus in parts of the South, and three new amendments that began to change the nature of federalism by applying the Bill of Rights and other federal protection to the states. Immigration, labor unions, anarchism, new political ideologies, the suppression of black equality, fears of pornography, feminism, and the dissemination of information about birth control all raised new civil liberties issues in the last part of the nineteenth century. World War I led to a new Sedition Act and, for the first time, the Supreme Court was forced to define the meaning of speech.

Throughout the twentieth century, the Supreme Court was at the center of the meaning of rights. The courts have protected civil liberties at times, and at others have been less protective. Most importantly, the courts have continuously expanded and reinterpreted the meaning of civil liberties. So too has popular culture. In the early nineteenth century it seemed reasonable, even within the context of freedom of speech and religion, to punish

INTRODUCTION

blasphemy. Today such an idea would be dismissed by almost all Americans. Early movies were often quite sexually suggestive. By the 1940s they were almost prudish. Today society tolerates almost anything in a movie, but we properly focus on who can see a movie—protecting children from sexually explicit content—rather than on the content itself.

The rights of the accused also changed over time. Since 1791, the Eighth Amendment has banned cruel and unusual punishment, and most states have had similar prohibitions in their constitutions. But until the 1960s, many police department routinely interrogated prisoners with threats, violence, sleep deprivation, and other tactics commonly called “the third degree.” When the U.S. Supreme Court stopped such practices in the mid-1960s many Americans objected. They feared that the police would be unable to do their job. Two generations later, even police departments find that protecting the rights of the accused makes policing easier and is less likely to lead to false confessions. Most Americans can recite their “Miranda” rights by heart, having heard them in movies and on television over and over again. Americans know their rights and understand the value of these rights.

At the beginning of the twenty-first century, civil liberties are at the center of political discourse. The wars in Afghanistan, in Iraq and the war on terrorism have raised new questions about civil liberties in an age of what may be perpetual war or at least perpetual alerts for terrorism. Americans have to ponder how eighteenth century ideas fit into a new technological age. The Bill of Rights requires that the government may not conduct a search without a warrant, issued by a judge on the basis of probable cause. The Sixth Amendment requires a speedy trial. Can such requirements work in an age of high-tech terror? Can our democracy survive if such requirements are ignored?

With these issues in mind, Routledge publishes the *Encyclopedia of American Civil Liberties*. We have designed this work to provide a comprehensive access to the key historical and contemporary issues surrounding civil liberties in the United States. We believe that no reference work could be more timely or more vital to the nation than one on civil liberties. We hope the encyclopedia will help students, scholars, the general public, lawmakers, and government officials better understand the complexity of civil liberties and their historic role in the development of the United States.

Coverage

In addition to freedom of speech, press, religion, assembly, and petition, the encyclopedia covers topics such as privacy, property rights, the rights of the accused, and national security. Its multidisciplinary approach and breadth of scope will make it an essential library reference for lawyers, scholars, students, and general readers. The entries discuss a wide range of topics, including:

- The Constitution, the Bill of Rights, and the history of civil liberties
- Cases, trials, and important court decisions
- Associations, societies, organizations, and government bodies
- Literature, entertainment, media, and art
- Slavery, crime, and war
- Religion, censorship, and privacy
- People, places, and events

The articles are grouped into thematic entries, as follows:

Biography

Biographies cover such pioneers from Thomas Jefferson, the master stylist of American history, to Margaret Sanger, the founder of Planned Parenthood. The biography entries in this encyclopedia are focused on the social, political, and other circumstances relevant to the individual's work.

Cases

Case entries provide a clear and engaging narrative that includes the background on the case, the identification of key players, and an explanation of how the case arose. The main text of the entry should discuss the analysis,

doctrine, and majority opinion vote. Case entries conclude by explaining the long-term impact of the decision, as well as the importance of the case in relation to civil liberties.

Historical Overview

Entries focus on the origin of the subject in American history and its relationship to civil liberties. The discussion includes influences (religious, philosophical, cultural, and so forth), major players and events, and long-term impact on civil liberties.

Legislation, Legislative Action, Statutes, and Acts

Entries on legislation detail the history, enactment, and current status of the law, statute, or act. This also includes precedents, actions, and events that led to its formation, cases involved in its history, and consequences or lasting impact on civil liberties.

Organizations and Government Bodies

Organizations are included that have had an impact on civil liberties in the United States. Each entry includes the organization or government body's history, key members (including founders) throughout its history, and legal implications of its impact on civil liberties.

Themes, Issues, Concepts, and Events

The focus of these entries is on the relationship between the subject and civil liberties. In addition to the basic discussion of the subject, each entry may include the following issues: history, origins, and development; legal, academic, or theoretical debates; perspectives from different fields or schools of thought; or any unresolved issues concerning the subject.

How to Use This Book

The *Encyclopedia of American Civil Liberties* contains 1423 entries of 250 to 6000 words in length. They range from biographies to thematic interpretations and analytical discussions of timely topics. As far as possible, the encyclopedia covers the history and politics of civil liberties from the time of the Founding Fathers to the present, providing the reader with a reliable, up-to-date view of the current state of scholarship on civil liberties and the meaning of freedom in American life.

Perhaps the most significant feature of the encyclopedia is the easily accessible **A to Z format**. Cross-referencing in the form of **See Alsos** at the end of most entries refer the reader to other related entries. Each article contains a list of **References and Further Reading**, including sources used by the writer and editor as well as additional items that may be of interest to the reader. Most books or articles cited are easily available through interlibrary loan services in libraries. Entries may also include a segment entitled **Cases and Statutes Cited**, which lists the citations of cases and statutes referred to in the article. **Blind Entries** direct readers to essays listed under another title. For example, the blind entry "Death Penalty" refers the reader to the article titled "Capital Punishment." A thorough, analytical index complements the accessibility of the entries, easing the reader's entry into the wealth of information provided. A **Thematic List of Entries** is also included to assist readers with research in particular areas.

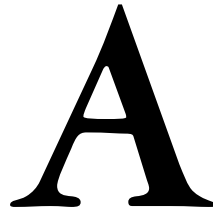
Four hundred and seventy authors have contributed the entries to this encyclopedia. Contributors represent a variety of fields, among them criminal law, Constitutional law, law and religion, legal history, law and race, and reproductive rights. The expertise of a wide-ranging and diverse group of contributors will provide the reader with a broad-based overview of issues, events, and theories of the developing world.

INTRODUCTION

Acknowledgments

This encyclopedia would not have been possible without the cooperation of hundreds of scholars who have written for it. My coeditors—Jack Chin, Dave Douglas, Rod Smolla, Mel Urofsky, and Mary Volcansek—have worked enormously hard in making this project happen. They have made my job as editor-in-chief a pleasure because they were such a pleasure to work with. The project began under the editorship of Sylvia Miller. I am especially grateful to Jamie Ehrlich, who has managed the project for the last year, Mark Georgiev, Mark O'Malley, Kate Aker, and Marie-Claire Antoine, and Tracy Grace for their efforts in the editorial production aspects of this encyclopedia. The creation of a reference work is a team effort, and I have been blessed with a wonderful team of scholars and publishers. I thank all of them not only for the pleasure of working together, but also for their dedication to helping all Americans learn more about our constitutional rights and our civil liberties.

Paul Finkelman



**A BOOK NAMED “JOHN CLELAND’S
MEMOIRS OF A WOMAN OF
PLEASURE” v. MASSACHUSETTS, 383
U.S. 413 (1966)**

A civil proceeding initiated by the Massachusetts attorney general declared *Memoirs of a Woman of Pleasure* (more commonly known as *Fanny Hill*) to be obscene. The publisher, G. P. Putman, appealed and lost. The Supreme Court, with Justice Brennan writing for a three-judge plurality (Justices Warren and Fortas joining him), reversed the lower court in a short opinion—one of three dealing with obscenity questions handed down on the same day. Justices Douglas and Black wrote opinions concurring with the judgment. Justices Clark, Harlan, and White wrote separate dissents.

The sole issue in *Memoirs* was the appellate court’s application of the *Roth* (*Roth v. United States*, 354 U.S. 476, 1957) standard. Justice Brennan concluded the court erred by not applying each element separately before declaring a publication obscene. The Massachusetts appellate court in affirming the lower court decision that *Memoirs* was obscene on two of *Roth*’s criteria applied the third standard according to its view that it did “not interpret the ‘social importance’ test as requiring that a book which appeals to prurient interest and is patently offensive must be unqualifiedly worthless before it can be deemed obscene.”

Justice Brennan disagreed and asserted that all three elements must be met. Moreover, he explained the third criterion, in accordance with his opinion in

Jacobellis v. Ohio, 378 U.S. 184 (1964), meant that the book must be “*utterly* without redeeming social value” (italics in original). The justice’s restatement of this criterion had the effect of shrinking the zone of sexually explicit material that would not be protected under the First Amendment. It constituted a liberalization of this criterion in *Roth* because prosecutions for obscenity would be made more difficult.

Moreover, the social value of allegedly obscene material cannot be weighed against the other two elements; material failing any one standard, therefore, is sufficient to consider the material not obscene. Even if *Memoirs of a Woman of Pleasure* possessed “only a modicum of social value,” the Massachusetts judgment would have to be reversed. Then, referring to the majority’s contemporaneous decision in *Ginzburg v. United States*, 383 U.S. 463 (1966), Justice Brennan added that the circumstances of production, sale, and publicity might be pertinent when determining the obscenity of material. Commercial exploitation of the book’s prurient appeal, “to the exclusion of all other values,” might indicate the book lacks redeeming social importance. In this instance, however, the courts were not asked to judge *Memoirs* against this background.

In an angry dissent, Justice Clark, reporting that he supplied the deciding vote in *Roth*, complained that the “utterly without redeeming social value” standard added a new element to *Roth*. In his view, *Roth* required only that a book be judged “as a whole” and in terms of “its appeal to the prurient interest of the average person, applying contemporary

community standards.” Prior to *Jacobellis*, Justice Clark pointed out, no previous decisions referred to the “utterly without redeeming social value” test, and Justice Brennan’s position in *Jacobellis* won only Justice Goldberg’s vote, which did not give it precedential weight. Justice White, agreeing with Justice Clark, claimed that this element “is not an independent test of obscenity but is relevant only to determining the predominant prurient interest of the material.” In other words, evidence of prurience implies something that is “utterly without redeeming social value.”

Justice Harlan lamented that *Roth* produced “no stable approach” to the obscenity problem. Moreover, the concept of pandering, suggested first by Justice Warren in his *Roth* concurrence and subsequently adopted in *Ginzburg*, provided no more than “an uncertain . . . interpretative aid” in sorting out “this tangled state of affairs.” Furthermore, Brennan’s suggestion that pandering may create a context that offsets social value “wipes out any certainty the latter term might be given . . . and admits into the case highly prejudicial evidences without appropriate restrictions.”

The companion cases to *Memoirs* are *Ginzburg vs. United States* and *Mishkin v. New York*, 383 U.S. 502 (1966).

ROY B. FLEMMING

Reference and Further Reading

Rembar, Charles. *The End of Obscenity: The Trials of Lady Chatterley, Tropic of Cancer, and Fanny Hill*. New York: Random House, 1968.

Cases and Statutes Cited

A Book Named “John Cleland’s Memoirs of a Woman of Pleasure” v. Attorney General of Massachusetts, 383 U.S. 413 (1966)

Ginzburg v. United States, 383 U.S. 463 (1966)

Jacobellis v. Ohio, 378 U.S. 184 (1964)

Mishkin v. New York, 383 U.S. 502 (1966)

Roth v. United States, 354 U.S. 476 (1957)

ABINGTON TOWNSHIP SCHOOL DISTRICT v. SCHEMP, 374 U.S. 203 (1963)

One of the two decisions known as the school prayer cases, *Abington* followed immediately in the wake of *Engel v. Vitale*, 370 U.S. 421 (1962), in which the Supreme Court declared unconstitutional the recitation in public schools of a prayer composed by the New York Board of Regents. There the Court concluded that it was “no part of the business of government to compose official prayers for any group

of the American people to recite as a part of a religious program carried on by government.” Unlike *Engel*, which involved the state’s participation in the composition of a religious exercise, in *Abington* government acted as the sponsor rather than composer of religious exercises. The case thus posed clearly the issue of whether state-sponsored and supervised religious activities violated the First Amendment’s establishment clause. A majority of the Court held that they did.

The Decision in *Abington*

At issue in *Abington* was the state-sponsored practice of beginning school days with Bible readings, selected and read by students or a teacher, and the recitation of the Lord’s Prayer by students. Writing for the Court’s majority, Justice Tom Clark easily concluded that the Bible readings and prayers were religious exercises. The primary defect of state-sponsored religious exercises in public schools, according to the Court’s opinion, was that they offended the establishment clause’s demand for neutrality on the part of government with respect to religion. The requisite constitutional neutrality was more than a mere lack of preference for one religion over another, though there was significant evidence before the Court that the religious exercises at issue preferred Christianity to Judaism. Instead, the Court characterized the necessary neutrality as one which avoided aiding or hindering religion. Justice Clark’s opinion did not characterize the establishment clause in terms of a necessary separation between church and state, but it quoted favorably from previous decisions emphasizing the requirement of separation.

The decision in *Abington* did not turn on a finding that students were compelled to participate in religious exercises that offended their beliefs, since students were allowed to absent themselves from the exercises. But the Court concluded that this fact did not salvage the practices at issue, since the establishment clause required neutrality toward religion, not simply the avoidance of religious compulsion. In language that would assume even greater importance once incorporated into the three-part test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), for determining whether a government action violated the establishment clause, the Court’s opinion emphasized that the requisite neutrality called for a “secular legislative purpose and a primary effect that neither advances nor inhibits religion.”

Against the claim that the removal of officially sponsored prayer and Bible reading would establish

a “religion of secularism,” the Court denied that its decision excluded religion from schools. “Nothing we have said here,” Justice Clark insisted for the majority, “indicates that . . . study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment.” Nor could the Court accept that its decision frustrated the free exercise of religion, an argument present by Justice Potter Stewart in a dissenting opinion. Stewart suggested that parents who wished their children to begin the school day with Bible readings and prayer had a substantial free exercise claim. If religion were excluded from public schools, then the religion would be placed at an “artificial and state-created” disadvantage. A majority of the Court, however, rejected this argument. The establishment clause meant that a local or state religious majority could not “use the machinery of the State to practice its beliefs.”

Aftermath

Abington established firmly the principle that public school authorities would not be permitted to sponsor devotional religious exercises. In subsequent cases, the Court demonstrated itself to be the implacable antagonist of every attempt to make state or local governments partners in the conduct of religious exercises or in the dissemination of religious teachings. Attempts to circumvent the holdings of *Engel* and *Abington* flourished in the decades that followed. Some states attempted to create “moments of silence” in which students might pray or meditate or do nothing, according to their individual desires. A majority of the members of the Court seemed receptive to this kind of legislative scheme, at least in some circumstances. But when evidence suggested that an Alabama statute of this nature had been passed with the purpose of restoring prayer to public schools, the Court struck the law down in *Wallace v. Jaffree*, 472 U.S. 38 (1985), as lacking a secular purpose. Since *Wallace v. Jaffree*, all lower courts have sustained these statutes as unconstitutional.

Later, when state-sponsored prayers banished from public school classrooms migrated to various paraschool functions, such as graduation ceremonies and football games, the Court responded with similar constitutional vigilance. In *Lee v. Weisman*, 505 U.S. 577 (1992), a majority of the Court held unconstitutional prayers at a middle school graduation ceremony offered by a rabbi at a school official’s request. Moreover, in *Sante Fe I.S.D. v. Doe*, 530 U.S. 290 (2000), the Court struck down an arrangement

established by a school district in which students were allowed to vote on whether to have prayers at football games and to select students to offer the prayers.

The Court has also applied the essential principle of *Abington* to contexts in which religious symbols or teaching was at issue. Thus, in *Stone v. Graham*, 449 U.S. 39 (1980), the Court invalidated a school district practice of displaying the Ten Commandments in classrooms, concluding that such displays lacked a secular purpose. In *Edwards v. Aguillard*, 482 U.S. 578 (1987), the Court found a similar lack of secular purpose in a Louisiana statute providing for the teaching of “creation science” when evolution was taught.

In spite of complaints that the Court had banished religion from public schools, however, not all forms of religious devotion or even teaching about religion are excluded by the principle of *Abington*. Both the opinion for the Court and Justice William Brennan’s important concurring opinion in the case emphasized the propriety of teaching about religion from an academic, rather than a devotional, standpoint. It would distort history and literature and other subjects to teach these subjects without reference to the religious experiences of humankind, and the Court hurried to acknowledge this fact. What the School Prayer cases prohibited was teaching designed to proselytize or to inculcate religious devotion. Moreover, private prayer offends no constitutional principle. Thus, in *Board of Education v. Mergens*, 496 U.S. 226 (1990), the Court refused to extend the ruling of *Engel* and *Abington* to prevent Congress from mandating equal access for religious student groups. The federal *Equal Access Act* provided that religious student groups were entitled to equal access to school facilities as enjoyed by other noncurricular groups. In *Mergens*, the Court held that this accommodation did not offend the establishment clause.

Abington acknowledged various forms of civic religiosity common in American society, including the divine invocation made a part of oaths in legal proceedings (“So help me God”), the invocation preceding the Court’s sessions (“God save this honorable Court”), and civic prayers such as those offered at the beginning of congressional sessions. But Justice Clark’s opinion for the majority did not seriously attempt to distinguish these aspects of public religion from the Bible readings and prayer before the Court. It would remain for future majorities to harmonize the principles articulated in *Abington* with civil religion more broadly conceived.

The School Prayer cases had a further legacy that reached outside the realm of courts into the realm of politics. After the controversy between theological

liberals and fundamentalists during the early part of the twentieth century, many theological conservatives withdrew from active participation in public affairs. They focused instead on the creation of their own educational and charitable institutions rather than on political action. But the School Prayers cases of the 1960s, coupled with the Court's decision affirming a right to abortion in *Roe v. Wade*, 410 U.S. 113, in 1973, almost certainly had the effect of igniting a new wave of conservative participation in the political process. Some of this political participation took the form of advocacy of a constitutional amendment to reverse the holdings in the School Prayer cases. Although such amendments have been proposed, none has secured the measure of support necessary to win passage.

The new advocacy also turned to a variety of other political issues. In the late 1970s, for example, Baptist minister Jerry Falwell founded the Moral Majority as a political group devoted to the advocacy of conservative political policies. Although the group remained active only for a decade, it is sometimes credited with helping to elect Ronald Reagan as president of the United States. Though Falwell disbanded the organization toward the end of the following decade, Pat Robertson, a popular religious television personality and would-be candidate for the Republican nomination for president, organized the Christian Coalition to serve purposes similar to those sought by the Moral Majority. The exact political influence of these and other manifestations of what came to be known as the "Christian right" remain highly contested. But the significant presence of such groups, a presence at least partially owing its genesis to hostility to the School Prayer cases, cannot be doubted.

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References and Further Reading

- Choper, Jesse H. *Securing Religious Liberty: Principles for Judicial Interpretation of the Religion Clauses*. Chicago: University of Chicago Press, 1995, 44–53.
- Curry, Thomas J. *Farewell to Christendom: The Future of Church and State in America*. Oxford: Oxford University Press, 2001, 76–80.
- Feldman, Stephen M. *Please Don't Wish Me a Merry Christmas: A Critical History of the Separation of Church and State*. New York: New York University Press, 1997, 233–235.
- Hall, Timothy L., *Sacred Solemnity: Civic Prayer, Civil Communion, and the Establishment Clause*, Iowa Law Review 79 (1993): 44–46.
- Nowak, John E., and Ronald D. Rotunda, *Constitutional Law, 1460–1465*, 7th ed. St. Paul, MN: Thompson–West, 2004.

Stone, Geoffrey R., *In Opposition to the School Prayer Amendment*, University of Chicago Law Review 50 (1983): 823–848.

Cases and Statutes Cited

- Board of Education v. Mergens*, 496 U.S. 226 (1990)
- Engel v. Vitale*, 370 U.S. 421 (1962)
- Edwards v. Aguillard*, 482 U.S. 578 (1987)
- Everson v. Board of Education*, 330 U.S. 1 (1947)
- Lee v. Weisman*, 505 U.S. 577 (1992)
- Lemon v. Kurtzman*, 403 U.S. 602 (1971)
- Roe v. Wade*, 410 U.S. 113 (1973)
- Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290 (2000)
- Stone v. Graham*, 449 U.S. 39 (1980)
- Wallace v. Jaffree*, 472 U.S. 38 (1985)
- Equal Access Act*, 20 U.S.C. §§ 4071–74

See also Bible Reading in Public Schools, History of before and after Abington School District v. Schempp; Engel v. Vitale, 370 U.S. 421 (1962); *Legislative Prayer; Marsh v. Chambers*, 463 U.S. 783 (1983); *Prayer in Public Schools; Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000)

ABOLITIONIST MOVEMENT

A new and aggressive phase of American abolitionism emerged in the 1830s. Called "immediatism," the movement for the immediate, uncompensated emancipation of slaves without expatriation (which received institutional expression first from the regional New England Anti-Slavery Society, founded in 1832, then the national American Anti-Slavery Society, founded in 1833) comprised individuals regardless of race, class, or gender, a stark departure from previous efforts that were primarily gradual in scope and genteel (read elite white male) in composition. The changes signified by immediatism's seemingly sudden appearance were anything but welcomed, as evidenced by the scores of mobs that assaulted exponents of that creed; by the federal postal service's (especially its state auxiliaries in the South) effective ban of abolitionist literature from reaching a southern audience; and by the U.S. Congress's virtual stranglehold, for nearly a decade, on the voices of antislavery petitioners, preventing them from receiving an appropriate hearing in the nation's highest council.

Although those reactions constituted a curtailment of, if not utter disregard for, traditional rights as guaranteed in the state and federal constitutions—freedom of speech and of the press, the right of the people to peaceably assemble and to petition the government for a redress of grievances, according to the First Amendment to the U.S. Constitution—abolitionists, though

seriously challenged, were neither thwarted nor suppressed. On the contrary, since the enjoyment of basic civil liberties was jeopardized, abolitionism actually thrived, despite and because of the animosity that immediatists directly and indirectly provoked.

Hostility and violence early greeted the abolitionist movement, as outbreaks of mob activity readily indicate. Although anti-abolitionist attacks occurred in the North throughout the three decades preceding the Civil War, the high tide of such riots took place in the years between 1834 and 1838. Too numerous to list in detail, a few incidents shall sufficiently illustrate immediatism's initial impact on northern society and reveal the difficulties that abolitionists encountered in order to broadcast their message.

In their attempts to assemble peaceably, abolitionists frequently confronted local antagonism, potentially volatile situations that sometimes threatened the safety of their very persons. For example, on October 21, 1835, an angry mob stormed a gathering of the Boston Female Anti-Slavery Society. Although concerned citizens directly targeted the meeting's invited speaker, William Lloyd Garrison, the outspoken and controversial editor of the Boston antislavery weekly, *The Liberator*, the society's members also confronted a raucous crowd. Yet, to protect one another from harm, white and black women marched in double-file, arm-in-arm, past protestors, a dangerous display of social equality that could have elicited unintended reactions from already belligerent demonstrators. Indeed, once the female abolitionists exited the building, the mob seized Garrison and then dragged him through the city's streets—only a night's refuge in prison protected him from additional assault.

Anti-abolitionist rioters also played havoc with the exercise of freedom of speech and of the press. Twice in July 1836 Cincinnatians sought to dissuade the southern-born former slaveholder and future Liberty Party presidential candidate James G. Birney from continuance of his abolitionist newspaper, *The Philanthropist*, by partial or complete destruction of his printing press. The relocated Maine native Elijah Lovejoy suffered similar opposition in the southern Illinois town of Alton. Over about a three-month period in 1837, city residents, alarmed by Lovejoy's increasing abolitionist editorial policy and his attempts to organize a state antislavery society, wrecked the press of his Presbyterian reformist paper, the *Observer*, three times. It was on that final and what proved to be fatal occasion, on November 7, that Lovejoy succumbed to five gunshot wounds when he, himself armed, rushed the mob that set ablaze the roof of the building that housed his press. Although some abolitionists expressed regret over Lovejoy's use of physical force in his defense, the

lack of unity over faithful adherence to the movement's founding pacifistic principles gave way to near unanimity over Lovejoy's symbolic importance for abolitionism. Thus, Lovejoy was thereafter known as "the first MARTYR to American LIBERTY[,] MURDERED for asserting the FREEDOM of the PRESS."

Although riotous events concerning abolitionists were occurrences largely in free states, anti-abolitionism reared its ugly head against immediatists throughout the country. The concurrent pamphlet and petition campaigns, amplified in 1835–1836, clearly revealed that nationwide antipathy to the cause. Each initiative underscored abolitionists' faith in the redemptive power of "moral suasion," one of the movement's fundamental tenets that emphasized the demise of slaveowning and racial prejudice once their sinfulness was exposed to the American public. To achieve that much-desired end, abolitionists appealed especially to those most capable of instituting the process of emancipation: slaveholders and congressmen.

Whatever abolitionists' expectations, the reactions from those groups to their proselytizing schemes were not unlike those of the northern mobs—vitriolic and censorious. For example, when postal sacks filled with antislavery newspapers and journals (addressed to prominent citizens and not free blacks or illiterate slaves) arrived in Charleston, South Carolina, on the morning of July 29, 1835 (only a small fraction of the more than one million pieces of printed matter circulated by the American Anti-Slavery Society to points and persons across the country during the fiscal year ending in May 1836), enraged residents quickly alleviated the uncertainties that beset the city's postmaster over what to do with the troublesome material. That evening, members of the Lynch Men vigilance committee spirited away the satchels containing immediatist propaganda during a raid on the post office. The following night the abolitionist mails—as appropriately befitted what the local press called "incendiary" tracts—were ceremoniously burned, along with effigies of three leading abolitionists, before a crowd of between two and three thousand people.

Despite the swift resistance by Carolinians to outside abolitionist incursions, antislavery periodicals continued unabated. Charlestonians once more mobilized in retaliation, forming another vigilance society to search for and confiscate what were judged to be seditious publications; the committee even called upon northern state governments to legislate abolitionist organizations out of existence. Although the Charleston postmaster provided for a guarded escort for the conveyance of that dreadful material from such seemingly malignant individuals, his protection of the mails was limited to the delivery of abolitionist

pamphlets to the post office only. Once there, they remained safely quarantined until orders from the postmaster general directed otherwise. The latter, Kentuckian and stalwart Jacksonian Democrat Amos Kendall, did not order a contrary course—which would have necessitated the uninhibited distribution of antislavery literature—but intimated approval, noting in correspondence that obedience to the community where one lived surpassed obligations to federal statutes.

The anti-abolitionist sentiments that the postal campaign unleashed finally reached a crescendo in December 1835, when President Andrew Jackson, in his annual message, urged Congress to enact appropriate measures against “the misguided persons [abolitionists] who have engaged in these unconstitutional and wicked attempts.” The national assembly, he suggested, should pass “such a law as will prohibit, under severe penalties, the circulation in the Southern States, through the mail, of incendiary publications intended to instigate the slaves to insurrection.”

Just as Carolinians prevented (extralegally if not illegally) the discussion of slavery (specifically, its abolition) at home, they sought similar action in the nation’s capital. In the same month that Andrew Jackson addressed Congress, South Carolina Representative James Henry Hammond remonstrated against any further introduction of abolitionist petitions in the lower house. In so doing, he not only captured the ire and recalcitrance of his constituents in matters involving the security of the “peculiar institution,” but also, by his demand that such memorials be peremptorily repudiated, initiated a debate that shifted congressional practices regarding the historic right of petition and spurred abolitionists to greater activity.

What resulted after weeks of heated deliberation was the “gag rule,” which prohibited congressmen from discussing or printing the contents of any petitions that dealt with slavery. Those antislavery memorials that reached, and would soon bombard, Congress were automatically “laid on the table,” with “no further action [taken] whatever.” That order, adopted in May 1836 and remaining in force until 1844, did not repulse abolitionists, but rather increased their resolve. Indeed, in 1837 and 1838 alone, 412,000 antislavery petitions deluged the House, and nearly two-thirds that amount flooded the Senate. Women especially contributed to the success of such operations. They were not only active in gaining signatures—women comprised over half of the signatories—but also became more involved in public affairs and more assertive on behalf of their own, deprived, rights.

The response to abolitionism was gravely important to activists at that time, for at stake was nothing

less than the Bill of Rights. The ensuing civil liberties controversy almost instantly redounded to the benefit of an otherwise unpopular and dissenting minority portion of the citizenry. In the short run, immediatist organizations increased by more than twofold, from about two hundred in May 1835 to over five hundred the following year. To be sure, abolitionists would remain a small segment of the population throughout the antebellum period, but the struggle over the maintenance of traditional American rights, which antislavery agitation instigated, catapulted the immediatist movement and the question of slavery onto a national stage. They remained there, despite attempts to the contrary, until President Abraham Lincoln officially announced the Emancipation Proclamation on New Year’s Day, 1863.

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References and Further Reading

- Grimsted, David. *American Mobbing, 1828–1861: Toward Civil War*. New York: Oxford University Press, 1998.
- Nye, Russel B. *Fettered Freedom: Civil Liberties and the Slavery Controversy, 1830–1860*. East Lansing: Michigan State College Press, 1949.
- Richards, Leonard L. *Gentlemen of Property and Standing: Anti-Abolition Mobs in Jacksonian America*. New York: Oxford University Press, 1970.
- Wyatt-Brown, Bertram. “The Abolitionists’ Postal Campaign of 1835.” *The Journal of Negro History* 50(4) (1965):227–238.
- Wyly-Jones, Susan. “The 1835 Anti-Abolition Meetings in the South: A New Look at the Controversy over the Abolition Postal Campaign.” *Civil War History* 47(4) (2001):289–309.
- Yellin, Jean Fagan, and John C. Van Horne, eds. *The Abolitionist Sisterhood: Women’s Political Culture in Antebellum America*. Ithaca, NY: Cornell University Press, 1994.
- Zaeske, Susan. *Signatures of Citizenship: Petitioning, Antislavery, and Women’s Political Identity*. Chapel Hill: The University of North Carolina Press, 2003.

ABOLITIONISTS

Abolitionists were individuals committed to eradicating chattel slavery in the United States. The first organized abolitionist group was the Pennsylvania Abolition Society (PAS). Dominated by socialites, politicians, businessmen, lawyers, and community leaders, its members included such prominent figures as Thomas Paine, George Washington, and Benjamin Franklin. PAS believed in the gradual abolition of slavery through legal (representing blacks in court) and political (petitioning Congress) means. PAS shunned grassroots involvement (even among African Americans) and instead focused on a strategy

whereby elite white males would pursue their moral calling by working within existing institutional structures to abolish slavery.

With the surge of democratic sentiment that swept the nation in the early nineteenth century, it became obvious that PAS's conservative approach to abolitionism was outdated and ineffective. In the 1830s, the abolitionist cause moved to Massachusetts, where the emphasis was on the immediate emancipation of slaves. The movement solicited the support of the masses (including African Americans and women) through the creation of organizations and societies and the dissemination of written material (pamphlets and newspapers) in a grassroots effort to abolish slavery. Abolitionists appealed to people's emotions by emphasizing the immorality of such an "evil institution." Such was the intent of Harriet Beecher Stowe's antislavery novel, *Uncle Tom's Cabin* (1852), which was written in response to the strengthening of the *Fugitive Slave Act* of 1850.

William Lloyd Garrison's (1805–1879) newspaper, *The Liberator*, was the rallying cry for the abolitionist cause. Garrison believed not only in the immediate emancipation of slaves, but also in a commitment to treating African Americans as persons with "inherent and unalienable rights." He supported the Declaration of Independence but shunned the Constitution as a "proslavery compact," a "covenant with death," an "agreement with hell," and a "flagrant robbery of the inalienable rights of men." The Constitution, which was created at the expense of human dignity, violated the laws of God and, therefore, was null and void. Garrison detested political action and believed that abolitionism was a moral and religious crusade to open the eyes of the people to the evils of slavery.

One of the most prominent African-American abolitionists was Frederick Douglass (1818–1895), a former slave, whose autobiographies (*The Narrative of the Life of Frederick Douglass, An American Slave*, and *My Bondage, My Freedom*) revealed the details of his life as a slave and were also arguments against the institution that denied slaves their self-worth. At first Douglass supported Garrison's reading of the Constitution as a proslavery compact, but soon parted ways with Garrison when he realized that the Constitution could be interpreted to be against slavery. Douglass encouraged abolitionists to work within the system to abolish slavery by becoming active in politics and exercising their constitutional rights of speech and press, as well as voting.

The abolitionist movement began in the Revolutionary era, reached its pinnacle in the 1830s, maintained its strength in the 1850s, and continued after

the Civil War until the end of Reconstruction. By 1900, slavery was completely abolished in the Western Hemisphere.

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References and Further Reading

- Blassingame, John W., ed. *The Frederick Douglass Papers: Series One: Speeches, Debates, and Interviews*. 3 vols. New Haven and London: Yale University Press, 1979.
- Cain, William E., ed. *William Lloyd Garrison and the Fight Against Slavery: Selections From The Liberator*. Boston: St. Martin's Press, 1995.
- Newman, Richard S. *The Transformation of American Abolitionism: Fighting Slavery in the Early Republic*. Chapel Hill: University of North Carolina Press, 2002.
- Stowe, Harriet Beecher. *Uncle Tom's Cabin*, 150th ed. Oxford: Oxford University Press, 2002.

ABOOD v. DETROIT BOARD OF EDUCATION, 431 U.S. 209 (1977)

In *Abood v. Detroit Board of Education*, the U.S. Supreme Court unanimously ruled that assessment of mandatory service charges on nonunion members in an agency shop to finance union expenditures for collective bargaining did not violate their First Amendment rights. However, the Court prohibited unions from requiring employees to contribute to the support of ideological causes to which they might be opposed as a condition of holding their jobs as public school teachers. Noting that the First Amendment safeguards the freedom to associate with others and contribute money to advance ideas and promote beliefs and that those protections are not surrendered by virtue of public employment, the Court decided compulsory contributions by union members for political purposes violate the First Amendment.

The First Amendment precludes the state from compelling association with a political point of view to retain public employment. The Court stressed, however, that the ruling did not stop the union from spending money to advance a political viewpoint or help a candidate to gain office. Rather, the First Amendment demands such political expenditures be funded by union members who neither oppose nor are forced to support those political ideas by the threat of loss of employment with the government.

By safeguarding individuals from being forced to contribute to causes they oppose as a condition of employment, *Abood* provides significant First Amendment protection against compelled financing of political or ideological speech.

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References and Further Reading

- Ogeka, Charles J., *Respecting Nonunion Member Employees' Rights While Avoiding a Free Ride*. Lehnert v. Ferris Faculty Ass'n, Hofstra Labor Law Journal 10 (1992): 349–373.
- Schoen, Edward J. et al., *United Foods and Wileman Bros: Protection Against Compelled Commercial Speech—Now You See It, Now You Don't*, American Business Law Journal 39 (2002): 467–520.
- Skaare, Jessica J., *Constitutional Law—First Amendment: University Fees Can Speak for Students: The Constitutionality of a University's Right to Fund Student Speech Via a Mandated Activities Fee*, North Dakota Law Review (2001): 549–586.

Cases and Statutes Cited

- International Association of Machinists v. Street*, 367 U.S. 740 (1961) (Union shops must not use compulsory assessments to support political activities against the expressed wishes of dissenting employees.)
- Keller v. State Bar of California*, 496 U.S. 1 (1990) (Compulsory bar association dues may not be expended to advance political causes, but may be spent for disciplining bar members or proposing ethical codes for the legal profession.)
- Lehnert v. Ferris Faculty Association*, 500 U.S. 507 (1991) (The state cannot compel its unionized employees to subsidize legislative lobbying or other political union activities outside the context of labor contract ratification or implementation.)

ABORTION

Prior to the middle of the nineteenth century, abortion was an issue to which men, and therefore lawmakers, judges, and politicians, paid little or no attention. With the Supreme Court's 1973 decision of *Roe v. Wade*, 410 U.S. 114 (1973), abortion became perhaps the most prominent legal and political issue of the late twentieth century and continues to be so in the twenty-first century.

In *Roe v. Wade*, the Supreme Court struck down a Texas law that prohibited all abortions except those strictly necessary to save the life of the mother. The statute in question (and similar laws in effect in a majority of states at that time) was not in fact part of the Anglo-American common law, but was of relatively recent origin. At the time at which the U.S. Constitution was ratified, there were no statutes against abortion in the United States or in England, and the English common law received by the new states recognized a crime of abortion only after “quickening”—that is, only after the movements of a fetus can be felt (generally between the fourteenth and sixteenth weeks of pregnancy). Since colonial times, early abortion was not only legal but also was

widely practiced in this country, increasingly so in the early nineteenth century. Abortion services were commonly advertised in newspapers, and women's folk medicine recognized a number of traditional herbal abortifacients that were widely known. It was not until after the Civil War that criminal statutes proscribing abortion were widely adopted by the states.

Two developments in the mid-1800s may have influenced state legislatures to enact criminal sanctions against abortion. The first was the founding in 1847 of the American Medical Association (AMA), which lobbied lawmakers to enact regulations limiting the practice of medicine to professionally licensed physicians and prohibiting “irregulars,” such as midwives, from providing healthcare services. In 1857, the AMA created a Committee on Ethics that launched a campaign to make all abortions illegal.

The second issue influencing the early development of abortion policy was the “first wave” feminist movement, which led many women to question their traditional roles in the family and to seek many of the social, economic, and legal privileges enjoyed by men. Abortion was seen as inimical to the proper role of women as wives and mothers. Concern for “protecting” women's traditional roles was expressed by the Supreme Court in its 1873 decision of *Bradwell v. Illinois*, 83 U.S., 16 Wall., 130 (1873), in which the Court denied women the right to practice law. The earliest state statutes generally prohibited only those abortions performed after “quickening.” Not until the 1920s, during a second wave of anti-abortion legislation, did most states adopt laws proscribing abortion at all stages of pregnancy.

Abortion laws remained largely unchanged until the 1960s, when a number of events led to a reexamination of abortion policy and practice. One such event was an outbreak of German measles, which, along with the widespread use of thalidomide, resulted in an epidemic of children born with serious birth defects. Many physicians feared the criminal sanctions they risked if they performed abortions on women at risk of delivering babies with severe birth defects. Another turning point in the evolution of abortion policy was the introduction in 1960 of the first birth control pill, which launched the “sexual revolution” and the “second-wave” feminist movement. More young women began pursuing higher education, entering into traditionally male professions, and postponing motherhood or eschewing it altogether. While this new form of contraception gave women additional and more reliable control over their fertility, the option of abortion was viewed as necessary to provide complete protection from unwanted pregnancies.

As a result of these developments, many groups began to push for the liberalization of abortion laws. In 1962, the American Law Institute (ALI) introduced a Model Penal Code that recommended legalizing abortion under certain circumstances, such as when pregnancy resulted from rape or incest or when the fetus was likely to suffer from serious defects. By the time of the *Roe* decision, fourteen states had adopted some or all of the ALI's recommendations, and four states, Alaska, Hawaii, New York, and Washington, had repealed their abortion laws altogether. While some groups sought legislative reform to liberalize or repeal the old criminal laws, other groups pursued judicial recognition of a constitutionally protected civil right to reproductive autonomy that would include access to birth control and to abortion.

The Supreme Court's first foray into the issue of reproductive rights was in the case of *Griswold v. Connecticut*, 381 U.S. 479 (1965), in which the Court recognized a right of privacy within the "penumbra" of the Constitution's enumerated rights that protected the freedom of married persons to obtain contraceptives. This right of privacy was extended to unmarried persons with the Court's decision in *Eisenstadt v. Baird*, 405 U.S. 438 (1972). Justice Brennan, writing for the majority, said: "If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision of whether to bear or beget a child."

These two cases set the stage for the Supreme Court's landmark decision of *Roe v. Wade*. Justice Harry Blackmun wrote the opinion for the seven-justice majority of the Court. In it he said that "the right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or . . . in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." Without resolving the question of the legal status of an unborn fetus, the Court held that the states had compelling interests in the health of the mother and the "potential human life" of the unborn. Each of these interests justifies state regulation at different stages of pregnancy. During the first trimester of pregnancy, when the Court found that abortion was medically safer than childbirth, a state has no legitimate interest in interfering with the abortion decision. After the third month of pregnancy, when the risks of abortion to the mother's health increase, the state "may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal

health." In the third trimester, when the fetus may be viable outside the womb, the state may "regulate, or even proscribe, abortion except where it is necessary . . . for the preservation of the life or health of the mother."

While the *Roe* decision was enthusiastically embraced by most abortion rights advocates, it also provoked the formation of a "right-to-life" movement that has fought relentlessly since the day the decision was handed down to limit its application or to overturn it outright. Even those who support abortion rights have criticized the *Roe* decision on grounds ranging from its lack of textual authority to the unworkability of its trimester framework. The "pro-life" movement initially focused its efforts on the election of lawmakers who, it was hoped, would appoint judges who would limit the application of *Roe*, support laws limiting access to abortions, and even amend the Constitution to define a right to life for the unborn.

Throughout the 1970s and early 1980s, the Court continued to refine the contours of the right to abortion, but held to the position that a woman's right to terminate a pregnancy prior to fetal viability was a fundamental one and that, therefore, any state's attempt to regulate abortion was subject to "strict scrutiny." Between 1973 and 1986, the Court, using this heightened standard of judicial review, struck down state laws that required spousal consent to an abortion (*Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 1976), that required a twenty-four-hour waiting period before an abortion (*Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 1983), that mandated specific information about fetal development be provided before consent would be considered "informed" (*Akron; Thornburgh v. American College of Obstetricians and Gynecologists, Pennsylvania Section*, 476 U.S. 747, 1986), that limited the methods that could be used to perform abortions (*Danforth* and *Thornburgh*), and that required a minor to notify a parent or to obtain parental consent to an abortion without providing adequate judicial bypass protections (*Bellotti v. Baird*, 443 U.S. 622, 1979; *Akron; Thornburgh*).

While the Court struck down most legislative attempts to impede or discourage abortions, it did uphold laws that reflected the government's refusal to support a woman's choice to abort. The "Hyde Amendment" enacted by Congress in 1976 to prohibit the use of Medicaid funds for abortions, along with similar state statutes, has been upheld by the Court. Many argued that these laws violated the equal protection clause by making safe abortions unavailable to poor women. But, in *Harris v. McRae*, 448 U.S. 297 (1980), that argument was rejected by the Court, which held that "although government may not place

obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation. Indigency falls in the latter category." Since the *Harris* decision, forty-seven states now prohibit the use of public funds for abortion except when the life of the mother is at risk.

The anti-abortion movement gained momentum in 1980 with the election of President Ronald Reagan, who made anti-abortion policies a top priority and vowed that he would appoint justices to the Supreme Court who would vote to overrule *Roe*. It was during this period that the abortion issue became highly politicized as the religious Right became more closely identified with the Republican administration. The Reagan years saw the passage of a number of federal laws that sought to limit access to abortion. Congress passed laws restricting access to abortions for government workers, Medicaid patients, and patients in public hospitals. "Gag rules" were imposed that prevented any facility receiving federal funds from giving women information about abortion. Reagan's administration also withheld foreign aid to countries that provided government access to abortion. But the principle focus of the Reagan and Bush administrations' anti-abortion efforts was on the Supreme Court, where views on abortion became a litmus test for judicial appointments.

When Chief Justice Warren Burger retired from the Court in 1986, Reagan appointed William Rehnquist, who had dissented in *Roe*, to fill the position. Other members of the *Roe* majority were replaced by the more conservative Justices O'Connor, Scalia, and Kennedy, each of whom had shown some degree of opposition to the right to abortion. When the case of *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), came before the Court in 1989, many believed that the Court was then poised to overturn *Roe v. Wade*.

The Court in *Webster* was asked to review a Missouri statute that declared that "the life of each human being begins at conception" and that "unborn children have protectable interest in life, health, and well being." The statute also prohibited the use of public employees or facilities for nontherapeutic abortions and required fetal viability testing for any pregnancy believed to be at twenty or more weeks. A five-justice majority upheld the statute, sustaining many restrictions on abortion that it had previously invalidated in *Thornburgh* and *Akron*. Without directly overruling the *Roe* decision, the Court effectively ceded control over abortion rights to states' regulation.

In the years following the *Webster* decision, states enacted a wide variety of laws limiting the right to abortion. One of these laws, the Pennsylvania Abortion Control Act, was brought before the Court in

1992, giving it the opportunity to clarify its *Webster* holding. In *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), a plurality of the Court reaffirmed the core principles of *Roe* but abandoned the notion that abortion was a "fundamental right" that required strict scrutiny. Instead, it found that abortion was simply a "liberty claim" subject to a more deferential "undue burden" test. The Pennsylvania law, which imposed a mandatory twenty-four-hour waiting period, informed consent, and parental consent requirements, was found not to impose an undue burden on women's choice of abortion.

The *Casey* decision was disappointing to the anti-abortion movement, which had hoped that the more conservative Rehnquist Court would overturn *Roe*. Anti-abortion strategies shifted from efforts to make abortion illegal to efforts to make access to abortion inconvenient or impossible. Abortion providers suffered a plague of violent and intimidating acts, ranging from protesters attempting to block entrances to abortion clinics to the bombing, arson, and vandalism of clinics, and the murder of two physicians who performed abortions. Some states issued injunctions against anti-abortion protesters, prohibiting them from demonstrating within "buffer zones" around clinic entrances. Many of these laws were challenged as violating the First Amendment rights of the protesters. In 1997, in the case of *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1997), the Court found that the creation of "fixed" buffer zones was constitutionally valid as necessary to protect women's freedom to seek pregnancy-related services and to protect the public's safety. While the extent of the violence has been reduced by these laws, the anti-abortion movement's intimidating tactics have, nevertheless, succeeded in eliminating abortion services entirely from as many as 87 percent of all counties in the United States.

Anti-abortion legislation since *Casey* has focused primarily on outlawing certain methods of abortion, particularly dilation and evacuation (D&E) and dilation and extraction (D&X), also referred to as "partial birth" abortion. Most of these laws have been struck down because they were not limited to postviability abortions or because they failed to provide exceptions for situations when the procedure is necessary to protect the woman's life or health (*Stenberg v. Carhart*, 530 U.S. 914, 2000). Congress continues its efforts to craft legislation outlawing "partial-birth" abortions that will pass constitutional review.

The 2000 election of President George W. Bush, who is firmly dedicated to outlawing abortion entirely, puts the current status of abortion law in this country at serious risk. The resignation of Justice Sandra Day O'Connor, who was often the critical swing vote on

decisions affirming the abortion right, gives President Bush the opportunity to appoint a new justice who will likely provide the fifth vote needed to overrule *Roe v. Wade*. The confirmation of O'Connor's successor was complicated by the death of Chief Justice William Rehnquist. This gave President Bush two slots to fill on the court. Abortion rights advocates opposed the confirmation of Samuel Alito, but were unsuccessful. Supporters of abortion rights were leery of John Roberts, but did not fight his confirmation as Chief Justice. At this point it is unclear whether these two justices will provide the necessary votes to overturn *Roe*, or simply vote to uphold state legislation that limits rights of choice.

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References and Further Reading

- Ely, John Hart. *Democracy and Distrust*. 1980.
 Gold, Rebecca Benson. *Abortion and Women's Health: A Turning Point for America?* 1990.
 Mohr, James. *Abortion in America*. 1978.
 Rubin, Eva. *Abortion, Politics, and the Courts*. 1987.
 Tribe, Laurence H. *Abortion: The Clash of Absolutes*. 1990.
 Wishner, Jane B., ed. *Abortion and the States: Political Change and Future Regulation*. 1993.

Cases and Statutes Cited

- Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983)
Bellotti v. Baird, 443 U.S. 622 (1979)
Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1873)
Eisenstadt v. Baird, 405 U.S. 438 (1972)
Griswold v. Connecticut, 381 U.S. 479 (1965)
Harris v. McRae, 448 U.S. 297 (1980).
National Organization for Women v. Scheidler, 510 U.S. 249 (1994)
National Organization for Women v. Scheidler, 537 U.S. 393 (2003)
Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976)
Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992)
Roe v. Wade, 410 U.S. 114 (1973)
Rust v. Sullivan, 500 U.S. 173 (1991)
Schenck v. Pro-Choice Network of Western New York, 519 U.S. 357 (1997)
Stenberg v. Carhart, 530 U.S. 914 (2000)
Thornburgh v. American College of Obstetricians and Gynecologists, Pennsylvania Section, 476 U.S. 747 (1986) (portions overruled by *Casey*)
Webster v. Reproductive Health Services, 492 U.S. 490 (1989)

ABORTION LAWS AND THE ESTABLISHMENT CLAUSE

A defining principle of the United States is the separation between church and state. This principle is

embodied in the establishment clause of the First Amendment, which provides that Congress shall make no law respecting the establishment of religion. Since 1947, the prohibition has also applied to the states, and it has been interpreted to prevent the states from enacting laws that are motivated by religious purposes. When states enact laws, they must have secular purposes for doing so.

In *Roe v. Wade*, the Supreme Court ruled that the right of privacy enjoyed by all Americans protects a woman's right to decide whether to terminate a pregnancy. During the first trimester, the state may not interfere with this right at all (though in subsequent trimesters the state may impose certain restrictions). A critical premise of the Court's holding was that, at the early stages of pregnancy, the fetus is not a "person" for constitutional purposes.

This critical premise of *Roe* is obviously at odds with certain religious views, which consider a fetus a person from the moment of conception, or shortly thereafter. Indeed, in *Roe*, the Court recognized that the question of when life begins is fundamentally a religious question. In cases subsequent to *Roe*, the Court expressly held that a state is not permitted to adopt one theory of when life begins to justify its regulation of abortions (*Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 444, 1983).

Saying that the states may not regulate abortion on the basis of religious doctrine is one thing; enforcing that prohibition is quite another. There are three reasons for the difficulty of enforcing the establishment clause norm in the abortion context. First, determining why people believe what they believe presents difficult epistemological questions; a legislator may oppose abortion because Catholic doctrine holds that a fetus is a human being, or the legislator might be a physician who has purely secular reasons for believing that a fetus possesses human qualities. Second, distinguishing religious beliefs from nonreligious beliefs presents similarly daunting difficulties. Finally, the answer to the question of when life begins may indeed have religious and nonreligious influences.

The complexity of invalidating abortion laws on the basis of the establishment clause is illustrated by *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), a case involving a challenge to a Missouri statute that placed various restrictions on the right to obtain an abortion. The preamble to the state statute asserted that life begins at conception—a statement clearly at odds with *Roe* and its progeny. Nevertheless, despite a powerful dissent from Justice Stevens that insisted that the statute reflected an "unequivocal enforcement" of religion—and was therefore in violation of the establishment clause—the

Court upheld many of the law's restrictions, reasoning that they could be justified by secular criteria unrelated to the statute's preamble.

Consequently, although *Roe*, *Akron*, and other decisions indicate that a state may not base anti-abortion legislation on religious ideology or premises, these premises are often so diffused into the secular legal culture that it is impossible to neutralize their influence. For example, in *Harris v. McRae*, 448 U.S. 297 (1980), the Supreme Court upheld the Hyde amendment, which prohibits the use of federal Medicaid funds for most abortions. Justice Stewart's opinion for the Court concluded that the attitude toward abortion reflected in the amendment could very well reflect what the Court called "traditionalist" values; these value overlap, but are not identical to, religious values.

As a matter of legal doctrine, therefore, the state may not predicate laws that interfere with a woman's right to choose on religious doctrine. At the same time, as a political matter, laws that place restrictions on abortions during the second and third trimesters will almost certainly have a strong religious influence.

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References and Further Reading

Everson v. Board of Education, 330 U.S. 1 (1947).
 Feldman, Noah, *From Liberty to Equality: The Transformation of the Establishment Clause*, Cal. Law Review 673 (2002): 90:680–700.

Cases and Statutes Cited

Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 444 (1983)
Harris v. McRae, 448 U.S. 297 (1980)
Roe v. Wade, 410 U.S. 113 (1973)
Webster v. Reproductive Health Services, 492 U.S. 490 (1989)

ABORTION PROTEST CASES

In three cases, the Supreme Court has considered the rights of anti-abortion protestors outside abortion clinics. The cases have pitted free-speech values against the fundamental right to abortion declared by the Supreme Court in *Roe v. Wade*, 410 U.S. 113 (1973).

In the first of the cases, *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994), anti-abortion protestors had repeatedly violated a federal court injunction against blocking access to a Florida abortion clinic and had harassed patients and doctors at the clinic and at their homes. After this defiance, the federal district court entered a broader injunction against the protestors. The new injunction prohibited

demonstrators from: (1) protesting within 36 feet of the clinic; (2) making excessive noise near the clinic by shouting and using sound devices; (3) exhibiting images observable by patients within the clinic; (4) approaching patients within 300 feet of the clinic unless the patient voluntarily indicated a desire to be approached; and (5) demonstrating within 300 feet of the home of any clinic employee.

The government defended the restrictions as necessary to protect a woman's freedom to seek medical services; to safeguard public safety and order; to keep open the free flow of traffic on streets and sidewalks; to protect private property rights; and to preserve residential privacy. The protestors complained that the restrictions were content based (and thus especially suspect under the First Amendment) and unduly restricted their free-speech rights.

The Supreme Court first held that the injunction was not content based merely because it aimed at the protestors. The nature of an injunction is to restrict only those subject to it, the Court held, and the purpose of the injunction was only to address past violations of the court's orders.

Next, the Court held that the government's interests were significant and that parts of the injunction were narrowly tailored to serve those interests. First, the Court upheld the 36-foot buffer zone as applied to the *public* property around the clinic but not the *private* property along the side and back of the clinic where there had been no showing of interference. Second, the Court upheld the ban on excessive noise near the clinic on the ground that medical recovery requires some tranquility. But the Court struck down the rest of the injunction as too broad.

The Supreme Court's next encounter with the free-speech rights of abortion-clinic protestors came three years later in *Schenck v. Pro-Choice Network*, 519 U.S. 357 (1997). In that case, several abortion clinics in upstate New York had been subjected to large-scale blockades in which protestors marched, stood, knelt, or lay in clinic parking lots and doorways. Smaller groups of protestors, called "sidewalk counselors," crowded, pushed, jostled, yelled, and spat at women entering the clinics. Police officers on the scene attempting to control the protests were also harassed verbally and by mail.

A federal district court issued an injunction against fifty individuals and three organizations (including Operation Rescue). One part of the injunction banned demonstrating within 15 feet of clinic entrances, including doorways and parking lots. The Supreme Court upheld this "fixed buffer zone" on the ground that it was necessary to prevent anti-abortion protestors from blocking entrance to and exit from the clinic.

The second part of the injunction allowed anti-abortion protestors to approach a patient to make “nonthreatening” conversation with her, but required such sidewalk counselors to withdraw a distance of 15 feet from a patient if she requested them to cease counseling her. The Court struck down this “floating buffer zone” as burdening more speech than necessary to serve the government’s interests.

The third clash of abortion and free-speech rights came in *Hill v. Colorado*, 530 U.S. 703 (2000). Unlike the first two cases, *Hill* involved a statute—not a court injunction—restricting protests around abortion clinics. The Colorado law in *Hill* made it unlawful within the vicinity of a health care clinic for anyone to “knowingly approach” within 8 feet of another person, without that person’s consent, “for the purpose of passing a leaflet to, displaying a sign to, or engaging in oral protest, education, or counseling” with that person. Unlike the floating buffer zone in *Schenck*, however, the statute did not require counselors to move away if a patient walked into the 8-foot zone.

The Court upheld the statute against a First Amendment free-speech challenge by anti-abortion protestors. The main issue was whether the statute was content based and thus subject to strict scrutiny, or content neutral and thus subject to lesser scrutiny. The majority held that the statute was a content-neutral regulation of the place where speech may occur. The Court observed that the statute applied equally to all demonstrators, regardless of viewpoint, and was not adopted because of the state’s disagreement with the message of the anti-abortion protestors. Furthermore, the Court said, the state’s interests in unimpeded access to health care and patient privacy were unrelated to the content of speech.

Justices Scalia, Thomas, and Kennedy dissented vigorously, as they had in the previous two abortion protest cases. Scalia’s dissent argued that the statute was content based because it prohibited only “protest, counseling, or education,” but not other speech like social or random conversation. Thus, whether a person could be prosecuted for violating the 8-foot buffer zone “depends entirely on what he intends to say once he gets there.” The majority replied that the statute applied equally to all who engage in “protest, counseling, or education” speech without further regard to content.

While the dissenters agreed that the state could prohibit protestors from physically blocking access to a clinic, they chided the majority for approving a restriction on “peaceful, nonthreatening, but uninvited speech” within a distance of 8 feet from a patient entering or exiting an abortion clinic. Scalia accused the majority of distorting free-speech jurisprudence

so that it could “sustain this restriction on the free speech of abortion opponents.” “Does the deck seem stacked?” he asked. “You bet.”

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Cases and Statutes Cited

Hill v. Colorado, 530 U.S. 703 (2000)

Madsen v. Women’s Health Center, Inc., 512 U.S. 753 (1994)

Roe v. Wade, 410 U.S. (1973)

Schenck v. Pro-Choice Network of Western New York, 519 U.S. 357 (1997)

ABRAMS v. UNITED STATES, 250 U.S. 616 (1919)

Condemning “the hypocrisy of the United States and her allies” and denouncing President Woodrow Wilson as a hypocrite and a coward, Jacob Abrams and four associates—all five Russian-born Jews and avowed anarchists—distributed fliers on the Lower East Side of Manhattan in the summer of 1918 directing attention to U.S. efforts to halt the Bolshevik Revolution. Among other things, the fliers called for a general strike by workers to stymie the war effort against the imperial German government. Abrams and his colleagues were charged with violating the Espionage Act of 1917 (as amended in 1918), which allowed convictions for conspiring to “utter, print, write, and publish disloyal, scurrilous, and abusive language about the form of government of the United States, or language intended to bring the form of government of the United States into contempt, scorn, contumely and disrepute, or intended to incite, provoke, and encourage resistance to the United States [. . .]” Thus, the stage was set for one of the most important freedom of speech cases of the twentieth century.

One of the defendants (Joseph Schwartz) died the night before the trial started; a federal district court found the other four guilty of violating the act. At the U.S. Supreme Court, Justice John H. Clarke affirmed the convictions, emphasizing the special circumstances of wartime and the potential consequences of the dissident speech. Rooting the Court’s conclusions in the recent precedent dealing with similarly “dangerous” speech—especially *Schenck v. United States*, 249 U.S. 47 (1919), *Frohwerk v. United States*, 249 U.S. 204 (1919), and *Debs v. United States*, 249 U.S. 211 (1919)—Clarke found that the plain purpose of their propaganda was to excite, at the supreme crisis of the war, disaffection, sedition, riots, and, as they hoped, revolution, in this country for the purpose of embarrassing and, if possible, defeating the military plans of the government in Europe.

Thus, the Court deemed that the expression in question constituted a “clear and present danger” (“whether the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent”)—the legal test recently implemented in the *Schenck* case—in that such advocacy may have had the tendency to inhibit the war effort, among other things. Congress was, therefore, within its authority to restrict speech in such a fashion.

Yet, *Abrams* is actually more famous for the powerful and poetic dissent authored by Justice Oliver Wendell Holmes, Jr. Though Holmes was, ironically, the one who had recently *devised* the “clear and present danger” test, he pulled back in *Abrams*, finding (with Justice Louis D. Brandeis) that the statutory requirement of “intent” had not been demonstrated in this case. More importantly, the speech at hand was not worthy of the alarm alleged by the state and accepted by the Court majority. Indeed, indicating the influences of early twentieth century philosophical pragmatism on his thinking, Holmes averred that, while one may be disturbed by or disagree with the substantive nature of such dissent, one should still be willing to subject it to the processes of inquiry, scrutiny, and significantly, “competition.” The following passage portrays Holmes’ famous assertion of *how* and *why* this might be done:

But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test for truth is the power of the thought to get itself accepted in the competition of the market; and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment.

Thus, the theory of the “marketplace of ideas” was formally articulated in American law.

While the introduction of this metaphor was significant in that it has become the predominant trope for the contemplation of free-speech issues in the United States, the *Abrams* decision was significant as well because it demonstrated the first serious challenge to the “clear and present danger” test. In essence, Holmes wondered, in this case, exactly how “clear and present” must the “danger” be in order for congressional authority to reach the situation? Estimating proximity and degree in such a way led the Court several decades later to abandon the test in favor of an evaluation of the potential for “imminent lawlessness” in *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

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References and Further Reading

Chafee, Zechariah. *Free Speech in the United States*. Cambridge, MA: Harvard University Press, 1940/1967.
Menand, Louis. *The Metaphysical Club*. New York: Farrar, Straus and Giroux, 2001.
Polenberg, Richard. *Fighting Faiths*. New York: Viking, 1987.

Cases and Statutes Cited

Brandenburg v. Ohio, 395 U.S. 444 (1969)
Debs v. United States, 249 U.S. 211 (1919)
Frohwerk v. United States, 249 U.S. 204 (1919)
Schenck v. United States, 249 U.S. 47 (1919)

See also **Freedom of Speech: Modern Period (1917–Present); Holmes, Oliver Wendell, Jr.; Marketplace of Ideas Theory; *Schenck v. United States*, 249 U.S. 47 (1919)**

ABSOLUTISM AND FREE SPEECH

Absolutism is an approach to interpretation of the First Amendment guarantee of freedom of speech that takes literally the text of the amendment when it declares that “Congress shall make no law . . . abridging the freedom of speech.” Under a theory of absolutism, Congress may not constitutionally interfere with free speech in any way; the theory would also limit the power of state and local governments, through incorporation of the First Amendment into the due process clause of the Fourteenth Amendment.

Although the U.S. Supreme Court never adopted an absolutist approach, the theory found credence in the decisions of Justice Hugo L. Black and, to a lesser degree, Justice William O. Douglas. Examining state restrictions on speech in dissent in *Beauharnais v. Illinois*, 343 U.S. 988 (1952), Black put it in simple fashion when he said, “I think the First Amendment, with the Fourteenth, ‘absolutely’ forbids such laws without any ‘ifs’ or ‘buts’ or ‘whereases.’” Throughout the 1950s and 1960s, as the Supreme Court created new tests to balance the state’s interest against free speech, Black objected. The “First Amendment’s unequivocal command that there shall be no abridgment of the rights of free speech and assembly shows that the men who drafted our Bill of Rights did all the ‘balancing’ that was to be done in the field,” Black wrote in a dissenting opinion in *Konigsberg v. State Bar of California*, 366 U.S. 36 (1961). Black’s concern was that balancing tests made the importance of particular speech dependent on the value judgments of individual judges.

The views of Justice Douglas were less clear. In *Dennis v. U.S.*, 341 U.S. 494 (1951), Douglas said, “The freedom to speak is not absolute.” But in *New*

York Times v. U.S., 403 U.S. 713 (1971), the Pentagon Papers case, Douglas said the guarantees of freedom of speech and of freedom of the press leave “in my view, no room for governmental restraint on the press.”

Even Black’s absolutism had significant definitional limits. When civil rights protesters in the 1960s argued that their demonstrations and lunch-counter sit-ins that led to their arrest were expressive conduct entitled to the protection of the First Amendment, Black drew a distinction between speech and conduct, finding the latter unprotected. Free speech, he wrote in *Cox v. Louisiana*, 379 U.S. 536 (1965), did not include the “right to engage in the conduct of picketing or patrolling, whether on publicly owned streets or on privately owned property.” In *Adderly v. Florida*, 385 U.S. 39 (1966), he wrote the Court’s opinion upholding the trespass convictions of students who protested outside a Florida county jail, rejecting the premise “that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please.” Even when the conduct was symbolic expression, Black viewed it as action that was not protected. He dissented in *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503 (1969), in which the Court ruled that students could wear black armbands to school as long as there was no evidence that their protest caused disruption.

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References and Further Reading

- Meiklejohn, Alexander, *The First Amendment Is an Absolute*, 1961 Supreme Court Review (1961).
 Smolla, Rodney A. *Smolla and Nimmer on Freedom of Speech*. 2005, § 2.49.
 Stemberge, Patricia R., *Adjusting Absolutism: Extending First Amendment Protection for the Fringe*, B.U. Law Review 907 (2000): 80.

Cases and Statutes Cited

- Adderley v. Florida*, 385 U.S. 39 (1966)
Beauharnais v. Illinois, 343 U.S. 988 (1952)
Cox v. Louisiana, 379 U.S. 536 (1965)
Dennis v. U.S., 341 U.S. 494 (1951)
Konigsberg v. State Bar of California, 366 U.S. 36 (1961)
New York Times v. Sullivan, 376 U.S. 254 (1964)
New York Times v. U.S., 403 U.S. 713 (1971)
Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503 (1969)

See also Douglas, William Orville; Due Process; First Amendment and PACs; Fourteenth Amendment; Freedom of the Press: Modern Period (1917–Present); Freedom of Speech: Modern Period (1917–Present)

ABU GHRAIB

Abu Ghraib prison was originally built in the 1960s by Western contractors but achieved notoriety during Saddam Hussein’s rule as a repository for up to fifteen thousand of his political enemies. More recently, it has become infamous as the site of torture of Iraqi detainees at the hands of American soldiers.

Abu Ghraib came into American possession following the U.S.-led invasion of Iraq in March 2003. Selected by Ambassador Paul Bremer, head of the Coalition Provisional Authority that governed the country, the prison was originally to be used as a temporary facility for criminal detainees until the new Iraqi government could establish a permanent prison at another site. Rather than limiting the number of prisoners, Abu Ghraib was also designated as a detention facility for high-value security detainees. These were individuals suspected of playing a role in the growing insurgency in Iraq, who were prime targets for interrogation. Of the seventeen detention facilities in Iraq in October 2003 Abu Ghraib was the largest, holding seven thousand prisoners with a guard force of approximately ninety Americans.

The release of the infamous photographs of prisoner abuse of Iraqi detainees by U.S. soldiers in April 2004 revealed for the first time to the world that something had gone badly wrong at Abu Ghraib. From the commencement of hostilities in Afghanistan and Iraq through 2004, the United States had apprehended fifty thousand people. Three hundred allegations of abuse resulted, leading to the determination that, in sixty-six cases, prisoners under U.S. control were abused. Fifty-five of those were later found to have occurred in Iraq. The seriousness of the allegations and the horrifying scenes depicted in the pictures prompted numerous investigations. The U.S. Army dispatched Maj Gen. Antonio Taguba to report on abuse at Abu Ghraib; the Pentagon later appointed an “independent panel” to review Department of Defense detention operations and provide recommendations. These, along with reports by organizations such as the International Committee of the Red Cross (“the Red Cross”) confirmed that multiple violations of international humanitarian law and the Uniform Code of Military Justice had occurred. The Taguba report cited instances of beating, terrorizing, and sodomizing detainees committed by military intelligence units and the 372nd Military Police Company.

Revelations of torture at Abu Ghraib did lasting damage to American credibility and cast doubt on the United States’ respect for international law and human rights. The U.S. military responded by calling court martials for soldiers directly implicated in the abuse. However, as the Independent Panel Report

makes clear, the sadistic tendencies of half-a-dozen enlisted soldiers are not alone to be blamed. Although the vast majority of detentions and prisoner interviews took place within the bounds of the law, the report points to larger systemic problems at the prison that also contributed to creating the conditions wherein such abuse was allowed to take place.

As the size and ferocity of the Iraqi insurgency grew, the inadequacies of American postwar planning became increasingly evident. Command and control structures broke down, and training of military police and interrogators proved insufficient in the face of a mounting prisoner population. A lack of understanding as to which interrogation procedures were acceptable was the result. Techniques deemed acceptable for Taliban and al Qaeda prisoners, who were found not to be entitled to protections guaranteed under the Geneva Convention of 1949, were in some cases used when questioning Iraqi detainees, who were entitled to those protections. Moreover, the presence of military intelligence operatives and the CIA, which ostensibly operated independently and had reportedly hidden “ghost detainees” during Red Cross inspections, created further confusion.

Along with an analysis of which specific decisions gave rise to conditions of lawlessness at Abu Ghraib prison, the legal community also debated the extent to which Bush administration policies with respect to domestic laws and international treaties forbidding torture played a role. Recognizing that the United States was now in a struggle against nonstate actors—terrorists who refused to abide by the laws of war—Bush administration lawyers set about providing a basis for expansive executive power in prosecuting what the President termed the Global War on Terror, or “GWOT.” The lack of human intelligence on terrorist organizations gave rise to a need to extract information through interrogation. Indeed, this need proved all the more pressing at Abu Ghraib, considering that existing interrogation techniques had yielded little actionable intelligence regarding the insurgency.

A legal memorandum from Assistant Attorney General Jay S. Bybee on August 1, 2002, for example, advised Counsel to the President Alberto Gonzales that physical pain amounting to torture must be “equivalent in intensity to the pain accompanying serious physical injury such as organ failure, impairment of bodily function or even death.” These and other memoranda sought to expand the range of acceptable interrogation techniques and to immunize those implementing interrogation procedures from the Convention on Torture and from U.S. law.

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References and Further Reading

- Greenberg, Karen, and Joshua Dratel, eds. *The Torture Papers: The Road to Abu Ghraib*. New York: Cambridge University Press, 2005.
- Independent Panel to Review DoD Detention Operations (James Schlesinger, Chairman). *Final Report of the Independent Panel to Review DoD Detention Operations*. Buffalo, NY: William Hein, 2005.

ACADEMIC FREEDOM

Origins of Academic Freedom

Academic freedom is a concept that encompasses notions of philosophy and contracts as well as civil liberties. In the United States the concept of academic freedom has developed primarily (although not exclusively) in the context of higher education. General U.S. understanding of academic freedom can be traced to two important documents published by the American Association of University Professors (AAUP). The first of these documents is the 1915 General Report of the Committee on Academic Freedom and Academic Tenure. The 1915 declaration was a manifesto on academic freedom in which the AAUP argued that academic freedom consisted of three components: the freedom of faculty to teach, to do research, and to talk and write on matters outside their disciplines. The AAUP argued that academic freedom could only be fostered in an environment of institutional neutrality.

In the second important document—the 1940 Statement of Principles on Academic Freedom and Tenure—the AAUP attempted to reduce the concept of academic freedom to a series of rule-like propositions that could guide university governance and serve as a basis for enforcing norms of academic freedom. Like the 1915 declaration, the statement of principles contains three core provisions that generally correspond with this three-part vision of research, teaching, and service responsibilities of most university professors:

Teachers are entitled to full freedom in research and in the publication of the results, subject to the adequate performance of their other academic duties; but research for pecuniary return should be based upon an understanding with the authorities of the institution.

Teachers are entitled to freedom in the classroom in discussing their subject, but they should be

careful not to introduce into their teaching controversial matter which has no relation to their subject. Limitations of academic freedom because of religious or other aims of the institution should be clearly stated in writing at the time of the appointment.

College and university teachers are citizens, members of a learned profession, and officers of an educational institution. When they speak or write as citizens, they should be free from institutional censorship or discipline, but their special position in the community imposes special obligations. As scholars and educational officers, they should remember that the public may judge their profession and their institution by their utterances. Hence they should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that they are not speaking for the institution.

These provisions of the statement of principles are based on the explicit assumptions of the drafters that “institutions of higher education exist not for themselves but for the ‘common good’; that academic freedom is ‘essential’ to that purpose; that academic tenure is ‘essential’ to academic freedom no less than to academic job security; and that ‘academic freedom carries with it duties correlative with rights.’”

These core values of academic freedom have been secured primarily through individual and institutional commitment to them. Statements regarding academic freedom are incorporated in the handbooks and/or procedures of most American universities. Commitments regarding academic freedom are also often incorporated in contracts between university faculty and administrations. Most American schools and colleges have adopted tenure for teachers as one of the mechanisms for ensuring academic freedom.

Academic Freedom and the First Amendment

American courts have found a nexus between academic freedom and rights of free speech protected in the First Amendment. The U.S. Supreme Court, in *Keyishian v. Board of Regents*, 385 U.S. 589 (1967), has referred to academic freedom as “a special concern of the First Amendment.” Yet, the scope of First Amendment protection afforded academic speech is ambiguous at best.

The first two U.S. Supreme Court cases explicitly to link academic freedom and the First Amendment

were *Adler v. Board of Education*, 342 U.S. 485 (1952), and *Wieman v. Updegraff*, 344 U.S. 183 (1952). Decided during the Court’s 1952 term, both cases dealt with state regulations arising from the opposition to Communism and the cold war. *Adler* involved a New York statute that required that any person espousing the use of violence or altering the form of U.S. government or belonging to a “subversive organization” that espoused such views be removed from public employment. Although the majority of the Court upheld the state law, Justice William O. Douglas dissented, reasoning that the law unreasonably infringed on the academic freedom of public school teachers by intimidating any teacher who had ever been associated with a “subversive organization” from going into teaching or voicing his or her thoughts on the topics of the day.

Wieman involved the constitutionality of a state statute requiring that state employees take a loyalty oath disclaiming affiliation with any subversive organization as a condition of state employment. In contrast to *Adler*, the majority of the Court struck down the statute. In a separate concurring opinion, Justice Felix Frankfurter reasoned that in addition to the infringement on freedom of association of state employees, the disclaimer oath would have a pernicious effect on the academic freedom of teachers.

These early cases set the stage for a series of Supreme Court decisions during the 1950s and 1960s that define the scope of First Amendment protection for teachers based on notions of academic freedom. In *Sweezy v. New Hampshire*, 354 U.S. 234 (1957), the Court addressed the question of academic freedom and the First Amendment in yet another case challenging the constitutionality of government action undertaken as part of the cold war.

In *Sweezy* a University of New Hampshire professor was charged with contempt when he refused to provide details of his lectures and political associations in answer to questions by the state attorney general as part of a state antisubversive investigation. In his concurring opinion, Justice Frankfurter said that requiring *Sweezy* to produce his notes violated his academic freedom rights ensured by the First Amendment. Frankfurter wrote, “[w]hen weighed against the grave harm [to academic freedom] resulting from governmental intrusion into the intellectual life of a university, [ordinary justifications] for compelling a witness to discuss the contents of his lecture [appear] grossly inadequate.” Frankfurter’s reasoning was based, in part, on his view that the examination of *Sweezy*’s notes would have a chilling effect on the continued free exchange of ideas within the university.

Despite the fact that the academic freedom argument in *Sweezy* was made by an individual professor,

Justice Frankfurter's analysis was rooted significantly in the government's intrusion into the university as an institution; he characterized the government's action as an intrusion into the "intellectual life of a university," not as an intrusion into the free speech and association rights of an individual professor. Frankfurter's grand but unspecific conclusion was that a free society depends on free universities and that "this means the exclusion of governmental intervention in the intellectual life of a university."

In *Shelton v. Tucker*, 364 U.S. 479 (1960), the Court struck down an Arkansas statute requiring teachers, as a condition of employment, to submit an annual affidavit listing every organization to which they had belonged or regularly contributed for the past five years. The Court held that this requirement violated the free association rights of teachers. Although it did not base its reasoning expressly on "academic freedom" grounds, the Court quoted *Weiman* and *Sweezy*, reasoning that "[t]eachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die."

The Supreme Court's majority relied on the link between free speech and academic freedom for the first time in 1967 in *Keyishian v. Board of Regents*. There the Court struck down the provisions of New York's Feinberg law that had been previously upheld in *Adler*. Writing for the majority, Justice William Brennan reasoned:

[A]cademic freedom . . . is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom The classroom is particularly the marketplace of ideas. The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, [rather] than through any kind of authoritative selection.

The *Keyishian* Court relied on the reasoning of *Sweezy* in its analysis and, as in Frankfurter's opinion in *Sweezy*, employed sweeping generalizations and avoided specific analysis. While Justice Douglas characterized academic freedom as a "transcendent value," his opinion does not shed additional light on the relationship between academic freedom and the First Amendment.

The year after *Keyishian*, Justice Douglas, writing for the majority in *Whitehill v. Elkins*, 389 U.S. 54 (1967), struck down an oath similar to that in *Wieman* on express academic freedom grounds. Continuing the sweeping, general invocation of academic freedom

without specific analysis, the Court concluded "[t]he continuing surveillance which this type of law places on teachers is hostile to academic freedom The restraints on conscientious teachers are obvious."

Individual Academic Freedom and the Public Employee Doctrine

The potentially broad reach of the First Amendment/academic freedom cases may be limited by the cases dealing with free speech of public employees. These cases define the scope of free speech rights of public employees including, arguably, teachers and faculty members at public institutions. In *Pickering v. Board of Education*, 391 U.S. 563 (1968), the Supreme Court recognized that the free speech rights of public employees may be limited when the speech interferes with the efficient operation of the government employer.

Pickering involved a teacher who was fired because he wrote a letter to a newspaper criticizing the conduct of the local board of education regarding tax increases for education. The Court held that in the absence of proof that the teacher knowingly or recklessly made false statements, he could not be fired for exercising his First Amendment rights. The *Pickering* Court did not rely on notions of academic freedom for its conclusion that the teacher's free speech rights were infringed by the school district. In fact, the Court cited *Keyishian* and *Whitehill* only for the narrower proposition that public employees do not shed the free speech rights enjoyed by all citizens simply because they are in the public's employ.

While the *Pickering* Court concluded that the teacher's free speech rights had been impermissibly invaded, the decision established a framework in which public employees' speech is subject to scrutiny when it is related to their employment or negatively affects their employer. The test adopted by the Court balances the government's interest in the efficient operation of public services and in not having those services disrupted against the speech of public employees. If the potential disruptiveness of a public employee's speech outweighs the value of that speech, the public employer may take appropriate disciplinary action against the employee.

The public employee cases—*Pickering* in particular—raise questions about the extent of First Amendment protection for individual academic freedom. While the cases certainly recognize that the speech of public employees is protected by the First Amendment, they nonetheless appear to treat the speech of

teachers no differently from the speech of other public employees. It may be that *Pickering* does not reach to the speech of college and university teachers or that it only applies to the speech of teachers outside the areas of the classroom and scholarly pursuits. While the latter limitation would be inconsistent with the AAUP's conception of academic freedom, it would leave intact the reasoning of *Sweezy*, *Shelton*, *Keyishian*, and *Whitehill*.

Institutional Academic Freedom

Within this basic context, the Supreme Court has slowly articulated a limited theory of institutional academic freedom. The core principle of this theory is that public institutions involved in academic endeavors should be accorded deference in core academic decision-making, even when the decision may arguably infringe the rights of institutional participants such as students, faculty, library patrons, and researchers. Thus, for example, in *Regents of the University of Michigan v. Ewing*, 474 U.S. 214 (1985), the Court recognized that a medical student had a constitutionally protected property right in continued enrollment free from arbitrary actions of the university. Nonetheless, the Court declined to second guess the decision of a university to disqualify a medical student after he did not pass required medical boards even though most other students were given the opportunity to retake the exam. The *Ewing* Court reasoned that “[w]hen judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for the faculty’s professional judgment.”

Deference to the decision-making of educational institutions on academic questions has played a role in other decisions. For example, in *Grutter v. Bollinger*, 539 U.S. 306 (2003), in upholding the University of Michigan’s admissions policy regarding affirmative action in law school admissions, Justice Sandra Day O’Connor cited *Keyishian* and *Ewing*, noting that “[o]ur holding today is in keeping with our tradition of giving a degree of deference to a university’s academic decisions, within constitutionally prescribed limits.” Justice O’Connor’s consideration of academic freedom in university admissions paralleled Justice Lewis F. Powell’s similar deference twenty-five years earlier in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

Likewise, in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), the Court held that educators could exercise “editorial control over the style and content of student speech in school-sponsored

expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.” Although the Court did not rely on a specific academic freedom rationale, its reasoning is consistent with the developing theory of institutional academic freedom on matters of core academic concern.

Academic Freedom in the Lower Federal Courts

The lower courts struggled to make sense of the Supreme Court’s approach in cases involving claims to individual academic freedom by faculty and students. While the cases rely on a number of different rationales, they consistently recognize the principle of deference to the academic decisions of educational institutions. Recently, for example, in *Brown v. Li*, 308 F. 3d 939 (9th Cir. 2002), the Ninth Circuit refused to question the University of California’s decision to require excisions from a master’s thesis, stating “under the Supreme Court’s precedents, the curriculum of a public education institution is one means by which the institution itself expresses its policy, a policy with which others do not have a constitutional right to interfere.” In *Axson-Flynn v. Johnson*, 356 F.3d 1277 (10th Cir. 2003), the Tenth Circuit similarly held that deference was due to university decision-making on curricular speech that was “reasonably related to legitimate pedagogical goals.”

While a limited theory of institutional academic freedom has developed, most courts have declined to recognize an independent, constitutionally based theory of academic freedom extending to faculty or to students, particularly when the protection of faculty and/or student academic freedom interests would conflict with the policies of the academic institution. *Brown* and *Axson-Flynn*, for example, each involved claims that the First Amendment protected academic speech by students that were overridden by the Court’s deference to institutional decision-making on matters of core academic concern.

In *Urofsky v. Gillmore*, 216 F. 3d 401 (4th Cir. 2001), the *en banc* panel of the Fourth Circuit expressly rejected the idea that individual faculty possess a constitutionally protected right of academic freedom separate and apart from institutional academic freedom. *Urofsky* involved a Virginia statute that prohibited state employees from accessing sexually explicit materials on state-provided computers. A number of university professors argued that the statute infringed on the free speech rights of all state employees and that, alternatively, the statute infringed on the academic freedom rights of state-employed teachers.

Applying *Pickering*, the Fourth Circuit found that the state did not infringe on the rights of state employees generally because states can regulate the speech of their employees undertaken in the course of the performance of their employment duties. The court also rejected the academic freedom argument stating: “[t]aking all of the cases together, the best that can be said for Appellees’ claim that the Constitution protects the academic freedom of an individual professor is that teachers were the first public employees to be afforded the now-universal protection against dismissal for the exercise of First Amendment rights. Nothing in Supreme Court jurisprudence suggests that the ‘right’ claimed by Appellees extends any further.”

Other decisions, such as *Bonnell v. Lorenzo*, 241 F. 3d 800 (6th Cir. 2001), have followed the approach of *Urofsky*, applying *Pickering* and not broader principles of academic freedom to claims advanced by individual faculty.

Academic freedom has played a role in a number of civil liberties debates arising in academic settings. In the debate about hate speech on college campuses, for example, opponents of civility and campus hate speech codes have argued that such codes violate academic freedom because they attempt to deter and sanitize protected academic speech that may be offensive. Academic freedom has also been part of the analysis of First Amendment defenses to sexual harassment claims based on a hostile educational environment. Nonetheless, cases in the hate speech and sexual harassment areas have not directly turned on the courts’ analysis of academic freedom.

Despite the broad language in early Supreme Court opinions regarding academic freedom and the First Amendment, constitutional protection of academic freedom is very narrow. Courts have deferred to academic institutions on matters involving core academic decision-making. At the same time, the lower federal courts have declined to recognize an independent, constitutionally protected right of academic freedom for faculty and students, especially when the recognition of such a right would require the court to intervene in institutional academic decision-making.

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References and Further Reading

- Byrne, J. Peter, *Academic Freedom: A “Special Concern of the First Amendment,”* Yale Law Review 99 (1989): 251–340.
- Menand, Louis, ed. *The Future of Academic Tenure*. Chicago: University of Chicago Press, 1996.
- Metzger, Walter P., *Profession and Constitution: Two Definitions of Academic Freedom in America*, Texas Law Review 66 (1988): 1265–1322.

Rabban, David M., *Functional Analysis of ‘Individual’ and ‘Institutional’ Academic Freedom Under the First Amendment*. Law and Contemporary Problems 53 (1990):227–301.

Van Alstyne, William W., *Academic Freedom and the First Amendment in the Supreme Court of the United States: An Unhurried Historical Review*. Law and Contemporary Problems 53 (1990):79–154.

———, ed. *Freedom and Tenure in the Academy*. Durham, NC: Duke University Press, 1993.

Cases and Statutes Cited

- Adler v. Board of Education*, 342 U.S. 485 (1952)
- Axson–Flynn v. Johnson*, 356 F.3d 1277 (10th Cir. 2003)
- Bonnell v. Lorenzo*, 241 F. 3d 800 (6th Cir. 2001)
- Brown v. Li*, 308 F. 3d 939 (9th Cir. 2002)
- Grutter v. Bollinger*, 539 U.S. 306 (2003)
- Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988)
- Keyishian v. Board of Regents*, 385 U.S. 589 (1967)
- Pickering v. Board of Education*, 391 U.S. 563 (1968)
- Regents of the University of California v. Bakke*, 438 U.S. 265 (1978)
- Regents of the University of Michigan v. Ewing*, 474 U.S. 214 (1985)
- Shelton v. Tucker*, 364 U.S. 479 (1960)
- Sweezy v. New Hampshire*, 354 U.S. 234 (1957)
- Urofsky v. Gillmore*, 216 F. 3d 401 (4th Cir. 2001)
- Whitehill v. Elkins*, 389 U.S. 54 (1967)
- Wieman v. Updegraff*, 344 U.S. 183 (1952)

See also Campus Hate Speech Codes; Freedom of Speech and Press: Nineteenth Century; Freedom of Speech: Modern Period (1917–Present); Student Speech in Public Schools; Teacher Speech in Public Schools; Universities and Public Forums

ACCESS TO GOVERNMENT OPERATIONS INFORMATION

In a democratic society, the informed citizen must have an affirmative right to gain access to information concerning the operations of government. Often referred to as “transparency,” the public’s right of access makes oversight possible and helps ensure that the government will be accountable to the people.

Access to the three branches of government varies in scope. Executive branch agencies are subject to the federal Freedom of Information and Sunshine laws, which create a presumptive right of access, subject to specific and limited exemptions. The legislative branch is generally open to public observation and review as a matter of practice and sometimes of statute. The Supreme Court declared that public and press access to criminal trials is guaranteed by the First Amendment in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), and common law and court rules are designed to keep most other court proceedings open.

The rights of access to other instrumentalities of government are less clear. Although the Supreme Court has recognized that news gathering is protected by the First Amendment, the precise parameters are vague. For example, the scope of a First Amendment-based right of media access to military operations remains ill defined and a source of constant tension; competing interests of the government in maintaining operational security and the right of the public to know are imperfectly balanced. In the aftermath of 9/11 and the War on Terrorism, the government closed down access to many sources of government operations information in the name of protecting national security.

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Cases and Statutes Cited

Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980)

See also **Access to Judicial Records; Freedom of Information Act (1966); Freedom of Information and Sunshine Laws; Media Access to Information; Media Access to Judicial Proceedings; Media Access to Military Operations; 9/11 and the War on Terrorism; *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980)**

ACCESS TO JUDICIAL RECORDS

Courts generally recognize two independent rights of public access to judicial records, one stemming from the common law and one from the First Amendment. Both are predicated on furthering government accountability.

The common law right originated before the First Amendment and is broader in scope; however, as with any common law right, it can be overridden by rule or statute. The Supreme Court recognized in *Nixon v. Warner Communications, Inc.*, 453 U.S. 589 (1978), that the common law creates a presumption of access to judicial records. But the Court denied access to White House audiotapes on grounds of supervening statute and declined to “delineate precisely the contours of the common-law right.”

Common-law access is decided case by case, entrusted to the discretion of the trial court, and privileged by high deference on appeal. Access is determined by balancing public interests in disclosure, such as understanding of the judiciary or of historical events, against potential ills of disclosure, such as invasion of privacy, promotion of scandal, dissemination of defamation, or revelation of trade secrets.

The Supreme Court has not explicitly recognized a First Amendment right of access to judicial records,

but lower courts have found the right implicit in the Court’s release of transcripts after access to proceedings was unconstitutionally denied in the *Press-Enterprise* cases. To analyze First Amendment access, courts employ the experience and logic test propounded in *Richmond Newspapers v. Virginia, Inc.*, 453 U.S. 589 (1978), for access to proceedings. As such, fewer records are covered. But access denial cannot be ordained by statute and merits no deference on appeal.

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Cases and Statutes Cited

Nixon v. Warner Communications, Inc., 453 U.S. 589 (1978)
Press-Enterprise Co. v. Superior Court (I), 464 U.S. 501 (1984)

Press-Enterprise Co. v. Superior Court (II), 478 U.S. 1 (1984)

Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980)

See also **Cameras in the Courtroom; Discovery Materials in Court Proceedings; Duty to Obey Court Orders; Gag Orders in Judicial Proceedings; Media Access to Information; Media Access to Judicial Proceedings; Nixon, Richard Milhous; *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); Right of Access to Criminal Trials; Sealed Documents in Court Proceedings; State Courts**

ACCESS TO PRISONS

In two cases decided on the same day in 1974, the U.S. Supreme Court said that state and federal prison regulations barring journalists from interviewing individual inmates did not violate the First Amendment. In *Pell v. Procunier*, 417 U.S. 817 (1974), and *Saxbe v. Washington Post*, 417 U.S. 817 (1974), the Court deferred to the judgment of prison officials who believed press interviews compromised security and discipline. The Court also said that journalists had the same right of access to prisons as the general public. Similarly, the Court in *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978), rejected a television station’s argument that barring cameras and sound equipment from public tours of a county jail infringed on the station’s First Amendment rights as long as all members of the public faced the same restrictions.

State and federal courts consistently have found that it does not violate the First Amendment to bar the media from filming prisoner executions. In *Garrett v. Estelle*, 556 F.2d 1274 (5th Cir. 1977), a federal appellate court upheld a Texas regulation barring the filming of executions for broadcast. In 2001, a

federal court in *Entertainment Network Inc. v. Lappin*, 134 F.Supp.2d 1002 (S.D. Ind. 2001), upheld a federal prison's decision to bar the Internet broadcast of an execution. However, the U.S. Court of Appeals for the Ninth Circuit said in 2002, in *California First Amendment Coalition v. Woodford*, 299 F.3d 868 (9th Cir. 2002), that California prison officials violated the First Amendment when they kept reporters and other witnesses invited to view an execution from seeing part of the lethal injection process.

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References and Further Reading

- Frost, Kristen, *Case Notes and Comments: The Constitutionality of an Internet Execution: Lappin v. Entertainment Network, Inc.*, DePaul-LCA Journal of Art and Entertainment Law 12 (Spring 2002): 173–216.
- Levi, Nicholas, *Note: Veil of Secrecy: Public Executions, Limitations on Reporting Capital Punishment, and the Content Based Nature of Private Execution Laws*, Federal Communications Law Journal 55 (December 2002): 131–152.

Cases and Statutes Cited

- California First Amendment Coalition v. Woodford*, 299 F.3d 868 (9th Cir. 2002)
- Entertainment Network, Inc. v. Lappin*, 134 F.Supp.2d 1002 (S.D. Ind. 2001)
- Garrett v. Estelle*, 556 F.2d 1274 (5th Cir. 1977)
- Houchins v. KQED, Inc.*, 438 U.S. 1 (1978)
- Pell v. Procunier*, 417 U.S. 817 (1974)
- Saxbe v. Washington Post*, 417 U.S. 843 (1974)

See also Capital Punishment: History and Politics; Freedom of Speech and Press: Nineteenth Century; Press Clause (I): Framing and History from Colonial Period up to Early National Period; Prisoners and Freedom of Speech

ACCOMMODATION OF RELIGION

The free exercise clause of the First Amendment is often interpreted as requiring the government to accommodate religion by refraining from applying to religious practitioners general laws that interfere with the edicts of particular religious faiths. This accommodation mandate has two aspects: the accommodation of religious belief and the accommodation of behavior motivated by religious belief. In *Reynolds v. United States* (1878), the Supreme Court's first comprehensive consideration of religious accommodation, the Court recognized that "while [laws] cannot interfere with mere religious belief and opinion, they may with practices." Even though the Court has always recognized that the law can interfere with

religiously motivated conduct, it has grappled repeatedly with the degree to which the First Amendment will permit legal interference with that conduct.

The mandatory accommodation required under the free exercise clause in some contexts is augmented by several federal and state statutes requiring accommodation of religious practitioners in other contexts. These statutes raise the issue of whether the Constitution permits government to accommodate religion in situations in which the free exercise clause does not mandate accommodation. Statutory accommodations potentially run afoul of two constitutional limits. First, to the extent that federal and state accommodation statutes provide favorable treatment to individuals based solely on religious belief, the provisions may violate the establishment clause. Second, federal statutes that require states to accommodate religion more comprehensively than the free exercise clause requires are vulnerable to the claim that Congress has exceeded its authority to remedy violations of the Fourteenth Amendment.

The History of Accommodation

For many years, courts were reluctant to require governments to accommodate religious practitioners by granting them exemptions from generally applicable laws. In *Reynolds v. United States*, 98 U.S. 145 (1878), for example, the Supreme Court refused to grant traditional Mormon practitioners an exemption from a federal statute criminalizing the practice of polygamy. Permitting individuals to avoid criminal punishment because their behavior was motivated by religious devotion, the Court held, "would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances."

This skeptical attitude characterized the Supreme Court's general approach to the issue of constitutionally mandated accommodations of religion until the early 1960s, when the Court became much more amenable to accommodation claims by religious practitioners. In 1963, the Supreme Court effectively required governments to accommodate religious practitioners in many cases in which legal obligations and religious obligations conflicted. In *Sherbert v. Verner*, 374 U.S. 398 (1963), the Court held that the state of South Carolina was required to provide unemployment benefits to a Seventh-Day Adventist woman who had been fired from her job because she had refused to work on Saturday, which was her Sabbath.

The state had refused to provide her benefits because the state unemployment statute denied benefits to anyone who refused "suitable work." The Court held that applying this provision to Sherbert forced her to "choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand." The Court held that this choice significantly burdened her free exercise of religion and could therefore only be justified by a compelling interest. Since the state had no compelling interest in refusing unemployment benefits to Sherbert while granting such benefits to others, it was required to accommodate her religious practices by providing her benefits.

The compelling interest analysis inaugurated in *Sherbert* prevailed on the Court until 1990. During this period the Court employed this analysis to require accommodations for Amish parents who sought to remove their children from school prior to the age designated in state mandatory attendance laws (*Wisconsin v. Yoder*, 406 U.S. 205, 1972), Jehovah's Witness foundry employees who refused to work on armaments production (*Thomas v. Review Board of Indiana*, 450 U.S. 707, 1971), and Native American parents whose religious beliefs prohibited them from obtaining social security numbers for their children (*Bowen v. Roy*, 476 U.S. 693, 1986).

On the other hand, the Court also refused to protect religious practitioners in a number of cases. The Court held, for example, that despite the constitutional accommodation mandate, the government could collect social security payments from Amish employers (*United States v. Lee*, 455 U.S. 252, 1982), force Jewish members of the military to refrain from wearing yarmulkes on duty (*Goldman v. Weinberger*, 475 U.S. 503, 1986), deny tax-exempt status to a religious university whose religious precepts prohibited interracial dating (*Bob Jones University v. United States*, 461 U.S. 574, 1983), and tax the sale of religious literature (*Jimmy Swaggart Ministries v. Board of Equalization of California*, 493 U.S. 378, 1990). In short, although the Court required the government to assert a compelling interest to override the constitutional mandate of accommodation, it found that many government interests were sufficient to satisfy this standard.

Theories of Accommodation

Although the courts have focused mostly on the practical application of the accommodation mandate, judges and legal academics have also debated the theory behind religious accommodation. Proponents

of accommodation argue that accommodation provides essential protection for religious minorities in a society defined by religious pluralism. Proponents of accommodation argue that the free exercise clause of the First Amendment is designed primarily to protect this culture of religious pluralism. They also argue that the theory of accommodation and religious pluralism should inform the courts' interpretation of the establishment clause. Under this approach, the need to accommodate religious practices would lead to a view of the establishment clause as fostering a spirit of what Chief Justice Warren Burger once labeled "benevolent neutrality." Granting property tax exemptions to religious organizations and permitting religious organizations to participate in government-funded social services programs are two examples of benevolent neutrality.

Proponents of accommodation also argue that accommodation is necessary to preserve the authority of religious institutions, which are (in the words of Professor Michael McConnell) "mediating structures" that provide citizens with the civic virtue necessary for successful democratic governance. Finally, proponents argue that accommodation is an overt recognition of the possibility that a supreme celestial authority exists. If God exists, they argue, then His sacred dictates must be deemed superior to those of any secular authority.

Opposition to mandatory accommodation revolves around the perceived discrimination built into the accommodation theory, which opponents believe is contrary to the underlying principles of the establishment clause. A central theme of establishment clause doctrine is that the government must be neutral toward particular religious faiths and religion in general. Mandatory accommodation rules, however, inevitably provide different levels of benefits to members of different faiths. Nonreligious individuals are automatically excluded from any accommodation regime. Members of religious groups that do not demand absolute conformity with strict behavioral decrees also will not benefit from accommodation mandates. In areas such as employment, moreover, the accommodation of religious practitioners will often have the effect of shifting burdens from one set of employees to another solely because of the employees' faith.

Under this view the internal contradictions of the oxymoron "benevolent neutrality" are evident: A system cannot be simultaneously "benevolent" and "neutral." If some citizens are given special dispensation to avoid complying with a general legal obligation based solely on their religious faith, then the system makes compliance with the law depend on one's religious faith. Such a system is not "neutral," as required by the establishment clause.

The Modern Standard

The Supreme Court has not formally adopted either position on the theory of accommodation, but in recent years the Court has significantly weakened the requirement that the government accommodate practices of religious adherents that violate otherwise applicable laws. In *Employment Division v. Smith*, 494 U.S. 872 (1990), the Supreme Court held that the First Amendment does not bar the government from applying a neutral, generally applicable law to individuals whose actions are motivated by religious faith. The Court therefore abandoned the requirement that the government must establish a compelling interest to apply general statutes to religious practitioners. The case involved the state of Oregon's refusal to grant unemployment compensation to two drug counselors who were fired from their jobs because they had used peyote in a religious ceremony conducted by the Native American Church. The Court held that the Oregon criminal law outlawing the use of peyote was not directed at members of the church. Violations of this law therefore justified denying unemployment benefits to anyone (including religious practitioners) using the prohibited substance.

After *Smith*, the Constitution requires governments to accommodate religion in only three relatively narrow circumstances: The government must (1) accommodate religion in statutes that provide benefits based on highly individualized governmental assessments of the reasons for the relevant conduct; (2) accommodate religion when the religious conduct is combined with some other constitutional right, such as free speech; and (3) still demonstrate a compelling interest before applying a statute that singles out religiously motivated practices for unfavorable treatment.

Although the Court has reduced the protection of religion through constitutionally mandated accommodation, the accommodation principle has been incorporated into several statutes protecting religious practitioners. The broadest of these statutes—the federal Religious Freedom Restoration Act—was held unconstitutional by the Supreme Court because it went beyond Congress's authority under section five of the Fourteenth Amendment. Congress subsequently enacted a narrower federal statute requiring the government to accommodate religious practitioners in the land use and prison contexts. Many states also have enacted statutes requiring the accommodation of religious practitioners, usually by reimposing the requirement that the government must prove a compelling interest before applying general legal

regulations to individual actions motivated by religion. The Supreme Court has not yet ruled on the constitutionality of these statutes.

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References and Further Reading

- Eisgruber, Christopher L., and Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, University of Chicago Law Review 61 (1994): 1245.
- Laycock, Douglas, *The Remnants of Free Exercise*, Supreme Court Review 1 (1990).
- Lupu, Ira C., *Reconstructing the Establishment Clause: The Case Against the Discretionary Accommodation of Religion*, University of Pennsylvania Law Review 140 (1991): 555.
- Marshall, William P., *The Case Against the Constitutionally Compelled Free Exercise Exemption*, Case Western Reserve Law Review 40 (1989–1990): 357.
- McConnell, Michael W., *Accommodation of Religion*, Supreme Court Review 1 (1985).
- , *The Origins and Historical Understanding of Free Exercise of Religion*, Harvard Law Review 103 (1990): 1410.

Cases and Statutes Cited

- Bob Jones University v. U.S.*, 461 US 574 (1983)
- Bowen v. Roy*, 476 U.S. 693 (1986)
- Employment Division v. Smith*, 494 U.S. 872 (1990)
- Goldman v. Weinberger*, 475 U.S. 503 (1986)
- Jimmy Swaggart Ministries v. Board of Equalization of California*, 493 U.S. 378 (1990)
- Reynolds v. United States*, 98 U.S. 145 (1878)
- Sherbert v. Verner*, 374 U.S. 398 (1963)
- Thomas v. Review Board of Indiana*, 450 U.S. 707 (1981)
- United States v. Lee*, 455 U.S. 252 (1982)
- Wisconsin v. Yoder*, 406 U.S. 205 (1972)

See also Amish and Religious Liberty; Antipolygamy Laws; Belief–Action Distinction in Free Exercise Clause History; Conscientious Objection, the Free Exercise Clause; Exemptions for Religion Contained in Regulatory Statutes; Jehovah's Witnesses and Religious Liberty; Mormons and Religious Liberty; Release Time from Public Schools (For Religious Purposes); Religious Freedom Restoration Act; Seventh Day Adventists and Religious Liberty

ACCOMPLICE CONFESSIONS

A defendant in a multidefendant criminal trial who confesses to illegal conduct is making a direct admission regarding his acts. This confession is admissible against the confessing defendant in court. However, when a defendant's confession also implicates a co-defendant, the statement generally cannot be used as

evidence in prosecuting the nonconfessing co-defendant. The confession is considered inadmissible hearsay violating the nonconfessing co-defendant's rights under the Sixth Amendment confrontation clause.

Accomplice confessions have long been an issue due to concern over how "voluntary" the confessions extracted by police really are, as well as the reliability of statements given by confessing co-defendants eager to shift blame for their criminal acts to others. The U.S. Supreme Court has addressed this issue in a number of important cases.

In *Delli Paoli v. United States* (352 U.S. 232, 1957), the Court held that a confession admitted by one defendant that also implicated a co-defendant was admissible if jurors were told to disregard that part of the confession. The *Delli Paoli* holding led the New Jersey Supreme Court Committee on Evidence to recommend that the law be changed to disallow defendant statements implicating a co-defendant, unless all references to the co-defendant could be eliminated. This recommendation was rejected and states were temporarily left to make their own decisions regarding the admissibility of such statements.

The Court readdressed the issue in *Bruton v. U.S.* (391 U.S. 123, 1968), where it overruled its holding in *Delli Paoli*. It held that jury instructions limiting the consideration of statements implicating co-defendants did not satisfy the Sixth Amendment confrontation clause. However, the Court soon relaxed its stance, finding that in certain circumstances, an error allowing such a statement (a *Bruton* error) could be deemed harmless and thus not amount to a breach of the Sixth Amendment's confrontation rights.

In 1970, the Court concluded that an exception to the rule against hearsay must be evaluated by the due-process standards of the Fifth and Fourteenth Amendments instead of the Sixth Amendment confrontation clause. Its reasoning was that the confrontation clause was not designed to cope with the many factors involved in passing evidentiary rules and ensuring the fairness of trials. (See *Dutton v. Evans*, 400 U.S. 74, 1970.)

One long-recognized exception to the hearsay rule was when the evidence established the existence of a conspiracy. In such cases, a statement by a co-conspirator made in furtherance of the conspiracy was admissible against other co-defendants and the declarant was not required to testify at trial. (See Rule 801 (d)(2)E, Federal Rules of Evidence.) In *Bourjaily v. U.S.*, 483 U.S. 171 (1987), and *U.S. v. Inadi*, 475 U.S. 387 (1986), the Court held that this hearsay exception did not violate the confrontation clause. The Court later expanded this exception by allowing

defendant pleas establishing the existence of a conspiracy to be admissible at trial without the declarant testifying.

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References and Further Reading

- Campaigne, Carol, Joanne Constantino, Glenn A. Guarino, Kathy E. Hinck, Kristin McCarthy, Kristin, Caralyn A. Irwin J. Schiffres, Melissa K. Stull, Tim A. Thomas, and Mitchell J. Waldman. 29A *American Journal* 2d Evidence § 751 (1992).
- Choo, Andrew L. T. *Hearsay and Confrontation in Criminal Trials*. Oxford: Oxford University Press, 1996.
- Coady, C.A.J. *Testimony: A Philosophical Study*. Oxford: Oxford University Press, 1992.
- Wright, Charles Alan, and Kenneth W. Graham, Jr. 21A *Federal Practices and Procedures* 2d Evidence § 5064.1–5064.2 (West 1987).

Cases and Statutes Cited

- Bourjaily v. U.S.*, 483 U.S. 171 (1987)
- Bruton v. U.S.*, 391 U.S. 123 (1968)
- Delli Paoli v. United States*, 352 U.S. 232 (1957)
- Dutton v. Evans*, 400 U.S. 74 (1970)
- People v. Salko*, 47 NY2d 230 (1979)
- U.S. v. Inadi* (475 U.S. 387 (1986)
- United States Constitution, Fifth Amendment
- United States Constitution, Sixth Amendment
- United States Constitution, Fourteenth Amendment

See also **Confrontation and Compulsory Process**

ACT UP

ACT UP—the AIDS Coalition to Unleash Power—came together in March 1987 out of the charismatic exhortations of author and playwright Larry Kramer. Already central to the creation of the Gay Men's Health Crisis, Kramer had grown impatient with the responses by the government and pharmaceutical industry to the AIDS epidemic. No longer content simply to react to the crisis, ACT UP aspired to force change through direct action, confrontation, and media-savvy street theatre.

Central to the motivational ethos of the coalition was the conviction that persons living with AIDS (PWAs) were not passive victims of a disease, but individuals who must take control of their situations through self-empowerment, demanding that bureaucracies take the problem seriously. The *Denver Principles* announced this proactive stance. Framed in 1983, the *Principles* eschewed the labels "victim" and "patient" and enumerated the rights of PWAs along with recommendations and strategies to achieve those goals. ACT UP embraced the spirit of

the *Principles* and gave flesh to what had been merely abstract ideas.

The group's first demonstration took place on March 24, 1987, when it staged a protest on Wall Street over the monopoly and profiteering by Burroughs Wellcome, the manufacturer of AZT. Of the two hundred fifty participants, seventeen were arrested, launching an innovative model for activist organizing.

Although all facets of the AIDS crisis fell within the group's mission, ACT UP came to be especially associated with three broad issues. First, it effectively pressured medical corporations to develop safe and effective drug treatments and offer them at affordable prices to those who needed them. Second, activists insisted that governmental agencies, such as the Food and Drug Administration, put new AIDS drugs on a fast-track for approval. Finally, any entity perceived to be complicating the lives and treatments of PWAs was singled out for public humiliation and embarrassing publicity.

Over the years ACT UP achieved astonishing successes. It shut down the FDA to international attention (October 11, 1988), convinced the government to adopt innovative drug testing procedures (June 4–9, 1989), and pressured Burroughs Wellcome to cut the price of AZT 20 percent by interfering with trading on the floor of the New York Stock Exchange (September 14, 1989).

ACT UP's singular success relied in part on its accurate sense of how to get its message out beyond its members. Its logo—the motto “Silence = Death” in front of a pink triangle—became one of the best known symbols of the period. From its inception the group valued praxis over theory. Going far beyond the traditional protest picket lines, its actions tended to be well-conceived, high-style mediagenic events designed for visual and symbolic impact, such as the “die in” on Wall Street.

A hallmark of an ACT UP action was an intrusion into “inappropriate” spaces. These actions were known as “zaps,” a term and strategy revived from earlier countercultural and gay liberationist campaigns. On the other hand, ACT UP rarely pursued its agenda in the courtroom. The few cases involving the organization more typically concerned its right to protest than AIDS issues per se.

At its height, ACT UP spawned more than seventy chapters around the country and the world. In addition, it spun off other, even more radical organizations such as Queer Nation, which fought against homophobia and assimilation of the gay community into heterosexual normalcy, and the Lesbian Avengers.

According to its own description, ACT UP is a group “united in anger.” Although that visceral

drive accounts for its great intensity, such emotional intensity could not be sustained over an extended period. By the 1990s, ACT UP was in decline, and today comparatively few chapters remain active. AIDS claimed many of its early charismatic leaders, and others left to pursue AIDS-related causes in more professional roles. As better drugs made AIDS more manageable for many PWAs, there was less “anger” for ACT UP to draw upon. Finally, ACT UP chapters suffered internal dissensions over whether the organization should remain with its single focus or branch out into wider issues of social justice.

Whatever the fortunes of the organization, ACT UP has an enduring legacy in its achievements to improve the lives of PWAs—in terms of quantity, through the demand for new drugs made rapidly available at affordable prices, and quality, by confronting AIDS-negative policies wherever found. Its refreshingly uninhibited and creative protests have had an enduring impact on the way ordinary citizens come together to demand recognition of their civil liberties.

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References and Further Reading

- ACT UP-New York. *ACTUP Capsule History*, www.actupny.org.
 Kramer, Larry. *Reports from the Holocaust: The Making of an AIDS Activist*. New York: St. Martin's Press, 1989.
 Shepard, Benjamin, and Ronald Hayduk, eds. *From ACT UP to the WTO: Urban Protest and Community Building in the Era of Globalization*. London: Verso, 2002.

See also **Demonstrations and Sit-ins; Gay and Lesbian Rights**

ACTON, LORD JOHN (1834–1902)

Lord John Acton, the great liberal academic who dominated the field of history during the latter part of the Victorian Age, was born into a family of the upper echelon of society in Italy and moved to England at the age of three. There, Acton faced persecution for his Catholic religious beliefs. Lord Acton went on to become a member of the first Vatican Council, where he advocated for political and religious freedom. At times throughout his career, he was highly critical of the Vatican for intolerance and persecution. He attended university in Germany, was elected a member of the House of Commons in 1859, and acquired and was the editor of the periodical the *Rambler*, which he shaped into a liberal journal of Catholicism. In 1895, Acton was appointed the Regius Professor of Modern History at Cambridge University. He began work on a universal history that

would track religious virtue and the expansion of liberty, but he died before completion.

Acton can be characterized as being critical of excessive power in only a few hands at the national level, in his Catholic Church as well as in government. Acton is best known for the famous phrase “power tends to corrupt, and absolute power corrupts absolutely.” He was suspicious of unchecked nationalism, meaning a political system that governs by a general will for an entire state, since it stood to undermine traditional liberties. For example, he hailed the secession of the South from the Union in the Civil War as the realization of states’ rights as the only check on absolutist rule.

Acton favored the slow evolution of institutions above broad-sweeping reactionary measures; law ought to parallel, not spur, history. He called for expanded personal freedom but viewed the central government as a hindrance to society’s progress on this front. He believed that a national government must have its authority divided in order safeguard liberty, akin to checks and balances. Acton also believed that liberty encompassed the rights of minorities—persons who fall outside the so-called majority group that controls the government. Acton’s views on nationalist power and liberty for all are manifest in the American system of checks and balances. This includes the Supreme Court’s protection of the civil liberties of so-called minority groups from laws that persecute them, such as the Amish or Jehovah’s Witnesses, while striking a necessary balance with majoritarian rule.

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References and Further Reading

- Acton, Lord John Emerich Edward. *Lectures on Modern History*. London: Macmillan and Co., 1930.
- Matthew, David. *Lord Acton and His Times*. University, Ala.: University of Alabama Press, 1968.
- Watson, George. *Lord Acton’s History of Liberty: A Study of His Library, with an Edited Text on His History of Liberty Notes*. Aldershot, England: Scolar Press, 1994.

ACTUAL MALICE STANDARD

In the landmark case of *The New York Times v. Sullivan*, 376 U.S. 25 (1964), the Supreme Court developed the actual malice concept. An advertisement (equivalent to a story for the Court) appeared in the Times that contained false and defamatory information about a commissioner of the city of Montgomery, Alabama. The commissioner sued, but the Supreme Court, while acknowledging the falsity and defamatory nature of the story, ruled that if the press

was to have freedom to write about public officials, it needed to be given a substantial amount of legal protection. A newspaper would only be culpable, the Court ruled, if it acted with actual malice, which the Court went on to define as “with knowledge that it [the story] was false or with reckless disregard of whether it was false or not.” In *Sullivan* this applied to suits brought by public figures; the argument was that these individuals had thrust themselves into the limelight and should expect more critical stories about themselves, and that, given their public position, they would have an easier opportunity to rebut allegations and set the record straight.

In later cases the Court extended the applicability of the actual malice standard to public figures (in *Sullivan* it was limited to public officials), but it declined to extend it to public issues. Deciding who is a public figure, however, has proven to be no easy matter. It also has not proven straightforward to obtain the information necessary to determine whether a paper acted with actual malice in its reporting.

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References and Further Reading

- O’Brien, David. *Constitutional Law and Politics*, 5th ed., vol. 2. New York: W.W. Norton and Company, 2003.
- Sullivan, Kathleen, and Gerald Gunther. *Constitutional Law*, 15th ed. New York: Foundation Press, 2004.

Cases and Statutes Cited

The New York Times Company v. Sullivan, 376 U.S. 25 (1964)

See also Freedom of the Press: Modern Period (1917–Present); Herbert v. Lando, 441 U.S. 153 (1979); *Public Figures; Public Officials*

ADMINISTRATIVE SEARCHES AND SEIZURES

The Fourth Amendment requires all searches and seizures to be reasonable. The Supreme Court has interpreted reasonableness to require a warrant based on probable cause, unless a recognized exception to this general rule applies. One such exception is for “administrative searches,” in which the government claims that the search advances administrative interests, not traditional law enforcement objectives.

The Court first recognized an “administrative search” exception to usual Fourth Amendment rules in the 1967 companion cases of *Camara v. Municipal Court*, 387 U.S. 523, and *See v. City of Seattle*, 387

U.S. 541. At issue in the cases was the constitutionality of warrantless entries into private property to inspect for municipal housing code and fire code violations, respectively. In addressing the reasonableness of the searches, the Court treated the warrant and probable cause requirements differently. On the one hand, emphasizing the historical importance of search warrants, the Court found no justification for the government to conduct administrative inspections without a warrant, in the absence of an emergency or consent.

On the other hand, the Court reasoned that requiring the government to articulate individualized suspicion that violations existed within the areas to be searched would threaten the efficacy of an administrative inspection program designed to prevent such violations. Instead, the Court developed a standard of “probable cause” for administrative searches that requires only that the search be “reasonable.” To measure reasonableness in the administrative context, the Court invoked a balancing test, weighing the government’s interest in the search against the privacy expectations implicated by the search.

Since *Camara* and *See*, the Court has backed away from its insistence upon a warrant to support administrative searches, emphasizing instead the more flexible requirement of reasonableness. For example, in *New York v. Burger*, the Court upheld a state statute that authorized police to conduct warrantless searches of businesses involved in the dismantling of automobiles. The Court reasoned that in the context of a “closely regulated” industry, individuals have reduced expectations of privacy. Therefore, both the warrant and probable cause requirements have reduced application. Departing from the earlier concept of an administrative warrant, the Court held that a regulatory scheme authorizing warrantless searches of a closely regulated industry is reasonable as long as three requirements are met: (1) the government must have a substantial interest in the scheme; (2) the warrantless inspections must be necessary to further the regulatory scheme; and (3) the inspection program must provide an adequate substitute for a warrant by notifying property owners that the search is authorized and by limiting the discretion of the inspecting officers.

The Court’s willingness to rely on a balancing test to determine reasonableness, rather than on the warrant and probable cause rules, is not limited to searches of closely regulated industries. More recently, the Court has recognized a “special needs” exception that applies whenever a “special need” other than the ordinary needs of law enforcement renders the warrant and/or probable cause requirements impracticable. Applying this exception, the Court has upheld,

for example, drug testing of railroad personnel to enhance railway safety, of certain U.S. Customs agents to ensure their fitness and integrity, and of public school students to detect and prevent drug use by youths.

Whether a search program advances administrative or otherwise “special” needs, as opposed to ordinary law enforcement, is not always apparent. In *Burger* (*New York v. Burger*, 482 U.S. 691, 1987), for example, the searches of automobile-dismantling businesses were conducted by police officers, and at least part of the statute’s purpose was to reduce criminal activity relating to car thefts. Nevertheless, the Court treated the warrantless inspections as administrative searches of a closely inspected industry, not as traditional law enforcement searches. In doing so, the Court did not appear troubled that the state’s ultimate objective may have been to reduce crime. Rather, the Court focused on the mechanism with which the state had chosen to pursue that objective, which the Court characterized as administrative.

In contrast, when the government’s mechanism for pursuing its objective bears too much resemblance to traditional law enforcement, the Court will treat it as such, despite the purportedly “special” purpose that motivates it. For example, in *Ferguson v. Charleston*, 532 U.S. 67 (2001), the Court addressed the constitutionality of testing pregnant women for drugs at public hospitals in order to reduce the number of drug-influenced babies. The threat of prosecution was used as leverage to encourage women who tested positive to obtain substance abuse counseling. The government argued that the drug testing advanced a special need beyond traditional law enforcement and, therefore, could be conducted without a warrant or probable cause. The Court disagreed, emphasizing not the government’s ultimate objective but the mechanism by which it had chosen to pursue that objective. Despite the government’s willingness to forego criminal charges against women who obtained counseling, the “immediate objective” of the drug testing was to generate evidence for use in a potential criminal case.

Although courts and commentators often treat administrative and special needs searches separately, both lines of cases can be seen as part of the same doctrinal approach. In both contexts, the Court relaxes or does away with the usual probable cause and warrant requirements because of the nature of the governmental interest; instead, it determines “reasonableness” by the balancing test first articulated in *Camara*. Courts similarly turn to balancing, and away from warrants and probable cause requirements, to weigh the reasonableness of border searches, airport searches, and checkpoints. These lines of cases could be increasingly important as mass surveillance

continues to develop as a precautionary security mechanism, testing the line between traditional law enforcement and “special” objectives.

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References and Further Reading

- Dressler, Joshua. *Understanding Criminal Procedure*, 3rd ed. New York: LexisNexis, 2002, 323–353.
- Stuntz, William J., *Implicit Bargains, Government Power, and the Fourth Amendment*, *Stanford Law Review* 44 (1992): 553.
- Sundby, Scott E., *Protecting the Citizen “Whilst He Is Quiet”: Suspicionless Searches, “Special Needs” and General Warrants*, *Mississippi Law Journal* 74 (2004): 501.

Cases and Statutes Cited

- Camara v. Municipal Court*, 387 U.S. 523 (1967)
- Ferguson v. Charleston*, 532 U.S. 67 (2001)
- New York v. Burger*, 482 U.S. 691 (1987)
- See v. City of Seattle*, 387 U.S. 541 (1967)

See also Airport Searches; Checkpoints (roadblocks); Drug Testing; Probable Cause; Search (General Definition); Search Warrants

ADOLESCENT FAMILY LIFE ACT

In 1981, Congress enacted the Adolescent Family Life Demonstration Grants Act (AFLA) in response to the severe social and economic consequences that often follow pregnancy and childbirth among unmarried adolescents. The enactment of AFLA was also prompted by Congress’s insight that the federal government has a responsibility to help states develop adequate approaches to the serious and increasing problems of adolescent premarital sexual relations and pregnancy.

Among the stated purposes of the AFLA is to find effective means, within the context of the family, of reaching adolescents before they become sexually active in order to promote self-discipline and other prudent approaches to the problem of adolescent premarital sexual relations and to promote adoption as an alternative to abortion. The act further indicates that since the problems of adolescent premarital sexual relations, pregnancy, and parenthood are multiple and complex, such problems are best approached through a variety of integrated and essential services provided to adolescents and their families by other family members, religious and charitable organizations, voluntary organizations, and other groups in the private sector. Furthermore, despite the fact that teenage females had, at the time, a fundamental right to an abortion, grants were to be made only to

programs that did not provide abortions, abortion referrals, or abortion counseling.

The only statutory restrictions on the use of AFLA funds are that none of the AFLA grants may be used for projects that provide abortion counseling, and the grants may be made only to projects or programs that do not promote, advocate, or encourage abortion. Furthermore, AFLA funds cannot be used to provide family planning services if such services are available elsewhere in the community.

The grants endorsed by AFLA are given to organizations providing two basic kinds of services: care services and prevention services. Care services, or necessary services for the provision of care to pregnant adolescent parents and adolescent parents, include pregnancy testing; maternity counseling; adoption counseling and referral services; primary and preventive health services, including prenatal and postnatal care; nutrition information and counseling; referral to appropriate pediatric care; referral to maternity home services and mental health services; child-care sufficient to enable the adolescent parent to continue his or her education; consumer education and homemaking; and transportation. Preventive services, or necessary services to prevent adolescent sexual relations, include referral for screening and treatment of venereal disease and educational services relating to family life and problems associated with adolescent premarital sexual relations, including information on adoption, education on the responsibilities of sexuality and parenting, and assistance to parents, schools, youth agencies, and adolescents and preadolescents concerning self-discipline in human sexuality.

The seminal case dealing with AFLA is *Bowen v. Kendrick*, 108 S. Ct. 2562 (1988). In 1983, this lawsuit against the Secretary was filed in the U.S. District Court for the District of Columbia by appellees, a group of federal taxpayers, clergymen, and the American Jewish Congress. Seeking declaratory and injunctive relief, appellees challenged the constitutionality of the AFLA on the grounds that, on its face and as applied, the statute violated the religious clauses of the First Amendment. Considering the federal statute on its face and as applied, the District Court ruled that the statute violated the establishment clause of the First Amendment insofar as it provided for the involvement of religious organizations in the federally funded program.

The U.S. Supreme Court upheld the constitutionality of the AFLA. The Court found that although the AFLA provided for grants to religious and other institutions, it did not have the primary effect of advancing religion. Moreover, the Court found that the AFLA would not lead to excessive government entanglement with religion.

After protracted litigation, the parties reached a settlement agreement on January 19, 1993, which established that AFLA-funded sexuality education may not include religious references, may not be offered in a site used for religious worship services, or offered in sites with religious iconography. Moreover, the agreement established that information disbursed by the AFLA-funded programs must be medically accurate.

The effect of the AFLA on civil rights in American has the potential to restrict or hinder an adolescent's ability to make an informed choice regarding her right to have an abortion. By the language of the act, institutions that receive grants are encouraged to provide information about adoption and implicitly discouraged from providing information dealing with any aspect of the adolescent's right to an abortion. This could particularly affect segments of the population that do not have the requisite financial resources to take their pregnant adolescents to private institutions, but rather must rely on those that receive AFLA grants.

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References and Further Reading

- Jones, Julie, *Money, Sex, and the Religious Right: A Constitutional Analysis of the Federally Funded Abstinence-Only-Until-Marriage Sexuality Education*, Creighton Law Review 35(2002): 1075.
- Petrich, Alexandra, *Bowen v. Kendrick. Retreat from Prophylaxis in Church and State Relationships*, Hastings Constitutional Law Quarterly 16 (1989): 513.

Cases and Statutes Cited

- 42 U.S.C. §300z(a)(5)
42 U.S.C. §300z-1(a)(7)
42 U.S.C. §300z-1(a)(4)
42 U.S.C. §300z-1(a)(8)
42 U.S.C. §300z-1(b)(1)
42 U.S.C. §300z(b)(2)
42 U.S.C. §300z(a)(8)(A)
42 U.S.C. §300z(a)(8)(B)
42 U.S.C. §300z(10)(a)
42 U.S.C. §300z-3(b)(1)
S. Rep. No. 161, 97th Cong., 1st Sess. 20 (1981)
S. Rep. No. 161, 97th Cong., 1st Sess. 4 (1981)

See also **Abortion; Bowen v. Kendrick, 487 U.S. 589 (1988)**

AFFIRMATIVE ACTION

Affirmative action has emerged as a controversial issue in American political and constitutional discourse. The phrase, which covers a range of meanings,

encompasses programs designed to help women and particularly African Americans and other historically disadvantaged minorities.

Affirmative action only became a national preoccupation after the Supreme Court and Congress first took steps in the 1950s and 1960s to outlaw *de jure* discrimination. Although the Wagner Act of 1935 used the term as a remedy for unfair labor practices, President John F. Kennedy's Executive Order 10925 introduced it into civil rights discourse by directing government contractors to take "affirmative action" to employ persons without regard to "race, creed, color or national origin." This meaning of the concept, which looks to recruitment to expand applicant pools, has proved relatively uncontroversial. Yet, President Lyndon B. Johnson in his June 1965 speech at Howard University implied that more might be required. A second familiar application of affirmative action involves race-conscious decision-making that gives some degree of preference to disadvantaged minorities in college admissions, employment, or government contracting.

This latter use of the concept has proved controversial. Proponents of race-conscious programs argue that they are appropriate vehicles to remedy past discrimination against certain historically disadvantaged minorities and to create opportunity for members of those groups to succeed in America. Some, like John Hart Ely, argued that racial classifications that a white majority used to benefit minorities were of an entirely different character than those used to oppress minorities. Conversely, critics condemn affirmative action as reverse discrimination that unfairly disadvantages members of other groups who may have been innocent of any personal wrongdoing.

As a constitutional matter the issue turns in part on whether one believes that the equal protection clause of the Fourteenth Amendment forbids government from drawing racial classifications, in which case race-conscious programs are suspect, or whether it simply forbids subjugation of minority groups, in which case a constitutional distinction might be drawn between benevolent and malevolent racial classifications.

In a series of divided decisions, the Supreme Court has held that race-conscious programs must be subject to strict scrutiny that requires that any race classification be narrowly tailored to serve a compelling state interest. As such, it has refused to distinguish between race classifications that benefit or burden a disadvantaged minority. The Court has rejected redressing past societal discrimination as an interest justifying racial classification.

The Supreme Court's 2003 decisions in *Grutter v. Bollinger*, 539 U.S. 306 (2003), and *Gratz v. Bollinger*,

539 U.S. 244 (2003), addressed race preferences in university admissions. In *Grutter*, the Court held that diversity is a compelling state interest that justifies considering race as one diversity factor among others in a process that makes an individual judgment in each applicant. The Court deemed racial quotas unconstitutional but allowed schools to use numerical targets to guide decisions. *Grutter* expanded the diversity rationale by recognizing that it helped create “one nation indivisible.” In *Gratz* the Court rejected a formulaic approach that awarded a specified number of points to persons based on race.

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References and Further Reading

- Anderson, Terry H. *The Pursuit of Fairness: A History of Affirmative Action*. Oxford: Oxford University Press, 2004.
 Bowen, William G., and Derek Bok. *The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions*. Princeton, NJ: Princeton University Press, 1998.
 Chin, Gabriel J., ed. *Affirmative Action and the Constitution*, 3 vols. New York: Garland Publishing, Inc., 1998.

Cases and Statutes Cited

- Gratz v. Bollinger*, 539 U.S. 244 (2003)
Grutter v. Bollinger, 539 U.S. 306 (2003)
Regents of the University of California v. Bakke, 438 U.S. 265 (1978)

See also Equal Protection of Law (XIV); Fourteenth Amendment; Johnson, Lyndon Baines

AGOSTINI v. FELTON, 521 U.S. 203 (1997)

In *Agostini v. Felton*, the U.S. Supreme Court reversed its 1985 decision in *Aguilar v. Felton*, 473 U.S. 402 (1985) (and portions of its companion decision in *School District of Grand Rapids v. Ball*, 473 U.S. 373, 1985), in which the Court had struck down government programs that provided remedial instruction in secular subjects on the grounds of religious schools. The *Agostini* decision, decided by a five-to-four vote, reflected a shift in the Court’s personnel between 1985 and 1997 and the ongoing modification of the Court’s strong separationist jurisprudence reflected in the two earlier decisions.

In *Aguilar*, the Court considered the constitutionality of the use of federal funds provided by Title I of the Elementary and Secondary Education Act (ESEA) to pay the salaries of public school teachers who taught

remedial reading and math courses to low-income children attending parochial schools in New York City. The Court in *Aguilar* ruled in a five-to-four vote that the government’s monitoring of the activities of these publicly funded teachers constituted an excessive entanglement between church and state in violation of the establishment clause.

More than a decade after the *Aguilar* decision, petitioners filed motions seeking relief from the injunction previously entered in the case that barred the use of publicly funded teachers in the parochial schools of New York City. The petitioners argued that several of the Court’s more recent decisions called into question the ongoing validity of the *Aguilar* decision, especially the decision in *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993), in which the Court had refused to presume that a state-funded interpreter working in a religious school would engage in religious indoctrination or constituted a symbolic union of government and religion. The petitioners also noted that five of the Court’s justices had expressed the view in *Board of Education, Kiryas Joel Village School District v. Grumet*, 512 U.S. 687 (1994), that *Aguilar* should be reconsidered or overruled.

The Supreme Court took the *Agostini* case and reversed. Justice Sandra Day O’Connor, who had dissented in the *Aguilar* case, wrote the opinion for the majority, finding that the provision of remedial instruction in secular subjects by publicly funded teachers did not violate the establishment clause, even if the instruction took place on the grounds of a religious school. In particular, the Court rejected the presumption of the *Aguilar* decision that a public school teacher who teaches on the property of a religious school is likely to inculcate students with the religious beliefs of that school. The *Agostini* Court also emphasized that any governmental aid under Title I comes to the religious school “only as a result of the genuinely independent and private choices” of those low-income children (and their parents) who attended a religious school. This “private choice” aspect of the Court’s decision would prove important to the Court in subsequent cases.

The four dissenters sharply criticized the majority’s decision. Justice David Souter, for example, claimed that “there is simply no line that can be drawn between instruction paid for at taxpayers’ expense and the instruction in any subject that is not identified as formally religious.”

The *Agostini* decision became an important precedent for the Court as it considered additional cases involving other forms of government aid to religious schools that involved private choice. For example, in

Zelman v. Simmons-Harris, 536 U.S. 639 (2002), the Court relied heavily on its *Agostini* decision to uphold the constitutionality of school vouchers.

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References and Further Reading

- Bunnow, Jeremy T., *Reinventing the Lemon: Agostini v. Felton and the Changing Nature of Establishment Clause Jurisprudence*, Wisconsin Law Review (1998): 1133–1180.
- Roberson, Doug, *Recent Development: The Supreme Court of the United States, 1996 Term: The Supreme Court's Shifting Tolerance for Public Aid to Parochial Schools and the Implications for Educational Choice: Agostini v. Felton*, 117 S. Ct. 1997 (1997), Harvard Journal of Law and Public Policy 21 (1998): 861–879.
- Whitehead, Daniel P., *Note: Agostini v. Felton: Rectifying the Chaos of Establishment Clause Jurisprudence*, Capital University Law Review 27 (1999): 639–666.

Cases and Statutes Cited

- Aguilar v. Felton*, 473 U.S. 402 (1985)
- Board of Education, Kiryas Joel Village School District v. Grumet*, 512 U.S. 687 (1994)
- School District of Grand Rapids v. Ball*, 473 U.S. 373 (1985)
- Witters v. Washington Department of Services*, 474 U.S. 481 (1986)
- Zelman v. Simmons-Harris*, 536 U.S. 639 (2002)
- Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993)

See also **Establishment Clause (I): History, Background, Framing; State Aid to Religious Schools**

AGUILAR v. FELTON, 473 U.S. 402 (1985)

In its 1985 decision in *Aguilar v. Felton*, the U.S. Supreme Court declared unconstitutional a government program that provided remedial instruction to low-income children attending parochial schools—a decision that reflected the strong separationist jurisprudence adhered to by a narrow majority of the Court's justices during that era.

Throughout the 1970s and early 1980s, the Court decided a large number of cases involving the constitutionality of various types of governmental financial assistance to religious schools. Throughout this time period, the Court assessed the constitutionality of such aid in accord with what was known as the “Lemon test,” drawn from the Court's highly influential decision in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Under the Lemon test, in order for a governmental aid program to survive scrutiny under the establishment clause, (1) it must have a secular legislative purpose; (2) its principal or primary effect must be one that neither advances nor inhibits religion; and

(3) it must not foster an excessive government entanglement with religion.

In *Aguilar v. Felton*, the Court determined that the aid program in question violated the third prong of the Lemon test. In this case, New York City used federal funds it received under Title I of the Elementary and Secondary Education Act (ESEA) to pay, among other things, the salaries of public school teachers who taught remedial reading and math courses to low-income children attending parochial schools in the city. To avoid an establishment clause violation, these teachers taught in special classrooms at the religious schools that were devoid of religious symbols, used secular instructional materials, and were monitored by the city through unannounced visits to make sure that they did not unwittingly inculcate their students with the religious beliefs of the parochial schools during the course of their instruction. The Supreme Court, in a five-to-four decision with Justice William Brennan writing for the majority, found that this monitoring process constituted an excessive entanglement of church and state in violation of the establishment clause.

The same day as the *Aguilar* decision, the Court decided a similar case involving the constitutionality of a state program in Michigan that also provided remedial instruction to low-income children in parochial schools. In that case, *School District of Grand Rapids v. Ball*, 473 U.S. 373 (1985), the Court, in another five-to-four decision, found that the aid program had the potential to “impermissibly advance religion” in violation of the second prong of the Lemon test because “the teachers participating in the programs may become involved in intentionally or inadvertently inculcating particular religious tenets or beliefs.”

In a sense, the New York City program provided what was missing from the Michigan program: careful monitoring to make sure that such inculcation did not happen. But in *Aguilar*, the Court found that the monitoring process, which the Court described as “a permanent and pervasive state presence in the sectarian schools receiving aid,” unduly entangled the government in the activities of the parochial schools in violation of the establishment clause. Therefore, both aid programs—one with governmental monitoring and one without—were unconstitutional. As a result of the *Aguilar* decision, remedial instruction to low-income parochial school children in New York City continued but at considerable public expense: typically by providing instruction in a publicly provided trailer parked near a parochial school.

The majority's decisions in *Aguilar* and *Ball* provoked bitter dissents. Chief Justice Warren Burger, for example, in his *Aguilar* dissent accused the majority of exhibiting “paranoia” and “nothing less than

hostility toward religion and the children who attend church-sponsored schools.” Justice Sandra Day O’Connor labeled the decision “tragic” and ridiculed the majority’s notion that teachers “are likely to start teaching religion because they have walked across the threshold of a parochial school.” She noted that the nineteen-year track record of the Title I program revealed not one instance in which a teacher “attempted to indoctrinate the students in particular religious tenets.”

In some ways, the *Aguilar* and *Ball* decisions constituted the “high-water” mark of the Court’s separationist jurisprudence. Thereafter, aided by personnel changes, the Court began to chip away at this jurisprudence and finally, in 1997, reversed the *Aguilar* and *Ball* decisions in *Agostini v. Felton*, 521 U.S. 203 (1997), in which it rejected its earlier presumption that publicly funded teachers of remedial reading and math in religious schools would inculcate their students with religious values.

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References and Further Reading

- Roberson, Doug, *Recent Development: The Supreme Court of the United States, 1996 Term: The Supreme Court’s Shifting Tolerance for Public Aid to Parochial Schools and the Implications for Educational Choice*: *Agostini v. Felton*, 117 S.Ct. 1997 (1997), Harvard Journal of Law and Public Policy 21 (1998): 861–879.
- Whitehead, Daniel P., *Note: Agostini v. Felton: Rectifying the Chaos of Establishment Clause Jurisprudence*, Capital University Law Review 27 (1999): 639–666.

Cases and Statutes Cited

- Agostini v. Felton*, 521 U.S. 203 (1997)
- Lemon v. Kurtzman*, 403 U.S. 602 (1971)
- School District of Grand Rapids v. Ball*, 473 U.S. 373 (1985)

See also **Burger, Warren E.; Establishment Clause (I): History, Background, Framing; Lemon Test; State Aid to Religious Schools**

AIRPORT SEARCHES

Airplane piracy increased in occurrence and success in the 1960s, leading to the creation of a 1968 task force that developed a hijacker detection and deterrence system. The system included severe penalties for air piracy, notices to passengers of the possibility of a preboarding search, the use of a hijacker profile to identify “selectees” for further investigation, magnetometer searches, interviews with selected passengers, and frisks or searches of suspected passengers. As the program was originally crafted, passengers who

triggered the magnetometer were only searched if they also were selected under the profile and could not provide sufficient identification. As a result of the government’s role in requiring the search and specifying its nature, courts concluded that airport searches, even when performed by privately employed guards, are subject to the Fourth Amendment. In *United States v. Lopez*, 328 F. Supp. 1077 (E.D.N.Y. 1971), a court relied upon the then recently decided opinion in *Terry v. Ohio*, 392 U.S. 1 (1968), to deem these initial passenger searches reasonable.

In 1973, the government expanded air piracy prevention efforts by requiring electronic screening of all passengers and their carry-on items. Passengers were subject to heightened screening if they exhibited suspicious behavior or triggered the magnetometer. While subject to the Fourth Amendment, the screening did not require a warrant on account of the extreme risk presented by passengers with weapons; because advanced warning of the search was given; because the search applied to all passengers and generally lacked stigma; and because the search occurred before other passengers and airline employees, thus reducing the risk of police wrongdoing. In *United States v. Davis*, 483 F.2d 893 (9th Cir. 1973), a court determined that the new scheme was reasonable and fell under the administrative search exception to the Fourth Amendment, provided that an individual could avoid the screening by not boarding the plane. Furthermore, the screening would be unreasonable if the administrative purpose of preventing air piracy was “distorted” by other general law-enforcement objectives, such as drug interdiction or searches for large amounts of currency.

Outside the boarding context, law enforcement agents accost individuals for an investigatory stop based on “drug courier” profiling. Such profiles alone do not grant police justification to engage in an investigatory stop. However, critics have argued that the courts have effectively allowed the profiles to justify a stop. David Cole, in *No Equal Justice*, argued that the “drug courier profile is a scattershot hodgepodge of traits and characteristics so expansive that it potentially justifies stopping anybody and everybody.”

The 9/11 event and the War on Terrorism focused public attention on the need to prevent air piracy, especially because the security regulations in place did not prohibit passenger possession of the box cutters and small knives used to hijack the four planes. Shortly after the attacks, the American Civil Liberties Union changed its 1973 position that the use of magnetometers violated the Fourth Amendment. The Department of Homeland Security assumed responsibility for passenger screening and implemented

plans for the Enhanced Computer Assisted Passenger Prescreening System, a program to identify risky passengers, who are then subjected to heightened screening and interviews.

The agency considered a “trusted traveler” system, in which prescreened passengers could avoid the most intense screening. Checked baggage is now matched to passengers and removed from the plane if the passenger fails to board. Additionally, checked baggage is subjected to random electronic and hand searches, and dog sniffs. At times of high terrorism risk as determined by the agency, vehicles approaching airports can be subject to search as well.

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References and Further Reading

- Airline Passenger Security Screening: New Technologies and Implementation Issues*. National Materials Advisory Board, National Academies Press, 1996.
- Becton, Charles L., *The Drug Courier Profile: All Seems Infected That Th' Infected Spy, As All Looks Yellow to the Jaundic'd Eye*, N.C.L. Rev. 65 (1987): 417.
- Brill, Steven. *After, the Rebuilding and Defending of America in the September 12 Era*. New York: Simon & Schuster, 2003.
- Cole, David. *No Equal Justice, Race and Class in the American Criminal Justice System*. New York: The New Press, 1999.
- LaFave, Wayne R. *Search and Seizure, a Treatise on the Fourth Amendment*, 3rd ed. St. Paul, MN: West Group 1996.
- United States v. Davis*, 482 F.2d 893 (9th Cir. Cal. 1973).
- United States v. Lopez*, 328 F. Supp. 1077 (E.D.N.Y. 1971).

Cases and Statutes Cited

- United States v. Davis*, 483 F.2d 893 (9th Cir. 1973) (Government's role in airport searches is dominant, subjecting such searches to the Fourth Amendment.)
- United States v. Lopez*, 328 F. Supp. 1077 (E.D.N.Y. 1971) (Initial passenger screening system is valid until *Terry* standard.)

See also Administrative Searches and Seizures; American Civil Liberties Union; Department of Homeland Security; Electronic Surveillance, Technological Monitoring and Dog Sniff; 9/11 and the War on Terrorism; Profiling (including DWB); Right to Travel; Search (General Definition); *Terry v. Ohio*, 392 U.S. 1 (1968); Warrantless Searches

AKRON v. AKRON CENTER FOR REPRODUCTIVE HEALTH, 462 U.S. 416 (1983)

After the 1973 decision of *Roe v. Wade*, 410 U.S. 113 (1973), a myriad of legislative responses to *Roe* held that the right of privacy encompasses a woman's right

to decide whether to terminate her pregnancy. In these responses the states were attempting to determine which restrictions on and regulations of abortion were constitutionally valid. A February 1978 abortion ordinance passed by the city of Akron, Ohio, was part of this wave of legislative responses. The ordinance contained seventeen provisions, five of which were at issue in *Akron v. Akron Center for Reproductive Health*. The Court, with three justices dissenting, found that all five of the provisions at issue were unconstitutional. In doing so the Court reiterated that a woman's right to an abortion is not unqualified; however, restrictive state regulations of a woman's right to choose must be supported by a compelling state interest.

The first provision of the ordinance that the Court addressed provided that abortions performed after the first trimester of pregnancy must be performed in a hospital. In finding the provision to be unconstitutional, the Court reaffirmed *Roe*'s recognition of the state's interest in a woman's health. Thus, at the end of the second trimester, the state may regulate the abortion procedure if the regulation reasonably relates to the preservation and protection of maternal health. In this case, however, the hospital requirement imposed a heavy and unnecessary burden on a woman's access to an abortion; thus, the city failed to demonstrate a compelling interest.

The requirement was heavy because an abortion at a hospital would cost twice as much as at a clinic and because the woman might need to travel to find a hospital that would perform the abortion. The requirement was unnecessary because current medical knowledge indicates that second trimester abortions have become substantially safer. Furthermore, medical evidence indicates that second trimester abortions can be performed safely in outpatient clinics.

The second provision of concern to the Court was that a physician must obtain the informed written consent of one of the parents of a minor below the age of fifteen. In reviewing this provision, the Court acknowledged that the state has an interest in encouraging parental involvement in their minor child's decision to have an abortion. However, it found the consent provision in the ordinance to be unconstitutional because, contrary to the Court's holding in *Bellotti v. Baird (Bellotti II)*, 443 U.S. 622, 1979), the ordinance did not create any procedures for allowing a minor to avoid the consent requirement.

The third provision required an attending physician to make certain specified statements to the patient and/or her parent (if parental consent was required) to ensure that the consent for the abortion

was truly informed. In considering this provision, the Court reaffirmed its previous holding in *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52 (1976), that a state could constitutionally require a woman to certify in writing her consent to the abortion and that her consent is informed and freely given. However, the Court found that it was the responsibility of the patient's physician to ensure that appropriate information was relayed to enable her to give informed consent. The state may not decide what information a woman must be given before she chooses to have an abortion. Furthermore, much of the information required to be given by the Akron ordinance was not designed to inform the woman, but rather to persuade her to carry the fetus to term.

In the fourth provision, a twenty-four-hour waiting period was mandated between the signing of the consent form and the performance of the abortion. The Court found that Akron failed to demonstrate that any legitimate state interest was furthered by an arbitrary and inflexible waiting period. There was no evidence that a waiting period would allow the abortion to be performed more safely or that the state's interest in the woman giving informed consent was reasonably served by the delay.

Finally, the fifth provision required that the fetal remains be disposed of in a humane and sanitary manner. The city of Akron contended that it enacted the provision to prevent the dumping of aborted fetuses on garbage piles. However, the Court found that there was uncertainty as to whether the provision had such limited intent. It was possible to interpret the statute as requiring that a decent burial be given to an embryo. The Court found that this uncertainty caused the provision to violate the due process clause in that the provision failed to give the physician the required fair notice as to what conduct was prohibited.

Although *Akron* answered a number of questions regarding the type of abortion regulations that a state could enact, it left a number of questions unanswered that would be the subject of subsequent abortion litigation.

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Cases and Statutes Cited

Bellotti v. Baird, 443 U.S. 622 (1979)
Planned Parenthood of Central Mo. v. Danforth, 428 U.S. 52 (1976)
Roe v. Wade, 410 U.S. 113 (1973)
 See also **Abortion; *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52 (1976); Reproductive Freedom; *Roe v. Wade*, 410 U.S. 113 (1973)**

ALCORTA v. TEXAS, 355 U.S. 28 (1957)

In *Alcorta*, the Supreme Court held that the Fourteenth Amendment due process clause bars prosecutors from knowingly presenting perjured testimony in a criminal case.

Alcorta stabbed his wife to death after finding her in a parked car with another man, Castilleja. Charged with murder, Alcorta claimed that he should be convicted of a lesser offense because he acted in the heat of passion after seeing his wife kissing Castilleja. At Alcorta's trial, Castilleja testified that his relationship with Alcorta's wife was nothing more than a casual friendship, and Alcorta was convicted of murder. After the conviction, however, Castilleja admitted that he had been engaged in a sexual relationship with Alcorta's wife and that the prosecutor had told him not to volunteer any information about that sexual relationship.

After the state courts refused to order a new trial, Alcorta appealed to the U.S. Supreme Court, which unanimously reversed. The Court observed that Castilleja's testimony gave the false impression that his relationship with Alcorta's wife was mere friendship and thereby refuted Alcorta's claim that he acted passionately after seeing his wife kissing Castilleja. Since the prosecutor knew Castilleja's testimony was false, the Court concluded that Alcorta had been denied due process. The Court's emphasis on the prosecutor's duty to avoid presenting perjured testimony, later clarified and expanded in *Napue v. Illinois*, 360 U.S. 264 (1959), laid the groundwork for later cases, such as *Brady v. Maryland*, 373 U.S. 83 (1963), and *Kyles v. Whitley*, 514 U.S. 419 (1995), which required the prosecution to disclose evidence favorable to the defendant.

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References and Further Reading

Imwinkelried, Edwin, and Norman Garland. *Exculpatory Evidence*, 2nd ed. Charlottesville, VA: Michie Publications, 1996.
 Stacy, Tom, *The Search for Truth in Constitutional Criminal Procedure*, Columbia Law Review 91 (1991): 1369.

Cases and Statutes Cited

Brady v. Maryland, 373 U.S. 83 (1963)
Kyles v. Whitley, 514 U.S. 419 (1995)
Napue v. Illinois, 360 U.S. 264 (1959)
 See also ***Brady v. Maryland*, 373 U.S. 83 (1963); Due Process; Fourteenth Amendment; *Kyles v. Whitley*, 514 U.S. 419 (1995); *Napue v. Illinois*, 360 U.S. 264 (1959)**

ALIEN AND SEDITION ACTS (1798)

Sedition may be defined as any illegal action tending to cause the disruption or overthrow of the government. In the Anglo-Saxon legal tradition, the concept of seditious libel (libel generally meaning any statement injurious of reputation) goes back to 1275, when an English statute outlawed *falsehoods* creating discord between the king and the people. By the early seventeenth century, English courts began to hold that even *true* libels could be criminally punished, since the truth of injurious statements made it much more difficult for the government to undo their harm. It became something of a maxim of English law that “the greater the truth the greater the libel.”

Such statements are particularly troubling in wartime when the existence of the nation may be threatened, forcing consideration of certain fundamental and enduring questions of civil liberty. Is dissent the equivalent of disloyalty? May national security concerns justify silencing dissent? What if partisans exploit the crisis to suppress legitimate criticism of government? Who will protect valued civil liberties in such turbulent times?

These questions run throughout American history and law. The nation first confronted them in the earliest years of the republic. Abuses of civil liberties occurred, but the more enduring legacy of this troubled period remains one of the great achievements of American constitutionalism.

Background: Faction and Xenophobia

Many of the Founders were suspicious of political parties, finding their “factionalism” contrary to republican government’s search for a common interest. By Washington’s second term, however, two parties were alive and well; they originated in the positions taken by the main supporters and opponents of the 1787 Constitution: Federalists and Anti-Federalists, respectively.

One group had coalesced around Alexander Hamilton and called themselves Federalists; the other group, led by James Madison and Thomas Jefferson, called themselves Republicans. More telling perhaps is what they called each other: Republicans characterized their opponents as monarchists or Tories, and Federalists saw their opponents as Jacobins (the twentieth century equivalent would be “Bolsheviks”) given to “licentiousness” and radical democracy instead of republicanism.

The Federalists generally represented mercantile, shipping, and financial interests, and some at least (most notably Hamilton) could even be characterized

as cryptomonarchists. Republicans distrusted executive power, felt that the people had too little power, and opposed restrictions on the liberty of the press. Federalists took opposite positions, and perhaps nowhere was the contrast more stark than about the question of political opposition. Federalists tended to deny the legitimacy of such opposition, contemptuously described as “faction.” The term was Madison’s, although by the 1790s Madison had come to believe that the evils of parties could be mitigated—most notably by promoting political equality to prevent any group from exerting influence beyond its numbers.

Perhaps the most significant difference was that Republicans tended to support the French Revolution, while Federalists had become bitterly hostile to it and thoroughly distrustful of France and its growing influence on the continent. Federalists wanted to strengthen ties with England. Republicans, though not unmindful of the dangers posed by France, considered British monarchism a far greater threat to the young republic.

By 1792, the French Revolution had sparked an international war, and the European nations opposing France sought to rid themselves of domestic pro-French elements (as well as any lingering reformers, republicans, or radicals). Many of these refugees fled to the neutral United States. Federalists saw in their ranks the democratic “disorganizers” that Federalists so dreaded.

In 1793, President Washington proclaimed American neutrality between France and England, incurring the wrath of both countries. The Jay Treaty of 1794 calmed Anglo-American relations, but the French only became more belligerent, launching a campaign against American shipping. (Between June 1796 and June 1797, some 316 American ships had been seized.)

The election of 1796 brought the Federalist John Adams to the presidency; Adams narrowly defeated the leader of the Republican Party, Thomas Jefferson (who under the constitutional provision then in effect became vice-president). This first contested presidential election in American history exacerbated already sharp political divisions.

Among the feared immigrants from Europe, none proved more obnoxious to the Adams administration than the Irish. In 1798, Ireland was in revolt against the British, who responded with military repression. Many Irish patriots came to the United States to avoid lengthy prison terms or the hangman. They brought with them considerable political experience and a taste for democracy coupled with a distrust of constituted authority that quickly drew them into the ranks of the Republicans. (In fairness, it should be noted that some of these refugees, particularly the

aristocratic immigrants from France, were seen as threatening Republican principles.)

Meanwhile, France had not only repelled a coalition of invaders led by England but also had seized Belgium, the Rhineland, and the Italian peninsula and was threatening to invade England. In America, anti-French sentiment was enflamed by the XYZ Affair, a clumsy attempt by agents of the French foreign minister to solicit a bribe from the United States in return for further negotiations. When the administration allowed the details to be made public, in 1798, Americans were outraged at the gall of the French. Adams, riding a wave of patriotic fervor, placed the country on a war footing without ever asking for a declaration of war. Thus began America's "half war" with France.

The rancor between Federalists and Republicans came to a head in the spring of 1798 when Congress debated the President's proposed defense measures. The arguments, heard for the first time in American history, have recurred in different contexts and with different enemies up to and including the War on Terrorism. The Republicans felt Adams was overreacting to the alleged threat. The Federalists raised the specter of French invasion, abetted by French sympathizers, spies, and enemy aliens who would undermine the country's defenses (marking the first but by no means the last time that American political discourse would center on the fear of internal subversion). Ignoring the line between dissent and treason, the Federalists accused the Republicans of disloyalty or worse.

The charges of the Federalists in Congress were taken up by several of the leading Federalist newspapers, branding the Republicans as "traitors." President Adams lambasted the Republicans for supporting policies that "would sink the glory of our country and prostrate her liberties at the feet of France."

The legislative program that the Federalists would soon enact was undoubtedly meant to respond to the threat of France. But Federalists also hoped that, by becoming the party of American patriotism, they might wound, perhaps mortally, the Republican Party as well.

The Alien Acts

In times of threat from foreign powers, suspicions immediately turn to the foreigners within: resident aliens, especially enemy aliens (natives of the nation that has become the enemy). Well before the "half war," Federalists were convinced that the greatest internal danger the country faced was the wave of

foreigners—especially French, Irish, and German—who had come to America between 1790 and 1798. They were in a sense doubly dangerous: potential traitors and a source of votes for Republicans.

Congress initially attempted to reduce or even end the flow of aliens being admitted to U.S. citizenship and to prevent all foreign-born persons from voting or holding federal office. The proposal was defeated by a two-to-one majority. Ultimately, Congress enacted (though by single-vote margins in House and Senate) the Naturalization Act of June 18, 1798, which extended the period of residence required for naturalization from five years to fourteen—the longest in American history. While immigrants could vote because voter qualifications were set by the states, the Naturalization Act (repealed by the Republicans in 1802) prevented them from holding federal office until they became citizens and discouraged further immigration.

The more extreme Federalists now hoped to enact a law granting sweeping powers to the executive branch to deal with every variety of threats (from actual plots to seditious speech) from aliens and native citizens. But highly effective opposition from Albert Gallatin, a Republican leader in Congress, as well as some doubters within the ranks of the Federalists, led eventually to three separate pieces of legislation.

The Alien Enemies Act of July 6, 1798 gave the President authority—but only in the face of war or invasion—to identify citizens or subjects of a hostile nation residing in the United States and to apprehend, restrain, or remove them according to procedures in the act. This law was never used because open war with France never occurred. The approach embodied in this act has remained a part of American wartime policy to the present and arguably represents a reasonable concern about the potential for enemy aliens to act as spies or saboteurs.

On June 25, 1798, Congress approved the Alien Friends Act. It applied to all aliens, enemy or not, in times of peace or of war. Its provisions allowed the President to expel any non-naturalized foreign-born person judged by the President to be a threat to the "peace and safety" of the United States. This could be done without a hearing and without any statement of the President's reasons. Individuals who did not leave the United States within a specified time period could be imprisoned for up to three years and permanently denied American citizenship. While they were not immediately apparent, there were free speech implications to the act, since, as Geoffrey R. Stone notes in *Perilous Times*, "judgments about a person's 'dangerousness' are often predicated upon his expression, beliefs, and associations." But President Adams

interpreted the act extremely narrowly; no one was deported under its provisions and it expired in June 1800.

Inevitably, though, such a fundamental assault on due process rights, right to counsel, and independent judicial review had its effects. Many French immigrants left the country, and few tried to enter. Those who remained (especially French and Irish) went to great pains to avoid public attention, and feelings of paranoia and suspicion were widespread.

Sedition Act: Theory

By far the most notorious piece of legislation introduced by the Federalists was the Sedition Act of July 14, 1798. The law made it a crime to utter or publish “any false, scandalous, and malicious writing or writings against the Government of the United States, or either House of the Congress . . . with intent to defame . . . or to bring them . . . into contempt or disrepute . . .” Punishment was a fine (up to \$2000—the 2004 equivalent of \$30,000) and prison up to two years. (The blatantly political motivation behind this legislation is well illustrated by the fact that the vice-president, the Republican Thomas Jefferson, was not included in the act’s coverage.)

The Sedition Act of 1798 is widely considered the first great clash between political liberties and the needs of national security in American history. Yet, as early as 1794 the Federalists had made a concerted effort to question the legitimacy of political criticism of the government by attacking the Democratic-Republican societies, groups of voluntary associations sharply critical of Federalist policy. From the Federalist perspective, these societies were illegitimate because their speech tended to foment insurrection and to undermine representative government. The Republicans, of course, insisted on the right of private citizens to organize and to criticize the actions of elected officials.

These same lines of debate surfaced in 1798, but now the Federalists were determined to pass legislation and to prosecute its violators. Given Federalist control of both houses of Congress and the presidency, even the strongest Republican arguments proved unavailing.

There is value in exploring the theoretical underpinnings of the arguments both sides presented in Congress and in the press, especially since the Federalists’ arguments were ultimately rejected wholeheartedly by the public and our political and legal process. The enactment of the Sedition Act, and subsequent prosecutions (discussed in the next section), proved a

Pyrrhic victory indeed and constituted a major factor in the decisive electoral defeat of the Federalists in the election of 1800.

While there were certainly public policy reasons for supporting or opposing the Sedition Act, much of the discussion centered on two essential constitutional issues:

How could a government of enumerated powers enact a law touching on seditious speech, given the absence of any such power in the text of the Constitution and what would appear to be a specific prohibition on such a law, that is, the First Amendment?

Was the law an infringement on the powers of the states, given that libel laws had traditionally been considered the exclusive concern of states and thus reserved to them by implication and by the specific text of the Tenth Amendment?

With respect to the first question, the Federalists argued that such a power in the national government could be inferred as a matter of self-preservation. All governments have a right to protect themselves from activities that might lead to their destruction. As far as the First Amendment went, the Federalists in turn argued that it did not go very far. They echoed an interpretation of English law given by William Blackstone, who argued that in England freedom of the press meant freedom from prior restraints (in essence, no governmental censorship prior to publication), but not freedom from punishment if the speech or publication proved to be criminal. For the Federalists, the First Amendment did not overturn English common law.

Instead, Republicans began to expand upon a crucial insight—the indispensability of free expression to the political process, especially one that saw governors as the servants of the people and thus subject to the people’s scrutiny and criticism. To the Federalists, this was dangerous Jacobinism and mob rule undermining the policies of the enlightened ruling elite.

On the issue of state vs. federal power over sedition, the most famous statement of the Republican position came not in the congressional debates but in the Kentucky and Virginia Resolutions (drafted secretly by Thomas Jefferson and James Madison) passed by those state legislatures in the fall of 1798. The resolutions’ essential argument was that the Constitution is a compact entered into by sovereign states. The federal government was limited to certain enumerated powers, and if the federal government exceeded its powers, states retained authority to protect their rights by declaring the federal action void and unenforceable. Here, the federal government had clearly exceeded its powers, since there is no

enumerated power over seditious speech; there is, instead, a clear prohibition on such legislation—the First Amendment.

Sedition Act: Practice

The enmity and rancor that marked these debates continued in the prosecutions brought under the Sedition Act. The role of Grand Inquisitor was assumed by Secretary of State Thomas Pickering, one of the most extreme of the Federalists.

Seventeen indictments for seditious libel were issued; all but three were under the Sedition Act and the remaining ones were based on the common law. Pickering led the charge, mindful of the upcoming presidential election of 1800 and determined to muzzle the leading Republican newspapers. He brought charges against four of the five most important Republican newspapers as well as some lesser ones. Because of these prosecutions, two newspapers closed forever and others were forced to suspend publication until their editors were released from jail.

In the period from July 1798 until the act expired (on March 3, 1801—the last day of the Adams administration), twenty-five prominent Republicans were arrested under the act; fifteen of these arrests led to indictments and ten cases went to trial. Each resulted in a conviction. Several of the trials were presided over by Supreme Court Justice Samuel Chase (in his capacity as circuit judge) with a degree of partisan judicial improprieties not seen before in an American court and referred to as “Chase’s Bloody Circuit.” Other Federalist judges were almost as bad.

In November 1799, Adams sent a peace mission to Paris and gradually America’s fear of Jacobinism began to dissipate. In the 1800 election, Jefferson won seventy-three electoral votes and Adams sixty-five. Republicans took control of the House by a margin of sixty-five to forty-one. The death knell of the Federalist Party was being sounded. Indeed, Republicans would dominate national politics for the next quarter-century.

In one of his first official acts as president, Jefferson pardoned all those who had been convicted under the Sedition Act and ordered the release of those still in jail, commenting, as quoted by Geoffrey R. Stone, that in his view the Sedition Act was a “nullity as absolute and as palpable as if Congress had ordered us to fall down and worship a golden image.”

On July 4, 1840, Congress ordered the repayment, with interest, of all fines paid under the Sedition Act. The congressional committee report in favor of the repayment legislation said that the act was an

ill-judged exercise of power, was null and void, and that its unconstitutionality had been “conclusively settled.”

Lessons and Legacy

Public opinion, the “revolution of 1800” (as Jefferson described that election), the judgment of history, and the evolution of First Amendment law all contributed to the conclusive settlement of the unconstitutionality of the Sedition Act. In its landmark 1964 decision, *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), the Supreme Court for the first time in the country’s history held public officials to First Amendment standards when they brought libel actions against critics of their official conduct. In the course of his opinion for the Court, Justice William J. Brennan spoke of a “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open” and that such debate might include “vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.” He described the Sedition Act and the controversy it aroused as “first crystalliz[ing] a national awareness of the central meaning of the First Amendment.” He noted that the Sedition Act had never been tested in the Supreme Court, but that “the court of history” clearly found it wanting.

In defending the act, Federalists celebrated it as an improvement over the English law of seditious libel because, unlike in England, the American version made malicious intent an essential element of the crime, made truth of the libel a defense, and provided that the jury rather than the judge determine an utterance’s seditious tendency. Republicans found little consolation in these “liberalizing” elements, foreseeing (correctly) that juries would reflect popular hysteria even more than judges and that most of the statements prosecuted under the act would involve opinions rather than provable facts. The notion of a false political opinion is profoundly inconsistent with the First Amendment, and in 1974 in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), the Supreme Court agreed: “under the First Amendment there is no such thing as a false idea.”

Political debate must indeed be vigorous, caustic, and spirited. Dissent about government policies is not the same as disloyalty. Punishing allegedly false political opinions is fundamentally incompatible with the First Amendment. These lessons of America’s initial experience with seditious libel prosecutions were eloquently articulated by Jefferson in his 1801 inaugural address:

Every difference of opinion is not a difference of principle We are all republicans—we are all federalists If there be any among us who would wish to dissolve this Union or to change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it.

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References and Further Reading

- Chesney, Robert M., *Democratic–Republican Societies, Subversion, and the Limits of Legitimate Political Dissent in the Early Republic*, North Carolina Law Review 82 (June 2004): 1525–1579.
- Curtis, Michael Kent. *Free Speech, “The People’s Darling Privilege.”* Durham, NC: Duke University Press, 2000.
- Elkins, Stanley, and Eric McKittrick. *The Age of Federalism*. New York: Oxford University Press, 1993.
- Smith, James Morton. *Freedom’s Fetters*. Ithaca, NY: Cornell University Press, 1956.
- Stone, Geoffrey R. *Perilous Times: Free Speech in Wartime*. New York: W.W. Norton and Company, 2004.

Cases and Statutes Cited

- Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974)
- New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)
- Alien Enemies Act*, Act of July 6, 1798, 1 Stat. 577 (1798)
- Alien Friends Act*, Act of June 25, 1798, 1 Stat. 570 (1798)
- Naturalization Act*, Act of June 18, 1798, 1 Stat. 566 (1798)
- Sedition Act*, Act of July 14, 1798, 1 Stat. 596 (1798)

See also Aliens, Civil Liberties of; Bache, Benjamin Franklin; Blackstone and Common-Law Prohibition on Prior Restraints; Due Process in Immigration; Franklin, Benjamin; Freedom of Speech and Press: Nineteenth Century; Freedom of Speech and Press under the Constitution: Early History (1791–1917); Non-U.S. Citizens Civil Liberties; Philosophy and Theory of Freedom of Expression; Ratification Debate, Civil Liberties in; Theories of Civil Liberties; Zenger Trial (1735)

ALIENS, CIVIL LIBERTIES OF

The extent to which the Constitution’s Bill of Rights and other political freedoms are enjoyed by noncitizens is a question that has existed since the founding of the United States. Even prior to the ratification of the Bill of Rights, the Constitution’s text distinguished between citizens of the United States and noncitizens, suggesting that the framers intended differential treatment between the groups, at the very least when it limited several federal offices to citizens. Arguably, the two most important differences wrought by citizenship status are the inability of

noncitizens to vote and the fact that noncitizens are subject to exclusion and deportation.

Limits on other civil rights—such as the freedom of speech and the free exercise of religion—can be best understood by appreciating the limits on the voting rights of, and the exclusive application of immigration laws to, noncitizens. First, because noncitizens do not enjoy the right to vote, they rely upon citizens to protect their political interests, thereby limiting their ability to secure their rights. Second, because noncitizens are subject to exclusion and deportation under immigration law, their ability to exercise their civil rights in the United States may effectively be denied by removing them to their home countries. Finally, it should be noted that within the group of noncitizens, American constitutional and statutory law generally affords greater liberty and protection to lawful long-term residents than to temporary visitors or undocumented migrants.

The debate over the citizen–noncitizen divide with respect to civil liberties focuses on balancing the desire to preserve the exclusivity of citizenship as a status that ensures a person’s full membership in a polity against the recognition that noncitizens are human beings deserving of a basic level of dignity and liberty. The nation’s first test of the divide came with the passage of the Alien and Sedition Act of 1798. Because it permitted the president exclusive power to deport suspicious noncitizens without being subject to judicial oversight, the act pitted those committed to ensuring that noncitizens be provided the same due-process protections afforded citizens against those who believed the Constitution was created solely for the benefit of U.S. citizens.

On the one hand, Thomas Jefferson, James Madison, and other Democratic–Republicans saw the act as unconstitutionally depriving noncitizens due process of law by failing to subject their executive deportations to procedural check. On the other, Hamiltonian Federalists argued that foreign nationals were not parties to the Constitution, were not its beneficiaries, and therefore could claim no rights under it. In *Chae Chan Ping v. United States*, 130 U.S. 581 (1889), the Supreme Court sided with the Federalists by recognizing the plenary power of the federal political branches over immigration and noncitizens, citing a nation’s decision to deny entry to a noncitizen as incident to its sovereignty.

Analogously, current Supreme Court jurisprudence recognizes few constitutional due-process and equal-protection limits to federal immigration power, but generally places strict restrictions on the states’ powers to discriminate against noncitizens residing in the United States. Over time, the Supreme Court has reaffirmed Congress’s plenary power over

immigration decisions to exclude or deport noncitizens, but has also stated that noncitizens legally within the United States were entitled to a rational-basis review of federal legislation that draws alienage distinctions. Because states do not possess Congress's plenary power over immigration law, in contrast, the Court has subjected state laws that discriminate against noncitizens to strict review. The Constitution's Article VI supremacy clause also provides textual support for the idea that where the federal government has chosen to regulate a field exclusively, as it has with immigration law, then contrary state laws are preempted by the federal, rendering the former unconstitutional.

Thus, while in *Mathews v. Diaz*, 426 U.S. 67 (1976), the Court upheld a federal law limiting the grant of Medicaid benefits only to certain noncitizens, in *Graham v. Richardson*, 403 U.S. 65 (1971), the Court struck down state laws limiting public benefits to certain individuals based on citizenship. The Court's protection of noncitizens against state discrimination has extended to undocumented immigrants. In *Plyler v. Doe*, 457 U.S. 202 (1982), the Court struck down a Texas law that denied free public education to the children of undocumented migrants. The sole exception that the Court has recognized is that a state may limit certain occupations to U.S. citizens when the jobs involved go to the heart of democratic government, as in the case of state troopers (*Foley v. Connelie*, 435 U.S. 291, 1978) and public school teachers (*Ambach v. Norwick*, 441 U.S. 68, 1979).

Aside from protecting foreign nationals by employing this federal-state divide in its constitutional alienage jurisprudence, the Court has sometimes chosen to avoid interpreting the constitutionality of a federal immigration act altogether, presumably because it believes its hands are tied by the plenary power or preemption doctrines. Instead, the Court has relied on liberal interpretations of ostensibly anti-immigrant legislation, choosing to uphold and affirm the foreigner's humanity through the approval of the legislation at issue.

Thus, in *Woodby v. Immigration and Naturalization Service*, 385 U.S. 276 (1966), the Court held that the government must prove a noncitizen's deportability subject to a "clear, unequivocal, and convincing evidence" standard, which is more stringent than the "preponderance of the evidence" norm generally used in civil cases, of which deportation proceedings are a kind. Although not based on its interpretation of the Constitution, the *Woodby* court's embrace of a standard more protective of noncitizen rights suggests that the judiciary's willingness to cross Congress's constitutionally approved plenary power over noncitizens and immigration when the Court believes some

fundamental personhood norm might be violated, even if the challenged statute's language might suggest a stricter reading.

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References and Further Reading

- Cole, David. *Enemy Aliens: Double Standards and Constitutional Freedoms in the War on Terrorism*. New York: New Press, 2003.
- Johnson, Kevin R. *The "Huddled Masses" Myth: Immigration and Civil Rights*. Philadelphia: Temple University Press, 2004.
- Motomura, Hiroshi, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, Yale Law Journal 100 (1990): 545–613.
- Neuman, Gerald L. *Strangers to the Constitution: Immigrants, Borders, and Fundamental Law*. Princeton, NJ: Princeton University Press, 1996.

Cases and Statutes Cited

- Ambach v. Norwick*, 441 U.S. 68 (1979)
- Chae Chan Ping v. United States*, 130 U.S. 581 (1889)
- Foley v. Connelie*, 435 U.S. 291 (1978)
- Graham v. Richardson*, 403 U.S. 65 (1971)
- Mathews v. Diaz*, 426 U.S. 67 (1976)
- Plyler v. Doe*, 457 U.S. 202 (1982)
- Woodby v. Immigration and Naturalization Service*, 385 U.S. 276 (1966)

See also **Citizenship; Equal Protection of Law (XIV)**

COUNTY OF ALLEGHENY v. ACLU, 492 U.S. 573 (1989)

In the mid-1980s, the Supreme Court first considered the constitutionality of religious holiday displays in *Lynch v. Donnelly*, 465 U.S. 668 (1984), involving a city's display of a nativity scene among other symbols of the Christmas holiday. There, a sharply divided Court upheld the display, concluding that the nativity scene, when accompanied by other, secular holiday symbols, had neither the purpose nor the effect of advancing religion and did not amount to an excessive entanglement between government and religion. Justice Sandra Day O'Connor concurred separately, suggesting that the appropriate inquiry was whether the city's action had the purpose or effect of endorsing religion. Unconstitutional endorsements of religion, according to her analysis, sent messages to those not adhering to the favored religion that they were outsiders and less than full members of the political community. In a series of concurrences in establishment clause cases following *Lynch*, O'Connor continued to argue for use of the no-endorsement

test. *County of Allegheny* is significant because it was the first case in which an opinion for the Court articulated a decision in terms of O'Connor's test.

In *County of Allegheny v. ACLU*, the Court revisited the issue of religious holiday displays. The case presented the Court with two different displays. The first display included a nativity scene bearing a banner proclaiming "Gloria in Excelsis Deo!" located on the grand staircase of a county courthouse. The display was surrounded by a fence, with poinsettias eventually placed in front of the fence and small evergreen trees, with red bows, stationed at the ends of the fence. A small sign informed observers that the display had been donated by a Roman Catholic organization.

Announcing the judgment of the Court, Justice Harry Blackmun, applying the no-endorsement test, concluded that the display of the nativity scene was unconstitutional since it had the effect of endorsing religion. Blackmun noted that, unlike the nativity scene in *Lynch*, the nativity scene in the courthouse was not accompanied by other holiday emblems or symbols that might have detracted from the religious message of the scene. The poinsettias and small evergreens did not have this effect. Accordingly, he concluded, the effect of this display was one of endorsing the Christian message associated with the nativity scene.

The second display consisted of a 45-foot high Christmas tree outside one of Pittsburgh's public buildings, at the foot of which was a sign with the mayor's name titled "Salute to Liberty." Under the title the sign contained a holiday message saluting liberty and reminding observers of their "legacy of freedom." An 18-foot menorah, a symbol of the Jewish holiday Chanukah, stood beside the Christmas tree. Justice Blackmun concluded that this display did not violate the establishment clause, since its multiple symbols—partially Christian, partially Jewish, and partially secular—did not collectively convey an endorsement of Christianity and Judaism, but simply recognition of cultural diversity. Justice O'Connor concurred with both results.

Justice Kennedy, joined by Chief Justice Rehnquist and Justices White and Scalia, partially dissenting and partially concurring, concluded that both displays were constitutional. He argued that the Establishment Clause permitted "some latitude in recognizing and accommodating the central role religion plays in our society" and that a contrary view would amount to "latent hostility" toward religion. Justice Kennedy's opinion suggested an attempt to pose a new framework for understanding the essential prohibition of the establishment clause in terms only of a bar against government action coercive of religious belief or practice and action with the tendency of establishing a state

religion. Justice Kennedy again emphasized the issue of coercion in *Lee v. Weisman*, 505 U.S. 577 (1992), where, writing for the Court's majority, he explained why prayers offered at a middle-school graduation ceremony violated the establishment clause.

But the notion that coercion must be a defining characteristic of establishment violations has failed to find the support of a majority of the Court. Justices Brennan and Stevens filed opinions partially concurring and partially dissenting from the judgment in the case. They, along with Justice Marshall, who joined their respective opinions, would have held both displays unconstitutional.

In terms of specific results, *County of Allegheny* reinforced the view of many observers after *Lynch v. Donnelly* that the Court had implicitly embraced what is sometimes referred to as the "reindeer rule." By this it was understood that nativity scenes would survive constitutional challenge so long as they were accompanied by secular symbols of the Christmas holiday, such as reindeer. In practice, the constitutionality of government-sponsored religious symbols has tended to turn on whether these symbols are part of a larger context that includes secular symbols as well. This judicial approach is a clear retreat from the "wall of separation" rhetoric of the Court's earlier establishment clause cases in favor of an emphasis on norms of equality. The possibility of a court finding an endorsement of religion declines as particular religious symbols take their place among other symbols.

This trend in the Court's treatment of religious symbols parallels its treatment of religious speakers during the same period. During the last two decades of the twentieth century, the Court repeatedly considered whether religious speakers were entitled to equal access to various public forums on terms comparable to those enjoyed by other speakers. The Court generally concluded that they did and, in so doing, rejected views of the establishment clause that would have denied this access as an impermissible aid to religion or as amounting to an unconstitutional breach in the wall separating government and religion. So long as religious speakers took their place in contexts with other speakers, the establishment clause did not forbid their speech and the free speech clause required that this speech be protected.

As to the Court's establishment clause jurisprudence, it appeared at the time that *County of Allegheny* might have represented a triumph of Justice O'Connor's no-endorsement test over the three-part *Lemon* test (*Lemon v. Kurtzman*, 403 U.S. 602, 1971). The case was the first in which an opinion for the Court had relied on the no-endorsement test. Subsequent cases, however, suggested that Justice O'Connor's test serves merely to supplement rather

than to replace the *Lemon* test. The Court continues to examine government actions in terms of whether they have the purpose or effect of advancing religion.

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References and Further Reading

- Feldman, Stephen M. *Please Don't Wish Me a Merry Christmas: A Critical History of the Separation of Church and State*. New York: New York University Press, 1997, 239–242.
- Karst, Kenneth L., *Justice O'Connor and the Substance of Equal Citizenship*, *Supreme Court Review* 55 (2003): 357–458.
- Levy, Leonard W. *The Establishment Clause: Religion and the First Amendment*, 2nd rev. ed. Chapel Hill: The University of North Carolina Press, 1994, 206–212.
- Nowak, John E., and Ronald D. Rotunda. *Constitutional Law*, 7th ed. St. Paul, MN: Thompson-West, 2004, 1422–1427.
- Shiffren, Steven H., *The Pluralistic Foundations of the Religion Clauses*, *Cornell Law Review* 90 (2004): 34–38.

Cases and Statutes Cited

- Lee v. Weisman*, 505 U.S. 577 (1992)
- Lemon v. Kurtzman*, 403 U.S. 602 (1971)
- Lynch v. Donnelly*, 465 U.S. 668 (1984)

See also ***Lemon Test***; ***Lynch v. Donnelly*, 465 US 668 (1984)**; **Religion in “Public Square” Debate**

ALLEN v. ILLINOIS, 478 U.S. 364 (1986)

The *Allen* Court decided the issue of whether proceedings under the Illinois Sexually Dangerous Persons Act are “criminal,” such that they open the door to the Fifth Amendment’s protection against self-incrimination.

Allen began when the Circuit Court charged Allen with the crimes of unlawful restraint and deviate sexual assault. The State of Illinois filed a petition to have him declared a sexually dangerous person under the Illinois Dangerous Persons Act. Pursuant to the act, the Court ordered Allen to undergo two psychological evaluations. During trial, the state presented testimony about the evaluation results. Allen objected, claiming that the state elicited information from him in violation of his Fifth Amendment privilege against self-incrimination. The Court determined that Allen was a sexually dangerous person under the act.

The U.S. Supreme Court affirmed the ruling of the Illinois Supreme Court. Both courts held that the Fifth Amendment privilege was not available in sexually dangerous person proceedings because those proceedings are civil in nature and Fifth Amendment protections extend only to criminal proceedings.

However, Allen’s statements to the court-ordered psychological evaluator could not be used against him in any subsequent criminal proceeding.

In examining the issue, the Court determined that the act was civil in nature because its goal was to provide treatment, not punishment, to persons whom the Court found to be “sexually dangerous.” The act failed to promote retribution or deterrence, the traditional aims of punishment, and its text clearly stated that it was to be a civil act.

Illinois restricted the scope of the act by requiring the state to file criminal charges against a person before the state could file a petition asking the Court to determine whether that person was sexually dangerous. The limitation of the scope of the act to persons with criminal charges, rather than the mentally ill population at large, did not transform the civil proceeding into a criminal one. Strict procedural safeguards failed to alter the nature of the proceedings, as did the commitment of sexually dangerous persons to a maximum-security institution also housing convicts in need of psychological care. Involuntary commitment alone did not trigger criminal procedure protections, as noted in *Addington v. Texas*, 441 U.S. 418 (1979), and the state met its treatment goals by committing sexually dangerous persons to institutions designed to provide psychological care.

The Court found that the Fourteenth Amendment due process clause did not require the application of the Fifth Amendment self-incrimination privilege to be applied to the act because the constitutional purpose of the privilege was not to enhance the reliability of fact-finding determinations. Procedurally, the act satisfied the Court by requiring the state to prove more than just the commission of a sexual assault.

Allen has helped states discover the bounds of mental health proceedings. It guides them in fashioning legislation directed toward mentally ill persons, specifically sexually dangerous persons, and it further defines the scope of the Fifth Amendment privilege against self-incrimination.

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References and Further Reading

- American Bar Association. “Case Law Developments.” *Mental and Physical Disability Law Reporter* 29 (January/February 2005):16–36.
- Bilionis, Louis D., *Conservative Reformation, Popularization, and the Lessons of Reading Criminal Justice as Constitutional Law*, *UCLA Law Review* 52 (April 2005): 979–1060.
- Blair, W. Wylie, *The Illinois Sexually Dangerous Persons Act: The Civilly Committed and Their Fifth Amendment Rights, or Lack Thereof*, *Southern Illinois University Law Journal* 29 (Spring 2005): 461–479.

ALLEN v. ILLINOIS, 478 U.S. 364 (1986)

Weitzel, Travis D., *The Constitutionality of Quasi-Convictions*, Rutgers Law Journal 36 (Spring 2005): 1029–1072.

Cases and Statutes Cited

Addington v. Texas, 441 U.S. 418 (1979)
Estelle v. Smith, 451 U.S. 454 (1981)
French v. Blackburn, 428 F. Supp. 1351 (MDNC 1977)
In re Gault, 387 U.S. 1 (1967)
Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963)
Lefkowitz v. Turley, 414 U.S. 70 (1973)
Malloy v. Hogan, 378 U.S. 1 (1964)
Mathews v. Eldridge, 424 U.S. 319 (1976)
McCarthy v. Arndstein, 266 U.S. 34 (1924)
Middendorf v. Henry, 425 U.S. 25 (1976)
Minnesota v. Murphy, 465 U.S. 420 (1984)
One Lot Emerald Cut Stones and One Ring v. U.S., 409 U.S. 232 (1972)
People v. English, 31 Ill. 2d 301 (1964)
People v. Nastasio, 19 Ill. 2d 524 (1960)
People v. Pembrock, 62 Ill. 2d 317 (1976)
Rogers v. Richmond, 365 U.S. 534 (1961)
U.S. v. Ward, 448 U.S. 242 (1980)
USCA Const. Amendment 5
725 ILCS 205 (Illinois Sexually Dangerous Persons Act)

See also *In re Gault*, 387 U.S. 1 (1967)

AMALGAMATED FOOD EMPLOYEES UNION LOCAL 590 v. LOGAN VALLEY PLAZA, 391 U.S. 308 (1968)

The conflict between the First Amendment rights of persons to speak and the rights of private property owners to exclude individuals from their property raises thorny questions at the intersection of state action doctrine and the First Amendment. *Logan Valley* concerned labor picketers who wished to inform the public of the nonunion status of a supermarket located in a large, privately owned shopping center. Accordingly, the Court needed to decide whether private property rights of the shopping center owner to declare picketers as trespassers were superior to any asserted right of the protestors to speak and to inform the public under the First and Fourteenth Amendments to the federal constitution.

The Court found that if the picketing had taken place in front of a supermarket located on the public streets, the picketers would have had a First Amendment right of access. Accordingly, the Court extended its 1946 decision in *Marsh v. Alabama*, 326 U.S. 501 (1946), concerning a company-owned town to declare that private property may under some circumstances be treated as though it were public. The Logan Valley Mall was the functional equivalent of the business block of the town in *Marsh*. Once an owner opened his property generally to the public, the more his

property rights became circumscribed by the Constitution. The difficulty of the issue is illustrated by the fact that the Court would revisit the issue four years later in *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972), and completely reverse course in *Hudgens v. NLRB*, 424 U.S. 507 (1976).

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References and Further Reading

Garvey, John H. *What Are Freedoms for?* Cambridge, MA: Harvard University Press, 1996, 242–251.
Tribe, Lawrence H. *American Constitutional Law*, 2nd ed. Minneola, NY: Foundation Press, 1988, 1708–1711.

Cases and Statutes Cited

Hudgens v. NLRB, 424 U.S. 507 (1976)
Lloyd Corp. v. Tanner, 407 U.S. 551 (1972)
Marsh v. Alabama, 326 U.S. 501 (1946)

See also *Lloyd Corporation v. Tanner*, 407 U.S. 551 (1972)

AMBACH v. NORWICK, 441 U.S. 68 (1979)

Interpreting the equal protection clause of the Fourteenth Amendment, the Supreme Court has generally subjected all state and local laws that discriminate on the basis of alienage to the strictest scrutiny, noting that, unlike the federal government, state entities do not have the power to regulate the admission or expulsion of noncitizens. The Court has nonetheless created a “public function” exception whereby the state is allowed to reserve certain occupations for U.S. citizens only if these jobs require their holders to perform functions intimately related to democratic self-governance. Hence, police officers exercise discretionary authority sufficiently connected to the development of state public policy that, in *Foley v. Connelie*, 435 U.S. 291 (1978), the Court upheld state laws precluding noncitizens from such service.

In *Ambach*, the Court extended this exception to uphold New York’s bar against certain noncitizens who wished to become public school teachers. Citing the importance of teachers in instilling democratic values and civic virtue among their pupils, the five-person majority held that the state’s decision to preclude noncitizens who were eligible but unwilling to apply for U.S. citizenship was rationally related to its goal of promoting democracy. The four dissenters questioned whether proxies for loyalty such as citizenship were rational, especially when applied against

otherwise well-qualified teacher applicants. In the end, *Ambach's* legacy may depend on the extent to which the case is limited to its facts. After all, the New York statute only precluded those who decided not to naturalize, a choice that the majority decided to hold against the noncitizens.

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References and Further Reading

- Carrasco, Gilbert Paul, *Congressional Arrogation of Power: Alien Constellation in the Galaxy of Equal Protection*, Boston University Law Review 74 (1994): 591–641.
 Scaperlanda, Michael A., *Partial Membership: Aliens and the Constitutional Community*, Iowa Law Review 81 (1996): 707–73.

Cases and Statutes Cited

Foley v. Connelie, 435 U.S. 291 (1978)

AMERICA ONLINE

America Online (AOL), founded in 1985 as Quantum Computer Services and since 2000 part of Time Warner, is one of the world's largest Internet service providers (ISPs). It has been involved in litigation with significant civil liberties implications.

In *Cyber Promotions v. America Online*, 948 F. Supp. 436 (E.D. Pa.1996), a mass-mailer of e-mail advertisements (a spammer) sued AOL for deliberately blocking its messages to AOL subscribers. This, the plaintiff claimed, violated its First Amendment right to have its communications delivered. A federal district court held, however, that a private ISP that is not a state actor may legally block mass-mailed e-mail messages.

The court explained that the plaintiff had not established state action under any of the three established tests: the exclusive public function test (whether the private entity has exercised powers that are traditionally the exclusive prerogative of the state); the state-assisted action test (whether the private entity has acted with the help of or in concert with state officials), or the joint participant test (whether the state has insinuated itself so far into a position of interdependence with the private entity that the state is a joint participant in the challenged activity). Similar results were reached in *Noah v. AOL Time Warner, Inc.*, 261 F. Supp. 2d 532 (E.D. Va. 2003), and *Green v. AOL*, 318 F.3d 465 (3rd Cir. 2003).

In *Zeran v. America Online*, 129 F. 3d 327 (4th Cir. 1997), AOL was sued for defamation by the victim of an Internet prank in which messages posted on an

AOL bulletin board advertised T-shirts with tasteless slogans relating to the bombing of the Oklahoma City federal building. Plaintiff Ken Zeran received numerous hostile telephone calls, as well as some death threats, and claimed that AOL delayed unreasonably in removing the offending messages. The Court found that AOL was protected by the Communications Decency Act, which insulates ISPs from liability for information originating with third parties.

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References and Further Reading

- AOL: Who We Are*, <http://www.corp.aol.com/whoweare/history.shtml#1985>, visited August 23, 2005.
 Sheridan, David R., *Zeran v. AOL and the Effect of Section 230 of the Communications Decency Act Upon Liability for Defamation on the Internet*, Alb. L. Rev. 61 (1997): 147.

Cases and Statutes Cited

- Cyber Promotions v. America Online*, 948 F. Supp. 436 (E.D. Pa.1996)
Green v. America Online, 318 F.3d 465 (3rd Cir. 2003)
In re America Online, Inc., 168 F.Supp.2d 1359 (S.D. Fla. 2001)
Noah v. AOL Time Warner, Inc., 261 F. Supp. 2d 532 (E.D. Va. 2003)
Zeran v. America Online, Inc., 129 F. 3d 327 (4th Cir. 1997)
Communications Decency Act, 47 U.S.C. sec. 230

See also Communications Decency Act (1996); Defamation and Free Speech; State Action Doctrine; Threats and Free Speech

AMERICAN ANTI-SLAVERY SOCIETY

At its inaugural meeting on December 4, 1833, the American Anti-Slavery Society (AASS) declared an unconditional commitment to the immediate abolition of slavery and equal rights for free black men. Loath to engage in violence and political compromise, the new organization was dedicated to "moral suasion" as a vehicle for social change. The American Colonization Society's proposals for the emancipation and resettlement of slaves in Liberia were anathema to the members of the AASS. Led by the Tappan brothers of New York and *Liberator* editor William Lloyd Garrison, the group sought to secure a perpetual place for African Americans within the United States.

In the mid-1830s, the AASS sent a seemingly endless stream of petitions to Congress, calling, most notably, for the abolition of slavery in Washington, D.C. Largely the result of female members' efforts,

this campaign eventually provoked the highly controversial “gag rules,” which precluded congressional debate regarding slavery until 1844. With the constitutional right to petition Congress in doubt in 1834, the AASS supplemented its petition drive by deluging southern mails with its tracts and periodicals (the *National Anti-Slavery Standard* and the *Liberator*, for example). When the first shipment of literature reached Charleston Harbor on July 29, however, it was promptly deemed “incendiary” and confiscated by the postmaster-general of the city and later destroyed by a mob of angry citizens.

Faced with this patently illegal censorship of the mails, the Jackson administration chose to turn a blind eye rather than challenge slaveholding interests. While the vast majority of white northerners opposed abolition, such repression of AASS reform efforts inspired a good deal of rights-conscious opposition from moderate and conservative northerners. Ultimately, AASS agitation laid bare the federal government’s willingness to compromise such civil liberties as freedom of the press and freedom of speech on behalf of minority interests.

By 1840, the AASS faced something of an identity crisis. The role of women in the movement, its responsibility to support reforms aside from abolition, and the merits of political participation were all sources of division that ultimately led to the collapse of the organization and the end of a united national opposition to slavery. While the radical elements in the group remained loyal to Garrison, those who favored a more focused, political approach defected in 1840, forming the American and Foreign Anti-Slavery Organization.

With statements like Wendell Phillips’s 1844 *The Constitution, a Proslavery Document*, the Garrisonian wing went on to assume an uncompromisingly disunionist position. It also took up the controversial cause of women’s rights during the 1840s. The organization’s assiduous agitation on behalf of the oppressed placed civil liberties at the center of public discourse. After its 1840 schism, AASS became the first organization in the United States actively to promote the universality of the principles enshrined in the Declaration of Independence.

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References and Further Reading

- Ericson, David F. *The Debate Over Slavery: Antislavery and Proslavery Liberalism in Antebellum America*. New York: New York University Press, 2000.
- Kraditor, Aileen S. *Means and Ends in American Abolitionism: Garrison and His Critics on Strategy and Tactics, 1834–1850*. New York: Pantheon Books, 1969, c. 1967.
- Jeffrey, Julie Roy. *The Great Silent Army of Abolitionism: Ordinary Women in the Antislavery Movement*. Chapel Hill: University of North Carolina Press, 1998.
- Mayer, Henry. *All on Fire: William Lloyd Garrison and the Abolition of Slavery*. New York: St. Martin’s Press, 1998.
- Van Broekhoven, Deborah Bingham. “American Anti-Slavery Society.” In *Macmillan Encyclopedia of World Slavery*, vol. 1, Paul Finkelman and Joseph C. Miller, eds. New York: Simon & Schuster and Prentice Hall International, 1998, 48.

AMERICAN BOOKSELLERS ASSOCIATION, INC. ET AL. v. HUDNUT, 771 F. 2ND 323 (1985)

The feminist movement in the 1960s and 1970s in the United States and other countries raised anew issues of discrimination and violence against women. In America, Andrea Dworkin and Catherine MacKinnon played critical intellectual and political roles in developing and pressing for a radically new perspective of how to interpret sexually explicit portrayals of women in films, books, or other works. Their ideas ignited heated debates in the United States and Canada as well as in other countries. Their perspective sparked commentary by the media, informed conferences and commission reports, and led to the passage of city ordinances in Minneapolis and Indianapolis. Their ideas also shaped an opinion of the Supreme Court of Canada ruling (*R. v. Butler*, 1 S.C.R. 452, 1992) that Canadian governments could prohibit pornography that harmed or dehumanized women through sexual depictions of their subordination or humiliation.

The Indianapolis ordinance was challenged in federal court by a large coalition of groups that also filed numerous amicus curiae briefs; the legal battle attracted national attention. The ordinance defined “pornography” very differently from how *Miller v. California*, 413 U.S. 15 (1973), identified “obscenity.” Pornography, according to the ordinance, was “the graphic sexually explicit subordination of women, whether in pictures or in words” that included one or more of six different forms or portrayals of subordination. The inclusion of any of these depictions or performances in a work was sufficient to prohibit the work; the work as a whole or its artistic or scientific value was not considered. Appeals to prurient interest, patent offensiveness, or standards of the community, the three basic components of the *Miller* test, were ignored. The ordinance prohibited trafficking in pornography as defined by the ordinance, coercing others into pornographic performances, and forcing pornography onto others; anyone injured by someone who saw or read pornography had a right of action against the maker or seller of the pornographic

material. *Scienter* or prior knowledge that the material was pornographic was generally not a defense.

The southern district court for Indiana in the Seventh Circuit Court of Appeals declared the ordinance was unconstitutional. A circuit court panel, whose opinion was written by Easterbrook, a Reagan appointee, affirmed the lower court's decision; the request for an *en banc* rehearing was denied. The lower court concluded the ordinance regulated speech and, accordingly, could be justified only by a compelling state interest in reducing sex discrimination, which Indianapolis did not establish. The trial judge ruled the ordinance vague, overbroad, and a prior restraint on speech.

For Easterbrook, the crux of the problem was that, given the ordinance's definition of pornography, it effectively legislated into a law a particular viewpoint: "The ordinance discriminates on the ground of the content of the speech." Depictions of women involved in sexual conduct as equals to men, regardless of the explicitness of the conduct, were lawful while portrayals of women enjoying humiliation or being submissive were unlawful without regard for the work's literary, artistic, or political qualities. "This is thought control," Easterbrook proclaimed. "It establishes an 'approved' view of women . . . Those who espouse the approved view may use sexual images; those who do not, may not."

Even if the premise underlying the ordinance is accepted—namely, that pornography is "an aspect of dominance" and that depictions of subordination tend to perpetuate subordination of women—"this simply demonstrates the power of pornography as speech." Easterbrook suggested various actions the city could take to save parts of the ordinance, but the fundamental problem, blunting these efforts, is that the law's definition of "pornography" is "defective root and branch."

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References and Further Reading

- Downs, Donald Alexander. *The New Politics of Pornography*. Chicago: University of Chicago Press, 1989.
- Lacombe, Dany. *Blue Politics: Pornography and the Law in the Age of Feminism*. Toronto: University of Toronto Press, 1994.
- MacKinnon, Catharine A. *In Harm's Way: The Pornography Civil Rights Hearings*. Cambridge, MA: Harvard University Press, 1997.

Cases and Statutes Cited

- American Booksellers Association, Inc. et al. v. Hudnut*, 771 F. 2d 323 (1985)
- Miller v. California*, 413 U.S. 15 (1973)
- R. v. Butler*, 1 S.C.R. 452 (1992)

AMERICAN CIVIL LIBERTIES UNION

The American Civil Liberties Union (ACLU) is a private nonprofit organization dedicated to the defense of civil liberties. The ACLU defines civil liberties as rights enjoyed by individuals over and against the power of government. The ACLU's agenda of civil liberties issues includes First Amendment rights, including freedom of speech, press and assembly, the free exercise of religion, and a prohibition of a government establishment of religion; equal protection of the laws, including equality for racial and ethnic minorities, women, and other groups that have experienced discrimination; due process of law, including protection against unreasonable searches and seizures and protection against self-incrimination; and the right to privacy, including reproductive rights and the privacy of personal information. In addition, since the 1970s, the ACLU has fought issues related to national security and the war on terrorism that result in violations of civil liberties by the federal government.

The ACLU was founded in New York City in January 1920. It grew out of the National Civil Liberties Bureau (NCLB), which had been created in 1917 to fight the suppression of freedom of speech and other violations of civil liberties during World War I. The NCLB was founded and led by Crystal Eastman and Roger Baldwin, who were political activists opposed to the involvement of the United States in World War I. Health problems soon forced Eastman to withdraw and Baldwin became the leader of the NCLB. Following the war, Baldwin and others in the NCLB felt there was a need for a permanent organization to continue to fight for civil liberties. They created the ACLU with Baldwin as director. In 1920, the ACLU had only about 1,000 members nationwide and membership remained low for several decades.

Roger Baldwin led the organization until his retirement in 1950. Over that thirty-year period he was widely recognized as the principal advocate of civil liberties in the United States. When the ACLU was founded, the political and legal climate of the United States was extremely hostile to the idea of civil liberties. Many people associated the phrase "free speech" with disloyalty and radical political doctrines. There were no Supreme Court decisions or statutes protecting freedom of speech or other civil liberties. In a series of World War I-related cases, the Court ruled that the government could prosecute individuals for speech that posed a "clear and present danger" to society (*Schenk v. United States*, 1919). The clear and present danger test was interpreted very broadly, however, to include virtually any criticism of the government.

Faced with extreme hostility to civil liberties in the courts and in legislatures, the ACLU in its first two decades devoted its efforts primarily to public education. It issued numerous pamphlets and statements about particular controversies and occasionally staged public protests to dramatize a particular issue. During these early years the ACLU's litigation program was very limited. Much of the ACLU's work in its first years was devoted to the rights of working people and labor unions. Courts were very sympathetic to employer requests for injunctions denying workers the right to hold public demonstrations in favor of organizing labor unions.

The first case to bring the ACLU favorable national attention was the so-called "Scopes Monkey Trial" in 1925. The ACLU challenged a Tennessee law outlawing the teaching of evolution in the public schools, representing biology teacher John T. Scopes, who was prosecuted under the law. The July 1925 trial in Dayton, Tennessee, created a sensation, drawing journalists from around the world. Scopes was convicted at trial, but a state appellate court overturned the conviction because the judge erred in imposing the punishment. The state did not retry Scopes, and as a result the issues of constitutional law raised by the case never reached the U.S. Supreme Court. The Scopes case is one of the most famous trials in American history, dramatizing the issues of the freedom to teach unpopular ideas and opposition to government establishment of religion.

The Scopes case was part of the ACLU's long defense of academic freedom. It has fought attempts to have public school teachers and college professors fired because of unpopular ideas and has also fought loyalty oaths for teachers, which were widely used during the cold war period. In the 1960s, the ACLU expanded its work on academic freedom to include the rights of students. This has included the right of students to express unpopular ideas and due process rights for students facing discipline.

The ACLU enjoyed its first significant victories in the Supreme Court in 1931. The Court overturned the conviction of a California woman convicted of possessing a red flag (*Stromberg v. California*, 283 U.S. 359, 1931) and ruled that the First Amendment prohibited prior restraint of newspapers (*Near v. Minnesota*, 283 U.S. 697, 1931). The Supreme Court did not begin to affirm civil liberties protections to a significant degree until the late 1930s, however. In a famous footnote in the case of *U.S. v. Carolene Products*, 304 U.S. 144 (1938), the Court declared that its role was to protect political and civil liberties, particularly of powerless people. In response, the ACLU altered its priorities and began to put more emphasis on litigation as a strategy for protecting civil liberties.

With the Supreme Court increasingly sympathetic to civil liberties after 1938, the ACLU exerted an enormous influence over the development of American constitutional law. One historian estimates that the ACLU was involved, directly or indirectly, in 80 percent of all recognized landmark civil liberties cases decided by the U.S. Supreme Court in the twentieth century. The ACLU initially confined its role to filing amicus ("friend of the court") briefs in court cases, addressing only the civil liberties issues involved in a case. In the 1960s, it began providing direct legal representation to its clients, handling cases at the initial trial level.

The ACLU's basic principle on free speech is that the First Amendment prohibits any restrictions on expression based on the content of the ideas expressed. Consequently, the organization has consistently defended the free-speech rights of communists and advocates of other radical political ideas. Under the same principle, the ACLU has fought censorship of literature containing allegedly offensive material. In one of its most famous cases, it overturned a U.S. Customs Bureau ban on the James Joyce novel *Ulysses*. The ACLU has also taken a broad definition of expression, arguing in cases that "expression" includes nonverbal as well as verbal expression. In 1967, the ACLU won a landmark case upholding the right of a public school student to wear an arm-band protesting the Vietnam War.

The ACLU defended the rights of Jehovah's Witnesses in a long series of cases and controversies from the late 1930s to the early 1950s. Because their doctrines and tactics were extremely unpopular, the Jehovah's Witnesses were subject to restrictive laws and attacks by vigilante groups. Several cases helped to define First Amendment protection for the free exercise of religion. The most famous controversy involved the refusal of public school students who were members of the Jehovah's Witnesses to participate in compulsory salutes of the American flag. In the landmark case of *West Virginia v. Barnette*, 319 U.S. 624 (1943), the Supreme Court affirmed the principle that the government cannot compel a person to express a belief that is contrary to his or her conscience.

The ACLU has been particularly controversial because of its position on the separation of church and state. The ACLU has held that the establishment clause of the First Amendment prohibits any government support or endorsement of religious activity. Since the 1925 Scopes case, the ACLU has fought other efforts to prohibit the teaching of evolution or to require the teaching of religious views of the creation of the universe. In the 1940s and 1950s, the ACLU fought government financial support for religious activities in public schools. In 1962, the

ACLU won one of its most controversial cases when the Supreme Court ruled that mandatory religious prayers in public schools violated the establishment clause of the First Amendment. The organization has also generated controversy by opposing religious displays in public buildings. The majority of these controversies involved religious displays in front of courthouses and other public buildings during the Christmas season or Christmas programs in public schools. In 2004 and 2005, the ACLU also sought to remove displays of the Ten Commandments from courthouses and public parks.

Because of its position on separation of church and state, and school prayers in particular, the ACLU has been attacked by religious conservatives as “Godless” and “antireligion.” The group has responded by arguing that the free exercise of religion clause of the First Amendment protects religious expression. In addition to its support for the Jehovah’s Witnesses in the 1930s and 1940s, the ACLU in the 1990s defended the right of Native Americans to use peyote, a drug that is generally illegal, in religious ceremonies. Together with many religious organizations, the ACLU supported the 1993 Religious Freedom Restoration Act designed to overturn an unfavorable Supreme Court ruling.

During World War II the ACLU defended the rights of nearly 120,000 Japanese Americans who had been evacuated from the West Coast of the United States and interned in concentration camps. Because of popular support for the war effort, the ACLU was the only national organization to provide significant support for the Japanese Americans, representing them in the major cases that reached the Supreme Court. The Court upheld the government’s actions in *Hirabayashi v. United States*, 320 U.S. 81 (1943), and *Korematsu v. United States*, 323 U.S. 214 (1944), but public opinion and subsequent court cases have supported the ACLU argument that the treatment of the Japanese Americans was a gross violation of civil liberties.

The most divisive internal controversy in ACLU history occurred in 1940 when the Board of Directors adopted a policy barring individuals who belonged to totalitarian organizations from positions of leadership in the ACLU. It then expelled Elizabeth Gurley Flynn from the Board. Many dissident ACLU members accused the organization of imposing the same kind of political test that it had always opposed. The controversy simmered for many years. Eventually, in 1976, the ACLU Board, led by a new generation of civil libertarians, reinstated Flynn posthumously to the Board.

During the cold war period of the late 1940s and 1950s, the ACLU opposed many anticommunist measures as violations of freedom of belief and

association. It challenged the Federal Loyalty Program created in 1947 because it barred people from federal employment simply because they had once belonged to an organization alleged to be subversive. It also called for abolition of the House Un-American Activities Committee (HUAC) because it investigated people’s beliefs and associations. The ACLU opposed the 1940 Smith Act, which outlawed advocating the overthrow of the government. At the state level, ACLU affiliates opposed loyalty oaths for teachers and legislative investigations of people’s beliefs and associations.

On civil rights issues, the ACLU worked closely with the NAACP from 1920 onward. In the 1920s, the ACLU called on local authorities to prevent Ku Klux Klan-led violence against African Americans, and in the 1930s joined the unsuccessful campaign for a federal law making lynching a crime. The ACLU was active in the Scottsboro case in the 1930s, which involved eight young African-American men accused of raping a white woman in Alabama. This was the first civil rights case to attract national attention. The ACLU handled two Supreme Court cases that led to landmark rulings on criminal procedure (*Powell v. Alabama*, 287 U.S. 45, 1932; *Patterson v. Alabama*, 1935). The organization also filed an amicus brief in the landmark case of *Brown v. Board of Education*, 347 U.S. 483 (1954), declaring racially segregated public schools unconstitutional. Beginning in the 1970s, the ACLU supported affirmative action programs in employment.

In the 1960s and 1970s, the ACLU’s agenda expanded enormously to include new areas of civil liberties, including women’s rights, prisoners’ rights, children’s rights, the right to abortion, the rights of lesbian and gay people, and many others. This development generated considerable controversy. Many people argued that the Constitution did not guarantee rights in these areas. Some prominent ACLU members resigned from the organization over these issues, arguing that it should adhere to its traditional role of defending First Amendment rights. In general, however, the ACLU was very successful in persuading the courts to adopt its interpretation of the Constitution. The single most important case in this regard was the 1973 decision in *Roe v. Wade*, 410 U.S. 113 (1973), holding that the constitutional right to privacy guaranteed women a right to an abortion.

The ACLU has had a major impact on the American criminal justice system. Its briefs were extremely influential in the Supreme Court cases of *Mapp v. Ohio*, 367 U.S. 643 (1961), and *Miranda v. Arizona*, 384 U.S. 436 (1966), protecting the rights of criminal suspects. The group has also supported the creation of independent agencies to review citizen complaints

against police officers. ACLU attorneys brought the first prisoners' rights cases in the 1960s and in the 1970s; it created the National Prison Project, which challenged the constitutionality of prison conditions in virtually every state in the country.

The Vietnam War and the Watergate scandal led the ACLU to devote more effort to civil liberties issues related to war and national security. The organization and its affiliates brought several unsuccessful cases seeking to have the courts declare the Vietnam War unconstitutional. During the Watergate scandal, the ACLU was one of the first national organizations to call for the impeachment of President Richard Nixon because of his abuse of presidential power.

In one of the most controversial First Amendment cases in its history, the ACLU in 1977 defended the right of a small American Nazi group to hold a demonstration in the heavily Jewish community of Skokie, Illinois. The organization was heavily criticized for defending the rights of a group associated with the Holocaust and it lost many members. The ACLU replied to critics with its traditional view that restrictions on speech based on the content of the message were impermissible and that the First Amendment guarantees "freedom for the thought we hate." The federal courts eventually upheld the ACLU's position and affirmed the right of the Nazi group to hold a demonstration in Skokie.

The ACLU took up the issue of abortion rights in the 1960s and filed an amicus brief in the landmark case of *Roe v. Wade* (1973), which established a constitutional right to an abortion. In the 1970s, the ACLU created its Reproductive Rights Project, which fought to defend the *Roe* decision and worked on other related reproductive rights issues. The ACLU also created a Women's Rights Project in the early 1970s. Under the leadership of Ruth Bader Ginsburg, the project won the first important cases on women's rights in the Supreme Court, beginning with *Reed v. Reed* (1971).

In the 1970s, the ACLU began to place more emphasis on legislation as the Supreme Court became less sympathetic to civil liberties. Originally staffed by only one person, by 2005 the ACLU Washington office had a staff of over twelve full-time lobbyists. In addition, ACLU affiliates lobby in state legislatures and several affiliates employ full-time lobbyists. In the 1980s, the ACLU began to strengthen its public education program, creating a separate Public Education Department in the national office. This development reflected the belief that public opinion was increasingly hostile or indifferent to civil liberties issues.

Two former leaders of the ACLU have been appointed associate justices of the U.S. Supreme Court. Felix Frankfurter, who was among the original founders of the ACLU in 1920, was appointed to

the Court in 1939 and served until 1962. Ruth Bader Ginsburg was the first director of the ACLU Women's Rights Project in the early 1970s. In that capacity she argued and won a series of landmark women's rights cases before the Court. She was appointed to the Court in 1993.

The terrorist attacks on the United States on September 11, 2001, had a dramatic effect on civil liberties. Many Americans felt that it was necessary to restrict individual liberties in order to protect against terrorism. Congress quickly passed the PATRIOT Act, which included many provisions the ACLU regarded as threats to civil liberties. Most important, the law authorized the federal government to conduct searches without notifying the person whose home or office was to be searched (so-called "sneak and peak" search warrants). The ACLU also protested interviews with Arab Americans by the Federal Bureau of Investigation, charging that the practice represented discriminatory profiling on the basis of national origins. In challenging aspects of the war on terrorism, the ACLU enjoyed significant public support. Immediately after the terrorist attacks of September 11, 2001, it developed a working coalition with conservative groups and leaders who were also concerned about expanded government powers. The membership of the ACLU grew by 30 percent between late 2001 and mid-2005.

The ACLU is a national organization with about five hundred thousand members. It maintains a national office in New York City, a legislative office in Washington, D.C., and staffed affiliate offices in all fifty states. The work of the ACLU is financed by members' dues, tax-deductible contributions, and grants to support specific projects. Grants from private foundations and donors support a series of special projects related to specific civil liberties issues. These include the Voting Rights Project, with an office in Atlanta, Georgia, the Reproductive Rights Project, the Women's Rights Project, and others.

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References and Further Reading

- Cottrell, Robert C. *Roger Nash Baldwin and the American Civil Liberties Union*. New York: Columbia University Press, 2000.
- Larson, Edward J. *Summer for the Gods: The Scopes Trial and America's Continuing Debate over Science and Religion*. New York: Basic Books, 1997.
- Murphy, Paul L. *World War I and the Origin of Civil Liberties in the United States*. New York: Norton, 1979.
- Walker, Samuel. *The American Civil Liberties Union: An Annotated Bibliography*. New York: Garland, 1992.
- . *In Defense of American Liberty: A History of the ACLU*, 2nd ed. Carbondale: Southern Illinois University Press, 1999.

AMERICAN COMMUNICATION ASSOCIATION v. DOUDS, 339 U.S. 382 (1950)

In 1947, Congress added Section 9(h) to the National Labor Relations Act; this section required all labor union officers to sign annual affidavits stating that they did not belong to the Communist Party or support the unlawful overthrow of the U.S. government. Unions whose officers refused to sign noncommunist affidavits were denied access to the National Labor Relations Board for relief from unfair labor practices. Congress justified the affidavit requirement as necessary to protect the free flow of Interstate Commerce from political strikes. In *American Communication Association v. Douds*, the Supreme Court upheld the statute despite noting that it “discourag[ed] the exercise of political rights protected by the First Amendment.”

In an opinion written by Chief Justice Vinson, the Court concluded that the affidavit provision was designed by Congress to regulate harmful conduct in the form of political strikes, but not harmful speech. Because the statute had what the Court viewed as only an indirect effect on speech, the Court applied a balancing test, rather than the clear and present danger test, to determine the requirement’s constitutional validity. After considering the competing interests, the majority concluded that protecting the national economy from disruptive political strikes outweighed any burden on the ability of a “relative handful” of union members to express their political views.

The holding’s precedential value today is questionable. While not explicitly overruling *Douds*, the Court invalidated a later version of Section 9(h) as an unconstitutional bill of attainder in *United States v. Brown*, 381 U.S. 437 (1965).

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References and Further Reading

Currie, David P., *The Constitution in the Supreme Court: 1946–1953*, Emory Law Journal 37 (1988): 249–294.
 Kalven, Harry Jr. *A Worthy Tradition: Freedom of Speech in America*. New York: Harper & Row, 1988.

Cases and Statutes Cited

United States v. Brown, 381 U.S. 437 (1965)

See also **Balancing Approach to Free Speech; Bill of Attainder; Clear and Present Danger Test; Interstate Commerce; National Labor Relations Board; Vinson Court**

AMERICAN INDIAN RELIGIOUS FREEDOM ACT OF 1978

Congress announced that the policy of the United States was to “protect and preserve” the rights of American Indians, Alaskan Natives, and Native Hawaiians “to believe, express, and exercise” their “traditional religions” in a joint resolution adopted in 1978, now known as the American Indian Religious Freedom Act (AIRFA). The AIRFA defined the practice of “traditional religions” to include, without limitation, “access to sites, use and possession of sacred objects, the freedom to worship through ceremonies and traditional rites.”

The impetus for the AIRFA was a study conducted by the House of Representatives that concluded the federal government was restricting Indian religious freedom in at least three ways. First, federal agencies such as the U.S. Forest Service, National Park Service, and the Bureau of Land Management frequently prevented Indians from entering federal land where sacred sites were located. Moreover, the agencies refused to allow the burial of tribal leaders in tribal cemeteries located on federal land. Second, federal law-enforcement officials regularly confiscated substances, such as peyote, used by Indians for religious purposes, even though federal cases had protected the use of these substances as a bona fide religious sacrament. Federal officials also confiscated the use of animal parts from endangered species, such as turkey and eagle feathers, that Indians used in religious ceremonies.

Third, the House found that federal agents directly and indirectly interfered with tribal ceremonies and religious practices. For example, federal officers had a long history of opposing and restricting the practice of tribal religions through the enforcement of Bureau of Indian Affairs-authored reservation law-and-order codes that flatly prohibited most tribal religious ceremonies. These law-and-order codes were enforced in the Courts of Indian Offenses, with judges hand-picked by federal officers. Federal courts in cases such as *United States v. Clapox*, 35 F. 575 (D. Or. 1888), upheld federal regulations, thus allowing the prosecution of Indians engaging in traditional religious practices. On-reservation federal Indian agents, as a matter of administrative practice, obstinately remained on the grounds at Rio Grande pueblos during religious ceremonies requiring that no non-Indian be present. Federal law-enforcement officers would also do little or nothing to stop unwelcome on-lookers from interfering in tribal religious ceremonies. The House also found that federal officials had directly interfered or allowed interference in tribal religious practices because the officials rejected Indian religions.

As a mere joint resolution, the AIRFA does not have the full force of federal law. Importantly, it did not include an enforcement and penalty provision. This status has undermined the effectiveness of the act in tough cases, such as *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988). There, the Supreme Court upheld a federal road project that would cut through the heart of tribal sacred sites located near the Hoopa Valley Reservation in California, even though the Ninth Circuit had determined that the project would destroy areas central to the religions of the Yurok, Karuk, and Tolowa tribes. The Court refused to enforce the act, largely because, without an enforcement clause, it had “no teeth in it.”

The Court evinced greater hostility to tribal religious practices in *Employment Division v. Smith*, 494 U.S. 872 (1990). There, the state of Oregon denied unemployment benefits to individuals who had been fired for good cause. The state denied benefits to two Indians who had been fired for using peyote as a religious sacrament outside of work. The Court upheld the regulation on the theory that the regulation was a neutral law not designed to restrict religion. As such, the Court applied the rational basis test to scrutinize Oregon’s action under the free exercise clause.

Congress attempted to reverse the holding in *Smith* and other freedom of religion cases by enacting the Religious Freedom Restoration Act (RFRA). This statute would require the Court to apply a compelling interest test, but the Court struck it down in *City of Boerne v. Flores*, 521 U.S. 507 (1997), as applied to state and local governments.

In 1996, President Clinton issued Executive Order No. 13007 that requires all federal agencies to accommodate access to sacred sites for Indian religious practitioners and avoid negatively affecting those sites. This executive order also does not contain an enforcement provision. In short, the AIRFA, along with Executive Order No. 13007, is little more than the imposition of a duty on federal agencies to take into consideration tribal interests, to consult with tribal leaders on the subject of Indian religion, and not to interfere with tribal religious practices.

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References and Further Reading

- Carpenter, Kristen A., *A Property Rights Approach to Sacred Sites Cases: Asserting a Place for Indians as Non-owners*, UCLA Law Review 52 (2005): 4:1061–1148.
 Cohen, Felix S., *The Erosion of Indian Rights, 1950-1953: A Case Study in Bureaucracy*, Yale Law Journal 62 (1953): 3:348–390.
 Epps, Garrett. *To an Unknown God: Religious Freedom on Trial*. New York: St. Martin’s Press, 2001.

Petoskey, John. “Indians and the First Amendment.” In *American Indian Policy in the Twentieth Century*, Vine Deloria, Jr., ed. Norman: University of Oklahoma Press, 1985, 221–238.

Pevar, Stephen L. *The Rights of Indians and Tribes*, 3rd. ed., Carbondale and Edwardsville: University of Southern Illinois Press, 2002, 260–266.

Cases and Statutes Cited

- City of Boerne v. Flores*, 521 U.S. 507 (1997)
Employment Division v. Smith, 494 U.S. 872 (1990)
Lyng v. Northwest Indian Cemetery Protective Association, 485 U.S. 439 (1988)
Native American Church of New York v. United States, 468 F. Supp. 1247 (S.D. N.Y. 1979), aff’d, 633 F.2d 205 (2nd Cir. 1980)
People v. Woody, 61 Cal. 2d 716, 40 Cal. Rptr. 69, 394 P.2d 814 (1964)
United States v. Clapox, 35 F. 575 (D. Or. 1888)
Wilson v. Block, 708 F.2d 735 (D.C. Cir.), cert. denied, 464 U.S. 956 (1983)
American Indian Religious Freedom Act, S.J. Res. 102, Aug. 11, 1978, Pub. L. 95-341, 92 Stat. 469, codified in part 42 U.S.C. § 1996
Religious Freedom Restoration Act, 42 U.S.C. § 2000bb et seq

See also Accommodation of Religion; City of Boerne v. Flores, 521 U.S. 507 (1997); *Drugs, Religion, and Law; Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872 (1990); *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988); *Native Americans and Religious Liberty; Religious Freedom Restoration Act*

AMERICAN REVOLUTION

The Subjects of Liberty

The words “liberty” and “rights” had far different connotations for people in the American colonies, depending on their status as slaves, free blacks, Native Americans on their homeland, women, indentured servants, loyalists, conscripted soldiers, religious dissidents, radical patriots, or propertied white males. The term “civil liberties” was not a term used in the period between 1760 and 1783. Many of the colonists depended on the rights they claimed as English citizens. For those with limited rights based on their English origins, a new understanding of rights was required; for others, the rights they claimed had far different origins in their understandings as indigenous peoples of the American or African continent.

Most of the history of the era has focused on the propertied white male colonist and his revolution against the British king and Parliament. Whether his battle was to retain rights as a citizen of the British Empire or to retain the unique habit of independence as an American colonist, he remained at the heart of the investigation of the causes of the American Revolution.

Many colonists viewed the indigenous populations as “savages” existing outside the polity of the colonial, state, or federal governments. The sovereign nations had their own views of the rights of people in relation to community. The five nations of the Haudenosaunee, in their Great Binding Law (Gayanashgowa, for example), demonstrated working concepts of confederation, and included, for example, rights of the people to deliberate and be consulted in times of dire threat to the tribes. The question of the relations between the revolutionary government and the tribal nations was not an issue of civil rights. The growing protection for colonial property rights, however, increasingly allowed the revolutionary states to encroach on Native American sovereign lands.

The free black population, particularly in the northern colonies, gradually increased as the events moved toward revolution. Slaves and free blacks expected that the cry for liberty and civil rights by the American colonists should include freedom and the end of slavery in the colonies. Petitions were sent to colonial governments seeking the end of slavery as well as, in some cases, receipt of land as compensation for involuntary servitude. While these petitions had little effect on the colonial governments, they did resonate with a number of state governments once the war began.

Between 1780 and 1804, eight states—including the fourteenth state, Vermont—abolished slavery outright or passed gradual abolition laws to end slavery over the course of the next few decades. Pennsylvania’s Gradual Abolition Act of 1780 noted the inconsistency of fighting for liberty against the British while maintaining slavery. In some states, including New York, Pennsylvania, Massachusetts, and Vermont, blacks gained complete political equality; in others they gained freedom, but not the ballot. The southern states did not end slavery, but a few, such as Virginia, allowed for voluntary manumission of slaves and most reduced the harshness of punishments for slaves and free blacks.

Many black males were manumitted in exchange for long service in the continental army. Some entered military service of their own accord and others were volunteered to substitute their service for the service of their white slave owners. Many white southerners objected to allowing blacks to serve in the army. They

feared uprisings among the slave population and objected to serving alongside black slaves or freedmen. In some cases the black soldiers were given service functions, such as jobs as cooks, drivers, or laborers, instead of fighting positions. Often, however, events necessitated an abandonment of this policy as the battles intensified. Black soldiers performed heroic acts in many of these battles; many had been slaves at the beginning of the Revolution and were able to gain their freedom through military service.

An undetermined number of white male indentured servants sometimes were released from their contractual bond in exchange for enlistment in the army. The rights of indentured servants were not, however, a focus of the revolutionary efforts to secure political and civil rights.

Women were represented by every possible status within the colonies, and whether they were southern female slaves or patriot or loyalist wives of propertied colonists, their plight was ignored by those who articulated the goals of the revolution. Their rights, except in the case of those included in manumissions, were not significantly improved as a result of the Revolution. The rights of white married women and widows may have diminished after the revolution as the law became more rigidly applied to their limited legal identity. Prior to and during the revolution, some of these women exercised a wider range of economic and legal power under circumstances that necessitated their action. Single women retained the power to own property, sue in court, and inherit property. However, during and after the Revolutionary period, some women, such as Mercy Otis Warren, participated in politics by writing essays and pamphlets. In New Jersey women gained the right to vote during the Revolution, although they would lose this right in the early 1800s.

The fight for liberty in the face of governmental oppression did not necessarily pertain to colonists, labeled “Tories” or “Loyalists,” who refused to join the revolutionary cause. They suffered loss of life, liberty, and due-process protections at the hands of American patriots who were fighting to secure liberties for themselves. Loyalty oaths were demanded of all men over the age of sixteen. Taxes were imposed at much higher rates than those imposed on patriots. Property was confiscated; many opponents of the revolutionary cause were imprisoned, tarred and feathered, or exiled. The military and the colonial governments asserted jurisdiction to investigate, bring to trial, and punish those who spoke in support of remaining loyal to the king.

Despite the denial of due process or freedom of expression to Tories, the Revolution had a profound affect on civil liberties. Before the war, the British

used arbitrary searches—writs of assistance—to look for smuggled goods and weapons. The British tried to move trials of Americans overseas, denying them access to witnesses, counsel, and juries of their peers. The war began with the British trying to seize the munitions of the Concord militia. The colonists petitioned the king, but received no response and felt cut off from having a voice in government. During the war, pamphleteers and newspaper editors pushed the patriot agenda with the printed word. These experiences led to demands after the war that culminated in the Bill of Rights, protecting the rights of petition and jury trials, banning warrantless searches, and prohibiting the federal government from disarming the state militias. Even the deprivations of Tory rights affected Americans. A number of states used bills of attainder to arrest Tories, but they did so with some discomfort, knowing that such behavior violated fundamental rights. Not surprisingly, such behavior was banned in the Constitution.

Historical Interpretations of the Revolution

Any description of liberties and rights during the period from 1760 until 1783 must take into account the different perspectives, the changes of the components of liberty and rights articulated by the people over time, and the school of historical thought reflected by the particular description of the period. Perhaps no period has received so much attention from historians with so little agreement.

During the nineteenth century George Bancroft's ten-volume *History of the United States* offered the accepted "Whig" interpretation of the American Revolution. The Whig party opposed the power of the Stuart kings in the seventeenth century on the basis that the English tradition of liberties was protected in the unwritten constitution. Bancroft and earlier historians, including Mercy Otis Warren and David Ramsay, described the Revolution as the reaction against parliamentary conspiracies to deprive the colonists of their rights as English citizens. American colonists viewed themselves as retaining the rights identified in England with the grant of the Magna Carta in 1215 and the Petition of Rights in 1628. Although not always followed by king or Parliament, these documents limited their powers and guaranteed that freemen could not be taken, imprisoned, or disseized of life, property, or liberties without due process of law.

Parliamentary actions that allowed general warrants to search any colonial home for smuggled goods (Writs of Assistance 1761) and imposed taxes and duties on commercial items including paper (The

Stamp Act of 1765), sugar (The Sugar Act of 1774), and tea (The Townshend Revenue Act of 1767) pushed the colonists to articulate their right to give consent by way of proper representation in Parliament before property could be taken from them. James Otis, one of the early opponents of the use of arbitrary power against the colonists, resigned his government position in order to argue against the practice of searching homes without specific warrants. In boycotts and other acts of open defiance to taxes imposed by Parliament, the colonists vigorously objected to being deprived of property without representation and also fought to ensure their right to petition concerning their grievances against the king and Parliament. Freedom of the press was understood as an essential tool in efforts to oppose arbitrary and oppressive use of power. Free speech was an idea initially subsumed by the fight for a free press.

In response to the punitive "coercive"/"intolerable acts" of 1774, the colonists met in Philadelphia at the First Continental Congress and identified a number of the rights that were threatened by Parliament at that time. "The Declaration and Resolves" issued by the Congress on October 14, 1774, reaffirmed their belief that colonists retained all of their rights as free natural-born subjects of England, and reiterated the right not to be deprived of life, liberty, or property without consent; the right to be tried by a jury of their local peers before an independent judiciary; and the right to peaceably assemble and petition the king with their grievances. In further documents, the Congress criticized the expanded jurisdiction of admiralty and vice admiralty courts that deprived the colonists of their right to a jury trial.

The focus of this early historical interpretation pits the struggles of the enfranchised male colonist against the arbitrary exercise of power and oppression by the British Parliament and the king. The developing nationalist unified view shared by all such colonists led to the ensuing revolution and creation of the Declaration of Independence. It also fostered a sense of rights and liberties that needed protection from arbitrary and oppressive interference from government. According to this view the colonists were primarily influenced by John Locke's theories.

The arguments of the wealthy, intellectual colonists, for the most part, did not focus on the interests of the "middling" classes of artisans, tradesmen, seamen, laborers, and small rural farmers, or the increasing numbers of immigrant poor who were flocking to the cities. "New Left" historians, including Gary Nash, have described the role of the common person in the pre-Revolutionary identification of rights and liberties. The resentment toward the wealthy merchants, lawyers, and politicians grew as measures

were passed ignoring the plight of the poor, the artisans, and the tradesmen while increasing the revenues for the rich colonists. In these historical accounts the poor claimed as many grievances against the wealthy colonists and their influence over government as they did against the dominance of the English parliament and king. They participated in demonstrations, uprisings, and petitions that reflected a demand for a more egalitarian society than that which existed in the goals of the elite merchants, politicians, and farmers.

As the revolution progressed, the new state governments began the task of writing their constitutions. Each of these new governments adopted its version of a declaration or bill of rights reflecting its previous colonial efforts to create written laws, its adaptations of English rights, and the unique interests of the particular state ratifying conventions. The Bay Colony reduced to writing its Massachusetts Body of Liberties in 1641 and the Laws and Liberties of Massachusetts in 1648. In 1780, their constitution began with "a declaration of the rights of the inhabitants of the Commonwealth of Massachusetts." As described by Professors Conley and Kaminski in *The Bill of Rights and the States*, when the new states prioritized the rights that were important:

New Yorkers championed freedom of expression; Rhode Islanders passionately defended religious liberty and church-state separation; Delawareans showed an unusual preoccupation with the right to keep and bear arms; Massachusetts men stoutly objected to unreasonable searches and seizures; Vermonters led the way in abolishing slavery; Rhode Islanders and North Carolinians exalted states' rights as an antidote to centralized power; and Pennsylvanians and Virginians pioneered in asserting a broad range of individual freedoms.

Because the states were viewed as the primary protectors of the rights of citizens of the states, the Articles of Confederation did not need a declaration of rights.

Progressive historians of the early twentieth century, including Charles Beard, identified conflicting economic interests that divided classes in the colonies and motivated the colonists. These historians examined the self-interest of revolutionary leaders and eventual founding fathers of the Constitution. The economic incentives of those holding wealth and power in the colonies also pitted the Colonists against the British, particularly against Parliament's imposition of external and internal taxes. The progressive historians focused much of their attention on identifying the incentives that would protect property rights of self-interested individuals. In this explanation, the rights of the disenfranchised, those held in slavery, or other

powerless individuals were not the primary motivation of these revolutionary activities.

A major revision in the history of the causes of the American Revolution occurred with the work of Bernard Bailyn, Gordon S. Wood, and J.G.A. Pocock in what has been termed "a republican revival" or "neo-Whig" history. This interpretation agreed with the earlier Whig interpretations of history that suggested that the colonists feared conspiratorial efforts by Parliament to deprive them of their rights as English citizens. The work of Bailyn and Wood located the intellectual origins of the colonists' revolutionary rhetoric and action in seventeenth century radical Whig oppositional thought in England.

The civil rights and liberties of the revolutionary era are best understood individually as the states adopted their declarations of rights and the Constitution of 1787 was ratified with a promise of a Bill of Rights. No unified view existed, and all versions excluded many of the peoples of the new governments.

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References and Further Reading

- Bailyn, Bernard. *The Ideological Origins of the American Revolution*. Cambridge, Mass.: Harvard University Press, 1967; enl. ed., Cambridge: Belknap Press, 1992.
- Beard, Charles A. *An Economic Interpretation of the Constitution of the United States*. New York: Macmillan, 1913.
- Bancroft, George. *History of the United States*, vols. 4-7, New York: D. Appleton, 1834-1874.
- Berlin, Ira. "The Revolution in Black Life." In *The American Revolution, Explorations in the History of American Radicalism*, Alfred F. Young, ed. Dekalb: Northern Illinois University Press, 1976, 349-382.
- Calhoun, Robert M. *The Loyalists in Revolutionary America, 1760-1781*. New York: Harcourt Brace Jovanovich, 1973.
- Conley, Patrick T., and John P. Kaminski. *The Bill of Rights and the States, The Colonial and Revolutionary Origins of American Liberties*. Madison, WI: Madison House, 1992.
- Higginbotham, Don. "Loyalist Experiences and Civil Liberties in Wartime." In *The War of American Independence: Military Attitudes, Policies, and Practice, 1763-1789*. New York: Macmillan Co., 1971.
- Kerber, Linda. *Women of the Republic: Intellect and Ideology in Revolutionary America*. Chapel Hill: University of North Carolina Press, 1980.
- Lemisch. "Revolution from the Bottom up." In *Towards a New Past: Dissenting Essays in American History*, Barton J. Bernstein, ed. New York: Pantheon Press, 1968.
- . "The Radicalism of the Inarticulate: Merchant Seamen in the Politics of Revolutionary America." In *Dissent: Essays in the History of American Radicalism*, Alfred F. Young, ed. Dekalb: Northern Illinois University Press, 1964.
- Morgan, Edmund S., and Helen M. Morgan. *The Stamp Act Crisis: Prologue to Revolution*. Chapel Hill: University of North Carolina Press, 1953.

- Nash, Gary. *Red, White and Black: The Peoples of Early America*. Englewood Cliffs, N.J.: Prentice Hall, 1974.
- . “Social Change and the Growth of Pre-Revolutionary Urban Radicalism.” In *The American Revolution, Explorations in the History of American Radicalism*, Alfred F. Young, ed. Dekalb: Northern Illinois University Press, 1976, 3–36.
- . “Also There at the Creation: Going Beyond Gordon S. Wood.” *WMQ*, 3d Ser., XLIV (1987), 602.
- Norton, Mary Beth. *Liberty’s Daughters: The Revolutionary Experience of American Women, 1750–1800*. Boston, MA: Little, Brown and Company, 1980.
- Otis, James. *A Vindication of the Conduct of the House of Representatives of the Province of Massachusetts-Bay*. Boston: 1762.
- . *The Rights of the British Colonies Asserted and Proved*. Boston: 1764.
- Pocock, J. G. A. *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition*. Cambridge, MA: Harvard University Press, 1975.
- Potter, Janice. *The Liberty We Seek: Loyalist Ideology in Colonial New York and Massachusetts*. Cambridge, MA: Harvard University Press, 1983.
- Ramsay, David. *The History of the American Revolution*, 2 vols. Foreword by Lester H. Cohen. Indianapolis, IN: Liberty Fund, 1990.
- Reid, John Phillip. *Constitutional History of the American Revolution: The Authority of Rights*. Madison: The University of Wisconsin Press, 1986.
- Wilson, Joan Hoff. “The Negative Impact of the American Revolution.” In *Major Problems in American Women’s History Series*, Mary Beth Norton, ed. Lexington, MA: D. C. Heath and Company, 1989.
- Warren, Mercy Otis. *The History of the Rise, Progress, and Termination of the American Revolution, Interspersed With Biographical, Political and Moral Observations*. Boston, MA: 1814; reprinted in New York: AMS Press, 1970.
- Wood, Gordon S. *The Creation of the American Republic: 1776–1787*. Chapel Hill: University of North Carolina Press, 1969.
- . *The Radicalism of the American Revolution*. New York: Alfred A. Knopf, 1992.

AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE

Americans United for Separation of Church and State (Americans United) is a Washington, D.C.-based public interest organization committed to preserving the principles of separation of church and state and religious liberty through litigation, lobbying, and public education. Americans United advocates a broad interpretation of the establishment and free exercise clauses of the First Amendment to the Constitution, sometimes described as a “strict” separationist approach. The organization’s primary focus and bulk of activity have been on establishment clause issues, opposing government financial support of religious institutions—including most forms of public aid

to religious schools—officially sponsored prayer and Bible reading in public schools, and the public display of religious symbols on public property. The organization publishes *Church & State* magazine.

Americans United was founded in 1947 by moderate and evangelical Protestant leaders and professional educators who became alarmed at the U.S. Supreme Court decision in *Everson v. Board of Education* (1947) upholding public payment of transportation expenses for children to attend parochial schools. The organizers also opposed President Harry S. Truman’s efforts to appoint an ambassador to the Vatican, claiming that the action provided official recognition of a religious body. The organization was founded as “Protestants and Other Americans United for Separation of Church and State” (POAU), with its support coming largely from Baptist, Methodist, Presbyterian, and Seventh-Day Adventist bodies, as well as organizations such as the Baptist Joint Committee on Public Affairs, the National Association of Evangelicals, the National Education Association, and several Masonic groups. The organization’s name, its primary opposition to parochial school funding, and its often highly charged rhetoric led to early claims that POAU was anti-Catholic.

In 1948, Americans United hired Glen Archer, dean of Washburn University Law School, as its first executive director. Archer, an effective public speaker and consummate fund-raiser, served as executive director for twenty-eight years, growing the membership to over two hundred thousand by the mid-1950s. Early supporters of Americans United, according to the organization, included Eleanor Roosevelt and Supreme Court Justice Hugo Black. An early affiliate of and spokesperson for Americans United was Paul Blanshard, author of the best selling *American Freedom and Catholic Power* (1949) and *God and Man in Washington* (1959), both works criticized as being anti-Catholic in orientation.

From its beginnings, Americans United has been a leading litigation organization on establishment clause issues. Americans United’s earliest cases involved challenges to joint operating agreements between public and parochial schools (common in many rural areas during the 1940s and 1950s) and religiously based censorship of books and motion picture films. However, Americans United’s greatest impact came through its litigation against public funding of parochial schools and religious colleges. Americans United, sometimes in conjunction with other groups, litigated several of the leading funding cases before the U.S. Supreme Court, including: *Flast v. Cohen*, 392 U.S. 83 (1968); *Lemon v. Krutzman*, 403 U.S. 602 (1971); *Tilton v. Richardson*, 403 U.S. 672 (1973); *Meek v. Pittenger*, 421 U.S. 349 (1975); *Grand Rapids School District v.*

Ball, 473 U.S. 373 (1985); *Mitchell v. Helms*, 530 U.S. 793 (2000); and *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002). The only Supreme Court decision bearing its name, however, is *Valley Forge Christian College v. Americans United*, 454 U.S. 464 (1982), an Article III standing case.

By the late 1960s, Americans United had dropped its earlier name, "Protestants and Other Americans United," and its anti-Catholic rhetoric had softened, indicating developing attitudes following Vatican II. Membership declined in the 1970s and 1980s, particularly following the retirement of Glen Archer in 1976, and the organization floundered under the leadership of several short-term directors. During the 1980s, Americans United expanded its involvement in issues concerning religion and public education and the free exercise of religion. The organization also became outwardly critical of the activities of the ascending religious Right, including groups such as the Moral Majority and the Christian Coalition. Also, by the 1980s, Americans United's support base had shifted from moderate and evangelical Protestants to liberal Protestants, Unitarians, Reform Jews, and non-believers. Americans United's transformation to a secular-oriented civil rights organization was completed by the 1992 appointment of Barry Lynn, a former American Civil Liberties Union official, as executive director. Membership and name recognition subsequently grew under Lynn's directorship.

Currently, Americans United litigates and lobbies in Congress and in state legislatures on a range of church-state issues, including private school vouchers, public school prayer and Bible reading, the teaching of evolution or creationism, charitable choice (public funding of religious charities), and the official display of the Ten Commandments and other religious symbols. Americans United cosponsored litigation in various voucher cases, including *Zelman v. Simmons-Harris* (2002). The organization also supported the Religious Freedom Restoration Act (1993) and the Religious Land Use and Institutionalized Persons Act (2000).

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References and Further Reading

- Berg, Thomas C., *Anti-Catholicism and Modern Church-State Relations*, Loyola University Chicago Law Journal 33 (2001): 121-172.
- Creedon, Lawrence P., and William D. Falcon. *United for Separation: An Analysis of POAU Assaults on Catholicism*. Milwaukee, WI: The Bruce Publishing Company, 1959.
- Jeffries, John C., and James E. Ryan, *A Political History of the Establishment Clause*, Michigan Law Review 100 (2001): 279-370.

- Lowell, C. Stanley. *Embattled Wall*. Washington, D.C.: Americans United, 1966.
- Lowell, C. Stanley, and Herbert S. Southgate. "POAU Position on Church-State Relations." *Journal of Church and State* 5 (1963):41-60.
- Salisbury, Franklin C. *The Separationist Position on Church State Relations*. Washington, D.C.: Americans United, 1965.
- Stokes, Anson Phelps, and Leo Pfeffer. *Church and State in the United States*, rev. ed. New York: Harper & Row, Publishers, 1964.
- Who's Who in the P.O.A.U.?* Huntington, IN: Our Sunday Visitor, 1951.

Cases and Statutes Cited

- Flast v. Cohen*, 392 U.S. 83 (1968)
- Grand Rapids School District v. Ball*, 473 U.S. 373 (1985)
- Lemon v. Krutzman*, 403 U.S. 602 (1971)
- Meek v. Pittenger*, 421 U.S. 349 (1975)
- Mitchell v. Helms*, 530 U.S. 793 (2000)
- Tilton v. Richardson*, 403 U.S. 672 (1973)
- Valley Forge Christian College v. Americans United*, 454 U.S. 464 (1982)
- Zelman v. Simmons-Harris*, 536 U.S. 639 (2002)
- See also **Christian Coalition; *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002)**

AMISH AND RELIGIOUS LIBERTY

The Amish seem to be an unlikely group to shape American law. These simple folk distance themselves from the trappings of modernity by living in largely isolated, rural communities. Moreover, they generally avoid relying on the courts to resolve disputes. ("Going to law," as it is called in the scriptures, is anathema to them.) Yet, remarkably, members of the faith have been at the center of several important legal cases that have helped to define the scope of judicial safeguards for religious liberty.

The Amish faith has its roots in the Reformation. Among the Protestant faiths to arise from that tumultuous period was Anabaptism, practiced by pious dissidents who made a particularly radical break with the Catholic hegemony that had long dominated political and religious life in Europe. Adhering to what might be best described as a primitive form of Christianity, they rejected infant baptism and disavowed state control of the church. In time, a group of Anabaptists who followed the teachings of Jakob Ammann splintered off and came to be known as the Amish. They followed Ammann's directives on such matters as personal adornments. Clothes were to be fastened with hooks and not buttons; beards were to be untrimmed; and hats, dresses, stockings, and other garments were to be uniformly plain.

When the Amish started flocking to the New World in the eighteenth century, they steered clear of cities and settled in rural areas. Doing so allowed the Amish to distance themselves from the innumerable perils of what they called “worldliness.” For members of the faith, the call for separation from the corruption of the world at large came most clearly from Romans 12:1–2, which advises, “Be not conformed to this world, but be ye transformed by the renewing of your mind that ye may prove what is that good and acceptable and perfect will of God.” No single admonition from the scriptures was more central to the lives of the Amish who fled Europe for the New World, and it would remain a basic tenet of their faith for the remainder of the millennium.

Despite their best efforts, the Amish were unable to distance themselves completely from the tentacles of state power. Throughout the early and middle parts of the twentieth century, members of Amish communities in several states—including Iowa, Kansas, Ohio, and Pennsylvania—clashed with state authorities who attempted to force them to comply with compulsory school attendance laws and related measures (such as curricula and the certification of teachers). The Amish resisted such laws in part because they seemed to threaten the faith’s tradition of not sending children to school beyond the age of fourteen. Several legal cases resulted from disputes over the application of school attendance laws to the Amish, among them *Kansas v. Garber*, 419 P. 2d 896 (Kan. 1966). In that case, the Kansas Supreme Court ruled that such measures did not impose an unconstitutional burden on the religious liberty of the Amish.

A trio of Amish farmers from Wisconsin fared better than their Kansas brethren when they challenged the constitutionality of their state’s school attendance law. In its landmark religious liberty opinion in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), the U.S. Supreme Court held that compulsory attendance measures did in fact burden the right of the Amish to exercise their religion freely. According to Chief Justice Warren Burger, who wrote for the high court’s majority striking down the application of the law on the Amish, the impact of the statute on the Amish was “not only severe, but inescapable, for the Wisconsin law affirmatively compels them, under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs.”

Yoder marked in many ways a high point not only for religious liberty jurisprudence in general but also for the Amish in particular. Never again would the courts provide such stout protections for free-exercise rights. This was demonstrated in the next significant Amish case to reach the U.S. Supreme Court. *United States v. Lee*, 455 U.S. 252 (1982), involved an Amish

man who claimed that he deserved a faith-based exemption to paying Social Security taxes for his employees. According to Chief Justice Burger, who wrote for the Court’s majority, whereas the circumstances of *Yoder* had lent themselves to permitting a narrow accommodation for members of one particular religious group, the complexities of the tax system involved in *Lee* made providing faith-based exemptions a hopelessly complicated endeavor. “Because the broad public interest in maintaining a sound tax system is of such high order,” he wrote in the Court’s denial of the Amish man’s claim, “religious belief in conflict with the payment of taxes affords no basis for resisting the tax.”

The *Yoder* precedent proved more useful when the Amish opposed the application of state laws mandating the display of bright red and orange reflective triangles on slow-moving vehicles (SMVs). In 1996, the Wisconsin Supreme Court ruled in *Wisconsin v. Miller* (538 N.W. 2d 573, Wisc. 1995) that application of that state’s SMV measure to the Amish—who had argued that placing the SMV emblem on their buggies was too “worldly”—violated their religious liberty. In determining that the state constitution’s protections of conscience shielded the Amish, the court relied in part on the interpretive framework established by the U.S. Supreme Court in *Yoder* and its forebears. *Yoder* had proved similarly important in earlier SMV emblem cases in Kentucky, Ohio, and Michigan.

Such cases are all the more noteworthy because the Amish are famously hesitant to “go to law.” This disinclination is rooted in large part in their adherence to the ethical principles detailed in the Sermon on the Mount. There, as he counsels meekness and nonresistance, Christ admonishes: “If any man sue you at law, and take away thy coat, let him have thy cloak also.” To the Amish, being sued or prosecuted is not quite the same as suing, for defendants in legal cases typically have not chosen to invoke the law; in most instances, they have been dragged into the courts by other people. Not all members of the faith approve of these dealings with the courts, but some justify them on the grounds that the Amish typically are defendants in criminal actions rather than plaintiffs in civil matters.

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References and Further Reading

- Hostetler, John. *Amish Society*, 4th ed. Baltimore, Md.: Johns Hopkins University Press, 1993.
- Kraybill, Donald. *The Riddle of Amish Culture*, rev. ed. Baltimore, MD: Johns Hopkins University Press, 2001.
- Peters, Shawn Francis. *The Yoder Case: Religious Freedom, Education, and Parental Rights*. Lawrence, KS: University Press of Kansas, 2003.

Cases and Statutes Cited

Kansas v. Garber, 419 P. 2d 896 (Kan. 1966)
United States v. Lee 455 U.S. 252 (1982)
Wisconsin v. Miller 538 N.W. 2d 573 (Wisc. 1995)
Wisconsin v. Yoder, 406 U.S. 205 (1972)

AMNESTY INTERNATIONAL

Amnesty International (Amnesty), an organization dedicated to advancing human rights and ending arbitrary detention, has been active worldwide for over forty years. By the early 1990s, Amnesty had worked on behalf of 33,500 prisoners and has since added to its long list of successes. With hundreds of researchers and full-time employees combating injustice around the globe, Amnesty International has become among the world's most visible Non-Governmental Organizations (NGOs).

The group has articulated four major objectives: (1) securing the release of prisoners of conscience (Amnesty defines a prisoner of conscience as one who is imprisoned on the basis of sex, religion, national origin, or belief who has not used or advocated violence.); (2) fair trials for political prisoners; (3) an end to torture, cruel, inhuman and degrading treatment; and (4) an end to executions. It pressures governments to comply with international law obligations embodied in treaties such as the Universal Declaration of Human Rights, which nearly all nations have ratified.

Amnesty was the brainchild of Peter Benenson, a Catholic lawyer of Jewish descent. Having been previously involved in human rights advocacy, Benenson, at the age of forty, was spurred into action in 1961 at reports that two Portuguese students had been sentenced to prison for raising their glasses in public and toasting to freedom. He recruited Eric Baker, a prominent Quaker, and Louis Blom-Cooper, an internationally known lawyer, and they began an effort to pressure Portugal's Salazar regime to release the students as well as to address and publicize the status of political and religious prisoners throughout the world.

The campaign was called "An Appeal for Amnesty, 1961" and was launched when the influential liberal British Sunday newspaper *The Observer* agreed to provide a platform for an exposé highlighting the plight of eight prisoners of conscience entitled "The Forgotten Prisoners." The article attracted worldwide media attention along with a flood of letters and donations. What began as a one-year campaign soon morphed into a permanent effort. Branches soon appeared in France, Ireland, Greece, Switzerland, Norway, the United States, and others. In over 160

countries Amnesty volunteers are now working to further the organization's goals.

The group has campaigned for causes such as exposing the use of child soldiers in Africa, responsible economic development and globalization, the rights of refugees, and arms control. Amnesty was particularly active in documenting and exposing human rights abuses in Argentina during its period of military rule and in Chile under Gen. August Pinochet. More recently, it has successfully campaigned for a permanent International Criminal Court, whose statute was adopted by the U.N. General Assembly in 1998. Amnesty has assured its impartiality and independence by refusing to accept monetary contributions from governments.

Amnesty has developed a successful formula of aggressive on-site investigation to uncover abuses, followed by an intensive letter-writing campaign supplemented by posters, advertisements, and media spots designed to publicize human rights violations and to pressure governments to end them. Its efforts have paid off. In 1963, of the 770 individuals "adopted" by Amnesty International, 140 had been freed from detention. In 1975, 1,403 of its adopted prisoners had been released. In 1978, the group won the United Nations Human Rights Prize for "outstanding contributions in the field of human rights," and by 1992 its membership had exceeded one million.

The group has attracted members and publicity in innovative ways. During the 1980s, Amnesty began to organize rock concerts designed to spread awareness of human rights issues. The 1986 "Conspiracy of Hope" concert sponsored by Amnesty's U.S. section was followed in 1988 by the "Human Rights Now!" concert tour (featuring Sting, Bruce Springsteen, and others) to mark the fortieth anniversary of the Universal Declaration of Human Rights.

Although its primary focus has often been elsewhere in the world, Amnesty has been involved in the United States from the beginning. Of the eight individuals profiled in its 1961 launch piece, one of them was Ashton Jones, a sixty-five-year-old minister who had been beaten, harassed, and imprisoned several times in Louisiana and Texas for his activities in support of civil rights for African Americans.

Its activities in the United States, however, have long focused on the issue of capital punishment. In 1965, Amnesty circulated a resolution at the United Nations that sought to suspend or outright abolish executions for peacetime offenses. In 1977, the group gathered delegates from over fifty countries to Stockholm, Sweden, to denounce the death penalty, labeling it a cruel, arbitrary, and irrevocable punishment that does not deter crime. In this sense, Amnesty's

opposition to the death penalty is well received by domestic opponents of capital punishment, who argue that it constitutes a type of “cruel and unusual” punishment proscribed by the Eighth Amendment. Amnesty has been particularly critical of the United States for executing child offenders—those under eighteen at the time of their crime—which Amnesty characterizes as being “in contravention of international law.” Moreover, it also decries execution of criminals with histories of mental illness.

More recently, the group has been particularly vocal in denouncing U.S. government tactics in prosecuting what President George W. Bush had dubbed the Global War on Terror, or GWOT. Amnesty has focused particularly heavily on revelations of torture at the Abu Ghraib detention facility in Iraq (see Abu Ghraib entry) and has accused the American administration of sanctioning interrogation techniques that violate the Convention on Torture. The detentions of suspected terrorists in Guantánamo Bay, Cuba, has also been criticized. Although the United States maintains that detainees at the facility do not qualify for protections under the Geneva Conventions and may be held indefinitely without judicial review, Amnesty has protested the prolonged detentions without charge or access to U.S. courts. In its 2005 annual report, the organization pilloried President Bush’s proposal to try certain suspects using military tribunals and has similarly denounced the practice of renditions—in which suspects in American hands are transferred to third-party countries to be interrogated and possibly tortured.

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References and Further Reading

Power, Jonathan. *Amnesty International: The Human Rights Story*. New York: McGraw-Hill, 1981.
Amnesty International Website, available at: <http://www.amnesty.org>.

AMSTERDAM, ANTHONY G. (1935–)

Anthony Amsterdam, law professor and opponent of the death penalty, earned an A.B. from Haverford College in 1957 and an L.L.B. in 1960 from the University of Pennsylvania. Amsterdam became an ardent opponent of capital punishment in 1963, after Justice Arthur Goldberg had written an unusual dissenting opinion on cases that had not been accepted for review. Goldberg’s dissent addressed six cases in which the defendants had been sentenced to death and noted that the death penalty was barbaric and constituted excessive punishment. Amsterdam, then a University of Pennsylvania law professor, formed

a partnership with the National Association for the Advancement of Colored People Legal Defense and Education Fund to mount a challenge to the constitutionality of the death penalty.

Amsterdam successfully argued for the abolishment of the death penalty in *Furman v. Georgia*, 408 U.S. 238 (1972), when the Supreme Court ruled that the death penalty as then applied was inherently arbitrary and therefore unconstitutional. However, this moratorium on the death penalty did not last long. In 1976, the Court in *Gregg v. Georgia*, 428 U.S. 153 (1976), ruled that Georgia’s new capital punishment system had sufficiently dealt with the problem of arbitrariness.

While perhaps most noted for his argument against the death penalty, Amsterdam has litigated cases involving claims of free speech and the press, privacy, and equality for racial minorities and the poor. His teaching career has included teaching positions at the University of Pennsylvania, Stanford University, and, as of 1981, New York University, where he developed the ground-breaking course Lawyering Theory Colloquium, which researches how law school experiences later affect lawyering roles and behavior. Throughout his career he has extended *pro bono* services to numerous civil rights, legal aid, and public defender organizations. Professor Amsterdam has established himself as a leading American legal scholar by writing extensively on issues such as legal pedagogy, experimental education, and cultural influences on Supreme Court opinions and rulings.

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References and Further Reading

Amsterdam, Anthony G., and Jerome Bruner. *Minding the Law*. Cambridge, MA: Harvard University Press, 2000.
Tushnet, Mark. *Constitutional Issues: The Death Penalty*. New York: Facts on File, Inc., 1994.

Cases and Statutes Cited

Furman v. Georgia, 408 U.S. 238 (1972)
Gregg v. Georgia, 428 U.S. 153 (1976)

ANARCHY

See *Anti-Anarchy and Antisyndicalism Acts*.

ANDERS v. CALIFORNIA, 386 U.S. 738 (1967)

In *Douglas v. California*, 372 U.S. 353 (1963), the Supreme Court held that an indigent defendant was entitled to have counsel appointed to handle the

appeal of his conviction. *Anders v. California*, 386 U.S. 738 (1967), then addressed an inevitable result of *Douglas*: a situation in which assigned counsel found no meritorious issues to present on appeal.

In *Anders*, the defendant was convicted of marijuana possession and requested appointed counsel on appeal. The assigned attorney reviewed the record and consulted with his client before determining the appeal lacked merit; the lawyer advised the court by letter to this effect and asked to withdraw. The defendant's request for another attorney was denied.

The Supreme Court acknowledged that assigned counsel should be allowed to withdraw from "wholly frivolous" cases, but deemed the procedure utilized by the lawyer in this case inadequate. Rather, the Court recommended that, first, after reviewing the record and finding the case frivolous, assigned counsel should notify the court and ask to withdraw, including with that request a brief referring to anything in the record that might arguably support the appeal. Second, the court should examine the case to decide whether it is wholly frivolous. If the court concurs with the attorney's assessment, it should grant the request to withdraw and dismiss the appeal subject to certain limitations; however, if the court finds any of the legal points arguable on the merits, then it must afford the defendant with the assistance of counsel to argue the appeal.

Whereas *Anders* set in motion the procedure for grappling with a "no-merit" appeal—and states responded by creating procedures along the lines of the Court's suggestions—the case failed to offer guidance as to what constitutes a frivolous issue, leaving that question for a later day.

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References and Further Reading

- Bentle, Ursula, and Eve Cary. *Appellate Advocacy: Principles and Practice*, 4th ed. 2004, 304–332.
 Duggan, James E., and Andrew W. Moeller. "Make Way for the ABA: *Smith v. Robbins* Clears a Path for *Anders* Alternatives." *Journal of Applied Practice and Process* 3 (2001):65.
 Warner, Martha C., *Anders in the Fifty States: Some Appellants' Equal Protection Is More Equal Than Others*, 23 Fla. St. U. L. Rev. 625 (1996).

Cases and Statutes Cited

- Douglas v. California*, 372 U.S. 353 (1963)
Ellis v. United States, 356 U.S. 674 (1958)
Eskridge v. Washington State Board, 357 U.S. 214 (1958)
Lane v. Brown, 372 U.S. 477 (1963)

See also **Due Process; Equal Protection Clause and Religious Freedom; Ineffective Assistance of Counsel; Right to Counsel**

ANNE HUTCHINSON TRIAL

The Puritans of the early Massachusetts Bay Colony formed a tightly knit community with a common belief system enforced by civil and ecclesiastical law. Yet, as the colony began to grow, divergent interpretations of scripture and the relationship between society and religion began to emerge, to the consternation of the Puritan clergy. Among the dissenters was Anne Hutchinson (1591–1643), whose radical interpretations of church doctrine directly challenged the authority of the Puritan establishment to regulate the secular and religious lives of the Massachusetts Bay settlers. Hutchinson was a follower of Minister John Cotton, whose teachings emphasized salvation by grace, bestowed directly by God upon worthy individuals, over salvation by works, which implied obedience to religious and secular authority. Hutchinson interpreted the teachings of Cotton as suggesting that those possessed with divine grace are not obligated to obey the laws of church or state. In defiance of Puritan traditions barring women from the pulpit, Hutchinson preached this doctrine, known as antinomianism, during informal meetings in her home, drawing the ire of Puritan authorities for the content of her teachings and the fact that her congregations included both men and women.

Puritan authorities first unsuccessfully tried to get Hutchinson to change her views, then arrested her brother-in-law on heresy charges. Yet Hutchinson persisted in her teachings and was arrested for heresy in November 1637 and sentenced to banishment from the Massachusetts Bay Colony, a sentence that was deferred pending an ecclesiastical trial held in March 1638. During her trial, Hutchinson befuddled her Puritan inquisitors with her intellectual acuity, engaging them in spirited theological debate for several days before declaring that her beliefs were the product of divine revelation, a clear heresy under Puritan law. She was excommunicated from the church and the sentence of banishment was imposed. A pregnant Hutchinson then fled on foot with her husband and children to the colony of Rhode Island, which had been founded by another Puritan dissenter, Roger Williams, banished from Massachusetts three years earlier under similar circumstances. There Hutchinson and her followers established a settlement that would become Portsmouth, Rhode Island. Following the death of her husband in 1642, Hutchinson moved to New York, where she and all but one of her family members were killed by Native Americans in 1643.

The trial of Anne Hutchinson is often cited as a seminal event in the shaping of American concepts of religious freedom and gender equality. By challenging

the theocratic government of the Massachusetts Bay Colony, Anne Hutchinson followed in the footsteps of fellow outcast Roger Williams in questioning the relationship between church and state and the role of civil authority in regulating the private beliefs of individuals, giving rise to a longstanding debate that would inspire constitutional prohibitions of government establishment of religion in the new United States, as well as myriad legislative acts and court decisions that collectively established clear boundaries between American religious and civil institutions. By defying the circumscribed roles assigned to women in Puritan society, Hutchinson also became a pioneer in the struggle for women's rights.

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References and Further Reading

- Battis, Emery. *Saints and Sectaries: Anne Hutchinson and the Antinomian Controversy in the Massachusetts Bay Colony*. Chapel Hill: University of North Carolina Press, 1962.
- Cooper, James F., Jr. "Anne Hutchinson and the 'Lay Rebellion' against the Clergy." *The New England Quarterly* 61(3) (September 1988):381.
- LaPlante, Eve. *American Jezebel: The Uncommon Life of Anne Hutchinson, the Woman who Defied the Puritans*. San Francisco: Harper San Francisco, 2004.

See also **Puritans; Quakers and Religious Liberty**

ANONYMITY AND FREE SPEECH

Anonymity has long been an important issue in American politics and jurisprudence. The key tension in American anonymity law is between the potentially chilling effects on speech stemming from compelled disclosure of identity and the desire to hold individuals accountable for harmful speech. But while early cases like *Lewis Publishing Co. v. Morgan*, 229 U.S. 288 (1913), drew this balance in favor of accountability, holding that mandatory disclosure requirements advanced knowledge by preventing deceptive propaganda, modern anonymity law strongly supports the right to speak and associate anonymously. This rich constitutional tradition of support for anonymous speech and association reflects America's historical experience with persecution and ostracism of "un-American" communists, members of disfavored religious sects, and advocates for racial equality. Today, anonymity has again become controversial with the rise of the Internet and privacy-enhancing technologies like encryption.

At its simplest, anonymous speech is speech that is not attributed to an author. But anonymity is more than the mere concealment of identity. An author

might use a pseudonym to establish an identity distinct from his or her "true" identity; some individual framers of the Constitution used pseudonyms in writing the essays that later came to be known as the Federalist Papers. The U.S. Supreme Court in *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995), treated this aspect of anonymity—an author's choice about whether and how to identify himself or herself—as part of the "content" of the speech, subject to strict scrutiny.

In the modern era, the Supreme Court has consistently protected anonymity as an aspect of the First Amendment freedoms of speech and association. The basic theme of this jurisprudence has been the benefit of anonymity to free speech. In *Talley v. California*, 362 U.S. 60 (1960), which invalidated a state law restricting the distribution of any handbill unless it included the name and address of the person who printed, wrote, compiled, manufactured, or distributed it, the Supreme Court noted that "[a]nonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind," and that "identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance."

The Supreme Court has also been protective of anonymous association. In *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), the Court refused to permit the state of Alabama to compel the state NAACP chapter to produce its membership records, saying that advocacy is "undeniably enhanced by group association," and recognizing "the vital relationship between freedom to associate and privacy in one's association." Well aware of the racial animus in the South, the Court noted that disclosure "may induce members to withdraw . . . and dissuade others from joining it because of fear of exposure of their beliefs shown through their associations and of the consequences of this exposure." Similarly, in *Shelton v. Tucker*, 364 U.S. 479 (1960), the Court invalidated an Arkansas statute requiring public school teachers to reveal to the state annually their group memberships and contributions for the previous five years, noting that "[e]ven if there were no disclosure to the general public, the pressure upon a teacher to avoid any ties which might displease those who control his professional destiny would be constant and heavy."

Today, the accountability or traceability aspect of anonymity has become more important as civil litigants and law enforcement agencies seek to discover Internet users' identities in defamation, intellectual property, and criminal cases. The law has continued to be relatively protective of anonymity; for instance, in *Columbia Insurance Co. v. Seescandy.com*, 185

F.R.D. 573 (N.D. Cal. 1999), a federal district court observed that litigants' need to seek redress "must be balanced against the legitimate and valuable right to participate in online forums anonymously or pseudonymously This ability to speak one's mind without the burden of the other party knowing all the facts about one's identity can foster open communication and robust debate. Furthermore, it permits persons to obtain information relevant to a sensitive or intimate condition without fear of embarrassment." Modern communications technology, on the other hand, tends to expose identity unless speakers take precautions such as using encryption, anonymous remailers, or anonymous proxies. Whether governments will restrict the use of such precautionary technologies remains an open question.

LEE TIEN

References and Further Reading

- Froomkin, A. Michael, *Anonymity and Its Enemies*, 1995 J. Online L. art. 4.
 Kreimer, Seth F., *Sunlight, Secrets, and Scarlet Letters: The Tension Between Privacy and Disclosure in Constitutional Law*, U. Pa. L. Rev. 140 (1991): 1.
 Marx, Gary. "Identity and Anonymity: Some Conceptual Distinctions and Issues for Research." In *Documenting Individual Identity*, J. Caplan and J. Torpey, eds. Princeton, NJ: Princeton University Press, 2001.
 Thompson, E. P. "The Crime of Anonymity." In *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England*. 1975, 255.
 Tien, Lee, *Who's Afraid of Anonymous Speech? McIntyre and the Internet*, Or. L. Rev. 75 (1996): 117.

Cases and Statutes Cited

- Columbia Insurance Co. v. Seescandy.com*, 185 F.R.D. 573 (N.D. Cal. 1999)
Lewis Publishing Co. v. Morgan, 229 U.S. 288 (1913)
McIntyre v. Ohio Elections Commission, 514 U.S. 334 (1995)
NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958)
Shelton v. Tucker, 364 U.S. 479 (1960)
Talley v. California, 362 U.S. 60 (1960)
Watchtower Bible and Tract Society v. Village of Stratton, 536 U.S. 150 (2002)

ANONYMITY IN ON-LINE COMMUNICATION

The current Internet architecture allows most on-line communications to be traced back to the author's computer. That tracing process depends on the cooperation of Internet Service Providers (ISPs). Changes in the Internet architecture, however, could someday end the debate over on-line anonymity, by evolving to a state of perfect identification or perfect anonymity.

Today, however, most legal challenges involving on-line anonymity involve identity seekers who demand, usually through a subpoena, that ISPs disclose identifying information about their customers. Some statutes and judicial decisions require little more than the identity seeker's signature to support its subpoena. Authors have challenged the constitutionality of such subpoenas in a variety of contexts, and a few courts have required the identity seeker to establish the merits of its claim before ordering disclosure.

Legislatures and courts considering whether to protect on-line anonymity must balance competing interests. On-line anonymity fosters free speech and association and allows authors to maintain their privacy. The Supreme Court has recognized the traditional value of anonymous speech in the United States. On the other hand, on-line anonymity can immunize authors from civil or criminal liability and can allow criminals and terrorists to communicate secretly.

Much of the justification for protecting on-line anonymity in the United States derives from the First Amendment. Other countries, however, may have different views on the value of on-line anonymity. International organizations may eventually debate whether to recognize protection for on-line anonymity, just as the United Nations and the European Union have recognized protection of privacy rights.

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References and Further Reading

- Nicoll, Chris et al., eds. *Digital Anonymity and the Law: Tensions and Dimensions*. The Hague: T. M. C. Asser Press, 2003.
 Sobel, David L., *The Process That "John Doe" Is Due: Addressing the Legal Challenge to Internet Anonymity*, Virginia Journal of Law & Technology 5 (2000): 3, <http://www.vjolt.net/vol5/symposium/v5i1a3-Sobel.html>.
 Spencer, Shaun B., *CyberSLAPP Suits and John Doe Subpoenas: Balancing Anonymity and Accountability in Cyberspace*, John Marshall Journal of Computer & Information Law (2001): 493–521.

ANSLINGER, HARRY JACOB (1892–1975)

Harry Anslinger was born in Altoona, Pennsylvania, the son of an immigrant railroad worker. He earned an associate degree in engineering and business management and then went to work for the Pennsylvania Railroad as an investigator. After rising to a captain of the railroad police, he worked for a variety of military and police organizations around the world

between 1917 and 1928, with a focus on stopping a growing international trade in narcotics. After a two-year tour with the Bureau of Prohibition—where Anslinger won a reputation as an honest and incorruptible agent in an agency noted for corruption—he became the first Commissioner of the Federal Bureau of Narcotics (FBN). He held that position for the next thirty-two years, a term rivaled only by J. Edgar Hoover's tenure at the FBI.

Anslinger claimed that he knew what his life's work would be from the age of twelve, when he heard the screams of a young morphine addict, screams that ended only when another boy returned from the pharmacist with more of the drug. Anslinger reported that he was appalled at how easy it was for children to secure such strong drugs.

He became an inveterate foe of all drug use, but especially of marijuana. In the 1920s, a movement of legislators, yellow journalists, and citizen groups started pressing for a federal ban on the use of marijuana, which supposedly played a major role in the corruption of youth, especially young girls. Scholars note that in addition to the moral elements of the crusade, chemical companies with an interest in eliminating hemp products, and southerners wanting to control cheap Mexican labor, also joined in the clamor.

William Randolph Hearst, whose papers led the fight, offered Anslinger space in his papers and magazines, and Anslinger gladly availed himself of the opportunity. He filled article after article with scare stories that not only warned against the alleged dangers of hemp, but also were overtly racist. "Colored students at the University of Minnesota partying with female students (white) smoking [marijuana] and getting their sympathy with stories of racial persecution. Result pregnancy." In another story he wrote that "Two Negroes took a girl fourteen years old and kept her for two days under the influence of marijuana. Upon recovery she was found to be suffering from syphilis."

Medical opinion at that time did not believe marijuana to be so dangerous a drug, and some doctors argued that it had beneficial medicinal properties. Anslinger made sure that when there were legislative hearings on drug bills, at the state or the national level, members of the medical profession did not receive notice until it was too late for them to testify. When the American Medical Association (AMA) failed to appear before a congressional hearing, Anslinger lied to the committee and told them that the AMA favored strict regulation of marijuana.

In August 1937, Congress passed the Marijuana Tax Act, which provided the first block in erecting a comprehensive scheme for federal regulation of the

drug. It classified marijuana as a narcotic and thus gave Anslinger's FBN still another target to go after. For the next twenty-five years Anslinger spearheaded the federal drive against drugs. Ironically, there is some evidence that in the early 1950s Anslinger secretly supplied morphine to Senator Joseph McCarthy.

Thin-skinned at all times, Anslinger did not handle criticism well and, later in his career, was reprimanded for failing to desist from harassing critics of his policies, especially Indiana University professor Alfred Lindsmith, whose books and articles attacked the war on drugs and Anslinger's leadership of it.

In 1962, Anslinger retired at the mandatory age of seventy and, for the next two years, served as a member of the American delegation to the United Nations. By then he had become completely blind and suffered from a variety of ailments, including an enlarged prostate and angina. Some thought it ironic—even hypocritical—that in his later years he became a regular user of morphine to control his pain.

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References and Further Reading

- McWilliams, John C. *The Protectors: Anslinger and the Federal Bureau of Narcotics (1930–1962)*. Newark, NJ: University of Delaware Press, 1990.
- Sloman, Larry. *Reefer Madness: A History of Marijuana in America*. Indianapolis, IN: Bobbs-Merrill, 1979.

ANTHONY, SUSAN B. (1820–1906)

Susan B. Anthony, reformer and women's suffragist, was born in Adams, Massachusetts, to Daniel Anthony and Lucy Read, one of eight children. When Anthony was six, the family moved to Battenville, New York, where Daniel Anthony managed a large cotton mill. Due to Daniel Anthony's Quaker heritage, the family believed in egalitarian education for their children, and Susan attended Deborah Moulson's Female Seminary. The Anthonys prospered until the panic of 1837, when the mill closed, the children returned from boarding school, and they lost their home. Susan aided the family by teaching, but in 1845, the family moved to a farm in Rochester, New York.

After the move, Anthony taught for a decade, ending her teaching career as headmistress of the female section of Canajoharie Academy. As a teacher, Anthony enjoyed her independence but recognized the unequal pay scale between men and women. In 1849, Anthony gave her first public speech at a Daughters of Temperance meeting, starting her involvement in reform. The same year, Anthony returned to Rochester to

manage the family farm and continued her involvement in temperance reform and became dedicated to the antislavery cause. Within a few years, Anthony met some of the most prominent abolitionists and women's rights advocates—Frederick Douglass, Stephen and Abby Foster, Isaac and Amy Post, and Elizabeth Cady Stanton. Stanton called the 1848 Seneca Falls Women's Rights Convention and, although a wife and mother, was dedicated to reforming laws to benefit women. Stanton and Anthony forged a friendship that would last more than fifty years.

When Anthony realized that women were welcome in the temperance movement only if they were taciturn and did not expect egalitarian treatment, she and Stanton founded the Women's State Temperance Society in 1852, but left when men voted them out of their elected positions. The two wove the women's rights and temperance movements together, going before the state legislature (the first time a women's group in the United States did this) calling for temperance laws and, later, coeducation, women's suffrage, liberal divorce laws, and married women's property rights. The women donned bloomers, an outfit associated with women radicals, and called numerous women's rights conventions. Anthony traveled extensively throughout New York, lecturing, petitioning, organizing, and fundraising. Anthony's energy never ceased; she traveled most of her next forty years, campaigning for women's rights. In 1855, she lectured at least once in each of New York's sixty-two counties and was called the movement's Napoleon.

In 1856, the American Anti-Slavery Society hired Anthony as New York's chief agent. She served the society until the Civil War, but was disheartened with the passage of the Fifteenth Amendment in 1870, which enfranchised former male slaves but ignored women. Anthony realized that women's suffrage might be won by the next generation.

Anthony worked for women's rights in numerous ways: she gave lectures; petitioned the state legislature and Congress; organized state, national, and international conventions; and formed the National Woman Suffrage Association with Stanton, which later merged with its rival, the American Woman Suffrage Association. She also wrote and distributed pamphlets, published the *Revolution* newspaper, had her biography written, and penned *History of Woman Suffrage* with Stanton and Matilda Joslyn Gage.

One of the most notable women's rights efforts consisted of women voting, in an attempt to amend laws judicially. The suffragists tested the Constitution through the Fourteenth and Fifteenth Amendments, which linked citizenship and enfranchisement. Since women were citizens, several dozen asserted their

right to vote. When they were denied the right, they intended to take their case to the Supreme Court. Anthony tried the theory in 1872 and was, surprisingly, permitted to cast a ballot. Several weeks later she was arrested for violating a federal law. Anthony's trial was a sham; it was rescheduled in another county because the judge believed she prejudiced any possible jury. Judge Ward Hunt wrote his decision before the trial began and ordered the jury to find Anthony guilty. Clearly, Anthony did not have a fair trial. At its conclusion, Hunt only fined her, refusing to put the suffragist in jail. Because of this, she could not carry her case to the Supreme Court based on applying for a writ of habeas corpus. When Hunt asked if she had any comments at the end of the trial, Anthony lambasted him and refused to pay the \$100 fine.

Undaunted by her trial ordeal, Anthony remained dedicated to her cause. She presided over the National-American Woman Suffrage Association from 1892 until her eightieth birthday in 1900. Anthony remained active in the women's rights movement, traveling until a month before her death in Rochester. Her legacy is documented in her speeches and books but most importantly in the passage of the Nineteenth Amendment, which granted women the right to vote, in 1920. Anthony was the first nonallegorical woman to appear on U.S. currency, with the Susan B. Anthony dollar minted from 1979 to 1981 and in 1999.

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References and Further Reading

- Anthony, Katharine Susan. *Susan B. Anthony; Her Personal History and Her Era*. Garden City, NY: Doubleday, 1954.
- Anthony, Susan Brownell. *An Account of the Proceedings on the Trial of Susan B. Anthony on the Charge of Illegal Voting, at the Presidential Election in November, 1872, and on the Trial of Beverly W. Jones, Edwin T. Marsh and William B. Hall*. Rochester, NY: Daily Democrat and Chronicle Book Print, 1874.
- Anthony, Susan Brownell, Elizabeth Cady Stanton, and Matilda Joslyn Gage, eds. *History of Woman Suffrage*, reprint ed. Salem, NH: Ayer Co., 1985.
- Barry, Kathleen. *Susan B. Anthony: A Biography of a Singular Feminist*. New York: New York University Press, 1988.
- Dorr, Rheta Childe. *Susan B. Anthony, the Woman Who Changed the Mind of a Nation*. New York: Frederick A. Stokes Company, 1928.
- DuBois, Ellen C., ed. *Elizabeth Cady Stanton, Susan B. Anthony, Correspondence, Writings, Speeches*. New York: Schocken Books, 1981.
- Flexner, Eleanor. *Century of Struggle: The Women's Rights Movement in the United States*, rev. ed. Cambridge, MA: Harvard University Press, 1996.
- Gordon, Ann D., ed. *Papers of Elizabeth Cady Stanton and Susan B. Anthony*. New Brunswick, NJ: Rutgers University Press, 1997.

Harper, Ida Husted. *Life and Work of Susan B. Anthony*. Indianapolis, IN: Hollenbeck Press, 1898–1908.

Stanton, Elizabeth Cady. *Eighty Years and More*. New York: European Publishing Company, 1898.

See also **American Anti-Slavery Society; Douglass, Frederick; Habeas Corpus: Modern History; Stanton, Elizabeth Cady**

ANTI-ABOLITIONIST GAG RULES

The First Amendment to the Constitution provides for the right of the people “to petition the Government for a redress of grievances.” Starting in the 1830s, opponents of slavery inundated Congress each session with petitions seeking to end slavery wherever the federal government had jurisdiction, such as the territories and the District of Columbia. What had started as a trickle swelled to a flood, and in 1837 and 1838, abolitionists sent more than 410,000 petitions to Congress bearing more than one million signatures.

Southerners responded with outrage, and in 1836 Representative Henry L. Pinckney of South Carolina proposed a “gag rule” that provided that all petitions relating to slavery “shall, without being either printed or referred, be laid upon the table, and that no further action whatever shall be taken thereon.” The rule passed by a large majority but not without opposition, especially from former president John Quincy Adams, now a congressman from Massachusetts. “I hold the resolution to be a direct violation of the Constitution,” he declared, and of “the rules of this House, and the rights of my constituents.”

The House renewed the Pinckney gag at each new session until 1840, when it became a standing rule. At every session, Old Man Eloquent, as Adams was nicknamed, protested, often alone, that the rule was unconstitutional. Despite threats of censure and expulsion from his proslavery colleagues, Adams gradually gained support from other northern congressmen. Adams did not agree with many of the petitions, he told the House, but he held the right to petition as one of the inalienable freedoms handed down to Americans from their English heritage. The English Bill of Rights of 1689 had confirmed this right, as had the resolutions of the Stamp Act Congress of 1765 and the First Amendment.

Finally, in 1844, Adams’s perennial resolution calling for the elimination of the gag rule carried the day.

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References and Further Reading

Bemis, Samuel Flagg. *John Quincy Adams and the Union*. New York: Knopf, 1956.

ANTI-ABORTION PROTEST AND FREEDOM OF SPEECH

The concept of a “buffer zone” was first raised in the 1990s. It was based on two things: increasingly violent and intrusive protests by anti-abortion forces and clinic actions to try to keep protesters a certain distance away from the clinics. In response, the groups filed counterchallenges in court, stating that their First Amendment rights to freedom of speech were being violated.

The central issue became one of how to differentiate between noninjurious and nonthreatening speech, which could be allowed under the First Amendment, and actions that effectively prohibited clients from entering clinics, which were outlawed under the federal FACE Act of 1994. The first Supreme Court case on the issue was *Madsen vs. Women’s Health Center*, 512 U.S. 753 (1994). The case started with Operation Rescue protests at the Melbourne, Florida, Aware Woman Center for Choice in 1991. These consisted of street marches and slogans shouted through bullhorns, directly confronting clients, following clinic staff home to demonstrate against them, and blockading clinic doors (which was outlawed by the 1994 FACE Act). When the clinic applied to the state court for an injunction against such protests, the court granted it and limited demonstrators to participating outside a “buffer zone” consisting of a 36-foot radius from the clinic; they were also prohibited from making loud noises or displaying graphic images near the facility. It also prohibited protesters from approaching patients who were within 300 feet of the facility and from demonstrating within 300 feet of any clinic employee’s residence, thus upholding a type of buffer zone at employees’ homes as well. The court specified that it did not seek to limit protestors’ First Amendment rights (Mezey, 2003, 266–268). This decision was upheld by the Florida Supreme Court in 1992.

Operation Rescue and other groups appealed the case to the Supreme Court, arguing that the restrictions were based on the content of the speech and therefore impermissible under the First Amendment. In its 1994 *Madsen* decision, the Supreme Court upheld some of the previous restrictions and struck others down. The significance of the case was found largely in its formulation of a new test for restricting public speech by court injunction based on a heightened level of constitutional scrutiny—that of a “significant” government interest. The Court did not grant Operation Rescue’s desire for the highest level of constitutional scrutiny, strict scrutiny, to be used. However, the fact that the level of constitutional scrutiny was raised from the lowest, minimal level

meant that speech restrictions would be harder to uphold in the future.

The new test entailed that an injunction (restriction or prohibition) against speech would be upheld unless it prevented more types of speech than necessary to promote a significant government interest (www.firstamendmentcenter.org). In this decision, the Supreme Court upheld the 36-foot buffer zone, provided it did not affect private property, and the prohibitions against loud noise within earshot of the clinic and within 300 feet of employees' homes. On the other hand, the decision struck down the previous prohibitions on displaying images outside clinics. It also significantly narrowed the restrictions concerning the 300-foot buffer zones around clinics and employees' homes, overturning the prohibitions against approaching clients within 300 feet of the clinic or "peacefully picketing" within 300 feet of employee residences. Overall, the Court stated that its decision did not impermissibly restrict speech but rather "the activities of the demonstrators who had repeatedly violated the earlier injunctions" (Mezey, 267). According to this formulation, the Court was not restricting the content of the speech and not privileging one point of view over another.

Court challenges since *Madsen* have focused on the type of activity to be prohibited, the type of buffer zone allowed (whether a fixed parameter or a "floating" one related to protesters' following a moving car or individual), and the question of whether unrelated, privately owned property such as a business or house may be included in a clinic's buffer zone against the owner's will. The 1997 Supreme Court case, *Schenk vs. Pro-Choice Network of NY*, 519 U.S. 357 (1997), focused on the first two sets of questions. This case concerned protests by Operation Rescue and affiliate organizations against physicians and clinics near Rochester and Buffalo and included the types of blockades and obstructions rendered illegal by the FACE Act of 1994. The other question had to do with the fact that the federal district court had issued an injunction against protesters' actions within a fixed 15-foot buffer zone away from the clinic as well as against their activity within a 15-foot radius from a moving car or person.

Based on the *Madsen* test, the Supreme Court found in this case that the fixed buffer zone did not "burden any more speech than necessary to serve the government interests of ensuring public safety and order and protecting women's freedom to seek abortions or other health-related services." On the other hand, the floating buffer zone was overly broad because it could include those "simply lining the sidewalks to demonstrate peacefully" and thus was struck down.

In the Supreme Court case of *Hill vs. CO*, 530 U.S. 703 (2000), the Court upheld a buffer zone passed by the Colorado Legislature in 1993 requiring protesters to remain 8 feet away from clients who were within 100 feet of the clinic. Anti-abortion activists challenged the statute three times on First Amendment grounds, losing at the Court of Appeals level in Colorado in 1997, the Colorado Supreme Court in 1999, and the U.S. Supreme Court in the 2000 case. In upholding the prohibition, the Supreme Court stated that it was not a regulation of speech but rather a "regulation of the places where some speech may occur." The Court also emphasized that the law applied to all demonstrators, regardless of viewpoint, and that other types of institutions may also show government interest in protection from protest, including schools, polling places, and courthouses.

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References and Further Reading

- Mezey, Susan Gluck. *Evasive Equality: Women's Rights, Public Policy, and the Law*. Boulder, CO: Lynne Rienner Publishers, 2003.
- Websites of the First Amendment Center, www.firstamendmentcenter.org, and the Center for Reproductive Rights, www.reproductiverights.org.

ANTI-ANARCHY AND ANTI-SYNDICALISM STATUTES

From the "Salem witch trials" to the criminal prosecutions that constitute part of the government's "war on terror," American criminal law has been used to stamp out threats, perceived or actual, to federal and state governments. Federal and state legislatures have proscribed conduct that they believe could challenge their continued existence. Courts, in turn, have generally upheld the constitutionality of these statutes as legitimate exercises of legislative power.

Anarchy and syndicalism have commonly been perceived as threatening to government, and both have been regulated, not surprisingly, in federal and state criminal codes. Criminal anarchy is defined as seeking to overthrow organized government by force, violence, or other unlawful means. Criminal syndicalism is generally defined as advocating or aiding and abetting the commission of sabotage or unlawful acts of force, violence, or terrorism for the sake of accomplishing a change in industrial ownership or control. More specifically, criminal syndicalism is understood to encompass such actions when those involved intend to effect political upheaval.

The majority of federal and state criminal codes regulating anarchy and syndicalism have been

enacted since the turn of the twentieth century. However, the history of anti-anarchy and anti-syndicalism statutes extends back to the founding of the country. The Sedition Act of 1798, for example, prohibited criticism of the government with the intent to bring it, or any of its high-ranking officials, into contempt or disrepute. While the constitutionality of the Sedition Act was never tested prior to its expiration in 1801, the U.S. Supreme Court has noted that “the attack upon its validity has carried the day in the court of history” (*New York Times Co. v. Sullivan*, 376 U.S. 254, 276 & n.16, 1964).

Laws such as the Sedition Act were used and threatened to be used against anarchists and syndicalists, notwithstanding the lack of an explicit prohibition on anarchy and syndicalism. Such an express prohibition against either category of conduct did not occur until the early twentieth century. As anticapitalist theories gained worldwide momentum and with the emerging domestic popularity of the Industrial Workers of the World (IWW), state governments quickly enacted laws directly targeting alleged anarchists and syndicalists. Idaho passed the nation’s first antisyndicalism statute in 1917, and twenty-three other states and two territories followed suit by 1922. By 1935, twenty-two states and one territory had passed anti-anarchy statutes. Many of these states were loci of activity of the IWW. States without a significant IWW presence, on the other hand, acted out of fear of an imminent IWW organizing drive or otherwise fell within the grips of the nationwide antiradical and antilabor drives.

Simultaneously, a push for federal anti-syndicalism and anti-anarchy legislation began to take shape. Five anti-syndicalism bills were introduced before Congress in the 1920s and 1930s, only one of which made it out of committee and was subsequently passed by the Senate. This lone bill, however, never came to a vote in the House of Representatives. (Anti-syndicalism provisions also found their way into at least nine broader bills [for example, sedition statutes]. However, none of these statutes was enacted.)

Efforts to ban anarchistic conduct on the federal level were more successful. On the eve of World War II, for example, Congress enacted the Alien Registration Act of 1940, 18 U.S.C. § 2385, also known as the Smith Act, which prohibited advocating for the overthrow of the government by force or violence. Upholding the constitutionality of the Smith Act, the U.S. Supreme Court noted: “That it is within the power of the Congress to protect the Government of the United States from armed rebellion is a proposition which requires little discussion No one could conceive that it is not within the power of Congress to prohibit acts intended to overthrow the Government

by force and violence” (*Dennis v. United States*, 341 U.S. 494, 501, 1951, plurality; see also *Yates v. United States*, 355 U.S. 66, 1957).

Although the Smith Act has not been repealed, it is seldom used because, after *Yates*, the government must prove that a defendant actually intended to advocate forcible overthrow of the government, a burden that is difficult, if not impossible, to satisfy in most cases. On the state side, few anti-anarchy and anti-syndicalism laws have been repealed outright, though many states have deleted provisions proscribing mere membership in an organization promoting anarchy or syndicalism. When these state laws were first challenged, ten state supreme courts and the U.S. Supreme Court upheld them as constitutional. (See, for example, *Whitney v. California*, 274 U.S. 357, 1927; *Fiske v. Kansas*, 274 U.S. 380, 1927; *Gitlow v. New York*, 268 U.S. 652, 1925; *Ex parte McDermott*, 183 P. 437, Cal. 1919, per curiam; *Berg v. State*, 233 P. 497, Ok. 1925; *State v. Moilen*, 167 N.W. 345, Minn. 1918).

Eventually, however, the judicial tide began to turn, culminating in the U.S. Supreme Court’s opinion in *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam). The *Brandenburg* Court reviewed the constitutionality of Ohio’s criminal syndicalism act, which punished individuals who “advocate or teach the duty, necessity, or propriety of violence as a means of accomplishing industrial or political reform . . . or who voluntarily assemble with a group formed to teach or advocate the doctrines of criminal syndicalism.” Striking down the statute as unconstitutional, the Court declared that “constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action” (at 447).

In reaching this decision the court overturned the *Whitney* and *Fiske* line of cases, thereby striking a middle ground: anti-anarchy and antisyndicalism statutes may pass constitutional muster when written and construed narrowly to proscribe only conduct that was intended to, and in fact will, produce imminent lawless action.

The line between lawful advocacy and unlawful incitement is blurry and, in some cases, arbitrary. The history of anti-anarchy and anti-syndicalism acts suggests that the line between advocacy and incitement is unlikely to be tested unless and until the government believes a significant threat exists to its security. However, in light of recent attempts to combat terrorism, it is not inconceivable to imagine circumstances under which the government might

employ anti-anarchy and anti-syndicalism legislation to punish potentially threatening conduct or fervent dissent.

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References and Further Reading

- Dowell, Eldridge F. *A History of Criminal Syndicalism Legislation in the United States*. Baltimore, MD: The Johns Hopkins Press, 1939.
- Stone, Geoffrey R., *War Fever*, Missouri Law Review 69 (2004): 4:1131–1155.
- Whitten, Woodrow C. *Criminal Syndicalism and the Law in California: 1919–1927*. Philadelphia: The American Philosophical Society, 1969.

Cases and Statutes Cited

- Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam)
- Dennis v. United States*, 341 U.S. 494 (1951) (plurality)
- Fiske v. Kansas*, 274 U.S. 380 (1927)
- Gitlow v. New York*, 268 U.S. 652 (1925)
- New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)
- Whitney v. California*, 274 U.S. 357 (1927)
- Yates v. United States*, 355 U.S. 66 (1957)
- Alien Registration Act of 1940* (“Smith Act”), 18 U.S.C. § 2385

See also **Alien and Sedition Acts (1798); Freedom of Speech and Press: Nineteenth Century**

ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH

The Anti-Defamation League (ADL) was founded in 1913 by Sigmund Livingston, a Chicago lawyer, to combat the anti-Semitism and discrimination against Jews that was prevalent at the time. The charter of the league states: “The immediate object of the League is to stop, by appeals to reason and conscience and, if necessary, by appeals to law, the defamation of the Jewish people. Its ultimate purpose is to secure justice and fair treatment to all citizens alike and to put an end forever to unjust and unfair discrimination against and ridicule of any sect or body of citizens.” Livingston’s action was in direct response to the infamous case of Leo Frank, the Jewish manager of a Georgia factory, who was falsely convicted of the murder of a young female worker and later dragged from his jail cell and lynched by a mob after the governor of Georgia announced he was commuting Frank’s death sentence.

From its inception the ADL has been associated with the Independent Order of B’nai Brith, a Jewish fraternal and service organization founded in New York City in 1843. The parent organization is engaged in a wide variety of community service and welfare activities, including the promotion of human

rights, assisting hospitals and victims of natural disasters, and, through the ADL, opposing anti-Semitism and other forms of racism.

In the first three decades after its founding, the ADL mission centered on combating anti-Semitism. It pursued this goal in two major ways. First, it sought to expose and counter the bigotry of groups such as the Ku Klux Klan and individuals, such as Henry Ford, whose newspaper, *The Dearborn Independent*, was notoriously anti-Semitic, even going so far as to publish the notorious Czarist anti-Semitic forgery *The Protocols of the Elders of Zion*. In the 1930s, with the ascendance of Adolf Hitler, the ADL also had to combat the rise of domestic groups eager to mimic the Nazi’s anti-Semitic actions, including German-American Bund and the Christian Front, headed by Father Charles Coughlin. Second, the league combated the pervasive economic and social discrimination against Jews, as exemplified by quotas on Jewish applicants to colleges and professional schools; company, or even industry-wide, policies barring the hiring of Jews; and discrimination against Jews in hotels, restaurants, and other public accommodations.

After the Second World War, the ADL expanded its mission to include the eradication of bias and discrimination against people of all races and religions. The organization at this time began filing amicus curiae briefs in Supreme Court cases involving religious freedom and civil rights and has remained active in this area ever since. The league has, for example, filed an amicus brief in every major Supreme Court case concerning church–state separation since 1947, as well as numerous cases on affirmative action, hate crimes, and other subjects.

The positions the league has taken in its amicus briefs are generally unsurprising given its stated goals. In religion-clause cases, it has argued for a strict view of the separation of church and state, tempered by a broad view of religious accommodation in cases in which minority religions may be threatened. Thus, it opposed a Christmas display on government property in *County of Allegheny v. ACLU*, 492 U.S. 573 (1989), and the display of the Ten Commandments on such property in *Van Orden v. Perry*, 125 S.Ct. 2854 (2005), and *McCreary County v. ACLU of Kentucky*, 125 S.Ct. 2722 (2005); opposed school prayer in *Engel v. Vitale*, 370 U.S. 421 (1962), and *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000); and opposed publicly funded tuition vouchers for religious schools in *Zelman v. Harris-Simmons*, 536 U.S. 639 (2002), and government aid in the form of instructional materials and equipment to religious schools in *Mitchell v. Helms*, 530 U.S. 793 (2000). However, the organization defended the constitutionality of a federal statute that protects the religious rights of

prisoners as a valid accommodation of religion in *Cutter v. Wilkinson*, 125 S.Ct. 2113 (2005).

With the founding of the State of Israel in 1948, the ADL began combating what it viewed as anti-Zionist organizations and publications. In more recent years, the intense debate over the Palestinian–Israeli conflict has led the league to attack what it views as a new form of anti-Semitism: the claim that Jews and Jewish organizations unfairly tag any criticism of the State of Israel with an anti-Semitic label. The league has explicitly stated that criticism of specific Israeli actions or policies in and of itself does not constitute anti-Semitism, but also notes that there are those who attempt to mask anti-Semitism under the guise of criticism of Israel or Zionism.

In the 1960s, the organization became actively involved in the emerging civil rights movement and actively worked for the passage of the Civil Rights Acts of 1964 and 1968 and the Voting Rights Act of 1965—three of the most important pieces of legislation that resulted from movement. As happened with other predominantly white organizations involved in the movement, tensions emerged between the ADL and the African-American community in the 1970s and have continued to some degree to the present, in light of differing positions on affirmative action, the Israeli–Palestinian conflict, Louis Farrakhan and the Nation of Islam, and other issues. Affirmative action in education has been a major dividing point between the two groups, with the ADL filing amicus briefs opposed to racial preferences in *Bakke* (*Regents of the University of California v. Bakke*, 438 U.S. 265, 1978) and *Grutter v. Bollinger*, 539 U.S. 306 (2003). Despite these tensions, the league remains strongly committed to cooperative efforts with the African-American community in fighting racial prejudice.

In more recent years, the ADL has identified and responded to new forms of bigotry and prejudice seen from the white-supremacist movement and other domestic hate groups. The organization has also expressed grave concern about the effect that the religious Right is having in eroding what the league views as the appropriate degree of separation between church and state in the United States. Finally, the ADL has grown increasingly concerned about, and is actively seeking to combat, what it perceives as the growth of anti-Semitism on American college campuses and the efforts by evangelical Christians to bring an explicitly religious message into public schools.

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References and Further Reading

ADL in the Courts: Litigation Docket, Anti-Defamation League, New York 1991 through 2001.

Dinnerstein, Leonard. *The Leo Frank Case*. Athens, GA: University of Georgia Press, 1999.

Ivers, Greg. *To Build a Wall: American Jews and the Separation of Church and State*. Clinch Wise, VA: University of Virginia Press, 1995.

www.adl.org.

Cases and Statutes Cited

County of Allegheny v. ACLU, 492 U.S. 573 (1989)

Cutter v. Wilkinson, 125 S.Ct. 2113 (2005)

Engel v. Vitale, 370 U.S. 421 (1962)

Grutter v. Bollinger, 539 U.S. 306 (2003)

McCreary County v. ACLU of Kentucky, 125 S.Ct. 2722 (2005)

Mitchell v. Helms, 530 U.S. 793 (2000)

Regents of the University of California v. Bakke, 438 U.S. 265 (1978)

Santa Fe Independent School District v. Doe, 530 U.S. 290 (2000)

Van Orden v. Perry, 125 S.Ct. 2854 (2005)

Zelman v. Harris-Simmons, 536 U.S. 639 (2002)

ANTIDISCRIMINATION LAWS

Discrimination occurs when the civil rights of an individual are denied or interfered with because of the individual's membership in a particular group or class. Many statutes have been enacted to prevent discrimination on the basis of a person's race, sex, religion, age, previous condition of servitude, physical limitation, national origin, and, in some cases, sexual preference.

Congress's early foray into civil rights legislation was a series of laws—the Reconstruction Civil Rights Acts—enacted in 1866, 1870, 1871, and 1875. These laws guarantee that all persons shall have the same right in every state to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws. Their primary purposes were to codify the rights of former slaves guaranteed under the newly enacted Thirteenth, Fourteenth, and Fifteenth Amendments and to protect noncitizens and persons not born in the United States within its coverage.

These acts were later codified as sections 1981 through 1985. Section 1981 established the general principle that no person may be denied, on the basis of race, equal protection of the laws. Specifically enumerated rights include the right to contract and to sue, and to give evidence, but this section has also been interpreted to include the right to earn a living, to participate in public benefits programs, and to fair use and access to justice. Section 1982 guarantees the right to inherit, own, and dispose of real and personal property. Section 1983 provides a civil cause of action for denial of equal rights but is limited to public and

private individuals acting under the color of state law. There is no remedy under this provision for private discrimination. Section 1985 targets conspiracies to violate civil rights.

The most prominent civil rights legislation since reconstruction is the Civil Rights Act of 1964, enacted in response to pervasive discrimination against minorities and women. Title II proscribes discrimination or segregation based on race, color, religion, or national origin in places of public accommodation; Title III makes such unlawful conduct applicable to state and local entities; Title IV applies to public education; Title V deals with the reauthorization of the Commission on Civil Rights; and Title VI applies to programs or activities receiving federal funds.

Title VII prohibits employment discrimination against applicants and employees on the basis of race or color, religion, sex, and national origin, unless the discrimination is tied to a bona fide occupational qualification or to nonfulfillment of national security requirements. Sex discrimination includes claims of discrimination on the basis of pregnancy as well as claims of sexual harassment. Title VIII, commonly known as the Federal Fair Housing Act, makes it unlawful, with some exceptions, to discriminate in the sale, rental, or advertising of a dwelling on the basis of race, color, religion, national origin, sex, familial status, or handicap, and it prohibits real estate brokers from discriminating. Title IX of the Education Amendments of 1972 prohibits discrimination or denial of benefits on the basis of sex under any educational program or activity receiving federal financial assistance. It protects employees and students and has been interpreted to encompass sexual harassment claims.

Congress has also passed federal antidiscrimination legislation to protect classes of persons other than women and minorities. The Age Discrimination in Employment Act of 1967 (ADEA) prohibits employers from discriminating against persons on the basis of age. Based on Congressional findings of marginalization and segregation of the disabled, Congress passed the Rehabilitation Act of 1973, which prohibits discrimination by any federal or federally funded program or activity, and the Americans with Disabilities Act of 1990 (ADA), guaranteeing disabled persons the same rights and benefits as non-disabled citizens.

The ADA addresses discrimination in employment, in the receipt or qualification of public benefits and services, and in the use of public accommodations and services. "Disabled" under the statute means that one or more major life activities are substantially limited by a physical or mental impairment. Major life activities include persons' abilities to care for

themselves, use their hands, walk, see, hear, speak, breathe, learn, and reproduce. The Supreme Court has held that HIV/AIDS is a disability under the ADA. Discrimination within the statute encompasses not making reasonable accommodations for an individual's disability.

The constitutional authority permitting Congress to enact antidiscrimination laws derives from the commerce clause or the Fourteenth Amendment's enforcement clause. Recently, however, the Supreme Court has begun to restrict Congress's power to enact such laws. For example, in 1997, it held that the Religious Freedom Restoration Act exceeded the authority of Congress under the Fourteenth Amendment, and, in 2000, the Court held that neither the Fourteenth Amendment nor the commerce clause permitted Congress to abrogate state immunity under the ADEA and to enact a civil remedy provision within the Violence Against Women Act. For its part, Congress passed the Civil Rights Restoration Act of 1987 in order to nullify the effects of various Supreme Court decisions altering the scope and meaning of provisions in Title VI of the Civil Rights Act of 1964, the ADA, the Rehabilitation Act, and Title IX of the Education Amendments.

The struggle for equality in America suffered many setbacks until the civil rights movement in the 1950s and 1960s. After ratification of the Thirteenth Amendment, southern states enacted black codes to severely restrict African-American life. In response, Congress enacted the Fourteenth Amendment, but by the end of Reconstruction, Jim Crow laws were in full effect and the Supreme Court had upheld the idea of separate but equal. The 1950s and 1960s finally saw an end to legal discrimination and the birth of a new era for all civil liberties and rights.

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References and Further Reading

- Lund, Nelson, *The Rehnquist Court's Pragmatic Approach to Civil Rights*, Northwestern University Law Review 99 (Fall 2004): 249–288.
- Post, Robert C., and Reva B. Siegel, *Equal Protection by Law: Federal Anti-Discrimination Legislation After Morrison and Kimel*, Yale Law Journal 110 (December 2000): 441–526.

Cases and Statutes Cited

- Age Discrimination in Employment Act* of 1967, 29 U.S.C. §§ 621–634 (2000)
- Americans with Disabilities Act* of 1990, 42 U.S.C. §§ 12101–12213 (2000)
- Civil Rights Act of 1964*, 42 U.S.C. §§ 1971, 2000(a) (1994)
- Civil Rights Restoration Act* of 1987, Pub. L. No. 100–259 (1988)

ANTIDISCRIMINATION LAWS

Reconstruction Civil Rights Acts, 42 U.S.C. §§ 1981, 1982, 1983, 1984, 1985 (1866)

Rehabilitation Act of 1973, 29 U.S.C. §§ 701-797b (2004)

Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb to 2000bb-4 (1994)

Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1902 (1994)

See also **Civil Rights Act of 1964; Religious Freedom Restoration Act; Title VII and Religious Exemptions**

ANTIPOLYGAMY LAWS

In the United States antipolygamy laws were exclusively aimed at the polygamous practices of the nineteenth-century Church of Jesus Christ of Latter-day Saints (the Mormons) which began to publicly practice and advocate polygamy in 1852.

In 1827, Joseph Smith, Jr., found and translated gold plates that became the basis of a new religion that considered itself the true version of a Christianity that had lost its way. The Mormons believed Indians were a lost Hebrew tribe that had been visited by Jesus after the crucifixion. Smith's new religion was born in an era of religious enthusiasm and revivalism centered in the northeastern part of the United States. Mormons believe all the fundamental tenets of Christianity; in addition, they believe that Native Americans are one of the lost tribes of Israel and were visited by Christ after his crucifixion, deny original sin and stress that everyone can advance to godhood, and believe that they are the only true Christians.

Although Smith, who had as many as forty-eight wives, began practicing polygamy as early as the 1835, the church did not publicly announce its advocacy of polygamy until 1852, after Brigham Young, Smith's successor after his 1844 assassination by an angry mob, had taken the Mormons to the basin of the Great Salt Lake. The antipolygamy movement, which began immediately after the announcement, was linked to the antislavery movement. Authors penned novels featuring themes of plural wives as slaves, the lust of old men for young girls, and incest in polygamous families. Scientists said that the progeny of polygamous unions carried genetic defects, as was also true of miscegenous unions; polygamy was described as an un-Christian practice found among Africans or Asians but not civilized Europeans (that is, whites).

Congress responded with a series of increasingly draconian antipolygamy laws. First, fearing that the Mormons would attempt to bring the Utah Territory into the Union as a polygamous state, Congress enacted the Morrill Act of 1862, making polygamy a crime in all territories. However, enforcement of the

act was left to local probate judges and local juries, most of whom were Mormon in the Utah Territory.

In 1874, hoping to prove that polygamy was protected by the First Amendment, the Mormons set up a test case involving Brigham Young's personal secretary, George Reynolds. But in the resulting case, *United States v. Reynolds*, a unanimous Supreme Court upheld the constitutionality of the antipolygamy act against this claim, analogizing polygamy to human sacrifice in the process. Because of these enforcement problems, Congress enacted the Poland Act in 1874 to shift enforcement of the Morrill Act to federally appointed judges. The act included a variety of procedural changes that sought to guarantee successful prosecution of polygamists.

Antipolygamy sentiment continued to grow in Congress. The resulting Edmunds Act of 1882 took away past and present polygamists' right to vote and allowed prosecutors to strike potential jurors not only for being polygamists but also for espousing belief in polygamy or even refusing to discuss their marital status. In addition, the act made "unlawful cohabitation" criminal, facilitating convictions when multiple marriages could not be proven. The even harsher Edmund-Tucker Act followed in 1887. This act made unrecorded marriages felonies, forced wives to testify against husbands, disinherited children of polygamous marriages, and allowed for the confiscation of virtually all church property.

Utah legislators began drafting an antipolygamy constitution the following year. On May 19, 1890, the Court upheld the constitutionality of the government's seizure of church property in *Late Corp. of the Church of Jesus Christ of Latter-day Saints v. United States*, 136 U.S. 1 (1890).

With Congress moving towards the passage of the Cullom-Stubble Bill, which took away all the citizenship rights of Mormons, Church President Wilford Woodruff issued the "Woodruff Manifesto" outlawing polygamy in 1890. However, the practice of polygamy continued, with more than 250 secret plural marriages performed until at least 1904. Although exact numbers are impossible to determine, today there are more than thirty thousand "Mormon fundamentalists" living mostly in Utah, Arizona, and Montana and practicing polygamy. Prosecution has been sporadic, notably prior to the 2002 Salt Lake City Winter Olympics and, in one case, that of Royston Potter, who was prosecuted following an appearance on the Phil Donahue television show.

The continued practice of polygamy prompted unsuccessful congressional efforts in 1902 to amend the U.S. Constitution to ban polygamy.

The Supreme Court has not examined the constitutionality of antipolygamy laws since the 1890 *Late*

Corp. of the Church of Jesus Christ case. Under the “Smith test” announced in the 1990 case of *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), the Court held that a generally applicable criminal law was not unconstitutional even though it had a negative impact on a religious practice. Seemingly, this holding would protect antipolygamy laws from constitutional attack. However, in *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993), the Court found a criminal statute to be unconstitutional because, although it was of general applicability, it was aimed at a particular religion. This suggests the argument, untested to date, that polygamy statutes aimed at the Mormon practice could be unconstitutional.

Antipolygamy provisions are preserved in the present day state constitutions of Utah (Utah Const. art. III), Oklahoma (Okla. Const. art. I, § 2), Idaho (Idaho Const. art. I, § 4), and New Mexico (N.M. Const. art. XXI, § 1).

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References and Further Reading

- Ostling, Richard, and Joan Ostling. *Mormon America: The Power and the Promise*. New York: Harper, 1999.
- Sealing, Keith. *Polygamists out of the Closet: Statutory and State Constitutional Prohibitions Against Polygamy Are Unconstitutional Under the Free Exercise Clause*, Ga. St. U. L. Rev. 17 (2001): 691 (arguing that antipolygamy statutes are unconstitutional).
- Van Wagoner, Richard. *Mormon Polygamy: A History*. Gaithersburg, MD: Signature Books, 1989.

Cases and Statutes Cited

- Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993).
- Davis v. Beason*, 133 U.S. 333 (1890).
- Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990).
- Late Corp. of the Church of Jesus Christ of Latter-day Saints v. United States*, 136 U.S. 1 (1890).
- Murphy v. Ramsey*, 114 U.S. 15 (1885).
- Reynolds v. United States*, 98 U.S. 145 (1878).

APODACA v. OREGON, 406 U.S. 404 (1972)

In *Apodaca v. Oregon*, the U.S. Supreme Court addressed the question of whether the Sixth Amendment’s right to a jury trial required a unanimous verdict. Robert Apodaca, Henry Morgan Cooper Jr., and James Arnold Madden were convicted of committing felonies by three separate Oregon juries, all of which returned less than unanimous verdicts. In a six-to-three decision, the Court denied that their

convictions violated the Sixth Amendment and rejected the argument that the due process clause of the Fourteenth Amendment made the constitutional right to a jury trial applicable to the states. Specifically, it denied that the unanimity rule was essential to the function of a jury trial or necessary to support a conviction beyond a reasonable doubt.

The Court also rejected the contention that the unanimity rule was mandated by the Fourteenth Amendment’s requirement that juries reflect a cross section of the community. The Court reasoned that although the Constitution forbade the systematic exclusion of specific groups from juries, defendants may not challenge the makeup of the jury simply because no member of their race is on it. The Court further rejected the idea that minority groups serving on juries would be denied the opportunity to express their opinions because it found no proof that a majority would ignore the evidence and make a decision solely on the basis of prejudice. The Court recognized that unanimous juries were more likely to result in hung juries, but nevertheless felt that the interest of the defendant would be fairly served under both situations.

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See also Due Process; Jury Trial; Jury Trial Right; Jury Trials and Race

APPLICATION OF FIRST AMENDMENT TO STATES

Those responsible for adding the Bill of Rights to the new federal constitution intended those amendments to act as limits on the national government only, a point illustrated as succinctly as possible by the opening words of the First Amendment: “Congress [emphasis added] shall make no law . . .” Relying on the still recent history of the amendments’ framing and ratification, Chief Justice John Marshall in *Barron v. Baltimore*, 7 Pet. (32 U.S.) 243 (1833), confirmed that understanding by rejecting a claim that the Fifth Amendment’s prohibition on the taking of private property for public use without just compensation applied to state governments.

In 1868, the Fourteenth Amendment was added to the Constitution. Section 1 states (in part): “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . .” The question of whether the amendment’s framers intended that one (or both) of these clauses would apply some or all of those first ten amendments to the states has been the subject of extensive scholarly and judicial commentary and controversy.

This incorporation debate (and the evolution of incorporation doctrine) need not be addressed here, except to note that, throughout the last decades of the nineteenth and early decades of the twentieth centuries, the Supreme Court read this language quite narrowly, stressing the importance of states' following due process in criminal cases. Indeed, the first case interpreting the new amendment (the *Slaughterhouse Cases*, 16 Wall., 83 U.S., 36, in 1873) read the "privileges and immunities" clause so narrowly as to in effect read it out of the Constitution (at least until the end of the twentieth century).

The majority of the justices in this era equated due process with "fundamental fairness" and with respect to Fourteenth Amendment "liberty" were far more concerned with protecting "liberty of contract" against efforts by state governments to regulate a variety of social and economic problems connected with America's rapid industrialization. The exception was Justice John Marshall Harlan (I) who, in three criminal procedures cases between 1884 and 1908, argued that the word "liberty" in the amendment was a kind of shorthand reference to the specific protections found in the Bill of Rights. (The most famous modern proponent of this "total incorporation" view was Justice Hugo Black, starting with his dissent in a 1947 case, *Adamson v. California*, 332 U.S. 46, 1947.)

Speech, Press, Assembly, and Petition

With respect to the First Amendment, an important watershed was the case of *Gitlow v. New York*, 268 U.S. 652, in 1925. In this case the defendant was charged with violating that state's Criminal Anarchy Act of 1902 by publishing several pamphlets that allegedly advocated the overthrow of New York's government by unlawful means. When Gitlow's appeal came before the Supreme Court, he argued that the New York law interfered with his freedom of speech, a "liberty" protected by the due process clause of the Fourteenth Amendment against state abridgment.

In his opinion for the Court, Justice Sanford made constitutional history when he stated (in dictum): "For present purposes we may and do assume that freedom of speech and of the press . . . are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States." Thus was freedom of speech "incorporated" into the Fourteenth Amendment. (The Court went on to uphold Gitlow's conviction, arguing that all constitutional liberties are subject to reasonable restrictions and that there is no

constitutional protection for speech advocating criminal activity.)

Two years later, in *Fiske v. Kansas*, 274 U.S. 380 (1927), the Court confirmed the applicability of freedom of speech to the states, with a more positive outcome for the defendant, holding that a Kansas criminal syndicalism statute as applied to Fiske violated the Constitution. Any lingering doubts about the Court's new course were further dissipated in two 1931 cases. In *Stromberg v. California*, 283 U.S. 359 (1931), the Court struck down a California law prohibiting the display of red flags. Chief Justice Charles Evans Hughes favorably cited *Gitlow* and *Fiske* and also laid the groundwork for the modern Court's "symbolic speech" cases, recognizing that certain actions can be so expressive as to constitute protected communication. In *Near v. Minnesota*, 283 U.S. 697 (1931), the Court overturned a Minnesota law as violative of freedom of the press, reaffirming that a bedrock principle of freedom of speech and the press (now also incorporated into the Fourteenth Amendment) is that governments cannot engage in "prior restraints."

Freedom of assembly was incorporated in *DeJonge v. Oregon*, 299 U.S. 353 (1937), again involving a state criminal syndicalism law. DeJonge was charged with participation in a political rally organized by the Communist Party. The evidence against DeJonge consisted solely of party literature in his possession; no illegal activity was advocated at the meeting. The Oregon Supreme Court upheld his conviction, but the U.S. Supreme Court reversed. Chief Justice Hughes argued that peaceable assembly is a "right cognate to those of free speech and free press and is equally fundamental."

While no Supreme Court case has directly held that the right to petition is incorporated into the Fourteenth Amendment, the overwhelming implication of the Court's reasoning in the cases thus far discussed must be that this right is also protected against state government infringement.

Religion

In 1934, in *Hamilton v. Regents of the University of California*, 293 U.S. 245 (1934), Justice Cardozo's concurring opinion suggests that the Fourteenth Amendment's due process clause undoubtedly includes certain religious liberties, but neither his nor the Court's opinion specifically refers to the free exercise clause. Ultimately, very much like Benjamin Gitlow, Hamilton won the battle but lost the war. He argued that his religious conviction entitled him to an

exemption from the University of California's military training requirement, but the Court held that Hamilton was not compelled to attend the university. But if he did, he could be subject to the school's rules and regulations.

Thus, by the late 1930s, the speech and press and free exercise of religion components of the First Amendment had been incorporated. There were also other cases (largely involving state criminal procedures, including those in which John Marshall Harlan (I) had dissented) in which the Court refused to incorporate some element of the Bill of Rights. The time was ripe for the Court to formulate a standard that would explain these disparate outcomes, and the task fell to Justice Benjamin N. Cardozo. In *Palko v. Connecticut*, 302 U.S. 319 (1937), Cardozo explained that only those rights that were fundamental were included in Fourteenth Amendment liberty, describing them as "those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions" and "rooted in the traditions and conscience of our people" For his quintessential illustration, Cardozo mentioned "freedom of thought and speech," a freedom "that is the matrix, the indispensable condition, of nearly every other form of freedom."

In 1940, building on *Hamilton v. Regents*, the Court, in *Cantwell v. Connecticut*, 310 U.S. 296 (1940), actually found in favor of the individual's claim of an infringement on free exercise. The Court held that Connecticut's conviction of a Jehovah's Witness for going door to door distributing religious literature was invalid. While the state may regulate the time, place, and manner of such solicitations, it could not forbid them entirely.

Would the Amendment's ban on establishment of religion—the only component not yet incorporated—now be added to the list of fundamental liberties applicable to the states? The answer came in a 1947 case, *Everson v. Board of Education*, 330 U.S. 1 (1947). There, speaking through Justice Black, the Court invoked Thomas Jefferson's "wall of separation between Church and State" and applied the ban on establishment of religion to state actions. At the same time, the Court decided that the wall had not been breached by the governmental action at issue in this case—New Jersey's statute authorizing boards of education to reimburse parents, including those whose children attended religious schools, for the cost of bus transportation to and from school. The Court did not see the program as prohibited aid to a specific religious institution, but rather as a general program to help all parents get their children, regardless of religion, to and from their schools.

Association

The First Amendment says nothing about "freedom of association," but in *NAACP v. Alabama*, 357 U.S. 449 (1958), the Court said that such a right was so essential to the enjoyment of rights enumerated in the amendment that it is protected against state infringements. The case must be seen, as the Court did, against the background of the struggle for civil rights for African Americans. In an attempt to frustrate the activities of the National Association for the Advancement of Colored People (NAACP) on behalf of civil rights, Alabama ordered the organization to produce a variety of its records, including its membership list. The NAACP claimed that publicizing the names of its members would inevitably lead to various reprisals, including possible violence, against those members. The Supreme Court held that the organization could assert the constitutional rights of its members, including most importantly the right to pursue lawful interests and to freely associate for the purpose of furthering such interests. The fine and contempt judgment against the NAACP by an Alabama trial court were overturned.

PHILIP A. DYNIA

References and Further Reading

- Abraham, Henry J. and Barbara A. Perry. *Freedom and the Court*, 8th ed. Lawrence: University Press of Kansas, 2003.
- Amar, Akhil Reed. *The Bill of Rights: Creation and Reconstruction*. New Haven, CT: Yale University Press, 1998.
- Curtis, Michael Kent. *No State Shall Abridge: The 14th Amendment and the Bill of Rights*. Durham, NC: Duke University Press, 1986.
- . *Free Speech, "the People's Darling Privilege": Struggles for Freedom of Expression in American History*. Durham, NC: Duke University Press, 2000.

Cases and Statutes Cited

- Adamson v. California*, 332 U.S. 46 (1947)
- Barron v. Baltimore*, 7 Pet. (32 U.S.) 243 (1833)
- Cantwell v. Connecticut*, 310 U.S. 296 (1940)
- DeJonge v. Oregon*, 299 U.S. 353 (1937)
- Everson v. Board of Education*, 330 U.S. 1 (1947)
- Fiske v. Kansas*, 274 U.S. 380 (1927)
- Gitlow v. New York*, 268 U.S. 652 (1925)
- Hamilton v. Regents of the University of California*, 293 U.S. 245 (1934)
- NAACP v. Alabama*, 357 U.S. 449 (1958)
- Near v. Minnesota*, 283 U.S. 697 (1931)
- Palko v. Connecticut*, 302 U.S. 319 (1937)
- Stromberg v. California*, 283 U.S. 359 (1931)
- Slaughterhouse Cases*, 16 Wall. (83 U.S.) 36 (1873)

See also Establishment Clause Doctrine: Supreme Court Jurisprudence; Free Exercise Clause Doctrine: Supreme Court Jurisprudence; Incorporation Doctrine; Privileges and Immunities (XIV)

APPRENDI v. NEW JERSEY, 530 U.S. 466 (2000)

This case was designed to protect the Sixth Amendment right to a “speedy and public trial, by an impartial jury” and the right inherent in the due process clauses of the Fifth and Fourteenth Amendments to have every element of a criminal offense proven beyond a reasonable doubt. Charles Apprendi fired shots into the home of an African-American family and pleaded guilty to a number of state weapons offenses, the most serious punishable by up to ten years in prison. At sentencing, the New Jersey trial judge applied the state’s statute providing for enhanced sentences for “hate crimes.” Pursuant to this statute, Apprendi faced not ten but twenty years, maximum, and was sentenced to twelve years’ imprisonment. The factual finding that Apprendi acted with racial animus was made by the judge, using a preponderance of evidence standard. Apprendi objected, and the U.S. Supreme Court reversed. Justice Stevens, writing for a five-member majority, declared, “Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”

In a dissent representing four justices, Justice O’Connor found the majority’s holding unsupported by history, and she argued that it would disadvantage defendants and undermine three decades of sentencing reform. Under federal sentencing guidelines and state determinate sentencing regimes, judges currently make numerous factual findings that can increase a defendant’s sentence for a particular offense—usually by a preponderance of the evidence standard and generally based upon certain characteristics surrounding the offense (such as whether the offense was committed with a gun) and the offender (such as the extent of his or her criminal history). The goal of the sentencing reform movement is to ensure equality of sentencing for similarly situated defendants in an efficient manner; a shift back to pure judicial discretion in sentencing or jury findings of all facts relevant to sentencing would halt this reform.

Moreover, Justice O’Connor suggested that the majority’s holding amounted to a “meaningless and formalistic” rule that legislatures could easily avoid.

For example, New Jersey could increase the maximum sentence for weapons offenses from ten to twenty years’ imprisonment and allow a judge to reduce the penalty to ten years by finding that the defendant did not act with racial animus. Finally, Justice O’Connor predicted that this “watershed” rule would unleash a “flood of petitions by convicted defendants seeking to invalidate their sentences.”

In the years since *Apprendi* was rendered, only one of Justice O’Connor’s predictions has born fruit. Though many state and federal statutes contain facts that boost maximum penalties, prosecutors have adjusted by charging those facts in the indictment and submitting them to the jury. Due to structural democratic constraints, neither Congress nor state legislatures have attempted to avoid *Apprendi*’s holding by raising statutory maximums. Likewise, *Apprendi* has not threatened completed criminal prosecutions; the vast majority of those sentences have been upheld on appeal via procedural hurdles such as harmless error, bars against successive petitions, and nonretroactivity (see *Schriro v. Summerlin*, 124 S.Ct. 2519 [2004]).

However, *Apprendi*’s negative impact on sentencing reform has been profound. In *Ring v. Arizona*, 536 U.S. 584 (2002), six justices held that because Arizona conditioned eligibility for the death penalty upon the presence of an aggravating fact that was not an element of first-degree murder, the Sixth Amendment guaranteed the defendant a right to a jury determination of that fact. This threatens the capital sentencing schemes in nine states.

In *Blakely v. Washington*, the five justices comprising the majority in *Apprendi* held that the relevant “statutory maximum” for Mr. Blakely’s offense of kidnapping was the fifty-three-month sentence provided for by the Washington state sentencing guidelines and not the ten-year statutory maximum specified for the offense. Thus, the judge could not impose a ninety-month sentence based upon his finding that the defendant acted with “deliberate cruelty.” This decision threatens the sentencing schemes in fourteen states and the federal system. In *United States v. Booker*, 543 U.S. (2005), five members of the Court held that the Sixth Amendment as construed by *Blakely* applies to judicial findings of fact under federal sentencing guidelines; however, a different five-member majority held that the remedy was not to submit those facts to the jury, but rather to transform the guidelines from mandatory rules (providing statutory maximum sentences) to advisory guidelines for federal judges.

SUSAN R. KLEIN

References and Further Reading

- Bowman, Frank O., III, *Train Wreck? Or Can the Federal Sentencing System be Saved? A Plea for Rapid Reversal of Blakely v. Washington*, Am. Crim. Law Rev. 41 (2004): 215.
- Chaneson, Steven L., *The Next Era of Sentencing Reform*, Emory Law Journal 54 (forthcoming 2005).
- King, Nancy J., and Susan R. Klein, *Apres Apprendi*, Federal Sentencing Reporter 12 (2000): 331.
- , *Essential Elements*, Vanderbilt Law Rev. 54 (2001): 1467.
- , *Apprendi and Plea Bargaining*, Stanford Law Rev. 54 (2001): 295.
- , *Beyond Blakely*, Federal Sentencing Reporter 16 (June 2004): 413.
- Klein, Susan R., and Jordan M. Steiker, *The Search for Equality in Criminal Sentencing*, Supreme Court Rev. 2002 (2003): 223.
- Levine, Andrew M., *The Confounding Boundaries of "Apprendi-land": Statutory Minimums and the Federal Sentencing Guidelines*, Am. Crim. L. 29 (2002): 377.

APPROPRIATION OF NAME OR LIKENESS

Appropriation of name or likeness, the oldest and most widely recognized branch of the invasion of privacy tort, imposes liability for unauthorized use of another's name, likeness, or other identifying characteristics. Although the tort applies whenever the defendant, for his or her benefit (pecuniary or otherwise), appropriates the plaintiff's identity, the great majority of appropriation cases involve "commercial" uses like advertising or merchandising.

Although initially understood as protecting a dignity or autonomy interest, this tort is now seen as protecting an economic interest as well. In a significant number of jurisdictions, individuals have a "right of privacy," which protects them from the indignity and embarrassment of having their personalities commercialized without their consent, and a "right of publicity," which affords them exclusive control of the commercial value of their identities. Whereas the former is a purely personal right, the latter is assignable by contract and, in many jurisdictions, descendible.

The appropriation tort's impact on the news media is limited because a news disseminator is generally privileged to use a person's name or image in connection with an article or program on a matter of public interest. This privilege, however, does not apply if there is no discernible relationship between the plaintiff and the content of the news report, if the report's content is deliberately fabricated, or if the report is a disguised advertisement. The use of a person's identity in commentary, entertainment, and creative

works is ordinarily privileged as well. However, in *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977), the Supreme Court held that the First Amendment does not bar liability for the unauthorized television news broadcast of a performer's "entire act."

MICHAEL MADOW

References and Further Reading

- Keeton, W. Page et al. *Prosser and Keeton on the Law of Torts*. St. Paul, MN: West Publishing, 1984.
- Madow, Michael, *Private Ownership of Public Image*, 81(1) California Law Review 125–240 (1993).
- McCarthy, J. Thomas. *The Rights of Publicity and Privacy*. Eagan, MN: Thomson West, 2005.
- Nimmer, Melville, *The Right of Publicity*, Law & Contemporary Problems 19 (Winter 1954): 203–223.
- Prosser, William L., *Privacy*, California Law Review 48 (1960): 3:383–423.
- Restatement (Second) of Torts*, Sec. 652C (1976).
- Warren, Samuel D. and Brandeis, Louis D., *The Right to Privacy*, Harvard Law Review 4 (1890): 5:193–220.

Cases and Statutes Cited

Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977)

See also Invasion of Privacy and Free Speech; Right of Privacy

APTHEKER v. SECRETARY OF STATE, 378 U.S. 500 (1964)

Aptheker is an important civil liberties case involving the right to travel. In *Aptheker v. Secretary of State*, 378 U.S. 500, 84 S.Ct. 1659 (1964), the U.S. Supreme Court overturned a federal law that the Court believed unconstitutionally interfered with the freedom of American citizens to travel abroad.

Herbert Aptheker (1915–2003), an historian and political activist, joined the Communist Party in 1939 and subsequently served in the U.S. military in World War II, the struggle for civil rights in the South, and the movement against the War in Vietnam. When his passport was revoked by the U.S. State Department, along with those of other Communist Party leaders, he legally challenged the governmental action.

The U.S. Supreme Court held that section 6 of the Subversive Activities Control Act, which permitted the State Department to refuse to issue or renew passports for members of communist organizations, was unconstitutional on its face. No specific circumstances surrounding application of the law could cure its constitutional infirmity since it "too broadly and

indiscriminately restricts the right to travel and thereby abridges the liberty guaranteed by the Fifth Amendment.” The Court had previously held the right to travel abroad was an important aspect of a citizen’s liberty and that liberty was violated by a subversive activities law ignoring an “individual’s knowledge, activity, commitment, and purposes in and places for travel.” *Aptheker* is one of a series of cases decided by the U.S. federal courts in the beginning of the 1960s that indicated a trend away from abject judicial acquiescence in cold-war interference with civil liberty and due process.

ANTHONY CHASE

ARIZONA v. FULMINANTE, 499 U.S. 279 (1991)

Arizona v. Fulminante considered whether a state court properly found a defendant’s confession was coerced in violation of the Fifth Amendment and whether admission of a coerced confession is properly evaluated using harmless error analysis.

Although the defendant was suspected of murdering his eleven-year-old stepdaughter, the state had insufficient evidence to file charges against him. While he was incarcerated in New Jersey for an unrelated felony, he was befriended by another inmate, a former officer, masquerading as an organized crime figure. The officer-turned-informant told the defendant that he knew that the defendant was “starting to get some tough treatment” from other inmates because of a rumor that he murdered a child. He offered to protect the defendant from the other inmates, but told him “You have to tell me about it, . . . for me to give you any help” (499 U.S. at 283). At that point, the defendant admitted killing and sexually assaulting the child and the confession was used to convict him for the murder.

The Court held that the state court accurately applied the “totality of the circumstances” test to determine the voluntariness of the confession (*Schneekloth v. Bustamonte*, 412 U.S. 218, 1973). Because the confession was tendered in the belief that the defendant’s life was in jeopardy, the lower court appropriately found that it was “a true coerced confession in every way” (778 P.2d 602, 627, 1988).

Over the strong dissent of four justices, the majority held that harmless error analysis could be applied to admission of a coerced confession. Under this test, the state must be able to show that introduction of the confession was harmless beyond a reasonable doubt (*Chapman v. California*, 386 U.S. 18, 24, 1967). Unable to do so in this case, the Court affirmed the state

court’s decision to grant the defendant a new trial. By allowing the application of harmless error analysis, the Court effectively overruled the blanket exclusion of coerced confessions.

EMILY FROMSON

Cases and Statutes Cited

Chapman v. California, 386 U.S. 18, 24 (1967)

Schneekloth v. Bustamonte, 412 U.S. 218 (1973)

See also **Coerced Confessions/Police Interrogations; Due Process**

ARIZONA v. HICKS, 480 U.S. 321 (1987)

In *Hicks*, the Supreme Court announced that probable cause is required to justify the search or seizure of items discovered in “plain view” during an unrelated search. Police entered an apartment after shots were fired through its floor, injuring a man in the apartment below. While they were searching for the shooter, weapons, and other victims, an officer noticed several pieces of expensive stereo equipment that he suspected were stolen. He read and recorded the serial numbers of all the items, moving at least one of them—a turntable—to do so. The equipment was identified by these numbers as having been stolen in an armed robbery, for which the respondent Hicks was indicted.

The state trial court and the Arizona Court of Appeals granted the respondent’s motion to suppress, reasoning that the officer’s obtaining the serial numbers exceeded the scope of the exigency that justified the search following the shooting. After the Arizona Supreme Court denied review, the Supreme Court granted the state’s petition for certiorari.

By a vote of six to three, the Court held that the evidence should be suppressed because, although the recording of the serial numbers was not a “seizure,” the moving of the turntable constituted a separate search, unrelated to the exigency justifying the officers’ entry. To be reasonable under the Fourth Amendment, that separate, warrantless search required probable cause. The majority declined to adopt the dissent’s suggestion that a lesser “cursory search” could be justified in connection with a plain-view inspection, holding instead that “a search is a search.”

JULIE A. BAKER

References and Further Reading

Milstein, Lee C., *Note, Fortress of Solitude or Law of Malevolence? Rethinking the Desirability of Bright-Line Protection of the Home*, N.Y.U.L. Rev. 78 (2003): 1789.

Sundby, Scott C., *A Return to Fourth Amendment Basics: Undoing the Mischief of Camara and Terry*, Minn. L. Rev. 72 (1988): 383.
 Wallin, Howard E., *Plain View Revisited*, Pace L. Rev. 22 (2002): 307.

Cases and Statutes Cited

Coolidge v. New Hampshire, 403 U.S. 443 (1971)
Illinois v. Andreas, 463 U.S. 765 (1983)
Mincey v. Arizona, 437 U.S. 385 (1978)
Payton v. New York, 445 U.S. 573 (1980)
Texas v. Brown, 460 U.S. 730 (1983)

See also **Plain View; Probable Cause; Scalia, Antonin; Search (General Definition); Seizures; Terry v. Ohio, 392 U.S. 1 (1968); Warrantless Searches**

ARIZONA v. YOUNGBLOOD, 488 U.S. 51 (1988)

In *Youngblood*, a divided Supreme Court held that the Fourteenth Amendment due process clause does not require the government to preserve evidence that could conclusively prove the defendant innocent.

Weeks after a young boy was abducted and raped, Youngblood was arrested and charged with the crime after the boy picked his photo from a lineup. Youngblood maintained his innocence and requested that a semen stain on the boy's clothing be tested to determine the rapist's blood type. Unfortunately, such testing could not be performed because the police had neglected to refrigerate the stained clothing. Youngblood was convicted at trial, but an appellate court reversed the conviction because the destroyed evidence deprived Youngblood of an opportunity to prove his innocence.

The U.S. Supreme Court reinstated Youngblood's conviction by a vote of six to three. Relying on *California v. Trombetta*, the majority ruled that the government's failure to preserve potentially exculpatory evidence violates due process only if the government intentionally destroys the evidence in bad faith. Since the police did not intentionally allow the evidence to deteriorate in Youngblood's case, the Court reasoned that he was not entitled to any relief even though the police's negligence deprived him of an opportunity to establish his innocence conclusively. *Youngblood* thus sharply limits the responsibility of the government to preserve potentially exculpatory evidence for testing.

In 2000, twelve years after the Court sent Youngblood back to prison, he was exonerated when more advanced DNA testing on the stained clothing established that he was not the rapist.

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References and Further Reading

Imwinkelried, Edwin, and Norman Garland. *Exculpatory Evidence*, 2nd ed. Charlottesville, VA: Michie Publications, 1996.
 Stacy, Tom, *The Search for Truth in Constitutional Criminal Procedure*, Columbia Law Review 91 (1991): 1369.
 Whitaker, Barbara. "DNA Frees Inmate Years After Justices Rejected Plea." *The New York Times*, August 11, 2000.

Cases and Statutes Cited

California v. Trombetta, 467 U.S. 479 (1984)

See also **California v. Trombetta, 467 U.S. 479 (1984); Due Process; Fourteenth Amendment**

ARRAIGNMENT AND PROBABLE CAUSE HEARING

Depending on whether the crime charged is brought federally or within a state jurisdiction, an individual accused of a crime could be faced with a few different pretrial proceedings. In a federal case, once a person is arrested, the Federal Rules of Criminal Procedure mandates a defendant be brought before a magistrate judge, or other lawful substitute, without unnecessary delay and be advised of his rights and the charges alleged. Most state jurisdictions mirror this requirement. A second type of hearing, as required by the Fourth Amendment of the Constitution, requires a preliminary hearing/examination to determine whether or not there is probable cause for the underlying arrest (pre-indictment) (*Gerstein v. Pugh*, 420 U.S. 107, 1975). While each of the pretrial hearings serves separate functions, it is not unusual if they are combined and heard simultaneously in some jurisdictions.

In addition, the U.S. Supreme Court has put a time clock on the probable cause hearing so that it is to be held within forty-eight hours for those arrested without a warrant (*Riverside v. McLaughlin*, 500 U.S. 44, 1991). Furthermore, in the federal criminal system, if the defendant is determined to be a danger or a flight risk and is detained after this initial appearance, the government then has ten days to seek a grand jury indictment or a finding of "probable cause" by a magistrate judge at a preliminary hearing. If the defendant is not detained, the government then has twenty days to seek grand jury indictment. Furthermore, even a finding of "probable cause" by a federal magistrate judge does not substitute for the Fifth Amendment's requirement for indictment by a grand jury in a federal case. Thus, the case must still be presented to a grand jury. It should also be noted that states are not required to bring a criminal charge

by a grand jury and therefore may generally proceed on a case with a finding of probable cause by a judge.

A preliminary hearing is the vehicle used to determine whether there is “probable cause” to believe that an offense has been committed and whether the defendant committed it. The proceeding does not establish guilt or innocence and does not preclude a subsequent grand jury from considering the same case for indictment. Therefore, even if a magistrate judge does not find probable cause to support the arrest and dismisses the complaint with a release of the accused, this does not prevent a prosecution for that same offense.

Subsequent to indictment or other charging document (for example, information), an arraignment must be held. Like the initial appearance in court after an arrest, the arraignment is merely part of the initial steps in the criminal process. At the arraignment, retained counsel represents the defendant or, if the defendant is considered indigent, court-appointed counsel is provided. In addition, the defendant is provided a copy of the charging document and asked to plead to the allegations. Normally, a defendant will initially enter a plea of “not guilty” to allow for time to receive and inspect discovery, investigate the charges, and consult with counsel. Finally, the arraignment is also significant in that it serves as a trigger for many procedural rules, such as the “speedy trial clock” (if the defendant is out of custody), discovery deadlines, and the multiple “notices,” as prescribed by the procedural rules such as insanity or alibi.

ROBERT DON GIFFORD

Cases and Statutes Cited

Gerstein v. Pugh, 420 U.S. 107 (1975)

Riverside v. McLaughlin, 500 U.S. 44 (1991)

ARREST

The fact of an arrest and the definition of an arrest are of fundamental importance. An arrest is a significant intrusion upon the liberty of the person arrested. Another reason the term is important is because, when a valid arrest is made, the right of the police to search the person arrested is automatic. It is also significant because, if an arrest is made without probable cause, the subsequent seizure of evidence may be considered a fruit of that unlawful arrest and cannot be used against the suspect in a criminal trial. The timing of an arrest is also important in civil actions for claims of false arrest.

Throughout most of the history of the United States, the law of arrest was largely unregulated by the strictures of Fourth Amendment theory. There

are two primary reasons for this. First, the exclusionary rule was not adopted to regulate the activities of federal authorities until the early part of the twentieth century. Only at that point, as Telford Taylor has observed, was there a “good reason” to contest the validity of a search incident to arrest. Second, law enforcement has been, and still remains, primarily a state and local issue. Given that the rule excluding illegally obtained evidence from criminal trials was not made applicable to state actors until 1961, the Fourth Amendment’s requirements did not regulate the great bulk of interactions between law enforcement officials and citizens. Accordingly, the concept of an arrest developed primarily outside the body of Fourth Amendment jurisprudence.

Most of the development of the law on arrest occurred at common law. Several centuries of precedent and many commentators have produced what appear to be irreconcilable definitions of what constitutes an arrest. This is because the common law definition of arrest, like many common law principles, has proved to be very malleable and has been engrafted with factual considerations and burdened by broad generalizations. One must look beyond each factual situation and eliminate the extraneous gloss on the definition created by some authorities. Once that is done, two essential components of the common law definition of an arrest by a law enforcement officer acting pursuant to real or pretended authority emerge: (1) the officer must obtain “custody” of the suspect; and (2) the officer must intend to obtain that custody.

The concept of “custody” at common law did not require a trip to the police station, booking, or the institution of formal charges to constitute an arrest. Rather, an arrest was equated with any form of intentional detention and began at the moment of the detention. Indeed, as has been stated by Alexander in his treatise, the word arrest “is derived from the French word *arreter*, which means to stop, detain, to hinder, to obstruct.” Custody occurs when the police officer physically touches the suspect with the intent to arrest him or when the suspect submits to the officer’s show of authority.

Intent to arrest is the second element of the common law definition of arrest. An officer’s act of obtaining custody must be intentional—that is, he or she must do the acts that would otherwise constitute an arrest with the intent to arrest the suspect. There is no required manifestation of an intent to arrest beyond the acts sufficient to obtain custody. Also, an officer must not intend to do anything with the suspect beyond the intent to detain him.

The U.S. Supreme Court has generally followed the common law rule to define an arrest. However, to permit a search incident to arrest, the Court has

sometimes required more, such as an intent by the police to take the person to the police station before they are allowed to search. An arrest is justified when the police have probable cause that the person arrested has committed a crime. Probable cause is a fair probability that the person has committed the crime. In measuring probable cause, a court examines the factual and practical considerations of everyday life upon which reasonable persons act.

Modern authority to arrest is governed by statute in most jurisdictions, with each jurisdiction specifying the types of offenses that permit an arrest. Arrests are generally made for the purpose of prosecuting the person for a criminal offense. However, arrests for other purposes are also sometimes permitted, including detaining material witnesses to an offense to obtain information from them. Police officers will also exercise their authority to arrest persons for a variety of reasons, such as separating persons involved in domestic disputes or fights, but will then exercise their discretion and let the arrestees go without charging them. These are just a few of the many reasons why a large percentage of arrests do not result in prosecution.

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References and Further Reading

- Alexander, C. *The Law of Arrest*. 1949 § 45.
 Clancy, Thomas K., *What Constitutes an "Arrest" within the Meaning of the Fourth Amendment?* Vill. L. Rev. 48 (2003): 129.
 Sherman, Lawrence W., *Defining Arrest: Practical Consequences of Agency Differences*, Crim. L. Bull. 16 (1980): 376.
 Taylor, Telford. *Two Studies in Constitutional Interpretation*. 1969.

Cases and Statutes Cited

- Barnhard v. State*, 587 A.2d 561 (Md. App. 1991), aff'd, 602 A.2d 701 (Md. 1992)
Brinegar v. United States, 338 U.S. 160, 175 (1949)
California v. Hodari D., 499 U.S. 621 (1991)
Knowles v. Iowa, 525 U.S. 113 (1998)
Michigan v. DeFillippo, 443 U.S. 31, 37 (1979)
State v. Oquendo, 613 A.2d 1300 (Conn. 1992)
Terry v. Ohio, 392 U.S. 1 (1968)
Weeks v. United States, 232 U.S. 383 (1914)

See also **Arrest Warrants; Search (General Definition); Seizures**

ARREST WARRANTS

Law enforcement officials in America and in England in the period preceding the American Revolution did not have broad inherent authority to search and

seize; such actions required authorization, and the warrant system was the primary means to confer that authority. Those were simple times and warrantless searches and seizures were virtually nonexistent. Only one type of warrantless seizure may have been common: the arrest of a suspected felon. Such arrests were rarely made except in hot pursuit of the felon. The common law also permitted warrantless arrests for misdemeanors committed in the officer's presence.

There existed at common law the legal process of obtaining an arrest warrant for criminal offenses. An arrest warrant was a command to the sheriff of the county or the marshal of the court to apprehend the suspect and bring him or her to court. This warrant was issued upon a showing of probable cause that the person had committed a felony. It was issued by the court after examining the requesting party under oath and reducing that examination to writing concerning whether a crime had been committed and the party's grounds for suspicion. The person suspected of the crime had to be named.

A similar legal process to obtain a warrant continues to this day. The contemporary authority of the police to arrest with or without warrants varies from state to state based on each state's law. Some of those considerations are whether the crime is a misdemeanor or felony and whether the crime occurred in the officer's presence.

In the twentieth century, the Supreme Court in two separate cases addressed the question of whether the Fourth Amendment required law enforcement officials to obtain a warrant before arresting a suspect. The Court made a distinction between arrests in the home and arrests in public. For arrests in a person's home, the Court in *Payton v. New York*, 445 U.S. 573 (1980), mandated that an arrest warrant was required and that that warrant carried the implicit authority to enter the home to arrest the suspect.

For arrests occurring in public, however, the Court in *United States v. Watson*, 423 U.S. 411 (1976), established that no warrant was required. The distinction between the two situations was based on the Court's view that the physical intrusion into a person's home is the "chief evil" that the Fourth Amendment is designed to prevent and that an intrusion into a home to arrest invades its sanctity and privacy. Thus, as *Payton* said, the "Fourth Amendment draws a firm line at the entrance of the house." Accordingly, absent exigent circumstances, a warrant is needed. In contrast, *Watson* relied heavily on the prevailing common law view that no warrant is needed for an arrest occurring in public.

THOMAS K. CLANCY

ARREST WARRANTS

References and Further Reading

- Clancy, Thomas K., *What Constitutes an "Arrest" within the Meaning of the Fourth Amendment*, Vill. L. Rev. 48 (2003): 129.
- , *The Role of Individualized Suspicion in Assessing the Reasonableness of Searches and Seizures*, Memphis L. Rev. 25 (1995): 483.
- Coke, Edwardo. *Institutes of the Laws of England*. 1797, 177.
- Davies, Thomas Y., *Recovering the Original Fourth Amendment*, Mich. L. Rev. 98 (1999): 547.
- Grano, Joseph D., *Rethinking the Fourth Amendment Warrant Requirement*, Am. Crim. L. Rev. 19 (1982): 603.
- Hale. *The History of the Pleas of the Crown*. 1847, 85–104.
- Wasserstrom, Silas J., *The Incredible Shrinking Fourth Amendment*, Am. Crim. L. Rev. 21 (1984): 257.

Cases and Statutes Cited

- Payton v. New York*, 445 U.S. 573 (1980)
- United States v. Watson*, 423 U.S. 411 (1976)

See also **Arrest; Seizures**

ARREST WITHOUT A WARRANT

An arrest constitutes a seizure and must therefore satisfy the Fourth Amendment's requirement that all searches and seizures be reasonable. In order to be reasonable, all arrests must be supported by probable cause to believe that a crime has been committed and that the person to be arrested has committed it. A further, more difficult question is whether the determination of probable cause must be made prior to the arrest by a magistrate issuing an arrest warrant or whether police may lawfully make the arrest without a warrant so long as a magistrate subsequently finds probable cause.

The rules dictating the necessity of a warrant are best understood as not protecting the arrestee's freedom from seizure, but rather any legitimate privacy interests in the physical area that police must enter to make the arrest. Viewed from that perspective, it is not surprising that the rules governing warrants vary depending on the location of the arrest.

In *United States v. Watson*, 423 U.S. 411 (1976), the Supreme Court upheld the constitutionality of warrantless arrests made in public places. The Court's opinion in *Watson* relied heavily on a history that permitted such arrests. The common law authorized police to make warrantless arrests for misdemeanors that occurred in the officer's presence and for all felonies. The traditional common law rule became prevailing contemporary practice under federal and state laws. In light of the national consensus, the Court declined in *Watson* to impose a different rule

under the Fourth Amendment. The Court had no opportunity in *Watson* to address the constitutionality of warrantless arrests for misdemeanors committed outside a police officer's presence. However, such arrests are rare because most state statutes prohibit officers from making custodial arrests for misdemeanors unless they are committed in their presence.

Suspects who are arrested without a warrant are entitled under *Gerstein v. Pugh*, 420 U.S. 103 (1975), to a "prompt" judicial determination of probable cause following their arrest. In *Riverside v. McLaughlin*, 500 U.S. 44 (1991), the Court explained that probable cause hearings provided within forty-eight hours of arrest are presumed to be prompt, absent a contrary showing. After forty-eight hours, the burden shifts to the government to demonstrate extraordinary circumstances justifying the delay.

Despite the Court's allowance of warrantless arrests in public places, strategic or practical considerations may nevertheless persuade police to obtain an arrest warrant. For example, police may be uncertain whether their evidence amounts to probable cause. A judicial determination in advance of arrest mitigates the risk of an unlawful arrest based on the lack of probable cause. Obtaining arrest warrants and maintaining a computerized database of them also facilitates future arrests of wanted suspects during happenstance encounters such as traffic stops.

In contrast to arrests in public places, the Supreme Court has construed the Fourth Amendment to require warrants when police must search a home to make the arrest. In *Payton v. New York*, 445 U.S. 573 (1980), the Court held that the Fourth Amendment prohibits the warrantless entry into a suspect's home to make an arrest. The Court explained that its holding was not intended to protect the suspect's freedom of movement, implicated by the arrest, but rather the suspect's privacy interests in the home, implicated by the police's nonconsensual entry.

Typically, police are required to obtain a search warrant to justify entry into a person's home. A search warrant is specific about location and requires the issuing magistrate to find probable cause that the person or thing to be seized is likely to be found on the premises to be searched. An arrest warrant, in contrast, only requires probable cause to believe that the suspect has committed a crime; the magistrate makes no determination about the suspect's current location. Despite the general rule requiring search warrants, the Court held in *Payton* that a suspect's privacy interests are sufficiently protected if the police enter an arrestee's home with an arrest warrant and reason to believe that the arrestee is currently home.

If police seek to arrest a suspect in the home of a third party, however, yet another rule applies, and

police must obtain a search warrant. In *Steagald v. United States*, 451 U.S. 204 (1981), the Court held that an arrest warrant for a suspect who lives elsewhere is insufficient to justify entering a third party's home to make the arrest. To protect the third party homeowner's privacy interests, police must obtain a search warrant based on probable cause to believe that the arrestee will be found on the premises.

Although the three rules established in *Watson*, *Payton*, and *Steagald* are relatively straightforward, their application can raise trickier issues. For example, it may be unclear whether the arrest is in a public place. In *United States v. Santana*, the defendant was standing directly in her open doorway at the threshold of her home. The Supreme Court noted that the doorway was private in the same sense as a defendant's yard, but nevertheless held that the defendant was in a "public place" for purposes of applying *Watson* and could be arrested without a warrant. Currently, lower courts remain divided on the question of whether the *Watson* rule or *Payton* rule applies when police arrest the suspect in a commercial establishment that is not open to the general public.

Another issue that complicates the application of the rules is the defendant's ability to challenge a violation of them. A person who challenges a police search must have a reasonable expectation of privacy in the area searched (see *Rakas v. Illinois*, 439 U.S. 128, 1978). Accordingly, if police violate *Steagald* by entering a third party's home to arrest a wanted suspect, the suspect will not be permitted to challenge the unlawful search if he or she lacks reasonable privacy expectations in the third party's home. Because the *Steagald* rule is intended to protect privacy rights and not the suspect's liberty, any challenge of the search would need to be made by a person who enjoys privacy rights in the home. If no such person has an incentive to complain, the Fourth Amendment violation may never be challenged at all.

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References and Further Reading

Dressler, Joshua. *Understanding Criminal Procedure*, 3rd ed. Understanding Series. New York: LexisNexis, 2002.

Cases and Statutes Cited

Gerstein v. Pugh, 420 U.S. 103 (1975)
Payton v. New York, 445 U.S. 573 (1980)
Rakas v. Illinois, 439 U.S. 128 (1978)
Riverside v. McLaughlin, 500 U.S. 44 (1991)
Steagald v. United States, 451 U.S. 204 (1981)
United States v. Watson, 423 U.S. 411 (1976)

See also Arraignment and Probable Cause Hearing; Arrest; Arrest Warrants; Probable Cause; Search (General Definition); Search Warrants; Seizures

ASHCROFT v. FREE SPEECH COALITION, 535 U.S. 234 (2002)

Congress passed the Child Pornography Prevention Act of 1996 that, among other things, dealt with "virtual" pornographic images of minors. The act prohibited not only the production, distribution, or advertising of pornographic images of actual children but also any visual depiction of what "appears to be" or "conveys the impression" of minors engaged in sexually explicit conduct. The lead respondent, Free Speech Coalition, a lobbying group for the adult entertainment industry, challenged the law on the grounds that the two provisions were constitutionally invalid.

A federal district court for the Ninth Circuit Court of Appeals in 1997 upheld the act's constitutionality, ruling the law was content neutral and legitimately discouraged child pornography's secondary effects, like pedophilia. Two years later, a panel for the Ninth Circuit reversed the district court in a two-to-one vote. From 1999 to 2001, however, four other circuit courts sustained the validity of the act. The Supreme Court granted certiorari and declared the "appears to be" and the "conveys the impression" provisions were overbroad, affirming the Ninth Circuit's decision. Justice Kennedy wrote for Justices Stevens, Souter, Ginsburg, and Breyer. Thomas concurred with the judgment. Justice O'Connor concurred in part and dissented in part. Justices Rehnquist and Scalia dissented.

According to Justice Kennedy, "This case provides a textbook example of why we permit facial challenges to statutes that burden expression." The imposition of criminal penalties on protected speech is a "stark example of speech suppression." The law prohibited the production of images "without using any real children" and thus went beyond *New York v. Ferber*, 458 U.S. 747 (1982), which sustained state interest in preventing the exploitation of actual minors involved in pornography. Virtual images do not involve real minors nor does the production of the images harm or exploit them.

Moreover, the law made no effort to conform to *Miller v. California*, 413 U.S. 015 (1973). Materials did not have to appeal to prurient interests; depictions of sexually explicit activity, regardless of their literary, artistic, political, or scientific value, were proscribed. Also, it was not necessary for the images to be patently offensive or contravene community standards, as

Miller requires. In addition, materials or images were not considered as a whole or in their entirety; a “single graphic depiction” of sexual activity could lead to severe criminal penalties.

Finally, the Court dismissed the government’s secondary effects arguments regarding child pornography. As Justice Kennedy concludes, “The Government has shown no more than a remote connection between speech that might encourage thoughts or impulses and any resulting child abuse. Without a significantly stronger, more direct connection, the Government may not prohibit speech on the ground that it may encourage pedophiles to engage in illegal conduct.”

Justice Rehnquist’s dissent, joined by Justice Scalia, argued that the act’s explicit definition of proscribed sexual activity did not reach protected images or materials. He accordingly claimed that if properly construed, based on its definition of child pornography, the act, would reach only “computer-generated images that are virtually indistinguishable from real children engaged in sexually explicit conduct. The statute need not be read to do any more than precisely this, which is not offensive to the First Amendment.”

In response to the Court’s decision, Congress enacted the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 (*PROTECT Act*) that adopted the dissent’s language to ban some nonobscene pornography produced without an actual minor.

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References and Further Reading

- Jenkins, Philip. *Beyond Tolerance: Child Pornography on the Internet*. New York: New York University Press, 2003.
- Kende, Mark S. “The Supreme Court’s Approach to the First Amendment in Cyberspace: Free Speech as Technology’s Hand-Maiden.” *Constitutional Commentary* 14(3) (1997):465–480.

Cases and Statutes Cited

- Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002)
- Miller v. California*, 413 U.S. 015 (1973)
- New York v. Ferber*, 458 U.S. 747 (1982)

ASHCROFT, JOHN (1942–)

John Ashcroft served as attorney general during the first term of the administration of George W. Bush, and in his last year in office analysts were terming him the worst attorney general in the nation’s history. Certainly in terms of civil liberties, Ashcroft showed no sympathy for or even understanding of due process and other constitutional protections. Under the

banner of the war on terrorism, Ashcroft defended every infraction as necessary for the nation’s security.

Ashcroft probably would not have become attorney general except for a freak political event. A conservative and very popular with the religious Right, Ashcroft had been governor of Missouri and then in 1994 won a seat to the U.S. Senate. He ran for reelection in 2000 against the popular Democratic governor, Mel Carnahan, who was killed in a plane crash just a few weeks before the election. Too late to replace his name on the ballot, Democrats urged voters to cast their votes for Carnahan, and the lieutenant governor said he would appoint Carnahan’s widow to the seat until a special election could be scheduled. Carnahan won, the first time in history that a dead man won a federal election, and Bush then named Ashcroft to head the Justice Department.

Clearly the attacks of September 11, 2001, and the resulting “war on terror” shaped Ashcroft’s and the administration’s policies. Historically, civil liberties have always been at risk in wartime, but this “war” took place in an era with technological possibilities of invading the privacy and rights of individuals far greater than in any previous conflict. Ashcroft determined to make full use of what he considered the unlimited power of the executive branch in wartime along with all the tools of surveillance to ferret out would-be terrorists. If he had found and prosecuted any terrorists caught in these webs, he might have offered some justification for his actions; but in fact there were none. Much of the activity in federal courts consisted of men caught in a web of often lawless tactics trying to secure minimal due process of law. As for these efforts, Ashcroft cavalierly dismissed them, saying due process in wartime could be found outside the federal court system and attacking federal judges who questioned the administration’s tactics as unpatriotic and allies of the terrorists.

In the wake of 9/11, the administration rounded up hundreds of men of Arab descent and held them virtually incommunicado for weeks and months. It fought every effort by civil liberties groups to get lawyers to these men and declared that, under the war powers, so-called “enemy combatants” were not entitled to the basic constitutional protections. In the end a number of these men were deported, not for terrorist activity, but for violations of immigration law; the rest were eventually released without any charges made against them and no apology from the government. Ashcroft considered the round-up justified by the circumstances; moreover, he argued that the president’s war powers allowed him to arrest and hold indefinitely not only aliens but also American citizens, and he condemned as “proterrorist wimps” those who objected to such a claim.

The bad behavior of American troops in treating prisoners in Afghanistan and Iraq eventually led journalists to discover that the Justice Department had advised the administration that in wartime it was not bound by international bans against torture. When called to testify before the Senate Judiciary Committee in June 2004, Ashcroft argued that these memoranda were nothing more than talking points and that the United States did not justify torture and the president had not ordered it. But he refused to state that torture was wrong and would never be used or justified by the administration.

Following the hurried passing of the USA PATRIOT Act in late 2001, civil libertarians warned that the broad powers given to the government in terms of surveillance posed a great threat to civil liberties. Ashcroft at the time denied that such violations would occur, but in fact they did. During his tenure, the FBI engaged in massive surveillance of suspected domestic terrorists, which included groups that had no ties to Al-Qaeda or other Muslim fundamentalist terror operations. Although the law established a special court to deal with requests for warrants for secret wiretaps, the Bush administration chose to bypass this tribunal and engage in illegal wiretaps on its own authority.

Even if there had been no 9/11, which some theorists believed could in fact justify the type of extralegal activities engaged in by the Bush administration, Ashcroft's record in other, nonterrorist-related areas also showed a blatant disregard for civil liberties. When he was governor of and then senator from Missouri, Ashcroft had been a strong conservative, who counted as among his strongest supporters members of the so-called Christian right. An adherent of the ultra-conservative Assembly of God church, he fully shared the Christian right's opposition to abortion and their demand for greater morality in public life.

He certainly tried to impose his brand of morality while attorney general. In one of the more ludicrous policies, he insisted that a blue cloth be draped over the torso of the "Spirit of Justice" statue in the Justice Department's great hall, the place where the attorney general normally holds his or her press conferences. It appears that the bare breast of the larger-than-life statue offended his sense of morality as well as those of his religious supporters.

With his defense of antipornography legislation and other attempts by Congress to regulate the Internet, Ashcroft also kept the solicitor general busy. All were struck down by the courts as violating the First Amendment.

A long time opponent of abortion, Ashcroft paid attention to some religious anti-abortion groups who equated physician-assisted suicide with termination of

pregnancy. The Supreme Court in 1990 had ruled that although there was no constitutional right to physician-assisted suicide, states were free in their power to regulate medical practice to allow such an end-of-life choice. The Court even pointed to the example of Oregon, which through a referendum had adopted a model assisted-suicide law, as one option open to the states.

But Ashcroft would have none of it, and he attempted to use provisions of the federal narcotics law to nullify the Oregon plan, even going so far as to threaten criminal prosecution of doctors who prescribed lethal drugs to qualified patients. Oregon fought back, and in the federal district court as well as in the Court of Appeals for the Ninth Circuit, the judges slapped Ashcroft down, in effect saying he was an intermeddling busybody who had no power or authority under federal law to interfere. (That case went on appeal to the U.S. Supreme Court, but Ashcroft had left office when the justices granted certiorari.)

The Ashcroft Justice Department showed little interest in civil rights, and a number of lawyers left the civil rights section in protest. Ashcroft also aroused the ire of federal attorneys when he moved to restrict their discretion in prosecuting certain types of cases. Under federal law, some offenses, such as killing a federal officer, are considered capital crimes; this means that a death penalty may be sought. Federal prosecutors often determined to allow the defendant to plea bargain down to a lesser punishment in return for cooperation, such as providing the names of drug dealers higher up in the organization. Usually, the prosecutor informs the Justice Department of his or her decision to do this, and the officials in Washington usually defer to the judgment of the attorney handling the case.

But John Ashcroft wanted federal prosecutors to go for the death penalty in every possible instance, and it would seem that he did not care at all about other matters such as ensnaring gang leaders or large drug dealers. Ashcroft's intervention in these cases, often after a judge had approved the plea bargain, brought him enormous criticism from federal attorneys and from judges as well. Upon his leaving office there was widespread anticipation that his successor, Alberto Gonzalez, would be flooded with requests to review and overturn many of Ashcroft's decisions in this area.

At the time of the terrorist attack in September 2001, many people warned that if the United States ignored its long tradition of rule by law and protection of civil liberties, it would be no better than the enemy and that, in fact, this would mean that the terrorists had won. Interestingly, when the administration began planning what powers it could utilize,

Secretary of Defense Donald Rumsfeld, aware of the violations of civil liberties in previous wars, convened a panel of respected, nongovernment lawyers to advise him and the administration on what they could and could not do. They warned him against the types of orders Bush was planning to use against noncitizens before special military panels, and to assure that traditional American rights, such as trial by jury and right to counsel, were not ignored. John Ashcroft, however, intervened to make sure that these recommendations were never implemented.

MELVIN I. UROFSKY

ASSISTED SUICIDE

It was not until the last decade of the twentieth century that the U.S. Supreme Court decided three cases in which the Court began what remains a tentative exploration of whether (if at all) the U.S. Constitution guarantees a choice concerning the time and manner of one's death. The Court seemed especially concerned that it leave room for the political process to address the so-called "right to die"—a term of art, covering a broad array of factual settings raising end-of-life issues, most notably physician-assisted suicide (PAS), decisions by competent adults to refuse or remove life-sustaining treatment, and choices made on behalf of children or incompetent adults. In 2004, the nation was riveted with the Terri Schiavo case, an especially powerful illustration of the legal and political complexities that abound in this area of individual liberty.

Legal Context

American law has long recognized a constitutional right to refuse medical treatment. Like all rights, it is not absolute and subject to reasonable state regulation. As early as 1905 (*Jacobson v. Massachusetts*, 197 U.S. 11), the Supreme Court upheld a compulsory vaccination law, justified by the government's interest in stopping the spread of communicable diseases.

The first case to bring to widespread public attention the issue of hastening the death of a dying person came in 1976, when a U.S. appellate court upheld the right of close family members to allow the termination of life support for a patient, Karen Ann Quinlan, in a persistent vegetative state. Other cases soon followed and all states enacted laws recognizing the legal right to withhold or withdraw life-sustaining medical treatment. There emerged a legal consensus

on three fundamental principles: (1) Competent persons have a right to refuse medical treatment, even if the result is death; (2) persons without decision-making capacity have a right to have their family decide to withhold or withdraw treatment; (3) a "bright line" exists between "passively" hastening a person's death by withholding or withdrawing treatment and more "active" means such as assisted suicide and active euthanasia.

The U.S. Supreme Court began its tentative forays into the problem in 1990 in the case of *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261 (1990). The parents of Nancy Cruzan, who was in a persistent vegetative state with no hope of regaining consciousness, sought to terminate food and hydration, ending her life.

The Court's decision was in three parts. First, the Court said that competent adults have a constitutional right to refuse medical care. (Only Justice Antonin Scalia refused to recognize such a right.) That principle, Chief Justice William Rehnquist wrote, "may be inferred from our prior decisions." Rehnquist "assumed" that there was a right to refuse food and water and thus hasten death. Five other justices stated explicitly that such a right exists. This liberty was grounded in the due process clause of the Fourteenth Amendment. The second major portion of the opinion held that before treatment is terminated, a state may require solid evidence that a person wanted that result. The third major component of the opinion held that states have the power to prevent family members from making this decision for another. The right to end treatment is uniquely personal, and a decision by others, even close family, may not necessarily be motivated by the best interests of the patient.

Key questions were left unresolved. The right recognized here was not deemed "fundamental" and thus the opinion gave no guidance as to what level of judicial scrutiny (strict or some lower level) was appropriate. The Court also did not address what kind of proof is needed to constitute clear and convincing evidence of the person's desires in these matters. The strong implication of the Court's language was that a written "living will" would meet the test but that a state could refuse to recognize oral testimony. Finally, the Court left open the question of whether a state is or is not required to defer to the decision of a surrogate or guardian if there is "competent and probative evidence" that the patient wished that surrogate to decide.

In 1997, the Court turned its attention to PAS in two cases, *Washington v. Glucksberg*, 117 U.S. 2258 (1997), and *Vacco v. Quill*, 117 U.S. 2293 (1997). While the Court rejected facial challenges to state laws

punishing persons aiding a suicide and the claim that there is a constitutional right to PAS, there was an even greater tentativeness to many of the justices' opinions than had been seen in previous cases. While the effect of the decisions was to uphold laws in forty-nine states prohibiting assisting another in committing suicide, a majority of the justices went to some pains to leave open the possibility of state laws protecting such a right consistent with the U.S. Constitution.

In *Washington v. Glucksberg*, the Court rejected the notion that the Fourteenth Amendment includes a fundamental right to assisted suicide. Reasoning that a right is fundamental under the due process clause only when grounded in history or tradition, Chief Justice Rehnquist's opinion noted that for "over 700 years" the "Anglo-American common-law tradition has punished or otherwise disapproved of both suicide and attempting suicide." Moreover, in almost every state in the United States and in most Western democracies it is a crime to assist suicide. Thus, the right is not fundamental; the Washington law could be upheld as long as it had a rational basis, which Rehnquist found in the state's concerns to preserve life, protect the integrity and ethics of the medical profession, protect vulnerable groups, and avoid the slippery slope to voluntary and possibly even involuntary euthanasia.

The constitutional issue in *Vacco v. Quill* was somewhat different: Do laws prohibiting PAS violate the equal protection clause of the Fourteenth Amendment? Rehnquist, again writing for the majority, held that such laws do not discriminate against a suspected class (for example, a racial minority) and do not violate a fundamental right, since *Glucksberg* refused to recognize the claimed right as fundamental. Under established equal protection analysis, the law must be upheld as long as it meets the rational basis test, and the state's rational interests for such laws had also been spelled out in *Glucksberg*.

States remain free to enact laws protecting this right. The Court indicated that nothing in the Constitution limits a state's ability to prohibit or allow PAS. (In 1994, the Oregon Death With Dignity Act legalized PAS for competent, terminally ill adults. Other states have considered or will consider similar laws.) Five justices in concurring opinions indicated that PAS prohibitions might be unconstitutional as applied in specific cases. Justice Sandra Day O'Connor said (several times) in her concurrence that suffering patients in the last days of their lives may have a constitutional right to relief of that suffering. Justice Stephen Breyer very clearly indicated that there may be a constitutional right to PAS in a specific case if the person's core claim is "avoidance of severe physical

pain (connected with death)." He noted pointedly that the Washington and New York laws "do not prohibit doctors from providing patients with drugs sufficient to control pain despite the risk that those drugs themselves will kill."

Political Context

Against the backdrop of totalitarian abuses in Russia and Germany, post-World War II America saw a heightened concern for fundamental human rights such as equality, personal liberty, and privacy. The African-American civil rights movement and Vietnam war protests paved the way for the liberation movements of the 1970s with respect to the rights of women, gays, other racial and ethnic minorities, and people with disabilities. Starting with the Cruzan case, the 1990s brought a movement for the rights of the dying.

As often happens (for example, the right of privacy recognized in *Griswold v. Connecticut*, 381 U.S. 479 (1965), and the right to abortion in *Roe v. Wade*, 410 U.S. 113, 1973), the Supreme Court comes on the scene only after challenges to laws at the state and local level. (In 1965, every state except Connecticut recognized a right to use contraception. In 1973, most states had legalized abortion.) Thus, some of the Court's tentativeness regarding the "right to die" undoubtedly reflects a genuine desire to allow states to engage fully in the political and legal experimentation that Justice Louis D. Brandeis hailed as one of the benefits of the federal system.

Liberation movements often spark backlash; the reaction of abortion foes to *Roe v. Wade* is an especially vivid example. The "right to die" is no exception. Perhaps nothing better epitomizes the intensity of conflict in this area than the case of Terri Schiavo, which sparked in Florida "Terri's Law," arguably one of the more extreme legislative interferences (if one discounts the U.S. Congress's subsequent interjections into the Schiavo case) with the judicial process and individual rights. Many conservative groups in that state applied concerted pressure on Florida legislators to pass the law, certainly out of a concern for Schiavo, but also as a means to advance their broader prolife and anti-abortion agenda.

Shortly after Oregon's Death with Dignity law went into effect, the federal Drug Enforcement Administration threatened Oregon doctors with loss of federal prescribing privileges if they provided dying patients with services authorized by the state law. Attorney General Janet Reno ruled that this was an improper use of the federal regulations. In the midst

of the 9/11 crisis, Attorney General John Ashcroft reversed his predecessor's decision. The U.S. District Court for Oregon held that Ashcroft lacked authority under the federal *Controlled Substances Act* (CSA), and the Ninth Circuit affirmed. On February 22, 2005, the U.S. Supreme Court granted certiorari in *Gonzales v. Oregon* (368 F. 3d 1118, 9th Cir. 2004, cert. granted, No. 04-623, U.S. Feb. 22, 2005) and will consider whether the attorney general's interpretation of the CSA prohibiting distribution of federally controlled substances for the purpose of facilitating an individual's suicide, regardless of state law, is a permissible interpretation. A decision was expected by the end of the Court's October 2005 term.

The legal and political future of PSA and other components of "the right to die" remains an open question, one of the first great civil liberties issues of the twenty-first century.

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References and Further Reading

- Allen, Michael P., *The Constitution at the Threshold of Life and Death: A Suggested Approach to Accommodate an Interest in Life and a Right to Die*, American University Law Review 53 (June 2004): 971–1021.
- Glick, Henry. R. *The Right to Die: Policy Innovation and Its Consequences*. New York: Columbia University Press, 1992.
- Law, Sylvia A. "Choice in Dying: A Political and Constitutional Context." In *Physician Assisted Dying*, Timothy E. Quill and Margaret P. Battin, eds. Baltimore, MD: Johns Hopkins University Press, 2004, 300–308.
- Stutsman, Eli D. "Political Strategy and Legal Change." In *Physician Assisted Dying*, Timothy E. Quill and Margaret P. Battin, eds. Baltimore, MD: Johns Hopkins University Press, 2004, 300–308.
- Winslade, William J. "Physician-Assisted Suicide: Evolving Public Policies." In *Physician Assisted Suicide*, Robert F. Weir, ed. Bloomington: Indiana University Press, 1997, 224–242.

Cases and Statutes Cited

- Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261 (1990)
- Gonzales v. Oregon*, 368 F. 3d 1118 (9th Cir. 2004), cert. granted, No. 04-623 (U.S. Feb. 22, 2005)
- Griswold v. Connecticut*, 381 U.S. 479 (1965)
- Jacobson v. Massachusetts*, 197 U.S. 11 (1905)
- Roe v. Wade*, 410 U.S. 113 (1973)
- Vacco v. Quill*, 117 U.S. 2293 (1997)
- Washington v. Glucksberg*, 117 U.S. 2258 (1997)

See also **Compelling State Interest**; *Cruzan v. Missouri*, 497 U.S. 261 (1990); **Gay and Lesbian Rights**; **Kevoorkian, Jack**; **Privacy**; **Privacy, Theories of**; **Refusal of Medical Treatment and Religious Beliefs**; *Washington v. Glucksburg*, 521 U.S. 702 (1997)

ASYLUM, REFUGEES, AND THE CONVENTION AGAINST TORTURE

The United States provides several forms of relief to refugees, or individuals fleeing persecution in their home country. The legal framework governing refugees derives principally from international law and has been implemented in statutes and regulations. It is the principal means by which those fleeing persecution or torture in their home countries may seek safety and possible resettlement in the United States or a third country.

Refugees may be divided into two general categories: (1) those individuals who are still outside the United States but who are seeking to resettle in the United States or another nation that receives refugees (known under U.S. law as "overseas refugees"); and (2) those individuals who have been able to reach the United States on their own and who are seeking to remain in the United States or to avoid return to their country of origin for fear of persecution (known under U.S. law as "asylum seekers"). The same definition of a "refugee" applies to both categories.

The definition of a refugee derives from the 1951 United Nations Convention Relating to the Status of Refugees and the 1967 United Nations Protocol Relating to the Status of Refugees. The 1951 refugee convention was drafted in response to atrocities that took place in Europe following World War II and was limited in both time and duration. The 1967 protocol sought to expand the protections of the 1951 convention to refugees worldwide without temporal limitations.

A refugee is defined as an individual who is outside his or her country of origin due to "a well-founded fear of being persecuted for reasons of race, religion, nationality, membership in a particular social group, or political opinion." Civil war or other internal strife does not provide a basis for establishing refugee status, unless the individual is fleeing persecution based upon one of the five protected grounds. An essentially identical definition of refugees is contained in the Refugee Act of 1980. The prohibition against returning refugees to countries where they would face persecution is known as the principle of nonrefoulement.

Persecution does not have a precise definition; it includes a wide range of harms and is not limited to threats to one's life or freedom. An applicant for asylum may establish a well-founded fear of persecution based upon persecution that occurred in the past or based upon a fear that persecution might occur in the future, as long as that fear is well founded. The Supreme Court has said that a person's fear is "well founded" if the chance of persecution is one in ten (*INS v. Cardoza-Fonseca*, 480 U.S. 421, 1987). An asylum applicant, however, must show not only that

the fear of persecution is well founded but also that the persecution is on account of one of the five protected grounds. Thus, an asylum applicant must produce evidence of a persecutor's motives and not just evidence of persecution. The applicant, moreover, must show that this persecution is on account of the applicant's political opinion or other protected characteristic and not the persecutor's (*INS v. Elias-Zacharias*, 502 U.S. 478, 1992). This "nexus" requirement prevents people who fear harm or even death from establishing refugee status absent a sufficient connection to one of the five protected grounds of the refugee definition.

Of the five protected grounds, membership in a particular social group is the most fluid. It was designed to include categories of people who should be protected as refugees but who did not fall within one of the other four categories. A "particular social group" has been defined to include individuals who "share a common immutable characteristic," whether it is innate (like kinship ties) or based upon shared past experience (*Matter of Acosta*, 19 I. & N. Dec. 211, BIA 1985). Over the years, this category has been expanded to include members of certain clans, homosexuals, and women subject to female genital mutilation.

To qualify for asylum, an applicant must also establish that he is not subject to one of the statutory bars to relief, which range from convictions of certain crimes to the failure to apply for asylum within the mandated deadline. Once an individual has demonstrated his eligibility, asylum may be granted at the discretion of the agency. After an individual is granted asylum, he has the opportunity to apply for permanent residence. While in theory there is no limit to the number of individuals who may be granted asylum, in practice that number generally does not exceed fifteen thousand annually.

A second form of relief under U.S. law is known as withholding of removal, which implements the United States' duty of nonrefoulement under the refugee convention. As for asylum, an individual must demonstrate that he or she meets the definition of a refugee. But to qualify for withholding of removal, an applicant must meet a higher standard of proof and show a clear probability of persecution or that the persecution would be more likely than not to occur (*INS v. Stevic*, 467 U.S. 407, 1984). Unlike asylum, withholding of removal is mandatory for those who qualify.

A third form available to those fleeing persecution is based on the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment (commonly referred to as CAT). An individual need not meet the definition of a refugee to

qualify for relief under CAT and its implementing regulations. Instead, he must show that it is more likely than not that he would be tortured if he were returned to the country from which he seeks protection. The definition of torture includes physical and mental harm, as long as that harm is intentionally inflicted and sufficiently severe. It is absolutely prohibited to return an individual who qualifies for relief under CAT. CAT has thus become an increasingly important form of relief as other avenues of obtaining relief from removal have been curtailed, particularly for individuals with criminal convictions. Unlike asylum, however, CAT provides only temporary relief from removal and does not provide a basis for obtaining permanent residence in the United States.

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References and Further Reading

- Anker, Deborah E. *Law of Asylum in the United States*, 3rd ed. RLC Publications, 1999.
 Goodwin-Gill, Guy S. *The Refugee in International Law*. Oxford: Clarendon Press, 1998.
 Hathaway, James C. *The Law of Refugee Status*. Toronto: Butterworths, 1991.
 Hughes, Anwen. *Asylum and Withholding of Removal—A Brief Overview of the Substantive Law*. New York: Practising Law Institute, 2005.

Cases and Statutes Cited

- INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987)
INS v. Elias-Zacharias, 502 U.S. 478 (1992)
INS v. Stevic, 467 U.S. 407 (1984)
Matter of Acosta, 19 I. & N. Dec. 211 (BIA 1985)
Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980)

See also Aliens, Civil Liberties of; Noncitizens and Civil Liberties

ATHEISM

Although the first two clauses of the First Amendment concern the establishment and free exercise of "religion," the amendment long has been understood to protect the liberty and equality of nonbelievers. The amendment comprehends "the infidel, the atheist" as much as "the adherent of a non-Christian faith" and "the Court has unambiguously concluded that the individual freedom of conscience protected . . . embraces the right to select any religious faith or none at all" (*Wallace v. Jaffree*, 472 U.S. 38, 1985, 52–53). The presence in the United States of a substantial minority that disclaims religious belief thus has helped maintain an expansive interpretation of the protections afforded by the amendment that extends

beyond religion per se to include a broader realm of individual conscience.

The term “atheism” is a contentious one. In general, it indicates the lack of belief in God, gods, or other divine beings or principles. Its exponents range from those who actively disparage religious ideas as false and incompatible with progressive human emancipation to agnostics, who dispute the possibility of ascertaining the existence of the divine and so forswear religious belief. The U.S. Census Bureau states that, in 2001, 14 percent of respondents asked to identify their religion reported having none, a figure that would indicate a nonbelieving population of about 29.4 million. Other surveys have estimated that American atheists fall between 6 and 9 percent of the American population; a minority have offered figures as low as 3 and as high as 16 percent.

As a matter of national identity, atheists have historically held an ambiguous status. Many of the founders were deists, such as Benjamin Franklin and Thomas Jefferson, and they are claimed as ancestors of modern atheism. Moreover, the Protestant context in which American conceptions of religious liberty developed placed special emphasis on safeguarding the individual conscience as the seat of voluntary religious choice, a position favorable to the protection of atheistic belief. James Madison’s “Memorial and Remonstrance” (1785) and Madison’s and Jefferson’s “Bill for Establishing Religious Freedom” (1786) sought to protect the free minds of nonbelievers at the same time that they protected those of Christians. Indeed, Jefferson’s foundational First Amendment metaphor, that a “wall of separation” had been built between church and state, was expressed in a letter solicited by a group of Baptists in Connecticut, highlighting the alliance between Enlightenment and evangelical thinkers in their mutual efforts to protect the self from coercion.

At the same time, the United States was founded by many who were deeply committed to their faith and sought to provide religious practice with special protection—not because it was a matter of individual conscience, but rather because of its status as religion. Notably, some of the great documents of American liberty, including the “Bill for Establishing Religious Freedom,” begin with an invocation of God. In this light, according to some, while the First Amendment prevents government from favoring one religious group over another, it by no means requires the state to maintain a neutral position between religion and nonbelief or to refrain from promoting religion generally. Within constitutional law, this position, labeled “nonpreferentialism” in contrast to the approach of “voluntarism and separatism,” has never gained a majority on the Court, though it represents

the view of a powerful segment of the voting public, which has been inspired to organize, in part, to resist the challenge of atheism and secularization.

While atheists once were subject to some legal disabilities based on their beliefs, they never experienced the systematic persecution faced by atheists in Britain, and those disabilities were fully eliminated in principle or practice over the course of the twentieth century as the First Amendment was applied to the states through the constitutional process of incorporation. Atheists today are competent witnesses in court; they do not fear prosecution for blasphemy and they need not swear a religious oath to serve in public office. Atheists have continued, however, to challenge two forms of public expression in which government can be said to prefer religion over nonbelief in violation of the establishment clause: prayer in public schools and those appeals to religion outside the school context often labeled “ceremonial deism.”

Challenges to prayer in public schools have been consistently successful. In its inaugural analysis of the issue, the Court in *Engel v. Vitale*, 370 U.S. 421 (1962), prohibited the recitation of a daily nondenominational prayer; in *Abington School District v. Schempp*, 374 U.S. 203 (1963), it struck down the reading of verses from the Bible at the opening of the school day; in *Wallace v. Jaffree* (1985), it struck down a law authorizing schools to set aside a one-minute moment of silence for “meditation or voluntary prayer”; and in *Lee v. Weisman*, 505 U.S. 577 (1992), it struck down a banally ecumenical invocation of God’s blessings at a high school graduation. Similarly, in *Stone v. Graham*, 449 U.S. 39 (1980), the Court struck down a law requiring the posting of the Ten Commandments in public school classrooms, and in *Edwards v. Aguillard*, 482 U.S. 578 (1987), it struck down a law requiring the teaching of “creation science” in classrooms that also taught evolutionary biology.

Challenges to the state use of nondenominational religious appeals outside the school context have met with mixed success. Some public religious holiday displays, such as nativity scenes, have been upheld against challenge, as in *Lynch v. Donnelly*, 465 U.S. 668 (1984), while others have not, as in *County of Allegheny v. ACLU*, 492 U.S. 573 (1989). As in most First Amendment litigation, the outcome of such cases has depended heavily on close scrutiny of the factual context at issue. Challenges to traditional invocations of the deity as an aspect of national civic culture—for instance, the use of the national motto “In God We Trust” on federal currency—have failed or are highly unlikely to succeed. When upheld, such religious appeals have been said to “have lost through rote repetition any significant religious

content” and to be “uniquely suited” to achieve “such wholly secular purposes as solemnizing public occasions, or inspiring commitment to meet some national challenge” (*Lynch*, 716–717).

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References and Further Reading

- Borden, Morton. *Jews, Turks, and Infidels*. Chapel Hill: University of North Carolina Press, 1984.
- Dorsen, Norman, *The Religion Clauses and Nonbelievers*, William & Mary Law Review 27 (1986): 5:863–873.
- Hartogensis, B.H., Denial of Equal Rights to Religious Minorities and Non-Believers in the United States, Yale Law Journal 39 (1930): 659–681.
- Laycock, Douglas, “Nonpreferential” Aid to Religion: A False Claim About Original Intent, William & Mary Law Review 27 (1986): 5:875–923.
- Zuckerman, Phil. “Atheism: Contemporary Rates and Patterns.” In *The Cambridge Companion to Atheism*, Michael Martin, ed. Cambridge: Cambridge University Press, 2007.

Cases and Statutes Cited

- Abington School District v. Schempp*, 374 U.S. 203 (1963)
- County of Allegheny v. ACLU*, 492 U.S. 573 (1989)
- Edwards v. Aguillard*, 482 U.S. 578 (1987)
- Engel v. Vitale*, 370 U.S. 421 (1962)
- Lee v. Weisman*, 505 U.S. 577 (1992)
- Lynch v. Donnelly*, 465 U.S. 668 (1984)
- Wallace v. Jaffree*, 472 U.S. 38 (1985)

See also American Civil Liberties Union; Americans United for Separation of Church and State; Bible Reading in Public Schools, History of before and after *Abington School District v. Schempp*; Defining Religion; Legislative Prayer; *Lemon Test*; No Coercion Test; No Endorsement Test; Prayer in Public Schools; Religious Symbols on Public Property; *Scopes Trial*; Secular Humanism and the Public Schools; Ten Commandments on Display in Public Buildings; Wall of Separation

AUTOMOBILE SEARCHES

The Fourth Amendment was added to the U.S. Constitution in 1791 as part of the Bill of Rights. The amendment regulates government actors and provides, in part, the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” The Supreme Court, in *Weeks v. United States*, 232 U.S. 383 (1914), described the protection against unreasonable searches and seizures as recognizing the principle that “a man’s house was his castle.” The amendment also provides that “no warrants shall issue, but upon probable cause.” In general, the Court has determined that

a search or seizure is unreasonable unless it is based on probable cause and a warrant, or probable cause and an exception to the warrant requirement.

Searches of automobiles and any containers or occupants therein implicate Fourth Amendment protections. These searches typically occur without warrants, subsequent to a traffic stop. Recognizing the difficulties in getting a warrant for a moving vehicle, the Court has fashioned an exception to the warrant clause for automobiles and containers therein. As long as police have probable cause to believe that an automobile contains an item subject to seizure, they can stop the vehicle and perform a warrantless search of the interior and any containers inside that are capable of holding the suspected item.

The Court first addressed a warrantless search of an automobile in 1925 in *Carroll v. United States*, 267 U.S. 132 (1925), a Prohibition-era case. In *Carroll*, federal agents had no warrant but did have probable cause to believe that a car contained illegal liquor. Agents stopped the car, searched its interior, and found illegal alcohol. In finding the search reasonable, the Court recognized first the inherent mobility of an automobile. The Court distinguished between a house, or other permanent structure, and an automobile; because an automobile can quickly be moved out of the jurisdiction, it is not practical for police to obtain a warrant. The Court also reasoned that one has a diminished expectation of privacy in an automobile, unlike in a house. Given these factors, the Court determined that an automobile search based upon probable cause is an exception to the warrant requirement.

In subsequent cases, the Court has developed and expanded the exception. In doing so, the Court has continued to rely on the two rationales of mobility and reduced expectation of privacy, but has found that the exception can apply even to vehicles that are stationary or are also being used as homes. In *Chambers v. Maroney*, 399 U.S. 42 (1970), pursuant to a lawful traffic stop and arrest, police drove the defendant’s car back to the police station, where it was searched some time later. The Court determined the warrantless search was justified because police could have lawfully searched the car without a warrant at the scene of the arrest. In *California v. Carney*, 471 U.S. 386 (1985), police conducted a warrantless search, based upon probable cause, of a parked motor home and discovered marijuana. In finding that the search was reasonable, the Court stressed the mobility of, and the reduced expectation of privacy in, a motor home. Motor homes, like automobiles, are regulated by the government in a manner not applicable to fixed dwellings. In *Carney*, the Court noted that an objective observer could also conclude that it was being used as a vehicle and not a home.

AUTOMOBILE SEARCHES

Probable cause to search an automobile extends to any containers within the vehicle, including those belonging to passengers, that are capable of concealing the suspected item. For example, if police have probable cause to believe a vehicle contains illegal weapons, they may, without a warrant, open only those containers inside the vehicle large enough to hold such weapons.

Probable cause to believe that a container alone, not the vehicle, contains contraband or evidence does not justify a warrantless search of the entire vehicle. In such a situation, police may lawfully stop the automobile, seize the container, and search only it without a warrant. In *California v. Acevedo*, officers had probable cause to believe that a paper bag in a car's trunk contained marijuana. Without a warrant, officers stopped the vehicle, opened the trunk and the paper bag, and discovered marijuana inside the bag. The lower court held that police acted properly in seizing the bag. However, because the officers did not have probable cause to believe that the defendant's car otherwise contained contraband, the court found that the officers violated the Fourth Amendment by opening the bag without a warrant. The Supreme Court reversed and found that, while a warrantless search of the entire vehicle would have been unreasonable because there was no probable cause, the warrantless search of the bag was justified because the officers had probable cause to believe that it contained marijuana. Interpreting *Carroll* as governing all warrantless automobile cases, the Court explained that "police may search an automobile and the containers within it where they have probable cause to believe contraband or evidence is contained."

Subsequent to a lawful impoundment of a vehicle, police may also perform a warrantless search in the course of inventorying its contents. Such an inventory search, however, must be conducted in accordance with standard procedures established by the jurisdiction's law enforcement agency.

While *Carroll* set forth the rule for warrantless automobile searches, other case law controls Fourth Amendment issues surrounding warrantless searches and seizures of occupants of an automobile. If an officer lawfully stops an automobile, he or she can ask all occupants to step out of the car as a result of the lawful stop, even without any indication that the occupants are engaging in illegal activities. If the officer has probable cause to arrest an occupant of the vehicle and take that person into custody, incident to that custodial arrest, he or she can search not only the arrestee but also the passenger compartment, including any closed or open containers, without a warrant. While the arrest alone does not provide the authority for a warrantless search of the trunk, what

is discovered during the search of the passenger compartment might provide the necessary justification for such a search.

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References and Further Reading

- Allen, Ronald Jay, Joseph L. Hoffmann, Debra A. Livingston, and William J. Stuntz. *Comprehensive Criminal Procedure*, 2nd ed. New York: Aspen Publishers, 2005, 333–336; 489–493.
- American Jurisprudence*, 2nd ed., vol. 68 (*Searches and Seizures*). St. Paul, MN: West Group, 2000, sec. 268 (Vehicular Searches).
- Investigation and Police Practices: Warrantless Searches and Seizures: Vehicle Searches, Container Searches, and Inventory Searches*, The Georgetown Law Journal 34th Annual Review of Criminal Procedure, 91–101 (2005).
- LaFave, Wayne R., Jerold Israel, and Nancy J. King. *Criminal Procedure: Criminal Practice Series*, vol. 2. St. Paul, MN: West Group, 1999, Chapter 3, sec. 2(e) and 7 (a – f).
- Loewy, Arnold H., *Cops, Cars, and Citizens: Fixing the Broken Balance*, Saint John's Law Review 76 (2002): 535–581.

Cases and Statutes Cited

- California v. Carney*, 471 U.S. 386 (1985)
- Carroll v. United States*, 267 U.S. 132 (1925)
- Chambers v. Maroney*, 399 U.S. 42 (1970)
- Florida v. Wells*, 495 U.S. 1 (1990)
- Knowles v. Iowa*, 525 U.S. 113 (1998)
- Maryland v. Wilson*, 519 U.S. 408 (1997)
- New York v. Belton*, 453 U.S. 454 (1981)
- Thornton v. United States*, 541 U.S. 615 (2004)
- United States v. Chadwick*, 433 U.S. 1 (1977)
- Weeks v. United States*, 232 U.S. 383 (1914)

See also Coolidge v. New Hampshire, 403 U.S. 443 (1971); **Exclusionary Rule**; *Florida v. Jimeno*, 500 U.S. 248 (1991); *Katz v. United States*, 389 U.S. 347 (1967); **Plain View**; **Probable Cause**; **Search (General Definition)**; **Seizures**; *South Dakota v. Opperman*, 428 U.S. 364 (1976); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975); *United States v. Robinson*, 414 U.S. 218 (1973); *Wyoming v. Houghton*, 526 U.S. 295 (1999)

AUTOPSIES AND FREE EXERCISE BELIEFS

As government has grown in the United States, conflicts between religious observers and the law have increased proportionately. Modern dilemmas are easy to find. Members of the Native American church seek to use peyote despite laws prohibiting its possession. Catholic churches seek to expand their sanctuaries despite historic-preservation ordinances.

One of the best illustrations of the depths to which law and religion can conflict is the class of cases

involving autopsies. Autopsies are conducted by the state for many reasons, but most frequently to discover the cause of a person's death. States often have statutes requiring autopsies to be made in certain categories of cases, such as all cases of violent or sudden death.

Many religious groups, such as Orthodox Jews, Navajo Indians, the Amish, the Hmong, and several denominations of Muslims, object to autopsies. Some of these groups object to autopsies unequivocally, while others object to them only under certain circumstances. (Orthodox Jews, for example, will not generally object to autopsies conducted to detect hereditary illnesses.)

Their reasons for objecting vary as well. For Orthodox Jews, autopsies violate the Talmud's prohibitions on mutilating the dead. For the Hmong people, autopsies threaten the post-death existence of the deceased. The Hmong see funerals as times for the soul to make its way to the next life; the physical invasion inherent in an autopsy threatens that passage and can cut off the possibility of an afterlife. Indeed, it is fair to say that, for the Hmong, autopsy is the equivalent of homicide.

These objections may strike Western observers as quite foreign. For such observers, perhaps an analogy may help. Cremation is becoming increasingly popular in this country. In 1963, only 3 percent of those who died were cremated. By 1980, that number was 10 percent and, in 2005, the number is expected to be almost 30 percent. Yet, until very recently, cremation was thought to be fundamentally incompatible with Christianity. Cremation was a Roman tradition, abhorrent to the early Christians, who believed that their bodies would be physically resurrected. Indeed, it was not until 1989 that the Roman Catholic Church officially renounced its traditional opposition to cremation; the Eastern Orthodox Church continues to forbid it. If one can imagine what a governmental policy of forced cremation would mean for these Christians, then one can begin to understand the implications of forced autopsies for religious groups like Orthodox Jews and the Hmong.

In the face of this obvious conflict, one persistent question has been whether religious objectors will be exempted from mandated autopsies. The small size of these religious groups and the infrequent nature of these controversies have made these problems largely invisible to legislatures. Therefore, religious groups have turned to the courts for refuge, arguing that the free exercise clause of the Constitution entitles them to protection from forced autopsies. Until 1990, those claims might have enjoyed some success. But in 1990, the Supreme Court held that the free exercise clause does not protect religious adherents

from laws that are generally applicable. The Religious Freedom Restoration Act, a federal statute designed to restore the pre-1990 standard, was passed in 1993. In 1997, however, it was declared beyond Congress's power to enact.

Since then, some similar statewide statutes have been passed. But the general rule has meant that religious objections to autopsies have generally not prevailed—even when the reasons for the autopsies are thin or almost nonexistent—as the cases cited here reflect. One example, which featured prominently in the legislative debate on the Religious Freedom Restoration Act and in the judicial opinions debating its constitutionality, was the case of *Yang v. Sturner* (728 F. Supp. 845, D.R.I., withdrawn, 750 F. Supp. 558, D.R.I. 1990). *Yang* involved the autopsy of a young Hmong man, performed over his parents' objections. The district judge who heard the case was outraged at the autopsy; he saw it as almost without purpose (given that there was no suspicion of foul play) and terribly painful for the family. But bound by the Supreme Court's 1990 opinion, the judge denied the Hmong family all relief. The judge's opinion has become a persuasive tool for those arguing for the need to accommodate autopsy objectors and religious objection more generally.

Autopsy cases are dramatic and compelling examples of religious objection in the regulatory state. But even more than that, autopsy cases encapsulate the free exercise clause; all of its complexity; all of its tensions, history, and theories can be seen through the lens of these simple cases.

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References and Further Reading

- Berg, Thomas C. *The State and Religion in a Nutshell*, 2nd ed. St. Paul, MN: West Publishing Group, 2004.
- Laycock, Douglas, *The Religious Freedom Restoration Act*, Brigham Young University Law Review 3 (1993): 221–258.
- Lund, Christopher C., *A Matter of Constitutional Luck: The General Applicability Requirement in Free Exercise Jurisprudence*, Harvard Journal of Law and Public Policy 26 (2003): 6:627–665.
- Stern, Marc D. *Testimony on Behalf of the American Jewish Congress Before the Subcommittee on the Constitution of the Committee on the Judiciary*, Mar. 26, 1998, available at <http://judiciary.house.gov/legacy/222390.htm>.

Cases and Statutes Cited

- City of Boerne v. Flores*, 521 U.S. 507 (1997)
- Employment Division, Dept. of Human Resources v. Smith*, 494 U.S. 872 (1990)
- Kickapoo Traditional Tribe of Texas v. Chacon*, 46 F. Supp. 2d 644 (W.D. Tex. 1999)

AUTOPSIES AND FREE EXERCISE BELIEFS

Montgomery v. County of Clinton, Michigan, 743 F.Supp. 1253 (W.D. Mich. 1990).

United States v. Hammer, 121 F. Supp. 2d 794 (M.D. Pa. 2000).

Yang v. Sturmer, 728 F. Supp. 845 (D.R.I.), withdrawn, 750 F. Supp. 558 (D.R.I. 1990).

42 U.S.C. § 2000bb (1994) (the *Religious Freedom Restoration Act*).

See also Accommodation of Religion; Belief–Action Distinction in Free Exercise Clause History; City of Boerne v. Flores, 521 U.S. 507 (1997); Conscientious

Objection, the Free Exercise Clause; *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872 (1990); Equal Protection Clause and Religious Freedom; Establishment of Religion and Free Exercise Clauses; Free Exercise Clause (I): History, Background, Framing; Free Exercise Clause Doctrine: Supreme Court Jurisprudence; Prisoners and Free Exercise Clause Rights; Refusal of Medical Treatment and Religious Beliefs; Religious Freedom Restoration Act; State Religious Freedom Statutes

B

BACHE, BENJAMIN FRANKLIN (1769–1798)

Born the grandson of Benjamin Franklin and educated in Geneva, Benjamin Franklin Bache epitomized early America's ambivalent relationship with the press. Raised largely in France, Bache was later trained as a type founder, and his famous grandfather's contacts in Philadelphia's publishing community were critical to Bache's early career. Few publishers have been as loved and as despised as Bache; profoundly partisan, he could be vicious and unforgiving toward his political enemies.

Bache began to make a name for himself as founder and editor of Philadelphia's *General Advertiser*. Indeed, he very quickly revealed both his liberal European education and his devotion to liberty. At a time when freedom of the press was perhaps not as well developed as in the twentieth century, Bache developed a reputation as a firebrand, as revealed by his nickname, "Lightning Rod Junior." His criticisms of the first two American presidents, George Washington and John Adams, while occasionally unfair and often perceptive, meant that Bache was not popular with Federalists.

By the beginning of Washington's second term, Bache had identified him as a legitimate target of liberal criticisms. First was the perception that Washington had aristocratic tendencies. His aloofness in public as well as his inclination toward grand and ceremonial events led Bache and others to the conclusion that Washington was a monarchist in disguise. As well, Washington's position as a slaveholder and

rumors of financial malfeasance in the Washington administration made him vulnerable to pointed attacks. Further, as popular devotion to Washington culminated in public celebrations of his birthday, and as Bache observed a growing opinion that Washington was somehow beyond criticism, Bache began to attack the President through his newspaper. Bache endorsed the sentiments of one of his anonymous correspondents: "Opinion has so far consecrated the President as to make it hazardous to say that he can do wrong."

As Bache's criticisms grew more pointed, Washington was forced to lead the country's young army into action to put down an insurrection in western Pennsylvania, and Bache began a sustained attack on Washington. When Washington condemned the actions of the Whiskey Rebels and the Democratic Societies he believed were responsible for the rebellion, Bache published pieces that supported the Democratic Societies' right to exist (although he condemned any violence on their part), and blamed the administration for the excise policies that motivated the rebels. A member of the Philadelphia Democratic Society himself, Bache's suspicions about Washington drove him to a near obsession with the President.

When the Washington administration entered treaty talks with Britain over what would later be known as the Jay Treaty, Bache blasted them for their secrecy and for tendencies he believed to be as anti-French as they were pro-British. He acquired a copy of the treaty before it was made public and printed it, along with a detailed criticism of its major provisions:

he hated the fact that it created a political connection between a republican government and a monarchy; he could not stand the fact that it essentially forgave the British for various wrongs committed against America; and he had a particular problem with a conflict of interest—John Jay, the primary negotiator of the treaty, could potentially have the responsibility to approve the treaty in his role as chief justice of the Supreme Court.

When Washington decided to retire after two terms, and as it became clear that John Adams would stand for president as a Federalist, Bache found himself in a dilemma: he initially saw Adams as a welcome alternative to Washington, but Thomas Jefferson had a record that more closely matched Bache's own political sensibility. His primary criticism of Adams, then, was based on his close political affiliation to Washington. Meanwhile, the *General Advertiser* had folded, and Bache founded another newspaper, the *Aurora*.

Bache had also become the exclusive publisher and distributor of Thomas Paine's *Age of Reason II*, which further alienated him from Washington. By 1798 Bache had few friends in Washington. His relentless attacks on, first Washington, and then Adams, made him an easy target for those less inclined to support universal freedom of the press. The looming military conflict with France set the stage for a final showdown between Bache and the Federalists.

When Congress passed the Alien and Sedition Acts in 1798, it was clear that some politicians had newspaper editors like Bache in mind when the bills were drafted. The provisions were vague enough, and Bache was inflammatory enough, that many insiders predicted a challenge from Bache. Even though the acts technically allowed truth as an absolute defense against prosecution under the law, Bache attacked the laws with typical enthusiasm. He published an attack on the Alien and Sedition Acts as illegal; he argued that they violated the First Amendment, and that the acts' mere existence was evidence of the Federalists' unsophisticated view of freedom of speech and press. Anticipating trouble with Bache, the Federalists had filed a libel suit against Bache even before the Alien and Sedition Acts had been passed, but their passage gave them a more powerful vehicle to quiet Bache.

Bache was arrested "on the charge of libeling the President, and the Executive Government in a manner tending to excite sedition, and opposition to the laws, by sundry publications and re-publications." While awaiting trial in a Philadelphia jail, Bache contracted yellow fever and died.

Sometimes unfair in his criticisms, Bache nonetheless saw himself as a watchdog against the intrusion of monarchy or aristocracy. He took seriously the idea

of republic. He was a pioneer in the American tradition of dissent and criticism.

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References and Further Reading

- Smith, Jeffery A. *Franklin and Bache: Envisioning the Enlightened Republic*. New York: Oxford University Press, 1990.
- Tagg, James. *Benjamin Franklin Bache and the Philadelphia "Aurora."* Philadelphia: University of Pennsylvania Press, 1991.

BAD TENDENCY TEST

Emerging by the early nineteenth century, the bad tendency test remained the predominant judicial approach to determining the scope of free expression for over a century. The government could not impose prior restraints on expression, but it could impose criminal penalties for speech or writing that had bad tendencies or likely harmful consequences. Many courts added that the criminal defendant, to be convicted, must also have intended harmful consequences. Even so, under the doctrine of constructive intent, the courts typically reasoned that a defendant was presumed to have intended the natural and probable consequences of his or her statements. If a defendant's expression was found to have bad tendencies, then the defendant's criminal intent would be inferred.

People v. Croswell (1804), a seditious libel prosecution arising from the criticism of public officials, manifested the bad tendency approach. *Croswell* held that such expression is protected if it is truthful and published for good motives and justifiable ends. Statements with bad tendencies, though, contravened the common good and were therefore punishable. The *Croswell* standard, in effect, took Blackstone's justification for punishing seditious libel and transformed it into the definition of seditious libel. According to Blackstone, criticism of governmental officials was subject to criminal punishment *because* of its bad or pernicious tendencies. Under the *Croswell* standard, criticism of public officials was subject to criminal punishment *if* it had bad tendencies.

In a series of unanimous U.S. Supreme Court decisions arising during the World War I era, Justice Oliver Wendell Holmes, Jr., articulated the scope of protection under the First Amendment in a variety of ways. Regardless of Holmes's precise phrasings, however, he resolved each case in accordance with the bad tendency test. In *Schenck v. United States* (1919), he used clear-and-present-danger language that in later cases would be reinterpreted more broadly: "The

question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.” In *Frohwerk v. United States* (1919), Holmes concluded: “[I]t is impossible to say that it might not have been found that the circulation of the paper was in quarters where a little breath would be enough to kindle a flame and that the fact was known and relied upon by those who sent the paper out.” And in *Debs v. United States* (1919), Holmes approved a jury instruction that presented the bad tendency test in conventional terms: the jurors, as charged, “could not find the defendant guilty for advocacy of any of his opinions unless the words used had as their natural tendency and reasonably probable effect [to violate the law], and unless the defendant had the specific intent to do so in his mind.” Moreover, Holmes added that the jury could find constructive intent. In each of these cases, then, the Court relied on the bad tendency test despite Holmes’s inconsistent phrasings.

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References and Further Reading

- Chemerinsky, Erwin. *Constitutional Law: Principles and Policies*. 2nd ed. New York: Aspen Law & Business, 2002.
- Emerson, Thomas I. *The System of Freedom of Expression*. New York: Random House, 1970.
- Rosenberg, Norman L. *Protecting the Best Men: An Interpretive History of the Law of Libel*. Chapel Hill: University of North Carolina Press, 1986.

Cases and Statutes Cited

- Debs v. United States*, 249 U.S. 211 (1919)
- Frohwerk v. United States*, 249 U.S. 204 (1919)
- People v. Croswell*, 3 Johns. Cas. 337 (N.Y. Sup. Ct. 1804)
- Schenck v. United States*, 249 U.S. 47 (1919)

BAIL

In 1791, the Eighth Amendment was added to the U.S. Constitution as part of the Bill of Rights for the purpose of prohibiting, among other things, the requirement of “excessive bail.” As applied in the context of the American criminal justice system, “bail” refers to the security or conditions ordered by a court to ensure the appearance of an accused for all court proceedings relating to a pending criminal case. As recognized by the U.S. Supreme Court in *United States v. Salerno* (1987), “[I]n our society liberty is the norm, and detention prior to trial . . . is the carefully limited exception.” This quote summarizes the

fundamental notion of personal freedom embodied in the Fifth Amendment due process provisions and the Eighth Amendment prohibition against excessive bail.

History and Conception of Bail

The idea of bail can be traced back hundreds of years before the U.S. Constitution. Original theories of bail are apparent in seventh century Anglo-Saxon law, which provided that persons accused of a crime pay an amount to the family of the victim; the payment was returned if the person was eventually proven innocent.

More modern bail theory can be traced to the late ninth or early tenth century, when sheriffs were required to arrest and hold defendants until they could be brought to trial. Because it often took years before a traveling magistrate could appear for a trial, this system was unjust for the accused, whose liberty was restrained during this period of time, and was a significant imposition on the sheriff, who was often forced to detain prisoners in his own home. To remedy these deficiencies, defendants were permitted to post a monetary bond, or have friends or relatives act as sureties to ensure their appearance at trial. As such, bail was initially created to protect the liberty interests of persons accused of crimes, while ensuring their appearance at trial.

Under modern-day practices, the decisions of whether to grant bail and, if so, in what amount, are made after an individual is charged, arrested, and processed at a police station. Initial bail determinations are often made by magistrates, and may be reviewed later by the court.

History of Federal Bail Law

Congress enacted the first federal bail provision in 1789 as part of the Judiciary Act, which set the guidelines for courts in making bail decisions. The decision of whether to grant bail and the particular amount of bail were left largely to the discretion of the courts. In practice, pretrial release was not favored. There were no substantial changes to bail law until Congress passed the Bail Reform Act of 1966. Contrary to the 1789 Act, this act favored pretrial release in all non-death-penalty cases and focused mainly on the question of whether the accused was likely to flee the jurisdiction in an effort to avoid trial. The purpose of the Bail Reform Act was to eliminate unwarranted and oppressive bail conditions, especially in cases

involving indigent defendants. However, many people criticized the Act because it did not address the issue of defendants committing crimes while on bail awaiting trial.

In an effort to address these public safety concerns, Congress enacted the District of Columbia Court Reform and Criminal Procedures Act of 1970. This act was the first federal law that permitted “preventive detention”—allowing courts to deny bail when an individual would pose a danger to the community if released pending trial, even if there is no evidence that the individual would flee the jurisdiction. Preventive detention is a controversial issue that continues to be hotly debated among attorneys, judges, and legal scholars. Critics of preventive detention argue that it denies defendants the presumption of innocence and allows the government to incarcerate individuals without a trial or any proof of wrongdoing, and merely on the basis of a prediction of future wrongdoing; while supporters argue that where a showing of future dangerousness is made, an individual’s liberty interest is outweighed by the government’s interest in ensuring community safety. In 1981, the District of Columbia Court of Appeals considered these arguments and upheld the 1970 Act in *United States v. Edwards* (1981).

Between 1970 and 1984, thirty-four states enacted statutes similar to the District of Columbia statute, all providing for preventive detention. The U.S. Supreme Court upheld constitutional challenges to many of these statutes, labeling them regulatory, rather than penal, in nature. In 1981, the U.S. Attorney General’s Office released a report recommending adoption of federal preventive detention provisions. Then-Supreme Court Chief Justice Warren Burger also supported the need for more flexible bail standards that would allow courts to consider future dangerousness when making pretrial release decisions.

In response to these recommendations and rising public concern regarding crimes committed by persons released pending trial, Congress enacted the Bail Reform Act of 1984, which replaced the Bail Reform Act of 1966. Pursuant to the 1984 act, a federal court may order preventive pretrial detention of an accused if the government demonstrates that no release condition(s) will reasonably ensure the safety of other persons and the community. A federal court may also order pretrial detention if the government shows that no release conditions(s) will reasonably ensure the presence of the accused at trial. The act also set forth specific factors to be considered by the court in setting pretrial release conditions. Specifically, courts are to consider the nature and seriousness of the charged offense, the weight of the evidence against the accused, the history and characteristics of the

defendant, and the nature and seriousness of the danger that would be posed to the community by releasing the accused pending trial.

In *United States v. Salerno* (1987), the Supreme Court rejected constitutional challenges to the preventive detention provisions of the 1984 Bail Reform Act, finding that such detention is consistent with both due process guarantees and protections against excessive bail embodied in the Eighth Amendment to the U.S. Constitution.

The Bail Decision

In a criminal case, bail is generally set within a very short time after arrest. Although each jurisdiction implements its own requirements and procedures for setting bail in criminal cases, many use what are commonly referred to as “bail schedules” or “master bond schedules” to set bail initially. These schedules set bail according to the offense with which a defendant is charged and do not take into account other circumstances such as a defendant’s financial condition, ties to the community or prior criminal history. Some jurisdictions have discontinued the use of such schedules because they fail to take into account issues relevant to ensuring the defendant’s presence at trial or assuring community safety. In *Ackies v. Purdy* (1970), a federal district court ruled that the use of a master bond list to set bail violates both the due process and equal protection rights of defendants.

Jurisdictions not using bond schedules often rely on pretrial services agencies to gather information relevant to the bail decision. Such agencies interview defendants to determine the extent of their financial resources, ties to the community, and prior criminal history. This information is then reviewed by the court to determine what amount of bail and other release conditions are necessary to ensure the defendant’s appearance at trial and the safety of the community.

When setting bail, a court may consider many forms of monetary and other conditions. Monetary conditions include secured bonds, unsecured bonds, property bonds, and personal recognizance bonds. Under a personal recognizance bond, defendants are not required to submit money to secure their release but are required to pay a set amount if they fail to appear for trial. In addition to, or in lieu of, monetary requirements, defendants may be subject to release conditions such as a requirement to maintain employment, refrain from contacting the alleged victim, report to a pretrial services agency on a regular basis, submit to random drug or alcohol testing, refrain

from leaving the jurisdiction, or refrain from committing any criminal acts. The Bail Reform Act includes a preference for pretrial release on personal recognizance or an unsecured appearance bond without additional conditions. Only if such release conditions will not reasonably ensure the defendant's appearance for trial or the safety of the community are other pretrial bail conditions permitted.

Defendants are permitted to request reductions in the amount of bail set or changes in the release conditions while their case is pending. Likewise, prosecutors may also request changes in a defendant's release conditions, including a request that a previously ordered bond be revoked pending trial. Generally, these requests are made in the form of a motion filed with the court before which the case is pending. However, in some circumstances, courts may allow bail reduction requests to be made orally, such as at the conclusion of a preliminary hearing or a pretrial motion to suppress evidence. Bail requests for release pending an appeal after conviction may also be made; however, such requests are rarely granted.

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References and Further Reading

- Dressler, Joshua. "Pretrial Release of the Defendant." In *Understanding Criminal Procedure*. 3rd ed. Newark, N.J.: LexisNexis Publishing, 2002.
- Metzmeier, Kurt X., *Preventive Detention: A Comparison of Bail Refusal Practices in the United States, England, Canada and Other Common Law Nations*, *Pace International Law Review* 8 (1996): 399–436.
- Scott, Thomas E., *Pretrial Detention Under the Bail Reform Act of 1984: An Empirical Analysis*, *American Criminal Law Review* 27 (1989): 1–51.
- Wisotsky, Steven, *Use of a Master Bond Schedule: Equal Justice Under Law?* *University of Miami Law Review* 24 (1970): 808.

Cases and Statutes Cited

- Ackies v. Purdy*, 322 F.Supp. 38 (S.D. Fla. 1970)
- United States v. Edwards*, 430 A.2d 1321 (D.C. 1981)
- United States v. Salerno*, 481 U.S. 739 (1986)

BALANCING APPROACH TO FREE SPEECH

"Balancing" refers to a method of adjudication used by judges to reach decisions through weighing the parties' competing interests or rights. In the context of legal disputes over free speech rights, "balancing" typically means judges weighing the government's interests in restricting speech against the speaker's

First Amendment free speech rights. For some courts, balancing also entails explicit cost-benefit comparisons.

Balancing approaches are usually contrasted with "categorical" approaches to free speech. Balancing requires judges to examine carefully the specific facts of each case and articulate the competing interests and rights at stake before weighing their relative strengths. In contrast, categorical approaches depend on a preestablished system of classifications or categories; judges decide which category the specific case before them belongs to, and then they apply legal rules already developed for that category. Thus, in a free speech case, the court would classify the nature of the speech as "protected" or "unprotected" by the First Amendment, categorize the setting of the speech as a "public forum" or "non-public forum" for speech, and determine whether the type of speech restriction at issue is "content based" or "content neutral." The outcome of that sequence of categorical moves would determine yet another category, the level of scrutiny ("strict" or "rational basis") that the court would apply to the government's speech restriction.

Advocates of balancing approaches believe that they ensure more nuanced, case-specific, fact-sensitive adjudication that is also more honest and transparent about the policy questions implicit in the dispute. Advocates of balancing also assert that it is more flexible and adaptable, and therefore better suited to the complexity of free speech disputes, where restrictions may not be easily classifiable as content based or content neutral, where the nature of the forum is not readily ascertainable, and where multiple speakers compete. Such complexities are often seen in cases concerning speech rights in rapidly evolving new media like cable and the Internet. See, for example, *Denver Area Educational Telecommunications Consortium, Inc. v. Federal Communications Commission* (1996) and *United States v. American Library Association* (2003).

Critics of balancing approaches argue that they are subjective, offer little predictability or certainty, and invite judges to usurp the role of legislatures by making policy determinations. Critics further charge that there is no real "weighing" because the rights and interests being compared are incommensurate. Balancing approaches have been strongly criticized in the context of free speech law for chilling speech (because speakers cannot be sure how a court would "weigh" their speech rights) and for unfairly favoring majoritarian government interests against the First Amendment rights of unpopular speakers. In this view, balancing approaches fail to safeguard speech because courts are likely to be swayed in their

assessment of the government's interests by the perceived exigencies and societal fears of the day.

Justification for such criticisms of balancing can be found in a series of speech-repressive cases in the communism-phobic McCarthy era, when the U.S. Supreme Court applied the balancing approach repeatedly to find that government interests in speech restrictions outweighed the speaker's right to speak. *Dennis v. United States* (1951) is the prime example.

Balancing has been making a comeback as a legitimate approach to free speech jurisprudence. As Kathleen Sullivan, a leading constitutional scholar, and others have argued, neither balancing nor categorical approaches are inherently liberal or conservative, speech protective or speech restrictive; the approaches themselves are neutral, and not always even clearly distinguishable. Supreme Court justices who are strong proponents of balancing approaches include Justices Stevens, O'Connor, Breyer, and Souter. See, for example, Justice O'Connor's concurrence in *Rosenberger* favoring balancing over categorical approaches. A move towards balancing is evident in the Court's development of intermediate scrutiny levels, somewhere in between "strict" and "rational basis," that assess government's reasons for the speech restriction as weighed against the effects on speech. Such "heightened scrutiny" balancing has been used in commercial speech cases since *Central Hudson Gas & Electric* (1980), and in speech cases involving new technologies like cable broadcasting (for instance, *Turner Broadcasting I* [1994] and *II* [1997]).

The debate between advocates of balancing and advocates of categorizing parallels debates between advocates of "standards" and advocates of "rules."

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References and Further Reading

- Barron, Jerome A., *The Electronic Media and the Flight from First Amendment Doctrine: Justice Breyer's New Balancing Approach*, University of Michigan Journal of Law Reform 31 (1998): 817.
- Huhn, Wilson R., *Assessing the Constitutionality of Laws that Are Both Content-Based and Content-Neutral: The Emerging Constitutional Calculus*, Indiana Law Journal 79 (2004): 801.
- Rubinfeld, Jed, *Comment: A Reply to Posner*, Stanford Law Review 54 (2002): 753.
- Schlag, Pierre, *An Attack on Categorical Approaches to Freedom of Speech*, University of California-Los Angeles Law Review 30 (1983): 671.
- Smolla, Rodney A. *Smolla and Nimmer on Freedom of Speech*. Vol. 1. St. Paul, Minn.: West Group, 2003.
- Sullivan, Kathleen M., *Post-Liberal Judging: The Roles of Categorization and Balancing*, University of Colorado Law Review 63 (1992): 293.

Cases and Statutes Cited

- Central Hudson Gas & Electric v. Public Service Commission*, 477 U.S. 557 (1980)
- Dennis v. United States*, 341 U.S. 494 (1951)
- Denver Area Educational Telecommunications Consortium, Inc. v. Federal Communications Commission*, 518 U.S. 727 (1996)
- Rosenberger v. University of Virginia*, 515 U.S. 819, 846–852 (1995)
- Turner Broadcasting System v. FCC*, 512 U.S. 622 (1994), and *Turner II*, 520 U.S. 180 (1997)
- United States v. American Library Association*, 539 U.S. 194 (2003)

See also **Absolutism and Free Speech; Categorical Approach to Free Speech; *Central Hudson Gas and Electric Corp. v. Public Service Commission of New York*, 477 U.S. 557 (1980); Content-Based Regulation of Speech; Content-Neutral Regulation of Speech; *Dennis v. United States*, 341 U.S. 494 (1951); Intermediate Scrutiny Test in Free Speech Cases; Public Forum Doctrines; Public/Nonpublic Forums Distinction; *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995); *Turner Broadcasting Sys., Inc. v. FCC* (*Turner I*), 512 U.S. 622 (1994); 520 U.S. 180 (1997) (*Turner II*)**

BALANCING TEST

In constitutional adjudication, the balancing test is the predominant mode of case resolution, although major differences exist on "how to strike the balance." The balance that must be struck is between individual freedoms and societal needs such as the need to preserve order. There is only one theory of constitutional decision making in which balancing does not occupy a position—the absolutist position. Proponents—most notably Justice Hugo Black—argued that the specific provisions of the Constitution and Bill of Rights are often stated in absolute terms. For example, when the First Amendment says, "Congress shall make no law . . . abridging the freedom of speech," Justice Black was fond of saying that this meant "no" law, plain and simple. Most other justices and legal scholars, however, disagree with this absolutist position, and opt instead for balancing between individual liberties and government needs. Some would weigh equally the government's need and constitutional protections. Greater protection is given to individual freedoms in the famous "clear and present" test. Here governments are forbidden to transgress on protected liberties unless there is both a "clear" and "present" danger. Finally, even more protection is given to individual liberties by the "preferred position" rule. Under this standard, individual protections are to be given very special protection,

and only substantial, grave, imminent threats justify government encroachment. Balancing becomes especially acute during crisis times. For example, does/has/should 9/11 justify tipping the scales more in the direction of government powers, trading off individual liberties to obtain a higher likelihood of safety in our society? What are the costs of these tradeoffs? Balancing allows these decisions to be made but remains silent on any hard and fast rule about how to strike the balance.

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References and Further Reading

Black, Hugo, *The Bill of Rights*, New York University Law Review 35 (April 1960): 865–31.
Pritchett, C. Herman. *The American Constitution*. New York: McGraw-Hill, 1968.

See also **Absolutism and Free Speech; Bad Tendency Test; Balancing Approach to Free Speech; Clear and Present Danger Test; 9/11 and The War on Terrorism**

BALDUS STUDY (CAPITAL PUNISHMENT)

The Baldus Study, conducted by Professors David Baldus, George Woodworth, and Charles Pulaski, was a sophisticated empirical analysis of 2,484 Georgia homicide cases that were charged and sentenced in the 1970s. The study found, among other results, that black defendants convicted of killing white victims were more likely to receive the death penalty than any other racial combination of defendant and victim.

The raw data showed that 11 percent of those charged with killing a white person were sentenced to death, whereas only 1 percent of those charged with killing a black person were sentenced to death. Because intraracial murders (victims and defendants of the same race) were more common than interracial murders (victims and defendants of different races), 7 percent of white defendants were sentenced to death as opposed to 4 percent of black defendants. However, death sentences resulted in 21 percent of cases involving black defendants and white victims, but only 8 percent of cases with white defendants and white victims.

The study also analyzed 230 potentially aggravating, mitigating, or evidentiary nonracial factors. Based on a regression analysis involving the most significant thirty-nine factors, the study found that death sentences were 4.3 times more likely for defendants charged with killing white rather than black victims, and that this result was largely due to the choices of prosecutors rather than juries.

The Baldus Study was presented in *McCleskey v. Kemp* to show that Georgia operated an unconstitutional racially discriminatory capital punishment system. The defendant's claims were rejected, however, on the grounds that the study failed to show either a constitutionally significant risk of racial bias in the operation of Georgia's system or a discriminatory purpose specifically in McCleskey's case.

ANTONY PAGE

References and Further Reading

Baldus, David C., George Woodworth, and Charles A. Pulaski, Jr. *Equal Justice and the Death Penalty: A Legal and Empirical Analysis*. Boston: Northeastern University Press, 1990.
Baldus, David C., George Woodworth, David Zuckerman, Neil Alan Weiner, and Barbara Broffitt, *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, Cornell Law Review 83 (1998): 1638–770.
Kennedy, Randall L., *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, Harvard Law Review 101 (1988): 1388–433.

Cases and Statutes Cited

McCleskey v. Kemp, 481 U.S. 279 (1987)

See also **Capital Punishment; Capital Punishment and Equal Protection Clause Cases; Capital Punishment and Race Discrimination; Capital Punishment: Eighth Amendment Limits; Furman v. Georgia**, 408 U.S. 238 (1972); *Gregg v. Georgia*, 428 U.S. 153 (1976); *McCleskey v. Kemp*, 481 U.S. 277 (1987)

BALDWIN, ROGER (1884–1981)

Roger Baldwin was the founder of the American Civil Liberties Union (ACLU) and served as its director from 1920 to 1950. He was widely recognized as the foremost advocate of civil liberties in the United States during those years.

Baldwin was born January 21, 1884, in Wellesley, Massachusetts to an old New England family that traced its roots back to the first English settlers. His father was a successful businessman in the leather goods industry. His religious background was in the Unitarian Church, and Baldwin inherited a liberal, freethinking outlook that emphasized social reform. Family members associated with prominent social and political reformers. Through his father, for example, he met attorney and future Supreme Court Justice Louis Brandeis. His uncle William Baldwin

was president of the Long Island Railroad and actively involved in social reform, including child labor and racial justice. Baldwin graduated from Harvard University in 1905 and earned a graduate degree in social work the following year.

He moved to St. Louis in 1906 to take a job as a social worker and remained there until early 1917. A person of boundless energy, Baldwin immediately became a prominent social reformer whose views reflected the goals of Progressive Era reforms. In 1910, he organized and became the secretary of the St. Louis Civic League, and through this organization was involved in many social reform issues. He taught social work courses at Washington University from 1906 to 1910. He helped to establish the first juvenile court in St. Louis and co-authored with Bernard Flexner *Juvenile Courts and Probation* (1914), a detailed manual on the goals and management of a juvenile court that gained a national audience. Baldwin was also active in the National Probation Association and other national organizations. Articles by or about him appeared in national publications, and he earned a national reputation as an energetic reformer.

Despite his subsequent claims, Baldwin was not an advocate of civil liberties during his years in St. Louis. He met controversial birth control advocate Margaret Sanger and anarchist Emma Goldman when they spoke in St. Louis. Although they and other speakers faced restrictions on their right to speak, Baldwin remained a rather conventional Progressive Era reformer who optimistically believed that they could and should serve the interests of the majority of the people. He did not at this time see a fundamental conflict between government actions reflecting majority opinion and the rights of individuals or unpopular groups. Baldwin was a vigorous advocate of racial equality at a time when few whites supported the rights of African Americans. He generated controversy, for example, in presenting an African-American speaker at Washington University. Race played a significant role in moving Baldwin's political thinking in a more radical direction. A referendum in St. Louis that approved racial segregation in housing greatly disillusioned his faith in majoritarian democracy. The outbreak of war in Europe in 1914, meanwhile, shattered his optimism about social progress.

By early 1917, Baldwin was increasingly concerned about possible American entry into World War I, and in March of that year he moved to New York City to work with the American Union Against Militarism (AUAM), a pacifist organization opposing American entry into the war. He and Crystal Eastman soon established a Civil Liberties Bureau (CLB) within

the AUAM to provide assistance to young men facing military service who sought conscientious objector status. At this point Baldwin's understanding of civil liberties took shape.

After the United States declared war in April 1917, the Civil Liberties Bureau not only provided assistance to conscientious objectors but also opposed censorship of individuals and organizations opposed to the war. Eventually, the CLB's own publications were banned from the mails by the U.S. Post Office. Baldwin and Eastman's activities in this regard provoked a split within the AUAM. The organization's leaders did not want to alienate the Wilson administration in the hope that they would be able to influence the eventual peace ending the war. In July 1917, the two factions agreed to split, and Baldwin and Eastman established a separate organization, the National Civil Liberties Bureau (NCLB). The NCLB was the direct forerunner of the ACLU.

In the summer of 1918, Baldwin received notice to report for induction into the military. Although he was thirty-four years old, the draft had been extended to cover people up to age thirty-five. Opposed to conscription as a matter of principle, he refused to report for induction and was subsequently convicted and sentenced to prison. A number of prominent reformers attended his trial, and his speech to the judge setting forth the reasons for his opposition to conscription was reprinted and widely circulated around the country. Baldwin served eight months in prison in New Jersey. During this time he reflected on the issues of free speech and due process raised by the wartime repression of dissent.

Upon leaving prison in July 1919, Baldwin traveled around the country for several months, often working in blue-collar jobs and contemplating his future. This experience was his first direct contact with working people and the labor movement. Later that year, Baldwin and other former NCLB leaders concluded that a permanent organization was needed to fight for civil liberties. They established the ACLU, which was officially born in January 1920 with Baldwin as its director.

Baldwin immediately established the style of activity that he would maintain over the next thirty years as director of the ACLU. He devoted his energies primarily to public education about civil liberties, giving numerous speeches and writing many articles. Almost all of his writings were topical, addressing particular cases or controversies. Baldwin himself was not an intellectual and never wrote a complete statement of his philosophy of civil liberties. He described himself as a philosophical anarchist, but he never subscribed to any specific political doctrine. For many years, Baldwin took trips across the United

States, speaking on civil liberties and enlisting support for the ACLU. These trips helped to establish his national reputation as a civil liberties advocate.

The ACLU was governed by a board of directors that met weekly in New York City to decide on organizational policy. Although a strong advocate of democracy, Baldwin was very much an autocrat within his own organization, maintaining strong control over his own board of directors. Baldwin's major contribution to the organization was his energy and magnetic personality, which brought into the ACLU individuals who were experts in particular areas of civil liberties. These included such notable figures as future Supreme Court Justice Felix Frankfurter and the longtime co-general counsels of the ACLU, Arthur Garfield Hays and Morris Ernst. He was also able to secure contributions from wealthy individuals, many of them Quakers who provided critical financial support for the small ACLU. In its first years, the ACLU had only about a thousand members.

In 1919, Baldwin married Madeline Z. Doty, who was also a social reformer. They divorced in 1936, and Baldwin married Evelyn Preston that same year.

In the 1920s, the courts at both the state and federal levels were not sympathetic to civil liberties. Consequently, under Baldwin's leadership the ACLU gave relatively little emphasis to litigation, especially compared with later decades. Typically, the ACLU would issue a public statement regarding a particular violation of civil liberties. In this respect, Baldwin's role as speaker and writer was a major part of the ACLU's activity. Legislatures were also very hostile to civil liberties, and the ACLU devoted relatively little energy to legislation.

Baldwin involved the ACLU in numerous civil liberties issues. He was particularly concerned about the rights of working people and labor unions. During this period, courts routinely granted requests from employers to enjoin union organizers from picketing or in some instances holding meetings to discuss unionization. Baldwin was also very active in the defense of Sacco and Vanzetti, two anarchists who had been convicted of murder and whose case became a symbol of the antiradical, anti-immigrant attitudes of the 1920s. The ACLU was particularly active in fighting race discrimination, protesting mob violence against African Americans led by the Ku Klux Klan. Baldwin always arranged to have a leader of the National Association for the Advancement of Colored People (NAACP) on the ACLU board of directors.

As part of his commitment to the rights of labor, Baldwin led a demonstration in Paterson, New Jersey in 1924, protesting a court injunction prohibiting labor union picketing and meetings. Many other

ACLU leaders in this period engaged in direct action in support of civil liberties. Baldwin was arrested and convicted of violating a 1796 state law against rioting that had never been previously used. In 1928, a state appeals court overturned the conviction in one of the few decisions in that decade upholding the right of freedom of assembly.

The most important ACLU case in the 1920s was a challenge to a Tennessee law prohibiting the teaching of evolution in the public schools. Baldwin placed a notice in a Tennessee newspaper indicating the ACLU's willingness to represent anyone arrested for violating the law. In this manner, the ACLU represented John T. Scopes. The 1925 trial was a national sensation that brought the first important favorable publicity to the ACLU. Baldwin himself did not play a direct role in the trial, however.

Throughout his career, Baldwin was involved with innumerable organizations and causes. The ACLU was only one of four organizations that he established in 1920 alone. One of the most important organizations Baldwin founded in the 1920s was the American Fund for Public Service (AFPS). Charles Garland inherited a large sum of money and wanted to use the money to advance social change. Baldwin convinced him to give the money to the AFPS, which he helped establish in 1922 and which was directed by Baldwin's friends and associates. Through the 1920s the Fund supported many civil liberties, liberal, and leftwing causes. The fund, for example, supported the early litigation program by the NAACP. The Depression wiped out the fund's assets after 1929 and it soon became defunct.

Baldwin always had an interest in international human rights, traveled frequently, and corresponded with rights activists in other countries. In 1927, he visited the Soviet Union, and upon his return published *Liberty Under the Soviets* (1928), a detailed account of the treatment of religious, racial, and ethnic minorities in that country.

Since its founding in 1920, Baldwin and the ACLU primarily had to fight restrictions on the free speech rights of communists and other leftwing activists. In the mid-1930s, following the rise of domestic Nazi groups, they had to confront the issue of whether the First Amendment protected the free speech rights of fascists and other advocates of totalitarianism. After a brief internal debate, Baldwin and the ACLU issued a formal statement supporting the First Amendment rights of all extremist groups, including communists and Nazis.

In the late 1930s, Baldwin's views of the federal government and civil liberties underwent a major shift. As a result of his World War I experience, he had always been extremely skeptical of virtually all

government power. By the mid-1930s, however, he developed a favorable view of President Franklin D. Roosevelt's administration, seeing that some New Deal agencies, such as the new National Labor Relations Board, supported civil liberties. He immediately began to spend more time in Washington, D.C., cultivating sympathetic officials in the Roosevelt administration. This shift was prompted in part by his disillusionment with the Soviet Union under Joseph Stalin. In the early 1930s, as a result of the Depression and the rise of fascism in Europe, Baldwin became more sympathetic to radical leftwing politics. In 1933 and 1934, he made a number of statements expressing sympathy for communism that were later used by ACLU critics against him. This very radical phase was brief, however, and Baldwin soon moved to a more moderate political point of view. Along with many other liberals and leftwing activists, he was shocked by Stalin's purge of other Soviet leaders in the famous Moscow trials. In the United States, Baldwin also became disgusted with what he saw as manipulative tactics by American communists participating in the Popular Front, a coalition of liberal and leftwing organizations. As a result, Baldwin became a strong anticommunist.

Baldwin's new anticommunist outlook set the stage for the most controversial episode in his career and in the history of the ACLU. In 1940, the ACLU board of directors adopted a policy under which no supporter of totalitarian organizations could serve in an official capacity in the ACLU. Under the policy, the board then quickly removed Elizabeth Gurley Flynn from its ranks because she was a member of the Communist Party. Many critics accused the ACLU of imposing the very same kind of political test that it had long fought against, and the incident tarnished the reputation of both Baldwin and the ACLU for several decades.

Although there was no widespread suppression of dissent as there had been during the First World War, World War II presented some difficult challenges for Baldwin. He strongly opposed the evacuation and internment of the Japanese-Americans by the federal government, but a majority of the ACLU board of directors limited the terms on which the ACLU would act. The result was a major conflict within the board of directors and between the ACLU national office and the organization's affiliates in San Francisco and Los Angeles. In the end, the ACLU brought the court cases that unsuccessfully challenged the government's program (*Hirabayashi* and *Korematsu*). Baldwin played a major role in organizing the Supreme Court cases, raising necessary funds and arranging for attorneys to write the court briefs and argue the cases before the Supreme Court.

The Federal Bureau of Investigation (FBI) in 1941 secretly designated Baldwin for detention in case of a national emergency. Although his political views had become more moderate, he was still regarded as a dangerous radical by the FBI. The FBI's secret emergency detention program did not become known until the 1970s, when the Watergate scandal exposed a number of abuses of power by federal agencies. The FBI maintained extensive surveillance of Baldwin over the years. Major portions of Baldwin's FBI file were released in the 1980s and were deposited with the Baldwin and ACLU archives at Princeton University.

In one of the most curious episodes in his career, Baldwin was invited to Japan in 1947 to advise General Douglas MacArthur on developing a constitution for postwar Japan. Somewhat surprisingly, the ACLU leader and the very conservative general established a close rapport.

Baldwin's role during the Cold War has been a subject of considerable controversy. Because of the removal of Elizabeth Gurley Flynn from the ACLU board in 1940, critics accused Baldwin and the ACLU of not opposing Cold War-era restrictions on freedom of speech and association with sufficient vigor. Baldwin had formed a personal relationship with FBI Director J. Edgar Hoover when the latter was first appointed in 1924, and he remained somewhat uncritical of the Bureau in the years that followed. And while Baldwin opposed the House Un-American Activities Committee (HUAC) since it was created in 1938, some other ACLU leaders had close and private relations with the committee. Despite the criticisms, however, both Baldwin and the ACLU strongly opposed most Cold War restrictions on civil liberties, including loyalty oaths, prosecutions under the 1940 Smith Act, and blacklisting in the entertainment industry.

In 1950, the ACLU board of directors decided to remove Baldwin as director, and he was given a vague "ambassadorial" position focusing on international issues. The decision to remove him was prompted by the feeling that Baldwin had not kept up with changing times. Always an autocrat who sought to maintain strong control of the organization, Baldwin had opposed any effort to increase the ACLU's membership or to create a network of affiliates across the country. In 1950, there were about 10,000 members and four affiliates with staff members. His successor embarked on a membership and affiliate development campaign that proved to be enormously successful. This development vindicated the decision of the ACLU board in removing Baldwin as director.

After being removed as executive director, Baldwin continued to work on human rights issues for another thirty-one years, devoting most of his energies to

international issues and working through the International League for the Rights of Man. In this effort, he was as tireless as he had been previously. He traveled extensively around the world, giving speeches and writing articles.

Baldwin's legacy for civil liberties is enormous. Without his energy and devotion to the organization, the ACLU probably would not have survived. Nor was there any other person who tirelessly advocated the cause of free speech and other rights during the 1920s and 1930s. The history of civil liberties in the United States would have been very different without the efforts of Roger Baldwin. President Jimmy Carter awarded Baldwin the Medal of Liberty in January 1981. Roger Baldwin died on August 26, 1981.

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References and Further Reading

- Baldwin, Roger N. *Liberty Under the Soviets*. New York: Vanguard Press, 1928.
- Cottrell, Robert C. *Roger Nash Baldwin and the American Civil Liberties Union*. New York: Columbia University Press, 2000.
- Lamson, Peggy. *Roger Baldwin, Founder of the American Civil Liberties Union: A Portrait*. Boston: Little, Brown, 1976.
- Walker, Samuel. *In Defense of American Liberties: A History of the ACLU*. New York: Oxford University Press, 1990.

BALLEW v. GEORGIA, 435 U.S. 223 (1978)

The manager of an adult theater was charged in a state court with distributing obscene materials, a misdemeanor. Pursuant to state law, and over his claim that the Sixth Amendment right to a jury trial required a jury of at least six members, he was tried and convicted by a jury of five people.

The purpose of a jury trial is to provide protection against government oppression by having members of the community participate in the determination of guilt, *Duncan v. Louisiana*. Although a jury traditionally comprised twelve members, the U.S. Supreme Court held in *Williams v. Florida* that the Sixth Amendment does not require a jury of that number; rather, it merely mandates a jury of sufficient size to encourage group deliberation, to shield members from outside deliberation, and to supply a representative cross-section of the community. In *Williams*, the Court concluded that a jury of six members can fulfill the functions of a jury trial, and therefore is not unconstitutional. In *Ballew v. Georgia*, however, the Supreme Court unanimously held that a five-person

jury does not comport with the requirements of the Sixth Amendment. The Court relied heavily on empirical studies raising doubts about the reliability of decisions by juries of fewer than six members, and indicating that such juries are less likely to contain members of minority groups and thus not truly represent their communities. In addition, the Court concluded that no significant state interest justified a reduction from six members to five.

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References and Further Reading

- LaFave, Wayne R., Jerold H. Israel, and Nancy J. King. *Criminal Procedure*. 4th ed. St. Paul, Minn.: Thompson-West, 2004.
- Rudstein, David S., C. Peter Erlinder, and David C. Thomas. *Criminal Constitutional Law*. Newark, N.J. and San Francisco: LexisNexis-Matthew Bender, 1990, 2004.
- Singley, Carl E., *Ballew v. Georgia: Five Is Not Enough*, Temple Law Quarterly 52 (1979): 2:217–58.

Cases and Statutes Cited

- Duncan v. Louisiana*, 391 U.S. 145 (1968)
- Williams v. Florida*, 399 U.S. 78 (1970)

See also ***Duncan v. Louisiana*, 391 U.S. 145 (1968); Incorporation Doctrine; Jury Trial; Jury Trial Right**

BALLOT INITIATIVES

Method by which the people of various states exercise their retained right to initiate and adopt legislation directly. Proponents argue that the process is a particularly effective means of political expression, and of circumventing a legislature that is lethargic or captured by interest groups. Detractors focus on the weaknesses of the initiative process, including the misleadingly simplistic advertising used to explain complicated proposals to voters, the growing expense of getting measures on the ballot, and the related risk that the process is falling under the control of the same special interest groups it seeks to restrain.

The method of state lawmaking is not new; California, for example, adopted the process in 1911 and has deployed it with increasing frequency and importance over the last three decades. Californians have directly passed important laws doing everything from reducing local property taxes, creating new state agencies, abolishing race-based affirmative action, widening the scope of the death penalty and lifetime imprisonment, and imposing term limits on members of the state legislature. But today critics of the process, including many California voters themselves,

are expressing some support for reforming the initiative process.

In states that use initiatives, to get a measure on the ballot supporters must collect a threshold number of citizen signatures, often tied to a percentage of the turnout at the last state election. The procedural details of the initiative power vary from state to state (and sometimes from locality to locality), but initiatives may be used to adopt state statutes, amendments to the state constitution, or both. States with an indirect initiative process require an intermediary step of submitting the proposed measure to the legislature. If approved by the legislature, the measure becomes law. If rejected, the measure will go to the people for their approval or rejection at the next election. By contrast, a direct initiative device allows measures to go straight onto the ballot after the signature threshold has been met and certified, without the measure having to be presented to the legislature for its consideration.

VIKRAM D. AMAR

BALTIMORE CITY DEPARTMENT OF SOCIAL SERVICES v. BOUKNIGHT, 493 U.S. 549 (1990)

Maurice M, after being hospitalized at age three months with fresh and partially healed bone fractures, was placed into shelter care by a court order but was later returned to his mother Jacqueline's custody. After a hearing, he was permitted to remain with her, provided that she complied with extensive conditions in a protective order. When Social Services later alleged that Bouknight had violated every such condition, the court granted a petition to remove Maurice from her control. Upon her repeated refusal to produce Maurice, the court ordered her imprisoned for civil contempt until she produced her son or revealed his location.

The juvenile court rejected Bouknight's later claim that the contempt order violated the Fifth Amendment's privilege against self-incrimination, which declares, "No person . . . shall be compelled in any criminal case to be a witness against himself," although the state court of appeals disagreed.

The U.S. Supreme Court reversed. The privilege applies only to the state's compelling the making of an act with a "testimonial or communicative nature" providing a link in a chain to potential criminal prosecution. Maurice's body would be physical, not testimonial, but the *act of producing* him would communicate the testimonial facts of his existence, authentic identity as Bouknight's son, and her possession of him. Nevertheless, the Court found the

privilege inapplicable, partly because it does not extend to "collective entities," like corporations, or to their representatives, such as records custodians, because they lack "private enclaves" needing protection. The *Bouknight* Court apparently viewed Bouknight as having custody of Maurice on *behalf of the state as a "collective entity."*

The Court also relied on the required records doctrine as taking the case outside the Fifth Amendment privilege. This doctrine requires first, that the purpose of government action is regulatory rather than furthering criminal investigation; and, second, that the records themselves have a "public aspect [making] them analogous to public documents," a phrase generally requiring balancing the public need against the intrusion upon the individual. Furthermore, the required records doctrine likely cannot extend to inquiries directed not at the general public but at a "highly selective group inherently suspected of criminal activities," such as requiring illegal gamblers to report their ill-gotten income to the Internal Revenue Service.

For the *Bouknight* Court, the demand to produce Maurice served the state's regulatory interest in protecting his safety, counterbalanced any intrusion upon Bouknight, and was not aimed at a "selective group inherently suspect of criminal activities" because a child may be placed by Social Services with foster parents or relatives not suspected of any crime. Without deciding the question, however, the Court noted that some privilege protection might remain for child custodians under certain circumstances.

Bouknight remained incarcerated for more than seven years after the Supreme Court's opinion. After her release, attorneys portrayed her "as a champion of civil disobedience, comparing her to the Rev. Martin Luther King Jr." State officials disagreed, adding that they feared her son was dead.

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References and Further Reading

Merker Rosenberg, Irene, *Bouknight: On Abused Children and the Parental Privilege Against Self-Incrimination*, *Iowa Law Review* 76 (1991): 535.

Cases and Statutes Cited

Fisher v. United States, 425 U.S. 391 (1976)
Haynes v. United States, 390 U.S. 85 (1968)
Marchetti v. United States, 390 U.S. 39 (1948)
Shapiro v. United States, 335 U.S. 1 (1948)
United States v. Doe, 465 U.S. 605 (1984)

See also **Coerced Confessions/Police Interrogation; Self-Incrimination (V): Historical Background**

BAPTISTS IN EARLY AMERICA

From the time in the early 1600s that some of the early Puritans came to believe that infant baptism could not be justified on biblical grounds, to the final abolition of the last remaining compulsory religious taxation system in Massachusetts in 1833, the Baptists bore the brunt of the religious persecution and discrimination meted out in early American communities. The Baptists countered by waging a struggle against governmental support for established religion more persistently and effectively than any other dissenting group. While they could not have prevailed in this struggle without significant assistance from other quarters, the Baptists are to be credited with exerting unsurpassed influence on the pace and course of the emergence of religious liberty in America.

The Baptists' struggle began in the New England colonies, whose Puritan founders believed themselves to constitute the vanguard of a "New Reformation" that would complete the work that Luther and Calvin had begun by restoring the purity of the early church. The Puritans believed that theirs was the one and only true church and faith, and all New England colonists were expected to support the New Reformation project by supporting the Puritan congregations in their local communities. Any who could not bring themselves to do so were free to leave, in the eyes of the Puritan leadership. Any who would not leave were to be punished, in an effort to force the dissenters to abandon their ways and return to living in conformity with Puritan beliefs and expectations.

New England colonists who came to believe that infant baptism was illegitimate would become known to the civil authorities when they would refuse to have their own children baptized, and either turn their backs when the children of other families were being baptized or walk out of the church to avoid participating in such ceremonies. These early Baptists were then haled into court, where they were warned, fined, or even whipped if they gave any indication that they would repeat their offending behavior. Those who refused to pay the fine were imprisoned for an indeterminate period. Church authorities would inflict a parallel process of warnings, censure, and ultimately excommunication. These early Baptists were considered social pariahs, subjected to harassment and ostracism, and they were denied the right to vote or hold office. Most either left the colony as quickly as they could or decided that they would henceforth refrain from disrupting baptism ceremonies and keep their views to themselves. To worship openly together, much less organize formally as a church, was completely out of the question.

The Puritans were committed to maintaining some connection to the Church of England, in the

hope of reforming it. Roger Williams, the pastor of the Puritan church at Salem, Massachusetts, came into conflict with Puritan officials when he advocated the view that the Church of England was a false church, and that the Puritans should separate themselves from it. Although the Puritans would become known as Congregationalists for their rejection of the Church of England's system of Episcopal authority over the local congregation, they could not accept Williams's call to break from the Church of England completely. The authorities banished Williams from the Massachusetts Bay Colony in 1635, and the next year he and some friends from the Salem church founded the colony of Providence Plantations, just to the south. After a number of English Baptists migrated to Providence between 1636 and 1639, Williams and his friends re-baptized themselves by immersion and formed the first Baptist church in America, in Providence. Although Williams would himself remain a Baptist for only a few months, the church continued on after him, and a second Baptist church was founded in nearby Newport by 1644.

In 1651 John Clarke, the pastor of the Newport church, and two of its members traveled to Lynn, Massachusetts, to preach in a private home. Massachusetts authorities arrested, tried, and gave them the choice of paying a fine or being whipped. Clarke and one of the others paid the fine, but the third, Obadiah Holmes, refused. He was tied to a stake on Boston Common, stripped to the waist, and given such a severe whipping that he was unable to leave Boston for several weeks. Clarke's account of this incident was published in London a year later in an unsuccessful effort to persuade Parliament to require New England colonies to tolerate dissent.

Baptists persisted in Massachusetts, despite the persecution that they faced there. In 1654, the president of Harvard College, Henry Dunster, shocked his community when he refused to have his child baptized and publicly declared his opposition to infant baptism. When church leaders tried to persuade him of his error, Dunster responded that no support can be found for the practice of infant baptism in either the Bible or the practice of the early church. The Massachusetts legislature responded by passing a law stating that all dissenters should be removed from teaching positions at Harvard and in the public schools. Dunster was publicly admonished, required to give bond ensuring his future good behavior, and forced to resign from Harvard.

By 1665, Boston Baptists were worshipping in the home of their pastor, Thomas Goold, who along with other members of the Boston church was arrested and disenfranchised, and later imprisoned and sentenced

to be banished. One of the first openings toward religious liberty in Massachusetts followed, when sixty-six residents submitted a petition asking the authorities to free and tolerate him and the others. Instead, the authorities gave Goold only a three-day release to attend to some private business. While out of prison on leave, Goold slipped away to an island where he could conduct services unmolested, until a more tolerant governor came into office in 1673, which enabled Goold to return openly to the Boston Baptist community.

When the authorities learned in 1679 that Boston's Baptists had secretly built and begun to assemble in a meetinghouse, however, the legislature passed a law making it illegal to build any church structure without its permission. The Baptists agreed to stop using their building until later that year, when a letter arrived from King Charles II expressing his support for "freedom and liberty of conscience" for all non-Catholic Christians. From that point on, the Boston Baptist church was never bothered again, and no Baptist was ever again indicted in the Massachusetts Bay Colony.

Although the overt persecution of Baptists had ended in the colony, its system of collecting taxes to support Congregationalist ministers and erect church buildings for each settlement remained in place. When Baptists would refuse to pay the tax, they were subject to imprisonment, and some of their property (for example, livestock) could be seized and sold at auction to pay the bill. In 1708, three local tax collectors (two Quakers and one Baptist) from Dartmouth were imprisoned for refusing to collect the religious tax. The governor intervened to secure their release, but when the problem erupted again in Dartmouth the Quakers presented a petition to the King and the Privy Council, which responded by exempting the residents of Dartmouth from the tax. The Privy Council decision prompted the adoption of a series of laws in Massachusetts and other New England colonies designed to exempt dissenters from the religious tax.

By 1735, the Baptists and other dissenters were more fully tolerated in New England than in England or in the southern colonies, where Anglicanism was legally established. Had the Great Awakening not burst on the New England scene in 1740, the Baptists might have remained content indefinitely with the legal status that they had achieved. The Great Awakening, however, split New England's established churches between the New Lights, who were filled with evangelical fervor, and the Old Lights, who wished to retain prevailing styles of worship and beliefs. Over a period of years, many of the New Light Congregationalists who had separated from the established churches (who thus became known

as Separates) adopted the Baptists' belief that infant baptism is illegitimate, and eventually were absorbed into the Baptist denomination (and became known as Separate-Baptists). In a series of cases during the first three decades after the Great Awakening, Massachusetts authorities cited legal technicalities in an attempt to prevent the Separate-Baptists from availing themselves of the existing exemption for Baptists from local religious taxes.

Meanwhile, beginning in about 1765 the Separate-Baptists began sending a number of evangelists into the South, especially North Carolina and Virginia. In Virginia, the authorities had been granting dissenting congregations a limited number of licenses. The Quakers, Presbyterians, and Baptists who were in Virginia prior to the Great Awakening generally complied with this law. The Separate-Baptists refused, and as a result from 1768 to 1775 about forty Separate-Baptists were jailed for preaching without a license.

The young James Madison was horrified at what he saw, but he saw little hope of redressing the situation through Virginia's colonial legislature. With the approach of the Revolutionary War, however, the tide began to turn. In 1775, with the assistance of Patrick Henry, the Virginia Baptist Association successfully petitioned for the right of Baptist ministers to minister to Baptist soldiers. In 1776, Virginia's Revolutionary Convention adopted the Virginia Declaration of Rights that, under Madison's influence, guaranteed to all "the free exercise of religion."

When war came, tax support for the Church of England was halted, and after the war the Baptists argued against the adoption of a tax system that would support religion in general. Their former ally, Patrick Henry, now led the effort to have such a system adopted. Madison credited the persuasiveness of his "Memorial and Remonstrance" for defeating the general religious assessment measure, but the signatures on petitions against the measure submitted by evangelicals, principally Baptists and Presbyterians, outnumbered those on Madison's document by five to one.

Seeing a valuable ally in Madison, John Leland, the leading Virginia Baptist champion of religious liberty, supported Madison's election to Virginia's convention to ratify the federal constitution and later to the U.S. House of Representatives in exchange for Madison's promise to secure an amendment to the federal constitution guaranteeing religious liberty. Once this was achieved, Virginia's Baptists then turned to the question of what was to be done with the property belonging to the former Church of England, now the Protestant Episcopal Church, which had been used to support its clergy. In a typical parish, this might include the parsonage and hundreds of acres of land.

For over a decade, Baptists petitioned Virginia's legislature, arguing persistently that this property belonged to all Virginians. By 1802, they had persuaded the legislature to create a system whereby this property would revert to the state as Episcopal clergy changed churches, retired, or died. This was the most sweeping social change that took place in Virginia during the Revolutionary era.

In Massachusetts, the laws exempting Baptists from religious taxation were widely accepted until 1773, when the regional Baptist association endorsed Separate-Baptist leader Isaac Backus's call for the total abolition of the religion tax system. When Backus's efforts failed to prevent Massachusetts from incorporating its religious tax system into the state constitution that it adopted post-independence to replace its colonial charter, the Baptists were left with challenging the system in court. In 1782, the Baptists succeeded in having a Bristol County court declare that the religious taxation system violated the state constitution, and by 1800 very few dissenters—whether Baptist, Universalist, Shaker, or Methodist—were being prosecuted for nonpayment of religious taxes.

The Baptists took the lead in persuading Vermont's legislature to abolish its religious tax system in 1807, and Connecticut and New Hampshire followed suit in 1818 and 1819, respectively. In Massachusetts, the Baptists had largely turned their attention away from religious liberty concerns to an ambitious program of mission and social reform efforts. In 1820, when Massachusetts called a constitutional convention to resolve the legal issues arising from the separation of Maine from Massachusetts in 1819, Baptists sought to remove the religious taxation provisions from the Massachusetts Constitution, but in the old Congregationalist elite's last stand they blocked the Baptist effort. It would be the Universalists who would eventually succeed in pushing for the abolition of Massachusetts' religious tax system in 1833.

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References and Further Reading

- Buckley, Thomas E., *Keeping Faith: Virginia Baptists and Religious Liberty*, *American Baptist Quarterly* 22 (2003): 421–33.
- Isaac, Rhys, *Evangelical Revolt: The Nature of the Baptists' Challenge to the Traditional Order in Virginia, 1765 to 1775*, *William and Mary Quarterly* 31 (1974): 345–68.
- McLoughlin, William G. *New England Dissent, 1630–1833: The Baptists and the Separation of Church and State*. 2 vols. Cambridge, MA: Harvard University Press, 1971.

BARCLAY v. FLORIDA, 463 U.S. 939 (1983)

Barclay was convicted of first-degree murder for his participation in the politically and racially motivated murder of a hitchhiker. After a separate sentencing hearing in which the jury recommended that Barclay be sentenced to life in prison, the trial judge imposed a death sentence. Under Florida law, a death sentence must be based on a finding of sufficient statutory aggravating circumstances that are not outweighed by any mitigating factors. Further, a jury's sentencing recommendation is only advisory; a judge may still impose a death sentence where the facts supporting it are so clear and convincing that no one could reasonably disagree.

Barclay argued that the trial judge relied on non-statutory aggravating factors in violation of Florida law and relied on statutory aggravating factors that did not apply in his case. The Court held that mere errors of state law do not ordinarily constitute a denial of due process. Because the Constitution does not require states to limit consideration of aggravating factors to those statutorily specified, the trial judge's reliance on a non-statutory factor did not violate the federal constitution. In addition, the Court determined that, despite the trial judge's improper reliance on a non-statutory aggravating factor, the Florida Supreme Court's harmless error analysis provided sufficient review of the relative weight of aggravating and mitigating factors. *Barclay* thus signals the Court's partial retreat from the demanding procedural restrictions adopted in the 1970s and the greater deference to state capital sentencing processes characteristic of its Eighth Amendment jurisprudence in the 1980s and 1990s.

MARY SIGLER

See also Capital Punishment and Sentencing; Capital Punishment: Due Process Limits; Gregg v. Georgia, 428 U.S. 153 (1976)

BAREFOOTE v. ESTELLE, 463 U.S. 880 (1983)

Many capital punishment statutes permit jurors to consider evidence of a convicted capital murderer's "future dangerousness." In those jurisdictions, prosecutors often argue that the defendant should be executed because he is likely to commit more acts of violence and thus poses an ongoing danger to society. Evidence supporting such arguments includes such things as the defendant's recidivism, prison violence, and lack of remorse. The particular circumstances of the capital crime may suggest future dangerousness as

well. But the most controversial evidence of future dangerousness is expert psychological and psychiatric testimony.

The validity of such testimony came under attack in the case of *Barefoote v. Estelle*, 463 U.S. 880 (1983). What is remarkable about the Supreme Court's opinion is that it approved of expert testimony on future dangerousness even though the overwhelming consensus among mental health experts regards such predictions as highly dubious. Most notable among the critics of future dangerousness testimony was, and still is, the American Psychiatric Association (APA). Empirical studies indicate that expert predictions of future dangerousness are wrong two out of three times. The Court brushed this and other concerns aside, reasoning instead that so long as future dangerousness is a valid factor for receiving the death penalty, jurors may hear the views of testifying mental health professionals. If lay jurors must assess future dangerousness, the Court explained, then "it makes little sense, if any, to submit that psychiatrists, out of the entire universe of persons who might have an opinion on the issue, would know so little about the subject that they should not be permitted to testify."

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References and Further Reading

The American Psychological Association Task Force on the Role of Psychology in the Criminal Justice System. *American Psychologist* 33 (1978): 1099. Reprinted in John Monahan, ed., *Who Is the Client? The Ethics of Psychological Intervention in the Criminal Justice System*. Washington, D.C.: American Psychological Association, 1980.

Carter, Linda E., and Ellen Kreitzberg. *Understanding Capital Punishment Law*. Newark, NJ: LexisNexis, 2004.

See also **Capital Punishment; Capital Punishment and Race Discrimination; Capital Punishment and Equal Protection Clause Cases; Capital Punishment: Eighth Amendment Limits; Capital Punishment: Due Process Limits**

BARENBLATT v. UNITED STATES, 360 U.S. 109 (1959)

In 1954, Lloyd Barenblatt was subpoenaed by the House Committee on Un-American Activities (HUAC), which was investigating communist activities and organizations. Barenblatt refused to say if he was a member of the Communist Party or had belonged to the Communist Party's Haldene Club while a graduate student at the University of

Michigan. He was convicted in federal court of contempt of Congress, fined \$250, and sentenced to six months in prison. He appealed the conviction, arguing that HUAC had violated his freedoms of thought, speech, press, and association. He added that, regardless of how he answered HUAC's questions, his social standing and ability to earn a living would be jeopardized. In 1959, a five-to-four majority of the Supreme Court rejected Barenblatt's arguments and reaffirmed his conviction.

The stage for the *Barenblatt* decision had been indirectly set by two 1957 decisions. In *Watkins v. United States*, the Court overturned a conviction for contempt of Congress for another communist sympathizer who had refused to answer HUAC's questions. In *Yates v. United States*, the Court ordered the acquittal of five communist defendants and sent back to the lower courts the cases of nine others in prosecutions under the federal Smith Act. Anticommunist conservatives were outraged by the decisions and dubbed June 17, 1957, the day on which both decisions were rendered, "Red Monday." Senator William Jenner of Indiana even introduced a bill to limit the Court's power to decide loyalty and subversion appeals.

The majority of the Court in *Barenblatt* retreated from *Watkins*, helped protect existing appellate jurisdiction, and to some extent defused political criticism. The authority of HUAC to conduct its investigation, Justice John Marshall Harlan II said, was unassailable, and it was indeed a violation of federal law when Barenblatt refused to answer. Furthermore, Harlan added, the balance between the individual and the government must be struck in favor of the government.

Dissenting justices were more sensitive to the civil liberties issues raised by the case. Justice Hugo Black, in a dissent joined by Chief Justice Earl Warren and Justice William O. Douglas, asserted that HUAC's goal was less investigative than judicial. HUAC wanted to try and punish suspected communists, but congressional committees did not have these judicial powers. Black also insisted that First Amendment protections were not to be balanced against government interests. "Ultimately all the questions in this case" he said, "really boil down to one—whether we as a people will try fearfully and futilely to preserve democracy by adopting totalitarian methods or whether in accordance with our traditions and our Constitution we will have the confidence and courage to be free."

In retrospect, the facts in *Barenblatt* illustrate the way that HUAC and other governmental bodies might disregard civil liberties while engaging in exposure

for exposure's sake. The Supreme Court's tolerance for such activity, meanwhile, illustrates its own susceptibility to the anticommunist political hysteria of the 1950s.

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References and Further Reading

- Alfange, Dean, *Congressional Investigations and the Fickle Court*, University of Cincinnati Law Review 30 (1961): 113–71.
 Kutler, Stanley I. *The American Inquisition: Justice and Injustice in the Cold War*. New York: Hill & Wang, 1982.
 Rohr, Marc, *Communists and the First Amendment: The Shaping of Freedom of Advocacy in the Cold War Era*, San Diego Law Review 28 (1991): 1–116.

Cases and Statutes Cited

- Watkins v. United States*, 354 U.S. 178 (1957)
Yates v. United States, 354 U.S. 298 (1957)

See also Communism and the Cold War; Vagueness and Overbreadth in Criminal Statutes; Warren Court

BARNES v. GLEN THEATRE, INC., 501 U.S. 560 (1991)

Nude dancing as an issue in earlier cases occurred in the context of alcohol regulations, such as *California v. LaRue* (1972), or zoning laws as in *Schad v. Mt. Ephraim* (1981). Although *LaRue*, in passing, suggested that nude dancing under certain circumstances might be “expressive conduct” entitled to some degree of First Amendment protection, *Barnes* is the first time that the Supreme Court directly confronted this issue. The question that emerges is whether nude dancing, if it is expressive conduct and not obscene, can be regulated without infringement on the First Amendment.

Indiana's public indecency law prohibited nudity in public places, and if individuals danced in the nude they were compelled to wear pasties and g-strings. Two establishments, The Kitty Kat Lounge and the Glen Theatre, wanted to provide totally nude dancing and together with one of the dancers challenged the law. The Court of Appeals for the Seventh Circuit declared nonobscene nude dancing performed as entertainment to be an expressive activity, protected by the First Amendment, and struck down Indiana's law.

In a five-to-four decision reversing the Court of Appeals' judgment, the members of the majority wrote three separate opinions. Rehnquist, O'Connor,

and Kennedy, forming a plurality, stated that “nude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment, although we view it as only marginally so.” As expressive conduct falling within the ambit of the First Amendment, the standard for review depended on whether the law comported with the four-part test developed in *United States v. O'Brien* (1968) that wrestled with communicative conduct (in this instance, burning a draft card) or symbolic speech that combined both speech and nonspeech. Applying this test, the three justices concluded Indiana's statute passed Constitutional muster “despite its incidental limitations on some expressive activity” because it did not target nude dancing per se and because of the state's superior interest in “protecting societal order and morality.”

Scalia disagreed that Indiana's law implicated the First Amendment, and thus rejected the rationale of the plurality opinion. In his view, Indiana's law was a general law not specifically directed at expression or prohibiting conduct because of its particular communicative attributes. He favorably quotes the dissenting judge in the lower court who, arguing the law did not regulate dancing but public nudity, noted that “[a]lmost the entire domain of Indiana's statute is unrelated to expression, unless we view nude beaches and topless hot dog vendors as speech.” Scalia accordingly disagreed that more than normal scrutiny of the law was required or that the O'Brien test was appropriate.

The inability of the five justices to agree on why Indiana's law was constitutional was met with confusion in the lower courts. Thus, in 2000, the Supreme Court tried a second time to gather a majority around a definitive common rule to guide states and localities on the issue of public nudity statutes. *City of Erie v. Pap's A.M.* (2000) sustained *Barnes* and upheld the constitutionality of Erie's anti-nudity ordinance, which was nearly identical to Indiana's, but, once again, only a plurality (O'Connor, Rehnquist, Kennedy, and Breyer) coalesced around *Barnes* and its reasoning, while Souter, Scalia, and Thomas, the other members of the majority (Stevens and Ginsburg dissented) concurred only in the judgment.

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Cases and Statutes Cited

- Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991)
California v. LaRue, 409 U.S. 109 (1972)
City of Erie v. Pap's A.M., 529 U.S. 277 (2000)
Schad v. Mt. Ephraim, 452 U.S. 61 (1981)
United States v. O'Brien, 391 U.S. 367 (1968)

BARRON v. BALTIMORE, 32 U.S. 243 (1833)

Barron v. Baltimore was an appeal to the Supreme Court from the Court of Appeals of Maryland, upon a writ of error through Section 25 of the Judiciary Act of 1789, on the grounds that a state action had violated the U.S. Constitution. The suit was begun by John Barron to recover damages from the city of Baltimore, which in paving streets and diverting streams had allegedly made his wharf useless from a buildup of sand that made the water too shallow for ships. Barron claimed that Baltimore's actions violated the takings clause in the Fifth Amendment, which stated "nor shall private property be taken for public use without just compensation." This raised the question of whether the Fifth Amendment and in general the Bill of Rights restricted the states as well as the federal government.

The Marshall Court answered in the negative, denying that it had jurisdiction and stating that the Bill of Rights did not apply to the states. In the opinion of the Court, Chief Justice John Marshall reasoned first, that in America the sovereign people through state constitutions empowered and restricted state governments and through the U.S. Constitution empowered and restricted the federal government. Unless expressly stated otherwise, the Constitution, including amendments to it, referred only to the federal government. Second, through textual analysis of the Constitution, Marshall compared the Bill of Rights to Sections 9 and 10 in Article I. Section 9, which he called a brief bill of rights with restrictions on the federal government, used general language. Section 10, which earlier in *Fletcher v. Peck* he called a brief bill of rights with restrictions on the states, clearly and expressly referred to only the states with each clause beginning with "No State shall." The first ten amendments are mostly in general language similar to Section 9. Third, he observed, "it is universally understood, it is a part of the history of the day" that during the ratification debate the Anti-Federalists demanded a bill of rights, almost every ratifying convention recommended amendments, and Congress proposed and the states ratified a bill of rights with safeguards against the new federal government, not the states.

Marshall's arguments are reinforced by the speeches in the First Congress by James Madison, the main author of the Bill of Rights, who proposed that the amendments be placed within the Constitution, mostly in the Article I, Section 9 restrictions on the federal government. Also, an amendment he proposed that would expressly apply to the states, which he wanted in the Section 10 restrictions on the states, failed to pass.

While there had been some discussion prior to the case, *Barron* settled in the courts that the Bill of Rights did not apply to the states, and, despite criticism by the abolitionists, the doctrine was maintained by the Court through to the Fourteenth Amendment, which used the language in Section 10 clearly expressing, "No state shall . . ." Through this amendment, by the Warren Court era, through a process of incorporation, the Court has applied most of the Bill of Rights to the states.

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References and Further Reading

- Amar, Akhil Reed. *The Bill of Rights: Creation and Reconstruction*. New Haven, CT: Yale University Press, 1998.
- Ely, James W., Jr. *The Guardian of Every Other Right: A Constitutional History of Property Rights*. 2nd ed. New York: Oxford University Press, 1998.
- Johnson, Herbert A. *The Chief Justiceship of John Marshall, 1801–1835*. Columbia: University of South Carolina Press, 1997.
- White, G. Edward. *The Marshall Court and Cultural Change, 1815–1835*. New York: Oxford University Press, 1991.

Cases and Statutes Cited

Fletcher v. Peck, 6 Cranch 87 (1810)

See also Abolitionists; Application of First Amendment to States; Bill of Rights: Structure; Fourteenth Amendment; Incorporation Doctrine; Madison, James; Marshall, John; Marshall Court; Takings Clause (V); Warren Court

BARTKUS v. ILLINOIS, 359 U.S. 121 (1959)

In this decision, the Supreme Court upheld a state conviction following federal acquittal for the same crime, ruling that the so-called "double jeopardy clause" of the Fifth Amendment, which bars multiple convictions for the same crime, did not apply to the states. Alfonse Bartkus was tried in federal court for robbing a federally insured bank and acquitted, but he was later convicted in Illinois state court for the same crime and sentenced to life in prison. The defendant challenged his conviction on the grounds that the Fourteenth Amendment's due process guarantees disallowed multiple trials for the same crime. The Court declared that the Fourteenth Amendment's due process clause did not apply any of the first eight amendments to the states, and thus the ban against multiple prosecutions—the double jeopardy

clause of the Fifth Amendment—did not apply to state courts. The Court relied on historical and federalist arguments that states were intended to remain separate from the federal government, beginning with their own constitutions, and their legal systems should be independent as well. Applying this “dual sovereignty” doctrine meant that the same crime could nevertheless be considered a separate offense in federal and state systems. The Court also relied on prior case law, in the Supreme Court and the states, upholding successive federal and state prosecutions, and invoked policy arguments that banning dual state and federal prosecutions would hinder states’ ability to protect themselves against crime. The strong dissent in this case argued that double prosecutions are contrary to the historical and moral precedents of civilized society.

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References and Further Reading

- Dawson, Michael A., *Note: Popular Sovereignty, Double Jeopardy, and the Dual Sovereignty Doctrine*, Yale Law Journal 102 (1992): 46:281–303.
- Lopez, Dax Eric, *Note: Not Twice for the Same: How the Dual Sovereignty Doctrine Is Used to Circumvent Non Bis In Idem*, Vanderbilt Journal of Transnational Law 33 (2000): 1263–303.
- “Selective Preemption: A Preferential Solution to the Bartkus–Abbate Rule in Successive Federal–State Prosecutions.” *The Notre Dame Lawyer* 57 (1981): 340–63.

See also Double Jeopardy (V): Early History, Background, Framing; Double Jeopardy: Modern History; Due Process; Due Process of Law (V and XIV); Fourteenth Amendment; Substantive Due Process

BARTNICKI v. VOPPER, 532 U.S. 514 (2001)

Plaintiffs, a union president and a chief negotiator, had a cellular phone conversation in which threats were made against school board members. An unknown third party intercepted and taped the conversation, and left a copy with a local activist. The activist gave copies to the local media, which disclosed the contents to the public.

Plaintiffs sued the activist and media outlets under federal and Pennsylvania wiretap laws prohibiting the disclosure of an electronic communication when a party knows or has reason to know that the communication was unlawfully intercepted. The Supreme Court assumed that the defendants violated the statutes.

The sole question was whether the First Amendment barred the statutes’ application on the specific facts of these cases.

Justice Stevens, joined by five other justices, concluded that the plaintiffs’ actions were barred. He began by characterizing the wiretap laws as content neutral, but then emphasized that the publication of lawfully obtained truthful information about a matter of public concern could not be punished “absent a need . . . of the highest order” (quoting *Smith v. Daily Mail Publishing Co.* [1979]). He found the government’s interest in deterring unlawful interceptions to be inadequate, noting that the government could further this interest more directly by punishing interceptors and not law-abiding possessors who disclose the information. By contrast, he characterized the government’s interest in protecting privacy of communication as “important,” recognizing that “fear of public disclosure of private conversations might well have a chilling effect on private speech.” Stevens suggested that this interest in protecting privacy and fostering private speech might justify disclosure prohibitions in most cases. But in this instance, he found the interest outweighed by the competing interest in having truthful information about a matter of public concern published. In reaching this narrow result, Stevens avoided the larger question of whether a party who himself unlawfully obtained truthful information could be punished for publishing the information and not merely for its unlawful acquisition. Justice Breyer, in a concurrence joined by Justice O’Connor, emphasized that he joined the majority’s opinion only because the speakers’ legitimate privacy expectations were “unusually low,” and the public’s interest in publication was “unusually high.”

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References and Further Reading

- Fishman, Clifford S., *Technology and the Internet: The Impending Destruction of Privacy by Betrayers, Grudgers, Snoops, Spammers, Corporations, and the Media*, George Washington Law Review 72 (2004): 1503.
- Huhn, Wilson R., *Assessing the Constitutionality of Laws that Are Both Content-Based and Content-Neutral: The Emerging Constitutional Calculus*, Indiana Law Journal 79 (2004): 801.
- Terrell, Timothy P., and Anne R. Jacobs, *Privacy, Technology, and Terrorism: Bartnicki, Kyllo, and the Normative Struggle Behind Competing Claims to Solitude and Security*, Emory Law Journal 41 (2002): 1469.
- Volokh, Eugene, *Freedom of Speech and Intellectual Property: Some Thoughts After Eldred, 44 Liquormart, and Bartnicki*, Houston Law Review 40 (2003): 697.

**BATES v. STATE BAR OF ARIZONA,
433 U.S. 350 (1969)**

Two recent law graduates opened a law practice, which they called the “Legal Clinic of Bates and O’Steen.” The lawyers placed a print ad in a local newspaper, which asked “Do You Need a Lawyer?” and offered “Legal Services at Very Reasonable Fees.” The ad then listed the fees for certain routine legal services. The state bar brought a disciplinary proceeding against the two for violating a state rule of professional conduct that flatly prohibited any mass media advertising.

The Arizona Supreme Court upheld the sanction against the lawyers, reasoning that the advertising rule did not violate either federal anti-trust laws or the First Amendment (*In re Bates and O’Steen*). The U.S. Supreme Court agreed to review this decision, having decided in the previous term that a rule restricting the advertising of prescription drug prices was an unconstitutional limitation on the free flow of information about the availability and price of commercial services (*Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*).

The Court held that the protection for commercial speech applied to advertising by lawyers, and that the Arizona rule was unconstitutionally broad. Although the law is traditionally said to be a profession, not a “mere” business, there is no reason for lawyers to pretend that they are not interested in earning fees for their work. Moreover, advertising need not be inherently misleading or deceptive. Four dissenting justices argued that there should be some distinction between advertising for products, such as prescription drugs, and professional services.

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Cases and Statutes Cited

Bates v. Arizona State Bar, 433 U.S. 350 (1977)
In re Bates and O’Steen, 555 P.2d 640 (Ariz. 1976)
Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976)

See also **Commercial Speech; Lawyer Advertising; *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976)**

**BATSON v. KENTUCKY, 476
U.S. 79 (1986)**

In *Batson v. Kentucky*, the Supreme Court addressed how a criminal defendant can establish that a prosecutor used a peremptory challenge against a prospective juror of the defendant’s race on the basis of race.

The Court had previously in a 1965 case, *Swain v. Alabama*, recognized that a state’s exercise of such a race-based peremptory challenge was unconstitutional under the equal protection clause. *Swain*, however, had imposed a virtually insurmountable evidentiary burden, in that a defendant needed to show a repeated pattern of discriminatory strikes across several cases in order to prevail.

The *Batson* defendant, an African American, was convicted of burglary and receipt of stolen goods by an all-white jury. The record showed that the prosecutor had used four out of six peremptory challenges to strike all of the African Americans from the venire. The defendant had moved to discharge the jury on the basis that the prosecutor’s use of peremptory challenges violated both the equal protection clause in the Fourteenth Amendment and the defendant’s Sixth Amendment right to a jury drawn from a fair cross-section of the community, as incorporated against the states by the Fourteenth Amendment. The trial court denied the motion without granting a hearing, and the Kentucky Supreme Court affirmed the conviction. On appeal, the defendant conceded that *Swain* precluded an equal protection claim based only on the peremptory challenges exercised in his own case.

Justice Powell, writing for the Court, overruled this part of *Swain*. The opinion outlined a three-step procedure drawn from other equal protection cases such as *Washington v. Davis* and modeled on several state court decisions. In the first step, the defendant must raise an inference that the prosecutor exercised a peremptory challenge on the basis of race. Such an inference could be drawn from all relevant circumstances, such as the prosecutor’s pattern of strikes, questions to the venire, or statements to the court.

In the second step, the burden of production—but not the burden of proof or persuasion—shifts to the prosecutor to supply a race-neutral reason. Later cases, in particular *Purkett v. Elem.*, clarified that this was a formalistic step, in that any reason, even those that are “implausible,” “fantastic,” “silly,” or “superstitious,” would be adequate to survive step two, so long as the reason was facially neutral. Mere denials of discriminatory motivation or affirmations of good faith, however, remain inadequate.

In the third step, the judge determines whether the defendant has established the prosecutor’s “purposeful discrimination.” Whether purposeful discrimination requires subjective discriminatory intent, and if so, whether it is sufficient, remains unclear. In any event, the Supreme Court has stated in cases such as *Miller-El v. Cockrell* that the decisive question will be the prosecutor’s credibility. If the judge believes the neutral explanation, no matter how trivial, then the peremptory challenge must be sustained.

In an important concurrence, Justice Marshall objected that the Court's *Batson* framework would not end racial discrimination in jury selection. He advocated instead the complete elimination of peremptory challenges. Chief Justice Burger argued in dissent that the Court's decision had effectively ended the peremptory challenge because articulating a neutral explanation would be difficult.

The Sixth Amendment claim that a prosecutor's use of peremptory challenges might deny the defendant a jury representative of a cross-section of the community was finally rejected in *Holland v. Illinois* on the grounds that the Sixth Amendment was intended to ensure an impartial jury rather than a representative jury.

Batson was later expanded in *Powers v. Ohio* so that defendants could object to the exclusion of jurors of other races as well as their own race. *Batson* was extended to civil litigants in *Edmonson v. Leesville Concrete Co.*, criminal defense counsel in *Georgia v. McCollum*, and to prevent peremptory challenges made on the basis of gender in *J.E.B. v. Alabama ex. rel. T.B.* The Supreme Court also stated in dicta in *United States v. Martinez-Salazar* that a peremptory challenge may not be exercised on the basis of ethnic origin. As the reach of *Batson* has expanded, the Court has clarified that the primary concern is the violation of the excluded juror's equal protection right rather than solely the rights of the litigants.

The bulk of academic commentary and empirical studies suggests that *Batson* has failed to eliminate the use of race as a factor in jury selection. Much of this commentary focuses on how dishonest lawyers can easily survive a *Batson* challenge by providing false but neutral reasons for their challenges. Commentators also note that limited misuse of peremptory challenges is unlikely to be discovered. *Batson* has, however, undoubtedly reduced the most egregious uses of race and gender in jury selection.

ANTONY PAGE

References and Further Reading

- Altschuler, Albert W., *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, University of Chicago Law Review 56 (Winter 1989): 153–233.
- Cavise, Leonard L., *The Batson Doctrine: The Supreme Court's Utter Failure to Meet the Challenge of Discrimination in Jury Selection*, Wisconsin Law Review 1999 (1999): 501–52.
- Melilli, Kenneth J., *Batson in Practice: What We Have Learned About Batson and Peremptory Challenges*, Notre Dame Law Review 71 (1996): 447–503.
- Muller, Eric L., *Solving the Batson Paradox: Harmless Error, Jury Representation, and the Sixth Amendment*, Yale Law Journal 106 (October 1996): 93–150.

Page, Antony, *Batson's Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, Boston University Law Review 85 (2005): 155–263.

Cases and Statutes Cited

- Batson v. Kentucky*, 476 U.S. 79 (1986)
- Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991)
- Georgia v. McCollum*, 505 U.S. 42 (1992)
- Hernandez v. New York*, 500 U.S. 352 (1991)
- Holland v. Illinois*, 493 U.S. 474 (1990)
- J.E.B. v. Alabama ex. rel. T.B.*, 511 U.S. 127 (1994)
- Miller-El v. Cockrell*, 537 U.S. 322 (2003)
- Powers v. Ohio*, 499 U.S. 400 (1991)
- Purkett v. Elem.*, 514 U.S. 765 (1995)
- Swain v. Alabama*, 380 U.S. 202 (1965)
- United States v. Martinez-Salazar*, 528 U.S. 304 (2000)
- Washington v. Davis*, 426 U.S. 229 (1976)

See also **Equal Protection of Law (XIV)**; *Holland v. Illinois*, 493 U.S. 474 (1990); **Jury Selection and Voir Dire**; **Jury Trials and Race**; **Race and Criminal Justice**; *Swain v. Alabama*, 380 U.S. 202 (1965)

BEAL v. DOE, 432 U.S. 438 (1977)

Indigents who were eligible for financial assistance under Title XIX of the Social Security Act's Medicaid program challenged a Pennsylvania statute that denied funding for their desired abortions. The state law limited such support to those abortions that were certified by physicians as medically or psychiatrically necessary.

According to the U.S. Supreme Court in *Beal v. Doe*, the only question was whether Title XIX required states to fund the cost of all abortions, including those that were elective. In ruling for the state limitation, Justice Powell reasoned that the language of the congressional statute did not specifically mention abortions and did not suggest that participating states were required to fund every medical procedure. States, he said, were only required to meet certain standards for determining eligibility under a plan that was consistent with the overall objectives of Medicaid. Next, he noted that in *Roe v. Wade*, the Court had expressly recognized the "important and legitimate interest [of the state] in protecting the potentiality of human life." He also found supporting history in the fact that when Title XIX was passed in 1965, nontherapeutic abortions were illegal in most states. Finally, he deferred to the interpretation of the law by the Department of Health, Education, and Welfare, the federal agency responsible for its administration, which was akin to the Court's rendition.

Beal was one of three cases that posed direct legislative challenges to the highly controversial abortion case, *Roe v. Wade*, decided just four years earlier. One

of the most direct and effective state and local strategies for curbing the availability of abortions following *Roe* was simply to deny public funding and/or the use of public hospitals and facilities for the procedure. The leading case, *Maier v. Roe*, established that although women have a fundamental constitutional right to decide whether to have an abortion, there was no corresponding obligation on the part of state and local governments to provide funding for them. *Maier* upheld Connecticut's refusal to reimburse Medicaid recipients for the cost of an abortion unless a doctor certified that it was medically or psychiatrically necessary. In the third case, *Poelker v. Doe*, the Court voted to sustain the St. Louis, Missouri, policy of denying indigent pregnant women access to nontherapeutic abortions in the city's public hospitals.

These rulings were later reaffirmed in *Harris v. McRae*, when the Court upheld congressional restrictions on federal funding for abortions, and in *Webster v. Reproductive Health Services*, sustaining Missouri's 1986 ban on the use of public hospitals, facilities, and employees for the elective procedure. After more than a decade in which the Supreme Court legitimated governmental policies denying funding and the use of public hospitals for nontherapeutic abortions, there remained, in 1989, thirteen states with no restrictions on funding. Thirty-one states passed laws denying support for indigent women.

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References and Further Reading

- Baer, Judith A. *Historical and Multicultural Encyclopedia of Women's Reproductive Rights in the United States*. Westport, CT: Greenwood, 2001.
- Bond, Jon R., and Charles A. Johnson. "Implementing a Permissive Policy: Hospital Abortion Services after *Roe v. Wade*." *American Journal of Political Science* 26 (1982): 1-24.
- Craig, Barbara Hinkson, and David M. O'Brien. *Abortion and American Politics*. Chatham, NJ: Chatham House, 1993.
- Hull, N.E.H., and Peter Charles Hoffer. *Roe v. Wade: The Abortion Rights Controversy in American History*. Lawrence: University Press of Kansas, 2001.

Cases and Statutes Cited

- Harris v. McRae*, 448 U.S. 297 (1980)
- Maier v. Roe*, 432 U.S. 464 (1977)
- Poelker v. Doe*, 432 U.S. 519 (1977)
- Roe v. Wade*, 410 U.S. 113 (1973)
- Webster v. Reproductive Health Services*, 492 U.S. 490 (1989)

See also *Harris v. McRae*, 448 U.S. 297 (1980); *Maier v. Roe*, 432 U.S. 464 (1977); *Poelker v. Doe*, 432 U.S. 59 (1977); *Roe v. Wade*, 410 U.S. 113 (1973); *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989)

BEAUHARNAIS v. ILLINOIS, 343 U.S. 250 (1952)

In *Beauharnais v. Illinois*, the U.S. Supreme Court upheld the validity of a 1917 Illinois group libel statute, finding that such speech fell outside the protections of the First Amendment. Speaking for a divided Court, Justice Frankfurter's majority opinion drew on the reasoning in *Chaplinsky v. New Hampshire* wherein libel was excluded from Constitutional protection, and on *Cantwell v. Connecticut* for the authority of states to punish speech that would "incite violence and breaches of the peace." Subsequent decisions, however, have cast doubt on the continuing validity of the Court's decision in *Beauharnais*.

Joseph Beauharnais, president of the White Circle League of America, was arrested and convicted for distributing leaflets calling for a halt to the "further encroachment, harassment and invasion of white people, their property, neighborhoods and persons by the Negro . . .", and further claiming that whites were in danger of being "mongrelized" by "the Negro." The Illinois law, passed against the backdrop of deadly race riots in that state, made it illegal to manufacture, sell, distribute, or exhibit anything that defames a class of citizens when such publication would expose a member of such group to "contempt, derision, or obloquy or which is productive of breach of the peace or riots."

Noting that the Illinois Supreme Court characterized Beauharnais's words as "liable to cause violence or disorder" and that one traditional basis of criminal libel law was to punish words likely to cause a breach of the peace, Justice Frankfurter's deference to the legislature in this case was colored by the state's acknowledged long history of racial strife. The opinion extended the scope of unprotected speech from libelous statements made against individuals to an entire race, class, or group of citizens, since it would be "arrant dogmatism . . . for [the Court] to deny that the Illinois legislature may warrantably believe that a man's job and his educational opportunities and the dignity accorded him may depend as much on the reputation of the racial and religious group to which he willy-nilly belongs, as on his own merits."

The majority opinion was met with four dissents, including Justice Black whose expansive interpretation of the First Amendment led him to criticize the Court's reliance on *Chaplinsky*, confining the decision to face-to-face encounters directed at individuals, and to attack the Illinois law as overly broad and tantamount to "censorship." Justice Douglas warned of the dangers of allowing legislatures to determine which kinds of speech may be proscribed, as "[t]oday a white man stands convicted for protesting in

unseemly language against our decisions invalidating restrictive covenants. Tomorrow a Negro will be ha[u]led before a court for denouncing lynch law in heated terms.”

Just as the Supreme Court seemed to uphold the validity of group libel laws, proponents of group libel legislation turned their focus away from prohibiting group defamation and towards bolstering freedom of expression and individual rights. The dissenters in *Beauharnais* proved to foreshadow the future direction of Supreme Court First Amendment jurisprudence, which expanded the protections afforded offensive speech in such cases as *Brandenburg v. Ohio* and *Cohen v. California*. Moreover, *New York Times Co. v. Sullivan* and *Collin v. Smith* cast doubt on the presumption of damage to the individual members of a group from criticism of a group, while the latter case also undermined the view that “fighting words need not be used in a personally abusive manner when they consist of language which defames a race or religion.” As such, the *Beauharnais* decision appears eclipsed by decisions more protective of provocative speech, and its precedential value damaged if not completely diluted.

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References and Further Reading

- Banks, Taunya Lovell, *What Is a Community? Group Rights and the Constitution: The Special Case of African Americans*, *Margins Law Journal* 1 (Spring 2001): 51.
- Eastland, Terry, ed. *Freedom of Expression in the Supreme Court: The Defining Cases*. New York: Rowman & Littlefield Publishers, Inc., 2000.
- Schultz, Evan P., *Group Rights, American Jews and the Failure of Group Libel Laws, 1913–1952*, *Brooklyn Law Review* 66 (Spring 2000): 71.
- Walker, Samuel. *Hate Speech: The History of an American Controversy*. Lincoln: University of Nebraska Press, 1994.

Cases and Statutes Cited

- Brandenburg v. Ohio*, 395 U.S. 444 (1969)
- Cantwell v. Connecticut*, 310 U.S. 296 (1940)
- Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942)
- Cohen v. California*, 403 U.S. 15 (1971)
- Collin v. Smith*, 447 F.Supp. 676 (N.D. Ill. 1978)
- New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)

BECKER AMENDMENT

The Becker amendment was one of the more significant congressional attempts to overturn an unpopular holding of the U.S. Supreme Court. Congressman Frank Becker (R-NY) introduced the prayer and

bible reading amendment of 1964, or “Becker amendment,” in response to two controversial Supreme Court decisions outlawing organized prayer and Bible reading in the nation’s public schools. Initially, when introduced, the Becker amendment had substantial congressional support and passage appeared likely. Ratification by three-fourths of the states seemed assured. The proposal stalled in legislative committee, however, and eventually died without a vote, primarily as a result of opposition from the religious community.

The impetus behind the Becker amendment lay in the public reaction to two Supreme Court decisions in 1962 and 1963. During the early 1960s, approximately one-half of the nation’s public schools conducted either daily or weekly religious exercises, often in the form of a short reading from the Bible (usually from the Protestant King James version) and a prayer given over the schools’ public address systems. Such “non-sectarian” exercises had been controversial since the mid-nineteenth century, particularly among Catholics, Jews, and other non-Protestants. Although a handful of state supreme courts had struck down such practices over the years, the majority of challenges had failed. In 1962, the U.S. Supreme Court heard a challenge to a New York law requiring public school students to repeat daily the following prayer, written by the state board of regents: “Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessing upon us, our parents, our teachers and our country.” In an eight-to-one decision, *Engel v. Vitale*, the Court struck down the practice as a violation of the establishment clause, writing that “government should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance.”

The *Engel* decision unleashed a public outcry, with public officials and religious leaders condemning the holding. In the weeks following the *Engel* decision, approximately seventy members of Congress, including Congressman Becker, introduced proposed constitutional amendments to permit religious exercises in public schools. The Senate Judiciary Committee held hearings on the proposals in July 1962, but took no action; by then the Court had granted review on two cases that considered the constitutionality of daily Bible readings and recitations of the Lord’s Prayer. The following year, in *Abington Township School District v. Schempp* and *Murray v. Curlett*, the high court struck down the practices by the same eight-to-one vote.

The public outcry in reaction to the *Schempp* and *Murray* decisions was greater than had occurred

following *Engel*. Evangelist Billy Graham and Catholic Bishop Fulton J. Sheen condemned the holdings, while Senator Strom Thurman called the decisions “another major triumph of secularism and atheism which are bent on throwing God completely out of our national life.” The *Schempp* and *Murray* decisions provided renewed momentum for amendment proponents. Prior to the 1963 decisions, House Judiciary Committee Chair Emanuel Celler had opposed the proposed amendments and had refused to schedule a hearing. By the spring of 1964, Congressman Becker had gathered over 170 of the needed 218 signatures to have his proposed amendment discharged from the House Judiciary Committee, forcing Celler to hold hearings.

The final language of the Becker amendment, compiled from the various proposals, provided in part:

Nothing in this Constitution shall be deemed to prohibit the offering, reading from, or listening to prayers or biblical scriptures, if participation therein is on a voluntary basis, in any governmental or public school. . . . Nothing in this Constitution shall be deemed to prohibit making reference to belief in, reliance upon, or invoking the aid of God or a Supreme Being in any governmental or public document, proceeding, activity, currency, school [or] institution . . .

Congressman Becker worked tirelessly to build support for the amendment, and found natural allies among evangelical groups. Groups such as the National Association of Evangelicals and the fundamentalist International Council of Christian Churches organized grassroots support and sent their officials to testify in favor of the proposed amendment. Working in Becker’s favor was the fact that few members of Congress wanted to go on record as opposing prayer and Bible reading in the public schools.

Opponents of the proposed amendment, including the American Civil Liberties Union, Americans United for Separation of Church and State, the American Jewish Congress, and the Anti-Defamation League, recognized that the House Judiciary Committee would likely approve the Becker amendment if it came to a vote. These groups organized a coalition behind the public leadership of the Baptist Joint Committee on Public Affairs and the National Council of Churches (NCC). Rev. Dean Kelley of the NCC, a United Methodist minister, became the spokesperson for the coalition and quietly organized testimony from many of the nation’s religious leaders, including deans of leading seminaries. Most significant, Kelley was able to obtain testimony from several religious leaders with impeccable evangelical credentials. This testimony provided political coverage to wavering members of the committee, enabling

Congressman Celler to allow the proposal to die without a committee vote. What had first appeared to be a significant threat to the First Amendment’s religion clauses was diffused primarily due to the efforts of religious groups.

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References and Further Reading

- Alley, Robert S. *Without a Prayer: Religious Expression in Public Schools*. Amherst, NY: Prometheus Books, 1996.
- DelFattore, Joan. *The Fourth R: Conflicts Over Religion in America’s Public Schools*. New Haven, CT: Yale University Press, 2004.
- Green, Steven K. “Evangelicals and the Becker Amendment: A Lesson in Church–State Moderation.” *Journal of Church and State* 33 (1991): 541–67.
- Phelps Stokes, Anson, and Leo Pfeffer, *Church and State in the United States*. New York: Harper and Row, 1964.

Cases and Statutes Cited

- Engel v. Vitale*, 370 U.S. 421 (1962)
- Murray v. Curlett*, 374 U.S. 203 (1963)
- School District of Abington Township*, 374 U.S. 203 (1963)
- See also Abington Township School District v. Schempp*, 374 U.S. 203 (1963); **Constitutional Amendment Permitting School Prayer; *Engel v. Vitale*, 370 U.S. 421 (1962)**

BELIEF–ACTION DISTINCTION IN FREE EXERCISE CLAUSE HISTORY

One of the central issues in free exercise clause jurisprudence has been the question of whether the state is obliged to give individuals exemptions from government regulations that interfere with their free exercise of religion. In resolving this issue, the U.S. Supreme Court has, for much of its history, distinguished between religious beliefs (which receive considerable protection under the free exercise clause) and religiously motivated conduct (which receives much less protection).

The Supreme Court first articulated the different constitutional protection enjoyed by religious beliefs and religiously motivated conduct in *Reynolds v. United States* (1878), a case involving the constitutionality of a congressional statute governing the Territory of Utah that made it a crime for a “person having a husband or wife living” to marry another person. Pursuant to this statute, George Reynolds, one of the leaders of the Church of Jesus Christ of Latter-Day Saints (the Mormons) whose church

doctrine at that time provided that it was a “duty of male members of said church . . . to practise polygamy,” was prosecuted. The question for the Court in *Reynolds* was “whether religious belief can be accepted as a justification of an overt act made criminal by the law of the land.” In holding that enforcement of the criminal prohibition on plural marriage against Reynolds did not violate the free exercise clause, the Court, with Chief Justice Waite writing, cited Thomas Jefferson for his “belief–action” distinction, which provided that religious *beliefs* and *opinions* enjoy greater protection from governmental interference than do *actions* motivated by religious beliefs and opinions. In his Bill for the Establishment of Religious Freedom, Jefferson had written that to permit “the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy which at once destroys all religious liberty,” but that it is legitimate for the magistrate “to interfere when principles break out into overt acts against peace and good order.” The *Reynolds* Court also cited Jefferson’s famous 1802 letter to the Danbury Baptists in which he wrote: “Believing with you that religion is a matter which lies solely between man and his God; . . . the legislative powers of the government reach actions only, and not opinions.” The Court in *Reynolds* placed great weight on the belief–action distinction articulated by Jefferson:

Coming as this does from an acknowledged leader of the advocates of the [free exercise clause], it may be accepted almost as an authoritative declaration of the scope and effect of the amendment thus secured. Congress was deprived of all legislative power over *mere opinion*, but was left free to reach *actions* which were in violation of social duties or subversive of good order Laws are made for the government of actions, and while they cannot interfere with mere religious *belief and opinions*, they may with *practices* [T]o permit [an exemption] would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself [emphasis added].

Accordingly, the Court enforced the criminal sanction against *Reynolds*.

Since *Reynolds*, the Supreme Court has generally retained the distinction between beliefs and actions when deciding cases under the free exercise clause, generally striking down government regulation of religious *beliefs*. For example, in *Torcaso v. Watkins* (1961), the Court struck down a Maryland constitutional provision that required a “belief in the existence of God” in order to hold public office. The Court concluded that Maryland had “unconstitutionally

invade[d] the appellant’s freedom of belief and religion” by denying him the right to hold public office on account of his nontraditional worldview.

Over the course of the twentieth century, the Court’s protection of religiously motivated *conduct* has varied—at times more protective than the *Reynolds* Court and more recently, about as protective as the *Reynolds* Court.

In *Cantwell v. Connecticut* (1940), the first case in which the Court applied the free exercise clause to state and local governments, the Court, with Justice Owen Roberts writing, reasserted the distinction between “freedom to believe and freedom to act” when evaluating the constitutionality of a criminal prosecution of Jehovah’s Witnesses for their aggressive proselytizing activities. “The first [freedom to believe] is absolute but, in the nature of things, the second [freedom to act] cannot be. Conduct remains subject to regulation for the protection of society.” But the Court went on to say that the “power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom.” In suggesting that some prohibitions on religiously motivated conduct might “unduly infringe” on free exercise rights, the Court invited a “weighing of two conflicting interests”: the state’s interest in “the preservation and protection of peace and good order” and the individual’s interest in engaging in religiously motivated conduct. In sum, the Court in *Cantwell* retained the belief–action distinction, but gave actions greater protection than they had enjoyed during the nineteenth century.

During the 1960s, the Court extended the constitutional protection afforded to religiously motivated conduct under the free exercise clause. In *Sherbert v. Verner* (1963), a Seventh Day Adventist challenged a decision to deny her unemployment benefits following her termination from her job for refusing to work on Saturday, her Sabbath. The Court articulated a new test for assessing whether religiously motivated conduct should be protected under the free exercise clause. The Court determined that if the state imposed a burden on an individual’s *exercise* of her religious belief—here, by denying unemployment benefits—then it must have a “compelling state interest” for so doing. The compelling state interest test offered greater protection under the free exercise clause for religiously motivated conduct than had been previously afforded by the Court. The Court retained this test until its decision in *Employment Division v. Smith* (1990).

In *Employment Division v. Smith*, the Court, in effect, jettisoned the *Sherbert v. Verner* compelling state interest test. *Smith* involved the constitutionality of the denial of unemployment benefits to Native

Americans who were fired from their job for smoking peyote as part of a religious ceremony. The *Smith* Court held that state interference with a person's religiously motivated conduct did not violate the free exercise clause so long as the interference took place pursuant to a neutral, generally applicable regulatory provision. After *Smith*, the state no longer had to justify its interference with religiously motivated conduct by demonstrating a compelling state interest. The Court continues to follow the *Smith* principle today, although both Congress and state legislatures have extended protection to religiously motivated conduct by statute in a number of areas.

Although the Court no longer speaks directly in terms of a "belief–action" distinction under the free exercise clause, it in effect maintains that distinction by affording state interferences with religious belief very high protection, while permitting state interference with religiously motivated conduct so long as the state has proceeded according to a neutral, generally applicable statute and has not acted with animus towards the religiously motivated person.

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References and Further Reading

- Epps, Garrett, *What We Talk About When We Talk About Free Exercise*, Arizona State Law Journal 30 (1998): 563–602.
 Friedelbaum, Stanley H., *Free Exercise in the States: Belief, Conduct, and Judicial Benchmarks*, Albany Law Review 63 (2000): 1059–100.

Cases and Statutes Cited

- Cantwell v. Connecticut*, 310 U.S. 296 (1940)
Employment Division v. Smith, 494 U.S. 872 (1990)
Reynolds v. United States, 98 U.S. 145 (1878)
Sherbert v. Verner, 374 U.S. 398 (1963)
Torcaso v. Watkins, 367 U.S. 488 (1961)

See also Accommodation of Religion; Free Exercise Clause (I): History, Background, Framing; Jefferson Thomas; Jehovah's Witnesses and Religious Liberty; Mormons and Religious Liberty

BELLE TERRE v. BORAAS, 416 U.S. 1 (1974)

When a local government zones, it typically classifies land uses according to use type (residential, commercial, industrial, etc.), and then regulates uses within each classification according to height and density. Residential zones are generally designated as either single-family or multi-family. Zoning ordinances therefore must define the word family for purposes

of regulating the density of residential zoning districts. The Village of Belle Terre, New York, limited all development within its jurisdiction to single-family dwellings, defining the word "family" to mean "one or more persons related by blood, adoption, or marriage, living and cooking together as a single housekeeping unit, exclusive of household servants." A homeowner in the village, who was cited for violating the ordinance when he rented his house to six unrelated college students, challenged the constitutionality of the ordinance, claiming that its definition of family violated constitutional rights of equal protection, privacy, association, and travel. In *Belle Terre v. Boraas*, the Supreme Court upheld the ordinance as a reasonable means of furthering a legitimate public purpose.

Justice Douglas, writing for the majority of the Court, noted the Court's long history of deference to legislative discretion in zoning decisions, citing to its landmark decision in *Euclid v. Ambler Realty Co.*, which sustained the validity of zoning as a legitimate means of furthering the public's interest in protecting single-family uses from the threats to health and safety posed by higher-density uses. Expanding on its holding in *Berman v. Parker*, the Court said that "the police power is not confined to elimination of filth, stench, and unhealthy places"; it is also permissible for cities to "lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people." The Court rejected the argument of the petitioners that it should apply a heightened level of scrutiny because the ordinance infringed on fundamental constitutional rights of privacy and association. Because the Court found that the ordinance was not "aimed at transients," it concluded that no right of travel was implicated. It also found that no right of association was violated since "a 'family' may, so far as the ordinance is concerned, entertain whomever it likes." In answer to the claim that the ordinance intruded into the privacy rights of individuals by discriminating against unmarried couples, the Court found that because two unrelated persons could live together under the ordinance there was no such discrimination.

Justice Marshall dissented from the majority's opinion, believing that the ordinance did violate the plaintiff's fundamental rights of association and privacy. As such the majority's application of a rational basis test was inappropriate. Marshall argued that the ordinance could "withstand constitutional scrutiny only upon a clear showing that the burden imposed is necessary to protect a compelling and substantial governmental interest."

Although the Belle Terre Court was willing to sustain an ordinance regulating the number of unrelated persons who could constitute a "single family,"

two years later, in *Moore v. City of East Cleveland*, it was unwilling to allow local authorities to regulate the number of related persons who could live together in a single-family zone. In the latter case, the Court applied strict scrutiny because the “special sanctity of the family” was at stake.

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References and Further Reading

Ginzburg, Rebecca M., *Altering ‘Family’: Another Look at the Supreme Court’s Narrow Protection of Families in Belle Terre*, Boston University Law Review 83 (2003):2:875–96.
 Juergensmeyer, Julian Conrad, and Thomas E. Roberts. *Land Use Planning and Development Regulation Law*. St. Paul, MN: Thomson West, 2003.
 Mandelker, Daniel R. *Land Use Law*. 5th ed. Newark, NJ: LexisNexis Publishing, 2003.

Cases and Statutes Cited

Berman v. Parker, 348 U.S. 26 (1954)
Euclid v. Ambler Realty Co., 272 U.S. 365 (1926)
Moore v. City of East Cleveland, 431 U.S. 494 (1977)

See also **Family unity for Noncitizens; Privacy**

BELLIS v. UNITED STATES, 417 U.S. 85 (1974)

Isadore Bellis was a partner in a small law firm who received a grand jury subpoena for the financial records of the partnership and sought to resist producing them by asserting his Fifth Amendment self-incrimination privilege. While a custodian of records for a large business cannot assert the privilege after *Hale v. Henkel*, Bellis argued that the law partnership was not an organization separate from its individual partners, and, therefore, the production of the documents was the same as if he were subpoenaed personally.

The Supreme Court held that while the owner of a sole proprietorship can assert the Fifth Amendment in response to a subpoena for records of the business, a custodian of records for a collective entity who holds the documents in a representative capacity cannot assert the self-incrimination privilege. The Court applied its analysis in *United States v. White* that a collective entity is an organization that exists separately from its individual members, and must be relatively well-organized and structured and not merely a loose, informal association of individuals. The law firm had three partners and six other employees, and its records were those of the entire business and not merely of Bellis’s activity alone.

The Court held that “[w]hile small, the partnership here did have an established institutional identity independent of its individual partners.” The analysis in *Bellis* means that even small businesses, so long as they are not sole proprietorships, cannot refuse to produce records in response to a grand jury subpoena.

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References and Further Reading

LaFave, Wayne R., Jerold H. Israel, and Nancy J. King. *Criminal Procedure*. Vol. 3. 2nd ed. St. Paul, MN: Thomson West, 1999.
 Mosteller, Robert P., *Simplifying Subpoena Law: Taking the Fifth Amendment Seriously*, Virginia Law Review 73 (1987): 1:1–110.

Cases and Statutes Cited

Hale v. Henkel, 201 U.S. 43 (1906)
United States v. White, 322 U.S. 694 (1944)

See also **Grand Jury Investigation and Indictment; Hale v. Henkel, 201 U.S. 370 (1906); Self-Incrimination (V): Historical Background**

BELLOTTI v. BAIRD, 443 U.S. 622 (1979)

As soon as the ink was dry on the Supreme Court’s opinion in *Roe v. Wade*, many state legislatures passed laws to limit a woman’s ability to get an abortion, or to at least place hurdles in her way. Some of these laws required that a woman seeking an abortion needed the consent of her husband, or, in the case of an unmarried minor, one or both parents.

These statutes were based on the Court’s statement in *Roe* that states could impose “reasonable” regulation of the performance of abortions, given the state’s “important and legitimate interest in preserving and protecting the health of the pregnant woman.”

One of the first Supreme Court decisions involving this type of post-*Roe* legislation was *Planned Parenthood of Central Missouri v. Danforth*, in which the Court struck down a Missouri statute that required for a woman to get an abortion during the first 12 weeks of pregnancy she needed the consent of her spouse, or, in the case of an unmarried minor, the consent of her parents. The Court said that since *Roe v. Wade* prevented the state from interfering with the woman’s right to obtain an abortion in the first 12 weeks, a state could not grant such a veto to a spouse or a parent.

A Massachusetts post-*Roe* statute provided that an unmarried pregnant minor who wanted an abortion was required to get her parents’ consent. The statute

provided that a minor who was unable to get that consent, or unwilling to seek that consent, could seek a court order allowing the abortion. A judge could grant permission for an abortion “for good cause shown,” despite the absence of parental consent. The Court said that the minor’s ability to get judicial consent was an important constitutional protection of the minor’s rights. However, the Court struck down the requirement that the minor first seek parental consent as an undue burden on her rights.

The Court then distinguished between two classes of minors—those mature enough to make an informed and reasonable decision to have an abortion, and those not so mature. (The Court did not explain how to distinguish between the two.) In the case of a “mature” minor, the Court said that she needed neither her parents’ consent nor that of a judge—such a minor is entitled to the full protection of *Roe v. Wade*.

Minors not mature enough to make informed decisions would be subject to a different set of proceedings. If such a minor persuaded a judge that the abortion was in her best interest, the judge could grant permission without any parental involvement. If the judge is not persuaded that an abortion is in the minor’s best interest, the Court said the judge could deny consent or could require consultation with the parents before making a decision.

Since the Court’s decision in *Bellotti v. Baird* did not completely foreclose parental involvement, the door was left open for further legislative efforts to limit abortions of unmarried minors.

ELI C. BORTMAN

Cases and Statutes Cited

Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976)

Roe v. Wade, 410 U.S. 113 (1973)

See also **Abortion; *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52 (1976); Reproductive Freedom; *Roe v. Wade*, 410 U.S. 113 (1973)**

BENTON v. MARYLAND, 395 U.S. 784 (1969)

The double jeopardy clause of the Fifth Amendment provides that no person shall “be subject for the same offense to be twice put in jeopardy of life or limb.” It provides protection against a second prosecution for the same offense following either an acquittal or conviction, and protects against multiple punishments for the same offense. In *Benton v. Maryland* (1969), the

Supreme Court held that the double jeopardy clause is incorporated into the due process clause of the Fourteenth Amendment and thereby made applicable to the states.

Prior to the adoption of the Fourteenth Amendment, the Supreme Court held that the specific guarantees of the Bill of Rights, the first eight amendments to the Constitution, applied only to the federal government (*Barron v. Mayor of City of Baltimore* [1833]). Thus, at this time, the Bill of Rights was not binding on state and local government. After the adoption of the Fourteenth Amendment in 1868, the question arose whether the Fourteenth Amendment incorporated any or all of the Bill of Rights. The Supreme Court has followed a process of selective incorporation pursuant to which it has determined on a case-by-case basis whether the particular right should be incorporated.

The most well-known test used to determine which rights are incorporated was articulated by Justice Cardozo in *Palko v. Connecticut* (1937). Under *Palko*, incorporation depends on whether the particular right is “of the very essence of a scheme of ordered liberty,” or is “a principle or justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.”

The Court framed the specific issue in *Palko*: Did the state court’s denial of double jeopardy protection “violate those ‘fundamental principles of liberty and justice which lie at the base of all our civil and political institutions?’” The Court held that “[t]he answer surely must be ‘no.’”

Three decades later, the Court in *Benton v. Maryland* reached the opposite result and overruled *Palko v. Connecticut*. By the time *Benton* was decided, the Court’s approach to the incorporation issue had changed. Under *Palko* the Court made a record-specific evaluation in order to determine whether deprivation of the right in issue violated the defendant’s right to due process. In later cases, however, the Court took a wholesale approach and inquired whether the right at issue should be incorporated.

The Court in *Benton* found that the Fifth Amendment protection against double jeopardy is of “the very essence of a scheme of ordered liberty,” a “principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.” In reaching this conclusion, the Court relied upon (1) the historical importance of the double jeopardy protection, as “[i]ts origins can be traced to Greek and Roman times” and was “established in the common law of England long before this Nation’s independence”; (2) state practices: “every State incorporates some form of the prohibition [against double jeopardy] in its constitution or common law”; and

(3) the practical importance of the right, namely, its protection against the “embarrassment, expense and ordeal” and being compelled “to live in a continuing state of anxiety and insecurity” from multiple prosecutions for the same offense.

So, as a result of the decision in *Benton v. Maryland*, the states, like the federal government, must grant individuals protection against double jeopardy.

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References and Further Reading

Chemerinsky, Erwin. *Constitutional Law: Principles and Policies*. 2nd ed. New York: Aspen Law and Business, 2002.

Rotunda, Ronald D., and John E. Nowak. *Treatise on Constitutional Law: Substance and Procedure*. 5 vols. 3rd ed. St. Paul, MN: West Group, 1999.

Cases and Statutes Cited

Barron v. Mayor of City of Baltimore, 32 U.S. 243 (1933)

Benton v. Maryland, 395 U.S. 784 (1969)

Palko v. Connecticut, 302 U.S. 319 (1937)

See also **Double Jeopardy (V): Early History, Background, Framing; Incorporation Doctrine**

BERGER v. NEW YORK, 388 U.S. 41 (1967)

Berger v. New York addressed questions pertaining to the Fourth Amendment. This decision overruled the precedent set by *Olmstead v. United States*. This precedent established in 1928 held that a wiretap was not included in the protections of the Fourth Amendment because there was no seizure of a tangible object. *Berger* addressed this question many decades later when wiretapping was common and new technologies were being introduced.

The petitioner, Ralph Berger, was convicted of conspiracy to bribe the chairman of the New York State Liquor Authority in attempts to obtain a liquor license for a controversial arena. The charges were based on a conversation overheard on a series of telephone wiretaps placed by the District Attorney of New York County. New York State law allowed wiretaps to be placed to obtain evidence if there were reasonable grounds for suspecting evidence of a crime could be obtained. The order to place a wiretap had to specify the person whose telephone conversations were being tapped and the phone number where the wiretap was to be placed. The order would be valid for two months. Berger appealed the decision of the New York Court to the Supreme Court based on the protections of the Fourth Amendment.

BERKEMER v. MCCARTY, 468 U.S. 420 (1984)

The Supreme Court found the New York statute to be too broad and reversed the ruling against Berger. The Court held that authorities must have “probable cause” to obtain evidence of this nature. Authorities would have to specify the crime, place to be searched, and the conversations that needed to be seized. This decision did not seek to end electronic surveillance since it was deemed an acceptable investigation method; rather it sought to apply more supervision to this type of surveillance. After this ruling, conversations were granted the full legal protections of the Fourth Amendment.

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References and Further Reading

Pollack, Harriet, and Alexander Smith. *Civil Liberties and Civil Rights in the United States*. St. Paul, MN: West, 1978.

Powe, Lucas. *The Warren Court and American Politics*. London: Belknap, 2000.

Cases and Statutes Cited

Olmstead v. United States, 277 U.S. 438 (1928)

See also **Electronic Surveillance, Technological Monitoring, and Dog Sniffs; Katz v. United States, 389 U.S. 347 (1967); Search (General Definition); Wiretapping Laws**

BERKEMER v. MCCARTY, 468 U.S. 420 (1984)

An individual is in custody, for purposes of *Miranda v. Arizona*, when a reasonable person in the suspect’s position would have believed himself in custody. In *Berkemer v. McCarty*, the Supreme Court held that during a routine traffic stop a motorist is not in custody for purposes of *Miranda*. In *Berkemer*, a police officer stopped a motorist he observed swerving between lanes on a highway. The officer asked the motorist if he was intoxicated, and the motorist responded that he had consumed two beers and had smoked some marijuana. The police officer then administered a field sobriety test, and when the motorist failed the test the officer arrested him. At the police station, the officer again asked the motorist if he had consumed any alcohol or drugs and the motorist again answered in the affirmative. The officer never administered the *Miranda* warnings to the motorist. The trial court admitted both of the motorist’s admissions of consuming alcohol and drugs.

As a consequence of the Supreme Court’s holding in *Berkemer*, police officers do not need to administer the *Miranda* warnings during routine traffic stops

before asking motorists questions. Thus, although the officer failed to provide the warnings, the Court nevertheless held that the trial court properly admitted the incriminating statements the motorist made because the interrogation was not custodial. Routine traffic stops, which are ordinarily brief and occur in the public view, do not create the police-dominated, coercive environment critical to triggering of the *Miranda* protections.

CANDICE R. VOTICKY

Cases and Statutes Cited

Miranda v. Arizona, 384 U.S. 436 (1966)

See also **Arrest; Coerced Confessions/Police Interrogations; *Miranda* Warning; Seizures; Stop and Frisk**

BETHEL SCHOOL DISTRICT v. FRASER, 478 U.S. 675 (1986)

Does the First Amendment prevent a school district from disciplining a high school student for giving a lewd speech at a school assembly?

On April 26, 1983, Matthew N. Fraser, a high school student, delivered a speech nominating a fellow student for student elective office. In attendance were about 600 high school students, some as young as fourteen years of age, and faculty. During the speech, Fraser referred to his classmate “in terms of an elaborate, graphic, and explicit sexual metaphor” according to the Court. Fraser was given a three-day suspension, and he was removed from the list of candidates to give the commencement speech. Prior to delivering the speech, Fraser had discussed the content of the speech with two of his teachers who informed him that it was “inappropriate and that he probably should not deliver it.” Both teachers also told Fraser that the delivery of the speech might have “severe consequences.”

The Court distinguished its earlier ruling in *Tinker v. Des Moines Independent Community School Dist.* as the lewd speech in this case was disruptive, whereas the students’ actions in *Tinker* were “nondisruptive” and “passive.” The Court further noted the marked distinction between the political “message” of the armbands in *Tinker* and the sexual content of Fraser’s speech. The Court was careful and deliberate in distinguishing the landmark *Tinker* ruling and re-acknowledged the *Tinker* Court’s famous adage that “students do not ‘shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.’” The Court re-affirmed the somewhat unique role of public schools within the larger constitutional

framework and the burden placed on public schools to not only provide substantive education but also to inculcate students with the “fundamental values necessary to the maintenance of a democratic political system.”

The Court also reaffirmed its holding in *New Jersey v. T.L.O.* that the “constitutional rights in public schools are not automatically coextensive with the rights of adults in other settings.”

The Court held that the school district had not violated the First Amendment and had acted “entirely within its permissible authority” in punishing him under school disciplinary rules for his lewd and indecent speech.

Justices Brennan and Blackmun concurred with the majority opinion written by Chief Justice Burger. Justice Marshall dissented from the majority opinion in narrow fashion, asserting specifically that the school district had failed to demonstrate that Fraser’s remarks were actually disruptive while agreeing in principle with Justice Brennan’s concurrence.

Justice Stevens’s dissent focused not on whether the school could govern the type of speech at issue in this case generally but more specifically on whether Fraser was given fair notice of the rule at issue and the consequences of his actions. Stevens’s dissent addressed not the content of the speech but also its context: “It seems fairly obvious that respondent’s speech would be inappropriate in certain classroom and formal social settings. On the other hand, in a locker room or perhaps in a school corridor the metaphor in the speech might be regarded as rather routine comment. If this be true, and if respondent’s audience consisted almost entirely of young people with whom he conversed on a daily basis, can we—at this distance—confidently assert that he must have known that the school administration would punish him for delivering it?”

Fraser is an important case that provides some boundaries to the general notion set forth in *Tinker* that “students do not ‘shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.’” These boundaries take the form of the Court’s attempt to balance students’ right to free speech and expression with the vital need for discipline in the public school environment.

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References and Further Reading

Hudson, David L., and John E. Ferguson, *The Courts’ Inconsistent Treatment of Bethel v. Fraser and the Curtailment of Student Rights*, John Marshall Law Review 36 (Fall 2002): 181.

Slaff, Sara, Silencing Student Speech: *Bethel School District No. 403 v. Fraser*, Note, American University Law Review 37 (Fall 1987): 203.

Cases and Statutes Cited

New Jersey v. T.L.O., 469 U.S. 325 (1985)
Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969)

BETTS v. BRADY, 316 U.S. 455 (1942)

The Sixth Amendment to the U.S. Constitution provides, among other things, that “in all criminal prosecutions, the accused shall enjoy the right to have the Assistance of Counsel for his defence.” The scope and nature of that right have been defined in a series of cases decided by the U.S. Supreme Court.

In *Betts v. Brady*, 316 U.S. 455 (1942), the Supreme Court was asked to decide whether the Sixth Amendment right to counsel, which applies only to the federal courts, is a “fundamental right.” If the right were found to be fundamental, then it would be applicable to the states under the due process clause of the Fourteenth Amendment. That clause prohibits the states from depriving their citizens of life, liberty, or property “without Due Process of law.” The Court held that the right to counsel was not a fundamental right, and therefore did not have to be honored by the state courts. In *Betts*, the defendant had been charged with robbery. Because he could not afford to pay for a lawyer he asked the court to appoint a lawyer for him. The judge refused, because in that county lawyers were only appointed at state expense for defendants charged with murder or rape. The defendant pled not guilty and chose to be tried by a judge alone, without a jury. He called some witnesses in his own defense to assert an alibi, and he cross-examined the state’s witnesses. The judge found him guilty and sentenced him to eight years in prison.

The defendant brought a federal habeas corpus petition, which is the way a defendant convicted in state court can have the federal courts review that conviction under the federal Constitution. In his petition, the defendant argued that he had been deprived of federal due process of law by the court’s refusal to appoint a lawyer for him, but the petition was denied. On appeal to the Supreme Court, the Court upheld the decisions of the lower courts. The Court traced the history of the right to counsel in the constitutions of the original thirteen colonies and found great diversity in the treatment of the right to counsel. It found that the right had not been treated as a fundamental one that would have to be observed by the

state courts but rather was provided to allow a defendant to appear by counsel instead of by himself. That is, the Court believed that the Sixth Amendment did not require a state ever to appoint an attorney at state expense. The Court also examined colonial statutes and found great diversity in treatment of the right. Finally, it examined the constitutions currently in force in the states and found that the issue was largely dealt with by statute and not as a constitutional issue. Thus, based on history and prevalence, the Court held that the refusal to appoint counsel for an indigent charged with a felony did not violate the “fundamental fairness” required by the due process clause.

Moreover, the Court held, under the facts of the case, the court’s refusal to give the defendant a lawyer did not deprive him of due process since he did a good enough job on his own. *Betts* waived a trial by jury, put forth an alibi defense, and cross-examined the state’s witnesses. The Court held that under the facts and circumstances of the case, the absence of a lawyer was not “so offensive to the common and fundamental ideas of fairness.”

Justice Black, joined by Justices Douglas and Murphy, dissented. The dissenters would have held that the right to counsel is fundamental, that is, that the practice of trying a defendant charged with a serious crime without counsel “cannot be reconciled with common and fundamental ideas of fairness and right.” The dissenters pointed to the fact that at that point in time thirty-five states had some “clear legal requirement or an established practice” that indigent defendants in serious noncapital cases be provided with lawyers when requested.

LISSA GRIFFIN

BIBLE IN AMERICAN LAW

To speak with precision of the Bible’s influence on American civil liberties is impossible because of its pervasive general presence in American culture during important formative periods of its history and jurisprudence. For centuries in Western civilization and in colonial America, the Bible was considered an integral part of the law, and therefore its foundational influence was systemic, organic, and often overt.

As law and society in the American Republic increasingly drew away from its biblical roots in the nineteenth and twentieth centuries, the authority behind biblical rules and the values expressed in biblical precepts came to figure less in technical legal expressions concerning civil liberties and judicial procedures. Many biblical concepts, concerning law,

ethics, human nature, civil liberties, judicial procedures, government, and society, however, continued to provide significant ingredients in the American images of justice, mercy, rights, and duties. Although clearly present, its influence on statutes, judicial opinions, or the common law in general is not always possible to document explicitly.

Sometimes the Bible can be and has been cited both for and against the same legal proposition, and postmodern culture is often in tension with biblical rubrics. While biblical provisions do not, and in many cases should not, control American law, neither can nor should they be eliminated from the realities of American law, either as a part of the common law in general or with respect to civil liberties in specific. American perceptions of civil liberties and human rights are rooted not only in the Enlightenment, but also in Greek and Roman antiquity and in the Bible.

Colonial Laws and Liberties

The Bible had extensive and direct influence on law in America during the colonial period, especially in the North. Without any doubt, the ideal notion of civic order in Puritan New England thoroughly embraced divine words and intentions as revealed in the law of Moses. The *Laws and Liberties of Massachusetts*, an early Puritan document warned, "The more any law smells of man, the more unprofitable."

Calvinism held that the judicial language in the law of Moses was binding on all people and should be incorporated into the laws of the land. Accordingly, the list of fifteen crimes punishable by death within the jurisdiction of Massachusetts (printed in 1641) was collected and crafted from the texts of the Bible and cited chapter and verse following each law. These provisions against idolatry, witchcraft, blasphemy, manslaughter, sexual offenses, kidnapping, perjury in capital cases, and subversion, offered no protections for religious liberty, freedom of speech, or rights of the accused.

Laws enacted in Massachusetts (1647), Rhode Island (1647), New Haven (1656), Pennsylvania (1681), and elsewhere selectively built upon, modified, or adapted several biblical provisions, while also adopting various regulations not prescribed by the Bible. For example, in these laws, a twofold punitive damage penalty was exacted in the case of theft of an animal (compare Exod. 22:4); when the thief could not make restitution, whipping of no more than forty lashes resulted (as in Deut. 25:3). Two or three witnesses were required in capital cases (Deut. 19:15). Debt servitude in America was limited to seven

years (compare Deut. 15:1). Examples of non-biblical "common liberties" afforded in Massachusetts (1641) included the rights of speaking in public meetings, fishing and fowling, water passage, and removing oneself and family from the jurisdiction.

Biblically motivated legal precepts and patterns had lasting influences on American jurisprudence in several ways. Religious and political institutions were seen as hand-in-hand partners, serving separate roles but working together to improve society. Lawmakers and judges cited explicit authority in support of their rulings. Biblical law was remarkable in that it expressly limited the powers of the king (see Deut. 17:14–20), a view of limited government that deeply influenced the development of constitutional law in America. As in biblical law, American law restricted the reach of governmental decisions, privileged the decisions of conscience, and guarded the basic values of individual choice. Codification, publication, and public education became parts of the fabric of committing the populace to the rule of law (compare Deut. 31:11), with Judges 21:25 being quoted in 1969 in *Barnett v. State* for the civic rule that "no individual may do simply what he will." Laws came to be seen as principles, subject to wise adaptation, paraphrase, and restatement, while the legal system still maintained the confidence that an undergirding of law itself existed and unified the nation. In addition, the biblical concept of covenant influenced the early American concepts of compact and the commonwealth, uniting God, the people, and a ruler, and this union formed the original theoretical basis of American constitutionalism.

Freedom and the American Republic

In the eighteenth century, American law began to regard and protect civil liberties and individual rights more widely. New England ministers frequently quoted Micah 4:4, "every man under his vine," in support of the right to own private property. While the Massachusetts law in 1647 had banned Jesuits from its territory and laws against Sabbath violations and heresies were common, freedom of religion soon gathered strength. The first chapter of the laws enacted in Pennsylvania in 1705, for example, was headed, "The Law concerning Liberty of Conscience." It provided that no persons, so long as they professed faith in the Trinity and acknowledged the divine inspiration of the Bible, "shall in any case be molested or prejudiced for his or her conscientious persuasion, nor shall he or she be at any time compelled to frequent or maintain any religious worship, place or ministry whatsoever, contrary to his or her mind, but shall freely and fully

enjoy his or her Christian liberty in all respects, without molestation or interruption.”

Americans often spoke of themselves in biblical images, as a New Israel having been delivered from the bondage of European kingship much as Israel had been delivered by Moses from slavery under the pharaohs of Egypt. Thomas Jefferson proposed a seal for the United States showing the Israelites being led by a pillar of fire, with the words “Liberty under God’s law—Man’s Inalienable Birthright of Freedom.” An oft-cited passage used polemically in behalf of freedom was “call no man your father” (Matt. 23:9). Commissioned in 1751, the Liberty Bell bore the inscription, “And proclaim liberty throughout the land unto all the inhabitants thereof,” a text from Leviticus 25:10. Flames of resistance against the Stamp Act were fanned by Galatians 5:12–13, “ye have been called unto liberty.” In this spirit, Andrew Jackson called the Bible “the rock on which our Republic rests.”

During the early nineteenth century, no law book was more influential in American law than was William Blackstone’s often-reprinted *Commentaries*. Although offering primarily a re-statement of English common law, Blackstone drew on biblical fundamentals. For example, his justifications of the three absolute rights of personal security, liberty, and private property were based on Genesis accounts regarding Abraham, Abimelech, Isaac, and Lot.

During this era, rights were not equated with permissiveness. To the founding generation, as James Hutson has explained in *Forgotten Features of the Founding*, a right was understood in its fullest sense as a “power inherent in and owned by an individual to act in a way consistent with Christian morality.” Thus, John Adams rejected Rousseau’s line that Americans had given birth to the “science of rights,” explaining that they had simply found their rights “in their religion.”

Many biblical precepts were influential in shaping the American Republic, inspiring much of its political theory and social values. For example, several biblical passages were cited in support of the separation of church and state (“render to Caesar the things that are Caesar’s,” Mark 12:17). Originally, however, the separation between church and state was not as rigidly understood as it has recently become. Recent documentary research has led some to conclude that Jefferson’s “wall of separation” would better be described as a “swiss cheese.” At least, it should be perceived as a wall with doors and windows. This openness itself reflects various models of church–state independence and interdependence found in the Bible itself.

Because controversy existed over possible interpretations advanced by various Bible-believing churches

and individuals, the Bible itself came to serve less and less in settling issues involving the public order, and legislation made little, if any, direct reference to the Bible. Formal disestablishment removed the religiously motivated Blue Laws, but court opinions continued to draw on the Bible as a source of authority. This had its upside as well as a downside, particular in the case of the debates over slavery, in which both sides invoked biblical authority in support of their views.

Twentieth Century

Well into the twentieth century, the Bible was used as a common source of legal language. In the 1920s, it went almost without saying that allusions to the Bible by legal practitioners were more frequent than to any other book outside of professional law treatises and previous case decisions. In 1943, H.B. Clark reported that “many provisions of biblical law are still seen in American statutes and court decisions.”

After World War II, the concept of a legal right underwent extensive and sudden transformation. A right came to be seen as “a raw power to gratify a sweeping range of appetites in the name of vindicating individual equality and autonomy,” as Hutson has described. The Bible became an influential tool in the hands of some rights advocates. In the civil rights movement in the 1960s, for example, the speeches of Martin Luther King Jr. often invoked the Bible, and sit-ins cited Exodus 1:15–22 in praise of the Egyptian midwives who disobeyed Pharaoh to save Hebrew male children.

Plentiful references to the Bible appear in judicial opinions down to the 1990s. The extensive study by Michael Medina located 150 such references in cases before 1970, 81 in the 1970s, and 115 in the 1980s. A presidential proclamation in 1983 announcing the year of the Bible extolled its role in inspiring concepts of civil government contained in the Declaration of Independence and U.S. Constitution. While it has been claimed that the Bible is the most influential book in American culture, Shakespeare is a close contender, judging by the times quoted in judicial opinions.

The Bible has been used for all kinds of judicial purposes. It has shaped substantive decisions. In *Lopez v. United States*, Chief Justice Warren took a broad meaning of the term “search” based on biblical meanings of this word. The Bible also influences interpretation, being quoted, for example, regarding the spirit and the letter of the law (2 Cor. 3:6). This rubric has had a vibrant life in the judicial rhetoric of American judges. The Bible also provides a wealth of

proverbial wisdom and common sense. In cases involving conflicts of interest, judges have spoken against serving “two masters” (Matt. 6:24); see, for example, *United States v. Mississippi Valley Generating Co.* (1961) and *Brickner v. Normandy Osteopathic Hospital* (1988). American laws recognize the value of Good Samaritans.

Some parts of the Bible are quoted much more than others. Because the Bible deals with such a wide array of human concerns, it speaks to many legal issues. Even though it was not written to be read as a legal textbook or handbook, it has influenced legal opinions concerning many areas of civil liberty.

Judicial and Criminal Rights

All legal systems begin with certain rules, values, expectations, and entitlements regarding access to and treatment from the courts. By providing memorable narratives about several judicial trials, such as the proceedings involving Naboth (1 Kings 21), Boaz (Ruth 4), Jeremiah (Jeremiah 26), Susanna (Apocrypha, Daniel 13), Jesus (in the four Gospels), and Paul (Acts 21–27), the Bible shaped American social and legal expectations concerning due process, witnesses, and fairness.

The rules found in Exodus 23:1–3 and 6–9 have been styled by scholars as a decalogue for the administration of justice. These provisions require all participants in the legal process to be honest, to avoid collusion, to be impervious to social pressure, to be impartial towards the rich and the poor alike, to shun perjury, to execute none that are innocent, to take no bribes or gifts, and not to oppress a resident alien. Similar rules are found today in American codes of judicial and legal ethics. American courts, for example, *Ex parte Kurth*, have cited Deuteronomy 16:19 in support of judicial impartiality, not perverting justice nor showing favoritism.

The Bill of Rights guarantees many rights to parties accused of crimes. In some cases, these principles stem from the Bible.

The right against self-incrimination, now found in the Fifth Amendment, grew out of Roman, Canon, and Jewish law, but William Tyndale can be credited for launching its adoption into English law. His English translation of the Bible (1525) and exposition on “swear not” in Matthew 5–7 (1530) boldly asserted that scripture rejects the idea of compelling a person to bear witness against himself or herself. Following these precepts, the courageous judicial stand of John Lilbourne during the English Revolution in the early 1650s resulted in the elimination of self-incriminating

oaths in the Star Chamber. The case of the adulteress in John 8 was also influential in showing that Jesus did not require her to testify for or against herself. From such developments, the right against self-incrimination found its way into the American Constitution.

In recent times, American decisions, such as *Coy v. Iowa*, have cited Paul’s assertion of rights under Roman law (Acts 25:16) in support of the civil right of due process, to confront one’s accusers and to answer charges with a personal defense. As legal precedent for the right to impeach accusing witnesses by separate cross-examination, Daniel’s detection of false witnesses (Apocrypha, Daniel 13) has been judicially cited, as in *Virgin Islands v. Edinborough* (1980).

The presumption of innocence until proven guilty does not prevail in all legal systems. C.S. Lewis has argued that this is a distinctively Christian attitude attributable to the concept of grace found in the New Testament. The necessity of affording a full and fair defense is found in Jonah 1:5–10 and Job 31:35 (“Oh that one would hear me!”), and the rule against double jeopardy has been supported by Nahum 1:9 (“affliction shall not rise up the second time”). In *California v. Hodari D.* and other cases, Proverbs 28:1 has been used in establishing evidentiary inferences from fleeing a crime scene; *People v. Simmons* draws on the silence of Jesus before his accusers.

The right against cruel and unusual punishment is consonant with biblical scruples against vengeance (Rom. 12:19, cited in *People v. Flynn*). At the same time, the Bible is cited as authority for the legitimacy of the death penalty, especially in cases of premeditated, hateful homicide (Gen. 9:6, Exod. 21:12, Num. 35:16), although these usages are not without their conceptual difficulties and complexities, as Samuel Levine and also John Blume and Sheri Lynn Johnson have argued.

Civil Liberties

The Bible speaks powerfully of freedom, and thus it has served as a potent springboard for civil libertarianism. At the same time, this appropriation has its limitations, for freedom in the Hebrew Bible mainly means freedom from bondage, not freedom to act independently; in the New Testament freedom equates with Christ, the way that makes one free. Edward Gaffney’s exposition of *The Interaction of Biblical Religion and American Constitutional Law* rightly states: “Although concerned intensely with persons, the Bible does not view them as isolated atoms, but as interrelated, socially connected parts

of a whole, or as members of a community.” Accordingly, freedoms in the Bible are never ends in themselves.

Freedom of speech in the Bible is not absolute, as the trial of the blasphemer in Leviticus 24 makes painfully clear. However, when Peter and John refused to be silenced by the Jerusalem Sanhedrin’s charge of blasphemy ordering them to desist from speaking of or teaching in the name of Jesus (Acts 4:17), their stand became a model of free speech, echoing the bold outspokenness of the Hebrew prophets in general.

Freedom of religion is constrained in the Bible by prohibitions against idol worship. Nevertheless, the Bible grants every person freedom to choose which god to serve (Josh. 24:15). The biblical loyalty that man owes to God is absolute; political loyalties are therefore secondary and separate. This rule is seen in the courageous exercise of religious freedom by Esther and Daniel, whose examples also served as critiques of the dominance of foreign rulers.

Jesus’ dictum about Caesar came to be used as an axiom of separation, but many Christian nations, especially in the Middle Ages, did not read Jesus’ dictum that way. To the contrary, they saw in Isaiah 49:23 a mandate for kings and queens to be “nursing fathers and nursing mothers” to the church. Although wrongly interpreted by European monarchs from the time of John Calvin until the French Revolution, this scripture was a powerful justification for state churches and official persecution of those of other faiths.

Freedom of association is tacitly recognized in the popular assemblies that were mandated under biblical law. The New Testament presupposes the right of “two or three” to meet together for religious purposes (Matt. 18:20). Freedom of travel arises in conjunction with the Christian imperative to “go forth to every part of the world” (Mark 16:15), as exemplified by the missionary travels of Paul. Regarding the bearing of arms, Jesus warned that those who live by the sword will die by the sword, but his own disciples were armed with weapons when he was arrested on the Mount of Olives.

No issue of civil rights has been more important in American history than the question of slavery. That issue divided the nation; it also divided churches, such as the Baptists and Presbyterians. The slavery issue split the Baptists into two Conventions. Both sides grounded their views on *sola scriptura*. Although slavery in biblical times had nothing to do with race in a modern sense, biblical provisions supported various forms of slavery or servitude (Exod. 21:1–6, Lev. 25:39–55, Deut. 15:1–6, Eph. 6:5–9), economic

institutions common throughout antiquity. The case of *Pirate v. Dalby* cited Leviticus and Deuteronomy to justify slavery during Pennsylvania’s period of gradual abolition. The Virginia case of *Commonwealth v. Turner* in 1827 looked to passages in Exodus 21 for guidance concerning the beating of a slave by his owner. By the 1830s, the fallacious so-called curse of Noah (Gen. 9:20–27) was used as a stock weapon by those advocating slavery; at the same time, the abolitionists drew support from biblical injunctions regarding love, justice, freedom, and release from bondage.

With various results in cases involving resident aliens, courts have referred to such passages as Leviticus 24:22, “you shall apply the same law to the alien as you do for one of your own country.” See *Memorial Hospital* (1974); *Rollins* (1979); and *Bhandari* (1987).

Women and children found themselves in subordinate roles in the ancient world, and thus the Bible may be cited, on the one hand, in opposition to women’s equal rights. On the other hand, courts have noted that the Bible also presents strong instances of women exercising rights in buying property (Prov. 31:16), in serving prominently in the military (Deborah, used in *Hill v. Berkman*), and in other contexts.

Family and Private Law

Biblical law extensively regulated family rights and duties in ways that supported the prevailing norms of society in biblical times. Marriage, chastity, and children were the principal areas of concern.

Marriage was complex, involving negotiation of prenuptial agreements, dowry rights, formal engagement, solemnization, and celebrations. Marriages outside the clan were at times prohibited, but marriages and sexual relations with too close of kin were also outlawed (Lev. 18:6–8). Analogously, some American courts have upheld bans on first-cousin marriages. Polygamy was allowed in Israel (Deut. 21:15), but a New Testament bishop was to have one wife (1 Tim. 3:2). Language regarding rights within marriage in American law has stemmed from the Bible concerning the husband’s role as head of the family (Eph. 5:23), the right to recover consortium damages (Matt. 19:5), and spousal immunity (Gen. 2:24). The unity of person behind the concept of survivorship stems from Gen. 2:14 (see *Freeman v. Belfer*). Various statements in the Bible on divorce (Deut. 24:1, Matt. 5:32, 19:6, Luke 16:18) have been

cited with legal influence in the past, such as *Wolfe v. Wolfe* (1976).

Biblical laws punishing adultery (Exod. 20:14, Deut. 22:22), incest, sodomy (Rom. 1:26–27, 1 Cor. 6:9), bestiality (Lev. 18:23), and prostitution (Deut. 23:17) have influenced American law over the years, as Patrick O’Neil demonstrates. Words such as “abominable” and “detestable crimes against nature,” however, have been held to be unconstitutionally vague, as stated in *Stone v. Wainright* (1973).

The Bible grants parents rights and responsibilities over their children. American law has been heavily influenced in regard to parental education of their children (Deut. 6:7), discipline (Prov. 23:13), and child labor (a father’s rights over fruits of his son’s labor have been upheld, citing Gen. 12:37). At the same time, biblical law made it a capital offense for a son to strike or curse a parent (Exod. 21:15, 17), but parents lacked the power to impose such a punishment (Deut. 21:19).

The Bible protects private property from theft, but in biblical times no property concept of fee simple absolute existed, for the land belonged to God with human owners as life tenants. This concept retains vitality in the environmental duties of human stewardship over the Earth. Hebrew law prohibits usury charged to another Hebrew (Exod. 22:25), but the New Testament seems to encourage making as much money as possible, as in the parables of the talents and of the wise steward. *Klein v. Commonwealth* cited the Matthew 20:1–16 on the fairness of agreed wages.

Concepts of redemption of property in foreclosure (Lev. 25:25) and forfeiture stem from the Bible. In *United States v. Bajakajian*, the Supreme Court traced the “guilty property” theory behind *in rem* forfeiture to Exodus 21:28, “which describes property being sacrificed to God as a means of atoning for an offense.” The seven-year rule for repeat bankruptcies derives from the biblical law of sabbatical release.

Reading the Bible for legal substance, however, is difficult. The Bible is not about law; it is about God. The Bible is not by people from the modern world; it must be read in historical contexts. Translating ordinary biblical passages into modern languages is hard enough; translating technical legal terms is almost impossible. Often, biblical rubrics can be cited on either side of a modern legal issue. Nevertheless, the Bible speaks profoundly on topics related to law, liberty, human nature, social predicaments, and civic obligations. It offers paradigms and precepts that have deeply influenced the development of civil rights and duties in the American experience.

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References and Further Reading

- Blume, John H., and Sheri Lynn Johnson. “Don’t Take His Eye, Don’t Take His Tooth, and Don’t Cast the First Stone: Limiting Religious Arguments in Capital Cases.” *William & Mary Bill of Rights Journal* 9 (December 2000): 61.
- Botein, Stephen. *Early American Law and Society*. New York: Knopf, 1982.
- Clark, H.B. *Biblical Law*. Portland, OR: Binfords and Mort, 1943.
- Falk, Ze’ev W. *Hebrew Law in Biblical Times*. 2nd ed. Provo, Utah: Brigham Young University Press, 2001.
- Gaffney, Edward McGlynn, Jr. “The Interaction of Biblical Religion and American Constitutional Law.” In *The Bible in American Law, Politics, and Political Rhetoric*, edited by James Turner Johnson, 81–105. Philadelphia: Fortress, 1985.
- Harrelson, Walter. *The Ten Commandments and Human Rights*. Philadelphia: Fortress, 1980.
- Hutson, James. *Forgotten Features of the Founding: The Recovery of Religious Themes in the Early American Republic*. Lanham, MD: Lexington Books, 2003.
- Katsh, Abraham I. *The Biblical Heritage of American Democracy*. New York: Ktav Publishing House, 1977.
- Levine, Samuel J., *Capital Punishment in Jewish Law and Its Application to the American Legal System: A Conceptual Overview*, *St. Mary’s Law Journal* 29 (1998): 1037.
- Medina, J. Michael, *The Bible Annotated: Use of the Bible in Reported American Decisions*, *Northern Illinois University Law Review* 12 (1991): 1:87–254.
- Meislin, Bernard, *The Role of the Ten Commandments in American Judicial Decisions*, *Jewish Law Association Studies* 3 (1988): 187–209.
- O’Neil, Patrick M. “Bible in American Constitutionalism,” and “Bible in American Law.” In *Religion and American Law: An Encyclopedia*, edited by Paul Finkelman, 29–34. New York: Garland, 2000.
- Otto, Eckart. “Human Rights: The Influence of the Hebrew Bible.” *Journal of Northwest Semitic Languages* 25, no. 1 (1999): 1–20.
- Rogerson, John W., Margaret Davies, and M. Daniel Carroll R., eds. *The Bible in Ethics*. Sheffield: Sheffield Academic Press, 1995.
- Welch, John W., *Biblical Law in America*, *Brigham Young University Law Review* 2002, no. 3 (2002): 611–42.

Cases and Statutes Cited

- Barnett v. State*, 8 Md. App. 35; 257 A. 2d 466 (1969)
- Bhandari v. First Nat’l Bank of Commerce*, 829 F.2d 1343 (5th Cir. 1987)
- Brickner v. Normandy Osetopathic Hospital, Inc.*, 746 S.W.2d 108 (Mo. App. 1988)
- California v. Hodari D.*, 499 U.S. 621 (1991)
- Commonwealth v. Turner* (Va. 1827)
- Coy v. Iowa*, 478 U.S. 1012 (1988)
- Ex parte Kurth*, 28 F.Supp. 258, 264 (S.D. Cal. 1939)
- Freeman v. Belfer*, 173 N.C. 581; 92 S.E. 486 (1917)
- Hill v. Berkman*, 635 F.Supp. 1228, 1238–39 (E.D.N.Y. 1986)
- Klein v. Commonwealth, State Employee’s Retirement System*, 521 Pa. 330; 555 A.2d 1216 (1989)
- Lopez v. United States*, 373 U.S. 427, 459 (1963)

Memorial Hospital v. Maricopa County, 415 U.S. 250, 261 (1974)
People v. Flynn, 223 N.Y.S.2d 441, 445 (1962)
People v. Simmons, 28 Cal. 2d 699; 172 P.2d 18 (1946)
Pirate v. Dalby (Pa. 1786)
Rollins v. Proctor & Schwartz, 478 F.Supp. 1137 (D.S.C. 1979)
Stone v. Wainwright, 478 F.2d 390 (5th Cir. 1973)
United States v. Bajakajian, 524 U.S. 321 (1998)
United States v. Mississippi Valley Generating Co., 364 U.S. 520, 549 (1961)
Virgin Islands v. Edinborough, 625 F.2d 472, 473 n. 3 (3rd Cir. 1980)
Wolfe v. Wolfe, 46 Ohio St. 2d 399, 350 N.E.2d 413 (1976)

BIBLE READING IN PUBLIC SCHOOLS, HISTORY OF BEFORE AND AFTER ABINGTON SCHOOL DISTRICT v. SCHEMPP

In the eighteenth and nineteenth centuries in America, there was homogeneity among Americans in that the majority were Protestant Christians, albeit of varied denominations. Due to the variety of denominations that existed, and due to the history of religious oppression that led many to come to America, it was generally accepted that the State could not establish one denomination as a state church. Rather, all denominations should be allowed to worship as they chose. However, due to the religious homogeneity among the majority of Americans, there existed a widely held belief that America was a Christian nation and the precepts of Protestant Christianity, as taught by the Bible, were the basis of good citizenship and good government. Thus, there should be a separation of church and state, but a separation of religion (read Protestant Christianity) and state was neither necessary nor desirable.

Given the above belief and the belief that society had an obligation to inculcate its young with proper moral precepts and to teach them to be good citizens, it made sense that they be exposed to Christian precepts in school. As a result, prior to *Abington School District v. Schempp*, it was generally believed that the Bible could and should be read in public schools, as long as the passages were read without any comment or discussion. Thus, in the period before *Schempp*, there was a widespread practice of Bible reading in the public schools. Specifically, in most instances several passages of the Bible were read by the teachers to their students or, in modern times, over the public address system by a teacher or student. In fact, in 1950 the reading of the Bible was required by thirteen states and permitted in twenty-five other states. Further, in a survey conducted in 1968, 48 percent of the respondent teachers teaching before 1962 reported

that Bible selections were read in their classrooms on a daily to less than weekly basis.

The Bible that was often used for Bible reading was the King James version of the Bible, a version used by many Protestants of varying denominations, but not by Catholics, Jews, or others of different religious faiths. The reason that the Bible passages were to be read without comment was to avoid the teaching of any particular religion. It was believed that the reading of the Bible imparted general moral precepts rather than the precepts of any particular religion.

In the last three quarters of the nineteenth century and the first half of the twentieth, there raged an episodic conflict between Catholics and Protestants in many areas, including the teaching of Protestant precepts in public schools. Nevertheless, the courts, with few exceptions, upheld the reading of the Bible in the schools if the Bible was read without comment or note and if pupils who desired to avoid the reading could do so. Most held that the reading was constitutional because it was not a teaching of sectarian tenets and doctrines. Although the court holdings appear to be somewhat contradictory, they can be understood if one remembers the mindset prevailing at the time. As one commentator explains, "The Protestant position that emerged by the mid-nineteenth century was that Protestants could participate in politics and teach their religion in the schools, but that Catholics could not The key step in the Protestant argument was this: Protestants tended to assume that, whereas Catholics acted as part of a church, Protestants acted in diverse sects as individuals Thus, Catholic instruction or political action violated separation [of church and state], because it was the work of an authoritarian church, but Protestant instruction and political action did not violate separation, because it was the work of free individuals."

A few courts disagreed with this generally held view and found Bible reading in public schools to violate either the federal or a state constitution. For example, the Wisconsin Supreme Court found that the reading of the Bible, without comment, at certain times in public schools, violated the Wisconsin Constitution because such was sectarian instruction. It was sectarian instruction because each sect, with few exceptions, bases its peculiar doctrines upon some portion of the Bible, the reading of which tends to inculcate those doctrines (*State ex rel. Weiss v. District Board of School Dist. No. 8 of City of Edgerton*, 44 N.W. 967 [Wis. 1890]).

In the mid-twentieth century, the acceptance of the intertwining of religion and the state began to come undone. In 1947, the Supreme Court handed down the significant establishment clause decision of *Eversen v. Board of Education*. In that case, the Supreme

Court purported to endorse a strict doctrine of separation of church and state when it stated that “[n] either a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another Neither a state nor the Federal government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect ‘a wall of separation between church and State.’” Ironically, although all of the justices concurred in the above statement, five members of the Court went on to hold that New Jersey’s program of providing transportation services for non-public school children did not violate the establishment clause.

In 1963, in the *Abington School District v. Schempp* case, the Supreme Court was faced with the question of whether Bible reading in the public schools, as it was currently practiced, violated the establishment clause. The Court found that it did. The *Schempp* case involved two separate cases. The first case came from Pennsylvania where a 1959 statute required the reading of ten Bible verses, without comment, at the opening of each public school, on each school day. At the written request of a parent or guardian, however, a child could be excused from such reading. The Schempps were members of the Unitarian Church in Germantown, Pennsylvania, and two of their children attended Abington High School where such Bible reading took place. Although the school only provided copies of the King James Bible, the student doing the reading could choose any passages he liked. Thus, readings had been done from the King James, the Douay (Catholic version), and the Revised Standard versions of the Bible as well as the Jewish Holy Scriptures. In spite of the inclusiveness of the Bible readings, the Schempps brought suit to enjoin enforcement of the statute because specific religious doctrines, gleaned by a literal reading of the Bible, were contrary to their religious beliefs. Further, although the children could be excused from the reading, their father did not do this because he believed that doing so would adversely affect the relationship between the children and their classmates and teachers.

The second case in *Schempp* came to the Supreme Court from Maryland where the City of Baltimore had adopted a rule providing for the reading, without comment, of a chapter in the Holy Bible and/or a recitation of the Lord’s Prayer in the Baltimore schools. The Bible used was the King James version. The Murrys, a mother and son, were atheists who sought to have the rule rescinded because it was a threat to their religious beliefs in that it placed a premium on belief as opposed to nonbelief. Further,

they felt that the Baltimore rule as practiced indicated a belief that God was the source of all moral and spiritual values, and thus such values were religious values. Such a belief rendered Petitioners’ beliefs suspect and promoted doubt as to Petitioners’ morality and good citizenship.

The Supreme Court struck down both the Pennsylvania statute and the Baltimore rule as violating the establishment clause. In doing so it recognized that religion was closely identified with American history and government; however, it contended that religious freedom was likewise embedded in American life. It went on to reaffirm its holding in *Everson v. Board of Education*, that the object of the First Amendment’s establishment clause was “to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion” (*Everson*, 330 U.S., at 31–32). However, the establishment clause, together with the free exercise clause, mandated that a state be neutral in its relations with religious believers and nonbelievers. Thus, a state can neither favor nor disfavor religions. In the instant case, the Court found that the Bible readings were a religious ceremony. Thus, the exercises and the law requiring them violated the establishment clause. The readings were a religious ceremony because, even if the purpose of the exercise was to promote moral values, the tool used was the Bible and the Bible is an instrument of religion.

After *Schempp* was handed down, the schools in large part abided by the Court’s decision. In a survey conducted in 1968 it was found that, with the exception of the South, the practice of Bible reading and prayer in public elementary schools had largely disappeared by the academic year 1964–65. Thus, a fairly entrenched practice gave way with surprising swiftness.

Like the schools, the lower courts followed the dictates of the Supreme Court and invalidated any reading of the Bible to the student body at the behest of the school or school district. Many schools, students, and parents, however, wanted the children to have some religious instruction and/or exposure to the Bible. The question then became how could children learn about the Bible without running afoul of the establishment clause. In some jurisdictions the schools allowed Bible study classes to be conducted on school grounds as part of the school curriculum. Such classes were found to be unconstitutional if they taught the Bible as religious truth. However, a Bible study class was permissible under the establishment clause if the course was secular in nature, intent, and purpose, and the effect of the course was neither to advance nor inhibit religion. Generally, a Bible study

course was found to be secular if the Bible was studied from a literary and historical viewpoint, with no claims made as to its truth or falsity.

In addition to Bible study classes, some students formed voluntary Bible study clubs. In the wake of *Schempp*, the lower courts often held that such clubs could not meet on school grounds because the establishment clause required religious speech to be barred from governmental forums. However, in recent times there has been a shift away from strict separation of religion and government and a move toward accommodation of private religious activities and expression.

With regard to voluntary Bible clubs, this shift culminated in the federal Equal Access Act (EAA) enacted by Congress in 1984. Under the EAA a public secondary school that receives federal financial assistance may not deny equal access to its facilities to any students who wish to conduct a meeting within its forum on the basis of religious, political, philosophical, or other content of the speech at such meetings. This equal access requirement applies only if the school allows one or more non-curriculum-related student groups to meet on school premises during noninstructional time. Thus, the school could bar all student groups from meeting; however, if it provides an opportunity for one, it must provide an opportunity for all.

In 1990, the Supreme Court upheld the EAA in the case of *Board of Education v. Mergens*. Then, in 2001, in the case of *Good News Club v. Milford Central School*, the Court provided for equal access in elementary schools by finding that the school's authorization for a Christian children's club to meet after hours on elementary school premises did not violate the establishment clause. Thus, Bible reading can take place in public schools in the context of student-sponsored Bible clubs. However, school-sponsored clubs are prohibited.

In the future, it is likely that the Court will continue to accommodate student-initiated religious activities and speech to the extent that there is no hint of school sponsorship of such activities or speech.

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References and Further Reading

- Collier, James M., and John J. George. "Education and the Supreme Court." *The Journal of Higher Education* 21, no. 2 (1950): 77–83.
- Donovan, Matthew D., *Notes: Religion, Neutrality, and the Public School Curriculum: Equal Treatment or Separation*. Catholic Lawyer 43 (Spring 2004): 187–223.
- Laycock, Douglas, *The Many Meanings of Separation*. University of Chicago Law Review 70 (Fall 2003): 1667–701.

McCarthy, Martha, *Religion and Education: Whither the Establishment Clause*. Indiana Law Journal 75 (2000): 123–66.

Valk, Rebecca A. "Note: *Good News Club v. Milford Central School*—A Critical Analysis of the Establishment Clause as Applied to Public Education." *St. John's Journal of Legal Commentary* 17 (Winter/Spring 2003): 347–98.

Way, H. Frank. "Survey Research on Judicial Decisions: The Prayer and Bible Reading Cases." *Western Political Quarterly* 21, no. 2 (1968): 189–205.

Cases and Statutes Cited

- Abington School District v. Schempp*, 374 U.S. 203 (1963)
- Board of Education v. Mergens*, 496 U.S. 226 (1990)
- Equal Access Act, 20 U.S.C.A. §4071 (a)
- Everson v. Board of Education*, 330 U.S. 1 (1947)
- Good News Club v. Milford Central School*, 533 U.S. 98 (2001)
- State ex rel. Weiss v. District Board of School Dist. No. 8 of City of Edgerton*, 44 N.W. 967 (Wis. 1890)

BIDDLE, FRANCIS BEVERLEY (1886–1968)

Francis Biddle, the scion of a family that emigrated to America in the early seventeenth century, attended private schools, including Harvard College, from which he graduated cum laude, and the Harvard Law School, where he received an LL.B. in 1911. He then served one year as a secretary to Justice Oliver Wendell Holmes, Jr. Holmes, a fellow patrician, influenced Biddle greatly, and he claimed in his memoirs that Holmes had not only reinforced his latent sense of noblesse oblige but also turned him into a liberal. He would later write both a biography of the justice as well as a book on his legal philosophy.

In 1912, he joined the family law firm in Philadelphia, but a few years later he struck out on his own and established a new firm. A successful Philadelphia lawyer, Biddle's clients included both the Pennsylvania Railroad and labor unions, and in 1927 he published a novel, *Llanfear Pattern*, which was highly critical of Philadelphia's inbred elite society.

Nominally a Republican, he became increasingly disillusioned with the party in the 1920s. He recalled that he had seen "the dark and dismal conditions under which the miners lived, and the brutality that was dealt them if they tried to improve things." Opposed to Herbert Hoover's handling of labor issues, Biddle campaigned against him and worked for the election of Franklin Roosevelt in 1932. Roosevelt awarded him with several appointments in New Deal programs, and Biddle chaired the special commission that cleared the Tennessee Valley Authority of charges of corruption. In 1939, Roosevelt nominated him to

the Court of Appeals for the Third Circuit. Within a short time Biddle grew bored with the job, and in 1940 resigned from the bench to become solicitor general. He won all fifteen cases he argued in the Supreme Court defending New Deal measures.

In 1941, Roosevelt named Robert H. Jackson to the Supreme Court and appointed Biddle to take his place as attorney general. He served in that office for four years, during which he oversaw the administration's handling of civil liberties issues during World War II.

For the most part, Biddle received good marks from civil libertarians. The Roosevelt administration, unlike that of Wilson in World War I, did not launch a wholesale attack on aliens or radicals, and did not try to either suppress radical speech or criticism of the Roosevelt administration. Moreover, Biddle took advantage of a ruling in which the Supreme Court held that federal antisubversion laws preempted state measures, and thus prevented the "little Red scares" of the 1920s.

The great failing in Biddle's administration, one that he later acknowledged, was his reluctant implementation and defense of the internment of Japanese Americans. Not until after Biddle's death in 1968 did evidence come out that middle-ranking officials in both the War Department and the Solicitor General's Office knew that the Japanese Americans posed no threat to American security, and that no proof of any sort had ever been found that they were involved in either espionage or sabotage. They deliberately withheld this information not only from the Supreme Court but from Biddle as well. A dedicated civil libertarian, it is highly unlikely that Biddle would have given his assent to the program had he been in possession of the facts.

Biddle also prosecuted several cases under the Alien Registration Act, but he refused to use it for witch-hunting of radicals, as its sponsors had hoped. While tens of thousands of German and Italian aliens were registered shortly after the United States entered the war, the Justice Department made sure that the process was carried out in such a way as to maintain the dignity of the aliens.

One should note that Biddle also knew, thanks to the work that the Federal Bureau of Investigation had done in the 1930s, just which aliens did support fascist ideology, but thanks to the FBI, practically none of them proved able to do damage to the American war effort.

With the death of Franklin Roosevelt in April 1945, Biddle's days in the Justice Department were limited, and at Harry Truman's request he resigned in June. Truman, however, then named Biddle as one of the American judges on the international tribunal

that tried former Nazi leaders for "crimes against humanity." Although there has been some criticism of the Nuremberg trials as ex post facto proceedings, at the time most people believed that it was right to try to impose a rule of law on wartime atrocities. Certainly the trials provided not only a means to expose the full extent of Nazi actions, but were far better than the older method of taking the losers out into the prison yard and shooting them. At the close of the trials, Biddle recommended to Truman that provocation of aggressive wars should, in the future, be declared a crime under international law.

Truman then tried to name Biddle as the U.S. representative to United Nations Educational, Scientific and Cultural Organization (UNESCO), but the Republican-controlled Senate blocked the appointment because Biddle was considered too liberal. Rather than go through a bruising confirmation fight, which he would surely have lost, Biddle asked Truman to remove his name.

Although he never again held appointed office, Biddle remained active in politics, and chaired the liberal interest group, Americans for Democratic Action, from 1950 through 1953. During those years he was an active foe of Senator Joseph McCarthy of Wisconsin, and repeatedly denounced McCarthy and the House Committee on Un-American Activities for their witch-hunting tactics, smear campaigns, and efforts to censor school textbooks. His most cogent case against McCarthyism is in his 1951 book, *The Fear of Freedom*.

MELVIN I. UROFSKY

References and Further Reading

- Biddle, Francis. *In Brief Authority*. Garden City, N.Y.: Doubleday, 1962.
Murphy, Paul L. *The Constitution in Crisis Times, 1918–1969*. New York: Harper & Row, 1972.

BILL OF ATTAINDER

A bill of attainder imposes punishment on specific individuals or members of a group through an act taken by the legislature rather than a judicial trial. The U.S. Constitution prohibits bills of attainder enacted by both Congress (Art. I § 9, clause 3) and by the states (Art. I § 10). These legislative statements of guilt were used by the British parliament to punish subversive acts such as treason by sentencing alleged traitors to death. The founders believed that these acts were abused in England, as later described by Thomas Jefferson as "instruments of vengeance by a successful over a defeated party." In framing the

Constitution, the founders put their faith instead in the trial by jury in order to protect the rights of the accused against the power of the state. Bills of attainder relate closely to the heralded principle of separation of powers in the Constitution, where it is the power of the legislative branch to enact laws of general applicability, while the judiciary is to independently decide how that law should be applied in a given set of factual circumstances. During the American Revolution, the legislatures of numerous states enacted bills of attainder or bills of pains and penalties (effectively the same, but with a lower level of punishment) against persons disloyal to the Revolution. Bills of attainder were therefore prohibited in order to ensure fairness in the process of adjudicating disputes via the judicial branch, essentially safeguarding against their tyrannical use in the future as had occurred in England. The founders believed that trial by jury, not legislature, would better protect civil liberties from the whims, whether well founded or not, of the democratically elected majority.

JAMES F. VAN ORDEN

BILLS OF RIGHTS IN EARLY STATE CONSTITUTIONS

State constitution making began during the Revolution. By 1787, when delegates from twelve of the original thirteen states (Rhode Island never sent any delegates) met in Philadelphia to write the national constitution, eleven of the first thirteen states had written constitutions. What would become the fourteenth state, Vermont, had also produced a written constitution. Only Rhode Island and Connecticut failed to adopt a new constitution during or immediately after the Revolution. A number of states wrote more than one constitution in this period, refining and revising their constitutional structure. All of the constitutions dealt with the important aspects of government, such as the powers of the legislative and executive branches, the allocation of representatives, and who could vote.

Liberty, of course, had been at the center of the American Revolution. For example, the New York legislature asserted in its “Address of the Convention of the Representatives of the State of New York to Their Constituents,” in 1776, that “[w]e do not fight for a few acres of land,” but rather, New Yorkers and all Americans fought “for freedom—for the freedom and happiness of millions yet unborn.” Similarly, Jefferson would assert in the Declaration of Independence that Americans were fighting to secure the “unalienable Rights” of “Life, Liberty, and the Pursuit of Happiness.” Surprisingly, however, only five of

the original states to write constitutions—Virginia, Pennsylvania, Maryland, North Carolina, and Massachusetts—actually included a bill of rights or declaration of rights in their fundamental law. On September 11, 1776, Delaware adopted a “Declaration of Rights,” but this was not formally part of the state’s constitution, which was adopted ten days later, on September 21. The last article of the Delaware constitution of 1776 made a reference to “the declaration of rights and fundamental rules for this State, agreed to by this convention,” but the constitution did not actually contain the declaration, and it was only sometimes printed and distributed with the constitution. What would become the fourteenth state, Vermont, also had a bill of rights in its first constitution. Some of the other states did, however, offer some formal assertion of fundamental liberties. Connecticut, for example, which did not adopt a constitution (but instead simply amended its colonial charter to remove references to England and the king), passed a declaration of rights in 1784, just after the Revolution. A number of states wrote more than one constitution in this period, in the process reconsidering and refining the notion of fundamental rights.

New Hampshire, for example, did not have a declaration of rights in its constitution of 1776, but did have one in its second constitution, adopted in 1784. Georgia, on the other hand, adopted three constitutions (1777, 1789, and 1798) in this period, none of which had a bill of rights, although the constitutions did protect some civil liberties.

Most of the new state constitutions written during or after the Revolution reflected historic claims of the “rights” of Englishmen. The new states added to these rights new protections of liberty based on the events leading up the Revolution and the circumstances of the new American nation.

Religion in the State Bills of Rights

Almost every American state constitution had some provisions that dealt with religion. These provisions, either in the main body of the document or in a separate declaration of rights, are perhaps the most important differences between the rights of Englishmen and Americans. Most states provided for some form of “free exercise.” New Jersey’s clause in its 1776 Constitution was typical in its detail and thrust:

That no person shall ever, within this Colony, be deprived of the inestimable privilege of worshipping Almighty God in a manner agreeable to the dictates of his own conscience; nor, under any pretence whatever,

be compelled to attend any place of worship, contrary to his own faith and judgment; nor shall any person, within this Colony, ever be obliged to pay tithes, taxes or any other rates, for the purpose of building or repairing any other church or churches, place or places of worship, or for the maintenance of any minister or ministry, contrary to what he believes to be right, or has deliberately or voluntarily engaged himself to perform.

However, the new states, including New Jersey, were ambivalent about how much political freedom members of dissenting churches should have. The first American state constitutions rejected the strict establishment of England, but at the same time the constitutions did not create and protect the religious freedom the way the U.S. Constitution and Bill of Rights would.

In England at this time an established church had special privileges and the support of the national government. The king was also the head of the church, and bishops and archbishops—princes of the Church—sat in the House of Lords. There was also a religious test for officeholding, which barred Jews, Deists, and Roman Catholics from holding office. At best England could be described as having a regime of grudging toleration for people who were not members of the Church of England. The U.S. Constitution of 1787 prohibited religious tests for officeholding, and by using the term “oath or affirmation,” rather “swear an oath,” opened officeholding to people of all faiths or no faith at all. The First Amendment, added to the Constitution in 1791, prohibited any establishment of religion at the national level and also guaranteed the free exercise of rights of all religions.

In this sense, the new state constitutions fell in between these two regimes, with some states being closer to the British model and some closer to what would become the American model under the Constitution and the Bill of Rights. Except for Virginia and New York, all of the first fourteen states had some form of religious test for officeholding, which was similar to what existed in England. These tests varied. Massachusetts specifically required that the governor “declare himself to be of the Christian religion,” and all persons holding offices in the legislative or executive branch were required to “declare that I believe the Christian religion, and have a firm persuasion of its truth.” Until 1792, Delaware required that all officeholders “profess faith in God the Father, and in Jesus Christ His only Son, and in the Holy Ghost,” and that they “acknowledge” the “divine inspiration” of the Old and New Testaments. New Hampshire’s constitution of 1784 required that all officeholders “shall be of the Protestant religion”—a provision that remained in place until 1877. New Jersey, North Carolina, South Carolina, and Georgia also required officeholders to be Protestants. South Carolina, which

had begun as a colony with religious freedom for all people, provided in its 1778 Constitution that “[t]he Christian Protestant religion shall be deemed, and is hereby constituted and declared to be, the established religion of this State.” Until 1826, Maryland required that all officeholders be Christians. In 1867, Maryland required that all officeholders have a “belief in the existence of God.” Until 1790, Pennsylvania required that officeholders believe in the divine inspiration of the Old and New Testament. In 1792, Delaware adopted such a provision. While requiring officeholders to be religious, some states did not want them to be *too* religious. Thus, Georgia, New York, North Carolina, and Tennessee all banned members of the clergy from holding public office.

Overall, the early state bills of rights show that at the time of the Revolution, the states had not fully clarified what they meant by religious freedom. For example, Section 2 of the Delaware Declaration of Rights of 1776 provided the following:

That all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences and understandings; and that no man ought or of right can be compelled to attend any religious worship or maintain any ministry contrary to or against his own free will and consent, and that no authority can or ought to be vested in, or assumed by any power whatever that shall in any case interfere with, or in any manner controul the right of conscience in the free exercise of religious worship.

This was surely a powerful statement supporting free exercise and to some extent hostile to establishment. However, Section 3 of the same document declared “[t]hat all persons professing the Christian religion ought forever to enjoy equal rights and privileges in this state, unless, under colour of religion, any man disturb the peace, the happiness or safety of society.” On top of this, as noted above, the constitution adopted a few weeks later required that all officeholders take an oath stating, “I . . . do profess faith in God the Father, and in Jesus Christ His only Son, and in the Holy Ghost, one God, blessed for evermore; and I do acknowledge the holy scriptures of the Old and New Testament to be given by divine inspiration.” Someone living in Delaware in 1777 might legitimately wonder if Unitarians or Jews were in fact full citizens of the state and entitled to freedom of worship.

Conflicting clauses like those in the Delaware Constitution (or the Protestant establishment) helped lead the framers of the U.S. Constitution to ban all religious tests for officeholding, and in the Bill of Rights to emphatically protect the “free exercise” of religion while guaranteeing that the United States could never establish any religion.

The “Palladium of Liberty”

Revolutionary-era Americans often referred to freedom of the press as the “palladium” of liberty. They understood a press that could criticize the government would be a “bulwark” (another one of their favorite terms) in preventing tyranny. Not surprisingly, most of the early state constitutions protected the press. Virginia’s constitution represented the sometimes overblown language of the period: “That the freedom of the press is one of the great bulwarks of liberty, and can never be restrained but by despotic governments.” Pennsylvania’s language in its 1776 Constitution was more modern and more restrained: “That the people have a right to freedom of speech, and of writing, and publishing their sentiments; therefore the freedom of the press ought not to be restrained.” Maryland’s Constitution of 1776 was more direct: “[T]he liberty of the press ought to be inviolably preserved.” Delaware’s 1776 Declaration of Rights used the exact same language as Maryland. Significantly, none of these documents contained the kind of absolute prohibition on regulating a free press found in the U.S. Bill of Rights that Congress “shall make no law” Equally important, neither of these bills of rights phrased the language of a “free press” in terms that we would understand as banning a suppression of the press. The Virginia Bill of Rights, for example, says that only “despotic governments” restrain the press. The implication of this is that Virginia would be acting despotically if it did so. But, presumably the state might choose to act despotically under some circumstances. Similarly the “ought” in the Pennsylvania and Maryland documents suggests that the state “could” restrain the press, but simply should not do so. In its second constitution, adopted in 1778, South Carolina moved closer to a more affirmative protection, declaring “[t]hat the liberty of the press be inviolably preserved.” Georgia’s 1777 Constitution provided the most emphatic protection of the press: “[f]reedom of the press and trial by jury to remain inviolate forever.” Oddly, Pennsylvania was the only state to protect freedom of speech at this time, although Maryland provided for freedom of speech for members of the state legislature, providing that “that freedom of speech and debates, or proceedings in the Legislature, ought not to be impeached in any other court or judicature.” Only Pennsylvania, North Carolina, Massachusetts, and New Hampshire protected the right of assembly. A few states—New York and New Jersey, for example—did not protect freedom of the press, speech, or assembly.

One important theme in these state constitutions is the connection between liberty and the press. Without

the press, the early constitution makers believed that their governments would be at risk. In an age when governments worry about a free press challenging the policies of an administration, the language of the Massachusetts Bill of Rights is particularly relevant. Written in the middle of the Revolution, the Massachusetts Bill asserted that “[t]he liberty of the press is essential to the security of freedom in a State; it ought not, therefore, to be restrained in this commonwealth.” The founding generation, it seems, understood that a free press was vital to national security, because in the end, republican values and an informed citizenry was the key to a secure society.

Jury Trials and Due Process

Most of the new state constitutions had a clause protecting the rights of accused, providing for due process of law, and for preventing the adoption of arbitrary laws, such as writs of attainder or ex post facto laws. New York’s first constitution declared the following:

And this convention doth further ordain, determine, and declare, in the name and by the authority of the good people of this State, that trial by jury, in all cases in which it hath heretofore been used in the colony of New York, shall be established and remain inviolate forever. And that no acts of attainder shall be passed by the legislature of this State for crimes, other than those committed before the termination of the present war; and that such acts shall not work a corruption of blood. And further, that the legislature of this State shall, at no time hereafter, institute any new court or courts, but such as shall proceed according to the course of the common law.

New Jersey emphatically declared “that the inestimable right of trial by jury shall remain confirmed as a part of the law of this Colony, without repeal, forever.” The framers in New Jersey were not yet certain if their jurisdiction was a “colony” or a state, but they understood that they wanted to be certain they would always have a trial by jury. New Jersey did not have any other protections for criminal justice or due process. South Carolina’s 1776 Constitution provided for jury trials in civil suits, if either party asked for one, but not in criminal cases.

Delaware, on the other hand, provided elaborate protections for jury trials and accused criminals. Much of the language from that document would appear, almost word for word, in the Fourth, Fifth, Sixth, and Eighth Amendments to the U.S. Constitution. Delaware’s 1776 Declaration of Rights prohibited “retrospective law” (what the U.S. Constitution

would call *ex post facto* laws); and required civil trials “speedily without delay, according to the law of the land,” with juries to determine the facts in all civil and criminal cases. The Delaware framers considered “that trial by jury of facts where they arise is one of the greatest securities of the lives, liberties and estates of the people.” In addition, Delaware’s Constitution required a “speedy trial by an impartial jury” in all criminal cases, with the accused having a right to confront his accusers, subpoena witnesses, and “not be compelled to give evidence against himself.” The document prohibited “excessive bail,” “excessive fines,” and “cruel or unusual punishments.” The section on searches and seizures was particularly detailed: “That all warrants without oath to search suspected places, or to seize any person or his property, are grievous and oppressive; and all general warrants to search suspected places, or to apprehend all persons suspected, without naming or describing the place or any person in special, are illegal and ought not to be granted.”

Virginia, Pennsylvania, and Maryland had similar protections of due process, often with the same language. Given the close proximity of these three states, it is not surprising that they borrowed and learned from each other in writing constitutions that protected civil liberties. Virginia’s jury provision mandated that juries have twelve members and that verdicts be unanimous. Massachusetts went further than most states in its emphatic language and in its guarantees, including the right to an attorney. Thus, in 1780 the Bay State’s constitution provided that:

No subject shall be held to answer for any crimes or no offence until the same if fully and plainly, substantially and formally, described to him; or be compelled to accuse, or furnish evidence against himself; and every subject shall have a right to produce all proofs that may be favorable to him; to meet the witnesses against him face to face, and to be fully heard in his defence by himself, or his counsel at his election. And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land.

Fundamental Liberty

In general, the newly independent states had a sharper sense of the need to be protected from arbitrary government than they did for protecting the rights of freedom of speech, press, or religion. Yet, with one

exception, nowhere in the world were civil liberties more protected than under the new constitutions of the American states. That one exception had to do with the most fundamental civil liberty of all: the right to personal autonomy as a free person.

On the eve of the Revolution, slavery was legal in all of the thirteen colonies. In explaining to the world why they were revolting, the Americans asserted “[t]hat all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness.” Yet, the man who wrote these words, Thomas Jefferson, owned about 175 slaves at the time. Many of the other signers of the Declaration were slave owners as well. Not surprisingly, there was a great conflict in the new nation between the assertions of equality and the struggle for liberty and the fact that so many leaders of the Revolution were slave owners. Not a few Englishmen and many Americans read the Declaration and wondered, as did Samuel Johnson, “How is it that we hear the loudest yelps for liberty among the drivers of negroes?” This question bothered some early constitution makers. But only three of the new states confronted the issue of slavery in their first constitutions.

Virginians borrowed some of Jefferson’s language when writing their constitution. Thus, Section 1 of the Virginia Declaration of Rights began with the words, “That all men are by nature equally free and independent, and have certain inherent rights.” The section ended with more language that mirrored Jefferson’s Declaration, asserting that free people “cannot, by any compact, deprive or divest their posterity, namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.” Had Virginia only used this language, the state’s framers would have been attacking slavery directly. But, the Virginia framers were cautious and careful, and between these two clauses they inserted language designed to exclude slaves. Thus, the entire provision of Section 1 read:

That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity, namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.

The phrase “when they enter into a state of society” was understood to limit the language of the document to free people. Slaves had not entered into “a state of society” but rather were property owned by people in society.

Four years later, Massachusetts began its Declaration of Rights with similar language, which did not have a proviso excluding those not “in a state of society.” Article I of the Massachusetts Constitution of 1780 declared:

All men are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness.

In 1781, Massachusetts courts would use this provision to declare slaves to be free, and by 1783 slavery would cease to exist in the state. In 1783, New Hampshire adopted a constitution which declared that “all men are born equal and independent,” with natural rights, “among which are enjoying and defending life and liberty.” This clause would be interpreted within the state to end slavery.

The remaining states did not end slavery by constitutional provision, and of course, in the southern states slavery would exist until the Civil War; the Emancipation Proclamation, and the Thirteenth Amendment ended slavery. In the North, slavery would end through gradual emancipation over a number of years. Civil liberties for blacks in the North would be slow to arrive. They would not arrive for most southern blacks until after 1865.

Despite the failure to extend civil liberty—and fundamental freedom—to all Americans, the first state constitutions were generally sensitive to individual rights, although not to the extent that the U.S. Bill of Rights would be. These first state constitutions, however, set the stage for the more expansive protection of civil liberties that James Madison would propose to Congress in 1789 and the states would ratify in 1791.

PAUL FINKELMAN

References and Further Reading

- Adams, Willi Paul. *The First American Constitutions: Republican Ideology and the Making of States Constitutions in the Revolutionary Era*. Chapel Hill: University of North Carolina Press, 1980.
- Conley, Patrick T., and John P. Kaminski, eds. *The Bill of Rights and the States: The Colonial and Revolutionary Origins of American Liberties*. Madison, WI: Madison House, 1992.
- Rutland, Robert A. *The Birth of the Bill of Rights, 1776–1791*. Chapel Hill: University of North Carolina Press, 1955.
- Wood, Gordon. *The Creation of the American Republic, 1776–1787*. Chapel Hill: University of North Carolina Press, 1969.

BILL OF RIGHTS: ADOPTION OF

The Constitution of 1787 did not contain a bill of rights, although it did have some protections for some civil liberties. The original Constitution prohibited ex post facto laws and bills of attainder, preserved the right of a jury trial in criminal cases, and banned religious tests for officeholding. The document gave life tenure to judges, which insulated them from being removed for decisions that displeased the president or other officeholders. The document provided for free speech for members of Congress but otherwise did not protect rights of expression, such as freedom of speech, press, assembly, or petition.

The lack of a bill of rights was not an oversight. On August 20, 1787, Charles Pinckney of South Carolina “submitted sundry propositions” to the Convention that were sent to the Committee on Detail. While some of Pinckney’s propositions ultimately were included in the body of the Constitution, the committee ignored his proposals for a guarantee of freedom of the press and for a protection against quartering troops in private homes. On September 12, the Convention rejected Massachusetts delegate Elbridge Gerry’s proposal that the right to a jury in civil cases be guaranteed by the Constitution. Virginia’s George Mason then suggested that the entire Constitution be “prefaced with a Bill of Rights.” He thought that “with the aid of the State declarations, a bill might be prepared in a few hours.” Roger Sherman of Connecticut argued that this was unnecessary because the Constitution did not repeal the state bills of rights. Mason replied that federal laws would be “paramount to State Bills of Rights.” This argument, however correct, had little effect on the Convention, which defeated Mason’s motion with all states voting no.

The next day Gerry failed to get the Convention to guarantee juries for civil trials. Pinckney then joined Gerry in proposing that the Constitution have a provision that “the liberty of the Press should be inviolably observed.” Roger Sherman again argued against specific protections for liberty on the ground that under a government of limited powers they were unnecessary because “[t]he power of Congress does not extend to the Press.” By a vote of five states for and six against, the Convention then defeated the motion to protect “the liberty of the Press.”

On Saturday, September 15, 1787, the penultimate day of the Convention, George Mason expressed his reservations about the Constitution, noting, “There is no Declaration of Rights, and the laws of the general government being paramount to the laws and Constitution of the several States, the Declaration of Rights in the separate States are no security.”

Mason complained that under this Constitution, “the people” were not “secured even the enjoyment of the benefit of the common law.”

Mason feared that the Senate and the president would combine “to accomplish what usurpations they pleased upon the rights and liberties of the people,” while the federal judiciary would “absorb and destroy the judiciaries of the several States.” He thought the expansive powers of Congress threatened the “security” of “the people for their rights.” Without a bill of rights, all this was possible. He complained, “There is no declaration of any kind, for preserving the liberty of the press, or the trial by jury in civil causes; nor against the danger of standing armies in time of peace.” For these reasons, Mason refused to put his signature to the new Constitution.

Another Virginian, Edmund Randolph, also refused to sign. He proposed a second Convention to consider amendments, including a bill of rights. Elbridge Gerry listed a number of problems with the Constitution, including the dangers posed by the aristocratic nature of the Senate and the centralizing tendencies of the commerce power. But, he could “get over all these” defects “if the rights of the Citizens were not rendered insecure” by the virtually unlimited power of Congress under the necessary and proper clause and the lack of a guarantee of jury trials in civil cases.

Throughout the next nine months, as the states debated the new constitution, the opponents of ratification—known as the Anti-Federalists—railed against the lack of a bill of rights in the new constitution. Many Anti-Federalists, such as Patrick Henry and Richard Henry Lee, used the bill of rights as a stalking horse for their desire to detail the entire constitution. They wanted a second convention to rewrite the entire document. Other Anti-Federalists were more sincere in their opposition. James Madison called them “honest anti-federalists,” because they were not opposed to a new stronger government, but only feared that such a government would become tyrannical without a bill of rights.

Madison and other Federalists scoffed at such fears. They opposed the addition of a bill of rights, asserting that it was (1) unnecessary, (2) redundant, (3) useless, (4) actually dangerous to the liberties of the people, (5) that its presence would violate the principles of republican government embodied in the Constitution, or some combination of these.

They argued that the Constitution created a government of limited powers and thus Congress could not do anything that it was not specifically empowered to do. Personal liberty, they argued, would be protected by the states. Congress could not create a national religion or suppress freedom of the press,

they argued, because it lacked the power to do so. Thus, in the Convention, Pennsylvania’s James Wilson asserted that one purpose of the states was “to preserve the rights of individuals.” Oliver Ellsworth of Connecticut explained that he looked to the state governments “for the preservation of his rights.” Roger Sherman argued that “the State Declarations of Rights are not repealed by this Constitution; and being in force are sufficient.” He believed that the national legislature might “be safely trusted” not to interfere with the liberties of the people.

Federalists also argued that the main body of the Constitution already had some protections of liberty, such as bans on ex post facto laws or religious tests for officeholding. Thus, combined with the notion of a limited government, a bill of rights was redundant. But, Madison also argued that a Bill of Rights was useless. In a letter to Thomas Jefferson (who was in France at the time), Madison explained that there was no bill of rights because “experience proves the inefficacy of a bill of rights on those occasions when its controul is most needed. Repeated violations of these parchment barriers have been committed by overbearing majorities in every state.” He noted that in Virginia he had “seen the bill of rights violated in every instance where it has been opposed to a popular current.” He warned that “restrictions however strongly marked on paper will never be regarded when opposed to the decided sense of the public; and after repeated violations in extraordinary cases, they will lose even their ordinary efficacy.” No bill of rights was better, in Madison’s mind, than one that might be ignored.

Federalists also feared that a bill of rights would be dangerous to the liberties of the people because any rights not protected would be given up. James Wilson asked who would “be bold enough to undertake to enumerate all the rights of the people?” He thought no one could, but warned that “if the enumeration is not complete, everything not expressly mentioned will be presumed to be purposely omitted.” Thus, he believed a bill of rights “not only unnecessary, but improper.” Alexander Hamilton made a similar point when arguing that a bill of rights was “not only unnecessary in the proposed Constitution, but would even be dangerous. They would contain various exceptions to powers not granted; and, on this very account, would afford a colorable pretext to claim more than were granted.”

Finally, some Federalists argued that under a republican government a bill of rights was unnecessary. Oliver Ellsworth, a future chief justice of the United States, argued that a bill of rights was something that the people wrested from the king; thus, in America a bill of rights was “insignificant since government is

considered as originating from the people, and all the power government now has is a grant from the people." Similarly, James Wilson argued that "it would have been superfluous and absurd, to have stipulated with a federal body of our own creation, that we should enjoy those privileges, of which we are not divested." North Carolina's James Iredell maintained that in England a bill of rights was necessary because of the Crown's "usurpations" of the people's liberties. But, under the new Constitution, the people delegated power to the national government, and thus such usurpations by the national government were impossible.

The Federalists won the debate over the Constitution, and by July eleven states had ratified the document. However, five states recommended that the new government amend the new Constitution in various ways, including adding protections for civil liberties. During the ratification struggle in Virginia, James Madison argued that a bill of rights was unnecessary and sincerely believed that most of the leading Anti-Federalists were not truly interested in a bill of rights, but rather simply wanted to derail the Constitution. At the Virginia convention, he was willing to compromise by supporting the idea that the convention could recommend amendments, but only after the convention had ratified the Constitution. Madison still did not believe a bill of rights was needed, but he did believe that some amendment protecting civil liberties, if carefully framed, might not harm the Constitution. He also realized that some Virginians—especially the Baptists who were a significant force in his part of the state—supported the new form of government but nevertheless sincerely wanted a bill of rights as well.

After ratification, when campaigning for a seat in the First Congress, Madison once again considered the issue of a bill of rights. Madison discussed this in a letter to Rev. George Eve, an influential Baptist leader in his district. Madison freely admitted his disagreement with Eve in that he did not see in the Constitution "those serious dangers which have alarmed many respectable Citizens" including Eve. Thus, he told Eve that until the Constitution was ratified, he had been unwilling to support any calls for amendments, because he believed they were "calculated to throw the States into dangerous contentions, and to furnish the secret enemies of the Union with an opportunity of promoting its dissolution." However, with the Constitution ratified he was willing to support "amendments, if pursued with a proper moderation and in a proper mode" because under such circumstances they would "be not only safe, but may well serve the double purpose of satisfying the minds of well meaning opponents, and of providing additional guards in favour of liberty."

Madison told Eve that "[u]nder this change of circumstances, it is my sincere opinion that the Constitution ought to be revised, and that the first Congress meeting under it, ought to prepare and recommend to the States . . . provisions for all essential rights, particularly the rights of Conscience in the fullest latitude, the freedom of the press, trials by jury, security against general warrants, &c."

After his letter to Eve, Madison publicly declared that he would work for amendments if elected to Congress. This public support for amendments swayed the Baptists and helped secure Madison's election to Congress. Once in Congress, Madison urged the House to support a bill of rights. He still did not think one was necessary, but he told the House he was "bound in honor and in duty" to bring the amendments forward. His plan was to "advocate them until they shall be finally adopted or rejected by a constitutional majority of this House."

The Federalist leaders of the House did not want to be bothered with amendments, as they were busy creating a national government. But Madison argued that postponement would play into the hands of those extreme Anti-Federalists who had predicted that the new national government would create a tyranny. He argued that "if we continue to postpone from time to time, and refuse to let the subject come into view, it may well occasion suspicions, which, though not well founded, may tend to inflame or prejudice the public mind against our decisions." Madison feared that the "very respectable number of our constituents" who had asked for amendments might conclude that Congress was "not sincere in our desire to incorporate such amendments in the constitution as will secure those rights, which they consider as not sufficiently guarded." Although about to propose amendments, Madison was still not advocating them for their substance. Rather, he argued he had a moral obligation to present them and that it would be politically expedient for Congress to accept them. When Connecticut's Roger Sherman proposed delaying any discussion of amendments, Madison argued that it was important to consider amendments to prove to the Anti-Federalists that the supporters of the Constitution were also "sincerely devoted to liberty and a Republican Government" and not attempting to "lay the foundation of an aristocracy or despotism." He reminded the House of those who had "apprehensions" that the new government wished to "deprive them of the liberty for which they valiantly fought and honorably bled." He believed that many who had opposed the Constitution were now ready "to join their support to the cause of Federalism, if they were satisfied on this one point." Furthermore, he reminded the House that North Carolina and Rhode

Island had not yet ratified the Constitution, but that amendments might lure them into the union.

In proposing the amendments, Madison showed little passion. He told the House that he had “never considered” a bill of rights “so essential to the federal constitution” that it would have been allowed to impede ratification. But, with the Constitution ratified, Madison was willing to concede “that in a certain form and to a certain extent, such a provision was neither improper nor altogether useless.” The amendments he proposed were unlikely to displease the hard-line Anti-Federalists, and in fact they did not. He proposed only amendments that were universally accepted, such as a protection of freedom of speech and freedom of worship. He noted that they were “limited to points which are important in the eyes of many and can be objectionable in those of none.” Proudly he noted that “the structure & stamina of the Govt. are as little touched as possible.”

Madison initially proposed that the amendments refer to specific provisions in the Constitution. So, for example, limitations on establishing religion or infringing on a free press would be inserted in Article I, Section 9 of the Constitution, which set out limits on congressional power. Fortunately, Roger Sherman prevailed upon Madison to reorganize his proposals as a series of numbered amendments that resembled the state bills of rights. This was a significant change, because it made the amendments into a coherent document as a “bill of rights.”

Congress debated Madison’s proposed amendments for much of the summer. Most of Madison’s speeches were along the lines of his opening remarks. He wanted the amendments to eliminate the discord between those who feared the Constitution and those who supported it. But on one issue Madison became somewhat passionate. His proposed amendments had not only limited the federal government. He also proposed limits on the state governments. Two brief speeches showed that Madison remained more committed to limiting the powers of the states than to limiting the power of the national government. Thus, he passionately supported a proposal that would have prohibited the states from infringing “the equal right of conscience . . . freedom of speech or the press, . . . [and] the right of trial by jury in criminal cases.” Madison thought this was “the most valuable amendment in the whole list.” Although the House approved this clause, the Senate did not, and thus these rights would not become applicable to the states until after the adoption of the Fourteenth Amendment and its modern development, starting with *Gitlow v. New York* (1925). Similarly, Madison strongly opposed adding the word “expressly” to what became the Tenth

Amendment. Madison thought that this would give the states too much power.

On September 24, 1789, the House and Senate agreed on twelve amendments to the Constitution. They were then sent to the states for ratification. The first two dealt with the size of the House and congressional salaries. Neither was ratified at the time. The amendment on salaries would have prevented Congress from raising its salary during any current term. Over the years, a number of states ratified this amendment, and in 1992, over two centuries after it was proposed, three-fourths of the states had ratified it and it was added to the Constitution as the Twenty-Seventh Amendment.

Nine states quickly ratified amendments three through twelve. Two states, Georgia and Connecticut, rejected the amendments, accepting the Federalist argument that they were unnecessary. Massachusetts apparently ratified the amendments, but never sent the ratification on to Congress. Before the amendments could be added to the Constitution, however, Vermont was admitted to the Union. Thus, with fourteen states, the amendments needed eleven ratifications. Vermont quickly ratified the amendments, but Virginia held out. The Anti-Federalists in the state, led by Patrick Henry, did not want the Bill of Rights ratified because they were holding out for a second convention, which would undo the Constitution and create a weaker national government. Henry understood that once a bill of rights was ratified, most opposition to the Constitution would disappear. On this point he was correct. On December 15, 1791, Virginia finally ratified the Bill of Rights. With this ratification, Anti-Federalism disappeared along with most opposition to the Constitution. Henry would in fact soon join the emerging Federalist Party and support the stronger national government. Madison would be remembered as the father of the Bill of Rights, albeit a clearly reluctant one. He never thought the nation needed a bill of rights, but in the end the document proved to be his greatest legacy and his most important contribution to American history.

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References and Further Reading

- Amar, Akhil. *The Bill of Rights: Creation and Reconstruction*. New Haven, CT: Yale University Press, 1998.
- Cogan, Neil H. *The Complete Bill of Rights: The Drafts, Debates, Sources, and Origins*. New York: Oxford University Press, 1997.
- Finkelman, Paul, *James Madison and the Bill of Rights: A Reluctant Paternity*, *Supreme Court Review* 1990 (1991): 301–47.

Rutland, Robert A. *The Birth of the Bill of Rights, 1776–1791*. Chapel Hill: University of North Carolina Press, 1955.

Veit, Helen E., Kenneth R. Bowling, and Charlene Bangs Bickford. *Creating the Bill of Rights: The Documentary Record of the First Federal Congress*. Baltimore: Johns Hopkins University Press, 1991.

BILL OF RIGHTS: STRUCTURE

The structure of the American Bill of Rights reflects its eighteenth-century origins. The framers of the Constitution did not include a bill of rights because they honestly believed that one was unnecessary. They understood that they were creating a government of limited powers. As Gen. Charles Cotesworth Pinckney told the South Carolina legislature after the Convention, “[I]t is admitted, on all hands, that the general government has no powers but what are expressly granted by the Constitution, and that all rights not expressed were reserved by the several states.” Thus, framers like James Madison, James Wilson, and Roger Sherman argued that there was no need to prohibit the government from infringing on civil liberties because the government had no power to do so.

Tied to this structural argument was the belief that fundamental liberties, such as those in a bill of rights, had to be taken from a king or monarch. The founders took their lessons from English history. The barons at Runnymede surrounded King John I and forced him to sign the Magna Carta. In the seventeenth century, Parliament struggled with the king to gain the English Bill of Rights and other laws that protected basic liberties. The framers reasoned that Parliament or “the people” had to force the king to give them these liberties and rights. Along these lines, the framers argued that in a republic this was unnecessary because the people already had these rights and liberties. Because the government was representative, the people could never lose these rights because the government represented the people.

Anti-Federalists and even some supporters of the new Constitution did not accept these arguments. They argued that a democratically elected legislature could still take away rights from the people. They also feared that the new central government might fail to represent the interests of “the people” because the legislature was so distant from the people it represented and the terms were so long that members of the House and Senate would become estranged from their constituents. Combined with a president from far away who served for four years, the Anti-Federalists feared the new government would trample on the liberties of the people. Some Anti-Federalists feared that the president would become a king or a

dictator. Thus, they demanded a bill of rights to protect their liberties.

The Bill of Rights reflected the concerns of both the Federalists and the Anti-Federalists. For the most part, the Bill of Rights did not *grant* liberties to the people but rather placed limitations on what the government could do. These amendments thus created “negative rights.” Another aspect of the bill of rights was its use of general language, rather than specific details.

The First Amendment illustrates this. The amendment does not give the people the right to worship as they wish, or to speak as they wish. Rather, the amendment says that “Congress shall make no law . . . prohibiting the free exercise” of religion or “abridging the freedom of speech, press, or the right of the people to peaceably assemble and to petition the government for a redress of grievances.” The amendment assumes that the people have these rights. There is no need for a toleration act in America, as there was in England. The king could in theory grant toleration to the people to worship as they wished, because the king, as the sovereign, had the right to set the religious standard for the nation. But under the American republic the people retained this right. Thus, the people did not need the permission of the government to speak or pray as they wish because the people were the sovereign, and so they had this right. Thus, under the Bill of Rights, the government was prohibited from taking these rights away from the people. Similarly, with this language the people could make no claim on Congress to facilitate these rights. Thus, for example, while Congress cannot pass laws “abridging the freedom [of] . . . the press,” Congress has no obligation to provide every citizen with his or her printing press.

The only clause in the First Amendment that does not presume that the people have rights is the establishment clause. Congress could conceivably have passed a law establishing a national religion. Madison and other framers denied that Congress had the power to do this—it was not an enumerated power. But, Madison also did not have any problem adding this extra level of protection against congressional action.

Most of the rest of the Bill of Rights was also phrased in negative terms, rather than the granting of positive rights. Thus, the Second Amendment presumed that the people of the states would be able to have organized militias, as the states already had. Thus, the amendment simply said that Congress could not disband the state militias. But the Federalists who controlled Congress were not willing to go beyond the simple statement that “a well regulated militia” was “necessary to the security of a free

State.” Madison and his colleagues ignored Anti-Federalists from Pennsylvania who demanded elaborate amendments setting out positive rights in great detail. This group of Pennsylvanians, who had been in the distinct minority at the state’s ratifying convention, wanted amendments declaring “that the people have a right to bear arms for the defense of themselves and their own state, or the United States, or for the purpose of killing game” and that “the inhabitants of the several states shall have liberty to fowl and hunt in seasonable times, on the lands they hold, and on all other lands in the United States not enclosed, and in like manner to fish in all navigable waters, and others not private property, without being restrained therein by any laws to be passed by the legislature of the United States.” Such provisions were too specific, and did not fit with the general pattern of using the Bill of Rights to place limits on Congress.

The “negative rights” or limitations on Congress in some ways provide for more universal protection of civil liberties than positive rights language might have accomplished. The Third Amendment assumed that soldiers could never be quartered in private homes except under narrowly defined circumstances created by positive law. Similarly, the Fourth Amendment “assumes” that there is a right to be secure against unreasonable searches, and so the amendment denies the government the right to conduct a search except under certain circumstances. In the same way, the Fifth Amendment declares that no one can be tried without a grand jury indictment. This limitation goes to the government action, and requires no act of enforcement by the person under investigation. Similarly, the right against self-incrimination is presumed and cannot be taken away, rather than given in the Fifth Amendment. The same is true with the Eighth Amendment’s ban on cruel and unusual punishment. People are not protected from torture; rather the government simply may not use torture. A curious exception to idea of general rights is the Seventh Amendment, which provides for jury trials in civil cases where the amount at issue exceeds twenty dollars. In the modern world, this limitation is absurdly outdated.

The Sixth and Seventh Amendments contain a series of positive rights, perhaps because these rights—to a jury trial or to legal counsel—were not seen as fundamentally inherent to a nature of free political society. The rights to a speedy and public trial by an impartial jury with subpoena power, confrontation of witnesses, and an attorney are new positive rights that were not secure in English law and not fundamental to a republican society. The right to counsel was truly an innovation—something never before secured by law.

The Ninth Amendment was the most creative of all the amendments, and goes directly to the heart of the way that the framers saw positive and negative rights. Many Federalists opposed a bill of rights because they thought that it was impossible to write one. They doubted the ability of anyone to list all the rights of the people and any rights left out would be lost. This argument assumed that a complete enumeration of all rights would be impossible. Thus, in defending the Constitution in the Pennsylvania ratifying convention, James Wilson asked who would “be bold enough to undertake to enumerate all the rights of the people?” He thought no one could, but warned that “if the enumeration is not complete, everything not expressly mentioned will be presumed to be purposely omitted.” He later argued that members of the Convention considered a bill of rights “not only unnecessary, but improper.” Alexander Hamilton made a similar point, arguing that a bill of rights was “not only unnecessary in the proposed Constitution, but would even be dangerous. [It] would contain various exceptions to powers not granted; and, on this very account, would afford a colorable pretext to claim more than were granted.” Madison agreed with this analysis. He told Jefferson that if a bill of rights were added to the Constitution, it had to “be so framed as not to imply powers not meant to be included in the enumeration.”

During the debates over the Constitution, Oliver Ellsworth, who would later become chief justice of the United States, made a similar point. He noted with frustration the persistent Anti-Federalist complaint that “[t]here is no declaration of any kind to preserve the liberty of the press, etc.” He answered, “Nor is liberty of conscience, or of matrimony, or of burial of the dead; it is enough that Congress have no power to prohibit either, and can have no temptation. This objection is answered in that the states have all the power originally, and Congress have only what the states grant them.” In part, Ellsworth reaffirmed the impossibility of listing all the rights of the people in a bill of rights. Madison responded to this problem with the Ninth Amendment, which provides that “[t]he enumeration in [the] Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” Since the amendments listed few positive rights, Madison wanted to be sure that no one believed the government could take basic rights from the people. Thus, the Ninth Amendment preserved those rights that were either too obvious to name—such as the right “of matrimony, or of burial of the dead,” and also those rights that the framers might not even have thought of. In the modern era, this amendment has helped create a right of privacy that protects reproductive rights and other kinds of personal privacy.

The Bill of Rights is a creation of the eighteenth century, written by politicians who were both pragmatists and skeptical of the power of government. Thus, it lacks large promises—such as the right to a job, housing, food, medical care, or education—which are found in some modern bills of rights. The Bill of Rights in fact makes few promises—such as that persons arrested will have fair trials, due process, and the right to an attorney. Rather, for the most part, the Bill of Rights simply limits government power so that individuals can exercise rights they presumably have always had—such as the right to speak, write, or worship as they wish, to be secure from intrusion in their homes, and to be free from being forced to incriminate themselves or face torture from their own government. While the government sometimes tried to trample their rights, most Americans, most of the time, have been able to exercise their rights without intrusion from the government. Moreover, because the rights come from what the government cannot do, for the most part Americans have been able to exercise them without having to depend on Congress or the president to vindicate their rights. Similarly, by placing a limitation on what the government can do, the Bill of Rights provided a legal claim to be taken into the courts to resist government misbehavior. Ironically, in this way the Bill of Rights has functioned to force citizens to challenge their own government, but in doing so they did not approach rights as supplicants. They did not have to ask the president or Congress for their rights, as English citizens had to ask the king for rights. Rather, they could go to the courts and demand that the national government not take away from them what they already possess, and use the explicit limitations in the Bill of Rights or the more general all-purpose limitation in the Ninth Amendment to vindicate their rights.

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References and Further Reading

- Amar, Akhil. *The Bill of Rights: Creation and Reconstruction*. New Haven, CT: Yale University Press, 1998.
- Finkelman, Paul, *James Madison and the Bill of Rights: A Reluctant Paternity*, *Supreme Court Review* 1990 (1991): 301–47.
- , *The Ten Amendments as a Declaration of Rights*, *Southern Illinois University Law Review* 16 (1992): 351–96.
- Rutland, Robert A. *The Birth of the Bill of Rights, 1776–1791*. Chapel Hill: University of North Carolina Press, 1955.
- Veit, Helen E., Kenneth R. Bowling, and Charlene Bangs Bickford. *Creating the Bill of Rights: The Documentary Record of the First Federal Congress*. Baltimore: Johns Hopkins University Press, 1991.

BINGHAM, JOHN ARMOR (1815–1900)

John Armor Bingham, an Ohio lawyer, was a prominent figure in American politics and government in the latter half of the nineteenth century. He participated in many of the key events surrounding and shortly after the Civil War. Most significantly, Bingham played a pivotal role in drafting the Fourteenth Amendment. Dissenting in *Adamson v. California* (1947), Justice Hugo Black referred to Bingham as “the Madison of the first section of the Fourteenth Amendment.” Bingham’s views on the Fourteenth Amendment, particularly as those views pertain to whether it “incorporates” the first eight amendments of the U.S. Constitution against the states, continue to be debated.

John Bingham was born on January 21, 1815, in Mercer County, Pennsylvania. His parents were Hugh Bingham and Ester Bailey Bingham. Not much is known about his mother, who died when John was twelve. After his mother died in 1827, John relocated to Cadiz, Ohio, where he lived with his uncle, Thomas Bingham, off and on for four years. At fourteen, Bingham attended Mercer Academy, then Franklin College in New Athens, Ohio, for two years. While at Franklin College, Bingham became friends with Titus Basfield. Basfield was a former slave who became the first black person to earn a degree from an Ohio college. He and Bingham corresponded for over a quarter-century following their acquaintance at Franklin. After college, Bingham read law in Pennsylvania, the typical preparation for aspiring attorneys at the time. He studied with John J. Pearson and William Stewart, two prominent Mercer, Pennsylvania, lawyers. Bingham was admitted to practice on March 25, 1840. He returned to Cadiz that same year and four years later married his cousin Amanda Bingham (his uncle Thomas’s daughter), with whom he had three children.

Abolitionist views run like a crimson thread throughout John Bingham’s early life. Perhaps the most compelling indication of the influences shaping his assessment of slavery is a passing reference to his mother that he made in 1862. Calling “chattel slavery . . . an ‘infernal atrocity,’” Bingham added, “I thank God that I learned to lisp it at my mother’s knee.” Both Hugh and Thomas Bingham were active in abolitionist political circles. Pennsylvania Governor Joseph R. Ritner, patron of John Bingham’s politically active father, was an outspoken abolitionist who was described as a person “[who] appoint[ed] to high and responsible stations . . . individuals notorious for their zeal in the cause of abolition.” Bingham’s uncle (eventually his father-in-law), Thomas, was an associate judge of the Harrison County Court of Common

Pleas. Bingham's father and his uncle were antislavery Whigs. In time, both became "free soilers" opposing the extension of slavery to territories of the United States. Among John Bingham's childhood friends was Matthew Simpson. Simpson became a very influential bishop in the Methodist Episcopal Church in America. An advisor to President Abraham Lincoln and a close friend to Lincoln and General Ulysses S. Grant, Bishop Simpson was among those who urged Lincoln to issue the Emancipation Proclamation while the President was reluctant to do so. Simpson delivered the oration at two of President Lincoln's funerals, at the White House, and in Springfield, Illinois. Franklin College, John Bingham's alma mater, was characterized as "the fountain-head of the abolition sentiment of eastern Ohio."

Bingham's career trajectory was shaped by the antislavery convictions he developed growing up in eastern Ohio and western Pennsylvania as well as by the divisions that exploded in the Civil War. The year 1856 was a tumultuous one in American history. Foreshadowing the Civil War, the border conflict known as "Bleeding Kansas" raged with cruel atrocities on both sides. Murderous hatred stalked the halls of the Capitol, where South Carolina Congressman Preston Brooks almost beat Massachusetts Senator Charles Sumner to death with a cane after Sumner delivered a speech excoriating supporters of the pro-slavery faction in Kansas. Amid this disorder, together with his professional mentors, John J. Pearson and William Stewart, John Bingham joined the new Republican Party. Founded in 1854 in Ripon, Wisconsin, the Republican Party unsuccessfully ran John C. Fremont for president in 1856 on the slogan, "Free soil, free labor, free men." Two years previously, Republican Bingham was first elected to the U.S. House of Representatives as a member of the Thirty-fourth Congress. He served four terms until March 1863. Bingham's views during this period are illustrated by his observation on the July 21, 1861, Union defeat at the First Battle of Bull Run (Manassas): "[W]e need these reverses to bring our people up to the peril of not abolishing slavery."

Defeated in his bid for a fifth term in 1864, Bingham was appointed a major in the Union Army by President Lincoln, serving as judge advocate. Lincoln's assassination on April 15, 1865, thrust Bingham into the national spotlight. With Joseph Holt, Army judge advocate general, and Henry L. Burnett, another assistant judge advocate, Bingham argued the government's case against the eight conspirators before a nine-man military commission. Bingham culminated his extensive summation by saying, "What these conspirators did in the execution of this conspiracy by the hand of one of their

co-conspirators [John Wilkes Booth] they did themselves; his act, done in the prosecution of the common design, was the act of all the parties to the treasonable combination, because done in execution and furtherance of their guilty and treasonable agreement."

Bingham was again elected to Congress in 1865. Two events dominated his second term of service: the impeachment of President Andrew Johnson and drafting of the Fourteenth Amendment. The role that Bingham played in both was defined by his participation in a group of American political figures known as Radical Republicans. These prominent members of Congress and of President Lincoln's Cabinet clashed often with Lincoln's successor, Andrew Johnson. Their fundamental difference with President Johnson revolved around the pace and direction of post-Civil War Reconstruction. For the Radical Republicans, "reconstructing" the defeated southern states required basically altering the social and political landscape of the former Confederacy in ways designed to protect the rights of former slaves—alterations they saw as the precondition for readmitting these states in rebellion to the Union. Johnson took a much more conciliatory and accommodating view. Amid a series of vitriolic clashes over three pieces of Reconstruction legislation, during which Johnson also vetoed the Civil Rights Act of 1866, he fired Radical Republican Edwin M. Stanton as secretary of war, in violation of the 1867 Tenure of Office Act. In response, the House of Representatives impeached Johnson. Bingham chaired the House Committee that argued, unsuccessfully, the articles of impeachment before the Senate.

While Radical Republicans and President Johnson locked horns over congressional Reconstruction, a Joint Committee on Reconstruction was at work on a constitutional amendment. Bingham opposed the 1866 Civil Rights Bill because he wanted the federal Bill of Rights "enforced everywhere," and he believed that this goal could be accomplished only by a constitutional amendment. As a Joint Committee member, he drafted (some say collaborating with Pennsylvania Representative Thaddeus Stevens) the first of the amendment's five sections. Section 1 reads: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Writing in *McCreary County, Kentucky v. American Civil Liberties Union of Kentucky* (2005), Justice David Souter characterized the Fourteenth Amendment

as “the most significant structural [constitutional] provision adopted since the original Framing.” Yale Law School professor Akhil Reed Amar offers this assessment of Bingham’s contribution: “It was Bingham’s generation that in effect added a closing parenthesis after the first eight . . . amendments, distinguishing these amendments from all others. As a result, Americans today can lay claim to a federal Bill of Rights set apart from everything else, and symbolically first even if textually middling.”

Apropos of Professor Amar’s appraisal, a central controversy in the Supreme Court’s interpretation of the Fourteenth Amendment involves whether its language applies all, some, or none of the first eight amendments (Bill of Rights) to the states. Under the doctrine of “selective incorporation,” it is settled law that most of the specific guarantees do apply to the states. Other scholars and judges, notably adherents to the notion of a “Constitution in Exile,” reject incorporation. While Bingham’s speeches during congressional debate of the Fourteenth Amendment have been used by both sides in this debate, the weight of scholarly opinion supports the view that Bingham embraced incorporation.

Bingham left Congress in 1873. That year President Ulysses S. Grant appointed him envoy extraordinary and minister plenipotentiary to Japan, a post he occupied for twelve years. His appointment came at a crucial time in Japanese history, just after the Meiji restoration (1866–1869). Bingham died on March 19, 1900. He is buried in Cadiz, Ohio.

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References and Further Reading

- Amar, Akhil Reed. “Hero Worship and the Bill of Rights.” *The American Lawyer*. December 1998, p. 66.
- Aynes, Richard L., *The Continuing Importance of Congressman John A. Bingham and the Fourteenth Amendment*, Akron Law Review 36 (2003): 4:589.
- , *On Misreading John Bingham and the Fourteenth Amendment*, Yale Law Journal 103 (October 1993): 57.
- Beauregard, Erving E. *Bingham of the Hills: Politician and Diplomat Extraordinary*. New York: Peter Lang, 1989.

BIRTH CONTROL

Birth control is the generic term to describe methods used to limit the number of children. These methods fall into two main categories: those that try to prevent conception, and those that terminate an embryo or fetus.

Humans seem to have utilized various forms of birth control since ancient times in almost all cultures. Common forms of birth control were non-vaginal

intercourse, *coitus interruptus* (withdrawal of the penis from the vagina before the point of ejaculation), vaginal barriers or pessaries to prevent sperm from reaching the ova, and abortifacients (potions taken to induce a miscarriage in a pregnant woman).

The Catholic Church has been particularly vocal in its opposition to birth control, and cites the story of Onan and the command to be fruitful as basis for this opposition. Sexual intercourse is for procreation, and attempts to interfere in this process are viewed as contrary to God’s will. Despite such opposition, evidence shows that the various forms of birth control have been widely practiced throughout the Western world.

Traditional local practice of birth control continued in the early United States, and abortion was widely practiced and accepted. Even Catholics accepted abortion before “the quickening,” the point at which life was thought to begin (approximately forty days after conception). In the 1830s, an increased religiosity began to stigmatize abortion at any stage. This coincided with attempts by doctors to professionalize medicine by preventing unlicensed persons from performing medical procedures, most often abortions. This combination led the states to prohibit all abortion unless medically necessary to save the life of the mother. In 1873, Anthony Comstock persuaded Congress to pass laws defining all information about contraception as obscene and punishing anyone who disseminated such information.

Towards the end of the nineteenth century, concerns for the health risks associated with pregnancy led women’s rights groups to become more vocal in their demands for access to birth control. This led to a backlash with some, including President Theodore Roosevelt, calling the practice of birth control “race suicide.” The fear was that white Anglo-Saxon Protestant Americans would be outnumbered by immigrants because of their lower birth rates through practicing birth control. This tension found some resolution as many advocates of birth control also supported forcible eugenic sterilization of those deemed unfit to pass on their genes to the next generation.

One of the twentieth century’s most active campaigners for birth control was Margaret Sanger, the founder of the group Planned Parenthood. She led calls for new legislation at the state and local level and also pushed for change through the courts. In *U.S. v. One Package of Japanese Pessaries* (1936), it was ruled that information about contraception was not obscene per se and that doctors could discuss contraception with their patients without fear of prosecution. In *Griswold v. Connecticut* (1965), the U.S. Supreme Court found that the penumbras of the

Fourteenth Amendment contained a right to privacy that protected married couples' use of contraceptive devices and struck down Connecticut's law prohibiting their usage. Sanger was involved in both cases. The Court later extended *Griswold* to cover unmarried couples in the case of *Eisenstadt v. Baird* (1972).

The 1960s also saw the development of the first contraceptive pill and later long-term implanted contraceptives. The contraceptive pill is credited as a leading factor in the sexual liberation experienced in the 1960s and was criticized for encouraging greater promiscuity and sexual immorality.

The awareness of the threat posed by human immunodeficiency virus/acquired immunity deficiency syndrome (HIV/AIDS) refocused the debates over birth control onto the prevention of sexually transmitted diseases. The 1980s and 1990s witnessed bitter divisions over what should be included in sex education in schools. Conservatives advocated the teaching of "abstinence only" as the only guaranteed protection against both pregnancy and infection. They resisted calls to include other methods of birth control in the curriculum for fears that greater awareness and understanding would lead to higher rates of teen sexual behavior. Others argued pragmatically that teens were likely to engage in this behavior anyway, and that other methods should be included to ensure that any sex was as safe as possible in terms of both avoiding pregnancy and preventing sexually transmitted diseases.

These debates took on an international dimension in 2001 when President George W. Bush began refusing funds for any United Nations sex education program that did not focus solely on abstinence, leading some to complain that the United States was putting its moral convictions ahead of concerns to deal with the HIV/AIDS crisis in Africa and Asia.

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References and Further Reading

- Garrow, David J. *Liberty and Sexuality: The Right to Privacy and the Making of Roe v. Wade*. Berkeley: University of California Press, 1998.
- Gordon, Linda. *Woman's Body, Woman's Right: Birth Control in America*. New York: Penguin Books, 1974.
- . *The Moral Property of Women: A History of Birth Control Politics in America*. Urbana: University of Illinois Press, 2002.
- Kennedy, David M. *Birth Control in America: The Career of Margaret Sanger*. New Haven, CT: Yale University Press, 1970.
- Noonan, John T. *Contraception: A History of Its Treatment by the Catholic Theologians and Canonists*. Cambridge, MA: Harvard University Press, 1986.
- Planned Parenthood. Home Page, <http://www.plannedparenthood.org>.

Reed, James. *From Private Vice to Public Virtue*. New York: Basic Books, 1978.

Cases and Statutes Cited

- Eisenstadt v. Baird*, 405 U.S. 438 (1972)
- Griswold v. Connecticut*, 381 U.S. 479 (1965)
- U.S. v. One Package of Japanese Pessaries*, 86 F.2d 737 (1936)
- See also* **Abortion Laws and the Establishment Clause; Abortion Protest Cases; Anti-Abortion Protest and Freedom of Speech; *Bellotti v. Baird*, 443 U.S. 622 (1979); *Buck v. Bell*, 274 U.S. 200 (1927); Search (General Definition); Family Values Movement; Obscenity; Reproductive Freedom; *Roe v. Wade*, 410 U.S. 113 (1973)**

BIVENS v. SIX UNKNOWN NAMED AGENTS OF FEDERAL BUREAU OF NARCOTICS, 403 U.S. 388 (1971)

Bivens held, for the first time, that a federal court may hold individual government agents liable for money damages for violating a person's Fourth Amendment rights. The Supreme Court further established that the Constitution itself implies a "cause of action," that is, a right to sue, government agents responsible for conducting unreasonable searches and seizures.

Webster Bivens had committed no crime. Nevertheless, agents of the federal government ransacked his home, conducted a broad search, handcuffed him in front of his wife and children (whom they also threatened to arrest), and later strip-searched him—all without probable cause. This blatantly unconstitutional search seemed to have no redress: given that he was never prosecuted, exclusion of evidence found in the home was irrelevant. Bivens sued, seeking money damages, but the federal courts dismissed his claim, finding that there was no right to sue under the Fourth Amendment.

The Supreme Court reinstated his claim, holding that without an implicit right to sue, the Fourth Amendment would be reduced to mere words. Despite the lack of a remedy articulated by the text of the amendment, the Court nonetheless held that the Article III judicial power, as discussed in *Marbury v. Madison*, inherently includes the authority to fashion remedies (including money damages) for constitutional violations. Even though traditional state tort claims were available, the Court created a new cause of action under the Fourth Amendment, and ultimately permitted similar suits under other amendments as well.

Bivens litigation, however, is not without its difficulties. First, as a practical matter, juries are reluctant to find liability in *Bivens* actions because they perceive that the individual government agent, and not the government itself, will be made to pay. Second, subsequent Supreme Court decisions have made the *Bivens* waters far murkier. In *Bush v. Lucas*, *Schweiker v. Chilicky*, and *United States v. Stanley*, the Court severely restricted the analysis of whether the Constitution would imply a cause of action to particular constitutional violations. The basis for this retreat was the notion, originally detailed in Chief Justice Burger's *Bivens* dissent, that the Court must defer to the will of Congress, given the lawmaking nature of the "creation" of remedies. Thus, if Congress has not addressed a given class of grievances, or has done so without designating the remedy of money damages, the Court should recognize the doctrine of "separation of powers"—that the legislature should make law, and the courts should simply interpret it.

To counteract these problems, commentators have suggested that Congress should amend the Federal Torts Claim Act (FTCA) to waive immunity, thus permitting claimants to sue the government rather than the individual agent. Although Congress did create a statutory cause of action under the FTCA for such purposes, it intentionally excluded money damages. Thus, the *Bivens* problem still remains.

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References and Further Reading

- Bandes, Susan, *Reinventing Bivens: The Self-Executing Constitution*, Southern California Law Review 68 (1995): 289.
- Grey, Betsy J., *Preemption of Bivens Claims: How Clearly Must Congress Speak?* Washington University Law Quarterly 70 (1992): 1087.
- Pillard, Cornelia T.L., *Taking Fiction Seriously: The Strange Results of Public Officials' Individual Liability under Bivens*, Georgetown Law Journal 88 (1999): 65.
- Thomas, Charles W., *Resolving the Problem of Qualified Immunity for Private Defendants in § 1983 and Bivens Damage Suits*, Louisiana Law Review 53 (1992): 449.

Cases and Statutes Cited

- Amos v. United States*, 255 U.S. 313 (1921)
- Bell v. Hood*, 327 U.S. 678 (1946)
- Berger v. New York*, 388 U.S. 41 (1967)
- Byars v. United States*, 273 U.S. 28 (1927)
- Gambino v. United States*, 275 U.S. 310 (1927)
- J.I. Case Co. v. Borak*, 377 U.S. 426 (1964)
- Katz v. United States*, 389 U.S. 347 (1967)
- Marbury v. Madison*, 1 Cranch 137 (1803)
- Silverman v. United States*, 365 U.S. 505 (1961)
- Weeks v. United States*, 232 U.S. 383 (1914)

See also **Exclusionary Rule**; *Mapp v. Ohio*, 367 U.S. 643 (1961); **Search (General Definition)**; **Search Warrants**; **Seizures**

BLACKLEDGE v. PERRY, 417 U.S. 21 (1974)

Perry was tried and found guilty of the misdemeanor assault of a fellow inmate. When he exercised his statutory right to a new trial under North Carolina law, the prosecutor charged him with felony assault for the same conduct that had been previously charged as a less serious offense. Perry then pleaded guilty to the felony assault indictment.

Perry argued before the Supreme Court that the prosecutor's action was unconstitutional under the due process clause of the Fourteenth Amendment. The Court held that when defendants have a statutory right to a new trial, apprehension that prosecutors may retaliate by recharging with a higher offense, if they were to exercise this legal right, may impermissibly prevent defendants from ever availing themselves of a new trial. Such prosecutorial action in effect cuts off a defendant's access to the courts in violation of the due process clause. Moreover, a defendant does not have to prove that a prosecutor acted vindictively because it is the mere apprehension of retaliation that chills a defendant's assertion of the right to appeal.

Thus, absent circumstances where there is the impossibility of initially indicting on a more serious charge, prosecutors may not constitutionally bring a more serious charge against defendants who have sought new trials as of right. *Perry* therefore extended *North Carolina v. Pearce*, which held that, following a retrial, a defendant cannot receive a harsher sentence unless the trial judge sets out specific reasons.

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References and Further Reading

- Breathing New Life into Prosecutorial Misconduct Doctrine*, Harvard Law Review 114 (May 2001): 2074–97.
- Henning, Peter J., *Prosecutorial Misconduct and Constitutional Remedies*, Washington University Law Quarterly 77 (Fall 1999): 735–46.

Cases and Statutes Cited

- North Carolina v. Pearce*, 395 U.S. 711 (1969)

See also **Due Process**; *North Carolina v. Pearce*, 395 U.S. 711 (1969)

BLACKLISTING

Blacklisting is similar to blackballing. As the latter is associated with the placement of a black marble among the white ones in a bag, signifying that the applicant to a club has been denied membership by a single member, a blacklist is a powerful tool wielded by employers that denies the possibility of work to anyone whose name has been placed on a specific list. The injustice of a blacklist can be seen in its arbitrariness—just as in blackballing, where a single marble can decide one's fate, the blacklist may, over time, come to include names that no one remembers for sure how or why they got there. The Hollywood blacklist, for example, was designed to prevent left-wing film industry workers from finding employment in the American motion picture business. But because of mistaken identities, misspellings, rumor, and so forth, many individuals were not only blacklisted but effectively denied employment in spite of the fact that their names had been entered on the list through sheer inadvertence or oversight.

The Hollywood blacklist can also be seen as unfair since it targeted for reprisal as communists people whose political sympathies rarely strayed beyond that of California liberalism, and magazine subscriptions or house parties were notorious ways by which the politically naïve and socially harmless managed to get their names in a file that would follow them the rest of their lives. The canard that communists had taken over the film industry and turned the citadel of entertainment into a propaganda arm of the Soviet Union was genuinely hallucinatory in its misreading of the product that the American film industry was selling at home and abroad.

Finally, the detractors of Hollywood radicals and fellow travelers uniformly ignored the fact that without the Red Army in Europe, and the Soviet Union's "popular front" alliance with Western capitalists, Hitler's regime might never have been defeated. President Franklin Roosevelt recognized the Soviet Union as one of his first acts in office after winning the 1932 national election; that there were warm relations between Americans of all sorts and Russian communism, or its various American outposts during the 1930s and the war itself, should hardly come as a surprise nor be condemned. If even Winston Churchill could embrace Stalin, when the time was right, a Hollywood movie actor ought to be able to read a book by John Reed, or go to meetings where Reed's politics began to make increasing sense as the Great Depression deepened.

Blacklisting did not begin with the Hollywood studios. In Charles Dickens's novel *Hard Times*, his "honest-but-doomed working man," Stephen

Blackpool, is blacklisted for rebellious comments that he makes to a factory owner, and his inability to find employment, crisscrossing Britain's brutal mid-nineteenth-century industrial landscape is virtually a death sentence. As labor researcher Mike Hughes documents, the rightwing Economic League operated a blacklist among British employers throughout most of the twentieth century, and was only brought to its knees by a House of Commons select committee investigation in 1990. The tale of blacklisting in American academia is a story that only a tiny handful of academics have come forward to tell. Historian Ellen Schrecker argues that, in fact, McCarthyism in the United States, whose tentacles reached well beyond the film industry and university campus, was a two-tiered process in which the success of the upper tier, led by criminal prosecutors and purveyors of rightwing political ideology, was only assured because it was founded upon a lower tier, the system of economic repression, that is, the blacklist.

Many of the same civil liberties that are at the heart of a democratic society and represent the soul of American constitutional law are the conventional victims of blacklisting—freedom of speech, association, and the press. Yet how does one campaign in the courts or march in the capital against as invisible and insidious an influence as that of a blacklist? The deprivation of civil liberties by blacklisting thus raises a special political problem and necessarily points toward hard philosophical questions about the parameters of liberty in liberal democracies. Many words have been written about the alleged superiority of negative over positive rights, the safeguards unique to negative constitutions, the essentially private and personal quality of liberty, and the transparent virtues of a government of laws and not men. The government that governs best, we are told, governs least. Lord Acton said, "Power corrupts. Absolute power corrupts absolutely." But the success of blacklisting as a political tool, the use of a discreet economic weapon for enforcing a grand public program, the destruction of civil liberties through a policy of intimidation, guilt by association, and economic strangulation—all outside the general purview of the law in liberal systems of rule—surely underscores not the strengths but the weaknesses of a politics that places economic processes, including decision making behind the blacklist, far from public regulation and the jurisdiction of the state.

Thus, a certain criticism of civil liberty itself is difficult to deflect. Civil liberty is to be enjoyed in private, but is that much more easily destroyed in private. Congress shall make no law . . . But what if it is corporations, and other private enterprises, that

rule? The state cannot force the private media to report a story or print an article or open its pages to dissident points of view. And when governments close down newspapers or television stations, it is a sure sign of the defeat of civil liberty by totalitarian tactics. But where is the freedom of speech for the citizen who does not own a newspaper or have his or her own television news station? At one level, these realities reveal fault lines separating liberty from democracy. There is “a contradiction between the sovereignty of the people and universal suffrage on the one hand, placing the fate of the nation in the hands of everyone,” wrote historian Georges Lefebvre, “and the capitalist economy where the wage-earner sees his work, his wages and consequently his life in the hands of those who own the means of production.”

But surely the illustration of blacklisting reveals contradictions with the system of civil liberty itself. The very private liberty that protects the right to hire and fire, the right to employ or not, the right to maneuver behind the scenes, to plan in secret, to remain silent in the face of injustice, to decline courageous action, to act on one’s own prejudice without explanation, the power of joint economic activity by owners of private property—everything that makes the blacklist work is itself a right and is protected by civil liberty and by law. The house of civil liberty may not be about to fall, but it is all too easily portrayed as divided against itself.

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References and Further Reading

- Caute, David. *The Left in Europe Since 1789*. New York: World University Library, 1966.
 Hughes, Mike. *Spies at Work*. Bradford, UK: 1 in 12 Publications, 1994.
 Schrecker, Ellen. *The Age of McCarthyism*. Boston: St. Martin’s Press, 1994.

BLACKSTONE AND COMMON-LAW PROHIBITION ON PRIOR RESTRAINTS

In the fourth volume of his famous *Commentaries on the Laws of England*, published in 1769, William Blackstone argued that freedom of the press under the common law was limited to a prohibition on prior restraints. As Blackstone explained,

The liberty of the press is indeed essential to the nature of a free state: but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published. Every free-man has an undoubted right to lay what sentiments he

pleases before the public: to forbid this, is to destroy the freedom of the press: but if he publishes what is improper, mischievous or illegal, he must take the consequences of his own temerity.

Blackstone’s formulation—which imposed an absolute bar on state censorship prior to publication, but permitted punishment after the fact—was widely influential in eighteenth- and nineteenth-century America. In the 1907 case of *Patterson v. Colorado*, the Supreme Court, citing Blackstone, held that freedom of the press under the First Amendment consisted solely of a prohibition on prior restraints. In 1919, however, the Court intimated in *Schenck v. United States* that freedom of the press extended more broadly, a holding confirmed in subsequent cases.

Blackstone’s denunciation of prior restraints has nonetheless remained a vital aspect of American law. In *Near v. Minnesota* (1931), the Supreme Court relied heavily on Blackstone and the prohibition on prior restraints to invalidate a Minnesota law providing for the abatement of certain newspapers as public nuisances.

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References and Further Reading

- Blackstone, William. *Commentaries on the Laws of England*. Vol. 4. Oxford: Clarendon Press, 1769.
 Friendly, Fred W. *Minnesota Rag: The Dramatic Story of the Landmark Supreme Court Case that Gave New Meaning to Freedom of the Press*. New York: Random House, 1981.
 Levy, Leonard. *Emergence of a Free Press*. New York: Oxford University Press, 1985.

Cases and Statutes Cited

- Patterson v. Colorado*, 205 U.S. 454 (1907)
Near v. Minnesota, 283 U.S. 697 (1931)
Schenck v. United States, 249 U.S. 47 (1919)

See also **Freedom of Speech and Press: Nineteenth Century; Freedom of Speech and Press under the Constitution: Early History (1791–1917)**

BLAINE AMENDMENT

The Blaine amendment was a proposed 1876 amendment to the U.S. Constitution.

Introduced by Congressman James G. Blaine in December 1875, the amendment sought to apply the First Amendment’s religion clauses directly to state actions, prohibit the disbursement of public funds for parochial education, and, as revised by the Senate, forbid the exclusion of the Bible from the nation’s

BLAINE AMENDMENT

public schools. Congress debated the measure during the heat of the 1876 summer presidential campaign, an election overshadowed by a resurgent Democratic Party and the inevitable demise of federally mandated southern reconstruction. Blaine's proposal passed a Democrat-controlled House of Representatives by an overwhelming margin, but fell four votes short in the Senate of being submitted to the states as the Sixteenth Amendment to the U.S. Constitution.

The Blaine amendment stands apart in significance from the majority of failed constitutional amendments for three reasons. First, based on the proposal's express language applying the First Amendment's religion clauses to state actions, some observers have argued that the proposal, coming eight years after the passage of the Fourteenth Amendment to the Constitution, indicates that members of Congress did not understand the due process or privileges and immunities clauses of that latter amendment to incorporate the rights contained in the Bill of Rights. Opponents of the Supreme Court's incorporation cases of the mid-twentieth century have used the Blaine amendment as one of their chief weapons. While there may be some merit to this argument, the Blaine amendment was much more expressive in its prohibition than the language of the First Amendment (and possibly differed from contemporary understandings of the establishment clause). In addition, during the debate on the measure, at least one senator referred to the Supreme Court's decision in the *Slaughterhouse Cases* (1873) rejecting the theory of incorporation under the Fourteenth Amendment as a providing a justification for the Blaine amendment. Consequently, legislators could have believed that the Blaine amendment was necessary to counteract the erroneous holding of *Slaughterhouse*.

The Blaine amendment is additionally significant as the apex of a mid-nineteenth-century controversy over the public funding of private religious schools. The "School Question" or "School Controversy," as it was popularly called, arose during the 1830s and 1840s following the creation of publicly funded "common" schools. A primary goal of the common schools was to teach republican values and integrate immigrant children into American culture. Increasingly, Catholic immigrants objected to the distinctly Protestant character of the nonsectarian curriculum of most common schools and, in turn, opted to establish Catholic parochial schools in the 1840s and 1850s. Catholic requests for pro rata shares of state school funds were regularly turned down by education officials who generally viewed parochial schools as a threat to the success of the common school movement.

After lying dormant during the Civil War and early Reconstruction years, the School Question rose to

prominence as a campaign issue during the 1876 election. Some evidence suggests that Republican officials seized on the funding issue as a way of attracting anti-Catholic and anti-immigrant sentiment while seeking to align the Democratic Party with the Catholic Church. In September 1875, President Grant, hoping for a third term as president, proposed a constitutional amendment to prohibit the public funding of religious schools. James G. Blaine, also seeking the Republican presidential nomination, then introduced the amendment that bore his name:

No State shall make any law respecting an establishment of religion, or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools, or derived from any public fund therefore, not any public lands devoted thereto, shall ever be under the control of any religious sect; nor shall any money so raised or lands so devoted be divided between religious sects or denominations.

The Democrat-controlled House of Representatives overwhelmingly passed Blaine's proposal after attaching a nonenforcement provision. The Republican-controlled Senate removed the nonenforcement provision, expanded the language to prohibit the expenditure of funds derived from any source, and added a provision to preserve the reading of the Bible in the public schools, which favored Protestant interests. During the Senate debates, Democrats charged that the amendment was motivated by anti-Catholicism and would expand federal control over local educational decisions. In the end, the Senate voted along party lines to reject the Blaine amendment. As a result of the episode, many observers have charged that the Blaine amendment was motivated primarily by anti-Catholic animus. While anti-Catholicism unquestionably fueled the controversy, the Blaine amendment episode also implicated larger issues about the federal role in public education and the future and religious character of public schooling.

The Blaine amendment is also significant for its legacy. Even though Congress failed to pass the Blaine amendment in 1876, several states subsequently adopted similar non-funding provisions in their state constitutions. In 1889, Congress expressly required the states of Montana, North and South Dakota, and Washington to adopt non-funding provisions in their respective constitutions as a condition for granting statehood. Approximately two-thirds of state constitutions now contain such provisions, usually found in sections governing expenditures for public education that prohibit appropriations for the support of sectarian or denominational schools. These state "Blaine amendments" have become important because state courts have occasionally interpreted these provisions

more strictly than the interpretation given to the establishment clause by the U.S. Supreme Court. For example, in 1961 the Alaska Supreme Court interpreted its non-funding provision to prohibit public reimbursement of transportation costs for children to attend religious schools, even though the U.S. Supreme Court in 1947 had upheld the constitutionality of a similar program under the federal establishment clause.

More recently, the issue of whether a stricter interpretation of a state non-funding provision might violate the free exercise and equal protection clauses came before the U.S. Supreme Court in *Locke v. Davey* (2004). Two years earlier, the Supreme Court had ruled in *Zelman v. Simmons-Harris* that a program that allows publicly financed vouchers to be used for religious school tuition does not violate the federal establishment clause. Relying on interpretations of its own constitution, however, Washington State refused to allow a student to use a publicly financed voucher to attend a religious college. The student charged that the Washington rule was unnecessarily restrictive, and that the denial infringed on his rights to free exercise and equal protection of the law. In *Locke*, however, the Supreme Court affirmed the state's decision, holding that the First Amendment allowed for "play in the joints" between the establishment and free exercise clauses, and that Washington State was free to interpret its state constitutional provisions independently of interpretations of the federal establishment clause.

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References and Further Reading

- DeForrest, Mark Edward, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, Harvard Journal of Law and Public Policy 26 (2003): 552–626.
- Garnett, Richard W., *The Theology of the Blaine Amendments*, First Amendment Law Review 2 (2003): 23–44.
- Gedicks, Frederick Mark, *Reconstructing the Blaine Amendments*, First Amendment Law Review 2 (2003): 85–106.
- Feldman, Noah, *Nonsectarianism Reconsidered*, Journal of Law and Politics 18 (2002): 65–117.
- Green, Steven K., *The Blaine Amendment Reconsidered*, American Journal of Legal History 36 (1992): 38–69.
- , *'Blaming Blaine': Understanding the Blaine Amendment and the 'No-Funding' Principle*, First Amendment Law Review 2 (2003): 107–52.
- Hamburger, Philip, *Separation of Church and State*. Cambridge, MA: Harvard University Press, 2002.
- McAfee, Ward M. *Religion, Race, and Reconstruction: The Public School in the Politics of the 1870s*. Albany: State University of New York, 1998.
- Stern, Mark D., *Blaine Amendments, Anti-Catholicism, and Catholic Dogma*, First Amendment Law Review 2 (2003): 153–78.

Viteritti, Joseph P., *Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law*, Harvard Journal of Law and Public Policy 26 (1998): 657–718.

Cases and Statutes Cited

- Locke v. Davey*, 124 S.Ct. 1307 (2004)
- Slaughterhouse Cases*, 83 U.S. 36 (1873)
- Zelman v. Simmons-Harris*, 536 U.S. 639 (2002)

See also **State Aid to Religious Schools**

BLOODY TENENT OF PERSECUTION FOR CAUSE OF CONSCIENCE, DISCUSSED IN A CONFERENCE BETWEEN TRUTH AND PEACE, THE

Roger Williams began his religious career as a Puritan minister, and when he arrived in Massachusetts in 1630 he was initially well received. But he quickly fell into disfavor with the local leaders because of his liberal views. He changed his religious affiliation from Puritan to Baptist, and in 1639 he became a Seeker, a person who adhered to no specific religious practices. It was as a Seeker that Williams wrote "The Bloody Tenent," while in England attempting to win back a charter for Rhode Island. The main theme of the tract, as it was of Williams's life, is that all individuals and religious bodies are entitled to religious liberty as a natural right, and that civil governments do not have the authority to enforce religious laws.

"The Bloody Tenent" is structured as a dialogue between "Truth" (representing the orthodox views of Puritans like John Cotton) and "Peace" (representing Williams's views), and the subject of their debate is whether secular laws should favor one religion over another, and whether these laws have any basis in the Bible. Williams argued that these laws were in fact contrary to biblical teachings, and utilized the parable in Matthew 21:33–46 about the tenants who killed the son of the landowner to lay claim to his property (hence the title).

Williams used numerous biblical parables to buttress his argument that the civil authority ought not to be used to enforce religious conformity. He noted that Jesus and his disciples did not enjoy the protection of civil authority, and when he sent the disciples into the countryside to preach, he instructed them to take no food or money, but to rely on God for their needs. In the same manner, the Church of Williams's day ought to rely on spiritual authority alone, not that of the Crown.

Altogether, the prose in the tract is quite dense, and not easily read. But the message it carried could

THE BLOODY TENENT

not be mistaken, and made Williams the leading champion in his time for the idea of religious liberty for both individuals and sects.

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References and Further Reading

Morgan, Edmund S. *Roger Williams, the Church and the State*. New York: Harcourt, Brace & World, 1967.

BLUE LAWS

See Sunday Closing Cases and Laws

BLUE WALL OF SILENCE

The blue wall of silence is an unwritten code that prohibits police officers from providing adverse information against fellow officers. In essence, the code states that “cops don’t tell on cops.”

Officers allegedly learn about the wall of silence in the police academy when instructors inform them that all officers are “blue” (referring to the color of their uniforms) and have to protect each other no matter what. “I’ll watch your back and you watch mine” is the understanding that police officers have among themselves. The problem with this philosophy is that a sense of loyalty develops that is based on relationships with other police officers rather than loyalty based on principles such as justice, fairness, and respect for human rights. Many police officers adopt this philosophy and turn a blind eye to fellow officers who engage in drug dealing, theft, assault and battery, murder, and other human rights violations.

The blue wall of silence makes it possible for police violence against citizens to be perpetuated with impunity. In one of the most egregious examples of this phenomenon, officers in the New York City Police Department failed to do or say anything to protect Abner Louima from a sadistic anal assault perpetrated by Officer Justin Volpe in a Brooklyn police station. When Volpe marched around his fellow officers waving a broken broomstick stained with Louima’s blood and feces, bragging that he had “taken a man down,” no police officer reported this outrageous conduct. Other egregious examples of how the blue wall of silence has operated include the cases of Rodney King (Los Angeles, Calif., 1992), Tyisha Miller (Riverside, Calif., 1998), and Amadou Diallo (New York City, 1999).

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References and Further Reading

Chin, Gabriel, and Scott Wells, *The Blue Wall of Silence As Evidence of Bias and Motive to Lie: A New Approach to Police Perjury*, *University of Pittsburgh Law Review* 59 (1998): 233.

Gallo, Gina. *Armed and Dangerous: Memoirs of a Chicago Policewoman*. New York: Forge, 2001.

Human Rights Watch. *Shielded from Justice: Police Brutality and Accountability in the United States*. Human Rights Watch Report, 1999. www.hrw.org/reports98/police/toc.htm.

Kappeler, Victor E., Richard Sluder, and Geoffrey P. Aplert. *Forces of Deviance: Understanding the Dark Side of Policing*. 2nd ed. Prospect Heights, IL.: Waveland Press, 1998.

Stamper, Norm. *Breaking Rank: A Top Cop’s Expose of the Dark Side of American Policing*. New York: Nation Books, 2005.

BOARD OF EDUCATION OF THE WESTSIDE COMMUNITY SCHOOLS v. MERGENS, 496 U.S. 226 (1990)

In *Board of Education of the Westside Community Schools v. Mergens*, a public school board denied students’ request to form a Christian club and meet after school on school premises. The school had created a limited open forum under the Equal Access Act (EAA) by permitting some non-curriculum-related student clubs, such as chess and stamp collecting, to meet during noninstructional time after school. The EAA, enacted by Congress in 1984, declared that once a school receiving federal financial assistance created a limited open forum, it could not discriminate against student-led clubs meeting during non-instructional time on school premises based on the “religious, political, philosophical, or other content of the speech at the meetings.” The Court found that the school board’s denying the Christian club the same opportunity to meet as other non-curriculum-related clubs amounted to discrimination based on the Christian club’s religious speech. The Court also upheld the constitutionality of the EAA against an establishment clause claim, finding that allowing a wide range of student clubs to meet, including the Christian club, had a secular purpose and that high school students were not likely to perceive that a religious club meeting on the same basis as other clubs constituted government sponsorship of religion.

The EAA protects the right of students to meet in clubs reflecting their own interests on the same basis as any other non-curriculum-related club. Although initially applied to religious clubs, the EAA applies as well to other student interest groups, such as gay/straight clubs.

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References and Further Reading

Equal Access Act, 20 U.S.C. §§ 4071–4074.
 Establishment Clause, U.S. Const. First Amendment.
 Mawdsley, Ralph, *The Equal Access Act and Public Schools: What Are the Legal Issues Related to Recognizing Gay Student Groups?* Brigham Young University Education & Law Journal (2001): 1–33.

BOARD OF EDUCATION v. ALLEN, 392 U.S. 236 (1968)

One of the most contentious church–state issues in the United States has been the question of the constitutionality of government aid to religious schools. In *Board of Education v. Allen* (1968), the U.S. Supreme Court considered the constitutionality of a New York statute requiring public school districts to purchase and loan secular textbooks free of charge to children enrolled in both parochial and public schools. The Court, in one of its early decisions interpreting the establishment clause in the context of government aid to religious schools, sustained the constitutionality of the statute.

In 1947, the Supreme Court launched the modern establishment clause era with its decision in *Everson v. Board of Education* in which the Court narrowly sustained the constitutionality of a New Jersey law that authorized reimbursement to parents for the transportation expenses their children incurred traveling to sectarian schools. Thereafter, the Court attempted to determine what type of governmental aid to children attending private religious schools violated the establishment clause. In *Allen*, a six-to-three decision with Justice Byron White writing for the majority, the Court, conceding that “the line between state neutrality to religion and state support of religion is not easy to locate,” relied on a test that it had articulated five years earlier in *Abington Township School District v. Schempp* (1963): “[W]hat are the purpose and primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution.”

The Court in *Allen* concluded that because the textbooks in question were secular, loaning them to children attending parochial schools did not have a “primary effect” of advancing the religious mission of the school. In reaching this conclusion, the Court concluded that “religious schools pursue two goals, religious instruction and secular education.” The Court concluded that secular textbooks serve only the latter function, rejecting the plaintiffs’ arguments that “all teaching in a sectarian school is religious” and that “the processes of secular and religious

training are so intertwined that secular textbooks furnished to students by the public are in fact instrumental in the teaching of religion.” The Court noted that there was no evidence in the record suggesting that the books in question had been used for religious instruction.

Justices Hugo Black, William Douglas, and Abe Fortas each dissented, distinguishing the bus fares at issue in *Everson* from the textbooks at issue in *Allen*. Black argued that textbooks in the hands of a sectarian school teacher would inevitably be used “to propagate the religious views of the favored sect.” Aware that states were considering other forms of aid to sectarian schools, Black worried that if the Court sustained the textbook loans, “on the argument used to support this law others could be upheld providing for state or federal government funds to buy property on which to erect the buildings themselves, [or] to pay the salaries of the religious school teachers.”

Although the Court sustained the textbook loan program, for the next several years it rejected various other forms of government aid to sectarian schools such as teacher salary supplements. In recent years, however, the Court has significantly liberalized its jurisprudence in this area by permitting greater government aid to religious schools.

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References and Further Reading

Freund, Paul, *Comment: Public Aid to Parochial Schools*, Harvard Law Review 82 (1969): 1680–92.
 Futterman, David, *School Choice and the Religion Clauses: The Law and Politics of Public Aid to Private Parochial Schools*, Georgetown Law Journal 81 (1993): 711–40.

Cases and Statutes Cited

Abington Township School District v. Schempp, 374 U.S. 203 (1963)

Everson v. Board of Education, 330 U.S. 1 (1947)

See also **State Aid to Religious Schools**

BOARD OF EDUCATION v. EARLS, 536 U.S. 822 (2002) (STUDENTS)

Drug testing of students by public school officials constitutes a search that must be reasonable under the Fourth Amendment. In *Board of Education v. Earls*, the Court addressed the lawfulness of warrantless, suspicionless drug testing of students.

A school district in Pottawatomie County, Oklahoma, implemented a policy that required all students who participated in competitive extracurricular

activities to submit to drug testing. Students Lindsay Earls and Daniel James, with their parents, sued the school district, arguing that the drug testing policy violated the Fourth Amendment.

The Court commenced its analysis by observing that the usual requirements of a search warrant and probable cause are uniquely situated to criminal investigations and may not be suitable for determining the reasonableness of searches intended to prevent future harms. Instead, the reasonableness of administrative searches is determined by balancing the government's legitimate interests in the search against the intrusion on individual privacy interests.

The Court had previously held that students' expectations of privacy are reduced in light of schools' responsibility for their health, education, discipline, and safety. Examining the specific policy at issue, the Court characterized the intrusion upon student privacy interests as relatively minor. Students provided urine samples in a closed restroom stall, test results were confidential, and the only consequence of a failed test was to limit the student's participation in extracurricular activities. Results did not carry academic, criminal, or other disciplinary consequences.

In contrast, the Court deemed the district's interest in drug testing as substantial. Although the government did not demonstrate a pervasive drug problem in its district, it did present evidence that some students had possessed or used drugs. Additionally, the Court noted a nationwide drug "epidemic." Weighing the intrusion on privacy interests against the government's interest in preventing and detecting drug use by schoolchildren, the Court found the policy to be reasonable.

In doing so, the Court extended its earlier ruling in *Vernonia School District v. Acton*, which applied only to school athletes. In *Vernonia*, the Court emphasized the safety hazards of drug use in athletes, as well as the reduced expectations of privacy in a locker-room atmosphere. Nevertheless, the Court found that the absence of these facts did not tip the reasonableness balance against the broader policy challenged in *Earls*.

Just as *Vernonia* did not determine the constitutionality of drug testing nonathletes, *Earls* does not resolve the constitutionality of testing students who do not participate in extracurricular activities. In its fact-specific analysis, the majority noted that students who engaged in extracurricular activities voluntarily subjected themselves to some intrusions on their privacy, and that the only consequence of a failed test was to limit participation in extracurricular activities. One member of the majority, Justice Breyer, wrote a concurring opinion emphasizing that the policy did not apply to the entire school. Four justices dissented,

reasoning that *Vernonia* was limited to athletes. Accordingly, it is possible that a majority of the Court might find unreasonable a drug testing policy that applied to all students.

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References and Further Reading

- Smiley, Jennifer E., *Comment. Rethinking the 'Special Needs' Doctrine: Suspicionless Drug Testing of High School Students and the Narrowing of Fourth Amendment Protections*, Northwestern University Law Review 95 (2001): 811.
 Sundby, Scott E., *Protecting the Citizen 'Whilst He Is Quiet': Suspicionless Searches, 'Special Needs' and General Warrants*, Mississippi Law Journal 74 (2004): 501.

Cases and Statutes Cited

Vernonia School District v. Acton, 515 U.S. 646 (1995)

See also **Administrative Searches and Seizures; Drug Testing; Probable Cause; Search (General Definition); Search Warrants**

BOARD OF EDUCATION v. PICO, 457 U.S. 853 (1982)

In *Board of Education v. Pico*, the sharply divided Court held that the school board violated the students' First Amendment rights by removing from high school and junior high school libraries several books that the board found "anti-American, anti-Christian, anti-Sem[itic], and just plain filthy." The books were not obscene, but the board stated that "[i]t is our duty, our moral obligation, to protect the children in our schools from this moral danger as surely as from physical and medical dangers."

Justice William J. Brennan's plurality opinion (joined by Justices Thurgood Marshall and John Paul Stevens) concluded that removal of the library books implicated students' First Amendment right to "receive information and ideas." The plurality acknowledged that students' First Amendment rights must be construed "in light of the special characteristics of the school environment," but concluded that the school board denies these rights when it acts with intent to deny students access to ideas with which the board disagrees. The plurality stressed that the decision concerned only the board's authority to remove library books, which by their nature are optional rather than required reading; the decision did not concern acquisition of library books, or removal from the curriculum of required texts.

Justices Harry A. Blackmun and Byron R. White concurred. Justice Blackmun stated that "school

officials may not remove books for the *purpose* of restricting access to the political ideas or social perspectives discussed in them, when that action is motivated simply by the officials' disapproval of the ideas involved" (emphasis in original). Justice White would have awaited a full trial before reaching the constitutional question.

To Chief Justice Warren E. Burger (joined by Justices William H. Rehnquist, Lewis F. Powell, Jr., and Sandra Day O'Connor), the case turned on "whether local schools are to be administered by elected school boards, or by federal judges and teenage pupils; and . . . whether the values of morality, good taste, and relevance to education are valid reasons for school board decisions concerning the contents of a school library." The chief justice wrote: "[A]s a matter of *educational policy* students should have wide access to information and ideas. But the people elect school boards, who in turn select administrators, who select the teachers, and these are the individuals best able to determine the substance of that policy" (emphasis in original).

Justice Powell accused the plurality of "reject[ing] a basic concept of public school education in our country: that the States and locally elected school boards should have the responsibility for determining the educational policy of the public schools." *Pico*, Justice Powell continued, allows "any junior high school student, by instituting a suit against a school board or teacher, [to] invite a judge to overrule an educational decision by the official body designated by the people to operate the schools."

Pico constrains the discretion of public school authorities to remove materials from school libraries. Some lower courts also cite *Pico* for a First Amendment right of students to receive information, although the right commanded only the three-justice plurality.

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References and Further Reading

Chemerinsky, Erwin. *Constitutional Law: Principles and Policies*. 2nd ed. New York: Aspen, 2002.
Nowak, John E., and Ronald D. Rotunda. *Constitutional Law*. 7th ed. St. Paul, MN: Thomson West, 2004.

See also **Children and the First Amendment**

BOARD OF EDUCATION, KIRYAS JOEL SCHOOL DISTRICT v. GRUMET, 512 U.S. 687 (1994)

Kiryas Joel involved a striking fact situation: a public school district created to serve only the disabled children of an ultra-Orthodox Jewish sect. But in striking

down the district under the establishment clause, the Supreme Court relied on a simple, bedrock principle: any government accommodation of religious practice must extend not only to a single sect, but to any sect engaged in a similar practice.

The Satmar Hasidim are an insular, traditionalist group who speak primarily Yiddish, permit no television or radio, wear distinctive hair and clothing, and educate their children in gender-segregated private schools permeated by religious teaching. They formed a village in upstate New York called Kiryas Joel, inhabited only by sect members. The village's disabled children, entitled to state and federal special-education assistance, at first received it in Satmar private schools, but had to switch to public schools after the Supreme Court signaled disapproval of private school aid in *Aguilar v. Felton* (1985; later overruled). The parents soon withdrew their children from public school, however, reporting that the children had been taunted by peers and traumatized by the secular atmosphere. The New York legislature then stepped in and created a special public school district tracking the lines of the village, allowing the Satmar children to receive aid in a sheltered setting, but prohibiting the district from teaching religion in its classes.

Notwithstanding the state's legitimate goal of accommodating a religious and cultural minority, the Supreme Court ruled that the creation of the district violated the establishment clause and its command of government neutrality toward varying religious views. Justice Souter's opinion for four justices, joined in part by Justice O'Connor, concluded that the Satmars had received a unique benefit, a separate school district, without any guarantee that it would be "provide[d] equally to other religious (and nonreligious) groups." The state could accommodate needs such as the Satmars', but only by a statute that did not single out one sect. Justice Scalia's dissent argued that New York had created comparable special districts before and had given no indication that it would fail to accommodate a similar group in the future.

The justices in the majority also objected to the drawing of political lines to encompass only members of one sect. Justice Souter's opinion argued that this created an improper "religious test" for membership in the district; Justice Kennedy concurred that "the Establishment Clause forbids the government to draw political boundaries on the basis of religious faith"; and Justices Stevens and Ginsburg argued even more broadly that the state cannot "affirmatively support[t] a religious sect's interest in segregating itself [from its] neighbors." These arguments raise interesting parallels with the Court's invalidation of race-based districting in decisions such as *Shaw v. Reno*. The arguments also touch on deep questions as to whether

cultural and religious pluralism are better served by integrating and assimilating various groups or by allowing certain limited forms of “segregation” by groups, like the Satmar, that are internally non-pluralistic.

The legislature responded to the Court’s holding by passing general statutes allowing the creation of smaller school districts out of larger ones under certain criteria. Two such efforts were struck down by state courts in 1997 and 1999 on the grounds that their requirements were “gerrymandered” to benefit only the Satmar. But a fourth, broader statute was upheld in 2001.

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References and Further Reading

- Berg, Thomas C., *Slouching Toward Secularism: A Comment on Kiryas Joel School District v. Grumet*, Emory Law Journal 44 (1995): 433–99.
- Boyarin, Jonathan, *Student Note: Circumscribing Constitutional Identities in Kiryas Joel*, Yale Law Journal 106 (1997): 1537–70.
- Eisgruber, Christopher L., *The Constitutional Value of Assimilation*, Columbia Law Review 96 (1996): 87–103.
- Greene, Abner S., *Kiryas Joel and Two Mistakes About Equality*, Columbia Law Review 96 (1996): 1–86.
- Lewin, Tamar, “Controversy Over, Enclave Joins School Board Group,” *New York Times*, April 20, 2002.
- Lupu, Ira C., *Uncovering the Village of Kiryas Joel*, Columbia Law Review 96 (1996): 104–20.
- Rosen, Jeffrey, *Kiryas Joel and Shaw v. Reno: A Text-Bound Interpretivist Approach*, Cumberland Law Review 26 (1996): 387–406.

Cases and Statutes Cited

- Aguilar v. Felton*, 473 U.S. 402 (1985)
- Grumet v. Cuomo*, 90 N.Y.2d 57, 681 N.E.2d 340 (1997)
- Grumet v. Pataki*, 93 N.Y.2d 677, 720 N.E.2d 66 (1999)
- Shaw v. Reno*, 509 U.S. 630 (1993)

BOB JONES UNIVERSITY v. UNITED STATES, 461 U.S. 574 (1983)

Federal law provides that “[c]orporations organized and operated exclusive for religious, charitable, or educational purposes” are entitled to tax-exempt status. But is a private school that discriminates on the basis of race entitled to federal tax-exempt status? In *Bob Jones University v. United States*, the Supreme Court concluded that racially discriminatory private school cannot receive federal tax exemptions, even if its discriminatory practices are grounded in religious belief.

Bob Jones University calls itself “the world’s most unusual university.” Although unaffiliated with any

established church, the university is dedicated to the teaching and propagation of fundamentalist religious beliefs. In pursuit of these goals, the university dictates strict rules of conduct for its students. To enforce one such rule forbidding interracial dating and marriage, the university denies admission to applicants engaged in or known to advocate interracial dating and marriage.

The Bob Jones University controversy began in 1970, when the Internal Revenue Service (IRS) concluded that it would no longer grant tax-exempt status to schools that violate governmental policy outlawing federal funding of discriminatory institutions. After paying a portion of the federal taxes due, the university filed suit for a refund, contending that it was statutorily and constitutionally entitled to reinstatement of its tax exemption. In 1981, the Supreme Court agreed to hear *Bob Jones University* and a related case raising similar issues, *Goldsboro Christian Schools, Inc. v. United States*. At that time, *Bob Jones University* was perceived as a religious liberty lawsuit. Specifically, little attention was paid to whether or not the IRS could withhold tax breaks from segregationist academies and other racist schools; the focus of the litigation, instead, was whether First Amendment religious liberty protections would extend to a school whose discriminatory practices were tied to religious conviction.

In January 1982, however, the Reagan administration sought to moot *Bob Jones University* and *Goldsboro*. Noting that Congress never formally specified that tax-exempt organizations must conform to “public policy,” the administration claimed that it lacked authority to withhold tax exemptions from racist schools. The administration’s policy shift prompted a political backlash and the administration withdrew its request to have the Supreme Court declare the case moot. In May 1983, the Court, by a vote of eight to one, denied tax exemptions to the two schools. In an opinion written by Chief Justice Warren Burger, the Court held that a tax-exempt institution must confer some “public benefit” and that its purpose must not be at odds with the “common community conscience.” The Court further held that the IRS has broad authority to interpret the code and to issue rulings based on its interpretation.

The Court also considered the religious liberty claims of Bob Jones University and Goldsboro Christian Schools. Noting that the “[g]overnment has a fundamental overriding interest in eradicating racial discrimination in education,” the Court concluded that this governmental interest “substantially outweighs whatever burden denial of tax benefits” places on the exercise of religious belief. By holding that equality of treatment on the basis of race is the

Constitution's most essential protection, and that the government's broad interest in racial discrimination in education was at issue, the Court had little difficulty in disposing of the religious liberty claims of Bob Jones University and Goldsboro Christian Schools.

In fact, the Court devoted less than three pages of its thirty-page opinion to the religious liberty issue. Furthermore, in ruling against the two schools, the Court made no effort to distinguish Bob Jones University's prohibition of interracial dating (among a student body that included both minorities and nonminorities) from Goldsboro Christian School's refusal to admit minority students. Apparently, the Reagan policy shift had transformed *Bob Jones* from a religious liberty lawsuit into a socially significant racial discrimination lawsuit. Against this backdrop, the Court may have thought it ill advised to distinguish the social policies of one school from the admissions policies of another, preferring, instead, to speak about the evils of racial discrimination.

The Court should not be faulted for its failure to give substantial attention to religious liberty concerns. Between nondiscrimination in education and religiously inspired discrimination, the Court's endorsement of nondiscriminatory objectives is hardly surprising. Indeed, the Court broke little, if any, doctrinal ground in *Bob Jones University*. Starting with its 1982 decision in *United States v. Lee*, the Court has refused to give special exceptions to religious organizations from generally applicable eligibility schemes. *Bob Jones University's* significance, in other words, is not tied to the case's precedential impact but to its explosive political setting.

References and Further Reading

Devins, Neal. "On Casebooks and Canons Or Why *Bob Jones University* Will Never Be Part of the Constitutional Law Canon." *Constitutional Commentary* 17, no. 2 (2000) 285–93.

Laycock, Douglas, *Tax Exemptions for Racially Discriminatory Religious Schools*, *Texas Law Review* 60 (1982): 1:259–77.

Case and Statutes Cited

Bob Jones University v. United States, 461 U.S. 574 (1983).
United States v. Lee, 455 U.S. 252 (1982)

CITY OF BOERNE v. FLORES, 521 U.S. 507 (1997)

The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The right

freely to engage in the rituals and observances of the religion of one's choice, without undue governmental interference, is one of the most cherished guarantees of the Bill of Rights. Exactly what criteria courts should apply to determine when this right has been violated has been the subject of sharp controversy over the years.

The Supreme Court required strict judicial scrutiny of this issue in a 1963 free exercise case, *Sherbert v. Verner*. There, the Court held that statutes which substantially burden the practice of religion will pass constitutional muster only if they are shown to be necessary to advance some compelling governmental interest. But in 1990, the Court relaxed that standard. In *Employment Division v. Smith*, a case upholding a ban on the use of peyote, the Court held that such a law does not offend the First Amendment if the burden it imposes on the free exercise of religion is merely an incidental effect of a generally applicable measure, and the law's objective is something other than interference with religious practice.

Congress responded to the public outcry over *Smith* by enacting, by a nearly unanimous vote, the Religious Freedom Restoration Act of 1993 (RFRA). RFRA expressly codified as federal law the previous standard of constitutional protection in free exercise cases, providing that "government shall not substantially burden a person's exercise of religion" unless the burden is justified by a compelling governmental interest, and does so by the least restrictive means available.

City of Boerne presented the first major test of RFRA. P.F. Flores, as archbishop of San Antonio, applied for a building permit to enlarge St. Peter Catholic Church, a small, aging structure in the city of Boerne, Texas. The permit was denied based on the city's recent designation of a historic preservation district that included St. Peter. The archbishop sued, alleging that the permit denial violated RFRA.

It is indisputable that the city's actions would not have violated the free exercise clause under the standard established by *Employment Division v. Smith*. Nothing in the city's creation of a historic preservation district, or the denial of a permit to enlarge a structure within that district, showed an intention to restrict the practice of any religion. The historic preservation regulations applied uniformly to all properties within the designated area, regardless of their use. Thus, the church's case depended on invoking the tougher protections set out in RFRA. The city's refusal to allow any enlargement of St. Peter could be said to substantially burden the parishioners' exercise of their religion, since the record indicated that forty to sixty people per week were unable to celebrate Sunday mass at the church because of its inadequate

capacity. Moreover, the denial could not be justified by a compelling governmental interest in preventing the expansion of St. Peter, nor did it meet RFRA's requirement of narrow tailoring.

In its defense, the city argued that RFRA was unconstitutional because it exceeded Congress's authority. In a majority opinion written by Justice Kennedy, the Supreme Court agreed and struck down the law as beyond Congress's enforcement powers under the Fourteenth Amendment.

The federal government has only those powers specifically granted to it by the Constitution. In enacting RFRA, Congress relied on the provision of Section 5 of the Fourteenth Amendment: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." Justice Kennedy acknowledged that Section 5 authorizes Congress to enact laws enforcing the constitutional right of free exercise of religion, which is deemed included within the Fourteenth Amendment's guarantee of due process of law. Such laws, however, must be remedial or preventive in nature, not substantive. In determining whether legislation is within Congress's Section 5 power, the Court will look for "congruence and proportionality" between the constitutional injury Congress seeks to redress, and the means adopted to prevent or remedy it.

In this case, the Court found that RFRA restricted the states' regulatory powers even more extensively than had the test set out by *Smith*, yet Congress had articulated no history of state discrimination against religion sufficient to justify such a response. Under the doctrine of separation of powers, only the Supreme Court itself may define the substantive restrictions imposed on the states by the Fourteenth Amendment. Legislation such as RFRA that effectively alters the Court's determination of the meaning of the free exercise clause, cannot be said to be enforcing the clause, and therefore exceeds the authority granted to Congress by Section 5.

This decision is significant for its express declaration that only the judicial branch has the authority to determine what constitutes a violation of the free exercise clause—and by extension, of all other constitutional provisions incorporated into the Fourteenth Amendment. It also set out a new standard for determining whether Congress has exceeded its enforcement powers under Section 5. The Court has applied *City of Boerne's* "congruence and proportionality" test in a variety of contexts since first enunciating it in 1997.

In response to this decision, Congress once again sought to extend heightened protection to religious liberties, this time via enactment of the Religious Land Use and Institutionalized Persons Act of 2000

(RLUIPA). Instead of broadly targeting all laws of general applicability that might burden the exercise of religion, RLUIPA targeted violations in two discrete contexts—land use controls and policies towards institutionalized persons. Like RFRA, the new law mandated strict judicial scrutiny in reviewing regulations that would substantially burden an individual's religious exercise in these contexts, but RLUIPA was buttressed with findings showing proportionality between the impact of such regulations and the need for close judicial review. Finally, congressional authority to enact RLUIPA was anchored in the Constitution's commerce and spending clauses, not the Fourteenth Amendment. Largely because of these efforts to avoid the constitutional problems identified in *City of Boerne*, the constitutionality of RLUIPA was upheld in *Cutter v. Wilkinson*.

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References and Further Reading

- Cookson, Catharine. *Regulating Religion: The Courts and the Free Exercise Clause*. New York: Oxford, 2001.
- DeBusk, Thomas L., *RFRA Came, RFRA Went; Where Does That Leave the First Amendment? A Case Comment on City of Boerne v. Flores*, Regent University Law Review 10 (1998): 223.
- Mallamud, Jonathan, *Religion, Federalism and Congressional Power: A Comment on City of Boerne v. Flores*, Capital University Law Review 26 (1997): 45.

Cases and Statutes Cited

- Cutter v. Wilkinson*, 125 S.Ct. 2113 (2005)
- Employment Division v. Smith*, 494 U.S. 872 (1990)
- Religious Freedom Restoration Act of 1993*, 42 U.S.C. § 2000bb et seq
- Religious Land Use and Institutionalized Persons Act of 2000*, 42 U.S.C. §§ 2000cc et seq
- Sherbert v. Verner*, 374 U.S. 398 (1963)

BOLGER v. YOUNGS DRUG PRODUCTS CORP., 463 U.S. 60 (1983)

Since the mid-1970s, it has been clear that commercial speech can be protected free speech under the First Amendment. However, it is typically accorded lesser protection than noncommercial speech. Thus, classifying a particular message as commercial or noncommercial is important. In *Bolger*, the Supreme Court developed principles relevant to such classification.

Youngs Drug Products Corporation ("Youngs") manufactured, sold, and distributed contraceptives. It publicized its products by various means, including unsolicited mass mailings to the public. The Postal Service notified Youngs that its mailings violated then

existing federal statutes prohibiting the mailing of unsolicited advertisements for contraceptives. Youngs brought suit, challenging the constitutionality of the statute.

Applying its decision in *Virginia State Board of Pharmacy*, the Supreme Court held that most of the Youngs mailings were commercial speech because they were “speech which does no more than propose a commercial transaction.” However, some of the Youngs materials contained discussions of important public issues such as family planning and venereal disease and so presented a closer classification question.

The *Bolger* Court offered no bright line but discussed a number of considerations. The mere fact that the pamphlets were advertising did not compel the conclusion that they were commercial speech, nor did the fact that they referred to a specific product, nor did the fact that Youngs had an economic motivation. However, the combination of *all* of those facts strongly supported the commercial nature of the speech. The Court stated that advertising is not non-commercial speech simply because it “links a product to a current public debate.”

Despite characterizing Youngs’s advertising as commercial speech, the Court held that the statute was unconstitutional as applied. The Court applied the *Central Hudson* four-part analysis: (1) whether the speech concerns a lawful activity and is not misleading, (2) whether the government has a substantial interest, (3) whether the regulation directly advances that interest, and (4) whether the regulation is more extensive than necessary to serve that interest.

Under this analysis, Youngs’s advertising was protected. The Court noted that advertising for contraceptives entails “substantial individual and societal interests” and relates to activity that is protected from unwarranted governmental interference. Further, neither of the two interests asserted by the government justified sweeping prohibition of mailing unsolicited contraceptive advertising. First, the fact that some recipients may find the material offensive was insufficient, especially since the recipients could simply avert their eyes or dispose of the mailings. Second, aiding parents’ efforts to control the manner in which their children become informed about birth control is a substantial interest. However, the marginal benefit provided by the statute in that regard came at the cost of suppressing material entirely suitable for adults. Moreover, the statute denied parents truthful information bearing on their ability to discuss birth control and to make informed decisions about it.

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References and Further Reading

Chemerinsky, Erwin, and Catherine Fisk, *What Is Commercial Speech: The Issue Not Decided in Nike v. Kasky*, Case Western Reserve Law Review 54 (2004): 4:1143–60.
 Rotunda, Ronald D., and John E. Nowak. *Treatise on Constitutional Law: Substance and Procedure*. Vol. 4. 3rd ed. St. Paul, MN: West, 1999.
 Tribe, Laurence H. *American Constitutional Law*. 2d ed. Mineola, NY: Foundation, 1988.

Cases and Statutes Cited

Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557 (1980)
Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976)

See also Free Speech in Private Corporations; Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557 (1980); **Commercial Speech**; *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976)

BOND v. FLOYD, 385 U.S. 116 (1966)

Bond v. Floyd arose from the intersection of the struggle for civil rights and the protest movement against U.S. involvement in Vietnam, two political movements that had a dramatic impact on the United States in the 1960s. The U.S. Supreme Court faced the question whether the Georgia House of Representatives could deny a seat to the newly elected Julian Bond because of statements he made or endorsed against the Vietnam War and in support of young men who resisted the draft.

Bond, an African-American civil rights activist, came to run for the Georgia House seat because of the Supreme Court’s “one man, one vote” decision in *Reynolds v. Sims*. Following that decision, a three-judge federal district court panel ordered the reapportionment of the Georgia General Assembly. Bond had been a founding member of the Student Non-Violent Coordinating Committee (SNCC), and was SNCC’s director of communications, when he decided in 1965, at age twenty-five, to run for a House seat from his overwhelmingly African-American Atlanta district. He handily won in the June election and was to begin his one-year term in January 1966.

Much of SNCC’s leadership strongly opposed the Vietnam War and resented the military draft, which both sent African Americans into the military and to Vietnam in disproportionate numbers and threatened to deplete the ranks of SNCC’s active civil rights workers. Nonetheless, the organization hesitated to alienate the Johnson administration by officially opposing the

war. Their hesitation finally evaporated after the murder of Samuel Younge, an SNCC worker and a Navy veteran, who was shot to death when he tried to use a “whites only” restroom.

In response to Younge’s death, SNCC’s executive committee released a statement that linked the civil rights struggle in the American South with the freedom struggles “of the colored people in . . . other countries.” The statement faulted the United States for being on the wrong side in many of those struggles, noting that: “The murder of Samuel Younge in Tuskegee, Alabama is not different from the murder of people in Vietnam In each case, the U.S. government bears a great part of the responsibility for those deaths.” The statement further suggested that young men should be able to choose to work in civil rights or other similar organizations as an alternative to the military draft. Finally, it expressed “sympathy” and “support” for those “who are unwilling to respond to a military draft which would compel them to contribute their lives to United States aggression in Viet Nam in the name of the ‘freedom’ we find so false in this country.”

Bond did not have a role in drafting the statement. However, when asked about it by a radio reporter, he endorsed it and expressed his opposition to all wars as a pacifist, but to the Vietnam War in particular. Members of the Georgia House of Representatives responded by challenging Bond’s right to be seated in the upcoming legislative session. Their petitions charged that Bond had violated the Selective Service laws, had given aid and comfort to the enemies of the United States and Georgia, and had brought discredit and disrespect to the House. They further contended that Bond’s endorsement of the SNCC statement showed that he could not sincerely take the oath of office prescribed by the Georgia Constitution, which essentially required him to swear that he would support the Georgia and U.S. constitutions and act to promote the interests of Georgia. When the House session was called to order, Bond was not allowed to take the oath of office. After a hearing, he was denied his seat.

Bond won election two more times only to be denied his House seat, before the Supreme Court decided his case. In a unanimous opinion written by Chief Justice Warren, the Court held that the Georgia House of Representatives must allow Bond to take his oath of office and assume his seat. The Court said that neither Bond’s nor SNCC’s statements were punishable under the Selective Service Act because they did not expressly advocate illegal behavior. In response to the state’s argument that it could bar Bond for lawful statements because it could hold its elected officials to a higher standard of loyalty than its citizens and

could, therefore, prohibit House members from saying things that ordinary citizens would have a First Amendment right to say, the Court responded that the First Amendment “requires that legislators be given the widest latitude to express their views on issues of policy.”

Bond served twenty years in the Georgia General Assembly.

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References and Further Reading

- Carson, Clayborne. *In Struggle: SNCC and the Black Awakening of the 1960s*. Cambridge, MA: Harvard University Press, 1981.
- Morgan, Charles, Jr. *One Man, One Voice*. New York: Holt, Rinehart, and Winston, 1979.

Cases and Statutes Cited

Reynolds v. Sims, 377 U.S. 533 (1964)

See also **Voting Rights (Compound)**

BOOK BANNING AND BOOK REMOVALS

In *Fahrenheit 451*, Ray Bradbury wrote about a world in which the responsibility of fire fighters was to burn books rather than to extinguish fires. This radical reconceptualization of the fire fighter’s role was the product of a dystopia in which all books were considered dangerous contraband. Yet the act of burning books has not been left to the imaginary worlds of science fiction writers. In Nazi Germany, for example, citizens collected books that were deemed “un-German” and burned them in great pyres on public streets. Even at the start of the twenty-first century, many seemingly well-intentioned Americans continue to wage wars on books that they think are threatening to the social order, with some even resorting to book burning escapades of their own. However, many Americans consider the burning of books—even those they strongly abhor—to be an extremely repulsive act that is normally associated with brutal totalitarian states. As a result, those who want to reduce the public’s exposure to books they find dangerous have been inclined to use the less drastic—but perhaps equally effective—tactic of having the relevant books banished from public libraries and public school curriculums.

Judges have traditionally extended substantial deference to the decisions of school administrators regarding matters pertaining to the governance and general operation of public schools. This deference is

most pronounced in matters regarding the school's curriculum and the books used in the teaching of that curriculum (see *Epperson v. Arkansas* [1968]). Paradoxically, this deference has in some instances resulted in outcomes that stymie the efforts of those who want to remove or ban books. For example, courts have uniformly rejected legal challenges against schools where litigants argue that books should be removed from a school's curriculum because they violate antidiscrimination laws by promoting religious/ethnic bigotry (*Rosenberg v. Board of Education of the City of New York* [1949]) and racist views (*Monteiro v. Tempe Union High School District* [1998]), or because they violate the First Amendment's establishment (*Brown v. Woodland Joint Unified School District* [1994]) and/or free exercise (*Mozert v. Hawkins County Board of Education* [1987]) clauses. In fact, the courts have recognized that students and teachers are entitled to significant First Amendment protection for the expressive acts in which they engage while on school grounds (*Tinker v. Des Moines Independent Free School District* [1969]), and that schools should not be allowed to cast a "pall of orthodoxy over the classroom" (*Keyishian v. Board of Regents* [1967]).

Nevertheless, those who want to restrict access to books in public schools have had significant success, particularly when they have been able to convince a school's administration that a book ought to be purged from the school's curriculum. Such a ban prevents the book from being used as an assigned student text in the school's curriculum, and it may—depending on its specificity—prevent teachers from discussing and presenting material from the book while teaching their classes. For example, in *Virgil v. School Board of Columbia County, Florida* (1989), the Eleventh Circuit Court of Appeals held that the school board had a reasonable basis to remove works by Aristophanes and Chaucer from its English curriculum after the Board concluded that the texts were too sexually explicit for high school students. The challenged regulation in *Virgil* allowed teachers and students to discuss the material during class discussions, and the texts were still available in the school library, but it is unclear whether any of these elements to the school's policy were required by the First Amendment. After all, the *Virgil* court relied on *Hazelwood School District v. Kuhlmeier* (1989), a Supreme Court decision that provides school administrators with the broad authority to enact any school curriculum regulations that are "reasonably related to legitimate pedagogical concerns."

First Amendment-based lawsuits against school administrators are also triggered when administrators take steps to either remove or reduce student access to

particular books in school libraries. For instance, administrators might decide not to purchase certain books as part of the library's periodic efforts to gain new acquisitions. Alternatively, school officials might design policies that limit student access to currently stocked books by placing them in restricted areas of the library and by requiring parental concession before a student can gain access to the books. And, of course, administrators may decide that certain books need to be discarded entirely from the library's collection. Regardless of which method school administrators choose to employ, lower federal and state courts have been guided by the Supreme Court's conclusion in *Board of Education v. Pico* (1982) that school libraries fall outside of the school's curriculum and, consequently, that judges should provide less deference to school administrators when litigants challenge the constitutionality of library policies as opposed to curriculum policies. However, because no opinion in *Pico* garnered majority support, lower courts have emphasized that it does not constitute a binding legal precedent, but instead constitutes an important factor that judges should consider when they address school board policies that limit access to certain books in school libraries (see *Campbell v. Tammany Parish School Board* [1995]).

In *Pico*, the plurality opinion conceptualized public school libraries as environments in which students and teachers should be allowed to freely and voluntarily examine a wide array of views on those topics that they are studying—a process that is often necessary for the acquisition of human knowledge. In addition, the plurality opinion explained that students and teachers have First Amendment rights to receive information, and that administrators should not be allowed to manipulate the stock of available library materials in an attempt to promote a particular political, social, economic, or religious orthodoxy. Administrators in public schools can shape their school library's holdings, particularly when making new purchases, by considering the intellectual merit of a book, whether a book is appropriate for students of a particular age, and whether a book complements the school's curriculum. However, books currently housed in a school's library that are acceptable on these dimensions cannot be removed or restricted because administrators find them threatening to their—or the community's—ideological predispositions.

The *Pico* plurality opinion also explained that school administrators face a greater chance of running afoul of the First Amendment when they remove a book already on their school library's shelves than when they choose not to purchase a book to add to the library's existing collection. When purchasing new acquisitions for school libraries, administrators must

strive to maximize, on what are normally quite limited budgets, the quality of library resources that can be provided to students and teachers. This budgetary rationale, however, is usually not available when the school attempts to remove books already sitting on its library's shelves. Since books are expensive and libraries generally prefer to have more rather than fewer titles, removing books from a library's existing stock is an inherently suspicious activity—especially when that activity prompts a lawsuit. To be sure, books can be removed from libraries for entirely legitimate reasons (for instance, they are tattered, out of date, or because room must be made for incoming new titles), but courts have nevertheless been inclined to view legal challenges to school library book removals and restrictions as more credible than challenges to administrative decisions to purchase some books but not others.

Thus, school administrators have lost most cases involving challenges to the removal or restriction of access to books in school libraries. For instance, the *Pico* Court held that the school board could not remove nine books from school libraries simply because they were considered “‘anti-American, anti-Christian, anti-Sem[i]tic, and just plain filthy.’” Similarly, a federal district court overturned a school board decision that required students to gain parental consent before gaining access to books in the *Harry Potter* series that were located in the school library (*Counts v. Cedarville School District* [2003]). That court rejected the school board's argument that exposure to the *Harry Potter* books would be likely to increase student “disobedience and disrespect for authority,” or that the school had an interest in preventing students from reading about “witchcraft” and “the occult.” Indeed, the court considered the latter rationale indicative of the fact that school administrators were attempting to promote only traditional religious values, and thus acting in clear violation of First Amendment doctrine prohibiting viewpoint-based regulations of expression. The Ninth Circuit Court of Appeals reached the same conclusion in overturning a local school board's decision to remove a book entitled *Voodoo & Hoodoo* from all school libraries in the district (*Campbell v. Tammany Parish School Board* [1995]).

Government administrators of nonschool public libraries who have taken steps to remove or restrict access to books have frequently encountered frosty judicial receptions when their acts are challenged in court. Unlike school libraries, the policies of local and state public libraries are not entitled to any heightened judicial deference and, therefore, those officials who manage them must hew very close to traditional First Amendment free speech doctrine. For example,

a federal district court declared unconstitutional the Wichita Falls Public Library's decision to remove *Heather Has Two Mommies* and *Daddy's Roommate*—books that experts had deemed suitable for small children—from the children's section of the library and have them placed in the adult section (*Sund v. City of Wichita Falls, Texas* [2000]). Thus, nonschool public libraries are even more tightly constrained by the First Amendment than are their public school counterparts, for the efforts of library officials to remove or restrict access to books have been closely scrutinized and are rarely tolerated by the courts.

MARK KEMPER

References and Further Reading

American Library Association. Home Page. <http://www.ala.org>.

Cases and Statutes Cited

- Board of Education, Island Trees Union School District No. 26 v. Pico*, 457 U.S. 853 (1982)
- Brown v. Woodland Joint Unified School District*, 27 F.3d 1373 (9th Cir. 1994)
- Campbell v. Tammany Parish School Board*, 64 F.3d 184 (5th Cir. 1995)
- Counts v. Cedarville School District*, 295 F.Supp.2d 996 (W.D. Ark. 2003)
- Epperson v. Arkansas*, 393 U.S. 97 (1968)
- Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988)
- Keyishian v. Board of Regents*, 385 U.S. 589 (1967)
- Monteiro v. Tempe Union High School District*, 158 F.3d 1022 (9th Cir. 1998)
- Mozert v. Hawkings County Board of Education*, 827 F.2d 1058 (6th Cir. 1987)
- Rosenberg v. Board of Education of the City of New York*, 92 N.Y.S.2d 344 (1949)
- Sund v. City of Wichita Falls, Texas*, 121 F.Supp. 2d 530 (Fed. Dist., 2000)
- Tinker v. Des Moines Independent Free School District*, 393 U.S. 503 (1969)
- Virgil v. School Board of Columbia County, Florida*, 862 F.2d 1517 (11th Cir. 1989)

BORDENKIRCHER v. HAYES, 434 U.S. 357 (1978)

When we think of adjudicating guilt, we think of *trials*—witnesses questioned, lawyers locked in forensic combat, juries attentive to the subtleties of the case in preparation for their deliberations, and the verdict that will ultimately puncture the tension in the courtroom. The reality is that upwards of 95 percent of felony convictions are secured by the accused's own admission of guilt. These admissions of guilt in open court are the consequence of the controversial but longstanding practice of plea bargaining. The idea is

simple: a criminal defendant admits guilt and thus foregoes a formal trial in exchange for sentencing leniency. Whereas the defendant benefits by the lighter punishment, society benefits by reducing the time and expense in adjudicating guilt. But are there limits to the pressure that the prosecution may apply to a defendant to induce a guilty plea?

Bordenkircher v. Hayes addresses that issue. The prosecutor offered to recommend a sentence of five years imprisonment in exchange for defendant Hayes's guilty plea to an indictment charging forgery. The prosecutor warned that he would secure another indictment if Hayes refused the plea offer, an indictment that would charge Hayes with being an "habitual offender," thus ramping up Hayes's sentencing exposure to life imprisonment. The prosecutor's motives were transparent and beyond dispute: he threatened Hayes with life imprisonment to induce him to forego his constitutional right to a jury trial. Hayes refused to plead guilty, and the prosecutor followed through on his threat, charging Hayes under the Kentucky Habitual Criminal Act. When Hayes was convicted, the judge sentenced Hayes to life imprisonment, as required by the habitual offender statute.

The Supreme Court found nothing improper with a prosecutor threatening to send a defendant to prison for life if that defendant refuses to accept a plea bargain of five years' imprisonment. The Court rooted its conclusion in the fact that plea bargaining is a form of bartering for rights, and prosecutors may legitimately drive hard bargains with the sole motive "to persuade the defendant to forgo his right to plead not guilty." That no one—not even the prosecutor himself—believed life imprisonment was the appropriate sentence for Paul Lewis Hayes was thus irrelevant to the issue of the prosecutor's ratcheting up the charges in reaction to Hayes's refusal to plead guilty. *Bordenkircher* marks the triumph of plea bargaining in our system of criminal justice.

DAN R. WILLIAMS

References and Further Reading

- Fisher, George, *Plea Bargaining's Triumph*, Yale Law Journal 109 (2000): 857.
 Schulhofer, Stephen J., *Is Plea Bargaining Inevitable?* Harvard Law Review 97 (1984): 1037.

See also **Guilty Plea; Due Process; Plea Bargaining**

BORK, ROBERT HERON (1927–)

Noted jurist, author, and scholar, Robert Heron Bork was born in Pittsburgh, Pennsylvania. He received a B.A. from the University of Chicago in 1948 and a

J.D. in 1953. From 1954 to 1962, he worked in private practice before moving on to a professorship at Yale Law School. He served as solicitor general of the United States from 1972 to 1977 and as acting attorney general of the United States in 1973–1974. During his tenure as attorney general he became a part of the history of the Watergate scandal when he followed President's Nixon's order to fire special prosecutor Archibald Cox. Attorney General Elliot Richardson and his assistant, William Ruckelshaus, were first ordered to fire Cox, but refused to do so and resigned. Bork wished to resign as well, but Richardson and Ruckelshaus asked that he remain in order to ensure that the Justice Department continued to operate.

In 1977, Bork returned to teaching at Yale Law School. In 1982, President Ronald Reagan appointed Bork to the Court of Appeals for the District of Columbia Circuit where he established a reputation as a conservative jurist. In 1987, with the announcement of Justice Lewis Powell's retirement, President Reagan nominated Bork for the U.S. Supreme Court.

The nomination sparked a major debate because of Bork's controversial views on issues such as judicial activism, civil rights, and civil liberties. Bork advocates a strict constructionist reading of the Constitution, argues that jurists should be guided by the original intent of the founders when applying provisions of the Constitution, and maintains that judges should not legislate from the bench. This has led him to take issue with the U.S. Supreme Court and some of its decisions. For example, Bork takes aim at *Griswold v. Connecticut* (1964), a landmark case that formally established a constitutional right to privacy. Bork contends that Justice Douglas created an overall right to privacy that does not exist in the Constitution. He asserts that the judiciary erroneously utilizes the Fourteenth Amendment to create new constitutional rights. Additionally, Bork supports a more limited reading of First Amendment rights and privileges.

Bork's nomination hearings before the Senate Judiciary Committee began on September 15, 1987, and lasted twelve days. In addition to the lengthy questioning of Bork by the Committee, numerous supporters and opponents testified as well. In addition, the American Bar Association gave Bork its highest rating. However, in the end, the vote from the Judiciary Committee was nine to five against Bork. All of the Democrats voted against him, as well as one Republican, Arlen Specter. Bork's nomination was defeated in the Senate at large, mainly on party lines, by a vote of fifty-eight to forty-two. The defeat was significant because it marked a change in what was viewed as the advice and consent role of the U.S. Senate. Previously, nominees could expect to be

confirmed regardless of political affiliation, as long as they were experienced and qualified.

Two months after his nomination was defeated, Bork resigned from the Court of Appeals to write and lecture at the American Enterprise Institute, where he is currently a senior fellow. He continues to research, publish, and speak on issues such as constitutional and anti-trust law, as well as American culture.

MARY K. MANKUS

References and Further Reading

- Bork, Robert H. *The Tempting of America: The Political Seduction of the Law*. New York: Free Press, 1990.
- , *The Constitution, Original Intent, and Economic Rights*, San Diego Law Review 23 (1986): 823–32.
- Bronner, Ethan. *Battle for Justice: How the Bork Nomination Shook America*. New York: W.W. Norton & Company, 1989.
- McGuigan, Patrick B., and David M. Weyrich. *Ninth Justice: The Fight for Bork*. Washington, DC: Free Congress Research and Education Foundation, 1990.

See also *Griswold v. Connecticut*, 381 U.S. 479 (1965)

BOSTON MASSACRE TRIAL (1770)

Troops had been stationed in Boston and other cities in the colonies as a result of growing resistance by the colonists against imperial laws, especially the hated Townshend Acts. Ironically, on the same day as the Acts were repealed, March 5, 1770, a fight erupted with fatal consequences. Citizens constantly harassed the troops, and during a demonstration, a squad of British soldiers led by Captain Thomas Preston was struck by missiles thrown by the colonists. The soldiers fired into the crowd and killed five men, including an African American, Crispus Attucks, who was leading the group. Only the withdrawal of troops from Boston prevented a major riot.

The eight soldiers and their commanding officer were tried for murder and were defended by John Adams, later the second president of the United States. Adams was a leader of the popular resistance to the British government, but he did not condone violence or mob action. When Adams was asked to defend the British soldiers who were charged with murder as a result of this clash, he promptly accepted. With the help of two other lawyers, he won acquittal for all but two of the men. Those two were declared guilty of manslaughter and, after claiming benefit of clergy, were branded on the thumb.

Despite the high tensions of the period, most patriots applauded the trial as evidence that the colonists

remained wedded to the rule of law, and that the right of trial by jury should not be abandoned.

MELVIN I. UROFSKY

References and Further Reading

- Zobel, Hiller B. *The Boston Massacre*. New York: Norton, 1970.

BOWEN v. AMERICAN HOSPITAL ASSOCIATION, 476 U.S. 610 (1986)

Important rights and policies can be in tension when a governmental agency seeks to act on a child's behalf and parental consent has not been obtained. The conflict is heightened when the agency is part of the federal government and is attempting to regulate in an area traditionally under the control of the states. In *Bowen v. American Hospital Assn.*, the Supreme Court reined in such an attempt because it exceeded the authority conferred upon the agency by Congress.

Under Section 504 of the Rehabilitation Act of 1973, "[n]o otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." In 1984, the Department of Health and Human Services (HHS) promulgated regulations under the act. In relevant part, the regulations established "[p]rocedures relating to health care for handicapped infants." Those procedures required the posting of informational notices, authorized expedited access to records and expedited compliance actions, and directed state child protective services agencies to "prevent instances of unlawful medical neglect of handicapped children."

Various plaintiffs, including the American Hospital Association and the American Medical Association, challenged the regulations. The lower courts held for the plaintiffs. The Supreme Court affirmed via a plurality opinion.

The plurality found that the need seen by HHS for federal monitoring of hospitals' treatment decisions rested wholly on situations in which parents refused their consent to treatment. Yet, the Court stated, a hospital's withholding treatment from a handicapped infant when the parents did not consent to treatment could not violate Section 504 of the act since—absent such consent—the infant neither is "otherwise qualified" nor has been denied care "solely by reason of his handicap."

The plurality also concluded that the regulations improperly commandeered state employees and resources. Although HHS could require state agencies to document their own compliance with Section 504, nothing in the act authorized HHS to compel state agencies to monitor and enforce compliance by other recipients (that is, the hospitals) of federal funds. The Supreme Court subsequently developed the “commandeering” principle in the *New York* and *Printz* cases.

Bowen offered important observations about the factual basis required for agency rules and about the degree of deference courts will accord to agency positions. “It is an axiom of administrative law that an agency’s explanation of the basis for its decision must include a rational connection between the facts found and the choice made Agency deference has not come so far that we will uphold regulations whenever it is possible to conceive a basis for administrative action.” This is particularly so when the federal agency seeks to superintend decisions “traditionally entrusted to state governance.”

STEVE R. JOHNSON

References and Further Reading

“Annotation: Who is recipient of, and what constitutes program receiving, federal financial assistance for purposes of §504 of the Rehabilitation Act (29 U.S.C.A. §794), which prohibits any program or activity receiving financial assistance from discriminating on basis of disability.” 160 *American Law Reports Federal* 297.

Cases and Statutes Cited

New York v. United States, 505 U.S. 144 (1992)
Printz v. United States, 521 U.S. 898 (1997)

BOWEN v. KENDRICK, 487 U.S. 589 (1988)

In *Bowen v. Kendrick*, the Court upheld the Adolescent Family Life Act (AFLA) against an establishment clause challenge. The act allowed federal grants to go to agencies that provide services related to teen sexuality and pregnancy. Both public and private agencies (including private religious organizations) were eligible for grants under the act. The act was challenged on its face, that is, it was challenged as being unconstitutional by itself, rather than as applied to various agencies. Chief Justice Rehnquist wrote the majority opinion.

The Court ostensibly applied the *Lemon* test. The *Lemon* test requires that a law have a secular purpose,

a primary effect that neither advances nor inhibits religion, and that the law not excessively entangle government and religion. Yet the Court held that even though the act in some ways paralleled the views and practices of certain religions, the purpose of the act was not to promote religion, but rather to address the problems caused by teen pregnancy and sexual behavior. The Court held that the primary effect of the act did not advance religion, because the grants were available to a wide range of agencies and organizations. It was reasonable for Congress to include religious organizations in the act because such organizations can have an influence on values and family structure, and many of the religious organizations that would receive funds under the program were not “pervasively sectarian.” Thus, the Court held that religion would only benefit incidentally and remotely from the act. Moreover, the Court held that the monitoring required under the act did not lead to excessive entanglement between government and religion. The Court did remand the case for a determination of whether the act violated the establishment clause as applied. This would require individual plaintiffs to challenge the program as applied to them, and thus the act could only be challenged through a patchwork of cases rather than on its face as the plaintiffs had attempted in *Bowen*.

Bowen is one of a series of cases that used the facial neutrality of a program—that is, the fact that aid was available to a wide range of providers, both religious and secular—to uphold the program despite effects that would seem to violate the *Lemon* test as applied in earlier decisions. The reasoning applied in this line of cases was expanded in *Zelman v. Simmons-Harris* (2002), a case that upheld a voucher program where the program was open to both religious and secular schools. *Bowen* might also serve as precedent for upholding “charitable choice” programs, and charitable choice proponents cite *Bowen* to support their arguments that such programs are constitutional. *Bowen*’s formalistic approach, and its language suggesting that it was reasonable for Congress to include religious organizations in AFLA since such organizations can have an influence on values and family structure, have been used by charitable choice advocates to argue that religious charities (which have an influence on helping the needy) should be allowed to receive government funding along with other charitable organizations. Yet, *Bowen* can be criticized for its formalistic reasoning and the resulting failure to seriously consider the effects of the program in question under the *Lemon* test.

FRANK S. RAVITCH

Cases and Statutes Cited

Bowen v. Kendrick, 487 U.S. 589 (1988)
Lemon v. Kurtzman, 403 U.S. 602 (1971)
Zelman v. Simmons-Harris, 536 U.S. 639 (2002)
Adolescent Family Life Act, 42 U.S.C. §§300z et. seq

BOWEN v. ROY, 476 U.S. 693 (1986)

Pursuant to federal regulations requiring social security numbers for all dependent children, Pennsylvania authorities had stopped Aid to Dependent Families and Children benefits to Stephen Roy and Karen Miller and were also taking steps to reduce food stamps. Other than failing to provide a Social Security number for their child, Little Bird of the Snow, Roy and Miller had met all other requirements. Roy based his refusal to provide a number on his Native American belief that doing so would “rob the spirit” of his daughter and prevent her from attaining greater spiritual power.” On the last day of the trial, however, it was shown that Roy had earlier obtained a Social Security number. In the face of this, Roy then claimed that since the number had not been “used,” there had been no damage to her spirit.

The District Court, despite this last-minute revelation, found for Roy, holding “that the public ‘interest in maintaining an efficient and fraud resistant system can be met without requiring use of a social security number’” It enjoined government from both using the existing Social Security number and denying any appropriate governmental benefits.

The Supreme Court, in an opinion by Chief Justice Warren Burger, reversed. Burger, who in *Wisconsin v. Yoder*, had surprised free exercise advocates by appearing to continue in the Warren Court’s tradition by following *Sherbert v. Verner*, saw Roy’s claim as involving something quite different, an effort by a free exercise claimant to dictate to government how government should conduct its own affairs. No justice explicitly disagreed with Burger on this point. Burger’s refusal, however, to apply either “the least restrictive means of achieving some compelling state interest” (test of *Thomas v. Review Board*), or the test of being “essential to accomplish an overriding governmental interest” (*United State v. Lee*), led Justice Sandra Day O’Connor to issue a partial dissent, joined by Justices William Brennan and Thurgood Marshall. Justice Harry Blackmun, although not joining O’Connor’s opinion—Blackmun and Justice John Paul Stevens concluded that the existing Social Security number mooted the case—agreed with O’Connor that Burger should have applied either the *Lee* or *Thomas* standards of review to the present case.

Burger, for his part, argued that when the government’s burden on religion was indirect and incidental as in this situation, “The Government meets its burden when it demonstrates that a challenged requirement for government benefits, neutral and uniform in its application, is a reasonable means of promoting a legitimate public interest.” If accommodations to such neutral regulations are to be made, Burger continued, that was the responsibility of the legislature. An effort to waive the Social Security number requirement was mounted in 1999, but was unsuccessful.

Four years after *Roy*, a different Court—Antonin Scalia replacing Burger and Anthony Kennedy succeeding Justice Lewis Powell—adopted a free exercise standard in *Employment Division v. Smith* that clearly owed much to Burger’s opinion.

FRANCIS GRAHAM LEE

References and Further Reading

Cole, Jamie Alan, *A New Category of Free Exercise Claims: Protection for Individuals Objecting to Government Actions that Impede Their Religion*, University of Pennsylvania Law Review 135 (1987): 1557–90.
Fisher, Louis. “Statutory Exemptions for Religious Freedom.” *Journal of Church and State* 44 (2002): 291–316.

Cases and Statutes Cited

Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990)
Sherbert v. Verner, 374 U.S. 398 (1963)
Thomas v. Review Board of Indiana Employment Security Division, 450 U.S. 707 (1981)
United States v. Lee, 455 U.S. 252 (1982)
Wisconsin v. Yoder, 406 U.S. 205 (1972)

BOWERS v. HARDWICK, 478 U.S. 186 (1986)

When a police officer came to serve an arrest warrant upon Michael Hardwick for a citation that Hardwick had already paid, the officer found Hardwick in his bedroom engaged in consensual oral sex with another man. Hardwick was arrested and jailed for violating Georgia’s sodomy law, which criminalized oral and anal sex. The American Civil Liberties Union offered to represent Hardwick and challenge the constitutionality of the sodomy law in his criminal trial. But because the Fulton County district attorney opted not to seek a jury indictment against Hardwick, the ACLU instead filed suit in federal court against Georgia Attorney General Michael Bowers. Hardwick and an anonymous married couple John and Mary Doe sought a declaration that Georgia’s sodomy law

unconstitutionally violated their right to privacy, which the Supreme Court had recognized in cases such as *Griswold v. Connecticut* (1965). The trial court summarily dismissed the suit, but the intermediate federal appellate court reversed, rejecting the participation of the Does but agreeing with Hardwick that Georgia's sodomy law deprived him of liberty without due process of law in violation of the Fourteenth Amendment to the U.S. Constitution.

The U.S. Supreme Court reversed, upholding Georgia's sodomy law five to four. Justices Lewis Powell, William H. Rehnquist, Sandra Day O'Connor, and Chief Justice Burger joined Justice Byron White's majority opinion. The Court commenced by framing the issue narrowly. Rather than ask whether the law violated Hardwick's fundamental right to privacy, the Court posed the threshold question as whether the Constitution "confers a fundamental right upon homosexuals to engage in sodomy," or, elsewhere, as whether under the Constitution there is "a fundamental right to engage in homosexual sodomy."

Having so narrowly framed the issue, the Court then narrowly construed its precedents. The majority refused to treat them as reflecting some abstract principle, such as the existence of a sphere of personal autonomy presumptively protected against government interference. Instead, the Court described them at a lower level of abstraction, interpreting them only as cases about discrete subjects: the opinion described the relevant cases "as dealing with child rearing and education; with family relationships; with procreation; with marriage; with contraception; and with abortion" (citations omitted). The contraception and abortion decisions might have been seen as protecting a right to engage in non-procreative sexual activity, which would then include the right to engage in oral or anal sex. The Court instead characterized them as involving only a "right to decide whether or not to beget or bear a child." The opinion contemptuously dismissed the arguments of Harvard law professor Laurence Tribe, who had joined Hardwick's counsel, as "at best, facetious." Finally, after deciding for the foregoing reasons that Georgia's law implicated no fundamental right, the Court subjected the statute to rational basis review, the form of scrutiny most deferential to legislatures, and concluded that a presumed judgment by the people of Georgia that "homosexual sodomy" was immoral was an adequate justification for its sodomy law.

Chief Justice Burger authored a concurring opinion that emphasized the long history of criminalization of sodomy as "firmly rooted in Judaeo-Christian moral and ethical standards," even going so far as to quote Blackstone's *Commentaries* assessment that sodomy was "an offense of 'deeper malignity' than

rape." Justice Powell, who later publicly stated that he thought he was probably mistaken in voting to uphold the constitutionality of Georgia's sodomy law, also wrote a concurring opinion, in which he suggested that since Hardwick had not been prosecuted, he could not raise a viable Eighth Amendment claim of cruel and unusual punishment, but that "a prison sentence for such conduct—certainly a sentence of long duration—would create a serious Eighth Amendment issue."

Justice Harry Blackmun wrote a dissenting opinion joined by Justices William Brennan, Thurgood Marshall, and John Paul Stevens. They criticized the majority for distorting the issue by its "almost obsessive focus on homosexual activity" when Georgia's ban on oral and anal sex was gender-neutral. Insisting that the Court should interpret constitutional rights with respect to their underlying purposes, the dissenters suggested that its precedents protected privacy rights "because they form so central a part of an individual's life." "[W]hat the Court really has refused to recognize is the fundamental interest all individuals have in controlling the nature of their intimate associations with others," they wrote. The dissenters argued that Georgia's law impinged upon Hardwick's "decisional privacy," or autonomy with respect to "certain decisions that are properly for the individual to make," as well as upon his "spatial privacy," for in their view, "the right of an individual to conduct intimate relationships in the intimacy of his or her own home seems . . . to be the heart of the Constitution's protection of privacy."

Justice Stevens also wrote a dissenting opinion, which was joined by Justices Brennan and Marshall. Like the Blackmun dissent, which also analogized Georgia's sodomy law to the antisecregation law invalidated in *Loving v. Virginia* (1967), the Stevens dissent read *Loving* as establishing that "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice." Invoking "our tradition of respect for the dignity of individual choice in matters of conscience," Stevens interpreted the Court's privacy decisions in cases such as *Griswold* and *Eisenstadt v. Baird* as dictating that married or unmarried different-sex couples enjoy "the right to engage in nonreproductive, sexual conduct that others may consider offensive or immoral." But because lesbian, gay, and bisexual persons have the same liberty interests as heterosexually identified people, Stevens concluded that the equal protection clause also prohibited the state from punishing same-sex sodomy. The vast majority of scholarly commentary on *Bowers v. Hardwick* holds that the dissenters had the better of the arguments.

Nevertheless, the precedent of *Bowers v. Hardwick* was used by lower courts to justify all manner of discrimination against lesbian, gay, and bisexual persons. If it is constitutional to criminalize “the conduct that defines the class,” courts said, then so is subjecting same-sex couples to greater criminal punishments for engaging in sex with a minor, excluding openly lesbian/gay people from military service, and so on. For seventeen years, *Bowers* remained part of the law of the land. Finally, though, *Bowers* was overruled in 2003 by *Lawrence v. Texas*, which declared *Bowers* to be “wrong the day it was decided.”

DAVID B. CRUZ

References and Further Reading

Thomas, Kendall, *Beyond the Privacy Principle*, Columbia Law Review 92 (1992): 1432.

Cases and Statutes Cited

Griswold v. Connecticut, 381 U.S. 479 (1965)
Eisenstadt v. Baird, 405 U.S. 438 (1972)
Loving v. Virginia, 388 U.S. (1967)
Lawrence v. Texas, 539 U.S. 588 (2003)

See also **Privacy**; *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Lawrence v. Texas*, 539 U.S. 588 (2003)

BOY SCOUTS

See *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000)

BOY SCOUTS OF AMERICA v. DALE, 530 U.S. 640 (2000)

The First Amendment right to free speech includes a right to associate for expressive purposes. Groups that come together to express a message cannot be compelled to include people whose presence would compromise that message. This right to expressive association can conflict with antidiscrimination laws. The task of courts in such cases is to determine whether the association has an expressive purpose, and whether forced inclusion of a particular member would undermine that purpose. *Boy Scouts of America v. Dale* presented both questions.

James Dale became a Cub Scout at the age of eight and a Boy Scout at eleven, eventually attaining the prestigious rank of Eagle Scout. In 1989, he applied for adult membership and became an assistant scoutmaster. Around the same time, after entering college, Dale first acknowledged to himself and others that he was gay.

In 1990, having apparently learned Dale’s sexual orientation from a newspaper article, the Scouts revoked his membership on the grounds that the Boy Scouts “specifically forbid membership to homosexuals.” In 1992, Dale filed a complaint in New Jersey state court, claiming that his expulsion violated a New Jersey statute forbidding discrimination on the basis of sexual orientation (among other traits) in any place of public accommodation. The Scouts argued that the application of this law violated their federal constitutional right to expressive association.

In the state courts, Dale ultimately prevailed. The New Jersey Supreme Court agreed that the Scouts expressed a belief in moral values and used its activities “to encourage the moral development of its members,” but found itself unpersuaded that the Scouts expressed a message condemning homosexuality. Thus, it concluded, requiring the Scouts to accept Dale did not affect the Scouts’ “ability to carry out their various purposes.”

The Supreme Court reversed. It announced that courts in expressive association cases “must give deference to an association’s assertions regarding the nature of its expression” and also to its “view of what would impair its expression.” Applying the appropriate deference, the Court found that the Scouts did “teach that homosexual conduct is not morally straight” and that accepting Dale as a member would force the Scouts to send the message “that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior.”

The Court went on to consider whether New Jersey’s interest in opposing discrimination was weighty enough to justify such an infringement on the Scouts’ right to expressive association, but for practical purposes, found that the infringement was enough. The Court has never allowed an antidiscrimination law to overcome the right to expressive association if its application would seriously burden the right. *Dale* is thus doctrinally consistent both with cases that strike the down the application of antidiscrimination laws, such as *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, and with those that allow it, such as *Roberts v. United States Jaycees* and *Runyon v. McCrary*. *Dale*’s significance lies in its announced deference to the association’s assertions, which may be a departure from *Roberts* and *Runyon*.

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References and Further Reading

Bernstein, David E., *Antidiscrimination Laws and the First Amendment*, Missouri Law Review 66 (2001): 83.

Koppelman, Andrew, *Signs of the Times: Boy Scouts of America v. Dale and the Changing Meaning of Nondiscrimination*, *Cardozo Law Review* 23 (2002): 1819.

Cases and Statutes Cited

Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston, 515 U.S. 557 (1995)

Roberts v. United States Jaycees, 468 U.S. 609 (1984)

Runyon v. McCrary, 427 U.S. 160 (1976)

See also Antidiscrimination Laws; Freedom of Association; Gay and Lesbian Rights; Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston, 515 U.S. 557 (1995); *Roberts v. United States Jaycees*, 468 U.S. 609 (1984)

BOYD v. UNITED STATES, 116 U.S. 616 (1886)

An agent of the customs department, referred to as a collector, seized thirty-five cases of plate glass in pursuance of customs law. The importer was accused of attempting to defraud the federal government of the revenues and duties normally imposed upon the goods. During the trial that followed, the government sought to obtain records of similar prior importations, specifically the receipt by the importer of twenty-nine cases of similar plate glass. A court ordered the importer to produce the invoice in question in court for governmental inspection. The production of the invoice was governed by an 1874 law (18 St. 186) that allowed the government to inspect, but not take possession of, documents of the sort requested. The 1874 legislation was enacted to revise similar past statutes (12 St. 737 and 14 St. 547), which were constitutionally objectionable; the legislation skirted constitutional questions by allowing judges to compel the production of documents without physical search or seizure. A party who refused to produce requested documents was considered guilty of the offenses that the documents may have proved.

The defense produced the requested invoice under heavy protest of Fourth and Fifth Amendment violations; they again protested during the trial when the government offered the invoice into evidence. After the trial, Boyd and unnamed companion claimants sued the government on the grounds that the statute which compelled the production of documents from the claimants was unconstitutional. They claimed that the mandatory production of documents before the court under risk of penalty constituted an illegal search. Although no government agent searched or seized evidence, the production order

was a functional equivalent of such a search. Further, assuming the guilt of a party who refused to produce requested documents before the court violated the Fifth Amendment's provision prohibiting self-incrimination.

In a lengthy legislative history reaching back to eighteenth-century British jurisprudence, Justice Bradley agrees with Boyd. He finds a strong connection between the Fourth and Fifth Amendments, writing that "they throw great light upon each other. For the 'unreasonable searches and seizures' condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment." Justice Bradley acknowledges that this breach of rights is not the most egregious example, but proposes that the Court operate under the principle of *obsta principiis* (resist the beginning) and decide this case with an eye toward more obnoxious encroachments. He writes "though the proceeding in question is divested of many of the aggravating incidents of actual search and seizure . . . it contains their substance and essence."

Boyd defines a strong relationship between the Fourth and Fifth Amendments that continues to guide the Court's deliberations in similar matters. However, the case's holding was overturned, in part, by *Warden, Md. Penitentiary v. Hayden*, which recognizes the limitations of the *Boyd* decision, most notably the production of evidence that does not serve to self-incriminate.

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References and Further Reading

Stephens, Otis, Richard Glenn, and Donald Stephenson, eds. *Unreasonable Searches and Seizures: Rights and Liberties under the Law (America's Freedoms)*. Santa Barbara, CA: ABC-CLIO, 2005.

Cases and Statutes Cited

United States of America v. E.A.B., 1–35, *Thirty-five Cases of Plate Glass*

Act to amend the customs revenue laws, etc., Act of June 22, 1874, 18 St. 186

An act to regulate the disposition of the proceeds of fines, penalties, and forfeitures incurred under the laws relating to the custom, and for other purposes, Act of March 2, 1867, 14 St. 547

An act to prevent and punish frauds upon the revenue, Act of March 3, 1863, 12 St. 737

Warden, Md. Penitentiary v. Hayden, 387 U.S. 294 (1967)

See also Search (General Definition); Search Warrants; Seizures; Warden v. Hayden, 387 U.S. 294 (1967)

BOYKIN v. ALABAMA, 395 U.S. 238, 242 (1969)

The central issue in the *Boykin* case was the responsibility of a criminal court to safeguard the rights of the accused. Edward Boykin, a twenty-seven-year-old African-American man, was sentenced to death by an Alabama judge in 1966 after pleading guilty to five counts of armed robbery, at the time punishable by execution according to state law. In his automatic appeal to the Alabama Supreme Court, Boykin's attorneys argued that a death sentence for armed robbery constituted cruel and unusual punishment. The Court rejected the appeal but expressed doubts as to whether the trial judge had acted properly in accepting the defendant's guilty plea without questioning him or requiring him to address the court.

Boykin then appealed his case to the U.S. Supreme Court, which in June 1969 ruled by seven-to-two majority that the judge erred in allowing the guilty plea without requiring Boykin to confirm it himself, stating that the standards for evaluating whether a defendant knowingly and voluntarily enters a guilty plea should at least equal the standards for determining a defendant's mental competence to stand trial. Writing for the majority, Justice William O. Douglas opined that in order to meet these standards, the trial record must clearly show that the defendant personally waived his or her constitutional rights. The *Boykin* decision thus joined the *Miranda* and *Gideon* decisions in expanding and clarifying the responsibility of courts to ensure the rights of criminal defendants, thereby reinforcing constitutional guarantees of due process, trial by jury, and protection from self-incrimination.

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References and Further Reading

- Horn, Maurita Elaine, *Confessional Stipulations: Protecting Waiver of Constitutional Rights*, University of Chicago Law Review 61 (Winter 1994): 1:225–51.
- Kersch, Kenneth I. *Constructing Civil Liberties: Discontinuities in the Development of American Constitutional Law*. New York: Cambridge University Press, 2004.

Cases and Statutes Cited

- Gideon v. Wainwright*, 372 U.S. 335 (1963)
- Miranda v. Arizona*, 384 U.S. 436 (1966)

See also Capital Punishment and Right of Appeal; Capital Punishment: Proportionality; Guilty Plea; Jury Trial Right; Miranda Warning; Plea Bargaining; Race and Criminal Justice; Self-Incrimination: Miranda and Evolution

BRADFIELD v. ROBERTS, 175 U.S. 291 (1899)

Bradfield v. Roberts is the first of only two Supreme Court cases that have addressed whether government funding of faith-based human services programs is constitutional. In *Bradfield*, a taxpayer sued the federal government challenging a congressional appropriation that funded the construction of a hospital in the District of Columbia that was owned and operated by the Sisters of Charity, a monastic order of the Catholic Church. Pursuant to the appropriation, city officials from the District of Columbia and the hospital directors entered into an agreement providing that the hospital would care for indigent city patients in exchange for construction of the hospital and continued payments for patient care. The taxpayer alleged that the appropriation violated the establishment clause of the First Amendment, which states that “Congress shall make no law respecting an establishment of religion.” In other words, the taxpayer asserted that the arrangement violated the separation between church and state.

The Court upheld the appropriation and ruled against the taxpayer. Writing for the Court, Justice Peckham reasoned that the hospital was incorporated as a secular institution. According to the Court, it was thus irrelevant that the Roman Catholic Church might influence the management of the hospital. Such influence could not “alter the legal character of the corporation” as defined in its charter. Rather, the hospital was an “ordinary private corporation” whose secular duties and rights were set forth in the legal documents of incorporation. Moreover, there was no allegation that the hospital discriminated on the basis of religion or in violation of its charter.

The Court relied on the *Bradfield* decision in 1988 in *Bowen v. Kendrick*, the only other Supreme Court decision addressing government funding of faith-based human service programs. In *Kendrick*, the Court upheld a federal statute that provided government grants to religious organizations for the counseling of pregnant teenagers. Citing to *Bradfield*, the *Kendrick* Court stated that “this Court has never held that religious institutions are disabled by the First Amendment from participating in publicly sponsored social welfare programs.” The Court determined that *Bradfield* remained good law, especially given this country's long history of interdependency between the government and religious organizations in providing for the needy.

Since 1996, when the American welfare system was reformed, *Bradfield* has taken on increased importance. Among other things, the 1996 welfare legislation authorized the granting of federal funds to faith-based

organizations that provide welfare-related social services. This provision is commonly called “charitable choice.” Opponents of charitable choice contend that charitable choice violates the separation of church and state. Proponents of charitable choice believe that faith-based organizations are particularly effective in combating social problems, and they are seeking to expand charitable choice programs to a wide array of federal human service programs. *Bradfield* provides legal support for these charitable choice programs. However, in both *Bradfield* and *Kendrick*, the faith-based organizations at issue were not using government funds to advance their religious missions. For instance, the hospital in *Bradfield* was not conducting religious services or discriminating against nonbelievers. Thus, *Bradfield* does not answer the question as to whether a government grant for social services that also flows to religious activities is constitutional. This question remains to be resolved by the Supreme Court.

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References and Further Reading

- Gilman, Michele, ‘Charitable Choice’ and the Accountability Challenge: Reconciling the Need for Regulation with the First Amendment Religion Clauses, *Vanderbilt Law Review* 55 (2002): 3:799–888.
- Rotunda, Ronald, and John E. Nowak. *Nowak and Rotunda’s Hornbook on Constitutional Law*. 7th ed. St. Paul, MN: West, 2004.

Cases and Statutes Cited

- Bowen v. Kendrick*, 487 U.S. 589 (1988)
- Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 42 U.S.C. § 604a (charitable choice provision)
- See also *Bowen v. Kendrick*, 487 U.S. 589 (1988); **Charitable Choice; Establishment Clause Doctrine; Supreme Court Jurisprudence**

BRADY v. MARYLAND, 373 U.S. 83 (1963)

In *Brady*, the Supreme Court for the first time squarely recognized that the Fourteenth Amendment due process clause guarantees criminal defendants the right to be given favorable information in the possession of the prosecution or the police.

Brady admitted at his murder trial that he had participated in the crime but claimed that his confederate, Boblit, had actually committed the killing. After Brady was convicted and sentenced to death,

his lawyers learned that the prosecution had withheld a statement Boblit made to the authorities before Brady’s trial in which Boblit confirmed that he was the killer. The Maryland Court of Appeals, reasoning that Brady’s admission that he had participated in the killing conclusively established his guilt, nonetheless ruled that the withheld statement was relevant to the question of punishment. Therefore, the state court granted Brady a new sentencing hearing.

Brady appealed to the U.S. Supreme Court, arguing that the withheld statement also entitled him to a new trial, but the Court rejected his argument by a vote of seven to two. The Court, however, used Brady’s case to broadly hold that if the prosecution has any information favorable to the defendant and material to his or her guilt or punishment, due process requires the prosecution to turn it over to the defense. In a series of subsequent cases, including *United States v. Agurs*, *Pennsylvania v. Ritchie*, and *Arizona v. Youngblood*, the Court has reaffirmed, but also limited, the defendant’s constitutional right to discovery of favorable information.

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References and Further Reading

- Imwinkelried, Edwin, and Norman Garland, 2d ed. *Exculpatory Evidence*. Charlottesville, VA: Michie, 1996.
- Stacy, Tom, *The Search for Truth in Constitutional Criminal Procedure*, *Columbia Law Review* 91 (1991): 1369.

Cases and Statutes Cited

- Arizona v. Youngblood*, 488 U.S. 51 (1988)
- Pennsylvania v. Ritchie*, 480 U.S. 39 (1987)
- United States v. Agurs*, 427 U.S. 97 (1976)
- See also *Arizona v. Youngblood*, 488 U.S. 51 (1988); **Due Process; Fourteenth Amendment; United States v. Agurs, 427 U.S. 97 (1976)**

BRANDEIS, LOUIS DEMBITZ (1856–1941)

An extremely effective lawyer and reformer in the Progressive era before Woodrow Wilson named him to the Supreme Court in 1916, Brandeis had very little if any contact with issues that would be identified as civil liberties. About the only reform that even comes close was his involvement in efforts to improve the treatment of patients in public mental asylums in the late 1890s, and that work seems to have resulted more from a request from one of his reform colleagues than from any innate personal interest.

At the time when Brandeis took his seat on the bench, the dominant issue on the Court's docket involved economic rights, primarily the protection of private property through substantive due process and the negation of protective labor legislation through the doctrine of freedom of contract. Brandeis, who as a lawyer had convinced the Court to uphold maximum hours legislation for women in *Muller v. Oregon* (1908), believed that while important rights inhered in property, they had to be subservient to the greater good. Under the states' police powers, both property rights as well as freedom of contract could be curtailed to protect workers from the harsh conditions that they faced in modern industrialized factories.

Once on the Court, Brandeis often spoke out against the conservative interpretation of property rights as a danger to the rights of others, especially workers. It is not that Brandeis did not believe in property rights; he did, but believed that when the public good required it they should be limited. He especially believed in the right of laboring people to organize into unions and to bargain collectively, although throughout the 1920s he often stood alone or with Holmes in this view, as in *Bedford Cut Stone Co. v. Journeymen Stone Cutters Association* (1927). But his most original contributions came in the areas of free speech and privacy.

In March 1919, Brandeis joined Holmes in his landmark speech decision in *Schenck v. United States* (1919), in which the Court upheld a conviction for antiwar expression under the 1917 Espionage Act. In this decision Holmes set out what would be the defining test for free speech for the next half-century: "The question in every case is whether the words are used in such circumstances and are of such a nature to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." Since the clear and present danger test was so highly subjective, it served as a device by which conservative judges could silence almost any unpopular opinion, a danger that civil libertarians immediately recognized. Holmes, long the darling of liberals, suddenly found himself the object of their severe criticism.

Eight months later, in *Abrams v. United States* (1919), Holmes, joined by Brandeis this time in dissent, attempted to make the clear and present danger test more speech protective, and introduced his idea of free trade in ideas, in which all ideas should be heard so that the "best test of truth is the power of the thought to get itself accepted in the competition of the market."

Brandeis would join Holmes in all of the great speech cases of the 1920s, always in dissent, but a significant difference existed between the two men in

why they valued free speech. Although Holmes provided the pithy phrases, Brandeis is the one who refined the concept and who ultimately provided the arguments that remain the basis of First Amendment free speech jurisprudence to this day.

In regard to the *Schenck* opinion, Brandeis later told Felix Frankfurter that "I have never been quite happy about my concurrence . . . I had not then thought the issues of freedom of speech out—I thought at the subject, not through it." In 1920, in his dissenting opinions in *Schaefer v. United States* (1920) and *Pierce v. United States* (1920), Brandeis, as he later recounted, began to understand the issues. Rather than list what the defendants should *not* have been allowed to say, Brandeis emphasized what they should have been allowed to say, and that would have been anything permitted in peacetime. Unlike his friend Herbert Hoover, who believed that criticism of the governmental policy ought to end at the water's shore—that is, there should be no dissent among Americans regarding foreign policy—Brandeis argued that all matters of public importance should always be open to full criticism, no matter how "radical" the speaker or how unpopular the ideas. Moreover, the test to be used in deciding whether a clear and present danger existed should not be the heightened emotional climate of wartime, but rather the quieter and presumably more rational environment of peacetime. While clearly the government could not allow war protesters to publish the times that troop ships sailed, in terms of policy criticism Brandeis would have utilized the same criteria in wartime as in peacetime, a standard that would have made convictions for seditious libel almost impossible.

In *Gilbert v. Minnesota* (1920), Brandeis and Holmes parted company over a state statute that prohibited interference with military enlistment. An official of the Nonpartisan League—hardly a radical organization—had been convicted under the law for telling a public meeting that the average citizen had not had a say in whether the United States should have entered the World War or whether Congress should have established a draft. Holmes silently concurred with McKenna's opinion for the majority that the speech constituted a clear and present danger, and that the state had the power to prevent such peril. Chief Justice White dissented on the grounds that the federal law preempted the field, grounds on which Brandeis agreed. But he apparently was very angry at his brethren who had consistently used the due process clause to strike down economic measures, but here forbore from even a rudimentary examination of a far greater imposition on civil liberties, freedom of speech. *Gilbert* is perhaps the best example that Brandeis saw a significant difference in how the

Court should approach economic measures—with judicial restraint and deferring to the elected branches’ policymaking authority—and laws affecting such basic rights as speech, in which the Court should take a more strenuous approach to protect individual liberties. The dissent in *Gilbert* in many ways prefigured not only Harlan Fiske Stone’s Footnote Four in *United States v. Carolene Products Co.* (1938), but also the strict scrutiny standard adopted by the Warren Court in First Amendment cases.

Brandeis’s greatest contribution to free speech jurisprudence came in his concurring opinion in *Whitney v. California* (1927), which clearly delineated the differences between what one scholar has called his “republican” justification for the First Amendment and Holmes’s libertarian approach.

Charlotte Anita Whitney, a niece of Justice Stephen J. Field and “a woman nearing sixty, a Wellesley graduate long distinguished in philanthropic work,” had been convicted under the California Criminal Syndicalism Act of 1919 for helping to organize the Communist Labor Party in that state. The law, originally aimed at the Industrial Workers of the World, made it a felony to organize or knowingly become a member of any organization founded to advocate the commission of crimes, sabotage or violence as a means of bringing about political or industrial change. Whitney denied that the party had ever intended to become an instrument of violence and that no evidence existed to prove that it had ever engaged in criminal or violent acts. Nonetheless, the conservative majority upheld the conviction, and characterized the law as a legitimate decision by the state legislature to prevent the violent overthrow of society.

Because of technical issues (the defense had not raised the particular constitutional issue that concerned Brandeis), he chose not to dissent, but his concurrence, joined in by Holmes, provided an eloquent defense of intellectual freedom and its relation to democratic society unmatched in the annals of the Court. His opinion, which has often been cited, provides the modern basis for much of First Amendment jurisprudence.

Holmes had put forward a marketplace of ideas rationale for free speech, but it had little direct bearing upon democratic government. Holmes loved ideas, but in the abstract, and so his rationale is powerful, but in an abstract manner. His famous aphorism, that “one cannot falsely shout fire in a crowded theatre” is certainly true, but devoid of practical guidelines. Holmes cared little for the practical and dismissed reform and reformers as ineffective. The Constitution set up certain guidelines, and so long as people acted within those guidelines, he could not have cared less what they did.

For Brandeis, on the other hand, free speech constituted an essential ingredient of good government. For him, the highest calling was that of a citizen in a democracy, but the great privileges that position bestowed required corresponding responsibilities. In order to be a good citizen, one had to participate in the democratic process, to make one’s voice and views known to policymakers. One could not think responsibly about complex issues if the state censored, through sedition laws and other devices, a broad spectrum of ideas. People might agree or disagree with any one view, but they had to be aware of that view in order to fulfill their obligations. Democratic government, properly conducted, provided humankind with the great opportunity for individuals to achieve their dreams. In a famous and oft-quoted passage, he wrote that:

Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinary adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a public duty; and that this should be a fundamental principle of the American government.

Rather than be afraid of what people might say, that radical ideas might undermine property rights, that strange ideas would yield “bad counsel,” Brandeis believed that the cure for “bad speech” was not fear, but more speech. Civic virtue, that hallmark of Athenian democracy that Brandeis prized so greatly, demanded that citizens not be afraid of the different. “Men feared witches and burnt women,” he noted. It is the function of speech to free men from the bondage of irrational fears.

Brandeis’s tying of free speech to government has led some people to argue that the First Amendment’s speech clause applies only to political speech, and that other kinds of expression do not fall within the ambit of its protection. While it is impossible to tell just how far Brandeis would have extended First Amendment protection, he clearly believed that it applied to some nonpolitical speech as well.

In *Senn v. Tile Layers Protective Union* (1937), the Court heard a challenge to a Wisconsin law that made peaceful picketing lawful, and forbade courts from issuing injunctions to prevent it. During a strike, a

construction company owner tried to get an injunction to prohibit workers from peaceful picketing of his plant, on the grounds that it deprived him of his property rights. The Court, by a five-to-four vote, upheld the law, and Brandeis, in the majority opinion, intimated that picketing, aside from its value as a tool in a labor dispute, might also be a form of speech. Union members, he held, did not have to rely on statutes to make the facts of a labor dispute public, “for freedom of speech is guaranteed by the Federal Constitution.” Although the Court has refused to categorize picketing per se as a protected activity, it is clear that in Brandeis’s mind the First Amendment protected many forms of expression.

In his dissent in *Gilbert v. Minnesota*, Brandeis not only protested against the state sedition law but also added the following line: “I cannot believe that the liberty guaranteed by the Fourteenth Amendment includes only liberty to acquire and to enjoy property.” While at the time it appeared to many as little more than a sign of the justice’s frustration with his conservative brethren, in fact that sentence set in motion one of the most significant constitutional developments of the twentieth century, the incorporation of Bill of Rights protections through the due process clause of the Fourteenth Amendment so as to apply them to the states as well as to the federal government. (Ever since *Barron v. Baltimore* [1833], the Court had held that the protections in the first eight amendments to the Constitution applied only against Congress and not to the states.)

If Brandeis could have had his way, he would have wiped out the Fourteenth Amendment’s due process clause completely, or else severely limited it to procedural matters. Aware that the conservatives on the Court would never allow this to happen, Brandeis wanted the same protection now given to property rights to be applied to other rights that he considered fundamental, such as speech, education, choice of profession, and travel.

Ironically, one of the Court’s archconservatives first applied substantive due process to non-property rights. Justice McReynolds, in *Meyer v. Nebraska* (1922), struck down a statute that forbade teaching German in public schools. Although McReynolds used the language of property protection, he expanded it to include other rights including the raising and educating of one’s children, an argument that he applied again in *Pierce v. Society of Sisters* (1925).

That same year, while the majority upheld the conviction of communist leader Ben Gitlow under New York’s 1902 Criminal Anarchy Act (with Holmes and Brandeis dissenting), Justice Sanford noted, without any further elucidation, that: “For present purposes we may and do assume that freedom

of speech and of the press—which are protected by the First Amendment from abridgement by Congress—are among the fundamental personal rights protected by the due process clause of the Fourteenth Amendment from impairment by the States.”

Ever since that time there has been an ongoing debate over whether in fact the framers of the Fourteenth Amendment meant the Bill of Rights to apply to the states, and if so, whether only certain rights should apply (the idea of “selective incorporation” proposed by Justice Cardozo and limited to those rights deemed “fundamental”) or whether all of the Bill of Rights should apply (the idea of “total incorporation” championed by Justice Black). In the end, nearly all of the rights were in fact incorporated, but through the rationale of selective incorporation. The great revolution in civil liberties in the 1960s and afterwards owed much to Brandeis.

It is difficult to know whether Brandeis would have been an advocate of selective or total incorporation. While on the bench he had the satisfaction of seeing not only speech but freedom of press incorporated, in *Near v. Minnesota* (1931), as well as right to counsel in capital cases, in *Powell v. Alabama* (1932). But in 1937 he joined in Justice Cardozo’s opinion for the Court in *Palko v. Connecticut* (1937), in which Cardozo set forth his theory of selective incorporation and held that the Fifth Amendment bar against double jeopardy did not apply to the states. Brandeis had left the Court and died before Hugo Black developed his theory of total incorporation in *Adamson v. California* (1947).

Second only to Brandeis’s contribution to the jurisprudence of free speech was his belief that the Constitution protected a right to privacy. Brandeis had first become interested in privacy in the 1890s, when reporters had sneaked into parties given by his socially prominent partner, Samuel D. Warren. The two men had written an article titled “The Right to Privacy” and published it in the *Harvard Law Review*. According to Dean Roscoe Pound, the article did “nothing less than add a chapter to our law.” Warren and Brandeis had based their right to be let alone on common law protections, but once on the Court, Brandeis began to believe that privacy constituted such a fundamental right that—even though nowhere listed as such in the Constitution—it deserved the highest level of protection.

Brandeis found his chance to expound this idea in the first wiretapping case to come before the high court, *Olmstead v. United States* (1928). In the 1920s, technology gave the government a new tool to fight crime, the ability to listen in on the telephone conversations of alleged gangsters. By tapping Olmstead’s phone, government agents secured evidence to convict

him under the National Prohibition Act. He appealed on grounds that the government had not secured a warrant, and had therefore violated the Fourth Amendment. By a bare majority of five to four, the Court upheld the conviction. In a mechanistic opinion, Chief Justice Taft said that since there had been no entry into the house itself, there had been no search within the meaning of the Fourth Amendment, and therefore a warrant had not been needed.

The opinion elicited a strong dissent from four justices—Holmes, Butler, Stone, and Brandeis. Holmes condemned wiretapping as “a dirty business” and seemed to imply that gentlemen should not read other gentlemen’s letters, or listen in on their conversations. Justice Butler tore apart Taft’s sterile interpretation of the warrant clause, but the most impressive opinion came from Brandeis, condemning not only the action of the government but also putting forth the idea of a constitutionally protected right to privacy.

First, he considered it “less evil that some criminals should escape than that the government should play an ignoble part.” The government is the great teacher in a democratic society, and if “government becomes a lawbreaker, it breeds contempt for the law.”

The most noted and influential part of the dissent dealt with the question of privacy. The framers of the Constitution, he wrote, “sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights, and the right most valued by civilized men.” That passage was picked up and elaborated on until finally, in *Griswold v. Connecticut* (1965), the Court recognized privacy as a constitutionally guaranteed liberty. Although so-called originalists argue that since the Constitution does not mention privacy it cannot protect it, a majority of the Court and most of the American people have come to see privacy as Brandeis saw it—“the most comprehensive of rights, and the right most valued by civilized men.”

Wiretapping itself remained legally permissible for many years, although Congress in 1934 prohibited admitting evidence obtained by wiretapping in federal courts. Not until *Berger v. New York* (1967) did the Court finally adopt Brandeis’s view and bring wiretapping within the reach of the Fourth Amendment; now wiretap evidence may be introduced, but only if it has been secured after the issuance of a proper warrant.

During the 1920s and 1930s, as the Court’s agenda slowly changed from concern with property rights to concern with civil liberties, Louis Brandeis clearly stood as its foremost champion of civil liberties. One

should not, however, confuse Brandeis with a modern liberal. Conservative in many ways, he was also a man of his times. He joined the majority of the Court in denying equal rights to Asiatics in *Ng Fung Ho v. White* (1922) and *Ozawa v. United States* (1922). He voted to uphold racially restrictive covenants in *Corrigan v. Buckley* (1926), and perhaps most infamously, joined in Holmes’s opinion upholding forced sterilization of mentally retarded people in *Buck v. Bell* (1927).

Nonetheless, his views on speech, wiretapping, privacy, and what came to be the doctrine of incorporation, although often propounded in dissent, eventually came to be the law of the land, and forms the basis of much of today’s civil liberties jurisprudence.

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References and Further Reading

- Blasi, Vincent, *The First Amendment and the Ideal of Civil Courage: The Brandeis Opinion in Whitney v. California*, William & Mary Law Review 29 (1988): 653.
 Cortner, Richard C. *The Supreme Court and the Second Bill of Rights: The Fourteenth Amendment and the Nationalization of Civil Liberties*. Madison: University of Wisconsin Press, 1981.
 Lahav, Pnina, *Holmes and Brandeis: Libertarian and Republican Justification for Free Speech*, Journal of Law & Politics 4 (1987): 451.
 Murphy, Walter F. *Wiretapping on Trial: A Case Study in the Judicial Process*. New York: Random House, 1965.
 Strum, Philippa. *Brandeis: Beyond Progressivism*. Lawrence: University Press of Kansas, 1993.

Cases and Statutes Cited

- Abrams v. United States*, 250 U.S. 616 (1919)
Adamson v. California, 332 U.S. 46 (1947)
Barron v. Baltimore, 7 Pet. 243 (1833)
Bedford Cut Stone Co. v. Journeymen Stone Cutters Association, 274 U.S. 37 (1927)
Berger v. New York, 388 U.S. 41 (1967)
Buck v. Bell, 274 U.S. 200 (1927)
Corrigan v. Buckley, 271 U.S. 323 (1926)
Gilbert v. Minnesota, 250 U.S. 325 (1920)
Griswold v. Connecticut, 381 U.S. 479 (1965)
Meyer v. Nebraska, 262 U.S. 390 (1922)
Muller v. Oregon, 208 U.S. 412 (1908)
Near v. Minnesota, 283 U.S. 697 (1931)
Ng Fung Ho v. White, 259 U.S. 276 (1922)
Olmstead v. United States, 277 U.S. 438 (1928)
Ozawa v. United States, 260 U.S. 178 (1922)
Palko v. Connecticut, 302 U.S. 319 (1937)
Pierce v. Society of Sisters, 268 U.S. 510 (1925)
Pierce v. United States, 252 U.S. 239 (1920)
Powell v. Alabama, 287 U.S. 45 (1932)
Schaefer v. United States, 251 U.S. 466 (1920)
Schenck v. United States, 249 U.S. 47 (1919)
Senn v. Tile Layers Protective Union, 301 U.S. 468 (1937)
United States v. Carolene Products Co., 304 U.S. 144 (1938)
Whitney v. California, 274 U.S. 357 (1927)

BRANDENBURG INCITEMENT TEST

Even though the U.S. Constitution provides strong protections for speech, in a number of early decisions, the U.S. Supreme Court gave government broad authority to prosecute those who engage in speech advocating violence or illegal activity. For example, in *Schenck v. United States* (1919), the defendants circulated a petition urging resistance to the draft during World War I. Even though the advocacy did not come close to causing the violence or illegal activity to actually happen, defendants were nevertheless convicted.

Brandenburg v. Ohio (1969) significantly altered the Court's approach to "illegal advocacy." In *Brandenburg*, members of the Klu Klux Klan (KKK) held a rally at which they made derogatory comments about African Americans and Jews, and stated that there might be a need for "revengeance" if Congress and other public officials failed to respond to KKK concerns. The Court overturned the defendant's conviction for "criminal syndicalism" (defined roughly as speech advocating the use of force or law violation), finding that the state did not have the power to prohibit the discussion of abstract principles. A criminal conviction could only be sustained if it could be shown that the advocacy was directed to inciting or producing imminent lawless conduct and is likely to produce such conduct. In the *Brandenburg* case, even though the KKK members spoke stridently, their speech was not close to causing actual violence. As a result, their convictions were reversed.

RUSSELL L. WEAVER

References and Further Reading

- Weaver, Russell L., and Donald E. Lively. *Understanding the First Amendment*. Newark, NJ: LexisNexis, 2003.
- Weaver, Russell L., and Arthur E. Hellman. *The First Amendment: Cases, Materials & Problems*. Newark, N.J.: LexisNexis, 2002.

BRANDENBURG v. OHIO, 395 U.S. 444 (1969)

This case originated in the state of Ohio where Clarence Brandenburg, a Ku Klux Klan leader, was convicted, fined, and sentenced to jail for having made a speech in which he suggested that if the branches of the federal government did not stop suppressing the Caucasian race, violence might be the only answer. He was charged under the Ohio criminal syndicalism statute of 1919, which punished advocacy of violence against the government.

Brandenburg appealed his conviction on the grounds that the provisions of the Ohio law were so

broad that they violated freedom of speech guarantees under the First and Fourteenth Amendments. The U.S. Supreme Court, in a per curiam opinion (with concurrences by Justices Hugo L. Black and William O. Douglas) overturned Brandenburg's conviction, and in doing so significantly broadened the reach of free speech protection. The decision overturned the earlier decision in *Whitney v. California* (1927) and rejected the clear and present danger test once and for all. In a striking defense of the importance of political speech, the Court emphasized the "principle that the constitutional guarantees of free speech and free press do not permit a state to proscribe or forbid advocacy of the use of force or law violation *except* where such advocacy is directed to inciting or producing *imminent* lawless action and is likely to incite or produce such action." The decision had the effect of invalidating state and federal laws that restricted the activities of political groups, including the Smith Act of 1940.

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References and Further Reading

- Linde, Hans A., 'Clear and Present Danger' Reexamined: *Dissonance in the Brandenburg Concerto*, Stanford Law Review 22 (June 1970): 6:1163–86.
- BeVier, Lillian, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle*, Stanford Law Review 30 (January 1978): 2:299–358.

Cases and Statutes Cited

- Brandenburg v. Ohio* 395 U.S. 444 (1969)
- Whitney v. California* 274 U.S. 357 (1927)

See also **Clear and Present Danger Test; Douglas, William Orville; Smith Act; *Whitney v. California*, 274 U.S. 357 (1927)**

BRANTI v. FINKEL, 445 U.S. 507 (1980)

When a newly appointed Democratic public defender discharged two assistant public defenders because they were Republicans, the discharged lawyers claimed that their First Amendment freedoms of belief and association were violated. In a prior case, *Elrod v. Burns*, the U.S. Supreme Court had held that political patronage dismissals were constitutionally valid when there is a demonstrable need for the political loyalty of employees, but that those circumstances were limited to employees who perform a policymaking function or are entrusted with confidential political information. In *Branti*, the Supreme Court broadened *Elrod* by concluding that "the

ultimate inquiry is not whether the label ‘policy-maker’ or ‘confidential’ fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved.” The public defender could not sustain that burden because the function of assistant public defenders is to defend accused criminal defendants. Whatever policy an assistant public defender makes “relate[s] to the needs of individual clients and not to any partisan political interests,” and the confidential information obtained by an assistant public defender “has no bearing whatsoever on partisan political concerns.”

Later cases extended this principle. In *Rutan v. Republican Party of Illinois*, the Court applied its patronage doctrine to include sanctions short of discharge and *O’Hare Truck Services, Inc. v. City of Northlake* extended its scope to independent contractors terminated for partisan political reasons.

CALVIN MASSEY

References and Further Reading

Brinkley, Martin H., *Despoiling the Spoils: Rutan v. Republican Party of Illinois*, North Carolina Law Review 69 (1991): 719.

Johnson, Ronald N., and Gary D. Libecap, *Courts, A Protected Bureaucracy, and Reinventing Government*, Arizona Law Review 37 (1995): 791.

Cases and Statutes Cited

Elrod v. Burns, 427 U.S. 347 (1976)

O’Hare Truck Services, Inc. v. City of Northlake, 518 U.S. 712 (1996)

Rutan v. Republican Party of Illinois, 497 U.S. 62 (1990)

See also *Elrod v. Burns*, 427 U.S. 347 (1976); **Freedom of Association; Political Patronage and First Amendment**; *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990)

BRANZBURG v. HAYES, 408 U.S. 665 (1972)

In *Branzburg*, the Supreme Court confronted an issue of continuing controversy: May journalists who are called to testify before grand juries protect the identities of their confidential sources? *Branzburg* is the only case to date in which the Court has squarely addressed whether the First Amendment provides a “reporter’s privilege.”

The case involved a reporter from the Louisville *Courier-Journal* who had published stories about

illegal drug activity, as well as journalists from the *New York Times* and a Massachusetts television station who had reported on the Black Panthers. All had been called before grand juries and asked to reveal confidential information about what they had seen or heard during their reporting.

Advocates for the reporter’s privilege argue that it is grounded in the historic role of the press in holding government officials accountable and keeping citizens informed on matters of public concern. The First Amendment protects the freedom to publish and broadcast the news, but this freedom means little, advocates note, without constitutional protections for the freedom to *gather* the news.

In *Branzburg*, the Supreme Court held that the First Amendment did not provide a journalist’s privilege. A plurality of four justices declined to erect what they called “a virtually impenetrable constitutional shield, beyond legislative or judicial control” by giving journalists a privilege not enjoyed by most other citizens. The Court’s holding was limited to times when a news source is implicated in a crime or possesses information relevant to a grand jury’s work. Justice Byron White emphasized that the decision should not threaten “the vast bulk of confidential relationships between reporters and their sources.”

Justice Lewis Powell, who provided the crucial fifth vote in *Branzburg*, wrote separately to emphasize what he saw as limited scope of the Court’s holding. In an important concurring opinion, Powell said that courts should balance on a case-by-case basis the rights and needs of journalists with the traditional obligation of all citizens to testify about criminal conduct. When subpoenas threaten to improperly impair the news-gathering process, Powell said, “the courts will be available to [journalists] under circumstances where legitimate First Amendment interests require protection.” In dissent, Justice Potter Stewart said a reporter’s constitutional right to a confidential relationship with a source stems from the broad social interest in the free flow of information. Thus, he said, the Constitution protects journalistic freedom “not for the benefit of the press so much as for the benefit of all of us.”

In the years since *Branzburg*, more than half of the states have enacted statutes providing some limited form of a reporter’s privilege. But there is no such federal law, and federal courts asked to shield journalists from testifying have continued to invoke *Branzburg* and hold that a reporter’s privilege cannot be inferred out of the First Amendment. In a famous case in 2005, a judge jailed a *New York Times* reporter who refused to testify in an investigation concerning the leak of a CIA officer’s identity by members of the George W. Bush administration.

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References and Further Reading

Pracene, Ulan C., ed. *Journalists, Shield Laws and the First Amendment*. New York: Novinka Books, 2005.

BRASWELL v. UNITED STATES, 487 U.S. 99 (1988)

The availability of the Fifth Amendment self-incrimination privilege to resist producing documents in response to a subpoena has depended on whether the government sought the records from an individual (or sole proprietorship) or from a larger business organization. In *Fisher v. United States*, the Supreme Court held that an individual may assert the Fifth Amendment if the act of production of the records would incriminate the person. Randy Braswell, the owner of a business who received a subpoena for its records, sought to apply *Fisher*'s privilege analysis to a single-shareholder corporation.

The Supreme Court, relying on a consistent line of cases going back to its 1906 decision in *Hale v. Henkel*, reaffirmed the collective entity doctrine in *Braswell v. United States* to bar a corporation from asserting the Fifth Amendment to resist production of its records, regardless of the corporation's size or whether an owner or officer would be incriminated by the documents. The Court noted that allowing a corporation's representative to assert the self-incrimination privilege "would have a detrimental impact on the government's efforts to prosecute" white-collar crime, one of the most serious problems confronting law enforcement authorities. The Court further explained that the production of documents by the corporation's representative could not be used by the government against that person if the government charged that person with an offense in a personal capacity.

The decision to incorporate an enterprise means that it cannot assert the Fifth Amendment privilege to resist a government demand for its records.

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References and Further Reading

LaFave, Wayne R., Jerold H. Israel, and Nancy J. King. *Criminal Procedure*. Vol. 3. 2nd ed. St. Paul, MN: Thomson West, 1999.

Mosteller, Robert P., *Simplifying Subpoena Law: Taking the Fifth Amendment Seriously*, Virginia Law Review 73 (1987): 1:1–110.

Note: *Right Against Self-Incrimination—Production of Documents*, Harvard Law Review 102(1988): 1:170–80.

Cases and Statutes Cited

Fisher v. United States, 425 U.S. 391 (1976)

Hale v. Henkel, 201 U.S. 43 (1906)

See also *Fisher v. United States*, 425 U.S. 391 (1976); **Grand Jury Investigation and Indictment**; *Hale v. Henkel*, 201 U.S. 43 (1906); **Self-Incrimination (V): Historical Background**

BRAUNFELD v. BROWN, 366 U.S. 599 (1961)

See *Sunday Closing Cases*

BRAY v. ALEXANDRIA WOMEN'S HEALTH CLINIC, 506 U.S. 263 (1993)

In *Bray v. Alexandria Women's Health Clinic*, the Supreme Court held that the anti-conspiracy provision of the 1871 Civil Rights Act, 42 U.S.C. § 1985(3), known as the Ku Klux Klan Act, did not support a claim against an anti-abortion group's conspiracy to obstruct access to abortion clinics. Anti-abortion activists have targeted clinics, physicians, and their patients with advocacy and harassment, obstructed clinic access and, in extreme cases, bombed abortion clinics and murdered abortion providers. *Bray* challenged Operation Rescue's blockades of abortion facilities throughout the Washington, D.C. area.

Congress originally enacted Section 1985(3) to bar Ku Klux Klan-style mob violence that terrorized black people and Reconstruction supporters and impeded local officials from protecting them. The statute provides a civil cause of action against private conspiracies (1) to deprive "any person or class of persons" of the equal protection of the laws, or (2) to "prevent or hinder the constituted authorities of any State" from providing equal protection. The act applies not only to government conduct, but also to private groups like the Klan or Operation Rescue (see *Bray* and *Griffin v. Breckenridge*). To prevent Section 1985(3) from becoming "a general federal tort law," which is traditionally the province of the states, the Court had interpreted the statute's first clause—the "deprivation clause"—to impose two additional limitations: first, that "some racial, or perhaps otherwise class-based, invidiously discriminatory animus [lay] behind the conspirators' action," and, second, that the conspiracy aim to interfere with rights that are "protected against private, as well as official, encroachment" (see *Griffin*, and *Carpenters v. Scott*).

In an opinion written by Justice Scalia for a five-member majority, the Court held that the *Bray* plaintiffs had failed to meet both of those requirements. In the majority's view, the class of women as a whole was not targeted by Operation Rescue's opposition

to abortion, and the subset of “women seeking abortions” is defined merely by its shared objective, making it not a statutorily protected class. In any event, the Court held, the deprivation clause does not prevent private interference with abortion, because constitutional abortion rights run only against the government. The right to interstate travel constrains private actors, but the Court viewed Operation Rescue’s interference with some women’s travel as a circumstantial effect rather than a purpose of the conspiracy. The majority did not rule on the belatedly raised hindrance claim.

For the four dissenters (Justices Stevens, O’Connor, Blackmun, and Souter), the case presented none of the federalism concerns that might justify restrictive interpretation of Section 1985(3). All four would have reached and sustained the plaintiffs’ hindrance claim. Three dissenters concluded that obstructing women’s access to abortion is sex-based “class animus” under the act, and that, unlike the deprivation clause, the hindrance clause protects the effectiveness of government and so applies even to private interference with official protection of rights like abortion. Justice Souter’s separate, broader dissent questioned the narrow deprivation-clause precedents requiring class-based animus and infringement of a right guaranteed against private impairment, and would have ruled for plaintiffs on that ground as well. Justice Stevens, joined by Justice Blackmun, also would have sustained the deprivation clause claim on the more limited ground that burdening interstate travel was “one of the intended consequences of [the] conspiracy,” and no specific intent to discriminate against out-of-staters should have been required.

The *Bray* majority did not foreclose litigation under the hindrance clause, and women in later cases have successfully pursued hindrance claims (see, for example, *Libertad v. Welch* and *National Abortion Federation v. Operation Rescue*), and also have gained protection under other sources of law. Partially in response to *Bray*, Congress in 1994 passed the Freedom of Access to Clinic Entrances Act (FACE), criminalizing the obstruction of clinics and the use of force to intimidate or interfere with persons seeking to provide or obtain abortions. Additionally, in *Schenck v. Pro-Choice Network of Western New York*, the Supreme Court upheld state-law buffer zones and other restrictions around abortion clinics against free speech challenges. While relief from anti-abortion protestors under RICO initially seemed promising, the Court held in *Scheidler v. NOW* that abortion protesters’ interference with or shutting down of clinics did not amount to the RICO predicate act of “extortion,” such that RICO did not apply.

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Cases and Statutes Cited

Carpenters v. Scott, 463 U.S. 825, 833 (1983)
Griffin v. Breckenridge, 403 U.S. 88 (1971)
Libertad v. Welch, 53 F.3d 428, 446–450 (1st Cir. 1995)
National Abortion Federation v. Operation Rescue, 8 F.3d 680 (9th Cir. 1993)
Scheidler v. NOW, 537 U.S. 393 (2003)
Schenck v. Pro-Choice Network of Western New York, 519 U.S. 357 (1997)

See also **Abortion; Operation Rescue**

BREITHAUPT v. ABRAM, 352 U.S. 432 (1957)

Breithaupt was convicted of involuntary manslaughter in New Mexico following an automobile collision resulting in three deaths. The primary evidence was a blood test showing his blood alcohol content at 0.17 percent. Breithaupt argued that this blood sample, which was obtained while he was unconscious due to his injuries, was illegally obtained and thus should have been excluded. Six justices, speaking through Justice Tom Clark, rejected this argument based on *Wolf v. Colorado*. Breithaupt also argued, on the basis of *Rochin v. California*, that the involuntary blood test “shocked the conscience,” thus violating his substantive due process rights.

The Court, however, distinguished the blood test at issue in *Breithaupt* from the forceful stomach pumping at issue in *Rochin*. The majority concluded that there was nothing offensive or brutal in the taking of a blood sample, under the supervision of a physician, despite the lack of conscious consent. Instead, a blood test was part of a routine medical examination and thus not violative of a suspect’s due process rights.

Chief Justice Earl Warren and Justice William O. Douglas wrote forceful dissents, both joined by Justice Hugo Black. The dissenters were especially outraged by police methods that, in Justice Douglas’s words, violated “the sanctity of the person.”

Breithaupt is most significant in limiting the “shocks the conscience” test elaborated in *Rochin* and in demonstrating the subjectivity involved in that test. The case was later reaffirmed in *Schmerber v. California*, decided after *Wolf* was overruled by *Mapp v. Ohio*.

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References and Further Reading

LaFave, Wayne R., Jerold H. Israel, and Nancy J. King. *Criminal Procedure*. 2nd ed. St. Paul, MN: West, 1999.

Cases and Statutes Cited

Mapp v. Ohio, 367 U.S. 643 (1961)
Rochin v. California, 342 U.S. 165 (1952)
Schmerber v. California, 384 U.S. 757 (1966)
Wolf v. Colorado, (1949), overruled by *Mapp v. Ohio*, 367 U.S. 643 (1961)

BREWER v. WILLIAMS, 430 U.S. 387 (1977)

On Christmas Eve 1968, a ten-year-old child was abducted by Williams, a recent escapee from a mental hospital. A day later, police in Davenport, Iowa, found Williams's car and located at a rest stop some of the child's clothes and the blanket in which she had been wrapped. Police initiated a search of the surrounding countryside.

Williams turned himself in on December 26 to the Davenport police. When he was formally charged, he obtained attorneys in Davenport and Des Moines who instructed the police not to question Williams during his transport to Des Moines, 160 miles away. A detective and another officer were assigned to drive Williams to Des Moines. During the car ride, the detective "delivered what [was] referred to in the briefs and oral arguments as the "Christian burial speech."

I want to give you something to think about . . . I want you to observe the weather conditions . . . They are predicting several inches of snow for tonight, and I feel that you yourself are the only person that knows where this little girl's body is . . . [T]he parents of this little girl should be entitled to a Christian burial for the little girl who was snatched away from them on Christmas (E)ve and murdered. And I feel we should stop and locate it on the way in rather than waiting until morning and trying to come back out after a snow storm and possibly not being able to find it at all.

After listening to these comments, Williams directed the police to the child's body.

During his trial, over the objections of the defense, the judge allowed the prosecution to admit Williams's highly incriminating statements to the police as to the location of the body. The jury found Williams guilty of first-degree murder.

In a five-to-four decision, the U.S. Supreme Court decided that Williams was denied his right to counsel guaranteed by the Sixth and Fourteenth Amendments. The majority said that the detective's speech constituted an interrogation outside the presence of counsel after judicial proceedings had been initiated. This conclusion was based on the admission that the detective was trying to elicit information from Williams in the car before he could re-contact his attorney in Des Moines.

The Court rejected the view that Williams had waived his Sixth Amendment right to a lawyer voluntarily during the car ride. The justices found that the prosecution had failed to meet its burden to prove that Williams affirmatively relinquished his right to counsel through a knowing and intelligent waiver. Thus, the police violated the right to counsel by eliciting incriminating statements from Williams without his counsel present.

The Court remanded the case to the Iowa courts and directed that Williams's incriminating statements and any testimony regarding the retrieval of the body be excluded from evidence at a new trial. However, the Court left open the possibility that the body, as well as its condition, could be admitted into evidence unrelated to his statement. This, in fact, occurred in the second trial where the defendant was again convicted. The Court affirmed this conviction using the so-called inevitable discovery doctrine, meaning that the confession did not affect the other evidence, as it would have been found anyway, inevitably.

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References and Further Reading

Kamisar, Yale, *Brewer v. Williams—A Hard Look at a Discomfiting Record*, *Georgetown Law Journal* 66 (1977): 209.

White, Welsh S., *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, *Harvard Civil Rights-Civil Liberties Law Review* 32 (1997): 105.

See also *Nix v. Williams*, 467 U.S. 431 (1984); **Right to Counsel; Self-Incrimination: Miranda and Evolution**

BREYER, STEPHEN GERALD (1938–)

Justice Stephen Breyer, a Massachusetts Democrat, was President Bill Clinton's second and final appointment to the Court (following Ruth Bader Ginsburg in 1993). A San Francisco native and son of a lawyer for the city's school board, Breyer was educated at Stanford (1959), Oxford (1961) (where he was a Marshall Scholar), and the Harvard Law School (1964). After law school, he clerked for Supreme Court Justice Arthur Goldberg (1964–1965) and went on to a distinguished career as a professor at Harvard's law school and lecturer at its Kennedy School of Government, and a high-level congressional and Justice Department staff member—special assistant to the assistant attorney general for anti-trust (1965–1967); assistant special prosecutor, Watergate Prosecution Force (1973); special (1974–1975) and chief counsel (1979–1980), U.S. Senate Judiciary Committee); and

a Carter appointee to Boston's First Circuit Court of Appeals (1980), where he ultimately served as chief judge (1990–1994).

Although Breyer clerked on the Supreme Court at the height of the Warren Court's "rights revolution," his chief scholarly interest and contribution was never in civil liberties—or even constitutional law—but rather in the law and economics of regulation. At Harvard, Breyer taught courses on anti-trust, regulatory, and administrative law. While on leave from academia, as an aide to Senator Edward Kennedy in the late 1970s, he was an influential architect of the deregulation of the airline industry. Later, as a judge, he played a major role in crafting the sentencing guidelines of the U.S. Sentencing Commission (1985–1989). In addition to many articles, Justice Breyer is the author of *Regulation and Its Reform* (1982), *Breaking the Vicious Circle: Toward Effective Risk Regulation* (1993), and co-author of a prominent administrative law casebook. That Breyer had devoted little time to contentious civil liberties and civil rights issues proved important, in the aftermath of a number of ideologically charged confirmation battles, to Clinton's decision to name him to the Court. Besides having said little about issues like abortion and affirmative action, Breyer's impressive command of economics and his understanding of (and sympathy for) business won him the goodwill of pro-business Republicans. What limited opposition there was to his appointment came from the public interest and consumer movements within the Democratic Party itself.

The texture of Justice Breyer's constitutional jurisprudence reflects his "legal process" training and longstanding interest in the design of efficient and effective regulatory systems. The style of Breyer's civil liberties opinions makes manifest his conviction that judging is a purposive task in which judges, mindful of the limits of judicial authority and expertise, collaborate with the other governmental institutions to formulate rational, goal-directed, and empirically grounded public policy. Those opinions devote relatively little time to deduction from fundamental principles and extended time to the pragmatic parsing of particular fact situations in light of purposive public policy considerations.

Since joining the Court, Justice Breyer has been called upon to apply his approach to a panoply of civil liberties issues. Despite the distinctive flavor of his analysis, in most areas of civil liberties (and civil rights), Breyer's votes have been predictably liberal, aligning fairly consistently with the votes of Justices Ginsburg, Souter, and Stevens. Justice Breyer has been a reliable supporter of the right to privacy, including expansive understandings of abortion

rights (*Stenberg v. Carhart* [2000]), the right to die (*Washington v. Glucksberg* [1997]), and gay rights (*Romer v. Evans* [1996]; *Lawrence v. Texas* [2003]). His free speech decisions are generally liberal. (See *Denver Area Educational Telecommunications Consortium v. FCC* [1995], *Ashcroft v. Free Speech Coalition* [2002], *Republican Party of Minnesota v. White* [2002], *McConnell v. Federal Elections Commission* [2003]. But see also *United States v. American Library Association* [2003]).

While maintaining a liberal predisposition, Justice Breyer has on occasion voted with the Court's conservatives in three areas of civil liberties law. While traditionally liberal in many criminal process cases involving matters such as capital punishment and other Eighth Amendment issues and the right to counsel (see, for example, *Stogner v. California* [2003], *Atkins v. Virginia* [2002], *Penry v. Johnson* [2001], *Kansas v. Hendricks* [1997]), Breyer has in some cases been more deferential to the government in search and seizure cases than quintessential constitutional liberals (*Venonia School District v. Acton* [1995], *Minnesota v. Carter* [1998], *Wyoming v. Houghton* [1999]). In a similar spirit, while evincing a quintessentially liberal concern for the civil liberties of detained persons, he has asserted that indefinite detentions might be constitutionally permissible in cases involving "terrorism or other special circumstances where special arguments might be made for forms of preventative detention and for heightened deference to the judgments of the political branches with respect to matters of national security" (*Zadvydas v. Davis* [2001]). Breyer sometimes evinces more flexibility in his establishment clause decisions than the Court's "strict separationist" justices. (Contrast *Good News Club v. Milford* [2001] and *Mitchell v. Helms* [2000], with *Rosenberger v. University of Virginia* [1995], *Zelman v. Simmons-Harris* [2002], and *Santa Fe Independent School District v. Doe* [2000].) Moreover, like many conservatives, Justice Breyer takes economic rights seriously (see *BMW v. Gore* [1996]). He nonetheless has refused to sign on to the conservative property rights jurisprudence pursuant to the Fifth Amendment's takings clause. (See *Palazzolo v. Rhode Island* [2001], *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency* [2002], and *Brown v. Legal Foundation of Washington* [2003].)

Perhaps the most innovative component of Justice Breyer's jurisprudence is his commitment to a belief that the Court should take greater cognizance in its decisions of the ways in which other nations and foreign and international courts have approached similar problems of law, governance, and public policy, a belief that has exerted a considerable influence on the Court's other justices. Breyer has gone so

far as to suggest that this may involve American judges working to integrate the U.S. Constitution into the governing documents of other nations. He has asserted that international treaties “may eventually prove relevant” in death penalty cases, and that “the number of treaties relevant to particular domestic legal disputes seems to be growing.” In *Grutter v. Bollinger* (2003), Breyer joined an opinion by Justice Ginsburg that cited international human rights agreements as authority for upholding the affirmative action policies of the University of Michigan Law School. Breyer’s transnationalism is a piece with his interest in pragmatic systems building: He sees a worldwide system of governance emerging, particularly with regard to human rights, and believes that the Supreme Court has an important role to play in integrating the United States (and the U.S. Constitution) into this system. This globalist inclination could ultimately have a significant impact on the future path of the Court’s civil liberties jurisprudence.

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References and Further Reading

- Kersch, Ken I. “The Synthetic Progressivism of Stephen G. Breyer.” In *Rehnquist Justice: Understanding the Court Dynamic*, edited by Earl M. Maltz. Lawrence: University Press of Kansas, 2003.
- . “Multilateralism Comes to the Courts.” *The Public Interest* (Winter 2004).

BROADCAST REGULATION

The history of broadcast regulation affords a unique civil liberties perspective because it is the sole example of a government agency created to supervise the press. That agency, the Federal Communications Commission (FCC), enforced specific statutory commands, such as the requirement to give equal time to candidates for elective office or suppressing indecency, as well as created its own, such as the “fairness doctrine” and the requirement to air local programming, based on its own notions of the public interest. All of these content regulations would have been unconstitutional if applied to the print media.

Until it was repealed in 1987, the fairness doctrine was the centerpiece of broadcast regulation. It required broadcasters to give adequate coverage to significant public issues and to ensure fair coverage that accurately presents conflicting viewpoints on those issues (although not necessarily in the same program). For years the FCC and the courts could not say enough good things about the fairness doctrine; it was, the Commission said, “the single most important requirement of operation in the public interest—the

sine qua non for grant of renewal of license.” No station could avoid it as the FCC made clear when it rejected a defense that opposite sides of the issues in question were fully available on other stations in the area. The FCC then proceeded to strip the license from a Philadelphia station that aired more controversial programming than any other in that market. The FCC believed that each station acting as a market (airing something of everything) was superior to having stations differentiate themselves on the basis of content. It feared that listeners would stick with a single station and thus might not be as well informed as the Commission believed they should be.

In operation the fairness doctrine proved a failure. In the days before unique formats became common, most stations would automatically do what the fairness doctrine required so that the doctrine itself should have affected only those who did not wish to comply (and those who lacked the competency to comply). Because the doctrine was triggered by complaints, however, a station in compliance could nevertheless be forced to respond to the FCC. Indeed the more controversial issues that a station covered, the more likely it was to have a complaint filed against it. Responding to a complaint—taking time from management and possibly hiring a lawyer—constituted a tax on airing controversial programming. Yet airing such programming was what the FCC claimed it desired.

Supporters of the fairness doctrine claimed that its effects were exactly those stated in its purposes: fostering coverage of controversial issues. Its repeal put the lie to that assertion. Freed from the fairness doctrine, talk radio, with its controversies, became possible and flourished. Thus, occasionally a supporter of the fairness doctrine now laments its demise and pines for the days when radio was not “uninhibited, robust, and wide open,” and instead was tempered by the fairness doctrine. That, of course, is inconsistent with the premises of the First Amendment as articulated in *New York Times v. Sullivan* (1964).

In *Red Lion Broadcasting v. FCC* (1969), the Supreme Court upheld the constitutionality of the fairness doctrine. Like the FCC, the Court assumed that the doctrine was synonymous with its purposes. Further, the Court was blind to the fact that such a good doctrine could have a chilling effect on broadcast speech; if there were a chilling effect, then the FCC would take appropriate action to eliminate it.

Red Lion announced a trust hierarchy. At the top were viewers and listeners whose rights were paramount. At the bottom were broadcasters who were mere proxies for the greater good. In between were the FCC and the federal courts poised to require that broadcasters give the people their due.

The Court never knew the actual facts behind *Red Lion*. If the facts had come out, perhaps the Court would have understood that government oversight of broadcasting would operate just like the Court knows that government oversight of the print media would work. It would be partisan.

In 1963, the Democratic National Committee created an operation to monitor rightwing radio stations and harass them with equal time and fairness doctrine complaints. The expressed hope was “that challenges would be so costly to them that they would be inhibited and decide it was too expensive to continue.” The monitoring did not cease with the 1964 elections and that picked up *Red Lion*’s supposed transgression. The station, accurately sensing that it was being harassed, fought back—and lost unanimously to a Court that was sure broadcasting was unique and that the FCC was promoting the public interest.

For almost every attempt by the FCC to coerce or coax diverse programming, there is an opposite one to mandate or persuade conformity. Thus, fresh from its success in *Red Lion*, the FCC turned on popular music attempting to rid the airwaves of songs that it believed promoted the drug culture (even though such songs had peaked three years previously and the phenomenon was subsiding). A “do not play” list of twenty-two songs was produced by the Broadcast Bureau. Included were “Lucy in the Sky with Diamonds” and “With a Little Help from my Friends” by the Beatles as well as “Truckin” by the Grateful Dead. Some panicked stations ceased playing “Puff, the Magic Dragon” by Peter, Paul, and Mary.

The Commission’s attention soon wandered to other issues—specifically sex and violence. Sometimes with censorship, sometimes with jawboning, the Commission attempted to return radio and television to the cultural standards of an earlier era. Like most attempts to move culture backward, this effort failed.

It has been over two decades since the Supreme Court last decided a broadcast case. Its discussions of broadcast regulation in cases involving cable and the Internet indicate that the Court recognizes its embrace of FCC actions was mistaken. Freedom of speech and the press will not blossom in an environment of government supervision. The Court knew that; broadcast regulation has proved it again.

SCOT POWE

References and Further Reading

- Krattenmaker, Thomas G., and Lucas A. Powe, Jr. *Regulating Broadcast Programming*. Cambridge, MA: MIT Press; Washington, D.C.: AEI Press, 1994.
- Powe, Lucas A., Jr. *American Broadcasting and the First Amendment*. Berkeley: University of California Press, 1987.

Spitzer, Matthew. *Seven Dirty Words and Six Other Stories*. New Haven, Conn.: Yale University Press, 1986.

Cases and Statutes Cited

- New York Times v. Sullivan*, 376 U.S. 254 (1964)
- Red Lion Broadcasting v. Federal Communications Commission*, 395 U.S. 367 (1969)

BROOKS v. TENNESSEE, 406 U.S. 605 (1972)

In *Brooks*, the Supreme Court struck down a state statute requiring criminal defendants to testify, if at all, before any other defense witnesses take the stand. The Court concluded that such statutes violate both the Fifth Amendment self-incrimination clause and the right to counsel.

At the close of the prosecution’s case in his robbery trial, Brooks’s attorney requested that Brooks be allowed to testify after the other defense witnesses. Relying on a Tennessee statute requiring the defendant to testify at the beginning of the defense case or not at all, the judge refused the request. Brooks then elected to not testify, and he was convicted.

The U.S. Supreme Court reversed Brooks’s conviction by vote of six to three. The Court acknowledged that the statute was intended to prevent defendants from adjusting their testimony to fit with testimony given by other defense witnesses. However, the Court held that the statute unjustifiably burdened Brooks’s right not to testify because it forced him to decide whether to testify before he knew if his testimony would be necessary or helpful to his case. The Court also concluded that the statute violated Brooks’s right to the effective assistance of counsel because it prevented his attorney from exercising his professional judgment as to the best time to call his client to testify.

Brooks thus holds that states may not erect arbitrary barriers that frustrate a criminal defendant’s exercise of his right to testify or interfere with his attorney’s ability to effectively represent him.

DAVID A. MORAN

See also Right to Counsel; Self-Incrimination (V): Historical Background

BROTHERHOOD OF RAILROAD TRAINMEN v. VIRGINIA EX REL. VIRGINIA STATE BAR, 377 U.S. 1 (1964)

The legal profession has traditionally exhibited antipathy toward activities that could be perceived as encouraging litigation. It has also taken a dim view of

nonlawyers providing legal advice. So it is not surprising that the Virginia State Bar (and the American Bar Association, as *amicus curiae*) sought to prevent a labor union from operating a “department of legal counsel.” This department functioned as a referral service, directing injured union members to local lawyers who could represent them in lawsuits against their employers, and also as an institutionalized warning system to employees, cautioning them not to settle injury claims without first consulting a lawyer.

The Virginia State Bar obtained an injunction against the department, contending that it constituted the unlawful solicitation of clients and the unauthorized practice of law. The U.S. Supreme Court reversed, however, on the grounds that the First Amendment’s guarantees of freedom of expression, assembly, and petition gave the employees the right to associate together for the purpose of petitioning for the redress of their grievances against the railroads. The Court noted that the Virginia bar may have a legitimate interest in preventing “ambulance chasing,” but that the union’s interest was not commercial gain but protecting the rights of its members. One might question whether this is a tenable distinction. Plaintiffs’ personal injury lawyers may be interested both in protecting the legal rights of their clients and in making money. Does one motivation diminish the other? In any event, read in conjunction with the commercial speech cases protecting most advertising by attorneys, this case is part of the foundation of the constitutional protection afforded to lawyers’ commercial activities.

W. BRADLEY WENDEL

References and Further Reading

Erichson, Howard M., *Doing Good, Doing Well*, *Vanderbilt Law Review* 57 (2004): 2087–125.

Wolfram, Charles W. *Modern Legal Ethics*. St. Paul, Minn.: West, 1986.

See also **Freedom of Association; Lawyer Advertising; NAACP v. Button**, 371 U.S. 415 (1963)

BROWN v. BOARD OF EDUCATION, 347 U.S. 483 (1954)

The U.S. Supreme Court’s 1954 decision in *Brown v. Board of Education*, declaring state-mandated school segregation unconstitutional, was perhaps the Court’s most important decision of the twentieth century. Prior to the *Brown* decision, seventeen states (including all eleven states of the old Confederacy)

and the District of Columbia either permitted or required racial segregation in public schools. Although such segregation relegated black children to poorly funded separate schools and imposed on them the stigma of second-class citizenship, many states were determined not to allow black children to attend school with whites.

Since the 1930s, the National Association for the Advancement of Colored People (NAACP) had brought a number of lawsuits challenging various aspects of racial segregation in education. Early lawsuits included challenges to the exclusion of blacks from white state university graduate and professional schools. After the Supreme Court in 1950 held in *Sweatt v. Painter* (1950) that the exclusion of black students from the University of Texas Law School (requiring them to attend a fledgling racially separate law school) violated the equal protection clause of the Fourteenth Amendment, the NAACP brought a number of lawsuits challenging racial segregation in elementary and secondary schools. Eventually, five of these suits—filed in Delaware, Kansas, South Carolina, Virginia, and the District of Columbia—were accepted for review by the U.S. Supreme Court.

On May 17, 1954, the Supreme Court in a unanimous decision declared state-mandated school segregation unconstitutional. The unanimity was hardly a foregone conclusion. After oral argument in the cases in 1952, the Court was sharply divided and scheduled reargument for 1953. In the meantime, Chief Justice Frederick Vinson died; his replacement, Earl Warren, worked skillfully and successfully to build unanimous support for a decision striking down segregation as violating the equal protection clause.

In its decision, the Court concluded that relegating black children to racially separate schools “solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.” Quoting from the district court in the Kansas case, the Supreme Court elaborated: “Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group . . . Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a [racially] integrated school system.”

In issuing its landmark decision, the Court postponed for one year the question of remedy. The Court heard argument on the remedy issue and on May 31, 1955, issued a second decision in the case, a decision

that came to be known as “Brown II.” In this second decision, the Court directed lower courts to supervise the desegregation of southern school districts with “all deliberate speed”—a directive that some white Southerners interpreted as signaling the Court’s willingness to tolerate some delay.

The *Brown* decisions did not lead to the immediate desegregation of southern school systems. Although a few communities did desegregate their schools in a token fashion within the next few years, most southern school districts refused to take any action. By the fall of 1957, only 0.15 percent of black children in the eleven states of the old Confederacy attended school with whites. Even this extraordinarily modest level of school desegregation provoked intense controversy and sometimes led to violence. For example, Arkansas Governor Orval Faubus caused a national crisis when he ordered the Arkansas National Guard to bar nine black students from desegregating Central High School in Little Rock in 1957. President Dwight Eisenhower was eventually forced to deploy federal troops to defuse the Little Rock crisis. Southern resistance would continue. On the tenth anniversary of the first *Brown* decision—May 1964—only about 1.2 percent of Southern black children attended school with white children, and in a few states, such as Mississippi, desegregation had not even begun. In the meantime, the Supreme Court, with a few exceptions, remained largely silent on the issue of enforcing the desegregation mandate of *Brown*.

After Congress passed the Civil Rights Act of 1964, which included a fund withholding provision for entities (such as southern school districts) that engaged in racial discrimination, the pace of desegregation quickened. In 1965, the Office of Education of the Department of Health, Education, and Welfare (HEW) issued a set of guidelines defining for school officials minimum desegregation standards that must be satisfied in order to retain federal funding. These guidelines, coupled with the threat of losing federal funds, contributed to an increase in school desegregation. Moreover, lower federal courts during the late 1960s began to insist that southern school districts had an affirmative duty to increase desegregation levels. In a series of decisions in the late 1960s and early 1970s, culminating in *Swann v. Charlotte-Mecklenburg Board of Education* (1971), the U.S. Supreme Court reentered the fray and insisted on significant desegregation. In the *Swann* decision, the Court legitimated the use of extensive school busing as a desegregation remedy, a decision that had an immediate and profound effect on desegregation levels across the South and in several northern and western cities as well.

Although *Brown* did not lead to the immediate desegregation of southern schools, it did contribute

to a renewed insistence among many blacks that racial segregation was morally and legally wrong and should be opposed. While the full impact of *Brown* would not be felt until after the Civil Rights Act of 1964, the decision was nevertheless a crucial event in the development of civil rights in American society. Moreover, *Brown* helped legitimate the notion that it is sometimes appropriate for courts to step in and overrule legislative bodies that have enacted laws that serve to harm racial and ethnic minorities.

DAVISON M. DOUGLAS

References and Further Reading

- Cottrol, Robert J., Raymond T. Diamond, and Leland B. Ware. *Brown v. Board of Education: Caste, Culture, and the Constitution*. Lawrence: University Press of Kansas, 2003.
- Klarman, Michael. *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality*. New York: Oxford University Press, 2004.
- Kluger, Richard. *Simple Justice: The History of Brown v. Board of Education and Black America's Struggle for Equality*. New York: Knopf, 1976.

Cases and Statutes Cited

- Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971)
- Sweatt v. Painter*, 339 U.S. 629 (1950)

BROWN v. MISSISSIPPI, 279 U.S. 278 (1936)

In *Brown v. Mississippi*, the Supreme Court for the first time relied upon the due process clause of the Fourteenth Amendment to exclude a confession from evidence in a state court. *Brown* was a seminal case, because the due process doctrine then dominated the Supreme Court’s confessions law jurisprudence until *Miranda v. Arizona* was decided in 1966. Even after *Miranda*, courts continue to exclude confessions extracted in violation of due process on the authority of *Brown*.

The facts of the case are appalling. *Brown* highlighted the fact that police officers in the South systematically abused black suspects in the criminal justice system during that era. A deputy sheriff, accompanied by other white men, hung defendant Ellington by a rope to a tree limb, let him down, hung him up again, and finally tied him to a tree and whipped him as the defendant protested his innocence. “[T]he signs of the rope on his neck were plainly visible during the so-called trial.” After the mob released Ellington, he went home, “suffering

intense pain and agony.” A day or two later, the same deputy arrested Ellington and headed to a jail in an adjoining county, taking a route that went into Alabama. While in Alabama, the deputy stopped and again severely whipped Ellington, making clear that he would continue the beating until Ellington confessed. Ellington then confessed to a statement dictated by the deputy, and the deputy then took him to jail.

Two other defendants (including the named defendant Brown) were also arrested. At the same jail where Ellington was held, the deputy who had beaten Ellington was once again accompanied by a “number of white men,” including an officer, and the jailer. This group forced the two defendants to strip, laid the men over chairs, and “cut to pieces” their backs with a leather strap with buckles. The deputy made clear that the beatings would continue until defendants confessed “in every matter of detail as demanded by those present.” The defendants confessed, and the beating continued until the confessions conformed to the torturers’ demands.

The state’s only evidence against the defendants was their confessions, the circumstances of which were not disputed. Indeed, in admitting to the whipping of Ellington, the deputy stated that the severity of the beating was “[n]ot too much for a negro; not as much as I would have done if it were left to me.”

The Court had little trouble finding that the defendants’ convictions in these circumstances violated due process. Although noting that the states have great latitude in establishing court procedures, their freedom “is the freedom of constitutional government and is limited by the requirement of due process of law.” The states may not resort to torture to obtain convictions. The wrong committed in the case was “so fundamental that it made the whole proceeding a mere pretense of a trial and rendered the conviction and sentence wholly void.” The Court’s decision was unanimous. Professor Morgan Cloud has described *Brown* as “one of the Court’s great opinions.”

M. K. B. DARMER

References and Further Reading

- Cloud, Morgan, *Torture and Truth*, Texas Law Review 74 (1996): 1211.
Darmer, M.K.B., *Beyond Bin Laden and Lindh: Confessions Law in an Age of Terrorism*, Cornell Journal of Law and Public Policy 12 (2003): 319–64.

Cases and Statutes Cited

- Miranda v. Arizona*, 384 U.S. 436 (1966)

BRUCE, LENNY (1925–1966)

Lenny Bruce is often considered the most influential figure in modern comedy, a pioneer of the acerbic social satire that would dominate the genre in the latter half of the twentieth century. His challenges to contemporary standards of artistic expression in the 1950s and 1960s also made him a target of authorities and a central figure in the debate over the limits of free speech, inspiring generations of performers and activists while exerting a substantial toll upon his own career and personal life.

Born Leonard Schneider in Long Island, New York, in 1925, Bruce began his comedy career as a vaudeville-style comedian after serving in World War II. After a brief hiatus, he returned to the stage in the early 1950s with an edgier, more experimental style heavily influenced by the emerging beat culture. His comedy routines often tested the boundaries of the decade’s rigid obscenity standards with irreverent, satirical commentary on social mores and institutions, and frequently included jokes about oral sex, bodily functions, racism, and religion.

Bruce reached the peak of his mainstream success with a sold-out performance at Carnegie Hall in 1961. However, his exposure to conventional audiences resulted in a series of arrests on obscenity charges in various cities across the United States. Bruce was acquitted of some of these charges but convicted of others; he continued to perform while free on bond and refused to compromise his material despite mounting legal and financial difficulties. Meanwhile, his health—and, critics charged, the quality of his performances—began to decline under the strain of numerous trials and ongoing struggles with drug addiction.

In April 1964, during a series of performances at the Café au Go-Go in New York City, Bruce was once again arrested and charged with obscenity, inspiring outrage from the city’s formidable community of artists, writers, and intellectuals. The prosecution presented a number of eyewitnesses to Bruce’s Café au Go-Go performances, whose testimony included graphic descriptions of Bruce’s language and gestures during the performance. The defense, spearheaded by renowned First Amendment attorney Ephriam London, countered with testimony from a series of expert witnesses, including psychiatrists, music and theater critics, and media experts, who testified that Bruce’s material possessed artistic merit and was not obscene according to the community standards of the city of New York. The Court ruled that Bruce’s performances were obscene, found him guilty, and sentenced him to four months of hard labor. He remained free on bond but would

not live to complete the appeals process, dying of a morphine overdose in Los Angeles on August 3, 1966.

The performances and legal battles of Lenny Bruce set precedents for subsequent challenges to free speech restrictions, resulting in a gradual relaxation of obscenity standards that allowed subsequent generations of writers and performers to present content more provocative than that for which Bruce was repeatedly arrested. In 2003, in response to a petition from artists and free speech advocates, New York Governor George Pataki issued Bruce a full posthumous pardon for his 1964 conviction.

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References and Further Reading

- Bruce, Lenny. *How to Talk Dirty and Influence People*. Rep. ed. New York: Simon & Schuster/Fireside, 1992.
- Collins, Ronald K.L., *Lenny Bruce and the First Amendment: Remarks at Ohio Northern University Law School*, Ohio Northern University Law Review 30 (Winter 2004): 1:15–34.
- Collins, Ronald K.L., and David, Skover. *The Trials of Lenny Bruce: The Fall and Rise of an American Icon*. Naperville, IL: Sourcebooks Mediafusion, 2002.
- Saporta, Sol. *Society, Language and the University: From Lenny Bruce to Noam Chomsky*. New York: Vantage Press, 1994.

See also **Obscenity; Obscenity in History; Pardon and Commutation; Public Figures; Public Vulgarly and Free Speech; Satire and Parody and the First Amendment**

BRYAN, WILLIAM JENNINGS (1860–1925)

Perhaps best known for his famous “Cross of Gold” speech, William Jennings Bryan had a public career lasting some thirty years. He served two terms in the U.S. House of Representatives, ran for president three times, served as secretary of state under Woodrow Wilson, and had a successful career as a public speaker and attorney. He championed the causes of middle America, even when it cost him politically to do so. Yet one of his legacies is tied inextricably with the Scopes trial in 1925, and he is misunderstood and remembered as a knee-jerk fundamentalist for his role in prosecuting John Scopes for teaching evolution in Tennessee.

A believer in social contract theory, which stated that governments existed essentially to do for people what they could not do for themselves, Bryan became associated with free silver as a political issue. He preached constantly for the adoption of silver as

circulating currency, making him a populist hero for much of Midwest America. Indeed, silver became a primary issue in the 1896 election, during which Bryan ran on both the Populist and Democratic tickets and lost to William McKinley. He sought to have the gold standard repealed and replaced with silver, but many contemporary observers believed that Bryan held onto the issue far too long, even after gold supplies increased enough to make circulation of silver irrelevant.

Partly because of his devotion to temperance as a social issue, Bryan also became an outspoken supporter of women’s suffrage. He, like many other suffrage activists, believed that women’s votes were critical to ensure the elimination of alcoholism and its various societal problems.

Despite his having served as a soldier in the Spanish-American War, Bryan became opposed to imperialism; he had particular problems with McKinley’s Philippine policies. He believed that the Philippines had the right to outright independence, as Cuba had received, rather than status as possessions of the United States. It cost the United States too much money, he argued, and led to poor relationships between the United States and Asian nations.

Bryan was also committed to reform, both economic and constitutional. He sought consumer protection against corporate excess and monopoly. He supported electoral-college reform and favored a constitutional amendment for the direct election of U.S. senators, declaring that if citizens were intelligent enough to elect representatives and the president, then they were surely smart enough to elect their senators. Nearly one hundred years before it became an issue in the 2000 and 2004 elections, Bryan called for public disclosure of campaign fundraising and spending.

The twilight of Bryan’s life saw his involvement as a prosecutor in Tennessee’s Scopes trial. When John Scopes was charged with violating state law, which forbade teaching evolution, Bryan found himself opposed by Scopes’s attorney, Clarence Darrow (provided by the American Civil Liberties Union). The trial climaxed with Bryan himself taking the witness stand to be cross-examined by Darrow. By all accounts, Bryan was a poor witness; Darrow made Bryan admit that he believed literally in the stories from the Bible, and made it seem as if Bryan were uneducated and ignorant of scientific teachings. Bryan’s team won the case, but Bryan died barely a week after it was over.

The truth about Bryan, though, was hardly that simple. Bryan’s writings indicate that he supported Scopes’s prosecution, not because he thought evolution had no place in schools, but because he thought

that parents, not state legislatures, should decide what their children were taught in school.

Often remembered without sufficient nuance, Bryan deserves to be remembered as a defender of American civil liberties. He championed several reforms that were only accomplished after his death, and he represented the under-franchised in America.

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References and Further Reading

- Anderson, David P. *William Jennings Bryan*. Boston: Twayne Publishing, 1981.
- Koenig, Louis W. *Bryan: A Political Biography of William Jennings Bryan*. New York: G.P. Putnam's Sons, 1971.
- Springen, Donald K. *William Jennings Bryan: Orator of Small-Town America*. New York: Greenwood Press, 1991.

BRYANT, ANITA (1940–)

If the Stonewall riot was the event that galvanized the movement for gays' civil rights, Anita Bryant was the personality that first embodied at the national level the opposition to those rights. Her successful campaign to repeal the gay rights ordinance in Dade County, Florida, not only inflicted an enduring setback for that state and ignited copycat referenda throughout the nation, but also set the negative terms of that debate for years to come.

Born on March 25, 1940, Bryant early achieved national attention when she represented Oklahoma in the 1959 Miss America pageant. Second runner-up in that competition, she parlayed the attention into a successful recording career. Bryant would become particularly known for her rendition of the *Battle Hymn of the Republic*, a patriotic association that she would effectively exploit during later antigay campaigns. To most households, however, Anita Bryant was known simply as the Florida orange juice lady, serving for many years as the national spokeswoman for the Florida Citrus Commission. Bryant wed Bob Green in 1969, a Miami disc jockey who then served as her manager, and went on to raise four children.

On January 18, 1977, the Miami Dade Metro Commission voted to include protections for gay men and lesbians in its human rights ordinance. The amendment to Chapter 11A of the Dade County Code would have prohibited discrimination in the areas of housing, public accommodation, and employment. Bryant founded the Save Our Children, Inc. organization to spearhead a petition drive to put the ordinance on the June 7 ballot for repeal by popular vote. An overwhelming majority rejected the ordinance, setting the stage for similar repeals in

Wichita, Kansas, St. Paul, Minnesota, and Eugene, Oregon.

The unprecedented battle inflicted long-term consequences on all parties. At the local level, the non-discrimination provisions were not reinstated until 1997 (Ord. 97-17, February 25, 1997). The Christian right again forced a referendum vote on September 10, 2002, which this time failed. More enduring fallout, however, includes a state law enacted in the 1977 aftermath that bans adoptions by gay persons. This policy survived a challenge in 2005 when the U.S. Supreme Court refused an appeal from the Eleventh Circuit upholding its constitutionality against equal protection claims (*Lofton v. Secretary of Dept. of Children and Family Services* [2005]).

More generally, the Dade County fight significantly altered the terms of discourse concerning gay rights. Where before the predominant stereotype had been the ineffectual poof, Bryant popularized the image of the gay "militant" bent on converting others into homosexuality, largely through child molestation. This new characterization would help give rise to the favorite myth of the right of a literal "homosexual agenda" that explicitly targets the seduction of young children.

Although her antigay movement enjoyed considerable success, Bryant herself did not. Having built her reputation on defending the family, her conservative supporters rejected her after a 1980 divorce from Green. Permanently estranged from her base, she quickly lost her association with the Citrus Commission, initiating a series of financial setbacks that included bankruptcies in 1997 and 2001. Despite the personal costs incurred by her spearheading this early campaign, recent interviews at the time of this writing have indicated no softening of her antigay position.

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References and Further Reading

- Bryant, Anita. *The Anita Bryant Story: The Survival of Our Nation's Families and the Threat of Militant Homosexuality*. Old Tappan, NJ: Revell, 1977.
- Nussbaum, Martha C., and Saul M. Olyan, eds. *Sexual Orientation & Human Rights in American Religious Discourse*. New York: Oxford University Press, 1998.

Cases and Statutes Cited

- Lofton v. Secretary of Dept. of Children and Family Services*, 358 F.3d 804 (Fla. 2004), cert. denied 125 S.Ct. 869 (2005)
- Miami-Dade County Ordinance Chapter 11A

See also **Christian Coalition; Gay and Lesbian Rights; Falwell, Jerry; Family Values Movement**

BUCHANAN v. KENTUCKY, 483 U.S. 402 (1987)

David Buchanan was indicted on capital murder charges for the rape and murder of Barbel Poore. Buchanan requested that the capital portion of his charges be dropped, arguing *Enmund v. Florida* (1982) made him ineligible for the death penalty because he had neither intended to kill Poore nor had he been the gunman. This was granted. He and fellow participant Stanford were tried jointly by the state. Buchanan was found guilty and sentenced to a life sentence on the murder charge.

Following his conviction and sentence being upheld by the Kentucky Supreme Court, Buchanan appealed to the U.S. Supreme Court. Buchanan claimed that because his jury at trial had been “death qualified,” he had been deprived of his Sixth Amendment right to an impartial jury of a fair cross-section of the community.

The U.S. Supreme Court disagreed, and affirmed the lower court. Death qualification of the jury was previously permitted in *Lockhart v. McCree* (1986), where the death penalty was sought for one of the defendants being tried. And in *Wainwright v. Witt* (1985), the Court ruled that “Witherspoon-excludables” did not constitute a distinctive group in regards to fair cross-section purposes. Moreover, death qualifying a jury did not make them automatically excludable for cause because the court assumes that jurors will set aside personal beliefs and make decisions based solely on case facts and the letter of the law.

NICHOLE H. FRANKLIN

Cases and Statutes Cited

Enmund v. Florida, 458 U.S. 782 (1982)

Lockhart v. McCree, 476 U.S. 162 (1986)

Wainwright v. Witt, 469 U.S. 412, 423 (1985)

BUCHANAN v. WARLEY, 245 U.S. 60 (1917)

A 1914 Louisville, Kentucky city ordinance prohibited blacks from buying houses on blocks where the majority of the residents were white, and at the same time, prohibited whites from buying houses on blocks where the majority of the residents were black. No one was forced to move under the law. In order to challenge the law, Warley, who was black, agreed to buy Buchanan’s house. The contract for purchase provided that “It is understood that I am purchasing the above property for the purpose of having erected thereon a house which I propose to make my residence, and it is a distinct part of this agreement that

I shall not be required to accept a deed to the above property or to pay for said property unless I have the right under the laws of the State of Kentucky and the City of Louisville to occupy said property as a residence.” After signing the contract, Warley then refused to pay for the house, asserting that the law prohibited him from doing so. This allowed Buchanan, the white seller, to sue Warley, for breach of contract. The Kentucky Supreme Court upheld the ordinance and declared that Warley did not have to pay for the house. This allowed the case to go to the U.S. Supreme Court.

This was the first case brought to the Supreme Court by the newly organized civil rights organization, the National Association for the Advancement of Colored People (NAACP). Moorfield Storey, one of the leaders of the American bar, argued the case for Buchanan. The posture of the case was of course odd. Buchanan, a white man, was suing Warley, a black, to force him to buy a house in a predominately white neighborhood. If Buchanan won, then all blacks would win.

The Supreme Court framed the question in simple terms: “May the occupancy, and, necessarily, the purchase and sale of property of which occupancy is an incident, be inhibited by the States, or by one of its municipalities, solely because of the color of the proposed occupant of the premises?” The Court refused to limit the Fourteenth Amendment to the rights of blacks or other minorities, noting that “while a principal purpose of the [Fourteenth] Amendment was to protect persons of color, the broad language used was deemed sufficient to protect all persons, white or black, against discriminatory legislation by the States.” Thus, under the Fourteenth Amendment, Buchanan had just as much of a right to sell his house as Warley did to buy a house.

In upholding Buchanan’s right to sell his house, and Warley’s right to buy it, the Court quoted from *Strauder v. West Virginia* (1880), which had struck down a West Virginia law that prohibited blacks from serving on juries. In *Strauder*, the Court had said that the Fourteenth Amendment was “designed to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons, and to give to that race the protection of the general government, in that enjoyment, whenever it should be denied by the States. It not only gave citizenship and the privileges of citizenship to persons of color, but it denied to any State the power to withhold from them the equal protection of the laws, and authorized Congress to enforce its provisions by appropriate legislation.” If this was so, then surely blacks could buy houses wherever they wanted. The Court also quoted the federal Civil Rights Act of

1866, which had specifically guaranteed that blacks would have the same right as whites to “inherit, purchase, lease, sell, hold, and convey real and personal property.” Justice William Day then asked, “In the face of these constitutional and statutory provisions, can a white man be denied, consistently with due process of law, the right to dispose of his property to a purchaser by prohibiting the occupation of it for the sole reason that the purchaser is a person of color intending to occupy the premises as a place of residence?” The answer was obviously that a law could not prevent the sale of property solely on the basis of the race of the buyer or seller.

While properly understood as a civil rights case, *Buchanan* must also be seen as civil liberties case protecting the right to own and convey property. The founders saw private property as a fundamental institution in society and key to a democratic state. Many of the early states had predicated voting on property ownership because they believed that only those with a financial stake in society should be able to vote. While this theory of political participation has long been discredited, the right to own—and to buy and sell—property has been seen as a fundamental civil liberty. Here the Court accepted this notion and applied it to race discrimination.

In reaching this result, the Court rejected the idea that racial segregation, which it had approved in *Plessy v. Ferguson* (1896), applied to the sale of real estate. The Court had no difficulty distinguishing between separating the races on trains, or in schools, and the real estate transaction in this case. Here there was no attempt to mix the races in a social setting. The Court declared that it lacked any power to influence racial relations and acknowledged that the “the law is powerless to control” racial views and feelings of white superiority to blacks or white hostility to blacks. But, in upholding the right of people to buy and sell property, the Court did not see itself doing any of these things. It was merely allowing citizens to exercise “their constitutional rights and privileges” to own land.

This case did not lead to housing integration. White landowners avoided integration through restrictive covenants which the Court approved on the same theory that approved *Buchanan*’s right to sell his land: that private individuals have a right to engage in contracts for their property. Thus, in *Corrigan v. Buckley* (1926), the Court undermined the value of *Buchanan v. Warley* by demonstrating that residential segregation could be achieved by private action—with court enforcement—even if it could not be achieved by actions of the state. *Corrigan* involved a private agreement among thirty-one landowners in Washington, DC, who all signed a restrictive covenant

that prevented them from selling law their houses or land for twenty-one years. The Court unanimously upheld the covenant, thus preventing Irene Corrigan from selling her land to a black woman. In *Shelley v. Kraemer* (1948), the Court would finally hold that restrictive covenants could not be enforced by courts because that would force the courts to violate the equal protection of citizens. Thus, after 1948 people were free to sign restrictive covenants, but they could not be enforced by courts and thus anyone would break the covenant without fear of being sued.

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References and Further Reading

Vose, Clement. *Caucasians Only: The Supreme Court, The NAACP, and the Restrictive Covenant Cases*. Berkeley: University of California Press, 1959.

BUCK v. BELL, 274 U.S. 200 (1927)

In 1924, the state of Virginia passed a law granting certain state hospitals the authority to sterilize patients deemed mentally defective. After becoming pregnant out of wedlock, possibly from being raped, seventeen-year-old Carrie Buck was institutionalized by her foster parents. While institutionalized, she, like her mother before her, was deemed “feeble minded,” and the hospital recommended sterilization pursuant to the new statute. This decision was upheld through a review process that included a special hospital review board, a hearing before the state trial court, and review by the state supreme court.

Under the theories of eugenic sterilization that were popular during this era, the state argued that sterilizing those with unwanted mental deficiencies would lessen the presence of these traits in future generations, save government tax dollars spent on these individuals, and allow more patients to be released from state mental hospitals. Buck’s attorney argued that the statute violated her right of bodily integrity under the due process clause and cited equal protection concerns.

Based on a very limited and possibly one-sided record from the lower court, the Supreme Court found the state’s arguments convincing. With only one justice dissenting without comment, the Court found that the statute provided for ample due process through the statute’s review procedures and it did not violate her rights to equal protection. Justice Oliver Wendell Holmes, writing the Court’s opinion, noted that since the best citizens are often required to give up their lives for the good of society, “[i]t would be strange if [the State] could not call upon those who

already sap the strength of the State for these lesser sacrifices . . . in order to prevent our being swamped with incompetence.” Acknowledging that other mandatory medical procedures were considered acceptable, Holmes noted, “The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes.” Referring to Carrie Buck, her mother, and her newborn daughter, Holmes noted, “Three generations of imbeciles are enough.”

Following the decision, several states passed similar sterilization laws and the number of sterilization procedures grew dramatically. While involuntary sterilization and the eugenics movements lost much of their support in the 1940s and 1950s, including the repeal of many states’ sterilization statutes, the decision itself has never been overturned. The case has been used as valid precedent in state courts to uphold sterilization laws and was cited by the Court in *Roe v. Wade* as an example of the states’ ability to limit privacy rights. However, the Court has taken some steps back from *Buck v. Bell*, such as striking down mandatory sterilization laws aimed at habitual criminals in *Skinner v. Oklahoma* and suggesting that the *Buck* decision upheld a “harsh measure” in *Board of Trustees of the University of Alabama v. Garrett*. Concurring in the 2004 case of *Tennessee v. Lane*, Justice David Souter went even further by citing *Buck* as an example of past judicial endorsement of disability discrimination. Debates over related issues, such as the sterilization of welfare recipients and criminals, whether voluntarily or involuntarily, have brought further attention to the legacy of *Buck v. Bell*, with many viewing it as one of the most intrusive encroachments into personal liberties.

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References and Further Reading

- Berry, Roberta M., *From Involuntary Sterilization to Genetic Enhancement: The Unsettled Legacy of Buck v. Bell*, Notre Dame Journal of Law, Ethics, & Public Policy 12 (1998): 1:401–48.
- Blake, Meredith, “Welfare and Coerced Contraception: Morality Implications of State Sponsored Reproductive Control,” University of Louisville Journal of Family Law 34 (1995): 311–44.
- Lombardo, Paul A., *Three Generations, No Imbeciles: New Light on Buck v. Bell*, New York University Law Review 60 (1985): 1:30–63.
- Reilly, Philip. *The Surgical Solution: A History of Involuntary Sterilization in the United States*. Baltimore: John Hopkins University Press, 1991.

Cases and Statutes Cited

- Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001)

Buck v. Bell, 130 S.E. 516 (Va. 1925)

Buck v. Bell, 274 U.S. 200 (1927)

Roe v. Wade, 410 U.S. 113 (1973)

Skinner v. Oklahoma, 316 U.S. 535 (1942)

Tennessee v. Lane, 541 U.S. 509 (2004) (Souter, J., concurring)

Virginia Sterilization Act, Act of Mar. 20, 1924, c. 394, 1924 Va. Acts 569, repealed by Act of Apr. 2, 1974, c. 296, 1974 Va. Acts 445

See also **Abortion; Eugenic Sterilization; *Jacobson v. Massachusetts*, 197 U.S. 11 (1905); Right of Privacy; *Roe v. Wade*, 410 U.S. 113 (1973); *Skinner v. Oklahoma*, 316 U.S. 535 (1942)**

BUCKLEY v. VALEO, 424 U.S. 1 (1976)

To appreciate the significance of *Buckley v. Valeo*, it is important to take a step back and consider the role of money in politics since the founding of the nation, but especially with the rise of the modern campaign in the twentieth century. To address the perceived abuses of money in the political system, Congress passed a series of acts throughout the 1900s, including the Tillman Act of 1907 (banning corporate contributions to presidential campaigns), the Hatch Act of 1939 (prohibiting political contributions of more than \$5,000 to federal candidates or campaign committees, among other things), and the most significant of all, the Federal Election and Campaign Act (FECA). This act, passed by Congress in 1971 and amended in 1974—in the wake of the Watergate scandal and the general decline in public trust of elected officials—called for the disclosure of the sources of campaign contributions and campaign expenditures, the public funding of presidential primaries and general elections, limits on campaign expenditures for those accepting public funding, limits on expenditures from individuals’ personal funds, \$1,000 limitation on independent expenditures, establishment of the Federal Election Commission (FEC), and a range of contribution limits for various individuals and organizations.

Convinced that the amended act violated core First Amendment rights, a collection of individuals and groups from across the political spectrum led by Senator James L. Buckley of New York filed suit against Francis Valeo, secretary of the Senate and ex-officio member of the newly formed FEC in the U.S. District Court for the District of Columbia. This court certified the constitutional questions in the case to the D.C. Circuit Court of Appeals, which upheld virtually all of the substantive provisions of the FECA. Senator Buckley, et al., appealed the decision to the U.S. Supreme Court, which announced its decision on January 30, 1976.

The *Buckley* decision is one of the longest, most complicated, and most controversial decisions that the Court has ever produced. It is a *per curiam* opinion of the eight justices sitting at the time (Justice John Paul Stevens took no part). In essence, the Court found *constitutional* the limitations on contributions to candidates for federal office, the disclosure and recordkeeping provisions, and the public financing of presidential elections. The Court found *unconstitutional* the limitations on expenditures by candidates and their committees (except for presidential candidates accepting public funds), the \$1,000 limitation on independent expenditures, the limitation on expenditures drawn from candidates' personal funds, and the method of appointment for FEC members.

The opinion, however, was quite fractured, with all the justices joining only in the "case or controversy" section of the decision. Three justices (William Brennan, Potter Stewart, and Lewis Powell) joined all parts of the decision, Justice Thurgood Marshall joined all except for the finding that limitations on expenditures by candidates from personal or family resources were unconstitutional, and Justice Harry Blackmun joined all parts except for the finding that contribution limits were constitutional. Then-Associate Justice William Rehnquist joined all parts except for the holding that public financing was constitutional with respect to the financing of nominating conventions, while Chief Justice Warren Burger joined only the sections explaining that the interest in preventing corruption was insufficient to justify expenditure limits and the section pertaining to the scope of the FEC's authority, and Justice Byron White joined only in the holding that public financing was constitutional.

While the disclosure and public funding provisions are of critical importance to the operations of modern campaigns, it was the Court's qualitative distinction drawn between campaign *expenditures* and campaign *contributions* that has had the greatest lasting significance. In its reasoning, the *per curiam* opinion held that expenditure limits violated the First Amendment, while the state's legitimate interest in preventing corruption and "the appearance of corruption" justified the limits on contributions to candidates for federal office to \$1,000 for individual and groups, \$5,000 for political committees, and \$25,000 in total contributions during any calendar year. Further, the governmental interest in the disclosure of contributors, and amounts of \$100 or more, outweighed the potential damage done to some minor parties and independent candidates. Finally, the system of public financing for presidential candidates was found to be constitutional, while the method of appointing members of the FEC was found unconstitutional.

In light of the recent abuses of public authority (that is, Watergate), the Court in this case was more prepared to accept a defense of the FECA that relied on public perceptions—whether accurate or not. As the *per curiam* opinion explained, it was not necessary to look beyond the primary purpose of the act—limiting "the actuality and appearance of corruption resulting from large individual financial contributions"—to find a constitutional justification for the contribution limits. "Under a system of private financing of elections," the opinion continued,

[a] candidate lacking immense personal or family wealth must depend on financial contributions from others to provide the resources necessary to conduct a successful campaign To the extent that large contributions are given to secure political quid pro quo's from current and potential office holders, the integrity of our system of representative democracy is undermined. Of almost equal concern as the danger of actual quid pro quo arrangements is the impact of the *appearance of corruption* stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions . . . [emphasis added].

Laws criminalizing bribery were insufficient to address these more *systemic* problems, because they addressed only the "most blatant and specific attempts of those with money to influence governmental action."

The *Buckley* decision dramatically altered American politics and shaped the nature of the modern campaign. Like water pressing against a dam, as the saying goes, money searches for a way into the political sphere and the numerous progeny since *Buckley* (dealing with limits on political action committee [PAC] spending, "hard" versus "soft" money restrictions, coordination versus correlation in a party's relationship to its candidate, etc.) indicate that the Court will continue to play a role in the superintending of campaign finance as long as the central provisions of this paradigm case are upheld.

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References and Further Reading

- Alexander, Herbert, and Brian Haggerty. *The Federal Election Campaign Act: After a Decade of Political Reform*. Los Angeles: Citizens' Research Foundation, 1981.
- Polsby, Daniel. "Buckley v. Valeo: The Special Nature of Political Speech." In *The Supreme Court Review*, edited by Philip Kurland, 1–43. Chicago: University of Chicago Press, 1976.
- Rosenkranz, E. Joshua, ed. *If Buckley Fell: A First Amendment Blueprint for Regulating Money in Politics*. New York: The Century Foundation, 1999.
- Smith, Bradley. *Unfree Speech*. Princeton, N.J.: Princeton University Press, 2001.

Cases and Statutes Cited

Federal Election Campaign Act of 1971, 2 U.S.C. 441b(a);
 later amended in 1974, 1976, and 1979
 Hatch Act of 1939, 18 U.S.C. §610
 Tillman Act, ch. 420, 34 Stat. 864

See also **Burger Court; Campaign Finance Reform, No. 1021; Freedom of Speech: Modern Period (1917–Present); Politics and Money**

**BULLINGTON v. MISSOURI, 451
 U.S. 430 (1981)**

Bullington was indicted and convicted of capital murder. Under Missouri law, this meant that he would receive either death or life imprisonment without eligibility for parole for fifty years. In addition, under Missouri law, there was a separate presentence hearing wherein the prosecutor must prove to the trial jury the existence of aggravating circumstances beyond a reasonable doubt, in order for the death penalty to be imposed. The jury imposed a life sentence. Bullington appealed and was granted a new trial because of an error in the jury selection process.

The prosecutor, then, in the second trial, sought the death penalty. Bullington objected, arguing that *Benton v. Maryland* (1969), held that the double jeopardy clause barred the seeking of the death penalty in a second trial when the first jury did not impose it. The Missouri Supreme Court agreed with the prosecutor, stating that double jeopardy did not apply in this case.

This case made its way to the Supreme Court, where the judgment of the Missouri Supreme Court was reversed. The justices felt that because the sentencing proceeding at the petitioner's first trial was like the trial of guilt or innocence, the protection of the double jeopardy clause was also available to him at retrial. This overruled *Stroud v. United States* (1919), in which the Court stated that a defendant whose conviction is reversed may receive a more severe sentence at retrial than he received at his first trial.

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Cases and Statutes Cited

Benton v. Maryland, 395 U.S. 784, 794 (1969)
Stroud v. United States, 251 U.S. 15 (1919)

See also **Capital Punishment; Double Jeopardy (V): Early History, Background, Framing**

**BURDEAU v. MCDOWELL, 256
 U.S. 465 (1921)**

Following an internal investigation into unlawful conduct, Henry L. Doherty & Co. fired its employee, J.C. McDowell. An agent of the company took control of the office that McDowell formerly occupied, searched the office, and took possession of documents locked inside two safes and one desk; after reviewing the documents, some of which were personal, the company forwarded them to Burdeau at the Justice Department. McDowell claimed a violation of his Fourth and Fifth Amendment rights on the grounds that the documents, illegally obtained by a private entity, would have otherwise been unavailable to Burdeau and thus self-incriminated the defendant.

Overturing a lower court's decision by a seven-to-two vote (Brandeis and Holmes dissenting), the Supreme Court found no Fourth or Fifth Amendment violations. The majority opinion acknowledged that Doherty & Co.'s seizure of the documents was likely illegal, but because the search had been performed by a private party acting on its own behalf, the Fourth Amendment did not apply. The company was a private business, not working in association with the government. The Fifth Amendment question centered on whether the government may retain papers dubiously obtained by a private party for use as evidence against a criminal defendant. Writing for the majority, Justice Day reasoned that because the papers were held by a private party, the government could have legally subpoenaed the documents had they not been sent to the Justice Department. The Court held that the evidence, although stolen from McDowell by an agent of Doherty & Co., could be used in a criminal case against him.

Burdeau v. McDowell represents an articulation of the scope of the Fourth Amendment; the ruling remains standing law, allowing evidence stolen by a private party to be used against a criminal defendant.

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BURDEN OF PROOF: OVERVIEW

If the notion of civil rights or civil liberties entails some fundamental freedoms from governmental overreaching, one of the most telling but perhaps subtle expressions of a commitment to the preservation of civil liberties is found in the legal concept of burden of proof. The burden of proof is traditionally described as a procedural device relating to the rules of engagement in the conduct of a trial. It sets out the parameters for which side should win a close case when the evidence is in equipoise or is ambiguous. However,

this feature, the effect of resolving close cases, reveals that burdens of proof also have substantive effect; that is, they often represent normative judgments about who should prevail, who is more likely to be “correct,” what substantive policy is to be advanced, and so forth. This aspect of burdens of proof is often obscured by the emphasis on its mechanical or procedural features, particularly when the area under examination is civil. The burden of proof as a commitment of substantive law emerges more clearly in the criminal context.

Burdens of proof are typically described, thanks to Thayer’s 1890 discussion in the *Harvard Law Review*, as consisting of two parts—the burden of production, that is, who is responsible for coming up with evidence, and the burden of persuasion. Most often the burden of both production and persuasion is on the same party, usually the party bringing the suit, that is, the plaintiff, or in the case of a criminal prosecution, the prosecutor. However, this is not always the case, and sometimes meeting a production burden with respect to a particular issue allows a party to then shift the burden to his opponent, such as the duty to produce counterevidence and/or to persuade the trier of fact as to an alternative interpretation of the evidence presented.

One of the most familiar examples of this shifting of burdens is the self-defense defense to a homicide prosecution. Of course, the prosecutor has the burden of production and persuasion as to the theory of homicide. But this burden can be increased if the defendant pleads and puts on a self-defense case. Typically, the defendant bears the burden of product and some burden of persuasion that the killing with which he is charged was done in self-defense. Assuming that the defendant meets this burden, the burden would then shift back to the prosecutor to disprove the affirmative defense beyond a reasonable doubt. Because the Constitution requires that the prosecution prove its case beyond a reasonable doubt, the concept of an affirmative defense complicates the prosecutor’s burden. The Model Penal Code tends to place the burden on the prosecutor to disprove any affirmative defenses. But because the task of anticipating all affirmative defenses is a daunting one, not too mention somewhat inefficient, this duty is often not triggered until the defense is raised by the defendant with the appropriate amount and quality of evidence—how much evidence the defendant must produce and the nature of his burden, whether preponderance, or some other standard, varies.

In addition, burdens of proof intersect to a large degree with yet another device with both procedural and substantive aspects—the presumption. Presumptions are evidentiary devices which require that a

particular fact be assumed to be true or to exist in the absence of evidence to the contrary. Such presumptions can be conclusive or rebuttable, shifting or “bursting,” but they function in much the same way as burdens of proof: to describe the contours of the way the law asserts the world should be or probably is. Thus, often discussions of burdens of proof often also involve the interaction of burdens of proof with presumptions.

A burden of proof of some kind applies to all cases, both civil and criminal. However, the *quantum* of proof that will satisfy the burden differs depending on whether a case is criminal or civil. And within the civil area the burden of proof can vary and shift depending upon the nature of the cause of action. Typically, however, in a civil case the burden, usually on the plaintiff, is a preponderance of the evidence. In certain types of cases, the burden may be the purportedly higher standard of “clear and convincing.” Arguably, however, the most important and well-known burden of proof, which is relevant for purposes of civil rights and civil liberties, is the burden of proof that distinguishes most criminal cases—*beyond a reasonable doubt*.

In the area of criminal law, the burden of proof has been an issue of constitutional dimension ever since the Supreme Court’s decision in *In re Winship* in 1970, although even prior to this decision, “beyond a reasonable doubt” was apparently the governing standard for criminal cases for some time, perhaps since this country’s founding. The “beyond a reasonable doubt” burden applies to both state and federal criminal cases. Thus, with respect to the criminal law, the burden of proof has an explicitly substantive aspect. Academic and political commentators often view the “beyond a reasonable doubt” standard in criminal cases as a forthright acknowledgment that the playing field is not level. Like a handicap in golf, the burden of proof of “beyond a reasonable doubt” arguably represents an attempt to even out some differences in the distribution of advantages as between the state and a defendant. At a minimum, the higher standard recalibrates the array of factors that would normally heavily favor the government.

As a practical matter, the state (whether state or federal) typically has little difficulty in convincing a jury that it has met its burden, at least in the average criminal case. Nevertheless, the common perception is that placing the burden of proof on the state in criminal cases and making that burden a high one, represents a nontrivial limitation on the potential for governmental overreaching. Still, most cases do not go to trial and it can be argued that burdens of proof that apply to the conduct of trials have less impact when it comes to settlement and pleas. Given that the

state's probability of prevailing is, in general, usually perceived to be fairly high, and defendants can be presumed to know that, it may be that the state is often able to use this knowledge to exert pressure on a defendant to enter a guilty plea even when the state might be at some risk if it had to go to trial. That is, the state can still use its power to bluff about its evaluation of the likelihood of prevailing in a particular case. Nevertheless, the burden of proof lurks in the background of any plea negotiations, serving as something of a counterweight, a means by which a defendant can call the state's bluff in a close case.

Apart from whether placing the burden of proof on the government at trial accomplishes the substantive goals asserted as its justification when, in fact, most cases settle, there is the issue of whether, even if a case goes to trial, the verbal formulation of "beyond a reasonable doubt" accomplishes what it is intended to do. There is some evidence from jury studies that juries do not understand this particular verbal formulation as placing the evidentiary burden on the government that lawmakers assume or intend for it to do. Indeed, such experiences led to the abandonment in the United Kingdom of this formulation in favor of one that requires a jury to be "firmly convinced" of a defendant's guilt before conviction.

Although the criminal case is the paradigmatic case of the use of a procedural device like the burden of proof to further goals related to civil liberties, its use or impact on civil liberties and civil rights is by no means limited to criminal cases. All manner of civil cases implicate important civil rights or liberties. Just a few of these are civil commitment proceedings, termination of parental rights, legitimacy proceedings, civil forfeitures, dependency proceedings, and other similar actions involving liberty, property, or family issues. In addition, there are civil causes of action that explicitly relate to civil rights such as actions under Section 1983 and Title VII. Adjustments to the burdens of proof, and shifts in understanding of who bears the burden and what sorts of evidence are necessary to meet that burden, have long been ways in which it is possible to track a strand of skepticism, perhaps even fear, in the creation of a variety of causes of action related to civil liberties and civil rights.

From time to time, burdens have been raised and shifted to suggest that claims related to civil rights or their protection have favored status, such as in *New York Times v. Sullivan* when the Supreme Court raised the burden of proof in defamation against public figures to exclude causes of action with lower burdens of proof. (Actually, the Court changed the substantive law in a way that had the effect of raising the burden of proof, thus providing an excellent illustration of the issue described above of the degree to

which burdens of proof implicate both substance and procedure, and presumptions and substantive evidentiary elements. What the Court did, among other things, was to rule that a presumption of damages, once a "libel per se" case had been made, was unconstitutional. One feature of this presumption was to shift the burden to the defendant to prove that his statements were true.)

In other cases, such as *Texas Department of Community Affairs v. Burdine*, changes in the understanding of who had the burden of proof have arguably signaled the shift to disfavored status for the protection of civil rights. In *Burdine*, the Supreme Court held that in a Title VII action, if an employer could prove the existence of a nondiscriminatory reason for discharge, the burden of proof shifted back to the employee/plaintiff to show that it was the *improper*, discriminatory motive that had led to the discharge, not the nondiscriminatory motive.

Tinkering with burdens of proof, either of production or persuasion, represents a way to "stack the deck" in particular kinds of cases. Thus, although facially neutral, burdens of proof can betray current normative positions about the desirability of the pursuit of a particular type of claim or of the likelihood that a particular type of claim is meritorious.

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References and Further Reading

- Allen, Ronald J., *Burdens of Proof, Uncertainty, and Ambiguity in Modern Legal Discourse*, Harvard Journal of Law and Public Policy 17 (1994): 627–46.
- Cleary, Edward W., *Presuming and Pleading: An Essay on Juristic Immaturity*, Stanford Law Review 12 (1959): 5–28.
- Jeffries, Jr., John Calvin, and Paul B. Stephan, III., *Defenses, Presumptions, and Burden of Proof in the Criminal Law*, Yale Law Journal 88 (1979): 1325–427.
- Solan, Lawrence M., *Refocusing the Burden of Proof in Criminal Cases: Some Doubt About Reasonable Doubt*, Texas Law Review 78 (1999): 105–47.
- Thayer, James B., *The Burdens of Proof*, Harvard Law Review 4 (1890): 45–70.
- Underwood, Barbara D., *The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases*, Yale Law Journal 86 (1977): 1299–348.

Cases and Statutes Cited

- In re Winship*, 397 U.S. 358 (1970)
- Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981)
- New York Times v. Sullivan*, 376 U.S. 254 (1964)
- See also **Due Process; In re Winship, 397 U.S. 358 (1970); Proof Beyond a Reasonable Doubt; Title VII and Religious Exemptions**

BURGER COURT (1969–1986)

The Burger Court was a transitional institution. It reflected the conflicting currents produced by the transition from the America of John F. Kennedy and Lyndon B. Johnson to the America of Ronald Reagan and his successors. In some areas, it ranged well beyond the civil libertarian aspects of the Warren Court. At the same time, it engendered many of the conservative tendencies that were to prevail during subsequent decades under Chief Justice William H. Rehnquist.

The composition of the Burger Court reflected its nature. In its heyday, the Warren Court had comprised Chief Justice Earl Warren leading a slim but solid liberal majority of justices made up of Hugo Black, William O. Douglas, William J. Brennan, and at different times, Arthur Goldberg, Abe Fortas, and Thurgood Marshall.

By 1972, four new justices had been appointed—Chief Justice Burger, and Justices Harry Blackmun, Lewis F. Powell, and William H. Rehnquist—replacing the liberal Warren, Fortas, and Black, and the conservative John M. Harlan, respectively. Four years later Justice Douglas left, replaced by John Paul Stevens, and in 1981 the conservative Potter Stewart was succeeded by the first female justice, Sandra Day O'Connor.

The Supreme Court of the second half of the twentieth century was thus an accurate reflection of the nation: activist liberalism led by a slim liberal majority during the 1950s and 1960s, some additional liberal advances, and a gradual movement towards conservatism in the 1970s and 1980s, and vigorous conservatism in the 1990s.

Social Issues: Abortion

The most controversial of the Burger Court decisions was *Roe v. Wade* (1973), which found that “the right of privacy founded in the Fourteenth Amendment’s concept of personal liberty” barred a state’s prohibiting women from terminating a pregnancy on the advice of their doctors. In a seven-to-two decision written by Justice Blackmun, with only Justices White and Rehnquist dissenting, the Court established a three trimester system: virtually no state regulation of the abortion procedure was permissible during the first trimester; “reasonable” regulation of abortion to protect the health of the mother was acceptable during the second trimester; and abortions could be prohibited during the last trimester unless the health of the mother was endangered by the pregnancy. In a companion case, *Doe v. Bolton* (1973), the

same seven-to-two majority struck down state regulations of abortion that it deemed inconsistent with the right established in *Roe*.

The decision did not come out of nowhere. In 1965, the Warren Court had recognized a right of privacy for married couples to use contraceptives. *Griswold v. Connecticut* (1965). The year before *Roe*, the Court had extended the right to use contraceptives to single people in *Eisenstadt v. Baird* (1972), and for several years prior to *Roe*, lower courts and some state courts had also struck down abortion laws. Also, some states, notably California under Governor Ronald Reagan, and New York, had legislatively liberalized their abortion laws.

Nevertheless, the decision set off a firestorm of protest, particularly among some religious groups, and the Republican Party made overturning *Roe v. Wade* a central feature of its party platform. A substantial majority of the public accepted the decision, however, and wanted it retained.

Three subsidiary issues soon arose: public funding; the rights of minors to terminate a pregnancy without parental consent or notification; and state and local regulation of the abortion procedure.

Five years after *Roe*, the Court ruled that Connecticut did not have to use Medicaid funds for first trimester abortions, even if it chose to pay for childbirth or “medically necessary” abortions (*Maher v. Roe* [1977]). Three years later the Court ruled that Congress may even bar Medicaid funding for medically necessary abortions (*Harris v. McRae* [1980]).

Minors who sought to terminate their pregnancy without either notifying or obtaining the consent of either or both parents were allowed to do so, but only with court approval (*Bellotti v. Baird* [1979], *Planned Parenthood of Kansas City v. Ashcroft* [1983]).

As the abortion wars heated up and the anti-abortion forces gained strength, state and local governments adopted a wide array of regulations designed to make it more difficult for women to obtain an abortion and for abortion providers to operate. All were struck down by the Burger Court, over persistent dissents by Justices White, Rehnquist, and O'Connor, and increasingly Chief Justice Burger.

After Justice Powell’s departure in 1987, the justices unhappy with *Roe v. Wade* were in the majority, and in 1992 they cut back sharply on that decision while affirming its “central holding.” In *Planned Parenthood of S.E. Pa. v. Casey* (1992), Justices O'Connor, Anthony Kennedy who succeeded Justice Powell, and David Souter, who followed Justice Brennan, redefined the right established in *Roe* as the right not to be encumbered by “undue burdens” in obtaining an abortion. The state’s interest in potential life from the inception of the pregnancy was

recognized, and the trimester system was abandoned. The plurality and the dissenters went on to uphold five of the six state regulations limiting abortion at issue, all of which had earlier been struck down, including provisions requiring waiting periods, favoring childbirth over abortion, and “informed consent;” only the requirement that a spouse be notified before an abortion was struck down. As of 2005, over four hundred state and local laws designed to make an abortion more difficult to provide and to obtain have been enacted.

Social Issues: Homosexual Intercourse

During these years, homosexuals, among the most oppressed of American minorities, also tried to free themselves from the legal burdens they faced, especially laws that made sexual intercourse between members of the same sex a criminal offense. These laws were rarely enforced but could be used for blackmail and to justify employment and other disabilities.

By the mid-1980s, some twenty-six states no longer had such laws. Nevertheless, in 1986, the last year of Chief Justice Burger’s tenure, a five-to-four majority of the Court refused to strike down a Georgia sodomy statute (*Bowers v. Hardwick* [1986]).

Bowers remained the law for seventeen years. During this period, many states repealed such laws or had them struck down by their highest courts. Finally, in 2003, the Court overruled *Bowers* and struck down a Texas law on due process grounds (*Lawrence v. Texas* [2003]).

Religion: The Establishment Clause

Religion has always played a central role in American life and politics. At the same time, the Constitution mandates a separation between church and state. Reconciling these two forces has resulted in a complex, often baffling series of Supreme Court decisions, a high proportion of which were issued during the Burger Court.

The difficulties and resulting inconsistencies appeared in the Supreme Court’s first decision on the use of public funds for aid to religious schools. In *Everson v. Board of Education* (1947), the Court, speaking through Justice Black, erected a “wall of separation between church and state” as a result of which, “[n]either [a state nor the federal government] can aid one religion, aid all religions, or prefer one religion over another.” Despite the apparent comprehensiveness of that statement, a five-to-four majority

of the Court went on to approve New Jersey’s willingness to fund bus transportation for children attending religious schools. That inconsistency pervaded the many subsequent separation decisions.

Guiding principles were announced early in the life of the Burger Court by the Chief Justice in *Lemon v. Kurtzman* (1971): “First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster ‘an excessive government entanglement with religion.’” In *Lemon*, the Court ruled that government may not fund salary supplements for teachers of secular subjects at religious schools or pay for their secular textbooks or other instructional materials or services, because that would “excessively entangle” the government in the administrative affairs of the church in order to ensure that the grant was not used for religious purposes. The chief justice also raised the dangers of political divisiveness because of religious strife over aid.

Although Chief Justice Burger sought to weaken the “wall of separation” metaphor by calling it “blurred, indistinct and variable,” the Court initially took a strong separationist position, holding that the Constitution bars the loan of maps, magazines, tape recorders, and laboratory equipment to parochial schools (*Meek v. Pittinger* [1975], *Wolman v. Walter* [1977]), as well as remedial and therapeutic services on parochial school premises (*Aguilar v. Felton* [1984]). The Rehnquist Court later overruled these decisions in *Mitchell v. Helms* (2000) and *Agostini v. Felton* (1995). The Burger Court did, however, allow the state to provide standardized testing and diagnostic services even when done on religious school premises in *Wolman*. In *Committee for Public Education v. Nyquist* (1973), the Court had also refused to allow government-funded tuition rebates and tax deductions for attendance at nonpublic schools. Ten years later, however, in *Mueller v. Allen* (1983), a five-to-four majority held that a tax deduction for parents of children in *all* schools (public and nonpublic) for tuition, textbooks, and transportation was constitutionally permissible. Writing for the Court, then-Justice Rehnquist stressed that the aid was “channel[ed]” through the parents for the benefit of the child, rather than given to the schools, and was “neutrally available” to a broad spectrum of citizens. The prospect of religious strife was disparaged and the fact that 96 percent of the nonpublic schoolchildren went to religious schools was deemed irrelevant. In succeeding years, individual choice and neutrality became key factors.

With respect to higher education, the Burger Court took a less restrictive position right from the start.

In *Tilton v. Roemer* (1971), and *Roemer v. Board of Pub. Works* (1973), the Court allowed states to provide money for building construction and for other non-sectarian activities because religious indoctrination was less likely either to be attempted or to be successful, given the nature of both the courses and the less impressionable nature of college students. In a case at the intersection of the establishment and free speech clauses, the Court allowed the speech clause to override separationist concerns. In *Widmar v. Vincent* (1981), the Court refused to allow a state university to deny a religious group use of the university's facilities to meet for religious discussion and prayer. The university grounded its refusal on the establishment clause, but the Court rejected its defense and found that an "equal access" policy was required to avoid discrimination against religious speech, once the university created a public forum; the assistance to religion was deemed only "incidental." And in one of the last Burger Court decisions, the Court unanimously agreed to allow state payment to assist a visually handicapped person who was studying to become a minister (*Witters v. Washington Dept. of Service for the Blind* [1986]).

The Court also dealt with other forms of governmental religious involvement in public schools. In *Wallace v. Jaffree* (1985), the Court struck down an Alabama law that mandated a moment of silence for "meditation or voluntary prayer" because it was clear to seven of the nine justices (the chief justice and Justice Rehnquist dissenting) that the inclusion of "voluntary prayer" in the Alabama legislation was an "effort to return voluntary prayer" to the schools." And in *Stone v. Graham* (1980), for similar reasons, a five-to-four majority of the Court summarily refused to allow public schools to hang a copy of the Ten Commandments in public school classrooms, issuing a per curiam opinion without oral argument concluding that there was "no secular legislative purpose."

One of the Burger Court's few important free exercise cases also arose in education. In *Wisconsin v. Yoder* (1972), a six-to-one majority concluded that the Old Order Amish, a religious order, could withdraw their children from the public schools after the eighth grade despite the state's compulsory school attendance law. Since the Amish believe that their salvation "requires life in a church community separate and apart from the world and worldly influence," the state's interest in education was subject to strict scrutiny because it impinged on rights protected by the free exercise clause. The state could not meet that test because the Amish alternative of informal education achieved whatever goals the state sought to deliver with its compulsory school attendance.

Because religion has been so intertwined with public life in America, the Burger Court had to struggle with two other issues: religious worship in public bodies and displays of religious symbols on public property. In *Marsh v. Chambers* (1983), a six-to-three majority ignored the *Lemon* test and looked to history and tradition to allow the Nebraska legislature to open each legislative day with a prayer by a Presbyterian minister paid by the state. The following year, in *Lynch v. Donnelly* (1984), a five-to-four majority of the Court allowed Pawtucket, Rhode Island to erect a nativity scene in a local park at Christmas time. The Court called it an "accommodation" to religious belief that did not advance religion but "depict[ed] the pastoral origins of this merely traditional event long recognized as a national holiday." Both opinions for the Court were written by Chief Justice Burger, but the most influential opinion in the two cases was Justice O'Connor's opinion in *Lynch*, in which she reinterpreted the effects prong of the *Lemon* test to focus on whether the government "endorsed" the religion in question. The O'Connor formulation, which was frequently used in subsequent years, reflected a persistent disenchantment with the *Lemon* test. Nevertheless, the test continued to be invoked throughout the Rehnquist Court era, although it was also often ignored and even criticized by many of the justices.

Free Speech: Campaign Finance

Since 1930, when the Supreme Court first struck down a statute for violating the free speech clause of the First Amendment, speech cases have accounted for a substantial portion of the Court's docket. The Burger Court's leading speech cases fall into four categories: electoral campaign financing; commercial speech; offensive speech including obscenity, pornography and vulgarity; and the rights of the press.

Perhaps the most perplexing speech issue to come before the Burger Court was its response to Congress's effort in 1974 to limit electoral campaign contributions and expenditures in the wake of the Watergate scandals. In *Buckley v. Valeo* (1976) (per curiam), the Court ruled that although limitations on both forms of financing would reduce political speech and association, Congress could restrict *contributions* by individuals and groups, including political action committees, in order to avoid both the actuality and appearance of corruption; the Court later made an exception for individual contributions to a public interest group in connection with a proposed ballot measure (*Citizens Against Rent Control v. Berkeley*

[1981]). *Expenditure* limits, however, were struck down, including limits that Congress tried to impose on a candidate's expenditure of personal funds. The Court found that unlike contribution limits, expenditure limits on explicit advocacy for or against a specific candidate—which is how the Court read the statute to avoid finding it unconstitutionally vague—“impose direct and substantial restraints on the quantity of political speech,” and were not justifiable; fiscally equalizing the electoral playing field was not an acceptable goal. Fourteen years later, however, the Rehnquist Court allowed Michigan to require the Chamber of Commerce and other business corporations to insist on a segregated fund for expenditures on elections for public office (*Austin v. Michigan Chamber of Commerce* [1990]), although expenditures on referenda and similar issues could not be so limited (*First National Bank v. Bellotti* [1978]).

Free Speech: Commercial Speech

Overturning prior law, in 1976 the Court ruled that speech that “does no more than propose a commercial transaction” was entitled to constitutional protection unless it was false or misleading or against public policy (*Va. St. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.* [1976]). Restraints on such speech, however, including prior restraints, would not be subject to the most stringent level of judicial scrutiny—strict scrutiny—so long as the restraint advanced a substantial governmental interest and was no more extensive than necessary (*Central Hudson Gas & Electric Co. v. P.S.C. of New York* [1980]). Commercial speech thus received less judicial protection than political, artistic, or other forms of speech, which were normally entitled to strict scrutiny protection. In later years, the Rehnquist Court further refined the *Central Hudson* test.

Free Speech: Obscene, Pornographic, and Vulgar Speech

For over fifteen years, the Warren Court had struggled to define a limited category of speech that would be denied First Amendment protection because it could be categorized as “obscene.” The result was confusion. Finally, a newly constituted majority of the Burger Court ruled that expression would be considered “obscene” if “(a) . . . ‘the average person, applying contemporary community standards’ would find that the work, taken as a whole, appeals to the

prurient interest; (b) . . . the work depicts or describes in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) . . . the work, taken as a whole lacks serious literary, artistic, political or scientific value” (*Miller v. California* [1973]). Local juries would apply “contemporary community standards” to determine “prurency” and “patent offensiveness.”

Concerned about child abuse, the Court also refused to protect material that put children in sexually explicit settings even if the material would not be considered obscene under *Miller* (*New York v. Ferber* [1982]). And though the Burger Court refused to allow the banning of “indecent” speech, regulating the location of adult movies houses was upheld (*City of Renton v. Playtime Theatres, Inc.* [1986]). Also, the government's power to regulate broadcasting was used to uphold Federal Communications Commission sanctions against a broadcaster for airing indecent speech (*F.C.C. v. Pacifica Foundation* [1978]).

On the other hand, in *Cohen v. California* [1971]), the Court refused to allow California to make it illegal to wear a jacket with the words “Fuck the Draft,” underscoring the principle that the state cannot deny protection to speech that is merely offensive, whether morally, aesthetically, or politically.

Free Speech: The Press

One of the Warren Court's landmark decisions was *New York Times Co. v. Sullivan* (1964), in which the Court ruled that the First Amendment required a plaintiff in a libel case to prove that the defendant had defamed him with “actual malice—that is, with knowledge that it [the statement] was false or made with reckless disregard of whether it was false or not.” Ten years after the *Sullivan* case, the Court ruled that only “public figure” plaintiffs had to meet this demanding standard in *Gertz v. Robert Welch, Inc.* (1974); the states could define for themselves the standards for suits by private plaintiffs. It remained uncertain when a private citizen who is thrust into public prominence involuntarily would be considered a “public figure.” The Court later ruled that if defamatory statements do not involve matters of public concern, but only private matters such as a confidential credit report, they would not be subject to the *Times v. Sullivan* standard (*Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.* [1985]).

The Court consistently refused to grant the press privileges or protection unavailable to the general public. In 1972, it refused to create a privilege for journalists who were called before a grand jury and

ordered to reveal information received confidentially or the source of the information (*Branzburg v. Hayes* [1972]). In libel case litigation (*Herbert v. Lando* [1979]), the Court required the press to open its files for a libel plaintiff suing under the *Sullivan* case, in order to enable the plaintiff to prove actual malice.

The press suffered other defeats at the hands of the Burger Court. In *Zurcher v. Stanford Daily* (1978), the Court denied a college newspaper any special protection against an ex parte warrant of the newsroom. In *Pell v. Procunier* (1974), the Court refused to require a prison administration to allow press interviews with individual inmates, and in 1978, it ruled that both the media and the general public could be denied any access to prisons and most other public institutions (*Houchins v. KQED* [1978]).

The press did gain some significant victories from the Burger Court. The most celebrated victory came in the Pentagon Papers case, or *New York Times Co. v. United States* (1971), in which a bitterly divided six-to-three majority refused to allow the government to enjoin publication of a classified Defense Department study of the origins of the Vietnam War, declaring such an injunction to be an unconstitutional prior restraint. In *Nebraska Press Ass'n v. Stuart* (1976), the Court also found an unlawful prior restraint in a “gag order” against publication of an accused’s confession or admissions in a widely publicized murder case. On the other hand, a former government employee was enjoined from publishing information about official activities because he had signed an agreement not to divulge such information without government approval (*Snepp v. United States* [1980]).

Finally, the print press was released from any obligation to allow a target of press criticism a right of reply in *Miami Herald Pub. Co. v. Tornillo* (1974). A year earlier, the Court had also allowed the broadcast networks to refuse to sell air time to the Democratic National Committee and others for political advocacy in *Columbia Broadcasting System v. Democratic Nat’l Committee* (1973), but Congress was allowed to mandate “reasonable access” to the air waves for federal political candidates in *CBS, Inc. v. F.C.C.* (1981).

Prisoners’ Rights

The Burger Court’s shifting nature was also reflected in its decisions on the rights of prisoners. For decades, the federal courts had refused to exercise any oversight over prison conditions. As part of the increasing concern for social justice in the 1960s, however, the federal courts began to accept prisoner petitions filed

under 42 U.S.C. § 1983, the 1871 Civil Rights law. In a summary opinion in 1972 decided without a signed opinion, the unanimous Court made it possible for prisoners to file their own suits, and set a high standard for dismissal of such suits (*Haines v. Kerner* [1972]). The Court followed this up with decisions allowing suits challenging prison conditions to be filed in federal court without first exhausting state judicial and administrative remedies. In short order, the prisoner’s right to practice his religion was given protection, mail censorship was limited, arbitrary disciplinary procedures were changed, physical abuse and corporal punishment were condemned, prisoner expression within the institution received some protection, unnecessary visiting restrictions were voided, improvements in medical care were ordered, strip searches were limited, and parole procedures were improved. In many cases, the entire state system was condemned.

In 1974, the tide began to turn. Although prisoners continued to receive some protection, their right to fair procedures in disciplinary hearings was curtailed in *Wolff v. McDonnell*. That same year, the Court upheld the authority of states to deny the right to vote to persons convicted of a felony, influencing elections for many years to come in *Richardson v. Ramirez*. In 1979, the rights of pretrial detainees were severely curtailed in *Bell v. Wolfish*. Although it was still possible to bring suits challenging brutal and inhumane conditions, as in *Hutto v. Finney* (1978), by 1986, there was a return to almost total deference to administrative discretion. In later years, the Rehnquist Court would extend such deference to more and more contexts, in the process limiting or overturning Burger Court precedents. Compare, for example, *Lewis v. Casey* (1996) with *Bounds v. Smith* (1978) (prisoners’ access to law libraries).

The transition to a more conservative federal judiciary initiated by the Burger Court is now complete. The Rehnquist Court developed and expanded many of the conservative doctrines originated during Chief Justice Burger’s tenure, and as this is being written, the Court is again being reshaped along conservative lines. Nevertheless, many of the advances in civil liberties made during Chief Justice Burger’s tenure and earlier are still in effect and will probably remain, if only because of the American judiciary’s respect for precedent. But predictions about the Supreme Court are notoriously unreliable, and the civil liberties legacy of the Burger Court is unpredictable.

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References and Further Reading

Barron, Jerome A., and C. Thomas Dienes. *First Amendment Law*. St. Paul, MN: Thomson West, 2000.

- Blasi, Vince, ed. *The Burger Court: The Counter-Revolution That Wasn't*. New Haven, CT: Yale University Press, 1983.
- Greenhouse, Linda. *Becoming Justice Blackmun*. New York: Henry Holt & Company, 2005.
- Jeffries, John. *Justice Lewis F. Powell, Jr.* New York: C. Scribner's Sons; Toronto: Maxwell Macmillan Canada; New York: Maxwell Macmillan International, 1994.
- Schwartz, Herman, ed. *The Burger Years*. New York: Viking Press, 1987.
- , ed. *The Rehnquist Court*. New York: Hill & Wang, 2002.
- Tribe, Laurence. *American Constitutional Law*. 2d ed. Mineola, NY: Foundation Press, 1988.

Cases and Statutes Cited

- Agostini v. Felton*, 521 U.S. 203 (1995)
- Aguilar v. Felton*, 473 U.S. 402 (1984)
- Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990)
- Bell v. Wolfish*, 441 U.S. 520 (1979)
- Bellotti v. Baird*, 443 U.S. 622 (1979)
- Bounds v. Smith*, 437 U.S. 678 (1978)
- Bowers v. Hardwick*, 478 U.S. 186 (1986)
- Branzburg v. Hayes*, 408 U.S. 665 (1972)
- Buckley v. Valeo*, 424 U.S. 1 (1976)
- CBS, Inc. v. F.C.C.*, 453 U.S. 367 (1981)
- Central Hudson Gas and Electric Co. v. P.S.C. of New York*, 447 U.S. 557 (1980)
- Citizens Against Rent Control v. Berkeley*, 454 U.S. 90 (1981)
- City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986)
- Cohen v. California*, 403 U.S. 15 (1971)
- Columbia Broadcasting System v. Democratic Nat'l Committee*, 412 U.S. 94 (1973)
- Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973)
- Doe v. Bolton*, 410 U.S. 179 (1973)
- Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985)
- Eisenstadt v. Baird*, 405 U.S. 408 (1972)
- Everson v. Board of Education*, 330 U.S. 1 (1947)
- F.C.C. v. Pacifica Foundation*, 438 U.S. 726 (1978)
- First National Bank v. Bellotti*, 435 U.S. 765 (1978)
- Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974)
- Griswold v. Connecticut*, 381 U.S. 479 (1965)
- Haines v. Kerner*, 404 U.S. 519 (1972)
- Harris v. McRae*, 448 U.S. 297 (1980)
- Herbert v. Lando*, 441 U.S. 153 (1979)
- Houchins v. KQED*, 438 U.S. 1 (1978)
- Hutto v. Finney*, 437 U.S. 678 (1978)
- Lawrence v. Texas*, 539 U.S. 588 (2003)
- Lemon v. Kurtzman*, 403 U.S. 602 (1971)
- Lewis v. Casey*, 518 U.S. 343 (1996)
- Lynch v. Donnelly*, 465 U.S. 668 (1984)
- Maher v. Roe*, 432 U.S. 464 (1977)
- Marsh v. Chambers*, 463 U.S. 783 (1983)
- Meek v. Pittinger*, 421 U.S. 349 (1975)
- Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974)
- Miller v. California*, 413 U.S. 15 (1973)
- Mitchell v. Helms*, 530 U.S. 793 (2000)
- Mueller v. Allen*, 463 U.S. 388 (1983)
- Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976)
- New York v. Ferber*, 458 U.S. 747 (1982)
- New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)
- New York Times Co. v. United States*, 403 U.S. 713 (1971)
- Pell v. Procunier*, 417 U.S. 817 (1974)
- Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833 (1992)
- Richardson v. Ramirez*, 418 U.S. 24 (1974)
- Roe v. Wade*, 410 U.S. 113 (1973)
- Roemer v. Board of Public Works*, 426 U.S. 736 (1973)
- Snepp v. United States*, 444 U.S. 507 (1980)
- Stone v. Graham*, 449 U.S. 39 (1980)
- Tilton v. Roemer*, 403 U.S. 672 (1971)
- Va. St. Bd. Of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976)
- Wallace v. Jaffree*, 472 U.S. 38 (1985)
- Widmar v. Vincent*, 454 U.S. 263 (1981)
- Wisconsin v. Yoder*, 406 U.S. 205 (1972)
- Witters v. Washington Dept. of Service for the Blind*, 474 U.S. 481 (1986)
- Wolff v. McDonnell*, 418 U.S. 539 (1974)
- Wolman v. Walter*, 433 U.S. 229 (1977)
- Zurcher v. Stanford Daily*, 436 U.S. 547 (1978). 42 U.S.C. § 1983, Civil Rights law of 1871

See also **Abortion; Access to Prisons; Accommodation of Religion; Amish and Religions Liberty; Birth Control; Burger, Warren E.; Campaign Finance Reform, No. 1021; Commercial Speech; Defamation and Free Speech; Equal Protection Clause and Religious Freedom; Establishment Clause Doctrine; Supreme Court Jurisprudence; Establishment of Religion and Free Exercise Clause; Felon Disenfranchisement; Freedom of Speech and Press: Nineteenth Century; Freedom of the Press: Modern Period (1917–Present); Freedom of Speech and Press under Constitution: Early History (1791–1917); Gag Orders in Judicial Proceedings; Lemon Test; Miller Test; National Security Prior Restraints; Newsroom Searches; Obscenity; Politics and Money; Prisoners and the Free Exercise Clause Rights; Prisons and Freedom of Speech; Privacy; Public Vulgarity and Free Speech; Rehnquist Court; Rehnquist, William H.; Release Time from Public Schools (For Religious Purposes); Religious Symbols on Public Property; Reporter's Privilege; Right to Reply and Right of the Press; Sodomy Laws; State Aid to Religious Schools; Subpoenas to Reporters; Ten Commandments on Display in Public Buildings; Warren Court; Warren, Earl**

BURGER, WARREN E. (1907–1995)

Chief Justice Warren Earl Burger was the fifteenth chief justice of the U.S. Supreme Court. Appointed in 1969 to the Supreme Court by President Nixon, Burger served for seventeen years until 1986. Born on September 17, 1907, in St. Paul, Minnesota, Burger was the fourth of seven children of Charles Joseph and Katharine Schnittger Burger. Charles Burger was a railroad cargo inspector and traveling salesman,

while Katherine Burger (as Warren Burger recalled) ran an “old-fashioned German house” based on “common sense” and respect for traditional values. Burger’s paternal grandfather, Joseph Burger, was a Swiss immigrant who joined the Union Army at age fourteen and became a Civil War hero. His maternal parents were immigrants from Germany and Australia.

Because he suffered from polio at age eight, Burger stayed at home for a year. Even then, he was already a fan of the U.S. Constitution and knew he wanted to be a lawyer. Thus, his teacher brought him autobiographies of judges and lawyers. At age nine, Burger began delivering newspapers to help with his family’s finances. In high school, Burger did not compile an outstanding academic record, but he was otherwise very active in several extracurricular activities. He was the president of the student council, head of the student court, and editor of the student newspaper. In addition, he participated in several sports, and ended up lettering in football, hockey, swimming, and track. Because of his extensive extracurricular activities, he was awarded a scholarship by Princeton University.

Concluding that the Princeton scholarship was insufficient to meet his financial needs and wanting to help support his family, Burger turned down the offer. He then enrolled in extension classes at the University of Minnesota in 1925, and after two years started attending night classes at the St. Paul College of Law (now the William Mitchell College of Law). He graduated magna cum laude from law school in 1931 and was admitted to the Minnesota Bar the same year. Burger worked as a life insurance salesman while attending college and law school, and served as the student body president. He met his wife, Elvera Stromberg, in college and married her in 1933. They later had two children, Wade and Margaret.

Burger began his legal career as an associate at a law firm in 1931 and became a partner at the firm in 1935. He earned a reputation as a capable lawyer who specialized in corporate, real estate, and probate law. While practicing law, Burger also taught contract law at his alma mater from 1931 to 1953 and was the president of the local junior chamber of commerce in 1935. Unable to sign up for military service during World War II because of a spinal condition, Burger nonetheless served as a member of Minnesota’s emergency war labor board from 1942 to 1947. After World War II, he served as a member of the governor’s interracial commission from 1948 to 1953. During that period, Burger also became the first president of the St. Paul’s Council on Human Relations, wherein his responsibilities included improving the

relationship between that city’s police and its racial minorities.

A lifelong Republican, Burger played an active part in politics. He was one of the founders of the Minnesota’s first Young Republicans organization, and served as floor manager for Harold Stassen’s unsuccessful campaigns for the Republican presidential nomination both in 1948 and in 1952. During the 1952 Republican convention when General Eisenhower emerged as the frontrunner, Burger shifted his support to Eisenhower. His support for President Eisenhower led to his appointment in 1953 to head what is now the civil division of the Justice Department. In 1955, President Eisenhower nominated Burger to the U.S. Court of Appeals for the District of Columbia. Although his confirmation stalled in the Senate for several months due to allegations of discrimination charges raised by former Justice Department employees that he had dismissed, Burger was confirmed and seated on the Appeals Court in April 1956. Burger’s record on the Appeals Court was largely conservative, especially with respect to criminal cases involving suspects and defendants. Although he served a total of thirteen years on the Appeals Court, he was considered a surprise choice for the Supreme Court.

In 1967, Burger in a speech delivered at Ripon College complained of the “prolonged conflict” characterizing the U.S. system of criminal justice. He noted that the adversary system has become “glorified” to a point whereby defendants are encouraged, even after conviction, to continue their fight with society. President Nixon, who had previously met Burger during the 1948 Republican Convention, must have taken note of that speech when trying to fulfill his own campaign promise to place “political conservatives” and “strict constructionists” on the federal bench. Therefore, on May 21, 1969, President Nixon nominated Burger to fill the seat and position being vacated by Chief Justice Earl Warren on the Supreme Court. Confirmed by the Senate on a seventy-four to three vote on June 9, 1969, Burger was sworn in by his predecessor, Earl Warren, on June 23, 1969. Burger ended up serving seventeen years, one of the longest terms of any Supreme Court chief justices, until September 26, 1986. President Reagan nominated Justice Rehnquist to replace Burger as the nation’s sixteenth chief justice.

After his retirement from the Supreme Court, Burger chaired the Commission on the Bicentennial of the United States, a role he took very seriously. Burger was extremely delighted that the 200th birthday of the U.S. Constitution on September 17, 1987, was also his own eightieth birthday. After his wife passed away in 1994, Burger’s health rapidly deteriorated and he died

of congestive heart failure on June 25, 1995. Chief Justice Burger was laid in state in the Great Hall of the Supreme Court, and buried next to his wife at Arlington National Cemetery on June 29, 1995.

Burger's Judicial Philosophy

Chief Justice Burger proved to be less of a knee-jerk conservative than most hard-line conservatives expected when he was nominated. In fact, the entire Burger Court era did not generate the counter-revolution Warren Court critics were anticipating.

Part of the disappointment felt by hard-line conservatives desiring a different Supreme Court from that of the liberal Warren Court was that they had raised their expectations far too high while forgetting that each justice, including the chief justice, had only one vote.

The Burger Court consisted of five holdovers from the Warren era that served long tenures during the Burger era. Three of these five holdovers—William O. Douglas, William J. Brennan, Jr., and Thurgood Marshall—were regarded as liberal activists, while the other two—Potter Stewart and Byron White—were considered more moderate to conservative justices. In addition to Burger, President Nixon appointed three other justices to the Supreme Court—Harry A. Blackmun, William H. Rehnquist, and Lewis F. Powell. After Nixon, two other justices—John Paul Stevens (appointed by President Ford) and Sandra Day O'Connor (nominated by President Reagan)—joined the Burger Court. During the overall course of the Burger Court, Blackmun and Stevens became part of the liberal bloc, Rehnquist and O'Connor (albeit not always) joined the conservative wing, while Powell generally maintained a centrist position.

Considered as lacking analytical rigor or great eloquence by critics, Burger brought a common-sense approach to his decisions. He tried to strike a balance between liberal excesses and conservative extremes. On most civil rights issues, Burger was a moderate. He believed that school busing should be limited to instances when de jure segregation had actually occurred and not for the purpose of racial balance (*Milliken v. Bradley* [1974]). On affirmative action, Burger maintained that congressionally mandated but not state-enacted preferences could be used to remedy past discrimination (*Fullilove v. Klutznick* [1980], later repealed by *Adarand Constructors v. Peña* [1995] during the Rehnquist era). In *Wisconsin v. Yoder* (1972), writing for the Court, Burger rejected compulsory high school education for the Amish, deeming it a violation of their religious beliefs. But

Burger was protective of the freedom of the press, claiming, for example, that newspapers should not be required to give space to the people they criticize as their right to reply (*Miami Herald Publishing Co. v. Tornillo* [1974]). However, Burger was hostile to other First Amendment issues such as pornography, dirty words, and disruptive speech in schools.

Unlike hard-line conservatives in more recent years, Burger was a “traditional” conservative on many important policy issues. For example, noting that it would only benefit the entire society, he advocated for the rehabilitation of prison inmates by urging job provisions for inmates. In addition, Burger believed in gun control and was a staunch advocate of gun licensing. In a magazine article in 1990 after his Supreme Court years, Burger explained the rationale behind the Second Amendment of the U.S. Constitution as being reflective of the founding fathers’ purpose and objectives then, and cautioned against the literal reading of the amendment in today’s world.

In the field of criminal justice, Burger acted as predicted. He participated in decisions limiting Warren-era precedents that gave criminal defendants substantial leeway. For example, Burger helped limit the Fourth Amendment exclusionary rule as merely deterring police misconduct rather than a constitutional requirement. He refused to extend the exclusionary rule to grand jury proceedings and “good faith” police seizures of evidence based on invalid warrants. As for *Miranda* warnings, Burger did not have problems with using tainted confessions to impeach a defendant’s trial testimony or to obtain other evidence against suspects. He also agreed with the Court’s decision not to apply *Miranda* to grand jury proceedings or to instances when police initiate interrogation to avoid an imminent danger to public safety. However, some of Burger’s Republican friends were not too happy that he wrote the Court’s opinion (albeit with significant assistance from his colleagues) in *United States v. Nixon* (1974) preventing President Nixon from withholding from Congress and the courts materials related to the Watergate affair.

Regardless of what Burger critics thought of his judicial temperament, they uniformly agree that he made a significant and memorable mark on judicial administration in U.S. history. He worked with the American Bar Association on judicial education programs and in creating the Institute of Judicial Administration. He improved the administration of the Supreme Court itself by either creating or adding new administrative positions such as administrative assistant to the chief justice, judicial fellows, public relations professionals, librarians, and clerks. He

substantially improved the Court's law library and enhanced its technology. Burger sponsored the National Center for State Courts, championed the creation of the Federal Judicial Center, and encouraged similar organizations to conduct scholarly research on the Court. Burger is celebrated as the chief architect of court mediation, alternative dispute resolution, arbitration, and other alternatives to litigation that are now widely used in U.S. jurisprudence.

Burger Court's Legacy on Civil Liberties

Although the Burger Court left its indelible mark on American civil liberties, it did not produce a seismic change as President Richard Nixon and his political allies would have preferred. Moreover, the Burger Court concentrated on non-economic issues rather than on property rights. Similar to other Supreme Court eras after 1937, the Burger Court did not nullify any economic regulation on substantive due process grounds. However, the Burger Court subjected Bill of Rights issues and other personal non-economic rights matters to strict judicial scrutiny.

On religious liberty, the Burger Court kept and extended many Warren Court precedents outlawing state-sponsored religious exercises in the public schools. Ruling in *Lemon v. Kurtzman* (1971), the Court established a three-pronged test for determining whether laws or government actions affecting religion activities violated the First Amendment establishment clause. Applying the *Lemon* test required that laws affecting religion were to be held constitutional only if they had a secular purpose, had a primary effect that neither advanced nor harmed religion, and did not create an excessive entanglement between church and state. In one particular application of the *Lemon* test, the Burger Court, in a six-to-three majority ruling, invalidated the posting of the Ten Commandments on the walls of classrooms (*Stone v. Graham* [1980]). However, the Burger Court sometimes took on a more expansive view of the First Amendment religion clauses. For example in *Widmar v. Vincent* (1981), the Court, disallowing a state university's concern over violating the establishment clause, concluded that the university could not exclude religious student groups from facilities available to secular student organizations.

On First Amendment free expression and association cases, the Burger Court mostly relied on the Warren era rulings except in certain instances when it clarified the Supreme Court's position on prior restraints on the press. The Burger Court maintained that in order for the government to impose prior

restraints on the press, the government must demonstrate a "heavy burden" of justification.

The Burger Court left a strong legacy on equal protection issues. Unlike the unanimity maintained mostly by the Warren era justices on many school desegregation cases, the Burger Court lacked such cohesion. Although the Burger Court unanimously ruled in *Swann v. Charlotte-Mecklenburg Bd. of Education* (1971) that trial judges in desegregation cases had broad remedial powers, Chief Justice Burger elaborated that racial balance was not a constitutional mandate but only a temporary remedy for past de jure segregation. The Burger Court was also split on other major desegregation school cases. For example, in *Milliken v. Bradley* (1974), it was only a five-to-four majority that held that de jure segregation must be distinguished from de facto segregation. The Court's majority was equally adamant that civil rights orders be limited to instances whereby there had been previous intentional discrimination.

On affirmative action cases, the Burger Court did not provide clear guidance. On the one hand, it ruled in *Regents of the University of California v. Bakke* (1978) that states were precluded from imposing racial quotas to correct the effects of past discrimination. On the other hand, the following year the Burger Court decided that under the 1964 Civil Rights Act, Congress did not bar affirmative action quotas voluntarily established by a private company (*United Steelworkers v. Weber* [1979]). In both cases, Burger made clear that he was opposed to affirmative action programs.

SALMON A. SHOMADE

References and Further Reading

- Maltz, Earl M. *The Chief Justiceship of Warren Burger, 1969–1986*. Columbia: University of South Carolina, 2000.
- Yarborough, Tinsley E. *The Burger Court: Justices, Rulings, and Legacy*. Santa Barbara, CA: ABC-CLIO, 2000.

Cases and Statutes Cited

- Adarand Constructors v. Peña*, 515 U.S. 200 (1995)
- Fullilove v. Klutznick*, 448 U.S. 448 (1980)
- Lemon v. Kurtzman*, 403 U.S. 602 (1971)
- Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974)
- Milliken v. Bradley*, 418 U.S. 717 (1974)
- Regents of the University of California v. Bakke*, 438 U.S. 265 (1978)
- Stone v. Graham*, 449 U.S. 39 (1980)
- Swann v. Charlotte-Mecklenburg Bd. of Education*, 402 U.S. 1 (1971)
- United States v. Nixon*, 418 U.S. 683 (1974)

United Steelworkers v. Weber, 443 U.S. 193 (1979)
Widmar v. Vincent, 454 U.S. 263 (1981)
Wisconsin v. Yoder, 406 U.S. 205 (1972)

BURKE, EDMUND (1729–1797)

Edmund Burke, British statesman and political philosopher, and the “father” of modern conservatism, was born in Dublin on January 29, 1729. He was the son of a Protestant lawyer and a Roman Catholic mother. After graduating from Trinity College, Dublin, Burke entered the Middle Temple in London to study law in 1750. He, however, soon abandoned the law for literature. Burke started his political career in 1765 when he became the private secretary for the Marquis of Rockingham. He served in Parliament from 1765 to 1794, almost always in the minority, where he gained fame, power, and influence far beyond most of his compatriots. It is a measure of Burke’s genius and force of personality that he managed to achieve political success in a tremendously hierarchical society that viewed the Irish as somewhat less than human and Catholics as little more than idolaters.

Burke’s family connections to Catholicism (in addition to having a Catholic mother and sister, he married the daughter of a Catholic doctor) allowed him to witness firsthand the tremendous oppression Catholics labored under in eighteenth-century Britain. This undoubtedly was one of the driving forces of his interest in toleration for minorities, especially in terms of religion.

Until the 1790s, one of Burke’s main concerns was liberty. Burke’s concept of liberty, however, was not the individualist type celebrated in twenty-first-century America. It was an organic form, closely related to responsibility. For Burke, rights, liberties, and indeed political significance itself, was not found in individuals, but in their collective identities. Humans, according to Burke, were qualified for liberty in proportion to control of their baser instincts, such as selfishness and licentiousness. It was society’s task to provide a stabilizing hand when a sense of justice and control were missing in a people. The expansion of liberty should only be done gradually and cautiously, according to Burke.

When Burke entered Parliament, the crisis that would develop into the American Revolution was already at a critical stage. Throughout that crisis, Burke continually attacked the British government’s attempt to assert what he considered arbitrary power over the colonists. Through his speeches and writings Burke laid out his case that only by respecting the rights and liberties of the American Colonies could

the British hope to win back their loyalty. He contended that even if the political argument for the arbitrary use of power were strong, prudence and justice would overawe it. For Burke, the revolutionaries were not the Americans, but the British ministry.

Burke’s title as the father of modern conservatism is due in large part to his most famous writing—*Reflections on the Revolution in France* (1790). Appalled by the excesses of that revolution, Burke delineated his philosophy on reform and revolution. While accepting the desire (even necessity) for change, he cautioned that any reform was to be approached cautiously and with an eye toward the lessons of history and tradition. By the 1790s, justice and order were the key concepts of government for Burke.

ENOCH W. BAKER

References and Further Reading

- Burke, Edmund. *Burke’s Political Writings*. Edited by John Buchan. New York: Thomas Nelson and Sons, n.d.
 ———. *Speeches and Letters on American Affairs*. Edited by Hugh Law. New York: Dutton, 1961.
 ———. *Reflections on the Revolution in France*. Edited by J. G.A. Pocock. Indianapolis: Hackett Publishing, 1987.
 Kirk, Russell. *Edmund Burke: A Genius Reconsidered*. Wilmington, DE: Intercollegiate Studies Institute, 1997.

BURKS v. UNITED STATES, 437 U.S. 1 (1978)

At the robbery trial of David Burks, the defendant presented three unchallenged witnesses testifying that he was insane. In response, the government presented two expert witnesses who did not express definite opinions. The jury nonetheless convicted Burks. He asked for a new trial and argued that the evidence was insufficient to support the guilty verdict. The Sixth Circuit reversed the conviction, agreeing that Tennessee had not fulfilled its burden of proving sanity, but rather than terminating the case it asked the District Court to decide whether a directed acquittal should be entered or a new trial ordered. Burks contended that the double jeopardy clause precluded another trial because the appellate court found the evidence insufficient, which was the equivalent of a judgment of acquittal.

The Supreme Court reversed, remanding Burks for a judgment of acquittal. The Court held that the prosecution could not have another opportunity to convict after it had been given a full and fair opportunity to do so. The Court determined that it made no difference that the determination of evidentiary insufficiency was made by the appellate court because the double jeopardy considerations were identical.

Burks establishes that the double jeopardy clause precludes a second trial once the reviewing court finds the evidence legally insufficient. *Burks* expressly overrules *Bryan v. United States*, *Yates v. United States*, and *Forman v. United States*. Also, any earlier decisions suggesting that moving for a new trial waives one's right to a judgment of acquittal on the basis of evidentiary insufficiency were also overruled.

SARA FAHERTY

Cases and Statutes Cited

Bryan v. United States, 338 U.S. 552 (1950)
Forman v. United States, 361 U.S. 416 (1960)
Yates v. United States, 354 U.S. 298 (1957)

See also **Double Jeopardy (V): Early History, Background, Framing; Proof beyond a Reasonable Doubt**

BURTON, JUSTICE HAROLD (1888–1964)

Harold Hitz Burton, mayor of Cleveland, senator from Ohio and associate justice to the U.S. Supreme Court was born on June 22, 1888, in Jamaica Plain, Massachusetts. After graduating from Bowdoin College, he went on to attend Harvard Law School where he graduated in 1912. After law school, Burton moved to Cleveland, Ohio, where he began his law practice. His law career was interrupted, however, by the outbreak of World War I. Burton served in the army and was wounded in combat for which he received the Purple Heart. After the war, Burton resumed his law practice in Cleveland. In 1935, he ran for and was elected mayor of Cleveland, and served in that capacity until 1940 when he was elected to the U.S. Senate. In 1945, President Truman nominated Burton to the Supreme Court. Burton remained on the Court for thirteen years until his retirement for health reasons in 1958. Justice Burton died on October 28, 1964 from complications due to Parkinson's disease.

While Burton was generally considered a conservative justice who favored a philosophy of judicial restraint, his contributions to civil liberties is best illustrated in his stance on the equal protection of the laws, and nowhere was that more apparent than in his opposition to the doctrine of separate but equal. Writing for the Court in *Henderson v. United States*, Burton found that the Southern Railway Company's practice of limiting black passengers to a small curtained-off section of the dining car, even when open seats were available elsewhere, was a patent violation of Section 3(1) of the Interstate Commerce Act, which made it illegal for a railroad traveling in interstate commerce to subject passengers to "any undue or

unreasonable prejudice or disadvantage." Burton went on to state that equality of treatment was a fundamental right guaranteed to all citizens. Moreover, Burton repeatedly joined in decisions that overturned segregationist laws. In 1948, Burton voted with the majority in *Shelley v. Kraemer*, where the Court found that it was unconstitutional for states to prevent the sale of real property, covered in racially restrictive covenants, to blacks. Then again in 1954, Burton was part of the unanimous decision in *Bolling v. Sharpe*, which found segregated schools in Washington, DC to be an unconstitutional violation of due process protected by the Fifth Amendment. Burton was also part of the unanimous decision in the landmark desegregation case *Brown v. Board of Education*, which was decided on the same day as *Bolling*. Burton was reportedly instrumental in bringing about the unanimous vote. Indeed, in a personal letter written to Chief Justice Earl Warren, Burton reveals his feeling that the *Bolling* and *Brown* cases where probably the most "significant decisions" made during his time on the Court and that it was a honor to have taken part in them. The segregation cases did, as Burton predicted, become two of the most important cases decided during the Warren Court. Accordingly, Burton's support for overturning racial segregation is perhaps his greatest legacy.

MARCEL GREEN

References and Further Reading

Langran, Robert W. "Why are Some Supreme Court Justices Rated as 'Failures'?" *Supreme Court Historical Society 1985 Yearbook*. http://www.supremecourthistory.org/04_library/subs_volumes/04_c19_d.html.
Rudko, Frances Howell. *Truman's Court: A Study in Judicial Restraint*. Westport, CT: Greenwood Press, 1988.

Cases and Statutes Cited

Bolling v. Sharpe, 347 U.S. 497 (1954)
Brown v. Board of Education, 347 U.S. 483 (1954)
Henderson v. United States, 339 U.S. 816 (1950)
Shelley v. Kraemer, 334 U.S. 1 (1948)

BUTLER v. MCKELLAR, 494 U.S. 407 (1990)

When the Supreme Court decides a case in a way that alters the constitutional rights available to a criminal defendant, can prisoners who have already completed their appeals benefit from that case through a petition for a writ of habeas corpus? In *Teague v. Lane* (1989), the Court decided that "new rules" would not be available to habeas petitioners. In *Butler v. McKellar*

(1990), the Court decided, five to four, that if the outcome of a case was “susceptible to debate among reasonable minds,” its rule would be deemed new.

Butler had been arrested for assault, about which he declined to speak to the police, invoking his *Miranda* rights. The police then began to ask him about an unrelated rape and murder. The settled law was *Edwards v. Arizona* (1981), prohibiting police from asking a suspect about a criminal charge once the suspect invoked *Miranda*. *Arizona v. Roberson* (1988), decided after Butler had completed his appeals, extended *Edwards* to questioning about all charges. If *Roberson* were not a new rule, the questioning of Butler was unconstitutional. *Roberson* suggested that it was dictated by *Edwards*, but Butler concluded otherwise; lower courts had reached conflicting results before *Roberson* was decided, demonstrating that reasonable minds disagreed. Thus, it was a new rule.

Butler’s definition of a new rule was extremely broad; many, if not most, of the cases that the Supreme Court hears involve conflicting decisions among lower courts and would create new rules. However, subsequent new rule cases appeared to cut back on Butler.

TUNG YIN

References and Further Reading

Yackle, Larry W. *Reclaiming the Federal Courts*. Cambridge, MA: Harvard University Press, 1994.

Cases and Statutes Cited

Arizona v. Roberson, 486 U.S. 675 (1988)

Edwards v. Arizona, 451 U.S. 477 (1981)

Teague v. Lane, 489 U.S. 288 (1989)

See also *Edwards v. Arizona*, 451 U.S. 477 (1981); **Habeas Corpus: Modern History**; Harlan, John Marshall II; *Miranda v. Arizona*, 384 U.S. 436 (1966); **Right to Counsel (VI)**

BUTLER, PIERCE (1866–1939)

Pierce Butler, one of the most conservative justices ever to sit on the U.S. Supreme Court, was born March 17, 1866, in a log cabin on a Minnesota farm. One of six children of Irish immigrant parents, Butler, an ardent patriot and devout Catholic, regarded economic liberty and self-reliance as indispensable components of democracy.

A tireless legal advocate for railroads, who was intolerant of social and political dissent, Butler, as an University of Minnesota regent (1901–1924), spearheaded the removal of professors with unorthodox views. Criticism of his reactionary attitude and

perceived corporate bias threatened his 1922 Court nomination.

As a Supreme Court justice, Butler, a rugged individualist, often opposed public control of private economic affairs. Due process, he believed, protected contractual freedom from the unreasonable exercise of state police powers, whose scope he narrowly construed to invalidate industrial regulations in *Weaver v. Palmer Bros. Co.* (1926) and *Burns Baking Co. v. Bryan* (1924). Refusing to balance public and private rights, Butler’s *Village of Euclid v. Ambler Realty Co.* (1926) dissent decried zoning ordinances that restricted businesses. Similarly, he invoked economic liberty to invalidate a minimum wage law in *Morehead v. New York ex. rel. Tipaldo* (1936), taxation in *Miller v. Standard Nut Margarine Co.* (1932), and sought to void Social Security in *Steward Machine Co. v. Davis* (1937) (dissent). A vociferous New Deal critic, Butler and three other justices comprised the notorious Four Horsemen, who persisted in interpreting the Constitution inflexibly rather than adapting its limitations to the Depression’s changing circumstances.

In contrast, Butler was more deferential toward public restrictions of free speech and citizenship. Rigidly patriotic, Butler was unsympathetic to social agitators. In *United States v. Schwimmer* (1929) and *United States v. MacIntosh* (1931), he upheld governmental authority to reject alien pacifists’ citizenship applications, and in *Kessler v. Strecker* (1939) (dissent), Butler thought that the government could deport a former communist. Similarly, his dissents in *Stromberg v. California* (1931) and *Herndon v. Lowry* (1938) demonstrate Butler’s willingness to apply criminal syndicalism laws to communists engaged in expressive activity. Concerned about the dissemination of unorthodox and controversial opinions, Butler’s dissents in *Near v. Minnesota* (1931) and *Hague v. Committee of Industrial Organizations* (1939) would have permitted public officials to restrict speech as a public nuisance through prior restraint and vague indirect regulations of its content.

Generally solicitous of criminal defendants’ procedural rights, Butler criticized federal prohibition officials whose search and seizure efforts violated the Fourth Amendment in *Olmstead v. United States* (1928) (dissent); *United States v. Lefkowitz* (1932), and *Go-Bart Importing v. United States* (1931). Butler also demonstrated a slight civil libertarian bent when he dissented silently from *Buck v. Bell* (1927), which upheld Virginia’s sterilization law.

In matters of race, Butler was less vigilant. In *The Alien Land Use Cases* (1923), he sustained laws that restricted Asians from owning land, and sanctioned a poll tax in *Breedlove v. Suttles* (1937) (dissent). Reluctant to expand the scope of due process beyond economic liberty, Butler would have left undisturbed

Texas's all-white primary in *Nixon v. Condon* (1932) (dissent); educational segregation in *Missouri ex. rel. Gaines v. Canada* (1938) (dissent); and the conviction of poor black defendants not afforded effective assistance of counsel in the infamous Scottsboro rape case, *Powell v. Alabama* (dissent).

Pierce Butler, whose social conservatism imbued his constitutional jurisprudence, died November 16, 1939, in Washington, DC.

SAMUEL R. OLKEN

References and Further Reading

- Brown, Francis J. *The Social and Economic Philosophy of Pierce Butler*. Washington, D.C.: Catholic University of America Press, 1945.
- Danelski, David J. *A Supreme Court Justice Is Appointed*. New York: Random House, 1964.
- Olken, Samuel R., *The Business of Expression: Economic Liberty, Political Factions and the Forgotten First Amendment Legacy of Justice George Sutherland*. William & Mary Bill of Rights Journal 10 (Winter 2002): 249–357.
- White, G. Edward. *The Constitution and the New Deal*. Cambridge, MA: Harvard University Press, 2000.

Cases and Statutes Cited

- The Alien Land Use Cases* (1923): *Frick v. Webb*, 263 U.S. 326; *Porterfield v. Webb*, 263 U.S. 225; *Terrace v. Thompson*, 263 U.S. 197; *Webb v. O'Brien*, 263 U.S. 326 (all 1923)
- Breedlove v. Suttles*, 302 U.S. 277 (1937)
- Buck v. Bell*, 274 U.S. 200 (1927)
- Burns Baking Co. v. Bryan*, 264 U.S. 504 (1924)
- Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926)
- Go-Bart Importing v. United States*, 282 U.S. 344 (1931)
- Hague v. Committee of Industrial Organizations*, 307 U.S. 496 (1939)
- Herndon v. Lowry*, 301 U.S. 444 (1938)
- Kessler v. Strecker*, 307 U.S. 22 (1939)
- Miller v. Standard Nut Margarine Co.*, 284 U.S. 489 (1932)
- Missouri ex. rel. Gaines v. Canada*, 305 U.S. 337 (1938)
- Morehead v. New York ex. rel. Tipaldo*, 298 U.S. 587 (1936)
- Near v. Minnesota*, 283 U.S. 697 (1931)
- Nixon v. Condon*, 286 U.S. 73 (1932)
- Olmstead v. United States*, 277 U.S. 438 (1928)
- Powell v. Alabama*, 287 U.S. 45 (1932)
- Steward Machine Co. v. Davis*, 301 U.S. 548 (1937)
- Stromberg v. California*, 283 U.S. 359 (1931)
- United States v. Lefkowitz*, 285 U.S. 452 (1932)
- United States v. MacIntosh*, 283 U.S. 605 (1931)
- United States v. Schwimmer*, 279 U.S. 644 (1929)
- Weaver v. Palmer Bros. Co.*, 270 U.S. 294 (1926)

BYERS v. EDMONDSON, 712 SO.2D 681 (1999) (“NATURAL BORN KILLERS” CASE)

The judgment rendered concerns the issue of whether the film *Natural Born Killers* is protected speech

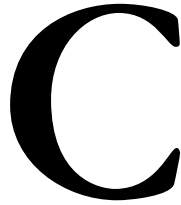
under the First Amendment, that is, should movie producers, directors, and studios be responsible for encouraging criminal behavior? Attorneys for the producers and director of the movie *Natural Born Killers* petitioned Louisiana's high court to review a lower court ruling that they say is the first of “American court decisions to hold that the creators of a fictional story can be sued for the deviant criminal acts of alleged imitators or copycats.” The Louisiana Court of Appeals upheld a District Court summary judgment in favor of the defendants. The Court found that, contrary to plaintiffs' claims, “nothing in [the film] constitutes incitement,” and therefore is protected speech.

Patsy Byers, a clerk shot by a young man and woman robbing a convenience store, sued Time Warner, Inc. and Oliver Stone in July 1995, alleging that they were responsible for her paralyzing injuries. Her lawsuit claimed that she was shot because the young couple was enamored with the movie *Natural Born Killers* and its glamorization of violent behavior. According to the attorney for the Byers estate, Time Warner and Oliver Stone should be liable for “intentionally, recklessly, or negligently including in the video subliminal images which either directly advocated violent activity or which would cause viewers to repeatedly view the video and thereby become more susceptible to its advocacy of violent activity.”

In May 1998, a Louisiana appeals court reversed the ruling that the trial court should not have dismissed the case and the plaintiffs presented adequate allegations to avoid dismissal on First Amendment grounds. Byers' allegations, which the appeals court said it had to accept as true at the early procedural stage of the lawsuit, are that the movie falls into a category of speech that directly incites and will likely lead to imminent, lawless action, which is unprotected by the First Amendment. In reaching its decision, the Louisiana appeals court relied on *Rice v. Paladin Enterprises, Inc.* (1997), in which the U.S. Court of Appeals for the Fourth Circuit ruled that the First Amendment did not merit wrongful death action against the publishers of an instructional book titled *Hit Man: A Technical Manual for Independent Contractors*.

In their appeal to the Louisiana Supreme Court, attorneys for the defendants noted that “no court in American has ever held a filmmaker or film distributor liable for injuries allegedly resulting from imitation of a film.” Their argument addressed the issue of whether “the specter of such boundless liability would cause those who create movies, music, books, and other creative works to avoid controversial or provocative subjects.”

G. L. TYLER



CABLE TELEVISION REGULATION

Cable television regulation began in the late 1940s and 1950s primarily as a local matter. The first cable systems needed easements to construct facilities on public and private land. Local authorities created franchises to provide access to rights of ways, and state regulators addressed questions of access to attach the cable plant to existing utility poles.

Federal regulation first began with questions of whether and how cable operators could retransmit distant and local broadcasters, a controversy that continues 40 years later. Importing major market stations into small communities that might have one TV station, for instance, bringing Denver stations to Casper, Wyoming, made for a good service for customers but created competitive issues for the local station. The Federal Communications Commission (FCC) set limits on the number and kind of stations that could be imported under “ancillary jurisdiction” approved by the U.S. Supreme Court. The Supreme Court also found no copyright liability on the cable operator’s part for carrying stations.

Congress began regulating cable, first in 1976 by creating copyright liability for station carriage in tandem with a cable compulsory copyright in those signals, and in 1978 with the first of several laws establishing pole attachment arrangements. In 1984, the first comprehensive federal cable law provided for explicit FCC authority, ground rules for granting and renewing franchises by localities, and public access and leased access channels.

In 1992, because of complaints over high cable rates and access by large-dish satellite competitors to program networks owned by operators, Congress passed the 1992 Act, which led to a complex set of rate regulation of cable rates (generally lifted in the 1996 Telecommunications Act.) The 1992 Act also imposed a requirement that operators generally “must carry” all local TV and alternatively granted TV stations the right to negotiate carriage rights, irrespective of the compulsory copyright created in TV signals in 1976.

The 1996 Telecommunications Act focused on facilities-based competition to incumbent local exchange carriers; cable, as the second wire to residences figured prominently in the debate. Although cable has provided some facilities-based phone competition using its hybrid fiber-coax plant, its primary new offering is cable modem service. Initially considered a cable service, the FCC in 2002 declared cable modem service an “interstate information service,” but judicial review may lead to the determination that it is a “telecommunications service.”

As cable operators offer modem service along with Voice over Internet Protocol, the laws surrounding its video service may be less significant than its role as an operator of a broadband network. Policies relating to nondiscrimination of applications or attachments to cable’s broadband network have engendered considerable policy debates.

Another significant provision of the 1996 Act, Sec. 629, requires the commercial availability of set-top

boxes, historically leased by the operator to subscribers both as a marketing matter and a way to control signal theft. Because digital transmissions pose new problems for copyright holders, regulations have also developed on how copying of cable programming may be accomplished along with rules for preventing unauthorized distribution on the Internet.

DANIEL L. BRENNER

CAIN v. KENTUCKY, 387 U.S. 319 (1970)

In a *per curiam* decision, based on *Redrup v. New York* (1967), the Supreme Court disposed of *Cain v. Kentucky* and reversed Kentucky's ban of public showings of the film "I, A Woman." Warren Burger, who had been confirmed as Chief Justice in 1969, and Harlan dissented. The Court disposed of two other cases (*Hoyt v. Minnesota* [1970] and *Walker v. Ohio* [1970]) in similar fashion, sparking dissents by Blackmun and Burger, respectively.

Until Burger's appointment, *per curiam* "redrapping" cases followed a fairly standard format with a simple declaration, "The judgment is reversed. *Redrup v. New York*, 386 U.S. 767." Harlan then would provide a dissent that cited his opposition in previous cases that the syllabus would summarize as "Mr. Justice Harlan would affirm the judgment of the state court upon the premises stated in his separate opinion in *Roth v. United States* . . . and his dissenting opinion in *Memoirs v. Massachusetts*" As the Court's composition shifted and became more conservative, the use of *per curiam* and redrapping attracted new dissenters and declined in frequency.

Burger's appointment meant that Harlan was no longer alone in his dissents to *per curiam* resting on *Redrup's* authority. Both Burger and Harlan thought the Court's majority in *Cain* failed to pay sufficient deference to the states. In *Cain*, they both issued separate dissents. Harlan modified his standard dissent, indicating he thought Ohio's decision presented a "borderline question" but concluded he could not say the state exceeded the "constitutional speed limit" in banning public showings of the film. Burger complained the Court was inflexible and denied the states the opportunity to adopt their own standards or deal with the problem on their own terms.

In *Walker*, Burger cited his dissent in *Cain* but added he found no justification for the Court to assume the role of national, unreviewable board of censorship for the states, "subjectively judging each piece of material brought before it without regard to the findings or conclusions of other courts, state or federal." Blackmun did not participate in *Walker*, but in *Hoyt* he dissented, arguing the Constitution did not

"necessarily prescribe a national and uniform measure" dealing with obscenity, and he was joined by Harlan and Burger.

Burger, Blackmun, and Harlan constituted the core coalition to challenge the majority's use of *per curiam*s to overrule state courts that in their eyes conscientiously tried to apply the Supreme Court's standards first laid out in *Roth*.

ROY B. FLEMMING

Cases and Statutes Cited

Cain v. Kentucky, 397 U.S. 319 (1970)
Hoyt v. Minnesota, 399 U.S. 524 (1970)
Redrup v. New York, 386 U.S. 767 (1967)
Walker v. Ohio, 398 U.S. 434 (1970)

CALDER v. BULL, 3 U.S. 386 (1798)

The Connecticut legislature enacted a resolution granting a new hearing in a probate trial. The disappointed heirs challenged the legislative action as a violation of Article 1, Section 10, Clause 1 of the Constitution of the United States, which prohibits any state from passing an "ex post facto" law.

The Supreme Court of the United States unanimously upheld the legislative act, concluding that the ex post facto clause applies only in the criminal context. For example, Connecticut would have been prohibited by the clause from enacting a law establishing criminal sanctions for an activity that was legal at the time it was done. The probating of a will is a civil matter, however, and the federal Constitution's prohibition against ex post facto laws does not cover it.

Calder v. Bull was one of the Supreme Court's first decisions involving limitations on governmental power. It remains a landmark decision for that reason alone. It also remains significant because it was the first case in which members of the Court openly disagreed with one another about how the Constitution should be interpreted. Justice Samuel Chase maintained in his opinion that the meaning of the Constitution—including specific clauses in the Constitution such as the ex post facto clause—cannot be discerned from the text of the Constitution alone. He wrote: "An act of the Legislature (for I cannot call it a law) contrary to the first great principles of the social compact, cannot be considered a rightful exercise of legislative authority The genius, the nature, and the spirit, of our state governments, amount to a prohibition of such acts of legislation; and the general principles of law and reason forbid them."

Justice James Iredell responded directly to Justice Chase's approach and rejected it. Justice Iredell

maintained that the only legitimate form of judicial review is interpretation of the written text of the Constitution. He wrote: "If . . . the legislature of the union, or the legislature of any member of the union, shall pass a law, within the general scope of their constitutional power, the court cannot pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice. The ideas of natural justice are regulated by no fixed standard; the ablest and the purest men have differed upon the subject."

The Chase-Iredell exchange about how to interpret the Constitution has been characterized by scholars as "the opening salvo in a running battle that has never simmered down completely." The specific rule of the case remains good law: the *ex post facto* clause applies only in the criminal context. One member of the current Court—Clarence Thomas—believes that the clause also applies in the civil context. Consequently, he has suggested that *Calder v. Bull* be overruled: despite the fact that the decision has stood as precedent for 200-plus years.

Before Justice Thomas's concurring opinion in *Eastern Enterprises v. Apfel* (1998), no member of the Supreme Court had called *Calder* into question since William Johnson in the 1829 case of *Satterlee v. Matthewson*. Justice Johnson wrote for himself alone in *Satterlee*, as he did when he first called *Calder* into question in *Ogden v. Saunders* (1827), and Justice Thomas wrote only for himself in *Apfel*. The future of *Calder* seems secure.

SCOTT D. GERBER

Cases and Statutes Cited

Eastern Enterprises v. Apfel, 524 U.S. 498 (1998)
Satterlee v. Matthewson, 27 U.S. (2 Pet.) 380 (1829)

CALERO-TOLEDO v. PEARSON YACHT LEASING CO., 416 U.S. 663 (1974)

Federal and state laws authorize the government to seize and forfeit property that is "tainted" by its connection to specified crimes. In *Calero-Toledo*, the Supreme Court addressed, albeit ambiguously, the question of whether the Constitution's due process clause protects an "innocent owner" from forfeiture when her property was illegally used without her knowledge or consent. Citing a number of precedents, the Court upheld the civil forfeiture of a rented yacht after a marijuana cigarette was discovered onboard, even though the yacht's owner was innocent of wrongdoing and ignorant of the renters' illegal activity.

Justice Brennan's opinion for the Court found forfeiture against the unwitting lessor rational, because it could induce owners to exercise greater care in transferring possession of their property. However, the opinion included dicta implying that the Constitution might mandate a narrower innocent owner defense, protecting owners who are not only unaware of the wrongful activity, but also have done everything "that reasonably could be expected" to prevent it.

On the basis of this language, some lower courts found a limited constitutional defense for owners who are *both* unknowing and non-negligent regarding the illegal use of their property. However, in *Bennis v. Michigan* (1996), the Supreme Court reaffirmed *Caldero-Toledo* with an even broader holding that dropped all reference to any circumstances that might constitutionally protect an unwitting and non-negligent owner. *Bennis* did not know of, and could not prevent, her husband from using their car for sex with a prostitute, but the Court held five to four that she had no constitutional protection against forfeiture of her interest in the automobile.

Despite the *Calero-Toledo* and *Bennis* cases, innocent owners have alternative remedies. Statutory innocent owner defenses have found their way into several forfeiture laws, and the Civil Asset Forfeiture Reform Act of 2000 creates a uniform innocent owner defense applicable to most federal forfeiture procedures. Moreover, federal and most state laws allow for administrative remission or mitigation of unduly severe forfeitures. Finally, the Supreme Court has held that the Eighth Amendment's excessive fines clause applies to forfeitures, and the Court has yet to decide whether subjecting an innocent owner to forfeiture of her property is necessarily excessive.

Caldero-Toledo also found no constitutional violation in the government's denial of notice or a hearing to the owner until after its seizure of the yacht. The Court subsequently modified this holding in *United States v. James Daniel Good Real Property et al.* (1993), finding that a preseizure notice and hearing is required for land, houses, and other real property, because in such cases, advanced notice cannot create a risk that the property will be removed from the jurisdiction.

ERIC D. BLUMENSON

References and Further Reading

Department of Justice. *Asset Forfeiture Law and Practice Manual*. June 1998.
 Kessler, Steven L. *Civil and Criminal Forfeiture: Federal and State Practice* §6.01, 1993.
 Smith, David B. *Prosecution and Defense of Forfeiture Cases*. Matthew Bender.

Cases and Statutes Cited

Bennis v. Michigan, 516 U.S. 442 (1996)

United States v. James Daniel Good Real Property et al., 510 U.S. 43 (1993)

See also **Civil Asset Forfeiture; Due Process; *United States v. 92 Buena Vista Avenue*, 507 U.S. 111 (1993)**

CALHOUN, JOHN CALDWELL (1882–1850)

John C. Calhoun received an elite education, studying under a prominent reverend tutor, and then graduating from Yale College. After his admission to the South Carolina bar, Calhoun was elected to the South Carolina legislature. He served in the U.S. House of Representatives, then as Secretary of War under James Monroe, then as Vice-President twice, under John Quincy Adams and Andrew Jackson. After resigning his position as Vice-President, he was elected to the U.S. Senate and then served as John Tyler's Secretary of State. At the end of that term, he returned to the Senate, where he served until his retirement. His connection to civil rights centers on two ideas: his belief in states' rights and his defense of slavery.

After the hated Tariff of 1828 (called the Tariff of Abominations in the South) was passed, Calhoun published *The South Carolina Exposition*, which outlined his theory of "state interposition." Also known as Nullification, Calhoun's theory gave individual states the authority to ignore, or nullify, federal law that interfered with any states' interests or sovereignty. The South Carolina Legislature eagerly embraced Calhoun's theory and voted to ignore the Tariff, but President Andrew Jackson was outspoken in his intention to enforce the law. Calhoun actually resigned from his position as Vice-President, was immediately elected as U.S. Senator from South Carolina, and began fighting for nullification on the Senate floor. The controversy grew into a crisis as Congress passed the Force Bill, giving Jackson authority to use federal troops to compel South Carolina to enforce the Tariff. Violence was averted only by compromise: Jackson agreed to lower the Tariff, South Carolina rescinded its nullification ordinance, and Calhoun, who wanted South Carolina to remain in the union but insisted on their right to nullify or secede, endorsed the agreement.

Calhoun also consistently defended the institution of slavery. He was a supporter of the "positive good" theory, which described slavery as a beneficial institution. Under positive good rationalization, slavery

civilized blacks. Slaveholders educated, supported, and managed their slaves so that American slaves had reached a level of civilization that no other society of blacks had ever reached before. Thus, slavery allowed both black slaves and white slave owners to thrive. To be sure, the doctrine was not widely accepted outside of the South, but it allowed Calhoun and other slaveholders to justify their institution. In a civil rights irony, Calhoun considered himself a great defender of civil rights because he held property rights sacred. Because slaves were considered property (and neither the Constitution nor the federal government challenged that idea), Calhoun was able to counter abolition movements by citing the Constitution's protections of private property. Finally, as a fierce defender of both South Carolina's and the South's interests, he was concerned about maintaining legislative balance between free and slave states. To that end, he supported the Missouri Compromise, which allowed Missouri into the Union as a slave state while allowing Maine in as a free state.

Calhoun thought of himself as a defender of civil rights; he saw the rights of South Carolina to make laws for its citizens as paramount over the federal government's, and he believed that because southern slaveholders owned slaves, the protection of slavery was simply a matter of protecting property.

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References and Further Reading

Bartlett, Irving H. *John C. Calhoun: A Biography*. New York: W.W. Norton and Company, 1993.

Thomas, John L., ed. *John C. Calhoun, A Profile*. New York: Hill and Wang, 1968.

CALIFORNIA v. ACEVEDO, 500 U.S. 565 (1991)

The Fourth Amendment's protection against unreasonable searches generally requires law enforcement to obtain a search warrant before initiating a search. In *Carroll v. United States*, the Supreme Court had crafted an exception for moving vehicles, which permitted law enforcement to conduct a warrantless search of an automobile when they had probable cause to believe that contraband was contained somewhere in a vehicle but not when probable cause extended only to a specific container.

Police officers in California observed Charles Acevedo exit the apartment of a man who that morning had picked up a package that they knew contained marijuana. Acevedo placed a brown paper bag,

identical in size to one of the marijuana packages, in the trunk of his car and drove off. The officers stopped him, opened the trunk, and discovered marijuana in the bag.

Although the officers only had probable cause to believe that the bag located in the car contained marijuana, rather than the car, the Supreme Court held that the Fourth Amendment did not require the officers to obtain a search warrant before opening the bag. It reasoned that if a warrantless search of a vehicle is permissible, then the Fourth Amendment must also allow a less intrusive search for a closed container based on probable cause. The Court stressed that the search of an automobile based on probable cause to believe that a closed container contains contraband is limited to a search for that object and does not extend to the entire car.

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References and Further Reading

LaFave, Wayne R. *Search and Seizure*, 4th ed. 6 vols. St. Paul: West, 2004.
William E. Ringel, et al. *Searches & Seizures, Arrests and Confessions*, 2nd ed. 3 vols. Deerfield, Ill.: Clark Boardman Callaghan, 1979 [updated three times a year but copyright listed as “1979”].

Cases and Statutes Cited

Carroll v. United States, 267 U.S. 132 (1925)

See also Automobile Searches; Carroll v. United States, 267 U.S. 132 (1925); *Probable Cause; Search (General Definition); Search Warrants*

CALIFORNIA v. GREENWOOD, 486 U.S. 35 (1988)

In *California v. Greenwood*, the police searched a defendant’s garbage bags left on the curb. The Supreme Court concluded that the Fourth Amendment did not apply, and thus the police are able to search people’s trash with no limitations and without the judicial oversight of a warrant. The Fourth Amendment only applies when a person has an expectation of privacy that society is prepared to recognize as reasonable. The Court reasoned that there was no reasonable expectation in the trash because “[i]t is common knowledge that plastic bags left on or at the side of a public street are readily accessible to animals, children, scavengers, snoops, and other members of the public.” The Court also reasoned that the trash was left at the curb “for the express purpose of conveying it to a third

party, the trash collector, who might himself have sorted through [the] trash or permitted others, such as the police, to do so.”

The Court’s reasoning equates privacy with total secrecy. If anything is exposed to others in any way, even if others are unlikely to see it, then according to the Court, there is no reasonable expectation of privacy. According to the dissenting opinion, a study of a person’s trash can reveal much about an individual’s personality and lifestyle. People often throw out very private items, such as prescription drug bottles, contraceptive devices, old financial documents, personal letters, and so on.

DANIEL J. SOLOVE

References and Further Reading

LaFave, Wayne R., Jerold H. Israel, and Nancy J. King. *Criminal Procedure*. 142–143 (3d ed. 2000).
Solove, Daniel J., *Digital Dossiers and the Dissipation of Fourth Amendment Privacy*, Southern California Law Review 75 (2002): 1083–1168.

See also Expectation of Privacy; Search (General Definition)

CALIFORNIA v. LARUE, 409 U.S. 109 (1972)

When a commercial activity requires a license or permit from a government, can a state use this authority to regulate “expression” even if aspects of the conduct do not meet the *Roth* standard of obscenity?

In 1970, the California Department of Alcoholic Beverage Control promulgated rules regulating entertainment in businesses serving alcoholic beverages. On the basis of legislative findings that the “gross sexuality” of topless or bottomless dancing in bars and nightclubs encouraged sexual encounters between the performers and customers, as well as sex crimes and prostitution outside the businesses, California’s regulations prohibited live or filmed sexual entertainment that included performances or simulations of specific sexual acts. A three-judge federal district court struck down the regulation as unconstitutional, because some of the proscribed entertainment was not obscene.

This is the Court’s first major obscenity decision in which the four Nixon nominees (Burger, Blackmun, Powell, and Rehnquist) participated. In a 6:3 decision reversing the lower court, Rehnquist, writing for the majority with Steward and White joining the four Nixon nominees, does not focus on whether nude dancing could be obscene but rather on its harmful,

secondary effects in establishments selling alcoholic beverages and whether state licensing power could regulate nude dancing to minimize its effects. Thus, he did not use the heightened tests usually associated with the “preferred freedoms” of the First Amendment. Instead, he notes the regulations dealt with bars and nightclubs selling liquor, not “a dramatic performance in a theater.” He thus uses a rationality test to the department’s regulations that are not unreasonable in light of the legislative findings and the questionable effectiveness of other options.

The lynchpin of the *LaRue* decision was Rehnquist’s view that the “broad sweep” of the Twenty-first Amendment conferred “something more than the normal state authority” over public health and morals. This amendment gave the states power to regulate the sale of alcohol, authority that, according to Rehnquist, outweighed any First Amendment interest in nude dancing. Brennan, and especially Marshall, attacked Rehnquist’s view in their dissents. In subsequent cases dealing with nude dancing and liquor licensing, for example, *New York State Liquor Authority v. Bellanca* (1981) and *City of Newport, Kentucky v. Iacobucci* (1986), both *per curiam* opinions resting on *LaRue*, Stevens, who joined the Court after *LaRue* was handed down, wrote dissenting opinions, launching a campaign challenging Rehnquist’s view of the Twenty-first Amendment, which provided a fortuitous way of upholding California’s regulations without having to directly address the relationship between nude dancing and the First Amendment.

Finally, in 1996, the Supreme Court in *44 Liquormart, Inc. v. Rhode Island* (1996) with Stevens writing for the majority disavowed the reasoning in *LaRue* without questioning, however, its holding. According to Stevens, the result in *LaRue* would have been the same if the majority had not relied on the Twenty-first Amendment. States, he argued, with their inherent police powers have ample authority to regulate the sale of alcoholic beverages to avoid “bacchanalian revelries.” Equally important, the Twenty-first Amendment, Stevens wrote, does not allow states to “ignore their obligations” under other provisions of the Constitution, nor does it “in any way diminish the force of the supremacy clause.”

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Cases and Statutes Cited

44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996)
California v. LaRue, 409 U.S. 109 (1972)
City of Newport, Kentucky v. Iacobucci 479 U.S. 92 (1986)
New York State Liquor Authority v. Bellanca, 452 U.S. 714 (1981)

CALIFORNIA v. RAMOS, 459 U.S. 1301 (1982)

People who disagree about something can be induced to set aside their disagreement to unite against a common enemy. Prosecutors often use the “common-enemy rule” in death-penalty trials, highlighting the specter of the convicted capital defendant someday getting out of prison to harm the community again. The fear of a predator again walking the streets—the “common enemy” of all the jurors—can be so powerful that jurors will set aside their disagreement over whether to impose life imprisonment or death and rally against the prospect of the defendant’s future release.

California v. Ramos presented the Supreme Court with the issue of when a prosecutor may deploy this sort of argument (though neither the Court nor the litigants used the “common-enemy” locution). The capital statute at issue in *Ramos* allowed the jury to consider the fact that a sentence of life imprisonment without the possibility of parole leaves open the possibility of future commutation of the sentence by the governor. The defendant argued that this “inject[ed] an unacceptable level of unreliability into the capital sentencing determination” and “deflect[ed] the jury from its constitutionally mandated task of basing the penalty decision on the character of the defendant and the nature of the offense.” The Court rejected this challenge to California’s allowance of a commutation possibility to be considered in a death-penalty trial. The Court ruled that the possibility of commutation—though remote; indeed, very remote—was relevant to the issue of the defendant’s future dangerousness. The Court sidestepped the concern that this remote possibility might warp the jury’s decision-making process by emphasizing that the instruction to the jury to consider possible commutation was accurate and the defendant had the opportunity to argue the remoteness of this possibility. Thus, in a broader sense, *California v. Ramos* represents one instance where the Court places enormous—too much?—faith in the adversarial process to reject a constitutional challenge on the basis of the prospect of unreliable capital sentencing. For a contrasting instance where the Court exhibits a profound distrust of the adversarial process, consider its decision in *Roper v. Simmons*, where it constitutionally bans executing juvenile offenders in part because the adversarial process is ill-equipped to decide life or death for juvenile offenders.

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References and Further Reading

California v. Ramos, 463 U.S. 992 (1983).

Carter, Linda E. and Ellen Kreitzberg, *Understanding Capital Punishment Law*. (2004)

See also **Capital Punishment; Capital Punishment and the Equal Protection Clause Cases; Capital Punishment: Due Process Limits; Capital Punishment: History and Politics; Capital Punishment: Eighth Amendment Limits**

CALIFORNIA v. TROMBETTA, 467 U.S. 479 (1984)

In *Trombetta*, the Supreme Court held that the Fourteenth Amendment due process clause does not require the government to preserve evidence that could potentially be useful to a criminal defendant.

Trombetta was one of several defendants charged with drunk driving after failing breath tests on California highways. Each defendant unsuccessfully moved to suppress the test results, because the police did not preserve the breath samples so that the defendants could attempt to prove the results were inaccurate. However, the state appellate court ruled that the failure to preserve the breath samples violated the defendants' due process rights.

The U. S. Supreme Court unanimously reversed. The Court explained that although the state has a duty under *Brady v. Maryland* to preserve and disclose exculpatory evidence, that duty does not generally extend to evidence that might or might not be exculpatory. The Court concluded that the destruction of the breath samples did not violate the defendants' rights, because it was very unlikely that retesting of the evidence would have benefited the defendants and because there was no indication that the police had destroyed the samples in a bad faith effort to hamper their defenses.

Trombetta thus made clear that the government is not always required to preserve potentially exculpatory evidence. Four years later, in *Arizona v. Youngblood*, the Court extended *Trombetta* to hold that the police may always destroy potentially exculpatory evidence, including evidence that could conclusively exonerate the defendant, so long as they do not act in bad faith.

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References and Further Reading

Imwinkelried, Edwin, and Norman Garland. *Exculpatory Evidence*. 2d ed. Michie, 1996.
 Stacy, Tom, *The Search for Truth in Constitutional Criminal Procedure*, Columbia Law Review 91 (1991): 1369.
 Whitaker, Barbara. "DNA Frees Inmate Years After Justices Rejected Plea." *New York Times*, August 11, 2000.

Cases and Statutes Cited

Arizona v. Youngblood, 488 U.S. 51 (1988)
Brady v. Maryland, 373 U.S. 83 (1963)

See also **Arizona v. Youngblood, 488 U.S. 51 (1988); Brady v. Maryland, 373 U.S. 83 (1963); Due Process; Fourteenth Amendment**

CAMARA v. MUNICIPAL COURT OF THE CITY AND COUNTY OF SAN FRANCISCO, 387 U.S. 523 (1967)

The Fourth Amendment's requirement that the government obtain a warrant before any search or seizure of private property is well established for criminal investigations. Whether a warrant was required when the government conducts a health and safety inspection, an administrative investigation, however, was not established until *Camara v. Municipal Court of the City and County of San Francisco*.

In 1963, a San Francisco public health inspector attempted to search the ground floor of an apartment building after learning that the lessee might be violating the building's occupancy permit. The inspector did not have a warrant, and the lessee refused to consent on three separate occasions. The lessee's refusal to allow the inspection resulted in the lessee's criminal prosecution under San Francisco's housing codes.

The Supreme Court held that administrative health and safety inspections conducted without a search warrant violated the Fourth Amendment. The Court reasoned that a search of private property without proper consent is unreasonable, except in narrowly defined situations, unless it has been authorized by a valid search warrant. Even if the inspections are not conducted to discover criminal activity, administrative inspections made pursuant to fire, health, and housing codes threaten interests of the property owner protected by the Fourth Amendment.

Although the Court held that a warrant is required to conduct administrative searches absent consent, the Court stated that the warrant for such a search need not be based on suspicion that any particular dwelling is in violation of health and safety codes. Rather, it is reasonable for the government to conduct periodic inspections of an entire area to protect the public's health and safety. Moreover, the Court's holding does not prevent prompt inspections of dwellings without a warrant in emergency situations.

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References and Further Reading

Sunby, Scott E., *A Return to Fourth Amendment Basics: Undoing the Mischief of Camara and Terry*, University of Minnesota Law Review 72 (1988): 383–447.

Cases and Statutes Cited

Camara v. Municipal Court of the City and County of San Francisco, 387 U.S. 523 (1967)

See also **Administrative Searches and Seizures; Probable Cause; Search (General Definition); Search Warrants; Warrantless Searches**

CAMERAS IN THE COURTROOM

The phrase “cameras in the courtroom” refers to the presence of news media cameras, both still and television cameras, inside courtrooms recording trial proceedings for the public. Since the early days of the American courts, members of the news media have been present in courtrooms, documenting proceedings for their audience. Before the arrival of cameras, reporters relied on pen and paper and courtroom sketch artists to relay details of trial proceedings to the public. In the television age, the simple installation of a small video camera in an unobtrusive location in a courtroom has allowed a much larger public to view the activities inside a courtroom. Trials are no longer accessible to only those who can fit into often-cramped courtrooms, but thousands, if not millions, turn on a television set to watch a trial. The most famous case in which cameras in the courtroom played a pivotal role was the murder trial of football star O. J. Simpson. Yet the overwhelming presence of the news media and the day-to-day coverage of the trial created a circus-like atmosphere and raised concerns over whether cameras should be permitted to record trial proceedings.

At the heart of the debate over cameras in the courtroom are the two constitutionally guaranteed rights: a defendant’s Sixth Amendment right to a fair trial and the news media’s First Amendment right of a free press. Those opposed to allowing news media cameras inside courtrooms argue that cameras would cause lawyers to overdramatize their arguments, scare away potential witnesses, and disrupt the solemn conduct of a trial, all of which could be detrimental to the defendant. Proponents of cameras in the courtroom argue that the public should have direct access to how the American judicial system really works. Television, proponents claim, is the best tool for allowing the public into the often shadowy world of the courts without having to attend a trial or having to sit on a jury.

Two cases directly addressing the constitutionality of allowing news media cameras inside courtrooms were brought to the U. S. Supreme Court. The case of *Estes v. Texas* (1964) involved the swindling conviction of Texas businessman Billy Sol Estes. Estes appealed his conviction on the grounds that the presence of the news media cameras infringed on his right to a fair trial. The Court ruled that the defendant’s right to a public trial did not mean that the news media had a right to bring in their cameras to record the trial. The Court’s decision in *Estes* was amended in the case of *Chandler v. Florida* (1981). The Court examined Florida’s rules regarding cameras in the courtroom and concluded that there was not enough evidence to prove that the presence of news media cameras violated the due process of the defendants.

Currently, cameras are not permitted in federal courtrooms, although there have been attempts by the news media to gain access. State courts, however, are more receptive to the idea of cameras in the courtroom, although judges are very cautious in what they will allow the news media to cover.

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References and Further Reading

Freedman, Warren. *Press and Media Access to the Criminal Courtroom*. New York: Quorum Books, 1988.

Cases and Statutes Cited

Estes v. Texas, 381 U.S. 532 (1964)

Chandler et al v. Florida 449 U.S. 560 (1981)

See also **Estes, Billy Sol; Free Press/Fair Trial**

CAMPAIGN FINANCE REFORM, NO. 1021

A California politician once famously observed: “Money is the Mother’s Milk of Politics.” For at least a century, the Congress has tried to legislate against this dictum. Since 1907, with the passage of the Tillman Act, which banned corporations from making direct contributions to political parties, Congress has enacted six major laws designed to regulate the use of money in politics. The Federal Corrupt Practices Act of 1925 provided for disclosure of certain federal campaign receipts and expenditures. The Taft–Hartley Act of 1947 subjected labor unions to the kinds of restrictions on campaign giving and spending that covered corporations. Each of these laws was enacted against a background of claimed corruption of the political process by those groups and individuals who wielded financial power.

It was widely believed, however, that these laws were not effective in achieving their objectives of deterring corruption and undue influence. They were narrowed by judicial interpretation and avoided by clever politicians. Indeed, President Lyndon B. Johnson once observed that federal campaign finance law was “more loophole than law.”

The fourth major push for reform began building with the high-spending, media-focused presidential campaigns of the 1960s. A well-known book, *The Selling of the President*, fueled fears that politicians were being marketed like toothpaste and that democracy was being sold to the highest bidder. These concerns culminated in the next major piece of campaign finance reform legislation, the Federal Election Campaign Act of 1971. Enacted before Watergate, the Act sought to limit the amount of media advertising that federal candidates could do and vastly expand and improve campaign finance reporting and disclosure to close the loopholes that Lyndon Johnson had noted.

But civil liberties problems soon surfaced as the government tried to use these new provisions against nonpartisan criticism of government officials. If campaign finance laws could be used to prevent the publication of advertisements criticizing the government or subject the speakers to intrusive government regulation, that would raise enormous First Amendment problems of freedom of speech and association. Recognizing these problems, some courts gave a narrow scope to the Federal Election Campaign Act provisions, excluding their application to nonpartisan organizations. (*United States v. National Committee for Impeachment*; *American Civil Liberties Union v. Jennings*).

That sensible resolution of the clash between free speech and campaign finance regulation might have solved the problem had it not been for the Watergate scandals of the early 1970s, partially involving payments for wrongdoing out of President Nixon’s reelection campaign funds. Congress was stampeded into enacting the Federal Election Campaign Act Amendments of 1974, a wide-ranging statute that imposed new and Draconian restrictions and penalties on campaign finance activity. This was the fifth major campaign finance enactment of the twentieth century.

It must be remembered, of course, that such activity almost invariably involves the exercise of First Amendment rights: speaking, associating, supporting candidates, electioneering, getting out the vote. Nonetheless, Congress decreed limits on how much any candidate could spend on seeking election, on how much candidates could contribute of their own funds to their own campaigns, how much their supporters could contribute to them, and, most alarmingly, severely limiting (to \$1,000 per year) how much independent groups and individuals could spend to

speak about candidates during a campaign season. That latter provision effectively made it a crime to run more than a minuscule ad in a newspaper criticizing the President of the United States. The amendments also tightened the disclosure requirements, so that as little as a \$15 contribution to any political party—even controversial ones—might be reported to the government. The one positive note was that the new law did provide, for the first time, for public financing of primary and general election campaigns at the Presidential level. Placed in charge of these onerous new speech restrictions was a new federal agency that was under the control and domination of the Congress. Substantial criminal penalties were prescribed for violation of these new campaign finance provisions.

There was an immediate challenge to this far-reaching new law by a coalition of “strange bedfellows,” including liberal Senator Eugene McCarthy, conservative Senator James Buckley, the American Conservative Union and the New York Civil Liberties Union (*Buckley v. Valeo*). All these challengers claimed that restrictions on political campaign funding were restrictions on political campaign speech and derogated the First Amendment values of freedom of speech and association. The Court agreed in part. It struck down all limitations on campaign expenditures, reasoning that such restraints cut to the core of First Amendment values while not advancing the valid concerns with political corruption. (The Court also rejected the concept that expenditure limits could be justified on the ground that campaigns had become too “extravagant” or that government could level down the free speech of all citizens.) It also ruled that only those expenditures for activities or advertisements that “expressly advocated” the election or defeat of specified candidates could be subject to any regulation whatsoever. Mere criticism of elected officials, no matter how strong, was immune from regulation.

On the other hand, the Court upheld limitations on contributions to candidates from others (the Court held that candidates could contribute as much as they could to their own campaigns.) The rationale was that large contributions, even though fully disclosed to the public, posed the potential for corruption or the appearance of corruption and could be sharply limited (to \$1,000). Likewise, routine disclosure of campaign contributors of as little as \$101 could be demanded, though those giving to controversial minor parties might be exempt from such public revelation, a point confirmed in a later case (*Brown v. Socialist Workers '74 Campaign Committee*). The provision of public financing for Presidential candidates was upheld against the challenge that it

was incestuous for the government to be subsidizing politics and that the particular scheme enacted favored the two major political parties, the Republicans and the Democrats, to the detriment of new, independent, and third parties and their candidates.

Finally, the appointment of the monitoring agency was found to violate separation of powers principles, because the primary designations were made by the Congress, not the President. (A new and properly constituted *Federal Election Commission* was installed shortly thereafter).

For the next twenty-five years, the landmark *Buckley* decision would provide the ground rules for resolving the clash between campaign finance restrictions and First Amendment rights. But two developments of the 1980s and 1990s would set the stage for the sixth major Congressional enactment in this area. They were the raising and spending of “soft money” by political parties for a wide range of electoral activities as long as they did not directly back their chosen candidates and the running of broadcast ads that strongly condemned or praised specific candidates while steering clear of “expressly advocating” any candidate’s election or defeat. Many believed that both developments—soft money and issue advocacy—were end runs around the contribution limitations that the Court had consistently upheld, because they involved large contributions from individuals, unions, and corporations, which would be illegal if given directly to candidates themselves or spent for “express advocacy.”

These concerns led to the enactment of The Bipartisan Campaign Reform Act of 2002, widely known as the McCain–Feingold law. That act outlawed “soft money” contributions to political parties and broadcast advertising by corporations or unions that even so much as mentioned the name of a federal candidate. Another coalition of candidates and cause organizations challenged these new restrictions as well, led by Republican Senator Mitch McConnell and including groups as diverse as the American Civil Liberties Union, the National Rifle Association, the AFL-CIO, and the Republican National Committee (*McConnell v. Federal Election Commission*). In another landmark ruling, a closely divided Supreme Court upheld this major feature of the law. The Court majority believed that the large soft money contributions to political parties were an effort to skirt the restrictions on contributions to candidates and carried the same potential for corruption or the appearance of corruption. The ban on broadcasting was upheld on the ground that the advertisements were really political, despite the lack of “express advocacy,” and could be banned if they were sponsored by corporations or unions or

even nonprofit membership organizations like the ACLU.

Thus, the pendulum has swung back to permit a greater regulation of campaign financing and, therefore, a greater regulation of First Amendment rights.

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References and Further Reading

- Association of the Bar of the City of New York. *Dollars and Democracy: A Blueprint for Campaign Finance Reform*, 2000.
- Mutch, Robert E. *Campaigns, Congress and the Courts: The Making of Federal Campaign Finance Law*, 1988.
- Smith, Bradley A. *Unfree Speech: The Folly of Campaign Finance Reform*, 2000.

Cases and Statutes Cited

- Buckley v. Valeo*, 424 U.S. 1 (1976)
- McConnell v. Federal Election Commission*, 124 S. Ct. 619 (2003)

CAMPUS HATE SPEECH CODES

During the 1980s and early 1990s, many colleges and universities responded to incidents of racial and sexual harassment by adopting campus hate speech codes. In 1994, Arati Korwar reported that more than 350 public colleges and universities had adopted some form of a hate speech code. Proponents of the codes contended that their goal, which was to reduce hateful, prejudiced speech, was legitimate, for such speech should receive little or no First Amendment protection. The courts, however, have repeatedly struck down campus hate speech codes on the First Amendment grounds of vagueness, overbreadth, and their tendency to permit content-based discrimination with respect to the topics that may be discussed or the views that may be expressed on campus.

Hate speech codes tend to be enacted in response to pressure from campus groups that become upset about insensitive or offensive student conduct, such as the use of racial epithets, verbally or in writing, or the perpetuation of ethnic and racial stereotypes, often in the context of fraternity functions. Such was the case at the University of Michigan, which adopted a hate speech code after a group of students had become upset over the use of racial epithets on campus, and at the University of Wisconsin, which adopted a hate speech code with a plan called “Design for Diversity” in response to several incidents including two instances of fraternity functions involving racial and ethnic stereotyping.

Using the Supreme Court's "fighting words" doctrine as a springboard, which holds that words that are likely to incite an immediate violent response are not entitled to First Amendment protection, campus hate speech codes have attempted to regulate expressions intended to stigmatize or demean an individual on the basis of the person's race, gender, handicap, religion, national or ethnic origin, age, sexual orientation, marital status, etc. The University of Michigan's policy, for example, prohibited "[a]ny behavior, verbal or physical, that stigmatizes or victimizes an individual on the basis of race, ethnicity, religion, sex, sexual orientation, creed . . . and that . . . [c]reates an intimidating, hostile, or demeaning environment for educational pursuits, employment or participation in University sponsored extra-curricular activities."

When challenged, in *Doe v. University of Michigan* (1989), the court found the University of Michigan's policy to be overbroad, in that it might be applied to restrict speech when the speech in question is merely unseemly or offensive. The court also found the policy to be unconstitutionally vague, because the limits of the scope and reach of the policy were too difficult to discern. In *UWM Post v. Board of Regents of University of Wisconsin System* (1991), the court struck down the University of Wisconsin's quite similar policy on the grounds that the hate speech code permitted the university to engage in content-based discrimination with respect to the types of speech that it would permit on campus, a form of "governmental thought control." These results, combined with the Supreme Court's ruling in *R. A. V. v. City of St. Paul* (1992), which struck down a hate-crime ordinance on First Amendment grounds, created a formidable barrier for hate speech codes that in a succession of later cases involving other universities has not been cleared.

In an effort to address the underlying problems caused by the types of speech in question, such as racial or sexual harassment, without running afoul of First Amendment protections, some colleges and universities have more recently taken the approach recommended by Arthur Coleman and Jonathan Alger in their article, "Beyond Speech Codes: Harmonizing Rights of Free Speech and Freedom from Discrimination on University Campuses." Rather than addressing these underlying problems by prohibiting certain forms of expression, colleges and universities can take the alternative approach of prohibiting the discriminatory harassment itself, even though speech may be involved in the harassing activity. These policies follow the applicable antidiscrimination statutes and standards as closely as possible and avoid any attempt to proscribe particular forms of expression

apart from the context of the situation in which such expressions may fit the legal definitions of unlawful harassing activity.

In the higher education context, a violation of Title VI or Title IX occurs if a college or university that receives federal funds fails to provide a non-discriminatory environment that is conducive to learning. Determining whether a violation has occurred depends on whether the conduct complained of, which may or may not involve speech, is sufficiently "severe, pervasive or persistent" that the victim cannot fully benefit from the educational opportunities provided by the institution. Courts use a "totality of the circumstances" test to assess whether the conduct is sufficiently "severe, pervasive or persistent" standard such that a similarly situated, "reasonable" (not hypersensitive) student would be significantly and adversely impacted in his or her ability to benefit from or participate in educational programs or activities. These protections do not, however, go so far as to entitle a student to complete comfort or agreement with the expressions and opinions encountered in an educational environment. There is a range of conduct that students might find offensive but that is not sufficiently "severe, pervasive or persistent" as to interfere with a "reasonable" student's educational experience.

In creating alternatives to campus hate speech codes, the First Amendment concern to be avoided is that the same words, phrases, or symbols that might be prohibited by a hate speech code could, in an appropriate setting, be important to use to advance the learning process. For example, a hate speech code that prohibits the use of racial epithets may interfere with the study of important literature such as Mark Twain's *Huckleberry Finn*, which uses a particular racial epithet more than 200 times. Study of such literature might even help to address problems of racial bias by making students more aware of the forms and harms of racism if handled with sensitivity and care.

A majority of the Supreme Court recognized in *R. A. V.* that a hostile environment discrimination claim could survive a First Amendment challenge under the standards that the Court set forth in that case. A college or university policy that seeks to prohibit expression animated by racial prejudice or sexist bias as forms of discriminatory harassment will still need to provide enough specific guidance for individuals to be able to understand the types of behavior that are prohibited under the policy to withstand First Amendment-based overbreadth and vagueness challenges.

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References and Further Reading

- Coleman, Arthur L., and Jonathan R. Alger, *Beyond Speech Codes: Harmonizing Rights of Free Speech and Freedom from Discrimination on University Campuses*, Journal of College and University Law 23 (1996): 91–132.
- Korwar, Arati R. *War of Words: Speech Codes at Public Colleges and Universities*. Nashville, TN: Freedom Forum First Amendment Center, 1994.
- Shiell, Timothy C. *Campus Hate Speech on Trial*. Lawrence, KS: University Press of Kansas, 2000.

Cases and Statutes Cited

- Doe v. University of Michigan*, 721 F.Supp. 852 (E.D. Mich. 1989)
- R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992)
- UWM Post v. Board of Regents of University of Wisconsin System*, 774 F.Supp. 1163 (E.D. Wis. 1991)

See also **Fighting Words and Free Speech**

CANTWELL v. CONNECTICUT, 310 U.S. 296 (1940)

Jehovah's Witnesses believe proselytizing is an essential part of their faith and, therefore, a religious obligation. As such, they preach on street corners, sell and/or distribute literature about their faith, and often engage in discussions with individuals about what the Witnesses believe. All of these are "activities," and, under the old belief/action dichotomy enunciated by the Court in *Reynolds v. United States* (1879), would not be protected under the First Amendment and could thus be regulated by the states. In a series of cases beginning in the late 1930s, however, the Supreme Court gradually came to the position that the line between belief and action could not always be clearly drawn, especially when certain actions flowed ineluctably from the tenets of the faith.

The Court first brought the First Amendment to bear in *Lowell v. City of Griffin* (1938), when it struck down a municipal ordinance requiring groups to get a permit before handing out pamphlets. That decision, however, had been based on the speech clause; in *Cantwell*, the Court for the first time in the modern era began exploring the meaning of the First Amendment's free exercise clause.

Newton Cantwell had gone door-to-door in overwhelmingly Catholic neighborhoods asking people if they would listen to a recording or receive one of the Witnesses' pamphlets. The materials all included attacks on Catholicism. When the residents objected, police arrested Cantwell, and he was subsequently convicted of failure to secure the necessary permit

for door-to-door solicitation from the secretary of public welfare.

The Supreme Court unanimously overturned the conviction, and the majority opinion, by Justice Owen Roberts, is notable for two reasons. First, it relied on the Free Exercise Clause of the First Amendment rather than the Speech Clause. The state had the power to license solicitors, Roberts held, but the arbitrary power lodged in the secretary of public welfare constituted an impermissible form of censorship over religion. The Court would still have trouble deciding whether religious activities came under the protection of the Speech Clause or the Free Exercise Clause (see, for example, Justice Jackson's opinion in *West Virginia Board of Education v. Barnette* [1943]), but in *Cantwell* at last began to move beyond the simplistic action/belief dichotomy that had been the untouched basis of Free Exercise interpretation since *Reynolds*.

In another important aspect of his opinion, Roberts set out what would become a universal rule of First Amendment jurisprudence, namely, that although a state may regulate the time, place, and manner in which groups hold public meetings or engage in solicitation, it may not ban them altogether or discriminate on the basis of the content of the message.

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References and Further Reading

- Peters, Shawn Francis. *Judging Jehovah's Witnesses: Religious Persecution and the Dawn of the Rights Revolution*. Lawrence, KS: University Press of Kansas, 2000.
- Waite, Edward F., *The Debt of Constitutional Law to Jehovah's Witnesses*, Minnesota Law Review 28 (1944): 209.

Cases and Statutes Cited

- Reynolds v. United States*, 98 U.S. 145 (1879)
- Lowell v. City of Griffin*, 303 U.S. 444 (1938)
- West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943)

CAPITAL PUNISHMENT

Introduction and Early Years

Capital punishment is a punishment option of the federal government in more than two thirds of states in the United States. The method of execution overwhelmingly used is lethal injection, although various states also allow execution by the electric chair, firing squad, gas chamber, and hanging.

Proponents of the death penalty argue that the death penalty serves important functions of deterrence and retribution. Those who argue for abolition of the death penalty, however, argue that the risk of executing the innocent is too great, there is no evidence the death penalty deters crime more than life imprisonment, and complex capital cases are significantly more expensive than life imprisonment cases. Furthermore, abolitionists argue that the death penalty is applied unfairly and arbitrarily to the poor and to people of color. Both sides also make arguments that focus on religious and moral foundations.

Historically and internationally, the death penalty has been used as a punishment for a wide variety of crimes. In North America around 1700, the colonists used the death penalty instead of prison as the main punishment for a range of serious crimes. With the adoption of prison as the normal punishment in the late eighteenth century, the death penalty's use became more limited. Since the late 1970s, capital punishment has only been used in the United States in murder cases.

Although the United States retains capital punishment while much of the world has abandoned the punishment, the United States was initially one of the leaders in the death penalty abolition movement. The Territory of Michigan voted to abolish capital punishment for all crimes except treason in a law that took effect March 1, 1847, more than twenty years before Portugal became the first European country to abolish the death penalty. During the next century, other state legislatures dealt with the issue of whether to abolish capital punishment, but the U. S. Supreme Court only examined the death penalty in a few cases, such as *Wilkerson v. Utah*, where the Court upheld execution by firing squad, and *In re Kemmler*, where the Court upheld execution by electrocution.

Capital Punishment Developments in the Supreme Court

In the 1960s and 1970s, however, the courts began to take a closer look at capital punishment, and organizations like the NAACP Legal Defense and Education Fund organized strategies to attack the punishment on constitutional grounds. In 1971 in *McGautha v. California*, the Supreme Court rejected a constitutional challenge to the procedures used to impose the death penalty.

However, the following year, the Supreme Court held in *Furman v. Georgia* that the death penalty statutes in use at the time violated the Eighth and Fourteenth Amendments of the U.S. Constitution,

in effect invalidating the death penalty's use in the United States. There was no clear majority on the rationale for the result in *Furman*, but several Justices reasoned that the procedures used in capital cases at the time gave too much discretion to jurors in deciding whether to impose the death penalty, so that the sentences were arbitrary and often resulted in racial discrimination. Although Justice William J. Brennan, Jr. concluded that the death penalty was degrading to human dignity and Justice Thurgood Marshall also agreed that the death penalty was unconstitutional per se, other Justices' written opinions left open the issue of whether the death penalty violates the constitution in all circumstances.

In 1976, the Court decided several cases that upheld the use of the death penalty and, along with *Furman*, laid the foundation for the modern use of the death penalty in the United States. In *Gregg v. Georgia*, the Court examined new capital punishment statutes that limited the discretion of jurors, and a Plurality held that these statutes did not violate the Eighth and Fourteenth Amendments. The Plurality, in an opinion written by Justice Potter Stewart, concluded that a statute with a list of factors for jurors to consider in sentencing provided "clear and objective standards" and gave adequate guidance to the sentencer. On the same day, the Court upheld other states' guided sentencing statutes in *Jurek v. Texas* and *Proffitt v. Florida*. Subsequent cases, like *Godfrey v. Georgia*, clarified that capital sentencing procedures must provide a way to distinguish the few cases that deserve the death penalty from those cases that do not.

At the same time as *Gregg*, the Court struck down death penalty statutes that automatically imposed the death penalty for certain crimes. In *Woodson v. North Carolina*, the Plurality concluded that in death penalty cases the Eighth Amendment requires consideration of the record and character of the defendant and the circumstances of the crime. Individualized sentencing in capital cases is required, because there is an increased need for reliability because the death penalty is significantly different from all other punishments. The Supreme Court further emphasized the concern about individualized sentencing in *Lockett v. Ohio*, where Ohio's death penalty statute was struck down because it limited a capital jury from being able to consider factors presented to mitigate the sentence.

Thus, two important principles emerge from the Supreme Court's Eighth Amendment capital punishment procedural jurisprudence: (1) sentencing juries must be given clear and objective standards to determine who is eligible for the death penalty and to narrow the group of those executed from the group of all murderers; and (2) the sentencing jury must be allowed to consider mitigating factors that include all

aspects of a defendant's character and record, as well as the circumstances of the offense. In 1994, Justice Harry A. Blackmun, who had voted to uphold the death penalty in *Gregg*, argued in dissent in *Callins v. Collins* that these two principles are incompatible and that the death penalty cannot be imposed fairly. Justice Blackmun concluded that "the death penalty experiment has failed" and then dissented from every case affirming a death sentence until retiring later that term.

In 1987 in another significant capital case, *McCleskey v. Kemp*, the Supreme Court considered evidence that the race of the defendant and the victim affects the determination of who receives the death penalty. The Court assumed the evidence was correct, including the statistics that showed that a defendant who kills a white victim is four times more likely to get the death penalty than a defendant who kills a black victim, but held that such racial disparities do not violate the constitution. Justice Lewis F. Powell, who wrote the majority opinion in *McCleskey*, noted after he retired that he regretted upholding the death penalty.

The Modern Death Penalty

Since the 1990s, there has been a growing concern about the use of the death penalty in the United States. In some recent decisions, the Supreme Court has narrowed the use of the death penalty. In the early twenty-first century, the Court reversed prior decisions in two significant cases. In *Atkins v. Virginia*, the Court held that it violates the constitution to execute mentally retarded individuals, and in *Roper v. Simmons* it held that it is unconstitutional to execute juveniles who commit their crimes while younger than eighteen years of age. In both of those cases, the Court reasoned that the Eighth Amendment required it to consider "evolving standards of decency" in American society, including recent political and public opinion changes, resulting in the Court reversing prior decisions.

One reason for the growing concern about the use of the death penalty has been the discovery that since *Furman*, more than 100 prisoners have been exonerated and released from death row. Developments in technology and DNA evidence have contributed to the new discoveries of innocence. Although some members of the Supreme Court stated in *Herrera v. Collins* in 1993 that a claim of innocence might not be the basis of a constitutional claim in itself, concerns about innocence have caused judges, legislators, and jurors to question the value of the death

penalty. In 2003, Governor George Ryan of Illinois commuted the sentences of everyone on death row in that state because of recent discoveries of innocent people on death row. In 2000, he had imposed a moratorium on executions in that state for the same reason.

Although Court challenges since *Furman* have been unsuccessful in eliminating the death penalty in the United States, more than half of the countries in the world have abolished the death penalty, at least in practice, and the long-range trend around the world is to abolish the death penalty. For example, since the United States reinstated the death penalty in 1976, more than seventy countries have abolished the death penalty. During that time in the United States, however, there have been close to 1,000 executions and there are more than 3,000 men and women on death rows across the United States. Still, as noted previously, concerns about the use of the death penalty and the unfairness of the system in the United States have continued to grow. The death penalty is used significantly less than it was 100 years ago, leaving the question for the future of whether 100 years from now capital punishment will be used at all.

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References and Further Reading

- Acker, James, Robert M. Bohm, and Charles S. Lanier, eds. *America's Experiment with Capital Punishment*, 2nd ed. Durham, NC: Carolina Academic Press, 2003.
- Death Penalty Information Center web site, <http://www.deathpenaltyinfo.org/>.
- Kirchmeier, Jeffrey L. "Aggravating and Mitigating Factors: The Paradox of Today's Arbitrary and Mandatory Capital Punishment Scheme." *William & Mary Bill of Rights Journal* 6 (1998): 2:345-459.
- , *Another Place Beyond Here: the Death Penalty Moratorium Movement in the United States*, Colorado Law Review 73 (2002): 1:1-116 (article available at <http://www.colorado.edu/law/lawreview/issues/summaries/73-1.htm>).
- Zimring, Franklin E., and Gordon Hawkins. *Capital Punishment and the American Agenda*. New York, NY: Cambridge University Press, 1989.

Cases and Statutes Cited

- Atkins v. Virginia*, 536 U.S. 304 (2002)
- Callins v. Collins*, 510 U.S. 1141 (1994)
- Furman v. Georgia*, 408 U.S. 238 (1972)
- Gregg v. Georgia*, 428 U.S. 153 (1976)
- Herrera v. Collins*, 506 U.S. 390 (1993)
- In re Kemmler*, 136 U.S. 436 (1890)
- Jurek v. Texas*, 428 U.S. 262 (1976)
- Lockett v. Ohio*, 438 U.S. 586 (1978)
- McCleskey v. Kemp*, 481 U.S. 279 (1987)
- McGautha v. California*, 402 U.S. 183, 196 (1971)
- Proffitt v. Florida*, 428 U.S. 242 (1976)

Roper v. Simmons, 125 S. Ct. 1183 (2005)
Wilkerson v. Utah, 99 U.S. 130 (1879)
Woodson v. North Carolina, 428 U.S. 280, 305 (1976)

See also Capital Punishment and the Equal Protection Clause Cases; Capital Punishment and Race Discrimination; Capital Punishment and Resentencing; Capital Punishment and the Right of Appeal; Capital Punishment and Sentencing; Capital Punishment: Proportionality; Capital Punishment Held Not Cruel & Unusual Punishment Under Certain Guidelines; Capital Punishment for Felony Murder; Capital Punishment Reversed; Capital Punishment: 8th Amendment Limits; Capital Punishment: Antiterrorism and Effective Death Penalty Act of 1996; Capital Punishment: Due Process Limits; Capital Punishment: Execution of Innocents; Capital Punishment: History and Politics; Capital Punishment: Lynching; Capital Punishment: Methods of Execution

CAPITAL PUNISHMENT AND RACE DISCRIMINATION

Race detrimentally affects the administration of capital punishment in the United States. The origins of this situation are found in the former practice of chattel slavery. During this time, people of African descent had a greater risk of being sentenced to death. This risk increased if the victim was Caucasian. For example, slaves were automatically sentenced to death if they were convicted of killing a Caucasian. Conversely, since slaves were not considered human beings, Caucasians could murder blacks with impunity.

After the Civil War, the U. S. Supreme Court ("the Court") held in *Plessy v. Ferguson* that the institutionalized racism doctrine of "separate but equal" did not violate the Equal Protection of Law. The Court's endorsement of this doctrine facilitated the continued viability of these racial disparities in the administration of capital punishment. This was especially evident if a man of African descent was convicted of raping a Caucasian woman. For example, in *Furman v. Georgia*, Justice Marshall notes that between 1930 and 1972, "455 persons, including 48 whites and 405 Negroes, were executed for rape" *Furman v. Georgia*, 408 U.S. 238, 364 and note 151 (Marshall, J. concurring).

These concerns are aggravated by the impact race has on the selection of a capital jury. Since slaves were property, they were not afforded the same criminal procedural rights, including the right to trial by jury, as Caucasians. After slavery's demise, many states enacted laws to continue this exclusionary practice. Consequently, the fate of capital defendants of African descent was historically decided by all white

juries. In 1880, the Court held in *Strauder v. West Virginia* that using race to bar someone from serving on a jury violated the Equal Protection of Law. Nonetheless, this admonition was circumvented by prosecutors who exercised their peremptory challenges in a racially discriminatory manner. This was accepted practice until 1965, when the Court decided to prohibit the purposeful racially discriminatory use of peremptory challenges in *Swain v. Alabama*. Defendants alleging a violation had to prove that the prosecutor actually purposefully exercised the peremptory challenge at issue to strike the potential juror because of the juror's race. States were able to continue exercising peremptory challenges in a manner contrary to the Court's rule, because it was difficult for defendants to satisfy this burden of proof.

In the Court's 1972 landmark opinion in *Furman v. Georgia*, several Justices acknowledged that race affects the administration of capital punishment. In 1986, in *Batson v. Kentucky*, the Court attempted to take remedial action by relaxing the burden of proof its earlier decision in *Swain* imposed on a defendant. Accordingly, the Court concluded that the burden of proof could be satisfied if the defendant could establish an inference that the prosecutor exercised a peremptory challenge in a purposefully racially discriminatory manner. The Court permitted the state to refute the inference by articulating a nonpretextual race neutral explanation for the challenge. The next year the Court rendered an opinion in *McCleskey v. Kemp*, a case presenting many of the issues of racial disparity identified and addressed in the Baldus Study. The Baldus Study's findings confirmed the continued presence of the bias historically experienced by people of African descent: The murderers of Caucasians remain more likely to be sentenced to death than those who murdered people of African descent. This was especially the case if the offender was of African descent. Although the Court declined to grant the defendant relief, it did not contradict the validity of the Baldus Study's findings. Subsequent studies examining the interaction between race and the death penalty in other jurisdictions reached conclusions similar to those made in the Baldus Study.

Execution statistics collected from 1976 when the Court's decision in *Gregg v. Georgia* lifted the legal moratorium on the use of the death penalty in the United States reinforce the validity of these findings. Compared with Caucasians, people of African descent comprise a significantly smaller percentage of the population in the United States. In contrast, they are overrepresented on this nation's death rows, because there the number of people of African descent almost equals the number of Caucasians. Two other statistics reveal that the United States's history of

racial discrimination continues to adversely affect the administration of capital punishment. First, the overwhelming majority of the victims of the people executed since 1976 were Caucasian. Similarly, the same disparity is found when the number of people of African descent executed for killing Caucasians is compared with the few number of Caucasians executed for killing people of African descent.

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References and Further Reading

- Baldus, David C., Charles Pulaski, and George Woodworth, *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, *The Journal of Criminal Law & Criminology* 74 (1983): 3:661–753.
- Bedau, Hugo Adam, ed. *The Death Penalty in America: Current Controversies*. New York: Oxford University Press, 1997.
- Blankenship, Michael B., and Kristie R. Blevins, *Inequalities in Capital Punishment in Tennessee Based on Race: An Analytical Study of Aggravating and Mitigating Factors in Death Penalty Cases*, *University of Memphis Law Review* 31 (2001): 4:828–859.
- Flcury-Steiner, Benjamin. *Jurors' Stories of Death: How America's Death Penalty Invests in Inequality*. Ann Arbor: University of Michigan Press, 2004.
- Issac, Unah, and Jack Boger. *Race and the Death Penalty in North Carolina: an Empirical Analysis, 1993–1997*. Raleigh, NC: Common Sense Foundation, 2001.
- Lyon, Andrea D., *Naming the Dragon: Litigating Race Issues During a Death Penalty Trial*, *DePaul Law Review* 53 (2004): 4:1647–1661.
- McNally, Kevin, *Race to Execution: Race and the Federal Death Penalty*, *DePaul Law Review* 53 (2004): 4:1615–1645.
- Radelet, Michael L. "Executions of Whites For Crimes Against Blacks: Exceptions to the Rule?" *The Sociological Quarterly* 30, no. 4.(1989): 529–544.

Cases and Statutes Cited

- Batson v. Kentucky*, 476 U.S. 79 (1986)
- Furman v. Georgia*, 408 U.S. 238 (1972)
- McCleskey v. Kemp*, 481 U.S. 279 (1987)
- Plessy v. Ferguson*, 163 U.S. 537 (1896)
- Strauder v. West Virginia*, 100 U.S. 303 (1880)
- Swain v. Alabama*, 380 U.S. 202 (1965)

See also *Brown v. Board of Education*, 347 U.S. 483 (1954); *Capital Punishment*; *Capital Punishment and the Equal Protection Clause Cases*; *Capital Punishment: Lynching*; *Coker v. Georgia*, 433 U.S. 584 (1977); *Discriminatory Prosecution*; *Dred Scott v. Sandford*, 60 U.S. 393 (1857); *Emancipation Proclamation* (1863); *Jury Trials and Race*; *Loving v. Virginia*, 388 U.S. 1 (1967); *Miscegenation Laws*; *Race and Criminal Justice*; *Scottsboro Trials*; *Segregation*; *Slavery and Civil Liberties*; *Thirteenth Amendment*

CAPITAL PUNISHMENT AND RESENTENCING

Sometimes a defendant facing the death penalty once will have to undergo another trial for the same capital offense and face the death penalty again. That sounds odd, in view of the double-jeopardy protection against twice being “put in jeopardy of life or limb” (U.S. Const. Amend. V). In a case in which a defendant has been sentenced to death but achieves a reversal of either the conviction or death sentence, no double-jeopardy concerns arise, because prosecutors as a general rule may retry defendants for the same crime in the aftermath of an appellate reversal. Often, such defendants are relieved to have a second opportunity to avoid a death sentence. Still, there are instances in which a death-sentenced defendant who succeeds in overturning a death verdict will argue that a capital resentencing ought not to be allowed. That occurs when the basis for overturning the death verdict involves a finding, implicit or explicit, that the defendant ought not to have been eligible for the death penalty in the first place.

But what if the defendant received a *life sentence* and later succeeds in overturning the conviction—may the prosecution now retry the defendant and seek a death sentence? Put in stark terms, does a defendant who avoids getting the death sentence in the original trial assume the risk of getting sentenced to death in a second trial, should he succeed in overturning his conviction?

In noncapital cases, prosecutors may retry defendants whose convictions have been reversed and seek the same or tougher sentence as that sought in the original trial. But a capital sentencing process is unlike the conventional sentencing process in that the capital penalty-phase proceeding resembles a trial, with testimony taken and the burden of proof placed on the prosecution to convince the jury to impose death. That fact triggers the Double Jeopardy Clause. In *Bullington v. Missouri*, 451 U.S. 430 (1981), the Supreme Court held that a prosecutor may not seek the death penalty in a retrial against a defendant who has received a life verdict in the original trial. The *Bullington* jury's life verdict, in effect, constituted an “acquittal” *vis á vis* the death penalty, and that acquittal barred putting the defendant again in jeopardy of losing his life.

Bullington is not as sweeping in its reach as one might think. It is possible that a capital defendant who succeeds in securing a life verdict could be reprosecuted and again face the death penalty. The Supreme Court confronted a not-so-unique situation in *Sattazahn v. Pennsylvania*, 537 U.S. 101 (2003), and authorized a reprosecution for the death penalty on a

defendant who had in his original trial secured a life verdict. A jury convicted Sattazahn of capital murder but deadlocked on the issue of whether to impose death (nine voting for life, three for death). Pennsylvania law required the judge to impose a life sentence in the event of a hung jury. Sattazahn successfully appealed his conviction, and on retrial the prosecution sought again to secure a death verdict. The Supreme Court, in a five to four vote, ruled that the Double Jeopardy Clause did not bar putting Sattazahn again in jeopardy of losing his life. Whereas in *Bullington*, the jury rendered a life verdict—thus affirmatively acquitting the defendant of the death penalty—the *Sattazahn* jury's failure to arrive at a verdict meant that there had been no such "acquittal." The dissenters argued that the life sentence, which was mandated by law, terminated the proceedings in defendant's favor, thus barring the renewed attempt to secure a death verdict. But the *Sattazahn* majority construed the Double Jeopardy Clause narrowly, finding that it only applies when there has been an actual jury finding that some element of the prosecution's case had not been proved.

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References and Further Reading

Carter, Linda E., and Ellen Kreitzberg. *Understanding Capital Punishment Law*, 2004.

Cases and Statutes Cited

Bullington v. Missouri, 451 U.S. 430 (1981)
Sattazahn v. Pennsylvania, 537 U.S. 101 (2003)

See also **Capital Punishment; Double Jeopardy: Modern History**

CAPITAL PUNISHMENT AND SENTENCING

Currently, forty jurisdictions (thirty-eight states, the federal government, and the military) authorize capital punishment. Although the U. S. Supreme Court has found there to be some constitutional restrictions on the imposition of the death penalty, it has yet to find that the punishment itself is cruel and unusual. In 1972, the Supreme Court effectively overturned all then-existing capital statutes when it held in *Furman v. Georgia* that such statutes must ensure that the death penalty will not be imposed in an "arbitrary and capricious" manner.

In the aftermath of the *Furman* decision, thirty-five states drafted new death penalty statutes. The statutes that the Supreme Court upheld as complying with the

Eighth Amendment included those with the following characteristics: separating the guilt/innocence phase from the sentencing phase of the trial; limiting the types of crimes that would qualify for capital punishment; creating specific aggravating factors, at least one of which must be found to exist before a jury can even consider the death penalty; specialized appellate review of death sentences; requiring that juries weigh aggravating and mitigating factors in determining whether a death sentence is appropriate. The Supreme Court struck down statutes mandating a death sentence for specific crimes, ruling that such statutes violate the Eighth Amendment because they do not allow for an individualized determination of sentence.

Although the specific death penalty sentencing procedures vary by jurisdiction, every state currently has what is referred to as a "bifurcated" trial procedure. In these proceedings, the jury first determines whether the defendant is guilty or not guilty of the offense of capital murder. Then, if a verdict of guilty is returned, the jury determines the defendant's sentence, which, in most jurisdictions, includes a choice between life without the possibility of parole and death. The sentencing phase of a capital trial shares many of the same characteristics as the guilt/innocence phase. For example, double jeopardy provisions have been deemed to apply to a jury "verdict" of life imprisonment, and the defendant is entitled to have a jury determine the existence of aggravating factors. Special rules also apply with respect to selection of jurors for capital cases, a process referred to as "death qualification." This process seeks to eliminate those jurors who would be unable to consider *both* life and death as potential sentences.

Although capital sentencing statutes also vary by jurisdiction, they all essentially involve, in some form, a weighing of mitigating factors against aggravating factors. Generally, if the aggravating factors outweigh the mitigating factors, the jury may return a verdict of death, although it is not always required. Common aggravating factors include the manner in which the killing is committed, any future danger that the defendant may pose, and the status of the victim. Common mitigating circumstances include the age of the defendant at the time the crime was committed, the relative role that the defendant played in the killing, mental health issues suffered by the defendant, lack of prior criminal record, and the defendant's personal background.

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References and Further Reading

Carter, Linda E., and Ellen Krietzberg. *Understanding Capital Punishment Law*, LexisNexis Publishing, 2004.

Furman v. Georgia, 408 U.S. 238 (1972)
Gregg v. Georgia, 428 U.S. 153 (1976)
Proffitt v. Florida, 428 U.S. 242 (1976)
Jurek v. Texas, 429 U.S. 262 (1976)

CAPITAL PUNISHMENT AND THE EQUAL PROTECTION CLAUSE CASES

Although the legal institution of slavery was dismantled by the Emancipation Proclamation and the Thirteenth Amendment, discrimination on the basis of race and racially motivated violence continued unabated. That black Americans received a different brand of justice than white Americans was made plain in the passage of Black Codes. These laws explicitly provided for criminal punishments that varied, depending on the race of the victim and the race of the criminal. Crimes involving either white victims or black perpetrators were punished more severely than crimes involving either black victims or white perpetrators.

The Fourteenth Amendment was framed and adopted . . . to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons, and to give to that race the protection of the General Government, in that enjoyment whenever it should be denied by the states” *Strauder v. West Virginia*, 100 U.S. 303, 306 (1886). Among its many other provisions, the Fourteenth Amendment contains the Equal Protection Clause that provides that “[no state shall] deny to any person within its jurisdiction the equal protection of the laws.” The principle of equality enshrined in the Equal Protection Clause has famously been described by one Supreme Court Justice as requiring racial neutrality in the application of the laws: “Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.” *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896) (Harlan, J., dissenting).

Prosecutors enjoy broad discretion in making critical decisions, such as the determination whether a particular suspect should be formally accused of crime and, if so, what charge or charges should be filed. However, prosecutorial discretion is not completely unfettered. In certain circumstances, the Constitution itself may impose constraints on a prosecutor’s power. For example, discriminatory prosecutions are prohibited by the Equal Protection Clause. According to the Supreme Court in *Yick Wo v. Hopkins*, 118 U.S. 356 (1886):

Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal

discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.

Each step in the prosecution of a capital case—arrest, charging, plea bargaining, jury selection, conviction, sentencing, appeal, clemency and execution—is equally subject to the application of inexact standards of decision making. The inevitable result, according to death penalty opponents, is a high risk of arbitrariness in the determination of who is ultimately put to death.

Of course, race is not the only basis on which discriminatory decisions may rest. The American Bar Association has cautioned that prosecutors, in discharging both their investigative and charging functions, “should not invidiously discriminate against or in favor of any person on the basis of race, religion, sex, sexual preference, or ethnicity,” whether the person appears as the defendant or as the victim. Standards for Criminal Justice Standard 3-3.1(b) (comment). Thus far, however, the most significant equal protection challenges have been predicated on race discrimination.

Before his execution in Florida’s electric chair in 1979, John Spenselink, a white man condemned to die for the murder of a white man, presented in state and federal court a study purporting to show that the revised Florida death penalty statutes were being applied far more often against killers of whites than against killers of blacks. The following year, two Northeastern University criminologists, William Bowers and Glenn Pierce, published a study of homicide sentencing in Georgia, Florida, and Texas, the three states whose new death penalty statutes were the first to be approved by the Supreme Court after its landmark decision in *Furman v. Georgia*, 408 U.S. 238 (1972).

Bowers and Pierce found that in white victim cases, black defendants in all three states were from four to six times more likely to be sentenced to death than white defendants. In Georgia, black on white killings resulted in death sentences thirty-three times more often than black on black killings. In Florida, a black defendant was thirty-seven times more likely to be sentenced to death if his victim was white than if his victim was black. And in Texas, black killers of white victims were eighty-four times more likely to be sentenced to death than black killers of black victims.

In 1981, John Eldon Smith, a Georgia death row inmate, introduced the Bowers and Pierce study in federal court. The court of appeals rejected the study as too crude to be legally significant, because it failed to take into account dozens of circumstances in each case—other than race—that might have accounted for unequal sentencing patterns.

A far more comprehensive analysis of the impact of race in capital cases was offered on behalf of a different condemned prisoner on Georgia's death row. Warren McCleskey, a black man, was convicted of murder and sentenced to die for his role in the shooting death of white police officer Frank Schlatt during a furniture store robbery.

Iowa law professor David Baldus and a team of researchers examined nearly 2,500 homicide cases that occurred in Georgia between 1973 and 1979. Unlike the less sophisticated study undertaken by professors Bowers and Pierce, Professor Baldus subjected his data to an exhaustive analysis, taking account of 230 variables that could have explained the disparities on nonracial grounds. The Baldus study, like the studies that preceded it, purported to show a disparity in the imposition of the death penalty in Georgia based on the race of the victim and, to a lesser extent, the race of the defendant.

Specifically, the Baldus study showed that for the universe of cases examined, defendants charged with killing white persons received the death penalty in eleven percent of the cases; defendants charged with killing blacks received the death penalty in only one percent of the cases. The death penalty was assessed in twenty-two percent of the cases involving black defendants and white victims; eight percent of the cases involving white defendants and white victims; one percent of the cases involving black defendants and black victims; and three percent of the cases involving white defendants and black victims.

Charging decisions were found to be similarly skewed along racial lines. Prosecutors asked for the death penalty in seventy percent of the cases involving black defendants and white victims; thirty-two percent of the cases involving white defendants and white victims; fifteen percent of the cases involving black defendants and black victims; and nineteen percent of the cases involving white defendants and black victims.

After taking into account nonracial variables, defendants charged with killing whites were found to be 4.3 times as likely to be sentenced to death as defendants charged with killing blacks. Black defendants were 1.1 times as likely to receive a death sentence as other defendants. The troubling conclusion of the Baldus study is that black defendants—such as Warren McCleskey—who kill white victims have the greatest likelihood of receiving the death penalty.

In the Supreme Court, McCleskey argued that the Baldus study demonstrated that the Georgia death penalty system discriminated on the basis of race in violation of the Equal Protection Clause. The Court disagreed five to four. Writing for the majority, Justice

Powell noted that a defendant claiming an equal protection violation has the burden to provide “the existence of purposeful discrimination.” In addition, the defendant must show that the purposeful discrimination “had a discriminatory effect” on him or her.

McCleskey's sole reliance on the Baldus study and his failure to show how any state actor had acted with discriminatory purpose *in his case* proved fatal to McCleskey's argument and, ultimately, to McCleskey himself. Although the Court has accepted statistics as proof of intent to discriminate in the context of a state's selection of a jury venire and in the context of statutory violations under Title VII of the Civil Rights Act of 1964, the Court refused to find that statistics alone were sufficient to demonstrate that the discretion inherent in the criminal justice system had been abused by racist decision makers.

Nor did the Court find the Baldus study persuasive proof that Georgia violated the Equal Protection Clause by adopting the capital punishment scheme and allowing it to remain in force despite its allegedly discriminatory application. For that claim to prevail, McCleskey would have to show that the Georgia legislature either enacted the statute to further a racially discriminatory purpose or maintained the statute because of the racially disproportionate impact suggested by the Baldus study.

Warren McCleskey died in Georgia's electric chair on September 25, 1991. That same year, retired Justice Lewis Powell, who had authored the majority opinion denying relief to McCleskey was asked by a biographer if he would change any of his votes as a justice if he could. Powell said that he would change his vote in McCleskey's case if he could.

Justice Brennan was one of the four *McCleskey* dissenters. He wrote, “It is tempting to pretend that minorities on death row share a fate in no way connected to our own, that our treatment of them sounds no echoes beyond the chambers in which they die. Such an illusion is ultimately corrosive, for the reverberations of injustice are not so easily confined.” *McCleskey v. Kemp*, 481 U.S. 279 (1987) (Brennan, J., dissenting).

The Court's *McCleskey* ruling has been harshly criticized. There are those who have likened the *McCleskey* decision to the Court's discredited opinion in *Plessy v. Ferguson*. According to an editorial that ran in the *Tallahassee Democrat* newspaper:

It is the same reasoning that enabled the Court in the late 1800s to approve the ‘separate-but-equal’ doctrine for the nation's schools . . . In *McCleskey* the Court essentially says Blacks must accept a separate-and-unequal system of justice in capital cases.

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Cases and Statutes Cited

Furman v. Georgia, 408 U.S. 238 (1972)
McCleskey v. Kemp, 481 U.S. 279 (1987)
Plessy v. Ferguson, 163 U.S. 537, 551 (1896)
Strauder v. West Virginia, 100 U.S. 303, 306 (1886)
Yick Wo v. Hopkins, 118 U.S. 356 (1886)

CAPITAL PUNISHMENT AND THE RIGHT OF APPEAL

Appellate review should ensure that no death sentence is handed down in an arbitrary and capricious manner. When the U.S. Supreme Court voided forty state death penalty statutes in *Furman v. Georgia*, it held that unrestricted jury discretion in imposing a death sentence resulted in arbitrary sentencing. Four years later, in *Gregg v. Georgia*, the U.S. Supreme Court reinstated the death penalty, holding that capital punishment does not violate the Eighth Amendment prohibition against cruel and unusual punishment, provided that a death sentence is not arbitrary and capricious.

After *Gregg*, all capital crimes are prosecuted in a bifurcated trial, with the guilt–innocence phase conducted separately from the penalty phase. If the jury finds the defendant guilty, the same jury will turn to the question of whether to impose a death sentence. Capital defendants are entitled to meaningful appellate review of both stages of the bifurcated trial.

The Court declared that the sentencing scheme in *Gregg* was constitutional because the appellate court would review the death sentence in every case to determine whether the jury had imposed death under the influence of passion or prejudice, whether the evidence supported the jury finding of a statutory aggravating circumstance, and whether the death sentence was proportionate to sentences in similar cases. In *Proffitt v. Florida*, handed down the same day as *Gregg*, the Court endorsed Florida's appellate review process because it guaranteed a review of aggravating circumstances and proportionate sentencing.

Most of the thirty-eight death penalty states provide for automatic appellate review of all death sentences, though in denying cert in *U.S. v. Hammer* the Court implicitly held that a mandatory review is not required by the Constitution. Furthermore, in *Gilmore v. Utah*, the Court found that a defendant could, with full knowledge of his right to seek an appeal, waive that right. In *Sattazahn v. Pennsylvania*, the trial judge imposed a life sentence after a jury hung during the sentencing phase. The defendant appealed, the case was reversed, the defendant was retried, and he received a death sentence at the retrial. On appeal, the Court held that there was no double jeopardy bar

to the death sentence on retrial because the life sentence at issue did not amount to an acquittal on the basis of the government's failure to prove one or more aggravating circumstances beyond a reasonable doubt at sentencing during the first trial.

After completing the direct appeals process, capital defendants may exercise their right to file a petition for habeas corpus review. These petitions usually raise new issues that were not expressly part of the trial. Ineffective assistance of counsel, police and prosecutor misconduct, and newly discovered evidence are typical subjects for habeas petitions. The reviewing court must assess whether the alleged error substantially affected the jury in deciding to sentence the defendant to death.

The Federal Death Penalty Act sets out appellate guidelines used in most capital cases. The act requires the appellate court to review the entire record, including the procedures used and evidence admitted during the sentencing and to examine the aggravating and mitigating factors enumerated in the statute. Whereas the appellate court may not reverse for harmless error, it must reverse if it concludes that the jury imposed the death sentence under the influence of passion, prejudice, or any other arbitrary factor.

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References and Further Reading

Golden, Sara L., *Constitutionality of the Federal Death Penalty Act: Is the Lack of Mandatory Appeal Really Meaningful Appeal?* Temple Law Review (Summer 2001): 429–468.

Cases and Statutes Cited

Gilmore v. Utah, 429 U.S. 1012 (1976)
Gregg v. Georgia, 428 U.S. 153 (1976)
Furman v. Georgia, 409 U.S. 902 (1972)
Proffitt v. Florida, 428 U.S. 242 (1976)
Sattazahn v. Pennsylvania, 537 U.S. 101 (2003)
U.S. v. Hammer, 226 F.3d 229 (3d Cir. 2000)
 39 C.J.S. Habeas Corpus § 159

See also Capital Punishment: Due Process Limits; Habeas Corpus: Modern History

CAPITAL PUNISHMENT FOR FELONY MURDER

Felony murder must not be confused with murder during the course of a felony. Murder during the course of a felony is an ordinary, intentional murder. When it is committed during the course of certain dangerous felonies, such as robbery, arson, or rape,

the felony may be used as an aggravating factor to impose the death penalty.

Felony murder, by contrast, is a legal term of art that means that person can be found guilty of murder, even though he lacks the mental state or *mens rea* ordinarily required for murder, if the killing took place during a felony. Thus, if while robbing a store, the robber's gun goes off accidentally, killing the proprietor, the defendant would lack the *mens rea* for murder, which would be something like malice a forethought or intentional depending on the state. Nevertheless, in many States, he would be guilty of murder anyway, because the killing occurred during the course of a felony. The concept of felony murder has been used to convict people of murder even when their culpability as to death is relatively low, such as where the victim dies of a heart attack during a robbery, where the deceased is a co-felon, shot by the victim of the original crime, and where the victim is shot by a co-felon whom the defendant had no reason to know would be armed.

In *Enmund v. Florida*, 458 U.S. 782 (1982), the Supreme Court considered whether a person who aids and abets a felony, but does not commit or have an intention to commit a killing, could be put to death. In a five to four opinion, the Court held that the death penalty in such a case was disproportionate to the crime and therefore violated the Eighth Amendment. The Court did not disapprove of the defendant's conviction for murder, despite the fact that he only served as a driver for the robbery in this case. It was only his death sentence that was struck down. In reaching this conclusion, the Court relied on its 1977 decision in *Coker v. Georgia*, 433 U.S. 584, in which it had invalidated, also on proportionality grounds, the death penalty for the crime of raping an adult woman.

The Court limited *Enmund* somewhat in the 1987 case of *Tison v. Arizona*, 481 U.S. 137. In *Tison* the death penalty was imposed on two sons whose father had killed a family of four whom the group had abducted at gunpoint during a prison escape. The Court conceded that the sons had neither inflicted the fatal wounds nor intended to kill the victims. Nevertheless, their death sentence was upheld on the ground that they displayed reckless indifference to the deaths: The reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death represents a highly culpable mental state that is appropriate for capital punishment, held the five to four majority. 481 U.S. at p. 157. This is not surprising considering that reckless indifference to death has traditionally been a mental state sufficient for conviction of murder, regardless of

the felony. Thus, person who shoots randomly into a house and kills someone would be guilty of murder even though he lacked intent to kill. *Tison*, however, limits the death penalty to cases where the defendant not only displays a reckless disregard for life but has also knowingly engaged in criminal activities known to create a grave risk of death. Thus, a participant in a robbery where someone is accidentally killed would not usually be subject to the death penalty.

After *Ring v. Arizona*, 536 U.S. 584 (2002), the aggravating factor justifying the death penalty must be found by the jury, beyond a reasonable doubt, not a judge.

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References and Further Reading

- Bedau, Hugo, ed. *The Death Penalty in America: Current Controversies*, 1997.
- Rosen, Richard, *Felony Murder and the Eighth Amendment Jurisprudence of Death*, B.C. Law Review 31 (1990): 1103–1170.
- Roth, Nelson, and Scott Sundby, *The Felony Murder Rule: A Doctrine at the Constitutional Crossroads*, Cornell Law Review 70 (1985): 446–492.

Cases and Statutes Cited

- Coker v. Georgia*, 433 U.S. 584 (1977)
- Enmund v. Florida* 458 U.S. 782 (1982)
- Ring v. Arizona*, 536 U.S. 584 (2002)
- Tison v. Arizona*, 481 U.S. 137 (1987)

See also **Capital Punishment; Capital Punishment: History and Politics; Capital Punishment: Eighth Amendment Limits**

CAPITAL PUNISHMENT HELD NOT CRUEL AND UNUSUAL PUNISHMENT UNDER CERTAIN GUIDELINES

After its finding the death penalty unconstitutional in *Furman v. Georgia*, 408 U.S. 238 (1972), in 1976, the Supreme Court confronted newly enacted death penalty statutes from five states. The cases were *Gregg v. Georgia*, 428 U.S. 153; *Jurek v. Texas*, 428 U.S. 262; *Proffitt v. Florida*, 428 U.S. 242; *Woodson v. North Carolina*, 428 U.S. 280; and *Roberts v. Louisiana*, 428 U.S. 325.

In *Gregg*, rejecting the argument that the death penalty is inherently cruel and unusual punishment, the Court upheld a death sentence for murder, approving the Georgia system of a bifurcated trial in which the guilt and punishment phases are separate, with the jury hearing additional evidence and

argument during the punishment phase. The Georgia statute further set out elements of aggravation, one of which must be found beyond a reasonable doubt for death to be imposed, as well as mitigation, that would allow the defendant to avoid the death penalty. Moreover, the Georgia Supreme Court mandatorily reviewed each death sentence to ensure that it was not disproportionate to sentences imposed in similar cases or otherwise on the basis of arbitrary or prejudicial factors.

Again there was no majority opinion, but a joint opinion by Justices Stewart, Stevens, and Powell expressed the plurality view and was agreed with in most respects by an opinion concurring in the judgment by Justice White, joined by Chief Justice Burger and Justice Rehnquist. Justice Blackmun concurred in the judgment as well.

In *Jurek* the same seven Justice majority upheld a similar scheme in Texas, and in *Proffitt* the same Justices upheld a Florida scheme in which the sentence was imposed by a judge. In *Woodson* and *Roberts*, however, a joint opinion by Stewart, Stevens, and Powell, with Justices Brennan and Marshall concurring in the judgment, struck down mandatory death sentences as generally unduly harsh and unworkably rigid (*Woodson*, 428 U.S. at p. 293).

Subsequent to these cases, which reinstated the death penalty and suggested a blueprint for constitutionally acceptable death penalty procedures, the Court has imposed a number of other limitations under the Eighth Amendment. In *Coker v. Georgia*, 433 U.S. 584 (1977) it rejected the death penalty for the rape of an adult woman as disproportionate to the crime, and in *Enmund v. Florida*, 458 U.S. 782 (1982) it held that the death penalty was also disproportionate for one who neither killed nor intended to kill the victim. In *Lockett v. Ohio*, 438 U.S. 586 (1978) it held that the defendant must be allowed to present, as a mitigating factor, any (relevant) aspect of a defendant's character or record and any of the circumstances of the offense that he wishes. *Id.* at p. 604. In *Thompson v. Oklahoma*, 487 U.S. 815 (1988), the Court held that the death penalty could not be applied to a person under the age of sixteen. And in *Atkins v. Virginia*, U.S., 122 S.Ct. 2242 (2002) it likewise exempted the mentally retarded from execution.

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References and Further Reading

- Gross, Samuel L., *The Romance of Revenge: Capital Punishment in America*, Studies in Law, Politics and Society 13 (1993): 71–104.
Model Penal Code and Commentaries. Comment to '210.6. Philadelphia: American Law Institute, 1985.

Radin, Margaret, *The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishment Clause*, U. of Pennsylvania Law Review 126 (1978): 989–1064.

Cases and Statutes Cited

- Atkins v. Virginia*, U.S., 122 S.Ct. 2242 (2002)
Coker v. Georgia, 433 U.S. 584 (1977)
Enmund v. Florida, 458 U.S. 782 (1982)
Furman v. Georgia, 408 U.S. 238 (1972)
Gregg v. Georgia, 428 U.S. 153 (1976)
Jurek v. Texas, 428 U.S. 262 (1976)
Lockett v. Ohio, 438 U.S. 586 (1978)
Proffitt v. Florida, 428 U.S. 242 (1976)
Roberts v. Louisiana, 428 U.S. 325 (1976)
Thompson v. Oklahoma, 487 U.S. 815 (1988)
Woodson v. North Carolina, 428 U.S. 280 (1976)

See also Capital Punishment; Capital Punishment: History and Politics; Capital Punishment: Eighth Amendment Limits

CAPITAL PUNISHMENT REVERSED

In the 1972 case of *Furman v. Georgia*, 408 U.S. 238, the Supreme Court struck down the death penalties of three men. The majority opinion was a brief, unsigned, *per curiam* (for the Court) simply declaring that The Court holds that the imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. *Id.* at p. 240. No further elaboration of the Court's reasoning appeared in this opinion.

However, each of the nine Justices wrote a separate opinion explaining the reasons for his agreement (five Justices) or disagreement (four Justices) with the holding. Justice Douglas noted that the death penalty was meted out mostly to the poor young and ignorant. *Id.* at p. 250, and applied disparately to racial minorities. He concluded that these discretionary (death penalty) statutes are unconstitutional in their operation. They are pregnant with discrimination, and discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on "cruel and unusual" punishments. *Id.* at pp. 256–257. He did not consider whether a mandatory death penalty might be constitutional.

Justice Brennan argued that, since the death penalty was being used in only a small percentage of cases in which it was available, and because it was a punishment that did not comport with evolving standards of human dignity, it had become cruel and unusual and therefore was unconstitutional under any circumstances.

Justice Marshall pointed out that the various purposes supposedly served by capital punishment, deterrence, retribution, and so forth, were equally well served by life imprisonment. *Id.* at p. 359. He further noted that the death penalty had been discriminatorily applied: A total of 3,859 persons have been executed since 1930, of whom 1,751 were white and 2,066 were Negro. *Id.* at p. 364. He agreed with Brennan that the death penalty should be abolished altogether.

Justice Stewart, like Douglas, did not rule out mandatory death sentences for certain crimes, but as to the cases before the Court he declared, and Justice White agreed:

These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed (T)he Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and freakishly imposed. *Id.* at pp. 309–310.

Thus, with no clear majority either declaring the death penalty flatly unconstitutional or explaining under what circumstances it would be acceptable, the states were left in considerable confusion as to how to proceed. By 1976 at least thirty-five states and the federal government had reenacted either mandatory death penalty statutes or statutes containing guidelines by which the penalty could appropriately be imposed. The Court was soon to decide challenges to these enactments. *Capital Punishment Held not Cruel and Unusual Punishment Under Certain Circumstances.*

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References and Further Reading

- Bedau, Hugo, ed. *The Death Penalty in America: Current Controversies*, 1997.
- Kaplan, John, Robert Weisberg, and Guyora Binder. *Capital Murder and the Death Penalty in Criminal Law, Cases and Materials* (4th ed.), 509–564. Gaithersburg, NY: Aspen Law and Business, 2000.
- Sellin, Thorsten, ed. *Capital Punishment*, 1967.

Cases and Statutes Cited

Furman v. Georgia, 408 U.S. 238 (1972)

See also Capital Punishment; Capital Punishment: History and Politics; Capital Punishment: Eighth Amendment Limits

CAPITAL PUNISHMENT: ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996

When Congress in the mid-1990s began considering reforms of federal post-conviction review, lawmakers faced an ongoing dilemma about the scope of habeas corpus law. That is, should habeas broadly protect constitutional rights of state prisoners through independent federal review, or should habeas be a narrow and extraordinary remedy that does not interfere with comity, finality, and federalism? Congress adopted the latter approach in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), a response to the April 1995 Oklahoma City bombing and one that quickly served as a vehicle for revamping habeas law and, more specifically, for attempting to ensure swifter, more certain imposition of capital punishment.

Particularly during the Warren Court years, habeas corpus was viewed as a means for explicating constitutional norms and broadly protecting individual rights. Critics of this trend argued that the existing system had become too slow, burdensome, and destructive of important state interests in defining and enforcing the criminal law. A variety of reform proposals died in the 1970s, 1980s, and early 1990s. After Republicans gained working control of Congress in 1995, however, and after the Burger and Rehnquist Courts consistently articulated a more restrictive approach to federal habeas review, Congress used the AEDPA to address its disenchantment with habeas jurisprudence. Although the AEDPA applies to capital and noncapital cases, the legislative debate focused on the effect the reforms would have on death penalty cases.

Congressional supporters of the legislation argued that the existing habeas system allowed death row inmates to abuse the process by repeatedly challenging their convictions and death sentences, indefinitely delaying execution of their sentences. Supporters further claimed that, in reviewing state cases, federal courts were improperly substituting their own judgment for that of the state courts. This system was, therefore, bad for federal-state comity, compromised the value of finality, and demeaned federalism, the healthy balance of authority between the state and federal governments. The AEDPA thus requires federal deference in cases involving state prisoners. In those cases, federal courts may grant the writ only if the state court decision involved an unreasonable application of clearly established Supreme Court precedent, or an unreasonable determination of the facts in light of the evidence presented in the state court. Beginning with *(Terry) Williams v. Taylor* (2000), a

capital case, the Supreme Court has interpreted these provisions to mean that the state court decision must be objectively unreasonable, not merely incorrect. In addition, the AEDPA provides a presumption of correctness for state court fact-findings, restricts a prisoner's ability to obtain a federal evidentiary hearing, and places severe limits on successive habeas petitions. Finally, the law provides "fast-track" procedures for a limited category of capital cases from qualifying jurisdictions.

The AEDPA was, and remains, controversial. Critics say it improperly hinders the federal judiciary's role as arbiter of federal rights, leaving many constitutional violations unchecked. Still, however, supporters contend the reforms have proven helpful in giving States latitude to administer their penal laws—particularly their systems of capital punishment—with minimal federal judicial interference.

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References and Further Reading

- Broughton, J. Richard, *Habeas Corpus and the Safeguards of Federalism*, Georgetown Journal of Law & Public Policy 2 (2004): 1:109–168.
- Lee, Evan Tsen, *Section 2254(d) of the New Habeas Statute: An (Opinionated) User's Manual*, Vanderbilt Law Review 51 (1998): 1:103–137.
- Yackle, Larry W., *A Primer on the New Habeas Corpus Statute*, Buffalo Law Review 44 (1996): 2:381–449.

Cases and Statutes Cited

- (Terry) *Williams v. Taylor*, 529 U.S. 362 (2000)
- Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. No. 104-132, 110 Stat. 1217, 1220 (1996), *codified at* 28 U.S.C. §2244 et seq. (2000)

See also **Habeas Corpus: Modern History**

CAPITAL PUNISHMENT: DUE PROCESS LIMITS

The Due Process Clauses in the Fifth and Fourteenth Amendments to the U. S. Constitution have played an important role in efforts to promote fairness in the use of capital punishment. Principles derived from the Eighth Amendment provide the central limitations on the use of the death penalty. However, the Eighth Amendment rules apply in state courts, where most capital prosecutions occur, only because the Supreme Court has deemed them incorporated through the Due Process Clause in the Fourteenth Amendment. Moreover, the Supreme Court has relied on principles of free-standing due process to provide additional

special protections in capital cases, and the mandates of due process that apply in all criminal cases also limit capital prosecutions.

From the time of the American founding through the middle of the twentieth century, the notion of *in favorem vitae* ("in favor of life") often moved courts to take extra precautions to promote fairness in capital prosecutions. Concern about the severity of capital punishment manifested itself in many ways by trial judges administering individual capital trials and by appellate courts reviewing capital convictions. Courts frequently interpreted statutes imposing the death penalty literally and strictly so as to avoid their application. Courts also showed special concern for the procedural rights of capital defendants, sometimes justifying this concern openly on the special nature of the death penalty.

In the modern era, the central legal assault on the death penalty has focused on its arbitrary and discriminatory imposition, and the Supreme Court has relied for a remedy on the prohibition against cruel and unusual punishment in the Eighth Amendment, which then applies against the states as a matter of due process. Reform-minded lawyers argued before the Supreme Court in *McGautha v. California*, 402 U.S. 183 (1971), that the then-prevailing practice of submitting the capital sentencing decision to the largely unrestricted discretion of a jury violated principles of free-standing due process. However, the Supreme Court rejected the challenge in an opinion concluding that the articulation of appropriate standards to guide capital sentencers was impossible and that jurors confronted with the capital sentencing decision would generally act appropriately. Nonetheless, the following year, in *Furman v. Georgia*, 408 U.S. 238 (1972), the Court rejected standardless capital sentencing under the Eighth Amendment, concluding that the potential for arbitrariness rendered death sentences imposed under standardless systems cruel and unusual. The Court also later judged revised capital-sentencing statutes under the Eighth Amendment, upholding several that provided for a sentencing hearing with standards while rejecting others that mandated the death penalty on conviction. Most of the modern doctrine regulating capital sentencing proceedings also builds on this Eighth Amendment grounding, with due process operating only as the means of incorporating the rulings against the states.

While relying primarily on the Eighth Amendment to address arbitrariness, the Supreme Court has occasionally turned to general notions of due process to promote other forms of fairness in capital prosecutions. Some of the due process decisions that provide

special protection to capital defendants have focused on the provision of notice and an opportunity to be heard at the capital sentencing trial. For example, in *Gardner v. Florida*, 430 U.S. 349 (1977), the Court reversed a death sentence where the sentencing judge had relied in part on a section of a sentencing report that had been kept confidential from the defense. Likewise, in *Lankford v. Idaho*, 500 U.S. 110 (1991), the Court reversed a death sentence where it seemed that the defense had not been adequately notified before the sentencing trial that the death penalty was being considered as a possible punishment.

Decisions that impose special protections in capital cases have also focused on a variety of other issues. For example, in *Green v. Georgia*, 442 U.S. 95 (1979), the Court held that a state could not appropriately object on hearsay grounds to the introduction at a capital sentencing trial of a codefendant's statement that the defendant had not been present when the victim was killed, where the state had previously introduced the same statement against the codefendant to obtain a death sentence at the codefendant's separate trial. Likewise, in *Beck v. Alabama*, 447 U.S. 625 (1980), the Court held that a state could not impose a death sentence when the jury at the guilt-or-innocence trial was not permitted to consider a verdict of guilt of a lesser included noncapital offense, although the evidence would have supported such a verdict. Further, in *Turner v. Murray*, 476 U.S. 28 (1986), the Court held that due process guaranteed a black capital defendant accused of killing a white person the opportunity to question potential sentencing jurors about their racial biases, although the interracial nature of the crime would not alone have triggered such a right in a noncapital case.

Principles of due process that apply in all criminal cases, of course, also protect capital defendants. Long ago, in *Brown v. Mississippi*, 297 U.S. 278 (1936), the Court reversed a capital conviction where the state was allowed to introduce the defendant's "involuntary" confession. Likewise, in *Ake v. Oklahoma*, 470 U.S. 68 (1985), the Supreme Court overturned a capital conviction because the state had denied an indigent defendant the assistance of a court-appointed psychiatrist to help prepare and present his defense at both the guilt-or-innocence and sentencing trials. Also, in *Kyles v. Whitley*, 514 U.S. 419 (1995), the Court set aside a capital conviction where the prosecution had failed to disclose before trial evidence in its possession that was material and favorable to the defense. Furthermore, in *Cooper v. Oklahoma*, 517 U.S. 348 (1996), the Court reversed a capital conviction where the state required the accused to prove his incompetence to stand trial by a standard of proof greater than a preponderance of

the evidence. While these kinds of general due process rulings apply in all criminal cases, the Supreme Court has often first announced them in capital prosecutions, which underscores their role in regulating the use of the death penalty.

SCOTT W. HOWE

References and Further Reading

- Israel, Jerold H., *Free-Standing Due Process and Criminal Procedure: The Supreme Court's Search for Interpretive Guidelines*, St. Louis University Law Journal 45 (2001): 303-432.
- Steiker, Carol S., and Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, Harvard Law Review 109 (1995): 355-438.
- Thurschwell, Adam. "Federal Courts, the Death Penalty, and the Due Process Clause: The Original Understanding of the 'Heightened Reliability' of Capital Trials." *Federal Sentencing Reporter* 14 (2002): 14-36.

Cases and Statutes Cited

- Ake v. Oklahoma*, 470 U.S. 68 (1985)
- Beck v. Alabama*, 447 U.S. 625 (1980)
- Brown v. Mississippi*, 297 U.S. 278 (1936)
- Cooper v. Oklahoma*, 517 U.S. 348 (1996)
- Furman v. Georgia*, 408 U.S. 238 (1972) (*per curiam*)
- Gardner v. Florida*, 430 U.S. 349 (1977)
- Green v. Georgia*, 442 U.S. 95 (1979)
- Kyles v. Whitley*, 514 U.S. 419 (1995)
- Lankford v. Idaho*, 500 U.S. 110 (1991)
- McGautha v. California*, 402 U.S. 183 (1971)
- Turner v. Murray*, 476 U.S. 28 (1986)

See also **Capital Punishment: Eighth Amendment Limits**; *McGautha v. California*, 402 U.S. 183 (1971)

CAPITAL PUNISHMENT: EIGHTH AMENDMENT LIMITS

The U. S. Supreme Court has interpreted the prohibition on "cruel and unusual punishments" in the Eighth Amendment to regulate but not forbid the use of capital punishment. The prohibition applies directly against the federal government and against the states through the Due Process Clause in the Fourteenth Amendment. The prohibition restricts the use of capital punishment in three ways. First, it limits execution methods. Second, it proscribes the death penalty for certain classes of offenders and crimes. Finally, it requires that states take steps to limit arbitrariness in the process for selecting the persons who will receive death sentences.

Limits on Execution Methods

Supreme Court decisions offer only general guidance regarding permissible execution methods. The Court has said little about these questions since *In re Kemmler*, 136 U.S. 436 (1890). Although authorizing electrocution, the *Kemmler* opinion implied that the Eighth Amendment proscribes not only certain barbarous execution methods that were prohibited at the time of the founding but any method that involves the wanton infliction of pain beyond that justified to extinguish life. In the last century, states have used various forms of execution, including hanging, shooting, gassing, electrocution, and lethal injection. All of these methods have usually been upheld by lower courts. In *Louisiana ex rel Francis v. Resweber*, 329 U.S. 459 (1947), the Supreme Court also upheld a second death warrant after the electric charge in a prior electrocution attempt failed to kill the inmate. However, since the 1970s, a few opinions of lower courts or of certain Justices dissenting from a Supreme Court denial of review have concluded that some of the methods, particularly hanging, gassing, and electrocution, are always or at least sometimes cruel and unusual. Disagreement remains over precisely how to analyze such claims. Nonetheless, in the modern era, these questions have eluded resolution by the Supreme Court, in part, because states faced with serious challenges have responded by making lethal injection the sole form of execution or an optional form at the request of the inmate. Although the level of physical pain involved will depend on the chemicals and method used, lethal injection is now generally regarded as the most humane execution method. Indeed, lethal injection became the accepted form of execution by the end of the twentieth century.

Prohibitions on the Use of the Death Penalty

The Supreme Court has derived a “disproportionality” principle from the Eighth Amendment that restricts the use of the death penalty mostly to certain murder cases. The disproportionality notion contemplates that a particular punishment can be excessive in application although it is not proscribed altogether. The Supreme Court first articulated this idea in *Weems v. United States*, 217 U.S. 349 (1910), a non-capital case in which the Justices struck down as excessively harsh for a relatively minor crime a sentence involving twelve years of hard labor and other forfeitures of civil rights. The Supreme Court used the idea in *Coker v. Georgia*, 433 U.S. 584 (1977), to hold

the death penalty categorically impermissible for the rape of an adult woman where no life was taken, and this prohibition has also been applied to other typical, nonhomicidal felonies. The *Coker* conclusion ultimately reflected a value judgment by the Court that the death penalty was too much retribution for Coker’s crime, although the Justices also pointed to objective evidence that the death penalty was only rarely imposed in the relevant context. Since *Coker*, the Court has also outlawed the penalty for felony-murder accomplices who are not otherwise highly blameworthy, for the retarded, for previously death-sentenced inmates who are insane, and to those who were juveniles at the time of their crime. The Court has not addressed whether the disproportionality principle forbids the death penalty for treason or similarly serious nonmurder crimes.

Protections against Arbitrariness

The most famous line of Supreme Court cases applying the Eighth Amendment to capital punishment focuses on protections against arbitrariness. These decisions started with *Furman v. Georgia*, 408 U.S. 238 (1972) (*per curiam*), where the Court struck down the then-prevailing approach of submitting the capital sentencing decision to a jury’s largely unfettered discretion. After *Furman*, many states quickly passed new death-penalty legislation, and the Supreme Court subsequently concluded that certain procedural protections could satisfy the Eighth Amendment. In a famous quintet of cases decided in 1976, including *Gregg v. Georgia*, 428 U.S. 153 (1976) (plurality opinion), the Supreme Court struck down statutes from North Carolina and Louisiana that mandated the death penalty on conviction, but it upheld statutes from Georgia, Florida, and Texas that provided for a separate sentencing hearing with at least some standards to limit the capital sentencer’s discretion.

Two principal doctrines of capital sentencing grow out of the 1976 cases. First, in rejecting the mandatory statutes, the Court concluded that capital defendants are entitled to “individualized consideration” on the sentencing question. The Court distinguished noncapital cases, where mandatory sentencing is permitted, on grounds that the unique severity and finality of the death penalty call for heightened reliability. The Court later amplified on the mandate of individualized consideration in *Lockett v. Ohio*, 438 U.S. 586 (1978) (plurality opinion), holding that a capital sentencer must be free to vote against the death penalty on the basis of any evidence that

the offender offers concerning his character, record, or crime.

The Court also stated in the 1976 cases that capital sentencers require guidance but soon modified this idea in *Zant v. Stephens*, 462 U.S. 862 (1983), to require only a narrowing of the death-eligible group. States have met the narrowing mandate by simply requiring the capital sentencer to find the presence of at least one “aggravating” factor from a statutory list before going on to consider mitigating circumstances at a final stage at which its discretion to reject the death penalty is essentially unfettered.

After *Furman*, efforts to attack capital sentences using statistical evidence of arbitrariness have failed. In *McCleskey v. Kemp*, 481 U.S. 279 (1987), the Supreme Court rejected a challenge to Georgia’s post-*Furman* capital-selection system that relied on a sophisticated, statistical study finding racial bias. The Court questioned whether the study adequately proved racial bias but concluded, in any event, that compliance with procedural rules satisfied the Eighth Amendment.

SCOTT W. HOWE

References and Further Reading

- Denno, Deborah. “Execution and the Forgotten Eighth Amendment” In *America’s Experiment With Capital Punishment*, edited by James R. Acker, Robert M. Bohm, and Charles S. Lanier, 547–577. Durham, North Carolina: Carolina Academic Press, 1998.
- Howe, Scott W., *The Failed Case for Eighth Amendment Regulation of the Capital Sentencing Trial*, University of Pennsylvania Law Review 146 (1998): 795–863.
- Mortenson, Julian Davis, *Earning the Right to be Retributive: Execution Methods, Culpability Theory, and the Cruel and Unusual Punishment Clause*, Iowa Law Review 88 (2003): 1099–1163.
- White, Welsh S. *The Death Penalty in the Nineties*. Ann Arbor: University of Michigan Press, 1991.

Cases and Statutes Cited

- Coker v. Georgia*, 433 U.S. 584 (1977)
- Furman v. Georgia*, 408 U.S. 238 (1972) (*per curiam*)
- In re Kemmler*, 136 U.S. 436 (1890)
- Lockett v. Ohio*, 438 U.S. 586 (1978) (plurality opinion)
- Louisiana ex rel Francis v. Resweber*, 329 U.S. 459 (1947)
- McCleskey v. Kemp*, 481 U.S. 279 (1987)
- Weems v. United States*, 217 U.S. 349 (1910)
- Zant v. Stephens*, 462 U.S. 862 (1983)

See also Capital Punishment; Capital Punishment and the Equal Protection Clause Cases; Capital Punishment: Due Process Limits; Capital Punishment: History and Politics; Capital Punishment Reversed; Capital Punishment and Race Discrimination

CAPITAL PUNISHMENT: EXECUTION OF INNOCENTS

Until recent years, the execution of innocents was mostly an abstract debate. Although abolitionists would point to a handful of cases where innocent individuals allegedly had been put to death, capital punishment supporters dismissed these examples and rejected the notion of wrongful execution as a mere theoretical possibility. Moreover, the U.S. Supreme Court’s seminal decision in this area, the 1993 case of *Herrera v. Collins*, held that a free-standing claim of actual innocence was not a basis for federal habeas corpus review in a death penalty case. Throughout most of the modern era of capital punishment, the bulk of discussion involved issues apart from wrongful conviction, such as racial disparities in the death penalty.

Around the time of the *Herrera* decision, a budding innocence movement began to take shape, largely as a result of advances in DNA technology. In 1992, Barry Scheck and Peter Neufeld started the Innocence Project at Cardozo Law School to investigate possible cases of wrongful conviction, and similar programs were initiated across the nation. But it would take a string of events in Illinois to draw public attention to the issue of actual innocence in capital punishment, beginning with a 1998 conference at Northwestern University that brought together scholars, practitioners, and a number of exonerated former death row inmates. Shortly after the conference, Lawrence Marshall and others helped secure the release of Anthony Porter, a wrongfully convicted man who came within two days of execution. In turn, the *Chicago Tribune* published a series of articles describing grave flaws in Illinois’s capital punishment system. Since the reinstatement of the death penalty in 1976, the state had executed twelve individuals, whereas thirteen of its death row inmates had been exonerated. In 2000, Illinois Governor George Ryan declared a moratorium on capital punishment on the basis of this information, and three years later Ryan commuted all remaining death sentences.

According to some sources, the modern era of capital punishment has witnessed the release of more than 100 individuals based on evidence of innocence. Leading causes of wrongful conviction include erroneous witness identifications, police or prosecutor misconduct, defective or “junk” science, false confessions, poor legal representation, and dishonest informants. In light of these problems, several states and the federal government have instituted studies of their capital punishment systems, and a number of reforms have been proposed, such as required videotaping of police interrogations and legislation providing

post-conviction access to DNA testing. Most recently, the U.S. Supreme Court agreed to hear the case of Paul House, a death row inmate whose case was described by one judge as “a real-life murder mystery, an authentic ‘who-done-it’ where the wrong man may be executed.”

Supporters of capital punishment still contend that no demonstrably innocent individual has been executed in the modern era, that few if any innocents remain or will be placed on death row, and that the minimal risk of wrongful execution is outweighed by the retributive and utilitarian benefits of the death penalty. Nonetheless, the issue of actual innocence has become central to today’s debate over capital punishment in America.

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References and Further Reading

- Armstrong, Ken, and Steve Mills. “The Failure of the Death Penalty in Illinois.” *Chicago Tribune* (November 14–18, 1999).
- Bedau, Hugo Adam, and Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, Stanford Law Review 40 (1987): 21–179.
- Center on Wrongful Convictions. *Web site available at* <http://www.law.northwestern.edu/wrongfulconvictions>.
- Dwyer, Jim, Peter Neufeld, and Barry Scheck. *Actual Innocence: Five Days to Execution and Other Dispatches from the Wrongly Convicted*. New York: Doubleday, 2000.
- Godsey, Mark A., and Thomas Pulley, *The Innocence Revolution and our “Evolving Standards of Decency” in Death Penalty Jurisprudence*, University of Dayton Law Review 29 (2004): 265–292.
- Innocence Project. *Web site available at* <http://www.innocenceproject.org>.
- Liebman, James S., et al., *Capital Attrition: Error Rates in Capital Cases, 1973–1995*, Texas Law Review 78 (2000): 1839–1865.
- Markman, Stephen J., and Paul G. Cassell, *Protecting the Innocent: A Response to the Bedau-Radelet Study*, Stanford Law Review 41 (1988): 121–160.
- Marshall, Lawrence C., *The Innocence Revolution and the Death Penalty*, Ohio State Journal of Criminal Law 1 (2004): 573–584.
- Radelet, Michael L., Hugo Adam Bedau, and Constance E. Putnam. *In Spire of Innocence: Erroneous Convictions in Capital Cases*. Boston: Northeastern University Press, 1992.
- Rosen, Richard A., *Innocence and Death*, North Carolina Law Review 82 (2003): 61–113.
- Symposium: Innocence in Capital Sentencing. *Journal of Criminal Law & Criminology* 95 (2005): 371–636.

Cases and Statutes Cited

- Herrera v. Collins*, 506 U.S. 390 (1993)
- House v. Bell*, 386 F.3d 668 (6th Cir. 2004), cert. granted, 125 S.Ct. 2991 (U.S. Jun 28, 2005) (No. 04-8990)
- Schlup v. Delo*, 513 U.S. 298 (1995)

See also Capital Punishment; DNA and Innocence; Eyewitness Identification; False Confessions; *Herrera v. Collins*, 506 U.S. 390 (1993); Pardon and Commutation

CAPITAL PUNISHMENT: HISTORY AND POLITICS

It will be useful to examine this topic by examining six eras of American history.

The Colonial Era

Almost all the American Colonies were established by England, and English penal law was naturally transported across the Atlantic. English law contained many capital offenses, all of which had a Biblical basis, although most also had a pragmatic basis in the protection of person and property. The first of the estimated more than 20,000 executions in American history took place almost as soon as colonization began—in 1608 in Jamestown. Part of the reason for the existence of the death penalty at the outset of colonial history was the absence of any other severe sanction. The idea of prisons for long-term incarceration had not yet been conceived.

Despite the common English influence, there were significant variations among the colonies concerning capital punishment. On one end of the spectrum stood two colonies strongly influenced by Quaker beliefs: West Jersey had no capital offenses, and Pennsylvania levied the ultimate sanction only for murder and treason. On the other end of the spectrum was Virginia, which authorized capital punishment for many of the same crimes (sometimes petty) as in England. And Puritan-influenced colonies like Massachusetts mandated capital punishment for crimes like adultery, sodomy, bestiality, witchcraft, and blasphemy. On average, the colonies each had about ten crimes at any given time for which death was the prescribed sanction, always including murder, and usually including rape, robbery, and arson.

The very early days of colonization manifested a trend that has continued throughout American history: the death penalty was much more prevalent in the South. This was largely due to the influence of slavery. As early as the 1600s southern colonies enacted Slave Codes to suppress any hint of revolt. Those codes prescribed the death penalty for many crimes for slaves that were not so punishable if committed by others.

The first significant abolitionist argument was put forth by Italian lawyer Cesare Beccaria in the 1763 essay *On Crimes and Punishments*. This tract was part of the Enlightenment movement in Europe that was inspired by scientific advances to attempt to supplant traditional Christian dogma with more rationalist discourse. Beccaria argued for extended incarceration with hard labor in lieu of death. The essay was translated into English in 1767 and became influential in America to some of the intellectual elite who were at the forefront of the American Revolution.

From the American Revolution to the Civil War

Among those influenced by Beccaria was Thomas Jefferson, who advocated scaling back severely on the use of capital punishment. Also influenced was Dr. Benjamin Rush, a Philadelphia physician who signed the Declaration of Independence, and who, through a tract written in 1787, became the first vocal abolitionist in the new country. Rush was an advocate for the new penitentiary movement, which aimed to reform criminals in an institutional setting. This movement was a manifestation of the Enlightenment, and its primary spokesperson was English rationalist philosopher Jeremy Bentham, who wrote extensively and in detail about how penitentiaries could secure the greatest happiness for the greatest number in society.

An important gain for abolitionists came in 1794 when Pennsylvania divided murder into two degrees, with only first-degree murder punishable by death. This measure was a compromise between the still-influential Quakers, who would have abolished capital punishment, and retentionist forces. Many other states soon embraced the division of murder into degrees.

By the first decade of the 1800s, the bloom of optimism about penitentiaries had wilted in the light of endemic bad administration and rampant recidivism. Thus, capital punishment continued unabated until the 1840s. Then a tide of abolitionism crested, fueled by religious liberals of Unitarian, Universalist, and Quaker beliefs and rationalist social reformers. This movement was closely affiliated with antislavery activism, since it was clear that capital punishment was inextricably intertwined in the South with the institution of slavery. In 1847, Michigan became the first English-speaking jurisdiction to effectively and permanently (so far) abolish capital punishment, followed by Rhode Island in 1852, and Wisconsin in 1853. However, by the 1850s, social activists began

to direct most of their efforts against what they saw as the greatest evil afflicting the country: slavery. Then the Civil War supplanted everything else as a matter of national interest. The movement to abolish the death penalty would not become a major force again until the end of the century.

Two additional important developments occurred in the mid-1800s. First, from colonial days, executions had been carried out in public. But public executions sometimes led to rowdy behavior and even riots. So in 1834, Pennsylvania became the first state to execute a prisoner outside public view. This idea was quickly adopted by most other jurisdictions, although the trend would not completely prevail for a century—the last public execution was conducted in the mid-1930s.

The other important development during this era was according jurors sentencing discretion. Until 1841, juries were not called on to render a sentencing verdict—the mandatory penalty on conviction of a capital offense was death. But in 1841, both Tennessee and Alabama bestowed on the jury the power to choose between a death sentence and an alternative prison sentence. The motivation behind this change is obscure: the best guess is that it was designed to permit jurors to discriminate between black and white defendants. Whatever the reason, this idea was also adopted by many jurisdictions, although mandatory death sentencing for some crimes continued in some states until this practice was struck down by the Supreme Court in 1976.

From the Civil War to World War I

Abolitionist sentiment lay largely dormant as the country struggled through the Civil War and Reconstruction. But around the turn of the century, the movement sprang back to life as part of the Progressive agenda.

By this era, it had become clear that there were two separate streams feeding the abolitionist movement, one religious and the other philosophical. Religiously, the movement was originally supported by “liberal” Christians who valued grace over judgment, and they have continued to be a strong force in the movement to the present. On the other hand, many “conservative” Christians supported capital punishment as legitimated by the Bible and continue that support to the present.

Philosophically, humanists, who believed flourishing of persons was the highest good, objected to the extinguishment of any human life. These reformers, too, have continued to be a strong force in the movement. These abolitionists fall on the “liberal” end of

the political spectrum and often believe that life circumstances severely constrain the choices available to those who commit crimes; thus, full-scale responsibility is diluted to the point that these persons cannot deserve a punishment as severe as death. On the other side of the coin, political “conservatives” believe strongly in free will, and thus believe very bad criminals deserve very harsh punishment, which can include the death penalty.

The turn-of-the-century abolitionist movement bore fruit with abolition in nine states between 1907 and 1917. However, the Progressive movement was derailed by World War I, and by 1920 five of the nine states that had abolished the penalty had reinstated it (and two others reinstated it in the 1930s—only in Minnesota and North Dakota has abolition “stuck” until the present).

One important development during this era was the movement to alternatives to hanging as the method of execution. Hanging had proven to be an inexact science that too often resulted in suffering for the condemned, and vicarious suffering for the witnesses. Thus, in 1888, New York became the first jurisdiction to adopt the newly developed electric chair for executions. Fifteen states had followed suit by 1913 and many more by 1950, although hanging and the firing squad persisted in a couple of states.

From World War I to 1957

The abolitionist movement experienced a four-decade period of relative dormancy after World War I. The most likely explanation is that world events—the economic boom of the 1920s, the Great Depression of the 1930s with its concomitant fear of crime, the Second World War and its aftermath, and the Cold War, simply drew attention and energy away from the death penalty issue. With relatively little public attention or protest, more than 5,000 people were executed during this period. (Of course, illegal lynchings, particularly of blacks, accounted for many additional deaths—indeed, it is estimated that in some years illegal lynchings outnumbered legal executions.) The year 1935 constituted the peak year in American history for legal executions, with 199. Still, the execution rate per capita, and per homicide, declined steadily over these four decades.

The search continued for a more humane method of execution. In 1923, Nevada opted for the newly devised gas chamber as a superior alternative to either hanging or electrocution, and thereafter about a dozen other states did likewise.

1957–1976

Beginning in 1957, the moribund abolitionist movement began to gather steam. The abolitionist movement experienced its first lasting successes since North Dakota abolished capital punishment forty-two years earlier: the Territories of Alaska and Hawaii abolished capital punishment shortly before they became states (Delaware abolished in 1958 but reinstated in 1961). Then in 1959, French philosopher Albert Camus wrote an influential polemic against the death penalty, and criminologist Thorsten Sellin published an empirical analysis in which he concluded that the death penalty had no deterrent effect above lengthy imprisonment. In 1960, the execution in California of Caryl Chessman brought the death penalty issue into high focus. Chessman had been sentenced to death for kidnapping but managed by various legal maneuvers to postpone his execution for eleven years, during which time he wrote several best-selling books from death row. Also, the country was experiencing relatively low crime rates. Meanwhile, the pace of executions slowed to a crawl, in large part because appellate review of death penalty cases was becoming relatively routine.

In the mid-1960s, death penalty opponents succeeded in effecting repeal in Iowa and West Virginia. But they also broadened their focus beyond state legislatures, where they had experienced only spotty success, to the courts. In a dissent in *Rudolph v. Alabama* (1963), Supreme Court Justice Arthur Goldberg hinted that more than one Justice was ready to hear arguments against the death penalty on constitutional grounds. In about 1966, the American Civil Liberties Union (ACLU) and the Legal Defense Fund (LDF) of the National Association for the Advancement of Colored People (NAACP) decided to bring court challenges to the death penalty. This coincided with the lowest ebb of American public sentiment in support of the death penalty—a mere forty-two percent in a 1966 Gallup Poll. (Ironically, this turned out to be a brief anomaly—by 1967, as the media was filled with news of a suddenly skyrocketing crime rate, “The Boston Strangler” [Albert DeSalvo] who killed at least thirteen women, and Richard Speck, who murdered eight student nurses in Chicago—death penalty support rose to fifty-three percent and continued climbing another twenty-five percent over the next three decades.)

The LDF decided in 1967 to provide representation to every death-sentenced inmate who had an execution date. This strategy soon tied up virtually every death penalty case that was approaching execution in constitutional challenges. An unofficial death penalty moratorium was affected.

The abolitionists' first major Supreme Court victory came in *Witherspoon v. Illinois* (1968). Professor/litigator Anthony Amsterdam on behalf the LDF convinced the Court that it was unconstitutional to permit the prosecution to strike every potential juror who expressed any scruples against the death penalty.

The retentionists had their day in the sun, though, in a pair of cases, *McGautha v. California* and *Crampton v. Ohio* (1971), in which the Court held that due process did not preclude giving juries unguided discretion to impose the sentence nor did it bar unitary trials in which the issues of guilt and punishment were tried together. Since these were two of the primary abolitionist challenges, the prospect for a major abolitionist victory that would stop capital punishment in its tracks seemed dim.

Yet in the next term, the Court agreed to hear essentially the same challenges but founded on the Cruel and Unusual Punishment Clause of the Eighth Amendment, rather than the Due Process Clause of the Fourteenth Amendment. And in a surprise decision in *Furman v. Georgia* (1972), the Court in a five to four vote held that the death penalty was so unpredictably administered that it violated the Eighth Amendment. The decision had the effect of invalidating the death sentences of every one of the more than 600 prisoners then under death sentences across the country and leaving no state with a constitutional death penalty scheme.

The Court had not held, though, that the death penalty was per se unconstitutional, only that it was not being assessed fairly. This left open the possibility that states could write new legislation that would pass constitutional muster. Many state legislatures hastened to do just that as the opinion polls showed support for capital punishment by far more than half of those polled.

Abolitionists challenged these new statutes, and in 1976 the Court decided that the Georgia statute defining death-eligible crimes via aggravating circumstances and providing for separate guilt/innocence and penalty determinations was constitutional in *Gregg v. Georgia* and so was the Texas statute defining a limited category of death-eligible crimes with a death sentence required if the jury found specified additional facts in *Jurek v. Texas*; but that the North Carolina and Louisiana statutes that made death the mandatory sentence for conviction of certain specified kinds of murder were held unconstitutional in *Woodson v. North Carolina* and *Roberts v. Louisiana*. The Supreme Court was now in the thick of the death penalty battle, where it has remained.

1976 to the Present

The highlights of Supreme Court death penalty jurisprudence after 1976 were that: (1) the death penalty was disproportionate to serious felonies other than murder—*Coker v. Georgia* (1977); (2) defendants must be permitted to present mitigating evidence on any aspect of their character, record, or the circumstances of the offense at the penalty phase—*Lockett v. Ohio* (1978); (3) the common “heinous, atrocious, or cruel” aggravating circumstance was unconstitutionally vague—*Godfrey v. Georgia* (1980); (4) competence of defense counsel was not judged by any higher standard in death penalty cases—*Strickland v. Washington* (1984); (5) even strong statistical evidence was insufficient to prove that the death penalty was administered in a racially biased manner—*McCleskey v. Kemp* (1987); (6) felony murderers who did not personally kill the victim could still be death-eligible if they acted with extreme reckless indifference to human life—*Tison v. Arizona* (1987); (7) that defendants must have been sixteen or older when they committed their crimes to be death-eligible—*Stanford v. Kentucky* (1989); and (8) mentally retarded offenders were not death-eligible—*Atkins v. Virginia* (2002).

Although abolitionists had significant, if mixed, success in the courts, they made little progress in legislatures during this era. Only one state abolished the penalty (Massachusetts), whereas four restored it (Kansas, New York, Oregon, and South Dakota). Furthermore, the federal government vastly expanded the list of federal death offenses, even though the number of federal death penalty cases remained a small slice of the death penalty pie. Public sentiment remained in the range of sixty-five percent to eighty percent support when asked a standard polling question like, “Do you approve of the death penalty for murder?” This figure overstated solid support, though, because when asked an alternative question like, “Do you prefer life without parole instead of the death penalty for murder?” support often slipped by more than twenty percentage points. Nonetheless, politicians during the 1970s through the present sensed that it was the kiss of death to oppose the death penalty, and even many Democrats, like Bill Clinton, gave it lip service.

In the late 1990s, though, the abolitionist forces found a fulcrum that seemed to move public opinion—the possibility of executing innocent persons. This issue came into stark relief in Illinois. There, journalism students showed that several convicts on death row were, in fact, innocent. Indeed, as many convicts had been released from death row for

innocence as had been executed since the reinstatement of capital punishment after *Furman*. This prompted Governor George Ryan to impose a moratorium on executions and in 2002 to commute the sentences of all of the more than 160 death-sentenced inmates on the ground that the system under which they were convicted was intolerably riddled with error. The innocence issue, though, had the potential to be a bittersweet one for abolitionists: it seems perhaps more likely to lead to death penalty system reforms than to complete abolition.

During this era, as in all past eras, the death penalty continued to show great variation along regional lines. The vast bulk of executions occurred in the South, with Texas leading the way by a wide margin.

The search for a more humane mode of execution continued during this era. Lethal injection, developed in the 1970s, almost completely displaced other modes of execution.

Executions slowly increased, but court challenges to virtually every death sentence often resulted in reversals. Even for those inmates whose convictions and sentences were upheld, the average time from conviction to execution increased in many states to more than ten years. In the meantime, far more defendants were being sentenced to death than were being executed, so the population of death rows across the country increased to well over 3,000, even as the task of providing legal representation to the condemned became ever more daunting. Still capital punishment seemed firmly entrenched in the United States, particularly in certain regions of the country.

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References and Further Reading

- Banner, Stuart. *The Death Penalty: An American History*. Cambridge, MA: Harvard University Press, 2002.
- Bedau, Hugo Adam. "Background and Developments" In *The Death Penalty in America: Current Controversies*, edited by Hugo Adam Bedau, 3–25, New York: Oxford University Press, 1997.
- Camus, Albert. *Reflections on the Guillotine*. Translated by Richard Howard. Michigan City, IN: Fridtjof-Karla, 1959.
- Haines, Herbert H. *Against Capital Punishment: The Anti-Death Penalty Movement in America 1972–1994*, 1996.
- Kronenwetter, Michael. *Capital Punishment: A Reference Handbook* (2d ed.). Denver: ABC-CLIO, 2001.
- Rush, Benjamin. "An Enquiry into the Effects of Public Punishments Upon Criminals and Upon Society (1787), reprinted in *Capital Punishment in the United States: A Documentary History*, edited by Bryan Vila and Cynthia Morris, 20–23, Westport, CT: Greenwood Press, 1997.

Sellin, Thorsten. *The Death Penalty*. Philadelphia: The American Law Institute, 1959.

Vila, Bryan, and Cynthia Morris, eds. *Capital Punishment in the United States: A Documentary History*. Westport, CT: Greenwood Press, 1997.

Cases and Statutes Cited

- Atkins v. Virginia*, 536 U.S. 304 (2002)
- Coker v. Georgia*, 433 U.S. 584 (1977)
- Furman v. Georgia*, 408 U.S. 238 (1972)
- Godfrey v. Georgia*, 446 U.S. 420 (1980)
- Gregg v. Georgia*, 428 U.S. 153 (1976)
- Jurek v. Texas*, 428 U.S. 153
- Lockett v. Ohio*, 438 U.S. 586 (1978)
- McCleskey v. Kemp*, 481 U.S. 279 (1987)
- McGautha v. California* and *Crampton v. Ohio*, 402 U.S. 183 (1971)
- Roberts v. Louisiana*, 428 U.S. 325 (1976)
- Rudolph v. Alabama*, 375 U.S. 889 (1963)
- Stanford v. Kentucky*, 492 U.S. 361 (1989)
- Strickland v. Washington*, 466 U.S. 668 (1984)
- Tison v. Arizona*, 481 U.S. 137 (1987)
- Witherspoon v. Illinois*, 391 U.S. 510 (1968)
- Woodson v. North Carolina*, 428 U.S. 280 (1976)

See also **Capital Punishment; Capital Punishment and the Equal Protection Clause Cases; Capital Punishment: Due Process Limits; Capital Punishment: History and Politics; Capital Punishment Reversed; Capital Punishment and Race Discrimination; Capital Punishment: Eighth Amendment Limits**

CAPITAL PUNISHMENT: LYNCHING

Lynching has a long history in the United States, beginning at least around the time of the Revolutionary War. The term "lynching" comes from the practices of Charles Lynch, a Virginia Justice of the Peace who, during the Revolutionary War, helped establish informal courts for the trial and punishment of individuals suspected of engaging in criminal behavior. While lynching originally was associated with imposition of physical punishment for suspected criminal or immoral behavior, since the mid-to-late 1800s, lynching has been understood to mean execution by a group of persons without legal authority for the purpose of punishing a crime or enforcing moral or social standards. Those who engaged in lynching acted outside the legal process to achieve what they claimed was public justice. The so-called "lynch mobs" generally claimed to be acting on behalf of the community, justifying their actions as a necessary means of keeping the peace and promoting moral behavior. It is believed that lynching was committed with the tacit support of the community, and sometimes with the tacit support of the government.

What began as an effort to promote public justice and maintain order eventually became a means of promoting more private goals, such as political and economic gain. For example, vigilante groups formed in the frontier states during the mid 1800s for the avowed purposes of maintaining peace and protecting morals. But these groups eventually engaged in lynching to win political power, as well as the economic benefits that accompany such power. They also used lynching to intimidate or eliminate business competitors.

By the late 1800s, the most common reason for lynching in America was to target and intimidate disfavored racial and ethnic groups. Lynch mobs executed people of many racial and ethnic groups, including African Americans, Native Americans, and Chinese, Japanese, Mexican, and Italian immigrants. Again, political and economic interests played a role, because these lynchings largely were the result of industrial strife and post-Civil War resistance to African-American freedom.

While lynch mobs targeted many racial and ethnic groups, lynching is most commonly associated with the nonlegal execution of African Americans, particularly those living in the South, during and after Reconstruction. Between 1882 and 1968, more than 3,400 African Americans were lynched in the United States. These numbers likely are conservative given that lynchings were not always publicized. Most of the lynchings during the 1882–1968 time period occurred in the South, with Mississippi, Georgia, Texas, Louisiana, and Alabama leading the country in the number of lynchings. Lynching, along with other forms of violence, helped prevent African Americans from fully enjoying economic, social, and political gains after the Civil War.

Lynchings began to decline toward the mid 1900s. By the late 1960s, lynchings had largely subsided, although observers might characterize certain modern-day hate crimes as a type of lynching.

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References and Further Reading

- Dray, Philip. *At the Hands of Persons Unknown, The Lynching of Black America*. New York: Random House, 2002.
- DuBois, W. E. B. *Black Reconstruction*. New York: Russell & Russell, 1935.
- Ifill, Sherrilyn A., *Creating a Truth and Reconciliation Commission for Lynching*, *Law and Inequity: A Journal of Theory and Practice* 21 (Summer 2003): 263–311.
- Lynching in America: Statistics, Information, Images. <http://www.law.umkc.edu/faculty/projects/ftrials/shipp/lynchingyear.html> (statistics provided by Tuskegee Institute Archives) (visited January 8, 2004).
- NAACP. *Thirty Years of Lynching in the United States: 1889–1918*. New York: Arno Press, 1969.

Steelwater, Eliza. *The Hangman's Knot, Lynching, Legal Execution, and America's Struggle with the Death Penalty*. Boulder, CO: Westview Press, 2003.

Tolnay, Stewart E., and E. M. Beck. *A Festival of Violence*. Urbana: University of Illinois Press, 1995.

See also **Capital Punishment; Capital Punishment and the Equal Protection Clause Cases; Capital Punishment: Due Process Limits; Capital Punishment: History and Politics; Capital Punishment Reversed; Capital Punishment and Race Discrimination; Cross-Burning; Dred Scott v. Sandford, 60 U.S. 393 (1857); Due Process; Hate Crimes; Ku Klux Klan; Segregation; Shepard, Matthew**

CAPITAL PUNISHMENT: METHODS OF EXECUTION

Introduction

Jurisdictions with capital punishment use one or more of the following methods to implement the sentence: hanging, firing squad, electrocution, lethal gas, and lethal injection. The Eighth Amendment of the U. S. Constitution bars states from using a method that constitutes Cruel and Unusual Punishment. Lawsuits alleging that the methods violate this federal and state constitutional right have been commenced in both court systems.

Hanging

Hanging has a lengthy history in this country and abroad. It requires attaching one part of a rope to an elevated item, securing the other end of the rope around the person's neck, and suspending the person from the rope. The "short drop" method preceded the "long drop" method. The latter was preferred because the former often resulted in protracted deaths through strangulation. The "long drop" requires constructing a gallows, an edifice with a beam from which the hanging rope is suspended and a floor containing a trap door. A rope treated to eliminate springing is attached to the beam and suspended over the trap door. A noose is created by making a knot in the rope and lubricating it with wax or soap. After ascending the gallows, the condemned's legs are bound and a leather halter is used to secure the arms and hands. Next the person is blindfolded or a hood is placed over his or her head. This is followed by putting the noose around the person's neck and positioning

the knot behind the left ear. After the warden signals, the executioner releases the trap door. The weight of the person's body plummeting through the trap door is supposed to cause a rapid fracture and dislocation of the neck, resulting in an instantaneous death. This method's popularity began to wane because of the realization that death often did not occur in this manner. Instead, the person died from strangulation or decapitation. This concern is evidenced by the fact that very few death penalty jurisdictions still authorize using this method and then only if the person selects it or the alternative method is deemed unconstitutional.

Firing Squad

Execution by firing squad also has a lengthy history of being an accepted method of execution. It requires strapping the condemned in a chair that is surrounded by sandbags to absorb the person's blood. Next a target, a white cloth circle, is placed over the person's heart. Then the person is blindfolded or a hood is placed over his or her head. The shooters, positioned behind an enclosure with slots in it exposing the barrels of their rifles, are instructed to shoot at the target. One shooter is not given live ammunition. The firing squad still remains an unpopular method of execution. The few jurisdictions still permitting it also have lethal injection as an alternative method.

Electrocution

Unlike the firing squad, execution by electrocution was once a popular method of execution. Its popularity was partially due to technological advances in the form of the increasing availability of electricity. In 1888, New York became the first death penalty jurisdiction to require that executions be carried out by electrocution rather than by hanging. First, the person is seated in a wooden chair. Leather belts are used to secure the person's chest, groin, legs, and arms. A natural sponge moistened with saline solution is placed on top of the prisoner's shaved head and covered with a metal electrode. Another electrode moistened with conductive jelly is fastened to a shaved area of the prisoner's leg to reduce resistance to the electricity. A hood is usually put over the person's head, and a chin strap secures the head. The electrical current starts flowing through the prisoner's body when the executioner pulls a handle or pushes a button. An

alternating current system is usually used. The initial jolt is around 2,000 volts and lasts for three to five seconds. It is followed by a second reduced charge. If a heartbeat is detected, the cycle recommences and continues until the prisoner is dead. Several jurisdictions still authorize this method, but only one mandates it, and the rest allow the condemned to select another method or make electrocution the default method.

Lethal Gas

Technological advances, this time in the field of chemistry, played a role in the adoption of lethal gas as a method of execution. In 1924, Nevada became the first jurisdiction to eliminate hanging and adopt this method. First, the condemned must be securely strapped to a chair in an airtight chamber. Sulfuric acid is put in a dish under the chair. The executioner moves a lever releasing sodium cyanide pellets into the dish. Mixing these two chemicals produces poisonous hydrogen cyanide gas. The person has been instructed to start inhaling deeply when he or she hears the lever fall. Eventually, the person loses consciousness and dies of hypoxia. Lethal gas never reached the same level of popularity as electrocution, and today very few states authorize its use. All these jurisdictions designate lethal injection as the alternative method.

Lethal Injection

In 1977, Oklahoma became the first death penalty jurisdiction to adopt lethal injection as a method of execution. To carry out an execution this way, the condemned person is strapped to a gurney and then several heart monitors are placed on his or her skin. Two needles, one a back up, are inserted into a vein. Tubes are connected to these needles. These tubes run through a hole in a wall leading to a room adjacent to the execution chamber and, depending on which protocol the jurisdiction uses, are attached to two or three drips that intravenously administer the chemicals. If the three chemical process is used, saline is first injected. Once the warden gives the signal, the curtain preventing the witnesses from seeing the condemned is raised. At this point sodium thiopental, a fast-acting anesthetic, is administered. Pavulon or pancuronium bromide is then injected, paralyzing the person and suppressing the respiratory system. Potassium

chloride, the last chemical injected, causes the heart to stop beating. Lethal injection is the most common method of execution in the United States.

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References and Further Reading

- Denno, Deborah W., *Is Electrocutation an Unconstitutional Method of Execution? The Engineering of Death over the Century*, Wm. & Mary L. Rev. 35 (1994): 2:551–692.
- , *When Legislatures Delegate Death: The Troubling Paradox Behind States Uses of Electrocutation and Lethal Injection and What It Says About Us*, Ohio St. L. J. 63 (2002): 1:63–260.
- Essig, Mark. *Edison & the Electric Chair: A Story of Light and Death*. New York: Walker & Company, 2003.
- Gatrell, V. A. C. *The Hanging Tree: Execution and the English People 1770–1868*. Oxford: Oxford University Press, 1994.
- Harding, Roberta M., *The Gallows to the Gurney: Analyzing the Un(Constitutionality) of the Methods of Execution*, Boston Univ. Pub. Int. L. J. 6 (1996): 1:153–178.
- Moran, Richard. *Executioner's Current: Thomas Edison, George Westinghouse, and the Invention of the Electric Chair*. New York: Alfred A. Knopf, 2003.

See also Capital Punishment; Capital Punishment: Eighth Amendment Limits; Cruel and Unusual Punishment (VIII); Cruel and Unusual Punishment Generally; Electric Chair as Cruel and Unusual Punishment

CAPITAL PUNISHMENT: PROPORTIONALITY

Proportionality in principle justifies, limits, or condemns capital punishment. That deeply held common value—that punishment must not be grossly disproportionate to the crime—dominates U.S. Supreme Court jurisprudence.

When the Court struck down the death penalty (five to four) in *Furman v. Georgia* (1972), Justices Brennan and Marshall held capital punishment per se cruel and unconstitutional. For these and like-minded absolutist opponents, death as punishment is an inhumane, morally disproportionate response to any crime, no matter how heinous. Other death penalty opponents may concede that sadistic mass murdering rapists do deserve to die. “Abstractly,” the punishment of death may fit *that* crime. But, they insist, history proves that government can never be trusted to kill proportionately.

In *Furman*, three Justices of the five who concurred found the death penalty only unconstitutional, because it was “freakishly imposed”. As then administered, the death penalty was “like being struck by lightning” (Stewart), applied chaotically to a

CAPITAL PUNISHMENT: PROPORTIONALITY

“capriciously selected, random handful”—in no proportion and thus cruel and unusual punishment. Separately concurring in *Furman*, Justice Douglas also condemned the death penalty as unconstitutionally malproportioned, because “disproportionately imposed and carried out on the poor, the Negro, and members of unpopular groups.”

After *Furman*, thirty-five states enacted new death penalty statutes. “The punishment must not be grossly out of proportion to the severity of the crime,” a plurality warned in *Gregg* in 1976, considering Georgia’s new statute. “We cannot say the punishment is invariably disproportionate to the crime,” the Court concluded, restoring the death penalty to the United States. “This is an extreme sanction, suitable to the most extreme of crimes.”

Was rape, or treason, also a “most extreme” crime? Death was “indeed a disproportionate penalty for the crime of raping an adult woman,” Justice White declared for a plurality (*Coker*). Ordinarily, death was a disproportionate penalty for the crime of rape, Justice Powell separately agreed in this case where the rape victim was not otherwise injured. But it “may be that the death penalty is not disproportionate punishment for the crime of aggravated rape.” Dissenting Justices in *Coker* also agreed in principle: “I accept that the Eighth Amendment’s concept of disproportionality bars the death penalty for minor crimes,” Justice Burger, joined by Rehnquist conceded. “But rape is not a minor crime,” and death was not necessarily disproportionate for a “chronic rapist” who had been previously convicted of murder and escaped from prison to rape again.

Although the death penalty for child rape and similarly heinous crimes remains an open question, the mantra of modern capital jurisprudence—“death is different”—suggests that Constitutional proportionality inherent in the Eighth Amendment may limit death as punishment only to murder. (See Proportionality in Punishment.)

Five years after *Coker*, the Court in *Enmund*, five to four, held that death was a disproportionate penalty for a getaway car driver who neither intended nor expected his cofelon to shoot and kill their robbery victim. Dissenting in this particular case, Justice O’Connor stated common ground for the Court: “The penalty imposed in a capital case [must] be proportional to the harm caused and the defendant’s blameworthiness.” How serious the crime, how morally culpable the killer? This depends not only on the harm to the victim, but also on the killer’s mental state and motive. In *Tison*, Justice O’Connor, this time in the majority, held that a reckless and depraved indifference to human life without an intent to kill

could make death a proportional penalty for a felony murder accomplice.

Harm and blameworthiness—essential components of proportionality—require a particularized consideration of each crime and each criminal. Thus, as constitutional punishment, death must not be grossly disproportionate to the crime, *and* it must not be disproportionate to the criminal's particular culpability, however measured. Capital punishment may neither be applied randomly, nor automatically, for any crime. Thus, the very same day the Court affirmed statutes from Georgia, Florida, and Texas, in *Woodson* and *Roberts*, it struck down North Carolina's and Louisiana's mandatory death penalties.

Since then, in a series of cases, explicitly or implicitly, a substantial majority has insisted that proportionality requires the capital sentencer to consider all relevant mitigating circumstances, not only of the crime, but also the background and character of the criminal (*Lockett* and *Eddings*).

Although proportionality constraints prohibit a state from *mandating* death for all individuals who commit even the most aggravated murder legislatively defined in advance, the Court itself has used proportionality, categorically to *exempt* from a death penalty entire classes of offenses (*Coker*) and also offenders. Thus, in 2002, a majority held death *per se* disproportionate punishment for *any* crime committed by a mentally retarded defendant (*Atkins*). And in 2005, a majority found the death penalty *per se* "disproportionate punishment for offenders under 18." (*Roper*)

Roper intensified controversy over *how to measure* proportionality. Constitutionally disproportionate punishment outlawed by the Eighth Amendment is not static, but must be informed by "the evolving standards of decency of a maturing society." (*Trop*, 1958) All Justices presently agree that "time works changes," that what's 'excessive' "may acquire meaning as public opinion becomes enlightened by a humane justice" (*Weems*, 1910). In determining proportionality *vel non*, the *Roper* majority, along with Justice O'Connor in dissent, would consider the views of the international community, while insisting that in the end the Court determines "moral proportionality" by exercising "our own independent judgment." Justices Scalia and Rehnquist in dissent insisted that Constitutionally mandated "moral proportionality" is an antidemocratic cover, by which individual Justices impose and substitute their subjective personal views for those of legislatures.

While the Court has focused constitutional attention on whether and when death is a too severe response, retributivists insisting on "just deserts" force the opposite proportionality question into the debate:

Is life in prison (with or without parole) a sufficiently unpleasant experience? (See *Retribution*) A public convinced that prison life is so unbearable that "life is worse than death" may abolish the death penalty, comfortable it has maintained proportionality. An informed public, however, aware that sadists who rape and torture children to death end up watching television and playing volleyball, may insist, that as administered, life without parole destroys the "moral proportionality," which only a death penalty can maintain.

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Cases and Statutes Cited

Atkins v. Virginia 536 U.S. 304 (2002)
Coker v. Georgia 433 U.S. 584 (1977)
Eddings v. Oklahoma 455 U.S. 104 (1982)
Enmund v. Florida 458 U.S. 782 (1982)
Furman v. Georgia 408 U.S. 238 (1972)
Gregg v. Georgia 428 U.S. 153 (1976)
Lockett v. Ohio 438 U.S. 586 (1978)
Roberts v. Louisiana 428 U.S. 325 (1976)
Roper v. Simmons 125 S.Ct. 1183 (2005)
Tison v. Arizona 481 U.S.137 (1987)

See also Capital Punishment; Capital Punishment and the Equal Protection Clause Cases; Capital Punishment: Due Process Limits; Capital Punishment: History and Politics; Capital Punishment: Eighth Amendment Limits

CAPITOL SQUARE REVIEW AND ADVISORY BOARD v. PINETTE, 515 U.S. 753 (1995)

Capitol Square is a 10-acre, state-owned plaza surrounding the statehouse in Columbus, Ohio. For over a century the square had "been used for public speeches, gatherings, and festivals advocating and celebrating a variety of causes, both secular and religious." As authorized by Ohio state statute, the Advisory Board denied a Ku Klux Klan application to place an unattended, unlabeled cross in the square during the Christmas season—while approving other displays, at least one of which was religious. The Klan was then permitted to erect its cross pursuant to a federal court injunction, and the Board appealed, claiming its denial was required by the First Amendment Establishment Clause.

The Supreme Court affirmed the lower courts' action, stating "There is no doubt that compliance with the Establishment Clause is a state interest sufficiently compelling to justify content-based restrictions on [expression]." However, "[r]eligious expression cannot violate the Establishment Clause where it (1) is purely private and (2) occurs in a traditional or

designated public forum, publicly announced and open to all on equal terms. Those conditions are satisfied here, and therefore the State may not bar respondents' cross from Capitol Square." The Court declined to deal with the possible political implications of the Klan's racist views because that issue had not been considered in the lower courts.

In addition, there was considerable discussion (and no majority agreement) among the justices on the proper use and application of the so-called endorsement test: whether permission by government for the display on its property of an unlabeled cross sent a message of government promotion of Christianity. Two justices dissented, focusing on the likelihood that the cross sends such a message.

The decision and accompanying disagreements are consistent with the Court's two prior holiday display cases, *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573 (1989); *Lynch v. Donnelly*, 465 U.S. 668 (1984).

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Cases and Statutes Cited

Capitol Square Review and Advisory Board v. Pinette, 515 US 753 (1995)
County of Allegheny v. American Civil Liberties Union, 492 U.S. 573 (1989)
Lynch v. Donnelly, 465 U.S. 668 (1984)

CAPTIVE AUDIENCES AND FREE SPEECH

The idea that speech may be curbed to protect the sensibilities of an audience held captive by the speaker is rooted in the notion that governmental power "to shut off discourse solely to protect others from hearing it [is] dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner" *Cohen v. California*, 403 U.S. 15 (1971). This principle is especially applicable to audiences held captive in their own homes. In *Rowan v. United States Post Office Department*, 397 U.S. 728 (1970), the Supreme Court upheld a federal law that permitted mail recipients to require the Post Office not to deliver mailings of "sexually provocative" materials from senders specified by the postal customer. The sanctity of the home is, however, not unlimited. In *Consolidated Edison v. Public Service Commission*, 477 U.S. 530 (1980), the Court struck down a government regulation barring utilities from mailing political matter to their customers along with their bills, and in *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983), the Court voided a federal

law banning the mailing of unsolicited advertisements for contraceptives, reasoning that the short "journey from mail box to trash can" was an acceptable burden to preserve free speech. These cases may be reconciled by noting that in *Rowan* the government merely acquiesced to private choice concerning the avoidance of unwanted communications, whereas in *Consolidated Edison* and *Bolger* the government itself decided on the material from which private citizens should be shielded. On that reading, the captive audience doctrine amounts to a privately held veto over speech that intolerably invades substantial privacy interests.

Captive audiences are not confined to the home. In *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), the Supreme Court upheld discipline of a radio station for broadcasting a vulgar comedy routine during hours that children might be listening. While *Pacifica* involved more factors than a captive audience, both *Lehman v. Shaker Heights*, 418 U.S. 298 (1974), and *Public Utilities Commission v. Pollak*, 343 U.S. 451 (1952), were concerned, respectively, with the captivity of bus passengers subjected to placard advertising and radio programming. Because the passengers had little choice but to listen or watch, Justice Douglas characterized them as captives.

Because the Supreme Court has never fully explained the import of the captive audience principle, its scope remains unclear. For example, may governments require computer and television manufacturers to insert devices that enable users to block certain unwanted programming? The principle reconciling *Consolidated Edison*, *Bolger*, and *Rowan* suggests that governments could do so. What if the blocking technology does not permit unlimited user choice, but merely gives the user a choice among a variety of preselected forms of programming? The same principle suggests that constriction of private choice would be impermissible if mandated by government, but perhaps not if it resulted from only the manufacturers' decisions. In short, there remains uncertainty about what constitutes a captive audience and what governments may do to protect captive audiences from unwanted messages.

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References and Further Reading

Strauss, Marcy, *Redefining the Captive Audience Doctrine*, Hastings Const. L. Q. 85 (1991): 19.

Cases and Statutes Cited

Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983)

Cohen v. California, 403 U.S. 15 (1971)
Consolidated Edison v. Public Service Commission, 477 U.S. 530 (1980)
FCC v. Pacifica Foundation, 438 U.S. 726 (1978)
Lehman v. Shaker Heights, 418 U.S. 298 (1974)
Public Utilities Commission v. Pollak, 343 U.S. 451 (1952)
Rowan v. United States Post Office Department, 397 U.S. 728 (1970)

See also *Bolger v. Youngs Drug Products Corp.*, 463, U.S. 60 (1983); *Broadcast Regulation*; *Cohen v. California*, 403 U.S. 15 (1971); *FCC v. Pacifica Foundation* 438 U.S. 726 (1978); *Rowan v. United States Post Office Department*, No. 399, 397 U.S. 728 (1970)

CARDOZO, BENJAMIN (1870–1938)

Benjamin Nathan Cardozo was born into a Sephardic Jewish family in New York City in 1870. Shortly after his birth, his father, Albert Cardozo, was forced to resign his position as a judge on the New York Supreme Court in the wake of charges of corruption. The standard treatments of Benjamin Cardozo's life and career suggest that he spent the better part of his adult life attempting to transcend, consciously or not, the disgrace of his father's professional malfeasance.

As a young teenager, Cardozo was tutored at home by Horatio Alger, Jr. He entered Columbia College at the age of fifteen. On graduation, he matriculated into the Columbia Law School at the age of nineteen, leaving after two years of study but without a law degree. After his departure from law school, Cardozo sat for the New York Bar, and thereafter entered into private practice with his brother, specializing in commercial practice and appellate litigation. Most accounts of Cardozo's work as a lawyer describe him as an extremely able practitioner—a "lawyer's lawyer." After slightly more than two decades of law practice, Cardozo was elected to the New York Supreme Court in 1913 and would take his seat as a justice on the court on January 5, 1914. Five weeks into his first term on the trial court, Cardozo was temporarily designated by Governor Martin Glynn to the court of Appeals (the state's highest court) to help clear a backlog of cases. In 1917, Cardozo was first appointed, and then elected, to a seat on the court of Appeals. It would be through his service on the New York high court that Cardozo would earn his reputation as one of America's most respected jurists. He served on the court of Appeals until 1932, when Cardozo, a Democrat, was appointed to the U. S. Supreme Court by Republican President Herbert Hoover. Cardozo served as an Associate Justice until his death in 1938.

Cardozo has been considered by many to be the quintessential common law jurist, a judicial craftsman respected not only for the quality of his judicial reasoning, but for the quality of his written opinions as well. Fundamental features of the common law define Cardozo's understanding of and approach to the judicial process: sensitivity to the importance of the judicial role in a system of judge-made law; and, the centrality of the judge in the process of legal development, maintaining continuity with the past by respect for the principle of *stare decisis*, while nurturing modest change by keeping the law relevant to changing social circumstances and need. Cardozo accepted the idea that law was not, and should not be, isolated from social life, and that judicial reasoning involved more than the mechanical application of abstract concepts, the relations of which being logically derived. Moreover, he resisted the simplistic notion that the judge is merely an "empty vessel," an unbiased figure through which the law itself might speak. Instead, Cardozo understood the importance of the subjectivity of the judge. The classic exposition of this view came in Cardozo's Storrs Lectures, delivered at Yale Law School and published in 1921 under the title, *The Nature of the Judicial Process*. In one of its most memorable passages, Cardozo observed, "There is in each of us a stream of tendency . . ." which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals. All their lives, forces that they do not recognize and cannot name have been tugging at them—inherited instincts, traditional beliefs, acquired convictions; and the resultant is an outlook on life . . ." *Roper v. Simmons* 125 S.Ct. 1183 (2005).

In this mental background every problem finds its setting. We may try to see things as objectively as we please. Nonetheless, we can never see them with any eyes except our own.

In other words, we are all—judges included—constituted by the society and culture in which we live; our vision of the world is inevitably a "shaped" vision. To concede, however, that the judicial view is a biased one has obvious implications for the rule of law ideal, if that ideal is understood as government by law and not by persons. Anticipating the possibility of an anxious response to his claims of the inherent subjectivity of the judicial process, Cardozo assured his Yale audience that "[w]e may wonder sometimes how from the play of all these forces of individualism, there can come anything coherent, anything but chaos and the void. Those are the moments in which we exaggerate the elements of difference. In the end there emerges something which has a composite shape and truth and order." Cardozo urged a mature

recognition of the fact that judges are inevitably “law-makers,” and of the related point that their lawmaking was based on their ideological orientation. The “business of the judge” is not to “discover [my emphasis] the objective truth.” Rather, according to Cardozo, the real duty of the judge is to “objectify in law, not my own aspirations and convictions and philosophies, but the aspirations and convictions and philosophies of the men and women of my time.” The judge functions, then, as a translator between his or her community and the law, rearticulating the interests and needs of the community into legal form and, in turn, giving voice to the law so that it may continue to speak relevantly and responsively to the community of which it is a part.

Cardozo has generally been characterized as a progressive and innovative jurist. And, his candor about the nature of the judicial process inevitably could be seen to gesture toward later, more radical developments in legal thought, such as Legal Realism. Yet, Cardozo’s actual judicial work-product generally appears (or is intended to appear) much more modest in aspiration. For example, in *MacPherson v. Buick Motor Company*, one of the canonical opinions from Cardozo’s corpus, he announces an important shift in the law of negligence, yet strives to characterize the decision as one that has simply made more clear an emerging trend in the development of negligence doctrine.

The vast bulk of Cardozo’s judicial experience came while serving as an appellate judge on New York’s Court of Appeals. Therefore, he rarely dealt with legal issues that today garner so much attention, issues of constitutional law—such issues would come at the very end of his judicial career. However, while on the New York Court of Appeals, he did deal with a number of criminal law/criminal procedure matters. And, although usually thought of as a “liberal” judge, Cardozo’s record in this area seems rather more mixed; he often seemed less sympathetic to criminal defendant’s rights than one might think a “liberal” judge would be. For example, in *People v. Defore*, Cardozo, writing for the court of Appeals, resisted the adoption of the exclusionary rule in New York and held that evidence obtained through an illegal police search of a criminal suspect’s home was, nonetheless, admissible in trial. And, toward the end of his life, while on the U. S. Supreme Court, in his opinion for the Court in *Palko v. Connecticut*, Cardozo rejected the Petitioner’s argument that the double jeopardy provision of the Fifth Amendment should be incorporated through the Fourteenth Amendment and applied against the State of Connecticut. The result was to uphold a capital murder conviction obtained in the second trial of the defendant, after

the state appealed a second-degree murder conviction from the first trial.

Certainly, there were instances when Cardozo was more receptive to the claims of criminal defendants—for example, joining the decision in *Powell v. Alabama* (otherwise known as one of the “Scottsboro Cases”), which found a constitutional right to counsel in state capital trials. Yet, it was primarily in cases dealing with the freedom of speech that Cardozo’s liberal inclinations seemed to be most fully engaged. In *Herndon v. State of Georgia*, Cardozo authored a strongly worded dissent from a decision that rejected, on procedural grounds, the appeal of an African-American communist who had been imprisoned for violating Georgia’s anti-surrection statute by “inducing others to join in combined resistance to the authority of the state.” Here, as elsewhere, Cardozo endorsed Holmes’ “clear and present danger” standard as the test to be used in cases involving the incitement of illegal activity, to balance a state’s interest in preserving order with an individual’s constitutional guarantee of freedom of speech. Indeed, it was in an essay celebrating Holmes’ life and career that Cardozo seemed to offer something more than simply an appreciation of Holmes’ contribution to the protection of freedom of speech, but a glimpse of his own views as well: “Only in one field is compromise to be excluded, or kept within the narrowest limits. There shall be no compromise of the freedom to think one’s thoughts and speak them, except at those extreme borders where thought merges into action. There is to be no compromise here . . . There is no freedom without choice, and there is no choice without knowledge—or none that is not illusory.”

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References and Further Reading

- Cardozo, Benjamin N. *The Nature of the Judicial Process*. New Haven: Yale University Press, 1921/1960.
- , *Mr. Justice Holmes*, *Harvard Law Review* 44 (1931): 682–692.
- Hall, Margaret E. *Selected Writings of Benjamin Nathan Cardozo: The Choice of Tycho Brahe*. New York: Matthew Bender, 1947/1975 reprint.
- Kaufman, Andrew L. *Cardozo*. Cambridge: Harvard University Press, 1998.
- Polenberg, Richard. *The World of Benjamin Cardozo: Personal Values and the Judicial Process*. Cambridge: Harvard University Press, 1997.
- Posner, Richard. *Cardozo: A Study in Reputation*. Chicago: University of Chicago Press, 1990.

Cases and Statutes Cited

- Herndon v. State of Georgia*, 295 U.S. 441 (1935), Cardozo dissenting

MacPherson v. Buick Motor Company, 217 N.Y. 382 (1916)
Palko v. Connecticut, 302 U.S. 319 (1937)
People v. Defore, 242 N.Y. 13 (1926)
Powell v. Alabama, 287 U.S. 45 (1932)

CAREY v. POPULATION SERVICES INTERNATIONAL, 431 U.S. 678 (1977)

Whether, and to what extent, minors should enjoy the same constitutional rights as adults is one of the most vexing and unsettled questions of constitutional law. In *Carey v. Population Services International*, the Supreme Court considered this question in the context of minors' right to privacy.

In 1976, the Supreme Court decided, in the case of *Planned Parenthood of Central Missouri v. Danforth*, that a state may not impose a blanket requirement that a minor obtain parental consent before getting an abortion. One year later, in *Carey*, the Supreme Court considered a challenge to a New York law regulating access to contraceptives by individuals younger than sixteen.

The law had three provisions. First, it prohibited the distribution of contraceptives to individuals younger than sixteen, except by a physician. Second, it allowed only licensed pharmacists to distribute non-prescription contraceptives to individuals older than sixteen. Finally, the law banned the advertisement or display of contraceptives.

The Supreme Court struck down all three provisions. The Court concluded that the fundamental right of the individual to make decisions about whether to procreate, recognized by the Court in *Griswold v. Connecticut* and *Eisenstadt v. Baird*, was unconstitutionally burdened by the requirement that only licensed pharmacists could distribute condoms. Furthermore, the Supreme Court decided that the prohibition on advertising or displaying contraceptives was an unconstitutional restriction on free speech.

The portion of the Court's decision striking down the prohibition on access to contraceptives by individuals younger than sixteen was joined by only four Justices, however. In that opinion, Justice Brennan rejected the argument that the prohibition could be justified by the state's desire to protect minors' health or morals. Justice Brennan found the state's argument that the law served to deter sexual activity by teenagers to be unworthy of serious consideration, expressing doubts that this method of deterrence would actually work, and further asserting that it was illogical to try to protect teens by making the consequences of their sexual activity more severe and harmful. Justice Brennan noted there was no medical justification for allowing only physicians to distribute

nonprescription contraceptives and reaffirmed the vitality of the Supreme Court's earlier decision in *Planned Parenthood of Central Missouri v. Danforth* that the state cannot itself exercise, nor can it give to a third party, an arbitrary veto power over minors' reproductive rights.

Justices White, Powell, and Stevens concurred in Justice Brennan's decision but not his reasoning. Each expressed concern about the breadth of the privacy right recognized by Justice Brennan's opinion and emphasized that states still have broad powers to regulate adolescents' sexual behavior. Nonetheless, all three agreed that the means New York had used to regulate adolescent sexual behavior in this instance were unacceptable.

Thus, in *Carey*, the Court provided an important precedent affirming the right of individuals, including minors, to a realm of sexual and decisional privacy into which the government could not constitutionally intrude; at the same time, however, the Court did not go so far as to recognize an absolute right of sexual autonomy on the part of either minors or adults.

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References and Further Reading

Cruz, David B., *The Sexual Freedom Cases? Contraception, Abortion, Abstinence, and the Constitution*, *Harvard Civil Rights-Civil Liberties Law Review* 35 (2000): 2:299–383.
Garrow, David J. *Liberty and Sexuality: The Right to Privacy and the Making of Roe v. Wade*, 600–704, New York: Macmillan, 1994.
Posner, Richard A., *The Uncertain Protection of Privacy by the Supreme Court*, *Supreme Court Review* (1979): 173.
Tribe, Laurence H. *American Constitutional Law*, 2nd ed., Mineola, NY: Foundation, 1988.

Cases and Statutes Cited

Eisenstadt v. Baird, 405 U.S. 438 (1972)
Griswold v. Connecticut, 381 U.S. 479 (1965)
Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976)

See also **Birth Control**; *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52 (1976); **Privacy**; **Right of Privacy**; **Substantive Due Process**

CAROLINE PRODUCTS v. U.S., 304 U.S. 144 (1938)

This relatively minor case is remembered not for the issue supposedly before the Court, but for a footnote

that in the eyes of many scholars launched a constitutional revolution.

The case itself involved a challenge to a federal law that prohibited the interstate shipment of “filled milk,” defined in the statute as skim milk “compounded with . . . any fat or oil other than milk fat.” The law had clearly been intended to benefit certain parts of the dairy industry, and *Carolene Products*, convicted of shipping “filled milk,” challenged it as exceeding Congress’s commerce powers.

Justice Stone practically dismissed this argument out of hand, and in doing so put forward a simple test for weighing the constitutionality of economic regulations. Legislation “affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon a rational basis within the knowledge and experience of the legislators.” This “rational basis” test became and remains the basic test for economic regulation; it is the least demanding of all constitutional tests, and few laws have ever failed it.

But immediately after the statement of the rational basis test, Stone inserted footnote four. In it he declared:

There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth.

The note went on to say that such legislation would be subject to a “more exacting judicial scrutiny,” as could laws aimed at particular religions, the integrity of the political process, or at “discrete and insular minorities.”

Although Stone did not himself use the term “strict scrutiny,” footnote four led to a new jurisprudence in which economic and other legislation not affecting individual civil rights and liberties would be examined by the courts on a minimal, “rational basis.” If the legislature, either Congress or the states, had the general constitutional power—in this instance, to regulate interstate commerce—and had acted with sufficient reason, the courts would not question the wisdom of the policy.

But when it came to individual rights protected by the Constitution, then the courts would apply a much higher standard. The individual would only have to make out a *prima facie* case that a right had been restricted, and the burden of proof would shift to the state to prove that the limitation of individual liberty resulted from a compelling governmental interest and had been constructed in the least intrusive manner.

In the 1940s, the Court began applying strict scrutiny to laws affecting First Amendment guarantees—especially speech—and statutes affecting race. As a result of footnote four, lower courts began assuming the role of interpreter of property rights vis-à-vis the state, and by applying the rational basis test rarely overturned economic regulation. The Court would rarely grant review in such cases. But in the area of free speech and other constitutionally protected rights—and after 1954 laws classifying people on the basis of race—the Supreme Court became the nation’s chief guardian of civil rights and civil liberties.

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References and Further Reading

Perry, Michael, *Mr. Justice Stone and Footnote 4*, *George Mason University Civil Rights Law Journal* 35 (1996): 6.
Powell, Lewis F. Jr., *Carolene Products Revisited*, *Columbia Law Review* 1087 (1982): 82.

CARROLL v. UNITED STATES, 267 U.S. 132 (1925)

The Supreme Court has held that, under the Fourth Amendment to the Constitution, police officers must obtain a warrant to engage in a search or a seizure, unless their activity falls within one of “a few specifically established and well delineated exceptions.” One of the most important of these exceptions is the “car search doctrine,” often called the “*Carroll* Doctrine,” as it was first enunciated in this case.

Carroll was a bootlegging case from Prohibition times. Police officers knew that the “*Carroll* boys” were bootleggers. They had previously offered to supply undercover agents in Grand Rapids with whiskey. So when officers saw their car by chance, outside Grand Rapids, coming from the direction of Detroit, it was stopped, searched, and sixty-eight bottles of whiskey were found stashed behind the back seat.

Chief Justice Taft, for the majority, was untroubled by the fact that the officers did not have a warrant. Automobiles, unlike “a store, dwelling house, or other structure,” are readily mobile, and “it is not practicable to secure a warrant, because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.”

That did not mean that officers could lawfully stop every car on the road on the chance that they might find contraband. To undertake a warrantless search and seizure of a car, officers had to possess probable cause.

While the *Carroll* Doctrine still applies, permitting a warrantless search and seizure of a vehicle where officers have probable cause to believe that evidence of crime is present, the Court has subsequently held that it is not justified only by the fact of ready mobility. Instead, the car search exception to the warrant requirement survives today because people have a reduced expectation of privacy in their vehicles due to “pervasive and continuing governmental regulation and controls, including periodic inspection and licensing requirements.”

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See also Automobile Search; California v. Acevedo, 500 U.S. 565 (1991); Probable Cause; Search (General Definition); Warrantless Searches

CATEGORICAL APPROACH TO FREE SPEECH

The “categorical approach” is a method of judging where decisions are reached through use of a preestablished system of classifications or categories. Judges compare the case before them to cases in the past to determine the category to which the new case belongs. Judges then apply legal rules already developed for that category to resolve the dispute.

In free speech cases, the categorical approach has been the dominant analytical method for many years. Multiple classification schemes have evolved that help courts systematically dissect and compare the complexities of First Amendment free speech disputes. Classification systems are applied to evaluate the nature of the speech being restricted by government, the setting where the speech would occur, and the nature of the speech restriction. Thus, in resolving a free speech case, a judge would determine first whether the speech at issue is “protected” or “unprotected” by the First Amendment. Categories of “unprotected” speech include obscenity, defamation, incitement, and child pornography produced with real children. If the speech were in the “protected” category, the judge would classify the setting of the speech as either some type of “public forum” or else a “non-public forum.” The judge would also classify the type of governmental speech restriction as either “content based” or “content neutral.” Depending on the outcome of that sequence of categorical moves, the judge would choose which category of “scrutiny” levels to apply to the speech restriction, whether “strict” or “rational basis” or a possible intermediate category.

In First Amendment jurisprudence, the “categorical approach” is usually contrasted with “balancing approaches” and “absolutist approaches.”

Balancing approaches involve weighing the competing interests and rights at stake and assessing their relative strengths to decide whether the speaker or the government speech-restriction will prevail. Absolutist approaches take literally the First Amendment’s command that “Congress shall make no law abridging the freedom of speech,” and only ask whether the restricted speech at issue is genuinely speech rather than conduct.

The categorical approach has been viewed as more speech-protective than balancing approaches, particularly since the U.S. Supreme Court’s use of a balancing method to decide a series of McCarthy-era speech cases in favor of government restrictions on speech (*Dennis v. United States* is the prime example). In addition to being seen as more protective generally of free speech rights, the categorical approach is praised by its proponents for being protective of those speech rights most in danger: the rights of unpopular or distasteful speakers. The categorical approach is commended for providing principled, objective guidance to courts, for helping judges take a pro-speech stand against the popular will, and for providing speakers with notice and fair warning about when governments can restrict speech. The categorical approach is also praised for bolstering the images of courts as dispensers of fair and equal treatment and for making judges less vulnerable to charges of legislating from the bench.

Opponents of categorical approaches, however, question the claimed objectivity of free-speech categories. What seem to be fixed, consistent categories can often be manipulated to produce the desired outcome in the case. Thus, liberal judges are more likely to classify as “content-based” laws regulating sexual expression, whereas conservative judges will often classify the same laws as “content-neutral;” conversely, liberal judges are more likely to categorize laws regulating abortion protesters as “content-neutral,” whereas conservatives assign them to the “content-based” category of speech restrictions. Critics of the categorical approach charge that it is mere labeling, that it is mechanical and formulaic, and that it is not adaptable to a changing world and new technologies. Critics further complain that categories mask the real but unarticulated assessments of facts and policies that occur whenever judges decide speech cases. To the extent such “silent” covert judging happens, the development of constitutional jurisprudence suffers.

Although balancing approaches have been making a comeback in free-speech cases since the days when they were discredited as too pro-government, the multiple classification schemes that comprise the categorical approach remain the primary means of adjudication of free speech cases for the U.S. Supreme Court and the lower courts. Recent Supreme Court

justices who are strong proponents of the categorical approach include Justices Scalia and Kennedy. See Justice Kennedy's defenses of categorical approaches in *Denver Area Educational Telecommunications Consortium* and in *Simon & Schuster*. An example of the Supreme Court using the categorical approach can be seen in Justice Kennedy's opinion for the Court in *Free Speech Coalition*.

The debate between advocates of categorizing and advocates of balancing parallels debates between advocates of "rules" and advocates of "standards."

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References and Further Reading

- Aleinikoff, T. Alexander, *Constitutional Law in the Age of Balancing*, Yale L. J. 943 (1987): 96.
 Barron, Jerome A., *The Electronic Media and the Flight from First Amendment Doctrine: Justice Breyer's New Balancing Approach*, U. Mich. J. L. Reform 817 (1998): 31.
 Huhn, Wilson R., *Assessing the Constitutionality of Laws that are Both Content-Based and Content-Neutral: The Emerging Constitutional Calculus*, Ind. L. J. 801 (2004): 79.
 Scalia, Antonin, *The Rule of Law as a Law of Rules*, U. Chi. L. Rev. 1175 (1989): 56.
 Smolla, Rodney A. *Smolla and Nimmer on Freedom of Speech*, vol. 1, 2:55-73. St. Paul, MN: West Group, 2003.
 Sullivan, Kathleen M., *Post-Liberal Judging: The Roles of Categorization and Balancing*, U. Colo. L. Rev. 293 (1992): 63.

Cases and Statutes Cited

- Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002)
Dennis v. United States, 341 U.S. 494 (1951)
Denver Area Educational Telecommunications Consortium, Inc. v. Federal Communications Commission, 518 U.S. 727, 780-812 (1996)
Simon & Schuster v. Members of the New York State Crime Victims Board, 502 U.S. 105 (1991)

See also **Absolutism and Free Speech; *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002); Balancing Approach to Free Speech; Content-Based Regulation of Speech; Content-Neutral Regulation of Speech; *Dennis v. United States*, 341 U.S. 494 (1951); Intermediate Scrutiny Test in Free Speech Cases; Public Forum Doctrines; Public/Nonpublic Forums Distinction**

CATHOLICS AND RELIGIOUS LIBERTY

The twentieth century witnessed a remarkable realignment of the Roman Catholic Church with the

cause of religious liberty. The widespread embrace of individual rights among Western democracies in the eighteenth and nineteenth centuries had been met with skepticism by the Church, which traditionally favored a confessional state and insisted that freedom must rest on truth. This relationship between freedom and truth was understood to require that the state recognize and defend the Church's unique status among religions.

In his 1832 encyclical *Mirari vos*, for example, Pope Gregory XVI lamented the "absurd and erroneous proposition which claims that liberty of conscience must be maintained for everyone." Pope Pius IX, in his 1864 encyclical *Quanta cura*, warned that "if human arguments are always allowed free room for discussion, there will never be wanting men who will dare to resist truth." The encyclical's accompanying Syllabus of Errors listed among "the principal errors of our times" the increasingly popular beliefs that "every man is free to embrace and profess that religion which, guided by the light of reason, he shall consider true," that "it is no longer expedient that the Catholic religion should be held as the only religion of the State, to the exclusion of all other forms of worship," and the broader notion that "[t]he Church ought to be separated from the State, and the State from the Church." These sentiments were prompted, at least in part, by the era's persistent and violent anticlericalism, particularly in Europe; nevertheless, their breadth seemed to sweep in America's more conciliatory experiment in church-state separation.

An Evolving Embrace

The tone and substance of the Vatican's pronouncements on religious liberty had changed dramatically by the mid-twentieth century. The shift was part of a broader reconception of the Church's relationship with the modern world. Modern liberalism's individualist presumptions forced the Church to think more deeply and articulate more carefully the scope and relevance of natural rights. This exercise was not aimed simply at solidifying a defensive posture against individualism; rather, the Church sought to address the more pressing dangers of materialism, fascism, and communism. In other words, the overlap between the Church's world view and modern liberalism became more obvious as other, more foreboding, threats loomed.

First, as market economies spawned great disparities in wealth along with an increased emphasis on material consumption, the Church broadened and deepened its teaching on social justice, effectively

linking itself with a broader progressive movement, initially focusing on the economic sphere, especially labor rights, but eventually extending to a variety of issues, including race. These causes facilitated the Church's friendlier stance toward individual rights generally, including religious liberty.

Second, in the wake of World War II, the Church was reminded that liberalism and fascism could not be considered moral equivalents. The Church could not be neutral, at least ideologically, on the contest that left Europe physically and spiritually devastated. More practically, World War II shaped the debate over religious liberty by forcing many European Catholic intellectuals to flee to the United States. A generation of influential thinkers was able to make firsthand comparisons between the American and European approaches to church-state separation. Given their divergent national histories, Americans saw liberalism as grounded in religion, whereas Europeans thought it necessary to escape religion to realize liberalism's promise. As a consequence, religion maintained its public relevance and vitality in the United States; this was not lost on observers.

Third, in the postwar climate, communism emerged as an even more overtly hostile threat, becoming the first political force of global reach founded on atheism. Not only did Western liberalism's emphasis on individual rights offer a preferred aspirational ideal, the rights-based system also offered the only realistic means by which to counter communism's expanding threat.

In addition to these sociopolitical factors, the Church's teaching on religious liberty was influenced by development in its theological stance toward other religions. The twentieth century saw renewed debate regarding the presence of truth and potential for salvation in other faith traditions. In this vein, the Second Vatican Council, in *Gaudium et spes* (1965), asserted the possibility of salvation "not only for Christians, but for all men of good will in whose hearts grace works in an unseen way." The Council also declared, in *Nostra aetate* (1965), that the Church "rejects nothing that is true and holy" in other religions and "regards with sincere reverence those ways of conduct and of life, those precepts and teachings which, though differing in many aspects from the ones she holds and sets forth, nonetheless often reflect a ray of that Truth which enlightens all men." Even more significantly, the Council warned that "[w]e cannot truly call on God, the Father of all, if we refuse to treat in a brotherly way any man, created as he is in the image of God." For purposes of religious liberty, this led to the essential recognition that "[n]o foundation therefore remains for any theory or practice that

leads to discrimination between man and man or people and people, so far as their human dignity and the rights flowing from it are concerned."

The Church's evolving embrace of religious liberty was also shaped by the work of several key Catholic intellectuals. Philosopher Jacques Maritain emphasized natural rights and played a key role in the development of the United Nations Declaration of Human Rights. The theology of Yves Congar, Henri de Lubac, and Karl Rahner displayed an increasing openness to much of modern human experience. Bernard Lonergan sought to reframe the conception of understanding in light of modernity. John Henry Newman made the provocative claim that the experience of the faithful has a role in the development of doctrine. These figures loom large in a story that proceeded, in significant part, as a theory-driven conversation.

But no figure looms as large as that of John Courtney Murray, the American theologian who insisted that state-sponsored religion need not be the Catholic ideal, that separate church and state spheres did not threaten—and indeed could enhance—the vitality of religion in society, and that economic and religious individualism must be distinguished from the political individualism of a rights-based democracy. Reflecting how stark his challenge was, he was forbidden by the Vatican from writing on church-state issues during the mid-1950s. (Indeed, virtually all of these key intellectual figures experienced significant institutional opposition from the Church at some point in their careers.) By the time of the Second Vatican Council (1962–1965), however, Murray managed to play an active role in drafting the key documents on which the Church's support for religious liberty would be based for years to come.

The Second Vatican Council

All of these contributing factors culminated in the Second Vatican Council's Declaration on Religious Freedom, *Dignitatis Humanae* (1965), in which the Church plainly declared that "the human person has a right to religious freedom." The key theoretical development was the Council's recognition of the civil sphere/religious sphere distinction, which facilitated in turn a distinction between moral or religious freedom and civil freedom. The Council stated that "[t]he truth cannot impose itself except by virtue of its own truth," and thus a person's "duty to worship God" demands "immunity from coercion in civil

society.” This left “untouched,” in the Council’s estimation, “traditional Catholic doctrine on the moral duty of men and societies toward the true religion and toward the one Church of Christ.”

The perceived necessity of articulating a civil freedom of religion emanated from the nature of the human person. As “beings endowed with reason and free will and therefore privileged to bear personal responsibility,” the Council explained that the human person must exercise his or her moral obligation to seek and adhere to truth, but that he or she can only do so if immune from external coercion. Thus, religious liberty “has its foundation not in the subjective disposition of the human person, but in his very nature,” and immunity from external coercion “continues to exist even in those who do not live up to their obligation of seeking the truth and adhering to it.” The dignity of the human person on which the Church’s conception of religious liberty is founded is known not only through divine revelation—in particular, the “respect which Christ showed toward the freedom with which man is to fulfill his duty of belief in the word of God”—but also is knowable through the human reason developed over the course of human experience, and so is accessible universally.

The Second Vatican Council denied any suggestion that its declaration amounted to an about-face on religious liberty. While the Council acknowledged that “in the life of the People of God, as it has made its pilgrim way through the vicissitudes of human history, there has at times appeared a way of acting that was hardly in accord with the spirit of the Gospel or even opposed to it,” it insisted that “the doctrine of the Church that no one is to be coerced into faith has always stood firm.” Subsequently, Pope John Paul II has recognized that the Church’s approach to human rights has been dynamic. In 1980, he observed that “[d]uring these last decades the Catholic Church has reflected deeply on the theme of human rights, especially on freedom of conscience and of religion,” and that “in so doing, she has been stimulated by the daily life experience of the Church herself and of the faithful of all areas and social groups.”

Championing the Cause

In the post-Vatican II era, John Paul II’s contributions to the theme of religious liberty stand out, as they reflect his own experience with fascism and communism. His voice deepened the Church’s

commitment to the civil sphere/religious sphere distinction, as explored in a 1980 letter:

On the basis of his personal convictions, man is led to recognize and follow a religious or metaphysical concept involving his entire life with regard to fundamental choices and attitudes. This inner reflection, even if it does not result in an explicit and positive assertion of faith in God, cannot but be respected in the name of the dignity of each one’s conscience, whose hidden searching may not be judged by others. Thus, on the one hand, each individual has the right and duty to seek the truth, and, on the other hand, other persons as well as civil society have the corresponding duty to respect the free spiritual development of each person.

Indeed, in John Paul II’s estimation, religious liberty is foundational of all other liberties “insofar as it touches the innermost sphere of the spirit.” His unwavering commitment to religious liberty became especially noteworthy as he used the Church’s moral authority as a leading rallying point of efforts to liberate Soviet bloc countries.

All of this is not to suggest that the Church’s vision of religious liberty has simply melded into the vision embodied in mainstream secular liberalism. The Church has long understood religious liberty not just as an individual right, but is a bulwark against state interference with society’s religious institutions. And at the individual level, the Church stakes out positions requiring a more robust conception of religious liberty than many modern liberals will grant. For example, the Church expects authentic religious liberty to encompass parents’ choice of schooling options for their children. As stated in *Dignitatis Humanae*, the Church expects the government to “acknowledge the right of parents to make a genuinely free choice of schools and of other means of education, and the use of this freedom of choice is not to be made a reason for imposing unjust burdens on parents, whether directly or indirectly.” Religious liberty also cannot be equated, in the Church’s view, with privatized religion. On this front, the Vatican expressed its concern to the United Nations that “[t]he greater exercise of individual freedoms may result in greater intolerance and greater legal constraints on the public expressions of people’s beliefs,” and that “what is being challenged, in effect, is the right of religious communities to participate in public, democratic debate in the way that other social forces are allowed to do.”

On the core concept of religious liberty, however, civil libertarians have a stalwart ally in the Roman Catholic Church. Moreover, by grounding the case for liberty in the very nature of the human person, the Church’s approach may offer a more compelling, less

transient justification than the necessarily contingent defense of liberty emerging from the majoritarian and pragmatic foundations used in modern liberal dialogue.

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References and Further Reading

- Bruce, Douglass, R., and David Hollenbach, eds. *Catholicism and Liberalism: Contributions to American Public Philosophy*. Cambridge: University Press, 1994.
- McGreevey, John T. *Catholicism and American Freedom: A History*. New York: W.W. Norton & Co., 2003.
- Murray, John Courtney. *Religious Liberty: Catholic Struggles With Pluralism*. Louisville: Westminster/John Knox Press, 1993.
- Steinfels, Margaret O'Brien, ed. *American Catholics and Civil Engagement: A Distinctive Voice*. New York: Rowan & Littlefield, 2004.

CATT, CARRIE CHAPMAN (1859–1947)

In 1859, Carrie Chapman Catt was born Carrie Clinton Lane in Wisconsin. She and her family soon moved to Iowa where she graduated with a bachelor's degree from Iowa State Agricultural College in 1880. During college, she enjoyed public speaking and after reading law for a year after college, she began teaching high school. She then became the school's principal and the superintendent of schools. In 1885, she wed Leo Chapman, the editor of the weekly *Mason City Republican*. She became coeditor of the paper and created a feature known as "Woman's World" to discuss women's rights issues. Due to political problems evolving from accusations made by Leo Chapman in the paper and an eventual lawsuit, the Chapmans sold the paper and left town. Leo looked for work in San Francisco while Carrie stayed with her parents. En route to see Leo, she received word that her husband had died of typhoid fever. Carrie remained in San Francisco for a year, where she worked as a reporter and began lecturing. She then returned to her hometown of Charles City, Iowa, to continue lecturing and working for local newspapers. She also joined the Woman's Christian Temperance Union at this time.

When she attended the Iowa Woman Suffrage Association convention in 1889, the association elected her state lecturer and organizer. At the national suffrage convention in 1890, the two leading woman suffrage organizations reunited as the NAWSA (National American Woman Suffrage Amendment) after a rupture two decades earlier, recognizing both methods of attaining woman suffrage—through state amendments and through a federal constitutional

amendment. Also in 1890, Chapman married engineer George Catt. During her first election campaign as a budding feminist politician, Catt went to South Dakota in 1891 to help gain support for a referendum to enfranchise women, and the campaign went disastrously. The following year, the Catts moved to New York. She continued her speaking engagements and became head of the NAWSA's new business committee. Catt wrote detailed instructions on how to start and maintain suffrage clubs, and she significantly helped to both create new and revitalize local clubs. At the 1893 World's Columbian Exposition, Catt began thinking about working with women on an international level. In 1902, she founded the International Woman Suffrage Alliance (IWSA) nearly entirely on her own and despite substantial opposition from her very powerful mentor, Susan B. Anthony. Catt held the presidency of the NAWSA from 1900 to 1904, but resigned her office then due to her husband George's poor health.

Catt continued both her national and international work for women, but her own health was deteriorating. In 1911, in a trip around the world, she announced that the battle for justice must be for the women of the entire world. In 1915, she again became president of the NAWSA and remained its president through the successful passage of the Nineteenth Amendment—which gave women the right to vote—in 1920. Throughout this time period, Catt and the NAWSA supported gaining the vote by constitutional means, whether through individual states or through a federal amendment. States were necessary because they could use their representatives to press for a federal bill, and the federal amendment was essential since it might be nearly impossible to get every individual state to ensure women the franchise.

When the United States declared war on Germany in 1917, the NAWSA decided to stand by the government. Catt would be widely criticized for NAWSA's decision, with pacifists accusing her of selling out to war and antisuffragists criticizing her lack of wartime work. Yet Catt herself had opposed war throughout her life, and in 1915, along with Jane Addams, she helped found the Woman's Peace party. She considered peace to be the greatest objective of any reformer. Catt led a critical suffrage campaign in New York State through the New York Woman Suffrage party that she founded earlier in the decade. Along with New York, six other states passed woman suffrage in 1917. In May 1919, the House ratified the woman suffrage bill, and the Senate followed the following month. After being passed by three quarters of the states, the Nineteenth Amendment passed into law on August 26, 1920.

Once woman suffrage was gained, Catt shifted her emphasis to increasing women's political power. In 1925, Catt organized the first annual Conference on the Cause and Cure of War to promote international solutions to conflict. Throughout her life, Catt led women throughout the world in the quest for suffrage. She died at her home in New York in 1947.

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References and Further Reading

- Catt, Carrie Chapman, and Nettie Rogers Shuler. *Woman Suffrage and Politics: The Inner Story of the Suffrage Movement*. New York: Scribner's, 1926.
- Fowler, Robert. *Carrie Catt: Feminist Politician*. Boston: Northeastern University Press, 1986.
- Peck, Mary. *Carrie Chapman Catt: A Biography*. New York: The HW Wilson Company, 1944.

See also Anthony, Susan B.

CENTRAL HUDSON GAS AND ELECTRIC CORP. v. PUBLIC SERVICE COMMISSION OF NEW YORK, 447 U.S. 557 (1980)

In 1973, when an oil embargo caused fuel shortages, the New York Public Service Commission issued a regulation prohibiting electric companies from advertising to promote electricity use. Central Hudson Gas & Electric, a public utility company, challenged the regulation, arguing that its advertisements were commercial speech protected by the First Amendment.

Before the 1970s, commercial speech was viewed as outside the scope of First Amendment protection. By the mid-1970s, however, the Supreme Court began recognizing some degree of protection for commercial speech, striking down advertising restrictions in *Bigelow* and *Virginia State Board of Pharmacy*.

In *Central Hudson*, the U.S. Supreme Court ruled that the ban on advertisements for electricity violated the First Amendment. In doing so, the Court established a four-part test, balancing government and commercial-speech interests to determine when commercial-speech regulations infringe on free-speech rights. Under this "intermediate scrutiny" test, if the commercial speech is truthful and relates to lawful activity, the regulation must directly advance a substantial government interest and be no more extensive than necessary to serve that interest.

In *Central Hudson*, the Court held that although energy conservation represented a substantial government interest, and the restriction on advertising

directly advanced that interest, the restriction was more extensive than necessary, as it banned even advertisements for products and services that use energy efficiently.

Since 1980, the *Central Hudson* test has endured as the standard governing regulation of commercial speech, despite being frequently criticized as too malleable, both by those favoring greater protection for commercial speech and by those favoring more government control over commercial speech. The most vocal critic of the *Central Hudson* test has been U.S. Supreme Court Justice Clarence Thomas, who would deem per se illegitimate any asserted government interest in withholding information from the public to manipulate their choices in the marketplace.

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References and Further Reading

- Blasi, Vincent, *The Pathological Perspective and the First Amendment*, Columbia Law Review 449 (1985): 85:484–89.
- Hudson, David L., Jr., *Justice Clarence Thomas: The Emergence of a Commercial-Speech Protector*, Creighton Law Review 485 (2002): 35.
- Kozinski, Alex, and Stuart Banner, *Who's Afraid of Commercial Speech?* Virginia Law Review 627 (1990): 76.
- Post, Robert, *The Constitutional Status of Commercial Speech*, UCLA Law Review 1 (2000): 48.
- Smolla, Rodney A. *Smolla and Nimmer on Freedom of Speech*, vol. 2, 20:1–47, St. Paul, MN: West Group, 2003.
- Sullivan, Kathleen, *Cheap Spirits, Cigarettes, and Free Speech: The Implications of 44 Liquormart*, 1996, Supreme Court Review 123 (1996).

Cases and Statutes Cited

- Bigelow v. Virginia*, 421 U.S. 809 (1975)
- Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976)
- See also **Balancing Approach to Free Speech; Balancing Test; Commercial Speech; First Amendment Balancing; 44 Liquormart v. Rhode Island, 517 U.S. 484 (1996); Freedom of Speech Extended to Corporations; Intermediate Scrutiny Test in Free Speech Cases; Thomas, Clarence; Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976)**

CENTRAL INTELLIGENCE AGENCY

As a result of the need for intelligence on the Axis Powers during World War II, the Office of Strategic Services (OSS) was created. After the war, policy makers realized the need for foreign intelligence.

Consequently, in 1947 the National Security Act was passed by Congress, creating the Central Intelligence Agency (CIA). The CIA absorbed the duties of the OSS, additionally taking on the responsibility of coordinating, evaluating, and disseminating intelligence from other U.S. agencies and advising both the president and the National Security Council. The CIA was one of the primary agencies on the front lines of the Cold War, often operating clandestinely in enemy territory.

After the 2001 terrorist attacks, political pressure led to the restructuring of the Intelligence Community of the United States. The CIA, once the hub of the community, came under the umbrella of a community-wide Director of National Intelligence (DNI) on February 17, 2005. The CIA still retains the community's most sizable and well-funded Human Intelligence (HUMINT) function, housed within the Directorate of Operations (DO). The DO, often cited as the most controversial and publicized section of the CIA, is only one of four directorates. The Directorate of Intelligence (DI) analyzes and disseminates collected intelligence. The Directorate of Science and Technology assists with technological systems and devices, document creation, disguises, and other technical activities. Finally, the Directorate of Support (DS), formerly the Directorate of Administration, handles finances, logistical support, security and background investigation, and other administrative activities.

The CIA relies heavily on the expertise of undercover foreign operatives even though their use has been controversial even before the CIA was created. As far back as 1876, the Supreme Court heard a case regarding the use of such operatives by the president in which the Court upheld their use. The CIA has often been the subject of criticism and accusations of legal violations because all of their operations are based on secrecy. Even the exact budget of the CIA is kept secret. In a democracy based on openness, this lack of transparency makes some elements of society uncomfortable. Though it could be argued that the secret nature of the organization and its budget are, in fact, the result of democratic governance, wherein the majority of Americans democratically support the decision.

After the creation of the CIA, the agency faced some of its harshest criticism during the Watergate investigation. During this time, President Nixon was accused of attempting to use the CIA to halt an investigation being conducted by the Federal Bureau of Investigations (FBI), which eventually led to accusations of obstruction of justice against President Nixon.

In addition, the CIA has been accused of several violations of civil liberties in foreign countries regarding various assassination plots of foreign leaders. After the CIA failed to recognize the terrorist threat prior to September 11, 2001, the agency has been under a lot of pressure to aggressively locate and stop terrorist organizations. The CIA has been accused of hiding information regarding their knowledge and actions. Often, the CIA has been questioned about their use of torture as an interrogation method, although the CIA has consistently denied that it engages in such violations of law and human rights.

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References and Further Reading

- Andrew, Christopher. *For the President's Eyes Only*. New York: Harper Collins, 1996.
- Breckinridge, Scott D. *The CIA and the U.S. Intelligence System*. Boulder: Westview Press, 1986.
- Farren, Mick. *CIA: Secrets of The Company*. Barnes & Noble Books: New York, 2003.
- Kessler, Ronald. *The CIA at War: Inside the Secret Campaign Against Terror*, 1st ed. New York: St. Martin's Press, 2003.
- Olmsted, Kathryn S. *Challenging the Secret Government: The Post-Watergate Investigations of the CIA and the FBI*. Chapel Hill, NC: University of North Carolina Press, 1996.
- Shulsky, Abram, and Gary Schmitt. *Silent Warfare: Understanding the World of Intelligence*. Washington DC: Brassey's Inc., 2002.

CEREMONIAL DEISM

One of the difficult church-state issues is determining when the use of religious language by the government violates the Establishment Clause. During the past quarter century, a few Supreme Court justices have defined certain types of government religious speech as "ceremonial deism"—speech that though religious in nature has a secular purpose and hence is constitutional.

The phrase originates with Eugene Rostow, then Dean of the Yale Law School, who explained in his 1962 Meiklejohn Lecture at Brown University that certain types of religious speech, which he called "ceremonial deism," were "so conventional and uncontroversial as to be constitutional." Although Rostow's speech was unpublished, Harvard law professor Arthur Sutherland discussed Rostow's use of ceremonial deism in an essay in the *Indiana Law Journal* in 1964, which helped to give the concept prominence among jurists and legal scholars.

Twenty years later, in 1984, Justice William Brennan became the first U.S. Supreme Court justice to invoke

the phrase ceremonial deism to explain aspects of the Court's Establishment Clause jurisprudence. In his dissenting opinion in *Lynch v. Donnelly* (1984), a case in which the Court considered the constitutionality of a government-supported holiday display that contained religious symbols, Justice Brennan explained that certain types of government religious speech "serve such wholly secular purposes as solemnizing public occasions, or inspiring commitment to meet some national challenge in a manner that simply could not be fully served in our culture if government were limited to purely nonreligious phrases." For Brennan, religious speech such as "the designation of 'in God We Trust' as our national motto, or the references to God contained in the Pledge of Allegiance to the flag can best be understood, in Dean Rostow's apt phrase, as a form of 'ceremonial deism,' protected from Establishment Clause scrutiny chiefly because they have lost through rote repetition any significant religious content." For Justice Brennan, these religious expressions have "an essentially secular meaning."

Five years later, in *County of Allegheny v. ACLU* (1989), another case dealing with the constitutionality of religious symbols in holiday displays, Justice Sandra Day O'Connor also used the phrase ceremonial deism to explain why certain religious speech by government actors does not violate the Establishment Clause: "Practices such as legislative prayer or opening Court sessions with 'God save the United States and this honorable Court' serve the secular purposes of 'solemnizing public occasions' and 'expressing confidence in the future.'" For Justice O'Connor, it was not enough that these forms of religious speech enjoyed long historical practice. Rather, what was crucial was that this use of religious language had a secular purpose, as opposed to a purpose of promoting religion. In that same case, Justice Harry Blackmun also relied on the concept of ceremonial deism for his conclusion that certain forms of governmental religious speech are "not understood as conveying government approval of particular religious beliefs."

More recently, in *Elk Grove Unified School District v. Newdow* (2004), Justice O'Connor again invoked the concept of ceremonial deism when addressing in a concurring opinion the constitutionality of the phrase "under God" in the Pledge of Allegiance recited in public schools. Justice O'Connor described as ceremonial deism that government religious speech about which there is "a shared understanding of its legitimate nonreligious purposes." For O'Connor, four factors were relevant to an assessment of whether religious speech has the requisite "nonreligious purpose" to render it a constitutional expression of ceremonial deism: (1) whether the speech has "been in

place for a significant portion of the Nation's history" and has been "observed by enough persons that it can fairly be called ubiquitous"; (2) whether the speech does not constitute "worship or prayer"; (3) whether there is an absence of reference to a *particular* religion; and (4) whether the speech contains "minimal reference" to religion at all. For Justice O'Connor, the "under God" language in the Pledge of Allegiance satisfied all four factors and hence was constitutional ceremonial deism.

No other justice joined Justice O'Connor's opinion in the *Newdow* case, and no other sitting justice has authored an opinion using the phrase ceremonial deism, but even for those justices who do not expressly rely on the concept of ceremonial deism as part of their Establishment Clause jurisprudence, all of the justices agree that the question whether government speech has a religious or secular purpose is highly relevant to an assessment of the constitutionality of that speech. Many lower courts have used, and continue to use, the concept of ceremonial deism in determining whether government religious speech offends the Establishment Clause.

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References and Further Reading

- Epstein, Steven B., *Rethinking the Constitutionality of Ceremonial Deism*, Columbia Law Review 96 (1996): 2083–2174.
- Sutherland, Arthur, *Book Review (Religion and American Constitutions, by Wilber G. Katz)*, Indiana Law Journal 40 (1964): 83–87.
- Warren, Charles Gregory, *No Need to Stand on Ceremony: The Corruptive Influence of Ceremonial Deism and the Need for a Separationist Reconfiguration of the Supreme Court's Establishment Clause Jurisprudence*, Mercer Law Review 54 (2003): 1669–1718.

Cases and Statutes Cited

- County of Allegheny v. ACLU*, 492 U.S. 573 (1989)
- Elk Grove Unified School District v. Newdow*, 542 U.S. 1 (2004)
- Lynch v. Donnelly*, 465 U.S. 668 (1984)

See also **Establishment Clause (I): History, Background, Framing; National Motto "In God We Trust"; O'Connor, Sandra Day; Pledge of Allegiance ("Under God")**

CHAE CHAN PING v. U.S., 130 U.S. 581 (1889) AND CHINESE EXCLUSION ACT

Chinese first emigrated to the United States in large numbers in 1849, when they joined thousands of

Americans and other foreign fortune-seekers in the “gold rush” to the American West. By 1852, there were approximately 25,000 Chinese in California. With the federal government’s blessing, more entered in the 1860s, when they provided cheap labor to complete the nation’s railroad system. By the time of the 1880 census, 105,465 Chinese were counted in the United States. Concentrated in the West, Chinese made up 8.7 percent of California’s population.

As the numbers of Chinese grew and labor needs subsided, the California legislature repeatedly tried to regulate their activities, as did some other Western states. Under California law, Chinese were subject to entry taxes and discriminatory regulation of their businesses, they were not allowed to vote or testify in court, and their children were prohibited from attending school with white children. Most of these state and local statutes were declared invalid by federal courts.

But beginning in the 1870s, California’s demand for restrictive legislation began to have a national impact. In an unprecedented series of laws in 1882, 1884, 1888, 1892, 1902, and 1904, Congress enacted the “Chinese exclusion laws,” designed to regulate, deter, and ultimately prevent, further Chinese immigration to the United States. The 1882 legislation imposed a ten-year suspension on immigration by Chinese laborers and restricted the ability of Chinese residing in the United States to re-enter after a trip abroad. These restrictions were refined and expanded in subsequent enactments. They quickly had the desired effect; in 1887, Chinese immigration fell to a low of ten admitted Chinese immigrants. However, these laws were not without controversy. With the case of *Chae Chan Ping v. United States*, the Chinese exclusion laws became the first federal immigration laws to be subject to judicial scrutiny.

Chae Chan Ping was a Chinese laborer who entered the United States in 1875. He lived in San Francisco for twelve years until 1887, when he left to visit relatives in China. Before departing, he obtained the “certificate of identity” required by the 1882 and 1884 acts that would permit him to re-enter the United States after his trip.

While Chae Chan Ping was in China, Congress enacted the 1888 Chinese exclusion law, called the Scott Act. Under the act, Congress suspended issuance of identity certificates, and specifically stated that no Chinese who had left the country would be permitted to re-enter, even if they held certificates that had been validly issued before the 1888 Act. Chae Chan Ping was stranded. He attempted to return to the United States less than a week after the 1888 Act came into effect, but he was denied readmission. He sued, claiming that the 1888 Act violated the

Constitution and conflicted with treaties between the United States and China that provided for admission of Chinese laborers.

A unanimous Supreme Court upheld the 1888 Act. The Court treated the legislation with extreme deference, invoking the U. S. government’s inherent power to control its borders. According to the Court, despite Chae Chan Ping’s long-time residence in the United States, his government-issued identity certificate was revocable at any time. Furthermore, the Court opined, if China was concerned about United States’ compliance with treaty obligations, it could raise this directly with the political branches. Treaty enforcement was not an issue for judges.

After this decision, Congress further expanded Chinese exclusion laws with the Geary Act in 1892. The 1892 legislation extended suspension of immigration of Chinese laborers for another ten years. It also required that all Chinese laborers living in the United States obtain a certificate of residence from the commission of internal revenue. The certificate would be issued only with the support of an affidavit from a witness (presumably white) who attested to the alien’s residence. Without a certificate, the alien would be subject to deportation. Although this statute was challenged on numerous constitutional grounds, it was upheld by the Supreme Court in 1893 in the case of *Fong Yue Ting v. United States* (1893). In 1902, Congress extended the suspension of Chinese immigration once again, this time with no termination date. And in 1904, in the Chinese Exclusion Extension Act, the exclusion provisions were made permanent and extended to citizens of the Philippines.

The Chinese exclusion laws and the cases challenging them have had a lasting impact on immigration law and on the experiences of Chinese in the United States. First, the Chinese exclusion cases established the principle of extreme judicial deference to congressional and executive authority over immigration—a principle that, while often challenged, has never been explicitly revoked. Second, the Chinese exclusion laws set the stage for later race- and ethnicity-based immigration restrictions—for example, the exclusion of Japanese and Koreans in the early 1900s—and even the Japanese internments of the 1940s. With the Chinese exclusion laws, the federal government began regulating who could be an “American,” with a significant impact on nonwhite residents and citizens. Third, the implementation of the Chinese exclusion acts served as a model for the identity inspections and documentation requirements that continue to proliferate at the U. S. border. Finally, the Chinese exclusion laws had a significant impact on Chinese families, forcing long (and often permanent) separations. Indeed, the exclusion of Chinese remained part of U. S.

immigration policy until 1943 when, in an act of World War II diplomacy, the laws were repealed by the Magnuson Act and replaced with a strict entry quota for Chinese. Combined with earlier policies such as the Page Act that favored the migration of male laborers, these laws cast a long shadow on the experiences of Chinese Americans.

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References and Further Reading

- Chin, Gabriel J. "Chae Chan Ping and Fong Yue Ting: The Origins of Plenary Power." *Immigration Stories* 7, David A. Martin and Peter H. Schuck eds, Foundation Press, 2005.
- Gyory, Andrew. *Closing the Gate: Race, Politics and the Chinese Exclusion Act*, Chapel Hill: University of North Carolina Press, 1998.
- Hing, Bill Ong. *Making and Remaking Asian America Through Immigration Policy, 1850–1990*. Stanford, CA: Stanford University Press, 1993.
- Lee, Erika. *At America's Gates: Chinese Immigration During the Exclusion Era, 1882–1943*. Chapel Hill: University of North Carolina Press, 2003.
- McLain, Charles, Jr. *In Search of Equality: The Chinese Struggle against Discrimination in Nineteenth Century America*, Berkeley, CA: University of California Press, 1994.

Cases and Statutes Cited

- Chinese Exclusion Act, Act of May 6, 1882, c. 126, 22 Stat. 58
- Chinese Exclusion Act, Act of July 5, 1884, c. 220, 23 Stat. 117
- Chinese Exclusion Act, Act of April 29, 1902, c. 641, 32 Stat. 176
- Chinese Exclusion Extension Act, April 27, 1904, c. 1630, 33 Stat. 394
- Fong Yue Ting v. United States*, 149 U.S. 698 (1893)
- Geary Act, Act of May 5, 1892, c. 60, 27 Stat. 25
- Magnuson Act (Chinese Exclusion Repeal Act), Act of Dec. 17, 1943, c. 344, 57 Stat. 600
- Page Act, Act of March 3, 1875, c. 141, 18 Stat. 477
- Scott (Chinese Exclusion) Act, Act of October 1, 1888, c. 1064, 25 Stat. 504

See also Due Process in Immigration; Noncitizens Civil Liberties; Race and Immigration; Sex and Immigration

CHAFEE, ZECHARIAH, JR. (1885–1957)

Zechariah Chafee Jr., attorney, professor, legal scholar and well-known champion of civil liberties, was born on December 7, 1885, in Providence, Rhode Island. The son of Zechariah Chafee, Brown University Trustee and president of Builders Iron Foundry, Chafee Jr. attended Brown for his undergraduate

degree. Chafee was an excellent student, graduating Phi Beta Kappa in 1907. After graduation, Chafee worked at his father's business for several years. In 1910, after finding the work unsatisfying, Chafee entered Harvard Law School, receiving his law degree in 1913. On graduation, Chafee moved back to Providence to begin his legal career at Tillinghast and Collins. In 1916, Chafee returned to Harvard Law School to take a position as a professor. He would remain at Harvard until his retirement in July 1956. Less than a year after his retirement, Chafee died in Boston, Massachusetts, on February 8, 1957.

Chafee's law school interest in civil liberties crystallized into a focus on the First Amendment as a law professor. Chafee deeply opposed the treatment of anti-war protesters during World War I under the Espionage Act of 1917 and the Sedition Act of 1918, which made it a crime to interfere with the operation of the U.S. military, as well as to speak out against the government or the Constitution. Chafee criticized the statutes as being unconstitutional and laid out his philosophy in a 1919 Harvard Law Review article entitled "Freedom of Speech in Wartime." The article was criticized by a group of Harvard alums that accused Chafee of being a radical and unfit for teaching. They attempted to have Chafee removed from that law school faculty. Although Chafee survived dismissal by a slim one-vote margin, he did not temper his advocacy for the freedom of speech and press. A year later, Chafee published *Freedom of Speech*, which expanded on the views he expressed in the law review article by criticizing current notions of free speech while emphasizing his belief that certain forms of free speech were absolutely essential to a healthy democracy. *Freedom of Speech* would go on to influence First Amendment law for a generation. In 1941, on the eve of the United States' entry into World War II, Chafee republished an updated and revised version of his 1920 book under the new title *Free Speech in the United States*.

In addition to his personal writings, Chafee was an active member in the civil libertarian community. He defended the freedom of speech and civil liberties every chance he could get. In 1920, Chafee, along with future Supreme Court Justice Felix Frankfurter and other prominent attorneys published *To the American People: A Report upon the Illegal Practices of the United States Department of Justice*, which criticized the Justice Department's frequent violations of the Constitution during the Palmer Raids. Chafee also helped to prepare the 1931 *Report on the Lawlessness in Law Enforcement* for the Wickersham Commission, which looked into police misconduct in the administration of justice. Most importantly, however, Chafee had access to or influence on some

of the most prominent jurists of the nation including Supreme Court Justices Louis Brandeis, William Cardozo, Hugo Black, and William O. Douglas. Chafee is widely credited with changing Justice Oliver Wendall Holmes' conception of free speech after his opinion in *Schenck v. United States*.

Chafee was not without his critics. In the 1950s during the House Committee on Un-American Activities' (HUAC) investigations of communist plots against the nation, his opponents often described him as a weak-minded liberal who actively aided communists at home and abroad. Moreover, Chafee's legal philosophy has been and continues to be criticized as inaccurate and placing too heavy an emphasis on the World War I Espionage and Sedition Act cases as the beginning of serious judicial consideration of free speech in America.

While Chafee was a noted authority in many areas of law including evidence, copyright law, and civil procedure, for which he drafted the Federal Interpleader Act of 1936, he is best known for his First Amendment analysis. Indeed, Chafee is frequently regarded as the individual most responsible for the modern constitutional interpretation of the freedom of speech.

Chafee's First Amendment theory was based on the idea that free speech served an essential role in a democracy. He believed that the Framers' purpose in passing the First Amendment was to abolish the law of seditious libel, or the defiant criticism of the government, that was commonly used in England. In addition, Chafee believed that the First Amendment not only protected the press from censorship but also allowed the press the ability to have unhindered discussion of public affairs.

Chafee argued that one of the most fundamental responsibilities of a democratic government is to investigate and spread truths that are of universal concern to the population at large. Accordingly, the best means to discover the truth or to learn what problems exist and therefore how to attempt change was to have open and unlimited debate. Chafee thought restrictions on free speech would cause greater damage to a society than any harm that might come as the result of open discussion. Contrary to many of his contemporaries, Chafee believed that open and unlimited discussion was most important during wartime, because it was during war when people are under the most pressure to conform to the majority. During wartime, society had the greatest need to learn both sides of the argument to determine the truth. Under Chafee's analysis, wartime restrictions on speech served only to produce empty, one-sided talk that was useless in determining the truth.

Chafee placed an equally important role for the protection of free speech on the average citizen. He

argued that if the community itself didn't stand up for open speech, then laws protecting freedom of speech would be ineffective. Chafee believed that community customs against free speech had as destructive an effect on free speech as a restriction by statute.

Chafee believed that two forms of expression existed: expressions of individual interest, where people express themselves on matters that are important to them personally, and expressions of social interest, where people express words that convey ideas that are concerned with essential or socially valuable principles. Chafee wrote that since expressions of social interest focus on the search for truths that will help keep order in society and safeguard morality, they were more important than expressions of individual interest. As a consequence, Chafee argued that expressions of social interest must be afforded the greatest protection from censorship and should only be restricted when it is absolutely certain to incite or cause harm to public safety.

Chafee, however, did not believe that the Framers intended there to be an absolute right to freedom of speech under every circumstance. He thought that obscene, profane, indecent, and defamatory speech should not be protected. Chafee argued that these forms of speech were more like acts than words. Moreover, he said that since they offered little if any chance for a counter-argument, they could not convey any socially valuable ideas. Under Chafee's analysis, because of their ability to inflict immediate injury on the listener, incite unlawful acts, or disturb the important societal interests in peace of mind, order, and the training of the young, their expression could be censored, restricted, or punished. For Chafee, however, the scope of what was included in obscene, profane, indecent, and defamatory speech needed to be narrow to protect against the inclusion of unpopular ideas as expressions that cause or incite harm or injury.

Chafee also believed that the freedom of speech, or more specifically, the freedom of debate extended to members of Congress. Indeed, he believed that the right of members to be free to debate was so important to the Framers that they included it in the Constitution under Article 1, Section 6, rather than in the Bill of Rights. He held that there was an intimate connection between the freedom to debate in Congress and the freedom of speech of the private citizen, because the basis for limiting freedom of debate in government was similar to that used to limit freedom of speech in society at large. For Chafee, just as the freedom of speech in society helped in the attainment of truth, freedom of debate in Congress helped to bring about the most efficient management of the government affairs.

Similar to his theories on freedom of speech, Chafee also believed that freedom of debate was not unlimited. He believed that the freedom to debate extended only to what members did as part of the business of Congress. All debate outside of these parameters was open to punishment. The Constitution, however, made clear that only fellow members of Congress had the ability to punish abuses of the freedom of debate. Accordingly, Chafee believed that members had a positive duty to police themselves and ensure that the freedom of debate did not result in slanderous speech against private citizens or interests.

Chafee's arguments for the right of all people to speak their mind without fear of punishment continues to play an important role in American society.

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References and Further Reading

- Chafee, Zechariah Jr., *Freedom of Speech in Wartime*, Harvard Law Review 32, (1919): 932.
 ———. *Free Speech in the United States*. Cambridge, MA: Harvard University Press, 1948.
 Smith, Donald L. *Zechariah Chafee, Jr., Defender of Liberty and Law*. Cambridge: Harvard University Press, 1984.

Cases and Statutes Cited

Schenck v. United States, 249 U.S. 47 (1919)

CHAIN GANGS

In the late 1860s, state legislatures authorized judges to sentence offenders to work on chain gangs. Traditionally, these gangs would spend ten to twelve hours a day breaking rocks with sledgehammers while they were bound together at the ankles with heavy chains and shackles. Members of the chain gang were allowed to change their clothes only once a week. They slept chained together and remained chained at all times even when defecating in a bucket—their only toilet.

Prison guards constantly threatened and physically abused chain gang members. Special forms of torture were also used to control the chain gangs. For example, the sweat-box treatment involved locking a prisoner into a wooden box that was too short to stand in but not deep enough to sit in. The prisoner would remain in the box for days while temperatures within the box exceeded 100 degrees.

Because the majority of chain gang members were African-American men, many citizens opposed the existence of chain gangs on the basis of racial discrimination. The brutal and inhumane treatment of chain

gang members was also criticized. In addition, organized labor opposed chain gangs because they constituted a form of “slave” labor. As a result of this opposition, chain gangs were eventually eliminated from the United States’ landscape sometime around the 1930s.

In 1995, however, chain gangs reappeared in several states including Alabama, Arizona, Florida, Iowa, Kentucky, Oklahoma, Mississippi, Nevada, Tennessee, and Wisconsin. At least five of these states have enacted statutes that require inmates to spend a portion of their sentence working on chain gangs. In the other states, chain gangs participation is permitted but not required.

As a result of the new laws, several inmates have filed lawsuits challenging the use of chain gangs as cruel and unusual punishment in violation of the Eighth Amendment. In *Austin v. James*, a lawsuit filed by the Southern Poverty Law Center (SPLC), the state of Alabama agreed in a settlement to stop chaining inmates together.

The SPLC was also able to secure a finding by the Federal Court that the practice of handcuffing chain gang members to a metal rail (the “hitching post”) in the Alabama heat for several hours without water or bathroom breaks was a violation of the Eighth Amendment of the United States Constitution.

Other groups, such as Amnesty International, believe that chain gangs violate international laws such as Article 7 of the International Covenant on Civil and Political Rights and Article 33 of the United Nations Standard Minimum Rules for the Treatment of Prisoners.

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References and Further Reading

- Oshinsky, David. *Worse than Slavery: Parchman Farm and the Ordeal of Jim Crow Justice*. Free Press Paperbacks, 1996.
 Southern Poverty Law Center—*Austin v. James* (Case Number 95 CV 637, U.S.D.C. Alabama 1995) available at <http://www.splcenter.org/legal/landmark/prison.jsp>.

CHAMBERS v. FLORIDA, 309 U.S. 227 (1940)

Torturing a man to confess a crime is an ancient evil. Subtler pressures can also break a man. Under the Fifth Amendment, *Bram v. United States*, and the Fourteenth Amendment, the Constitution outlaws the use of mental pressure or physical force to get a confession. “And they who have suffered most from secret and dictatorial proceedings have almost always been the poor, the ignorant, the numerically weak, the

friendless, and the powerless.” Justice Black’s steel prose in *Chambers v. Florida* was extolled by Justice Frankfurter as “One of the enduring utterances in the history of the Supreme Court and in the annals of human freedom.”

The petitioners were four “ignorant young colored tenant farmers” arrested without a warrant on suspicion of having robbed and murdered an elderly white man. The community was outraged. The sheriff rounded up a group of blacks, locked them in jail, and subjected them to relentless questioning for a week on the fourth floor of the county jail. One was told “if I didn’t come across I would never see the sun rise.” After a concluding all-night session, Chambers and the other petitioners gave their “sunrise confessions.”

Justice Black reversed the Florida Supreme Court and petitioners’ death sentences. *Chambers* is half way between Hughes’s due process condemnation of coerced confessions in *Brown v. Mississippi* (1936) and Black’s later dissent in *Adamson v. California* (1947). Thus in *Chambers* Black speaks of “fundamental standards of procedure in criminal trials” and one of those fundamentals, according to Hugo Black, is the Fifth Amendment’s prohibition against self-incrimination. At the time of *Chambers*, the Supreme Court had not yet come around to Justice Black’s view; *Twining v. New Jersey* (1908) stood in the way. The “current of opinion” mentioned in a careful footnote in *Chambers* “—that the Fourteenth Amendment was intended to make secure against state invasion all the rights, privileges and immunities protected from federal invasion by the Bill of Rights”—was Hugo Black’s own.

Justice Black did something unprecedented in 1968, appearing on national television. With great emotion, Justice Black read from the closing part of his opinion in *Chambers v. Florida*:

Under our constitutional system, courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement. Due process of law, preserved for all by our Constitution, commands that no such practice as that disclosed by this record shall send any accused to his death. No higher duty, no more solemn responsibility rests upon this Court, than that of translating into living law and maintaining this constitutional shield deliberately planned and inscribed for the benefit of every human being subject to our Constitution—of whatever race, creed or persuasion.

“And I think if it’s enforced that way, this can be and is bound to be the best Constitution in the world.”

PAUL R. BAIER

References and Further Reading

- Baier, Paul R. “Introduction to Hugo Black: A Memorial Portrait.” *Yearbook Supreme Court Historical Society* (1982): 72–73.
- Ball, Howard. *Hugo L. Black: Cold Steel Warrior*. New York and Oxford: Oxford University Press, 1996.
- Black, Elizabeth S. “Hugo Black: A Memorial Portrait.” *Yearbook Supreme Court Historical Society* (1982): 73–94.
- Black, Hugo L., and Elizabeth Black. *Mr. Justice and Mrs. Black*. New York: Random House, 1986.
- Frank, John P. *Mr. Justice Black: The Man and His Opinions*. New York: Alfred A. Knopf, 1949.
- “Justice Black and the Bill of Rights,” Interview by Eric Sevarid and Martin Agronsky, CBS News Special, December 3, 1968 (Burton Benjamin producer), transcript published in *Southwestern University Law Review* 9, no. 4 (1977): 937–951.
- Newman, Roger K. *Hugo Black: A Biography*. New York: Pantheon, 1994; Second Edition, New York, Fordham University Press, 1997.

Cases and Statutes Cited

- Adamson v. California*, 332 U.S. 46 (1947)
- Brown v. Mississippi*, 297 U.S. 278 (1936)
- Bram v. United States*, 168 U.S. 532 (1897)
- Malloy v. Hogan*, 378 U.S. 1 (1964)
- Twining v. New Jersey*, 211 U.S. 78 (1908)

See also **Bill of Rights: Structure; Brown v. Mississippi, 279 U.S. 278 (1936); Coerced Confessions/Police Interrogation; Due Process; Fourteenth Amendment; Frankfurter, Felix; Hughes Court; Hughes, Charles Evans; Ku Klux Klan; Lincoln, Abraham; Self-incrimination (V): Historical Background; Self-incrimination: Miranda and Evolution**

CHAMBERS v. MISSISSIPPI, 410 U.S. 284 (1973)

Unreasonable application of evidentiary principles against a criminal defendant may violate the U.S. Constitution on any number of grounds, including the Compulsory Process, Due Process, or Confrontation Clauses. *Chambers v. Mississippi*, 410 U.S. 284 (1973), stands for the proposition that the Due Process right to a fair trial is implicated when evidentiary rules deprive a criminal defendant of the right to present evidence critical to his defense.

Chambers involved the shooting of a police officer during a fracas in a Mississippi pool hall. While some evidence pointed to Leon Chambers as the perpetrator, another man—Gable McDonald—later confessed to the crime. McDonald, however, recanted one month after his confession. Unable to inquire fully into the nature of McDonald’s confession and recantation on

cross-examination at trial due to state evidence rules, Chambers' defense team sought to introduce the testimony of three witnesses to whom McDonald had admitted participation in the shooting. Nevertheless, McDonald's statements to these witnesses were deemed inadmissible hearsay under state law, and Chambers was convicted of murder. In an 8–1 decision, the U. S. Supreme Court reversed Chambers' conviction, finding that state law prevented him from developing his defense and thereby interfered with his Due Process rights.

Although the Supreme Court opinion was crafted narrowly and linked to the facts of the case, *Chambers* has subsequently taken on significance as a landmark case for criminal defendants: a bulwark safeguarding a defendant's right to present exculpatory evidence in his own defense.

DANIEL S. MEDWED

References and Further Reading

- Fisher, George. Evidence (2002): 580–586.
 Hoeffel, Janet C., *The Sixth Amendment's Lost Clause: Unearthing Compulsory Process*, Wis. L. Rev. (2002): 1275.
 Nagareda, Richard A., *Reconceiving the Right to Present Witnesses*, 97 Mich. L. Rev. 1999: 1063.

Cases and Statutes Cited

- In re Oliver*, 333 U.S. 257 (1948)
Webb v. Texas, 409 U.S. 95 (1972)
Washington v. Texas, 388 U.S. 14 (1967)

See also **Confrontation and Compulsory Process; Defense, Right to Present; Due Process**

CHAMBERS, WHITTAKER (1901–1961)

Whittaker Chambers, born Jay Vivian Chambers in Brooklyn, New York, in 1901, was a central figure in one of the most sensational of the post-1945 Red Scare investigations conducted by the House Un-American Activities Committee (HUAC). Educated at Columbia University in the 1920s and active in college literary and intellectual activities, Chambers became enamored with bolshevism, joining the U.S. Communist Party in 1925. An active member in Communist literary circles, he was recruited for the Communist underground in 1932 where he functioned as a courier, smuggling U.S. government documents to the Soviets. He became disillusioned with communism, however, and broke with the party in the late 1930s.

During his subsequent tenure as an editor for *Time*, Chambers became a more strident anticommunist. He was called before HUAC in 1948 during the

Committee's very public investigation into the problem of communists in government. In his testimony, he identified former Communist colleagues, including a bright, well-respected diplomat and civil servant named Alger Hiss, who had traveled at high levels of the Franklin Roosevelt administration. The hearings became a well-publicized standoff between Chambers and Hiss, because Hiss emphatically maintained he had never been a member of the Communist Party. Ultimately, Chambers expanded his allegations to include an accusation that Hiss had also been involved in espionage for the Soviets. Amidst a series of charges and countercharges, as well as a well-publicized face-to-face confrontation with Hiss, Chambers summoned the Committee to his Maryland farm where he very dramatically extracted reels of microfilm from a hollowed out pumpkin, claiming these were classified documents reproduced on Hiss's personal typewriter. Although Hiss continued to maintain his innocence, a subsequent FBI investigation of the documents seemed to validate Chambers's charges. Hiss was ultimately convicted of perjury in 1951. The hearings, however, the first ever televised, contributed greatly to the public fear of the danger of domestic communism and its ability to penetrate American institutions.

Hiss continued to assert his innocence even until his death in 1996. Chambers's allegations, however, have received support in recent years as disclosures in the *VENONA* transcripts of messages sent by Soviet agents in the United States to Moscow during the early 1940s seem to identify Alger Hiss as a Soviet spy.

KAREN BRUNER

References and Further Reading

- Haynes, John Earl, and Harvey Klehr. *VENONA: Decoding Soviet Espionage in America*. New Haven: Yale University Press, 1999.
 Swan, Patrick A., ed. *Alger Hiss, Whittaker Chambers, and the Schism in the American Soul*. Wilmington, DE: Intercollegiate Studies Institute, 2003.
 Tanenhaus, Sam. *Whittaker Chambers*. New York: Random House, 1997.
 Weinstein, Allen. *Perjury: The Hiss-Chambers Case*. New York: Knopf, 1978.

See also **Hiss, Alger; House Un-American Activities Committee**

CHANDLER v. FLORIDA, 449 U.S. 560 (1981)

The Supreme Court ruled in *Chandler v. Florida* that the Constitution did not require an absolute ban on

cameras in the courtroom, marking a significant change in its thinking on the issue. In 1965 in *Estes v. Texas*, the Court overturned a defendant's conviction based on its finding that the presence of television cameras had violated his right to a fair trial. Television technology was still fairly primitive at the time, however, and the *Estes* Court acknowledged that technological improvements that would make cameras more unobtrusive would require a reexamination of the issue. By the time of *Chandler*, many states had experimented with cameras in the courtroom, and at least ten states allowed them without the consent of the defendant. Florida was one of those states, and in 1981, the Supreme Court reexamined the camera issue when it heard the appeal of two Miami policemen convicted of burglary who claimed that the presence of cameras over their objections had denied them a fair trial. The Supreme Court unanimously disagreed, holding that the presence of television cameras does not inherently violate a criminal defendant's Sixth Amendment rights. While individual defendants retained the ability to show that the presence of cameras had prejudiced their fair trial rights in a specific case, the Court said, an absolute ban on cameras was not justified, given improvements in broadcasting technology. After *Chandler*, restrictions on cameras were eased in most states and today, all fifty states allow still or video camera coverage for some court proceedings.

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References and Further Reading

- Barber, Susanna. *News Cameras in the Courtroom: A Free Press-Fair Trial Debate*. Norwood, NJ: Ablex Publishing, 1987.
- Cohn, Marjorie, and David Dow. *Cameras in the Courtroom: Television and the Pursuit of Justice*. Lanham, MD: Rowman & Littlefield, 2002.
- Radio-Television News Directors Association & Foundation. "Cameras in the Court: A State-by-State Guide," <http://www.rtndf.org/foi/sec.shtml>.

Cases and Statutes Cited

Estes v. Texas, 381 U.S. 532 (1965)

See also **Cameras in the Courtroom; First Amendment and PACs**

CHANDLER v. MILLER, 520 U.S. 305 (1997) (CANDIDATES)

In 1990, the Georgia legislature passed a law requiring that each candidate for state office certify that

he or she had tested negative for illegal drugs. The statute limited qualification to those who had passed a urinalysis test administered by a state-approved laboratory. The tests sought to identify use of marijuana, cocaine, opiates, amphetamines, and phencyclidines. The statute covered such posts as the governor, the school superintendent, and justices of the state supreme court. Some candidates, including Walker L. Chandler, the Libertarian nominee for Lieutenant Governor, sued the state, arguing that the mandatory drug testing violated the Fourth Amendment.

When the case reached the U. S. Supreme Court, it raised the question of whether the Fourth Amendment allowed states to compel drug tests of candidates absent any showing of individualized suspicion. The Court recognized that the Fourth Amendment, in protecting "the right of the people to be secure in their persons . . . against unreasonable searches and seizures," usually required that searches of a citizen's own body only be permitted when the government had some level of information, such as probable cause, to believe it would find something illegal. The Court had crafted an exception to this general rule to apply only under certain limited circumstances, called "special needs." In these special needs cases, the government pursued information not for criminal prosecution, but for narrow goals beyond those of law enforcement. The Court had previously accepted drug testing as meeting a special need for only certain groups of people, such as student athletes (to protect the educational environment of schools), customs agents (to protect the security of the nation's borders), and railroad employees (to ensure the safety of trains).

To decide whether drug testing of candidates fell within special needs, the Court balanced the competing interests of the public and the individual. In this analysis, special needs were found when the privacy interest implicated by the government search was "minimal" whereas the government interest in the search was "substantial—important enough to override the individual's acknowledged privacy interest." In assessing the citizen's side of the scales, the *Chandler* Court deemed Georgia's testing method to be "relatively noninvasive." The Court, however, was troubled when it focused on the government's side of the equation. Since the state tests could be foiled by abstention before the testing date, Georgia's scheme would be ineffective in identifying illicit drug users. The only purpose remaining in testing candidates was to display the government "commitment to the struggle against drug abuse." Such a "symbolic" need was not enough to be "special," for "diminishing personal privacy for a symbol's sake" did

not pass Fourth Amendment muster. The Court therefore held that Georgia's mandatory drug testing of candidates did not "fit within the closely guarded category of constitutionally permissible suspicionless searches."

The long-term impact of *Chandler* remains uncertain. Five years after *Chandler*, the Court reaffirmed drug testing as within special needs in *Board of Education v. Earls*, 536 U.S. 822 (2002). In *Earls*, the Court upheld urinalysis of students participating in extracurricular activities. The language of the *Earls* decision left in doubt whether *Chandler* represented a curtailment of the entire special needs doctrine or merely a refinement in the context of candidates for public office.

GEORGE M. DERY, III

References and Further Reading

Dery III, George M., *Are Politicians More Deserving of Privacy than Schoolchildren? How Chandler v. Miller Exposed the Absurdities of Fourth Amendment "Special Needs" Balancing*, Ariz. L. Rev. 40 (1998): 73.
United States Constitution, Amendment IV.

Cases and Statutes Cited

Board of Education v. Earls, 536 U.S. 822 (2002)
Chandler v. Miller, 520 U.S. 305 (1997)

CHAPLAINS: LEGISLATIVE

The practice of using a chaplain to offer a prayer at the beginning of each legislative session dates back to the first session of the first congress. Since then, state legislatures, the U. S. Congress, and the U. S. Supreme Court have opened sessions with prayers. Some have questioned, however, whether this tradition represents an unlawful entanglement of church and state, violating the Establishment Clause of the Constitution.

The Supreme Court addressed the constitutionality of legislative chaplains in 1983 with *Marsh v. Chambers*, 463 U.S. 783 (1983). Ernest Chambers, a member of the Nebraska legislature, challenged that legislature's practice of opening sessions with a prayer. Chief Justice Burger, writing the opinion for the 6-3 majority, looked at the history of legislative chaplains. He noted that the Continental Congress, whose membership included many framers of the Constitution, used legislative chaplains. Therefore, the Court concluded, the framers themselves did not view legislative chaplains as unconstitutional. Burger

went on to say that the use of legislative chaplains is a "tolerable acknowledgement" of the role of religion in the United States and the beliefs held by many of its citizens. He claimed that the Establishment Clause is not necessarily violated when the actions of the government coincide with religious ends, and that the fact that legislatures have long used without a negative consequence shows that the practice is harmless.

Justice Brennan's lengthy dissent outlined some of the arguments against the constitutionality of legislative chaplains. He first noted that the majority failed to subject the issue to any legal tests.

One issue that the majority did not address was whether the use of legislative chaplains failed the Lemon test. When there is a question of whether a practice violates the Establishment Clause, the Supreme Court generally applies the Lemon test, developed in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). A government action does not violate the Lemon test when (1) the government's action has a legitimate secular purpose; (2) the primary effect of the action is not to either advance or inhibit religion; and (3) the action does not create an "excessive government entanglement" with religion. Brennan noted that a prayer has an inherently religious, rather than secular, purpose. He also notes that the goal of the prayer, to quiet legislators down and put them in a serious frame of mind, could be accomplished in a secular manner, so the use of a religious prayer to that end does not have a secular purpose. He also claimed that the primary effect of the prayer as to "explicitly link religious belief and observance to the power and prestige of the State" and thus to advance religion. He also claimed that by having the government choose a chaplain or chaplains for the invocation, an excessive government entanglement necessarily exists. There is also government entanglement because the issue of legislative chaplains is politically divisive and could cause voters to choose their legislators based on religion. Thus, in Brennan's opinion, the use of legislative chaplains violates all three prongs of the Lemon test, and thus violates the Establishment Clause.

The Lemon test aside, Brennan said that the use of legislative chaplains violates the Establishment Clause. He noted historically that the Establishment Clause has been regarded ensuring a separation of church and state and a neutrality of the government with regard to religion. This practice forces citizens to pay taxes to further Judeo-Christian prayer, when they may or may not believe in such traditions, involves government oversight and regulation of chaplains, and, according to Brennan, trivializes religion "by too close an attachment to the organs of

government.” The Nebraska legislature was not being neutral toward religion, but was favoring religion over non-religion and Judeo-Christian traditions over others. Similarly, the Nebraska legislature failed to keep the government and religion separate by hiring, employing, and overseeing religious officials performing religious duties. Thus, Brennan stated, the employment of legislative chaplains is unconstitutional.

While it may be true that the framers of the Constitution did not see the use of legislative chaplains as an impermissible establishment of religion, that does not mean the debate ought to end there. There are instances in which we deliberately go against the intent of the framers. Our views on race and gender, for example, have evolved since the passage of the Constitution. Perhaps, even if the framers believed that the Establishment Clause did not apply to legislative chaplains, their employment might be considered no longer appropriate given the ever-increasing religious diversity of our nation.

Thus, despite the holding in *Marsh v. Chambers*, there are still Constitutional issues to examine regarding legislative chaplains.

FATHER ROBERT F. DRINAN, S. J.

Cases and Statutes Cited

Lemon v. Kurtzman, 403 U.S. 602 (1971)

Marsh v. Chambers, 463 U.S. 783 (1983)

CHAPLAINS: MILITARY

Military chaplains originated in biblical times and have long been recognized as an important component of many armed forces. They have served in Western armies since at least the fourth century. From the earliest days of British settlement in the New World, chaplains were employed in American colonial militias. When the Continental Army was formed, chaplains attached to the militia of the thirteen colonies became part of the nation's first army. Military chaplaincy has continued ever since, with its size growing larger in proportion to the increase in the size of the armed forces.

The federal government has viewed chaplains as necessary to the well-being of the military. George Washington, as the first commander-in-chief, felt strongly that they were needed to bolster the morale of his troops. Moreover, before the invasion of predominantly Roman Catholic Canada in September 1775, he ordered his generals “to protect and support the free Exercise of Religion of the Country and the undisturbed Enjoyment of the rights of Conscience in religious Matters.”

The military chaplaincy was formally established in July 1775 and is the second oldest branch of the Army, preceded only by the infantry. The Continental Congress passed regulations governing the appointment and salaries of chaplains. The first Articles of War called on soldiers to attend religious services, which were performed twice daily.

Although their noncombatant status was recognized as early as the Council of Regensburg in 742 C. E., in colonial America chaplains fought alongside their comrades—as they did some during the Revolutionary War, the War of 1812, and the Civil War. Others played a more professional role by serving as intelligence gatherers and camp aides. In 1864, an international convention brought about the first treaty that recognized chaplains as noncombatant persons on the battlefield. From that point on, U. S. military chaplains did not fight in armed conflicts.

At first, American chaplains were mostly Protestant ministers, but by the Civil War Catholic priests and Jewish rabbis had also been admitted into the armed forces. Today military chaplains represent more than 200 denominations.

In modern times, the Department of Defense has continued to commission chaplains to accompany United States soldiers at every location they may be serving. Eleven chaplains were killed in World War I. Seventy-seven lost their lives in World War II—during which four became famous when a rabbi, a Catholic priest, and two Protestant ministers offered their life vests to young soldiers as their transport ship was sinking off the North Atlantic coast. The four died as a result of their sacrifice. Eleven chaplains lost their lives in Korea, and thirteen in Vietnam. More than 3,000 Army chaplains were decorated during the twentieth century. More recently, more than 500 chaplains were deployed in Iraq, many of them coming from reserve units.

Today, there are currently some 25,000 American military chaplains, serving primarily in the Army, Navy, and Air Force—on military bases, at front lines, and in medical units. The Chief of Chaplains determines their number and denominations on the basis of current needs of the military population. The Department of Defense recognizes a wide range of religious groups, from traditional faiths such as Christianity, Judaism, and Islam to nontraditional religions such as Wicca.

Chaplains must possess both bachelors and divinity degrees. Like regular military personnel, they are required to meet age and fitness requirements and to engage in military training (although they are exempt from weapons training). They are also subject to military discipline. Although all chaplains have been ordained by their denominational group, because they

must be available any place soldiers are deployed, they must also be able to provide religious guidance to persons of other faiths. They are specifically prohibited from converting members of others faiths.

The most difficult responsibility of military chaplains is spiritually and morally to prepare troops to take life and to die, but they also serve as personal counselors. Many are trained in addressing the special concerns of young adults, such as family affairs and substance-abuse issues.

Military chaplains' commissions have come under fire from a Constitutional perspective. Although Congress has been required to provide troops with chaplains in distant parts of the world, their funding has been challenged as a violation of the establishment clause of the First Amendment. Similarly, limitations placed on specific religious observances while in the military have been challenged under the free-exercise clause.

The U. S. Court of Appeals for the Second Circuit addressed the first argument in *Katcoff v. Marsh*, holding that Congress does have the authority to commission chaplains. The court declared that the government's power is derived from Art. I, § 8 of the Constitution, which allows Congress to establish an army for the purpose of "preserving the peace and security, and providing for the defense, of the United States." It viewed the government's goal as one that does not include establishing a religion, but rather "maintain[ing] the efficiency of the Army by improving the morale of our military personnel."

The establishment clause and the statutes creating the military chaplaincy, said the court in *Katcoff*, must be viewed in light of their historical background. Congressional authorization of a military chaplaincy—both before and contemporaneous with the adoption of the First Amendment, and for two centuries thereafter—is "weighty evidence" that the establishment clause was not intended to restrict religious freedom in the military. The purpose of the Constitutional and legislative provisions "is to insure that no religion be sponsored or favored, none commanded, and none inhibited."

Moreover, said the court, the free exercise clause obligates Congress to accommodate the religious practices of military personnel who have been moved to areas outside the United States.

In fact, although free exercise has long been viewed as subordinate to military necessity, chaplains have nevertheless been successful in overcoming various restrictions placed on them by their superiors. For example, the Persian Gulf War presented special dilemmas for Jewish and Christian troops, many of whom found it difficult to practice their religion for fear of offending the predominantly Moslem host countries. Chaplains themselves were ordered to

remove religious insignia from their uniforms. Christmas and Passover observances had to be muted or celebrated on ships offshore. By the end of the war, however, chaplains were allowed to wear their insignia and were able to hold both Christian and Jewish services in their encampments and beyond.

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References and Further Reading

- 10 U.S.C. §§ 3293, 3581 (2000).
- Annan, Kent. *Chaplains Who Serve the US Armed Forces*, 6 For God & Country 3 (2002), http://www.pstem.edu/read/inspire/6.3/feature_1/.
- Brown, Michael. "Military Chaplains Role in War, History." *Air Combat Command News Service*, April 25, 2003, <http://www2.acc.af.mil/accnews/apr03/03147.html>.
- Department of Defense, Directive 1304.19 §§ 3,5 (Sept. 18, 1993).
- Diamond, Mark. *Deployed Chaplains: Faith on the Front Lines*, U.S. Military Art Prints, April 21, 2003, <http://www.globalsecurity.org/military/library/2003/04/mil-030421-afpn04.htm>.
- Drazin, Israel, and Cecil B. Currey. *For God and Country: The History of a Constitutional Challenge to the Army Chaplaincy*, 1995.
- Jewish U.S. Marine, <http://www.kolot.com/FS1999/rick0004.shtml>.
- Lasson, Kenneth, *Religious Liberty in the Military: The First Amendment Under 'Friendly Fire,'* Journal of Law & Religion 471 (1992): 9:493.
- Malin, Don. *Military Chaplains and Religious Pluralism*, http://www.wfial.org/Articles/Military_chaplains.htm (April 2003).
- Odom, Jonathan G., *Beyond Arm Bands and Arms Banned: Chaplains, Armed Conflict, and the Law*, Naval Law Review 1 (2002): 49:5.
- Separation: Military Chaplains—Government Chaplains and the Separation of Church and State*, http://atheism.about.com/library/FAQs/cs/blcsm_gov_chapmilit.htm.
- Sweet, Michael. "Rabbi Brings Torah to Marines in Babylon." *Marine Corps News* June 28, 2003, <http://www.usmc.mil/marine.unk/nch2000.nsf/0/DE75471AF9EF7-BE185256D550004E024>.
- War Over, Some Clergy Still Away on Duty*. *Christian Century*, June 28, 2003, http://www.findarticles.com/cf_dls/m1058/13_120/104681891/print.jhtml. Forty percent of the chaplains in the army were from reserves and sixty percent were from active duty.

Case and Statutes Cited

Katcoff v. Marsh, 755 F.2d 223, 225 (2nd Cir. 1985)

See also **Religious Freedom in the Military**

CHARITABLE CHOICE

Charitable Choice is a set of statutory parameters attached to a social service program with the purpose

of making the government more welcoming to all faith-based social service providers. The provision first appeared in the federal comprehensive welfare reform act of 1996. A year later Charitable Choice was extended to welfare-to-work assistance, was next incorporated into the Community Services Block Grant Act of 1998, and finally was made part of the Substance Abuse and Mental Health Services drug treatment programs reauthorized in late 2000. Before the adoption of this provision, it was widely believed that faith-based charities could receive government aid only if the funds were administered by a separately incorporated nonprofit that was secular in its program operations.

When George W. Bush assumed the Presidency in January 2001, he incorporated Charitable Choice as an integral part of a much broader and more ambitious White House Faith-Based & Community Initiatives. By executive order issued December 12, 2002, the President directed that several federal departments ensure nondiscriminatory treatment toward faith-based charities in all the welfare programs they administered.

Charitable Choice interweaves three fundamental principles. First, it imposes on government the duty to refrain from discriminating on the basis of religion with respect to the eligibility of providers seeking to deliver services under one of the government's welfare programs. Rather than examining the nature of the service provider with an eye to excluding those thought overly religious, Charitable Choice requires officials to focus on the nature of the services and the means by which they are provided. The relevant inquiry is not "Who are you?" but "What can you do?" Faith-based providers are not to be preferred, merely allowed to compete on the same basis as all other providers.

Second, the provision imposes on government the duty to refrain from intruding into the religious autonomy of faith-based organizations (FBOs). Charitable Choice extends a guarantee that in religious matters each FBO that competes for funding "shall retain its independence" including "control over the definition, development, practice, and expression of its religious beliefs." Government-funded FBOs continue to be subject to general regulation, of course, and must provide an accounting for public monies received. The guarantee, rather, is that FBOs retain their religious independence from regulations imposed solely as a consequence of receiving the government assistance. There are also specific safeguards from demands to remove religious symbols at an FBO's facility and from regulations requiring FBOs to adjust the makeup of their governing board. A

private right of action vests in FBOs to enforce these guarantees.

Third, Charitable Choice imposes on both government and participating FBOs the duty to refrain from abridging certain religious rights of the ultimate beneficiaries of these welfare programs. When the form of the funding is direct to the social service provider, each beneficiary is empowered with a choice. Beneficiaries who want to receive their services from an FBO may do so—assuming, that is, that an FBO has qualified for a grant. On the other hand, if a beneficiary has religious objections to receiving services from an FBO, then the government is required to provide equivalent alternative services. This is the "choice" in Charitable Choice. When a beneficiary selects an FBO receiving direct funding, the provider cannot discriminate against the beneficiary on the basis of religion.

Charitable Choice is based on an Establishment Clause that accords with the principle of "neutrality." In such a view, when government secures social services without regard to religion, then neither provider nor beneficiary has to alter their religious behavior to do business with the government. Thus the Establishment Clause is understood as minimizing the government's influence over the religious choices made by individuals. Because many beneficiaries freely choose to receive their services from an FBO, it is religion-neutral for the government to provide aid to FBOs on the same basis as other providers. When beneficiaries elect an FBO and receive the secular benefit of the service for which the welfare program is designed, the government is not advancing religion but merely responding to the choices freely made by its citizens. That other voluntarily activities, including religious activities, occur at the FBO is not properly a governmental concern.

Charitable Choice contemplates funding that is structured to be either direct (that is, where the government awards grants to charities who in turn provide services to qualifying beneficiaries) or indirect (that is, where the provider which ultimately receives the government's aid is selected by the beneficiary, such as with vouchers). When the form of the assistance is indirect, the regulations promulgated under Charitable Choice incorporate the Supreme Court's approach to school vouchers and the case of *Zelman v. Simmons-Harris*. Conversely, when the form of the assistance is direct, then the regulations follow the approach upheld in *Mitchell v. Helms*. Consistent with *Mitchell*, the regulations require that no inherently religious activities such as worship or proselytizing take place within the funded program. If any such activities are conducted on a voluntary basis by a

participating FBO, then the activities must be separated, by time or location, from the funded program. By following the Court's guidance in *Zelman* and *Mitchell*, the regulations are calculated to rebuff critics who argue that Charitable Choice violates the Establishment Clause.

To reduce regulatory entanglement, Charitable Choice safeguards the freedom of FBOs to employ staff of like-minded faith. The ability to restrict employees and volunteers to those of shared faith is said to be central to maintaining the organization's essential religious character. As Justice William Brennan wrote in his concurring opinion in *Corporation of Presiding Bishop v. Amos*, "Determining that certain activities are in furtherance of an organization's religious mission, and that only those committed to that mission should conduct them, is thus a means by which a religious community defines itself."

The ability of FBOs to consider religion when hiring, a right set out in § 702(a) of Title VII of the Civil Rights Act of 1964, is cross-referenced in Charitable Choice. It was initially assumed that the guarantee of religious "independence" in Charitable Choice overrides conflicting nondiscrimination procurement rules at the state and local level. The latter becomes important if the federal welfare funds involved are administered through the states. That Charitable Choice enables FBOs to compete for funding, whereas retaining the right to staff on a religious basis has become controversial and is largely the reason that attempts to further expand Charitable Choice have stalled in the U. S. Senate. The question of overriding state and local procurement rules is debated in the literature, but as of this writing no court has been asked to pass on the issue.

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References and Further Reading

- Ackerman, David M. *Public Aid to Faith-Based Organizations (Charitable Choice) in the 107th Congress: Background and Selected Legal Issues*. Library of Congress, Congressional Research Service, Report RL31043, August 19, 2003.
- Esbeck, Carl H., Stanley W. Carlson-Thies, and Ronald J. Sider. *The Freedom of Faith-Based Organizations to Staff on a Religious Basis*. Wash., DC: Center for Public Justice, 2004, available at <http://www.cpjustice.org/publications/charitable_choice/resources.pdf>.
- Laycock, Douglas. *The Constitutional Role of Faith-Based Organizations in Competitions for Federal Social Service Funds*. Testimony Before the House Subcommittee on the Constitution, Committee on the Judiciary, 107th Cong., June 7, 2001, available at <<http://www.house.gov/judiciary/72981.pdf>>.
- Lupu, Ira C., and Robert W. Tuttle. *Government Partnerships with Faith-Based Service Providers: The State of the*

Law. Wash., DC: Roundtable on Religion and Social Welfare Policy, December 2002, available at <http://www.religiousandsocialpolicy.org/docs/legal/reports/12-4-2002_state_of_the_law.pdf>.

White House Office of Faith-Based and Community Initiatives. *Protecting the Civil Rights and Religious Liberty of Faith-Based Organizations: Why Religious Hiring Rights Must Be Preserved*, June 23, 2003, available at <<http://www.whitehouse.gov/government/fbci/booklet.pdf>>.

Cases and Statutes Cited

- Corporation of Presiding Bishop v. Amos*, 483 U.S. 327 (1987)
- Mitchell v. Helms*, 530 U.S. 793 (2000) (plurality opinion)
- Zelman v. Simmons-Harris*, 536 U.S. 639 (2002)
- Charitable Choice as applicable to the Temporary Assistance for Needy Families (TANF) Program, 42 U.S.C. § 604a, and regulations thereto, 68 Fed. Reg. 56449 (Sept. 30, 2003), codified at 45 C.F.R. pt. 260
- Charitable Choice as applicable to the Community Service Block Grant (CSBG) Act, 42 U.S.C. § 9920, and regulations thereto, 68 Fed. Reg. 56466 (Sept. 30, 2003), codified at 45 C.F.R. pt. 1050
- Charitable Choice as applicable to THE Substance Abuse and Mental Health Services Administration (SAMHSA) Drug Treatment Programs, 42 U.S.C. § 300x-65 and 42 U.S.C. § 290kk, and regulations thereto, 68 Fed. Reg. 56429 (Sept. 30, 2003), codified at 42 C.F.R. pts. 54 and 54a
- Executive Order 13279, issued December 12, 2002, *Equal Protection of the Laws for Faith-Based and Community Organizations and Permitting Religious Staffing by Faith-Based Federal Contractors*, 67 Fed. Reg. 77141 (Dec. 16, 2002)
- The Civil Rights Act of 1964, § 702(a) of Title VII, 42 U.S.C. § 2000e-1(e)

See also **Discrimination by Religious Entities that Receive Government Funds; Establishment Clause Doctrine: Supreme Court Jurisprudence; Title VII and Religious Exemptions**

CHASE COURT (1864–1873)

The Chase Court combined powerful rhetoric in favor of civil liberties with very little protection for civil liberties. The justices in *Ex parte Milligan* (1866) asserted that "the Constitution of the United States is a law for rulers and people, equally in war and peace." Nevertheless, the Chase Court did not challenge any Civil War measure before Appomattox and found procedural reasons to avoid reaching the merits of several important constitutional challenges to Reconstruction measures. The judicial majority in the *Slaughter-House Cases* (1872) asserted that the primary purpose of the constitutional amendments ratified after the Civil War was to secure, "the freedom of the slave race, the security and firm establishment of that

freedom, and the protection of the newly-named free-men and citizen from the oppression's of those who have normally exercised on them and dominion over him." Nevertheless, the actual decision the court made sharply limited to protect any rights. In no case did the Chase Court protect the constitutional rights of a person of color. The passivity of the Chase Court in civil rights and the these cases is partly explained in procedural issues that prevented justices from handing down more libertarian rulings. Still, the Chase Court left future libertarians with very quotable phrases, but few workable precedents.

Ex parte Milligan highlights both the passivity and aggressiveness of Chase Court responses to claims of constitutional right. The precise issue in that case was whether President Abraham Lincoln had the legal or constitutional authority to declare martial law and order military trials during the Civil War. When Confederate armies were in the field, both the Taney Chase Courts found various reasons not to adjudicate the constitutionality of those policies. After the shooting was over, a unanimous Chase Court ruled that Lincoln acted unconstitutionally when he tried northern civilians in military courts. Five justices insisted that neither the president nor Congress could declare martial law in localities far from the front lines where ordinary trials had not been disrupted by the war. "Military jurisdiction," Justice David Davis declared, "can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and the process unobstructed." Four justices, in an opinion written by Chief Justice Salmon Chase, insisted that Congress had broad powers to declare martial law, but that Lampkin Milligan's trial was inconsistent with the rules for trying civilians accused of aiding the Confederacy that Congress had previously set out. The actual result in *Milligan* was relatively uncontroversial, because suspensions of habeas corpus in the north had troubled many Americans during the Civil War and could not be justified after Lee's surrender. The crucial question was whether the justices would use *Milligan* as a precedent for striking down Northern imposition of martial law in the South after the Civil War.

The first Reconstruction cases heard by the Chase Court suggested that the justices would police civil rights violations in the South as aggressively as the justices policed civil rights violations in the North after the Civil War. In *Cummings v. Missouri* (1866), a five to four judicial majority ruled that states could not require certain state employees is where that they had been loyal to the Union during the Civil War. Such demands, Justice Stephen Field declared, violated both the ex post facto clause and the constitutional prohibition on bills of attainder. A federal law

insisting that attorneys practicing in federal courts take a similar oath was declared unconstitutional on the same grounds in *Ex parte Garland* (1866).

Partisan fears or hopes that these cases where the beginning of a full-scale assault on military rule in the Reconstruction South were never realized. The Chase Court was given three opportunities to strike down martial law on the authority of *Ex parte Milligan* but declined to reach the merits of the constitutional issues in each instance. The justices in *Mississippi v. Johnson* (1866) rejected the constitutional attack on martial law by unanimously ruling that federal courts could not issue an injunction to the president that forbade him from executing what state attorneys claimed was an unconstitutional law. The next year, in *Georgia v. Stanton* (1867), the justices unanimously ruled that a state had no standing to challenge a law that state attorneys claimed violated the constitutional rights of state citizens. The justices did, however, initially take jurisdiction to determine whether William McCardle was unconstitutionally imprisoned for publishing anti-Reconstruction editorials in the Vicksburg Times. While oral argument was taking place on the merits, Congress first debated then passed a bill stripping the court of jurisdiction necessary to adjudicate that case. After some debate, the Chase Court majority elected to delay issuing a decision until that bill became law over President Johnson's veto. The justices then ruled that they jurisdiction to decide McCardle's appeal.

These judicial refusals to reach the merits of various constitutional attacks on Reconstruction may have been good faith judging and not a strategic retreat in the face of congressional opposition. The Johnson administration, no friend of martial law in the South, vigorously argued for and supported the result in *Johnson v. Mississippi* and *Stanton v. Georgia*. Most contemporary commentators agree these cases were rightly decided. The judicial decision to delay announcing the result in *Ex parte McCardle* (1868) was consistent with previous Marshall, Taney, and Chase Court practice in cases of no political significance. Almost immediately after denying jurisdiction in *McCardle*, the justices announced they would decide *Ex parte Yerger* (1869), another case raising the constitutionality of martial law in the South. Rather than risk an adverse decision, the Grant administration settled the case.

Chase Court decisions on the rights of former slaves also provided civil libertarians with good language but little law. Justice Miller's majority opinion in *The Slaughter-house Cases* highlighted how the Thirteenth and Fourteenth Amendments were designed to protect the rights of persons of color. Several Chase Court justices while on circuit broadly interpreted this new national commitment to racial equality. Chief Justice

Chase in *In re Turner* (1867) interpreted the Thirteenth Amendment that outlawing certain onerous apprenticeship agreements. Nevertheless, in no case did the Chase Court protect the rights of former slaves, thus failing to establish any precedent that might promote egalitarian rulings in the future.

The Slaughter-house Cases contain the Chase Court's best-known statements on civil rights and liberties. At issue was the constitutionality of a New Orleans law granting a monopoly to certain butchers, butchers who probably bribed the local legislature. Former Justice John Campbell sought to use those cases as a vehicle for making the post-Civil War Constitution an instrument for economic rights rather than for racial equality. In a powerful argument, he asserted that the right to practice common callings was protected by the privileges and immunities clause of the newly minted Fourteenth Amendment and that the denial of such a right was a form of enslavement prohibited by the Thirteenth Amendment. The five to four judicial majority rejected that invitation to expand the post-Civil War Constitution beyond race. Justice Miller asserted that ordinary health regulations were not enslavements and that the privileges and immunities clause protected only such rights of national citizenship as the right to travel to the national capital and the right to be protected when abroad. In his view, a broader interpretation of the Fourteenth Amendment "would constitute this court a perpetual censor upon all legislation of the states." Due process, he continued, had nothing to do with this case and equal protection was largely limited to laws discriminating against persons of color. Four justices dissented. Justice Field insisted that the privileges and immunities clause "refers to the natural and inalienable rights which belong to all citizens." This theme would greatly influence later Supreme Court decisions, but under due process rather than privileges and immunities.

The judicial opinions in *The Slaughter-house Cases* structured the judicial responses to the claim in *Bradwell v. Illinois* (182) that women had a constitutional right to become lawyers. Justice Miller's majority opinion simply repeated his previous claim that no one had a federal constitutional right to practice a common calling. Justice Bradley, who had joined Justice Field's dissent in *Slaughter-House*, insisted that past practice and divine law provided better grounds for rejecting Ms. Bradwell's appeal. "The natural and proper timidity and delicacy which belongs to the female gender," he infamously declared "evidently unfit for many of the occupations of civil life." In Justice Bradley's view, the "paramount destiny and mission of women are to fill the noble and the nine offices of wife and mother. This is

the law of the Creator." Chief Justice Chase, who was dying at the time, dissented without opinion.

This lack of justification may be fitting. The Chase Court is best known for issuing bold statements in favor of protecting rights without actually handing down challenging live violations of rights. The vote that most challenged contemporary understanding of rights, Chief Justice Chase's dissent in *Bradwell*, by comparison, was given without any justification or bold quotation at all.

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References and Further Reading

- Hyman, Harold M. *The Reconstruction Justice of Salmon P. Chase: In re Turner and Texas v. White*. Lawrence, KS: University Press of Kansas, 1997.
- Kutler, Stanley I. *Judicial Power and Reconstruction Politics*. Chicago: University of Chicago Press, 1968.

Cases and Statutes Cited

- Bradwell v. Illinois*, 83 U.S. 130 (1872)
- Cummings v. Missouri*, 71 U.S. 277 (1866)
- Ex parte Garland*, 71 U.S. 333 (1866)
- Ex parte McCardle*, 74 U.S. 506 (1868)
- Ex parte Milligan*, 71 U.S. 2 (1866)
- Ex parte Yerger*, 75 U.S. 85 (1868)
- Georgia v. Stanton*, 73 U.S. 50 (1867)
- In re Turner*, 24 F. Cas. 333 (C.C.D. Maryland, 1867)
- Mississippi v. Johnson*, 71 U.S. 475 (1866)
- Slaughter-House Cases*, 83 U.S. 36 (1872)

CHASE, SAMUEL (1744–1811)

Although an ardent patriot, a signer of the Declaration of Independence, and an associate justice of the U. S. Supreme Court who made a significant contribution to nineteenth-century American jurisprudence, Samuel Chase is best known for his interpretation of the Sedition Act of 1798 and his impeachment trial in 1804. Chase was born on April 17, 1744. His mother, Matilda Walker, died at his birth and he was raised by his father, Thomas Chase, an Episcopalian minister renowned for his tenacity, impulsiveness, and tendency to live beyond his means, which led to his imprisonment in 1746 for unpaid debts. The elder Chase passed on these characteristics to his son but also provided him with a sound classical education.

At eighteen, Chase began studying law in the offices of John Hammond and John Hall in Annapolis. Admitted to the bar in 1761, he was appointed prosecutor in the mayor's court, a position that provided him with a meager salary but permitted him to represent clients in civil suits for debt. In

May 1762, he married Ann (Nancy) Baldwin of Anne Arundel County. The couple had seven children, three of whom died in infancy. In 1763, Chase commenced legal practice in Frederick County, Maryland, and became politically active, aligning himself with the country party against the elite-controlled court party. In the following year, he obtained a seat in the assembly. During the Stamp Act crisis, Chase mobilized the “middling sort,” participated in the drafting of Maryland’s resolutions to the Stamp Act Congress, and helped to organize the Sons of Liberty in Annapolis.

In the early 1770s, Chase assumed a leading role in the movement to lower clerical salaries and tobacco inspection fees, which he regarded as oppressive. He became a member of the nonimportation committee of Annapolis in 1770 and a vigorous supporter of colonial resistance after Britain’s imposition of the Intolerable Acts. Selected as a delegate to the First and Second Continental Congresses, Chase embraced the principle of “no taxation without representation,” assailed British suppression of colonial trade, and denounced the royal navy’s seizure of American ships. He emerged as one of Maryland’s leading advocates of Independence, but distanced himself from the colony’s radical faction led by John Hall, Matthias Hammond, and Charles Ridgely, whose policies he believed threatened the colony’s internal stability and social order. Chase joined Charles Carroll and Benjamin Franklin on the commission sent to Canada to request support for resistance to the imperial authorities.

In the late 1770s, Chase advocated that large states cede their western lands to the union. He also supported the confiscation of British property and the expansion of paper money. His views reflected his speculative interests and difficulty in repaying debts. In 1778, he was accused of having breached public trust by using for speculative purposes confidential information on wheat and flour shortages provided to Congress. Although absolved of these charges, he became the central figure in the infamous flour scandal and was defeated in the 1778 elections for Congress. The scandal plagued him throughout his public life.

Fearing the domination of national affairs by elites, identifying state legislatures as bastions of popular liberties, and regarding the participants in the Constitutional Convention as having exceeded their mandate to amend the Articles of Confederation, Chase initially supported the Antifederalist cause. The adoption of the Bill of Rights, his affinity for English traditions and fear of the radicalism of the French Revolution, and his heightened concern about social unrest after the Whiskey Rebellion and the Fell’s Point Riot led to his Federalist conversion.

Presiding over the Court of Oyer and Terminer in Baltimore, Chase sought to distinguish between the freedom and licentiousness of the press in 1794.

Appointed to the Supreme Court in 1796, Chase quickly distinguished himself and contributed to the development of American jurisprudence. In the British debt case, *Ware v. Hylton* (1796), he ruled on the supremacy of national treaties over state law. In *Hylton v. United States* (1796), he recognized the power of the Supreme Court to void congressional legislation deemed to be unconstitutional and declared the federal excise tax on carriages to be a duty. In *United States v. Worrall* (1798), Chase refused arguments to prosecute a crime on the basis of common law, noting that federal courts could not “punish a man for any act, before it is declared by law of the United States to be criminal.” In *Calder v. Bull* (1798), he laid foundations for the doctrine of “substantive due process” by acknowledging the importance of fundamental principles not specifically set out in the Constitution.

Chase’s interpretation of the Sedition Act of 1798 precipitated strong Republican criticism and culminated in the call for his impeachment in 1804. Alleging irregularities in his handling of John Fries’s trial for treason and James Callender’s prosecution for seditious libel, as well as judicial indiscretion before a grand jury in Newcastle, Delaware, in 1803 when he denounced President Jefferson’s repeal of the Judiciary Act of 1801, John Randolph tabled seven articles of impeachment in the House of Representatives. Although none received the Senate’s two-thirds majority required for Chase’s removal from the Court, the impeachment trial enshrined him as a symbol of Federalist political partisanship. Samuel Chase died in Baltimore on June 19, 1811.

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References and Further Reading

- Elsmere, Jane Shaffer. *Justice Samuel Chase*. Muncie, IN: Janevar Publishing, 1980.
- Haw, James, et al. *Stormy Patriot: The Life of Samuel Chase*. Baltimore: Maryland Historical Society, 1980.
- Sharp, James Roger. *American Politics in the Early Republic: The New Nation in Crisis*. New Haven: Yale University Press, 1993.

CHAVEZ, CESAR (1927–1993)

Cesar Chavez, farm worker, civil rights activist, and union leader, was born near Yuma, Arizona, to Librado Chavez and Juana Estrada, who owned a farm and several small businesses. In 1938, the Chavez family lost their property and became migrant

farm workers. Chavez's childhood was wrought with racial discrimination and hard work, which severely limited his school attendance.

Chavez enlisted in the U.S. Navy during World War II but returned to migrant farming in 1946. Shortly after, Chavez joined the National Agricultural Workers' Union (NAWU). This started a lifetime dedication to social change and fair treatment for Mexican Americans, particularly migrant farmers. In 1948, Chavez married Helen Fabela and resided in Delano, California, where he was a migrant laborer.

In 1952, Chavez volunteered for the Community Services Organization (CSO) and later became a paid organizer. The CSO, a body devoted to promoting political and civil rights for Mexican Americans, committed itself to the formation of new CSO chapters, voter registration drives, citizenship campaigns, educational improvements, urban developments, and other issues important to improving Mexican Americans' quality of life. Chavez eventually held the position of General Director for the CSO and remained active until 1962, when he left to form a union dedicated to migrant farmers.

Chavez started the National Farm Workers Association (NFWA), which became the United Farm Workers (UFW) in 1973. Inspired by Mahatma Gandhi and Martin Luther King Jr., Chavez became known as a natural leader, dedicated to a militant, yet racially unbiased, nonviolent, grass roots movement. To Chavez, the organization was more than a union; it was a social movement aimed at fixing the restricted civil liberties most members faced. He demonstrated his dedication by fasting and involving union members in masses, boycotts, pilgrimages, and processions. In doing so, he appealed to the Mexican-American culture of the farm workers. This heritage included Catholicism and a belief in the merits of sacrifice to fight injustice. Chavez also influenced and actively supported the Chicano civil rights movement until some of the reformers advocated violence.

Chavez's union struck numerous times, the first in May 1965. The most notable strike began in September 1965. Another union, the Agricultural Workers Organizing Committee (AWOC) struck and realized it needed the support of the NFWA. Although reluctant, the NFWA leadership voted to strike as well. Eventually, the two unions merged and formed the United Farm Workers Organizing Committee (UFWOC). The strikers used nonviolent tactics such as fasts, pilgrimages, demonstrations, an international grape boycott, and political campaigning amid violence from opposition. In 1970, the five-year long strike ended triumphantly for the union. Most of its demands were met, and many grape growers signed contracts with the strikers.

The UFW had subsequent strikes, but none had the longevity of the Delano grape strike.

Later, California farm workers achieved government-regulated collective bargaining through the instatement of the Agricultural Labor Relations Board. Unfortunately for the UFW, the elections of President Ronald Reagan and California Governor George Deukmejian, both agribusiness allies, slowed union achievements nationwide. Some claimed the UFW had lost its power and criticized Chavez. The reformer and union leader died in his sleep at the age of sixty-six and inadvertently rejuvenated the farm workers' resolve. In 1994, President William Clinton posthumously awarded Chavez the nation's highest civilian honor, the Medal of Freedom.

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References and Further Reading

- Dalton, Frederick John. *The Moral Vision of Cesar Chavez*. Maryknoll, NY: Orbis Books, 2003.
- Dunne, John Gregory. *Delano: The Story of the California Grape Strike*. New York: Farrar, Straus & Giroux, 1967.
- Etulain, Richard W., ed. *Cesar Chavez: A Brief Biography with Documents*. Boston: Bedford/St. Martins, 2002.
- Hammerback, John C., and Richard J. Jensen. *The Rhetorical Career of Cesar Chavez*. College Station: Texas A&M University Press, 1998.
- Jensen, Richard J., and John C. Hammerback, eds. *The Words of Cesar Chavez*. College Station: Texas A & M University Press, 2002.
- Levy, Jacques E. *Cesar Chavez: Autobiography of La Causa*. New York: W.W. Norton & Company, Inc., 1975.
- Taylor, Ronald B. *Chavez and the Farm Workers*. Boston: Beacon Press, 1975.

CHECKPOINTS (ROADBLOCKS)

If police set up a checkpoint (also known as a roadblock) on the highway, requiring all drivers to stop and answer some questions, is that constitutional? The answer is yes if certain conditions are met.

To assess the constitutionality of police conduct, traditional Fourth Amendment analysis provides that the police cannot search a person unless they have both probable cause to believe evidence of crime is located with that person and a warrant authorizing the search. Since the 1960s, however, two lines of cases deviating from this traditional approach have developed to give law enforcement more flexibility. One is stop and frisk law. The other is a series of cases referred to as "special needs" cases. The Fourth Amendment analysis developed in these "special needs" cases governs the constitutionality of highway checkpoints.

The types of cases referred to as “special needs” cases today were originally described as administrative inspection cases. These cases generally involved police activity that focused on goals other than the traditional investigation of crime. Examples include government agents conducting workplace inspections for compliance with occupational health and safety laws and government agents inspecting housing for compliance with local codes. In these cases, police were not required to meet the usual probable cause and warrant requirements. Rather, the Fourth Amendment requirements were relaxed, so that warrants were frequently not required, and the grounds necessary to justify the police conduct were reduced from probable cause to a lesser standard, reasonable suspicion, or eliminated altogether. The Supreme Court defined the reasonableness of government conduct in these cases by using a balancing analysis, balancing the government’s need to search against the extent of the invasion to the citizen. One line of cases in this category is the roadblock cases.

The question of whether roadblocks are constitutional was first raised in the mid-1970s in cases where the police stopped cars near the border looking for illegal aliens. After concluding that police could *search* the cars only with probable cause, the Court authorized police to stop the cars and briefly *question* the occupants. If the stops were roving stops, that is, if the police were driving around to select which cars to stop, the police had to justify the stop and questioning by showing reasonable suspicion that led them to that car. This was the holding of *United States v. Brignoni-Ponce*. On the other hand, if the stops were fixed checkpoint stops, police could briefly question car occupants with no grounds whatsoever. The distinction was based on the idea that a fixed checkpoint necessarily limits police discretion, because they cannot pick the cars they stop, they have to take what comes their way. This limit on discretion minimizes the chance of abuse. In contrast, a roving stop allows police to cruise around and select which cars they approach, so in that situation, police have to provide reasons for stopping the cars they did. In combination, these cases indicated that whether grounds were required to stop a car depended to two variables: the intrusiveness of the police activity (search of the car as opposed to brief questioning of the occupants) and the amount of police discretion used (fixed checkpoints as opposed to roving stops).

The law was eventually refined in other types of investigations. When the police in Delaware made roving stops of cars for license and registration checks, and they made the stops randomly—that is, with no grounds to justify why the particular cars were chosen—the Supreme Court in *Delaware v.*

Prouse declared it unconstitutional. But in a significant case decided in 1990, the Supreme Court found it constitutional when Michigan used checkpoint stops to look for persons driving under the influence of alcohol. The Michigan authorities had no grounds for stopping the particular cars, but because their discretion was limited by the fixed character of the checkpoint, the Court approved it. And, the Supreme Court relied on the fact that the purpose of the checkpoint was not so much to investigate crime but to work toward the goal of highway safety. The highway death toll from drunk drivers indicated a special need for police to make the highways safer.

Two more Supreme Court cases complete the law on roadblocks. In 2000, the city of Indianapolis set up fixed checkpoints to briefly question occupants of cars about possession of street drugs. Police articulated no grounds for stopping the cars. In addition, the police had drug-detection dogs present at the roadblock to sniff the cars. The Court held this practice to be unconstitutional on the basis that the primary purpose was to detect evidence of ordinary criminal wrongdoing, so the case fell outside of the special needs category, and the checkpoint stops with no grounds were struck down. Most recently, in 2004, the Court held that a checkpoint set up to question car occupants about a recent hit-and-run case was constitutional. Like the drug checkpoint struck down, the police questioned each car without having any grounds for picking that car. However, the Court determined that asking for information about a recent hit-and-run did qualify as a special need situation, and the checkpoint was not set up merely to do the usual criminal investigation. Thus the checkpoint was constitutional.

In summary, the law today is that under the Fourth Amendment, police can use fixed checkpoints or roadblocks to briefly question occupants of the stopped cars without articulating any individualized reason for stopping that car, if the police purpose is focused on a special need rather than the traditional purpose of detecting evidence of crime. This is significant, because traditional Fourth Amendment law would not allow police to stop or question persons without articulating individualized grounds for selecting that person. However, based on the evolution described previously, the Supreme Court has now authorized police to use roadblocks under the conditions described.

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Cases and Statutes Cited

Camara v. Municipal Court, 387 U.S. 523 (1967)
City of Indianapolis v. Edmond, 531 U.S. 32 (2001)
Delaware v. Prouse, 440 U.S. 648 (1979)

Fourth Amendment

Illinois v. Lidster, 540 U.S. 419 (2004)

Marshall v. Barlow's, Inc., 436 U.S. 307 (1978)

Michigan Department of State Police v. Sitz, 496 U.S. 444 (1990)

U.S. v. Brignoni-Ponce, 422 U.S. 873 (1975)

See also *Delaware v. Prouse*, 440 U.S. 648 (1979); **Search (General Definition); Seizures; *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975)**

CHEMERINSKY, ERWIN (1953–)

Erwin Chemerinsky was born May 14, 1953, in Chicago, Illinois. He grew up on the south side of Chicago in a working class family and was the first member of his family to go to college. He attended Northwestern University and received his Bachelors of Science degree in 1975 with highest distinction. He then earned his Juris Doctorate in 1978, graduating cum laude from Harvard Law School.

After graduating from law school, he began working as an attorney for the U. S. Department of Justice. At the Justice Department, he worked in the Fraud Section of the Civil Division. In 1980, he decided to pursue an academic career and returned to his native Chicago to begin teaching at De Paul University School of Law. Three years later, Professor Chemerinsky began teaching at University of Southern California (USC) Law School, where he continues to teach. He currently is the Sydney M. Irmas Professor of Public Interest Law, Ethics, and Political Science and teaches courses on Constitutional Law and Federal Courts. He has published numerous articles and books including two major treaties on constitutional law and federal jurisdiction.

Professor Chemerinsky has been influential in establishing civil liberties legislation in the state of California. He was instrumental in drafting the California Privacy Protection Act. Moreover, in April 2000, he was selected to investigate civil liberties violations in the Rampart scandal. In this scandal, police officers in the Los Angeles Police Department (LAPD) were accused of making false arrests, framing innocent people, and offering false testimony at trials. Chemerinsky's analysis indicated that civil liberties violations occurred because of flaws and oversights in the police and justice systems. He, therefore, recommended significant changes in both the police and justice systems, which ultimately were instated.

Chemerinsky also has argued a number of civil liberties cases in the federal courts. His most notable work challenged the constitutionality of California's

controversial "three strikes" legislation. This legislation requires a person with two prior "serious" or "violent" felony convictions (or "strikes"), who is convicted of a third felony, to be sentenced to twenty-five years to life for the crime. Chemerinsky challenged the constitutionality of this law in *Bray v. Ylst*, arguing the law violated the Constitution's Eighth Amendment prohibition on "cruel and unusual" punishment. The U. S. Court of Appeals agreed. While the *Bray* decision did not invalidate the "three strikes" law generally, it did determine that circumstances exist in which an indeterminate life sentence is "grossly disproportionate" for the crime, and therefore, is unconstitutional.

Professor Chemerinsky continued his challenge of California's "three strikes" law in the U. S. Supreme Court. In *Lockyer v. Andrade*, he argued that, like *Bray*, Andrade's punishment for petty theft under "three strikes" was unconstitutional. The U.S. Supreme Court, however, ruled that the California Court of Appeals decision, which upheld Andrade's twenty-five year to life sentence, was constitutional. This is because the California court's decision was not contrary to "established federal law."

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References and Further Reading

Chemerinsky, Erwin. *Federal Jurisdiction*. 4th ed. New York: Aspen Publishers, 2003.

———. *Constitutional Law: Principles and Policies*. 2nd ed. New York: Aspen Law and Business, 2002.

———. *Interpreting the Constitution*. Westport, CT: Praeger, 1987.

Cases and Statutes Cited

Andrade v. Lockyer, 270 F. 3d 743 (2001)

Bray v. Ylst, 283 F. 3d 1019 (2002)

Lockyer v. Andrade, 538 U.S. 63 (2003)

CHESSMAN, CARYL (1921–1960)

Caryl Chessman, born in St. Joseph, Michigan, in 1921, grew up in Glendale, California. During the Depression, Chessman began stealing food to provide for his family. In the late 1930s and early 1940s, Chessman was in and out of jail for auto theft. In January 1948, the state of California charged Caryl Chessman with eighteen counts of robbery, sexual assault, and kidnapping. Two female victims identified Chessman as the "red light bandit," a rapist who used a red light to impersonate police officers. Because Chessman had forcibly removed his victims

from their vehicles, he was charged under California's "Little Lindbergh Law" that carried the death penalty. Chessman's capital conviction and unprecedented twelve-year stay on death row fundamentally shaped public opinion and legal precedents on the death penalty nationwide.

At trial Chessman rebuffed the services of a defense attorney and defended himself. Chessman's defense, however, failed for several reasons: He was inexperienced with courtroom procedure, both the judge and prosecuting attorney had strong capital conviction records, and the jury was composed of eleven women and only one man. Death in the gas chamber seemed imminent until the court reporter died two days before Chessman's official sentencing. Sensing an opportunity, Chessman moved for a new trial stating that new trial transcripts would be inaccurate. Although the judge refused his motion, higher court judges repeatedly stayed Chessman's execution citing potential transcription errors.

By early 1952, the California Supreme Court decreed that new trial transcripts were accurate. Chessman's new execution date was set for March 1952; however, over the next eight years, Chessman convinced several California judges, federal judges, and even governor Pat Brown that the new transcripts were flawed. The transcription issue never evaporated, because Chessman took his case to the public in 1954 when he smuggled his autobiography, *Cell 2455 Death Row*, out of San Quentin. Once the book was published, politicians, prison officials, criminologists, and psychiatrists, committed to the ideals of prisoner rehabilitation, claimed that Chessman's literary attainments proved that he had reformed and deserved to live. Chessman continued to demonstrate his rehabilitation by publishing two more books. As public discussion on Chessman's case increased, Americans questioned the efficacy of the death penalty. Many citizens wrote to California Governors Knight and Brown pleading for clemency in Chessman's case. For many, Chessman's legal and public appeals provided proof that the death penalty had no place in modern society.

In the late 1950s, however, increasing crime rates prompted many Americans to conclude that prisoner rehabilitation did not work. American public opinion on capital punishment reversed direction. A 1960 opinion poll indicated a strong approval trend. In 1995, approval of the death penalty reached an unprecedented eighty percent.

In 1962, after exhausting all of his legal and public appeals, Chessman died in the gas chamber. Even though he had lost his personal battle, Chessman ultimately pressed Americans to agree or disagree

with the death penalty. Legally speaking, he forced the higher courts to consider new standards of fairness in capital cases.

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References and Further Reading

- Hamm, Theodore. *Rebel and a Cause: Caryl Chessman and the Politics of the Death Penalty in Postwar California, 1948–1974*. Berkeley: University of California Press, 2001.
- Kunstler, William. *Beyond a Reasonable Doubt? The Original Trial of Caryl Chessman*. New York: Morrow Press, 1961.
- Parker, Frank J. *Caryl Chessman: The Red Light Bandit*. Nelson Hall, 1975.

See also **Capital Punishment**

CHICAGO SEVEN TRIAL

The 1968 Democratic convention was held in one of the most tumultuous times in recent history. Martin Luther King, Jr., and Bobby Kennedy had been assassinated, racial tensions exploded into riots in cities across the country, and student protests paralyzed college campuses. It felt like the country was coming apart at the seams, and Chicago's law-and-order mayor, Richard Daley, was not about to allow this chaos to engulf his city. The convention turned into a fiasco as police attempted to control massive crowds of civil rights and anti-war protesters who had converged on the convention.

Federal prosecutors indicted eight alleged leaders of the protests for conspiring to violate an anti-riot statute. Defendants included Youth International Party leaders Abbie Hoffman and Jerry Rubin, Students for a Democratic Society national director Rennie Davis, pacifist David Dellinger, and Tom Hayden, the author of the 1962 Port Huron Statement. (The trial of Bobby Seale was severed from the others, resulting in the Chicago Seven.) The strategy of defense lawyers William Kunstler and Leonard Weinglass was to politicize the trial, attempt to win public support, and in effect to continue the protests using the trial as another medium. The trial occasionally degenerated into a circus-like atmosphere, with outbursts from the defendants and repeated citations for contempt of court issued by the presiding judge. Five of the seven defendants were convicted of conspiracy. All of the convictions, along with the contempt citations, were reversed on appeal.

W. BRADLEY WENDEL

References and Further Reading

- Lukas, J. Anthony. *The Barnyard Epithet and Other Obscenities: Notes on the Chicago Conspiracy Trial*. New York: Harper & Row, 1970.
- Schultz, John. *The Chicago Conspiracy Trial*. New York: Da Capo Press, rev'd ed., 1993.

See also **Kunstler, William M.**

CHICAGO v. MORALES, 527 U.S. 41 (1999)

The City of Chicago passed an ordinance that was aimed at reducing gang presence in Chicago neighborhoods. The ordinance provided that when a police officer saw "a criminal street gang member loitering . . . with one or more persons," the officer "shall order all such persons to disperse." Loitering was defined as remaining in "any one place with no apparent purpose." Anyone failing to obey the dispersal order was subject to arrest.

In *City of Chicago v. Morales*, the Supreme Court found the ordinance facially invalid. The Court reaffirmed its earlier holding of *Kolender v. Lawson*: a penal law is void for vagueness if ordinary people cannot understand what conduct is prohibited, or if it fails to prevent arbitrary and discriminatory enforcement by the police. In *Morales*, the definition of loitering was the principal source of the constitutional problem because it failed to establish minimal guidelines to govern law enforcement. Whether a purpose is "apparent" is an inherently subjective inquiry. Furthermore, too much innocent conduct fell within the ordinance because it did not require a harmful purpose and both gang members and non-gang members could be ordered to disperse.

The ordinance was based on the "broken windows" theory of policing, which posits that officers prevent more serious crime when they eliminate small, visible signs of public disorder. While *Morales* was sympathetic to this approach, the Court was unwilling to uphold an ordinance that effectively allowed police to determine what constituted "disorder" within a particular community.

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References and Further Reading

- Alschuler, Albert W., and Stephen J. Schulhofer, *Antiquated Procedures or Bedrock Rights? A Response to Professors Meares and Kahan*, University of Chicago Legal Forum (1998): 215–244.
- Meares, Tracey L., and Dan M. Kahan, *Wages of Antiquated Procedural Thinking: A Critique of Chicago v.*

Morales, University of Chicago Legal Forum (1998): 197–214.

- Rosenthal, Lawrence, *Policing and Equal Protection*, Yale Law and Policy Review 21 (2003): 53–103.
- Strosnider, Kim, *Anti-Gang Ordinances After City of Chicago v. Morales: The Intersection of Race, Vagueness Doctrine, and Equal Protection in the Criminal Law*, American Criminal Law Review 39 (2002): 101–146.
- Waldeck, Sarah E., *Cops, Community Policing and the Social Norms Approach to Crime Control: Should One Make Us More Comfortable With the Others?* Georgia Law Review 34 (2000): 1253–1310.

Cases and Statutes Cited

Kolender v. Lawson, 461 U.S. 352 (1983)

See also **Equal Protection of Law (XIV); Gang Ordinances; Kolender v. Lawson, 461 U.S. 352 (1983); Papachristou v. City of Jacksonville 405 U.S. 156 (1972); Vagueness and Overbreadth in Criminal Statutes; Vagueness Doctrine**

CHILD CUSTODY AND ADOPTION

In the area of adoption, the interest that takes center stage is that of the biological parents. As the Supreme Court pointed out in *Troxel v. Granville*, it is well accepted that a biological parent has a fundamental liberty interest in the care, custody, and control of his or her child. Thus, a state generally may not take a child from the custody of his or her biological parent simply because it believes that another parent would do a better job of raising the child. In the case of adoption, this means that prior to handing down an adoption decree, the state must either have the voluntary consent of the parents or the state must have involuntarily terminated the rights of the parents.

One of the most common scenarios in the adoption arena is that of a mother putting her nonmarital child up for adoption, with or without the knowledge and/or consent of the father. Consonant with the constitutional precepts outlined previously, all of the states require that, prior to an adoption, the State must obtain the biological mother's consent and this consent must be informed and free from fraud, coercion, or undue influence. If the consent was not freely given, then the adoption decree is subject to being overturned. In addition, many states allow the mother to revoke her consent within a specified period of time and thus stop the adoption proceeding.

The question of notice to and consent of the biological father for the adoption of a nonmarital child is considerably more complicated. Unlike in the case of a mother, the question of who the father is of a nonmarital child is at times difficult to answer. Given this reality, the states have had to determine

how much effort must be expended in giving notice of the adoption proceedings to the putative father(s) and whether the consent of the putative father is necessary. The issue then arises as to whether the resultant state statutory schemes violate the constitutional rights of the putative father.

Prior to 1972, the fathers of nonmarital children were generally afforded little constitutional protection. This changed somewhat in 1972 with *Stanley v. Illinois* where the Supreme Court held that the private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection. *Stanley v. Illinois*, 405 U.S. at 651.

Because *Stanley* was a custody case, the question remained as to what rights a father had in the adoption arena. The Supreme Court gave partial answers in two cases, *Quilloin v. Walcott* (1978) and *Caban v. Mohammed* (1979). In these cases the Supreme Court found that if a father has established a substantial relationship with his child and has admitted paternity, then he has a constitutional right to consent to or veto an adoption. Thus, in *Quilloin* the father was not entitled to veto the adoption even though, in the eleven years of the child's life, he had made some support payments and had visited the child on numerous occasions. He had never had or sought custody and he had not legitimated the child. Conversely, in *Caban* the father was entitled to veto the adoption. He had lived with the mother for five years, during which time the two children were born, he continued to see the children frequently after he and the mother ceased living together, and at one point he had custody of the children.

Caban and *Quilloin* concerned the question of consent. The Supreme Court in *Lehr v. Robertson* addressed the issue of when a putative father is entitled to receive notice of the adoption proceedings. There the Court reiterated that when a putative father has a developed parent-child relationship with his nonmarital child, then his interest in continued contact with the child has substantial constitutional protection. A mere biological link does not merit equal constitutional protection, but it does afford the father the opportunity to form a parent-child relationship. Thus, if there is a biological link, yet the putative father has not developed a parent-child relationship, then the question facing the Court is whether the statutory scheme at issue adequately protected the putative father's opportunity to form such a relationship. In *Lehr* the Court found that New York State's statutory scheme adequately protected the father's opportunity. The statute required that notice of the adoption proceeding be given to seven categories of putative fathers (the categories encompassed

situations where the mother and/or the father had somehow acknowledged the father's paternity) and the categories were not likely to omit many responsible fathers. Furthermore, qualification for notice was within the putative father's control. The father in *Lehr* did not register his name with the state and did not fit within the other six categories, thus the state was not required to notify him of the adoption proceedings.

None of the preceding cases addressed the question of what rights a putative father has to veto an adoption when the child is placed for adoption as a newborn and/or the mother hides the child's birth from him. Several state Supreme Court cases have, however, found that a putative father's consent to the adoption may be necessary even if the father does not yet have a parent-child relationship. In such a case, the father's consent is necessary if, once the father learns of the birth of his child, he does all he can to assert his interest in the child and to assume the responsibilities of parenthood. According to these states, this right to veto the adoption can only be overcome if the father is unfit such that the state has the right to terminate his parental rights. It should be noted that these courts, in the process of protecting the right of the natural father, often find themselves in the position of failing to protect the interest of the child in staying with her or his adoptive parents and/or the interest of the adoptive parents in retaining custody of the child.

Other state supreme courts have not, however, afforded putative fathers this same level of protection. For example, in the case of *In re Baby Boy C.*, the D.C. Court of Appeals held that the best interests of the child could trump the father's rights to custody even where the father had grasped his opportunity to form a relationship with the child. Thus, the court granted the adoption without the consent of the father and without a finding that the father was unfit, because granting custody to the father would be detrimental to the child's best interests.

As mentioned earlier, in certain circumstances the state can terminate the parental rights of parents to their child, thus making the child eligible for adoption. However, because, of the nature of the parent's constitutional rights, it is generally held that the state may only terminate the parent's rights if the state can prove that the parent is unfit. Furthermore, the Supreme Court in the *Santosky v. Kramer* case held that the state must prove this lack of fitness with clear and convincing evidence.

As previously noted, traditionally in the area of adoption, the rights of the biological mother of a nonmarital child were often paramount. In the 1970s, the Court began to recognize that the biological father's interest was also worthy of recognition. The

question remains, however, regarding the rights of the child and the adoptive parents.

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References and Further Reading

- Hollinger, Joan Heifetz. "Adoption Law." *The Future of Children*, vol. 3, no. 1, (1993): 43–61.
- Kessel v. Leavitt*, 204 W.Va. 95, 511 S.E.2d 720 (1988). West Virginia Supreme Court does a very good job of summarizing the current state of the law regarding when the consent of the putative father of a nonmarital child is necessary.
- Mnookin, Weisberg. *Child, Family, and State: Problems and Materials on Children and the Law*. 4th Ed. New York: Aspen, 2000.

Cases and Statutes Cited

- Caban v. Mohammed*, 441 U.S. 380 (1979)
- In re Baby Boy C.*, 630 A.2d 670 (D.C. 1993), cert. denied *sub nom. H.R. v. E.O.*, 513 U.S. 809 (1994)
- Lehr v. Robertson*, 463 U.S. 248 (1983)
- Quilloin v. Walcott*, 434 U.S. 246 (1978)
- Santosky v. Kramer*, 455 U.S. 745 (1982)
- Stanley v. Illinois*, 405 U.S. 645 (1972)
- Troxel v. Granville*, 530 U.S. 57 (2000)

CHILD CUSTODY AND FOSTER CARE

In America, the family serves as both the primary vehicle for the care and rearing of children and as a private realm of intimate association and moral autonomy. This tradition of family privacy is rooted in early American common law, inherited in part from England, and in principles of political and personal autonomy on which the United States was founded. Family privacy remains a fundamental principle, but since colonial times and escalating beginning in the Progressive era, the patriarch's power over children has diminished whereas maternal, state, and children's power have increased (Appell 2004; Mason).

Prior to the abolition of slavery, family privacy generally did not extend to slaves, because children born to female slaves legally belonged to the slave master. Indeed, it was not until decades after adoption of the Thirteenth and Fourteenth Amendments that the U. S. Supreme Court began to recognize a zone of family privacy and its attendant parental rights doctrine. The constitutional source of this fundamental family liberty is contested but is found in, or in the penumbra of, constitutional amendments relating to freedom of religion and association, freedom from unreasonable searches and seizures, due process, equal protection, and the natural liberties retained by the people (*Stanley v. Illinois*).

Children and parents share a liberty interest in family integrity and against state intervention (*Santosky v. Kramer*), but children have few liberty interests in opposition to their parents. This imbalance between adult and child rights in the custodial context has become a growing source of controversy since the last half of the twentieth century as children are increasingly viewed as rights-holders, family forms become more fluid, and lawyers and other professionals work directly with, or on behalf of, children (Appell 2004).

Parental Custodial Liberties

The parent-child relationship is so fundamental that the U. S. Supreme Court has extended special protections to parents for custodial decisions regarding child rearing, visitation, health care, education, and religion, for example, *Meyer v. Nebraska*; *Parham v. J.R.*; *Pierce v. Society of Sisters*; *Prince v. Massachusetts*; *Troxel v. Granville*; *Wisconsin v. Yoder*. Parents have a superior right to custody of their children unless the parent is unfit or has abdicated all or part of the parental role (*Stanley v. Illinois*) even when others believe that the child's best interests lay elsewhere (*Santosky v. Kramer*). Furthermore, courts may not base custodial decisions on racial prejudice (*Palmore v. Sidoti*).

States cannot coercively remove a child from parental custody without a hearing (*Stanley v. Illinois*). In termination of parental rights proceedings, parents receive heightened procedural protections not normally available to civil litigants. For example, a court may not terminate parental rights unless the parent has been shown to be unfit or otherwise unable to parent under a heightened standard of proof known as clear and convincing evidence (*Santosky v. Kramer*). Moreover, indigent parents may be entitled to a court-appointed attorney when the termination of parental rights proceedings are complex (*Lassiter v. Dept. Soc. Services*); like criminal defendants, indigent parents are entitled to free transcripts on appeal of termination of parental rights decisions (*M.L.B. v. S.L.J.*).

There are, however, limits to parental freedom to make decisions regarding their children's care and upbringing. These limitations generally arise from other constitutional principles that outweigh parental liberties. Thus parents do not have the right to send their children to a segregated school (*Runyon v. McCrary*) or to abuse or neglect their children (*Stanley v. Illinois*). Moreover, a daughter's reproductive health rights can trump the parent's right to

make medical decisions regarding birth control (*Carey v. Pop. Services International*) and abortion (*Bellotti v. Baird*).

State law, within constitutional parameters, normally determines who the mother and father are, and it is those mothers and fathers so defined whose liberties the Supreme Court protects. Generally, the law considers the birth mother and biological or marital father to be parents (*Lehr v. Robertson*; *Michael H. v. Gerald D.*; *Quilloin v. Walcott*). States have, however, recognized custodial rights of stepparents and same sex partners of legal parents by establishing special rules for second-parent adoption and for visitation rights after the adult relationship terminates (Appell 2001).

Foster parents do not have the same liberty interest, if any, in their foster children as parents have in their children (*Smith v. Organization of Foster Families for Equality and Reform*). Similarly, grandparents do not have special liberties regarding their grandchildren on par with the rights of parents (*Troxel v. Granville*), but certain constitutional family privacy protections may be extended to grandparents living with grandchildren (*Moore v. City of East Cleveland*) (plurality).

Children's Custodial Liberties

Children do not have many liberty interests in the custodial context because the Supreme Court views children as always in the custody of another (*Schall v. Martin*). Although children and parents share a liberty interest in their relationship, parents hold most of the rights within that relationship. Thus, although parents have the right to make major decisions about their children's care, education, and custody, children have only limited rights to oppose those decisions.

Children do not have many rights against the state as custodian or protector either. For example, although parents are not entitled to abuse their children, children do not have a right to state protection from that abuse (*DeShaney v. Winnebago County Dept. of Social Services*; *City of Castle Rock v. Gonzalez*). Children also have few liberties when in protective state custody, such as foster care, although presumably they have the right to be free from avoidable harm (*See Reno v. Flores*; *Youngberg v. Romeo*).

Children do, however, have slightly greater liberty interests in other custodial contexts such as school (*Goss v. Lopez*; *New Jersey v. T.L.O.*; *Tinker v. Des Moines*; *West Virginia Board of Education v. Barnette*)

and the threat of juvenile or penal incarceration (*In re Gault*; *In re Winship*).

Native American Children

Special rules apply to certain custody and foster care proceedings regarding Native American children. These rules both enhance and limit parental and children's liberties and provide special rights for tribes (Indian Child Welfare Act; Appell, 2004).

ANNETTE R. APPEL

References and Further Reading

- Appell, Annette R., *Uneasy Tensions Between Children's Rights and Civil Rights*, Nevada Law Journal 5 (2004): 1:141–171.
- , *Virtual Mothers and the Meaning of Parenthood*, University of Michigan Journal of Law Reform 34 (2001): 4:683–790.
- Davis, Peggy Cooper. *Neglected Stories: The Constitution and Family Values*, New York: Hill and Wang, 1997.
- Guggenheim, Martin. *What's Wrong with Children's Rights*, Cambridge, MA: Harvard University Press, 2005
- Lindsey, Duncan. *The Welfare of Children*, 2nd ed., New York: Oxford University Press, 2004.
- Mason, Mary Ann. *From Father's Property to Children's Rights*, New York: Columbia University Press, 1994.
- Mnookin, Robert H. *In the Interest of Children: Advocacy, Law Reform, and Public Policy*, New York: W.H. Freeman & Co., 1985.
- Woodhouse, Barbara Bennett, *Who Owns the Child?: Meyer and Pierce and the Child as Property*, William & Mary Law Review 33 (1992): 4:995–1122.

Cases and Statutes Cited

- Bellotti v. Baird*, 443 U.S. 622 (1979)
- Carey v. Pop. Services International*, 431 US 678 (1977)
- City of Castle Rock v. Gonzalez*, 125 S. Ct. 2796 (2005)
- DeShaney v. Winnebago County*, 489 U.S. 189 (1989)
- Goss v. Lopez*, 419 U.S. 565 (1975)
- In re Gault*, 387 U.S. 1 (1967)
- In re Winship*, 397 U.S. 358 (1970)
- Lassiter v. DSS*, 452 U.S. 18 (1981)
- Lehr v. Robertson*, 463 U.S. 248 (1983)
- Meyer v. Nebraska*, 262 U.S. 390 (1923)
- Michael H. v. Gerald D.*, 491 U.S. 110 (1989)
- M.L.B. v. S.L.J.*, 519 U.S. 102 (1996)
- Moore v. City of East Cleveland*, 431 U.S. 494 (1977)
- New Jersey v. T.L.O.*, 469 U.S. 325 (1985)
- Palmore v. Sidoti*, 466 U.S. 429 (1984)
- Parham v. J.R.*, 442 U.S. 584 (1979)
- Pierce v. Society of Sisters*, 268 U.S. 510 (1925)
- Prince v. Massachusetts*, 321 US 158 (1944)
- Quilloin v. Walcott*, 434 U.S. 246 (1978)
- Reno v. Flores*, 507 U.S. 292 (1993)
- Runyon v. McCrary*, 427 U.S. 160 (1976)
- Santosky v. Kramer*, 455 U.S. 745 (1982)

Schall v. Martin, 467 U.S. 253, 268 (1984)
Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816 (1977)
Stanley v. Illinois, 405 U.S. 645 (1972)
Tinker v. Des Moines, 393 U.S. 503 (1969)
Troxel v. Granville, 530 U.S. 57 (2000)
West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943)
Wisconsin v. Yoder, 406 U.S. 205 (1972)
Youngberg v. Romeo, 457 U.S. 307 (1982)
 Indian Child Welfare Act, 25 USC 1901–1963

See also **Child Custody and Adoption**

CHILD PORNOGRAPHY

In 1982, in *New York v. Ferber*, the Court held that production and dissemination of child pornography—“depictions of sexual activity involving children”—is unprotected by the First Amendment. The Court acknowledged that the Amendment protects nonobscene depictions of sexual activity between adults, but granted states “greater leeway” in regulating child pornography because of its effect on the child performers themselves, without regard for its effect on viewers.

Ferber concluded that states have a compelling interest in “safeguarding the physical and psychological well-being of a minor” and in “prevention of sexual exploitation and abuse of children.” The Court also found that “the use of children as subjects of pornographic materials is harmful to the physiological, emotional and mental health of the child” because “the materials produced are a permanent record of the children’s participation.”

Ferber, decided before the age of computer-generated images, thus took the extraordinary step of removing child pornography from First Amendment protection because of its harmful effects on actual child performers. In dictum, the Court stated that “distribution of descriptions or other depictions of sexual conduct, not otherwise obscene, which do not involve live performance or photographic or other visual reproduction of live performances, retains First Amendment protection.” The computer age, however, soon made “virtual” child pornography a pressing national issue. Computers can manipulate, or “morph,” an innocent picture of an actual child to create a picture showing the child engaged in sexual activity. An obscene or nonobscene picture of an adult can be transformed into the image of a child. Computer graphics can even generate the realistic image of a nonexistent child.

The federal Child Pornography Prevention Act of 1996 legislated against nonobscene virtual child pornography. The Act reached “any visual depiction,

including . . . any . . . computer or computer-generated image[s] or picture[s], whether made or produced by electronic, mechanical or other means . . . where such visual description is, or appears to be, of a minor engaging in sexually explicit conduct.” (emphasis added). Congress based the 1996 act squarely on virtual child pornography’s effect on viewers. The lawmakers found that pedophiles might use virtual images to encourage children to participate in sexual activity and might whet their own sexual appetites with the pornographic images. Congress also found that the existence of computer-generated images could complicate prosecutions of pornographers who do use actual children by making it more difficult to prove that a particular picture used actual children.

In 2002, in *Ashcroft v. Free Speech Coalition*, the Court struck down provisions of the 1996 act relating to materials that appear to depict minors but are produced without using actual children. The plaintiffs did not challenge the provision criminalizing morphing, which (like the materials at issue in *Ferber*) implicates the interests of actual children. *Ashcroft* also left undisturbed the provision criminalizing child pornography using actual children, *Ferber*’s target. But *Ashcroft* held that the provisions relating to non-existent children violated the First Amendment for prohibiting speech that “records no crime and creates no victims by its production.” The Court found any causal link between virtual images and actual incidents of child abuse only “contingent and indirect.”

The Supreme Court has not decided whether photographs or films of nude or partially nude children, without sexual activity, constitute punishable child pornography or First Amendment-protected expression. *Ferber* stated that “nudity, without more is protected expression,” but the statement was dictum because the Court was not reviewing a statute that presented the nudity issue. Most lower courts have regarded photographs and films of nude children, without more, as constitutionally protected expression, but have upheld convictions under statutes that prohibit such depictions made for sexual gratification. As thus limited, the depictions become child pornography proscribable under *Ferber*.

In *Osborne v. Ohio*, the Court upheld a statute that prohibited private possession and viewing of nonobscene child pornography (including private possession and viewing in one’s own home), even without proof that the possessor intended to distribute the material. The Court found that because “much of the child pornography market has been driven underground” since *Ferber*, “it is now difficult, if not impossible, to solve the child pornography problem by only attacking production and distribution.”

The Child Pornography Prevention Act followed nearly two decades of congressional legislation against child pornography. The Protection of Children Against Sexual Exploitation Act of 1977 added two substantive sections that remain in the federal criminal code. The first section, now 18 U.S.C. § 2251, prohibits the use of children in “sexually explicit” productions and prohibits parents and guardians from allowing such use of their children. The second section, now 18 U.S.C. § 2252, makes it a federal crime to transport, ship, or receive in interstate commerce for the purpose of selling, any “obscene visual or print medium” if its production involved the use of a minor engaging in sexually explicit conduct.

Because the 1977 act required proof that the materials were obscene and that the defendant had a profit motive, the act yielded only a handful of prosecutions in its first five years of operation. Relying on *Ferber*, the Child Protection Act of 1984 prohibited distribution of nonobscene material depicting sexual activity by children and eliminated the “pecuniary profit” element. The 1984 act also legislated against possession by criminalizing the receipt in interstate or foreign commerce of materials showing minors engaged in sexually explicit conduct.

In 1986, Congress prohibited production and use of advertisements for child pornography and created a private civil remedy in favor of persons who suffer personal injury resulting from the production of child pornography. To help effect the proscriptive authority approved in *Ferber*, Congress and a number of states also require photo processors to report customers’ sexual depictions of children on film. These statutes typically extend beyond films made by commercial customers, and parents and guardians who do nothing more than film their toddlers on bear skin rugs and the like are sometimes reported. Processors are typically granted immunity from civil or criminal liability arising from filing a required report in good faith.

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References and Further Reading

- Abrams, Douglas E., and Sarah H. Ramsey, *Children and the Law—Doctrine, Policy and Practice*. 643–656, 2nd ed., St. Paul, MN: Thomson West, 2003.
Nowak, John E., and Ronald D. Rotunda. *Constitutional Law*, 1395–1396, 7th ed, St. Paul, MN: Thomson West, 2004.

Cases and Statutes Cited

- Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002)
New York v. Ferber, 458 U.S. 747 (1982)
Osborne v. Ohio, 495 U.S. 103 (1990)
18 U.S.C. § 2251

18 U.S.C. § 2252

18 U.S.C. § 2256

See also *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002); *Children and the First Amendment; Child Pornography; New York v. Ferber*, 458 U.S. 747 (1982); *Osborne v. Ohio*, 495 U.S. 103 (1990); *Unprotected Speech*

CHILDREN AND THE FIRST AMENDMENT

Children hold rights under the First Amendment Speech Clause, but these rights may provide less protection than adults hold. Leading Supreme Court decisions have arisen in the public schools. *Tinker v. Des Moines Independent Community School District* (1969) held that “[s]tudents in school as well as out of school are ‘persons’ under our Constitution,” and do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” *Bethel School District v. Fraser* (1986), however, stated that “the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings.” *Hazelwood School District v. Kuhlmeier* (1988) stated that students’ constitutional rights “must be applied in light of the special characteristics of the school environment.”

The Speech Clause may also protect children more than adults. *Ginsberg v. New York* (1968) upheld a statute that prohibited sale to minors of material defined as obscene based on its appeal to children, even where the material would not be obscene for adults. *New York v. Ferber* (1982) held that the Clause does not protect production and dissemination of nonobscene child pornography—“depictions of sexual activity involving children.” *Osborne v. Ohio* (1990) held that states may prohibit private possession and viewing of child pornography (even in one’s own home), without proof that the possessor intended to distribute the material. *Ashcroft v. Free Speech Coalition* (2002), however, invalidated legislation relating to computer-generated materials that seem to depict minors but are produced without using actual children.

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References and Further Reading

- Abrams, Douglas E., and Sarah H. Ramsey. *Children and the Law—Doctrine, Policy and Practice*. 36–52, 643–655, 2nd ed., St. Paul, MN: Thomson West, 2003.
Sullivan, Kathleen M., and Gerald Gunther. *Constitutional Law*. 1114–1120, 1294–1303, 15th ed., New York: Foundation Press, 2004.

Cases and Statutes Cited

Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002)
Bethel School District v. Fraser, 478 U.S. 675 (1986)
Ginsberg v. New York, 390 U.S. 629 (1968)
Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988)
New York v. Ferber, 458 U.S. 747 (1982)
Osborne v. Ohio, 495 U.S. 103 (1990)
Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969)

See also ***Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002); Balancing Approach to Free Speech; Child Pornography; Freedom of the Press: Modern Period (1917–Present); Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988); In re Gault, 387 U.S. 1 (1967); New York v. Ferber, 458 U.S. 747 (1982); Osborne v. Ohio, 495 U.S. 103 (1990); Prior Restraints; Public Forum Doctrines; Public/Nonpublic Forums Distinction**

CHIMEL v. CALIFORNIA, 395 U.S. 752 (1969)

In *Chimel v. California*, the Supreme Court addressed the permissible scope of a search incident to a lawful arrest under the Fourth Amendment. After the issuance of an arrest warrant for burglary of a coin shop, police officers arrested Chimel in his home. Over his objection, the police conducted a detailed search of Chimel's residence, entering every room, opening drawers, and recovering coins and other suspected stolen items. The trial court found that the search was justified because it was incident to a lawful arrest.

The Supreme Court reversed and found this search unreasonable under the Fourth Amendment, holding that a search incident to arrest is limited to the arrestee's person and the area "within his immediate control." Justice Stewart's majority opinion includes a history of the evolving search incident to arrest doctrine, beginning with its apparent inception in *Weeks v. United States* in 1914. In arriving at the "immediate control" rule, the Court focused on the dual rationale behind allowing police to search in conjunction with an arrest: (1) to ensure officer safety and (2) to prevent the destruction or concealment of evidence. The Court also emphasized the heightened level of intrusion involved in the search of a home.

Justices White and Black dissented, criticizing the "remarkable instability" of this shifting area of law. The dissent argued in favor of the case-by-case "reasonableness" approach previously used by the Court, citing the likelihood of destruction of evidence by a third party while the police obtain a search warrant.

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References and Further Reading

Katz, Lewis R., *The Automobile Exception Transformed: The Rise of a Public Place Exemption to the Warrant Requirement*, Case W. Res. 36 (1986): 375.
 Moskovitz, Myron, *A Rule in Search of a Reason: An Empirical Reexamination of Chimel and Belton*, Wis. L. Rev. 2002 (2002): 657.
 Rigg, Robert, *The Objective Mind and "Search Incident to Citation"*, B.U. Pub. Int. L.J. 8 (1999): 281.
 Salken, Barbara C., *Balancing Exigency and Privacy in Warrantless Searches to Prevent Destruction of Evidence: The Need for a Rule*, Hastings L. J. 39 (1988): 282.

Cases and Statutes Cited

Agnello v. United States, 269 U.S. 20 (1925)
Carroll v. United States, 267 U.S. 132 (1925)
Preston v. United States, 376 U.S. 364 (1964)
Terry v. Ohio, 392 U.S. 1 (1968)
United States v. Lefkowitz, 285 U.S. 452 (1932)
Weeks v. United States, 232 U.S. 383 (1914)

See also **Arrest; Exclusionary Rule; New York v. Belton 453 U.S. 454 (1981); Search (General Definition); Seizures; Warrantless Searches**

CHINESE EXCLUSION ACT

See Chae Chan Ping v. U.S., 130 U.S. 581 (1889) and *Chinese Exclusion Act*

CHRISTIAN COALITION

The Christian Coalition is a Washington, D.C.-based national advocacy group that supports conservative political and religious ideals. The Christian Coalition lobbies Congress, state legislatures, city councils, and school boards on a range of issues, including abortion regulation, religious expression in public schools, social welfare policy, and tax-relief. The Christian Coalition maintains an extensive grassroots network of volunteers and distributes candidate voters' guides prior to elections that describe candidate positions on religious, social, and economic issues. The Coalition maintains its activities concentrate on "traditional family values" and are nonpartisan, but liberal advocacy groups, such as People for the American Way and Americans United for Separation of Church and State, have claimed the Coalition policies and voters' guides favor Republican Party issues and candidates. Despite its disclaimers, the Coalition has become a powerful force in the Republican Party, influencing the latter's position on many social issues.

The Christian Coalition was founded in 1989 by Rev. Marion G. (Pat) Robertson, a television

evangelist (host of the “700 Club”) and founder of the Christian Broadcasting Network. Robertson created the Christian Coalition after his failed bid for the Republican Party nomination for President in 1988. Early promotional literature stated the group’s purpose as to “mobilize and train [theologically conservative] Christians for effective political action.” The Coalition’s inaugural event was a \$500,000 campaign to defund the National Endowment for Humanities. The bulk of Coalition efforts, however, have involved election-related activities such as voter registration, “get-out-the-vote” campaigns, and distributing candidate voters guides. The Coalition experienced initial political success by recruiting unknown conservative candidates for lower level political offices, a strategy described by Coalition Executive Director Ralph Reed as supporting “stealth candidates.” By 1995, the Coalition claimed a dominant or substantial role in the Republican parties of thirty-one states. In the 2000 general election, the Coalition distributed 70 million candidate voters’ guides, primarily to conservative Christians. The Coalition claimed responsibility for the conservative Republican takeover of Congress in the 1994 election and for securing the election of George W. Bush as President in 2000.

Although the Coalition’s agenda concentrated initially on religious and moral issues, Reed expanded the organization’s focus to include support for conservative economic policies, health care reform, and increased defense spending. In 1995, the Coalition announced its “Contract with the American Family,” which outlined ten legislative or policy goals, including school prayer, regulation of pornography and abortion, the adoption of a flat tax rate, and the abolition of the Department of Education, the National Endowment for the Humanities, and the Corporation for Public Broadcasting. The Republican controlled Congress embraced several of the Coalition’s proposals, resulting in legislation authorizing federal funding of religious charities (Charitable Choice) and regulating sexually explicit material on the internet. Criticism of the Coalition’s political activity and voters’ guides led the Internal Revenue Service to deny the organization’s charitable tax-exempt status in 1999. The Coalition reorganized through one of its state affiliates.

An organization related to the Christian Coalition is the *American Center for Law and Justice* (ACLJ). Pat Robertson founded the ACLJ in 1990 as a legal advocacy group “dedicated to defending and advancing religious liberty, the sanctity of human life, and the two-parent, marriage-bound family.” Modeled after the American Civil Liberties Union, the

ACLJ represents religiously conservative litigants in controversies involving public school student religious activities and abortion clinic protests, among others. Through its general counsel, Jay Sekulow, the ACLJ has argued several leading free speech and religion clause cases before the U.S. Supreme Court, including *Board of Education of Westside Community Schools v. Mergens* (1990), *Lamb’s Chapel v. Center Moriches School District* (1993), *Madsen v. Women’s Health Center* (1994), and *Santa Fe Independent School District v. Doe* (2000). ACLJ also maintains an active amicus practice before the Supreme Court. ACLJ has been effective in encouraging the Supreme Court to adopt a First Amendment jurisprudence that provides equal access to public facilities and funding for religiously motivated expression and conduct.

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References and Further Reading

- Boston, Robert. *The Most Dangerous Man in America? Pat Robertson and the Rise of the Christian Coalition*. Amherst, NY: Prometheus Books, 1996.
- Brown, Ruth Murry. *For a “Christian America”: A History of the Religious Right*. Amherst, NY: Prometheus Books, 2002.
- Diamond, Sara. *Roads to Dominion: Right-Wing Movements and Political Power in the United States*. New York: The Guilford Press, 1995.
- Green, John C., et al. *Religion and the Culture Wars*. Lanham, Maryland: Rowman & Littlefield Pub., 1996.
- Watson, Justin. *The Christian Coalition: Dreams of Restoration, Demands for Recognition*. New York: St. Martin’s Press, 1997.
- Wilcox, Clyde. *Onward Christian Soldiers? The Religious Right in American Politics*. Boulder, CO: Westview Press, 1996.

Cases and Statutes Cited

- Board of Education of Westside Community Schools v. Mergens*, 496 U.S. 226 (1990)
- Lamb’s Chapel v. Center Moriches School District*, 508 U.S. 384 (1993)
- Madsen v. Women’s Health Center*, 512 U.S. 753 (1994)
- Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000)

CHURCH OF SCIENTOLOGY AND RELIGIOUS LIBERTY

The Church of Scientology is a religious–scientific movement that has been at the center of several legal controversies regarding the government’s treatment and regulation of new religious movements.

Since its founding in the early 1950s, the Church has had to struggle for legal recognition as a religion and to counter critics who have claimed the Church's religious and financial practices are a sham. These controversies have engendered a significant amount of litigation in the United States and foreign courts, resulting in mixed successes for the Church. Viewed cumulatively, however, the court decisions reveal the difficulties associated with applying the religious liberty principle to nontraditional religious movements.

The Church of Scientology was founded in the early 1950s by L. Ron Hubbard, best known as a science-fiction writer during the 1930s and 1940s. The religion of Scientology came out of an earlier body of Hubbard's work called Dianetics, which proposes an alternative approach to psychology and psychiatry for treating mental disease and dysfunctioning (See *Dianetics: The Modern Science of Mental Health* [1950]). The premise of Dianetics is that the human brain has indefinite power but is hampered by painful memories ("engrams") that inhibit its proper functioning and full potential. Through a process called "auditing"—a practice similar to abreaction therapy or the uncovering of repressed memories—an individual can restore his or her mind to its full capacity. Hubbard developed a device used in auditing, called an "electropsychometer" ("E-meter")—similar to a skin galvanometer or lie detector—for measuring and treating engrams. After Hubbard adapted his secular theory of Dianetics into the religious philosophy of Scientology, auditing became the latter's central religious practice. Scientology also claims to have elements of spirituality and cosmology, with kinships to Eastern religious traditions, and has developed religious doctrines, rituals, and ceremonies governing matters such as marriage, christenings, and the ordination of clergy.

Legal controversies concerning Scientology have involved whether Scientology is a bona fide religion, thus deserving of First Amendment protections, and whether its practices should be entitled to the same tax privileges as afforded other faiths. The absence of spirituality in Hubbard's earlier science fiction and psychological writings and the parallels in Scientology doctrines led critics to claim that Hubbard created Scientology for financial gain and to retain control over the growing Dianetics movement. In particular, allegations have centered on the Church's graduated fee for auditing sessions, which can run into the thousands of dollars. The Internal Revenue Service initially denied the Church's application for nonprofit tax status, claiming the Church was a commercial operation. In the early 1960s, agents of the Food

and Drug Administration conducted a raid on Scientology's Washington, D. C., church to confiscate E-meters, based on government claims the Church was engaged in false and misleading practices through its auditing. In 1969, the U.S. Court of Appeals for the District of Columbia ruled, however, that Scientology is a bona fide religion and the use of the E-meter, being part of a central religious practice, did not constitute false labeling under the federal Food, Drug, and Cosmetic Act. In 1973, the Internal Revenue Service relented by awarding the Church tax-exempt status.

The Church of Scientology's attaining status as a religion has not blunted controversy or litigation. In 1979, Hubbard's wife and several church officials were charged with conspiracy to burglarize federal government offices and steal official documents related to government investigations of Scientology. The Church has also faced civil lawsuits by former members alleging that church officials have engaged in fraud, kidnapping, and severe emotional injury associated with the recruiting and auditing of members.

The most significant legal controversy involved the Internal Revenue Service's refusal to allow individual Scientologists to deduct the costs associated with auditing sessions from their tax liability. In *Hernandez v. Commissioner of Internal Revenue* (1989), the Supreme Court upheld the IRS determination that auditing fees were not deductible contributions. Although acknowledging Scientology is a recognized church and that auditing is a central religious practice of the religion, the Court agreed with the IRS that the "fixed donation" or fee was not equivalent to a tithe or gift to a church but was payment for a quid pro quo exchange of an identifiable benefit. Furthermore, the Court rejected the Church's claim that this interpretation of the Internal Revenue Code violated the Church's establishment and free exercise clause rights. Distinguishing the auditing fees from pew rents and other religious assessments recognized as deductions, the Court stated that the relevant inquiry is "not whether the payment secures religious benefits or access to religious services, but whether the transaction . . . is structured as a *quid pro quo* exchange." The Court also found no substantial burden on Scientologists' religious practice arising from the fact that the IRS interpretation imposed a greater financial cost to engage in auditing.

Despite its legal setbacks, Scientology has achieved full legal recognition as a religious denomination in the United States. Scientology has had greater difficulty attaining similar recognition and protection outside the United States, particularly in Germany

and Great Britain, where government officials have maintained that Scientology is more a philosophy or commercial enterprise than a religion.

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References and Further Reading

- Friedman, Jerold A., *Constitutional Issues in Revoking Religious Tax Exemptions: Church of Scientology of California v. Commissioner*, University of Florida Law Review 37 (1985): 565–589.
- Horwitz, Paul, *Scientology in Court: A Comparative Analysis and Some Thoughts on Selected Issues in Law and Religion*, DePaul Law Review 47 (1997): 86–154.
- Hubbard, L. Ron. *Dianetics: The Modern Science of Mental Health*. New York: Hermitage Press, 1950.
- Jentzsch, Herber C. “Scientology: Separating Truth from Fiction.” In *New Religious Movements and Religious Liberty in America*, edited by Derek H. Davis and Barry Hankins, 141–161. Waco, TX: J.M. Dawson Institute of Church-State Studies, 2002.
- Lamont, Stewart. *Religions Inc.* London: Harrap, 1986.
- Melton, J. Gordon. *The Church of Scientology*. Torino, Italy: Signature Books, 2000.
- . “Scientology in Europe: Testing the Faith of a New Religion.” In *International Perspectives on Freedom and Equality of Religious Belief*, edited by Derek H. Davis and Gerhard Besier, 57–68. Waco, TX: J.M. Dawson Institute of Church-State Studies, 2002.
- Miller, Russell. *Bare-Faced Messiah*. New York: Henry Holt, 1987.
- . *Scientology: Theology and Practice of a Contemporary Religion*. Los Angeles: Bridge Publications, 1998.

Cases and Statutes Cited

- Christofferson v. Church of Scientology of Portland*, 644 P.2d 577 (Or. Ct. App. 1981)
- Church of Scientology of California v. Commissioner of Internal Revenue*, 823 F.2d 1310 (9th Cir. 1987)
- Founding Church of Scientology of Washington, D.C. v. United States*, 409 U.S. 1146 (D.C. Cir. 1969)
- Hernandez v. Commissioner of Internal Revenue*, 490 U.S. 680 (1989)
- Van Schaick v. Church of Scientology of California*, 535 F. Supp. 1125 (D. Mass. 1982)
- Wollersheim v. Church of Scientology*, 260 Cal. Rptr. 331 (Cal. Ct. App. 1989)

CHURCH OF THE HOLY TRINITY v. UNITED STATES, 143 U.S. 457 (1892)

Church of the Holy Trinity v. United States shocks supporters of a complete separation of church and state because of Justice David J. Brewer’s statement for a unanimous Supreme Court that the United States is a Christian nation. In support of this idea, Brewer even invoked the Establishment of Religion and Free Exercise Clause of the First Amendment

that barred Congress from establishing a religion or interfering with the free exercise of religion. *Holy Trinity* reflects the widespread understanding of nineteenth-century Protestant jurists and lay people that the prohibition on an established church in no way undermined the religiosity of the nation itself.

The case began when the Collector of U.S. Customs at the port of New York levied a \$1,000 fine against the Church of the Holy Trinity in New York for violating Alien Contract Labor Act of 1885 by hiring the Rev. E. Walpole Warren, an Englishman. The act’s broad language made it “unlawful for any person, company, partnership, or corporation . . . to prepay the transportation, or in any way assist or encourage the importation or migration of any alien . . . under contract . . . to perform labor or service of any kind in the United States . . .” The action against Holy Trinity was taken at the behest John Stewart Kennedy, a wealthy Scottish immigrant, who reasoned that the courts would balk at enforcing the act against a clergyman. Kennedy wanted to bring the act into disrepute and paid the fine and the costs of defense.

Holy Trinity’s attorney, Seaman Miller, sought to recover the fine by filing a demurrer raising the question of whether the act applied to a clergyman. Stephen A. Walker, the U. S. District Attorney, did not think much of the drafting skills of the act’s writers, but he dutifully argued in 1888 that the law applied. The statute excepted only actors, artists, lecturers, singers, or personal servants. Miller responded that that Congress had targeted cheap, manual labor only. He also invoked briefly the First Amendment’s free exercise clause, but this argument was ignored by the circuit court judge. The decision in *United States v. Rector, Etc., of the Church of the Holy Trinity* in 1888 limited the question to whether Congress intended to prohibit the entry of an immigrant who came under contract with a religious society to perform the functions of a minister of the gospel. The judge held that the language of the statute clearly applied, although he believed that no legislative body in this country would have purposefully enacted a law framed so as to cover the case before him.

During Miller’s oral argument before the U.S. Supreme Court in January 1892, the justices’ questions made clear that they agreed that the only statutory exceptions were actors, lecturers, etc. The assistant attorney general became convinced that his oral argument was unnecessary to success, so merely submitted his brief. He learned the next month that he had lost the case. Justice Brewer insisted that the literal construction of a statute must not result in an absurdity. Congressional debate revealed that the act targeting the immigration of

large numbers of laborers willing to work for low pay. Yet Brewer was not done. He then declared that a literal construction was also an absurdity because not legislature, state, or national would act against religion because of the religious character of the American people and their society. Brewer included a list of pronouncements drawn from political and legal documents—including the First Amendment clauses—to prove this. In addition, American laws, customs, and society demonstrated that this is a Christian nation.

Modern liberal church/state scholars have dismissed, too eagerly, the Christian nation statement as mere dictum unnecessary to the reasoning of the decision. In a dissent from *Lynch v. Donnelly* in 1984 where the Court approved of a nativity display on city property, Justice William J. Brennan denounced Brewer for his sectarian arrogance. Today, legal writers are more likely to examine Holy Trinity as part of the debate on the appropriateness of examining legislative history when interpreting statutes. Of course, some were appalled in 1892 by Brewer's statement, but this reaction was not widespread as many Americans shared Brewer's belief in the religious character of their country. In fact, Brewer had made a similar statement for a unanimous Kansas Supreme Court in *Board of Commissioners of Wyndotte Co. v. The First Presbyterian Church of Wyandotte* in 1883. *Holy Trinity* thus exemplifies an evangelical Protestant theory of church-state relations as opposed to a liberal theory.

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References and Further Reading

- Alien Contract Labor Act, Act of February 26, 1885, 23 Stat. 332.
 Hylton, Joseph Gordon, *David Josiah Brewer and the Christian Constitution*, *Marquette Law Review* 91 (1998): 417–425.
 Przybyszewski, Linda. "The Secularization of the Law and the Persistence of Religious Faith: The Case of Justice David J. Brewer." *Journal of American History* 90 (2004).
 Vermeule, Adrian, *Legislative History and the Limits of Judicial Competence: the Untold Story of Holy Trinity Church*, *Stanford Law Review* 50 (1998): 1833–1896.

Cases and Statutes Cited

- Board of Commissioners of Wyndotte Co. v. The First Presbyterian Church of Wyandotte*, 30 Kan, 620, 637 (1883)
Lynch v. Donnelly, 465 U.S. 668 (1984)
United States v. Rector, Etc., of the Church of the Holy Trinity, C.C. S.D. N.Y. 36 F. 303, 303 (1888)

See also **Establishment of Religion and Free Exercise Clauses**; *Lynch v. Donnelly*, 465 U.S. 668 (1984)

CHURCH OF THE LUKUMI BABALU AYE v. CITY OF HIALEAH, 508 U.S. 520 (1993)

A central theme of the U. S. Constitution, particularly in the balance of powers between the various branches of government and in the federal system itself, is protecting the rights of minorities against the unchecked power of majorities. Alexander Hamilton, writing in *Federalist* 78, saw an independent judiciary as "an essential safeguard against the effects of occasional ill humors in society" and "the injury of the private rights of particular classes of citizens, by unjust and partial laws" (*Federalist* 78).

As unwilling to place fundamental rights at the mercy of democratic but sometimes ephemeral and unjust decisions as under the autocratic whims of a monarch, the Founders sought to further enshrine them in the Constitution itself. The decision of the Supreme Court of the United States in *Church of the Lukumi Babalu Aye* exemplifies the wisdom of amending the Constitution to include a Bill of Rights, particularly the clauses of the First Amendment that promote religious liberty.

The petitioners practiced Santeria ("the way of the saints"), a religion that developed in the crucible of the African slave trade in the New World and fused elements of the Yoruba traditions with those of Roman Catholicism. A central tenet of Santeria involves the invocation of the assistance of orishas (spirits), particularly through the use of animal sacrifice. In 1987 the Church leased land in the City of Hialeah, Florida, and announced plans to build a complex that included a house of worship, school, cultural center, and museum.

The Church's announcement caused an upheaval in the community. The City Council convened an emergency meeting and unanimously passed not only a resolution expressing concern "that certain religions may propose to engage in practices that are inconsistent with public morals, peace or safety," but also a series of ordinances banning certain ritual killings of animals and their use in sacrifices.

The Church responded by suing the City and various officials pursuant to 42 U.S.C. § 1983, claiming that the ordinances violated their rights under the Free Exercise Clause of the Constitution. Federal district and appellate courts upheld the laws, and the Church appealed.

The Supreme Court of the United States held that all of the ordinances were unconstitutional. Writing for a unanimous but conflicted Court, Justice Anthony Kennedy first acknowledged that, under the holding in a 1990 case, *Employment Div'n, Dept. of Human Resources of Ore. v. Smith*, a law that had

the incidental effect of burdening a particular religious practice may be constitutional even in the absence of a compelling state interest as long as it was neutral and of general applicability.

The Court found, however, that the City ordinances at issue failed the neutrality test both textually and in their operation. Therefore, the precedent in *Smith* did not apply, and the Court was obliged to evaluate the ordinances under a standard of strict scrutiny, that is, that they had to be justified by a compelling governmental interest and were narrowly tailored to advance that interest.

The Court observed that the legislative history of the ordinances, their wording, and their application all amply demonstrated that their purpose was to suppress animal sacrifice, a central element of Sante-ria. Because they were overbroad in some respects and underinclusive in others, the Court found that the ordinances constituted a “religious gerrymander . . . an impermissible attempt to target petitioners and their religious practices.”

For example, the Court found that an ordinance’s definition of “sacrifice” was drafted in such a way to permit all forms of killing animals except for religious sacrifice. At the same time, it found that other challenged ordinances were written more broadly than necessary to achieve the City’s preferred secular purposes of protecting public health and preventing cruelty to animals. The Court concluded: “The Free Exercise Clause commits government itself to exercise religious tolerance, and upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures.”

In a sense, this case represented little more than an adherence to a line of precedents protecting the rights of religious minorities under both religion clauses of the First Amendment. See, for example *Fowler v. Rhode Island* (municipal ordinance violated Free Exercise Clause where interpreted to ban preaching in a public park by Jehovah’s Witnesses but permit preaching at Roman Catholic Mass or Protestant service) and *Larson v. Valente* (state law that excepted some, but not all, religious organizations from registration and reporting requirements for charitable solicitations violated Establishment Clause). At the same time, it provided the Court with an opportunity, one particularly evident in the array of concurrences to the Court’s judgment, to revisit the decision in *Smith* and to ask whether it may have given the government too much power to inhibit or otherwise burden religious practices.

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References and Further Reading

- Goldberg, Steven B. *Seduced by Science: How American Religion Has Lost Its Way*. New York: New York University Press, 2000, 68–83.
 Loewy, Arthur H. *Religion and the Constitution: Cases and Materials*. St. Paul, MN: West Group, 1999.
 Sullivan, Kathleen. *Constitutional Law* (13th Ed.). Westbury, NY: The Foundation Press, 1997, 1461–1500.

Cases and Statutes Cited

- Employment Div’n, Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990)
Fowler v. Rhode Island, 345 U.S. 67 (1953)
Larson v. Valente, 456 U.S. 228 (1982)

See also **Amish and Religious Liberty**; **Application of First Amendment to States**; **Balancing Approach to Free Speech**; **Bill of Rights: Structure**; *Bob Jones University v. United States*, 461 U.S. 574 (1983); *Bowen v. Roy*, 476 U.S. 693 (1986); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); **Catholics and Religious Liberty**; *City of Boerne v. Flores*, 521 U.S. 507 (1997); **Compelling State Interest**; **Defining Religion**; **Employment Division, Department of Human Resources v. Smith, 494 U.S. 872 (1990); *Engel v. Vitale*, 370 U.S. 421 (1962); **English Toleration Act**; **Equal Protection Clause and Religious Freedom**; **Equal Protection of Law (XIV)**; **Establishment of Religion and Free Exercise Clauses**; *Everson v. Board of Education*, 330 U.S. 1 (1947); **Free Exercise Clause (I): History, Background, Framing**; **Free Exercise Clause Doctrine: Supreme Court Jurisprudence**; *Goldman v. Weinberger*, 475 U.S. 503 (1986); *Good News Club v. Milford Central School*, 533 U.S. 98 (2001); *Hernandez v. Commissioner of Internal Revenue*, 490 U.S. 680 (1989); **Jehovah’s Witnesses and Religious Liberty**; **Jews and Religious Liberty**; **Kennedy, Anthony McLeod**; *Lamb’s Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993); *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988); *McDaniel v. Paty*, 435 U.S. 618 (1978); **Mormons and Religious Liberty**; **Muslims and Religious Liberty**; *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979); *O’Lone v. Estate of Shabazz*, 482 U.S. 342 (1987); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); **Prisoners and Free Exercise Clause Rights**; **Private Religious Speech on Public Property**; **Quakers and Religious Liberty**; **Religious Freedom Restoration Act**; **Religious Land Use and Institutionalized Persons Act**; *Reynolds v. United States*, 98 U.S. 145 (1878); **Seventh Day Adventists and Religious Liberty**; *Sherbert v. Verner*, 374 U.S. 398 (1963); **State Religious Freedom Statutes**; **Theories of Civil Liberties**; *United States v. Lee*, 455 U.S. 252 (1982); *Walz v. Tax Commission of City of New York*, 397 U.S. 664 (1970); *Wisconsin v. Yoder*, 406 U.S. 205 (1972)**

CHURCH OF THE NEW SONG AND RELIGIOUS LIBERTY

The Church of the New Song (CNS) is an entity created within the federal correctional system. It has engaged in significant litigation in the federal courts over the past thirty years to gain recognition as a "religion" for purposes of establishing the right of its adherents to practice their religion while incarcerated. Interestingly, the federal courts have split in their response to arguments advanced by CNS. The Eighth Circuit recognized the sect as a religious entity entitled to First Amendment protection in *Remmers v. Brewer*, 494 F.2d 1277 (8th Circuit 1974). In contrast, CNS failed to gain recognition in the Fifth Circuit, which dismissed the CNS appeal from adverse findings by the trial court in *Theriault v. Silber*, 453 F.Supp. 254, 260 (W.D. Tex. 1978), appeal dismissed, 579 F.2d 302 (5th Cir. 1978). The district court concluded:

The Church of the New Song appears not to be a religion, but rather as a masquerade designed to obtain First Amendment protection for acts which otherwise would be unlawful and/or reasonably disallowed by the various prison authorities but for the attempts which have been and are being made to classify them as 'religious' and, therefore, presumably protected by the First Amendment.

The conflicting findings concerning the legitimacy of CNS's claim to First Amendment protection lie, in part, in the tactics of the entity's founder and leader, Dr. Harry Theriault, a federal inmate with a record of prison escape, violence, and threatened violence. Theriault admittedly created the entity's underlying doctrine, the "Eclatarian faith" while incarcerated and a critical finding of some courts has been that a central tenet of the faith is rebellion against the prison system, judiciary, and government, in general. *Theriault v. Carlson*, 494 F.2d 390, 394 (5th Cir. 1974).

The difficulty in assessing the legitimacy of CNS's claim to constitutional protection is complicated by the recognition of many other nontraditional or non-Western sects whose theological precepts or practices have been accorded protection under the Free Exercise Clause. As the Supreme Court observed in *United States v. Ballard*:

It embraces the right to maintain theories of life and of death and of the hereafter which are rank heresy to followers of the orthodox faiths. Heresy trials are foreign to our Constitution. Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences that are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken

of mortals does not mean that they can be made suspect before the law. 322 U.S. 78, 87 (1944) (defendant accused of fraud claimed religious leadership of the "I Am" movement).

Federal courts have routinely permitted practitioners of minority sects to assert claims for constitutional protection, typically in actions brought by inmates. See for example, *Cruz v. Beto*, 405 U.S. 319, 322 (1972) (Buddhist inmate); *Cooper v. Pate*, 378 U.S. 546 (1964) (Black Muslim inmate); *Teterud v. Gillman*, 385 F.Supp. 153, 160 (S.D. Iowa 1974) (Native American hair length protected against claim of institutional disruption); and *Kennedy v. Meacham*, 540 F.2d 1057 (10th Cir. 1976) (remanding for evidentiary hearing on claims of professed Satanists). The proper resolution of such claims requires conscientious analysis of the purported system of belief and, typically, in the context of inmate litigation, its potential burden or disruption for the institution, as demonstrated by the excellent analysis in *Childs v. Duckworth*, 509 F.Supp. 1254 (D. Ind. 1982). There, the court rejected the claim of a practitioner of the Church of Satan/Fraternity of the Goat that his need to burn incense and candles in his cell was entitled to First Amendment protection.

A similarly thorough analysis was applied by the Iowa court in reviewing the status of CNS as a recognized religion in the Eighth Circuit, with the conclusion being drawn that CNS functioned much as many other religious sects, had a body of beliefs or theology, and did not exist as a sham or to disrupt the institution. *Loney v. Scurr*, 474 F.Supp. 1186, 1193-94 (S.D. Iowa 1979). These findings contrast sharply with those entered by the district court in Texas that contributed to a rather hostile view of the CNS and its founder in the Fifth Circuit, evidenced by its explanation for dismissal of the appeal in *Theriault v. Silber*.

The CNS litigation demonstrates the difficulty in determining when a particular claim of faith is sufficiently well grounded to be accorded protection under the First Amendment. Even when the claim of faith is recognized, that recognition does not necessarily lead to unfettered practice, particular in the context of penal institutions. As the court observed in *Loney v. Scurr*, 474 F.Supp. at 1196: "... the free exercise of religion has two aspects the freedom to believe, which is absolute, and the freedom to practice, which is not."

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Cases and Statutes Cited

Childs v. Duckworth, 509 F.Supp. 1254 (D. Ind. 1982)
Cooper v. Pate, 378 U.S. 546 (1964) (Black Muslim inmate)
Cruz v. Beto, 405 U.S. 319, 322 (1972)

Kennedy v. Meacham, 540 F.2d 1057 (10th Cir. 1976)
Loney v. Scurr, 474 F.Supp. 1186, 1193-94 (S.D. Iowa 1979)
Remmers v. Brewer, 494 F.2d 1277 (8th Circuit 1974)
Teterud v. Gillman, 385 F.Supp. 153, 160 (S.D. Iowa 1974)
Theriault v. Carlson, 494 F.2d 390, 394 (5th Cir. 1974)
Theriault v. Silber, 453 F.Supp. 254, 260 (W.D. Tex. 1978)
United States v. Ballard

CHURCH PROPERTY AFTER THE AMERICAN REVOLUTION

The American Revolution brought about the dissolution of ties between many religious bodies in America, necessitating separate organizations.

Prior to the American revolution, religious corporations were created either by royal charter or by provincial authority derived from the crown. In this period the Catholic Church was without civil rights in the colonies, and title to its property was held in the name of individuals. With the establishment of the United States, religious orders and organizations began to incorporate: the Augustinian Fathers at Philadelphia in 1796, the Sulpicians at Baltimore in 1805, the Jesuits at Georgetown in 1815, and a few years later the Dominicans by legislative act in Ohio. Also, the Methodists formed in 1784, the Anglicans in 1789, the Baptists in 1784, the Presbyterians in 1785, the Dutch Reformed in 1792, and the Lutherans in 1795.

After the revolution, churches were incorporated either by special acts of state legislatures or under the provisions of general statutes. The religious corporation in the United States belongs to the class of civil corporations, not for profit, which are organized and controlled according to the principles of common law and equity as administered by the civil courts. The church is a spiritual and ecclesiastical body, and as such does not receive incorporation. It is from the membership of the religious society that the corporation is formed. The general statutes under which religious corporations can now be formed in most of the American states contain provisions authorizing the legislature to alter, amend, or repeal any charter granted. The life of a religious corporation dates in law from its organization, not from the time it began to exercise its corporate powers. But a mere use of corporate powers limited to the maintenance of religious observances is not sufficient to establish a corporation *de facto*. The primary object of religious incorporation in the United States is the core of real property devoted to the purposes of religion. American courts have consistently recognized that the terms "church" and "incorporated religious society" are not identical. "Church" encompasses objects and purposes that are moral and religious, whereas "church

corporation" deals chiefly with care and control of temporalities.

A religious corporation may not engage in business transactions for profit. It may, however, hold revenue-producing property not used by the church, as investment in the form of an endowment. The mortgaging of real property by a religious corporation generally requires the consent of some superior ecclesiastical authority, as well as an order of the court. Because of the objects of religious incorporation is to give a legal person standing in court, such corporations have the right to sue and be sued. It is in civil courts and not in the ecclesiastical courts that the religious corporation has standing. It is from the civil courts that orders or wants will issue, directing or restraining corporate action. Unlike private corporations, the religious corporation can neither merge nor dissolve without the consent of local church body and higher church authorities.

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References and Further Reading

Arnold, Jack L. *Church History, American Christianity: 18th Century*.

CICENIA v. LAGAY, 357 U.S. 504 (1958)

Newark police asked Cicienia to report for questioning in a murder case. Cicienia went to the police at 9:00 the next morning. Cicienia's attorney visited the station and asked to see Cicienia throughout the afternoon and evening. Meanwhile, Cicienia was asking to see his lawyer. The two were not permitted to confer until 9:30 PM, when Cicienia had already signed a confession.

The lower courts decided New Jersey's refusal to permit Cicienia counsel during the inquiry did not deprive him of due process.

A five-member majority affirmed, relying on *Crooker v. California*, which allowed police to refuse to honor a general request to consult with a lawyer. The majority acknowledged that, unlike Crooker, Cicienia had already retained a lawyer, but ultimately reached the same conclusion. They admitted a "strong distaste" for New Jersey's tactics, but found no constitutional violation.

The Court acknowledged the right to counsel is critical, but only "one pertinent element in determining from all the circumstances whether a conviction was attended by fundamental unfairness." Because requiring the police to permit accused persons to see an attorney "might impair [their] ability to solve

difficult cases,” the Court refrained from “laying down any such inflexible rule.”

The dissent argued the right to counsel is “fundamental and absolute.” Citing *Crooker’s* dissent, they lamented, we “regret that we have not taken this case . . . as the occasion to bring our decisions into tune with the constitutional requirement for fair criminal proceedings against the citizen.”

Miranda expressly overruled *Cicenia*.

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Cases and Statutes Cited

Crooker v. California, 357 U.S. 433 (1958)

Miranda v. Arizona, 384 US 436 (1966)

See also **Coerced Confession/Police Interrogation**

CINCINNATI v. DISCOVERY NETWORK, INC. 507 U.S. 14 (1993)

The question before the U.S. Supreme Court in *Cincinnati v. Discovery Network* was whether commercial speech should be entitled to the same First Amendment protections as private speech. The defendant was a publishing company that provided educational services to adults in the Cincinnati area and advertised these services in free magazines distributed from newspaper racks on city sidewalks. The city of Cincinnati had granted Discovery Network, Inc. permission to place its distribution racks on public property in 1989, but the following year the city Commissioner of Public Works revoked their permit and a similar permit granted to real estate advertiser Harmon Publishing, claiming that the racks were eyesores and that their placement posed a threat to public safety. The free magazines, the city argued, were “commercial handbills” to which the free press protections of the First Amendment did not apply. The decision affected only sixty-two of the more than 1,500 news racks placed on city property and did not place restrictions on the similar distribution of conventional newspapers.

Discovery Network and Harmon Publishing unsuccessfully challenged the decision in federal court on the grounds that it violated the First Amendment rights of the two companies. The case was appealed to the U.S. Supreme Court, which reversed the federal court’s decision by a 6–3 majority on March 24, 1993. The Court held that commercial speech, while enjoying less constitutional protections than noncommercial speech, cannot be restricted without adequate, demonstrable cause. Writing for the majority, Justice John Paul Stevens stated that disseminators of

commercial speech are not entitled to unlimited rights to distribute materials on public property, but that a public entity must be able to justify restricting their activities by demonstrating a “reasonable fit” between the restriction and the stated goals of the restrictions, especially if the restrictions are based in part on the content of the speech. The Court held that the city’s decision to ban free magazine racks did not reasonably fit its stated goals of ensuring public safety and aesthetics, as evidenced by the fact that the ban only applied to less than one percent of the city’s news racks. These goals, the Court opined, could just as easily be achieved by less restrictive means, such as regulating the size, shape, and appearance of the boxes. Justices William Rhenquist, Byron White, and Clarence Thomas dissented, arguing that commercial speech is subordinate to private speech and thus subject to a greater degree of government regulation.

In reaffirming previous decisions in cases such as *Central Hudson Gas and Electric v. Public Service Commission*, which prohibited government interference in commercial speech without demonstrable cause, the Supreme Court in *Cincinnati v. Discovery Network* clarified, if only partially, the place of commercial speech in American public discourse. The Court’s decision validated what at the time was a growing medium for the distribution of free information for commercial purposes by implication extending greater constitutional protections to other media for commercial speech such as telemarketing and infomercials.

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References and Further Reading

- Belsky, Martin H. *The Rhenquist Court: A Retrospective*. New York: Oxford University Press, 2002.
- Cain, Rita Marie, *Call Someone Up and Just Say ‘Buy’ – Telemarketing and the Regulatory Environment*, *American Business Law Journal* 31 (February 1994): 4:641–698.
- Denniston, Lyle. “A Major Victory for Commercial Speech.” *American Journalism Review* 15 (May 1993): 46.
- Stewart, David O. “Commercial Break: Supreme Court Bolsters Constitutional Protections for Commercial Speech.” *ABA Journal* 79 (June 1993): 42.

Cases and Statutes Cited

Central Hudson Gas and Electric v. Public Service Commission, 447 U.S. 557 (1980)

See also **Bill of Rights: Structure; Content-based Regulation of Speech; 44 Liquormart v. Rhode Island, 517 U.S. 484 (1997); Freedom of Speech and Press: Nineteenth Century; Free Speech in Private Corporations; Freedom of Speech Extended to Corporations; Prior Restraints; Public/Nonpublic Forums Distinction**

CITIZENSHIP

Citizenship comprises the legal status conferring full membership in the national political community. In the absence of any other definitive marker of membership, citizenship has been central to the American experience. Citizenship has been an equalizing force among those afforded the status. It has been exclusionary to the extent that race, ideology, and other criteria have been deployed as qualifications.

The two primary routes to citizenship are by birth and by naturalization. The Framers adopted no constitutional provision for citizenship at birth, unable to resolve the citizenship status of blacks. In *Dred Scott v. Sanford*, the Supreme Court held that even free blacks could not qualify as U.S. citizens. The *Dred Scott* ruling was reversed by the Citizenship Clause of the Fourteenth Amendment, which extends citizenship at birth to all persons born in the territory of the United States and “subject to the jurisdiction thereof.” In the *Wong Kim Ark* decision, the Supreme Court found the clause to apply to the children of Asian parents who were themselves ineligible to naturalize.

Although the Citizenship Clause does not apply to members of Native American tribes and those born in unincorporated territories, most notably Puerto Rico, those groups have been extended birth citizenship by statute. By constitutional practice, territorial birthright citizenship is extended without regard to parental immigration status. Proposed constitutional amendments introduced in the 1990s to deny birthright citizenship to the children of undocumented aliens and temporary immigrants were repulsed. Given the growing population of undocumented aliens in the United States (estimated to be as large as 10 million individuals), the strict rule of territorial birthright citizenship has avoided the difficulties of intergenerational caste.

Citizenship is also extended at birth to the children of U.S. citizens born outside the United States, so long as the citizen parent has resided in the United States prior to the child’s birth. Citizenship by descent is extended by statute rather than under the Fourteenth Amendment, as highlighted in *Rogers v. Bellei*. The condition precedent of parental residence limits the possibility of a nonterritorially connected American diaspora.

The Constitution allocates to Congress the power to establish “an Uniform Rule of Naturalization.” Eligibility to naturalize was long qualified on the basis of race. The original naturalization statute, enacted in 1790, provided only for the naturalization of “free white persons.” Blacks were made eligible to naturalize by statute in 1868. Asian immigrants, however, were long barred from

acquiring citizenship. It was not until 1952 that the last race-based criteria for naturalization were repealed.

Racial exclusions aside, conventional wisdom has characterized naturalization requirements as minimal. While this is true in comparative perspective—the thresholds to naturalization have historically been much higher in the European context, for instance—other barriers to naturalization have been and continue to be formidable. From the early twentieth century, naturalization has not been open to those advocating anarchism, communism, and other such doctrines, activity that would otherwise enjoy core First Amendment protection. Naturalization also continues to be statutorily contingent on facility in the English language and a demonstrated understanding of “the fundamentals of the history, and of the principles and form of government, of the United States.” Naturalization applicants must pass a test by way of satisfying these requirements. Thousands fail each year, and many others are deterred from applying at all. Naturalization applicants must also pay a nontrivial application fee.

Finally, naturalization has been contingent on a durational residency requirement, first set at two years, briefly raised to fourteen under the Alien and Sedition Acts, reduced to five years in 1802 where it has stood since. Under current law, qualified residency must be as a permanent resident alien. Aliens in other status are thus ineligible to naturalize. Unlike other naturalization requirements, including the oath of naturalization, the durational residency requirement is not waivable.

Whether by birth or naturalization (at least where not procured by fraud), citizenship cannot be terminated without an individual’s consent under Supreme Court decisions severely limiting the government’s power of expatriation.

As a determinant of constitutional rights, citizenship status has been of declining significance. Some rights have long been extended to aliens, such as the rights of the accused and to equal protection, which the Constitution extends to all “persons.” Discrimination against aliens under state law has been restricted to political functions, in the wake of the Court’s designation of aliens as a “suspect classification” in *Graham v. Richardson*. Although the federal 1996 welfare reform act deprived noncitizens of important public benefits, many have since been restored. Noncitizens do remain subject to immigration control, including the possibility of removal, and they are also deprived of the franchise, although permanent resident aliens may make campaign contributions. As for the obligations of citizenship, aliens must pay taxes and are subject to

conscription. They are exempted only from jury service. Consistent with a constitutional account in which citizenship status is subordinated, Alexander Bickel found “it gratifying that we live under a Constitution to which the concept of citizenship matters very little, that prescribes decencies and wise modalities of government without regard to the concept of citizenship.”

As a constitutional value, citizenship may be enjoying a resurgence. Building on Charles Black’s interpretation of the Citizenship Clause to include a substantive component in the context of racial equality, scholars have deployed citizenship as the basis for economic, gay, and multicultural rights. Linda Bosniak has argued that the Citizenship Clause is sufficiently expansive to protect the rights of noncitizens. With the Supreme Court’s rediscovery in *Saenz v. Roe* of the Privileges and Immunities Clause, which by its terms is citizenship dependent, such theorizing may have jurisprudential consequences. On the other hand, citizenship remains an exclusionary institution insofar as otherwise willing individuals are barred from membership. Although liberal theorists, notably Michael Walzer, argue that justice requires low thresholds to naturalization, most maintain the necessity of residency, language, and other naturalization requirements. The increasing density of transnational interactivity highlights the inherently illiberal aspects of citizenship. Globalization may also challenge the correlation of citizenship status to individual identity, as associational ties fragment and multiply. The increased incidence of dual citizenship and the rise of social movements, on both domestic and global levels, point to the possible dilution of national citizenship as a primary vehicle for community attachment.

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References and Further Reading

- Aleinikoff, T. Alexander. *Semblances of Sovereignty: The Constitution, The State, and American Citizenship*. Cambridge: Harvard University Press, 2002.
- Bosniak, Linda. *Constitutional Citizenship Through the Prism of Alienage*, Ohio State Law Journal 63 (2002): 1285.
- Black, Charles L., Jr. *Structure and Relationship in Constitutional Law*. Baton Rouge: Louisiana State University Press, 1969.
- Eskridge, William N., *The Relationship Between Obligations and Rights of Citizens*, Fordham Law Review 69 (2001): 1721.
- Forbath, William E., *Caste, Class, and Equal Citizenship*, Michigan Law Review 98 (1999): 1.
- Haney-Lopez, Ian. *White By Law: The Legal Construction of Race*. New York: New York University Press, 1996.
- Neuman, Gerald L. *Strangers to the Constitution*. Princeton: Princeton University Press, 1997.
- Schachar, Ayelet. “Children of a Lesser State: Sustaining Global Inequality through Citizenship Laws.” In *NOMOS XLVI: Child, Family, State*, Iris Marion Young and Stephen J. Macedo, eds. New York: NYU Press, 2003.
- Smith, Rogers. *Civic Ideals: Conflicting Visions of Citizenship in U.S. History*. New Haven: Yale University Press, 1997.
- Spiro, Peter J., *Questioning Barriers to Naturalization*, Georgetown Immigration Law Journal 13 (1999):479.
- Walzer, Michael. *Spheres of Justice*. New York: Basic Books, 1984.

Cases and Statutes Cited

- Elk v. Wilkins*, 112 U.S. 94 (1884)
- Graham v. Richardson*, 403 U.S. 365 (1971)
- Saenz v. Roe*, 526 U.S. 489 (1999)
- Scott v. Sanford*, 60 U.S. 393 (1857)
- Wong Kim Ark v. United States*, 169 U.S. 649 (1898)

See also Aliens, Civil Liberties of; Alien and Sedition Acts (1798); Dual Citizenship; Equal Protection of Law (XIV); Expatriation; State and Federal Regulation of Immigration

CIVIL ASSET FORFEITURE

Civil asset forfeiture has been part of the federal government’s law enforcement arsenal since the founding of the Republic and now exists in all state jurisdictions as well. Civil forfeiture laws establish a legal process by which title to “tainted assets”—including contraband and other assets related to specified criminal activity—is transferred to the government. Although civil forfeiture is generally triggered by criminal conduct, it is accomplished through civil or administrative proceedings and to be distinguished from criminal forfeiture, which can only be imposed after criminal conviction.

Colonial and early federal courts forfeited ships and cargos when used in violation of customs or revenue laws, and subsequent forfeiture laws applied to other categories of contraband and instrumentalities. But modern civil forfeiture laws, initially enacted as part of the War on Drugs in the 1970s, reach much further. Under 21 USC § 881(a) and expansive legislation since, the government is authorized to seize and forfeit drugs; drug manufacturing equipment; cars, houses, and other property used to facilitate drug crimes; and proceeds traceable to drug transactions. Other modern civil forfeiture laws target assets connected to alien smuggling, money laundering, customs offenses, and, under the 2001 Patriot Act, terrorism. State forfeiture laws have also proliferated.

Forfeiture is designed to strip criminals of their undeserved, ill-gotten gains. In theory, forfeitures also can terminate criminal enterprises in a way criminal penalties cannot. Jailing a drug dealer, for

example, may simply allow a subordinate to take his place, but seizing the means of production and other capital may shut down a trafficking business for good. In practice, however, forfeiture seems to have done little to incapacitate or deter the multibillion dollar drug trade, because forfeiture losses inflict so small a loss on drug profits.

Whatever their merits as crime-control mechanisms, modern forfeiture laws provide law enforcement with important procedural and financial advantages that, beginning in the mid-1980s, generated greater government reliance on forfeiture and a good deal of concern on the part of legislators, courts, and civil libertarians. Procedurally, a number of benefits accrue to federal and state prosecutors from an ancient legal fiction that dominates all civil forfeiture proceedings: that the *property* is guilty and on trial. This means, first, that forfeiture can be used even when there is insufficient evidence for a criminal case, when the defendant is a fugitive, or even when the defendant has been acquitted. Second, as a “civil action” against the property itself, few constitutional safeguards imposed on criminal prosecutions apply. Courts have found that the claimant has no constitutional presumption of innocence, no right to an appointed attorney, and no right to confront witnesses. The constitution imposes no burden of proof on the government, permitting most states (and the federal government until reform legislation in 2000) to require the claimant to establish the property’s “innocence.” There is also no constitutional requirement that the property owner be at fault or be prosecuted for the underlying criminal activity. The “disregard for due process” in forfeiture law, as a Second Circuit opinion described it, has deterred property owners from even challenging the government in the vast majority of cases.

However, the government’s largely unchecked forfeiture power began to encounter resistance beginning in the 1990s, first from the courts and then from Congress. In 1993, the Supreme Court decided four forfeiture cases against the government. The most significant, *Austin v. United States*, 509 U.S. 602, held that forfeiture constitutes punishment regardless of whether it is labeled civil or criminal and, therefore, is subject to the Eighth Amendment’s prohibition on excessive fines. The *Austin* holding should provide recourse for a homeowner whose house is seized because his daughter sold “nickel bags” in her bedroom, for example. Subsequently, a coalition of conservative and liberal lawmakers excised some of the more draconian provisions from most federal forfeiture laws by passing the Civil Asset Forfeiture Reform Act of 2000. This law filled part of the constitutional void by affording a number of due process rights to the

claimant in federal proceedings, including requirements that the government provide adequate notice, prove its case by a preponderance of the evidence, provide counsel to the claimant when the property is his or her primary residence and in limited other circumstances, and temporarily return the property if the claimant would otherwise suffer a substantial hardship. 18 U.S.C. sec. 983. CAFRA also eliminated the short deadline and the ten percent bond federal law had required to challenge a forfeiture, which had effectively denied access to the courts for many claimants. Substantively, CAFRA expanded the number of offenses subject to both civil and criminal forfeiture; unified and refined the defense for innocent owners that had been afforded by earlier federal statutes; and defined the “facilitation” of an offense to require that a “substantial connection” between the asset’s use and the criminal conduct (rather than mere incidental involvement, as some courts had permitted). Similar protections do not yet apply in most state proceedings, although CAFRA will likely prompt reform legislation in some states.

Neither CAFRA nor the Supreme Court has addressed another aspect of forfeiture law that is perhaps most responsible for fueling overzealous, sometimes lawless, use of the forfeiture power: since 1984, federal law has authorized law enforcement agencies to retain the drug-related assets they seize for their own use. States have largely followed suit, but even when a state’s law earmarks forfeited assets to education or other non-law enforcement purposes, the federal scheme allows a local police force to “federalize” its seizure and receive back eighty percent of the assets for its own budget. Under this arrangement, some local police forces have managed to double or triple their appropriated budgets through forfeitures.

This financial incentive scheme has aroused a number of civil libertarian concerns. First, with facilities, salaries, and positions sometimes dependent on how much money can be generated by their own seizures, police and prosecution agencies may pursue their economic self-interest at the expense of both crime control and due process. This financial incentive may also skew plea bargains in favor of drug kingpins and against “mules” without assets to trade, or, as one federal district court has warned, create “an unduly dangerous propensity to encourage unreasonable searches and detentions.” *Buritica v. United States*. Arguably, this prosecutorial conflict of interest is substantial enough to abridge due process under the Supreme Court’s dicta in *Marshall v. Jerrico* (1980), although only one lower court decision, in New Jersey, has so held to date. Another concern is that these forfeiture rewards could ultimately produce

self-financing, unaccountable law enforcement agencies divorced from legislative oversight. Here too, the issue implicates constitutional protections, and the Supreme Court may one day have to decide whether providing federal executive agencies with the power to finance themselves violates the Appropriations Clause and the separation of powers it was designed to protect. Meanwhile, a few states have passed laws that redirect forfeited funds into education, drug treatment, or other non-law enforcement uses.

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References and Further Reading

- Blumenson and Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, U. Chi. L. Rev. 35 (1998): 65.
 Department of Justice. *Asset Forfeiture Law and Practice Manual*, June, 1998.
 General Accounting Office. *Asset Forfeiture: Historical Perspective on Asset Forfeiture Issues*, GAO/T-GGD-96-40, March 19, 1996.
 Hyde, Henry. *Forfeiting our Property Rights: Is Your Property Safe From Seizure?*, Washington, DC: Cato Institute, 1995.
 Kessler, Steven L. *Civil and Criminal Forfeiture: Federal and State Practice* § 6.01, 1993.
 Levy, Leonard. *A License to Steal: The Forfeiture of Property*, Chapel Hill: Univ. of North Carolina Press, 1996.
 Smith, David B. *Prosecution and Defense of Forfeiture Cases*, Matthew Bender.
 Stahl, Marc B., *Asset Forfeiture, Burdens of Proof and the War on Drugs*, J. Crim. L. & Criminology 274 (1992): 83.

Cases and Statutes Cited

- Buritica v. United States*, 8 F.Supp.2d 1188 (N. D. Cal., 1998)
Marshall v. Jerrico, 446 U.S. 238, 242 (1980)
State of New Jersey v. One 1990 Ford Thunderbird, No. CUM-L-000720-99 (Cumberland County Sup. Ct., Dec. 11, 2002)
 Thompson, Sandra Guerra, *Congressional Reform of Civil Forfeiture: Punishing Criminals Yet Protecting Property Owners*, 14 Fed. Sentencing Repr. No. 2, pp. 71-75, Sept.-Oct. 2001

See also *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974); *Due Process*; *United States v. 92 Buena Vista Avenue*, 507 U.S. 111 (1993)

CIVIL DEATH

While there is disagreement about the origin of "civil death," its definition is undisputed. Civil death ends a person's legal capacity and renders him legally dead. The individual loses his property and can no longer perform any legal functions.

In ancient Athens, an "infamous" offender could be precluded from participating in the functions of citizenship. Through the Roman Empire, civil death was later exported to Germanic tribes and England where the practice came to be known as "outlawry." It developed into a penal sanction referred to as "attainder," which triggered the forfeiture of all civil and property rights. The concept ultimately took hold in the United States, albeit in an attenuated way, even though the Constitution prohibits Corruption of Blood and Bills of Attainder. Civil death applied only to those incarcerated for life or a term of years. Courts held that civil death required a statutory mandate. Until the middle of the twentieth century, consequences of criminal convictions, many of which continued after release from incarceration, included the automatic dissolution of marriage, the denial of licenses, and the inability to enter into contracts or to engage in civil litigation.

By the 1960s, however, civil death had largely disappeared from Europe and North America. Most of the rights of felons were restored, at least on their release from confinement. However, remnants of civil death remain in the United States to this day. Large-scale disenfranchisement after criminal convictions is a consequence of former civil death statutes, as are the denial of the right to hold public office and to serve on a jury.

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References and Further Reading

- Damaska, Mirjan R. "Adverse Legal Consequences of Conviction and Their Removal: A Comparative Study." *J. Crim. L., Criminology & Police Sci.* 59 (1968): 347.
History and Theory of Civil Disabilities, Vand. L. Rev. 23 (1970): 941-1241.

See also **Bill of Attainder; Collateral Consequences; Corruption of Blood**

CIVIL RELIGION

Although the phrase "civil religion" was coined by Jean-Jacques Rousseau, it was the American sociologist Robert Bellah who launched the term into widespread use with his 1967 essay, "Civil Religion in America." The term refers to a coherent body of beliefs that many would argue could give transcendent meaning to a nation's sense of purpose.

Unlike other religious belief systems, which correspond to identifiable religious groups, civil religion is unique in that it does not correspond to any particular religious group or institution in the conventional

sense. Rather, civil religion is observed within the public sphere. For example, presidents refer to God during their inaugural addresses, proclaim Thanksgiving Day holidays, and close their speeches with “God Bless America”; Congress has a chaplain; coins bear the nation’s motto, “In God We Trust”; and the Supreme Court begins each session with the words, “God save the United States and this honorable Court.”

Despite the constitutional separation of church and state in the United States, according to Bellah, Americans like any people inevitably generate for themselves a shared set of beliefs, symbols, and rituals. Together, these may be seen to provide a religious dimension for the whole of America’s common life, including the political sphere. There may, however, be situations in which certain manifestations of civil religion, such as the governmental display of a religious symbol, violate the First Amendment’s Establishment Clause. While the outcomes of these cases are notoriously difficult to predict, in part because the Supreme Court has not settled on a single test to be applied in all such cases, the Court has on several occasions expressed concern that governmental expression of civil religion may create the perception that government endorses or disapproves of individual religious choices; for example, *County of Allegheny v. ACLU* (1989) (display of crèche in public building unconstitutional); *McCreary County v. ACLU* (2005) (O’Connor, J., concurring) (display of Ten Commandments on county courthouse walls unconstitutional).

American civil religion displays certain Christian influences, but this does not mean that it is itself a form of Christianity. To illustrate, American civil religion includes a wide variety of references to God, whereas references to Christ and other sectarian beliefs are extremely rare. This, according to Bellah, is because there is a clear division of function between conventional religion, to which the spheres of personal piety and voluntary social action are allocated, and civil religion, which lies within the realm of a nation’s public self-understanding.

The genesis of American civil religion lies in the Puritan leader John Winthrop’s 1630 sermon, “A Model of Christian Charity,” which set the purpose of the Massachusetts Bay Colony according to a God-given standard: “Thus stands the cause between God and us. We are entered into covenant with Him for this work. We have taken out a commission For we must consider that we that we shall be as a city upon a hill. The eyes of all people are upon us.” Winthrop and the Puritan founders of the Massachusetts Bay Colony believed that they had a duty to God to create a community that all could respect and admire. In keeping with the Puritans’ understanding that

political communities were to be held to divine standards, from the colonial period through the years of the early Republic days of thanksgiving were proclaimed not only to express gratitude to God but also to call for the nation to engage in a collective act of soul-searching—rigorous inquiry into whether the nation was fulfilling the expectations that God was understood to have established for it.

Although in its original form civil religion was understood to offer a critical vantage point on the nation’s conduct, civil religion can be used, as Bellah concedes, to fuse God, country, and flag into a form of nation worship that would permit no place for dissent or for questioning the acts of those in positions of political leadership. Civil religion’s original emphasis, however, entailed the sense that national goals and accomplishments should be measured according to transcendent standards, rather than the self-justifying assumption that God is always on the side of one’s own nation or that out of respect for God all persons should support their country, right or wrong.

To those who have criticized civil religion as the shallow worship of the “American Way of Life,” Bellah counters that American civil religion contains profound religious insights that compare favorably to those of the more conventional forms of religion. Civil religion “is a genuine apprehension of universal and transcendent religious reality . . . as revealed through the experience of the American people,” Bellah claims. To make his point, Bellah comments that he is “not at all convinced that the leaders of the churches have consistently represented a higher level of religious insight than the spokesmen of the civil religion.” The theologian Reinhold Niebuhr contends, “Lincoln’s religious convictions were superior in depth and purity to those, not only of the political leaders of his day, but of the religious leaders of the era.”

A brief description of Lincoln’s Gettysburg Address can serve to illustrate how civil religion can function within the nation’s public discourse. On that occasion, Lincoln sought to inspire a nation overwhelmed by the horrible loss of life to rededicate themselves to the Union’s cause. On one level, Lincoln began a ceremony to dedicate a battlefield cemetery was “altogether fitting and proper.” “In a larger sense,” however, according to Lincoln, “we can not dedicate—we can not consecrate—we can not hallow—this ground. The brave men, living and dead, who struggled here, have consecrated it, far above our poor power to add or detract.” Those who had come to dedicate the cemetery could only, from Lincoln’s perspective, truly dedicate *themselves*, by devoting themselves to the cause for which so many Union soldiers had died: “that this nation, under God,

shall have a new birth of freedom—and that government of the people, by the people, for the people, shall not perish from the earth.” Though it may be said that Lincoln here was using civil religion simply to advance the nation’s interests, many have concluded with Bellah that civil religion, as practiced by Lincoln and others, is significant to the extent that it offers a deeper perspective, beyond the mere worship of a nation’s way of life, or the advancement of national self-interest, which might otherwise be absent from American public discourse.

References and Further Reading

- Bellah, Robert N. *Broken Covenant: American Civil Religion in Time of Trial*. Chicago: University of Chicago Press, 1992.
- . “Civil Religion in America.” In *Beyond Belief: Essays on Religion in a Post-Traditional World*, 168–189. New York: Harper & Row, 1970.
- Lincoln, Abraham. “Address Delivered at the Dedication of the Cemetery at Gettysburg” (1863). In *The American Intellectual Tradition: A Sourcebook, 1630–1865*, vol. 1, edited by David A. Hollinger and Charles Capper, 527. Fourth edition. New York: Oxford University Press, 2001.
- Marty, Martin E. *A Nation of Behavers*. Chicago: University of Chicago Press, 1976.
- Niebuhr, Reinhold. “The Religion of Abraham Lincoln.” In *Lincoln and the Gettysburg Address*, edited by Allan Nevins, 39. Urbana, IL: University of Illinois Press, 1964.
- Winthrop, John. “A Modell of Christian Charity” (1630). In *The American Intellectual Tradition: A Sourcebook, 1630–1865*, vol. 1, edited by David A. Hollinger and Charles Capper, 7–15. Fourth edition. New York: Oxford University Press, 2001.

Cases and Statutes Cited

- County of Allegheny v. ACLU*, 492 U.S. 573 (1989)
- McCreary County v. American Civil Liberties Union*, U.S. 125 S.Ct. 2722 (2005)

CIVIL RIGHTS ACT OF 1866

The Civil Rights Act of 1866 became law on April 9, 1866, by a two-thirds majority overriding President Andrew Johnson’s veto. The first aim of the Act was to provide federal protection to emancipated African Americans, giving practical effect to the Thirteenth Amendment. It was the first in a series of Reconstruction-era Civil Rights Acts.

An immediate concern of the Thirty-Ninth Congress was to invalidate the Black Codes emerging from southern legislatures after the Civil War.

Promulgated first in 1865, these laws limited the civil rights of freedmen to own real and personal property, to freely seek employment or redress in the courts on terms equal to whites, and established harsher criminal penalties for blacks than for whites, among other depredations.

Although early Black Codes were invalidated by the Act, oppressive elements of them were renewed and survived the Act, such as vagrancy laws that put blacks without employment in jeopardy of being jailed, fined, or forced into compulsory labor. Together with terrorizing effects of the Ku Klux Klan and similar organizations, the purposes of the Act were substantially undermined.

Sections 1 and 2 of the Act have proved most important in the history of civil rights. Section 1 declared all persons born in the United States, excepting Indians not taxed, as citizens of the United States, contrary to the decision of *Dred Scott v. Sandford*. It granted to all citizens the right “to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens.” Section 2 provided a criminal penalty for persons who, under color of state law, deprived any citizen of the rights granted on account of race. This was a significant expansion of basic rights and liberties to former slaves. While not specifically protecting freedom of expression, the law was designed to guarantee minimum due process protections for former slaves, and many of the law-makers believed this would help protect their rights to speech, petition, and assembly. The act would also lead to the Fourteenth Amendment, which ultimately made most of the Bill of Rights applicable to the states.

James Wilson sponsored the Act in the House of Representatives; Lyman Trumbull in the Senate. The latter captured its spirit with the statement that “any statute which is not equal to all, and which deprives any citizen of civil rights which are secured to other citizens, is an unjust encroachment upon his liberty; and is, in fact, a badge of servitude which, by the Constitution, is prohibited.”

Whether the Act was within the Constitutional authority of the federal government, however, was a controversial point in Congress. Representative John Bingham, a framer of the Fourteenth Amendment, strongly supported the aims of the Act but believed it beyond constitutional authority. This cloud was a substantial motivation for the ratification of the Amendment, which eliminated any uncertainty.

CIVIL RIGHTS ACT OF 1866

The Act was reenacted in full by the Enforcement Act of 1870. Sections 1 and 2 of the Act are perpetuated in 42 U.S.C. §§ 1981-82, which is the form in which it has remained relevant to modern controversies.

Jones v. Alfred H. Mayer Co., decided by the Court in 1968, addressed a complaint by Jones and his wife that a housing developer refused to sell them a residence on account of their race. The Court held on the basis of its reading of the legislative history of the Civil Rights Act of 1866 that 42 U.S.C. § 1982 prohibited “all racial discrimination, private as well as public, in the sale or rental of property, and that the statute, thus construed, is a valid exercise of the power of Congress to enforce the Thirteenth Amendment.”

A dissent took strong objection to the majority’s account of the legislative history, declaring it “ill considered and ill-advised” to apply the Act to private discrimination, rather than solely to state action. It had been clear to the Court in 1883 in the *Civil Rights Cases*, for instance, that the Act “was intended to counteract State laws and proceedings, and customs having the force of law” and not the actions of individuals without color of state law. The *Civil Rights Cases* invalidated the Civil Rights Act of 1875, however, and as to the 1866 Act its discussion was dicta.

The majority interpretation was extended to section 42 U.S.C. § 1981 in *Runyon v. McCrary*, which held that the Civil Rights Act of 1866, as codified the United States Code, prohibits racial discrimination generally in the making and enforcement of private contracts.

Regardless of the merits of dissenting opinions, the principle that the 1866 Civil Rights Act prohibits private racial discrimination was expressly reaffirmed in *Patterson v. McClean Credit Union*, after the Court invited arguments to reconsider the issue and has not since been in jeopardy of reversal.

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References and Further Reading

- Bernstein, David E. *Only One Place of Redress: African Americans, Labor Regulations and the Courts from Reconstruction to the New Deal*. Duke University Press, 2001.
- Bickel, Alexander M., *The Original Understanding and the Segregation Decision*, Harvard L. Rev. 1 (1955): 69.
- Fairman, Charles. *7 History of the Supreme Court of the United States: Reconstruction and Reunion 1864–1868*, 1207–1300, MacMillan Co., 1971.
- Foner, Eric. *Reconstruction: America’s Unfinished Revolution 1863–1877*. New York: Harper & Row, 1988.

Cases and Statutes Cited

Civil Rights Act of 1875, 18 Stat. 335 (1875)

- Civil Rights Cases*, 109 U.S. 3 (1883)
- Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856)
- Enforcement Act of 1870*, 16 Stat. 141 (1870)
- 42 U.S.C. §§ 1981–82
- Jones et ux. v. Alfred H. Mayer Co., et al.*, 392 U.S. 409 (1968)
- Patterson v. McClean Credit Union*, 491 U.S. 164 (1989)
- Runyon v. McCrary*, 427 U.S. 160 (1976)

See also **Bingham, John Armor; Civil Rights Act of 1875; Civil Rights Cases, 109 U.S. 3 (1883); Dred Scott v. Sandford, 60 U.S. 393 (1857); Fourteenth Amendment; Ku Klux Klan; Slavery and Civil Liberties; Thirteenth Amendment; Vagrancy Laws**

CIVIL RIGHTS ACT OF 1875

One of the major and last pieces of civil rights legislation passed during the era of Reconstruction, the Civil Rights Act of 1875 sought to ensure that all citizens, regardless of race, were protected against discriminatory acts in both public and private venues.

Passed during a lame-duck session of a Republican-controlled Congress, the act sought to ensure the freedom of access to the “full and equal enjoyment of the accommodations, advantages, facilities, and privileges” of many public venues, including inns, hotels, railroad cars, theaters, and other “places of public amusement” regardless of race. The act was passed under the authority of both the Thirteenth and Fourteenth Amendments to the U.S. Constitution. Led by Republican U.S. Senator Charles Sumner, the act’s intent was to ensure that freedoms and rights were guaranteed to blacks and that private individuals could not discriminate based on race. If an individual violated the act, they were subject to fines of no less than \$500 or thirty days in prison.

The act was rarely enforced, however, and in 1883, the U.S. Supreme Court struck down the law as unconstitutional (the *Civil Rights Cases*, 109 U.S. 3). The Court’s majority held that Congress had overstepped its authority to regulate private behavior. It would be eighty-two years before Congress passed another act dealing with civil rights, following the imposition of state-sanctioned segregation and Jim Crow laws, most notably in the South.

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References and Further Reading

- Foner, Eric. 2002. *Reconstruction: America’s Unfinished Revolution, 1863–1877*. New York: HarperCollins.

Cases and Statutes Cited

Civil Rights Cases, 109 U.S. 3 (1883)

CIVIL RIGHTS ACT OF 1964

With the twentieth century civil rights movement well underway, Congress passed one of the two major acts focused on prohibiting and providing remedies for discrimination against blacks. The 1964 Civil Rights Act, along with the Voting Rights Act of 1965, is a comprehensive piece of legislation designed to attack racial segregation, as well as discrimination based on gender, in public accommodations, employment, and by any private individual or organization that receives federal funding.

The 1964 act came after the passage of the 1957 and 1960 civil rights acts, which sought to protect voting and provide federal protection to ensure voting by blacks. However, racial discrimination in voting and other facets of American society, particularly in the South, prompted President John F. Kennedy to push for a civil rights act. However, it was after Kennedy's assassination that the bill gained major moment in Congress, due in large part to President Lyndon B. Johnson's call for equal rights for all Americans, regardless of race.

The first section of the act focused on voting and barred discriminatory techniques to voter registration; however, the use of such discrimination techniques as the literacy test, which were used to deny voting privileges to blacks and poor whites, would be dealt with major reforms protecting the right to vote would come a year later with the Voting Rights Act. The second section (Title II) prohibits discrimination in any public accommodations (inns, hotels, restaurants, and theaters for example), even though they may be privately owned. This section was based on the power of Congress to regulate interstate commerce and was subsequently upheld (unlike the Civil Rights Act of 1875) by the U.S. Supreme Court in *Heart of Atlanta Motel v. United States* and *Katzbach v. McClung*. Title III of the act promoted the concept of desegregation of public schools, begun with the 1954 and 1955 U.S. Supreme Court decisions in *Brown v. Board of Education*. Title VI prohibits discrimination to any public or private organization that receives federal funding. Finally, Title VII outlaws discrimination based on race, national origin, gender, or religion in employment practices. This section was upheld as constitutional in the 1971 case of *Griggs v. Duke Power Co.*, which also held that the act prohibited both intentional discriminatory practices and those practices that had a "disparate impact" on minorities. In addition, the U.S. Supreme Court ruled that Title VII sanctioned the use of hiring and promotion practices to counter historical discrimination in employment. This has led to the controversy of affirmative action as a policy to alleviate past discrimination in present-day situations. Finally, by

outlawing discrimination based on gender, the Civil Rights Act extends beyond racial discrimination also to areas of "sexual harassment."

In conjunction with the Voting Rights Act of 1965, the Civil Rights Act of 1964 has provided the impetus for major societal changes in regard to all kinds of discrimination and to protect and ensure civil liberties for all Americans.

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References and Further Reading

- Graham, Hugh Davis. *The Civil Rights Era: Origins and Development of National Policy 1960–1972*. New York: Oxford University Press, 1990.
- Klarman, Michael J. *From Jim Crow to Civil Rights: the Supreme Court and the Struggle for Civil Rights*. New York: Oxford University Press, 2004.
- Kotz, Nick. *Judgment Days: Lyndon Baines Johnson, Martin Luther King, Jr., and the Laws that Changed America*. New York: Houghton-Mifflin, 2005.
- Lawson, Stephen F. *Black Ballots: Voting Rights in the South, 1944–1969*. New York: Columbia University Press, 1976.
- Mann, Robert. *The Walls of Jericho: Lyndon Johnson, Hubert Humphrey, Richard Russell and the Struggle for Civil Rights*. New York: Harcourt Brace, 1996.

Cases and Statutes Cited

- Brown v. Board of Education of Topeka, KS*, 347 U.S. 483 (1954)
- Griggs v. Duke Power Co.*, 401 U.S. 424 (1971)
- Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964)
- Katzbach v. McClung*, 379 U.S. 294 (1964)

CIVIL RIGHTS CASES, 109 U.S. 3 (1883)

A U.S. Supreme Court case striking down as unconstitutional the last of the Reconstruction-era acts designed to protect against discrimination based on race, the Civil Rights Act of 1875 sought to outlaw racial discrimination on both public and private acts.

The decision focused on five different instances in which whites denied blacks admission to various venues like inns, theaters, and a railroad car. Through a narrow interpretation of the Thirteenth and Fourteenth Amendments to the U.S. Constitution, an eight-justice majority found that Congress overstepped its constitutional authority in passing the 1875 act. In their attempt to bar discrimination in public accommodations, Congress used the Civil War amendments to affect both public and private acts of inequality based on race. However, the justices interpreted the amendments narrowly as prohibitions against state governments, and not against private

individuals who operated public inns, hotels, and other public accommodations. The act of refusing individuals the right to stay at a private inn, due to a person's race, did not amount to "a badge or incident of slavery," Justice Bradley wrote, echoing a legal theme that would serve as the foundation for Jim Crow laws in a segregated South.

In his dissent, Justice John Marshall Harlan, a Southerner and former slaveholder, attacked the narrow interpretation of the Civil War amendments and instead argued that Congress had the broad power to protect the rights of blacks against all "badges of slavery." This case, along with *Plessy v. Ferguson*, effectively removed the federal government from civil rights enforcement for more than eighty years, allowing states to impose segregation and Jim Crow laws that discriminated on the basis of race.

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References and Future Reading

Klarman, Michael J. *From Jim Crow to Civil Rights: the Supreme Court and the Struggle for Civil Rights*. New York: Oxford University Press, 2004.

Cases and Statutes Cited

Plessy v. Ferguson, 163 U.S. 537 (1896)

See also **Equal Protection of Law (XIV)**

CIVIL RIGHTS LAWS AND FREEDOM OF SPEECH

The goal of civil rights is to achieve equality, itself definable in various ways, in place of discrimination. Free speech can powerfully advance that goal, and hence is often linked historically with it. Yet free speech can also mean the expression of ideas or attitudes that are at odds with civil rights, and hence there are times when the two are in conflict or at least in tension with one another.

The civil rights movement, and civil rights laws in the United States, center first and foremost on the idea of racial equality, especially in opposition to the pervasive discrimination that was long directed against Black Americans. Free speech, and freedoms of association and assembly which have close practical links to free speech, in turn have a long and positive association with the cause of civil rights, dating back to the movement for the abolition of slavery before the American Civil War. Freedom of speech was uncertain at best for many opponents of slavery. The abolitionist editor Elijah Lovejoy

was shot dead and his press destroyed by a mob in Alton, Illinois, in 1837. Southern opponents of slavery, like Angelina and Sarah Grimké of South Carolina, fled or were driven out of the South. Southern postmasters would not deliver anti-slavery literature, and Congress for some years during the 1830s and 1840s even adopted a "gag rule" against anti-slavery petitions.

For a century after the Civil War, segregation and discrimination ("Jim Crow") made for a racial caste system in the American South. Protest against Jim Crow was often perilous, just as protest against slavery had been. In the 1890s the offices of several black newspapers were destroyed by mobs, including—after it printed an editorial against lynching—the offices of the Memphis, Tennessee, "Free Speech." Throughout the South, there were many decades of violence, both official and unofficial, against opponents of segregation. As protest against Jim Crow gathered force in the 1950s and early 1960s, civil rights rallies and marches were broken up by force. Civil rights demonstrators, including Dr Martin Luther King, were arrested, and there were notorious incidents of police dogs and fire hoses being turned on marchers. Three civil rights workers were murdered in Mississippi in 1964 with the apparent connivance of the police, and churches where civil rights meetings took place were attacked, including the Baptist church in Birmingham, Alabama, where four children were killed by a bomb in 1963.

With advocacy of civil rights under threat, civil rights and free speech became intertwined as causes: support for the one seemed easily interchangeable with support for the other. Constitutional law reflected this. In the 1950s and 1960s, the U.S. Supreme Court quashed disorderly conduct convictions of civil rights marchers, for example, and struck down parade permit laws as applied against civil rights demonstrations. The hostility of Southern officials, courts, and juries against civil rights advocates provoked a series of Supreme Court decisions safeguarding free speech and freedom of association, in some cases perhaps extending those concepts further than they might have been extended were it not for the struggle over civil rights. Thus, in *NAACP v. Alabama*, when the state of Alabama sought the local membership lists of a national civil rights organization in the course of a civil lawsuit, the Supreme Court held that freedom of association, with its "close nexus" to freedom of speech, precluded the disclosure, despite otherwise liberal "discovery" rules in litigation, since rank-and-file members would be open to local reprisals if their identity were revealed. In *NAACP v. Claiborne Hardware*, the Supreme Court also upheld, on free speech grounds, a business

boycott organized by civil rights groups in Mississippi, although in addition to peaceful picketing and urgings to support the boycott, there had admittedly been threatening speeches and publications by the organizers against those in the local Black community who failed to observe the boycott. And the law of libel took a new constitutional direction in *New York Times v. Sullivan*, when an Alabama police commissioner sued the *New York Times* and was awarded \$1.25 million in damages by a local jury over an advertisement criticizing law enforcement for a “reign of terror” against peaceful civil rights groups in the South. The Supreme Court not only quashed the verdict, it laid down very narrow conditions under which a “public figure” could successfully sue for libel, so that statements that would readily be deemed libelous in many other countries and, at common law, are now immune from lawsuits in the United States. It is at least imaginable that these cases, with their liberal view of what should be protected as free speech and freedom of association—even at the expense of other values or interests—might have been decided differently had they not arisen in the civil rights context.

By the mid-1960s, the social and legal revolution associated with the civil rights movement brought an end to the old regime of racial segregation and discrimination in the South. With the end of Jim Crow, the climate of threat and violence against opponents of segregation, once so pervasive in the South, also came to an end. Campaigns for civil rights certainly continued, aimed at achieving racial justice, defined in various ways. The success of the civil rights movement in the South also inspired others to frame their causes in civil rights terms: ethnic advocates, feminists, sexual minorities, and many others put their claims in this framework. These civil rights advocates, like advocates of any cause, have an obvious interest in freedom of speech and of assembly and association. In this sense, there continues to be important common ground between civil rights and free speech. But with the disappearance of the sort of hostility to free speech that typified the Jim Crow South, various tensions between civil rights and free speech have also come to the surface.

The tension was implicit, in a sense, even in landmark legislation like the Civil Rights Act of 1964. By forbidding employment discrimination, for example, the law inevitably diminished freedom of association for employers who wished to discriminate. It also amounted to a direct ban on certain sorts of “speech,” such as “Whites only” or “No Irish need apply” in employment advertisements. It can plausibly be said that freedom of association is always subject to a variety of limitations, especially in economic life,

and that discriminatory want ads are “verbal acts” and hence should not be protected as free speech. In any event, the national interest in banning discrimination was great. Yet the fact remains that prohibiting discrimination does affect freedom of association; as for “verbal acts,” the distinction between “expressive speech” and “verbal acts” is a notoriously slippery one. Even here, then, there was some inevitable tradeoff, however fully justified the Civil Rights Act was.

In the decades that followed, a variety of civil rights laws, regulations, and policies have been directed at least in part at the expression of insulting or otherwise unwelcome attitudes or opinions, revealing more sharply and perhaps more troubling how civil rights and free speech interests can sometimes diverge.

Hate Speech

Criminal penalties for racial insults, and commonly for sexual or religious insults as well, have been adopted in several states. The courts have generally struck down these laws on free speech grounds, although in *R.A.V. v. City of St Paul*, four Justices of the Supreme Court indicated that they would uphold such laws if they were restricted to “fighting words” and did not seek to punish a broader range of insults such as those which (merely) “arouse anger” or “resentment.”

Hate Crimes

The federal sentencing guidelines, and many state laws, punish various crimes—such as assault and vandalism—more severely if the crime was committed because of the race, ethnicity, gender, or sexual orientation of the victim. Unlike “hate speech” laws, the Supreme Court has upheld “hate crime” legislation, on the theory that punishment often takes motive into account; that the culprit has been convicted of a crime, not an opinion; and that the law may consider “bias” crimes to be especially dangerous to society, by terrorizing particular groups for example, and hence may punish the crimes more severely. From a free speech point of view, the trouble is that the extra punishment is for the culprit’s attitude or opinion, not for the crime itself. In that sense, “hate crimes” smack of the old criminal syndicalism laws, which punished ordinary crimes more severely if

they were committed with socialist or anarchist motivations.

Speech Codes

Many colleges and universities, public and private, have adopted “speech codes,” which, typically, prohibit speech that “stigmatizes” anyone on the basis of race, ethnicity, gender, sexuality, or on any number of other bases. Supporters urge that these codes are necessary to ensure that members of groups who might otherwise be stigmatized should feel welcome on campus. Critics say that these codes contribute to enforcing a climate of political conformity on campus, since any expression of unwelcome intellectual or political views can easily be alleged to stigmatize one or another group. When adopted by public institutions, the courts have mostly struck down these codes as content based, vague, and likely to chill free expression. The state of California, by statute, also forbids private colleges to impose limits on free speech that would be unconstitutional on a public campus. But many private colleges and universities elsewhere maintain such speech codes.

Harassment in the Workplace

Federal and state employment discrimination laws have been interpreted to forbid speech in the workplace that creates a “hostile environment” on the basis of race, gender, ethnicity, or various other characteristics. Speech by employers or fellow employees that might be deemed harassment, if “pervasive” enough, can range from racial or ethnic slurs and sexual propositions to religious proselytizing, posting sexually suggestive pictures (including reproductions of works of art), and statements about political or social questions felt to be offensive. If an employee is harassed by fellow employees, it can be the basis for a discrimination suit against the employer. Hence employers have a strong incentive to forbid any workplace speech that could arouse complaint; and an employer might not give much weight to free speech concerns where it is a question of controlling the speech of employees, not the employer’s own speech. The tension between civil rights and free speech interests may be particularly stark here, because there is surely a danger to the effectiveness of equal employment laws if employees can be driven from their jobs by systematic verbal abuse. Yet most people spend a large part of their waking lives at work. Employers,

pressured by federal and state civil rights enforcement agencies, and under threat of civil lawsuits, may seek to avoid harassment claims by closely policing what employees say, what topics they discuss, what views they express, and how they express them: even during mealtimes and work breaks, and with little regard for the chill on free expression.

Freedom of Association

Speech and advocacy by an organized group will usually get a better hearing than speech from an isolated individual: hence the obvious link between freedom of association and freedom of speech. But a group promoting a particular cause may “speak” with more unity and more effectiveness if membership is restricted to those likely to support the cause. To what extent can such groups lawfully discriminate in their membership? For example, may an organization promoting the advancement of an ethnic group restrict itself to members of that ethnicity? In 1984, the Supreme Court in *Roberts v. U.S. Jaycees* held that Minnesota civil rights laws could require the Jaycees to admit women as members, although the Jaycees’ stated purpose was “promoting the interests of young men.” In 2000, in *Boy Scouts of America v. Dale*, the Supreme Court apparently reversed itself by deciding, on free speech grounds, that the Boy Scouts could exclude adult gay volunteers, despite a New Jersey law forbidding discrimination against gays, because opposition to homosexual activity was one of the principles advocated by the Scouts. In recent decades, civil rights advocates have mostly favored a narrow right of “expressive association” and a robust enforcement of nondiscrimination laws, even as against noncommercial groups, and especially—as with the Jaycees and the Scouts—where advocacy is not the main or the only purpose of the group.

Feminism and Pornography

Many feminist activists and academics support bans on pornography, and a few cities and towns have enacted such bans on the theory that pornography is degrading to women and hence is discriminatory. Pornography in this context is typically defined as “sexually explicit subordination of women,” whether in words or pictures. This definition is much broader than the constitutional definition of obscenity: its ban would extend to works that have literary or

artistic value, for example. Even some proponents of such laws are troubled when the law is enforced against homosexual or avant-garde literature, as has happened in Canada and other jurisdictions with feminist-inspired bans. Proponents of banning pornography do not deny the conflict with free speech: some deny that free speech is very valuable, but most urge that feminist civil rights concerns should weigh more heavily because pornography is “low value” speech. But celebrated twentieth-century campaigns against censorship involved works like James Joyce’s *Ulysses*, which had been banned as pornographic, and which might well fall under the feminist ordinances as well. When cities and towns in recent years passed “civil rights” laws against nonobscene pornography—and when Congress enacted restrictions on internet pornography—the courts struck down these laws on free speech grounds. Feminists and their supporters continue to debate, however, whether pornography should be banned and, if so, with what limits and definitions.

Inasmuch as civil rights are about equality, there is always a potential for conflict with free speech, especially when civil rights are thought to be threatened by inimical attitudes, insults, or ideas. Yet if the equality sought by civil rights is an equality of rights, few if any political rights are more fundamental than freedom of speech. Both as a matter of prudence and of principle, therefore, civil rights advocates might do well to respect and to defend free speech. It would be difficult to achieve civil rights, or any social change, without freedom to speak, to persuade, and to organize. And erosions of free speech compromise the goal of civil rights by eroding one of the fundamental rights which it is, or ought to be, the very purpose of civil rights to guarantee, equally, to all.

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References and Further Reading

- Bernstein, David E. *You Can't Say That! The Growing Threat to Civil Liberties from Antidiscrimination Laws*. Washington DC: Cato Institute, 2003.
- Miller, William Lee. *Arguing About Slavery*. New York: Alfred A. Knopf, 1996.
- Rauch, Jonathan. *Kindly Inquisitors: The New Attacks on Free Thought*. Chicago: University of Chicago Press, 1993.
- Schauer, Frederick. *Free Speech: A Philosophical Inquiry*. Cambridge: Cambridge University Press, 1982.
- Strossen, Nadine. *Defending Pornography: Free Speech, Sex, and the Fight for Women's Rights*. New York: Scribner, 1995.

Cases and Statutes Cited

Boy Scouts of America v. Dale, 530 U.S. 640 (2000)

NAACP v. Alabama, 357 U.S. 449 (1958)
NAACP v. Claiborne Hardware, 458 U.S. 886 (1982)
New York Times v. Sullivan, 376 U.S. 254 (1964)
R.A.V. v. City of St Paul, 505 U.S. 377 (1992)
Roberts v. United States Jaycees, 468 U.S. 609 (1984)
 Civil Rights Act of 1964, Public Law 82-352 (78 Stat. 241)

CIVILIAN COMPLAINT REVIEW BOARDS

A civilian review board is a group of citizens who are given responsibility for investigating or reviewing complaints of misconduct by police officers. These groups are responsible for holding police officers accountable to the public.

In most instances civilian review board members are appointed by local government officials. The boards are established through municipal ordinances, state statutes, orders from municipal mayors, popular vote, or less often, by request from police chiefs. Each board is unique in terms of the amount of investigatory power it possesses. Some boards are given the power to subpoena witnesses, to discipline officers, and to access police files. Some of these boards also have the power to conduct evidentiary hearings and investigate allegations of racial profiling. Most civilian review boards, however, do not have investigation powers, and they are restricted to reviewing the internal police investigation. These boards do not have any power to discipline police officers, and they merely make recommendations to police administrators who have the power to reject these recommendations without consequence. In some jurisdictions boards are composed entirely of citizens, whereas others have both police and citizen members.

Many police officers oppose the formulation of civilian review boards, because they believe they are capable of policing themselves. Police officers also oppose civilian review, because they fear that their authority will be reduced, and they believe that they need a veil of secrecy to effectively operate. In addition, many police officers believe that civilians generally lack an understanding of the pressures of law enforcement and should, therefore, not be empowered to second guess the actions of police officers.

Thirty of the fifty largest communities, as well as many smaller cities in the United States, have instituted civilian review boards.

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References and Further Reading

Best Practices in Police Accountability. A web site dedicated to information and resources on civilian review, www.policeaccountability.org.

Civilian Review Sample Model. Available at www.aclufl.org/take_action/download_resources/civilian_review.model.cfm.

Shielded from Justice: Police Brutality and Accountability in the United States, a Human Rights Watch Report (1998) available at <http://hrw.org/reports98/police/usp92.htm>.

CLARK, RAMSEY (1927–)

One of the most controversial figures in the field of civil liberties litigation, Ramsey Clark is many things to many people. Perhaps to everyone he is a test case for the fundamental principle of the adversary system of justice that all defendants, regardless of the charge lodged against them and no matter how odious their conduct may have been, are innocent until proven guilty and entitled to a zealous defense at law. As familiar as the principle has become, in the annals of American legal history and culture, as well as on prime-time evening television programs, like *Law & Order*, it has surely been honored more in the breach than in the observance.

William Ramsey Clark, born in Dallas, Texas, in 1927, is the son of U.S. Supreme Court Justice Tom Clark. After serving in the U.S. Marine Corps and graduating from the University of Texas, Clark received a law degree from the University of Chicago and was admitted to the Texas bar in 1951. Clark was a member of the Clark, Reed, and Clark law firm from 1951 to 1961 and was an Assistant Attorney General, then Deputy Attorney General in the Kennedy and Johnson Administrations, 1961 to 1966. In March of 1967, when Tom Clark stepped down from his position on the U.S. Supreme Court, President Lyndon Johnson named Clark's son, Ramsey, Attorney General of the United States.

Contemporary critics of Clark from the left of the American political spectrum look back on his two years as Attorney General as a time when the radical lawyer showed his true colors. He admired J. Edgar Hoover, they allege, instructed the F. B. I. to look for conspiratorial designs in the 1967 race riots in Watts and Newark, and in 1968 was still a sufficient supporter of the Vietnam War to be willing to prosecute Dr. Benjamin Spock and Yale's Rev. William Sloan Coffin, Jr., for conspiring to promote illegal resistance to the draft. But Clark's prosecution of the case may not have reflected his deepest political values and commitments. After all, the attorney for Coffin, Hale and Door's James St. Clair, later represented a cornered President Richard Nixon and was himself criticized by Yale's chaplain for being, in the draft resistance litigation, "all case and no cause." The Boston Globe heralded St. Clair for "accepting clients

from across the ideological spectrum." If Clark's legal career is assessed as a whole, the same could easily be said of him, and in praise rather than criticism, so long as one buys into the central claims of an adversary legal process.

At the same time, some of Clark's supporters point out that he supervised U.S. Marshals when they were sent to Oxford, Mississippi, ensuring the enrollment of James Meredith at the University, helped write and secure passage of the Voting Rights Act of 1965 and the Civil Rights Act of 1968, and famously sought to block J. Edgar Hoover's wiretaps of the Rev. Dr. Martin Luther King, Jr. Assuming one regards the civil rights movement of the 1960s as part of the legacy of progressive politics, it is hard to understand *Salon* writer Ian Williams claim that Clark's "long march leftward only began afterward," after, that is, Clark's tenure as Attorney General.

Generally omitted from Clark balance sheets drawn up by friends, as well as enemies, would be an entry for one of his most interesting confrontations as Attorney General—with none other than the infamous Howard Hughes. As part of an elaborate scheme to take over the gaming industry in Las Vegas, Hughes had presented his chief aid, Robert Maheu, with a blueprint for further acquisition of land, hotels, casinos, and so forth. After closing its casino and operating the Bonanza exclusively as a hotel, thus obviating the need to secure a gaming license, Hughes would then purchase the Silver Slipper and the Stardust, all the while retaining an option to buy the Silver Nugget. With public support from Las Vegas newspaperman and power broker, H. M. 'Hank' Greenspun, Hughes and Maheu were confident they could win gambling licenses from Nevada authorities for the Stardust and Silver Slipper. But Hughes' scheme went awry when U.S. Justice Department lawyers intervened and threatened to initiate antitrust litigation against Hughes if he persisted in his plan to buy the Stardust.

While an assistant attorney general in charge of the Justice Department's Criminal Division sent Clark a memo stating that Hughes would drive undesirable elements out of Las Vegas and suggested that F.B.I. Director Hoover looked favorably on Hughes' expansion in Nevada, the Antitrust Division would not budge and their boss, Attorney General Clark, backed them up. Maheu then appealed to Nevada's two U.S. Senators and then-Governor Laxalt who promptly wrote Clark a letter warning of "permanent damage" to Nevada's economy if Hughes' acquisition plans were frustrated. But it was "to no avail," according to Hughes biographers Donald L. Barlett and James B. Steele. Ramsey Clark, they report, "stood firm. When Hughes realized that the federal

government fully intended to sue him, he caved in and withdrew his offer for the Stardust.” Barlett and Steele go so far as to assert that this “was one of the very few times in a career distinguished by harmonious relations with government agencies that Howard Hughes had been thwarted.” Things would soon change, they observe wryly, with the inauguration of President Richard Nixon.

With the Republicans back in power, Clark joined the antiwar movement and would make a controversial visit to North Vietnam in 1972. Two years later, he ran unsuccessfully as the Democratic Party’s candidate for the U.S. Senate from New York (losing out to antiwar Republican, Jacob Javits) and has subsequently devoted himself to providing legal advice to a wide range of public figures and organizations. His clients have included David Koresh of the ill-starred Branch Davidian Church; Native-American political activist and federal penitentiary resident, Leonard Peltier; right-wing conspiracy theorist and demagogue, Lyndon LaRouche; a leader of the Rwandan genocide; former Yugoslavian President Slobodan Milosevic; the Palestine Liberation Organization; Father Philip Berrigan and the Harrisburg Six (prosecuted for allegedly planning to kidnap Henry Kissinger and try him for war crimes); Sheik Omar Abd El-Rahman, the “Blind” Sheik, convicted of participating in the first World Trade Center bombing; and Lori Berenson, an American woman jailed in Peru for alleged contacts with the Tupac Amaru radical movement.

It would be interesting to compare the hostility with which Ramsey Clark’s representation of unpopular clients has occasionally been greeted with that directed, for example, toward Harvard professor, Alan Dershowitz, for his representation of O. J. Simpson, Leona Helmsley, and Klaus von Bulow; or William Kunstler, whose clients included H. Rap Brown, Angela Davis, El Sayyid Nosair, and Malcolm X. Indeed, with respect to the American Indian Movement and Islamic fundamentalists accused of terrorism in the U.S., Kunstler and Clark shared some of the same clients. Kunstler, it will be recalled, “was respected for his belief in justice and his commitment to the rights of the defendant,” as ABC’s Peter Jennings put it in his on-air report of Kunstler’s death; the courageous defender of the “underdog” had even been granted a starring role in one episode of *Law & Order*, with a script written virtually to marquee Kunstler’s view of the Constitution. Perhaps unlike Kunstler, however, Ramsey Clark’s politics, his choice of clients, something, seem to have placed him beyond the pale for many commentators on the legal scene.

In one of the sharpest interrogations of Clark’s conduct, Ian Williams argues that in 1998, “Clark attended a human rights conference in Baghdad, Iraq, where in his keynote speech he pointed out how ‘the governments of the rich nations’ . . . dominated the wording of the Universal Declaration of Human Rights, which showed ‘little concern for economic, social, and cultural rights.’” Williams may feel he has thus demonstrated with this example the hypocritical relationship between Clark and his presumed “Kunstleresque” stature as a defender of individual rights and civil liberties. But unless Clark is dishonest for saying what he said where he said it, then it is a statement with which it is hard to disagree.

First, consider Harold Laski’s observation that the gap between liberalism’s promises and performance has always been wide. *Any* hopeful promises “governments of the rich nations” have made to the rest of the countries of the world have rarely been kept; certainly not kept in a way that would change significantly the quality of life for the world’s poor. From promises of safety against tyrannical regimes and marauding armies, guarantees against the ravages of hunger and disease, to promises of debt reduction or curtailment of agricultural subsidies to developed economies, the rich nations have generally turned a blind eye to the human catastrophe endured day in and day out by the wretched of the earth.

Second, one need only recall Anatole France’s famous aphorism about the law, which in its majesty, prohibits the rich as well as the poor from sleeping beneath the bridges of Paris. Human rights proclaimed by middle class revolution and Western cultural tradition are often of little use to the great mass of people living on earth today, and this sad irony has become so well worn that by now it seems almost pointless to repeat it. That Ramsey Clark is willing to do so, in Baghdad or anywhere else, seems less evidence of devious character or fatal inconsistency than an almost Pollyannaish willingness to maintain faith in the prospect of real social change. How can anyone have confidence in the future, with so little accomplished, these many years after France’s skewering of a purely formal equality before the law? In Dickens’ *Hard Times*, a working class school-girl is asked if she is not pleased to be living in such a thriving and prosperous state as Britain. Her instructor is horrified when she responds she would have to know, first, who had got the money and whether or not any of it was hers. Again, Dickens was writing in the middle of the nineteenth century. Comments along these same lines by Ramsey Clark are long overdue, and criticizing him for making them in Baghdad is as silly as castigating Bill Clinton, not

for having protested the Vietnam but for having done so at Oxford.

No criticism of Ramsey Clark is heard more frequently than that he does not simply provide legal representation for his clients but, goes further, and offers support for their politics and apologies for their alleged misdeeds. He cannot seem to separate out the legal value of zealous advocacy, central to the system, from the dangerous assault on liberal values many of his clients perpetrate, on the very margins or fringes of the system. Nevertheless, in the summer of 2005, Clark was the target of a very different kind of attack. The Associated Press reported that “Saddam Hussein’s chief lawyer quit the Iraqi dictator’s Jordan-based legal team” because “some of the team’s American members were trying to control the defense and tone down his criticism of the U.S. presence in Iraq.” The attorney specifically rejected Ramsey Clark’s defense strategy, saying that Clark “had often asked me to refrain from criticizing the American occupation of Iraq and the U.S.-backed Iraqi government.” No one would claim that Ramsey Clark “is all case and no cause.” But, perhaps Clark simply appreciates that different degrees of identification with clients can be appropriate depending upon the circumstances of individual cases. Unlike his politics, Clark, like most lawyers, is unlikely to share his defense strategy with reporters.

Ariah Naier, once the leader and, arguably, moral conscience of the American Civil Liberties Union, defended the constitutional rights of bedraggled remnants of wartime fascism and obnoxious new Nazi skin heads who demonstrated publicly in Skokie, Illinois, despite the offense thus given to many in the Chicago Jewish community, including some survivors of the Holocaust and many more relatives of those who did not survive. What could protecting the rights of thugs whose hatred for rights is notorious have to do with civil liberty? Naier was often asked this question by deeply perplexed supporters of his values and his organization. It is a hard question, appropriately directed at Ariah Naier and his comrades in the cause of civil liberty, as well as at Ramsey Clark and his colleagues in the legal profession. When prominent Massachusetts attorney John Adams was asked to provide legal representation for soldiers who fired on unruly citizen-rebels in what was called the “Boston Massacre,” Adams did not hesitate. What, he wondered, could be more important to the citizen of a democracy than the right to a lawyer? For better or for worse, Ramsey Clark continues to answer that question in ways not very different from early American patriot John Adams of Boston.

ANTHONY CHASE

References and Further Reading

- Barlett, Donald L., and Steele, James B. *Empire: The Life, Legend, and Madness of Howard Hughes*. New York: W.W. Norton, 1979.
- “Top Hussein Lawyer Quits, Chides U.S.” *USA Today*, July 7, 2005.
- Williams, Ian. “Ramsey Clark: The War Criminal’s Best Friend” (*Salon.com*, June 21, 1999).

CLARK, TOM CAMPBELL (1899–1977)

Tom C. Clark was one of the more controversial justices of the twentieth century Supreme Court. His 18 years on the Court were filled with controversies and shifts among the justices as they decided issues. Clark himself took the unusual step of resigning from the Court in 1967. He did this to avoid any question of conflict of interest when his son, Ramsey Clark, took the position of U.S. Attorney General. Knowing that Ramsey himself or his subordinates would argue cases before the Court that could be interpreted as at least a violation of propriety in court, led the father to resign.

Tom Clark was born in Dallas, Texas, on September 23, 1899. Having been born and raised in a family of lawyers, Clark followed in the family profession, graduated from the University of Texas law school in 1922. After some years of practice in the family firm and a stint as a district attorney of Dallas, Clark moved to Washington, D. C., where he worked for the government during World War II.

Clark’s support in 1944 of Harry S. Truman’s bid for Franklin D. Roosevelt’s vice-president at the Democratic Party convention led Truman when president to nominate Clark as Attorney General.

An opening on the Supreme Court followed four years later. Some amount of controversy followed Clark’s nomination by President Truman; nevertheless, the vote in the Senate was seventy-three to eight in favor of Clark taking the vacancy on the Court.

As Attorney General, Clark had to deal with the growing Red Scare that gripped the nation after the breakdown of the alliance that had won World War II. On the international scene, the concept of a Cold War dominated that breakdown. At home, the Red Scare had significant political overtones for the Truman administration as the accusation of being “soft on communism” was leveled against the Democratic administration.

Clark was at the center of the maelstrom surrounding the Red Scare; even in Clark’s own administration of the justice department, there was pressure on him to take action against communists, their party, and those accused of being disloyal, if not guilty of,

espionage. The main call for action was from J. Edgar Hoover, Director of the FBI who, although ostensibly subordinate to Clark nevertheless, put pressure on the Justice Department in his crusade to destroy the Communist Party and all those he believed were the enemies of this nation. Behind Senator Joseph McCarthy (Rep. Wisc.) was Hoover. During the years 1950 to 1954, Hoover supplied McCarthy and the House Un-American Activities Committee (HUAC) with information surreptitiously given to these fellow crusaders. Hoover also placed FBI men on the staffs of McCarthy and HUAC.

In an attempt to counterattack charges of “soft on communism” and recover from the losses in the 1946 election, in 1947 Clark following Truman’s Executive Order 9335, created the nation’s first peacetime loyalty program.

The next year, 1948, Clark issued a list of 123 allegedly subversive organizations. It was compiled for use of the Federal Loyalty Review Board. Again, the purpose was to demonstrate how vigorous Truman was in exposing true “subversives.” In fact, however, the list was used by many individuals, as well as public loyalty boards. The “list” was used to discredit anyone who might, for any reason, have joined any of these organizations.

The creation and use of this “subversive list” was more than a political tool. It indicated just how far the nation and its leaders would go to show vigor in searching for Reds under the beds; the result was crippling to the civil rights of all citizens.

In 1951, the Supreme Court found the Clark listing process unconstitutional. It was the only major victory won by those opposing the Red Scare until 1957. Justice Clark did not take part in the decision, since he had partaken in the creation of the loyalty system and was responsible for the “subversive organizations list.”

To some extent, Clark typified a type of New Dealer: one who would give the widest latitude possible to Congress and the executive branch on economic issues but was very narrow on civil rights. The terrible Great Depression seems to have sent the message that only the widest interpretation of the law would restore the economy. The civil rights of individuals and groups were of less consequence and required less concern or protection. Had Clark been able to vote to support the “subversive organization list” in 1951, there is little doubt he would have voted to sustain the loyalty program.

Another case that Clark was not able to participate in was the appeal of the eleven (the twelfth was too ill to be tried) national leaders of the Communist Party, in *Dennis v. United States*, 341 U.S. 643 (1961). The government prosecutors did not need his vote to confirm the guilt of the communists (six to affirm; two

against; Clark not participating). This time and for some years thereafter, the government’s prosecutions of communists and others trapped in the Red Scare resulted, almost invariably, in confirmation of guilt by the Supreme Court.

A change of the Supreme Court’s makeup began in 1953, following the death of Chief Justice Frederick M. Vinson; Earl Warren was appointed Chief Judge; John M. Harlan II and William J. Brennan, Jr., were appointed as associate justices. The result was a new majority ready to recognize the importance of the First Amendment and place curbs on the use of the Red Scare to justify guilty verdicts. The holdouts from joining this new majority (now dissenters) included Justice Clark.

With these changes in the makeup of the Supreme court, the Justice Department, Hoover, and his FBI lost the ability to punish citizens with jail and fines because of what they believed, what organizations they belonged to, and even what they read. Beyond the change in personnel, the change in the Court can be attributed to not only the changed makeup in the Court but also to the dissipation of the Red Scare throughout the nation.

Two developments signify the importance of what was happening: the 1954 televised Army–McCarthy Hearings and the 1957 decision by the Supreme Court in the *Yates v. United States*, 354 U.S. 298 (1957). Justice Clark led the battle to sustain the guilt of the Yates defendants, but he failed to convince his brethren. The defendants were all from the California branch of the Communist Party. Following the track laid out in the prosecution of the Dennis case defendants, all nineteen of them were found guilty, fined, and were to serve prison terms. In *Yates*, the new Court majority stated that only when the government could show that any defendant did some act or took some action (beyond believing) could a citizen be found guilty of the Smith Act. More was required to meet the higher standard imposed by the Court majority.

In 1949, when Clark joined the Court, it seems that Chief Justice Vinson was the colleague whose views Clark followed. This changed, however, as the years passed; the influence of Chief Justice Warren can be seen, particularly in 1954, when Warren led the battle for attacking the race issue (*Brown v. Board of Education*, 347 U.S. 483 [1954]). Clark joined with the other eight justices in the unanimous decision.

During his mature years on the bench, Clark wrote many excellent and important decisions. A review of his participation confirms that Clark, particularly in those later years on the Court, was with the majority in most decisions; one list of majority vs. minority positions taken by Clark counts forty-six majority listing and only sixteen minority positions by him.

He also moved from being the leading dissenter on First Amendment issues during the period 1955 and forward to a more flexible view of such issues. He was not implacable; he moved from majority to minorities as he felt the case deserved.

Clark is perhaps best known as the author of the Court's controversial decision on *Mapp v. Ohio*, 367 U.S. 643 (1961). In this decision, the Court held that in state criminal trials, the use of evidence obtained in violation of the Fourth Amendment must be excluded. The roots of *Mapp* took hold, albeit in the face of a continuing controversy, down to this day.

Two areas where Clark wrote for a majority reflected his abiding interest in religious issues that came before the Court, as *Mapp* showed his strong interest in criminal law. In *Abington School District v. Schemm*, 374 U.S. 203 (1963), the Court banned the recitation of bible reading in public school classrooms. In the 1965 case of *U.S. v. Seeger*, 380 U.S. 163 (1965), Clark again used his formidable writing skills to obtain a majority opinion that broadened that right of a citizen called to army service, to ask for conscientious objector status on the grounds of what that person's religion stated about killing and war.

To study the Supreme Court career of Tom C. Clark is to open a significant window on the difficult years that followed World War II. In the latter years, he was still the major voice in opposing any weakening of the government's use of the courts to attack those he thought posed a threat to the country's security. Justice Clark also demonstrated his independence as a justice who could move between minority and majority sides, particularly where issues of criminal conduct and religious issues were before the Court.

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References and Further Reading

- Ferrell, Robert H. *Harry S. Truman: A Life*. Columbia: University of Missouri Press, 1994.
- Friedman, Leon, and Fred L. Israel. *The Justices of the United States Supreme Court 1789–1969 Their Lives and Major Opinions: Volume IV*. New York: Chelsea House Publishers, 1969.
- Hall, Kermit L. *The Oxford Companion to the Supreme Court of the United States*. New York: Oxford University Press, 1992.
- Klingman, William K. *Encyclopedia of the McCarthy Era*. New York: Facts on File, Inc., 1969.
- Marcus, Maeva. *Truman and the Steel Seizure Case: The Limits of Presidential Power*. New York: Columbia University Press, 1977.
- McCoy, Donald R. *The Presidency of Harry S. Truman*. Lawrence: University of Kansas, 1984.
- Sabin, Arthur J. *In Calmer Times: The Supreme Court and Red Monday*. Philadelphia: University of Pennsylvania Press, 1999.

CLASSIFIED INFORMATION

Classified information is information held by executive agencies of government that only persons with special permission ("clearance") are allowed to see. While the term "classified" is of fairly recent origin, executive efforts to withhold information from the general public, the press, Congress, and the courts go back to the earliest days of the Republic.

The constitutional basis, if any, for such efforts has been equally long disputed. Accountability of government to the people is a fundamental principle, and secrecy inherently compromises it, since one cannot judge or modify policies one does not know of. The Constitution addresses government control of information in several different provisions. One is the requirement that the President *shall*—not *may*—inform Congress from time to time of the state of the union.

The only provision aimed explicitly at secrecy is Article I, section 5, which provides that "Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may *in their Judgment* require Secrecy (emphasis added)." Obviously, this is not a grant of power to the executive branch.

The separation of powers system entails numerous types of interbranch communication. Practices dating back to Washington's presidency include congressional requests for information from the President or his department heads and presidential transmittals that asked Congress to keep certain information confidential. Over time, the President realized that the two Houses would not invariably abide by his requests and that individual members might sometimes leak information on their own. This led to the confrontation over Jay's Treaty, in which Washington refused outright to honor a call for papers by the House of Representatives. This episode is sometimes invoked as precedent for "executive privilege" to withhold information. Yet, in actuality, the House adopted resolutions of protest, declaring the President's act unconstitutional.

Similar conflicts would recur from time to time, with varying results depending on the political situation. Appeals for secrecy were often effectively pressed when national defense and foreign policy concerns were at stake, but Congress never formally relinquished its role as "grand inquest of the nation."

A formalized system for protecting these types of information awaited America's rise to great power status and the coinciding expansion of the executive bureaucracy, both of which massively increased the quantity of potentially sensitive official documents. Today's classification system originated in 1951, when President Truman, without a legislative

mandate, issued an executive order authorizing officials in both military and civilian agencies to designate information as “confidential,” “secret,” or “top secret.” Over time additional, even more restrictive, designations have evolved. The power to classify is wielded by thousands of officials in many different agencies. The criteria are rather permissive: classification is permitted if release “could reasonably be expected to cause damage to the national security.” Because control of information confers power, both high-level policy makers and ordinary officials have incentives to err on the side of secrecy. Currently, the government produces millions of classified documents each year.

Details of the guidelines have been repeatedly revised, but the constant is that classification limits access to those cleared by the executive branch, after careful background checks, to receive a specific category of information. Most members of Congress, the judiciary, the media, and the public are excluded, and disclosure to such persons or possession by them could perhaps be criminally prosecuted. Since provisions for automatic declassification after a period of years have not been effectively implemented, the system obstructs historical research, as well as debate on current policy issues.

The courts have had very limited involvement with the growth, administration, and regulation of the secrecy system. Since 1967, anyone may file a request for any identifiable document under the Freedom of Information Act, but there is an exception for information that is properly classified. Under a 1974 amendment, such a request may lead to court review of whether the document can safely be declassified, in whole or in part. This procedure is protracted and costly and is, of course, unavailable where the very existence of the information is unknown.

A few cases seem to acknowledge a power of the President, whether “inherent” or arguably implied by legislation, to withhold information sought by parties in litigation. Courts have sometimes been reluctant even to examine the requested documents to balance the requesting party’s need against the alleged need for secrecy. The executive action complained of is then unreviewable. See *Totten v. United States*, 92 U.S. 105 (1876), *United States v. Curtiss-Wright Corp.*, 299 U.S. 304 (1936), *Chicago and Southern Airlines v. Waterman Steamship Corp.*, 333 U.S. 103 (1948), *Knauff v. Shaughnessy*, 338 U.S. 537 (1950), *United States v. Reynolds*, 345 U.S. 1 (1953), *Haig v. Agee*, 453 U.S. 280 (1981), *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

The Court has also upheld the oaths of secrecy required of certain officials given access to classified information and enforced them with life-long

prepublication clearance requirements and confiscation of profits—even where no classified information was disclosed. *Snepp v. United States*, 444 U.S. 507 (1980).

On the other hand, in *New York Times Co. v. United States*, 403 U.S. 713 (1971), the Court declined to enjoin publication of the Pentagon Papers, despite an insistent claim of danger to national security. In *United States v. Nixon*, 418 U.S. 683 (1974), the President was ordered to surrender his Oval Office tapes to the Special Prosecutor. Nixon had considered invoking national security in this case but for some reason did not do so, relying instead on a distinct privilege for confidential advice.

In sum, the courts are scarcely an effective check on executive secrecy in the domain of national security information. Since Congress and the media have usually shown an equal timidity, it seems that the needed institutional check does not exist. The implications for civil liberties are potentially grave: first, the rights to speak, publish, and participate in debate are hampered by withholding of crucial information. Second, individuals may be subject to loss of employment, denial of redress for damages, revocation of passports, deportation (for aliens), even (for “unlawful combatants”) indefinite detention, based on classified information they are not allowed to see.

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References and Further Reading

Hoffman, Daniel N. *Governmental Secrecy and the Founding Fathers: A Study in Constitutional Controls*. Westport, CT: Greenwood Press, 1981.

Cases and Statutes Cited

Chicago and Southern Airlines v. Waterman Steamship Corp., 333 U.S. 103 (1948)
Department of the Navy v. Egan, 484 U.S. 518 (1988)
Haig v. Agee, 453 U.S. 280 (1981)
Knauff v. Shaughnessy, 338 U.S. 537 (1950)
New York Times Co. v. United States, 403 U.S. 713 (1971)
Snepp v. United States, 444 U.S. 507 (1980)
Totten v. United States, 92 U.S. 105 (1876)
United States v. Curtiss-Wright Corp., 299 U.S. 304 (1936)
United States v. Nixon, 418 U.S. 683 (1974)
United States v. Reynolds, 345 U.S. 1 (1953)

CLEAR AND PRESENT DANGER TEST

The phrase “clear and present danger,” as a criterion for determining when the government can constitutionally punish individuals for their speech, appeared for the first time in the opinion for the U.S. Supreme

Court by Justice Oliver Wendell Holmes, Jr., in the case of *Schenck v. United States* (1919). In *Schenck* and two companion cases, the Court considered the constitutionality of convictions obtained under the federal Espionage Act against various pamphleteers and public speakers for speaking out against World War I and thus allegedly impeding military recruitment. In upholding their convictions, Holmes wrote:

The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.

The “clear and present danger” concept eschewed consideration of the speaker’s “bad” intentions or motivations and focused on the likelihood that an utterance would have consequences dangerous to the country, such as interference with military recruitment. This disinclination to probe into a speaker’s private beliefs or intentions was, in a general sense, protective of civil liberty. But it also seemed to authorize criminal punishment for speech even when the speaker had little control over, or even knowledge of, its consequences. Moreover, these “consequences” of a speech or pamphlet were little more than speculations made by courts and prosecutors, who in times of war were unlikely to err on the side of the speaker.

That Holmes had applied the clear and present danger test to *uphold* convictions in *Schenck* and its companion cases convinced contemporary liberals that the test offered little protection for unpopular speech. But Professor Zechariah Chafee of Harvard Law School argued in the *New Republic* that Holmes’s “clear and present danger” phrase was actually libertarian in spirit, because it established that the government must meet a high standard before it could punish speech consistently with the First Amendment. Both Chafee and U.S. District Court Judge Learned Hand, who had suggested a more speech-protective “incitement to violence” First Amendment test in a 1917 case, communicated with Holmes after the *Schenck* decision in a tactful effort to move Holmes toward a greater appreciation of the free speech values at stake.

These efforts proved partly successful when, only a few months after *Schenck*, Holmes dissented in *United States v. Abrams*. In *Abrams*, the Court upheld the convictions of several anarchists for distributing literature condemning the U.S. government’s postwar military policy in the Soviet Union. Holmes (joined by Justice Louis D. Brandeis) now condemned any

government “attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.” His dissent became a rallying point for supporters of free speech and remains one of the most stirring statements in the free speech literature.

During the 1920s, the Court upheld a number of state-court convictions for subversive advocacy, always over a dissent by Holmes and/or Brandeis. In the best-known of these cases, *Whitney v. California* (1927), Brandeis wrote a separate opinion in which he sought to put more “teeth” into the “clear and present danger” formula: “[N]o danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion . . . [and] even imminent danger cannot justify resort to prohibition of these functions essential to effective democracy, unless the evil apprehended is relatively serious.” Like Holmes’s dissent in *Abrams*, Brandeis’s *Whitney* opinion inspired civil libertarians. But it was not until the late 1930s and 1940s that a more liberal Court gradually transformed the free speech opinions of Holmes and Brandeis from lonely dissents into the law of the Constitution.

By 1937, a majority of the Court had seized hold of the “clear and present danger” test and adopted the libertarian gloss Brandeis had placed on it in his separate opinion in *Whitney*. Over the next few years the Court expanded the test’s application to circumstances far removed from the “seditious speech” situation for which it had been devised; it used the test to reverse convictions under state law for house-to-house soliciting, for picketing, and for criminal contempt in publicly criticizing a judge during a pending case. Some, notably Justice Felix Frankfurter, deprecated this unsystematic application of the “clear and present danger” test, arguing that the Court was using it as a substitute for discriminating, case-by-case analysis of free speech problems.

The Court’s hospitality to civil liberties arguments diminished in the years after World War II. The clear and present danger test, as a meaningful protection of free speech, disintegrated in the *Dennis* case (1951), in which the Court upheld the convictions of American Communist Party leaders under the Smith Act, which prohibited the organizing of a group for the purpose of teaching the advisability of violently overthrowing the government. Several justices suggested that the assumptions underlying the “clear and present danger” concept were poorly adapted to a new and dangerous world. Courts could not

engage in nice calculations of how clear, present, or grave a danger must be before the government could act to preempt the subversive activities of secret organizations presumably under the direction of a foreign dictator. In *Dennis* and ensuing cases, the Court largely disclaimed the authority to second-guess the legislative and executive branches in their determinations that those with radical political views or affiliations were subject to a variety of criminal and civil disabilities.

The Court returned to a more speech-protective jurisprudence in the 1960s, especially after political protest became associated more with the civil rights movement than with left-wing radicalism. Ironically, the Court gave perhaps its final nod to the clear and present danger test in 1969, when it specifically overruled *Whitney* while overturning the convictions of Ku Klux Klan members under an Ohio criminal syndicalism statute for organizing a rally. The “clear and present danger” test has long since departed the legal scene, partly because the problem of seditious speech that gave birth to it is no longer at the center of the First Amendment docket. But with the War on Terrorism and legislation like the Patriot Act, this situation may soon change.

CLYDE SPILLINGER

References and Further Reading

- Gunther, Gerald. *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*. Stanford Law Review 27 (February 1975), 719–773.
- Kalven, Harry. *A Worthy Tradition: Freedom of Speech in America*. New York: Harper & Row, 1988.
- Rabban, David M. *Free Speech in Its Forgotten Years*. Cambridge University Press, 1997.
- Stone, Geoffrey. *Perilous Times: Free Speech in Wartime from the Sedition Act of 1798 to the War on Terrorism*. New York: W.W. Norton, 2004.

Cases and Statutes Cited

- Abrams v. United States*, 250 U.S. 616 (1919)
- Brandenburg v. Ohio*, 395 U.S. 444 (1969)
- Dennis v. United States*, 341 U.S. 494 (1951)
- Schenck v. United States*, 249 U.S. 47 (1919)
- Whitney v. California*, 274 U.S. 357 (1927)

CLONING

The right to reproduce is generally deemed to be a fundamental right in American law. Reproductive cloning is an extension of that right. The scientific and then legal construct of reproductive cloning will be explored. (Therapeutic cloning is no different from any other medical treatment and is dealt with elsewhere.)

Cloning: The Scientific Background

Cloning, until now the subject of the fictional analysis of the type found in the novel *The Boys from Brazil* (1976), has become a medical reality with the recent cloning of a sheep, a horse, a cat, and a dog. Indeed, there is no doubt that in a very short number of years, it will be medically possible to clone human beings, and there is already extensive discussion about whether such conduct should be permissible.

To discuss cloning, one must understand exactly what cloning is. Every human being currently in the world is the product of a genetic mixture: One's father provides half of one's nucleic genetic material, and one's mother contributes the other half; this genetic material is united in the process that we call fertilization, which normally happens after intercourse but can also happen in a petri dish after in vitro fertilization (IVF). A child bears a genetic similarity to his mother and father but cannot be genetically identical to either one of them, because each has only contributed half of their genetic materials. Every person has, along with his or her nucleic DNA, mitochondrial DNA that is not located in the nucleus of the cell but in the cytoplasm. This mitochondrial DNA is inherited solely from one's mother through the egg that she provides and is identical to hers; mitochondrial DNA creates certain proteins needed to function (particularly for respiration—energy metabolism on the cellular level). A father contributes no mitochondrial DNA to his children. As noted in an editorial in *Nature*, a woman with a mitochondrial disease might be able to produce children free of the disease by having the nucleus of her egg implanted in a donor's oocyte, thus providing the same chromosomal genetic code, but with disease-free mitochondrial DNA.

Siblings who are not identical twins share some of the genetic materials of their parents; however, since each sperm and each egg take a different (sub)set of material from the parents, each sibling has a unique genetic makeup based on a combination of portions of their parents' genes different from that found in their siblings. Identical twins, though, are the product of a single fertilized egg of a unique genetic makeup that splits in half after fertilization, leaving two fully formed zygotes that develop into two fully formed—but genetically identical—siblings. (Both the nucleic and the non-nucleic DNA are the same.) These two children share an absolutely identical genetic makeup and until recently represented the only case in which two people could have an identical genetic makeup.

In the current state of cloning technology, genetic material is isolated from cells taken from a donor. This genetic material is then introduced into the

nucleus of an egg/ovum whose own nucleic genetic material has been destroyed, so as to produce an egg/ovum that contains a full set of genetic material identical to the nucleic genetic material of the donor. If the genetic material is taken from one person, and the egg is taken from another, the non-nucleic genetic material of the clone will be that of the egg donor, and not the gene donor, whereas the nucleic genetic material will be from the gene donor. A woman could avoid this “problem” and produce a “full clone” by using her own genetic material and one of her own eggs/ova in the cloning process; that clone will have the exact same DNA makeup as its clonor.

Through stimulation, the egg/ovum with transplanted nucleic genetic material is induced to behave like a fertilized egg, and it then starts the process of cellular division and development as if it is a newly fertilized diploid with genetic materials from a mother and a father. It divides and reproduces, and when implanted into the uterus of a gestational mother, the zygote will grow and develop into a fully formed fetus that will eventually be born from the uterus of its gestational mother. In the current state of technology, all fertilized eggs—including cloned ones—are implanted in a uterus and are carried to term like all normal pregnancies.

The child who is born from this gestational mother is genetically identical to the donor(s) of the genetic material and bears no genetic relationship to the gestational mother. It is not a combination of the genetic material of two people (the mother and father). It is, instead, genetically identical to the one who donated the DNA (or perhaps the two women who donated the nuclear DNA and mitochondrial DNA). It is as if, on a genetic level, this person produced an identical twin, many years after the first person was born. It is impossible to genetically distinguish cells of the clone from cells of the clonor, because their genetic makeup remains absolutely identical. Indeed, there is no reason why this process could not be done from the cells of a person who is deceased.

American Law

To date, there is no case law addressing cloning and no statutes prohibiting cloning. As a general proposition, the guiding principles found in American law governing assisted reproduction are predicated on two concepts: The first is that reproduction is a protected right in American Law, and the second is the desire of American law to assign “parenthood”—both maternal and paternal identity—to the individuals who are expected to function *in loco parentis* of

the child when it is born. Thus, contractual regulation of the terms of surrogacy is permitted so as to ensure that the one who “wants” the child is the parent. Sperm donors can “waive” their paternal rights, and adoption can end the parental rights of natural parents. Generally speaking, unlike the common law tradition, modern American law views status issues (such as parenthood) as something that law *determines*, rather than something that law *discovers*. Law can change the natural order of relationships in this view.

Cloning will undoubtedly be yet another such area. While there is a popular sentiment and considerable scholarship to categorically prohibit such activity, one suspects that, in reality, there is no likelihood that human cloning will be banned in all fifty states. Statutes will be passed that regulate cloning and regulate the “market” to ensure that the wishes of the parties—as to status, paternity, and a host of other issues—are met. Indeed, one can already see such a consensus developing. Professor Laurence Tribe, a well-known constitutional law scholar, endorsed the free market approach to cloning. A recent New York Times article accurately captures the spirit of modern medical ethics in America in the reproductive area by noting:

In the hubbub that ensued [after the first sheep, ‘Dolly’ was cloned], scientist after scientist and ethicist after ethicist declared that Dolly should not conjure up fears of a Brave New World. There would be no interest in using the technology to clone people, they said. They are already being proved wrong. There has been an enormous change in attitudes in just a few months; scientists have become sanguine about the notion of cloning and, in particular, cloning a human being The fact is that, in America, cloning may be bad but telling people how they should reproduce is worse

In America, freedom to choose one’s own reproductive method, and market forces that make such choices profitable, will determine who the parent is and what the law should permit. America is not ruled by ethics. It is ruled by law. While there well might be restrictions on embryo research, legal restrictions on reproductive cloning are fraught with constitutional issues, because they impact on the basic right to reproduce.

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References and Further Reading

- Amer, Mona S., *Breaking the Mold: Human Embryo Cloning and its Implications for a Right to Individuality*, UCLA L. Rev. 1659 (1996): 43.

- Broyde, Michael, *Cloning People: A Jewish View*, Connecticut Law Review 30 (1998): 2503–2535.
- Katz, Sanford N., *Re-writing the Adoption Story*, Fam. Advoc. 5 (1982): 9.
- Kolata, Gina. “Human Cloning: Yesterday’s Never Is Today’s Why Not?” *N.Y. Times*, Dec. 2, 1997.
- Stumpf, Andrea, *Redefining Mother: A Legal Matrix for New Reproductive Technologies*, Yale L. J. 96 (1986): 187.
- The Science of Cloning: Sheep: see I. Wilmut *et al.* “Viable Offspring Derived from Fetal and Adult Mammalian Cells.” (Letters) 385 *Nature* (27 February 1997) at page 810; Horse: see Cesare Galli *et al.* “Pregnancy: A Cloned Horse Born to its Dam Twin.” (Brief Communications) 424 *Nature* (07 August 2003) at page 635; Cat: see Taeyoung Shin *et al.* “A Cat Cloned by Nuclear Transplantation.” (Brief Communications) 415 *Nature* (21 February 2002) at page 859; Dog: see Byeong Chun Lee *et al.* “Dogs Cloned from Adult Somatic Cells.” (Brief communications) 436 *Nature* (04 August 2005), at page 641.
- Tribe, Laurence. “Second Thoughts on Cloning.” *N.Y. Times*, Dec. 5, 1997.

Cases and Statutes Cited

- Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993)
- Zablocki v. Redhail*, 434 U.S. 374 (1978)

See also **Reproductive Freedom**

COERCED CONFESSIONS/POLICE INTERROGATIONS

Confessions are deemed the “gold standard” that assure convictions. The majority of confessions are garnered through an interrogation process. Detainees rarely spontaneously confess. Promises, inducements, and sometimes coercion are used by law enforcement officers to obtain confessions. For confessions to withstand legal scrutiny, they must be trustworthy and free and voluntary in nature. However, trustworthiness was the lynchpin for determining whether a confession would be excluded. In the first reported case challenging a coerced confession, *Commonwealth v. Dillon*, the court’s major concern was not the fact that the twelve-year-old defendant was deprived of food or clothing for three days but that he voluntarily made his confession. At the time of *Commonwealth v. Dillon* (1792), no constitutional basis existed to challenge a coerced confession. The Thirteenth, Fourteenth, and Fifteenth Amendments would give the federal government greater power to review state actions.

Law enforcement has developed sophisticated methods of interrogation that disarm or put at ease detainees. Different levels of coercion exist to induce

detainees to confess. The law does allow for coercive tactics but draws the line at such tactics as physical and psychological torture. The 1930s saw the development of the modern doctrine of coerced confessions. *Brown v. Mississippi* was the seminal case that raised the question of coerced confessions to a constitutional level. The U.S. Supreme Court determined that law enforcement would not be able to use torture as a coercive tactic to garner confessions.

Three black men—Henry Shield, Yank Ellington and case namesake Ed Brown—were accused of the murder of a white farmer, Raymond Stewart. A white mob seized Ellington from his home and hung him by a rope from a tree. Despite being nearly lynched twice by the mob, Ellington continued to protest his innocence. The mob eventually released him and allowed Ellington to return to his home. Kemper County sheriff deputies decided to arrest Ellington and administered a beating to him until he finally confessed to the murder. The sheriff deputies later arrested Brown and Shields and proceeded to torture them. They were bent over chairs and beaten with buckled leather straps until their backs were cut to pieces. The whipping continued until they confessed. A grand jury indicted Brown, Ellington, and Shields the next day for murder.

Defense attorneys for Brown, Ellington, and Shields did not challenge the admissibility of their confessions. The trial court found the “free and voluntary” confessions admissible. The Mississippi jury convicted Brown, Ellington, and Shields of murder, and the court sentenced them to die. The Mississippi Supreme Court upheld the convictions. The court set an execution date for Brown, Ellington, and Shields. However, the United States Supreme Court agreed to review the case.

The Brown defense team raised the then novel argument that the convictions should be overturned due to the violation of the Fifth Amendment right against self-incrimination. The tortured confessions of Brown, Ellington, and Shields were not “free and voluntary.”

The Supreme Court in the era of *Brown v. Mississippi* did not recognize self-incrimination as a constitutional issue. The Fifth Amendment of the U.S. Constitution says no one “shall be compelled in any criminal case to be a witness against himself.” The language is directed at the use of the legal process to compel testimony in a criminal trial. The Kemper County deputies did not compel Brown, Ellington, or Shields to testify against themselves in the courtroom. They tortured the defendants in the station house. Prior to *Brown v. Mississippi*, the Supreme Court found on numerous occasions that individual state courts were not subject to the Fifth Amendment.

The Bill of Rights directed what the federal government could do to its citizens, not to state courts. Defense counsel for Brown, Ellington, and Shields had to use a new constitutional standard to get the Supreme Court to review the case.

The Fourteenth Amendment Due Process Clause prevents states from depriving "... any person of life, liberty or property without due process of the law." Defense counsel for Brown, Ellington, and Shields asserted that the actions of torturing the defendants to garner confessions violated their due process rights. The Supreme Court was generally reluctant to intervene into state actions. However, the Court acknowledged that the state of Mississippi had gone too far. Justice Hughes in writing the opinion remarked, "The state is free to regulate the procedure of its courts in accordance with its own conceptions of policy, unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." Mississippi was free to govern as it chose but it could not violate the basic principle of justice in doing so. The Court stated, "the freedom of the state in establishing its policy is the freedom of constitutional government and is limited by the requirement of due process of law."

Justice Hughes found that the constitution prohibited coercive tactics in obtaining confessions. "Coercing the supposed state's criminals into confessions and using such confessions so coerced from them against them in trials has been the curse of all countries . . . the Constitution recognized the evils that lay behind these practices and prohibited them in this country." The trial court knew Brown, Ellington, and Shields confessed after being tortured yet declined to act. The Mississippi Supreme Court declined to address the due process violations when Brown, Ellington, and Shields appealed their convictions. The Supreme Court had to enforce constitutional rights the state of Mississippi refused to do. The Supreme Court unanimously overturned the convictions and developed a new doctrine that would allow federal review of state actions in criminal cases if constitutional violations existed.

Coercion after Brown

Subsequent to the Brown ruling, trial judges had to apply not only state laws for admissibility of confessions but also had to adhere to a new federal due process standard. The South became the predominant source for coerced confessions. The tactics used by southern law enforcement officers became typified

by the use of torture of numerous blacks until they induced confessions.

In *Chambers v. Florida*, the Supreme Court held that confessions could be coerced psychologically as well as physically. The robbery and murder of an elderly white man prompted Florida law enforcement to detain twenty-five to forty black men without a warrant for a week. After interrogators used sleep deprivation and hunger as manipulation tools, four detainees confessed.

Texas Rangers took an illiterate plantation worker into the woods for a week and beat him until he confessed to a rape. At trial, the defendant steadfastly refused to admit that he confessed. The trial court convicted the plantation worker and sentenced him to death. In *White v. Texas*, the issue was the singular coerced confession but the state of Texas proffered a novel argument before the Supreme Court. Texas argued that since the defendant denied ever making or signing the confession, White should be denied the right to argue the state of Texas violated his due process rights. The Court rejected the argument and overturned White's conviction. The Court found that since the state insisted on publishing the confession to the jury, the confession was subject to constitutional review.

The Supreme Court struck down convictions in a series of southern cases that each had the theme of a tortured confession. In *Ward v. Texas*, Justice Byrnes stated,

This Court has set aside convictions based upon confessions extorted from ignorant persons who have been subjected to persistent and protracted questioning, or who have been threatened with mob violence, or who have been unlawfully held incommunicado without advice of friends or counsel, or who have been taken at night to lonely and isolated places for questioning. Any one of these grounds would be sufficient cause for reversal. All of them are to be found in this case.

The Court set due process standards that states continued to flout. In *McNabb v. United States*, the Court reversed the homicide convictions of two brothers with fourth grade educations from an isolated rural area who confessed after two continuous days of interrogation. The holding spawned what came to be known as the McNabb Rule. Police were to show "with reasonable promptness" some legal cause for holding persons. The Court would not allow convictions to stand where the police failed to promptly allow defendants a preliminary hearing. The Court did not, however, apply a per se blanket exclusion rule to coerced confessions.

The Court extended the McNabb Rule in *Mallory v. United States*. Washington D.C. police arrested a

nineteen-year-old black janitor for the rape of a white woman. Mallory was not told of his right to counsel or to a preliminary examination before a magistrate, nor was he warned he could be silent and that any statement made by him could be used against him. The police interrogated him for several hours, and he then confessed. The police used a court stenographer to record the confession and the deputy coroner to certify that no evidence of physical or psychological coercion existed. Mallory went before court the next day. Mallory's trial was delayed a year to determine whether he was competent to stand trial. The trial proceeded with the strongest evidence being Mallory's confession. Mallory was found guilty. The court sentenced Mallory to death for rape. The Supreme Court reversed the conviction and found the confession inadmissible. The Court held that the D.C. violated federal law that required Mallory be brought before a magistrate "without unnecessary delay."

The McNabb-Mallory Rule put law enforcement on notice that a statement obtained from a defendant during a period of unnecessary delay in having a probable cause determination should be excluded. Federal law dictates that law enforcement delays in taking a defendant before a judicial officer greater than six hours makes any confession gotten inadmissible.

In *Lisenba v. California*, the Court acknowledged the police illegally detained the defendant for a two-week period before he confessed to murdering his wife, yet the court found Lisenba to be an intelligent man who minimized his own culpability. The Court gave inconsistent holdings. Just two years after Lisenba, the Court reversed a conviction based on a confession garnered from thirty-six hours in detention. In *Ashcraft v. Tennessee*, the Court began to liken the standards for confessions induced from long detentions to those held up to the constitutional scrutiny of a confession used in a public trial. The Court used the same rationale in *Watts v. Indiana*. Police interrogations began to be held to strict courtroom standards.

In *Malinski v. New York*, a police officer killing led to overzealous police interrogation tactics. New York police had no suspects in the killing of Officer Leon Fox. Malinski and his brother-in-law, Spielfogel, ran a "protection racket" and promised each other if one became imprisoned, the other was to care for his family. Spielfogel went to prison, but Malinski breached his end of the agreement. Spielfogel became upset and had contact with the police. The police picked up Malinski but did not bring him to a police station. The police brought Malinski to a Brooklyn hotel and had him strip naked for three hours. They continuously questioned Malinski in the nude and dressed only in a blanket and socks. Spielfogel was

brought to the hotel and left alone with Malinski. He confessed soon thereafter. The police drove Malinski to scenes of the crime where he again confessed. Malinski stayed at the hotel three more days before being brought before a magistrate. Malinski signed a written confession while in custody. Malinski confessed a total of four times. Malinski was tried and convicted of Fox's murder.

Malinski challenged the admission of the first oral confession. The trial judge found the confession specious but he allowed it for issues of voluntariness of the written confession. However, the trial judge instructed the jury to disregard the statement unless it was voluntarily given beyond a reasonable doubt. While the judge instructed the jury to potentially disregard the confession, the prosecutor made several references during the trial to the oral confession. The Supreme Court found that one coerced confession corrupted the use of the other three and reversed Malinski's conviction.

The due process doctrine for coerced confessions reached its zenith.

Due Process Limitations

The Supreme Court began to refine the due process doctrine. In *Stein v. State*, the New York police arrested the codefendants, Cooper and Stein, and interrogated them for robbery and murder. Four defendants were arrested in total. The police initially detained Cooper's father to persuade him to confess. Cooper refused. The Parole Department detained Cooper's brother and threatened his freedom. In total, the police interrogated Cooper for more than thirty-six hours. He eventually confessed. The police confined Stein in the basement of an army barracks. An army officer initially interrogated Stein. Over the course of twenty-four hours, police interrogated Stein, and he eventually confessed after being told about the Cooper confession.

Cooper and Stein had bruises and injuries at their arraignment, but their defense counsel did not raise the issue at trial. However, defense counsel did challenge the use of the confessions. One of the codefendants, Dorfman, testified against Cooper and Stein at trial. The trial court also admitted their confessions, and Cooper and Stein were convicted. Cooper and Stein appealed to the Supreme Court. They claimed the police use of physical and psychological coercion induced them to confess.

The Supreme Court examined the trial court and was critical of the claims of Cooper and Stein. They chose not to testify, and the Court theorized that was

due to their prior records. The Court found it could not state what prompted the jury to find the defendants guilty. Was it the coerced confessions or was it the testimony and other State evidence? The Court refused to attempt to second-guess the jury. The Court had to examine whether the confessions were obtained in violation of Cooper and Stein's due process rights.

The Court examined the intelligence and character of Cooper and Stein. Justice Jackson stated, "these men were not young, soft, ignorant or timid . . . they were not inexperienced in the ways of crime or its detection, nor were they dumb as to their rights." Justice Jackson also noted the fact that Cooper negotiated the terms under which he would confess undermined his argument of coercion.

The Court set new standards with Stein. Due process rights would not attach to cases in which the doctrine was meant to protect the innocent not be used as a loophole to protect the guilty. Station house confessions would not be held to the same standard as courtroom testimony. On a case-by-case basis, the personality of the accused would be examined along with other relevant circumstances. The admission of confessions would be examined by the totality of the circumstances.

The Warren Court

President Dwight Eisenhower nominated former California Governor Earl Warren Chief Justice to the U.S. Supreme Court in 1953. Justice Warren created a revolution in criminal law and criminal procedure that culminated in *Miranda v. Arizona*. The Warren Court reviewed cases with greater scrutiny and held law enforcement accountable by reversing several convictions on technical grounds. Confessions became a central component.

Justice Warren began carve out fundamental rights for defendants and challenge conventional law enforcement procedures. In *Gideon v. Wainwright*, Florida state court charged Gideon with breaking and entering a poolroom with intent to commit a felony under Florida law. Appearing in court without funds and without a lawyer, Gideon asked the court to appoint him counsel. The court refused, and Gideon represented himself. The jury found him guilty and he received a five-year prison sentence. Justice Black succinctly stated, "The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours."

The Court began to give a nuanced definition of what it meant to have counsel. A Mexican immigrant and murder suspect continued to request his attorney while being interrogated, but the police refused his request. The Supreme Court held that once a suspect becomes the target of an investigation and was not warned about his constitutional rights, he is entitled to representation under the Sixth and Fourteenth Amendments. *Escobedo v. Illinois* gave suspects the right to counsel during the interrogation phase. The Court began to grant constitutional guarantees at the critical interrogation phase for defendants.

What prompted the Court was the police interrogation of Ernesto Miranda. He was a Mexican immigrant of limited intelligence who confessed to a kidnapping and rape after a two-hour detention. While the police detained and interrogated Miranda, they never informed him of his right to counsel or of his Fifth Amendment right against self-incrimination. The trial court convicted Miranda and sentenced him to sixty years in prison. The Arizona Supreme Court affirmed the conviction. Miranda appealed to the Supreme Court.

The Supreme Court gave defendants the most clearly detailed and defined rights and created a firestorm in the law enforcement community that still reverberates. *Miranda v. Arizona* was the first of four combined cases appealed before the Supreme Court to clarify issues of the right of defendants while in custody and under interrogation. Justice Warren held the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. Justice Warren's opinion became the verbatim Miranda Warnings that are so well known today: (1) an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation; (2) an individual indicates that he wishes the assistance of counsel before any interrogation occurs, the authorities cannot rationally ignore or deny his request on the basis that the individual does not have or cannot afford a retained attorney; and (3) it is necessary to warn him not only that he has the right to consult with an attorney, but also that if he is indigent a lawyer will be appointed to represent him.

Law enforcement feared that Miranda warnings would have a chilling effect on their interrogation procedures. Justice Warren acknowledges that fear in the Miranda opinion:

In dealing with statements obtained through interrogation, we do not purport to find all confessions

inadmissible. Confessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence. The fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel, but whether he can be interrogated. There is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime, or a person who calls the police to offer a confession or any other statement he desires to make. Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today.

Justice Warren makes it clear that interrogations are still allowed to be a key investigation strategy. However, the Court demanded higher standards from law enforcement in the interrogation room.

Permissible Coercion

The legal prerequisite for a confession is voluntariness, but to some degree coercion is used in police interrogations. As the Supreme Court stated in *Oregon v. Mathiason*, “Any interview of one suspected of crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of the law enforcement system which may ultimately cause the suspect to be charged with a crime.” No legal test exists that will provide complete freedom from a suspect’s perceived coercion during the course of a police interrogation. To prohibit coercion would mean prohibiting all police interrogations—something society would not contemplate.

Although judges determine whether a confession is admissible, some state legislatures have attempted to establish their own tests. Most of the tests proved to be unsatisfactory, and some have only confused the issue. New York was the exception in drafting legislation that clearly defined a confession “involuntarily made”:

(a) By any person by the use or threatened use of physical force upon the defendant or another person, or by means of any other improper conduct or undue pressure which impaired the defendant’s physical or mental condition to the extent of undermining his ability to make a choice whether or not to make a statement; or

(b) By a public servant engaged in law enforcement activity or by a person acting under his direction or in cooperation with him;

(c) By means of any promise or statement of fact, which promise or statement creates a substantial risk that the defendant might falsely incriminate himself; or

(d) In violation of such rights as the defendant may derive from the constitution of this state or the United States.

Courts quickly resolve cases in which the issue on confession voluntariness hinges on the infliction of direct physical harm on the suspect. Confessions that involve such occurrences are patently rejected. The general rationale for the blanket exclusion centers on the realization that an innocent person may confess, and admission of such a confession would be an affront to the integrity of the judicial system.

Ambiguity does exist with confessions obtained through indirect coercion such as a lengthy interrogation by two or more interrogators or the deprivation of food, water, sleep, or toilet facilities. Many variables are present regarding the suspect’s tolerability or sensitivity to what occurred and to the degree and extent of the deprivations. The Supreme Court found any interrogation inherently coercive, but as in *Oregon v. Mathiason* (where the defendant was free to leave after confessing) the coercive effects did not rise to a due process violation.

The presence of multiple interrogators during a lengthy interrogation time period is one of the most blatant uses of indirect force. For the prosecution to prove their case, they must present as witnesses all officers involved in the interrogation process. The Illinois Supreme Court ruled in *People v. Ardenarczyk* that when a defendant in criminal prosecution objects to confession as being result of threats and violence, the burden is on the people to show that confession was made voluntarily, and evidence must show all circumstances under which confession was made. Courts have also held that the number of interrogators and the length of interrogation do not automatically render a confession inadmissible.

The threat factor of coercion does invalidate confessions. When an interrogator led a suspect to believe that unless he confessed he would face great bodily harm or death, the court in *People v. Flores* found coercion. A mother being threatened with the loss of her children invalidated the confession in *Lynum v. Illinois*.

Threatening behavior in an interrogation is distinguished from outright threats. An interrogator is allowed to question roughly, to question suspects assuming guilt, express impatience with a potentially lying suspect, or bluff a suspect into believing that evidence was secured to ensure a conviction. The “good cop – bad cop” interrogation scenario is allowed as long as the “bad cop” does not taint the interrogation with force or the threat of force. The comments must be limited to derogatory remarks and expressions of impatience.

The semantics of an interrogator's phraseology can be perceived as coercive. The interrogator's use of the word "better" in trying to persuade a suspect to confess can be construed as coercive if it is interpreted as "you had better confess" versus "it would be better for you to confess." In *Edwards v. State*, the court found a confession inadmissible based on the coercive effects of a letter. Just before the defendant confessed, a police officer urged the defendant to tell the truth and showed the defendant a letter supposedly written to the officer by an inmate of the state penitentiary (which contained statements amounting to a recommendation that it was better for a person accused of a crime to do what officers told him to do what the police officers urged). The confession, supported by the letter, constituted an inducement to the defendant and made the confession inadmissible in the murder prosecution.

Promises

When an interrogator uses language that leads a detainee to believe that confessing could lead to leniency, the confession becomes questionable. The mere promise of a lighter sentence does not vitiate a confession. A promise of leniency that may induce a false confession is what courts abhor.

Exhorting a detainee to tell the truth is permissible, because it is considered free from inducing false confessions. However, when an interrogator attempts to make specific promises, courts consider such language coercive. In *Hillard v. State*, the interrogating officer promised Hillard that he would "go to bat" for him. The court found that such a promise was an inducement that provoked an involuntary confession. An interrogator may report that a detainee has been cooperative as long as there is no specific promise of a lesser sentence. Detainees are without counsel during interrogations, and such promises or plea bargains are the purview of attorneys.

An interrogator can make limited promises such as keeping incriminating statements from family members, reduced bail recommendations, or assisting with psychiatric treatment after incarceration. A more explicit promise such as putting a homosexual detainee in the "gay cell" was found in *State v. Greene* to invalidate the confession.

Trickery and Deceit

The Supreme Court has given leeway to interrogators to use trickery and deceit during the interrogation

process. In *Frazier v. Cupp*, the Court upheld the conviction of Frazier—dismissing his argument that his confession was involuntary and induced by the deceit of his interrogator. Oregon law enforcement officers detained Frazier as a murder suspect along with his cousin Rawls. An officer deliberately lied to Frazier and told him that Rawls confessed. Frazier then confessed. On appeal, Frazier claimed coercion. Justice Marshall rejected Frazier's claim and found he was a man of normal intelligence who knowingly waived his right to silence. Justice Marshall surmised that under the totality of the circumstance, none of Frazier's constitutional rights were violated.

Interrogators are given latitude by the courts to use aggressive and deceitful tactics in questioning detainees. Interrogators can lie about having positive fingerprint identification placing a detainee at a crime scene. One suspect can be pitted against another in seeking to obtain a confession. Even lying about victims is not considered sacrosanct. Interrogators have condemned and maligned victims hoping the suspects would confess. One officer blatantly told a murder suspect that the victim was still alive. However, in the Illinois Supreme Court a detective crossed the line when he lied to a suspect by falsely claiming that they obtained his fingerprints from the burgled residence and that the victim positively identified him. The court found that in determining whether a confession was voluntarily made, the defendant's confession was made freely, voluntarily, and without compulsion or inducement of any sort.

Present Day: Harmless Error

The Supreme Court began a retreat from the Warren Court's judicial activism. The case that signaled the greatest retreat was *Fulminate v. Arizona* (1991). The Supreme Court overruled prior cases and found coerced confessions could be deemed harmless error. Harmless error means that coerced confessions could be used in a trial if the prosecutor can prove beyond a reasonable doubt that the coercive actions did not violate due process rights.

Oreste Fulminate was in an Arizona detention center for a gun violation when another inmate befriended him. The inmate, Anotho Sarivola, began to question Fulminate about the murder of his stepdaughter. Sarivola worked for Arizona law enforcement and was given the specific task of befriending Fulminate hoping he would confess to Sarivola. Fulminate began to get threats from other detainees. Sarivola promised to protect Fulminate if he told Sarivola the truth about the murder. Fulminate

admitted to the charge. Fulminate was released from prison and later confessed to Sarivola's fiancé.

The State of Arizona prosecuted Fulminate for murder. During the trial, Fulminate attempted to have the confessions deemed inadmissible. The trial court disagreed. The confessions were admitted into evidence, and the court found Fulminate guilty and sentenced him to death. Fulminate appealed his conviction claiming violations of the Fifth and Fourteenth amendments.

Fulminate's appellate history became complicated. The Arizona Supreme Court disagreed with Fulminate's initial appeal but allowed the case to be heard again. On rehearing, the court did reverse Fulminate's conviction. The Supreme Court decided to hear the case. The Supreme Court broke from the history of prior cases that held there is no such thing as a coerced confession being harmless error. Many in the criminal justice system feared that the Supreme Court would begin to retreat on the well-established doctrine of coerced confessions.

The Future

In the post September 11th world, the U.S. government has used unprecedented power in its war against terrorism. The government has the power to suspend the civil liberties of its citizens by incurring the enemy combatant status. Once the status is invoked, the person is placed outside the purview of American law and jurisprudence. An enemy combatant is not allowed to have regular contact with an attorney, has no judicial review, and may be detained indefinitely. The unchecked power that is granted to federal law enforcement without review could lead to circumstance similar to *Brown v. Mississippi*.

Enemy combatants are not entitled to general court trials. Military tribunals are established to try cases due to national security issues. The tribunal does not have a court of higher review. Once the tribunal decides the case, the defendants have no appellate rights. Coercive tactics can arise in cases where there exists no governing body to review federal agents' actions. Coercive tactics include physical and psychological interrogations techniques that render detainees/enemy combatants with no legal recourse. Legal challenges to the enemy combatant status are underway that present fundamental constitutional questions to the Supreme Court: (1) do they have a right to remain silent; (2) can they be compelled to be a witness against themselves; (3) can a "free and voluntary" confession be given or used in court when

a detainee has been deprived of his fundamental constitutional rights?

GENEVA BROWN

References and Further Reading

- Nasheri, Hedieh, and Victor J. DeMarco, *True Confessions?: A Critique of Arizona v. Fulminate*, Am. J. Crim. L. 273, 21.
- Raddack, Jesselyn, *United States Citizens Detained As Enemy Combatants: The Right to Counsel as a Matter of Ethics*, William and Mary Bill of Rights Journal 12 (2003): 221.

Cases and Statutes Cited

- Brown v. Mississippi*, 279 U.S. 278 (1936)
- Chambers v. Florida*, 309 U.S. 227 (1940)
- Frazier v. Cupp*
- Fulminate v. Arizona*
- Malinski v. New York*
- Miranda v. Arizona*, 384 U.S. 436 (1966)
- Ward v. Texas*
- Padilla ex rel. *Newman v. Bush*, 233 F. Supp. 2d 564, 599 (S.D.N.Y. 2002)
- Supreme Court Historical Society
www.supremecourthistory.org/02_history/subs_timeline/images_chiefs/014.html
 Title 18 of the United States Code Section 3501(c)

See also **Due Process; Race and Criminal Justice**

COHEN v. CALIFORNIA, 403 U.S. 15 (1971)

In 1968, Paul Cohen peaceably entered the Los Angeles County Courthouse wearing a jacket visibly bearing the words "Fuck the Draft," deliberately denouncing American involvement in Vietnam. He was convicted and sentenced to thirty days in jail under California Penal Code §415 that prohibited conduct that "maliciously or willfully disturbs the peace." The California Court of Appeal upheld the conviction, ruling Cohen's attire had "a tendency to provoke others" to violence or to disrupt the peace.

U.S. Supreme Court Justice John Marshall Harlan II ruled that because Cohen's conviction relied on the offending words, his actions amounted to speech—not conduct—and were, therefore, protected under the First and Fourteenth Amendments. The rest of the opinion addressed state limits in restricting speech. Noting that Cohen neither showed intent to incite actual draft resistance, nor aimed any fighting words at bystanders, nor was there was a crowd "standing ready to strike out" against his words, Harlan maintained the government had no authority to censor speech for fear that violence or disruption

could break out. He reminded the bench that the right to free expression was “powerful medicine” in a diverse population, because it cultivates “a more capable citizenry and more perfect polity”—products especially important to a nation divided by war. Nor was Harlan persuaded that “Fuck” was a particularly inflammatory word requiring government regulation. He warned against sanitizing free speech without clear standards for measuring appropriateness because “one man’s vulgarity is another’s lyric.” Furthermore, such cleansing could cripple the emotive function of communication; often “grammatically palatable” words fail to express the emotions and ideas underlying expressive speech adequately. Harlan also rejected the state’s claim that Cohen’s jacket was especially egregious in the “decorous atmosphere” of the courthouse, because the penal code did not put Californians on notice that certain words or conduct were impermissible in specified circumstances. The speech also did not fall within the state’s police powers to prohibit obscenity where there was no intent to stimulate an erotic response from the people in the courthouse. Finally, Cohen’s words did not engage California’s authority to protect privacy and shield people from vulgarities, because those in the courthouse were neither captive nor powerless to avoid his jacket—they could simply look away. In a five to four split, Harlan reversed Cohen’s conviction.

Cohen is frequently cited in free speech cases, especially if matters of taste, audience captivity, or the suppression of ideas are at issue. Its legacy in First Amendment litigation, however, is cloudy because it is rarely central to Supreme Court rationale. The Court often sidesteps the ruling by distinguishing it as peculiar to the California courthouse circumstances. On its face, *Cohen* places most profanity under First Amendment protections by separating it from obscenity considerations. The opinion also invalidates state laws prohibiting all profanity in public, unless they define factors such as audience or location. In all, it seems that Harlan rescued profanity’s emotive function from state efforts to restrict expression to preserve social and moral order.

DOMINIC DEBRINCAT

References and Further Reading

- Cohen, William, *A Look Back at Cohen v. California*, UCLA Law Review 34 (1987): 1575–1614.
 Krotoszynski, Ronald J., Jr., *Cohen v. California: “Inconsequential” Cases and Larger Principles*, Texas Law Review 74 (1996): 1251–1256.

Cases and Statutes Cited

California Penal Code §415

See also Application of First Amendment to States; Fighting Words and Free Speech; Freedom of Speech: Modern Period (1917–Present); Harlan, John Marshall II; Obscenity; Police Power of the State; Public Vulgarity and Free Speech; Speech and its Relation to Violence

COHEN v. COWLES MEDIA COMPANY, 501 U.S. 663 (1991)

Journalists often promise confidentiality to news sources; in *Cohen v. Cowles Media Co.*, the U.S. Supreme Court ruled the First Amendment does not protect journalists who break promises of confidentiality.

Dan Cohen, a spokesperson for a 1982 gubernatorial candidate in Minnesota, offered reporters documents damaging to an opposing candidate. Reporters for two newspapers agreed to protect Cohen’s identity, but their editors decided to publish Cohen’s name to show that one candidate’s campaign was leaking damaging information about an opponent on the eve of the election. After publication of these stories, Cohen lost his job and sued the newspapers. A jury awarded Cohen damages; the Minnesota Supreme Court set the jury verdict aside, ruling that enforcing promises between reporters and sources would chill debate about political campaigns.

By a five to four vote, the U.S. Supreme Court overruled the state supreme court and held that promissory estoppel, a legal doctrine protecting people who rely on promises, could be applied to the press. Drawing on a well-established line of cases, the Court emphasized that the press has no special immunity from laws that apply to everyone. Reporters cannot break into a home to gather news, nor can reporters break promises to sources with impunity. The Court rejected claims that promissory estoppel would harm freedom of the press, stating that the law “simply requires those who make promises to keep them.”

Cohen reiterates the doctrine that enforcement of generally applicable laws against the press is “constitutionally insignificant” and does not trigger heightened judicial review.

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References and Further Reading

- Easton, Eric B., *Two Wrongs Mock a Right: Overcoming the Cohen Maledicta That Bar First Amendment Protection*

for News-gathering, Ohio State Law Journal 58 (1997): 1135–1216.

Richards, Jeffrey A., *Note: Confidentially Speaking: Protecting the Press from Liability for Broken Confidentiality Promises*, Washington Law Review 67 (1992): 501–519.

Rothenberg, Eliot C. *The Taming of the Press: Cohen v. Cowles Media Company*. Westport, CT: Praeger, 1999.

See also *Branzburg v. Hayes*, 408 U.S. 665 (1972); **Journalism and Sources; Subpoenas to Reporters**

COHN, ROY (1927–1986)

Roy M. Cohn, a young ambitious attorney, gained fame in the 1950s for the intense pursuit of communist sympathizers during his tenure as chief counsel for Senator Joseph McCarthy's (R-WI) Subcommittee on Investigations of the Government Operations Committee. Cohn was born in 1927 in New York City, the son of Al Cohn, a New York State judge and Democratic Party functionary and Dora Cohn, the daughter of a wealthy banker.

Cohn's legal career became linked very early to anticommunism. A graduate of Columbia College and Columbia Law School, Cohn was admitted to the New York bar in 1948 and immediately became an assistant U.S. attorney in New York City. In this capacity he participated in the Smith Act prosecution of the eleven top Communist party leaders in the country of that same year and also played an active part in the espionage prosecution of Julius and Ethel Rosenberg in 1951. In 1952 Cohn landed in Washington, D. C. as special assistant to U.S. Attorney General James McGranery. Cohn's first assignment was running a grand jury searching out communist sympathizers on the U.S. staff at the United Nations Secretariat. He soon went on to prosecute Johns Hopkins professor Owen Lattimore for perjury. Lattimore, a sometime State Department advisor on China, had been on the board of the left wing journal *Amerasia*, in the office of which federal agents had found stolen classified State Department documents in 1945. Senator Joseph McCarthy had denounced Lattimore in 1951 as the top Soviet espionage agent in the United States. The charges were eventually dismissed, but Cohn's role as prosecutor and the efforts of several right wing admirers brought Cohn to the attention of McCarthy, who selected the young attorney to be chief counsel of his investigating subcommittee in 1953.

Intelligent, although intense and often abrasive, Cohn became McCarthy's most trusted aide. Cohn drew headlines almost immediately on his appointment when he and his young millionaire friend,

G. David Shine, took off on a well-publicized trip through Europe checking for pro-Communist literature in U.S. Information Agency libraries overseas. The boondoggle highlighted the arrogant naiveté of the two young men who spent much time enjoying, at State Department expense, the food and lodgings of the continent. Their crusade also brought the frenzied removal of hundreds of books from the American embassy libraries including works of Mark Twain, Dashiell Hammett, and Langston Hughes.

Cohn's fortunes, however, became inextricably linked with McCarthy's during the Army–McCarthy hearings of 1954. In fact, it was Cohn's actions in seeking favorable treatment by the military for his friend, Shine, which instigated those proceedings and set in motion the events that resulted in McCarthy's downfall. When McCarthy leveled charges against the U.S. Army of harboring and even promoting communists and called General Ralph Zwicker "not fit to wear the uniform," the Army retaliated with its own charges, producing a chronology of Cohn's efforts to keep Shine, who had just been drafted, out of the Army. The chronology also documented subsequent demands from Cohn that resulted in preferential treatment for Army Private Shine, including suspension of rigorous training activities and extraordinarily frequent weekend passes. The televised hearings regarding the charges and countercharges gave audience to McCarthy's brutish behavior, ultimately producing the Senator's humiliation at the hands of Army counsel Robert Welsh and Cohn's eventual resignation.

Not one to creep quietly away into the night, Roy Cohn returned to New York and private practice, embarking on what would become a controversial legal career. Until his death, Cohn represented dozens of high-profile clients, including several Mafia bosses, gaining a reputation as a skillful powerbroker. He hobnobbed with the rich and famous at New York's celebrity gathering spots and was well connected to the media. He encountered his own legal difficulties during the 1960s and 1970s when he was tried, although never convicted, of bribery and fraud, as well as jury tampering. His refusal to pay income taxes brought prosecution for tax evasion.

Cohn's high-energy lifestyle included the company of numbers of young men, and it was widely assumed that Cohn was homosexual. He never acknowledged it, however, nor did he admit to his subsequent infection with AIDS. He died of the disease in 1986.

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References and Further Reading

Oshinsky, David. *A Conspiracy So Immense: The World of Joe McCarthy*. New York: The Free Press, 1983.

Reeves, Thomas C. *The Life and Times of Joe McCarthy*. New York: Stein and Day, Publishers, 1982.
von Hoffman, Nicholas. *Citizen Cohn*. New York: Doubleday and Co., 1988.

See also **Communist Party**

COKER v. GEORGIA, 433 U.S. 584 (1977)

Rape was punishable by death in many ancient and medieval cultures, as well as in colonial and modern American criminal law. But shortly after it revived state death penalty schemes in *Gregg v. Georgia* (1976), the U.S. Supreme Court was asked to determine whether the Eighth Amendment's ban on cruel and unusual punishments prohibited the death penalty for rape.

In 1974, Ehrlich Anthony Coker escaped from a Georgia prison and entered the home of Allen and Elnita Carver. Coker bound Mr. Carver, then raped Mrs. Carver at knifepoint before kidnapping her. The Carvers survived the attack. Coker was sentenced to death under Georgia law for the rape.

Justice Byron White's plurality opinion for the Supreme Court reversed the sentence, finding the death penalty disproportionate to the crime of raping an adult woman. The plurality first looked to objective factors, citing the rarity of both capital rape statutes in modern America and of jury-imposed death sentences for rape in those few jurisdictions that authorized it. In addition, the plurality concluded that rape did not compare with murder in terms of moral depravity or injury to the victim. Justice Lewis Powell wrote an important separate concurrence arguing that some rapes could be so brutal as to warrant capital punishment, but that Coker's crime did not involve serious or lasting injury.

Coker remains controversial and potentially far-reaching. Notably, the Court left open the possibility that capital punishment for many non-homicide crimes—including child rape, aggravated kidnapping, treason, and espionage—might be unconstitutional.

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References and Further Reading

Bedau, Hugo Adam, ed. *The Death Penalty in America*. New York: Oxford University Press, 1997.

Cases and Statutes Cited

Gregg v. Georgia, 428 U.S. 153 (1976)
Coker v. Georgia, 433 U.S. 584 (1977)

See also **Capital Punishment**; *Furman v. Georgia*, 408 U.S. 238 (1972); *Gregg v. Georgia*, 428 U.S. 153 (1976); **Rape: Naming Victim**

COLAUTTI v. FRANKLIN, 439 U.S. 379 (1979)

In the wake of the Supreme Court's recognition in *Roe v. Wade* that the constitutional right to privacy included the right to choose an abortion, the states, no longer able to outlaw abortion, made several attempts to regulate it. In *Colautti v. Franklin*, the Supreme Court considered the constitutionality of a Pennsylvania law providing that physicians performing abortions must attempt to preserve the life and health of an aborted fetus that is viable or may be viable. Without deciding whether a more clearly drafted law requiring such a standard of care would be constitutional, the Court struck the law as unconstitutionally vague.

The Pennsylvania law stated that a physician performing an abortion involving a fetus that is viable or may be viable must exercise the same care to preserve the life and health of the fetus as if the physician intended the fetus to be born alive and to use the abortion method most likely to preserve the life and health of the fetus, so long as another method was not necessary to preserve the life and health of the mother.

The Supreme Court decided the law was void for vagueness. Specifically, the Court held that it was unclear what was meant by the phrase "may be viable" and how this was different from the phrase "is viable." It was unclear whether the phrase "may be viable" referred to a point in time prior to actual viability. If the statute was an attempt by the state to define viability differently from how it had been defined in *Roe v. Wade*, the Court explained, it would be unconstitutional. Drawing on its decision in *Doe v. Bolton*, the Supreme Court emphasized that the physician must be given broad discretion to determine viability, defined as the point at which, in the physician's reasonable medical judgment, the fetus had a reasonable likelihood of survival outside the womb.

An additional reason for the statute's vagueness was that it held the physician criminally liable regardless of fault or intent. The Court noted that criminal statutes that do not require intent on the part of the wrongdoer are often constitutionally problematic, since they have a tendency to create a trap for the unwary individual who may be acting in good faith.

Finally, the law was vague, because it did not make clear whether the woman's health and life must always take precedence over the fetus's health and life,

or whether the law required the physician in some circumstances to sacrifice the woman's health for the fetus's survival. Seven years later, in *Thornburgh v. American College of Obstetricians and Gynecologists*, the Supreme Court decided that a state may not force a tradeoff between a woman's health and that of her fetus; the woman's health and life must always be paramount.

Colautti is primarily a case about abortion regulation and about unconstitutional vagueness. *Colautti*'s statement that the physician must be given wide discretion to determine important issues such as viability, however, may have been undermined by the Supreme Court's subsequent, less deferential approach in *Webster v. Reproductive Health Services* and *Planned Parenthood v. Casey*.

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References and Further Reading

- Daly, Erin, *Reconsidering Abortion Law: Liberty, Equality, and the New Rhetoric of Planned Parenthood v. Casey*, *American University Law Review* 45 (1995): 1:77–150.
 Garrow, David J. *Liberty and Sexuality: The Right to Privacy and the Making of Roe v. Wade*, 600–704, New York: Macmillan, 1994.
 Tribe, Laurence H. *American Constitutional Law*, 2nd ed., Mineola, NY: Foundation, 1988.

Cases and Statutes Cited

- Doe v. Bolton*, 410 U.S. 179 (1973)
Roe v. Wade, 410 U.S. 113 (1973)
Planned Parenthood v. Casey, 505 U.S. 833 (1992)
Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986)
Webster v. Reproductive Health Services, 492 U.S. 490 (1989)
See also Abortion; Doe v. Bolton, 410 U.S. 179 (1973); **Privacy; Planned Parenthood v. Casey**, 112 S.Ct. 2791 (1992); **Right of Privacy; Roe v. Wade**, 410 U.S. 113 (1973); **Substantive Due Process; Thornburgh v. American College of Obstetricians and Gynecologists**, 476 U.S. 747 (1986); **Vagueness Doctrine; Void for Vagueness**

COLEMAN v. THOMPSON, 501 U.S. 722 (1991)

In 1982, a Virginia jury found Roger Coleman guilty of the rape and murder of his sister-in-law. The trial judge sentenced Coleman to death. During his subsequent efforts to persuade Virginia's courts to overturn his conviction, Coleman narrowly missed the deadline for filing an appeal with the Virginia Supreme Court—the papers arrived at the courthouse one day late. Because Coleman had violated the

state's procedural rules, the Virginia Supreme Court ordered Coleman's appeal dismissed.

Coleman then filed a habeas corpus lawsuit in federal court, arguing that Virginia officials had violated his constitutional rights. By this time, the case was beginning to draw national attention, because Coleman's attorneys were amassing evidence that indicated, in their judgment, that Coleman was innocent. When Coleman's case reached the U.S. Supreme Court, however, the Court refused to consider Coleman's legal claims. Overruling the Warren Court's ruling in *Fay v. Noia* (1963), and building on rulings by the Burger Court in *Francis v. Henderson* (1976) and *Wainwright v. Sykes* (1977), the Rehnquist Court held that, ordinarily, a federal court must dismiss a state prisoner's habeas lawsuit if that prisoner previously failed to follow all of the state's procedural rules. Because Coleman had failed to meet one of Virginia's filing deadlines, the Court dismissed his federal lawsuit. Coleman was executed on May 20, 1992, only days after appearing on the cover of *Time* magazine under the headline "This Man Might Be Innocent." The legal rule announced in *Coleman v. Thompson* remains the rule today.

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References and Further Reading

- Hertz, Randy, and James S. Liebman. *Federal Habeas Corpus Practice and Procedure*. Charlottesville: LexisNexis, 4th ed., 2001.
 Tucker, John C. *May God Have Mercy: A True Story of Crime and Punishment*. New York: Dell Publishing, 1997.

Cases and Statutes Cited

- Fay v. Noia*, 372 U.S. 391 (1963)
Francis v. Henderson, 425 U.S. 536 (1976)
Wainwright v. Sykes, 433 U.S. 72 (1977)

See also Capital Punishment; Capital Punishment: Execution of Innocents; Habeas Corpus: Modern History

COLLATERAL CONSEQUENCES

Collateral consequences, often also called collateral sanctions, civil disabilities, or civil penalties, are the indirect legal effects of a criminal conviction. In contrast to the penalties imposed at trial, such as incarceration, probation, or a fine, they flow either automatically from the fact of a criminal conviction or may be administratively imposed on conviction. They may be based on state or federal law. Collateral consequences differ from private discrimination based

on a criminal conviction, because they result from state action.

The distinction between collateral sanctions and primary penalties remains ambiguous. Courts generally consider all indirect sanctions—those not imposed directly by the court even though they result from a subsequent state action—collateral, and therefore not punishment. Constitutional protections otherwise extended to criminal offenders at sentencing, such as the Ex Post Facto Clause, do not apply to indirect sanctions. The accused usually has no right to be informed about collateral sanctions at the plea colloquy.

Some jurisdictions have established rules requiring courts to inform criminal defendants of potential immigration consequences. Lack of such information has led to the reversal of convictions. Courts have required such advance information only for a few other drastic collateral sanctions, such as civil commitment for sex offenders.

Criminal defendants are rarely informed of the panoply of collateral consequences that may befall them, largely because none of the players in the criminal justice system have easy access to such information. Collateral sanctions may be grouped into three categories: restrictions on an ex-offenders' participation in the political life (among them disenfranchisement, ban on holding public office, exclusion from serving on a jury; deportation); limitations on employment opportunities (among them a host of licensing restrictions, denial of gun licenses, restrictions on participation in government programs, suspension of driver's license); limitations on governmental benefits (among them denials of public housing and food stamps; denial of student loans). While some collateral sanctions are based on a direct connection between the criminal conduct and the collateral sanction—pedophiles are barred from employment in schools or day-care centers—many others lack such a connection. The former serve an incapacitative function; the latter remain largely unjustified.

Because of their scope, collateral consequences frequently hinder the rehabilitation or re-entry of ex-offenders. They limit their ability to obtain employment and to obtain transitional housing and welfare benefits. Violations of collateral sanctions lead to criminal sanctions, many with substantial penalties attached. Collateral penalties also have a dilatory impact on the ex-offenders' families, especially their children and their communities.

While collateral sanctions have long existed in U.S. law, they have dramatically expanded in number and scope during the 1980s and 1990s. Automatic sanctions have impacted drug and sex offenders most dramatically, in many cases without a specific link

between the crime of conviction and the collateral sanction.

Ex-offenders may encounter substantial difficulties in removing collateral sanctions. Some states provide relief that is awarded almost automatically and leads to the full restoration of rights; others require gubernatorial pardons to allow ex-offenders to regain at least some rights.

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References and Further Reading

- ABA Standards for Criminal Justice. 3rd Ed. Collateral Sanctions and Discretionary Disqualification of Convicted Persons, 2004.
- Chin, Gabriel J. and Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, Cornell L. Rev. 697 (2002): 87.
- Demleitner, Nora V., *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, Stan. L. & Pol'y Rev. 153 (1999): 11.
- , 'Collateral Damage': No Re-entry for Drug Offenders, Vill. L. Rev. 1027 (2002): 47.
- Mauer, Marc, and Meda Chesney-Linds, eds. *Invisible Punishment: The Collateral Consequences of Mass Imprisonment*. The New Press, 2002.
- Mele, Christopher, and Teresa A. Miller, eds. *Civil Penalties, Social Consequences*. Routledge, 2005.
- Office of the Pardon Attorney. U.S. Dep't of Justice, Federal Statutes Imposing Collateral Consequences Upon Conviction.
- Petersilia, Joan. *When Prisoners Come Home: Parole and Prisoner Reentry*, 2003.

See also **Civil Death; Corruption of Blood; Criminalization of Civil Wrongs; Sentencing Guidelines**

COLONIAL CHARTERS AND CODES

The early colonial charters, compacts, patents, agreements, and codes were generally not very sympathetic to civil liberties, because they would be understood today. Neither the Virginia Company Charter of 1606 nor the Massachusetts Bay Charter of 1629 contained anything that would have protected civil liberties. The 1609 Charter of Virginia empowered the Virginia Company to "ordain, and establish all Manner of Orders, Laws, Directions, Instructions, Forms and Ceremonies of Government and Magistracy, fit and necessary for and concerning the Government of the said Colony and Plantation; And the same, at all Times hereafter, to abrogate, revoke, or change, not only within the Precincts of the said Colony, but also upon the Seas, in going and coming to and from the said Colony, as they in their good Discretion, shall think to be fittest for the Good of the Adventurers and inhabitants there." Another section of the

Charter required that laws Virginia's "Statutes, Ordinances and Proceedings as near as conveniently may be, be agreeable to the Laws, Statutes, Government, and Policy of this our Realm of England." But the two provisions and the rest of the charter allowed for arbitrary and harsh rule that denied basic liberties to most settlers in the colony. This second Virginia charter made it clear that religious dissent would not be tolerated. The charter declared that the Company would not allow settlers who accepted "the Superstitions of the Church of Rome," and further provided that on one could enter the colony who had not "taken the Oath of Supremacy."

The Maryland charter of 1632 merely proclaimed that the law of England would be the basis of the laws of the colonies. The charter allowed the proprietor to impose martial law to suppress rebellions or sedition. While founded as a haven for English Catholics, the Maryland charter authorized religious worship according to the "Ecclesiastical laws of our Kingdom of England." Thus, the Maryland settlers did not get any new rights of expression or protection from the sometimes arbitrary criminal justice of England and were perhaps subject to even harsher and more arbitrary law. Even the Pennsylvania charter of 1781 contained nothing at all that connected to civil liberties. The settlers of New Hampshire, for example, agreed in 1639 to the following declaration when creating a government: "We his loyal Subjects Brethern of the Church in Exeter situate and lying upon the River Pascataqua with other Inhabitants there, considering with ourselves the holy Will of God and o'er own Necessity that we should not live without wholesome Lawes and Civil Government among us of which we are altogether destitute; in the name of Christ and in the sight of God combine ourselves together to erect and set up among us such Government as shall be to our best discerning agreeable to the Will of God professing ourselves Subjects to our Sovereign Lord King Charles according to the Liberties of our English Colony of Massachusetts, and binding of ourselves solemnly by the Grace and Help of Christ and in His Name and fear to submit ourselves to such Godly and Christian Lawes as are established in the realm of England to our best Knowledge, and to all other such Lawes which shall upon good grounds be made and enacted among us according to God that we may live quietly and peaceably together in all godliness and honesty." Similarly, when the colonies in Massachusetts and Connecticut joined together in 1639 under "The Articles of Confederation of the United Colonies of New England," they provided no protection for due process, freedom of expression, or religious liberty. The document proclaimed that one of the purposes of settlement was to

"advance the Kingdom of our Lord Jesus Christ and to enjoy the liberties of the Gospel in purity with peace," but this did not imply that all people—even all Christians—would have religious freedom in these colonies.

By the end of the Seventeenth Century the newer colonies began with a greater sense of civil liberties. The Carolina charter of 1663 noted that "it may happen that some of the people and inhabitants of the said province, cannot in their private opinions, conform to the publick exercise of religion, according to the liturgy, form and ceremonies of the church of England, or take and subscribe the oaths and articles, made and established in that behalf." Taking this into consideration, the charter allowed the proprietors to give "indulgencies and dispensations" to such persons. This was a major step toward religious toleration. This move toward greater protections for liberty in the charters can be seen most clearly in Rhode Island. The "Patent for Providence Plantations," granted by Parliament in 1643, contained no protections of civil liberties or religious freedom, even though the founder of the colony, Roger Williams, established Rhode Island as a haven for people of all faiths. However, the Rhode Island charter of 1663 was even more expansive in its support for religious liberty, providing that "noe person within the sayd colonye, at any tyme hereafter, shall bee any wise molested, punished, disquieted, or called in question, for any differences in opinione in matters of religion, and doe not actually disturb the civill peace of our sayd colony; but that all and everye person and persons may, from tyme to tyme, and at all tymes hereafter, freelye and fullye have and enjoye his and their owne judgments and consciences, in matters of religious concernments, throughout the tract of lence hereafter mentioned; they behaving themselves peaceable and quietlie, and not using this libertie to lycentiousnesse and profanenesse, nor to the civill injurie or outward disturbance of others; any lawe, statute, or clause, therein containned, or to bee containned, usage or custome of this realme, to the contrary hereof, in any wise, notwithstanding." The 1691 Massachusetts allowed "liberty of Conscience allowed in the Worshipp of God to all Christians (Except Papists)," which was an improvement over the earlier regime in Massachusetts, which had been hostile to all non-Puritans, but was hardly civil libertarian.

This notion appeared more emphatically in the two charters granted to settlers in 1701 by William Penn: the Delaware Charter of 1701 and the Pennsylvania Charter of 1701. These are among the earliest formal documents in American history to use the term "civil liberties" as it is understood today. These charters did

not come from the King or Parliament. Instead they were granted to the settlers of both places by William Penn, who was the proprietor of Pennsylvania, which until 1701 included present-day Delaware. Penn's charters noted that: "no People can be truly happy, though under the greatest Enjoyment of Civil Liberties, if abridged of the Freedom of their Consciences, as to their Religious Profession and Worship." Thus, the charter provided that "no Person or Persons, inhabiting In this Province or Territories, who shall confess and acknowledge One almighty God, the Creator, Upholder and Ruler of the World; and professes him or themselves obliged to live quietly under the Civil Government, shall be in any Case molested or prejudiced, in his or their Person or Estate, because of his or their conscientious Persuasion or Practice, nor be compelled to frequent or maintain any religious Worship, Place or Ministry, contrary to his or their Mind, or to do or suffer any other Act or Thing, contrary to their religious Persuasion." This was an enormously expansive grant of religious toleration, although the charter did not grant full religious freedom to all people. The next clause provided that "all Persons who also profess to believe in Jesus Christ, the Saviour of the World, shall be capable (notwithstanding their other Persuasions and Practices in Point of Conscience and Religion) to serve this Government in any Capacity, both legislatively and executively." This provision allowed all Christians to hold office, which made Pennsylvania and Delaware far more progressive than Britain, even if it was protective of liberty by modern standards.

In a subsequent part of the charter, Penn provided that "the First Article of this Charter relating to Liberty of Conscience, and every Part and Clause therein, according to the true Intent and Meaning thereof, shall be kept and remain, without any Alteration, inviolably for ever."

In criminal law the Pennsylvania and Delaware charter contained a major recognition of the rights of the accused that was unknown in England. Penn provided that "all Criminals shall have the same Privileges of Witnesses and Council as their Prosecutors." This simple statement would later lead to the confrontation clause and assistance of counsel clause in the Sixth Amendment. The charter also abolished the English practice of denying inheritance to the heirs of anyone who committed suicide. This provision reflected Penn's generally humane view of law while it also protected property.

The last charter of the colonial period, granted to Georgia, in 1732 adopted the general support for Protestant religious freedom and anti-Catholicism. The charter provided that:

And for the greater ease and encouragement of our loving subjects and such others as shall come to inhabit in our said colony, we do by these presents, for us, our heirs and successors, grant, establish and ordain, that forever hereafter, there shall be a liberty of conscience allowed in the worship of God, to all persons inhabiting, or which shall inhabit or be resident within our said provinces and that all such persons, except papists, shall have a free exercise of their religion, so they be contented with the quiet and peaceable enjoyment of the same, not giving offence or scandal to the government.

In general, the colonial charters did little to expand existing English liberty, except in the area of religious toleration, where a few colonies, like Rhode Island, Pennsylvania, and Delaware, set a new standard for religious liberty. Granted by the King or Parliament, the charters reflected the need of the mother country to govern the colonies. There was little idealism in these charters and thus few innovations in civil liberties. The great exception was the two charters granted by William Penn.

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References and Further Reading

Thorpe, Francis N. *The Federal and State Constitutions Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America*. Washington, DC: Government Printing Office, 1909.

COLORADO REPUBLICAN FEDERAL CAMPAIGN COMMITTEE v. FEDERAL ELECTION COMMISSION, 518 U.S. 604 (1996)

Should political parties on their own be able to spend unlimited amounts of money on behalf of their candidates? The Supreme Court stated yes, upholding on First Amendment free speech grounds the right of political parties to make independent expenditures.

In *Buckley v. Valeo*, the Supreme Court upheld the constitutionality of limits on political contributions to candidates and political parties, even though money spent implicated free speech-like issues. In *Buckley* the Court also stated that money spent by third-party groups independently of campaigns was protected by the First Amendment and could not be limited, but that money spent in coordination with a candidate would be counted against the latter's contribution limits. However, unresolved was whether money spent independently by political parties on behalf of

candidates could be limited? This was the subject of Colorado Republican Federal Campaign Committee.

In this case the Colorado Republican Party spent money to attack Tim Wirth, the likely Democratic Party U.S. Senate candidate in 1986. At the time of the ads, the Republicans did not have a candidate. The issue in the case was whether the ads were coordinated and subject to limits, or an independent expenditure, free from limits.

In a divided seven to two opinion, Justice Breyer wrote the plurality opinion ruling that these contributions were independent expenditures. The First Amendment protects the right of political parties to make them without limit on behalf of candidates, so long as spending is not coordinated with candidates. The Court reached this conclusion by simply drawing on its arguments in *Buckley* that independent expenditures are protected by the First Amendment, whether made by political parties or other entities.

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References and Further Reading

Hasen, Richard L. *The Supreme Court and Election Law*. New York: New York University Press, 2003.

Cases and Statutes Cited

Buckley v. Valeo, 424 U.S. 1 (1976)

See also **First Amendment and PACs; Campaign Finance Reform**

COLORADO v. CONNELLY, 479 U.S. 157 (1986)

In *Colorado v. Connelly*, the Supreme Court explicitly held that police coercion was an indispensable element to a finding that a confession was “involuntary” under the Due Process Clause. The Court further held that the government need only establish waiver of *Miranda* rights under a preponderance of the evidence standard.

Defendant Connelly had approached a police officer and, without prompting, confessed to murdering someone. After receiving *Miranda* rights, the defendant elaborated on his confession, stating that he had killed a particular young woman in November of 1982. Police records confirmed that the body of an unidentified woman had been found several months later. The defendant then directed police officers to the crime scene.

The following day, while meeting with the public defender’s office, the defendant became confused and disoriented, stating that “voices” had driven him to

confess. At a suppression hearing, a psychiatrist testified that the defendant was suffering from “command hallucinations” that interfered with his ability to make free choices. The state courts suppressed defendant’s statements on the basis that they were involuntary.

The Court reversed in an opinion authored by Chief Justice Rehnquist, holding that there could be no due process violation without some element of police overreaching. Because the police had nothing to cause the defendant’s confession, his statements should have been admitted. Justices Brennan and Marshall dissented, finding that the majority opinion denied the defendant the right to make an important choice with a “sane mind.”

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References and Further Reading

Benner, Laurence A., *Requiem for Miranda The Rehnquist Court’s Voluntariness Doctrine in Historical Perspective*, Washington University Law Quarterly 67 (1989): 59.

Darmer, M. K. B., *Beyond Bin Laden and Lindh: Confessions Law in an Age of Terrorism*, Cornell Journal of Law and Public Policy 12 (2003): 319–364.

Dix, George E., *Federal Constitutional Confession Law: The 1986 and 1987 Supreme Court Terms*, Texas Law Review 67 (1988): 231; 244–246, 276.

Cases and Statutes Cited

Miranda v. Arizona, 384 U.S. 436 (1966)

See also **Coerced Confessions/Police Interrogations; Miranda Warning**

COMMERCIAL SPEECH

Commercial speech is a subset of speech that is protected by the First Amendment. Its status as protected speech is of relatively recent vintage. It was only in 1976 that the Supreme Court announced that “commercial speech” was entitled to some, limited First Amendment protection in *Virginia Pharmacy v. Virginia Citizens’ Council*. Prior to that case most observers thought commercial speech clearly unprotected on the basis of the Court’s decision in 1942 in *Valentine v. Chrestensen*. There the Court had thought it self-evident that the First Amendment offered no “restraint [analogous to that imposed on political speech] on government as respects purely commercial advertising.” Almost a decade later, in 1951, the Court had again rebuffed the First Amendment argument of a door-to-door magazine salesman in *Breard v. Alexandria*.

So *Virginia Pharmacy* represented a new turn in the Court’s treatment of commercial speech. Nevertheless, *Virginia Pharmacy* did not clearly define what

constituted “commercial speech.” One definition proposed in the case was that commercial speech was speech that “does no more than propose a commercial transaction.” However, this does not do much more to define the boundaries than the term “commercial speech itself.” And although the Court in *Virginia Pharmacy* used the terms “commercial advertising” and “commercial speech” interchangeably, it was not clear it meant to suggest that “commercial speech” and “commercial advertising” were synonymous, and thus that the boundaries of the new doctrine would be confined to advertising. Subsequent decisions of the Court have suggested that the two terms are not synonymous and that the category of commercial speech is broader than simply advertising. Nevertheless, as several commentators have noted, the definition of commercial speech remains unclear, and the ambiguities in the Court’s decisions in this area have laid the foundation for future struggles over the boundaries of protection for this type of speech.

The turn to protection for commercial speech, although somewhat abrupt from the perspective of the Court’s decisions, was nevertheless presaged in the academic literature. Despite the brevity of the Court’s dismissal of the notion of protection for commercial speech in *Valentine v. Chrestensen* in 1942, the social and economic conditions that would later generate arguments for the protection of commercial speech were well under way in the 1940s. Advertising and public relations were twentieth century outgrowths of the industrial revolution, and the accompanying technological developments that enhanced the speed of communications allowed for the mass production of an ever-larger proliferation of products—many of which were relatively indistinguishable from one another. The competition for custom led manufacturers to rely on increasingly large-scale advertising and promotional efforts—from package design, print ads and billboards, to radio and then television ads and sponsorship of particular shows. As the twentieth century progressed, the role advertising played in generating and maintaining sales seemed, to many observers, as crucial as the manufacturing process itself, despite always having somewhat mixed empirical support for the cause-and-effect relationship between advertising and sales. Lagging behind somewhat, but developing along similar lines, was the public relations business and the practice of promoting a product or service by issuing press releases and trying to get the media to report on it. By the late twentieth century this practice had become well established, threatening in some ways to swamp traditional advertising, because the advantage of the public relations approach is that if the media picks up information from a press release and reports on it, the item has

greater credibility than an ad and at less cost since there is no charge for news coverage.

Parallel to these developments in the markets were other social developments—an increased focus on civil rights for women, blacks, and other historically disadvantaged groups, an increased degree of respectability for protest and dissent, perhaps growing out of the antiwar movement and protest against the war in Vietnam, loosening of restrictions on women’s reproductive choices to turn over more control to the individual and increased visibility for certain types of nonconformity and what might be viewed as a return to the relatively greater sexual permissiveness of the 1930s and 1940s. All these changes, and perhaps many others, involved an increased focus on the individual as rights holder. During this same period, roughly after the trajectory of the industrial revolution was a shift in the theory of the corporation away from the charter and the contractarian theories to an entity theory that proposed that a corporation was a “person” for purposes of the law. These various developments converged in the 1970s and played a part in the development of what became known as the commercial speech doctrine.

The first hint of new attitude on the part of the Court came in *New York Times v. Sullivan* in 1964. Although the case is often not thought of as a commercial speech case, it, like *Chrestensen*, involved an ad. But this time it was the civil rights struggle and defamation law that stood in the spotlight. *Sullivan* involved an ad paid for by various supporters of Dr. Martin Luther King who sought donations from the public to raise money for Dr. King’s defense. The ad described clashes between police and civil rights marchers and specific instances of violence that had been perpetrated by, or ignored by, law enforcement. Sullivan, a police commissioner, although unnamed in the text of the ad, felt sufficiently implicated in what he deemed were illegal police practices that he alleged he had been libeled because the ad contained some inaccuracies. The question presented was whether the First Amendment protected defendants’ from liability, for their statements and the publisher for running the ad, despite those inaccuracies.

The Court concluded that it did even though the vehicle for their statements was a paid advertisement and even though the publisher published the ad in exchange for money. The Court asserted that neither of these facts necessarily disqualified the speech from First Amendment protection. The Court distinguished *Chrestensen* as dealing with “purely commercial advertising.” In contrast, in the *Sullivan* case the Court found that the speech in question was the sort of key political speech that the First Amendment was intended to protect. Nevertheless, since a broader

ruling might have swept away defamation law altogether, the Court held that absent evidence of malice speech about public figures on matters of public concern was fully protected.

A few years later, in 1973, this observation, that merely appearing in an ad does not make something “commercial,” was repeated in *Pittsburgh Press v. Human Relations Commission*. There the Court upheld a cease and desist order to a newspaper requiring it to stop the practice of listing the help wanted ads by gender, a practice that was arguably rendered illegal by Title VII. But it still did not announce a fully articulated theory of what constituted “commercial speech” and what level of protection such speech should receive. Only two years later another case came before the Court that again arguably involved commercial speech but that also implicated other protected rights. The case, *Bigelow v. Virginia*, involved the criminal prosecution of a newspaper publisher for printing ads announcing the availability of abortions in New York, under a statute criminalizing the sale or circulation of material encouraging abortions. Because the statute itself was clearly unconstitutional with respect to noncommercial expression, particularly in light of the Court’s decision in *Roe v. Wade*, it was unclear whether the fact that the expression took the form of an ad was of any significance. Arguably, it might have been had the Court been operating under the old *Chrestensen* schema. But *Sullivan* and *Pittsburgh Press* seemed to point in the other direction and, indeed, the Court felt constrained to add that it was not the case that if speech was related to commerce it was of no value to “the marketplace of ideas.”

Finally, in 1976, the Court rendered a decision in a case that squarely presented a question that seemed to involve purely commercial speech without any of the overtones of civil rights issues intertwined in the previous cases. In *Virginia Board of Pharmacy v. Virginia Citizens’ Consumer Council*, a consumer group challenged the State’s prohibition on the advertising of drug prices. Virginia asserted that the ban on the advertising of price information was intended to promote professionalism by deterring a decline into a price war by pharmacists, a result that was liable to undercut the quality of their services. The Court did not find this argument convincing and concluded that there was no legitimate state interest in keeping consumers ignorant of truthful information. Any other conclusion, the Court held, would be unduly paternalistic where consumers’ interest in the information was keen and relevant to their decision-making process.

Despite the protection afforded commercial speech in this case, the Court held protected the publishing of price information on the grounds of the listeners’

right to receive the information rather than on any notion of the speakers right to speak. Moreover, the Court did not elevate the protection announced in this new doctrine to the level of the full protection afforded political speech. Commercial speech would only be protected, the Court held, to the extent that it was truthful and not misleading or illegal and where the regulation in question was not supported by a legitimate public interest by legislation reasonably calculated to address that interest. Protection of the public’s right to receive information did not, the Court felt, prevent the government from seeing that the information stream ran “cleanly.”

At last a doctrine had been announced. And a definition of sorts had even emerged. In *Virginia Pharmacy* the Court referred to speech that “does no more than propose a commercial transaction.” And at first, even to the Court to the extent that in later parts of the opinion it seemed to use the terms “commercial speech” and “commercial advertising” interchangeably, this definition seemed to mean “advertising”—want ads, print ads, television ads, but apparently the term seemed sufficiently self-explanatory that no other definitional clarification was offered. However, the test for the assessment of governmental regulation was further refined in *Central Hudson Gas & Electric Service v. Public Service Commission*. In *Central Hudson* the Court announced the four-part test that, despite some criticisms, has survived up to the present day as the test for commercial speech.

According to the Court in *Central Hudson*, for commercial speech to be protected it must first be (1) truthful and involve a legal activity. If the speech in question meets that prong, it is entitled to intermediate scrutiny. So for governmental regulation of such speech to be acceptable it must (2) reflect a substantial governmental interest (3), and actually advance that substantial interest but do so (4) in a way that is no more extensive than necessary to advance the government’s legitimate interest. These last two portions of the test are often referred to as testing “the fit” between the interest to be protected or advanced and the implementing regulation.

While initially the Court seemed to address the “fit” question with a fair amount of deference to governmental judgments in cases such as *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico* and *Board of Trustees v. Fox*, in recent years the Court has become increasingly more inclined to strictly construe the test against the government and to strike down governmental restrictions where it finds the “fit” is not very tight. Examples of this trend are *City of Cincinnati v. Discovery Network, Inc.* and *Edenfield v. Fane*. Indeed, as Professor David Vladeck noted in a law review article in 2003, “The Court has

not upheld a single restraint [against commercial speech] in the past decade.”

What has occurred in the past decade is ever-greater pressure to consider the definition of commercial speech and what is or is not included in its ambit. As noted previously, initially it seemed that “commercial speech” was coextensive with “commercial advertising.” But subsequent cases made clear that this could not be the case. In *Bolger v. Youngs Drugs* the Court confronted the attempt to prevent the distribution of informational pamphlets about condoms. The bulk of the text was informative only, but the brochure included product identification and thus presented a case of “mixed” speech. The Court concluded that the pamphlet could not be suppressed simply because it contained some elements that were commercial. In deciding whether speech was commercial, the Court proposed that a fact-intensive review of the context was required, and it found three elements of particular relevance: (1) the use of the advertising form, (2) a reference to a specific product, and (3) an underlying economic motive on the part of the speaker. The presence of all three characteristics was a strong indication that the speech in question was “commercial.” But even with all three factors present, as they were in *Bolger*, this did not preclude protection for the speech. Any regulation of such speech would still need to meet the requirements of the *Central Hudson* test.

Such discussions have only raised more questions rather than settling them. And as marketing forms have proliferated, the variety of ways in which commercial expression occurs, many of which seem far away from directly “propos[ing]” a commercial transaction, the doctrine seems to cover less and less. Does corporate image advertising, that is, advertising intended to address the corporation’s image, as, for example, in Wal-Mart’s ads addressing its labor practices or BP’s advertising regarding its environmental practices, count as “commercial speech” since they don’t explicitly propose a commercial transaction. Indeed, much traditional advertising does not propose a commercial transaction either, at least not directly. Do the marketing practices of pharmaceutical representatives to doctors on, for example, off-label uses of drugs, count as commercial speech, despite occurring outside of the media? What about speech by nonprofit corporations operated as research or public relations arms of for-profit corporations? Can their speech be designated as “commercial” because of the connection with a for-profit enterprise? Does format matter? If something appears in the form of a press release, does this necessarily mean it is not commercial speech? And if it is not commercial, does that mean it is fully protected? These and many other questions with very

important ramifications for marketing practices, as well as social and governmental regulatory power, remain unanswered.

Moreover, the very first prong of the *Central Hudson* test, the requirement that the speech be truthful and not misleading and involve a legal activity has revealed more ambiguity over time than appeared at first blush. Of course the first prong is one that in other First Amendment contexts would be seen as problematic, since typically the argument in favor of protection of a multiplicity of opinions is that it is only through airing all sides of a debate that truth is best arrived at. Nevertheless, because *Virginia Pharmacy* and many of the subsequent cases involved concrete information that was verifiable, in that case prices, the problems raised by the first prong have not been deeply probed. Some of the other cases that fall into this category are *Rubin v. Coors Brewing Co.* (alcohol content on labels) and *44 Liquormart v. Rhode Island* (price). When the ad deals less with concrete information and more with just product visuals or announcements, the Court has, to date, shown little willingness to engage in a more nuanced parsing of what constitutes “misleading,” such as where cigarette advertising makes smoking look glamorous or life enhancing. There is some argument that to the extent that smoking raises serious health risks such advertising is misleading.

However, far from indicating a greater willingness to regulate commercial speech in the absence of a specific claim, the weight of opinion seems to be inclining for greater protection for commercial speech. Indeed, some commentators have urged that the ambiguities in the commercial speech doctrine and the uncertainties of the boundaries be clarified by elevating commercial speech to the same status as political speech. In fact, the extent that promotion of consumption arguably also promotes a particular social and political agenda, an argument exists that commercial speech is political.

No case underscored the weight of this trend more clearly than the 2003 case of *Nike v. Kasky*. The *Nike* case involved a claim by a California activist, Kasky, that Nike’s public statements and public relations campaign aimed at defending its labor practices in response to criticism of those practices, contained numerous false statements that amounted to false advertising, unfair competition, and fraud and deceit. Kasky was suing under a provision of California law that allowed any citizen, acting as a “private attorney general,” to bring such claims on behalf of the citizens of the state. Nike responded to the complaint with a demurrer, claiming that all of its statements were completely protected by the First Amendment. Despite Kasky’s claim that these statements were motivated by

the desire to promote sales and boost the company's image and thus were "commercial" in nature, Nike maintained that its statements were offered in self-defense and represented a contribution to the debate on globalization. Such statements were, it claimed, fully protected and thus the First Amendment represented a complete bar to Kaksy's lawsuit.

The California trial and appellate courts agreed with Nike and dismissed the case with prejudice. A divided California Supreme Court disagreed and reversed, finding that at least some of the statements could constitute commercial speech and thus remanding the case back to the trial court for further proceedings. Nike petitioned the Supreme Court for review, and it was granted. Although both sides had several *amici* filing briefs in support of their position, Nike had the bulk of them, including one from the AFL-CIO, which, while explicitly disclaiming support for either party, nevertheless supported Nike's claim that its speech was not commercial. News media coverage also was, by and large, supporting Nike.

In the end, the Court decided that review had been improvidently granted, because reversal of a motion to dismiss did not represent a sufficiently final judgment to confer jurisdiction on the Court. Still, the concurring and dissenting opinions written in connection with the dismissal suggested that a majority of the Court found Nike's claim to protection compelling. This in turn suggests that a major overhaul of the commercial speech doctrine may occur if another case comes before the Court soon. And although the *Nike* can be seen as a harbinger of greater protection for commercial speech, a case presenting significantly different facts might shift the momentum, since it was clear from the briefs submitted in support of Kaksy by several states and by members of Congress, that significant expansion of the protection for commercial speech might imperil other governmental regulatory efforts that the Court may not have considered—for example, in the areas of corporate governance such as Sarbanes-Oxley, or with respect to the regulation of the sale of pharmaceuticals. At present, all definitional questions remain unanswered, and with the recent change in the makeup of the Court, the Court's future direction may be relatively difficult to predict. Still, the commercial speech area promises to be one of the most interesting, active, and far-reaching areas of the Court's Constitutional jurisprudence to come.

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References and Further Reading

Baker, C. Edwin. *Human Liberty and Freedom of Speech*. Oxford University Press, 1989.

- Chemerinsky, Erwin, and Catherine Fisk, *What is Commercial Speech? The Issue not Decided in Nike v. Kasky*, Case Wes. Res. L. Rev. 1143 (2004): 54.
- Collins, Ronald K. L., and David M. Skover. *The Death of Discourse*. Westview Press, 1996.
- Greenwood, Daniel J.H., *Essential Speech: Why Corporate Speech is Not Free*, Iowa L. Rev. 995 (1998): 83.
- Horwitz, Morton J. *The Transformation of American Law: 1870–1960*. Oxford University Press, 1992.
- Kosinski, Alex, and Stuart Banner, *The Anti-History and the Pre-History of Commercial Speech*, Tex. L. Rev. 627 (1990): 71.
- Langvardt, Arlen W., and Eric L. Richards, *The Death of Posadas and the Birth of Change in Commercial Speech Doctrine*, Am. Bus. L. J. 483 (1997): 34.
- Morrison, Alan B., *How We Got the Commercial Speech Doctrine: An Originalist's Recollections*, Case Wes. Res. L. Rev. 1189 (2003): 54.
- Neuborne, Burt, *A Rationale for Protecting and Regulating Commercial Speech*, Brook. L. Rev. 437 (1980): 46.
- Redish, Martin H., *The First Amendment in the Marketplace: Commercial Speech and the Value of Free Expression*, Geo. Wash. L. Rev. 429 (1971): 39.
- Schauer, Frederick F., *Commercial Speech and the Architecture of the First Amendment*, U. Cinn. L. Rev. 1181 (1988): 56.
- Shiner, Roger A. *Freedom of Commercial Expression*. Oxford University Press, 2003.
- Vladeck, David C., *Lesson From a Story Untold: Nike v. Kasky Reconsidered*, Case Wes. Res. L. Rev. 1049 (2003): 54.

Cases and Statutes Cited

- 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996)
- Bigelow v. Virginia*, 421 U.S. 809 (1975)
- Board of Trustees v. Fox*, 492 U.S. 469 (1989)
- Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983)
- Breard v. Alexandria*, 341 U.S. 622 (1951)
- Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557 (1980)
- Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001)
- New York Times v. Sullivan*, 376 U.S. 254 (1964)
- Nike v. Kasky*, 539 U.S. 654 (2003)
- Posadas de Puerto Rico Assoc. v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986)
- Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995)
- Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976)
- Valentine v. Chrestensen*, 316 U.S. 52 (1942)

See also **First Amendment and PACs**

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY v. NYQUIST, 413 U.S. 756 (1973)

One of the more controversial issues confronting the U.S. Supreme Court in the church-state area has been the question of the constitutionality of government aid

to religious schools. The Court's jurisprudence in this area has ebbed and flowed during the past half century. During the early 1970s, the Court was particularly skeptical of such financial assistance, consistently rejecting government efforts to provide aid to private sectarian schools. One of the more important of the Court's decisions during that time period was *Committee for Public Education and Religious Liberty v. Nyquist* in which the Court declared unconstitutional a New York statute that provided for (1) "maintenance and repair" grants to private schools serving children from low-income families, (2) tuition reimbursement grants for low-income parents whose children attended private schools, and (3) tax relief (in the form of a tax deduction) for parents whose children attended private schools but who did not qualify for a tuition reimbursement grant. The Court, with Justice Lewis Powell writing for a six to three majority, concluded that all aspects of the New York statute had the primary effect of advancing religion in violation of the Establishment Clause. The importance of the *Nyquist* decision lies particularly in the Court's ruling on the tuition grants and tax deduction provisions that benefitted parents directly and religious schools only indirectly.

During the early 1970s, private schools educated a significant portion of New York's schoolchildren—approximately twenty percent. The New York state legislature expressed concern that the "fiscal crisis in nonpublic education . . . has caused a diminution of proper maintenance and repair programs, threatening the health, welfare and safety of nonpublic school children" in low-income urban schools. The legislature thus established the maintenance and repair grant program to "ensure the health, welfare and safety" of children attending such schools. The legislature also worried that any "precipitous decline in the number of nonpublic school pupils would cause a massive increase in public school enrollment and costs" and would "aggravate an already serious fiscal crisis in public education." Accordingly, it enacted the tuition grant and tax benefit programs to relieve private school parents of some of the costs of their children's education. In so doing, the legislature observed that a "healthy competitive and diverse alternative to public education is not only desirable but indeed vital to a state and nation that have continually reaffirmed the value of individual differences."

Although the legislation encompassed both religious and nonreligious private schools, eighty-five percent of the nonpublic schoolchildren in New York attended a church-affiliated school. Moreover, virtually all of the schools eligible for the maintenance and repair grants were operated by the Catholic Church. A private organization, known as the Committee

for Public Education and Religious Liberty, challenged all aspects of the New York statute as violative of the Establishment Clause. The Supreme Court concluded that to pass constitutional muster, "the law in question must first reflect a clearly secular legislative purpose, second, must have a primary effect that neither advances nor inhibits religion, and, third, must avoid excessive entanglement with religion."

The Court concluded that the New York law had a secular purpose but that all aspects of the program had the primary effect of advancing religion. With respect to the maintenance and repair grants, the Court noted that the program did not limit the grants to the "upkeep of facilities used exclusively for secular purposes," and hence the monies could be used to support directly the religious mission of the school. With respect to the tuition reimbursement grants, the Court noted that "there can be no question that these grants could not, consistently with the Establishment Clause, be given directly to sectarian schools." The Court then concluded that the fact that the tuition reimbursement monies were given to the parents, rather than directly to the school, was not constitutionally significant—either way, "the effect of the aid is unmistakably to provide desired financial support for nonpublic, sectarian institutions." Finally, the Court concluded that the tax deductions had the same impermissible effect, even though the tax benefits accrued directly to the parents, not the religious schools.

Three justices—Warren Burger, William Rehnquist, and Byron White—dissented on the tuition reimbursement and tax deduction aspect of the state's plan (they joined the majority with respect to the repair and maintenance grants). In dissenting, they relied on the Court's recent decision in *Walz v. Tax Commission* (1970) in which the Court had upheld property tax exemptions for religious institutions noting that "the grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state There is no genuine nexus between tax exemption and establishment of religion." The majority had distinguished *Walz* in part by arguing that exempting religious property from the taxing power of the state was different from providing a tuition grant or tax deduction to private citizens who choose a private sectarian school for their children's education. The dissenters rejected that distinction.

The Court would revisit *Nyquist* almost thirty years later in *Zelman v. Simmons-Harris* (2002), a case in which the Court considered the constitutionality of the government providing vouchers to parents for use at public or private schools (including private sectarian schools). The *Nyquist* decision posed a

constitutional problem for the voucher plan. The Court distinguished *Nyquist* in part on the grounds that the voucher program in *Zelman* encompassed both public and private schools, whereas the tax benefits at issue in *Nyquist* benefitted only private school parents. Under the Court's more recent doctrine, tax benefits, so long as they are neutral with respect to all schools (religious and nonreligious, public and private), are likely constitutional.

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References and Further Reading

Lawrence, Rebecca, *Comment. The Future of School Vouchers in Light of the Past Chaos of the Establishment Clause Jurisprudence*, *University of Miami Law Review* 55 (2001): 419–452.

Note, *State Aid to Private Schools: Reinforcing the Wall of Supervision*, *Albany Law Review* 38 (1974): 611–631.

Zelinsky, Edward, *Are Tax 'Benefits' Constitutionally Equivalent to Direct Expenditures?* *Harvard Law Review* 112 (1998): 379–433.

Cases and Statutes Cited

Walz v. Tax Commission, 397 U.S. 664 (1970)

Zelman v. Simmons-Harris, 536 U.S. 639 (2002)

See also **State Aid to Religious Schools**

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY v. REGAN, 444 U.S. 646 (1980)

During the 1970s and early 1980s, the U.S. Supreme Court considered a large number of constitutional challenges to various forms of government aid to religious schools. In each of these cases, plaintiffs argued that the aid in question violated the Establishment Clause of the Constitution. In *Committee for Public Education and Religious Liberty v. Regan* (1980), the Court considered the constitutionality of a New York statute that authorized the use of public funds to reimburse both secular and religious private schools for costs incurred in “the administration, grading, and . . . reporting of the results of [state-prepared and state-mandated] tests and examinations.” The legislation was part of a state effort to make sure that private schools maintained minimal secular educational standards—an important goal given the significant percentage of the state's children who attended private schools. In a five-to-four decision, the Court sustained the constitutionality of the law.

Seven years earlier, the Supreme Court in *Levitt v. Committee for Public Education* (1973) struck down

an earlier version of the New York law that provided reimbursement for tests prepared by private school teachers, noting that it was impossible to determine whether such tests involved religious instruction. The Court concluded that “the State is constitutionally compelled to assure that the state-supported activity is not being used for religious indoctrination” and that the New York law failed to provide that assurance. In response, the New York legislature amended its statute to provide reimbursement only for the personnel costs incurred in grading and reporting the results of tests prepared by the *state*. The amended statute also imposed tight controls to make sure that state reimbursements did not exceed the value of the actual grading services provided by the private school teachers.

In assessing the constitutionality of the amended New York law, the Court applied the familiar “Lemon” test (from the Court's 1971 decision in *Lemon v. Kurtzman*) pursuant to which a law is constitutional “if it has a secular legislative purpose, if its principal or primary effect neither advances nor inhibits religion, and if it does not foster an excessive government entanglement with religion.” The Court, with Justice Byron White writing, concluded that the amended law satisfied that test: “grading the secular tests furnished by the State . . . is a function that has a secular purpose and primarily a secular effect” since both the purpose and effect of the tests was to ensure that schoolchildren are being provided “an adequate secular education.” Moreover, the amended New York law also provided for “ample safeguards against excessive or misdirected reimbursement,” a feature absent from the original statute. In upholding the constitutionality of the New York statute, the Court relied on *Wolman v. Walter* (1977), a case in which the Court had upheld an Ohio statute whereby the state provided, among other things, state-prepared standardized tests and grading services to children attending sectarian schools.

Four justices—Harry Blackmun, William Brennan, Thurgood Marshall, and John Stevens—dissented. They emphasized that in *Wolman*, the statutory scheme “did not involve direct cash assistance” to any private school. In fact, the Ohio law at issue in *Wolman* involved only the provision of state-prepared tests to children attending sectarian schools, which were then graded by an independent commercial service, whereas the New York law reimbursed private schools for the cost of grading the tests and reporting the scores. For the dissenters, secular aid, like a standardized test, could be provided to children attending religious schools so long as no cash payments were made to the schools. The majority had found that feature constitutionally insignificant: “[The dissenters]

insist on drawing a constitutional distinction between paying the nonpublic school to do the grading and paying . . . some independent service to perform that task, even though the grading function is the same regardless of who performs it In either event, the nonpublic school is being relieved of the cost of grading state-required, state-furnished examinations None of our cases require us to invalidate these reimbursements simply because they involve payments in cash.”

By upholding the payment of monies to sectarian schools, the Court made a slight move in the direction of permitting greater government aid to religious schools—signaling the direction the Court would take over the course of the next quarter century.

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References and Further Reading

- Avitabile, Alex S., *Comment. P.E.A.R.L. v. Regan: Permitting Direct State Aid to Parochial Schools*, Brooklyn Law Review 47 (1981): 469–515.
- Pryor, Elizabeth Scott, *Comment. Permissible State Aid to Parochial Schools: A Plea for Neutrality*, Emory Law Journal 33 (1984): 487.

Cases and Statutes Cited

- Lemon v. Kurtzman*, 403 U.S. 602 (1971)
- Levitt v. Committee for Public Education*, 413 U.S. 472 (1973)
- Wolman v. Walter*, 433 U.S. 229 (1977)

See also **State Aid to Religious Schools**

COMMON LAW OR STATUTE

Common law is law that evolves over time based on custom, practice, and precedent from judicial decisions—it often is called judge-made law—and is found in cases and opinions. Statutory law, by comparison, represents law created by legislative bodies at the federal, state, and local level, ranging from the U.S. Congress to city councils and is found in compilations called codes, such as the U.S. Code embodying federal laws, or ordinances.

Although constitutional law is a primary source of civil liberties, both common law and statutory law directly affect and, sometimes, embody civil liberties. For instance, the common law developed and recognized a right to privacy long before the U.S. Supreme Court discovered a constitutional right to privacy in *Griswold v. Connecticut* (1965). Sometimes, however, the common law conflicts with civil liberties. For example, the common law of defamation that protects individuals’ reputations restricts the civil liberty of

free speech embodied in the First Amendment. In that area, the Supreme Court was forced in *New York Times v. Sullivan* (1964) to adopt the actual malice standard to balance the common law’s protection of reputation with the U.S. Constitution’s protection of free expression.

Like the common law, statutory law can have both positive and negative effects on civil liberties. For instance, federal statutes have been enacted to protect voting rights and to prevent discrimination. Conversely, recently enacted federal statutes like the USA Patriot Act and the Homeland Security Act restrict the liberties of speech and privacy.

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References and Further Reading

- Holmes, Jr., Oliver Wendell. *The Common Law*. Boston: Little, Brown, & Co., 1881.

Cases and Statutes Cited

- Griswold v. Connecticut*, 381 U.S. 479 (1965)
- Homeland Security Act, Public Law No. 107-296
- New York Times v. Sullivan*, 376 U.S. 254 (1964)
- USA Patriot Act, Public Law No. 107-56

See also **Balancing Approach to Free Speech; Defamation and Free Speech; Freedom of Speech: Modern Period (1917–Present)**

COMMUNICATIONS DECENCY ACT (1996)

The Communications Decency Act (CDA) of 1996, an amendment to the Telecommunications Reform Act of 1996, aimed to protect children by regulating the content of the Internet. The legislation, introduced by Senator James Exon (D-Nebraska), could theoretically have led to the fining and imprisonment of anyone who used an offensive word in an electronic communication. It had the potential to smother both free expression and the infant Internet. The Supreme Court ruled this effort at censorship to be unconstitutionally broad in June 1997.

The CDA formed part of an effort to update laws relating to the telecommunications industry in light of dramatic technological advancements. While the other parts of the telecommunications bill removed barriers that restricted the growth of media business, Congress also decided to regulate the content of the material distributed by these companies. Previous communications law banned the deliberate telephone transmission of obscene material. The new CDA covered all methods of telecommunication. In addition,

existing federal laws against importing obscene material or transporting such material across state lines for sale or distribution were now applicable to computer-transmitted materials.

The CDA prohibited the display of sexual and excretory material deemed “patently offensive” in “a manner available to a person under 18 years of age.” It targeted both text and images in public areas of the Internet. In a revision of the CDA by the House, the indecency provision of the amendment was changed to update the 1873 Comstock Act. This amendment, introduced by longtime abortion opponent Representative Henry Hyde (R-Illinois), banned electronic dissemination of information “designed, adapted, or intended for producing abortion or for any indecent or immoral use or any . . . notice of any kind giving information, directly or indirectly, where, how, or of whom, or by what means any such mentioned article, matter, or things may be obtained or made . . .” Violation of the CDA brought a penalty of up to two years in prison and a maximum fine of \$250,000. The Senate approved the Telecommunications Reform Act by a vote of ninety-one to five with the House supporting it by a vote of 414 to sixteen. President Bill Clinton signed the bill into law on February 8, 1996.

Part of the problem with the legislation lay with Congress’s lack of knowledge about electronic communication. Senator Patrick Leahy, an opponent of the CDA, estimated that only six other senators had used the Internet. Unfamiliar with the technology, they did not understand how the Internet worked. They apparently thought that it was like cable television, with channels that could easily be regulated. Senators were also unaware that much of the available pornography came from foreign sources that would not be affected by American laws.

The new law met with immediate opposition. The online community condemned the CDA as state-sanctioned censorship. The American Civil Liberties Union, along with twenty-five anticensorship organizations, filed a lawsuit against the Justice Department challenging the constitutionality of the law on the day that it went into effect. On February 26, 1996, a coalition of thirty-five groups, including the American Library Association, the Recording Industry Association of America, the National Writers Union, and commercial online providers America Online, CompuServe, Microsoft, and Prodigy, filed a second lawsuit against the CDA. Lawyers for the opponents of the CDA argued both that the law banned certain speech that was suitable for adults and that such a ban would be unenforceable. It would not be possible for online service providers to verify the identity and age of each person browsing the Internet.

On June 12, 1996, the U.S. District Court in Philadelphia imposed a preliminary injunction against enforcement of the CDA. The judges ruled that the CDA violated First Amendment guarantees of free speech and Fifth Amendment protections against vaguely defined criminal conduct. The judges stated that the government had provided no compelling reason to restrict speech. The availability of software that enabled parents to regulate the Internet use of their children led the judges to further conclude that the government had not met its obligation to use the least restrictive means to regulate speech.

The Justice Department, under Attorney General Janet Reno, appealed the decision. The Supreme Court ruled on June 26, 1997, in *Reno v. American Civil Liberties Union*, that the CDA was unconstitutional, because it was so broad that it would have banned material about breast cancer and AIDS awareness, as well as such art as Michelangelo’s nude *David*. Seven justices supported the decision, with Justices Sandra Day O’Connor and William Rehnquist agreeing in part and dissenting in part. Congress has made subsequent efforts to restrict Internet content, but no bill was made into law.

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References and Further Reading

- Drucker, Susan J., and Gary Gumpert, eds. *Real law @ Virtual Space: Communication Regulation in Cyberspace*. Cresskill, NJ: Hampton Press, 2005.
 Godwin, Mike. *Cyber Rights: Defending Free Speech in the Digital Age*. Boston: MIT Press, 2003.

Cases and Statutes Cited

Telecommunications Act of 1996, Pub. LA. No. 104-104, 110 Stat. 56 (1996)

See also **Abortion; American Civil Liberties Union; Comstock, Anthony; Obscenity; *Reno v. ACLU*, 521 U.S. 844 (1997)**

COMMUNISM AND THE COLD WAR

Formed in 1919, the Communist Party of the United States (CPUSA) grew to approximately 60,000 members during The Great Depression as it worked to eliminate poverty, racial inequality, and exploitation of workers. However, during the escalating Cold War of the late 1940s and 1950s, membership plummeted as many Americans took CPUSA members to be spying for the Soviet Union and, more generally, undermining American institutions and government. This perception became especially widespread after

the victory of the Communists in the Chinese civil war and the Soviet Union's development of nuclear weapons, both in 1949. Private organizations and branches of the state and national governments expelled, investigated, and punished CPUSA members, suspected members, individual Communists, and fellow travelers. Many of these undertakings rode roughshod over Communists' civil liberties, but individuals and organizations defended their actions by underscoring the security concerns of the Cold War.

The most important private organizations to strike out against Communists were universities, labor unions, and the movie industry. Many universities dismissed faculty members, librarians, and research scientists because of real or merely suspected Communist sympathies. In the union movement the Congress of Industrial Organizations (CIO) had during the 1930s and 1940s come to include Communist-led unions, but in 1949 the CIO leadership expelled the electrical workers' union for supposed Communist leanings. Nine other leftist unions were subsequently expelled, and when the CIO merged with the American Federation of Labor (AFL) in 1955, the new AFL-CIO was avowedly anti-Communist. In Hollywood, after the House Committee on Un-American Activities (HUAC) investigated Communist infiltration of the movie industry, the industry began black-listing Communists and suspected Communists, thereby ruining the careers of dozens of writers, actors, and technicians and indirectly reducing the social commentary included in movie fare.

Most large cities and states also contributed to the persecution of Communists during the Cold War. Southern cities were especially aggressive in attempting to drive out Communists, even though fewer Communists lived in the South than in any other region. Birmingham, Alabama, for example, passed an ordinance imposing a fine and six-month jail sentence for each day a Communist remained in Birmingham. Thirteen states had legislative committees or commissions comparable to HUAC. In 1953, Massachusetts' Special Commission to Study and Investigate Communism and Subversive Activities and Related Matters in the Commonwealth questioned eighty-five individuals regarding the CPUSA membership. Boston newspapers published their names and addresses, and many lost jobs and friends as a result. Many states enacted laws requiring state employees to sign loyalty oaths. Some states required members of the CPUSA and other Communist organizations to register, and a few states banned membership in organizations thought to be subversive. These laws' obviously impaired Communists' freedoms of speech, assembly, and association.

The most powerful threats to civil liberties came on the federal level, and all three branches of the federal government attempted to restrict and root out Communists. Congress passed the Smith Act (1940), which made advocating the overthrow of the U.S. government or belonging to an organization that did so a criminal offense; the Taft-Hartley Act (1947), which required union leaders to sign affidavits swearing they were not Communists; and the McCarran Act (1950), which required the CPUSA, members of CPUSA, and members of Communist front organizations to register with the federal government. Congress used HUAC and other committees in both the Senate and the House to investigate supposed Communists and Communist activities. Joseph McCarthy, a Senator from Wisconsin, was the most rabid of the red-baiters, and the term "McCarthyism" came to be used for assigning guilt by association, tarnishing reputations by innuendo, and manipulating public opinion. Congressional investigations by McCarthy and others discouraged Communists from exercising their rights to say and publish what they wished and from belonging to clubs, groups, and organizations of their choosing.

The executive branch did not stand in the way of this legislation but rather in some instances attempted an anti-Communist one-upmanship. President Harry S. Truman, for example, in 1947, established the Federal Loyalty Program by executive order. The Program led to the reprimand and termination of federal employees with Communist ties. J. Edgar Hoover's Federal Bureau of Investigation was an eager tracker of Communists, and attorneys in the Justice Department of course prosecuted supposed offenders under the new federal statutes and other existing laws. The most important prosecution was that of Eugene Dennis, General Secretary of the CPUSA, and ten other CPUSA leaders for violation of the Smith Act. The trial took place in 1949 in the federal courthouse in New York City's Foley Square and devolved into a government expose of the CPUSA. In the midst of Cold War hysteria it seemed not to matter that many of the broadsides and pamphlets the prosecution used as evidence were published before the enactment of the Smith Act.

When statutes and prosecutions were challenged in appeals to the Supreme Court, the nation's highest tribunal also proved susceptible to political paranoia. In *American Communications Association v. Dowds* (1950) the Court refused to toss out a federal law requiring union leaders to disavow the CPUSA. The Court also upheld the Smith Act conviction of CPUSA officials in *Dennis v. United States* (1951), rejecting in the process the argument that the law violated the First Amendment's guarantee of freedom of speech. A strong connection existed between the

Soviet Union and the CPUSA, the Court said, and Congress had the duty and power to prevent the CPUSA from advancing the Soviet Union's interest in the overthrow of the United States. The Smith Act did not impede free discussion but rather guarded against the advocacy of violence. Indeed, the Court maintained, the CPUSA's expressed intent to overthrow the United States presented a clear and present danger to the government.

Only in the 1960s did the government begin to acknowledge forcefully the rights and liberties of Communists. In 1964, for example, the Supreme Court ruled in *Aptheker v. Secretary of State*, that the revocation of Communist Party officials' passports under the Subversive Activities Control Act unconstitutionally denied the plaintiff's liberty to travel. More generally, the intolerance and stigmatizing that had so marked the late 1940s and 1950s abated. Even though the Vietnam War was fought in the 1960s and early 1970s in part to stop the successive fall of Southeast Asian governments to Communists, few blamed the unsuccessful war effort on domestic Communists. At the peak of the Cold War, by contrast, a fear was present in many circles of the Communists in our midst. Communists and suspected Communists saw their civil liberties ignored and were harmed in other ways as well. Intolerance and witch-hunting were part of American life, and the national mood was often repressed, suspicious, and paranoid.

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References and Further Reading

- Belknap, Michael R. *Cold War Political Justice: The Smith Act, the Communist Party, and American Civil Liberties*. Westport: Greenwood Press, 1977.
- Caute, David. *The Great Fear: The Anti-Communist Purge under Truman and Eisenhower*. New York: Simon & Schuster, 1978.
- Haynes, John Earl. *Red Scare or Red Menace? American Communism and Anticommunism in the Cold War Era*. Chicago: Ivan R. Dee, 1996.
- Kutler, Stanley I. *The American Inquisition: Justice and Injustice in the Cold War*. New York: Hill & Wang, 1982.
- Selcraig, James Truett. *The Red Scare in the Midwest, 1945–1955*. Ann Arbor: UMI Research Press, 1982.
- Steinberg, Peter L. *The Great "Red Menace": United States Prosecution of American Communists, 1947–1952*. Westport: Greenwood Press, 1984.

Cases and Statutes Cited

- Aptheker v. Secretary of State*, 378 U.S. 500 (1964)
- American Communications Association v. Dowds*, 339 U.S. 382 (1950)
- Dennis v. United States*, 341 U.S. 494 (1951)

See also **Blacklisting; Communist Party; Due Process; Extremist Groups and Civil Liberties; Hiss, Alger; McCarthy, Joseph; Rosenberg, Julius and Ethel; State Constitutions and Civil Liberties; Vinson Court; Warren Court**

COMMUNIST PARTY

One of the most significant developments during the First World War in 1917 was the overthrow of the despotic government controlled by Nicholas II, Czar of all of the Russians, on March 12, 1917.

On November 7, 1917, another revolution took place in Russia, this time led and controlled by the Bolshevi (Russian for "majority"). Like the leadership in the first revolution, they were influenced by the writings of Karl Marx. But the Bolshevi took Marx further under the leadership of V. I. Lenin, who called for a sudden and violent revolution, aimed at the creation of the "dictatorship of the proletariat."

The success of the communists led by Lenin preached a system of collective ownership of property. Given these goals (which would destroy capitalism) and the Soviet exit from World War I, it is understandable that nations coming out of the devastating war would see a significant threat to their political and economic way of life in the Russian Revolution of November 1917.

Indeed, within a matter of two years, Communist parties were organized throughout Western and Southern Europe and in Latin America. The Communist Party of the United States (CPUSA) was organized in 1919.

This nation and the world were rocked to the core by the devastating Great Depression of the 1930s. The Great Depression opened up the "Great Opportunity" for the Communist Party.

The Party worked mainly through unions (especially the Congress of Industrial Organizations—the C.I.O.) as the spearhead of its drive against capitalism, racism, and exploitation of the working class. Regardless of the terrible deprivations suffered by millions during the Great Depression, there was a deep-rooted antagonism against radicals and their solutions; the hope engendered by Franklin D. Roosevelt leading the nation in the "war" against the Great Depression showed the willingness to wait and give the economy a chance to recover. The "jump start" came in the form of World War II (1939–1945) in Europe and then in America. The Communist Party supported the war once Russia was attacked by Nazi Germany in June 1941; until

then, the Party called for isolation from another capitalist war.

Through the 1930s, the CPUSA claimed the hearts and minds of a number of persons (including intellectuals, stage and movie stars) who approved of the announced program of the Party.

With the end of World War II, the alliance that won the war began to break apart. Instead of alliance, the world was introduced to the concept of a Cold War between the United States and its allies and Russia with Joseph Stalin as its communist leader. The domestic result of the Cold War between these countries was a Red Scare in the United States—a fear of communists, their Party, and those who followed in the path of their beliefs.

The Red Scare came as a result of a push to demonize all who were in the Party and those who agreed with the party line. The main figure was J. Edgar Hoover, Director of the Federal Bureau of Investigation (FBI). His aim was to destroy the Communist Party and all those who followed the Party program. He viewed the Party as a cancer on the nation's body. Hoover carried on his anticommunist crusade, even during those years when, with great energy, the CPUSA supported the war.

Using materials such as CPUSA internal meeting minutes, the FBI gathered information in clear violation of the Fourth Amendment. Illegal wiretaps, surreptitiously obtained letters, breaking into Party offices (Black Bag jobs), and a number of other quite illegal methods were used. Ultimately a criminal suit was filed against twelve national Party leaders.

The case, *Dennis v. United States*, 341 U.S. 497 (1951), was designed to break the back of the CPUSA and it did effectively do so, sending all defendants to jail, including all attorneys representing the defendants. All of the defendants were charged with violation of the Smith Act (1940), which made it a federal offense to advocate the forceful overthrow of the government. The times dictated the guilty verdicts for these defendants and for a parade of secondary CP functionaries.

At its height of membership during the 1930s, there were probably 80,000 CPUSA card-carrying members. By the end of the Dennis case (and those that followed), there were probably only 15,000–20,000 left.

Reeling from serious body blows in the American court system, from a Red Scare mentality that looked for “Reds under the beds,” and the belief that all major problems in the nation and in the world were the result of the Communist Party and their followers, further reduced the number of members.

Even the charged attitude of the Supreme Court expressed in four cases decided in 1957 came too little

and too late to pump blood into the dying veins of the CPUSA.

The Communist Party was never outlawed as such, but that made no pragmatic difference. Some will argue that the Party killed itself with its slavish attachment to the Soviet Communist Party line. In all, it was a terrible time for liberalism, Communism, the CPUSA, and for the American justice system. It was also a time of harm to the body of civil, political, and economic freedoms in our nation.

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References and Further Reading

- Buhle, Mari Jo, et al., eds. *Encyclopedia of the American Left*. New York and London: Garland Publishing, Inc., 1980.
- Clifford, Clark, and Richard Holbrooke. *Counsel to the President: a Memoir*. New York: Random House, 1991.
- Howe, Irving, and Lewis Closser. *The American Communist Party a Critical History*. New York: Fredrick A. Praeger, 1962.
- Klingaman, William K. *Encyclopedia of the McCarthy Era*. New York: Facts on File, Inc., 1996.
- Sabin, Arthur J. *In Calmer Times: The Supreme Court and Red Monday*. Philadelphia: University of Pennsylvania Press, 1999.
- Schrecker, Ellen. “McCarthyism and the Decline of American Communism, 1945–1960” In Michael E. Brown, et al., eds. *New Studies in the Politics and Culture of U.S. Communism*, 123–140. New York: Monthly Review Press, 1993.
- . *Many are the Crimes: McCarthyism in America*. New York: Little, Brown, and Company, 1998.

COMPANY TOWNS AND FREEDOM OF SPEECH

With industrial development in the United States in the first half of the twentieth century, some companies found that it was more practical to provide housing for employees near the factory, mine, etc. They would buy a substantial amount of land, build homes, pave roads, and lay sewers. The resulting “company town” was like any other town in almost every respect, except that title rested in the companies’ private hands. As large percentages of workers in many industries lived in company towns, the question arose as to whether individual liberties were protected.

In 1946, the Supreme Court held that on such land, while held in private hands, individuals still maintained constitutional rights. In *Marsh v. Alabama* the Court overturned the trespassing conviction of a Jehovah’s Witness who had attempted to distribute literature in the company town Chickasaw, Alabama. The Court wrote, “The more an owner, for his advantage, opens up his property for use by the public in

general, the more do his rights become circumscribed by the rights of those who use it." Chickasaw had been sufficiently opened to the public to mandate that First Amendment activity be allowed. The function to which the property was placed was tantamount, not where title to the land rested.

Company towns faded away, but the basic conflict did not. Analysis of individual rights on private property remains influenced by *Marsh*, such as in modern shopping centers, with proponents of greater individual liberties seeking protection under *Marsh* but private property owners often resisting.

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Cases and Statutes Cited

Marsh v. Alabama, 326 U.S. 501 (1946)

COMPELLING STATE INTEREST

Judicial review of government restrictions of individual rights takes different forms depending on the nature of the right and the infringement. The most stringent form, "strict scrutiny," requires that the restriction be necessary to serve a compelling state interest.

The modern Supreme Court demands a compelling state interest in essentially two circumstances. First, some (although not all) infringements on fundamental rights receive strict scrutiny. Fundamental rights include textually specified rights such as the protections of speech and religion found in the Bill of Rights, and also some unenumerated rights, such as the right to travel interstate or the right of access to the courts. Second, discrimination either with respect to a fundamental right or on the basis of a "suspect classification" will receive strict scrutiny under Equal Protection doctrine. Suspect classifications include race, national origin, religion, and alienage.

In essence, the demand for a compelling state interest is the codification of a balancing test that weighs the governmental regulatory interest against the individual's liberty. The specific demand for a "compelling" interest dates back to Justice Felix Frankfurter's 1957 concurring opinion in *Sweezy v. New Hampshire* and was adopted by the Court one year later in *NAACP v. Alabama*.

While there has been much debate over how and whether the Court should go about identifying unenumerated fundamental rights, the process of deeming an interest compelling has received much less attention. The Court has never clearly explained how it assesses the importance of an interest, and relatively few scholars have addressed the subject.

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References and Further Reading

Gottlieb, Stephen, *Compelling Governmental Interests: An Essential but Unanalyzed Term in Constitutional Adjudication*, B.U. L. Rev. 68 (1988): 917.

Symposium, *Conference on Compelling Governmental Interests: The Mystery of Constitutional Analysis*, Alb. L. Rev. 55 (1992): 535.

Cases and Statutes Cited

Sweezy v. New Hampshire, 354 U.S. 234, 265 (1957)

NAACP v. Alabama, 357 U.S. 449, 463 (1958)

See also **Balancing Test**

COMPULSORY VACCINATION

The question of whether or not one can be forced to submit to a medical vaccination against a contagious disease pits the police power of the states found in Amendment X against the rights of the individual to due process in Amendment XIV. The police power is generally understood to include the requisite powers to secure the health, safety, and general welfare of the population. The question of compulsory vaccination reached the U.S. Supreme Court in the 1905 case of *Jacobson v. Massachusetts*. Because of the potential for deadly outbreaks of smallpox, the State of Massachusetts enacted a law that permitted cities to require residents to be vaccinated against the disease and provided for a fine of five dollars for failure to obtain the vaccination. Jacobson argued that he could not be compelled to submit to vaccination, because it would violate his constitutional rights under the Preamble and Amendment XIV. The requirement was, he asserted, unreasonable, arbitrary, and oppressive and interfered with his right to care for his own body and his own health. The Supreme Court quickly dismissed the allegation that the Preamble to the Constitution was the "source of any substantive power," but considered the question of whether the Massachusetts law violated the due process clause of Amendment XIV. Justice Harlan, writing for the majority, noted that many restraints are placed on an individual's liberties, but that these are necessary to protect the health of the larger community; a person or minority of people cannot dominate the greater good. The state could constitutionally require individuals to be vaccinated.

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Cases and Statutes Cited

Jacobson v. Massachusetts, 197 U.S. 11 (1905)

COMSTOCK, ANTHONY (1844–1915)

Vice crusader Anthony Comstock was born in Connecticut in 1844. His father was Thomas Anthony Comstock, a farmer and sawmill owner, and his mother was Polly Lockwood. Comstock's mother died when he was ten, and he attended public schools in his youth in New Canaan and New Britain. During the Civil War, he served in the Union army for two years. After the war, he held a variety of jobs across New England and the South before settling in New York City. In 1871, he married Margaret Hamilton, and after their only child died in infancy, they adopted a daughter.

Comstock was deeply impressed, and even obsessed, with the disparities he saw between the moral "values" he believed most Americans possessed and the behavior that the government, meant to "protect" the people, would tolerate. Particularly concerned by growing urban centers that seemed large, impersonal, amoral, and indifferent to the "innocents" moving into them, Comstock set out to change governmental response to such immorality. Comstock won the support of influential persons who helped him organize a special committee of the Young Men's Christian Association to conduct a war on vice and, in essence, entrap criminals. When some YMCA members balked at such action, Comstock and friends formed the autonomous committee known as the New York Society for the Suppression of Vice. For the rest of his life, Comstock would serve as the society's secretary and principal agent with his friends providing him money, respectability, and influence. In 1873, together they persuaded Congress to strengthen the law against sending obscene material through the U.S. mail. Congress appointed Comstock as special agent of the U.S. Post Office with broad responsibilities for prosecuting the law's violators. Comstock held this position until his death.

In 1880, Comstock published a memoir of his ten-year crusade against vice entitled *Frauds Exposed; or, How the People are Deceived and Robbed, and Youth Corrupted, being a Full Disclosure of Various Schemes Operated through the Mails, and Unearthed by the Author*. In the book, he attacked lotteries, bogus banks, jewelry frauds, real estate scams, and false plans for medical aid to the poor. In all his work, Comstock consistently upheld his often-deviant means of entrapping violators, making strong-armed arrests, and his merciless persecution of violators in the courts. Some findings suggest that Comstock enjoyed somewhat widespread support. A special committee of the New York legislature not only absolved him of wrongdoing but also concluded that his work was vital and essential to the community's

safety and decency, despite a petition circulating at the time signed by fifty thousand citizens calling for the repeal of all Comstock laws.

Later in his life, Comstock became obsessed with what he thought was a rising tide of obscenity. He managed to remove tons of pamphlets and paraphernalia from the U.S. mails pertaining to birth control and abortion. He prosecuted abortionist and contraceptionist Ann Trow Lohman (also known as Madame Restell) and rejoiced when she chose suicide over facing trial. Comstock also prosecuted Victoria Woodhull and her sister Tennessee Claflin for publishing an account in their newsletter *Weekly* of Henry Ward Beecher's extramarital affairs. Comstock also increasingly prosecuted artists and critics. In 1887, he raided a reproduction of French paintings, including many nudes, at Knoedler's Gallery in New York City. In response, the Society of American Artists condemned Comstock's interference. Comstock countered by publishing a pamphlet, *Morals vs. Art*, in which he delineated that morality overrode all other considerations, and art was only desirable if it promoted, or at least did not counter, morality.

Comstock also attacked books, including the popular turn-of-the-century dime novels that he believed led youths down a path of crime and asserted that even many literary classics should only be read by mature scholars. He also protested against exotic dancers, plays, and many other public amusements that he felt corrupted morality. Aware that his crusades actually drew much more attention to these "immoral" acts than would have otherwise with no such publicity, Comstock seemed to care little, deriving satisfaction from the many convictions he won, fines collected, and in general, vice suppressed. Comstock continued his crusade for moral absolutism until his death, influencing the federal government and many states to pass more stringent antiobscenity laws. He helped form other vice societies such as the New England Watch and Ward Society, and the Society for the Suppression of Vice remained in existence long after his death. He died in New Jersey in 1915.

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References and Further Reading

- Beisel, Nicola Kay. *Imperiled Innocents: Anthony Comstock and Family Reproduction in Victorian America*. Princeton, NJ: Princeton University Press, 1997.
- Broun, Heywood. *Anthony Comstock, Roundsman of the Lord*. Literary Guild of America, 1927.
- Pivar, David. *Purity Crusade: Sexual Morality and Social Control, 1868–1900*. Westport, Conn.: Greenwood Press, 1973.

See also **Obscenity**

CONCEPT OF "CHRISTIAN NATION" IN AMERICAN JURISPRUDENCE

For much of American history, the U.S. Supreme Court and various state courts have characterized the United States as a "Christian nation." In recent years, however, courts have generally stopped making such references, and some justices and judges have expressly sought to distance themselves from these earlier proclamations.

During the nineteenth century, the Supreme Court issued several opinions in which it referred to the United States as a Christian nation. In *Vidal v. Girard's Executors* (1844), for example, a case involving a challenge to a will on the grounds that it devised property for a purpose "hostile to the Christian religion," the Court rejected the will challenge but did characterize the United States as a "Christian country." Similarly, in two slave trade cases, the Court characterized the United States as one of the "Christian nations" of the world: *The Antelope* (1825); *The Kate* (1864). Confronted with the question of the scope of American consulate jurisdiction, the Court in a few cases resolved the issue by distinguishing between the "Christian countries" and non-Christian countries of the world: *In re Ross* (1891); *Dainese v. Hale* (1875). Similarly, the Court repeatedly legitimated broad Congressional control over the property rights of Indian tribes, noting that Congress would be constrained by "such considerations of justice as would control a Christian people in their treatment of an ignorant and dependent race": *Beecher v. Wetherby* (1877). In the late nineteenth century, the Court decided a number of cases adverse to the interests of the Mormon religion, relying on the fact that certain Mormon practices such as polygamy were contrary to the "spirit of Christianity" and to the "laws of all civilized and Christian countries." See, for example, *The Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. United States* (1890); *Davis v. Beason* (1890).

The Supreme Court's most forthright claim that the United States is a Christian nation, however, came in Justice David Brewer's opinion in *Church of the Holy Trinity v. United States* (1892). In that opinion, Brewer set forth a lengthy argument for his claim that the United States is a religious, and specifically Christian, nation in the context of analyzing the intent of Congress in enacting a particular statute. Justice Brewer quoted several colonial charters, state constitutions, and state supreme court decisions that referred to the central importance of Christian belief in the life of the American people; cited the practice of various legislative bodies of beginning their sessions with prayer; and noted the large number of churches

and Christian charitable organizations that exist in every community in the country as evidence that the United States is a Christian nation. In 1905, Justice Brewer expanded on his *Holy Trinity* decision in a series of lectures at Haverford College entitled "The United States is a Christian Nation," which were subsequently published as a book by the same title. Justice Brewer's contemporaries made similar observations about the American polity. For example, British observer Lord Bryce commented in his 1888 two-volume study of the United States, *The American Commonwealth*, that "Christianity is in fact understood to be, though not the legally established religion, yet the national religion."

During the nineteenth century, a few state supreme courts also asserted that Christianity was part of the common law of the United States. The Pennsylvania Supreme Court, for example, claimed that "Christianity . . . is, and always has been, a part of the common law of Pennsylvania": *Updegraph v. Commonwealth* (1824). The Ohio Supreme Court disagreed: The assertion that "'Christianity is a part of the common law of this country,' lying behind and above its constitutions . . . can hardly be serious The only foundation . . . for the proposition, that Christianity is part of the law of this country is the fact that it is a Christian country, and that its constitutions and laws are made by a Christian people": *Board of Education of Cincinnati v. Minor* (1872).

During the twentieth century, the Supreme Court stopped characterizing the United States as a Christian nation. In *United States v. Macintosh* (1931), the Court rejected an application for citizenship on the grounds that the applicant, claiming religious objections, had refused to pledge his unconditional support for this nation's future war efforts. Justice George Sutherland, writing for a narrow majority, noted that "[w]e are a Christian people . . . acknowledging with reverence the duty of obedience to the will of God," and that obedience to the nation's military endeavors was "not inconsistent with the will of God." The *Macintosh* decision was the last time that the Supreme Court expressly characterized the United States as a Christian nation, although in 1952, in *Zorach v. Clauson*, Justice William Douglas did write for the Court that "[w]e are a religious people whose institutions presuppose a Supreme Being."

Even after the Supreme Court stopped referring the United States as a Christian nation, some state court judges continued to do so. The Mississippi Supreme Court announced in 1950 that "[o]ur great country is denominated a Christian nation": *Paramount-Richards Theatres v. City of Hattiesburg* (1950). The Oklahoma Supreme Court claimed in

1959: “[I]t is well settled and understood that ours is a Christian Nation, holding the Almighty God in dutiful reverence”: *Oklahoma v. Williamson* (1959). In 1998, Alabama state judge Roy Moore defended the display of the Ten Commandments in his courtroom on the grounds that the U.S. Supreme Court in *Holy Trinity* had recognized that “the United States is a Christian Nation”: *In re State of Alabama ex rel. James v. ACLU of Alabama* (1998).

But in recent years, some Supreme Court justices and lower federal court judges have attempted to distance the courts from its “Christian nation” heritage. In *Lynch v. Donnelly* (1984), for example, Justice William Brennan criticized the Court’s decision upholding a governmental display of a creche as “a long step backwards to the days when Justice Brewer could arrogantly declare for the Court that ‘this is a Christian nation.’” Similarly, writing for the U.S. Court of Appeals for the Sixth Circuit, Judge Avern Cohn noted in 2000: “We have come a long way from when it was acceptable that . . . a member of Congress could introduce a bill [in 1880] saying, ‘Whereas, The people of the United States are a Christian people, and firmly believe in God, the Father Almighty, Maker of heaven and earth; and in Jesus Christ His only Son, our Lord . . .’, . . . or that the Supreme Court of Oklahoma could say: ‘it is well settled and understood that ours is a Christian Nation, holding the Almighty God in dutiful reverence’”: *American Civil Liberties Union v. Capital Square Review and Advisory Board* (2000).

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References and Further Reading

- Brewer, David. *The United States a Christian Nation*. Philadelphia: J.C. Winston Co., 1905.
 Bryce, James Bryce. *The American Commonwealth*. 3 volumes. New York: Macmillan & Co., 1888.
 Green, Steven K., *Justice David Josiah Brewer and the ‘Christian Nation’ Maxim*, *Albany Law Review* 63 (1999): 427–476.
 Hylton, J. Gordon, *David Josiah Brewer and the Christian Constitution*, *Marquette Law Review* 81 (1998): 417–425.

Cases and Statutes Cited

- American Civil Liberties Union v. Capital Square Review and Advisory Board*, 210 F.3d 703 (6th Cir. 2000)
The Antelope, 23 U.S. 66 (1825)
Beecher v. Wetherby, 95 U.S. 517 (1877)
Board of Education of Cincinnati v. Minor, 23 Ohio St. 211 (1872)
Church of the Holy Trinity v. United States, 143 U.S. 457 (1892)
Dainese v. Hale, 91 U.S. 13 (1875)
Davis v. Beason, 133 U.S. 333 (1890)
In re Ross, 140 U.S. 453 (1891)
In re State of Alabama ex rel. James v. ACLU of Alabama, 711 So.2d 952 (Ala. 1998)

- The Kate*, 69 U.S. 350 (1864)
Late Corporation of the Church of Jesus Christ of Latter Day Saints v. United States, 136 U.S. 1 (1890)
Lynch v. Donnelly, 465 U.S. 668 (1984)
Oklahoma v. Williamson, 1959 Ok 207 (1959)
Paramount-Richards Theatres v. City of Hattiesburg, 210 Miss. 271 (1950)
United States v. Macintosh, 283 U.S. 605 (1931)
Updegraph v. Commonwealth, 11 Serg. & Rawle 394 (Pa. 1824)
Vidal v. Girard’s Executors, 43 U.S. 127 (1844)
Zorach v. Clauson, 343 U.S. 306 (1952)

See also Douglas, William Orville

CONFRONTATION AND COMPULSORY PROCESS

Constitutional Bases

Adopted in 1791, the Sixth Amendment of the U.S. Constitution guarantees the defendant in a criminal trial the right “to be confronted with the witnesses against him,” and “to have compulsory process for obtaining witnesses in his favor.”

The confrontation clause is designed to ensure the truthfulness of witness testimony against a defendant in a criminal trial. It accomplishes this by forcing the prosecution’s witnesses to testify in front of the party on trial and by allowing the defendant’s counsel to challenge the credibility and reliability of the witness’s testimony through cross-examination.

Also, rules of evidence such as Rule 801—the Hearsay Rule—of the Federal Rules of Evidence, stems from the Sixth Amendment right to confrontation and precludes the prosecution in a criminal trial from using as evidence statements made by witnesses not actually present at trial. The U.S. Supreme Court has carved out a number of exceptions to this rule, including instances where the prosecution is able to show a good-faith, but unsuccessful, effort in getting a witness to testify. For exceptions, see Federal Rules of Evidence 801(d)(E) through 804.

The compulsory process clause provides a defendant the court’s subpoena power to compel witnesses to testify. To exercise this right, a defendant must demonstrate that the witness’s testimony would be relevant, suitable, and favorable to him or her.

The confrontation and compulsory process clauses have grown in scope through a number of key U.S. Supreme Court cases.

Confrontation Clause

In drafting the Sixth Amendment, the Framers intended to incorporate the common law right to confrontation to prevent in the United States the type of abuses suffered by the likes of Sir Walter Raleigh in his trial in England. See, *United States v. Inadi*, 475 U.S. 387, 411 (1986). When John Adams was a defense attorney in a criminal case he said— “[e]xaminations of witnesses upon Interrogatories, are only by the Civil Law. Interrogatories are unknown at common Law, and Englishmen and common Lawyers have an aversion to them if not an Abhorrence of them”: 2 Legal Papers of John Adams 207 (Wroth and Zobel eds., 1965).

The U.S. Supreme Court has found violations of the Confrontation Clause when the prosecution introduced at trial statements from accomplices and witness that were not subject to cross-examination. See, *Lilly v. Virginia*, 527 U.S. 116 (1999) (custodial confession of accomplice); *Idaho v. Wright*, 497 U.S. 805 (1990) (statements by victim to doctor made with participation of police investigating defendant); *Lee v. Illinois*, 476 U.S. 530 (1986) (accomplice’s custodial confession); *Berger v. California*, 393 U.S. 314 (1969) (*per curiam*) (testimony from preliminary hearing); *Brookhart v. Janis*, 384 U.S. 1 (1966) (confession of accomplice taken during interrogation); and *Pointer v. Texas*, 380 U.S. 400 (1965) (testimony at preliminary hearing).

In the well-known case of *Bruton v. United States*, 391 U.S. 123 (1968), the Court held that in a joint trial the Confrontation Clause prohibits the admission of the codefendant who does not testify when the confession also incriminates the defendant. See also *Roberts v. Russell*, 392 U.S. 293 (1968) (*per curiam*); *Cruz v. New York*, 481 U.S. 186 (1987); and, *Gray v. Maryland*, 523 U.S. 185 (1998). But, the Court has also allowed the use of prior testimony from a witness against the accused because the witness was subject to cross-examination during the prior testimony. See *Ohio v. Roberts*, 448 U.S. 56 (1980), one of the most significant cases in confrontation jurisprudence. And, in *Bourjaily v. United States*, 483 U.S. 171 (1987), the Court allowed co-conspirator’s statement to another co-conspirator); *United States v. Inadi*, 475 U.S. 387 (1986) (same); *Dutton v. Evans*, 400 U.S. 74 (1970) (same).

In the recent confrontation landmark case of *Crawford v. Washington*, 541 U.S. 36 (2004), the Court reaffirmed a principle in one of its line of cases that the Sixth Amendment right to confrontation precludes the admission of “testimonial” hearsay unless the witness is unavailable and there was a prior

opportunity for full cross-examination. This controversial decision has been viewed as a double-edged sword by commentators. See *Crawford v. Washington: A Critique*. Miguel A. Mendez; Stanford Law Review, Vol. 57, 2004.

Compulsory Process

In *Washington v. Texas* (388 U.S. 14 (1967)), the Court found that through the Fourteenth Amendment, the Sixth Amendment compulsory process clause extends to criminal trials in state courts. It further held that principals, accomplices, and accessories to a crime might be introduced as witnesses for co-defendants to the same crime(s). In *Washington* the Court stated of this concept:

The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant’s version of the facts as well as the prosecution’s to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution’s witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law

Washington at 19-23. This right is not absolute. The compulsory process right is not absolute, and a court may refuse to allow a defense witness to testify where defense counsel did not identify the desired witness to gain a tactical advantage. See *Taylor v. Illinois*, 484 U.S. 400 (1988). See also *United States v. Wallace*, 32 F.3d 921 (5th Cir. 1994).

The compulsory process clause has also been the subject of debate in two notorious cases involving the U.S. President—*Clinton v. Jones*, 520 U.S. 681 (1997) and *United States v. Nixon*, 418 U.S. 683 (1974).

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References and Further Reading

- Amar, Akhil Reed. *The Constitution and Criminal Procedure*. 129–131 & n.194, 1997.
- Berger, Margaret A., *The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model*, Minn. L. Rev. 76 (1992): 559.
- Dickinson, Joshua C., *The Confrontation Clause and the Hearsay Rule: The Current State of a Failed Marriage in Need of a Quick Divorce*, Creighton L. Rev. 33 (2000): 763.
- Friedman, Richard D., *Confrontation: The Search for Basic Principles*, Geo. L. Rev. 86 (1998): 1011.
- “The Voice Of Adjudication”: The Sixth Amendment Right To Compulsory Process Fifty Years After *United States*

Ex Rel. Touhy v. Ragen, Milton Hirsh, *Florida State University Law Review* Vol. 30:81.

See also **Confrontation Clause; Defense, Right to Present**

CONFRONTATION CLAUSE

The Confrontation Clause of the Sixth Amendment to the U.S. Constitution declares, "In all criminal proceedings, the defendant shall enjoy the right . . . to be confronted with the witnesses against him." The Clause protects a criminal defendant's presumptive guarantee of an opportunity for effective *face-to-face* cross-examination of his accusers. The Clause is thus implicated in a child abuse case in which the child testifies in a separate room visible to the defendant only by closed circuit television or in admitting the child's hearsay statements even when he or she has never testified under oath.

The Clause cannot be understood in isolation but rather must be seen as complementing other Sixth Amendment rights, such as those to a public trial by jury with the effective assistance of counsel. Together, these rights make "crucial workings of the government visible and keep . . . the overwhelming prosecutorial powers of the government in check." Public cross-examination in a public trial helps to ensure that any effort by the prosecution to shape tainted evidence in secret or by improper methods faces public scrutiny.

The confrontation concept has ancient roots, particularly in English trials challenging civil-law-like trials by affidavit. During the American Revolutionary period, the right became associated with the struggle to enhance citizen power against the state, and its absence from the original, unamended constitution was one of the reasons cited by Anti-Federalists for their opposition to ratification of that document. Many historians thus see the direct purpose of the Clause as restraining government power.

The U.S. Supreme Court has apparently come to agree. Recently it replaced the *Ohio v. Roberts* test for admitting hearsay, which required proof of reliability by means of "particularized guarantees of trustworthiness" or a showing that a hearsay exception was "firmly rooted" in American history. This nearly toothless test was overruled in *Crawford v. United States*, which held that "testimonial" hearsay statements may not be used at trial unless the declarant is then unavailable and the accused had a prior opportunity for cross-examining the witness. The Court was vague about its definition of "testimonial," but it clearly requires government involvement in creating evidence or the witness's expectation of such involvement. Although commentators generally agree that

the *Crawford* test will do a better job than *Roberts* in restraining the state and is more consistent with the Clause's history, some authors worry that *Crawford* will make it harder for the criminal justice system to protect vulnerable populations. In particular, in child abuse, elder abuse, and battered women cases, victims are often afraid, and unwilling to testify. Other commentators worry instead that *Crawford* does not go far enough, the opportunity for "effective" cross-examination being meaningless unless supplemented by broad defense rights to pretrial discovery so that defense counsel has the informational tools with which to wage war with Leviathan.

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References and Further Reading

- Amar, Akhil Reed. *The Constitution and Criminal Procedure*. 125–131 1997.
- Berger, Margaret, *The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model*, Minn. L. Rev. 76 (1992): 557.
- Douglass, John G., *Beyond Admissibility: Real Confrontation, Virtual Cross-Examination, and the Right to Confront Hearsay*, Geo. Wash. L. Rev. 67 (1999): 191.
- Mosteller, Robert M., *Crawford v. Washington: Encouraging and Ensuring the Confrontation of Witnesses*, Richmond L. Rev. 39 (2005): 511.
- Raeder, Myrna, *Domestic Violence, Child Abuse, and Trustworthiness Exceptions After Crawford*, Crim. J. 20 (2005): 24.
- Symposium Issue, *Crawford and Hearsay: One Year Later*, Crim. J. 20 (2005): 1–80.
- Taslitz, Andrew E., *What Remains of Reliability and Free-standing Due Process After Crawford v. Washington*, Crim. J. 20 (2005): 39.

See also **Confrontation and Compulsory Process; Defense, Right to Present**

CONGRESSIONAL PROTECTION OF PRIVACY

Congress has often lagged behind other institutions in the protection of individual privacy. State laws often provide greater privacy protections than their federal counterparts, and courts and legal commentators have often presaged Congressional action. Despite its general laggardness, however, Congress' forays into privacy law are numerous and varied. When Congress does act, it often seems torn between competing values: individual freedom vs. national security, or individual privacy vs. free-market principles. As a result, Congressional protection of privacy often falls far short of what privacy advocates would urge and, in most cases, below that of even state legislative efforts.

The earliest federal efforts to protect privacy centered on the Census of the Population and the Census of Manufactures. The nineteenth and early twentieth centuries saw various Congressional attempts to assure citizens that any information gathered under the Censuses would be held in strictest confidence. Congress passed laws criminalizing the disclosure of any nonstatistical data gathered by the Censuses.

Other than the Census, however, Congress was slow to act to protect information privacy concerns. While state courts and legislators were busy developing various legal remedies to protect individual privacy, Congress was silent. It was not until various high-profile controversies, including Watergate and revelations of FBI profiling of civil rights activists, that Congress began to act. A number of important privacy-related hearings were held by Congress in the 1960s and, as a result, a consensus began to emerge that some federal laws were required to protect individual privacy and curb government excesses.

Although most privacy advocates urged Congress to pass a comprehensive privacy law, governing all data collection, compilation, and dissemination practice in the public and private sectors, Congress chose to pass narrower laws that generally left the free-market unregulated. The Privacy Act (1974) did apply to all information held by the federal government and included a number of important rights for citizens such as the right to be notified of information uses, the right to access government files, and the power to have errors corrected. Despite the Privacy Act's broad protections, it did not apply to the private sector.

Private sector regulation was limited to specific areas where the data in question were believed to be highly sensitive. As a result, Congress in the 1970s did pass a number of laws to protect credit information, Fair Credit Reporting Act (1970), financial privacy, Right to Financial Privacy Act (1978), and education records: Family Education Rights and Privacy Act (1974). A number of laws were also passed to limit the federal government's power to engage in surveillance of citizens, Wiretap Statute (1968, 1970), Foreign Intelligence Surveillance Act (1978), and to, later, to protect electronic and digital communications and information: Electronic Communications Privacy Act (1986), Computer Fraud and Abuse Act (1984). These acts, amended from time to time, reveal Congress' general intent to leave the private sector generally free from privacy regulation while protecting those areas deemed most dangerous and sensitive.

This piecemeal approach continued throughout the 1980s and to the present. Over the last few decades, Congress has passed laws to protect video rental information, Video Privacy Protection Act (1998); drivers' license information, Drivers Privacy Protection

Act (1996); data related to television and telephone habits, Cable Privacy Protection Act (1984), Telephone Consumer Protection Act (1991), strengthened financial privacy, Gramm-Leach-Bliley (1999); and passed strong medical data privacy legislation, *HIPAA* (1996).

The last decade has witnessed strong pressure on Congress to pass new laws protecting online privacy and, in the aftermath of 9/11, to pass laws that balance privacy and security interests. Passage of the USA PATRIOT Act (2001) reworked many prior privacy rules and granted the federal government increased antiterrorism powers to investigate and use data previously held confidential under various laws and regulations. As technologies and new national security threats emerge, Congress will be asked to review its current approaches. Numerous privacy advocates continue to call for more comprehensive privacy legislation that would regulate all private and public sector data collection. Although Congress has seldom been visionary in its privacy laws, there is no doubt that this is an issue that will increasingly form part of its agenda.

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References and Further Reading

- Burnham, David A. *The Rise of the Computer State*. New York: Random House, 1983.
- Cate, Fred H., et al., *Financial Privacy, Consumer Prosperity, and the Public Good*. Washington, DC: Brookings Institution Press, 2003.
- Hisson, Richard T. *Privacy in a Public Society: Human Rights in Conflict*. New York: Oxford University Press, 1987.
- Packard, Vance O. *The Naked Society*. New York: Pocket Books, 1964.
- Sylvester, Douglas J., and Sharon M. Lohr, *The Security of Our Secrets: A History Of Privacy And Confidentiality In Law And Statistical Practice*, Denver University Law Review, vol. 83, no. 1 (2005).
- Warren, Stephen A., and Louis Brandeis, *The Right to Privacy*, Harvard Law Review, vol. 4, no. 1 (1890): 193-220.
- Westin, Alan F. *Privacy and Freedom*. New York: Atheneum, 1967.

Cases and Statutes Cited

- Cable Privacy Protection Act of Oct. 30, 1984, 98 Stat. 2794
- Computer Fraud and Abuse Act of Oct. 12, 1984, Pub.L. 98-473, 98 Stat. 2190
- Fair and Accurate Credit Transaction Act of Dec. 4, 2003, 111 Stat. 1952
- Fair Credit Reporting Act of Oct. 26, 1970, c. 41, 84 Stat. 1127
- Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783
- Health Insurance Portability and Accountability Act of Aug. 21, 1996 ("HIPAA"), 110 Stat. 2023

CONGRESSIONAL PROTECTION OF PRIVACY

Right to Financial Privacy Act of Nov. 10, 1978, P.L. No. 95-630, 92 Stat. 3697
Telephone Consumer Protection Act of 1991, 105 Stat. 2394
The Driver's Privacy Protection Act of Sept. 13, 1994, 108 Stat. 2099
The Electronic Communications Privacy Act of 1986 ("ECPA"), 100 Stat. 1848
The Family Educational Rights and Privacy Act, Pub. L. No. 93-380, 88 Stat. 571
The Financial Modernization Act of Nov. 12, 1999 ("Gramm-Leach-Bliley Act"), 113 Stat. 1445
The Privacy Act of 1974, Pub. L. No. 93-579, 88 Stat. 1896
Title III of the Omnibus Crime Control and Safe Streets Act of 1968 ("Wiretap Statute"), 82 Stat. 211
Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism ("USA PATRIOT Act"), Act of Oct. 26, 2001, PL 107-56, 115 Stat. 272
Video Privacy Protection Act, Act of Oct. 21, 1998, P.L. No. 100-618, 102 Stat. 3195

See also **Anonymity in Online Communications; Cable Television Regulation; Electronic Surveillance, Technological Monitoring, and Dog Sniffs; Fair Credit Reporting Act, 84 Stat. 1127 (1970); Freedom of Information Act (1966); National Security; 9/11 and the War on Terrorism; Nixon, Richard Milhous; Omnibus Crime Control and the Safe Streets Act of 1968 (92 Stat. 3795); Privacy; Privacy, Theories of; State Constitution, Privacy Provisions; Terrorism and Civil Liberties; Video Privacy Protection Act (1980); Wiretapping Laws**

CONNALLY v. GEORGIA, 429 U.S. 245 (1977)

After a search of John Connally's house, marijuana was seized based on a search warrant issued by a local justice of the peace. Connally was then indicted, tried, and convicted in the Superior Court of Georgia in Walker County for possession of marijuana in violation of the Georgia Controlled Substances Act.

Connally appealed his conviction to the Supreme Court of Georgia, and later to the U.S. Supreme Court, on the basis that the justice of the peace who issued the warrant was not a neutral party because he had an interest in issuing the warrant. Georgia Code allowed a justice of the peace to charge \$5 for issuing a warrant. If no warrant was issued, they could receive no fee. The fee was given to the county, which then paid the fee to the issuing justice.

The Supreme Court held that the Georgia statute was not valid because of its linkage of receiving compensation for warrants granted. The decision relied on the precedent set in *Tumey v. Ohio*, which held that an officer of the court could not issue a warrant when he or she had direct gain in the manner. The justice of the peace stood to benefit financially by issuing a warrant, which, therefore, might cloud his judgment when

deciding whether to issue or deny the warrant. The issuance of this search warrant was found to be in violation of the protections provided by the Fourth and Fourteenth Amendments of the U.S. Constitution.

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References and Further Reading

LaFave, Wayne R. *Search and Seizure: A Treatise on the Fourth Amendment*, 4th ed. St. Paul, Minn.: West, 2004.
Maltz, Earl. *The Fourteenth Amendment and the Law of the Constitution*. Durham, NC: Carolina Academic Press, 2003.
Wilson, Bradford P. *Enforcing the Fourth Amendment: A Jurisprudential History*. New York: Garland Press, 1986.

Cases and Statutes Cited

Tumey v. Ohio, 273 U.S. 510 (1927)

See also **Due Process; Impartial Decisionmaker**

CONNOR, EUGENE "BULL" (1897–1973)

Eugene "Bull" Connor, born in Selma, Alabama, in 1897 was commissioner of public safety in Birmingham during civil rights crusades of the 1950s and 1960s. His confrontation with Martin Luther King, Jr., in 1963 brought him notoriety as the ugly face of southern racism.

In his six terms as chief law officer in Birmingham between 1937 and 1953 and 1957 and 1963, Connor's reputation and political support thrived on his staunch enforcement of racial segregation. His leadership of the public safety department was based on racism and cronyism. After a sexual scandal forced him out of office in 1953, he fought his way back to power four years later with appeals to white fears of racial integration. His strong support of segregation, however, set him on a collision course with the increasingly assertive civil rights movement.

The nation had its first glimpse of Bull Connor's tactics in the spring of 1961, when Freedom Riders set off on an interstate bus journey through the South to publicize the persistence of segregated bus terminals. After violent collisions with whites in Rock Hill, South Carolina, and Anniston, Alabama, riders were greeted at the Birmingham bus station by Ku Klux Klan thugs who beat the protesters as they exited from the bus. The absence of any police protection for the riders occurred as a result of an arrangement between Connor and the Klan to allow Klansmen fifteen minutes to work on the passengers.

Two years later, in May 1963, Connor's reputation as an ugly, stubborn racist was reinforced when the commissioner was confronted by Reverend Martin

Luther King, Jr.'s civil rights crusade. Birmingham, which King had characterized as the most segregated city in the South, was riven by racial tensions. White businessmen had been economically damaged by months of black boycotts of the segregated downtown stores that had only white restrooms. Connor's vigorous enforcement of the city's segregation ordinances had eventually driven many of Birmingham's business leaders to introduce a city government reform plan that would eliminate Connor's office. Meanwhile, for months King and the Southern Christian Leadership Conference had been staging demonstrations against the city's segregated facilities. The civil rights marches, however, by May, had been attracting diminishing participation, even after King himself went to jail for defying an injunction not to march. King decided to boost the flagging support for his crusade by sending hundreds of children out into the streets day after day. After mass arrests had filled city jails, Connor ordered the use of high-pressure fire hoses and police dogs to turn back the demonstrators. The televised brutal confrontation between defenseless black children, snarling dogs, and apparently heartless police brought the obscenity of southern racism directly into the living rooms of Northern whites. King's strategy did, in fact, energize Northern liberals, as well as the Kennedy administration, leading to the passage of the Civil Rights Act of 1964 that would finally outlaw segregation in public facilities. In Birmingham, the resulting economic consequences of racial disorder propelled white business owners in the city to more actively negotiate with civil rights leaders over accommodating black demands. Connor, himself, was forced out of office finally at the end of the May 1963 as the result of the structural reform of Birmingham's city government. He ended his public career, safely shelved by the white business community, as president of the Alabama Public Services Commission until his retirement in 1972.

Bull Connor became the symbol of the intransigent Southern racism of the civil rights era. Ironically, however, it was Connor's obstinate defense of segregation in Birmingham that ultimately was the catalyst for its demise. Speaking about his effect on the administration's civil rights bill of 1963, President John F. Kennedy observed that Connor had done as much for civil rights as had Abraham Lincoln.

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References and Further Reading

Branch, Taylor. *Parting of the Waters: American in the King Years: 1954-1963*. New York: Simon and Schuster, 1988.
Nunnally, William A. *Bull Connor*. Tuscaloosa, AL: University of Alabama Press, 1991.

CONSCIENTIOUS OBJECTION, THE FREE EXERCISE CLAUSE

The first amendment to the U.S. Constitution provides "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." The restraint on prohibitions of the free exercise of religion has significant implications for conscientious objectors to government regulation including military conscription.

Conscientious objectors are those who are unable to comply with a regulation because of a sincerely held conviction. The objector may seek to be exempt from an affirmative regulation requiring behavior, such as a military draft, or a prohibitory regulation preventing certain behavior such as the wearing of religious garb.

The free exercise clause protects some religiously motivated objections, although other law may accommodate additional types of objections. In military conscription cases, for example, current law recognizes objections based on religious belief, as well as on dictates of conscience equivalent to a sincerely held religious belief. Although a statute regulates the exemption of conscientious objectors from military conscription, the free exercise clause apparently motivated the legislature to enact the series of statutes, and it continues to guide the Court in its interpretation of the statute. The statute, 50 USC 456(j), states that "Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to war in any form." It continues to distinguish "religious training and belief" from a "merely personal moral code." This statute expanded earlier exemption statutes that required membership in religious institutions. The current statute allows those unaffiliated with a religious institution to claim conscientious objector status. It recognizes objection to all wars but not to specific wars. This provision of the statute has been upheld but not extended by the U.S. Supreme Court. See *Gillette v United States*, 401 U.S. 437, 1971.

Conscientious objector cases often turn on an objection to regulations supporting war, but they may also be about the right to an exemption from regulation to permit an exercise of religion such as the wearing of religious clothing, the ritual use of regulated drugs, marriage practices such as polygamy, or the taking of oaths. The clause also has implications

for a wide range of military-related issues from forced conscription to mandatory participation in other programs such as high school ROTC programs and even unemployment law.

Early cases involving the free exercise clause distinguished between belief and conduct, so that while belief was unfettered, conduct could be regulated. See *Reynolds v. U.S.*, 98 U.S. 145 (1879). A long line of Mormon and Seventh Day Adventist cases expanded and contracted the scope of the protection before *Sherbert v. Verner* 374 US 398 (1963) adopted the requirement of a “compelling state interest” to justify burdening the free exercise of religion. *Gillette* (401 U.S. 437) used this compelling interest test to deny CO status to a draft registrant who objected to the Vietnam War but not to wars of national defense. Justice Douglas dissented that “conscience and belief were the main ingredients of First Amendment rights of free speech and religion” and “that the statute as written was constitutionally infirm under the First Amendment.” Douglas’s view that “if exemption was afforded to persons holding religious or conscientious scruples against all wars, so must it be afforded to those with religious or conscientious objection to participation in particular wars.” The majority rejected this argument, deciding that the government interest in a fair exemption system outweighed the right of conscience.

Conscientious objection cases require statutory construction of 50 USC 456 to measure it against Constitutional requirements of the establishment, free exercise, and even due process clauses. Exemptions for conscientious objectors have been used since early colonial days. In *U.S. v. Macintosh*, 283 U.S. 605, 633 (1931), Chief Justice Hughes noted that such exemptions are “indicative of the actual operation of the principles of the Constitution.” Modern cases extended the religious belief requirement to beliefs that fill the same function as religious beliefs, although the Justices often split on the rationale for such an exemption. In *United States v. Seeger*, 380 U.S. 163 (1965), the Court extended the statutory exemption to a nontheist whose conscience did not permit participation in war but who did not identify his belief as religious in nature (the 1948 statute, Provision 6(j) of the Universal Military Training and Service Act of 1948, required that the objection be based on a belief in a Supreme Being). The Court held that a belief occupying the place of religion would suffice. The *Seeger* analysis centered on the Establishment Clause’s prohibition on establishing a particular religion, but Justice Douglas noted in a concurrence that the free exercise and equal protection clauses prohibit preferring one religion over another.

Welsh v. United States, 398 U.S. 333 (1970), followed *Seeger*, and the plurality opinion revealed the complexity of the Court’s analysis of exemption cases. *Welsh* reversed the conviction of Elliott Welsh II who had a deeply held conviction to war as unethical and immoral, although he did not identify this as religious nor profess belief in a Supreme Being. The majority evaluated the intensity and sincerity of the belief. Justice Harlan’s concurrence rejected the majority’s reliance on intensity as a valid test of compliance with the statute. He noted that the statute violated the establishment clause and that the language of the statute “cannot be construed . . . to exempt from military service all individuals who in good faith oppose all war . . .” (See *Welsh* at 348–354). Rather, the exemption should be reconciled with the establishment clause by specifically including “those like the petitioner who have been unconstitutionally excluded from its coverage” (*Welsh* at 367).

The *Welsh* dissent, however, noted the close relationship of the establishment and free exercise clauses. While Congress intended to exclude purely moral objections, “Congress may have granted the exemption because otherwise religious objectors would be forced into conduct that their religions forbid and because in the view of Congress to deny the exemption would violate the free exercise clause or at least raise grave problems in this respect” (*Welsh* at 369).

The free exercise clause has been applied to conscientious objection to a spectrum of military involvement. From cases requiring saluting the flag, the training to or bearing of arms, taking of an oath to bear arms, or a range of other activities linked to military service and goals, government regulations have been challenged by those who argue that their religious beliefs require accommodation. These cases evidence the same shift as in free exercise cases generally from the *Reynolds* standard to the *Sherbert* “compelling interest” test. See, for example, *Gillette v. U.S.*, 401 US 437 (1971), upholding the “substantial” government interest in conscription over the individual’s free exercise of religion; and *Spence v. Bailey*, 465 F.2d 797 (6th cir. 1972), stating that religious objections to mandatory participation in a high school ROTC program would not unduly burden officials. In cases involving military regulation of noncivilians, review has generally been more deferential than for regulation of civilians. See, for example, *Goldman v. Weinberger*, 475 US 503 (1986) allowing the military to prohibit wearing of a yarmulke, although Congress later legislated to allow religious apparel while in uniform (Pub. L. 100-180, Sec 508(a)(2), 101 Stat. 1086 (1987); 10 USC Sec 774.

Modern cases involving religious objection to military conscription continue to follow the requirements summarized in *Clay v. United States*, 403 U.S. 698, 705(1971) for the implementation of the Military Selective Service Act Section 6(j): that the objection be to war in any form, that the objection be based on religious training or belief or the equivalent, and that the belief be sincere. Clay involved Cassius Clay, aka Muhammed Ali, who objected to war not declared by Allah. Because the Justice Department did not clearly state which of the three tests formed the basis for its decision, the Supreme Court reversed the conviction without reaching the selective opposition to war issue.

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CONSPIRACY

The common law definition of conspiracy is an agreement between two or more individuals to commit an unlawful act, such as murder, or to commit a lawful act by unlawful means, such as artificially increasing the price of goods through collusion. In jurisdictions that follow the common-law definition, the term “unlawful” includes, but is not limited to, acts and means that are criminal; acts and means that are “prejudicial to the public, oppressive of individuals, or done for a malicious purpose” also suffice. Some jurisdictions, however, statutorily limit conspiracy to agreements to commit a criminal offense.

Conspiracy has been a crime since the reign of Edward I in the late thirteenth century. The early common law defined conspiracy narrowly; the crime encompassed only conspiracies to obstruct justice, normally through false accusation of criminal conduct, and required the wrongly accused individual be indicted and then acquitted of the crime. The first major expansion of conspiracy came in the 1611 decision *Poulterer’s Case*, where the Court of Star Chamber held that a conspiracy was punishable even if it was unsuccessful. Not surprisingly, the decision led to a dramatic increase in conspiracy prosecutions, and by the end of the seventeenth century conspiring to commit any criminal offense was punishable. Finally, by the mid-nineteenth century, conspiracy had adopted its current common-law form, punishing conspiracies to commit lawful acts by legal means, as well as conspiracies to commit unlawful acts.

As with all crimes, conspiracy is defined by the combination of a certain act and a certain mental state. The act requirement of conspiracy is unique, in that the requirement is satisfied by the defendant’s decision to enter into the conspiracy. The testimony

of one of the conspirators is the ideal method for proving the agreement but is not required given the secretive nature of conspiracies. Indeed, the prosecution does not have to show that the conspirators actually exchanged words explicitly communicating agreement. A “tacit understanding” is sufficient, and that understanding can be inferred circumstantially from the coordinated actions of the conspirators themselves.

The mental requirement is more complex, because the crime of conspiracy actually requires two mental states: an intent to enter into the conspiratorial agreement and an intent to commit the unlawful act that is the object of the agreement. The intent to enter into the agreement is rarely contested, because the prosecution will not charge a defendant with conspiracy without evidence of the agreement. Whether the defendant intended to commit the unlawful act is thus the critical issue in most conspiracy prosecutions.

At common law, a conspiracy was punishable even if the conspirators had done nothing in furtherance of the conspiracy beyond the agreement itself. In the absence of a statute providing otherwise, this is still the rule. The federal conspiracy statute and many state conspiracy statutes, however, require proof that one of the conspirators committed an “overt act” in furtherance of the conspiracy. The purpose of the overt-act requirement is to ensure that the conspiracy was underway, not “a project still resting solely in the minds of the conspirators.” Virtually any act will satisfy the overt-act requirement, legal as well as illegal.

A conspiracy and its unlawful object, where criminal, are separate and distinct offenses. As a result, a defendant can be convicted of both conspiracy and the underlying crime and can be convicted of conspiracy even when the underlying crime is not prosecuted or results in an acquittal. When convicted of both, the sentences can be added on to each other, and there is no requirement that the sentence for the conspiracy be shorter than the sentence for the underlying crime.

There are two basic rationales for the crime of conspiracy. First, by criminalizing the conspiratorial agreement itself, conspiracy permits law enforcement to authorities to intervene against criminally minded individuals before they carry out the more harmful underlying crime. Second, conspiracy as a freestanding crime protects the public from the heightened dangers of concerted criminal activity. A criminal plan carried out by a group is far more likely to succeed than one carried out by an individual and is capable of causing far greater harm. Moreover, the existence of

a conspiratorial group always has the potential to branch out into new and different kinds of crimes.

The crime of conspiracy has always been controversial. To begin with, the crime gives the prosecution substantive and procedural advantages unparalleled elsewhere in the criminal law—advantages that led Judge Learned Hand to famously describe conspiracy as “the darling of the modern prosecutor’s nursery.” One such advantage is simply the crime’s inherent vagueness, both in terms of its applicability to non-criminal objectives and its definition of the required mental state. Such vagueness makes a conspiracy charge particularly difficult to defend.

A critical procedural advantage for the prosecution is what’s known as the “co-conspirator hearsay exception,” which permits any incriminating statement made by a conspirator during and in furtherance of the conspiracy to be used against all of his co-conspirators. In fact, a conspirator’s incriminating statement can even be used against a co-conspirator who joined the conspiracy *after* the statement was made.

The most problematic advantage, however, is the prosecution’s ability to try all of the members of a conspiracy jointly. Such joint trials dramatically increase the possibility of guilt by association, where an innocent defendant is convicted either because jurors are unable to keep the evidence against the different defendants separate or simply because they assume that if one defendant is guilty, all of them must be.

These advantages help explain why prosecutors have often misused the crime of conspiracy for political purposes. Efforts to organize labor unions were consistently prosecuted as criminal conspiracies in the nineteenth century. And conspiracy prosecutions were effective tools for silencing the protected speech of peace and anti-war activists during World War I and of communists and alleged communists during the McCarthy Era.

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References and Further Reading

LaFave, Wayne R. *Substantive Criminal Law* 2. Ch. 12. St. Paul: West Publishing, 1986.
Sayre, Francis B., *Criminal Conspiracy*, Harvard Law Review 35 (1922): 2:393–427.

Cases and Statutes Cited

Harrison v. United States, 7 F.2d 259 (2d Cir. 1925)
Poulterer’s Case, 77 Eng. Rep. 813 (1611)

See also *Dennis v. United States*, 341 U.S. 494 (1951);
Schenck v. United States, 249 U.S. 47 (1919)

CONSTITUTION OF 1787

The U.S. Constitution of 1787 did not contain a bill of rights, because the overwhelming majority of the delegates did not believe that one was necessary. They were creating a government of limited powers and did not think that these powers included the right to generally regulate civil liberties. Thus, the Framers did not include any general protections for freedom of religion, speech, the press, or assembly, because they quite frankly did not believe Congress could ever legislate on such matters. They did anticipate a federal criminal law, but not one at the convention believed it was necessary to guard against warrantless searches or prosecution without grand jury indictments because the Framers simply could not imagine that any representative government could act in such a manner. In opposing the addition of a bill of rights, Roger Sherman of Connecticut explained that the national legislature could “be safely trusted” to protect liberty. [2 Farrand 588–589] Similarly, he argued that no special protection freedom of the press was necessary because “the power of Congress does not extend to the Press.” [2 Farrand 617–618] A majority of the convention agreed with Sherman both times. Sherman may have been wrong about this, but it’s position was not taken out of hostility to civil liberties. The Framers were naïve in this regard, but not tyrannical.

While generally not protecting civil liberties, the Constitution contains a number of clauses that are protective of civil liberties. There are also provisions that could threaten civil liberties, especially in the absence of a bill of rights.

Protections of Civil Liberties in the Constitution

While not generally protecting freedom of speech, the “Speech and Debate Clause” of Article I, Sec. 6, Par. 1, does protect the freedom of members of the House and Senate to speak freely and openly when debating issues in Congress. This was a critical provision in the development of open government and representative government. At the same time, however, this clause has allowed demagogues, like Senator Joseph McCarthy, to destroy the reputations of innocent Americans without fear or interference from the courts.

Article I, Sec. 8 provided for the granting of copyrights to authors. This is generally seen as an important stimulus for the growth of literature and publishing in America. The protection of copyright is seen as essential to a free press to the extent that

authors and publishers need economic and legal protection for their work.

Article I, Sec. 9, Par. 2 allows for the suspension of habeas corpus only under very limited circumstances: when there has been an invasion or rebellion *and* the public safety requires it. This clause prevents arbitrary suspensions. Indeed, the only sustained suspension took place during and after the Civil War, when there were true rebellions in the nation. During World War II habeas was suspended in Hawaii, which was a war zone. The Japanese Internment was technically not a suspension of habeas, although it unfortunately had a similar affect for Japanese Americans. The strict requirement for habeas suspension contrasts with the easier methods by act of Parliament in Britain.

Tied to the habeas clause is the prohibition on ex post facto laws and bills of attainder. These clauses were important additions to the Constitution that limited the ability of the government to punish people for their political acts and viewpoints. Article I, Sec. 10, Par. 1 also prohibited the state from passing such laws. The Constitution did not, however, prohibit the states from suspending habeas corpus in situations other than rebellion or invasion. This meant that if martial law had to be declared in the event of a natural or man-made disaster, it would be done at the local or state level.

Two clauses dealing with religion are perhaps the most important protections for civil liberties in the original Constitution. Article II, Sec. 1, Par. 7 and Art. VI, Sec. 1, Par. 3 both provide that in taking the oath of office state and federal officials “shall be bound by Oath or Affirmation” to support the Constitution. By adding the term “or Affirmation,” the framers opened office holding to Quakers and members of other pietistic faiths who refused to take “oaths.” In addition, by not including an oath to “God” or an oath on a Bible, the Framers placed no religious impediments to officeholders such as existed in England, where members of Parliament had to swear an oath on the Protestant, King James Bible. More importantly, the same clause of Art. VI also declared that “no religious Test shall ever be required as Qualification to any Office or public Trust under the United States.” At the time eleven of the thirteen states had some form of religious test for office holding, as did every nation in Europe. The United States thus became the first nation in the world to allow people of any religion, or no religion at all, to hold office. Significantly, Jews had already held some offices in the new nation, including one who was an officer on George Washington’s personal staff during the Revolution. The Constitution reaffirmed that

in this nation anyone, of any religion, could hold office.

The other major protections for civil liberties were in Article III of the Constitution. Section 2, Par. 2 of that Article provided that all prosecutions under federal law would be by jury, and the trials would have to take place in the state where the alleged crime was committed. This would prevent the government from moving defendants far from their homes and witnesses, as England had done before the Revolution. Section 3, Paragraph 1 of this Article set out a high standard for treason: that it could consist only of “levying War” against the United States or “adhering to their enemies, giving them Aid and Comfort,” and that no conviction could take place without two witnesses to the same “overt act” or a confession in “open court.” England allowed prosecutions for constructive treason—that is for statements, or even cartoons or drawings—that could be construed as treasonous. No overt act was necessary for the crime, and two witnesses to the same act were not necessary for conviction. Paragraph three of this section of the Constitution also prohibited the government from punishing the descendants or heirs of those convicted of treason, which had been done in England.

Threats to Civil Liberties

Although creating a government with limited powers, the Constitution was open-ended on many issues. Article I, Sec. 8 allowed Congress to regulate interstate trade. Even if Congress could not abridge freedom of the press, it might prevent political literature from being sent across state lines if the content was deemed unacceptable to a political majority. This would also be accomplished by denying the use of the mail to certain categories of publications. Starting the 1870s with the Comstock Act, Congress prohibited “obscene materials” from the mail. For more than fifty years this included any material that women could have used to learn about birth control. Authorities prosecuted and jailed the founder of family planning in America, Margaret Sanger, under this statute. During World War I, the post office prohibited papers critical of war policies from being circulated through the mail. In the 1960s, the Congress tried to use the commerce clause to prevent antiwar activists from crossing state lines, although this law, known as the H. Rap Brown law (after a black activist), was struck down as violating the First Amendment.

The power to regulate naturalization (Art. I, Sec. 8, Part. 4) has also been used to threaten civil liberties. Aliens have been deported, or threatened with deportation, for exercising free speech rights. Also, immigration laws, which are tied to naturalization, have been used to discriminate against people on the basis of political ideology and ethnicity. Sometimes this has been used to protect the nation from those who might harm the country (fascists, communists, terrorists), but it has also been used merely to weed those with unpopular ideas, such as pacifists or advocates of polygamy, that did not pose any security threat to the nation.

The fugitive slave clause (Art. IV, Sec. 2, Par. 3) provided that runaway slaves would be “delivered up” on the claim of the owner, without any due process requirements. This would lead to kidnappings and the removal of people who had claims to freedom. At the time this clause was barely debated, but it had great potential, which was played out in the first six decades of the nineteenth century to deny fundamental rights to African Americans.

Provisions That Both Protect and Threaten Civil Liberties

A number of provisions can both threaten or protect civil liberties, depending how they are implemented. For example Article I, Sec. 8, Par. 15 allows for the use of the militia to suppress insurrections, whereas Article IV, Sec. 4 allows the use of the army to protect the states from rebellions and insurrections. These clauses have been used to suppress those who would violate the civil liberties of others—such as the use of the army to suppress the Ku Klux Klan after the Civil War or the use of the Army and the state national guards (the militia) to help integrate public schools and state universities in the South in the 1950s and 1960s. But, this clause was also used to suppress labor strikes, where workers were seeking high wages or better working conditions, but not threatening violence.

Article I, Sec. 9 prevented Congress from ending the African slave trade for twenty years. On the other hand, when the twenty years were up, Congress was able to end the trade. To the extent that enslavement is the most outrageous denial of civil liberty, this clause can be seen as cutting in both directions on civil liberties.

The most significant clauses that could have threatened, or protected, civil liberties were tied to those places—such as the territories and the national capital—where Congress had the exclusive right to

legislate. The Framers argued that a Bill of Rights was unnecessary for the Constitution because the states, not Congress, would pass most general laws. The regulation of the press, for example, would be left to state law under the constitution. However, in the territories and the planned federal district—what became Washington, D.C.—the Congress would function as a state legislature. Thus, without a bill of rights the Congress would be able to deny or protect fundamental liberties without any constitutional guidance or limitation.

Conclusion

In the end, the Constitution did not greatly threaten civil liberties, because it created a government of limited powers. However, the potential for great harm to fundamental liberties could be found throughout the Constitution. With no bill of rights the Congress might find it necessary to suppress free speech or freedom of the press in times of war. The government might find it “necessary and proper” to favor one faith or one general religious ideology to accomplish some policy goal. The government might decide that a treaty required the suppression of some liberty at home to achieve a foreign policy goal. The Framers did not see these potential dangers—or did not believe them realistic, and thus did not think the Constitution needed a bill of rights. The First Congress, using the power to amend the Constitution, would remedy the lack of a bill of rights.

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References and Further Reading

- Borden, Morton. *Jews, Turks, and Infidels*. Chapel Hill: University of North Carolina Press, 1984.
- Farrand, Max, ed. *The Records of the Federal Convention of 1787*. 4 vols. New Haven: Yale University Press, 1966.
- Finkelman, Paul, *James Madison and the Bill of Rights: A Reluctant Paternity*, Supreme Court Review 1990 (1991): 301–347.
- Levy, Leonard W. *Origins of the Bill of Rights*. New Haven: Yale University Press, 1999.
- Urofsky, Melvin I., and Paul Finkelman. *A March of Liberty: A Constitutional History of the United States*. 2 vols. New York: Oxford University Press, 2002.

CONSTITUTION OVERSEAS

The Constitution for the United States contains four provisions that can provide some basis for extending the jurisdiction of the Constitution beyond territorial borders:

1. The power of Congress to declare war and issue letters of marque and reprisal.
2. The power of Congress to punish as crimes 'piracy and felonies on the high seas' and "offenses against the laws of nations.'
3. The power of Congress to fund and regulate military forces everywhere.
4. The commander-in-chief power of the President to command those forces.

With those exceptions, the jurisdiction of the Constitution and statutes and official acts under its authority were originally considered limited to the territory of the nation. This included the territory of states, nonstate territories, and was extended, by the law of nations, to coastal waters, naval vessels flying the U.S. flag, and the grounds of U.S. diplomatic facilities abroad.

By international status of forces agreements, such jurisdiction has been partially extended to the grounds of U.S. military bases abroad. It has long been accepted that U.S. law governs U.S. military personnel anywhere they operate, and by extension, certain civilian contractors under the terms of their contracts.

Although it has been generally accepted that U.S. officials have no authority to officially act on foreign citizens on the territories of their own nations, there has been a movement, beginning in the twentieth century, to extend extraterritorial jurisdiction to civilian U.S. citizens abroad, to foreign nationals charged with "crimes against humanity," and to "enemy combatants" against U.S. forces of any nationality.

The first criminal prosecutions for "crimes against humanity" were in the Nuremberg Trials of German nationals after World War II. The alleged authority for such criminal prosecutions was the unconditional surrender of Germany, which was deemed to have conferred plenary power to the victorious Allies to exercise sovereignty over German territory and its citizens. However, the U.S. Constitution delegates no such power to its officials in such circumstances, even if the surrender could be considered some kind of "treaty," which it was not, since it was not presented to the Senate for ratification as a treaty. The President as commander-in-chief has authority to command U.S. military forces but no power to command civilians of foreign nations no longer in a state of war against us.

In *Reid v. Covert*, 354 U.S. 1 (1957) the U.S. Supreme Court reversed a conviction of a civilian resident on a U.S. military abroad and issued a clear statement of its findings:

1. When the United States acts against its citizens abroad, it can do so only in accordance with all the

limitations imposed by the Constitution, including Art. III, 2, and the Fifth and Sixth Amendments

2. Insofar as Art. 2 (11) of the Uniform Code of Military Justice provides for the military trial of civilian dependents accompanying the armed forces in foreign countries, it cannot be sustained as legislation which is 'necessary and proper' to carry out obligations of the United States under international agreements made with those countries; since no agreement with a foreign nation can confer on Congress or any other branch of the Government power which is free from the restraints of the Constitution
3. The power of Congress under Art. I, 8, cl. 14, of the Constitution, "To make Rules for the Government and Regulation of the land and naval Forces," taken in conjunction with the Necessary and Proper Clause, does not extend to civilians—even though they may be dependents living with servicemen on a military base
4. Under our Constitution, courts of law alone are given power to try civilians for their offenses against the United States

On the other hand, in *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), the U.S. Supreme court sustained a conviction of a foreign national convicted on the basis of evidence obtained in Mexico without a search warrant, finding that:

The Fourth Amendment does not apply to the search and seizure by United States agents of property owned by a nonresident alien and located in a foreign country.

Extension of criminal jurisdiction to civilian contractors associated with the Department of Defense was legislated in the 2000 Military Extraterritorial Jurisdiction Act. Congress knew that it is nearly impossible to charge civilians under the Uniform Code of Military Justice, even if they work alongside active-duty service members. However, since the Constitution only extends to military personnel, this raises a question of whether the contracts of such civilians make them members of the armed forces subject to the jurisdiction of either U.S. military or civil courts. If not, the only authority would seem to be to prosecute them as "pirates" for warlike acts committed without state authority.

U.S. courts have also thus far sustained assertions of authority to tax U.S. citizens on their earnings from sources not only within U.S. territory, but from foreign sources, and not only while residing on U.S. territory, but while domiciled abroad. Since the U.S. Constitution delegates coercive authority only over "persons" and not "citizens," this would constitute either the extension of U.S. legal jurisdiction to personal jurisdiction over U.S. citizens everywhere, even if they are not contractually part of U.S. military forces, or a conflict with equal protection, which

requires equal treatment of persons, not just citizens. U.S. statute does extend voting rights to expatriates in congressional and presidential elections (although the U.S. Constitution delegates power to Congress only to regulate congressional elections), which would avoid violating the principle of “no taxation without representation” but presents an issue of “jurisdiction creep” that has not been adequately tested.

The military actions in Afghanistan and Iraq, and detentions of persons suspected of “terrorism,” has raised several constitutional issues. Many of them center around the availability of due process protection for prisoners held at the Guantanamo Bay base on the island of Cuba. This base is held by the United States under the terms of a simple lease that does not contain a cession of legal jurisdiction over the land leased to the United States. However, such jurisdiction is also not exercised by Cuba. This has created a kind of legal “no-man’s-land,” where U.S. officials have sought to hold detainees as a way to avoid the supervision of any but military tribunals.

On Nov. 8, 2004, Federal District Judge James Robertson ruled that the Bush administration had not followed a lawful procedure in declaring Salim Ahmed Hamdan, held at Guantanamo, an “enemy combatant” who was not entitled to protections and privileges under the Geneva Convention. The “combatant status review tribunals”—used by the Pentagon to decide whether to hold detainees—are not a “competent” court to make such a determination, Robertson said. And the military commission process, which prosecutes detainees using secret evidence and unnamed witnesses, “could not be countenanced in any American court,” the judge ruled.

The U.S. Supreme Court held in *Rasul v. Bush*, 542 U.S. 466 (2004), that non-U.S. citizen prisoners at Guantanamo may file habeas corpus petitions challenging their imprisonment, as well as claims under federal law concerning the conditions of their confinement. Legislation was introduced in Congress to remove such jurisdiction from the federal courts, but the constitutionality of such legislation is itself in doubt.

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References and Further Reading

- de Vattel, Emmerich. *The Law of Nations*. (1758) Joseph Chitty, ed. Philadelphia: Johnson, 1883. <http://www.constitution.org/vattel/vattel.htm>.
 Du Ponceau, Peter Stephen. *A Dissertation on the Nature and Extent of the Jurisdiction of the Courts of the United*

- States*. Philadelphia: Small, 1824. <http://www.constitution.org/cmt/psdp/juris.htm>.
 Grotius, Hugo. *The Law of War and Peace*. (1625). <http://www.constitution.org/gro/djbp.htm>.
 Stimson, Edward S. *Conflict of Criminal Laws*. Chicago: Foundation Press, 1936. http://www.constitution.org/cmt/stimson/con_crim.htm.

CONSTITUTIONAL AMENDMENT PERMITTING SCHOOL PRAYER

The appropriate role of religion in public schooling has long been controversial. At the time of the nation’s founding, few people believed that education could be divorced from religion; religious instruction was viewed as being indispensable for the inculcation of virtue and morality in children. The founders of the nineteenth century common school movement believed, however, that important religious values could be isolated from specific dogmas and tenets that separated denominations and could be taught in a manner acceptable to children of all faiths. The leaders of the common schools—Horace Mann being the most notable figure—were all Protestants, so the “nonsectarian” instruction—teacher-led prayer and readings from the King James version of the Bible—had a distinctly Protestant tone. Early opposition to school prayer and Bible reading came from Catholics, Jews, and a handful of freethinkers, but their attacks on the religious exercises led only to intransigence among education leaders and occasional violence between Protestant nativists and Catholic immigrants. Over time, particularly in cities with large immigrant populations, public schools began to moderate or even dispense with organized religious exercises.

The first attempt to preserve the practices of prayer and Bible reading through a constitutional amendment occurred in the ill-fated Blaine Amendment of 1876. Although the primary focus of the Blaine Amendment was to prevent the payment of public funds to parochial schools, the proposal also contained a provision authorizing school boards to retain school prayer and Bible readings. That latter provision was included in reaction to an 1872 decision by the Ohio Supreme Court affirming the Cincinnati school board’s ban on school prayer and Bible reading (*Minor v. Board of Education*). In 1888, again in response to concerns of Protestant leaders that public schools were dispensing with the religious exercises, Congress held hearings on a constitutional amendment proposed by Senator Henry W. Blair that would have prohibited the removal of prayer and Bible reading. The proposal died in committee.

During the late-nineteenth and early-twentieth centuries, a handful of state courts struck down devotional school prayer and Bible reading as violative of state constitutional provisions (Wisconsin 1890, Nebraska 1903, Illinois 1910); however, the majority of challenges to such practices failed, with state courts finding the practices constitutional.

The late-nineteenth and early-twentieth century challenges to prayer and Bible reading were based on state constitutional provisions, coming before the incorporation of the First Amendment's Establishment Clause in 1947. In 1948, the U.S. Supreme Court struck down a practice of allowing school children to be released from class for religious instruction by non-school personnel (*McCollum v. Board of Education*). Four years later, however, the high court stepped back from its controversial decision and upheld "release time" for religious instruction, provided it occurred off school premises (*Zorach v. Clauson*).

Based on the long-standing practice of religious exercises in public schools, therefore, the Supreme Court's 1962 and 1963 decisions holding prayer and Bible reading to be a violation of the Establishment Clause were extremely controversial. Several members of Congress, led by Representative Frank Becker (R-NY), proposed constitutional amendments to preserve school prayer and Bible reading. Congress held hearings on the "Becker Amendment" in 1964, and initially the measure seemed destined for passage. Only a highly organized effort by mainstream Protestant and Jewish groups, led by the National Council of Churches, defeated the proposed amendment in committee. Subsequent proposed amendments by Senator Everett Dirksen (R-IL) in 1966 and Representative Chambers Wylie (R-OH) in 1970 also died in committee.

Time failed to moderate opposition to the Court's school prayer decisions among religious conservatives. During the late 1970s, a resurgent Religious Right, led by evangelicals Jerry Falwell of the Moral Majority and Pat Robertson of the Christian Broadcasting Network, put a school prayer amendment at the top of their agenda along with an amendment to reverse the Court's 1973 abortion decision (*Roe v. Wade*). Candidate Ronald Reagan expressed sympathy with a prayer amendment and, after his election as President, Reagan issued a call in 1982 for an amendment: "Nothing in this Constitution shall be construed to prohibit individual or group prayer in public schools or other public institutions. No person shall be required by the United States or any State to participate in prayer." Initially, passage of the "Reagan Amendment" seemed assured. However, moderate Republican Senator Mark Hatfield (R-OR), supported by mainstream religious groups such as the

Baptist Joint Committee on Public Affairs, proposed a compromise statute, the Equal Access Act, which authorized student religious club meetings in public secondary schools. After moderate evangelical groups including the Christian Legal Society and the National Association of Evangelicals signaled their support, Congress enacted the Equal Access Act instead of the Reagan Amendment.

Despite the resolution of the Equal Access Act, agitation for a constitutional amendment to protect prayer and Bible reading has resurfaced occasionally, particularly after controversial court decisions. In 1992 and 2000, the Supreme Court struck down prayers at public school graduation ceremonies and athletic events, respectively (*Lee v. Weisman*; *Santa Fe Independent School District v. Doe*). Those holdings, and similar holdings by lower courts, elicited proposed constitutional amendments in Congress by Representatives Henry Hyde (R-IL) and Ernest Istook (R-OK), including one to strip the federal courts of jurisdiction to hear school prayer controversies. To date all such proposals have failed.

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References and Further Reading

- Alley, Robert S. *Without a Prayer: Religious Expression in Public Schools*. Amherst, NY: Prometheus Books, 1996.
- DeFattore, Joan. *The Fourth R: Conflicts Over Religion in America's Public Schools*. New Haven: Yale University Press, 2004.
- Green, Steven K. "Evangelicals and the Becker Amendment: A Lesson in Church-State Moderation." *Journal of Church and State* 33 (1991): 541-567.
- Ravitch, Frank S. *School Prayer and Discrimination*. Boston: Northeastern University Press, 1999.
- Stokes, Anson Phelps, and Leo Pfeffer. *Church and State in the United States*. New York: Harper and Row, Pub., 1964.

Cases and Statutes Cited

- Engel v. Vitale*, 370 U.S. 421 (1962)
- Lee v. Weisman*, 505 U.S. 577 (1992)
- McCollum v. Board of Education*, 333 U.S. 203 (1948)
- Minor v. Board of Education*, 23 Ohio St. 211 (1872)
- Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000)
- School District of Abington Township*, 374 U.S. 203 (1963)
- Zorach v. Clauson*, 343 U.S. 306 (1952)

CONSTITUTIONAL CONVENTION OF 1787

The delegates to the Constitutional Convention of 1787 (known as the Framers) were initially concerned

with creating a stronger, centralized government that would allow for regulation of trade and commerce, provide for a stronger national defense, and reduce tensions and jealousies between the states. The Framers were also concerned about a fair allocation of power in national Congress and the necessity of having a government that could collect taxes and function. The leading Framers decried what they called the “imbecility” of the government under the Articles of Confederation, which was unable to accomplish very much. The Framers believed they were creating a government of relatively limited power, which could only legislate in those areas that were enumerated through specific grants of power to Congress.

Given their vision of a limited government, the Framers were relatively unconcerned about “civil liberties” under the new regime. They believed that the regulation of most behavior would be at the state level, and thus they did not see civil liberties as a particularly important concern for the national government. Most of the Framers did not believe that Congress had the power to regulate freedom of the press or create a state religion, and, therefore, they saw no reason to discuss such powers in the Convention or provide for their protection in the Constitution. Furthermore, most of the Framers could not conceive of a representative government trampling on the fundamental liberties of the people. In their view, kings, princes, and dictators threatened the liberties of the people; legislatures chosen by the people could not do so.

There was, of course, an internal logic to this argument. In England the people had forced the king to grant them rights. King John I signed the Magna Carta at sword point, surrounded by knights and other great men of the realm who demanded he guarantee them certain rights. Over the next four centuries all Englishmen came to believe that they were entitled to some of these rights. In the seventeenth century Englishmen demanded more rights and wrested them from the King in the Civil War, the Glorious Revolution, and through acts of Parliament. The English Bill of Rights was a statute passed by Parliament as part of the Revolution. This history led some Framers to believe that the United States did not need a “bill of rights,” because there was no monarch from which to wrest these rights. On the contrary, they argued that a bill of rights was unnecessary in a government of limited powers in which the people would be sovereign. In a debating congressional power over the army and the militias, James Madison asserted the widely held belief that “the greatest danger to liberty is from large standing armies, it is best to prevent them by an effectual provision for a good Militia.” [2 Farrand 338] This argument led to a number of provisions

that kept the military under strict civilian control. It would eventually lead to the Second Amendment, guaranteeing that Congress lacked the power to abolish the state militias (“A well regulated Militia, being necessary to the security of a free State . . .”), but did have the power to regulate them and set rules for government them.

These many understandings about the origin of liberties and the threats to them led the Framers to ignore civil liberties issues until the very end of the Convention. The delegates debated the nature of government from the end of May until the end of July without discussing issues that are today considered fundamental aspects of civil liberties. Some protections of civil liberties were taken for granted. In an early debate, for example, James Madison cited “the diversity of religious Sects” to support the idea of checks and balances [1 Farrand 108]. Madison assumed these sects would have the liberty to practice their faiths as they wished. There was no sense in this, or any other debate, that the constitution had to protect religious freedom. Madison and others assumed that Congress would have no power to regulate religious practice and that the states would have to allow religious liberty because of the growing diversity of the nation. In the early debates in the Convention, Madison noted that “religion itself may become a motive to persecution & oppression,” but he argued that large electoral districts, not a bill of rights, would protect against this [1 Farrand 135].

When the draft constitution was first presented, in early August, it contained a few provisions that protected civil liberties. It guaranteed the right to trial by jury for federal criminal offense and guaranteed that the trial would take place in the state where the alleged crime was committed. This would emerge in the final Constitution in Article III, Sec. 2, par. 3. The draft Constitution also defined treason as only “levying war against the United States,” thus eliminating constructive treason or other definitions of treason based on speech or belief.

On August 18, both Madison and Charles Pinckney proposed adding what became the copyright clause of Article I, Sec. 8 of the Constitution. This clause would serve authors and publishers and was key to the development of a free press, although it was seen at the time as more of a protection of economic interests than of civil liberties.

On August 20, almost three months after the beginning of the Convention, a delegate made the first proposals for specific protections of civil liberties. Charles Pinckney of South Carolina proposed a series of additions to the draft constitution. Some of these eventually became part of the original constitution, including the clause limiting the suspension of the writ

of habeas corpus, the prohibition of religious tests for office holding, and the prohibition on simultaneous multiple office holding. The first two would be keys to protecting civil liberties in the new nation. The third helped prevent the concentration of power in the hands of a few officials. Pinckney also proposed an explicit clause declaring that “the military shall always be subordinate to the Civil power.” The final Constitution would not have such specific provision, but the spirit of this proposal is clearly evident in the clauses that give Congress authority to make all rules for the military and to appropriate money for the military, while making the president, a civilian, the Commander-in-Chief of the Army and Navy. Finally, Pinckney proposed a clause that would later be incorporated into the Bill of Rights. One was a statement that “The Liberty of the Press shall be inviolably preserved.” The second would form the first clause of what became the Third Amendment: “No soldier shall be quartered in any House in time of peace without the consent of the owner.” Indeed, while the order would be changed slightly, these eighteen words would form the first eighteen words of what became the Third Amendment [2 Farrand 341-42].

In retrospect, it seems astounding that no one at the Convention suggested any of these provisions during the first three months of debate. The best explanation for this is that no one thought such protections of liberty were necessary until after the Constitution took shape, and the framers understood the extent of power the new national government would have. It may seem ironic to modern Americans that the first person to make these proposals was Pinckney, who is most remembered as the most articulate and vociferous defender of slavery and the African slave trade at the convention and the man who, along with Pierce Butler, proposed the fugitive slave clause. However, this connection between civil liberties and slavery should be not seen as ironic. Masters of slaves, like Pinckney, were fully aware of their own civil liberties, and the need to preserve them, even as they denied more fundamental liberties to their slaves.

On the same day Pinckney proposed these additions, George Mason offered a clause that was distinctly hostile to civil liberties. Mason proposed that Congress have the power “to enact sumptuary laws.” Such clause would have allowed Congress to regulate how people dressed, limiting certain kinds of clothing to people certain social classes. Governor Morris, one of the richest men at the Convention and one of the largest landholders in the nation, argued that such laws “tended to create a landed Nobility.” Indeed, such a provision would have given Congress the power to establish social classes and regulate personal expression. Mason argued that such laws were

necessary to make sure all citizens maintained “manners.” The Convention wisely voted this proposal down [2 Farrand 344]. Mason would later be remembered for his strident demands for a bill of rights and his refusal to sign the Constitution, because it lacked one. Yet, here he wanted to create a class-based society that would have denied to some people the fundamental right to choose how to dress themselves. Later that day Mason also opposed only allowing the United States to punish treason, arguing that the national government would have only a “qualified sovereignty” [2 Farrand 347]. Such an analysis had strong implications for civil liberties, because it would allow the state to define treason more broadly than merely “making war” on the nation. This would allow the states to use treason to suppress nonviolent opposition to state policies and, as such, suppress civil liberties.

On August 22, the Convention accepted a proposal by Elbridge Gerry and James McHenry to prohibit ex post facto laws and bills of attainder. No one at the Convention opposed a prohibition on bills of attainder that should be banned, but the ex post facto provisions roused the ire of a number of attorneys in the Convention, including Oliver Ellsworth and James Wilson, both of whom would serve on the Supreme Court. They argued that a ban on ex post facto laws was unnecessary, because, as Ellsworth put it, everyone knew that such laws “were void of themselves.” Wilson argued that such a clause would insult the Convention by leading people to believe that the delegates were “ignorant of the first principles of legislation.” In response to these arguments, Daniel Carroll of Maryland pointed out that the states has passed and enforced ex post facto laws, despite the universal belief they were unconstitutional. Wilson jumped on this argument to make a point held by many at the Convention—that a bill of rights or any constitutional provision on civil liberties was useless, because such constitutional prohibitions were unenforceable. Wilson noted that a number of states had passed ex post facto laws despite state constitutional prohibitions. Hugh Williamson agreed with Wilson, noting that in his home state of North Carolina the legislature had ignored the state constitution and passed such laws. Nevertheless, he believed a constitutional prohibition had much value “because the Judge can take hold of it.” In other words, Williamson argued that judicial review would allow courts to strike down laws that violated the Constitution. After a bit more debate, the Convention adopted the provision banning ex post facto laws, just as it had banned bills of attainder [2 Farrand 375-76].

In the weeks that followed, the Convention finished debating and refining the articles dealing with

the legislative, executive, and judicial branches. These debates and votes considered various clauses touching on civil liberties, such as jury trials for accused criminals and the civilian control of the military. The Convention also adopted the slave trade provision of Article I, Sec. 9, which allowed the African slave trade to remain open until at least 1808. This was not a civil liberties issue per se, but it clearly affected the civil liberties of approximately 100,000 Africans who were imported into the country, mostly between 1800 and 1808. The Convention also adopted the Fugitive Slave Clause or Article IV, Sec. 2, Par. 3. No one at the Convention articulated any fear that this clause would jeopardize civil liberties, either of blacks or their white allies. From the 1830s to the Civil War, the implementation of this clause would deprive numerous people—free blacks, fugitive slaves, and white abolitionists—of their civil liberties. But this potential problem was not obvious to anyone at the Convention.

On August 30, with the heated debate over the African slave trade behind them, the Convention returned to finalizing the document. The delegates agreed, without debate, to add the words “or affirmation” to the clause on the presidential oath and later did the same for all other required oaths. This allowed Quakers and others who were opposed to taking oaths, to hold office under the new Constitution. This can be seen as the first constitutionally sanctioned accommodation to religion under the Constitution. Charles Pinckney once again proposed that there be no religious tests for office holding. Roger Sherman thought this was unnecessary because “the prevailing liberality” was “a sufficient security ag[ain]st such tests” [2 Farrand 468]. The Convention wisely rejected Sherman’s protest and unanimously accepted Pinckney’s proposal. The Convention then spent nearly two weeks revising the rest of the Constitution and debating the powers of the president and how it would be both elected and removed from office. The delegates were worried about presidential power and the tyranny of the executive. The debates obviously had implications for civil liberties, which could easily be destroyed by a president turned dictator. But there was not explicit discussion of civil liberties. On September 10, the Convention turned the draft Constitution over to a Committee of Style, which came back on the 12th with what was more or less the final version of the Constitution.

At this point, after almost three and half months of debate, a few delegates suddenly noticed that the Constitution did not have a bill of rights. Hugh Williamson noted that the Constitution did not have a provision to protect the right of a jury trial in civil cases. Nathaniel Gorham asserted that it “was not

possible to discriminate equity cases from those in which juries are proper” and thus “this issue should be left to the legislature.” Elbridge Gerry, who a week later would refuse to sign the Constitution, argued that juries were necessary “to guard ag[ain]st corrupt judges” [2 Farrand 587]. George Mason, who would also refuse to sign the Constitution, said that a statement of the general principle of having juries, where appropriate, could resolve this issue.

But, the lack of a protection of civil juries was not the real problem. Mason asserted, for the first time in the Convention, that “He wished the plan had been prefaced with a Bill of Rights, & would second a Motion if made for the purpose—It would give great quiet to the people; and with the aid of the State declarations, a bill might be prepared in a few hours.” Elbridge Gerry, then proposed a bill of rights. Roger Sherman of Connecticut replied that the state bills of rights were not repealed by the Constitution and would be sufficient to protect the liberties of the people. He also argued that the national legislature “may be safely trusted” to protect liberty. Mason answered that the laws of the United States would be “paramount to the State Bills of Rights,” implying that liberties protected by states could be trumped by federal law or even by the federal courts. The state delegations then voted unanimously to reject the call for the addition of a Bill of Rights. Mason and Gerry doubtless supported the measure in their delegations, but no delegation supported them [2 Farrand 588-89].

The next day (September 13) Mason once again asked for a clause allowing Congress to pass sumptuary laws. The convention agreed to send this to a committee, but it never emerged from the committee. On the 14th the disgruntled Mason tried to remove the ban on “ex post facto” laws, arguing that the phrase was unclear. The Convention voted this down. The Convention then rejected a motion to add a clause “that the liberty of the Press should be inviolably observed.” Roger Sherman argued it was unnecessary because “the power of Congress does not extend to the Press.” Four states, Massachusetts, Maryland, Virginia, and South Carolina, supported this provision, but the rest did not [2 Farrand 617-18].

This was the last debate over a bill of rights. The next day George Mason announced he would not sign the Constitution. His speech, which was later published, was a wholesale denunciation of the Constitution and reflected his deep dissatisfaction with a stronger national government. He began the speech with a statement about the lack of a bill of rights:

There is no Declaration of Rights, and the laws of the general government being paramount to the laws and

constitution of the several States, the Declaration of Rights in the separate States are no security. Nor are the people secured even in the enjoyment of the benefit of the common law (which stands here upon no other foundation than its having been adopted by the respective acts forming the constitutions of the several States).

However, nowhere else in the speech did he complain about the lack of protection for civil liberties. He complained about the continuation of the African Slave Trade, which would lower the value his own state's excess slaves, but he also complained that the regulation of trade in general would hurt the South. While not focusing on any specific civil liberties that were not protected, Mason did, however, attack the Constitution for prohibiting ex post facto laws, which most civil libertarians consider one of the great protections of liberty in the Constitution.

Mason's last speech, as well as the brief debate in September over a protection of a free press, helps explain why the Framers did not include a bill of rights in the Constitution. Most of the delegates agreed with Roger Sherman that a bill of rights was unnecessary, because they believed that Congress lacked the power to regulate religion or the press or any other fundamental liberties. Mason, who is often credited with pushing for the Bill of Rights after the Constitution was ratified, seems to have raised the issue mostly to express his general displeasure over the Constitution. It is extremely doubtful that Mason or Gerry would have signed the document, even if "the plan had been prefaced with a Bill of Rights," as he "wished." The fact that he waited until the last week of the Convention to raise this issue suggests that the Bill of Rights and civil liberties in general was not a high priority for him. Pinckney, who happily signed the Constitution, thought that the Framers should explicitly protect the "liberty of the Press," and four delegations agreed with him. However, the rest of the Convention did not, accepting Sherman's position that it was unnecessary. The majority of the Framers also must have understood that if they protected the press, they would have to protect every other civil liberty. Otherwise opponents of the Constitution would accuse them of planning to subvert all other liberties. Thus, the Framers rejected the demand for a bill of rights as unnecessary. The lack of a bill of rights would become an issue in the debate over ratification, but probably they Framers were wiser for refusing to be trapped into a debate of that issue at the Convention.

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References and Further Reading

Farrand, Max, ed. *The Records of the Federal Convention of 1787*. 4 vols. New Haven: Yale University Press, 1966.

Finkelman, Paul, *James Madison and the Bill of Rights: A Reluctant Paternity*, Supreme Court Review 1990 (1991): 301–347.

Levy, Leonard W. *Origins of the Bill of Rights*. New Haven: Yale University Press, 1999.

Urofsky, Melvin I., and Paul Finkelman. *A March of Liberty: A Constitutional History of the United States*. 2 vols. New York: Oxford University Press, 2002.

CONTENT-BASED REGULATION OF SPEECH

One of the most important principles of First Amendment jurisprudence states that the government may not regulate speech solely on the basis of its content. Public debate would be distorted, and individual autonomy impaired, if the government were allowed to pick and choose certain ideas, viewpoints, or types of information to suppress. A law is content based if it limits or restricts speech that concerns an entire topic ("subject matter discrimination") or that expresses a particular stance or ideology ("viewpoint discrimination"). The Supreme Court generally invalidates content-based speech regulations unless the government can meet an exacting standard of justification known as "strict scrutiny" analysis.

The content distinction is a relatively recent development in First Amendment law. The Court first established its importance in *Police Department of Chicago v. Mosely* (1972). In that case, postal worker Earl Mosely challenged a Chicago ordinance that prohibited all picketing outside schools except for "peaceful picketing of any school involved in a labor dispute." Mosely had for several months picketed a high school that he believed engaged in racial discrimination. The Court struck down the ordinance because it applied selectively, depending on what message picketers carried on their signs. Writing for the Court, Justice Marshall explained that "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its viewpoint."

Pursuant to strict scrutiny analysis, content regulations of speech are unconstitutional unless they are (1) justified by a compelling state interest; and (2) narrowly drawn to achieve that interest with the minimum abridgement of free expression. The compelling-interest prong of the test ensures that speech cannot be restricted just because the majority finds it offensive. For example, in *Texas v. Johnson* (1989), the Court invalidated the conviction of a protestor who burned an American flag at the Republican National Convention. Although Texas claimed that its flag desecration statute served to prevent breaches of

the peace and encourage respect for the flag, the Court found these arguments unconvincing. Rather, the Court concluded that the statute's real purpose was to eliminate political protests considered by many to be insulting and unpatriotic. In his opinion for the Court, Justice Brennan noted that "the bedrock principle underlying the First Amendment . . . is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."

Even where a compelling justification exists, a content-based speech regulation will not meet the requirements of strict scrutiny if it is overbroad and limits too much speech. In *Simon & Schuster v. Members of the New York State Crime Victims Board* (1991), the Supreme Court unanimously declared New York's "Son of Sam Law" unconstitutional as penalizing expression based on its content. The law provided that all profits made by criminals who wrote about their illegal activities were to be redistributed to crime victims, whereas criminals who wrote about other topics could keep their earnings. Although the Court agreed that the state had a compelling interest in preventing criminals from capitalizing on their crimes, it held that the New York statute was not sufficiently narrow in scope. Had the law been in effect at the time, the Court noted that it would have placed a financial disincentive on valuable works of literature by authors such as Malcolm X, Thoreau, Martin Luther King, Jr., and even Saint Augustine.

Although the Court generally treats content discrimination with disfavor, the justices do not always agree about what constitutes content-based regulation. In *Hill v. Colorado* (2000), for instance, six of the nine justices upheld a Colorado statute that made it a crime to approach within eight feet of another person outside a medical facility without consent "for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person." The majority concluded that the statute was neither content nor viewpoint based because it applied equally to "all 'protest,' to all 'counseling,' and to all demonstrators whether or not the demonstration concerns abortion, and whether they oppose or support the woman who has made the abortion decision." Content-neutral speech restrictions are subject to a less-demanding level of judicial scrutiny; therefore, the Court was able to uphold the statute as a valid time, place, and manner regulation. Dissenting, Justice Scalia argued that the abortion clinic no-approach buffer zone was "obviously and undeniably content-based"

because its intent and practical effect was to limit the speech of abortion opponents.

One of the paradoxes in First Amendment jurisprudence is that despite both the obvious importance of the content distinction and the Court's absolutist-sounding rhetoric in cases such as *Mosely*, the Constitution does not always prohibit content-based regulations of speech. The Court has identified certain categories of expression that are unprotected (such as libel, obscenity, or fighting words) or entitled only to limited protection (such as commercial speech) under the First Amendment. These speech categories, which undeniably are defined by their content, are exceptions to the rule that all content-based regulations are presumptively unconstitutional. Rather, in these areas, the Court has determined that a compelling interest already exists for treating the entire category of speech as outside the boundaries of First Amendment protection.

Yet even within these unprotected categories of speech, the government does not have free rein to regulate expression based on content. In *R.A.V. v. City of St. Paul*, the Court overturned a city ordinance that prohibited hate speech based on race, color, religion, or gender, but not political affiliation or sexual orientation. In his opinion for the Court, Justice Scalia explained that although the state could outlaw all fighting words, the city's partial ban impermissibly discriminated within that speech category on the basis of content. The government may not make content distinctions even within these lower classes of speech solely because of official disapproval of the ideas expressed. "Thus," Justice Scalia wrote, "the government may proscribe libel; but it may not make the further content discrimination of proscribing only libel critical of the government."

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References and Further Reading

- Chemerinsky, Erwin, *Content Neutrality as a Central Problem of Freedom of Expression: Problems in the Supreme Court's Application*, S. Cal. L. Rev. 74 (2000): 49–64.
 Farber, Daniel A. *The First Amendment*, 2nd ed. New York: Foundation Press, 2003.
 Redish, Martin H., *The Content Distinction in First Amendment Analysis*, Stan. L. Rev. 34 (1981): 1131–51.
 Stone, Geoffrey R., *Content Regulation and the First Amendment*, Wm. & Mary L. Rev. 25 (1983): 189–252.

Cases and Statutes Cited

- Hill v. Colorado*, 530 U.S. 703 (2000)
Police Department of Chicago v. Mosely, 408 U.S. 92 (1972)
R.A.V. v. City of St. Paul, 505 U.S. 377 (1992)

Simon & Schuster v. New York State Crime Victims Board, 502 U.S. 105 (1991)
Texas v. Johnson, 491 U.S. 397 (1989)

See also Anti-Abortion Protest and Freedom of Speech; Categorical Approach to Free Speech; Content-Neutral Regulation of Speech; Flag Burning; Time, Place & Manner Rule; Viewpoint Discrimination in Free Speech Cases

CONTENT-NEUTRAL REGULATION OF SPEECH

While phrased in absolute terms, the free speech clause has been interpreted to require a greater level of justification for government regulation of the content of speech and a lesser degree of justification for speech regulations that apply without regard to the content of speech. When governments impose the latter form of speech regulations, they are called content-neutral regulations of speech. The essential distinction between content-based regulation of speech and content-neutral speech regulations is that the former regulates on the basis of *what* is said, whereas the latter regulates on the basis of either *how*, *when*, or *where* the speech is uttered, or is only an incidental restriction on speech that has as its purpose the regulation of some conduct that is not related to speech. Some facially content-neutral laws are treated as content based if their application hinges on what the speaker says (for example, a law against disturbing the peace is treated as content based when it is applied because of what the speaker says). Some content-based laws are treated as content neutral if their purpose is to address the “secondary effects” of that speech, effects that are not produced by what is said but are merely adventitious by-products of the regulated speech. Content-neutral regulations of speech can be subdivided into three main types: restrictions on the time, place, or manner of speech; restrictions on conduct that have only an incidental and unintended effect on expression that is part of the regulated conduct; and restrictions intended to control the “secondary effects” of regulated speech.

Time, Place, or Manner Regulations

In general, governments may regulate the time, place, or manner of speech, so long as the restrictions on speech “are justified without reference to the content of the regulated speech, . . . are narrowly tailored to serve a significant governmental interest, and . . . leave

open ample alternative channels for communication of the information” *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984). This rule was articulated as early in 1949, in *Kovacs v. Cooper*, 336 U.S. 77 (1949), in which the Supreme Court upheld a ban on “loud and raucous” sound trucks. In *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), the Court clarified its requirement that content-neutral time, place, or manner regulations be “narrowly tailored to serve a significant governmental interest” by noting that such regulations “need not be the least restrictive or least intrusive means of doing so So long as the means chosen are not substantially broader than necessary to achieve the government’s interest, [a] regulation will not be invalid simply because a court concludes that the government’s interest could be adequately served by some less-speech-restrictive alternative.” In recent years the Supreme Court has stressed the importance of leaving open “ample alternative channels of communication.” In *Ladue v. Gilleo*, 512 U.S. 43 (1994), for example, the Court struck down a municipal ordinance banning almost all signs displayed on or in residences. The majority noted that the city had “almost completely foreclosed a venerable means of communication that is both unique and important” and opined that the danger posed to free speech by bans of an entire medium of communication is that “such measures can suppress too much speech.”

The line between content-based and content-neutral regulations was blurred in *Hill v. Colorado*, 530 U.S. 703 (2000), in which the Court upheld a ban on approaching a person in close proximity to a medical facility to “engage in oral protest, education, or counseling” without the other person’s consent. The majority thought the ban was content neutral because it applied to any such speech, not just abortion protests. The dissenters claimed that the ban was content based because it was triggered by what the speaker says.

Regulations of Symbolic Conduct or Symbolic Speech

Government regulation of conduct does not generally implicate the free speech guarantee, but because some conduct does communicate ideas, the Supreme Court has crafted a test to determine when it is permissible for governments to regulate conduct when such regulation also restricts the symbolic speech imbedded in the regulated conduct. In *United States v. O’Brien*, 391 U.S. 367 (1968), the Supreme Court upheld a

ban on the knowing destruction or mutilation of a military draft registration certificate, as applied to David O'Brien, who publicly burned his draft card as part of a demonstration against the Vietnam War. The Court assumed that O'Brien's action was sufficiently communicative to invoke the free speech clause but concluded that the government's ban on destruction or mutilation of a draft card was valid because it was "within the constitutional power of the Government" (considered apart from the free speech issue); furthered "an important or substantial governmental interest" (facilitating the military draft); the governmental interest was "unrelated to the suppression of free expression;" and the "incidental restriction on [free speech was] no greater than is essential to the furtherance of [the governmental] interest." Although *O'Brien* created the test for symbolic speech or conduct, the case was much criticized as an erroneous application of the principle, especially because there was evidence in the legislative record that the statute was enacted to punish this particularly inflammatory mode of protesting the Vietnam War.

The heightened level of scrutiny demanded by *O'Brien* only applies when the regulation impinges on "conduct with a significant expressive element" or "where a statute based on a nonexpressive activity has the inevitable effect of singling those out engaged in expressive activity" *Arcara v. Cloud Books*, 478 U.S. 697 (1986). In general, conduct "possesses sufficient communicative elements to bring the First Amendment into play" when the actor intends "to convey a particularized message" and there is a great likelihood "that the message would be understood by those who viewed it" *Texas v. Johnson*, 491 U.S. 397 (1989).

A series of flag-burning and flag desecration cases have cemented the principle that, under the *O'Brien* test, the government's asserted interest must not only be real but unrelated to the suppression of ideas. In *Spence v. Washington*, 418 U.S. 405 (1974), and in *Smith v. Goguen*, 415 U.S. 566 (1974), the Court found that the government's interest in promoting respect for the American flag was related to the suppression of ideas. In *Spence* the Court overturned a conviction for taping a peace sign to a flag, and in *Smith* the Court struck down a conviction for sewing a flag to the seat of one's pants. This came to a head in *Texas v. Johnson*, in which the Court overturned Johnson's conviction for "desecration of a venerated object," conduct that consisted of burning the American flag. A year later, in *United States v. Eichman*, 496 U.S. 310 (1990), the Supreme Court also voided the federal Flag Protection Act of 1989. Because the flag is an unalloyed symbol of the nation, its use—whether it ranges from display to destruction—inevitably involves communication of some idea, be it respect

or contempt for America. Thus, the Court saw the governmental interest in proscribing destruction of the flag to be inherently related to the suppression of the idea of contempt for America and the flag for which it stands. Of course, the principle applies more broadly than just to flag burning. In *Schacht v. United States*, 398 U.S. 58 (1970), the Supreme Court invalidated the application of a federal law forbidding the wearing of an American military uniform without authorization to an actor performing in a dramatic protest of the Vietnam War, because another federal law permitted the wearing of American military uniforms in theatrical productions so long as "the portrayal does not tend to discredit" the military. The interplay of the two statutes provided proof that the government's interest in limiting the wearing of military uniforms in dramas was related to the suppression of ideas.

The flag-burning cases produced calls for a constitutional amendment to permit punishment of flag burners. Although some of those proposals have received the requisite majority in the House of Representatives, none have been approved by the Senate.

While many of the cases dealing with symbolic speech have involved the politically charged issue of flag desecration, the most recent applications have involved more prosaic and salacious matters. In each of *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991) and *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000), the Supreme Court upheld state laws banning public nudity, as applied to nude dancing. The Court conceded that there was some protected expression in nude dancing but thought that the government's interest in prohibiting such conduct was sufficiently unrelated to the suppression of the erotic ideas inherent in nude dancing to warrant application of the *O'Brien* test. Moreover, because the ordinance at issue in *Erie* permitted dancers to perform wearing only "pasties" and G-strings, the inhibition on the expressive element of the dancers' performance was as minimal as the required garments.

The Secondary Effects Doctrine

The third type of content-neutral regulations are those that address the so-called secondary effects doctrine. The essence of this doctrine is that content-based regulations of speech that are intended to regulate conduct that is closely associated with the regulated speech but that is not produced by the content of the speech are treated as if they are content neutral, and thus valid if they are narrowly tailored to serve a significant government interest and leave open ample

alternative channels of communication. This is, of course, a legal fiction, but one that the Supreme Court has created to deal almost exclusively with the collateral effects of pornographic, but not obscene, speech. In *Young v. American Mini Theatres*, 427 U.S. 50 (1976), the Court upheld a Detroit zoning law that required purveyors of pornographic materials to disperse throughout the city. The purpose of the law was to ameliorate the problems of public drunkenness, drug dealing, theft, and other criminal behavior that is closely associated spatially with concentrations of smut houses, but which is not produced by the consumption of smut. The plurality opinion in *Young* made much of the fact that pornographic expression is of lesser value than other speech. This doctrine was extended in *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), in which the Court upheld a municipal zoning ordinance that required movie theaters exhibiting pornographic films to locate in a limited portion of the community. The doctrine was extended even further in *City of Erie v. Pap's A.M.*, in which the Court applied the secondary effects doctrine to conclude that Erie's substantial governmental interest in prohibiting nude dancing was to alleviate the secondary effects of such tawdry expression and that this interest was unrelated to the suppression of ideas.

Not every effect of regulated speech is a secondary effect. When the behavior that the government seeks to control by regulating speech is the natural, foreseeable reaction of listeners' reaction to the speech, such effects are not treated as secondary effects. The District of Columbia enacted a law barring the display within 500 feet of an embassy any sign that might bring the foreign government into "public odium [or] disrepute." D. C. defended the law as intended to address the secondary effects of demonstrations against foreign governments: an increased risk of public disorder and crime. The Supreme Court rejected that argument in *Boos v. Barry*, 485 U.S. 312 (1988): "Listeners' reactions to speech are [not] 'secondary effects.'" Because the law focused "on the direct impact of speech on its audience," the law was regarded as content based and thus subject to the strict scrutiny test in free speech cases.

Content-neutral regulations are subject to a lesser degree of scrutiny than content-based regulations, because there seems to be less danger that the government is attempting to skew the nature of public discourse. Moreover, content-neutral regulations are far more likely to have some plausible noncensorial reason for their enactment. But because content-neutral regulations have the potential to foreclose all speech, or all of a given type of speech, by drawing the scope of the regulation broadly the Supreme Court has insisted on the intermediate level of scrutiny embodied

by the combination of the time, place, or manner and the *O'Brien* tests.

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References and Further Reading

- Kagan, Elena, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, U. Chi. L. Rev. 415 (1996): 63:446-463.
 Stone, Geoffrey, *Content-Neutral Restrictions*, U. Chi. L. Rev. 54 (1987): 46.
 ———, *Content Regulation and the First Amendment*, William & Mary L. Rev. 189, (1983): 25:207-217.

Cases and Statutes Cited

- Arcara v. Cloud Books*, 478 U.S. 697 (1986)
Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991)
Boos v. Barry, 485 U.S. 312 (1988)
City of Erie v. Pap's A.M., 529 U.S. 277 (2000)
Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984)
Hill v. Colorado, 530 U.S. 703 (2000)
Kovacs v. Cooper, 336 U.S. 77 (1949)
Ladue v. Gilleo, 512 U.S. 43 (1994)
Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986)
Schacht v. United States, 398 U.S. 58 (1970)
Smith v. Goguen, 415 U.S. 566 (1974)
Spence v. Washington, 418 U.S. 405 (1974)
Texas v. Johnson, 491 U.S. 397 (1989)
United States v. Eichman, 496 U.S. 310 (1990)
United States v. O'Brien, 391 U.S. 367 (1968)
Ward v. Rock Against Racism, 491 U.S. 781 (1989)
Young v. American Mini Theatres, 427 U.S. 50 (1976)

See also **Abortion Protest Cases; Anti-Abortion Protest and Freedom of Speech, *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000); Content-Based Regulation of Speech, Draft Card Burning; Flag Burning; Freedom of Speech and Press: Nineteenth Century; Freedom of Speech: Modern Period (1917–Present); Intermediate Scrutiny Test in Free Speech Cases; O'Brien Content-Neutral Free Speech Test; O'Brien Formula; *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986); Secondary Effects Doctrine; Speech versus Conduct Distinction; Symbolic Speech; Theories of Free Speech Protection; Two-Tiered Theory of Free Speech; *United States v. O'Brien*, 391 U.S. 367 (1968); *Young v. American Mini Theaters, Inc.*, 427 U.S. 50 (1976)**

COOLIDGE v. NEW HAMPSHIRE, 403 U.S. 443 (1971)

In *Coolidge v. New Hampshire*, the Supreme Court addressed the question of which state officials may validly issue search warrants.

In 1964, a fourteen-year-old girl was murdered in Manchester, New Hampshire. A subsequent investigation led the police to suspect Edward H. Coolidge,

Jr., of the crime. The police presented their evidence to the State Attorney General who supervised the investigation and who would later serve as chief prosecutor at Coolidge's trial. Acting in his capacity as a justice of the peace under New Hampshire law, the Attorney General issued a search warrant for Coolidge's car. The police impounded the car, vacuumed its carpet, and discovered evidence linking Coolidge to the murder. State courts rejected Coolidge's claim that the search violated the Fourth and Fourteenth Amendments.

In an opinion written by Justice Potter Stewart, the Supreme Court held that the Constitution prohibits the issuance of a warrant except where probable cause has been found by a "neutral and detached magistrate" who independently assessed the evidence collected by the police. In *Coolidge*, the chief investigator/prosecutor in this case was not sufficiently "neutral and detached." Only a plurality of the Court, however, found that the search did not fall under any of the exceptions to the warrant requirement and that the evidence against Coolidge should have been suppressed.

Coolidge affirms the principle that the Fourth Amendment serves as a check on the power of police to search and seize property without a prior, independent assessment by a neutral state official.

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References and Further Reading

LaFave, Wayne R. "The 'Neutral and Detached Magistrate' Requirement." Sec. 4.2 of *Search and Seizure: A Treatise on the Fourth Amendment*. Vol. 2. 4th ed. St. Paul: Thomson/West, 2004.

See also **Probable Cause; Search (General Definition); Search Warrants; Stewart, Potter; Warrant Clause; Warrantless Searches**

COPYRIGHT LAW AND FREE EXERCISE

The First Amendment forbids Congress from making any law prohibiting the free exercise of religion. The federal copyright statute grants copyright holders a court-enforced power to prevent third parties from using religious texts. Nevertheless, copyright is unlikely to violate the Free Exercise Clause. In 1990, the Supreme Court held that the Free Exercise Clause does not require the government to grant religious exemptions to neutral laws of general applicability, *Employment Division v. Smith*. Since copyright doctrine makes no distinctions based on the content of works or the religious status of their authors, copyright is a neutral law of general applicability.

Courts could accommodate the needs of persons wishing to use copyright-protected material for religious purposes without permission by using several different copyright doctrines. Courts could refuse copyright to works allegedly dictated to humans by divine beings on the ground that copyright requires a human author. Courts could find that seemingly infringing uses are allowed as "fair use." Fair use allows some actions that otherwise would be copyright infringement after balancing the purpose and nature of the use (including whether it is commercial or non-profit), the nature of the copyrighted work, the amount used, and the economic burden on the copyright holder, Title 17 United States Code, Section 107. One could argue that religious worship is a socially valuable nonprofit use under the first factor. Courts could narrow the copyright protection of the religious work through the "idea/expression dichotomy." Copyright only protects the way an idea or fact is expressed, but not the idea or fact, Title 17 United States Code, Section 102(b). If only a few ways of expressing something are possible, the expression and content are said to merge, allowing no copyright protection. One could argue that religious practice requires access to the exact words of a divine message; no paraphrase is equivalent. Even if the court decides that copyright has been infringed, it could accommodate religiously motivated infringement by granting only money damages instead of ordering the use stopped.

The courts generally have been unsympathetic to these arguments. For example, a believer was held to infringe the copyrights of the Urantia Foundation when she made numerous electronic copies of the Urantia Book for free distribution to other potential believers. The court was not swayed by the claimed celestial authorship of the scripture, insisting that the human "intermediaries" were "authors" for purposes of the copyright statute, *Urantia Foundation v. Maherra*. In *Urantia*, religious practice was not greatly affected, because the copied work was available to anyone at a reasonable price from the copyright holder. Copyright has been enforced even when the copyright holder may have intended to prevent any use of the religious book. The World Wide Church of God (WWCG) holds copyright in Pastor General Herbert W. Armstrong's *Mystery of the Ages* (MOA). After distributing more than nine million free copies of MOA, the WWCG decided to halt distribution because of doctrinal changes. WWCG was out of print for at least ten years. Two former WWCG ministers started a separate church dedicated to the original teachings of MOA; all members were required to read MOA to be considered for baptism. The separatist ministers were held to have infringed WWCG's copyright when they began printing and distributing

new copies of MOA without permission. The court did not find relevant that the new church was more dedicated to the teachings of MOA's author than was the MOA-suppressing copyright holder. The court gave great weight to WWCG's claim that it intended to publish an annotated version of MOA sometime in the future. The separatist ministers were ordered to cease publication and distribution of MOA, *Worldwide Church of God v. Philadelphia Church of God*.

Many intellectual property cases involve the Church of Scientology's attempts to keep secret various church materials disseminated by disaffected former scientologists. The Free Exercise Clause has been of scant help to either side in these cases. Seemingly to prevent Establishment Clause issues, the courts generally apply standard copyright doctrine without taking religious motivations into account. Two Establishment Clause issues loom in such copyright disputes. First, copyright is usually considered a type of personal property. Allowing copyright infringement for religious use would constitute limiting one person's property rights to accommodate another person's religious belief. This might violate the Establishment Clause by showing favoritism toward one religious sect. Second, deciding which of competing sects is more in line with the beliefs of the spiritual work's author might violate the Establishment Clause by entangling the court in issues of religious doctrine.

The copyright statute includes one specific exemption for religious worship. According to section 110(3) of title 17 of the United States Code, copyright is not infringed by "performance of a nondramatic literary or musical work or of a dramatico-musical work of a religious nature, or display of a work, in the course of services at a place of worship or other religious assembly." In other words, if church members have a legally obtained copy of a hymnbook or scripture, they can sing or read the words aloud during worship services without obtaining a license from the copyright holder. A license would otherwise be necessary, because a copyright holder has the exclusive right not only to make and distribute copies of his work but also to allow the work to be performed publicly. This statutory exemption has not been discussed by any court opinions, but Professor Cotter argues that it violates the Establishment Clause by favoring religion over secularism.

In addition, a court could hold that otherwise infringing activity must be allowed because of the Religious Freedom Restoration Act (RFRA), which protects religious practices from substantial burdens created by laws of general applicability unless the law is the least restrictive means of furthering a compelling government interest. Congress enacted the RFRA in reaction to *Employment Division v. Smith*. No court has accepted the argument that copyright

enforcement is a substantial burden for purposes of RFRA, not even the *Worldwide Church* case discussed previously. In 1997, the Supreme Court held the RFRA to be unconstitutional as applied to state statutes, *City of Boerne v. Flores*. Copyright is a federal statute, so it is not touched by *Boerne*.

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References and Further Reading

Cotter, Thomas F., *Gutenberg's Legacy: Copyright, Censorship, and Religious Pluralism*, California Law Review 91 (2003): 232.

Cases and Statutes Cited

City of Boerne v. Flores, 521 U.S. 507 (1997)
Employment Division, Department of Human Resources v. Smith, 494 U.S. 872 (1990)
Urantia Foundation v. Maaherra, 114 F.3d 955 (9th Cir. 1997)
Worldwide Church of God v. Philadelphia Church of God, Inc., 227 F.3d 1110 (9th Cir. 2000)

See also **Church of Scientology and Religious Liberty; City of Boerne v. Flores, 521 U.S. 507 (1997); Employment Division, Department of Human Resources v. Smith, 494 U.S. 872 (1990); Establishment Clause: Theories of Interpretation; Establishment of Religion and Free Exercise Clauses; Religious Freedom Restoration Act**

CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS v. AMOS, 483 U.S. 327 (1987)

The Supreme Court in *Corporation of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos* (1987) addressed the important issue of whether statutory exceptions to otherwise generally applicable laws are constitutionally permissible as an accommodation to religious freedom. The nine to zero decision in the case became more important after the Supreme Court's holding in *Employment Division, Department of Human Resources of Oregon v. Smith* (1990) that religious exemptions to generally applicable laws are not constitutionally required. Indeed, Justice Scalia in *Smith* specifically stated that issues of religious freedom are most appropriately within the purview of the political process, a constitutional possibility that *Amos* allows but *Smith* explains is not required.

The specific issue in *Presiding Bishop* was whether a religious organization exemption from Title VII of the Civil Rights Act of 1964 violates the Establishment Clause. The claimant, Mayson, worked at the

Deseret Gymnasium in Salt Lake City, Utah, a non-profit public facility owned and operated by the Church of Jesus Christ of Latter-Day Saints. The church discharged him in 1981 because he failed to qualify for a “temple recommend,” a religious worthiness standard for church members. Following his discharge for religious reasons, he brought a civil rights class action against the church, under Section 703 of Title VII, for discriminating in employment on the basis of religion. The church defended on the basis of Section 702, which exempts religious organizations from the proscription against religious discrimination. At trial Mayson successfully argued that the exemption provided in Section 702 violates the Establishment Clause, because it has the primary effect of advancing religion, contrary to the *Lemon* test.

Justice White, writing for the Court, reversed the district court’s judgment, holding that the state may accommodate religion by statutory exemptions without violating the establishment Clause. Despite variant explanations of why statutory exemptions may be constitutionally permissible, no justice dissented from the Court’s essential holding that the establishment clause does not prohibit the state from ever accommodating religious freedom through statutory exemptions.

Justice White’s majority opinion held that to avoid conflicting with the establishment clause, any religious exemption must pass the three-pronged *Lemon* test, a test Section 702 clearly passed. Under *Lemon*’s secular purpose test, the 702 exemption served “a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions.” In response to Mayson’s argument that it was difficult to imagine how working in a gym would affect a religious organization’s “religious activities,” the Court concluded that narrowly defining a religious institution’s “religious activities” would unduly burden the religious organization’s ability to define and carry out its religious mission.

With regard to the *Lemon* issue of secular effect, the Court held that this test is violated only where “the government itself has advanced religion through its activities and influence.” In *Presiding Bishop* Congress had not advanced religion by the exemption, but simply had permitted the religious institution to advance its own religious purposes. Because Congress’s incidental advancement of the religious institution could not reasonably be attributable to the government, the exemption did not trigger a *Lemon* violation of an impermissible religious effect. With regard to *Lemon*’s entanglement prong, the Court held that deferring to the religious institution for the determination of what constituted a “religious

activity” diminished any likelihood of entanglement. Indeed, how could any court effectively trump a religious institution’s evaluation of what constitutes “religious activity” without seriously violating the proscription against entanglement?

Justice Brennan, with whom Justice Marshall joined, agreed that the legislature might have a constitutional secular purpose of deferring as a matter of religious freedom to the religious community’s sense of their religious mission. Justice Brennan acknowledged that the “authority to engage in this process of self-definition inevitably involves what we normally regard as infringement on free exercise rights, since a religious organization is able to condition employment in certain activities on subscription to particular religious tenets.” However, Justice Brennan conceded that “[w]e are willing to countenance the imposition of such a condition because we deem it vital that, if certain activities constitute part of a religious community’s practice, then a religious organization should be able to require that only members of its community perform those activities.”

Justice O’Connor, in a concurring opinion, suggested that the religious accommodation could also be justified on the basis of her endorsement test alternative to the *Lemon* analysis. She reasoned that while any religious exemption may conflict with the *Lemon* proscription against any legislative purpose beneficial to religion, some exemptions might be justifiable as a matter of respect to the free exercise of religion. The question should not be whether the exemption is beneficial to religion but rather whether the accommodation provides “unjustifiable awards of assistance to religious organizations.” To resolve this issue, Justice O’Connor suggested that the test ought to ask “whether government’s purpose is to endorse religion and whether the statute actually conveys a message of endorsement.” To ascertain whether the statute conveys a message of endorsement, the relevant issue is how it would be perceived by an objective observer who is acquainted with the text, the legislative history, and the implementation of the statute. As applied to the facts, Justice O’Connor concluded that “[b]ecause there is a probability that a nonprofit activity of a religious organization will itself be involved in the organization’s mission, in my view the objective observer should perceive the Government action as an accommodation of the exercise of religion rather than as a Government endorsement of religion.”

Amos has since been cited repeatedly for two line-drawing propositions for statutory exemptions that are beneficial to religious communities: (1) that the state may accommodate religious freedom through the political process, unless (2) that “accommodation” crosses the establishment line by endorsing

religion to the objective observer. Without the principle of religious accommodationism announced in *Amos*, Justice Scalia's relegation of religious freedom to the political processes in *Smith* would leave precious little for the free exercise of religion other than the equal protection mandate acknowledged in *Church of the Lukumi Bablu Aye v. City of Hialeah* that the state not actively target religion.

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Cases and Statutes Cited

Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987)
Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993)
Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990)
Lemon v. Kurtzman, 403 U.S. 602 (1971)

CORRIGAN v. BUCKLEY, 271 U.S. 323 (1926)

In *Corrigan v. Buckley*, the U.S. Supreme Court unanimously rejected a legal challenge to racially restrictive covenants and thereby made a significant contribution to the upsurge in residential segregation that took place in America's cities during the first half of the twentieth century.

In 1917, in *Buchanan v. Warley*, the Court found that municipal ordinances requiring residential segregation violated the fourteenth amendment, relying in significant measure on the fact that it was the *government* that had mandated the segregation. In response to that decision, in cities across the country, residents entered into private contracts whereby they agreed not to sell or rent their homes to blacks (or members of other minority groups), thereby accomplishing the same goal that the drafters of the municipal ordinances had sought to achieve.

The *Corrigan* case involved a racially restrictive covenant in the District of Columbia. In 1921, several residents of the District had entered into a covenant pursuant to which they promised to never sell their home to "any person of the negro race or blood." The next year, Irene Corrigan, one of the white residents who had signed the covenant, contracted to sell her home to a Negro, Helen Curtis. Another white homeowner, John Buckley, sued to block the sale of the home on the grounds that it violated the restrictive covenant. After a lower court granted relief to the plaintiff and the Court of Appeals for the District of Columbia affirmed, the defendants appealed to the Supreme Court. The defendants argued that the covenant itself (not its judicial enforcement) violated several provisions of the

U.S. Constitution, including the Fifth, Thirteenth, and Fourteenth Amendments. At this time, the Supreme Court's jurisdiction over cases from the District of Columbia was limited to matters raising "substantial" federal claims. The Court determined that the appellants had presented no such claims and hence dismissed the appeal "for want of jurisdiction." In reaching that conclusion, the Court concluded that both the Fifth and Fourteenth Amendments limited only the action of the government, not private parties, and that the Thirteenth Amendment, which prohibited slavery and involuntary servitude, had no application to the sale of real estate. Although the defendants had not challenged the constitutionality of the judicial enforcement of the covenant at any point in the litigation, they did raise the enforcement issue in their arguments to the Supreme Court. The Court noted that this issue was not properly before it, but nevertheless observed—in dicta—that this argument was also "lacking in substance." Although the Court did not clearly resolve the question whether judicial enforcement of racially restrictive covenants was constitutional, a difficult one since such enforcement arguably implicated state action, after the *Corrigan* decision, state courts across the nation cited *Corrigan* for the view that the judicial enforcement of such covenants did not violate the Constitution.

The *Corrigan* case legitimized racially restrictive covenants and gave encouragement to white property owners to use such covenants to retain the racial integrity of residential neighborhoods. Their use was extensive and contributed to the solidification of the black ghetto in many northern cities. For example, by the 1940s, eighty-five percent of the housing in Detroit and eighty percent of the housing in Chicago was encumbered by a racially restrictive covenant.

Finally, in 1948, the U.S. Supreme Court in *Shelley v. Kraemer* (1948) declared that judicial enforcement of racially restrictive covenants did violate the Fourteenth Amendment. But the legacy of several decades of enforcement of these covenants meant that residential segregation was well entrenched in most major American cities, a pattern that has never been undone.

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References and Further Reading

Massey, Douglas S., and Nancy A. Denton. *American Apartheid: Segregation and the Making of the Underclass*. Cambridge: Harvard University Press, 1993.
 McGovney, D. O., *Racial Residential Segregation by State Court Enforcement of Restrictive Agreements, Covenants or Conditions in Deeds is Unconstitutional*, California Law Review 33 (1945): 5–39.
 Vose, Clement E. *Caucasians Only: The Supreme Court, the NAACP, and the Restrictive Covenant Cases*. Berkeley: University of California Press, 1959.

Cases and Statutes Cited

Buchanan v. Warley, 245 U.S. 60 (1917)
Shelley v. Kraemer, 334 U.S. 1 (1948)

See also **Fourteenth Amendment; State Action Doctrine**

CORRUPTION OF BLOOD

The doctrine of corruption of blood mandated that when a person committed a criminal or treasonous act, he and his entire family became outlaws. As a consequence, the offender forfeited all of his property, real and personal. In addition, the offender could no longer transfer his property, either during his lifetime or on death. The property itself fell to the crown.

Blackstone indicates in his commentaries that the Normans introduced corruption of blood into English law on their conquest of the Isles. After 1066, civil disabilities were imposed through “attainder,” a procedure that declared a criminal convicted of treason or a felony “attained.” Attainder immediately led to corruption of blood, forfeiture and loss of all civil rights. This denial of all rights became referred to as “civil death.”

By the late eighteenth century, the penalty had come under attack in England as unduly harsh and lacking in use, as rehabilitative principles began their ascent during the Age of Enlightenment. During this time, the English parliament created felonies without corruption of blood as penalty. It ultimately abolished corruption of blood in 1870.

The U.S. Constitution rejected the penalty in the Corruption of Blood Clause of Article III. It limits forfeiture for treason to the traitor’s lifetime and indicates its hostility to the punishment also in the Bill of Attainder Clause. These are among the substantive values, as Alexander Hamilton noted, included in the Constitution itself. Why the founding fathers rejected corruption of blood remains unclear, but they seem to have been concerned about creating familial, rather than individual, punishment. The decisions in *Wallach v. Riswick* and Justice Miller’s dissent in *Ex parte Garland* both point in this direction. After the constitutional prohibitions, the federal government passed complementary legislation that remained on the books until the 1980s.

Several state constitutions also contain corruption of blood clauses. However, despite federal and state prohibitions, the problems created by corruption of blood continued because of civil death provisions that prohibited inmates, and especially lifers, from entering into contracts and from inheriting property. Therefore, their rights to grant property to their children was

limited, albeit they were not restricted from bequeathing property they held at the time of conviction to their children. Modern forfeiture statutes also raise some of the same problems inherent in the corruption of blood penalty.

Despite the attempt to protect children from the sins of their parents, in many other situations, the law penalizes children for choices their parents made. This held particularly true for children born out of wedlock but continues to other groups of children, such as the noncitizen children of undocumented immigrants who may be barred from access to certain public goods. Moreover, the prohibition on corruption of blood does not entail prohibition on other consequences of a criminal offense, many of which also impact the offender’s family. Among them are the denial of welfare benefits to the offender, restrictions on access to one’s children because of incarceration, and inability to provide appropriately for one’s family because of statutory limitations on employment.

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References and Further Reading

U.S. Const. art. I, 9. cl. 3, art. I, 10, cl. 1; art. III, 3, cl. 2.
William Blackstone, Commentaries.
History and Theory of Civil Disabilities, Vand. L. Rev. 23 (1970): 941.
Stier, Max, Note, *Corruption of Blood and Equal Protection: Why the Sins of the Parents Should Not Matter*, Stan. L. Rev. 44 (1992): 727.

Cases and Statutes Cited

Ex parte Garland, 71 U.S. (4 Wall) 333 (1866)
Wallach v. Van Riswick, 92 U.S. 202 (1875)

See also **Bill of Attainder; Civil Death; Collateral Consequences**

COUNSELMAN v. HITCHCOCK, 142 U.S. 547 (1892)

This case concerns the breadth of the protection against self-incrimination under the Fifth Amendment. The defendant, Counselman, invoked his Fifth Amendment privileges in refusing to answer specific questions from a federal grand jury. Because of the existence of a federal statute granting immunity from prosecution on the basis of evidence the witness had provided during a criminal proceeding, Counselman was charged with contempt. He filed a petition for a writ of habeas corpus, arguing that he could legitimately invoke the Fifth Amendment, because its protection was broader than that offered by the statute.

The case went on appeal to the U.S. Supreme Court, where it was heard in December 1891 and decided in January 1892, with Justice Samuel Blatchford writing for a unanimous Court. The Court agreed with Counselman's contention, saying that the protection provided by the federal law was limited by the fact that, while the evidence obtained through his testimony could not be used against him in a federal proceeding, it could be used as a basis for obtaining information that might be used in another case against him. The Court thus acknowledged the limited protection offered by the federal statute. Congress subsequently revised the law, prohibiting the prosecution of a witness granted immunity for his involvement in the matter about which he testified.

In a period when relatively little attention was being paid to the scope of civil liberties protection offered by the federal Bill of Rights, the ruling in this case was significant because the Court, given the opportunity, was willing to acknowledge the broad scope of the guarantees against self-incrimination offered by the Fifth Amendment.

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References and Further Reading

Constitutional Rights at the Junction: The Emergence of the Privilege against Self-Incrimination and the Interstate Commerce Act, Virginia Law Review, 81 (1995): 7:1989–2042.

Levy, Leonard. *Origins of the Fifth Amendment; the Right against Self-incrimination* New York: Oxford University Press, 1968.

See also Coerced Confessions/Police Interrogations; Self-incrimination (v): Historical Background

COUNTY AND CITY SEALS WITH RELIGIOUS CONTENT

One issue that frequently generates controversy in the United States is whether the use of religious symbols or language on government property constitutes an establishment of religion in violation of the Establishment Clause. One example of the use of religious symbols or language on government property is the use of religious language or imagery on the official seals of cities and counties. On a number of occasions, plaintiffs have challenged the constitutionality of such usages. The U.S. Supreme Court has never considered such a case, but a few lower courts have done so. These courts have tended to focus on whether the use of the religious imagery or language has a primary effect of advancing religion or would be

reasonably viewed as constituting an endorsement of religion. If so, then the seal violates the Establishment Clause.

Most courts that have occasion to consider such a case have held that religious content on a city or county seal violates the Establishment Clause. In 1985, the U.S. Court of Appeals for the Tenth Circuit sitting en banc considered the constitutionality of a Bernalillo County, New Mexico, seal that contained the Spanish motto "Con Esta Vencemos," which means "With This We Conquer," arched over a gold Latin cross. The district court had found that the seal's religious imagery had only historical, not religious, significance, because it denoted the role of the Catholic Church in the settlement of the American Southwest. The Tenth Circuit disagreed, holding that the seal had "the primary effect of advancing religion" and so violated the Establishment Clause. By way of example, the court noted that those persons who encounter a police officer with the county seal emblazoned on his car could reasonably assume that the "officers were Christian police, and that the organization they represented identified itself with a Christian God" *Friedman v. Board of County Commissioners* (1985). Thereafter, the county removed the religious language and replaced the Latin cross with an ancient Native American sun symbol.

In 1989, the Tenth Circuit again considered the constitutionality of a government seal—one for the city of St. George, Utah—that included a depiction of the city's Mormon temple. The district court found on a summary judgment motion that the illustration of the temple did not have the primary effect of endorsing the Mormon Church, but the Tenth Circuit reversed, holding that there was an issue of fact as to whether the depiction constituted a governmental endorsement of religion and remanded for a trial: *Foremaster v. City of St. George* (1989).

In 1991, the U.S. Court of Appeals for the Seventh Circuit found that two Illinois city seals—the first of which contained a Latin cross along with various secular symbols and the second of which also contained a Latin cross along with the words "God Reigns"—violated the Establishment Clause, because they constituted an endorsement of the Christian religion: *Harris v. City of Zion* (1991); *Kuhn v. City of Rolling Meadows* (1991).

In 1995, the Tenth Circuit again considered the constitutionality of a city seal—for Edmond, Oklahoma—that contained four quadrants, one of which depicted a Latin cross. The court rejected the city's argument that the seal reflected "the unique history and heritage of Edmond" and concluded that the use of the cross on the seal violated the Establishment Clause: *Robinson v. City of Edmond* (1995).

In 1998, a federal district court found that a city seal for Stow, Ohio, containing, along with other secular symbols, a Latin cross superimposed on an open book, had the primary effect of advancing Christianity and thus violated the Establishment Clause” *ACLU v. City of Stow* (1998). The following year, in 1999, a federal district court found that a city seal in Republic, Missouri, that contained a symbolic representation of a fish—a Christian symbol—along with other secular images violated the Establishment Clause: *Webb v. City of Republic* (1999).

One court, however, has sustained the constitutionality of a city seal containing religious content. In 1991, the U.S. Court of Appeals for the Fifth Circuit found that the seal of the city of Austin, Texas, that incorporated the family coat of arms of Stephen F. Austin for whom the city was named did not violate the Establishment Clause even though the coat of arms included a Latin cross: *Murray v. City of Austin* (1991).

On at least one occasion, the use of a county name itself has been challenged as violating the Establishment Clause. In 1994, the U.S. Court of Appeals for the Ninth Circuit considered a constitutional challenge to use of the word “Sacramento” on the Sacramento county seal because the English word, “sacrament,” is a term associated with Christianity. The district court dismissed the lawsuit on standing grounds and the Ninth Circuit affirmed: *O’Leary v. County of Sacramento* (1994).

DAVISON M. DOUGLAS

References and Further Reading

- Curtis, Ralph, *Religious Symbols on Municipal Seals and Logos*, *Journal of Contemporary Law* 19 (1993): 287–300.
- Hill, David S., *City of Edmond v. Robinson: The Coercion-Standing Test—A New Approach to Religious Symbols Under the Establishment Clause?* *Utah Law Review* 2000 (2000): 643–669.
- McCabe, Kevin J., *Note: Toward a Consensus on Religious Images in Civic Seals Under the Establishment Clause: American Civil Liberties Union v. City of Stow*, *Villanova Law Review* 46 (2001): 585–611.

Cases and Statutes Cited

- ACLU v. City of Stow*, 29 F. Supp. 2d 845 (N.D. Ohio 1998)
- Foremaster v. City of St. George*, 882 F.2d 1485 (10th Cir. 1989)
- Friedman v. Board of County Commissioners*, 781 F.2d 777 (10th Cir. 1985)
- Harris v. City of Zion*, 927 F.2d 1401 (7th Cir. 1991)
- Kuhn v. City of Rolling Meadows*, 927 F.2d 1401 (7th Cir. 1991)
- Murray v. City of Austin*, 947 F. 2d 147 (5th Cir. 1991)

O’Leary v. County of Sacramento, 19 F.3d 1440 (9th Cir. 1994) (unpublished)

Robinson v. City of Edmond, 68 F.3d 1226 (10th Cir. 1995)

Webb v. City of Republic, 55 F. Supp. 2d 994 (W.D. Mo.1999)

See also Establishment Clause (I): History, Background, Framing

COVINGTON, HAYDEN (1911–1980)

Hayden Covington, a graduate of the San Antonio Bar Association School of Law (later St. Mary’s University School of Law), ranks among the most overworked and underappreciated attorneys in American history. During the middle part of the twentieth century, he handled as many as fifty major cases every year involving the civil liberties of Jehovah’s Witnesses, who faced an unparalleled wave of religious persecution because of their uncommon beliefs and sometimes peculiar behavior. His indefatigable work helped usher in a new era in American constitutional law, the “rights revolution” that reached its apogee under the Warren Court of the 1960s.

Unleashed in a courtroom, Covington could be a whirlwind. A brief magazine profile published in 1943, marveling at his athletic delivery of oral arguments, compared him to a cyclone. After watching the frenetic Witness attorney argue several cases in the early 1940s, a Supreme Court clerk cracked that while Covington might not have talked a greater length longer than other attorneys appearing before the nation’s highest bench, he undoubtedly performed more calisthenics. Covington’s loud attire also was conspicuous: he argued one important case while sporting a vibrant green suit and a red plaid tie.

But while Covington’s demeanor in the courtroom was easy to mock, his record was one that any lawyer would envy. Between 1938 and 1955, he prevailed in more than two dozen cases heard by the U.S. Supreme Court, a record that prompted more than one sympathetic observer to compare him to the likes of Thurgood Marshall. Such landmark cases as *Minersville School District v. Gobitis*, 310 U.S. 586 (1940), *Cantwell v. Connecticut*, 310 U.S. 296 (1940), and *West Virginia v. Barnette*, 319 U.S. 624 (1942) bore his unmistakable imprimatur. His work in these cases and myriad others prompted one national magazine to call him an extraordinary precedent-breaker. Indeed, Covington was nothing short of relentless in asking the high court to scrap ossified judicial precedents and broaden judicial protections for civil liberties.

Asked to explain why he and his fellow Witnesses defended their civil liberties so zealously in the courts, Covington said that they were simply devout

Christians following a precedent established in the Scriptures by the likes of the apostle Paul. The Witnesses were like the earliest Christians, Covington suggested, because they used the courts not only to secure their own freedoms but also to help ensure religious liberty for all Christians.

Covington's star faded in the 1960s and 1970s. He clashed with the leaders of his faith and was at one point "disfellowshipped" (effectively excommunicated). Until his death in 1980, he also was dogged by rumors that he suffered from a drinking problem. But even as he floundered, Covington managed to briefly return to prominence as an attorney in the late 1960s by helping the boxer Muhammad Ali contest his military draft classification in court.

SHAWN FRANCIS PETERS

References and Further Reading

- Ali, Muhammad. *The Greatest: My Own Story*. New York: Random House, 1975.
- Newton, Merlin Owen. *Armed with the Constitution: Jehovah's Witnesses in Alabama and the U.S. Supreme Court*. Tuscaloosa, AL: University of Alabama Press, 1995.
- Penton, M. James. *Apocalypse Delayed: The Story of Jehovah's Witnesses*, 2nd ed. Toronto: University of Toronto Press, 1997.
- Peters, Shawn Francis. *Judging Jehovah's Witnesses: Religious Persecution and the Dawn of the Rights Revolution*. Lawrence, KS: University Press of Kansas, 2000.

Cases and Statutes Cited

- Cantwell v. Connecticut*, 310 U.S. 296 (1940)
- Minersville School District v. Gobitis*, 310 U.S. 586 (1940)
- West Virginia v. Barnette*, 319 U.S. 624 (1943)

COX v. LOUISIANA, 379 U.S. 536 (1965)

The First Amendment rights to freedom of speech and assembly have long been used as tools to spur political reform in our country. In December of 1961, a few years before President Lyndon B. Johnson signed the 1964 Civil Rights Act, Reverend Elton Cox led approximately 2000 African-American students in a civil rights march in Baton Rouge, Louisiana, to protest the recent arrest of students picketing racially segregated establishments. It began at the old State Capitol building and was to proceed to the courthouse where the picketers were being held.

Cox refused to disband the group when contacted by authorities. Near the courthouse, Cox explained the march to the police chief, who gave directions to stay on the sidewalk across the street and to refrain from interfering with traffic. The marchers followed the instructions. When Cox encouraged marchers to

demand service at segregated diners, there was muttering and grumbling from a group of several hundred white onlookers. The local sheriff then stated that the protestors were now violating the law and ordered them to disband. Police began grabbing some students. Within moments, the police used tear gas on the demonstrators.

The next day, the police arrested Cox for disturbing the peace and for obstructing public passages (the sidewalk across the street from the courthouse) and other offenses. Cox was convicted. The Louisiana Supreme Court upheld his convictions. The Supreme Court granted *certiorari* to determine whether these convictions infringed on Cox's First Amendment rights to freedom of speech and assembly.

The Supreme Court reversed the convictions. The conduct of the marchers, which included singing, clapping, and cheering, did not exceed the sort of activities expected at a peaceful assembly and did not establish a breach of the peace. The Supreme Court cited cases like *Edwards v. South Carolina*, which protected similar First Amendment conduct and held that the breach of the peace statute, as interpreted by the Louisiana Supreme Court, was unconstitutionally overbroad. As for the argument that encouraging demonstrators to demand service at segregated lunch counters could result in violence, the Court noted that the free speech and free assembly rights could not be denied based on hostility to the assertion or exercise of such rights. The Supreme Court explained that the function of free speech is to invite dissent, induce unrest, or stir people to anger.

When considering the statute that prohibited the obstruction of public passages, the Supreme Court distinguished between communicating ideas through conduct from communicating ideas through "pure speech" and rejected the claim that communicative conduct was afforded the same protections as pure speech. Although Cox's conduct violated the statute, the statute violated the First Amendment, because it granted local authorities unfettered discretion to restrict speech and assembly by deciding which views would be permitted. The Supreme Court overturned this conviction as well. *Cox v. Louisiana* was one of several important cases for the Civil Rights movement. It also helped protect the rights of freedom of speech and assembly from impermissible restrictions by local authorities exercising unfettered statutory discretion.

VINCENT L. RABAGO

References and Further Reading

- Kalven, Harry, *The Concept of the Public Forum: Cox v. Louisiana*, SUP. CT. REV. 1 (1965)

Police Dep't v. Mosley, 408 U.S. 92, 96, 99 & n.6 (1972) (speech in public forums).

Tribe, Laurence. *American Constitutional Law*, § 12-24, at 986, 2d ed., Mineola, NY: Foundation, 1988.

Cases and Statutes Cited

Edwards v. South Carolina, 372 U.S. 229 (1963)
Civil Rights Act of 1964

See also **Civil Rights Act of 1964; Civil Rights Laws and Freedom of Speech; Demonstrations and Sit-ins; First Amendment and PACs; Speech Tests; Freedom of Assembly; Freedom of Assembly Infringed; Freedom of Speech and Public Property; Incitement to Violence and Free Speech; Johnson, Lyndon Baines; Public Forum Doctrines**

COX v. NEW HAMPSHIRE, 312 U.S. 569 (1941)

A group of Jehovah's Witnesses was convicted in New Hampshire of violating a state statute that prohibited public processions without a permit. The religious group had staged an unauthorized march in downtown Manchester to advertise their religious and political beliefs. After their arrest, the group sued the state for violating their Fourteenth Amendment rights to freedom of speech, press, worship, and assembly. The Supreme Court unanimously rejected their claims, arguing that the licensing laws served a limited and practical purpose of promoting social order and did not violate their civil liberties. The courts emphasized that the marchers were convicted for breaking the licensing statute, not for distributing information, holding public meetings, or expressing religious beliefs. Moreover, the group could have advertised its beliefs without breaking the law by getting a permit for an organized march. Also, there was no indication that the licensing laws were applied in a discriminatory manner to censor the Jehovah's Witnesses or any other group, so the constitutional challenge was inapplicable. The Court shows here that the expression of civil liberties can be reasonably restrained, through the government's traditional regulation of the use of streets, in the interest of social order. The case is one of many cases where the Court has held that nondiscriminatory restrictions on time, place, and manner of speech are reasonable for a public forum. The case is distinguished from those in which the challenged laws explicitly or more severely restrict freedom of speech and assembly, where such laws have been declared unconstitutional.

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References and Further Reading

Baker, C. E., *Unreasoned Reasonableness: Mandatory Parade Permits and Time, Place, and Manner Regulations*, *Northwestern Law Review* 78 (1983): 937-1024.

Goldberger, D., *A Reconsideration of Cox v. New Hampshire: Can Demonstrators Be Required to Pay the Costs of Using America's Public Forums?* *Texas Law Review* 62 (1983): 403-451.

Paying for Free Speech: The Continuing Validity of Cox v. New Hampshire, *Washington University Law Quarterly* 64 (1986): 985-995.

Cases and Statutes Cited

Cox v. New Hampshire, 312 U.S. 569 (1941); *Lovell v. Griffin*, 303 U.S. 444 (1938)

See also **Accommodation of Religion; Balancing Approach to Free Speech; Content-Based Regulation of Speech; Content-Neutral Regulation of Speech; Equal Protection Clause and Religious Freedom; Establishment of Religion and Free Exercise Clauses; Fourteenth Amendment; Freedom of Speech and Press; Nineteenth Century; Jehovah's Witnesses and Religious Liberty; Private Religious Speech on Public Property; Religion in "Public Square" Debate; Religious Symbols on Public Property; Zoning and Religious Entities; Zoning Laws and Freedom of Speech**

COY v. IOWA, 487 U.S. 1012 (1988)

An individual charged with sexually assaulting two young girls was convicted after a jury trial in which a screen placed between him and the girls blocked him from their sight when they testified. In authorizing use of the screen, the trial judge relied on a state statute intended to make child-victims feel less uneasy in giving their testimony.

In *Coy v. Iowa*, the U.S. Supreme Court held that the Sixth Amendment right of a criminal defendant "to be confronted with the witnesses against him" guarantees a face-to-face encounter between a witness and the accused. It reasoned that such an encounter is essential to fairness and to the perception of fairness, in part, because "[i]t is always more difficult to tell a lie about a person 'to his face' than 'behind his back.'" The Court also held that the screen violated the accused's confrontation right. Without deciding whether any exceptions exist to the requirement of a face-to-face encounter, it concluded that, because the trial judge did not find that the complaining witnesses needed special protection, use of the screen in this case could not fit within any conceivable exception. Two Justices who concurred in the six-member majority opinion, however, believed that the right to a

face-to-face encounter is “not absolute” and that use of certain procedural devices designed to protect a child witness from the trauma of testifying in court may sometimes be permissible—a view the Court subsequently adopted in *Maryland v. Craig*.

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References and Further Reading

- Brustein, Sharon Parker, *Coy v. Iowa: Should Children Be Heard and Not Seen?* University of Pittsburgh Law Review 50 (1989): 4:1187–1208.
- Hasselbach, W. Andrew, *Placing a Child Victim of Sexual Abuse Behind a Screen During Courtroom Testimony as Violation of Sixth Amendment Confrontation Clause: Coy v. Iowa*, University of Cincinnati Law Review 57 (1989): 4:1537–1566.
- LaFave, Wayne R., Jerold H. Israel, and Nancy J. King. *Criminal Procedure*, 1110–1111, 4th ed., St. Paul: Thompson-West, 2004.

Cases and Statutes Cited

Maryland v. Craig, 497 U.S. 836 (1990)

See also Confrontation Clause; Incorporation Doctrine; Maryland v. Craig, 497 U.S. 836 (1990)

CRANE v. JOHNSON, 242 U.S. 339 (1917)

This case stems from a statute California enacted to regulate the field of medicine. The statute created a board of medical examiners to prescribe a specific course of study, administer an examination, and issue licenses for those practicing medicine. The statute defined “medicine” broadly to encompass traditional medicine, such as surgery and prescription drugs, and nontraditional medicine, such as chiropractics and faith-based healing. Drugless practitioners who healed with prayer were exempt from the statutory requirements, whereas other nontraditional practitioners were not.

For the past seven years, the plaintiff in this case practiced nontraditional, faith-based medicine in Los Angeles, California. His practice used faith, hope, mental suggestion, and mental adaptation. The plaintiff challenged the enforcement of the statute against him on the basis of its distinction between drugless practitioners and prayer healers. He claimed that the state was incompetent to make such a distinction. He also alleged that the statute violated the Equal Protection Clause of the Fourteenth Amendment, because the classification among drugless practitioners did not relate to a legitimate purpose.

The Court held that the statute was enforceable. The distinction between drugless practitioners and

prayer practitioners was rooted in a legitimate basis and was therefore not arbitrary. According to the Court, the basis of the state’s distinction came from the fact that the state considered the plaintiff’s medical practice to be that of drugless medicine. His medical practice required skills that could be enhanced through practice and specialized knowledge. Alternately, the Court considered the practice of prayer-based medicine to be akin to the practice of religion, an area that could not be constitutionally regulated by the state.

The precedent established in this case has since permeated the regulation of alternative medicine throughout the country. States are now creating more stringent standards for nontraditional medical practitioners. They are mandating these practitioners to attain state certifications prior to claiming to practice medicine, and they are becoming stricter in their enforcement of noncompliance with these statutory requirements.

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References and Further Reading

- Cohen, Michael H., *Healing at the Borderland of Medicine and Religion: Regulating Potential Abuse of Authority by Spiritual Healers*, Journal of Law and Religion 18 (2002–2003): 373–426.
- Kallmyer, J. Brad, *A Chimera In Every Sense: Standard of Care for Physicians Practicing Complementary and Alternative Medicine*, Indiana Health Law Review 2 (2005): 225–265.
- Noah, Lars, *Ambivalent Commitments to Federalism in Controlling the Practice of Medicine*, Kansas Law Review 53 (2004): 149–193.
- Silverman, Ross D., *Regulating Medical Practice in the Cyber Age: Issues and Challenges for State Medical Boards*, American Journal of Law and Medicine 26 (2000): 255–276.
- Smalley, Ruth Ellen, *Will a Lawsuit a Day Keep the Cyberdocs Away? Modern Theories of Malpractice as Applied to Cybermedicine*, Richmond Journal of Law and Technology 7 (Winter 2001): 29–56.

Cases and Statutes Cited

- Truax v. Raich*, 239 US 33 (1915)
- West’s Ann. Cal. Bus. & Prof. Code § 2100

CRANE v. KENTUCKY, 476 U.S. 683 (1986)

In *Crane v. Kentucky*, 476 U.S. 683 (1986) the Supreme Court held that the defendant’s Fourteenth and Sixth Amendment rights to a fair trial were violated when the trial judge excluded testimony regarding the physical and psychological circumstances of a

confession, based on the fact that a pretrial hearing had already been held on the issue of voluntariness of the confession.

Crane, at the age of sixteen, was questioned about the murder of a convenience store clerk and began voluntarily confessing to numerous past crimes and, after being moved to a formal interrogation facility, eventually confessed to the murder in question. The police had no physical evidence against Crane, only the confession. Crane sought to suppress his confession at trial, but the judge ruled the voluntariness issue had been addressed and could not be relitigated before a jury.

The Supreme Court had previously held in *Sims v. Georgia*, 385 U.S. 538 and *Jackson v. Denno*, 378 U.S. 368, that the circumstances surrounding the taking of a confession are “relevant to two separate inquiries, one legal and one factual.” How a confession is derived, such as the issue of voluntariness, is a matter of legality and was appropriately addressed during the pretrial hearing. In *Crane*, the Supreme Court held that the issue of the physical and psychological circumstances under which a confession was derived is relevant to the factual issue of innocence or guilt and must be allowed as a defense at trial in the presence of a jury.

JEANNINE M. EIBAND

Cases and Statutes Cited

Jackson v. Denno, 378 U.S. 368

Sims v. Georgia, 385 U.S. 538

See also **Coerced Confessions/Police Interrogations; Defense, Right to Present**

CREATIONISM AND INTELLIGENT DESIGN

Background

Writing in the 1830s, Alexis de Tocqueville identified the place of religion in society as one of the major differences between the United States and Europe. The continuing truth of this observation can be seen in the prevalence of belief in creationism: Americans are more skeptical about evolutionary thinking than any other developed nation. Survey data consistently report that approximately forty-five percent of Americans believe in the literal truth of Genesis and approximately forty percent believe that God guides evolutionary developments. These proportions have, if anything,

tended to rise in recent years. Only approximately ten percent accept the Darwinian orthodoxy of natural selection as a result of random mutations that generate reproductive advantage. The proportions in Europe are almost exactly reversed, with subscribers to the Genesis story being virtually undetectable in most national surveys. Even religiously conservative countries like Poland show majority acceptance of the Darwinian account, not least because this has been the official position of the Roman Catholic church since the issue of the encyclical, *Humani Generis*, in 1950.

It is, then, hardly surprising that the teaching of science in high schools has become a major source of social conflict in the United States almost from the point at which evolution ceased to be a topic confined largely to specialists and was established as a central theme of modern biology. The belated synthesis of Darwin's theories of how a process of natural selection might work and of Mendel's observations on the inheritance of specific characteristics within species, during the first decade of the twentieth century, entered high school curriculum after World War I and almost immediately came into collision with the faith beliefs of large numbers of ordinary Americans, particularly, but not exclusively, in the South and Midwest. In contrast to Europe, the public provision of education is a highly devolved matter in the United States, with relatively little federal involvement and even states having limited central authority over local school boards. At the same time, the First Amendment erects a strong barrier to any arm of the American state acting in any way that may seem to endorse any religious belief or, indeed, belief in preference to nonbelief. This immediately creates a tension between the desire of local communities to prescribe a public school curriculum that reflects their faith beliefs and the Constitutional objection to the promotion of religion by public bodies.

Early Challenges

The publication of high school biology textbooks, from 1919 onwards, that included coverage of evolution provoked a backlash from fundamentalist religious leaders, including campaigns for state legislation to ban the teaching of this subject. Tennessee was the first state to legislate, in 1925, but community leaders in Rhea County linked up with the ACLU to fight a test case against this law. Local science teacher John Scopes volunteered to be prosecuted. Although the evolutionists are usually thought to have won a moral victory in the “Scopes Trial” (*Tennessee v. Scopes*, 1925), the defendant was

convicted and fined. The State Supreme Court reversed the verdict on technical grounds but recommended that the state attorney general should not pursue the matter further. The Tennessee statute was not repealed until 1967. In the absence of a Constitutional test, similar laws were passed in Mississippi (1926) and Arkansas (1928), and publishers voluntarily omitted the topic of evolution from most 1930s high school biology textbooks. Each state and community reached its own accommodation between biblical literalism and evolutionary thought until the perceived challenge of Soviet technology in the late 1950s provoked national elites to press for the modernization of science education, overriding local objections as their counterparts in Europe had long since done.

This generated the First Amendment challenge, which Scopes had failed to accomplish, to the 1928 Arkansas statute. On the recommendation of its biology teachers, the Little Rock School Board adopted a high school textbook for the 1965–1966 session that included a chapter on evolution. One teacher, Susan Epperson, asked the courts to declare that the statute was invalid and that she would not be committing a criminal offense by teaching from the prescribed text. Although her claim was initially upheld, on a combination of Fourteenth and First Amendment grounds, as a violation of her rights to freedom of speech, it was overturned on appeal. The State Supreme Court held that the 1928 act was a valid direction by the state government about the actions of its employees in their official capacity. The case was further appealed to the U.S. Supreme Court, in *Epperson v Arkansas* (1968), which found for Epperson. There is a certain mythology about this: Mr Justice Fortas took a strong First Amendment approach, whereas his colleagues simply thought that the state law was too vague to be constitutional on Fourteenth Amendment grounds. In the longer term, however, Fortas's analysis has prevailed.

In effect, Fortas anticipated the *Lemon* analysis of the First Amendment, formulated three years later, which set a three-part test for the constitutionality of statutes bearing on religious issues: they must have a secular purpose; their principal effect must neither advance nor inhibit religion; they must not foster "an excessive government entanglement with religion." In looking to the "secular purpose" element, the Supreme Court has not confined itself to looking exclusively at evidence of legislators' intent but also at the activities of groups lobbying in support of statutes.

The Supreme Court decision in *Epperson* blocked the possibility of legally prohibiting the teaching of evolution in public schools. However, this remained as offensive as ever to large and influential faith

communities, who sought to dilute its impact by two new strategies. One was to require classroom teachers to give "equal treatment" to Biblical and Darwinian accounts of the origin and development of species. Creationism was relabelled as "creation science" and presented as an alternative scientific account. The other was to require that students be cautioned about the status of the Darwinian account, either by having teachers read a prescribed statement or by placing stickers on biology textbooks warning that elements of the content were controversial.

The first of these was evaluated by the Supreme Court in *Edwards v Aguillard* (1987). With Justice Scalia dissenting, the Court held that the statute's stated secular purpose, of protecting the rights of teachers to talk about creationism, was a sham: the legislature's disavowal of religious purpose was undermined by the evidence of active lobbying by faith groups. However, the most important element of the decision was its declaration that creationism—or creation science—was inherently religious in its nature. It could not be subject to normal academic tests of its validity, it was historically permeated by religious entanglements, and, at its heart, it requires belief in a supreme being as creator. Any doctrine that requires a prior faith belief is inherently religious, whether or not the word "God" is actually spoken in the classroom and cannot be promoted in the public school curriculum.

The Supreme Court has not ruled directly on the issue of stickers or disclaimers, although three justices (Scalia, Rehnquist, and Thomas) indicated their willingness to hear the issue when an application for *certiorari* was refused in *Freiler v Tangipahoa* (1999).

The Tangipahoa Parish Board of Education in Louisiana had adopted a resolution in 1994 disavowing evolution and requiring teachers to read a disclaimer. A group of parents appealed against this to the district court, which found in their favor, a decision affirmed by the Fifth Circuit, following *Lemon* and, ultimately, *Epperson*. The sticker issue has not been definitively adjudicated, although a case arising from a sticker introduced in 2002 by the School Board in Cobb County, Georgia, was still before the federal courts in 2005. This does, however, seem likely to face the same hurdles unless a change in the balance of the Supreme Court leads to a fundamental restatement of the established interpretation of the First Amendment.

Intelligent Design Creationism

After *Epperson* and *Edwards*, it became clear that creationists would need a new strategy if they were

to be able to sustain their challenge to the entrenchment of scientific materialism in public school curricula. Intelligent Design Creationism (IDC) is the result. Its promoters seem to have observed that two propositions associated with the post-*Epperson* developments in creation science, namely that competing views on any issue deserve equal treatment and that free speech by those who disagree with orthodoxies, should be protected and are capable of generating widespread support beyond fundamentalists because of their resonance with general American values. Provided that the explicitly religious elements of creationism could be eliminated, accounts of the origin and development of species that imply the intervention of a creator might be introduced into the high school curriculum with a sufficient measure of support from nonbelievers to render First Amendment challenges more difficult to sustain. IDC is the result.

IDC abandons the Biblical literalism of previous generations in favor of an approach first formulated by the Reverend William Paley (1743–1805), an important eighteenth century theologian and philosopher. Paley's *Natural Theology* (published 1802) was the dominant intellectual statement against which Darwin's generation reacted. Paley argued that, were we to find a watch lying on the ground, we would necessarily infer that its parts had been framed and put together for a purpose. This evidence of design would, in turn, imply the existence of a designer. In a similar way, Paley argues that the intricacy and complexity of the universe, as exemplified in structures like the human eye, implies the existence of a Design and a Designer. Although contemporaries like David Hume (1711–1776), in his discussion of miracles, attacked this line of argument, it remained influential well into the nineteenth century, and elements can still be seen in the mainstream Christian acceptance of "theistic evolution." However, whereas IDC stresses the constant engagement of the Designer, theistic evolutionists like the Reverend John Polkinghorne (b.1930), a former professor of mathematical physics at Cambridge and an influential theologian, tend to think more in terms of a Cosmic Planner, who may have supplied the raw material of the universe and its basic physical laws but who now, at most, supplies an occasional nudge to the system, deep in the uncertainties of the quantum world.

IDC is the core of what its advocates describe as the "Wedge Strategy" devised during the 1990s by a group of writers associated with the Discovery Institute's Center for Science and Culture in Seattle. Whereas all modern science rests broadly on the principle of naturalism—that events can only be explained by natural and hence observable causes—the Wedge movement seeks to insert a space for "supernaturalism."

that some, if not all, events in the world have a supernatural cause that is inaccessible to observation and objective verification. IDC, however, seeks to avoid specifying the source of that supernatural cause to evade the First Amendment proscriptions. In theory, the Designer could be an alien being from another galaxy or a time-traveling cell biologist. In practice, though, IDC advocates identify the Designer with the Christian God. Nevertheless, IDC is set out as an alternative scientific program with its own alternative school texts like *Pandas and People* (1989).

By redefining science in a way that leaves space for the supernatural and by suppressing the explicitly religious elements of the argument from design, IDC advocates hoped to take their approach outside the scope of *Epperson* and *Edwards*, relying on commonly held notions of "fair play" to mobilize support for their attempt to drive their wedge into the high school curriculum.

This strategy was tested and found wanting by the district court in Pennsylvania in the fall of 2005. On October 18, 2004, the Dover Area School Board resolved that high school students should be made aware of problems with Darwin's theory of evolution and of the possibility for other theories "including but not limited to intelligent design." The Board determined that, from January 2005, teachers would be required to read a disclaimer that asserted compliance with state policy on the science curriculum, and the standardized tests through which this would be assessed, but drew attention to the alternative offered by IDC and referred students to the *Pandas and People* text. A group of parents, teachers, and former School Board members brought an action, *Kitzmiller v. Dover Area School District*, seeking to have this declared unconstitutional. After a six-week trial, the judge, known as something of a conservative, handed down a lengthy and stinging judgment declaring the Board's actions to be in breach of the First Amendment and severely censuring the conduct of a number of Board members, officers, and their advisers. The judge closely follows precedent to determine whether the Board's actions would constitute a message of official "endorsement or disapproval" of religion to an objective student or adult in the school district.

In summary, the judge holds that an objective observer would know that IDC and references to "gaps" or "problems" in evolutionary theory are creationist strategies for weakening education about evolution. He outlined a wealth of statements by leading IDC advocates asserting the identification of the Designer with the Christian God. The supernatural elements of IDC make it inherently religious. The judge goes on to discuss whether students would see

the disclaimer as an official endorsement of religion. He holds that the phrasing, effectively saying “the State of Pennsylvania requires us to teach you evolution but we don’t really believe it and think you should study this inherently religious account instead,” constitute a message of religious endorsement comparable to that struck down in *Freiler*. Turning to the understanding of the Board’s action in the wider community, he notes the evidence of newsletters and public meetings that present IDC in religious terms and from correspondence and articles in the local press that show it was perceived as such by local residents. Again, he holds that there has been a clear endorsement of religion by a public body. This leads to an unequivocal finding against the School Board on First Amendment grounds, coupled with strong criticism of the conduct of members in office and of their behavior, including frequent evasion and outright lying, in court.

However, the judge also discusses a number of the other issues raised in the case, in the hope, he declares, of avoiding “the obvious waste of judicial and other resources” that would be incurred in further trials. In particular, he directly evaluates the question of whether IDC is science, as distinct from his evaluation of whether it is an expression of religious belief. This has a wider importance, because an alternative IDC strategy has been to seek to have school boards or other public bodies redefine what counts as science to encompass IDC. The State Board of Education in Kansas, for example, has been in turmoil over this issue since 1999. In *Kitzmiller*, the judge finds that IDC fails the test on three grounds: that it invokes and permits supernatural causation; that its argument of “irreducible complexity,” that some biological phenomena are too complex to have arisen by the chance processes of evolution, is flawed and illogical; and that its negative attacks on evolution have been successfully refuted. Its only textbook contains outdated concepts and badly flawed science. IDC is, in the end, a theological position, which has no place in a science curriculum.

Kitzmiller is, of course, at best a limited precedent in one federal district. The judgment is unlikely to be reviewed by higher courts, since control of the Dover School Board changed in November 2005 elections, just as the trial was ending. However, it is hard to see how the judge’s analysis can be faulted or how First Amendment obstacles to IDC can be overcome, unless there is a major reassessment of *Lemon* by the Supreme Court. Evolution’s place in lawful high school science curricula would seem to be secure from challenge unless IDC supporters can produce convincing empirical evidence to support their claims to have presented an alternative.

One last argument, which was not discussed in *Kitzmiller*, may be worth mentioning, namely, whether a requirement to teach evolution in high schools violates teachers’ free speech rights under the First Amendment. There are a number of cases on this that make it clear that the rights of teachers are abridged during the school day, whether they are actually teaching or not. In the course of their employment, teachers’ speech is official speech on behalf of their employers and subject to whatever restrictions apply to those employers. As public employees, then, teachers cannot lawfully speak in ways that violate the *Lemon* test by appearing to endorse or promote religious belief or nonbelief. This prohibition can extend into their private time if there is a danger that they might be identified as representatives of that public body. For example, a teacher may not organize, out of school hours, a religious society meeting in premises rented from their own school but can do this on the premises of another school where there is no risk of confusion about their status as a private individual. A requirement to teach evolution as part of a standard science curriculum is a lawful exercise of the employer’s rights, and termination of a contract for teaching any version of creationism in science curriculum time is a lawful exercise of the employer’s responsibility not to breach their First Amendment obligations. This does not, of course, prevent the examination of IDC within a religious studies curriculum, any more than it prevents examining the Book of Genesis as part of a comparative study of the creation myths told by various faith communities.

Conclusion

Given the financial resources available to the conservative Christian interests that have sustained creationism in various guises for almost a century, and the evidence of the scale of creationist belief in the contemporary United States, it is unlikely that the legal setback in Dover will end the confrontation between some forms of religious belief and the scientific community in the American courts. However, it does seem that a more ingenious intellectual strategy than IDC will need to be devised to overcome the established interpretation of the First Amendment, unless this is revised by the Supreme Court.

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References and Further Reading

Brauer, Matthew J., Barbara Forrest, and Steven G. Gey, *Is it Science yet? Intelligent Design Creationism and the*

- Constitution*, Washington University Law Quarterly 83 (2005): 1:1–149.
- Coleman, Simon, and Leslie Carlin, eds. *The Cultures of Creationism: Anti-Evolutionism in English-Speaking Countries* Aldershot: Ashgate.
- Manson, Neil A., ed. *God and Design: The Teleological Argument and Modern Science*, London: Routledge, 2003.
- Pennock, Robert T., ed., *Intelligent Design Creationism and Its Critics: Philosophical, Theological and Scientific Perspectives*, Cambridge, MA, MIT Press, 2001.
- Reule, Deborah A., *The New Face of Creationism: The Establishment Clause and the Latest Efforts to Suppress Evolution in Public Schools*, Vanderbilt Law Review 54, (2001): 2555–2610.
- Russo, Charles J., *Evolution v Creation Science in the US: Can the Courts Divine a Solution?* Education Law Journal 3, September (2002): 152.

Cases and Statutes Cited

- Edwards v Aguillard*, 482 U.S. 578 (1987)
- Epperson v. Arkansas*, 393 U.S. 97 (1968)
- Freiler v Tangipahoa Parish Bd. of Educ.*, 385 F.3d 337 (5th Cir. 1999)
- Kitzmiller et al. v Dover Area School District et al.* (2005) (accessed at <http://www.aclupa.org/downloads/Dec200-opinion.pdf>)
- Lemon v Kurtzman* 403 U.S. 602 (1971)
- State of Tennessee v John Thomas Scopes* (1925) (accessed at <http://www.law.umkc.edu/faculty/projects/ftrials/scopes/scopes.htm>)
- John Thomas Scopes v. The State of Tennessee*, 154 Tenn. (1 Smith) 105 (1927), 289 S.W. 363
- Tangipahoa Parish Bd. of Educ. v. Freiler*, 530 U.S. 1251 (2000)
- See also *Edwards v. Aguillard*, 482 U.S. 578 (1987); *Epperson v. Arkansas*, 393 U.S. 97 (1968); Fortas, Abe; Fourteenth Amendment; *Lemon Test*; Rehnquist, William H.; Scalia, Antonin; Thomas, Clarence

CRIMINAL CONSPIRACY

Conspiracy is a crime that requires (1) an intent to commit a crime, (2) an agreement between two or more persons to commit that crime, and (3) an overt act by one of them in furtherance of the agreement. For example, conspiracy is met when three persons agree to commit a bank robbery and one of the persons gets the bank's blue prints to plan the robbery.

One purpose for the crime of conspiracy is that it allows police to intervene before the crime that is the object of the conspiracy occurs. In our example, police can intervene and arrest the defendant for conspiracy without waiting for the bank robbery. Here conspiracy allows official intervention before the commission of the (harmful) substantive crime that is the goal of the conspiracy.

Now assume that our conspirators go ahead and commit the bank robbery. In some jurisdictions, the

defendants can still be charged with conspiracy. In this situation the crime is justified because collective action presents a greater risk to society than individual action and so warrants additional punishment. Collective action is more dangerous because it makes success of the crime more likely.

Prosecutors like to charge conspiracy because it gives them several advantages. Recognizing this, in 1925 in *Harrison v. U.S.*, Judge Learned Hand famously called conspiracy “that darling of the modern prosecutor's nursery.” Because of these advantages and some vagueness in the definition of the crime, it is controversial.

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References and Further Reading

- Brickey, Kathleen F. *Corporate Criminal Liability: A Treatise on the Criminal Liability of Corporations, Their Officers, and Agents* §§ 6:01–6:28 (2d ed. 1992).
- Johnson, Phillip, *The Unnecessary Crime of Conspiracy*, Cal. L. Rev. 61 (1973): 1137.
- LaFave, Wayne R. *Criminal Law* §§ 12.1–12.4, 4th ed., 2003.
- Marcus, Paul, *Conspiracy: The Criminal Agreement in Theory and in Practice*, Geo. L. J. 65 (1977): 925.

Cases and Statutes Cited

- Harrison v. United States*, 7 F.2d 259, 263 (2d Cir. 1925)
- See also **Chicago Seven Trial**

CRIMINAL LAW/CIVIL LIBERTIES AND NONCITIZENS IN THE UNITED STATES

The Fourth, Fifth, and Sixth Amendments to the U.S. Constitution ensure that defendants enjoy traditional due process rights in all domestic criminal law proceedings. Like their U.S. citizen counterparts, noncitizens are afforded basic rights to notice of the charges filed, to a lawyer to represent them, and to a speedy and public trial. The U.S. Supreme Court, however, has simultaneously recognized limits on certain noncitizens' ability to invoke the Fourth Amendment's protection against unreasonable governmental searches and seizures. Designed to deter unlawful governmental conduct, the Fourth Amendment ensures that law enforcement conduct proper investigations of alleged criminal conduct, otherwise risking that the evidence they obtain may be thrown out of court or that they may be subject to civil suit. That the Fourth Amendment's scope may be limited when the suspect in a criminal investigation is a noncitizen

raises concerns especially when certain immigration law violations trigger criminal sanctions—for instance, in cases of reentering the United States surreptitiously or smuggling noncitizens across the border.

Three limits on the Fourth Amendment's applicability to noncitizens are worth noting. First, the government is permitted a wide berth in conducting investigative stops during roving patrols of the U.S. interior adjacent to the border in its search for undocumented migrants. While the Supreme Court held unconstitutional a roving patrol investigative stop made without either a warrant or probable cause in *Almeida-Sanchez v. United States*, two years later in *United States v. Brignoni-Ponce*, the Court held that during such operations, agents did not have to comply with the regular "probable cause" standard to justify an immigration stop leading to the discovery of an undocumented person; satisfying "reasonable suspicion" is sufficient and that may be based on a variety of factors including a suspect's apparent Mexican ancestry.

Second, the government is held to a higher "probable cause" Fourth Amendment standard when it conducts searches at fixed immigration checkpoints than when it engages in roving border patrols; it need not, however, comply with this higher standard when simply stopping vehicles and questioning their occupants. In *United States v. Ortiz*, the Court held that government officers must have probable cause before they may search private vehicles at fixed checkpoints removed from the border. In *United States v. Martinez-Fuerte*, however, the Court allowed the government to stop vehicles to question their occupants about their immigration status at fixed checkpoints, reasoning that this was less of an intrusion than a full search.

Finally, when the government obtains evidence from abroad pursuant to an illegal search, it may use that evidence at the stateside criminal trial of a noncitizen defendant. In *United States v. Verdugo-Urquidez*, the Supreme Court refused to bar evidence illegally seized abroad for use in a domestic drug trial of a noncitizen. The Court reasoned that because the noncitizen defendant had insufficient connections with the United States, he was not part of "the People" the Fourth Amendment was intended to protect.

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References and Further Reading

- Johnson, Kevin R., *The Case Against Race Profiling in Immigration Enforcement*, Washington University Law Quarterly 78 (2000): 675–736.
- LaFave, Wayne R. et al. *Criminal Procedure, Third Edition*. St. Paul: West Group, 2000.
- Neuman, Gerald L. *Strangers to the Constitution: Immigrants, Borders, and Fundamental Law*. Princeton: Princeton University Press, 1996.

Romero, Victor C., *The Domestic Fourth Amendment Rights of Undocumented Immigrants: On Guitterez and the Tort Law-Immigration Law Parallel*, Harvard Civil Rights-Civil Liberties Law Review 35 (2000): 57–101.

Cases and Statutes Cited

- Almeida-Sanchez v. United States*, 413 U.S. 266 (1973)
- United States v. Brignoni-Ponce*, 422 U.S. 873 (1975)
- United States v. Ortiz*, 422 U.S. 891 (1975)
- United States v. Martinez-Fuerte*, 428 U.S. 543 (1976)
- United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990)

See also Aliens, Civil Liberties of; Equal Protection of Law (XIV); Race and Criminal Justice

CRIMINAL SYNDICATION ACT

See Anti-Anarchy and Anti-Syndicalism Acts

CRIMINALIZATION OF CIVIL WRONGS

Traditionally there was a clear line between civil and criminal law. The civil law, for example, contracts, property, and torts, sought to balance private rights and to restore wronged parties to their rightful positions. The criminal law, on the other hand, was primarily a way for society in general to express its outrage at harmful conduct: it was a way to enforce deeply held norms. Thus, the traditional so-called common law crimes included homicide, rape, arson, and theft. Thus, the law properly recognizing the difference between bad conduct, for example, breach of contract, and conduct that would be criminal, for example, rape.

While the theories underlying the need for criminal and civil law overlapped somewhat, in practice there were clear legal differences. One, for example, could be held civilly liable for negligent conduct (or for the conduct of subordinates). But to be held criminally liable, one had to act deliberately, recklessly, or wantonly. There were good reasons for the difference. Whereas one held civilly liable would lose money, a person found criminally liable would lose his freedom and civil rights. Colloquially, there is a difference between the shame of being sued and the shame of having a criminal record. Moreover, almost everyone in a civilized society knows that murder is wrong. But civil issues such as whether property has been adversely possessed, or whether a prescriptive easement exists, are usually more complex. The demarcation between civil and criminal misconduct ensured that those who harmed the rights of others would pay for the harm caused but that they would not have the force of the criminal law brought down on them. Today that has changed: the line is blurred.

State and local governments enact myriad and sometimes Byzantine civil regulations covering everything from how a multinational corporation may issue stock to whether a small landowner can build on his property. Unfortunately, from a civil liberties perspective, these regulations increasingly carry with them criminal penalties. As Professor Gainer noted in *Federal Criminal Code: Past and Present*, there are tens of thousands of pages of regulatory violations that carry with them criminal penalties. Moreover, as an ABA report noted: "So large is the present body of federal criminal law that there is no conveniently accessible, complete list of federal crimes." In other words, the breach of a regulation that one is ignorant of can carry with it criminal penalties. Worse, if one wanted to ensure he did not violate any criminal laws, he or she wouldn't be able to reference a list.

Still worse is that the Environmental Protection Agency doesn't adequately understand what regulatory violations carry with them criminal penalties. The line between criminal and civil wrongs moves each time a new director of the EPA is appointed.

James DeLong best summed up the problem in *Go Directly to Jail: The Criminalization of Almost Everything*: "The criminalization of highly complex and often conflicting [civil] regulations with virtually no requirement of intent" means that "even the well educated and well informed cannot be sure what the law is and what they must do to comply with it."

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References and Further Reading

- ABA Report. *The Report of the ABA Task Force on the Federalization of Criminal Law*. Washington: ABA, 1998.
- Baker, John S., Jr. *Measuring the Explosive Growth of Federal Crime Legislation*. Washington: The Federalist Society for Law and Public Policy, 2004.
- Gainer, Ronald L., *Federal Criminal Code: Past and Present*, Buff. Crim. L. Rev. 46 (1988): 2.
- Healy, Gene, ed. *Go Directly to Jail: The Criminalization of Almost Everything*. Washington: Cato, 2004.
- Lynch, Timothy. *Polluting Our Principles*, *Cato Institute Policy Analysis* No. 223 (April 10, 1995).
- Meese, Edwin III, *Big Brother on the Beat: The Expanding Federalization of Crime*, *Texas Review of Law and Politics* 1 (Spring 1997): 1.

See also **Federalization of Criminal Law**

CROMWELL, OLIVER (1599–1658)

Oliver Cromwell, soldier and statesman, Lord Protector of England in the 1650s, was born in 1599, into a lower middle class family. For the first forty years of

his life he was a farmer (1599–1640), followed by twelve years as a member of Parliament and a senior military officer (1640–1652), and then five years as Lord Protector of England (1653–1658).

Cromwell believed in Providence and the role of God in bringing about a holy Commonwealth. As God's instrument to lead his people, his providentialism led him to reject forms of church government, institutions, and rituals. His religion was biblical and Christocentric. He supported unity among various religious groups of the godly nation and hoped that it would lead to increased liberty of conscience. His hope for toleration for various denominations did not succeed because of controversies among the various protestant sects, whereas his later parliaments also refused to provide for full liberty of conscience. John Morrill concludes that "Cromwell's achievements as a soldier are great but unfashionable; as religious libertarian great but easily mis-stated; as a statesman inevitably stunted." (Morrill, "Cromwell, Oliver." Oxford DNB, p. 352).

His support for religious liberty did not extend after his death, for more than a generation the Church of England reestablished itself in England until 1689, when a Toleration Act, rather than comprehension, passed Parliament and created an "established" rather than a "national" state church and gave dissenters, under some state restrictions, the ability to practice their religion.

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References and Further Reading

- Cromwell, Oliver. *The Writings and Speeches of Oliver Cromwell*. With an Introduction, Notes and a Sketch of his Life by Wilbur Cortez Abbott, with the assistance of Catherine D. Crane. Published: Cambridge, Harvard Univ. Press, 1937–1947. 4 v.
- Morrill, John. "Cromwell, Oliver." *Oxford Dictionary of National Biography*. Vol. 14. 328–353. Oxford: Oxford University Press, 2004.
- , ed. *Oliver Cromwell and the English Revolution*. London: Longman, 1990.
- Roots, Ivan, ed. *Cromwell, A Profile*. New York, Hill and Wang, 1973.

CROSS BURNING

Perhaps no symbol in American history carries with it the strong sense of infamy and controversy as the burning cross. Justice Thomas, dissenting in a 2003 U.S. Supreme Court opinion, penned, "Cross burning has almost invariably meant lawlessness and understandably instills in its victims well-grounded fear of physical violence." Whether or not a burning cross conveys a message seems settled, especially against the backdrop of the Ku Klux Klan and the

African-American struggle during Reconstruction and the Civil Rights Movement.

What has been, and continues to be, debated is whether a state should be free to proscribe and criminalize the act of burning a cross?

The U.S. Supreme Court's 2003 ruling in *Virginia v. Black* provides an exhaustive overview of both the expressive elements of burning a cross and the constitutional constraints that exist that limit the manner in which a state can criminalize the act of burning a cross.

In *Virginia v. Black*, the U.S. Supreme Court held that Virginia could criminalize the burning of a cross provided that it was done "with the intent of intimidating any person or group or persons." The Court found that cross burning was a particularly virulent type of intimidation. The Court relied on previous First Amendment precedent and exceptions related to "true threats" and "fighting words" that may be regulated in a manner consistent with the Constitution.

Although the Court held that the act of burning a cross for the purposes of intimidation could be criminalized without offending the First Amendment of the Constitution (made applicable to the states by the Fourteenth Amendment), the Court further held that there are instances where crosses are burned without any intention to intimidate. For example, Justice White, concurring in *R.A.V. v. St. Paul*, (1992) stated, "[b]urning a cross at a politically rally would almost certainly be protected expression."

Whenever expressive conduct such as a burning cross is intertwined with such strong historical underpinnings, a short review of the symbol's place in American culture becomes relevant.

Cross burning was used as early as the fourteenth century as a means for Scottish tribes to signal one another. Sir Walter Scott used the burning cross to symbolize both a summons and a call to arms. The integration of the burning cross into American subculture began in the spring of 1866 in Pulaski, Tennessee. The Ku Klux Klan (hereinafter "Klan"), an organization that originated as a social club, transformed into a group that resisted Reconstruction efforts and fought to exclude freed blacks from the political process. The Klan's victims included not only African Americans but also northern whites known as "carpetbaggers" and southern whites who disagreed with the Klan's policies or methods. Justice Thomas, concurring in *Capitol Square Review and Advisory Board v. Pinette* (1995), reminded us that the Klan not only disfavored individuals on racial and geographical bounds but also on religious and political grounds, hating Jews, Catholics, and Communists alongside "Yankees" and blacks. The Klan, which had generally died out in the late 1870s, was

"reborn" around 1915. The "second" Klan's first initiation ceremony, on Stone Mountain, Georgia (near Atlanta), used a 40-foot burning cross.

Throughout the life of the "second" Klan, cross burnings were used as a tool to intimidate and threaten imminent violence against individuals and groups the Klan disfavored. The burning cross was not only an outward symbol to send a message to others but also served as a symbol to identify and express shared ideology and purpose among Klan members.

The Commonwealth of Virginia, in its Petitioner's Brief in the *Virginia v. Black* case, summed up the common perception of cross burning's expressive effect: "A white, conservative, middle-class Protestant, waking up at night to find a burning cross outside his home will reasonably understand that someone is threatening him. His reaction is likely to be very different than if he were to find, say, a burning circle or square. In the latter case, he may call the fire department. In the former, he will probably call the police."

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References and Further Reading

- Brannon, Chris L., *Note, Constitutional Law—Hate Speech—First Amendment Permits Ban on Cross Burning When Done with the Intent to Intimidate*, Miss. L. J. 73 (Fall 2003): 323.
- Gey, Steven G., *A Few Questions About Cross Burning, Intimidation, and Free Speech*, Notre Dame L. Rev. 80 (2005): 1287.

Cases and Statutes Cited

- Virginia v. Black*, 538 U.S. 343 (2002)
- Capitol Square Review and Advisory Bd v. Pinette*, 515 U.S. 753 (1995)
- R.A.V. v. St. Paul*, 505 U.S. 377 (1992)

CRUEL AND UNUSUAL PUNISHMENT (VIII)

The Eighth Amendment forbids the infliction of cruel and unusual punishments. This constitutional prohibition is itself unusual, because in using the intrinsically subjective terms "cruel" and "unusual," it necessarily calls for the use of judgment. Determining the meaning of the Eighth Amendment, then, first requires ascertaining on whose judgment the clause hinges.

The judgment as to what is cruel and unusual, and therefore what is unconstitutional, cannot be that of Congress or the president, because the Bill of Rights

was enacted to curtail the power of the federal government. The Eighth Amendment, like most of the Bill of Rights, applies to state governments through the incorporation doctrine, and as such, it cannot be left to the judgment of the states to determine the contours of the cruel and unusual punishment clause. The Constitution is also meant to protect vulnerable minorities from the tyranny of majority whim; such protection would be meaningless if the interpretation of what is cruel and unusual was determined by the views of a majority of the people. Since *Marbury v. Madison*, it has been the recognized province of the federal judiciary to interpret the Constitution; however, the Supreme Court has repeatedly stated that the cruel and unusual punishment clause cannot merely reflect the subjective views of what the Supreme Court Justices find repugnant.

The paradox of whose view of acceptable punishments should shape the cruel and unusual punishment clause has been resolved by adopting an ad hoc collection of doctrines drawing from various sources of authority. Deference is generally given to state governments to define appropriate punishments for given crimes. However, state and federal governments are subject to three core restrictions. First, punishments cannot be arbitrary, capricious, or barbaric. Second, at least in some circumstances, punishments can be overruled for being disproportionate to a defendant's culpability. Third, punishments must not be contrary to a national consensus as to evolving standards of decency. The first two restrictions have largely been developed with reference to judicial views of acceptability of certain punishments: a punishment is overruled if the Justices consider it disproportionate or arbitrary. The third restriction is facilitated by judicial aggregation of state legislation, and to a lesser extent jury determinations: the less often a punishment is available or imposed in a state jurisdiction, the more likely the Supreme Court is to rule that it is contrary to a national consensus and thus unconstitutional.

The foregoing description overstates the clarity of Eighth Amendment jurisprudence. In recent years, some Supreme Court Justices have challenged the appropriateness of a proportionality requirement; in its defense, other Justices have argued that the proportionality requirement and the national consensus test are in fact one doctrine. There is also strong Supreme Court division over the application of the evolving consensus doctrine. It is also unclear whether "cruel" and "unusual" constitute separate prohibitions or whether "cruel and unusual" is one proscription. Each of these ambiguities contributes to an enormous jurisprudential uncertainty surrounding the cruel and unusual punishment clause.

In addition, the death penalty has been treated differently from all other punishments, resulting not just in special rules for capital punishment but a schism in the overall approach of the Supreme Court to capital and noncapital forms of punishment. Arguably, the Supreme Court has largely abdicated its role in determining the bounds of nondeath penalty punishments, while simultaneously adding so many limits to the application of the death penalty as to be gradually rendering it, although constitutional in theory, unconstitutional in practice.

Despite the confusion surrounding Eighth Amendment jurisprudence, it is possible to identify four types of challenge that could be made to the constitutionality of a given criminal sentence. Constitutional challenges can be made as to: first, the type of punishment inflicted; second, the process followed in imposing the punishment; third, the category of crime to which a punishment may attach; and fourth, the categories of defendant against whom a punishment can be imposed. However, because of the "death is different" jurisprudence, the rules of each of these four types of challenge are bifurcated according to whether the punishment is death or some other sentence.

Types of Punishment

Supreme Court precedent as to which types of punishment are constitutional has taken two forms: specific sanctions or prohibitions of particular types of punishment, and general doctrine promulgating guidelines as to when punishments can ever be appropriate.

Of the specific rulings, the most contested concerns the constitutionality of the death penalty. As is discussed in the subsequent subsections, the death penalty has been highly restricted as to when and to whom it can apply, but imposition of the death penalty per se was upheld under the Federal Constitution in *Gregg v. Georgia*.

Generally, the Supreme Court has refrained from ruling on whether particular forms of capital punishment are unconstitutional. Four types of capital punishment have been sanctioned to the extent that the Supreme Court has refused to prohibit them when the issue came before it. In *Wilkinson v. Utah*, death by shooting was authorized; in *Gomez v. U.S.*, use of the gas chamber was allowed; in *Glass v. Louisiana*, use of the electric chair was permitted; and in *Campbell v. Wood*, death by hanging was tolerated. However, the latter three cases contained only cursory consideration of the type of punishment by the majority, but strong dissents on point.

Historically, a variety of forms of corporal punishment were occasionally used in the colonies, including lashing, branding, and even ear-cropping and tongue-cutting. Various forms of physical humiliation, such as stocks and the Scarlet letter, were more commonly used. Two key cases have held nondeath penalty punishments unconstitutional. *Weems v. U.S.* held that a lengthy punishment including hard labor in stocks, combined with the loss of basic rights, including over property and voting, was excessive for the crime of falsifying records. *Trop v. Dulles* held that denationalization for military desertion was cruel and unusual.

The Supreme Court has gone back and forth as to whether these cases constituted a general requirement of proportionality in nondeath penalty sentences. In *Rummel v. Estelle*, the court considered that there is no proportionality test: the punishment in *Weems* was excessive because of the combination of punishments. But in *Harmelin v. Michigan*, Justice Kennedy's concurrence suggested a grossly disproportionate test exists, and this has since been adopted by the Supreme Court in *Lockyer v. Andrade*, although the court stressed it was only applicable in extreme and rare cases. Of particular note, exceptionally long punishments, including multiple life sentences, can be imposed even for relatively minor offences if defendants have prior felony convictions.

The use of corporal punishment and more torturous forms of capital punishment have been discontinued, but most of this change has not come through judicial decisions, but rather through social change and legislative rejection. Although the Supreme Court has disallowed few types of punishment, it has constitutionally enshrined societal rejection of the application of the death penalty to certain types of crime and categories of defendant, as well as closely monitoring the process by which the death penalty is imposed.

Proper Procedure in Death Penalty Legislation

Unlike the high level of deference given to the states in imposing noncapital punishments, the Supreme Court has actively developed detailed procedural requirements that must be satisfied for death penalty legislation to withstand scrutiny. Death penalty jurisprudence is divided into two eras: "pre-Furman" and "post-Furman." In 1972, in *Furman v. Georgia*, the Supreme Court ruled that the death penalty as it was then implemented was unconstitutional because of its discretionary nature and its indeterminate and haphazard application, which rendered it arbitrary, and thus cruel and unusual.

A national four-year hiatus on capital punishment followed *Furman*, but in that period thirty-five states and Congress reinstated the death penalty in new statutes that attempted to meet the Supreme Court's procedural requirements. The Supreme Court again addressed the constitutionality of the death penalty in 1976 in *Gregg v. Georgia*. The Georgia Act at issue in the case provided a list of aggravating and mitigating circumstances that could be found by a jury or a judge, in a trial with separate stages for guilt and sentencing determinations, and provided for the possibility of higher court review. These clear processes satisfied the Court, although Justices Brennan and Marshall vigorously dissented, arguing that the death penalty is per se unconstitutional.

Since 1976, imposition of the death penalty has been permissible; however, the Court has continued to add procedural hurdles to the process. *Woodson v. North Carolina* held that the death penalty cannot be a mandatory punishment for a crime. *Lockett v. Ohio* held that a sentencer must consider a range of mitigating factors, including the defendant's age, character, and record, and the circumstances of the offence. *Beck v. Alabama* held that the jury must have the option of considering a verdict of a lesser, non-capital offense. Most of these developments have been prodefendant, although not all: for instance, *Payne v. Tennessee* ruled that it is now permissible to have victim impact statements given during the sentencing phase.

In addition to these specific procedural restrictions, the death penalty can only be imposed in ways that are proportionate and conform to recognized societal evolving standards of decency. These two requirements have provided the basis for restrictions on when and to whom the death penalty can apply.

Categories of Crime

Historically, the death penalty could be applied as punishment for a variety of crimes. It had previously been upheld as fit punishment for murder, rape, attempted rape, arson, assault, kidnapping, and robbery. However, starting in 1977 in *Coker v. Georgia*, the Supreme Court began applying the evolving standards of decency doctrine, which it developed in *Trop v. Dulles*, to death penalty jurisprudence. Noting that eighteen states had made rape a capital punishment prior to the *Furman* ruling, the Court emphasized that only three states had reinstituted the death penalty for rape by 1977, and two of those states only imposed the death penalty when the victim was a child. On this basis, as well as an assessment of proportionality that showed that the punishment was excessive, the Court

ruled that imposing the death penalty for rape of an adult woman is unconstitutional.

In that case, Chief Justice Burger in dissent and Justice Powell in concurrence strongly criticized the majority holding on a number of fronts. First, since the death penalty moratorium had only been lifted the previous year in *Gregg*, it could not safely be concluded that legislatures had time to express their community standards in new legislation. Second, Coker was a recidivist rapist and murderer who had escaped from prison, then committed armed robbery, theft, kidnapping, and rape. Even if society considers the death penalty for rape generally disproportionate, it may not do so for a repeat felon for whom no other punishment would be effective: a recidivist serving a life sentence who would otherwise be in no way deterred from committing further rapes when he escapes again, or even within prison. Third, the majority based its finding on indications that society found the death penalty unacceptable when imposed for rape without aggravating brutality, but it was not clear that society found the death penalty disproportionate for all rapes. As such, the ruling was unnecessarily broad.

This division on the Court, between Justices willing to make broad findings of community consensus against imposition of the death penalty for a variety of crimes and those seeking stronger evidence of a clearer and more specific national consensus before constitutionally enshrining it, continues today. Nevertheless, the evolving standards doctrine has been used to rule the death penalty inapplicable for felony-murder without intent to kill in *Enmund v. Florida*, and for “ordinary” murder in *Godfrey v. Georgia*. Today, the death penalty can only be applied for murder with aggravating circumstances.

The only significant restriction on the categories of crime for which noncapital punishments can be imposed is that sentences cannot be imposed for a person’s status of being. This includes, for example, being a drug addict or an alcoholic, or suffering from a disease. It is unconstitutional to punish someone for who they are rather than for an act that they have committed.

Categories of Defendants

The evolving standards doctrine and the proportionality test have both been used in similar fashion to restrict the application of the death penalty to certain categories of defendants. *Ford v. Wainwright*^{xx} prohibited execution of offenders who are insane at the time of the proposed execution. *Atkins v. Virginia*

proscribed execution of the mentally retarded. This case reversed the 1989 ruling in *Penry v. Lynaugh*, on the basis that an additional sixteen states had discontinued the practice since then, when only two states had exempted the mentally retarded. In 1981, *Stanford v. Kentucky* held that execution of minors was not cruel and unusual, but in 1988, *Thompson v. Oklahoma* held that execution of those sixteen and younger was unconstitutional, and in 2005 in *Roper v. Simmons*, the Supreme Court held that execution of anyone younger than eighteen is cruel and unusual.

Each of these decisions rested to a large extent on the fact that trends in state legislation were in the direction of the relevant limit on the death penalty in each case. However, it is unclear how many states are required to make the change before the Court will recognize an evolving national consensus. In addition, the Court is divided as to whether it only counts states that prohibit execution of the class of defendant or whether the Court also counts states that do not have the death penalty at all in their tally of states that consider execution of the given class of defendant cruel and unusual.

Two other doctrines on which these cases rested remain equally unsettled: First, the majorities in *Atkins* and *Roper* each also relied on notions of culpability and proportionality, arguing that juveniles, like the mentally retarded, are incapable of adequately controlling their impulses or comprehending the criminal process and thus are less responsible and less able to mount an effective defense. But Chief Justice Rehnquist and Justices Scalia and Thomas rejected the applicability of these doctrines, arguing evolving standards should be the only basis of challenging the death penalty. Second, in the *Roper* case, Justice Kennedy’s Opinion of the Court also gave consideration to the views of the international community. Although these views were considered only persuasive, and not authoritative, this move was enormously controversial, with elected representatives going so far as to propose impeaching judges who cite such evidence in future cases.

Conclusion

There are many areas of debate and doctrinal uncertainty in death penalty jurisprudence; nevertheless, the Supreme Court is continuing to develop numerous restrictions on the application of the death penalty, without fully resolving these ambiguities. In contrast, Eighth Amendment jurisprudence relating to noncapital offenses is marked by Supreme Court

inaction. Given the result in *Lockyer*, when the Supreme Court upheld multiple life sentences for minor offences under the “three strikes” law, it seems unlikely that this strongly deferential approach will change in the near future. As such, we can expect to see an increased cabining of cruel and unusual punishment jurisprudence to an almost exclusive focus on limiting the circumstances in which capital punishment can be imposed.

TONJA JACOBI

References and Further Reading

- Berkson, Larry Charles. *The Concept of Cruel and Unusual Punishment*, 1975.
- Coyne, Randall, and Lyn Entzeroth. *Capital Punishment and the Judicial Process*, 1994.
- Foley, Michael A. *Arbitrary and Capricious: the Supreme Court, the Constitution, and the Death Penalty*, 2003.
- Hoffman, Joseph L. “The ‘Cruel and Unusual Punishment’ Clause: a Limit on the Power to Punish or Constitutional Rhetoric?” In Bodehamer, David J., and James W. Ely, Jr. eds, *The Bill Of Rights in Modern America*, 1993.

Cases and Statutes Cited

- Atkins v. Virginia* 536 U.S. 304 (U.S. 2002)
- Beck v. Alabama* 447 U.S. 625 (U.S. 1980)
- Campbell v. Wood*, 511 U.S. 1119 (U.S. 1994)
- Coker v. Georgia*, 433 U.S. 584 (U.S. 1977)
- Enmund v. Florida*, 458 U.S. 782 (U.S. 1982)
- Ford v. Wainwright*, 477 U.S. 399 (U.S. 1986)
- Furman v. Georgia*, 408 U.S. 238 (U.S. 1972)
- Glass v. Louisiana*, 471 U.S. 1080 (U.S. 1985)
- Godfrey v. Georgia*, 446 U.S. 420 (U.S. 1980)
- Gomez v. United States District Court*, 503 U.S. 653 (U.S. 1992)
- Gregg v. Georgia*, 428 U.S. 153 (U.S. 1976)
- Harmelin v. Michigan*, 501 U.S. 957 (U.S. 1991)
- Lockett v. Ohio*, 438 U.S. 586 (U.S. 1978)
- Lockyer v. Andrade*, 538 U.S. 63 (U.S. 2003)
- Marbury v. Madison*, 5 U.S. 137 (1803)
- Payne v. Tennessee*, 501 U.S. 808 (U.S. 1991)
- Penry v. Lynaugh*, 492 U.S. 302 (U.S. 1989)
- Roper v. Simmons*, 125 S. Ct. 1183 (U.S. 2005)
- Rummel v. Estelle*, 445 U.S. 263 (U.S. 1980)
- Stanford v. Kentucky*, 492 U.S. 361 (U.S. 1981)
- Thompson v. Oklahoma*, 487 U.S. 815 (U.S. 1988)
- Trop v. Dulles*, 356 U.S. 86 (U.S. 1958)
- Weems v. U.S.*, 217 U.S. 349 (1910)
- Wilkerson v. Utah*, 99 U.S. 130 (1879)
- Woodson v. North Carolina*, 428 U.S. 280 (U.S. 1976)

CRUEL AND UNUSUAL PUNISHMENT GENERALLY

The Eighth Amendment to the U.S. Constitution provides that “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” The U.S. Supreme Court has

worked for the past century to define the phrase “cruel and unusual punishments.” At its inception, the phrase was meant to place some restriction on the types of punishments permitted in the context of criminal offenses, specifically prohibiting tortuous and barbaric punishments. However, over the years it has been interpreted to apply not only to the methods of punishment permitted, but also to the proportionality and implementation of punishments.

History of Cruel and Unusual Punishment Clause

The first prohibition against tortuous and barbarous punishments was written into American law in 1641 in a document entitled “Body of Liberties,” which was enacted in the Colony of Massachusetts. Nearly fifty years later, the phrase “cruel and unusual punishments” appeared in the English Declaration of Rights of 1688, ratified by William and Mary. The clause was later incorporated verbatim into the Virginia Declaration of Rights of 1776 and in substantially similar form in the Eighth Amendment to the U.S. Constitution in 1791.

When the Cruel and Unusual Punishments clause of the Eighth Amendment was adopted, its full meaning was unclear. However, state and federal courts alike originally interpreted the Clause to prohibit certain methods of punishment that were deemed to be tortuous or barbaric. In 1892, the U.S. Supreme Court first indicated that the Clause might be construed not only as a barrier to certain tortuous or barbaric punishments but also to punishments that were excessive under the circumstances. In 1910, a slim majority of the Supreme Court held that that the Cruel and Unusual Punishments clause should be expanded to include disproportionate punishments. The defendant in the case at issue was convicted under a statute that required a sentence of fifteen years at hard labor for anyone convicted of making a false entry in a government payroll book. Although the punishment was not cruel and unusual per se, it violated the Eighth Amendment in that case because it was grossly disproportionate to the crime of forging public records.

There were no other significant applications of the Clause until 1958, when the Supreme Court decided *Trop v. Dulles*. At issue in that case was whether expatriation was a cruel and unusual punishment for the crime of military desertion. The Supreme Court found that the extreme punishment of expatriation, which involves the “total destruction of the individual’s status in organized society,” constituted cruel and unusual punishment. In *Trop v. Dulles*, the court first

developed the concept of “evolving standards of decency.” Under this theory, the Eighth Amendment is deemed to draw its meaning from “the evolving standards of decency that mark the progress of a maturing society.” Four years later, the Supreme Court held in another landmark case that it is cruel and unusual to make drug addiction a criminal offense.

The next significant Supreme Court decision regarding the Cruel and Unusual Punishments clause occurred in 1972, when the court declared that all existing capital punishment statutes violated the Eighth Amendment. Although the court did not hold that the death penalty was cruel and unusual per se, it declared that the imposition of the death penalty through the existing statutes violated the Eighth Amendment because death sentences were being imposed in an “arbitrary and capricious” manner. In 1976, the Supreme Court reviewed newly drafted death penalty statutes from Georgia, Florida, and Texas and upheld the statutes against Eighth Amendment challenges, because the statutes provided juries with sufficient guidance in the decision-making process and permitted individualized sentencing for each defendant. Since 1976, a majority of the Supreme Court has upheld the death penalty against per se Eighth Amendment challenges but has declared that the application of the death penalty is cruel and unusual in cases involving the rape of an adult woman, insane defendants, mentally retarded defendants, and defendants who were younger than eighteen at the time the crime was committed.

Although death penalty cases make up the majority of Cruel and Unusual Punishment claims, the Supreme Court has also applied the Clause to prison conditions and treatment of prisoners and to repeat offender statutes, often referred to as “three strikes” laws.

Evolving Standards of Decency

As early as 1910, the Supreme Court recognized the progressive nature of the Eighth Amendment when it indicated that the Amendment “may acquire meaning as public opinion becomes enlightened by a humane justice.” In 1958, the Supreme Court affirmatively held that the interpretation of what constitutes “cruel and unusual” punishment changes over time, because it is judged by the “evolving standards of decency that mark the progress of a maturing society.”

The Supreme Court has indicated that the determination of current societal standards of decency should be guided by objective factors to the maximum extent possible. In the context of death penalty claims, such factors include state and federal legislation, jury

verdicts, and national and international views. Although there is much disagreement regarding the role that international views should play in a constitutional analysis, some of the Supreme Court justices have indicated that international opinion, although in no way binding on the Court, should be considered in some manner as part of a societal standard of decency analysis.

In addition to the objective factors, the Court also applies its own judgment to determine whether a particular punishment contributes to an accepted sentencing goal or whether it is nothing more than the needless imposition of pain and suffering. In the context of capital cases, the Court determines whether the punishment of death effectively contributes to either deterrence or retribution.

The Cruel and Unusual Punishments clause is unique in that it has been interpreted to change over time, unlike other Constitutional provisions. As society develops and matures over time, it is certain to maintain its pivotal role in the evolution of the American criminal justice system.

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References and Further Reading

- Bukowski, Jeffrey D., *The Eighth Amendment and Original Intent: Applying the Prohibition Against Cruel and Unusual Punishments to Prison Deprivation Cases is Not Beyond the Bounds of History and Precedent*, Dick. L. Rev. 99 (1994): 419.
- Furman v. Georgia*, 408 U.S. 238 (1972).
- Granucci, Anthony F., *Nor Cruel and Unusual Punishments Inflicted: The Original Meaning*, Cal. L. Rev. 57 (1969): 839.
- Gregg v. Georgia*, 428 U.S. 153 (1976).
- Jurek v. Texas*, 429 U.S. 262 (1976).
- Proffitt v. Florida*, 428 U.S. 242 (1976).
- Trop v. Dulles*, 356 U.S. 86 (1958).
- Varland, Brian W., *Marking the Progress of a Maturing Society: Reconsidering the Constitutionality of Death Penalty Application in Light of Evolving Standards of Decency*, Hamline L. Rev. 28 (2005): 311.
- Weems v. United States*, 217 U.S. 349 (1910).

See also **Capital Punishment and Sentencing; *Trop v. Dulles*, 356 U.S. 86 (1958)**

CRUZAN v. MISSOURI, 497 U.S. 261 (1990)

Nancy Cruzan is the first case in which the Supreme Court of the United States (the Court) had to decide on the issue of “right to die” under the U.S. Constitution. In a five to four decision, the Court struggled to balance individual rights with state interests.

In January 1983, Nancy Cruzan lost control of her car in a serious accident. Her breathing and heartbeat were recovered; however, she remained in a coma for approximately three weeks before she progressed to an unconscious state. Surgeons implanted a gastrostomy feeding and hydration tube to ease feeding, but subsequent rehabilitative efforts failed to recover her from the so-called persistent vegetative state, in which she “exhibits motor reflexes but evinces no indications of significant cognitive function.” Seeing no chance of regaining her mental faculties, Cruzan’s parents asked a court authorization to terminate the artificial nutrition and hydration. Recognizing her medical condition, the trial court believed that Nancy Cruzan had a fundamental right under both Missouri and U.S. Constitutions to “refuse or direct the withdrawal of ‘death prolonging procedures.’” The trial court also found reliable Cruzan’s conversation with a housemate friend, in which Nancy Cruzan expressed her unwillingness to continue her life if she could not “live at least halfway normally.” The Missouri Supreme Court reversed and refused to read the State Constitution so broadly to support a person’s right to terminate medical treatment in every circumstances. Rather, the Missouri Supreme Court found the roommate’s story unreliable and held that there was not “clear and convincing” evidence to support the termination.

In a close call, the Court affirmed the State Supreme Court’s decision. First, reviewing relevant state cases, the Court found that the common-law doctrine of informed consent is always viewed as encompassing a competent individual’s right to refuse medical treatment. However, reluctant to establish such a doctrine under the Constitution, the Court simply “assumed” that the U.S. Constitution would grant a similar right to a competent person. Second, the Court refused to extend such a right to incompetent persons and held that states may adopt certain procedural requirements to safeguard relevant state interests. In the present case, after a balance, the Court validated Missouri’s claimed interest in “the protection and preservation of human life” and approved Missouri’s imposition of heightened evidentiary requirements (that is, the incompetent’s wish to withdraw treatment must be proved by “clear and convincing” evidence) against potential abuses that might result harsh erroneous decisions. Justice O’Connor filed a separate concurring opinion and clarified her belief that a right to refuse unwanted medical treatment might be inferred from the Constitution. In another concurring opinion, Justice Scalia traced the traditional opposition of suicide by states and struggled with the distinction between action (for example, suicide) and inaction (right to refuse treatment). Rather, Justice Scalia believed that this is not a proper

issue for the Constitution. Justices Brennan, Marshall, and Blackmun dissented. They argued that Nancy Cruzan “has a fundamental right to be free of unwanted artificial nutrition and hydration,” and her incompetent condition does not deprive her of such a right. The state’s general interest in the preservation of life cannot subdue Nancy Cruzan’s particularized interest, and the procedural obstacles placed by the Missouri Supreme Court imposed an impermissible burden on Nancy Cruzan’s right. Compared with the majority, the dissenters would clearly assign more weight to evidence provided by family members and friends in determining Cruzan’s personal wishes. Justice Stevens filed a separate dissenting opinion and argued that the State Supreme Court’s decision totally ignored Nancy Cruzan’s best interests. Rather, the state should have given appropriate respect to her best interests when it evaluated evidence based on the “clear and convincing” standard.

Six months after the Court’s ruling, Nancy Cruzan died after her family and friends presented new evidence and the judge ruled that there was clear evidence to show her wishes. The significance of *Nancy Cruzan* lies in the fact that the Court recognized a competent patient’s right to terminate medical treatment, although states may impose necessary protection procedures to incompetent patients. However, the Court refused to go one-step further to honor active euthanasia or physician-assisted suicide (see *Washington v. Glucksberg*, 521 U.S. 702 (1997); *Vacco v. Quill*, 521 U.S. 793 (1997)), leaving the line between active and inactive euthanasia arguable. *Nancy Cruzan* and later relevant cases showed a continuous weighing by the courts the value of life against the value of death and what is the meaning of diminished human lives to the incompetent patients.

BIN LIANG

References and Further Reading

- Angell, Marcia. “The Supreme Court and Physician-Assisted Suicide—The Ultimate Right.” *The New England Journal of Medicine* 336 (1997): 50–53.
- Annas, George J., *The “Right to Die” in America: Sloganeering from Quinlan and Cruzan to Quill and Kevorkian*, Duquesne University Law Review 34 (1996): 875–897.
- Baggett, Sandy D., *In Search of a Right to Die: Preventing Government Infliction of Pain*, University of Tennessee Law Review 65 (1997): 245–292.
- Bopp, James Jr., and Daniel Avila, *The Due Process “Right to Life” in Cruzan and its Impact on “Right-to-Die” Law*, University of Pittsburgh Law Review 53 (1991): 193–233.
- , *Perspectives on Cruzan: The Siren’s Lure of Invented Consent: A Critique of Autonomy-Based Surrogate Decisionmaking for Legally-Incapacitated Older Persons*, Hastings Law Journal 42 (1991): 779–815.

- Martyn, Susan R., and Henry J. Bourguignon, *Perspective on Cruzan: Coming to Terms with Death: The Cruzan Case*, Hastings Law Journal 42 (1991): 817–858.
- Robertson, John A., *Cruzan and The Constitutional Status of Nontreatment Decisions for Incompetent Patients*, University of Georgia Law Review 25 (1991): 1139–1203.
- Ronzetti, T. A. Tucker, *Constituting Family and Death Through the Struggle with State Power: Cruzan v. Director, Missouri Department of Health*, University of Miami Law Review 46 (1991): 149–204.

Cases and Statutes Cited

- Vacco v. Quill*, 521 U.S. 793 (1997)
- Washington v. Glucksberg*, 521 U.S. 702 (1997)

CUBAN INTERDICTION

Interdiction of vessels at sea to deter migration dates back to the early days of the Republic, when interdiction was used to interfere with the forced migration of slaves. Similarly, persons fleeing war, persecution, or economic and political upheaval have been arriving at American shores since at least 1793, when waves of white refugees poured into U.S. ports fleeing a slave insurrection in Santo Domingo. That insurrection led to the establishment of Haiti in 1801. Those refugees, however, were welcome on U.S. shores, particularly in the slave-owning South.

It was not until the 1980s, however, that the United States began to aggressively use interdiction in the open seas to prevent migration. The catalyst for the change in federal policy seems to have been the Mariel Boatlift in 1980 during which approximately 124,000 Cuban migrants entered the United States. Marielitos, as these refugees came to be known, were detained, in some cases, indefinitely, in others, until a family or individual could be found to serve as a sponsor. The Mariel crisis and an influx of Haitians fleeing economic and political repression in Haiti led President Reagan to issue Executive Order 12324 on September 23, 1981, which ordered the Coast Guard to interdict vessels carrying undocumented aliens and return them to their point of origin. The order, thus, required interdiction, screening of migrants aboard vessels to determine whether they qualified as refugees under American and international law, and return of those who did not.

Interdiction became a favored practice to deter undocumented migration, as federal constitutional and immigration law became more protective of migrants in the United States. Once on shore, statutory and constitutional protections provide some degree of process to undocumented immigrants; interdiction at sea allowed the government to deter migrants from entering the United States without

having to extend any due process or statutory protections to those seeking refuge in the United States. Although President Reagan's order preserved some degree of screening on board vessels, the policy changed in the wake of the overthrow of Haitian president Jean Aristide in 1991, when a new influx of Haitians were received on U.S. shores. In 1992, President Bush issued Executive Order 12807 directing the Coast Guard to interdict undocumented migrants at sea and repatriate them. President Bush's order terminated screening of migrants to determine whether they were entitled to refugee status. This order was challenged and upheld by the U. S. Supreme Court in *Sale v. Haitian Centers Council, Inc.*

Few Cuban migrants, however, were interdicted at sea until the 1990s; interdiction to deter migration was directed primarily at Haitians. Beginning in 1991, however, when Castro again signaled a willingness to allow Cubans to leave Cuba without interference from the Cuban government, the rate of Cuban interdictions increased, peaking dramatically in 1994, when 37,191 Cubans were interdicted at sea. Most of these Cubans were detained in Guantanamo, as were their Haitian counterparts. After litigation and public criticism of the practice, most Guantanamo Cuban detainees were released to a sponsor in the United States or returned to Cuba pursuant to an agreement worked out between the Cuban and U.S. governments.

Today, the U.S. Coast Guard continues to use interdiction of undocumented migrants at sea to quickly return them to their country of origin and to avoid what the Coast Guard refers to as "the costly processes required if they successfully enter the U.S." The largest group of migrants to be interdicted in fiscal year 2005 continue to be persons from the Caribbean, with the largest number to come from the Dominican Republic (3,520), followed by Cubans (2,532), and Haitians (1,850). Since 1982, a total of 57,800 Cubans have been interdicted at sea.

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References and Further Reading

- Hamm, Mark S. *The Abandoned Ones: The Imprisonment and Uprising of the Mariel Boat People*. Boston: Northeastern University Press, 1995.
- Palmer, Capt. Gary W., USCG, *Guarding the Coast: Alien Migrant Interdiction Operations at Sea*, Connecticut Law Review 29 (1997): 1565–1615.
- Rivera, Mario A. *Decision and Structure: U.S. Refugee Policy in the Mariel Crisis*. Lanham, MD: University Press of America, 1991.
- Rosenberg, Lori D., *International Association of Refugee Law Judges Conference: The Courts and Interception: The United States Interdiction Experience and Its Impact on Refugees and Asylum Seekers*, Georgetown Immigration Law Journal 17 (2003): 199.

U.S. Coast Guard. "Alien Migrant Interdiction-Overview"
<http://www.uscg.mil/hq/g-o/g-opl/AMIO/AMIO.htm>
 (2005).

U.S. Coast Guard, "History of the U.S. Coast Guard in
Illegal Immigration (1794-1971)" <http://www.uscg.mil/hq/g-o/g-opl/AMIO/amiohist.htm> (2005).

Cases, Statutes, and Executive Orders Cited

Sale v. Haitian Centers Council, Inc., 509 U.S. 155 (1993)
Cuban American Bar Association, Inc. v. Christopher, 43 F.
 3d 1412 (11th Cir. 1995)

Haitian Refugee Center, Inc. v. Christopher, 43 F. 3d 1431
 (11th Cir. 1995)

Cuban Refugee Adjustment Act, Pub. L. No. 89-732, 80
 Stat. 1161 (1966)

Executive Order 12324, 46 Fed. Reg. 48,109 (1981)

Executive Order 12807, 57 Fed. Reg. 23,133 (1992)

Presidential Proclamation No. 4865, 46 Fed. Reg. 48,108
 (1981)

CULTURAL DEFENSE

Strictly speaking, there is no such thing as a "cultural defense." Instead, the term refers to all of the ways in which a defendant can use evidence of his cultural background—the "shared organization of ideas that includes the intellectual, moral, and aesthetic standards" prevalent in his community of origin—to argue that his conduct was either not criminal, should be excused, or should be punished less severely.

Courts have traditionally been hostile to cultural defenses, viewing them as incompatible with the Rule of Law, the idea that "to apply a law justly to different cases is simply to take seriously the assertion that what is to be applied in different cases is the same general rule." More recently, however, three different kinds of cultural defenses have begun to gain a degree of judicial acceptance.

First, courts have allowed defendants to use cultural evidence to show that they lacked the mental state required by a particular crime. An example is *People v. Moua*, in which a young Hmong man was accused of raping and kidnapping a young Hmong woman. Prior to trial, the defendant introduced evidence that abducting and having intercourse with an unmarried woman against her will, and despite her protests, was an expected part of the Hmong's "marriage by capture" tradition. The court dismissed the charges on the ground that the defendant lacked the specific intent required by rape and kidnapping.

Second, courts have allowed defendants to use cultural evidence to establish criminal defenses such as provocation, self-defense, duress, and necessity. In *People v. Croy*, for example, a jury acquitted a Native

American man accused of murdering a police officer after a historian testified that, in light of the U.S. government's repeated persecution of the defendant's tribe, the defendant could have reasonably believed he was acting in self-defense.

Third, courts have allowed defendants to use cultural evidence as a mitigating factor during sentencing. Such evidence is particularly common in child-abuse cases, where the defendant argues that he should be given a lenient sentence because he was simply disciplining his child in accord with his cultural traditions. For example, a Mexican woman was sentenced to probation for beating her son with a spoon and biting him after she introduced evidence that such punishment was standard discipline in Mexico.

There are two basic rationales for recognizing cultural defenses. To begin with, such recognition promotes individualized justice, the idea that the defendant's punishment should match his personal culpability. An individual who commits a criminal act either because his cultural values required him to do so or because he did not know the act was illegal in the United States is not as personally culpable as someone who commits the same criminal act freely and with knowledge of its illegality.

Recognizing cultural defenses also promotes cultural pluralism. By judging individuals according to the standards and values of their native cultures, cultural defenses help preserve those cultures, maintain a culturally diverse society, and ensure that minority groups are not penalized simply for being different.

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References and Further Reading

Levine, Kay L., *Negotiating the Boundaries of Crime and Culture: A Sociolegal Perspective on Cultural Defense Strategies*, *Law and Social Inquiry* 28 (2003): 1:39-86.

Note: *The Cultural Defense in Criminal Law*, *Harvard Law Review* 99 (1986): 6:1293-1311.

Renteln, Alison Dundes. *The Cultural Defense*. New York: Oxford University Press, 2004.

Cases and Statutes Cited

People v. Moua, No. 315972-0 (Cal. Super. Ct. Fresno County Feb. 7, 1985)

People v. Croy, 710 P.2d 392 (Cal. 1985)

CUMMINGS v. STATE OF MISSOURI, 71 U.S. 277 (1866)

See Test Oath Cases

D

DANDRIDGE v. WILLIAMS, 397 U.S. 471 (1971)

The federal welfare program called Aid to Families with Dependent Children (AFDC), enacted as part of the Social Security Act of 1935, was repealed in 1996. Under AFDC, states calculated a standard of need for each family, then allocated welfare grants based on that standard. Generally, the standard of need increased with each additional person in the household. However, some states, like Maryland, imposed an upper limit on the amount of money a family might receive.

Several families affected by Maryland's policy sued the state under the Equal Protection Clause, arguing that the maximum grant irrationally discriminated against children in large families. The Supreme Court upheld the policy in a five-to-three decision. Applying the minimum level of constitutional scrutiny, the Court held that the policy was rational. The Court credited Maryland's argument that it maintained financial equity between welfare recipients and the working poor and created an incentive for members of large families to seek employment.

Dandridge was one of a series of cases initiated in the late 1960s and early 1970s to test the constitutionality of state welfare policies. Many of these cases were successful, and some poverty rights activists believed that the Supreme Court would eventually establish a constitutional right to welfare. *Dandridge*, however, signaled that the Court was prepared to approach state welfare policies with greater deference. In the wake of 1996 welfare reform, lower courts have cited *Dandridge* to uphold state policies that deny

benefit increases when a child is born to a family on welfare, thus permitting states to use financial disincentives to deter poor women from having a child while receiving government benefits.

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References and Further Reading

- Davis, Martha. *Brutal Need: Lawyers and the Welfare Rights Movement, 1960–1973*. New Haven, CT: Yale University Press, 1993.
- Krislov, Samuel. *The OEO Lawyers Fail to Constitutionalize a Right to Welfare: A Study of the Uses and Limits of Judicial Process*, Minnesota Law Review 58 (1973): 211–245.
- Lawrence, Susan E. *The Poor in Court: The Legal Services Program and Supreme Court Decision Making*. Princeton, NJ: Princeton University Press, 1990.
- Sparer, Edward. “The Right to Welfare.” In *The Rights of Americans: What They Are—What They Should Be*, Norman Dorsen, ed. New York: Pantheon Books, 1971, 65–93.

Cases and Statutes Cited

- Social Security Act* of 1935, Pub. L. No. 74-271, 49 Stat. 620
- See also **Equal Protection of Law (XIV); Fourteenth Amendment; *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Wyman v. James*, 400 U.S. 309 (1971)**

DARROW, CLARENCE (1857–1938)

The most celebrated criminal defense lawyer of the twentieth century, Clarence Seward Darrow achieved near legendary status in a series of highly publicized

cases in which he championed individual rights and progressive political causes. He was born in Kinsman, in rural northeastern Ohio. His father, a seminary graduate who became a freethinker, worked as a furniture maker and undertaker. His mother, whom Darrow called his greatest influence, died when he was fifteen. His parents instilled a lifelong reverence for books, which expressed itself in later literary efforts at fiction and criticism, culminating in a masterful autobiography, *The Story of My Life* (1932).

Darrow attended preparatory school for one year (1873) at Allegheny College. Though an indifferent student and contemptuous of formal education, he taught school for three years in Ohio while he read law. He studied law for one year at the University of Michigan (1877–1878) and apprenticed with a lawyer in Youngstown, Ohio, where he was admitted to the Ohio bar.

Darrow practiced law and participated in Democratic Party activities in rural northern Ohio. He moved to Chicago in 1887 where he sought out the patronage of Judge John Peter Altgeld, who arranged Darrow's appointment as legal counsel for the city of Chicago. In 1891, Darrow joined the law department of the Chicago and Northwestern Railway. He also advised Altgeld during his successful campaign for governor in 1892.

Darrow's sympathy for poor people and victims of injustice led him to join numerous reform clubs. A lifelong opponent of capital punishment, he encouraged Governor Altgeld to pardon the surviving anarchists convicted of the terrorist bombing during the Chicago Haymarket riot. He also intervened after Chicago's popular mayor was assassinated, challenging the killer's competence in an unsuccessful effort to prevent his execution.

Sympathizing with labor and disapproving of the industrialists' influence over political power, Darrow resigned in 1894 as counsel for the railroad in order to represent Eugene Debs, the militant president of the American Railway Union. Prior to New Deal legislation, employers enlisted the aid of law enforcement to crush unions by charging organizers with criminal conspiracy. This crime broadly prohibited two or more persons from agreeing to do anything unlawful, and pro-owner prosecutors reasoned that labor's goal was the unlawful injuring of employers' economic interests.

Darrow rose to prominence representing union leaders in criminal cases. His vigorous defense of Debs at his criminal conspiracy trial is credited with causing the railroad to influence the government to drop the case. (This did not prevent Debs from being convicted of contempt for violating a federal

injunction.) In 1898, Darrow defended Thomas I. Kidd, general secretary of the Amalgamated Woodworkers' International Union, who was tried for criminal conspiracy in Oshkosh, Wisconsin. Darrow's jury argument lasted two days. Drawing on sources from the Bible to Victor Hugo, Darrow lionized Kidd as a "great soul" devoted to "humanity's holy cause" and accused the prosecutors and industrialists of being the true conspirators for their effort to prevent freedom of association for the sake of property rights. The jury found Kidd not guilty. In 1903, Darrow added to his reputation as a labor lawyer, representing the United Mine Workers in arbitration proceedings in Pennsylvania, where he won the workers wage increases and back pay.

In 1908, Darrow defended radical union leader William D. ("Big Bill") Haywood in Iowa, where he was tried for the murder of former governor Frank Steunenberg. Darrow persuaded the jury to reject the testimony of the state's main witness, a confessed killer, and the jury acquitted Haywood.

In 1911 union leaders persuaded Darrow to represent the McNamara brothers, union activists charged with the terrorist bombing of the *Los Angeles Times* building that claimed twenty-one victims. Darrow eventually pled his clients guilty, avoiding death sentences for them, but in doing so he permanently alienated organized labor. In this highly charged atmosphere, Darrow was accused of attempting to bribe two jurors. He was obliged to remain in Los Angeles for two years and faced two separate trials. The first trial provided the occasion for one of his greatest speeches, and the jury acquitted him. In the second trial, the jury could agree neither to convict nor acquit. Though the case was eventually dropped, his reputation suffered.

Darrow returned to Chicago, economically and emotionally depleted, where he rebuilt his practice, specializing in criminal cases. He returned to civic prominence as a pro-war spokesman during the Great War and as an opponent of the League of Nations after the war.

Darrow distinguished himself from most populists and progressives by his outspoken support for African-American rights. In the 1890s, he promoted the creation of Chicago's first interracial hospital. In 1910, he defended interracial marriage in an address to a precursor of the NAACP. His biographer Kevin Tierney records that Darrow gave more time and money to African-American causes than any other white person of the day.

In 1925, Darrow defended eleven members of the Sweet family and their friends, who had been charged with conspiracy to commit murder. The death occurred when Dr. Ossian Sweet, an African American,

moved into a white neighborhood of Detroit and a mob attacked his home. When Sweet and other occupants defended themselves, a bystander was shot and killed. Darrow's forceful confrontation of race hatred and energetic assertion of the right to self defense resulted in a hung jury. A few months later, the state retried one of Sweet's brothers. Darrow won an outright acquittal, and the remaining charges were dropped.

Darrow's two most publicized cases occurred during the 1920s. In 1924, he defended Leopold and Loeb, two young college graduates who murdered a teenage neighbor. Public sentiment strongly favored executing the killers, who came from wealthy Jewish families and whose motive was intellectual thrill-seeking. Darrow entered pleas of guilty and devoted himself to the improbable goal of saving his clients from hanging. His argument remains one of the most forceful pleas against capital punishment, and it convinced the sentencing judge to impose life prison terms. The crime inspired numerous books, plays, and films, and Darrow's defense established him as a national spokesperson against capital punishment.

In the summer of 1925, Darrow appeared for the defense in the Scopes "monkey trial" in Dayton, Tennessee, where a schoolteacher was charged with violating a state statute banning the teaching of evolution. William Jennings Bryan, populist orator and former Democratic presidential candidate who had campaigned for the legislation, agreed to serve as special prosecutor. Scopes was convicted as expected, though his judgment was later reversed because the judge rather than jury fixed the fine. The national news media closely covered Darrow's defense of science and his ridicule of religious ignorance. The case helped marginalize the antievolution crusade as a rural movement and identified science with tolerance and religion with censorship. Darrow dramatized the conflict by calling Bryan as an expert witness on Christianity and questioning him about Biblical passages that seemingly required interpretation. The case was popularized for later generations by the film *Inherit the Wind* (1960).

Darrow's career vindicated the importance of defense lawyers in protecting groups and individuals from efforts to control unpopular thought and behavior by criminal law enforcement. He was by temperament an agnostic who questioned the reality of freedom of will and an individualist who asserted his right to drink during Prohibition. He insisted on the value of privacy, protesting, "Wouldn't it be better that every rogue and rascal in the world should go unpunished than to say that detectives could put a Dictograph into your parlor, your dining room, in

your bedroom, and destroy that privacy which alone makes life worth living?"

While he recognized the need for collective action to achieve social reform, Darrow's skepticism left him equally suspicious of moral absolutes and of popular opinion. This explains how his populist convictions could coexist with hostility to expansive government power, accounting for paradoxes such as his support for Democratic candidates and opposition to New Deal programs. He flirted with electoral politics only twice, running unsuccessfully for Congress in 1896 as a Democrat and successfully for the Illinois legislature in 1902 as an Independent. He held appointed positions, including chair of the National Recovery Review Board in 1934.

A humanist who viewed all humans as flawed, Darrow's strategy, which succeeded even when his clients were guilty of wrongdoing, was to fight to establish a broader vision of a controversy in which his clients' conduct did not deserve condemnation. In an age when judicial construction of the Bill of Rights provided fewer protections, he employed common-law doctrines like the presumption of innocence and right to self-defense to protect unpopular clients against the totalitarian tendencies he feared were inherent in the modern state.

Darrow married Jessie Ohl in 1880, and the couple moved to Andover, Ohio. The couple's only child, Paul Edward Darrow, was born in 1883. The Darrows were divorced in 1897. In 1903, Darrow married Ruby Hamerstrom, a journalist with whom he had no children.

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References and Further Reading

- Boyle, Kevin. *Arc of Justice: A Saga of Race, Civil Rights, and Murder in the Jazz Age*. New York: H. Holt, 2004.
- Cowan, Geoffrey. *The People v. Clarence Darrow: The Bribery Trial of America's Greatest Lawyer*. New York: Times Books, 1993.
- Darrow, Clarence. *Resist Not Evil*. Chicago: C. H. Kerr, 1903.
- . *Farmington*. New York: Charles Scribner's Sons, 1932.
- . *Attorney for the Damned: Clarence Darrow in the Courtroom*, Arthur Weinberg, ed. Chicago: University of Chicago Press, 1957.
- . *Crime: Its Causes and Treatment*. Montclair, N.J.: Patterson Smith, 1972.
- . *The Story of My Life*. New York: Da Capo Press, 1996.
- Higdon, Hal. *Leopold and Loeb: The Crime of the Century*. Urbana: University of Illinois Press, 1999.
- Larson, Edward J. *Summer for the Gods: The Scopes Trial and America's Continuing Debate Over Science and Religion*. New York: Basic Books, 1997.

Sayer, James Edward. *Clarence Darrow: Public Advocate*. Monograph series no. 2. Dayton, OH: Wright State University, 1978.

Stone, Irving. *Clarence Darrow for the Defense*. Garden City, NY: Doubleday, Doran and Company, 1941.

Tierney, Kevin. *Darrow: A Biography*. New York: Thomas Y. Crowell Publishers, 1979.

Vine, Phyllis. *One Man's Castle: Clarence Darrow in Defense of the American Dream*. New York: Amistad, 2004.

See also **Capital Punishment; Prohibition; Scopes Trial**

DAVIS v. ALASKA, 415 U.S. 308 (1974)

In *Davis*, the Supreme Court established that the Sixth Amendment Confrontation Clause generally guarantees criminal defendants the right to relevant cross-examination of prosecution witnesses about their criminal records.

Davis was tried for burglarizing a bar and stealing the safe. The prosecution's star witness was a teenager, Green, who testified that he saw Davis standing on the road near where the empty safe was later found. Since Green had recently been adjudicated as a juvenile delinquent for two burglaries, Davis's attorney wanted to question Green about his juvenile record to show that Green was eager to identify Davis in order to deflect suspicion from himself. However, the state courts barred Davis from revealing Green's prior record because juvenile adjudications were confidential under state law.

Davis appealed to the U.S. Supreme Court, which reversed by a vote of seven to two. The Court stressed that criminal defendants have the right to conduct probing cross-examinations of their accusers in order to discredit them. Since witnesses have traditionally been discredited by their criminal histories, the Court concluded that Davis should have been allowed to reveal Green's criminal history and that his Confrontation Clause right to do so trumped the state's interest in keeping juvenile records confidential. Since *Davis*, the Court has occasionally struck down other limits on cross-examination, such as the ruling in *Olden v. Kentucky*, 488 U.S. 227 (1988), barring a rape defendant from revealing the complainant's sexual relationship with another key witness, while emphasizing that judges still retain discretion to protect witnesses from unnecessary harassment.

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References and Further Reading

Jonakait, Randolph N., *Restoring the Confrontation Clause to the Sixth Amendment*, UCLA Law Review 35 (1988): 557.

Cases and Statutes Cited

Olden v. Kentucky, 488 U.S. 227 (1988)

See also **Confrontation Clause; Defense, Right to Present**

DAVIS v. BEASON, 133 U.S. 333 (1890)

Davis v. Beason (1890) was an appeal to the U.S. Supreme Court of a conviction for unlawfully attempting to register to vote in violation of an Idaho statute that denied the franchise to would-be voters who practiced polygamy, belonged to an organization that practiced polygamy or taught, advised, counseled, or encouraged polygamy. The statute also required that applicants swear an oath to that effect.

The Utah statute was created in a nationwide atmosphere of anti-Mormon sentiment and must be viewed in the context of the federal acts of Congress aimed at the Church of Jesus Christ of Latter-day Saints (Mormons). From 1852, when Brigham Young made public a church practice that had gone on underground for at least two decades, to at least 1890, when the church officially banned the practice, the public practice of polygamy was the touchstone that ignited popular sentiment against the young church.

Samuel Davis and other Mormons registered to vote in Utah and, in so doing, as required by the Utah statute, took an oath stating that they were not polygamists and did not belong to any organization that taught or encouraged polygamy. Thus, because they belonged to the Mormon Church that practiced and encouraged polygamy, they had committed perjury and violated the statute. Davis argued that the statute under which he was convicted violated the Free Exercise Clause of the First Amendment.

The case was short on constitutional analysis, relied heavily upon the first Mormon case of two years prior, *Reynolds v. United States*, 98 U.S. 145 (1878), and was transparent in its condemnation of Mormon beliefs, "To call [the Mormons'] advocacy [of polygamy] a tenet of religion is to offend the common sense of mankind."

As it had done in *Reynolds*, the Court first distinguished Mormonism from true religion, describing it as a "cultus or form of worship of a particular sect." The Court stated that the First Amendment religious freedoms were enacted as a response to the "oppressive measures" enacted by the dominant religions in European countries, but were never intended to protect acts "inimical to the peace, good order, and morals of a society."

What if certain sects had advocated promiscuity, suttee (the Hindu practice of a wife throwing herself upon her deceased husband's funeral pyre), or human

sacrifice, the Court asked. “Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice?”

The Court concluded with a note that at least thirteen state constitutions expressly excluded “acts of licentiousness” from free exercise protection, including those of California, Colorado, Connecticut, Florida, Georgia, Illinois, Maryland, Minnesota, Mississippi, Missouri, Nevada, New York, and South Carolina.

The case was the third in a series of defeats for the polygamous Mormon Church, following *Reynolds v. United States* (1878) and *Murphy v. Ramsey*, 114 U.S. 15, 45 (1885). It hit the church particularly hard because, in upholding the state law, the Court made it impossible for Mormons to vote in local elections and greatly diminished the local political clout that Mormons had previously been able to wield due to their geographic concentration. However, the final and most serious blow to Mormon polygamy was to come five years later in *Late Corp. of the Church of Jesus Christ of Latter-day Saints v. United States*.

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References and Further Reading

- Ostling, Richard, and Joan Ostling. *Mormon America: The Power and the Promise*. New York: Harper, 1999.
- Sealing, Keith. *Polygamists out of the Closet: Statutory and State Constitutional Prohibitions Against Polygamy Are Unconstitutional Under the Free Exercise Clause*. Ga. St. U. L. Rev. 17 (2001): 691.
- Van Wagoner, Richard. *Mormon Polygamy: A History*. Gaithersburg, MD: Signature Books, 1989.

See also *Reynolds v. United States*, 98 U.S. 145 (1878)

DAWSON, JOSEPH MARTIN (1879–1973)

Joseph Martin Dawson, ordained Baptist minister and advocate of religious liberty and church–state separation, was cofounder of Americans United for the Separation of Church and State, for which he served as first acting director and executive secretary (1947–1948). The first full-time executive director of the Baptist Joint Committee on Public Affairs (1946–1953), Dawson left an indelible mark on Baptist social thought, linking it for decades with a brand of church–state separationism that shaped a generation of American jurists, including Justice Hugo Black.

Born in 1879 near Waxahachie, Texas, Dawson was a natural leader with a passion for writing and

preaching, which served him well throughout his career as a champion of religious liberty. A graduate of Baylor University (1904 valedictorian), Dawson was founding editor of the school’s student paper, *The Lariat*. During and after college, Dawson served as pastor at several Texas churches, including a thirty-one-year stint (1915–1946) at the First Baptist Church of Waco.

Under the influence of the writings of Walter Rauschenbusch, Dawson incorporated elements of the “social gospel” in his sermons and publications. An opponent of racial prejudice, Dawson once publicly condemned the Ku Klux Klan from the pulpit of the First Baptist Church to an audience consisting almost entirely of Klan members.

Dawson opposed government funding of religious institutions, including hospitals and schools, as well as the use of public schools to teach religious doctrine. As Dawson writes in *Journal of Church and State*, “What the Constitution of the United States forbids and what the constitutions of all the states forbid . . . is the making of any law or the action of any government authority in pursuance of any law that involves the interlocking of the official functions of the state (or any of its agencies) with the official functions of any church.” This view, according to Dawson, is consistent with military chaplaincy and clergy offering invocations at legislative sessions because, in both cases the government is not making an agreement or contract with a religious organization, but rather, with “an individual qualified to perform the services asked for.” Ironically, many contemporary separationists disagree.

In 1951, Dawson was instrumental in helping to convince President Harry S. Truman not to assign a U.S. ambassador to the Vatican. Dawson found common cause with nativists and secularists in their suspicion of the influence of Roman Catholic immigrants on American public life. But what some considered a legitimate concern to preserve American democracy, others saw as religious bigotry. Writes Dawson in *Separate Church and State Now*: “The Catholics . . . would abolish our public school system which is our greatest single factor in national unity and would substitute their old-world, medieval parochial schools, with their alien culture.” This sentiment, however, was widely helped by pre-Vatican II American Protestants, including conservatives, liberals, and moderates.

In 1957, Baylor honored its distinguished alumnus and former trustee by founding the J. M. Dawson Institute of Church–State Studies, which began publishing the *Journal of Church and State* in 1959.

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References and Further Reading

- Dawson, Joseph Martin. *Christ and Social Change*. Philadelphia: The Judson Press, 1937.
- . *Separate Church and State Now*. New York: R. R. Smith, 1948.
- . *America's Way in Church, State, and Society*. New York: Macmillan, 1953.
- . *Baptists and the American Republic*. Nashville, TN: Broadman Press, 1956.
- . "The Meaning of Separation of Church and State in the First Amendment." *Journal of Church and State* 1 (1959):37–42.
- . *A Thousand Months to Remember: An Autobiography*. Waco, TX: Baylor University Press, 1964.
- Dunn, James. "The Ethical Thought of Joseph Martin Dawson." Th.D. diss., Southwestern Baptist Theological Seminary, 1966.
- Hamburger, Philip. *Separation of Church and State*. Cambridge, MA: Harvard University Press, 2002.
- Reynolds, J. A. "Dawson, Joseph Martin." In *The Handbook of Texas Online*, <http://www.tsha.utexas.edu/handbook/online/articles/print/DD/fda52.html>.
- Summerlin, Travis L. "Church-State Relations in the Thought of Joseph Martin Dawson." Ph.D. diss., Baylor University, 1984.

See also **Americans United for Separation of Church and State; Baptists in Early America; Catholics and Religious Liberty; Wall of Separation**

DAYS OF RELIGIOUS OBSERVANCE AS NATIONAL OR STATE HOLIDAYS

One question that has arisen on several occasions is whether the government can establish a day of religious observance as an official state or national holiday consistent with the Establishment Clause of the First Amendment. Some observers argue that to do so constitutes an unconstitutional establishment of the religion whose special day has been designated an official holiday. Courts have considered claims that declaring Good Friday or Christmas Day an official holiday is an unconstitutional establishment of religion. The courts are divided on the issue as it pertains to Good Friday, generally sustaining the constitutionality of the holiday if a secular purpose exists. By the same token, courts have uniformly concluded that declaring Christmas Day a government holiday poses no constitutional problem because of the secular nature of the day.

In 1995, the U.S. Court of Appeals for the Seventh Circuit held that an Illinois state law maintaining Good Friday as a holiday on which schools must be closed violated the Establishment Clause (*Metzl v. Leininger*, 57 F. 3d 618, 7th Cir., 1995). The court noted that Good Friday is the *only* religious holiday on which schools must be closed in Illinois (schools are not required to close, for example, on Jewish

holidays). Because Illinois law already permitted students to miss school on religious holidays, the court concluded that the special accommodation for Good Friday served no secular purpose and thus violated the Establishment Clause. The court did note in dicta, however, that if the state had defended the holiday on the grounds that the schools would otherwise experience a high degree of absenteeism on that day, the case might have been decided differently.

A few other courts have also found that making Good Friday a state holiday violates the Establishment Clause when the purpose appears to be to promote Christian worship. For example, a federal district court in Wisconsin in *Freedom From Religion Foundation v. Thompson*, 920 F. Supp. 969 (W.D. Wisc., 1996), held that a Wisconsin statute providing that "[o]n Good Friday the period from 11:00 A.M. to 3:00 P.M. shall uniformly be observed [as a state holiday] for the purpose of worship" violated the Establishment Clause. Similarly, a California state appellate court held unconstitutional a California governor's order that state offices be closed from noon until 3:00 P.M. on Good Friday—the three most sacred hours of that religious holiday (*Mandel v. Hodges*, 127 Cal. Rptr. 244, 1976).

But other courts have rejected claims that establishing Good Friday as a state holiday violates the Establishment Clause when the decision is motivated by secular reasons. For example, the U.S. Court of Appeals for the Sixth Circuit upheld the constitutionality of a Kentucky statute making Good Friday a state holiday on the grounds that the legislature acted in order to provide a holiday on the third busiest travel day of the year (*Granzeier v. Middleton*, 173 F. 3d 568, 6th Cir., 1999). Similarly, the U.S. Court of Appeals for the Fourth Circuit upheld a Maryland statute making Good Friday and the Monday after Easter Sunday school holidays on the grounds that the schools would otherwise have a high rate of absenteeism on those days (*Koenick v. Felton*, 190 F. 3d 259, 4th Cir., 1999). The U.S. Court of Appeals for the Seventh Circuit upheld an Indiana law giving state employees a holiday on Good Friday when the state presented evidence that the purpose was to create a holiday during a time period when there would otherwise be four months without one (*Bridenbaugh v. O'Bannon*, 185 F.3d 796, 7th Cir., 1999).

Yet another circuit court, the U.S. Court of Appeals for the Ninth Circuit, found that a Hawaii statute declaring Good Friday a state holiday did not violate the Establishment Clause since, in the court's view, Good Friday in Hawaii had become the first day of an annual three-day spring weekend devoted to shopping and recreational pursuits and that the establishment of that day as a holiday merely

accommodated those secular activities (*Cammack v. Waihee*, 932 F.2d 765, 9th Cir., 1991). Finally, a federal district court in Ohio rejected a claim that giving municipal workers a holiday on Good Friday violated the Establishment Clause since the purpose of the holiday was to satisfy union demands, not to advance the religion of Christianity (*Franks v. City of Niles*, 29 Fair Empl. Prac. Cas. (BNA) 1114, N.D. Ohio, 1982).

On the other hand, courts are uniform in their conclusion that declaring Christmas Day a state holiday does not violate the Establishment Clause. Even the Seventh Circuit judges in *Metzl v. Leininger* (1995), who found the Illinois law making Good Friday a state holiday to violate the Establishment Clause, conceded that designating Christmas Day (and Thanksgiving Day) a state holiday did not offend the Constitution: “Some holidays that are religious, even sectarian, in origin, such as Christmas and Thanksgiving, have so far lost their religious connotation in the eyes of the general public . . . [that they] have only a trivial effect in promoting religion” (*Metzl v. Leininger*, 1995). Similarly, a federal district court judge in Ohio rejected a challenge to Christmas Day as a government holiday on the grounds that the day had become a secular holiday (*Ganulin v. United States*, 71 F. Supp. 2d 824, S.D. Ohio, 1999). Four justices of the U.S. Supreme Court in *Lynch v. Donnelly*, 465 U.S. 668 (1984), agreed that making Christmas Day a state holiday did not violate the Establishment Clause:

When government decides to recognize Christmas Day as a public holiday, it does no more than accommodate the calendar of public activities to the plain fact that many Americans will expect to spend time visiting with their families, attending religious ceremonies, and perhaps enjoying some respite from preholiday activities. The Free Exercise Clause, of course, does not necessarily compel the government to provide this accommodation, but neither is the Establishment Clause offended by such a step.

State statutes that prohibit the sale of intoxicating liquors on designated religious holidays have received limited judicial scrutiny. But in 1981, the Connecticut Supreme Court declared a state statute unconstitutional that prohibited the sale of alcohol on Good Friday, holding that such law constituted an establishment of the Christian religion (*Griswold Inn v. State*, 183 Conn. 552, 1981).

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References and Further Reading

Brookman, Justin, *The Constitutionality of the Good Friday Holiday*, N.Y.U. L. Rev. 73 (1998): 193.

Hartenstein, John M., *A Christmas Issue: Christian Holiday Celebration in the Public Elementary Schools is an Establishment of Religion*, Cal. L. Rev. 80 (1992): 981.

Kleinfelder, Megan E., *Good Friday, Just Another Spring Holiday?* U. Cinn. L. Rev. 69 (2000): 329.

Cases and Statutes Cited

Bridenbaugh v. O'Bannon, 185 F.3d 796 (7th Cir. 1999)

Cammack v. Waihee, 932 F.2d 765 (9th Cir. 1991)

Franks v. City of Niles, 29 Fair Empl. Prac. Cas. (BNA) 1114 (N.D. Ohio 1982)

Freedom From Religion Foundation v. Thompson, 920 F. Supp. 969 (W.D. Wisc. 1996)

Ganulin v. United States, 71 F. Supp. 2d 824 (S.D. Ohio 1999)

Granzeier v. Middleton, 173 F. 3d 568 (6th Cir. 1999)

Griswold Inn v. State, 183 Conn. 552 (1981)

Koenick v. Felton, 190 F. 3d 259 (4th Cir. 1999)

Lynch v. Donnelly, 465 U.S. 668 (1984)

Mandel v. Hodges, 127 Cal. Rptr. 244 (1976)

Metzl v. Leininger, 57 F. 3d 618 (7th Cir. 1995)

See also Establishment Claus (I): History, Background, Framing; Sunday Closing Cases and Laws

DEATH PENALTY

See Capital Punishment

DEBS, EUGENE V. (1855–1926)

Eugene Debs was one of the most important figures in American labor history. He is most often remembered for being a proponent of socialism, but long before his time as the leader of the Socialist Party in the United States, Debs worked as a crusader for American workers. He was born to Alsatian immigrants and grew up in Terre Haute, Indiana. Debs left school at the age of fourteen to work for an Indiana railroad. As a young railway worker, he learned to appreciate the hardships that laborers endured on their jobs, leading him to pursue an active voice for workers' rights at a very young age.

Most of Debs's early labor activity involved the railroad. He quickly gained recognition through his involvement with the Terre Haute lodge of the Brotherhood of Locomotive Firemen and was elected the organization's secretary in 1875. Rising quickly through the ranks, he was recognized as the national secretary of the brotherhood by 1881. Initially, Debs held conservative views when it came to labor questions. For example, he argued against his group participating in the national railroad strikes of 1877.

It was at this time that Debs also gained an interest in participating in government. He first entered political service by running for city clerk of Terre Haute in

1879, and by 1885 he had enough support to win a seat in the Indiana State Assembly. Debs drew support from workers and business leaders in his hometown.

One of the qualities that allowed Eugene Debs to remain at the forefront of labor organization in the United States was his ability to change his ideals over time. When he first became involved in labor, he believed that small craft unions were more important than national organizations such as the Knights of Labor. For example, Debs refused to allow his members to participate in 1885 strikes against railroads brought by the Knights of Labor. Within a few years, however, Debs changed his views after seeing the inability of small labor organizations to deal with business managers effectively. Debs also began to speak out against the powers of corporate leaders in the United States, claiming that corporations hindered the majority of Americans from receiving a fair wage. By 1893, Debs had resigned as secretary of the Brotherhood of Locomotive Firemen and he began to organize a new labor organization, the American Railway Union (ARU).

Debs formed the American Railway Union in a politically charged atmosphere. Many members of the ARU came from the disgruntled ranks of the Pullman Palace Car Company. George Pullman angered labor leaders by his treatment of those that worked for his company. Pullman lowered wages, laid off workers, and raised prices at his company stores; his employees had no say in the matter. Pullman refused to listen to Debs's pleas for arbitration, so Debs led the American Railway Union into action. In June 1894, the union refused to handle Pullman cars and soon tied up most of the railroad traffic in the Midwest.

In response, the railroads brought in strikebreakers and developed a scheme to involve the federal government in the strike. Railroad leaders ordered the strikebreakers to attach Pullman cars to mail cars so that interfering with delivery of the mail would bring in the government. The U.S. attorney general as well as President Grover Cleveland used the power of the federal government to bring injunctions against labor leaders and enforce the timely delivery of the mails. The federal courts also brought cases against many of the labor activists, including Debs. On July 13, 1894, a federal district court sentenced Debs to six months in jail for violating a federal injunction. The sentence was upheld by the Supreme Court in the case of *in re Debs* (1895), in which the court claimed the sentence was just in protecting the interests of national sovereignty, where the government had the duty to protect interstate commerce and the delivery of the mails.

While in prison, Debs studied socialism and believed it could save the American worker. By 1897, he was putting together a socialist movement in the United States. Debs found success by building a coalition that embraced all viewpoints in the socialist sphere, ranging from moderate reformers to loyal Marxists. He soon organized the Social Democratic Party, mainly from holdovers from the American Railway Union. Debs ran for President in 1900 and received over four thousand votes. From this modest beginning, Debs became the leading spokesman for the Socialist Party in the United States. By the election of 1912, in a four-way race for the presidency with Woodrow Wilson, Theodore Roosevelt, and William Howard Taft, Debs received 6 percent of the vote, or almost nine hundred thousand votes.

Even though he never achieved the presidency, Debs tirelessly campaigned for workers' rights. He traveled the country participating in strikes and defending workers in industrial disputes. Debs also reached out to workers through print media when he became the associate editor of the Socialist publication, *Appeal to Reason*, in 1907.

Perhaps the greatest example of Debs's fiery rhetoric was leveled at the U.S. government for its participation in World War I. Debs declared that he was against all wars except for the one that would result in a worldwide socialist revolution. He urged American men not to serve in the military and spoke out against the war all over the country. For his remarks, Debs was prosecuted under the Alien and Sedition Act passed during the Wilson administration. He was eventually arrested and given a twenty-year prison sentence for encouraging resistance to the draft; he served three years in a federal prison in Atlanta, Georgia. While a prisoner in Atlanta, Debs made his final run for the presidency in 1920, polling over a million votes. On Christmas Day, 1921, the Republican president, Warren G. Harding, commuted Debs's sentence to time served and he was released. Debs spent the final years of his life in Terre Haute trying to recover his health from the time he spent in prison. He is remembered for tirelessly promoting the rights of all people and pushing for government reforms.

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References and Further Reading

- Currie, Harold W. *Eugene V. Debs*. Boston: Twayne Publishers, 1976.
- Salvatore, Nick. *Eugene V. Debs: Citizen and Socialist*. Urbana: the University of Illinois Press, 1982.

DEBS v. UNITED STATES, 249 U.S. 211 (1919)

In *Debs v. United States*, the Supreme Court, in a unanimous opinion written by Justice Holmes, upheld the conviction of Eugene V. Debs, the American socialist, who was convicted of violating the Espionage Act of 1917, a statute that Congress enacted two months after the United States entered World War I. The Espionage Act made it unlawful to cause or attempt to cause insubordination or to obstruct recruitment for the armed forces. Debs had given two speeches opposing the war effort and the draft.

In affirming his conviction, the Court relied on the so-called “clear and present danger test,” which Justice Holmes had first articulated in the case of *Schenck v. United States*, 249 U.S. 47 (1919), another Espionage Act case decided during the same term in which the Court decided *Debs*. Although the First Amendment protects freedom of speech, the clear and present danger test allows speech to be punished “if the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent” (*Schenck*, 249 U.S. at 52).

The clear and present danger test rests on the idea that certain speech is fairly viewed as an *act*, and the government has the power to prohibit certain acts. On the authority of this test, Congress enacted the Smith Act in 1940, which prohibited advocating force to overthrow the U.S. government. The statute was used to punish political dissenters, principally communists, during World War II in the early 1940s and during the “red scare” in the late 1940s and 1950s.

Eventually, the clear and present danger test was replaced by the so-called incitement test, first articulated in *Brandenburg v. Ohio*, 395 U.S. 444 (1969). Under the incitement test, the government may punish only speech that is an incitement to imminent lawless action.

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Cases and Statutes Cited

Brandenburg v. Ohio, 395 U.S. 444 (1969)
Schenck v. United States, 249 U.S. 47 (1919)

DEBTOR’S PRISONS

Debtor’s prisons existed in America from colonial days until the 1833 federal law abolishing the confinement of debtors. Federal debtor’s prisons may have been abolished in 1833, but they persisted in the

states. Persons owing money to the local, state, or national government or to private citizens could be incarcerated to force the indebted to pay what they owed to the debtors. The majority of the inmates in debtor’s prisons owed money to private individuals. Their incarceration served as a persuasive method of collecting debt and as an incentive to others to settle debts. The prisoners lived in the debtor’s prisons and paid for their room, board, and meals from the “goalers” or “jailers.” The term “goal” applied to both prisons pronounced as “jail,” a term used in modern times. These prisons were separate from prisons housing those convicted of crimes.

Many debtor’s prisons grew overcrowded, and disease ran rampant in these unsanitary prisons. Many prisoners could not pay back their debts and relied on friends and relatives to pay what they owed in order to be freed from jail. The practice of using debtor’s prisons stopped as governments and people sought to use other methods of debt collection, such as property confiscation, without resorting to prisons. In modern America, people are still put into prison for nonpayment of alimony, various instances of fraud, refusal to pay child support, and other monetary violations. The debt owed in these cases is substantially higher than that owed by those jailed in colonial years. The system of debtor’s prisons is gone, but the law continues utilizing incarceration as a form of persuasion for debt collection.

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References and Further Reading

Holton, Woody. *Forced Founders: Indians, Debtors, Slaves, and the Making of the American Revolution*. Chapel Hill: University of North Carolina Press, 1999.
Rhode, Steve. “The History of Credit and Debt,” http://www.myvesta.org/history/history_debtorprison.htm, (2003).

DECLARATION OF INDEPENDENCE

The Declaration of Independence stands as a rejection of British tyranny as well as the emboldened embrace of a republican form of democracy that has, albeit imperfectly, stood the test of time in America. The Declaration of Independence draws from and expanded upon a notion of natural rights—the principle that government’s role in relation to its people is to provide for the protection of certain key rights that derive from nature and are therefore inalienable and fundamental. After brief introductory remarks regarding the need for independence, the often quoted second paragraph begins: “We hold these truths to be

DECLARATION OF INDEPENDENCE

self evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.” It continues by describing the role of government in a republican democracy so as to secure these rights and describes the foundation for government as not being divined from the heavens (as in the British system), but from the people.

It is no surprise that Jefferson then outlined the many colonial grievances against British rule, including taxation without representation, since the notion of a people-based democratic rule constituted an overwhelming rejection of the tyrannical rule of unchecked power over the citizenry the colonists had suffered at the hands of the English. The Declaration of Independence persists as an outline of American popular governance. Since government derives its sovereignty from the people via the polls, it is thus subject to ongoing revision through the casting of ballots by the electorate. Next, the government cannot infringe on certain core “unalienable rights” of the people, such as the right to due process of liberty or the protection against governmental takings of property without just compensation. There is also a lasting irony in the notion that while the founding fathers rejected the subservience of British rule, they at the same time struggled with the enslavement of African Americans on their own shores. Slavery in America defied some of the principles of freedom for all, a notion that embodied the words of American independence.

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References and Further Reading

Becker, Carl. *The Declaration of Independence*. New York: Harcourt Brace, 1922.

DEFAMATION AND FREE SPEECH

To be defamed is to be falsely described. To bear false witness against someone has been prohibited since biblical times. That prohibition can be found in Exodus, the second book of the Bible. Later, Iago in Shakespeare’s *Othello* said, “Good name in man and woman, dear my lord, is the immediate jewel of their souls: Who steals my purse steels trash . . . But he that filches from me my good name robs me of that which not enriches him, and makes me poor indeed.” In modern times, in the United States, states seek to protect their citizens from harm caused by statements that steal one’s good name by letting their citizens recover damages by means of tort law. A tort is a civil wrong that allows someone who is wronged to

bring a lawsuit to recover compensation for harm caused by the wrong. The tort of defamation enables someone whose good name has been stolen—who has been defamed—to bring a lawsuit to seek monetary compensation for damage to reputation and for emotional distress.

Because defamation is a tort, it is developed by states, not the federal government, through their judicial decisions or legislative enactments. Because there are fifty states, as well as the District of Columbia and U.S. territories, each of which formulates its own tort law, defamation law can vary from state to state.

General Principles of Defamation

Despite variations among states as to the scope of defamation law, defamation has some consistent principles. Defamation is speech: libel is written, slander is oral. For a statement to be defamatory, generally it must be about an individual, it must be published, and it must tend to injure that individual’s reputation in the community. Publication does not necessarily mean printed and distributed, although that is a familiar method of publication. A statement can also be published if it is overheard by someone other than the person defamed. The definition of community may also be debated. One can ask whether a statement is defamatory if its injury comes from what a small group of people will think of the person defamed, or whether the opprobrium must come from a larger population. If a plaintiff proves that he or she has been defamed, the next step is to seek compensation.

Tort actions protect citizens from harm by compensating them for that harm. Besides benefiting the plaintiff, compensation for harm can also deter a tortfeasor from committing further harm. The availability of compensatory damages can deter others as well. In addition to awarding compensatory damages, juries may also award punitive damages against a tortfeasor, another deterrent. One purpose of the availability of damages in defamation law, therefore, is to deter harmful speech.

While speech can cause harm, speech is also protected from governmental infringement by the First Amendment to the Constitution. Thus arises a conflict between a state’s use of its judicial system to protect its citizens from harmful speech and society’s goal of encouraging robust debate free from state interference. Beginning in 1964 with *New York Times v. Sullivan*, 367 U.S., 254 (1964), the Supreme Court of the United States decided a number of cases to balance those competing interests.

***New York Times v. Sullivan*—Actual Malice Standard for Public Figures**

In 1960, the *New York Times* published an advertisement signed by the “Committee to Defend Martin Luther King and the Struggle for Freedom in the South.” The advertisement said that “thousands of Southern Negro students are engaged in widespread nonviolent demonstrations in positive affirmation of the right to live in human dignity as guaranteed by the U.S. Constitution and the Bill of Rights.” It accused the police in Montgomery, Alabama, of terrorizing those students. L.B. Sullivan was the elected city commissioner who supervised the police. Because some of the statements in the advertisement were incorrect, he sued the *New York Times* for defamation and recovered \$500,000. In reversing that recovery, the Supreme Court said erroneous statement is inevitable in free debate and held that in order to protect debate, the First Amendment required a federal rule that prohibits a public official from recovering damages for a defamatory falsehood unless he proves that the statement was made with “actual malice,” that is, with knowledge that it was false or with reckless disregard of whether it was false or not. This statement has become the widely quoted standard for determining when a public officer may recover damages for defamation.

In 1967, the Supreme Court applied this actual malice standard to actions brought against public figures. The result of this standard is that a plaintiff’s claim for defamation will be dismissed, and therefore will not go to trial, unless the plaintiff has evidence that would prove that the defamer acted with malice as defined by the Supreme Court. If a plaintiff does present evidence at trial, he or she can only recover damages if the jury believes the evidence about malice. Proving malice is a high hurdle for a public official or a public figure to overcome. Because of this, if an official or public figure loses a defamation case, the loss does not necessarily mean that the challenged statements are true, only that the publisher did not act with malice.

Negligence Standard for Private Individuals

In 1974, the Supreme Court decided *Gertz v. Robert Welch, Inc.*, 418 U.S., 323 (1974). That defamation case was brought by Elmer Gertz, a lawyer who was neither a public official nor a public figure. He had represented the family of a man who was killed by a

policeman. The policeman had been convicted of the man’s murder, and the family was suing him for damages. Robert Welch, Inc. published a magazine that warned of a conspiracy to discredit local police so that they would be replaced by people who would support a communist dictatorship. The magazine published a story that falsely accused Gertz of being a communist and of helping to frame the policeman. The jury awarded Gertz \$50,000, but the verdict was overruled by the judge because Gertz had not proved that the magazine editor had acted with malice when he published the author’s story. Gertz, therefore, recovered nothing.

In *Gertz*, because the plaintiff was a private individual, the Supreme Court rebalanced a state’s interest in protecting reputations with the Constitutional interest in protecting speech. The Court sent the case back to the trial court to apply a standard different from the *New York Times* malice standard. The new standard articulated in *Gertz* that is applicable to private individuals differs from the standard of *Sullivan* in two ways. First, a private plaintiff can bring suit by showing that the defendant acted with some fault, even if the fault does not amount to malice. If the plaintiff cannot prove malice, however, the manner in which a plaintiff can prove damages is limited. Unlike in *Sullivan*, in which no justice dissented, in *Gertz* the justices split, five votes to four. Two of the dissenters would have reinstated the jury’s verdict and allowed state law to govern. In contrast, the other two would not have permitted liability on a showing of mere negligence.

Negligence

The standard that the Court articulated in *Gertz* was that a private individual did not need to prove malice, but could recover for defamation by proving that the defendant was merely negligent. The Court explained that a different standard is necessary for private plaintiffs because they do not have the same access to the media to deliver their messages as public officials and public figures have. The Court did not give states free rein to determine how to apply defamation law to private individuals, however. The Court held that the First Amendment limited damages for these plaintiffs to recovery of actual damages, but not the usual presumed damages often awarded in defamation cases. The significance of this ruling requires an understanding of the unusual remedial structure of defamation law.

Damages for Defamation

In most tort actions a plaintiff must present evidence of harm before a jury can award damages to compensate the harm. In defamation *per se* actions, however, traditionally a jury could award presumed damages to the plaintiff. Defamation is *per se* when the defamatory statement is particularly injurious, such as an accusation of the commission of a crime. For defamation *per se*, a jury could assess damages, not based on evidence of actual injury to the plaintiff but rather based on the seriousness of the defamatory statement. A jury could presume from the egregiousness of the statement that it must have caused damage. From that presumption the jury could award whatever amount it determines to be appropriate. In that case the plaintiff is not required to produce any evidence that the statement actually harmed his or her reputation or caused emotional distress.

Not all defamatory statements would entitle a plaintiff to presumed damages. If the statement is not defamatory on its face, it will be labeled *per quod*. Often such statements are defamatory only because those who hear them know the context. In many states that lesser libel or slander may not be actionable unless the plaintiff can prove that the statement caused special damages, which are measurable economic losses such as lost wages. Without proof of economic injury, a plaintiff cannot bring suit, cannot prove that the statement is defamatory, and cannot recover for harm to reputation or emotional distress. In this way defamation law eliminates cases deemed less important, with importance measured by whether or not the plaintiff was injured financially. This approach devalues the impact of mental anguish but is consistent with other traditional areas of tort law, which do not recognize mental anguish as a compensable harm. Consistent with that approach, some states require a plaintiff to prove that his or her reputation was damaged by the defamation before permitting recovery for emotional distress.

In *Gertz*, the Court held that without proof of malice, a plaintiff could not recover traditional presumed damages because the largely uncontrolled discretion of juries to award damages where there is no loss unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms. Elimination of presumed damages for negligent, but not malicious, defamation means that a private plaintiff must prove actual harm to reputation or prove emotional distress.

The Supreme Court was explicit, however, that after proving loss, whether economic, reputational,

or emotional, a plaintiff could recover both special damages: those out-of-pocket economic losses as well as damages for harm to reputation and for humiliation and mental anguish. The Court did not set the constitutional bar for recovery so that damages would be recoverable only if the defamatory statement caused economic injury. While state law cannot permit greater recovery for defamation than allowed under the First Amendment, states may permit less. Thus, some states may retain the traditional rule that to recover anything for certain types of defamatory statements, a plaintiff must prove economic injury (special damages).

Truth

Another legal presumption that the Supreme Court invalidated as interfering with vigorous debate was the traditional presumption that a defamatory statement is false; truth is a defense that, if proved, would enable a defendant to avoid liability. In *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986), the Supreme Court held that when a plaintiff sues a media defendant for defamation, if the statement involves a matter of public concern the plaintiff must bear the burden of proving that the statement is false. Allocation of burden of proof is a procedural matter that becomes important when evidence is inconclusive—when neither party can prove the truth or falsity of a statement. When that evidence is inconclusive, the party who needs to prove something (who has the burden of proof) will lose. The Supreme Court said that requiring a media defendant to prove the truth of a matter of public concern deters such speech because of the fear that liability will unjustifiably result. As in *Gertz*, the justices in *Hepps* split five votes to four. The four dissenters stated that requiring a private person to prove that a defamatory statement is false gives a character assassin an absolute license to defame by means of statements that can be neither verified nor disproved.

Private Plaintiffs and Matters of Private Concern

In 1985, a little over twenty years after having decided *Sullivan*, the Supreme Court ruled that state defamation law may apply without constitutional restrictions in suits that do not involve matters of public concern. The case, *Dun & Bradstreet, Inc. v. Greenmoss Builders*, 472 U.S. 749 (1985), involved an incorrect

statement in a credit report about a private company. The report was sent to five subscribers, with the caveat that the subscribers were not to reveal the information. Greenmoss Builders brought suit in defamation, and the jury awarded it \$50,000 in presumed or compensatory damages and \$300,000 in punitive damages. The jury did not find malice as defined by *Sullivan*. This raised the question of whether the standard of *Gertz* for recovery of damages should apply, which would allow recovery only for proven damages.

In *Greenmoss*, none of the opinions written by the justices had more than four votes. A majority of justices agreed on the result of the case, but not the reasoning. Four of the justices distinguished *Greenmoss* from *Gertz* on the ground that the statements in *Greenmoss* were not matters of public concern. Those justices reasoned that speech that is not of public concern has reduced constitutional value and its protection is outweighed by the state's interest in protecting a person's good name—a basic concept of the essential dignity and worth of every human that is at the root of any decent system of ordered liberty. Two justices who concurred in the result would overrule *Gertz* to allow the states more freedom to apply their defamation laws to protect private individuals.

One of those justices, Justice White, questioned the wisdom of the *Sullivan* case, with which he joined in 1964. In retrospect, he would recommend limiting damages in cases involving public matters in a *Gertz*-like manner rather than require a showing of malice before an action may be brought. According to Justice White, the malice standard has created two evils: first that the stream of information about public officials and public affairs is polluted by false information, and second that the defeated plaintiff may be destroyed by falsehoods that might have been avoided with a reasonable effort to investigate the facts. Four justices in *Greenmoss* dissented on the ground that even speech about economic matters such as credit reports implicates matters of public concern. Those four would have retained the rules articulated in *Gertz* for *Greenmoss*, limiting recovery to proven damages and not permitting recovery of presumed or punitive damages.

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References and Further Reading

- Bollinger, Lee C., and Geoffrey R. Stone, eds. *Eternally Vigilant: Free Speech in the Modern Era*. Chicago: Chicago University Press, 2002.
- Smolla, Rodney A. *Law of Defamation*, 2nd ed., Eagan, Minn.: Thomson West, last update 2005.
- Sullivan, Kathleen M., and Gerald Gunther. *Sullivan and Gunther's First Amendment Law*, 2nd ed. University Casebook Series, St. Paul, Minn.: Thomson West Press, 2003.

DEFENSE OF MARRIAGE ACT

On September 21, 1996, the Defense of Marriage Act was signed into law. It was developed in response to the possibility and fear that same-sex marriage might soon become legal, at least in Hawaii. In the House Committee on the Judiciary's Report on the Defense of Marriage Act, the committee referred to the Hawaii case as an orchestrated legal assault being waged against traditional heterosexual marriage by gay rights groups and lawyers. In *Baehr v. Lewin*, 852 P.2d 44 (1993), individuals whose applications for marriage were denied solely on the ground that they were of the same sex filed a complaint alleging that the denial of licenses violated their right to privacy and equal protection as guaranteed by the Hawaii Constitution. The First Circuit Court, City and County of Honolulu, granted the defendant's motion for judgment on the pleadings, and the plaintiffs appealed.

The Hawaii Supreme Court held that pursuant to the Hawaiian Constitution, the applicant couples did not have a fundamental constitutional right to same-sex marriage arising out of the right to privacy or otherwise. Moreover, the court held that pursuant to the Hawaiian Constitution, sex was a suspect classification for purposes of equal protection analysis and was subject to the strict scrutiny test. Therefore, the statute in question was presumed to be unconstitutional unless on remand the defendant Lewin surpassed the requirements set forth under the strict scrutiny test.

The Defense of Marriage Act has two primary purposes. The first is to defend the institution of traditional heterosexual marriage. The second is to protect the right of the states to formulate and determine their own public policy in regards to the implications that might result in the recognition by one state of the right for homosexual couples to acquire marriage licenses.

The act, which allows other states to disregard completely an otherwise valid same-sex marriage, has two distinct parts. Section 2, entitled "Powers Reserved to the States," amends 28 U.S.C. 1738 by adding a new section, 1738C to provide that:

No State, territory, or possession of the United States, or Indian tribe shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession or tribe, or a right or claim arising from such relationship.

The committee would emphasize the narrowness of this provision in that it merely provides that, in the

event that Hawaii or some other state permits same-sex couples to marry, other states will not be obligated or required, by operation of the Full Faith and Credit Clause of the U.S. Constitution, to recognize that marriage, or any right or claim arising from it. Section 2 therefore is concerned exclusively with the potential interstate implications that might result from a decision by one state to issue marriage licenses to same-sex couples. Proponents of interstate recognition of same-sex marriage assert that the language of the Full Faith and Credit Clause of the U.S. Constitution requires states to give full faith and credit to such marriages performed in other states.

Section 3 defines marriage for federal purposes by providing that:

In determining the meaning of any Act of Congress, or any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, the word spouse refers only to a person of the opposite sex who is a husband or a wife.

There is nothing novel about the definitions contained in Section 3. The definition of marriage is derived from *The State of Washington, Singer v. Hara*, 522 P.2d 1187, 1191-92 (Wash. App. 1974); that definition—a legal union of one man and one woman as husband and wife—has found its way into the standard law dictionary. It is fully consistent with the Supreme Court's reference, over one hundred years ago, to the union for life of one man and one woman in the holy estate of matrimony. The definition of spouse obviously derives from and is consistent with this definition of marriage.

The most important aspect of this provision is that it applies to federal law only. It does not, therefore, have any effect on the manner in which any state might choose to define the words "marriage" and "spouse." The determination of who may marry in the United States is uniquely a function of state law. The general rule for determining the validity of a marriage is *lex celebrationis*—that is, a marriage is valid if it is valid according to the law of the place where it was celebrated.

The legal and social implications of the Defense of Marriage Act will have a profound impact in the arena of civil rights. By passing this act, Congress is not only condoning discrimination against same-sex couples but is also perpetuating it. Specifically precluding same-sex couples from marrying perpetuates discrimination against same-sex couples, just as miscegenation laws perpetuated racial discrimination. The consequences include denying these couples the rights and benefits of marriage such as inheritance

rights, as well as making the children of such marriages illegitimate if these families were to cross state lines.

Such rights and benefits are by no means nominal. Legal as well as economic benefits extended to spouses include property rights, tax breaks, veterans' and social security benefits, testamentary benefits, recovery for loss of consortium, employment benefits, lower insurance premiums, spousal testimonial privileges, financial support upon separation, and status of next of kin to make medical decisions or burial arrangements. Furthermore, laws that make class-based distinctions, whether based upon race, gender, sexual orientation, or religion, proclaim to the world that the targeted group is different and should be treated as such.

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References and Further Reading

- Ryan, Brett P., *Love and Let Love: Same Sex Marriage, Past, Present, and Future and the Constitutionality of DOMA*, U. Haw. L. Rev. 22 (2000): 185.
- Paige, Rebecca S., *Wagging the Dog—If the State of Hawaii Accepts Same-Sex Marriage Will Other States Have to? An Examination of Conflict of Laws and Escape Devices*, Am. U. L. Rev. 47 (1997): 165.
- Treuthart, Mary Patricia, *Adopting a More Realistic Definition of "Family,"* Gonz. L. Rev. 26 (1991): 91.
- Eskridge William N. Jr., *A History of Same-Sex Marriage*, Va. L. Rev. 79 (1993): 1419.

Cases and Statutes Cited

- Murphy v. Ramsey*, 114 U.S. 15, 45 (1885)
28 U.S.C. §1738(c)
1 U.S.C. §7
H.R. Rep. 104-664, 1996 U.S.C.C.A.N 2905 (1996)
U.S. Const. art. IV, §1 (Full Faith and Credit Clause)

See also **Same-Sex Marriage Legalization**

DEFENSE, RIGHT TO PRESENT

The Constitution guarantees a criminal defendant the right to present a complete defense to the charges against him or her. The right to present a defense is not explicitly stated in the Constitution, and the Supreme Court did not speak of a general right of criminal defendants to present evidence until the twentieth century. Indeed, many American jurisdictions placed severe restrictions on the ability of defendants to present evidence in their defense until relatively recent times. For example, many jurisdictions in the nineteenth century flatly precluded criminal defendants from testifying in their own behalf

because it was thought that they were likely to perjure themselves. It was not until the Supreme Court's 1960 decision in *Ferguson v. Georgia*, 365 U.S. 570 (1961), that all such bans were finally declared unconstitutional.

By the middle of the twentieth century, however, the Supreme Court had begun to recognize a general right to present a defense and, over the next several decades, the Court found the right to be implied by several different constitutional provisions. In 1948, in *In re Oliver*, 233 U.S. 257 (1948), the Supreme Court declared that the Due Process Clause provides a criminal defendant "an opportunity to be heard in his defense," including the right "to offer testimony." In *Taylor v. Illinois*, 484 U.S. 400 (1988), the Court held that the Sixth Amendment Compulsory Process Clause guarantees defendants the right not only to subpoena favorable witnesses but also to present their testimony. Finally, in *Rock v. Arkansas*, 483 U.S. 44 (1987), the Court recognized that the Fifth Amendment Self-Incrimination Clause, as well as the Compulsory Process and Due Process Clauses, implies that a criminal defendant has the right to present his or her testimony as part of the defense case.

Litigation over the right to present a defense usually arises when a jurisdiction's evidentiary rules preclude criminal defendants from presenting certain types of evidence in their defense. Since the right to present a defense is of constitutional magnitude, the Supreme Court has held that rules of evidence and criminal procedure must occasionally yield to a defendant's need to introduce evidence in his or her favor.

Therefore, the Court concluded in *Chambers v. Mississippi*, 410 U.S. 284 (1973), that the defendant's due process right to present a defense outweighed a state rule against hearsay evidence that had been invoked to exclude testimony that another man had confessed to the crime for which the defendant was on trial. Similarly, the Court declared in *Washington v. Texas*, 388 U.S. 14 (1967), that the defendant's Compulsory Process Clause right to obtain witnesses in his favor trumped a state rule barring the defendant from presenting the testimony of his or her alleged accomplices and codefendants. In *Cool v. United States*, 409 U.S. 100 (1972), the Court ruled that a judge unconstitutionally burdened the defendant's Compulsory Process Clause right to call a codefendant who testified in her favor by instructing the jury that it should be exceptionally cautious in accepting the codefendant's testimony. The Court held in *Rock* that a state rule barring a witness whose testimony had been hypnotically refreshed had to yield to the defendant's constitutional right to testify in her defense.

However, the right to present a defense is not absolute, and the Supreme Court has upheld several

types of limitations on the right. First, the exclusion of defense evidence may be justified by society's interest in conducting orderly trials. Thus, defense evidence may be excluded if the defendant fails to abide by the rules of pretrial discovery or is attempting to surprise the prosecutor unfairly. Therefore, in *Williams v. Florida*, 399 U.S. 78 (1970), the Court upheld state laws requiring defendants to give pretrial notice of their intent to present certain defenses, such as alibi and insanity, or face exclusion of evidence relating to those defenses; the Court has also upheld exclusion as a sanction for other types of discovery violations. In *Taylor*, for example, the Court affirmed a judge's ruling excluding the testimony of a defense witness as a sanction against defense counsel who had failed to disclose his plan to call the witness until the trial was underway.

Second, a defendant's right to present a defense may yield to local rules designed to improve the reliability of the trial process. Therefore, in *United States v. Scheffer*, 523 U.S. 303 (1998), the Supreme Court upheld a military justice rule that precluded the defendant from presenting polygraph evidence in his favor. The Court explained that "state and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials. Such rules do not abridge an accused's right to present a defense so long as they are not 'arbitrary' or 'disproportionate' to the purposes they are designed to serve."

Third, the Supreme Court has curtailed the right to present a defense by limiting the right to the introduction of evidence in support of the defense. The Court held in *Gilmore v. Taylor*, 508 U.S. 333 (1993), that the right to present a defense does not, therefore, include the right to have the judge deliver instructions to the jury in support of the defense.

Fourth, a jurisdiction may entirely eliminate the right to present a particular defense entirely by changing the law so as to eliminate the defense. For example, the Supreme Court in *Montana v. Egelhoff*, 518 U.S. 37 (1996), upheld a state law prohibiting defendants from proving that they lack the mental state necessary to be guilty of a crime by introducing evidence of their voluntary intoxication. The Court in *Egelhoff* viewed the prohibition on defense evidence of voluntary intoxication as permissible because states have traditionally been accorded the freedom to define crimes and the available defenses to those crimes.

Even with these limitations, criminal defendants still enjoy a core constitutional right to present relevant and reliable evidence in support of their defenses. Subject to reasonable rules designed to assure a fair and orderly trial, a defendant must be permitted to

present favorable witnesses and evidence. The right to present a defense thus protects defendants from those local authorities who may otherwise be all too willing to tilt the scales of justice in favor of the prosecutor.

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References and Further Reading

Stacy, Tom, *The Search for Truth in Constitutional Criminal Procedure*, Columbia Law Review 91 (1991): 1369.
Westen, Peter, *The Compulsory Process Clause*, Michigan Law Review 73 (1974): 71.

Cases and Statutes Cited

Chambers v. Mississippi, 410 U.S. 284 (1973)
Cool v. United States, 409 U.S. 100 (1972)
Ferguson v. Georgia, 365 U.S. 570 (1961)
Gilmore v. Taylor, 508 U.S. 333 (1993)
In re Oliver, 233 U.S. 257 (1948)
Montana v. Egelhoff, 518 U.S. 37 (1996)
Rock v. Arkansas, 483 U.S. 44 (1987)
Taylor v. Illinois, 484 U.S. 400 (1988)
United States v. Scheffer, 523 U.S. 303 (1998)
Washington v. Texas, 388 U.S. 14 (1967)
Williams v. Florida, 399 U.S. 78 (1970)

See also *Chambers v. Mississippi*, 410 U.S. 284 (1973); **Due Process**; *Rock v. Arkansas*, 483 U.S. 44 (1987); **Self-Incrimination (V): Historical Background**; *Taylor v. Illinois*, 484 U.S. 400 (1988); *Washington v. Texas*, 388 U.S. 14 (1967)

DEFIANCE OF THE COURT'S BAN ON SCHOOL PRAYER

For much of the twentieth century, religion was an important part of the curriculum in many K–12 public schools. In the early 1960s, however, the Supreme Court held that prayer and Bible reading were unconstitutional in those schools. In *Engel v. Vitale*, 370 U.S. 421 (1962), the Court held that a short nondenominational prayer composed by the New York Board of Regents and recommended by it for daily use in the public schools violated the Establishment Clause of the First Amendment. The Court reasoned that “in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government.” The following year, in *Abington School District v. Schempp*, 374 U.S. 203 (1963), the Court held that it was unconstitutional for school boards to require the reading of Bible passages or the recitation of the Lord’s Prayer in public schools. The Court declared: “In the relationship

between man and religion, the state is firmly committed to a position of neutrality.” In both cases the Court forcefully asserted that the separation of church and state was best for government and for religion.

Among religious leaders, conservative Christian evangelicals and Roman Catholics were the primary opponents of the decisions. The vast majority of Protestant leaders and organizations approved of *Engel* and *Schempp*. Indeed, after *Engel*, thirty-one Protestant leaders published a manifesto asserting that the Court’s ruling protected “the integrity of the religious conscience and the proper function of religious and governmental institutions.” Jewish leaders, moved in part by a concern about their minority status in an overwhelmingly Christian nation, concurred in supporting public secularism.

Despite the opinions of many religious leaders, the majority of Americans disagreed with the Court. Indeed, the school prayer and Bible reading decisions were met with strong opposition and noncompliance from the public. The Supreme Court received five thousand letters denouncing *Engel*, and a Gallup Poll showed that 80 percent of Americans favored prayer in the public schools. Critics accused the Court of secularizing the United States and promoting communist atheism. Disturbed by the intensity of the public response to *Engel*, Justice Clark took the unusual step of denouncing press coverage of the case in an American Bar Association speech.

Engel and *Schempp* were openly defied in the South, where public officials encouraged the resistance, and in the Midwest. There was a greater degree of compliance with the decisions in the rest of the country. When school boards continued classroom religious practices in northern states, states attorneys general ordered them to stop doing so. Despite the resistance, *Engel* and *Schempp* worked changes in classroom practices. One national survey showed that the percentage of classrooms in which prayers were recited declined from 60 percent before 1962 to 28 percent in the 1964–1965 school year; the percentage in which Bible reading was taking place declined from 48 to 22 percent.

Congress also responded strongly to the Court’s decisions. Within days of the *Engel* decision, senators introduced five proposed constitutional amendments to overturn it, and the House received twenty-nine proposals to revoke the Court’s ruling. By 1975, 215 such amendments had been introduced in Congress. While none of those proposed amendments was successful (they were opposed by the majority of Protestant religious leaders and the Catholic Church eventually adopted a neutral stance), the proponents of school prayer did get Congress to enact the 1984 Equal Access Act. The act, which the Court upheld in

Board of Education v. Mergens, 496 U.S. 226, 247 (1990), provides that K–12 public schools must treat student religious groups who wish to use meeting rooms equally with nonreligious groups.

Those concerned about the diminishing role of religion in the United States have also tried to work around the *Engel* and *Schempp* decisions. More than twenty years after those decisions, twenty-five states permitted or required that a moment of silence be observed in public school classrooms. In *Wallace v. Jaffree*, 472 U.S. 38 (1985), the Supreme Court held that one such statute, a 1981 Alabama statute authorizing a period of silence “for meditation or voluntary prayer,” violated the Establishment Clause because it had no secular legislative purpose and was a poorly disguised effort to return prayer to public schools. More recently, the Court has sustained Establishment Clause challenges to prayers at public school graduations (*Lee v. Weisman*, 505 U.S. 577, 1992) and at high school football games (*Santa Fe Independent School District v. Doe*, 530 U.S. 290, 2000). In both cases the Court held that government may not coerce anyone to support or participate in a religious exercise. Notwithstanding the Court’s consistent position banning prayer and Bible reading in public schools, noncompliance continues to be a problem.

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References and Further Reading

- Alley, Robert S. *School Prayer: The Court, the Congress, and the First Amendment*. Buffalo, NY: Prometheus Books, 1994.
- Dent, George W., Jr., *Religious Children, Secular Schools*, *Southern California Law Review* 61 (1988): 4:864–942.
- Jeffries, John C., Jr., and Ryan, James E., *A Political History of the Establishment Clause*, *Michigan Law Review* 100 (2001): 2:279–370.

DEFINING RELIGION

The First Amendment prohibits laws “respecting an establishment of religion” or “prohibiting the free exercise thereof.” Three terms are crucial to determining the meaning of the religion clauses of the First Amendment: “establishment of religion,” “free exercise,” and “religion.” Much of the debate over the meaning of the religion clauses concerns the first two terms, but the meaning of the third term is equally important and in many respects even more difficult to resolve. Defining religion is crucial because the First Amendment prohibits the government from “establishing” a set of beliefs and practices only if those beliefs and practices fall within the category of “religion.” Likewise, the government’s general authority

to regulate behavior is much more constrained if that behavior can be characterized as “religious.”

The task of defining “religion” as that term is used in the First Amendment religion clauses is complicated by the fact that the courts often seem to apply one definition of religion to problems arising under the Establishment Clause and a different definition to problems arising under the Free Exercise Clause. This task will become more difficult as the country becomes religiously more diverse. An increasing number of citizens belong to nontraditional faiths, and their beliefs will not always fit easily within the framework of Western religion with which the courts are most familiar.

Traditional Definitions of Religion

Until the middle of the twentieth century, the task of defining constitutionally protected religion was viewed by the Supreme Court as a relatively simple one. During the nineteenth century the constitutional significance of religion was often viewed as coextensive with the dominance of the Christian faith. In Justice Joseph Story’s 1851 *Commentaries on the Constitution*, for example, he wrote that the “real object of the [First Amendment] was, not to countenance, much less to advance, Mahometanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment.” Although the Supreme Court never took quite such a narrowly focused view of the subject, until well into the twentieth century the Court continued to define religion in a way that coincided with Christianity and other Western religions. In *United States v. Mcintosh*, 283 U.S. 605 (1931), Chief Justice Charles Evans Hughes described religion in the most traditional manner possible: “The essence of religion is belief in a relation to God involving duties superior to those arising from any human relation.”

Broadening the Definition of Religion: The Conscientious Objector Cases

A series of cases involving conscientious objectors to the draft during the Vietnam War caused the Court to move beyond the traditional definition of religion in First Amendment cases. These cases involved a provision of the military conscription laws that exempted from military service individuals who were conscientiously opposed to participation in war in any form

because of their “religious training and belief.” The statute defined “religious training and belief” in the traditional way as “an individual’s belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but [not including] essentially political, sociological, or philosophical views or a merely personal moral code.” If the Court had adhered to the literal meaning of this provision, it would have been faced with a statute that would deny conscientious objector status to many different groups of believers, agnostics, and atheists whose views on religion did not fit the traditional model.

In contrast to the narrow precision of its previous opinions on the subject, the Court took a more ecumenical and open-ended approach to the definition of religion in its conscientious objector cases. The Court started by asserting that “in no field of human endeavor has the tool of language proved so inadequate in the communication of ideas as it has in dealing with the fundamental questions of man’s predicament in life, in death or in final judgment and retribution.” The Court then attributed to Congress the intent to include within its conscientious objector provision “the ever-broadening understanding of the modern religious community.”

The Court thus interpreted the statutory term “religious” by reference to the broad ideas of modern theologians such as Paul Tillich. At one point the Court noted that, in developing its standard, it was reminded of Tillich’s notion that God is “the source of your being, of your ultimate concern, of what you take seriously without any reservation.” The Court derived the basic holding of the case from this concept of an “ultimate concern.” According to the Court, the statutory term “religious training and belief” applied to anyone who expressed a “sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption.” The Court then used this definition to extend conscientious objector status to several individuals whose religious views were abstract and theologically unspecific. In a later decision the Court would extend its broad approach to the concept of religion to cover applicants whose views bordered on atheism.

Bifurcating the Definition of Religion

Despite the fact that the Court’s conscientious objector decisions technically only involved a matter of statutory interpretation, the decisions had clear constitutional overtones. Indeed, Justice Harlan noted

that the Court’s rather tortured interpretation of the statute was necessary because “limiting this draft exemption to those opposed to war in general because of theistic beliefs runs afoul of the religious clauses of the First Amendment.” Thus, the Court’s broad interpretation of religion became the touchstone of the Court’s modern Free Exercise Clause decisions. Under these decisions, the Court extended constitutional protection to members of nontraditional religious groups, such as the Native American Church, as well as individuals whose religious beliefs were derived solely from their individual religious introspection, rather than from a specific organized faith.

The Court has not, however, applied this same expansive view of religion to its interpretations of the Establishment Clause. At first glance, this seems inconsistent with the constitutional text, which mentions the word religion only once and seems to imply that the term should be defined identically with regard to both clauses. The problem with this interpretation is that it would create serious difficulties for any modern government. Everything that modern government does in some way exerts an impact on what some people “take seriously without reservation.” If this expansive definition were used consistently in all First Amendment contexts, virtually everything the government does would potentially be activity “respecting an establishment of religion.”

In response to this problem, some constitutional theorists have suggested bifurcating the First Amendment definition of religion. Under this scheme, the courts would use a broad definition of religion in enforcing the Free Exercise Clause (to provide the broadest possible protection of individual liberty) and a narrow definition in enforcing the Establishment Clause (to give government the broadest possible authority in the areas of education and social services). One such suggestion is Laurence Tribe’s early recommendation that the Free Exercise Clause should protect all “arguably religious” activities and that the Establishment Clause should permit government to engage in any “arguably nonreligious” action.

This suggestion generated its own negative response. There are two main criticisms of the argument for a bifurcated definition of religion. The first is that this argument conflicts with the unitary implications of the constitutional text. The second is that a bifurcated definition would create three different tiers of religion, each of which would receive different constitutional treatment. Under such a system, a traditional form of religious belief would be unquestionably religious and therefore actions motivated by this belief would receive free exercise protection, but the religion would be prohibited from receiving direct government support or endorsement. Conversely, secular beliefs

that are unquestionably nonreligious would receive no free-exercise protection, but would not be barred under the Establishment Clause from receiving direct government support or endorsement. Any category of beliefs and actions that included some religious elements along with some secular elements, however, would receive favorable treatment under both constitutional provisions because such beliefs would be arguably religious and arguably nonreligious.

Modern Definitions for Establishment Clause Cases

For whatever reason, the Supreme Court has never adopted a bifurcated definition of religion. It has also, however, never defined religion in the Establishment Clause context. In *Edwards v. Aguillard*, 482 U.S. 578 (1987), a case involving state-mandated teaching of creationism, the Court emphasized that “concepts concerning God or a supreme being of some sort are manifestly religious”; however, the Court has never stated whether any other indicia of religion are necessary or sufficient to trigger the application of the Establishment Clause. The lower courts have occasionally mentioned other factors that contribute to a finding that a particular set of beliefs is religious. In one prominent case, Judge Arlen Adams mentions three factors: whether the beliefs concern fundamental problems of human existence; whether the beliefs purport to provide a comprehensive belief system; and whether the beliefs include the formal indicia of religion, such as an administrative structure, rituals, clergy, liturgies, and holidays.

The Supreme Court has embraced no single test that will definitively determine in every case whether an Establishment Clause case implicates “religion.” Conversely, the test for religion announced by the Court in the conscientious objector cases is so broad that the Free Exercise Clause is potentially implicated in a variety of different contexts. In the end, the courts seem to have settled on an instrumental as well as intuitive definition of religion. The definition applied in the Establishment Clause context is narrow enough to permit the government to do its modern job of providing social services and operating public schools that teach a broad range of subjects (including controversial topics such as morality and evolution). Conversely, the definition of religion applied in the free-exercise context is expansive enough to avoid having any citizen suffer at the hands of the government solely because that person’s unpopular religious beliefs offend the political and religious majority.

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References and Further Reading

- Choper, Jesse H., *Defining “Religion” in the First Amendment*, U. Ill. L. Rev. 579 (1982).
 Feofanov, Dmitry N., *Defining Religion: An Immodest Proposal*, Hofstra L. Rev. 23 (1994): 309.
 Freeman, George, *The Misguided Search for the Constitutional Definition of “Religion,”* Ga. L. J. 71 (1983): 1519.
 Greenawalt, Kent, *Religion as a Concept in Constitutional Law*, Calif. L. Rev. 72 (1984): 753.
Note, Toward a Constitutional Definition of Religion, Harv. L. Rev. 91 (1978): 1056.

Cases and Statutes Cited

- United States v. Macintosh*, 283 U.S. 605 (1931)
United States v. Seeger, 380 U.S. 163 (1965)

See also Accommodation of Religion; Atheism; Ceremonial Deism; Concept of “Christian Nation” in American Jurisprudence; Free Exercise Clause (I): History, Background, Framing; Religion in “Public Square” Debate; Selective Draft Law Cases (1918), Selective Service Act of 1917

DEJONGE v. OREGON, 299 U.S. 353 (1937)

In 1934, about three hundred people attended a meeting organized by the Communist Party in Portland, Oregon, to support a maritime workers’ strike. Fewer than 15 percent of them were Communist Party members. Speaker Dirk DeJonge, a party member, spoke against police shootings of strikers and raids on party headquarters and workers’ halls. He encouraged attendees to buy party literature, join the party, and gather people to attend another Communist Party meeting the following night.

Police raided the orderly meeting, confiscated party literature, and arrested DeJonge and three other meeting organizers. DeJonge was charged, convicted, and sentenced to seven years in prison under the Oregon criminal syndicalism statute for helping conduct a Communist Party meeting. Criminal syndicalism laws prohibit advocating or organizing a group to use unlawful means to overthrow business owners or government. The prosecution did not claim that DeJonge advocated illegal acts, but did present Communist Party literature from other sources that suggested the party supported such advocacy.

The Supreme Court struck down the conviction as a violation of the essence of constitutionally guaranteed personal liberty. The Court ruled unanimously that government may not proscribe “the holding of meetings for peaceable political action.” The First Amendment, as applied through the Due Process Clause of the Fourteenth Amendment, prohibits

states from regulating free speech or assembly that does not incite violence or crime. In 1969, in *Brandenburg v. Ohio*, 395 U.S. 444 (1969), the Court said states may forbid only advocacy of criminal acts that is directed toward and likely to produce imminent illegal action.

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References and Further Reading

Blasi, Vincent, *The Pathological Perspective and the First Amendment*, Colum. L. Rev. 85 (1985): 449.
Parrish, Michael E., *New Deal Symposium: The Great Depression, the New Deal, and the American Legal Order*, 59 Wash. L. Rev. 723 (1984).
U.S. Constitution. Amendments One, Fourteen.

Cases and Statutes Cited

Brandenburg v. Ohio, 395 U.S. 444 (1969)

DELAWARE v. PROUSE, 440 U.S. 648 (1979)

The Supreme Court in this case made it clear that police officers may not ordinarily stop a person's car without probable cause or reasonable suspicion of criminal activity. The car in *Delaware v. Prouse* was stopped by a police officer who had not observed any suspicious activity at all. He claimed to have made the stop randomly, just to make a spot check to see if the driver possessed his license and registration.

Upon approaching the stopped car, the officer smelled marijuana and, ultimately, he found some inside. The Court held that the marijuana should be suppressed because the officer had no right under the Fourth Amendment to the Constitution to stop the car, given the driver's reasonable expectation of privacy.

Justice White reasoned for the majority that permitting such suspicionless spot checks would only contribute marginally, if at all, to the goal of highway safety. Since the Court could not "conceive of any legitimate basis upon which a patrolman could decide that stopping a particular driver for a spot check would be more productive than stopping any other driver," approving such stops would have created a "grave danger" of abuse of discretion. "This kind of standardless and unconstrained discretion," Justice White concluded, "is the evil the Court has discerned when . . . it has insisted that the discretion of the official in the field be circumscribed."

Subsequent Supreme Court decisions have permitted police to operate suspicionless, drunk-driving roadblocks when they take great care to avoid this

sort of "standardless and unconstrained discretion" in the selection of cars to be stopped. But, the core of the *Prouse* decision remains vital and has been applied in other settings as well—for example, when a city sought to stop cars simply to see whether occupants possessed drugs.

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See also Automobile Searches; California v. Acevedo, 500 U.S. 565 (1991); *Carroll v. United States*, 267 U.S. 132 (1925); *Checkpoints (roadblocks); Probable Cause; Search (General Definition); Seizures*

DEMONSTRATIONS AND SIT-INS

Demonstrations and sit-ins served as powerful tools in the struggle for equality in the civil rights movement and other civil liberty struggles. Both forms of protest adhere to the principles of nonviolence endorsed by such figures as Mahatma Ghandi in India and Dr. Martin Luther King, Jr. in the United States.

The most famous example of a sit-in occurred in 1960 in Greensboro, North Carolina. In February 1960, four African-American students from Greensboro A&T sat at a Woolworth's lunch counter. The lunch counter was not integrated and the four men were refused service. This began a three-month-long struggle to integrate the lunch counter. Each day, more African-American students and supporters sat down at the counter and were refused service. They withstood verbal and physical abuse, threats, and jail time and persevered in their efforts. The lunch counter eventually integrated and the sit-in first begun in Greensboro spread throughout the South as increasing numbers of civil rights groups adopted the sit-in strategy. Despite the abuse, at no time did the students and supporters of the Greensboro sit-in resort to violence.

Demonstrations have taken place for centuries and usually serve as public forums to protest injustice and wrongs perceived by the people. In the modern era, demonstrations serve as important ways in which to get a particular viewpoint or message spread to others. Demonstrations are often used for political reasons, with various groups attempting to get their messages heard. The civil rights movement used demonstrations effectively to gain media attention on their struggle and turn America against prejudice and bigotry.

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References and Further Reading

Bermanzohn, Sally Avery. *Through Survivors' Eyes: From the Sixties to the Greensboro Massacre*. Nashville, Tenn.: Vanderbilt University Press, 2003.

Hairston, Otis L., Jr. *Greensboro North Carolina* (Black America Series). Mount Pleasant, S.C.: Arcadia Publishing, 2003.

DENATURALIZATION

As discussed earlier, U.S. citizenship may be acquired at birth or through the statutory process of naturalization. A U.S. citizen may lose citizenship in two ways. Loss of citizenship can occur when or if the citizen voluntarily relinquishes it through an act of expatriation. A person may also lose citizenship through the process of denaturalization or revocation of citizenship. Denaturalization may occur when an individual has failed to comply with all of the prerequisites for naturalization and, as a result, naturalization was improperly granted.

The general statutory requirements for naturalization require that an individual be eighteen years of age and a lawful permanent resident; meet the applicable continuous residence and physical presence requirements; demonstrate good moral character, attachment to the principles of the Constitution, and a favorable disposition to the good order and happiness of the United States; demonstrate understanding of English and U.S. government and history; and be not otherwise barred from naturalization. There are some exceptions to these general requirements identified in the statute and discussed generally elsewhere. Revocation of naturalization can occur if lawful permanent residence was improperly granted since one of the statutory grounds for naturalization requires that the individual possess the status of a lawful permanent resident.

The Immigration and Nationality Act identifies the grounds for denaturalization and the process for revocation of citizenship. Revocation of naturalization will occur if a person illegally procured citizenship or citizenship was obtained by concealment of a material fact or willful misrepresentation. The government bears the burden of proof and must establish by clear and convincing evidence that naturalization was improperly granted based on one of these grounds.

Revocation can only occur if the government can establish that the naturalized citizen intentionally concealed a material fact or intentionally made a material misrepresentation. The government must further prove that the naturalization was granted based on the material misrepresentation or concealment. Examples of material facts that can result in denaturalization if intentionally made include such facts as the length and location of residence in the United States, marital or family status, occupation,

name or other facts of identity, and past criminal record.

Naturalization may be illegally procured if an individual failed to satisfy one of the statutory requirements for naturalization. As noted earlier, this ground for denaturalization can reach a naturalized citizen's initial status as a lawful permanent resident and any prior immigration status in the United States as a noncitizen. There is some overlap between this ground for denaturalization and the intentional material misrepresentation or concealment ground; however, they are separately identified in the statute and viewed as separate grounds.

Denaturalization can occur at any time if naturalization was improperly granted based on misrepresentation or concealment, or if naturalization was illegally procured. The denaturalization process generally occurs through a judicial proceeding instituted by a U.S. attorney in a U.S. district court. The civil suit to revoke citizenship is filed in the judicial district where the naturalized citizen resides. A suit may only be filed if there is good cause indicating that there are grounds for denaturalization. The government will only prevail in the denaturalization lawsuit if it can present clear and convincing evidence of one of the two grounds for denaturalization. This significant burden on the government is designed to protect the status of citizenship.

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References and Further Reading

- Gallagher, Anna Marie. *Immigration Law Service*, 2nd ed. St. Paul, Minn.: West Publishing, 2004. Chapter 14.
- Immigration and Nationality Act* §312(a), 8 U.S.C. § 1423(a).
- Immigration and Nationality Act* §313, 8 U.S.C. § 1424.
- Immigration and Nationality Act* §316 (a), (b), 8 U.S.C. § 1427(a), (b).
- Immigration and Nationality Act* §318, 8 U.S.C. § 1429.
- Immigration and Nationality Act* § 329(a), (b), 8 U.S.C. § 1440(a), (b).
- Immigration and Nationality Act* §340(h), 8 U.S.C. § 1451(h).
- Immigration and Nationality Act* § 349(a), 8 U.S.C. § 1481(a).
- Kungys v. U.S.*, 485 U.S. 759 (1988).
- Kurzban, Ira J. *Immigration Law Sourcebook*, 9th ed. Washington, D.C.: American Immigrant Lawyers Association, 2004.
- Legomsky, Stephen. *Immigration and Refugee Law*, 4th ed. Foundation Press, 2005, 1312.
- Mailman, Gordon, and Yale-Loehr. *Immigration Law and Procedure*. New York: Matthew Bender, § 100.02 [1][a].
- Rosenberg v. U.S.*, 60 F. 2d 475 (3d Cir. 1932).
- Schneiderman v. United States*, 320 U.S. 118 (1943).
- U.S. v. Costello*, 275 F. 2d 355 (2d Cir. 1960).
- U.S. v. D'Agostino*, 338 F. 2d 490 (2d Cir. 1964).
- U.S. v. DeLucia*, 256 F. 2d 487 (7th Cir. 1958).
- U.S. v. Rossi*, 319 F. 2d 701 (2d Cir. 1963).

**DENNIS v. UNITED STATES,
341 U.S. 494 (1951)**

In *Dennis v. United States*, the U.S. Supreme Court upheld the conviction of eleven national leaders of the Communist Party (CPUSA) under the Smith Act (Alien Registration Act) of 1940 for conspiring to organize the CPUSA to “teach and advocate the overthrow and destruction of the Government of the United States by force and violence.” *Dennis* was the leading precedent upholding cold war prosecution of communists and others suspected of leftist sympathies during the 1950s.

The Truman administration, led by Attorney General Tom Clark, sought Smith act indictments against the CPUSA leadership in 1948 to fend off Republican criticism that Democrats were lax in ferreting communists out of positions of influence in American life, and also as a way of indirectly promoting Truman’s aggressive and expensive policy of containment of the Soviet Union. The trial before U.S. District Court Judge Harold Medina in New York City was a raucous affair that resulted in convictions of all the defendants, followed by contempt citations of their attorneys. The U.S. Supreme Court upheld those contempt convictions when they were appealed (*Sacher v. United States*, 343 U.S. 1, 1952; *In re Isserman*, 345 U.S. 286, 1953). These convictions and subsequent disbarment of some of counsel had a chilling effect on the availability of legal representation for radicals during the cold war.

On appeal of the Smith Act convictions, Chief Judge Learned Hand wrote for the court of appeals panel, affirming the convictions on the basis of a reworked clear-and-present-danger test: “whether the gravity of the ‘evil,’ discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.” In the case of communists, Hand thought the answer to be clearly in the affirmative because he considered communism to be a mortal menace to American freedom. Under the Hand formula, if the apprehended evil is great enough, its likelihood can be remote and still provide a basis for government censure.

On appeal to the Supreme Court, the justices affirmed by a vote of six to two. (Justice Tom Clark recused himself because of his earlier participation in the case as attorney general.) Chief Justice Fred Vinson wrote the plurality opinion, in which only three other members of the Court joined. (This opinion, despite lacking majority status, is accepted as *the* opinion for the Court and will be treated as such here.)

Like Judge Hand, Justice Vinson subscribed wholeheartedly to the then prevalent belief that the

CPUSA was “a highly organized conspiracy, with rigidly disciplined members” committed to “overthrow of the Government by force and violence.” In this view, the CPUSA had a unique constitutional status, placing it and its members at least partially outside the protections that the First Amendment afforded other political movements.

With those assumptions constituting the foundation of his opinion, the Chief Justice then went on to endorse Judge Hand’s sliding-scale calculus. He applied it in such a way as to permit the federal government to suppress what he called “advocacy” as well as “incitement.” In doing so, he forced free-speech doctrine, and the clear-and-present-danger test in particular, back into its World War I era formulation, which considered a mere bad tendency as within government’s power to crush. Vinson also adopted Justice Felix Frankfurter’s balancing approach (as opposed to Justice Hugo Black’s absolutism), weighing national security against individual liberty to communicate. Security easily won. The Vinson opinion permitted government to go beyond its unquestioned power to suppress actual evils like insurrection and incitement to punish communicative activities that had previously enjoyed some degree of First Amendment protection: advocacy, organizing, and belonging to political groups.

Yet, despite the speech-suppressive result of his holding, *in dicta* Justice Vinson inconsistently endorsed Justice Oliver Wendell Holmes’s dissent in *Gitlow v. New York*, 268 U.S. 652 (1925), and Justice Louis D. Brandeis’s concurrence in *Whitney v. California* (1927), both of which repudiated bad-tendency readings and provided a wide latitude for political speech. Such incompatibilities in Justice Vinson’s opinion help account for its short-lived actual influence.

Because Vinson’s opinion was only a plurality, the concurrences assumed greater than usual significance. Frankfurter construed away the clear-and-present-danger test altogether. This required considerable intellectual contortion on his part since he had previously identified himself with Justices Holmes and Brandeis, whose views would have condemned the *Dennis* result and its doctrine. He dismissed the Holmes/Brandeis vision as “a sonorous formula,” as “dogmas too inflexible” to be applied in the real world, and as merely “attractive but imprecise words.” As a substitute for clear and present danger, now drained of all meaning, Frankfurter substituted balancing, which had the double vice of enhancing judicial power while invariably privileging government authority over freedom of speech.

Justice Robert H. Jackson's concurrence went even further than Justices Vinson's and Frankfurter's in embracing an apocalyptic vision of Communism. From that metajudicial assumption, he derived an unlimited power of government to suppress speech. In his view, communists could claim no effective constitutional protection for their activities.

Justices Black and William O. Douglas dissented, Black expressing the "hope . . . that in calmer times, when present pressures, passions and fears subside," a later Court would "restore the First Amendment liberties to the high preferred place" they had previously occupied.

Justice Black's hope was realized seventeen years later in *Brandenburg v. Ohio*, 395 U.S. 444 (1968), which did in fact reinstate the Holmes/Brandeis reading of clear and present danger to canonical status. Since then political discourse has enjoyed nearly absolute immunity from government suppression. But in the interim, *Dennis* plowed wide inroads into First Amendment liberties, depriving not only communists but also much of the American Left of freedoms to speak, publish, organize, and agitate enjoyed by all other Americans. It was the major constitutional bulwark of the cold war.

Moreover, though *Dennis* has been ignored by judges and condemned by academics and civil libertarians since 1968, it has never been overruled. It remains valid precedent, at least technically, available to authorize suppression of the speech, press, and assembly liberties of some feared, loathed, and/or radical group in the future.

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References and Further Reading

- Belknap, Michal R. *Cold War Political Justice: The Smith Act, the Communist Party, and American Civil Liberties*. Westport, CT: Greenwood Press, 1977.
- Kutler, Stanley I. *The American Inquisition: Justice and Injustice in the Cold War*. New York: Hill and Wang, 1982.
- Murphy, Paul L. *The Constitution in Crisis Times, 1918–1969*. New York: Harper & Row, 1972.
- Urofsky, Melvin I. *Division and Discord: The Supreme Court Under Stone and Vinson, 1941–1953*. Columbia: University of South Carolina Press, 1997.
- Wiecek, William M., *The Legal Foundations of Domestic Anticommunism: The Background of Dennis v. U.S.*, Supreme Court Review (2001): 375–434.

Cases and Statutes Cited

- Brandenburg v. Ohio*, 395 U.S. 444 (1969)
- In re Isserman*, 345 U.S. 286 (1953)
- Sacher v. United States*, 343 U.S. 1 (1952)

DEPARTMENT OF HOMELAND SECURITY

The Department of Homeland Security (DHS) was created on November 25, 2002, by the Homeland Security Act. In the wake of the attacks of September 11, 2001, President Bush established the Office of Homeland Security by executive order. Following congressional calls for the reorganization and refocusing of government agencies to bolster national security, the Office of Homeland Security was supplanted by a full-scale department to be headed by a new secretary of homeland security. After much wrangling between the president and Congress over the scope and the extent of legislative oversight of the new entity, DHS came into being in the largest government reorganization since the 1940s. It subsumed twenty-two existing federal agencies consisting of approximately 180 thousand federal employees, and represents the third largest government department.

The Department of Homeland Security's mandate is to reduce America's vulnerability to terrorism, prevent terrorist attacks inside the country, and manage recovery efforts in the event of such an attack. Agencies such as the Immigration and Naturalization Service, the Secret Service, the Federal Emergency Management Administration, the Customs Service, and others were placed under the department's authority. Former Pennsylvania Governor Tom Ridge was named as the first secretary of homeland security.

A primary aim of the Homeland Security Act is to assist with the collection, analysis, and sharing of intelligence information relating to security threats to the homeland and to enabling DHS to be proactive in forestalling attacks. However, threats to national security inevitably create tensions with the constitutional liberties and freedoms Americans have long cherished. The breadth and nature of DHS's mandate have generated significant criticism from civil libertarians who argue that the legislation undermines privacy rights and government openness by restricting public access to government information while lowering barriers to the monitoring and interception of electronic communications.

The Freedom of Information Act (FOIA) of 1966 provides a right to the public to have access to information regarding government activities to prevent "wrongdoing" by the federal government; however, section 214 of the Homeland Security Act provides blanket authorization for DHS to withhold certain information relating to national security-related "critical infrastructure" if provided voluntarily by private companies. While supporters contend that such a

provision is critical to encouraging the sharing of critical information with the government, critics note that information voluntarily provided to DHS by a nuclear power company related to a nuclear spill could not be shared with other government regulatory agencies or the general public. Section 214, it is contended, significantly undermines the purpose of FOIA.

Section 225 expands the government's ability to monitor electronic communications absent a judicial warrant. One provision within this section expands the scope of cases in which Internet service providers (ISPs) are shielded from liability for turning over private communications to the government. Although prior statutes went further to protect the privacy of ISP subscribers from unreasonable searches and seizures in line with the Fourth Amendment, the new law lowers the standard necessary to permit disclosure of private Internet communications. The section also expands the government's ability to install monitoring devices temporarily without a warrant on certain electronic devices in an "emergency situation" or on computers deemed "protected," which Courts have understood to mean those involved in or affecting interstate or foreign commerce or communication. Although the standard of a "reasonable expectation of privacy" that has governed consideration of Fourth Amendment searches and seizures is in a state of flux and may well have shrunk in this new world of Internet connectivity, section 225 certainly narrows the scope of privacy rights over certain electronic communications.

The Homeland Security Act has also been criticized for eroding individual rights by authorizing the president to suspend collective bargaining rights for DHS employees if he or she deems that union activities are having a "substantial adverse impact" on homeland security. The act also limits liability, even in cases of negligence, for makers of critical vaccines against smallpox or anthrax with whom the department has contracted.

Sensitive to the civil liberties implications of the legislation, section 705 of the law created a position for the officer for civil rights and civil liberties while section 222 creates a privacy officer. The former is tasked with conducting investigations on allegations of civil rights abuses in DHS and providing advice to the secretary of homeland security as to matters concerning civil liberties. The officer, for example, has established a training program for DHS employees called Civil Liberties University. The privacy officer is similarly responsible for advising the secretary and for reporting on the privacy implications of DHS activities and new technologies.

Although DHS includes some administrative structures to review the privacy and civil rights effects of the Homeland Security Act, this has not prevented groups such as the American Civil Liberties Union from initiating litigation concerning border security practices or the sharing of airline passenger screening procedures. The focus on homeland security appears unlikely to recede in importance in the near future, so pressures on civil liberties will no doubt endure.

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References and Further Reading

Jones, Karen E., *Comment and Casenote: The Effect of the Homeland Security Action on Online Privacy and the Freedom of Information Act*, University of Cincinnati Law Review 72: 787.

Thessin, Jonathan, *Recent Developments: Department of Homeland Security*, Harvard Journal on Legislation 40 (2003): 513.

See also Electronic Surveillance, Technological Monitoring, and Dog Sniffs; 9/11 and the War on Terrorism; Patriot Act; Wiretapping Laws

DERSHOWITZ, ALAN (1938–)

Alan Dershowitz, professor of law at Harvard University, is a prolific writer, social activist, and legal commentator who has been described by *Newsweek* as "the nation's most peripatetic civil liberties lawyer and one of its most distinguished defenders of individual rights."

Early in his career Dershowitz clerked for Supreme Court Justice Arthur Goldberg. At the time of his teaching appointment at the age of 28, he was the youngest tenured faculty member ever at Harvard Law School. Dershowitz, who specialized in appellate work, has since been involved in a number high-profile criminal defense cases, including the trial of Claus Von Bülow, and served as an advisor to O. J. Simpson's defense team. Acknowledging that his philosophy as a civil-liberties lawyer is to "challenge the government at every turn," Dershowitz has campaigned for Jews in the former Soviet Union and has taken on less highly publicized cases involving issues of individual rights, many of them on a pro bono basis.

Dershowitz articulated his concept of civil rights, which he views as deriving from past human experiences with injustice rather than from God or natural law, in a 2002 book entitled *Shouting Fire: Civil Liberties in a Turbulent Age*. He has been at the forefront of a discussion, provoked by the events of September 11, concerning the legality and propriety of the use of

torture in exceptional circumstances. Addressing the hypothetical “ticking bomb scenario” in which torture is contemplated as a means of last resort to extract information needed to forestall a massive terrorist attack and save lives, Dershowitz’s proposal to regulate torture through a “warrant” system has sparked debate among civil-rights lawyers and academics. The concept of a torture warrant system—a delicate balance of conflicting rights that ensures judicial oversight and government accountability at the cost of establishing a damaging legitimizing precedent for torture—represents a salient new component in Dershowitz’s concept of civil liberties.

ANDREW FINKELMAN

References and Further Reading

- Dershowitz, Alan. *Shouting Fire: Civil Liberties in a Turbulent Age*. Boston: Little, Brown, 2002.
- Williams, Marjorie, and Ruth Marcus. 1991. Courting fame, fanning flames: lawyer Alan Dershowitz, from rogues to riches. *The Washington Post*, February 10, F1.

DESIGNATED PUBLIC FORUMS

First Amendment law concerning government regulation of the freedom of speech tends to develop in strands. One such strand is forum analysis, which concerns the constitutional limitations on government control of speech and expression on government property.

The Supreme Court’s forum analysis includes three types of forums. The traditional public forum includes public streets, sidewalks, and parks, all places historically reserved for expressive activities. The designated public forum is any other government property intentionally held open for expressive activities. The nonpublic forum comprises all of the remaining government property, such as jails and military bases. The forum label dictates the analysis the court will apply.

The Supreme Court uses essentially the same test for traditional and designated public forums. The test has several requirements. First, the government generally cannot enact content based regulations that discriminate against a particular message (*Widmar v. Vincent*, 454 U.S. 263, 1981). Second, the government can enact content-neutral time, place, and manner regulations, but only if the regulations are reasonable (*Perry Education Ass’n v. Perry Local Educators’ Ass’n*, 372 U.S. 229, 1963). Reasonable regulations are defined by the Supreme Court as those that are narrowly tailored to serve a substantial government interest and leave open ample alternative channels of

communication (see, for example, *Ward v. Rock Against Racism*, 491 U.S. 781, 1989).

It is important to emphasize that heavy use does not dictate whether a designated public forum is created. Instead, the government’s intent is critical. Thus, airports generally are not designated public forums but rather nonpublic forums, because they are places where people congregate to travel, not to speak (see, for example, *International Society for Krishna Consciousness, Inc. v. Lee*, 502 U.S. 1022, 1992). Similarly, a public school during school hours is a nonpublic forum and not a designated public forum because it is dedicated to teaching and learning, not to freedom of expression (see, for example, *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 1986).

On the other hand, public schools opened to the community for the after-hours exchanges of communication can become designated public forums. If a public school becomes a designated public forum after hours, school officials are prevented from excluding certain groups because of their message (see, for example, *Good News Club v. Milford Central School*, 553 U.S. 98, 2001). (The exclusion of a religious group from after-hours discussions of character and morals while allowing all other nonreligious groups to do so is impermissible content based discrimination.)

S. FRIEDLAND

Cases and Statutes Cited

- Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986)
- Good News Club v. Milford Central School*, 553 U.S. 98 (2001)
- International Society for Krishna Consciousness, Inc. v. Lee*, 502 U.S. 1022 (1992)
- Perry Education Association v. Perry Local Educators’ Association*, 372 U.S. 229 (1963)
- Ward v. Rock Against Racism*, 491 U.S. 781 (1989)
- Widmar v. Vincent*, 454 U.S. 263 (1981)

DEWITT, GENERAL JOHN (1880–1962)

John DeWitt, the army general in charge of Japanese American relocation in World War II, was born in 1880 at Fort Sidney, Nebraska, and reared on army posts. Eager to join the Spanish–American War of 1898, DeWitt left Princeton University in his sophomore year. The conflict left a lasting impact on DeWitt, and instead of returning to Princeton, he decided to join the regular army. His responsibilities in the military included work as a supply officer, desk duty, and Philippines tours of service before serving in France during World War I as director of supply and

transportation for the First Army Corps. Dewitt served in the War Department from 1919 to 1930 in positions that included chief of the storage and issue branch, acting assistant chief of staff, and assistant commandant of the General Staff College. In 1930, he became quartermaster general and in 1937 was named commandant of the Army War College. Two years later, DeWitt became commander of the West Coast Fourth Army and the Ninth Corps Area.

General DeWitt's appointment as commander on the West Coast and the 1941 Pearl Harbor attack by the Japanese Imperial Navy would be important factors resulting in the internment of Japanese Americans in prison camps. Prior to the Pearl Harbor attack, DeWitt had a history of racist behavior toward African Americans and Asians during his career in the then segregated army; he preferred that they serve in the more dangerous and combat-focused infantry units. Fueled by his disdain for minorities and by widespread fear of more attacks by the Japanese military, DeWitt put in place a plan to restrict the rights of Japanese Americans.

Although unsubstantiated by the other federal agencies, DeWitt made claims to government officials against Japanese and Japanese Americans that they were enemy aliens with no loyalty to the United States, had committed acts of espionage, and therefore had to be detained. As a result of public hysteria on the West Coast, President Franklin D. Roosevelt signed Executive Order 9066 on February 12, 1942, making it legal for the United States to confine Japanese Americans to internment camps in the western United States. General DeWitt directed the operation to round up approximately one hundred twenty thousand Japanese and Japanese Americans into internment camps.

Nearly fifty years after the internment of Japanese Americans, the U.S. government acknowledged that their internment had been a mistake derived from fear and prejudice. The Justice Department made the decision no longer to defend internment and Congress enacted a bill of redress for internment camp survivors in which President Reagan included an apology.

DeWitt's career in the U.S. Army spanned almost fifty years. He retired in 1947 with the Distinguished Service Medal at the rank of lieutenant general. Seven years after his retirement, Congress promoted DeWitt to full general. He died in 1962 of a heart attack.

BA-SHEN WELCH

References and Further Reading

Daniels, Roger. *Concentration Camps: North American Japanese in the United States and Canada During World*

War II. Malabar, FL: Robert E. Krieger Publishing Company, Inc., 1981.

Irons, Peter. *Justice at War: The Story of the Japanese American Internment Cases*. New York: Oxford University Press, 1983.

United States Army Quartermaster Museum. Major General John L. DeWitt 28th quartermaster general February 1930–February 1934 (online). Fort Lee: USA Quartermaster Center (retrieved 2 July 2003). Available from http://www.qmfound.com/MG_John_DeWitt.htm.

DIAL-A-PORN

Dial-a-porn services provide prerecorded, sexually explicit messages via telephone. In 1983, following concerns that young people were being harmed by exposure to offensive and damaging messages that were easily accessible, Congress amended the Communications Act of 1934. Section 223(b) prohibited obscene or indecent telephone communications to any person under eighteen years of age or to any other person without that person's consent.

Critics of the legislation claimed that it was unconstitutional content based regulation of free speech. After the Second Circuit ruled that indecency is not a separate category of speech, Congress amended section 223(b) to prohibit all indecent and obscene commercial telephone communications directed to any person, regardless of age.

In *Sable Communications v. FCC*, 492 U.S. 115 (1989), the Supreme Court upheld Congress's total ban on obscene transmissions. Since obscenity is not protected by the First Amendment, Congress may regulate the dissemination of obscene materials, so long as it has a legitimate governmental interest in such regulation. It struck down, however, the total ban on indecent communications, which may be regulated only when a compelling governmental interest exists, and then only by the least restrictive means available. Although the Court held that the welfare of minors is a compelling governmental interest, a total ban on indecent communication was not the least restrictive means to further that interest.

In response, Congress enacted the Helms amendment, prohibiting any indecent commercial telephone communication available to minors, but allowing a waiver for adults agreeing to abide by a "presubscription" procedure. The Second Circuit has since upheld the amendment.

DEBORAH ZALESNE

References and Further Reading

Burrington, William W., and Thaddeus J. Burns, "Hung Up on the Pay-Per-Call Industry? Current Federal Legislative

and *Regulatory Developments*,” Seton Hall Legis. Journal 17 (1993): 359, 365.

Cases and Statutes Cited

Carlin Communications v. FCC, 837 F.2d 546, 560 (2d Cir. 1988)
Dial Information Services Corp. v. Thornburgh, 938 F.2d 1535 (2d Cir. 1991), cert. denied, 112 S.Ct. 966 (1992)
Sable Communications v. FCC, 492 U.S. 115 (1989)
Communications Act of 1934, 47 U.S.C. § 223(b) (1983)
Communications Act of 1934, 47 U.S.C. § 223(b) (1990) (Helms amendment)

DICKERSON v. UNITED STATES, 530 U.S. 428 (2000)

Prior to the leading case of *Miranda v. Arizona*, 384 U.S. 436, decided in 1966, the U.S. Supreme Court used the standard of “voluntariness” in determining the admissibility of a confession. The *Miranda* decision replaced this standard in most cases with a prescribed set of warnings that must be given prior to custodial interrogation. Failure to give the warnings would render a confession inadmissible, even if it were given voluntarily.

In the midst of the widespread criticism that *Miranda* generated, Congress enacted 18 U.S.C. section 3501, which purported to overturn *Miranda* insofar as it applied in federal criminal cases. Under the statute, which was totally ignored for thirty years, the failure to give the warnings did not prevent a confession from being admitted as long as it was voluntary.

In *Dickerson v. United States* the trial court granted Dickerson’s motion to suppress a statement he made to the F.B.I. on the ground that the *Miranda* warnings had not been given. The Fourth Circuit Court of Appeals reversed, holding that under section 3501 the confession was voluntary and therefore admissible. In reversing the court of appeals, the U.S. Supreme Court held that the rule in *Miranda* was based on the Constitution and, as such, could not be overruled by an act of Congress. The Court refused to overrule *Miranda* on its own, finding that it has become part of routine police procedures and that subsequent cases have reaffirmed *Miranda*’s core ruling while reducing its negative impact on legitimate police practices.

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References and Further Reading

Dripps, Donald A., *Constitutional Theory for Criminal Procedure: Dickerson, Miranda, and the Continuing Quest for Broad-but-Shallow*, William & Mary Law Review 43 (2001): 1–77.

LaFave, Wayne R., Jerold H. Israel, and Nancy J. King. *Criminal Procedure*, 4th ed. St. Paul, MN: Thomson/West, 2004.

Prebble, Amanda L., *Manipulated by Miranda: A Critical Analysis of Bright Lines and Voluntary Confessions Under United States v. Dickerson*, University of Cincinnati Law Review 68 (2000): 555–588.

Cases and Statutes Cited

Miranda v. Arizona, 384 U.S. 436 (1966)
 18 U.S.C. section 3501 (1994)

See also Coerced Confessions/Police Interrogation; Miranda Warning

DIES, MARTIN (1900–1972)

Martin Dies, born in Colorado, Texas, in 1900, served in the House of Representatives from 1931 to 1944, where he gained notoriety as the first chairman of the House Un-American Activities Committee. A protégée of Speaker of the House John Nance Garner, Dies was initially an early supporter of President Franklin Roosevelt’s New Deal. He ultimately became disillusioned with the program, however, and in 1938 he introduced a resolution to create a special committee to “investigate subversive and un-American propaganda” with which he hoped to attack the New Deal.

Between 1938 and 1944, during his tenure as chairman of the HUAC, Dies used the committee’s wide-ranging mandate to hunt for communists, generating much publicity from the unsupported charges of Communist and Nazi subversion that emanated from HUAC hearings. Dies’s tactics became the model for the later subversion investigations of the post-1945 “red scare.”

The committee fed on names. Witnesses before the committee were asked to identify those they suspected of being communist. They were permitted to ramble and indulge in blind accusations with little guidance from the chairman or committee members. Membership records of alleged communist organizations were released publicly without substantiation. Hearings before HUAC were rarely impartial and reflected Dies’s political persuasion. After 1939, consulting seldom, if at all, with other committee members, Dies turned HUAC hearings into a one-man road show that often gave right-wing extremists an arena to cast suspicion on liberal organizations and individuals.

Although Dies left the House in 1944, the committee was reauthorized in 1945, becoming the most notorious of the McCarthy era investigating committees. Dies re-entered Congress in 1953, but by this time his reputation had been eclipsed by that of Joseph

McCarthy. Dies was not appointed to HUAC. He left Congress in 1959, but continued his devotion to the anticommunist cause as a dedicated member of the John Birch society. He died in 1972.

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References and Further Reading

Goodman, Walter. *The Committee: The Extraordinary Career of the House Committee on Un-American Activities*. New York: Farrar, Straus and Giroux, 1968.

Ogden, August Raymond. *The Dies Committee: A Study of the Special House Committee for the Investigation of Un-American Activities*. Washington, DC: Catholic University Press, 1945.

See also **House Un-American Activities Committee; John Birch Society; McCarthy, Joseph; New Deal; Roosevelt, Franklin Delano**

DISCIPLINING LAWYERS FOR SPEAKING ABOUT PENDING CASES

Lawyers sometimes believe that it is important to influence public opinion as part of the representation of a client. Perhaps the aim is to present a favorable case to potential jurors, or perhaps the client is a public figure whose reputation may be affected by the outcome of the proceedings. In any event, when lawyers discuss a pending case at a news conference or make statements to reporters, these extrajudicial comments may have a negative impact on the fairness of the trial process. Courts and bar associations therefore seek to limit speech concerning pending cases. These limitations pose a conflict between two constitutional rights: the First Amendment press-freedom guarantee and the litigants' right to a fair trial, protected by the Sixth Amendment.

The Supreme Court has tried to balance these rights. After a mid-century trial accompanied by a media frenzy, the Court granted a writ of habeas corpus sought by a doctor who had allegedly killed his wife, on the grounds that the publicity prevented him from receiving a fair trial (*Sheppard v. Maxwell*, 384 U.S. 333, 1969). In the wake of the *Sheppard* case, many states adopted rules to limit extrajudicial statements by lawyers. The Court considered a First Amendment challenge to one of these rules and concluded in a divided decision that many existing rules were unconstitutional vague (*Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1991). The rule in effect in most jurisdictions now prohibits a lawyer from making an extrajudicial statement that will have a "substantial likelihood of materially prejudicing an adjudicative proceeding."

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References and Further Reading

Cole, Kevin, and Fred Zacharias, *People v. Simpson: The Agony of Victory and the Ethics of Lawyer Speech*, *Southern California Law Review* 69 (1996): 1627–1678.

Cases and Statutes Cited

Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991)

Sheppard v. Maxwell, 384 U.S. 333 (1969)

ABA Model Rules of Professional Conduct, Rule 3.6 (2002)

See also **Cameras in the Courtroom; Due Process; Gag Orders in Judicial Proceedings; *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991); Right of Access to Criminal Trials; Rights of the Accused**

DISCIPLINING PUBLIC EMPLOYEES FOR EXPRESSIVE ACTIVITY

A public employee's right to free speech under the First Amendment is not unlimited and employers have the right to discipline employees for expressive activity under certain circumstances (*Pickering v. Board of Education*, 391 U.S. 563, 1968). The employer has an interest in ensuring that its employees do not undermine its operations or interfere with accomplishment of its objectives. At the same time, employees do not give up their constitutional rights when they accept government employment. Indeed, government employees may play a particularly important role in enlightening the public about governmental operations by contributing to public debate and alerting the public about potential wrongdoing. Thus, the courts have developed a test for determining when public employers can discipline their employees for expressive activity.

The threshold requirement for protected speech is that it must relate to a matter of public concern. If speech relates to an employee's private grievance, discipline based on the speech does not implicate the First Amendment. (For further information, see *Matters of Public Concern Standard in Free Speech Cases*.) In addition, even if the speech addresses matters of public concern, when the employee's speech rights are outweighed by the disruption that the speech causes to the operations of government, the employer can discipline the employee for speech. The more central the speech is to matters of concern to the public, the more disruptive to government operations it must be in order to justify discipline. The impact of the speech on discipline, working relationships, work performance, and government operations is a significant consideration in weighing the government's interests

(*Rankin v. McPherson*, 483 U.S. 378, 1987). In the 2005 term (*Garcetti v. Ceballos*, 361 F.3d. 1168, 9th Cir. 2004, cert. granted, 125 S. Ct. 1395, 2005), the Supreme Court had to decide whether an employee who brings to light suspected wrongdoing in speech required by job duties is protected from discipline, thus further refining the balancing test.

In some cases, the government disputes that discipline was motivated by the employee's protected speech, asserting a lawful basis for the discipline. To prevail on a constitutional claim, the employee must prove that the protected speech was a motivating factor in the employer's decision to discipline (*Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 1977). The employee must show that the person who made the decision was aware of the speech. In addition, proof of actual motivation is necessary; this can involve evidence such as the timing of the discipline in relation to the speech, employer unhappiness with the speech, or the pretextual nature of the employer's asserted reason for the discipline. If the employee proves that the speech motivated the employer, the employer can avoid liability by showing that it would have disciplined the employee for legitimate reasons even if the employee had not engaged in the protected speech. When there is disagreement about what the employee actually said, the employer may rely on what it reasonably and in good faith believes was said in deciding whether to discipline the employee (*Waters v. Churchill*, 511 U.S. 661, 1994). To ensure that it acts reasonably, the wise employer will investigate prior to discipline when employee statements may have First Amendment protection.

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References and Further Reading

- Deskbook Encyclopedia of Public Employment Law*, Malvern, PA: Center for Education and Employment Law, 2005.
- Hudson, David L., Jr. *Balancing Act: Public Employees and Free Speech*, First Amendment Center, 2002.
- Smolla, Rodney A. *Smolla and Nimmer on Freedom of Speech*, vol. 2, Eagan, MN: Thomson/West, 2005.

Cases and Statutes Cited

- Garcetti v. Ceballos*, 361 F.3d. 1168 (9th Cir. 2004), cert. granted, 125 S. Ct. 1395 (2005)
- Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977)
- Pickering v. Board of Education*, 391 U.S. 563 (1968)
- Rankin v. McPherson*, 483 U.S. 378 (1987)
- Waters v. Churchill*, 511 U.S. 661 (1994)

See also **Matters of Public Concern Standard in Free Speech Cases**; *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977); *Pickering v. Board of Education*, 391 U.S. 563 (1968); *Rankin v. McPherson*, 483 U.S. 378 (1987); **Speech of Government Employees**

DISCOVERY MATERIALS IN COURT PROCEEDINGS

In civil as well as criminal court proceedings, discovery serves as a tool whereby all parties to an action can discover, before a trial on the matter's merits, precisely what evidence will be offered at the trial. The discovery process provides each party to an action the opportunity to examine the evidence that will be used against them as well as to find or discover the evidence to be used in their favor. The rules of procedure place few limits on the kinds of evidence subject to discovery, whereas the rules of evidence place significant limits on the admissibility of discovered evidence at trial. For example, a deposition transcript may be used, in whole or in part, but only pursuant to the applicable rules of evidence governing admissibility and the applicable rules of procedure that set out particular conditions precedent to their use.

Because the facts conceded in a party's responses to requests for admission are not subject to dispute at trial, these responses are commonly used for document authentication, for impeachment purposes, or as proof of the existence or nonexistence of an element of a claim. Physical examinations can be used to prove the extent of a party's injuries. Expert witnesses may be called to give their conclusions or opinions regarding information, likely obtained through discovery, provided to them before trial. In court proceedings, discovery is an equalizer, arming all parties to an action access to the same information before it is presented to the trier of fact.

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References and Further Reading

- Federal Rules of Civil Procedure*. St. Paul, MN: Thompson/West, 2005.
- Federal Rules of Criminal Procedure*. St. Paul, MN: Thompson/West, 2005.
- Federal Rules of Evidence*. St. Paul, MN: Thompson/West, 2005.
- Friedenthal, Jack H., Mary Kay Kane, and Arthur R. Miller. *Civil Procedure*, 4th ed. St. Paul, MN: Thompson/West, 2005.
- Giannelli, Paul C. *Understanding Evidence*. New York: Matthew Bender & Company, Inc., 2003.
- Imwinkelried, Edward J. *Evidentiary Foundations*, 5th ed. New York: Matthew Bender & Company, Inc., 2002.

Park, Roger C., David P. Leonard, and Steven H. Goldberg. *Evidence Law: A Student's Guide to the Law of Evidence as Applied in American Trials*. St. Paul, MN: West Group, 1998.

Shreve, Gene R., and Peter Raven-Hansen. *Understanding Civil Procedure*, 3rd ed. New York: Matthew Bender & Company, Inc., 2002.

DISCRIMINATION BY RELIGIOUS ENTITIES THAT RECEIVE GOVERNMENT FUNDS

Religious entities currently receive government funds in a variety of ways and for a variety of purposes. Increasingly, the government is turning to nongovernmental entities—including religious and secular nonprofit organizations—to provide the sorts of services that the government used to provide directly. As a result, religious groups presently receive funds from state and federal governments to provide all kinds of social services, from elementary education to drug rehabilitation. In fact, under the federal programs begun in 1996 known generally as “charitable choice,” religious groups have the right to participate in various funding opportunities on the same terms as secular organizations.

This raises a number of political and constitutional issues. First is the straightforward issue of whether such funding is constitutionally permissible. Much of the Supreme Court’s Establishment Clause jurisprudence over the last fifty years has centered on whether (and to what extent) religious entities can receive government funds. Yet, its decisions in cases like *Mitchell v. Helms*, 530 U.S. 793 (2000), and *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), seem to suggest that as long as religious groups are not privileged over competing secular groups, they can constitutionally receive government funds to do social-service work.

Aside from the issue of funding is another difficult one, which is just as contentious and even more complicated. This issue is one of discrimination. It is widely accepted that the government cannot discriminate on the basis of religion when hiring employees. The Constitution’s Equal Protection and Free Exercise Clauses require this. Yet, it is just as widely accepted that religious groups should have the right to so discriminate. This, too, is seen as a matter of free exercise. Accordingly, religious organizations are exempt from the Title VII statute, which generally forbids businesses from discriminating against employees on the basis of religion. Charitable choice thus creates a problem by crossing up these two competing intuitions. What should happen when religious groups receive government funds in programs like charitable choice? Should they continue to enjoy the right to select staff

along religious lines? Should they, like governmental actors, be barred from engaging in this sort of discrimination?

This question is one on which people vehemently disagree. Both sides have good points to make. On one hand, allowing religious organizations to keep their Title VII exemption is, in a sense, to allow government-funded discrimination. It means that workers in publicly funded positions (performing what had until recently been government work) can be terminated solely because of their religious beliefs. While it may be fine for religious groups to prefer coreligionists in their own affairs, surely the government—under the Equal Protection and Establishment Clauses—must ensure that when it acts, all of its citizens are treated equally. Moreover, given that religious groups are the only groups that have the right to staff religiously, they are being unfairly privileged over secular organizations, perhaps in violation of the Establishment Clause.

Yet, those who defend religious staffing in charitable choice have their arguments as well. They point to the fact that religious staffing has always been a prerogative of religious organizations, and for good reason. In a diverse country, religious staffing is what enables a group to maintain a religious identity; it is part and parcel of their right under the Free Exercise Clause to practice their religion. Without a right to hire along religious lines, a Jewish social-justice organization might well become Jewish in name only. To tell a religious group that it can have government funds only if it gives up its right to staff religiously, supporters argue, would be essentially to bribe them out of their religious identity—a quintessential violation of the unconstitutional-conditions doctrine.

How this debate will be resolved is far from clear. As for current practice, the law is mixed. Title VII exempts religious groups without regard to whether they are receiving government funds. As a result, the general rule is that religious organizations can discriminate along religious lines. Yet there are exceptions to this rule. In some programs (like the AmeriCorps VISTA program, for example), special federal contracting rules require all parties contracting with the government (including religious ones) to pledge that they will not discriminate on the basis of religion. States and cities sometimes have quite similar rules for their contracting partners. In such cases, the default rule is reversed and religious organizations must give up their religious staffing rights to receive government funds. There is no doubt, however, that this issue is of increasing importance in the charitable-choice debate. Indeed, battles over this discrimination issue have been a central impediment to legislative proposals to expand charitable choice, principally

because those working against charitable choice have made it the fulcrum of their attack. How the foregoing issues will play out in the Congress and the courts is perhaps impossible to predict.

As a concluding note, it is important to keep in mind that this discussion has only been concerned with discriminations on the basis of religion. Title VI of the *Civil Rights Act* of 1964 prohibits all organizations that receive federal funds, religious and secular alike, from discriminating in employment on the basis of race, color, or national origin. (As those defending religious staffing like to note, Title VI does not list religion as a protected characteristic.) No federal law currently prohibits employment discrimination on the basis of sexual orientation, so religious and secular organizations are entitled to discriminate on that basis with the use of federal funds. Lastly, it is worth noting that, while they protect the right of religious groups to discriminate on the basis of religion in hiring, charitable-choice provisions do not permit religious groups to discriminate among *beneficiaries* on the basis of religion. Under current federal law, that sort of religious discrimination is flatly condemned, although some worry that it may exist in practice.

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References and Further Reading

- Esbeck, Carl H., Stanley W. Carlson–Thies, and Ronald J. Sider. *The Freedom of Faith-Based Organizations to Staff on a Religious Basis*. Washington, DC: Center for Public Justice, 2004.
- Green, Steven K., *Religious Discrimination, Public Funding, and Constitutional Values*, *Hastings Constitutional Law Quarterly* 30 (2003): 1:1–55.
- Laycock, Douglas, *The Underlying Unity of Separation and Neutrality*, *Emory Law Journal* 46 (1997): 1:43–74.
- Lund, Christopher C., *Of Government Funding, Religious Institutions, and Neutrality*, *Tulsa Law Review* 40 (2004): 2:321–342.
- Lupu, Ira C., and Robert W. Tuttle. *Government Relationships With Faith-Based Providers: The State of the Law*. Albany, NY: Roundtable on Religion and Social Welfare Policy, 2002.
- Saperstein, David, *Public Accountability and Faith-Based Organizations: A Problem Best Avoided*, *Harvard Law Review* 116 (2003): 6:1353–1396.

Cases and Statutes Cited

- Mitchell v. Helms*, 530 U.S. 793 (2000)
- Zelman v. Simmons–Harris*, 536 U.S. 639 (2002)
- 42 U.S.C. § 2000e (Title VII)
- 42 U.S.C. § 604a (Charitable Choice)

See also Accommodation of Religion; Charitable Choice; Equal Protection Clause and Religious Freedom; Establishment Clause Doctrine; Supreme Court

Jurisprudence; Establishment of Religion and Free Exercise Clause; Free Exercise Clause Doctrine; Supreme Court Jurisprudence; *Mitchell v. Helms*, 463 U.S. 793 (2000); Religion in “Public Square” Debate; Religious Freedom Restoration Act; School Vouchers; State Action Doctrine; State Aid to Religious Schools; State Regulation of Religious Schools; Tax Exemptions for Religious Groups and Clergy; Title VII and Religious Exemptions; Unconstitutional Conditions; *Zelman v. Simmons–Harris*, 536 U.S. 639 (2002)

DISCRIMINATORY PROSECUTION

In deciding whom to prosecute, prosecutors may not deliberately use impermissible arbitrary criteria, such as race, religion, national origin, or the exercise of protected statutory or constitutional rights. This discriminatory prosecution violates the defendant's equal protection rights under the Fourteenth Amendment or as incorporated through the Due Process Clause of the Fifth Amendment if the case is federal. A finding of discriminatory prosecution generally justifies a dismissal of the indictment or conviction unless the state can establish a compelling justification for its selectivity. A discriminatory prosecution claim does not serve as a defense on the merits to the underlying charge; it is simply a constitutional defect in the prosecution rather than a determination of a defendant's innocence or guilt.

Just as the legislative branch is prevented from enacting laws that deny equal protection, so too is the executive branch restrained from enforcing laws in a way that denies equal protection. As the Supreme Court in *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), explained well over a century ago in reference to an administrative agency's actions, “[t]hrough the law itself be fair on its face, and impartial in appearance, yet if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.”

While the foregoing is relatively uncontroversial, the more debatable issue is what elements a defendant must prove to prevail in a claim of discriminatory prosecution and how a defendant can obtain such evidence. Allegations of discriminatory prosecution are very difficult to prove. Courts almost invariably reject defendants' claims.

Discriminatory prosecution claims are judged according to ordinary equal protection standards. In *Wayte v. United States*, 470 U.S. 598 (1985), the Court stated that the defendant must show that the

prosecutor's charging decision "had a discriminatory effect and that it was motivated by a discriminatory purpose." Courts have required a burden of proof ranging from a reasonable inference of impermissible discrimination to convincing evidence.

Proof of a discriminatory effect, also referred to as a disparate impact, requires showing that similarly situated people, in an identifiable group other than the defendant's, were not but could have been prosecuted. Obtaining such evidence may be very difficult, especially if the similarly situated people's offenses have not come to the attention of the police, perhaps because they focused their efforts on one group rather than another. Even if a discriminatory effect can be shown, this does not show that the prosecutor purposefully caused or intended such an effect. Defendants must instead produce evidence that they have been intentionally and purposefully singled out for prosecution on the basis of arbitrary or invidious criteria. Put differently, a defendant must show that the prosecutor chose to prosecute because of, rather than in spite of, the defendant's membership in an identifiable group.

Just as it is difficult to prove discriminatory prosecution, it is also difficult for a defendant to obtain discovery of evidence from the prosecution to establish the claim. In *United States v. Armstrong*, 517 U.S. 456 (1996), defendants moved for discovery on their claim that federal "crack" cocaine laws were selectively enforced against blacks. The Supreme Court held that in order to obtain discovery regarding the state's charging practices, a defendant must establish a "colorable basis" for discriminatory effect and discriminatory purpose. To demonstrate discriminatory effect, the defendant must make a "credible showing" that the state could have, but failed, to prosecute similarly situated people of a different race. A defendant cannot simply point at the race of those prosecuted and presume that people of all races commit all types of crimes. A colorable basis refers to evidence tending to show the existence of discriminatory effect and intent. This showing appears to be less onerous than a prima facie case but more difficult than a nonfrivolous showing.

The Supreme Court in *Armstrong* reasoned that restricting a defendant's access to discovery would be a significant barrier to the litigation of insubstantial claims. Requiring a credible showing would serve to balance a state's interest in vigorous law enforcement and a defendant's interest in avoiding selective prosecution. Many legal commentators, however, argue that the defendant's burden is too onerous, primarily because the facts that might show discriminatory prosecution, especially those that might show discriminatory intent, are often exclusively in the prosecutor's possession.

Nonetheless, courts have sound reasons for their highly deferential approach to prosecutors' charging decisions. Because of concerns about separation of powers, courts are reluctant to intrude on a province constitutionally assigned to the executive branch. In addition, prosecutors have special expertise that courts institutionally do not have in assessing the severity of a crime, the probability of a conviction, public opinion, or the deployment of scarce prosecutorial resources. Courts also fear that subjecting a prosecutor's motives and decision-making to outside scrutiny might chill law enforcement, or that a less restrictive approach to discriminatory prosecution claims would unleash an unmanageable number of such claims, resulting in additional long delays and costs in the criminal justice system. Finally, there is the underlying presumption that a prosecutor properly discharges his or her official duties in good faith.

On the other hand, this restrictive approach may eliminate legitimate claims. It may be very difficult for a defendant to prove racial and other forms of discrimination since discrimination is much more subtle than in the past and may even be unconscious. Some empirical studies purport to show that minorities with prior criminal records and convicted of drug offenses who refuse to plead guilty or who are associated with white victims are charged and punished more severely than comparable nonminorities. In addition, if the criminal justice system is perceived as unfair or racist because the courts fail to recognize discriminatory prosecution, then communities may cooperate less with the police, resulting in less effective law enforcement. Because there is rarely a judicial remedy for discriminatory prosecution claims, it remains true that the primary check against prosecutorial abuse is political.

ANTONY PAGE

References and Further Reading

- Davis, Angela J., *Prosecution and Race: The Power and Privilege of Discretion*, Fordham Law Review 67 (1998): 13–67.
- McAdams, Richard H., *Race and Selective Prosecution: Discovering the Pitfalls of Armstrong*, Chicago Kent Law Review 73 (1998): 605–667.
- Poulin, Anne B., *Prosecutorial Discretion and Selective Prosecution: Enforcing Protection After United States v. Armstrong*, American Criminal Law Review 34 (Spring 1997): 1071–1125.

Cases and Statutes Cited

- McCleskey v. Kemp*, 481 U.S. 277 (1987)
- Oyler v. Boles*, 368 U.S. 448 (1962)
- United States v. Armstrong*, 517 U.S. 456 (1996)

Wayte v. U.S., 470 U.S. 598 (1985)
Yick Wo v. Hopkins, 118 U.S. 356 (1886)

See also **Equal Protection of Law (XIV); Race and Criminal Justice**

DISESTABLISHMENT OF STATE CHURCHES IN THE LATE EIGHTEENTH CENTURY AND EARLY NINETEENTH CENTURY

It is one of the ironies of our constitutional history that at the time the U.S. Constitution was adopted, including its requirement that the newly created federal government refrain from establishing religion, churches established by state law not only were permitted by state constitutions of the time, but also were common (Tarr, 1989). Establishment was accomplished via measures that imposed taxes on citizens to support the officially recognized church, attendance requirements, and religious oaths (McLoughlin, 1971, pp. 767–797; 849–850; 1183). In the years following the ratification of the Constitution, however, a movement to disestablish state churches made rapid progress. The principal driving force behind the drive to disestablish state churches in the late eighteenth and early nineteenth centuries was opposition to paying taxes to support a church other than the one that an individual attended. In addition, the movement's supporters also wished to prevent the civil government from coming between individuals and God and to be free to worship without interference (Tarr, p. 82; Adams and Emmerich, 1989).

State Establishment of Religion

During the time of the nation's founding, states imposed taxes and assessments to pay pastors and religious teachers. In Virginia, the *Bill for Establishing a Provision for Teachers of the Christian Religion*, introduced in 1784, would have continued the pre-Revolution practice of using general taxes to support the state's church (Tarr, 1989, 81–82). Vermont's legislature passed a law in 1783 that established its system of religious taxation (McLoughlin, 1971, 797–798). There, each town by majority vote established a denomination as the town's church, which would then be supported by local taxes (McLoughlin, 798). Citizens who did not want to pay a tax to that church could, through a system of certificates, become exempt from that tax.

Connecticut and Massachusetts also levied taxes for the support of churches and religious schools in the late 1700s, and both provided for some exemptions (McLoughlin, 922–925; 1162; 1205). New Hampshire went further. Its religious taxes were written into its first constitution (McLoughlin, 844–845), under which each town established its religion and assessed taxes on its inhabitants to support the schools and ministries. Unlike other states, however, New Hampshire did not provide for any exemptions for dissenters.

States also used religious oaths to establish a state church. Early constitutions, such as those of New Jersey, Georgia, South Carolina, and New Hampshire, required anyone seeking public office to profess a belief in Christianity and Protestantism (Adams and Emmerich, 1989, 1576). North Carolina and Pennsylvania required citizens to take strict belief oaths before holding public office, and Delaware required “all officeholders to profess belief in the Trinity and the divine inspiration of the Bible” (Adams and Emmerich, pp. 1576–1577). Vermont's 1777 constitution included a loyalty oath, as did Massachusetts' original constitution (McLoughlin, 1971, pp. 797; 1184).

The Disestablishment Movement

The fight over religious taxes sparked the disestablishment movement, and eliminating taxes was the crucial act of disestablishment in many states. The Virginia proposal to use tax revenues to support Christian teachers was so unpopular that, after its defeat, the victors were able to pass Thomas Jefferson's *Bill for Establishing Religious Freedom*, which included the provision that “no man shall be compelled to frequent or support any religious worship, place or ministry whatsoever” (Padover, 1943). As early as 1783, Connecticut's legislature began passing laws exempting people from religious taxation (McLoughlin, 1971, 922–923). After support for state churches declined, however, the legislature tightened the exemption requirements in 1790 (McLoughlin, p. 926). These renewed religious requirements—the combination of paying taxes or having to show church membership and attendance—once again fueled opposition. A year later, the strict requirements were repealed, effectively disestablishing the state church in Connecticut (McLoughlin, pp. 937–938).

Massachusetts and New Hampshire took longer to repeal their religious taxes. As late as 1803, New Hampshire courts refused to grant exemptions to dissenters from religious taxes (McLoughlin, 1971, 863–870, citing *Muzzy v. Wilkins*, 1803). Eventually, forcing citizens to pay taxes to religious denominations

to which they did not belong led to passage of New Hampshire's Toleration Act of 1819, which ended religious taxation (McLoughlin, pp. 895; 898–902). The end of religious taxes in Massachusetts was finalized in 1833 (McLoughlin, p. 1259) through enactment of the eleventh amendment to the state constitution (McLoughlin, pp. 1205–1206; 1253–1260).

The U.S. Constitution eliminated religious tests for holding federal office (U.S. Const., Art. VI, Cl. 3: “[N]o religious Test shall ever be required as a qualification to any Office or public Trust under the United States.”), and states eventually followed the federal lead (Adams and Emmerich, 1989, 1578). The increased role in public affairs by various sects and the growth of religious pluralism led to the elimination of religious tests (Adams and Emmerich, p. 1578–1579; McLoughlin, 1971). “[B]y 1793 Delaware, South Carolina, Georgia, and Vermont had completely removed religious tests from their constitutions” (McLoughlin). The voters of Massachusetts supported abolishing the oath requirement for public office, although this did not occur until 1920 (McLoughlin, pp. 1184–1185). In fact, some religious oath provisions remained in place until 1961, when they were finally struck down when the Supreme Court overturned a Maryland law requiring officeholders to declare their belief in God (see *Torasco v. Watkins*, 367 U.S. 488, 1961).

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References and Further Reading

- Adams, Arlin M., and Charles J. Emmerich, *A Heritage of Religious Liberty*, U. Pa. L. Rev. 137 (1989): 1559, 1621–1622.
- Borden, Morton. *Jews, Turks, and Infidels*. Chapel Hill: University of North Carolina Press, 1984.
- McLoughlin, William G. *New England Dissent 1603–1833*. Cambridge, Mass.: Harvard University Press, 1971.
- Padover, Saul K., ed. *The Complete Jefferson: Containing His Major Writings, Published and Unpublished, Except His Letters*. Reprint Services Corp., 1943, 946–947.
- Tarr, G. Alan, *Church and State in the States*, Wash. L. Rev. 64 (1989): 73.

DIVERSITY IMMIGRATION PROGRAM

Source and Purpose

Immigration is the act of moving to or settling in another country or region, temporarily or permanently. The Diversity Immigration Program, also

popularly known as the “DV lottery program,” is a congressionally mandated immigrant visa program administered on an annual basis by the Department of State under the authority of section 203(c) of the Immigration and Nationality Act (INA). More specifically, as amended, section 203 of the act creates a new class of immigrants known as “diversity immigrants.” Since 1990, the act makes available 55,000 permanent resident visas annually to persons from countries with low rates of migration to the United States. To qualify, DV visa applicants must comply with simple, but strict, eligibility standards, which require first being chosen by a computer-generated random lottery. The act provides that visas are made available to six geographic regions; however, a greater number of visas go to regions and countries with lower rates of immigration to the United States and no visas go to citizens of countries who have sent more than fifty thousand immigrants to the United States in the past five years. It also limits the number of visas a country may receive to no more than 7 percent in any given year.

History and Events That Led to the DV Program

In its effort to diversify, the legislative history of the Diversity Visa Program is remarkably distinct from previous immigration laws such as the Quota and National Origin Acts of 1921, 1924, and by extension 1952; these overtly discriminated on the basis of national origin in the issuance of immigrant visas to aliens seeking entry to the United States. In 1965, Congress imposed a general prohibition against these forms of discrimination by establishing a seven-category preference system. The passage of the Immigration Act of 1990 was a major overhaul of the 1965 Immigration Nationality Act and therefore consistent with its goals. While it creates new categories of immigrants, it furthers the widely held view of America as a country of immigrants. To be sure, the 1990 act can be traced from a 1981 report issued by a congressional Select Commission on Immigration and Refugee Policy. In that report, the commission recommended three goals upon which Congress could fashion U.S. immigration policy: (1) family reunification; (2) economic growth balanced with the view of protecting the U.S. labor market; and (3) cultural diversity consistent with national unity. These goals served as the basis of the 1990 act; the third served as the foundation for the Diversity Visa Program.

Goals and Actions

Critics decry the 1990 act as simply another bad legislative scheme designed to lure cheap foreign labor. However, advocates and especially President George H. W. Bush sold the 1990 statute as a blend of tradition of family reunification and increased immigration of skilled individuals to meet U.S. economic needs of the 1990s. The act also made several policy changes that are worth noting in contrast to the 1965 statute. For example, the annual allocation of numerically restricted visas was set at two hundred seventy thousand under the 1965 act, but the 1990 law established a flexible worldwide cap based on family, employment, and “diversity” by increasing the total eligible immigration under the new flexible cap. It also provided for unrestricted immigration of certain immediate relatives of U.S. citizens and residents while placing emphasis on employment considerations.

The old preferences for occupation, especially the so-called third and fifth of the 1965 act, placed similar emphasis on employment and immediate families. The new law provides more latitude and flexibility. While it provides for diversity immigrants, it explicitly excludes natives of countries that are oversubscribed. It also requires that prospective immigrants establish that they have at least a high school education or its equivalent with at least two years of work experience in an occupation requiring at least two years of training or experience.

Summarily, the 1990 act increased the total immigration under the overall flexible cap of 675 thousand immigrants beginning in fiscal year 1995, which was preceded by the 700 thousand levels during the years 1992 through 1994. In all, the 675 thousand level consists of 480 thousand family-sponsored individuals, 140 thousand employment-related immigrants, and fifty-five thousand “diversity” immigrants to whom visas are randomly assigned to facilitate the selection of persons from previously underrepresented countries. While the diversity immigration lottery program so far accounts for little more than one-third of the ten-year cumulative increase in permanent immigration, it appears to have had the effect of boosting the employment-related immigration category that was a major objective of the new law. However, critics remain unimpressed and argue that immigration from other parts of the world, such as Africa, is still disproportionately underrepresented under current immigration law.

Impact on Rights and Civil Liberties

An important aspect of the Immigration Act of 1990 is that it repealed the prohibition on politics and policy as grounds for denial of visas to the United States. Specifically, the act revised all grounds for exclusion and deportation by significantly rewriting the political and ideological grounds for exclusion. It ended the ban on communist nonimmigrant visa applicants in effect since 1952 and authorized the attorney general of the United States to revise and establish new nonimmigrant admission categories. The act also authorized the attorney general to grant temporary protected status to undocumented nationals of designated countries subject to armed conflict and natural disasters.

It also created a new subcategory for religious persons seeking immigrant visas under a “special immigrant admission” category. Prior to the 1990 act, religious workers were simply not categorized at all; the new designation limited the number of persons to whom visas are granted under this category. Critics charge that limiting the number of religious workers amounts to the denial of free exercise of religion, but this view has yet to face judicial scrutiny. The act also established a short-term amnesty program to grant legal residence to up to 165 thousand spouses and minor children of immigrants who were granted amnesty under the Immigration Reform and Control Act of 1986 (IRCA).

Summary

From numerical restriction to worldwide flexible cap, the overall impact of the U.S. immigration policy of diversity immigration under the 1990 immigration act has been a marked improvement over previous legislation. Focusing on legal immigration by enabling family-based immigration, the act appears to have had the effect of boosting employment-related immigration—one of its major objectives, as well as increased diversity-based immigration. Certainly, opening new immigration possibilities for immigrants from parts of the world previously underrepresented, oppressed, or fleeing from oppression to be part of the American experience of freedom is central to a new immigration policy. The debate over illegal immigration and perhaps the legalization of those already in the country continues as evidenced by recent congressional debates.

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References and Further Reading

- Bush, George H. W. *Statement on Signing the Immigration Act of 1990*, November 29, 1990. (S. 358, approved November 29, Public Law No. 101-649).
<http://bushlibrary.tamu.edu/research/papers/1990/90112910.html>.
- Immigration and Nationality Act Amendment of 1965*, Pub. L. No. 89-236, 79 Stat. 911 (codified as amended in scattered sections of 8 U.S.C.).
- Immigration Act of November 29, 1990* (104 Statutes at Large 4978).
- Pub. L. No. 101-649, §§ 131-162, 104 Stat. 4997-5012 (codified at 8 U.S.C.A. § 1153(c) (2000)).
- Select Commission to Study and Evaluate . . . Existing Laws, Policies, and Procedures Governing the Admission of Immigrants and Refugees to the United States. Pub. L. No. 95-412, 92 Stat. 907 (1978).
- Select Committee on Immigration and Refugee Policy, 97th Cong., 1st Session, U.S. Immigration Policy and the National Interest XI (Joint Committee, 1981).
- Subcommittee on Immigration, Refugee and International Law, House Committee on the Judiciary, 101st Cong, 2nd Session, *Family Unity and Employment Opportunity Immigration Act of 1990* (Amendment in the Nature of a Substitute to the Comm. Print, May 7, 1990).

DNA AND INNOCENCE

DNA—the common abbreviation for deoxyribonucleic acid—is the genetic substance that determines the characteristics of all living things. DNA consists of two long, interlocking molecular chains. The links of these chains are called bases and a portion of these bases is unique to each human being. Only identical twins share the exact same sequence of DNA bases. Consequently, DNA bases hold the key to distinguishing biologically between one human being and another.

At crime scenes, DNA samples can be collected from blood, hair, skin, saliva, and/or semen. These samples can then be compared to the DNA profiles of suspects in the case. In addition, as a result of the federal government establishing an index system called CODIS (Combined DNA Index System), samples of DNA gathered at crime scenes can be compared to DNA profiles stored in state data banks. In the United States, all fifty states have enacted laws to provide for the collection and retention of DNA samples of all individuals convicted of murder and/or sex offenses. Forty-seven states require all violent offenders to submit DNA samples and thirty states actually require “all felons” to provide DNA samples to be stored in CODIS. Currently, CODIS contains information from over six hundred fifty thousand convicts.

Although CODIS was instituted in 1994, DNA evidence has been extremely useful in helping to

identify, apprehend, and convict some of the most violent criminals in sexual assault and homicide cases since the mid-1980s. When properly collected, tested, and preserved, DNA provides an accurate means of identifying and eventually convicting individuals who left DNA at the scene of a crime.

However, DNA can also be and has been a viable tool for exonerating the innocent. Every year since 1989, the FBI has reported that, in 25 percent of the sexual assault cases that they handled, the primary suspects were excluded by forensic DNA testing. To date, there have been at least 150 cases in which DNA technology has been used to eliminate suspects who were charged with serious crimes that they did not commit or to exculpate individuals who were wrongfully convicted.

Approximately fifty nonprofit legal clinics in the United States now utilize DNA technology to help establish the innocence of their clients. Many of these clinics, referred to as “innocence projects,” are housed at universities where students of law, journalism, and/or forensics work together under the supervision of attorneys to establish evidence that will exonerate wrongfully convicted individuals.

These innocence projects make use of state statutes that allow defendants to access DNA testing in order to prove their innocence. Thirty-eight states have now enacted postconviction state statutes related to DNA testing. Most state statutes, however, are limited in scope. For example, in many jurisdictions, DNA testing is limited to defendants who have claimed innocence at trial. Consequently, defendants who plead guilty in state courts are prohibited from accessing DNA testing. Thirty-three states also deny access to DNA testing if the defendant fails to request testing within six months of being found guilty.

Like state prisoners, federal prisoners are also allowed access to DNA testing if they assert their innocence. Under the Innocence Protection Act (which took effect on October 30, 2004), a federal criminal defendant may obtain DNA testing by filing a motion on or before October 2009 or within three years of being convicted.

In addition to establishing rules and procedures to govern DNA testing of federal prisoners, the Innocence Protection Act also provides funding to state governments to review systematically all death penalty cases in which DNA testing may be appropriate. The law does not, however, compel states to develop postconviction DNA testing and procedures equal to the federal guidelines. Consequently, many state criminal defendants can and will be denied access to DNA testing.

One of the simplest ways in which defendants are denied access to DNA testing is when prosecutors and

state officials, under political pressure to reduce crime, destroy physical evidence as soon as the appeals process is exhausted. In destroying the evidence, these officials destroy the possibility of a defendant's access to DNA testing. More stringent state laws governing the retention of physical evidence in criminal cases could help resolve this problem and thereby guarantee greater access to justice for the wrongfully accused and convicted. Technology is always advancing, so often physical evidence can be subjected to new DNA tests that had not previously existed. This new technology could be the key to freedom for some individuals. But without the physical evidence to test, no such hope of freedom exists.

In the event that exculpatory DNA evidence is obtained, a new trial will generally be granted. In some instances, however, exculpatory DNA has not resulted in the granting of a new trial. For example, when Joseph O'Dell presented a Virginia court with exculpatory DNA evidence, the court indicated that the evidence did not matter and O'Dell was subsequently executed. Unfortunately, courts in other jurisdictions have also concluded that newly discovered exculpatory DNA evidence does not necessarily mandate a new trial. Thus, although DNA testing has the potential to exonerate the innocent, it is not always procedurally embraced by the justice system.

In other instances, the potential of DNA to exonerate the innocent is mismanaged as a result of poor testing procedures. For example, the Pennsylvania State Crime Lab discovered that one of its scientists had performed shoddy DNA testing. They were consequently forced to schedule the retesting of 615 cases. The New Jersey State Crime Lab discovered that its scientists had failed to control for contamination of DNA samples and they subsequently reopened 102 cases for retesting. Similarly, the manager of the DNA Unit at the Oklahoma City Police Department Crime Lab was fired because of flawed analysis. It was disclosed that none of the scientists who worked in the DNA section of the Houston Police Department Crime Lab was qualified by education or training to do his or her job. As a result of this discovery, evidence in 378 cases had to be redone.

In 2005, another DNA scandal was brought in to public light. It was revealed that a Virginia State Crime Lab senior analyst responsible for conducting DNA tests in capital cases had made significant mistakes in DNA testing. As a result of this, 160 cases had to be re-examined. The mistakes committed by this analyst came to light after it was discovered that a DNA test that clearly supported the innocence claims of Earl Washington, Jr., a death row inmate, had been ignored. According to an audit report of the Virginia State Crime Lab, not only did the laboratory's leading

DNA analyst generate erroneous test results in a capital case, but also the laboratory's system of retesting samples to catch these errors completely failed. The external audit of the Virginia State Crime Lab (allegedly the best DNA lab in the country) provided proof that crime labs should not be allowed to police themselves. Considering the professional relationship between crime labs and police departments, it is not surprising that a pro-prosecution bias sometimes exists and blinds individuals to the reality of exculpatory DNA evidence. If, however, DNA testing is to be used in the pursuit of justice, expert oversight of state police crime labs may be necessary to address this problem.

Despite the challenges that DNA testing presents, it is clear that DNA has the potential to provide reliable evidence of guilt as well as innocence. If the United States, as a society, is to realize this potential fully, management of and access to DNA testing must be improved and eventually perfected.

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References and Further Reading

- Bureau of Justice Statistics, U.S. Department of Justice. *Survey of DNA Crime Laboratories*, 2001.
- "The Case for Innocence." *Frontline*, www.pbs.org, aired January, 2000; updated October 2000.
- "Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial," The National Institute of Justice Research Report, 1996. www.ncjrs.org/pdffiles/dnaevid.pdf.
- Edds, Margaret. *An Expendable Man: The Near Execution of Earl Washington Jr.* New York: New York University Press, 2004.
- Evans, Colin. *The Casebook of Forensic Detection*. New York: John Wiley, 1996.
- Kurtis, Bill. *The Death Penalty on Trial: Crisis in American Justice*. Public Affairs Publisher, 2004.
- National Commission on the Future of DNA Evidence, www.ojp.usdoj.gov/nij/topics/forensics/dna/commission/.
- National Institute of Justice. "Postconviction DNA Testing: Recommendations for Handling Requests." September 1999, available at ncjrs.org/pdffiles1/nij/177626.pdf.
- Scheck, Barry, and Peter Neufeld. "DNA and Innocence Scholarship." In *Wrongly Convicted: Perspectives on Failed Justice*, Sandra D. Westervelt and John Humphrey, eds. New Brunswick, NJ: Rutgers University Press, 2001.
- Scheck, Barry, Peter Neufeld, and Jim Dwyer. *Actual Innocence*. New York: Random House, 2000.
- Swedlow, Kathy. *Don't Believe Everything You Read: A Review of Modern Post Conviction DNA Testing Statutes*, Cal. W. L. Rev. 38 (Spring 2002): 355.
- Urs, Lori. "Commonwealth v. Joseph O'Dell: Truth and Justice or Confuse the Courts? The DNA Controversy." *New England Journal on Criminal and Civil Confinement* (Winter 1999): 25.
- Wambaugh, Joseph. *The Blooding*. New York: Bantam, 1989.

DNA TESTING

Deoxyribonucleic acid, or DNA, is the genetic information contained within the nucleus of cells. It is found in all living cells in the body and determines how the body grows and develops; it is essentially a recipe book for life. DNA controls inherited characteristics, such as the color of one's eyes and hair. DNA is made up of many millions of pieces of discrete information and their exact combination in any person is unique except for identical twins, who share the same DNA. DNA testing, sometimes called DNA profiling or fingerprinting, does not examine a person's entire DNA; instead, it focuses on a few highly variable components of the genetic code. This means that a DNA test gives a probability that two samples with the same genetic components come from the same person, a related person, or an unrelated person.

The techniques behind DNA testing were first developed in the United Kingdom by Sir Alec Jeffreys at the University of Leicester in 1984. Professor Jeffreys was a microbiologist studying inherited genetic variations between people. While he was examining the human myoglobin gene, he noticed what he called a "minisatellite"—a small sequence of DNA that was repeated many times and was theoretically open to a number of slight variations due to mutation and replication. By using these minisatellites as landmarks, Jeffreys was able to find and analyze systematically the differences in people's DNA.

Collection of DNA Evidence

DNA evidence can be recovered from a wide variety of cells and is very easily left behind at a crime scene. It can be recovered from buccal cells found in saliva, from semen, blood, or even from hair follicles. DNA can also be preserved for a long time, and some tests have been performed on remains that are hundreds of years old. The collection of DNA for testing can be a painless and comparatively nonintrusive process using a mouth swab or a hair, but most states in the USA require a blood sample to be drawn.

DNA Testing in the Courtroom

The world's first use of DNA testing in court was in a British immigration case in 1985 to determine the identity of a young boy. The boy in question had been born in the United Kingdom and was the son of British citizens of Ghanaian extraction. He traveled to Ghana and, upon his return, his passport

was rejected as a possible forgery. The courts had to determine whether he was the boy in the passport or some other relative from Ghana. The family's lawyer asked Jeffreys for help and he was able to develop a genetic "fingerprint" that proved the boy was who his family said he was. Testing is frequently used in this way to determine paternity in cases where that is disputed.

The world's first application of DNA profiling in a criminal case also took place in the United Kingdom, in 1986. In that case two young girls had been raped and murdered three years apart, but the cases were similar enough that police suspected that they were victims of the same man. The police arrested someone who confessed to the second murder, but not the first, and asked Jeffreys to compare forensic evidence gathered from the two cases with those of the man in custody. The DNA profile showed that the same man was responsible for both murders, but that the man who had confessed was not that person. The police collected DNA samples from over five thousand local men and ultimately used the DNA evidence in the successful prosecution of the murderer, who tried to avoid detection by sending a friend to give a DNA sample in his place. DNA profiling first appeared in a courtroom in the United States in *State of Florida v. Tommy Lee Andrews*, 533 So. 2d 841 (Fla. Dist Ct. App 1988), and helped to convict Andrews of rape.

DNA Dragnets

As its name suggests, a DNA dragnet involves requesting a DNA sample from a large number of people in the hopes of obtaining a sample that matches one recovered from a crime scene. If the sample does not match, the police can eliminate that person from their inquiries, though police can become suspicious if a person refuses to give a sample. There is usually some attempt to target a particular subsection of the public—for example, local males within a particular age range and/or of a particular race—but this still encompasses a great many people.

In the United States a DNA dragnet can be particularly controversial because it is generally held that the Fourth Amendment protects one from "mass suspicionless searches" (*Veronia School Dist. v. Acton*, 94-590, 515 U.S. 646, 1995). Moreover, the idea that refusing to give a DNA sample might make the police more suspicious seems to defeat the spirit of the law's presumption of innocence. Problems can also arise depending upon the manner of the police in collecting samples. There have been a number of instances in the

United States where DNA dragnets have been used, and people have subsequently complained that the police pressured them into giving samples and did not make it seem like a voluntary process. These problems have been exacerbated in cases in which a racial group was the target of a dragnet, leading to charges of racism in the execution of the dragnet.

Perhaps the greatest potential concern with DNA dragnets relates to the police use of the sample. Will it be compared only to the sample from the crime that sparked the dragnet or will it also be compared against samples recovered from other, unrelated crime scenes? Once the sample shows that the person is not connected to this crime, will the sample be destroyed or saved for future use and entered into the DNA database? Most jurisdictions now guarantee that a sample given in a dragnet will be returned or destroyed, along with any record of the DNA profile after it has been compared to the evidence and found not to be a match.

DNA Databases

Police forces rapidly understood the potential for DNA testing to be a powerful tool for law enforcement. As the techniques to analyze DNA became more sophisticated, faster, and cheaper, the possibility of creating a DNA database modeled after long established fingerprint databases grew to a reality. DNA samples recovered from a crime scene could be compared against a permanent record of known DNA samples. This created the possibility of suspects being positively identified many years after the offense took place, thus helping to solve so-called cold cases. A standardized repository for DNA evidence would also allow police in different jurisdictions to link crimes committed by the same person. The United Kingdom became the first country in the world to create a national DNA database in 1995. In the United States the Federal Bureau of Investigation's National DNA Index System became operational in 1998.

Collecting Samples for the DNA Database

Most jurisdictions now have laws mandating DNA testing and entry into a DNA database. Some limit this to those convicted of crimes such as murder and rape, but the trend has been to expand the range of offenses covered to all felonies, with the aim of constructing a database containing DNA samples from

all the "active criminals" within that jurisdiction. Some protest against this as a violation of privacy, but the generally accepted position is that, when one commits a crime, one loses some rights and the collection of DNA from convicted criminals to construct a database is now almost universally accepted.

One problem common during the initial stages of setting up a DNA database and requiring DNA samples to be given was whether such measures could be applied retroactively. Should those already convicted and serving time in prison be required to give samples? Should those released on parole be required to give a DNA sample? While there is still no definitive pronouncement on these matters in the United States, the consensus is that DNA samples can be taken from prisoners, even if their offenses took place before the enabling legislation, and from those convicted afterwards. It can also be a condition of parole to provide a DNA sample, though opinion is divided on the question of whether those already given parole could be forced to give samples if that was not a requirement of their parole, and some jurisdictions have allowed this.

Problems with DNA Databases

Unlike fingerprints, DNA samples contain information that reveals something about the private life of the subject. This raises extra concerns regarding how this information is used.

DNA samples can reveal whether the person has genetic disorders or propensities towards medical conditions that have not yet manifested. This could place the state in a position in which it knows more about the health of the subject than the subject does. Subjects could even find out information about their health from the state that they would rather not have known. This also raises concerns about access to this information, particularly by private companies providing services such as insurance.

One of the biggest differences between the information in fingerprints and DNA tests is whose privacy interests are at stake. Fingerprints are thought to be unique, unrelated to other physical characteristics, and devoid of familial connection. DNA, on the other hand, can be very similar between blood relations. Criminals forfeit some of their privacy when they are convicted of a crime and must submit fingerprints and DNA samples to aid future identification. Their family members have not been convicted of anything, but the state will gain substantial information about them through the sample. In 2004, the United Kingdom saw the world's first conviction based upon

familial DNA in the National DNA Database. Evidence recovered from the scene was almost identical to a sample in the database and police traced the family tree until they found the person responsible. As DNA databases grow in size, such convictions will become more likely in the future, leading some to question whether it is ethical to store and trace DNA information in this way.

Cross-Jurisdictional Issues for DNA Databases

There are concerns about who can have access to a DNA database, especially across jurisdictional boundaries and when one jurisdiction has different standards for collecting and maintaining evidence. For example, one jurisdiction might require samples taken from someone arrested but not convicted of a crime to be destroyed, but another might retain that sample. As the technical sophistication of databases increases and information is shared more across jurisdictions, the problems of differing sensitivities to the privacy considerations will come to the fore, as will the ethical use of information from one jurisdiction that would have been destroyed or never collected in another.

Implications of the Use of DNA Testing

As DNA testing is becoming more sophisticated and the relationship between genes is better understood, the range of information one can glean from a DNA is growing. DNA can provide information on gender, race, and eye color that could be used in conjunction with traditional policing techniques to link a particular person with a DNA sample. This raises the possibility of increasingly sophisticated DNA “photofits” of the person being sought.

While the extent to which our genetic makeup determines us as individuals is unknown, there is the suggestion that one day everything from eyesight to left handedness to sexual orientation could be revealed by DNA testing. The sheer range and wealth of information might force a re-examination of the ways with which DNA testing is dealt.

The potential to use DNA evidence to link people conclusively to crimes committed decades earlier can have a far reaching impact on the calculus to determine the statute of limitations on crimes, especially of a sexual nature. This capacity has led to pressure to extend the timeframe to prosecute in the knowledge

that, while witnesses’ memories may deteriorate over time, forensic evidence, if properly tested and stored, can provide reliable evidence for many years to come.

DNA and Innocence

DNA can also be and has been used to show that through a miscarriage of justice, an innocent person has been convicted of an offense. This is troubling for any justice system and all the more so when the person was convicted of a capital crime. The availability of DNA evidence has prompted changes to allow new appeals based on DNA evidence.

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References and Further Reading

- Laurie, Graeme. *Genetic Privacy: A Challenge to Medico-Legal Norms*. New York: Cambridge University Press, 2002.
- Lazer, David. *DNA and the Criminal Justice System: The Technology of Justice*. Boston: MIT Press, 2004.
- National Conference of State Legislatures. “DNA and Crime,” <http://www.ncsl.org/programs/health/genetics/dna.htm>.
- National Criminal Justice Reference Service. “What Every Law Enforcement Officer Should Know About DNA Evidence,” <http://www.ncjrs.org/nij/DNAbro/intro.html>.
- Rothstein, Mark A., ed. *Genetic Secrets: Protecting Privacy and Confidentiality in the Genetic Era*. New Haven, CT: Yale University Press, 1999.
- Tutton, Richard, and Oonagh Corrigan, eds. *Genetic Databases: Socio-ethical Issues in the Collection and Use of DNA*. New York: Routledge, 2004.

Cases and Statutes Cited

State v Andrews, 533 So. 2d 841 (Fla. Dist Ct. App 1988)
Vernonia Sch. Dist. 47J v. Acton, (94-590), 515 U.S. 646 (1995)

See also Capital Punishment and Right of Appeal; Cloning; Duty to Obey Court Orders; Right of Privacy; Search (General Definition); Search Warrants; State Constitution, Privacy Provisions

DOE v. BOLTON, 410 U.S. 179 (1973)

In the 1960s, there was a marked change in attitude among physicians and attorneys toward abortion, which since the late nineteenth century had been a crime in most states except when performed to save the life of the mother. The American Medical Association and the American Bar Association advocated a more liberal approach to the interests of women in

terminating unwanted pregnancies. In 1962, the American Law Institute (ALI) included a more tolerant abortion statute in its Model Penal Code. Approximately one-fourth of the states, including Georgia, enacted new abortion laws modeled after the ALI draft. In *Doe v. Bolton*, the Supreme Court ruled that the relatively enlightened Georgia abortion law was inconsistent with a woman's right to end her pregnancy as delineated in the companion case decided the same day—*Roe v. Wade*, 410 U.S. 113 (1973).

Mary Doe, an indigent married Georgia citizen, was denied an abortion after eight weeks of pregnancy for failure to meet any of the conditions in the 1968 Georgia abortion statute. Georgia law prohibited abortion except when continued pregnancy would endanger a pregnant woman's life or injure her health, the fetus would likely be born with a serious defect, or the pregnancy resulted from rape. The law also limited the availability of abortion to Georgia residents and required that abortions be performed in hospitals accredited by the Joint Commission on the Accreditation of Hospitals (JCAH) and be approved by the hospital's abortion committee. The law also demanded that two other physicians concur in the attending physician's judgment that abortion is advisable.

The Supreme Court, in a seven-to-two decision, ruled in favor of the plaintiff, citing its holding in *Roe* that personal liberty as protected by the Due Process Clause of the Fourteenth Amendment includes the decision to terminate a pregnancy. The Court made clear that abortion was a medical procedure to be undertaken at the discretion of the attending physician. The state cannot prevent even late-term abortions if the physician judges that the abortion is necessary to protect the female patient's physical or mental health. In *Doe* the Court interpreted the concept of mental health broadly, allowing the physician to weigh physical, emotional, psychological, familial, and age factors—all of which are relevant to the patient's well-being.

The limitation of abortion to the three conditions specified in the Georgia law violates the rule announced in *Roe* that, during the first trimester, the state cannot place any restraints on a woman's right to terminate her pregnancy for whatever reason. The Court found each of the procedural requirements unduly burdensome as well. The state cannot require that abortions be performed in a hospital, that abortions be approved by a hospital committee, or that two additional physicians concur in the abortion decision. These limitations interfere with the attending physician's exercise of his or her professional judgment. The Court struck down the residency requirement on the grounds that the Privileges and Immunities Clause of Article IV, section 2, protects

persons who enter a state seeking medical services, including abortion.

The broad definition of health in *Doe* ensured that pregnant women would be able to exercise their constitutional right to abortion throughout each of the three trimesters of pregnancy with minimal interference from the state.

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References and Further Reading

- Curriden, Mark. "Doe v. Bolton: Mary Doe Has a Change of Heart, Pickets Abortion Clinics." *ABA Journal* 75 (1989): 26–27.
- Glidewell, Gail, "Partial Birth" Abortion and The Health Exception: Protecting Maternal Health or Risking Abortion on Demand? *Fordham Urban Law Journal* 28 (2001): 1089–1150.
- Jipping, Thomas J., *Informed Consent to Abortion: A Refinement*, Case Western Reserve Law Review 38 (1988): 329–386.
- Sargent, John D., *Analysis of the United States Supreme Court Decisions Regarding Abortions: Roe v. Wade, No. 70-18, and Doe v. Bolton, No. 70-40, decided January 22, 1973*. Washington, DC: Congressional Research Service, Library of Congress, 1973.

Cases and Statutes Cited

Roe v. Wade, 410 U.S. 113 (1973)

See also **Abortion; Privileges and Immunities (XIV); Roe v. Wade**, 410 U.S. 113 (1973)

DOMESTIC VIOLENCE

Domestic violence is abusive behavior within an individual in an intimate relationship or within family bonds. It includes wife-beating and, more generally, abuse of an intimate partner, whether married or not, and regardless of sexual orientation, child abuse, sibling abuse, and elder abuse. Nonetheless, when discussed, it most often refers to the violence used to control a wife or girlfriend, perhaps because, statistically, abuse of women by their male partners is the most reported and prevalent of family violence. Notwithstanding this understanding, intimate abuse is one of the most underreported crimes in society. Most statutes that address domestic violence include any single act of physical violence. However, most activists and theorists refer to a pattern of abusive conduct by an intimate designed to control his partner. Some scholars estimate that upwards of 50 percent of all women will be victims of battering during their lifetimes.

Control of an intimate is essential in defining the nature of domestic abuse. It is not uncommon for the

batterer to blame his victim for his violence. Some of the most dangerous times for a victim of abuse are when she decides to leave her abuser and during pregnancy. During these times, the abuser loses some, if not all, control over the abused and attempts to regain control through force.

History

In early American history, following English common law and ecclesiastical tenets, women were afforded very few rights. Unmarried women were considered to be under the control of their fathers until marriage. Upon marriage, however, women were subject to the marital unity under the doctrine of coverture, which meant that a wife had no legal identity outside her husband. Some of the effects of these rules included women's inability to contract or to own property. The legal doctrine of chastisement had the greatest significance to the perpetuation and sanction of physical violence against women. Sir Henry Blackstone, in discussing the rights and responsibilities of husbands vis-a-vis their wives, said of English common law:

The husband also (by the old law) might give his wife moderate correction. For, as he is to answer for her misbehaviour, the law thought it reasonable to intrust him with this power of restraining her, by domestic chastisement, in the same moderation that a man is allowed to correct his servants or children.

During the mid-nineteenth century, married women's property acts, granting women the right to own property, were instituted across the United States and roughly accompanied the abandonment of coverture and the repudiation of chastisement. These changes in status, primarily for white women, came at approximately the same time as change in other forms of social status, namely, slavery. In fact, there is evidence that the emancipation of black slaves assisted in the formal repudiation of chastisement. One of the first cases to renounce chastisement, *Fulgham v. State*, 46 Ala. 143 (1871), was as much about ensuring that a male emancipated slave did not feel equal to white males as it was about denouncing physical violence against wives. After citing Judge Blackstone for the proposition that "the authority . . . to chastise" was asserted primarily, if not exclusively, by "the lower rank of the people," the court in *Fulgham* said:

A rod which may be drawn through the wedding ring is not now deemed necessary to teach the wife her duty and subjection to the husband. The husband is therefore not justified or allowed by law to use such a weapon, or

any other, for her moderate correction. The wife is not to be considered as the husband's slave.

Thus, the complexities of societal violence confronted by those in poverty and by people of color became part of the landscape that permitted the political abandonment of wife-beating. Stereotypes of poverty and race, while fueling change for some women, continue even today to impede protection or redress for others.

Repudiation of chastisement altered social condoning of spousal violence in form, but not in substance. That is, after the abandonment of chastisement, courts continued to enforce male privilege of control in the home, even to the extent of tacit acceptance of violent conduct, through deference to family privacy. This deference reinforced norms of violence in the home through the guise of nonintervention by the state.

Modern History

The beginnings of the modern-day battered woman's movement in the mid-1970s are generally attributed to the feminist antirape movement of the 1960s and its existing organizational and political structures. Early strategies of the battered women's movement avoided legal remedies and redress by formal institutions. The law and these institutions were viewed as patriarchal and accommodating to the social structures that permitted intimate violence. Instead, activists established shelters as a means for protection and escape from the abusive relationship and engaged in public awareness campaigns.

In addition to nonlegal means for protection, the movement later began to use the justice system. The focus was to find means of reform that would eliminate, rather than perpetuate, violence in the home. Part of the strategy was to challenge notions of family privacy that denied protection from marital violence.

Activism in domestic violence led to the development of the battered woman syndrome as a judicially recognized description of victim's responses in abusive relationships. Recognition of this syndrome allows an expert to explain to a jury the mental state of a reasonable person in the defendant's situation. This kind of testimony is often necessary to support a defense of self in the context of a murder prosecution.

Recent efforts to reform the legal system and its ability to address domestic violence include no-drop prosecution rules, mandatory arrest, and inclusion in hate crime legislation. Some of these efforts are controversial and are as yet not fully tested for efficacy. Activists' reform efforts, within and outside the legal

system, will continue as long as violence within the home exists as a social problem.

Other recent efforts for reform include those within the federal system such as the Violence Against Women Act of 1994, Pub. L. No. 103-322, §§ 40001-40703, 108 Stat. 1902. This legislation includes funding for shelters, encouraging arrest and prosecution, and incentives for prevention through education and support programs. Unfortunately, in *United States v. Morrison*, 529 U.S. 598 (2000), the Supreme Court significantly undercut the ability of this legislation to redefine intimate violence as a public problem rather than merely a matter of private concern. It held that Congress exceeded its authority under the Commerce Clause and section five of the Fourteenth Amendment by creating in the act a federal civil remedy for persons victimized by gender-motivated violence. The Violence Against Women: Civil Rights for Women Act, 42 U.S.C. § 13981 (2000), was promulgated to allow for a private right of action within the constitutional limits addressed by *Morrison*.

Resistance by activists to using the legal system for redress was not entirely unfounded. Current areas of concern involve ways in which the legal system is turned against battered women. This includes dependency or failure to protect actions by child welfare authorities against the battered woman for conduct by an abusive partner. When child protection may be the ultimate objective, removing a child from a non-abusing parent may nonetheless be detrimental to the child and may punish an individual for conduct not within her control.

Custody matters in family court are also problematic in abusive situations. Abusers often use children as leverage in maintaining control over their partners. Many judges disregard evidence of spousal abuse in considering the best interests of the child. This approach does not take into account the impact on the child in witnessing abuse of one parent by the other. Joint custody arrangements are routinely imposed, allowing the abuser access to his partner through the child and continuation of physical and emotional abuse. This result is gradually lessening as legislatures and judges include abusive behavior as a factor in the best interests analysis.

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References and Further Reading

- Blackstone, William. *Commentaries*. 444-445.
 Dobash, R. Emerson, and Russell Dobash. *Violence Against Wives: A Case Against the Patriarchy*. New York: Free Press, 1979.
 Gordon, Linda. *Heroes of Their Own Lives: the Politics and History of Family Violence, Boston 1880-1960*. New York: Viking Press, 1988.

Schechter, Susan. *Women and Male Violence: The Visions and Struggles of the Battered Women's Movement*. Cambridge, Mass.: South End Press, 1982.

Siegel, Reva B., *The Rule of Love: Wife Beating as Prerogative and Privacy*, Yale L. J. 105 (1996): 2117.

Cases and Statutes Cited

Bradley v. State, 1 Miss. 156 (Miss.1824)

Fulgham v. State, 46 Ala. 143 (1871)

State v. Kelly, 97 N.J. 178, 478 A.2d 364 (N.J. 1984)

United States v. Morrison, 529 U.S. 598 (2000)

Wanrow v. State, 88 Wash.2d 221, 559 P.2d 548 (Wash.1977)

See also Equal Protection of Law (XIV); Marital Rape; Rape: Naming Victim; Sex and Criminal Justice

DON'T ASK, DON'T TELL

"Don't ask, don't tell" is a shorthand description for policies regulating who can serve in the U.S. armed forces. These policies generally restrict the admission and service of homosexuals in the military. While some form of restriction on military service by these individuals is as old as the nation, today's more restrictive military policies were first adopted during World War II.

The current military policies were enacted into statutory law in 1993. These provisions were implemented as provisions of the National Defense Authorization Act of fiscal year 1994, public law 103-160, and have been codified at 10 U.S.C. sec. 654. This legislation was a reaction to promises made by then presidential candidate Bill Clinton during the 1992 presidential campaign. Clinton had suggested that he would, after taking office, issue an Executive Order that would override the policies of the Department of Defense limiting the service of homosexuals in the military. The candidate's proposal was, at least in part, offered in recognition of the brutal murder that same year of a Navy enlisted man.

Development of a New Policy

The issue of the service of homosexuals in the military received substantial attention during 1993. The first part of the debate came with a report from the General Accounting Office, Congress's primary investigative and accountability agency, with a survey of the military policies and practices of twenty-five other nations.

On July 19, 1993, President Clinton announced a new policy on homosexuals in the military. This new policy consisted of several essential elements: those in

the military would be judged on their performance and not their sexual orientation; the practice of not asking or inquiring about sexual orientation during the enlistment procedure would continue; an open statement made by a service member that he or she is a homosexual would create a rebuttable presumption that the individual intends to engage in prohibited conduct; and the provisions of the Uniform Code of Military Justice would be enforced in an even manner regardless of the service member's sexual orientation. The new policy was substantially based on sexual orientation. Yet, the term was not expressly defined.

The new policy announced by the Clinton administration was initially intended to be a "don't ask, don't tell, don't pursue" measure. But the President did not include "don't pursue" in his announcement. The secretary of defense added to the uncertainty about the announced policy when he testified before Congress that individual service members could publicly acknowledge their homosexuality without risking a military criminal investigation, but the individual statements might still be credible grounds for a military criminal investigation.

Many believe that the ambiguities in the newly announced administration policy encouraged Congress to act by including a provision in the 1994 National Defense Authorization Act. This measure was signed into law by the President on November 30, 1993. Section 571 of the public law, now codified at 10 U.S.C. sec. 654, describes homosexuality in the military as an "unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability." The law also codified the grounds on which a service member might be discharged.

On December 22, 1993, the Secretary of Defense announced regulations to implement the provisions of the new statute. These new regulations attempted to balance the statutory prohibition on the service in the armed forces by homosexuals and President Clinton's previously expressed desires. The new regulations provided that no one would be asked questions about his or her sexual orientation upon entering the armed forces. However, homosexual conduct could be grounds for rejecting a military enlistment, appointment, or induction.

In the years following the implementation of the "don't ask, don't tell" policies, records kept by the Department of Defense show that the number of discharges for homosexuality has increased. Data from the Servicemembers Legal Defense Network (SLDN) show that 617 service members were discharged during fiscal year 1994, with the number of discharges rising to 1,273 in 2001. The number of discharges has declined in the following years to 653 in 2004.

The Court's Consideration of Homosexuality in the Military

There have been numerous court challenges to the "don't ask, don't tell" policy since 1993. Most federal district and appeals courts have affirmed the regulations and their application as a necessary part of the military's needs for discipline and good order. However, two U.S. Supreme Court decisions have led to questions about the policy's continued validity.

The U.S. Supreme Court in its 1986 decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986), held that there is no fundamental right to engage in consensual homosexual sodomy. Other federal courts followed this precedent in affirming the discharge of service members for overt homosexual activities. Most of these appellate decisions found that there was a rational relationship between the military's needs for unit cohesion and discipline and the policies adopted restricting homosexuals from serving in the military.

However, in 2003, the Supreme Court in *Lawrence v. Texas*, 539 U.S. 558 (2003), found a Texas statute that prohibited sexual acts between same-sex couples unconstitutional. In this opinion, the Court focused on the liberty interests protected by the Due Process Clause of the Fourteenth Amendment of the Constitution. The *Lawrence* decision holds that this liberty interest in privacy even protects a right for adults to engage in consensual and legal homosexual conduct.

While neither Supreme Court decision directly challenged the military's policies governing the service of homosexuals in the military, the *Lawrence* decision poses a problem for the armed forces. Article 125 of the Uniform Code of Military Justice defines sodomy as a court martial event for which criminal punishment may be imposed. That provision is now called into question by this most recent decision.

An indirect challenge to the "don't ask, don't tell" policies was before the U.S. Supreme Court during its 2005 term. This appeal challenged the right of the federal government to deny federal funds to institutions barring military recruiters from their campuses because of the military's policies regarding the service of homosexuals. A decision is expected in 2006.

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References and Further Reading

- Balkin, Jack, and Geoffrey Bateman, eds. *Don't Ask, Don't Tell: Debating the Gay Ban in the Military*. Boulder, CO: Lynne Rienner Publishers, 2003.
- Eskridge, William N. *Gaylaw: Challenging the Apartheid of the Closet*. Cambridge, MA: Harvard University Press, 1999.

Cases and Statutes Cited*Bowers v. Hardwick*, 478 U.S. 186 (1986)*Lawrence v. Texas*, 539 U.S. 558 (2003)*National Defense Authorization Act for Fiscal Year 1994*, Public Law 103-160, sec. 571, codified at 10 U.S.C. sec. 654**DOUBLE JEOPARDY (V): EARLY HISTORY, BACKGROUND, FRAMING****Origins of the Guarantee**

The Double Jeopardy Clause of the Fifth Amendment protects a person from being placed twice in jeopardy for the “same offense.” While the exact origins of this guarantee against double jeopardy are not known, there can be no doubt that it possesses a long history. Ancient Jewish law contained references to principles encompassed by double jeopardy law; early Greek and early Roman law provided some form of protection against double jeopardy; and a prohibition against double jeopardy, emanating from a reading given to a verse in the Old Testament by Saint Jerome in 391, entered canon law as early as 847.

English Common Law

By the second half of the eighteenth century, the protection against double jeopardy was firmly established in English common law through the pleas of *autrefois acquit* (a former acquittal), *autrefois convict* (a former conviction), and pardon. Indeed, in his *Commentaries*, published between 1765 and 1769, William Blackstone, perhaps the most influential writer on the common law, stated that the principle that “no man is to be brought into jeopardy of his life, more than once for the same offense,” upon which the pleas are based, constitutes a “universal maxim of the common law.”

Various theories have been offered to explain the introduction of the double jeopardy principle into the common law. One theory postulates that it came from the Continent through canon law or through Roman law. Another theory suggests that the twelfth-century power struggle between Thomas à Becket, Archbishop of Canterbury, and King Henry II, which ended in Henry’s retreating from his claim that the royal courts could punish clerics after they were convicted of a crime and stripped of their clerical status in

an ecclesiastical court, led to the introduction of the principle. Still another theory claims that the protection against double jeopardy merely evolved over hundreds of years from Anglo-Saxon criminal procedure.

The scope of the common law’s protection against double jeopardy in the hundred years following the Norman Conquest in 1066 cannot be ascertained. The available evidence suggests that the earliest rulers paid little heed to questions of double jeopardy. For example, the Charter of Liberties issued by Henry I in 1101 did not contain a protection against double jeopardy, and in 1163, Henry II claimed he could try a cleric for murdering a knight despite the cleric’s acquittal of that offense in an ecclesiastical court.

Some cases decided at the beginning of the thirteenth century apparently recognized some protection against double jeopardy, but Magna Carta, which was originally issued by King John in 1215, contained no protection against double jeopardy. It is clear, however, that by the middle of the century the principle against double jeopardy had entered the common law. Nevertheless, its subsequent development and emergence into modern double jeopardy law was slow, perhaps because the power to prosecute for offenses had not yet coalesced in the state. At least since the Norman Conquest, criminal prosecutions could be brought not only by the king, but also by a private person in an action against another individual demanding punishment for the particular wrong the person suffered rather than for the offense against the public. By its very nature, the protection against double jeopardy constitutes a limitation upon the power of the state to prosecute and punish an individual, so the state’s gathering of the power to prosecute individuals is a prerequisite to a true double jeopardy situation.

Modern double jeopardy law began to emerge in England in the last half of the seventeenth century. By that time prosecutions by the king had begun replacing private prosecutions as the preferred method of prosecution. In addition, Edward Coke’s *Institutes* had been published posthumously in 1641 and 1644. Coke detailed the pleas of *autrefois acquit*, *autrefois convict*, and pardon and described the basis for double jeopardy, clarifying the concept and emphasizing its importance. Moreover, during the late 1600s, English courts began dealing with a variety of double jeopardy issues, expanding the protection against double jeopardy considerably. Among other things, the Court of King’s Bench held that a prosecutor could not seek a new trial following an acquittal (*The King v. Read*) and that an acquittal in another country barred a subsequent prosecution for the same offense in England (*Rex v. Hutchinson*). It also

prohibited the practice frequently engaged in by trial judges of discharging the jury when an acquittal appeared imminent in order to afford the prosecutor the opportunity to bring a stronger case in a new trial (*The King v. Perkins*).

Double Jeopardy Protection in America before the Adoption of the Fifth Amendment

While double jeopardy law continued developing in England during the seventeenth century, it began to take root in the North American colonies. The first colonial enactment containing an express guarantee against double jeopardy appeared in 1641 when the Massachusetts Bay Colony enacted a detailed charter of liberties that served as the model for other colonies and constituted a forerunner of the federal Bill of Rights. The Massachusetts Body of Liberties of 1641 guaranteed that “[n]o man shall be twice sentenced by Civill Justice for one and the same Crime, offense, or Trespasse.”

Shortly thereafter, Connecticut, in its Code of 1652, adopted a provision against double jeopardy that it took from the Body of Liberties. In addition, the Fundamental Constitutions of Carolina, a document drafted by John Locke but never adopted, included a clause stating that “[n]o cause shall be twice tried in any one court, upon any reason or pretence whatsoever.”

After the Revolutionary War, the former colonies formed the United States of America under the *Articles of Confederation*. The articles, however, contained neither a Bill of Rights nor an express protection against double jeopardy. Most state constitutions at that time also did not contain an express guarantee against double jeopardy. The first state constitution to incorporate a protection against double jeopardy was the New Hampshire Constitution of 1784. It provided that “[n]o subject shall be liable to be tried, after an acquittal, for the same crime or offense.” In 1790, Pennsylvania ratified a new constitution containing a clause providing that “[n]o person shall, for the same offense, be twice put in jeopardy of life or limb.”

Courts in several of the colonies and, after independence, the states recognized a prohibition against double jeopardy through decisional law. For example, courts in Virginia and New York acknowledged the English common law pleas of a former conviction and a former acquittal. Courts in Connecticut (*Hannaball v. Spalding*, 1 Root 86, Conn. Super. Ct., 1783; *Coit v. Geer*, 1 Kirby 269, Conn. Super. Ct., 1787) and

Pennsylvania (*Respublica v. Shaffer*, 1 Dall. 236, Pa. Ct. Oyer and Terminer, 1788) also recognized a protection against double jeopardy.

The Adoption of the Fifth Amendment Guarantee against Double Jeopardy

As originally adopted, the U.S. Constitution did not contain a bill of rights. Its failure to do so caused great concern among the country’s populace and many of its leaders, including Thomas Jefferson. When the First Congress convened in 1789, Representative James Madison sought to rectify this omission by introducing a series of proposed amendments, including all those that ultimately became the Bill of Rights. One of Madison’s proposed amendments provided that “[n]o person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offense.” A select committee of the House of Representatives redrafted the proposal to read: “No person shall be subject, [except] in case of impeachment, to more than one trial or one punishment for the same offense.”

During the debates on this proposal in the House, several representatives opposed the provision because they believed its language prohibiting more than one trial for the same offense contradicted established law and would, for instance, prevent a convicted individual from obtaining a new trial if prejudicial error infected the individual’s initial trial. One representative, arguing that the objective of a guarantee against double jeopardy is to preclude multiple punishments for a single offense, sought to amend the proposal by striking the words “one trial or,” but his proposed amendment was soundly defeated. An attempt to amend the proposal by inserting the words “by any law of the United States” after the words “same offense” also failed. The House subsequently adopted the proposed amendment concerning double jeopardy as submitted by the select committee and sent it and other proposed amendments to the Senate for its concurrence.

The Senate rewrote the proposed amendment on double jeopardy by substituting the phrase “be twice put in jeopardy of life or limb by any public prosecution” for the words “except in case of impeachment, to more than one trial or punishment.” It later deleted the words “by any public prosecution” and, after joining the provision with several others, approved it in its current form. The House agreed to the Senate’s version, and Congress submitted it to the states (along with other proposed amendments) for ratification.

The states ratified the double jeopardy provision (as well as nearly all the other proposed amendments) in 1791, making it part of the Fifth Amendment.

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References and Further Reading

- Cogan, Neil H., ed. *The Complete Bill of Rights: The Drafts, Debates, Sources, and Origins*. New York: Oxford University Press, 1997, 297–314.
- Friedland, Martin L. *Double Jeopardy*. Oxford, England: Clarendon Press, 1969, 1–16.
- Hunter, Jill. “The Development of the Rule Against Double Jeopardy.” *Journal of Legal History* 5(1) (1984):3–19.
- Rudstein, David S. *Double Jeopardy: A Reference Guide to the United States Constitution*. Westport, Conn.: Praeger, 2004, 1–15.
- Sigler, Jay A. *Double Jeopardy: The Development of a Legal and Social Policy*. Ithaca, NY: Cornell University Press, 1969, 1–37.

Cases and Statutes Cited

- Coit v. Geer*, 1 Kirby 269 (Conn. Super. Ct. 1787)
- Hannaball v. Spalding*, 1 Root 86 (Conn. Super. Ct. 1783)
- The King v. Perkins*, Holt. K.B. 403, 90 Eng. Rep. 1122 (1698)
- The King v. Read*, 1 Lev. 9, 83 Eng. Rep. 271 (1660)
- Respublica v. Shaffer*, 1 Dall. 236 (Pa. Ct. Oyer and Terminer 1788)
- Rex v. Hutchinson*, 3 Keble 785, 84 Eng. Rep. 1011 (1677) (discussed in *Beak v. Thyrrwhit*, 3 Mod. 194, 87 Eng. Rep. 124 (K.B. 1688))

See also **Bill of Rights: Structure; Bills of Rights in Early State Constitutions; Colonial Charters and Codes; Constitutional Convention of 1787; Double Jeopardy: Modern History; Madison, James; Magna Carta; Massachusetts Body of Liberties of 1641; New Hampshire Constitution of 1784; Ratification Debate, Civil Liberties in; State Constitutions and Civil Liberties**

DOUBLE JEOPARDY: MODERN HISTORY

Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb (U.S. Constitution, Amendment Five).

Twenty simple words contained in the Fifth Amendment to the U.S. Constitution protect individuals against being subjected to double jeopardy for any crime. While the phrase “double jeopardy” is commonly understood to prohibit multiple prosecutions and multiple punishments for the same criminal offense, the parameters of the Fifth Amendment promise are often difficult to distill and appreciate.

History provides only slight guidance to the contours of this protection. Instead, at least in the United States, the double jeopardy doctrine has been amplified, if not solidified, by judicial interpretations of these often quoted twenty simple words.

History

Double jeopardy is neither a new nor uniquely American concept. Rather, the principle of double jeopardy dates back to the early Roman period and has a historical pedigree spanning well over one thousand years. In fact, there are primitive notions of double jeopardy appearing in the Bible. In the book of Nahum, we are assured in one translation that “he will not take vengeance twice on his foes” and, in an alternate translation, “affliction will not rise up a second time.” While jurists and scholars debate the origins of double jeopardy, traces of the doctrine can be readily distilled from English common law. The doctrine does not, however, appear in the Magna Carta.

The first known codified reference to double jeopardy was set forth in the *Digest of Justinian*. Therein, the pronouncement was made that “the governor should not permit the same person to be again accused of a crime of which he had been acquitted.” The concept continued to change and improve through many kings and queens in England. Thereafter, the writings of Lord Coke and William Blackstone were commingled to provide us with the modern day concept of double jeopardy. Lord Coke is credited with carving out the three categories to which double jeopardy historically applied: *autrefois acquit*, *autrefois convict*, and former pardon. Blackstone further advanced the doctrine by pronouncing that “the plea of *autrefois acquit*, or a formal acquittal, is grounded on the universal maxim . . . that no man is to be brought into jeopardy of his life more than once for the same offense.”

A main distinction between historical doctrine and modern double jeopardy provisions is that the former only applied to capital crimes. In modern times, double jeopardy is not limited only to crimes affecting “life or limb” but, rather, applies to all criminal prosecutions and punishments in which an individual is at risk of multiple attacks on his or her liberty.

Colonial Massachusetts gave birth to the modern American approach to double jeopardy in its Body of Liberties published in 1641. As one author noted, “[t]his document bears a close resemblance to the Bill of Rights later to become a stock feature of American constitutions, state and federal.” Similar to prior pronouncements, the Body of Liberties provided that

“no man shall be twice sentenced by civil justice for one and the same crime, offense, or trespass.”

Over one hundred years later, in 1784, New Hampshire became the first state to protect against double jeopardy in its Bill of Rights, proclaiming that “no subject shall be liable to be tried, after an acquittal, for the same crime or offense.” James Madison’s proffering at the Constitutional Convention five years later was strikingly similar to the previous colonial offerings declaring that “no person shall be subject, except in case of impeachment, to more than one trial, or one punishment for the same offense.” Yet, it was not until 1790 in the Pennsylvania Declaration of Rights that a phrase resembling our modern phraseology appeared. The Pennsylvania Declaration of Rights succinctly stated that “no person shall, for the same offense, be twice put in jeopardy of life or limb.” From these ideals sprang the modern protection contained in twenty simple words.

International Application

In modern times, remnants of double jeopardy exist in many countries, including Australia, Canada, the United Kingdom, parts of Asia, and the United States. In fact, protection against double jeopardy is now provided for in the International Covenant on Civil and Political Rights and the European Union Constitution and numerous documents governing international criminal tribunals, including the International Criminal Tribunal for Yugoslavia, the International Criminal Tribunal for Rwanda, and the nascent International Criminal Court.

There are significant differences, however, between the English and American perspective of precisely when “jeopardy” attaches. The English rule, which retains the common-law approach, limits application of double jeopardy to instances in which a defendant has been acquitted or convicted. In other words, the English rule requires a full, completed trial. In contrast, the American rule attaches jeopardy as soon as the jury is sworn, in a jury trial, or when the prosecution offers its first piece of evidence in a trial before the court. Thus, the concept of jeopardy attaches much earlier in the American legal system than in its English counterpart.

Despite the apparent staying power of the general double jeopardy concept, England recently diluted its double jeopardy protection with parliamentary passage of the Criminal Justice Act 2003. England’s departure from the stricter version existing in the United States permits a subsequent prosecution following acquittal for certain offenses, such as murder,

rape, kidnapping and manslaughter, when new and compelling evidence arises. Additionally, individuals acquitted prior to 2003 may nonetheless be subject to prosecution retroactively under the act. The revised English approach was motivated by notorious trials in which individuals adjudged not guilty later confessed to committing the crimes for which they were accused. Societal tolerance for such perceived travesties of justice waned and the English legislators responded to victims’ rights groups in altering their previously steadfast approach to double jeopardy.

American Application

While numerous countries maintain variations of double jeopardy, the American approach remains one of the more potent provisions. Enshrined in the Constitution, the proscription against double jeopardy cannot be undermined by the kind of legislative pronouncement that occurred in England and appears to be under way in Australia. Furthermore, unlike Korea, where the prosecution can appeal a defendant’s acquittal, only in the rarest instances may the state or federal government appeal a criminal judgment.

The American interpretation, however, has not always provided criminal defendants a formidable defense. For nearly two hundred years, the Fifth Amendment’s double jeopardy protection was limited solely to actions by the federal government and its subdivisions. Not until the Supreme Court’s 1969 decision in *Benton v. Maryland*, 395 U.S. 784 (1969), did the Double Jeopardy Clause extend equally to state governments. *Benton* considered the Fifth Amendment promise against multiple prosecutions and multiple punishments to “represent a fundamental ideal in our constitutional heritage” and, accordingly, held double jeopardy to be applicable to the states through incorporation of the Fourteenth Amendment. Having so found, the Supreme Court decision in *Benton* mandates that double jeopardy determinations now be governed by federal standards rather than state nuances.

Nonetheless, states retain certain flexibility under double jeopardy due to the dual sovereignty doctrine. In 1922, the Supreme Court explicitly recognized the power of distinct sovereigns to prosecute an individual for criminal conduct falling within the jurisdiction of both in *United States v. Lanza*, 260 U.S. 377 (1922). Thereafter, in 1985, the Court further expanded the dual sovereignty doctrine to permit separate prosecutions by distinct state sovereigns in *Heath v. Alabama*, 474 U.S. 82 (1985). By holding that each state has

independent power to determine an individual's guilt or innocence under the state's criminal code for all conduct occurring within that state, the Supreme Court permitted a subsequent prosecution of Heath for murder, which resulted in a much harsher sentence than had been received in the other state prosecution. The Supreme Court held that separate, independent sovereigns possess the right to try a criminal defendant for conduct occurring within their separate borders. The conduct, constituting independent criminal acts in each state, is not protected by double jeopardy because the conduct offends both sovereigns equally.

The dual sovereignty doctrine was extended recently to embrace dual prosecution by the federal government and tribal courts on Indian reservations in *United States v. Lara*, 541 U.S. 193 (2004). Thus, although the Fifth Amendment protects against multiple prosecutions by the same sovereign—or subdivisions thereof—double jeopardy poses no bar to separate prosecutions by independent sovereigns.

Two of the more renowned instances of separate prosecutions by independent sovereigns include the Rodney King case defendants' subsequent federal trials following state acquittals and Terry Nichols's subsequent state capital trial following a federal trial resulting in a life sentence.

Finally, double jeopardy does not affect the ability of a private individual to sue civilly for conduct that may be prohibited by criminal and civil law. The paradigm example continues to be the O. J. Simpson case, in which Simpson was subsequently sued civilly for wrongful death following his acquittal for murder.

Multiple Prosecutions

In its most literal sense, the Double Jeopardy Clause protects against multiple prosecutions after an individual has been acquitted. Double jeopardy ensures that the prosecution will put forth its strongest case first and allow a jury, rightly or wrongly, to assess the defendant's guilt.

In the United States, jeopardy attaches once the jury is sworn or once the prosecution introduces evidence in a trial before the court. Once jeopardy attaches, courts and prosecutors are prevented from retrying an individual for the same offense unless: (1) the jury is unable to return a verdict, or (2) a mistrial is granted and there is a manifest necessity to retry the defendant in the interest of justice. This second category presumes the absence of prosecutorial or judicial misconduct in securing the mistrial.

Finally, although the ability of the government to appeal criminal convictions is extremely limited, a defendant's successful appeal will not bar his or her reprosecution on double jeopardy grounds as voluntary appeal operates as a waiver to reprosecution.

The double jeopardy limitation of the same offense does not preclude multiple counts emanating from a single criminal episode and does not prohibit multiple prosecutions for separate crimes against separate individuals, even when there was but a single criminal act, such as two murders during a single robbery. Rather, the "same offense" test as set forth in *Blockburger v. United States*, 284 U.S. 299 (1932), to "determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not." A good example of the *Blockburger* test in application is the Supreme Court's decision in *Brown v. Ohio*, 432 U.S. 161 (1977), where the Court determined that an attempted second prosecution for stealing an automobile was barred by double jeopardy when the defendant had previously been convicted of operating the same vehicle without the owner's consent. Finding that the misdemeanor count of joyriding was a lesser-included offense of auto theft, the Court held that the defendant had been twice put in jeopardy for the same offense and reversed the subsequent prosecution.

As a reminder that double jeopardy operates as a limitation on courts and prosecutors, the *Brown* Court struck down the state court's interpretation of double jeopardy, stating that the "Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units."

Likewise, the Supreme Court found in *Ashe v. Swenson*, 397 U.S. 436, that the doctrine of collateral estoppel is embodied by the Double Jeopardy Clause. In *Ashe*, the defendant had been accused of participating in the robbery of six men at a poker game. Prosecutors decided to try the defendant for only one of the robberies first. At this trial, the main issue was identity and the jury returned a verdict of not guilty due to insufficient evidence. During the subsequent trial, defendant raised the defense of double jeopardy when the state presented a much stronger argument regarding identification. The Court had no difficulty finding this second attempted trial to be barred by double jeopardy through the application of collateral estoppel (the issue of identity having been resolved in the first trial), remarking that "for whatever else that constitutional guarantee may embrace, it surely protects a man who has been acquitted from having to 'run the gauntlet' a second time."

Multiple Punishments

A person may not be punished twice for the same offense. The difficulty often arises in defining punishment. For instance, individuals that appeal their criminal conviction may be reprosecuted and repunished and this does not violate double jeopardy. However, someone who has been convicted of a lesser included offense may not be retried or later punished for the greater crime, even following a successful appeal. This is because failure to convict on the greater offense retains the initial jeopardy and subsequent efforts to resurrect the previously faced, though defeated, charge are barred.

Similarly, once an individual has successfully avoided the death penalty in the initial proceeding, a successful appeal of the case will not permit retrial where the defendant is again subjected to possible capital punishment. Instead, an individual that was spared the death penalty is presumed to have had jurors find in his or her favor on the capital issues and can only be reprosecuted with a potential prison term. Other than death penalty cases, there is no limit on resentencing following a proper retrial.

Another important question under the multiple punishment doctrine is whether civil fines, forfeitures, and administrative proceedings qualify as "punishment." The general rule is that matters that are remedial in nature and not intended as punishment do not equate to punishment. Loss of driving license following a charge of driving while intoxicated is the prime example of an administrative sanction that is not considered as punishment for double jeopardy purposes.

The more controversial issue is whether a civil forfeiture of a home, car, or simply monetary funds qualifies as "punishment" under double jeopardy. The general answer following the Supreme Court's decision in *United States v. Ursery*, 518 U.S. 267 (1996), is that civil forfeitures do not constitute punishment under double jeopardy. Despite the fact that civil forfeitures may contain punitive elements, the *Ursery* Court found sufficient nonpunitive elements involved to permit application of civil forfeiture and criminal sanction in the same proceeding without violating double jeopardy. While civil forfeitures may be immune from claims of double jeopardy, such fines and forfeitures may nonetheless be subject to review under the Eighth Amendment proscription against cruel and unusual punishment.

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References and Further Reading

Sigler, Jay A. "A History of Double Jeopardy." *American Journal of Legal History* 7 (1963):285.

Cases and Statutes Cited

Ashe v. Swenson, 397 U.S. 436
Benton v. Maryland, 395 U.S. 784 (1969)
Blockburger v. United States, 284 U.S. 299 (1932)
Brown v. Ohio, 432 U.S. 161 (1977)
Heath v. Alabama, 474 U.S. 82 (1985)
United States v. Lanza, 260 U.S. 377 (1922)
United States v. Lara, 541 U.S. 193 (2004)
United States v. Ursery, 518 U.S. 267 (1996)

DOUGLAS v. CALIFORNIA, 372 U.S. 353 (1963)

In *Douglas v. California*, 372 U.S. 353 (1963), decided the same day as *Gideon v. Wainwright*, 372 U.S. 335 (1961), the Supreme Court held that the right to the assistance of counsel at state expense applied to defendants on a first level of appeal, extending *Gideon* to the first stage of appeal. In *Douglas*, two defendants were charged with thirteen felonies and both were represented by a single public defender. Both of the defendants were convicted after trial and both appealed. The defendants requested counsel be appointed for them on appeal and the court refused to grant their request, even though neither of them could afford to pay a lawyer.

Under California statutory law, a rule of criminal procedures requires state appellate courts upon the request for a lawyer to review the record independently to see whether counsel would be helpful. If the court concludes that counsel would be helpful, counsel should be appointed. The California appellate court stated it had gone through the record and reached the conclusion that "no good whatever could be served by the appointment of counsel." It then upheld the defendants' convictions and held that the court had properly refused to give them counsel at state expense.

The U.S. Supreme Court reversed the defendants' convictions. It disagreed with the California appellate court and found that the California procedure allowing the state court to decide whether counsel was necessary to be unconstitutional. The Court held that the procedure violated the Equal Protection Clause of the Fourteenth Amendment because "the type of an appeal a person is afforded . . . hinges upon whether or not he can pay for the assistance of counsel." If a defendant can pay, explained the Court, the appeals court will consider his appeal in full, which includes written briefs and oral argument by counsel. If he cannot, the court is allowed to prejudge the merits before it even decides whether a lawyer should be appointed. According to the Court, "the indigent, where the record is unclear or

the errors are hidden, has only the right to a meaningless ritual, while the rich man has a meaningful appeal.”

In so holding the Court made clear that it was not deciding whether a lawyer would have to be appointed for a poor person at any higher level of appeal beyond the first-level appeal after a conviction in a criminal case.

Justice Clark dissented. He began by noting that “the overwhelming percentage of appeals by indigents are frivolous and that California has adopted a procedure that saves it the unnecessary expense of the ‘useless gesture’ of providing counsel in such cases.” The justice would have held that this procedure did not violate Due Process or Equal Protection. In support of his conclusion, Justice Clark pointed to the U.S. Supreme Court’s procedure for dealing with petitions for review by unrepresented poor people: in the prior term of the Court, it had decided over 1200 such applications without appointing any lawyers or requiring a full record. California, he noted, furnishes a complete record to every poor person and, if counsel is requested, (1) appoints counsel; or (2) makes an investigation of the record to determine whether counsel would be advantageous. As Justice Clark concluded, “People who live in glass houses had best not throw stones.”

Justice Harlan, joined by Justice Stewart, separately dissented. Justice Harlan did not believe that Equal Protection was relevant and would have held that due process did not require the appointment of a lawyer on a first appeal. First, Justice Harlan explained that the states are free to pass a statute “of general applicability that may affect the poor more harshly than it does the rich,” but that the Equal Protection clause does not require the states to “lift the handicaps flowing from differences in economic circumstances.” Second, as for due process, Justice Harlan was not willing to find that a defendant would be deprived of adequate appellate review without a lawyer. Justice Harlan did not believe that the state’s rule was “so arbitrary or unreasonable” to render it unconstitutional.

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Cases and Statutes Cited

Douglas v. California, 372 U.S. 353 (1963)

See also *Betts v. Brady*, 316 U.S. 455 (1942); *Due Process*; *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Powell v. Alabama*, 287 U.S. 45 (1932); *Right to Counsel*; *Ross v. Moffitt*, 417 U.S. 600 (1974)

DOUGLAS, WILLIAM ORVILLE (1898–1980)

William O. Douglas served longer on the U.S. Supreme Court than any other justice, and his thirty-six-year tenure spanned major transformations in mid-twentieth-century American society. After a brief stint as a lawyer in a large New York law firm, Douglas turned to teaching, first at Columbia and then at the Yale Law School, where he became one of the leaders of the legal realism school. During the New Deal he came to Washington first as a commissioner and then as chair of the Securities Exchange Commission. He also became a poker buddy of Franklin Roosevelt, who named him to the Court to succeed Louis D. Brandeis in February 1939.

Justice Douglas’s judicial opinions do not fit within any particular school of legal doctrine, although he is associated with the legal realists and considered an activist and a liberal jurist. In fact, he resisted the concept of legal doctrine and rejected any set of propositions from which resolutions of legal controversies could be deduced. Instead, he believed that his job as a justice was to make decisions about specific sets of facts in their particular social, economic, and political contexts. As situations changed, his decisions changed. Initially, he did not appear to be any sort of champion of civil liberties; by the time he retired, he was hailed as one of the staunchest defenders of individual liberties ever to sit on the Court.

Justice Douglas brought to the Court a distinctive approach to law and judging and insisted on an empirical approach to legal problems in the light of actual social, political, economic, and psychological realities. For the legal realists, concentration on doctrine and precedents masked the vital actuality of present circumstances. Although Justice Douglas sometimes referred approvingly to “sociological jurisprudence,” he avoided describing himself as a legal realist or as a functionalist. He was far too independently minded to associate with anything that sounded like orthodoxy.

Having rejected legal doctrine as a basis for judicial decision making, the justice gradually developed a distinctive judicial style. In simplest terms, he considered his job to decide cases. Justice Douglas believed he was responsible for making his own decision in each case that came before the Court and said that he agreed with Thomas Jefferson that each judge should give his individual opinion in every case. Explaining decisions was of secondary importance to deciding cases. Justice Douglas generally avoided established legal doctrine. He said he was opposed to *stare decisis*, the judicial practice of deciding cases based on precedent, because present controversies should be decided on their own terms, rather than

by applying past cases. Particularly in constitutional cases, the justice thought *stare decisis* was an excuse for not making hard choices about how to apply constitutional values to new circumstances. He often said that he would rather create a precedent than find one.

The Douglas approach to judicial decision-making has been often criticized as result oriented: first deciding the result he wanted to reach and then building an argument for the correctness of that outcome. Critics also have disparaged some of his judicial opinions as careless, slapdash polemics. Justice Douglas was generally unperturbed by criticisms that he was result oriented or intellectually untidy. For him, life, including law, was just like that. Judicial opinions should provide solutions to real-life problems, not academic dissertations about legal doctrine. Sometimes he gave no reasons at all. Since deciding the case was the point of judging, and supporting reasons were far less important, it is not surprising that he did not often invest a lot of time developing the latter.

Justice Douglas had an uncanny ability to understand what was at issue in complicated cases and to envision new ways of looking at them. A typical Douglas opinion is filled with facts and may even have an appendix or two to provide even more background for his view of the case. He would first focus on the facts at issue and then find a key, pivotal issue at the heart of the legal controversy. In the latter part of his judicial career, he grasped cases especially quickly because he believed that legal controversies, like much of human behavior, fall into cyclical patterns, recurring every decade or so.

The justice's opinion for the Court in *Griswold v. Connecticut*, 381 U.S. 479 (1965), which recognized a penumbral right of privacy in the Constitution, provides a typical as well as famous example of his characteristic approach to judicial decision-making. In *Griswold*, the Court held unconstitutional a Connecticut criminal statute prohibiting the use and distribution of contraceptives. Justice Douglas saw the heart of the case as marital privacy: "Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives?" he asked, and then answered: "The very idea is repulsive to the notions of privacy surrounding the marriage relationship." The justice's opinion found that the penumbras of various constitutional guarantees establish a "right of privacy older than the Bill of Rights," which protects marriage as "a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred." His insight into what was really at stake in *Griswold* retains remarkable vitality.

According to Justice Douglas, the Constitution not only established the Supreme Court's political role, but also provided a set of general principles that the Court was to apply. These constitutional principles provided a philosophy which must be interpreted and applied by judges in light of their lives and experiences. For the justice, such a dynamic approach to constitutional interpretation was not at all incompatible with strict construction. Justice Douglas considered himself a strict constructionist, like Hugo Black, because he believed strict construction meant not subtracting from or making exceptions to constitutional freedoms. He also considered himself a strict incorporationist because he believed that all of the rights contained in the Bill of Rights were incorporated into the Fourteenth Amendment's due process guarantee against state and local action that deprives individuals of liberty.

Among the more interesting examples of Justice Douglas's adjustment of constitutional guarantees to contemporary circumstances was his 1946 opinion in *United States v. Causby*, 328 U.S. 256 (1946). The case was brought by a North Carolina chicken farmer whose property served as a glide path for military aircraft using an adjacent airport during World War II. The farmer sought compensation under the Takings Clause of the Fifth Amendment because the overflights made his property less valuable. Justice Douglas's opinion recognized two important realities. First, modern air transport requires use of the air space above private property as part of the public domain, where airplanes can fly without restriction by those who own the land below. At the same time, the farmer's particular circumstances involved frequent low-level takeoffs and landings. That particular pattern of overflights, so low that they frightened the farmer's chickens literally to death, was a government use of the farmer's land. Since this government use made the farmer's land less valuable, the farmer was entitled to recover just compensation for his loss.

For Justice Douglas, applying constitutional guarantees that the government will not take property without paying just compensation required focusing on what was really at stake: the devaluation of the chicken farmer's land by the government's overflights. In a sense, the decision is result oriented: big government should bear the financial loss rather than the small farmer. But the opinion's apt focus on the particular circumstances of the case also exemplifies the justice's characteristic ability to apply the Constitution to new circumstances and technologies.

Change was at once inevitable and beneficial in his view. Unconstrained by commitment to doctrinal consistency, Douglas was notably uninhibited about changing his mind. There are many instances of cases

in which he simply admitted that an earlier decision or view was wrong. In the 1940s, the Supreme Court decided a series of cases that involved the constitutionality of compelling school children to salute the American flag. In *Minersville School District v. Gobitis*, 310 U.S. 586 (1940), Justice Douglas first voted with the majority of the Court that Jehovah's Witnesses children could be compelled to salute the flag, even though doing so violated their religious beliefs. Three years later, in *Board of Education v. Barnette*, 319 U.S. 624 (1943), he changed his mind and joined Justice Black in a concurring opinion that argued that forced expression contrary to an individual's religious principles violates the First Amendment.

In 1952, Justice Douglas forthrightly declared that he had changed his views with regard to the constitutionality of electronic surveillance. Dissenting in *On Lee v. United States*, a case involving a narcotics agent carrying a hidden microphone, he simply confessed that his earlier tolerance of electronic surveillance in *Goldman v. United States* (1942) had been mistaken. "I now more fully appreciate the vice of the practices spawned by . . . *Goldman*. Reflection on them has brought new insight to me. I now feel that I was wrong in the *Goldman* case" (in not voting to overrule *Olmstead v. United States*, 277 US 438, 1928, which had found wiretapping to be constitutional).

In addition to cases in which Justice Douglas changed his mind and said so, his flexible approach in deciding particular cases greatly annoyed some of his judicial colleagues, especially Felix Frankfurter. The Japanese exclusion cases and the Rosenberg espionage case are two prominent examples. In these cases, which involved highly charged political controversies, the justice did not see himself or his decisions as inconsistent. In his view, he simply responded to the particular circumstances of various aspects of the cases to help resolve difficult tensions among strongly held values and interests.

The three Japanese exclusion cases, *Hirabayashi v. United States*, 320 U.S. 81 (1943), *Korematsu v. United States*, 323 U.S. 214 (1944), and *Ex parte Endo* (1944), contested the legality of military orders that imposed curfews, relocation, and detention of Japanese on the West Coast after the attack on Pearl Harbor. Justice Douglas filed a concurring opinion in *Hirabayashi* that upheld the legality of a curfew order against persons of Japanese ancestry. He voted with the majority in *Korematsu*, in which the Supreme Court upheld an order excluding persons of Japanese ancestry from military areas of the West Coast and providing for their relocation and detention. Although the justice opposed racial and ethnic

discrimination and said so repeatedly in his opinions, he thought that the wartime circumstances presented by the *Korematsu* and *Hirabayashi* cases involved a genuine national emergency sufficiently grave to warrant interference with individual civil rights.

Justice Douglas's sense that the nation was in imminent danger was probably particularly acute because, during this time, he was a frequent visitor at the White House, where the fear of Japanese invasion of the West Coast must have been palpable. However, his opinion for the Court in *Ex parte Endo* focused on the conceded fact that Mitsuye Endo was a loyal American citizen who posed no danger to the war effort or national security. Justice Douglas's context-bound realist view saw that the government's exclusion of Endo was unjustified and therefore unconstitutional.

Much of William O. Douglas's judicial philosophy focused on the importance of individual freedom and equality. In his 1958 book, *Right of the People*, he declared, "Our Society is built upon the premise that it exists only to aid the fullest individual achievement of which each of its members is capable. Our starting point has always been the individual, not the state."

The justice's concerns about individual freedom were mostly focused on threatened government oppression, although he sometimes also expressed misgivings about domination of independent entrepreneurs by what he called the unelected "industrial oligarchy." Early in his judicial career he was sometimes willing to subordinate individual rights to broader government interests. For example, in the emergency circumstances of World War II, Justice Douglas thought it constitutionally acceptable to sacrifice the rights of individuals of Japanese ancestry in the interests of national security.

In the early 1950s, he became increasingly concerned about the dangers posed by government regimentation of individual freedom. He came to believe that one of the most important purposes of the Constitution was to restrain government. Dissenting in *Laird v. Tatum* (1972), he declared, "The Constitution was designed to keep government off the backs of the people. The Bill of Rights was added to keep the precincts of belief and expression, of the press, of political and social activities free from surveillance." In Justice Douglas's view, "The aim [of the Bill of Rights] was to allow men to be free and independent and to assert their rights against government."

Justice Douglas provided the most comprehensive discussion of his views regarding individual freedoms guaranteed by the Constitution in connection with the 1973 abortion cases, *Doe v. Bolton*, 410 U.S. 179 (1973), and *Roe v. Wade*, 410 U.S. 93 (1973), in

which the Supreme Court invalidated Georgia and Texas abortion statutes on privacy grounds. In his concurring opinion in *Bolton*, he described what he called “a reasoning” about individual rights, which are guaranteed by the Bill of Rights and are included within the right to liberty protected against state government interference under the Fourteenth Amendment to the Constitution. Douglas suggested three concentric circles of individual rights:

“First is the autonomous control over the development and expression of one’s intellect, interests, tastes, and personality.” The justice saw these rights, including freedom of conscience and free exercise of religion, as aspects of freedom of thought and conscience that were absolutely protected under the First Amendment without any exceptions or qualifications. In this absolutely protected area, he also placed the right to remain silent under the Fifth Amendment.

“Second is freedom of choice in the basic decisions of one’s life respecting marriage, divorce, procreation, contraception, and the education and upbringing of children.” These fundamental rights, including the right of privacy involved in *Griswold* and the abortion cases, were outside the absolute protection of the First Amendment and were therefore subject to some reasonable control by the regulatory power of government. Nevertheless, any regulation had to be narrowly drawn and supported by a compelling state interest.

“Third is the freedom to care for one’s health and person, freedom from bodily restraint or compulsion, freedom to walk, stroll, or loaf.” These rights protected individuals as they interacted with others out in the world where the individual, although not exactly immune from government regulation, nevertheless retained certain rights to be let alone by the government, even in relatively public circumstances.”

The particular individual freedom with which Justice Douglas is most closely associated is the right of privacy. He derived many of his views about protecting individual privacy against government interference from his predecessor on the Court, Louis D. Brandeis. But he nearly always referred to a right “of” privacy, rather than Justice Brandeis’s right “to” privacy. Moreover, Justice Douglas’s right of privacy was solely focused on governmental threats to privacy. He rejected imposing damage liability for invasions of privacy by the news media, which Brandeis had suggested many years earlier. For example, dissenting in *Public Utilities Commission v. Pollak* (1952), the justice argued that when the government forced a “captive audience” of riders on the publicly licensed street cars in the District of Columbia to listen to radio broadcasts, such action infringed on the privacy rights of individuals to be let alone by the government.

After repeatedly calling for recognition of a constitutional right of privacy in a series of dissenting opinions, Justice Douglas eventually persuaded a majority of the Court to adopt his views about privacy in *Griswold*. In that case, he characterized the right of privacy as based on “several fundamental constitutional guarantees” of individual freedom, including the First Amendment right of association, the Third Amendment’s prohibition of quartering soldiers, the Fourth Amendment’s prohibition of unreasonable searches and seizures, and the Fifth Amendment’s prohibition of compelled self-incrimination. His opinion for the Court found the right of privacy in the penumbras of these constitutional guarantees. In Justice Douglas’s view, “Specific guarantees of the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy.”

For Justice Douglas, the right of privacy was part of the meaning of the Constitution, even though the word “privacy” does not appear in the text. One had only to open one’s eyes and one’s mind to see it. He believed that the right of privacy is consistent with strict construction of the Constitution because it is part of what the Bill of Rights means. Since he also believed that all of the guarantees of individual freedom in the Bill of Rights are included as aspects of the liberty protected against state action under the due process clause of the Fourteenth Amendment, states such as Connecticut were constrained to respect the right of privacy along with the rest of the Bill of Rights. The justice did not believe that the right of privacy was the same thing as substantive due process, which he rejected as simply fastening extra-constitutional personal views and economic preferences of particular justices on the Constitution. The right of privacy was, for him, part and parcel of the Constitution.

Justice Douglas came to agree with Justice Black that First Amendment guarantees of freedom of expression and religion permit no governmental regulation of any kind with regard to speech, press, religion, conscience, or association. In the appeal of the conviction of the Communist Party leaders (*Dennis v. United States*, 341 U.S. 494, 1951), Justice Douglas entered a short but extremely effective dissent that tore apart the weak reasoning of Chief Justice Vinson’s majority opinion upholding the convictions. He searched the record to find evidence—any evidence—that the defendants had done anything else than talk and could find no proof that that had committed a single act of any sort, even conspiracy to act. Although vilified at the time for his defense of

free speech even for communists, Justice Douglas's dissent has become one of the great markers in free speech jurisprudence. Thomas Emerson noted an essential ingredient in his thought: a "remarkable ability to grasp the realities of the system of free expression." For Justice Douglas, free speech could only be understood in the larger context of facts. The power of his dissent lies in his reliance on the facts of the case.

Justice Douglas dissented in obscenity cases such as *Roth v. United States*, 354 U.S. 476 (1957), in which he stated, "The First Amendment, its prohibition in terms absolute, was designed to preclude courts as well as legislatures from weighing the values of speech against silence. The First Amendment puts free speech in the preferred position." Even though the justice was a victim of obnoxious press accounts of his personal life, he believed that awarding damages for defamation or invasion of privacy was unconstitutional because it involved penalizing the media for disseminating information. For example, he concurred in rejecting the invasion of privacy action in *Time v. Hill*, 385 U.S. 374 (1957), which involved a sensationalized magazine account of a family's experience as hostages of escaped criminals. He was concerned that the possibility of having to pay damages might discourage publication.

Because he believed in the intrinsic worth of each individual, Justice Douglas consistently favored equality of opportunity. A case involving a special admissions program for minority applicants to the University of Washington Law School (*DeFunis v. Odegaard*, 1974) presented a particularly difficult equal protection question. The majority found the case moot because the nonminority plaintiff was in his last semester of law school and would graduate no matter what the Court decided. Justice Douglas thought the Court should decide the case.

Repeatedly insisting on racial neutrality and decrying racial, religious, and ethnic quotas, the justice took a hard look at law school admissions practices. After carefully considering the circumstances, he concluded that the law school's special admissions process was constitutional because, in his view, it was designed to individualize and to equalize the treatment of applicants from minority backgrounds. "I think a separate classification of these applicants is warranted, lest race be a subtle force in eliminating minority members because of cultural differences," he wrote. At the same time, he also insisted that "there is no constitutional right for any race to be preferred." For Justice Douglas, equal protection, like many constitutional values, involved a complex balancing of the realities of the situation. Individualized treatment

in this instance satisfied his understanding of the spirit of equal protection.

The justice's concerns about individual equality are also reflected in his application of equal protection guarantees to strictly scrutinize legislative classifications that affect fundamental rights. Among the most interesting examples of this approach to equal protection guarantees was his inventive 1942 opinion for the court in *Skinner v. Oklahoma*. His opinion describes Oklahoma's Habitual Criminal Sterilization Act at issue in the case as "legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. There is no redemption for the individual whom the law touches He is forever deprived of a basic liberty."

Therefore, the opinion concludes, the Court should apply "strict scrutiny of the classification" that differentiated between those convicted of grand larceny and others convicted of such similar property crimes as embezzlement. Careful scrutiny was required "lest unwittingly, or otherwise, invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws." Since Oklahoma provided no reasons why it needed to sterilize people who had been three times convicted of grand larceny, but not people who had been three times convicted of embezzlement, the statute was unconstitutional. "The equal protection clause would indeed be a formula of empty words if such conspicuously artificial lines could be drawn," when such fundamental individual rights as the right to have children is at stake. Justice Douglas later applied this strict scrutiny approach in invalidating Virginia's \$1.50 annual poll tax as a condition for voting in state elections in *Harper v. Virginia State Board of Elections* (1966). His idea that legislative classifications that affect fundamental individual rights must be strictly scrutinized by the courts has proved to be powerful as well as enduring.

William O. Douglas's judicial work was as eclectic as it was prolific. People tend to agree strongly or equally strongly to disagree with his independent-minded judicial philosophy, much as they intensely liked or disliked the blunt-spoken and impatient man. Some of his judicial opinions have a remarkable resonance and eloquence. Some are political tracts. Still others appear to have been carelessly thrown together. Through it all, Justice Douglas had an insight into the American spirit, an ability to articulate constitutional values, and a power to provoke thought and argument that few Supreme Court justices have equaled.

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References and Further Reading

- Ball, Howard, and Philip J. Cooper. *Of Power and Right: Hugo Black, William O. Douglas and America's Constitutional Revolution*. New York: Oxford University Press, 1992.
- Belknap, Michal R. *Cold War Political Justice: The Smith Act, the Communist Party, and American Civil Liberties*. Westport, CT: Greenwood Press, 1977.
- Douglas, William O. *Go East, Young Man: The Early Years*. New York: Random House, 1974.
- . *The Court Years: The Autobiography of William O. Douglas*. New York: Random House, 1980.
- Emerson, Thomas. *Mr. Justice Douglas' Contribution to the Law: The First Amendment*, *Columbia Law Review* 74 (1974): 354.
- Murphy, Bruce Allen. *Wild Bill: The Legend and Life of William O. Douglas*. New York: Random House, 2003.
- Simon, James. *Independent Journey*. New York: Harper & Row, 1980.
- Urofsky, Melvin. *William O. Douglas as a Common Law Judge*, *Duke Law Journal* 41 (1991): 133.
- Wasby, Stephen L., ed., “He Shall Not Pass This Way Again.” *The Legacy of Justice William O. Douglas*. Pittsburgh: University of Pittsburgh Press, 1990.
- White, G. Edward. “The Anti-Judge: William O. Douglas and the Ambiguities of Individuality.” In *The American Judicial Tradition*, New York: Oxford University Press, 1988.

DOUGLASS, FREDERICK (1818–1895)

Born Frederick Augustus Washington Bailey, Frederick Douglass liberated himself from his Baltimore owner's possession at the age of twenty. Beaten and exploited by a series of plantation owners, Douglass nonetheless taught himself to read and write. He found relative safety in New Bedford, Massachusetts, calling himself Douglass and securing work as a manual laborer. He subscribed to William Lloyd Garrison's *The Liberator*, an abolitionist paper, and within a few months he became a full-time lecturer for the Massachusetts Anti-Slavery Society. Traveling with Garrison and other abolitionists, Douglass developed a reputation as a powerful, passionate speaker, and his greatest asset was his ability to speak firsthand of the horrors of slavery.

As Douglass spoke about his enslavement, he was forced to be vague about his circumstance. As an escaped slave, Douglass could be recaptured and sent back to his master. He was encouraged to write his story and, by the summer of 1845, had published *The Narrative of the Life of Frederick Douglass*. The book was an immediate success, but Douglass had included enough information to identify his former master, so friends implored him to go to Europe. Douglass spent most of the next two years touring

the British Isles, returning to find that supporters had raised enough money to purchase his freedom.

Returning home committed to continuing his abolitionist activity, Douglass decided to create his own paper. Advised by his friend William Lloyd Garrison that an abolitionist paper written by a black man would not succeed financially, Douglass nonetheless pressed forward. An argument over the issue ended the friendship between the two men, and Douglass moved to Rochester, New York, and began publishing the *North Star*. Unwilling to take direction from Garrison or any other white abolitionist and believing that blacks should be more prominent in abolitionist activities, Douglass began to believe that emancipation could be achieved through political means. To that end, much of the *North Star's* message was directed toward free blacks, calling for their self-improvement and cooperation.

Openly supportive of other reform movements, such as temperance and women's rights, Douglass also attracted attention from more militant reformers. John Brown tried to recruit him for his assault on Harper's Ferry, but Douglass refused.

After President Lincoln's assassination, Andrew Johnson offered the position of head of the Freedman's Bureau, which Douglass declined. Douglass supported Ulysses S. Grant in his run for the 1868 presidency, then turned his attention to other political matters. He worked for the passage of the Fifteenth Amendment, which guaranteed blacks the right to vote, then was appointed president of the Freedman's Savings and Trust Company. Three years later Douglass received another political appointment, this time as the U.S. Marshal for Washington, D.C. He served in that and other political positions until his retirement.

Thousands of schoolchildren read Douglass's autobiography in English and history classes. Few other examples tell as profound a story as Douglass's writing. Born a slave, self-educated and self-liberated, Douglass had only just begun his real life's work when he wrote his autobiography. The real success came years later: political activist and ideological crusader, Douglass embraced not only the cause of abolitionism, but also feminism and temperance.

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References and Further Reading

- Douglass, Frederick. *Narrative of the Life of Frederick Douglass, An American Slave, Written by Himself*. Boston: Bedford Books, 1993.
- Quarles, Benjamin. *Frederick Douglass*. New York: Da Capo Press, 1948.

DRAFT CARD BURNING

Several years before mass demonstrations protesting America's involvement in the Vietnam War became commonplace in the 1970s, David Paul O'Brien, along with three others, stood on the steps of the South Boston, Massachusetts, courthouse and, in front of a crowd of people, burned his selective service registration certificate, better known as a draft card. It was March 31, 1966, and O'Brien's protest provoked the crowd to attack him and his companions. Among the onlookers were several FBI agents; after ushering O'Brien inside the courthouse, they arrested him for violation of Title 50 of the *United States Code*, section 462(b), prohibiting the willful and knowing mutilation or destruction of a registration certificate. Throughout the course of the litigation, O'Brien claimed that his conviction was barred by the First Amendment. At trial, he admitted that he knowingly destroyed his draft card, but took the position that his conduct was intended to be public affirmation of his disapproval of the draft and the war, and the lawful exercise of free speech.

O'Brien was convicted in the District Court for the District of Massachusetts. On appeal, the First Circuit held that the statute criminalizing the mutilation of the draft card was an unconstitutional infringement on the defendant's rights of free speech. It did, however, affirm his conviction based upon a regulation that required persons to carry their registration cards with them at all times, a crime with which he had not been charged or convicted.

O'Brien and the United States appealed. The Supreme Court granted certiorari and, in what might be considered a landmark case, held that the question of whether "expressive conduct" or "symbolic speech"—that is, activity containing speech and nonspeech elements—is protected by the First Amendment will be governed by a four-prong test. The so-called "*O'Brien* test" is generally acknowledged to be less exacting than strict scrutiny and is sometimes referred to as "intermediate scrutiny":

[A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest (*United States v. O'Brien*, 391 U.S. 367, 377, 1968).

Writing for the Court, Chief Justice Earl Warren refused to concede that O'Brien's conduct was actually intended to send a message; however, he proceeded to apply the test to the facts of that case. After first acknowledging that Congress's power to raise and

support armies and to make all laws necessary and proper to achieve that end is extremely broad, the Court proceeded to announce four purposes of the selective service registration card and the restrictions relating to prohibition against mutilation, none of which was aimed at expression.

First, the Court said, the certificate was proof that the holder has registered for the draft. In a time of national crisis, possession of the registration card (which, along with the certification card that also had to be kept on one's person, contained all relevant information concerning the holder's draft status) facilitated "immediate induction, no matter how distant in our mobile society [the registrant] may be from his local board." Second, the cards together facilitated communication with the local draft boards. Boards could respond to requests for information more easily if the person requesting the information had all this information on hand at all times. Third, carrying both cards was a reminder to the holder that he had to inform the local draft board of any changes in the information, such as his residential address. Finally, the prohibition against mutilation assisted the government in achieving the permissible purpose of prohibiting alteration of the cards for a deceptive reason.

The Court then disposed of O'Brien's argument that these interests were already furthered by the requirement that the cards be kept on one's person because the two statutes protect overlapping but different governmental interests. The Court noted that the antidestruction provisions would apply to a person's mutilating a third party's certificate, but the possession requirements applied only to the owner of the certificates. The Court dealt with the fourth prong—the narrowness of the regulation—merely by concluding that it could perceive no alternative that would more narrowly achieve the government interests at stake.

Finally, the Court addressed O'Brien's contention that the statute was passed with the intent of curtailing speech, an argument that had factual support. O'Brien relied on statements made by three congressmen that the statute was enacted to stop dissidents from burning the cards in protest of the war in Viet Nam. The majority summarily disposed of the arguments by reaffirming long-standing Supreme Court jurisprudence that legislative purpose is difficult to ascertain and is not a legitimate basis for declaring a facially constitutional statute unconstitutional. Besides, the Court said, hearings before the Senate and House Armed Services Committees spoke not only to the "defiant" destruction of the cards, but also to the necessity of maintaining them to ensure the smooth functioning of the selective service system, a goal unrelated to expression.

Justice Harlan issued a brief concurrence to make explicit his belief that the *O'Brien* test would not “foreclose consideration” under the First Amendment of claims based upon regulations at issue that passed that test, but had the effect of preventing entirely communication of the speaker’s views. O’Brien, he said, had other ways of making his position heard.

Justice Douglas dissented. Congress, he said, had no authority to conscript persons in the absence of a declaration of war; therefore, the statutes at issue were beyond Congress’s power. The justice would have addressed that issue, not raised by O’Brien, but raised apparently by a number of cases in which the Supreme Court had refused to grant certiorari.

The *O'Brien* case is frequently referred to as the “leading case” in First Amendment jurisprudence when courts are called upon to evaluate so-called “content-neutral” statutes—that is, statutes not aimed at the message being expressed. The Supreme Court has directly relied on *O'Brien* in deciding a number of First Amendment cases since 1968. Twice, the Supreme Court has applied the O’Brien test to ordinances regulating public nudity. In *Barnes v. Glen Theaters*, 501 U.S. 560 (1991), and *City of Erie v. Pap’s A.M.*, 529 U.S. 57 (2000), first a plurality then a majority of the Court applied *O'Brien* and held that public nudity statutes (which prohibited nude dancing and required dancers to wear pasties and g-strings) were constitutional, even though they imposed an incidental burden on expression, because a government clearly has the authority to regulate societal order and morality and, in these cases, it did so in a manner unrelated to expression. The requirement that dancers wear pasties and a g-string was a “de minimus” interference with the dancers’ abilities to send the erotic message.

Two years earlier, the Court considered applying *O'Brien* to one of the numerous flag-burning statutes that have come before the Court. In *Texas v. Johnson*, 491 U.S. 397 (1989), the Court rejected applying the more lenient standard because Texas could not posit a purpose to the statute prohibiting mutilation of the flag that was unrelated to speech; therefore, the “more exacting” strict scrutiny standard applied. The Court did, however, reconfirm that not all conduct with a communicative element will be suitable for the *O'Brien* approach. Not only must the intent to communicate a message be present, but there must be a great likelihood that observers would understand the message sought to be communicated.

Although the genesis of the *O'Brien* test was a case involving what is called “symbolic speech” or

“expressive conduct” (in which the effect on speech is only “incidental”), the standard has been applied to factual situations bearing little resemblance to those of the original case, though not without criticism. In *Turner Broadcasting v. F.C.C.*, 520 U.S. 180 (1997), the Supreme Court held the “must carry” provisions of the FCC were content-neutral regulations that “advance[d] important governmental interests unrelated to the suppression of free speech and [did] not burden substantially more speech than necessary to further those interests,” citing *O'Brien*.

Following the lead of the Supreme Court, lower courts have frequently used *O'Brien* interchangeably with the “time place and manner” test generally applicable to any content-neutral statute or regulation, whether its effect on speech is incidental or not. *O'Brien*’s “balancing approach” has also been said to have spawned the standard currently used by the Supreme Court to evaluate laws and regulations that affect commercial speech, causing some confusion among courts and frequent disapproval from constitutional scholars.

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References and Further Reading

- Chemerinsky, Erwin. *Constitutional Law Principles and Policies*, 2nd ed. New York: Aspen, 2002, 1026–1032.
- Emerson, Thomas. *The System of Freedom of Expression*. New York: Vintage, 1970, 80–87.
- Hall, Kermit, ed. *The Oxford Companion to the Supreme Court of the United States*. New York: Oxford Press, 1992, 597–599; 602.
- Mallamud, Jonathan. *Judicial Intrusion Into Cable Television Regulation: The Misuse of O'Brien in Reviewing Compulsory Carriage Rules*, Vill. L. Rev. 34 (August 1989): 467.
- Martin, Melanie Ann. 1992 *Note Constitutional Law—Non-Traditional Forms of Expression Get No Protection: An Analysis of Nude Dancing Under Barnes v. Glen Theatre, Inc.*, 27 Wake Forest L. Rev. 1061 (Winter 1992).
- Seid, Richard A., *A Requiem for O'Brien: On the Nature of Symbolic Speech*, Cumb. L. Rev. 23 (1992/1993): 563.
- Werhan, Keith. *The O'Briening of Free Speech Methodology*, Ariz. St. L. J. 19 (Winter 1987): 635.
- Zick, Timothy. *Cross Burning, Cockfighting, and Symbolic Meaning: Toward a First Amendment Ethnography*, Wm. & Mary L. Rev. 45 (April 2004): 2261.

Cases and Statutes Cited

- Barnes v. Glen Theaters*, 501 U.S. 560 (1991)
- City of Erie v. Pap's A.M.*, 529 U.S. 57 (2000)
- Texas v. Johnson*, 491 U.S. 397 (1989)
- Turner Broadcasting v. F.C.C.*, 520 U.S. 180 (1997)
- United States v. O'Brien*, 391 U.S. 367, 377 (1968)

DRED SCOTT v. SANDFORD, 60 U.S. 393 (1857)

The *Dred Scott v. Sandford* case served as a catalyst for providing blacks civil rights and civil liberties under the U.S. Constitution. Specifically, the case helped put an end to slavery in the United States and granted blacks citizenship, due process rights, equality under the law, and voting rights. Ironically, though, this expansion of rights and liberties to blacks did *not* come about from the ruling in this case. Rather, the expansion of rights and liberties came about from the country's struggle to overturn the Supreme Court's ruling in *Dred Scott v. Sandford*.

Dred Scott was born in Virginia in 1799. He was a slave of the Peter Blow family. In 1830, the Blows moved to St. Louis, Missouri. Two years later, Peter Blow died, and Scott was sold to Dr. John Emerson, an army surgeon who traveled across the country. Scott accompanied Dr. Emerson on his travels, which included traveling to the free territories of Illinois, Wisconsin, and upper Louisiana from 1833 to 1843. While in the Wisconsin territory, Scott met and married Harriet Robinson, who also was a slave. As a result of the marriage, Harriet's ownership was transferred to Emerson. Dred and Harriet had two children. In 1843, Dr. Emerson died, and Emerson's widow, Eliza Sandford, then began hiring out the Scott family to work for others.

In 1846, Dred and Harriet Scott asked the courts to recognize them as free people, since they had traveled with their master, Dr. John Emerson, to the free territories of Illinois, Wisconsin, and upper Louisiana from 1833 to 1843. The Scotts believed that under the precedent to *Rachel v. Walker*, 4 Missouri Rep. 350 (1836), they should be granted their freedom, since this Missouri court ruling declared that slaves were entitled to freedom in a slave state if they at one time had residency in a free state. The *Rachel v. Walker* case, along with other Missouri precedents, established the legal principle in Missouri of "once free, always free." This was a straightforward case that should have led to the Scotts' freedom based on the *Rachel* precedent; however, problems of hearsay led to a mistrial in 1847. Dred Scott pursued his case for freedom once again in 1850 and his case encountered multiple appeals, all the way up to the U.S. Supreme Court.

By the time Dred Scott's case was appealed to the U.S. Supreme Court, Mrs. Emerson's brother, John Sandford, had assumed responsibility for Dr. Emerson's estate, and thus Scott's suit was filed against Sandford. Sandford questioned whether Scott had the right to sue in a federal court. Specifically, Sandford questioned whether blacks could be citizens of

the United States. Likewise, Sandford's attorney challenged the constitutionality of the Missouri Compromise of 1820, asserting that Congress did not have the authority to ban slavery in the territories.

In a seven-to-two ruling, Chief Justice Roger Taney ruled that blacks were not citizens of the United States. To defend this position, Taney pointed out that this ruling was consistent with the intentions of the men who founded the United States. Taney argued that the language of the Declaration of Independence as well as the history of the times indicated that the country's founders did not intend for slaves or their descendants to be citizens of the United States. In fact, even if a former slave received his or her freedom, Taney explained that the founding fathers never intended for blacks to be considered citizens.

Moreover, Taney emphasized that this view against citizenship for blacks remained the predominant public opinion during the writing and ratification of the Constitution. This idea, he argued, could be witnessed in the Constitution. In Article I, section 9, the Constitution granted the states the right to import slaves until 1808. Additionally, Article IV, section 2 required the states to return escaped slaves to their owners. Chief Justice Taney argued that these two portions of the Constitution indicated that the framers of the document did not view members of the black race as citizens of the government.

In short, Taney ruled that blacks lacked civil rights and civil liberties. More specifically, the Supreme Court ruled that blacks, freedmen as well as slaves, were not "citizens" within the meaning of the Constitution. Thus, while it was possible for blacks to be citizens of an individual state, the Constitution precluded blacks from being citizens of the United States. As a result, this meant that Scott did not have the right to sue in federal courts, and that he and other blacks were considered "property" under the Constitution. Furthermore, Taney ruled that Scott was still a slave and was not a free man based on the fact that he traveled to free territories in the United States. Finally, Taney went on to declare the Missouri Compromise unconstitutional.

Although the Supreme Court's ruling did not grant Dred Scott his freedom, he and the rest of his family did receive their freedom later that year. Peter Blow's sons, who helped pay Scott's legal fees, had promised to purchase the Scott family and set them free if they lost their case in the U.S. Supreme Court. In 1857, Mrs. Emerson sold the Scotts back to the Blow family, who subsequently set Dred and Harriet free. Nine months after receiving his freedom, Dred Scott died of tuberculosis.

The Supreme Court ruling in this case exerted an impact on blacks beyond Dred Scott himself. Reaction to the *Dred Scott* ruling was mixed and did not settle the controversial slavery issue for the United States. Rather, the Court's decision only furthered the country's division over the slavery issue, which ultimately led to the Civil War. The other two branches of government eventually responded with attempts to overcome the issues surrounding slavery. In 1862, Congress passed the Act of June 19, 1862, which prohibited slavery and involuntary servitude in any of the territories of the United States. That same year, Congress also passed legislation prohibiting slavery in the District of Columbia and repealed the Fugitive Slave Act. Likewise, in 1863, President Lincoln issued the Emancipation Proclamation, which announced that slaves who lived in rebellion states would be free once these states were under the control of the Union army.

Despite these efforts of the legislative and executive branches to eradicate the effects of the *Dred Scott* case, these efforts were inconsistent with the original Constitution. Consequently, the document had to be amended to overcome the problems of slavery and to promote the civil rights and civil liberties of blacks.

With the end of the Civil War, three Reconstruction amendments were written and ratified to overcome the *Dred Scott* ruling. Specifically, these amendments recognized and promoted civil rights and civil liberties for blacks. In 1865, slavery and involuntary servitude were abolished with the ratification of the Thirteenth Amendment. Likewise, in 1868, the Fourteenth Amendment recognized all persons born or naturalized in the United States as "citizens." This amendment specifically overturned *Dred Scott*'s ruling that blacks were not U.S. citizens. Moreover, the Fourteenth Amendment prohibited the states from denying blacks, as well as all other citizens, "equal protection" of the laws and "due process of law." Finally, in 1870, the Fifteenth Amendment extended voting rights to black males. Thus, although the case of *Dred Scott v. Sandford* is notorious for its denial of rights and liberties to blacks, the three constitutional amendments that overturned this ruling have been instrumental in protecting civil rights and civil liberties of all American citizens.

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References and Further Reading

- Ehrlich, Walter. *They Have No Rights: Dred Scott's Struggle for Freedom*. Westport, CT: Greenwood Press, 1979.
- Fehrenbacher, Don Edward. *Slavery, Law and Politics: The Dred Scott Case in Historical Perspective*. New York: Oxford University Press, 1981.

Finkelman, Paul. *Dred Scott v. Sandford: A Brief History With Documents*. Boston: Bedford Books, 1997.

Herda, D. J. *The Dred Scott Case: Slavery and Citizenship*. Hillside, NJ: Enslow Publishers, 1994.

Cases and Statutes Cited

Rachel v. Walker, 4 Missouri Rep. 350 (1836)

DRUG TESTING

President Reagan announced the War on Drugs in a televised speech in 1982. Shortly thereafter, federal agencies began to drug test their employees randomly, particularly those involved in law enforcement and those in safety-sensitive positions. The Supreme Court's first foray into defining the contours of the constitutionality of drug testing of federal government employees came in the companion cases *Skinner v. Railway Labor Executives' Association*, 489 U.S. 602 (1989), and *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989).

Skinner involved the drug testing of federal railway employees who had been involved in serious train accidents. In upholding the drug testing regulations, the Court relied on the "special needs" exception to the Fourth Amendment as articulated in *Griffin v. Wisconsin*, 483 U.S. 868 (1987). The Court also noted that the Federal Railway Administration had made a finding that there was a high rate of alcoholism and drug abuse among railway workers. Finally, the Court held that public safety was a concern that outweighed the privacy interests of the railway workers, focusing on the fact that trains were dangerous instruments when in the hands of inebriated workers.

Von Raab, decided on the same day, upheld the drug testing regulations of the Commission of Customs. The regulations provided for random, suspicionless drug testing of all customs officers because they carried weapons and many of them engaged in drug interdiction activities. The Court accepted the government's argument that there was a serious crisis brewing in law enforcement due to drug abuse and held that the government had a compelling interest in randomly testing its customs officers, emphasizing the "extraordinary" dangers of drug interdiction.

Following these two cases, the D.C. circuit adopted a "nexus" test in *Harmon v. Thornburgh*, 878 F.2d 484 (D.C. Cir. 1989), requiring the government to prove a direct nexus between the employee's position and the possible safety repercussions that could result from drug or alcohol abuse. This nexus test tends to invalidate most drug testing schemes of federal government workers unless the government

can prove that a very serious safety issue exists. A few states, such as Alaska and Massachusetts, have declared all random, suspicionless drug testing to be in violation of state constitutions.

Later, the Supreme Court heard two cases relating to random, suspicionless testing of public high school students: *Veronia School District 47J v. Acton*, 515 U.S. 646 (1995), and *Board of Education of Independent School District of Pottawatomie County v. Earls*, 536 U.S. 822 (2002). In *Veronia*, the Court upheld the random, suspicionless drug testing of high school athletes, holding the deterrence of student drug use to be at least as important as the schemes in *Skinner* and *Von Raab*, particularly since high school athletes faced potential physical injury during sports activities. The Court also noted that children entrusted to the care of public schools had lesser expectations of privacy than adults, a holding the Court relied on in *Earls* as well. There, the Court upheld the random, suspicionless drug testing of public high school students who participated in any extracurricular activity, even those that would pose no danger to the children, such as choir.

The Court's lone invalidation of a drug testing scheme occurred in *Chandler v. Miller*, 520 U.S. 305 (1997). There, the Court invalidated Georgia's requirement that all candidates for state office must submit to a drug test. Georgia made no showing of any concrete threat that would serve to show a special need for the test. Also, the Court noted that the test would not serve to deter illicit drug use because the test was not a secret and drug abusers could abstain for a sufficient time period before the test.

Public opinion about drug testing shifted dramatically after President Reagan's drug war declaration in 1982. Private employers and landlords began drug testing employees and tenants. State and federal public housing authorities began to require tenants to consent to drug tests as a condition of residence. Many state government and private employers require a pre-employment drug screen as a condition of employment. Federal and state agencies sometimes require organizations that receive grants to adopt drug testing policies. Finally, and perhaps most pervasively, individuals convicted of crimes and placed on probation or released on parole are usually subjected to random drug tests as a condition of their release from detention.

Scholars disagree as to the efficacy and constitutionality of drug testing. The magnitude of false positives and negatives detracts from the usefulness of drug testing as a deterrent to drug abuse. Anecdotal evidence suggests that, for example, marijuana users switched to cocaine when their employers began random drug testing because traces of cocaine use leave

the body much more quickly. Moreover, an entire industry of manufacturing chemicals that disguise drug abuse has arisen. Recent scientific evidence suggests that expert testimony in criminal cases about the accuracy of drug tests is deeply flawed.

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References and Further Reading

- American Civil Liberties Union. "Drug Testing: A Bad Investment," <http://www.aclu.org/Files/Files.cfm?ID=9998&c=184> (1999).
- Charles, Guy-Uriel, *Fourth Amendment Accommodations: (Un)Compelling Public Needs, Balancing Acts, and the Fiction of Consent*, Michigan Journal of Race and Law 2 (1997): 1:461–512.
- Lang, David, *Get Clean or Get Out: Landlords Drug-Testing Tenants*, Washington University Journal of Law and Policy 2 (2000): 459–487.
- Zeese, Kevin B. *Drug Testing Legal Manual and Practice Aids*, 2nd ed. Deerfield, IL: Clark, Boardman, Callahan, 2000.

Cases and Statutes Cited

- Anchorage Police Department Employees Association v. Municipality of Anchorage*, 24 P.3d 547 (Alaska 2001)
- Board of Education of Independent School District of Pottawatomie County v. Earls*, 536 U.S. 822 (2002)
- Chandler v. Miller*, 520 U.S. 305 (1997)
- Griffin v. Wisconsin*, 483 U.S. 868 (1987)
- Guiney v. Police Commission of Boston*, 582 N.E.2d 523 (Mass. 1991)
- Harmon v. Thornburgh*, 878 F.2d 484 (D.C. Cir. 1989)
- National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989)
- Skinner v. Railway Labor Executives' Association*, 489 U.S. 602 (1989)
- Veronia School District 47J v. Acton*, 515 U.S. 646 (1995)
- See also Chandler v. Miller*, 520 U.S. 305 (1997) (candidates); *Griffin v. Wisconsin*, 483 U.S. 868 (1987); *National Treasury Employee Union v. Von Raab*, 489 U.S. 656 (1989); *Skinner v. Railway Labor Executives' Association*, 489 U.S. 602 (1989); *Veronia School District 47J v. Acton*, 515 U.S. 646 (1995); *War on Drugs*

DRUGS, RELIGION, AND LAW

Law on many levels regulates access to drugs, complicating any incorporation of an interdicted substance within religious ceremonies. Arguments to obtain that liberty implicate issues on at least three levels. Drug restrictions exist on federal and state levels, and thus the religiously motivated drug users must confront the impediments at both levels.

Previously, an obvious source of support would have been the free exercise clause of the Constitution's First Amendment. As explained later, after the ruling in *Employment Div., Dept. of Human Resources of Oregon v. Smith (II)*, 494 U.S. 872 (1990), that line of reasoning today offers little solace. The best option remains explicit legislative exemptions for the religious use of drugs, specifically (for example, the American Indian Religious Freedom Act) or through the judicial interpretation of more general statutes that command respect for religious practices.

Free Exercise Protections of Religious Practices

Religious liberty in the United States has never been absolute, despite its place as a preferred liberty in law and in the national imagination. The limited scope of the protection of religion was driven home during the anti-Mormon hysteria of the late nineteenth century and the line of polygamy cases that began with *Reynolds v. U.S.*, 98 U.S. 145 (1878). *Reynolds* announced a belief/action dichotomy, holding that the former was absolutely protected, but the latter was not. The government remained "free to reach" actions "in violation of social duties or subversive of good order," regardless of any religious command.

Thereafter, it would become a matter of dispute about which religious practices the state needed to allow, by refraining from passing some laws altogether or by granting exemptions from general laws that would otherwise conflict with religious beliefs and practices. Cases would address whether the state's justification for any imposed burden need be only rational, or compelling, for interfering with this First Amendment right.

On no topic has this context been more enduring than the use of drugs within religious ritual. Although the conflict could arise, at least in theory, over any controlled substance, sustained litigation has primarily targeted peyote and marijuana.

The Peyote Cases

Peyote use is regulated by federal and state governments, requiring the religiously motivated person wishing to ingest peyote to seek exemption from both. One such group that occasionally incorporates peyote use into its ritual practices is the Native American Church (NAC). Although peyote is a controlled substance under federal law, since 1971 the Church

has been granted an exemption (21 C.F.R. 1307.31). Lingering issues concern peyote use by persons who are not members of the NAC and peyote use that is illegal under state laws that do not grant an exemption similar to the federal regulations. For example, in *Peyote Way Church of God, Inc., v. Thornburgh*, 922 F.2d 1210 (5th Cir., 1991), it was unsuccessfully argued that limiting the peyote exemption to only one religion violated the Establishment Clause. Courts have also been unwilling to allow peyote use by NAC members who are not Native Americans (*U.S. v. Warner*, 595 F.Supp. 595, D.C.N.D., 1984).

Although some states had offered religious exemptions for peyote use—most notably in *People v. Woody*, 394 P.2d 813 (Cal. 1964)—many did not. The illegality of religious peyote in Oregon occasioned the litigation of *Employment Div. v. Smith (II)*, which held that the free exercise clause alone does not require exemption from a generally applicable law, including those proscribing a certain class of drugs. As part of the reaction against this drastic curtailment of religious freedom, Congress enacted Public Law 103-344 (108 Stat. 3125, October 6, 1994), which amended the American Indian Religious Freedom Act to grant a religious exemption for peyote at state and federal levels. Significantly, this new exemption is not limited only to the Native American Church, but extends to peyote use "by an Indian for bona fide traditional ceremonial purposes in connection with the practice of a traditional Indian religion."

Nonpeyote Cases

On the surface, marijuana might appear to offer many of the same features as peyote: traditional use of a proscribed substance by an identifiable religious and ethnic minority, Rastafarians. Thus far that analogy has not succeeded. *State v. McBride*, 955 P.2d 133 (Kan. 1998), ruled that Rastafarians are not "similarly situated" to Native Americans because: "(1) Peyote is consumed by the NAC members only at specific and infrequent religious ceremonies, whereas Rastafarians may consume marijuana in any quantity at any time; (2) peyote generally is not abused at the same rate as marijuana; and (3) the Kansas and federal NAC exemptions were passed under the ambit of the federal trust responsibility, which seeks to preserve the cultural and political integrity of Native American tribes."

The third prong particularly, should it continue to be relevant, would permanently prevent the peyote exemption from serving as a precedent for the creation of a religious exemption of any other controlled

substances. Other religious groups less favorably situated have also failed in their claims for religious marijuana use, including Hindus (*Leary v. U.S.*, 383 F.2d 851, 5th Cir., 1967), Black Muslims (*U.S. v. Spears*, 443 F.2d 895, 5th Cir., 1971), and members of the Ethiopian Zion Coptic Church (*Olsen v. Drug Enforcement Admin.*, 878 F.2d 1458, D.C.C., 1989).

As an alternative to explaining why drug-ingestion rituals fall outside the protections of the Free Exercise Clause, courts have occasionally attempted to circumvent the religious liberty claim altogether by denying that the practice at issue qualifies as “religious” in the constitutional context. For example, in *U.S. v. Koch*, 288 F.Supp. 439 (D.C.D.C. 1968), the federal district court denied the use of LSD (lysergic acid diethylamide) by the Neo-American Church in part because the organization failed to satisfy the judges that it was a genuine religion. Yet, even when that hurdle is surmounted, if it can be shown that other adherents freely practice the religion without resort to the illegal drug, the ritual may fail to qualify as “intrinsic” to the faith, minimizing the burden imposed by a ban on its use.

Conclusions

The lessons from this thick body of jurisprudence are fairly straightforward. At the federal level, the likelihood of winning a free exercise claim to use a controlled substance in religious rituals is minute. This tactic rarely succeeded in the best-case scenario—peyote use by Native Americans—and was categorically rejected by the U.S. Supreme Court. While the special relationship between Native Americans and the federal government secured for them a legislative exemption, no other group can count on similar largesse.

In contexts in which a balancing test will still be applied, the state’s interest in controlling access to mind-altering substances can be expected to continue to be deemed compelling. This interest will trump any burden on the religious practice inflicted by an inability to perform its sacred rituals.

Nonetheless, this area of the law continually evolves, as religious organizations initiate further suits in hopes of securing a right to worship in their chosen manner. Most recently, the Supreme Court has agreed to hear *Gonzales v. Centro Espirita Beneficiente Uniao do Vegetal*, 389 F.3d 973 (10th Cir. 2004), cert. granted Apr. 18, 2005, to decide whether the Religious Freedom Restoration Act of 1993 should allow the church access to hoasca, an hallucinogenic tea. As one line of argument is closed, new ones may be asserted, such as Renteln’s (2004)

argument that criminalizing substances unfamiliar to our culture under an unproven presumption that they are necessarily harmful can violate the right to culture recognized in international law. These efforts represent an ongoing effort to forge a balance between the well-intentioned secular needs of society and the religious spirit of its multicultural citizens.

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References and Further Reading

- Epps, Garrett. *To an Unknown God: Religious Freedom on Trial*. New York: St. Martin’s Press, 2001.
 Long, Carolyn N. *Religious Freedom and Indian Rights*. Lawrence: University Press of Kansas, 2000.
 Renteln, Alison Dundes. *The Cultural Defense*. New York: Oxford University Press, 2004.

Cases and Statutes Cited

- Employment Div., Dept. of Human Resources of Oregon v. Smith (II)*, 494 U.S. 872 (1990)
Gonzales v. Centro Espirita Beneficiente Uniao do Vegetal, 389 F.3d 973 (10th Cir. 2004)
Leary v. U.S., 383 F.2d 851 (5th Cir. 1967)
Olsen v. Drug Enforcement Admin., 878 F.2d 1458 (D.C.C. 1989)
People v. Woody, 394 P.2d 813 (Cal. 1964)
Peyote Way Church of God, Inc., v. Thornburgh, 922 F.2d 1210 (5th Cir. 1991)
Reynolds v. U.S., 98 U.S. 145 (1878)
State v. McBride, 955 P.2d 133 (Kan. 1998)
U.S. v. Spears, 443 F.2d 895 (5th Cir. 1971)
U.S. v. Warner, 595 F.Supp. 595 (D.C.N.D. 1984)
American Indian Religious Freedom Act, P.L. 95-341 (92 Stat. 469, Aug. 11, 1978)
American Indian Religious Freedom Act Amendments of 1994, P.L. 103-344 (108 Stat. 3125, Oct. 6, 1994)
Religious Freedom Restoration Act, P.L. 103-141 (107 Stat. 1488, Nov. 16, 1993)
Special Exempt Persons: Native American Church, 21 C.F.R. 1307.31

See also **Accommodation of Religion; Exemptions for Religion Contained in Regulatory Statutes; Free Exercise Clause Doctrine: Supreme Court Jurisprudence; Free Exercise Clause (I): History, Background Framing; Native Americans and Religious Liberty; War on Drugs**

DUAL CITIZENSHIP

Long disfavored though never formally unlawful, dual citizenship is now completely tolerated under U.S. law and practice. Many nineteenth-century immigrants to the United States technically held the status of dual nationals because their countries of origin refused to recognize the transfer of allegiance to their new homeland. However, active dual citizenship was policed by expatriation measures providing

for the termination of U.S. citizenship upon undertaking certain activities as a national of another state, including voting in foreign elections, serving in foreign armed forces, or holding office in a foreign state. Mere residence in a foreign country of alternate nationality or the use of a foreign passport could result in the termination of U.S. citizenship.

Dual citizenship was also the target of harsh moral condemnation. It was often compared to bigamy; Theodore Roosevelt described it as a “self-evident absurdity.” In the early and middle twentieth century, the incidence of dual nationality declined as countries of origin came more commonly to terminate original citizenship upon naturalization in the United States.

The Supreme Court’s 1968 decision in *Afroyim v. Rusk* found the termination of citizenship unconstitutional when it was not intended by the individual. Although *Afroyim* and subsequent cases do not protect the status of dual citizenship as such, current practice allows the retention of U.S. citizenship upon naturalization in another country in all cases. At the same time, the laws of other countries are more liberally permitting the retention of citizenship upon naturalization in the United States; many naturalizing Americans today (including those from Mexico) are routinely retaining their citizenship of origin. In the face of greater global mobility, more individuals are born with multiple citizenship to parents of different nationality. As evidenced by the 1997 European Convention on Nationality and its increasing tolerance in the practice of nation-states, there is evidence that dual citizenship may come to be conceived of as an associational human right under international law.

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References and Further Reading

- Hansen, Randall, and Patrick, Weil, eds. *Dual Nationality, Social Rights and Federal Citizenship in the U.S. and Europe*. New York: Berghahn Books, 2002.
- Martin, David A., and Kay Hailbronner, eds. *Rights and Duties of Dual Nationals: Evolution and Prospects*. The Hague: Kluwer Law International, 2003.
- Schuck, Peter H. “Plural Citizenships.” In *Immigration and Citizenship in the 21st Century*, Noah M. J. Pickus, ed. Lanham, MD: Rowman & Littlefield Publishers, 1998, 149–192.
- Spiro, Peter J., *Dual Nationality and the Meaning of Citizenship*, *Emory Law Journal* 46 (1997): 1412.

See also **Citizenship**

DUE PROCESS

The term “due process” appears in the U.S. Constitution in the Fifth and Fourteenth Amendments, but it is not defined there. It is one of those fundamental

legal concepts that arises from Anglo–American legal tradition, and we need to look to history for the meaning. The key word is “due,” meaning fair or that to which one has a right, as in the phrase, “Give him his due.” But historical precedent does not leave the definition of fairness entirely to some natural sense of justice or allow us to be satisfied that process is “due” if it is merely uniform and equally applied. Implicit in the concept is a minimum standard of protection of rights that might be achieved by different procedures, but is unlikely to be protected unless certain procedures are strictly enforced to some minimum degree.

In the amendments, the phrase is qualified by the phrase “of law,” and legal scholars and judges have equated “due process of law” with the phrase “by the law of the land,” suggesting that it could be defined by positive law, such as a statute, or by natural law, common law, or traditional judgments of equity. The phrase “by the law of the land” was first established in 1215 in Magna Carta: “No freemen shall be taken or imprisoned or disseised or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land.”

This was rendered into statute in 1354: “No man of what state or condition he be, shall be put out of his lands or tenements nor taken, nor disinherited, nor put to death, without he be brought to answer by due process of law.” This was further affirmed in 1628 in the Petition of Right: “. . . no freeman may be taken or imprisoned or be disseized of his freehold or liberties, or his free customs, or be outlawed or exiled, or in any manner destroyed, but by the lawful judgment of his peers, or by the law of the land.”

The equivalence of the phrases “due process of law” and “law of the land” was asserted by Coke in his *Second Institutes*, in which he specified that “law” meant “the common law” or “by the indictment or presentment of good and lawful men . . . or by writ original of the Common Law.”

The phrase appears again in 1647 in the *Heads of the Proposals Offered by the Army*:

That the right and liberty of the Commons of England may be cleared and vindicated as to a due exemption from any judgment, trial or other proceeding against them by the House of Peers, without the concurring judgment of the House of Commons: as also from any other judgment, sentence or proceeding against them, other than by their equals, or according to the law of the land.

The phrase later appeared in 1776 in the Virginia Declaration of Rights: “. . . that no man be deprived

of his liberty, except by the law of the land or the judgment of his peers.”

These usages suggest that “law of the land” is distinguished from jury verdicts. However, in the Fifth and Fourteenth Amendments it is apparent that “law of the land” and “judgment of his peers” have been combined in the phrase “due process.” Thus, we can conclude that jury verdicts and, for that matter, the indictments or presentments of grand juries are subsumed in the broader concept of “due process.”

Due process can be legislative or administrative, as well as judicial, because legislative and executive branch officials may conduct proceedings that have a judicial aspect, which may ultimately affect individual rights, but the focus here will be on judicial proceedings, since most dispositions of individual rights eventually involve the judiciary.

In general, due process is bounded to a finite period of time, with a beginning and an end, and may be classified into types and divided into phases. The two most common types are the *inquisitorial*, to acquire information and reach a finding, and the *dispositive*, to decide the assignment and operation of rights, powers, and duties. Inquisitorial proceedings, sometimes called “*ex parte*,” generally involve only one side of an issue, whereas dispositive proceedings are generally adversarial, allowing contenders to argue their side of the case. Original parties may be joined by intervenors, who enter the case as additional parties, or by *amici curiae*, who offer commentary and perhaps evidence not offered by the parties, but in the public interest.

A hearing on a petition for a search, seizure, arrest, or execution of judgment is inquisitorial, as is a grand jury proceeding, a legislative issuance of a declaration of war or letters of marque and reprisal, or investigatory hearings of legislative committees. It is a violation of due process to conduct only an inquisitorial proceeding when a dispositive proceeding is required or to proceed with a dispositive proceeding if an inquisitorial proceeding is required to precede and authorize it.

Most of judicial due process is centered on one or more courts, which are a specialized form of deliberative assembly with specific powers to make certain kinds of decisions in certain ways. A court proceeding may be called a hearing or a trial. It is composed of various officers with specialized duties. Presiding over the proceedings is the bench, which may consist of one or more officials, often called “judges” in Anglo American courts and “presidents” or other titles in the courts of some other countries. Other officers of the court include the bar, consisting of the attorneys for the parties, and witnesses, jurors, bailiffs,

recorders, clerks, and perhaps others. Even the audience may be officers if sworn to perform certain duties during the proceedings, such as witnessing them.

A trial jury is a specialized form of subassembly within the larger court, with its officer, the foreman, and procedures for reaching a verdict. A grand jury, however, is an inquisitorial assembly with the power to subpoena witnesses, interrogate them under oath, and report their findings. They also have the special power to authorize a criminal prosecution and appoint or ratify the appointment of the prosecutor, who will usually appear before it as a complainant and present his evidence.

Dispositive due process generally begins with some kind of due notice, usually called a petition or complaint, served on the defendant or respondent. It may enter an inquisitorial phase (sometimes called discovery), proceed through a series of fair hearings leading to a finding (often called a verdict), and then to an order of the court, called a sentence in a criminal proceeding. This order may consist of a disablement, or restriction, of the exercise of a right of a party called the defendant or respondent, a deprivation of a right disabled, and a warrant to some agent to execute the deprivation. That or another court may exercise continuing oversight on the execution until it is completed, which terminates the due process.

Due process proceedings may be criminal, leading to a punitive deprivation of life, liberty, or property, or civil, leading to a nonpunitive deprivation of any of those rights. The level of protection of defendants or respondents is higher in criminal than in civil proceedings. Beginning with the opinion in *Dred Scott*, courts began to make the distinction between *procedural* and *substantive* due process. While courts have not consistently defined the distinction, the notion of substantive due process generally speaks to the question of *how much* protection, as distinct from *how to* provide that protection.

Although not usually discussed in such terms, the distinction can be seen by examining the requirements for jury verdicts to authorize the court to grant the petition of the plaintiff or prosecutor. It is procedural that the verdict be rendered by a jury and not the bench, but substantive that the jury be of a certain size (twelve in criminal cases) and that its verdict be a supermajority of the jurors, in civil cases, or unanimous, in criminal cases. It also enters as rules of evidence, “preponderance” in civil cases and “beyond a reasonable doubt” in criminal cases, or “probable cause” to authorize a search warrant.

Contrary to the Declaration of Independence that “life, liberty, and the pursuit of happiness” are “unalienable” rights, the exercise of all rights, except due process rights, may be disabled and deprived by some

kind of due process, even if the rights are not removed. Therefore, the right to due process is the most fundamental for the exercise of rights. The problem remains, then, of determining the minimum levels of substantive protection and how much variation of procedural due process is consistent with maintaining that substantive level. This is not defined with sufficient specificity in constitutions, and while court precedents may define it in many ways, those precedents may collide with statutes that represent the findings of the legislative branch or the constitutions of states, provisions of which may be challenged in federal courts.

The question sometimes arises whether a person has a positive right to petition and get a fair hearing (called “oyer” in old English usage) and a just decision (called “terminer” in old English usage). The answer is that the right to petition is only the right not to be punished for petitioning and, while there is a right to terminer if a court of competent jurisdiction accepts a petition and grants oyer, there is no right to oyer, except for prerogative writs (see the following). This does not affect whether one has a justiciable right, only whether he or she will get the support of the court in enforcing his right. A court is a public service and the expenditure of a scarce resource, to which no one can have a justiciable or constitutional right to a sufficient allocation. All one can have is a right to a fair opportunity for oyer and terminer under the principle of equal protection, lacking which a person must enforce his or her rights by extrajudicial means.

The main purpose of public courts is not to protect everyone’s rights, but rather to avoid the conflict, and perhaps violence, that can arise from extrajudicial enforcement. The public policy of almost every country is to demand that everyone defer extrajudicial enforcement of their rights if that can lead to conflict and seek the support of a court, if the courts are open, whose judgments can then inform the public which side of a dispute to join in supporting. When the court and public join in helping people enforce their rights, it is less likely that the party judged to be in the wrong will resist. It should always be kept in mind, however, that, ultimately, courts have no power to command that is not based on public consent and support from one judgment to the next. They do not have armies, and if officials and civilians ignored their orders, the rule of law would collapse.

This leads to an important element of due process called “presumption,” to which the parties to various kinds of disputes have certain rights. The most fundamental of these is the right to a presumption of non-authority, which is most clearly represented in the Ninth Amendment to the U.S. Constitution. It is

the basis for the presumption in favor of the defendant, putting the burden of proof on the plaintiff or prosecutor. It is also the basis for the right of private prosecution of a public right and to have oyer and terminer on petitions for the common-law prerogative writs, such as *quo warranto*, *habeas corpus*, *mandamus*, *prohibito*, *procedendo*, and *certiorari*. The court has a duty to hear cases concerning these writs before other cases, and the public has a duty to consider issuing by default if the respondent and court, having been duly noticed, fail to respond or to hold oyer and terminer, respectively.

The key element of notice can take many forms. A filing with a court is a notice to the court and, while some courts have arrogated a power to refuse to accept certain filings, this is no more proper than it would be for a witness to refuse to accept a subpoena or for a citizen to refuse to accept a summons to appear for jury duty; he is considered noticed when it is presented to him, whether he accepts it or not. The defendant in a case is deemed noticed by a summons to appear and answer the petition of the plaintiff or prosecutor, and if he ignores it, he is subject to penalties or a default judgment. A criminal arrest is a kind of notice to appear for arraignment and may or may not be custodial—that is, be combined with detention. On a petition for a prerogative writ, notice is to a public or private official to prove his authority to perform or not perform certain acts or, as with a *quo warranto*, to act or continue holding an office.

A public notice is one posted at one or more public places or in a publication of record. It is used for such purposes as to call for a public assembly or election or for a militia muster; to announce a public sale, perhaps on a foreclosure or to satisfy a judgment; or as a way to reach a public or private party whose identity or whereabouts are unknown, such as the owner of unclaimed property or property on which taxes are overdue.

The substantive component of notice is that the respondent must have sufficient time to respond and prepare to respond. For example, the traditional and usually statutory periods for responding to a petition for a prerogative writ were three to twenty days, depending on the distance of the respondent from the court, and usually twenty days for public notices. If the respondent needs more time to prepare a response, he or she may petition the court for additional time, called a continuance, but granting a continuance is generally at the discretion of the court.

There are a number of open issues involving due process. For example, during the period just before and after the founding of the United States, the standard of due process was to argue all issues of law in the presence of the jury, especially in criminal cases.

It was understood that although the primary role of the jury was to bring a verdict on the facts, in bringing a general verdict of guilty or not guilty, they necessarily had to review the decisions of the bench and could only do so if they heard all the legal argument that led to such decisions. However, beginning in the second third of the nineteenth century, first in England and then in the United States, courts began to demand that legal argument be made in written pleadings, mostly presented to the bench prior to convening the jury, and decided in chambers or out of the hearing of the jury.

This process has been called “Mansfieldization” by some, after Lord Mansfield, an English jurist of the late eighteenth century, who led the courts toward this practice. He was opposed by Lord Camden, whose views on the role of the jury in reviewing the legal argument were more popular with English Whigs and with the founders of the United States. Today, the bench will hold a party or his attorney in contempt or initiate disbarment of a lawyer if he mentions the law in the presence of the jury, other than perhaps in the course of raising an objection. The evidence of history strongly supports the position that this practice is a violation of the due process rights of defendants.

Another controversy concerns the practice of holding persons as material witnesses or for contempt of court at the sole discretion of a judge, for long periods of time, without access to counsel. If they were charged with a crime, these individuals would have to be released for lack of access to counsel, lack of speedy trial, lack of compulsion of witnesses, or other due process violations. There is no express provision of the U.S. Constitution that authorizes criminal prosecution for contempt of court. The power is asserted by judges as an inherent power of courts. They also assert the power to make their own rules of judicial procedure, even contrary to legislative statutes, and to control who may be admitted to the practice of law in their courts by a customary practice of admitting lawyers to the bar and disbarring them or prosecuting laypersons for the unauthorized practice of law.

An ongoing controversy concerns the traditional doctrine or practice of *stare decisis*, which means “let the decision stand.” There is an ancient doctrine of law to decide like cases alike, sometimes called the First Law, and the constitutional requirements for equal protection and due process would seem to incorporate it. Certainly, court precedents that preceded the adoption of the written U.S. Constitution and were well known to the founders are historical evidence of what the founders meant when they used similar language in the Constitution. The requirement

for finality of due process also supports the related doctrine of *res judicata* that things decided in a case do not have to be decided again, unless error or abuse can be shown. It is also reasonable to use court decisions in exemplary cases to clarify ambiguities in written constitutions or statutes and sharpen the boundaries of interpretation.

The problem arises when past decisions or opinions involving similar issues are treated as *binding* rather than as merely *persuasive* in deciding other cases. Court decisions and opinions can progressively depart from original understanding until decisions that rely more on precedents than on original text, structure, or historical evidence can depart from the meaning of the enactments in important ways. A judicial process that never returns to original text, structure, and history to re-examine precedent and correct departures or does so only at the top level of the U.S. Supreme Court (which has recently been accepting only about eighty of the eight thousand cases submitted to it each year) cannot be considered constitutional due process. Lower courts can try to distinguish issues in their cases from past precedents to return to original understanding, but this is too often an exercise in legal sophistry that builds a body of precedents that can support almost any decision at all. It leaves too much to the discretion of the bench, thereby subverting the rule of law.

The Fourteenth Amendment expanded the field of controversy over due process. In extending the jurisdiction of federal courts of general jurisdiction to cases between a citizen and his state over infringement of rights recognized for citizens of the United States, it presented the problem that such rights, or “immunities,” could not be defined merely as the complement of delegated powers. The essential idea of the Ninth and Tenth Amendments is that public action that Congress is not authorized to disable or restrict is a right and any declaration of a right is a restriction on delegated powers. Thus, deciding immunity when there is only one sovereign is logically straightforward, in principle.

But states are also sovereigns with their own constitutions that delegate other powers not delegated to U.S. officials by the U.S. Constitution. Powers not delegated to state officials by state constitutions define immunities under the state constitution or statutes, but that still leaves a zone of potential contention where powers are delegated by a state constitution that intrudes into the immunities defined by nondelegation of powers by the U.S. Constitution. Most of this zone of contention arises from the “police powers” provisions of state constitutions to authorize legislation of the health, safety, order, or morals of the public. There is no such broad provision

in the U.S. Constitution. The vagueness of state police powers could be interpreted to authorize infringement of almost any federal immunity. This has left the federal courts to adopt standards of review and rational basis tests and a distinction between “fundamental” and “nonfundamental” rights. Only the first of these is protected from state action. This has led the U.S. Supreme Court to authorize state departures from the standards of federal due process in what is called “selective incorporation” of federal immunities.

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References and Further Reading

- Coke, Sir Edward. *Institutes of the Laws of England, Part II*. London: 1641. <http://www.constitution.org/coke/coke2nd.htm>.
- Haines, Charles Grove. *The Revival of Natural Law Concepts*. London: Oxford University Press, 1930, Chaps. 5, 6. http://www.constitution.org/haines/haines_005.htm.
- Magna Carta, Art. 39. See also Art. 55. <http://www.constitution.org/eng/magnacar.htm>.
- Matthews v. Eldridge*, 424 U.S. 319 (1976). Often cited as defining sufficient condition of a due process claim, it is sometimes mistakenly taken as a necessary condition to limit standing to those who have suffered actual injury, contrary to the historic right to prosecute public rights privately. <http://laws.findlaw.com/us/424/319.html>.
- Petition of Right, 1628. Art. 3. <http://www.constitution.org/eng/petright.htm>.
- Roland, Jon. “Presumption of Nonauthority and Unenumerated Rights,” <http://www.constitution.org/9ll/schol/pnur.htm>.
- Winter, Steven L., *The Metaphor of Standing and the Problem of Self-Governance*. 40 Stan. L. Rev. 1371 (July 1988). http://www.constitution.org/duopr/standing/winter_standing.htm.
- Wood, Horace G. *A Treatise on the Legal Remedies of Mandamus and Prohibition, Habeas Corpus, Certiorari, and Quo Warranto*. Albany: Little, 1896, section on quo warranto. <http://www.constitution.org/cmt/woodhg/wood-hc.htm>.

See also **Incorporation Doctrine**

DUE PROCESS IN IMMIGRATION

“Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned” (*United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544, 1950). On the other hand, all “persons within the United States,” citizens and noncitizens alike, are entitled to the procedural protections of the Due Process Clauses of the Constitution (*Zadvydas v. Davis*, 533 U.S. 678, 693, 2001). To determine the due process rights of noncitizens, it is therefore critical to determine who is “within the United States.” To understand the due process rights

of noncitizens more completely, it is also important to distinguish briefly between the substantive constitutional rights of aliens (or the lack thereof) and their procedural rights.

Procedural versus Substantive Rights

From the earliest days of federal regulation of immigration beginning in the latter half of the nineteenth century, the Supreme Court has deferred to Congress’s substantive policy choices. Pursuant to the Court created “plenary power” doctrine, Congress can fashion substantive immigration law and policy virtually free from what we might call domestic constitutional norms. For instance, Congress has used race and ideology as criteria for who can enter and remain in the United States (for example, *Chae Chan Ping v. United States* [*The Chinese Exclusion Case*], 130 U.S. 581, 1889; *Kleindienst v. Mandel*, 408 U.S. 753, 1972).

In contrast, the Court has been less deferential to the political branches’ procedural treatment of noncitizens in the United States. Neither the federal nor the state governments can criminally punish a noncitizen without affording the noncitizen the same trial rights due a citizen (*Wong Wing v. United States*, 162 U.S. 228, 1896). Noncitizens are also entitled to due process protections before they can be deported. In *Yamataya v. Fisher* (*The Japanese Immigrant Case*), 189 U.S. 86, 101 (1903), the Court established that a noncitizen was entitled “all opportunity to be heard upon questions involving his right to be and remain in the United States. No such arbitrary power can exist where the principles involved in due process of law are recognized.” Noncitizens considered not within the United States, however, receive no constitutional due process protection.

Who Is “Within the United States”?

Only noncitizens who are within the United States are entitled to the Constitution’s guarantee of due process. This presents no problems for the hundreds of millions of persons with no connection or desire to interact with the United States. But, the lack of procedural guarantees can create a myriad of problems for those wishing to come to the United States and those physically within the borders but not considered “within the United States.”

Noncitizens who apply for visas and/or who present themselves at the border seeking entry are entitled

only to those procedural protections provided by Congress or the executive branch. For those whose ties to the United States are attenuated, the lack of due process guarantees results, at most, in inconvenience. As the ties grow stronger, the lack of protection can be devastating. For example, *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950), involved a “war bride” attempting to come to the United States to live with her U.S. citizen husband. She was excluded from the United States as an alleged threat to national security. The Supreme Court upheld the decision not to give her a hearing, deferring to the attorney general’s conclusion that giving her a hearing would compromise national security.

Significant ties to the United States and inability to travel to another country can exacerbate the harshness of the rule that only noncitizens “within” the United States are entitled to the Constitution’s due-process protections. The plight of Ignatz Mezei amply illustrates the stakes. Mezei had lived a life of “unrelieved insignificance” with his family in Buffalo, New York, for a quarter of a century when he left on an extended journey to visit his ailing mother behind what was then emerging as the Iron Curtain. Upon his attempted return to the United States, he was excluded in the interest of national security and, like Ellen Knauff, he was denied a hearing and a chance to confront his accusers. Since no other country would take him, he was confined indefinitely on Ellis Island. Since he had not been admitted into the United States, he was entitled to none of the Constitution’s procedural protections (see *Shaughnessy v. United States ex rel. Mezei*, 345 U.S., 206, 1953).

Noncitizens, like Mezei, who are at the border (including those arriving to interior airports), although physically present on U.S. soil, have not passed through an immigration checkpoint and therefore have not been admitted to the United States and are not entitled to due process. For humanitarian reasons, the United States may allow an otherwise excludable alien to visit the United States. Instead of admitting the alien into the country, the United States grants the alien “parole,” which allows the government to maintain the legal fiction that the noncitizen is not within the United States and therefore is not entitled to due-process protections.

To ameliorate the harshness of a strict territorial demarcation, the Court, in *Landon v. Plasencia*, 459 U.S. 21 (1982), concluded that a permanent resident alien returning to the United States after a brief sojourn abroad had not cut her ties to the United States so severely as to be entitled to no due-process protection.

The Process Due

For those noncitizens entitled to the Constitution’s due-process protection, the further question is what process is due. To determine whether the government’s action comports with constitutional minima, the Court balances the individual’s interest at stake against the interest of the government in using its current procedures. The risk that the government’s current procedures could wrongfully deprive the individual of that interest coupled with the anticipated value of different or additional procedures provides the fulcrum upon which these competing interests are balanced (*Mathews v. Eldridge*, 424 U.S. 219, 334-335, 1976).

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References and Further Reading

- Aleinikoff, Alex, *Due Process and “Community Ties”*: A Response to Martin, University of Pittsburgh Law Review 44 (1983): 237-260.
- Chin, Gabriel, Victor Romero, and Michael Scaperlanda, eds. *Immigration and the Constitution*, vol. 3, *Shark Infested Waters: Procedural Due Process in Constitutional Immigration Law*. New York: Garland, 2000.
- Cole, David, *In Aid of Removal: Due Process Limits on Immigration Detention*, Emory Law Journal 51 (2002): 1003-1039.
- Martin, David, *Due Process and Membership in the National Political Community: Political Asylum and Beyond*, University of Pittsburgh Law Review 44 (1983): 165-235.
- Motomura, Hiroshi, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, Columbia Law Review 92 (1992): 1625-1704.
- Nafziger, *Review of Visa Denials by Consular Officials*, Washington University Law Review 66 (1991): 1-105.
- Saito, Natsu, *The Enduring Effect of the Chinese Exclusion Cases: The “Plenary Power” Justification for On-Going Abuses of Human Rights*, Asian Law Journal 10 (2003): 13-36.
- Scaperlanda, Michael, *Polishing the Tarnished Golden Door*, Wisconsin Law Review 1993 (1993): 965-1032.
- , *Are We That Far Gone? Due Process and Secret Deportation Proceedings*, Stanford Law and Policy Review 7 (1996): 23-30.
- , *Partial Membership: Aliens and the Constitutional Community*, Iowa Law Review 81 (1996): 707-773.
- Weisselberg, Charles, *The Exclusion and Detention of Aliens: Lessons From the Lives of Ellen Knauff and Ignatz Mezei*, University of Pennsylvania Law Review 143 (1995): 933-1034.

Cases and Statutes Cited

- Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581 (1889)
- Demore v. Kim*, 123 S.Ct. 1708 (2003)

DUE PROCESS IN IMMIGRATION

Kleindienst v. Mandel, 408 U.S. 753 (1972)
Landon v. Plasencia, 459 U.S. 21 (1982)
Mathews v. Eldridge, 424 U.S. 219 (1976)
Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953)
United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537 (1950)
Wong Wing v. United States, 162 U.S. 228 (1896)
Yamataya v. Fisher (The Japanese Immigrant Case), 189 U.S. 86 (1903)
Zadvydas v. Davis, 533 U.S. 678 (2001)

See also **Bill of Rights: Structure; Chae Chan Ping v. U.S.**, 130 U.S. 581 (1889) and **Chinese Exclusion Act; Citizenship; Aliens, Civil Liberties of; Criminal Law/Civil Liberties and Noncitizens in the United States; Due Process; Due Process of Law (V and XIV); Indefinite Detention; Kleindienst v. Mandel**, 408 U.S. 753 (1972); **9/11 and the War on Terrorism; Noncitizens, Civil Liberties; Plenary Power Doctrine**

DUE PROCESS OF LAW (FIFTH AND FOURTEENTH)

The Fifth Amendment of the U.S. Constitution contains a clause that prohibits the national government from depriving a person of “life, liberty, or property, without due process of law.” The Fourteenth Amendment has a similarly worded clause that applies to state governments. Other than applying to different levels of government, the two clauses have the same basic meaning.

In its most general sense, due process of law is another term for rule of law, the principle that government cannot act against persons unless it has a legal basis for doing so. This principle does not preclude most government takings of life, liberty, and property, but only those that are arbitrary or capricious in nature. More specifically, due process of law requires that in order to deprive a person of life, liberty, or property, the government must notify the person that it wants to do just that and then must, in a fair hearing, convince an impartial judge or court that the person has violated some previously enacted, but valid, law.

In this general sense, due process of law has an ancient lineage. As early as 1215, it was guaranteed by the Magna Carta, one of several documents that now make up the English Constitution. Therein, the king of England promised that “[n]o freeman shall be arrested, or imprisoned, or disseized, or outlawed, or exiled, or in any way molested; nor will we proceed against him, unless by the lawful judgment of his peers or by the law of the land.” The principle of due process of law was reaffirmed in the Petition of Right (1628), for it said that English freemen could

“be imprisoned or detained only by the law of the land, or by due process of law, and not by the king’s special command without any charge.” It was also at the heart of John Locke’s *Second Treatise of Government* (1690), which significantly influenced the thinking of those who established the American political system. Before the Constitution was ratified, most state constitutions had a due process clause.

Although the general meaning of the two due-process clauses is clear, exactly what kinds of government actions violate the clauses is not clear. In its first case interpreting the due-process clause of the Fifth Amendment, the Supreme Court said, “The Constitution contains no description of those processes which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process” (*Murray’s Lessee v. Hoboken Land and Improvement Company*, 18 How., 59 U.S., 272, 1856). Consequently, the Court has had to spell out exactly what due process of law means, and in doing so, it has significantly expanded its power of judicial review and generated considerable controversy.

The Court’s decisions interpreting the clauses fall into two categories: (1) those dealing with *procedural* due process (whether the application or enforcement of a law violated due process) and (2) those dealing with *substantive* due process (whether a law itself violated due process).

Procedural Due Process

Issues involving procedural due process usually arise in criminal cases in which the Court must decide whether a person’s conviction of a crime resulted from a fair judicial proceeding. As for what counts as a fair proceeding, until approximately the 1960s, the Court’s answer depended on which of the two due-process clauses it was interpreting. The Court has said relatively little about the procedural due process guaranteed by the Fifth Amendment, mainly because there are other provisions in the Bill of Rights that guarantee, as against the federal government, specific aspects of procedural due process. Quite different has been the Court’s interpretation of the Due Process Clause of the Fourteenth Amendment. Because it was the only constitutional provision the Court could use to guarantee procedural due process in state criminal proceedings, the Court has written much about its meaning.

At first, however, the Court interpreted that clause rather narrowly. For example, it said that the clause does not require states to use a grand jury as the way

to indict persons of capital crimes (*Hurtado v. California*, 110 U.S. 516, 1884) or prohibit them from requiring persons accused of crimes to answer questions at their trials (*Twining v. New Jersey*, 211 U.S. 78, 1908). In the latter case, however, the Court said:

It is possible that some of the personal rights safeguarded by the first eight Amendments against national action may also be safeguarded against state action, . . . If this is so, it is not because those rights are enumerated in the first eight Amendments, but because they are of such a nature that they are included in the conception of due process of law.

By the 1920s, the Court began using the Due Process Clause of the Fourteenth Amendment to overturn convictions that it felt had not been fairly obtained. For example, in *Moore v. Dempsey*, 261 U.S. 86 (1923), it overturned the convictions of five black men for murder because their trial was so influenced by a racially prejudiced mob that the Court held that it was a travesty. Most importantly, in *Brown v. Mississippi*, 297 U.S. 278 (1936), the Court unanimously held that states could not use coerced confessions to convict persons of crimes.

Decisions like these, however, were usually the result of the Court's examining fully and carefully the record of what occurred before and during a trial. Even in the famous case of *Powell v. Alabama*, 287 U.S. 45 (1932), in which the Court overturned the convictions of nine black teenagers for raping two white girls (on the grounds that they were denied aid of counsel), it did not hold that in all criminal or even felony trials the Due Process Clause requires that the accused be afforded effective counsel. Rather, the Court justified its decision on the basis of the circumstances of the case and the characteristics of the defendants. Not surprisingly, five years later, in *Palko v. Connecticut*, 302 U.S. 319 (1937), the Court refused to hold that a right against double jeopardy is part of procedural due process guaranteed by the Fourteenth Amendment. It did so on the grounds that specific procedural rights mentioned in the Bill of Rights, like the right against double jeopardy, are not "fundamental" rights "implicit in the concept of ordered liberty."

In the mid-twentieth century, however, the Court changed its mind on this issue. It decided that most of the rights of the accused guaranteed in the Bill of Rights were included within the procedural due process guaranteed by the Fourteenth Amendment. It held in 1949 that unreasonable searches and seizures like those prohibited by the Fourth Amendment cannot be conducted by state officials without violating due process of law (*Wolf v. Colorado*, 338 U.S. 25, 1949) and, in 1961, that evidence obtained through

such unconstitutional searches and seizures cannot be used in state courts against persons accused of a crime (*Mapp v. Ohio*, 367 U.S. 643, 1961).

After that, the Court held that due process of law means that persons accused of serious crimes not only have a right to counsel, but also must be provided with a lawyer by the state if they do not have the means to pay for one (*Gideon v. Wainwright*, 372 U.S. 335, 1963); that persons tried in state courts cannot be forced to answer questions or testify in their defense (*Malloy v. Hogan*, 378 U.S. 1, 1964); and that defendants in state courts must be given the opportunity to confront and cross-examine witnesses against them (*Pointer v. Texas*, 380 U.S. 400, 1965). *Klopfer v. North Carolina*, 386 U.S. 213 (1967), required states to provide speedy trials to persons accused of crimes; *Duncan v. Louisiana*, 391 U.S. 145 (1968), said that persons accused of serious crimes have a right to be tried by juries in state courts; and *Benton v. Maryland*, 395 U.S. 784 (1969), held that states cannot try persons more than once for the same crime.

Since the 1960s, although the Supreme Court has elaborated on the meaning of the specific rights mentioned in the preceding paragraph, it has not created any additional procedural due-process rights. It could still do this, however. Moreover, the Court can always declare any deprivation of life, liberty, and property to be a violation of procedural due process if it believes that all the facts in a case show that the deprivation was the product of an unfair procedure.

Finally, the Court has held that procedural due process (a fair hearing of some sort) must also be afforded in various kinds of noncriminal (for example, civil, administrative, juvenile) proceedings that could lead to the loss of a person's liberty or property. What exactly is required in such proceedings? The Court has said that a variety of processes and hearings, depending on the situation, can work to ensure due process of law and legislatures have a role to play in determining what is required (*Bell v. Burson*, 402 U.S. 535, 1971), but that "the hearing must provide a real test" (*Fuentes v. Shevin*, 407 U.S. 67, 1972).

Substantive Due Process

The constitutional law of substantive due process is quite different from and more controversial than that of procedural due process. Here the basic issue is whether a law, as distinguished from its application or enforcement, is inconsistent with due process of law. When the Supreme Court first addressed the meaning of the Due Process Clause of the Fifth

Amendment, it said, “The article is a restraint on the legislative as well as on the executive and judicial powers of the government . . .” (*Murray’s Lessee v. Hoboken Land and Improvement Company*, 1856). Later, the Court said, “It is not every act, legislative in form, that is law. Law is something more than mere will exerted as an act of power” (*Hurtado v. California*, 1884).

Laws can violate the principle of due process of law in four ways. First, they can do so if they require judges or law enforcement officials to use a procedure inconsistent with procedural due process. The Court has thus said, “It is manifest that it was not left to the legislative power to enact any process which might be devised” (*Murray’s Lessee v. Hoboken Land and Improvement Company*, 1856). An example of a law that authorized a procedure inconsistent with due process of law was the one struck down in *Chicago, Milwaukee and St. Paul Ry. Co. v. Minnesota*, 134 U.S. 118 (1890), which gave a regulatory commission the power to set the rates for railroads without holding hearings and allowing the railroads to present evidence.

Second, a law violates due process if it is arbitrary or inherently unfair. The emphasis here is not on a law’s effect—the liberty or property that it takes, prohibits, or regulates—but on its nature as law. Even if the liberty or property it takes is very minor, a law can still violate due process if it does not possess the requisite character of law. On this point, the Court has said, “It [a law] must be not a special rule for a particular person or a particular case,” but a “general law” . . . Arbitrary power . . . is not law, whether manifested as the decree of a personal monarch or of an impersonal multitude” (*Hurtado v. California*, 1884).

How might a law, regardless of its effects on liberty or property, be unfair or arbitrary? Two examples of such a law are bills of attainder and ex post facto laws, both of which are explicitly prohibited in Article One, sections 9 and 10, of the Constitution. Bills of attainder are unfair because they inflict punishment on specified persons even though a court of law has not found them guilty of violating any existing laws, and ex post facto laws are equally unfair because they apply retroactively and thereby punish persons for doing something that was not illegal when they did it. Very similar to these kinds of laws are “acts of confiscation,” “acts directly transferring one man’s estate to another,” and legislative acts deciding specific cases that should have been decided by courts or reversing decisions already made by courts (*Hurtado v. California*, 1884).

Another kind of law that the Supreme Court considers to be arbitrary, regardless of what it regulates

or prohibits, is one that has no “rational basis”—that is, that serves no public purpose or interest. When a law deprives persons of their life, liberty, or property for no apparent reason relating to the common good, the Court is likely to assume that it is the result of a legislature’s incompetence or animosity toward those harmed by the law.

Third, a law violates due process if it is “so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application . . .” (*Connally v. General Construction Co.*, 269 U.S. 385, 1926). On the other hand, because of the inherent imprecision of language and the need for government to do its business without having to be perfect, the Court has also said that “no more than a reasonable degree of certainty can be demanded” (*Boyce Motor Lines Inc. v. United States*, 342 U.S. 337, 1952).

Fourth, even if a law is not inherently arbitrary, unfair, or unclear, it may still violate due process of law if it deprives persons of an especially important private interest (liberty or property). As early as 1875, the Court used the term “fundamental rights” to refer to the especially important private interests protected by the due process clauses (*United States v. Cruikshank*, 92 U.S. 542, 1875). What rights are fundamental? The Court’s answer to this question has evolved over time. Traditionally, the “liberty” that could not be taken without due process of law was that of freedom from physical restraint or imprisonment, but now the word refers to a range of behaviors that the Court believes deserve special protection from legislation.

Whatever these fundamental rights are, however, they are not absolute; they can be abridged by the government if it can make a strong enough case for doing so. This means that in cases involving government regulation of fundamental rights, the Court must utilize some kind of criterion or “test” to determine whether the government’s reasons for the regulation are strong enough to justify the regulation. There are, moreover, different tests for different kinds of fundamental rights and they, like the rights, have changed over time. This fourth component of substantive due process has been, by far, the most significant part of the Court’s interpretation of the two due process clauses, and its development has been long, complicated, and very controversial.

The idea of substantive due process seems to have arisen first in 1856 in the Court of Appeals of New York, which in *Wynehamer v. People*, 13 N.Y. 378 (1856), declared a New York law prohibiting the possession of liquor to be in violation of that state’s due-process clause. One year later, in the infamous case of *Dred Scott v. Sandford*, 19 How. (60 U.S.) 393 (1857), the U.S. Supreme Court used the Due Process

Clause of the Fifth Amendment to strike down the portion of the Missouri Compromise that excluded slavery from certain U.S. territories. It held that “[a]n act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offense against the laws, could hardly be dignified with the name of due process of law.” Then, in *Hepburn v. Griswold*, 8 Wallace 608 (1870), the Court implied that a federal law that authorized the national government to issue paper money that was not redeemable in hard currency but was legal tender for payment of all debts deprived creditors of their property without due process of law guaranteed by the Fifth Amendment. In record time, however, the Court reversed itself and upheld the law in *Second Legal Tender Cases*, 12 Wallace 457 (1871).

In the meantime, in 1868, the Fourteenth Amendment was added to the Constitution. In addition to prohibiting states from abridging “the privileges or immunities of citizens of the United States” and denying “to any person . . . the equal protection of the laws,” it prohibited them from depriving “any person of life, liberty, or property, without due process of the laws.”

In the *Slaughterhouse Cases*, 16 Wall. (83 U.S.) 36 (1873), the Court was asked to hold that all three of these provisions were violated by a Louisiana law that, for public health reasons, gave one company a monopoly on the slaughtering of animals in the New Orleans area. The plaintiffs who challenged the law were the slaughterers who had been put out of business. Their attorney argued that they had a natural right to practice their trade and that the three provisions were intended to protect that right as well as individual freedom and free enterprise in general. He also argued that the due process clause guaranteed more than procedural due process. Although the Court upheld the law, the idea of substantive due process was given credibility, not only by the plaintiffs’ attorney but also by one of the four dissenters, Justice Joseph Bradley, who wrote, “[A] law which prohibits a large class of citizens from adopting a lawful employment, or from following a lawful employment previously adopted, does deprive them of liberty as well as property, without due process of law.”

Not surprisingly, therefore, in spite of the *Slaughterhouse Cases* decision, attorneys for businesses, corporations, and others whose property rights were threatened by legislation continued to press the Supreme Court to interpret both due process clauses as guaranteeing substantive, and not merely procedural, due process.

Although during the 1870s and 1880s, the Court resisted using the due process clause to strike down laws, its dicta in several cases and a growing number of dissenting opinions indicated that it was becoming more sympathetic to the idea of substantive due process. Noteworthy is what the Court said in *Mugler v. Kansas*, 123 U.S. 623 (1887): “The courts are not bound by mere forms. They are at liberty—indeed are under a solemn duty—to look at the *substance* of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority.”

The breakthrough came in the 1890s. First, the Court struck down rates established for railroads by different state regulatory commissions as “unreasonable” and thus as deprivations of property without due process of law. Then, in *Allgeyer v. Louisiana*, 165 U.S. 578 (1897), which nullified a Louisiana law that banned businesses in that state from buying insurance from companies not licensed to do business in that state, the Court enunciated freedom of contract as a fundamental right protected by the due process clause of the Fourteenth Amendment. In essence, this right meant that individuals and businesses could enter into contracts without the state’s dictating the parties to or terms of the contracts.

After *Allgeyer*, the Court used the Due Process Clause of the Fourteenth Amendment and the doctrine of liberty of contract to overturn state laws that limited the number of hours that bakers could work (*Lochner v. New York*, 198 U.S. 45, 1905); outlawed yellow-dog contracts (promises by workers not to join labor unions) (*Coppage v. Kansas*, 236 U.S. 1, 1915); forbade courts to issue injunctions against picketing (*Truax v. Corrigan*, 257 U.S. 312, 1921); created a special court to handle labor disputes (*Wolf Packing Co. v. Court of Industrial Relations*, 262 U.S. 522, 1923); and set minimum wages for employees (*Morehead v. Tipaldo*, 298 U.S. 587, 1936). The Court also used the Due Process Clause of the Fifth Amendment to nullify federal laws that banned yellow-dog contracts (*Adair v. United States*, 208 U.S. 161, 1908) and set minimum wages for female employees in the District of Columbia (*Adkins v. Children’s Hospital*, 261 U.S. 525, 1923).

During this same period, the Court actually upheld many more laws challenged as violations of due process of law than it overturned. What was the difference between the laws upheld and those not upheld? According to the Court, the laws that were nullified were “unreasonable”—in purpose, in the means for achieving that purpose, or in the degree of restraint imposed upon liberty or property. Sometimes the Court contended that a law was “arbitrary,” by which it usually meant that the restrictions it imposed

were more severe than its benefits to the public. Both tests were very vague, and their use allowed the Court to make decisions of the sort traditionally reserved to legislatures, thereby greatly enhancing its power of judicial review.

When the Court first began using substantive due process to nullify laws, the rights that it protected were primarily property rights, such as freedom to choose and practice an occupation and freedom of contract. However, it soon occurred to some justices and lawyers that if the due process clauses could be used to protect property rights, they could and should also be used to protect other “fundamental rights.” For example, in dissenting opinions, Justices Harlan and Marshall contended that the rights to free speech and press, the “right to enjoy one’s religious belief, unmolested by any human power,” and the “right to impart and receive instruction” were protected by the due process of law (*Patterson v. Colorado*, 205 U.S. 454, 1907; *Berea College v. Kentucky*, 211 U.S. 548, 1908). Other justices made similar statements.

Not surprisingly, therefore, in *Meyer v. Nebraska*, 262 U.S. 390 (1923), which nullified a Nebraska law forbidding the teaching in schools of any language other than English, the Court said that the liberty protected by the due process clause includes not only “freedom from bodily restraint” and economic rights, but also the right “to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.” Two years later, on the grounds that the right of parents to direct the education of their children was a fundamental right protected by due process of law, it overturned an Oregon law that made private schools illegal (*Pierce v. Society of Sisters*, 268 U.S. 510, 1925). Then, just one week later, in *New York v. Gitlow*, 268 U.S. 652 (1925), the Court said that “freedom of speech and of the press . . . are among the fundamental personal rights and ‘liberties’ protected by the due process clause of the Fourteenth Amendment . . .”

Other substantive rights guaranteed in the First Amendment were gradually added to the list of rights protected by the Due Process Clause of the Fourteenth Amendment—freedom of assembly in 1937, *De Jonge v. Oregon*, 299 U.S. 353 (1937), free exercise of religion in 1940 (*Cantwell v. Connecticut*, 310 U.S. 296, 1940) and in 1947 the ban on laws respecting an establishment of religion (*Everson v. Board of Education*, 330 U.S. 1, 1947).

Some scholars and Supreme Court justices use the phrase “selective incorporation of the Bill of Rights into the due process clause of the Fourteenth

Amendment” to describe the process whereby First Amendment rights and certain procedural rights (discussed in “Procedural Due Process” in this entry) guaranteed in the Bill of Rights were included within the meaning of the Due Process Clause of the Fourteenth Amendment and thus protected from state laws and actions. The “incorporation” is said to be “selective” because it happened gradually and because the Court has never held that due process of law includes all the rights guaranteed in the Bill of Rights. (For example, the right to be indicted by a grand jury has never been incorporated.)

Ironically, not long after the Court decided that certain nonproperty rights were among the fundamental rights protected from legislation by due process of law, it changed its mind about the importance of property or economic rights. In several decisions in the 1930s, the Court upheld state and federal laws that had been passed to deal with the economic problems caused by the Great Depression but had been challenged on the grounds that they violated liberty of contract and related property rights. The Court upheld the laws and, in *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), explicitly stated that economic regulations would be upheld in the face of due process challenges provided they had a “rational basis”—a test that most laws could easily pass. In contrast, it said that laws that abridge other fundamental rights, especially those specifically mentioned in the Bill of Rights, and that are challenged as violations of due process of law would be subjected to a much higher level of scrutiny. This difference in treatment of economic and noneconomic rights is often referred to as the “double standard.”

Once the Court decided to use substantive due process to protect noneconomic rights, it did not stop with those explicitly mentioned in the Constitution. In *Griswold v. Connecticut*, 381 U.S. 479 (1965), it held that a right to privacy was a fundamental right protected by due process of law, which, it later held, included within it the right of a pregnant woman to abort a fetus prior to its viability (*Roe v. Wade*, 410 U.S. 93, 1973). The Court has said that substantive due process also protects the right of extended family members to live together (*Moore v. City of East Cleveland*, 431 U.S. 494, 1977); the right of a competent person to refuse unwanted medical treatment (*Cruzan v. Missouri*, 497 U.S. 261, 1990); and the right of parents alone (and not others) to rear their children (*Troxel v. Granville*, 530 U.S. 57, 2000). In *Lawrence v. Texas*, 539 U.S. 558 (2003), the Court held that the liberty protected by due process includes the liberty of consenting adults, including those of the same sex, to engage in whatever private sexual conduct they choose.

Many of these decisions were justified on the basis of the Ninth Amendment, which says, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." During the period in which it decided to protect the previously mentioned rights, however, the Court also declined to use substantive due process to protect a range of other behaviors or "rights" because it did not feel they were fundamental.

Perhaps the Court's most extreme expansion of substantive due process occurred in 1954, the year it used the Equal Protection Clause of the Fourteenth Amendment to nullify state laws requiring that public schools be racially segregated. Because there is no equal protection clause that applies to the federal government, in *Bolling v. Sharpe*, 347 U.S. 497 (1954), it used the Due Process Clause of the Fifth Amendment to prohibit segregated public schools in the District of Columbia. The Court thereby essentially equated the equal protection and due process clauses of the Constitution, and it now uses the Due Process Clause of the Fifth Amendment to nullify any congressional law that, if passed by a state, would violate the equal protection clause of the Fourteenth Amendment.

In summary, the scope of the due process of law guaranteed by the Fifth and Fourteenth Amendments is quite large and expanding. It prohibits laws from being enforced or applied in a way that violates the specific rights of the accused listed in the Bill of Rights or that violates the general principle of fairness. It also prohibits laws that are unfair, unclear, or restrictive of First Amendment freedoms and other substantive rights that the Court has deemed or may yet deem to be fundamental. Although the Court has been fairly restrained about increasing the rights it considers fundamental, in the future that could change.

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References and Further Reading

- Barnett, Randy, ed. *The Rights Retained by the People: The History and Meaning of the Ninth Amendment*. Fairfax, VA: George Mason University Press, 1989.
- Bodenhamer, David. *Fair Trial: Rights of the Accused in American History*. New York: Oxford University Press, 1992.
- Cortner, Richard C. *The Supreme Court and the Second Bill of Rights: The Fourteenth Amendment and the Nationalization of Civil Liberties*. Madison: University of Wisconsin Press, 1981.
- Ely, James W. *The Guardian of Every Other Right: A Constitutional History of Property Rights*. New York: Oxford University Press, 1992.
- Garrow, David J. *Liberty & Sexuality: The Right to Privacy and the Making of Roe v. Wade*. New York: MacMillan, 1994.

- Hamilton, Walton H. "The Path of Due Process of Law." *Ethics* 48 (April 1938):269–296.
- Keynes, Edward. *Liberty, Property, and Privacy: Toward a Jurisprudence of Substantive Due Process*. University Park: Pennsylvania State University Press, 1996.
- Levy, Leonard W. *Origins of the Fifth Amendment*. New York: Oxford University Press, 1968.
- Orth, John V. *Due Process of Law: A Brief History*. Lawrence: University Press of Kansas, 2003.
- Paul, Ellen F., and Howard Dickman. *Liberty, Property, and the Future of Constitutional Development*. Albany: State University of New York Press, 1990.
- Seigan, Bernard. *Economic Liberties and the Constitution*. Chicago: University of Chicago Press, 1980.
- Warren, Charles. *The New "Liberty" Under the Fourteenth Amendment*, *Harvard Law Review* 39 (1926): 431–465.

Cases and Statutes Cited

- Adair v. United States*, 208 U.S. 161 (1908)
- Adkins v. Children's Hospital*, 261 U.S. 525 (1923)
- Allgeyer v. Louisiana*, 165 U.S. 578 (1897)
- Bell v. Burson*, 402 U.S. 535 (1971)
- Benton v. Maryland*, 395 U.S. 784 (1969)
- Berea College v. Kentucky*, 211 U.S. 548 (1908)
- Bolling v. Sharpe*, 347 U.S. 497 (1954)
- Boyce Motor Lines Inc. v. United States*, 342 U.S. 337 (1952)
- Brown v. Mississippi*, 297 U.S. 278 (1936)
- Cantwell v. Connecticut*, 310 U.S. 296 (1940)
- Chicago Milwaukee and St. Paul Ry. Co. v. Minnesota*, 134 U.S. 118 (1890)
- Connally v. General Construction Co.*, 269 U.S. 385 (1926)
- Coppage v. Kansas*, 236 U.S. 1 (1915)
- Cruzan v. Missouri Department of Health*, 497 U.S. 261 (1990)
- De Jonge v. Oregon*, 299 U.S. 353 (1937)
- Dred Scott v. Sandford*, 19 How. (60 U.S.) 393 (1857)
- Duncan v. Louisiana*, 391 U.S. 145 (1968)
- Everson v. Board of Education*, 330 U.S. 1 (1947)
- Fuentes v. Shevin*, 407 U.S. 67 (1972)
- Gideon v. Wainwright*, 372 U.S. 335 (1961)
- Griswold v. Connecticut*, 381 U.S. 479 (1965)
- Hepburn v. Griswold*, 8 Wallace 608 (1870)
- Hurtado v. California*, 110 U.S. 516 (1884)
- Klopper v. North Carolina*, 386 U.S. 213 (1967)
- Lawrence v. Texas*, 539 U.S. 558 (2003)
- Lochner v. New York*, 198 U.S. 45 (1905)
- Malloy v. Hogan*, 378 U.S. 1 (1964)
- Mapp v. Ohio*, 367 U.S. 643 (1961)
- Meyer v. Nebraska*, 262 U.S. 390 (1923)
- Moore v. City of East Cleveland*, 431 U.S. 494 (1977)
- Moore v. Dempsey*, 261 U.S. 86 (1923)
- Morehead v. Tipaldo*, 298 U.S. 587 (1936)
- Mugler v. Kansas*, 123 U.S. 623 (1887)
- Murray's Lessee v. Hoboken Land and Improvement Company*, 18 How. (59 U.S.) 272 (1856)
- New York v. Gillogh*, 268 U.S. 652 (1925)
- Palko v. Connecticut*, 302 U.S. 319 (1937)
- Patterson v. Colorado*, 205 U.S. 454 (1907)
- Pierce v. Society of Sisters*, 268 U.S. 510 (1925)
- Pointer v. Texas*, 380 U.S. 400 (1965)
- Powell v. Alabama*, 287 U.S. 45 (1932)
- Roe v. Wade*, 410 U.S. 93 (1973)
- Second Legal Tender Cases*, 12 Wallace 457 (1871)
- Slaughterhouse Cases*, 16 Wall. (83 U.S.) 36 (1873)

Troxel v. Granville, 530 U.S. 57 (2000)
Truax v. Corrigan, 257 U.S. 312 (1921)
Twining v. New Jersey, 211 U.S. 78 (1908)
United States v. Carolene Products Co., 304 U.S. 144 (1938)
United States v. Cruikshank, 92 U.S. 542 (1875)
Wolf v. Colorado, 338 U.S. 25 (1949)
Wolf Packing Co. v. Court of Industrial Relations, 262 U.S. 522 (1923)
Wynehamer v. People, 13 N.Y. 378 (1856)

See also **Application of First Amendment to States; Capital Punishment: Due Process Limits; Due Process in Immigration; Economic Rights in the Constitution; Incorporation Doctrine; Incorporation Doctrine and Free Speech; Privileges and Immunities (XIV); Retained Rights (Ninth Amendment); Vagueness and Overbreadth in Criminal Statutes; Vagueness Doctrine**

DUNCAN v. LOUISIANA, 391 U.S. 145 (1968)

Duncan v. Louisiana was argued January 17, 1968, and decided May 20, 1968, by a vote of seven to two. Justice White delivered the opinion for the Court, with Justices Harlan and Stewart dissenting. The Court held that the defendant, accused under Louisiana law of simple battery, a misdemeanor punishable by a maximum of two years' imprisonment and a \$300 fine, was entitled under the Sixth and Fourteenth Amendments to a jury trial, even though Duncan was sentenced to sixty days in jail and a \$150 fine. The decision reaffirmed the right to a jury trial in criminal cases as a fundamental right even if the offense is petty.

In the lower courts, Duncan was tried and convicted of simple battery. The State of Louisiana argued, successfully, that a jury trial was only required in cases in which capital punishment and hard labor may be imposed. Justice White reversed the Louisiana Supreme Court by arguing that fundamental issues of liberty were at stake and cited *Powell v. Alabama*, 287 U.S. 45 (1932) for his rationale.

In *Duncan*, Justice White summarized the history and importance of trial by jury, dating back to the Magna Carta. Fearful of possible judicial bias in cases, the justice explained why trial by jury remains an important fixture in the U.S. legal system:

The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government . . . If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it (pp. 155–156).

Justice Harlan, whom Justice Stewart joined, dissented. His dissent centered around the notion of states' rights. Justice Harlan argued that a state has historically held the responsibility for "operating the machinery of criminal justice within its borders."

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DUSKY v. U.S., 362 U.S. 402 (1960)

To satisfy any theory of punishment, a criminal defendant must be competent to stand trial. In making this determination, the trial court in *Dusky* tested whether the defendant was oriented to time and place and had some recollection of the events. On appeal, defense counsel argued that Dusky was not competent to stand trial under 18 U.S.C. § 4244 because he was not able to assist properly in his defense.

The U.S. Supreme Court reversed the trial court's holding and redefined the test for competency to stand trial. According to *Dusky*, trial courts must determine whether the defendant has a present rational and factual understanding of the proceedings against him and whether he has the present ability to assist counsel with a reasonable degree of rational understanding. The Court remanded the case for another determination of the defendant's present competency to stand trial in accordance with the articulated standard.

In recent years, the Court has continued to assess the standard for competency to stand trial. As explained in *Godinez v. Moran*, 509 U.S. 398 (1993), the *Dusky* standard represents the constitutional minimum for testing a defendant's competency to stand trial, enter a guilty plea, or waive his right to counsel. In *Ford v. Wainwright*, 477 U.S. 399 (1986), the Court addressed a similar question and held that a capital defendant must be competent for execution and must understand that he is being executed and why. To maintain integrity in the criminal justice system, courts must assess a defendant's competency at all critical stages of the proceedings.

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References and Further Reading

Bonnie, Richard J., *The Competency of Criminal Defendants: Beyond Dusky and Drope*, U. Miami Law Review 47 (1993): 539–601.

Cases and Statutes Cited

Dusky v. U.S., 362 U.S. 402 (1960)
Ford v. Wainwright, 477 U.S. 399 (1986)
Godinez v. Moran, 509 U.S. 398 (1993)

See also **Insanity Defense; Mentally Ill**

DUTY TO OBEY COURT ORDERS

Relatively unyielding is the rule that a party must do what is required of him by the court order that resolves his case. (For example, an injunction might require a defendant never to take specified action.) In this, the rule differs from the much more complex and malleable rules (*stare decisis* and collateral estoppel) concerning the consequences for later cases of an earlier court decision's fact finding and legal reasoning.

Compliance with court orders is essential to our conception of the "rule of law." President Nixon's grudging acquiescence to the Watergate subpoenas makes clear that the rule of compliance binds the government as well as ordinary persons. Basic order depends on government and citizens alike abiding by official adjudications until they are dislodged by a higher court. Consequently, as the Supreme Court made clear in *United States v. United Mine Workers*, 330 U.S. 258, 293-94 (1947), courts usually require compliance even with erroneous court orders until they are overturned on appeal. Even if the order is invalidated, the appellate court will regard it, in effect, as valid for the period before it was overturned.

In *Walker v. Birmingham*, 388 U.S. 307, 318-20 (1967), the Supreme Court suggests in dicta that an erroneous court order enjoining constitutionally protected activity might be disobeyed if it is determined on appeal that (1) the order was legally wrong; (2) prompt attempts had been made to appeal; and (3) rights would have been lost by obeying the order pending relief on appeal. For example, if someone is ordered not to speak concerning politics until after the next election and no appeal is available very soon, then it is a reasonable gamble that he may disobey the order until the appeal can be decided. However, he takes the risk, among others, that the appellate courts will find (1) that the original order complied with the constitution or (2) that he had avenues of meaningfully swifter review. If either is found and he has disobeyed the order, then he is likely to be in contempt. It is also possible that an order resulting from certain court proceedings regarded as shams or as completely lawless need not be followed.

Action against those not complying with a court order takes a variety of forms including (1) contempt proceedings, resulting in fines or terms of confinement or (2) executive seizure of property necessary to satisfy the order. A court order also exerts great force outside the issuing court. The federal constitutional text, federal statutes, and related federal common law require that state and federal courts honor and enforce each other's judgments.

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References and Further Reading

Palmer, J., *Note: Collateral Bar and Contempt: Challenging a Court Order After Disobeying It*, Cornell L. Rev. 88 (2002): 215.

Cases and Statutes Cited

United States v. United Mine Workers, 330 U.S. 258, 293-94 (1947)
Walker v. Birmingham, 388 U.S. 307, 318-20 (1967)

DWI

State laws forbid driving while intoxicated, or DWI. The offense is also referred to in some jurisdictions as DUI (driving under the influence), OWI (operating while intoxicated), or OUI (operating under the influence). The enforcement of these laws involves searches and seizures subject to the Fourth Amendment.

The two types of DWI offenses are driving while impaired and driving while alcohol or drugs are present in the body. Driving while impaired requires proof that drugs or alcohol affected the operator's physical or mental functions. Although no particular level of alcohol or drugs is proscribed, test results showing alcohol content in the body are evidence of impairment.

In contrast, driving while drugs or alcohol are in the body does not require proof of impairment. Instead, these laws require only that a forbidden level of alcohol be found in the body, as measured by breath, blood, or urine. Statutes often presume driving under the influence from 0.08 percent alcohol content in the blood. The 0.08 standard is a reduction from the formerly prevailing standard of 0.10. The lower standard exemplifies increasingly strict DWI statutes, which also have imposed greater punishments as social tolerance of drunk driving has decreased.

Fourth Amendment issues arise in DWI enforcement at two phases of DUI investigation: (1) the initial police-citizen encounter and (2) the detection of alcohol content in the suspect's body.

The police-citizen encounter typically begins with a stop of a vehicle. Such a stop is a "seizure" under the Fourth Amendment. The Fourth Amendment permits police to stop a vehicle to detect drunk driving under three circumstances. First, police can stop the vehicle to investigate for drunk driving if they have reasonable suspicion to believe that the offense is being committed, as the U.S. Supreme Court held in *Michigan v. Long*, 463 U.S. 1032 (1983). This is the same legal basis used in *Terry v. Ohio*, 392 U.S. 1 (1968), to permit stopping a pedestrian.

Second, as the Supreme Court held in *Whren v. United States*, 517 U.S. 806 (1996), police can stop a vehicle for a traffic violation. Police can use the time spent in citing the motorist to look for indications of other crimes, including drunk driving. If reasonable suspicion of DWI arises, the officer may detain the driver further to investigate.

Third, police can establish checkpoints to find drunk drivers. Checkpoints are allowed but must be fixed—roving patrols are not allowed—and must be of limited duration and nondiscriminatory in determining which motorists are stopped.

The Fourth Amendment also protects citizens from searches in the form of compulsory drug or alcohol tests, as the Court held in *Schmerber v. California*, 384 U.S. 757 (1966). *Schmerber* said that although police generally must obtain warrants, they can obtain blood without a warrant if they have probable cause, their method of obtaining the sample is reasonable, and a warrant cannot be secured before the alcohol in the body will dissipate.

The driver is required by most state laws to consent to these tests and provide samples of breath or blood. The theory of “implied consent” is that the state driving laws can condition the privilege of driving upon consent to such a test. In some states, the driver’s license of a motorist who refuses the test is subject to suspension or revocation. A more recent trend, adopted earlier in countries such as Canada and Australia, is to make refusal to submit to the test a crime.

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Cases and Statutes Cited

Michigan v. Long, 463 U.S. 1032 (1983)
Schmerber v. California, 384 U.S. 757 (1966)
Terry v. Ohio, 392 U.S. 1 (1968)
Whren v. United States, 517 U.S. 806 (1996)

See also **Checkpoints (roadblocks); Drug Testing; Exemplars; Probable Cause; *Skinner v. Railway Labor Executives, Association*, 489 U.S. 602 (1989); Stop and Frisk**

DWORKIN, ANDREA (1946–2005)

With the 1979 publication of her book, *Pornography: Men Possessing Women*, Andrea Dworkin established herself as a feminist poised on the procensorship camp of the pornography debates, alongside theorists such as Catharine MacKinnon. In *Pornography*, Dworkin argued that the major theme of pornography as a genre is male power. She postulated that pornography does not fall under the protection of

the First Amendment’s Free Speech Clause because that amendment only protects those who can exercise the rights it protects. She argued that pornography trades in a class of people who have been systematically denied the rights protected by the First Amendment, so pornography should not receive First Amendment protection.

Along with Catharine MacKinnon, Dworkin coauthored an antipornography ordinance first introduced in Minneapolis in 1983. Dworkin and MacKinnon based the ordinance on their definition of pornography as a discriminatory practice based on sex. They included speech and action under their ordinance, arguing that speech and action work together to form a discriminatory system of sexual exploitation based upon sex-based powerlessness, which generates sex-based abuse. They also argued that photographic porn should be indisputably classified as action since they believed it only receives classification as speech because the women in pornographic photography have been depicted as objects or as commodities by the pornography. Thus, the speech belongs to those people who control the consumption of the images—the pornographers—and not the women featured in the pictures.

In the ordinance, Dworkin and MacKinnon constructed pornography as a human rights violation against women; they posited that men learn to sexually abuse women through pornography because pornography creates, in their words, a physiologically real conviction in men that women want to be abused. They argued that their antipornography ordinance articulated, for the first time, how pornography uses and affects women by recognizing an “energetic” agent of male domination over women. The First Amendment, they argued, cannot protect pornography because it would then be protecting exploitation since, by their definition, pornography functions as sexual exploitation that produces sexual abuse and discrimination. Through the Indianapolis ordinance (which was ultimately declared unconstitutional), Dworkin and MacKinnon postulated that porn in any form constituted an act inescapably linked to the general disempowerment of women. Pornography thus shows the “truth” of women’s enslavement to men.

In a 1985 case, *American Booksellers Association, Inc., et al v. William H. Hudnut II*, 84-3147 (1985), a unanimous federal appeals court upheld the district court finding that the ordinance functioned too broadly and violated the First Amendment.

Dworkin wrote several other books, including *Intercourse* (published in 1987), in which she maintained that, according to men, the inferiority of women originates in sex, where women are inherently unequal;

since men have the “right” to exploit women in sex, then they have the right to possess women in other realms as well. Marriage, according to Dworkin, perpetuated an institution of inequality because of what women must do to attract husbands. She continued to work, write, and lecture on topics concerning women’s rights and sexuality until her death in 2005.

MELISSA OOTEN

References and Further Reading

- Dworkin, Andrea. *Pornography: Men Possessing Women*. New York: Perigee, 1979.
 ———. *Intercourse*. New York: The Free Press, 1987.
 ———. *Letters from a War Zone: Writings, 1976–1989*. New York: E. P. Dutton, 1989.

- . *Heartbreak: The Political Memoir of a Feminist Militant*. New York: Basic Books, 2002.
 Dworkin, Andrea, and Catharine MacKinnon. *Pornography and Civil Rights: A New Day for Women’s Equality*. Minneapolis, MN: Organizing Against Pornography, 1988.
 ———, eds. *In Harm’s Way: The Pornography Civil Rights Hearings*. Cambridge, MA: Harvard University Press, 1997.
 Soble, Alan. *Pornography, Sex, and Feminism*. Amherst, NY: Prometheus, 2002.

Cases and Statutes Cited

- American Booksellers Association, Inc., et al v. William H. Hudnut II*, 84-3147 (1985)
 See also MacKinnon, Catharine; Strossen, Nadine

E

ECONOMIC REGULATION

The Framers of the Constitution who met in Philadelphia in 1787 were all or nearly all well-off property owners. One of their major concerns was the need to protect property owners in the unprecedented experiment in democracy that they were proposing. A major defect of democracy, they feared, was that debtors, always greatly outnumbering creditors, would be able to pass laws relieving themselves of their debt obligations. Probably the most important of the very few restrictions placed on the states in the original Constitution, therefore, was a provision prohibiting the states from passing any law “impairing the Obligation of Contracts,” the principal purpose of which was to prevent debtor relief legislation. Further, James Madison, the principal author of the Constitution, in preparing a first draft of a bill of rights from suggestions made by many of the ratifying states, decided on his own to add a provision that private property may not be “taken for public use without just compensation.”

In the last third of the nineteenth century following the Civil War, the nation experienced, in the near-total absence of government regulation, the greatest growth of industrial development and wealth in history. Alleged abuses of economic power by railroads and other large business entities led to demands for national economic regulation. The Interstate Commerce Commission was created in 1887 to regulate the railroads, and the Sherman Antitrust Act was adopted in 1890 to protect free market competition from business combines. Similar developments took

place at the state level with the adoption of various price and wage controls and other economic and business regulations.

Attorneys for railroads, grain elevators, and other businesses subjected to economic regulation repeatedly besieged the Supreme Court to hold such regulations unconstitutional under the Due Process Clauses of the Fourteenth Amendment, applicable to the states, and the Fifth Amendment, applicable to the federal government. The clauses, providing that no person shall be deprived of “life, liberty, or property without due process of law,” were understood to impose only a requirement of fair legal procedures. The attorneys argued that the Court should interpret the clauses as also placing a restriction on the substance of law, permitting the justices to declare unconstitutional any law they considered “unreasonable.” After first dismissing this argument as based on “some strange misconception of the scope” of the Due Process Clause, the Court finally succumbed at the end of the nineteenth century, creating the oxymoronic doctrine of “substantive due process.”

The Court thereafter and through the first third of the twentieth century invalidated more than 180 business or economic regulations as violating the “liberty of contract” that the Court read into the Due Process Clause or as simply “unreasonable” (most challenged regulations, however, were upheld). This period in the Court’s history became known as the *Lochner* era, epitomized by the Court’s 1905 decision in *Lochner v. New York*, holding unconstitutional a New York law that limited the working hours of bakers to sixty

hours a week. The Court held that this restriction on liberty of contract between bakers and employers was not necessary to protect the health of bakers, and that it was not a legitimate use of state power to seek to improve the condition of the working class.

During the same period, the Court invalidated two federal anti-child labor laws as beyond the power of Congress to regulate interstate commerce and to tax. It then stopped the carrying out of President Franklin Roosevelt's New Deal during his first term (1933–1936) by invalidating a series of attempts to regulate the national economy as beyond Congress's commerce power and as a violation of substantive due process.

Two important five-to-four decisions in 1934, however, pointed in a different direction. In *Nebbia v. New York*, the Court upheld price controls on the dairy industry, making clear that such controls were no longer generally impermissible. Even more remarkably, in *Home Building & Loan Ass'n v. Blaisdell*, the Court upheld a Minnesota mortgage moratorium law that prevented unpaid creditors from foreclosing on property, precisely the type of debtor relief measure that the Contracts Clause was meant to prohibit. The effect of the decision was virtually to read the clause out of the Constitution as a limitation on state economic regulation. The clause enjoyed a surprising partial revival in the late 1970s when two state laws were found to be in violation, but later decisions indicate that the revival is over.

The era of judicial concern with economic regulation came to a sudden and apparently complete end in 1937, often referred to as the year of the "constitutional revolution." Overwhelmingly reelected in 1936, President Roosevelt undertook to keep the Court from continuing to frustrate his New Deal by proposing what became known, derisively, as his "Court-packing" plan. If justices over seventy years of age failed to retire, the plan would have permitted the appointment of additional justices up to a total of fifteen. While the plan, which aroused intense opposition, was pending in Congress, the Court, almost entirely due to a change in the position of a single justice, Owen Roberts, handed down two opinions that seemed to reverse the position it had taken on federal and state economic regulation just the year before.

In *NLRB v. Jones & Laughlin Steel Corp.* (1937), the Court upheld application of the National Labor Relations Act, prohibiting the firing of union organizers, to a steel mill as a valid exercise of Congress's power to regulate interstate commerce. In *West Coast Hotel Co. v. Parrish* (1937), the Court upheld a state minimum wage law after invalidating a similar law the year before. Whether or not the pending plan was

the cause, the Court made what was called "the switch in time that saved nine." The plan was then defeated, but President Roosevelt was able to claim that although he lost the battle, he had won the war. *Jones & Laughlin* and companion cases initiated the Court's withdrawal from attempts to limit Congress's regulation of economic and business affairs by means of the commerce power, and *West Coast Hotel* signaled the end of the Court's invalidation of state regulations of business or economic affairs on the basis of substantive due process.

The Fifth Amendment's prohibition of the taking of private property for public use without just compensation, originally applicable only to the national government, was held in the late 1900s to be, in effect, applicable to the states as well through the Fourteenth Amendment. The Court has read the "public use" requirement very broadly so as to impose no real limit on the taking of property by eminent domain. It is clear that just compensation is required when government takes possession of or asserts title to property. In *Pennsylvania Coal Co. v. Mahon* (1922), the Court held that compensation may also be required when a regulation of the use of property reduces its value even when the government does not take possession.

The Court has not, however, been able to state a rule as to what constitutes such a "regulatory taking," and none was again found until several regulatory taking claims were upheld in a series of five-to-four decisions beginning in 1987. The five more conservative justices attempted to breathe new life into the Taking Clause by holding that even a temporary restriction on the use of property could constitute a taking requiring compensation, that a regulation that deprives property of "all economically beneficial or productive use" constitutes a taking per se (automatically), and that a property owner could base a taking claim even on restrictions that were on the property before he bought it. Finally, the Court held that when government requires a permit for a certain use of property (for example, to build a house), any conditions attached to a grant of the permit must be related to the reason for requiring a permit.

Much of the increased protection apparently given property owners by these decisions was undone, however, by the Court's decision in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency* (2002) denying a regulatory taking claim. The Court very much limited, if it did not effectively overrule, both its earlier temporary regulatory taking decision, and its per se rule by holding that a regulation that prohibited all productive use of property for (at least) thirty-two months did not constitute a taking per se because the property retained value because

productive use will be possible when and if the restriction is removed.

In sum, Congress's virtually unlimited power to regulate economic and business affairs under the Commerce Clause, the demise of the doctrine of economic substantive due process, the virtual elimination of the Contract Clause, and the very limited application of the Taking Clause mean that there are now very few constitutional restrictions on either national or state regulation of economic and business affairs.

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References and Further Reading

- Ackerman, Bruce. *Private Property and the Constitution*. New Haven, CT: Yale University Press, 1977.
- Alsop, Joseph, and Turner Catledge. *168 Days*. New York: Doubleday Doran, 1938.
- Corwin, Edward. *Liberty Against Government*. Baton Rouge: Louisiana State University Press, 1948.
- Epstein, Richard. *Takings: Private Property and Eminent Domain*. Cambridge, MA: Harvard University Press, 1985.
- Rossiter, C., ed. *The Federalist Papers, No. 10 (Madison)*. New York: Penguin Books, 1961.
- McClosky, Robert. *The American Supreme Court*. Chicago: University of Chicago Press, 1960.
- Novak, John, and Ronald O. Rotunda. *Constitutional Law*. 7th ed. St. Paul, MN: Thomson West, 2004.
- Twiss, Benjamin. *Lawyers and the Constitution: How Laissez-Faire Came to the Supreme Court*. New Haven, CT: Princeton University Press, 1942.
- Wright, Benjamin F. *The Growth of American Constitutional Law*. Boston and New York: Houghton Mifflin, 1942.

Cases and Statutes Cited

- Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934)
- Lochner v. New York*, 198 U.S. 45 (1905)
- Nebbia v. New York*, 291 N.Y. 502 (1934)
- NLRB v. Jones & Laughlin*, 301 U.S. 57 (1937)
- Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922)
- Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002)
- West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937)
- U.S. Const. art. I, sec. 10; Fifth and Fourteenth Amendments

ECONOMIC RIGHTS IN THE CONSTITUTION

Protection of the rights of property owners has long been a vital function of the Anglo-American legal system. In particular, the English constitutional tradition stressed individual property rights as an important bulwark of freedom from arbitrary government. The Magna Carta (1215) contained a number of provisions that safeguarded property ownership.

Foremost among these was the provision that “no freeman shall be taken, imprisoned, disseised . . . except by the lawful judgment of his peers and by the law of the land.” With this language, the Magna Carta sought to secure owners against deprivation of their liberty or property without due process of law.

The property-conscious tenets of English constitutionalism were powerfully reinforced by the political theorist John Locke. He maintained in his famous *Second Treatise on Government* (1689) that private property existed under natural law before the creation of political authority, and that one of the principal functions of government was to protect property. Locke rejected the view that property could be created only by government. In Locke's thought, property ownership was closely connected with the preservation of liberty. Property was seen as giving people basic security and was therefore a necessary predicate to the enjoyment of other individual liberties. William Blackstone, in his influential *Commentaries on the Laws of England* (1765–1769), also attached great significance to the protection of property. He classed the free use and disposal of property as an “absolute right, inherent in every Englishman.” Blackstone stressed the high regard of law for private property and the exclusive dominion of owners, but he noted that the use of property was subject to control by law. In particular, he insisted that English common law mandated the payment of compensation to persons whose property was taken for public use.

Revolutionary Era

By the time of the American Revolution the right to property was central to legal and political thought. Property was viewed as the linchpin upon which other rights rested. Indeed, the American colonists repeatedly invoked safeguards of property rights in their struggle with England. Economic issues, such as taxation without representation and restrictions on colonial trade, were crucial in shaping the drive for independence. The colonists therefore manifested a deep concern for property rights as part of their effort to devise constitutional restraints on governmental power.

Not surprisingly, the initial state constitutions contained a number of provisions to protect the rights of property owners. Several state constitutions asserted that the right to acquire and possess property was a natural right. Some states sought to promote free trade and the incentive to accumulate property by prohibiting grants of monopoly. Echoing the Magna Carta, a number of constitutions also declared that no person could be “deprived of his life, liberty, or

property but by the law of the land.” In addition, several states incorporated into their constitutions the common law principle that compensation should be paid when private property was taken for public use. Similarly, the Northwest Ordinance of 1787 included language protective of property ownership and contractual arrangements. Besides law of the land and Takings Clauses, the ordinance stated that no law should “interfere with or affect private contracts.” These property guarantees were forerunners of provisions in the federal Constitution and Bill of Rights.

Notwithstanding the professed devotion to the security of property, the actual behavior of Americans during the Revolutionary era resulted in widespread despoliation of property rights. State legislators enacted bills of attainder declaring named Loyalists to be guilty of treason and confiscating their property without a judicial trial. Similarly, states, most notably Virginia, placed legal obstacles to the recovery of private debts owed to British merchants. Moreover, in the aftermath of the break with England, state lawmakers frequently interfered in debtor–creditor relations with a variety of measures designed to assist debtors. A particular sticking point was the issuance of depreciated paper currency, a move seen by merchants and creditors as amounting to confiscation of their economic interests. The seizure of Loyalist property and the repudiation of debts did not bode well for the security of economic rights in the new republic. As a result, many political leaders became convinced that the states could not adequately protect property ownership.

Constitution and Bill of Rights

Heirs to the English constitutional tradition linking tradition and liberty, the Framers of the Constitution in 1787 were anxious to secure property rights and halt the abuses that characterized the Revolutionary era. They also understood the advantages of private property as the basis for a strong national economy. Envisioning a unified commercial nation, the Framers recognized that uncertain ownership and contractual rights discouraged investment and inhibited economic growth. Many provisions of the Constitution therefore relate to economic interests. The Contract Clause bars states from enacting any law “impairing the obligation of contracts.” Moreover, the states were prohibited from enacting bills of attainder and from making anything other than gold or silver coin legal tender for the payment of debts. The Constitution curtailed the power of Congress to levy “direct” taxes by requiring that such levies be apportioned

among the states according to population. Congress was authorized to regulate interstate and foreign commerce, thus encouraging the growth of a national market for goods. Mindful of the emerging importance of intellectual property, the framers gave Congress the power to award copyrights and patents to authors and inventors. It should further be noted that several provisions in the Constitution were concerned with the protection of property in slaves.

The high priority assigned by the Framers to property rights was further evidenced in the *Federalist Papers*. In *Federalist* 54, for instance, James Madison asserted that “government is instituted no less for the protection of the property, than of the persons of individuals.” In addition to the specific provisions relating to economic interests, the Framers anticipated that the structural arrangements of the new federal government, with its system of checks and balances between branches of government, would foster a political climate in which property rights would be secure.

The Constitution as originally drafted did not include a Bill of Rights to guarantee individual liberty. The Framers felt that a Bill of Rights was unnecessary because they proposed to create a national government of limited powers. The absence of a Bill of Rights, however, proved to be one of the major obstacles in winning ratification of the new Constitution by the states. Accordingly, the proponents of the Constitution informally agreed to adopt a bill of rights in order to secure ratification. James Madison took the lead in drafting this bill of rights. For the most part he drew upon traditional guarantees already recognized in state bills of rights or English common law. Madison had long been an advocate for private property rights, and he included important protections for property ownership in the proposed bill of rights. The Fifth Amendment provides in part that no person shall be “deprived of life, liberty, or property, without due process of law; nor shall a private property be taken for public use, without just compensation.” It is revealing that Madison placed this language in the same amendment with procedural safeguards governing criminal trials. This step emphasized the close association of property rights with personal liberty in his mind.

Madison amplified his thinking about property rights in a 1792 essay published shortly after ratification of the Bill of Rights. Madison broadly defined property as including more than physical objects. Madison treated important individual liberties, such as freedom of expression and religious conscience, as forms of property. He cautioned against either direct or indirect violations of property rights by governmental action. Indeed, Madison may well have been seeking to buttress support for civil liberties

by associating them with the strong protections afforded private property. The essay suggests that Madison himself would lean toward a muscular reading of the property clauses in the Constitution.

The inclusion of specific constitutional guarantees of property in the federal Constitution led to similar moves by the states. Many states adopted clauses from the Constitution and Bill of Rights when they fashioned their own fundamental laws. State constitutions generally included a Contract Clause, protected persons against deprivation of property without due process, and required that just compensation be paid when property was taken by the state for public use. These state developments reinforced the high standing of property and contractual rights in the constitutional culture. Moreover, it bears emphasis that the Bill of Rights was initially understood as restraining just the federal government. Only the Contract Clause applied to the states and provided a basis for federal court oversight of state legislation interfering with economic rights. It followed that property owners looked primarily to state constitutions as safeguards of their rights. Even where state constitutions did not contain specific property guarantees, state courts tended to treat the rights set forth in the federal Bill of Rights as articulating fundamental constitutional principles. In *Gardner v. Village of Newburgh* (1816), for instance, the distinguished jurist James Kent ruled that, even in the absence of an express state constitutional provision, owners of land were entitled as a matter of natural equity to compensation when their property was taken for public use.

From the outset of the new republic, federal courts made clear their willingness to curtail state infringement of property and contractual rights. In the important case of *Vanhorne's Lessee v. Dorrance* (1795), Justice William Patterson, who had been an active member of the Constitutional Convention, characterized the pivotal role of private property in Lockean terms. Declaring that "the right of acquiring and possessing property, and having it protected, is one of the natural, inherent and inalienable rights of man," he added, "the preservation of property . . . is a primary object of the social compact." As this suggests, the right to acquire and use property was seen by the framers as a bedrock principle of social order, a right that was crucial for the enjoyment of individual liberty and economic growth.

Nineteenth Century

The interdependence of economic rights and political freedom was a major principle of American

constitutionalism throughout the nineteenth century. In *Wilkinson v. Leland* (1829), for instance, Justice Joseph Story expressed this view in striking language: "That government can scarcely be deemed to be free, where the rights of property are left solely dependent upon the will of a legislative body, without any restraint. The fundamental maxims of a free government seem to require, that the rights of personal liberty and private property should be held sacred."

To vindicate this vision of the importance of economic rights, the Supreme Court under Chief Justice John Marshall developed a broad reading of the Contract Clause. In essence, the Court concluded that the Contract Clause covered both private bargains and agreements to which states were parties, such as land sales and grants of corporate charters. In revealing language, Marshall in *Fletcher v. Peck* (1810) characterized the various constitutional restraints on state legislative power, including the Contract Clause, as a "bill of rights for the people of each state." In the *Dartmouth College Case* (1819), the Contract Clause was invoked to guarantee the contractual nature of state-granted charters of incorporation from abridgement. Although the Contract Clause decisions of the Marshall Court upset local interests and states rights theorists, there was little criticism directed against the Court's defense of private property and contractual arrangements. In fact, the Marshall Court was expressing a widely shared constitutional norm. Not only did Marshall and his colleagues give vitality to the property-conscious value to the framers, but they did much to set the parameters of American constitutionalism for more than a century.

Marshall's successor as chief justice, Roger B. Taney, was more inclined to uphold state regulatory authority, but he also did much to protect property rights and facilitate economic growth. In cases such as *Bronson v. Kinzie* (1843), the Court under Taney applied the Contract Clause to uphold private credit arrangements against state legislative interference. This line of decisions reflected the high standing of contracts in the legal culture of the nineteenth century as a vehicle by which individuals participated in the expanding market economy.

At the state level courts began to treat the due process norm as protecting economic rights. In the landmark case of *Wynehamer v. People* (1856), for example, the New York Court of Appeals ruled that a prohibition statute constituted a deprivation of property without due process when applied to liquor already owned when the measure took effect. By the eve of the Civil War a number of state courts had fashioned substantive guarantees of property from the due process concept. This principle found expression in the maxim that laws which took property from

A and transferred it to B amounted to a deprivation of property without due process.

The centrality of property to the constitutional order did not rule out any role for public controls. States possessed a general legislative authority, known as the police power, to enact laws protecting public health, safety, and morals. Yet such regulations restricted the rights of owners to utilize their property. Moreover, both the federal and state governments could exercise the power of eminent domain to take private property for public use. State governments aggressively employed eminent domain to acquire property to promote transportation projects, and delegated the power to canal and railroad companies. Of course, property owners were entitled to just compensation when their property was taken.

The bedrock status of property rights in the constitutional order was dramatically illustrated during the Civil War. Although property in slaves was destroyed by the Thirteenth Amendment, Congress refused to adopt a sweeping confiscation policy calculated to seize all the property of persons supporting the Confederacy. Reluctant to disturb the property rights of individuals, even those in rebellion, Congress in 1862 passed a weak measure that authorized confiscation only after condemnation proceedings before a court. The presidential administration of Abraham Lincoln showed no enthusiasm for confiscation and did little to enforce the act. In marked contrast to the experience of the Revolutionary era, the Civil War debates over confiscation served to underscore the sanctity of private property, and to stigmatize confiscation as an illegitimate exercise of governmental power.

Property rights and private economic ordering continued to occupy a key position in constitutional doctrine throughout the late nineteenth century. For example, the Civil Rights Act of 1866 enumerated the right to make contracts and acquire property as among the liberties guaranteed to freed persons. Moreover, the Supreme Court invoked the Contract Clause in numerous cases to prevent municipalities from repudiating their bonded debt, thus protecting investment capital.

Supporters of economic rights, however, increasingly shifted their focus to the Due Process Clause of the Fourteenth Amendment. A central constitutional question was the extent to which this amendment, ratified in 1868, imposed new limits on state authority. Thomas M. Cooley, an influential treatise writer, asserted that the Due Process Clause was a substantive as well as a procedural restraint on state legislative power. He paved the way for a muscular interpretation of the Fourteenth Amendment. Initially, however, the Supreme Court was reluctant to see the Fourteenth Amendment as establishing a basis

for federal court review of state law. In the *Slaughterhouse Cases* (1873), the justices adopted a narrow reading of that amendment. Similarly, the Supreme Court in *Munn v. Illinois* (1877) affirmed state regulatory power, rejecting a due process challenge to state laws that regulated the prices charged by railroads and allied industries.

Yet by the 1880s the Court was increasingly receptive to arguments that the Due Process Clause of the Fourteenth Amendment protected fundamental individual rights, such as the ownership and use of private property, from unwarranted encroachment by state government. In essence, federal judges did not accept legislative exercises of the police power at face value. Rather, they assessed legislative controls on economic activity against a reasonableness standard, invalidating those deemed arbitrary or beyond the legitimate scope of government. It bears emphasis that most state laws, and especially those protecting health and safety or fostering public morals, passed constitutional muster.

Still, the due process norm afforded considerable protection for economic rights. In *Allgeyer v. Louisiana* (1897), the Supreme Court held that the Due Process Clause guaranteed the liberty to make contracts. Freedom to enter contracts was treated as the constitutional baseline. States had to justify laws that limited contractual freedom, a requirement that set the stage for conflict between individual economic freedom and social legislation. Further, the Court ruled in *Chicago, Burlington & Quincy Railroad v. Chicago* (1897) that the just compensation principle concerning taking of property was applicable to the states as an element of due process in the Fourteenth Amendment. In effect, the just compensation rule became the first provision of the Bill of Rights to be “incorporated” into the Fourteenth Amendment Due Process Clause. In a closely related development, the Court determined that the governmental taking of property from one person for the private use of another constituted a deprivation of property in violation of due process.

The Supreme Court looked with particular skepticism on laws that appeared to redistribute property to achieve greater economic equality. To compel the redistribution of private property was viewed as threatening the very individual autonomy that respect for property promised to safeguard from governmental encroachment. This rejection of redistributive claims found expression in a series of cases which held that regulated industries, such as railroads, were constitutionally entitled to a reasonable return upon their investment. In other words, states could not impose confiscatory rates that would impair the value of property. Even more dramatic were the decisions in

Pollock v. Farmers' Loan & Trust Company (1895), invalidating the 1894 income tax as an unconstitutional direct tax. This levy, which affected only a small number of upper-income taxpayers, breached the widely accepted norm enjoining equality of rights and duties. *Pollock* represented the culmination of long-standing constitutional principles that restricted the power of government to redistribute wealth.

Twentieth Century

The traditional place of property rights in American constitutionalism was challenged in the early twentieth century. Concerned about a variety of problems arising from urbanization and industrialization, the Progressive movement urged a more active role for federal and state governments in redressing the economic and social imbalances associated with the new industrial society. Progressives called for the imposition of workplace safety standards, minimum wage laws, and limits on the hours of work, measures that curtailed contractual freedom. They also successfully pushed for adoption in 1913 of the Sixteenth Amendment, which authorized Congress to tax incomes, effectively overturning the *Pollock* decisions and opening the door to redistributionist use of the taxing power. At the same time, theorists began to reconceptualize property ownership as a set of social relationships rather than as dominion over an object. Property was analyzed in terms of being a cluster or bundle of rights, an approach that emphasized the contingent and changing nature of ownership. By suggesting that property did not imply any fixed set of rights, this theory sought to undermine the constitutional position of property and make room for greater governmental regulation of economic behavior.

The response of the Supreme Court to these novel political and intellectual currents was mixed. The majority of the justices remained suspicious of laws that altered free-market ordering or infringed on property rights. In the landmark case of *Lochner v. New York* (1905), for example, the Court struck down a statute limiting the hours of work in bakeries as violative of the liberty of contract protected by the Fourteenth Amendment. Similarly, the Court invoked the Due Process Clause to invalidate minimum wage laws for women. Judicial solicitude for the rights of property owners resulted in a significant victory for civil rights. In *Buchanan v. Warley* (1917), the Supreme Court voided a city ordinance mandating racial segregation in residential areas as a deprivation of property without due process. More commonly, the Court relied on due process review to eliminate entry barriers that

impeded competing enterprise. Thus, in *New State Ice Co. v. Liebmann* (1932), the Court declared unconstitutional a state licensing law that had the practical effect of fostering a monopoly in established ice companies by excluding competitors. Suggesting the link between economic liberty and other rights, the Court equated the right of free speech with entrepreneurial freedom.

In addition to relying on the Due Process Clause, the Supreme Court strengthened the protection afforded property owners under the Fifth Amendment Takings Clause. Speaking for the Court, Justice Oliver Wendell Holmes, Jr. in *Pennsylvania Coal Co. v. Mahon* (1922) ruled that a regulation of the use of property could be so severe as to amount to a taking of property which required compensation. Although agreeing that property could be controlled to some extent, he cautioned that "if regulation goes too far it will be recognized as a taking."

Yet the Court was prepared to accommodate much of the economic regulation associated with the Progressive movement. The justices sustained in *Muller v. Oregon* (1908) a state law restricting the working hours for women in factories and laundries. They likewise approved workers' compensation laws that mandated payment to employees injured in industrial accidents without regard to fault. Moreover, the Court in *Village of Euclid v. Ambler Realty Company* (1926) upheld the validity of comprehensive zoning laws to control land use patterns against due process objections.

The Great Depression and the election of Franklin D. Roosevelt as president in 1932 were watershed events in American history. Roosevelt's New Deal program was premised on the belief that government should intervene in the economy and actively promote social welfare. This political philosophy was sharply at odds with traditional constitutional doctrines stressing a limited role for government and a high regard for private property. Not surprisingly, the Supreme Court was initially hostile to much of the New Deal's regulatory program. Following a lacerating struggle, however, the Court in 1937 began to uphold New Deal legislation and largely abandoned its longstanding commitment to economic rights. Freedom of contract was stripped of its constitutional base. A major component of New Deal constitutionalism was a dichotomy between property rights and other personal liberties. In *United States v. Carolene Products Co.* (1938), the Court indicated that in due process cases it would afford a higher level of judicial scrutiny for a preferred category of personal rights, such as free speech and religious freedom, than for property rights. Such a distinction was contrary to the belief of the Framers that protection of property was

essential for political liberty, but this constitutional double standard soon became the reigning paradigm. For decades thereafter economic rights were of scant concern to judges or scholars, and they downplayed the historical importance of property as a bulwark of individual autonomy.

Obituaries for property rights, however, proved to be premature. Starting in the 1980s, jurists and scholars rediscovered the constitutional dimensions of property rights. A series of Supreme Court decisions have revitalized the regulatory doctrine and helped to restore property rights to the forefront of academic debate. Wealth redistribution, which has rarely aroused sustained interest, was replaced by tax-cutting initiatives. International developments also contributed to the resurgence of interest in economic rights. With the collapse of communist regimes throughout the world, new governments have looked to the restoration of private property as a route to economic growth and political freedom.

The historic link between economic rights and the preservation of individual liberty retains considerable vitality even in an age with far-reaching economic regulations. Private property tends to diffuse power and resources throughout society, and thus shield all personal liberties by limiting a concentration of power in governmental hands. Other important rights, such as free speech and voting, would be unlikely to check governmental abuses without secure property rights to encourage political independence. With citizens under the economic thumb of the government, the exercise of personal and political freedom is illusory. Indeed it is difficult to find examples of free societies that do not respect private property.

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References and Further Reading

- Alexander, Gregory S. *Commodity & Propriety: Competing Visions of Property in American Legal Thought, 1776–1970*. Chicago: University of Chicago Press, 1997.
- Benedict, Michael Les. *Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*. Law and History Review 3 (1985): 243–331.
- Bruchey, Stuart. *The Impact of Concern for the Security of Property Rights on the Legal System of the Early American Republic*. Wisconsin Law Review (1980): 1135–58.
- Ely, James W., Jr. *The Guardian of Every Other Right: A Constitutional History of Property Rights*. 2nd ed. New York: Oxford University Press, 1998.
- . *The Marshall Court and Property Rights: A Reappraisal*. John Marshall Law Review 33 (2000): 1023–61.
- Horwitz, Morton J. *The Transformation of American Law, 1870–1960*. New York: Oxford University Press, 1992.
- Nedelsky, Jennifer. *Private Property and the Limits of American Constitutionalism: The Madisonian Framework and Its Legacy*. Chicago: University of Chicago Press, 1990.
- Pipes, Richard. *Property and Freedom*. New York: Alfred A. Knopf, 1999.
- Rose, Carol M., *Property as the Keystone Right?* Notre Dame Law Review 71 (1996): 329–66.
- Scheiber, Harry N., ed. *The State and Freedom of Contract*. Stanford, CA: Stanford University Press, 1998.

Cases and Statutes Cited

- Allgeyer v. Louisiana*, 165 U.S. 578 (1897)
- Bronson v. Kinzie*, 42 U.S. 311 (1843)
- Buchanan v. Warley*, 245 U.S. 60 (1917)
- Chicago, Burlington & Quincy Railroad v. Chicago*, 166 U.S. 226 (1897)
- Fletcher v. Peck*, 10 U.S. 87 (1810)
- Gardner v. Village of Newburgh*, 12 Johns. Ch. 162 (N.Y. 1816)
- Lochner v. New York*, 198 U.S. 45 (1905)
- Muller v. Oregon*, 208 U.S. 412 (1908)
- Munn v. Illinois*, 94 U.S. 113 (1877)
- New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932)
- Pennsylvania Coal v. Mahon*, 260 U.S. 393 (1922)
- Pollock v. Farmers' Loan & Trust Company*, 157 U.S. 429 (1895), 158 U.S. 601 (1895)
- Slaughterhouse Cases*, 83 U.S. 36 (1873)
- Trustees of Dartmouth College v. Woodward*, 17 U.S. 518 (1819)
- United States v. Carolene Products Co.*, 304 U.S. 144 (1938)
- Vanhorne's Lessee v. Dorrance*, 2 Dallas 304 (1795)
- Village of Euclid v. Amber Realty Company*, 272 U.S. 365 (1926)
- Wilkinson v. Leland*, 27 U.S. 627 (1829)
- Wynehamer v. People*, 13 N.Y. 378 (1856)

EDWARDS v. AGUILLARD, 482 U.S. 578 (1987)

This case is part of the ongoing cultural struggle over teaching evolution in public schools that began with the 1925 Scopes trial. The issue previously had come before the U.S. Supreme Court in *Epperson v. Arkansas* (1968), and continues to be a point of controversy in American life.

In *Edwards v. Aguillard*, the Court dealt with a 1981 Louisiana statute that prohibited “the teaching of the theory of evolution in public schools unless accompanied by instruction in ‘creation science.’” Although no school was obligated to teach creation science or evolution, if one was taught, the other had to be taught as well. In a seven-to-two decision, the Court held that the statute violated the Establishment Clause.

The Court assessed the statute under the first prong of the three-prong test *Lemon* test: “[T]he statute must have a secular legislative purpose.” It evaluated several secular purposes claimed by Louisiana, concluding that none were convincing. It is rare that a court finds a statute in violation of *Lemon*’s first prong. For virtually all statutes that have failed the

second prong, a statute's "principal or primary effect must be one that neither advances nor inhibits religion."

The Court first evaluated the state's claim that the statute was intended to protect academic freedom. After agreeing with the Fifth Circuit Court of Appeals that "the Act was not designed to further" academic freedom, the Court rejected the state's claim in oral argument that the legislature intended to protect academic freedom by requiring a fair and balanced and more comprehensive science curriculum even though it "may not [have] use[d] the terms 'academic freedom' in the correct legal sense." But even if that were true, the Court argued, the statute's construction was not tailored to accomplish this goal, since the statute in fact limited the curriculum and a teacher's academic freedom by forbidding instruction in evolution unless creation science was offered. Citing the statute's legislative history, including public comments by the statute's sponsor that he would have preferred that neither creationism nor evolution be taught, the Court concluded that the secular purpose claimed by the state was a sham.

The Court, agreeing with the Fifth Circuit, held that the statute's requirements—including the production of curriculum guides only for creationism, prohibition of discrimination only against creationists, and acquiring of resources and advice only from creation scientists—had the "purpose of discrediting 'evolution by counterbalancing its teaching at every turn with the teaching of creationism . . .'" Thus, the statute did not advance fairness, as the state argued.

The Court also held that the statute's purpose was to advance a particular religious viewpoint, the Genesis account of creation. The Court looked at the "historic and contemporaneous link between the teachings of certain religious denominations and the teaching of evolution." According to the Court, the legislative history "reveals that the term 'creation science,' as contemplated by the legislature that adopted this Act, embodies the religious belief that a supernatural creator was responsible for the creation of humankind." Also, the statute and its sponsor targeted one theory, evolution, which some citizens, including the statute's sponsor, believe is hostile to their religious faith. But the Constitution "forbids alike the preference of a religious doctrine or the prohibition of a theory which is deemed antagonistic to a particular dogma."

Edwards is an important case because it contains a standard that courts may use to assess a statute that requires a public school science curriculum on the topic of origins: (1) the statute's historical continuity with the creation/evolution battles throughout the twentieth century; (2) how closely the curricular

content required by the statute parallels the creation story in Genesis, and/or whether the curricular content prohibited or regulated by the statute is treated as such because it is inconsistent with the creation story in Genesis; (3) the motives of those who support the statute in the legislature; and (4) whether the statute is a legitimate means to achieve appropriate state ends.

The only dissenting opinion was penned by Justice Antonin Scalia (joined by Chief Justice William Rehnquist). Among Scalia's many comments is his criticism of the Court's "religious motive test" to determine a statute's purpose. He argues that legislative motive, even if it is religious, is not the same as the actual purpose of the statute, which may be secular. Scalia also points out that legislators may support the same legislation for a variety of motives, and that "political activism by the religiously motivated is part of our heritage," which includes feeding the hungry and sheltering the homeless.

Because the Court stated that its opinion did "not imply that the legislature could never require that scientific critiques of prevailing scientific theories be taught," *Edwards* does not exclude the teaching of scientific views that are critical of evolution but that are not based exclusively on the authority of religious writings.

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References and Further Reading

- Beckwith, Francis J. *Law, Darwinism & Public Education: The Establishment Clause and the Challenge of Intelligent Design*. Lanham, MD: Rowman & Littlefield, 2003.
- Campbell, John A., and Stephen C. Meyer, eds. *Darwinism, Design, and Public Education*. East Lansing, MI: Michigan State University Press, 2003.
- Carter, Stephen L., *Evolutionism, Creationism, and Teaching Religion as a Hobby*, Duke Law Journal 1987 (1987): 977.
- Darwin, Charles. *On the Origin of Species*. Facsimile of the 1st edition (1859), with introd. by Ernst Mayr. Cambridge, MA: Harvard University Press, 1964.
- Dembski, William A., and Michael Ruse, eds. *Debating Design: From Darwin to DNA*. New York: Cambridge University Press, 2004.
- Greenawalt, Kent, *Establishing Religious Ideas: Evolution, Creationism, and Intelligent Design*, Notre Dame Journal of Law, Ethics & Public Policy 17 (2003): 2:321–97.
- Johnson, Phillip E. *Darwin on Trial*. Chicago: Regnery Gateway, 1991.
- Miller, Kenneth R. *Finding Darwin's God: A Scientist's Search for Common Ground Between God and Evolution*. New York: Cliff Street Books, 1999.
- Numbers, Ronald. *Darwinism in America*. Cambridge, MA: Harvard University Press, 1998.
- Pennock, Robert T., ed. *Intelligent Design Creationism and Its Critics: Philosophical, Theological, and Scientific Perspectives*. Cambridge, MA: MIT Press, 2001.
- Ruse, Michael. *The Evolution Wars: A Guide to the Debates*. Santa Barbara, CA: ABC-CLIO, 2000.

Cases and Statutes Cited

Balanced Treatment for Creation-Science and Evolution-Science in Public School Instruction. *La. Rev. Stat. Ann.* sec. 17:286.1–17:286.7 (West 1982)
Epperson v. Arkansas, 393 U.S. 97 (1968)
Lemon v. Kurtzman, 403 U.S. 602, 613 (1971)

See also *Epperson v. Arkansas*, 393 U.S. 97 (1968); **Lemon Test; Scopes Trial; Teaching “Creation Science” in Public Schools; Teaching Evolution in Public Schools**

EDWARDS v. ARIZONA, 451 U.S. 477 (1981)

In *Edwards*, the police arrested and questioned the defendant after advising him of his *Miranda* rights. He initially consented to questioning but later asked for an attorney. Questioning stopped at that time. The next day, police questioned him against his will, without counsel present. He answered freely and later confessed after the police played him the taped statement of an alleged accomplice. At trial, he challenged the confession, but the judge admitted it because it was voluntarily given.

In a nine-to-zero reversal, the Supreme Court analyzed its *Miranda v. Arizona* (1966) and *Schneekloth v. Bustamonte* (1973) holdings, and determined that the Constitution affords special protection to the right to counsel that cannot be protected by a merely voluntary waiver. It held that a confession can only be admitted when the suspect both voluntarily and knowingly relinquishes his Fifth Amendment right to counsel. The Court went further to protect the right, holding that once it has been invoked, a valid waiver must contain more than responses to police-initiated questioning. However, the Court noted that if the defendant initiates a subsequent conversation, he could be deemed to have waived his right.

Chief Justice Burger concurred in the judgment but voiced concern over the majority’s expansive holding. A second concurrence faulted the majority’s reliance on “initiation” as part of the waiver analysis. Subsequent cases interpreted *Edwards* broadly, leading the Court, in *Minnick v. Mississippi* (1990), to announce a bright-line rule that once a suspect invokes the right to counsel, he cannot be reinterviewed without counsel present.

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References and Further Reading

Shapiro, Eugene L., *Thinking the Unthinkable: Recasting the Presumption of Edwards v. Arizona*, Oklahoma Law Review 53 (2000): 1:11–34.

Tomkovicz, James J., *Standards for Invocation and Waiver of Counsel in Confession Contexts*, Iowa Law Review 71 (1986): 4:975–1061.

Cases and Statutes Cited

Minnick v. Mississippi, 498 U.S. 146 (1990)
Miranda v. Arizona, 384 U.S. 436 (1966)
Schneekloth v. Bustamonte, 412 U.S. 218 (1973)

See also **Miranda Warning; Rights of the Accused; Right to Counsel**

EDWARDS v. CALIFORNIA, 314 U.S. 160 (1941)

When Californian Fred Edwards drove his destitute brother-in-law from Texas into California in 1939, Edwards violated a California statute criminalizing transportation of indigents into California. State and local governments had long restricted the movement of the poor because poverty had historically been considered a “moral pestilence.” During the Great Depression many poor citizens fled the South and Southwest for more prosperous states such as California, only to be greeted with hostile poor laws and with California’s claim that exclusion was a valid use of its police powers.

In *Edwards v. California*, the Supreme Court unanimously struck down the California statute as unconstitutional, clearly establishing a right to travel across state borders. A majority of the Court argued that California’s attempt to isolate itself from the national problems of poverty and labor migration violated the Commerce Clause, which prohibited states from restricting the movement of people and property across state lines. The Court also expressed its support for New Deal antipoverty programs and its rejection of the idea that poverty automatically presumed immorality.

Four justices concurred in the result but argued that by using the Commerce Clause, the Court in effect equated poor citizens with cattle and fruit. These justices instead relied on the constitutional clauses protecting the privileges and immunities of citizenship. However, the Court had just two years earlier rejected the use of the Privileges or Immunities Clause of the Fourteenth Amendment to limit federal legislative powers, and the majority in *Edwards* did not want to revisit that issue.

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References and Further Reading

Katz, Michael B., *In the Shadow of the Poorhouse: A Social History of Welfare in America*. New York: Basic Books, 1986.

Patterson, James T. *America's Struggle Against Poverty in the Twentieth Century*. Cambridge, MA: Harvard University Press, 2000.

Tribe, Laurence H. *American Constitutional Law*. Mineola, NY: Foundation, 1988.

See also **Right to Travel**

EDWARDS v. SOUTH CAROLINA, 372 U.S. 229 (1963)

This case was decided by the Supreme Court in 1963. It was one of numerous cases involving civil rights demonstrations to come before the Court. *Edwards* decided several important issues that facilitated the ability of groups to make these protests. It involved a demonstration by 187 black high school and college students. They marched to the South Carolina State House grounds in groups of about fifteen, then walked single file or two abreast in an orderly way on the sidewalks around the grounds, carrying signs protesting segregation. As the demonstration continued, about 355 onlookers, mostly hostile to the demonstrators, congregated on the grounds. These spectators impeded the traffic flow around the State House. The response of law enforcement officials was to order the student demonstrators to disperse. When they failed to do so, they were arrested, charged, and convicted for a breach of the peace.

The Court held that state government ground such as the State House grounds were quintessential public fora where First Amendment activities were entitled to the greatest protection. The Court also held that these rights were to be protected against a hostile audience. This ensured the “heckler’s veto” could not justify stifling the demonstrators. That holding established a wide range of protection for nonviolent protests. The Court said “the Fourteenth Amendment does not permit a State to make criminal the peaceful expression of unpopular views.” The Court found that state and local governments could not use their breach of the peace statutes to arrest or imprison peaceful demonstrators.

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References and Further Reading

Weaver, Russell L., and Arthur D. Hellman *The First Amendment: Cases, Materials and Problems*. Charlottesville, Va.: LexisNexis, 2002.

Friedman, Leon, and Richard Mark Gergel. “Matthew J. Perry’s Contribution to the Development of Constitutional Law.” In *Matthew J. Perry: The Man, His Times, and His Legacy*, edited by W. Lewis Burke and Belinda Gergel, 105–10. Columbia: University of South Carolina Press, 2004.

EISENSTADT v. BAIRD, 405 U.S. 438 (1972)

Appellee Baird delivered a lecture on contraception to a group of college students in which he displayed contraceptive materials and then gave one of the students a package of contraceptive foam in violation of a Massachusetts law. The law at issue criminalized the distribution of contraceptives. Yet, the statute provided, in part, that a “registered physician may administer to or prescribe for any married person drugs or articles intended for the prevention of pregnancy or conception” (*Eisenstadt v. Baird* [1972]). Appellee, having been charged with violation of the Massachusetts law, challenged its constitutionality in a writ of habeas corpus upon his conviction.

The question presented was whether there was some ground of difference between married and unmarried persons that rationally explained their different treatment under the law. The Supreme Court invalidated the statute on equal protection grounds. It held that the statute, viewed as a prohibition on contraception, per se, violated the rights of single persons under the Equal Protection Clause of the Fourteenth Amendment. As the Court indicated, the legislative intent of the statute, as explained by the state courts, was unclear. One state court found that the prohibition was directly related to the state’s goal of “preventing the distribution of articles designed to prevent conception which may have undesirable, if not dangerous, physical consequences” (*Commonwealth v. Baird* [1969]). Another Massachusetts court, however, found that “a second and more compelling ground for upholding the statute” was to protect morals through “regulating the sexual lives of single persons” (*Sturges v. Attorney General* [1970]). The state further argued to the Supreme Court that the purpose of the statute was to promote marital fidelity.

The Supreme Court rejected all of these purported goals of the statute at issue. As written, in making contraceptives available to married persons without regard to their intended use, the statute did nothing to prohibit the illicit sexual activities of married persons. With regard to the purported goal of discouraging premarital sexual intercourse, the effect of the statute would be to make the birth of an unwanted child the punishment for fornication. Clearly, such an outcome would be at odds with the proffered objective. Finally, with regard to the purported goal of protecting individuals from dangerous consequences, the statute forbade physicians from distributing contraceptives even when needed to protect the patient’s health.

Writing for four members of the Court, Brennan explained that although the Court has recognized that the Fourteenth Amendment does not prohibit states

from treating different classes of persons in different ways, the Equal Protection Clause does prohibit the state from doing so arbitrarily. A classification must be reasonable and must rest on some grounds having a fair and substantial relation to the object of the legislation. Similarly situated persons must be treated alike. As discussed above, in this case, the evils that the statute purported to address applied equally to both married and unmarried persons. Therefore, the discrimination against unmarried persons was found to be invidious. Although *Griswold v. Connecticut* found a right to privacy only in the marital relationship, a married couple is an association of two people each with a separate intellectual and emotional make-up (striking down a law that forbade the use of contraceptives by married persons). The right to privacy, thus, is a right of the *individual* “to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child” (*Eisenstadt*).

Although decided on equal protection grounds, the Court’s language was consistent with the noneconomic substantive due process cases of 1920s and 1960s. *Eisenstadt* continues to be cited in most cases addressing abortion and an individual’s right to privacy. Indeed, the right to privacy found in *Griswold* and *Eisenstadt* paved the way for *Roe v. Wade* (1973); *City of Akron v. Akron Ctr. for Reproductive Health* (1983) (relying in part on *Eisenstadt* in invalidating ordinance requiring all second trimester abortions to be done in a hospital). Most recently, the Supreme Court relied on *Eisenstadt* in striking down a state law criminalizing sodomy, stating, “the right to make certain decisions regarding sexual conduct extends beyond the marital relationship” (*Lawrence v. Texas* S.Ct. [2003]).

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Cases and Statutes Cited

- City of Akron v. Akron Ctr. for Reproductive Health*, 462 U.S. 416 (1983)
Commonwealth v. Baird, 355 Mass. 746, 247 N.E.2d 574 (1969)
Eisenstadt v. Baird, 405 U.S. 438 (1972)
Griswold v. Connecticut, 381 U.S. 479 (1965)
Lawrence v. Texas, 123 S.Ct. 2472, 2477 (2003)
Roe v. Wade, 410 U.S. 113 (1973)
Sturges v. Attorney General, 358 Mass. 37, 260 N.E.2d 687 (1970)

ELDRED v. ASHCROFT, 537 U.S. 186 (2001)

The U.S. Constitution has a special provision allowing Congress to enact copyright and patent statutes. Article one, section eight, clause eight reads: “The

Congress shall have the power . . . [t]o promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries” (Copyright Clause). According to the Supreme Court, the Copyright Clause grants Congress a limited power; the clause provides an incentive for creative persons, but its main purpose is to benefit the public (*Feist Publications, Inc. v. Rural Telephone Service Co., Inc.* [1991]).

Copyright protection has changed greatly during the history of the United States. The first Congress passed the first Copyright Act in 1790. That statute allowed fourteen years of protection with the option of renewing protection for another fourteen years. The act only protected books, charts, and maps from persons producing close copies. Over time Congress has expanded copyright protection in many ways, including by covering many different types of works (such as songs and movies), protecting them from more types of competition (such as translations, sequels, and public performances), giving authors the entire term without needing to request renewal, and extending the length of protection. In 1998, Congress passed the Copyright Term Extension Act (CTEA), which changed the copyright term for most works from fifty years after the author died to seventy years after the author died. The extension covered not only works created after the CTEA, but those already in existence (referred to as “retrospective extension”). The CTEA was nicknamed the “Mickey Mouse Act” because it prevented Walt Disney’s famous cartoon from losing copyright protection. Like Disney, many of the other businesses that lobbied Congress to pass the CTEA had already successful works about to lose copyright protection.

Many businesses and nonprofit organizations specialize in distributing works that are no longer under copyright protection. Several of them sued, claiming that retrospective extension is beyond Congress’s power under the Copyright Clause and violates the First Amendment. In *Eldred*, the Supreme Court rejected both of these claims.

Discussing the Copyright Clause, the Supreme Court declared that “a page of history is worth a volume of logic.” The CTEA is constitutional because earlier statutes had included retrospective extensions.

Second, the Court rejected arguments about the purpose of the Copyright Clause. Economists had demonstrated that the change in term length had no appreciable value to an author deciding whether to write a new work or to a publisher deciding whether to print a new work. Opponents of the act argued that the Copyright Clause’s sole purpose was to provide an incentive for the creation of new works; the act failed to provide such an incentive, and therefore, was

beyond Congress's power. Additionally, during the long period when copyright protection had included an optional renewal term, most authors had not filed for renewal. The dearth of renewals demonstrates that most works quickly stop producing money for their authors and publishers. However, many works are "orphans," that is, their authors and publishers are not exploiting them, but members of the public cannot use them either, because they cannot locate these authors and publishers to obtain copyright permission. Extending the copyright term increases the number of orphan works and the number of years that these orphan works are used by no one. In sum, opponents of the CTEA argued that it placed much too high a burden on public use of works in comparison to the incentives provided to authors and publishers.

The Supreme Court refused to conduct its own balance of the CTEA's burdens and benefits. Instead, the Court deferred to Congress's judgment about needed incentives; it also approved Congress's decision to base policy on all of the creation of new works, incentives for distributing old works, and international harmonization of copyright law.

Regarding the First Amendment challenge, the Court called copyright "the engine of free expression." Additionally, the Court felt that works under copyright protection did not present First Amendment problems for two reasons. First, certain publicly beneficial uses (such as criticism and parody) are allowed without authors' permission (called "fair use"). Second, copyright only protects expression (the way the author explains his point); it does not prevent others from reusing facts or ideas.

Eldred demonstrates Supreme Court deference to Congress. However, the limit of the Court's deference is not clear because the suit only involved retrospective extension.

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References and Further Reading

- Yu, Peter K., ed. *Extending Mickey's Life: Eldred v. Ashcroft and the Copyright Term Extension Debate*. Cambridge, Mass.: Kluwer Law International, 2005.
- Lessig, Lawrence. *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity*. New York: Penguin Press, 2004.
- Loyola of Los Angeles Law Review. "Eldred v. Ashcroft: Intellectual Property, Congressional Power and the Constitution." *Loyola of Los Angeles Law Review* 36, no. 1 (2002). Symposium issue. <http://llr.lls.edu/volumes/v36-issue1/>.

Cases and Statutes Cited

- Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*, 499 U.S. 340 (1991)

See also Content-Neutral Regulation of Speech; Fair Use Doctrine and First Amendment; Intellectual Property and the First Amendment; Satire and Parody and the First Amendment

ELECTRIC CHAIR AS CRUEL AND UNUSUAL PUNISHMENT

On August 6, 1890, William Kemmler became the first person to be executed via electric chair. He was also the first person to argue that this method of execution was a violation of the Eighth Amendment of the U.S. Constitution (*In re Kemmler* [1890]).

Kemmler's execution, like several other executions by electric chair, has been described as a gruesome event. In most electrocutions, the prisoner is strapped into a chair with leather belts across the chest, thighs, legs, and arms. Two copper electrodes are then attached—one to the leg and the other to a helmet. A leather mask or black cloth is placed over the prisoner's face. The executioner then presses a button to deliver the first shock of between 1,700 and 2,400 volts. This lasts somewhere between thirty seconds and one minute. Smoke usually comes out of the prisoner's leg and head. A doctor then examines the individual, who if not dead is given another jolt of electricity. A third and fourth are given if necessary. In at least one instance, the death of Ethel Rosenberg, five jolts of electricity were needed. In some instances, the process can last between six and nineteen minutes.

After electrocution the body temperature rises to about 138°F. The fluids inside the body "boil" the internal organs. Justice William Brennan of the U.S. Supreme Court stated in his dissent to the denial of certiorari in *Glass v. Louisiana* (1985), that during an electric chair death

the prisoner's eyeballs sometimes pop out and rest on his cheeks. He often defecates, urinates, and vomits blood and drool. The body turns bright red as its temperature rises, and the prisoner's flesh swells and his skin stretches to the point of breaking. Sometimes the prisoner catches on fire, particularly if he perspires excessively. Witnesses hear a loud and sustained sound like bacon frying, and the sickly sweet smell of burning flesh permeates the [death] chamber.

Despite the fact that this description of death by electric chair sounds cruel, the U.S. Supreme Court has never determined that this method of execution is "cruel and unusual" in violation of the Eighth Amendment of the U.S. Constitution.

In order for a punishment to violate the Eighth Amendment, it must be both cruel and unusual. According to the U.S. Supreme Court, punishment that involves torture or unnecessary pain is cruel. However, the fact that a punishment is cruel alone does not make it unconstitutional. It must also be "unusual," which has been defined by the Court in terms of consistency. This means that a punishment is unconstitutional only if it is not applied consistently to all like crimes. The underlying notion is that individuals will not be subjected to arbitrary, humiliating, or whimsical punishment outside the normal course of the law.

Lower courts have also examined the issue of whether the electric chair constitutes a form of cruel and unusual punishment under state constitutions. In these cases, the analysis is dominated by the length of time that it takes for the prisoner to die and the pain involved in the execution. For example, the Supreme Court of Florida accepted evidence of "instantaneous unconsciousness" and therefore no "unnecessary and wanton pain" when it upheld electrocution as a method of execution (*Provenzano v. Moore* [1999]). On the other hand, Georgia's highest court held that use of the electric chair was cruel and unusual punishment because electrocution "inflicts purposeless physical violence and needless mutilation that makes no measurable contribution to accepted goals of punishment." The Court also held "that death by electrocution, with its specter of excruciating pain and its certainty of cooked brains and blistered bodies, violates the prohibition against cruel and unusual punishment" (*Dawson v. State* [Ga. 2001]).

At one time in history, electrocution was used in twenty-six states as the preferred form of execution. Since 1924, however, there has been a clear movement away from this method of execution.

In 2005, death by electrocution is mandatory in only one state—Nebraska. However, in *Palmer v. Clarke* (2003), Judge Bataillon questioned the legitimacy of this form of execution by noting in dicta that the Court would find, in accordance with "evolving standards of decency," that execution by electrocution is both cruel and unusual particularly since there is no evidence that electrocution is either quick or painless.

In addition to Nebraska, nine other states explicitly authorize electrocution as a form of execution—Alabama, Arkansas, Florida, Illinois, Kentucky, Oklahoma, South Carolina, Tennessee, and Virginia.

From 1890 until 2005, more than 4,460 people have been sentenced to death by electrocution in the

United States. We remain the only nation in the world that continues to allow this form of execution.

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References and Further Reading

- Banner, Stuart. *Death Penalty: An American History*. Cambridge, MA: Harvard University Press, 2003.
- Capital Defense Weekly. *The Shocking Truth About Death in the Electric Chair*. N.d. <http://members.aol.com/karlkeys/chair.htm>.
- Harding, Roberta M., *The Gallows to the Gurney: Analyzing the (Un)constitutionality of the Methods of Execution*, Boston University Public Interest Law Journal 6 (1996): 153.

Cases and Statutes Cited

- Dawson v. State*, 554 S.E.2d 137 (Ga. 2001)
- Glass v. Louisiana*, 471 U.S. 1080 (1985)
- In re Kemmler*, 136 U.S. 436 (1890)
- Palmer v. Clarke*, 293 F.Supp. 2d 1011 (D. Nebraska 2003)
- Provenzano v. Moore*, 744 So.2d 413 (1999)

ELECTRONIC SURVEILLANCE, TECHNOLOGY MONITORING, AND DOG SNIFFS

The fundamental question for examining any possible civil liberties violations for electronic surveillance, technology monitoring, and dog sniffs is whether a prohibited search occurred under the Fourth Amendment. A prohibited search occurs when a person has a subjective expectation of privacy that society will objectively recognize and that expectation of privacy is violated. The analysis is on the person because as the U.S. Supreme Court stated in *United States v. Katz*, "the Fourth Amendment protects people not places." The first part of the analysis is whether the person has exhibited a subjective expectation of privacy by looking at the location and what acts were taken to protect privacy. The analysis concludes with whether society will recognize that expectation as objectively reasonable. Accordingly, the use of electronic surveillance, technology monitoring, and dog sniffs hinges on whether there was an expectation of privacy for the person, object, or place being searched and that search violated an expectation of privacy. This civil liberty interest against unreasonable searches is protected by the exclusionary rule, which prohibits the use of evidence obtained in violation of the Fourth Amendment. However, if the government obtains a valid probable cause warrant, then the searches would not fall under the Fourth Amendment prohibition.

Electronic Surveillance

Electronic surveillance by the government is regulated by the Electronic Communications Privacy Act (ECPA) and the Fourth Amendment. The ECPA is a broad statute that regulates government regarding the interception and attempted interception of wire, oral, or electronic communications, access to electronic communication service, and remote computing services, and pen register surveillance. The Fourth Amendment restrictions are whether the person has a subjective expectation of privacy that society is objectively willing to recognize. However, the Foreign Intelligence Surveillance Act (FISA) has exceptions to the surveillance requirements under the ECPA for national security matters.

The ECPA has three main sections that cover what the government can and cannot do with regard to obtaining electronic communications, information stored on computers, and pen register surveillance. The ECPA also covers actions by individuals and nongovernmental entities and has civil and criminal penalties for unlawful access. However, for civil liberties purposes, only government restrictions are covered below.

The first section covering the interception of wire, oral, and electronic communication sets forth the rules that the government must abide by making the application for an interception and the restrictions on the use of the information that is obtained. This section was originally introduced as Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (also known as Title III). This section covers the actual content of wire and electronic communication, and the ECPA sets forth the metes and bounds of when and how the interception can occur. The ECPA restricts the use of the information intercepted when the interception does not comply with requirements of the ECPA.

The second section covers the processes for the government to obtain access to electronic communication services and remote computing services and the information contained by the services. Because different types of information are deemed to have varying privacy interests, the ECPA has five mechanisms from which the government can obtain information from the services. These five mechanisms include subpoenas, subpoenas with notice, court order, court order with notice, and a search warrant, which are tailored in light of the privacy interests of the information being requested. Even if the information regulated under this section is obtained without complying with the requirements of the ECPA, the ECPA does not explicitly restrict the use of this information as

evidence. However, the information could be restricted under the exclusionary rule if it is obtained in violation of the Fourth Amendment.

The third section covers processes for the government to conduct pen register surveillance and the information obtained therein (also known as the “pen/trap statute”). This section covers the address and other noncontent information for wire and electronic communication. Information obtained outside of the requirements of the ECPA is not explicitly disallowed as evidence unless the method of obtaining the information violates the Fourth Amendment and is thus excluded under the exclusionary rule.

The first question for electronic surveillance that does not fall under the ECPA is whether the surveillance is a search. If the surveillance is not a search, then there cannot be a Fourth Amendment violation for the surveillance. The surveillance is a search under the Fourth Amendment when the person has a subjective expectation of privacy that society will objectively recognize and that privacy is violated by the search. Generally any information that a person puts out into public view falls outside of the purview of the expectation of privacy that society will objectively recognize.

For example, the use of a pen register to record phone numbers dialed from a telephone is not a search. Even if a person thinks that the phone numbers dialed are private, that expectation is not reasonable because the telephone company routinely monitors and records the numbers dialed for troubleshooting and billing purposes. Accordingly, since a reasonable person knows that the numbers dialed are turned over to the telephone company, then there is no reasonable expectation of privacy for the dialed numbers and therefore no search has occurred when the government obtains those numbers. This lack of privacy would most likely be extended to other address types of information such as email addresses and website addresses in which the traffic has been exposed to third parties but not necessarily the content of the traffic. However, as noted above pen register surveillance is now regulated by the ECPA but a person still has a lowered expectation of privacy when information is turned over to a third party.

The lack of privacy for the information turned over to third parties extends to most types of information that are obtained by electronic surveillance that third parties would have or which do not fall under the ECPA. There is a lowered expectation of privacy when the communication is knowingly exposed to a third party. For example, when an undercover agent or informant has a microphone from which a conversation is recorded, there is no reasonable expectation of privacy because the conversation

has been exposed to the third party. In these situations, no search has occurred because the people have exposed their conversations to the person who has the microphone.

Other situations where the objective expectation of privacy is too minimal to be considered a search under the Fourth Amendment include ham radio communication and citizen's band radio. However, a person having a conversation over a cordless phone would in general have a reasonable expectation of privacy that society would recognize because although it is conceivable that the conversation could be overheard, it is reasonable for a person to expect that the conversation is private. This expectation of privacy extends to a person having a conversation in a phone booth, a hotel room, and other locations when the person has taken the steps to exclude others from the conversation, and society recognizes those exclusionary steps as objectively reasonable. Accordingly, the key factor in the determination is not simply whether the communication can be intercepted but whether it is reasonable for the communication to be intercepted by another.

Thus, if the electronic surveillance falls under the ECPA, then the government has to abide by the restrictions in the ECPA. However, even if the government does not abide by the restrictions in the ECPA, it does not necessarily violate the person's Fourth Amendment rights. Generally, electronic surveillance is not a search under the Fourth Amendment unless the person has a subjective expectation of privacy that society is objectively willing to recognize and that expectation of privacy is violated. However, when the government has a warrant issued with probable cause, then the government can in general conduct the search by the means specified in the warrant.

Technology Monitoring

The issue of whether technology monitoring by the government is a search hinges on whether the monitoring invades on a person's subjective expectation of privacy that society objectively recognizes. If there is no invasion of privacy, then no search under the Fourth Amendment has occurred. However, technology that provides information about a physically protected area that could not be searched without a warrant constitutes an unreasonable search when the technology is not in general public use. Where the government is using technology that is not in general public use such as thermal imaging devices, then the government must obtain a search warrant to utilize the technology.

In general, when a person knowingly exposes his or her activity to the public or third parties, then that activity can be monitored by the government through public or third party means. For example, the government can use global positioning system (GPS) or radio beacons attached to the exterior of a car to track the location of packages or containers that a person receives from a third party or common carrier. The tracking beacon is simply a way for the government to monitor the location of the package that the government could otherwise do by visual tracking methods. The tracking beacon is just an extension of the allowable methods by which a person can be tracked.

Technology monitoring also includes closed caption television monitoring (CCTV), audio monitoring, and infrared monitoring. CCTV monitoring is widespread in various countries throughout the world in airports, trains, subways, on public streets, police stations, and other public places. Generally, these types of surveillance that occur in public places are not searches because people are knowingly exposing their activities to the public view. However, technology monitoring using CCTV, audio monitoring, and infrared monitoring that occur outside of public view such as in a person's private home without a valid search warrant would violate a person's reasonable expectation of privacy. However, if the person invites a third party into the home, then the monitoring that the third party brings into the home is reasonable because the person invited the third party into the home and exposed the internal workings of the home to the third party. Accordingly, CCTV, audio, and infrared monitoring have to work within the same confines as other types of technology monitoring in that they violate a person's Fourth Amendment rights when the person has a reasonable expectation of privacy that society objectively recognizes.

The government can also monitor an employee's activity with the employer's consent when the employee has no reasonable expectation of privacy regarding whether the employer can monitor work activities. However, to dispel any expectation of privacy, the employer should disclose to the employee that the employer can and will monitor the employee's activities. This monitoring can also extend to government employees as long as the employees are aware that their expectation of privacy is lowered because the government is monitoring. The issue of whether the monitoring is a search hinges on whether the employee is aware of the monitoring and thus has a lowered expectation of privacy in regards to the activity or location being monitored.

Accordingly, the issue of whether technology monitoring is a search under the Fourth Amendment

hinges on whether the person being monitored has a subjective expectation of privacy that society objectively recognizes. In general, people in a public place have a limited expectation of privacy unless they have taken the steps necessary to shield their activities from public view. In addition, the monitoring must not intrude into places that are protected places such as the interior of a person's home without a search warrant that was issued with probable cause. Thus, the government can use different methods of technology monitoring without a warrant as long as the means do not intrude on a person's reasonable expectation of privacy that society objectively recognizes and as long as the technology means does not intrude on a protected area with technology that is not commonly available by the public.

Dog Sniff

Dog or canine sniffs do not in general compromise any legitimate expectation of privacy as long as the dog and the officer are legally allowed to be where the sniff occurs. The key issue for any Fourth Amendment violations involving a dog sniff is whether the dog is in a place that it can legally be since a dog sniff itself does not intrude on areas that are hidden from public view. A person does not have a reasonable expectation of privacy in an odor radiating from an object because the odor has been put into the public view by its release from the object. Additionally, dog sniffs do not show the interior of protected areas but simply indicate the presence or absence of contraband items. Accordingly, as long as the dog is in a location that it can legally be then the sniff is not a search under the Fourth Amendment. However, if the dog and the handler are not in a location where they legally can be, then the dog sniff is a search under the Fourth Amendment because the presence of the dog and its handler is itself a search.

Even if the dog sniff is not a search, the seizure that leads to the dog sniff may become unreasonable under the Fourth Amendment if the person or items have been unlawfully detained by the police. The seizure of an automobile at a checkpoint does not turn the subsequent sniff by the dog into a search as long as the stop is lawful in nature and is not extended beyond what is reasonable. The reasonableness question for detaining people or items hinges on whether under the Fourth Amendment the government has reasonable suspicion for detaining the people or items for the dog sniff and has specific and articulable facts for the suspicion. In addition, the government must work diligently to obtain a trained dog for the

sniff when people or items are seized under reasonable suspicion. However, when the people have placed themselves or items into the public view and the odor is radiating to the public place, then no reasonable suspicion is needed because the dog sniff of the radiating smell is not a search and the person or items have not been seized. The government can utilize a dog sniff for checked luggage on planes, trains, and busses, shipped packages, storage lockers, trailers, and cars, as long as the items have not been seized or the seizure of those items is reasonable.

In general, a dog sniff on items in public view is not a search. However, the sniff can become an unreasonable search under the Fourth Amendment if the person or items to be sniffed are detained beyond a reasonable time or without reasonable suspicion. Accordingly, a dog sniff is not a search under the Fourth Amendment because the privacy interest of odor radiating from a person or item is not a reasonable privacy interest protected by the Fourth Amendment.

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References and Further Reading

- Ball, Kirstie, and Frank Webster, eds. *Intensification of Surveillance: Crime, Terrorism and Warfare in the Information Age*. London: Pluto Press, 2003.
- Bloom, Robert M. *Searches, Seizures, and Warrants: A Reference Guide to the United States Constitution*. Westport, CT: Praeger Publishers, 2003.
- City of Indianapolis v. Edmond*, 531 U.S. 32 (2000).
- Hall, John Wesley. *Search and Seizure*. Charlottesville, VA: Lexis Law Publishing, 2000.
- LaFave, Wayne R. *Search and Seizure: A Treatise on the Fourth Amendment*. St. Paul, MN: Thomson West, 2004.
- Newburn, Tim, and Stephanie Hayman. *Policing, Surveillance and Social Control: CCTV and Police Monitoring of Suspects*. Devon, UK: Willan Publishing, 2001.
- Schneier, Bruce, and David Banisar, eds. *The Electronic Privacy Papers: Documents on the Battle for Privacy in the Age of Surveillance*. New York: John Wiley & Sons, 1997.
- Sharpe, Sybil. *Search and Surveillance*. Aldershot, England: Ashgate Publishing, 2000.
- USA Patriot Act of 2001, 115 Stat. 272.
- U.S. Department of Justice, Computer Crime and Intellectual Property Section. "Searching and Seizing Computer and Obtaining Electronic Evidence in Criminal Investigations." July 2002. <http://www.usdoj.gov/criminal/cybercrime/s&smanual2002.pdf>.

Cases and Statutes Cited

- Electronic Communications Privacy Act (ECPA) of 1986, 100 Stat. 1848
- Foreign Intelligence Surveillance Act (FISA) of 1978, 92 Stat. 1783
- Illinois v. Caballes*, 125 S.Ct. 834 (2005)
- Katz v. United States*, 389 U.S. 347 (1967)
- Kyllo v. United States*, 533 U.S. 27 (2001)

Mapp v. Ohio, 367 U.S. 643 (1961)
O'Connor v. Ortega, 480 U.S. 709 (1987)
Silverman v. United States, 365 U.S. 505 (1961)
Smith v. Maryland, 442 U.S. 735 (1979)
United States v. Byrd, 31 F.3d 1329 (5th Cir. 1994)
United States v. Dixon, 51 F.3d 1376 (8th Cir. 1995)
United States v. Gonzalez, 328 F.3d 543 (9th Cir. 2003)
United States v. Hernandez, 313 F.3d 1206 (9th Cir. 2002)
United States v. Johnson, 990 F.2d 1129 (9th Cir. 1993)
United States v. Karo, 468 U.S. 705 (1984)
United States v. Knotts, 460 U.S. 276 (1983)
United States v. Matlock, 415 U.S. 164 (1974)
United States v. McIver, 186 F.3d 1119 (9th Cir. 1999)
United States v. Michael, 645 F.2d 252 (5th Cir. 1981)
United States v. Place, 462 U.S. 696 (1983)
United States v. Rose, 669 F.2d 23 (1st Cir. 1982)
United States v. Shovea, 580 F.2d 1382 (10th Cir. 1978)
United States v. Simons, 206 F.3d 392 (4th Cir. 2000)
United States v. Sukiz-Grado, 22 F.3d 1006 (10th Cir. 1994)
United States v. Smith, 978 F.2d 171 (5th Cir. 1992)
United States v. Sundby, 186 F.3d 873 (8th Cir. 1999)
United States v. Ward, 144 F.3d 1024 (7th Cir. 1998)
United States v. White, 42 F.3d 457 (8th Cir. 1994)
 U.S. Constitution, Fourth Amendment

See also **Administrative Searches and Seizures; Airport Searches; Anonymity in Online Communication; Automobile Searches; Checkpoints (roadblocks); Invasion of Privacy and Free Speech; 9/11 and the War on Terrorism; Plain View; War on Drugs; Warrantless Searches; Wiretapping Laws**

ELK GROVE UNIFIED SCHOOL DISTRICT v. NEWDOW, 542 U.S. 1 (2004)

In *Elk Grove Unified School District v. Newdow*, the Supreme Court declined to resolve the constitutionality of the inclusion of the words “under God” in the Pledge of Allegiance when recited in public schools. Instead, the Court found that the plaintiff in the case lacked standing to sue and thereby reversed a controversial decision by the U.S. Court of Appeals for the Ninth Circuit that had found the “under God” language in the Pledge when recited by public schoolchildren violative of the Establishment Clause.

A California school district required each elementary school class in the district to recite the Pledge of Allegiance every day. The father of a schoolchild objected, claiming that the inclusion of the words “under God” in the Pledge constituted religious indoctrination in violation of the Religion Clauses of the First Amendment (even though his daughter was not compelled to participate in the recitation). The U.S. Court of Appeals for the Ninth Circuit found that the recitation violated the Establishment Clause. This decision sparked a national controversy, and the U.S. Congress promptly passed a resolution—unanimously

in the Senate and with only five nay votes in the House—condemning that decision.

The Supreme Court accepted review and held that the father, who was a noncustodial parent of the schoolchild, lacked standing to bring the action. The Court emphasized that the father’s standing derived entirely from his relationship with his daughter, and that their interests were not parallel and were potentially in conflict. Since the father lacked standing, the Court dismissed the case, thereby reversing the decision of the Ninth Circuit.

Three justices, however, dissented from the majority’s discussion of standing. These justices, all of whom wrote separate opinions, would have reached the merits of the case and found that the school recitation of the Pledge with the “under God” language *did not* offend the Establishment Clause. (A fourth justice, Antonin Scalia, recused himself from consideration of the case because of prior public comments critical of the Ninth Circuit’s ruling.)

In his separate opinion, Chief Justice William Rehnquist concluded that the recitation of the Pledge did not violate the Establishment Clause:

I do not believe that the phrase ‘under God’ in the Pledge converts its recital into a ‘religious exercise’ Instead, it is a declaration of belief in allegiance and loyalty to the United States flag and the Republic that it represents. The phrase ‘under God’ is in no sense a prayer, nor an endorsement of any religion Reciting the Pledge, or listening to others recite it, is a patriotic exercise, not a religious one; participants promise fidelity to our flag and our Nation, not to any particular God, faith, or church.

Justice Sandra Day O’Connor, in her opinion, argued that the recitation of the Pledge did not violate the “endorsement test.” For Justice O’Connor, quoting her earlier concurring opinion in *Lynch v. Donnelly* (1984), endorsement “sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.” Justice O’Connor concluded that recitation of the Pledge sent no such message. Justice O’Connor concluded that the “under God” language in the Pledge constituted an expression of “ceremonial deism” which did not offend the Establishment Clause.

Finally, Justice Clarence Thomas concluded that the recitation of the Pledge *did* violate the Establishment Clause as interpreted by the Court because it “coerced” young children “to declare a belief” that this is “one Nation under God.” Hence, for Justice Thomas, “as a matter of our precedent, the Pledge policy is unconstitutional.” But, Justice Thomas went

further, arguing that almost all of the Court's prior Establishment Clause cases were wrongly decided because, in his view, the Establishment Clause does not apply to the states. Justice Thomas recognized that the Court in prior cases had "incorporated" the Establishment Clause through the Fourteenth Amendment to apply to the states, but he concluded that that incorporation was inappropriate as a matter of history. Because, in Justice Thomas's view, the Establishment Clause does not apply to the states, the recitation of the Pledge by a local California school district was not unconstitutional.

In light of the resolution of the *Elk Grove* case on standing grounds, the constitutionality of recitations of the Pledge in public schools remains uncertain.

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References and Further Reading

Collins, Todd, *Lost in the Forest of the Establishment Clause: Elk Grove v. Newdow*, *Campbell Law Review* 27 (2004): 1–38.

Gey, Steven, 'Under God,' *The Pledge of Allegiance, and Other Constitutional Trivia*, *North Carolina Law Review* 81 (2003): 1865–925.

Hancock, Kevin P., *Comment: Closing the Endorsement Test Escape-Hatch in the Pledge of Allegiance Debate*, *Seton Hall Law Review* 35 (2005): 739–88.

Cases and Statutes Cited

Lynch v. Donnelly, 465 U.S. 668 (1984)

See also **Ceremonial Deism; Establishment Clause (I): History, Background, Framing; Pledge of Allegiance ("Under God")**

ELLSWORTH COURT (1796–1800)

The "Ellsworth Court" is the title attributed to the Supreme Court during the tenure of Oliver Ellsworth as chief justice of the United States, from March 1796 to December 1800. Ellsworth, of Connecticut, was the de facto leader of the Federalist faction in Congress prior to his appointment. In addition, Ellsworth had been instrumental in the passage of the Judiciary Act of 1789 that established the basic structure of the federal judiciary. Ellsworth was the third chief justice of the United States, attaining the office after John Rutledge failed to achieve confirmation after becoming chief justice by recess appointment.

Prominent associate justices to serve during Ellsworth's time as chief justice include William Cushing, Samuel Chase, James Iredell, William Paterson, Bushrod Washington, and James Wilson. Justice

Alfred Moore also served briefly during this period, resigning due to ill health and dissatisfaction with his duties. As with the Jay Court, each of these jurists was selected by President George Washington and was considered sympathetic to Federalist principles. The Ellsworth Court met twice annually in Philadelphia, which was then the temporary national capital.

Unlike the contemporary Supreme Court, the Ellsworth Court consisted of only six justices. The composition of the Supreme Court during Ellsworth's tenure was geographically balanced with members drawn from each region of the United States. This was the norm for the early Supreme Court, as it facilitated "circuit riding" duties and stifled disputes among sectional interests.

Circuit riding was a hallmark of the Supreme Court in its first century, requiring justices to hold court alongside district judges twice each year in a judicial circuit assigned to them. Justices rode circuit each year following the February and August terms of the Supreme Court. Many justices found circuit riding objectionable as it required extensive travel for weeks or months at a time. Although this aspect of the justices' duties provoked discontent, their repeated appeals to Congress yielded little relief.

Although it remained relatively small, the workload of the Supreme Court under Ellsworth's leadership was greater than during the tenures of John Jay and John Rutledge (1789–1795). The institution's docket during Ellsworth's tenure was generally dominated by admiralty and diversity cases, many of which resulted from contemporaneous American treaty obligations. The years 1796 and 1797 in particular saw escalation in the Supreme Court's workload, with more than fifty cases considered in 1796 and nearly thirty in 1797. Along with maritime and economic disputes, the justices faced some controversies with ramifications for American civil liberties. The most significant of these concerned seditious libel and the legitimacy of criminal prosecutions under federal common law.

Federal indictments for sedition and acts of rebellion had occurred as early as 1792, but these issues became particularly important during Ellsworth's tenure. Domestic furor over Jay's Treaty (1795–1796) and strained relations with France created a volatile political climate. Following the scandalous XYZ Affair, the federal government prepared for war with France and sought to discourage domestic dissent. This contributed to the passage of the Sedition Act (1798). This statute clearly stipulated that sedition was a criminal act, as it had been considered by jurists previously on the basis of common law. This proved controversial, with some legislators asserting that the act merely codified existing common law, and others

believing it to be an infringement of Americans' civil liberties guaranteed by the Constitution.

The Supreme Court justices enforced the Sedition Act in the circuit courts, with Chief Justice Ellsworth advocating the position that the act was in agreement with constitutional principles and the common law. The other justices were sympathetic with this position and enforced the Sedition Act, sometimes vigorously. Both ordinary citizens and members of the press were prosecuted under the Act, most often for criticism of President John Adams and the Federalists in Congress. The Sedition Act came to be viewed as a tool of the Federalists to thwart dissent and became a contentious issue in the election of 1800. Both the Sedition Act and the notion of federal common-law crimes were attacked by Thomas Jefferson and the Democratic-Republicans. The Supreme Court never addressed the Sedition Act directly, as it expired in 1801 and was not renewed by the Democratic-Republicans after their electoral victory in 1800.

Interestingly, the Ellsworth Court preceded the Supreme Court's 1803 decision in *Marbury v. Madison* (1803), but its justices apparently agreed on the legitimacy of judicial review. The justices clearly considered the constitutionality of a federal tax in *Hylton v. United States* (1796), although they did not strike down the relevant statute. In addition, the Court's decision in *Ware v. Hylton* (1796) provided perhaps the Supreme Court's earliest expression of the supremacy of federal law. While *Ware* dealt specifically with a conflict between a Virginia statute and a federal treaty with Britain, the invocation of the Supremacy Clause was an important declaration of the precedence of federal over state laws.

A notable institutional development during this period was the decline of *in seriatim* opinions under Ellsworth's leadership. Unlike his predecessors as chief justice, Ellsworth employed the prestige of his position to craft a single majority opinion. While in contrast to English tradition, this custom had been followed on the Connecticut court on which Ellsworth had previously served. While the practice of justices publishing *in seriatim* opinions did not diminish completely until the tenure of Chief Justice John Marshall (1801–1835), the Ellsworth Court issued consolidated majority opinions in every case in which the chief justice participated.

Chief Justice Ellsworth retained his position until December 1800, when he resigned after four and a half years of judicial service. Prior to his resignation, Ellsworth had been appointed as minister to France in 1799–1800 and was instrumental in the effort to thwart a naval war with America's former ally. While serving abroad Ellsworth's health declined considerably, and it is believed to have contributed substantially

to his decision to step down. Ellsworth was succeeded as chief justice by John Marshall of Virginia, whose own contributions to the legal and political development of the Supreme Court would be immense.

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References and Further Reading

- Casto, William R. *The Supreme Court in the Early Republic: The Chief Justiceships of John Jay and Oliver Ellsworth*. Columbia: University of South Carolina Press, 1995.
- Gerber, Scott D., ed. *Seriatim: The Supreme Court Before John Marshall*. New York: New York University Press, 1998.
- Goebel, Julius Jr. *History of the Supreme Court of the United States. Volume I: Antecedents and Beginnings to 1801*. New York: Macmillan Company, 1971.

Cases and Statutes Cited

- Hylton v. United States*, 3 Dall. 171 (1796)
- Judiciary Act of 1789, Act of September 24, 1789, 1 Stat. 73
- Marbury v. Madison*, 5 U.S. 137 (1803)
- Sedition Act of 1798, Act of July 14, 1798, 1 Stat. 596
- Ware v. Hylton*, 3 Dall. 199 (1796)

See also Alien and Sedition Acts (1798); Calder v. Bull, 3 U.S. 386 (1798); Chase, Samuel; Common Law or Statute; Freedom of Speech and Press under the Constitution: Early History (1791–1917); Jefferson, Thomas; Judicial Review; Marshall, John; National Security and Freedom of Speech; Natural Law, 18th Century Understanding; Seditious Libel

ELROD v. BURNS, 427 U.S. 347 (1976)

Cook County, Illinois was notorious for patronage. The Democratic Party hired supporters for city and county jobs and required them to work on behalf of its political candidates. When Richard Elrod was elected Cook County sheriff in 1970, he promptly fired several Republican employees of the office. Those fired brought suit under the First Amendment, alleging that they were discharged because they were not Democrats.

The Supreme Court agreed, relying upon its decisions in loyalty oath cases, such as *Keyishian v. Board of Regents* (1967), which held that conditioning a public job upon political belief was unconstitutional. Firing an employee based on political belief or association amounted to coercion of the individual's freedom of association and could deter others who would like to apply for city jobs from the free exercise of speech and association.

The defendants argued that political patronage was necessary to ensure efficient and loyal employees

and to maintain a strong democratic political party system. Applying the high level of review required when government action affects First Amendment rights, the Court rejected this argument. These interests could be served by politically based dismissals of policymaking employees only (defined in *Branti v. Finkel* [1980] as those where “party affiliation is an appropriate requirement for the effective performance of the public office involved”).

Elrod prohibited political firing, but left political hiring an open question. This was held unconstitutional in *Rutan v. Republican Party of Illinois* (1990). *Elrod* also invited lawsuits about the reasons employees had been fired and whether they were policymakers and thus exempt from *Elrod*’s prohibition.

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References and Further Reading

- Allswang, John M. *Bosses, Machines and Urban Voters*. Rev. ed. Baltimore: Johns Hopkins University Press, 1986.
- Bowman, Cynthia Grant, ‘We Don’t Want Anybody Sent’: *The Death of Patronage Hiring in Chicago*, Northwestern University Law Review 86 (1991): 1:57–95.

Cases and Statutes Cited

- Branti v. Finkel*, 445 U.S. 507 (1980)
- Keyishian v. Board of Regents*, 385 U.S. 589 (1967)
- Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990)

See also Branti v. Finkel, 445 U.S. 507 (1980); **Political Patronage and the First Amendment**; *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990); **Unconstitutional Conditions**

EMANCIPATION PROCLAMATION (1863)

On January 1, 1863 President Abraham Lincoln issued the Emancipation Proclamation, which declared that slaves living in most of the Confederate states were forever free. The Proclamation was certainly one of the most important advances in civil liberties, because it provided for freeing from slavery millions of African Americans. At the same time, from the perspective of slave owners, the proclamation was a huge violation of civil liberties because it took their “property” away from them without any compensation. From the perspective of constitutional law, the Proclamation was extremely problematic. The Constitution prohibited the government from taking private property without compensation. Furthermore, the Constitution protected slavery a variety of ways and

the Supreme Court, in *Dred Scott v. Sandford* (1857), had held that slavery was a privileged form of property deserving of special constitutional protection. Finally, it was not at all clear that under the Constitution the president ever had power to unilaterally act in such a way as to deprive citizens of their property.

President Lincoln understood all of these issues, and thus he drafted the Proclamation carefully. He excluded from the Proclamation those portions of the Confederacy, such as New Orleans and parts of Virginia, which were under the control of the United States. In the rest of Confederacy, Lincoln acted in his capacity as commander-in-chief of the Army to emancipate all slave on the grounds they constituted a military asset to those states in rebellion.

By proceeding in this manner, Lincoln avoided a number of constitutional pitfalls. Since he acted as commander-in-chief, he presumably did not need any authorization from Congress. Clearly Lincoln could order the Army to destroy or confiscate the property of Confederates in order to suppress the rebellion. Freeing the slaves was simply another form of destroying property that those in rebellion were using to make war on the United States. Lincoln could plausibly argue that the Constitution was in force where the Confederate government operated. Thus, by limiting the Proclamation to those regions of the United States that were under the control of the Confederates, Lincoln could argue that emancipation was not a “taking of private property” as contemplated in the Fifth Amendment, because the Constitution was not in force in the Confederacy. Alternatively, he could argue that the writ of habeas corpus had been suspended in all of those states in rebellion, and thus the military could seize property (and emancipate slaves) as needed to suppress the rebellion.

Each of these theories was sufficient to justify freeing the slaves of rebel masters while the war was in progress, but it was not clear what would happen to the emancipated slaves when the war ended. Lincoln had some reason to believe that the Supreme Court might overturn the Proclamation, or enforce a judgment against the United States for taking private property without just compensation in violation of the Fifth Amendment. This was especially plausible because the Supreme Court was still dominated by pro-slavery justices, and continued to be until led by Chief Justice Roger B. Taney, the author of the *Dred Scott* decision. Thus, Lincoln was delighted when Congress passed the Thirteenth Amendment and sent it on to the states for ratification. Once ratified, this Amendment freed all remaining slaves in the nation and prevented any former masters from making any claims on the U.S. government for the value of their emancipated slaves.

The Emancipation Proclamation was the most significant antislavery action by the U.S. government until the adoption of the Thirteenth Amendment. The Proclamation freed millions of slaves. That freedom, however, would only be secured as the U.S. Army moved deeper in the South, crushing the rebellion. However, after January 1, 1863, the nature of the Civil War was permanently altered. It was still a war to preserve and restore the Union. But, after that date it was also a war to extend the most fundamental civil liberty—freedom to millions of African Americans who were held in slavery. After Lincoln issued the Proclamation, the U.S. Army became the greatest army of liberation the world had ever known, bringing liberty everywhere it went.

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References and Further Reading

- Franklin, John Hope. *The Emancipation Proclamation*. Garden City, NY: Doubleday, 1963.
 McPherson, James. *Battle Cry of Freedom*. New York: Oxford University Press, 1988.

Cases and Statutes Cited

- Dred Scott v. John F.A. Sandford*, 60 U.S. (19 How.) 393 (1857)

EMERGENCY, CIVIL LIBERTIES IN

Discussions of civil liberties in emergency are plagued by the recurrent problem of defining the kind of situation designated by the term “emergency.” According to German jurist Carl Schmitt, sometimes thought of as the theorist of the Third Reich, the “exception”—closely related to the emergency—can only be declared, not defined; hence, “Sovereign is he who decides on the exception.” Justice Stone, concurring in *Duncan v. Kahanamoku* (1946), a case involving martial law, described “the power which resides in the executive branch of the government to preserve order and insure the public safety in times of emergency, when other branches of the government are unable to function, or their functioning would itself threaten the public safety.” As he explained, “[t]he Executive has broad discretion in determining when the public emergency is such as to give rise to the necessity of martial law, and in adapting it to the need.” While the emergency may coincide with war, it need not do so. Likewise, although foreign relations may be implicated, the emergency may possess a largely domestic compass, as in the case of civil unrest. It may, indeed, be in the nature of the emergency

to defy definition except in contradistinction to a “normal” state of affairs. And, in general, in an emergency, the survival of the nation is thought to be at stake. In this respect, the emergency stands in the lineage of the “raison d’état,” or “reason of state,” which designates, according to one formulation, “the doctrine that whatever is required to insure the survival of the state must be done by the individuals responsible for it, no matter how repugnant such an act may be to them in their private capacity as decent and moral men.” Initially derived from Italian political theory, this concept found expression in the Anglo-American context in John Locke’s discussion of prerogative in the *Second Treatise of Government*. Although economic emergencies have sometimes swept the United States—most notably during the Great Depression—the most prevalent associations with emergency involve the imminent threat of violence.

The main questions that arise in considering emergency situations involve who identifies or constructs the existence of an emergency, and by what means; the scope of extraordinary powers sought to resolve the declared emergency; and the emergency’s duration. As Schmitt’s and Justice Stone’s comments suggest, the executive has traditionally taken charge of designating emergency situations. Some constitutions, like that of Poland, contain explicit provisions concerning emergencies and specify the mechanism by which an emergency is to be announced; that is not the case in the United States. The most relevant constitutional clauses include those articulating Congress’s power to declare war and to call forth the militia (art. I, sec. 8, cls. 11 and 14), and the provision for suspension of the writ of habeas corpus (art. I, sec. 9, cls. 2). Despite the congressional nature of these related powers, the president has, in emergency situations, often issued an executive order concerning the emergency or simply taken what he asserts is necessary action. In the attempt to reduce the likelihood of executive overreaching during and through times of emergency, the constitutions of many other countries, such as Estonia, have granted legislatures a greater role in declaring and limiting the duration of emergencies. Some have argued that this strategy is currently being or should be employed in the United States as well. A proposal put forth by Professor Bruce Ackerman would involve a “supermajoritarian escalator,” under which the president would be given “the power to act unilaterally only for the briefest period—long enough for the legislature to convene and consider the matter, but no longer,” and subsequent action would have to be approved by ever-increasing supermajorities in Congress. Professors John Ferejohn and Pasquale Pasquino assert that a

similar reliance on legislative action to delegate emergency powers to the executive has been on the rise internationally, and that a “new model of emergency powers . . . has evolved over the past half century, at least for the advanced or stable democracies.”

A related concern implicates the scope of the emergency powers exercised, and who is authorized to employ them. To the extent that the president acts in an emergency, he may do so either pursuant to a statute or through authority derived directly from particular provisions of Article II of the Constitution. In *Youngstown Sheet & Tube Co. v. Sawyer* (1952), involving President Truman’s seizure of the steel mills “to avert a national catastrophe which would inevitably result from a stoppage of steel production” when a strike was threatened during the Korean War, Justice Jackson’s concurrence articulated three categories of presidential action and described the relative legitimacy of each. According to Jackson’s typology, “[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum,” while “in absence of either a congressional grant or denial of authority,” a “zone of twilight” exists where the president may have concurrent authority with Congress, and, finally, the president’s “power is at its lowest ebb” when he “takes measures incompatible with the expressed or implied will of Congress.” After the events of September 11, 2001, the government has, however, insisted in several instances that Article II of the Constitution grants the president a more extensive overarching power than its individual clauses alone provide. For example, in the case of Yaser Esam Hamdi, a U.S. citizen captured during hostilities in Afghanistan and subsequently held in a naval brig in South Carolina, the government claimed that “the Executive possesses plenary authority to detain [citizens considered “enemy combatants”] pursuant to Article II of the Constitution” (*Hamdi v. Rumsfeld* [2004]). The extent to which the president can exercise power independent of congressional authorization during times of emergency thus remains subject to dispute. Granting the president greater capacity in emergencies could have an adverse impact on civil liberties because it would diminish the check on executive aggrandizement provided by the constitutional separation of powers.

Tactics employed to deal with the emergency may also directly infringe upon civil liberties through three mechanisms, or a combination of them: legislation granting the government greater powers of surveillance or limiting the freedom of association, executive action contravening or exceeding the scope of statutes designed to protect certain rights, or reduction in the compass of those liberties that are constitutionally

based. Historically, noncitizens have been subject to the most dramatic restrictions on their civil liberties, as David Cole has demonstrated in *Enemy Aliens*, and, with the increasingly international reach of the United States, those located outside the country have suffered more extreme forms of rights deprivation. The judiciary has tended to acquiesce in the political branches’ violation of civil liberties during emergency, either by refraining from vindicating individuals’ rights until after a particular crisis has ended, as in the post-Civil War case *Ex parte Milligan* (1866), or by upholding the government’s actions on the grounds of necessity, as in the World War II case *Korematsu v. United States* (1944). Which alternative is worse has been the subject of some dispute. Whereas some commentators—such as Kathleen M. Sullivan—insist that constitutional norms should remain the same during times of emergency, others—such as Mark Tushnet and Oren Gross—maintain that accommodation is the right approach, whether achieved by the Supreme Court’s recognition of a difference between normal and emergency situations or by allowing public officials to take extralegal measures in moments of crisis that the public may or may not subsequently ratify. A recent empirical study by Lee et al. has concluded counterintuitively that emergency does affect judicial decision making, but only with respect to non-war cases.

The right of habeas corpus is the only one that the Constitution explicitly contemplates suspending under certain circumstances. Because of the placement of the Suspension Clause amid the limitations upon Congress’s powers in Article I, scholars and judges have concluded that the legislature alone has the capacity to restrict availability of the writ. The executive branch has not, however, accepted this judgment without resistance. In 1861, towards the beginning of the Civil War, President Lincoln proclaimed a suspension of the writ in certain areas; although Chief Justice Taney, riding circuit, vehemently rejected the constitutionality of this purported suspension, in the 1861 case *Ex parte Merryman*, the Supreme Court itself never adjudicated the question. Congress subsequently granted the president authority to suspend habeas corpus “during the Rebellion”—an authority that Lincoln rapidly and comprehensively implemented—but simultaneously provided for judicial review of detentions (An Act Relating to Habeas Corpus). More recently, under President George W. Bush, the government contended that the writ was not available to “enemy combatants” or to those detained outside the territorial limits of the United States. The Supreme Court’s opinions in *Rasul v. Bush* (2004) and *Hamdi v. Rumsfeld* confirmed respectively, however, that at least a partial right of habeas corpus remained for

individuals held at the military base in Guantanamo Bay, Cuba, and that, in general, “a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government’s factual assertions before a neutral decisionmaker.”

Internment has also been employed in a manner comparable to executive branch detention. Subsequent to the bombing of Pearl Harbor, President Franklin Delano Roosevelt issued Executive Order 9066, which excluded Japanese Americans, including citizens, from certain areas of the West Coast, on the grounds of military necessity; Congress soon criminalized failure to obey this directive. Fred Korematsu, a Japanese American, was convicted of violating the order. In its decision on his appeal, the Supreme Court insisted that racial classifications should be subject to strict scrutiny—but that the exclusion of Japanese Americans under emergency circumstances satisfied this searching review. In doing so, Justice Black deferred to the judgment of the “war-making branches” that “exclusion of the whole group was . . . a military imperative” (*Korematsu v. United States*). Although recognized as one of the most reviled cases that the Supreme Court has ever decided, *Korematsu* remains good law. At the same time, however, the Court in *Ex parte Endo* (1944), in language reminiscent of the technique of constitutional avoidance, construed the War Relocation Authority’s continued detention of loyal Japanese Americans—as opposed to their exclusion from particular areas—as exceeding its delegated capacity; the decision effectively coincided with the end of the relocation camps.

The government has infringed on civil liberties in times of emergency in ways short of detention or internment as well. During World War I and the subsequent red scare, as well as the cold war, among other periods of conflict, First Amendment freedoms of speech and association were statutorily curtailed, with the Supreme Court’s partial acquiescence. Commentators have likewise argued that the Fourth Amendment’s prohibition against unlawful searches and seizures has been relaxed during times of emergency. The most notable recent examples include the expansion of various forms of surveillance under the USA Patriot Act, passed just days after the attacks of September 11, 2001, as well as President Bush’s secret program for collecting data on telephone calls routed through the United States.

Finally, measures taken during emergency have often curtailed the cluster of rights surrounding the trial of an accused individual. During both the Civil War and World War II, the executive established military commissions and tried various individuals

under these tribunals, thus circumventing a number of due process guarantees, including that of trial by jury. In ruling on the constitutionality of these commissions, the Supreme Court held that, although the government cannot subject civilians to trial by military tribunal when the courts are actually open (*Ex parte Milligan*), it may so prosecute allegedly unlawful combatants, whether citizens or not (*Ex parte Quirin* [1942]). The “war on terrorism” has sparked renewed debate about the constitutionality, advisability, and legality under international law of trial by military commission. While the Bush administration initially promoted the notion of trying al-Qaeda operatives and other suspected terrorists by military tribunal, it soon resorted to a strategy of indefinite detention at Guantánamo Bay and elsewhere. Language from the plurality’s opinion in *Hamdi* suggested that the government might meet the due process standards for establishing that an individual should be identified as an “enemy combatant” “by an appropriately authorized and constituted military tribunal.” The *Hamdan v. Rumsfeld* (2005) case—granted certiorari during the October 2005 term—likewise concerns the validity under domestic and international law of a trial by military commission. The Supreme Court has, however, declined to answer the question of whether the government can, consistent with the public’s First Amendment right of access to certain types of judicial proceedings, close so-called “special interest” deportation hearings (*North Jersey Media Group v. Ashcroft* [2003]).

Finally, the duration of emergency—or even of war—may have implications for its effect on civil liberties as well. To avoid the situation of permanent or semipermanent emergency—such as occurred in South Africa under apartheid—many countries’ constitutions prescribe temporal limitations upon declared emergencies. The current “war on terrorism” does not, however, possess a well-defined endpoint. Nor is it likely under the Court’s current construction of political question doctrine that the question of the termination of this—or any war—would be subject to judicial review (*Baker v. Carr* [1962]).

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References and Further Reading

- Ackerman, Bruce, *The Emergency Constitution*, Yale Law Journal 113 (2004): 5:1029–1092.
- Amar, Akhil Reed, and Vikram David Amar, *The New Regulation Allowing Federal Agents to Monitor Attorney–Client Conversations: Why It Threatens Fourth Amendment Values*, Connecticut Law Review 34 (2002): 4L1163–1167.
- Cole, David. *Enemy Aliens*. New York: New Press, 2003.

- , *The New McCarthyism: Repeating History in the War on Terrorism*, Harvard Civil Rights-Civil Liberties Law Review 38 (2003): 1:1–30.
- Dauber, Michele Landis, *The Sympathetic State*, Law and History Review 23. (2005): 2:387–442.
- Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2002).
- Ellmann, Stephen. *In a Time of Trouble: Law and Liberty in South Africa's State of Emergency*. Oxford: Oxford University Press, 1992.
- Epstein, Lee, Daniel E. Ho, Gary King, and Jeffrey A. Segal, *The Supreme Court During Crisis: How War Affects Only Non-War Cases*, New York University Law Review 80. (2005): 1:1–116.
- Ferejohn, John, and Pasquino, Pasquale, *The Law of the Exception: A Typology of Emergency Powers*, International Journal of Constitutional Law 2 (2004): 2:210–239.
- Friedrich, Carl J. *Constitutional Reason of State: The Survival of the Constitutional Order*. Providence, RI: Brown University Press, 1957.
- Gross, Oren, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?* Yale Law Journal 112 (2003): 5:1011–1034.
- Gudridge, Patrick O., *Remember Endo?* Harvard Law Review 116 (2003): 7:1933–1970.
- Home Bldg. & Loan Assn. v. Blaisdell*, 290 U.S. 398 (1934).
- Koh, Harold Hongju, *The Case Against Military Commissions*, American Journal of International Law 96 (2002): 2:337–344.
- Lichtblau, Eric. “Officials Want to Expand Review of Domestic Spying.” *New York Times*, December 25, 2005.
- Locke, John. *Two Treatises of Government*. Edited by Peter Laslett. Cambridge: Cambridge University Press, 1988.
- Mark Tushnet, *Defending Korematsu? Reflections on Civil Liberties in Wartime*, Wisconsin Law Review 2003 (2003): 273–307.
- Mayer, Jane. “Outsourcing Torture: The Secret History of America’s ‘Extraordinary Rendition’ Program.” *New Yorker*, February 14 and 21, 2005.
- Posner, Eric A., and Vermeule, Adrian, *Accommodating Emergencies*, Stanford Law Review 56 (2003): 3:605–44.
- Reed, Christopher. “Are American Liberties At Risk?” *Harvard Magazine*, January–February 2002: 100–1 (summarizing Kathleen M. Sullivan’s Tanner Lecture on “War, Peace, and Civil Liberties”).
- Rehnquist, William H. *All the Laws but One: Civil Liberties in Wartime*. New York: Vintage Books, 2000.
- Rostow, Eugene, *The Japanese American Cases—A Disaster*, Yale Law Journal 54 (1945): 3:489–533.
- Rotenberg, Marc, *Privacy and Secrecy After September 11*, Minnesota Law Review 86 (2002): 6:1115–1136.
- Schmitt, Carl. *Political Theology: Four Chapters on the Concept of Sovereignty*. Trans. George Schwab. Cambridge, MA: MIT Press, 1985.
- Stone, Geoffrey R. *Perilous Times: Free Speech in Wartime from the Sedition Act of 1798 to the War on Terrorism*. New York: W.W. Norton & Co., 2004.
- Tribe, Lawrence H., and Gudridge, Patrick O., *The Anti-Emergency Constitution*, Yale Law Journal 113 (2004): 8:1801–1870.
- Wedgwood, Ruth, *Al Qaeda, Terrorism, and Military Commissions*, American Journal of International Law 96 (2002): 2:328–337.
- Whitehead, John W., and Aden, Steven H., *Forfeiting ‘Enduring Freedom’ for ‘Homeland Security’: A*

Constitutional Analysis of the USA PATRIOT Act and the Justice Department’s Anti-Terrorism Initiatives, American University Law Review 51 (2002): 6:1081–1133.

Cases and Statutes Cited

- Albanian Constitution of 1998, Article 173
- “An Act Relating to Habeas Corpus,” 12 Stat. at Large, 755 (1863)
- Baker v. Carr*, 369 U.S. 186, 213 (1962)
- Constitution of Poland of 1997, Article 228
- Duncan v. Kahanamoku*, 327 U.S. 304 (1946)
- Estonian Constitution of 1992, Articles 65, 129
- Ex parte Endo*, 323 U.S. 283, 287 (1944)
- Executive Order Concerning the Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 *Federal Register* 57 (November 13, 2001): 833
- Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005), *cert. granted* 126 S.Ct. 622 (November 7, 2005)
- Hamdi v. Rumsfeld*, 542 U.S. 507 (2004)
- Korematsu v. United States*, 323 U.S. 214, 215–16 (1944)
- Ex parte Merryman*, 17 F. Cas. 144 (1861)
- Ex parte Milligan*, 71 U.S. 2 (1866)
- North Jersey Media Group v. Ashcroft*, 308 F.3d 198 (3d Cir. 2002), *cert. denied* 538 U.S. 1056 (May 27, 2003)
- Ex parte Quirin*, 317 U.S. 1 (1942)
- Rasul v. Bush*, 542 U.S. 466 (2004)
- USA Patriot Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001)
- Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)

EMERSON, THOMAS IRWIN (1907–1991)

Thomas Irwin Emerson was a noted legal scholar and civil rights and civil liberties advocate. Born in Passaic, New Jersey, he graduated Phi Beta Kappa from Yale College (1928), attended Yale Law School and was editor-in-chief of the *Yale Law Journal*. While at the law school he studied under, among others, Robert Maynard Hutchins, and was a friend and classmate of William O. Douglas. He received his law degree in 1931.

A few years after graduating from law school, Emerson worked at the National Recovery Administration, on the National Labor Relations Board, and in the Attorney General’s Office. During World War II, he then served as general counsel for the Office of Economic Stabilization and for the Office of War Mobilization and Reconversion. In 1948 he ran for governor of Connecticut as the People’s Party candidate, and in 1950–1951 was the president of the National Lawyers Guild.

Emerson served on the Yale law faculty from 1946 to 1976; in 1955 he was named the Lines Professor of Law. He authored or edited four books and numerous

articles, including an autobiographical work entitled, *Young Lawyer for the New Deal: An Insider's Memoir of the Roosevelt Years* (1991).

Civil Rights

As a young lawyer Emerson was employed at Engelhard, Pollak, Pitcher and Stern. Working with Walter Pollak—one of the lead lawyers who argued *Gitlow v. New York* (1925) and *Whitney v. California* (1927)—Emerson was on the legal team that successfully appealed the convictions of the Scottsboro Boys. In that case eight black teenagers were sentenced to death for the alleged rapes of two white women. Emerson and his colleagues challenged the convictions on Fourteenth Amendment grounds, arguing that due process required the appointment of counsel by state courts for indigent defendants in capital cases. The Court in *Powell v. Alabama* (1932) agreed by a seven-to-two margin, thereby launching a new era in civil rights law.

Early in January of 1950, Emerson filed an important *amicus* brief—joined by Dean Erwin Griswold of Harvard and Professor John P. Frank of Yale, among others—in *Sweatt v. Painter* (1950) on behalf of 188 law professors. The brief defended the claim of Heman Marion Sweatt that he had been denied equal protection under the Fourteenth Amendment when the University of Texas Law School refused to admit him on the basis of race; instead it referred him to a newly created state law school for blacks. The brief also challenged the viability of *Plessy v. Ferguson* (1896) and argued that inequality was inherent in segregation. The Court, in a nine-to-zero decision, held that the separate systems of education were not equal and sustained Sweatt's claim, thus mandating his admission to the University of Texas Law School. Both the brief and the holding helped to set the stage for the Court's ruling in *Brown v. Board of Education* (1954).

Emerson co-edited (initially with David Haber and then with Haber and Norman Dorsen, et al.) *Political and Civil Rights in the United States* (1967–1979), the first casebook of its kind and a voluminous treatment of the subject that included the reproduction of many original documents.

Freedom of Expression

Throughout his life Thomas Emerson was a staunch defender of freedom of expression. As early as 1948 he co-authored (with David Helfeld) a scholarly

143-page article entitled “Loyalty Among Government Employees,” in which he argued that government loyalty programs were repressive and violated the First Amendment. Two years later Emerson openly condemned the University of California regents for firing 157 university employees suspected of being communists or communist sympathizers. During a “Bill of Rights Conference” in New York (July 17, 1949) Emerson, an active member of the American Civil Liberties Union's (ACLU) Free Speech Committee, strongly defended a resolution calling for restoring civil liberties for members of the Socialist Workers Party who had been caught up in government loyalty sweeps. Morris Ernst, a noted ACLU lawyer, and others took a different view and defeated the resolution.

In 1957, Professor Emerson successfully represented Paul Sweezy, a university teacher, in the Supreme Court case involving legislative inquiries concerning his ties to the Progressive Party and about a lecture he gave on socialism. The petitioner, who declined to respond to such inquiries, prevailed on due process grounds (*Sweezy v. New Hampshire* [1957]).

Emerson's most enduring contribution to First Amendment law was his widely respected book, *The System of Freedom of Expression* (1970), which grew out of an earlier work entitled *Toward a General Theory of the First Amendment* (1966), which in part was based on a 1963 article published in the *Yale Law Journal*. Tracking in format the presentation offered by Zechariah Chafee in *Free Speech in the United States* (1941), Emerson's 750-page tome offered a comprehensive survey and analysis of nineteen broadly defined areas of free speech law.

In *The System of Freedom of Expression*, Emerson argued that the “system of freedom of expression in a democratic society rests upon four main premises:” (1) “freedom of expression is essential as a means of assuring individual self-fulfillment,” (2) “freedom of expression is an essential process for advancing knowledge and discovering truth,” (3) “freedom of expression is essential for participation in decision making by all members of society,” and (4) “freedom of expression is a method of achieving a more adaptable and hence a more stable community, of maintaining the precarious balance between healthy cleavage and necessary consensus.” Hence, for Emerson, First Amendment freedom was “essential to all other freedoms.” It was, he stressed, “a good in itself, or at least an essential element in a good society.”

While not entirely subscribing to either the Black or Douglas “absolutist” approaches to the First Amendment, Emerson was highly critical of the Supreme Court's ad hoc balancing and clear-and-present-danger tests. His presumptively protective theory of

expression was based, in meaningful part, on the “distinction between ‘expression’ and ‘action’ and the difference in degree of social control allowed over each.” Thus, the more expression was actually “linked to action” or the more it had the “same immediate impact as action,” the more it became a candidate for government regulation. Absent such direct consequences linked to harmful actions, Emerson’s theory would protect expression.

One of his later writings on the First Amendment was his 1983 article “Freedom of the Press under the Burger Court.” He wrote, “The Burger Court has taken a ‘crabbed view’ of the First Amendment and has exhibited a ‘disturbing insensitivity’ to the role of the press. In doing so, it has significantly reduced the protections afforded the press by the First Amendment.” The Burger Court’s press rulings—reflected in cases such as *Gertz v. Robert Welch, Inc.* (1974, libel) and *Branzburg v. Hayes* (1972, reporter’s privilege)—he concluded, “bode ill for the future.”

Right to Privacy

Emerson’s greatest achievement as a lawyer was his victory in *Griswold v. Connecticut* (1965), a case he argued in the Supreme Court. Emerson represented the petitioners, Estelle Griswold and Dr. Thomas Buxton, who had been prosecuted under a state law that banned the use and distribution of contraceptives, even to married couples. The Court ruled seven-to-two in favor of the petitioners. In an opinion by Justice Douglas, it was declared that the Connecticut statute violated the right of marital privacy deemed within the penumbra of specific guarantees of the Bill of Rights and hence protected under the Fourteenth Amendment. The ruling thus foreshadowed the holding in *Roe v. Wade* (1973), the landmark abortion case.

Women and Equality

Eleven months before the equal rights amendment’s (ERA) final approval by Congress, Emerson co-authored “The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women.” The 113-page article (in support of the ERA) offered an authoritative analysis of the probable impact of the proposed amendment. Several years later, in November 1977, Emerson testified before a subcommittee of the House Judiciary Committee concerning the ERA. Taking issue with his Yale Law School colleague

Charles L. Black, Emerson argued that Congress could constitutionally extend the ratification period of the proposed amendment by a simple majority vote rather than by a two-thirds vote of each house. Agreeing with Emerson, in 1978 Congress by a 233-to-189 vote extended the ratification period by five years, though to no avail.

During that period, Emerson also wrote the foreword to *Sexual Harassment of Working Women* (1979) by Catharine A. MacKinnon, a friend and former student. “Sexual harassment,” he began, “has been one of the most pervasive but carefully ignored features of our national life.” Emerson’s concern about this problem reflected his parallel concerns about “real” equality:

MacKinnon undertakes to give a new dimension to the Equal Protection Clause . . . [She] argues that the focus in equal protection law should not be on the ‘differences,’ or whether the differences are ‘arbitrary’ rather than ‘rational,’ but upon the basic issue of inequality. In other words, the courts should consider whether the treatment by the law results in systematic ‘disadvantage’ because of group status . . . Such an approach deserves serious consideration.

That consideration, however, did not prevent him from taking exception to Professor MacKinnon’s claim that there should be civil law remedies for women who suffered harm from the alleged effects of pornography. Writing in the *Yale Law and Policy Review* (1984), Emerson declared: “My claim arises not from Professor MacKinnon’s statement of the problem but from her proposals for a solution.” While he granted that “pornography plays a major part in establishing and maintaining male supremacy,” he also believed that if MacKinnon’s proposals were tested against First Amendment law, “there is no way her solution of the pornography problem can be sustained.” He concluded on an emphatic note: “Any attempt to deal with the problem of pornography through government suppression would involve a dangerous evisceration of the First Amendment.”

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References and Further Reading

- Chafee, Zechariah Jr. *Free Speech in the United States*. Cambridge, MA: Harvard University Press, 1941.
- Dorsen, Norman, *Thomas Irwin Emerson*, *Yale Law Journal* 85 (1976): 463.
- Emerson, Thomas Irwin., *Loyalty Among Government Employees*, *Yale Law Journal* 58 (1948): 1.
- . *Toward a General Theory of the First Amendment*. New York: Random House, 1966.
- . *The System of Freedom of Expression*. New York: Random House, 1970.

- . “Freedom of the Press under the Burger Court.” In *The Burger Court*, edited by Vince Blasi. New Haven, CT: Yale University Press, 1983.
- . *Pornography and the First Amendment: A Reply to Professor MacKinnon*, Yale Law and Policy Review 3 (1984): 130–143.
- . *Young Lawyer for the New Deal: An Insider’s Memoir of the Roosevelt Years*. Savage, MD: Rowman and Littlefield, 1991.
- . *The Writings of Thomas Irwin Emerson*, Yale Law Journal 101 (1991): 327.
- Emerson, Thomas I., Barbara Brown, Gail Frank, and Ann Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, Yale Law Journal 80 (1971): 871.
- Emerson, Thomas I., David Haber, Norman Dorsen, eds. *Political and Civil Rights in the United States*. 1st–4th eds. 2 vols. Boston: Little, Brown, 1967–1979.
- MacKinnon, Catharine A., with Thomas I. Emerson. *Sexual Harassment of Working Women*. New Haven, CT: Yale University Press, 1979.
- Yale Law Library. *Thomas Irwin Emerson: 1907–1991*. Memorial Booklet. New Haven, CT: Yale Law Library, 1991.

Cases and Statutes Cited

- Branzburg v. Hayes*, 408 U.S. 665 (1972)
- Brown v. Board of Education of Topeka, Kansas*, 347 U.S. 483 (1954)
- Gertz v. Robert Welch Inc.*, 418 U.S. 323 (1974)
- Gitlow v. New York*, 268 U.S. 652 (1925)
- Griswold v. Connecticut*, 381 U.S. 479 (1965)
- Plessy v. Ferguson*, 163 U.S. 537 (1896)
- Powell v. Alabama*, 287 U.S. 45 (1932)
- Roe v. Wade*, 410 U.S. 113 (1973)
- Sweatt v. Painter*, 339 U.S. 629 (1950)
- Sweezy v. New Hampshire*, 354 U.S. 234 (1957)
- Whitney v. California*, 274 U.S. 357 (1927)

EMPLOYMENT DIVISION, DEPARTMENT OF HUMAN RESOURCES v. SMITH, 494 U.S. 872 (1990)

This is currently the leading case on the scope of the First Amendment’s prohibition against laws that “prohibit the free exercise” of religion. The case attracted little notice during its prolonged consideration by the Court. However, in its opinion, the Court’s majority announced an entirely new doctrine of free exercise, reinterpreting or discarding much seemingly settled doctrine and sharply limiting the effect of the Free Exercise Clause. In *Smith*, the Court held that “neutral, generally applicable laws” do not violate the clause even when they limit or entirely prohibit the practice of minority religions. The clause, the Court said, is violated only when government intentionally targets religious practice. The result has since been subject to withering academic and

public criticism, all the more intense because the Court gave no hint to the parties or the public that it was considering abandoning precedent and fashioning a new rule. *Smith* remains controversial today, and has inspired no fewer than three federal statutes designed to overturn its result in whole or part.

The case arose in 1984, when a private, government-funded alcohol and drug abuse treatment agency in Roseburg, Oregon, fired two of its employees, Alfred Leo Smith, Jr. and Galen W. Black, because they had participated in the tipi ceremony of the Native American Church and had consumed peyote as part of the ceremony. The Native American Church, a loose federation of congregations and church bodies, is the main representative in the United States of peyotism, the religious worship of the hallucinogenic peyote cactus. Indian lore and anthropological records suggest that people in the New World have been making ceremonial use of peyote for well over 10,000 years. In the nineteenth century, peyotism assumed its present shape in the United States, and during the late twentieth century public health specialists studying native people began to suggest that the ritual and peyote itself were useful methods of treating alcoholism and drug addiction, at least among indigenous populations. It was this possibility that led Galen Black, a white man and a recovering alcoholic, to participate in a tipi ceremony in late 1983. When his employers found out that he had consumed peyote at the ceremony, they dismissed him, suggesting that the use of peyote constituted “drug abuse” and “relapse” into substance abuse. Al Smith, a Klamath Indian with many years of experience with the church, then also consumed peyote to protest against what he saw as disrespect for Native-American traditions. The agency fired him as well, and the Employment Division of the State Department of Human Resources denied both men unemployment compensation, alleging that they had been dismissed for work-related “misconduct.”

The two men brought separate lawsuits against the division in the Oregon State courts, and in 1986 the Oregon Supreme Court held that the denial of unemployment compensation violated the Free Exercise Clause. The state court relied on a precedent called *Sherbert v. Verner* (1963), in which the Court had ordered the State of South Carolina to pay unemployment compensation to a Seventh-Day Adventist who refused a job because it required Saturday work, forbidden by her faith. The Oregon Court reasoned that the two cases were equivalent, even though Oregon law technically forbade the use of peyote by anyone, even for religious reasons.

The U.S. Supreme Court granted certiorari, vacated the state court opinion, and remanded the case (*Employment Division v. Smith* [1988], *Smith I*). The

Court majority ordered the state court to determine whether religious use of peyote violated state law. If so, the majority suggested, this fact might distinguish the case from *Sherbert*. On remand, however, the state court simply stated that Oregon law did not appear to provide a religious exemption to the prohibition on peyote. Citing its own rule against advisory opinions, it declined to consider whether the state law violated the Oregon Constitution. Instead, it reaffirmed its holding that *Sherbert* required payment to Smith and Black as a matter of federal constitutional law. Once again, the state petitioned the Supreme Court for certiorari, which was granted in 1989. Representatives of the Native American Church, fearing the effects of a loss, attempted to negotiate a settlement. Oregon agreed, provided that Smith and Black would return the compensation they had received. Smith refused, and the case went forward.

Smith II was briefed and argued by both parties and all amici as a case about the proper application of *Sherbert*. In that case, the Court had suggested that state laws that “burden[ed]” religious practice could pass First Amendment muster only if they furthered a “compelling state interest.” The State of Oregon argued that its public policy of refusing any exemptions to its drug laws was a “compelling interest”; Smith and Black argued that, because the state had not actually prosecuted Smith and Black, the only “state interest” present in this case was the state’s desire to conserve funds in its unemployment compensation fund—an interest the *Sherbert* Court had already rejected as less than “compelling.”

When the Court announced its opinion in *Smith II*, shock waves traveled around the religious community. Without giving any hint to anyone that it was considering doing so, the Court had decided, in an opinion by Justice Antonin Scalia, to scrap the *Sherbert* rule and replace it with a new rule, hitherto unknown, that was significantly less protective of religious minorities who found themselves in conflict with majority beliefs. Unless such a minority plaintiff could show that the law burdening her belief had been passed with the purpose or intention of discriminating on religious grounds, the Free Exercise Clause would provide no protection at all. “Neutral, generally applicable laws” that unintentionally gutted minority religions were not subject to any heightened scrutiny by the Court. Minorities facing such “incidental” burdens were directed to seek exemptions from the political process rather than from courts. In order to reach this result, Justice Scalia reinterpreted much of the Court’s prior free exercise jurisprudence as dealing with “hybrid cases,” involving two or more provisions of the Bill of Rights, rather than free exercise alone. He also relied heavily upon the Court’s

decision in *Minersville School District v. Gobitis* (1940), one of the Court’s more reviled precedents—and one that had been overturned by *West Virginia Board of Education v. Barnette* (1943), only three years after it was decided. Justice Scalia further explained that the growing religious diversity of the American people meant that “we cannot afford the luxury of deeming *presumptively invalid*, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order.”

Religious groups across the political and theological spectrum mobilized in opposition to the decision. In 1993, Congress passed the Religious Freedom Restoration Act (RFRA), which directed the courts to apply the *Sherbert* test to any state or federal law or regulation that burdened a religious practice. (Although seeking to reverse the doctrine of *Smith*, the religious coalition deliberately excluded peyotists and cooperated in the creation of legislative history suggesting that a prohibition of peyotism might pass the “compelling interest” test.) In passing RFRA, Congress relied on the enforcement clause in section 5 of the Fourteenth Amendment. In 1997, the Supreme Court, in *City of Boerne, Texas v. Flores* (1997), held that RFRA, as applied to states, exceeded Congress’s power under section 5. In response, Congress in 2000 enacted the Religious Land Use and Institutionalized Persons Act, which made use of the commerce and spending powers to impose the “compelling interest” test on state actions that burdened religious organizations or persons in zoning and prison-discipline cases. To date, the new act has been upheld by the federal courts of appeals.

Meanwhile, the Native American Church, with the assistance of Sen. Daniel Inouye, persuaded Congress in 1994 to pass the American Indian Religious Freedom Act Amendments (AIRFAA). AIRFAA prohibits the federal or state governments from outlawing the use of peyote by Native Americans as part of a traditional native religion, or from denying native peyotists state benefits because of their religious use of peyote.

The *Smith* rule, however, remains the Court’s statement of the constitutional scope of the Free Exercise Clause. Justice David Souter, who joined the Court after its decision in *Smith*, has criticized the rule as leaving free exercise doctrine “in tension with itself,” and Justice O’Connor, who concurred in the result in *Smith* but defended the *Sherbert* rule, has also called for *Smith* to be overruled.

GARRETT EPPS

Cases and Statutes Cited

American Indian Religious Freedom Act Amendments, 1994, 42 U.S.C. sec. 1996a

City of Boerne, Texas v. Flores, 521 U.S. 507 (1997)
Employment Division v. Smith, 485 U.S. 660 (1988)
(*Smith I*)
Minersville School District v. Gobitis, 310 U.S. 586 (1940)
Religious Freedom Restoration Act, 42 U.S.C. sec. 2000bb
Religious Land Use and Institutionalized Persons Act, 42
U.S.C. sec. 2000cc et seq
Sherbert v. Verner, 374 U.S. 398 (1963)
West Virginia Board of Education v. Barnette, 319 U.S. 624
(1943)

ENGEL v. VITALE, 370 U.S. 421 (1962)

One of the most controversial issues involving the Establishment Clause of the First Amendment is the constitutionality of prayer in public schools. Public school prayer had been a common feature in government-operated schools throughout the nineteenth century and the first half of the twentieth century, but in 1962 the Court found the practice unconstitutional in *Engel v. Vitale*.

In *Engel*, the Court considered the constitutionality of the following prayer which the state of New York required to be said aloud in every public school classroom each day: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country." A group of parents brought suit, alleging that the recitation of this official prayer in the public schools was contrary to their beliefs and religious practices and violated the Establishment Clause of the First Amendment.

Although New York intended the prayer to be nonsectarian and observance on the part of students to be voluntary (no student was compelled to say the prayer), the Court, with Justice Hugo Black writing, held that the state-mandated prayer offended the Establishment Clause. The Court determined that the Establishment Clause barred more than simply the preference of one religion over another; it also required that the government remain neutral between religion and nonreligion. The Court found it irrelevant that objecting students were permitted to leave the classroom during the recitation of the prayer:

The Establishment Clause . . . does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce non-observing individuals or not When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.

The Court made an appeal to history to justify its position:

The history of governmentally established religion, both in England and in this country, showed that whenever government had allied itself with one particular form of religion, the inevitable result had been that it had incurred the hatred, disrespect and even contempt of those who held contrary beliefs.

In a separate concurrence, Justice William Douglas conceded that a "religion is not established in the usual sense merely by letting those who choose to do so to say the prayer that the public school teacher leads." But Douglas was troubled by the fact that New York had financed a religious exercise and had thereby inserted "a divisive influence into our communities." To Douglas, "the First Amendment leaves the Government in a position not of hostility to religion but of neutrality The philosophy is that if government interferes in matters spiritual, it will be a divisive force."

Justice Potter Stewart was the lone dissenter in *Engel* (Justices Frankfurter and White did not participate in the decision). Stewart concluded that by requiring the recitation of the prayer, New York had not "established an 'official religion' in violation of the Constitution." Rather, argued Stewart, New York had merely recognized

the deeply entrenched and highly cherished spiritual traditions of our Nation—traditions which come down to us from those who almost two hundred years ago avowed their 'firm Reliance on the Protection of divine Providence' [quoting the Declaration of Independence] when they proclaimed the freedom and independence of this brave new world.

The Court's decision in *Engel* decision produced widespread opposition in the United States. Justice Tom Clark, who joined the majority in *Engel*, took the unusual step of defending the decision in a public speech in which he emphasized the narrowness of the Court's holding. In response to *Engel*, many efforts were launched in Congress to secure a constitutional amendment that would permit school prayer. Although enjoying broad support, all of these efforts failed. Since *Engel*, the Court has not departed from its view that public school prayer, composed by the state and led by school officials, is unconstitutional. The following year, in *Abington School District v. Schempp* (1963), the Court expanded on the *Engel* holding by finding state-endorsed prayer also unconstitutional; *Schempp* involved the recitation of the Lord's Prayer in the public schools. Subsequent legal debates have centered on the constitutionality of moments of silence or prayer by private persons in public schools. In every such case, the Supreme Court has found the public school prayer in question unconstitutional. But even today, *Engel* remains contentious

for many Americans and is properly described as one of the most controversial Supreme Court decisions of the twentieth century.

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References and Further Reading

Stone, Geoffrey R., *In Opposition to the School Prayer Amendment*, *University of Chicago Law Review* 50 (1983): 823–848.

Sutherland, Arthur E. Jr., *Establishment According to Engel*, *Harvard Law Review* 76 (1962): 25–62.

Cases and Statutes Cited

Abington School District v. Schempp, 374 U.S. 203 (1963)

See also Establishment Clause Doctrine: Supreme Court Jurisprudence; Prayer in Public Schools

ENGLISH BILL OF RIGHTS, 1689

The Bill of Rights was the most important document of the Glorious Revolution, and constituted the core of the Revolution settlement. Among the primary causes of the revolution was conflict over whether James II possessed “dispensing power,” or prerogative to absolve a person from the duty to obey a particular law, and if he could thereby exercise the legislative power without consent of Parliament. After James II fled to France, William of Orange convened a convention Parliament to reestablish the government. A committee designed to resolve the issue of succession drew up a Declaration of Rights, which was to comprise the bulk of the Bill of Rights (the exclusion of Roman Catholics and spouses of Roman Catholics from the throne was included in the bill but not the declaration). However, the declaration needed the committee’s approval, the support of a majority of both houses of Parliament and the acquiescence of William: bargains and compromises had to be struck, among them that James could not be accused of violating a contract, and that the monarch could exercise dispensing power only with consent of Parliament. The Bill of Rights was enacted on December 16, 1689; in 1701, the Act of Settlement, an “Act for the further limitation of the Crown, and better securing the rights and liberties of the subject,” further strengthened Parliament against the monarchy. Beyond clarifying monarchical authority and situating legislative power with the king and both houses of Parliament, the Bill of Rights included among its provisions that “raising or keeping a standing army” in peacetime required parliamentary consent; that Protestant subjects “may have arms for their defense

suitable to the conditions and as allowed by law;” that “excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted;” that parliamentary debate ought to be free; and that the subjects possessed the right to petition the king and the right of jury trials.

Although the English Bill of Rights certainly was part of the Framers’ intellectual background, scholars disagree about its significance: whereas some have highlighted the similarities between the two bills of rights, others have held that the English experience was obviously not taken by the Americans to be authoritative. Nevertheless, comparing the two texts helps to illuminate some of the American framers’ choices both to reflect and to deviate from this earlier document. Two recent controversies in American constitutional interpretation have focused attention on the proper understanding and the degree of influence of the English Bill of Rights on the American Constitution.

Remarkably, at least since *Weems v. United States* (1910), some of the most salient Eighth Amendment cases have focused at least in part on the question of whether the English Bill of Rights granted a right to proportionate punishment. The opinions in *Furman v. Georgia* (1972), in particular, debate the influence of the tenth section of the English Bill of Rights at substantial length; notably, Justice Thurgood Marshall’s concurrence featured a noteworthy discussion of the origins of the provision. Justice Lewis Powell’s dissent in *Rummel v. Estelle* (1980) suggested that English constitutional law was deeply concerned about disproportionality, and argued that this held enduring importance for Eighth Amendment jurisprudence even in noncapital cases. Further, Powell’s majority opinion in *Solem v. Helm* (1983) located a right to proportionate punishment in the English Bill of Rights. However, Justice Potter Stewart argued that the Framers focused on prohibiting torture rather than proportionality in his opinion in *Gregg v. Georgia* (1976), as did Burger in his dissent to *Solem v. Helm* (1983). This view was echoed in *Harmelin v. Michigan* (1991), in which Justice Antonin Scalia argued that the “cruel and unusual punishments” provision was not intended to forbid disproportionate sanctions.

Historical investigations of the English Bill of Rights have also shaped recent Second Amendment jurisprudence. Historian Joyce Lee Malcolm has recently argued that the seventh article of the English Bill of Rights granted Protestants an individual right to bear arms, and that the Framers had this provision in mind when they drafted the Second Amendment. Both Scalia (in *Matter of Interpretation*) and Judge Samuel Cummings, in *United States v. Emerson* (1999), have cited Malcolm’s work in this context.

Although some prominent historians have challenged Malcolm's understanding of the English Bill of Rights, as well as the claim that the seventh article influenced the Framers, the debate has generated fresh interest in the legacy of the English Bill of Rights for American constitutionalism.

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References and Further Reading

- Granucci, Anthony, 'Nor Cruel and Unusual Punishments Inflicted': *The Original Meaning*, California Law Review 57 (1969): 839.
- Maitland, F.W. *Constitutional History of England*. Delanco, NJ: Legal Classics Library, 2000.
- Malcolm, Joyce Lee. *To Keep and Bear Arms: The Origin of an Anglo-American Right*. Cambridge, MA: Harvard University Press, 1994.
- Scalia, Antonin. *A Matter of Interpretation: Federal Courts and the Law*. Princeton, NJ: Princeton University Press, 1997.
- Schworer, Lois, *Symposium on the Second Amendment: Fresh Looks: To Hold and Bear Arms: The English Perspective*, Chicago-Kent Law Review 76 (2000): 26.
- Weston, Corinne Comstock, and Janelle Renfrow Greenberg. *Subjects and Sovereigns: The Grand Controversy over Legal Sovereignty in Stuart England*. Cambridge: Cambridge University Press, 1981.

Cases and Statutes Cited

- An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown. (English Bill of Rights, 1689). 1 Gul. & Mar., sess. 2, c. 2. In Act for the Further Limitation of the Crown, and Better Securing the Rights and Liberties of the Subject (Act of Settlement, 1701). 12 Gul. III, c. 2. In Andrew Browning, ed., *English Historical Documents, 1660–1714*. New York: Oxford University Press, 1953
- Browning, Andrew, ed., *English Historical Documents, 1660–1714*. New York: Oxford University Press, 1953. <http://www.yale.edu/lawweb/avalon/england.htm>
- Furman v. Georgia*, 408 U.S. 238 (1972)
- Gregg v. Georgia*, 428 U.S. 153 (1976)
- Harmelin v. Michigan*, 501 U.S. 957 (1991)
- Rummel v. Estelle*, 445 U.S. 263 (1980)
- Solem v. Helm*, 463 U.S. 277 (1983)
- United States v. Emerson*, 46 F Supp. 598 (N.D. Tex. 1999)
- Weems v. United States*, 217 U.S. 349 (1910)

See also **Bill of Rights: Structure; Cruel and Unusual Punishment (VIII); English Tradition of Civil Liberties; Right to Bear Arms (II)**

ENGLISH TOLERATION ACT

A 1689 Act of Parliament granted increased religious freedom for Protestants whose beliefs or practices did not conform (hence, nonconformists) to the national Church of England. The act allowed

dissenters separate places of worship, as well as their own preachers and teachers.

Of the many issues taken up by the Convention Parliament at the height of the Glorious Revolution in January 1689, none proved more difficult than settlement in the church. Although historians disagree regarding the depth of political division within English society at the end of the seventeenth century, few doubt the magnitude of religious tensions throughout the Stuart period. Indeed, religious loyalties shaped the political affiliations that caused the Glorious Revolution. Just as England wrestled over royal prerogative and Parliamentary rule, Tories versus Whigs, so too was the nation having to choose between the established church and nonconforming Protestantism, Anglicans versus Dissenters. Dissent had escalated during previous periods of toleration in a way that generated grave concern among Anglicans (a term describing members of the Church of England that really only entered common usage in the nineteenth century). Furthermore, religious fervor was easily politicized, rendering dissent against the church equivalent to dissent against the state. It was no small coincidence that Tories favored royal prerogative to the same degree that Whigs feared arbitrary rule, nor that the former tended to be Anglicans while the latter accepted dissent. A significant distrust of centralized power united politics and religion.

The rash of Protestant sectarianism that fomented during Cromwell's Commonwealth in the 1650s (for instance, Baptists, Presbyterians, Congregationalists, and Quakers) gave way to the post-Restoration discord among three main camps: separatists who dissented against, and desired toleration from, the established church; hard-line Anglicans who refused to concede anything to anyone; and Presbyterians who were open to compromise, namely a settlement with Anglicans that did not include toleration for separatists. Despite the fact that Protestant Dissenters constituted less than 6 percent of the total English population, their influence was disproportionately large. Parliament was pressured to consider three statutory alternatives relating to the Church of England: abolition of the sacramental oath required of office holders (mandated by the Test and Corporation Acts of 1661 and 1673); the incorporation of moderate dissenters (known as "comprehension"); and complete freedom of worship, including even the more radical dissenters (toleration). These proposals represented increasing levels of challenge to Anglican supremacy; each threatened the status quo.

In 3,100 words and nineteen paragraphs, the act did not repeal any laws relating to religion per se, nor did it exempt anyone from the obligation to tithe for the established church. On the other hand, certain

dissenting practices would henceforth be tolerated, but only for “certified” Protestants willing to sign loyalty oaths. The act makes repeated mention of these professions of loyalty, demonstrating the insecurity still prevalent within both the political realm and the Church of England. Future tolerance was predicated upon an oath “to be true and faithful to King William and queen Mary and . . . abhor, detest, and renounce . . . any authority of the see of Rome.” Although comprehension never passed and toleration did not extend to non-Christians, Quakers, or Catholics, Parliament granted nonconforming Protestants outside the Church of England the freedom to worship in their own meetinghouses under their own leaders.

The Toleration Act gained royal assent in May 1689, thus becoming one of the most important elements of the Revolution settlement. Through the act, Parliament demonstrated that it had statutory authority stretching beyond royal prerogative; it also put an end to Anglican hegemony as it liberalized religious practice. In the first year after passage of the act, hundreds of non-Anglican places of worship were licensed; two decades later, parishes of the Church of England outnumbered other Protestant meeting places by fewer than four to one.

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References and Further Reading

- Harris, Tim. *Politics under the Later Stuarts, 1660–1715*. London: Longman Group, 1993.
 Hoppit, Julian. *A Land of Liberty? England 1689–1727*. Oxford: Oxford University Press, 2000.

ENGLISH TRADITION OF CIVIL LIBERTIES

The Bill of Rights in the U.S. Constitution, which has been critical in defining the civil liberties enjoyed by Americans, reflects the influence of political struggles that occurred in seventeenth-century England. Indeed, the roots of American liberty lie in the constitutional conflicts that pitted Parliament against the English monarch and defenders of England’s “ancient liberties” against attempts by the Stuart kings to exercise unlimited executive power. The gradual resolution of this conflict, often referred to as the English Revolution, established a tradition of constitutionally limited government based on custom, the common law, and a series of momentous written declarations, including the Petition of Right (1628), the Agreement of the People (1647), and the Bill of Rights (1689), each of which will be discussed below.

In the Middle Ages, liberty was understood to consist of exclusive privileges and immunities claimed by corporate bodies such as guilds or the clergy, rather than rights that were universal because they belonged to all members of society. Such liberty could be claimed by individuals only as members of those organizations. Thus, freedom was more a matter of social status than a quality inherent in individuals per se, and was exclusive rather than inclusive because it depended on the possession of property or special status in society. However, the events of the English Revolution—which began to germinate early in the reign of Charles I (1625–1649), deepened during the period of the personal rule (when Charles ruled for eleven years without calling a single Parliament), exploded into Civil War during the 1640s, and was finally concluded in the Glorious Rebellion of 1689—led the English to rethink and expand their understanding of the meaning of liberty. Although these struggles produced a less expansive understanding of civil liberties than Americans were to embrace at the writing of their constitution a century later, they did lay a foundation on which the American understanding of civil liberty could evolve.

Freedom in the English Revolution

As the term is being used in this article, the English Revolution was a long, drawn-out affair, provoked by the efforts of the Stuart monarchs to impose absolute rule. Based on their belief that all political authority flowed from the Crown, the Stuarts conducted themselves in ways that deeply offended members of Parliament. The Stuart doctrine of “royal absolutism,” which was defended in well-known works of the period, such as Sir Robert Filmer’s *Patriarcha*, theorized that all privileges enjoyed by Parliament were grants from the king rather than inherent rights. Armed with this theory, the early Stuart monarchs, James I (1603–1625) and his son, Charles I, frequently exercised governing powers without the cooperation or consent of Parliament. This assertion of royal power led Parliament to engage in an equally vigorous search to define its own privileges. What was Parliament’s legitimate role in government? In the search for answers to this question, Parliament pushed forward a discussion not only of its own liberties but indeed a nearly century-long debate over the rights of the English people. In their absolutist zeal, the Stuarts tried to restrict Parliament’s role when it was sitting and often resorted to ruling without Parliament altogether. This policy reached its zenith in 1629 when Charles I initiated eleven years of rule without calling

Parliament into session. This period, known as the “personal rule” period, led to civil war in the 1640s. The Civil War (1642–1649), which ended with the execution of Charles I, brought into focus the civil liberty issues that would be a continuing source of tension until they were resolved in the Glorious Rebellion (1689).

What were those issues? Perhaps the most fundamental issue dividing king and Parliament was the issue of taxation. The Stuarts sought to use the prerogative power to impose taxes without parliamentary approval. This policy led to notoriously unpopular forms of royal revenue such as “forced loans,” which were based on a theory of the king’s right to seize his subjects’ property for public purposes at his discretion. Members of Parliament spoke out strongly against this breach of their property rights. To blunt such criticism, the Stuarts resorted to arresting individual members of Parliament (MPs), which was seen as an attack on the MPs’ right of free speech. They also utilized the Star Chamber, a juryless court whose members served at the pleasure of the king, to send offending MPs to prison or impose severe penalties on them for acts of political opposition. To quell spreading protests against this abuse of power, the monarchy imposed heavy censorship on an emerging opposition press. All published materials were subject to strict censorship by the Archbishop of Canterbury, and severe punishments, including mutilations and death sentences, could be imposed for violators.

Direct censorship of the press was reinforced by the doctrine of seditious libel, which treated criticisms of the government or individual office holders as a crime because it was thought to undermine respect for public authority. The Star Chamber helped to establish this doctrine in the 1606 case *De Libellis Famosis*, but it was subsequently incorporated into the common law and the English government continued to draw upon it to punish dissent long after abolition of the Star Chamber in 1641. Following the Glorious Rebellion, Parliament would finally end formal press censorship in 1695, but the law of seditious libel persisted and served as a tool to restrain criticism of the government. Libel cases were to be heard by juries after adoption of Fox’s Libel Act of 1692, but in eighteenth-century England and colonial America alike, juries typically upheld government prosecutions for seditious libel.

In sum, during the reign of the early Stuart monarchs a momentous struggle developed over the competing claims of royal prerogative and parliamentary privilege. This struggle put issues of basic rights of property, free speech and press, and trial by jury on the agenda of English national politics.

Seventeenth-Century Milestones in the Development of English Liberties

One of the most important milestones in the evolution of English liberty was the Petition of Right put forward by Parliament and signed in 1628 by King Charles I. The petition sought to formalize Parliament’s claim that the king could not impose taxes without its consent. Under the leadership of Sir Edward Coke, the era’s most distinguished jurist and defender of the common law, Parliament asserted that its role in raising taxes could be traced back to the Magna Carta and was an inviolable element of the “ancient constitution.” The first step toward the petition was a “protestation” by Parliament in 1621, which asserted MPs’ right of free speech. King James famously repudiated this claim by tearing out the page where it appeared in the *Commons Journal*, and Sir Edward Coke was sent to prison for eight months for his advocacy of the right. Because both James and Charles ignored the protestation, Parliament resorted to the Petition of Right. The petition asserted that citizens could not be forced to loan money to the king or be imprisoned for not doing so, thereby highlighting the importance of the right of habeas corpus as an essential protection of the individual against the arbitrary exercise of power. Parliament enacted the Petition of Right as a statute in order that it would be treated as law by the king, but to no avail. When Charles I dismissed the 1628 Parliament and entered on the personal rule period, he proceeded to violate freely the principles articulated in the petition. Even though the Petition of Right did not succeed in limiting absolutist power in the short run, however, it affirmed principles of constitutional liberty that would remain on the political agenda until they eventually were enshrined in law and practice.

The personal rule foundered in the late 1630s due to the king’s inability to raise sufficient revenue without Parliament’s collaboration. Charles’s need for money led to the famous Long Parliament, which convened in November 1640. Determined to restore constitutional rule and protect parliamentary liberties, MPs passed the Triennial Act, which called for regular sittings of Parliament. They abolished the Star Chamber and other prerogative courts, thereby laying a foundation for a more independent judiciary. In declaring forced loans illegal, they affirmed the sanctity of property rights. But the Long Parliament was unable to reconcile with King Charles, and England plunged into civil war in 1642, a war that finally ended with the king’s execution for treason in January 1649. During the Civil War, the discussion of English liberties spread beyond the traditional political elite

and produced a second milestone in English thinking about civil liberty.

The decisive factor in Parliament's victory in the Civil War, Oliver Cromwell's New Model Army, facilitated the rise of the Levellers, a popular movement for the extension of civil liberties. The Levellers put forward ideas that became staples of the written constitutions and bills of rights that were adopted in America. Reformers who lacked the status of gentlemen, the Levellers professed to speak for the common people of England. They opposed not only the tyranny of the king but also the potential for tyranny by Parliament. The Levellers made common cause with the Agitators (regimental leaders in the New Model Army who shared their views) to put forward claims for the individual rights that belonged equally to all Englishmen. These ideas were innovative and anticipated the modern conception of rights because they were based on the presumption of human rationality rather than on precedent. In this respect, they anticipated the famous doctrines of John Locke's *Two Treatises of Government*, which was published four decades later.

Leveller ideas were advanced in an Agreement of the People, which has been regarded as the first written constitution in modern history. It proposed limiting both royal and parliamentary power through a written charter that would derive its authority directly from the people. The Levellers contended that Parliament should not exercise a judicial function, thereby contributing to the notion of separation of powers that subsequently figured so prominently in the American conception of limited government. They attacked the use of bills of attainder, which were used by Parliament as well as the king to punish individuals legislatively. They expressed a demand for freedom of speech, not just for MPs but for all Englishmen. In an age when persons were drawn and quartered or even hanged for dissident religious views, they advocated freedom of conscience in matters of religion and for general suffrage of all men, a goal that was not to be fulfilled in English history for two more centuries. In essence, the Levellers contended that Parliament was the trustee of the people, which implied that its authority was limited by inherent rights that were beyond the reach of government. Although Leveller aspirations were far ahead of their times, some of their goals were achieved in a more modest, but nonetheless decisive fashion during the Glorious Rebellion in 1689, which produced the historic Bill of Rights.

Although Charles I was executed in 1649 and the monarchy abolished temporarily, experiments with republican government during the 1650s failed, and when the English monarchy was restored in 1660 the

limits of royal power were still unresolved. During the reign of Charles II, this question again became politically explosive over the prospect that his successor, James II (1685–1688), might restore a Catholic dynasty to the English throne. To enforce his pro-Catholic policies, James (a professing Catholic) turned to the prerogative power just as his father, Charles I, had done. He dissolved Parliament and threatened his dissenting subjects with a standing army. This turn back toward absolutism led a rebellious Parliament to invite the Protestant Dutch prince, William of Orange, and his wife Mary (daughter of James II) to accept the Crown of England under conditions specified by Parliament. When Prince William's army forced James's abdication, the Glorious Rebellion finally defeated the absolutist tendencies of the English monarchs and brought the king under the law. The Rebellion's most famous achievement, the Bill of Rights adopted in December 1689, was a third milestone in the development of English liberty.

The English Bill of Rights does not contain guarantees of free speech rights for individuals. Such guarantees first appeared a century later in the setting of the American and French revolutions. It did, however, guarantee the right of free speech to MPs during parliamentary debates. What had been considered at the beginning of the century a privilege granted by the king now became a right that the king could not deny. In this sense, the Bill of Rights vindicated the claim made by Sir Edward Coke some sixty years earlier that the liberty of the English people depended on the liberty of Parliament. On that basis, the high priority given to parliamentary rights made sense. Leaders of the Glorious Rebellion did not consider that Parliament itself could threaten the civil liberties of the citizens. Later generations seem to have agreed. The English people accepted the doctrine of parliamentary sovereignty established by the Glorious Rebellion, and Britain did not develop a system of separate powers with checks and balances, or a system of judicial review. In this latter regard, however, the Glorious Rebellion did open the way to a more independent judiciary by limiting the Crown's power to appoint and dismiss judges at will. The 1701 Act of Settlement consolidated the principle of judicial independence by providing for lifetime appointment of judges. The Bill of Rights also stipulated that any attempt to impose taxes without the authorization of Parliament was illegal. Subsequently, no English monarch has attempted to override this provision, and in the eighteenth century legislative supremacy in this matter became accepted practice in the colonial assemblies in America.

During the Civil War, English parliamentarians had come to appreciate the importance of a right to

bear arms and the danger of standing armies, a danger that the excesses of James II had reinforced. Hence, the Bill of Rights specifies that all Protestant Englishmen could retain arms for their own defense, as provided by law. However, we should note that the Bill of Rights actually preserved discrimination against Roman Catholics and it explicitly prohibited any Roman Catholic from occupying the English throne. In this respect it fell well short of the aspirations for religious freedom and tolerance advocated by the Levellers forty years earlier. Englishmen had also developed a strong aversion to the forced quartering of soldiers, which they saw as an invasion of their liberty. Thus, the Bill of Rights includes a prohibition against a standing army in peacetime, except by consent of Parliament.

Finally, although the Bill of Rights was not written from the point of view of individual rights of citizens, it did provide certain critical legal protections to persons accused of crimes. Let us bear in mind that it was a common practice of Stuart monarchs to imprison their subjects without trial or bail and to use courts such as the Star Chamber to inflict cruel punishments on political adversaries. With these abuses in mind, the authors of the English Bill of Rights included provisions that anticipated the concern in the American Bill of Rights with due process of law. These provisions included a prohibition against excessive bail, the repudiation of cruel and unusual punishment, and the right to a jury trial.

Civil Liberties in Colonial America

It is somewhat paradoxical that, despite their attacks on civil liberties in England, the Stuart monarchs adopted more forward-looking policies in the American colonies, especially with regard to religious freedom. Because most colonial charters were nondiscriminatory, religious freedom was encouraged in early seventeenth-century America, even as religious conflict was tearing England apart. Maryland's Toleration Act of 1649 was more generous with religious liberty than England's Bill of Rights. Meanwhile, during the reign of Charles II, the grant of religious freedom was written into the charters of Rhode Island, the Carolinas, and Pennsylvania.

More generally, the American colonists were strongly influenced by the English Bill of Rights to regard themselves as living under a constitutional system that limited government's power over the individual. American lawyers were familiar with Edward Coke's *Commentaries on the Common Law*,

from which they derived the notion that Parliament itself was under the law. The colonists strongly believed that they enjoyed the rights granted to all English citizens. Consider the following illustrations. The Massachusetts Body of Liberties (1641) included the right of free speech and assembly, the right to bail, legal counsel, and trial by jury, and prohibited excessive bail and cruel punishment. In Pennsylvania, the Frame of Government (1682) enshrined these same rights and offered detailed procedural guarantees for the criminally accused. On the eve of the American Revolution, the Virginia Constitution of 1776 opened with a declaration of rights that presaged the national bill of rights and anticipated the famous due process rights contained in the Fourth through Eighth Amendments to the U.S. Constitution. In short, the Americans, more vigorously than their English brethren, embraced the Leveller legacy that civil liberty depends on restraining the power of government and enshrining the protection of individual rights in a written constitution.

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References and Further Reading

- Barth, Alan. "The Heritage of Civil Liberties." In *The Rights of Free Men*, edited by James E. Clayton, 110–24. New York: Alfred E. Knopf, 1984.
- Davies, Stevie. *A Century of Troubles: England 1600–1700*. London: Pan Macmillan, 2001.
- Hexter, J.H., ed. *Parliament and Liberty: From the Reign of Elizabeth to the English Civil War*. Stanford, CA: Stanford University Press, 1992.
- Jones, James R., ed. *Liberty Secured? British Freedom Before and After 1689*. Stanford, CA: Stanford University Press, 1992.
- Kelly, Alfred H., ed. *Foundations of Freedom in the American Constitution*. New York: Harper and Brothers, Publishers, 1954.
- Levy, Leonard W. *Origins of the Bill of Rights*. New Haven, CT: Yale University Press, 1999.
- Schwartz, Bernard. *The Great Rights of Mankind: A History of the American Bill of Rights*. New York: Oxford University Press, 1977.
- Schworer, Lois G. "The English Bill of Rights, 1689: A Perspective on Liberty." In *Three Beginnings: Revolution, Rights and the Liberal State*, edited by Stephen F. Englehart and John Allphin Moore Jr., 93–114. New York: Peter Lang, 1994.
- Smith, David L. *The Stuart Parliaments, 1603–1689*. London: Arnold, 1999.
- Wolfe, Don M. *Leveller Manifestoes in the Puritan Revolution*. New York: Humanities Press, 1967.
- Wormuth, Francis D. *The Origins of Modern Constitutionalism*. New York: Harper and Brothers, 1949.
- Zaret, David. "Tradition, Human Rights, and the English Revolution." In *Human Rights and Revolutions*, edited by Jeffrey N. Wasserstrom, Lynn Hunt, and Marilyn B. Young, 43–58. Lanham, MD: Rowman and Littlefield Publishers, Inc., 2000.

ENTRAPMENT AND “STINGS”

Entrapment is a defense to criminal charges based on the idea that the defendant was induced to commit the crime by government agents. The defense is often raised in drug crimes, child pornography crimes, bribery, and prostitution. These “victimless crimes” are often prosecuted based on undercover investigations, which are colloquially known as stings.

Entrapment is an affirmative defense, meaning the defendant admits that he committed the crime but seeks to avoid punishment by explaining the conduct. In effect, the defendant is saying, “Yes, I committed the crime, but you should not punish me because the government made me do it.”

The entrapment defense is hard to define because government encouragement to commit a crime is not per se impermissible; merely setting a trap to ensnare a criminal is not entrapment. The courts often say that a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal. A court must evaluate where that line is to be drawn based on the facts of each case by focusing on the individual defendant’s predisposition and police conduct.

Two basic theories for the entrapment defense have evolved, and jurisdictions in the United States are about evenly split on which is best. One approach focuses on the defendant and asks whether the defendant is worthy of punishing. The theory is that persons should not be held liable for acts they would not have committed without encouragement from a government agent. This approach focuses on the actual mental state of individual defendant, and is often called the subjective approach. Judge Learned Hand described the rationale in *United States v. Becker* (1933) as “a spontaneous moral revulsion against using the powers of government to beguile innocent, though ductile, persons into lapses which they might otherwise resist.” This is the approach used in the federal courts.

The Supreme Court recently clarified this subjective approach to the defense in *Jacobson v. United States* (1992). *Jacobson* was a child pornography case wherein the defendant received repeated invitations and inquiries from several fictitious organizations. He was also invited to place orders with several businesses. Many of the communications from the bogus organizations referred to freedom of speech and censorship. The Court held that Jacobson’s conviction for receiving child pornography could not stand because the government had not shown that “Jacobson was predisposed, independent of the Government’s acts and beyond a reasonable doubt, to violate the law by receiving child pornography

through the mails.” By the time he committed the offense, in other words, Jacobson had already been exposed to so much inducement by the government that he had become predisposed to commit it, but only because of the government’s inducement. Thus, the government must prove that a defendant was predisposed to commit the offense, and was so predisposed before any government action to induce the commission of the offense.

The second approach to the defense is based on using the defense as a tool to regulate police conduct. If the defendant has a defense to crimes committed when police are heavily involved, the prosecution will be worthless, so the defense will extinguish any incentive the police have to set up abusive stings. This approach focuses on the police conduct without regard to the mental state of the particular defendant being prosecuted. This definition of entrapment is often referred to as objective because it focuses on police conduct without regard to the particular defendant’s mental state. This is the approach used in a majority of state courts.

These somewhat conflicting rationales have translated into two definitions of the entrapment defense. For jurisdictions focusing on the defendant’s mental state, the government can overcome the defense by showing that the particular defendant was predisposed to commit the offense. If the defendant was predisposed to commit the offense, it does not matter what the government agents did, as the defense is unavailable. For jurisdictions focusing on police conduct, the defense is established if the conduct of the government agents is so intrusive that an ordinary law-abiding person would have been enticed to commit the offense. If this is so, the police went too far and need to be deterred from such investigations. For example, in one case a friend (actually an undercover police officer) approached the defendant and begged her to buy her food stamps because she needed money to buy Christmas presents for her children; when the defendant was prosecuted for trafficking in food stamps, she claimed entrapment.

An important difference between the objective approach focusing on police conduct and the subjective approach focusing on the defendant’s mental state is that predisposition of the defendant is irrelevant under the objective approach, while under the subjective approach, it is the key element. This means that in jurisdictions adopting the subjective approach, the government can introduce at trial evidence of the defendant’s bad conduct as proof of predisposition. This bad conduct, normally excluded from trial as irrelevant under the rules of evidence, is rendered admissible under the subjective definition of the defense.

This evidentiary impact of the subjective approach is a drawback for defendants.

One question frequently raised by the defense is whether a defendant may be targeted for investigation in the absence of any suspicion. In other words, must the government justify why the defendant was chosen as the target for a sting? The Supreme Court has never directly addressed the question of whether the government must demonstrate some level of suspicion before targeting a defendant. Generally the lower appellate courts have concluded that no suspicion is required.

A defendant cannot use the defense of entrapment when a private agent induces commission of the offense.

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References and Further Reading

- Bennett, Warren, *From Sorrells to Jacobson: Reflections on Six Decades of Entrapment Law, and Related Defenses in Federal Court*, Wake Forest Law Review 27 (1992): 829.
- Marcus, Paul. *The Entrapment Defense*. 2nd ed. Charlottesville, VA: Michie Butterworth, 1995.
- Paton, Scott C., *The Government Made Me Do It: A Proposed Approach to Entrapment Under Jacobson v. United States*, Cornell Law Review 79 (1994): 995.
- Seidman, Louis M., *The Supreme Court, Entrapment, and Our Criminal Justice Dilemma*, Supreme Court Review 1981 (1981): 111.

Cases and Statutes Cited

- United States v. Becker*, 62 F.2d 1007, 1009 (2d Cir. 1933)
- Jacobson v. United States*, 503 U.S. 540 (1992)

See also **Child Pornography; Due Process; Entrapment by Estoppel**

ENTRAPMENT BY ESTOPPEL

In the American criminal justice system, individuals are held to the principle that “ignorance of the law is no excuse.” Essentially, this rule means that an accused may not escape criminal liability by alleging that he was unaware that his conduct was illegal. All people are presumed to know the law, and to act in accordance with it. However, courts have recognized a narrow exception to this rule where an accused relies on information from an official state actor and acts in accordance with that information. This exception is referred to as “entrapment by estoppel,” “reasonable reliance,” or “good faith reliance on a state actor’s advice.”

The U.S. Supreme Court discussed the constitutional aspect of the defense in *Raley v. Ohio* (1959) and *Cox v. Louisiana* (1965). In these decisions, the

Court recognized that individuals should not be prosecuted for engaging in conduct specifically authorized through government advice. Prior to these decisions, state courts had considered the issue with varying results, weighing the need for bright-line rules on the one hand, against the potential for government misconduct and the conviction of individuals with little or no moral culpability on the other. In 1962, the American Law Institute included a codified form of entrapment by estoppel in the Model Penal Code, a version of which many states subsequently adopted.

The specific elements of the defense of entrapment by estoppel may vary slightly by jurisdiction; however, to rely on the defense, an accused must essentially show that (1) the legality of the conduct was officially authorized by a government agent, (2) the accused relied on this acknowledgement, (3) the reliance was reasonable, and (4) given the reliance, prosecution would be unfair. “Official” authorization can be found in statutes, judicial decisions, or interpretations offered by relevant government actors in an official capacity. Under no circumstances are individuals permitted to rely on their own interpretation of a law as a defense, no matter how reasonable that interpretation may be. This principle was noted in *People v. Marrero* (1987), in which a New York court upheld a conviction even though half of the judges who considered the issue agreed with the defendant’s interpretation of the law in question. Additionally, as the court found in *Miller v. Commonwealth* (1997), the government agent must be one who is charged with the interpretation, administration, or enforcement of the law at issue.

There are several justifications for the defense of entrapment by estoppel. First and foremost, the defense recognizes that it is fundamentally unfair to convict an individual for conduct that is authorized by the government, even if that authorization later turns out to be erroneous. Second, individuals who act in compliance with the government’s interpretation of a law, even if that interpretation is erroneous, lack the moral culpability necessary to justify a criminal conviction. Finally, holding individuals criminally liable for complying with the government’s interpretation of a law may have the effect of inhibiting otherwise lawful behavior and undermining society’s confidence in the government.

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References and Further Reading

- Cohen, Mark S., *Entrapment by Estoppel*, Colorado Lawyer 31 (February 2002): 45–48.
- Dressler, Joshua. “When Mistake of Law Is a Defense: Exceptions to the General Rule.” In *Understanding*

Criminal Law, 168—177. 3rd ed. New York: Lexis Publishing, 2001.

Parry, John T., *Culpability, Mistake, and Official Interpretations of Law*, *American Journal of Criminal Law* 25 (1997): 1–78.

Pasano, Michael S., Walther J. Tache, and Thierry Oliver Desmet. “Using the Defense of Entrapment by Estoppel.” *Champion*, May 26, 2002, 20–4.

Cases and Statutes Cited

Cox v. Louisiana, 379 U.S. 559 (1965)

Miller v. Commonwealth, 492 S.E.2d. 482 (Va. 1997)

People v. Marrero, 597 N.E.2d 1068 (N.Y. 1987)

Raley v. Ohio, 360 U.S. 423 (1959)

See also **Due Process; Entrapment by Estoppel; Raley v. Ohio**, 360 U.S. 423 (1959)

EPPELSON v. ARKANSAS, 393 U.S. 97 (1968)

The legal conflict over the teaching of Darwinism in public schools began with the 1925 Scopes trial. But it was not until 1968 that the U.S. Supreme Court, in *Epperson v. Arkansas*, struck down as unconstitutional an antievolution statute similar to the one upheld in both Scopes and the Tennessee Supreme Court (*Scopes v. State* [1927]).

This case concerns the constitutionality of a 1929 Arkansas statute that prohibited the teaching of evolution—in either textbooks or by classroom instructors—in all state-supported educational institutions, including universities, colleges, and public schools. The statute defined evolution as “the theory or doctrine that mankind ascended or descended from a lower order of animals.”

In the beginning of the 1965 school year, Susan Epperson, a tenth-grade biology teacher in Little Rock, was provided with a new textbook from which she was to instruct her students. Unlike the one she had used the previous school year, this textbook “contained a chapter setting forth ‘the theory about the origin . . . of man from a lower form of animal.’” This put Epperson in a quandary: if she uses the state-required textbook, she violates the state’s law and subjects herself to criminal prosecution and termination. Joined by other parties, Epperson filed a suit in Chancery Court. That court held that the statute violated Epperson’s First Amendment freedom of speech and thought. The court also prohibited the state from terminating Epperson based on any alleged violation of the statute. The Arkansas Supreme Court reversed on appeal.

The Supreme Court held that the statute was unconstitutional because it violated both the Free

Exercise and Establishment Clauses of the First Amendment. The Court concluded that the statute proscribed evolution solely because it is inconsistent with the creation story in the Book of Genesis. The court cited two reasons for this conclusion: (1) “no suggestion has been made that Arkansas’ law may be justified by considerations of state policy other than the religious view of some of its citizens,” and (2) “fundamentalist sectarian conviction was and is the law’s reason for existence.” The second reason was supported by the historical origin of the Arkansas statute and its connection to the Tennessee statute adjudicated in Scopes. Thus, the statute had *no secular purpose*.

The Court did not base its holding, as the Chancery Court did, on the teacher’s right to freedom of speech, but rather, on the principle that “government . . . must be neutral in matters of religious theory, doctrine, and practice.” Arkansas’ statute was not religiously neutral, for it did not prohibit from its academic institutions all discussion of human origins, but rather, singled out one view to prohibit, evolution, because of its apparent conflict with a religious belief.

Epperson’s importance lies in its establishing the principle of “religious neutrality” as central to public school curricula, especially in the sciences. That principle, however, cuts both ways, for it means that scientific criticisms of evolution that may be consistent with certain religious beliefs may pass constitutional muster. For such views typically appeal to public reasons—empirical facts and widely held conceptual notions—that do not contain religious texts or dogmas.

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References and Further Reading

Beckwith, Francis J. *Law, Darwinism & Public Education: The Establishment Clause and the Challenge of Intelligent Design*. Lanham, MD: Rowman & Littlefield, 2003.

Campbell, John A., and Stephen C. Meyer, eds. *Darwinism, Design, and Public Education*. East Lansing: Michigan State University Press, 2003.

Carter, Stephen L., *Evolutionism, Creationism, and Teaching Religion as a Hobby*, *Duke Law Journal* 1987 (1987): 977.

Darwin, Charles. *On the Origin of Species*. Facsimile of the 1st edition (1859), with introd. by Ernst Mayr. Cambridge, MA: Harvard University Press, 1964.

Dembski, William A., and Michael Ruse, eds. *Debating Design: From Darwin to DNA*. New York: Cambridge University Press, 2004.

Greenawalt, Kent, *Establishing Religious Ideas: Evolution, Creationism, and Intelligent Design*, *Notre Dame Journal of Law, Ethics & Public Policy* 17 (2003): 2:321–397.

Johnson, Phillip E. *Darwin on Trial*. Chicago: Regnery Gateway, 1991.

- Miller, Kenneth R. *Finding Darwin's God: A Scientist's Search for Common Ground Between God and Evolution*. New York: Cliff Street Books, 1999.
- Numbers, Ronald. *Darwinism in America*. Cambridge, MA: Harvard University Press, 1998.
- Pennock, Robert T., ed. *Intelligent Design Creationism and Its Critics: Philosophical, Theological, and Scientific Perspectives*. Cambridge, MA: MIT Press, 2001.
- Ruse, Michael. *The Evolution Wars: A Guide to the Debates*. Santa Barbara, CA: ABC-CLIO, 2000.

Cases and Statutes Cited

- Arkansas (Anti-Evolution) Statute. Initiated Act No. 1, Ark. Acts 1929; Ark. Stat. Ann. ss 80–1627, 80–1628 (1960 Repl. Vol.)
- Arkansas v. Epperson*, 242 Ark. 922, 416 S.W. 2d 322 (1967)
- Scopes v. State*, 154 Tenn. 105 (1927)

See also *Edwards v. Aguillard*, 482 U.S. 578 (1987); **Scopes Trial; Teaching “Creation Science” in Public Schools; Teaching Evolution in Public Schools**

EQUAL ACCESS ACT

The Equal Access Act (EAA), enacted with broad bipartisan support by Congress in 1984, prohibits public school districts receiving federal financial assistance from discriminating among noncurriculum-related student groups who want to use school premises. Once schools have created a limited open forum within the definition of EAA, those schools cannot deny student access to school premises on the basis of “religious, political, philosophical, or other speech content.” An immediate effect of EAA was that student religious groups, previously denied use of school facilities in such federal circuit court of appeal cases as *Brandon v. Board of Education* (1980) and *Lubbock Civil Liberties Union v. Lubbock Independent School District* (1982) because of concern about advancing or sponsoring religion in violation of the Establishment Clause, now had a federal statutory right to meet on the same terms as other non-curriculum-related student groups. The language and purpose of the EAA was influenced by a Supreme Court decision, *Widmar v. Vincent* (1981), where the Court held with reference to a public university that, once it had opened its facilities to use of a wide range of student groups, it had created a limited public forum and was prohibited under the free speech clause from denying the use of its facilities to student religious groups. In enacting EAA, Congress deliberately selected the term, “limited open forum,” so as not to confuse rights granted under EAA with those granted, as in *Widmar*, under the free speech clause’s limited public forum. A limited open forum exists

whenever one or more noncurriculum-related student groups meets on school premises during noninstructional time. While EAA does not define what constitutes noncurriculum-related student groups, the Supreme Court, in upholding the constitutionality of EAA against an Establishment Clause challenge in *Board of Education of the Westside Community Schools v. Mergens* (1990), provided a useful analytical framework for determining the curricular relatedness of student groups. The EAA defines non-instructional time as that which is “set aside by the school before actual classroom instruction begins or after actual classroom instruction ends.” In order to assure that students have a fair opportunity to conduct meetings under a school’s limited open forum, meetings must be voluntary and student-initiated; cannot be government sponsored; can be attended by government employees only in a nonparticipatory capacity; cannot materially or substantially interfere with the educational activities of the school; and cannot be directed, conducted, or regularly attended by nonschool persons. In clarifying the statute’s prohibition on government-sponsored meetings, EAA defines “sponsorship” as “promoting, leading, or participating in a meeting,” but expressly excludes from sponsorship “the assignment of a teacher, administrator, or other school employee to a meeting for custodial purposes.” Congress in enacting EAA provided assurance to public schools that the statute was not intended to “limit the authority of the school, its agents or employees, to maintain order and discipline on school premises, to protect the well-being of students and faculty, and to assure that attendance of students at meetings is voluntary.” However, Congress also placed broad limitations on every level of government and its subdivisions, including school districts, to prohibit them from: influencing the content of prayer or religious activities, requiring that any person participate in prayer or religious activities, expending more than incidental funds to provide space for student meetings, compelling school agents or employees to attend meetings where the content of speech at a meeting would be contrary to a person’s beliefs, sanctioning meetings otherwise unlawful, limiting the rights of groups not of a specified size, and abridging the constitutional rights of any person. The EAA allows for private enforcement of the statute by students who claim that they have been denied equal access rights, but the statute expressly prohibits the federal government from denying or withholding federal financial assistance to any school.

The Equal Access Act has been extended to a wider range of student groups than religious clubs, such as gay/straight clubs. Protection under EAA’s limited open forum may overlap with free speech’s

limited public forum which means that students denied access to school premises could have both statutory and constitutional claims.

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References and Further Reading

Equal Access Act, 20 U.S.C. sec. 4071–4074 (1984).
 Establishment Clause, U.S. Const., First Amendment.
 Free Speech Clause, U.S. Const., First Amendment.
 Mawdsley, Ralph, *The Equal Access Act and Public Schools: What Are the Legal Issues Related to Recognizing Gay Student Groups?* Brigham Young University Education and Law Journal 2001 (2001): 1:1–33.

Cases and Statutes Cited

Board of Education of the Westside Community Schools v. Mergens, 496 U.S. 226 (1990)
Brandon v. Board of Education of Guilderland Central School District, 635 F.2d 971 (2d Cir. 1980)
Lubbock Civil Liberties Union v. Lubbock Independent School District, 669 F.2d 1038 (5th Cir. 1982)
Widmar v. Vincent, 454 U.S. 283 (1981)

EQUAL PROTECTION CLAUSE AND RELIGIOUS FREEDOM

The Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution serves to ensure that all persons are afforded equal treatment by the government, including governmental treatment of religious groups. Through the Fourteenth Amendment, the Religion Clauses of the First Amendment were first incorporated against the states in 1947 through *Everson v. Board of Education*. More recently, the courts have tended to ground treatment of religious groups in the First Amendment instead of an equal protection clause analysis grounded in the Fourteenth.

Ordinarily, equal protection acts to protect members of minority groups, in general, from unfair treatment in a majoritarian system. An equal protection analysis is triggered when the government treats similarly situated individuals dissimilarly or when government action affects an individual's fundamental rights under the Constitution. Classifications based on a "suspect class" (for example, race) are subjected to "strict scrutiny." That is, in order for the government action to survive, the government must have a "compelling state interest," and the governmental action must be "narrowly tailored" to accomplish that interest. The courts consider certain characteristics that strongly correlate with suspect classes: historical subjugation, political powerlessness, distinct attributes, and immutability, all of which are prevalent

in minority religious groups. When the equal protection inherent in the Religion Clauses is imported, the requirements of the Free Exercise Clause can conflict with a stigma-based equal protection. The government may not endorse one religion over another.

In the area of free speech and equal protection, religious groups are protected in their speech and press activities at the same level as other groups and individuals. However, the Religion Clauses do not provide greater protection to the religious groups in proselytizing. As a result, the Free Exercise Clause does not provide rights unavailable to other groups under the free speech clause where expression is concerned.

Also, in public education religious groups are afforded a right similar to any other group to gather under either a free exercise or free speech analysis. In application, however, certain minority religious groups, particularly disfavored groups such as Wiccan or Satanist groups may face hurdles in gaining the constitutional rights that apply.

One of the major factors that differentiate religion, specifically religious practice from other suspect classifications, is the belief structure inherent in religion. A constitutional doctrine that bends to every belief (and claimed belief) may place religious doctrine ahead of the legal mandate of neutral laws. In *Employment Division v. Smith* (1990), the Supreme Court diminished the scrutiny required by the equal protection aspect of the Religion Clauses as applied to neutral laws of general applicability.

Despite the lower level of scrutiny afforded to religious groups in the face of neutral laws, laws that treat religious groups less favorably than cultural, educational, and civic groups may be struck down. For example, in *Fairfax Covenant Church v. Fairfax County School Board* (1994), the U.S. Court of Appeals for the Fourth Circuit struck down a law setting rental rates of school facilities higher for churches than other nonprofit organizations.

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Cases and Statutes Cited

Employment Division v. Smith, 494 U.S. 872 (1990)
Everson v. Board of Education, 330 U.S. 1 (1947)
Fairfax Covenant Church v. Fairfax County School Board, 17 F.3d 703 (4th Cir. 1994)

EQUAL PROTECTION OF LAW (XIV)

Oliver Wendell Holmes, Jr.'s famous quip that equal protection is "the usual last resort of constitutional arguments" would today be accepted more as a

positive than a negative commendation. Given the importance of equality in today's America, many are surprised to discover that neither the original Constitution nor the Bill of Rights contains a reference to equality. Neither the founders nor the members of the First Congress chose to borrow at all from Thomas Jefferson's memorable proclamation in the Declaration of Independence "that all Men are created equal."

The Civil War, what some scholars have termed America's true revolutionary experience, changed that. Significantly, Abraham Lincoln in his Gettysburg Address marked the founding of "a new nation, conceived in Liberty, and dedicated to the proposition that all men are created equal" to 1776 and not to the Constitution of 1787. Within a month of Lincoln's speech, Congress came to grips with the issue of framing an amendment abolishing slavery. One version, put forth by Senator Charles Sumner would have provided that "all persons are equal before the law, so that no other person can hold another as a slave." Sumner, however, was rebuffed; opponents of his formula wanted no part of language "copied from the French Revolution," preferring "the good old Anglo-Saxon language employed by our fathers in the [Northwest O]rdinance of 1787."

No such objection was raised to the inclusion in the first section of the proposed Fourteenth Amendment that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." Today, equality is universally embraced as a value of American society, but different people have vastly different ideas of what it means and what the Fourteenth Amendment's guarantee of equal protection requires.

The Fourteenth Amendment: Framing and Early History

The language of the Fourteenth Amendment clearly reflected earlier language from the Civil Rights Act of 1866. Indeed, many who voted for the Fourteenth Amendment felt that it was necessary in order to constitutionalize the 1866 legislation that hitherto rested solely on Congress's power to enforce the Thirteenth Amendment. Among other things, the Civil Rights Act provided that

all persons born in the United States . . . citizens of the United States . . . that] such citizens, of every race and color . . . shall have the . . . equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any

law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

Unfortunately, the Thirty-ninth Congress's debates offer little help as to exactly what equal protection meant. The general consensus among scholars is that in addition to putting the 1866 Act on firmer constitutional ground, it was intended to ensure that, were the Democrats to regain power, they would have to amend the Constitution to undo the protections for the freedmen. This said, the most prominent historian of the Fourteenth Amendment, Charles Fairman, summed up the problem facing later generations seeking to plumb the depths of meaning of the equal protection clause by observing that "in the main the [authors of the Freedom Amendments] did not discern the obduracy of problems lying on the shady side of victory." Americans of the twenty-first century continue to be divided and uncertain as to what equal protection means.

Unlike the Bill of Rights, which waited until the twentieth century for judicial interpretation, the Fourteenth Amendment and in particular the first section were interpreted a scant five years after ratification, or as Justice Samuel F. Miller wrote in the opinion of the Court in *The Slaughterhouse Cases* (1873), "in the light . . . of events, almost too recent to be called history, but which are familiar to us all" Speaking for a five-member majority, Miller dismissed the butchers' claims that by granting the Crescent City Slaughter-House Company a monopoly the Louisiana legislature had deprived them of the equal protection of the laws.

[N]o one can fail to be impressed with the one pervading purpose found in them all [that is, The Freedom Amendments], lying at the foundation of each, and without which none of them would have even be suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freedman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him.

Specifically addressing the meaning of equal protection, Miller concluded simply that it was

[t]he existence of laws . . . which discriminated with gross injustice and hardship against [African Americans] as a class, was the evil to be remedied It is so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other.

The Court continued in a similar vein in *Strauder v. West Virginia* (1880), striking down a statute barring African Americans from jury service. In that opinion, though, Justice William Strong allowed that the guarantees of equal protection extended beyond the

former slaves, protecting both “white men” and “naturalized Celtic Irishmen.”

Subsequent decisions, most notably those in *The Civil Rights Cases* (1883) and *Plessy v. Ferguson* (1896), made Miller’s and Strong’s language ring hollow. In the former case, the Court held that prosecutions under the Civil Rights Act of 1875 of private individuals for discriminating against blacks went beyond the powers of Congress. In *Plessy*, Justice Henry Brown found that state-mandated segregation on railroad cars was reasonable, in contrast to hypothetical “laws requiring colored people to walk upon one side of the street, and white people upon the other.” Brown’s distinction built on Justice Stanley Matthews’ earlier opinion in the case of *Yick Wo v. Hopkins* (1886). There Matthews had used the equal protection clause to protect the Chinese operators of laundries in San Francisco from the discriminatory application of a facially neutral ordinance designed to reduce dangers from fire. According to Matthews, “No reason for [its current enforcement] is shown, and the conclusion cannot be resisted, that no reason exists except hostility to the race and nationality to which [Yick Wo] belong[s]”

Using this standard, the Court upheld various measures enacted to impose segregation under the banner of “separate but equal,” actions that would undo all the advances that the former slaves had gained during Reconstruction. For its part, the equal protection clause was used sporadically to allow the Court an additional check on state economic legislation with which it disagreed, although in this area the Due Process Clause played a much more important role. Other than these exceptions, the equal protection clause slipped into the same degree of irrelevance to which the Court in *The Slaughterhouse Cases* had relegated the Fourteenth Amendment’s “privileges and immunities” clause.

The Demise of the Old Court and the Rise of the New Court

Matters stood pretty much unchanged until the 1930s. Then, the struggle between the Court and the New Deal, culminating in the so-called “switch in time that saved nine,” produced a Court that adopted a very different role than any of its predecessors. Although Congress had rejected President Franklin Roosevelt’s effort to appoint additional judges and thus secure a majority of justices willing to uphold challenged New Deal legislation, the Court in 1937 appeared to give way, first upholding a state minimum wage law and

later, the constitutionality of the National Labor Relations Board. Commentators, accordingly, generally refer to Roosevelt as having lost the battle over expanding the size of the Court, but winning the war to save the New Deal.

For the Court, this was a time of adjustment from the “Old Court’s” concern with property to the “New Court” and its protection of civil rights and liberties. In 1938, in an otherwise unremarkable case, Justice Harlan Fiske Stone traced the basic outlines of this new role. Frequently dubbed a “double standard,” the famous footnote four of *United States v. Carolene Products* (1938) set forth a highly deferential standard for legislation dealing with economic matters. In contrast, a far more rigorous test was established for legislation that dealt with noneconomic individual rights.

[A] narrower scope for operation of the presumption of constitutionality [is appropriate for] legislation [that] appears on its face to be within a specific prohibition of the Constitution, such as the first ten amendments . . . , or which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, [or] review of statutes directed at particular religions . . . or national, . . . or racial minorities . . . [or] prejudice against discrete and insular minorities . . .

The NAACP and the Challenge to “Separate But Equal”

The Court’s changed attitude was not lost on Court watchers and, in particular, on those who sought to fight Jim Crow laws. In 1939, the National Association for the Advancement of Colored People (NAACP) took steps to strengthen its already nine-year-old legal attack on segregation by establishing the Legal Defense Fund with future Supreme Court Justice Thurgood Marshall as its first head. A year earlier, the NAACP had scored a major victory against segregation before the Supreme Court in the case of *Missouri ex rel. Gaines v. Canada* (1938). Missouri had a policy providing for payment of tuition of African-American law school applicants attending an out-of-state law school. It eventually agreed to start an all-black law school in Missouri. Neither was enough to satisfy Chief Justice Charles Evans Hughes who spoke for a six-to-two Court in finding that Missouri had failed to provide a “legal education substantially equal to those which the State there offered for persons of the white race.”

World War II brought other changes to American society that raised further questions about segregation.

The war effort required a total mobilization of the population, and one consequence was that jobs formerly monopolized by white men were now open to blacks and to women. This development attracted a growing stream of southern blacks moving to northern cities where they were able to vote and gain some share of political power. The racist ideology preached by Hitler and the discovery of the horrors of the Holocaust raised further discomfiting questions about America's own policies on race. The gradual breakup of the European colonial empires and the contest for the hearts and minds of these new nations with the Soviet Union gave a new urgency to re-examining the prewar racial status quo.

With the end of the war, the NAACP renewed its attack on educational segregation. In the wake of *Gaines*, some southern states had expanded educational opportunities for blacks, albeit on a segregated basis. South Carolina's new governor, former associate justice James Byrnes returned from Washington to warn South Carolinians that Washington, and in particular the Supreme Court, was likely to demand more equality as the price the South must pay for maintaining "separate but equal."

Two victories soon validated the NAACP's 1930 decision to attack segregation in education. Even before these, however, the Vinson Court signaled a significant change in its 1948 decision in *Shelley v. Kraemer*.

The White Court had previously struck down an effort to enforce residential segregation in *Buchanan v. Warley* (1917) on grounds typical of the "Old Court," that is, the fact that Kentucky's restriction interfered with an individual's liberty of contract. Restrictive covenants posed quite a different issue. These were conditions placed in deeds to property limiting the right of the property owner to either to rent or sell the property to persons of certain ethnic or racial backgrounds. They had been upheld in *Corrigan v. Buckley* (1926) in a unanimous decision by a Court that included Holmes, Louis Brandeis, and Stone. As had been true in *The Civil Rights Cases*, the Court found no state action and therefore no equal protection violation. In contrast, in *Shelley*, Chief Justice Fred Vinson for a unanimous Court—three justices not participating—now found judicial enforcement of covenants to be "state action."

The 1950 education decisions were also unanimous. *Sweatt v. Painter* and *McLaurin v. Oklahoma* caused the Court to consider whether separate could ever be equal. In *Sweatt*, Texas, after much litigation, had finally established a law school for blacks. Again Chief Justice Vinson spoke for the Court. He accepted Thurgood Marshall's argument that there was no way that this newly established law school could ever be

the equal of the existing white law school. Vinson noted that even if the facilities were equal, the education could not be. By the state's excluding

members of the racial groups which number 85 percent of the population . . . and include most of the lawyers . . . with whom petitioner will inevitably be dealing . . . we cannot conclude that the education offered . . . is substantially equal to that which he would receive if admitted to the University of Texas Law School.

In *McLaurin*, Oklahoma had admitted a veteran African-American teacher into the university's graduate program in education. Instead of establishing a separate doctoral program at an existing black-only state school, it proceeded to require McLaurin to sit behind a cordon in class that separated him from his fellow classmates and to sit at tables in both the library and cafeteria labeled as reserved for "colored." Although Vinson's opinion in *McLaurin* was brief, it may have presaged more than *Sweatt* what the Court would write in the 1954 decision of *Brown v. Board of Education*. By so separating him from his fellow graduate students, Oklahoma had denied McLaurin "his personal and present rights to equal protection of the laws . . . [He] must receive the same treatment . . . as students of other races." By denying this, Oklahoma adversely affects McLaurin's education and the education of his future students. "Their own education will necessarily suffer to the extent that his training is unequal to that of his classmates. State-imposed restrictions which produce such inequalities cannot be sustained."

Buoyed by these victories, Marshall and his team at the Legal Defense Fund prepared to make their long-planned frontal attack on public education at the elementary and secondary levels. Their decision to concentrate on graduate and professional education had been a tactical one. They realized that since this involved fewer students, it was likely to produce less of a backlash than an attack on public schools. They also thought that by challenging separate but equal at law schools, they would have a more sympathetic hearing from the justices.

Still they realized that the Court of the 1950s was itself an institution that might be hesitant to wade into this highly explosive area. The Court's prestige had not fully recovered from the scars suffered in its battle with Roosevelt. The Court was also more conservative. The Truman appointees had tilted the Court away from the very liberal tint it had taken on in the 1940s. This combination had created a Court that largely embraced the judicial role known as self-restraint, a notion that Holmes had championed and which had been enthusiastically embraced by Justice Felix Frankfurter. According to C. Herman Pritchett,

the Vinson Court took “[t]he strong legislature–weak judiciary formula which Holmes developed for the . . . purpose of controlling judicial review over state economic legislation,” and extended it to legislation that touched directly upon guarantees of individual liberties found in the Constitution.

Despite these concerns, the NAACP undertook to mount a series of challenges to public school segregation. Five state cases were combined in what has come to be known as *Brown v. Board of Education* (1954), arguably the Court’s most important decision of the twentieth century. Each had been carefully selected to force the Court finally to address squarely whether “separate but equal” was still good law. First argued in 1952, the Court took the unusual step of ordering a second set of arguments set for October 1953. Clearly, the justices realized the political implications of a decision setting aside a precedent that not only had survived since 1896 but had been repeatedly invoked by the Supreme Court, a fact that South Carolina’s attorney, John W. Davis, vigorously reminded the Court. Before the second round of argument, Chief Justice Vinson died and President Dwight D. Eisenhower nominated California Governor Earl Warren to succeed him. Although scholars disagree as to how the Court would have voted in 1953, they seem universally to credit Warren with ensuring that the Court would speak with one voice in *Brown*. The Warren opinion seems to have been as much directed at the general public than to academics or lawyers. One of the chief justice’s biographers noted that more than any thing else, Warren was guided by a desire for fairness, and if anything was not fair it was segregation.

After reviewing the Court’s previous rulings on educational segregation, Warren proceeded to address the particular issues in elementary and secondary education.

To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone We concluded that in the field of public education the doctrine of “separate but equal” has no place. Separate educational facilities are inherently unequal.

Current Controversies

The unanimity that Warren had worked to achieve in *Brown* was maintained throughout his tenure (1953–1968) despite little support from the political branches of government and dogged opposition by public officials from the old Confederacy. Warren’s

successor, Warren Earl Burger, was not so successful in this regard. Although he held the Court together in the first of the busing cases, *Swann v. Charlotte-Mecklenburg School District* (1971), the unanimity ended two years later in another busing case, *Keyes v. School District No. 1, Denver* (1973) from which Justice William Rehnquist dissented, and further deteriorated in *Milliken v. Bradley* (1974) with the issue of de jure versus de facto segregation producing a five-to-four split, a margin that would be repeated frequently in subsequent cases involving race.

The issue of affirmative action, although not provoking the violence that frequently surrounded busing, has proven to be more enduring. In early opinions, the Burger Court adopted the “disparate impact” theory, and held that job qualifications must be closely related to job performance. Affirmative action in education proved more troublesome. By a vote of five to four, the Court found the quota adopted by a California medical school violated the Civil Rights Act of 1964, but a different five-member majority found that the equal protection clause did not preclude a school from considering race as one factor in admissions. Subsequent decisions of the Burger and Rehnquist Courts appeared to undermine the finding of *Regents of the University of California v. Bakke* (1978). Despite concerns that the transformation of the Court effected by the appointees of Presidents Reagan and Bush would result in a holding that racial preferences could be used only when there was evidence of past discrimination, another five-to-four Court in 2003 upheld the use of race as one factor in making decisions. Justice Sandra Day O’Connor’s opinion in *Grutter v. Bollinger* (2003) in fact put Justice Lewis Powell’s opinion in *Bakke* on much firmer precedential ground than it had ever enjoyed previously. (Powell’s *Bakke* opinion had been only a judgment of the Court; the core of his decision was not fully accepted by any of the eight other justices.)

O’Connor found that “the Law School’s use of race [was] justified by a compelling state interest,” the school’s and society’s interest in having diversity in education and in the legal community. “Strict scrutiny” meant for O’Connor that racial “classifications are constitutional only if they are narrowly tailored to further compelling state interests”

Suspect Categories and Fundamental Rights

Early opinions, such as *The Slaughterhouse Cases* and *Strauder*, had emphasized that the equal protection clause was designed for “the newly emancipated

negroes.” Paragraph three of *Carolene Products*’s footnote four returned to this theme and provided a basis upon which the concept of “suspect categories” developed and the requirement that such classifications be subjected to “strict scrutiny,” serve a “compelling state interest,” and be “narrowly tailored” to the achievement of that interest.

Footnote four’s promise in this regard was first realized in the 1940s. Justice William O. Douglas used “strict scrutiny” to strike down an Oklahoma law that required the sterilization of a three-time offender in *Skinner v. Oklahoma* (1942). Ironically, however, the emergence of the idea of race as a modern-day “suspect category” surfaced first in what is generally labeled the infamous case of *Korematsu v. United States* (1944). An executive order signed by President Franklin Roosevelt gave the military power to designate military zones “from which any and all persons” might be excluded. General John DeWitt carried the order out on the West Coast. When queried why Italian and German aliens were not included, he replied “a Jap is a Jap,” and this was “a war of the white race against the yellow race.” Justice Hugo Lafayette Black sustained Korematsu’s conviction for not reporting for evacuation, while at the same time holding that

all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny.

None of the early education cases made mention of suspect categories or strict scrutiny, but in finally addressing the sensitive subject of state antimiscegenation statutes (*Loving v. Virginia* [1967]), the Warren Court invoked strict scrutiny to strike down a statute that punished blacks and whites equally.

The requirement that legislation challenged under the equal protection clause be reasonable or rational, the standard used in *Yick Wo* and *Plessy*, was now reserved only for situations that did not involve fundamental rights or suspect categories, the “New Court” applying it, for example, to economic classifications. These received deferential scrutiny; it was sufficient that government was able to establish a legitimate goal for its legislation and to demonstrate that the means employed had a rational relationship to the goal.

In addition to race and ethnicity, the late Warren Court appeared interested in expanding the number of suspect categories adding illegitimacy. The Burger Court seemed to add alienage. Subsequently, however the Burger Court cut back on both.

More significant during the Warren Court was the use of “strict scrutiny” in reviewing equal protection claims that involved rights identified as fundamental, such as the rights to vote in *Reynolds v. Sims* (1964), and *Harper v. Virginia State Board of Elections* (1966), and access to courts in *Douglas v. California* (1963).

The Burger Court signaled in *San Antonio Independent School District v. Rodriguez* (1973) a reluctance to expand neither fundamental rights nor suspect categories. By a five-to-four vote, it rejected the claim that poverty constituted a “suspect class,” and education, a “fundamental right.”

Equal Protection and Gender

In contrast to its general reluctance and that of the succeeding Rehnquist Court to expand on either concept, the Burger Court began a judicial revolution affecting gender-based classifications. Although the Court in *Reed v. Reed* (1971) claimed that it was simply determining whether the differential treatment prescribed by the challenged Idaho statute was reasonable, two years later a four-member bloc sought to elevate gender to suspect status in *Frontiero v. Richardson* (1973). Justice William Brennan, who had argued in *Frontiero* that gender should be treated as a suspect category, subsequently fashioned what has been referred to as an intermediate test between suspect and nonsuspect classes or rationality with bite. According to Brennan in *Craig v. Boren* (1976), “classifications based on gender must serve important governmental objectives and must be substantially related to achievement of those objectives.” With the appointments of Justices Sandra Day O’Connor and Ruth Bader Ginsburg and, despite the failure of the equal rights amendment to win ratification, the Court has moved ever closer to placing gender on the same level as race. Justice Ginsburg’s opinion in the 1996 case of *United States v. Virginia* (1996) called for “skeptical scrutiny of official action denying rights or opportunities based on sex,” while at the same time conceding that “[t]he heightened review standard our precedent establishes does not make sex a proscribed classification.” Unanswered is whether under “skeptical scrutiny” any classification based on gender would survive that would not survive under “strict scrutiny.”

Equal protection, despite Holmes’s observation, is surely no longer a forgotten section of the Constitution.

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References and Further Reading

- Abraham, Henry J. "Some Post-Bakke-and-Weber Reflections on 'Reverse Discrimination.'" In *Taking the Constitution Seriously: Essays on the Constitution and Constitutional Law*, edited by Gary L. McDowell. Dubuque, IA: Kendall-Hunt, 1981.
- Cottrol, Robert J., Raymond T. Diamond, and Leland B. Ware. *Brown v. Board of Education: Caste, Culture, and the Constitution*. Lawrence: University Press of Kansas, 2003.
- Fairman, Charles. *Reconstruction and Reunion, 1864–88, Part One*. New York: Macmillan, 1971.
- Graglio, Lino A. *Disaster by Decree: The Supreme Court Decisions on Race and the Schools*. Ithaca, NY: Cornell University Press, 1976.
- Kelly, Alfred H., Winfred A. Harbison, and Herman Belz. *The American Constitution: Its Origin and Development*. Vol. 2, 7th ed. New York: W.W. Norton, 1991.
- Klarman, Michael J. *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality*. New York: Oxford University Press, 2004.
- Kluger, Richard. *Simple Justice: The History of Brown v. Board of Education and America's Struggle for Equality*. New York: Alfred A. Knopf, 1975.
- Lee, Francis Graham. *Equal Protection: Rights and Liberties under the Law*. Santa Barbara, CA: ABC-CLIO, 2003.
- Myrdal, Gunnar. *An American Dilemma: The Negro Problem and Modern Democracy*. New York: Harper, 1944.
- Patterson, James T. *Brown v. Board of Education: A Civil Rights Milestone and Its Troubled Legacy*. New York: Oxford University Press, 2001.
- Pritchett, C. Herman. *Civil Liberties and the Vinson Court*. Chicago: University of Chicago Press, 1954.
- Reams, Bernard D. Jr., and Paul E. Wilson. *Segregation and the Fourteenth Amendment in the States*. Buffalo, NY: William S. Hein, 1975.
- Wilkinson, J. Harvie. *From Brown to Bakke: The Supreme Court and School Integration, 1954–1978*. New York: Oxford University Press, 1979.

Cases and Statutes Cited

- Brown v. Board of Education of Topeka, Kansas*, 347 U.S. 483 (1954)
- Buchanan v. Warley*, 245 U.S. 60 (1917)
- The Civil Rights Cases*, 109 U.S. 3 (1883)
- Corrigan v. Buckley*, 271 U.S. 323 (1926)
- Craig v. Boren*, 429 U.S. 190 (1976)
- Douglas v. California*, 372 U.S. 353 (1963)
- Frontiero v. Richardson*, 411 U.S. 677 (1973)
- Grutter v. Bollinger*, 539 U.S. 306 (2003)
- Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966)
- Keyes v. School District No. 1, Denver*, 413 U.S. 189 (1973)
- Korematsu v. United States*, 323 U.S. 214 (1944)
- Loving v. Virginia*, 388 U.S. 1 (1967)
- McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950)
- Milliken v. Bradley*, 418 U.S. 717 (1974)
- Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938)
- Plessy v. Ferguson*, 163 U.S. 537 (1896)
- Reed v. Reed*, 404 U.S. 71 (1971)
- Regents of the University of California v. Bakke*, 438 U.S. 265 (1978)
- Reynolds v. Sims*, 377 U.S. 533 (1964)

- Shelley v. Kraemer*, 334 U.S. 1 (1948)
- San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973)
- Skinner v. Oklahoma*, 316 U.S. 535 (1942)
- The Slaughterhouse Cases*, 83 U.S. 36 (1873)
- Strauder v. West Virginia*, 100 U.S. 303 (1880)
- Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971)
- Sweatt v. Painter*, 339 U.S. 629 (1950)
- United States v. Carolene Products*, 304 U.S. 144 (1938)
- United States v. Virginia*, 518 U.S. 515 (1996)
- Yick Wo v. Hopkins*, 118 U.S. 356 (1886)

EQUAL RIGHTS AMENDMENT

The equal rights amendment (ERA) is best known as a proposed amendment to the U.S. Constitution, almost ratified in the 1970s, that would have specifically barred government-sanctioned discrimination on the basis of gender. However, the 1970s ERA was the second version of this amendment. An earlier, potentially broader version had been proposed by suffragists shortly after women were granted the right to vote in 1920. Further, many states have incorporated their own versions of an ERA into their state constitutions. These state-level ERAs provide a window into the impact that a federal ERA might have had on women's legal status in the United States.

The Legal and Historic Context of the ERA

The original U.S. Constitution was written at a time when only white men were deemed to be public citizens with the right to vote, hold property, and hold office. Because of this common understanding, there was little need to specifically address gender in a public, political document such as the Constitution. Except for the generic use of male pronouns, the language of the Constitution is gender-neutral, and might be taken to apply to both men and women. But there is virtually nothing in the historical record to indicate that the founders of the Republic considered, or intended to address, women's status.

Instead, for much of U.S. history, the Constitution was deemed to apply to men alone. Upper-middle-class women began to mobilize for greater legal equality in the early nineteenth century. In 1848, abolitionists Lucretia Mott and Elizabeth Cady Stanton convened a women's convention in Seneca Falls, New York. The 1848 Declaration of Sentiments adopted by the convention was one of the first public demands for women's legal equality. Deliberately paraphrasing the Declaration of Independence, the Declaration of Sentiments' second paragraph begins: "We hold these

truths to be self-evident: that all men and women are created equal.” After the Civil War, leading women’s rights activists Susan B. Anthony and Sojourner Truth fought in vain to have women included in the new constitutional amendments giving rights to former slaves. Instead, the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution is a model of terse drafting, providing simply that a state shall not “deny to any person within its jurisdiction the equal protection of the laws.” Without independent personhood, women, white or black, were not protected by this clause. Similarly, the Fifteenth Amendment, ratified in 1870, granted freed male slaves—but not women, white or black—the right to vote.

Decades of marches, litigation, civil disobedience, and activism followed, and women finally gained the right to vote—and constitutional recognition—with the passage of the Nineteenth Amendment in 1920. By that time, suffragists were already planning the next phase of their campaign for women’s legal equality. Voting aside, many laws and informal practices perpetuated men’s privileged status and relegated women to second-class citizenship. In 1923, while in Seneca Falls for the seventy-fifth anniversary of the 1848 Women’s Rights Convention, Alice Paul, the head of the National Women’s Party and a leading suffragist, introduced a new constitutional ERA. The proposed ERA read in its entirety: “Men and women shall have equal rights throughout the United States and in every place subject to its jurisdiction. Congress shall have power to enforce this article by appropriate legislation.”

Alice Paul and other activists in the National Women’s Party worked tirelessly in support of the amendment, but progress was slow. Among other things, labor leaders were concerned that women’s equality would eliminate protective labor laws that treated men and women differently. Significant women’s groups, such as the League of Women Voters, the Consumers’ League, and the YWCA, also opposed the amendment strategy, believing that preserving special treatment for women was preferable to blanket equality. Many other women’s groups remained on the sidelines. Despite the efforts by the National Women’s Party, the amendment campaign made little progress through the 1920s and 1930s. By 1937, the only major women’s group to endorse the ERA was the National Federation of Business and Professional Women’s Clubs. Hoping to breathe new life into the campaign by narrowing its scope and focusing more directly on governmental (as opposed to private) discrimination, in 1943, Paul rewrote the ERA to track the language of the post-Civil War constitutional amendments. The substantive

provision stated: “Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex.”

Although the ERA was introduced in every subsequent session of Congress, there was still no favorable congressional action. In 1946, it was passed out of committee and narrowly defeated by the full Senate; in 1950 and 1953, the Senate passed the ERA, but with a rider that nullified important aspects of the amendment. Finally, in the 1960s, the newly reenergized women’s rights movement, led by the National Organization for Women, broke the logjam. Women’s equality became politically acceptable. Organized labor groups like the National Education Association and the United Auto Workers called for the ERA’s ratification. The League of Women Voters reversed their longstanding position and endorsed the amendment. The 1943 version of the ERA passed the U.S. Senate and the House of Representatives by the requisite two-thirds majority, and on March 22, 1972, it was sent to the states for ratification. At the time, Congress placed a seven-year time limit on the ratification process.

In the first year, the ERA received twenty-two of the thirty-eight state ratifications needed. But as ERA opposition forces rallied, the pace of ratification slowed. Twelve more states had ratified the amendment by 1976. In 1977, Indiana became the thirty-fifth and final state to ratify the ERA. As the 1979 ratification deadline approached, at the behest of women’s rights leaders, Congress granted an extension until June 30, 1982.

However, political momentum was turning against the ERA. Phyllis Schlafly, founder of the National Committee to Stop ERA, became a prominent spokesperson against ratification. Schlafly and other ERA opponents tailored their messages to women who might be persuaded to oppose equal rights. They argued that the ERA would eliminate women’s privacy rights, requiring co-ed bathrooms and physical education classes, and that women would be sent into combat alongside men. Further, they claimed, a federal ERA would create a constitutional right to abortion. In 1980, the Republican Party removed support of the ERA from its platform and Ronald Reagan, an active opponent of the ERA, was elected president. Despite massive mobilization by pro-ERA activists, there were no more ratification votes, and the effort to amend the Constitution by the 1982 deadline fell three states short.

The ERA has been reintroduced in every session of Congress since that time. Passage of the reintroduced ERA would again require a vote of two-thirds of each house of Congress and ratification by thirty-eight states. Under an alternative strategy advanced by

some activists, Congress could repeal the 1982 time limit on ERA ratification, opening up the possibility of final ratification sometime in the future if three additional states approve.

The ERA's Impact

Because the ERA was never ratified, the U.S. Supreme Court has not been directly called upon to construe it. However, the Supreme Court's decisions in the area of women's equality have played a role in the ERA debate. In particular, because the Court has construed women's equal protection rights in areas that would have been addressed by the ERA, some argue that regardless of whether the ERA was legally significant in an earlier time, it is now no longer necessary. On the other hand, because existing Supreme Court jurisprudence on women's equality has developed on a case-by-case basis, it leaves gaps that would arguably be filled by a more comprehensive constitutional amendment.

Until 1971, the U.S. Supreme Court had never struck down a state or federal law on the basis of its discrimination against women. This fact gave considerable impetus to the ERA movement, since it appeared that existing constitutional doctrine might not be capable of addressing women's equality. However, in 1971, the Court in *Reed v. Reed* struck down an Idaho law that barred women from administering estates in probate court. And in 1973, in *Frontiero v. Richardson*, the Court struck down the federal law providing gender-based benefits to military dependents. The federal ERA specifically figured in the latter case. The Court's opinion, written by Justice William Brennan, held that the statutory scheme was unconstitutional and applied the highest level of skepticism, that is, strict scrutiny, in evaluating the gender-based classifications. Strict scrutiny had previously been reserved for race-based classifications. However, only four justices joined that opinion. A fifth justice concluded that the statute was illegal even without any special scrutiny. And three other justices, led by Justice Lewis Powell, concluded that while the statute was illegal, it was inappropriate to decide the particular level of scrutiny to be applied to sex-based classifications while the ERA—then before the states—was pending ratification.

Although ERA ratification remained open until 1982, the standard of scrutiny to be applied to sex-based classifications was settled earlier, in 1976. In *Craig v. Boren*, a case concerning sex-based laws regulating underage drinking, the Court finally adopted an intermediate scrutiny standard, lower than that

applied in cases of race discrimination. Under the intermediate standard, a sex-based classification must be substantially related to an important governmental purpose.

In subsequent cases, the Supreme Court has found that a number of sex-based laws can meet this intermediate standard, including selective service laws, and laws delineating rights of mothers and fathers of out-of-wedlock children. Many other laws and practices, however, have been struck down as unconstitutional, including unequal single-sex schools, sex-based preemptory challenges to jurors, and sex-based allocation of government benefits. These decisions of the Supreme Court and lower courts have done much to undermine the perceived urgency of ratifying the ERA. Similarly, statutes like Title IX of the Education Amendments of 1972 have provided redress for much of the educational discrimination that once faced women and girls. In short, the purposes that the ERA was intended to address when it was introduced in 1943 have been to some extent superseded by developments dictated by the courts and Congress.

The legislative history of the ERA, however, suggests that a constitutional ERA would have required more than the spotty intermediate scrutiny standard developed by the courts. An authoritative source for this interpretation is a 1970 *Yale Law Journal* article that comprehensively reviews the potential applications of the ERA. The article, which is cited in the *Congressional Record* on the ERA debate, interprets the ERA to require the highest level of scrutiny, and surveys labor legislation, domestic relations law, criminal law, and equality in the military. Under its analysis, the ERA would not have permitted separate but equal facilities for women except in those areas where privacy involving personal bodily functions dictated separation of the sexes. Further, the Yale authors conclude that the ERA would have required a restructuring of the military to involve women equally in the draft and in all aspects of military activity.

State ERAs

Although the federal ERA ultimately failed, a number of state constitutions contain their own separate ERAs. Some of these equality provisions, like those in Wyoming and Utah, were part of the original state constitutions. Others, like those in Massachusetts and Illinois, were enacted at the time the federal ERA effort was at its height. In all, eighteen state constitutions have some version of a constitutional sex-based equality provision. State courts cases construing these

provisions provide instructive examples of the national impact that might have been felt from a federal ERA had it been tested and applied in the courts.

First, while the 1943 version of the federal ERA, tracking earlier constitutional amendments, has been construed to apply only to governmental action, some state ERAs have been applied more broadly. For example, some Pennsylvania state courts have indicated that the state's ERA is not limited to governmental activities but extends protections from sex discrimination to every sphere of state life.

Second, as predicted by the Yale authors, many of these state ERAs have been construed to include exceptions for personal privacy and biological functions unique to one sex. Thus, an ERA state may still provide single-sex bathrooms in its government buildings, and may extend pregnancy-related benefits (as opposed to parental benefits) only to women. However, some states have taken a broad view of what is biologically "unique" about the sexes. For example, under one Texas court's construction, a state may have a law criminalizing women's exposure of their chests while not imposing such requirements on men.

Third, some state ERAs have been construed to permit affirmative action and to go beyond preferences to uphold rigid, sex-based quotas. For example, a Washington State rule that required parity on political committees was upheld under that state's ERA.

Fourth, in several states, abortion funding restrictions have been struck down as violating state ERAs. New Mexico is an example. Applying the state's ERA, the New Mexico Supreme Court examined whether any similar funding restrictions had been imposed on men needing medical procedures. Finding none, the court concluded that the policy singling out a procedure needed only by women reflected a gender bias that was illegal under the ERA.

Finally, it is important to note that not all state ERAs have been construed so aggressively. The state ERA of Virginia, for example, has been held to require no more than the scrutiny accorded under the federal constitution, that is, intermediate scrutiny. Because of this, the Virginia ERA has little independent force.

Contemporary ERAs

Times have changed since 1943. The constitutional backdrop for the ERA debate is considerably more complex. In the intervening years, social movements have strengthened and waned. National politics have shifted to the right. Many women's rights activists are working to promote U.S. participation in global

women's rights efforts, including urging the federal government to ratify the International Convention on the Elimination of All Forms of Discrimination Against Women. But despite these developments, many members of the women's movement, particularly organizations such as the National Organization for Women and the Feminist Majority Foundation, continue to work to promote a constitutional equality amendment for women. Toward that goal, in 1995, the National NOW Conference adopted a working draft of a new constitutional equality amendment.

Reflecting the influence of more contemporary approaches to constitutional drafting, the proposed amendment is significantly longer and more detailed than prior ERA proposals. For example, it specifically addresses the standard of scrutiny to be applied ("the highest"), rather than leave that issue to be resolved by the courts. Further, the amendment goes beyond sex discrimination to provide for equal rights without regard to "sex, race, sexual orientation, marital status, ethnicity, national origin, color or indigence." It also specifically permits affirmative action. Interestingly, however, NOW's proposed constitutional equality amendment comes full circle, rejecting a focus on governmental action and returning in its opening paragraph to the broad, original language proposed by Alice Paul in 1923: "Women and men shall have equal rights throughout the United States and in every place subject to its jurisdiction."

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References and Further Reading

- Archer v. Mayes*, 213 Va. 633 (1973).
- Berry, Mary Frances. *Why ERA Failed*. Bloomington: Indiana University Press, 1986.
- Brown, Barbara, Thomas I. Emerson, Gail Falk, and Ann E. Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights of Women*, *Yale Law Journal* 80 (1971): 5:871-985.
- Friesen, Jennifer. *State Constitutional Law: Litigating Individual Rights, Claims and Defenses*. Charlottesville, VA: Lexis Publishing, 2000.
- Mansbridge, Jane J. *Why We Lost the ERA*. Chicago: University of Chicago Press, 1986.
- Marchioro v. Chaney*, 585 P.2d. 487 (Wash.), aff'd on other grounds, 442 U.S. 191 (1979).
- McBride-Stetson, Dorothy. *Women's Rights in the U.S.A: Policy Debates and Gender Roles*. 3rd ed. New York: Routledge, 2004.
- MJR's Fare of Dallas v. City of Dallas*, 792 S.W.2d 569 (Tex. Ct. App. 1990).
- National Organization for Women. *NOW and Economic Equity*. <http://www.now.org/issues/economic/cea.html>.
- New Mexico Right to Choose/NARAL v. Johnson*, 975 P.2d 841 (Becker, N.M. 1998).
- Susan D. *The Origins of the Equal Rights Amendment: American Feminism Between the Wars*. Westport, CT: Greenwood Press, 1981.

Cases and Statutes Cited

Convention on the Elimination of All Forms of Discrimination Against Women, adopted December 18, 1979, art. 6, 1249 U.N.T.S. 13, 17
Craig v. Boren, 429 U.S. 190 (1976)
Frontiero v. Richardson, 411 U.S. 677 (1973)
Reed v. Reed, 404 U.S. 71 (1971)
 Title VII of the Civil Rights Act of 1964, 42 U.S.C. sec. 2000e, et seq
 Title IX of the Education Amendments of 1972, 20 U.S.C. sec. 1681–1688

See also Anthony, Susan B.; Equal Protection of Law (XIV); Ginsburg, Ruth Bader; National Organization for Women; Schlafly, Phyllis Stewart; Stanton, Elizabeth Cady; State Constitutional Distinctions

CITY OF ERIE v. PAP'S A.M., 529 U.S. 277 (2000)

An Erie, Pennsylvania, law outlawed the act of appearing in public, either knowingly or intentionally, in a “state of nudity.” Respondent Pap’s A.M. (a Pennsylvania corporation) ran “Kandyland,” a strip club that featured totally nude female erotic dancers. In order to comply with the law, the dancers at Kandyland had to wear, at a minimum, “pasties” and a “G-string.”

Pap’s filed suit seeking declaratory relief and a permanent injunction against the enforcement of the ordinance. The Court of Common Pleas struck the ordinance down as unconstitutional. The Commonwealth Court reversed. The Pennsylvania Supreme Court reversed this ruling and held that the ordinance violated Pap’s freedom of expression under the First and Fourteenth Amendments to the U.S. Constitution.

The Pennsylvania Supreme Court followed the U.S. Supreme Court’s ruling in *Barnes v. Glen Theatre, Inc.* (1991) and held that nude dancing is expressive conduct entitled to some level of First Amendment protection. The Pennsylvania Supreme Court found that the ordinance was not content-neutral and therefore applied strict-scrutiny review.

The U.S. Supreme Court, in *Pap’s*, held that the ordinance should be analyzed under the framework set forth by the Court in *United States v. O’Brien* (1961). The Court held that the ordinance at issue satisfied *O’Brien*’s four-factor test and was therefore constitutionally valid. The Court held that the ordinance was within Erie’s power to protect public health and safety, it furthered an important governmental interest related to the “secondary effects” of nude dancing, it was unrelated to the suppression of free expression, and the restriction was no greater

than is essential to the furtherance of the government interest.

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References and Further Reading

Harrold, Marc M., *Stripping Away at the First Amendment: The Increasingly Paternal Voice of Our Living Constitution*, University of Memphis Law Review 32 (Winter 2002): 403.
 Leahy, Christopher Thomas, *The First Amendment Gone Awry: City of Erie v. Pap’s A.M., Ailing Analytical Structures, and the Suppression of Protected Expression*, University of Pennsylvania Law Review 150 (2002): 1021–1078.

Cases and Statutes Cited

Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991)
United States v. O’Brien, 391 U.S. 367 (1968)

ERZNOZNIK v. CITY OF JACKSONVILLE, 422 U.S. 205 (1975)

A Jacksonville, Florida, ordinance prohibited drive-in theaters (and only drive-in theaters) from exhibiting any films that contained nudity visible from a public street or place. Erznoznik, manager of a drive-in theater, was charged with showing an R-rated film, *Class of ’74*, which ran afoul this law. The theater’s screen was visible from the street and a church parking lot. Florida’s courts upheld the ordinance after Erznoznik challenged its constitutionality. Although the film was not declared obscene, this case is one of several related to the Court’s emerging secondary-effects doctrine dealing with nudity.

Jacksonville argued that it could protect its children and citizens against unwilling exposure to offensive material. At oral argument, the city added that the ordinance prevented displays of nudity which might affect traffic safety. In a six-to-three decision, the Supreme Court struck down the ordinance as both overbroad and not content-neutral. Powell, writing for the majority, was joined by Brennan, Douglas, Stewart, Marshall, and Blackmun. Burger, joined by Rehnquist, dissented as did White. The conference vote had been deadlocked at four to four because Douglas was in the hospital. At conference, Powell and Stewart voted to uphold the ordinance but later switched their votes; White, it appears, changed his vote after Powell circulated his opinion.

The ordinance, according to Powell, “sweepingly forbids display of all films containing any uncovered

buttocks or breasts, irrespective of context or pervasiveness.” As examples, he mentions a “baby’s buttocks, the nude body of a war victim . . . newsreel scenes of the opening of an art exhibit.” The problem thus arises that when a government, acting as a censor, decides to “shield the public from some kinds of speech on the ground that they are more offensive than others, the First Amendment strictly limits its power.” Moreover, the ordinance “discriminates among movies solely on the basis of content . . . however innocent or educational” the nudity might be in the films; the ordinance was not content-neutral, as films without nudity could be just as distracting or disturbing for people in nearby areas or driving motor vehicles.

White’s brief dissent objects to Powell’s conclusion in Part IIA of his opinion, where Powell writes, “Thus, we conclude that the limited privacy interests of persons on the public streets cannot justify [Jacksonville’s] censorship of otherwise protected speech on the basis of its content.” White states this “broadside” goes too far if it means expressive nudity on public streets or in other public places cannot be banned because of the limited privacy rights of other persons in those places who may “merely look the other way.” White, however, agrees that the ordinance is fatally overbroad, and if the majority had limited itself to this conclusion he may not have dissented.

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References and Further Reading

Dickson, Del. *The Supreme Court in Conference (1940–1985)*. New York: Oxford University Press, 2001.
Woodward, Bob, and Scott Armstrong. *The Brethren*. New York: Simon and Schuster, 1979.

ESCOBEDO v. ILLINOIS, 378 U.S. 478 (1964)

Danny Escobedo was arrested by police and told that another suspect, Benedict DiGerlando, had named him as the person that fired the fatal shot that killed Escobedo’s brother-in-law Manuel. Escobedo, refusing to admit his involvement, asked to see his lawyer. At about the same time, Escobedo’s lawyer arrived and asked to speak to his client. Both Escobedo and his lawyer were denied their requests. After some time, the police officers told Escobedo that if he would testify against DiGerlando they would set him free. Without access to his lawyer and without being informed of his right to remain silent, Escobedo made statements against DiGerlando that incriminated himself. These statements were later used to help convict Escobedo of murder.

The Supreme Court of Illinois affirmed the conviction, holding that the statements were admissible because they were made voluntarily even though without the assistance of counsel. The U.S. Supreme Court reversed. The Court found that statements shall be inadmissible when the circumstances of an investigation are such that (1) the person under investigation becomes the target of the investigation, (2) he is not informed of his right to remain silent, (3) he has asked for but been denied access to counsel, and (4) he makes statements that will be prejudicial later at trial. The Court’s opinion severely restricted how police obtain confessions by making it clear that the right to counsel extends beyond the formal institution of proceedings to include pre-indictment examinations. The opinion would lead to the landmark *Miranda v. Arizona* decision.

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References and Further Reading

Israel, Jerold H., Yale Kamisar, and Wayne R. LaFare. *Criminal Procedure and the Constitution*. St. Paul, MN: West, 2005.

Cases and Statutes Cited

Miranda v. Arizona, 384 U.S. 436 (1966)

See also **Coerced Confessions/Police Interrogations; Miranda Warning; Right to Counsel**

ESTABLISHMENT CLAUSE (I): HISTORY, BACKGROUND, FRAMING

Since the Establishment Clause is located at the beginning of the First Amendment, it is referred to at times as our “first freedom”: “Congress shall make no law respecting an establishment of religion . . .” This article will provide a general guide to understanding the Establishment Clause by describing the historical context of its framing, the process by which it was drafted, and the history of its interpretation and application.

Historical Background

In medieval Europe, after the fall of the Roman Empire and the failure of the attempt to replace it with a Christian empire, political power was fragmented. The bond of a common religion was the only bond that united Western Christian society. In this context,

as difficult as it is to imagine today, religious persecution seemed to be not only unavoidable, but necessary. It was taken for granted that rulers had both the right and a duty to punish religious error. With the coming of the Reformation in the sixteenth century, Protestants and Catholics disagreed vehemently about the true content of Christian doctrine, but both groups assumed that a ruler's power would continue to be used to root out and eradicate the errors of those who disagreed with the prevailing side. Reformation-era civil authorities were expected to use their power to enforce religious uniformity.

Accordingly, when the New England colonies were founded by the Puritans, a group known for its commitment to the "New Reformation" project of purifying the Church of England, New England's colonial legislatures, courts, and magistrates involved themselves in supporting the Puritan faith and suppressing any dissenters. Any who refused to comply were free to leave, in the eyes of the Puritan leadership. Any who would not leave were to be punished, in an effort to force the dissenters to abandon their ways and return to living in conformity with Puritan beliefs and expectations.

The most significant early challenge to religious conformity in New England arose when certain colonists who had come to believe that infant baptism could not be biblically justified would either turn their backs or walk out of church to avoid participating in the baptism of children. These early Puritan dissenters, who came to be known as "Baptists," were then haled into court, where they were warned or fined. Those who refused to pay their fines were imprisoned, and the most defiant were whipped.

Meanwhile, in 1636, after being banished from the Massachusetts Bay Colony for his own disagreements with Puritan authorities, Roger Williams had founded the new colony of Providence Plantations, just to the south, where Baptists were free to worship as they pleased. The Puritans' efforts to suppress those Baptists who remained in Massachusetts continued, unsuccessfully, until 1679. That year, a letter came from King Charles II in which he expressed his support for "freedom and liberty of conscience" for all non-Catholic Christians. Puritan authorities responded by halting the practice of imposing criminal punishments on those who refused to conform to Puritan beliefs and practices.

Although Puritan authorities no longer attempted to enforce religious conformity by persecuting dissenters as criminals, they did continue to attempt to promote the Puritan (or, as it came to be known, Congregational) religion in various ways. Massachusetts authorities subjected Baptists and other dissenters to a compulsory religious taxation system that was designed to fund

Congregational churches in every settlement. The authorities also required that only the preachers and churches that they had approved could engage in religious activity. This effectively barred non-Puritan worship in Massachusetts until William and Mary issued Massachusetts a new charter in 1691 that granted religious freedom to all Protestants. As for the religious tax, those who refused to pay could be imprisoned, and their property seized and sold at auction to pay the bill. The prosecution of those who refused to pay the tax continued until the early 1700s, when a series of laws was passed to exempt dissenters from this religious tax. The courts interpreted these exemption laws very narrowly, however, with the result that dissenters were still often subjected to imprisonment and the seizure and sale of their property thereafter.

By the outbreak of the Revolution, Puritanism's hold on religion in New England had loosened to the point that each locality was permitted to choose (by majority vote) which church to establish. The will of the majority in a given locality determined which church (usually but not always a Congregational church) would receive the religious taxes collected there. It would not be until 1782 that the Baptists succeeded in having this system declared to be a violation of the Massachusetts Constitution.

Elsewhere, not all colonies had formally established a single church as the official religion. In Pennsylvania, Delaware, New Jersey, Rhode Island, and most of New York, no one church was officially established. There were, however, laws requiring religious tests for office; blasphemy laws; and other forms of legal support for the Christian faith. Most of these were still in place through the period that the Constitution was ratified and the First Amendment adopted.

In five Southern colonies, however, from Maryland through Georgia, plus the four counties of metropolitan New York, the Church of England had become the established church. Maryland had originally been founded as a haven for Catholics fleeing persecution in England, but the Glorious Revolution of 1688, which brought about the replacement of Catholic King James II with the Protestants William and Mary, sparked a wave of anti-Catholicism in Maryland that led to the establishment of the Church of England there. Throughout these Southern colonies, laws were enacted to require attendance at Anglican services, to provide financial support for Anglican clergy, to control the clergy selection process, to dictate religious doctrine, to give certain civil powers to church officials, and to penalize participation in non-Anglican worship.

By the mid-1700s, the influx into Virginia of dissenting missionaries who had been inspired by the

evangelistic fervor of the Great Awakening had led to the creation of a system that permitted non-Anglicans to worship freely if they were to obtain one of a limited number of licenses. Initially, Presbyterians, Baptists, and other dissenters complied with this system. In the mid-1760s, however, a new type of Baptists, known as Separate-Baptists (ex-New England Congregationalists who had split from their former churches in rigid adherence to the Baptist position on infant baptism) began sending missionaries to Virginia. The Separate-Baptists refused to comply with Virginia's licensure laws on the grounds that civil governments had no authority to license preachers, for God alone governs the church. From 1768 to 1775, Virginia authorities jailed about forty Separate-Baptists for preaching without a license.

In 1774, after a young James Madison witnessed the jailing of some of these Separate-Baptist preachers, he wrote to a friend that he could no longer countenance the "diabolical, hell-conceived" religious persecution in his home state. By 1776, Madison had succeeded in persuading Virginia's Revolutionary Convention to adopt the Virginia Declaration of Rights, which guaranteed for all the right to "the free exercise of religion." In that same year, Virginia's legislature suspended the collection of the compulsory taxes that had been supporting the Church of England, and in 1779 these taxes were repealed. Free exercise protections were not extended, however, to Anglican clergy, who when they were ordained in England were required to take an oath of allegiance to the Crown. The Anglican clergy who refused to violate their oaths were mobbed, beaten, and driven from their pulpits.

In 1785, Patrick Henry championed a bill that would have established Christianity as the state religion of Virginia and imposed a tax that could be directed to the Christian denomination of one's choice (or in the alternative to support public education), but a powerful coalition of dissenters and disestablishment statesmen, led by Madison and Thomas Jefferson, was able to defeat the bill. The next year, the Virginia Statute of Religious Freedom, authored by Jefferson, was enacted. It prohibited any form of compulsory support of religion and guaranteed the rights of all to worship freely.

At the outbreak of the Revolution, nine of the thirteen colonies still had established churches. Only Virginia had, by the time of the adoption of the Establishment Clause, squarely considered and rejected the establishment of religion. Massachusetts, in the course of adopting its new Constitution in 1780, had actually strengthened its system of localized establishments, and every state but Virginia restricted

the right to hold office on religious grounds. Five of these states limited public office to Protestants.

The ratification of the U.S. Constitution of 1787 put an end to religious tests for office holding. Article six provides that "no religious test shall ever be required as a Qualification to any Office or public Trust under the United States." This, the only explicit religious liberty in the Constitution, was controversial due to the risk that it would allow Catholics (who it was feared might persecute Protestants if they were ever to attain a political majority) or non-Christians to hold office.

Drafting

In the years after independence, leading up to the enactment of the First Amendment, many leaders became convinced that the public spiritedness of the Revolutionary era was waning. Some attributed this decline to the collapse of the established church, especially in the South. Virginia had lost half of its clergy during the Revolution, and Connecticut, one-third. In response to this concern, movements arose in nearly every state to institute or strengthen broadly inclusive religious establishments. Civic leaders looked to religion to provide an appreciation of the importance of the common good, which was seen as crucial to the success of the republican form of government.

The countervailing force was concern for religious liberty, which Madison had used as a campaign issue in defeating James Monroe for election from their Virginia district to the first U.S. House of Representatives. Virginia's Baptists had helped Madison to get elected, and when he succeeded, they did not hesitate to remind him of their interest in religious liberty.

Upon arrival, Madison was the spokesperson for religious freedom in the first session of Congress, the session that would begin by considering more than two hundred state-sponsored proposals for amending the new Constitution. Out of these, Madison culled nineteen, and added one of his own. Initially, he planned to work these amendments into the body of the existing Constitution, rather than append them to it in the form of a bill of rights.

With respect to religious freedom, Madison began by proposing his own idea, that the states be prohibited in Article I, section 10, from violating "the equal rights of conscience." With respect to the federal government, Madison proposed that to Article I, section 9, be added: "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor

shall the full and equal rights of conscience be in any manner, or under any pretext infringed.”

When a House committee took up Madison’s proposals, some representatives were concerned that the anti-Establishment provision in the clause pertaining to the federal government might be interpreted to preclude the courts from protecting the legal rights of clergy. Others worried that the reference to “national religion” conflicted with the structure of the federal system. To avoid these problems, the prohibition against the establishment of a national religion, in the passive voice, was replaced by the subject “Congress,” in the active voice. This clarified that the provision was intended, at the time that the First Amendment was drafted, to limit the powers of the federal legislature only. (Only much later would the U.S. Supreme Court interpret the effect of the Fourteenth Amendment in terms of making the First Amendment apply to the states.) The version that then passed the House read as follows: “Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience.”

The Senate did not support Madison’s idea about prohibiting the states from violating equal rights of conscience, which effectively ended the First Congress’s consideration of that possibility. In considering the House’s proposal pertaining to the federal government, the Senate countered that Congress should be barred from establishing “articles of faith or a mode of worship,” rather than “religion” in a more general sense, apparently in an attempt to permit financial support for religion but not the endorsement of doctrine or practice. The Senate also dropped the House proposal’s final phrase, about noninfringement of the rights of conscience, presumably because the retained free exercise protection was seen as inclusive of the rights of conscience.

In conference, the House and the Senate finally agreed upon the final version of the Religion Clauses of the First Amendment that Congress passed in 1789 and the states ratified in 1791: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” Two key changes had been made. First, whereas the House had urged that Congress should be barred from making laws “establishing religion,” and the Senate, from “establishing articles of faith or a mode of worship,” the conference committee proposed that Congress should be prohibited from making laws “respecting an establishment of religion.” Financial support for religion in those states that continued to support churches with taxes would not be disturbed, nor would any other aspect of the existing state religious establishments. Congress could pass no law

“respecting an establishment of religion,” whether at the federal or state level, whether the purpose of such a law would be to create or to dismantle it. Second, once the Senate’s references to “articles of faith” and “a mode of worship” were replaced simply with “religion,” the Senate’s ban on Congress “prohibiting the free exercise of religion” could be shortened to “prohibiting the free exercise thereof,” which avoided a second reference to the term “religion,” and thus any possibility that the second reference to religion could be interpreted as having a different meaning than the first.

By the end of the drafting process, the First Congress had developed a proposal to protect religious freedom that contained two complementary halves: the Establishment Clause, which seeks to prevent the imposition *of* religion by the government, and the Free Exercise Clause, which seeks to prevent governmental imposition *on* religion. Or as John Witte describes it in *Religion and the American Constitutional Experiment*, the Establishment Clause prohibits the government from *prescribing* religion, and the Free Exercise Clause prohibits the government from *proscribing* religion.

One of the primary current debates about the Establishment Clause focuses on whether it was drafted to prohibit any government support for religion, including support offered on a nonpreferential, inclusive basis, or whether it merely intended to prohibit government support for religion offered on a selective, or preferential, basis. Douglas Laycock, among others, who argue that the drafters of the Establishment Clause intended to prohibit not only governmental preference for one religion over others but also governmental aid to all religions even-handedly, point to the fact that the Senate considered but ultimately rejected four different drafts of the Establishment Clause that would have easily lent themselves to the latter interpretation. Still others, such as Michael Malbin, contend that the drafters intended to permit even-handed, nonpreferential government support for all religion by agreeing to prohibit any law respecting “*an* establishment of religion,” because hypothetically they might instead have chosen “*the* establishment of religion.” Their choice of “an” establishment of religion, Malbin maintains, suggests that the drafters intended to bar only selective governmental support for religion, whereas a reference to “the” establishment of religion would have reflected the intent to ban inclusive, even-handed governmental support.

This debate has even split the Supreme Court, as is evident in the opposing views expressed by Justice Souter, for a five-justice majority, taking the position that the drafters intended for the Establishment Clause to prohibit even-handed support for religion

in general, and Justice Scalia, on behalf of four justices in dissent, taking the position that they did not so intend, in *McCreary County v. American Civil Liberties Union* (2005). Noah Feldman concludes that the answer to this question “seems shrouded in uncertainty,” due in large part to the lack of any consensus at the time regarding whether even-handed governmental support for religion violated basic principles of religious freedom. What *was* clear to the Framers was that governmental support for selected religious groups and not others *did* violate the principles that they were attempting to enshrine in the Establishment Clause.

Interpretation and Application

Prior to 1940, the courts interpreted the Religion Clauses of the First Amendment to apply only to Congress, and most questions of religious liberty were left to the states to resolve under their own constitutions. By and large during the early years of the republic, state and local governments did not disturb mainstream Christian activities, but the efforts of evangelical Catholics, Baptists, and Methodists were hampered in New England; abuses against Unitarians, Adventists, and Christian Scientists were ignored in the middle colonies; and Catholics, conservative Episcopalians, and evangelical Protestants were presented with obstacles in the South. In most areas, apart from the largest eastern cities, the religious rights of Jews, Muslims, Native Americans, and enslaved African Americans were not respected. During this period, state and local governments promoted a “public” or civil religion that was generally Christian in character by using religious symbols and ceremonies, subsidizing religious programs, providing special legal protections to certain religious groups, promoting the teaching of basic Christian values, and prohibiting certain conduct on explicitly religious grounds.

Religious groups that could not fit comfortably within the religiously homogenous climate of the early republic were expected to leave, with the frontier providing a “release valve” for religious nonconformists like Mormons, Catholics, Baptists, and Methodists. In the mid- to late nineteenth century, however, the traditional Protestant homogeneity of the East was disrupted by influxes of Methodists, Baptists, and Roman Catholics along with scores of newly formed religious groups such as Disciples, Jehovah’s Witnesses, Pentecostals, Unitarians, and Universalists. These diverse groups challenged state and local policies that promoted traditional Protestantism, with

the Baptists and Methodists calling for genuine separation of church and state. State and local governments responded by seeking out ways to hamper the efforts of the new groups, such as by denying charters to Catholic schools and preaching permits to Jehovah’s Witnesses. In the face of such overt discrimination, these dissenting groups turned to the federal courts for relief.

In the landmark cases of *Cantwell v. Connecticut* (1940) and *Everson v. Board of Education* (1947), the U.S. Supreme Court determined for the first time that the Religion Clauses of the First Amendment applied equally to local, state, and federal government. The *Everson* Court’s ruling sent the message that state and local support for the beliefs and activities of dominant religious groups would now be open to challenge.

In the wake of the *Everson* decision, hundreds of Establishment Clause cases poured into the lower courts. Nearly three-quarters of those that reached the Supreme Court represented challenges to prevailing patterns of state and local support for religious education. As summarized by John Witte in “From Establishment to Freedom of Public Religion,” this series of Supreme Court Establishment Clause rulings banned religion from the public schools, whether in the form of prayers, moments of silence, the reading of scripture, the storage of religious books, the teaching of doctrine, the display of symbols, or the use of religious services or facilities. These rulings also banned public support for religious schools, whether in the form of salaries, services, reimbursements for administering required examinations, loans of state-required educational resources or counseling services, or tax deductions or credits for tuition costs.

By 1971, the Court had formulated a three-part Establishment Clause test to guide its decision making. As set forth in *Lemon v. Kurtzman*, any government action challenged under the Establishment Clause needs to satisfy three criteria. It must (1) have a secular purpose, (2) not have a primary effect that either advances or inhibits religion, and (3) not foster any excessive entanglement between government and religion. If the government’s action fails to meet any of these three criteria, under the *Lemon* test the Establishment Clause has been violated and the government must discontinue the offending activity.

Some members of the Supreme Court have come to question the adequacy of the *Lemon* test for resolving Establishment Clause disputes. In the 1984 case of *Lynch v. Donnelly*, Justice O’Connor offered a distinctive perspective in a concurring opinion that emphasized the impression that an ordinary citizen would have regarding the activity in question. Her perspective, now known as the “endorsement test,” asks whether a reasonable observer would view the

government's action as either official endorsement or disapproval of religion. Her concern was that governmental endorsement of religion might give some members of the community whose beliefs have been officially recognized the impression that they have some special civil status, or conversely, the impression that they lack such status if their beliefs have not been sanctioned. Justice O'Connor consistently applied the endorsement test to Establishment Clause cases that she helped to decide, but it has never been embraced by a majority of the justices as a replacement for the *Lemon* test.

Five years after *Lynch*, in the 1989 case of *County of Allegheny v. ACLU*, Justice Kennedy unveiled another challenge to the *Lemon* test, the "coercion test." Justice Kennedy's concern was that the Court's contemporary Establishment Clause jurisprudence tends to manifest a certain degree of hostility toward religion, in contrast to the pattern of positive interaction between government and religion that can be observed through the course of U.S. history. To avoid undue governmental hostility toward religion, Justice Kennedy would give government a fair degree of latitude in accommodating and acknowledging religion, so long as government has not coerced someone to support or participate in religion. Justice Kennedy has continued to apply his coercion test to Establishment Clause cases, but (as with the endorsement test) the coercion test has not been embraced by a majority of justices as a replacement for the *Lemon* test.

Given the multiplicity of competing tests, every Establishment Clause case that reaches the Supreme Court presents an opportunity for the Court to set *Lemon* aside in favor of another test. Much speculation attends every Establishment Clause decision, as Supreme Court observers await a clarification of Establishment Clause jurisprudence.

When the manner in which the Court has resolved Establishment Clause cases is carefully analyzed, however, it becomes clear that the Court has never confined itself to any of these three competing Establishment Clause tests in resolving these cases. Rather, the Court has consistently, although not systematically, applied a series of questions to scrutinize the government's conduct for Establishment Clause violations. The following paragraphs present these questions in their logical sequence, although any given Supreme Court ruling might not treat all of them, and might not do so in the same order.

The threshold Establishment Clause issue is whether a constitutionally significant governmental imposition of religion has taken place. Without such a finding, the Court need not proceed to consider the challenge any further. In considering this issue, the Court has found that not all governmental impositions

of religion are constitutionally significant: the burden that allowing parents to deduct the cost of parochial education from their taxable income imposes on all other taxpayers was found to be too attenuated to be constitutionally significant in *Mueller v. Allen* (1983). Nor is the expression of religion by nongovernmental actors an Establishment Clause violation: the temporary placement of crosses by the Ku Klux Klan on the grounds of Ohio's state capitol was an instance of private, not governmental, action and thus no Establishment Clause violation in *Capital Square Review and Advisory Board v. Pinette* (1995).

If a constitutionally significant governmental imposition of religion is found, the issue becomes whether there is a legitimate governmental purpose behind the action in question. If there is not, then government must discontinue engaging in the challenged activity. In *Mueller*, for example, it was legitimate for the government to grant parents of parochial school children a tax deduction to defray the parents' educational expenses, to promote the health of private schools, and to support quality education. On the other hand, a requirement that an official prayer be read at the start of every public school day for the sake of the "moral and spiritual training" of the students was found not to have a legitimate Establishment Clause purpose in *Engel v. Vitale* (1962).

If the government is able to assert with some degree of persuasiveness that a legitimate purpose lies behind its action, the issue becomes whether the case in question arises in the special context in which there is a significant risk of governmental entanglement in the operational autonomy of religious institutions. This, the third prong of the *Lemon* test, justifies governmental refusal to get involved in the operation of religious institutions, for example, by exempting them from certain types of taxes to avoid the necessity of scrutinizing their internal financial records, as in *Walz v. Tax Commission* (1970), or due to the monitoring that would be necessary to prevent publicly funded special education teachers from teaching religion in parochial schools, as in *Lemon*.

Provided a case involving a constitutionally significant governmental imposition of religion and a legitimate governmental purpose does not stand to entangle government in the operational autonomy of religious institutions, a series of four questions can be employed to scrutinize the nature of the relationship between the imposition of religion and the governmental interest that has been asserted to legitimate the action. In this kind of case, if the answer to any of these four questions is "yes," an Establishment Clause violation has occurred.

First, the Court can ask whether there is a clear indication that the governmental purpose that has

been asserted is actually a pretext to mask other, illegitimate governmental motives. In *Wallace v. Jaffree* (1985), for example, Alabama's provision for a moment of silence for "meditation or voluntary prayer" in the public schools, when a previous version of the statute in question had authorized only a moment for "meditation," revealed the inappropriately religious motives behind the statutory change.

Second, the Court can inquire as to whether there is a lack of solid evidence regarding the existence of the problem that the government claims it is trying to solve. In *Everson*, in which public funding of transportation to parochial schools was challenged, the Court determined that the evidence showed that there are no alternatives to public school transportation systems that are equally safe for the children. In *Texas Monthly v. Bullock* (1989), by contrast, the Court found that the evidence did not support the government's claim that it was necessary to exempt religious publications from a sales tax to avoid violating religious beliefs or inhibiting religious activity.

Third, the Court can consider whether there are adequate alternative means that would enable the government to achieve its purposes without implicating Establishment Clause concerns. To illustrate, in *Everson*, the Court found that there are no alternatives to publicly funded school transportation systems that are equally safe for children. In *Abington Township School District v. Schempp* (1963), by contrast, Justice Brennan's concurring opinion emphasized that students can be taught morality just as effectively by studying the speeches of great Americans as they could by studying the Bible.

Fourth, the Court can ask whether the government has delegated one of its core functions to a group chosen according to a religious criterion. To illustrate, in *Larkin v. Grendel's Den* (1982), the Court disallowed a statute that granted veto power over applications for liquor licenses to churches within 500 feet of an applicant's premises. Similarly, in *Kiryas Joel Village School District v. Grumet* (1994), the Court ruled that the creation of a special school district to serve a village inhabited solely by members of a particular Jewish sect violated the Establishment Clause.

As the foregoing discussion reveals, the court has consistently employed a series of several different questions when resolving Establishment Clause cases that are not all reflected in the three-prong *Lemon* test, nor in the even more narrowly focused "endorsement" or "coercion" tests. These latter two tests focus mainly on the first threshold question that the Court has tended to ask in analyzing Establishment Clause cases: whether a constitutionally significant governmental imposition of religion has taken place. They do not incorporate the other areas of inquiry to which

the Court has attended in resolving the Establishment Clause cases that have come before it. Adoption of either one of these tests, therefore, would compress the Court's Establishment Clause analysis, limiting it to resolving these cases on the basis primarily of what has historically amounted to a threshold determination about whether a constitutionally significant governmental imposition of religion has taken place.

Since it is notoriously difficult to define "religion," and since constitutional theorists continue to dispute whether the word "religion" as used in the Establishment Clause prohibits governmental support for religion in any form, as opposed to support for a particular religion or a subset of religious groups, exclusive reliance by the Court on the "endorsement" or "coercion" tests would leave the Court to use imprecise, disputed concepts in resolving Establishment Clause cases without the benefit of asking some of the key questions that it has used to resolve such cases in the past. The result would be that the outcome of cases would be even less predictable than it has already become, as cases are resolved based solely on whether the government has or has not done something that is "religious" in nature, and if so whether it has done something that is *inappropriately* "religious" or not.

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References and Further Reading

- Cobb, Sanford H. *The Rise of Religious Liberty in America: A History*. New York: Macmillan, 1902.
- Feldman, Noah, *The Intellectual Origins of the Establishment Clause*, New York University Law Review 77 (2002): 346–428.
- Laycock, Douglas, 'Nonpreferential' Aid to Religion: A False Claim about Original Intent, William and Mary Law Review 27 (1986): 875–923.
- Levy, Leonard W. *The Establishment Clause: Religion and the First Amendment*. New York: Macmillan, 1986.
- Madison, James. Letter to William Bradford, January 27, 1774. Quoted in Sanford H. Cobb, *The Rise of Religious Liberty in America: A History*. New York: Macmillan, 1902.
- Malbin, Michael J. *Religion and Politics: The Intentions of the Authors of the First Amendment*. Washington, D.C.: American Enterprise Institute for Public Policy Research, 1978.
- McConnell, Michael W., *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, William and Mary Law Review 44 (2003): 2105–2208.
- McLoughlin, William G. *New England Dissent, 1630–1833: The Baptists and the Separation of Church and State*. 2 vols. Cambridge, MA: Harvard University Press, 1971.
- Noonan, John T., Jr. *The Lustre of Our Country: The American Experience of Religious Freedom*. Berkeley: University of California Press, 1998.
- Reynolds, Noel B., and W. Cole Durham, Jr., eds. *Religious Liberty in Western Thought*. Atlanta, GA: Scholars Press, 1996.

Witte, John Jr., *From Establishment to Freedom of Public Religion*, *Capital University Law Review* 32 (2004): 499–518.

———. *Religion and the American Constitutional Experiment: Essential Rights and Liberties*. Boulder, CO: Westview Press, 2000.

Cases and Statutes Cited

Abington Township School District v. Schempp, 374 U.S. 203 (1963)

Cantwell v. Connecticut, 310 U.S. 296 (1940)

Capital Square Review and Advisory Board v. Pinette, 515 U.S. 753 (1995)

County of Allegheny v. ACLU, 492 U.S. 573 (1989)

Engel v. Vitale, 370 U.S. 421 (1962)

Everson v. Board of Education, 330 U.S. 1 (1947)

Kiryas Joel Village School District v. Grumet, 512 U.S. 687 (1994)

Larkin v. Grendel's Den, 459 U.S. 116 (1982)

Lemon v. Kurtzman, 403 U.S. 601 (1971)

Lynch v. Donnelly, 465 U.S. 668 (1984)

McCreary County v. American Civil Liberties Union, 125 S.Ct. 2722 (2005)

Mueller v. Allen, 463 U.S. 388 (1983)

Texas Monthly v. Bullock, 489 U.S. 1 (1989)

Wallace v. Jaffree, 472 U.S. 38 (1985)

Walz v. Tax Commission, 397 U.S. 664 (1970)

See also **Baptists in Early America**

ESTABLISHMENT CLAUSE DOCTRINE: SUPREME COURT JURISPRUDENCE

The First Amendment to the U.S. Constitution provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” This single, integrated statement limits the power of the federal government in religious life. But it contains two distinct principles—free exercise and nonestablishment—that the courts have often treated separately. The Free Exercise Clause prohibits governmental interference with the religious practice of private individuals and groups; as such it resembles other personal liberties in the Constitution such as freedom of speech. But the second component, the Establishment Clause, is unusual among constitutional limitations. Government typically may promote or embrace particular ideas as long as it leaves people free to dissent, but the Establishment Clause prohibits government from promoting religious doctrines in certain ways, and from creating certain relationships with religious institutions. These mandates may be crucial to both religious freedom and social peace. But because they restrict government more than with respect to nonreligious ideas, the Establishment Clause has been especially difficult and controversial

to interpret in the circumstances of modern, pervasive government. Just what promotion of and involvement with religion are prohibited?

Background and Adoption

The “establishment[s] of religion” familiar to the founders had three main features, present in varying degrees in the Church of England and in the colonial establishments (Anglicanism in the South, Puritan Congregationalism in New England). One feature was governmental *coercion* to support the favored church: mandatory membership, mandatory financial contributions, and even prohibitions on practicing other faiths and preaching their doctrines. Prohibitions on dissenting faiths largely disappeared by the time of the founding, with the rise of the “free exercise” ideal; but requirements of financial support for religion continued. A second feature was government *regulation* of the established church, including selection of clergy and oversight of doctrine and liturgy (for example, Parliament approved the successive Books of Common Prayer). The third feature was *symbolic recognition* of the favored faith, through official ceremonies and titles. The monarch headed the Church of England, bishops held seats in the House of Lords, and state ceremonies incorporated the established faith.

The practice of establishment rested on both theological and political rationales: protecting the true faith, maintaining social unity, and promoting ideals that would make citizens virtuous. Likewise, the rise of disestablishment in the colonies and the early American republic rested on both theological and political arguments. Certain Christian leaders from Roger Williams through founding-era Baptists argued that the union of religion and government would interfere with the individual’s free response to God and would corrupt (in Williams’s words) the “garden” of the church with the “wilderness” of the world. Meanwhile, Enlightenment figures such as Thomas Jefferson and James Madison attacked establishments on the ground that they threatened social peace and minority rights—“destroy[ing],” in Madison’s words, “moderation and harmony . . . amongst [society’s] several sects,” and “degrad[ing] from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority.”

The latter quotes come from Madison’s “Memorial and Remonstrance” against a 1785 proposal in Virginia to renew tax assessments in support of clergy. Madison masterfully combined political arguments

with theological (for example, that “ecclesiastical establishments” have undermined “the purity and efficacy” of religion). Disestablishment in America, unlike its counterpart in France, was generally not hostile to religion, and indeed took much of its inspiration from Baptists and other dissenting Protestant groups. Most Americans continued to believe that religion was essential to civic virtue (an “indispensable suppor[t]” for “political prosperity,” in George Washington’s words). They simply concluded, in increasing numbers, that governmental promotion of religion would weaken, rather than strengthen, it in its social role.

By the late 1780s, these arguments had led to the elimination of taxes for clergy support in the majority of states. Virginia, the most notable case, rejected even a liberalized proposal that would have allowed a citizen to direct to which sect his payment would go. But the pattern was not uniform: clergy taxes remained in three New England states well after the adoption of the Constitution (the last system, in Massachusetts, was repealed in 1833). Like the defeated Virginia proposal, these taxes permitted dissenters to support their own clergy or opt out altogether: yet even these nonpreferential systems were typically referred to as “establishments.”

Thus, when the First Amendment was ratified in 1791, states remained divided over the basic principle of disestablishment (in contrast, all had some commitment to basic free exercise for dissenters). But this division did not matter, for the amendment’s purpose was to restrain the new federal government from interfering in religious matters; the Bill of Rights left untouched the states’ powers over religion. The brevity of congressional debates over the religion provision reflects that the founders were not thinking about the many questions that might arise if state governments were limited from interacting with religion. Despite this brevity, the First Amendment prohibition on laws “respecting an establishment of religion” has some clear meanings. As noted above, a tax to support religion almost certainly qualified as an establishment even when it was nonpreferential among denominations or faiths; this proposition is confirmed by the fact that the Senate rejected several proposals to prohibit establishment of “one religious sect or society” and instead ultimately approved the broader ban on “an establishment of religion.” Moreover, given the Framers’ agreement on the inviolability of religious conscience, they almost certainly rejected federal power to coerce anyone to practice religion.

A far more complicated historical question, however, concerns noncoercive acknowledgements of religion: official prayers, religious proclamations, and religious symbolic displays. Such practices can

implicate several concerns underlying disestablishment—diluting the religious message to a politically acceptable content, alienating citizens who dissent from it—and some in the founding generation criticized the practices in the name of a stricter separation of church and state. President Jefferson refused to follow his predecessors in issuing Thanksgiving proclamations, and Madison in a series of letters and memoranda in the 1820s and 1830s attacked such proclamations as well as congressional prayers. Yet the practices were commonplace in the early republic: the First Congress initiated daily prayers, and the congressional chaplaincy and Washington began the nearly unbroken practice of presidential Thanksgiving proclamations. Just how ecumenical such expressions were required to be is also ambiguous. Although most of them referred in general terms to God or the “Supreme Being,” many people in the founding generation would likely have agreed with the narrower position of Joseph Story (in 1835) that the First Amendment was intended “not to countenance, much less to advance Mahometanism, or Judaism, . . . but to exclude all rivalry among Christian sects.”

As the nineteenth century progressed, formal disestablishment mixed even more with government promotion of a generalized Protestantism, producing what historians have called a “de facto establishment.” A series of revivals driven by evangelicals, especially Methodists and Baptists, made Americans much more thoroughly and explicitly religious, and this widespread faith pervaded public discourse. Much of this expression occurred within state governments, but it nonetheless reflected Americans’ understanding of the disestablishment ideal. A different controversy arose in the mid-1800s when Catholics departed the new, Protestant-dominated public school system and sought equal funding for their own schools. Most states banned such support in their own constitutions—a move that has been controversial ever since—thus extending the founding-era ban on specifically religious taxes to prohibit even general tax support for education from including religiously affiliated schools.

State Establishments, Federalism, and Incorporation

As enacted, the First Amendment, like the rest of the Bill of Rights, bound only the federal government. But the Supreme Court has held, of course, that the adoption of the Fourteenth Amendment in 1868 made most of the Bill of Rights applicable to state and local government actions. The incorporation of

the Establishment Clause was declared in *Everson v. Board of Education* (1947). Although several commentators have argued that the Fourteenth Amendment was not intended to incorporate the Bill of Rights, the Court continues to adhere emphatically to incorporation (see, for instance, *Wallace v. Jaffree* [1985]).

Special challenges have been raised to the incorporation of the Establishment Clause. The clause, it is asserted, was meant not just to prohibit establishment of a national church, but as much to prohibit federal interference with the state establishments still existing in 1791. This interpretation could explain the peculiar phrasing “no law respecting an establishment.” In Justice Thomas’s words, “the Establishment Clause is best understood as a federalism provision—it protects state establishments from federal interference but does not protect any individual right,” which in turn “make[s] incorporation of the Clause [to limit state governments] difficult to understand” (*Elk Grove Unified School Dist. v. Newdow* [2004] [concurring in the judgment]). Thomas would incorporate, at most, the aspects of non-Establishment that protect individuals from direct coercion. But no other justice has joined him; the Court implicitly follows Justice Brennan’s argument that a fully incorporated Establishment Clause makes sense “as a co-guarantor, with the Free Exercise Clause, of religious liberty” for individuals against all levels of government (*Abington School Dist. v. Schempp* [1963] [concurring opinion]).

Modern Interpretation: The *Lemon* Test and Church–State Separation

The modern Court’s Establishment Clause interpretations reflect a fundamental tension. As American society has become more religiously diverse—with Christians joined by substantial numbers of Jews, Muslims, and Eastern-religion adherents as well as atheists and believers in generalized spirituality—any religious involvement by government appears more partial to one group of citizens and thus threatens some of the general harms of establishment: division among faiths and alienation of dissenters. At the same time, given the pervasive activity of the modern welfare state, to keep government wholly separate from religion can discriminate against religious citizens and artificially restrict religion’s role in public life.

The tension appeared in the very first modern Establishment Clause case, *Everson* (1947), where a local government reimbursed parents’ costs for sending their children to parochial schools on public buses. The majority opinion by Justice Hugo Black began by

emphasizing a strict “wall of separation between Church and state” (quoting Thomas Jefferson) that prohibited “any tax in any amount . . . to support any religious activities.” Next, however, the opinion argued that the First Amendment prohibited excluding individuals, “because of their faith, or lack of it, from receiving the benefits of public welfare legislation,” and it ended up narrowly approving the reimbursements. Strict church–state separation conflicted with and gave way to the equal participation of religion in the widespread programs of the welfare state.

In *Lemon v. Kurtzman* (1971), however, the Court formulated a general Establishment Clause test that, as applied, elevated strong church–state separation over equal religious participation. *Lemon* required that a law (1) have a secular legislative purpose, (2) have a primary effect that neither advanced nor inhibited religion, and (3) not create an excessive entanglement between church and state. Under this framework, the Court in the 1970s and early 1980s struck down several programs of government aid to religious education through a “Catch 22”: if the statute allowed aid to benefit religious teaching in church-related schools, it violated the “primary effect” prong, but if it imposed restrictions on religious uses, policing those restrictions created “excessive entanglement.” The no-advancement and no-entanglement prongs both required separation from the religious school.

The *Lemon* test, or nascent versions of it, also invalidated religious exercises and symbols in public schools: classroom prayers (*Engel v. Vitale* [1962]), classroom Bible readings (*Schempp*), postings of the Ten Commandments (*Stone v. Graham* [1980]), and classroom “moments of silence” (*Jaffree*). These decisions found it insufficient for Establishment Clause purposes that the exercises were formally voluntary and were general enough in content to encompass many different faiths. The clause, the Court said, reflected the broader “belief that a union of government and religion tends to destroy government and to degrade religion” (*Engel*). Thus, the government should not promote religion even in noncoercive or denominationally neutral ways; government must be neutral toward religion altogether.

Although official religious practices in public schools could be invalidated based on their religious “effects,” in several cases (*Stone*, *Jaffree*) the Court struck them down under the first *Lemon* prong for lack of a “secular purpose.” To invalidate a law solely because of an impermissible legislative intent, without regard to a forbidden effect, is an unusual principle in constitutional law, and reflects a prophylactic approach: the Court seeks to keep the government from even trying to involve itself in religious matters.

These decisions also led some observers to suggest that government might violate the Establishment Clause if it relied too heavily on religious doctrines as the basis even for legislation on facially nonreligious matters such as abortion or other issues of sexuality. See, for instance, *Webster v. Reproductive Health Services* (1989) (Stevens J., dissenting) (arguing that abortion law based on declaration that life begins at conception “serves no identifiable secular purpose”). The Warren Court invalidated an Arkansas law forbidding the teaching of evolution in public schools—a remnant of the Scopes-era fundamentalist movement—on the ground that the law could not “be justified by considerations of state policy other than the religious views of some of its citizens” (*Epperson v. Arkansas* [1968]). Since then, however, the Court has generally affirmed the legitimate role of religious activism in politics, noting that “[a]dherents of individual faiths and individual churches frequently take strong positions on public issues” and have the right to do so “as much as secular bodies” (*Walz v. Tax Commission* [1970]). In the same vein, the fact that denials of government funding for abortions “coincide with the religious tenets of the Roman Catholic Church does not, without more, contravene the Establishment Clause” (*Harris v. McRae* [1980]).

Lemon’s Decline and Less Separationist Alternatives

The *Lemon* test came under substantial attack from some justices and commentators. Some found the test too indeterminate, especially in the various rulings on when a law’s “primary effect” was to advance religion or promote a secular goal such as education. But other objections ran deeper.

Some critics objected to the requirement that government not advance any religious proposition. They argued that the demand of neutrality was contradicted by the long historical tradition of government endorsements of religion: legislative prayers, presidential proclamations, symbolic displays, official mottoes, and statements such as “in God we trust” on coins and “under God” in the Pledge of Allegiance. As Justice Kennedy claimed, “A test for implementing the protections of the Establishment Clause that, if applied with consistency, would invalidate longstanding traditions cannot be a proper reading of the Clause” (*County of Allegheny v. American Civil Liberties Union* [1989] [concurring in part and dissenting in part]). Indeed, some critics observed, landmark founding-era documents themselves argued for religious liberty on religious grounds—“Almighty God hath

created the mind free,” began Jefferson’s bill establishing religious freedom in Virginia—and thus, paradoxically, might have been ruled invalid under the neutrality or no-advancement tests. Some critics argued that because many religious ideas concern matters of morality and justice, government cannot be neutral toward them but must embrace or reject them as it does secular ideas.

Critics of “neutrality” tended to train their attack on the decisions invalidating government-sponsored religious ceremonies or symbols. The Court turned to a historical approach in *Marsh v. Chambers* (1983), upholding the practice of legislative prayer on the basis that it had been instituted by the First Congress—three days before adoption of the Religion Clauses—and the delegates could not have “intended the Establishment Clause to forbid what they had just declared acceptable.” Relying solely on this history, the Court did not apply *Lemon* or any other analytical test. It used history not to develop a general legal principle reflecting the clause’s original meaning, but simply to validate the specific practice in question. Accordingly, it was unclear if or how *Marsh* would apply to any other issue, and the Court has never followed the *Marsh* approach again.

Then-Associate Justice Rehnquist offered an alternative principle to *Lemon*: the Establishment Clause was intended only “to prevent the establishment of a national religion or the governmental preference of one religious sect over another. (*Jaffree* [Rehnquist, J., dissenting]). He relied on quotes from the congressional debates on the First Amendment, as well as on many founding-era official statements endorsing religion in generalized form. But no one else on the modern Court ever limited the Establishment Clause solely to forbidding preferences between sects. As Professor Douglas Laycock pointed out, the first Congress’s rejection of drafts that would have prohibited only preferences for one sect further undermines the no-preferences position as a general Establishment Clause rule. Recently, however, Justice Scalia has urged the more limited position that the government must be neutral toward religion in financial aid cases, but may favor religion in noncoercive acknowledgments as long as they are nonpreferential among monotheistic faiths (*McCreary County v. American Civil Liberties Union* [2005] [dissenting opinion]).

Indeed, the more persistent alternative to *Lemon* is the no-coercion test: government may promote or acknowledge religion (perhaps only in generalized form) but may not coerce anyone to profess or participate in religion. The test fits much of the historical record, for most official acknowledgments of religion appear in noncoercive settings: nonbinding

proclamations, or displays on government property. But proponents of the neutrality approach answer that limiting the Establishment Clause's reach to coercive practices would make it redundant with the Free Exercise Clause, which (arguably) prohibits coercion to practice religion as well as not practice religion. In addition, they argue, noncoercive acknowledgments still threaten the harms at which the Establishment Clause was aimed—social division, alienation of dissenting citizens, corruption of religious integrity—especially in a society as pluralistic in religious views as America.

After several years of raising doubts about *Lemon*, the Court relied on the non-coercion test in *Lee v. Weisman* (1992), striking down officially sponsored prayers at public school graduation ceremonies. But *Weisman* specifically declined to overrule *Lemon*, and it referred to noncoercion as only the undisputed “minimum” guarantee of the Establishment Clause. Moreover, proponents of the test divided over its meaning, with Justice Kennedy's majority opinion finding “subtle” peer pressure on dissenting students to participate in the prayer, while Justice Scalia's dissent insisted that only coercion “by force of law and threat of penalty” was unconstitutional. Thus, the no-coercion test remained doubtful in both its status and its scope as of early 2006.

The other chief criticism of the *Lemon* test was that despite its invocation of “neutrality,” it actually produced hostility and discrimination against religious ideas and religiously motivated citizens. This objection primarily targeted the decisions on financial aid, which disqualified religious schools from the tax-financed support available to public and secular private schools. Those rulings treated public education as “neutral” because it explicitly advanced neither religious nor antireligious views. But critics argued that education limited to secular viewpoints competes with education based on religious viewpoints, and therefore providing equal aid to religious schools coincides more with Establishment Clause values of neutrality and individual choice in religious matters. These arguments, unlike the criticisms of the school prayer decisions, eventually made substantial headway on the Court.

Recent Case Law: Equal Access for Religion, But No Government Endorsement

The Rehnquist Court (1986 to 2005) retreated from strong church–state separationism in its Establishment Clause rulings, but only in part.

The major shift came in financial aid cases, where the Court more and more allowed religious institutions to participate on equal terms with nonreligious institutions. The “equal access” principle developed with respect to the less controversial issue of whether religious groups could meet voluntarily on public school grounds on the same terms as other student groups. Beginning with *Widmar v. Vincent* (1981), involving evangelical students at a public university, the Court held that permitting religious meetings along with other meetings did not violate the Establishment Clause and indeed, in several cases, was required by the Free Speech Clause principle of viewpoint neutrality. See also, for example, *Board of Education v. Mergens* (1990) (high school groups); and *Good News Club v. Milford Central School* (2001) (elementary school students).

Soon after *Widmar*, financial aid cases were reconceptualized as involving equal access for religion to government funding. *Mueller v. Allen* (1983) upheld a state tax deduction for tuition and other educational expenses of families, even though the vast majority of deductions went for religious schooling and the tuition benefit was not limited to the secular aspects of such schooling. Under a strict application of the *Lemon* approach, these features would have doomed the program. But the Court, while still using *Lemon*'s phrases, emphasized different features: The deduction's terms were neutral and thus created no incentive for parents to choose religious schools over public or secular private schools. The emphasis on neutral terms and individual choice continued in *Witters v. Dept. of Services* (1986), which allowed a blind student to use generally available state rehabilitation funds to study for the ministry at an evangelical Bible college. Under the program, the aid flowed to religious teaching “only as a result of the genuinely independent and private choices of aid recipients,” much like a state employee “donat[ing] all or part of [his] paycheck to a religious institution.”

The “private choice” approach culminated in *Zelman v. Simmons-Harris* (2002), which upheld the inclusion of religious schools in a program of vouchers for students in Cleveland's failing public schools. Like the tax deductions and rehabilitation funds, the voucher's terms were neutral and left the family the choice of the school at which to use it. The Court also found that “genuine secular alternatives” existed—charter and magnet public schools, secular private schools—so that children would not be pushed into religious education to escape poor public schools. *Zelman* set forth a permissive blueprint for aid, and by treating public schools as simply one “secular alternative” to religious education, it rejected *Lemon*'s premise that they were a neutral baseline.

But *Zelman* has not entirely displaced the separationist, *Lemon*-oriented approach. In *Locke v. Davey* (2004), the Court held that although a state program of college scholarships could include students studying theology in preparation for the ministry, the Free Exercise Clause did not require their inclusion. The majority gave the state discretion because it found “strong Establishment Clause interests” in denying public funding for clergy training, interests grounded in history as far back as Madison’s “Memorial and Remonstrance” and the rejection of taxes to support teachers of Christianity. Although *Davey*’s application beyond clergy training is uncertain, the decision limits the argument that religion must be allowed equal participation in private-choice programs.

Moreover, when an aid program falls outside the rubric of “private choice,” the Court has continued a *Lemon*-like approach. In *Mitchell v. Helms* (2000), a splintered Court upheld a federal law providing computers and other instructional equipment and materials to public and private, including religious, schools. Justices O’Connor and Breyer, the decisive votes, upheld the program only because it included safeguards to prevent “diversion” of materials to religious uses. They argued that direct aid to religious schools fell closer to the core prohibitions of the Establishment Clause than did aid to individuals who could use it at religious schools. This distinction—if it survives changes in the Court’s makeup—significantly affects funding not only of education but of social services, where aid often flows through direct government contracts with providers.

In contrast to its increasing approval of aid to private religious activities, the Rehnquist Court reaffirmed the decisions prohibiting government’s own religious activity. The Court refused to limit the Establishment Clause to cases of coercion against individuals, instead gravitating toward a test championed by Justice O’Connor: government should not act with the purpose or effect of endorsing (or disapproving of) religion or any religious view. Endorsement of a religious view, she argued, “sends a message to non-adherents that they are outsiders, not full members of the political community,” and a message to adherents that they are favored “insiders” (*Lynch v. Donnelly* [1984] [concurring]). The no-endorsement test gathered a majority in *County of Allegheny v. ACLU* (1989), which invalidated a county courthouse’s stand-alone display of a nativity scene (distinguishing the *Lynch* case, which had upheld a municipal nativity display accompanied by numerous secular Christmas symbols).

The endorsement test paralleled *Lemon* in looking beyond coercion to more subtle effects such as government messages concerning the status of citizens.

Accordingly, critics found the approach too subjective and complained that government disagrees on issues with dissenters every day without thereby consigning them to general second-class status. The “outsider” argument thus requires another step showing why disagreements on religious issues are of special concern. That step might be that religious debates are irrelevant to government policy, so the public divisions they create are unnecessary; that religious divisions are especially heated and irreconcilable; or that religious identity is more central to persons than are particular political views, and thus the alienation produced by government favoritism is deeper. But all of these propositions are debatable, some of them extremely so.

The Court recently reaffirmed its restrictions on even noncoercive government symbolism, by invalidating a display of the Ten Commandments in a county courthouse (*McCreary County*). Although the display also included historic secular documents of law and government, the majority interpreted it in the light of immediate previous displays that had been solely religious in nature, as well as numerous religious statements from county officials. The decision thus reaffirmed *Lemon*’s “secular purpose” prong, indeed arguably stiffening it by requiring that the secular motive not just exist but be “primary.”

Even approaches based on separationism and neutrality, however, can be expected to permit some religious statements and displays by government—although it is not always clear how to explain this logically. Religious elements may appear in a broader display that overall does not endorse religion: a crèche with secular Christmas symbols as was upheld in *Lynch v. Donnelly*, or a Ten Commandments plaque as one of an assortment of monuments on public grounds representing various historic events and ideas as was upheld in *Van Orden v. Perry* (2005). Moreover, individual justices who vote to invalidate some government symbols or statements have justified others—“In God we trust” on coins, “under God” in the Pledge of Allegiance—as examples of “ceremonial deism,” a category of short, highly generalized religious references, often with a long-standing history, that impose on no one’s liberty and may indeed have developed largely ceremonial rather than specifically religious meanings. See, for instance, *Newdow* (O’Connor, J., concurring).

To approve religious references only by stripping them of their religious meaning surely calls to mind the founding-era concern that official establishments undermine the purity and vigor of religion. It is also doubtful that some of these references, such as “under God” in the Pledge, have lost religious import. Justice Breyer was likely more honest when he explained his decisive vote to uphold the Decalogue display in

Van Orden: striking down all official religious symbols, especially longstanding ones, would be more divisive than are the symbols themselves. But Breyer provided no clear line for whether a display was permitted or forbidden; the jurisprudence in this area remains uncertain.

The recent cases reveal a shift in answers to the question posed at the outset of this entry: beyond protecting individuals from being coerced to engage in religion, what limits does the Establishment Clause impose on government? In the nineteenth and early twentieth centuries, the majority generally understood disestablishment to prevent tax-financed support for religious schools, but to permit governmental expression endorsing a generalized Christianity. At the dawn of the twenty-first century, the Supreme Court case law has moved in the opposite direction: greater latitude for religious schools and social services to receive aid on equal terms with nonreligious institutions, but significant limits on official endorsement even of familiar symbols like the Ten Commandments. The shift has several causes. The welfare state's widespread spending on social programs makes the denial of aid to religious providers appear less as nonentanglement and more as discrimination. And while increasing religious pluralism in America makes any explicit religious statement by government look more and more partial, financial aid can be defined in secular terms and in theory can be available to a wide range of religious groups. The pervasive modern state has reduced the viability of strict separationism as an ideal, and the competing ideals of equality, neutrality, and individual choice are more hospitable to aid programs than to explicit government endorsement of any religious view.

The Establishment Clause and Religious Institutional Autonomy

Finally, one potential implication of the Establishment Clause remains relatively unexplored by the Court: the use of the clause as a shield to protect religious institutions from government interference, at least in core or inherently religious matters such as doctrine, liturgy, and the selection of clergy. Establishments typically involved government oversight of such religious matters—albeit in the name of preserving the favored faith—and a prime purpose of disestablishment was to separate the structures of church and state to ensure the autonomy of religious life. The Establishment Clause may play an increased role in protecting religious institutional autonomy as Free Exercise Clause protections have declined with the

Court's holding (*Employment Division v. Smith* [1990]) that religiously motivated conduct generally has no constitutional claim to exemption from "neutral law[s] of general applicability."

A few Court decisions have sounded the theme of Establishment Clause immunity from regulation. Most explicitly, the Court invalidated financial aid to religious schools on the ground that the regulation accompanying aid produces "excessive entanglement" (*Lemon*) and "the spectre of government secularization of a creed" (*Aguilar v. Felton* [1985]). Ironically, such rulings used the school's autonomy as a ground to strike down aid that the school wished to receive. "Pure" protections of religious institutional autonomy, by contrast, have invoked the Religion Clauses in general, a rationale consistent with, but not explicitly mentioning, the Establishment Clause. Under a century-long series of decisions involving property disputes between church factions, civil courts deciding such cases must sometimes defer to the resolution of the matter by the highest authority within the church (*Watson v. Jones* [1872], *Serbian E. Orthodox Diocese v. Milivojevich* [1976]). Although states may often apply "neutral principles" of property or trust law to such disputes, they must defer to the internal church authority whenever the controversy requires interpretation of religious concepts or involves "religious authority or dogma" (*Jones v. Wolf* [1979], *Milivojevich*, *Smith*). Applying these principles, lower courts have barred suits by clergy against churches for employment discrimination, suits against clergy and churches for "malpractice" in religious counseling, and—in some cases—suits against churches for negligent hiring or supervision of clergy who commit torts. Whether these decisions extend to nonclergy positions in religious institutions is uncertain at best, although the Supreme Court in *NLRB v. Catholic Bishop* (1979) held that application of collective bargaining laws to teachers in parochial schools would raise serious constitutional questions concerning church-state entanglement. Institutional autonomy from regulation remains among the least explored implications of the Establishment Clause.

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References and Further Reading

- Conkle, Daniel O., *Toward a General Theory of the Establishment Clause*, *Northwestern University Law Review* 82 (1988): 1113–1194.
- Esbeck, Carl H., *Dissent and Disestablishment: The Church-State Settlement in the Early Republic*, *Brigham Young University Law Review* 2004 (2004): 4:1385–592.
- Laycock, Douglas, 'Nonpreferential' Aid to Religion: *A False Claim About Original Intent*, *William and Mary Law Review* 27 (1986): 875–921.

- Lupu, Ira C., *Government Messages and Government Money: Santa Fe, Mitchell v. Helms, and the Arc of the Establishment Clause*, William and Mary Law Review 42 (2001): 771–822.
- McConnell, Michael W., *Coercion: The Lost Element of Establishment*, William and Mary Law Review 27 (1986): 933–941.
- McConnell, Michael W., John H. Garvey, and Thomas C. Berg. *Religion and the Constitution*. Boulder, CO: Aspen Publishers, 2002.
- Smith, Steven D., *The Rise and Fall of Religious Freedom in Constitutional Discourse*, University of Pennsylvania Law Review 140 (1991): 149–239.
- Sullivan, Kathleen M., *Religion and Liberal Democracy*, University of Chicago Law Review 59 (1992): 195–223.

Cases and Statutes Cited

- Abington School Dist. v. Schempp*, 374 U.S. 203 (1963)
- Aguilar v. Felton*, 473 U.S. 402 (1985)
- Board of Education v. Mergens*, 496 U.S. 226 (1990)
- County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573 (1989)
- Elk Grove Unified School District v. Newdow*, 542 U.S. 1 (2004)
- Employment Division v. Smith*, 494 U.S. 872 (1990)
- Engel v. Vitale*, 370 U.S. 421 (1962)
- Epperson v. Arkansas*, 393 U.S. 97 (1968)
- Everson v. Board of Education*, 330 U.S. 1 (1947)
- Good News Club v. Milford Central School*, 533 U.S. 98 (2001)
- Harris v. McRae*, 448 U.S. 297 (1980)
- Jones v. Wolf*, 443 U.S. 595 (1979)
- Lee v. Weisman*, 505 U.S. 577 (1992)
- Lemon v. Kurtzman*, 403 U.S. 602 (1971)
- Locke v. Davey*, 540 U.S. 712 (2004)
- Lynch v. Donnelly*, 465 U.S. 668 (1984)
- Marsh v. Chambers*, 463 U.S. 783 (1983)
- McCreary County v. American Civil Liberties Union*, 125 S. Ct. 2722 (2005)
- Mitchell v. Helms*, 530 U.S. 793 (2000)
- Mueller v. Allen*, 463 U.S. 388 (1983)
- NLRB v. Catholic Bishop*, 440 U.S. 490 (1979)
- Serbian E. Orthodox Diocese v. Milivojevic*, 426 U.S. 696 (1976)
- Stone v. Graham*, 449 U.S. 39 (1980)
- Van Orden v. Perry*, 125 S.Ct. 2854 (2005)
- Wallace v. Jaffree*, 472 U.S. 38 (1985)
- Walz v. Tax Commission*, 397 U.S. 664 (1970)
- Watson v. Jones*, 13 Wall. 679, 722–724 (1872)
- Webster v. Reproductive Health Services*, 492 U.S. 490 (1989)
- Widmar v. Vincent*, 454 U.S. 263 (1981)
- Witters v. Dept. of Services*, 474 U.S. 481 (1986)
- Zelman v. Simmons-Harris*, 536 U.S. 639 (2002)

ESTABLISHMENT CLAUSE: THEORIES OF INTERPRETATION

The Establishment Clause of the First Amendment to the Constitution provides that “Congress shall make no law respecting an establishment of religion”

The aim of the Establishment Clause is to keep the government neutral in matters of religion (*Epperson v. Arkansas* [1968], *McCreary County v. ACLU* [2005]). The Supreme Court has used a number of different approaches to determine whether a government action has departed from the neutrality principle and unconstitutionally established religion.

The Court has most often used the *Lemon* test, a three-prong test announced in *Lemon v. Kurtzman* (1971). More recently, however, Justice Sandra Day O’Connor has moved the Court towards more frequent use of the “endorsement test.” See, for instance, *Lynch v. Donnelly* (1983) (O’Connor, J., concurring), *County of Allegheny v. ACLU* (1989) (O’Connor, J., concurring), and *Santa Fe Ind. Sch. Dist. v. Doe* (2000). Still another test that has gained some currency on the Court is the “coercion test” articulated by Justice Anthony Kennedy. See *Allegheny* (Kennedy, J., dissenting in part). In light of the Court’s turbulent approach in this area, as well as changes in the Court’s membership, it is reasonable to characterize the Establishment Clause as an area in transition.

The *Lemon* Test

When applying the *Lemon* test, courts will find no establishment of religion if the government action (1) has a secular legislative purpose, (2) does not have the effect of advancing or prohibiting religion, and (3) does “not foster ‘an excessive entanglement with religion’” (*Lemon* [internal citations omitted]).

First, the challenged law or action must have a legitimate secular purpose. In *Stone v. Graham* (1980) (*per curiam*), for example, the Supreme Court struck down a state law requiring that the Ten Commandments be hung on the walls of Kentucky classrooms. The Court looked beyond the secular purpose proffered by the legislature and found that the “pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature.” Similarly, in *Wallace v. Jaffree* (1985), the Court found an unconstitutional purpose behind a law whose sponsor had confirmed that it was “an ‘effort to return voluntary prayer’ to the public schools.” More recently, in *McCreary County v. ACLU* (2005), the Court found that a Ten Commandments display in a courthouse violated the Establishment Clause. Critical to the Court’s decision was that the initial display included only the Ten Commandments and a subsequent display, erected after the first was challenged, included religious excerpts from historical documents. The Court found the purpose behind the display was to “favor religion.” As the Court noted in

McCreary, “the principle of neutrality has provided a good sense of direction: the government may not favor one religion over another, or religion over irreligion.”

The second prong of the *Lemon* test looks at whether the effect of the challenged government action is the establishment of religion. In *Lynch*, the Court upheld a crèche surrounded by other secular Christmas symbols, including a Santa Claus house, reindeer, and a Christmas tree, because the display’s effect was not to establish religion over nonreligion or endorse one particular sect over another. Similarly, in *Allegheny*, the Court approved a holiday display that included a menorah, a Christmas tree, and a plaque explaining a secular connection. The inclusion of the secular elements with the religious ones meant that the display did not have the effect of establishing religion. However, the Court held unconstitutional a separate display, consisting solely of a crèche sitting on another piece of government property. By displaying the crèche on its own, without the surrounding secular items, the county sent “an unmistakable message that it supports and promotes the Christian praise to God that is the crèche’s religious message.” Similarly, student-led prayer before high school football games had the unconstitutional effect of endorsing religion in *Santa Fe*. There, the Court found that forcing students to make religion a factor in deciding whether to attend the games had the “effect of coercing those present to participate in an act of religious worship.”

The entanglement prong of the *Lemon* test is focused primarily on government spending that supports religion and the resulting government intrusion into religious organizations. In *Lemon* itself, the policies of two states to spend tax dollars to support religious schools were found unconstitutional because of excessive entanglement. To determine if the entanglement between government and religion is excessive, the Court looks at “the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority.” Because of the intrusive government oversight necessary to administer financial aid, the Court in *Lemon* found excessive entanglement in the states’ laws. A similar monetary and oversight analysis for the entanglement prong was applied to a Texas sales tax exemption for religious publications in *Texas Monthly v. Bullock* (1989). The statute required that applicants for the exemption prove to government officials that their “message or activity is consistent with ‘the teaching of the faith.’” This entanglement could also lead to the perception that government has approved some religions and disapproved others (*Bullock* quoting

United States v. Lee [1982] [Stevens, J., concurring]). Where government action, especially concerning money, could result in intrusive oversight of religion, the Court has found excessive entanglement and an Establishment Clause violation.

The Endorsement Test

The endorsement test grew out of the effects and purpose prongs of the *Lemon* test. In *Lynch*, Justice O’Connor suggested that the Court should focus its attention not on generalized inquiries into the purpose and effect of the challenged government action, but instead should ask whether the action was taken with the purpose, or had the effect, of endorsing religion (*Lynch* [O’Connor, J., concurring]). She also suggested analyzing government action from the standpoint of the “reasonable observer,” asking whether that observer would believe her standing in the political community was based on adherence or nonadherence to that message. In *Lynch* itself, the surrounding secular symbols neutralized the religious nature of the crèche, ensuring that a reasonable observer would not feel the government was endorsing the crèche’s religious message. However, in *Allegheny*, there were no secular symbols surrounding the crèche, which to Justice O’Connor conveyed “a message to nonadherents of Christianity that they are not full members of the political community, and a corresponding message to Christians that they are favored members of the political community.” This religious symbol in a government building had the “the unconstitutional effect of conveying a government endorsement of Christianity.”

Justice O’Connor’s theory of endorsement animates the majority opinions in *Wallace*, *Allegheny*, and *Santa Fe*. In *Wallace*, the majority framed the analysis of the purpose prong as “whether the government intends to convey a message of endorsement or disapproval of religion.” In *Allegheny*, the majority noted the recent trend in Court decisions of paying “close attention to whether the challenged governmental practice either has the purpose or effect of ‘endorsing’ religion.” Finally, in *Santa Fe*, the Court deemed school-sponsored religious speech “impermissible because it sends the ancillary message to members of the audience who are nonadherents ‘that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community’” (*Santa Fe* citing *Lynch*). While the Court still applies the *Lemon* framework in these cases, its analysis of the effects and purpose prong has been

transformed by Justice O'Connor's endorsement test. In most cases, the previously generalized inquiry into purpose and effect has been narrowed into a search for one particular purpose (to endorse) and one specific effect (endorsement).

The Coercion Test

Justice Kennedy has proposed a coercion test for Establishment Clause cases, and Justice Thomas has recently incorporated this idea into his own opinions (*Allegheny* [Kennedy, J., dissenting], *Van Orden v. Perry* [2005] [Thomas, J., concurring]). Justice Kennedy suggested in *Allegheny* that actions should be invalidated only when they "further the interests of religion through the coercive power of government." He suggested that coercion, rather than "infringement on religious liberty by passive or symbolic accommodation" is the evil that the Establishment Clause is designed to guard against. Justice Kennedy incorporated the coercion analysis in his opinion for the majority in *Lee v. Weisman* (1992). There, a public school graduation prayer led by a rabbi was found to violate the Establishment Clause. Kennedy held that "at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion or religious faith, or tends to do so'" (internal citations omitted). Because children were coerced to either participate in or protest a religious exercise, the school violated the Establishment Clause in *Lee*.

Justice Thomas has recently begun to advocate use of the coercion test as well. He argued in *Van Orden* that the original constitutional meaning of establishment was coercion. "The Framers understood an establishment 'necessarily [to] involve actual legal coercion'" (*Van Orden* [Thomas, J., concurring] quoting *Elk Grove Unified Sch. Dist. v. Newdow* [2004] [Thomas, J., concurring in the judgment]). Justice Thomas had argued in *Newdow* that "'government practices that have nothing to do with creating or maintaining . . . coercive state establishments' simply do not 'implicate the possible liberty interest of being free from coercive state establishments'" (*Van Orden* quoting *Newdow* [Thomas, J., concurring]). While Justice Kennedy was the first member of the contemporary Court to propose use of the coercion test, he has not suggested that it be adopted to represent the full scope of the Establishment Clause's reach. As his opinion in *Lee* intimated, he sees refraining from coercion as the "minimum" that is required of

government. Justice Thomas, on the other hand, has opined that *only* coercive governmental measures can violate the Establishment Clause.

In light of these crosscurrents in the Court's Establishment Clause jurisprudence, it is difficult to predict with any confidence which approach (if any) will come to dominate the Court's analysis in the future. Because of her centrality in the development and application of the endorsement test, Justice O'Connor's departure from the Court heightens this uncertainty. There are few, if any, signs of the emergence on the Court of a consistent, clear majority in favor of a single approach to deciding Establishment Clause cases.

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References and Further Reading

- Levy, Leonard W. *The Establishment Clause: Religion and the First Amendment*. Chapel Hill: University of North Carolina Press, 1994.
 McConnell, Michael W., *Religious Freedom at a Crossroads*, University of Chicago Law Review 59 (1992): 1:115–194.
 Shiffrin, Steven H., *The Pluralistic Foundations of the Religion Clauses*, Cornell Law Review 90 (2004): 1:9–95.

Cases and Statutes Cited

- County of Allegheny v. ACLU*, 492 U.S. 573 (1989)
Elk Grove Unified School District v. Newdow, 542 U.S. 1 (2004)
Epperson v. Arkansas, 393 U.S. 97 (1968)
Lee v. Weisman, 505 U.S. 577 (1992)
Lemon v. Kurtzman, 403 U.S. 602, 613 (1971)
Lynch v. Donnelly, 465 U.S. 668 (1984)
McCreary County v. American Civil Liberties Union, 125 S.Ct. 2722 (2005)
Santa Fe Ind. Sch. Dist. v. Doe, 530 U.S. 290 (2000)
Stone v. Graham, 449 U.S. 39 (1980)
Texas Monthly v. Bullock, 489 U.S. 1 (1989)
U.S. v. Lee, 455 U.S. 252, 262 (1982)
Van Orden v. Perry, 125 S.Ct. 2854 (2005)
Wallace v. Jaffree, 472 U.S. 38 (1985)

ESTABLISHMENT OF RELIGION AND FREE EXERCISE CLAUSES

The First Amendment of the U.S. Constitution begins as follows: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The first clause is commonly called the Establishment Clause, and the second the Free Exercise Clause. Together they are commonly called the Religion Clauses. Their meaning, however, is a matter of considerable debate.

Do the Clauses Have Different Meanings?

The first issue is whether the two clauses have different meanings or are two different ways of making the same point. Scholars who say the latter contend that the clauses together were intended to prevent Congress from directly addressing and legislating on the subject of religion or any religious issue. They take this position, first, because during the ratification of the Constitution several of its defenders stated that it was not intended to grant Congress any power over religion. For example, at the Virginia Ratifying Convention, James Madison said, “There is not the shadow of right in the general government to intermeddle with religion. Its least interference with it would be a most flagrant usurpation.” Second, they note that the Constitution’s opponents, unconvinced by Madison’s and similar assurances, insisted that an amendment be added to the Constitution to make it abundantly clear that Congress has no jurisdiction over religion. Finally, both the First Amendment’s initial words, “Congress shall make no law . . . ,” and the fact that Madison originally intended for it to become part of Article I, section 9, of the Constitution, which lists restraints on the powers granted Congress in section 8, imply that the Religion Clauses were meant to deny Congress any jurisdiction over religion.

Those scholars who interpret the Religion Clauses as a single provision meant to prevent the national government from legislating on the subject of religion are, however, divided over why early Americans wanted such a provision. Some scholars contend that the Religion Clauses were intended to protect states’ rights. They note that many of the Constitution’s opponents feared that the new national government it created would be so powerful as to significantly weaken, if not destroy, the state governments. They also note that the states traditionally had the power to legislate on the subject of religion. The Religion Clauses, they reason, were intended to protect this power of the states by denying it to the national government.

Other scholars say that the reason the Religion Clauses gave jurisdiction over religion to the states was because the nation was so divided over the issue of church–state relations that the framers of the Religion Clauses could not possibly have agreed on what policy toward religion the national government should have. Rather than proposing a policy that would have been controversial and divisive, they drafted the Religion Clauses simply as a way of saying that the issue should be left up to the individual states to resolve. In either case, whether to protect states’ rights or to avoid dealing with an issue “too hot to

handle,” the Religion Clauses have no substantive meaning, that is, they express no position on what the proper relationship between religion and government should be. Rather, they uphold the principle of federalism.

Another, larger group of scholars, while agreeing that the Religion Clauses were meant to deprive the national government of jurisdiction over religion, contend that they did so primarily, if not entirely, for substantive reasons. They point out that most early Americans thought that whenever *any* government legislates on the subject of religion it poses a threat to religious freedom and to the integrity of religion itself, and often leads to conflict among different religions and to political instability. They also note that according to the contract theory of government, originally propounded by John Locke and widely accepted by early Americans, liberty of conscience is an inalienable right—one that persons can never and have never ceded to any government’s control.

In contrast to the preceding interpretations of the Religion Clauses, the Supreme Court and some scholars have said that the Establishment and Free Exercise Clauses have different meanings and were not intended to deprive the government of all jurisdiction over religion. Essentially the Court has said that the Free Exercise Clause prohibits the government from *harming or disfavoring* religion in general, any particular religion, or any person or group because of her/his/its religion, and the Establishment Clause prohibits it from *aiding or favoring* the same. It has also said that for the Free Exercise Clause, but not the Establishment Clause, to be violated, coercion must be present or threatened.

If the Clauses Have Different Meanings, Can They Be Reconciled?

The Court’s interpretation of the Religion Clauses has proven to be problematic, because it makes it difficult for courts to apply them in cases without creating conflict between the clauses. Is it possible for the government to avoid harming religion without aiding it, and vice versa? The answer depends on the kind of harm or aid that is prohibited—direct and intentional or indirect and unintentional. If it is the former, then conflict between the two clauses can be avoided, for there is no reason why the government’s not directly and intentionally harming religion means that it is necessarily aiding religion, and vice versa. According to this interpretation, what the two clauses require is government *neutrality* toward all religions

and between religion and nonreligion, and this can be achieved if the government avoids directly legislating either for or against religion, any particular religion, or any person or group because of his/her/its religion.

On the other hand, if the Court were to hold that the Religion Clauses prohibit harm and aid that is indirect and unintentional as well as direct and intentional, then it becomes difficult if not impossible to reconcile the two clauses. For example, if the Free Exercise Clause is interpreted as prohibiting *all* government-imposed restraints or burdens on religion so that persons or groups do not have to obey valid, secular, generally applicable laws, provided they have a sincere religious reason for not doing so, then it can be argued that the government is favoring or giving special treatment to religious persons and groups, because nonreligious ones are not entitled to such exemptions. At times, however, this is how the Court has interpreted the Free Exercise Clause (see *Sherbert v. Verner* [1963] and *Wisconsin v. Yoder* [1971]). Similarly, if the Establishment Clause is interpreted as prohibiting *all* government aid to religion so that educational and welfare-type programs that are primarily secular in nature but sponsored and operated by religious organizations are precluded from receiving government funding, then it can be argued that the government is disfavoring or discriminating against religious organizations, because nonreligious organizations are allowed to receive the government funding. At times, however, this is how the Court has interpreted the Establishment Clause (see *Lemon v. Kurtzman* [1971] and *Aguilar v. Felton* [1985]).

Since approximately 1990, primarily to avoid interpreting the Religion Clauses in a way that would cause them to conflict with each other, the Court has adopted neutrality as the guiding principle to be followed when it decides cases arising under the Religion Clauses. In effect, it has said that it is only direct, intentional harm or aid that is prohibited by the free exercise and Establishment Clauses, respectively. In *Employment Division, Dept. of Human Resources v. Smith* (1990), therefore, the Court held that the Free Exercise Clause does not guarantee a right to religion-based exemptions from valid, secular, generally applicable laws that only indirectly and unintentionally harm the exercise of religion, and in *Agostini v. Felton* (1997) and *Zelman v. Simmons-Harris* (2002), the Court upheld government funds going to parochial schools because the aid to religion was indirect and secondary.

Some scholars have criticized the Court's move to neutrality as the unifying principle of the Religion Clauses. Those who believe that the Free Exercise Clause guarantees a right to religion-based exemptions from valid, secular laws contend that the basic

principle underlying and unifying both Religion Clauses is not neutrality but religious *freedom*. They argue that even indirect and unintentional government regulations of or burdens on the exercise of religion should be disallowed except in those cases when the government can provide "compelling" reasons for them. On the other hand, those who believe that the Establishment Clause prohibits even indirect and unintentional aid to religion contend that the basic principle underlying and unifying both Religion Clauses is *separation* of government and religion. They argue that government funding of church-run secular programs inevitably involves government control over and entanglement in religion.

The Court, however, is not likely to adopt either the *freedom* or *separation* interpretation of the Religion Clauses, even though theoretically either one could work to unify the clauses. The main problem with both is that as a practical matter there cannot be either complete religious freedom or complete separation of government and religion, and yet there is no workable test for determining where to "draw the line," that is, when to compromise either freedom or separation. In contrast, *neutrality*, which prohibits only direct, intentional harm or aid to religion, is relatively easy to apply and, thus, seems likely to remain as the dominant principle for reconciling the Religion Clauses.

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References and Further Reading

- Amar, Akhil R. *The Bill of Rights: Creation and Reconstruction*. New Haven, CT: Yale University Press, 1998.
- Conkle, Daniel O., *The Path of American Religious Liberty: From the Original Theology to Formal Neutrality and an Uncertain Future*, Indiana Law Journal 75 (Winter 2000): 1–36.
- Kurland, Philip B. *Religion and the Law: Of Church and State and the Supreme Court*. Chicago: Aldine, 1962.
- Laycock, Douglas, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, DePaul Law Review 39 (1990): 993–1018.
- Sherry, Suzanna, *Lee v. Weisman: Paradox Redux*, Supreme Court Review 1992 (1993): 123–153.
- Smith, Steven D., *The Rise and Fall of Religious Freedom in Constitutional Discourse*, University of Pennsylvania Law Review 140 (1991): 149–240.
- . *Foreordained Failure: The Quest for a Constitutional Principle of Religious Freedom*. New York: Oxford University Press, 1995.

Cases and Statutes Cited

- Agostini v. Felton*, 521 U.S. 203 (1997)
- Aguilar v. Felton*, 473 U.S. 402 (1985)
- Employment Division, Dept. of Human Resources v. Smith*, 494 U.S. 872 (1990)

Lemon v. Kurtzman, 403 U.S. 602 (1971)
Sherbert v. Verner, 374 U.S. 398 (1963)
Wisconsin v. Yoder, 406 U.S. 205 (1972)
Zelman v. Simmons-Harris, 536 U.S. 639 (2002)

See also Establishment Clause (I): History, Background, Framing; Establishment Clause Doctrine: Supreme Court Jurisprudence; Free Exercise Clause (I): History, Background, Framing; Free Exercise Clause Doctrine: Supreme Court Jurisprudence

ESTATE OF THORNTON v. CALDOR, 472 U.S. 703 (1985)

Estate of Thornton v. Caldor is an important case because it limited the ability of states to require private employers to accommodate the religious beliefs of employees. In *Estate of Thornton*, the U.S. Supreme Court struck down a Connecticut statute that required private employers to allow employees to take their Sabbath day off regardless of which day that was. Some scholars consider *Estate of Thornton* to be part of a “one-two punch” impacting those whose religious beliefs or practices require them to refrain from work on the Sabbath. The first “punch” came in the early 1960s when the Supreme Court upheld “Sunday closing laws” against challenges under the Establishment Clause (*McGowan v. Maryland* [1961]), and under the Free Exercise Clause (*Braunfeld v. Brown* [1961]). These laws required businesses to close on Sunday, even though this could have a profound impact on religious minorities such as Jews and Seventh Day Adventists, who would also have to close their stores on Saturday, thus effectively closing those businesses for the entire weekend. In fact, the Connecticut law in question was part of its “Sunday closing law,” and was an attempt to accommodate those who would be forced to work on their Sabbath. The Connecticut Supreme Court struck down the general Sunday closing provisions of the law under the Connecticut Constitution, but the provision requiring employers to allow employees to take their Sabbath day off was not challenged in that case.

In an opinion by Chief Justice Burger, the Court applied the *Lemon* test and held that the Connecticut law violated the Establishment Clause. The *Lemon* test requires that a law have a secular purpose, a primary effect that neither advances or inhibits religion, and that the law not excessively entangle government and religion. The Court held the Connecticut law violated this test because the statute’s primary effect was to advance a “particular religious practice.” The Court pointed out that the law gave employees the absolute power to designate their Sabbath day, and to take off on that day if required by

religious concerns. The Court also noted that the law had no exceptions based on employer necessity. Therefore, employees could not be penalized for taking their Sabbath day off even if doing so caused the employer significant economic harm, forced the employer to close down its business, or forced other workers, including those with greater seniority under a valid seniority system, to cover for employees who took their Sabbath day off. Moreover, only those who asserted religious reasons for taking the day off were protected under the law. Thus, other employees with a valid reason for taking the day off would not receive similar consideration under the law.

Many who have criticized this decision have done so because when combined with the “Sunday closing law” cases *Estate of Thornton* could lead to a regime where the dominant faith’s Sabbath is accommodated and arguably preferred by government, while government is prevented from requiring private entities to accommodate those who are negatively effected by the government preference. After *Estate of Thornton*, states cannot protect employees who are religiously compelled to take their Sabbath day off by requiring employers to allow them to do so. The critics suggest that in light of the “Sunday closing cases” this result favors mainstream Christianity.

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Cases and Statutes Cited

Braunfeld v. Brown, 366 U.S. 599 (1961)
Lemon v. Kurtzman, 403 U.S. 602 (1971)
McGowan v. Maryland, 366 U.S. 420 (1961)

ESTELLE v. SMITH, 451 U.S. 454 (1980)

In this case, the defendant was charged with capital murder stemming from his participation in an armed robbery. The trial judge ordered a psychiatric exam to determine whether Estelle was competent to stand trial. After the defendant was tried and convicted, the doctor who conducted the pretrial examination testified for the state at the sentencing hearing on the issue of whether Estelle would be a future danger to society. Pursuant to Texas law, the jury answered the “future dangerousness” question and two other required questions in the affirmative, and the judge imposed the mandatory death penalty. The U.S. Supreme Court reversed. Justice Burger, writing an opinion in that all justices joined or concurred, held that the admission of the doctor’s testimony violated Estelle’s Fifth Amendment privilege against compelled self-incrimination. The defendant was not advised prior to the psychiatric examination that he had

a right to remain silent, and that any statement he made could be used against him at a capital sentencing proceeding, as required by the famous case *Miranda v. Arizona* (1966). Moreover, Estelle was denied his Sixth Amendment right, as defense counsel was not notified that the competency examination would encompass the issue of future dangerousness, and the defendant had no opportunity to consult with his counsel in deciding whether to submit to the examination.

In the years since *Estelle* was rendered, it has been narrowed by two subsequent Supreme Court decisions. In *Penry v. Johnson* (2001), the Court held that where a defendant chooses to offer expert testimony regarding his mental condition at trial or sentencing, earlier unwarned and uncounseled statements made to a psychiatrist may be used against him. In *Allen v. Illinois* (1986), the Court held five to four that use of psychiatric examinations in proceedings to commit individuals found to be “sexually dangerous persons” is not prohibited by the Fifth Amendment, as the proceedings are civil not criminal.

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References and Further Reading

- Comment, *The Right to Counsel During Court-Ordered Psychiatric Examinations of Criminal Defendants*, Villanova University Law Review 26 (1980): 135.
 Cochran, Gregory R., *Is the Shrink's Role Shrinking? The Ambiguity of Federal Rule of Criminal Procedure 12.2 Concerning Government Psychiatric Testimony in Negating Cases*, University of Pennsylvania Law Review 147 (1999): 1403.
 Wright, Charles. *Federal Practice and Procedure*. 3rd ed. St. Paul, MN: West Group, 1999, and 2003 pocket part.

Cases and Statutes Cited

- Allen v. Illinois*, 478 U.S. 364 (1986)
Miranda v. Arizona, 384 U.S. 436 (1966)
Penry v. Johnson, 532 U.S. 782 (2001)

See also **Capital Punishment; Capital Punishment and the Equal Protection Clause Cases; Capital Punishment: Due Process Limits; Capital Punishment: History and Politics; Capital Punishment Reversed; Capital Punishment and Race; Self-Incrimination (V): Historical Background**

ESTELLE v. WILLIAMS, 425 U.S. 501 (1975)

Williams reinforced the concept that defendants must make timely objections; otherwise, any constitutional violations would be deemed harmless error. Williams

was held in custody pending trial. On the day of trial, Williams asked for and was denied by the jail, his civilian clothes. Consequently, Williams was tried and convicted in clothes that were distinctly marked as prison clothes. Williams did not make an objection to wearing these clothes.

The Court (six to two) found that Williams's wearing prison clothes at trial was harmless error because he did not make a timely objection. The Court held that it would violate the Fourteenth Amendment if an accused were compelled to trial in prison clothes because the jurors could be biased against him. However, the accused must make an objection in a timely manner so that the trial judge may rule on the issue. In the instant case, it was the trial judge's practice to allow the accused to wear his civilian clothes. Because Williams had no defense to present at trial and the defense counsel referenced his prison attire at trial, it appeared that Williams wore his jailhouse clothes only to elicit jury sympathy. There was nothing in the record to show that Williams was forced to stand trial in these clothes or that there was any reason to excuse the defense from raising an objection.

Justices Marshall and Brennan dissented on the grounds that Williams's due process rights were not waived when he did not knowingly consent to being tried in his prison clothes.

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References and Further Reading

- Chapman v. California*, 386 U.S. 18 (1967).
 Fischer, Paul A. Annotation: Propriety and Prejudicial Effect of Compelling Accused to Wear Prison Clothing at Jury Trial—Federal Cases. *American Law Reports, Federal Series* 26 (2005): 535.
Hernandez v. Beto, 443 F. 2d 634 (Fifth Cir.), cert. denied, 404 U.S. 897 (1971).
Illinois v. Allen, 397 U.S. 337 (1970).
Turner v. Louisiana, 379 U.S. 466 (1965).

See also **Harmless Error; Substantive Due Process**

ESTES, BILLIE SOL (1925–)

Billie Sol Estes, the subject of media-tainted trial, was born in the Panhandle of Texas in 1925 and reared in Abilene. He moved to Pecos in 1951 with the hopes of starting an agricultural business. By 1960, Estes had built a fortune through land and business purchases. To help amass his fortune Estes would befriend prominent politicians, most notably then-Senate majority leader, Lyndon Johnson of Texas, who would later become vice president and president of the United

States. He would also befriend Johnson's presidential running mate, John F. Kennedy.

In 1961, Estes's cotton holdings became the subject of a Department of Agriculture investigation. In 1962, the *Pecos Independent and Enterprise* began publishing a series of stories detailing Estes's fraudulent business practices, which led to an indictment charging that he had created a multimillion-dollar scheme that illegally manipulated government cotton allotments. The indictment and pretrial maneuvers that followed garnered tremendous media attention due to the fact that Estes was a well-known Texas businessman who had close connections with prominent politicians; his pretrial hearing was carried live on television and radio.

During the trial under the rules of the Texas courts, cameras and still photographers were allowed in the courtroom to record the Estes trial, in which he was convicted of fraud for swindling hundreds of farmers. Estes sued the State of Texas, claiming that he did not receive a fair trial as a result of the publicity associated with his pretrial and trial.

The Supreme Court overturned his conviction in *Estes v. Texas* (1965) citing Estes's rights to due process were violated due to excessive publicity, and ruling that Estes should have a new trial. He was retried without cameras in the courtroom and convicted again of fraud and sentenced to prison. Sixteen years later the Court would overturn its *Estes* decision in *Chandler v. Florida* (1981).

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References and Further Reading

Moore, Roy L. *Mass Communication Law and Ethics*. 2d ed. Mahwah, NJ: Lawrence Erlbaum Associates, 1999.
 Pecos Enterprise. *Bill Sol's Back in Town*. *Pecos Enterprise Archives*. <http://www.pecos.net/news/arch2002/012302p.html>.

Cases and Statutes Cited

Estes v. Texas, 381 U.S. 532 (1965)
Chandler v. Florida, 449 U.S. 560 (1981)

EUGENIC STERILIZATION

The latter half of the nineteenth century witnessed great scientific advances in a number of fields, including biology. Charles Darwin's *On the Origins of the Species by Means of Natural Selection* and Gregor Mendel's experiments shed light on the hereditary transmission of characteristics, prompting consideration of how to use this knowledge to aid humanity.

In 1883, the English scientist Sir Francis Galton was the first to coin the phrase "eugenics," which means "good in birth" in Greek. Eugenics was concerned with applying principles of animal husbandry to humans, encouraging positive genetic traits and eliminating negative genetic traits by controlling who could breed and pass on their genes.

The scientific approach to human breeding found particular resonance in the Progressive movement in the United States. That movement was concerned with improving the conditions of the worst-off in society. Eugenics offered the promise that through the application of scientific principles, future generations of such unfortunates could avoid being born, improving the lot of all society. The rudimentary understanding of genetics at the time conceptualized such ills as pauperism, criminality, insanity, immorality, and low intelligence as negative hereditary characteristics that could be "bred out" of the bloodline. Progressive eugenicists sought to ensure that those possessing these characteristics would decline as a proportion of the population by encouraging or mandating the sterilization of people who displayed those characteristics.

While the ideas behind eugenics found favor across the world, the United States led the way in their practical application with Indiana becoming the first state to pass a law enabling the sterilization of persons for eugenic purposes in 1907. A further twenty-two states passed similar laws by 1926, and by 1940, thirty states had passed eugenic sterilization laws, with California and Virginia being particularly strong proponents. Most states provided for involuntary eugenic sterilization, whereby the state could forcibly sterilize a person found to be unfit to have children, because such offspring would be a similar burden on society.

The Supreme Court ruled involuntary eugenic sterilization laws constitutional in the case of *Buck v. Bell* (1927). The eight-to-one decision was announced with an opinion by Oliver Wendell Holmes declaring, "It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind . . . Three generations of imbeciles are enough." In *Skinner v. Oklahoma* (1942), the Supreme Court limited the use of involuntary eugenic sterilization for habitual criminals.

For a number of years eugenics was widely accepted; it was taught in many of the nation's colleges, eugenicists took part in state fairs across the nation and a number of famous people supported eugenics, including Presidents Theodore Roosevelt and Calvin Coolidge; John Maynard Keynes, the

noted economist; and Margaret Sanger, the founder of Planned Parenthood. The popularity of eugenics declined in the late 1930s, but involuntary eugenic sterilizations continued in the United States until 1979, by which time over 60,000 Americans had been sterilized.

The concern for the gene pool in the United States that was expressed through eugenic sterilization laws can also be seen in its miscegenation laws and the curtailment of immigration from Southern and Eastern Europe (whose immigrants were seen as particularly degenerate and a threat to future generations of Americans) in the Immigration Act of 1924.

The American eugenic sterilization laws formed the basis for similar laws across the world, starting in the Swiss canton of Vaud in 1928. Denmark, Sweden, Finland, Belgium, Austria, Norway, and Germany were among those countries to embrace eugenic sterilization laws a way of dealing with hereditary defects and controlling the growth of ethnic minorities. Despite the United Kingdom's early association with the eugenics movement, political opposition prevented the adoption of eugenic sterilization laws.

Eugenic sterilization was carried out most vigorously in Nazi Germany. Adolf Hitler cited the United States and its laws aimed at genetic purity as an example for the world in his book *Mein Kampf*, and there was much interaction between eugenicists in the United States and Germany until the late 1930s. Nazi Germany sterilized hundreds of thousands of people between 1933 and 1945. Between 1939 and 1941, the logic of eugenic sterilization was carried to its conclusion and over 70,000 people deemed to be a burden on the state were forcibly euthanized.

Despite the association of eugenics and eugenic sterilization with the Nazi regime, the United States and much of Northern Europe continued to carry out eugenic sterilizations for the remainder of the twentieth century, although many countries repealed these laws by the 1980s and 1990s. Japan did not begin its program of eugenic sterilization until after World War II, starting in 1948 and continuing until 1996.

State-mandated eugenic sterilization is no longer a current concern in the field of American civil rights and civil liberties. Many states have apologized for their prior actions and a return to eugenic sterilization programs seems unlikely. Instead, the concern is more focused on similar results being achieved through coercion.

One fear is that advances in DNA testing raise the possibility that genetic defects could be accurately identified and that information used to affect decisions about reproduction to ensure "designer babies." Fetuses possessing unfavorable genetic material could

be aborted, or in vitro fertilization techniques used to ensure that only children with the couple's favored genetic characteristics are born.

State coercion is seen as a bigger concern for the reproductive freedom of individuals. Some have called for the state to restrict access to welfare payments for those unwilling to be sterilized or have other long-term birth control procedures such as implants. Others see the existence of federally funded voluntary sterilizations as promoting a program of eugenic sterilization. These sterilizations, in addition to those provided by a number of charities, are performed on the poor with disproportionately large numbers from ethnic minorities. The argument is that by funding sterilization instead of other means of birth control the state encourages individuals to undergo sterilization simply because they cannot afford other options.

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References and Further Reading

- Kevles, Daniel J. *In the Name of Eugenics: Genetics and the Uses of Human Heredity*. Cambridge, MA: Harvard University Press, 1998.
- Klein, Wendy. *Building a Better Race: Gender, Sexuality, and Eugenics from the Turn of the Century to the Baby Boom*. Berkeley: University of California Press, 2001.
- Sofair, Andre N., and Lauris C. Kaldjian. "Eugenic Sterilization and a Qualified Nazi Analogy: The United States and Germany, 1930–1945." *Annals of Internal Medicine* 132 (2000): 312–9.

Cases and Statutes Cited

- Buck v. Bell*, 274 U.S. 200 (1927)
- Skinner v. Oklahoma*, 316 U.S. 535 (1942)

EUTHANASIA

Euthanasia is ending a life before its natural end, motivated by a concern for the welfare of the killed person. It is this motivation that distinguishes euthanasia from simple homicide or suicide and it is sometimes called "mercy killing" for this reason.

Voluntary Euthanasia versus Involuntary Euthanasia

In cases of voluntary euthanasia, the persons killed made requests for their lives to be ended prematurely, often in cases of terminal illness. In cases of involuntary euthanasia, the persons killed expressed no such

desire, and may have even expressed an opinion to the contrary. This may seem incongruous with the idea of euthanasia being motivated out of a concern for the welfare of the person, but in such cases the persons may be considered incapable of fully understanding their own best interests. The most extreme examples of involuntary euthanasia occurred in Nazi Germany when thousands of disabled people were killed by the state, although these killings were also motivated by the prevailing theory of eugenics.

Choosing to End One's Life

Ancient civilizations differed in their approaches towards people choosing to end their own life; some viewed it as taboo, others saw ending one's life to retain dignity as laudable. The Western tradition was most heavily influenced by Judeo-Christian views that suicide was against God's will, and these views were incorporated into laws. The American colonies followed the English tradition of viewing suicide as a crime, a position that continued until changes in the latter part of the twentieth century to encourage attempted suicides to seek medical attention.

For many theorists the right to privacy places some aspects of life beyond state regulation. These claims of privacy are most compelling when they concern intimate aspects of one's life and the control of one's own body (*Griswold v. Connecticut* [1965] and *Roe v. Wade* [1973]). Some extend this reasoning and argue that individuals should be able to decide when they want to end their lives by doing harm to that body; they argue that there is a right to die. Under this theory, laws preventing one from ending one's own life are unwarranted intrusions into a person's autonomy.

The Role of Medical Professionals in Euthanasia

Those seeking their own death may want assistance, either because their medical condition renders them incapable of taking their own life, or because they want to make sure that any attempt is both successful and as painless as possible. Medical professionals are uniquely placed in that they have both extensive contact with seriously ill people and the ability to hasten their death through refraining from treating them, or administering drugs to ensure a painless death. However, requests to assist a patient seeking death conflict with the Hippocratic oath sworn by all doctors to

"neither prescribe nor administer a lethal dose of medicine to any patient even if asked nor counsel any such thing."

Active versus Passive Euthanasia

Active euthanasia entails an intervention to bring about the death of the subject, frequently a lethal dose of medication; a doctor who assists in this violates the Hippocratic oath and such conduct is illegal in the United States. The 1980s and 1990s saw a determined effort by some states, particularly in the West, to make euthanasia easier, and in 1994 Oregon legalized physician-assisted suicide by referendum. However, due to court challenges it was not implemented until after a second referendum in 1997. The highest-profile euthanasia advocate was Dr. Jack Kevorkian, who assisted in many deaths and was later imprisoned in 1999. The U.S. Supreme Court ruled that the Due Process Clause of the Fourteenth Amendment does not confer a right to physician-assisted suicide (*Washington v. Glucksberg* [1997]).

Internationally, there are only a few countries that explicitly permit physician-assisted suicide. Switzerland legalized euthanasia in 1947, but it was the legalization of physician-assisted suicide in the Netherlands (2000) and Belgium (2002) that reignited the international debate on euthanasia.

Passive euthanasia entails failing to take action that would otherwise save the life of the subject. There is considerable debate as to what falls within the scope of the passive category from complying with a "do not resuscitate" order, not providing life-saving medication, or even withholding food and water. It is considered to be legally, medically, and ethically sound to refrain from life-giving treatment if the patient so desires. In the United States, a person can refuse medical treatment, and actions that violate this constitute an assault, forming the legal and ethical justification for allowing passive euthanasia. The Supreme Court has ruled that the Due Process Clause does not extend this right to relatives of a patient incapable of making his or her wishes known (*Cruzan v. Missouri* [1990]). This has contributed to the rise of so called "living wills," documents drawn up in advance specifying under what conditions medical treatment should be withheld.

The active/passive distinction in euthanasia is considered to be extremely important from the standpoint of the Supreme Court and medical ethicists, although others maintain that this is a false distinction and that both are morally equivalent actions taken with the understanding that a hastened death

will be the result. In addition, many question allowing someone to choose a potentially slow and painful death through refusing medical treatment, but denying them the chance to die quickly and relatively painlessly with medical assistance. The consequences of this distinction are felt most by people who, because of their condition, are incapable of quickly ending their own life, although the Supreme Court refused an Equal Protection Clause challenge to this distinction in *Vacco v. Quill* (1997).

Euthanasia is an extremely controversial topic in an aging society with the medical capacity to prolong life to an extent far greater than previously possible. Advocates cite the importance of allowing people to die with dignity, rather than to live on in pain, and to allow them to make their own decisions to end their own lives as peacefully and painlessly as possible. Those opposed to euthanasia are concerned that this would lead to the deaths of those who do not want to die, either through social pressure to cease being a burden on their families and request euthanasia, or the well-meaning but misguided carrying out involuntary euthanasia. As medical technology advances, the importance of this issue will increase, although the chances of resolution seem remote.

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References and Further Reading

- Dworkin, Ronald. *Life's Dominion: An Argument about Abortion, Euthanasia, and Individual Freedom*. New York: Vintage, 1994.
- Kevorkian, Jack. *Prescription Medicide: The Goodness of Planned Death*. Amherst, N.Y.: Prometheus Books, 1993.
- Minois, George. *History of Suicide: Voluntary Death in Western Culture*. Baltimore: Johns Hopkins University Press, 2001.
- Moreno, Jonathan, ed. *Arguing Euthanasia: The Controversy over Mercy Killing, Assisted Suicide, and the "Right to Die"*. New York: Touchstone, 1995.
- Neeley, G. Steven. *The Constitutional Right to Suicide: A Legal and Philosophical Examination*. New York: Peter Lang, 1994.
- Quill, Timothy E. *Death and Dignity: Making Choices and Taking Charge*. New York: W.W. Norton & Company, 1994.

Cases and Statutes Cited

- Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261 (1990)
- Griswold v. Connecticut*, 381 U.S. 479 (1965)
- Roe v. Wade*, 410 U.S. 113 (1973)
- Vacco v. Quill*, 521 U.S. 793 (1997)
- Washington v. Glucksberg*, 521 U.S. 702 (1997)

See also **Ballot Initiatives; Kevorkian, Jack; Oregon's Death with Dignity Act (1994); Penumbra; Privacy;**

Privacy, Theories of; Reproductive Freedom; Substantive Due Process; Theories of Civil Liberties

EVERS, MEDGAR WILEY (1925–1963)

An African-American civil rights activist who fought racial violence in Mississippi, worked to secure voting rights, and coordinated movements leading to desegregation of state educational institutions and public accommodations, Medgar Wiley Evers was born in 1925 in Decatur, Mississippi.

During World War II, Evers served in the Army in England and France where he experienced nonsegregated institutions and formed friendships with whites. Upon returning to Mississippi, he challenged the Jim Crow voting system in 1946 by registering to vote, but he was prevented from voting. He completed high school and graduated in 1950 from Alcorn College, where he played an active role in student organizations and athletics.

Evers promoted the National Association for the Advancement of Colored People (NAACP) while working for an African-American insurance company. In 1954, he applied to the University of Mississippi law school. When his application was denied, he moved to Jackson to become the first Mississippi field secretary for the NAACP, the only full-time civil rights advocate in the state.

During the 1950s he investigated racial violence against African Americans, helping bring national attention to the murders of George Lee and Lamar Smith and to the attempted murder of Gus Courts—all shot for attempting to vote or actually voting. He helped investigate the murder of fourteen-year-old Emmett Till. He continued to investigate crimes and police brutality against African Americans in the 1960s. Aaron Henry summarized, "In most of these cases, we were not able to get punishment for guilty parties, but at least we got them into court and into the spotlight of public attention."

In the face of massive state resistance to *Brown v. Board of Education*, Evers encouraged action pressing for the integration of local schools, supported litigation that desegregated the University of Mississippi in 1962, and cooperated with Justice Department lawsuits that challenged state practices which denied voting rights to African Americans. He encouraged boycotts, demonstrations, and other activities aimed at desegregating public facilities.

Evers was convicted of criminal contempt for his criticism of the unjust conviction of Clyde Kennard. The reversal of Evers's conviction by the state supreme court in *Evers v. State* (Miss. 1961) signaled a modest but significant retreat from judicial

suppression of political speech. This case illustrates the important connection between the protection of civil liberties and the struggle for black civil rights in the 1950s and 1960s.

In 1963, Evers was murdered by a white supremacist. Despite overwhelming evidence, two all-white juries failed to convict, seemingly confirming the view that no white man could be convicted of killing an African American in Mississippi. Evers's death galvanized public opinion, demonstrated the need for federal enforcement of civil rights, and motivated the adoption of new federal civil rights laws.

In 1994, Evers's killer was retried and finally convicted of murder. The result symbolized the change in attitudes towards racial violence, proved the value of criminal justice in promoting racial reconciliation, and inspired the reopening other cold cases from the civil rights era.

Evers married Myrlie Beasley in 1951 and had three children with her. After his death, she became a prominent spokesperson for civil rights, serving as chair and interim president of the NAACP.

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References and Further Reading

- Bailey, Ronald. *Remembering Medgar Evers*. Oxford, MS: Heritage Publications, 1988.
- Brown, Jennie. *Medgar Evers*. Los Angeles: Melrose Square, 1994.
- DeLaughter, Bobby. *Never Too Late: A Prosecutor's Story of Justice in the Medgar Evers Case*. New York: Scribner, 2001.
- Evers, Medgar Wiley. *The Autobiography of Medgar Evers: A Hero's Life and Legacy Revealed Through His Writings, Letters, and Speeches*. Edited by Myrlie Evers-Williams and Manning Marable. New York: Harper Collins, 2005.
- Evers, Myrlie B. *For Us the Living*. Jackson: University Press of Mississippi, 1996.
- Henry, Aaron, with Constance Curry. *Aaron Henry: The Fire Ever Burning*. Jackson: University Press of Mississippi, 2000.
- Nossiter, Adam. *Of Long Memory: Mississippi and the Murder of Medgar Evers*. Reading, MA: Addison-Wesley, 1994.
- Voller, Maryanne. *Ghosts of Mississippi: The Murder of Medgar Evers, The Trials of Byron de la Beckwith, and the Haunting of the New South*. Boston: Little, Brown, 1995.

Cases and Statutes Cited

- Brown v. Board of Education of Topeka, Kansas*, 347 U.S. 483 (1954)
- Evers v. State*, 131 So. 2d 653 (Miss. 1961)

See also **National Association for the Advancement of Colored People (NAACP); Voting Rights (Compound)**

EVERSON v. BOARD OF EDUCATION, 330 U.S. 1 (1947)

This landmark Supreme Court decision is important for two reasons. One, it held for the first time that the Establishment Clause of the First Amendment ("Congress shall make no law respecting an establishment of religion . . .") is incorporated into the Due Process Clause of the Fourteenth Amendment ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . .") and, thus, applies to state governments as well as the federal government. Two, the Court's *Everson* opinion was the first to give an extensive, if not authoritative, interpretation of the Establishment Clause.

Facts, Issues, and Holdings

In 1941, New Jersey passed a statute authorizing local school districts to provide transportation to children going to either public or private schools. In turn, the Township of Ewing began reimbursing parents for money they spent on the public transportation of their children to either public or private schools. In Ewing, however, the only children who did not go to public schools went to Catholic schools, which taught them not only secular subjects, but the tenets and practices of Catholicism. A district taxpayer challenged the constitutionality of the state law on the grounds that it violated the Due Process Clause of the Fourteenth Amendment in two ways. First, the law authorized the taking of private property and spending it for a private, not public, purpose. Second, the law was one "respecting an establishment of religion," which, because it was prohibited by the First Amendment, was also prohibited by the Fourteenth Amendment. By a five-to-four vote, the Court upheld the law.

Justice Hugo Black wrote the opinion for the majority. He rather easily disposed of the first argument that the law had a private rather than a public purpose. He said that the law's purpose was to protect the safety of the children by enabling them to "ride in public busses to and from schools rather than run the risk of traffic and other hazards incident to walking or 'hitchhiking.'" It did not matter, he said, that the public money went to individuals as reimbursement for what they had already spent. Subsidies and loans to private individuals and businesses that serve to promote a public good "have been commonplace practices in our state and national history."

As for whether the Establishment Clause applied to state and local governments via the Fourteenth Amendment, Black simply assumed that it did. All that he did to justify his assumption was cite a brief

passage from *Murdock v. Pennsylvania* (1943) that said the Fourteenth Amendment had made the First Amendment “applicable to the states.”

More troublesome for Black was the issue of what the Establishment Clause prohibited. Although he quickly asserted that the Establishment Clause prohibited government from funding “any or all religions,” he noted that it was difficult to distinguish “between tax legislation which provides funds for the welfare of the general public and that which is designed to support institutions which teach religion.” Black even suggested that in deciding cases like this the Court had no margin for error—that the First Amendment required it, in effect, to walk a tightrope. Although the Establishment Clause does not allow tax funds to go to institutions that teach religious doctrines, the Free Exercise Clause, he said, disallows government’s excluding any persons, “because of their faith, or lack of it, from receiving the benefits of public welfare legislation.”

The main issue, therefore, was how to categorize the law. Was it a general welfare provision or a law that supported the teaching of religion? The Court majority concluded it was the former. Although Black conceded that the state’s providing free school transportation indirectly aided the church schools (and thus the teaching of religion), by causing some children, who otherwise would not do have done so, to attend those schools, he said the same could be said of the state’s providing police protection to children going to and from schools. Obviously, he said, the state was not required to remove general government services, such as police and fire protection, from church schools. Black concluded: “The State contributes no money to the schools. It does not support them. Its legislation . . . does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools.”

Justice Black’s History and Interpretation of the Establishment Clause

If Black had said only what was summarized above, the *Everson* decision might have caused hardly a ripple, but he did not. He felt obliged to give a definitive interpretation of the Establishment Clause. In an often-quoted passage, he said:

The “establishment of religion” clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can

pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or nonattendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect “a wall of separation between Church and State.”

To justify this interpretation of the Establishment Clause, Black presented a lengthy account of its origin. He relied primarily on James Madison’s “Memorial and Remonstrance” and Thomas Jefferson’s “Virginia Statute of Religious Liberty,” both of which were opposed to a bill in Virginia that would have taxed persons for the purpose of supporting all Christian clergy. More specifically, Black wrote that

the provisions of the First Amendment, in the drafting and adoption of which Madison and Jefferson played such leading roles, had the same objective and were intended to provide the same protection against government intrusion on religious liberty as the Virginia [Jefferson’s] statute.

Black, however, did not stop here. Aware that his “wall of separation” interpretation of the Establishment Clause was difficult to reconcile with the actual holding of the Court, he enunciated another “purpose of the First Amendment.” It “requires the state to be a neutral in its relations with groups of religious believers and nonbelievers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions, than it is to favor them.” Ultimately, then, Black justified the *Everson* decision on the grounds of neutrality, not separation.

Black’s opinion has been widely and sharply criticized by both scholars and justices on the Court. At the time, the dissenting opinions, written by Justices Robert Jackson and Wiley Rutledge, who wanted the law nullified, complained that the Court’s decision was simply inconsistent with Black’s interpretation of the Establishment Clause, especially with his assertion that “[n]o tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.” They insisted that the New Jersey law breached the “wall of separation between Church and State.”

Since then, Black's opinion has been criticized for other reasons: for simply assuming that the Establishment Clause, even though it guarantees no "liberty" and may have been intended to protect state establishments of religion, was incorporated into the Due Process Clause of the Fourteenth Amendment; for interpreting the Establishment Clause so broadly as to make the Free Exercise Clause superfluous; for saying that the clause prohibits not just aid to one religion, but aid to all religions; for saying that the clause prohibits religious organizations from "participating" in the affairs of government; for asserting without any evidence that it was the views of Virginians, especially Madison and Jefferson, that are reflected in the Religion Clauses; and for failing to present evidence from the drafting of the clauses by the First Congress.

Perhaps above all else, Black's opinion can be criticized for spawning what most scholars consider to be a series of confusing and inconsistent Court decisions based on the Religion Clauses of the First Amendment. By being indecisive and saying that the Religion Clauses require both *separation* of government and religion, and government *neutrality* between religion and nonreligion, Black gave the justices of the Court two different principles that for decades competed for dominance. In some decisions, separation prevailed; in others neutrality did. Eventually, however, the Court rejected the principle of separation in favor of the principle of neutrality.

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References and Further Reading

- Formicola, Jo R., and Hubert Morken, eds. *Everson Revisited: Religion, Education, and the Law at the Crossroads*. Lanham, MD: Rowman & Littlefield, 1997.
- Kauper, Paul G., *Everson v. Board of Education: A Product of the Judicial Will*, *Arizona Law Review* 15 (1973): 307–326.
- Murray, John Courtney, *Law or Prepossessions?* *Law and Contemporary Problems* 14 (1949): 23–43.
- Sorauf, Frank J. *The Wall of Separation*. Princeton, NJ: Princeton University Press, 1976.

Cases and Statutes Cited

- Murdock v. Pennsylvania*, 319 U.S. 105 (1943)
- Virginia Statute for Religious Freedom (1786), *Statutes at Large* 12 (1823): 84

See also **Application of First Amendment to States; Establishment Clause Doctrine: Supreme Court Jurisprudence; Establishment of Religion and Free Exercise Clauses; History and Its Role in Supreme Court Decision Making on Religion; Incorporation Doctrine; State Aid to Religious Schools**

EX PARTE MILLIGAN, 71 U.S. 2 (1866)

The *Milligan* opinion, issued just after the Civil War ended, held that Lambdin Milligan's trial by military commission was unconstitutional. Vehemently denounced by Republicans who viewed it as a threat to military reconstruction in the South, and somewhat limited by its own facts and by subsequent cases, the opinion still stands as one of the Supreme Court's most important decisions on civil liberties and the limits of military authority over civilians.

Milligan, a lawyer practicing in southern Indiana, was an outspoken critic of both President Lincoln and Indiana's Republican Governor Oliver P. Morton. A Democrat who unsuccessfully sought his party's nomination for governor in 1860, Milligan opposed the war and infringements of civil liberties by state and federal officials. After 1862, Democrats controlled both houses of the Indiana legislature. State politics became extremely partisan as the 1864 presidential and gubernatorial elections drew near, and Democrats and Republicans alike formed secret societies to support their parties. Milligan's association with one such society, the Sons of Liberty, led to his subsequent arrest and trial by military commission.

The Sons of Liberty, founded in part to get out the vote for Democratic candidates, also made initial plans to free thousands of Confederate soldiers held in Illinois and other states; the group may have also accepted money from Confederate agents in Canada. In August 1864, federal officials arrested Milligan and a handful of others, charging them with conspiracy, affording aid and comfort to the enemy, and other offenses. The Indianapolis military trials lasted from September to December 1864, partially amid the electoral campaign. The commission found Milligan guilty and sentenced him to death. The precise extent of Milligan's involvement in the Sons of Liberty remains unclear.

Milligan and two others filed writs of habeas corpus with the federal court in Indianapolis, which certified the legal issues in the case to the Supreme Court. Milligan argued in part that military commissions had no power to try civilians like himself where the regular courts were open and functioning. The military trial meant that Milligan did not receive many constitutional protections afforded defendants tried by civilian courts, including the right to a jury of residents of Indiana and the right to be tried only for conduct that Congress had criminalized by law.

All nine justices agreed that the military commission that tried Milligan was unlawful, but they were deeply divided in their reasoning. The majority opinion, authored by Justice Davis, a longtime friend and political ally of Lincoln, reasoned broadly that

neither Congress nor the president could authorize military trials of civilians, except in the actual theater of war where the regular courts were not functioning.

Chief Justice Chase, writing for the four-person concurrence, reasoned that Congress had not authorized the trial of Milligan; indeed, the Habeas Corpus Act of 1863 required that prisoners like Milligan had to be indicted by a grand jury or released. A grand jury had met just prior to Milligan's arrest, but had failed to indict him. This settled the matter for Chase, who thought the majority erred by considering whether Congress would have the power to authorize military commissions if it attempted to do so. Chase also believed that the majority erred in how it answered this hypothetical question: he reasoned that Congress would have the power to establish such commissions.

Justice Davis's famous opinion for the Court includes sweeping and often-cited language about the limits of government power during war. The opinion, however, met with immediate and vitriolic criticism from Republicans who charged that the Court's reasoning would have lost the war for the Union and that Congress's efforts at military reconstruction in the South would be fatally undermined. In 1868, the Court appeared ready to consider the constitutionality of military commissions authorized by reconstruction legislation in *Ex parte McCardle*. Congress, however, revoked the appellate jurisdiction of the Supreme Court over this and similar habeas appeals, and the Court honored the revocation.

Twentieth-century commentators sometimes applauded Milligan as a vitally important civil liberties opinion. Others argued that it has had little practical effect, noting that the Court issued it only after Confederate troops had surrendered and the war was over. An American citizen tried by a military commission during World War II relied in part on *Milligan* to support his petition for a writ of habeas corpus. The Court rejected the petition and distinguished *Milligan* on the grounds that the World War II defendant had actually joined the Nazis, while Milligan was not part of the enemy armed forces and was not subject to the laws of war. The president's detention of "enemy combatants" in the United States following the September 11, 2001 terrorist attacks has once again raised fundamental questions about civil liberties and military authority, and has focused new attention on *Milligan*.

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References and Further Reading

Fairman, Charles. *History of the Supreme Court of the United States: Reconstruction and Reunion: 1864–1888*. Vol. VI, Part I. New York: Macmillan Company, 1971.

Klement, Frank L. "The Indianapolis Treason Trials and *Ex parte Milligan*." In *American Political Trials*, edited by Michal R. Belknap. Westport, Conn.: Greenwood Press, 1981.

Rehnquist, William H. *All the Laws but One*. New York: Alfred A. Knopf, 1998.

Warren, Charles. *The Supreme Court in United States History*. Vol. 3, 1856–1918. Boston: Little, Brown, and Co., 1923.

Cases and Statutes Cited

Ex parte McCardle, 74 U.S. 506 (1869)

See also **Military Tribunals; 9/11 and the War on Terrorism**

EX PARTE VALLANDIGHAM, 28 F.CAS. 874 (1863)

This case deals with the conflict between free expression and military necessity during the course of war. It represents the struggle between free speech rights and the imperiled security of the Union.

On September 24, 1862, President Lincoln issued a proclamation suspending the writ of habeas corpus and declaring martial law. In March 1863, President Lincoln appointed General Ambrose Burnside to the post of Union commander of the Department of Ohio. Thereafter, General Burnside issued General Order No. 38, which announced that "[i]t must be distinctly understood that treason, expressed or implied, will not be tolerated in this department." General Burnside's issuance of General Order No. 38 resulted in what turned out to be the Civil War's most celebrated arrest and prosecution for disloyal speech.

In May 1863, Clement Vallandigham addressed a large meeting of citizens where he described the war as "wicked, cruel, and unnecessary;" characterized General Order No. 38 as a "base usurpation of arbitrary authority;" and contended that "the sooner the people informed the minions of the usurped power, that they will not submit to such restrictions upon their liberties, the better."

Based on the speech, Vallandigham was arrested and brought before a five-member military commission and charged with "[p]ublicly expressing in violation of General order No. 38 . . . sympathy for those in arms against the government of the United States, and declaring disloyal sentiments and opinions with the object and purpose of weakening the power of the government in its efforts to suppress an unlawful rebellion."

After a two-day trial, at which Vallandigham refused to plead because he contended that the tribunal

had no lawful authority over a civilian, the commission found Vallandigham guilty as charged and sentenced him to confinement “in some fortress of the United States, . . . there to be kept during the war.” President Lincoln commuted the sentence a few days later, and Vallandigham was banished from military lines.

Vallandigham filed a petition for writ of habeas corpus arguing that his constitutional rights had been violated, including his right to due process of law, the right to be tried on the indictment of a grand jury, the right to a public trial by an impartial jury, the right to confront witnesses against him, and the right to have compulsory process for witnesses in his behalf. Judge Humphrey H. Leavitt denied Vallandigham’s petition, basing his decision on moral grounds rather than precedent.

Judge Leavitt explained that

[t]he court cannot shut its eyes to the grave fact that war exists, involving the most eminent public danger, and threatening the subversion in destruction of the constitution itself. In my judgment, when the life of the republic is in peril, he misstates his duty and obligation as a patriot who is not willing to concede to the constitution such a capacity of adaptation to circumstances as may be necessary to meet a great emergency, and save the nation from hopeless ruin. Self-preservation is a paramount law.

Addressing the specific circumstances of this case, Judge Leavitt observed that “[a]rtful men, disguising their latent treason under hollow pretensions of devotion to the Union,” have been “striving to disseminate their pestilent heresies among the masses of the people.” Judge Leavitt found that General Burnside was reasonable in perceiving “the dangerous consequences of these disloyal efforts” and in resolving, “if possible, to suppress them,” because the “evil was one of alarming magnitude.” Judge Leavitt concluded by stating that those who criticized the government in time of crisis “must learn that they cannot stab its vitals with impunity.”

Ex parte Vallandigham raised basic civil liberty issues—the power of the military to try civilians and imprison or otherwise punish people for antiwar speech. Lest we not forget, without free speech, we would not have democracy.

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References and Further Reading

- Curtis, Michael Kent. *Free Speech, “The People’s Darling Privilege”: Struggles for Freedom of Expression in American History*. Durham, NC: Duke University Press, 2000.
- Klement, Frank L. *The Limits of Dissent: Clement L. Vallandigham & The Civil War*. Lexington: University of Kentucky Press, 1970.

- Rehnquist, William H. *All the Laws But One: Civil Liberties in Wartime*. New York: Alfred A. Knopf, 1998.
- Vallandigham, James L. *A Life of Clement L. Vallandigham*. Baltimore: Turnbull Bros., 1872.

EX POST FACTO CLAUSE

Ex post facto laws are laws which apply to an event which occurred in the past. They are a form of retroactive legislation. Most are enacted as an attempt by a legislature to identify specifically one person or group of persons who are to be punished by the legislation. The U.S. Constitution prohibits such retroactive legislation in Article I, section 9, clause 3. While this is a constitutional provision that only applies to the federal government, a parallel provision in Article I, section 10, clause 1, applies to the states.

The twin constitutional provisions prohibiting ex post facto laws were limited in their application by the U.S. Supreme Court in the 1798 decision of *Calder v. Bull* (1798). The Court held that legislatures can not pass a law subjecting someone to a fine or period of imprisonment for an act that was not unlawful when it was done. This meant that the ex post facto provisions in the U.S. Constitution would apply only to penal and criminal statutes. In addition to limiting the application of the ex post facto provisions, Justice Samuel Chase suggested strongly that many types of retroactive legislation are generally unjust and as a general rule should be avoided.

In his opinion, Justice Chase wrote the authoritative formulation of the kinds of retroactive legislation that would fall within the Constitution’s prohibition of ex post facto legislation:

1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th Every law that alters the legal rules of evidence, and receives less, or different testimony, than the law required at the time of the commission of the offence, in order to convict the offender.

The Supreme Court’s decision in *Calder v. Bull* reflected the ideas of many of this nation’s founders. Alexander Hamilton had written, for example, in *The Federalist Papers* Number 84 of a strong opposition to “[t]he creation of crimes after the commission of the fact, or, in other words, the subjecting of men to punishment for things which, when they were done, were breaches of no law . . .”

The essential character of all ex post facto legislation is its retroactive application. But within the meaning of the prohibition as defined in *Calder v. Bull*, not all retroactive legislation is barred by the Constitution's dual provisions. For example, laws that require the deportation of certain aliens for past conduct have been held as not penalizing a person for his or her past conduct. One such case is *Marcello v. Bonds* (1955) where an order deporting a resident alien was affirmed by the Supreme Court because of an earlier drug conviction. Other laws, such as those challenged in *Kansas v. Hendricks* (1997), which have changed the length or nature of the incarceration for certain convicted sexual offenders have been held to be civil in nature. Thus, the additional commitment to a mental health facility because the offender was determined to be a danger to self or to others has been upheld.

A provision enacted by the California legislature, which extended the statute of limitations for a crime beyond the one-year period for prosecution following the commitment of the crime, was found in *Stogner v. California* (2003) to violate the ex post facto barrier when the purpose was to revive a previously time-barred prosecution. The allegations in the *Stogner* prosecution were that the alleged sexual offenses had occurred more than twenty years prior to the revision of California's three-year statute of limitations. This distinction between civil and penal laws was also made in the decision in *Smith v. Doe* (2003) in the same U.S. Supreme Court term upholding the application of provisions of Alaska's "Megan's Law," which required convicted sex offenders to register with local police departments. The Supreme Court noted that the legislature intended to create a civil regulatory scheme and one that was not clearly punitive in nature.

Three considerations usually underlie any evaluation of enacted ex post facto laws. First, ex post facto laws are generally believed to violate the Constitution's separation of powers. The Constitution assigns to the executive and judicial branches the responsibility for handing out punishment against individuals found to have committed crimes. The legislative branch, by contrast, is expected to make laws of general application. Second, ex post facto laws may violate First Amendment principles if the intended punishment is seen to have a chilling effect on otherwise constitutionally protected speech or actions. And, third, ex post facto laws are generally unfair in that they fail to provide adequate notice to individuals that their actions may have criminal consequences.

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References and Further Reading

- Congressional Research Service. *The Constitution of the United States of America: Analysis and Interpretation*. Washington, D.C.: U.S. Government Printing Office, 2004.
- Monk, Linda R. *The Words We Live By: Your Annotated Guide to the Constitution*. New York: Hyperion, 2003.
- Rotunda, Ronald D., and John E. Nowak. *Treatise on Constitutional Law: Substance and Procedure*. 3rd ed. St. Paul, MN: West Group, 1999.

Cases and Statutes Cited

- Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798)
- Kansas v. Hendricks*, 521 U.S. 346 (1997)
- Marcello v. Bonds*, 349 U.S. 302 (1955)
- Smith v. Doe*, 538 U.S. 84 (2003)
- Stogner v. California*, 539 U.S. 607 (2003)

EXCLUSIONARY RULE

The exclusionary rule forbids the introduction of certain evidence in court, in an attempt to ensure that the state and federal governments do not violate individuals' constitutional rights. The rule applies to criminal trials and as a general matter forbids the use of evidence that was obtained as a result of a violation of the Fourth or Fifth Amendments in the government's case-in-chief, that is, in the part of the trial where the government presents its evidence of the defendant's guilt. Accordingly, if the police, on a wild hunch, break down a person's front door and discover drugs in the house, the drugs may not be used to convict the homeowner of drug possession.

There are several exceptions to this rule, however, which will be discussed in more detail below. The rule does not apply to civil proceedings and does not apply to pretrial or sentencing hearings in a criminal prosecution. Even at trial, if the defendant testifies falsely, the government can rebut the defendant's testimony by using the illegally obtained evidence. Furthermore, if the police obtain a warrant that is defective in some way, so that the resulting search is unconstitutional, the evidence found may still be admitted at trial in the prosecution's case-in-chief if the police were acting in reasonable good faith on the warrant.

The exclusionary rule ordinarily applies to ban the government from using not only the evidence that is found during an unconstitutional search, but also that evidence that is found *because of* that search. So, a search that turns up a lead to further evidence will result in suppressing both the lead and the additional evidence. But not all evidence that is found as a result of the unconstitutional action will be excluded. If the connection between the illegality and the evidence is

too attenuated, or if the police would have found the evidence by legal means, then the exclusionary rule does not apply. Lastly, the exclusionary rule is an available remedy only for the individual whose person or property was searched or seized. If a search of a person turns up evidence of his friend's crime, the friend will usually be unable to have that evidence suppressed.

Arguments for and against the Exclusionary Rule

The Supreme Court has held since *Weeks v. United States* (1914) that the exclusionary rule bars the use in federal trials of evidence that was obtained by violating the Fourth Amendment, which prohibits "unreasonable searches and seizures." It was not until *Mapp v. Ohio* (1961), however, that the Supreme Court required states to use the exclusionary rule as well. The rule was originally based on two considerations. First, the Court wanted to deter police from violating the Constitution. If any evidence illegally seized by the police could not be used in the defendant's trial, then (the theory went) there would be no reason to commit the violation in the first place. Second, the Court thought it was wrong to involve the judicial process in the constitutional violation. That is, even though the judiciary did not commit the unreasonable search, the Court thought it improper that the Court take part in the constitutional violation by using its fruits. In later years this second justification has fallen out of favor and the courts now exclusively rely on the deterrence rationale, as the Supreme Court itself pointed out in *Stone v. Powell* (1976) and *United States v. Janis* (1976).

The rule remains controversial today because its effect is to make it more difficult to convict guilty criminal defendants. In the example in the first paragraph, there is no doubt that the homeowner whose house was unconstitutionally searched by police was guilty of drug possession. Justice Benjamin Cardozo, who was then a judge on the New York Court of Appeals, most famously stated the disadvantage of the exclusionary rule: "The criminal is to go free because the constable has blundered" (*People v. Defore* [1926]). Moreover, the exclusionary rule does nothing to compensate innocent persons for violations of their Fourth Amendment rights. An illegal search that turns up no evidence will never be subject to the exclusionary rule because there will be no trial, yet the rights of that innocent person were violated just as much as were the rights of the manifestly guilty person for whom the exclusionary rule is a

get-out-of-jail-free card. Nevertheless, to the extent the exclusionary rule deters unlawful police conduct, there will be fewer violations of the Fourth Amendment rights of the innocent and the guilty, so perhaps the rights of the law-abiding are served in some way by the application of the rule to the nonlaw-abiding.

There are considerable instances when the rule does not deter police conduct. This can happen for several reasons. First, the officers may not know that their conduct violates the Constitution. They may think they are following the Fourth Amendment, but a judge may later disagree. In that instance, the exclusionary rule—like any penalty—will not deter a violation, for the officer will not know that he is subjecting himself to the penalty. Second, if the person whose property is searched is not prosecuted (or if the case is plea bargained), then the exclusionary rule never comes into play. The exclusionary rule then does nothing to protect the rights of persons who will not be prosecuted. As a result, whatever deterrent effect the exclusionary rule has is lessened because a certain portion of unconstitutional searches will not result in exclusion. Third, officers may not be deterred from committing violations if the exclusionary rule is applied months or years after the unconstitutional search, and the passage of time makes it hard for the officer to learn from his error, if he is ever told of the exclusion at all. Fourth, an officer bent on violating the Fourth Amendment may be able to lie in court and avoid the exclusionary rule that way, lessening the deterrent value of the rule.

On the other hand, police departments have become more conscious of the Fourth Amendment in the years since *Mapp*, and officers whose searches cannot yield convictions eventually feel some heat from the officials whom the voters expect to put criminals behind bars. Even as to the first objection—that officers cannot reasonably be expected to know the details of Fourth Amendment doctrine—there is vast disagreement. Several states have concluded that the exclusionary rule does deter officers, and if it causes officers to be cautious even when they are approaching the constitutional line, so much the better.

The Good Faith Exception

The Supreme Court has decided, however, that the police act "reasonably," and therefore there is no need to exclude evidence if the police were acting reasonably in good faith reliance on a warrant—even if that warrant is later determined to be invalid (*United States v. Leon* [1984]). If, for example, the

EXCLUSIONARY RULE

police lack probable cause to obtain a search warrant, but they apply for the warrant anyway and a judge issues one, evidence found in that search will be admissible if the officers' reliance on the warrant was reasonable and in good faith. The Court has decided that police cannot be expected to second-guess judges, and if a judge finds that there is probable cause, the police should not be expected to doubt that determination.

There are, however, some important limitations on the use of the good faith exception. If the judge signs the warrant because he is deceived by the police, then the police are not acting in good faith and the exception does not apply. Also, if probable cause is so lacking, or if the warrant wholly fails to specify the place to be searched or the items to be seized such that no reasonable officer would believe that the warrant is valid, the exception will not apply.

Leon's good faith exception is merely one instance where illegally obtained evidence is admitted in court despite the exclusionary rule. Perhaps most significant, the exclusionary rule does not apply in civil cases, and even in criminal cases the rule applies only to trials. Accordingly, illegally obtained evidence may be introduced before grand juries or at sentencing hearings. The Supreme Court has explained that the exclusionary rule is most likely to achieve its deterrent objective in criminal trials (as the government is often tempted to violate the Fourth Amendment in the investigation of crimes), and that accordingly the rule need not be extended to cover other proceedings. Nevertheless, as critics have pointed out, if the integrity of the courts is thought to be undermined by the use of illegally obtained evidence (as *Weeks* maintained), the admission of such evidence in civil and criminal trials would equally undercut that interest.

Habeas Corpus

Habeas corpus proceedings—which are technically civil but often involve federal court review of state court criminal prosecutions—are somewhat more complicated. A defendant convicted in state court can bring an action for a writ of habeas corpus in federal court, which would require the state to justify its continued imprisonment of the criminal defendant. Ordinarily, if the federal court finds that the state conviction was obtained through a violation of the Constitution—for example, because the state failed to respect the defendant's request for a jury trial—the federal court would require the state to conduct a new trial or release the prisoner. Under *Stone v. Powell*, however, the result is different when the prisoner

objects to his conviction based on a violation of the Fourth Amendment exclusionary rule.

Suppose that a state tries a defendant for murder, and a key piece of evidence is the defendant's knife stained with the victim's blood. The police obtained that knife, however, by violating the Fourth Amendment—perhaps because they unreasonably failed to obtain a search warrant. *Mapp* makes the exclusionary rule applicable to the initial state trial. The state courts, however, believe that no warrant was necessary, so they allow the knife into evidence. After the defendant is convicted, he petitions for a writ of habeas corpus, claiming that his constitutional rights were violated. Even if the federal court hearing his claim agrees that the police violated the Constitution, the defendant will not receive a new trial. *Stone v. Powell* concluded that the deterrent effect on the police of applying the exclusionary rule to habeas corpus proceedings simply does not justify the costs of setting convicted, guilty criminals free.

Even this rule, however, has limits. If the state gave the defendant no chance at the original trial to argue that his Fourth Amendment rights were violated, then he would be able to argue the violation on habeas review. And—although the Supreme Court has not yet decided this question—if the state court decision admitting the evidence was clearly and obviously wrong, the federal court might conclude that in effect the defendant was not given “an opportunity for a full and fair litigation of [his] Fourth Amendment claim,” requiring a new trial. As a general matter, however, a prisoner will not receive habeas relief if a state court wrongly admits unconstitutionally obtained evidence at his trial.

The Impeachment Exception

Furthermore, the exclusionary rule applies only to the prosecution's case-in-chief—that part of a criminal trial where the government sets forth its proof of the defendant's guilt. If the defendant takes the witness stand to testify, however, the prosecution can use unconstitutionally obtained evidence to “impeach” the defendant, that is, to demonstrate that the defendant's statements are untrue. The Court has reasoned that defendants should not be able to use the exclusionary rule to enable them to commit perjury (*United States v. Havens* [1980]). This impeachment exception, however, applies only when the defendant himself takes the stand. The Supreme Court held in *James v. Illinois* (1990) that the prosecutor may not use unconstitutionally obtained evidence to impeach the testimony of other defense witnesses.

Fruit of the Poisonous Tree

The exclusionary rule typically extends not only to the evidence found during an unconstitutional search, but also to evidence that is discovered because of the illegal search. Thus, if the police enter a house unconstitutionally and find drugs and a letter indicating where other drugs could be found, both the letter and the drugs at that house would be excluded because they were found during an unconstitutional search. But what if the police then go to the place referenced in the letter and find the other stash of drugs? Are those drugs admissible? The general answer is no, because those drugs are “fruit of the poisonous tree,” that is, they were found as the result of unconstitutional police action, and they too must be excluded.

Like all the other aspects of the exclusionary rule, however, this one has exceptions. First, if the police discover the evidence illegally but then their investigation takes them to the same evidence without violating the Constitution, they have established an “independent source” for the evidence—independent, that is, from the constitutional violation—and the evidence will be admitted (*Murray v. United States* [1988]). Second, if the police discover evidence unconstitutionally but can demonstrate that they *would have* discovered the same evidence had no constitutional violation occurred, the evidence will be admitted under the “inevitable discovery” exception (*Nix v. Williams* [1984]). Third, if the unconstitutional police action is so removed from the acquisition of the evidence that “the deterrent effect of the exclusionary rule no longer justifies its cost,” the attenuation doctrine serves to admit the evidence (*Wong Sun v. United States* [1963]). It is unclear when exactly a court will determine that there has been sufficient attenuation, but relevant factors include the amount of time elapsed between the unconstitutional action and the discovery of the evidence, and how flagrant the violation of the Constitution was. Additionally, if the suspect provided the evidence in a display of his own free will, or if the evidence consisted of another person’s testimony, a court is likely to find that the evidence was attenuated from the violation.

Although both the direct evidence traceable to a constitutional violation and the indirect “fruits” of that violation are ordinarily inadmissible in a trial of the person whose rights were violated, the exclusionary rule does not apply where the defendant is someone *other* than the person who was subject to an unconstitutional search or seizure. So, suppose the police unconstitutionally break in to *A*’s apartment, where they find drugs and a letter from *B* to *A* proposing a drug transaction. At trial, *A* will have the

letter and the drugs suppressed because of the constitutional violation. *B*, however, will not be able to contest the admission of the evidence against him, because *his* rights were not violated; the police broke into *A*’s apartment and invaded *A*’s privacy, not *B*’s.

The Fifth Amendment Exclusionary Rule

Although most observers are familiar with the exclusionary rule’s applicability to Fourth Amendment violations, the rule applies also to violations of the compulsory Self-Incrimination Clause of the Fifth Amendment. In fact, while the text of the Fourth Amendment makes no explicit mention of exclusion, the Fifth Amendment contains an exclusionary rule that does not require judicial construction. That amendment provides that “[n]o person . . . shall be compelled in any criminal case to be a witness against himself.” Accordingly, where a court, the police, or another agency of government compels a statement by a criminal defendant—where the statement is made involuntarily because of the threat of criminal sanctions or physical harm, for example—that statement may not be admitted at the defendant’s trial for any purpose. The amendment presupposes that coerced statements are inherently unreliable, and therefore it would harm the truth-seeking process of trials for such evidence to be admitted.

More controversial has been the Supreme Court’s decision in *Miranda v. Arizona* (1966), in which compulsion would be *presumed* if the defendant were subjected to custodial interrogation and he were not provided the now-famous *Miranda* warnings. Under *Miranda*, then, *voluntary* statements are subject to the exclusionary rule. Because such voluntary statements *are* reliable, however, the Supreme Court has held that they will be excluded only from the prosecution’s case-in-chief. In other words, when the prosecution puts forward its evidence that the defendant committed a crime, that evidence cannot include the un-*Mirandized* statement. If the defendant takes the stand and testifies in his own defense, however, and makes statements contradicting the excluded statement, then the prosecution can make use of the un-*Mirandized* statement. The Supreme Court has held that excluding evidence from the prosecution’s case-in-chief is necessary to ensure that the police will not violate *Miranda*, but the Court is unwilling to apply the exclusionary rule to allow the defendant to lie on the stand, when the lie could be exposed by using the un-*Mirandized* statement.

A further controversy centers on the application of the exclusionary rule to evidence obtained as the

result of a *Miranda* violation. Suppose a suspect is interrogated without *Miranda* warnings and makes a voluntary confession to a murder, in which he discloses the location of the murder weapon. The police then give the suspect the *Miranda* warnings and ask the suspect to repeat the confession, which he does. The first confession is excluded from the prosecution's case-in-chief.

The protections in the Bill of Rights are written in lofty terms, guaranteeing freedoms and invoking ideals that continue to inspire us. The exclusionary rule is both an attempt to realize those ideals and to take account of the practical necessities of investigating, prosecuting, and punishing crime. As a result, the doctrine is a hodgepodge of conflicting decisions and will remain so as long as the country continues to debate the price that it is willing to pay to protect its civil liberties.

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References and Further Reading

- Amar, Akhil Reed. *The Constitution and Criminal Procedure: First Principles*. New Haven, CT: Yale University Press, 1997.
- Amsterdam, Anthony G., *Perspectives on the Fourth Amendment*, Minnesota Law Review 58 (1974): 3:409–39.
- Dressler, Joshua *Understanding Criminal Procedure*. 3d ed. Newark, NJ: Matthew Bender & Co., 2002.
- Hall, John Wesley, Jr. *Search and Seizure*. Vol. 1, 3d ed. Charlottesville, VA: LEXIS Law Publishing, 2000.
- Kamisar, Yale, *In Defense of the Search and Seizure Exclusionary Rule*, Harvard Journal of Law and Public Policy 26 (2003): 1:119–40.
- LaFave, Wayne R. *Search and Seizure: A Treatise on the Fourth Amendment*. Vol. 1, 4th ed. St. Paul, MN: Thomson West, 2004.
- Stuntz, William J., *The Virtues and Vices of the Exclusionary Rule*, Harvard Journal of Law and Public Policy 20 (1997): 2:443–55.
- Whitebread, Charles H., and Christopher Slobogin. *Criminal Procedure: An Analysis of Cases and Concepts*. 4th ed. New York: Foundation Press, 2000.

Cases and Statutes Cited

- James v. Illinois*, 493 U.S. 307 (1990)
- Mapp v. Ohio*, 367 U.S. 643 (1961)
- Miranda v. Arizona*, 384 U.S. 436 (1966)
- Murray v. United States*, 487 U.S. 533 (1988)
- Nix v. Williams*, 467 U.S. 431 (1984)
- People v. Defore*, 150 N.E. 585, 587 (N.Y. 1926)
- Stone v. Powell*, 428 U.S. 465, 485 (1976)
- United States v. Havens*, 446 U.S. 620 (1980)
- United States v. Janis*, 428 U.S. 433, 446 (1976)
- United States v. Leon*, 468 U.S. 897 (1984)
- Weeks v. United States*, 232 U.S. 383 (1914)
- Wong Sun v. United States*, 371 U.S. 471 (1963)

See also *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971); **Search (General Definition); Seizure**

EXEMPLARS

The Fifth Amendment provides that “no person . . . shall be compelled in any criminal case to be a witness against himself.” This restriction on government power, commonly known as the privilege against self-incrimination, is designed to protect individual autonomy by forcing the government to obtain evidence against a defendant through its own labors, rather than by “the cruel, simple expedient of compelling it from his own mouth.”

The classic example of the privilege against self-incrimination is the right to remain silent when questioned by government officials, established in the seminal case *Miranda v. Arizona* (1966). Questions about the scope of the privilege also commonly arise, however, when the prosecution attempts to compel a defendant to produce a sample of his handwriting, fingerprints, or similar kind of physical evidence. Such examples are collectively known as exemplars.

With few exceptions, courts have rejected claims that the compelled production of exemplars violates the privilege against self-incrimination. The privilege extends only to “testimonial” evidence—evidence that in some sense discloses the contents of the defendant’s mind—and the Supreme Court has consistently held that exemplars are not testimonial. The classic case in this regard is *Schmerber v. California* (1966), where the Court noted that the incriminating potential of a blood test results from chemical analysis, not from any testimony or otherwise communicative act on the part of the defendant.

Courts have permitted the compelled production of a wide variety of exemplars on the ground that they were nontestimonial and thus not protected by the privilege against self-incrimination, including examples of the defendant’s blood, fingerprints, footprints, DNA, handwriting, voice, urine, and breath.

Courts have also held that compelling a defendant to exhibit his body to an eyewitness in a manner that promotes identification is nontestimonial. Thus, defendants have been required to shave their beards and have their hair trimmed, reveal their teeth and tattoos, wear clothes and masks allegedly worn by the perpetrator, and re-enact the physical actions involved in a crime.

In addition to privilege challenges, defendants have also argued that the compelled production of exemplars violates the Fifth Amendment’s guarantee of due process and the Fourth Amendment’s right to be free from unreasonable searches and seizures. Fourth Amendment challenges involving external physical features such as voice or hair regularly fail, on the ground that defendants have no reasonable expectation of privacy in those characteristics,

because they are normally exposed to others in everyday life. Courts have held, however, that probable cause is required to compel the production of more physically intrusive exemplars such as blood or x-rays.

Due process challenges, although generally rejected, have occasionally succeeded when a voice exemplar or crime re-enactment was so suggestive of the defendant's guilt that it effectively undermined the defendant's presumption of innocence. It is impermissible, for example, to require a defendant to "put on a ski mask, wave a toy gun, and shout 'give me your money or I'm going to blow you up.'"

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References and Further Reading

- Connor, Michael A., *The Constitutional Framework Limiting Compelled Voice Exemplars: Exploration of the Current Constitutional Boundaries of Governmental Power over a Criminal Defendant*, San Diego Law Review 33 (1996): 1:349–83.
- Levy, Leonard W. *Origins of the Fifth Amendment: The Right Against Self-Incrimination*. New York: Oxford University Press, 1968.
- United States v. Olvera*, 30 F.3d 1195 (1994).

Cases and Statutes Cited

- Miranda v. Arizona*, 384 U.S. 436 (1966)
- Schmerber v. California*, 384 U.S. 757 (1966)
- See also **Due Process**; *Miranda v. Arizona*, 384 U.S. 436 (1966); *Schmerber v. California*, 384 U.S. 757 (1966)

EXEMPTIONS FOR RELIGION CONTAINED IN REGULATORY STATUTES

Discussions of the relation of religion and secular law of the United States often center on constitutional controversies arising out of the Free Exercise and Establishment Clauses of the First Amendment. That narrow focus, however, overlooks the practical and conceptual importance of the thousands of ways in which subconstitutional sources of law such as statutes and common law rules also play a defining role in mapping out the boundaries of civil and religious authority. This entry discusses, in particular, the many federal and state statutes that explicitly provide religious institutions and religiously motivated individuals with exemptions from otherwise applicable secular law. Such statutes seek, variously, to accommodate religious conscience, recognize the relevance of religious norms, minimize intrusion into

religious life, acknowledge religious diversity, adjust regulatory regimes to take religious facts into account, or simply oblige religious interest groups. Exemption statutes have been criticized on various grounds, and sometimes pose particular difficulties, although courts have generally indicated that they are not unconstitutional simply for setting out distinctive legal treatment for religion and religious persons. In any event, their existence and variety are vital features of the legal landscape of religion in the United States whose practical significance and larger normative meaning need to be appreciated and understood.

This entry does not attempt an exhaustive account of statutory exemptions. It does try to provide a framework for considering a range of examples, and to suggest how such provisions illuminate the law's effort to understand and accommodate the normative force of religious life.

Statutory religion-based exemptions can be categorized in a variety of ways. Some create specific exemptions; others create general regimes of exemption. Some accommodate minority religious beliefs; others protect religious self-governance. Some demonstrate a willingness to put aside state interests; others further state interests in the face of the fact of religious diversity.

The oldest and most common form of statutory religion-based exemptions are specific exceptions from otherwise applicable legal norms. As Michael McConnell pointed out in an important study, several of the original American colonies exempted members of certain dissenting faiths from oath requirements, military conscription, and—ironically—assessments to support an established church. Since those early years, as religious diversity in the United States has exploded, and as the degree and scope of governmental regulation have grown even more dramatically, the number of exemption statutes and the range of issues they cover, have grown proportionately. A merely illustrative sampling of such provisions might include, for example, statutes exempting persons with contrary religious beliefs from immunization requirements, exemptions from certain drug laws and certain forms of alcohol regulation, exemption from autopsy requirements, qualified exemptions for Christian Scientists to employ spiritual healers rather than doctors under certain circumstances, qualified exemption of persons whose religions forbid acquiring insurance from the rule requiring automobile owners to obtain liability insurance, exemptions for persons whose religion forbids the taking of photographs from the requirement that they have a photograph on their driver's license, a federal statute allowing military personnel in uniform to wear items of religious apparel under certain conditions, qualified exemptions from

certain mandatory autopsy requirements, exemptions of religiously motivated students from certain parts of an otherwise required public school curriculum, exemptions of certain religious believers (such as the Amish) from certain otherwise mandatory provisions of the building codes, and qualified exemptions of certain religious employers from otherwise applicable requirements that their prescription benefit plans cover contraceptives.

All the statutes just listed detail accommodations for religion in particular contexts. A very different category of more recent statutes dating from the 1990s, such as the federal Religious Freedom Restoration Act (RFRA) and similar legislation in at least eleven states, set out instead a general, abstract, standard for drawing the boundaries between secular and religious authority across the whole legal domain. These statutes have a distinct quasiconstitutional coloration, and their history is intertwined with the modern development of the constitutional law of religion.

For many years, the courts have grappled with the question of whether the constitutional protection of free exercise includes any sort of fundamental right to be exempt from laws that directly conflict with religious norms. In *Reynolds v. United States*, its 1879 decision upholding laws against polygamy, the Supreme Court answered “no.” Beginning in 1963, however, with *Sherbert v. Verner*, the Supreme Court held in a line of cases that the Free Exercise Clause guaranteed religious believers a prima facie right to be exempt from laws that directly conflicted with the demands of their faith unless the government could demonstrate that its law was the least restrictive means to further a compelling state interest. Then, in 1990, in *Employment Division v. Smith*, the Court all but overruled this line of cases. It held, subject to some important qualifications, that the Free Exercise Clause could not be used to challenge laws that were otherwise “neutral” and “generally applicable.” RFRA and its state counterparts sought, in effect, to reinstate the *Sherbert* test as a statutory rather than constitutional entitlement. In *City of Boerne v. Flores* (1997), the Supreme Court struck down, as beyond the Congress’s powers under section five of the Fourteenth Amendment, the federal RFRA’s application to state laws. But the statute remains applicable to federal laws, and the State RFRA’s remain in force as well.

Like most analytic divides, the distinction between specific and general exemption statutes is often a matter of degree. Thus, for example, some exemption statutes are so detailed as to actually name the religions to which they apply, although most do not. Meanwhile, in the wake of *Flores*, Congress enacted the Religious Land Use and Institutionalized Persons

Act (RLUIPA), which mandated a compelling interest test in two specified albeit still broad categories of state laws, subject to a set of jurisdictional predicates that had been absent in the original RFRA. RLUIPA, which might be described as situated somewhere between the “specific” and “general” paradigms of exemption statutes, survived at least one Establishment Clause challenge in *Cutter v. Wilkinson* (2005).

The statutes discussed so far—whether at the specific or general end of the spectrum—still have in common the goal of accommodating the demands of religious norms that happen to come into conflict with the demands of certain secular laws. Such exemptions, by their terms, only apply to persons, usually in minority faith traditions, for whom such a conflict exists. A whole other category of exemption statutes has a quite different goal: to minimize, more broadly, the intrusion of the state into the self-government of religious communities. These institutional autonomy statutes stand out from other exemption statutes in at least two respects. To begin with, they generally protect churches and other religious institutions rather than individuals. More important, they generally apply with equal force to *all* religious communities, and do not depend on the existence of a particular conflict between secular law and religious belief. Examples of such institutional autonomy provisions include: exemptions of certain religious organizations from the reach of certain civil rights laws, whether or not the discrimination at issue is religiously motivated; exemption of churches from certain of the reporting and oversight provisions in the Internal Revenue Code and certain state statutes; and special provisions for churches in state charitable corporation laws.

Again, the distinction outlined here often blurs at the edges. For example, the statutory clergy–penitent privilege as enacted in the various states applies across the board, both to faith traditions that include something like a “seal of confession” and to those that do not. In a sense, then, the imperative to protect the distinctive religious practice of certain faiths has expanded, by analogy, to establish a principle protecting against undue intrusion into the religious communications of all faiths. Nevertheless, the conscientious element has not disappeared entirely: in some states, the question of whether the “penitent” can waive the privilege turns on whether revealing the confidence would violate the tenets of the clergyman’s faith.

A final, more subtle, way of categorizing exemption statutes goes to the relation between the exemption and the underlying legal norm to which the exemption applies. In many cases, exemptions clearly reflect a willingness to compromise or limit the reach

of an underlying legal norm, and to do so in favor of religious rights. In other cases, though, the relation between the exemption and the underlying norm is more complicated. For example, many state marriage statutes, while ordinarily requiring marriages to be solemnized by a single, licensed celebrant, make an exception for marriages conducted in faith traditions such as the Society of Friends (Quakers) in whose marriage rituals there is no such officiant. Such provisions, however, do not really compromise the state's policy that marriages be entered into with some formality and deliberation, but instead effectuate that policy in the face of the diverse ways in which religious communities organize their formal and deliberative rituals.

The most interesting cases, of course, are those in which it is not entirely apparent how an exemption relates conceptually to the underlying legal norm. For example, the federal Humane Slaughter Act purports on its face to spell out two equivalent and equally acceptable modes of animal slaughter, either by rendering the animal unconscious before killing it, or "by slaughtering in accordance with the ritual requirements of the Jewish faith or any other religious faith that prescribes a method of slaughter whereby the animal suffers loss of consciousness by anemia of the brain" This textual equivalence reflects the fact that Jewish and similar methods of slaughter were themselves designed to be humane. A puzzle remains, however, why, if the two methods are truly equivalent, permission for the second would be limited to the "ritual" context.

The number, breadth, and variety of religious exemptions contained in federal and state statutes suggests some important conclusions about the place of religion in the American legal imagination. Over the years, some commentators have suggested that the Religion Clauses of the First Amendment bar any or at least most classifications based on religion. Indeed, there is a strain of discomfort with apparent religious discrimination that goes back to colonial times and continues in the Supreme Court's emphasis on the principle of "neutrality" in both its Free Exercise and Establishment Clause cases. In a small number of cases, lower courts have held exemption statutes unconstitutional when they are drafted so as to protect only certain named religions or only "recognized religions." More famously, the Supreme Court, in its conscientious exemption decisions in the 1960s, stretched the language of the law to encompass persons whose beliefs played a role in their lives functionally equivalent to that of religion, and suggested that a more literal reading would pose problems under the Establishment Clause. Nevertheless, beyond these few counter-instances, statutory religion-based exemptions have generally been upheld, and the

Supreme Court has made clear, in cases such as *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos* (1987) and *Cutter v. Wilkinson*, and even in its decision in *Employment Division v. Smith*, that legislatures are entitled to go beyond formal equality and neutrality to take into account the distinctive normative dilemmas facing adherents of certain faiths and the unique character of religion and religious communities more generally.

Beyond the concern for equality and neutrality, however, lies a deeper jurisprudential puzzle. In *Reynolds v. United States*, the Court held not only that the Free Exercise Clause did not protect religious polygamists from the enforcement of antibigamy statutes, but that recognizing such a right would "in effect . . . permit every citizen to become a law unto himself." Some 110 years later, in *Smith*, the Court quoted this language approvingly and went on to state that recognizing a right to religion-based exemptions in the Free Exercise Clause would create a "constitutional anomaly." These statements suggest that a general doctrine of constitutionally required religion-based exemptions, particularly those that depend on the religious beliefs of specific claimants, would not only be wrong in the Court's view, but would violate the rule of law itself. The puzzle, of course, is why exemptions violate the rule of law if required by courts as a constitutional right, but not if enacted by legislatures as a statutory entitlement. The tension here might reflect problems with the Court's Free Exercise doctrine. It might also, however, suggest a particular legislative capacity, not only to respect religious conscience but to recognize, in an almost political sense, the diversity and juridical dignity of nonstate normative perspectives.

To underscore this point, consider one last example: the New Jersey Declaration of Death Act requires that individuals be declared dead if they have "sustained irreversible cessation of all functions of the entire brain," but makes an exception for persons whose religious beliefs would require the more traditional cardiorespiratory definition of death. The question arises whose rights this provision is protecting. In a sense, it cannot be the individual in question, since the state would otherwise consider him or her dead. Nor is it even the person's next of kin, since it is his or her religious views and not theirs that are dispositive. The answer might be that the state is deferring, not so much to the rights of an individual, but to the legitimacy of a normative system alongside its own.

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References and Further Reading

Dane, Perry, 'Omalous' Autonomy, Brigham Young University Law Review 2004 (2004): 5:1715.

- Kurland, Philip B. *Religion and the Law: Of Church and State and the Supreme Court*. Chicago: Aldine, 1962.
- Lupu, Ira C., *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, University of Pennsylvania Law Review 140 (1991): 555, 580–609.
- McConnell, Michael W., *The Origins and Historical Understanding of Free Exercise of Religion*, Harvard Law Review 103 (1990): 1409–1517.
- Newsom, Michael deHaven, *Some Kind of Religious Freedom: National Prohibition and the Volstead Act's Exemption for the Religious Use of Wine*, Brooklyn Law Review 70 (2005): 739.

Cases and Statutes Cited

- City of Boerne v. Flores*, 521 U.S. 507 (1997)
- Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 340 (1987)
- Cutter v. Wilkinson*, 125 S.Ct. 2113 (2005)
- Employment Division, Dept. of Human Resources v. Smith*, 494 U.S. 872 (1990)
- Humane Slaughter Act, 7 U.S.C. 1901–1906
- New Jersey Declaration of Death Act, N.J. Stat. sec. 26:6A-5 (2006)
- Religious Freedom Restoration Act, 42 U.S.C. 2000bb to 2000bb-4
- Religious Land Use and Institutionalized Persons Act, 42 U.S.C. 2000cc to 2000cc-5
- Reynolds v. United States*, 98 U.S. 145, 167 (1879)
- Sherbert v. Verner*, 374 U.S. 398 (1963)

See also **Establishment of Religion and Free Exercise Clauses; Employment Division, Department of Human Resources v. Smith**, 494 U.S. 872 (1990); **Establishment Clause Doctrine: Supreme Court Jurisprudence; Free Exercise Clause Doctrine: Supreme Court Jurisprudence; Religious Freedom in the Military; Religious Freedom Restoration Act; Religious Land Use and Institutionalized Persons Act of 2000**

EXPATRIATION

Expatriation is the voluntary relinquishment of nationality and allegiance. In this context, nationality is more or less synonymous with citizenship, and allegiance means the multifaceted bond joining citizen and state. Not surprisingly for a country born in rebellion, the United States has always recognized a right of allegiance transfer on the part of those becoming Americans. However, it was not until after passage of the Fourteenth Amendment that Congress first acknowledged the right of Americans to forsake U.S. citizenship.

Thereafter, the critical question became whether the government might unilaterally strip nationality, as a punishment or otherwise. Beginning with the act

of March 3, 1865, Congress asserted authority to treat certain actions (desertion and draft evasion) as evidence of an American's intent to abandon U.S. allegiance. In the Expatriation Act of 1907, Congress made loss of American nationality the automatic consequence of either naturalization elsewhere or a pledge of foreign allegiance. In the same statute, Congress declared that whenever a naturalized American returned to his or her homeland and resided there for two years it proved an intent to abandon U.S. nationality, and that any American woman forfeited her nationality by marrying a foreigner. Shortly thereafter, a native Californian who had married a British subject permanently residing in California was refused registration as a California voter on the grounds that she was no longer a U.S. citizen. Her appeal of that judgment failed when the U.S. Supreme Court in *Mackenzie v. Hare* (1915) accepted that Congress could make marriage to a foreigner an irrefutable presumption of the bride's expatriating intent. Congress repealed the provision for denationalization by marriage in 1922, but in the Nationality Act of 1940, added to the list of acts evidencing expatriation voting in a foreign election, service in the armed forces or government of a foreign power, and treason against the United States. Then, in the Expatriation Act of 1954, Congress added attempting by force to overthrow the government of the United States, advocating such an attempt, and participating in a seditious conspiracy. Four years later, in *Perez v. Brownell* (1958), the Supreme Court upheld the denationalization of a native Texan who had admitted sojourning in Mexico to avoid military service, and, while there, voting in political elections. That he denied any intention of renouncing his American nationality was immaterial. By the mid-twentieth century, therefore, Congress was confident that the Constitution allowed it to unilaterally denationalize, and the Supreme Court agreed.

But the Court soon changed its mind, declaring in *Trop v. Dulles* (1958) that, even if Congress had the power to denationalize, it could not do so as a sanction for wartime desertion without violating the Eighth Amendment's prohibition of cruel and unusual punishments. A decade later, in *Afroyim v. Rusk* (1967), the Court held unconstitutional the government's refusal to renew a naturalized American's U.S. passport because he had voted in an Israeli election. Overruling *Perez*, the Court struck down the relevant section of the Nationality Act on the grounds that for all those "born or naturalized in the United States," nationality is conferred by the Constitution itself and cannot be revoked by ordinary legislation. In 1980, the Court ruled in *Vance v. Terrazas* (1980) that, to establish expatriation, the government had to prove

by a preponderance of the evidence that an American specifically intended to forsake U.S. nationality. Under the Constitution today, therefore, expatriation is the only lawful form of denationalization, and an American's intention in this regard cannot be established simply by the drawing by Congress of an inference from an act, however incompatible Congress might find that act with continued allegiance.

Only those born in the United States and those, who having first immigrated to the United States have completed the process of naturalization, are citizens in the constitutional sense of *Afroyim* and *Terranzas*. Children born abroad to American citizens, for example, enjoy American nationality not as a constitutional right but as the consequence of an act of Congress. Whether such "statutory" Americans are also constitutionally protected from involuntary denationalization remains an open question.

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References and Further Reading

- Aleinikoff, T. Alexander, *Theories of Loss of Citizenship*, University of Michigan Law Review 84 (1986): 1471.
 Boudin, Leonard B., *Involuntary Loss of American Nationality*, Harvard Law Review 73 (1960): 1510.
 Gordon, Charles, *The Citizen and the State: Power of Congress to Expatriate American Citizens*, Georgetown Law Journal 53 (1965): 315.
 Jones, J.P., *Limiting Congressional Denationalization after Afroyim*, University of San Diego Law Review 17 (1979): 121.
 Roche, John. P., *The Loss of American Citizenship—The Development of Statutory Expatriation*, University of Pennsylvania Law Review 99 (1950): 25.
 U.S. Department of Justice, Office of Legal Counsel. *Survey of the Law of Expatriation* (June 12, 2002). <http://www.usdoj.gov/olc/expatriation.htm>.

Cases and Statutes Cited

- Afroyim v. Rusk*, 387 U.S. 253 (1967)
Mackenzie v. Hare, 239 U.S. 299 (1915)
Perez v. Brownell, 356 U.S. 44 (1958)
Trop v. Dulles, 356 U.S. 66 (1958)
Vance v. Terranzas, 444 U.S. 252 (1980)

See also **Citizenship**

EXTRADITION

Extradition is the process through which an individual held by one country is transferred to another country to face criminal prosecution or serve a criminal sentence. In the United States, extradition is possible only pursuant to a valid extradition treaty; in the absence of such a treaty, the government has neither

the right to demand extradition of an individual from a country nor the right or obligation to extradite an individual to that country. The United States has valid extradition treaties with most countries; notable exceptions include Afghanistan, Russia, Saudi Arabia, and China.

There are two substantive requirements for extradition. First, the offense for which extradition is requested must be an extraditable offense under the relevant treaty. Most extradition treaties include an exhaustive list of extraditable offenses. Others provide that all offenses of a certain severity—those that qualify as felonies, for example—are extraditable.

Second, the offense for which extradition is sought must be criminal under the laws of both the United States and the other country. This "dual criminality" requirement is designed to ensure that extradition is granted only for offenses that are considered serious by both countries.

Even if these requirements are met, there are a number of exceptions to extradition. The most controversial is what is known as the "political offense" exception, which prohibits the United States and its extradition partners from extraditing individuals whose offenses were either directed specifically at the government, such as treason and espionage, or involved a common crime like murder that was "so connected with a political act that the entire offense is regarded as political." Courts have used the political offense exception, for example, to refuse to extradite members of the Irish Republican Army (IRA) to the United Kingdom.

The nature of the applicable punishment can also serve as a ground for denying extradition. A number of treaties preclude extradition for offenses for which the requesting country can impose the death penalty. Such a provision permitted France to refuse to extradite Ira Einhorn, the "Unicorn Killer," to the United States until U.S. authorities promised not to execute him if convicted. (He was finally extradited to the United States in July 2001 to face trial for a 1977 murder.)

Individuals in the United States for whom extradition is sought are entitled to a hearing before a neutral magistrate. The magistrate's only responsibility, however, is to determine whether the charged offense is extraditable under the relevant treaty and, if it is, whether there is probable cause to believe the individual committed the offense. The extradition hearing is not a full trial; the normal rules of evidence do not apply, and the individual does not have an absolute right to confront the witnesses against him, call his own witnesses, or even introduce evidence that contradicts the prosecution's evidence. Moreover, the magistrate cannot take into account the treatment

that the individual will receive in the requesting country.

If the magistrate determines that the individual is extraditable, the secretary of state retains the authority to deny extradition, and can deny extradition on humanitarian grounds. If the magistrate determines that the individual is not extraditable, however, the secretary cannot reverse the magistrate's decision.

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References and Further Reading

- Bassiouni, M. Cherif. *International Extradition: United States Law and Practice*. New York: Oceana Publications, 2002.
- Bush, Jonathan A., *How Did We Get Here? Foreign Abduction After Alvarez-Machain*, *Stanford Law Review* 45 (1993): 3:939–83.

EXTREMIST GROUPS AND CIVIL LIBERTIES

The people of this nation have a great deal to be proud of and to celebrate. At holiday celebrations, the media is ready with hyperbolic words that praise this nation. And why not? The spectacular rise from a barely occupied wilderness to the most powerful nation on Earth in a remarkably short period of time is amazing and worthy of praise.

This was to be a nation built on the labor of many races and a variety of religions; a county that can build anything and everything; who believed in capitalism and not in kings; a nation that votes and accepts change through elections. All of these qualities and more are part of the American national heritage. Less known and not celebrated is this fact: since the formation of colonies, this nation has demonstrated a streak of intolerance, xenophobia, and violence that continues to this time. It can be argued that at every stage of American development, one finds examples of extremist groups in operation.

An example can be seen in religious groups or splinter groups who demonstrate fanaticism. During the 176 years of colonial status, there were instances of violence and extreme measures taken in most colonies against Catholics, Jews, Quakers, and within competing Protestant sects. Before 1692, there were forty-four witchcraft trials and during 1692, there were three hangings in Massachusetts alone. As the fanaticism died down, some 150 prisoners accused of witchcraft were released by the end of the year. One difference between European witchcraft and colonial practices was that in Europe, those found guilty of alleged heresy were burned at the stake, while

colonials found guilty of being witches or possessed of the devil, were hung.

Examples of religious intolerance during the colonial period included the banishment of Roger Williams because he rejected the right of civil authorities to legislate in matters of conscience. He and his followers had to flee the Massachusetts Colony or risk persecution. From the Salem witch trials through Mormon battles to exist in a hostile religious climate, one finds terror and violence used against various religious groups.

Beyond extremist groups that took violent action against small, generally vulnerable religious persons and groups, there were extremist groups who persecuted people because of their race. The history of the Ku Klux Klan after the Civil War demonstrates the use of murder, lynching, torture, and other extreme measures to prevent black people from exercising their newly found freedoms.

Even the passage into constitutional law of three amendments initially aimed at empowering blacks could not stop the overwhelming power of extremist groups in the South from having their way. The Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution (as well as additional specific laws) did not stop extremist groups from using terror and acts of violence against blacks, Asians, and Native Americans.

Another manifestation of extremists was the vigilante movement that appeared mainly in the last decades of the nineteenth century and into the early twentieth century. They claimed that the regular justice system was not working to their liking (too slow, too sympathetic to defendants). This led various extremist groups of vigilantes to hold their own "courts" and mete out punishments (including death) to those caught in their net.

In all of these instances of extremist acts, there is a continuing question that seems to be insoluble: what should a nation, through its representatives, its executive, and its system of law do when confronted by one or more organizations that reject the sovereignty of the nation over them? The challenge thrown up by extremists groups is to assert that the national government had failed to adequately act to protect its citizens. Note that this was before September 11, 2001. The obverse can also be seen in hate groups that refuse to admit that the government has any right to control their lives, tax them, or educate them. Frequently the message was bundled with one of racial hatred and religious violence. It was and still is a classic case of safety versus freedom. How much freedom are we (as a nation) willing to give up for safety?

This nation, as is true of many others in the early twenty-first century, has to cope with a new enemy: terrorists. These terrorists come from extremist groups that differ from the long line of earlier extremists in that they seek to win their goals through fear—paralyzing fear of violence emanating from religious, political, and cultural extremists willing to *destroy themselves* in order to destroy the lives of masses of people and public institutions. They are religious, political, and cultural fanatics beyond anything this and other nations have seen in modern times. They pose a continuing threat to the relatively open boundaries of Western democracies, and they are able to hide behind the existence of their fellow countrymen, who while they may have no involvement in these extremist plans with deadly aims, carry the color of skin and difference in religion as makers of a potential enemy. To date, there have been few instances of actively branding the innocent as an answer to how to identify the truly radical and dangerous. The question is how long will this be the case?

Because so much has changed since September 11, 2001, the need to confront how the nation and its leadership should deal with extremists is crucial.

The existence of extremist groups currently demands that our nation continually evaluate how we should react to these killers and terrorists. Are these murderers entitled to enter the American justice system? Should they be given the protection of the rights under First Amendment and other amendments? All of these issues present the ultimate issue of how we preserve our freedoms at the same time as we effectively protect our citizens and the safety of our national infrastructure.

One clue as to how to deal with extremists is to study the history of extremists in this country. In that history we note that in the twentieth century, extremists organized around leaders who preached hatred of minorities and encouraged the formation of militia-type members. They claimed that their enemy (among others) was the federal government, considered to be under “Zionist control.” One response of these hate groups included moving to relatively open and empty territory, such as in Montana and Utah, where they could practice their beliefs and claim their right to challenge the right of any government over them. The 1980s and 1990s were times of concern in law enforcement circles that extremist groups also targeted violence against law officers and judges.

Three major incidents occurred that explain changes in extremist groups compared to before 9/11/01: the Ruby Ridge shootout, the Waco standoff, and the Oklahoma City bombing of a federal building in 1995; 168 people were killed in the Oklahoma bombing.

September 11 overwhelmed all instances of domestic violence until that time except the earlier bombing of the Twin Towers in 1993, which introduced foreign terrorists. Three thousand people were killed as a result of the Twin Towers attack in Manhattan. This crime was committed by Muslim extremist groups. This terrible event created a demarcation point in what has turned out to be a war against extremist groups by the government. Military action in Afghanistan and Iraq followed. What was announced as a war to overthrow the dictatorship became a terrorist plan of destruction against the U.S. presence in Iraq and Afghanistan.

Compare 9/11/01 to what happened in Ruby Ridge, Utah. In brief, a warrant had been issued to be served by the U.S. Marshals Service upon a resident in this area. Armed with what have been called illegal “shoot-to-kill” orders, a firefight took place as the occupants attempted to resist the service of the federal warrant, leaving two dead. Although the ties of those involved to radical causes and groups was less than clearly established, the killings became the rallying cry for extremists who, for religious, political, or racial hate reasons used what happened as proof that the federal government was out to destroy their extremist group.

Three years after Ruby Ridge, in 1995, two American citizens, Timothy McVeigh and Terry Nichols, plotted the destruction of the Alfred R. Murrah federal building as revenge for the events of Waco; the plot climaxed in an act of terror on the second anniversary of Waco. Both McVeigh and Nichols were followers of extremist groups. Until 9/11/01, the McVeigh and Nichols action was the deadliest attack on American soil. McVeigh believed that his act of destruction of lives and property would be the opening call for all rightwing extremist organizations to rise up in revolution against the national government.

Preceding McVeigh were other “lone-wolf” actors including William Krar, a white supremacist who was arrested having in his possession enough sodium cyanide to kill 6,000 people. Another was Eric Rudolph, a domestic terrorist who killed people in an abortion clinic and at the 1996 summer Olympics.

One of the results of the Oklahoma bombing was actually a decline in domestic terrorists, “lone wolves,” or extremist organizations. But those who study these movements warned what while the number of those involved in rightwing (as well as leftwing extremist groups) have diminished, the hard-core believers are still there. They point to neo-Nazis, white supremacists, and Christian identity groups that are still functioning. They advise that while the number of militia groups has dropped from 900 (prior

to Oklahoma bombing) to 150, homegrown haters and hate groups are still there—and dangerous.

Since 9/11/01, we are a different nation. To gain an appreciation of this assertion, consider the following.

The presence of extremists in groups and in “lone-wolf” attacks has been a part of American culture since colonial days. There has been an apparent relationship between the openness of American society and the extremes of totalitarian extremism. The use of violence by extremists is a method of taking control into one’s own hands, and has been directed to the production of fear: Where will they strike next?

The nineteenth and twentieth centuries contained many forms of extremism. Until 9/11/01, these forms of extremism have come from white, Protestant individuals and groups and were intended to implant fear into minority groups—or as a control device to keep blacks and other racial or religious minorities from asserting their constitutional rights.

The national government has from time to time used extremist tactics to attack those who were considered dangerous. Examples are the destruction of the Industrial Workers of the World (Wobblies); the use of troops to break strikes; and the first red scare (1918–1920) and the second (1946–1957) that played on the paranoia regarding communists or leftists as dangerous to the existence of the country.

Extremism is found in the left as well as the right in the political spectrum. John Brown fits into the category of leading extremists. Certain groups of environmentalists and animal rights groups can be seen as current extremists of the left.

The planning to destroy large numbers of people and a country’s economy takes advantage of the openness of borders as well as public transportation. Most of the planning can take place thousands of miles away from the targets.

The ability to kill people and harm a nation’s infrastructure with little chance to catch or to stop the terrorist act is a reality because members of the extremist group frequently intend to kill themselves as a sacrifice to the “cause.”

Until 9/11/01, most people in the United States neither understood nor cared about the Muslim religion. Certain Muslim extremists hate Western nations and particularly the United States, believing that this nation has and will continue to corrupt and weaken their culture. They also believe that the aim of the United States and their allies is to conquer Muslim nations for their oil.

Not one nation openly supports the Muslim fanatics; instead, bands of these fighters “float” from one nation to another. They seem to have an endless number of men, women, and children ready to sacrifice their lives for their religious cause. This is a technique

that the United States and its allies have not seen prior to 9/11/01.

Brutalities such as beheading are used against anyone they consider an enemy, and at times for no valid reason but to promote fear in countries where such behavior is neither understood nor acceptable. Some countries have already bent to the will of fanatic groups to avoid the relentless war being waged, thus rejecting American leadership in the war against fanatics.

In the words of Benjamin Franklin, “They that give up essential liberty in order to obtain a little temporary safety deserve neither liberty nor safety.” This statement may no longer be entirely valid. Certainly it is subject to challenge: a little “temporary safety” in the sense Franklin made this statement is no longer possible in today’s world. Oceans, mountain ranges, densely populated cities and industrial areas, as well as buildings of every kind have proven to be no barrier to terrorists.

There has been (thus far) an absence of suicides in domestic extremist groups but there seems to be no feasible way of providing the safety that Franklin addressed, especially if airlines, ships, trains, shopping malls, among many other possibilities, may become effective targets for suicidal terrorists. The slide down the slippery slope of restricting liberties seems to afford at least the appearance of “doing something” to respond effectively to the threat posed by these extremists.

The red scares that followed World Wars I and II yielded legislation aimed at ensuring the loyalty of its citizens. Action was taken against those whose beliefs were not orthodox. Aliens were shipped out of the country. Criminal legal procedures were taken against alleged subversives.

With the collapse of Soviet Russia, the cold war seemed to yield a period of peaceful times; 9/11/01 shattered that peace. Terrorists were actually trained in this country to fly large aircraft, and turned that skill into opportunities for death and destruction.

Looking back at the red scare years, there was not a single instance of any communist having a cache of arms, military training, bombing, or attempt to use suicide terrorists on targets. What they were most guilty of was their beliefs. On the other hand, such rightwing groups as the National Alliance, Aryan Nations, and Creativity Movement were frequently trained in armed conduct. They gathered weapons with the goal of creating some sort of revolution. They carried out armed actions; between 1995 and 2005, fifteen law enforcement officers were killed by these antigovernment fanatic groups. Still, however, there was no realistic chance that they would even successfully mount an attempt to kill masses of people

or disrupt the nation. When threats became possible, they came from *outside the nation*.

The response of the administration that came in the wake of the successful killing of some 3,000 people as well as destroying the Twin Towers, was to rush through Congress with little or no dissent, a law commonly called the USA Patriotic Act. The basic idea was to give law enforcement agencies powerful tools with which to respond to the terrorist act of 9/11/01, and to stop further acts of violence against this nation.

As the act rushed through Congress, there was little thought given to the civil rights issues involved, although there was a section of the law that expressed the sense that all Americans, including Arab Americans, must be protected.

The heart of the act was to direct and authorize actions against those who might attempt attacks on Americans and the American infrastructure. To a significant extent, the Patriot Act set aside restrictions as to what the federal government could do that the government could not do since 1976. The Federal Bureau of Investigation (FBI) has used bugging devices, letter opening, invasion of offices and homes, infiltration of domestic organizations, and many other illegal or extralegal acts. Hoover died in 1972 and there followed a wide-ranging congressional committee whose work revealed abuse of power by Hoover and his FBI. These restrictions, coming out of a congressional committee's work, allowed the government to once again use these powers and techniques. Additionally, this means that the FBI can monitor groups and public meetings, and the Internet. The FBI could even send undercover agents to suspected houses of worship.

As of this writing, the effectiveness of those operating under the umbrella of the Patriot Act remains to be seen. That the act (most of it permanent as of early 2006) raises important issues of infringement of civil rights seems evident. Secret trials, hidden detainees, torture, and profiling are intended to break the will of those who seek to sway history through terror. In the case of aliens alleged to be terrorists, it appears that no concern for their civil rights limits our government. Intrusions and detentions are the price these people pay as the nation continually seeks out its enemies. Only time will answer the question of whether the nation has gone too far to ensure its safety against extremists. Perhaps the times have been so catastrophic in scope that the Patriot Act as well as other measures will justify the curtailment of civil rights and liberties. The march of history will eventually answer.

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EYEWITNESS IDENTIFICATION

Police investigation often entails interviewing those who were eyewitnesses to an offense, attaining a description of the culprit, and then later presenting a suspect or suspects to the eyewitness in a lineup or other identification procedure. Lineups, also known as identification parades in Britain, involve a corporeal identification procedure where persons appear before the witness. In a lineup, the witness reviews those who have been assembled and determines whether the culprit is among them. In a photo spread, a noncorporeal identification procedure, an array of photos is placed before the witness. In a show-up identification procedure, which may be corporeal or noncorporeal, the witness is presented with a single individual rather than several, and thus has no others to select from or compare. During a lineup or show-up, persons may be asked to move about or speak so that the eyewitness may use memory of action or speech as well as appearance to make an identification.

Many social scientists and judges believe that erroneous identification testimony is one of the leading causes of wrongful convictions. All eyewitness identification procedures are tests of recognition memory, seeking a match between the memory of the perpetrator and the person presented. Eyewitness identification actually engages three tasks: perception of the original perpetrator, storage in memory, and retrieval from memory. Psychologists studying the fallibility of each task have made suggestions to improve the reliability of eyewitness identification. Error may arise when the witness selects an individual who is the best match, even if that match is not perfect. A sequential lineup presenting one person at a time and attaining a yes or no decision for each minimizes the likelihood of such comparative or relative judgments, and is recommended by the American Psychology/Law Society (AP/LS). Informing the eyewitness that the perpetrator may not be present further reduces comparative judgment. As police conducting the identification procedure may communicate their own view that they have apprehended the right person and pressure the witness, the AP/LS also recommends a double-blind procedure where those administering the procedure are not aware which person is the suspect.

Since 1967, the Supreme Court has overseen procedures in an effort to reduce unreliability and the likelihood of convicting the innocent. Motions to suppress or exclude possibly mistaken eyewitness identification testimony rely on varying constitutional arguments. If an illegal detention or arrest violating the defendant's Fourth Amendment prohibition against unreasonable seizure preceded the identification procedure,

testimony regarding the out-of-court procedure will be excluded as a fruit of the poisonous tree, and possibly also the in-court identification (*United States v. Crews* [1980]). Lineup participants who are ordered to repeat the words used by the culprit during the crime are not denied their Fifth Amendment privilege against self-incrimination as this is not a testimonial communication (*United States v. Wade* [1967]). However, the Sixth Amendment right to assistance of counsel does attach when a defendant appears in a lineup after the criminal prosecution has begun, and denial of counsel will require exclusion of some identification testimony (*Wade*). When suggestive procedures of any type create a substantial likelihood of misidentification, due process will require exclusion of all identification testimony from the witness (*Manson v. Brathwaite* [1977]).

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References and Further Reading

- Borchard, E.M. *Convicting the Innocent: Sixty-Five Actual Errors of Criminal Justice*. New Haven, CT: Yale University Press, 1932.
- Gross, Samuel H., *Loss of Innocence: Eyewitness Identification and Proof of Guilt*, *Journal of Legal Studies* 16 (1987): 395–493.
- Judges, Donald P., *Two Cheers for the Department of Justice's Eyewitness Evidence: A Guide for Law Enforcement*, *Arkansas Law Review* 53 (2000): 231–297.
- Koosed, Margery M., *The Proposed Innocence Protection Act Won't—Unless It Also Curbs Mistaken Eyewitness Identifications*, *Ohio State Law Journal* 63 (2002): 263–314.
- Rattner, Arye, *Convicted but Innocent: Wrongful Convictions and the Criminal Justice System*, *Law and Human Behavior* 12 (1988): 283–93.
- U.S. Department of Justice. *Eyewitness Evidence: A Guide for Law Enforcement* (1999). <http://www.ncjrs.org/txtfiles1/nij/178240.txt>.
- Wells, Gary L., Mark Small, Steven Penrod, Roy S. Mullan, Solomon M. Fulero, and C.A.E. Brimacombe, *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, *Law and Human Behavior* 22 (1998): 603–647.

Cases and Statutes Cited

- Manson v. Brathwaite*, 430 U.S. 98 (1977)
United States v. Crews, 445 U.S. 463 (1980)
United States v. Wade, 388 U.S. 218 (1967)

See also **Due Process; Lineups; Right to Counsel**

F

FAIR CREDIT REPORTING ACT, 84 STAT. 1127 (1970)

The collection, compilation, and dissemination of consumer credit information in reports (“consumer reports”) is not a recent development. The first credit reporting agency (CRA), Retail Credit Company, began compiling consumer reports as early as 1899. Today, the consumer credit reporting industry is dominated by three major companies, Experian, Equifax (the descendant of Retail Credit Company), and Trans Union. Together, these three CRAs hold records on more than 200 million consumers and provide crucial economic information to lenders, retailers, and employers in millions of transactions every day. Indeed, it is difficult, if not impossible, to imagine our economy without them or the thousands of others.

Despite the obvious importance and value of CRAs, they also have the potential to affect the privacy and livelihood of millions of Americans. Over time, poor collection and dissemination practices by CRAs resulted in real dangers to individual privacy. By the 1960s, consumer reports not only tracked credit history but many also included personal information, including sexual orientation, drinking habits, and even cleanliness. Compounding these problems were the lax disclosure practices many CRAs used—making consumer reports available to almost anyone willing to pay a fee. In addition, many of these consumer reports were highly inaccurate—containing obsolete, incomplete, or even fraudulent data. Finally, CRAs policies made it virtually impossible for consumer to see or correct their own consumer reports.

Out of this mess Congress passed the Fair Credit Reporting Act (FCRA) of 1970. Congress’ intent in passing FCRA was to address the most important problems associated with CRAs’ past practices. In particular, FCRA addressed the two major areas of abuse: (1) dissemination of consumer reports to unauthorized parties and (2) creation of inaccurate, false, incomplete, or obsolete consumer reports. In addressing these problems, FCRA created a complex regulatory framework that imposes obligations on CRAs and provides rights and remedies to consumers. This important legislation, therefore, represents the first attempt by Congress to protect individual privacy from the intrusive and, at times, abusive practices of private industry.

FCRA created a very broad definition of CRA, encompassing any entity that regularly prepares and disseminates consumer reports. As a result, bill collection agencies, cable companies, banks, and even universities have been held to be CRAs. Congress also insisted on a broad definition of consumer report—defining it to include any report that “touches” on an individual’s creditworthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or modes of living.

Under FCRA, CRAs are required to enact “reasonable procedures to assure maximum possible accuracy” in consumer report information. Among the steps CRAs must take are: (1) removing inaccurate or obsolete data on notice or discovery; (2) informing consumers of adverse actions taken as a result of a consumer report; (3) allowing consumers to challenge

the accuracy, currency, or completeness of information contained in consumer reports; and (4) removing or changing challenged data that cannot be confirmed within a reasonable period of time. Finally, CRAs are prohibited from disclosing consumer reports for anything other than a “permissible purpose.” Permissible purposes include, among others, requests for reports to employers (with consent), as part of an application for credit, or to allow financial institutions to review the creditworthiness of current customers.

CRAs are also required to make consumer reports available to consumers for review and correction. Prior to 2003, the provision of reports was only required in two circumstances: (1) on request and for a fee or (2) when an adverse action has been taken based on the report. In 2003, Congress amended FCRA with passage of the Fair and Accurate Credit Transactions Act (FACTA). Among the many changes made to FCRA, this latest amendment now requires all the three major CRAs to provide a copy of a consumer’s report, without fee, once a year on request.

Unlike many privacy and consumer protection laws, FCRA authorizes private lawsuits. Injured consumers may sue for economic and punitive damages. Criminal prosecutions may be brought against both CRAs and those who fraudulently obtain consumer reports. These robust remedial provisions have led many individuals to sue CRAs and users of consumer reports for damages caused by inaccurate information and unauthorized disclosures. In addition, the Federal Trade Commission has been active in enforcing FCRA’s provisions—mostly recently obtaining a \$2.5 million settlement from the major CRAs based on their sale of consumer reports to advertisers and marketers (*Trans Union v. FTC* [2001]).

In the decades since its passage, FCRA has required various amendments to capture the current practices and capabilities of CRAs. The most fundamental change in consumer reports has been the creation of “credit scores.” Credit scores (using proprietary formulas created by CRAs) have become more important for assessing the creditworthiness of consumers than the consumer reports on which they are based. Yet FCRA, in its original formulation, does not govern credit scores. In 2003, Congress amended FCRA to require disclosure of credit scores, including explanations of their use, for a fee. As consumer reports become increasingly important in a credit-rich and electronic market, we may assume that FCRA will be amended again. Indeed, FCRA has recently been amended by the USA Patriot Act to give law enforcement greater access to credit and financial information.

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References and Further Reading

- Cate, Fred H., *et al. Financial Privacy, Consumer Prosperity, and the Public Good*. Washington D.C.: Brookings Institution Press, 2003.
 FTC Commentary on FCRA, 16 C.F.R. Part 600.
 Maurer, Virginia G., *Common Law Defamation and the Fair Credit Reporting Act*. Georgetown Law Journal 72 (1983): 95–134.
 Smith, H. J. *Managing Privacy: Information Technology and Corporate America*. Chapel Hill: University of North Carolina Press, 1994.
 Westin, Alan F. *Privacy and Freedom*. New York: Atheneum, 1967.

Cases and Statutes Cited

- Fair and Accurate Credit Transaction Act of Dec. 4, 2003, 111 Stat. 1952
 Fair Credit Reporting Act of Oct. 26, 1970, c. 41, 84 Stat. 1127
Trans Union v. FTC, 245 F.3d 809 (D.C. Cir. 2001), *cert. denied*, 536 U.S. 915 (2002)
 Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (“USA PATRIOT Act”), Act of Oct. 26, 2001, 115 Stat. 272

See also **Congressional Protection of Privacy; 9/11 and the War on Terrorism; Privacy; Terrorism and Civil Liberties**

FAIR LABOR STANDARDS ACT AND RELIGION

Religious institutions usually are subject to laws of general applicability. A particularly contentious situation involves the interplay between one such generally applicable law, the federal Fair Labor Standards Act, providing minimum wage and overtime premium pay to employees, and religiously affiliated institutions operating as employers of largely secular enterprises. The government and/or the employees contend that the employees are entitled to the FLSA rights and protections. Meanwhile, the religiously affiliated employer contends that the workers are volunteers, or, because the enterprise is related to the social justice ministry of the religion, its employment practices are exempt from the FLSA by First Amendment separation of church and state and free exercise principles.

The landmark United States Supreme Court decision governing these disputes is *Tony and Susan Alamo Found. v. Secretary of Labor*.

In *Tony and Susan Alamo Found.*, the Supreme Court unanimously affirmed the decision of the Eighth Circuit that the Fair Labor Standards Act, the federal minimum wage law, protected persons used in the commercial enterprises of religious foundations.

This particular application of federal wage law did not violate the free exercise rights of the employees and did not constitute excessive entanglements of the government with the religious foundation. Because the Foundation had thoroughly involved itself in operating business commercial enterprises, it had effectively deprived itself of the mantle of religious exemption and immunity from compliance as an employer with the federal minimum wage law.

The Alamo Foundation was a nonprofit religious organization. Its proclaimed mission was Christian evangelism and active corporal works of mercy to disadvantaged persons. The Foundation derived its income from operating a variety of commercial businesses, including service stations, retail clothing and grocery outlets, hog farms, roofing and electrical construction companies, a record-keeping company, a motel, and companies engaged in the production and distribution of candy. These businesses were staffed largely by the Foundation's unpaid associates. They received clothing, room, and board but no cash wages in return for their services.

Other than its peculiar nonwage practices, for all practical purposes the Foundation was substantially equivalent, in its day-to-day operations, with other secular employers. The fact that the workers of the religious foundation considered themselves charitable volunteers serving their religion, and not employees within the meaning of the FLSA, was not determinative.

The Court deemphasized the free exercise elements of the case and, instead, highlighted the federal wage law issues because of the pervasive commercial nature of the Foundation's various business enterprises.

The free exercise clause of the First Amendment does not require an exemption from a governmental program unless, at a minimum, inclusion in the program actually burdens the freedom to exercise religious rights. Application of the FLSA to the foundation workers who were engaged in commercial ventures did not violate the workers' free exercise rights under the First Amendment, because they remained free to donate their FLSA-mandated wages back to the Alamo Foundation.

Religious organizations do not have carte blanche to exploit persons employed in their commercial ventures. Free exercise claims by those persons, disavowing their labor law and employment rights, are properly unavailing. The Court implicitly recognized the potential coercive influence of religious institutions on their employees, pressuring the workers to assert positions contrary to their legal rights.

Since the Court's Alamo decision in 1985, several federal circuit courts of appeals have issued decisions in full accord with the Alamo precedent.

In *Reich v. Shiloh True Light Church of Christ*, the court determined that children younger than the age of sixteen employed in the commercial enterprises of a religious institution as part of their religious belief that they should receive vocational training are covered employees under the FLSA. Church youth participated in the Shiloh Vocational Training Program, through which they performed various construction projects. In turn, customers paid the Church for the services performed. Children younger than the age of sixteen did not receive wages for their work. Instead, they received lump sum payments that the Church characterized as gifts. In these situations where free labor is for the supposed benefit of the worker, the general test applied by the courts is whether the employer or the employee is the primary beneficiary of the free labor. Because the Church was the primary beneficiary of the labor, the children were in fact employees and thus entitled to the protections of the FLSA.

Applicability of the FLSA often arises in religiously affiliated schools. *Dole v. Shenandoah Baptist Church* involved application of the FLSA to lay faculty at the Roanoke Valley Christian Schools operated by the Shenandoah Baptist Church. The Church asserted that application of the FLSA would violate both the free exercise and establishment clauses of the First Amendment. The court disagreed, holding that the FLSA applies to church run schools that are enterprises within the meaning of the FLSA. Any minimal free exercise burden was justified by the compelling government interest in enforcing the minimum wage and equal pay provisions of the FLSA. Likewise, in *DeArment v. Harvey*, a church-operated private religious school was subject to the FLSA. The school used a unique learning technique composed of a self-study program for the students. A supervisor and class monitor assisted the students in their studies. The students themselves were responsible for independent learning, whereas the supervisors graded papers, answered students' questions, conducted prayer services, and counseled students. Both the supervisor and the class monitors were required to be born again Christians, and these employees considered their work an integral component of their personal ministry. However, despite the contention that their employment was part of their religious ideology, the Court applied *Shenandoah*, holding that the FLSA applied to both the class monitors and supervisors. The ministerial exemption of the FLSA is narrowly limited in its application. Clearly, this exception includes ordained clergy, as well as employees essential to carry out particular religious rituals.

In light of the narrow applicability of the ministerial exception, religious organizations engaged in

commercial enterprises will usually be deemed employers of employees subject to the FLSA.

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References and Further Reading

- Gregory, David L., *The First Amendment Religion Clauses and Labor and Employment Law in the Supreme Court, 1984 Term*, New York Law School Law Review 31 (1986): 1.
- Miller, Scott D., *Revitalizing the FLSA*, Hofstra Labor and Employment Law Journal 19 (2001): 1.
- Rowan, Regan C., *Solving the Bluish Collar Problem: An Analysis of the DOL's Modernization of the Exemptions to the Fair Labor Standards Act*, U. Pennsylvania Journal of Labor and Employment Law 7 (2004): 119.

Cases and Statutes Cited

- DeArment v. Harvey*, 932 F.2d 721 (8th Cir. 1991)
- Dole v. Shenandoah Baptist Church*, 899 F.2d 1389 (4th Cir.) cert denied, 498 U.S. 846 (1990)
- Fair Labor Standards Act, 29 USC 201 et. seq.
- The First Amendment of the United States Constitution
- Reich v. Shiloh True Light Church of Christ*, 85 F.2d 6161 (4th Cir. 1996)
- Tony and Susan Alamo Foundation v. Secretary of Labor*, 105 S. Ct. 1953 (1985)

See also **Exemptions for Religion Contained in Regulatory Statutes; *Tony and Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290 (1985)**

FAIR USE DOCTRINE AND FIRST AMENDMENT

A certain tension exists between copyright law and first amendment values. Copyright law has a particularly broad sweep today. It extends to books, creative literature, visual art, photographs, videos, sound recordings, and computer programs. Copyright protection also extends to the "derivative" forms of this work, including translations, performances, and digital reproductions. Even noncommercial use of copyrighted work can be illegal, as when copyrighted music is downloaded on one's home computer.

Conventional wisdom has it that copyright law resolves any first amendment concerns by recognizing two limitations. First, the Copyright Act denies protection to "ideas," "concepts," facts, or "principles" per se and instead protects only their "expression." Second, potential infringers are permitted to make "fair use" of copyrighted material. Because of these two limitations, the first amendment seldom plays a role in suits for copyright infringement. As Justice Ruth Ginsburg has written, existing copyright law contains "built-in free speech safeguards."

The fair use doctrine has been recognized by courts for more than 160 years, although it was not codified by Congress until 1976. The Copyright Act currently permits the fair use of copyrighted work "for purposes such as criticism, comment, news reporting, teaching...scholarship, or research." When determining whether a defendant has engaged in fair use of copyrighted work, courts consider four statutory factors. They consider (1) the purpose and character of the defendant's use, including whether the use is commercial or nonprofit; (2) the nature of the copyrighted work; (3) the amount of copyrighted work that has been used; and (4) the effect of the defendant's use on the existing or potential market value of the work. The Supreme Court has emphasized that all these factors are to be weighed together and that no bright-line test exists for achieving this "sensitive balancing of interests."

In recent years, the Court has shown greatest solicitude for "transformative" use of copyrighted work when applying the fair use doctrine. The transformation standard focuses on the extent to which the alleged infringer "adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message." This transformative use of copyrighted material, although not necessary to a fair use defense, lies "at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright." When the alleged infringer "transforms" copyrighted work, even the infringer's commercial exploitation of the transformed product is unlikely to negate the fair use defense. For example, in *Campbell v. Acuff-Rose Music, Inc.*, the Court found that the rap group "2 Live Crew" had engaged in protected fair use when it parodied the classic Roy Orbison song, "Oh, Pretty Woman" and profited by both recording and performing its parody.

Current law thus achieves a compromise between copyright and First Amendment values. Whether it is a sound compromise is a matter of debate. Professor Rebecca Tushnet, writing in the *Yale Law Journal*, has recently argued that the fair use doctrine protects only one version of first amendment values—a version that esteems the alleged infringer's transformative expression—while ignoring a version that recognizes the value of nontransformative uses like copying. In particular, the fair use doctrine's emphasis on transformative expression is said to ignore the interest of the public audience in gaining greater access to valued expression. It remains to be seen whether alternative versions of a compromise between copyright and first amendment values, like Tushnet's, will ultimately gain traction in Congress or the courts.

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References and Further Reading

- Boorstyn, Neil. *Boorstyn on Copyright*. 2nd Ed., Vol. 1, 12-4-12-38. 2000.
- Goldstein, Paul. *Copyright*. 2nd Ed., Vol. 2, 10:1-10:71. Supp., 2005.
- Leval, Pierre N., *Toward a Fair Use Standard*, Harvard Law Review 103 (1990): 1105.
- Tushnet, Rebecca, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, Yale Law Journal 114 (2004): 535.

Cases and Statutes Cited

- Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994)
- Eldred v. Ashcroft*, 537 U.S. 186 (2003)
- Copyright Act of 1976, 17 U.S.C. §§ 102, 107

FAIRNESS DOCTRINE

The fairness doctrine was developed by the Federal Communications Commission (FCC) to ensure fairness and balance in broadcasters' coverage of controversial public issues. Because radio and television broadcasters enjoy a governmental license to use part of the "scarce" broadcast spectrum, they must act in the public interest. The fairness doctrine is one means by which the FCC attempted historically to serve the public interest. The fairness doctrine existed in some form from 1949 until the late 1980s, when it was repealed by the FCC. It had greatest influence between 1962 and 1976.

The fairness doctrine took specific form in rules such as the "personal attack" rule and the "political editorializing" rules that were challenged in *Red Lion Broadcasting Co. v. Federal Communications Commission*. Under the personal-attack rule, when a person involved in an issue of public interest was attacked during a broadcast, the station was obligated to give him an opportunity to respond. Under the political-editorializing rule, when a political candidate was endorsed in an editorial, his opponent had the right to respond.

In *Red Lion*, the Supreme Court upheld these rules and the fairness doctrine. The Court rejected claims (1) that the FCC lacked statutory authority to implement the fairness doctrine, and (2) that the doctrine infringed broadcaster's first amendment rights. Responding to the first amendment challenge, the Court observed:

Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium. But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the

ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.

This view of government's need to regulate broadcast fairness because of medium scarcity has not weathered well over time. In 1985, the FCC released a report concluding that the fairness doctrine did not promote the public interest, that it "chilled" broadcast speech, and that it was effectively obsolescent. Since then, attempts to reinstate some form of the fairness doctrine have failed politically, with greatest opposition coming from members of the Republican Party.

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References and Further Reading

- Krattenmaker, Thomas, and Lucas Powe, *The Fairness Doctrine Today: A Constitutional Curiosity and an Impossible Dream*, Duke Law Journal 1985 (1982): 151.
- Logan, Charles, Jr., *Getting Beyond Scarcity: A New Paradigm for Assessing the Constitutionality of Broadcast Regulation*, California Law Review 85 (1997): 1687.

Cases and Statutes Cited

- Communications Act of 1934, *as amended* 47 U.S.C. § 301 *et seq.*
- Red Lion Broadcasting Co. v. Federal Communications Commission*, 395 U.S. 367 (1969)

FALSE CONFESSIONS

One of the most compelling forms of evidence in a criminal trial is a confession of the crime by the accused. This evidence is so compelling because most people believe it highly unlikely that someone would confess to a crime they did not commit, especially a serious crime. Although intuitively appealing, this common belief has been disproved by many recent studies. Not only do individuals falsely confess, they sometimes do so without outside justification—such as the desire to protect someone else—and they confess to very serious crimes, including capital murder. In fact, false confessions are one of the three most commonly cited factors in death penalty cases that have been reversed or resulted in an executive pardon due to the defendant's actual innocence.

There are many reasons why an individual might falsely confess. Some individuals falsely confess due to outside justifications such as protecting another individual. However, mentally coercive police interrogation techniques are the more common cause of false confessions in cases that have been overturned. Although these techniques are designed to elicit

genuine confessions, they also risk encouraging false confessions, especially when dealing with juveniles or mentally challenged suspects. Typical techniques include isolating the suspect from others and encouraging a confession through the use of deception and mental coercion. In response to these interrogation techniques, some individuals actually come to believe that they committed the crime. Others succumb to the pressure of the interrogation and falsely confess due to a highly suggestible or compliant mental state. Although the mentally retarded and individuals with subaverage intelligence are most at risk for falsely confessing, most individuals who have been proven to have falsely confessed are of average intelligence.

Most of the false conviction studies that have been conducted have focused mainly or exclusively on individuals who have falsely confessed to murder and been sentenced to death. Some of these individuals have come within minutes of execution before receiving reprieves that eventually led to their exoneration. As a result of these and other jurisdictional studies, a handful of states—including Alaska, Illinois, Minnesota, and Wisconsin—have instituted legislative or judicial requirements that police interrogation sessions be videotaped as a prerequisite to admission of statements at trial. Some jurisdictions apply the requirement only to juvenile cases or interrogation of murder suspects, but others apply it to all criminal cases, and some police departments require videotaping as a matter in internal policy. Although not generally required, the most effective use of videotaping is to record the entire interrogation along with the statement itself. This technique provides an objective and complete record for courts and attorneys to review to determine the reliability of statements.

False confessions have many negative effects—most notably on the wrongfully convicted defendant—but also on the victims of the crime and society, who are still vulnerable to the commission of further criminal acts by the actual perpetrator, and the criminal justice system itself, which relies on the faith of the people for its effectiveness.

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References and Further Reading

- Drizin, Steven A., and Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, North Carolina Law Review 82 (2004): 891.
- Gross, Samuel R., et al., *Exonerations in the United States, 1989 through 2003*, Journal of Criminal Law and Criminology 95 (2005): 523.
- White, Welsh, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, Harvard C. R.-C.L. Law Review 32 (1997): 105.
- Wisconsin v. Jerrell, 699 N.W.2d 110 (2005).

Cases and Statutes Cited

- Minnesota v. Scales, 518 N.W.2d 587 (1994)
- Stephan v. Alaska, 711 P.2d 1156 (1985)

FALSE LIGHT INVASION OF PRIVACY

The tort of false light invasion of privacy has been recognized in the majority of American states and codified in Section 652E of *The Second Restatement of Torts*. It protects the interest of individuals in not being placed before the public in an embarrassing, humiliating, or otherwise objectionable false light. Whether this interest is properly characterized as a dignitary or a reputational interest is a matter of dispute among courts and commentators.

Although the false light tort closely resembles and substantially overlaps with the tort of defamation, its scope differs. Whereas defamation is limited to derogatory statements that significantly impair a person's community standing or associational opportunities, even a non-disparaging statement is actionable as an invasion of privacy if the false light is of a kind that would be—as the *Restatement* puts it—“highly offensive to a reasonable person.” Thus, there can be liability even if the false light is laudatory, as when a star athlete who served honorably but uneventfully in the military is falsely depicted as a war hero, or when a hostage victim is falsely described as bravely resisting her brutal captors.

The First Amendment limits the availability of false light actions, but the precise nature of this limitation is uncertain. In 1967, in *Time, Inc. v. Hill*, the U.S. Supreme Court held that the rule of *New York Times v. Sullivan*—which requires public official plaintiffs in defamation cases to prove that the defamatory falsehood was published “with knowledge that it was false or with reckless disregard of whether it was false or not”—applies as well in false light cases. However, it is uncertain whether the holding of *Hill* survives the Court's subsequent ruling in *Gertz v. Robert Welch, Inc.* that private figure defamation plaintiffs need only prove negligence. This issue was left unresolved in *Cantrell v. Forest City Publishing Co.*, the Supreme Court's only other false light decision. Some lower courts continue to adhere to *Hill*, whereas others permit private figure false light plaintiffs to recover on a showing of negligence.

Early predictions that the false light tort would ultimately supplant the older tort of defamation have not been fulfilled. Some courts, including the highest courts of several states, have rejected the tort altogether, whereas a number of others have limited

its scope in various ways. Academic commentary on the tort has been predominantly critical, with some writers urging its outright abolition and others recommending that it be confined to nondefamatory falsehoods. Chief among the reasons for judicial and academic resistance is the danger, which is exacerbated by the tort's uncertain boundaries, of a chilling effect on constitutionally protected speech. There is also concern that the false light tort adds unnecessary complexity to defamation litigation, that it may enable plaintiffs to circumvent various speech-protective rules that have traditionally restricted recovery for defamation, and that the harm caused by a non-defamatory falsehood is seldom serious enough to warrant legal remedy.

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References and Further Reading

- Keeton, W. Page, *et al. Prosser and Keeton on the Law of Torts*. St. Paul, MN: West Publishing, 1984.
 Prosser, William L., *Privacy*, *California Law Review* 48 (1960): 3:383–423.
 Schwartz, Gary T., *Explaining and Justifying a Limited Tort of False Light Invasion of Privacy*, *Case Western Reserve Law Review* 41, No. 3 (1991): 885–919.
 Warren, Samuel D., and Brandeis, Louis D., *The Right to Privacy*, *Harvard Law Review* 4 (1890): 5:193–220.
 Zimmerman, Diane L., *False Light Invasion of Privacy: The Light That Failed*, *New York University Law Review* 64 (1989): 2:364–453.

Cases and Statutes Cited

- Cantrell v. Forest City Publishing Co.*, 419 U.S. 245 (1974)
Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974)
New York Times Co. v. Sullivan, 376 U.S. 254 (1964)
Time, Inc. v. Hill, 385 U.S. 374 (1967)
Restatement (Second) of Torts § 652E (1976)

See also Appropriation of Name or Likeness; Defamation and Free Speech; Invasion of Privacy and Free Speech; Right of Privacy

FALWELL, JERRY (1933–)

Jerry Falwell was born in Lynchburg, Virginia. In 1952, he became a “born again” Christian and earned a Divinity degree from Baptist Bible College in Springfield, Missouri. After his graduation, Falwell returned to Lynchburg and married Macel Pate, with whom he has three children. In 1956, Falwell established the Thomas Road Baptist Church in Lynchburg, which grew quickly. Soon after, he began to preach on television and in 1971, Falwell founded Liberty University in Lynchburg.

In 1976, Falwell staged a series of rallies calling for moral renewal and opposing the U.S. Supreme Court ruling on prayer in public schools, homosexuality, pornography, abortion, and the Equal Rights Amendment. In 1979, Falwell founded Moral Majority Incorporated, a secular group that lobbied for moral values. The Moral Majority played a large role in the election of President Ronald Reagan in 1980 and supported George Bush's run in 1988. Falwell disbanded the organization in 1989.

With the publication of a parody in the November 1983 issue of *Hustler Magazine*, Falwell was thrust into a major debate on the First Amendment. The parody was an advertisement for Campari Liqueur that contained Falwell's name and picture. In the advertisement, Falwell purportedly describes his “first time,” intoxicated, in an outhouse, with his mother. The advertisement did contain a disclaimer reading “ad parody—not to be taken seriously” and in the table of contents, the advertisement is listed as “Fiction; Ad and Personality Parody.” Still outraged by what he believed was an obscene, false, and vulgar piece, Falwell filed suit against Larry Flynt, the publisher of *Hustler Magazine*, and Flynt Distributing Company for libel, invasion of privacy, and intentional infliction of emotional distress. At trial, the court dismissed the invasion of privacy claim, and the jury ruled against him on the libel count, because they did not believe the advertisement could be reasonably understood as conveying actual facts or events. However, Falwell did prevail on the count of intentional infliction of emotional distress and was awarded \$200,000.

On appeal, the court upheld the ruling that the First Amendment did not shield Flynt and *Hustler* from liability. However, Flynt and *Hustler* appealed that decision, and on February 24, 1988, the U.S. Supreme Court reversed the appellate court's decision as inconsistent with the First Amendment. The Supreme Court reasoned that public figures cannot recover under intentional infliction of emotional distress for such a publication unless they can show that the publication contained a “false statement of fact” that “was made with ‘actual malice.’” Because the jury held that the advertisement parody was not reasonably believable, Falwell could not meet his burden of proof.

Falwell continues to provoke controversy because of his willingness to address controversial issues and speak candidly about his beliefs. He frequently speaks out against homosexuality, pornography, abortion, and communism and in support of family, morality, human life, voluntary prayer, and the teaching of creationism in schools. Although criticized for not respecting the division between church and state,

Falwell continues to believe that there is a place for God in government.

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References and Further Reading

- D'Souza, Dinesh. *Falwell Before the Millennium: A Critical Biography*. Chicago: Regnery Gateway, 1984.
Falwell, Jerry. *Falwell: An Autobiography*. Lynchburg, Virginia: Liberty House Publishers, 1997.
Hustler Magazine and Larry C. Flynt v. Jerry Falwell, 485 U.S. 46; 108 S.Ct. 876 (1988).
Smolla, Rodney. *Jerry Falwell v. Larry Flynt: The First Amendment on Trial*. Urbana and Chicago: University of Illinois Press, 1990.

See also **Abortion; Equal Rights Amendment; Flynt, Larry; Hustler Magazine v. Falwell, 485 U.S. 46 (1988); Prayer in Public Schools**

FAMILY UNITY FOR NONCITIZENS

Family unity for noncitizens originates primarily from family-sponsored immigration, which is one of the mainstays of the federal immigration law system. Recognizing the importance of the family unit, family reunification has been a significant policy of the immigration law system since the early twentieth century. After 1952, when the Immigration and Nationality Act was enacted, the immigration law system contains a comprehensive family-based set of preferences, specifying which noncitizen family members can be reunited with their relatives who are either U.S. citizens or noncitizens who are legal permanent residents of the United States (LPRs). Noncitizens who are parents, spouses, or minor children of adult U.S. citizens are admitted as immediate relatives and are not subject to quotas or waits, only the administrative processing times.

Same sex partners and unmarried cohabitants are not eligible for family-sponsored immigration as spouses. Family unity for noncitizens does not include the right to reunite in the United States with a U.S. citizen spouse if the couple was married abroad and the noncitizen spouse is denied the right to enter the country. Thus, noncitizen families do not enjoy the same level of constitutional protection for the fundamental family unit as recognized by the U.S. Supreme Court in the case of U.S. citizens.

The family-based preferences are limited to the following: first, the unmarried adult sons and daughters of U.S. citizens; second, the spouses or unmarried children of LPRs; third, the married sons and daughters of U.S. citizens, and the fourth and final preference is for brothers and sisters of adult U.S. citizens. There are lengthy waits during which noncitizen

families abroad are separated from their U.S.-based relatives, depending on when a visa will become available in each preference category under congressionally mandated quotas and country limits. No other noncitizen relatives are allowed to enter the United States under family-based immigration.

Children of noncitizens born in the United States acquire U.S. citizenship at birth but cannot file a family-sponsored immigration petition for their noncitizen parents until they reach the age of 21. Thus, if a noncitizen parent is subject to removal from the United States, the fact that the noncitizen parent has a U.S. citizen child does not prevent the removal of the parent to his or her country of origin. Scholars have argued that such a child's citizenship should be valued as much as the citizenship of an adult, yet the fact remains that a U.S. citizen child does not have the right to reside in the United States with his or her parents if they are removable noncitizens. International law grants broader rights to family unity than those granted in domestic immigration law in such situations. At least one lower court has ruled that when the non-citizen father of a U.S. citizen child is about to be removed from the United States, the U.S. government must take into account customary international law regarding family unity and consider the best interests of the child.

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References and Further Reading

- Legomsky, Stephen H. *Immigration and Refugee Law and Policy*. New York: Foundation Press, 2005.
Jastram, Kate (2003). Family unity, in Aleinikoff, T. Alexander, and Vincent Chetail, eds. *Migration and International Legal Norms*. The Hague: T.M.C. Asser Press, pp. 185–201.
Romero, Victor C. *Alienated: Immigrant Rights, the Constitution, and Equality in America*. New York: New York University Press, 2005.
———. *Asians, Gay Marriage, and Immigration: Family Unification at a Crossroads*, *Indiana International & Comparative Law Review* 15 (2005) 2:337–347.

Cases and Statutes Cited

- Adams v. Howerton*, 673 F.2d. 1036 (9th Cir. 1982)
Beharry v. Reno, 183 F. Supp. 2d 584 (E.D. N.Y. 2002), vacated on other grounds sub nom, *Beharry v. Ashcroft*, 329 F.3d 51 (2nd Cir. 2003) (NO. 02-2171), as amended (Jul 24, 2003)
Immigration and Nationality Act, P.L. 82-414, 66 Stat. 163 (June 27, 1952), as amended
Hermina Sague v. U.S., 416 F. Supp. 217 (D.P.R. 1976)
Moore v. City of East Cleveland, 431 U.S. 494 (1977)
INA § 201 (b)(2)(A)(i), codified at 8 U.S.C. § 1151 (b)(2)(A)(i) (2000)
INA § 203 (a), (d), codified at 8 U.S.C. § 1153(a), (d) (2000)

FAMILY VALUES MOVEMENT

The family values movement is actually a very loose alliance of different organizations united by the belief that government has a duty to protect both the traditional American family and the moral foundations of society. The central tenet of the various groups that make up the family values movement is that the state has not just a role but a duty to promote a particular type of morality for the good of all its citizens.

There are two main views as to how the state gets its duty to protect morality. Some value morality extrinsically: immorality corrupts every aspect of society and so morality must be promoted to protect all members of society from that corruption. Others see morality as something that's intrinsically important; actions that violate this morality are simply wrong and ought to be stopped. This view is particularly prevalent among more religious groups whose morality rests on Judeo-Christian ethics and other theological justifications. This second position has attracted criticism for ignoring the establishment clause of the First Amendment.

Although the family values movement is often thought of as beginning in the 1980s, it can trace its origin to the reactions against the shift in American politics away from its traditional, broadly conformist, White Anglo-Saxon Protestant roots that began in the 1950s. These changes were aimed at the creation of a secular, pluralistic society that not only understood and fostered differences in life choices between citizens but also protected the rights of its minorities to act without fear of reprisal from the majority. Mass-based social groups began to push against the traditional constraints placed on their members, particularly feminists striving for equality in the workplace, and homosexual rights groups campaigning against state discrimination such as policies preventing homosexuals from working for the federal government.

The impetus for the many of these policy changes came from the courts in a series of decisions that favored the autonomy of the individual over the interests of the state in promoting a particular morality.

Some of these decisions were centered on the right to make choices over their behavior within the privacy of their homes. One example of this would be *Stanley v. Georgia*, which recognized a "right to satisfy emotional needs in the privacy of [one's] own house" that precluded the state from banning the possession of pornography.

Others were centered on the right of the individual to make decisions about their body and intimate aspects of their lives. One example of this would be *Roe v. Wade*, where the Court recognized the importance of a woman's right to choose to have an abortion.

Others were aimed at protecting the rights of minorities from discrimination by the majority motivated by animus and moral differences. An example of this would be *Romer v. Evans*, where the Court struck down a state constitutional amendment prohibiting laws that would protect homosexuals from discrimination.

The family values movement saw these decisions as dangerous and worked in the courts and the legislatures to protect the role of the state in advancing and defending a particular idea of morality to protect society. They achieved many successes in the electoral realm, especially in the southern states, only to have many laws later overturned by the courts. They regarded the interventions of the court as undemocratic intrusions on the ability of the majority to protect their society.

The family values movement thinks that reformers, including the courts, fail to see that some apparently private acts actually have wide-ranging consequences for all of society. Permitting the use of pornography degrades all women, desensitizes the public to sex, and leads to increased sexual violence. Allowing the use of contraceptives decouples sex from reproduction and promotes sex outside of marriage. Abortion involves the termination of another life and can lead to decreased regard for all human life.

The movement is often characterized as being "right wing," religious, and Republican, and some of its most high-profile groups have included the Moral Majority, the Christian Coalition, Concerned Women for America, and the Family Research Council.

The socially conservative views of the movement attract religious groups from across the wider political spectrum. The movement is most associated with the Republican Party, because that party has actively courted them by pursuing family-based moral policies for some time. This link with the movement was most active and important in the 1980s when President Ronald Reagan placed traditional family values at the core of his political philosophy.

The political power of the family values movement has declined since the 1980s, but it remains active through its many organizations. They have not given up attempts to overturn the developments of the last few decades and continue to fight a rearguard action in the face of further socially liberal reforms. At the start of the twenty-first century, the most heated battles involve the expansion of the term marriage to cover same sex unions. This opposition is even more intense when children are involved, and they see same sex adoption as not only giving official recognition to deviant behavior but also potentially affecting the

child's sexual orientation by growing up in a home where homosexual behavior is the norm.

Although the culture wars fought by the family values movement show no sign of abating, their political victories of the movement have tended to be either short lived (as *Bowers v. Hardwick* gave way to *Lawrence v. Texas*) or merely limiting the scope of their defeat (as *New York v. Ferber* qualified *Stanley*). Their opponents have been far more successful in challenging the status quo and have radically transformed American society over the past few decades. It seems unlikely that these opponents will win completely, but their advances show no sign of slowing, and it remains to be seen whether the movement can force a retrenchment of traditional family values in American politics.

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References and Further Reading

- Formicola, Jo Renee, and Hubert Morken, eds. *Religious Leaders and Faith-based Politics : Ten Profiles*. Lanham, MD: Rowman & Littlefield Publishers, 2001.
- Hunter, James D. *Culture Wars: The Struggle to Define America*. New York: Basic Books, 1991.
- Kaplan, Esther. "The Religious Right's Sense of Siege is Fueling a Resurgence." *The Nation* July 5, 2004.
- Lawler, Michael G. "Family: American and Christian." *America* August 12, 1995.
- Walsh, Andrew D. *Religion, Economics, and Public Policy: Ironies, Tragedies, and Absurdities of the Contemporary Culture Wars*. Westport, CT: Praeger, 2000.
- Yarnold, Barbara M., ed. *The Role of Religious Organizations in Social Movements*. New York: Praeger Publishers, 1991.

Cases and Statutes Cited

- Bowers v. Hardwick*, 478 U.S. 186 (1986)
- Lawrence v. Texas*, 539 U.S. 558 (2003)
- New York v. Ferber*, 458 U.S. 747 (1982)
- Roe v. Wade*, 410 U.S. 113 (1973)
- Roemer v. Evans*, 517 U.S. 620 (1996)
- Stanley v. Georgia*, 394 U.S. 557 (1969)

See also **Abortion; Abortion Laws and the Establishment Clause; Abortion Protest Cases; Bible in American Law; Birth Control; Bowers v. Hardwick**, 478 U.S. 186 (1986); **Boy Scouts of America v. Dale** 530 U.S. 640 (2000); **Child Pornography; Defense of Marriage Act; Gay and Lesbian Rights; Griswold v. Connecticut**, 381 U.S. 479 (1965); **Homosexuality and Immigration; Marriage, History of; Same-Sex Marriage Legalization; Stanley v. Georgia**, 394 U.S. 557 (1969); **Right of Privacy; Roe v. Wade**, 410 U.S. 113 (1973); **Romer v. Evans**, 517 U.S. 620 (1996); **Lawrence v. Texas**, 539 U.S. 558 (2003); **New York v. Ferber**, 458 U.S. 747 (1982)

FCC v. LEAGUE OF WOMEN VOTERS, 468 U.S. 364 (1984)

The writers of the Constitution safeguarded the individual right to freedom of speech with the First Amendment, which forbids Congress from making laws abridging freedom of the press. But does the First Amendment also protect television broadcasters, even those established by law and publicly funded? *FCC v. League of Women Voters* (League) is important in shaping the answer: broadcasters, even publicly owned, are protected by the First Amendment.

Educational stations, organized and funded under Public Broadcasting Act of 1967 (PBA), were banned by the PBA from editorializing. A station operator, joined by the League of Women Voters, challenged the ban in a lawsuit against the Federal Communications Commission (FCC), the Regulatory Agency responsible for Broadcast Regulation.

In *League*, the Supreme Court upheld the district court decision that the ban on editorializing violated the First Amendment. The First Amendment rights of broadcasters cannot be taken away, even though they owe their creation and funding to law. The holding relied on the finding in *Red Lion v. FCC*, that broadcasters enjoy the broad First Amendment rights of journalists, limited only as required to accommodate the physical limitations of broadcast spectrum. Finding the right to editorialize fundamental, the Supreme Court suggested that FCC regulations of content on the basis of spectrum scarcity should be closely reviewed. This standard of review was subsequently applied to overrule the Fairness Doctrine, regulations requiring broadcasters to present both sides of an issue.

As a result of the decision in *League*, restrictions on broadcast content are subject to strict scrutiny. Few governmental restrictions remain on television broadcast content. Most important are indecency, as confirmed by the Supreme Court in *FCC v. Pacifica*, and right of response for presidential candidates, specified in the Communications Act of 1934. The particulars of these restrictions are subject to continuing challenge and debate.

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References and Further Reading

- Carter, T. Barton, Marc A. Franklin, and Jay B. Wright. *The First Amendment and the Fifth Estate: Regulation of Electronic Mass Media*. 2nd Ed. Westbury, New York: Foundation Press, 1989.
- Corn-Revere, Robert L., et al. *Modern Communication Law*. St. Paul, MN: West Group, 1999.
- Russomanno, Joseph. *Speaking Our Minds: Conversations with the People Behind Landmark First Amendment*

Cases. Mahwah: NJ: Lawrence Erlbaum Associates, 2002.

Cases and Statutes Cited

CBS, Inc. v. FCC, 453 U.S. 367 (1981)
FCC v. League of Women Voters of California, 468 U.S. 364 (1984)
FCC v. Pacifica, 438 U.S. 726 (1978)
Red Lion Broadcasting Co. v. FCC, 453 U.S. 367 (1981)
 The Public Broadcasting Act of 1967, Pub. L. 90-129, 81 Stat. 365, 47 U.S.C. 390 *et seq.*, 47 U.S.C. 399

See also **Broadcast Regulation; Fairness Doctrine; *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978); Federal Communications Commission; Government Speech; *Red Lion Broadcasting Co. v. FCC*, 453 U.S. 367 (1969)**

FCC v. PACIFICA FOUNDATION, 438 U.S. 726 (1978)

George Carlin, a comedian, recorded a famous monologue in which he riffed on “7 Dirty Words”—slang words he claimed could never be uttered on radio or television. Carlin’s thesis was proved correct one day when Pacifica’s New York radio station broadcast a recording of the monologue during an afternoon program addressing contemporary attitudes on language. A parent driving with his child complained to the Federal Communications Commission (FCC). The FCC found Pacifica had violated “indecent” rules applicable to public broadcasters. Pacifica appealed to the Supreme Court.

The Court found that the First Amendment permits different standards to be applied to the broadcast media, as opposed to print or other public spaces such as taverns. The earlier *Cohen* decision, for example, had overturned the conviction of a war protestor wearing a jacket emblazoned with the words, “F*** the Draft,” holding that the government could not sanction offensive words used in public speech because of the risk of censoring ideas.

The key features of broadcasting distinguishing it from other modes of communication reflected the Court’s desire to shield “captive audience” members from offensive communications, particularly in the privacy of the home and in other settings in which children might be present. Unlike other contexts in which unwilling listeners may avoid offensive language, on-air listeners cannot so easily predict whether a given program will contain offensive language. The Court also thought that parents could not realistically monitor broadcasts for indecent language to protect children.

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References and Further Reading

Cohen v. California, 403 U.S. 15 (1971).
Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).
Reno v. ACLU, 521 U.S. 844 (1997).

Cases and Statutes Cited

Cohen v. California, 403 U.S. 15 (1971)
 18 U.S.C. § 1464 (1976)

See also **Broadcast Regulation; Captive Audiences and Free Speech; *Cohen v. California*, 403 U.S. 15 (1971); Federal Communications Commission; Public Vulgarity and Free Speech**

FEDERAL COMMUNICATIONS COMMISSION

The Federal Communications Commission (FCC), a Regulatory Agency established by Congress, implements Broadcast Regulation, Cable Television Regulation, and regulates telecommunications services, and common carriers under the Communications Act of 1934, the Telecommunications Act of 1996, and others.

Guided by the public interest standard, the FCC sets technical standards and operating regulations and monitors and enforces compliance. It assigns broadcast licenses for the television and radio spectrum. Decisions of the five FCC commissioners, appointed by the President, are appealed to federal courts.

FCC regulations affecting broadcast content have provoked challenges that they and the underlying laws abridge the right to free speech under the First Amendment of the U.S. Constitution (First Amendment). As confirmed in *Red Lion v. FCC*, the FCC preserves broadcasters’ First Amendment protections as journalists while administering laws that permissibly affect content such as the Communications Act’s requirement that broadcasters offer equal time to federal candidates. As special situations justifying the regulations change, the FCC has overturned policies such as the Fairness Doctrine, requiring balanced views in broadcast content.

While FCC regulation of indecency is permissible, as confirmed by the Supreme Court in *FCC v. Pacifica*, the FCC is required to regulate speech of new technologies in the face of successful challenges to underlying legislation such as the Communications Decency Act. The FCC regulates obscenity, a form of Unprotected Speech; however, the definitions and standards are the subject of continuing challenges.

The FCC’s Equal Opportunity rules, adopted in 1969 under the public interest standard, required broadcasters to hire minorities and women in

proportion to the local population. Federal courts rejected the rules as unconstitutional race-based qualifications violating the equal protection clause of the Fifth Amendment of the U.S. Constitution.

A federal court in *Prometheus Radio Project v. FCC* found that limits on cross-ownership of broadcast and cable stations in the same markets may survive First and Fifth Amendment challenges. It remanded the case to the FCC to develop permissible regulations.

Aware that improper regulation can be challenged as a government taking of property under the Fifth Amendment, the FCC has interpreted current laws narrowly as inapplicable to new media and new technologies. The FCC determined that Internet access offered by cable companies is not a regulated telecommunications service, a decision upheld by the U.S. Supreme Court in *National Cable & Telecommunications Association v. Brand X Internet*.

The FCC is the arbiter of first resort balancing First and Fifth Amendment rights against regulations and underlying laws in the areas of mass communications. As technologies continue to develop, the FCC will continue its pivotal role in developing Constitutional law.

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References and Further Reading

- Abernathy, Kathleen Q., *The Role of the Federal Communications Commission on the Path from the Vast Wasteland to the Fertile Plain*, Federal Communications Law Journal 55 (2003): May:435.
- Botein, Michael, and Douglas H. Ginsburg. *The Regulation of the Electronic Mass Media: Law and Policy for Radio, Television, Cable and the New Video Technologies*. St. Paul, MN: West Group, 1999.
- Carter, T. Barton, Marc A. Franklin, and Jay B. Wright. *The First Amendment and the Fifth Estate: Regulation of Electronic Mass Media*. 2nd Ed. Westbury, NY: Foundation Press, 1989.
- Communications Law and Policy Resources, maintained by Justin Brown, Assistant Professor, College of Journalism and Communications, University of Florida, <http://www.jou.ufl.edu/faculty/jbrown/lawandpolicy.htm> (accessed September 1, 2005).
- Corn-Revere, Robert L., et al. *Modern Communication Law, Practitioner's Edition*. St. Paul, MN: West Group, 1999.
- Creech, Kenneth C. *Electronic Media Law and Regulation*. Boston, MA: Focal Press, 1996.
- Einstein, Mara. *Media Diversity: Economics, Ownership and the FCC*. Mahwah, N.J.: L. Erlbaum Associates, 2004.
- The Federal Communications Commission website. <http://www.fcc.gov> (accessed September 1, 2005).

Cases and Statutes Cited

The Communications Act of 1934, Act June 19, 1934, ch. 652, 48 Stat. 1064, 47 U.S.C. Sec. 151 *et seq.*

The Communications Decency Act, Pub. L. 104-104, Title V, Sec. 501, Feb 8, 1996, 110 Stat. 133

FCC v. Pacifica, 438 U.S. 726 (1978)

FCC v. League of Women Voters of California, 468 U.S. 364 (1984)

Lutheran Church-Missouri Synod v. FCC, 141 F.3d 344 (D.C. Cir. 1998)

Miller v. California, 413 U.S. 15 (1973)

Prometheus Radio Project v. FCC, ___ F. 3d ___ (3rd Cir. 2003), *cert. den.* June 13, 2005, 545 U.S. ___

The Telecommunications Act of 1996, Pub. L. No. 104-104

See also Affirmative Action; Balancing Approach to Free Speech; Bill of Rights: Structure; Broadcast Regulation; Cable Television Regulation; Communications Decency Act (1996); Fairness Doctrine; FCC v. League of Women Voters, 468 U.S. 364 (1984); *Government Speech; Red Lion Broadcasting v. FCC*, 453 U.S. 367 (1981)

FEDERALIZATION OF CRIMINAL LAW

Since it first adopted a statute with criminal penalties under the alleged authority of the Commerce Clause in 1884, Congress has increasingly been asserting the power to legislate police powers, first on interstate shipments, later within state territory. Most such legislation has claimed authority under ever-broader constructions of the Commerce Clause and the Necessary and Proper Clause, which have been extended to include almost anything. This criminal legislation would have been deemed unconstitutional in the Founding Era.

The original meaning of “commerce among the states” seems to have been limited to tangible commodities the title and possession of which are transferred from a party outside a state to a party within that state. It did not include services, information, energy, or primary production such as mining, farming, hunting, or fishing. Nor did it include manufacturing, transport, possession, use, or disposal, or the activities of the transacting parties, or anything that might have a “substantial effect” on such transactions.

Furthermore, the original meaning of the power to “regulate” did not include the power to prohibit, or to impose criminal penalties, but only civil penalties, such as fines or confiscation.

The original Constitution delegated authority to the central government to punish as crimes, committed on state territory, only a limited number of subjects: (1) treason (Art. III Sec. 3 Cl. 2); (2) counterfeiting (Art. I Sec. 8 Cl. 6); (3) piracy or felonies on the high seas; (4) offenses against the “laws of nations” (Art. I Sec. 8 Cl. 10); or (5) violations of discipline by military or militia personnel (Art. I Sec. 8 Cl. 14).

This was confirmed in the constitutional ratifying conventions, and again in the Kentucky Resolutions of 1798, authored by Thomas Jefferson, although he omitted the last one in that document.

There have been no subsequent amendments to expand the criminal powers of Congress, other than the Thirteenth (slavery), Fourteenth (violations of rights by state agents), Fifteenth (denial of vote to former slaves), Eighteenth (alcohol prohibition, repealed by Twenty-first), Nineteenth (denial of vote to women), and Twenty-sixth Amendments (denial of vote to those aged 18 or older).

The process has been driven by perceived problems that evoked public demand for solutions, combined with diminished public understanding, from generation to generation, of what is and is not constitutional, and declining public devotion to the strict enforcement of the Constitution.

U.S. criminal statutes that exceeded the bounds asserted by the Kentucky Resolutions of 1798 did occasionally get adopted between 1798 and 1884, but only in minor ways. They were seldom enforced and were not subjected to the test of appellate review until 1906.

The next significant piece of legislation was the Sherman Anti-Trust Act of July 2, 1890, which imposed criminal penalties on monopolistic combinations but was sustained by a 1908 precedent enforcing it not against industrialists but against a call for a boycott by a labor union.

The next significant precedent was in 1911, in which criminal penalties were sustained for violation of regulations by the Secretary of Agriculture, not for regulation of interstate commerce but of grazing rights on federal lands, even though exclusive jurisdiction over them had not been ceded to Congress by a state legislature under U.S. Const. Art. I Sec. 8 Cl. 17. This was also significant in that it breached the non-delegation doctrine that legislative powers could not be delegated to administrative agencies.

The Necessary and Proper Clause was extended by a key 1914 precedent that it may be necessary to regulate “purely” intrastate activities so that the regulation of interstate activities might be fully effectuated. When written, the commerce clause was only intended to authorize what might be required to make the *effort* to exercise a delegated power, not whatever might be convenient to attain an *outcome* for which the power might be exercised. This represented a major departure from the original understanding of what a delegated power is.

In 1917 the U.S. Supreme Court sustained a conviction under a 1910 statute forbidding transport of women across state lines for sexual purposes. This was the first exercise of a “police power” against

immoral behavior, and it also introduced the notion that the U.S. government acquired criminal jurisdiction over offenses that involve crossing a state line.

In 1919, the Court sustained a conviction under a 1916 act, a precedent that Congress has criminal jurisdiction over fraud that influences or obstructs interstate commerce. In 1920, there was a precedent that extended “commerce” to include communications, including noncommercial communications, across state lines. In 1925 came a precedent that Congress can exercise a police power by regulating interstate commerce to the extent of forbidding and punishing the use of such commerce as an agency to promote immorality, dishonesty, or the spread of any evil or harm to the people of other states from the state of origin.

The key precedent came in 1942, when the conviction was sustained of a farmer for consuming his own grain, subject to price and production controls, as having a “substantial effect” on interstate commerce. Most federal criminal legislation since then cites this precedent for its authority, including federal criminal drug control statutes, a statute against murdering federal agents, gun control legislation, and more than 4000 other distinct penal provisions.

More federal criminal legislation gets introduced and adopted each session of Congress, with little effective opposition on constitutional grounds. Congress now sees no limit on its powers, other than a few rights expressly protected by the Constitution. From an understanding that “all powers not delegated are prohibited,” they have gone to a position that they have “all powers not expressly prohibited,” contrary to the Ninth and Tenth Amendments.

It should be noted, however, that none of the precedents or any legislation has actually sought to extend the definition of “commerce.” It is all based on ever-broader extensions of the necessary and proper clause, with only tenuous connections to “commerce” as such. From an original understanding of “necessary and proper” to include only the power to make a limited effort to whatever power might be convenient to obtain a desired result.

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References and Further Reading

- Elliot, Jonathan. (1836). “The Debates in the Several Conventions on the Adoption of the Federal Constitution.” <http://www.constitution.org/elliott.htm>.
- Meese, Edwin III, chair. “The Federalization of Criminal Law.” Report of Task Force of the American Bar Association. [http://www.nacdl.org/public.nsf/legislation/overcriminalization/\\$FILE/fedcrimlaw2.pdf](http://www.nacdl.org/public.nsf/legislation/overcriminalization/$FILE/fedcrimlaw2.pdf).
- Meese, Edwin III and Rhett DeHart. “How Washington Subverts Your Local Sheriff.” *Policy Review*, January-February 1996, Number 75; <http://www.policyreview.org/jan96/meese.html>.

Randolph, J. W., ed. *"The Virginia Report."* Richmond: 1850. Includes writings of Thomas Jefferson and James Madison, the Kentucky Resolutions of 1798 and 1799, and the Virginia Resolution of 1798. <http://www.constitution.org/rf/vr.htm>.

FEINER v. NEW YORK, 340 U.S. 315 (1951)

Irving Feiner was an undergraduate student at Syracuse University in 1949. As a member of the Young Progressive Party, he had participated in the Party's decision to invite John Rogge, a past Assistant Attorney General of the United States and a member of the American Progressive Party, to give a speech to be held in public school about what he, and the Progressives, thought was the unfair conviction of several young blacks in a New Jersey courtroom. The mayor was enraged about this invitation, as was the chapter of the Syracuse American Legion, and the mayor orchestrated a denial of the permit for Rogge to speak in the school auditorium.

Feiner, and his associates from the Progressives, arranged to have Rogge speak in a private hotel in Syracuse. To publicize this new venue and to advertise some of the themes they expected Rogge to emphasize, Feiner held a street corner rally in downtown Syracuse. Standing on a box and using a microphone, Feiner condemned the Mayor, the local political system, and the American Legion. Quoting from the subsequent trial court record (and Feiner disputed some of these contentions), the judge found that specifically Feiner said: "Mayor Costello is a champagne-sipping bum; he does not speak for the Negro people... The 15th Ward is run by corrupt politicians, and there are horse rooms [betting parlors] operating there.... President Truman is a bum.... Mayor O'Dwyer [of Syracuse] is a Nazi Gestapo.... The Negroes don't have equal rights; they should rise up in arms and fight for their rights." A crowd of approximately seventy-five to eighty (the police estimate accepted by the trial judge; twenty-five to thirty were estimated by the defense) gathered on the street corner to hear Feiner's comments. Some in the crowd voiced approval; other objected, some vociferously. Passersby on the sidewalk might also have had their paths partially blocked by the crowd. The police alleged that one spectator (never a witness during trial however) shouted to them: "If you don't get that son of a bitch off, I will go over and get him off there myself." The police judged that the situation was becoming dangerous and asked Feiner to stop speaking. When he ignored them, they asked him to step down from the box and informed him that he was under arrest for disorderly conduct.

Feiner's arrest was upheld in the local court, and he was sentenced to thirty days in jail. The case was appealed (unsuccessfully for Feiner) to two New York courts and finally to the U.S. Supreme Court. The Court in a six to three decision in 1951 also upheld the trial court's decision reasoning that police should have discretion to decide when a local rally was becoming a danger to the community. The Court stressed that Feiner was not arrested for the political content of his speech but for the effects his words were having on the crowd, and the Court thought that the police could legitimately conclude that a disturbance or breach of the peace was imminent. The dissenting justices, in addition to calling into question the "factual" record the trial judge had sustained, also questioned the premise of the majority Supreme Court decision. Specifically, they thought that the police, rather than ask Feiner to stop speaking in the face of a potentially hostile audience, should have asked—insisted that the crowd move aside and allow pedestrians to pass and should have informed any one in the crowd threatening the speaker that this kind of threat was unacceptable, and that if a threat was serious, it could lead to the spectator's arrest. In the dissenters' view, the majority deferred too much to both the police and trial judge version of the events, but even if the view of the police and judge was accepted for the sake of the argument, Feiner's right to speak nonetheless should have been upheld by the majority. The decision, the dissenters maintained, gave the police too much discretion to decide when a speaker's words were likely to lead to a breach of the peace and did not make the dissenters sufficiently responsible for those in a crowd threatening a speaker.

Feiner had been expelled from Syracuse shortly after the trial court's decision but was free on bail pending the final resolution of the case. After the Supreme Court's decision was announced, Feiner served his thirty days in jail.

The Feiner case has become known as the case that supported what has been called the "heckler's veto." The police could legitimately conclude—here by the crowd's demeanor in general, by the "get the son-of-a-bitch" comment in particular—that continued speech would result in a breach of peace.

And so the legal history ends, but the question that remains is "whatever happened to Irving Feiner," what happened to this idealistic student arrested because the courts decided to defer to local police assessments of the consequences of his words. Several years ago, with the help of my students, we tracked Irving Feiner to his home outside of New York City. It was wonderful to learn that he had had a relatively successful business career, ultimately was reaccepted into

Syracuse and earned his college degree, and now stands as a kind of icon for “doing the right thing.” He has spoken at several law schools about the case and is an annual speaker in my undergraduate class at Rutgers. Still the fighter for principled issues, two pieces of Irving Feiner’s take on *Feiner* are important to include in this entry. First, he notes that his “take up arms” comments were referring to what he had experienced in post-war France, when thousands of citizens walked down the Champs-Elysee “arm in arm” to insist on greater social justice. Second, he thinks the recollection of calling Truman a “bum” was incorrect. Noting that he knows his own rhetorical style, he now invariably tells his audience that he would never have used the word “bum” but instead would have said something more colorful, something that included a reference to Truman’s relationship to his mother!

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References and Further Reading

- Barker, Lucius, and Twiley Barker, Jr. *Civil Cases and Commentaries Liberties and The Constitution*. 4th Ed. Englewood Cliffs, NJ: Prentice Hall, 1982, pp. 17–28.
- Cushman, Robert. *Cases in Civil Liberties*. New York: Appleton-Century-Crofts, 1968.
- Heumann, Milton. *Interview with Irving Feiner*. New Brunswick, NJ: Rutgers University, March 2005.
- Konvitz, Milton. *Bill of Rights Reader*. 5th Ed. Revised, Ithaca: Cornell University Press, 1973.

Cases and Statutes Cited

Feiner v. New York 340 U.S. 315 (1951)

See also **Captive Audiences and Free Speech; Fighting Words and Free Speech; Heckler’s Veto Problem in Free Speech**

FELON DISENFRANCHISEMENT

Felon disenfranchisement refers to the practice of restricting the voting rights of those convicted of felony-level crimes. The loss of voting rights is a Collateral Consequence of a felony conviction. Almost every state in the United States bars felons from voting for some amount of time. States vary, however, in the classes of felons disenfranchised and the duration of disenfranchisement.

In general, states follow one of four disenfranchisement schemes: (1) disenfranchising prisoners; (2) disenfranchising prisoners and parolees; (3) disenfranchising prisoners, parolees, and probationers; or (4) disenfranchising prisoners, parolees, and probationers, and former felons who have completed their

sentences. In the first three categories, voting rights are usually restored automatically on completion of prison, parole, or probation. In the last category, however, persons wishing to vote must receive a pardon or clemency from the state. Some states make further distinctions by restoring rights automatically only to first-time offenders or to those convicted of nonviolent crimes, while requiring recidivists and violent offenders to receive a pardon or clemency. The United States is unusual in restricting the voting rights of non-incarcerated felons, because almost no other democratic nation does so.

Origins and Development of Felon Disenfranchisement Laws in the United States

The practice of limiting the citizenship rights of criminals has ancient origins, and some form of disenfranchisement has been practiced in the United States since colonial times. Earlier forms of disenfranchisement, however, were limited both in scope and duration, because laws typically barred from voting only those convicted of specific crimes and only for a limited time. It was not until the 1800s that states began disenfranchising entire classes of felons without regard to the underlying crime. By 1850, eleven states disenfranchised felons, all of which imposed indefinite disenfranchisement that typically required a gubernatorial or legislative pardon to regain voting rights. The 1860s and 1870s were a period of significant change, during which seventeen states added a felon disenfranchisement law.

Because this period coincided with the end of the Civil War and the passage of the Fourteenth and Fifteenth Amendments, which expanded both definitions of citizenship and the right to vote, many assert that felon disenfranchisement laws are linked to racial conflict. This theory stresses that states used felon disenfranchisement laws as a tool to suppress the voting power of African Americans. Research has found a link between the proportion of African Americans in a state’s prison population and passage of a felon disenfranchisement law. Competing views, however, stress that the laws are race-neutral, and any disparate impact is an incidental effect.

Another period of marked change occurred nearly a century later. During the 1960s and 1970s, many states liberalized their disenfranchisement laws, typically by providing for automatic restoration of rights on completion of sentence. This trend toward expanding the voting rights of felons continued throughout the rest of the century, although a few states implemented new restrictions on felon voting rights.

Constitutional Challenges to Felon Disenfranchisement

Although voting attained and confirmed its status as a fundamental right through a series of decisions by the Warren Court, felon disenfranchisement laws are treated differently than other Voting Rights cases. Most challenges to the laws have been unsuccessful. In 1974, the Supreme Court upheld the practice of felon disenfranchisement. In *Richardson v. Ramirez*, the Court interpreted disenfranchisement as an “affirmative sanction” of Section Two of the Fourteenth Amendment, which reduced congressional representation of states disenfranchising males, *unless* that disenfranchisement was for “rebellion or other crimes.” Thus, while other restrictions on the right to vote are subjected to judicial “strict scrutiny” under which states must demonstrate a compelling state interest served through narrowly tailored means, felon disenfranchisement laws have not been held to this standard.

In addition to general challenges, others claim that felon disenfranchisement denies the right to vote based on race. In 1985, in *Hunter v. Underwood*, the Supreme Court invalidated an Alabama disenfranchisement law based on an impermissible intent to racially discriminate. Race-based challenges focus on the Fourteenth and Fifteenth Amendments, as well as the Voting Rights Act of 1965. Despite the disproportionate impact of felon disenfranchisement on African Americans, courts have rejected these claims in the absence of establishing a clear discriminatory intent.

The Impact of Felon Disenfranchisement Laws

Although the size of the disenfranchised population varies by state, the laws collectively have a large impact in the United States. In the 2000 presidential election, nearly 4.7 million people—about 2.3 percent of the voting-age population—were disenfranchised because of a felony conviction. Of this group, 1.8 million people were African Americans, representing more than seven percent of the African-American voting-age population.

The size of the disenfranchised population also holds the potential to change the outcomes of closely contested elections, particularly in states with laws that ban voting beyond completion of sentence. Because of the demographic characteristics of disenfranchised felons, these voting restrictions seem to

have provided a small but consistent advantage to Republican candidates in several U.S. Senate and presidential elections.

Despite the prevalence of laws disenfranchising felons across the United States, the restrictions do not enjoy widespread popular support. One national poll indicated that eighty percent of Americans approve of permitting felons to vote after they have completed their sentences, whereas sixty percent approved of allowing felons on probation and parole to vote. Incarcerated felons, however, receive less support, with only one-third believing that prisoners should be permitted to vote.

Conclusion

Felon disenfranchisement laws restrict the voting rights of those convicted of felonies. Although the laws in their contemporary form did not take shape until the mid- to late-nineteenth century, nearly all states eventually adopted a law prohibiting certain classes of felons from voting. Although state laws vary, the laws collectively disenfranchise millions and likely hold the power to change elections. Despite the breadth of felon disenfranchisement laws and their disproportionate impact on African Americans, courts have generally upheld their constitutionality as a restriction on the right to vote.

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References and Further Reading

- Allard, Patricia, and Marc Mauer. *Regaining the Vote: An Assessment of Activity Relating to Felon Disenfranchisement Laws*. Washington, D.C.: The Sentencing Project, 1999.
- Behrens, Angela, Christopher Uggen, and Jeff Manza. “Ballot Manipulation and the ‘Menace of Negro Domination’: Racial Threat and Felon Disenfranchisement in United States, 1850-2002.” *American Journal of Sociology* 109 (2003): 3:559–605.
- Chin, Gabriel J., *Rehabilitating Unconstitutional Statutes: An Analysis of Cotton v. Fordice*, 157 F.3d 388 (5th Cir. 1998), University of Cincinnati Law Review 71 (2002): 2:421–455.
- Clegg, Roger, *Who Should Vote?* Texas Review of Law and Politics 6 (2001): 1:159–178.
- Demleitner, Nora V., *Continuing Payment on One’s Debt to Society: The German Model of Felon Disenfranchisement as an Alternative*, Minnesota Law Review 84 (2000): 4:753–804.
- Ewald, Alec C., *‘Civil Death’: The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, University of Wisconsin Law Review 2002 (2002):5:1045–1137.
- Fellner, Jamie, and Marc Mauer. *Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United*

- States*. Washington, D.C.: Human Rights Watch and The Sentencing Project, 1998.
- Fletcher, George, *Disenfranchisement as Punishment: Reflections on Racial Uses of Infamia*, *UCLA Law Review* 46 (1999): 6:1895–1908.
- Hench, Virginia, *The Death of Voting Rights: The Legal Disenfranchisement of Minority Voters*, *Case Western Law Review* 48 (1998): 4:727–798.
- Itzkowitz, Howard, and Lauren Oldak, *Restoring the Ex-Offender's Right to Vote: Background and Developments*, *American Criminal Law Review* 11 (1973): 3:721–770.
- Keyssar, Alexander. *The Right to Vote: The Contested History of Democracy in the United States*. New York: Basic Books, 2000.
- Manza, Jeff, Clem Brooks, and Christopher Uggen. “Civil Death or Civil Rights? Public Attitudes Toward Felon Disenfranchisement in the United States.” *Public Opinion Quarterly* 68 (forthcoming 2004).
- Shapiro, Andrew, *Challenging Criminal Disenfranchisement under the Voting Rights Act: A New Strategy*, *Yale Law Journal* 103 (1993): 2:537–566.
- Uggen, Christopher, and Jeff Manza. “Democratic Contraction? The Political Consequences of Felon Disenfranchisement in the United States.” *American Sociological Review* 67 (2002): 6:777–803.
- United States Department of Justice, Office of the Pardon Attorney. *Civil Disabilities of Convicted Felons: A State-by-State Survey*. Washington, D.C.: United States Government Printing Office, 1996.

Cases and Statutes Cited

- Hunter v. Underwood*, 471 U.S. 222 (1985)
Richardson v. Ramirez, 418 U.S. 533 (1974)
 Voting Rights Act of 1965, Act of Aug. 6, 1965, 79 Stat. 437, codified at 42 U.S.C. § 1973

See also **Collateral Consequences; Fourteenth Amendment; Voting Rights; Voting Rights Act of 1965; Warren Court**

FIALLO v. BELL, 430 U.S. 787 (1977)

Under U.S. immigration law, biological mothers who are citizens or lawful permanent residents may petition their nonmarital offspring to enter the country; similarly, nonmarital children may petition their biological mothers. Biological fathers do not enjoy the same privileges with respect to their nonmarital children. In *Fiallo*, three sets of fathers and unwed children challenged the law as unconstitutional. The Court ruled in the government's favor, holding that Congress's plenary power over the admission of non-citizens precluded the judiciary from second-guessing the legislature's reasons for enacting the law. Citing precedent, the Court noted that immigration laws are closely connected with the political branches' conduct of foreign affairs. Writing for the majority, Justice Powell opined that Congress enacts many laws that

draw distinctions between U.S. citizen and noncitizen—based on age, for example—that, while they may seem arbitrary, are rational. Specifically, he surmised that Congress might have perceived family ties between the biological father and nonmarital child to be less close than those between mother and child. Likewise, Congress may have been concerned about the difficulty in proving paternity in many cases. Powell rejected the argument that the Court more closely scrutinize this law, finding that the effects on U.S. citizens and lawful permanent residents, the gender and illegitimacy discrimination alleged, and the absence of a national security concern did not warrant less deferential judicial review. Although criticized for its deference to Congress, *Fiallo v. Bell* has long been recognized as a key case to support the government's plenary power over immigration.

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References and Further Reading

- Satinoff, Debra L., *Sex-Based Discrimination in U.S. Immigration Law: The High Court's Lost Opportunity to Bridge the Gap Between What We Say and What We Do*, *American University Law Review* 47 (1998): 1353–1392.

See also **Aliens, Civil Liberties of; Citizenship; Equal Protection of Law (XIV); Illegitimacy and Immigration; Sex and Immigration**

FIELD, STEPHEN J. (1816–1899)

One of the most colorful individuals to ever serve on the Supreme Court, Stephen J. Field led major shift in constitutional jurisprudence. He pioneered a broad reading of the Fourteenth Amendment in an effort to define and preserve liberty, and especially economic freedom, by restraining the power of government.

Field was born in Haddam, Connecticut, the sixth child of a Congregationalist minister. Although Field never shared his father's religious commitment, a strong sense of moral certitude permeated his judicial opinions. Reared in Connecticut, Field spent two and a half years in present-day Turkey before beginning study at Williams College. Field graduated first in his class at Williams in 1837. Thereafter, he moved to New York City to study law with his brother, David Dudley Field, a prominent attorney and legal reformer. Field practiced law with his brother in New York City until 1848. A year later he moved to California, where gold had been recently discovered. Field, however, had no intention of prospecting for gold. Rather, he saw the gold rush as a chance to begin a law practice. After brief service as alcalde (an office combining functions of mayor and judge) of Marysville

and as a member of the California legislature, Field unsuccessfully sought election to the U.S. Senate. He then developed a lucrative private practice of law in Marysville until he was elected as a Democrat to the California Supreme Court in 1857. The Court heard a large number of disputes over land ownership, and Field helped to develop a consistent body of law in this area. On the outbreak of the Civil War, Field was a Union loyalist.

In 1863, Congress revamped the structure of the federal judiciary and created a new spot on the U.S. Supreme Court for a justice who would have responsibility for the isolated Pacific Coast federal judicial circuit. President Abraham Lincoln was anxious to name a Californian for political and geographical reasons, and he selected Field in part to strengthen California's attachment to the Union. Easily confirmed by the Senate, Field served as a justice for thirty-four years and ranks second among justices for longevity of service.

Although Field generally voted to uphold the actions of the Lincoln administration in the Civil War, he soon demonstrated a libertarian bent. Field joined the opinion in *Ex Parte Milligan* (1866), which invalidated the trial of civilians by the military when civil courts were open. Writing for the Court, Field struck down Civil War loyalty oaths in *Cummings v. Missouri* (1867) and *Ex Parte Garland* (1867). He reasoned that such oaths, designed to keep ex-Confederates out of public offices and certain professions, constituted unconstitutional bills of attainder and ex post facto laws. Field also consistently voted to curtail the confiscation of property owned by Confederate supporters. He authored a number of opinions that held particular confiscations under the Second Confiscation Act to be invalid.

Anti-Chinese sentiments on the West Coast produced numerous laws discriminating against Chinese immigrants. Although not fully consistent in cases involving Chinese immigrants, Field was often sympathetic to their plight. In *Ah Kow v. Nunan* (1879), decided by Field on the federal circuit bench, he invalidated the San Francisco queue ordinance intended to harass the Chinese as discriminatory class legislation barred by the Fourteenth Amendment.

Field is best known for a series of dissenting opinions in which he asserted that the due process clause of the Fourteenth Amendment placed substantive, as well as procedural, checks on state authority. In the *Slaughterhouse Cases* (1873), for example, Field argued in dissent that the Amendment protected the rights of persons to engage in lawful occupations. Field, again in dissent, amplified his views in *Munn v. Illinois* (1877), a case involving state-imposed rate regulation. He vigorously assailed the notion that

government could control the right of owners to charge for the use of their property absent special circumstances. Field also broadly defined liberty as more than freedom from restraint, and as encompassing the right to pursue ordinary trades. During the 1880s Field's views gradually gained ascendancy on the Supreme Court.

Property and liberty were closely linked in Field's jurisprudence. He was primarily concerned to safeguard economic liberties of individuals against state-imposed regulations. In his view, governmental power could not be legitimately used to interfere in the market or redistribute wealth. Voting with the majority in *Pollock v. Farmers' Loan and Trust Co.* (1895) to invalidate the 1894 income tax, Field expressed concern that the levy constituted class legislation, because it imposed burdens based on wealth. In *Allgeyer v. Louisiana* (1897), decided at the end of Field's tenure on the bench, the Court built on his theory that the due process clause Fourteenth Amendment protected the right to pursue lawful callings to recognize the right to make contracts without unreasonable state interference.

Field, however, was never a doctrinaire laissez-fairest or a one-sided champion of business interests. He recognized that states had the authority under the police power to protect the health and safety of their residents. In *Missouri Pacific Railway Company v. Humes* (1885), for instance, he spoke for the Court in an opinion upholding state railroad fencing laws as a means to prevent accidents. Similarly, Field was often supportive of claims of injured industrial workers. He validated state laws that abrogated the fellow-servant rule for railroad employees in *Missouri Pacific Railway Company v. Mackey* (1888). Field also believed that states possessed wide power to promote public morals. He readily sustained laws regulating the sale of alcoholic beverages and controlling lotteries. Writing for the Court in *Davis v. Beason* (1890), he affirmed a territorial law that denied suffrage to those who belonged to a group advocating polygamy and concluded that the First Amendment protected religious beliefs but not conduct.

Field's emphasis on the due process clause of the Fourteenth Amendment as a vehicle to protect property rights and limit government influenced Supreme Court decisions for decades after his retirement. In 1937, however, the Court abandoned the due process review of economic legislation and fashioned a dichotomy between property rights and other personal liberties. Nonetheless, the justices continue to invoke substantive due process to safeguard noneconomic interests, a development that partially reflects Field's jurisprudence.

JAMES W. ELY, JR.

References and Further Reading

- Ely, James W., Jr. *The Chief Justiceship of Melville W. Fuller, 1888–1910*. Columbia: University of South Carolina Press, 1995.
- Field, Stephen J. *Personal Reminiscences of Early Days in California*. 1877 Reprint, New York: Da Capo Press, 1968.
- Kens, Paul. *Justice Stephen Field: Shaping Liberty from the Gold Rush to the Gilded Age*. Lawrence: University Press of Kansas, 1997.
- McCurdy, Charles W. “Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism.” *Journal of American History* 61 (1975): 970–1005.
- Swisher, Carl Brent. *Stephen J. Field: Craftsman of the Law*. Washington: Brookings Institute, 1930. Reprint: Chicago: University of Chicago Press, 1969.

Cases and Statutes Cited

- Ah Kow v. Nunan*, 12 F. Cases 252 (C.C.C. Cal. 1879)
- Allgeyer v. Louisiana*, 165 U.S. 578 (1897)
- Cummings v. Missouri*, 71 U.S. 277 (1867)
- Davis v. Beason*, 133 U.S. 333 (1890)
- Garland, Ex Parte*, 71 U.S. 333 (1867)
- Milligan, Ex Parte*, 71 U.S. 2 (1866)
- Missouri Pacific Railway Company v. Humes*, 115 U.S. 512 (1885)
- Missouri Pacific Railway Company v. Mackey*, 127 U.S. 205 (1888)
- Munn v. Illinois*, 94 U.S. 113 (1877)
- Pollock v. Farmers’ Loan and Trust Co.*, 157 U.S. 429 (1895)
- Slaughterhouse Cases*, 83 U.S. 36 (1873)

FIGHTING WORDS AND FREE SPEECH

The Supreme Court has held that some speech is not deserving of First Amendment protection—including obscenity, defamation, and fighting words—so that government can regulate it. The Court first articulated the fighting words doctrine in *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), upholding a statute that prohibited the use of “offensive, derisive or annoying” language. The *Chaplinsky* decision defined fighting words as “those which by their very utterance inflict injury or tend to incite an immediate breach of the peace,” and concluded that statements such as those uttered by Chaplinsky—he called a city marshal a “damned racketeer” and “a damned Fascist”—were of so little value that government could ban them to preserve order and morality. Although the Court continues to reaffirm the fighting words doctrine, it has not upheld any convictions for using fighting words since *Chaplinsky*. In subsequent cases, the Court has either held that the speech in question does not meet the definition of fighting words or concluded that the

statute at issue could be construed to be overbroad or underinclusive.

The Court has subsequently narrowed the definition of fighting words to those that are likely to provoke immediate retaliatory violence. In *Terminiello v. Chicago*, 337 U.S. 1 (1949), the Court clarified that speech does not lose First Amendment protection merely because it causes anger. Terminiello’s speech enraged a large audience by criticizing various political and racial groups, but the Court held that it was protected unless it was “shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.” Similarly, in *Street v. New York*, 394 U.S. 576 (1969), the Court held that the mere offensiveness of speech does not strip it of constitutional protection. Street was convicted of violating a New York state flag desecration statute because, in response to hearing about the murder of civil rights leader James Meredith, he burnt an American flag and said “If they let that happen to Meredith, we don’t need an American flag.” The Court reversed Street’s conviction because, although contemptuous, his speech was not “so inherently inflammatory as to come within that small class of ‘fighting words’ which are ‘likely to provoke the average person to retaliation, and thereby cause a breach of the peace.’”

The Court further narrowed the definition of fighting words and expanded protection for offensive speech in *Cohen v. California*, 403 U.S. 15 (1971). Cohen, a Vietnam War protester, was convicted of disturbing the peace for wearing a jacket bearing the words “Fuck the Draft.” The Court held that the words on Cohen’s jacket were not fighting words, because they were not directed at an individual and so were not “personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction.” The Court also recognized that both the emotive and the cognitive impact of Cohen’s expression were deserving of First Amendment protection.

In more recent years, the Court has overturned convictions for using fighting words on the grounds that the statutes prohibiting them were constitutionally overbroad. In *Gooding v. Wilson*, 405 U.S. 518 (1972), the Court cautioned that states must narrowly regulate fighting words so as not to chill protected speech. The *Gooding* court struck down a Georgia statute prohibiting “opprobrious words or abusive language, tending to cause a breach of the peace” because it concluded that the law had been broadly construed to proscribe speech that would not cause an immediate violent response. Similarly, in *Lewis v. City of New Orleans*, 415 U.S. 130 (1974), the Court struck down an ordinance that made it illegal for

“any person wantonly to curse or revile or to use obscene or opprobrious language toward or with reference to any member of the city police while in the actual performance of his duty,” concluding that the statute could be construed to prohibit offensive, but constitutionally protected, speech. Indeed, in *City of Houston v. Hill*, 482 U.S. 451 (1987), the Court reasoned that the fighting words doctrine “might require a narrower application in cases involving words addressed to a police officer, because ‘a properly trained officer may reasonably be expected to exercise a higher degree of restraint than the average citizen, and thus be less likely to respond belligerently to fighting words.’”

In its most recent fighting words case, the Court recognized for the first time that fighting words are not “entirely invisible to the Constitution.” In *R.A. V. v. City of St. Paul*, 505 U.S. 377 (1992), the Court struck down as underinclusive a St. Paul, Minnesota, ordinance prohibiting the display of a symbol one has reason to know “arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender.” The defendants were charged with burning a cross on an African-American family’s lawn. Justice Scalia’s majority opinion reasoned that government regulation of fighting words cannot be based on hostility or favoritism toward any constitutionally protected message those words contain. Accordingly, even though the ordinance regulated only unprotected speech, it violated the First Amendment for the city to draw a content-based distinction between subsets of fighting words. Four concurring justices, disagreeing with the majority rationale, argued that the ordinance was constitutionally overbroad, because it prohibited expression that “causes only hurt feelings, offense, or resentment.”

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References and Further Reading

- Greenwalt, Kent. *Fighting Words: Individuals, Communities, and Liberties of Speech*. Princeton, NJ: Princeton University Press, 1995.
- Hill Collins, Patricia. *Fighting Words: Black Women and the Search for Justice*. Minneapolis: University of Minnesota Press, 1998.
- Note, *The Demise Of The Chaplinsky Fighting Words Doctrine: An Argument For Its Interment*, Harvard Law Review 106 (1993): 5:1129–1146.

FIRST AMENDMENT AND PACS

The Political Action Committee, or PAC, is a type of “separate segregated fund” that allows corporations and business entities, long barred from giving

directly to candidates for office, to make political contributions. Although some labor organizations and unions had been using PACs before 1971, their legality was questionable. The Federal Election Campaign Act, known as FECA, of that year established rules legalizing and governing PACs. Since that time, PACs have proliferated and have become a primary and, at times, controversial vehicle for candidate financing.

As Congress has progressively strengthened campaign finance regulations over time, PACs have been at the center of the debate over the legality of restricting political giving in light of the Constitutional protection of free speech. Opponents of regulation argue that political contributions amount to political speech and, therefore, merit First Amendment protection from Congressional infringement. Proponents of reform, by contrast, suggest that large campaign contributions such as those from PACs exert undue influence on the political process, whereas regulation of such contributions does not necessarily constitute a check on free speech.

While recognizing that campaign contributions were equivalent to speech and that statutes limiting them would have to withstand strict scrutiny, the Supreme Court affirmed the constitutionality of certain restrictions on political giving in the seminal case *Buckley v. Valeo* (1976). However, the Court later struck down as unconstitutional a provision of FECA which made it illegal for PACs to spend more than \$1,000 in “independent expenditures” in *Federal Election Commission v. National Conservative Political Action Committee* (1985). The Supreme Court recognized that speech does not lose constitutional protection merely because it originates from a corporation or union. However, the most recent major campaign finance reform bill, the Bipartisan Campaign Reform Act (2002), has placed additional restrictions on PAC giving. The legislation, which was tested before the Supreme Court in *McConnell v. Federal Election Commission* (2003), affects *inter alia* caps on PAC giving, PAC coordination with candidate committees, and, of course, the main object of the legislation, soft money.

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References and Further Reading

- Lowenstein, Daniel H., and Richard L. Hasen, eds. *Election Law: Cases and Materials*. 3rd Ed. Durham, NC: Carolina Academic Press, 2004, pp. 717–750.
- Morgan, Anne M. (Note), *Election Law: Limitations on Independent PACs Held Unconstitutional*, Federal Election Commission v. National Conservative Political Action Committee, 105 S. Ct. 1459 (1985), Marquette Law Review 69 1985–1986:143.

Cases and Statutes Cited

Buckley v. Valeo, 424 U.S. 1 (1976)
Federal Election Commission v. National Political Action Committee, 470 U.S. 480 (1985)
McConnell v. Federal Election Commission, 540 U.S. 93 (2003)

FISHER v. UNITED STATES, 425 U.S. 391 (1976)

Taxpayers being investigated by the Internal Revenue Service (IRS) provided workpapers prepared by their accountant to their attorney, and the IRS then served a summons on the attorney to obtain the personal records of the clients. While the attorney could not assert the Fifth Amendment Self-Incrimination Privilege on behalf of the client, the Supreme Court found that if the documents would have been protected by the Fifth Amendment in the hands of the taxpayers, then the attorney–client privilege would protect them when the attorney holds the records.

The Court rejected the argument that the Fifth Amendment protects the contents of voluntarily produced documents, largely overturning its 1886 holding in *Boyd v. United States*. The Court changed the Fifth Amendment analysis by holding that the Self-Incrimination Privilege does apply to an individual's act of production in response to a subpoena in a grand jury investigation, which can communicate information about the existence, possession, and authenticity of the records.

A recipient of a grand jury subpoena or an IRS summons may not resist production in every case, however, if the government can show that it will not gain any information from the individual's act of production because the existence, possession, and authenticity of the records is a foregone conclusion. The act of production issue is highly fact-specific and depends on the types of records sought and the scope of the government's knowledge about them. *Fisher* makes clear that the content of the records is not protected by the Self-Incrimination Privilege.

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References and Further Reading

Allen, Ronald J., and M. Kristin Mace, *The Self-Incrimination Clause Explained and Its Future Predicted*, *Journal of Criminal Law & Criminology* 94 (2004): 2:243–293.
 LaFare, Wayne R., Jerold H. Israel, and Nancy J. King. *Criminal Procedure*. 2nd Ed. Vol. 3, St. Paul, MN: Thomson West, 1999, pp. 248–254.
 Reitz, Kevin J., *Clients, Lawyers and the Fifth Amendment: The Need for a Projected Privilege*, *Duke Law Journal* 41 (1991): 3:572–660.

Cases and Statutes Cited

Boyd v. United States, 116 U.S. 616 (1886)

See also *Boyd v. United States*, 116 U.S. 616 (1886); **Grand Jury Investigation and Indictment; Self-Incrimination (V): Historical Background**

FLAG BURNING

The American flag is a powerful symbol that evokes strong emotions in many citizens. As a result, few methods of political protest are as offensive—or as potentially effective at attracting public attention—as flag burning. Although incidents of flag burning in the United States are relatively rare, law-makers have enacted flag-desecration statutes and even proposed a federal constitutional amendment that would prohibit flag burning. Supporters of these efforts believe they are necessary to preserve the flag as a cherished emblem of national unity. Opponents argue that flag burning constitutes a means of expressing dissent that is, and must remain, fully protected by the First Amendment. In a pair of cases decided in 1989 and 1990, the U.S. Supreme Court held that the First Amendment protects flag burning as a type of Symbolic Speech. Since then, proposals for a flag-desecration amendment to the Constitution have been introduced frequently in Congress, but so far none has gathered the two-thirds support in the Senate needed for passage.

Is Flag Burning “Speech”?

The First Amendment ensures the right to free speech; it does not prohibit the government from regulating behavior. Flag burning certainly communicates a message, but it does so through an act and without the necessity of words. Could the government therefore treat flag burning as illegal conduct, rather than as protected expression?

The Supreme Court dodged the question when it first emerged in the 1960s in *Street v. New York* (1969). In that case, decorated war veteran Sydney Street burned a flag on a Brooklyn street corner after learning that civil rights activist James Meredith had been shot by a sniper in Mississippi. Street told the gathered crowd, “We don’t need no damn flag,” and explained to a police officer that “If they let that happen to Meredith we don’t need an American flag.” Street was convicted under a New York statute that criminalized flag desecration, as well as the expression of contemptuous words about the flag.

Although the Supreme Court overturned Street's conviction on First Amendment grounds, the decision rested on the conclusion that Street had been punished for his offensive language, rather than for his act of flag burning.

In related contexts, however, the Court had already recognized that expressive conduct could qualify as speech entitled to a measure of First Amendment protection. For example, in *Stromberg v. California* (1931), the Court overturned a woman's conviction under a California law that prohibited public use or display of a red flag "as a sign, symbol or emblem of opposition to organized government," noting that the ban interfered with free political discussion. And in a famous case involving a war protestor who burned his draft card, *United States v. O'Brien* (1968), the Court outlined a test for determining when government regulation is justified in symbolic speech cases. According to that test, the First Amendment requires that government regulation of symbolic speech be content neutral and narrowly tailored to achieve a valid government interest that is unrelated to the suppression of expression.

Does all behavior that communicates an idea, therefore, constitute speech protected by the First Amendment? Not necessarily. According to the Court in *Spence v. Washington* (1974), expressive conduct will only qualify as symbolic speech if an "intent to convey a particular message was present, and...the likelihood was great that the message would be understood by those who viewed it."

Texas v. Johnson

The Supreme Court finally addressed the flag-burning issue in *Texas v. Johnson* (1989), holding by a five-to-four vote that Gregory Johnson's conviction under a Texas flag desecration statute violated the First Amendment. Johnson had burned an American flag at the 1984 Republican National Convention in Dallas as part of a public protest against Reagan Administration policies and had been tried, convicted, and sentenced to one year in jail and a \$2,000 fine. The statute prohibited any physical mistreatment of the flag "that the actor knows will seriously offend one or more persons likely to observe or discover his action."

Writing for the majority, Justice William Brennan began by confirming that Johnson's act qualified as symbolic speech under the First Amendment, noting that flag burning in this context clearly conveyed a particular political message. Justice Brennan then looked to see whether the state could justify its prohibition against flag burning in a content-neutral way.

The state made two arguments to support Johnson's conviction: first, that it was necessary to avert a breach of the peace; and second, that it preserved the flag's unique symbolic value.

With respect to the first argument, Justice Brennan noted that although several onlookers had been offended by Johnson's conduct, no breach of the peace had occurred or had been threatened. According to the Court, the state may not prohibit offensive speech by merely asserting that such speech presents a risk of violence. Nor could the state say that Johnson's conduct fell within the First Amendment exception for Fighting Words, because no bystander could have reasonably regarded Johnson's act as "a direct personal insult or an invitation to exchange fisticuffs."

As for the asserted state interest in safeguarding the flag's value as a national symbol, Justice Brennan concluded that this interest was not content neutral. The Texas flag desecration statute contained an exception that allowed worn, dirty, or torn flags to be burned as a proper method of disposal. Therefore, while the statute allowed respectful, "patriotic" flag burning, it prohibited flag burning as an expression of political protest. "If there is a bedrock principle underlying the First Amendment," Justice Brennan wrote, "it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."

The Aftermath

The Court's decision in *Texas v. Johnson* touched off what one newspaper termed "a firestorm of indignation" that ultimately resulted in Congressional passage of the federal Flag Protection Act of 1989. The law attempted to prohibit flag desecration in a content-neutral manner by banning all physical harm to the flag (except that caused by disposing of old or soiled flags) regardless of the conduct's effect on bystanders. Nevertheless, the Court in *United States v. Eichman* (1990) struck down the law in a five-to-four decision. Again writing for the majority, Justice Brennan concluded that the federal law violated the First Amendment because it proscribed expression "out of concern for its likely communicative impact." In other words, the statute was content based because it criminalized only those acts that demonstrated disrespect for the flag. "Punishing desecration of the flag dilutes the very freedom that makes this emblem so revered, and worth revering," he wrote. Justice John Paul Stevens authored the dissent, in which he argued that the statute was

content neutral, because it prohibited all flag desecration no matter what the actor's intended message.

Since the Court's decision in *Eichman*, the House of Representatives approved a Constitutional amendment in 1995, 1997, 1999, 2001, and 2003 that would have allowed Congress or the states to criminalize "physical desecration of the flag." To date, this proposed amendment has always been defeated in the Senate. Supporters of the amendment argue that the flag is a unique national symbol that deserves special protection against mistreatment or disrespect. Flag burning, according to this view, adds nothing meaningful to the marketplace of ideas and, therefore, has no value as speech. Critics respond that a nation founded on principles of liberty must safeguard its citizens' right to express dissent—even when that expression takes a form that the majority finds offensive. Critics also object to the possible wide array of legislative interpretations under the amendment regarding what constitutes either "desecration" or "the flag."

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References and Further Reading

- Goldstein, Robert Justin. *Flag Burning and Free Speech: The Case of Texas v. Johnson*. Lawrence, KS: University Press of Kansas, 2000.
- Greenawalt, Kent. *O'er the Land of the Free: Flag Burning as Speech*, *UCLA Law Review* 37 (1990): 925–947.
- Smolla, Rodney A. *Free Speech in an Open Society*. New York: Alfred A. Knopf, Inc., 1992.
- Van Alstyne, William W. Freedom of speech and the flag anti-desecration amendment: antinomies of constitutional choice, in Rodgers, Raymond S., ed. *Free Speech Yearbook*, Vol. 29. Carbondale & Edwardsville: Southern Illinois University Press, 1991, pp. 96–105.

Cases and Statutes Cited

- Spence v. Washington*, 418 U.S. 405 (1974)
- Street v. New York*, 394 U.S. 576 (1969)
- Stromberg v. California*, 283 U.S. 359 (1931)
- Texas v. Johnson*, 491 U.S. 397 (1989)
- United States v. Eichman*, 496 U.S. 310 (1990)
- United States v. O'Brien*, 391 U.S. 367 (1968)

See also **Content-Based Regulation of Speech; Draft Card Burning; Fighting Words and Free Speech; Symbolic Speech**

FLAG SALUTE CASES

In 1935, Jehovah's Witnesses in Germany refused to salute the Nazi flag. Ultimately, more than 10,000 German Jehovah's Witnesses would be sent to concentration camps for their affront to Nazi authorities. In 1935, the leader of the Jehovah's Witnesses in

America declared that followers of the faith "do not 'Heil Hitler' nor any other creature." He found scriptural support for this position by arguing that saluting the flag was a form of idolatry. After this speech, American Jehovah's Witnesses refused to take part in flag saluting ceremonies. After this change in their religious practice, Jehovah's Witnesses began to face disciplinary actions in public schools across America. In *Minersville School District v. Gobitis* (1940), the Court upheld the school district's attempt to force students to salute the flag. In *West Virginia State Board of Education, v. Barnette* (1943) the court reversed course, siding with the claims of religious freedom made by the Jehovah's Witnesses.

Minersville School District v. Gobitis (1940)

This case resulted from the refusal of twelve-year-old Lillian Gobitis and her ten-year-old brother William to say the pledge of allegiance in the public schools of Minersville, Pennsylvania. The father of these children, Walter Gobitis, had grown up in Minersville and was raised in a Roman Catholic family and of course saluted the flag as a child. In 1931, Gobitis became a Jehovah's Witness, a faith that regularly denounced the Catholic Church and the Pope. At the time Lillian was eight and William was six. The Gobitis children continued to salute the flag until November 1935, when members of their faith across the nation ceased to salute the flag.

In a more cosmopolitan community, the refusal of the Gobitis children to salute the flag might have gone unnoticed. But, neither Gobitis nor his faith was popular in Minersville, where eighty percent of the population was Roman Catholic. Rather than ignoring what was neither an act of defiance nor a disruption in the schools, the school board adopted a regulation allowing for the expulsion of any students who would not salute the flag. Gobitis then sent his children to a private Jehovah's Witness school.

Eighteen months later, Gobitis sued the school district. The case was first heard by Judge Albert B. Maris, a recent Roosevelt appointee to the federal court. As a Quaker, Maris was probably more sympathetic to the Jehovah's Witnesses than most Americans. Although he had a distinguished military record during World War I, as a member of a faith long persecuted for its pacifism, Maris, doubtless understood the nature of prejudice and religious persecution that the Jehovah's Witnesses faced.

During the trial, the school superintendent was openly hostile toward the Gobitis children and the Jehovah's Witnesses, asserting that the children were

“indoctrinated,” thereby implying that their actions were not based on sincerely held religious beliefs. Judge Maris rejected Roudabush’s contentions. Judge Maris asserted that “To permit public officers to determine whether the views of individuals sincerely held and their acts sincerely undertaken on religious grounds are in fact based on convictions religious in character would sound the death knell of religious liberty.” Maris refused to sustain “such a pernicious and alien doctrine” and reminded the school officials that Pennsylvania itself had been founded “as a haven for all those persecuted for conscience’ sake.” Judge Maris found that “although undoubtedly adopted from patriotic motives,” the flag salute requirement “appears to have become in this case a means for the persecution of children for conscience’ sake.” He noted that “religious intolerance is again rearing its ugly head in other parts of the world” and thus it was of “utmost importance that the liberties guaranteed to our citizens by the fundamental law be preserved from all encroachment.” While not central to his decision, Maris’s point placed the controversy over the Jehovah’s Witnesses in the context of the rise of Nazism, preparation for World War II, and eventually American involvement in the War. In part the cases involving the Jehovah’s Witnesses raised important questions about how much dissent a democracy can allow at a time of crisis and international conflict. Maris took the position that such dissent was vital to the democracy and part of its ultimate strength. The Minersville School Board took the position that national unity required submission to the will of the majority, especially on issues involving outward displays of patriotism. This argument would reemerge among before the Supreme Court in both *Gobitis* and *Barnette*.

Having concluded that the flag salute requirement was motivated by a desire to provide “a means for the persecution of children for conscience’ sake,” Maris ordered the children readmitted to the public schools, and a unanimous panel of the U.S. Court of Appeals affirmed this decision. Minersville school officials did not plan to appeal the Supreme Court, but, patriotic groups, including the American Legion, stepped in to help finance the case. Before the Supreme Court, Harvard Law School Professor George K. Gardner argued *Gobitis*’s case on behalf of the American Civil Liberties Union.

In an eight to one decision, the Supreme Court reversed the two lower court decisions and upheld the right of the Minersville School District to require that students salute the flag. Writing for the Court was Justice Felix Frankfurter, who conceded that “the affirmative pursuit of one’s convictions about the ultimate mystery of the universe and man’s

relation to it is placed beyond the reach of law. Government may not interfere with organized or individual expression of belief or disbelief.” However, Frankfurter noted that there were no absolute guarantees of religious freedom. He found that the task of the Court was to “reconcile two rights in order to prevent either from destroying the other.” He found that “conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs. The mere possession of religious convictions that contradict the relevant concerns of a political society does not relieve the citizen from a discharge of political responsibilities.” Put simply, Frankfurter was arguing that the First Amendment’s guarantee of religious freedom only extended to protection from laws that were overtly religious in nature. Frankfurter rejected the findings of the lower court that the enforcement of the pledge was overt religious discrimination.

In a hyperbolic analogy, Frankfurter compared the dilemma of the Jehovah’s Witnesses to that of Lincoln’s query during the Civil War: “Must a government of necessity be too *strong* for the liberties of its people, or too *weak* to maintain its own existence?” Frankfurter argued that the flag was a “symbol of national unity, transcending all internal differences” and as such he implied that failure to salute it somehow threatened the existence of the nation.

He further argued that the states should be given great latitude in determining how best to instill patriotism in children. He thought judicial review was “a limitation on popular government” that should be used sparingly. Thus, he urged that issues of liberty be fought out in the state legislatures and “in the forum of public opinion” to “vindicate the self-confidence of a free people.”

Justice Harlan Fiske Stone dissented, asserting that “by this law the state seeks to coerce these children to express a sentiment that, as they interpret it, they do not entertain, and which violates their deepest religious convictions.” Stone dismissed Frankfurter’s appeals to patriotism and his unrealistic suggestion that the issue be decided “in the forum of public opinion” by appeals to the wisdom of the legislature. Stone pointed out that “History teaches us that there have been but few infringements of personal liberty by the state which have not been justified, as they are here, in the name of righteousness and the public good, and few which have not been directed, as they are now, at politically helpless minorities.” Finally, Stone argued that the Constitution was more than just an outline for majoritarian government, it was “also an expression of faith and a command that freedom of mind and spirit must be preserved, which

government must obey, if it is to adhere to that justice and moderation without which no free government can exist.”

Stone understood the value of instilling patriotism in future citizens. He declared that the state might “require teaching by instruction and study of all in our history and in the structure and organization of our government, including the guarantee of civil liberty, which tend to inspire patriotism and love of country.” But, forcing children to violate their religious precepts was, in Stone’s mind, not the way to teach patriotic values. He thought it far better that the schools find “some sensible adjustment of school discipline in order that the religious convictions of these children may be spared” than to approve “legislation which operates to repress the religious freedom of small minorities....”

The *Gobitis* decision helped unleash a wave of political, legal, and physical attacks on Jehovah’s Witnesses. Immediately after the decision, there were hundreds of assaults on Jehovah’s Witnesses and their property. Throughout the nation, Jehovah’s Witnesses were beaten, mobbed, and kidnapped. Their attackers often included police officials. In Odessa, Texas, for example, seventy Jehovah’s Witnesses were arrested for their own “protection,” held without charges when they refused to salute the flag, and then released to a mob of more than 1,000 people who chased them for five miles, throwing stones at them. In Wyoming some Jehovah’s Witnesses were tarred and feathered, in Arkansas some were shot, and in Nebraska one Jehovah’s Witness was castrated. In Richwood, West Virginia, the police arrested a group of Jehovah’s Witnesses who sought police protection, forced them to drink large amounts of castor oil, tied them up, and paraded them through the town. By 1943 more than 2,000 Jehovah’s Witnesses had been expelled from schools in all forty-eight states. This was the nationwide answer to Justice Frankfurter’s unrealistic suggestion that the Jehovah’s Witnesses appeal to the state legislatures for relief.

The nation’s intellectual community responded to *Gobitis* in quite a different way. Overwhelmingly law review articles condemned the decision. The law reviews at Catholic universities, such as Fordham, Georgetown, and Notre Dame, were unanimous in their opposition to *Gobitis*, even though the Jehovah’s Witnesses had traditionally vilified the Roman Catholic Church. But, the issue here was civil liberties, not theology, as Catholic scholars clearly understood.

Members of the Supreme Court soon came to doubt the wisdom of *Gobitis*. In another case involving the Jehovah’s Witnesses, *Jones v. Opelika* (1942), three dissenting justices who had voted with the

majority in *Gobitis* declared they now believe it was “wrongly decided” and that “the historic Bill of Rights has a high responsibility to accommodate itself to the religious views of minorities however unpopular and unorthodox those views may be.”

Barnette v. West Virginia State Board of Education

In January 1942, the West Virginia state school board adopted a strict flag salute requirement. The board’s resolution, which had the authority of a statute, began with a long preamble that quoted at length portions of Frankfurter’s *Gobitis* opinion. The resolution ended by declaring “that refusal to salute the Flag [shall] be regarded as an act of insubordination, and shall be dealt with accordingly.” Shortly after the adoption of this resolution, school officials in Charleston expelled a number of Jehovah’s Witnesses, including the children of Walter Barnette.

In August 1942, attorneys for Barnette and other Jehovah’s Witnesses asked the District Court to convene a three-judge panel to permanently enjoin state school officials from requiring Jehovah’s Witnesses to salute the flag. Writing for a unanimous court, Judge John J. Parker, of the Fourth Circuit Court of Appeals, granted the injunction. Parker acknowledged that “ordinarily” the lower court would “feel constrained to follow an unreversed decision of the Supreme Court of the United States, whether we agreed with it or not.” However, in the light of the dissents in *Opelika*, Parker expressed doubt that *Gobitis* was still binding. The three-judge panel believed that the West Virginia flag salute requirement was “violative of religious liberty when required of persons holding the religious views of the plaintiffs.”

West Virginia’s attorney general refused to appeal this decision to the U.S. Supreme Court, so the attorney for the Board of Education appealed the case with an unimaginative argument that relied almost entirely on *Gobitis*, supported by a weak *amicus* brief from the American Legion. Attorneys for Barnette attacked *Gobitis*, comparing it to the *Dred Scott* decision of 1857. Amicus briefs for Barnette came from the American Civil Liberties Union written by Osmond K. Fraenkel and Arthur Garfield Hays and the American Bar Association’s Committee on the Bill of Rights written by Harvard Law professor Zachariah Chafee, Jr.

On June 14, 1943, which was Flag Day, Justice Robert Jackson, speaking for a six to three majority upheld the lower court and reversed the *Gobitis* precedent. Justice Frankfurter wrote a bitter dissent.

While the Flag Salute cases are generally seen as involving freedom of religion, that issue is virtually absent from Jackson's majority opinion. He accepts, without question, that the Jehovah's Witnesses sincerely held beliefs that made it impossible for them to conscientiously salute the flag. But, Jackson does not offer any analysis of the importance of that belief or even of the role of religious freedom in striking down the mandatory flag salute. Indeed, he links the freedom to worship with other bill of rights protections, noting that the "right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections." He finds that the "freedoms of speech and of press, of assembly, and of worship may not be infringed" on "slender grounds."

Rather than grounding his opinion in freedom of religion, Jackson analyzed the case as one of freedom of speech and expression. Jackson argued that the flag salute—or the refusal to salute the flag—was "a form of utterance" and thus subject to standard free speech analysis. He noted that the flag was a political symbol, and, naturally, saluting that symbol was symbolic speech:

Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind. Causes and nations, political parties, lodges and ecclesiastical groups seek to knit the loyalty of their followings to a flag or banner, a color or design. The State announces rank, function, and authority through crowns and maces, uniforms and black robes; the church speaks through the Cross, the Crucifix, the altar and shrine, and clerical raiment. Symbols of the State often convey political ideas just as religious symbols come to convey theological ones.

The question for Jackson was rather simple, did the "speech" of the Jehovah's Witnesses threaten the rights of any individuals or the peace and stability of the government. If the answer to either question was yes, then Jackson might have allowed the mandatory flag salute. But, if they did not threaten the rights of others or threaten the government, then there was no valid reason to suppress their expression.

Jackson noted that the conduct of the Jehovah's Witnesses "did not bring them into collision with rights asserted by any other individuals." The Court was not being asked "to determine where the rights of one end and another begin." It was, rather, a conflict "between [governmental] authority and rights of the individual."

Jackson compared the forced flag salute to *Stromberg v. California*, 283 U.S. 359 (1931), which had allowed protestors to carry a red flag. This case and

others supported the "commonplace" standard in free speech cases "that censorship or suppression of expression of opinion is tolerated by our Constitution only when the expression presents a clear and present danger of action of a kind the State is empowered to prevent and punish. It would seem that involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence." But, were there such grounds? No one claimed that the silence of the children "during a flag salute ritual creates a clear and present danger that would justify an effort even to muffle expression." Jackson pointed out the irony of the flag salute requirement, in light of the expanded freedom of speech found in recent decision. "To sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind."

Jackson's shrewd analysis had turned the case inside out. It was no longer one of freedom of religion, but one that in part took the form of an establishment of religion on the part of the government through its "flag salute ritual." Jackson correctly saw that the Jehovah's Witnesses were not trying to force their views on anyone else, but rather, that the government was trying to force its views and beliefs on the Jehovah's Witnesses. He noted that in *Gobitis* the Court had "only examined and rejected a claim based on religious beliefs of immunity from general rule." But, Jackson pointed out, this was not the correct question to ask. Indeed, Jackson noted that people who did not hold the religious views of the Jehovah's Witnesses might still find "such a compulsory rite to infringe constitutional liberty of the individual." For Jackson the correct question was "whether such a ceremony so touching matters of opinion and political attitude may be imposed upon the individual by official authority . . . under the Constitution." In other words, did the government have the power to force anyone, regardless of their religious beliefs, to participate in any ceremony or "ritual." What Jackson might have asked was, did the Constitution allow for the establishment of a secular national religion with the flag as the chief icon? This led him to a discussion, and refutation, of various points in *Gobitis*.

In *Gobitis*, Frankfurter had noted Lincoln's "memorable dilemma" of choosing between civil liberties and maintaining a free society. Jackson had little patience for "such oversimplification, so handy in political debate." He "doubted whether Mr. Lincoln would have thought that the strength of government to maintain itself would be impressively vindicated by our confirming power of the state to expel a handful of children from school." Here Jackson revealed

the fundamental weakness of Frankfurter's assertion in *Gobitis* that somehow the safety of the nation depended on whether Jehovah's Witnesses were forced to salute the flag in the public schools.

Along this line, Jackson noted even Congress had made the flag salute optional for soldiers who had religious scruples against such ceremonies. This act "respecting the conscience of the objector in a matter so vital as raising the Army" contrasted "sharply with these local regulations in matters relatively trivial to the welfare of the nation."

This led Jackson to the national security issue raised by Frankfurter in *Gobitis*. At the time of *Gobitis*, the nation was not at war, but war seemed imminent. By the time the Court heard *Barnette*, the nation had been at war for more than a year. Jackson agreed that in wartime "national unity" was necessary and something the government should "foster by persuasion and example."

But, could the government gain national unity by force? Jackson made references to the suppression of the early Christians in Rome, the Inquisition, "the Siberian exiles as a means of Russian unity," and the "fast failing efforts of our present totalitarian enemies." He warned that "those who begin coercive elimination of dissent soon find themselves exterminating the dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard." During a war against Nazism, Jackson's opinion was a plea for the nation to avoid becoming like its enemies.

Jackson ended his opinion by reminding Americans that the patriotism in a free country could not be instilled by force. Indeed, he argued that those who thought otherwise "make an unflattering estimate of the appeal of our institutions to free minds." America's strength, he argued, was found in diversity. The test of freedom was "the right to differ as to things that touch the heart of the existing order." This led Jackson to a ringing defense of individual liberty: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."

Justice Felix Frankfurter was unmoved by Jackson's powerful defense of individual liberty and his condemnation of oppressive "village tyrants" who expelled small children from school because of their religious beliefs. At a time when millions of Jews (and thousands of Jehovah's Witnesses) were perishing in German death camps, Frankfurter used his ethnicity to justify his support for the suppression of a religious minority in the United States. He began: "One who belongs to the most vilified and persecuted minority in history is

not likely to be insensible to the freedoms guaranteed by our Constitution." But, he argued that he could not bring his personal beliefs to the Court because, "as judges we are neither Jew nor Gentile, neither Catholic nor agnostic." He then defended judicial self-restraint and recapitulated and elaborated on his *Gobitis* opinion.

Frankfurter argued that "saluting the flag suppresses no belief nor curbs it" because those saluting it were still free to "believe what they please, avow their belief and practice it." In making this point Frankfurter failed to explain how one could "practice a belief" by doing what that belief prohibited. Nor did he explain how forcing children to say and do one thing, while encouraging them to secretly believe that what they were doing was a violation of God's commandments, would inspire patriotism in them.

Frankfurter conceded that the flag salute law "may be a foolish measure," and that "patriotism cannot be enforced by the flag salute." But he argued that the court had no business interfering with laws made by democratically elected legislatures. Frankfurter argued that because a total of thirteen justices had found the flag salute laws to be constitutional, the state laws "can not be deemed unreasonable." Because the state legislators had relied the recent decision in *Gobitis*, Frankfurter thought it unfair to strike down their legislation.

Frankfurter condemned "our constant preoccupation with the constitutionality of legislation rather than with its wisdom..." Yet he refused to strike down the West Virginia law that he conceded was unwise, not because it passed all constitutional tests but because of judicial restraint and respect for *stare decisis*. He argued that the "most precious interests of civilization" were to be "found outside of their vindication in courts of law" that thus he urged that the Court not interfere in the democratic process but to wait for a "positive translation of the faith of a free society into the convictions and habits and actions of the community." What would happen to the Jehovah's Witnesses in the meantime seemed of little concern to Frankfurter.

There was some minor resistance in a few localities to *Barnette*. The Supreme Court heard a few cases in which various local decisions were overturned. On the same day it handed down *Barnette*, the court unanimously overturned a conviction for sedition in *Taylor v. Mississippi*, 319 U.S. 583 (1943). The Jehovah's Witnesses in that case had been convicted for "violating a statute making it an offence to preach, teach or disseminate any doctrine which reasonably tends to create an attitude of stubborn refusal to salute, honor, or respect the Government of the United States or the State of Mississippi." The defendants

FLAG SALUTE CASES

had been sentenced to remain in jail until the end of the War or for ten years, whichever came first. The Court found the act abridged freedom of speech and press and was “so vague, indefinite, and uncertain as to furnish no reasonably ascertainable standard of guilt.” The Mississippi law, and the prosecutions under it, illustrates the extent of official persecution of the Jehovah’s Witnesses. After 1946, the Court heard no more cases on the flag salute issue. *Barnette* became an important precedent for other free speech and freedom of religion cases.

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References and Further Reading

Manwaring, David. *Render Unto Caesar: The Flag Salute Controversy*. Chicago: University of Chicago Press, 1962.

Peters, Shawn Francis. *Judging Jehovah’s Witnesses: Religious Persecution and the Dawn of the Rights Revolution*. Lawrence, KS: University of Kansas Press, 2000.

FLAST v. COHEN, 392 U.S. 83 (1968)

Case litigation requires courts to possess the authority to hear the case (“justiciability”). An important justiciability requirement is that litigants have “standing” (be able to show injury to a protected interest) to sue. One of the most important cases involving standing is *Flast v. Cohen*, where the Supreme Court determined that taxpayers have standing to sue the government to prevent unconstitutional uses of taxpayer funds.

In *Flast*, taxpayers challenged federal legislation financing the purchase of textbooks for religious schools, arguing such use of tax money violated the First Amendment’s establishment clause. The issue before the Supreme Court was whether petitioners’ status as taxpayers gave them standing to sue in federal courts. Using a two-part test, the Court held (eight to one) that petitioners had standing to pursue the lawsuit.

Flast clarified an earlier ruling in *Frothingham v. Mellon* (262 U.S. 447 [1923]), which prevented taxpayers from having standing to sue the federal government if the only injury was an anticipated tax increase. The Court explained that *Frothingham* did not absolutely bar taxpayer suits but prevented courts from serving as forums for generalized taxpayer grievances. The *Flast* decision allows taxpayer suits against the federal government if the taxpayer can show: (1) a logical relationship between their taxpayer status and the challenged statute; and (2) that the challenged enactment exceeds constitutional limitations imposed on congressional taxing and spending power. Although the Burger and Rehnquist Courts

have restricted standing requirements, taxpayer suits are commonly used today to contest the constitutionality of government actions.

LEE R. REMINGTON

References and Further Reading

Dorf, Michael, ed. *Constitutional Law Stories: Constitutional Law*. New York: Foundation Press, 2004.

Miller, Robert T., and Ronald B. Flowers. *Toward Benevolent Neutrality: Church, State, and the Supreme Court*. 4th Ed. Waco, TX: Markham Press, 1992.

Tribe, Laurence H. *American Constitutional Law*. 3rd Ed. New York: West Publishing Company, 1999.

Cases and Statutes Cited

Flast v. Cohen, 392 U.S. 83 (1968)

Frothingham v. Mellon, 262 U.S. 447 (1923)

FLORIDA STAR v. B.J.F., 491 U.S. 524 (1989)

Florida Star is an important free press case reinforcing the principle that the press can rarely be punished for publishing truthful, lawfully acquired information about a matter of public importance. In *Florida Star*, the Supreme Court refused to punish a weekly newspaper that published the name of a rape victim in violation of a state statute.

The Court agreed that the statute attempted to serve the “highly significant interests” of protecting rape victims’ privacy and safety and encouraging victims to report rapes without fear of exposure or reprisal. But the Court majority was unwilling to hold a newspaper liable for publishing truthful information, information in B.J.F.’s case about a matter of “paramount public import: the commission, and investigation, of a violent crime which had been reported to authorities.”

The Court did not rule that the press could never be punished for publishing truthful information, but, drawing on *Smith v. Daily Mail Publishing Company*, the Court said only a government interest of the “highest order” would justify such punishment. Once again, the Court left editors to decide what to publish.

The six-member majority was unwilling to hold the press responsible for publishing information that was already public, especially because it was the sheriff’s office that released the victim’s name. The Court also thought the statute was too broad, automatically punishing the press, whether or not anyone was offended or damaged by the publication.

The three dissenters argued the Court’s ruling would “obliterate” the legal protection for a person’s “private facts.”

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References and Further Reading

Franklin, Mark A., David A. Anderson, and Fred H. Cate. *Mass Media Law: Cases and Materials*. 6th Ed. New York: Foundation Press, 2000, pp. 424–451.

Cases and Statutes Cited

Smith v. Daily Mail Publishing Co., 443 U.S. 97 (1979)

FLORIDA v. JIMENO, 500 U.S. 248 (1991)

Argued March 25, 1991, decided May 23, 1991, by a vote of seven to two, Chief Justice Rehnquist delivered the opinion for the Court, with Justice Marshall and Stevens dissenting. The Court held that a criminal suspect's Fourth Amendment right to be free from unreasonable searches is not violated when, after he gives police permission to search his car, they open a closed container found within the car that might reasonably hold the object of the search.

Police Officer Trujillo followed Jimeno's car after overhearing Jimeno arrange what seemed to be a drug transaction. Jimeno was subsequently stopped for a traffic violation. Officer Trujillo declared he had reason to believe that Jimeno was carrying narcotics in the car and asked permission to search it. Jimeno consented, and Trujillo found cocaine inside a folded paper bag on the car's floorboard. Jimeno argued that his consent to search did not carry the specific consent to open the bag and examine its contents.

Chief Justice Rehnquist opined that the Fourth Amendment was satisfied when, under the circumstances, "it is objectively reasonable for the police to believe that the scope of the suspect's consent permitted them to open the particular container." (p. 250–252). The authorization to search extended beyond the car's interior surfaces to the bag, since Jimeno did not place any explicit limitation on the scope of the search and was aware that Trujillo would be looking for narcotics in the car. Since a reasonable person may be expected to know that narcotics are generally carried in some form of container, it is reasonable for Trujillo to open the bag. There is no basis for adding to the Fourth Amendment's basic test of objective reasonableness a requirement that if police wish to search closed containers within a car, they must separately request permission to search each container.

The dissent argued the distinction between open and closed containers and noted that general consent should not be specific consent as well. "A person who consents to a search of the car from the driver's seat could also be deemed to consent to a search of his person, or indeed of his body cavities, since a

reasonable person may be expected to know that drug couriers frequently store their contraband on their persons or in their body cavities. I suppose (and hope) that even the majority would reject this conclusion, for a person who consents to the search of his car for drugs certainly does not consent to a search of things other than his car for drugs." (p. 256). There are distinct privacy expectations a person has in a car and in closed containers.

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See also **Search (General Definition); Seizures; Warrantless Searches; Automobile Searches**

FLORIDA v. RILEY, 488 U.S. 445 (1989)

Florida v. Riley considered whether helicopter surveillance constituted a search within the meaning of the Fourth Amendment, such that a warrant would be required. In the plurality opinion, the Supreme Court reversed the lower court, holding that the Fourth Amendment did not require police traveling in the public airways (in legal airspace) at an altitude of 400 feet to obtain a warrant to observe what was visible to the naked eye.

After an anonymous tip that respondent was growing marijuana, a sheriff's officer circled over the property in a helicopter flying at 400 feet. With his naked eye, he was able to see through openings in the roof and sides of the greenhouse. After he identified what he thought was marijuana, he obtained a search warrant to confirm his observations.

The Court relied on *California v. Ciraolo*, 476 U.S. 207 (1986), a similar case involving a police inspection from a fixed wing aircraft at 1,000 feet. There, the Court held that the viewing was not a search subject to the Fourth Amendment even though the occupant had a subjective expectation of privacy. A home and its curtilage are not necessarily protected from inspection that involves no physical invasion. "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Ciraolo*, 476 U.S. at 213 (citing *Katz v. United States*, 389 U.S. 347, 351 (1967)). As long as the police are "where [they have] a right to be," *Ciraolo*, 476 U.S. at 213, they need not obtain a warrant.

EMILY FROMSON

Cases and Statutes Cited

California v. Ciraolo, 476 U.S. 207 (1986)

Katz v. United States, 389 U.S. 347, 351 (1967)

See also **Electronic Surveillance, Technological Monitoring, and Dog Sniffs**

FLORIDA v. ROYER, 460 U.S. 491 (1983)

The nature of a police-citizen encounter determines whether Fourth Amendment rights are implicated and possibly infringed; without a seizure by police, Fourth Amendment protections do not apply. In *Florida v. Royer*, the Supreme Court revisited its stop and frisk doctrine, further clarifying when a consensual encounter becomes a seizure or when a seizure becomes an arrest.

Plainclothes narcotics detectives stopped Royer in the airport, identified themselves, and asked him to speak with them. At their request, Royer gave them his airline ticket and driver's license. Noticing a discrepancy, the detectives told Royer they suspected he was carrying narcotics. Retaining his documents, the detectives asked Royer to come with them to a small room nearby. One detective then retrieved Royer's luggage without his consent. When asked if he would consent to a search of the luggage, Royer simply produced a key and unlocked one bag. Marijuana was found inside, as well as in another bag. Royer was arrested and convicted of felony possession of marijuana.

In a plurality opinion, the Court found the initial encounter had escalated into an unlawful arrest when the detectives moved Royer to a small room while retaining his ticket, license, and luggage. Because Royer's consent was given after the unlawful arrest, it was tainted by this illegality and could not justify the luggage search. Recognizing there was no bright-line marking when an encounter becomes a seizure or an arrest, the Court reiterated that a lawful investigatory detention has to be limited in its scope and duration, considering the specific circumstances justifying its inception.

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References and Further Reading

American Jurisprudence. 2nd Ed., vol. 68 (Searches and Seizures). West Group, 2000, sec. 18–19.
Dressler, Joshua. *Understanding Criminal Procedure*. 3rd Ed. LexisNexis Publishing, 2002, pp. 131–134.
Katz, Lewis R., Terry v. Ohio at Thirty-Five: *A Revisionist View*, Mississippi Law Journal (2004) 74: 423–500.
LaFave, Wayne R., Jerold Israel, and Nancy J. King. *Criminal Procedure: Criminal Practice Series*. vol. 2, Chapter 3, sec. 8. St. Paul, MN: West Group, 1999.
United States v. Mendenhall, 466 U.S. 544 (1980).

Cases and Statutes Cited

Terry v. Ohio, 392 U.S. 1 (1968)

See also Arrest without a Warrant; Balancing Test; Exclusionary Rule; Race and Criminal Justice; Stop and Frisk

FLORIDA v. WHITE, 526 U.S. 559 (1999)

How far does the Supreme Court extend the automobile exception to the search warrant requirement? In *Florida v. White*, the court extended the exception in time and place and to new circumstances.

The exception was extended to new circumstances: The defendant's automobile had been searched after it was been seized under a state criminal forfeiture law. Police found drugs inside in the ensuing inventory search.

Police had probable cause to believe that defendant had used the vehicle in a drug transaction, which allowed forfeiture of the vehicle under state law. The court relied on *Carroll v. United States* to declare that police can search without a warrant when they have probable cause to believe that a vehicle contains contraband. In *Florida v. White*, the vehicle did not contain contraband; the vehicle itself was contraband. However, at the time of the seizure defendant was incarcerated and the state proved no immediate need to search.

The exception was also extended in time: The seizure occurred more than two months after defendant was seen using the vehicle in the drug transaction.

And the exception was extended in place: The Court relied on the fact that the vehicle was located in a public place when it was seized. Like seizures of vehicles for taxes in *G.M. Leasing v. United States*, the seizure involved no invasion of privacy because the vehicle was in a public place.

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References and Further Reading

Chilcoat, Kendra H., *The Automobile Exception Swallows the Rule: Florida v. White*, Journal of Criminal Law & Criminology 90 (2000): 917–950.
Dery, George M. III, *Missing the Big Picture: The Supreme Court's Willful Blindness to Fourth Amendment Fundamentals in Florida v. White*, Florida State University Law Review 28 (2001): 571–604.

Cases and Statutes Cited

Carroll v. United States, 267 U.S. 132 (1925)
G.M. Leasing Corp. v. United States, 429 U.S. 338 (1977)

See also South Dakota v. Opperman, 428 U.S. 364 (1976); Warrantless Searches

FLYNT, LARRY (1942–)

Born in Kentucky in 1942, Larry Flynt dropped out of school in ninth grade and, lying about his age, joined the army at age fifteen. Discharged at age seventeen, he again lied about his age to get into the

navy, where he served as a radar technician. He currently heads the Hustler Publishing Company, which oversees more than twenty sex magazines and sees an annual turnover of a \$100 million. In 1974, he started *Hustler* as a working-class magazine. In 1978, an assassination attempt left him paralyzed. Flynt was the defendant in a landmark Supreme Court in 1988 concerning Jerry Falwell in a decision that stipulated that offensive speech aimed at a public figure—Falwell, in this case—was constitutionally protected as long as it did not claim to be fact.

In 1983, when the Defense Department refused to allow American journalists to accompany the U.S. invasion force into Grenada by blockading all news concerning its activities there for two days, Flynt sued the government claiming a constitutionally guaranteed right of access for the media in combat zones under the First Amendment. The case was declared moot, because the Defense Department had lifted the restrictions against coverage by the time the case came to court. That same year, the Flynt-owned *Hustler* magazine ran an advertisement parody in its November issue featuring Jerry Falwell. In response to the parody, Falwell brought a \$45 million lawsuit against *Hustler* and its publisher, Larry Flynt. Falwell charged that Flynt and the magazine had appropriated his name and image for advertisement or trade without his consent, that the parody represented libel—written defamation (that false and defamatory statements had been made against Falwell)—and that the parody intentionally inflicted emotional distress on him. According to Falwell and his supporters, constitutionally guaranteed freedoms cannot be understood outside of a moral framework. The First Amendment, in this view, cannot be perverted to mean that the nation must tolerate ideas that the Constitution did not intend to protect and that run counter to the moral truths they believe the Constitution embodies. There is no value in destructive speech, such as appeared in *Hustler*, and thus it does not fall under First Amendment protection. For Flynt and his supporters, the freedom of speech is absolute. In other words, any and all speech that does not physically threaten anyone falls under First amendment protections. Furthermore, Flynt contended that the advertisement was a joke, and any award of damages would be frivolous.

In an opinion written by Chief Justice William Rehnquist on February 24, 1988, the Supreme Court of the United States found that the case presented the question of the First Amendment's limitations on a State's authority to protect its citizens from intentionally inflicted emotional distress. In reversing the judgment of the Court of Appeals, the Supreme Court concluded that public figures cannot recover damages

for emotional distress from issues like the one at issue without also showing that the publication contained a false statement of fact made with actual malice or reckless disregard for its truthfulness. Thus Flynt prevailed in an eight-to-zero opinion.

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References and Further Reading

Flynt, Larry, with Kenneth Ross. *An Unseemly Man*. Los Angeles: Dove Books, 1996.
Smolla, Rodney. *Jerry Falwell v Larry Flynt: The First Amendment on Trial*. NY: St. Martins Press, 1988.

Cases and Statutes Cited

Hustler Magazine v. Falwell, 485 U.S. 46 (1998)

See also *Falwell, Jerry; Hustler Magazine v. Falwell*, 485 U.S. 46 (1998); *Obscenity*

FOLLETT v. TOWN OF MCCORMICK, S.C., 321 U.S. 573 (1944)

Mr. Lester Follett, a member of Jehovah's Witness faith, devoted his life to preaching. In this capacity he traveled door-to-door in his hometown of McCormick, South Carolina, and accepted contributions for the sale of religious texts. Follett had no other source of income. The town of McCormick required licensure for book salesmen with a fee amounting to \$1.00 per day or \$15.00 per year. Mr. Follett claimed the fee imperiled his freedom of religion and refused to remit the licensure fee. Although precedent leaned in his favor, the South Carolina Supreme Court disagreed, narrowly interpreting past cases as only applying to transient booksellers (see *Murdock v. Pennsylvania* 319 U.S. 113 and *Jones v. Opelika* 319 U.S. 103).

Justice Douglas delivered for the Court a verdict in favor of Mr. Follett. Noting that similarly to *Murdock* and *Opelika*, Mr. Follett was "engaged in a 'religious' rather than 'commercial' venture," his activities cannot be measured "by the standards governing the sales of wares and merchandise." Justice Douglas narrows the question to whether a license tax is applicable to a preacher in his hometown and concludes that full-time preachers may not be taxed for commercial activities directly related to their evangelism. He writes: "Freedom of religion is not merely reserved for those with a long purse. Preachers of more orthodox faiths are not engaged in commercial undertakings because they are dependant on their calling for a living."

Justices Roberts, Frankfurter, and Jackson dissented, citing two main points. (1) The license tax

did not affect only preachers, but all street vendors, and thus did not discriminate against religions expression. (2) The tax exemption would potentially open the door for entire churches to claim tax exemption from their commercial holdings.

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Cases and Statutes Cited

Murdock v. Pennsylvania, 319 U.S. 113

Jones v. Opelika, 319 U.S. 103

See also *Graham v. Commissioner of Internal Revenue*, 490 U.S. 680 (1989)

FONG YUE TING v. UNITED STATES, 149 U.S. 698 (1893)

In the late nineteenth century, amid a rise in anti-alien sentiment, Congress promulgated a series of Chinese Exclusion Acts. The Act of 1892 required all “Chinese laborers” lawfully resident within the United States to apply for certificates of residence and provided for the deportation of those who did not obtain certificates. Failure to obtain the certificate could be excused by a demonstration of “unavoidable cause” and the testimony of “at least one credible white witness” as to lawful residency. Fong Yue Ting and two other Chinese were arrested in New York City for failure to possess certificates. They challenged the constitutionality of the Exclusion Act.

The question of what limits the Constitution places on Congress’s power over aliens had come before the Court before. In *Chae Chan Ping v. U.S.*, the Supreme Court held that Congress possessed full and unrestrained power to exclude aliens as an inherent incident of sovereignty. *Fong Yue Ting* presented the further question of whether the Constitution constrained the ability of Congress to expel aliens lawfully present within the country. The Court extended the rule of *Chae Chan Ping*, concluding that the right to expel non-citizens “rests upon the same grounds, and is as absolute and unqualified, as the right to prohibit and prevent their entrance into the country.”

The extreme language of *Fong Yue Ting* has been moderated by subsequent cases such as *Wong Yang Sung v. McGrath*, which affirmed that deportation hearings must comport with procedural due process.

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References and Further Reading

Henkin, Louis, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny*, Harvard Law Review 100 (1987): 853.

Neuman, Gerald. *Strangers to the Constitution*. Princeton: Princeton University Press, 1996.

Tribe, Laurence H. *American Constitutional Law*. 3rd Ed. New York: Foundation Press, 2000, pp. 967–977.

Chin, Gabriel J. Chae Chan Ping and Fong Yue Ting: The origins of plenary power, in Martin, David A., and Peter S. Schuck, eds. *Immigrant Stories 7*. Foundation Press, 2005.

Cases and Statutes Cited

Wong Yang Sung v. McGrath, 339 U.S. 33 (1950)

Chae Chan Ping v. U.S., 130 U.S. 581 (1889)

See also *Chae Chan Ping v. U.S.*, 130 U.S. 581 (1889) and Chinese Exclusion Act; Due Process in Immigration; Undocumented Migrants

FORCED SPEECH

In times of peril and uncertainty, governments often seek to ensure that all pay obeisance to central tenets of the state. In the 1940s, West Virginia sought to teach school children about democracy and required them to recite the pledge of allegiance. Children of devout Jehovah’s Witnesses objected on grounds that their religion forbade such oaths, and school officials expelled them. In *West Virginia v. Barnette*, the Supreme Court reversed in ringing tones: “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”

This principle—that the First Amendment prohibits the government from forcing citizens to feign compliance with state orthodoxy—has been extended. When car owners objected on religious grounds to the slogan, “Live Free or Die,” embossed on New Hampshire license plates and covered it, violating state law, the Supreme Court held that the state could not punish the act. Another citizen who wished to distribute literature anonymously was held to have a First Amendment right to do so even though state law required disclosure to avoid anonymous political mud slinging.

Most people recognize the power of social pressure. To one degree or another, we are all pressured to conform to the views and habits of our neighbors, whether those habits consist in wearing fashionable clothes, adhering to implicit codes of behavior (no spitting on the sidewalk; don’t eat with your mouth open), or adopting conventional attitudes about other people or policies. Some conformity is essential to civilized society. We adopt laws requiring people to

pay taxes, to drive on the right, and to attend schools until age sixteen. And, while the government may require compliance with many rules of behavior, the First Amendment forbids the government from exacting conformity in belief or speech.

Why does our Constitution permit the government to force people to pay taxes but may not force people to salute the flag? The answer lies in a fundamental understanding that individuals must be left free to think their own thoughts, make their own decisions about what and how to express themselves. In addition, a core principle of a functioning democracy is the citizenry's freedom from government coercion in their associations and in developing individual ideas and beliefs. Conflicting perspectives, what *Barnette* called "intellectual individualism," and preservation of the right to dissent are essential characteristics of a democratic society.

In some instances, the principle has protected media outlets from being forced to publish views it opposed. For example, a Florida statute required newspapers to accord equal space to political candidates who the newspaper had criticized. In *Miami Herald v. Tornillo*, the Supreme Court held the statute unconstitutional, because it interfered with editorial judgment about what should be published and essentially punished the paper for criticizing politicians. One might also point to the special favoritism granted political candidates as a further support for the outcome of the decision.

In contrast, in *Turner Broadcasting*, the Court upheld federal law requiring cable operators to carry the signals of local broadcasters. The Court distinguished the Florida case on the ground that the "trigger" for the Florida law was content based—publishing criticism of politicians—whereas here the overriding objective was not to favor one viewpoint over another but the economic one of preserving free television programming regardless of the content of the expression. In enacting the legislation, Congress expressed particular concern that a key communication outlet for large numbers of Americans, local broadcasting, would dry up. The Supreme Court's decision thus recognized the value of preserving multiple channels of communication.

Although the First Amendment prohibits government from coercing speech, different sets of problems arise when the issue concerns government efforts to break up broadcast monopolies or to remove financial barriers to promote diversity among speakers. For example, the Federal Communications Commission, the agency designated to allocate broadcast licenses in the limited spectrum available, sought to promote fairness by requiring broadcasters to allow persons who had been attacked on air a "right of

reply" and further required licensees to promote discussion of public affairs. This "Fairness Doctrine" was unanimously upheld in *Red Lion Broadcasting*. The Supreme Court reasoned that the government had selected the broadcasters; because the spectrum was scarce, anyone could be attacked on the air without recourse. Furthermore, much of the public would be unable to access the airwaves without regulations providing for public access rights.

A similar result obtained when California required private shopping centers to permit student protestors to set up a table inside their malls over the owners' objections: California could promote greater diversity of expression in this fashion, and the rule did not infringe the owners' rights not to express ideas since the owners could post a sign disassociating themselves from the petitioners.

Gay rights activists sought to rely on the "access" line of cases to enforce a Massachusetts Human Rights Commission order that allowed them to march in a *privately organized* Irish-American parade. The Supreme Court unanimously held that the Commission rule interfered with the First Amendment right of the organizers to express their own message. Although ostensibly enacted to promote equal treatment of a disfavored minority, the Commission's approach would have supported a ruling by a different agency requiring civil rights marches to include Ku Klux Klan floats.

The distinction between these two lines of cases is that the government may promote access to channels of communication to diversify the voices that may be heard in public spaces provided it neither prescribes the message nor interferes with others' rights to express their own messages or to disavow association with the speech. Indeed, with increasing concentration of media empires, some have argued that it is even more important to democracy for the government to ensure access to media—especially for those who are unable to purchase such access.

A different set of issues arises when the government compels individuals to give financial support to private organizations with whose ideological positions they disagree. In the *Abood* case, for example, public sector employees were represented by a union pursuant to a collective bargaining contract with their employer, the Detroit Board of Education. One provision in the contract required non-union members to pay to the union a service fee equal to union dues as a condition of employment.

Some nonunion employees objected to paying the fee because they disapproved of (1) collective bargaining in the public sector and especially (2) "ideological union expenditures not directly related to collective bargaining." The Supreme Court ruled

that mandating fees to support the collective bargaining process was constitutional, but that objecting individuals must be allowed the opportunity to opt out of the “ideological expenditures.” The basis of the distinction between the two types of expenditures has proven to be important in subsequent cases as well.

Mandatory fees to support labor negotiations were constitutional, because otherwise the entire system of collective bargaining would be undermined: non-union members could free load off the benefits obtained by the union negotiators without paying for them. On the other hand, fees to support ideological causes unrelated to collective bargaining (for example, lobbying expenses) and that were not germane to the collective bargaining process itself could not constitutionally be imposed on objecting members.

The *Abood* principle was reaffirmed in a case involving mandatory bar dues for lawyers: California could require its attorneys to finance the regulatory apparatus governing lawyers such as bar discipline but could not require objecting attorneys to finance political lobbying by the State Bar organization. But in *Southworth*, the Court held that the First Amendment permits a public university to charge its students an activity fee to support speech activities by extracurricular student organizations promoting a wide range of ideological views, provided that the program is viewpoint neutral. In contrast to *Abood*, where the Court was concerned to protect dissenters from being forced to subsidize speech they disagreed with, *Southworth* recognized that where the purpose of the fee was to “stimulate the whole universe of speech and ideas” it was implausible that individual students would be permitted to “opt out” of such funding mechanisms.

The First Amendment has also been invoked in cases involving advertising of agricultural products. The federal government and some states finance demand-bolstering advertising for agricultural products such as fruit, vegetables, and beef. In one case, fruit growers objected to mandatory assessments ordered by California agricultural authorities for generic advertising of fruit. They attempted to piggyback off the *Abood* “ideological” branch, arguing that requiring growers to pay for speech they didn’t want was unconstitutional “compelled speech.” However, in the Court’s view, the California marketing arrangement carried no ideological message (which distinguished the case from *Abood*). Moreover, the marketing scheme was part of a broader regulation of the market in fruits.

Nonetheless, when mushroom growers challenged a similar program, the growers cleverly argued that *their* message was that their mushrooms were *superior* to the generic mushrooms. Thus, remarkably, they

persuaded the Court that being made to pay for *generic* mushroom advertising by an industry association violated their First Amendment rights not to finance “ideological” messages with which they disagreed.

Many scholars saw the mushroom growers’ argument as a smokescreen: the growers simply objected to paying for a government program they disliked, and that funneling the funds through a private association should not have made a difference. However, the mushroom case left open another question: does the First Amendment permit citizens to withhold fees for *government* advertising programs with whose message they disagree? The Court forestalled this possibility in the *Johanns* decision, where the governmental agency responsible for generic beef advertising argued that the government itself was “speaking” about the virtues of beef consumption. The Court ruled that beef producers who objected to government-compelled subsidy of the government’s own speech had no valid First Amendment complaint. The mushroom growers case was distinguished on grounds that the growers’ money went to a *private* association.

In sum, the government may not force an individual personally to adhere to a message he or she disagrees with; nor may the government generally compel an individual to subsidize an ideological message he or she disagrees with, where the message is expressed by a private entity. However, public universities can require students to pay to support ideologically diverse student organizations. And, individuals have no First Amendment right to challenge compelled subsidies of the government’s own message.

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References and Further Reading

- Cantor, Norman L., *Forced Payments to Service Institutions and Constitutional Interests in Ideological Non-association*, Rutgers Law Review 36 (1983): 3.
 Klass, Gregory, *The Very Idea Of A First Amendment Right Against Compelled Subsidization*, University of California at Davis Law Review 38 (2005): 1087.
 Jacobs, Leslie Gielow, *Pledges, Parades, And Mandatory Payments*, Rutgers Law Review 52 (1999): 123.
 Wasserman, Howard, *Compelled Expression And The Public Forum Doctrine*, Tulane Law Review 77 (2002): 163.

Cases and Statutes Cited

- Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977)
Board of Regents of Univ. of Wis. System v. Southworth, 529 U.S. 217 (2000)
Glickman v. Wileman Bros. & Elliott, Inc., 521 U.S. 457 (1997)
Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557 (1995)

Johanns v. Livestock Marketing Association, 544 U.S. ____ (2005)
Keller v. State Bar of California, 496 U.S. 1 (1990)
McIntyre v. Ohio Elections Commission, 514 U.S. 334 (1995)
Miami Herald v. Tornillo, 418 U.S. 241 (1974)
Pruneyard v. Robbins, 447 U.S. 74 (1980)
Red Lion Broadcasting v. FCC, 395 U.S. 367 (1969)
Turner Broadcasting v. FCC, 512 U.S. 622 (1994) (Turner I)
Turner Broadcasting v. FCC, 520 U.S. 180 (1997) (Turner II)
United States v. United Foods, Inc., 533 U.S. 405 (2001)
West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943)

See also *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977); **Anonymity and Free Speech; Broadcast Regulation; Cable Television Regulation; Content-Based Regulation of Speech; Fairness Doctrine; Federal Communications Commission; Forced Speech; Government Funding of Speech; Government Speech; Gay and Lesbian Rights; *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974); Pledge of Allegiance and First Amendment; *Red Lion Broadcasting v. FCC*, 395 U.S. 367 (1969); Shopping Centers and Freedom of Speech; Student Activity Fees and Free Speech; *Turner Broadcastings Sys., Inc. v. FCC I & II*, 512 U.S. 662 (1994); *University of Wisconsin v. Southworth*, 529 U.S. 217 (2000); *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943)**

FORTAS, ABE (1910–1982)

Abe Fortas is remembered more for the circumstances surrounding his abortive nomination as Chief Justice and his subsequent resignation than for his judicial opinions. This is unfortunate. Trained as a Washington lawyer during the 1930s, and later trusted as a close advisor to President Johnson, Fortas, perhaps more than any other Justice, provided a link between Roosevelt's New Deal and Johnson's Great Society. Although his tenure was brief and controversial, Fortas played a significant role in shaping some of the most important cases to come down from the Warren Court.

Abe Fortas was born on June 19, 1910, in Memphis Tennessee, to Woolfe and Rachel Berzansky Fortas recent Jewish immigrants from Eastern Europe. Theirs was a modest, working class family steeped more in the cultural than the religious tradition of Judaism. From his father, an amateur musician, Fortas inherited a deep and abiding love of music. Fortas himself became an avid violinist, and he later came to count Pablo Casals and Isaac Stern among his friends and clients.

An outstanding student, Fortas won scholarships both to Southwestern College in Memphis and to Yale Law School. At Yale, Fortas served as editor-in-chief of the *Yale Law Journal* and came under the

influence of two powerful exponents of legal realism: Thurman Arnold and William O. Douglas. After graduating in 1933, Fortas joined Yale's faculty while also accepting a position with Jerome Frank in Franklin Roosevelt's New Deal Agricultural Adjustment Administration. In 1937, while serving at the Interior Department, Fortas befriended a young Texas Congressman named Lyndon Johnson.

In the 1940s, Fortas left government service but remained in Washington, D.C. and founded a law firm with Thurman Arnold and Paul Porter. Fortas came to exemplify the Washington lawyer of the post-war era. An able and aggressive advocate, trained in the New Deal, he effectively navigated clients through the intricacies of federal policies and programs.

At the outset of the Cold War in the late 1940s, Fortas took a lead role in opposing President Truman's loyalty program. He particularly objected to an incursion of the Executive and Legislative Branches of government into what he perceived as the judicial province of "judging" loyalty. Such incursions threatened to abridge the due process rights of challenged individuals. Soon, loyalty cases occupied a substantial portion of his firm's working hours. Prominent among the cases taken on by Fortas during this time was that of Owen Lattimore, a sinologist who headed the Page School of International Relations at Johns Hopkins University, who was accused by Senator Joseph McCarthy of being the "top Russian espionage agent in the United States." After five years of impassioned and meticulously organized defense by Fortas before investigating committees led both by Senator McCarthy and later, Senator McCarran, Lattimore was finally vindicated in 1955.

In 1962, the U.S. Supreme Court appointed Fortas to represent Clarence Gideon, in what became a landmark case of *Gideon v. Wainwright*. Gideon had been convicted of breaking and entering in Florida. He was indigent and could not afford to hire a lawyer at his initial trial. He filed a *pro se* appeal to the Supreme Court asserting that he should be freed because he had been denied effective access to counsel. Fortas argued the case before the Supreme Court and won a unanimous decision. In finding for Gideon, the Supreme Court held that the Sixth Amendment guaranteed anyone accused of a serious crime a right to counsel, and that those too poor to pay would be provided with a lawyer at no cost.

Always drawn to men of power and influence, Fortas maintained his friendship with Lyndon Johnson during the 1950s, serving as his lawyer and close advisor until Johnson, as President, nominated his old friend to the Court in 1965.

On the Court, Fortas developed a reputation as a liberal in civil rights and a conservative in areas

involving government regulation of business. “The Courts may be the principles guardians of the liberties of the people,” he wrote, but “They are not chiefly the administrators of its economic destiny.” *Baltimore & Ohio Railroad v. United States*, 386 U.S. 372, 478 (1967). His opinions demonstrate an instrumental approach to the law but reveal no coherent legal philosophy. This is not to say Fortas was unprincipled, although some accused him of this, but that, true to his education in legal realism, he saw the law as a tool to achieve specific results.

Fortas’ experience as a corporate lawyer led him to take a dim view of government interference in business matters. For example, in *Baltimore & Ohio Railroad v. United States*, 386 U.S. 372 (1967), Fortas, in dissent, argued that the Court had no business questioning the informed decision of the Interstate Commerce Commission to allow a merger of two railroads.

Fortas’ greatest concern, however, lay in protecting the rights of minorities, the disenfranchised, and the powerless. He fiercely championed the rights of criminal defendants, especially their Fifth Amendment right against self-incrimination. In *Re Gault*, 387 U.S. 1 (1967), Fortas wrote a strong opinion that effectively created a “Bill of Rights” for juvenile criminal offenders by extending certain basic Fourteenth Amendment due process rights into juvenile courts. Writing in a realist vein, Fortas relied more on historical, sociological, and psychological studies of the juvenile justice system than on legal precedent to support his holding.

Free speech was an area of special concern for Fortas especially in the era of civil rights and anti-Vietnam War demonstrations. He was not, however, a First Amendment absolutist. To the contrary, he could not abide disruptive civil disobedience or symbolic speech that violated valid laws merely to dramatize dissent. The musician in him cherished harmony and decorum. He allowed for tension and conflict but insisted it be contained or structured. Thus, in *Brown v. Louisiana*, 383 U.S. 131 (1966), Fortas found a Louisiana breach of the peace statute unconstitutional as applied to several blacks who conducted a peaceful sit-in of a segregated public library. But in *Street v. New York*, 394 U.S. 576 (1968), Fortas, in a stinging dissent, drew the line at flag burning, declaring that “Protest does not exonerate lawlessness.” *Id.* at 617. Yet in his landmark opinion in *Tinker v. Des Moines School District*, 393 U.S. 503 (1969), Fortas held that a school’s prohibition on black armbands worn by certain students to protest the Vietnam War was unconstitutional. Echoing his support for juvenile rights enunciated in *Gault*, Fortas declared that students did not surrender their First Amendment rights

on entering a school. Wearing armbands, Fortas asserted, was akin to “pure speech” that did not involve “aggressive, disruptive actions” and did not interfere with the school’s work. *Id.* at 508–509, 512.

Fortas also has a very strong commitment to privacy as a constitutional right. Indeed, Fortas saw the right to privacy as a significant limitation to the freedom of the press. Consistent with his free speech cases (and with his deep personal antipathy toward the press), Fortas refused to extend First Amendment protections to press activities he considered to be intrusive or disruptive. Thus, for example, dissenting in *Time v. Hill*, 385 U.S. 374 (1967), Fortas asserted that “There are great and important values in our society, none of which is greater than those reflected in the First Amendment, but which are also fundamental and entitled to the Court’s careful respect and protection. Among these is the right to privacy.” *Id.* at 412.

After only three years on the Court, President Johnson nominated Fortas to replace the retiring Earl Warren as Chief Justice. It was an honor from which he never recovered. The confirmation hearings took place after Johnson had become a lame duck by refusing to seek reelection. Fortas soon became the target of a conservative backlash against the activism of the Warren Court and Johnson’s Great Society programs. Revelations of his ongoing business connections with millionaire businessman Louis Wolfson didn’t help matters any. By October, Johnson was forced to withdraw Fortas’ name. One year later, amid further allegations of improper business dealings, Fortas resigned from the Court although he maintained his innocence of any wrongdoing. Back in the private sector he was rebuffed by his old law firm but continued to practice law until his death in 1982.

JONATHAN KAHN

References and Further Reading

- Fortas, Abe. *Concerning Dissent and Civil Disobedience*. New York: World Publishing Co., 1968. A fascinating look into Fortas’ ideas on the nature and limits of free expression in a civil society, made even more interesting by the fact that he wrote it while sitting on the Supreme Court.
- Kalman, Laura. *Abe Fortas: A Biography*. New Haven: Yale University Press, 1990. Kalman’s solid study of Fortas’ life is the first to be based on complete access to Fortas’ private papers. Her work is therefore more complete than Murphy’s yet lacks a certain critical distance. Provides a good review of the development of Fortas’ legal ideas.
- Murphy, Bruce Allen. *Fortas: The Rise and Fall of a Supreme Court Justice*. New York: William Morrow and Co., 1988. An incisive study that concentrates on Fortas’

life as a Washington insider. More of a political biography, where Kalman's work is more a mix of the personal and the legal sides of Fortas' life.

Cases and Statutes Cited

Baltimore & Ohio Railroad v. United States, 386 U.S. 372 (1967)
Brown v. Louisiana, 383 U.S. 131 (1966)
In Re Gault, 387 U.S. 1 (1967)
Street v. New York, 394 U.S. 576 (1968)
Time v. Hill, 385 U.S. 374 (1967)
Tinker v. Des Moines School District, 393 U.S. 503 (1969)

FOURTEENTH AMENDMENT

If the standard for the significance of law be its effects on the everyday life of citizens, then the Fourteenth Amendment is one the most significant aspects of American law. This is certainly the case in regard to the Bill of Rights and civil liberties and perhaps in regard to the Constitution itself. In illuminating the impact of this great Amendment, we will first view its evolution and adoption as a part of post-Civil War reconstruction and then review the history and meaning of the guarantees of its great clauses: privileges and immunities, due process, and equal protection.

The Civil War and Reconstruction

The adoption of the Fourteenth Amendment in 1868 was to change the very nature of America. With the emancipation proclamation of questionable legal merit, the first order of post-war business was the adoption of the Thirteenth Amendment in 1865 and abolishing slavery. The major issue concerning the meaning and intent of the Thirteenth Amendment was whether the amendment could reach "the badges" of slavery—the conditions that the former slaves faced as a result of the bondage and oppression that they had suffered.

That Congress so intended to reach these "badges" is supported by the fact that the Congress adopted civil rights legislation to protect the freed slaves in the South at the same time (Civil Rights Acts of 1865 and 1866) as it adopted the Amendment. Although this evidences the Framers intent that Congress could reach the badges of slavery under its enforcement power, the Framers feared that a still conservative Supreme Court might limit the Amendments and its enforcement power reach to abolition alone. This concern served as the predicate for the adoption, in May and June of 1866, of the most far-reaching

constitutional protection of civil rights and liberties in our nation's history, the Fourteenth Amendment. Of particular relevance and meaning are the self-executing right prohibitions to the states in Section 1, and Section 5's empowering the Congress to enforce the newly creating rights delineated in Section 1.

Amendment XIV (1868)

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

The State Action Limitation

Before we review the rights guaranteed by the noble clauses articulated in Section 1 and Section 5 of the Amendment, one issue begs attention because of its effect on the application of the Amendment as a whole. The Fourteenth Amendment speaks in language directed at state governments, "No state shall make or enforce, . . . nor shall any state deprive, . . . nor deny." To what degree did this reference to the states indicate the framers intent that this limit application of the Amendment in regard to private forms of discrimination? This issue has been debated to this very day.

An answer supporting the Amendment's reach to private discrimination is, as noted previously, that the same Congress that adopted the Amendment passed civil rights legislation enforcing the Amendment that was clearly aimed at private conduct. The importance of this question cannot be overstated, since ultimately the fate of freed persons in the South would be decided by their former masters, and if the Amendment could not reach private activity, private racial discrimination would undoubtedly flourish. The answer to this question awaited what the Framers correctly characterized as their major antagonist, the Supreme Court.

The Court faced this issue in the *Civil Rights Cases* in 1883. The onset of "Jim Crow" can be traced to the

Court's creation of the judicial fiction limiting application of the Amendment to affirmative "state action." Affirmative in the sense that inaction, even though a state might allow discrimination by not acting, was not sufficient. It is worthy of note that this was one of a trilogy of cases in which the Court provided threshold interpretations of the Fourteenth Amendment that "watered down" the effect of the Amendments so as to deny its intended benefit not only to the freed persons in the South but to the nation as a whole. The impact of these decisions set back individual rights and liberties until the mid-twentieth century, both doctrinally and substantively. It would be more than 100 years before the noble goals of the post-war era would meet fruition—although, that day would come. The other cases were *Slaughter-House Cases*, 83 U.S. 36 (1872) (Discussed in regard to the privileges and immunities clause, *infra*.) and *Plessy v. Ferguson*, 163 U.S. 537 (1896) (discussed in regard to the equal protection clause, *infra*).

The modern "story" of state action emphasizes the ability to reach some forms of what had previously been considered private and unreachable conduct and was closely associated with the rise of the civil rights movements in America in the mid-twentieth century, reaching its zenith in the 1960s and the "Warren Court."

These decisions changed the landscape of the state action doctrine, perhaps bringing it more in touch with the framers intent. Justice Harlan's dissenting opinion in the *Civil Right's Cases*, for example, would be drawn on in this regard. Yet, as the nation turned away from the civil rights era, the more conservative and "privacy" oriented Burger and Rehnquist Courts would limit and retreat from the Warren Court's doctrine liberalizing the ability to reach private activity.

Two concepts have emerged unto which the Court will treat private activity as state action. First, certain private activities are so public in character that they satisfy state action, because they serve a "public function." Note the potential breadth here, since many activities that are in private hands arguably serve a "public function." In recent years, however, the Court has severely limited this doctrine by requiring "the exercise by a private entity of powers traditionally *exclusively* reserved to the State" *Jackson v. Metropolitan Edison Company* (1974). As if to emphasize the limitation of this concept, the Court held in *Flagg Brothers v. Brooks* (1978), that, "While many functions have been traditionally performed by governments, *very few* have been "exclusively reserved to the State."

Next, the government may be so involved in regulating private activities that the Court may find state

action because of "significant state involvement." Once again, although still a more functional path to reach private activity, the modern Court has limited application of this doctrine as well. Now the state must "significantly encourage private activity," be a "joint actor or participant," or maintain a symbiotic and close relationship with the private activity so that, "there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself" *Jackson v. Metropolitan Edison Company* (1974); *Burton v. Wilmington Parking Authority* (1961); *Lugar v. Edmondson* (1982).

At what point individual autonomy should end and the protections of the Fourteenth Amendment begin is an important thesis that underlies the concept of state action. In *Moose Lodge v. Irvis* (1972), the Court weighed in with its own moral views on this issue by finding that a private club could discriminate against admission of African Americans based on their race, because the activity was private and lacked state action. The Court held, despite liquor licensing by the state, that, "Our holdings indicate that where the impetus for the discrimination is private, the State must have 'significantly involved itself with invidious discriminations,' in order for the discriminatory action to fall within the ambit of the constitutional prohibition."

Since all of the clauses of the Amendment speak to the states, the state action limitation and the issue of private versus public in America are most consequential.

Privileges or Immunities

... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.

Incorporation

There is no doubt the first sentence of the Fourteenth Amendment had as its intent overruling the heinous *Dred Scott v. Sanford* (1856) decision. Despite the Court's conclusion in *Dred Scott* that slaves were not "citizens" of the national government because they were mere chattels, now, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." The meaning of the second sentence, however, has produced as much

debate concerning intent then perhaps any other verbiage in the Constitution: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.” What are the “privileges or immunities” of federal citizenship? If the first sentence overruled *Dred Scott*, did the second sentence overrule *Barron v. Baltimore* (1833), where the Supreme Court held that the “bill of rights” was not applicable to the states? Was this “short hand” language for the “Bill of Rights?” If it was, *Baron* would be overruled, the Bill of Rights would be applicable to the states, and the nation would have national protection of civil rights and liberties for the first time in its history. It would seem logical to so conclude based on the language of these two sentences, particularly because the now abolished “slavery” was a major reason for limiting the applicability of the Bill of Rights to the states. Yet, to so conclude would provide a profound change in the power balance between state and federal government, most particularly in the “new” post-war South. Incorporation of the Bill of Rights in the states via the privileges and immunities clause of the Fourteenth Amendment was a question of great meaning, and it awaited application of judicial review by the very Supreme Court the Framers feared.

In the first major post war decision interpreting the Amendment, the Supreme Court faced this most significant issue in the *Slaughter-House Cases* (1872). Despite what seemed to be the framers intent to overrule *Baron*, the Amendment’s author had stated the Amendment’s intent was, “to arm the Congress, . . . with the power to enforce the bill of rights” against the states, the Court would not so conclude. Justice Miller, speaking for the Court, refused to “radically change[s] the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people,” placed the privileges and immunities clause in the constitutional “waste paper basket,” where it still rests today. The Court not only rejected “incorporation” but also provided a limited nature of rights that Miller concluded would be protected—rights already given by some other federal law. Offhand it does not seem likely that the Civil War was fought and the Fourteenth Amendment adopted for access to navigable water, seaports, parks, and to redress the national government *Twining v. State of N.J.* (1908). This rejection of incorporation set the stage for the onset of “Jim Crow” and apartheid that would follow.

For all practical purposes *Slaughter-House* remains “good law” today, and the Court has thus rendered the clause essentially “superfluous.” Almost 100 years later the dissents of Field and Bradley in *Slaughter-House* would reach fruition in regard to

“fundament rights” incorporation, but by application of the due process clause of the Fourteenth Amendment as opposed to the privileges and immunities clause.

Due Process Of Law

... nor shall any State deprive any person of life, liberty, or property, without due process of law.

Due Process Incorporation

The mandate that “. . . Nor shall any State deprive any person of life, liberty, or property, without due process of law,” seems to be procedural in character. Although *Slaughter House* was the death knell of “privileges and immunities” incorporation, that finding was not to be the end of the road when it came to the issue of incorporation and national protection of civil rights and liberties. The Court, by the 1930s, would turn to the “due process” clause as a basis for incorporation.

Although due process seems to conjure “procedural” as opposed to “substantive” rights, the use of the term “liberty” in the clause, and the plain and simple “need” for at least some national protection of civil rights and liberties, found it the most likely alternative for “incorporating” rights. By the *Palko v. Connecticut* decision in 1937, there was no longer any doubt that “due process” could embrace not only procedural rights but substantive rights as well. Paramount in this move to “due process” incorporation was the Court applying the free speech protection of the First Amendment to the States on the basis of the due process clause of the Fourteenth Amendment, because freedom of speech was “among the fundamental personal rights and liberties” *Gitlow v. New York* (1925).

If the due process clause was to serve as the basis for incorporation, particularly given the procedural nature of the right, the most significant question was how one would decide which rights were protected? This might have been a less difficult inquiry under the privileges and immunities clause. Recall the argument that the privileges and immunities of national citizenship must have been the Bill of Rights and that the terminology was “short hand” language for such. The “textual” problem of incorporating via due process made this question quite difficult. In the *Palko* and *Adamson v. California* (1937) decisions, the debate between Justices Black, Cardozo, and Frankfurter

reached historic proportion as the Justices debated how this process should be invoked.

Ultimately the Court settled on what as been described as fundamental fairness/natural law select incorporation. Natural law because this is an independent Fourteenth Amendment inquiry in regard to the significance and meaning of any particular right. Fundamental fairness because the “trademark” language in both *Palko* (double jeopardy) and *Adamson* (self-incrimination) is whether the right is “implicit in our concept of ordered liberty,” “deeply rooted in our civil and political institutions,” or a “principal of justice so rooted in the conscience of our people as to be ranked as fundamental.”

“Select” because the rights detailed in the first nine amendments are the ones most likely to be deemed “fundamental” via the preceding detailed nomenclature. The Warren Court’s active expansion of incorporation looked increasingly to the Bill of Rights to “selectively” incorporate more and more of its specific guarantees via the due process clause of the Amendment. The “fundamental fairness” inquiry would be used to decide which of the protections in the Bill of Rights should be selectively incorporated. To be sure, although selective incorporation centered on the first nine amendments, only those protections of the Bill of Rights deemed fundamental would be so included. Significantly, it was also possible that unarticulated rights not so specified could be deemed “fundamental” and held applicable to the states as well. By *Duncan v. Louisiana* (1968), the present position of the Court in regard to application of fundamental fairness selective incorporation seemed solidified as the Court concluded that the Sixth Amendment right to a jury trial was fundamental to ordered liberty and applicable to the states. By this time almost all of the provisions of the Bill of Rights had been incorporated.

This “fundamental fairness” inquiry, used by the Court to selectively incorporate “fundamental rights,” creates and secures rights by a substantive application of the due process clause. Using the due process clause in this sense has been described as “substantive due process.” Here the inquiry by which rights are incorporated and made applicable to the states is the approximate inquiry the Court uses to create fundamental rights that are not delineated in the Constitution.

Substantive Due Process

“Substantive due process,” John Ely asserted, “sounds like a contradiction in terms—sort of like ‘green pastel

redness” Ely, *Democracy and Distrust* 18 (1980). “A contradiction in terms” because the concept of due process normally conjures procedural rights, “An established course for judicial proceedings or other governmental activities designed to safeguard the legal rights of the individual” *The American Heritage Dictionary of the English Language*, 4th Ed. 2003.

Although the due process clause has been used to incorporate most of the Bill of Rights to the states, it invokes the greatest controversy when the Supreme Court applies it to create unarticulated rights not specified in the Constitution itself. This we call “substantive” due process. Substantive in the sense that the clause is not applied to protect “process” but to create and secure additional rights against which the government may only intrude with great difficulty.

Much the same as due process incorporation, we apply the fundamental fairness litany to create rights that are not articulated in the Constitution. The creation of unarticulated rights via substantive due process is a most controversial and oft-debated role for the Court.

Those asserting a more clause-bound basis for judicial interpretation, limited to the original intent of the Framers themselves, cite to the repudiation of the Court’s creation of the “liberty to contract” as an unarticulated right in *Lochner v. New York* in 1905. The creation of this unarticulated right by the Court’s substantive application of the due process clause has been criticized as an example of the danger in allowing the creation of such rights. The activism generated during the “Lochner era,” where the Court read “laissez-faire” capitalism as if it were a constitutional mandate, is the traditional armor for those who favor judicial restraint. The application of “substantive due process” to create unarticulated rights that a Court might find “implicit in our concept of ordered liberty and deeply rooted in this Nation’s history and tradition,” are the controversial tools of this trade.

Nonetheless, and with ongoing controversy, the Court in the modern era has continued to apply substantive due process to create and secure unarticulated constitutional rights. The creation of a right of privacy in *Griswold v. Connecticut* (1965) and its extension to “abortions” in *Roe v. Wade* (1973) are the most notable examples. In the modern era the Court has tended to apply “substantive due process” to conserve traditional social values or to deem privacy interests as fundamental based on a “respect for the teachings of history [and] solid recognition of the basic values that underlie our society” *Moore v. East Cleveland* (1977). Family, for example, is deemed a fundamental privacy interest “precisely because the institution of the family is deeply rooted in this Nation’s history and tradition.” Ultimately, based

on these themes, the Court has extended fundamental right protection “to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education” *Planned Parenthood v. Casey* (1992).

The creation of unarticulated rights rests at the root of a constitutional debate as to how a non-elected Supreme Court, enforcing the supremacy of the Constitution as fundamental law, should interpret the document in light of the framers intent and contemporary needs in a democratic society. Although most citizens today are well aware of the moral controversy extending from the abortion debate, very few are likely aware that among those who study the Court and the Constitution it is the issue of judicially created unarticulated constitutional rights via substantive due process that affords the greatest controversy. The modern Court, for example, has often cited to the word “liberty” in the due process clause to respond to this criticism and to ground these rights in the words of the Constitution. The magnitude of this polemic has been emphasized by the contemporary Senate confirmation process of Supreme Court nominees, where nominees’ views on the right of privacy have been center stage.

Procedural Due Process

Since due process normally conjures process-based protection, there is no controversy in regard to this application. Procedural due process normally requires some form of individualized hearing before the state can invoke a deprivation, for example, employment, license or welfare. It is, however, a right to “process,” or how a decision is reached, not the nature of the decision itself. There are two independent inquiries made when the Court applies the procedural protections of the due process clause. First, whether the right to due process protections apply, and second, once process is due, what type of process is required?

The Court has resorted to the specific terminology of the Fourteenth Amendment itself to decide if process is due. A state is required to grant due process if the individual so affected has a sufficient “liberty” and/or “property” interest. Although the interests are often state created and can thus be defined and limited by state law, they have nonetheless been interpreted with some degree of breadth.

A property interest sufficient to invoke due process procedural protection extends beyond “real property.” Thus, a welfare benefit, or entitlement, has been held as a sufficient property interest *Goldberg v. Kelly* (1970). The claim to an entitlement is not based on a

constitutional right to such a benefit, but rather from a legislative decision by the state to offer the benefit, perhaps subject to certain conditions. A variety of cases after *Goldberg* have extended procedural due process guarantees to a wide range of other claimants: employees, students, prisoners, parolees, debtors, and automobile drivers.

The range of property interests that afford such protection are not “infinite,” and the Court has required a “legitimate claim of entitlement,” and or a “legitimate expectation to continued employment,” to invoke them *Board of Regents v. Roth* (1972).

A liberty interest sufficient to require due process reaches beyond “mere confinement” and may be invoked by a stigma that damages one’s reputation *Wisconsin v. Constantineau* (1971). Recently, however, the Court has limited the expansion of a liberty interest that is sufficient to require due process to circumstances where, “more tangible interests such as employment were present,” and “that reputation alone, apart from some more tangible interests such as employment,” is not “sufficient to invoke the procedural protection of the due process clause” *Paul v. Davis* (1976).

Once a sufficient property and/or liberty interest has been successfully advanced, or “process is due,” a court must then decide “what process is due.” Here the Supreme Court has made the process due dependent on the factual circumstances and interests in each case. Their guidance for the lower court extends from three criteria, now firmly established in *Mathews v. Eldridge* (1976), “First, the private interest that will be affected by the official action; second, the risk of a erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.”

Equal Protection

... nor [shall any state] deny to any person within its jurisdiction the equal protection of the laws.

The Meaning of Equality in an Economically Privileged Society

The Fourteenth Amendment’s guarantee that no state shall “deny to any person within its jurisdiction the

equal protection of the laws,” is perhaps America’s greatest anomaly. In a society where privilege abounds, a grant of “equal protection” seems to conflict with our core socioeconomic values. To enforce the equalitarian mandate of this language on our society via judicial review would likely have a revolutionary impact. Consequently, and perhaps much the same as the unequivocal language of the First Amendment, the history of the equal protection clause has been centered around how to limit its meaning and avoid a judicially led reordering of American society.

It is worth noting that almost all laws discriminate. In this regard, for example, a criminal sanction discriminates against the convicted. Here, of course, the argument is that the state has a justified purpose in discriminating against the convicted. Viewed in this sense the clause would be interpreted as allowing a state to deny equal protection, depending on its purpose.

With this in mind, and despite the unequivocal language of the equal protection clause, the Court has interpreted the clause as if it read, “A state *may* deny to any person within its jurisdiction the equal protection of the laws if it has a sufficient purpose.” This analysis has at a minimum successfully limited an enforcement of the clause that would challenge the very ethic of privilege that abounds in America. Any study of equal protection is then an analytical inquiry into whether a state has a sufficient purpose to defend its discriminatory classification.

Our review of equal protection will thus center on the degree of scrutiny the Court applies to evaluate a state’s purpose. Here the Court, over the years, has devised a method that depends on the classification and/or interest that is discriminated against. The standards the Court applies, particularly how closely they scrutinize a state’s purpose in discriminating, are the central issue in the application of equal protection doctrine.

The Rational Purpose Test

The traditional restraint the Court has historically applied in enforcing the equal protection clause has been described as the old equal protection and is identified as the rational purpose test. Here the Court will analyze whether the state has a legitimate purpose and whether or not the means it has chosen to achieve its purpose are rationally related to the attainment of its ends. In practice, this rational purpose review deferred to the legislative process. The application of this minimum scrutiny was so

deferential that it was described as “fatal in theory but not in fact.” This was the case because *any* rational purpose asserted by the state seemed adequate to defend the constitutionality of its statute *Williamson v. Lee Optical* (1955).

In the modern era, the “lessons of the *Lochner*” have mandated minimal scrutiny of a state’s purpose in cases concerning “socio-economics” *Dandridge v. Williams* (1970). Although application of minimum scrutiny in regard to socioeconomic issues continues unto this day, the Court has recently applied the rational purpose test with what it describes as “teeth,” so that in some circumstances the test may be “fatal in theory and in fact.” Where parties can prove the means chosen by the state are “arbitrary and/or irrational” in relation to its ends, statutes have been held unconstitutional even under minimum scrutiny. Thus, in *Cleburne v. Cleburne Living Center* (1985), the Court applied the rational purpose test in striking down a state statute that discriminated against the disabled and reached much the same result in *Romer v. Evans* (1996) in striking Colorado’s Amendment 2, because it “classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else.”

In a meaningful review of the present status of the rational purpose test, the majority in *Romer* commented, “In the ordinary case, a law will be sustained if it can be said to advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous,” and that even though Amendment 2 failed this inquiry, “if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end.”

The Compelling Purpose Test: Strict Judicial Scrutiny

If the rational purpose inquiry was the only standard applied in equal protection analysis, the impact of the clause and its powerful verbiage would likely have become meaningless. Perhaps because of such and by the onset of the “Warren Court,” a dual standard, two-tier approach, referenced in the *Romer* opinion above, provided a basis for judicial activism in regard to the clause. The level of judicial scrutiny applied to a state’s legislative purpose now depended on *who* was classified and *what* rights the legislation discriminated against. If the “old” equal protection was the deferential rational purpose test, this dual standard test became the “new” equal protection. If a state

discriminated against a racial classification or denied a fundamental right the Court would apply strict scrutiny, and the state would be required to prove a compelling purpose. Application of this dual standard seemed to mean that a state's successful defense of its legislation became all but impossible. The compelling purpose test of the new equal protection was thus "strict in theory but *fatal* in fact."

Much the same as our discussion of the current application of the rational purpose test, the Court in the modern era has applied a compelling purpose test that is strict in theory but *not* fatal in fact. A review of the application of strict scrutiny and the present means of analysis is best served by viewing the evolution of the two conduits to compelling purpose review—race-based classifications and the denial of fundamental rights.

Race-Based Classifications

That the Supreme Court has closely scrutinized race-based discrimination should come as no surprise given the Civil War and the primary purpose of the Fourteenth Amendment and the equal protection clause. The Court's opinion in *Strauder v. West Virginia* (1880) certainly exemplified such, "[What is equal protection] but declaring, [in] regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color? [That] the West Virginia statute respecting juries [is] such a discrimination ought not to be doubted."

Based on this premise, the Court has traditionally treated all disadvantaged racial classifications as inherently suspect, mandating close judicial scrutiny and requiring the state to prove a compelling purpose. Traditionally, the closest scrutiny has been applied to what the Court has described as discrete (easily identifiable) and insular (isolated) minorities who have a history of being discriminated against and disadvantaged in the majoritarian process. The degree to which this approach would be applied to any racial group, as opposed to a "discrete and insular" racial minority, awaited the modern civil rights era and the onset of affirmative action.

How, given this history, could Jim Crow and apartheid flourish in the South for some 100 years after the adoption of the clause? The answer rests in the conclusion of the Court in *Plessy v. Ferguson* (1896), that racial segregation imposed by the force of state law satisfied the mandate of the equal protection clause. Viewed in this sense, *Brown v. Board of Education* (1954) was of greatest import as an

antiapartheid case, holding that separate but equal was unconstitutional and inherently unequal. Even a determination that apartheid was unconstitutional, however, did not rid us of racial discrimination. In postapartheid America, the Court faced two significant issues in this regard.

Life and discrimination are subtle. It is possible, for example, to discriminate even though a statute is neutral on its face. In postapartheid America, this was a major issue of consequence in regard to race-based discrimination. What resolution when there was a racially discriminatory effect, yet the statute itself was neutral? To require affirmative proof that a state "intended" to discriminate in such a circumstance would be an extremely difficult, if not impossible, burden. This is the case in regard to proving anyone's intent.

Yet, the Supreme Court, as it withdrew from the leadership it had exercised in the civil rights arena, precisely so held. In *Washington v. Davis* (1976), the Court found that "official action will not be held unconstitutional solely because it results in a racially disproportionate impact," and that, "proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause" *Arlington Heights v. Metropolitan Housing Development Corporation* (1977).

The next issue of constitutional and social significance was whether discrimination against a racial majority should be treated the same as discrimination against a disadvantaged racial minority? Many state programs voluntarily attempted to offer "affirmative action" to remedy the past discrimination suffered by disadvantaged racial minorities. Although it hardly seems odious for a racial majority to discriminate against itself, the concept of discriminating against the majority stirred extensive political controversy. Given such, the standard of review to be applied by the Court was contentiously debated *Regents of The University Of California v. Bakke* (1978).

By 1995, the Court definitively resolved this issue and held, "that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny." Yet, this was not a compelling purpose test that was always "fatal in fact." For a state could constitutionally advance affirmative action programs if such classifications were, "narrowly tailored measures that further compelling governmental interests" *Adarand Constructors, Inc v. Peña* (1995).

To be "narrowed tailored" and constitutional the Court has indicated that the program must not just remedy the general nature of past societal discrimination but be supported by facts that "identify prior discrimination" in the area challenged. In *City of*

Richmond v. Croson (1989), for example, this meant a history of identified discrimination in the Richmond construction industry itself. In the 2003 term, in *Grutter v. Bollinger*, the Court reaffirmed the *Bakke* decision and held that a law school's admission program that favored racial minority candidates to further the goal of "diversity" was constitutional. This was the case because the program was narrowly tailored in that it did not, "unduly burden individuals who are not members of the favored racial and ethnic groups," and, "because the Law School considers" all pertinent elements of diversity, "it can (and does) select nonminority applicants who have greater potential to enhance student body diversity over underrepresented minority applicants."

The Supreme Court has also included classifications based on "religion and national origin" as inherently suspect and requiring application of strict scrutiny. The Court in *Bernal v. Fainter* (1984), made this clear in holding that "a state law that discriminates on the basis of alienage can be sustained only if it can withstand strict judicial scrutiny." The Court cited to a "narrow exception" to this rule that has been labeled the "political function" exception and applies to laws that exclude aliens from "positions intimately related to the process of democratic self-government."

Fundamental Rights

The second conduit to the application of strict scrutiny under equal protection analysis is rights that are deemed fundamental. When a fundamental federal right is denied, strict scrutiny is applied no matter what the discriminatory classification. Thus, although deference is applied to wealth-based classifications, strict scrutiny will be applied if a fundamental federal right is denied to the poor as against the wealthy.

This makes a determination of what rights are deemed fundamental of consequence. With "explicit" constitutional rights most likely deemed "fundamental," the more particularized issue is once again what nonarticulated rights are deemed fundamental as well. Despite the inherent controversy of this process, the fact that a right to vote is not expressly articulated in the Constitution and is most certainly necessary for the democratic government mandated by the document makes it almost impossible not to conclude that there are "implicit, nonarticulated" fundamental rights. Just as our discussion concerning the "implicit" fundamental right of privacy, so we now make a similar inquiry as to other such rights.

The Supreme Court's conclusion that education was not a fundamental right in *San Antonio Independent School District v. Rodriguez* in 1973 articulated reluctance on behalf of the Court to expand implicit fundamental rights. The Court's conclusion in *Rodriguez* that only rights "explicit and implicitly" in the Constitution could be deemed fundamental was, in fact, quite limiting in nature. The conclusion that education was not such a right, and the history since the opinion, indicates the Court's reluctance to expand implicit fundamental rights.

Beyond the explicit detailing of rights in the Constitution, most notably, of course, the Bill of Rights, the following implicit rights have been deemed fundamental and subject to strict judicial scrutiny: vote, privacy, access to courts, and the right to interstate travel.

Heightened Review: The Middle Scrutiny Test

Although the Constitution hasn't changed, the role of women in our society certainly has. Whatever individual justices might have to say about a "living constitution," in *Craig v. Boren* in 1975, the Supreme Court retuned its positional analysis when it came to gender-based discrimination. The Court revolutionized its "two-prong" method and gave birth to "middle scrutiny" or heightened review when it came to gender. Under this increased scrutiny of gender-based classification, the Court held that "[To] withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." As opposed to a legitimate governmental objective, the objective must now be "important," and not just rationally related to its ends, but "substantially."

The Court has, since *Boren*, continued to emphasize this increased scrutiny when it comes to gender. They have put state legislatures on notice that any gender-based classifications "must be applied free of fixed notions concerning the roles and abilities of males and females. Care must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions" *Mississippi University for Women v. Hogen* (1982). The Court now references the application of middle scrutiny as requiring an "exceedingly persuasive justification" for any gender-based classification. It has described its review as "skeptical scrutiny," rejecting "overbroad generalizations about the different talents, capacities, or preferences of males and females" that "perpetuate the

legal, social, and economic inferiority of women” *J.E.B. v. Alabama* (1994). Gender today finds the Supreme Court applying a heightened review that is very close to strict scrutiny.

The application of middle scrutiny review has not been limited to gender. In *Clark v. Jeter* (1988), after some confusion in previous cases, the Court indicated that “intermediate scrutiny” would be applied to any state classification of nonmarital children. The Court has also applied intermediate scrutiny on a case-by-case basis when the nature of the facts may require such. Thus, in *Plyler v. Doe* (1982), the Court found Texas’ denial of an education to children who had not been legally admitted into the United States an unconstitutional denial of equal protection, noting the “discrete” nature and “innocence” of the children and carefully limiting the application of middle scrutiny to the facts at hand.

The Enforcement Power

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Finally, and of particular significance given the framers intent of adopting the Fourteenth Amendment to support the constitutionality of post-war civil rights legislation, the Framers granted to Congress the “power to enforce, by appropriate legislation, the provisions of this article.” The post-war Congress exercised their enforcement power to adopt legislation that is significant even until today. Notable among this legislation are two statutes offering federal criminal protection: 18 U.S.C. § 241 (Derived from § 6 of the 1870 Act): Conspiracy against rights; 18 U.S.C. § 242 (Derived from § 2 of the 1866 Act): Deprivation of rights under color of law; and their civil law counterparts: 42 U.S.C. § 1983 (Derived from § 1 of the Civil Rights Act of 1871): Civil action for deprivation of rights.; 42 U.S.C. § 1985(3) (Derived from Civil Rights Act of 1871): Conspiracy to interfere with civil rights. Section 1983’s deprivation of fundamental rights under color of law has been a major source of litigation in the modern era, because it can be used to protect against the deprivation of all rights protected by the Fourteenth Amendment. This is quite expansive given that most of the Bill of Rights is incorporated by means of the Amendment.

Although most all of this legislation was “remedial” in character, the dominant issue in regard to the enforcement power is whether or not Congress could substantively enforce the Amendment to reach beyond the Court’s own definitions of the Amendment’s

clauses. The first arguments that surfaced addressed whether or not Congress could reach private activity that the Court held the Amendment itself could not (the state action limitation). Although the fact that Section 241 and its civil parallel, Section 1985, seems to address private activity, and despite affirmative nuances by the Warren Court, the Court has essentially settled this question in the negative, and the Fourteenth Amendment’s enforcement has been limited to at least some involvement of the state, or state action.

Within the same context, the issue as to whether or not Congress can extend the substantive reach of the Amendment, based on its enforcement power, has also generated much debate. In reviewing one of the most significant pieces of civil rights legislation, the Voting Rights Act of 1965, the Warren Court affirmed its sweeping mandate that extended well beyond the Court’s own interpretation of Section 1 *Katzenbach v. Morgan* (1966).

But by the late twentieth century, the Rehnquist Court “put the brakes” on the *Katzenbach* rationale in finding that the Court could not modify substantive rights *City of Boerne v. Flores* 1997. Although they would conclude that Congress could abrogate the states Eleventh Amendment immunity from suit by the enforcement clause, they nonetheless scrutinized congressional purpose and limited legislation to remedies that were “proportional and congruent” to the alleged discrimination *United States v. Morrison* (2000). In fact, as if to make its point in regard to limits on the modern enforcement power, the Court held that in areas where the Court itself provided a higher degree of scrutiny (gender, fundamental rights), they would allow Congress greater leeway in legislating under its enforcement power *Nevada Department of Human Resources v. Hibbs* (2003), *Tennessee v. Lane* (2004).

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References and Further Reading

- Amar, *The Bill of Rights and the Fourteenth Amendment*, Yale Law Journal 101 (1992): 1193.
- The American Heritage Dictionary of the English Language*. 4th Ed. 2003.
- Charles and Mary Beard. *The Rise of American Civilization*. 2 vols. 1927.
- Corwin, E. *The Constitution of the United States of America* 965, 1953.
- Currie, *The Constitution in the Supreme Court: Limitations on State Power, 1865–1873*, University of Chicago Law Review 51 (1983): 329, 348.
- Ely. *Democracy and Distrust*. 18, 1980.
- Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, Stanford Law Review 2 (1949): 5, 132, 137–139.
- Graham, *Our “Declaratory” Fourteenth Amendment*, Stanford Law Review 7 (1954): 3, 23, 25.

FOURTEENTH AMENDMENT

Reich. "The New Property." *Yale U.* 73 (1964): 733.
Tribe, L. *American Constitutional Law*. 1978.
Tussman and tenBroek, *The Equal Protection of the Laws*,
California Law Review 37 (1949): 341.

Cases and Statutes Cited

Adamson v. California, 332 U.S. 46 (1947)
Adarand Constructors, Inc v. Peña, 515 U.S. 200 (1995)
Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977)
Barron v. Baltimore, 32 U.S. 243 (1833)
Bernal v. Fainter, 467 U.S. 216 (1984)
Board of Regents v. Roth, 408 U.S. 564 (1972)
Brown v. Board of Education, 47 U.S. 483 (1954)
Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961)
City of Boerne v. Flores, 521 U.S. (1997)
City of Richmond v. Croson, 488 U.S. 469 (1989)
Civil Rights Cases, 109 U.S. 3 (1883)
Clark v. Jeter, 486 U.S. 456 (1988)
Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985)
Craig v. Boren, 429 U.S. 190 (1976)
Dandridge v. Williams, 397 U.S. 471 (1970)
Dred Scott v. Sanford, 60 U.S. 393 (1856)
Duncan v. Louisiana, 391 U.S. 145 (1968)
Flagg Brothers v. Brooks, 436 U.S. 149 (1978)
Gitlow v. New York, 268 U.S. 652 (1925)
Goldberg v. Kelly, 397 U.S. 254 (1970)
Griswold v. Connecticut, 381 U.S. 479 (1965)
Gutter v. Bollinger, 1236 S. Ct. 2325 (2003)
Jackson v. Metropolitan Edison Company, 419 U.S. 345 (1974)
J.E.B. v. Alabama, 511 U.S. 127 (1994)
Katzenbach v. Morgan, 984 U.S. 641 (1966)
Lockner v. New York, 198 U.S. 45 (1905)
Lugar v. Edmondson, 457 U.S. 922 (1982)
Mathews v. Eldridge, 424 U.S. 319 (1976)
Mississippi University For Women V. Hogen, 458 U.S. 718 (1982)
Moore v. East Cleveland, 431 U.S. 494 (1977)
Moose Lodge v. Irvis, 407 U.S. 163 (1972)
Nevada Department of Human Resources v. Hibbs, 528 U.S. 721 (2003)
Palko v. Connecticut, 302 U.S. 319 (1937)
Paul v. Davis, 424 U.S. 693. (1976)
Planned Parenthood v. Casey, 505 U.S. 833 (1992)
Plessy v. Ferguson, 163 U.S. 537 (1896)
Plyler v. Doe, 457 U.S. 202 (1982)
Regents of The University Of California v. Bakke, 438 U.S. 265 (1978)
Roe v. Wade, 410 U.S. 113 (1973)
Romer v. Evans (1996), 517 U.S. 620 (1996)
San Antonio Independent School District V. Rodriguez, 411 U.S. 1 (1973)
Slaughter-House Cases, 83 U.S. 36 (1872)
Strauder v. West Virginia, 100 U.S. 303 (1880)
Tennessee v. Lane, 124 S.Ct. 1978 (2004)
Twining v. State of N.J., 211 U.S. 78 (1908)
United States v. Morrison 529 U.S. 598 (2000)
Washington v. Davis, 426 U.S. 229 (1976)
Williamson v. Lee Optical, 348 U.S. 483 (1955)
Wisconsin v. Constantineau, 400 U.S. 433 (1971)

44 LIQUORMART v. RHODE ISLAND, 517 U.S. 484 (1996)

Freedom of speech is not unlimited in the case of "commercial speech," such as advertising. A 1942 Supreme Court decision upheld an ordinance that prohibited distribution of advertising leaflets on the street, saying that purely commercial advertising was not entitled to any First Amendment protection.

The Court later retreated from that position. Beginning in 1975, the Court said that an ordinance could regulate the manner of distribution but not its content. In a series of decisions the Court struck down prohibitions of specific types of advertising, where the commercial message also involved a matter of "public interest"—advertisements for abortion clinics, prescription drug prices, lawyers, optometrists, contraceptives, and electrical appliances.

A Rhode Island statute prohibited the advertising of liquor prices. 44 Liquormart's newspaper ad stated that "State law prohibits advertising liquor prices"—but claimed that that 44 Liquormart had low prices for potato chips, peanuts, and sodas. 44 Liquormart filed for a declaratory judgment, challenging the statute's validity.

The Court said that a statute that bans truthful, nonmisleading advertising must be subjected to strict scrutiny. The Court applied two of the four *Central Hudson* tests and overturned the statute. The Court said the prohibition did not directly advance the state's interest in promoting temperance, seeing no evidence that liquor price advertising and alcohol consumption were related. The Court also said that the state could reduce the consumption of alcohol by means other than abridging speech.

Rhode Island also argued that since the state could ban the sale of alcohol, it could ban or regulate the advertising of alcoholic beverages. The state cited, as authority for this proposition, a 1986 Supreme Court decision upholding a Puerto Rico statute limiting advertising of Puerto Rico gambling casinos. 44 *Liquormart* overturned that decision.

ELI C. BORTMAN

Cases and Statutes Cited

Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557 (1980)
Posadas De Puerto Rico Assocs. v. Tourism Company of Puerto Rico, 478 U.S. 328 (1986)

See also **Commercial Speech; Lawyer Advertising; Professional Advertising**

FRANCE v. UNITED STATES, 164 U.S. 676 (1897)

This case involved a charge of conspiracy for violating an act of Congress intended to suppress interstate lottery traffic. A lottery drawing of three random numbers was held in the city of Covington, Kentucky, located immediately across the Ohio River from Cincinnati, Ohio. Lottery agents in Cincinnati recorded the numbers chosen by players. At a certain time before the lottery was to be drawn in Covington, the agents in Cincinnati sent messengers with a paper showing the various numbers chosen, the amounts of the bets, and the money to the office in Covington. The messengers would return with “hit slips,” which were slips of paper with the winning numbers and the amounts payable to those who won in the last drawing. On their return to Cincinnati, some of the messengers were arrested and charged with conspiracy for carrying these hit slips. This was a violation of the statute prohibiting papers or instruments relating to lotteries across state lines.

Justice Peckham delivered the opinion of the Court and ruled that the words “concerning any lottery” must be strictly construed to mean a current or future lottery. Because the lottery had already been drawn, the hit slips carried by the messengers were not dependent on a current lottery and, therefore, did not violate the law. Furthermore, because the hit slips did not contain any particular person’s name, did not have signatures, and were not addressed to any person, they did not represent a ticket, share, or interest in the event of any lottery. Thus, a strict interpretation of the language of the statute required that the judgment against the messengers be reversed.

LYNNE GARCIA

References and Further Reading

- Carlisle v. United States*, 517 U.S. 416 (1996): a case involving the power of an appellate court to reverse a district court’s denial of a motion for a directed verdict.
- Millan Couvertier v. Gil Bonar*, United States Court of Appeals for the First Circuit, No. 98-1997 (1999): a case involving lotteries in Puerto Rico.
- United States v. Halseth*, 342 U.S. 277 (1952): case that affirms strictly construing the meaning of “concerning any lottery” when information concerning lotteries is sent through the mail.

FRANCIS v. FRANKLIN, 471 U.S. 307 (1985)

Francis v. Franklin expanded on the Court’s earlier decision in *Sandstrom v. Montana*, 442 U.S. 510 (1979), by holding that jury instructions that create

an unconstitutional burden-shifting presumption in a criminal trial could not be cured by informing the jury that the presumption was rebuttable. During an escape from custody, Franklin killed a man with a pistol. Franklin’s sole defense was that the firing of the gun was unintentional. The judge charged the jury that a person’s acts were presumed to be the product of his will and that a person was presumed to intend the natural and probable consequences of his acts, then the judge charged that these presumptions could be rebutted. The jury convicted Franklin of murder, and he was sentenced to death. After exhausting state remedies through unsuccessful appeals in Georgia, Franklin sought federal habeas corpus relief.

Franklin argued that the jury charge violated the due process clause, because it relieved the State of its burden to prove the element of intent beyond a reasonable doubt, and the Court agreed. Justice Brennan found that a reasonable juror could have understood that the disputed instructions created a mandatory presumption that shifted to Franklin the burden of persuasion on the element of intent once the state had proven the act of firing the pistol. Justice Brennan also found that neither the use of rebuttable language nor the jury instructions read as a whole cured the error.

Franklin affirmed the basic constitutional principle that the State has the burden to prove every element of a crime beyond a reasonable doubt, and the jury must be so charged.

EARL F. MARTIN

Cases and Statutes Cited

Sandstrom v. Montana, 442 U.S. 510 (1979)

See also **Capital Punishment; Capital Punishment: Due Process Limits; Capital Punishment: History and Politics; Proof beyond a Reasonable Doubt**

FRANK, JOHN P. (1917–2002)

John Frank was a twentieth century legal practitioner, scholar, teacher, mentor, and author who most assuredly lived “a life in the law.” As a law professor and practicing lawyer, he participated in a number of the major Supreme Court cases of the modern era.

After earning degrees at the University of Wisconsin and Yale Law School, Frank began his legal career in 1942 as a clerk for Supreme Court Justice Hugo Black. He subsequently taught law at Indiana University and at Yale. In 1954, when health problems pushed him to the southwestern United States,

he joined the Phoenix, Arizona, law firm of Lewis and Roca in 1954 and practiced there for almost fifty years.

During his faculty tenure at Yale, Frank, who had met Thurgood Marshall at Indiana, joined in the NAACP Legal Education and Defense Fund assault on segregated education. In 1949 in *Sweatt v. Painter*, the Fund challenged the State of Texas for providing inadequate law school facilities for African Americans. At Marshall's request, Frank and two Yale Law School colleagues submitted an *amicus* brief, eventually signed by 187 law professors, supporting the NAACP suit. The brief in *Sweat v. Painter* went far beyond Marshall's argument, suggesting a complete end to segregation. Frank argued that racial classifications intrinsically violated the Fourteenth Amendment. Although the Court did not at the time accept the academics' argument, the justices did acknowledge that the plaintiff had been denied equal educational opportunity. Ultimately, the constitutional argument was addressed in the 1954 *Brown v. Education* litigation in which Frank also advised Thurgood Marshall.

During his time in private practice in Phoenix, Frank's accomplishments were many and varied. He became an expert on civil procedure and participated in a major revision of those rules. He was noted for his extensive *pro bono* work and represented Ernesto Miranda in *Miranda v. Arizona* in which the United States Supreme Court declared that the Fifth Amendment requires suspects be informed by law enforcement authorities that they have the right to an attorney during questioning. Frank was noteworthy, as well, for his mentoring of aspiring lawyers and was instrumental in encouraging the opening up of law practice to women. As a nationally respected lawyer, he testified in support of Richard Nixon's controversial nomination of Clement Haynsworth to the Supreme Court in 1970 but testified in opposition to Ronald Reagan's Robert Bork nomination in 1987. He also advised Anita Hill in her appearance before the Senate Judiciary Committee in 1991 in the contentious Thomas–Hill confirmation hearings.

Frank remained an active legal scholar until the end of his career, publishing eleven books that included a portrait of Abraham Lincoln as lawyer, a study of the Supreme Court, and last, an examination of the Haynsworth nomination process. His most important legacy, however, was summed up best by a former protégé, Leon Higginbotham, an African-American student of Frank's at Yale who later became chief judge for the U.S. Court of Appeals for the Third Circuit, himself a noted jurist. Higginbotham, in an address to young lawyers thanked Frank for the lesson he had learned from him at Yale—"that the

pursuit of justice was not an inappropriate profession for a lawyer."

KAREN BRUNER

References and Further Reading

- Barrett, John Q., *Symposium: John Frank, Leon Higginbotham, and One Afternoon at the Supreme Court—Not a Trifling Thing*, *Yale Law and Policy Review* 20 (2002): 311–323.
- Cardena, José A., *John P. Frank: A Life of Socially Useful Work*, *Arizona Attorney* 39 (November 2002): 22.
- Entin, Jonathan L., *In memoriam: John P. Frank*, *Case Western Reserve Law Review* 53 (Fall 2002): 238–242.
- Kluger, Richard. *Simple Justice: The History of Brown v. Board of Education and Black America's Struggle for Equality*. New York: Vintage Books, 1977.
- Sperry, Lisa, *John Frank's Mark of Excellence*, *Arizona Attorney* 36 (December 1999): 40–45.

FRANKFURTER, FELIX (1882–1965)

Felix Frankfurter—law professor and associate justice of the U.S. Supreme Court—had been known as one of the country's leading reformers when Franklin Roosevelt named him to the high court in early 1939. By the time he retired, forced off the bench by a debilitating stroke in 1962—he had become the *bête noire* of most judicial liberals and the most conservative member of the Warren Court. There is an irony here, because the two men—the supposedly "liberal" Professor Frankfurter and the supposedly "conservative" Justice Frankfurter—did not differ that much. Both adhered to a single judicial philosophy—judicial restraint—but whereas that view made a man a liberal in the 1930s, by the 1950s, at least in terms of civil liberties, it stood for the notion that the Bill of Rights could be restricted by the government provided it could offer a minimalist justification.

Born in Austria, Frankfurter came to the United States as a child. His ambitious mother dominated his young life, urging him to excel so he could rise up in the world; she fully believed in the American dream, and it was her drive that got the family out of the immigrant slums and into a better neighborhood. The brilliant Frankfurter easily excelled in public school and at City College, and then went to the Harvard Law School. There he learned a very important lesson, namely, that intelligence did matter, that there was a world in which those who could think clearly, logically, and quickly could do well. At Harvard, he later claimed, he discovered the democracy of merit, an idea that to him epitomized what America was all about.

After graduation he worked briefly—and unhappily—in a private law firm, and then eagerly accepted

an offer to become an assistant to U.S. Attorney Henry L. Stimson. The patrician New Yorker would be an important influence in Frankfurter's life, opening to him the possibility of how exciting and rewarding a career in public service could be. He followed Stimson to Washington during the administrations of Theodore Roosevelt and William Howard Taft. Stationed in the War Department, the gregarious Frankfurter soon met all the movers and shakers in the capital. He lived in a house on "I" Street with other young men, where people like Oliver Wendell Holmes, Jr., and Louis D. Brandeis would stop by to visit at what soon became known as the House of Truth. Both Holmes and Brandeis would become mentors to the young Frankfurter, and it was the latter who convinced him to accept an appointment at the Harvard Law School.

From the time Frankfurter joined the Harvard Law faculty in 1914 through the constitutional crisis of 1937, conservatives on the courts used the notion of substantive due process to strike down economic reform legislation they did not like. Led by Holmes and Brandeis, liberals called for judicial restraint, that is, for allowing legislatures wide discretion in policy-making provided no specific constitutional bar prohibited it. Frankfurter stood as the leading academic champion of judicial restraint, and at the time of his appointment, his friends expected—correctly—that he would not allow his personal economic views to thwart legislative will.

But what Frankfurter never understood—and Holmes and Brandeis had made very clear—was that whereas judges ought not to thwart legislative policy in economic matters, they had a special role to play in protecting individual liberties. This showed up in its most explicit form in the famous Footnote Four in the *Carolene Products* case, in which Harlan Fiske Stone said the courts should impose much higher scrutiny on legislation affecting civil rights and civil liberties than on economic regulation. Despite his great reverence for Holmes and Brandeis, Frankfurter did not absorb this lesson.

Frankfurter's earlier reputation is well deserved. Brandeis called him the "most useful lawyer in America." He had opposed A. Mitchell Palmer's Red Scare after World War I; he had taken over Brandeis's role as chief litigator for the Consumer's Union in defending protective legislation for workers; he had been the chief advocate in the most sensational case of the 1920s, the trial of two Italian immigrants, Sacco and Vanzetti, for payroll robbery and murder. Although there is still controversy over whether or not the two men were guilty, it was clear at the time that the two men had been arrested because they were immigrants and anarchists, and the trial was marked by gross

prejudice on the part of the presiding judge. Frankfurter thought the entire episode a travesty of justice, and in his view either there should be a new trial with a fair and impartial judge or the two men should be pardoned. His defense of the two men made him a hero to liberals, but many misunderstood his position. The real crime, he believed, had been the perversion of the justice system; to some extent the guilt or innocence of the two men was secondary.

With the arrival of Franklin Roosevelt in the White House in 1933, he became one of the president's closest advisors and a one-man personnel agency stocking New Deal agencies with his former students from Harvard. He had been a member of the American Civil Liberties Union, as well as the National Association for the Advancement of Colored People, and he had used the columns of the *New Republic* to attack judges deciding cases on personal predilection rather than the law.

Yet during most of this time Frankfurter had said little and written less about issues such as freedom of speech. In part this is understandable, since the Supreme Court's agenda through the early 1930s consisted mainly of economic matters; that agenda changed at about the time Frankfurter went on the Court, and so neither he nor his admirers would have expected the types of cases he would confront. However, one might get an idea of his views on this from a letter he wrote to Ellery Sedgewick, the editor of the *Atlantic Monthly*, regarding the attacks on him during the Sacco and Vanzetti controversy. He believed that his criticism of the judge and other public officials opened him to charges of seditious libel. He argued that while it would probably be politically unwise for the state to do so, he believed that it had the right and the power to act against those who attacked the actions of the state.

While on the Court, Frankfurter engaged in a running battle with Hugo Black for more than twenty years on two issues key to civil liberties—the incorporation of the Bill of Rights through the Fourteenth Amendment to apply to the states and the preferred position of the First Amendment, especially freedom of speech in the constitutional pantheon.

Brandeis had first suggested the Fourteenth Amendment's Due Process Clause included noneconomic liberties, and by 1939, the Court had made freedom of speech and press, as well as counsel in capital cases, applicable to the states. Then in *Palko v. Connecticut* (1938), Justice Cardozo had suggested that not all of the protections in the Bill of Rights should be incorporated, but only those that were fundamental to a free society. Frankfurter, who succeeded Cardozo on the Court, took up this theme and thus fought against any notion that all of the Bill of

Rights applied to the states. In part, this belief stemmed not only from conservatism but also from a strong belief in federalism, and that under a federal system states ought to be given as much leeway as possible. Just as judicial restraint meant that judges did not interpose their economic views against Congress and state legislatures, so it also meant that states had the authority to limit rights in a manner denied to the national government.

In 1942, Frankfurter joined with a majority of the Court in declining to extend the right of counsel in *Betts v. Brady* and continued to oppose incorporation of that right throughout his years on the Court. Not until after he retired did the Court unanimously overrule *Betts* in the landmark decision of *Gideon v. Wainwright* (1963).

In 1947, the Court was asked to overrule *Twining v. New Jersey* (1908), in which it had held that a state law permitting comment on a defendant's refusal to testify did not violate procedural due process. Since that time, the Court had begun to incorporate parts of the Bill of Rights to apply to the states, and Frankfurter, in *Adamson v. California*, argued that the Fifth Amendment protection against testifying against oneself, or having the prosecution comment on it, did not apply to the states. The right against self-incrimination, he declared, did not constitute one of those fundamental principles inherent in "the concept of ordered liberty." In a concurring opinion that defined the notion of selective incorporation for the next two decades, Frankfurter spelled out his ideas of federalism, judicial restraint, and the notion that even in the areas of individual liberties courts should not second-guess the legislature.

Opposing him was Hugo Black, who after initially agreeing with Cardozo's *Palko* opinion, had come to the conclusion that the due process clause of the Fourteenth Amendment incorporated totally all of the protections in the first eight amendments. The Court nominally followed the Cardozo–Frankfurter notion of "selective" incorporation, but in the end it was Black who triumphed, because the Court incorporated practically every protection in the Bill of Rights. In 1964, the Court overturned *Adamson* and incorporated the right against self-incrimination in *Malloy v. Hogan* and then a few years later carried it to even greater length in *Miranda v. Arizona* (1966).

Even when Frankfurter was willing to incorporate a provision, he did so in as restricted a manner as possible. He wrote the majority opinion in *Wolf v. Colorado* (1949), which in effect applied the warrant clause to the states but did so in as crabbed a manner as possible. Refusing to come right out and declare the Fourth Amendment protection incorporated, he found that unreasonable searches and seizures on the

part of state officials violated the sue process clause of the Fourteenth Amendment. Although that clause was the basis of incorporation, here Frankfurter emphasized the procedural process elements. He also refused to apply the exclusionary clause, the only means of truly enforcing the warrant clause, against the states. Here again, his view was eventually rejected by the Court in *Mapp v. Ohio* (1961).

In terms of free speech, Frankfurter rarely voted to support the individual against efforts by the state to restrict it. In *Carpenters' and Joiners' Union v. Ritter's Café* (1942), he held that peaceful picketing enjoyed no immunity from state regulation, although the Court had earlier extended free speech protection in labor disputes. In what is perhaps his most notable speech opinion, he concurred with the majority in *Dennis v. United States* (1941), a case that has been universally condemned ever since. The Court convicted Communist Party leaders not of attempting to overthrow the government of the United States by force but of conspiring to teach about the idea of overthrowing the government. Although he personally abhorred the McCarthy witch hunt and the various loyalty programs, he believed that the First Amendment posed no barrier to Congress and the executive putting such programs into place.

Unlike Hugo Black and William O. Douglas, who took an absolutist view of the First Amendment Speech Clause, Frankfurter in effect saw no difference between the government's right to regulate economic activity and the regulation of expression. When Black suggested that the First Amendment held a "preferred position," Frankfurter wrote to Stanley Reed "Please tell me what kind of sense it makes that one provision of the Constitution is to be 'preferred' over another? The correlative of 'preference' is 'subordination,' and I know of no calculus to determine when one provision of the Constitution must yield to another."

To Frankfurter, as William O. Douglas correctly observed, the First Amendment was little more than a caution for moderation. This can be seen when a friend reminded him that during the 1920s, Frankfurter had voiced extremely unpopular opinions in defense of Sacco and Vanzetti. Frankfurter shot back that while it would have been poor policy for the Commonwealth of Massachusetts to have put him in jail for what he did, it was clear to him that the state did in fact have the power to do so.

Although Frankfurter strongly believed in separation of church and state, and voted accordingly in *Everson v. Board of Education of Ewing Township* (1947), *Illinois ex rel. McCollum v. Board of Education* (1948), and *Zorach v. Clausen* (1952), he apparently had little interest in the free exercise clause, as he

displayed in the series of cases launched by Jehovah's Witnesses in the early 1940s.

In these cases, Frankfurter is best known for his opinions in the two flag salute cases. In *Minersville School District v. Gobitis* (1940), he ruled for an eight-to-one Court that the state could force school children to salute the American flag, even if it went against their religious principles. He dismissed the free exercise argument out of hand, and in a telling phrase wrote: "To the legislature no less than to courts is committed the guardianship of deeply cherished liberties." In essence, courts should accept that legislatures were rights-protective and defer to their judgment. There has been a great deal of comment over this case, and a number of scholars have suggested that the real key to understanding Frankfurter's position is the fact that he was an immigrant and a super-patriot. America had been good to him; in Europe his brilliance would have done him little good, and doors would have been closed to him solely for the reason that he was a Jew. He had had his innate patriotism reinforced in his public school days, and he saw no reason why schools should not continue to do so, especially with the chances so high that the United States would soon be involved in another war. The so-called religious rights of a small and insignificant sect mattered little when balanced against the needs to promote love of country.

The resulting uproar over the *Gobitis* case, the increase on attacks on Witnesses, and the determination of the Witnesses to fight for their civil liberties brought one case after another to the high court, and in every one of them Frankfurter voted against the free exercise claim. Then in *Jones v. Opelika* (1942), Black, Douglas, and Murphy indicated that they had voted wrongly in *Gobitis*, and the following year the Court reheard the flag salute issue, this time finding for the Witnesses in *West Virginia Board of Education v. Barnette* (1943). Justice Jackson wrote a ringing endorsement of the right of free thought, and Frankfurter wrote an anguished dissent noting that, although he belonged to "the most vilified and persecuted minority in history," the courts had no special business protecting minorities. The Framers of the Bill of Rights, he said, "knew that minorities may disrupt society."

Twenty years later Frankfurter still had no sympathy for minorities and voted against making exemption for religious Jewish merchants from Sunday closing laws in *Braunfeld v. Brown* (1961) and *Gallagher v. Crown Kosher Market* (1961).

Frankfurter was not a complete enemy of civil liberties, and even while opposing incorporation of the Fourth Amendment often wrote opinions denouncing the police for going too far in their zeal.

A good case in point is *Rochin v. California* (1952), in which he chastised the police for forcibly pumping a suspect's stomach to get incriminating evidence of drugs. And in the notorious *Rosenberg* case, Frankfurter throughout the ordeal was the only member of the Court to consistently argue that the two had not had a fair trial, and that the Court should review the proceedings.

Frankfurter was also a champion of civil rights and voted in every case that came before the Court during his tenure in support of the rights of black Americans. He named the first African-American clerk to the Court and worked out the strategy that led the Court to reconsider the *Brown* case so that Chief Justice Earl Warren would be able to develop a unanimous opinion. Unfortunately, Frankfurter also imposed the "all deliberate speed" formula on *Brown II*, although it is clear that by it he did not mean it to serve as an excuse for delay. And in *Gomillion v. Lightfoot* (1960), Frankfurter wrote the opinion striking down an Alabama gerrymandering scheme designed to deny black voters their rights.

That opinion, however, led to the overturn of an earlier Frankfurter opinion and in the end marked his departure from the Court with one of the great reversals of his career. In 1946, the Court heard a case challenging the failure of the State of Illinois to reapportion its election districts as required under the state constitution. The result was that although there had been great population shifts into the cities and their suburbs, the now under-populated rural areas still controlled the legislature, and refused to reapportion. In *Colgrove v. Green* (1946) Frankfurter, for a bare four to three majority, held the issue to be a "political question," and therefore not amendable to judicial resolution. He warned the courts to stay out of "the political thicket." In fact, four of the seven justices who heard the case did believe the matter justiciable, but Wiley Rutledge joined Frankfurter's opinion, because he did not believe there was sufficient time before the next election to resolve the case.

Then Frankfurter wrote the *Gomillion* opinion, and now people wondered why it was all right to strike down laws that discriminated against African Americans but not against urban residents. For Frankfurter the answer was clear—the Fifteenth Amendment addressed the issue specifically. But with the Warren Court's attack on segregation (in which Frankfurter joined) and the beginning of its due process revolution, it was only a matter of time before the question of apportionment came up before the high court again.

In *Baker v. Carr* (1962), the Court agreed that the question of mal-apportionment was justiciable and set the case down for argument on its merits in the

following term. Frankfurter entered a bitter dissent, accusing the majority of going where it should not go. The answer, he said, lay with the legislature, completely ignoring the fact that a majority of the people could not get their way because the minority controlled the legislature and would not yield that power. What must have made his defeat even more galling was the fact that the majority opinion was written by his one-time student, William Brennan, who with great skill and craftsmanship completely demolished Frankfurter's argument in *Colgrove*.

Frankfurter had a stroke later in the year and was off the Court when it heard the apportionment cases and handed down a series of decisions requiring the states to reapportion on the basis of "one person, one vote." Frankfurter had warned that there was no judicially manageable formula by which courts could oversee reapportionment, but his longtime foe on the Court, William O. Douglas, came up with the catch phrase that not only garnered public support but also provided the judicial formula necessary.

Frankfurter's place in the history of civil liberties is mixed at best. A prisoner of the idea of judicial restraint that he and other reformers championed before the Court crisis of 1937, Frankfurter could never grasp the fact that rights belonging to the people, be they civil rights or civil liberties, are in a different class than simple economic regulations. Practically all of Frankfurter's opinions concerning incorporation and the Bill of Rights—especially relating to the First Amendment—have been overruled or otherwise discarded. Even conservative jurists now agree that, even if they do not use the phrase, the First Amendment does occupy a preferred position and that courts have to be vigilant in the protection of people's liberties. Frankfurter's great heroes—Holmes and Brandeis—understood that; regrettably he never did.

MELVIN I. UROFSKY

References and Further Reading

- Hirsch, Harry N. *The Enigma of Felix Frankfurter*. New York: Basic Books, 1981.
- Kurland, Philip H., ed. *Felix Frankfurter on the Supreme Court: Extrajudicial Essays on the Court and the Constitution*. Chicago: University of Chicago Press, 1971.
- Parrish, Michael E. *Felix Frankfurter and His Times: The Reform Years*. New York: Free Press, 1982.
- Silverstein, Mark. *Constitutional Faiths: Felix Frankfurter, Hugo Black, and the Process of Judicial Decision-Making*. Ithaca: Cornell University Press, 1984.
- Simon, James F. *The Antagonists: Hugo Black, Felix Frankfurter, and Civil Liberties in Modern America*. New York: Simon & Schuster, 1989.
- Urofsky, Melvin I. *Felix Frankfurter: Judicial Restraint and Individual Liberties*. Boston: Twayne, 1992.

Cases and Statutes Cited

- Adamson v. California*, 332 U.S. 46 (1947)
- Baker v. Carr*, 369 U.S. 186 (1962)
- Betts v. Brady*, 316 U.S. 455 (1942)
- Braunfeld v. Brown*, 366 U.S. 599 (1961)
- Brown v. Board of Education of Topeka I*, 347 U.S. 483 (1954)
- Brown v. Board of Education of Topeka II*, 349 U.S. 294 (1955)
- Carpenters' and Joiners' Union v. Ritter's Café*, 315 U.S. 722 (1942)
- Colgrove v. Green*, 328 U.S. 549 (1946)
- Dennis v. United States*, 341 U.S. 494 (1951)
- Everson v. Board of Education of Ewing Township*, 330 U.S. 1 (1947)
- Gallagher v. Crown Kosher Supermarket*, 366 U.S. 617 (1961)
- Gideon v. Wainwright*, 372 U.S. 335 (1963)
- Gomillion v. Lightfoot*, 364 U.S. 339 (1960)
- Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203 (1948)
- Jones v. Opelika*, 316 U.S. 584 (1942)
- Malloy v. Hogan*, 378 U.S. 1 (1964)
- Mapp v. Ohio*, 367 U.S. 643 (1961)
- Minersville School District v. Gobitis*, 310 U.S. 586 (1940)
- Miranda v. Arizona*, 384 U.S. 436 (1966)
- Palko v. Connecticut*, 302 U.S. 319 (1938)
- Rochin v. California*, 342 U.S. 165 (1952)
- Rosenberg v. United States*, 346 U.S. 273 (1955)
- Twining v. New Jersey*, 211 U.S. 78 (1908)
- United States v. Carolene Products Co.*, 304 U.S. 144 (1938)
- West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943)
- Wolf v. Colorado*, 338 U.S. 25 (1949)
- Zorach v. Clausen*, 343 U.S. 306 (1952)

FRANKLIN, BENJAMIN (1706–1790)

Well-known as a printer, scientist, and inventor, Benjamin Franklin is less well-known as a civil rights champion. There was no more committed proponent of freedom of the press than Franklin, and he was active in the protest movement that began with the Stamp Act Crisis. It is often forgotten that Franklin held certain natural rights sacred, inasmuch as he explained in 1759, "They that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety."

Long an advocate of such Lockean ideas as the state of nature, the social contract, and natural law, Franklin particularly embraced Locke's reverence for life, liberty, and property. His actions during the Stamp Act Crisis and the Revolutionary period show that Franklin fully embraced the citizen's right to petition the government when government became tyrannical and to initiate revolution when all other means of reform failed. And Franklin's own writings indicate a particular respect for property and equality before the law. Although he was generally not given to profound political theory, and instead embraced

the ideas of Locke and other theorists without expounding on them, he did feel compelled to write about property and equality (although he believed Parliament wrong for passing the Intolerable Acts after the Boston Tea Party, Franklin insisted that the activists should pay for the tea they had destroyed, because it was private property).

As a printer, Franklin also had a profound reverence for freedom of speech and the press. And his concern that citizens remain able to express thoughts, ideas, even criticisms through speech and media were well founded. James Franklin, Benjamin's older brother, had been jailed for a month when Franklin was sixteen for printing a piece that was critical of the Pennsylvania Assembly. Furthermore, he was forced to shut down his newspaper. To avoid actually closing the paper down, James transferred responsibility to young Benjamin, who published the *New England Courant* under his own name. So Franklin's concern was not merely academic.

Franklin was also assigned to Thomas Jefferson's committee to draft a Declaration of Independence. While Jefferson wrote the first draft himself, Franklin, John Adams, and the other members of the committee read it and offered suggestions before presenting it to the entire Continental Congress for further editing. It may be assumed, because Franklin left no explicit comment, that he approved of Jefferson's ideas of life, liberty, and the pursuit of happiness.

And it should not be forgotten that Franklin was a framer of the Constitution, as well. Indeed, he argued against property requirements of officeholders; he believed property qualifications would "debase the spirit of the common people." As the convention drew to a close and the time came for delegates to sign the document, Franklin stood and gave a speech. He expressed his belief that the document was not perfect and that he had some reservations but that he believed it better than any other government he knew of. He signed it, of course, and supported its ratification.

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References and Further Reading

Morgan, Edmund S. *Benjamin Franklin*. New Haven: Yale University Press, 2002.
Wright, Esmond, ed. *Benjamin Franklin, A Profile*. New York: Hill and Wang, 1970.

FREE EXERCISE CLAUSE (I): HISTORY, BACKGROUND, FRAMING

Along with the establishment clause, the free exercise clause is located at the beginning of the First Amendment: "Congress shall make no law respecting an

establishment of religion, or *prohibiting the free exercise thereof*..." This article will provide a general guide to understanding the free exercise clause by describing the historical context in which it was drafted, the process by which it was drafted, and an overview of its interpretation and application.

Historical Background

During the time that North America was being explored and settled, England was grappling with the Protestant Reformation's extremely disruptive impact on English society and government. Henry VIII had broken with Rome and established an official Protestant Church of England, but when his eldest child, the devout Roman Catholic Mary Tudor, came to power, she began persecuting Protestants vigorously and drove their leaders into exile. The outright persecution of Mary's reign came to end when she was succeeded by her half-sister Elizabeth, who reestablished the Protestant identity of the Church of England. Queen Elizabeth I continually had to guard, however, against being overthrown by Mary Queen of Scots, who was intent on turning the nation back to Roman Catholicism.

Despite that Elizabeth had reestablished Protestantism in England, many Protestants, known as "Puritans," believed that the Church of England still needed to be cleansed of the residues of Roman Catholic belief and practice. When James I succeeded Elizabeth on her death in 1603, he resolved to suppress and drive the Puritans out. To avoid persecution under James I and his successor, Charles I, by the 1640s as many as 20,000 Puritans had sought refuge by fleeing to North America. Most of these Puritan emigrants congregated in New England; others spread as far south as the West Indies.

When Parliamentary leaders overthrew Charles I in the English Civil War, they ostensibly granted religious freedom to the entire nation, but this actually extended only to conformist Protestants. Catholics were excluded; Baptist ministers were imprisoned; and Protestant clergy who insisted on using the Anglican prayer book were ejected during this period. The official persecution of Protestant dissenters did not end until 1688, and Catholics remained subject to restrictions on political and military office throughout the eighteenth century.

Meanwhile, in the North American colonies, four distinctive approaches to resolving this extremely divisive question of the civil status of religion had been developing. As described by religion clause historian Michael McConnell, these four approaches ranged

from the near theocracy of New England, at one end of the continuum; to the southern colonies where the state used religion as a means of social control; to the benign neglect of religion in New York and New Jersey; and finally to the four colonies founded as havens for religious dissenters, at the opposite end of the continuum.

In the New England colonies that the Puritans had founded, civil authorities suppressed any dissenters in an effort to force them to conform to Puritan beliefs and expectations. This approach led to Baptists being banished, dissenters being whipped or jailed, and four Quakers (who had returned after having been expelled) being hanged. Puritans continued to suppress dissenters until 1679, when, in response to a letter from King Charles II expressing support for “freedom and liberty of conscience” for all non-Catholic Christians, Puritan authorities halted the practice of imposing criminal punishments on those who refused to conform to Puritan beliefs and practices.

In most of the southern colonies, the Church of England had been established by order of the Crown and was financed and tightly controlled by the government. Although New England and the southern colonies were alike in maintaining religious establishments, in a more profound sense, as McConnell points out, these two types of systems are better understood as opposites. Whereas in New England the Puritans used government to make society conform to religious ideals, in the south the governing authorities and local gentry used religion to maintain their social status and control. This second approach is thus characterized by state domination of the church. By the eighteenth century, Virginia had become the most intolerant of all of the colonies. Georgia differed from the other southern colonies in that the authorities exhibited a remarkable degree of tolerance toward non-Anglican Protestants and Jews, although Catholics were detested and banned from the colony.

In New York and New Jersey, the official attitude toward religion was one of what McConnell describes as “benign neglect.” The populations of these two colonies were religiously quite diverse, and a *de facto* policy of religious toleration emerged, even in the four counties of metropolitan New York, where majorities had voted to establish the Church of England. In these areas, Protestants were free to live and worship as they chose, and Quakers and Jews were for the most part left alone.

Four colonies were intentionally founded as havens for religious dissenters. Maryland, the first of these, was founded by a Catholic proprietor as a haven from the persecution that Catholics were facing in England. Its founder, Lord Calvert, is credited with the first use of the term “free exercise” in an American

legal document. In 1648, he instructed Maryland’s new Protestant governor and its councilors to promise to make sure that no Christian, “and in particular no Roman Catholic,” is disturbed in the “free exercise” of religion. The proprietor had previously used the term “free liberty of religion” in his attempts to attract Boston-area colonists to resettle in Maryland, but Massachusetts Governor John Winthrop had responded to the effect that no Bostonians were interested in religious “liberty.”

In 1649, Maryland’s Assembly followed Lord Calvert’s lead by enacting a statute that contained the phrase “free exercise.” This was North America’s first free exercise clause. The security of Catholics in Maryland changed radically, however, after the Glorious Revolution of 1688, which brought about the replacement of England’s Catholic King James II with the Protestants William and Mary and sparked a wave of anti-Catholicism in Maryland that led to the establishment of the Church of England there. Soon thereafter Maryland would come to rival Virginia for its lack of tolerance for religious dissenters.

Rhode Island was originally settled by Roger Williams in 1536, just to the south of the Massachusetts Bay Colony, from which Williams had been expelled for his differences with the Puritan authorities. The Rhode Island Charter of 1663 described the colony as a “lively experiment” with a “full liberty in religious concernments.” The Charter prohibited the infringement of civil liberty on the basis of “any differences in opinion in matters of religion,” and declared that residents may “freely and fully have and enjoy his and their own judgments and consciences, in matters of religious concernments.” Religious freedom in Rhode Island had its limits, however. Jews were barred from citizenship and Catholics from public office. Although in later times, many would come to admire Rhode Island’s “lively experiment” in religious liberty, during the colonial period neighboring New England colonists tended to see Rhode Island as an embarrassment, “the licentious Republic” and the “sink hole of New England.”

Despite Rhode Island’s negative reputation, its Charter of 1663 seems to have served as a model for the religious freedom provisions that were included in the original agreements between the proprietors and the prospective settlers of Carolina and New Jersey. These documents contained wording that was almost identical to the religious freedom provisions of the Rhode Island Charter of 1663. These provisions were later superseded by more limited religious freedom provisions for the colonies of North Carolina, South Carolina, and New Jersey, but after the Revolution, many of the new state constitutions seem to have drawn on the Rhode Island model.

In practice, it was probably the middle colonies that were the most influential examples of religious freedom on the later development of the free exercise clause. They established no church (except in the four counties of metropolitan New York), and welcomed persons from a wide range of religious traditions. Under William Penn's Charters of Privileges of 1701, Pennsylvania and Delaware provided for the religious freedom of all theists, while confining the holding of public office to Christians. Pennsylvania's reputation for religious tolerance contributed to the high level of immigration that it enjoyed, which was accompanied by widespread prosperity.

Following the Revolution, several of the states that had established the Church of England as colonies took swift steps to sever their official ties with the church. The new state constitutions of Georgia, New York, North Carolina, and South Carolina eliminated the provisions that had granted the Church of England special status and benefits. Going forward, South Carolina "established" the Protestant religion but provided churches no financial support; Georgia authorized a tax that would go to support the individual taxpayer's own denomination; and New York and North Carolina joined the middle colonies and Rhode Island with no establishment of religion.

Virginia and Maryland moved more gradually toward disestablishment after the Revolution. In 1776, the Virginia Declaration of Rights was adopted, which guaranteed for all the right to "the free exercise of religion," and the Virginia legislature suspended the collection of the compulsory taxes that had been supporting the Church of England. In 1779, these taxes were repealed, but the Church of England was not formally disestablished in Virginia until 1785. Virginia's post-Revolutionary free exercise protections, in practice, were not extended to Anglican clergy, who when they had been ordained in England were required to take an oath of allegiance to the crown. Anglican clergy who refused to violate their oaths after the Revolution were mobbed, beaten, and driven from their pulpits.

The Maryland Declaration of Rights of 1776 disestablished the Church of England, but it also authorized the legislature to impose a general tax "for the support of the Christian religion." The legislative battle over whether such a tax would be imposed lasted throughout the 1780s. Those who supported such an assessment were never able to prevail.

In 1786, the Virginia Statute of Religious Freedom, authored by Thomas Jefferson, was enacted, which prohibited any form of compulsory support of religion and guaranteed the rights of all to worship freely. By 1789, every state, with the exception of Connecticut, had enacted some form of protection

for religious freedom, but Maryland and Delaware limited such protection to Christians, and five other states limited it to theists. According to McConnell, "These state constitutions provide the most direct evidence of the original understanding" of what would later be adopted as the Free exercise clause, "for it is reasonable to infer that those who drafted and adopted the first amendment assumed the term 'free exercise of religion' meant what it had meant in their states" (McConnell, 1456).

All of these state constitutional provisions contemplated the protection not only of belief but also of one's freedom to participate in religious activity. Four states described the scope of protection for religious activity in broad terms, but eight states limited such protection to acts of "worship." The First Amendment's Free exercise clause seems to have followed these four states' broader approach by not limiting the protection that it offers to "worship" activities. It also bears noting, however, that the limitation to "worship" in these eight states does not seem to have had any actual impact on the scope of free exercise protection in them.

Drafting

The federal free exercise clause emerged from the debate that surrounded the ratification of the Constitution of 1787 regarding whether or not that document should contain specific guarantees of individual liberties. The Federalists, proponents of the draft Constitution, contended that the inclusion of certain specific guarantees might be interpreted to mean that the other rights that the Constitution had sought to respect by carefully spelling out and limiting the scope of federal power should not also be protected. Their opponents, distrustful of federal power, insisted that specific guarantees were necessary.

Patrick Henry, among others, was concerned that the religious freedoms that had been forged at the state level might be overridden by the emerging federal government. John Leland, the leader of Virginia's Baptists, opposed ratification, because in his view religious freedom was not adequately protected by the Constitution in the form that it had been proposed. Rhode Island decided that it could not support ratification until an accompanying Bill of Rights had been drafted and put forward. Those in several other states who called for explicit constitutional guarantees of individual liberties eventually accepted the promise that a Bill of Rights would be drafted later in exchange for their votes for ratification.

James Madison had initially opposed the addition of specific guarantees of individual liberties in the new Constitution, but he came to accept them as a necessary compromise to ensure ratification. When he announced his candidacy for the first Congress under the new Constitution and learned that local Baptists were planning to support his opponent, James Monroe, Madison responded by pledging his support for express guarantees of all individual rights, including one that would fully protect religious liberty. This won the support of the Baptist leadership and tipped the election in his favor. Having helped Madison to get elected, Virginia's Baptists did not hesitate to remind him of their interest in religious liberty as he headed off to take his place in the first House of Representatives.

On arrival, Madison kept his word. He emerged as the foremost spokesperson for religious freedom in the first session of Congress. More than 200 state-sponsored proposals for constitutional guarantees of individual liberties had been received. Of these, which included five state-sponsored religious freedom proposals, Madison culled nineteen and added one of his own. Initially, he planned to work these amendments into the body of the existing Constitution rather than append them to it in the form of a Bill of Rights.

Madison chose not to put forward any of the religious freedom proposals submitted by the states. Instead, he advanced his own approach by suggesting that in Article I, section 10, the states should be prohibited from violating "the equal rights of conscience." With respect to the federal government, Madison proposed that to Article I, section 9, be added, "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or under any pretext infringed."

Madison's initial formulation of what would become the First Amendment's religion clauses did not include the term "free exercise" of religion. Rather, in keeping with the laws of his own state and with three of the five state-submitted proposals, he favored protection for the freedom of "belief" and "worship" and of one's "rights of conscience."

Little was said during the recorded debates when the House took up the issue of religious freedom. Most of the controversy centered about what would become the establishment clause. To gain insight into the meaning that the drafters may have intended the free exercise clause to have, one must carefully analyze the wording of successive drafts of the religion clauses.

The House Select Committee that took up Madison's proposals initially shortened the religion clauses

to read, "no religion shall be established by law, nor shall the equal rights of conscience be infringed." The reference to protecting freedom of belief and worship was deleted. The phrase "free exercise of religion" made its first appearance in the amended version, as passed by the House and sent to the Senate: "Congress shall make no law establishing religion, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed."

To this point, the phrases "rights of conscience" and "free exercise of religion" seem to have been used interchangeably. The inclusion of both in the version passed by the House suggests that some thought it necessary to use both terms.

The version that was sent to the Senate used a form of the verb "prohibit" rather than "infringe," as the prior drafts had used. Because this change was made after the close of recorded debate, we have no direct evidence of the reason for it. In a contemporary case, *Lyng v. Northwest Indian Cemetery Protective Association* (1988), the Supreme Court interpreted this switch from protection against *infringements* of free exercise to a ban on *prohibitions* of religious activity to mean that only laws that make the practice of religion unlawful or impossible are forbidden under the free exercise clause. According to the Court in *Lyng*, the free exercise clause is not violated if the practice of religion is merely made more difficult. McConnell has concluded, however, on the basis of the available evidence, that the *Lyng* Court's narrow interpretation of "prohibiting" is not justified, and that the verb should be given approximately the same meaning as "infringing."

In the Senate, Madison's idea about prohibiting the states from violating equal rights of conscience was not supported, presumably out of deference to states' rights. This effectively ended the First Congress' consideration of that possibility. Turning to the House's proposal pertaining to the federal government, the Senate initially amended it to refer only to the "rights of conscience," but then settled on a version that referred to the "free exercise of religion" instead: "Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion. . . ."

Without direct evidence of the rationale for this change, since it occurred after the close of recorded debate, one could infer that "rights of conscience" was deleted because it was viewed as redundant, or (as a few expressed during the recorded portions of debate) that some were concerned to avoid establishing protection for claims of conscience based on something other than religion. Although the distinction in Free Exercise law between religiously based and non-religiously based rights of conscience has

been criticized in academic circles, as McConnell points out, it makes no difference whether “rights of conscience” was deleted because it was redundant or because of concern about the extension of protection to nonreligious matters of conscience. Neither explanation offers any support for the view that the free exercise clause protection must be provided in secular matters of conscience. Either the scope of “free exercise of religion” is coextensive with that of “rights of conscience,” or it is not. Either way, by settling on “free exercise of religion,” Congress eliminated any textual support for the view that secular rights of conscience should be protected under the free exercise clause.

A conference committee, which included James Madison, then reconciled the differences between the House and Senate versions. The only change pertaining to the free exercise clause was that the Conference Committee eliminated the Senate version’s references to “articles of faith” and “a mode of worship” and replaced them simply with “religion.” This meant that the Senate’s ban on “prohibiting the free exercise of religion” could be shortened to “prohibiting the free exercise thereof.” The conference committee’s version was passed by Congress in 1789 and ratified by the states in 1791: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”

The First Congress had developed a constitutional guarantee for religious freedom that contains two complementary clauses: the establishment clause, which seeks to prevent governmental imposition of religion; and the free exercise clause, which seeks to prevent governmental imposition on religion. Or as John Witte describes it in *Religion and the American Constitutional Experiment*, the establishment clause prohibits the government from *prescribing* religion, and the free exercise clause prohibits the government from *proscribing* religion.

Interpretation and Application

Prior to 1940, courts interpreted the religion clauses of the First Amendment as limitations on federal power only, not applicable to the states. It was not until its 1940 decision in *Cantwell v. Connecticut* that the United States Supreme Court held the free exercise clause to apply to the states through the Fourteenth Amendment.

Even after *Cantwell*, virtually all cases finding a free exercise violation involved governmental restrictions on religious *speech* or *belief*. The distinction between a high level of free exercise protection for

religious belief, versus a much lower level of protection for the *practice* of those beliefs in terms of religious *conduct*, originated in the Court’s very first free exercise clause case, *Reynolds v. United States* (1879). In *Reynolds*, the Court refused to grant free exercise protection to a Mormon who had been convicted under a federal statute that made polygamy a crime. Although a number of Free exercise scholars, including McConnell (1998), have come to view the *Reynolds* decision as wrongly decided, its emphasis on the distinction between religious belief and conduct would be reaffirmed as recently as the Court’s 1990 decision in *Employment Division, Department of Human Resources v. Smith*, which is discussed later.

It was not until 1963 that the Court found a general government regulation of *conduct*, enacted for secular purposes, to violate the free exercise clause in circumstances in which such a regulation conflicted with the freedom to exercise one’s faith. In *Sherbert v. Verner* (1963), the Court upheld the unemployment compensation rights of a Seventh Day Adventist factory worker who was discharged for engaging in religiously motivated conduct, by refusing to work on Saturday, in accordance with her beliefs.

In so doing, the Court applied what has come to be known as the “strict scrutiny” test for free exercise claims. The Court first asked whether some “compelling state interest” justifies the governmental infringement of religious freedom. Even if such a compelling interest were found, under this test the state would still have to demonstrate that “no alternative forms of regulation would combat such abuses without infringing First Amendment rights.”

The “high water mark” for free exercise clause protection, according to constitutional scholar Jesse Choper, came in *Wisconsin v. Yoder* (1972), when the Court used the strict scrutiny test outside the context of an unemployment compensation dispute (Choper, 657). In *Yoder*, the Court found that the state had no compelling interest in enforcing its compulsory public education laws on Amish children whose parents did not want to expose their children to the influence of public education beyond the eighth grade. The decision in *Yoder* reaffirmed the *Sherbert* rule, that the strict scrutiny test is to be applied even when alleged free exercise violations result from the application of a religiously neutral governmental regulation that was enacted for secular reasons.

In the wake of *Sherbert* and *Yoder*, however, the Court rejected nearly all of the free exercise claims it considered. Then, in *Employment Division, Department of Human Resources v. Smith* (1990), the Court ruled the strict scrutiny test inapplicable to challenges brought against generally applicable regulations, enacted for secular reasons, that restrict the freedom

to exercise one's faith. *Smith*, like *Sherbert*, arose in the context of an unemployment compensation dispute. In *Smith*, two Native American drug counselors were dismissed from their employment for having ingested peyote as a part of a Native American religious ceremony. They argued that the sacramental use of peyote should not disqualify them from receiving unemployment benefits as work-related "misconduct." Justice Blackmun agreed, in dissent, finding that Oregon had not advanced any state interest compelling enough to meet the demands of the strict scrutiny test.

Justice Scalia's opinion for the Court, however, asserted that the strict scrutiny test had been applied in challenges to generally applicable laws only when the free exercise clause was implicated along with other constitutional protections, such as freedom of speech. Justice Scalia thus refused to apply the strict scrutiny test to the drug counselors' claims. Justice Scalia conceded that, as a result of the Court's decision in *Smith*, accommodation of free exercise interests would need to be sought through the political process, which "may fairly be said . . . [to] place at a relative disadvantage those religious practices that are not widely engaged in. . . ." Smaller, less influential religious groups are not protected by the free exercise clause against the risk of being subjected to legislation that seriously restricts their freedom to practice their beliefs.

Justice Scalia's opinion in *Smith* did not, however, undermine the availability of free exercise protection against intentional discriminatory measures aimed by government at regulating the conduct of specific religious groups. Accordingly, in *Church of the Lukumi Babalu Aye v. City of Hialeah* (1993), the Court struck down a city ordinance targeted at prohibiting the ritual sacrifice of animals according to the Santeria religion.

Congress has attempted to restore the type of free exercise protection offered by the strict scrutiny test to the extent that to do so lies within its power. In 1993, it enacted the Religious Freedom Restoration Act (RFRA), which would have reestablished strict scrutiny protection for free exercise claims. In *City of Boerne v. Flores* (1997), however, the Supreme Court struck RFRA down, on the grounds that in enacting RFRA Congress had violated federalism and separation of powers principles. In 2000, Congress responded by enacting the Religious Land Use and Institutionalized Persons Act (RLUIPA). More narrowly focused than RFRA, RLUIPA reestablishes strict scrutiny protection for free exercise claims arising in the context of land use regulations and the treatment of institutionalized persons. To date, RLUIPA's constitutionality has been upheld.

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References and Further Reading

- Choper, Jesse, *The Rise and Decline of the Constitutional Protection of Religious Liberty*, Nebraska Law Review 70 (1991): 651–688.
- Cobb, Sanford H. *The Rise of Religious Liberty in America: A History*. New York: Macmillan, 1902.
- Hutson, James H. *Religion and the Founding of the American Republic*. Washington, D.C.: Library of Congress, 1998.
- Lupu, Ira C., *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, Harvard Law Review 102 (1989): 933–990.
- McConnell, Michael W. What would it mean to have a 'First Amendment' for sexual orientation? in Olyan, Saul M., and Martha C. Nussbaum, eds. *Sexual Orientation & Human Rights in American Religious Discourse*. New York: Oxford University Press, 1998, p. 249.
- , *The Origins and Historical Understanding of Free Exercise of Religion*, Harvard Law Review 103 (1990): 1409–1517.
- McLoughlin, William G. *New England Dissent, 1630–1833: The Baptists and the Separation of Church and State*. 2 vols. Cambridge, MA: Harvard University Press, 1971.
- Witte, John, Jr. *Religion and the American Constitutional Experiment: Essential Rights and Liberties*. Boulder, CO: Westview Press, 2000.

Cases and Statutes Cited

- Cantwell v. Connecticut*, 310 U.S. 296 (1940)
- Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993)
- City of Boerne v. Flores*, 521 U.S. 507 (1997)
- Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872 (1990)
- Lynn v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988)
- Reynolds v. United States*, 98 U.S. 145 (1879)
- Sherbert v. Verner*, 374 U.S. 398 (1963)
- Wisconsin v. Yoder*, 406 U.S. 205 (1972)

See also **Baptists in Early America; Establishment Clause (I): History, Background, Framing**

FREE EXERCISE CLAUSE DOCTRINE: SUPREME COURT JURISPRUDENCE

The free exercise clause of the First Amendment provides that Congress shall "make no law . . . prohibiting the free exercise" of religion. The application of the free exercise clause to a person's religious beliefs is relatively noncontroversial, because the United States Supreme Court has held that the state cannot penalize a person on account of his or her beliefs. For example, in *Torcaso v. Watkins* (1961), the Court held that the state of Maryland could not condition the right to hold public office on whether a person believed in God. More controversial has been the application of the free exercise clause to religiously motivated

conduct. In recent years, the Supreme Court has made clear that if the state prohibits certain conduct for the *purpose* of disadvantaging a particular religion, then it violates the free exercise clause. In *Church of the Lukumi Babalu Aye v. City of Hialeah* (1993), for example, the Court considered the constitutionality of several municipal ordinances that prohibited the slaughtering of animals in certain circumstances. The City of Hialeah, Florida, had promulgated these ordinances in response to an increase in the number of practitioners of the Santeria religion who engaged in a variety of practices and rituals, including animal sacrifice, that many non-Santerians found offensive. The Santerians argued that the ordinances violated their free exercise clause rights. The Court agreed, concluding “that suppression of the central elements of the Santeria worship service was the object of the ordinances.” Because the ordinances were not “neutral” in their purpose with respect to religion, the Court found that they violated the free exercise clause.

More controversial—indeed, the most frequently litigated free exercise clause issue at the Supreme Court during the past half century—has been the question whether the state is obliged to give exemptions from neutral and generally applicable regulatory laws to individuals for whom those laws burden the exercise of their religion. The question whether an “accommodation”—an exemption from a regulatory provision—is sometimes *required* has dominated free exercise clause jurisprudence for much of the past half century.

The Supreme Court first considered the question of exemptions from generally applicable regulatory statutes in *Reynolds v. United States* (1878), a case involving the constitutionality of a congressional statute governing the Territory of Utah that made it a crime for a person to have more than one spouse. This criminal prohibition conflicted with the religious obligations of members of the Church of Jesus Christ of Latter-Day Saints (the Mormons) whose church doctrine at that time provided that it was a “duty of male members of said church, circumstances permitting, to practise polygamy.” Reynolds, a Mormon who had engaged in plural marriage, was convicted of violating that statute.

The question for the Court in *Reynolds* was whether “religious belief can be accepted as a justification of an overt act made criminal by the law of the land.” In holding that enforcement of the criminal prohibition on polygamy against Reynolds did not violate his free exercise clause rights, the Court, with Chief Justice Morrison Waite writing, cited Thomas Jefferson for his “belief-action” distinction: religious beliefs and opinions enjoy greater protection from governmental

interference than do religiously motivated actions. In his Bill for the Establishment of Religious Freedom, Jefferson had written that to permit “the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy which at once destroys all religious liberty,” but that it was legitimate for the magistrate “to interfere when principles break out into overt acts against peace and good order.” Moreover, in his famous 1802 letter to the Danbury Baptists, Jefferson had written that “[b]elieving with you that religion is a matter which lies solely between man and his God; . . . the legislative powers of the government reach actions only, and not opinions.” The *Reynolds* Court placed great weight on the views of Jefferson: “Coming as this does from an acknowledged leader of the advocates of the [free exercise clause], it may be accepted almost as an authoritative declaration of the scope and effect of the amendment thus secured. Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive good order. . . . To permit [an exemption] would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to come a law unto himself.” Accordingly, the Court enforced the criminal sanction against Reynolds.

The Court in *Reynolds* concluded that the free exercise clause did not compel an exemption from regulatory statutes for religiously motivated conduct. Because the free exercise clause restrained only Congress, few cases arose under the clause, and the Court had limited opportunity to revisit its decision in *Reynolds*. After the Court incorporated the free exercise clause against the states through the due process clause of the Fourteenth Amendment in *Cantwell v. Connecticut* (1940), free exercise clause claims became far more common on the Court’s docket. Since its decision in *Cantwell*, the Court’s position on the application of the free exercise clause to religiously motivated conduct has ebbed and flowed.

In *Cantwell*, some Jehovah’s Witnesses in New Haven, Connecticut, had been convicted of, among other things, soliciting without a license and “inciting a breach of peace” by playing an anti-Catholic phonograph record on the street in a Catholic neighborhood. Citing *Reynolds*, the Court, with Justice Owen Roberts writing, reasserted the distinction between “freedom to believe and freedom to act.” The Court noted that “the first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society.” But the Court went on to say that “the power to regulate must be so exercised as not, in attaining a permissible

end, unduly to infringe the protected freedom.” In suggesting that some prohibitions on religiously motivated conduct might “unduly infringe” free exercise clause rights, the Court invited a “weighing of two conflicting interests”: the state’s interest “in the preservation and protection of peace and good order” and the Jehovah’s Witnesses’ interest in “free communication of views, religious or other.” The Court, on weighing these interests, ruled in favor of the Jehovah’s Witnesses.

During the 1960s and 1970s, the Court extended the constitutional protection of religiously motivated conduct in two landmark cases. In *Sherbert v. Verner* (1963), the Court considered whether the free exercise clause compelled an exemption from a neutral and generally applicable regulatory statute for a person’s religiously motivated conduct. Sherbert, a Seventh-Day Adventist employed at a South Carolina textile mill, refused to work on Saturday, her church’s Sabbath, when her employer rearranged her schedule requiring such work. As a result, the textile mill terminated her employment. Sherbert applied for unemployment benefits, but refused all job opportunities that required her to work on Saturday. The state Employment Security Commission denied her benefits claim because she had failed “without good cause, to accept available suitable work when offered.”

The Supreme Court, with Justice William Brennan writing, held that the denial of unemployment benefits to Sherbert violated the free exercise clause as applied to the states through the Fourteenth Amendment. The Court found that the South Carolina unemployment scheme imposed a burden on Sherbert by forcing her “to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion to accept work, on the other hand. Government imposition of such a choice puts the same kind of burden on the free exercise of religion as would a fine imposed against appellant for her Saturday worship.” Having found that the unemployment system imposed a burden on Sherbert’s free exercise right, the Court then considered whether the government had a “compelling state interest” for imposing this burden. The Court stated that in this “highly sensitive constitutional area,” only “the gravest abuses, endangering paramount interests, give occasion [to the government] for permissible limitation.” The government justified the denial by asserting an interest in preventing “the filing of fraudulent claims by unscrupulous claimants feigning religious objections to Saturday work” that might “not only dilute the unemployment compensation fund but also hinder the scheduling by employers of necessary Saturday work.” The Court concluded, however, that there was no evidence

questioning the sincerity of Sherbert’s motives and that “even if the possibility of spurious claims did threaten to dilute the [unemployment insurance] fund and disrupt the scheduling of work, it would be plainly incumbent upon [the state] to demonstrate that no alternative forms of regulations would combat such abuses without infringing First Amendment rights.”

In dissent, Justice John Harlan, joined by Justice Byron White, rejected such a broad reading of the free exercise clause. Justice Harlan concluded that those “situations in which the Constitution may require special treatment on account of religion are, in my view, few and far between.” He rejected “the conclusion that the State is constitutionally compelled to carve out an exception to its general rule of eligibility in the present case.” Thus, for Justices Harlan and White, the resolution of the question of accommodating religious practices by granting exemptions from neutral and generally applicable regulatory laws should be left to the discretion of the political branches. Almost thirty years later, a majority of the Supreme Court would come to agree with them.

Nine years after *Sherbert*, the Supreme Court reconsidered the question of constitutionally compelled exemptions for religiously motivated conduct. In *Wisconsin v. Yoder* (1972), the Court considered the refusal of Yoder, a member of the Old Order Amish, to send his children to school after they completed the eighth grade. Wisconsin required school attendance until age sixteen and refused to grant Yoder’s two children an exemption from that requirement. (Yoder’s children, although they had completed eighth grade, had not yet reached age sixteen.) Yoder objected to the formal education of his children beyond the eighth grade on religious grounds, contending that high school emphasized “intellectual and scientific accomplishments, self-distinction, competitiveness, worldly success, and social life with other students” as opposed to the Amish emphasis on “informal learning-through-doing,” “wisdom, rather than technical knowledge,” and “community welfare, rather than competition.” The Supreme Court, with Chief Justice Warren Burger writing, acknowledged the state’s “interest in universal education,” but concluded that that interest did not outweigh the Amish’s religiously motivated desire to direct the education of their children as they saw fit.

After *Sherbert* and *Yoder*, the government was constitutionally compelled to grant an exemption from neutral, generally applicable regulatory statutes to persons claiming an infringement on their free exercise rights unless the government had a compelling interest in uniform enforcement and there was no less restrictive means of fulfilling the government’s

interest. Thereafter, in a few unemployment benefit cases in which a person had quit his or her job for religious reasons, the Court required an exemption. For example in *Thomas v. Review Board* (1981), the Court held that a state could not deny unemployment benefits to an employee who quit his job rather than accept a transfer to a section of the employer's factory that produced armaments when the employee had religious objections to that type of work. Similarly, in *Hobbie v. Unemployment Appeals Commission* (1987), the Court held that a state could not deny unemployment benefits to an employee who was fired for refusing to work on her Saturday Sabbath—similar to the employee in *Sherbert v. Verner*. Two years later, in *Frazee v. Illinois Department of Income Security* (1989), the Court held that a state could not deny unemployment benefits to an employee who refused to work on Sunday because of a religious objection to such work.

In all other free exercise clause cases that it considered during the 1970s and 1980s, however, the Court refused to grant exemptions from neutral and generally applicable regulatory laws, despite the burden the enforcement of such laws placed on religiously motivated persons. For example, in *United States v. Lee* (1982), the Court rejected a challenge by an Amish taxpayer to the required payment of Social Security taxes. The Amish taxpayer argued that the Amish believe it “sinful not to provide for their own elderly and therefore are religiously opposed to the national social security system.” The Court held that mandatory participation in the social security system was “indispensable” to its fiscal vitality and that burdening the free exercise rights of the Amish taxpayer was therefore “essential to accomplish an overriding governmental interest.”

In *Bob Jones University v. United States* (1983), the Court held that the federal government's refusal to grant tax exempt status to a private religious college that engaged in racial discrimination did not violate the free exercise clause, even though the college's racially discriminatory policies were motivated by its religious beliefs. The Court noted that “the Government has a fundamental, overriding interest in eradicating racial discrimination in education” that “substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs.” The Court further held that the elimination of racial discrimination was a “compelling government interest” and that “no less restrictive means are available to achieve the government interest.”

Other free exercise clause claimants also lost their challenges to generally applicable governmental regulations. In *Goldman v. Weinberger* (1986), the Court

refused to grant an Orthodox Jew who wished to wear a yarmulke an exemption from an Air Force dress code requirement that barred members of the Air Force from wearing headgear indoors, citing the military's need for uniformity. In *Bowen v. Roy* (1986), the Court rejected a free exercise clause challenge to a requirement that individuals must provide Social Security numbers to receive welfare benefits. The Court emphasized that the “free exercise clause simply cannot be understood to require the Government to conduct its own affairs in ways that comport with the religious beliefs of particular citizens.” In *O'Lone v. Estate of Shabazz* (1987), the Court rejected a prisoner's free exercise clause challenge to a neutral prison work policy that impeded the ability of Muslim prisoners to attend certain religious exercises. The Court relied on the prison's articulated need for the policy to reject the free exercise clause claim. As the Court had deferred to the military in *Goldman*, so the Court deferred to prison officials in *O'Lone*.

In *Lyng v. Northwest Indian Cemetery Protective Association* (1988), the Court considered a variation on the traditional free exercise claim to an exemption from a regulatory statute. In *Lyng*, the government proposed the construction of a road and the harvesting of timber in a portion of a National Forest that was a sacred religious site for three Native American tribes. The tribes claimed that the traffic, noise, and logging threatened to render impossible the exercise of their religion on the sacred land in question. The Court rejected the claim, holding that the free exercise clause rights of the tribes “do not divest the Government of its right to use what is, after all, its land.”

In the meantime, both Congress and various state legislatures granted literally hundreds of statutory exemptions from generally applicable regulatory laws for individuals whose otherwise prohibited conduct was religiously motivated. But some critics questioned whether religiously motivated individuals should receive exemptions from regulatory laws that would be denied to persons motivated by non-religious reasons. Why, for example, should a person retain eligibility for unemployment benefits on refusing Saturday work for religious reasons, whereas a person who refuses such work to spend time with his family is denied benefits? Some argued that the granting of exemptions for persons whose conduct is religiously motivated constituted an unconstitutional state preference for religion in violation of the establishment clause.

The Court addressed this question in *Corporation of Presiding Bishop v. Amos* (1987). In *Amos*, a Mormon owned-and-operated gymnasium fired a worker because he failed to secure a “temple recommend”—a necessary endorsement from the Mormon. The worker

alleged a violation of Title VII of the Civil Rights Act of 1964 that prohibits, among other things, employment discrimination based on religion. The church defended on the grounds that the Civil Rights Act expressly granted religious organizations an exemption from the prohibition on religious discrimination. The question for the Court was whether this statutory exemption, which gave preferential status to religious organizations, violated the establishment clause. The Court held that it did not. First, the Court found that the exemption did not have the *purpose* of advancing religion; rather, it had the secular purpose of allowing religious groups to carry out their mission unfettered by government regulation. Second, the Court found that the exemption did not have the *effect* of advancing religion. (Justice Sandra Day O'Connor, in her concurrence, argued that the exemption *did* have the effect of advancing religion, but that the exemption did *not* constitute an "endorsement" of religion and hence was not unconstitutional.) After *Amos*, both Congress and state legislatures were free to grant statutory exemptions to religious organizations or to religiously motivated individuals from neutral and generally applicable regulatory laws without offending the establishment clause.

Three years later, in *Employment Division v. Smith* (1990), the Court revisited the question whether a religiously motivated person had a *constitutional right* under the free exercise clause to an exemption from a neutral and generally applicable regulatory law. At issue in *Smith* was whether the state of Oregon properly withheld unemployment benefits from two Native Americans who were discharged from their jobs because they smoked peyote—a substance prohibited under Oregon law. The Native Americans, who had smoked the peyote as part of a religious ceremony, argued that the denial of unemployment benefits violated their rights under the free exercise clause. The Court rejected their claim, concluding that the free exercise clause afforded no such exemption from laws that were neutral and generally applicable and that did not infringe any other constitutional right—even if such laws imposed a substantial burden on the free exercise of religion for certain persons. The *Smith* decision constituted an important shift in the Court's free exercise clause doctrine, foreclosing constitutional claims for an exemption from neutral and generally applicable regulatory laws that interfered with a person's religiously motivated conduct. After *Smith*, such persons would need to appeal to the legislative process for relief from a regulatory statute.

The Court's decision in *Smith* sparked a significant political fight eventually capturing congressional attention. In 1993, Congress enacted the Religious

Freedom Restoration Act (RFRA) by an overwhelming margin in response to the *Smith* decision. In this statute, Congress provided that "Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." In doing so, Congress made clear that it sought to restore the legal landscape that existed prior to the Court's decision in *Smith*. Specifically, Congress found that "in *Employment Division v. Smith*, the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion." Congress stated that its purpose in enacting RFRA was "to restore the compelling interest test as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder* and to guarantee its application in all cases where free exercise of religion is substantially burdened."

But in *City of Boerne v. Flores* (1997), the Court found RFRA to be an unconstitutional exercise of congressional power to the extent that it applied to state and local governments. (Lower courts have found RFRA constitutional as applied to the federal government.) Congress had justified RFRA's limitation on state and local governments by relying on its power under Section 5 of the Fourteenth Amendment that gave Congress authority to enact legislation for the purpose of preventing state violations of Section 1 of that amendment. Because the Supreme Court had previously held that state restraints on the free exercise of religion violated the due process clause of Section 1 of the Fourteenth Amendment, Congress concluded that it had power under Section 5 to prohibit state and local governments from burdening the free exercise of religion unless they could justify such burdens by reference to a compelling state interest. The problem was that Congress in RFRA defined free exercise rights more expansively than had the Court in *Smith*. As a result, in *City of Boerne*, the Court found RFRA unconstitutional as applied to state and local governments. To the Court, Section 5 permitted Congress to redress free exercise clause violations as defined by the Court—not to define free exercise rights more expansively than the Court had done in *Employment Division v. Smith*. Accordingly, the Court concluded that Congress had exceeded its Section 5 power.

In response to *City of Boerne*, Congress took further action. Relying on its constitutional power to regular interstate commerce, Congress in 2000 enacted the Religious Land Use and Institutionalized Persons Act (RLUIPA) that provided that land use regulations (such as zoning) and regulations

governing institutionalized persons (primarily in prisons and mental hospitals) may not “substantially burden” the exercise of religion unless the state has a “compelling interest.” Although RLUIPA is more limited in its scope than is RFRA, it restored some of the protections that Congress had provided in the earlier statute.

Today, if a person or religious organization seeks an exemption from a neutral and generally applicable law that prohibits its religiously motivated conduct, it must appeal to the legislative process because the free exercise clause no longer affords relief (unless the statute in question infringes another constitutional protection, such as the Free Speech Clause). Rather, the free exercise clause provides protection from outright restraints on religious belief or restraints on conduct that are motivated by a desire to disadvantage a particular religion.

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References and Further Reading

- Duncan, Richard F., *Free Exercise is Dead; Long Live Free Exercise: Smith, Lukumi, and the General Applicability Requirement*, University of Pennsylvania Journal of Constitutional Law 3 (2001): 850–884.
- Gordon, James D., *The New Free exercise clause*, Capital University Law Review 26 (1997): 65–92.
- Hamilton, Marci A., *The First Amendment's Challenge Function and the Confusion in the Supreme Court's Contemporary Free Exercise Jurisprudence*, Georgia Law Review 29 (1994) 81–135.

Cases and Statutes Cited

- Bob Jones University v. United States*, 461 U.S. 574 (1983)
- Bowen v. Roy*, 476 U.S. 693 (1986)
- Cantwell v. Connecticut*, 310 U.S. 296 (1940)
- Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993)
- City of Boerne v. Flores*, 521 U.S. 507 (1997)
- Corporation of Presiding Bishop v. Amos*, 483 U.S. 327 (1987)
- Frazee v. Illinois Department of Income Security*, 489 U.S. 829 (1989)
- Goldman v. Weinberger*, 475 U.S. 503 (1986)
- Hobbie v. Unemployment Appeals Commission*, 480 U.S. 136 (1987)
- Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988)
- O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987)
- Reynolds v. United States*, 98 U.S. 145 (1878)
- Sherbert v. Verner*, 374 U.S. 398 (1963)
- Thomas v. Review Board*, 450 U.S. 707 (1981)
- Torcaso v. Watkins*, 367 U.S. 488 (1961)
- United States v. Lee*, 455 U.S. 252 (1982)
- Wisconsin v. Yoder*, 406 U.S. 205 (1972)

See also **Accommodations of Religion; Free Exercise Clause (I): History, Background, Framing**

FREE PRESS/FAIR TRIAL

Under the United States Constitution, there has always been tension between the right of a criminal defendant to a fair trial, untainted by excessive and prejudicial publicity, and the press' right to report on criminal proceedings.

The landmark decision is *Sheppard v. Maxwell*, 383 U.S. 333 (1966). That case involved Dr. Sam Sheppard who was convicted of murdering his wife and children under sensational circumstances, and who claimed that he was unfairly convicted based on excessive and prejudicial pretrial publicity. In reviewing Sheppard's conviction, the Court began by emphasizing the importance of a free press to society, as well as to the criminal justice process, noting that the “press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism.” However, the Court also recognized that every criminal defendant is entitled to a fair trial and that freedom of speech (especially excessive reporting) has the potential to subvert the criminal justice process. The Court held that the criminal justice process is subverted when there is a violation of the “requirement that the jury's verdict be based on evidence received in open court, not from outside [sources].” In other words, defendant was entitled to have his or her case tried by the jury without the effect of excessive and prejudicial pretrial publicity. In *Sheppard*, the Court found that defendant's rights had not been sufficiently protected, because “bedlam reigned at the courthouse during the trial and newsmen took over practically the entire courtroom, hounding most of the participants in the trial, especially Sheppard.” Throughout the preindictment investigation and the nine-week trial, “circulation-conscious editors catered to the insatiable interest of the American public in the bizarre.” In this atmosphere of a “‘Roman holiday’ for the news media, Sam Sheppard stood trial for his life.”

After *Sheppard*, even though the courts had the duty and obligation to mitigate the effects of publicity on the criminal justice process, it was unclear how that objective was to be accomplished. In *Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976), in a highly sensational murder case, the trial judge became concerned that “because of the nature of the crimes charged in the complaint that there is a clear and present danger that pretrial publicity could impinge upon the defendant's right to a fair trial.” In an effort to limit the impact of the publicity on the trial, the judge entered a gag order restraining the press from publishing or broadcasting accounts of confessions or

admissions made by the accused or facts “strongly implicative” of the accused. However, the U.S. Supreme Court concluded that the trial court had gone too far. The Court emphasized the importance of the press to the criminal justice process, noting that a “responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field.... The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism.” In addition, the Court emphasized the importance of a free press noting that it had “learned, and continue to learn, from what we view as the unhappy experiences of other nations where government has been allowed to meddle in the internal editorial affairs of newspapers. Regardless of how beneficent-sounding the purposes of controlling the press might be.”

In *Nebraska Press*, the Court did not rule out the possibility of a gag order in a criminal case. However, it concluded that a much stronger showing of necessity must be made. In deciding whether to grant a gag order, the trial court must consider three factors: “(a) the nature and extent of pretrial news coverage; (b) whether other measures would be likely to mitigate the effects of unrestrained pretrial publicity; and (c) how effectively a restraining order would operate to prevent the threatened danger.” Although the Court concluded that the *Nebraska Press* case involved significant danger of excessive pretrial news coverage, it concluded that there was insufficient evidence regarding whether alternatives to a gag order might not be sufficient.

After the holding in *Stuart*, it has been widely recognized that courts should avoid entering gag orders restricting trial coverage and should instead use other means for protecting defendants against the possible adverse impact of prejudicial trial publicity. These other measures, originally cataloged in *Sheppard* but reaffirmed in *Stuart*, include the following. First, the trial court can order a change of venue when the glare of publicity is too great. In a locale that is removed from the publicity, the court is more likely to be able to seat an unbiased jury, and the defendant is more likely to receive a fair trial. Second, the court can postpone a defendant’s trial until press interest is less intense and public attention has sufficiently subsided. Third, as part of the *voir dire* process, the trial judge and the attorneys can ask searching questions of prospective jurors in an effort to screen out jurors who have been unduly prejudiced by pretrial publicity. Fourth, and additionally, a trial judge can provide the jury with clear and emphatic instructions regarding their duty to disregard media

speculation and to decide the case based only on evidence presented in open court. Fifth, in an appropriate case, the trial court can sequester jurors to insulate them against the effects of publicity. In other words, courts must strive to maximize the possibility of press coverage while using other methods to protect the defendant’s right to a fair trial.

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References and Further Reading

- Weaver, Russell L., and Arthur E. Hellman. *The First Amendment: Cases, Materials & Problems*. LexisNexis (2002): 747–761.
- Weaver, Russell L., and Donald E. Lively. *Understanding the First Amendment*. LexisNexis, (2003): 217–229.

FREE SPEECH IN PRIVATE CORPORATIONS

Writers and speakers are often dependent on corporate publishers or corporate-owned locales to be heard. Business corporations use their economic power to participate in the political process through lobbying, news media, contributions, and political campaigns.

The Tillman Act (1907) barred corporate contributions to federal candidates, expressing a view that corporations were not legitimate political actors. The courts restricted the ban and its state equivalents to a limited core. The current statute specifically permits corporations to use corporate money to staff political action committees so long as the funds transferred to candidates are derived from employee contributions (FECA, 2 U.S.C. § 441[b]).

Generally, First Amendment law does not distinguish between corporate and human speakers. Thus, governmental restriction of corporate funds used for lobbying, “public education” and even referenda campaigns seems to be fully barred by the First Amendment (*First National Bank v. Bellotti* (political lobbying); *New York Times v. Sullivan* [“editorial advertisement”]). However, corporate law typically requires corporate decisionmakers to cause the corporation to use its resources (including its employees’ voices) on behalf of the limited, legally constructed interests of the institution itself, not any human affiliated with it. Accordingly, granting free speech rights to corporations probably does not further free speech values of political self-governance or freedom of expression even of corporate participants.

Dissident speakers within the corporation (for example, employees who disagree with official corporate positions or shareholders who seek to change

corporate policies) have no First Amendment rights against business corporations, because the Amendment extends only to state action.

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References and Further Reading

- Greenwood, Daniel J. H., *Essential Speech: Why Corporate Speech Is Not Free*, Iowa Law Review 83 (1998): 5:995–1070.
- Meir, Dan-Cohen. *Rights, Persons, and Organizations: A Legal Theory for Bureaucratic Society*. Berkeley: University of California Press, 1986.
- Winkler, Adam, *McConnell v. FEC, Corporate Political Speech and the Legacy of the Segregated Fund Cases*, Election Law Journal 3 (2004): 2:361–369.

Cases and Statutes Cited

- First National Bank v. Bellotti*, 435 U.S. 765 (1978)
- McConnell v. FEC*, 124 U.S. 619 (2003)
- Federal Elections Campaign Act (FECA), 2 U.S.C. § 441(b)
- Tillman Act (1907), Ch. 420, 34 Stat. 864

FREEDOM OF ACCESS TO CLINIC ENTRANCES (FACE) ACT, 108 STAT. 694 (1994)

Originally introduced in 1992 by then House members Charles Schumer (D-NY), Constance Morella (R-MD), and Senator Ted Kennedy (D-MA), it gained impetus for passage only after the first death of an abortion provider, Dr. Paul Gunn of Florida, killed by anti-abortion extremists in 1993. The FACE Act was passed in 1994.

The FACE Act prohibits the intentional use of force, threat, or physical obstruction to either attempt or actually to injure, intimidate, or interfere with somebody providing or obtaining reproductive health services. It also punishes anyone found to be intentionally damaging or destroying a reproductive health facility (www.prochoice.org, National Abortion Federation website, 12/17/2005). This legislation protects not only facilities at which abortions are actually provided but also those providing “medical, surgical, counseling, or referral services related to pregnancy (or the termination of pregnancy). It covers facilities located in hospitals, clinics, doctors’ offices or “any other facility providing” such health services (NAF website). Those protected at both pro-choice and pro-life “pregnancy crisis centers” include security guards, maintenance staff, patients, and their escorts.

As with other attempts to limit the presence of anti-abortion activity at reproductive health clinics, two sets of constitutional challenges have been

brought. The first concerns the assertion of a First Amendment freedom of speech right to tell clients about opposing views outside clinics. Most states have dealt with this question through constitutionally protected “buffer zones” of a certain radius outside clinics. The FACE Act does not prohibit constitutionally protected speech, only those threatening or intimidating activities designed to prevent clients from reaching the clinic.

The second constitutional question that has been raised in response to this Act has been that of Congress’ authority to affect the private sector (the operation of clinics). In 1997 and 2005, the Fifth Circuit Court of Appeals ruled that the FACE Act was constitutional, based on Congressional authority to “regulate commerce among the states” as granted by the commerce clause in Article I. Those opposing this view argue that those who interfere with reproductive clinics are not engaging in “commercial or economic” activity as required by the statute. This argument has been successfully used to continuously appeal judgments against Joseph Scheidler of the Pro-Life Action League and Randall Terry of Operation Rescue under the RICO statute, passed in the 1970s to curtail racketeering. However, it has not damaged the FACE Act. The FACE Act was written specifically for reproductive health facilities and thus does not suffer the constitutional problems of trying to apply an “overly broad” statute. Each of the eight federal appeals courts that has heard challenges to FACE have upheld its constitutionality, and the Supreme Court has been asked but chosen not to review these cases (unlike the RICO statute cases regarding abortion clinics). Similarly, federal appeals courts have upheld Congress’ right to enact FACE through its commerce clause powers. The Alan Guttmacher Institute reports that as of December 2005, thirteen states and the District of Columbia have enacted state FACE statutes specifically with respect to abortion providers.¹

The FACE Act provides for criminal and civil penalties. Only the federal government can file criminal charges, whereas federal and state governments or any person harmed by a prohibited act under FACE can file a civil lawsuit against a violator. Criminal penalties include one year in prison and a fine of \$100,000 for a first-time offender and penalties up to \$250,000 and three years in prison for subsequent offenses. For offenses that are nonviolent in nature (yet still constitute physical obstructions of facilities), the penalties begin at 6 months’ jail time and a fine of

¹Alan Guttmacher Institute, www.guttmacher.org, “State Policies in Brief: Protecting Access to Clinics,” as of December 1, 2005; website accessed 12/17/05.

\$10,000 (both of which are increased on subsequent offenses). The maximum sentence contained in the legislation is ten years in prison for bodily injury and life imprisonment for causing death (NAF website, 12/17/2005). Civil penalties may include fines of \$10,000 or \$15,000 and also the potential of getting an injunction against further actions by the protesters.

The National Abortion Federation website, www.prochoice.org, states that FACE prosecutions have been extremely successful in deterring “hard-core” violence at reproductive clinics. This is important, because some actions have included the gluing of locks or spraying of butyric acid (rendering a facility unusable): a woman in 1996 who threatened a doctor by shouting, “remember what happened to Dr. Gunn; this could happen to you,” and a man who parked a Ryder truck outside a clinic shortly after the Oklahoma City bombings. In 1994, at the time of the act’s passage, half the clinics (fifty-two percent) reported some type of violence directed against them that would be actionable under FACE (such as bombing, arson, stalking, gunfire, or physical violence). That percentage had been reduced by more than half (to twenty percent total) by 2000, usually attributed to the legislation’s enforcement. On the other hand, violence directed at clinics has not totally ceased. For example, in the two months after the September 11, 2001, attacks, 500 reproductive and women’s rights facilities reported anthrax threats. Similarly, in 2004, the Feminist Majority Foundation stated that about one in every five reproductive care facility in the United States reports that it continues to experience violence.

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References and Further Reading

Planned Parenthood. National Abortion Federation and Alan Guttmacher websites: www.plannedparenthood.org, www.prochoice.org, www.guttmacher.org.

See also **Abortion**

FREEDOM OF ASSOCIATION

After the American Revolution, neither the U.S. nor the state constitutions protected the freedom of association. They protected the freedom of assembly, which encompassed the right of “the people” collectively to protest against an unjust government but did not protect minorities from majorities.

States limited the freedom of association to protect the majority from minorities. Political parties were considered “factions” that put private interests ahead of the common good. Labor unions were

treated as illegal “conspiracies” in common law, because they promoted the interests of one class over the public interest. The ability to form a corporation was strictly limited. Corporations were considered public institutions that must serve the common good. In New England, states denied corporate privileges to many churches until disestablishment in 1818 in Connecticut, 1819 in New Hampshire, and 1833 in Massachusetts. Virginia refused to grant any churches corporate privileges, denying them the ability to hold property and govern their own institutional affairs. The status of corporations changed when the Supreme Court, in the *Dartmouth College* (1819) decision, ruled that corporate charters were contracts protected by the Constitution. *Dartmouth* transformed many corporations from public agencies to private ones. After *Dartmouth*, corporations gained new rights vis-à-vis the state. Moreover, as the number of corporations expanded, more and more citizens demanded the right to form one to pursue their own commercial and charitable purposes. States responded with general incorporation laws allowing any group of persons to associate and receive corporate privileges under certain guidelines.

Philanthropic trusts followed a similar path as corporations. Americans, especially Thomas Jefferson, worried that trusts placed too much wealth beyond the people’s control. Many states denied their courts equity jurisdiction for trusts. In the *Girard Will* case (1844), however, the U.S. Supreme Court ruled that federal common law recognized trusts, granting them legal rights and privileges.

Laborers continued to struggle for the right to organize. Not until the early 1810s in New York, and then in the 1844 Massachusetts case of *Commonwealth v. Hunt*, did laborers gain the freedom to associate. When laborers sought collective bargaining or closed shops, however, courts continued to define their activities as coercive and illegal.

After the Civil War, associations and corporations faced new challenges and limits. Labor unions continued to seek collective bargaining rights, whereas courts used new techniques, such as the injunction, to limit them. Catholics faced a challenge to their freedoms when Oregon passed a law requiring all children to attend public schools. With the KKK’s support, Oregonians hoped to teach Catholics Protestant values. In *Pierce v. Society of Sisters* (1925), the Supreme Court ruled that the law violated religious liberty, permitting religious minorities to associate for educational purposes.

During the Gilded Age, business corporations expanded beyond any one state’s control and threatened the welfare of workers and consumers. Politicians and reformers pressed for new regulations, but federal

courts struck down state laws interfering with economic freedom. In the Progressive and New Deal eras, reformers turned to the federal government. Starting with the Sherman Anti-Trust Act, the federal government committed itself to ensuring a free market by challenging corporate monopolies. Ironically, the Sherman Act was also used against unions until the Wagner Act legalized collective bargaining and set up procedures to recognize unions in return for allowing the federal government to oversee and regulate their activities. The subsequent Taft-Hartley Act weakened Wagner by permitting states to pass "right to work" laws limiting closed shops. Today, labor unions are again threatened. Many of the rights gained in the New Deal are routinely violated. In addition, important categories of workers, including agricultural workers, still do not have a guaranteed right to unionize.

From the 1920s through the 1950s, political minorities faced limits to their freedom to associate when their goals supposedly threatened the public interest. In the early 1920s, ten states passed laws to limit the activities of the Ku Klux Klan. Louisiana and New York also required KKK members to register with the state. These laws were upheld in *Bryant v. Zimmerman* (1928). The 1917 Espionage Act, passed during World War I, prohibited associating with groups hostile to the government. During the Red Scare, the Supreme Court in *Gitlow v. New York* (1925) upheld convictions for publishing communist propaganda. (*Gitlow* also incorporated the freedom of speech as a nationally protected right of all American citizens under the due process clause of the fourteenth amendment. As a result, the federal government became the major arbiter in future freedom of association cases.) The Alien Registration (or Smith) Act (1940) extended the ban to peacetime. In 1947, President Truman issued Executive Order 9835 requiring all civil servants to declare loyalty to the government and prohibiting membership in any association the Attorney General determined to be "totalitarian, fascist, communist, or subversive."

Gilded Age money established new philanthropic foundations, including those founded by Rockefeller and Carnegie. Many progressives echoed Jefferson's fears that the foundations would enhance the power of the rich through permanent foundations beyond the people's control. In fact, foundations proved supportive of many progressive causes and it was the Right that turned against them. In the early 1950s, Congressional leaders in the House Select Committee to Investigate Tax-Exempt Foundations launched a broad probe into whether foundations were promoting communist ideas within the United States.

The emergence of constitutional protection for the freedom of association was tied to the civil rights revolution of the twentieth century. In the 1950s, southern states sought to check the NAACP by forcing members to register their names. In *NAACP v. Alabama* (1958), the Supreme Court ruled that the freedom to associate is protected by the Constitution. According to Justice John M. Harlan, "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of 'liberty' assured by the Fourteenth Amendment due process clause." The freedom of association was not absolute, however. The Court distinguished *NAACP* from *Bryant* by noting that the KKK, unlike the NAACP, promoted violence and illegal activity.

Although *NAACP* raised the bar for limiting associations, the Supreme Court continued to allow the government to monitor, and to limit, the activities of associations deemed threatening. In *Dennis v. United States* (1951) and *Yates v. United States* (1957), the Court upheld convictions under the Smith Act for advocating the violent overthrow of the U.S. government. Two cases concerning the membership clause of the Smith Act were decided in 1961. The first, *Scales v. United States*, sustained the conviction of a member of the Communist Party, because party membership proved commitment to overthrow the government. In *Noto v. United States* (1961), the Court limited the Smith Act to cases in which violence against the government was clearly intended, providing greater protection for the freedoms of expression and association.

The McCarran Subversive Activities Control Act (1950) and the Communist Control Act (1954) passed in the McCarthy era required Communist groups to register members with the Attorney General. The McCarran act was upheld in *Communist Party v. Subversive Activities Control Board* (1961). Moderating the act in *Albertson v. Subversive Activities Control Board* (1965), a unanimous Supreme Court ruled that the Board could not force a person to register if he invoked the Fifth Amendment. Congress subsequently repealed the mandatory registration clause. Finally, in *Boorda v. Subversive Activities Control Board* (1969), the Supreme Court let stand a D.C. Circuit Court ruling that Party members cannot be exposed unless it can be proved that they shared the Party's violent goals, bringing some of the protections promised in *NAACP* to Communists.

The Supreme Court also limited the scope of loyalty oaths such as those required under EO 9835. *Adler v. Board of Education* (1952) allowed state governments to refuse to hire public employees who belonged to the Communist Party or similar associations. In *Elfbrandt v. Russell* (1966) and *Keyishian v. Board of*

Regents (1967), the Court changed course and ruled that such actions amounted to guilt by association.

Recent cases have continued to balance the freedom of association against the public interest. In *Moose Lodge no. 107 v. Irvis* (1972), the Court decided that private social clubs could refuse to admit a member because of his race without violating the Fourteenth Amendment. But in *Bob Jones University v. United States* (1983), the Court ruled that Bob Jones University could not receive nonprofit status, meaning that it must pay taxes, if it discriminates against African Americans. In *Roberts v. U.S. Jaycees* (1984), the Supreme Court ruled that the Jaycees of Minnesota must admit girls. The Court determined that admitting girls would not alter the association's core mission and that the state's interest in eradicating gender discrimination outweighed the Jaycees' associative freedom. The Court reinforced these principles: *Board of Directors of Rotary International v. Rotary Club of Duarte* (1987). On the other hand, in *Boy Scouts of America v. Dale* (2000), the Supreme Court ruled that the Boy Scouts' religious beliefs permitted them to discriminate against homosexuals despite a New Jersey law protecting gay citizens. The Court argued that compelling the Boy Scouts to admit homosexuals violated the core purposes of the association and thus imposed an unconstitutional burden. Together, *Jaycees* and *Boy Scouts* expose the difficult balance the state has tried to maintain in the post-*NAACP* era.

After the attacks of September 11, 2001, new questions arose about how to balance the freedom of association with national security. These debates are nothing new. For better or for worse, Americans have always sought to balance the freedom of association with national security and the common good.

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References and Further Reading

- Bresler, Robert J. *Freedom of Association: Rights and Liberties under the Law*. Santa Barbara, CA: ABC-CLIO, 2004.
- Cole, David, and James X. Dempsey. *Terrorism and the Constitution: Sacrificing Civil Liberties in the Name of National Security*. New York: Norton, 2002.
- Compa, Lance. *Unfair Advantage: Workers' Freedom of Association in the United States under International Human Rights Standards*. Ithaca: ILR Press, 2004.
- Fellman, David. *The Constitutional Right of Association*. Chicago: University of Chicago Press, 1963.
- Gutmann, Amy, ed. *Freedom of Association*. Princeton: Princeton University Press, 1998.
- Hall, Peter Dobkin. *Inventing the Nonprofit Sector and Other Essays on Philanthropy, Voluntarism, and Nonprofit Organizations*. Baltimore: Johns Hopkins University Press, 2001.

Hammack, David C., ed. *Making the Nonprofit Sector in the United States: A Reader*. Bloomington: Indiana University Press, 1998.

Katz, Stanley, Barry Sullivan, and C. Paul Beach, *Legal Change and Legal Autonomy: Charitable Trusts in New York, 1777–1893*, *Law and History Review* 03 (1985): 1:51–89.

Neem, Johann N. "Freedom of Association in the Early Republic: The Republican Party, the Whiskey Rebellion, and the Philadelphia and New York Cordwainers' Cases." *Pennsylvania Magazine of History and Biography* 127 (2003): 3:259–290.

———. "The Elusive Common Good: Religion and Civil Society in Massachusetts, 1780–1833." *Journal of the Early Republic* 24 (2004): 3:381–417.

Novak, William J. "The American Law of Association: The Legal-Political Construction of Civil Society." *Studies in American Political Development* 15 (Fall 2001): 163–188.

Tomlins, Christopher L. *The State and the Unions: Labor Relations, Law, and the Organized Labor Movement in America, 1880–1960*. New York: Cambridge University Press, 1995.

———. *Law, Labor, and Ideology in the Early American Republic*. New York: Cambridge University Press, 1993.

Wyllie, Irvin G. "The Search for an American Law of Charity." *Mississippi Valley Historical Review* 44 (1959): 2:203–221.

Cases and Statutes Cited

- Dartmouth College v. Woodward*, 17 U.S. 518 (1819)
- Commonwealth v. Hunt*, 4 Metcalf 111 (1842)
- Vidal v. Girard's Executors*, 43 U.S. 127 (1844)
- Pierce v. Society of Sisters*, 268 U.S. 510 (1925)
- Gitlow v. New York*, 268 U.S. 652 (1925)
- Bryant v. Zimmerman*, 278 U.S. 63 (1928)
- Dennis v. United States*, 341 U.S. 494 (1951)
- Adler v. Board of Education*, 342 U.S. 485 (1952)
- Yates v. United States*, 354 U.S. 298 (1957)
- NAACP v. Alabama*, 357 U.S. 449 (1958)
- Scales v. United States*, 367 U.S. 203 (1961)
- Noto v. United States*, 367 U.S. 290 (1961)
- Communist Party of the United States v. Subversive Activities Control Board*, 367 U.S. 1 (1961)
- Albertson v. Subversive Activities Control Board*, 382 U.S. 70 (1965)
- Elfbrandt v. Russell*, 384 U.S. 11 (1966)
- Keyishian v. Board of Regents*, 385 U.S. 589 (1967)
- Boorda v. Subversive Activities Control Bd.*, 421 F.2d 1142 (D.C. Cir.1969)
- Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972)
- Bob Jones University v. United States*, 461 U.S. 574 (1983)
- Roberts v. United States Jaycees*, 468 U.S. 609 (1984)
- Board of Directors, Rotary International v. Rotary Club of Duarte*, 481 U.S. 537 (1987)
- Boy Scouts of America v. Dale*, 530 U.S. 640 (2000)

FREEDOM OF CONTRACT

The right to liberty of contract is not found in the text of the Constitution but has its origins in Anglo-American common law and natural rights ideology.

Beginning in the 1880s, American courts began to assert that a right to contract free from unreasonable government regulations is protected by the due process clause of the Fourteenth Amendment. The U.S. Supreme Court first invalidated a law as a violation of liberty of contract in the infamous 1905 case of *Lochner vs. New York*.

Lochner, however, was something of an anomaly until the 1920s, because the Court almost always deferred to the states' assertion of their regulatory powers, the so-called police power. Between 1923 and 1934, however, the Court aggressively policed the boundaries of the states' regulatory powers, invalidating a wide range of laws as violations of liberty of contract that had no valid police power rationale. For example, in 1923 in *Adkins v. Children's Hospital*, the Court, in a controversial five-to-four decision, invalidated a law mandating minimum wages for women workers.

Ultimately, the doctrine of liberty of contract could not survive the Great Depression and of the pro regulatory sentiment that accompanied it. In the late 1930s, the Supreme Court announced that henceforth it would defer to government regulations of economic activity and the longer enforce the right to liberty of contract. Since then, Americans' right to make and enforce contracts has largely been at the mercy of legislative majorities.

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References and Further Reading

- Bernstein, David E., *Lochner Era Revisionism Revised: Lochner and the Origins of Fundamental Rights Constitutionalism*, Georgetown Law Journal 92 (2003):1–67.
 Gillman, Howard. *The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence*. Durham and London: Duke University Press, 1993.

Cases and Statutes Cited

- Lochner v. New York*, 198 U.S. 45 (1905)
Adkins v. Children's Hospital, 261 U.S. 525 (1923)

FREEDOM OF EXPRESSION IN THE INTERNATIONAL CONTEXT

The First Amendment's protection of freedom of expression became part of the U.S. Constitution in 1791. The French Declaration of the Rights of Man and of the Citizen, adopted by the French National Assembly in 1789, provides that "No one shall be disquieted on account of his opinions" (Article 10) and "That the free communication of ideas and opinions is one of the most precious of the rights of man.

Every citizen may, accordingly, speak, write and print with freedom, but shall be responsible for such abuses of this freedom as shall be defined by law" (Article 11). Otherwise, provisions for protecting freedom of expression have mostly come through the principal human rights documents that have been adopted or that have come into force only since World War II. This does not mean that countries without explicit rights documents have always failed to protect of freedom of expression. This is also not to suggest that freedom of expression has been universally honored since World War II by counties with explicit protective provisions. Indeed, either with or without rights documents, the number of national governments with serious breaches of freedom of expression no doubt has far exceeded the number of governments that has consistently protected that freedom. Nonetheless, it is important to remember that the great movement toward formal documentation of human rights after World War II began with the Universal Declaration of Human Rights (adopted in 1948). The freedom of expression provision of the Universal Declaration is contained in Article 19: "Everyone has the right to freedom of opinion and expression; this right includes the right to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers." Other post-World War II human rights documents with provisions protecting freedom of expression include the International Covenant on Civil and Political Rights (Article 19, came into force in 1976), the American Declaration of the Rights and Duties of Man (Article 4, adopted 1948), the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 10, came into force in 1953), the American Convention on Human Rights (Article 13, came into force in 1978), and the African Charter of Human and Peoples' Rights (Article 9, came into force in 1986). These provisions, mostly from the second half of the twentieth century, usually include qualifications or conditions set out in a separate paragraph, for example, the European Convention's qualifications are set out in paragraph (2) of Article 10: "The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interest of national security, territorial integrity or public safety, for the protection of health or morals, for the protection of reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary." Taken together, these qualifications represent what is known in the decisions of the

European Court of Human Rights as the “margin of appreciation.” The margin has been described by Judge R. St. J. Macdonald of the European Court as involving the “delicate task of balancing the sovereignty of Contracting Parties (member-states of the Council of Europe) with their obligations under the [European] Convention.” As we shall see in the following, this balancing act has required the recurring attention of the European Court of Human Rights.

After proclaiming freedom of expression in Article 19(2), Article 19(3) of the International Covenant on Civil and Political Rights contains the proviso that: “The exercise of these rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary.” Thus, Article 19(3)(a) provides, “For respect of the rights and reputations of others,” and 19(3)(b) provides, “For the protection of national security or of public order, or of public health or morals.” Also Article 20 provides that “any propaganda for war shall be prohibited by law” and also for the prohibition by law of, “Any advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility or violence.”

It should be noted that in the United States, although the First Amendment’s protection of freedom of speech seems on its face to be absolute (“Congress shall make no law abridging freedom of speech”), the balance between freedom of speech and other values or interests has been worked out in decisions of the Supreme Court of the United States. In U.S. practice none of the first Amendment freedoms are absolute. The rights documents adopted after World War II all contain explicit provisos, perhaps recognizing both the recent excesses and outrages that led to World War II and to the tensions of the cold war, as well as the experience of the Supreme Court of the United States in working out the limits of freedom of expression.

International Institutions

What institutions are responsible for enforcing human rights in the international context? The most active and influential institution has been the European Court of Human Rights, which has ultimate responsibility for interpreting the European Convention on Human Rights. While that Convention first came into force in 1953, the first judges of the European Court of Human Rights were not appointed until 1959, when fifteen European Countries were obligated to

follow the European Convention. Its first decision on the merits was not made until 1961. The European Convention now applies to forty-four member-states with an aggregate population of more than 800 million people. Contrasting to the European Court, the Inter-American Court that applies the American Declaration and the American Convention on Human Rights is a fledgling institution, having become active in 1979, whereas the African Commission on Human and Peoples Rights, responsible for interpreting the African Charter is even more recent, being fully staffed only in 1989.

The freedom of expression articles of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights (ICCPR) are broadly within the responsibilities of the United Nations Commission on Human Rights and the United Nations High Commissioner for Human Rights, and, in the instance of the ICCPR, the UN Human Rights Committee, but there is no United Nations agency or court with the authority to adjudicate cases involving alleged violations of freedom of expression and the direct or indirect power to enforce its decisions. The International Criminal Court, although not a UN agency was proposed under UN auspices at the conference that adopted what is known as the 1998 Rome Statute for the International Criminal Court. That court came into force on July 1, 2002, but it has exclusively criminal jurisdiction to try war crimes, crimes against humanity, genocide, and other crimes defined by the Rome Statute, rather than comprehensive authority of human rights.

Freedom of Expression under the European and American Conventions

As noted previously, the first substantive decision of the European Court of Human Rights was not made until 1961. The first Article 10 case before the European Court of Human was the 1976 *Handyside* case in which the prosecution of a publisher for having in his possession obscene books for publication for gain was upheld as having a legitimate aim of the protection of morals that was necessary in a democratic society. Among the other early Article 10 cases was *Sunday Times v. United Kingdom* (1979), the first case in which a violation of Article 10 was found by the European Court of Human Rights. That case is notable for our purposes because it shares its English common law origins with the United States and because its key issue, the legitimacy of an injunction (prior restraint) against publication of a newspaper article, also had been the subject of a case before the

Supreme Court of the United States in the 1971 Pentagon Papers cases (*New York Times v. U.S.*).

The *Sunday Times* case involved a conflict between freedom of the press and the contempt powers of British courts applied to the press through an injunction to prevent the publication of an article that would have tended to “obstruct, prejudice or abuse the administration of justice.” The article that *The Sunday Times* proposed to publish was about the development, sale, and prescription of the drug thalidomide, which had resulted in the birth of a number of children with serious deformities. One feared consequence of the proposed article was that it would influence the payment of damages offered by the defendant pharmaceutical company for the suffered deformities. The House of Lords Appellate Committee, the court of last resort for the United Kingdom, sustained an injunction against *The Sunday Times* in 1973. It was this injunction that was held by the European Court of Human Rights (ECHR) in 1979 (by 11 votes to 9) to violate Article 10 of the European Convention on Human Rights. This was the first violation of Article 10 found by the ECHR.

The five law lords who had ruled against *The Sunday Times* had concluded that prejudgment of important issues through trial by newspaper should be prevented. While it was clear to all of the judges of the ECHR that the injunction was a violation of Article 10(1), the key issue was whether the injunction had a legitimate aim (“maintaining the authority and impartiality of the judiciary” was included in Art. 10 [2]) that was “necessary in a democratic society.” Eleven members of the ECHR found that the injunction did not represent a pressing social need sufficient to outweigh the right to freedom of expression, whereas nine members disagreed. Their differences were over the “margin of appreciation” to be allowed national authorities by a transnational institution. The majority concluded that the exceptions to the freedom of expression protected by Article 10(1) must be narrowly interpreted. Freedom of expression was the primary concern. This “presumption” in favor of freedom of expression is like that expressed by the Supreme Court of the United States when it assesses intrusions on “preferred or fundamental freedoms” (*U.S. v. Carolene Products Co.*).

The second case in which the ECHR found a violation of freedom of expression was in 1986. It also involved a journalist who was sued in a private prosecution for defamation brought by Bruno Kreisky, then the outgoing Chancellor of Austria and President of the Austrian Socialist party. Austrian law provided for criminal punishment for any who “accuses another of possessing a contemptible character or attitude or of behavior contrary to honour or

morality of such a nature as to make him contemptible or otherwise lower him in public esteem.” The defendant, Peter Lingens, had accused Kreisky, in a series of articles, of protecting former members of the SS for political reasons and of being too accommodating toward former Nazis, as well as citing his lack of tactful treatment of the victims of the Nazis. When, after extensive litigation in Austria, Lingens was found guilty and fined for his articles, he appealed to the ECHR. Once again, the violation of Article 10 (1) was clear, so the margin of appreciation the issue. Austria claimed that the prosecution was justified under the express provision of Article 10(2) to protect the “rights and reputations of others.” In holding that the criminal prosecution of Lingens was not “necessary in a democratic society,” and was “disproportionate to the legitimate aim pursued” (the protection of the reputation of others), the ECHR concluded that, “The limits of acceptable criticism are...wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and by the public at large, and he must consequently display a greater degree of tolerance.” As was true with the *Sunday Times Case*, the *Lingens case* has a U.S.-relevant U.S. precedent, *New York Times v. Sullivan* (1964), with much the same outcome.

The second *Sunday Times Case* (1991), along with its companion cases for the *Guardian* and the *Observer*, was another prior restraint case, this one involving the proposed publication by the three newspapers of articles about or excerpts from *Spycatcher*, Peter Wright’s book about his work as a senior member of the British Security Service (MI5). The House of Lords had first voted to continue a preliminary injunction against publication of the articles, pending a trial on the facts of the confidentiality and security issues involved. That was followed by the judgment in the House of Lords Legal Committee that *The Sunday Times* had breached a duty of confidentiality by publishing extracts from the book and was liable to account for its profits from the publication. No permanent injunction was issued because by the time of judgment, global dissemination of *Spycatcher* had destroyed any element of confidentiality. When *The Sunday Times* took its case to The European Court of Human Rights, that court noted that “the dangers inherent in prior restraint are such that they call for the most careful scrutiny on the part of the Court.” Consistent with its concern, the ECHR found, by a vote of fourteen to ten, that although confidentiality and national security justified an injunction against publication for the first year, after that the injunctions were no longer justifiable under Article 10(2). Once

confidentiality had been lost by publication outside the United Kingdom, the only purpose in continuing the injunctions was to deter others who might choose to emulate Peter Wright or to demonstrate that the Security Service would not “countenance authorized publication.” Neither of these justifications was seen as sufficient to support a continuation of the injunction. It is interesting that the dissenters expressed even stronger protection for freedom of expression and even greater suspicion of prior restraints than the majority.

Consistent with its strong protection for freedom of expression, in 1992 the European Court of Human Rights in the case of *Castells v. Spain* wrote that, “Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of their political leaders,” whereas the 1994 decision in *Jersild v. Denmark*, the ECHR held that punishing a journalist for assisting another person in the dissemination of information violated Article 10.

Among the most recent decisions of the European Court of Human Rights, the case of *Hirico v. Slovakia* (2004) involved a publisher and editor of a weekly publication that published a series of articles concerning a prosecution for defamation brought by a government minister against a poet who had claimed that the minister was a fascist. The articles included accusations against the judge who tried the defamation case, and the judge then brought proceedings against the publisher and editor of the weekly claiming that the articles had impugned his civil and professional honor and his authority as a judge. The publisher claimed the protection of Article 10, and once again the issue was the appropriate margin of appreciation. The judge’s position was complicated by the fact that he also was a political candidate on the list of the Christian-Social Union, a party that had well-known views on issues involved in the defamation case that had been discussed in the series of articles. In a very brief opinion, the ECHR found for the publisher, holding that the limits of acceptable criticism are larger when a judge enters political life. Moreover, it held that Article 10’s protection extends journalistic freedom to include the expression of opinions that may “shock or offend” and even “possible recourse to a degree of exaggeration.” The articles commented on issues “of general concern on which a political debate existed.” Presumably the European cases involving freedom of expression have focused on press freedom, because that is where the critical issues have arisen.

To aid in the enforcement of Article IV of the American Declaration of Human Rights and Article

13 of the American Convention on Human Rights, the Office of the Special Rapporteur on Freedom of Expression of the Inter-American Commission on Human Rights developed a Declaration of Principles on Freedom of Expression that were approved by the Inter-American Commission in October 2000. These thirteen principles were especially concerned with access to information and prior censorship and with the use of violence or threats of violence to intimidate or prevent social communications.

Also, in a 1985 Advisory Opinion (OC-5-85), the Inter-American Court of Human Rights wrote that: “[F]reedom of expression is a cornerstone upon which the very existence of a democratic society rests... It represents, in short, the means that enable the community, when exercising its options, to be sufficiently informed. Consequently, it can be said that a society that is not well informed is not a society that is truly free.”

It is not surprising that Inter-American institutions should place such an emphasis on free access to information, when we take into account that one of the first substantive decisions of the Inter-American Court of Human Rights case in the 1988 case of Velásquez Rodríguez involving the disappearance of a journalist. The Inter-American court there stressed that the investigation into his disappearance must be objective and effective. In its 1998 Annual Report, the Inter-American Commission of Human Rights wrote that threatening, intimidation, abduction or murder of journalists “seek to silence the press in its watchdog role, or render it an accomplice to individuals or institutions engaged in abusive or illegal actions.”

National Courts

Nihal Jayawickrama’s excellent review of contemporary application of human rights law, while focusing chiefly on the work of the European Court of Human Rights and the UN Human Rights Committee, reviews cases from Canada, India, Nigeria, Lithuania, and from the High Court of St. Vincent and the Grenadines that have viewed freedom of expression as being “indispensable to the operation of a democratic system.” These precedents suggest that the jurisprudence of the Supreme Court of the United States will be only part of the story of the protection of freedom of expression in the future. It will be a good thing if other countries have more success stories for the protection of freedom of expression through their own processes.

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References and Further Reading

- Inter-American Commission on Human Rights. *Report on Terrorism and Human Rights*. Washington, DC, 2002.
- Jackson, Donald W. *The United Kingdom Confronts the European Convention on Human Rights*. Gainesville: The University Press of Florida, 1997.
- Jayawickrama, Nihal. *The Judicial Application of Human Rights Law: National, Regional and International Jurisprudence*. Cambridge: Cambridge University Press, 2002.

Cases and Statutes Cited

- Castells v. Spain*, 14 E.H.R.R. 445 (1992)
- Handyside v. United Kingdom*, 24 Eur. Ct. H.R. (ser. A) (1976)
- Hirico v. Slovakia*, 41 E.H.R.R. 300 (2004)
- Jersild v. Denmark*, 19 E.H.R.R. 28 (1994)
- Lingens v. Austria*, 103 Eur. Ct. H.R. (ser. A) (1986)
- New York Times v. Sullivan*, 376 U.S. 254 (1964)
- New York Times v. U.S.*, 403 U.S. 703 (1971)
- Sunday Times v. United Kingdom*, 30 Eur. Ct. H.R. (ser. A) (1979)
- U.S. v. Carolene Products Co.*, 394 U.S. 144 (1938)

FREEDOM OF INFORMATION ACT (1966)

The First Congress charged executive departments of the federal government with “housekeeping,” or maintenance, of their own records. Neither the Constitution nor any comprehensive law required disclosure of government records until the Administrative Procedure Act of 1946 (APA). However, access under the APA was severely limited. Agencies could regulate access, and only “persons properly and directly concerned” with records were entitled to see them.

Dissatisfaction with secrecy in government, especially on the part of the press, grew in the 1950s. Bills were introduced in Congress as early as 1957, but none gained traction until 1963, when the APA came subject to overhaul. After back and forth between House and Senate, resolute dissent from federal agencies, and a threatened White House veto, President Lyndon B. Johnson signed into law the Freedom of Information Act (FOIA) on July 4, 1966.

The FOIA, as since amended, mandates publication by executive authorities of materials such as rules and procedures and mandates disclosure of any executive branch record on request, regardless of the requester’s motive. However, the FOIA enumerates nine exemptions, including classified national security matters, trade secrets, agency memoranda, certain law enforcement records, matters of personal privacy, and records exempted by other statutes.

Though often touted as a journalist’s tool, the FOIA is used more widely by businesses and

individuals. The FOIA has been litigated extensively, especially as to the scope of its exemptions. Since the terrorist attacks of September 11, 2001, the scope of the FOIA’s national security exemption has been fiercely contested.

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References and Further Reading

- Hammit, Harry A., David L. Sobel, and Mark S. Zaid, eds. *Litigation Under the Federal Open Government Laws 2004*. 22nd Ed. Washington, D.C.: EPIC Publications, 2004.
- O’Reilly, James T. *Federal Information Disclosure*. 3rd Ed. St. Paul: West Group, 2000.

Cases and Statutes Cited

- Administrative Procedure Act, 5 U.S.C. §§ 551–706, Act of June 11, 1946, c. 324, 60 Stat. 237
- Freedom of Information Act, 5 U.S.C. § 552, Act of July 4, 1966, Pub. L. No. 89-487, 80 Stat. 250

See also Access to Government Operations Information; Classified Information; Freedom of Information and Sunshine Laws; Media Access to Information; United Nations Subcommittee on Freedom of Information and of the Press

FREEDOM OF INFORMATION AND SUNSHINE LAWS

Although the First Amendment to the Constitution provides a freedom to speak and publish information that a person possesses, especially about government, the Constitution has not been construed to provide a freedom to obtain information. Thus the extent to which government must conduct business in public view or in secret is chiefly a matter for federal statutory and state law. Still, openness has long been recognized as a critical component of democracy. Louis D. Brandeis famously observed in 1914, “Sunlight is said to be the best disinfectant.” Laws ensuring public access to government have thus been termed “sunshine” laws.

At the federal level, the principal sunshine laws are the Freedom of Information Act (FOIA) and the Privacy Act, which provide access to government records, and the Federal Advisory Committee Act and Government in the Sunshine Act, which provide access to government meetings. All but the FOIA (1966) were enacted in the 1970s, when the Vietnam War and the Watergate scandal strained public confidence in government.

The federal laws were mirrored at the state level and made sunshine an entrenched feature of state

government, although many states had sunshine laws dating to the early twentieth century. Today every state has an open meetings law and an open records law. They vary dramatically in their particulars. Some states, such as Florida and North Dakota, have sunshine laws in their state constitutions. Some states, such as Connecticut and Virginia, have established freedom of information councils to facilitate sunshine law compliance.

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References and Further Reading

- Leslie, Gregg, and Rebecca Daugherty, eds. *Tapping Officials' Secrets*. 4th Ed. Arlington, VA: Reporters Committee for Freedom of the Press, 2001.
- O'Reilly, James T. *Federal Information Disclosure*. 3rd Ed. St. Paul: West Group, 2000.

Cases and Statutes Cited

- Fla. Const. Art. I, § 24
- N.D. Const. Art. 11, §§ 5-6
- Federal Advisory Committee Act, 5 U.S.C. app. 2, Act of Oct. 6, 1972, Pub. L. 92-463, 86 Stat. 770
- Freedom of Information Act, 5 U.S.C. § 552, Act of July 4, 1966, Pub. L. No. 89-487, 80 Stat. 250
- Government in the Sunshine Act, 5 U.S.C. § 552b, Act of Sept. 13, 1976, Pub. L. No. 94-409, 90 Stat. 1241
- Privacy Act, 5 U.S.C. § 552a, Act of Dec. 31, 1974, Pub. L. No. 93-579, 88 Stat. 1896
- Conn. Gen. Stat. §§ 1-205 to -205a
- Va. Code §§ 30-178 to -181

See also **Access to Courts; Access to Government Operations Information; Access to Judicial Records; Access to Prisons; Brandeis, Louis Dembitz; Classified Information; Congressional Protection of Privacy; Freedom of Information Act (1966); Media Access to Information; Media Access to Judicial Proceedings; Media Access to Military Operations; Nixon, Richard Milhous; Right of Access to Criminal Trials**

FREEDOM OF SPEECH AND PRESS UNDER THE CONSTITUTION: EARLY HISTORY, 1791-1917

When reading this, it is important to remember that most of the First Amendment law concerning freedom of speech and press came after the period covered here. Nonetheless, 1791 was important as the year when the U.S. Bill of Rights (the first ten amendments to the U.S. Constitution) came into effect through ratification, whereas 1917 is the year the U.S. Espionage Act, which was designed to punish

certain political speech (seen as being dangerous during World War I) was passed. So, the end of our period was just before the first important free speech decision of the Supreme Court of the United States in 1919, *Schenck v. United States*, which interpreted the scope of freedom of political speech under that act by adopting the “clear and present danger test.”

When we consider the freedoms protected by the First Amendment to the U.S. Constitution during the first 125 years of American constitutional history, our first task is to set aside our contemporary understanding of what the word “freedom” means to us. To be sure, First Amendment “freedom language” is mostly a product of the years since 1917, beginning, as noted previously, with several important cases involving political speech that were decided in the immediate aftermath of World War I. Our task is made somewhat easier by the fact that the seminal early book on freedom of speech, Professor Zechariah Chafee’s *Freedom of Speech*, was first published in 1920, just after the period that we consider here. Chafee’s update, *Freedom of the Speech in the United States*, was published in 1941, but, as he notes in his preface to that edition, the substantive material that was covered and first published in 1920 (Part I of the 1941 update) was mostly unchanged. Thus Chafee’s work can help us understand how freedom of speech was seen in 1920.

In Chafee’s 1941 update, from a book of more than 500 pages, only Chapter I (just more than thirty pages) deals with the pre-1918 period, so the first thing we realize is that for most purposes freedom of speech law developed with the prosecutions of political dissidents that followed World War I. It is true that the historical precedent to the Espionage Act of 1917 was the U.S. Sedition Act of 1798, through which the Federalist Party of John Adams sought to prosecute their political opponents, but that act led to no important Supreme Court decisions. Instead, the Act lapsed in March 1801, just before Thomas Jefferson’s inauguration as president. An excellent book, James Morton Smith’s *Freedom’s Fetters*, covers the relevant events of those years.

We need to note that one reason why a bill of rights was not included in the original U.S. Constitution was based on the view that the U.S. Congress had no power to enact legislation on the subjects eventually covered by the Bill of Rights of 1791. That point was belied by the Sedition Act of 1798, which was predicated on the view that Congress had the power to punish unlawful conspiracies or combinations that might impede the efforts of the federal government. Without knowing that he was beginning a tradition of exceptions, President John Adams called the Alien and Sedition Acts war measures justified by a

perceived emergency (because of the possibility of war with France). The Sedition Act created the possibility of prosecution of anyone who “shall write, print, utter or publish...scandalous and malicious writing or writings against the government of the United States, or either House of the Congress...or the President...with the intent to defame...or to bring them...into contempt or disrepute; or to excite against them...the hatred of the good people of the United States.” It is important to note that freedom of speech and freedom of the press were treated in much the same manner at this time, and freedom of the press was probably the more important of the two because then the only way to reach a large audience was through print media.

Elkins and McKittrick’s *The Age of Federalism* describe the Federalists’ resort to prosecution of its opponents. Their narrative relies in part on Madison’s *Federalist 10* in which he argued against political parties and factions as being usually contrary to the public interest. The ideal was that, instead of factions, enlightened and virtuous leaders should transcend narrow interests and seek the higher public good. When this ideal was applied in practice by the Federalists, the outcome was that when men of such good will and reason (as the Federalists saw themselves) were attacked by others who were insolent, vulgar, self-interested, and demagogic (as they saw their opponents), the Sedition Act of 1798 was the reasonable consequence. Madison, however, was not part of this outcome.

Indeed, in 1800 Madison reported to the Virginia legislature on the Alien and Sedition Acts. He argued that the Sedition Act was unconstitutional, because the federal government had no jurisdiction under its enumerated or implied powers over conduct that may have been criminal under English common law (political sedition) and that the First Amendment replaced the common law on freedom of speech and press. As to the federal government, freedom of speech and press were absolute, because there was no authority on the part of the federal government to legislate on those subjects. As to the notion that the common law had only prevented previous restraints against publications and did not prohibit post-publication criminal liability, as quoted by Leon Levy, Madison argued that, “It would seem a mockery to say that no laws should be passed preventing publications from being made, but that laws might be passed for punishing them in case they should be made.” In the United States, Madison argued, the people, rather than the king, were sovereign and they granted to the government only the powers that they had spelled out in the Constitution of the United States. Another compelling argument in Madison’s report was the fact

that the First Amendment also prohibited an establishment of religion by the federal government, whereas there was clearly such an establishment (the Church of England) under the common law. The logical implication was that the common law was modified by the Bill of Rights when the two conflicted, as they did with respect to the establishment of religion. In this context it must be recognized that this logical implication did not apply to the states, although this was not explicitly decided by the Supreme Court until 1833 in the case of *Barron v. Baltimore*, which held that the Bill of Rights was written to limit the national government. The adoption of provisions protecting freedom of speech and press in state constitutions, however, possibly raised the same logical implication. Although Levy concludes that Madison’s *Report* was not necessarily indicative of the intended meaning of the Bill of Rights in the period of 1789–1791, it certainly represented the evolution of Madison’s thinking by 1800.

There were fourteen prosecutions under the Sedition Act. Elkins and McKittrick argue that these cases, while marked with “brutal highhandedness,” were more striking for the “almost comic clumsiness, the sheer political ineptitude with which the Federalists went about their work of trying to silence the opposition press.” Nonetheless only one defendant was acquitted under the Sedition Act of 1798. Because the Sedition Act expired in 1801, coupled with the fact that the U.S. Supreme Court did not exercise the power of judicial review until its decision in *Marbury v. Madison* in 1803, there was no constitutional review of these cases.

Although political sedition had been part of the common law of England, whether it had been, in effect, repealed by the First Amendment’s protection of freedom of speech was a question that never reached the Supreme Court in our early history. An interesting book on that question is Leon Levy’s *Legacy of Suppression*. Levy argues that the Federalist leaders, who contributed to the drafting and ratification of the U.S. Constitution, and later the Bill of Rights, did not understand freedom of speech to have broad scope, especially in the instance of political expression. Levy concluded that we know relatively little about the original understanding of the meaning of freedom of speech or of the press within the First Amendment. He notes that, “The phrase, ‘freedom of speech’ used in connection with the right of a citizen to speak his mind was extremely rare in the seventeenth century.” Freedom of the press and of religion were of much greater concern, but even so, under English law prosecutions for seditious libel were the means by which the press could be controlled. Greater tolerance of political criticism and a

libertarian understanding of freedom of speech, he suggests, did not come until the Jeffersonians took power. However, Justice Holmes took a contrary position in *Abrams v. U.S.* (1919), when he concluded that the First Amendment's protection for freedom of speech was intended to prohibit prosecutions for political sedition, as it was then understood in English common law. Chafee affirms that position in the first chapter of *Freedom of Speech in the United States*. Whichever view is right, it is necessary to first understand at least the basic elements of the English law of seditious libel (political sedition).

Seditious Libel

The English common law of seditious libel criminalized speech that might have the tendency to bring the government into disrepute, even if the content of the speech was true. According to Chafee, the law of seditious libel in England through the close of the eighteenth century was “the intentional publication without lawful excuse or justification, of any written blame of any public man, or of the law, or of any institution established by law.” Under this definition, freedom of speech and of the press consisted chiefly of the absence of prior censorship, whereas the publication of information tending to disparage public officials or institutions was usually punishable. The early common law rule was that the only question for a jury was whether the defendant had indeed published the material; all other issues were questions of law to be determined by judges. Thus, liberty of the press in particular was simply the absence of a government censor to which publications had to be submitted prior to publication. As reported by Levy, the result was that in prosecutions for criminal libel—those libels against the state—“a man might be arrested on a general warrant, prosecuted on an information without the consent of a grand jury, and convicted for his political opinions by judges appointed by the government he had aspersed.”

Probably the most famous early prosecution for political sedition in the American colonies was the trial in 1735 of John Peter Zenger, printer of the *New York Weekly Journal*. Zenger attacked the administration of colonial Governor William Cosby. Cosby assumed his office in 1731 and promptly achieved widespread unpopularity. Zenger, who was associated with the Popular Party that opposed Cosby, was defended by Alexander Hamilton, who argued that truth should be a defense to prosecution for seditious libel. As noted in the website cited in the references, the prosecution accused Zenger of “being

a seditious person and a frequent printer and publisher of false news and seditious libels” who had “wickedly and maliciously” sought to “traduce, scandalize and vilify” Governor Cosby and his cabinet. Hamilton argued that the law of New York colony need not be the same as the common law of England. The presiding judge ruled that Hamilton could offer no proof of the truth of Zenger's publication and instructed the jury that its duty was clear; it was not to judge or alter the law. However, when the question of his guilt was submitted to a jury, Zenger was acquitted. That single, although famous, outcome did not establish the universal principal of truth as a defense, but it did reveal and offer the prospect for enhancing the power of American juries. Yet, Levy concludes that one of the reasons for the fame of the Zenger case was its singularity. Today such verdicts are known as *jury nullification*, that is, when a jury simply refuses to enforce the extant law. Even given such occasional victories as Zenger's, Levy argues that to consider the American colonies as “a society in which freedom of expression was cherished is a hallucination of sentiment that ignores history.”

Levy reports that the first instance of freedom of speech being protected by a constitution came in Pennsylvania in 1776, when its first constitution said “That the people have a right to freedom of speech, and of writing, and publishing their sentiments; therefore the freedom of the press ought not to be restrained.”

Despite those words, Pennsylvania failed to protect Loyalist (pro-English) speech during the American Revolution, and Quakers were often the objects of official persecution.

The Cushing-Adams letters of 1789, reviewed by Levy, are often cited for their relatively broad understanding of freedom of speech and press. Cushing was then the Chief Justice of Massachusetts. In his letter to John Adams, Cushing sought Adams confirmation of his view that the free press clause of the Massachusetts constitution guaranteed “freedom to discuss all subjects and characters ‘within the bounds of truth.’” Adams' reply was that he agreed the provision that Cushing relied on supported the view that a jury ought to determine the truth of accusations and if they found that they were published for the “Public good,” they would acquit. This standard was indeed contained in the Sedition Act of 1798, but the acquittals did not follow. Indeed, Cushing, who became a Justice of the Supreme Court of the United States in 1789, after his letter to Adams was written, presided over some of the trials brought under the Sedition Act of 1798 and viewed that act as constitutional. Since the Sedition Act came only seven years after the First Amendment became part of the U.S. Constitution,

the conclusion that Federalists, who then held power, did not see that amendment as a bar to prosecutions for seditious libel seems inescapable.

Story's Commentaries

In the absence of early judicial precedents interpreting the scope of freedom of speech and press in the United States, we must consider instead the work of notable nineteenth century scholars. Joseph Story's *Commentaries on the Constitution of the United States* was published in three volumes in 1833 and dedicated to then Chief Justice John Marshall. In the last volume of his treatise, when discussing freedom of the press, Story emphasized responsibility rather than freedom. He wrote that absolute freedom was a "supposition too wild to be indulged by any rational man."

Instead he wrote that:

It is plain then, that the language of this amendment imports no more, than that every man shall have a right to speak, write, and print his opinions upon any subject whatsoever, without any prior restraint, so always, that he does not injure any other person in his rights, person, property or reputation; and so always that he does not thereby disturb the public peace, or attempt to subvert the government. (Section 1874)

And he added that:

Every freeman has an undoubted right to law what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press. But, If he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity. (Section 1878).

Story's position was consistent with Blackstone's narrative of the English common law as prohibiting "previous restraints" but not subsequent prosecution. Blackstone's *Commentaries*, published in a readily portable format, probably was the single most important law book on the American frontier.

Cooley's Constitutional Limitations

In his famous book, first published in 1871, Thomas Cooley also concluded that the English law of libel was not abolished by the First Amendment, citing as precedent the opinion of Chief Justice Parker of Massachusetts, who, writing in 1825 in *Commonwealth v. Blanding* about his own state constitution's protection of liberty of the press, argued that such liberty should be distinguished from licentiousness and that all that was prohibited by liberty of the

press was previous restraints on publication. Thus, prosecutions for publication of material of a blasphemous, obscene, or a scandalous character were not protected. However, Cooley did review at some length the exceptions to the general common law rule against seditious libel that had in England sustained prosecution of publications that had a tendency to defame the government or to subject public officials or institutions to disrepute.

As to common law prosecutions for seditious libel in federal courts, Cooley argued that they could not be maintained, because those courts had no common law jurisdiction, their only jurisdiction being prescribed by Article III of the U.S. Constitution. Reviewing the Sedition Act of 1798, Cooley argued that it was counterproductive, because he thought all such extreme measures might be among a democratic populace. In the abstract he ventured an exception of the discussion of "constitutional questions"—that they ought to be privileged "if conducted with calmness and temperance"—and that they ought not to be indictable unless beyond the "bounds of fair discussion." But then he noted the indeterminacy of words like calmness and temperance.

As to state prosecutions, if the American states are the receptors and standard bearers of English common law, Cooley urged that prosecution for seditious libel, because those had been brought in England, were "unsuited to the condition and circumstances of the people of America, and therefore ought never to be adopted in the several states." Thus, in considering whether there might be liability for criticizing public officials, Cooley reviewed several cases from the American states. For example, a case from New York upheld such criticism as, "the most sacred and unquestionable rights of free citizens; rights essential to the very existence of a free government; rights necessarily connected with the relations of constituent and representative; the right of petitioning for the redress of grievances and the right of remonstrating to the competent authority against the abuse of official functions." However, when the criticism involved the allegation of the commission of a crime or of corrupt practices, another case from New York held that the proof of justification, chiefly the truth of the allegations, rested on the person making such charges. Finally, when the charges against a public official or candidate concerned only his or her qualifications for office, and did not impugn personal character, there was no basis for recovery of damages. These state cases seem to have offered somewhat greater protection for freedom of speech and press than previously had been the rule under the English common law—because truth was accepted as a defense—as it had not previously been under criminal prosecutions for libel in

England. Under the English rule there arose a common law maxim: “The greater the truth, the greater the libel,” as Cooley reports. Nonetheless, newspapers were presumed to have been guilty of malice when their published words were untrue and damaging to individuals. They had the burden of rebutting that presumption. Still, Cooley reported that publishers could not be liable for exemplary or “vindictive” damages without proof of actual malice or of negligence. Cooley’s first edition was published in 1871. It was not until the case of *New York Times v. Sullivan* (1964) that the U.S. Supreme Court required greater First Amendment protection for the press.

Cooley also reported that several American state constitutions provided that in libel cases the jury had the right to determine both the law and the facts of the case. The limited role of juries in libel cases under the common law of England led to the enactment of what was known as Mr. Fox’s Libel Act in 1792 and, it seems, to the insertion of these provisions in state constitutions. Levy reports that after the Libel Act of 1792, juries were, with few exceptions, as repressive as judges had been. Levy reports that “There are more trials for seditious utterances reported in the *State Trials* for the two years after Fox’s Libel Act than the total number reported for the whole of the eighteenth century before that time.” These included the conviction of Tom Paine for publishing *The Rights of Man*. American state constitutional provisions made truth a defense, but only if published with good motives and justifiable ends. Cooley reported that the meaning of those conditions had not been settled by judicial precedents.

In the views of Levy and other scholars, it was the Sedition Act of 1798 that provoked the Jeffersonian Republicans to support a more libertarian understanding of freedom of speech and press and to repudiate the law of seditious libel, chiefly as their defense to Federalist oppression. Jefferson’s Kentucky Resolutions against the Alien and Sedition Acts were introduced in the Kentucky legislature in 1799. It is clear that the resolutions were motivated by fear of Federalist support for greater power for the national government and by Federalist repression of their enemies. That the supporters of the resolutions also favored state nullification of acts of Congress and possibly the right of secession from the union had even greater interest in the events leading to the Civil War.

Lincoln and the Civil War

Certain steps taken by military authorities during the civil war intruded on freedom of speech. A recent

book, Daniel Farber’s, *Lincoln’s Constitution*, does an excellent job of reviewing the Lincoln years. The most famous of these was *Ex parte Vallandingham* (1864), which involved an order by General Burnside proclaiming that the “habit of declaring sympathies for the enemy will not be allowed in this Department” (Ohio). In 1863, Vallandingham, a former congressman who opposed the war, was arrested for violating Burnside’s order.

Farber reports that Vallandingham had given a speech in which he referred to the war as “wicked, cruel and unnecessary,” and although he said that he would not counsel civil disobedience, he urged his audience to turn Lincoln out of office through use of the ballot box. Although Vallandingham was ordered to be detained for the duration of the war, Lincoln instead ordered that he be expelled into rebel territory. As to the constitutionality of Vallandingham’s treatment, Farber quotes Lincoln’s argument that Vallandingham had been properly prosecuted because he “avows his hostility to the war on the part of the Union; and his arrest was made because he was laboring, with some effect, to prevent the raising of troops; to encourage desertions from the army, and to leave the rebellion without an adequate military force to suppress it.” Whether Lincoln was right or wrong was not determined by the federal courts. The Supreme Court concluded that it had no jurisdiction to review the decisions of the military tribunal that had tried Vallandingham, so it did not rule on the legality of his treatment. Indeed, it ruled on issues like these only after World War I, after the period covered in this article.

One other incident was even more problematic. Lincoln seized the premises of the *New York World*, a newspaper he suspected of being involved in a Confederate conspiracy, and ordered the arrest of those responsible for its publication. This violates even the guarantee affirmed by Blackstone and others as being protected by the common law: the prohibition against previous restraint.

Lincoln’s defense of his actions was extra-legal: that he acted in response to the necessity of preserving the union and consistent with his oath as president to see that the laws are faithfully executed.

In his 1999 book, *All the Laws But One*, Chief Justice William Rehnquist reviewed Lincoln’s conduct as well, but as part of his book’s overall review of civil liberties in wartime. Because Lincoln’s wartime policies were never effectively challenged in the federal courts, Rehnquist infers that Lincoln’s policies became the “benchmark for future wartime presidents. Referring to Vallandingham, Rehnquist repeats Lincoln’s famous question: “Must I shoot a

simple-minded soldier boy who deserts while I must not touch a hair of a wily agitator who induces him to desert?" The Chief Justice's comments on Lincoln's policies focus on the fact that Lincoln, and the military authorities who acted under his executive powers, acted alone, that is, without explicit congressional authorization, yet there was no challenge of his policies as violations of the First Amendment. Although Rehnquist does not adopt the Latin maxim, *Inter arma silent leges* (the law is silent in wartime), he concludes that although the laws may not be silent in time of war, "they will speak with a somewhat different voice." It was not until 1919 that the U.S. Supreme Court seriously attempted to set the tone for that different voice.

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References and Further Reading

- Blackstone, Sir William. *Commentaries on the Laws of England* (1765–1769). Chicago: University of Chicago Press, 1979.
- Chafee, Zechariah, Jr. *Freedom of Speech*. Cambridge, MA: Harvard University Press, 1920.
- . *Freedom of Speech in the United States*. Cambridge, MA: Harvard University Press, 1941.
- Cooley, Thomas M. *Treatise on the Constitutional Limitations Which Rest on the Legislative Powers of the States of the American Union*. Boston: Little Brown, 1890.
- Elkins, Stanley, and Eric McKittrick. *The Age of Federalism: The Early American Republic, 1788–1800*. New York: Oxford University Press, 1993.
- Farber, Daniel. *Lincoln's Constitution*. Chicago: University of Chicago Press, 2003.
- Levy, Leonard W. *Legacy of Suppression: Freedom of Speech and Press in Early American History*. Cambridge: Harvard University Press, 1960.
- Madison, James. Federalist No. 10 in Hamilton, Alexander, John Jay and James Madison, *The Federalist Papers*. New York: The Modern Library Edition, 1937.
- Rehnquist, William. *All the Laws But One: Civil Liberties in Wartime*. New York: Vintage Books, 1998.
- Smith, James Morton. *Freedom's Fetters: The Alien and Sedition Laws and American Civil Liberties*. Ithaca, NY: Cornell University Press, 1956.
- Story, Joseph. *Commentaries on the Constitution of the United States*. (Reprint of the 1833 edition in 3 volumes). New York: Da Capo Press, 1970.
- On the trial of John Peter Zenger: www.law.umkc.edu/faculty/projects/ftrials/zenger/zengeraccount.html (accessed July 26, 2005).

Cases and Statutes Cited

- Abrams v. U.S.*, 250 U.S. 616 (1919)
- Barron v. City of Baltimore*, 7 Pet. 243 (1833)
- Commonwealth v. Bland*, 3 Pick. 304 (Mass. 1825)
- Ex parte Vallandigham*, 68 U.S. 243 (1864)

FREEDOM OF SPEECH AND PRESS: NINETEENTH CENTURY

The nineteenth century is notable for the inactivity of the Supreme Court in matters of freedom of speech and freedom of the press. The century began with these freedoms enumerated in the Bill of Rights, but when interpreted with their common law understandings, proved to offer little protection for individual liberty. A more libertarian and protective notion of freedom of speech and freedom of the press would not emerge in Supreme Court doctrine until the twentieth century. Because provisions of the First Amendment were not incorporated into the Fourteenth Amendment until the twentieth century as well, speech and press were subject to the state-level determination of public order that superseded liberty claims. Given that states and local governments in early America relied on the police power to maintain social order, the criminalization of written material that was offensive or mischievous to public peace was permissible and expected under the common law standards. Nevertheless, the nineteenth century occasioned the development for the construction of modern free speech theory outside the courts. In the interplay that ensued between the exercise of public ordering and the resultant resistance from affected individuals who invoked freedom of speech and freedom of the press in more protective versions, a constitutional discourse did take place in American political culture. In these extrajudicial venues, activists articulated modern conceptions of speech. These included the theory of the marketplace of ideas, which encouraged the proliferation of all ideas in the expectation that truth would emerge; the notion of the liberty of speech and liberty of press as prepolitical rights that are not subject to governmental creation or denial; the notion of freedom of speech and freedom of press as instrumental and necessary for a self-governing people to assess their public officials; and the identification of free speech and a free press as essential to the development of human autonomy. Although these theories did not inform the Court's doctrine in the nineteenth century, the ongoing discourse allowed for a dissemination of these theories in political culture, laying the groundwork for acceptance of the Supreme Court's later modern free speech doctrine.

Earlier Legacies

The century began with the predominance of the common law conception of freedom of speech and freedom of press and the aftermath of the Sedition

Act of 1798. In his exposition of the common law, the eighteenth-century British jurist Sir William Blackstone explained freedom of the press as consisting of the absence of no prior restraint. Liberty of the press meant that the government could not censor material before it was published; once it was printed, however, the writer had to accept the consequences of his words if the government found the expression to be criminal. In this tradition, the Sedition Act was a legitimate exercise of government power. The product of a majority Federalist legislature designed to restrict criticism from the Jeffersonian Republicans in the impending election of 1800, however, this partisan measure invited opposition. Detractors developed arguments against the federal government's restriction of speech and press and articulated positive arguments for the role of freedom of speech and freedom of the press in self-governance by the people. As President, Jefferson pardoned those who had been convicted under the Sedition Act. The outrage against the Sedition Act did not render illegitimate the federal government's criminalization of sedition—it would pass a Sedition Act again in World War I—but it did set the tone of free speech discourse that would occur time and again in the nineteenth century in inviting the dynamic of repression and resistance.

Free Speech Theory outside the Courts

The common law doctrine gave way to more libertarian theories in a pattern of repression and response from radical groups. In stated efforts to maintain public peace and social order, state governments and the federal government passed laws and policies that restricted, silenced, and censored the expressions of groups that threatened the social order, whether they were challenges to slavery, gender norms, or employment law. In response, as affected individuals and groups sought free speech and free press in the public sphere, they mustered arguments that defended their right to freedom of speech and press against government suppression.

As tensions over slavery mounted in the nineteenth century, the federal government sought to avoid deciding on the issue of slavery and to avoid talking about it altogether. Congress, federal agencies, state governments—both north and south—and citizen groups repressed the expression of the ideas that issued from the abolitionist movement. When technological advances allowed for a proliferation of newspapers and pamphlets, abolitionists printed their own literature and attempted to mail it to slave states to reach slaves. The Postmaster General

deferred to slaveholding states that prohibited the dissemination of literature for fear of slave insurrection. The federal government supported these state laws with the Post Office Act of 1836, which held that the post office would refuse to deliver mail that was rendered criminal by state law. In the same year, abolitionist groups inundated Congress with petitions requesting it to address the abolition of slavery in the District of Columbia. The House of Representatives received the petitions but failed to discuss them in the notorious gag rule that was finally ended in 1844 after the persistent efforts of Rep. John Quincy Adams. Abolitionist newspapers were targets of anti-abolitionist mobs. The office of the Cincinnati newspaper, *Philanthropist*, was beset by mobs, and the printer Elijah Lovejoy lost his life defending his presses from mobs in Illinois in November 1837. In response to the multiple forms of suppression of speech, abolitionists responded with defenses of their right to the discussion of slavery in speech and in print. In addition to defending the liberty of slaves, they defended the liberty of abolitionists to express their positions. Abolitionists declared freedom of the speech and the press as natural rights, never relinquished to government, and necessary political rights for participating in self-government. The free exchange of ideas in newspapers, they argued, would allow for a flourishing of positions and the possibility of arriving at the truth. Although public opinion was initially against the abolitionists regarding the issue of slavery, public sentiment turned more sympathetic as the issues of freedom of speech and freedom of press emerged, altering the position of the abolitionist movement in American politics and centrally positioning protective theories of free speech and the press in the public discourse.

The abolitionist movement welcomed women in its ranks, providing them with a forum in the public sphere. Laws denied women the political rights of voting and jury service, whereas social norms dictated that they not speak in public. The practices of the abolitionist movement challenged those norms, with abolitionist meetings seating men and women, blacks and whites, together. Abolitionist women were enlisted as public speakers, violating the stricture against women speaking in public, provoking the charge that women were speaking in front of “promiscuous audiences.” Forerunners included Frances “Fanny” Wright, who conducted a lecture series to much controversy in 1829. Maria Stewart, a freeborn black woman, was a well-known speaker in the early years of the abolitionist movement. In response to a public speaking tour by Sarah Grimke and Angelina Grimke, members of the Massachusetts Congregational clergy publicly expressed their chastisement.

The Grimke sisters responded with the development of a theory that recognized women's right to speech. In her letters written on the equality of the sexes, Sarah Grimke outlined women's equal rights with men by developing a rights theory in which all rights were granted by God. A government could not create or deny those rights that were between a woman and God. In making the case, Grimke asserted a place for women in free speech theory, but she also advanced modern free speech theory in arguing that freedom of speech was prepolitical and could not be denied to a citizen because of her gender. The common law doctrine, with its repression of speech for the purpose of public order, could not come between the natural rights of any individual and the Creator. A less visible development took place in the practices of women who collected signatures for petitions and sewed goods for sale, opportunities for women to redefine their political identity and to claim a space in political life.

The Civil War occasioned the deprivation of civil liberties of the abolitionists' opponents—those northern Democrats who declared themselves to be against the war and President Lincoln's policies. Clement Vallandigham, a former Ohio politician, was arrested in May 1863 for an antiwar speech he delivered at a political rally. A civilian, he was arrested by the United States military and denied habeas corpus, which had been suspended by Lincoln in 1861. Other Democrats were arrested for their dissent, and the military closed or threatened to close newspapers. In response, the Democratic newspaper, *Chicago Times*, claimed the freedom of the press, a right that preceded the Constitution that the federal government had no right to suppress. U.S. soldiers destroyed copies of the *Chicago Times*, an act that was reported by the *New York Tribune* as government suppression of the press. A series of newspaper stories, protest meetings, and party conventions pointed to the recognition that even opponents to abolition deserved the right to speak their opinion. Despite the government's explanation that civil liberties deserved less protection in time of rebellion, members of the public, abolitionists, and Democrats alike acknowledged the importance of the speech, even speech of the opposition, to democratic governing.

Free speech controversies also occupied the social reformers involved in the free love movement, which originated in the utopian communities of the 1820s and 1830s. Free love advocates challenged the conventions of gender norms and marriage. Early leaders Frances Wright and Robert Dale Owen worked for equality within marriage and reform in divorce laws. The later free love activist Victoria Woodhull provoked a free press controversy in 1872 when *Woodhull*

and *Claffin's Weekly* publicized the Beecher-Tilton Scandal, revealing an affair between Reverend Henry Ward Beecher and the wife of his friend, Theodore Tilton. Anthony Comstock had Woodhull arrested for sending obscene material through the mails, but a judge dismissed the charge, noting that the federal statute did not apply to newspapers. The Comstock Act (1873), which suppressed the trade and circulation of obscene literature and items deemed for immoral use, would subsequently target a wide variety of material considered obscene. The Comstock Act included literature about birth control in its prohibitions, a feature that would be fought out in the twentieth century. It was also instrumental in banning books such as *Lysistrata*, *The Canterbury Tales*, *Moll Flanders*, and *The Arabian Nights* from the mails. The National Defense Association, founded in 1878, provided a libertarian defense for those convicted under the Comstock Act, but the surveillance of the Comstock Act would linger into the twentieth century, and the Act remains part of American law. Prosecuted under the Comstock Act, Ezra Heywood, author of *Cupid's Yokes* (1876), claimed freedom of speech to be essential to the development of human autonomy. He sought to associate the earlier abolitionist movement with the free love and anarchy movements of his own time. His prosecution indicates the disconnect between the various radical movements of the nineteenth century. Although the radical social reform and workers' movements further contributed to the development of modern free speech theory, their theories of free speech became less sympathetic in the eyes of the law and the larger public.

Labor unions in the later decades of the nineteenth century exercised their right to speak. At the Haymarket rally in Chicago on May 4, 1886, in the midst of a nationwide strike over the eight-hour workday, various speakers spoke out for workers' rights and against the death of two workers at the hands of police at a strike the previous day. Members of anarchist groups distributed fliers for the rally, and Samuel Fielden, a member of the Socialist Labor Party, issued a speech urging workers to challenge and defy the law. Following his speech, a bomb was thrown into the crowd. Eight police officers would eventually die of wounds resulting from the bomb, and a riot ensued, with attendees killed and injured, as the police dispersed the crowd. Eight men were charged, not with throwing the bomb, but with criminal conspiracy. Four of them were eventually hanged. The Supreme Court foreclosed any question of the free speech rights of the speakers when it dismissed the petition for writ of error in *Spies v. Illinois* (1887).

The disputes over freedom of speech and freedom of the press at the end of the nineteenth century

indicated that the struggle between the government's perceived need for order would continue to conflict with individuals' stated liberty requirements. Although these struggles would continue into the twentieth century, they would, eventually, fall under the purview of the courts. The nineteenth century remains notable for the public participation in defining and defending rights of speech and press.

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References and Further Reading

- Curtis, Michael Kent. *Free Speech: 'The People's Darling Privilege': Struggles for Freedom of Expression in American History*. Durham: Duke, 2000.
- Rabban, David M. *Free Speech in Its Forgotten Years*. New York: Cambridge University Press, 1997.
- Zaeske, Susan. *Signatures of Citizenship: Petitioning, Antislavery, and Women's Political Identity*. Chapel Hill: The University of North Carolina Press, 2003.

Cases and Statutes Cited

Spies v. Illinois 123 U.S. 131 (1887)

See also **Abolitionist Movement; Comstock, Anthony**

was because a corporation rather than an individual or association was involved." Corporate speech in the form of truthful advertising about lawful products/services receives protection today under the commercial speech doctrine.

Corporate speech is now a "dominant discourse," as Herbert Schiller wrote. Corporations control the marketplace of ideas and, some argue, use the protection of free speech to ward off government attempts to regulate the content they propagate.

CLAY CALVERT

References and Further Reading

- Allen, David S. "The First Amendment and the Doctrine of Corporate Personhood: Collapsing the Press-Corporation Distinction." *Journalism* 2 (2001): 255–278.
- Schiller, Herbert I. *Information Inequality: The Deepening Social Crisis in America*. New York: Routledge, 1996.

Cases and Statutes Cited

First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978)

Grosjean v. American Press Co., 297 U.S. 233 (1936)

Santa Clara County v. Southern Pacific Railroad Corp., 118 U.S. 394 (1886)

FREEDOM OF SPEECH EXTENDED TO CORPORATIONS

Since 1791, the First Amendment's text has protected "the press." Today, the press often is owned by large corporations whose speech rights are protected by the First Amendment as if they were people rather than legally created, artificial entities.

The doctrine of corporate personhood dates back to 1886, when the U.S. Supreme Court held in *Santa Clara v. Southern Pacific* that the Fourteenth Amendment equal protection clause protects corporations just as it does persons. In 1936, the Court held in *Grosjean v. American Press Co.* that the corporate press was a "person" within the meaning of the Fourteenth Amendment equal protection and due process clauses and that the tax at issue in the case "abridged the freedom of the press." Then, in 1978, the Court ruled in *First National Bank of Boston v. Bellotti* that corporations possess a First Amendment right of free speech. It wrote that speech about government affairs is "indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual." It added that "[i]n cases where corporate speech has been denied the shelter of the First Amendment, there is no suggestion that the reason

FREEDOM OF SPEECH IN BROADCASTING

Broadcasters enjoy free speech rights under the First Amendment, but not to the same degree as their colleagues in the print or online media.

One rationale for the differential treatment is that broadcasting—unlike other media in the United States—is licensed by the federal government. When Congress first addressed the licensing issue in the 1920s, it was decided that the government should not own the broadcast system in this country but instead should regulate it to ensure that broadcasters operate in the "public interest, convenience, and necessity."

At that time, broadcasters asked the government to intervene because the spectrum of available frequencies was limited, and amateurs too often usurped the airwaves space others had occupied. This scarcity of available spectrum space was another reason for government to step in and create some system of order. As the industry developed throughout the twentieth century, however, broadcasters grew weary of the government's interference in their operations. In the 1980s, Congress and the courts relaxed a number of the programming requirements on broadcasters, but some controversial content restrictions remain.

Broadcasters, for instance, may not air *indecent* material between 6:00 a.m. and 10:00 p.m. The United States Supreme Court has upheld that rule as it affects broadcasting, but has struck down a similar restriction as applied to the Internet. Print media face no such restrictions.

Likewise, in the political arena, broadcasters are required to provide equal opportunities for candidates to appear on the air. Print and online media have no similar space requirements.

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References and Further Reading

Carter, T. Barton, *et al. The First Amendment and the Fifth Estate*. New York: Foundation Press, 1999.

Cases and Statutes Cited

Federal Communications Commission v. Pacifica, 438 U.S. 726 (1978)

Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241 (1974)

Reno v. ACLU, 521 U.S. 844 (1997)

Communications Act of 1934, 47 U.S.C. § 315(a)

Radio Act of 1927, 44 Stat. 1162

See also Broadcast Regulation; Cameras in the Courtroom; Communications Decency Act (1996); Fairness Doctrine; Federal Communications Commission; Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969); *Reno v. ACLU*, 521 U.S. 844 (1997)

FREEDOM OF SPEECH: MODERN PERIOD (1917–PRESENT)

Introduction

The U.S. Supreme Court did not decide a case presenting a significant First Amendment free speech question until 1919. Since that time, however, the Court has decided a substantial number of free speech cases and in the process has developed a vast and complex array of legal doctrine that delineates the contours and dimensions of expression protected by the First Amendment. But not all of this doctrine is of equal importance. Consequently, the most prominent and significant doctrinal developments contained in the Court's post-1919 free speech decisions will be analyzed here.

In particular, the essay examines case law in which the Supreme Court developed doctrines that allow the government, in limited circumstances, to use the

criminal law to punish individuals for engaging in certain types of expression—especially that which is harshly critical of the current government and its policies. How protective the law is toward such speech is, in many respects, an accurate barometer of how protective the law is of expression in general. As Farber (2003, p. 57) explains: “[e]ver since governments have existed, they have used force to suppress their opponents and quell criticism. Tolerance for enemies of the established order, then, is the acid test for free speech.”

In addition, this essay examines how the Court has developed what might be labeled a neutrality theory of the First Amendment—a theory premised on the idea that a democratic government should be significantly restricted from favoring particular ideas or viewpoints. The neutrality theory posits that constitutional democracies governed by free speech principles should be limited from coercing individuals into subscribing to government-endorsed ideas or views, as well as from enacting policies that systematically favor the private expression of such ideas and views. Nearly all aspects of the Court's current free speech doctrine—particularly that pertaining to time, place, and manner regulations—have been strongly influenced by the Court's deep aversion to content- and viewpoint-biased policies. Indeed, one could easily argue that content and viewpoint neutrality theory has become the central cog in the modern Supreme Court's understanding of the First Amendment—and that Amendment's place in the broader American constitutional regime.

Expression and the Incitement of Criminal Activity

The World War I Era

In the wake of WWI, the U.S. Supreme Court heard several cases involving First Amendment free speech issues. Not surprisingly, these cases dealt with left-wing, anti-war activists who had criticized foreign and defense policies of the U.S. government during WW I. In the first (and most famous) of these cases, *Schenck v. United States* (1919), the Court addressed whether the free speech clause prohibited the government from prosecuting the expressive activities of anti-war protesters pursuant to the Espionage Act of 1917. Charles Schenck had been charged with “attempting to cause insubordination . . . in the military and naval forces of the United States” (ibid) by mailing circulars critical of the draft to men who recently

had been drafted. The document, which drew on the Thirteenth Amendment's prohibition against involuntary servitude, asserted that a conscript was "little better than a convict" and constituted "despotism in its worst form and [was] a monstrous wrong against humanity in the interest of Wall Street's chosen few" (ibid). However, although the document asked its recipients to "not submit to intimidation" and to "assert [their] rights," it did not specifically ask anyone to act violently or to violate the law (ibid).

A unanimous Supreme Court held, in an opinion written by Justice Oliver Wendell Holmes, that Schenck's conviction did not violate the First Amendment. Although the First Amendment does more than simply prohibit prior restraints on private speech, the Court concluded that it does not provide absolute freedom to expressive activity. Instead, the Court held that the government could regulate speech that presents a "clear and present danger" of bringing "about the substantive evils that Congress has a right to prevent" (ibid). Justice Holmes, having had significant experience with the criminal law as a judge on the Massachusetts Supreme Judicial Court, compared Schenck's expressive activities to the law of criminal attempts. He explained that the government has a right to intervene and punish individuals for expressive activities if those activities are dangerously close to eliciting illegal activities (such as refusing to report for duty when drafted). Justice Holmes noted that it "is a question of proximity and degree" (ibid) as to when the government can intervene and punish individuals on the grounds that they are inciting criminal activity. Moreover, whether the government's intervention is constitutional will depend on the context in which the expression occurs. As Justice Holmes explained, "the character of every act depends upon the circumstances in which it is done," and that Schenck's expression would have been protected by the First Amendment "in many places and in ordinary times" (ibid).

One week after the *Schenck* decision was announced, the Court handed down decisions in *Frohwerk v. United States* and *Debs v. United States*, both of which also involved prosecutions under the Espionage Act of 1917. In *Frohwerk*, a unanimous Court upheld the defendant's conviction of conspiring to disrupt the war effort by disseminating material critical of the national government's draft policy in a Missouri-based German language newspaper. Similarly, a unanimous Court upheld the conviction of Eugene Debs on the grounds that a speech he had delivered to the 1918 state convention of the Ohio Socialist Party constituted a clear and present danger to the nation's war effort. Justice Holmes approvingly explained in *Debs* that the trial judge had instructed

the jury to convict Debs only if "the words used had as their natural tendency and reasonably probable effect to obstruct the recruiting service...and unless the defendant had the specific intent to do so in his mind." Although the Court interpreted the statute to impose a *scienter* requirement, this and later cases often assumed that such requirements were satisfied if the speech in question had a reasonable tendency to produce the substantive harm that the government wanted to prevent.

In both *Frohwerk* and *Debs* the Court concluded that the government had satisfied the requirements of the clear and present danger test. However, as the quote from Justice Holmes' *Debs* opinion illustrates, it is certainly questionable whether the Court was sufficiently demanding in its evaluation of the nexus between the speech act for which the defendants were convicted and the illegal action (that is, substantive harm) that the government was seeking to prevent. For example, Justice Holmes indicates that the nexus was satisfied in *Frohwerk* because "it is impossible to say that it might not have been found that the circulation of the paper was in quarters where a little breath would be enough to kindle a flame." Quite simply, this language does not have much in common with the notion that the expression must present a "clear and present danger" of producing illegal activities.

It was not until the Court decided *Abrams v. United States* (1919) that we find a member of the Court casting a dissenting vote in favor of free speech. In *Abrams*, seven members of the Court cited *Schenck* and its progeny and concluded that Abrams could be punished under the amended Espionage Act of 1918. Abrams had distributed circulars on the streets of New York City and was charged with acting to "incite, provoke, and encourage resistance to the United States' during World War I, and of conspiring 'to urge, incite, and advocate curtailment of production [of] ordnance and ammunition, necessary [to] the prosecution of the war'" (Sullivan and Gunther, 2003, p. 19). The *Abrams* majority concluded that Abrams intended to disrupt the U.S. military forces because that would be the natural tendency of his expression, and that "[m]en must be held to have intended, and to be accountable for, the effects which their acts were likely to produce." So much for the idea that a *scienter* requirement would be a major impediment to government prosecutions of speech acts.

The dissenting votes in *Abrams* were cast by Justices Brandeis and Holmes. In this instance, we see the justices heretofore most responsible for the development of the clear and present danger test conclude that the majority erred in its application. First, Holmes and Brandeis argued that the majority's conception of what constitutes the requisite level of intent

under the statute was not sufficiently demanding. Instead, Holmes argued that intent to disrupt the war effort by curtailing the production of munitions is satisfied only if the “aim to produce it is the proximate motive of the specific [expressive] act.” Second, the dissenters argued that the government could prosecute only those expressive acts that “present danger of immediate evil or an intent to bring it about,” neither of which, they believed, was present in this case. As Holmes explains, “Nobody can suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger that its opinions would hinder the success of the government arms or have any appreciable tendency to do so” (*Abrams*). Some scholars argue that Holmes modified his views about the requirements of the clear and present danger test—by requiring that the danger be immediately and dangerously proximate to the substantive harm targeted by the statute—between the time the Court decided *Schenck*, *Frohwerk*, and *Debs* and the time it decided *Abrams* (Sullivan and Gunther, 2003, p. 23–24).

As the Supreme Court was developing the clear and present danger test, lower federal court judge Learned Hand was developing his own test for when the government could prosecute individuals for inciting illegal activity. According to Hand, such convictions could occur only in those instances when the speaker “directly advocated” illegal activity (*Masses Publishing Co. v. Patten*). Hand rejected contextual tests that allowed the government to regulate expression that had a tendency to incite others to engage in illegal activity. Hand did not think that the Justice Holmes’s *Abrams* version of the clear and present danger test provided adequate protection for expression. Hand feared that contextual tests of the ilk used in *Schenck* and *Abrams* were too easily manipulated by prosecutors and judges, especially during periods of social and political unrest. Instead, Hand believed that direct advocacy of law violation was the appropriate standard. Hand explained that as long as “one stops short of urging upon others that it is their duty or their interest to resist the law, [then] it seems to me one should not be held to have attempted to cause its violation” (*Masses*). This test, which came to be known as “Hand’s ‘incitement’ approach” (Sullivan and Gunther, 2003, p. 28), was not used by the Supreme Court until 1969, when the Court incorporated it into the modern test for incitement of illegal activity.

The Red Scare Era

During the red scare period of U.S. history, the Court decided several additional cases involving speech and

criminal attempts and conspiracies. The most famous of these is *Gitlow v. New York* (1925). Benjamin Gitlow, who was involved with the publication of *The Left Wing Manifesto*, was prosecuted for violating a New York statute that, in part, authorized the criminal punishment of one who “advises or teaches the duty necessity, or propriety of overthrowing or overturning organized government by force or violence” (Sullivan and Gunther, 2003, p. 29). Although the majority opinion explained that “[t]here was no evidence of any effect resulting from the publication and circulation of the *Manifesto*” (ibid), the Court nevertheless upheld Gitlow’s conviction. The Court noted that this case was different from the 1919 free speech cases, because Gitlow was charged with violating a state law that expressly forbade the use of certain language and the expression of certain ideas. In contrast, the 1919 cases involved prosecutions under statutes that only prohibited certain actions (for example, disrupting the war effort or the production of munitions); unlike the law involved in *Gitlow*, the 1919 statutes did not codify certain language or ideas that could not be articulated. The defendants in the 1919 cases were prosecuted because their expression was deemed to constitute an attempt to complete one of the acts prohibited by the criminal law.

As a result of this difference, the Court argued that it should be deferential toward the state legislature and its decision to statutorily proscribe certain types of expression. Consequently, the *Gitlow* majority rejected the notion that the clear and present danger test was applicable, and instead developed what came to be known as the “bad tendency test.” In language quite similar to that used by Justice Holmes in *Debs*, the majority explained that a “single revolutionary spark may kindle a fire that, smoldering for a time, may burst into a sweeping and destructive conflagration,” and that the government can legitimately punish the defendant’s “specific utterance...if its natural tendency and probable effect was to bring about the substantive evil which the legislative body might prevent” (*Gitlow*). The *Gitlow* majority did not require the government to provide evidence demonstrating that the *Left Wing Manifesto* caused anyone to take steps toward overthrowing the government by force and violence or that the publication created a clear and present danger of inciting individuals to take such steps. The fact that Gitlow had engaged in expression that the state legislature considered dangerous was enough to sustain his conviction. Indeed, given Gitlow’s expression, his conviction probably would have been upheld by the Court if it had used Judge Learned Hand’s direct advocacy test—a test that Hand thought was more protective of speech than the clear and present danger test. In any event, *Gitlow*

did expand speech protections in the United States by holding—for the first time—that free speech was a fundamental right entitled to protection from state governments by the Fourteenth Amendment.

In their dissenting opinion in *Gitlow*, as well as their concurring opinion in *Whitney v. California* (a 1927 case in which the Court upheld convictions pursuant to a California statute similar to the one involved in *Gitlow*), Justices Holmes and Brandeis argued that the Court should apply the clear and present danger test in all free speech cases involving the incitement of criminal activity. The two justices, who had worked since *Abrams* to strengthen the speech protective capacities of the clear and present danger test, believed that only that speech that had a high probability (clear) of producing imminent (present) violations of serious laws (danger) could be subjected to criminal punishment by the government. In his concurring opinion in *Whitney*, Justice Brandeis explained that “[w]henver the fundamental rights of free speech and assembly are alleged to have been invaded, it must remain open to a defendant to present the issue whether there actually did exist at the time a clear danger; whether the danger, if any, was imminent; and whether the evil apprehended was one so substantial as to justify the stringent restriction interposed by the legislature.”

The World War II and McCarthy Era

Despite the economic and military crises faced by the United States in the two decades after *Gitlow*, the Supreme Court became, somewhat surprisingly, more protective of free speech. For example, in *De Jonge v. Oregon* (1937) and *Herdon v. Lowry* (1937) the Court reversed, on free speech grounds, convictions under state laws prohibiting individuals from organizing to incite or attempting to incite others to violate the law (Sullivan and Gunther, 2003, p. 39). In those cases, as well as others (see *Thornhill v. Alabama* and *Cantwell v. Connecticut*), it seemed that the Court was using a test similar to the clear and present danger test. What is not clear is whether this shift toward speech protection was because the ideological predispositions of the justices toward free speech issues were becoming more liberal or whether the Court was beginning to see its role as one revolving around the protection of rights essential for democratic government (see footnote four, *Carolene Products Co. v. United States*). Whichever the case, free speech reached a new high water mark in the late 1930s and throughout the 1940s.

The case that best captures this libertarian perspective toward freedom of speech came near the end of

this period in *Terminiello v. Chicago* (1949). Father Arthur Terminiello, a Catholic priest who one might characterize as a Christian nationalist, was charged by municipal authorities for disturbing the peace as a result of a speech he delivered to a capacity crowd of 800 sympathizers in a Chicago auditorium. Terminiello’s speech was filled with negative references to racial, ethnic, religious, and political groups, and for these and other reasons relating to his views, a hostile crowd of more than 1,000 people had convened in the streets outside the auditorium. The crowd, which Terminiello on several occasions disparaged in his speech, soon grew restive and began throwing stones, bricks, and stink bombs. The police feared that they were losing control of the situation and arrested Terminiello for inciting the crowd to act disorderly.

Over four dissenting votes—and a passionate dissenting opinion from Justice Jackson—five members of the Supreme Court overturned Terminiello’s conviction. Writing for the majority, Justice Douglas argued that speech is “protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.” Given the circumstances of this case, especially the fact that violent acts had already begun to occur—seemingly as a result of Terminiello’s speech—the majority’s conclusion demonstrates that its members subscribed to something akin to Justice Holmes and Brandeis’s *Abrams-Gitlow-Whitney* conceptualization of the clear and present danger test. Thus, entering the 1950s, it seemed that the Court was poised to be very protective of free speech claims.

But that was not to be. As a result of rapid turnover in the Court’s membership, and the rise of Joseph McCarthy’s efforts to expose alleged Communist sympathizers within the United States, the Court became much less inclined to question government regulation of expressive activities. For example, in 1952, the Court upheld a disorderly conduct conviction for expressive behavior that, compared with the circumstances in *Terminiello*, seemed quite tame (*Feiner v. New York*, 1951). Soon thereafter, the Court indicated that it was in no mood to protect individuals who were critical of the government and who were expressly advocating that it be violently overthrown and replaced with a socialist state.

The preeminent case of this era is *Dennis v. United States* (1952). In *Dennis*, the Court upheld the *Smith Act* prosecution of Eugene Dennis and other upper-echelon members of the U.S. Communist Party. The *Smith Act*, passed by Congress in 1940, was similar to the New York statute upheld by the Court in *Gitlow*. However, the one distinction was that the *Smith Act* made it “unlawful for any person to attempt to

commit, or to *conspire* to” advocate—or organize for the purpose of advocating—the overthrow of the U.S. government by force and violence (*Dennis*). Because criminal attempts and conspiracies are incomplete offenses in which the substantive harm has not yet occurred, this is not a trivial distinction. Indeed, as Justice Black noted in his *Dennis* dissent:

At the outset I want to emphasize what the crime involved in this case is, and what it is not. These petitioners were not charged with an attempt to overthrow the Government. They were not charged with overt acts of any kind designed to overthrow the Government. They were not even charged with saying anything or writing anything designed to overthrow the Government. The charge was that they agreed to assemble and to talk and publish certain ideas at a later date: The indictment is that they conspired to organize the Communist Party and to use speech or newspapers and other publications in the future to teach and advocate the forcible overthrow of the Government. No matter how it is worded, this is a virulent form of prior censorship of speech and press, which I believe the First Amendment forbids.

Unfortunately for Black, six members of the Court did not see it this way.

Instead, the Court upheld the *Smith Act* prosecutions by purportedly relying on the clear and present danger test. In reality, however, the Court used on a watered-down version of the clear and present danger test that has subsequently become known as the “clear and probable danger” test. This test, first articulated by Judge Learned Hand when the *Dennis* case was before the Court of Appeals for the Second Circuit, posited that the government could punish conspiracies that organize to advocate the violent overthrow of the government if “the gravity of the ‘evil,’ discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger” (183 F.2d at 212). Hand’s clear and probable danger test is, like the Holmes/Brandeis clear and present danger test, one that is based on context. However, Judge Hand’s clear and probable danger test allows judges and prosecutors to balance—or trade-off—the serious danger, high probability, and imminence prongs of the clear and present danger test. In other words, if the danger is severe enough (for example, overthrow of civil government by force), then it does not need to be something that is likely to imminently occur. Similarly, if the danger that the government wants to avoid is likely to imminently occur, then the danger does not need to be serious. In contrast, Holmes and Brandeis argued that the government had to meet each element (severity, probability, imminence) of the clear and present danger test in their strictest forms.

From the 1960s to the Present

Beginning in the late 1950s and throughout the 1960s, the Court became less inclined to uphold convictions of individuals either because they advocated (or were organizing to advocate) the overthrow of the government by force and violence or because they expressed support for violating the criminal law (see, Sullivan and Gunther, 2003, pp. 47–50). But during this period the Court was unable (or unwilling) to articulate a test to govern First Amendment challenges to such prosecutions. In most cases it engaged in a form of ad hoc balancing, whereby it examined the government’s interests vis-à-vis the speaker’s interests and ruled in favor of that party whose interests were deemed greater.

This situation came to an end, however, when the Court announced in *Brandenburg v. Ohio* (1969) that the government could not punish individuals for speech advocating illegal activity “except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.” Some have argued that this test combines elements of the Holmes/Brandeis clear and present danger test with Hand’s direct advocacy test (Sullivan and Gunther, 2003). The test requires that individuals advocate law violation (direct advocacy) and that the danger be probable/likely and imminent (the latter two being two of the three elements of the clear and present danger test). It is unclear, however, whether any advocacy of law violation qualifies, or whether the law violation must be one that poses a serious and substantial danger (which was deemed necessary under the Holmes/Brandeis conception of the clear and present danger test). Although the *Brandenburg* test has been used by the Court for the past thirty-six years in incitement cases, the number of such cases has been sparse. As a result, it is not fully clear how the current Court conceptualizes the test, how protective it is of free speech, or how firmly entrenched it is in First Amendment law.

Freedom of Expression, Democratic Theory, and Government Neutrality

The Relation of Free Speech to Democratic Government

Another crucial doctrinal development since 1919 is the Court’s conclusion that the First Amendment’s free speech clause imposes content and viewpoint neutrality requirements on the government. In a plethora of cases decided since the mid-twentieth

century, the Court has argued that free speech is integrally related to democratic government. For democracy to work correctly—for the citizenry to engage in effective self-rule—the people must be afforded ample freedom to discuss the merits and demerits of all types of political, social, and economic ideas. In most instances, public policies will be tailored around those ideas that, in the end, are endorsed by the largest segment of the population. Democracy does not mean much, and probably does not truly exist, if the citizenry is not allowed to debate ideas and then enact policies that are consistent with the views garnering majority support. Of course, democracy does not mean the majority should be allowed to ensconce its views into public policy in all instances, but it does mean that in most situations there is a presumption in favor of allowing such a result. To be sure, democracy is often defined as majority rule with minority rights. But clearly there must be significant latitude for the former if a regime is going to be considered democratic.

However, allowing free and fair debate often comes hard to those in power. After all, those in power typically do not want to lose their grip on the levers of government control. Therefore, dominant groups—and their representatives in government—often have an incentive to maintain their authority by preventing others from criticizing their policies, actions, and agendas. Indeed, these tendencies are what led to the long line of cases pertaining to the incitement of illegal activity that was discussed earlier. Current laws normally represent the choices of those in power, and it is a potential threat to their status if outsiders are allowed to advocate that those laws be intentionally violated.

But there are more subtle techniques available to those in power to prolong their control. More subtle methods, that is, than crushing those who advocate illegal activity. For example, the dominant governing coalition could decide to enact policies that directly promote the ideological worldview and political orthodoxy to which it subscribes. These policies, if successful, will persuade members of the citizenry—perhaps even those who were initially not supportive of the dominant coalition's ideology—that the current regime's ideology is correct and (as a corollary) that its representatives in government ought to be retained at the next election. In *West Virginia State Board of Education v. Barnette* (1943), a majority of the Supreme Court argued that the state of West Virginia was engaging in just such an effort and that it had contravened core principles underlying the First Amendment.

The West Virginia state school board had enacted a policy requiring students, at the commencement of

each day's public school classes, to rise and recite the pledge of allegiance while offering a stiff-arm salute to the American flag. Students who refused to engage in this activity could be suspended from school, and their parents could be subjected to fines. In *Barnette*, the parents of two school children challenged the state's pledge policy by arguing that it violated the tenets of their religious beliefs—and thus the First Amendment's free exercise clause. However, rather than relying on the free exercise clause, the Supreme Court—which at the time was a staunch supporter of the First Amendment—concluded that the state's policy violated the free speech interests of the school children.

In a stirring opinion for the Court, Justice Robert Jackson argued that the free speech clause protects a person's right to both speak and to remain silent. The government, according to Jackson, cannot force individuals to articulate support for or subscribe to any particular beliefs, ideologies, or orthodoxies. This principle, Jackson explained, is one of the primary differences between democratic and totalitarian governments, and that the latter have frequently resorted to extreme measures in their efforts to induce political consent. In his *Barnette* opinion Justice Jackson wrote that “[t]hose who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.” In subsequent decisions, the Supreme Court has affirmed its commitment to prevent the government, in most circumstances, from forcing individuals to express their support for particular political, social, religious, or economic viewpoints (see *Wooley v. Maynard*, 1977, where the Court upheld the right of a New Hampshire resident to cover the motto “Live Free or Die” on his vehicle's license plate).

First Amendment First Principles: Content and Viewpoint Neutrality

One can argue that the *Barnette* case constitutes the earliest doctrinal foundations for the Supreme Court's conclusion that the First Amendment requires government regulations touching on private expression be content and viewpoint neutral. What the Court feared in *Barnette*, and what it fears in the presence of any content- and viewpoint-biased regulations of expression, is the possibility that the government is attempting to tilt the free speech playing field so that the government's preferred views will “win” the battle in the marketplace of ideas. If such behavior is allowed, then the ruling majority coalition can tailor government policies to inculcate

its ideological worldview among members of the public—thus orchestrating its continued political support and, ultimately, perpetuating its rule of the regime. Such machinations smell more of fascism than democracy.

To challenge such efforts, the Supreme Court has developed the content and viewpoint neutrality doctrines. The former looks unfavorably on speech regulations that limit the types of subjects and topics that can be discussed in a particular setting. For example, in *R.A.V. v. City of St. Paul* (1992), the Supreme Court concluded that a St. Paul, Minnesota, hate speech ordinance was unconstitutional, because it was content biased. The *R.A.V.* majority noted that the ordinance only prohibited hate speech pertaining to “race, color, creed, religion, or gender.” The law was content biased because it did not prohibit all types of hate speech. However, during that same Term the Court upheld a law that the each justice agreed was content biased. The policy being challenged in *Burson v. Freeman* (1992) prohibited individuals from soliciting votes or displaying and distributing campaign paraphernalia within 100 feet of a polling place entrance. The law was upheld because the Court concluded that the state had a compelling state interest in promoting the integrity, fairness, and accuracy of elections, as well as in protecting the citizen’s fundamental right to vote. Moreover, the policy was narrowly tailored to further those objectives.

Viewpoint neutrality doctrine is concerned with regulations that favor particular viewpoints about a particular subject or topic. For example, a regulation that allowed supporters (but not opponents) of the nation’s defense policy speak in a public park would be a prime example of a viewpoint-biased law. Similarly, in 1989 and 1990, the Supreme Court concluded that state and federal flag desecration laws were viewpoint biased—and thus unconstitutional (see *Texas v. Johnson*, 1989 and *United States v. Eichman*, 1990). The Court argued that the only government interests being furthered by these laws were those pertaining to the sanctity and image of the flag and the government’s desire to prohibit its disrespectful treatment. After all, neither law punished those who burned a flag in a respectful and dignified manner (for example, to dispose of a soiled flag). Punishment only resulted if the flag’s desecration was disrespectful and likely to anger those who witnessed the event. Clearly, the application of the laws hinged on the views being conveyed by the person burning the flag.

The Supreme Court considers problematic both content- and viewpoint-biased regulation of expressive

activities, and the presence of either typically results in the policy being declared unconstitutional. However, the justices consider viewpoint bias the worst of the two, because in that instance the government is openly seeking to promote one side of a political debate. Consequently, as of 2005, the Supreme Court has never upheld a viewpoint-biased regulation of expressive activity. In fact, even in those instances when the government is regulating a form of expression not considered entitled to significant First Amendment protection (for example, obscenity, libel, fighting words), or when it enacts an otherwise legitimate time, place, and manner regulation (for example, constraints on the use of sound trucks), the government will normally encounter insurmountable First Amendment obstacles if it has created a content- or viewpoint-biased regulatory scheme. The content and viewpoint neutrality doctrines, along with the Court’s larger effort to curb government attempts to manipulate the chorus of voices in the marketplace of ideas, represent bedrock principles of the Supreme Court’s interpretation of the First Amendment in the modern era.

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References and Further Reading

- Farber, Daniel A. *The First Amendment*. 2nd Ed. New York: Foundation Press, 2003.
 Sullivan, Kathleen, and Gerald Gunther. *First Amendment Law*. 2nd Ed. New York: Foundation Press, 2003.

Cases and Statutes Cited

- Abrams v. United States* 250 U.S. 616 (1919)
Brandenburg v. Ohio 395 U.S. 444 (1969)
Burson v. Freeman 504 U.S. 191 (1992)
Cantwell v. Connecticut 310 U.S. 296 (1940)
Carolene Products Co. v. United States 304 U.S. 144 (1937)
De Jonge v. Oregon 299 U.S. 353 (1937)
Debs v. United States 249 U.S. 211 (1919)
Dennis v. United States 341 U.S. 494 (1951)
Feiner v. New York 340 U.S. 315 (1951)
Frohwerk v. United States 249 U.S. 204 (1919)
Gitlow v. New York 268 U.S. 652 (1925)
Herdon v. Lowry 301 U.S. 242 (1937)
Masses Publishing Co. v. Patten 244 Fed. 535 (S.D.N.Y., 1917)
R.A.V. v. City of St. Paul 505 U.S. 377 (1992)
Schenck v. United States 249 U.S. 47 (1919)
Terminiello v. Chicago 337 U.S. 1 (1949)
Texas v. Johnson 491 U.S. 397 (1989)
Thornhill v. Alabama 310 U.S. 88 (1940)
United States v. Eichman 496 U.S. 310 (1990)
West Virginia State Board of Education v. Barnette 319 U.S. 624 (1943)
Whitney v. California 274 U.S. 357 (1927)
Wooley v. Maynard 430 U.S. 705 (1977)

FREEDOM OF THE PRESS: MODERN PERIOD (1917–PRESENT)

Freedom of the press is a work in progress. The U.S. Constitution's First Amendment provides that the U.S. Congress shall make no law abridging freedom of the press. State constitutions predating the adoption of the Bill of Rights in 1791 provide similar protection. Nevertheless, press freedom had limited scope and meaning when the United States entered World War I in 1917. At the time, courts and the vast majority of legal scholars held the view that the press clause protected only against government censorship, or prior restraint. Government, however, could rightfully punish after publication, as English jurist Sir William Blackstone (1723–1780) noted in his influential *Commentaries on the Laws of England*.

In June 1917, Congress passed the Espionage Act. The Act targeted, among other activities, the mailing of materials advocating treason, insurrection, or resistance to U.S. laws. The following year, Congress amended it with the Sedition Act of 1918. The Sedition Act criminalized statements intended to provoke or encourage resistance to the war effort. Many states passed similar statutes, resulting in more than 2,000 prosecutions and more than 1,000 convictions under federal and state laws. The repressive laws were part of the overall government attack on civil liberties during our nation's first red scare (1917–1920).

Sometimes, government repression breeds unanticipated results. Because several defendants appealed their convictions to the U.S. Supreme Court, some of the justices—notably Oliver Wendell Holmes, Jr. (1841–1935) and Louis D. Brandeis (1856–1941)—reexamined their theories about dissent and national security. (Similarly, during this era, which included the Palmer Raids, the American Civil Liberties Union was formed.)

But post-WWI defendants did not benefit from the justices' emerging theories on free press and free speech. The Court upheld the convictions of defendants in cases involving leafleting and periodicals: *Schenck v. U. S.*, 249 U.S. 47 (1919), *Frohwerk v. U. S.*, 249 U.S. 204 (1919), *Abrams v. U.S.*, 250 U.S. 616 (1919), and *Gitlow v. New York*, 268 U.S. 652 (1925). (At the same time, in *Schenck*, Holmes, writing for a unanimous court, said a person might be convicted of a conspiracy to obstruct recruiting by mere words of persuasion. He said, “free speech would not protect a man in falsely shouting fire in a theater and causing a panic,” a now well-worn phrase. He also used the phrase clear and present danger, an expression that has found a place in popular culture.

Holmes also delivered the opinion in *Frohwerk v. U.S.* He acknowledged that the circulation of the

German-language newspaper in question was too small to have an impact on recruiting. Nevertheless, he said, the paper posed a threat to national security because it “represented a little breath that could ‘kindle a flame’ in the ‘tinder box’ of the Germany community...”

A Clear and Present Danger

That summer, intellectuals whom Holmes respected took issue with his view of the appropriate limits of government authority to punish subversive advocacy. Law professors Zechariah Chafee (1885–1957) at Harvard and Ernst Freund (1864–1932) at the University of Chicago and political scientist Harold Laski (1893–1950), also at Harvard, sharply criticized Holmes' reasoning in *Schenck* and *Frohwerk* in articles published in the *New Republic* and *Harvard Law Review*, letters and in conversation. Laski, Chafee, and Holmes met for tea and discussion on July 23. It is not known what they said, but Holmes' First Amendment position took a libertarian turn that October in *Abrams v. United States*. Seven justices upheld the convictions of Russian immigrant Jacob Abrams and others for circulating leaflets urging opposition to the war. Their writings posed a clear and present danger, the majority found.

But Holmes and Brandeis dissented, setting the Court on a decades-long search to establish a test to judge the point at which inflammatory words posed a danger to national security and community safety sufficient to justify state punishment. In *Abrams*, Holmes contended that the First Amendment protected the expression of political opinions “unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.” Holmes also first articulated what he said was a core value of the First Amendment, the marketplace theory of ideas, “that the best test of truth is the power of the thought to get itself accepted in the competition of the market...” The free expression theory undergirded much of the Court's free press-free speech rulings in the 1960s and 1970s and has been invoked by proponents of broadcast deregulation.

Congress repealed parts of the espionage and sedition laws in 1921. Much of the Espionage Act remains in Title 18 U.S.C. 793, 794. (Fifty years later, the federal government unsuccessfully argued before the Court that the *New York Times* violated Title 18 U.S.C. 793, 794 by publishing the Pentagon Papers in *New York Times Co. v. United States*, 403 U.S. 713 (1971).

In the 1930s, a majority of the Court clung to the bad tendency test. By the early 1950s, however, a majority applied various incarnations of the clear and present danger test. Finally, in *Brandenburg v. Ohio*, 395 U.S. 444 (1969), the justices developed a doctrine combining Holmes and Brandeis's immediacy component with a requirement that expression must incite unlawful action to justify government restriction. The serious and imminent threat test is substantially more protective of subversive expression than any of the clear and present danger variants; some scholars contend it is yet another variation of the clear and present danger test. In the first decade of the twenty-first century, the *Brandenburg* serious and imminent doctrine remains the test for determining the constitutional limits on laws that punish political speech.

For the most part, the *Brandenburg* test also has protected the entertainment media against liability in incitement lawsuits—wrongful death and other kinds of negligence actions seeking monetary damages. Starting in the mid-1970s, such incitement lawsuits contended, for example, that disk jockey banter, sexually and violently explicit Rock lyrics, on-air stunts, and graphically vicious movie scenes instructed, urged, or inspired a family member to commit crimes leading toward death. The overwhelming number of the suits failed because appeals courts required that plaintiffs show specific intent to promote criminal activity and a direct causal link between exposure to words and resulting deaths.

But the U.S. Circuit Court of Appeals for the Eleventh Circuit allowed a jury award to stand against a magazine publisher in *Braun v. Soldier of Fortune Magazine*, 968 F.2d 1110 (1992). The appeals court ruled that an advertisement placed in *Soldier of Fortune Magazine* by a gun-for-hire offering his services to kidnap and murder was an obvious offer of criminal activity. The Court declined to review the ruling. In *Rice v. Paladin*, 128 F.3d 233 (4th Circuit 1997), cert. denied, 523 U.S. 1074 (1998), the U.S. Circuit Court of Appeals for the Fourth Circuit reversed a grant of summary judgment favoring a book publisher and sent an aiding and abetting lawsuit back to trial. The appeals court said the publisher had stipulated that he had intended that “the book would immediately be used by criminals and would-be criminals in the solicitation, planning, and commission of murder...” The Court declined to hear the publisher's appeal.

Prior Restraint

Government may impose prior restraints under certain conditions. In *Near v. Minnesota*, 283 U.S.

697 (1931), the leading Court ruling on prior restraint, Chief Justice Charles Evans Hughes held that prior restraints are legitimate to prevent the obstruction of military recruiting, the dissemination of troop locations, transport dates and numbers, incitements of violence, and publication of obscenity. In the Pentagon Papers case, the *Near* doctrine protected the right of the *New York Times* to continue to publish classified government papers. Journalists and civil libertarians hailed *Near* and the *Pentagon Papers* rulings as major victories for press freedom.

In *Snepp v. U.S.*, 444 U.S. 507 (1980), the Court ruled that nondisclosure agreements requiring former CIA agents from publishing without government approval were legitimate prior restraints. The Court also ruled that public school officials have the authority to impose prior restraints on student newspapers in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988). Government's authority to license broadcasters; to limit public protest by time, place, and manner; and court injunctions to prevent violation of copyright laws are other forms of permissible prior restraints.

Sexual Expression

When does sexual expression become obscene? In 1917, such a determination was based on the *Hicklin* rule established in a British Parliamentary measure in 1868 and adopted by courts in the United States. The rule imposed a version of the highly restrictive bad tendency test; materials that had a tendency to deprave and corrupt minds open to immoral influences could be banned as obscene. *Hicklin* remained the leading test of obscenity until U.S. Judge John Woosley's ruling in *U.S. v. One Book Called "Ulysses,"* 5 Supp. 182 (S.D.N.Y. 1933). A book is obscene, the judge said, only when it arouses lust in a person with average sexual instincts, rather than to minds open to immoral influences such as abnormal adults and children as the *Hicklin* rule required. Woosley ruled that James Joyce's *Ulysses*, now acclaimed as a literary masterpiece, was not obscene.

In 1959, the Court handed down its first opinion on obscenity in *U.S. v. Roth*, 354 U.S. 476 (1957), establishing a nationwide standard. Justice William Brennan (1906–1997) fashioned the following test for obscenity: “whether to the average person, applying contemporary standards, the dominant theme of the material taken as a whole appeals to prurient interest.” Brennan also declared that obscenity enjoys

no protection under the law because it is “devoid of redeeming social importance.”

Over the course of sixteen years, the Court wrestled with its definition of obscenity until it reached consensus in *Miller v. California*, 413 U.S. 15 (1973). Under the *Miller* guidelines—still the predominate test for obscenity—a judge or jury must weigh whether the “average person, applying contemporary community standards” would find that a work in its entirety appeals to prurient interests; whether the work depicts patently offensive sexual conduct; and whether it lacks serious literary, artistic, political, or scientific value.

Miller did not put to rest legal efforts to redefine obscenity. Feminists led by novelist Andrea Dworkin and law professor Catharine McKinnon waged an assault on pornography, persuading the Indianapolis–Marion County City–County Council to pass an ordinance banning pornography as sex-based discrimination. The U.S. Court of Appeals for the Seventh Circuit struck down the ordinance as unconstitutional in *American Booksellers Association, Inc. v. Hudnut*, 771 F.2d 323 (1985). In *New York v. Ferber*, 458 U.S. 747 (1982), the Court placed the production and sale of child pornography outside the First Amendment’s protection.

Starting in the mid-1990s, the U.S. Congress pursued several mostly unsuccessful efforts to censor adult entertainment in cyberspace. The Court, for example, struck down two provisions of the Communications Decency Act (CDA) in *Reno v. ACLU*, 521 U.S. 844 (1997), ruling that the Internet was entitled to a level of First Amendment protection historically enjoyed by print. Two decades after *Ferber*, the Court—acknowledging that computer technology allows one to make realistic human images without the use of live models—ruled the Child Pornography Prevention Act of 1996 unconstitutional. In *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), Justice Anthony M. Kennedy ruled that child sexual abuse recorded in child pornography is not the same as the expression of the idea of child sexuality created by digital technology.

In *American Civil Liberties Union v. Ashcroft*, 535 U.S. 564 (2004), the Court affirmed a lower court finding that the Child Online Protection Act (COPA) violated the First Amendment. Earlier, the Court ruled the Children’s Internet Protection Act (CIPA) constitutional in *U.S. v. American Library Association*, 539 U.S. 194 (2003). CIPA requires public libraries to place filters on computers to prevent children from accessing adult content.

Meanwhile, by one count, the number of pornographic Web pages grew from fourteen million in 1998 to 420 million within five years. In 2004, it was

estimated that Americans spent \$10 billion a year on adult entertainment.

Libel

For 173 years, courts considered libel—defamatory statements that harm reputation—outside the protection of the First Amendment. Consequently, citizens and journalists risked criminal prosecution and civil liability by accusing government officials of misconduct. Under most states’ seditious libel laws, truth was no defense. Under most states’ civil libel laws, truth was a defense, but a statement’s minor inaccuracies rendered an entire news report untrue. Thus, public officials could and did use such laws to intimidate or punish critics and muckrakers. In the early 1960s, the threat of such suits dampened news coverage of the civil rights movement.

That changed after the Court handed down its ruling in *New York v. Sullivan*, 375 U.S. 254 (1964), one of the Court’s most significant free press rulings. The ruling stemmed from a libel action brought by L. B. Sullivan, a public affairs commissioner in Montgomery, Alabama. Inaccurate and false statements published in a political advertisement in the *New York Times* in 1960 falsely defamed him, Sullivan charged. Sullivan won a \$500,000 judgment against the *Times*.

Overtaking the judgment, Brennan sought to create breathing space for the erroneous statements that are inevitably part of political debate and journalism reportage by creating a test for defamatory statements targeting public officials in their public capacity. The First Amendment, Brennan declared, required a public official to show with clear and convincing evidence that a defamatory statement about an official’s public conduct was made with actual malice or with knowing or reckless disregard for the truth. The ruling also declared the Sedition Act of 1798 unconstitutional, deemed that advertisements addressing social issues were political speech worthy of full First Amendment protection, and made libel law a federal constitutional matter. In following years, the Court required non-governmental, public figures to meet the same standard in libel actions.

The ruling had an immediate impact beyond the legal sphere; it is widely believed that soon after, news coverage of the civil rights struggle increased. It has had long-term consequences. The Media Law Resource Center, for example, reports that since 1980, the annual average number of trials in each decade declined, and media defendants’ win percentage has increased during the same period.

Free Press v. Privacy

The press's right to report on matters of public concern may be checked by an individual's right to privacy, the right to be left alone. In 1890, Brandeis, then a Boston lawyer and Samuel Warren, also a lawyer, proposed a theory of a right to privacy to check what they saw as the press's excessive gossip mongering. Their theory gave rise to civil actions (torts) in which plaintiffs sued for the emotional and physical harm resulting from invasion of privacy. In the early 1900s, the New York legislature and Georgia Supreme Court were the first to recognize such legal actions.

In 1960, another law review article sparked renewed interest in invasion of privacy torts. In that article, legal scholar William L. Prosser defined four types of invasion of privacy torts: intrusion, false light, appropriation, and publication of private matters. Most states allow plaintiffs to sue based on Prosser's four legal actions.

Free press advocates are troubled by the intrusion and publication of private torts because, unlike libel, truth is not necessarily a defense in such cases. In the 1990s, plaintiffs recast intrusion complaints and other allegations of wrongdoing such as fraud and misrepresentation into news-gathering torts. Such new legal theories threatened to handcuff the press's ability to gather news, particularly to conduct undercover investigations.

News-Gathering Torts

In its landmark ruling in *Cohen V. Cowles Media Co.*, 501 U.S. 663 (1991), the Court held that journalists must obey laws that apply to everyone—laws of general applicability. In *Cowles Media*, the general applicable law was contract. Two newspaper reporters broke their promise of confidentiality to a source. As a result, the source lost his job.

Within a few years after *Cowles Media*, plaintiffs—mostly corporations—targeted journalists for alleged wrongs committed during news gathering. In the mid-1990s, a lawsuit brought by the Food Lion, Inc. supermarket company against Capital Cities/ABC Inc. threatened to make investigative reporting too costly to pursue. Food Lion sued ABC-TV's *Prime Time Live* for fraud, trespass, misrepresentations, and breach of loyalty stemming from the television magazine shows' undercover probe of food preparation at a Food Lion store. The allegations of unsanitary food preparation were apparently true; they were caught on camera. Nevertheless, a jury awarded the company an

astounding \$5,545,750 in punitive damages and \$1,400 in actual damages in 1997.

The size of the punitive damage award, many in the media argued, posed a grave threat to freedom of the press. Two years later, however, an appeals court reduced the award to a mere two dollars. The court ruled that undercover journalists did not defraud the company in *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505 (4th Cir. 1999).

As a general rule, the First Amendment does not license journalists to break the law to obtain information. The Court, however, held in *Bartnicki v. Vopper*, 532 U.S. 514 (2001) that the First Amendment protects news media outlets that disseminate information about a matter of public significance when a stranger breaks a law to obtain the information.

A small minority of state courts also allow a journalist to mount a substantive First Amendment defense during a criminal trial; that is, a judge allows a journalist to argue to a jury that he broke the law solely to publicize a publicly significant matter, did not benefit from the illegal act, or cause the harm the statute was designed to prevent. Typically, however, courts reject the notion that the First Amendment provides a defense to a criminal charge.

Access

It is almost universally accepted that governments have a legitimate interest in keeping sensitive military, espionage, and diplomatic information from the public. In the United States, laws establishing federal departments called “housekeeping statutes,” passed as early as 1789, allowed such departments to keep certain information secret. Even so, it was not until the cold war period that the news media and government clashed over public access to government documents.

Such conflicts led to the formation of a Special Subcommittee on Government Information, more popularly known as the Moss subcommittee after its chair, California Democratic Representative John E. Moss (1915–1997) in 1955. Meanwhile, prominent journalists and the American Society of Newspaper Editors (ASNE) spearheaded efforts to fight government secrecy. The ASNE formed the Freedom of Information Committee. Their combined efforts led to the passage of the Federal Public Records Law, known as the Freedom of Information Act (FOIA) in 1966.

The act provides a right of access to government information, although it provides nine categories of exemptions. The 1972 Federal Advisory Committee Act requires executive branch federal advisory

committees to be open. The 1976 Government in the Sunshine Act requires public access to federal boards, commissions, and councils subject to the nine exemptions provided by FOIA. The 1996 Electronic Freedom of Information Act requires access to electronically stored databases. States and the District of Columbia have passed similar acts and Sunshine Laws requiring open access to public meetings.

The First Amendment, however, does not guarantee the press or the public a right to government information or access to meetings and places. From a free press advocate's view, such lack of constitutional protection weakens the right to know, because statute-guaranteed rights are quite vulnerable to politics. Such advocates also argue that FOIA exemptions are so broad as to make the disclosure requirements almost meaningless.

In its September 2004 edition of *Homefront Confidential: How the War on Terrorism Affects Access to Information and the Public's Right to Know*, the Reporter's Committee for Freedom of the Press claimed the Bush Administration's post-9/11 security measures severely threatened public access to government-held information. The committee identified Attorney General John Ashcroft's 2001 memo, instructing agency heads on how to use FOIA exemptions to deny access by claiming invasion of privacy or breach of national security and new federal laws and regulations that override state open records laws as part of the effort limiting access. The committee, however, noted that the highly controversial USA Patriot Act had not had an impact on news gathering.

In the 1990s, the popularity of personal computers, allowing anyone access to the Internet, launched the Information Age. But quick and easy access to a wealth of government-collected data and information raised concerns about invasion of privacy. Privacy right advocates argued that the universal and almost effortless access to public records containing information such as social security numbers that the Internet provides posed a threat to privacy that did not exist when the same public records were stored in files in government buildings. Acting on that logic, access to driver's license information that the public and press enjoyed for many decades was restricted under the federal Drivers Privacy Protection Act of 1994 and similar state statutes.

Fair Trial–Free Press

A presumption that local and federal trials are open to the public and the press predates the U.S.

Constitution. Of course, the Founding Fathers did not contemplate photography cameras or radio and television broadcast equipment. But during the first four decades of the twentieth century, many judges allowed reporters to use photography cameras and radio transmission equipment at criminal trials. In 1937, the American Bar Association (ABA) adopted Judicial Canon 35 and spurred the federal government and all states to ban cameras and broadcasting equipment from courtroom proceedings. The ABA adopted Canon 35 in response to what many saw as the largely media-created chaos of the Bruno Hauptmann trial of 1937.

No court has held that the news media have a First Amendment right to televise courtroom proceedings. The Court, however, ruled in *Chandler v. Florida*, 449 U.S. 560 (1981) that states may televise trials as long as a defendant's right to a fair trial is protected. Under Federal Rules of Criminal Procedure 53, only the Court and Congress have the authority to permit cameras at federal criminal trials. The Court exercised that authority when it declined to allow the oral arguments of *Bush v. Gore*, 531 U.S. 98 (2000) to be televised.

Although some reporter's tools might be banned, the Court has held that reporters and the public have a First Amendment right to attend pretrial proceedings, jury selection, and trials. Lower federal and state courts have held that reporters have a right to attend other proceedings such as bail and plea hearings.

The constitutional right of access does not extend to civil proceedings nationwide. Only a handful of federal appeals courts have ruled that reporters and the public have a constitutional right of access to such proceedings. Since the late 1980s, reporters and free press advocates have been highly critical of the practice by some judges of sealing files to prevent news of filings and settlements of lawsuits and the practice of deleting opinions from the public record.

Under the Constitution, judges have the authority to impose gag orders—another form of prior restraint—on reporters to protect a defendant's right to a fair trial. But judges are required to adhere to a balancing test established in *Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976). Can court-imposed injunctions effectively work as prior restraints in the Internet era? Any one with a website, access to e-mail, or access to chat groups can disseminate confidential government and court documents to thousands within minutes. The risk remains, however, that courts may use their contempt power to punish after publication.

Electronic Media

Radio did not start as a mass medium. In its earliest incarnation in 1900, mostly shipping vessels used radio wave transmitters and receivers to communicate ship to ship. Even then, governments recognized the need to regulate the airwaves, particularly for maintaining safety on the high seas. The radio wave spectrum is limited, and a frequency is useless when more than one entity transmits on or near it simultaneously. Consequently, the U.S. government started to regulate use of the airwaves in 1910.

By 1923, radio had become a mass medium; there were 556 broadcasting stations operating and 550,000 radio receivers that year. With the growing popularity of radio broadcasting, interference problems resurfaced. In response, Congress passed the Radio Act of 1927, which established the Federal Radio Commission. The Act authorized the commission to issue and revoke licenses to ensure clear radio transmission, to regulate programming for the public interest, convenience, and necessity, but not to censor broadcasters.

In 1934, Congress passed the Communications Act, folding the FRC and its authority into the newly created Federal Communications Commission (FCC). But the Act failed to clarify whether the authority to regulate in the public interest infringed on a broadcaster's right to control its programming. The Court issued its first response to that question in *National Broadcasting Co. v. U.S.*, 319 U.S. 190 (1943), noting that potential broadcasters far outnumbered the availability of radio frequencies and, consequently, government regulation was necessary. Under that rationale—otherwise known as spectrum scarcity—radio and television broadcasters do not enjoy the full First Amendment rights accorded print journalists.

The Court reaffirmed the doctrine's legitimacy in *Red Lion Broadcasting Co. Inc. v. FCC*, 395 U.S. 367 (1969). In its ruling, the Court upheld the FCC's fairness doctrine that requires radio and television outlets to allow targets of on-air personal or political attacks to reply. The Court also noted that the public's First Amendment rights are paramount to broadcasters'. The FCC eliminated the fairness doctrine in 1987. Nevertheless, it is still constitutionally valid, having never been struck down by the Court. In contrast, the Court struck down a similar right-to-reply imposed on newspapers in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).

The Court held in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), that the uniquely pervasive presence of broadcasting in the home justifies FCC authority to fine licensees for indecent broadcasting. In

contrast, print publishers and writers of sexually explicit expression are subject only to prosecution for obscenity.

Civil libertarians and free market advocates argue that spectrum scarcity is not a valid rationale for government regulation of broadcast because cable and satellite television, the Internet, and the technological capability to splice the spectrum have dramatically increased consumers' choices of electronic media. In the 1970s and 1980s, the Court seemed as though it was open to reexamine its spectrum scarcity-public trustee rationale in its ruling in *CBS, Inc. v. Democratic National Committee*, 412 U.S. 94 (1973) and *FCC v. League of Women Voters of California*, 468 U.S. 364 (1984). Yet as of 2005, the Court had not abandoned the spectrum rationale.

It has, however, ruled that spectrum scarcity does not provide a rationale for government licensing of cable TV outlets, communication satellites in *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994), and or the Internet in *Reno v. ACLU*, 521 U.S. 844 (1997). Under *Reno v. ACLU*, the Court held that the Internet enjoys the substantial First Amendment protections afforded the print media.

The Court has not made clear the precise contours of cable's First Amendment protections. The government, for example, has the authority to require some cable operators to set aside channel capacity for local broadcasters as the Court held in *Turner Broadcasting System v. FCC*, 520 U.S. 180 (1997). On the other hand, in *U.S. v. Playboy Entertainment Group*, 529 U.S. 803 (2000), the Court declined to apply the restrictions of *FCC v. Pacifica Foundation* on cable television.

Reporter's Privilege

The press argued that reporters should be shielded from forced testimony as early as 1848 when the U.S. Senate put *New York Herald* reporter John Nugent under arrest, the first recorded jailing of a journalist for refusing to identify a confidential source. Nugent refused to reveal the identity of the source who gave him a copy of a secret draft treaty between the United States and Mexico. After a month, the Senate released Nugent. Most historians believe then-Secretary of State James Buchanan was the source of the leak.

In 1957, the same newspaper—then the *New York Herald Tribune*—engaged in another dispute over the reporter's privilege to remain silent. The newspaper argued in *Garland v. Torre*, 259 F. 2d 545 (1958), that journalists enjoy a reporter-source privilege under the First Amendment. The *Herald Tribune* was the first to

make a First Amendment argument for such a testimonial privilege for journalists, but to no avail. A federal appeals court rejected the argument.

Twelve years later in *Branzburg v. Hayes*, 408 U.S. 444 (1969), the Court declined to find a testimonial privilege for an agreement a journalist makes with a source to conceal information. The ruling was five to four, and a plurality opinion said prosecutorial bad-faith investigations amounted to impermissible harassment. A concurring opinion noted that courts would protect journalists “where legitimate First Amendment interests require protection.” In addition, Justice Potter Stewart’s (1915–1985) dissent offered a rationale for striking the proper balance between freedom of the press and the general obligation to respond to a subpoena.

By the early years of the twenty-first century, eleven of twelve federal appeals courts recognized some form of qualified reporter’s privilege, with the Eighth Circuit as the exception. Courts and legislatures in forty-nine states and the District of Columbia also recognized a qualified reporter’s privilege. Most used Stewart’s balancing test. Statutes that provide protection against forced testimony by reporters are called shield laws, and in response to the scandal stemming from the outing of Valerie Plame, a CIA operative, by a newspaper columnist, federal legislators proposed two versions of a federal shield law in 2005.

In 1791, few doubted that freedom of the press entitled pamphleteers to protection under the newly adopted Bill of Rights. Yet in the first decade of twenty-first century, bloggers—the modern-day counterpart to pamphleteers—had yet to earn the full protections and privileges enjoyed by traditional reporters. In 2005, for example, a California appeals judge in *Apple Computer, Inc. v. Doe*, 1-04-CV-032178 (2005), declined to address whether bloggers were qualified to invoke the reporter’s privilege to remain silent. Freedom of the press is a work in progress.

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References and Further Reading

- Blackstone, William. *Commentaries on the Laws of England*. Chicago: University of Chicago Press. 1991.
- Cornwell, Nancy C. *Freedom of the Press: Rights and Liberties under the Law*. Santa Barbara: ABC-CLIO, Inc. 2004.
- Reporters Committee for Freedom of the Press. *Homefront Confidential: How the War on Terrorism Affects Access to Information and the Public’s Right to Know*, <http://www.rcfp.org/homefrontconfidential>, (2005).

Cases and Statutes Cited

Abrams v. U.S., 250 U.S. 616 (1919)

American Booksellers Association, Inc. v. Hudnut, 771 F.2d 323 (1985)

American Civil Liberties Union v. Ashcroft, 322 F. 3d 240 (3d Cir. 2003)

Apple Computer, Inc. v. Doe, 1-04-CV-032178 (2005)

Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002)

Bartnicki v. Vopper, 532 U.S. 514 (2001)

Brandenburg v. Ohio, 395 U.S. 444 (1969)

Braun v. Soldier of Fortune Magazine, 968 F.2d 1110 (1992)

Bush v. Gore, 531 U.S. 98 (2000)

CBS, Inc. v. Democratic National Committee, 412 U.S. 94 (1973)

Chandler v. Florida, 449 U.S. 560 (1981)

Cohen v. Cowles Media Co., 501 U.S. 663 (1991)

FCC v. League of Women Voters of California, 468 U.S. 364 (1984)

FCC v. Pacifica Foundation, 438 U.S. 726 (1978)

Food Lion, Inc. v. Capital Cities/ABC, Inc., 194 F.3d 505 (4th Cir. 1999)

Frohwerk v. U.S., 249 U.S. 204 (1919)

Garland v. Torre, 259 F. 2d 545 (2d Cir., 1958)

Gitlow v. New York, 268 U.S. 652 (1925)

Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988)

Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974)

Miller v. California, 413 U.S. 15 (1973)

National Broadcasting Co. v. U.S. 319 U.S. 190 (1943)

Nebraska Press Association v. Stuart, 427 U.S. 539 (1976)

Near v. Minnesota, 283 U.S. 697 (1931)

New York v. Ferber, 458 U.S. 747 (1982)

New York Times Co. v. United States, 403 U.S. 713 (1971)

New York v. Sullivan, 375 U.S. 254 (1964)

Red Lion Broadcasting Co. Inc. v. FCC, 395 U.S. 367 (1969)

Reno v. ACLU, 521 U. S. 844 (1997)

Rice v. Paladin, 128 F. 3d 233 (4th Cir.1997), cert. denied, 523 U.S. 1074 (1998)

Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622 (1994)

Schenck v. U.S., 249 U.S. 47 (1919)

Snepp v. U.S., 444 U.S. 507 (1980)

U.S. American Library Association, 539 U.S. 194 (2003)

U.S. v. Playboy Entertainment Group, 529 U.S. 803 (2000)

U.S. v. One Book Called “Ulysses,” 5.Supp. 182 (S.D.N. Y.1933)

U.S. v. Roth, 354 U.S. 476 (1957)

FREUND, PAUL A. (1908-1992)

Paul A. Freund, an eminent constitutional law scholar at Harvard Law School, was born in St. Louis, Missouri on February 16, 1908. After graduating from Washington University in 1928 and receiving his L.L.B and S.J.D. from Harvard Law School in 1931 and 1932, he served as law clerk to Justice Louis D. Brandeis (1932–1933). He spent most of the next dozen years serving in the executive branch of the federal government—in the Treasury Department, Reconstruction Finance Corporation, and twice in the Solicitor’s General’s office. He joined the Harvard Law School faculty first in 1939, and then permanently in 1946, where he taught until his retirement in 1976. Freund declined the entreaty of President John

F. Kennedy to serve as Solicitor General in December 1960. Kennedy later considered, but passed over, Freund for two Supreme Court appointments in 1962. Freund died February 5, 1992.

Freund wrote widely on the Supreme Court and its justices and the constitutional issues of the era, including those relating to civil liberties. He frequently testified before Congressional committees considering such matters.

Freund generally supported the Warren Court's decisions that took on expansive view of civil liberties. He thought they made America more participatory and less hierarchical. He did not usually embrace the absolute tests of many of those opinions, believing that the cases often involved competing principles. He tended to strike the balance in a way that protected civil liberties but thought the Warren Court sometimes prescribed one approach when a range of solutions would protect the constitutional norm.

Freund defended the Court's decisions in the early 1960s that banned organized school prayer and classroom Bible reading. He thought these outcomes reflected a proper balance between the claims of the establishment and free exercise clauses consistent with the concept of religious voluntarism implicit in American traditions. The classroom presented an area where psychological pressures to conform were most likely to be coercive. Freund did not view the establishment and free exercise clauses as absolutes. They must yield at times to public concerns and to each other.

Freund helped develop and defend the constitutional basis for the public accommodations section of the Civil Rights Act of 1964. In a 1963 brief requested by the Senate Committee on Commerce, Freund argued that Congress had power under the Commerce Clause to outlaw racial discrimination in places of public accommodation. He thought that resting the legislation on § 5 of the Fourteenth Amendment was riskier and more problematic jurisprudentially. Congress adopted Freund's rationale, and the Supreme Court upheld the legislation on that basis.

Freund gave early defense to race conscious remedies to address past discrimination against African Americans. In 1964, when affirmative action was in its infancy, he argued that the Constitution did not preclude transitional measures to provide favored treatment to racial minorities to correct for past disadvantage. The Constitution mandated equal protection of the law, not color blindness. The latter was simply a metaphor, and a misleading one at that.

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References and Further Reading

Freund, Paul A. *On Law and Justice*. Cambridge: The Belknap Press of Harvard University Press, 1968.

———. *The Supreme Court of the United States: Its Business, Purposes, and Performance*. Cleveland: World Publishing Company 1961.

In Memoriam: Paul A. Freund. (Essays by Hon. William J. Brennan, Jr., Hon. Lewis F. Powell, Jr., Archibald Cox, James Vorenberg, and Anthony Lewis) *Harvard Law Review* 106 (1992): 1–18.

See also Affirmative Action; Brandeis, Louis Dembitz; Civil Rights Act of 1964; Establishment and Free Exercise Clauses; Warren Court

FRISBIE v. COLLINS, 342 U.S. 519 (1952)

Frisbie v. Collins involved the forcible capture of Collins in Illinois by Michigan law enforcement agents and his subsequent murder conviction in that state. Collins alleged that “Michigan officers forcibly seized, handcuffed, blackjacked and took him to Michigan” in violation of the Fourteenth Amendment and the Federal Kidnapping Act, thus voiding his conviction. The Supreme Court, with Justice Black writing for the majority, rejected Collins’ argument that the illegal nature of his apprehension denied the Michigan Court jurisdiction, thus reaffirming a position first articulated in the 1886 case *Ker v. Illinois*. *Frisbie* reified the concept of *male captus bene detentus*, otherwise known in Court jurisprudence as the *Ker-Frisbie* rule, applying it to cases of domestic and extraterritorial abduction. Despite lower court attempts to limit the rule’s scope and application, the precept seems to have survived later constitutional development unscathed.

The Court in *Ker* affirmed the conviction of a defendant who had been forcibly abducted in Peru by a U.S. agent acting *ultra vires* and brought back to the United States to stand trial. In *Frisbie*, Justice Black announced that the Court had “never departed from the rule announced in *Ker v. Illinois*,” which allowed law enforcement officers personal jurisdiction over an accused, despite the commission of illegal acts in bringing him or her to trial. Had Congress added a sanction to the Kidnapping Act denying states’ jurisdiction to prosecute defendants brought to Court in violation of one of its provisions, a different result the Justices concluded, might obtain. Nor do such abductions enhance the State’s case at trial, as would be the case with illegally seized evidence, for example. But Black’s opinion focused on the fairness of the trial as the critical issue in the due process analysis, finding no Fourth or Fourteenth Amendment violations in the presumably illegal rendition of the defendant across

state lines. “Due process of law” wrote the Court, “is satisfied when one present in court is convicted of crime after having been fairly apprised the charges against him and after a fair trial in accordance with constitutional procedural safeguards.”

The U.S. Court of Appeals for the Second Circuit leveled the first major attack on *Ker-Frisbie* in *United States v. Toscanino*, holding that recent Supreme Court decisions expressed an “expanded and enlightened” interpretation of due process to cover the pretrial treatment of a defendant. Toscanino had allegedly been tortured by American officials, among others, en route to trial in the United States from Uruguay. The Second Circuit held that the Constitution would require the Court to divest itself of jurisdiction in the face of “unreasonable invasion of the accused’s constitutional rights” where such conduct “shocked the conscience.” However, the demise of *Ker-Frisbie* in the wake of *Toscanino* proved illusory. The Fifth, Seventh, and Eleventh Circuit Courts of Appeals have been unreceptive to such an interpretation, whereas the Supreme Court later refused to void a conviction due to “illegal arrest or detention” in *Gerstein v. Pugh*.

The continuing vitality of the rule does prevent it from being challenged by publicists who argue that it condones detainee abuse by law enforcement officials. But the *Ker-Frisbie* rule will likely remain relevant, especially in so far as it concerns extraterritorial abduction, because the United States prosecutes its war on terrorism and combats drugs abroad.

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References and Further Reading

- Campbell, Andrew, *The Ker-Frisbie Doctrine: A Jurisdictional Weapon in the War on Drugs*, *Vanderbilt Journal of Transnational Law* 23 (1990–1991): 385.
- Semmelman, Jacques, *Due Process, International Law, and Jurisdiction over Criminal Defendants Abducted Extraterritorially: The Ker-Frisbie Doctrine Reexamined*, *Columbia Journal of Transnational Law* 30 (1992): 513.
- Torcia, Charles, ed. *Wharton’s Criminal Procedure*. 13th Ed. Rochester, NY: Lawyers Co-Operative Publishing Co., 1989.

Cases and Statutes Cited

- Gerstein v. Pugh*, 420 U.S. 103 (1975)
- Ker v. Illinois*, 119 U.S. 436 (1886)
- United States v. Toscanino*, 500 F.2d 267 (2d Cir. 1974)

FRISBY v. SCHULTZ, 487 U.S. 474 (1988)

A town enacted an ordinance prohibiting picketing “before or about” any residence. Abortion foes who wished to picket on the public street outside the

residences of abortion providers brought suit, contending that the ordinance was invalid on its face. Substantial precedent supported their position: all public sidewalks, streets, and parks are considered traditional public forums—presumptively open for peaceful marches and protests. The town, however, urged that the Court treat residential picketing differently.

The initial question was the exact reach of the ordinance. Did it prohibit *all* picketing in residential areas? Or just “targeted” picketing—that is, directed to a particular residence? Because it preferred to avoid addressing substantial constitutional difficulties raised by the broader interpretation, the Court reviewed only the narrower “targeted picketing.”

Place regulations may be upheld only if “narrowly tailored to serve a significant government interest” and must “leave open ample alternative channels of communication.” Here, other “channels” remained open: protesters could solicit door-to-door, by phone, or through the mails. Moreover, preserving residential privacy and the tranquility of the home justified the restriction on targeted residential picketing. In public spaces, one can often avert one’s eyes or avoid the controversy. This becomes difficult when one is targeted at home.

The Court’s holding effectively protects residential picketing, yet acknowledges the capacity of government to reduce the din outside a target’s home. Picketers have a right to cycle throughout residential neighborhoods, including in front of a “target’s” home, but the government may prohibit picketing focused on a specific residence.

JOHN NOCKLEBY

See also **Public Forum Doctrines**

FRUIT OF THE POISONOUS TREE

When the police seize evidence in violation of a defendant’s constitutional rights, the courts have historically applied an exclusionary evidence rule that prevents the prosecutor from using the evidence to convict the defendant (See *Mapp v. Ohio*, 367 U.S. 643 [1961]). They apply this rule to deter the police from violating citizen’s constitutional rights. A corollary to the exclusionary evidence rule is provided by the “fruit of the poisonous tree” doctrine (a/k/a the “derivative evidence” rule). The fruit of the poisonous tree doctrine provides that, not only is the prosecution prohibited from introducing evidence obtained “directly” from illegality (the poisonous tree), they are also prohibited from using evidence “derived”

from the illegality (the fruit) (See *Brown v. Illinois*, 422 U.S. 590 [1975]).

Although the derivative evidence rule has been applied in a variety of contexts, it frequently arises in several contexts. One is when the police illegally interrogate a suspect and obtain a confession from which they are able to locate and seize other evidence (for example, a murder weapon). Because the confession was illegally obtained, it constitutes the “poisonous tree,” and the weapon constitutes derivative evidence because the police learned of its existence only because of the illegally obtained confession. A second context in which the derivative evidence rule applies is when the police illegally seize a defendant and obtain a confession as a result of the seizure. For example, suppose that the police illegally stop a motorist who they take to the police station for questioning. The initial seizure may be illegal if the police lacked adequate grounds to make the stop (the police generally must have a “reasonable suspicion” that the motorist was involved in criminal activity), and the decision to take the suspect to the police station may be illegal if the police lacked probable cause. As a result, both the decision to seize and the decision to transport the suspect to the police station constitute “poisonous trees.” If the suspect is then interrogated at the police station and confesses, the confession might be regarded as a “fruit” of the poisonous tree. A third context is when the police illegally stop a motorist (again, perhaps, without a reasonable suspicion of criminal activity) and then develop probable cause to search the motorist’s vehicle, which leads them to find contraband. The illegal search might be regarded as a “fruit” of the illegal stop.

Although the derivative evidence rule is an important part of modern criminal procedure, it is important to realize that it is not slavishly or routinely applied. If the police can show that the fruit of the illegal conduct would have “inevitably” been discovered, or that they have an “independent source” for the information, the courts will sometimes allow it into evidence.

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References and Further Reading

- Weaver, Russell L., et al. *Principles of Criminal Procedure*. Thomson/West, 2004, pp. 253–258.
- Weaver, Russell L., et al. *Criminal Procedure: Cases, Problems & Exercises*. 2nd Ed. Thomson/West, 2001, pp. 662–671.

See also **Exclusionary Rule; Probable Cause; Search (General Definition); Seizures**

FULLER COURT (1888–1910)

The Supreme Court under the leadership of Melville W. Fuller (1888–1910) decided more constitutional controversies than all previous Courts combined. From a contemporary perspective, however, the Fuller Court’s jurisprudence was flawed in a number of respects. For example, it decided *Plessy v. Ferguson*, which adopted “separate but equal” as an interpretation of the equal protection clause. In the field of civil liberties, it was not an aggressive champion of the noneconomic rights protected by the Constitution but instead a defender of property rights. Even so, the Fuller Court decided a number of significant civil liberties cases and laid much of the groundwork for contemporary constitutional doctrine. Twenty justices served during the Fuller Court, including justices nominated by presidents from Lincoln to Taft and such important figures as John Marshall Harlan I, David Brewer, and Oliver Wendell Holmes, Jr.

The Fuller Court was the first to use the theory of substantive due process to invalidate state legislation. In 1905, it decided the case that often provides the name for this entire period in Court history, *Lochner v. New York*. The Fuller Court’s substantive due process decisions were largely limited to economic rights, but these cases laid the fundamental-rights groundwork for much of the Court’s later civil liberties jurisprudence. Perhaps most importantly, the Fuller Court’s substantive due process jurisprudence established, despite great controversy, judicial enforcement of fundamental rights as part of the Supreme Court’s role. Many members of the Court believed that this included protection of unenumerated rights against government invasion. Commentators have traced the origins of modern Privacy decisions to the Fuller Court’s substantive due process jurisprudence.

At the same time as it was protecting unenumerated economic rights, however, the Fuller Court consistently rejected incorporation of the criminal procedural protections found in the Bill of Rights into the due process clause of the Fourteenth Amendment. The Fuller Court, in other words, resisted the various efforts of litigants to federalize state criminal procedure, often over dissents by the first Justice Harlan. It rejected incorporation of the guarantee against cruel and unusual punishment in *O’Neil v. Vermont* and *In re Kemmler*, the confrontation clause in *West v. Louisiana*, the right to a twelve-member jury in criminal cases in *Maxwell v. Dow*, and the privilege against self-incrimination in *Twining v. New Jersey*. But its legacy here is complicated. In *Chicago, Burlington, and Quincy Railroad Co. v. Chicago*, the Fuller Court held for the first time that a provision in the Bill of Rights applied to the states. That case

involved, not surprisingly, property rights protected by the Takings Clause; indeed, this was just one of many significant Takings Clause cases during this period. In addition, *Twining*, decided in 1908, clarified the fundamental-rights analysis that would be applied in deciding whether to apply Bill of Rights safeguards to the states in future cases.

The Fuller Court did decide some important cases of first impression involving constitutional safeguards in federal criminal cases. Few such cases reached the Supreme Court before extension of its appellate jurisdiction in criminal cases in 1889 and 1891. In two cases, the Fuller Court was the first to address the constitutionality of immunity statutes in light of the Fifth Amendment privilege against self-incrimination, although it is worth noting that both involved business prosecutions. In *Counselman v. Hitchcock*, a unanimous Court held that the privilege against self-incrimination applies to grand jury witnesses and that immunity statutes must provide at least as much protection as the constitutional privilege. *Counselman* was not very clear, however. In its immediate aftermath, Congress adopted an immunity statute providing transactional immunity for compelled testimony in federal proceedings. In *Brown v. Walker*, a narrowly divided Court upheld this statute. But the Court has since held, most significantly in *Kastigar v. United States*, that the Fifth Amendment only requires use/derivative use immunity, the *Kastigar* majority concluding that the broad transactional-immunity language in *Counselman* was merely dicta. The Fuller Court also applied the protection against unreasonable searches and seizures to corporations, while rejecting application of the privilege against self-incrimination to corporations in *Hale v. Henkel*. The *Insular Cases* held that constitutional guarantees did not apply in territories acquired in the Spanish-American War. Finally, in *Weems v. United States*, the Court inserted a proportionality standard into the protection against cruel and unusual punishment.

In religion cases, in *Bradfield v. Roberts*, the Court rejected a taxpayer's Establishment Clause challenge to a contract between the District of Columbia and a Roman Catholic hospital, holding that institutions with secular purposes may receive governmental aid, as long as they are not pervasively sectarian. The Fuller Court's most notable free-exercise cases, both decided in 1890, involved laws burdening the practice of plural marriage among members of the Church of Jesus Christ of Latter-day Saints. In *Davis v. Beason*, the Court upheld an Idaho territory law denying voting rights to members of the church, following the 1878 precedent *Reynolds v. United States*. A closely divided Court upheld a federal law abolishing the

Utah church and expropriating its property in *Late Corporation of the Church of Jesus Christ of Latter-day Saints v. United States*. In the latter case, involving property rights, Chief Justice Fuller and three other members of the Court dissented.

The Fuller Court decided two early speech cases, both against speech rights. In *Turner v. Williams*, the Court upheld the deportation of an English anarchist based on his political beliefs. In *Patterson v. Colorado*, in an opinion by Justice Holmes, the Court upheld a conviction for criminal contempt based on criticism of the state high court.

The Fuller Court's greatest contribution to civil liberties jurisprudence arguably came in *Ex Parte Young*, which held that the Eleventh Amendment does not bar suits to enjoin state officials from violating the Constitution and federal law. The legal fiction created in this case has been used by litigants seeking to protect civil liberties and other rights in a great number of cases.

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References and Further Reading

- Bernstein, David E., *Lochner Era Revisionism, Revised: Lochner and the Origins of Fundamental Rights Constitutionalism*, Georgetown Law Review 92 (2003): 1:1–60.
- Currie, David P. *The Constitution in the Supreme Court: The Second Century 1888–1986*. Chicago: University of Chicago Press, 1990.
- Ely, Jr., James W. *The Chief Justiceship of Melville W. Fuller, 1888–1910*. Columbia: University of South Carolina Press, 1995.
- Fiss, Owen M. *History of the Supreme Court of the United States, Volume 8: Troubled Beginnings of the Modern State, 1888–1910*. New York: Macmillan, 1993.
- King, Willard L. *Melville Weston Fuller: Chief Justice of the United States 1888–1910*. Chicago: University of Chicago Press, 1967.
- Yarbrough, Tinsley E. *Judicial Enigma: The First Justice Harlan*. New York: Oxford University Press, 1995.

Cases and Statutes Cited

- Bradfield v. Roberts*, 175 U.S. 291 (1899)
- Brown v. Walker*, 161 U.S. 591 (1896)
- Chicago, Burlington, and Quincy R. Co. v. Chicago*, 166 U.S. 226 (1897)
- Counselman v. Hitchcock*, 142 U.S. 547 (1892), overruled by *Kastigar v. United States*, 406 U.S. 411 (1972)
- Davis v. Beason*, 133 U.S. 333 (1890), overruled by *Romer v. Evans*, 517 U.S. 620 (1996)
- Ex Parte Young*, 209 U.S. 123 (1908)
- Hale v. Henkel*, 201 U.S. 43 (1906), overruled by *Murphy v. Waterfront Commission*, 378 U.S. 52 (1964)
- In re Kemmler*, 136 U.S. 436 (1890)
- Kastigar v. United States* 406 U.S. 411 (1972)
- Late Corp. of Church of Jesus Christ of Latter-day Saints*, 136 U.S. 1 (1890)
- Lochner v. New York*, 198 U.S. 45 (1905)

Maxwell v. Dow, 176 U.S. 581 (1900), overruled by *Williams v. Florida*, 399 U.S. 78 (1970)
O'Neil v. Vermont, 144 U.S. 323 (1892)
Patterson v. Colorado 205 U.S. 454 (1907)
Reynolds v. United States, 98 U.S. 145 (1878)
Turner v. Williams 194 U.S. 279 (1904)
Twining v. New Jersey, 211 U.S. 78 (1908), overruled by *Malloy v. Hogan*, 378 U.S. 1 (1964)
Weems v. United States, 217 U.S. 349 (1910)
West v. Louisiana, 194 U.S. 258 (1904), overruled by *Pointer v. Texas*, 380 U.S. 400 (1965)

See also **Incorporation Doctrine; Mormons and Religious Liberty; Substantive Due Process; Waite Court; White Court**

FURMAN v. GEORGIA, 408 U.S. 238 (1972)

Furman v. Georgia began the modern era of Capital Punishment jurisprudence in the United States. The broad issue in the case was whether the death penalty was unconstitutional, but the narrower issue concerned capital sentencing procedures. A majority of the Justices did not resolve the first issue, but the Court held that the procedures used to impose the death penalty violated the constitution.

At the time of *Furman*, death penalty statutes gave juries complete discretion on the issue of whether or not to impose the death penalty. The previous year, in *McGautha v. California*, the Supreme Court held that such systems do not violate the due process clause of the Fourteenth Amendment. However, in *Furman*, the Court in a five-to-four decision held that these discretionary systems do constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.

Furman left open several issues because there was no clear consensus among the Justices. In addition to the short per curiam opinion striking the death penalty in the cases at issue, each of the nine Justices wrote a separate opinion, creating the longest decision ever issued by the Court.

Two of the Justices in the majority concluded that the death penalty itself is unconstitutional, but the other three Justices in the majority did not go so far, focusing on the arbitrariness and racial discrimination resulting from the process. *Furman* ended the death penalty in the United States until the Court approved of new death penalty statutes approximately four years later in *Gregg v. Georgia*.

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References and Further Reading

Kirchmeier, Jeffrey L., *Another Place Beyond Here: the Death Penalty Moratorium Movement in the United*

States, Colorado Law Review 73 (2002): 1:1–116 (article available at <http://www.colorado.edu/law/lawreview/issues/summaries/73-1.htm>).

Woodward, Bob, and Scott Armstrong. *The Brethren: Inside the Supreme Court* 260. New York: Avon Books, 1981.
 Zimring, Franklin E., and Gordon Hawkins. *Capital Punishment and the American Agenda*, New York: Cambridge University Press, 1989.

Cases and Statutes Cited

Furman v. Georgia, 408 U.S. 238 (1972)
Gregg v. Georgia, 428 U.S. 153 (1976)
McGautha v. California, 402 U.S. 183, 196 (1971)

See also **Capital Punishment; Gregg v. Georgia, 428 U.S. 153 (1976)**

FW/PBS, INC. v. CITY OF DALLAS, 493 U.S. 215 (1990)

Young v. American Mini-Theatres (1976) and *Renton v. Playtime Theatres* (1986) upheld the constitutionality of zoning ordinances regulating the locations of movie theaters specializing in sexually explicit films to counter the theatres' negative secondary effects on adjacent neighborhoods or nearby places of worship or schools. In the wake of these decisions, localities adopted more comprehensive regulations, including licensing schemes as well as zoning restrictions that focused on a wider array of "adult businesses."

Dallas, Texas, the respondent in this case, adopted a regulatory regime involving zoning, licensing, and inspections of sexually oriented businesses that included adult arcades, bookstores, video stores, cabarets, motels, theaters, and, before the Supreme Court reviewed the ordinance, escort agencies, nude model studios, plus "sexual encounter centers." Three separate lawsuits were filed by an array of businesses in federal district court that upheld most of the ordinance. The cases were subsequently appealed to the Fifth Circuit Court of Appeals, which affirmed the lower court, viewing it as a content-neutral time, place, and manner regulation under *Renton*.

Critical to the Supreme Court's review was the circuit court's conclusion that, despite the absence of the procedural safeguards mandated in the film censorship case, *Freedman v. Maryland* (1965), the ordinance was constitutional. Brennan's majority opinion in *Freedman* struck down Maryland's law because the procedures for censoring and licensing the presentation of films created the risk of delay while lacking prompt judicial review of decisions censoring or banning films. Prompt judicial review was needed whenever "unduly onerous" procedures for judicial review

mean the “censor’s determination may, in practice, be final.”

Brennan proposed three procedural protections in *Freedman*. First, a censorship scheme must assure the exhibitor, “by statute or authoritative judicial construction, that the censor will, within a specified brief period, either issue a license or go to court to restrain showing the film.” Second, the censorship scheme must “assure a prompt final judicial decision” after a refusal to license because, Brennan reasoned, “only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression.” Third, “the burden of proving that the film is unprotected expression must rest on the censor.”

FB/PBS, Inc. v. City of Dallas resulted in a complex, divided ruling that affirmed in part, reversed in part, and vacated in part with the cases remanded for further consideration. One issue dividing the Court was whether the Dallas ordinance constituted a censorship regime with regard to the regulation of adult businesses. Another issue, if the Dallas law was a censorship regime, was whether *Freedman* applied and if so whether all three parts of Brennan’s test were also applicable.

O’Connor authored the fractured opinion. Stevens and Kennedy joined her opinion declaring the Dallas ordinance unconstitutional because it constituted a prior restraint on protected expression. According to O’Connor, a regulatory regime placing “unbridled discretion in the hands of a government official or agency” with respect to the location, licensing, or inspection of adult businesses “constitutes a prior restraint.” Such restraints are not unconstitutional per se, but “any system of prior restraint...comes to this Court bearing a heavy presumption against its constitutional validity.”

Brennan, Marshall, and Blackmun agreed with O’Connor that the ordinance was unconstitutional, giving her six votes on this question. The three justices, however, balked at her conclusion that because the Dallas ordinance did not pose the “grave ‘dangers of a censorship system’” that only *Freedman*’s first two elements, particularly “the possibility of prompt judicial review,” were applicable. The three justices argued the burden of proof element also applied.

White and Rehnquist, agreeing with the Fifth Circuit Court, felt the ordinance as a time, place, and manner restriction was not subject to strict scrutiny and thus *Freedman* was inapplicable. Scalia dissented from the judgment and developed an alternative argument that the Dallas ordinance legitimately regulated the “pandering” activity of adult businesses, consistent with *Ginzburg v. United States* (1966).

The difficulties the decision in *FW/PBS* created for the lower courts surfaces in the litigation leading to *City of Littleton v. Z.J. Gifts* (2004).

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References and Further Reading

- Hixson, Richard F. *Pornography and the Justices: The Supreme Court and the Intractable Obscenity Problem*. Carbondale, IL: Southern Illinois University Press, 1996.
- Mackey, Thomas C. *Pornography on Trial: A Handbook with Cases, Law, and Documents*. Santa Barbara, CA: ABC-Clio, 2002.

Cases and Statutes Cited

- City of Littleton v. Z.J. Gifts D-4, L.L.C.*, 2003-058 (2004)
- City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986)
- Freedman v. Maryland*, 380 U.S. 51 (1965)
- FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990)
- Ginzburg v. United States* 383 U.S. 463 (1966)
- Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976)

G

GAG ORDERS IN JUDICIAL PROCEEDINGS

Gag orders are judicial commands that restrict the media's right to publish stories about a case or a trial participant's right to talk about the case outside the courtroom. The Supreme Court in *Sheppard v. Maxwell*, 384 U.S. 333 (1966), endorsed gag orders as a tool for combating prejudicial publicity, but media gag orders have rarely been used since 1976, when the Court in *Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976), held that they are a form of prior restraint and presumptively unconstitutional. The Court ruled that media gag orders should be used only in exceptional circumstances; in order to issue such an order, a judge must show that the nature and extent of the publicity would jeopardize a fair trial, that the proposed gag order would be effective, and that there are no less restrictive alternative measures available to prevent the harm (such as change of venue, continuance, or jury sequestration).

After *Nebraska Press Association*, judges turned to more indirect ways to prevent prejudicial publicity by issuing gag orders limiting the out-of-court statements of parties, attorneys, witnesses, police officers, and other trial participants for the duration of the trial. The Supreme Court has not specifically addressed the constitutionality of participant gag orders, although in *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991), the Court ruled that out-of-court statements by attorneys may be punished after the fact if it can be shown that the statements posed "a substantial likelihood" of materially prejudicing a

trial. The case involved not a gag order but a state ethics rule that barred attorneys from making prejudicial statements outside the courtroom. In finding that the rule's "substantial likelihood of material prejudice" standard was a constitutionally permissible balance between an attorney's free speech rights and a defendant's right to a fair trial, the Court indicated that attorneys may enjoy reduced speech rights as officers of the court.

In the absence of clear guidance from the Supreme Court, no consensus exists among lower courts about the constitutionality of participant gag orders, nor even about the constitutional standard that should be used to examine them. Some courts have extended the reasoning of *Gentile* and allowed the imposition of participant gag orders in criminal and civil trials as long as the judge finds a "substantial" or "reasonable" likelihood of prejudice without them. Other courts have applied strict scrutiny, requiring a showing that the publicity represents a "clear and present danger" or "serious and imminent threat" to the fairness of the proceedings for a gag order to be imposed.

Lower courts are divided on whether participant gag orders violate the First Amendment rights of the press and public as recipients of speech. The Supreme Court has recognized some constitutional protection for newsgathering, and lower courts have generally granted standing to the media to challenge participant gag orders. Courts are split, however, on whether participant gag orders constitute a prior restraint on the media and whether the media can assert trial

participants' First Amendment rights when those directly affected have not challenged the gag order.

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References and Further Reading

- Bernabe-Riefkohl, Alberto, *Prior Restraints on the Media and the Right to a Fair Trial: A Proposal for a New Standard*, Kentucky Law Journal 84 (1995/1996): 259–316.
- Chemerinsky, Erwin, *The Sound of Silence: Reflections on the Use of the Gag Order: Lawyers Have Free Speech Rights, Too: Why Gag Orders on Trial Participants Are Almost Always Unconstitutional*, Loyola of Los Angeles Entertainment Law 17 (1997): 311–331.
- Swartz, Michael E., *Trial Participant Speech Restrictions: Gaggling First Amendment Rights*, Columbia Law Review Journal 90 (1990): 1411–1444.
- Todd, Rene L., *A Prior Restraint by Any Other Name: The Judicial Response to Media Challenges of Gag Orders Directed at Trial Participants*, Michigan Law Review 88 (1990): 1171–1208.

Cases and Statutes Cited

- Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991)
- Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976)
- Sheppard v. Maxwell*, 384 U.S. 333 (1966)

See also **Clear and Present Danger Test; Disciplining Lawyers for Speaking about Pending Cases; Free Press/Fair Trial; *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991); Media Access to Judicial Proceedings; *Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976); Prior Restraints; Standing in Free Speech Cases**

GAG RULE

In an effort to provide low-income women in the United States with greater access to family planning advice from skilled health care and social service professionals, Congress passed—and President Richard Nixon signed into law—the Public Health Service Act of 1970. To help assist in its implementation, Title X of the act authorized the secretary of Health and Human Services to “make grants to and enter into contracts with public or nonprofit private entities to assist in the establishment and operation of voluntary family planning projects which shall offer a broad range of acceptable and effective family planning methods and services” (*Rust v. Sullivan*, 500 U.S. 173, 1991). However, Title X prohibited the secretary from making grants that fund “programs where abortion is a method of family planning” and enabled him to enact rules and regulations to ensure that this and

other aspects of the provision were followed by Title X grantees.

In 1988, acting pursuant to Title X's delegation of authority, the secretary of Health and Human Services published detailed regulations (subsequently labeled the “gag order” by their detractors) designed to eliminate the possibility of federal funds being used by Title X grantees to engage in, or counsel clients about the use of, abortion procedures as a form of family planning. According to the regulations, while working within the confines of a federally subsidized project, the employees of a Title X service provider were prohibited from counseling clients or disseminating material to clients about abortion; lobbying or litigating for policies that would make abortion more widely available; employing speakers to discuss the benefits of abortion; paying dues to organizations that promote abortion; or referring pregnant women to abortion providers. The regulations proved to be quite controversial, and in *Rust v. Sullivan* (1991), the U.S. Supreme Court was faced with a challenge to their legality.

Chief Justice William Rehnquist, writing in *Rust*, noted that the 1988 HHS regulations “reverse[d] a long-standing agency policy that permitted nondirective counseling and referral for abortion, and thus represented a sharp break from the department's prior construction of the statute.” The *Rust* Court explained how the regulations emphasized Title X's focus on preconception aspects of family planning (as opposed to postconception issues like prenatal care, childbirth, and pregnancy). Title X grantees were not supposed to provide pregnant women directly with health care services or advice. Instead, the regulations held that all “Title X projects must refer every pregnant client ‘for appropriate prenatal and/or social services by furnishing a list of available providers that promote the welfare of the mother and the unborn child’” (*Rust*).

Moreover, in keeping with its nonpromotion of abortion philosophy, the new HHS regulatory scheme held that the list of service providers could not be biased in favor of providers that perform or advocate abortion as a family planning option and that a pregnant woman could not be referred to an abortion provider—even if that was her specific request. Finally, the regulations required that grantees be able to demonstrate a clear separation between their projects subsidized by federal monies and their nonsubsidized projects involving abortion. A provider could attempt to comply with this requirement by using separate budget and accounting systems, different personnel, and distinct physical facilities and equipment for its abortion-related and non-abortion-related projects.

The *Rust* challengers—a group of doctors suing on behalf of themselves and their patients—argued that the secretary’s regulations violated the congressional intent behind Title X. In particular, they argued that Congress’s goal in writing Title X’s ban on projects using abortion as a “method of family planning” was to prohibit Title X grantees from using federal money to *perform*—as opposed to *counsel* clients about—abortions. However, the Supreme Court rejected this contention and instead affirmed the lower court’s conclusion that judges must give significant deference to a federal agency that has been delegated significant regulatory authority, and that the agency’s new rules were based on a reasonable and legitimate interpretation of the statute and its legislative intent. The fact that the new regulations constituted a “sharp break” from past interpretations of the statute did not trouble the Court; the majority explained that expert administrators need to be provided ample leeway to modify and improve agency rules.

The challengers also believed that the new HHS regulations violated several aspects of the U.S. Constitution. First, they asserted that the regulations impinged to an unacceptable degree on a woman’s constitutional right to obtain an abortion. The Court rejected this idea by drawing on those precedents in which it had upheld state laws that prohibited the use of government money, employees, or facilities in the performance of abortions (see *Maher v. Roe*, 432 U.S. 464, 1977; *Harris v. McCrae*, 448 U.S. 297, 1980; *Webster v. Reproductive Health Services*, 492 U.S. 490, 1989). In those cases the Court held that the laws being challenged did not erect barriers to a pregnant woman’s right to obtain an abortion that did not exist prior to their enactment. For example, a poor woman who could not afford an abortion prior to the enactment of these laws would be just as likely not to be able to afford one afterward. The *Rust* majority held that the new HHS regulations were analogous by arguing that the “difficulty that a woman encounters when a Title X project does not provide abortion counseling or referral leaves her in no different position than she would have been if the Government had not enacted Title X.”

Since the new regulations prohibited doctors from providing all pertinent information to their patients, the *Rust* challengers argued that they constituted an unwarranted governmental intrusion into the doctor–patient relationship. This, in turn, infringed upon the fundamental constitutional right to make personal medical decisions free from governmental interference—a right that is enhanced if the medical decision pertains to a procedure that, like abortion, has been categorized as a fundamental constitutional right. For legal authority the challengers cited *Akron v. Akron*

Center for Reproductive Health, Inc., 462 U.S. 416 (1983), and *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986).

In those decisions the Court struck down state regulations that required health care personnel to inform each patient who considered having an abortion about the potential health risks of abortion vis-à-vis childbirth; the nature of the abortion procedure being contemplated; the status and potential viability of the patient’s fetus; the presence of state assistance for prenatal, childbirth, and neonatal care; and the availability of printed materials discussing the gestation of fetuses. The states argued in both cases that they were merely attempting to provide women with all pertinent information necessary for them to make rational decisions that would best fit their individual circumstances. Nevertheless, the Court held that the laws unjustifiably interfered with the constitutional right of women to obtain abortions.

The *Rust* majority, however, did not believe that the Secretary’s regulations posed the same problems as the regulations involved in *Akron* and *Thornburgh*. Specifically, the majority drew attention to the fact that the *Akron* and *Thornburgh* regulations applied to all women and their respective health care providers within each state’s respective jurisdiction. In contrast, the HHS regulations only apply to women seeking family planning advice from an agency operating pursuant to a Title X grant. Women are free to seek alternative family planning advice—free from Title X constraints—from providers who are not in any way associated with Title X or who have erected a firewall between their Title X projects and their other family planning programs.

As the majority in *Rust* explained, a “doctor’s ability to provide, and a woman’s right to receive, information concerning abortion and abortion-related services outside the context of the Title X project remains unfettered.” The petitioners countered by arguing that the regulations violate the constitutional rights of poor women since they will often find it impossible to afford family planning assistance outside of clinics subsidized with Title X funds. The majority rejected this idea by again emphasizing that poor women are “in no worse position than if Congress had never enacted Title X.”

Another argument proffered by the *Rust* petitioners was that the secretary’s regulations violated free-speech principles of the First Amendment. As the *Rust* majority explained:

Petitioners contend that the regulations violate the First Amendment by impermissibly discriminating based on viewpoint because they prohibit “all discussion about abortion as a lawful option—including counseling,

referral, and the provision of neutral and accurate information about ending a pregnancy—while compelling the clinic or counselor to provide information that promotes continuing a pregnancy to term.”

The majority rejected this claim by explaining that employees of family planning clinics that accept Title X funds do not forfeit their ability to engage in discussion of abortion in contexts outside of Title X projects. Moreover, it explained that clinics are not coerced by the government to seek and accept Title X funds; if a clinic’s staff does not want to be constrained in how it counsels patients, then it should not apply for a Title X grant.

Drawing again on its decisions in *Maier* (*Maier v. Roe*, 432 U.S. 464, 1977) and *Harris*, the majority concluded that the government’s legitimate interest in protecting fetal life justified family planning policies that did not promote abortion. The First Amendment does not require that the government act neutrally by giving all family planning methods equal recognition. Such a principle would be hard to contain, the Court argued, because all government laws are viewpoint biased in the sense that they reflect the government’s decision to select and promote a single policy option (and that option’s corresponding views about proper behavior) from what is typically an infinite menu of alternatives. The government would be forced to give up passing laws and thereby close its doors if the Court were to enforce such a broad principle.

One can reasonably argue that employees of family planning agencies who are participating in the implementation of a legitimate government program should not have the ability to articulate views that directly conflict with (and potentially undermine) that program’s policy goals. Just as the government can limit what its employees are allowed to say in their capacity as government employees (see *Connick v. Myers*, 461 U.S. 138, 1983), it should also be allowed to regulate what a family planning agency’s employees can say while they are working within the confines of a Title X project. Although the majority did not expressly employ this reasoning, it did imply that personnel working on Title X projects take on the status of “quasigovernment” employees, with many of the potential speech constraints that that status sanctions.

In 1992, President George H. W. Bush lifted the counseling and referral bans on doctors working in the context of Title X programs—the bans were left in effect for other employees working for Title X providers (see *National Family Planning and Reproductive Health Association, Inc. v. Sullivan*, 1992). However, on January 22, 1993, the newly inaugurated President

Clinton suspended the regulations and asked the secretary of Health and Human Services to start the rulemaking process in order to have them permanently replaced. This was eventually accomplished on July, 3, 2000, when the Department of Health and Human Services published new regulations nearly identical to the pre-1988 regulations. These regulations granted Title X service providers the authority to offer their clients nondirective counseling and referral advice about all aspects of family planning—including abortion. The regulations continue to remain in effect as of the time of this writing.

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Cases and Statutes Cited

- Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983)
- Gallagher v. Crown Kosher Super Market of Massachusetts, Inc.*, 366 U.S. 617 (1961)
- Harris v. McCrae*, 448 U.S. 297 (1980)
- Maier v. Roe*, 432 U.S. 464 (1977)
- National Family Planning and Reproductive Health Association, Inc. v. Sullivan*
- Rust v. Sullivan*, 500 U.S. 173 (1991)
- Thornburg v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986)
- Webster v. Reproductive Health Services*, 492 U.S. 490 (1989)

See also **Sunday Closing Cases and Laws**

GANG ORDINANCES

In 1988, California enacted the Street Terrorism Enforcement and Prevention Act (STEP Act) to address participation in gang street crime activity. STEP has spurred the adoption by the vast majority of states of two primary types of measures to stem gang problems, particularly drug sales. One type, adopted in Chicago, uses the so-called “antigang loitering ordinance.” A second type, initiated in Los Angeles and now present in many California communities, uses “antigang public nuisance injunctions.”

The Chicago 1992 city loitering ordinance essentially permitted police to arrest any group of two or more people who remained in a public place with no apparent purpose, if the police reasonably believed the group included a gang member and if loiterers failed to disperse. Enforcement of the ordinance led to thousands of dispersal orders and arrests. The U.S. Supreme Court in the 1999 case of *City of Chicago v. Morales*, 527 U.S. 41 (1999), addressed the constitutionality of the ordinance and held that it was unconstitutional under the “void for vagueness”

doctrine. That is, the ordinance allowed police too much discretion as to who would be arrested and when that would take place.

Those who championed the decision maintained that the ordinance had been used in a discriminatory fashion to target and harass minority youngsters. Those who criticized the decision believed that efforts to curtail gang activity had now been inhibited. In reaction to the decision, Chicago city officials in 2000 enacted a new antigang loitering ordinance that they suggested would withstand constitutional “vagueness” examination due to its being more narrowly written and only keying on so-called “gang hot spot blocks,” while additionally limiting street officer discretion.

California cities have enacted “antigang public nuisance injunctions,” which are generally considered more resilient to constitutional attack. These civil injunctions usually apply only to named defendants and prevent the individuals from engaging in such acts as standing, sitting, walking, driving, gathering, or appearing anywhere in public view with any other known member of a gang. It is crime preventative in nature and the injunction generally designates a specific square mile area, or “safety zone,” that is off limits to the designated gang member. Violation of the injunction generally results in the imposition of minor criminal sanctions. Proponents claim the injunctions are highly successful in reducing gang crimes in Los Angeles and other California communities.

The 1997 California Supreme court case of *People ex rel. Gallo v. Acuna*, 929 P.2d 596 (Cal 1997), upheld such an injunction, indicating that it did not violate the San Jose defendants’ First Amendment rights to associate or Fifth Amendment guarantee of due process. Moreover, it found that the injunction was not vague or overbroad and that the conduct of the gang members qualified as a public nuisance and was the proper subject of an injunction. Those opposing the decision argue that such injunctions prohibit otherwise “innocent conduct” and amount to “racial profiling” because most of the identified gang members are African-American or Hispanic individuals.

Obviously, antigang ordinances and public nuisance injunctions will need to be written clearly if they are to be effective in reducing or disrupting gang activity, while also ensuring individual civil liberties.

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References and Further Reading

Egley, Arlen, Jr., Cheryl L. Maxson, Jody Miller, and Malcolm W. Klein, eds. *The Modern Gang Reader*, 3rd ed. Los Angeles: Roxbury Publishing, 2005.

Strosnider, Kim, *Anti-Gang Ordinances After City of Chicago v. Morales: The Intersection of Race, Vagueness Doctrine, and Equal Protection in the Criminal Law*, *American Criminal Law Review* 39 (Winter 2002): 1:101–146.

Cases and Statutes Cited

City of Chicago v. Morales, 527 U.S. 41 (1999)
People ex rel. Gallo v. Acuna, 929 P.2d 596 (Cal 1997)
 Chicago Gang Congregation Ordinance, Chicago IL, Mun. Code Section 8-4-015 (1992)
 Chicago Gang Loitering Ordinance, Chicago IL, Mun. Code Section 8-4-015, (a), (e) (2000)
California Public Nuisance Act, 1892 (& amendments), West’s Ann. Cal.Civ. Code section 3479
California Street Terrorism Enforcement and Prevention Act, 1988, West’s Ann. Cal. Penal Code section 186.20

See also *Kolender v. Lawson*, 461 U.S. 352 (1983); **Void for Vagueness**

GARDNER v. FLORIDA, 430 U.S. 349 (1977)

Gardner was argued November 30, 1976, and decided on March 22, 1977, by a vote of seven to two. Justice Stevens wrote for the Court, joined by Justices Stewart and Powell; Chief Justice Burger and Justices White and Blackmun concurred; Justice Brennan concurred and dissented; Justices Marshall and Rehnquist dissented. Although the Court had previously condoned Florida’s capital sentencing procedure in *Proffitt v. Florida*, 428 U.S. 242 (1976), *Gardner* held a judge’s use of a confidential pre-sentence report in sentencing a defendant to death to be unconstitutional. After he was convicted of murdering his wife, Gardner’s capital jury returned an advisory verdict of life in prison. Thereafter, relying in part on a pre-sentence investigation report with a confidential portion not disclosed to defense counsel, the trial judge overrode the jury’s verdict and sentenced Gardner to death.

The Supreme Court concluded that Gardner was denied due process of law because he was sentenced to death on the basis of information that he did not have the opportunity to deny or explain. In response to Florida’s contention that confidentiality was required to facilitate the availability of personal information for the pre-sentence report, Justice Stevens replied that the interest in reliability outweighed any such desire for information. Justice Stevens reminded Florida that a judge’s unbridled discretion in sentencing was forbidden under *Furman v. Georgia*, 408 U.S. 238 (1972), and thus full disclosure of the basis for a death

sentence was required so that a reviewing court could examine the considerations motivating the sentence in every case in which it was imposed. *Gardner* pronounced that due process required the full disclosure of the information upon which any death sentence was based.

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Cases and Statutes Cited

Furman v. Georgia, 408 U.S. 238 (1972)

Proffitt v. Florida, 428 U.S. 242 (1976)

See also **Capital Punishment; Capital Punishment and the Equal Protection Clause Cases; Capital Punishment: Due Process Limits; Capital Punishment: History and Politics**

GARRISON, WILLIAM LLOYD (1805–1879)

Raised in a Massachusetts Quaker family, William Lloyd Garrison served apprenticeships as a shoemaker, a cabinetmaker, and a typesetter before deciding that his talents and passions lay in print. Beginning during his adolescence, he was acutely aware of and offended by injustice, and he spent most of his life trying to effect reform in society; intemperance, slavery, women's rights, and peace movements were particular causes.

In 1829, Garrison was convicted of libel after printing an editorial in which he accused a prominent businessman of participating in illegal slave trade. He spent nearly two months in a Baltimore jail, where he became acquainted with several escaped slaves who had been caught and sent to jail to wait for their masters to retrieve them. He later said that conversations with those slaves led him to believe in the intellectual and biological equality of African slaves.

After his release, Garrison began publishing *The Liberator*, an antislavery paper that he would oversee for thirty-five years. Although as a pacifist he eschewed violence as a means for social change, he was very much an agitator. Calling not only for the immediate emancipation of slaves, but also for the social and legal equality of African Americans, Garrison often found himself out of touch with other abolitionists, who favored gradual emancipation or believed in the inferiority of blacks. He also helped form the New England Anti-Slavery Society.

His activism was not limited to abolitionism. He supported the women's rights movement, and he abhorred violence and war. Indeed, although he applauded the end of slavery brought on by the

Civil War, he regretted that it could not have happened peacefully. Hated by southerners and supporters of slavery, Garrison nevertheless made a career out of confronting what he believed to be the primary moral failure of Americans to end slavery. His rejection of violence while he supported confrontation and agitation was influenced by his friends Henry David Thoreau and Ralph Waldo Emerson and, in turn, influenced twentieth-century activists such as Mahatma Gandhi and Martin Luther King, Jr.

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References and Further Reading

Mayer, Henry. *All on Fire: William Lloyd Garrison and the Abolition of American Slavery*. New York: St. Martin's Press, 1998.

Merrill, Walter M. *Against Wind and Tide*. Cambridge, MA: Harvard University Press, 1963.

Thomas, John L. *The Liberator: William Lloyd Garrison, A Biography*. Boston: Little, Brown and Company, 1963.

GAY AND LESBIAN RIGHTS

From the outset of U.S. history under English colonization, the legal climate for persons who loved others of their sex was inhospitable. The common law of England prohibited sodomy, and the criminal laws of the colonies in at least one case included lesbian sexual activity within their scope. Death was sometimes prescribed as punishment for sodomy, and people were in fact executed for that offense.

These laws targeted nonreproductive and "deviant" sexual activity, but as recognizable gay identities and communities developed in the United States, the regulatory gaze of government and, in particular, of vice enforcement was trained upon lesbian, gay, and bisexual (collectively termed "lesbigay") people and their meeting places, especially gay bars. State disorderly conduct laws were also used against the founder of the nonprofit Society for Human Rights, which Illinois chartered in 1924 and which was the first organization devoted to protect the rights of lesbigay persons.

Thereafter, the first nationally focused homophile organizations were not formed until the 1950s. Roughly contemporaneously with the formation of the Mattachine Society and the Daughters of Bilitis, the federal government was engaged in a post-World War II campaign to expel not only communists but also "sex perverts" or homosexuals from federal employment. The federal government also excluded homosexual persons as "sexual psychopaths," and this provision of the immigration laws was upheld by the U.S. Supreme Court in *Boutilier v. Immigration and Naturalization Service* (1967). State and local

governments as well as the federal government censored gay publications, ultimately leading to the Supreme Court's decision in *One, Inc. v. Olesen* (1958), which held that a homophile magazine produced by some members of the Mattachine Society was not obscene and therefore could lawfully be mailed.

The step-up of governmental suppression of homosexuality responded to an increased visibility in the postwar era, with gay bars springing up all over the country. States sometimes stripped bars catering to lesbian clientele of their liquor licenses, and state and local police targeted the bars for raids and shakedowns.

A turning point came in the early morning hours on June 28, 1969. When police raided the Stonewall Inn, an unlicensed mixed gay bar, its patrons unexpectedly resisted. The riot or uprising sparked by the actions of customers, including black and Puerto Rican effeminate gay men and butch lesbians, continued for days. This event is often taken as the advent of the modern lesbian, gay, bisexual, and transgender (LGBT) movement in the United States, first in the form of "gay liberation," which particularly argued for sexual freedom.

Yet lesbian people were not at all uniformly libertine. One area in which emboldened gay people sought legal rights in the wake of Stonewall was marriage. Starting in the very early 1970s, a number of same-sex couples filed suits arguing that it violated the U.S. Constitution to deny them the right to marry. These arguments were uniformly rejected, often on conclusory grounds invoking the "traditional" definition of "marriage," the validity of which was precisely what the litigation contested.

At the same time as these early marriage challenges, the first civil rights law to prohibit sexual orientation discrimination was enacted by East Lansing, Michigan, in 1972. Although Representative Bella Abzug introduced a federal bill to do likewise in 1974, it was not adopted. Through 2005, the sponsors in Congress of the Federal Employment Non-Discrimination Act (ENDA) were unable to secure its passage, although it did come within one vote in the Senate in 1996. More success has been enjoyed on the state and local levels: by the end of 2005 some seventeen states and the District of Columbia prohibited sexual orientation discrimination in employment, with many local governments doing likewise, seeming to signal a maturity of the gay and lesbian rights movement.

Then came AIDS. Although the pandemic brought many people in LGBT communities closer together, it also occasioned rampant discrimination against HIV-positive persons and gay men, who were often taken to be synonymous with HIV infection. In this

climate the Supreme Court decided *Bowers v. Hardwick*, 478 U.S. 186 (1986), the infamous decision that curtailed the constitutional right of privacy and upheld Georgia's law against oral and anal sex as applied to "homosexuals." *Bowers* was bad enough for the gay rights movement on its own terms, but it was also used in defense of all manner of legal discriminations against lesbian people.

As one example, criminal restrictions on sodomy have been used to justify the exclusion of lesbian persons from the armed forces. During his 1992 presidential campaign, William Jefferson Clinton pledged to repeal the ban. Once he took office, however, Clinton found strong resistance within military leadership and Congress, which ultimately enacted the statute known as "Don't Ask, Don't Tell." This ostensible compromise removed mere sexual orientation as an official disqualification, but allowed even a bare statement of gay identity to be used as a basis for separation from the services. Although frequently challenged on equal-protection, privacy, and free-speech grounds, the suits against the policy have been unsuccessful to date.

Starting shortly after Don't Ask, Don't Tell, the movement for equal marriage rights for same-sex couples took off, galvanized by the Hawaii Supreme Court's decision in *Baehr v. Lewin*, 852 P.2d 44 (1993), that the restriction of marriage to different-sex couples was sex discrimination subject to the most searching form of judicial scrutiny. This led to litigation in other states that ultimately resulted in Vermont's adopting "civil unions" for same-sex couples and Massachusetts opening marriage to same-sex partners. In addition, other states adopted domestic partnership or reciprocal beneficiaries laws to provide same-sex couples with some but not all the legal rights of marriage.

In reaction to the Hawaii decision, however, the federal government in 1996 enacted the Defense of Marriage Act, or DOMA. This statute defines "marriage" as a mixed-sex institution for federal law purposes, thus preemptively refusing to give effect to any state law that would allow same-sex couples to marry. It also purports to authorize individual states to refuse to recognize same-sex marriages performed in other states.

Reacting to activists' achieving legal protections against sexual orientation discrimination on the local level in Colorado, conservative activists in the early 1990s successfully campaigned to amend the state constitution to repeal all such laws and prohibit every level of government from taking any action to protect lesbian people from discrimination. The U.S. Supreme Court ruled this backlash effort unconstitutional in *Romer v. Evans* (1996), which held that amendment

two's far-reaching legal restrictions violated the guarantee of equal protection of the laws.

Then, in 2003, the Supreme Court decided *Lawrence v. Texas*, No. 02-102 (2003), overruling *Bowers v. Hardwick* and holding that Texas's same-sex-only criminal ban on oral and anal sex was unconstitutional. *Lawrence* brought the U.S. treatment of sodomy laws into line with that of England, which statutorily repealed them as applied to consenting adults in 1967, and indeed of the European Union, whose Court of Human Rights had held such laws to violate the right to respect for private life as early as 1981.

Lawrence removed the crutch of *Bowers* from opponents of lesbian rights; yet, in its first few years as precedent its consequences have been limited. The Supreme Judicial Court of Massachusetts cited *Lawrence* in *Goodridge v. Department of Public Health* (2003), the case that held the exclusion of same-sex couples from civil marriage to violate the state's constitution. The Supreme Court of Kansas relied on *Lawrence* when it invalidated an age-of-consent law that discriminated in favor of different-sex couples in *State v. Limon* (2005). However, *Limon* refused to apply heightened scrutiny to the sexual orientation discrimination reflected in the criminal statute, and other courts have similarly minimized the import of *Lawrence*.

The U.S. Court of Appeals for the Eleventh Circuit, for example, criticized Justice Kennedy's opinion for the Court in *Lawrence* in *Lofton v. Secretary of Department of Children and Family Services* (2004). *Lofton* upheld Florida's categorical ban on adoption by homosexual persons, the only law of its kind in the country, and the Supreme Court let that decision stand. Apparently, the justices were of the view that only a limited amount of progress in the area of gay and lesbian rights could come from the federal courts at that moment and that more work would need to be done through state court litigation and through the political process.

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References and Further Reading

- Arriola, Elvia R., *Faeries, Marimachas, Queens, and Lez-zies: the Construction of Homosexuality Before the 1969 Stonewall Riots*, *Columbia Journal of Gender and Law* (1995): 33.
- Eskridge, William N., Jr. *Gaylaw: Challenging the Apartheid of the Closet*. Cambridge, MA: Harvard University Press, 1999.
- Eskridge, William N., Jr. and Nan D. Hunter. *Sexuality, Gender, and the Law*, 2nd ed. New York: Foundation Press, 2004.
- Katz, Jonathan Ned. *Lesbians and Gay Men in the U.S.A.*, rev. ed. New York: Penguin Books, 1992.

Koppelman, Andrew. *The Gay Rights Question in Contemporary American Law*. Chicago: University of Chicago Press, 2002.

Lambda Legal, Antidiscrimination, <http://www.lambdalegal.org/cgi-bin/iowa/issues/record?record=18>.

Richards, David A. J. *The Case for Gay Rights: From Bowers to Lawrence and Beyond*. Lawrence: University Press of Kansas, 2005.

GENERAL WARRANTS

One of the most fundamental aspects of the constitutional right of privacy—that embodied in the Fourth Amendment protection against unreasonable searches and seizures—was born as a constitutional remedy for a legacy of the evils of one aspect of British law, the general warrant. As early as 1335, in Britain the general warrant permitted government to search without limitation on location and without having to describe with any specificity the person or object sought. Instead, British authorities were given free reign to break into any shop or place, wherever and whenever they chose.

Such a powerful tool could be and was employed often to intimidate. During the reign of Charles I, general warrants were employed to harass dissidents, authors, and printers of what was considered seditious material by ransacking homes and seizing personal papers. By 1765, British courts declared general warrants unlawful, and Parliament followed suit a year later.

Through their government of the colonies, royal officials threatened the privacy of the colonists by employing writs of assistance, equivalent to general warrants. At the time, English law did not recognize a personal right of privacy, leaving the colonists' complaints of royal abuses without a legal remedy. The Virginia Declaration of Rights declared that general warrants were "grievous and oppressive," and colonial leaders shared the growing antipathy toward their abuse. This particular form of governmental overreaching was fresh in the minds of the delegates to the constitutional convention in Philadelphia in 1787.

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References and Further Reading

- Banks, William C., and M. E. Bowman, *Executive Authority for National Security Surveillance*, *American University Law Review* 50 (2001): 2–3.
- Cuddihy, William, and B. Carmon Hardy, *A Man's House Was Not His Castle: Origins of the Fourth Amendment to the United States Constitution*, *The William and Mary Quarterly* 37 (1980): 371–400.

- Fribourg, Marjorie. *The Bill of Rights: Its Impact on the American People*. 1967.
- Lasson, Nelson B. *The History and Development of the Fourth Amendment to the United States Constitution*. Baltimore, MD: Johns Hopkins Press, 1970.
- O'Brien, David. *Privacy, Law and Public Policy*. New York: Praeger Publishers, 1979.

Cases and Statutes Cited

Entrick v. Carrington, 95 Eng. Rep. 807, 818 (K.B. 1765)

GENTILE v. STATE BAR OF NEVADA, 501 U.S. 1030 (1991)

This case found that the First Amendment protected political comments made by a lawyer during a press conference, while holding that attorneys' speech could be restricted if they knew their comments would create a "substantial likelihood of material prejudice" in a court proceeding.

Dominic Gentile, a lawyer in Nevada, was reprimanded by the state bar for holding a press conference on behalf of a client. Gentile held the press conference to counter negative publicity against his client, who was accused of theft, and to present his theory that corrupt police were actually responsible for the crimes. The Nevada bar said Gentile should have known that his statements were likely to prejudice his client's coming trial.

The U.S. Supreme Court dismissed Gentile's reprimand and voided Nevada's court rule for violating the First Amendment. The state failed to show that Gentile should have known that his press conference would bias his client's case; on the contrary, the Court favored Gentile's argument that he did not believe his comments would prejudice a jury. The Court also concluded that the Nevada rule was unconstitutionally vague and raised suspicions of selective enforcement by the authorities, given that Gentile implicated police corruption in his comments. The Court categorized his criticism of the government as political speech, deserving of special protection under the First Amendment as a check on state power. However, commentators afterwards focused less on the Court's forgiveness of Gentile and more on the possibility that other lawyers' free speech could still be restricted if their comments were likely to affect a court proceeding.

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References and Further Reading

Campbell, L. C., *Gentile v. State Bar and Model Rule 3.6: Overly Broad Restrictions on Attorney Speech and*

Pretrial Publicity, Georgetown Journal of Legal Ethics 6 (1993): 583–608.

Daly, J. L., *What Can the Defense Attorney Say at a "Pre-Formal Charge" Press Conference?* Gentile v. State Bar of Nevada *Puts a Porous Gag on Trial Lawyers*, The American Journal of Trial Advocacy 15 (Winter 1991/1992): 269–291.

Day, Suzanne, Note: *The Supreme Court's Attack on Attorneys' Freedom of Expression: The Gentile v. State Bar of Nevada Decision*, Case Western Reserve Law Review 43 (1993): 1347–1409.

Porter, Lester, Jr., Note: *Leaving Your Speech Rights at the Bar—Gentile v. State Bar*, 111 S. Ct. 2720 (1991), Washington Law Review 67 (1992): 733–753.

Cases and Statutes Cited

Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991)

See also Application of First Amendment to States; Disciplining Lawyers for Speaking about Pending Cases; Threats and Free Speech

GERSTEIN v. PUGH, 420 U.S. 103 (1975)

Two individuals being held in custody under an information (a formal criminal charge made by a prosecutor without a grand jury indictment) charging them with various state offenses brought a class action claiming they had a federal constitutional right to a judicial hearing to determine whether probable cause for their further detention existed.

The Fourth Amendment permits police officers to arrest an individual only when they have probable cause to believe that the individual is committing, or has committed, an offense (*Beck v. Ohio*). While the existence of probable cause generally must be determined by a neutral and detached judicial officer (*Johnson v. United States*, 333 U.S. 10, 1948), practical necessities require that police be allowed to make arrests based upon their assessment of probable cause. Accordingly, police do not need an arrest warrant to arrest an individual in a public place (*United States v. Watson*, 423 U.S. 411, 1976).

In *Gerstein v. Pugh*, however, the U.S. Supreme Court explained that once a person arrested without a warrant is in custody, the reasons justifying dispensing with a judge's determination of probable cause evaporate, while the arrestee's need for such a neutral determination increases significantly. It therefore held that the Fourth Amendment requires a judicial determination of probable cause, before or "promptly" after arrest, as a prerequisite for any extended restraint of liberty following arrest. Nevertheless, it further held that this determination need not be

made in an adversary proceeding at which the arrestee has the right to counsel or the rights of confrontation and compulsory process.

DAVID S. RUDSTEIN

References and Further Reading

- LaFare, Wayne R. *Search and Seizure: A Treatise on the Fourth Amendment*, 4th ed., vol. 3. St. Paul, MN: Thomson-West, 2004, pp. 52–64.
- LaFare, Wayne R., Jerold H. Israel, and Nancy J. King. *Criminal Procedure*, 4th ed., St. Paul, MN: Thomson-West, 2004, pp. 176–177.
- Winter, Stephen D., *Probable Cause for Pretrial Detention: Does Gerstein v. Pugh Adequately Insure Its Existence?* *Golden Gate University Law Review* 6 (1975): 1:139–178.

Cases and Statutes Cited

- Beck v. Ohio*, 379 U.S. 89 (1964)
- Johnson v. United States*, 333 U.S. 10 (1948)
- United States v. Watson*, 423 U.S. 411 (1976)
- See also **Arrest; Arrest without a Warrant; Incorporation Doctrine; Probable Cause; *United States v. Watson*, 423 U.S. 411 (1976)**

GERTZ v. ROBERT WELCH INC., 418 U.S. 323 (1974)

Throughout history, there has been considerable controversy regarding how to strike the proper balance between speech and reputation. The English common law cut the balance decisively in favor of reputation, thereby making it easy for defamation plaintiffs to recover damages for defamation. Even in the United States, until the mid-1960s, the courts preferred defamation plaintiffs over free speech. Some states allowed the imposition of liability based on strict liability principles.

The balance between speech and reputation shifted decisively when the U.S. Supreme Court rendered its landmark decision in *New York Times Co. v. Sullivan*, 367 U.S. 254 (1964). In *Sullivan*, the Court held that certain defamation plaintiffs, in particular “public officials” and so-called “public figures,” must prove that the defendant had acted with “actual malice” in defaming them in order to recover. Actual malice required a showing that a defendant “knew” that the allegations were false or acted in “reckless disregard” for whether they were true or false. The Court applied this heightened standard of proof in an effort to ensure adequate “breathing room” for speech. Because of the actual malice standard, it

became virtually impossible for public official or public figure defamation plaintiffs to recover for defamation.

In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), the Court reassessed the balance between speech and reputation. In that decision, the Court concluded that a state might be justified in applying a lower standard of proof in defamation cases brought by private individuals. The Court distinguished private individuals from those “who, by reason of the notoriety of their achievements or the vigor and success with which they seek the public’s attention, are properly classed as public figures and those who hold governmental office.” The Court noted that the actual malice standard exacts a “high price” from the victims of defamatory falsehood because many “deserving plaintiffs, including some intentionally subjected to injury, will be unable to surmount the barrier of the *New York Times* test.”

The Court found that the “*New York Times* rule states an accommodation between this concern and the limited state interest present in the context of libel actions brought by public persons.” However, the Court concluded that the “state interest in compensating injury to the reputation of private individuals requires that a different rule should obtain with respect to them.” The Court noted that private individuals do not have access to the media and therefore cannot easily reply to defamatory allegations. In addition, public officials and public figures necessarily seek out greater public notoriety and therefore must accept the consequences of greater criticism and comment that come with that notoriety.

In *Gertz*, the Court ultimately concluded that the states could not impose liability without fault in defamation cases brought by private individuals, but otherwise could “define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual.” The Court found that this approach would provide a more “equitable boundary between the competing concerns” by recognizing the “strength of the legitimate state interest in compensating private individuals for wrongful injury to reputation,” but yet shielding “the press and broadcast media from the rigors of strict liability for defamation.” However, the Court concluded that the states could not compensate private individuals for anything more than actual injury and could not “permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth.”

RUSSELL L. WEAVER

References and Further Reading

- Weaver, Russell L., and Arthur E. Hellman. *The First Amendment: Cases, Materials & Problems*. New York: LexisNexis, 2002, pp. 747–761.
- Weaver, Russell L., and Donald E. Lively. *Understanding the First Amendment*. New York: LexisNexis, pp. 2003, 121–132.

GIBSON v. FLORIDA LEGISLATIVE INVESTIGATION COMMITTEE, 372 U.S. 539 (1961)

It has long been accepted that the state has the power to use legislative investigations to protect its vital interests. However, in *Gibson v. Florida Legislative Investigation Committee*, the Supreme Court held that the state may not use this power to infringe upon individual First and Fourteenth Amendment rights of free speech and association of its citizens, unless it can show that such infringement serves a “compelling and subordinating governmental interest.”

In 1959, five years after the Court’s decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), the Florida State Legislature established a legislative investigation committee to study “subversive organizations.” As part of its work, the committee subpoenaed Gibson, president of the Miami branch of the NAACP, and asked him to produce a membership list of his organizations. He refused and was found in contempt.

The state of Florida’s purported reason for requesting the NAACP’s membership list was to determine whether it had been infiltrated by communists. The Court recognized that inquiring about the actions of a subversive group such as the Communist Party might qualify as a state effort to protect its vital interests. However, the committee made no claim that the NAACP was a subversive organization. Its failure to establish a “substantial connection” between the “Miami branch of the NAACP and communist activities” meant that the Court could not find the “compelling and subordinating state interest which must exist if” the essential freedoms of the First and Fourteenth Amendments “are to be curtailed” (emphasis in original).

LAWRENCE D. NORDEN

References and Further Reading

- Entin, Jonathan L., *Litigation, Political Mobilization, and Social Reform: Insights From Florida’s Pre-Brown Civil Rights Era*, Florida Law Review 52 (2000): 497.

Cases and Statutes Cited

- Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954)

GIDDINGS, JOSHUA REED (1795–1864)

Joshua Giddings, a lawyer and abolitionist congressman, was born in Bradford County, Pennsylvania, to farmers Joshua Giddings and Elizabeth Pease. Despite a childhood plagued with hard work, financial instability, and minimal education, Giddings taught himself to read and write. After his family moved to the Western Reserve, Giddings studied law under Elisha Whittlesey, a future U.S. representative. In 1838, Giddings quit law and successfully ran for U.S. Congress for Ohio’s Sixteenth District under the Whig nomination. He maintained the position until 1859, although he ran under the Free Soil and Republican Party tickets in ensuing years. Giddings continued to live in Ashtabula County until his death in 1864.

Giddings adhered to radical politics and was a staunch supporter of the abolitionist cause. By attempting reform within the confines of the U.S. Congress, Giddings became known as a radical and supported John Quincy Adams’s campaign against the gag rule, which severely limited debate on anti-slavery issues. This censure of the antislavery topic lasted from 1836 to 1844.

The gag rule did not stop Giddings’s efforts. In 1842, he introduced his Creole Resolutions, a declaration that supported the rebellion of slaves on the high seas. This resulted in a censure from the House of Representatives and, subsequently, a resignation from Giddings. Shortly after the incident Giddings’s district reelected him and he successfully returned to Congress. As years passed, Giddings became even more determined in his antislavery views and continued to work towards emancipation. Despite obstacles such as the gag rule and his censure, Joshua Giddings and other antislavery politicians managed to have their abolitionist views heard.

HEIDI SCOTT GIUSTO

References and Further Reading

- Gamble, Douglas A. “Joshua Giddings and the Ohio Abolitionists.” *Ohio History* 88 (Winter 1979): 37–56.
- Giddings, Joshua R. *An Expose of the Circumstances Which Led to the Resignation by the Hon. Joshua R. Giddings*. Painesville, OH: J. Leonard & Co., Printers, 1842.
- . *Speeches in Congress*. Boston: J. P. Jewett and Company, 1853.
- . *The Exiles of Florida: or, The Crimes Committed by our Government Against the Maroons, Who Flew From South Carolina and the Other Slave States, Seeking*

Protection Under Spanish Laws. Columbus, OH: Follett, Foster, 1858.

———. *History of the Rebellion; Its Authors and Causes*. New York: Follett, Foster, 1864.

Julian, George W. *The Life of Joshua R. Giddings*. Chicago: A. C. McClurg and Co., 1892.

Stewart, James Brewer. *Joshua R. Giddings and the Tactics of Radical Politics*. Cleveland, OH: The Press of Case Western Reserve University, 1970.

See also **Gag Rule**

GIDEON v. WAINWRIGHT, 372 U.S. 335 (1963)

In *Gideon v. Wainwright*, 372 U.S. 335 (1963), the Court held that the Sixth Amendment requirement of the assistance of counsel was obligatory on the states under the Fourteenth Amendment. In *Gideon*, then, the Court overruled its earlier decision in *Betts v. Brady*, 315 U.S. 455 (1962). Justice Black wrote the majority opinion. Justices Douglas, Clark, and Harlan each concurred in separate opinions.

In *Gideon*, the defendant, Clarence Gideon, was charged in Florida state court with breaking into and entering a poolroom with intent to commit a misdemeanor inside. This was, of course, a noncapital offense under Florida law. He appeared in court without any money and without a lawyer and asked the court to appoint a lawyer for him at state expense. The court refused to do so. The defendant then went to trial and, like *Betts*, defended himself. Although the courts observed that he did a fairly good job, he was found guilty of the charges. Gideon appealed, seeking review of the lower court's order refusing to appoint counsel for him. Not surprisingly, the conviction was upheld on appeal because the state courts properly followed the existing Supreme Court opinion in *Betts v. Brady*, discussed earlier.

However, the U.S. Supreme Court took Gideon's case and reversed his conviction. Returning to the issue of whether counsel is required in noncapital cases, the Court changed its mind and overruled their decision in *Betts*.

The Court held that *Betts v. Brady* had been wrongly decided and that the right to counsel was fundamental. In doing so, it relied on *Powell v. Alabama*, 287 U.S. 45 (1932), and *Grosjean v. American Press Co.*, 297 U.S. 233 (1936), as two cases that had recognized the fundamental nature of the right, although limiting the holdings to the facts of those cases. Accordingly, the Court held that *Betts* was an "abrupt break with its own well-considered precedents." In addition to relying on its precedents, the Court held that "reason and reflection" require

the recognition that any person who is haled into court without an attorney cannot be assured a fair trial. The court recognized that the government hires lawyers to prosecute people and defendants hire the best lawyers they can to represent them and that these are evidence "of the widespread belief that lawyers in criminal courts are necessities, not luxuries."

Justice Douglas concurred, restating his long-held position on the so-called "total incorporation" theory. Under that theory, Justice Douglas believed that the Bill of Rights was incorporated as a whole and applicable on the states as it was to the federal courts through the Fourteenth Amendment. Justice Clark concurred in the result, indicating that, as far as he was concerned, the Court had already held that the Fourteenth Amendment required counsel in all capital crimes and that the majority's decision did no more than "erase a distinction which has no basis in logic and an increasingly eroded basis in authority." That is, the Constitution "makes no distinction between capital and noncapital cases."

Justice Harlan also concurred, agreeing that *Betts* should be overruled. But he did not view *Betts* as a break with precedent. According to Justice Harlan, *Betts* simply held that special circumstances could require the appointment of counsel in noncapital trials, but required that such circumstances be present. As Justice Harlan explained, the special circumstances rule exists but its substance has been eroded. "The court has come to recognize, in other words, that the mere existence of a serious criminal charge constituted in itself special circumstances requiring the services of counsel at trial. In truth the *Betts v. Brady* rule is no longer a reality."

LISSA GRIFFIN

Cases and Statutes Cited

Betts v. Brady, 315 U.S. 455 (1962)

Gideon v. Wainwright, 372 U.S. 335 (1963)

Grosjean v. American Press Co., 297 U.S. 233 (1936)

Powell v. Alabama, 287 U.S. 45 (1932)

GIDEON, CLARENCE EARL (1910–1972)

Born in Hannibal, Missouri, in 1910, Clarence Earl Gideon secured the right to counsel for indigent criminal defendants charged with felonies in *Gideon v. Wainwright*, 372 U.S. 335 (1963). Gideon experienced extreme poverty throughout his lifetime. He ran away from home in the eighth grade and was first arrested for a petty crime as a juvenile. He spent one year in reform school. At eighteen, he was arrested, charged

with burglary, robbery, and larceny, and sentenced to ten years. For the next thirty years, Gideon served several more prison terms in Kansas, Missouri, and Texas and worked as an itinerant laborer when he was free. Just before the arrest that led to his historic appeal, he lost three children to the Florida welfare authorities.

In June 1961, a pool hall in Panama City, Florida, where Gideon was a frequent customer, was burglarized. Some beer and wine and \$65.00 in change were stolen. An eyewitness told police that he had seen Gideon, his pockets full of change, exit the pool hall carrying a bottle of wine. The eyewitness said he saw Gideon make a phone call, then get into a cab and leave. The police arrested Gideon at a nearby tavern with his pockets full of coins.

Because he was too poor to hire an attorney, Gideon asked the trial judge to appoint an attorney for him. The judge denied Gideon's request because Florida law, unlike that in forty-five other states and the federal courts at the time, authorized court-appointed counsel only for indigent defendants charged with capital crimes. Gideon represented himself, was convicted, and sentenced to serve five years.

While he was incarcerated, Gideon began reading the law and decided to pursue an appeal based on his belief that the denial of counsel violated his Fourteenth Amendment right to due process. He wrote to the Florida Supreme Court and the FBI, but neither gave Gideon any relief. He then wrote a five-page petition to the U.S. Supreme Court. The Court granted cert and appointed Abe Fortas to represent Gideon on appeal. The Warren Court reversed, holding that all defendants charged with felonies were entitled to counsel, and ordered a new trial for Gideon. As a result of his appeal, Florida released over two thousand convicted felons who had been tried without the assistance of counsel.

W. Fred Turner represented Gideon at the new trial, and the jury acquitted Gideon after one hour of deliberation. Turner located the cab driver and called him as a witness at the new trial. He testified that, when Gideon got into his cab, he did not see Gideon carrying any bottles. Moreover, Turner impugned the credibility of the eyewitness by suggesting that he had been a lookout for the real thieves.

Upon his acquittal Gideon returned to a life of poverty and died in 1972. He was buried in an unmarked grave, though a granite headstone was later added. Gideon has become a patron saint of criminal defense attorneys, especially public defenders, with numerous celebrations honoring his appeal and awards in his name.

J. AMY DILLARD

GIGLIO v. UNITED STATES, 405 U.S. 150 (1972)

References and Further Reading

Lewis, Anthony. *Gideon's Trumpet*. New York: Random House, 1964.

Cases and Statutes Cited

Gideon v. Wainwright, 372 U.S. 335 (1962)

GIGLIO v. UNITED STATES, 405 U.S. 150 (1972)

In *Giglio*, the Supreme Court held that the prosecution violates the Fourteenth Amendment due process clause when it fails to disclose exculpatory evidence to the defense, even if the individual prosecutors are unaware of the undisclosed information.

The prosecution's star witness at Giglio's forgery trial was his alleged coconspirator, Taliento. Taliento testified that the prosecution had not promised him immunity from prosecution in exchange for his testimony. However, after Giglio's conviction, the defense learned that another prosecutor had indeed promised Taliento that he would not be prosecuted.

Giglio's motion for a new trial was denied, but the U.S. Supreme Court unanimously reversed. The Court held that the government's failure to disclose its promise to Taliento violated Giglio's due process right, established in *Brady v. Maryland*, 373 U.S. 83 (1963), to receive exculpatory information from the prosecution in advance of the trial. In addition, as in *Napue v. Illinois*, 360 U.S. 264 (1959), the undisclosed information proved that the government violated Giglio's due process rights by presenting testimony from Taliento that it knew to be false. Finally, the Court stressed that it was irrelevant that the prosecutor who tried Giglio did not personally know of the promise to Taliento because the prosecution has a duty, as an entity, to disclose exculpatory information.

Giglio is therefore an important case because it establishes that a prosecutor's duty to disclose exculpatory evidence extends beyond information that he or she personally possesses. Instead, a prosecutor has a duty to find and disclose any exculpatory information in the hands of the government.

DAVID A. MORAN

References and Further Reading

Imwinkelried, Edwin, and Norman Garland. *Exculpatory Evidence*, 2nd ed. Charlottesville, VA: Michie Publications, 1996.

Stacy, Tom, *The Search for Truth in Constitutional Criminal Procedure*, Columbia Law Review 91 (1991): 1369.

Cases and Statutes Cited

Brady v. Maryland, 373 U.S. 83 (1963)

Napue v. Illinois, 360 U.S. 264 (1959)

See also ***Brady v. Maryland*, 373 U.S. 83 (1963); Due Process; Fourteenth Amendment; *Napue v. Illinois*, 360 U.S. 264 (1959)**

GILMORE, GARY (1940–1977)

On January 17, 1977, Gary Gilmore, a habitual criminal who, at age thirty-six, had spent more than half of his life incarcerated was executed by a Utah state firing squad. His death, the first in the state in sixteen years and the first in the nation in ten years, ignited renewed and heated debate over the legitimacy of capital punishment.

In April 1976, Gilmore, a talented, intelligent, though violent high school drop-out, had been released from the Oregon State Penitentiary into the state of Utah, where a cousin lived, after serving a sentence for armed robbery. In just three months, however, Gilmore was back in jail, accused of two armed robberies and the brutal, unprovoked murders of a gas station attendant and a motel clerk. In November, after a two-day trial, Gilmore was convicted of first-degree murder and sentenced by the trial jury to be executed the next month. Given a choice of execution by hanging or by firing squad, Gilmore chose the latter.

Gilmore's sentencing provoked nationwide debate over capital punishment on several fronts. In 1972, the U.S. Supreme Court had ruled in *Furman v. Georgia*, 408 U.S. 238 (1972), that the arbitrary and capricious way in which states applied the death penalty was cruel and unusual punishment as forbidden by the Eighth Amendment. That ruling had effectively suspended executions in the United States. By 1976, however, states had significantly revised their death penalty statutes to meet the Court's constitutional objections. Utah's had just become law on July 2, 1976, only three weeks before Gilmore committed his murders.

Death penalty opponents had long argued that capital punishment was an anomaly in civilized society, where the deliberate taking of human life could not be morally sanctioned. Anticapital punishment groups insisted that the death penalty was an irreversible sentence that did not function as an effective deterrent against future crime. Over Gilmore's objections, the American Civil Liberties Union and the NAACP Legal Defense Fund, among other parties, including Gilmore's mother, entered appeals of the sentence.

Those appeals raised another objection to Gilmore's sentence that also disturbed death penalty opponents. Gilmore had refused to sanction the appeals. He argued that he had no desire to spend the remainder of his life in prison and considered the penalty to be fair and proper. The underlying problem here, however, was whether or not Gilmore's execution would amount to state-assisted suicide, for Gilmore was putting the full burden of his death upon the state. It was even suggested that Gilmore had committed the murders, for which he was bound to get caught, to force the state to kill him. Gilmore offered the most articulate answer to those arguments. In a last hearing before the Utah pardon board, Gilmore contended that he accepted his fate, bluntly saying to all those attempting to have his sentence commuted, "I'd like them to butt out. It's my life and my death."

Gilmore was executed, according to his wishes, by firing squad, on January 17, 1977. According to author Norman Mailer, when asked for his final words, Gilmore, with a phrase that would enter American popular culture, replied simply, "Let's do it."

KAREN BRUNER

References and Further Reading

Banner, Stuart. *The Death Penalty: An American History*. Cambridge, MA: Harvard University Press, p. 202.

Gilmore, Mikal. *Shot in the Heart*. New York: Doubleday, 1994.

Johnson, Kathleen L., *The Death Row Right to Die: Suicide or Intimate Decision?* Southern California Law Review 54 (1980): 575–631.

Mailer, Norman. *The Executioner's Song*. Boston: Little, Brown and Company, 1979.

White, Welsh S., *Essay: Defendants Who Elect Execution*, University of Pittsburgh Law Review 48 (Spring 1987): 853–877.

See also **Capital Punishment and the Equal Protection Clause Cases; Capital Punishment: Eighth Amendment Limits; Capital Punishment: Methods of Execution**

GINSBERG v. NEW YORK, 390 U.S. 629 (1968)

Is a state law constitutional when it prohibits the sale to minors of publications that may not be obscene to adults? The appellant, who operated a luncheonette on Long Island in New York and sold magazines, was convicted of selling "girlie" magazines to a sixteen-year-old boy. The boy's mother sent him to the luncheonette to buy the material so that Ginsberg would be prosecuted under New York's law prohibiting the

sale of obscene material to persons under seventeen years of age.

New York's statute declared that various representations of female nudity were harmful to persons under the age of seventeen if the representations (1) appealed predominantly to the prurient, shameful, or morbid interest of minors; (2) were patently offensive to prevailing standards in the adult community as a whole with respect to what was suitable material for minors; and (3) were utterly without redeeming social importance to minors. The New York Court of Appeals turned back Ginsberg's challenge to the state's authority to define obscenity based on its appeal to minors.

In doing so, the court of appeals followed the "variable concepts" notion of obscenity that Justice Brennan introduced in *Mishkin v. New York*, 383 U.S. 502 (1966), which adapted the *Roth* standard (*Roth v. United States*, 354 U.S. 476, 1957) according to the "sexual interests" of the "intended and probable recipient group," including "sexually immature persons." As Justice Brennan argues for the majority in affirming the New York court's decision, the ethical or moral development of youth is an important interest of the state and accordingly within the state's constitutional authority to regulate. Thus, it was "rational" for New York's legislature to limit exposure to sexual material in order to avoid its harmful effects on minors even if this material would not be considered obscene from an average adult's perspective. Justice Brennan dismisses in passing Ginsberg's claim that New York's statute was vague as well as his challenge to the *scienter* requirements of the law.

Justice Fortas dissented and objected to the majority's unwillingness to determine whether the magazines in question were in fact obscene. Although the justice did not object to the variable obscenity standard, he complained that the majority failed to define what made the material in question obscene for persons under seventeen, but not obscene for those who are seventeen and older. In making this argument, Justice Fortas ignored the content of the New York statute and asked for an independent assessment by the Court. (Ginsberg's lawyer did not claim the magazines were not obscene in the lower courts, and the Supreme Court majority chose not address this question.)

The question of *scienter* was also left unresolved from Justice Fortas's perspective since Ginsberg was prosecuted for selling magazines that, under previous Supreme Court decisions, he had a right to sell. Finally, Ginsberg did not persuade the minor to buy the magazines and thus he was not guilty of pandering. The justice concluded that the majority's decision meant that a state "may convict a passive

luncheonette operator of a crime because a 16-year-old boy maliciously and designedly picks up and pays for two girlie magazines which are presumably are not obscene."

ROY B. FLEMMING

References and Further Reading

- Alexander, Donald. *The Politics of Pornography*. Chicago: University of Chicago Press, 1989.
 Hixson, Richard F. *Pornography and the Justices: The Supreme Court and the Intractable Obscenity Problem*. Carbondale: Southern Illinois University Press, 1996.
 Mackey, Thomas C. *Pornography on Trial: A Handbook with Cases, Law, and Documents*. Santa Barbara, CA: ABC-CLIO, 2002.

Cases and Statutes Cited

- Ginsberg v. New York*, 390 U.S. 629 (1968)
Mishkin v. New York, 383 U.S. 502 (1966)

GINSBURG, RUTH BADER (1933–)

Ruth Bader Ginsburg, legal scholar, successful advocate for gender equality, and jurist, currently serving as an associate justice on the U.S. Supreme Court, was born Joan Ruth Bader in Brooklyn, New York, on March 15, 1933. She was the daughter and granddaughter of Jewish immigrants from Central and Eastern Europe. Ginsburg's life has shaped both of the main phases of her career as an advocate and a judge. Her personal experiences of unfairness undoubtedly spurred her to fight for greater equality for women. These experiences also led to her determination not to read her personal values into the Constitution. An early job researching another legal system led to a comparative perspective on American law. Additionally, personal tragedy gave Ginsburg great strength, as well as a strong commitment to family. She has said, "The smell of death was strong in my life," but has still described herself as a lucky person, fortunate in love, motherhood, and a highly successful career in the law.

Ginsburg's parents, Celia Bader, a garment district bookkeeper, and Nathan Bader, a furrier and haberdasher, were loving and supportive. But tragedy marred Ginsburg's childhood. Her only sibling, Marilyn, died when Ginsburg was a toddler, and her mother fell seriously ill with cervical cancer when Ginsburg entered high school, dying the day before Ginsburg's graduation. These losses made Ginsburg aware of the uncertainty of life and caused her to treasure her family, which has now expanded to include several grandchildren. She gave a third birthday

party for one beloved granddaughter at the Supreme Court and has recalled that it was the only time that the main menu item on the buffet table was child-sized peanut butter and jelly sandwiches.

Ginsburg's mother was her greatest inspiration. Despite the fact that Celia did not have the opportunity to attend college, she valued learning and believed that women should have the same educational opportunities as men. Ginsburg attended Brooklyn public schools, where she excelled as a student and obtained a scholarship to attend Cornell University.

At Cornell, Ginsburg met her husband, Martin Ginsburg, also an undergraduate there. They married in 1954. The gregarious Martin is the reserved Ginsburg's polar opposite in temperament, but their long marriage has been happy. After their wedding, Martin interrupted his studies at Harvard Law School to complete his military service, and the couple spent two years at Fort Sill, Oklahoma. Ginsburg worked in a Social Security office where she experienced workplace gender discrimination, receiving a job demotion after announcing her pregnancy. Following the birth of her daughter, Jane Carol, in 1955, Ginsburg spent a year as a full-time mother, the only time in her life that she did not hold a job outside her home.

Bolstered by the support of Martin and his family, Ginsburg decided to pursue a legal career and gained admission to Harvard Law School. When she started there in 1956, she was one of only nine women in a class of more than five hundred students. Martin's willingness to share childcare and other household duties, most famously by acquiring gourmet cooking skills, gave Ginsburg time to study. She reciprocated by supporting Martin through his successful battle with a life-threatening cancer diagnosed in his third year of law school. After Martin graduated, the couple moved to New York City, where he had accepted a position with a law firm. Ginsburg transferred to Columbia Law School after Harvard refused to grant her a degree if she spent her last year at Columbia, even though male students usually received permission for similar arrangements.

Despite excelling in law school, being elected to the Harvard and Columbia Law Reviews, and tying for first place in her graduating class at Columbia in 1959, Ginsburg's legal career got off to a difficult start as a result of the institutionalized gender discrimination in existence at the time. None of the many law firms to which she applied was willing to hire a woman, mother, and Jew. Finally, Judge Edmund L. Palmieri of the Southern District of New York agreed to take Ginsburg as his law clerk, though only after receiving an assurance from one of her professors that if her work was unsatisfactory, a

male graduate was waiting in the wings to take over. This backup proved unnecessary. Judge Palmieri later rated Ginsburg one of his best law clerks.

After her two-year clerkship, Ginsburg's career can be divided into two phases. During the first stage, which lasted just under two decades, she worked in law schools. For the second ten years, she also worked as an activist and highly successful advocate for gender equality. In the second phase of her career, she has served as a federal appellate judge for twenty-five years.

In her first law school position, Ginsburg focused on comparative law as a research associate in Columbia University's International Procedure Project from 1961 to 1962 and as its director from 1962 to 1963. Her work there led to her 1965 book, *Civil Procedure in Sweden*, coauthored by Anders Bruzilius. In 1963, she obtained a position as a tenure track assistant law professor at Rutgers University, where she was only the second woman on the law faculty. She published a number of articles and book chapters on aspects of civil procedure, conflicts of law, private international law, and comparative law, as well as a 1968 translation of the Swedish Code of Judicial Procedure, also coauthored with Bruzilius.

While at Rutgers, Ginsburg experienced gender discrimination, receiving substantially less pay than male colleagues on the stated justification that her husband had a well-paying job. But the Equal Pay Act was already in force, and around 1970 Ginsburg joined a class action lawsuit brought by a number of women employees against Rutgers that ended in a settlement giving the plaintiffs a large pay increase. Fearing additional discrimination, Ginsburg hid her pregnancy with her son, James Steven, born in 1965, until she received a contract renewal. Ginsburg taught at Rutgers until 1971, when she moved to Columbia Law School where she was the first woman law professor to obtain tenure.

During the 1970s, Ginsburg shifted her attention to gender discrimination, inspired in part by students who wanted a course in women and the law. She taught courses on women's rights, authored articles on that subject, and coedited the first casebook on sex-based discrimination. She combined her academic work with activism in support of the proposed equal rights amendment as well as advocacy in many gender discrimination cases, serving as codirector of the American Civil Liberties Union's (ACLU's) Women's Rights Project. She was the ACLU's general counsel from 1973 to 1980 and a member of its National Board of Directors from 1974 to 1980.

Believing that gender stereotypes are irrational and harmful, Ginsburg sought "to help place women's rights permanently on the human rights agenda."

She worked to attack discrimination as an activist for ratification of the equal rights amendment and also through litigation brought under the equal protection clauses of the Fifth and Fourteenth Amendments to the U.S. Constitution. Although the states failed to ratify the equal rights amendment, Ginsburg's work as an advocate resulted in much success. She authored the ACLU's brief in *Reed v. Reed* (1971), the first case in which the Supreme Court ruled in favor of a woman on an equal-protection claim. Ginsburg was the principal author of briefs in eight other gender discrimination cases argued before the Court, and she also coauthored fifteen amicus curiae briefs. She personally argued six gender discrimination cases before the Court, winning five of them.

These successful cases challenged laws that gave women special benefits but were based on stereotypical assumptions about women's inferiority. Prominent among them was *Frontiero v. Richardson* (1973), a challenge to a statute that gave the families of men serving in the military automatic benefits while requiring the families of women in military service to prove that a woman provided more than half of her husband's support. Another case, *Duren v. Missouri* (1979), attacked a law giving women an automatic exemption from jury service on request.

Ginsburg brought some of these cases on behalf of male plaintiffs in a successful effort to show that statutory gender-based classifications based on stereotypes harmed men as well as women. One example is *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975), in which a widower with a young child sued the Social Security Administration to obtain survivor benefits then available only to widows. Another is *Califano v. Goldfarb* (1977), in which a widower sued to obtain survivor benefits that were only payable if he could prove that he received at least half his support from his wife, but which a widow would have automatically obtained.

The Court never accepted Ginsburg's arguments that gender was a suspect classification requiring the same strict scrutiny that has been applied to classifications based on race or national origin. But by using alternative arguments, she was instrumental in persuading the Court to establish gender as a category for heightened constitutional scrutiny. In *Craig v. Boren* (1978), a case in which Ginsburg coauthored an amicus curiae brief, the Court endorsed a heightened intermediate level of scrutiny for official gender classifications, and it continues to apply a version of this test today.

Ginsburg's work as an advocate ceased in 1980 after President Carter nominated her to the federal bench. She became a judge on the U.S. Court of Appeals for the District of Columbia. In thirteen

years there, she wrote over seven hundred published and unpublished opinions. A White House report assessed her as "tough on crime, committed to free speech and freedom of religion, and supportive of civil rights." In cases that were not unanimous, the judge voted more often with Republican colleagues than with Democrats. Judge Ginsburg earned a reputation for being a careful judge, meticulous with facts, committed to respecting precedent, and devoted to maintaining collegiality with her colleagues.

In 1993, President Clinton nominated Judge Ginsburg to serve as the 107th justice on the U.S. Supreme Court. The Senate easily voted to confirm her, by a vote of ninety-seven to three. Justice Ginsburg filled the seat vacated by Justice Thurgood Marshall, which seemed particularly appropriate to commentators who had nicknamed her the "Thurgood Marshall of gender equality law." They drew a parallel between her advocacy and activism in gender discrimination cases and Marshall's fight against race discrimination as chief counsel for the NAACP Legal Defense Fund.

Justice Ginsburg clearly views her role on the bench as fundamentally different from the adversarial job of an advocate. She has cited the words of Alexander Hamilton that "the mission of judges is to secure a steady, upright and impartial administration of the laws." According to the justice, "one of the most sacred duties of a judge is not to read her convictions into the Constitution." She believes that a judge should limit herself to deciding the case before her. Justice Ginsburg has described courts as "reactive institutions" that respond to societal problems brought to them. Protecting civil rights is thus not the sole responsibility of the judiciary, but depends on the people in society. Within these parameters of judicial restraint, she has retained her commitment to advancing gender equality and fighting discrimination.

Justice Ginsburg's most significant Supreme Court opinion on gender equality was *United States v. Virginia (VMI)* (1996). She wrote a seven-to-one majority opinion finding it unconstitutional, under the Equal Protection Clause of the Fourteenth Amendment, for the state of Virginia to bar women from admission to the Virginia Military Institute. The justice found the applicable level of constitutional review to be a flexible version of the intermediate scrutiny test endorsed by the Court in *Craig v. Boren*. She called this test "skeptical scrutiny." Under it, a government gender-based classification will only be upheld if the government can establish an "exceedingly persuasive justification" for it. The government must show that the classification serves important governmental objectives and that the discriminatory means used are substantially related to achieving those objectives.

The justice has expressed disapproval of a rigid categorical approach to the equal protection clause in discrimination cases of any sort. She has voiced concern that the Court's higher standard of review for race-based classifications has undesirable consequences for affirmative action. Justice Ginsburg views a formal tier-based approach to equal protection as undesirable for making government attempts to assist historically disadvantaged racial minorities through affirmative action less likely to fend off constitutional attacks than similar efforts to aid women. She views the core idea underlying the equal protection clause as the human rights principle of respect for essential human dignity. Justice Ginsburg believes that basic notions of fairness should guide the Court in resolving discrimination cases. This view is manifested in her dissenting opinion in the case successfully challenging the University of Michigan's undergraduate affirmative action program, *Gratz v. Bollinger*, 539 U.S. 244 (2003).

As this opinion shows, the justice still retains her belief in the value of analyzing legal issues comparatively, a method that she has endorsed since her very first academic position. In one of her lectures, Justice Ginsburg said:

In my view, comparative analysis emphatically is relevant to the task of interpreting constitutions and enforcing human rights. We are the losers if we neglect what others can tell us about endeavors to eradicate bias against women, minorities, and other disadvantaged groups. For irrational prejudice and rank discrimination are infectious in our world. In this reality, as well as the determination to counter it, we all share.

SUSANNA FISCHER

References and Further Reading

- Bayer, Linda. *Ruth Bader Ginsburg*. Philadelphia: Chelsea House, 2000.
- Baugh, Joyce Ann et al., *Justice Ruth Bader Ginsburg: A Preliminary Assessment*, University of Toledo Law Review 26 (1994): 1.
- Celebrating the Jurisprudence of Ruth Bader Ginsburg*, New York City Law Review 7 (2002).
- The Day, Berry and Howard Visiting Scholar, An Open Discussion with Justice Ruth Bader Ginsburg*, Connecticut Law Review 36 (Summer 2004): 1033.
- Ginsburg, Ruth Bader, *Remarks for the Celebration of 75 Years of Women's Enrollment at Columbia Law School*, Columbia Law Review 102 (October 2002) 1441.
- Ginsburg, Ruth Bader, and Deborah Jones Merritt, *Fifty-First Cardozo Memorial Lecture Affirmative Action: An International Human Rights Dialogue*, Cardozo Law Review 21 (October 1999): 253.
- Gunther, Gerald, *Ruth Bader Ginsburg: A Personal, Very Fond Tribute*, University of Hawaii Law Review 20 (Winter 1998): 583.

Pressman, Carol, *The House That Ruth Built: Justice Ruth Bader Ginsburg, Gender, and Justice*, New York Law School Journal of Human Rights 14 (1997): 311.

Symposium: Celebration of the Tenth Anniversary of Justice Ruth Bader Ginsburg's Appointment to the Supreme Court of the United States, Columbia Law Review 104 (January 2004).

GINZBURG v. UNITED STATES, 343 U.S. 463 (1966)

Can the marketing and advertising of printed material constitute "pandering" that under the *Roth* test for obscenity prohibits the material from being mailed? Ginzburg was convicted of mailing publications and unsolicited circulars that indiscriminately pandered to "erotic interests." He was sentenced to five years in prison. The majority led by Justice Brennan affirmed the lower court convictions and the appellate decision upholding them. This was one of three obscenity decisions handed down on the same day by majorities led by Justice Brennan. Justices Black, Douglas, Harlan, and Stewart wrote separate dissenting opinions in this case.

Justice Brennan's opinion drew from Justice Warren's concurring opinion in *Roth* (*Roth v. United States*, 354 U.S. 476, 1957) in which the chief justice suggested the focus should be on the defendant's behavior and not on the character of the material in question. Justice Warren's view was that current laws forbade persons from "purveying textual graphic matter openly advertised to appeal to the erotic interest of their customers." Justice Brennan thus accepted the government's argument that the setting in which the publications are presented can be assessed for obscenity using the *Roth* test. A background of "commercial exploitation of erotica solely for the sake of their prurient appeal" could be obscene.

The advertisements in this case deliberately represented the publications as "erotically arousing" and "stimulated the reader to accept them as prurient" with no expectation of "saving intellectual content." Moreover, the advertisements gave the material a "salacious cast." Evidence of pandering, particularly in "close cases," may be "probative" under *Roth* since appeals to prurient interests indicate the transactions in question "involved sales of illicit merchandise, not sales of constitutionally protected matter."

Justice Black's dissent attacked the *Roth* test for its vagueness. He concluded by pointing out that the justices deciding *Ginzburg* and its two companion cases wrote fourteen separate opinions, which, the justice claimed, by themselves revealed the interpretative challenges posed by *Roth*. Justice Douglas similarly attacked *Roth* and reviewed the lower court

testimony to make the point that the publications were not obscene by *Roth*'s standards. Justice Harlan criticized the Court for exceeding the bounds of a federal statute that focused "solely" on the character the material deemed to be unmailable because it was obscene. He also restated his position that the statute only authorized banning "hard-core pornography," a test, he said, that the majority and lower courts agreed the publications at issue did not meet.

Agreeing with Justice Harlan on the need to prove "patent indecency" before someone can be convicted for mailing obscene material, Justice Stewart went on to claim that the majority upheld Ginzburg's convictions on the newly developed grounds under *Roth* of pandering even though he was not charged for this offense. As a consequence, this decision, the justice maintained, denied Ginzburg his due process rights. The companion cases to *Ginzburg* are *Memoirs of a Woman of Pleasure v. Attorney General of Massachusetts*, 383 U.S. 413 (1966), and *Mishkin v. New York*, 383 U.S. 502 (1966).

ROY B. FLEMMING

References and Further Reading

- Alexander, Donald. *The Politics of Pornography*. Chicago: University of Chicago Press, 1989.
- Hixson, Richard F. *Pornography and the Justices: The Supreme Court and the Intractable Obscenity Problem*. Carbondale: Southern Illinois University Press, 1996.
- Mackey, Thomas C. *Pornography on Trial: A Handbook with Cases, Law, and Documents*. Santa Barbara, CA: ABC-CLIO, 2002.

Cases and Statutes Cited

- A Book Named John Cleland's Memoirs of a Woman of Pleasure v. Attorney General of Massachusetts*, 383 U.S. 413 (1966)
- Ginzburg v. United States*, 383 U.S. 463 (1966)
- Mishkin v. New York*, 383 U.S. 502 (1966)
- Roth v. United States*, 354 U.S. 476 (1957)

GITLOW v. NEW YORK, 268 U.S. 652 (1925)

The right to criticize the government and to argue for a change is an essential aspect of the First Amendment's freedom of speech. This freedom is not unlimited, however. In *Schenck v. United States*, 249 U.S. 47 (1919), Justice Holmes said there is a boundary between allowable speech and prohibited speech. That is, there are certain substantive evils that the government has the right to prevent, and the government

can criminalize words that create a "clear and present danger" of bringing about that evil.

A range of unrests marked the early years of the twentieth century. The labor union movement, the rise of anarchist and socialist political groups, the antiwar movement during World War I, and the Russian Revolution, with its accompanying development of Bolshevik and Communist Parties led to the enactment of anti-anarchy and antisindicalism acts. The usual definition of "criminal anarchism" was the advocacy of the overthrow of the government by violent or unlawful means.

Bernard Gitlow had served in the New York state legislature in 1918 as a member of the Socialist Party. In 1919, Gitlow split from the Socialist Party because he was dissatisfied with the socialist approach to change and joined what became the Communist Party. Gitlow soon became business manager of *The Revolutionary Age*, the Communist Party's official publication, which published a copy of the *Communist Manifesto*. The *Manifesto* explained the reason for this split: "Moderate socialism" advocated social change by peaceful, parliamentary means—the ballot box. This will not work, said the *Manifesto*. "Revolutionary socialism," or Communism, "insists that the democratic parliamentary state can never be the basis for the introduction of socialism; it is necessary to destroy the parliamentary state," by violence and unlawful means, as was recently demonstrated by the Communist Revolution in Russia.

Gitlow was arrested in November 1919 and accused of violating New York's criminal anarchy statute, which prohibited a number of acts, including publication of a document "containing or advocating, advising or teaching the doctrine that organized government should be overthrown by force, violence or any unlawful means" (N.Y. Penal Law sec. 161). Gitlow was convicted and sentenced to a term of five to ten years. He appealed, challenging the statute's constitutionality.

In a seven-to-two decision, the Supreme Court upheld the constitutionality of the statute, relying on "the principle that the state is primarily the judge of regulations required in the interest of public safety and welfare" and that a statute should be declared unconstitutional only when it is arbitrary or unreasonable:

A single revolutionary spark may kindle a fire that, smoldering for a time, may burst into a sweeping and destructive conflagration. It cannot be said that the state is acting arbitrarily or unreasonably when . . . to protect the public peace and safety, it seeks to extinguish the spark without waiting until it has enkindled the flame or blazed into the conflagration.

Justices Holmes and Brandeis dissented. Justice Holmes argued that the proper test was the rule in *Schenck*—that the state could prohibit speech only if that speech presented a “clear and present danger” to the state’s continued existence. Publication of the Communist Manifesto presented “no present danger of an attempt to overthrow the government by force on the part of the admittedly small minority who shared the defendant’s views.”

Six months later, New York Governor Al Smith commuted Gitlow’s sentence. Smith said Gitlow’s conviction was proper, noting that while the Supreme Court had upheld the constitutionality of the statute, two and a half years in prison was sufficient punishment for “a political crime.” In addition, the governor said he agreed with the reasoning in the Holmes dissent.

Gitlow immediately returned to his prominent position in the Communist Party. He later split with the party and even became an active anticommunist, testifying against the party before the House Un-American Activities Committee. He died in 1965.

Although the Supreme Court upheld Gitlow’s conviction, the clear-and-present-danger test became the standard by which most free speech cases have been decided ever since. The language in the dissent, that Gitlow’s group was too small to be a threat to the government, was distinguished in the 1951 case of *Dennis v. United States*, 341 U.S. 494 (1951), when the cold war made the strength of the Communist Party seem more worrisome.

A second interesting aspect of the decision is that it is one of the first in which the Supreme Court incorporated a First Amendment guarantee into the Fourteenth Amendment. Almost as an aside, the Court said, “we . . . assume that freedom of speech and of the press . . . are among the fundamental personal rights and ‘liberties’ . . . protected by the due process clause of the Fourteenth Amendment.”

ELI C. BORTMAN

Cases and Statutes Cited

Dennis v. United States, 341 U.S. 494 (1951)

Schenck v. United States, 249 U.S. 47 (1919)

N.Y. Penal Law sec. 161, Consol. Laws 1909, c. 40

See also **Anti-Anarchy and Anti-Syndicalism Statutes; Application of First Amendment to States; Clear and Present Danger Test; Communist Party; House Un-American Activities Committee**

GLORIOUS REVOLUTION

In what is sometimes called the Revolution of 1688 (or 1689), a specially convened “Convention Parliament” recognized William of Orange, Dutch Prince of the Holy Roman Empire of the German Nation and champion of Europe’s Protestants, and Mary, Protestant daughter of James II by Anne Hyde, as king and queen of England. The Convention Parliament established its own legitimacy and proceedings (as did the two preceding convention parliaments of 1399 and 1660); it also barred all Catholics from future succession to the throne. Though the Glorious Revolution is typically described as the resolution of more than one hundred years of religious and political strife, historians continue to debate the extent to which the events of 1688 and 1689 were glorious or revolutionary.

Background

From the time in 1685 when James II became the last Catholic king of England, all of Britain seemed mired in the simultaneous tensions between Catholics and Protestants and the rising political struggles over divine right vs. parliamentary power. Neither of the two parties in Parliament, Whigs and Tories, was willing to accept James’s Catholicism, particularly when his Catholic second wife, Mary of Modena, gave birth to a son (subsequently the Old Pretender) in June 1688. The newborn son was whisked to France, and the Convention Parliament convened, while James struggled to retain the crown.

Shortly thereafter, six noblemen and the bishop of London (remembered as the Immortal Seven) conspired against James by inviting William of Orange to take the throne and, in so doing, protect the liberties and religion of England. The small army James raised saw only a few minor skirmishes that ended in defeat and the defection of a lead commander to William. All seemed lost when James’s other daughter Anne, a Protestant, also deserted (for which she was later rewarded with a senior position in the line of royal succession). In December James attempted to escape from England but was captured and returned, after which he escaped yet again with greater (perhaps allowed) success.

The question of how to transfer power to William of Orange divided members of the convention between Whigs, who were willing to depose James and treat the throne as vacant, and Tories (previously Stuart loyalists), who refused to acknowledge that

any subordinate power could in any way tamper with the historically determined succession. A compromise was reached stating that when James took flight from England he had essentially “abdicated,” thereby leaving the throne vacant. In February 1689, William and Mary were granted the crown jointly, but William became sole ruler so long as he lived, limited only by the liberties of England as articulated by the Declaration of Right (stipulating the rights of Parliament as against the Crown). On December 16, 1689, an act of Parliament formalized the declaration as the Bill of Rights and a permanent buttress to England’s newfound constitutional monarchy.

How Revolutionary Was the Glorious Revolution?

It is often suggested that the Glorious Revolution was too orderly, too deliberate, too prescriptive, and too bloodless to have been revolutionary. Lord Macaulay insisted, “We cannot but be struck by its peculiar character,” the reason for which “is sufficiently obvious, and yet seems not to have been understood either by eulogists or censors.” Indeed, historians have long debated who won, and the magnitude of change brought about by, the revolution. Old Whig historians characterize William of Orange as the “deliverer,” a “savior,” and the “soul of Protestantism”; they see the Revolution as the climax of a century-long battle for parliamentary rule.

Subsequent scholars represented the revolution as a rather conservative affair, with Tories facilitating the change in monarchs without any significant redefinition or diminution of royal authority. The revolution is perhaps best understood as something of a compromise, offering victory for both Whig and Tory. It is certainly too simplistic to cast the revolution as a showdown between conservative Tories and liberal Whigs since either side proved capable of challenging the Crown or supporting royal prerogative. Likewise, it would be too narrow to suggest that no significant results were achieved—witness the validation of exclusion (a virulent decade-old attempt to prevent “popish” successors to the throne) as well as the establishment of a sovereign Parliament and a constitutional monarchy.

In the end, “the settlement” (including the Declaration of Rights, the Mutiny Act, the Toleration Act—all in 1689; the 1690 Land Tax Act; the Triennial Act of 1694; and the 1701 Act of Settlement) was a compromise intended to appeal to as many people as possible; it remained to be seen just how it would get

worked out in practice. The next twenty-five years saw a refashioning of the state that, by 1714, developed into a structure different from what anyone anticipated in 1689.

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References and Further Reading

- Harris, Tim. *Politics Under the Later Stuarts*. London: Longman Group, 1993.
- Hopppit, Julian. *A Land of Liberty? England 1689–1727*. Oxford: Oxford University Press, 2000.
- Macaulay, Thomas B. *The History of England* (first published 1848–1861). London: Penguin Books, 1968.
- Pincus, Steven. *The First Modern Revolution*. New Haven, Conn.: Yale University Press, 2006.
- Trevelyan, G. M. *England Under the Stuarts*. London: Folio Society, 1996.
- Underdown, David. *A Freeborn People: Politics and the Nation in 17th Century England*. Oxford: Clarendon Press, 1996.

GODFREY v. GEORGIA, 446 U.S. 420 (1980)

Upon reexamining the Court’s prior acceptance of Georgia’s capital sentencing scheme in *Gregg v. Georgia*, 428 U.S. 153 (1976), *Godfrey* held that a catch-all statutory aggravating circumstance was unconstitutionally vague. *Godfrey* was convicted of the murder of his wife and mother-in-law. His jury sentenced him to death after finding, consistent with a statutory aggravating circumstance, that his offenses were “outrageously or wantonly vile, horrible or inhuman.” The Georgia Supreme Court affirmed the sentence.

In *Gregg*, the Supreme Court found that the language of the catch-all statutory aggravating circumstance *could* apply to all murders, but that the Georgia Supreme Court could adopt a more limited construction. In *Godfrey*, Justice Stewart found that Georgia had limited the application of that aggravating circumstance to murders involving torture or aggravated battery, resulting in serious physical abuse before death. Justice Stewart concluded that *Godfrey*’s case, however, did not involve any of these characteristics because his victims died instantaneously. Therefore, the Georgia Supreme Court failed to follow the standards that it had set forth in order to limit discretion and thus avoid the arbitrary and capricious application of the death penalty. Justice Stewart found that there was no way to distinguish the imposition of the death penalty in this case from other cases in which the penalty was not imposed.

Godfrey further limited the possibility of the arbitrary and capricious application of the death penalty

by holding that a vaguely constructed aggravating circumstance provided constitutionally inadequate guidance for the jury.

EARL F. MARTIN

Cases and Statutes Cited

Gregg v. Georgia, 428 U.S. 153 (1976)

See also **Capital Punishment; Capital Punishment and the Equal Protection Clause Cases; Capital Punishment: Due Process Limits; Capital Punishment: Eighth Amendment Limits; Capital Punishment: History and Politics**

GODINEZ v. MORAN, 509 U.S. 389 (1993)

In *Godinez v. Moran*, the U.S. Supreme Court held that a criminal defendant who is competent to stand trial under *Dusky v. United States*, 362 U.S. 402 (1961), is also competent to enter a guilty plea and to waive the right to counsel. Thus, a defendant who has a basic understanding of the criminal process, his charges, and their consequences and who can recount pertinent facts to his attorney—the criteria for competency to stand trial—is also competent to waive his rights to trial by jury, remain silent, and confront accusers (the rights waived when one pleads guilty) and competent to decide to represent himself. The Court also held that a defendant who pleads guilty or waives counsel must do so “knowingly and voluntarily,” which requires that defendants actually understand the relevant facts (but does not necessarily require that the decision be “rational”).

Applying this standard, the Court refused to overturn the death sentences of Moran, who was found competent to stand trial by the evaluating psychiatrists and the trial judge, but who clearly was extremely depressed when he fired his attorneys, pleaded guilty, and presented no evidence at his capital sentencing proceeding. This case increases the risk that defendants who are irrational, but who can demonstrate a basic understanding of the criminal process, will be allowed to make important decisions and to represent themselves, to their obvious detriment.

CHRISTOPHER SLOBOGIN

References and Further Reading

Slobogin, Christopher, and Amy Mashburn, *The Criminal Defense Lawyer's Fiduciary Duty to Clients with Mental Disability*, *Fordham Law Review* 68 (2000): 1581–1642.

Cases and Statutes Cited

Dusky v. United States, 362 U.S. 402 (1961)

See also ***Dusky v. U.S.*, 362 U.S. 402 (1960); Guilty but Mentally Ill; Guilty Plea; Insanity Defense; Right to Counsel**

GOLDBERG v. KELLY, 397 U.S. 254 (1970)

In *Goldberg v. Kelly* (1970), the U.S. Supreme Court held that a state could not terminate welfare benefits without first giving the recipient the opportunity for an evidentiary oral hearing.

Goldberg capped a trio of decisions expanding federal welfare rights. *King v. Smith*, 392 U.S. 309 (1968), had held that a state may not limit Aid to Families with Dependent Children (AFDC) to families headed by married couples. *Shapiro v. Thompson*, 394 U.S. 618 (1969), struck a one-year welfare residency requirement as violating the right to interstate travel. In *Goldberg*, the Court went beyond scrutinizing the particulars of state welfare programs to articulate the general proposition that welfare enjoys the same legal protection as other property.

The plaintiffs in *Goldberg v. Kelly* were New York City residents who had been cut from the welfare rolls or were about to be. Under agency rules, they could discuss the proposed termination with a caseworker, submit a written protest and have a supervisor review the decision. A hearing, however, was available only after benefits ended. This, the Court held, was unconstitutional.

Writing for the six-to-three majority, Justice William Brennan noted that welfare benefits are “a matter of statutory entitlement for persons qualified to receive them,” adding that “it may be realistic today to regard welfare entitlements as more like ‘property’ than a ‘gratuity’” (Here cited to Charles A. Reich’s, “The New Property”). Thus, the prohibition against deprivation of property without due process of law contained in the Fourteenth Amendment to the U.S. Constitution applies to benefits termination.

“Due process of law” in this situation requires a pre-termination hearing because of the danger that if aid is terminated pending resolution of a controversy over eligibility, a person who is actually eligible may lose the “very means by which to live while he waits.” The hearing, however, need not be the equivalent of a full-dress trial, but should reflect the needs of the agency and the abilities of the average welfare recipient. The court then articulated a set of “minimum procedural safeguards,” namely, (1) timely notice, giving reasons for the proposed termination; (2) a hearing

at which recipients can speak, confront adverse witnesses, and be assisted by counsel (although counsel need not be provided); (3) an impartial decision maker; and (4) a reasoned decision resting on evidence adduced at the hearing.

In its original area of welfare law, the force of *Goldberg v. Kelly* has been blunted. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 abolished AFDC, replacing it with block grants to states. Indeed, the statute specifies that it creates no federal entitlement to welfare in favor of individuals, leaving the scope of entitlements to state law. Additionally, the Court has retreated from *Goldberg*'s trial-like vision of administrative due process in such cases as *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

Nevertheless, the “procedural due process revolution” started by *Goldberg v. Kelly* continues. “Fair hearings” are now an established element of the administrative landscape and the importance of statutory and administrative rights—the “new property”—is beyond dispute.

AMY SHAPIRO

References and Further Reading

- Davis, Martha F. *Brutal Need: Lawyers and the Welfare Rights Movement, 1960–1973*. New Haven, CT: Yale University Press, 1993.
- Mashaw, Jerry L. *Due Process in the Administrative State*. New Haven, CT: Yale University Press, 1985.
- Michelman, Frank I., *Welfare Rights in a Constitutional Democracy*, Washington University Law Quarterly (1979): 659.
- Reich, Charles A., *The New Property*, Yale Law Journal 73 (1964): 733.

Cases and Statutes Cited

- Goldberg v. Kelly*, 397 U.S. 254 (1970)
- King v. Smith*, 392 U.S. 309 (1968)
- Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)
- Shapiro v. Thompson*, 394 U.S. 618 (1969)
- Personal Responsibility and Work Opportunity Reconciliation Act of 1996*, Pub. L. No. 104-193, 110 Stat. 2105 (1996)

GOLDBERG, ARTHUR J. (1908–1990)

Over the nearly six decades of his working life, Arthur J. Goldberg was a consummate public citizen. In that period, Goldberg served as a captain and then a major in the U.S. Army Office of Strategic Services during World War II, general counsel to the United Steelworkers of America and Congress of Industrial Organizations (CIO), secretary of labor to President

John F. Kennedy, the nation's ninety-eighth Supreme Court justice, U.S. ambassador to the United Nations under President Lyndon Johnson, the Democratic Party's challenger to incumbent Republican Nelson Rockefeller in the 1970 New York gubernatorial election, and U.S. ambassador to the Belgrade Conference on Human Rights under President Jimmy Carter. Regardless of which post he held, Goldberg's lifetime of public service evidenced conciliation, tolerance, and his dedication to improving the living standards of working Americans and protecting civil liberties.

The Early Years

Goldberg was born on August 8, 1908, on the west side of Chicago. He was the youngest of eleven children born to Jewish Russian immigrant parents. Goldberg's father was a peddler, delivering produce by horse-drawn wagon until his death in 1916. After his death, Goldberg's older siblings quit school and worked full-time to support the family. As the youngest sibling, Goldberg worked in various low-paying jobs—wrapping fish at a fish market, as a shoe salesman, as a vendor at Wrigley Field, and as a part-time library clerk—and continued his education. No doubt, Goldberg's working-class childhood shaped his career-long dedication to the betterment of working Americans' lives.

By the age of sixteen, Goldberg had graduated from Benjamin Harrison Public High School, a feat that none of his siblings had achieved, and, motivated by the well-publicized 1923 murder trial of Nathan Leopold and Richard Loeb, was determined to study law. Goldberg accepted a scholarship at Chicago's Crane Junior College and also enrolled in classes at DePaul University. Despite his almost full-time work schedule, Goldberg continued to excel at school and, in 1926, secured a scholarship to transfer to Northwestern University.

Meanwhile, Goldberg also secured a scholarship to attend the Northwestern University School of Law, where, like many lawyers of his day, he began his study of law without having completed his undergraduate studies. While at Northwestern, Goldberg continued to work, performing hard labor on a part-time basis as a hod carrier in the construction industry. Nevertheless, as he had done throughout his academic career, Goldberg continued to excel, compiling the best academic record in the history of the law school, becoming editor-in-chief of the *Illinois Law Review* (the journal then jointly edited by Northwestern, the University of Chicago, and the University of

Illinois) and graduating at the top of his class with a bachelor of science in law and a doctor of science in law by age twenty-one.

Goldberg's graduation at such a young age posed a problem, however, because the Illinois Bar Association's rules prohibited the admission of someone so young. Ultimately, Goldberg overcame this hurdle by suing the Illinois Bar and, arguing his own case, persuaded an Illinois judge to waive the age restriction.

Lawyer and Patriot

Newly licensed, Goldberg spent four years working as an associate at two Chicago-based firms, where his work focused primarily on legal finance matters. Unexcited by this work and after seeing the Great Depression take its toll on working-class America, in 1933, Goldberg opened his own law firm specializing in labor law. Goldberg's associations with labor leaders and growing skills as a lawyer brought him to the attention of the CIO; in 1938, the organization asked him to advise the American Newspaper Guild during its strike against the Hearst Newspapers in Chicago and to defend guild pickets in court. Consistent with his sympathy and compassion for workers and his evident distaste for the violence that had plagued so many strikes, Goldberg accepted the representation. He prevailed by securing an injunction against the publisher that prevented it from using violence to dispel guild strikers and secured contempt charges against it after it disobeyed the injunction. With these victories, Goldberg emerged as a rising legal star of the nation's labor movement.

After reading about the December 7, 1941, attack on Pearl Harbor, Goldberg demonstrated his patriotism by joining President Franklin Delano Roosevelt's Office of Strategic Services (OSS)—the first civilian-run intelligence agency in modern history. Because of Goldberg's experience with labor unions, his work at the OSS focused on gathering secret information from European labor unions. While at the OSS, Goldberg was commissioned as a captain in the U.S. Army and eventually ascended to the rank of major.

Whereas Goldberg's prior work as a labor lawyer had been confined to the industrial and commercial centers of the Midwest and Pacific Coast, Goldberg made valuable contacts with domestic labor leaders on the East Coast—in particular, New York and Washington, D.C.—and abroad through his work at the OSS. Additionally, his exposure to and work with leading international trade unionists and Socialist Party leaders from every country in western and

central Europe solidified his belief that tripartite cooperation (a "social contract") among workers, businesses, and government provided the best model for raising living standards of the working class.

After D-day, Goldberg returned to Chicago to reopen his law practice. He immediately became active in committees working to reelect President Roosevelt and reestablished ties with his former union clients, the membership of which (chief among them, the United Steelworkers of America) had swelled during wartime. But once the war was over, the cancellation of military orders and accompanying layoffs spurred widespread fear of postwar depression. The removal of wartime price controls and accompanying increases in prices without corresponding increases in wages resulted in an estimated 30 percent decline in the real income of those fortunate to still be employed. As a result, by November 1945, America was experiencing the beginning of one of the largest strike waves in history. In response to the strike wave, Congress passed, over President Truman's veto, the Taft-Hartley Act—legislation that the labor movement had labeled a "slave labor law."

After the Steelworkers' and CIO's general counsel resigned in February 1948, the CIO's leadership knew that they would need a brilliant labor lawyer to cope with Taft-Hartley. Goldberg was chosen. His victories on behalf of the Newspaper Guild, impressive earlier work for the Steelworkers, OSS service, contacts in the international labor movement, and open hostility to the Communist Party (which was alleged to have infiltrated the domestic labor movement and motivated, at least in part, the passage of Taft-Hartley) all made him a popular choice.

One of Goldberg's greatest accomplishments during his early years as general counsel was his successful challenge to the steel industry's refusal to bargain over pensions. Rather than advising the Steelworkers to strike over the pensions, which Goldberg believed would be illegal under the National Labor Relations Act, he petitioned to the National Labor Relations Board (NLRB), seeking a declaration that the steel industry had a "duty to bargain" over such fringe benefits. In *NLRB v. Inland Steel Co.* (170 F.2d 247, 7th Cir. 1948, cert. denied, 336 U.S. 960, 1949), the NLRB and Seventh Circuit Court of Appeals accepted Goldberg's position. The Supreme Court denied review, thereby making an employer's duty to bargain over fringe benefits a permanent fixture of the labor-management relationship.

Meanwhile, Goldberg was also working to hold together a domestic labor movement fracturing over allegations of corruption levied by Senator Estes Kefauver's Special Committee to Investigate Organized Crime in Interstate Commerce and allegations of

communist influence levied by Senator Joseph McCarthy. After the Senate's censure of McCarthy in 1954, Goldberg worked with leaders of the CIO and American Federation of Labor (AFL) to create a "no raiding" agreement, which prohibited one union from soliciting membership from another's members. The no raiding agreement ultimately led to the 1955 merger of the two organizations and formation of the AFL–CIO—a partnership that Goldberg had hoped to achieve all along and for which he deserves most of the credit.

Goldberg's most important work as a legal advocate likely came in 1957 in *Textile Workers Union v. Lincoln Mills of Alabama* (170 F.2d 247, 7th Cir. 1948, cert. denied, 336 U.S. 960, 1949), which established the federal courts' power to enforce arbitration clauses in labor contracts under the *Taft–Hartley Act*. Because 90 percent of existing labor contracts contained arbitration clauses under which unions promise not to strike if employers promise to submit grievances to an arbitrator, the Court's ruling in *Lincoln Mills* meant that, rather than strike, unions could sue in federal court over an employer's refusal to arbitrate.

Goldberg and President Kennedy

In 1957, the Senate authorized Senator John McClellan to chair a Select Committee on Improper Activities in the Labor Management Field that would pick up where Senator Kefauver's Organized Crime Committee had left off: investigating corruption within and organized crime's influence over the American labor movement and business. Although the committee was authorized and directed, as its name indicated, to investigate corruption in labor *and* management, its members quickly focused primarily on the improper activities of organized labor. For three years, the committee hearings were televised daily, exposing the public to such abuses as collusion between dishonest employers and union officials, extortions and the use of violence by certain segments of labor leadership, and the misuse of funds by high-ranking union officials. By 1959, polls indicated that Americans ranked "labor problems" on par with national defense, the space race, and education among the eight most important concerns facing the nation.

In response to the Committee's revelations, the public, Congress, and Goldberg all agreed that corrective legislation was needed to address weaknesses in labor regulation. As the chief legal representative of the labor movement, Goldberg teamed-up with then-Senator John F. Kennedy and Senator Irving

Ives—the Committee's two most labor-friendly members—to craft an appropriate legislative remedy. Their legislative proposal would require reporting and disclosure for union officers, restrictions on administratorships (the mechanism by which an international union takes control of a local or other subordinate body), and modest election restrictions.

Goldberg believed that these reforms would prevent the kinds of thievery and misconduct uncovered by the McClellan committee from recurring but not go so far as to cripple the labor movement. But to secure support from leaders of many CIO affiliates who were opposed to anticorruption legislation (the CIO leadership believed that corruption was primarily an AFL problem), an additional title was added to the Kennedy–Ives proposed legislation to amend some provisions of Taft–Hartley that the CIO leadership had despised most. These Taft–Hartley "sweeteners," as they became popularly known, led to the death of the Kennedy–Ives bill.

After the Democrats' sweep of the 1958 congressional elections, Goldberg and Kennedy resumed their efforts to create what they thought would be appropriate remedial legislation. This time, Kennedy chose Sam Erwin as his cosponsor, but the bill they proposed was essentially unchanged from the Kennedy–Ives version. Unfortunately for Goldberg and Kennedy, the bill was significantly modified on the Senate floor. The modified version limited organizational picketing; outlawed "hot cargo" agreements, under which union workers could refuse to handle or process struck or nonunion work, in the carrier industry; regulated the conduct of union elections; and imposed strict bonding requirements on union officials. While labor debated whether to support the modified Kennedy–Erwin bill, Phillip Landrum and Robert Griffin sponsored their own version in the House—a version virtually identical to the modified Senate bill. By the first week of September 1959, the bill had passed both houses, thereby becoming the *Landrum–Griffin Act of 1959*.

Landrum–Griffin has been characterized by many as serving little, if any, benefit to organized labor and therefore as a failure for Kennedy and Goldberg. However, the friendship they forged and confidence that they established in each other would pay huge dividends for Goldberg in the years to come.

Mr. Secretary

After Kennedy's successful presidential campaign in November 1960, which Goldberg forcefully supported, President Kennedy nominated Goldberg to

be secretary of labor. Because of their past dealings and friendship and Goldberg's work on Kennedy's campaign, the nomination was not surprising.

With his election, Kennedy inherited a recession, and he gave Goldberg the primary responsibility of fighting it through labor policy. Goldberg's weapons included increasing the minimum wage, extending unemployment benefits, encouraging youth employment, and revitalizing depressed local economies. Meanwhile, Goldberg also believed that while raising the minimum wage was important, keeping higher wages and prices from increasing was equally important. To achieve this latter goal, Goldberg believed that lost productivity due to strikes, which had become so frequent throughout the postwar era, would have to be minimized.

During the first six months of his tenure as secretary of labor, Goldberg personally intervened in and ended three key strikes affecting domestic infrastructure: the New York City tug- and ferryboat strike and related sympathy strikes reaching as far west as St. Louis in the railway industry; a pilots' strike in the commercial airline industry; and a maritime workers' strike over management's efforts to avoid domestic labor laws by registering their vessels overseas. With Goldberg at the helm of the Department of Labor, the United States experienced the fewest working hours lost due to strikes since World War II.

Goldberg's greatest achievement as secretary of labor arguably came, however, as a result of his strategic threat to resign the post in April 1962. In 1961, Goldberg had heard that the steel industry was planning to raise steel prices by over 3 percent. Goldberg took the lead in moderating negotiations for a master steel contract that would raise steelworkers' wages only 2.2 percent and implied that steel prices would remain unchanged.

Just ten days after the contract was announced, U.S. Steel's general counsel announced that U.S. Steel was raising steel prices 3.5 percent. In response, Goldberg offered to resign as secretary of labor and leaked news of his resignation offer to the media. The ploy worked. Business leaders outside the steel industry feared that a new secretary of labor would be much less likely to embrace Goldberg's consensual approach to resolving labor disputes. Accordingly, they pressured U.S. Steel to accede to Goldberg's demand that it not raise prices.

Mr. Justice

On August 28, 1962, just twenty months after Goldberg assumed the secretary of labor position and after

Justice Felix Frankfurter resigned from the Supreme Court because of poor health, President Kennedy nominated Goldberg to the Court. Other worthy candidates, such as Solicitor General and former Harvard Law Professor Archibald Cox, Harvard Law Professor Paul Freund, and U.S. Court of Appeals Judge William Henry Hastie, had been available. But Kennedy chose Goldberg as he had chosen Byron R. White in April 1962 to fill Justice Charles E. Whittaker's seat. Kennedy knew Goldberg and White well; he was comfortable with them personally, professionally, and ideologically; he trusted their dedication to the country and to the Constitution; and, in Robert Kennedy's words, they were "his kind of people." One month after his nomination, on September 28, 1962, the Senate confirmed Goldberg for his position on the Court.

Justice Goldberg's tenure on the Court would be one of the briefest in history. After he had served only three terms, President Lyndon Johnson persuaded him (some claim that he was duped by Johnson, though Justice Goldberg vehemently denied this claim) to resign from the Court and become U.S. ambassador to the United Nations in 1965. Certainly, his brief tenure on the Court prevented him from having the direct influence on the Court's jurisprudence that those with longer tenure achieved, and it is tempting to speculate how modern constitutional law might differ had Kennedy survived a two-term presidency and had Justice Goldberg, as is most likely, remained on the Court.

Even during the brief three terms in which he served, Justice Goldberg authored a handful of significant opinions in constitutional criminal procedure that contributed to what scholars have dubbed the "Warren Court Revolution." In *Murphy v. Waterfront Commission*, 378 U.S. 52 (1964), he wrote that a state witness could not be compelled to give testimony that may be incriminating under federal law unless the compelled testimony and its fruits could not be used in any manner by federal officials in connection with a criminal prosecution against him. In *Escobedo v. Illinois*, 378 U.S. 478 (1964), the justice wrote that confessions obtained after a criminal suspect requested but was refused assistance of counsel were in violation of his Sixth Amendment rights and therefore inadmissible against him at trial. Justice Goldberg's opinion in *Escobedo* paved the way for the Court's landmark 1966 ruling in *Miranda v. Arizona*, 384 U.S. 436 (1966).

Justice Goldberg was the first justice to intimate that the death penalty might be unconstitutional on cruel and unusual punishment and due process grounds—views that were not embraced by the Court until 1972 in *Furman v. Georgia*, 408 U.S. 238

(1972)—in *Rudolph v. Alabama*, 375 U.S. 889 (1963), and *Snider v. Cunningham*, 375 U.S. 889 (1963). Additionally, in his concurring opinion in *Griswold v. Connecticut*, 381 U.S. 479, 488 (1965), he gave an expansive interpretation to the notion that “additional fundamental rights” (such as a right to privacy that extends to marital sexual intimacy) not enumerated elsewhere in the Bill of Rights may rest in the Ninth Amendment. The justice also wrote for the six-to-three majority that held in *Aptheker v. Secretary of State*, 378 U.S. 500 (1964), that the denial of passports to members of the Communist Party and its affiliates was an unconstitutional infringement on the right to travel.

In addition to his contributions to the expansion of constitutional civil liberties through his written opinions, Justice Goldberg contributed to the “Warren Court Revolution” by voting with Chief Justice Earl Warren between 85 and 89 percent of the time. Moreover, after his resignation, the five-vote Warren majority hardly changed at all. President Johnson’s replacement for the justice was Abe Fortas, who not unlike Justice Goldberg, agreed with the chief justice between 83 and 92 percent of the time in each of his four years on the Court.

To this end, Justice Goldberg’s appointment turned the Warren Court’s pro-civil liberties wing into a majority by providing the long-awaited fifth vote. Indeed, contemporary and present-day commentators agree that his replacement of Frankfurter had a profound impact on the shape of the Court’s jurisprudence. For example, in 1965, just three years after Justice Goldberg took the bench, Yale Law professor and Frankfurter protégé Alexander Bickel noted that Justice Goldberg’s appointment “does more than merely change a vote; it alters the entire judicial landscape. . . . it is the magnetic field in which the Justices operate that is altered. . . . There *is* a new Court.” Over thirty years later, in 1998, legal historian Morton Horwitz agreed that “Goldberg’s appointment to replace Frankfurter . . . signaled a major realignment of the Court.” Similarly, as Chief Justice Rehnquist noted in memoriam of Goldberg:

Probably more important than any individual opinion which he wrote was the outlook on constitutional law which he brought to the Court. His succession to the seat of Felix Frankfurter gave the ‘Warren Court’ a solid majority for an expansive reading of the Equal Protection and Due Process Clauses of the Fourteenth Amendment. He thus contributed far more to the jurisprudence of the Supreme Court than one would think possible in so brief a period of service.

Mr. Ambassador

On July 14, 1965, Adlai Stevenson, who was serving as U.S. ambassador to the United Nations, suddenly died. Believing Goldberg to be the strong negotiator he needed at the United Nations and seeing a chance to fill a Supreme Court seat with his friend Abe Fortas, President Johnson asked Goldberg to assume the post. Sensing that the nation needed a negotiated, rather than military, solution to the war in Vietnam, Goldberg accepted (after much hesitation) after Johnson guaranteed him that he would be Johnson’s principal advisor on all decisions leading to a Vietnam settlement.

The ambassadorship proved frustrating for Goldberg as Johnson shifted his support for a negotiated settlement to increased military intervention. Goldberg had supported a de-escalation strategy all along and was not shy about sharing his views within the Johnson administration. After North Vietnam’s Tet Offensive in 1968 cast doubt on the soundness of the United States’ escalating U.S. military involvement, many high-ranking officials within the administration sided with Goldberg’s call for de-escalation. Goldberg’s victory was Pyrrhic, however, because Johnson resented him for his steadfast and public antiwar stance. Perhaps to punish Goldberg, Johnson announced on March 31, 1968, that Averill Harriman—not Goldberg, as he was promised—would be the United States’ chief negotiator on a North Vietnamese peace accord. Three weeks later, on April 23, 1968, Goldberg resigned as United Nations ambassador.

The Emeritus Years

After leaving public service, Goldberg returned to the practice of law by becoming a partner at a prominent New York law firm. In 1969, he decided to run as a Democrat for governor of New York against incumbent Republican Nelson Rockefeller. Rockefeller, a moderate Republican, enjoyed support from both parties and proved a tough incumbent to unseat. He defeated Goldberg by nearly 20 percent of the three-and-a-half million votes cast.

After his humbling loss, Goldberg returned to his farm in Marshall, Virginia, and to his old law firm in Washington, D.C. In 1977, President Jimmy Carter offered Goldberg one final tour as a diplomat when Carter appointed him U.S. ambassador to the Belgrade Conference on Human Rights. Goldberg

performed very effectively, “batting the Russians like a tiger,” it has been said. After his return from Belgrade, President Carter awarded Goldberg the Presidential Medal of Freedom for his many contributions to his country in and out of government.

Goldberg died on January 19, 1990, after suffering the second heart attack since the death of his wife, Dorothy, in 1988. After receiving a full military funeral, he was buried at Arlington National Cemetery next to his wife and near his dear friend, Chief Justice Warren.

JEAN-CLAUDE ANDRÉ

References and Further Reading

- Abraham, Henry J. *Justices, Presidents, and Senators*, new and revised ed. Lanham: Rowman & Littlefield, 1999.
- Berendt, Gerald, Gil Cornfield, Peter Edelman, Hon. Milton Shadur, David Stebenne, Wesley Wildman, and Willard Wirtz, *Lecture: Arthur J. Goldberg's Legacies to American Labor Relations*, John Marshall Law Review 32 (Spring 1999): 3:667–723.
- Goldberg, Arthur J. *AFL–CIO: Labor United*. New York: McGraw–Hill, 1956.
- . *Equal Justice: The Warren Era of the Supreme Court*. New York: Farrar, Straus & Giroux, 1972.
- Goldberg, Dorothy. *A Private View of a Public Life*. New York: Charterhouse, 1975.
- Horwitz, Morton J. *The Warren Court and the Pursuit of Justice*. New York: Hill and Wang, 1998.
- In Memoriam Arthur J. Goldberg 1908–1990, Northwestern University Law Review 84 (Spring/Summer 1990): 3–4:807–831.
- Lasky, Victor. *Arthur J. Goldberg: The Old & the New*. New Rochelle: Arlington House, 1970.
- Moynihán, Daniel Patrick, ed. *The Defenses of Freedom: The Public Papers of Arthur J. Goldberg*. New York: Harper & Row, 1966.
- Rubin, Eva Redfield. “The Judicial Apprenticeship of Arthur J. Goldberg, 1962–1965.” Ph.D. diss., Johns Hopkins University, 1967.
- Stebenne, David L. *Arthur J. Goldberg: New Deal Liberal*. New York: Oxford University Press, 1996.

Cases and Statutes Cited

- Aptheker v. Secretary of State*, 378 U.S. 500 (1964)
- Escobedo v. Illinois*, 378 U.S. 478 (1964)
- Furman v. Georgia*, 408 U.S. 238 (1972)
- Griswold v. Connecticut*, 381 U.S. 479, 488 (1965) (Goldberg, J., concurring).
- Miranda v. Arizona*, 384 U.S. 436 (1966)
- Murphy v. Waterfront Commission*, 378 U.S. 52 (1964)
- NLRB v. Inland Steel Co.*, 170 F.2d 247 (7th Cir. 1948), cert. denied, 336 U.S. 960 (1949)
- Rudolph v. Alabama*, 375 U.S. 889 (1963) (Goldberg, J., dissenting from denial of certiorari)
- Snider v. Cunningham*, 375 U.S. 889 (1963) (Goldberg, J., dissenting from denial of certiorari)
- Textile Workers Union v. Lincoln Mills of Alabama*, 353 U.S. 448 (1957)

See also *Aptheker v. Secretary of State*, 378 U.S. 500 (1964); *Capital Punishment: Due Process Limits*; *Capital Punishment: Eighth Amendment Limits*; *Escobedo v. Illinois*, 378 U.S. 478 (1964); Fortas, Abe; Frankfurter, Felix; Freund, Paul A.; *Furman v. Georgia*, 408 U.S. 238 (1972); *Griswold v. Connecticut*, 381 U.S. 479, (1965); McCarthy, Joseph; *Miranda v. Arizona*, 384 U.S. 436 (1966); Ninth Amendment; Privacy; Right of Privacy; Right to Travel; Taft–Hartley Act of 1947; Warren Court; Warren, Earl; White, Byron Raymond

GOLDMAN v. WEINBERGER, 475 U.S. 503 (1986)

Members of the military take an oath to support and defend the Constitution of the United States. However, due to the nature of the military lifestyle and the inherent requirements for discipline and uniformity, military members may not enjoy the same range of constitutional protections as other members of society. In *Goldman v. Weinberger*, the Supreme Court weighed the free exercise of religion rights of service members against the requirements for uniformity in the military.

Captain (Dr.) Simcha Goldman was an Orthodox Jew whose religion required him to wear his yarmulke at all times. He served in the Navy as a chaplain from 1970 until 1972. After he completed his Ph.D. in psychology, he joined the Air Force as a psychologist. Between 1977 and 1981, Goldman served honorably as an Air Force officer and wore his yarmulke at all times, even in uniform, with no incident. In 1981, based on Air Force uniform regulations, his commander ordered Goldman not to wear the yarmulke outside the hospital in which he worked. Goldman asked his commander to reconsider or to allow him to wear civilian clothes to work, rather than his uniform, so that he could wear his yarmulke without violating the regulation. His commander denied the request.

Goldman sued in federal district court, and the court ordered the Air Force to allow him to wear his yarmulke while in uniform. The district court used reasoning based on the Supreme Court's prior decision in *Rostker v. Goldberg*, 453 U.S. 57 (1981). In *Rostker*, the Court held that it was permissible for Congress to exclude women from mandatory Selective Service registration. Congress had made a deliberate decision in weighing the equal protection and due process rights of women vs. the need to raise combat forces (women are precluded from most ground combat roles in the military). Congress decided that an all-male draft was the appropriate mechanism to raise combat forces,

and the Supreme Court deferred to the judgment of Congress. However, in this case, the Air Force had not conducted a deliberative process and had not weighed the competing interests of the Free Exercise Clause with the need for uniformity; therefore, the district court would not defer to the regulations of the Air Force in the matter.

The government appealed the decision to the federal appeals court. The appeals court reversed the decision. The appeals court held that rather than balance the competing interests of the Free Exercise Clause and uniformity, it would simply determine whether the regulation served legitimate military ends and had appropriate accommodations for individuals. Since the regulation served a valid military purpose, and there were some exceptions for religious purposes (such as wearing religious apparel, in uniform, during religious services), the appeals court ruled that the Air Force could strictly enforce its regulations. Goldman requested a rehearing of the entire court of appeals, but it was denied. Interestingly, two future Supreme Court justices, Ruth Bader Ginsburg and Antonin Scalia, were on the appeals court and voted to rehear the case (in favor of Goldman).

Goldman appealed to the Supreme Court. In a five-to-four decision, the Supreme Court upheld the appeals court and ruled that the Free Exercise Clause did not require the Air Force to grant an exemption from the uniform regulation. The Court relied on *Chappell v. Wallace*, 462 U.S. 296 (1983); *Parker v. Levy*, 417 U.S. 733 (1974); and *Orloff v. Willoughby*, 345 U.S. 83 (1953). Taken together, these cases articulate the principle that members of the military have constitutional rights, but due to the special nature of military service, those rights are not the same as those other members of society; the military is a separate society. Furthermore, when courts decide cases regarding military matters, the courts should show great deference to the military and its rules. The Supreme Court showed deference and held that the Free Exercise Clause did not require a uniform exemption.

If this case had been decided just a few months later, when Chief Justice Burger retired (he had voted with the five-vote majority) and Justice Scalia joined the Court, there likely would have been a different outcome. Based on Justice Scalia's vote on the appeals court, it is reasonable to assume the four-vote minority would have become a five-vote majority.

The following year, Congress responded and created a statutory right to a uniform exemption. It passed a law that requires the military to permit wear of religious apparel, in uniform, as long as wearing the item does not interfere with military duties and it is "neat and conservative."

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References and Further Reading

Employment Div. Dep't of Human Res. of Or. v. Smith, 494 U.S. 872 (1990).

Cases and Statutes Cited

Chappell v. Wallace, 462 U.S. 296 (1983)

Orloff v. Willoughby, 345 U.S. 83 (1953)

Parker v. Levy, 417 U.S. 733 (1974)

Rostker v. Goldberg, 453 U.S. 57 (1981)

GOOD NEWS CLUB v. MILFORD CENTRAL SCHOOL, 533 U.S. 98 (2001)

In *Good News Club*, the Supreme Court considered whether speech can be excluded from a limited public forum on the basis of the religious nature of the speech. The school enacted a policy authorizing local residents to use the school's facilities after school for, among other things, (1) instruction in education, learning, or arts and (2) social, civic, recreational, and entertainment uses relevant to the community's welfare. Following the policy, members of the club submitted a request to use the school's facilities after school hours. The school rejected the request because the club's meetings involved Bible lessons, memorizing scripture, and praying.

The case raised two First Amendment issues. The first issue was whether the school violated the club's free speech rights by prohibiting it from meeting after hours on the school's campus. Following *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993), and *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819 (1995), the Court held the club's First Amendment rights were violated. Although the school is not required to permit every type of speech in a limited public forum, it may not engage in viewpoint discrimination (*Rosenberger*) and any restriction must be "reasonable in light of the purpose served by the forum" (*Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 806, 1985).

The Court rejected the proffered distinction between the activities at issue in this case and *Lamb's Chapel*—that teaching of moral values from a Christian perspective came from film in *Lamb's Chapel*, while in this case, the teaching came through live storytelling. The school's policy permitted teaching morals and character development to children and there was no question that the club's activities also taught moral and character development. Thus, the Court held that the school district engaged in impermissible viewpoint discrimination by excluding the club from using campus facilities. Having decided

this issue, it did not consider the reasonableness of the restriction in light of the forum.

The school also argued that it would have violated the establishment clause if it had permitted the religious club to meet on campus. Although a state may engage in content based discrimination to satisfy a compelling interest in avoiding violating the establishment clause (*Widmar v. Vincent*, 454 U.S. 263, 271, 1981), the Court found that the school in this case had no such compelling interest. Because the club would meet after school hours and was not sponsored by the school, “there would have been no realistic danger that the community would think that the District was endorsing religion” (533 U.S. at 110 [quoting *Lamb’s Chapel*, 508 U.S. at 395]). The neutrality of the school towards religion and the lack of coercive pressure were significant factors in dismissing the establishment clause claim. Moreover, in spite of language suggesting that elementary school students were more susceptible to a perceived union between church and state (*Grand Rapids School Dist. v. Ball*, 473 U.S. 373, 1985), the mere presence of religious conduct on public elementary school premises is not prohibited.

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Cases and Statutes Cited

Grand Rapids School Dist. v. Ball, 473 U.S. 373 (1985)
Lamb’s Chapel v. Center Moriches Union Free School Dist.,
 508 U.S. 384 (1993)
Rosenberger v. Rector and Visitors of University of Virginia,
 515 U.S. 819 (1995)
Widmar v. Vincent, 454 U.S. 263, 271 (1981)

GOVERNMENT FUNDING OF SPEECH

In a democratic society, the government typically allocates its resources in support of its political agenda. A legislature whose members are elected on a “family values” platform, for example, may finance a campaign against indecency that includes public service announcements delivered by official representatives or hired agents. When the government pays for its own speech, it can say what it pleases without incurring any obligation to finance alternative points of view.

Rather than engage in speech, the government often attempts to advance its policy objectives by selectively subsidizing private speech. For example, the federal government historically has provided second-class mail subsidies to print publications. May the government encourage media decency by denying second-class mailing privileges to magazines that contain sexual material? In other words, may the

government use the power of the purse to promote or disfavor certain private viewpoints?

Although the Supreme Court has often said that the First Amendment prohibits the government from using its subsidy power to suppress “dangerous ideas,” the Court has applied this prohibition in an inconsistent, context-specific manner. In the second-class mailing example, the Court in *Hannegan v. Esquire, Inc.*, 327 U.S. 146 (1946), held that second-class mail status could not be denied to publications that postal officials found objectionable. The Court saw the subsidy denial as the imposition of an unconstitutional condition: the state had conditioned the receipt of a government benefit on the recipients’ willingness to curtail their right of free speech. Although the state was not obliged to award postage subsidies at all, it could not penalize offensive speakers by revoking the subsidy in a viewpoint-discriminatory manner.

Compare, however, the Court’s analysis in subsidy situations involving nonmedia grantees. In *Rust v. Sullivan*, 500 U.S. 173 (1991), the Court upheld federal regulations that prohibited doctors at federally funded family-planning clinics from providing pregnant women with abortion counseling or referrals, requiring instead that these doctors dispense information about prenatal care. Although the doctors challenged these regulations as unconstitutional, viewpoint-based discrimination, the Court disagreed.

In a five-to-four opinion written by Chief Justice Rehnquist, the Court reasoned that when the government funds a program, it must be allowed to set program limits. Here, Justice Rehnquist said, “The government is not denying a benefit to anyone, but is instead simply insisting that public funds be spent for the purposes for which they were authorized.” According to Justice Rehnquist, the federal regulations did not favor one viewpoint over another; rather, they imposed necessary boundaries on the scope of a federal enterprise. In dissent, Justice Blackmun argued that the federal regulations constituted obvious, unconstitutional viewpoint discrimination by creating family-planning clinics that could provide information on only one family-planning option—the one favored by Congress.

Similarly, the Court in *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998), upheld congressional legislation that required the National Endowment for the Arts (NEA) to consider “general standards of decency” in awarding grant funding for the arts. Artists challenged the law as providing an unconstitutional federal subsidy to inoffensive art, while denying federal funding to art outside mainstream American values. The Court disagreed, finding that the statute did not violate the First Amendment prohibition on viewpoint discrimination, but only by

interpreting the decency clause as advisory rather than compulsory. Technically, the Court said, the NEA was only required to give “consideration” to the decency issue; the statute did not absolutely forbid the NEA from funding indecent art. Furthermore, the Court noted that because NEA grants already were based on subjective notions of artistic excellence, adding a decency standard to the process would not offend the First Amendment. Writing for the Court, Justice O’Connor concluded that “the Government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake.”

Based on *Rust* and *Finley*, the Court’s often repeated statement that in awarding financial subsidies, the government “may not . . . aim at the suppression of dangerous ideas” appeared to be an empty platitude. A decade after *Rust*, however, the Court in *Legal Services Corporation v. Velazquez*, 531 U.S. 533 (2001), returned to the principle that government subsidies must be allocated in a viewpoint-neutral manner when they involve private speech. In that case, by another five-to-four vote the Court invalidated a condition in a federal statute that prohibited federally funded legal aid attorneys from representing clients who challenged existing welfare laws. The Court distinguished *Rust* by characterizing the clinic doctors in *Rust* as government agents, engaged in government rather than private speech.

The Court emphatically denied that the legal aid attorneys could also be described as government speakers. Nor could the attorney speech limitation be considered necessary to define the scope of a federal legal aid program. According to the Court, “Congress cannot recast a condition on funding as a mere definition of its program in every case, lest the First Amendment be reduced to a simple semantic exercise.” Furthermore, by limiting the scope of litigation, the Court found that the funding condition in *Velazquez* also unconstitutionally distorted the “usual functioning” of the judicial system. Justice Scalia disagreed, stating in his dissent that the legal aid funding scheme should have been upheld because it was “in all relevant respects indistinguishable” from the subsidy program the Court had approved in *Rust*.

The question of whether the government can condition its subsidies in ways that limit private speech has also arisen in the public library context. In an effort to keep on-line pornography away from children, Congress in 2000 passed a law requiring public libraries that receive federal funds to install blocking software on all computers. The American Library Association protested, stating that the filters blocked too much nonobscene material and interfered with adults’ First Amendment rights to view

constitutionally protected Web pages. In *United States v. American Library Association*, 123 S. Ct. 2297 (2003), the Court upheld the law, stating that Congress was entitled to impose conditions on how libraries spend government monies and that objecting libraries were free to turn down federal funds. Two concurring justices in the six-to-three decision agreed to uphold the law because it allowed libraries to remove filters for adult patrons upon request.

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References and Further Reading

- Cásarez, Nicole B., *Public Forums, Selective Subsidies, and Shifting Standards of Viewpoint Discrimination*, Albany Law Review 64 (2000): 501–581.
 Post, Robert C., *Subsidized Speech*, Yale Law Journal 106 (1996): 151–195.
 Smolla, Rodney A. *Free Speech in an Open Society*. New York: Alfred A. Knopf, Inc., 1992.

Cases and Statutes Cited

- Hannegan v. Esquire, Inc.*, 327 U.S. 146 (1946)
Legal Services Corporation v. Velazquez, 531 U.S. 533 (2001)
National Endowment for the Arts v. Finley, 524 U.S. 569 (1998)
Rust v. Sullivan, 500 U.S. 173 (1991)
United States v. American Library Association, 123 S. Ct. 2297 (2003)

See also Government Speech; Internet Filtering at Libraries and Free Speech; Unconstitutional Conditions

GOVERNMENT SPEECH

For a representative democracy to function, the government must communicate with the governed. A democratic government formulates, explains, justifies, and garners support for its policies and programs through discourse by governmental entities that include elected and appointed officials, administrative agencies, and government agents and employees. Without access to the government’s views, citizens could not evaluate governmental policies and therefore would be unable to make the informed political decisions necessary for effective self-government. Laws, speeches, debates, advertisements, hearings, research reports, leaflets, press conferences, meetings, and even public education are just some of the means by which government communicates its positions to the populace.

Although the First Amendment limits the government’s ability to regulate private speech, the government as speaker is free to determine the content of its messages. Nothing in the Constitution forbids the

government from favoring one viewpoint over another—for example, that teenagers should “Just Say No” to drugs—when it engages in public communication campaigns. In the democratic system, the electorate ultimately has the power to hold the government accountable for what it says.

In spreading its views, however, the government is prohibited by the First Amendment from forcing private citizens to espouse governmental messages against their will. For example, in *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943), the Supreme Court held that school children could not be compelled to salute the flag and recite the pledge of allegiance, stating that the Bill of Rights denies government the power to coerce consent for its policies. Similarly, in *Wooley v. Maynard*, 430 U.S. 705 (1977), the Court struck down a New Hampshire law requiring automobile license plates to display the state motto, “Live Free or Die.” Writing for the Court, Chief Justice Warren Burger stressed that the state could not require its citizens to act as “mobile billboards” for official ideological positions: “A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts.”

In practice, these rules are not always easy to apply. The distinction between what constitutes government, as opposed to private, speech can be difficult to draw in a number of contexts. In states that have specialty or vanity license plate programs, for example, could a driver force the state to issue plates containing words or emblems to which the state objects? If the plates are government speech, the state is entitled to control the message displayed there. If the message on the plates is private speech, the government may not prohibit it just because it expresses an “offensive” viewpoint. Courts that have considered the question have reached conflicting answers; however, commentators tend to conclude the plates should be considered private speech.

Troublesome questions regarding the nature of government speech also arise in the government subsidy context. Sometimes, as part of a government benefit package such as government grants for art or the provision of medical services for the poor, the state attempts to restrict private speech. When the government pays for programs that include expressive activities by private speakers, is the resulting expression “government speech” that can be restricted without reference to the First Amendment?

In *Rust v. Sullivan*, 500 U.S. 173 (1991), the Supreme Court upheld government regulations that forbid doctors at federally funded family planning clinics from discussing abortion as an option with pregnant

women. In an opinion written by Chief Justice Rehnquist, the Court concluded that the regulations did not violate the doctors’ First Amendment rights because “when the government appropriates public funds to establish a program it is entitled to define the limits of that program.”

Ten years later, however, the Court in *Legal Services Corporation v. Velazquez*, 531 U.S. 533 (2001), invalidated on First Amendment grounds a similar program that prevented federally funded legal aid attorneys from representing clients who sought to challenge existing welfare laws. In striking down the restrictions, the Court distinguished *Rust* as a case involving government speech. According to the Court, the Title X doctors in *Rust* had been employed to transmit government information, whereas the legal aid program at issue in *Velazquez* “was designed to facilitate private speech, not to promote a governmental message.” The Court reiterated that the state may discriminate by viewpoint when funding its own speech, but must allocate subsidies in a viewpoint-neutral manner when private speech is at issue.

The government may constrain the speech of public employees or agents without violating the First Amendment as long as the restricted expression pertains to the employment rather than to general matters of public concern. For example, the Supreme Court held in *Pickering v. Board of Education*, 391 U.S. 563 (1968), that a public school teacher could not be fired for writing a letter to the editor criticizing the school board. The Court noted that the letter addressed an important public policy matter and did not interfere with the teacher’s ability to fulfill his contractual duties.

However, in *Connick v. Myers*, 461 U.S. 138 (1983), the Supreme Court upheld the dismissal of an assistant district attorney for circulating a questionnaire about workplace issues. The Court concluded that the public employee’s survey regarding job-related grievances did not rise to the level of a public controversy and, in fact, could reasonably be expected to disrupt the workplace. In his opinion for the Court, Justice White noted that “[w]hen employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices without intrusive oversight by the judiciary in the name of the First Amendment.”

Although government expression is essential for the operation of democratic processes, First Amendment scholars have also recognized that government speech presents certain dangers to our system. Specifically, it is feared that government today is so powerful and ubiquitous that its speech might easily drown

out private speakers or otherwise distort the marketplace of ideas. Some scholars, therefore, have concluded that the First Amendment should not only safeguard private speech from government censorship, but also protect democratic decision-making from manipulative or over-reaching government communications. The Supreme Court, however, suggested in *Board of Regents of the University of Wisconsin System v. Southworth*, 529 U.S. 217 (2000), that no First Amendment challenge could be brought against speech by the government. Rather, the Court said that the citizenry could elect new officials who would “espouse some different or contrary position.”

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References and Further Reading

- Bezanson, Randall P., and William G. Buss, The Many Faces of Government Speech, *Iowa Law Review* 86 (2001): 1377–1511.
- Herald, Maybeth, *Licensed to Speak: The Case of Vanity Plates*, *University of Colorado Law Review* 72 (2001): 595–660.
- Jacobs, Leslie Gielow, *Who’s Talking? Disentangling Government and Private Speech*, *University of Michigan Journal of Law Review* 36 (2002): 35–113.
- Yudof, Mark G. *When Government Speaks: Politics, Law, and Government Expression in America*. Berkeley and Los Angeles: University of California Press, 1983.

Cases and Statutes Cited

- Board of Regents of the University of Wisconsin v. Southworth*, 529 U.S. 217 (2000)
- Connick v. Myers*, 461 U.S. 138 (1983)
- Legal Services Corporation v. Velzaquez*, 531 U.S. 533 (2001)
- Pickering v. Board of Education*, 391 U.S. 563 (1968)
- Rust v. Sullivan*, 500 U.S. 173 (1991)
- West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943)
- Wooley v. Maynard*, 430 U.S. 705 (1977)

See also Flag Salute Cases; Forced Speech; Government Funding of Speech; Pledge of Allegiance and the First Amendment; Speech of Government Employees

GRAHAM v. COMMISSIONER OF INTERNAL REVENUE, 490 U.S. 680 (1989)

The Church of Scientology holds sessions for participants to better understand their spiritual being; it charges mandatory and fixed prices (which vary according to length and sophistication of the content) for these “auditing” sessions. Free sessions are not allowed by the church, and participants receive

receipts and vouchers indicating uncompleted sessions. Katherine Graham et al. brought the case before the Court to question whether fees for “auditing sessions” can be considered charitable contributions to the church and thus deductible according to the Internal Revenue Code.

The commissioner of internal revenue ruled that these fees did not constitute charitable contributions. Subsequent rulings in tax court and the court of appeals affirmed this decision. Writing for a majority of the Court, Justice Marshall affirmed the decision of prior courts. The payments in question are not considered charitable contributions because they are payments for services rendered by the church. Participants were not contributing of their free will, but as compensation for a specific service. “Congress intended to differentiate between unrequited payments to qualified recipients, which are deductible, and payments made to such recipients with some expectation of quid pro quo in terms of goods or services, which are not deductible,” concluded Justice Marshall. The payments to the Church of Scientology were thus not deductible and the taxation of such income paid out to the church was not a violation of the free exercise clause.

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References and Further Reading

- Dejong v. Commissioner*, 36 T.C. 575 (1961).
- United States v. Lee*, 455 U.S. 252.

GRAND JURY

A *grand jury* is a panel of citizens selected to represent the community in performing an *inquisitorial* function, as distinguished from a trial, or *petit*, jury that renders a *verdict* in a *dispositive* trial. Traditionally, a grand jury has consisted of twenty-three persons. Twelve of these people are required to return a finding, called a *presentment*; sometimes, a specialized form of presentment called an *indictment* is returned. This is a finding, in response to a petition for a bill of indictment, that there is sufficient evidence against an accused criminal to authorize the complainant to prosecute him or her in a trial.

The qualifiers “grand” and “petit” refer to the size of the panel and mean “large” and “small,” respectively. In early English legal practice, the inquisitorial and veridical functions were combined, and trial juries commonly investigated the facts before reaching a conclusion. However, it became apparent that the process of investigation could lead to biased judgment, so the two functions became divided between two different kinds of juries.

Traditionally, grand juries, like trial juries, have been regarded as independent bodies, not accountable to anyone for how they reach their findings. A grand jury could investigate anything it chose and had total discretion in what it found and reported. It had the power to subpoena witnesses and evidence. It also had the power to decide who could be present during its deliberations and to keep those deliberations secret until it decided to report its findings.

However, would-be prosecutors, especially those who were already public officials, often felt that it was inconvenient to get an indictment from a grand jury and argued for merely filing an *information* with a court, allowing the judge to decide whether the evidence was sufficient. However, in the eighteenth century the practice of using the information to bypass the grand jury was used in various criminal prosecutions of a political character, mainly against dissidents and reformers, sometimes called “Whigs.” Because the American colonies were dominated by Whig views, this resulted in the demand for grand juries to screen criminal cases, and this demand became embedded in the Fifth Amendment: “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury.”

However, California removed the requirement for a grand jury in criminal cases. In the first major decision in which a right recognized in the U.S. Constitution was excepted from incorporation, California’s position was sustained by the U.S. Supreme Court, in *Hurtado v. California*, 110 U.S. 516 (1884), as not incorporated by the Fourteenth Amendment as a protected right against a state. Other states have continued the requirement, often in their state constitutions.

Originally, most criminal prosecutions in the United States were done by private parties—usually, lawyers hired for the case by the victims or their families, by law enforcement officials, or through public subscription—or who volunteered to serve pro bono. By the late nineteenth century, however, these were largely displaced by the advent of professional public prosecutors who were full-time, paid public officials, usually elected. Crime had been fairly rare in the early Republic, but as it became more common, private criminal prosecution became perceived as unequal to the caseload and lacking in the ability to gather the resources needed. Paying private lawyers to prosecute cases from public funds was also sometimes abused as a form of patronage.

The populations of counties eventually grew from the small sizes (typically less than three thousand persons) of the founding era, when crime was very rare by modern standards, to populous urban or

suburban settlements, with higher crime rates. However, the legal system did not respond to the greater need by establishing grand juries for smaller jurisdictions, like wards or precincts, but continued to load county grand juries with more and more cases. Today, an urban grand jury may have only ten minutes for each case presented to it.

There has also been a trend toward the loss of independence of grand juries and domination of them by professional prosecutors, some of whom boast they can “indict a ham sandwich.” Grand juries have been isolated from the public they serve; in the view of many, they have been used abusively (especially against political dissidents) to interrogate witnesses without some of the protections they have in a trial.

Occasionally, members of a grand jury will resist manipulation by professional prosecutors and choose their own targets for investigation, even prosecutors or judges. These are called “runaway” grand juries, and some of their presentments are worthy of study.

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References and Further Reading

- Edwards, George J. *The Grand Jury*. 1906, http://www.constitution.org/gje/gj_00.htm.
- Roots, Roger, *If It's Not a Runaway, It's Not a Real Grand Jury*, *Creighton Law Review* 33 (1999–2000): 4:821, <http://www.constitution.org/lrev/roots/runaway.htm>.
- Tooke, John Horne. *Address on Libels, Case of John Horne* (1777) (criticism of indictment by information, rather than by grand jury; may have contributed to requirement for grand juries in Fifth Amendment). <http://www.constitution.org/jury/cmt/tooke1777/tooke1777.htm>.

GRAND JURY IN COLONIAL AMERICA

A cornerstone of American democracy is the right to a jury composed of one’s peers. Grand juries are an integral part of the modern American legal system because their primary function is to review the prosecutor’s evidence to determine whether probable cause exists for an indictment. Grand juries originated as accusatory bodies in early Greece. In Britain, the use of grand juries dates back to the tenth century, when twelve men from each village were assembled to reveal names of suspected criminals.

Massachusetts was the first British colony to use grand juries (in 1635) to consider cases of murder, robbery, and spousal abuse. In 1683, New York permitted the use of grand juries with the passage of the Charter of Liberties and Privileges. By 1700, grand juries were used to express disdain for the British

government. In 1735, for example, New York's colonial governor demanded the indictment of newspaper editor John Zenger for libel because he criticized the king. The grand jury refused. In 1765, a grand jury refused to indict leaders of the Stamp Act Rebellion and to bring libel charges against the *Boston Gazette's* editors. Furthermore, a Philadelphia grand jury in 1770 agreed to join other colonies in opposing British taxes. When war finally broke out, grand juries returned treason indictments against colonists who sided with the British and disqualified Crown sympathizers from serving on grand juries. At war's end, the grand jury was such an indispensable part of American government that the right to such was included in the Fifth Amendment of the Constitution.

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References and Further Reading

- Costello v. United States*, 350 U.S. 359, 362 (1956).
 Finkelman, Paul, Kermit Hall, and James Ely, eds. *Law in the Morning of America: The Beginnings of American Law, to 1760. American Legal History: Cases and Materials*, 3rd ed. Oxford: Oxford University Press, 2004.
 Greene, Evarts Boutell. *Provincial America, 1690–1740*. New York: Harper and Brothers, 1905.
 Hamilton, Alexander, John Jay, James Madison, Charles R. Kessler, and Clinton Rossiter, eds. *The Federalist Papers, Number 83*. New York: Signet Classics, 2003.
 Kadish, Mark, *Behind the Locked Door of an American Grand Jury: Its History, Its Secrecy, and Its Process*, Florida State University Law Review 24(1) (Fall 1996).
 Morse, Wayne, *A Survey of the Grand Jury System*, Oregon Law Review 10 (1931).
 Tucker, St. George, and William Blackstone. *Blackstone's Commentaries: With Notes of Reference to the Constitution and Laws of the Federal Government of the United States and of the Commonwealth of Virginia*, reprint ed. Clark, N.J.: Lawbook Exchange, 1996.

GRAND JURY INDICTMENT (V)

The Fifth Amendment to the Constitution provides that “[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury . . .” Before any person can be “indicted” for a federal felony offense, Rule 7 of the Federal Rules of Criminal Procedure requires that a grand jury be convened to investigate and decide whether to go forward with the case. For misdemeanor offenses, this has been interpreted to allow charges to be pursued without the convening of a grand jury. In addition, the U.S. Supreme Court has held that the requirement to have a grand jury prior to a felony indictment does not apply to charges brought within the state criminal justice courts. As such, fewer than half of the states in the United States

employ the use of a grand jury and have replaced them with the preliminary hearing at which a judge hears evidence concerning the alleged offenses and makes a decision on whether the prosecution can proceed.

Often referred to as the “fourth branch” of the federal government, the grand jury is one of the most valuable devices in a federal investigation. It not only assists in obtaining otherwise inaccessible evidence such as documents, handwriting samples, DNA, and voice exemplars, but a grand jury can also secure a witness's testimony on the record and subject to perjury that may otherwise corroborate and serve as key evidence in a criminal investigation. It is also available only for the prosecution, thus ensuring the sanctity of the grand jury by not providing a defendant easy access or automatic right to grand jury materials. In addition, what may start as an investigation into one matter may lead into directions never envisioned and encompass new individuals to be targeted under a completely separate and different nature of allegations.

With its roots traced back to Frankish lineage, the grand jury concept was introduced into England after the conquests and the Assize of Clarendon recognized what was to become a forerunner of the modern grand jury of American jurisprudence. The Assize of Clarendon enacted

that inquiry be made in each county and in each 100 by 12 lawful men of the 100 and 4 lawful men of every township, who are sworn to say truly whether in their 100 or township there is any man accused of being or notorious as a robber or a murderer or a thief or anybody who harbors of robbers or murderers or thieves since the King began to reign and this let the justices and the sheriffs inquire, each officer before himself.

The English Crown originally devised the grand jury to augment royal authority, as well as defend the citizens against prosecutions thought to be malicious and oppressive. Basically, the purpose of the English grand jury was to provide a fair method for instituting criminal proceedings against persons believed to have committed crimes. However, as a note of interest, England abolished its use of the grand jury in 1933 and now uses a committal procedure, as does Australia.

With the foundation of the grand jury dating back nearly 900 years, the U.S. Supreme Court stated in *Costello v. United States*, 350 U.S. 541 (1956), that the original purpose of the grand jury, by acting as an independent body, was to act as a safeguard against unjustified prosecutions by scrutinizing evidence, determining probable cause, and protecting citizens from otherwise overzealous allegations. Mirroring its prior opinions, the Supreme Court in *United States v. Dionisio*,

410 U.S. 1 (1973), emphasized the grand jury's "historic role as a protective bulwark standing solidly between the ordinary citizen and an overzealous prosecutor . . . [and for it to] even approach the proper performance of its constitution mission . . . it must be free to pursue its investigations unhindered by external influence or supervision."

As prescribed by Section 1783(a) of title 28 of the U.S. Code, the grand jury differs from the "petit" (trial) jury in that it is composed of twenty-three voting members, with sixteen to constitute a quorum, and twelve votes favoring to return a "true bill" indictment to charge an individual with a crime. The Supreme Court has also described the duties of the grand jury in *United States v. Sells Engineering, Inc.* to have the "dual function of determining if probable cause exists to believe that the crime has been committed and of protecting the citizens against unfounded criminal prosecutions." To carry out this dual function, the grand jury has the authority to subpoena witnesses to testify and to produce physical and documentary evidence.

While most law enforcement agents work for a particular agency and/or in conjunction with a prosecutor, that agent actually acts on behalf of the grand jury in not only initiating the investigation, but also securing the witnesses and documents that build the case. Furthermore, a grand jury is designed to act independently and without the constraints of "technical, procedural and evidentiary rules governing the conduct of criminal trials" and may initiate an investigation on mere "suspicion," without a showing of probable cause. Unlike law enforcement personnel, a federal grand jury may freely use investigative techniques without any "preliminary showing of reasonableness" to justify the exercise of their powers to investigate any person without probable cause or reasonable suspicion.

The cornerstone of the federal grand jury is that everything in the proceedings takes place beneath a "veil of secrecy." The secrecy serves public as well as private interests and is codified by Rule 6(e) of the Federal Rules of Criminal Procedure. Everything from the subject of the investigation, who testified, what was said, what documents were subpoenaed to the identities of the grand jurors is considered secret. Only in rare circumstances and with a court order can the information from the grand jury be disclosed to outside parties.

The only individuals allowed in the grand jury are the attorneys for the government (serving as legal advisors), witnesses under examination, interpreters, stenographers, and the grand jurors. The investigating case agent, like a witness's attorney, cannot be present along with a witness or sit with the prosecutor

as he or she might during the actual trial. While states are not required to use a grand jury in charging a defendant, some state jurisdictions that do may vary from these federal procedures and allow for attorney representation within the grand jury room. Nongovernmental witnesses who appear before the federal grand jury, however, are free to discuss their testimony with anyone as evidenced during the Clinton/Whitewater investigation.

Different types of witnesses are called to appear before a grand jury. Some may be considered "targets" of the investigation, and some may be mere testimonial whose involvement is limited to their conduct within the scope of the grand jury's investigation. A "target" is a person for whom the grand jury has evidence linking him or her to the commission of a crime and is a potential defendant. Of significance with the federal grand jury is that witnesses have no legal right to be informed whether they a subject or target of the investigation; to be reminded of the right against self-incrimination or the right to counsel, or even to be told that the conduct in question is being investigated for possible violations of federal criminal law.

It is important to note that corporations do not have a Fifth Amendment privilege. Accordingly, records generated by corporations are not shielded by the privilege against self-incrimination, and neither a corporation nor its employees may avoid a grand jury subpoena for documents by asserting that the records may expose the corporation to criminal liability. In *Braswell v. United States*, 487 U.S. 99 (1998), the Court held that there is no Fifth Amendment privilege against the production of corporation records by a corporate representative, reasoning that corporations are artificial entities and can only operate through their agents and representatives. Courts have also found that the act of compelling the corporate custodian to identify documents produced does not violate the Fifth Amendment privilege. However, in *United States v. Hubbell*, 53 U.S. 27 (2000), the U.S. Supreme Court held that the mere act of producing documents under a grand jury subpoena could result in self-incrimination in certain circumstances.

If any witness refuses to testify, the prosecutor may seek a motion to compel from a judge, but must first obtain a grant of "transactional immunity" for the grand jury witness pursuant to Section 6003 of Title 18 of the *United States Code*. Once the prosecutor receives an order compelling a witness to testify, the witness is brought back before the grand jury and asked whether, despite the immunity order, he or she still refuses to answer questions. A witness's failure to comply can subject the witness to contempt charges by the court. Generally, there are two forms

of contempt: civil and criminal. Under civil contempt, a witness may be incarcerated for the life of the grand jury, but in no event any longer than six months, and the witness can purge the civil contempt by complying with the order. Under criminal contempt, a witness subject to contempt is punishable by fine or imprisonment (but not both). Unlike the civil contempt witness, a witness charged with criminal contempt cannot purge the contempt charge by subsequently agreeing to testify, and a federal court may impose a sentence of up to six months pursuant to Section 402 of Title 18 of the United States Code.

The ability to gather evidence through issuance of subpoenas is a central function of the federal grand jury. This process is rarely decided by the grand jury, but rather is directed and guided by its legal advisor—usually the prosecutor. These subpoenas are not limited to the jurisdiction from which they arose and have a nationwide service of process pursuant to Rule 17 of the *Federal Rules of Evidence*. A grand jury may issue dozens if not hundreds of subpoenas in investigations that range from complex white-collar to simple felon-in-possession cases. There are two basic types of subpoenas: the subpoena *ad testificandum* (to require witness testimony) and the subpoena *duces tecum* (issued for documents or other physical evidence).

Despite the vast scope of the grand jury's power, it is not without its limits. It is inappropriate to issue a grand jury subpoena for the purpose of gathering evidence for a civil case, preparing for trial, harassing or intimidating the recipient of the subpoena, investigating cases not in that venue, or compelling a witness's appearance at a federal prosecutor's office for the sole purpose of conducting an interview.

As evidenced during the Whitewater investigation during the Clinton presidency, any investigation may start in one area and expand into a completely different allegation. The ability of law enforcement to investigate a case thoroughly derives from a wide variety of resources. Field interviews, running background checks on suspects, calling on reliable sources and informants, and, of course, a seasoned law enforcement officer's instincts are all tools that help build a successful case. During any given case, the government may conduct long-term investigations in multiple ways: covert operations, search warrants, "crunching data," and the powerful tool of the grand jury. While it is often said that a grand jury could "indict a ham sandwich," another much quoted statement from the federal district court case, *In re Grand Jury Proceedings*, 4 F. Supp. 283, 284 (E.D. Pa. 1933), arguably summed it up best in recognizing that the grand jury is "an engine of discovery against organized and far reaching crime, it has no counterpart."

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References and Further Reading

- Brown, J. Robert, *The Witness and Grand Jury Secrecy*, American Journal of Criminal Law 11 (1983): 170.
Helmholz, Richard H., *The Early History of the Grand Jury and Canon Law*, Chicago Law Review 50 (1983): 613.

Cases and Statutes Cited

- Costello v. United States*, 350 U.S. 541 (1956)
In re Grand Jury Proceedings, 4 F. Supp. 283, 284 (E.D. Pa. 1933)
United States v. Braswell, 487 U.S. 99 (1998)
United States v. Dionisio, 410 U.S. 1 (1973)
United States v. Hubbell, 53 U.S. 27 (2000)
United States v. Sells Eng'g., Inc., 463 U.S. 418 (1983)
Federal Rule of Criminal Procedure 6(e)
Federal Rule of Criminal Procedure 7
Federal Rule of Criminal Procedure 17
18 U.S.C. § 402
18 U.S.C. § 6003
28 U.S.C. § 1783(a)

GRAND JURY INVESTIGATION AND INDICTMENT

Grand juries, comprising sixteen to twenty-three citizens serving for extended periods of time, wield tremendous investigative power and determine whether a criminal accusation called an "indictment" is warranted because there exists probable cause to believe that an individual has engaged in criminal conduct. The grand jury, with its roots in ancient civilizations, came to the American colonies with the English common law. The right to grand jury indictment in serious federal criminal prosecutions later was enshrined in the Bill of Rights, in the Fifth Amendment. Although the Supreme Court declared in the 1884 case of *Hurtado v. California*, 110 U.S. 516 (1884), that the Constitution does not require states to use grand jury indictment to institute criminal proceedings, a number of states make grand jury indictment mandatory for serious crimes.

The grand jury has nearly boundless power of investigation. This investigative prerogative extends not only to testimony and documents, but also to physical evidence. There are two types of grand jury subpoenas: subpoenas *duces tecum*, which seek documents and other tangible items, and subpoenas *ad testificandum*, which seek testimony from specified witnesses before the grand jury at a certain date and time. Although subpoenas *duces tecum* generally command the evidence to be brought to the grand jury at a specified date and time, compliance with such a subpoena is often satisfied more informally, with materials delivered to the office of the prosecutor. The issuance of subpoenas is ostensibly the province

of the grand jurors, although decisions regarding whether, when, and to whom to issue grand jury subpoenas typically are made solely by the prosecutor presenting evidence to the grand jury.

Constraints on the subpoena power are found in certain constitutional, statutory, and common-law privileges. One important constitutional privilege is the Fifth Amendment's privilege against self-incrimination, which forbids compulsion of statements tending to incriminate the witness. A grand jury witness asserting the privilege against self-incrimination may be compelled to testify once granted immunity. Failure to testify after a grant of immunity gives rise to contempt and possible incarceration. Although prosecutors may institute self-imposed constraints on subpoenaing members of the news media, the Supreme Court has not recognized a news-gathering privilege under the First Amendment. Indeed, in a number of high-profile grand jury investigations, reporters have been jailed after refusing to testify regarding sources.

In addition to constitutional privilege, certain common law evidentiary privileges, such as the marital privilege, shield against the grand jury subpoena power. Perhaps the most well-known common law privilege is the attorney-client privilege, which protects confidential communications made by the client to the attorney for the purpose of obtaining legal advice. The privilege is controlled by the client and may extend to communications with those who aid the attorney in the provision of legal advice, such as forensic accountants. The attorney-client privilege may be pierced and disclosure of such confidential communications may be compelled if the communications were made in furtherance of criminal or fraudulent activity.

Generally, there is no right to counsel for witnesses testifying before the grand jury, although witnesses are afforded ready access to counsel sitting outside the grand jury room. Grand jury witnesses, who testify under oath and on the record, typically are warned about the consequences of making untruthful statements before the grand jury, including possible prosecution for perjury or obstruction of justice. There is no double jeopardy bar to successive attempts to indict an individual, although prosecutors often follow self-imposed constraints.

Grand juries typically operate in secrecy. Federal grand juries, for instance, are subject to stringent rules that restrict prosecutors, law enforcement officials, court employees, and the grand jurors from disclosing matters that took place before the grand jury. Witnesses, however, may speak freely about their testimony. Even once indicted, defendants are not given access to grand jury transcripts unless such access is

compelled by statute or constitutional mandate. Those government attorneys and members of law enforcement with access to grand jury materials, including testimony transcripts, documents, and physical objects, must take particular care when handling such materials and generally must obtain a court order to share the materials even with other government employees working on the case.

So strict are the secrecy rules that criminal government attorneys may not share grand jury materials with civil government attorneys investigating the same conduct unless a showing of particularized need prompts a court order. Grand jury secrecy has a number of rationales, including safety of witnesses, protection of grand juror identities, preserving the integrity and effectiveness of the criminal investigation, preventing flight of witnesses or putative defendants, and, most importantly, protection of the reputation of individuals who may be investigated but ultimately not indicted.

At an appropriate time, the prosecutor may ask the grand jury to return an indictment against a target of the investigation. Indictments serve a number of functions. First, the indictment provides the defendant with notice of the charges against him or her. The indictment also informs the court of the charges so that it may assess the legal sufficiency of the evidence and protect the defendant against successive prosecution in violation of the double jeopardy clause. Furthermore, the indictment demonstrates that a grand jury of the defendant's peers screened the charges being brought and determined that there is probable cause to believe that criminal conduct occurred and that prosecution is warranted.

The grand jury has been described as a "shield," in that it serves as protection for the criminal defendant against the power of the state, and as a "sword," in that it is a potent investigatory tool used for the discovery of criminal wrongdoing. Grand juries performed both of these functions, from the colonies' resistance to the Crown in the eighteenth century to the investigation of alleged corporate and political misconduct in the late twentieth and early twenty-first centuries. Despite calls for reform and even abolition of grand juries by some who question their continued usefulness, grand juries continue to play the role of guardian of individual rights and effective instrument for the investigation of crime.

ROGER A. FAIRFAX, JR.

References and Further Reading

- Branzburg v. Hayes*, 408 U.S. 665 (1972).
 Edwards, George J., Jr. *The Grand Jury*. New York: AMS Press, 1906.

United States v. Williams, 504 U.S. 36 (1992).
 Younger, Richard D. *The People's Panel: The Grand Jury in the United States, 1634–1941*. 1963.

Cases and Statutes Cited

Hurtado v. California, 110 U.S. 516 (1884)

GRANT'S GENERAL ORDER #11 (1862) (EXPELLING JEWS)

In December 1862, in the midst of the Civil War, General Ulysses S. Grant issued an order expelling all Jews from Kentucky, Tennessee, and Mississippi because, as the document claimed, "The Jews as a class violat[e] every regulation of trade established by the Treasury Department and also [War] Department orders." Local commanders were to furnish passes for Jews to cross military lines solely for the purpose of leaving the department of the Tennessee, the military district under Grant's command, and anyone returning would be arrested and confined to prison. No passes were to be given them for the purpose of visiting headquarters in an effort to secure trade permits.

Grant had responded to the thriving black market in southern cotton. Although at war, northern mills needed southern cotton, and President Lincoln had allowed limited trade to satisfy some of the demands of the mills, in part to furnish uniforms and other textiles to the Union Army. Technically, one needed a license to engage in this trade, but in fact many people ran the borders, since the price of cotton had soared.

Some of these unlawful traders were indeed Jews, but not all Jews were engaged in the trade, and the vast majority of illegal traders were non-Jews. People like Grant, General Henry Halleck and others, however, used the term "Jew," "profiteer," and "speculator" interchangeably. Grant described the Jews as "an intolerable nuisance," and no doubt his anti-Semitism reflected that of many other people in the army and the government.

Although army officers began to carry out Grant's order, a group of Paducah, Kentucky, Jewish merchants, led by Cesar Kaskel, sent an indignant telegram to Abraham Lincoln, condemning Order No. 11 as an "enormous outrage on all laws and humanity, . . . the grossest violation of the Constitution and our rights as good citizens under it." Jewish leaders organized protest rallies in other cities and sent dozens of telegrams to the White House.

Kaskel arrived in Washington on January 3, 1863—two days after the Emancipation Proclamation

went into effect—and, along with influential Jewish businessman and the Cincinnati Congressman John A. Gurley, went to the White House to see the president. Lincoln immediately ordered Halleck, the commanding general of the Union army, to have Grant revoke Order No. 11. As the president told another delegation of Jews that arrived three days later, Grant had been wrong to issue the order and he believed that "to condemn a class is, to say the least, to wrong the good with the bad."

Grant later proved a friend to Jews, won much of their vote in his presidential campaigns, and named several Jews to high office. But his Order No. 11 remains the sole example of blatantly anti-Semitic action by the government of the United States.

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References and Further Reading

Ash, Stephen V. "Civil War Exodus: The Jews and Grant's General Order No. 11." *The Historian* 44 (1982): 502–523.

GREEN v. GEORGIA, 442 U.S. 95 (1979)

This case examines the applicability of rules of evidence when possibly contrary to due process. Green and Carzell Moore were indicted for the rape and murder of Teresa Carol Allen. During Moore's trial, a witness was brought in to testify that Moore told him Green was not present during the murder. Green wished to present the evidence at trial. The state rejected the evidence, citing Georgia Code § 38-301 (1978), which allows for hearsay for declarations against pecuniary interest, but not for declarations against penal interest.

The decision of the Court was delivered per curiam. The Court reasoned that the testimony should be allowed. Though it might not fall within the Georgian rules of evidence, the testimony was highly relevant and its exclusion constituted a violation of due process. There was ample reason to trust the testimony—it had been made to a friend, there was corroborating evidence, the statement was against interest, and, most importantly, the state found the evidence trustworthy enough to be used in Moore's trial. Rules of evidence must not be used to frustrate justice.

This case continues to be an example of when evidentiary errors may be redressed by the due process clause, though courts have limited the effects of this case on evidentiary rules by distinguishing the fact patterns.

MICHELE L. HILL

GREGG v. GEORGIA, 428 U.S. 153 (1976)

Gregg v. Georgia resolved the confusion surrounding the Court's decision in *Furman v. Georgia*, 408 U.S. 238 (1972), by holding that capital punishment was not unconstitutional per se. A jury convicted Gregg on two counts of armed robbery and two counts of murder and sentenced him to death on all counts. The Georgia Supreme Court affirmed the death sentences for murder, but vacated the sentences for armed robbery because the death penalty was rarely imposed for that crime in the state.

After reviewing the history of acceptance of capital punishment and the then-current support for the sanction in the United States, Justice Stewart declared that the death penalty for murder was consistent with the dignity of man, a basic concept underlying the Eighth Amendment. Justice Stewart, while adopting a posture of deference to the legislature, stated that the death penalty could serve the social purposes of retribution and deterrence and was not a disproportionate punishment for the crime of murder.

Turning to the particulars of the case, Justice Stewart focused on the statutory scheme Georgia employed to impose death sentences. Generally speaking, Georgia's death penalty statute required a capital jury to balance statutory aggravating and mitigating factors in choosing between punishments. Justice Stewart said that by focusing the jury's attention on the circumstances of the crime and the criminal, Georgia had sufficiently eliminated the risk of an arbitrary and capricious sentence.

The outcome in Gregg settled the debate over the constitutionality of the death penalty per se and the plurality's approval of Georgia's death penalty statute provided a blueprint for other states to follow.

EARL F. MARTIN

Cases and Statutes Cited

Furman v. Georgia, 408 U.S. 238 (1972)

See also **Capital Punishment; Capital Punishment and the Equal Protection Clause Cases; Capital Punishment: Due Process Limits; Capital Punishment: Eighth Amendment Limits; Capital Punishment: History and Politics; Capital Punishment Reversed**

GRIFFIN v. CALIFORNIA, 380 U.S. 609 (1965)

There is a long-standing tradition in constitutional law that the government may not punish a person for exercising his constitutional rights. However, many states allowed jurors to draw adverse inferences

from the accused's failure to testify at trial. In *Griffin v. California*, the Supreme Court considered whether this practice was consistent with the Fifth and Fourteenth Amendments.

In *Griffin*, the trial court told the jury that if it determined that the defendant likely knew certain case facts, but did not take the witness stand to explain those facts, the jury could draw an adverse inference from his silence. During closing argument, the prosecutor argued to the jury that since the defendant did not testify, the jury should infer that he had something to hide.

Justice Douglas wrote for a six-to-two Court majority that the practice was "a penalty imposed by courts for exercising a constitutional privilege." Thus, the practice was unconstitutional. Justice Douglas wisely recognized that jurors might still infer that a defendant without something to hide would testify. But the Court's concern was what the jury "may infer when the court solemnizes the silence of the accused into evidence against him."

Later, the Court held that trial courts, if counsel requests, must instruct the jury to disregard the defendant's silence—that is, not to infer any facts the silence (*Carter v. Kentucky*). The Court also held that the sentencing court may not consider the defendant's silence when sentencing the defendant (*Mitchell v. United States*, 526 U.S. 314, 1999). These practices ensure that no citizen is punished for asserting his constitutional rights.

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References and Further Reading

LaFare, Wayne R. et al. *Criminal Procedure*, 3rd ed. St. Paul, MN: West Group, 2000, Section 24.5.

Cases and Statutes Cited

Carter v. Kentucky

Griffin v. California, 380 U.S. 609 (1965)

Mitchell v. United States, 526 U.S. 314 (1999)

See also **Self-Incrimination (V): Historical Background; Warren Court**

GRIFFIN v. ILLINOIS, 351 U.S. 12 (1956)

In *Griffin v. Illinois*, 351 U.S. 12 (1956), the Court addressed the question of whether a state may, under the due process and equal protection clauses of the Fourteenth Amendment, deny a means of effective review on appeal to defendants who cannot afford the cost while granting it to those who can. The problem arose because, under Illinois law, all

defendants who wanted to appeal their convictions were required to purchase the stenographic transcript of the lower court proceedings. Aside from indigent defendants sentenced to death, all defendants needing a transcript were required to buy it themselves.

In *Griffin*, the defendants had been convicted of armed robbery and filed a motion in the court asking that a certified copy of the record be given to them at state expense. They were too poor to buy it and it was required for them to get an appeals court to review their convictions. The court refused to order that the record be produced at state expense. The defendants appealed, contending that the failure to provide them with a transcript deprived them of due process and equal protection under the Fourteenth Amendment of the U.S. Constitution. The Illinois appeals courts upheld the denial. However, the U.S. Supreme Court agreed with the defendants.

In reaching its decision, the Court first looked at history and noted that, since the Magna Carta in 1215, courts have sought to guarantee equal application of the criminal law. It emphasized the importance of the concept of equal treatment to the U.S. system, explaining that “equal protection and due process emphasize the central aim of our entire judicial system—all people charged with crime must, so far as the law is concerned, ‘stand on an equality before the bar of justice in every American court’” (*Chambers v. Florida*, 309 U.S. 227, 241). Accordingly, the Court explained, “a state can no more discriminate on account of poverty than on account of religion, race, or color.” Thus, although a state need not provide for review on appeal at all, a state that does allow for appeals cannot do so in a way that discriminates on the basis of poverty.

As the Court pointed out, all states provide some method of appeal from criminal convictions, and statistics show that a “substantial proportion” of state criminal convictions are reversed. Accordingly, the Court recognized that “to deny adequate review to the poor means that many of them may lose their life, liberty or property because of unjust convictions which appellate courts would set aside.” In a well-known phrase, the Court held that “There can be no equal justice where the kind of trial a man gets depends on the amount of money he has.”

In a separate opinion, Justice Frankfurter concurred. He warned, however, to pay attention to the “admonition of de Tocqueville not to confuse the familiar with the necessary.” As Justice Frankfurter pointed out, the right to appeal has never been held to be a fundamental right that must be afforded by the state courts. In fact, there were no appeals for the first one hundred years of U.S. history and until 1907 in England. Agreeing that discrimination based

on poverty is unconstitutional, Justice Frankfurter stated, “Neither the fact that a State may deny the right to appeal altogether nor the right of a state to make an appropriate classification, based on differences in crimes and their punishment, nor the right of a state to lay down conditions it deems appropriate for criminal appeals, sanctions differentiations by a State that have no relation to the rational policy of criminal appeal or authorizes the imposition of conditions that offend the deepest presuppositions of our society.”

Justices Burton and Minton, joined by Justices Reed and Harlan, dissented. While they did not dispute the “desirability of the policy of supplying an indigent defendant with a free transcript,” they did not agree that the constitution required that the states do this. First, the dissenters held that since due process does not even require an appeal, it could not be a denial of due process to allow for some differences among defendants. As to the equal protection claim, the dissenters would have held that the state could differentiate between its treatment of capital and noncapital defendants. Accordingly, the dissenters explained that a state had no duty to make sure every defendant was economically equal. After all, the Court observed, in reality some defendants can afford better lawyers than others, some can afford better investigations than others, and, of course, some can afford bail and some cannot. The Constitution does not require that the states fix this. The dissenters also disagreed with the majority’s application of its holding to invalidate past state convictions. That is, the dissenters would have held that the Court’s holding was not to be applied retroactively.

Justice Harlan dissented in a separate opinion, adding to the dissenting opinion of Justices Burton and Minton. According to Justice Harlan, this was not a good case to decide the due process and equal protection issues because it was possible under the state system that the defendants could have gotten appellate review by other procedures. Therefore, there was no need for Supreme Court review, and the Court should have left the case alone. On the merits of the issues, however, were they to be decided, Justice Harlan would have held that the state had no obligation to “alleviate the consequences of differences in economic circumstances that exist wholly apart from any state action.” As to the issue of fairness under the Due Process Clause, Justice Harlan believed it was not arbitrary or unfair for the state to refuse to pay for transcripts in noncapital cases. In such cases, review can be adequately provided by other means and the consequences are not as significant as in capital cases.

LISSA GRIFFIN

References and Further Reading

Griffin v. Illinois, 351 U.S. 12 (1956).

See also **Due Process; Equal Protection of Law (XIV); Right to Counsel**

GRIFFIN v. WISCONSIN, 483 U.S. 868 (1987)

Joseph Griffin, a convicted felon, was released from prison into a probation program. The state placed probationers in the legal custody of the Wisconsin Department of Health and Human Services, which monitored their activities and subjected them to regulations and restrictions that normal citizens need not bear. One such regulation allowed probation officers to search the property and residences of probationers without obtaining a warrant. The officer must certify to supervisors that “reasonable grounds” existed to execute a search, but need not meet the standard of “probable cause” normally required by the Fourth Amendment.

Upon receipt of a tip from a police detective that Griffin likely possessed a firearm in his residence, probation officers executed a search and recovered the firearm. The state trial court denied Griffin’s motion to suppress the evidence resulting from the search, and subsequent appeals at the state level affirmed that decision.

Writing for a majority of the Court, Justice Scalia concluded that the warrantless search did not offend the Fourth Amendment. He wrote, “Probation is simply one point . . . on a continuum of possible punishments ranging from solitary confinement in a maximum-security facility to a few hours of mandatory community service.” Though not behind the walls of a prison, Griffin remained in the custody of the state penal system and was thus subject to regulations related to protecting the citizenry from possible adverse behavior. Criminals in the rehabilitation system do not enjoy the same rights and privileges as the general citizenry, and thus Griffin had a reduced expectation of privacy and protection against search.

JOHN GREGORY PALMER

Cases and Statutes Cited

Morrissey v. Brewer, 408 U.S. 471
New Jersey v. T.L.O., 469 U.S. 325
O’Connor v. Ortega, 480 U.S. 709
Payton v. New York, 445 U.S. 573

See also **Search (General Definition)**

GRISWOLD v. CONNECTICUT, 381 U.S. 479 (1965)

The Planned Parenthood League of Connecticut and Yale University medical and law faculty made three attempts to persuade the Supreme Court to negate the 1879 Connecticut statute that criminalized the giving of advice about and the use of contraceptives to prevent conception. After the state legislature in successive sessions failed to change the policy supported by the Catholic hierarchy, clinics that served patients unable to afford private medical services turned to the third branch. In 1943 (*Tileston v. Ullman*, 318 U.S. 44, 1943), the Court dismissed the action on the ground that the doctor petitioner had no standing to litigate a patient’s right to medical advice. In 1961 (*Poe v. Ullman*, 367 U.S. 497, 1961), the Court refused to face the substantive issue for lack of prosecution of violators. Chief Justice Earl Warren agreed to reject the case for a political reason: the race equality decisions of the 1950s had aroused opposition and anger toward the Court that would be intensified if the Court mandated a new liberal national policy toward sex and procreation.

The litigants provided a real controversy in 1965 by arranging for the arrest of the executive and medical directors of the Planned Parenthood clinic as they were giving advice on contraception to married couples. Upon appeal of their conviction and sentence, the Court decided (contrary to *Tileston*) that the professional relationship gave the petitioners standing to litigate their patients’ constitutional rights. All nine justices recognized that the Connecticut policy was irrational, but two voted in dissent to leave the policy in state hands. On the question of constitutionality, seven justices concluded that the state law infringed on the marital right of privacy. The minimal five signed the Court opinion of Justice Douglas. Only Justice Clark did not separate himself from Justice Douglas’s reasoning.

Diverse Reasoning

Griswold was a case of first impression, although Justice Douglas found support in two 1920s cases that protected family preferences for private schooling and for foreign language training for their children (*Meyer v. Nebraska*, 262 U.S. 390, 1923; *Pierce v. Society of Sisters*, 268 U.S. 510, 1925). These cases were not entirely apposite since they were decided when substantive due process was a legitimate doctrine and involved family choices for an activity (schooling) that would be performed in a public space. *Griswold* concerned sexual acts using contraceptives that would

be performed in a private space. The justice emphasized this distinction with his poetic invocations of the sacredness of marriage and his apprehension of police searching marital bedrooms.

The focus on procreation brought *Griswold* closer to *Skinner v. Oklahoma*, where punishment for repeat offenders of certain offenses included sterilization. In 1942, writing for the *Skinner* Court, Justice Douglas had characterized the right to have offspring as a basic right, but then sidestepped the issue by using the equal protection clause to negate the penalty. Although equal protection, “the last resort of constitutional arguments,” was also available in the *Griswold* case facts, the Court faced the substantive issue directly.

The justices provided four different constitutional foundations for the new right to privacy. Justice Douglas tried to avoid the revival of substantive due process by basing his argument on penumbras and emanations from specific guarantees in the Bill of Rights, as applied to the states through the Fourteenth Amendment. He recognized a zone of privacy emanating from the First, Third, Fourth, Fifth, and Ninth Amendments. The justice also reached outside the Constitution to older rights that he assumed existed in the consciousness of the founders. Justice Goldberg wrote a concurring opinion signed by Justices Warren and Brennan to emphasize that the Constitution protected fundamental personal rights not listed in the Bill of Rights. He relied on the Ninth Amendment as indicator of the existence of other rights rooted in American traditions and institutions.

Two justices, John Harlan II and Byron White, agreed with the majority’s disposition but rejected Douglas’s reasoning and openly revived substantive due process. Justice Harlan used his concurrence in the judgment to continue an old battle with Justice Black over the incorporation doctrine. He argued that incorporation would not guarantee judicial restraint and substantive due process would not unleash judicial power, if the justices respected national history, basic values, and structural doctrines. Although categorized as conservative, Justice Harlan perceived a living and changing Constitution.

Justice White differentiated economic rights from the family rights created in the *Meyer* and *Pierce* precedents. His focus here and in *Eisenstadt v. Baird*, 405 U.S. 438 (1972), on conventional sexual relationships and procreation allowed him in *Roe v. Wade*, 410 U.S. 113 (1973), to dissent in opposition to abortion and in *Bowers v. Hardwick*, 478 U.S. 186 (1986), to write for the Court in refusing to decriminalize

sodomy. He did not question the legitimacy of Connecticut’s stated purpose of preventing illicit sexual relationships, but pointed out the absence of any rational connection between the purpose and the method. He also emphasized an inequality aspect of the factual situation ignored by other justices: that the statute did not affect persons with knowledge and resources.

Like Justices Harlan and White, Justice Black recognized that the only appropriate constitutional basis for this decision was due process. But he reasoned from the plain words of the Constitution and, like Justice Douglas, maintained an adamant New Deal stand against substantive due process in refusing to distinguish moral from economic regulations. The justice had expressed his fears in 1947 when he predicted that the Court would “roam at large in the broad expanse of policy and morals . . .” (*Adamson v. California*, 332 U.S. 46, 1947, at 90). Justice Stewart in a separate dissent criticized the Connecticut statute as poor social policy but could find no privacy right in the Constitution or in the Court’s precedents. He particularly derided Justice Goldberg’s attempt to introduce the Ninth Amendment into constitutional jurisprudence. His solution to bad law was representative government.

Constitutional meaning is not settled by the flawed reasoning of a single case but emerges from successive cases that address the same conceptual and constitutional problems. The constraints of precedent and history and the Court’s need to satisfy at least five members often result in opinions with imaginary facts, strained judicial reasoning, and faulty doctrines. The justices hold an institutional memory of political problems exacerbated by past precedents and follow old thinking even after the context has changed.

Although the relationship at the Connecticut clinic involved an outsider to the marital couple—the doctor—and the locus was a quasipublic health clinic, the opinions described a fictional situation of sex in the marital bedroom. To meet the expectation of clarity in their opinions, the Court prefers to reduce the number of issues in a case, so it ignored the issues of the doctor’s professional integrity and the patient’s autonomy in order to focus on the marital couple’s privacy. The *Griswold* opinions adopted the concept of privacy because precedents and legal literature on privacy, but not on autonomy, were available to support their disposition. The Court ignored the fact that the two extant meanings of privacy rights applied to criminal procedure and torts and not to substantive crimes.

Development of Precedent

Griswold was innovative in its use of privacy doctrine to void a criminal law passed under state police power. Its significance lies in its creation of a public policy supportive of personal sexual autonomy that fit the country's changing national culture. After 1965, the Court expanded its new doctrine to invalidate criminal laws that denied personal choice of abortion and sodomy. The unintended consequence of *Griswold* was to place the Court at the center of national electoral and legislative politics over controversial social issues into the twenty-first century.

Justices are aware of the potential use of their precedents but cannot control their future application. In *Poe* Justice Harlan had written that "I would not suggest that adultery, homosexuality, fornication, and incest are immune from criminal enquiry, however privately practiced" (@552). In his concurring *Griswold* opinion Justice Goldberg warned of the doctrine's impact on homosexuality and other sexual offenses. Justice White had tried to head off expansion through his emphasis on family values. Nevertheless, the Court in the 1970s extended the right to buy and use contraceptives from the married couple to adult and minor individuals (*Eisenstadt v. Baird*; *Carey v. Population Services International*). The most important direct legacy of *Griswold* was the 1973 (limited) right to abortion. In *Roe* the Court abandoned Justice Douglas's penumbras and relied openly on the liberty protected by the Due Process Clause to support a woman's right to choose an abortion.

The Court temporarily halted its expansion of the *Griswold* doctrine in 1986 in denying the privacy rights of practicing homosexuals (*Bowers v. Hardwick*). Then, in 2003, the Court overruled *Bowers* (*Lawrence v. Texas*, No. 02-102, 2003). Justice Kennedy tied the new decision to *Griswold* through a factual similarity—the legislative proscription of nonprocreative sex—and through the reasonableness of applying the same doctrine that protects conventional sexual bonding to a different choreography. In *Lawrence* the Court provided the clarity that was lacking in the reasoning and doctrinal basis of *Griswold*, revealing again that constitutional meaning is always a work in progress.

The series of cases following *Griswold* are not the last word on the constitutionality of legislative policy on sex and procreation. Justice White's separate opinion in *Griswold* focused attention on the purpose of the state in regulating sexual conduct. If the state connected a well-grounded security purpose to its control of reproductive sex (to increase or decrease

population), it is possible that a future Court would find a compelling state interest and rework its doctrines on the autonomy of sexual behavior once more.

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References and Further Reading

- Baer, Judith A. *Women in American Law*, 2nd ed. New York: Holmes & Meier, 1996, pp. 195–199.
- Beane, William M., *The Constitutional Right to Privacy in the Supreme Court*, *The Supreme Court Review* (1962): 212–251.
- Copelon, Rhonda. "Beyond the Liberal Idea of Privacy: Toward a Positive Right of Autonomy." In *Judging the Constitution: Critical Essays on Judicial Lawmaking*, Michael W. McCann and Gerald L. Houseman, eds. Glenview, Ill.: Scott, Foresman and Company, 1989, pp. 87–314.
- Ernst, Morris L., and Alan U. Schwartz. *Privacy: The Right to Be Let Alone*. New York: The Macmillan Company, 1962.
- Henken, Louis, *Privacy and Autonomy*, *Columbia Law Review* 74 (1974): 1410–1433.
- Kauper, Paul G., *Penumbras, Peripheries, Emanations, Things Fundamental and Things Forgotten: The Griswold Case*, *Michigan Law Review* 64 (1965) 235–258.
- Posner, Richard A., *The Uncertain Protection of Privacy by the Supreme Court*, *The Supreme Court Review* (1977): 173–216.

Cases and Statutes Cited

- Adamson v. California*, 332 U.S. 46 (1947)
- Bowers v. Hardwick*, 478 U.S. 186 (1986)
- Eisenstadt v. Baird*, 405 U.S. 438 (1972)
- Lawrence v. Texas*, No. 02-102 (2003)
- Meyer v. Nebraska*, 262 U.S. 390 (1923)
- Olmstead v. U.S.*, 277 U.S. 438 (1928)
- Pierce v. Society of Sisters*, 268 U.S. 510 (1925)
- Planned Parenthood v. Casey*, 505 U.S. 833 (1992)
- Poe v. Ullman*, 367 U.S. 497 (1961)
- Roe v. Wade*, 410 U.S. 113 (1973)
- Tileston v. Ullman*, 318 U.S. 44 (1943)

GROSJEAN v. AMERICAN PRESS CO., 297 U.S. 233 (1936)

This case examined freedom of press and information. In 1934, Louisiana passed an act that taxed newspapers and others on the gross receipts of any advertisements that they published. The act pertained to businesses that had a circulation of more than twenty thousand copies per week. Nine publishers brought suit against the act. Justice Sutherland delivered the opinion of the Court.

The publishers claimed the act violated the federal Constitution by abridging the freedom of the press. The Court established that because the First Amendment is a fundamental right, it is safeguarded against

state action by the Fourteenth Amendment. The Court then discussed the history of “taxes on knowledge,” including different taxes placed on colony newspapers by the English Crown. Such taxes were protested not because of their tax burden, but because of their effect of curtailing the circulation of newspapers. The Court saw that it was clear that the Constitution’s framers were aware that such taxes were not acceptable to the American people and that the First Amendment was meant to protect against prior restraint, including prior restraint through taxation. Newspapers, as an instrument of spreading information crucial to self-governance, need freedom of publication. Taxes against newspapers are certainly permissible, but taxes that are a method of limiting circulation and information are not. This case, with its measurement based on circulation, is clearly suspicious. This tax is not constitutionally legal.

The Court continues to favor freedom of press as a method of supplying information to the voting population.

MICHELE L. HILL

GROUP LIBEL

“Group libel” is a term used in civil defamation law and in criminal libel statutes. In civil defamation suits and criminal libel prosecutions, the group libel concept is often in tension with First Amendment values and principles.

In the civil defamation context, the phrase group libel refers to the problem posed by defamatory statements that do not single out any one individual by name, but rather refer to a group of individuals, such as members of the police force, the law faculty, or Hispanic voters. The general rule is that no valid action for libel or slander (the twin torts that comprise defamation) exists for the publication of a general defamatory statement about a large group or class of persons. This common-law rule is grounded in the rationale that such a general condemnation could not reasonably be construed as targeting each individual member of the group, and the disparagement is too diffuse to create a realistic likelihood of reputational injury to any individual member.

Similarly, under the common law of defamation, mere insults or epithets are not actionable. The rationale is that such insulting language, however crude or indecorous, is endemic to social life, and the law cannot be expected to provide a remedy for all such verbal slights. The common-law view is also buttressed by the notion that the use of such insulting language reflects more poorly on the speaker than the victim of the verbal attack.

This common-law principle is in turn enforced by First Amendment standards that shelter rhetorical hyperbole and the expression of opinion from defamation liability. First Amendment standards established in Supreme Court decisions such as *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986), and *Milkovich v. Loraine Journal*, 497 U.S. 1 (1990), require a “false statement of fact” to support a defamation action. Because group slurs will often be expressions of hyperbole or opinion, attempts to predicate civil liability on such group insults will violate the First Amendment.

As an alternative to civil liability as a means of dealing with racial, ethnic, or religious disparagement, some states have, over the years, enacted criminal libel laws aimed at creating criminal sanctions for group libel. In a 1952 decision, *Beauharnais v. Illinois*, 343 U.S. 250 (1952), the Supreme Court upheld the constitutionality of the Illinois criminal group libel statute. The *Beauharnais* case, however, predated much of modern First Amendment Law. This includes the body of law placing First Amendment limits on civil liability for defamation emanating from *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and cases that protect racist speech under the First Amendment unless the speech meets the “incitement” standard of cases such as *Brandenburg v. Ohio*, 395 U.S. 444 (1969), or the “true threat” standard of cases such as *Virginia v. Black*, 538 U.S. 343 (2003).

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References and Further Reading

Reisman, David, *Democracy and Defamation: Control of Group Libel*, Columbia Law Review 427 (1942): 72.
Smolla, Rodney. *Law of Defamation*. New York: Thomson/West, 2005, sections 4:50–4:71.

Cases and Statutes Cited

Beauharnais v. Illinois, 343 U.S. 250 (1952)
Brandenburg v. Ohio, 395 U.S. 444 (1969)
Milkovich v. Loraine Journal Co., 497 U.S. 1 (1990)
New York Times Co. v. Sullivan, 376 U.S. 254 (1964)
Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986)

GUANTANAMO BAY, ENEMY COMBATANTS, POST 9/11

Since early 2002, the United States military has used the Guantanamo Bay Naval Base on the southeastern coast of Cuba to house prisoners associated with al Qaeda, the Taliban, and related organizations. The detentions began during the conflict in Afghanistan following the September 11, 2001, Al Qaeda attacks

on the United States. There are currently approximately 480 detainees at Guantanamo, down from a high of more than 600; the detainees come from over fifty countries. None are U.S. citizens.

The detentions at Guantanamo have been the subject of intense domestic and international criticism. From the beginning critics claimed that the detentions themselves violate international law, including the Geneva Conventions of 1949, a series of treaties providing a broad set of protections for civilians and combatants during armed conflict. Criticism has also focused on claims of physical abuse (including sleep deprivation, isolation, and sexual humiliation), the indefinite nature of the detentions, the detention of minors, attempted suicide by detainees, force feeding of detainees engaged in hunger strikes, and other conditions. The United States maintains that the detentions comply with its obligations under domestic and international law. U.N. Secretary General Kofi Annan, a United Nations Committee Against Torture, and the German and British governments have all called for Guantanamo to be closed.

Many lawsuits filed in the United States have challenged the detentions. The Supreme Court has issued an opinion in one, *Rasul v. Bush*, 542 U.S. 466 (2004), holding that the U.S. courts have jurisdiction over habeas petitions brought by Guantanamo detainees. The opinion did not resolve the scope of the detainees' rights under domestic or international law; many cases raising these issues are currently pending before the lower courts. In 2004, partially in response to the *Rasul* opinion, the United States government established Combatant Status Review Tribunals ("CSRTs") at Guantanamo. A CSRT conducts a hearing and reviews the evidence against each detainee to determine whether he is an "enemy combatant." In addition, an administrative review is conducted annually for each prisoner to determine whether further detention is warranted. Prisoners are not entitled to have lawyers, hearsay evidence is considered, and for security reasons detainees are not entitled to hear all of the evidence against them; these and other aspects of the review process have provoked extensive criticism. In early 2006, the United States released for the first time transcripts of the CSRT and administrative review board hearings, as well as the names of all persons currently and formerly detained at Guantanamo. As of May 2006, the United States reports that it has released 192 detainees and transferred 80 detainees to other governments, including Afghanistan, Australia, Bahrain, Belgium, Denmark, France, Great Britain, Kuwait, Morocco, Pakistan, Russia, Saudi Arabia, Spain, Sweden, and Uganda.

Ten of the detainees have been designated by the President to appear before military commissions

established at Guantanamo. Charges against them include conspiracy to commit war crimes, murder and terrorism. The military commissions have been challenged in the U.S. courts on the grounds that they violate international law and exceed the President's statutory and constitutional authority. The Bush administration maintains that Congress has authorized the military commissions and that in any event the President, as Commander in Chief, has the power to determine how to try enemy combatants during wartime. The Supreme Court is considering these questions in *Hamdan v. Rumsfeld*, with a decision expected in Summer 2006.

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References and Further Reading

- Aldrich, George H., *Editorial Comment, the Taliban, Al Qaeda, and the Determination of Illegal Combatants*, *American Journal of International Law* 96 (2002): 891.
- Anderson, Kenneth, *What to Do With Bin Laden and Al Qaeda Terrorists: A Qualified Defense of Military Commissions and United States Policy on Detainees at Guantanamo Naval Base*, *Harvard Journal of Law and Public Policy* 25 (2002): 591.
- Commentary on the Geneva Conventions of 12 August 1949: III Geneva Convention Relative to the Treatment of Prisoners of War*, Jean S. Pictet et al., eds., 1960.
- "Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment," 26 Feb. 1996, Sen. Treaty Doc. No. 100-20, 1914 *United Nations Treaty Series* 519.
- "Geneva Convention Relative to the Treatment of Prisoners of War," 12 August 1949, *United States Treaties and Other International Agreements*, vol. 6, p. 3316.
- Murphy, Sean D., *Contemporary Practice of the United States: Executive Branch Memoranda on Status and Permissible Treatment of Detainees*, *American Journal of International Law* 98 (2004): 820.
- "Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts," 12 Dec. 1977, Arts. 43, 44, 1125 *United Nations Treaty Series*, p. 3.
- Ratner, Steven R., *Notes and Comments: Jus ad Bellum and Jus in Bello After September 11*, *American Journal of International Law* 96 (2002): 905.
- Memorandum from the Deputy Secretary of Defense for the Secretary of the Navy, dated July 7, 2004, Subject: Order Establishing Combatant Status Review Tribunals, available at <http://www.defenselink.mil/news/Jul2004/d20040707review.pdf> (last visited May 22, 2006).
- Presidential Order, Military Order of Nov. 13, 2001, Detention, Treatment, and Trial of Certain non-Citizens in the War Against Terrorism, available at <http://www.whitehouse.gov/news/releases/2001/11/20011113-27.html> (last visited May 22, 2006).
- United States Department of Defense, Military Commission Instructions, available at http://www.defenselink.mil/news/Aug2004/commissions_instructions.html (last visited May 22, 2006).
- Washington Post, Names of the Detained in Guantanamo Bay Cuba, available at <http://projects.washingtonpost.com/guantanamo/> (last visited May 22, 2006).

Cases and Statutes Cited

Rasul v. Bush, 542 U.S. 466 (2004)

GUIDED DISCRETION STATUTES

Guided discretion statutes restrict the otherwise unbounded discretion of judges and juries during non-capital and capital sentencing, respectively. Such statutes come in two forms. First, in determinate sentencing systems such statutes provide a sentencing range within which the sentencing judge is to sentence unless unusual factors are present. Such statutes also outline individualized factors that should guide departures from the prescribed range. The goals of such statutes are to decrease judicial discretion and the resulting disparity and create a more rational sentencing policy. Guided discretion statutes have accomplished these goals, albeit with varying success.

Judicial resistance to guided discretion statutes was most pronounced in the federal system, but declined once the Supreme Court declared the federal sentencing guidelines constitutional. Nevertheless, federal judges continue to resist the complexity of the federal sentencing regime and their limited discretion. Even though guided discretion statutes limit judicial sentencing discretion, disparity continues throughout the system because prosecutorial charging and plea bargaining decisions remain largely unpoliced.

Second, in *Furman v. Georgia*, 408 U.S. 238 (1972), the Supreme Court declared the death penalty, as administered, unconstitutional because of its “wanton[] and . . . freakish[]” imposition. Under the statutes then existing, juries lacked any guidance in deciding whether death should be imposed.

Following the decision, some states enacted guided discretion statutes that mandated the separation of the guilt and punishment phase, required appellate review, and set out specific aggravating and mitigating factors. In *Gregg v. Georgia*, 428 U.S. 153 (1976), and subsequent cases, the Supreme Court upheld different versions of such statutes.

Today virtually all of the states authorizing the death penalty have guided discretion statutes. While such statutes have made the sentencing process fairer and less arbitrary, they have not succeeded in eliminating the impact of extrajudicial factors on sentencing.

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References and Further Reading

Bowers, William J., *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, *Indiana Law Journal* 70 (1995): 1043.

Parent, Dale. *Structuring Criminal Sentencing: The Evolution of Minnesota's Sentencing Guidelines*. London: Butterworth Legal Publishers, 1988.

Reitz, Kevin. “Modeling Discretion in American Sentencing Systems.” *Law and Policy* 20 (1998): 289.

Cases and Statutes Cited

Furman v. Georgia, 408 U.S. 238 (1972)

Gregg v. Georgia, 428 U.S. 153 (1976)

See also **Capital Punishment; Capital Punishment and the Equal Protection Clause Cases; Capital Punishment: Due Process Limits; Capital Punishment: Eighth Amendment Limits; Capital Punishment: History and Politics; Sentencing Guidelines**

GUILTY BUT MENTALLY ILL

The verdict of “guilty but mentally ill” (GBMI) was developed in Michigan in 1975 in response to dissatisfaction with the insanity defense and has since been adopted by approximately a quarter of the other states. The insanity defense is based on the premise that only individuals who act knowingly and willingly should be held criminally responsible. Thus, a defendant who is acquitted under a “not guilty by reason of insanity” (NGRI) verdict lacks the requisite *mens rea* to be convicted, even though he or she may have committed the offense. Such insanity acquittees can be civilly confined for as long as they are dangerous, though they are entitled to regular hearings on that issue. When GBMI was first proposed, several high-profile crimes committed by insanity acquittees had increased public fears about the premature release of dangerous individuals from psychiatric facilities and had sapped public confidence in psychiatrists’ ability to predict dangerousness.

A GBMI verdict is a conviction that recognizes the defendant’s mental illness. However, because the defendant is held criminally responsible, a GBMI verdict allows for the incarceration, not just civil commitment, of mentally ill offenders. GBMI offenders can be sentenced to prison and incarcerated for the duration of their sentences, even if they no longer present a danger to others. Defendants convicted upon a GBMI verdict may spend a portion of their sentence in a psychiatric facility and/or receive treatment in a correctional institution. Proponents of GBMI laws believe they reduce the number of unwarranted insanity acquittals and protect the public through the incarceration of dangerous individuals. The GBMI verdict also allows juries to recognize that a defendant’s mental illness may be serious enough to require treatment, but not so serious as to negate criminal responsibility.

A GBMI verdict is only available if the defendant asserts the insanity defense. It does not replace the NGRI verdict, but rather provides an additional option for the jury or, in the case of a plea agreement, an additional option for the defendant. The GBMI verdict, unlike the NGRI verdict, assumes that the individual had the requisite mens rea, despite his or her mental illness. Thus, a GBMI verdict requires a finding that the defendant was mentally ill but not legally insane at the time he or she committed the offense.

Critics contend that the real purpose of GBMI laws is not treatment since mentally ill prisoners are already supposed to receive mental health services and adequate services are nevertheless rarely available. Rather, they are an expansion of criminal responsibility to include the mentally ill. Critics also maintain that the GBMI verdict violates due process since there is no hearing on the defendant's current mental state; violates equal protection because GBMI defendants may be treated less well than regular defendants or insanity acquittees; constitutes cruel and unusual punishment because insane individuals could inaccurately be found GBMI; and effectively eliminates the insanity defense because juries do not understand the difference between a GBMI and NGRI verdict. Courts have been unsympathetic to these arguments.

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References and Further Reading

- Frey, Roger George, *The Guilty but Mentally Ill Verdict and Due Process*, Yale Law Journal 92 (1983): 475-498.
- LaFond, John Q., and Mary Durham, *Cognitive Dissonance: Have Insanity and Civil Commitment Reforms Made a Difference?* Villanova Law Review 39 (1994): 92-122.
- Morris, Norval. *Madness and the Criminal Law*. Chicago: University of Chicago Press, 1982.
- Slobogin, Christopher, *The Guilty but Mentally Ill Verdict: An Idea Whose Time Should Not Have Come*, George Washington Law Review 53 (1985): 494-526.
- Smith, G. A., and J. A. Hall, *Evaluating Michigan's Guilty but Mentally Ill Verdict: An Empirical Study*, Journal of Law Reform 16 (1982): 75-112.
- Steadman, Henry et al. *Before and After Hinckley: Evaluating Insanity Defense Reform*. New York: Guilford, 1993.

See also **Cruel and Unusual Punishment (VIII); Due Process; Equal Protection of the Law (XIV); Insanity Defense; Mentally Ill**

GUILTY PLEA

A guilty plea is a formal admission of guilt by a criminal defendant. A plea is not simply a confession, but also is a conviction. Individuals who plead guilty give up a number of constitutional rights, including

the privilege against compulsory self-incrimination, the right to a trial by jury, and the right to confront one's accusers. Because guilty pleas eliminate the need for the state to prove guilt at trial, they are an inexpensive and efficient way to adjudicate criminal responsibility. The vast majority of convictions in the United States result from guilty pleas.

The Supreme Court, in *Boykin v. Alabama*, 395 U.S. 238 (1969), held that a valid guilty plea requires "an intentional relinquishment or abandonment of a known right or privilege." The defendant must be competent, and the judge cannot accept the plea without an affirmative showing that it was voluntary, knowing, and intelligent. In order to be voluntary, a plea cannot result from improper government coercion, such as actual or threatened physical harm. It may be inherently coercive to impose longer sentences on defendants who go to trial instead of pleading guilty, but courts have accepted this practice. Thus, if a defendant enters a plea to avoid a longer sentence post-trial, the plea is still considered voluntary. Conversely, while prosecutorial vindictiveness is impermissible, under *Bordenkircher v. Hayes*, 434 U.S. 357 (1978), a post-trial conviction is not invalid simply because the prosecutor makes good on a threat to bring more severe charges if the defendant refuses to plead guilty.

A plea must also be knowing and intelligent, meaning that the defendant must be told the elements of the crime and nature of the charges. In *Henderson v. Morgan*, 426 U.S. 637 (1976), the Supreme Court found a plea invalid because the defendant had not been told that an intent to cause the victim's death was an element of second-degree murder. The requirement that a plea be knowing and intelligent is related to voluntariness: because a guilty plea is an admission of the elements of a crime, it cannot be truly voluntary unless the defendant understands the relationship of the law to the facts. In most cases, the defendant need not be told about the collateral consequences of the conviction, such as the loss of a driver's license.

In the federal courts, Rule 11 of the *Federal Rules of Criminal Procedure* is designed to ensure that pleas are voluntary, knowing, and intelligent. The rule requires: disclosure on the record of any plea agreement; the court to ensure that there is a factual basis for the plea and that it was voluntarily offered; and the judge to inform the defendant of the nature of the charges, the maximum and minimum sentence, the applicability of sentencing guidelines, and the rights given up by pleading guilty.

Not all jurisdictions require a factual basis for a plea. Requiring a factual basis may help prevent innocent people from pleading guilty. However, requiring a factual basis can also complicate plea bargaining

since the facts may not support the lesser charges to which the defendant would agree to plead guilty. In *North Carolina v. Alford*, 400 U.S. 25 (1970), the Supreme Court, noting that there was a strong factual basis for the plea, upheld the conviction of a man who pled guilty but maintained his innocence. Consequently so-called “Alford pleas,” which are specifically provided for in Rule 11, allow the court to accept a defendant’s guilty plea even though the defendant does not admit actual guilt, so long as the court finds that it is reasonable for someone in the defendant’s position to plead guilty.

Once entered, a guilty plea is difficult to withdraw. A defendant generally needs a “fair and just” reason to withdraw the plea before sentence is imposed. Some jurisdictions bar any attempt to withdraw a plea after sentence is imposed; others allow withdrawal, but only to correct manifest injustice. However, if a plea is not voluntary, intelligent, and knowing, a defendant may attack it by seeking to withdraw it or by raising the issue on appeal. A withdrawn guilty plea is inadmissible.

By pleading guilty, the defendant waives almost all claims regarding any prior constitutional or other inadequacies in the adjudicative process. A guilty plea does not waive jurisdictional challenges, challenges based on ineffective assistance of counsel, or claims of prosecutorial retaliation. Some jurisdictions allow conditional pleas, under which the defendant pleads guilty but is allowed to appeal specific rulings that could otherwise not be appealed. The use of conditional pleas may promote plea bargaining, since the defendant need not go to trial to preserve an issue, such as a search and seizure challenge, that could turn the entire case around on appeal. In most cases the prosecutor must consent to, and the court must approve, the conditional plea.

Many guilty pleas result from plea bargaining. Plea bargaining may involve modification of the charges by the prosecutor, a prosecutorial sentencing recommendation, a judicial indication of the likely sentence, or some combination of these. Plea bargains are akin to contracts, and many principles of contract law apply. Thus, under *Ricketts v. Adamson*, 483 U.S. 1 (1987), double jeopardy does not prevent a state from bringing additional charges against a defendant who breaches a plea agreement.

Advocates of plea bargaining argue that guilty pleas conserve judicial resources; ensure prompt and efficient application of criminal punishment; enable defendants to acknowledge guilt; avoid trial in cases where this would be undesirable; allow defendants to bargain for lower sentences in return for giving up some rights or cooperating with prosecutors; and permit both prosecutors and defendants to avoid the uncertainty of trial. Proponents also contend that

the criminal justice system, as presently constituted and funded, simply could not cope if every case went to trial. Critics of plea bargaining maintain that the system forces innocent people to plead guilty; exacts an unfairly high price from defendants who exercise their constitutional right to go to trial; allocates decision-making authority to prosecutors rather than judges; disadvantages the indigent; and camouflages the injustices of the criminal justice system.

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References and Further Reading

- Alschuler, Albert, *The Supreme Court, the Defense Attorney, and the Guilty Plea*, University of Colorado Law Review 47 (1975): 1–71.
 Easterbrook, Frank H., *Plea Bargaining as Compromise*, Yale Law Journal 101 (1992): 1969–1978.
 Fisher, George, *Plea Bargaining’s Triumph: A History of Plea Bargaining in America*. Stanford, CA: Stanford University Press, 2003.
 Schulhofer, Stephen, *Plea Bargaining as Disaster*, Yale Law Journal 101 (1992) 1979–2009.
 Scott, Robert, and William Stuntz, *Plea Bargaining as Contract*, Yale Law Journal 101 (1992): 1909–1968.

Cases and Statutes Cited

- Bordenkircher v. Hayes*, 434 U.S. 357 (1978)
Boykin v. Alabama, 395 U.S. 238 (1969)
Henderson v. Morgan, 426 U.S. 637 (1976)
North Carolina v. Alford, 400 U.S. 25 (1970)
Ricketts v. Adamson, 483 U.S. 1 (1987)
Santobello v. New York, 404 U.S. 257 (1971)
 See also *Blackledge v. Perry*, 417 U.S. 21 (1974); *Bordenkircher v. Hayes*, 434 U.S. 357 (1978); *Boykin v. Alabama*, 395 U.S. 238, 242 (1969); *Double Jeopardy: Modern History*; *North Carolina v. Alford*, 400 U.S. 25 (1970); *Plea Bargaining*; *Ricketts v. Adamson*, 483 U.S. 1 (1987); *Santobello v. New York*, 404 U.S. 257 (1971)

GUN CONTROL/ANTI-GUN CONTROL

Gun control has become one of the most contentious public policy issues of the past thirty years. The advocates and opponents of gun control are among the loudest, most passionate participants in American politics. Interest groups on both sides have poured vast sums of money into national advertising and public education campaigns; lobbying; and direct contributions to political parties, members of Congress, and state legislators. Elections have been won or lost because of a candidate’s stance on this issue, including (some observers believe) the 2000 presidential election, when the Democratic nominee, Vice President Al

Gore, failed to carry some traditionally Democratic states with a high percentage of gun owners.

Advocates of gun control believe that the possession and sale of firearms should be regulated by government, so as to ensure that (more) guns do not fall into the hands of criminals, the mentally ill, and children. Most advocates also believe that certain kinds of guns, such as assault weapons, should be prohibited altogether. Advocates say that their goal is the reduction of rampant gun violence in America through the regulation—not the abolition—of guns and that recreational hunters who use rifles are not their target.

Opponents of gun control believe that guns are used primarily by law-abiding citizens for self-protection, hunting, and sport. They also believe that government regulation of firearms constitutes a slippery and inevitable slope toward the ultimate abolition of guns. Opponents contend that the Second Amendment to the U.S. Constitution unmistakably protects the rights of individuals to own guns and to be free from unreasonable government regulation. Supporters of gun control argue that the Second Amendment is about militias and merely prohibits the national government from disarming the state militias. Opponents of gun regulation claim that ownership of a gun is a civil liberty like the right to free speech and can never be abridged; supporters of gun control argue that the amendment only secures the rights of the states to have what the amendment calls “a well regulated militia.”

Today, approximately 35 to 40 percent of all U.S. households have at least one gun; on average, these households possess about three guns, accounting for an estimated 250 million firearms. Rifles and shotguns outnumber handguns by a ratio of two to one. These figures, upon which advocates and opponents of gun control generally agree, suggest how widespread gun ownership is, how difficult the abolition and confiscation of guns would actually be, and the potentially enormous impact of gun regulations.

The story of guns in early America is a more contested one. Americans have had a long-standing cultural image that guns were an integral part of living in the eighteenth and nineteenth centuries, at least until the advent of professional police forces. This image has been reinforced by movies and television, in particular the entertainment media's depiction of the “Wild West.” Recent research by historians, political scientists, and legal scholars has called into question this image, suggesting that guns were not widely available, owned, or used to commit violent crimes. Historian Michael Bellesiles, who used a variety of empirical methods to study the prevalence of guns in

pre-Civil War America, has called this image a “myth.” Other scholars, however, dispute the accuracy of this research, suggesting that it is part of a pro-gun control lobby to downplay the routine nature of gun ownership and the positive contribution of guns to public order and self-protection in colonial and antebellum America.

Guns and Public Policy

Public opinion has helped propel the march toward increased regulation of guns by the federal government in the twentieth century. A substantial majority of Americans has supported stricter control of firearms, particularly handguns, for as long as opinion polling has taken place. Agreement breaks down, however, over specifics, including bans on assault rifles or the ballistic fingerprinting of guns. In particular, gun owners are much more likely than non-owners to oppose intrusive or controversial forms of regulation. The abolition of handguns, however, is rejected by a large majority of all Americans.

Key violent events on the national stage have helped to direct and intensify public opinion. Prohibition and the related gangster violence of the 1920s and early 1930s, typified by Al Capone's massacre of rival mobsters on Valentine's Day in Chicago in 1929, led to two major pieces of federal gun control legislation. A year after the Twenty-First Amendment repealed prohibition, The National Firearms Act of 1934 imposed a substantial tax on the manufacturers, importers, and dealers of sawed-off shotguns, silencers, and the like; this legislation also provided for the first firearms registration system—The National Firearms Registration and Transfer Record—still in place today. The Federal Firearms Act of 1938 established a licensing system for all types of firearms, by creating Federal Firearms Licensees (dealers) and criminalized the sale of guns to convicted felons.

The assassination of President John F. Kennedy in 1963 led to renewed calls for stricter gun control laws. But it was not until the assassinations of Senator Robert F. Kennedy and Dr. Martin Luther King, Jr. in 1968 that Congress finally passed legislation designed to (1) close some of the loopholes that allowed rifles and handguns to fall into the hands of assassins and (2) curb the growing level of violence, especially urban homicides. The Gun Control Act of 1968 was supported even by the National Rifle Association (NRA), the most powerful pro-gun lobby in the United States. It broadened the categories of people who were not eligible to purchase firearms,

prohibited the mail-order sales of firearms, prohibited the interstate sale of firearms (a restriction later removed for rifles), and banned the importation of “Saturday night specials,” a handgun often used in street crimes.

The shootings of President Reagan and his press secretary, James Brady, in 1981 from John Hinckley’s handgun set in motion the most vigorous and sophisticated campaign to control handguns in the United States. Paralyzed by the shooting, Brady joined his wife, Sarah, in efforts to implement stricter controls on handguns. In 1989, Sarah Brady became chairperson of Handgun Control Inc. (HCI), the most influential interest and lobbying group in favor of gun control (by 2001, HCI changed its name to the Brady Campaign Against Handgun Violence). After years of battles involving HCI, NRA, and other groups, Congress passed the Brady Bill in 1993; President Clinton signed the bill, which had some bipartisan support, into law.

Hailed by supporters as one of the most significant pieces of gun control legislation ever enacted, the Brady law required a five-day waiting period and background checks on all handgun purchasers (the five-day waiting period was rescinded in 1998 when the FBI implemented a computerized national instant checking system). These provisions represented a major shift toward stricter gun controls in thirty-two states; the other states already had “Brady-like” laws in place. Shortly thereafter, Congress passed the Violent Crime Control and Law Enforcement Act of 1994, which banned the manufacture and sale of assault weapons; however, the ten-year term of this act expired in 2004 and was not renewed by Congress.

Guns and the Second Amendment

Is the ownership of guns one of our nation’s fundamental civil liberties? This question is hotly debated among scholars, activists, members of Congress and other policymakers, and even the public at large. The controversy largely focuses on the original meaning of the Second Amendment, which states: “A well regulated militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”

One viewpoint, usually referred to as the “collective” view of the Second Amendment, is that the right to own guns refers *only* to the context of a citizen’s participation in a state government-regulated militia, whose purpose was to protect the national defense in an era when people were wary of a too powerful

federal government and standing armies. When serving in these citizen militias, men were expected to provide their own weapons of a type in common use at the time. Adherents to the collective view, such as political scientist Robert Spitzer, argue that there is no historical evidence to suggest that the right to bear arms extended beyond the militia context to private possession and use. Indeed, some early drafts or alternative versions of the Second Amendment, which specified a private right to own and use guns, were ultimately rejected. As citizen militias gave way to the professionalized national guards of the twentieth century, the militia justification for contemporary gun ownership seemed no longer relevant.

A quite opposite viewpoint, referred to as the “individual” view of the Second Amendment, is that this amendment was intended to guarantee the right of individuals to possess arms, not only for militia use but also for self-defense and protection from government tyranny. Adherents to this view remind us that the militia was a universal citizen militia, one that extended to all able-bodied men (at least those between the ages of sixteen and forty-five). In addition, legal scholars such as Robert Cottrol point to the English Bill of Rights of 1689, which provides that “the subjects which are Protestants may have arms for their defence suitable to their conditions and as allowed by law,” as the basis for our Second Amendment. Historian Joyce Lee Malcolm observes that in the nineteenth century the right to own guns in Britain was expanded to all religions, and British judicial opinions made clear that this right was an individual one that extended to self-protection.

In sum, supporters of the collective and individual perspectives on the Second Amendment disagree about several key issues, including the universality and meaning of militia service, the intentions of the framers of our Constitution, and the relevance of British laws and jurisprudence for interpreting the Second Amendment. They also disagree on the implications of the very few U.S. Supreme Court decisions that have addressed the right to bear arms and gun regulation within the framework of the Second Amendment.

In the *Dred Scott* case (*Scott v. Sandford*, 60 U.S. 393, 1857), Chief Justice Roger Taney listed the right “to keep and carry arms wherever they went” as one of the privileges of citizens and a compelling reason why blacks should not be considered citizens. Those who believe that the Second Amendment provides an individual right to own guns point to this decision for support. But given that *Dred Scott* was overturned by the passage of the Civil War amendments and has been discredited by virtually all constitutional

scholars, the significance of Taney's dicta about guns is in doubt.

In *Presser v. Illinois*, 116 U.S. 252, (1886), the Supreme Court upheld an Illinois state law that banned public parades of armed men, in this case the parade of German (and other) immigrant laborers protesting working conditions and seeking to mobilize a national labor movement. Advocates of the collective view of the Second Amendment cite *Presser* for support of the regulation of guns, as well as for the point that the Illinois National Guard constituted the only legitimate militia of the time. Advocates of the individual view of the Second Amendment cite *Presser* for the reiteration of the individual right to own guns. In fact, the Court's opinion declares that "the states cannot . . . prohibit the people from keeping and bearing arms, so as to deprive the United States of their rightful resource for maintaining the public security." Whether in these words the *Presser* Court is declaring the right to bear arms as an individual right or, instead, one reserved only for citizen militias in their performance of a public duty is disputed by scholars of the Second Amendment today.

The Supreme Court's most definitive statement on the regulation of guns occurred in *U.S. v. Miller*, 307 U.S. 174, (1939). In *Miller*, two defendants were convicted of transporting a sawed-off shotgun across state lines, in violation of the National Firearms Act. The Supreme Court unanimously ruled that a sawed-off shotgun was subject to federal government regulation (including registration), noting that such a weapon bore no "reasonable relationship" to the preservation of militias or the common defense. It seems clear that the Supreme Court did not wish to tackle the larger, more controversial, and wholly hypothetical question of whether guns used by individual citizens for militia purposes were also subject to government regulation. Nevertheless, advocates of the individual view of the Second Amendment cite *Miller* for support, noting with approval the Court's extensive discussion of state militias.

Finally, it is important to distinguish between views of the Second Amendment and support for, or opposition to, gun control. Virtually all opponents of gun control base their arguments on the Second Amendment, in particular their view that this amendment protects the right to bear arms and precludes most or all forms of government regulation. Supporters of gun control vary in their views of the Second Amendment. Those favoring the abolition of all firearms or handguns believe the amendment confers no individual right to own guns. Other gun control supporters are willing to acknowledge a constitutional right to own guns; however, they believe that the Second Amendment permits the regulation of

guns, whether the constitutional test for regulation is "rational basis" or even the higher threshold "strict scrutiny" standard.

Gun Policy in Perspective

Debates about the desirability or constitutionality of gun control measures are not the only sources of disagreement between supporters and opponents. They also have different points of view about the efficacy of gun control legislation. Since the Brady law was enacted in 1993, more than one million applications for firearm transfers or permits were rejected by the FBI or state and local law enforcement agencies (Bureau of Justice statistics). Although comprising only about 2 percent of all applications, these rejections reflect a large number of instances in which convicted felons and other ineligible classes of individuals were unable to purchase a gun. How often did these background checks prevent crimes or reduce the violence associated with crimes? We cannot know for sure, but we do know that (1) the violent crime rate has declined since 1993, and (2) the number of crimes committed with a gun has also sharply declined—by about 50 percent—in that same time period (Bureau of Justice statistics).

Supporters of gun control point enthusiastically to these data for evidence of success; opponents of gun control argue that the national crime rate was declining for other reasons (such as demographic changes) and that the impact of the Brady law has been minimal. Researchers who have studied this issue empirically are often skeptical of the more grandiose claims of success for the Brady law. Legal scholar James Jacobs, for example, points out that guns are still widely available to the criminal class through illegal transfers of registered guns from friends and accomplices as well as still unregulated gun shows.

Finally, there are new laws at the state and federal level that gun owners and manufacturers support with enthusiasm. Thirty-seven states now have right-to-carry (shall issue) laws, which give all adults with no criminal record the right to possess and carry a concealed weapon. At the federal level, Congress recently passed, again with bipartisan support, the Protection of Lawful Commerce in Arms Act, designed to prohibit civil liability actions against manufacturers, distributors, dealers, or importers of firearms or ammunition for damages resulting from the misuse of their products. Hoping to curb "abusive" lawsuits by the Brady campaign and other gun control organizations, President Bush signed the bill into law on October 26, 2005. For now and the foreseeable future,

guns will continue to be a contested but integral part of American life.

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References and Further Reading

- Bellesiles, Michael A. *Arming America: The Origins of a National Gun Culture*. New York: Knopf, 2000.
- Bogus, Carl, ed. *The Second Amendment in Law and History: Historians and Constitutional Scholars on the Right to Bear Arms*. New York: The New Press, 2000.
- Cottrol, Robert J., ed. *Gun Control and the Constitution: Sources and Explorations on the Second Amendment*. New York: Garland, 1994.
- Gun Laws and Policies: A Dialogue*, Focus on Law Studies XVIII(2) (Spring 2003).

- Jacobs, James B. *Can Gun Control Work?* New York: Oxford University Press, 2002.
- Malcolm, Joyce Lee. *To Keep and Bear Arms: The Origins of an Anglo-American Right*. Cambridge, MA: Harvard University Press, 1996.
- Spitzer, Robert J. *The Right to Bear Arms*. Santa Barbara, Calif.: ABC-CLIO, 2001.
- U.S. Department of Justice: Bureau of Justice Statistics—Office of Justice Programs. “Firearms and Crime Statistics.” www.ojp.usdoj.gov/bjs/guns.htm. Accessed November 9, 2005.

Cases and Statutes Cited

- Presser v. Illinois*, 116 U.S. 252 (1886)
- Scott v. Sandford* (Dred Scott case), 60 U.S. 393 (1857)
- U.S. v. Miller*, 307 U.S. 174 (1939)

H

H. L. v. MATHESON, 450 U.S. 398 (1981)

Following the Court's decision in *Roe v. Wade* (1973) that pregnant women enjoyed a personal liberty under the due process clause of the Fourteenth Amendment to terminate their pregnancies, five states, including Utah, enacted laws to discourage minors from exercising this right. Reasoning that if parents knew that their teenage daughter was pregnant they might dissuade them from aborting the pregnancy, these states required the attending physician to notify the girl's parents and wait a specified period of time before performing the procedure. In *H. L. v. Matheson* the Supreme Court found no constitutional barriers to enactment of parental notification statutes as long as the parents were not given a veto over the abortion.

H. L. was an unmarried 15-year-old girl living with her parents in Utah and dependent on them for support. After discovering that she was pregnant, she consulted with a social worker and a physician, who advised her that ending her pregnancy was in her best interest. A Utah statute required the attending physician to notify the parents of a pregnant minor seeking an abortion "if possible." Because of the law, the physician declined to perform the abortion until he had notified H. L.'s parents. For reasons that she did not reveal, she said that it was not in her best interest for the parents to know and filed a suit in a state trial court claiming that the parental notification statute violated the federal constitution. The law contained no judicial bypass, whereby the physician could notify a judge instead of the parents.

On appeal, the U.S. Supreme Court noted that in *Bellotti v. Baird* (1979) it had ruled that a state cannot give parents a veto over a child's abortion decision. It also said that a statute that required parental notification in the case of a mature, emancipated minor seeking an abortion would violate the minor's constitutional rights. This case, however, involved an immature minor, dependent on her parents. The statute requires only parental notification, not parental consent.

The Utah statute, said the Court, serves the important considerations of family integrity and protection of adolescents. The law also serves the state's interest in ensuring that the attending physician has access to the patient's full medical and psychological history, which the parents or the family physician, with authorization from the parents, are likely to be able to provide. Research indicates that abortion has an especially devastating effect on the mental health of adolescent girls.

It is reasonable, found the Court, for a state to require a physician to notify parents before performing an abortion while not requiring such notice when she gives birth to a child. In *Maher v. Roe* (1977), the Court held that states serve a legitimate interest, protecting potential human life, when they enact public policies favoring childbirth over abortion. In a subsequent case, *Hodgson v. Minnesota* (1990), the Court held that the Fourteenth Amendment requires states with parental notification requirements to include the option of notifying a

judge instead when the best interests of the minor so necessitate.

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References and Further Reading

- Bridge, Burneatta, *Parent versus Child: H.L. v. Matheson and the New Abortion Litigation*, Wisconsin Law Review 1982 (1982): 1:75–116.
- Feldman, H. N., *H. L. v. Matheson: Where Does the Court Stand on Abortion and Parental Notification?* American University Law Review 31 (1982): 2:431–69.
- McCullough, Eric D., *New Jersey Parental Notification for Abortion Act Violates State Constitutional Guarantee of Fundamental Right—Planned Parenthood of Central New Jersey v. Farmer*, 762 A.2d 620 (N.J. 2000), Seton Hall Constitutional Law Journal 11 (2001): 495–528.
- Solinger, Rickie. *Abortion Wars: A Half Century of Struggle, 1950–2000*. Berkeley: University of California Press, 1998.

Cases and Statutes Cited

- Bellotti v. Baird*, 443 U.S. 622 (1979)
- Hodgson v. Minnesota*, 497 U.S. 417 (1990)
- Maher v. Roe*, 432 U.S. 464 (1977)
- Roe v. Wade*, 410 U.S. 113 (1973)

See also **Abortion; Due Process of Law (V and XIV); *Maher v. Roe*, 432 U.S. 464 (1977); *Roe v. Wade*, 410 U.S. 113 (1973)**

HABEAS CORPUS ACT OF 1679

Although Parliament in the seventeenth century was loath to tamper with the common law, in a few instances it did intervene. The most notable example was the Habeas Corpus Act of 1679.

Until that time, the writ of habeas corpus (literally “produce the body”) had been a discretionary matter for courts responding to petitions from people who claimed that they had been illegally jailed and held. Because judges did have wide discretion in the matter, Parliament worried that the writ did not serve as sufficient protection against arbitrary imprisonment by the Crown. Moreover, the Crown often evaded the matter by charging persons with misdemeanors, since habeas corpus only applied to felonies and treason, or moving the prisoners to the Channel Islands, land technically outside the realm where the writ did not run. The final straw seems to have been the imprisonment of Francis Jenkes for urging that a new Parliament be called. When he sought his release through habeas corpus, the Lord Chief Justice denied it, on no grounds other than that the courts were on vacation; Jenkes received a similar answer from the Lord Chancellor.

The Act of 1679 greatly reduced judicial discretion in whether to issue the writ, made it applicable to misdemeanors as well as felonies, and empowered as well as required individual justices to issue the writ and hear its return at any time. Justices and jailors not complying with the statute or removing prisoners beyond the reach of the writ were subject to heavy fines.

The act strongly influenced the American colonists, who later wrote habeas corpus into the Constitution; it has been known ever since as the “Great Writ.”

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References and Further Reading

- Mian, Badsah K. *English Habeas Corpus: Law, History, and Politics*. San Francisco: University of California Press, 1984.

HABEAS CORPUS IN COLONIAL AMERICA

“Habeas corpus” (or “habeas corpus ad subjiciendum”) is Latin for “[that] you have the body.” It is a writ issued by a court to a person having custody of another, commanding him/her to produce the detainee in order to determine the detention’s legality. The “Great Writ” is primarily used today to release individuals from unlawful imprisonment.

Although mentioned in the Magna Carta (1215), the writ was part of English common law long before that time. In 1679, Parliament codified the common law with the Habeas Corpus Act, which allowed courts to issue writs when not in session and provided penalties to judges who refused.

As with other American legal system features, the Great Writ’s use was accepted by the colonies by their adoption of English common law. By the time of the American Revolutionary War, the writ was part of every American colony’s common law, except for South Carolina, which re-enacted the English statute. In fact, the writ’s use as a safeguard for liberty was so important to the colonists that the British government’s refusal to issue writs was one of the grievances causing the Revolution. Accordingly, the Constitution of the United States provides that “[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it” (Art. 1, sec. 9). Although a continual aspect of American common law, most colonies did not pass formal habeas corpus statutes until after the Revolution.

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References and Further Reading

- Carpenter, A.H. "Habeas Corpus in the Colonies." *American Historical Review* 9 (January 1904).
- Duker, William. *A Constitutional History of Habeas Corpus*. Westport, CT: Greenwood Press, 1980.
- Longsdorf, George F. *The Federal Habeas Corpus Acts: Original and Amended*. 13 F.R.D. 407 (1953).
- Oaks, Dallin, *Legal History in the High Court—Habeas Corpus*, Michigan Law Review 64 (1966).
- Stoebuck, William B., *Reception of English Common Law in the American Colonies*, William and Mary Law Review 10 (1968).

HABEAS CORPUS: MODERN HISTORY

General Background

The writ of habeas corpus has long been one of the primary legal remedies sought by prisoners who believe that they are being held in custody in violation of federal law. The importance of the "Great Writ" is reflected in Article I, section 9 of the U.S. Constitution, which provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

To obtain what practitioners often call "habeas relief," a prisoner must file a civil lawsuit in federal court against the person holding him or her in custody—usually the warden in charge of the facility where the prisoner is being held. In the papers initiating the lawsuit, the prisoner must outline the reasons for believing that his or her detention violates federal law. Ordinarily, the prisoner must allege a violation of constitutional (rather than merely statutory) law. In almost all cases, the remedy that the prisoner must seek is release from custody, a lawful trial, or a lawful sentence. The vast majority of habeas lawsuits involve prisoners who were charged with a state crime, convicted in a state court, and then sentenced either to a term of imprisonment or, in the most extreme cases, to death. State prisoners usually must wait to file their habeas lawsuits until after they have "exhausted their state remedies" by presenting all of their claims to the appropriate state's appellate courts.

The modern era has seen great changes in the rules relating to federal habeas lawsuits, from the vast expansion of habeas remedies' availability in *Brown v. Allen* (1953) and *Fay v. Noia* (1963), to the significant restrictions placed on habeas remedies' availability

by the Burger and Rehnquist Courts and by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).

Expansion of Habeas Corpus under *Brown* and *Fay*

In *Brown v. Allen* (1953), the U.S. Supreme Court greatly broadened the range of cases in which federal courts could grant prisoners' requests for habeas relief. The Court held that, if a federal judge agreed with a prisoner's constitutional claim, he or she could award the prisoner the appropriate remedy, even if a state court had already considered that very claim and rejected it. The Court went still further in *Fay v. Noia* (1963), holding that, even if the state courts had refused to hear a prisoner's claim because the prisoner had failed to follow the state courts' applicable procedural rules (such as rules requiring the prisoner to file certain papers by specified deadlines or requiring the prisoner to let the court know immediately if he or she objects to evidence offered by the prosecution at trial), the federal court could still agree to consider the claim. The only time that a prisoner's failure to obey a state court's procedural rules could bar a federal court from granting habeas relief, the *Fay* Court held, was when the prisoner himself or herself knew about those procedural rules and decided not to follow them.

The Court's rulings in *Brown* and *Fay* coincided with an era in which the Court was using the Fourteenth Amendment's due process clause and the incorporation doctrine to expand the range of constitutional rights that a person could claim when being investigated, prosecuted, or sentenced by state authorities. As a result of these developments and the Court's rulings in *Brown* and *Fay*, federal habeas lawsuits became one of the primary occasions on which the Warren Court announced new rules of constitutional law to be applied in criminal cases.

By the 1970s, state prisoners' ability to use habeas corpus lawsuits to challenge their convictions and sentences had become intensely controversial. Critics argued, for example, that federal judges were not showing sufficient respect for the work being done by their counterparts within the state judiciaries. Others contended that federal habeas lawsuits were largely to blame for the long delays that often separated a prisoner's death sentence and execution. Critics pointed out, for example, that there were no strict deadlines for filing habeas lawsuits and that death-row inmates often were allowed to file one

habeas petition after another, thereby forestalling their executions for many years. Supporters argued, however, that federal habeas proceedings were essential in order to catch all of the constitutional violations that occurred in criminal cases and that escaped the state courts' attention. Habeas corpus' supporters also contended that, because vindicating the constitutional rights of convicted criminals was often politically unpopular, federal judges with lifetime appointments to the bench should be given the opportunity to review each allegation of constitutional impropriety alleged by a prisoner.

Restriction of Habeas Corpus under the Burger and Rehnquist Courts and under AEDPA

In the final quarter of the twentieth century, the Burger and Rehnquist Courts issued a number of rulings that significantly restricted prisoners' ability to prevail in federal habeas lawsuits. In *Stone v. Powell* (1976), for example, the Supreme Court categorically declared that a state prisoner ordinarily cannot seek habeas relief based on a Fourth Amendment claim that the police obtained incriminating evidence through an unreasonable search or seizure. In *Wainwright v. Sykes* (1977) and *Coleman v. Thompson* (1991), the Court overruled its earlier decision in *Fay v. Noia*, declaring that, with narrow exceptions, a prisoner cannot raise a claim in a federal habeas lawsuit if he or she failed to follow the state courts' procedural rules for presenting that claim to the state courts. In *Teague v. Lane* (1989), the Court went a long way toward reversing the practice that had prevailed under the Warren Court, declaring that, with only the narrowest of exceptions, "habeas corpus cannot be used as a vehicle to create new constitutional rules of criminal procedure."

Congressional Republicans had long wished to join the Burger and Rehnquist Courts in limiting prisoners' ability to prevail in federal habeas lawsuits. Those efforts were resisted by Democrats, however, until an act of domestic terrorism united the country's politicians and set the stage for a large number of federal anticrime legislative initiatives. On April 19, 1995, a bomb planted by Timothy McVeigh destroyed the Alfred P. Murrah Federal Building in Oklahoma City, Oklahoma, killing 168 people and injuring nearly 1,000 others. Congressional leaders quickly responded with AEDPA, setting forth new federal standards on a wide range of matters, including

terrorism and civil liberties, victims' rights, the treatment of aliens, weapons of mass destruction, and federal habeas corpus. Almost exactly one year after the Oklahoma City bombing, President Bill Clinton signed AEDPA into law.

In its provisions relating to habeas corpus, AEDPA codified the Court's rulings in some areas and further restricted habeas relief availability in others. AEDPA established a one-year statute of limitations for filing habeas claims, for example, and imposed even stricter deadlines—for prisoners and federal judges alike—in capital cases arising from states that met certain standards for providing indigent death-row prisoners with free and competent legal representation. The statute also declared that, absent extraordinary circumstances, a prisoner cannot file more than one federal habeas lawsuit—he or she ordinarily must raise all of his or her claims in his or her first habeas lawsuit. AEDPA also limited federal courts' ability to hear new evidence in support of prisoners' claims. And, in perhaps its most significant and controversial provision, AEDPA greatly narrowed the rule that the Court had established in *Brown v. Allen*. This provision stated that, when a prisoner files a federal habeas lawsuit based upon a claim that was heard and rejected by the state courts, the federal court must similarly reject the claim unless it finds that the state courts' handling of the claim was contrary to clearly established Supreme Court precedent, involved an unreasonable application of Supreme Court precedent, or was based upon an unreasonable determination of the relevant facts. Under AEDPA, therefore, a federal judge must reject a request for habeas relief that is based upon a claim previously rejected by a state court—even if the federal judge disagrees with the state court's ruling—unless the federal judge concludes that the state court's ruling was either unreasonable or directly contrary to Supreme Court holdings.

Although surely no one wants to abolish it entirely, habeas corpus will always be controversial. Skeptics will claim that federal habeas proceedings do not show sufficient respect for the work being done by the states' trial and appellate judges and that habeas lawsuits frustrate states' efforts to bring individual cases to a final close. Proponents will argue that, in the absence of a meaningful opportunity to seek federal habeas relief, prisoners whose constitutional rights were violated by state officials will either be executed or spend years in prison. Judges and attorneys who handle habeas cases, meanwhile, will be asked to interpret and apply the very complex laws that emerge as the product of those ongoing debates.

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References and Further Reading

Hertz, Randy, and James S. Liebman. *Federal Habeas Corpus Practice and Procedure*. 4th ed. Charlottesville, Va.: LexisNexis, 2001.

Cases and Statutes Cited

Brown v. Allen, 344 U.S. 443 (1953)
Coleman v. Thompson, 501 U.S. 722 (1991)
Fay v. Noia, 372 U.S. 391 (1963)
Stone v. Powell, 428 U.S. 465 (1976)
Teague v. Lane, 489 U.S. 288 (1989)
Wainwright v. Sykes, 433 U.S. 72 (1977)
 28 U.S.C. sec. 2241–2254, 2261–2266
 Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. 1214.

See also **Capital Punishment; Antiterrorism and Effective Death Penalty Act of 1996; Habeas Corpus in Colonial America; Incorporation Doctrine; Terrorism and Civil Liberties**

HAGUE v. C.I.O., 307 U.S. 496 (1939)

New Jersey required citizens who wished to march or distribute literature to obtain advance permission of the city manager. In *Hague*, the Court struck down this regulation. The ordinance failed in part because of a defect inherent in licensing schemes: requiring speakers to obtain “permission” before speaking grants enormous power to the licensing official to determine what is acceptable speech in a public place. This risks the official denying permission arbitrarily or because the speech criticizes government.

More significantly, in a concurring opinion, Justice Owen Roberts emphasized that public places such as streets and parks are presumptively open for speech activities. Justice Holmes had once argued that the government could forbid use of streets and parks much like a private homeowner could eject trespassers. However, Justice Roberts rejected Holmes’s analogy in this famous passage: “Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.”

This concept, that public streets and parks (and sidewalks) are presumptively open to the public for communications such as leafleting, marching, or speaking, became a key underpinning of the modern Court’s jurisprudence of the “public forum.” Roberts’s dictum does not mean that public spaces are always open for speech (e.g., consider the importance of maintaining highways for transportation), but does mean that the burden is on officials to justify restrictions on their use for communicative activity.

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References and Further Reading

Davis v. Massachusetts, 167 U.S. 43 (1897).

See also **Holmes, Oliver Wendell, Jr.; Public Forum Doctrine; Roberts, Owen J.**

HAGUE, FRANK (1876–1956)

Frank “Boss” Hague rose from the slums of Jersey City to become its mayor from 1917 to 1947. Hague was a controversial political force of the Democratic Party on the local, state and national level at the height of his power. He heralded progressivism, while maintaining iron-fisted control over the channels of the local political system. Hague lived lavishly on a meager public servant’s salary and was often accused of widespread corruption. It is widely believed that he made a fortune by taking a small percentage of the salaries of all appointed local workers and took kickbacks for the sale of land.

Hague created a political “machine” through a network of intensely loyal civil servants, many of whom did very little work for their city paychecks, rampant “get out the vote” efforts, election fraud, and intimidation of enemies to Hague or his cause. This system produced lopsided majorities for Hague or whoever he chose to back in the election (beneficiaries of the Hague machine included Franklin Delano Roosevelt).

Hague, who believed in tough law and order, often disregarded the civil liberties of those who did not share his positions or those who posed any threat to his dominance. His political foes would be physically beaten by the police or poll workers. Hague barred the Congress of Industrial Organizations (CIO) union from using the city’s meeting halls since he considered them to be socialist. The U.S. Supreme Court ruled that this was an unconstitutional violation of their right to assemble under the Fourteenth Amendment in *Hague v. CIO* (1939). When students from Princeton University came to Jersey City on election day to monitor the polls, they were beaten and jailed, thwarting their attempts to ensure fairness and deter fraud. Hague’s response against the objections of those seeking the protection of their civil liberties by the law was his famous line, “I am the law.”

Hague also embodied notions of the benevolent local government, as seen in the great improvements in sanitation and the building of a “state of the art” public hospital. The hospital offered free services to all city residents, although the program came at the expense of high taxes. Overall, Hague believed in an unrelenting law and order government and used the police department to further his goals. Frank Hague’s

career in politics embodies the tension that exists between authoritarianism, which can be quite efficient in attaining certain social welfare accomplishments, and civil liberties, the hallmark of an open and democratic system.

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References and Further Reading

McKean, Dayton David. *The Boss: The Hague Machine in Action*. Boston: Houghton Mifflin, 1940.

Cases and Statutes Cited

Hague v. CIO, 307 U.S. 496 (1939)

HAIG v. AGEE, 453 U.S. 280 (1981)

Philip Agee, a disillusioned former agent of the Central Intelligence Agency, wrote a book while living abroad in which he denounced covert operations and published the names of undercover agents. The U.S. State Department responded by revoking Agee's passport, and he brought suit, claiming that the revocation was not authorized by law. *Kent v. Dulles* (1958) had earlier struck down on that ground a regulation denying passports to communists.

The lower courts held for Agee, but the Supreme Court held, seven to two, that a revocation on grounds of "substantial reasons of national security and foreign policy" was implicitly authorized because the State Department had publicly claimed to possess such a power and Congress had failed to prohibit such actions.

Since Congress is extremely unlikely to legislate in response to a mere unexercised claim of executive power, this approach goes far toward abandoning the distinction between authorized actions and actions on which the law is silent.

Kent v. Dulles was not expressly overruled. There are several important distinctions. First, *Kent* involved a whole class of people, not all of whom would plausibly cause harm by traveling abroad, while Agee had already sought to cause harm. On the other hand, the civil liberty at stake in *Kent* was the right to obtain a passport, while Agee's interest was in his right to re-enter the United States. *Kennedy v. Mendoza-Martinez* (1963) had forbidden revoking citizenship in such a case, yet here the consequences were almost equally severe.

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References and Further Reading

Agee, Philip. *Inside the Company: CIA Diary*. New York: Bantam, 1984.

Cases and Statutes Cited

Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963)

Kent v. Dulles, 357 U.S. 116 (1958)

HALE v. HENKEL, 201 U.S. 370 (1906)

The Supreme Court established in *Hale v. Henkel* the power of a federal grand jury investigation into corporate misconduct to require an organization to turn over its records. Hale was an officer of MacAndrews and Forbes Company, one of six companies being investigated for illegal price fixing of tobacco. A federal grand jury subpoena addressed to Hale required him to produce extensive corporate records, and he refused. The Court rejected Hale's argument that a grand jury cannot compel the production of records without first providing a list of charges being investigated, holding that a grand jury can initiate an investigation of potential crimes on its own volition without identifying the scope of its investigation before examining witnesses and compelling the production of documentary evidence. This broad inquisitorial power permits a grand jury to first investigate misconduct before deciding whether to approve an indictment.

The Court then determined that the Fifth Amendment self-incrimination privilege did not apply to a corporation, rejecting Hale's privilege claim. Reasoning that the constitutional protection is "purely personal" and cannot be asserted to protect a third person, Hale could not refuse to produce the company's records on the ground that they would incriminate him. Because a corporation is incorporeal and cannot testify, the Court's holding in *Hale v. Henkel* effectively denies to corporations any Fifth Amendment right to refuse to produce records because only individuals can assert the privilege. This was the first step in limiting the scope of protection for documents in *Boyd v. United States* (1886).

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References and Further Reading

LaFare, Wayne R., Jerold H. Israel, and Nancy J. King. *Criminal Procedure*, vol. 3. 2nd ed. St. Paul, MN: Thomson West, 1999.

Mosteller, Robert P., *Simplifying Subpoena Law: Taking the Fifth Amendment Seriously*, Virginia Law Review 73 (1987): 1:1–110.

Cases and Statutes Cited

Boyd v. United States, 116 U.S. 616 (1886)

See also *Bellis v. United States*, 417 U.S. 85 (1974); *Boyd v. United States*, 116 U.S. 616 (1886); **Grand Jury Investigation and Indictment; Self-Incrimination (V): Historical Background**

HAMDI v. RUMSFELD, 542 U.S. 507 (2004)

Hamdi v. Rumsfeld presented the Supreme Court with the question of whether an American citizen captured in a war zone and designated an enemy combatant by the executive branch could be detained indefinitely in the United States without constitutional protection. The Court, in a plurality opinion by Justice O'Connor, held that while Congress authorized the detention of enemy combatants in limited circumstances, the Fifth Amendment due process clause of the Constitution permitted American citizens detained on American soil to challenge their putative enemy combatant status before a neutral arbiter.

The case emerged from the September 11, 2001, terrorist attacks on the United States. One week after those attacks, the Congress enacted the Authorization for Use of Military Force (AUMF), a law allowing the executive branch to apply all "necessary and appropriate force" against the al-Qaeda terrorist network, the Taliban, or any nation harboring such terrorists. In November 2001, President George W. Bush issued an order under the AUMF directing the military to identify and detain "enemy combatants."

One of the several hundred persons detained pursuant to the president's order was Yaser Esam Hamdi, an American citizen born in Louisiana and raised in Saudi Arabia. Hamdi was captured by American forces in a war zone, Afghanistan, designated an "enemy combatant" member of the Taliban by the executive, and eventually imprisoned in South Carolina. The United States denied Hamdi access to counsel, kept him incommunicado from family and friends, and detained him without formal charges. Hamdi's father challenged his son's incarceration by filing a habeas corpus petition on his son's behalf.

Justice O'Connor utilized the traditional procedural due process balancing test of *Mathews v. Eldridge* (1976), to determine the scope of the due process protection afforded citizen detainees. While not providing alleged enemy combatants with the full panoply of due process rights accorded to citizens who are charged with crimes, she held that citizen detainees are entitled to notice of the factual grounds

for the detention and a "meaningful opportunity" to challenge those grounds before a neutral tribunal.

Justice O'Connor decided that petitioner Hamdi did not concede enemy combatant status and that he was entitled to challenge his detention. She added, "We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens" (*Youngstown Sheet & Tube Co. v. Sawyer* [1952]).

Justice Souter, joined by Justice Ginsburg, agreed with Justice O'Connor that Hamdi had a constitutional due process right to challenge his alleged enemy combatant status before a neutral arbiter, but he reached that conclusion from a vastly different perspective. Justice Souter found that Congress had not authorized Hamdi's detention, either in the AUMF or in laws enacted prior to September 11th, and that without congressional approval Hamdi ought to be released. Because the Court did not align with him in decreeing that Hamdi ought to be released, Justice Souter agreed that Hamdi at least was entitled to contest his detention through a habeas corpus claim.

Justice Scalia dissented, asserting his belief that American citizens held by the United States must either be prosecuted in federal court for a crime, such as treason, or have the writ of habeas corpus suspended pursuant to the suspension clause, Article I, section 9, clause 2. Since the federal government did not take either permissible avenue, he asserted that any continued detention of Hamdi, without being treated like other citizens accused of a crime, was unlawful.

Justice Thomas also dissented. He wrote that Hamdi's detention fell squarely within the government's war powers and thus the courts lacked the competence to second-guess those powers. Therefore, he found the detention permissible without any overlay of due process.

Less than two months after the fractured Supreme Court decision, the government and the petitioner's lawyers worked out a plan to release Hamdi. The government agreed to release Hamdi and deport him to Saudi Arabia on October 9, 2004, subject to a variety of conditions, including Hamdi renouncing his U.S. citizenship, agreeing to restrict his travel, and promising not to sue the U.S. government for a violation of his rights.

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References and Further Reading

Moeckli, D., *The U.S. Supreme Court's "Enemy Combatant" Decisions: A "Major Victory for the Rule of Law"?* *Journal of Conflict and Security Law* 10 (2005): 75.

- Savage, D. "‘Enemy Combatant’ May Soon Be Freed." *Los Angeles Times*, August 14, 2004.
- Stumpf, J., *Citizens of an Enemy Land: Enemy Combatants, Aliens, and the Constitutional Rights of the Pseudo-Citizen*, University of California-Davis Law Review 79 (2004).
- Wuerth, I., *The President’s Power to Detain ‘Enemy Combatants’*: Modern Lessons from Mr. Madison’s Forgotten War, Northwestern University Law Review 98 (2004): 1567.
- Iraola, R., *Enemy Combatants, the Courts, and the Constitution*, Oklahoma Law Review 56 (2003): 565.
- Lepri, T., *Note: Safeguarding the Enemy Within: The Need for Procedural Protections for U.S. Citizens Detained as Enemy Combatants Under Ex Parte Quirin*, Fordham Law Review 71 (2003): 2565.

Cases and Statutes Cited

- Mathews v. Eldridge*, 424 U.S. 319 (1976)
- Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)

HAMILTON, ALEXANDER (1757–1804)

As a delegate to the Constitutional Convention, a co-author of the *Federalist Papers*, Cabinet officer, and lawyer, Hamilton was a key player in the founding of the nation. His career intersected with civil liberties in a number of ways. Hamilton was an early member of the New York Manumission Society and its second president. Thus, he worked for providing the most fundamental liberties to people of African descent in the new nation. Having grown up in a slave society, on the Island of Nevis, Hamilton was particularly aware of the fundamental contradiction between liberty and slavery.

In *Rutgers v. Waddington* (1784), Hamilton argued that a New York statute violated the state constitution and was therefore void. The court rejected this argument (although it sided with Hamilton on other grounds). Nevertheless, this was an early argument in favor of judicial review, which would ultimately be a key tool in preserving civil liberties from oppressive legislatures.

At the Constitutional Convention, Hamilton opposed adding a bill of rights to the new frame of government. Like most other Federalists, Hamilton believed a bill of rights was unnecessary. He made similar arguments during the debates over ratification. Like other Federalists, Hamilton believed it was impossible to draft a bill of rights that would protect all liberties, and that any liberties not specifically protected would be lost. Thus, in *Federalist 84*, he argued that a bill of rights was

not only unnecessary in the proposed Constitution, but would even be dangerous. They would contain various

exceptions to powers not granted; and, on this very account, would afford a colorable pretext to claim more than were granted.

He also argued that a bill of rights was unnecessary because Congress could only pass laws under the power granted to it by the Constitution. In *Federalist 84* he wrote:

[W]hy declare that things shall not be done which there is no power to do? Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed?

In *Federalist 85*, Hamilton noted that the proposed national Constitution was just like New York State’s Constitution in that both lacked a “formal bill of rights” and “a provision respecting the liberty of the press.” However, Hamilton argued that in fact the new national Constitution provided “securities” to “liberty and to property” because it would limit the “ambition of powerful individuals in single States.” Like Madison, Hamilton believed that liberty would be best protected by a strong national government that would undermine local power. He believed that local interests were far more dangerous to liberty than any national government elected by the entire people of the nation. Similarly, in *Federalist 78*, Hamilton argued that the “independence of the judges” would “guard the Constitution and the rights of individuals from the effects of those ill humors, which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves.” He believed that the judiciary would prevent the “serious oppression of the minor party in the community.” As a lawyer, Hamilton believed that the common law, republican government, and an independent judiciary would coalesce to protect fundamental civil liberties.

With the adoption of the Constitution, Hamilton became secretary of the treasury. In urging President George Washington to sign a bill to charter the Bank of the United States, Hamilton argued for an expansive concept of constitutional interpretation, especially the “necessary and proper clause” of Article I, section 8. This interpretation did not immediately affect civil liberties. However, Hamilton’s argued that Congress has implied powers, which presumably could be used to regulate some fundamental liberties. Secretary of State Thomas Jefferson opposed the bank and argued that the as-yet-to-be-ratified Tenth Amendment limited the powers of the national government and precluded the creation of a bank. Jefferson saw Hamilton’s nationalism as a threat to local government and civil liberties; Hamilton saw Jeffersonian localism as a threat to the nation, which

in turn would leave minorities vulnerable to the political force of majorities.

Hamilton successfully persuaded Washington to call out troops to suppress the Whiskey Rebellion in 1794. The “rebellion” consisted mostly of farmers who did not want to pay an excise tax on the whiskey they produced from their corn. Hamilton successfully urged Washington to use 12,000 troops to suppress the rebellion. Hamilton’s strong response maintained the rule of law, but the episode made Hamilton appear to be supportive of oppression. In fact, he saw this event as being about the rule of law and the necessity of maintaining a civil society. Throughout his life Hamilton argued that liberty could thrive only under a strong government, which maintained stability and peace and kept local majorities from oppressing minorities.

Hamilton left government in 1795 to return to private law practice, but in 1796 drafted Washington’s farewell address. Here he repeated, with Washington speaking the words, his long-held views that a strong union “ought to be considered as a main prop of your liberty, and that the love of one ought to endear to you the preservation of the other.” Using Hamilton’s speech, Washington warned that “where the government is too feeble to withstand the enterprises of faction[s],” it would be impossible to “maintain all in the secure and tranquil enjoyment of the rights of person and property.”

In 1798 Hamilton opposed his party’s support for the Sedition Act. Hamilton considered suppression of newspapers to be both bad policy and bad law. A brilliant political writer, Hamilton doubtless believed that the best test of political ideology was in what Justice Oliver Wendell Holmes, Jr. would call the “marketplace of ideas,” and that government should allow debate to be open and unconstrained by prosecution. In 1800 he tried to get the Federalists to replace John Adams with Charles Cotesworth Pinckney. This failed, but so did the Federalist Party. When the election was over, Thomas Jefferson and Aaron Burr had the same number of electoral votes. This sent the election to the House of Representatives. Although Jefferson mistrusted Hamilton, thinking he was a monarchist, Hamilton worked to secure Jefferson’s election, because Hamilton believed Burr to be dangerous and dishonest. With Jefferson in power, Hamilton started a newspaper to be part of the “loyal opposition.” However, by this time he was mostly involved in his law practice.

His law practice led to his defense of freedom of the press after Jefferson took office. While Jefferson is often seen as a defender of a free press, he in fact urged his supporters to prosecute Federalist editors at the state level. In 1804, Jefferson’s allies in New York

prosecuted the Federalist publisher Harry Crosswell for common law seditious libel, after he criticized Jefferson (*People v. Crosswell* [1804]). Crosswell had accused Jefferson of paying James T. Callender to denounce George Washington and John Adams. Crosswell wanted to call Callender as a witness to prove the truth of his article, but the judge, a Jeffersonian Democrat, would not postpone the trial long enough to allow the witness to arrive. Not that it would have mattered. Reverting to the pre-Sedition Act theory of libel law, the trial judge, Lewis Morgan (who would soon become the Democratic governor of New York), in instructions to the jury, said that truth was not a defense to a libel prosecution. Crosswell appealed to New York’s highest court. In *People v. Crosswell* (1804), Hamilton, eloquently, but unsuccessfully, argued for the right of Crosswell to prove the truth of his accusations, and thus made a strong argument for a freedom of the press. Hamilton argued that “[t]he liberty of the press consisted in publishing with impunity, truth with good motives, and for justifiable ends, whether it related to men or to measures.” Without a free press, he argued, “you must for ever remain ignorant of what your rulers do.” Hamilton declared that his “soul has ever abhorred the thought, that a free man dared not speak the truth.” New York’s highest court was divided on whether to give Crosswell a new trial and so the conviction remained. However, in April 1805 the New York legislature passed a law declaring that truth would be a defense in a seditious libel case. In the wake of this statute, the state’s highest court ordered a new trial, which apparently never took place, and Crosswell went free. While Crosswell’s case was on appeal, Hamilton also represented Samuel Freer of Kingston, New York, the Federalist publisher of the *Ulster Gazette*, who was prosecuted on contempt of court by Jeffersonians for reporting on the Crosswell trial (*People v. Freer* [1804]). Freer had published an attack on the Crosswell prosecution, but not, he said, to attack the court, but rather in response to a vitriolic piece attacking his paper in the Jeffersonian paper, the *Plebeian*. The Jeffersonian majority on the Court charged him with contempt. In *People v. Freer*, the great jurist James Kent, reflecting Hamilton’s arguments, rejected any idea that Freer could be charged with libel for reprinting material from the Crosswell case, and said his motives—to answer a rival paper—were sufficient to relieve him of any criminal intent. Nevertheless, Kent gave Freer a token fine of \$10.00 for his contempt towards the court itself.

Late in 1804 Hamilton was killed by Aaron Burr in a duel. His untimely death brought an end to the life of one of the most brilliant among the founders. Hamilton’s commitment to the rule of law, to

personal liberty, and even to the right of personal property were significant forces in the subsequent development of civil liberties. His arguments in the cases of *Croswell* and *Freer*, late in his life, helped destroy the idea that the government could legitimately prosecute the political opposition, thus paving the way for a free press.

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References and Further Reading

- Finkelman, Paul. "Alexander Hamilton, Esq.: Founding Father as Lawyer." *American Bar Foundation Research Journal* 1984 (1984): 229–52.
- Levy, Leonard W. *The Emergence of a Free Press*. New York: Oxford University Press, 1985.
- McDonald, Forrest. *Alexander Hamilton: A Biography*. New York: Norton, 1979.

Cases and Statutes Cited

- People v. Croswell*, 3 Johns Cas. 337 (N.Y. Sup. 1804)
- People v. Freer*, 1 Cai. R. 485, Cole. & Cai. Cas. 300 (N.Y. Sup. 1803)

HAMILTON, ANDREW (1676–1741)

Andrew Hamilton, early American attorney and political figure, most famous for defending John Peter Zenger in a seditious libel suit, was most likely born in Scotland and probably attended the University of St. Andrews. Records are sparse regarding Hamilton's early life; the name of his parents and his place and exact date of birth are unknown. It is suspected that Hamilton arrived in Virginia in 1697, but there is no conclusive evidence. His name first appeared in colonial records in 1700. Since he did not open his law practice until 1703, it is highly probable that Hamilton learned law from self-study or through an office of an established attorney. Hamilton became a man of prominence; he inherited a substantial estate from friends and his practice grew in Accomac and Northampton Counties, Virginia. On March 6, 1706 or 1707, Hamilton and Ann Brown Preeson married. The couple had three children.

Around 1709, the Hamiltons moved from the eastern shore of Virginia to Kent County, Maryland, where his law practice grew slowly. Hamilton's work took him to Philadelphia, where he met William Penn's proprietary agent, James Logan. Soon after, he managed the Penn family's legal concerns. In representing the Penn family, the attorney helped settle a famous dispute. The conflict arose when the Penn family and Lord Baltimore disagreed over the boundary of Maryland. In 1713, Hamilton traveled to

England to gain more professional prestige. While overseas, he was admitted to Gray's Inn of Courts and the English bar. When Hamilton returned to the colonies, he was elected to Maryland's House of Delegates, but settled in Philadelphia in either late 1715 or early 1716. Although business kept him in London in 1724 and 1725, Hamilton's permanent residence was in Philadelphia until his death.

Throughout Hamilton's lifetime, the prominent lawyer stayed in the public eye. In 1717, Hamilton was appointed attorney general of Pennsylvania, and in 1720 became a member of the provincial council. Some of the other positions Hamilton held were master of the rolls, prothonotary of Philadelphia, recorder for Philadelphia, Bucks County representative in the Pennsylvania assembly, Kent County representative in the Delaware assembly, and Speaker of both assemblies. Hamilton also designed and oversaw the construction of the Pennsylvania assembly's Independence Hall.

Andrew Hamilton's legacy lies in his 1735 defense of John Peter Zenger, with his argument that truth could be a defense against libel. New York Governor William Cosby's administration accused Zenger, a German immigrant and publisher of the *New York Weekly Journal*, of seditious libel. At the time, a jury's only duty was to decide whether the accused was guilty of printing the material. It was the judge who determined whether the questionable writing was libelous. Chief Justice James DeLancey and Second Judge Frederic Philipse disbarred Zenger's attorneys, James Alexander and William Smith, after they questioned the authority of the judges. The defendant's lawyers accused the judges of being improperly commissioned. Although after the incident a local attorney was appointed, Zenger's supporters wanted Andrew Hamilton for counsel, who was known as the best lawyer in the colonies.

Hamilton chose to defend Zenger and won the famous suit. He asked the jury to disregard the law and acquit his client, since the statements that Zenger made were factual. The bold attorney also argued that in order for free government to prosper, the civil liberty of freedom of the press must be ensured. The jury found the defendant not guilty, and Zenger was welcomed back into the community as a free man. Had there been a guilty verdict, Zenger would have been at the mercy of the judges who were strongly influenced by Governor Cosby.

Following the New York court case, Hamilton returned to Philadelphia and continued to be speaker of the Pennsylvania assembly until his retirement in 1739. Although no longer in the assembly, he held other positions that were chiefly administrative in nature. Hamilton, who was preceded in death by his

wife, died August 4, 1741. His son, James Hamilton, later become governor of Pennsylvania. There is difficulty assessing Hamilton's career without bias since many documents and records are lost or incomplete. Nevertheless, contemporaries viewed Hamilton as the most powerful trial attorney in the colonies, and he has the legacy of defending the freedom of the press.

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References and Further Reading

- Alexander, James. *A Brief Narrative of the Case and Trial of John Peter Zenger*. Cambridge, MA: Belknap Press of Harvard University Press, 1972.
- Buranelli, Vincent. *The Trial of Peter Zenger*. Westport, CT: Greenwood Press, 1975.
- Konkle, Burton Alva. *The Life of Andrew Hamilton, 1676–1741*. Philadelphia: National Publishing Company, 1941.
- Lewis, Walker. *Andrew Hamilton and the He-Monster*, *William and Mary Quarterly*, 3rd ser., 38 (April 1981): 2:268–94.
- Morris, Richard B. *Fair Trial*. New York: Knopf, 1952.
- Nelson, Harold L., *Seditious Libel in Colonial America*, *American Journal of Legal History* 3 (April 1959): 2:160–72.
- Nix, Foster C., *Andrew Hamilton's Early Years in the American Colonies*, *William and Mary Quarterly*, 3rd ser., 21 (July 1964): 3:390–407.
- Rutherford, Livingston. *John Peter Zenger: His Press, His Trial and a Bibliography of Zenger Imprints*. New York: Johnson Reprint Corp., 1968.
- Vile, John R., ed. *Great American Lawyers*. Santa Barbara, CA: ABC-CLIO, 2001.

HAND, (BILLINGS) LEARNED (1872–1961)

Few twentieth-century American jurists, if any at all, attained the high reputation for judicial wisdom that Learned Hand enjoyed at the height of his career. Certainly no other judge on the U.S. Supreme Court ever achieved the respect and prestige that attached to him. The greatest living American jurist, said Benjamin Cardozo in a famous remark, isn't *on* the Supreme Court. In the view of Judge Charles E. Wyzanski, Learned Hand, at the end of his life, was universally acknowledged as the greatest living judge in the English-speaking world. Partly, no doubt, Hand's stature derived from his majestic presence: his rugged features, his penetrating glance, and above all, his incredibly bushy eyebrows—he looked somehow like an olympian dispenser of justice. Among the general public, his celebrity owed something to his first name. (Learned was his mother's maiden name and he used it as his own first name from his mid-twenties onward.) In the end, however,

Learned Hand's preeminence, particularly among lawyers, legal scholars, and fellow judges, rested on the legendary discernment, intellectual authority, and powerful eloquence of his judicial opinions.

Hand was born in Albany, New York, on January 27, 1872. His future career may have been predetermined by the fact that so many of his male relatives, including both his father and grandfather, were prominent attorneys. He was from his earliest days bookish, introspective, withdrawn, and socially insecure, and to some extent these traits would remain with him for the rest of his life. After receiving his preparatory education at Albany Academy, he entered Harvard College in 1889, a school still notable for its rigid student hierarchies. Hand was effectively excluded from the most aristocratic and prestigious social clubs, reinforcing his feelings of inferiority and habits of lonely studiousness. Like many other Harvard undergraduates, he fell under the spell of the brilliant triumvirate of the Philosophy Department, William James, Josiah Royce, and George Santayana. The encounter left him an agnostic, a confirmed skeptic regarding all received authority, and even more cerebral than before. He was briefly tempted by graduate work in philosophy, but surrendered to the wishes of his family and enrolled in the Harvard Law School in 1893. Hand was captivated by Harvard's case-method approach to the study of law, and by the school's erudite faculty. He graduated in 1896, only to quickly discover that he was far less enamored of the routine, day-to-day practice of law.

Nevertheless, he persevered. From 1897 until 1902, he practiced in Albany, but in 1902, engaged to be married and ambitious for a larger field, he moved to New York City. Legal work there proved no more stimulating than it had in Albany, and Hand sought fulfillment in other ways. He wrote some articles, including an attack, in the *Harvard Law Review*, on the Supreme Court's lack of judicial restraint in the majority decision in *Lochner v. New York* (1905). His principal diversion, however, was his association with a group of progressive, reform-minded intellectuals and activists. Hand himself participated in some reform crusades and came to the attention of Charles Culp Bulingham, an eminent attorney and civic reformer who was influential in Republican circles. It was a warm endorsement from Bulingham that got Hand appointed a federal judge; in 1909, President William Howard Taft nominated Hand, who was still in his mid-thirties, to be a district judge in New York City, the start of more than five decades on the federal bench. Felix Frankfurter later remarked that it took the pedestrian members of the profession some time to make their adjustment to this new planet in the judicial sky. Becoming a judge did not dampen

Hand's enthusiasm for social reform. For the next ten years, he was an active member of a group of youthful intellectual reformers that included Herbert Croly, Walter Lippmann, Walter Weyl, and Frankfurter. They were enthusiastically loyal to the colorful former president, Theodore Roosevelt (Hand had first called Roosevelt's attention to Croly's influential book of 1909, *The Promise of American Life*), and Hand, although now a federal judge and appointed by Roosevelt's rival for the White House, engaged actively with his friends in the campaign to elect Roosevelt in 1912. This group of progressives advocated government regulation of the trusts (rather than breaking them up) and greater federal power and involvement in the economic life of the nation. In 1914, they created the leading journal of progressive politics, the *New Republic*, and Learned Hand was intimately involved, writing articles and editorials for the magazine and participating in its editorial conferences.

After World War I, perhaps following the private advice of his idol and hero, Justice Oliver Wendell Holmes, Hand stepped back from his extrajudicial activities and devoted himself to his work as a judge. In 1924, President Calvin Coolidge appointed him to the Court of Appeals for the Second Circuit; he was to serve as chief judge from 1939 to his retirement in 1951. During his half-century as a judge, he handed down thousands of decisions, touching virtually every aspect of American law. His opinions were crafted with exquisite care and were often characterized by a noble and persuasive elegance. Despite his breaking new ground in several areas of the law, he was firmly committed to the philosophy of judicial restraint, the belief that judges must try to keep their personal views out of the decision-making process and interpret the law by giving fullest latitude to the intentions of the elected branches of government. This stance placed him in the company of such eminent twentieth-century jurists as Holmes, Louis Brandeis, and Felix Frankfurter; he rejected the judicial activism often associated with judges such as Earl Warren and William O. Douglas. In 1958, Hand gave his view of the importance of restraint typically lofty expression in his Holmes Lectures at Harvard, published as *The Bill of Rights*.

His most notable work in the area of civil liberties involved the much contested area of freedom of speech and the reach of the First Amendment. In the World War I case of *Masses Publishing Co. v. Patten* (1917), Hand ruled that the federal government acted wrongly in banning the radical antiwar magazine, *The Masses*, from the mails, despite the fact that the power to do so was granted by the Espionage Act of 1917. In his eloquent (and, given

the fevered wartime circumstances, his courageous) opinion, Hand proposed an extremely broad definition of protected speech. If the actual words of a speaker or writer directly urged hearers or readers to violate the law, if the speaker incited illegality, the utterance fell outside of the protection of the First Amendment and the government could act against such speech. But, Hand insisted, any dissent that fell outside of this incitement test was not only protected speech and beyond the ability of the government to suppress but, even more, was a vital concomitant to a free society. Gerald Gunther, Hand's finest biographer, has written that the *Masses* case compelled Hand to draw on his deepest personal resources of courage and independence and evoked the most important, pathbreaking opinion of his trial court tenure.

To Learned Hand's great disappointment, his decision was overturned by the Court of Appeals, and two years later, in the famous *Schenk v. United States* (1919) case, the Supreme Court adopted Justice Holmes's clear and present danger test, which Hand believed was too subjective, too dependent on guessing the probable outcome of a speech act, and too subject to the momentary and inflamed passions of the majority. Although Hand was able to persuade Holmes to partially liberalize his view (as in his dissent in the *Abrams v. United States* case of 1919), it was the more speech-restrictive clear and present danger test that prevailed in freedom of speech cases for the next five decades. Hand went to his grave thinking that his own incitement standard was decisively rejected. But, eight years after his death, the Supreme Court, in *Brandenburg v. Ohio* (1969), moved to a position very close to Hand's view of 1917.

The precarious situation of civil liberties during the cold war forced Hand to negotiate between two of his most strongly held beliefs. On the one hand, as a resolute defender of American freedoms, Hand could hardly have approved of the assaults on those freedoms inherent in McCarthyism and other aspects of the anticommunist crusades of the 1950s. Hand responded to this crisis in civil liberties with a series of plainspoken statements, warning against the erosion of constitutional liberties. When he could, he used his position on the bench to protect basic rights, such as when, in *United States v. Coplon* (1950), he reversed the conviction of a spy, whose guilt was clear, because she had been arrested without a warrant and tried on the basis of improper wiretap evidence. Both his extrajudicial statements and some of his opinions made him subject to vehement denunciations, delivered in the passionate and fearful atmosphere of cold war America.

At the same time, however, Hand was also wedded to his philosophy of judicial restraint. Under that

persuasion, he ruled to uphold the convictions of eleven Communist Party leaders in *United States v. Dennis* (1950). They had been found guilty, in a lower court, of violating the prohibition in the Smith Act of 1940 against advocating the violent overthrow of the U.S. government. In affirming the convictions, Hand understood his duty as applying Holmes's clear and present danger test and not insisting on his own more speech-generous incitement test, which, he thought, had been definitively rejected by the Supreme Court back in 1919. Nevertheless, even while upholding the convictions, Hand's careful opinion (later adopted by the majority on the Supreme Court) attempted to define the Holmes test in as speech friendly a way as he could. He did so by attempting to factor into the judgment the question of the gravity of the evil being advocated, contending that only a very grave evil could excuse the government from having to show that the speech act was likely to lead, soon and directly, to a breach of the law.

To the regret of many of his admirers, no president nominated Learned Hand to serve on the Supreme Court. Although his name was mentioned whenever there was a vacancy, he was a serious candidate only twice. In the 1920s, Chief Justice Taft, remembering Hand's betrayal in the election of 1912 and wary of his liberalism, was able to forestall the nomination each time a seat came open; and in the early 1940s, Franklin Roosevelt, who admired the seventy-year-old Hand and who was pressed by Frankfurter and others to nominate him, desired to leave a more lasting impact on the Court and turned to younger men. Hand formally retired from active duty in 1951, but he continued to serve, sometimes carrying almost as full a judicial burden as ever. During the last years of his long life, he was held in such universal respect and esteem and was the subject of such unrestrained praise and honor, that even he must have had reason occasionally to question the appropriateness of his lifelong modesty and to wonder whether the nagging self-doubt that had always characterized and often plagued him, was entirely justified. He died, in New York City, on August 18, 1961.

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References and Further Reading

- Dilliard, Irving, ed. *The Spirit of Liberty: Papers and Addresses of Learned Hand*. New York: Alfred A. Knopf, 1952.
- Frankfurter, Felix, *Judge Learned Hand*, 60 *Harvard Law Review* (1947): 325–9.
- Griffith, Kathryn. *Judge Learned Hand and the Role of the Federal Judiciary*. Norman: University of Oklahoma Press, 1973.

- Gunther, Gerald. *Learned Hand: The Man and the Judge*. New York: Alfred A. Knopf, 1994.
- Hand, B. Learned. *The Bill of Rights*. Cambridge, MA: Harvard University Press, 1958.
- Wyzanski, Charles E., Jr. Introduction to *The Bill of Rights*, by Learned Hand. New York: Atheneum, 1964.

Cases and Statutes Cited

- Abrams v. United States*, 250 U.S. 616 (1919)
- Brandenburg v. Ohio*, 395 U.S. 444 (1965)
- Lochner v. New York*, 198 U.S. 45 (1905)
- Masses Publish Co. v. Patten*, 244 U.S. 535 (1917)
- Schenck v. United States*, 249 U.S. 47 (1919)
- United States v. Coplon*, 185 F.2d 629 (2d Cir. 1950)
- United States v. Dennis*, 183 F.2d 201 (2d Cir. 1950)

See also ***Brandenburg v. Ohio*, 395 U.S. 444 (1969); Clear and Present Danger Test; Communism and the Cold War; *Dennis v. United States*, 341 U.S. 494 (1951); Freedom of Speech and Press: Nineteenth Century; *Masses Publishing Company v. Patten*, 244 U.S. 535 (1917)**

HARISIADES v. SHAUGHNESSY, 342 U.S. 580 (1952)

This is an important civil liberties case dealing with the constitutional status of legally resident aliens decided by the U.S. Supreme Court in 1952. In *Harisiades v. Shaughnessy*, the Court held that in spite of having legally resided in the U.S. for almost forty years since he first came to America at age thirteen, defendant Harisiades could be legally deported under the Alien Registration Act of 1940. The act amended existing law in order to authorize deportation of a legally resident alien who had been a member of an organization advocating the overthrow of the U.S. government by force or violence even where the alien's membership in the group had ended prior to passage of the act.

Harisiades had been a member of the Communist Party between 1925 and 1939 when he quit the organization because he did not support the use of force or violence. An American citizen, engaged in the same conduct as Harisiades during the same time period could not, of course, be deported, but the government was constitutionally entitled to deport Harisiades since legally resident aliens had (and have) fewer rights than U.S. citizens.

In his opinion for the Court, apparently trying to make the distinction between citizens and aliens seem less objectionable, Justice Robert Jackson argued that by maintaining American residence but Greek citizenship, Harisiades could "derive advantages from two sources of law—American and international." That,

however, was true of U.S. citizens as well since international law protects—and binds—U.S. citizens just like domestic law. Jackson himself had famously participated as lead prosecutor for the United States in the application of international law to Nazi war criminals in Nuremberg, Germany, only seven years earlier. The Court was, perhaps, making the best of a bad situation: trying to uphold a law during the heyday of anticommunism whose hostility to civil liberty was entirely transparent.

ANTHONY CHASE

See also Aliens, Civil Liberties of; Due Process in Immigration; Ex Post Facto Clause; Noncitizens, Civil Liberties

HARLAN, JOHN MARSHALL, THE ELDER (1833–1911)

John Marshall Harlan the Elder was the first justice on the U.S. Supreme Court to argue consistently that the Fourteenth Amendment to the U.S. Constitution applied the Bill of Rights to state action via the amendment's due process and privileges and immunities clauses. This idea is called "incorporation theory" because it holds that the Fourteenth Amendment incorporates the Bill of Rights. Harlan's distinctive judicial record—including his support for incorporation theory, for the application of the Bill of Rights to all United States territory, and for civil rights protections for black Americans—arose from his loyalty to a vision of constitutional nationalism. These were some of the legal issues that provoked impassioned dissents from Justice Harlan and earned him the title of Great Dissenter.

Slaveholder and Unionist

The future justice's father, James Harlan, a Kentucky slaveholder and Whig Party leader, instilled this constitutional nationalism in his son. The Whig Party broke apart over the slavery issue during the 1850s, but John Harlan's devotion to the Union prompted him to organize a Union Army regiment in 1861 at the start of the Civil War. Harlan's position as a proslavery Unionist became an increasingly uncomfortable one as President Abraham Lincoln decided that the emancipation of Southern slaves was a military necessity. Harlan resigned his commission in the army in early 1863, shortly after the Emancipation Proclamation and his father's death. For the next four years, Harlan reminded the voters at every election

that the war had been fought to save the Union, not in order to free the slaves.

But a series of events forced Harlan to reconsider. He had devoted himself to both the Constitution and a benign vision of slavery, but he faced a new constitution as the war ended in early 1865. First, the states ratified the Thirteenth Amendment that freed the slaves in late 1865, and then, the Fourteenth Amendment that guaranteed civil rights to black citizens in late 1868. Harlan also faced former Confederates who terrorized freed blacks and white Unionists in Kentucky. Harlan came to believe that the Civil War amendments to the Constitution were a providential correction of the original proslavery flaws of the founding document. When Harlan ran as a Republican for governor of Kentucky in 1871, he defended the civil rights of blacks as a fulfillment of the country's mission and celebrated the end of slavery. But these were not popular ideas among Kentucky white men. Harlan lost that election and the next in 1875. But, he had caught the attention of Rutherford B. Hayes who would be elected president in 1876. As a Republican and a Southern nominee to the Supreme Court, Harlan fulfilled Hayes's political and regional agendas. Despite some opposition, Harlan was confirmed by the U.S. Senate in 1877.

Justice Harlan became a champion of black civil rights by dissenting from the Court's stingy interpretations of the Thirteenth and Fourteenth Amendments in the *Civil Rights Cases* in 1883 and *Plessy v. Ferguson* in 1896. In the first, the Court held that private owners of businesses that served the public, such as railroads and inns, might segregate or exclude blacks. According to the Court, the Thirteenth Amendment did not apply because segregation was not a badge of slavery; the Fourteenth Amendment did not apply because it targeted only the states. But in the second decision, the Court held that a state law ordering segregation did not violate the civil rights of blacks either; such a law only affected so-called social rights. Harlan dissented alone and vigorously each time that segregation was the kind of racial discrimination that the amendments were meant to end. In his *Plessy* dissent, Harlan declared that the Constitution is color blind.

Justice Harlan followed out the logic of his view that the amendments had fundamentally altered the relationship of the states to the country's citizens by arguing that the Fourteenth Amendment incorporated the provisions of the Bill of Rights. This interpretation violated rules of constitutional draftsmanship according to which nothing is repeated and a term used once has the same meaning when used again. The Fifth Amendment guarantees due process, so according to these rules, other rights and

liberties found in the Fifth Amendment and in the other amendments are not covered by the term “due process of law.” Harlan objected that such a conclusion would lead to decisions contrary to fundamental principles of republican government.

Incorporation Theory

Harlan argued for incorporation theory for the first time in his dissent from *Hurtado v. California* in 1884. California had altered its constitution in 1879 to eliminate a grand jury indictment for felonies in favor of prosecution on information filed by the district attorney. Speaking for the Court, Justice Stanley Matthews declared that so long as fundamental rights were protected, the state could use any process so long as the process was not arbitrary or partial. The Fourteenth Amendment’s due process clause did not incorporate the Fifth Amendment’s guarantee against self-incrimination: “No person shall be held for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand jury....” Justice Harlan dissented alone. In other public forums, he voiced a heart-felt veneration for the jury system as the embodiment of republican government. Juries allowed the ordinary men of the community to do justice and confounded the hasty opinions of the ignorant and the snobbish concerns of legal experts. From the bench, he responded vigorously to the argument of *Hurtado*’s attorney that a grand jury indictment for a capital crime was a venerable, time-honored institution under both English and American law that protected public liberty and private rights. The Fourteenth Amendment fulfilled the founders’ plans by applying these essential guarantees to individuals confronted with the power of the states. Harlan explained that the secrecy of grand jury investigations protected those targeted because of their race or because of popular hostility from mobs, abuses of official power, and personal vendettas.

Only in *O’Neil v. Vermont* in 1892 did Harlan find some support from his brethren for incorporation theory. O’Neil was a New York liquor merchant who had been convicted by a Vermont court for selling his goods in Vermont, a dry state. O’Neil was convicted of 307 separate sales and sentenced by a justice of the peace to a fine of over \$9,000 or a potential seventy-nine-year sentence; the county court reduced the fine to \$6,140 or fifty-four years. O’Neil appealed to the Supreme Court, which ruled that the Eighth Amendment, which prohibits cruel and unusual punishment, did not apply to the states. Both Justices Stephen J. Field and Harlan filed

dissents. Field protested that O’Neil would be serving far more jail time than criminals convicted of manslaughter or highway robbery. Field went on to argue that such shipments were a part of interstate commerce and so outside of state jurisdiction. Justice Harlan disagreed with Field’s Commerce Clause argument, but he seconded Field’s point on incorporation theory. He argued that none of the fundamental rights of life, liberty, and property as guaranteed by the U.S. Constitution could be abridged by a state since the adoption of the Fourteenth Amendment. These included those guarantees found in the Bill of Rights and others. *O’Neil* was a high mark in Justice Harlan’s success in advancing incorporation theory among his brethren, for Justice David J. Brewer concurred in his dissent as well.

Justice Harlan expanded upon the constitutional necessity of a common law jury trial in his dissent from *Maxwell v. Dow* in 1900. The Court had approved prosecution on information again as well as Utah’s decision to reduce the number of jurors in a jury trial from twelve to eight. Justice Rufus Peckham declared for the Court that the number of persons in a jury was up to the state so long as the same process applied to all defendants. But the founders’ Bill of Rights remained Harlan’s touchstone. He did not see how anyone could doubt that the founding fathers considered the privileges and immunities found in the Bill of Rights to be vital to the personal security of American citizens. He detailed a parade of horrible hypotheticals in which states violated every provision of the Bill of Rights, such as Utah would establish Mormonism as the state religion, and another jurisdiction would burn criminals at the stake. According to Peckham’s reasoning, Harlan warned, the Court could not hold any of these actions to be violations of the Constitution. It was no answer that none of these horrors had yet come to pass. He argued that liberty depends not merely on the absence of oppression; it requires the existence of constitutional checks on the power to oppress. As Justice Matthews had in *Hurtado*, Justice Peckham minimized the national government’s role in protecting rights in *Maxwell*. He also minimized the protections found in the privileges and immunities clause of the Fourteenth Amendment. As in *Hurtado*, the other justices approved these innovations in *Maxwell* and Justice Harlan dissented alone. Only he feared a frightening constitutional future should this line of argument prevail.

Justice Harlan believed one of his dire prophecies had come true in regards to the guarantees of the First Amendment: the free press clause. In 1907, Justice Oliver Wendell Holmes, Jr. held that the Fourteenth Amendment did not prevent the Supreme Court of

Colorado from punishing a newspaper publisher for running articles that questioned its motives in *Patterson v. Colorado* in 1907. The state court had held that the cases mentioned by the publisher were still technically pending (because the litigants might petition for a rehearing) and that such comments interfered with the course of justice and contrary to the public welfare. When the publisher appealed to the Court, Justice Holmes held that such a judgment was entirely a state question. Justice David J. Brewer protested in dissent that the Court should confront the constitutional issue raised and determine Patterson's rights. Justice Harlan went much further. He wrote an impassioned dissent arguing that the Fourteenth Amendment applied the First Amendment's guarantees of freedom of speech and of the press to the states. He made the most of what little the Court had acceded to black citizens by citing the *Civil Rights Cases* and *United States v. Cruikshank* (1876) in order to demonstrate that the right of the people to assemble and to petition their government—a right found in the First Amendment—was an aspect of national citizenship. It followed that citizens were guaranteed the First Amendment rights of freedom of speech and of the press as well, not merely freedom from prior restraints—as Justice Holmes had indicated—but also from subsequent punishment. The public welfare could not trump these constitutional privileges. Justice Harlan concluded that freedom of speech and of the press were essential components of liberty guaranteed by the Constitution from interference from the nation or by the states.

A year later, Harlan again argued alone and fruitlessly in favor of incorporation theory when he dissented from *Twining v. New Jersey* in 1908. Albert C. Twining and his codefendant were bank directors who had been convicted of trying to mislead a bank examiner. The state judge, following state rulings, had suggested that the jurors might take into consideration the failure of the men to testify in their own defense and their attorneys objected. Justice William H. Moody held for the Court that the Fifth Amendment clause against self-incrimination was not incorporated in the Fourteenth Amendment. The protection against self-incrimination was a modern invention, he reasoned, and could not be ranked among the essential protections. Justice Harlan again harked back to the founders to protest. He wrote that the men who had decided the federal Constitution would have been appalled at the idea that immunity from self-incrimination had not been a fundamental principle of English common law. Again, he conjured up a parade of horrors contrary to American law and the spirit of American liberty.

The Insular Cases

Harlan was equally troubled when the Court determined that Congress might refuse to apply the whole of the Bill of Rights to federal territory that it controlled following the Spanish-American War in 1898. In the *Insular Cases* of 1901, *Delima v. Bidwell* and *Downes v. Bidwell*, a divided Court determined that some rights would be retained by the territorial inhabitants of Puerto Rico, but refused to specify which. The dissenters, Justice Harlan among them, were appalled at the implications of the decision. They were also unimpressed by the insistence of the Court that the administration of an overseas empire demanded certain flexibility in regards to constitutional rights. Justice Harlan warned that if the Court's decision was allowed to stand, the United States would end an era of liberty protected by a written constitution into an era of legislative tyranny. Justice Harlan also dissented from *Hawaii v. Mankichi* in 1903 when the Court held that the Constitution did not require a grand jury indictment or a jury of twelve in federal territories. When the Court held that there was no constitutional guarantee of a jury trial in the Philippines in *Dorr v. United States* in 1904, Harlan declared its reasoning to be revolting to his mind. It was as though the majority thought the Constitution read, "The trial of all crimes, except in cases of impeachment, and *except where Filipinos are concerned*, shall be by jury."

From Eccentric to Prophet

When Justice Harlan drew up a list of decisions that he wanted gathered in a volume to commemorate his work on the bench, he included his dissenting opinions from the *Civil Rights Cases*, *Hurtado*, *Plessy*, *Maxwell*, *Twining*, *Hawaii v. Mankichi*, and *Dorr*. Although Harlan would not have approved of the piecemeal incorporation of the Bill of Rights into the Fourteenth Amendment that occurred in the twentieth century, he would have probably approved of the results. *Gitlow v. New York* in 1925 marked the beginning by holding freedom of speech and of the press were included in the Due Process Clause of the Fourteenth Amendment. *Twining* was overruled in *Malloy v. Hogan* in 1964. Criminal defendants benefited further from *Powell v. Alabama* in 1932, which held that due process in state court requires that counsel for indigents charged with capital crimes, and *Gideon v. Wainwright* in 1963, which required counsel for all indigent state felony defendants. But

it was *Brown v. Board of Education* in 1954, the first public school desegregation decision, that overturned *Plessy* and brought sustained scholarly attention to Justice Harlan. He has been a perennial presence on lists of great judges ever since. In the decades after his death, Justice Harlan was considered something of an eccentric for his dissents in civil rights and civil liberties cases. By the mid-twentieth century, he was being hailed as a prophet for these very same opinions.

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References and Further Reading

- Bartosic, Florian, *The Constitution, Civil Liberties and John Marshall Harlan*, Kentucky Law Journal 46 (1958): 407–77.
- Fairman, Charles, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, Stanford Law Review 2 (1949): 5–173.
- Przybyszewski, Linda. *The Republic According to John Marshall Harlan*. Chapel Hill: University of North Carolina Press, 1999.
- Waite, Edward F., *How “Eccentric” Was Mr. Justice Harlan?* Minnesota Law Review 37 (1953): 173–87.
- Westin, Alan F., *John Marshall Harlan and the Constitutional Rights of Negroes: The Transformation of a Southerner*, Yale Law Journal 66 (1957): 637–710.

Cases and Statutes Cited

- Brown v. Board of Education*, 347 U.S. 483 (1954)
- Civil Rights Cases*, 109 U.S. 3 (1883)
- Delima v. Bidwell*, 182 U.S. 244 (1901)
- Dorr v. United States*, 195 U.S. 138 (1904)
- Downes v. Bidwell*, 182 U.S. 1 (1901)
- Gideon v. Wainwright*, 372 U.S. 335 (1963)
- Gitlow v. New York*, 268 U.S. 652 (1925)
- Hawaii v. Mankichi*, 190 U.S. 197 (1903)
- Hurtado v. California*, 110 U.S. 516 (1884)
- Malloy v. Hogan*, 378 U.S. 1 (1964)
- Maxwell v. Dow*, 176 U.S. 581 (1900)
- O’Neil v. Vermont*, 144 U.S. 343 (1892)
- Patterson v. Colorado*, 205 U.S. 454 (1907)
- Plessy v. Ferguson*, 163 U.S. 537 (1896)
- Powell v. Alabama*, 287 U.S. 45 (1932)
- Twining v. New Jersey*, 211 U.S. 78 (1908)
- United States v. Cruikshank*, 92 U.S. 542 (1876)

See also **Bill of Rights: Structure**; *Brown v. Board of Education*, 347 U.S. 483 (1954); **Civil Rights Cases**, 109 U.S. 3 (1883); **Cruel and Unusual Punishment Generally**; **Fourteenth Amendment**; *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Gitlow v. New York*, 268 U.S. 652 (1925); **Grand Jury Indictment (V)**; **Jury Trial**; *Plessy v. Ferguson*, 163 U.S. 537 (1896); *Powell v. Alabama*, 287 U.S. 45 (1932); **Press Clause (I): Framing and History from Colonial Period up to Early National Period**; **Prior Restraints**; **Privileges and Immunities (XIV)**; **Self-Incrimination (V)**; **Historical**

Background; **Thirteenth Amendment**; *United States v. Cruikshank*, 92 U.S. 542 (1876)

HARLAN, JOHN MARSHALL, II (1899–1971)

John Marshall Harlan served as U.S. Supreme Court Justice from 1955 to 1971. His tenure spanned almost all of the Warren Court years (1953–1969) and extended into the Burger Court. He was the son, grandson, and great-grandson of lawyers, and the grandson of John Marshall Harlan, who also served on the Supreme Court, from 1877 to 1911.

Harlan was educated at Princeton (where he was class president), Oxford, and New York Law School. He was both a federal and state prosecutor and a Wall Street lawyer in private practice. He served less than a year as a judge of the U.S. Court of Appeals for the Second Circuit before President Eisenhower nominated him to the Supreme Court to replace Robert H. Jackson.

Harlan was greatly admired for the craftsmanship of his opinions and the civility and warmth of his manner. His biographer refers to him as the “great dissenter of the Warren Court.”

Harlan indeed frequently dissented from the Warren Court’s decisions. He parted ways with the majority in such landmark opinions as *Miranda v. Arizona* (1966), *Reynolds v. Sims* (1964, one-person, one-vote legislative apportionment), and *Mapp v. Ohio* (1961, exclusionary rule for evidence obtained through unreasonable searches and seizures applied to states). Even when he joined the Court’s opinions, Harlan frequently concurred separately to indicate that his agreement was limited. “Upon the foregoing premises, I join the opinion of the Court,” Harlan often wrote.

But dismissing Harlan as an inveterate naysayer would oversimplify his jurisprudence and underestimate his judgeship. For one thing, Harlan was admired as a craftsman and intellectual by his colleagues, who also appreciated Harlan’s respect, civility, and warmth. Harlan’s dissents “seared, but never burned,” Chief Justice Earl Warren said. Harlan maintained close relationships with both Felix Frankfurter, with whom he often agreed on constitutional issues, and Hugo Black, with whom he frequently disagreed. Justice Sandra Day O’Connor has extolled Harlan as the exemplar of judicial collegiality.

Harlan also cannot be easily pigeonholed because he did not invariably vote against citizen rights. For example, he concurred in the right to counsel case, *Gideon v. Wainwright* (1963). He joined the Court in enforcing the mandate of *Brown v. Board of Education* (1954, 1955). He reversed convictions of Communist Party members

in *Yates v. United States* (1957), one of several such Court opinions countering the McCarthyism of the 1950s. Harlan also dissented forcefully in *Poe v. Ullman* (1961), arguing for a constitutional right to privacy.

Harlan's votes for and against individual liberties are only superficially inconsistent. Understood in the context of Harlan's philosophy, his decisions appear more consistent. He was motivated by several values that explain and unify his opinions. First, he was a believer in the process approach to judicial decision making. His was an analytical style based on history and precedent. If a Warren Court decision lacked precedential support, or was unfaithful to precedent, Harlan unhesitatingly noted the flaw.

Harlan also valued federalism. His federalism was not the nationalism of the old Federalists, but a respect for the values of state sovereignty and diversity and the constitutional balance of state and federal power. To Harlan, timeless principles of federalism were more important than a contemporary judge's notion of what was "right" or "just."

Harlan also preferred the political process to the judicial process in rectifying social injustice. It was not the function of the judiciary to cure social problems or promote equality, Harlan argued.

These beliefs cautioned Harlan against what he regarded as the errors of the Warren Court. He argued against the incorporation doctrine, by which the Court incorporated selected provisions of the Bill of Rights into the due process clause of the Fourteenth Amendment. The Fourteenth Amendment did not necessarily have the same content as the Bill of Rights. Specifically, the due process clause did not impose precisely the same limits upon the states that the Bill of Rights required of the federal government.

But Harlan also believed that the Fourteenth Amendment protects basic rights. Those rights were not necessarily found in the Bill of Rights, but were independent guarantees of the due process clause, rooted in their historical and fundamental character. As he wrote in his concurrence in *Gideon*, the question for Harlan was whether a right protected against the federal government was "implicit in the concept of ordered liberty" that the due process clause represented, and therefore the right was valid against the states. The answer could not be found in any shortcut by looking at the Bill of Rights to see whether the right was enshrined there, but had to be found case by case.

In Harlan's hierarchy of civil liberties, these were among the rights sufficiently fundamental to be worthy of protection against the states: the right to counsel (*Gideon v. Wainwright*); the freedom of association (*NAACP v. Alabama* [1958]); the freedom of expression (*Cohen v. California* [1971]); marital privacy (*Poe v. Ullman*, *Griswold v. Connecticut* [1965]); and

protection against cruel and unusual punishment (*Robinson v. California* [1962]). In these areas, Harlan was not merely willing to accede to the Warren Court majority; he wrote the Court's opinions in *Cohen* and *NAACP v. Alabama*, and presaged *Griswold* with his earlier dissent in *Poe*.

Harlan assailed the incorporation doctrine as unprincipled and not historically grounded, lacking sufficient regard for the importance of the states and, as he argued in his concurrence in *Griswold v. Connecticut*, unduly restrictive of the reach of due process. Harlan was no more satisfied with "selective incorporation" of the Bill of Rights than he was with the idea of "total incorporation."

But Harlan's approach seemed no more certain or expansive than the Warren Court majority's. His view of the Fourteenth Amendment depended no less on an opinion that the right enforced against the states was sufficiently important. As he wrote in *Griswold*, Harlan would turn for guidance to "the teachings of history, . . . basic values that underlie our society, and wise appreciation of the great roles [of] the doctrines of federalism and separation of powers. . . ." And although he argued that the incorporation doctrine was more restrictive, in practice it frequently resulted in more, rather than less, protection than Harlan's vision of the Fourteenth Amendment. This was most notably true in the areas of criminal procedural rights and reapportionment.

Next to Justice Warren and the majority of the Warren Court, whose approach emphasized justice more than principle, judicial activism rather than restraint, Harlan was noticeably out of step. Harlan was on the losing end of many issues.

In *Harper v. Virginia Board of Elections* (1966), for example, he dissented from an opinion that poll taxes were unconstitutional. He condemned judicial imposition of an "ideology of 'unrestrained egalitarianism'" that he failed to find in the equal protection clause, which he thought limited to race. Harlan not only distrusted judicial interpretation of the Constitution as uncertain, he trusted in the political process to remedy what he saw as political problems. For much the same reasons, Harlan had declined to follow the court in its landmark state legislative apportionment case, *Baker v. Carr* (1962).

Harlan's disagreement and frustration with the Warren Court was perhaps no more evident than in his dissent in *Reynolds v. Sims*, in which he denounced the notion "that every major social ill in this country can find its cure in some constitutional principle and that this court should take the lead in promoting reform when other branches of government fail to act. The Constitution is not a panacea for every blot upon the public welfare. . . ."

Harlan, the former prosecutor, refused to join the Court in many of its opinions enforcing criminal procedural rights against the states. For example, he resisted *Mapp v. Ohio*, which applied the exclusionary rule to the states, as over-reaching the issue presented. In matters of criminal procedure, Harlan again distinguished the Fourteenth Amendment that binds the states from the Bill of Rights that governs the federal government. The states were subject to the broad due process requirements of fundamental fairness, but the federal government was confined more closely by specific limits such as the reasonableness standard of the Fourth Amendment's search and seizure provision.

The difficulty of labeling Harlan a conservative dissenter or opponent of civil liberty is illustrated by his dissent in *Poe v. Ullman*. Poe ranks as one of the most famous and influential dissents of modern times. Harlan's opinion soon led to a decision on the contraceptives issue in *Griswold v. Connecticut*, and ultimately reverberated in the abortion decision in *Roe v. Wade* (1973). The Court's majority declined to hear the case as not justiciable. Harlan thought the Court should face the issue created by plaintiff's declaratory judgment actions attacking a Connecticut statute criminalizing the use of contraceptive devices.

Harlan's *Poe* dissent not only typifies Harlan's scholarly, analytical and thorough work but also exemplifies his Fourteenth Amendment jurisprudence. Harlan was not constrained by the text of the Bill of Rights in finding that the Constitution protected a right to privacy. He need only find that such a right was sufficiently historically grounded and important to liberty that it be enforced against the states via the Fourteenth Amendment. Harlan recognized that the due process guaranteed by the Constitution was not merely procedural, but also protected fundamental substantive rights.

What rankled Harlan in *Poe* was that Connecticut criminalized the private conduct of married couples. Intimate marital relationships were not subject to intrusion by the state, which could search, seize, and subject to public trial the private details of marital privacy. The Connecticut statute was saved neither by its rationality nor its purpose in regulating morality if it could lead to such intrusions. Given that the statute intruded upon "the privacy of the home in its most basic sense," the statute could not survive the "strict scrutiny" to which the courts should subject it. In *Poe*, Harlan stands as a staunch defender of a broad concept of constitutionally protected liberty.

Harlan also sided with individual liberty when he wrote for the Court in *NAACP v. Alabama*. Harlan held that the Fourteenth Amendment barred the Alabama courts from fining the National Association for the Advancement of Colored People (NAACP)

for refusing to surrender its membership list. The court's order to produce the list overburdened the fundamental freedom of association.

A series of cases regarding the right to a jury trial illustrate the interplay between the Court's approach and Harlan's. In *Duncan v. Louisiana* (1968), the Court held, over Harlan's dissent, that a state criminal defendant is entitled to a jury trial in any case which, if brought in a federal court, would require a jury under the Sixth Amendment. For Harlan, that decision made the mistake of following the incorporation doctrine. However, it established that the states must provide jury trials.

Soon after *Duncan*, the Court began defining the contours of the jury that states must provide. In *Williams v. Florida* (1970), the Court approved a six-member jury. The Court declined to incorporate the federal standard of a jury of twelve, calling the number "a historical accident," and said that the Sixth Amendment was satisfied with a jury of six.

According to Harlan, the "necessary consequence" was that twelve-member juries were not constitutionally required in federal criminal trials either. In other words, Harlan argued, the Court's reluctance to strictly impose the Bill of Rights against the states via the incorporation doctrine threatened to dilute the Bill of Rights as against the federal government. It indirectly undercut the previously unquestioned federal practice of twelve-person juries to hold that the states, bound by the same Sixth Amendment that applied to the federal government, need not have twelve jurors. This was not only inconsistent, Harlan argued, it was hazardous to the Sixth Amendment.

The Court later took the matter a step further in holding that state juries need not be unanimous. In *Johnson v. Louisiana* (1972), the Court held that the due process clause itself did not mandate unanimity, and in *Apodaca v. Oregon* (1972), held that the Sixth Amendment's incorporation by the Fourteenth Amendment in *Duncan v. Louisiana*, did not require that the jury's vote be unanimous. Were Harlan still alive, he might have argued that the due process clause itself did not require unanimity, but that it threatened federal jury unanimity to hold that a state jury mandated by Sixth Amendment incorporation did not have to be unanimous. These cases revealed the Court majority to be inconsistent, not Harlan.

History cast John Marshall Harlan, like his namesake, in the role of dissenter. Even when he agreed with the Court's decisions on civil liberties, he often set forth separate reasons. When the Court enforced the Fourteenth Amendment's equal protection clause beyond matters of race, and applied federal criminal procedures to state proceedings via incorporation, Harlan objected. To Harlan, the equal

protection clause had a core meaning and the due process clause had force independent of the Bill of Rights. He found certain liberties so essential that due process must include them, and in cases implicating those rights he held that the Constitution barred the states from infringing on them.

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References and Further Reading

- Schroeder, Andrew B., *Keeping Police Out of the Bedroom: Justice John Marshall Harlan, Poe v. Ullman, and the Limits of Conservative Privacy*, Virginia Law Review 86 (August 2000): 1045.
- Shapiro, David L., ed. *The Evolution of a Judicial Philosophy: Selected Opinions and Papers of Justice John M. Harlan*. Cambridge, MA: Harvard University Press, 1969.
- White, G. Edward. *The American Judicial Tradition: Profiles of Leading American Judges*. New York: Oxford University Press, 1976.
- . *Earl Warren: A Public Life*. New York: Oxford University Press, 1982.
- Yarbrough, Tinsely E. *John Marshall Harlan: Great Dissenter of the Warren Court*. New York: Oxford University Press, 1992.

Cases and Statutes Cited

- Apodaca v. Oregon*, 406 U.S. 404 (1972)
- Baker v. Carr*, 369 U.S. 186 (1962)
- Brown v. Board of Education*, 347 U.S. 483 (1954), 349 U.S. 294 (1955)
- Cohen v. California*, 403 U.S. 15 (1971)
- Duncan v. Louisiana*, 391 U.S. 145 (1968)
- Gideon v. Wainwright*, 372 U.S. 335 (1963)
- Griswold v. Connecticut*, 381 U.S. 479 (1965)
- Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966)
- Johnson v. Louisiana*, 406 U.S. 356 (1972)
- Mapp v. Ohio*, 367 U.S. 643 (1961)
- Miranda v. Arizona*, 384 U.S. 436 (1966)
- NAACP v. Alabama*, 357 U.S. 449 (1958)
- Poe v. Ullman*, 367 U.S. 497 (1961)
- Reynolds v. Sims*, 377 U.S. 533 (1964)
- Robinson v. California*, 370 U.S. 660 (1962)
- Roe v. Wade*, 410 U.S. 113 (1973)
- Williams v. Florida*, 399 U.S. 78 (1970)
- Yates v. United States*, 354 U.S. 298 (1957)

See also *Apodaca v. Oregon*, 406 U.S. 404 (1972); *Brown v. Board of Education*, 347 U.S. 483 (1954); *Cohen v. California*, 403 U.S. 15 (1971); Due Process; *Duncan v. Louisiana*, 391 U.S. 145 (1968); Equal Protection of Law (XIV); Frankfurter, Felix; Fourteenth Amendment; *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966); *Mapp v. Ohio*, 367 U.S. 643 (1961); *Miranda v. Arizona*, 384 U.S. 436 (1966); *NAACP v. Alabama Ex Rel. Patterson*, 357 U.S. 449 (1958); O'Connor, Sandra Day; *Poe v. Ullman*, 367 U.S. 497 (1961);

Reapportionment; Right of Privacy; *Robinson v. California*, 370 U.S. 660 (1962); *Roe v. Wade*, 410 U.S. 113 (1973); Warren Court; Warren, Earl; *Yates v. United States*, 354 U.S. 298 (1957)

HARMELIN v. MICHIGAN, 501 U.S. 957 (1991)

In *Harmelin v. Michigan*, the Supreme Court revisited its holding in *Solem v. Helm* (1983) that the Eighth Amendment, applicable to states through the Fourteenth Amendment, prohibits grossly disproportionate sentences in criminal cases. Harmelin had been convicted in Michigan state court of possession of 672 grams of cocaine and had received a mandatory life sentence without the possibility of parole.

A five-member majority of the Court agreed only that the mandatory imposition of a life sentence without the possibility of parole did not violate the cruel and unusual punishment clause of the Eighth Amendment despite the factfinder's inability to evaluate any mitigating evidence, such as lack of prior felony convictions. Seven justices also agreed with the proposition that the Eighth Amendment imposes some requirement of proportionality in sentencing.

Justice Scalia announced the opinion of the Court, but was joined only by Chief Justice Rehnquist in his radical assertion that *Solem* should be overruled because the Eighth Amendment contains no proportionality guarantee. Justice Kennedy's concurrence, joined by two other justices, upheld *Solem* but altered its three-part test for determining whether a sentence is proportionate. It made the first prong—whether a punishment is grossly disproportionate to the crime—a threshold requirement before a judge may evaluate how a state punishes similar crimes (the second prong) or how other states punish the same crime (third prong). Kennedy's and Scalia's opinions read together make clear that a majority of the Court wishes at least to rein in the constitutional guarantee of proportionality in sentencing.

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References and Further Reading

- Bailey, Pamela L., *Harmelin v. Michigan: Is the Eighth Amendment's Proportionality Guarantee Left an Empty Shell?*, Pacific Law Journal 24 (October 1992): 221–73.
- Friedman, Lawrence M. *Law in America: A Short History*. New York: Modern Library, 2002.
- McGowan, Edward J. *Eighth Amendment Proportionality in the Aftermath of Harmelin v. Michigan*, New York Law School Journal of Human Rights 10 (Fall 1992): 185–222.

Meltzer, Stephen E. Harmelin v. Michigan: *Contemporary Morality and Constitutional Objectivity*, New England Law Review 27 (Spring 1993): 749–89.

Cases and Statutes Cited

Solem v. Helm, 463 U.S. 277 (1983)

See also **Cruel and Unusual Punishment (VIII); Cruel and Unusual Punishment Generally; Fourteenth Amendment; Kennedy, Anthony McLeod; Proportionality Reviews; Rehnquist, William H.; Robinson v. California**, 370 U.S. 660 (1962); **Scalia, Antonin; Solem v. Helm**, 463 U.S. 277 (1983); **Stare Decisis; Three Strikes/Proportionality**

HARMLESS ERROR

During the mid-1800s, England observed the “exchequer rule” of automatic reversal. Under this rule, prejudice was presumed upon discovery of any trial error and a new trial was required whenever error was found. The inevitable result was a plethora of retrials at considerable cost to judicial economy, finality, witnesses, and litigants. During the early 1900s, American jurisdictions adopted harmless error statutes. The 1919 federal statute, which served as a model for many state statutes, required federal appellate courts to “give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties.” Today every American jurisdiction now employs some version of the “harmless error” rule.

The harmless error doctrine recognizes that not only is no one entitled to a perfect trial, but that perfect trials occur rarely, if ever. Nonetheless, until the mid-1960s, most courts automatically reversed criminal convictions upon a finding that the trial was tainted by constitutional error. Up to that point, appellate courts applied the harmless error rules only to nonconstitutional errors. In 1967, the Supreme Court in *Chapman v. California* (1967) held that, unless prejudice resulted from the mistake, even constitutional errors do not require reversal. A harmless error is a mistake during judicial proceedings that does not affect the substantial rights of the defendant. The purpose of the harmless error rule is to avoid “setting aside convictions for small errors or defects that have little, if any likelihood of having changed the result of the trial.”

By contrast, a plain error is a mistake of constitutional magnitude that compromises a structural right deemed essential to a fair trial. The mere existence of a structural defect in the constitution of the trial

mechanism—for example, deprivation of the right to counsel—requires automatic reversal because such an error infects the entire trial process. Other constitutional errors involve “rights so basic to a fair trial that their infraction can never be treated as harmless error.” These include the right to an impartial judge, and the right to not be coerced into confessing. Other rights that may trigger automatic reversal include the right to a speedy trial, the right to be free from double jeopardy, the right to a representative jury, and the right to a representative grand jury.

The *Chapman* rule requires the beneficiary of the constitutional error—usually the government—to prove beyond a reasonable doubt “that the error complained of did not contribute to the verdict.” Thus, if overwhelming error-free evidence supports the conviction, it will not be reversed.

The “harmless beyond a reasonable doubt” standard set forth in *Chapman* applies to courts on direct appeal, but does not apply to federal habeas corpus review of constitutional errors committed at trial. Instead, the Supreme Court in *Brecht v. Abrahamson* (1993), held that federal courts on habeas may not grant relief unless the error “had a substantial and injurious effect or influence in determining the jury’s verdict.”

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References and Further Reading

Whitebread, Charles H., and Christopher Slobogin. *Criminal Procedure*. Mineola, NY: Foundation Press, 2000.

Cases and Statutes Cited

Chapman v. California, 386 U.S. 18, 22 (1967)

Brecht v. Abrahamson, 507 U.S. 619 (1993)

HARPER v. VIRGINIA STATE BOARD OF ELECTIONS, 383 U.S. 663 (1966)

In *Harper v. Virginia State Board of Elections*, the U.S. Supreme Court considered whether conditioning the right to vote in state elections upon payment of an annual fee, or poll tax, violated the U.S. Constitution, specifically the equal protection clause of the Fourteenth Amendment. The Court addressed this issue previously in *Breedlove v. Suttles* (1937), unanimously upholding a Georgia statute generally requiring a poll tax as a prerequisite to voting. However, by 1966 only four states continued to exact a poll tax, and Congress had enacted the Twenty-Fourth Amendment, prohibiting the use of poll taxes in federal elections. In addition, the Court’s interpretation and application

of the Equal Protection Clause was evolving. Writing for a majority of the Court in *Harper* and overruling *Breedlove*, Justice William O. Douglas concluded, “[A] state violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard.”

At issue in *Harper* was a provision of the Virginia Constitution requiring payment of \$1.50 as a precondition for voting. Virginia residents brought suit, challenging the provision as an unconstitutional violation of the Equal Protection Clause. Relying on *Breedlove*, a three-judge panel in the Eastern District of Virginia dismissed the complaint.

In overruling the district court, Justice Douglas acknowledged that the right to vote in state elections is not included in the text of the Constitution. However, he relied upon previous voter qualification cases to demonstrate that “once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the equal protection clause of the Fourteenth Amendment.” The Court explained that determining whether a provision limiting suffrage is acceptable requires more than an inquiry into whether there is a rational basis for the categorization scheme. This heightened scrutiny for issues surrounding voting followed *Reynolds v. Sims* (1964), where the Court invalidated a voting district system that diluted the relative power of some citizens. Because, as Justice Douglas noted in *Harper*, “the right of suffrage is a fundamental matter in a free and democratic society” and voting is “preservative of other basic civil and political rights,” any classification that may restrain this fundamental right must be “closely scrutinized and carefully confined.”

In applying this searching review, the Court analogized wealth classifications to those based upon race, stating that both “are traditionally disfavored.” Justice Douglas concluded that because one’s wealth is not related to capacity for effective exercise of the right to vote, the consideration of that factor in voter qualifications constituted invidious discrimination.

The Court acknowledged that *Harper* marked a departure from its previous analysis of the poll tax issue. In discussing this departure, Justice Douglas underscored the fact that the definition of equal protection is not static, not “confined to historic notions of equality,” but is dynamic. Considering the fundamental importance of equal access to the vote, the Court concluded that the Equal Protection Clause required the reversal of the district court’s opinion.

Thus, *Harper*’s significance went beyond the termination of the use of the poll tax in state elections. It constituted yet another important decision expanding the franchise to more Americans and demonstrated

the application of heightened equal protection scrutiny to classifications disadvantaging the poor.

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Cases and Statutes Cited

Breedlove v. Suttles, 302 U.S. 277 (1937)

Reynolds v. Sims, 377 U.S. 533 (1964)

HARRIS v. McRAE, 448 U.S. 297 (1980)

In 1965 Congress established Medicaid, a program in which it reimbursed states for a portion of the costs of providing medical care to the poor. Many members of Congress disagreed with the Supreme Court’s controversial decision in *Roe v. Wade* (1973), the case in which the Court recognized that women have a constitutional right under the due process clause of the Fourteenth Amendment to terminate their pregnancies. Beginning in 1976, Congress passed legislation, known as the Hyde Amendment, that denied reimbursement for abortions, even those deemed medically necessary, except those necessary to save the life of the mother. In *Harris v. McRae*, the Supreme Court found no constitutional barriers to this withholding of federal funds.

Cora McRae, a New York Medicaid recipient in the first trimester of an unwanted pregnancy, filed a suit in U.S. District Court alleging that the Hyde Amendment was unconstitutional. She alleged that it violated the establishment clause of the First Amendment because it mirrored the Roman Catholic Church’s teachings that abortion is a sin and that human life begins at conception. Refusal to provide federal funds to support abortion also was inconsistent, she claimed, with the equal protection component of the Fifth Amendment’s due process clause because Medicaid reimbursed medical expenses associated with childbirth. This discrimination in types of reimbursable medical procedures placed an especially heavy burden on indigent, unmarried teenage girls, the category most in need of abortion.

The Court, in a five-to-four decision, upheld the constitutionality of the Hyde Amendment. The majority relied on its earlier decision in *Maher v. Roe* (1977) in which it sustained Connecticut’s decision, with regard to poor women, to pay for expenses associated with delivery of a baby but not for abortions. The Court reasoned that *Roe v. Wade* does not prevent a state from making a value judgment favoring childbirth over abortion and implementing that judgment through the allocation of public funds. The Constitution, said the Court, blocks government from placing obstacles in the path of a woman’s right to

choose to terminate her pregnancy but it does not mandate that government remove obstacles, such as poverty, that it did not place there. No one is entitled to government funds needed to exercise a constitutional right.

Laws that discriminate against a suspect category of people, such as members of a racial minority, trigger a heightened level of judicial scrutiny. The Court, however, does not view poverty as a suspect classification and, therefore, Congress only has to demonstrate that the withholding of federal funds for abortion serves a legitimate governmental interest. *Roe v. Wade* recognized the government's interest in preserving potential human life, an end achieved in the Hyde Amendment by providing incentives to pregnant women to carry their pregnancy to term.

The fact that the ban on use of federal funds to pay for abortion coincides with the tenets of the Catholic Church does not violate the prohibition on governmental establishment of religion. Preferring childbirth over abortion has a secular purpose, as do laws against stealing and murder, concluded the Court.

Most states have followed the federal government's lead in restricting public funding for abortions. Congress has extended the ban on abortion funding to other federal programs financing health care, including those for federal employees, Peace Corps volunteers, and military personnel and their dependents.

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References and Further Reading

- Boonstra, Heather, and Adam Sonfield, *Rights Without Access: Revisiting Public Funding of Abortion for Poor Women*, Guttmacher Report on Public Policy, 3 (2000): 2:8–11.
- Fried, Marlene Gerber. "The Economics of Abortion Access in the US: Restrictions on Government Funding for Abortion Is the Post-Roe Battleground." *Conscience* 26, no. 4 (2005): 10–15.
- Luker, Kristin. *Abortion and the Politics of Motherhood*. Berkeley: University of California Press, 1985.
- McDonagh, Eileen L., *My Body, My Consent: Securing the Constitutional Right to Abortion Funding*, Albany Law Review 62 (1999): 3:1057–118.

Cases and Statutes Cited

- Maher v. Roe*, 432 U.S. 464 (1977)
Roe v. Wade, 410 U.S. 113 (1973)

See also **Abortion; Due Process of Law (V and XIV); Due Process; Equal Protection of Law (XIV); Establishment Clause Doctrine: Supreme Court Jurisprudence; *Roe v. Wade*, 410 U.S. 113 (1973)**

HARRIS v. NEW YORK, 401 U.S. 222 (1971)

In its landmark decision in *Miranda v. Arizona* (1966), the Supreme Court held that the police may not interrogate a suspect in custody unless the police advise him of his right to remain silent and to an attorney. The suspect is entitled to be advised that (1) he has the right to remain silent; (2) anything he says "can and will" be used against him in court; (3) he has the right to consult an attorney and to have an attorney present during the interrogation; and (4) if he cannot afford an attorney, one will be provided for him. Statements obtained by the police in violation of *Miranda* are inadmissible in the prosecutor's case-in-chief.

Miranda initially generated great controversy. However, by 2000 the Supreme Court in *Dickerson v. United States* found that "*Miranda* has been embedded in routine police practice to the point where the warnings have become part of our national culture." Even prosecutors came to embrace the *Miranda* warnings because they provide law enforcement officers with much needed structure for carrying out custodial interrogations.

However, there has been ongoing controversy over the scope of *Miranda*. In *Harris v. New York* (1971), the Court marked out a significant exception to the exclusionary rule. The Court in *Harris* held that if the defendant testifies on his own behalf, statements obtained from him in violation of the *Miranda* warnings may be used to impeach his credibility.

Harris was charged with selling heroin to an undercover officer. He testified on his own behalf that he knew the undercover officer but denied selling him heroin. Harris had not been given complete *Miranda* warnings because he was not advised of his right to assigned counsel. Nevertheless, on cross-examination, the prosecutor asked Harris if he had made specified statements to the police officer immediately after his arrest that partially contradicted his direct testimony. Harris said that he couldn't remember what he told the officer. The trial judge instructed the jury that the statements attributed to Harris by the prosecutor could be considered in evaluating Harris's credibility, although not as substantive evidence of guilt.

The U.S. Supreme Court upheld Harris's conviction. The Court found that the *Miranda* exclusionary rule does not apply to inconsistent statements used to attack the defendant's credibility. The Court stressed the importance of testing the veracity of the defendant's testimony: "The shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances." The Court also found that "[a]ssuming that the [*Miranda*]

exclusionary rule has a deterrent effect on proscribed [police] conduct, sufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case in chief.”

In a follow-up case, *Oregon v. Hass* (1975), the Supreme Court held that *Harris* applies to other *Miranda* violations, for example, where the police continued to question the suspect after he asked for an attorney.

Harris was the beginning of a series of Supreme Court decisions restricting the scope of *Miranda*. Later Supreme Court decisions took a narrow view of the meaning of “interrogation,” held *Miranda* inapplicable to statements made to undercover agents, recognized “public safety” and booking exceptions to *Miranda*, and rejected the fruit of the poisonous tree doctrine.

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References and Further Reading

LaFave, W., J. Israel, and N. King. *Criminal Procedure*. 4th ed. St. Paul, MN: Thomson West, 2004.

Cases and Statutes Cited

Dickerson v. United States, 530 U.S. 428 (2000)
Harris v. New York, 401 U.S. 222 (1971)
Miranda v. Arizona, 384 U.S. 436 (1966)
Oregon v. Hass, 420 U.S. 714 (1975)

See also **Miranda Warning; Self-Incrimination: Miranda and Evolution; Self-Incrimination (V): Historical Background**

HATCH ACT (1939)

The Hatch Act was an effort to limit the institutional flow of money into politics by barring campaign donations by federal employees. It was passed in response to reports that Works Progress Administration workers had been pressured to contribute to candidates favored by President Franklin Roosevelt during the 1938 midterm elections.

Although the act resembled decades-old campaign finance reform initiatives, its passage was due to contemporary political realities. Despite Roosevelt’s tactics, Republicans gained eighty House seats and eight Senate seats in 1938, and their then-powerful alliance with conservative Democrats forced Roosevelt to reluctantly sign the legislation.

The law made it illegal for federal civil servants to run for office, make or solicit campaign donations, or “take any active part in political management or political campaigns.” In 1940, it was extended to

state and local employees of programs funded by the federal government.

Federal employees challenged the law as a violation of their right to engage in political speech. However, noting the government’s longstanding authority to regulate the civil service, the Supreme Court upheld the law by a four-to-three vote in 1947, in *United Public Workers v. Mitchell*, and reaffirmed that holding in *United States Civil Service Commission v. National Association of Letter Carriers* (1974).

The Hatch Act was liberalized in 1993, allowing federal employees to make campaign contributions, run in nonpartisan elections, and campaign for or against other candidates while off duty. Federal employees still may not run in partisan elections or solicit contributions for other candidates from the public.

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References and Further Reading

Corrado, Anthony, and Thomas E. Mann, Daniel Ortiz, and Trevor Potter, eds. *The New Campaign Finance Sourcebook*. Washington, DC: Brookings Institution Press, 2005.
Overacker, Louise. “Campaign Finance in the Presidential Election of 1940.” *American Political Science Review* 35 (August 1941): 701–27.
U.S. Office of Special Counsel. *Political Activity (Hatch Act)*. April 2004. <http://www.osc.gov/hatchact.htm>.

Cases and Statutes Cited

Hatch Act, Act of August 2, 1939, 53 Stat. 1147
United Public Workers v. Mitchell, 330 U.S. 75 (1947)
United States Civil Service Commission v. National Association of Letter Carriers, 413 U.S. 548 (1973)

See also **Campaign Finance Reform; Roosevelt, Franklin Delano**

HATE CRIME LAWS

A wide range of laws can be used to prosecute hate crimes (also known as bias crimes), which are crimes motivated by bias based on race, religion, national origin, sexual orientation, gender, or other social group membership. First, it is important to remember that almost every case of hate crime can be prosecuted as a violation of the ordinary criminal law (for example, as an assault or trespass), without regard to the defendant’s bias motivation. However, because hate crimes are believed to be more harmful to the individual victim, the targeted social group, and society at large, Congress and most state legislatures have enacted a variety of criminal statutes that directly

address bias-motivated acts. These laws include traditional approaches that criminalize specific conduct that has long been associated with racial, ethnic, or religious hatred, and a more modern approach that increases the penalty for criminal conduct based on the defendant's biased motivation.

Traditional Legislation

Although the idea of treating bias-motivated crime as a distinct category of crime can be traced only to the 1980s. The United States and most of the individual states have for well over a century had laws specifically addressing acts that today we would label hate crimes. These older laws take primarily two approaches: (1) criminalizing civil rights violations and (2) outlawing particular acts that historically have been associated with racial, religious, and ethnic hatred and violence.

The civil rights approach dates back to the enactment of the oldest of the relevant federal statutes, 18 U.S.C. section 241 ("Conspiracy against rights") and section 242 ("Deprivation of rights under color of law"), during the post-Civil War Reconstruction Era. In addition to those laws, the major federal criminal civil rights statutes used to prosecute hate crime are 18 U.S.C. section 245 ("Federally protected activities"), 18 U.S.C. section 247 ("Damage to religious property; obstruction of persons in the free exercise of religious beliefs"), 18 U.S.C. section 248 (prohibiting interference with religious freedom), and 42 U.S.C. section 3631 ("Prevention of intimidation" provision of the Fair Housing Act). The federal government prosecutes hate crimes primarily as civil rights violations, and several states have enacted statutes modeled on the federal laws.

The essence of a civil rights offense is interference with the free exercise of a right protected by law. Therefore, the key element under these statutes is that the defendant intended to intimidate the victim in or to interfere with the free exercise of rights under the constitution or laws of the United States or a particular state. Some of these statutes—particularly the newer ones—also require the prosecution to prove that the defendant was motivated by bias; they therefore resemble antidiscrimination laws in many respects.

Another group of traditional statutes takes a different approach, prohibiting specific acts that historically have been associated with racial, religious, and ethnic hostility, primarily practices that traditionally were employed by the Ku Klux Klan. The common theme of these laws is the prohibition of acts that

induce fears of persecution, particularly in members of minority groups. Thus, several states have criminalized cross burning and the placement of similar exhibits, including Nazi swastikas, that have traditionally been interpreted as threats of violence or physical intimidation against a particular group.

Many states also have enacted special institutional vandalism statutes to punish individuals who deface or destroy churches, synagogues, and other institutional property, such as monuments, memorials, or cemeteries, that are associated with or significant to particular groups. Related statutes prohibit interfering with religious worship or obstructing a person in the free exercise of his or her religion. Finally, several states have "anti-mask" statutes, which prohibit wearing a mask or hood under specified circumstances. These statutes were enacted in two waves during the 1920s and 1950s, in response to the terrorism of minority groups that was practiced by "night-riding" members of the Ku Klux Klan, who carried out campaigns of violence and intimidation while wearing the traditional Klan regalia of white robe, hood, and mask.

Like the modern, penalty enhancement approach discussed below, these statutes have been vulnerable to constitutional challenge based upon the First Amendment right to freedom of expression. The most vulnerable of the traditional statutes have been those that prohibit conduct that may be viewed as expressive or symbolic, such as cross burning or mask wearing. Conduct of this type lies on the boundary between hate crime and hate speech, and a number of cross-burning and anti-mask statutes have been struck down in cases where courts found that they regulated expressive conduct. In cases where the courts have found the statutes to punish intimidation or threats, however, the statutes have tended to survive constitutional attack.

The Modern Approach: Penalty Enhancement

The newest and most controversial hate crime laws are penalty enhancement statutes. These laws increase the punishment for a crime in a case where the prosecution proves that, in committing the crime, the defendant was motivated by bias based upon the race or other group-based status of the victim, such as religion or gender. Penalty enhancement laws have generated a great deal of controversy, with many critics arguing that they are unconstitutional because they punish a defendant for his or her unpopular or offensive viewpoint, thereby infringing on the right to freedom of speech and thought, or unwise because

their focus on the defendant's bias draws attention to tensions between groups. Nevertheless, the penalty enhancement approach has gained widespread acceptance, and almost every state now has a penalty enhancement or ethnic intimidation statute for prosecuting hate crimes. The federal sentencing guidelines also incorporate the penalty enhancement approach, in a provision (U.S.S.G. sec. 3A1.1[a]) that directs the sentencing court to adjust the sentence for a federal crime upward based upon the defendant's biased motivation.

The Anti-Defamation League of B'nai B'rith introduced the penalty enhancement approach in 1981, when it published its model ethnic intimidation statute. Under this model, punishment for conduct that already violates some provision of the criminal code is to be increased if the defendant committed the crime "by reason of the actual or perceived race, color, religion, national origin, sexual orientation, or gender of another individual or group of individuals." States that follow this model typically either adopt the enhancement as a separate sentencing provision or create a new, higher-grade crime that comprises an existing crime plus a bias motive. States vary in their designations of which crimes are subject to hate crime enhancement; some state statutes provide that the enhancement applies only to specified crimes (such as trespass, harassment, intimidation, assault, and battery), while others would apply the enhancement to any crime.

The identifying feature of ethnic intimidation laws is their focus on the defendant's bias-related state of mind. The precise phrasing of the prohibited state of mind varies from statute to statute, with most states defining a bias crime as one in which the actor committed the offense "because of" another person's race or other protected status. Some statutes also require that the defendant be motivated by malice or animus. All hate crime penalty enhancement statutes punish bias based on race, color, religion, or national origin. In addition, several statutes include other protected categories, such as gender, handicap, age, disability, or sexual orientation.

Constitutional and Policy Issues

All of the hate crime laws discussed above have raised constitutional and policy questions, but the most controversial have been the penalty enhancement statutes.

The penalty enhancement approach stirred controversy from the beginning. During the early 1990s, the debate centered on fundamental issues concerning the

constitutionality, legitimacy, and wisdom of penalty enhancement. Proponents of the laws contended that they were needed in order to recognize the unique and serious harms that hate crimes inflict on the victim, the targeted social group, and the larger community. They also argued that increased punishment was justified because someone who commits a crime because of bias is more culpable than a person who commits the same criminal act without a bias motivation.

Critics raised several concerns. First, they argued that penalty enhancement laws created unconstitutional "thought crimes" in violation of the First Amendment—that is, that the laws violated a defendant's right to freedom of expression by punishing racist speech, mental processes, or opinions based upon the state's disagreement with their ideological content. Critics also argued that the laws would have a "chilling effect" on free speech, because people would be fearful of exercising the right to attend racist talks or read racist literature because their activities might be brought into trial as evidence against them should they one day be charged with committing a hate crime. Challenges to the legitimacy and wisdom of the laws included the arguments that penalty enhancement is not warranted because bias crimes are no different from any other criminal act committed for an unpopular reason or that hate crimes are viewed as different only if one attributes some heightened sensitivity or weakness to the victims, who in most cases are members of minority social groups. Based on the latter argument, bias crime laws were sometimes characterized as stigmatizing or insulting to minority groups. Conversely, they also were viewed as insulting to other crime victims, because they were said to send the message that these individuals' lives and well-being are not "worth" as much as the lives and well-being of minorities. Critics also contended that hate crime laws would exacerbate rather than reduce tensions between groups, because they draw attention to the perpetrator's group-based animus.

Hate crime laws appeared vulnerable to constitutional attack following the U.S. Supreme Court's 1992 decision, in *R.A.V. v. City of St. Paul*, striking down a municipal hate speech ordinance on free speech grounds. However, the following year the Court directly addressed the constitutionality of penalty enhancement legislation in *Wisconsin v. Mitchell*. In *Mitchell*, a unanimous Court upheld a Wisconsin statute that enhanced the punishment for a crime where the defendant "intentionally selected" the victim based on race or other protected group status. The Court distinguished the penalty enhancement statute from the ordinance it had struck down in *R.A.V.*, noting that the ordinance had been directed at expression, while the statute in *Mitchell* was "aimed

at conduct unprotected by the First Amendment.” The Court further found that the state could single out bias-motivated crimes for enhanced punishment based upon its assessment that such crimes inflict greater harm than non-bias-motivated crimes, because its desire to redress those greater harms was distinct from “mere disagreement” with the perpetrator’s beliefs or biases. Finally, the Court rejected the argument that the statute would chill free speech as being “too speculative.”

Before and since *Mitchell*, several state courts have addressed free speech and other constitutional challenges to hate crime penalty enhancement laws. In addition to the free speech issues, defendants have argued that hate crime laws violate their right to due process of law because they are unconstitutionally vague—that is, they fail to provide fair warning of the conduct prohibited and therefore may permit arbitrary and discriminatory enforcement or inhibit individuals’ exercise of their First Amendment freedoms—or to equal protection of the law because they treat offenders differently based upon their viewpoints or victims differently based upon their social group membership. With few exceptions, these constitutional challenges have failed.

In addition to the constitutional issues, hate crime laws raise important policy questions. Chief among these has been the question of which categories of social group membership to include among the punishable biases. The categories that have inspired the greatest controversy have been gender and sexual orientation. As a result, many states do not yet include gender or sexual orientation in their penalty enhancement statutes.

Other Hate Crime Laws

In addition to the criminal laws described above, many jurisdictions have adopted a variety of other laws to address hate crime. For example, a number of state statutes create a civil action under which victims of hate crimes can sue their perpetrators for money damages or other relief. In addition, the federal Hate Crimes Statistics Act of 1990 directs the U.S. Department of Justice to collect and report data on hate crimes every year, and many states have enacted similar laws.

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References and Further Reading

Anti-Defamation League of B’nai B’rith. *Hate Crimes Laws: A Comprehensive Guide*. New York: Anti-Defamation League, 1994.

- . *Hate Crimes Laws*. http://adl.org/main_hate_crimes.asp (web update complements 1994 report).
- Jacobs, James B., and Kimberly Potter. *Hate Crimes: Criminal Law & Identity Politics*. New York: Oxford University Press, 1998.
- Lawrence, Frederick M. *Punishing Hate: Bias Crimes Under American Law*. Cambridge, MA: Harvard University Press, 1999.
- Wang, Lu-in. *Hate Crimes Law*. Deerfield, IL: Clark Boardman Callaghan, 1994.

Cases and Statutes Cited

- R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992)
- Wisconsin v. Mitchell*, 508 U.S. 476 (1993)

See also **Campus Hate Speech Codes; Content-Based Regulation of Speech; Freedom of Speech: Modern Period (1917–Present); Overbreadth Doctrine; Shepard, Matthew; *Virginia v. Black*, 123 S.Ct. 1536 (2003)**

HATE CRIMES

Hate crimes are crimes in which the perpetrator is motivated by prejudice toward the victim and/or toward the group to which the defendant belongs. Typically, hate crimes punish conduct in which race, ethnicity, gender, religion, and often sexual orientation are motives for the prohibited conduct. Efforts to prosecute hate crimes began in earnest in the 1980s, and have been coupled with federal and state legislation requiring the compilation of hate crime data. Some point to an “epidemic” of hate crime over the last two decades. Those who disagree note that there are enormous differences in what constitutes hate crimes in different jurisdictions, and that more generally “hate crime” data are easily manipulated, difficult to collect, and subject to different interpretations. Also, in assessing hate crime data, distinctions need to be drawn between minor crimes motivated by hate (for instance, graffiti), and major crimes with a hate component (for example, a murder of a black man because of his race).

It is important to distinguish between “hate crimes” and “hate speech.” The latter clearly implicates the First Amendment’s free speech protections, and most efforts to proscribe “hate speech”—for instance, in college speech codes—have been struck down by the courts. The fairly consistent view of these courts has been that words—no matter how heinous, how hateful—are protected speech, and cannot be criminalized. In contrast, “hate crimes,” the courts have stressed, deal with conduct. This conduct unarguably can be prohibited by the states or federal government, whether it is part of a hate crime or not. The “hate” designation is applied when, as suggested

above, the defendant is motivated by prejudice with respect to the victim's race, ethnicity, gender, and so on. The Court, while striking down laws that exclusively punish hate speech, has upheld sentencing enhancements against defendants for hateful motivations. In short, standing alone, punishment of words or ideas no matter how prejudiced are not proscribable; it is only when coupled with conduct that a "hateful motivation" can result in an enhanced sentence. The major exception to this rule involves the expression of a hateful idea by burning a cross. In 2003, the Court ruled that this kind of expression—unlike other kinds of ways to convey a message of hate—can be criminally punished. The long history of cross burning in the United States was considered so substantial a form of intimidation that states could prohibit cross burning even if not specifically linked to another underlying crime.

Hate crime appellations are introduced for two main reasons. First and foremost is the matter of symbolic politics. A jurisdiction intends to send a message about not countenancing certain kinds of hateful behavior, and wants to send this message by harsher penalties for behavior associated with hateful motivations. Second, proponents of hate crime statutes (and often of special units within police departments whose task it is to collect data on, and prosecute hate crimes) argue that by calling matters hate crimes these automatically receive higher priority treatment by the police. In serious crimes in which "hate" is also charged, this ironically is less important since the defendant can/will be subject to a substantial sentence for the underlying felony; however, in less serious felonies and misdemeanors (including, for example, incidents of graffiti or malicious destruction of property), calling these relatively minor matters hate crimes makes it more likely the perpetrator will receive a tougher sentence.

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References and Further Reading

- Bell, Jeannine, *Deciding When Hate Is a Crime: The First Amendment, Police Detectives, and the Identification of Hate Crime*, Rutgers Race & Law Review 4 (2002): 1:33–76.
- Gould, Jon. *Speak No Evil*. Chicago: University of Chicago Press, 2005.
- Heumann, Milton, and Thomas Church, eds. *Hate Speech on Campus*. Boston: Northeastern University Press, 1997.
- Jacobs, James, and Kimberly Potter. *Hate Crimes: Criminal Law and Identity Politics*. New York: Oxford University Press, 1998.
- Lawrence, Frederick. *Punishing Hate*. Cambridge, MA: Harvard University Press, 1999.

R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).
Virginia v. Black, 538 U.S. 123 (2003).
Wisconsin v. Mitchell, 508 U.S. 476 (1993).

See also *Beauharnais v. Illinois*, 343 U.S. 250 (1952); **Campus Hate Speech Codes; Cross-Burning**

HATE SPEECH

Hate speech is speech that degrades an individual or group on grounds such as race, gender, nationality, ethnicity, language, religion, or sexual orientation. Sometimes referred to as group libel, hate speech often takes the form of vilification of a group because all members are claimed to share invidious characteristics. Hate speech raises difficult issues because history has shown that many programs, repressions, genocides, and racist behaviors begin with verbal libels targeted against vulnerable groups. Thus, a society committed both to freedom of speech and to equal opportunity must wrestle with the challenge posed by racist, sexist, and other phobic speech.

Hate speech is distinct from hate crime, which consists of a criminal act motivated by bias against the victim's race, ethnicity, gender, and so on. Many states as well as the federal government have enacted laws that provide for greater penalties for crimes committed because the victim was selected because of race, or other group membership, or the criminal behavior was motivated at least in part by bias. Hate crimes do not raise the same problems as hate speech, because the underlying behavior involved in the crime may independently be punished.

Some have contended that adding punishment to criminal acts because someone committed a crime because of bias raises problems of free speech: arguably, punishing someone's motive for committing a bias crime is equivalent to punishing "thought." But this line of reasoning seems faulty. The punishment for many crimes hinges on one's state of mind—whether one acted deliberately as opposed to negligently, for example. The reasons someone hit another (in self-defense? to inflict pain?) can even establish whether a crime was even committed. As Justice Oliver Wendell Holmes said, even a dog can distinguish between being kicked and being stumbled over.

Many societies have contended with hate speech. The Nazis defined Jews as enemies of the state, condemned homosexuals, Roma, and Jehovah's Witnesses, and eventually killed millions. Closer to home, American racists fulminated against African Americans, Catholics, Jews, and immigrants, and embraced violence against them. In response to the horrors of world wars, and sometimes in response to race

riots at home, many states enacted statutes criminalizing “libel” against such groups.

For example, as early as 1917, Illinois made it a crime to exhibit in any public place any publication that “portrays depravity, criminality . . . or lack of virtue of a class of citizens, of any race, color, creed or religion” which “expose[d] the citizens of any race, color, creed or religion to contempt, derision, or obloquy.” In 1952, in *Beauharnais v. Illinois*, the U.S. Supreme Court upheld a conviction of a leafleteer whose tract set forth a petition calling on Chicago officials to exclude African Americans because members of that group’s alleged propensity to commit crime. According to the Court, the posters had been defined by Illinois as a form of libel against African Americans, and libels could be punished for their “tendency to cause breach of the peace.”

How Do Courts Treat Hate Speech Today?

The Supreme Court’s *Beauharnais* decision, while never formally repealed, no longer represents the state of the law on whether government may regulate or punish hate speech. In subsequent decisions, the Court has emphasized that the First Amendment imposes higher requirements. A state may not punish speech merely because the speaker expresses outrageous views, even though those views conflict with other core constitutional values of equality. Further, even though all recognize the danger to a multiracial society of allowing falsehoods to be deployed against vulnerable groups, unless a speaker intends to foment violence and the violence is imminent, or the speech threatens specific individuals, the government may not regulate the speech or punish the speaker for expressing outrageous views.

To see how far these principles take us, consider some examples. In 1977, neo-Nazis proposed to march in uniform, including displaying swastikas, in Skokie, Illinois, a community in which many survivors of Nazi concentration camps had settled. The town and the state both enacted laws designed to prevent the march, but an intermediate federal appeals court held that the Nazis could not be prevented from parading merely because the town found their views repulsive. The case was so controversial that it split the American Civil Liberties Union, which had defended the Nazis’ right to march.

A few years earlier, a Ku Klux Klan (KKK) leader speaking to assembled members at an outdoor meeting infused with racial epithets, urged his followers to march on Washington. He suggested the possibility that there might have to be some “revengeance”

taken if civil rights were given to African Americans. The Supreme Court held that the state could not punish the speaker since it could not show that he deliberately sought to incite violence and that violence was imminent.

These more recent decisions share certain common features. First, they hold that an individual who is merely attempting to persuade others that racism, homophobia, or cruelty should be practiced cannot be punished for those expressions.

But more significantly, suppose a listener hears a vitriolic speech condemning a particular group, say Catholics, and is thereby incited to acts of violence. The speaker cannot be held responsible for those violent acts unless he knows it is likely that his words will incite others to violence, and that violence will immediately result. This rule, that speech that merely increases the probabilities of violent acts towards vulnerable groups, is justified on the grounds that in a free society, passionate argument, vitriolic assertions, and hate-filled invective must be permitted in order to protect vibrant speech in a democratic society.

Furthermore, the concept of “group libel” as applied in *Beauharnais* has been seriously eroded. A series of Supreme Court decisions has emphasized that in order to comply with First Amendment standards, a libel must be personally directed to identifiable members of a group. By analogy, one is free to say “all lawyers are liars” without running afoul of libel laws; but a state is free to hold liable someone who falsely proclaims that “Fredrica, a lawyer, cheats her clients.” Similarly, to say that all members of a particular religious sect are thieves may “libel” the group, but the state may not punish such utterances.

Although the free speech principle has dominated the outcomes of these decisions, nonetheless there are important limits. One challenge the Court has faced concerns “mixed messages” accompanying symbolic communications.

The practice of cross burning provides a helpful illustration. The KKK has a history of using burning a cross at its rallies as an affirmation of its ideological unity and opposition to an integrated society. So long as the burning is used in such a fashion, and not to intimidate neighbors or passersby, the cross burning constitutes protected communication. But the burning cross has also been used as a method of intimidation, to coerce others into complying with the Klan’s demands. For example, if someone burns a cross across the street from a racially mixed couple as a message of intimidation, the state may criminally punish the threat—in the same way that malicious phone calls or other threats of violence may be punished. In sum, the Klan has a First Amendment right

to assemble and share vitriolic sentiments among themselves about minorities, but they may not target others for threats of violence or intimidation.

Another important limit on the free speech principle is the “fighting words” doctrine. If a person accosts another in a face-to-face setting, one does not have a First Amendment right to heap abuse on that person to the point that violence is likely. This doctrine is justified on the same grounds as the “incitement” limit: one does not have a free speech right to incite others to immediate violence. Even here, however, following the *R.A.V. v. St. Paul* (1992) decision, a state that wishes to criminalize fighting words is not permitted to select for special punishment only those fighting words involving disfavored topics (for example, speech involving race or religion). The state, in other words, must draft its regulations carefully.

Furthermore, although hate speech may not generally be punished, in certain special contexts, speech that is hateful may be regulated. For example, in an employment setting certain forms of hateful speech can contaminate a workplace, making it impossible for minorities and women to succeed. An employer is bound under civil rights laws to remove discriminatory speech from the workplace that degrades employees or could reflect a “pattern” of discriminatory behavior affecting the job performance of minorities or women. Workplace prohibitions on verbal sexual harassment, for example, are not generally viewed as violative of free speech principles. Employees who wish to participate in discriminatory communications are still free to do so outside the workplace.

Some have urged that a university setting is sufficiently similar to a workplace to justify similar speech restrictions on campus hate speech. Although controversial, court decisions have generally sided with free speech proponents.

Why Protect Hate Speech That Neither Incites Violence Nor Intimidates?

As noted earlier, the right of certain individuals to spew invective about minorities, religious sects, or unpopular immigrants has proven controversial. Some argue that hate speech should not be protected by the First Amendment because it falsely attributes negative characteristics to an entire group. Hate speech is pernicious because it undermines critical values in a free society—namely the equal right of everyone to participate in society without fear or the built-in headwind of prejudice. The repetition of hatred inevitably influences others in the society, reinforcing prejudice.

Others contend that hate speech targets the most vulnerable groups in the society. It undermines the ability of members of those groups to live without fear and marginalization. Moreover, hate speech interferes with the capacity of different groups in the society to trust members of other groups. As Kent Greenawalt said in a different context, hate speech can have “an insidious effect on social relations” among different groups in the society.

Such arguments have persuaded some countries to regulate certain hateful expressions. For example, the German Constitution forbids the display of Nazi symbols. And Canadian courts have upheld the power of the state to punish extremist expressions of hatred against minority groups.

Given these harms, why do American courts protect hate speech? Speech is powerful, and to pretend otherwise denies the power of ideology to cause armies to march and missiles to fly. Justice Brandeis said that during witchhunts “men feared women and burnt women.” Yet, Brandeis also held that a democratic society requires robust debate to flourish. Those who hold power in society would prefer not to be subject to criticism, derision, or vehement verbal attack. Some civil rights activists also argue that minorities and vulnerable groups especially need a powerful speech right in order to challenge those who are dominant in society.

While recognizing the power of speech to motivate, to anger, and to organize, Justice Holmes also said the test of an idea is its capacity to gain acceptance in the marketplace of ideas. Under this “marketplace” rationale, the answer to pernicious speech is more speech, not punishment of the speaker.

One problem with punishing certain types of communications, of course, is that speech takes many forms. Some is vicious, where the speaker uses slurs to denigrate hated groups. Many people are greatly offended by such speech. However, as Henry Louis Gates has pointed out, sometimes the most forceful denigrating speech about disfavored groups is presented artfully and in an intellectual fashion.

Another problem with punishing hate speech is that there is widespread disagreement as to how to define it. Jokes, political discussion, religious speech, and history can all cast some groups in an unfavorable light. “Speech that denigrates” or that subjects certain groups to derision could be described in very broad terms. One person’s passionately-held core beliefs might be experienced by another as pernicious lies. Moral judgments are not readily categorized as either “true” or “false.” In sum, speech that denigrates on grounds such as race or gender may be outrageous, but beyond fighting words, incitement, or intimidation, most scholars agree that it’s difficult

to define a category of “hate speech” that should not be protected as free speech.

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References and Further Reading

- Bollinger, Lee C. *The Tolerant Society: Freedom of Speech and Extremist Speech in America*. New York: Oxford University Press, 1986.
- Brandenburg v. Ohio*, 395 U.S. 444 (1969).
- Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).
- Cohen v. California*, 403 U.S. 15 (1971).
- Collin v. Smith*, 578 F.2d 1197 (7th Cir., 1978).
- Delgado, Richard, and Jean Stefancic. *Understanding Words That Wound*. Boulder, CO: Westview Press, 2004.
- Gates, Henry Louis. “Let Them Talk.” *The New Republic*, September 20–27, 1993, 37–49.
- Gooding v. Wilson*, 405 U.S. 518 (1972).
- Greenawalt, Kent. *Speech, Crime, and the Uses of Language*. New York: Oxford University Press, 1989.
- Massachusetts General Laws 272, section 98C, on April 30, 1943, c. 223, M.G.L.A. 272 section 98C (2000).
- Massaro, Toni, *Equality and Freedom of Expression: The Hate Speech Dilemma*, William & Mary Law Review 32 (1991): 211.
- Matsuda, Mari J., Charles R. Lawrence, III, Richard Delgado, and Kimberle Williams Crenshaw. *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment*. Boulder, CO: Westview Press, 1993.
- New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).
- Nockleby, John T., *Hate Speech in Context*, Buffalo Law Review 42 (1994): 653–713.
- Post, Robert C., *Racist Speech, Democracy, and the First Amendment*, William & Mary Law Review 32 (1991): 267.
- R. v. Keegstra*, 39 Alta. L.R. (3d) 305, 105 C.C.C. (3d) 19, 48 C.R. (4th) 118, 197 N.R. 26, 184 A.R. 217, 122 W.A.C. 217, [1996] 1 S.C.R. 458.
- Virginia v. Black*, 538 U.S. 343 (2003).

Cases and Statutes Cited

- Beauharnais v. Illinois*, 343 U.S. 250 (1952)
- R. A. V. v. St. Paul*, 505 U.S. 377 (1992)

See also American Civil Liberties Union; Beauharnais v. Illinois, 343 U.S. 250 (1952); Brandeis, Louis Dembitz; Cross-Burning; Fighting Words and Free Speech; Group Libel; Hate Crimes; Hate Crime Laws; Holmes, Oliver Wendell, Jr.; *R. A. V. v. City of St. Paul*, 505 U.S. 377 (1992); Symbolic Speech; Threats and Free Speech

HAYS, WILL H. (1879–1954)

Born in Sullivan, Indiana, Will Hays began his public career as a lawyer and Republican politician in the first decade of the twentieth century. He achieved

fame, however, in the rapidly expanding film industry of the 1920s and 1930s for his role in developing and enforcing the industry’s strict self-censorship code.

The popularity of moving pictures in the early years of the century was unsettling to many concerned over the impact of the cinema on public morals, and by 1920 a number of states and municipalities had established film censorship boards. In order to clean up the industry’s image, as well as to head off potential federal censorship, in 1922 film executives organized the Movie Producers Production and Distribution Association (MPPDA) and asked Will Hays to head the new organization. Hays came very well connected, having been very active in party politics. He had been national chair of the Republican Party and had been elevated to postmaster general by Warren G. Harding in 1921.

When he accepted his new position, Hays promised that Hollywood could police itself. To that end, the Hays Office, as it would come to be identified, developed voluntary guidelines for film content that came to be honored more in the breach than in compliance. In 1927 an official set of “don’ts and be carefals” were issued by the Office to specifically guide producers. The advent of the “talkies,” however, both increased the popularity of the movies and made editing film more expensive. In addition, as the nation entered the Great Depression, producers, anxious to buck up failing revenues, turned soon to the increasing use of sex and violence to attract audiences.

Women’s and religious groups, especially the Catholic Church, became more and more disturbed over film content, and the threat of expanded government censorship loomed. Movie financiers pressured the MPPDA to tighten compliance with the guidelines. Thus in 1930, the Hays Office issued a much stricter production code, which had actually been drawn up by a Catholic cleric. The Code of 1930 went far beyond regulating just sex and violence by also promoting an idealized view of life that embraced strict moral values and conservative ideals. Producers were cautioned, for example, never to encourage sympathy with criminals, and were instructed to portray “correct” standards of life. Audiences were to be protected from explicit scenes of crimes, violence, and sex. The institution of marriage was to be celebrated; profanity, nudity, or suggestive dancing were undesirable; and the character of the clergy must never be maligned. To ensure that producers complied with these standards, the Code required the submission of all scripts to the MPPDA for review.

Between 1930 and 1934, the Hays Office labored to enforce the Code, rejecting nearly 20 percent of the scripts it reviewed. Since the Code contained no enforcement provisions, however, criticism mounted

that the Office still catered too much to the public's taste. When the Catholic Church established the Legion of Decency in 1934, promising to boycott inappropriate films, Hays finally had the club he needed to ensure compliance with the Code. He installed his colleague Joe Breen in Hollywood in an office called the Production Code Administration, which adopted the authority to award a seal of approval for those films that adhered to the Code. Tasked with maintaining the "well-being of the industry," Breen's operation finally reined in the film producers, guaranteeing that what America saw on the screen would reflect an idealized view of American life, avoiding, where possible, political and social issues.

The Code would come to govern film tone, if not content, into the 1960s. Post–World War II social changes significantly altered public tastes and the willingness of both audience and producers to accept Code limitations. Hays resigned from the MPPDA in 1945, forced out by studio chiefs who wanted greater latitude in what they produced. The Supreme Court would further emasculate the rationale for the Code when it declared in *Burstyn v. Wilson* (1952) that motion pictures were protected by the provisions of the First Amendment. Nevertheless, Will Hays played the essential role in what American audiences saw on the silver screen for more than twenty-five years.

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References and Further Reading

- Black, Gregory D. "Hollywood Censored: The Production Code Administration and the Hollywood Film Industry, 1930–1940." *Film History* 3 (1989): 167–89.
- Hays, Will H. *Memoirs*. Garden City, NY: Doubleday, 1955.
- Leff, Leonard J., and Jerold L. Simmons. *Dame in the Kimono: Hollywood, Censorship, and the Production Code from the 1920s to the 1960s*. New York: Grove Weidenfeld, 1990.
- Vaughn, Stephen. "Morality and Entertainment: The Origins of the Motion Picture Production Code." *Journal of American History* 77 (June 1990): 39–65.

Cases and Statutes Cited

Burstyn v. Wilson, 343 U.S. 492 (1952)

See also **Movie Ratings and Censorship**

HAZELWOOD SCHOOL DISTRICT v. KUHLMIEER, 484 U.S. 260 (1988)

In *Hazelwood School District v. Kuhlmeier*, the Court upheld the school district's authority to exercise editorial control over a high school newspaper that

was produced in the journalism class and funded largely by the school board. The student staff members contended that school officials had violated their First Amendment speech rights by deleting pages containing two articles from an issue of the paper. One article described the experiences of three students with pregnancy, and the other discussed the impact of divorce on students at the school. The school principal was concerned that the first article would invade the privacy of the three unidentified students by enabling readers readily to determine their identities, and that its discussion of sexual activity and birth control would be unsuitable for younger students. The principal was concerned that the second article named a particular student and contained negative references to her divorced parents, who had been given no opportunity to respond or object to the article's contents.

Kuhlmeier's five-justice majority distanced itself from *Tinker v. Des Moines Independent Community School District* (1969), which had upheld the students' First Amendment rights to wear black armbands in school in a nondisruptive protest of the Vietnam War. *Tinker* held that "[s]tudents in school as well as out of school are 'persons' under our Constitution," and concluded that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Kuhlmeier* reaffirmed post-*Tinker* Supreme Court decisions which emphasized that "the First Amendment rights of students in the public schools 'are not automatically coextensive with the rights of adults in other settings'" and "must be 'applied in light of the special characteristics of the school environment'." For the four *Kuhlmeier* dissenters, Justice William J. Brennan accused the majority of "abandon[ing] *Tinker*."

Kuhlmeier concluded that

[t]he question whether the First Amendment requires a school to tolerate particular student speech—the question that we addressed in *Tinker*—is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech. The former question addresses educators' ability to silence a student's personal expression that happens to occur on the school premises. The latter question concerns educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school.

School-sponsored expressive activities "may be fairly characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular

knowledge or skills to student participants and audiences.”

Because the school newspaper was not a public forum, school officials could regulate its contents “in any reasonable manner.” *Kuhlmeier* held that “educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.” The decision’s reasonableness test confers considerable discretion on school officials:

It is only when the decision to censor a school-sponsored publication, theatrical production, or other vehicle of student expression has no valid educational purpose that the First Amendment is so ‘directly and sharply implicate[d],’ as to require judicial intervention to protect students’ constitutional rights.

Justice White found the Hazelwood principal’s decision, grounded in pedagogical concerns, reasonable under the circumstances as the principal understood them.

In later First Amendment challenges brought by students, lower courts have applied *Kuhlmeier*’s reasonableness test to uphold exercises of authority by school officials over a wide variety of school-sponsored activities other than school newspapers. In *Henerey v. City of St. Charles* (1999), for example, the Eighth Circuit upheld disqualification from a school election of a high school student who distributed condoms during his campaign, whose slogan was “The Safe Choice.” In *McCann v. Fort Zumwalt School District* (1999), the district court upheld the school superintendent’s refusal to permit the high school marching band to play a song that he believed promoted illicit drug use.

Kuhlmeier demonstrated that the First Amendment Speech Clause provides schoolchildren considerably less protection than it provides adults. In almost all circumstances, official editorial control of a newspaper published outside the public schools would be an unconstitutional prior restraint. Public school officials, however, have considerable leeway to determine the curriculum and regulate improper influences because, as *Kuhlmeier* reaffirmed, “the education of the Nation’s youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges.”

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References and Further Reading

Chemerinsky, Erwin, *Constitutional Law: Principles and Policies*. 2nd ed. New York: Aspen, 2002.

Gardner, Martin R. *Understanding Juvenile Law*. 2nd ed. Charlottesville, VA: LexisNexis, 2003.

Cases and Statutes Cited

Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969)

Henerey v. City of St. Charles, 200 F.3d 1128, 1135–36 (8th Cir. 1999)

McCann v. Fort Zumwalt School District, 50 F.Supp.2d 918 (E.D.Mo. 1999)

See also Children and the First Amendment; Freedom of the Press: Modern Period (1917–Present); Public Forum Doctrines; Public/Nonpublic Forums Distinction

HEARSAY EVIDENCE

The hearsay rule bars admitting at a trial statements that were made out of court if they are offered to establish the facts asserted in such statements. The hearsay bar is thought by many scholars to have its origins in outrage over the admission of hearsay at trials like that of Sir Walter Raleigh, tried for treason in 1603. The primary witness against Raleigh was his alleged co-conspirator, Lord Cobham, who never appeared at trial, but whose out-of-court statements implicating Raleigh were read into evidence. Raleigh’s protests that he “may be massacred by mere hearsay” were ignored, and he was sentenced to death, though later reprieved but confined for years in the Tower of London. The danger raised by this hearsay was that Raleigh had no opportunity to cross-examine Cobham so that the jury could better gauge Cobham’s credibility.

Hearsay admissibility also risks prosecutors creating evidence molded to their liking, evidence used to condemn a man without his being able to challenge its reliability. This danger is vividly illustrated by the hearings of the House Committee on Un-American Activities (HUAC) during the red scare of the late 1940s and early 1950s. HUAC used hearsay and innuendo to accuse defense contractors, college professors, actors, labor organizers, and others of being Communist Party members, ruining their lives and careers with no opportunity to challenge their absent accusers.

Hearsay, especially when it is oral rather than written, is particularly easy to fabricate. One modern danger arises when jailhouse informants or other “stoolies” lie about what they have heard another saying. They lie in the hope of cutting a deal with the prosecutor to testify in exchange for, or even in the simple hope of, a reduced sentence. Significant

numbers of innocent defendants have been convicted throughout the common law world based on such fabrications, resulting in the creation of commissions in Canada and the United Kingdom to recommend ways to protect the innocent from false informant accusations.

Relatedly, the hearsay bar equalizes the power disparity between prosecutor and defense counsel, given the generally greater ease with which the state can track down and interview hearsay declarants relative to those sought by often indigent criminal defendants. At present, the power disparity is especially great in terrorism prosecutions, particularly those done via military commissions, at which hearsay is freely available, including the potential admission of even suspects' involuntary confessions. In certain classes of cases, such as date rape trials, however, it is the defendant who may hold more power than the prosecution. For example, hearsay about a rape victim's "sluttish" reputation may play into gendered stereotypes that portray the alleged victim as simply not believable. "Rape shield statutes" accordingly often prohibit use of hearsay concerning the alleged rape victim's sexual reputation.

In child molestation cases, on the other hand, it is the *exclusion* of hearsay that may disempower already weak children. A child who reports sexual abuse to his mother or teacher may be too terrified to repeat what happened in a courtroom, facing his adult abuser and many adult strangers (those composing the jury).

In continental European inquisitorial systems, judicial fact finders must write opinions identifying why they gave what weight to which evidence, including hearsay, unlike common law jurors, who are largely unaccountable for their verdicts. Inquisitorial trials are also not concentrated, but can occur in recurring episodes across a relatively long time period so that it is easier to do further investigation of the worth of hearsay statements considered at earlier trial stages. Accordingly, hearsay is more freely admissible in the European continent than in the United States. Yet both the European Convention and the European Court on Human Rights limit the availability of criminal convictions based on uncorroborated hearsay.

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References and Further Reading

- Brown, Cynthia, ed. *Lost Liberties: Ashcroft and the Assault on Personal Freedom*. New York: New Press, 2003.
- Choo, Andrew L.T. *Hearsay and Confrontation in Criminal Trials*. Oxford: Clarendon Press; New York: Oxford University Press, 1996.
- Criminal Justice, *Symposium Issue: Crawford and Hearsay: One Year Later*, 20 Criminal Justice (2005): 2.

- Damaska, Mirjan R. *Evidence Law Adrift*. New Haven, CT: Yale University Press, 1997.
- Dwyer, William L. *In the Hands of the People: The Trial Jury's Origins, Triumphs, Troubles, and Future in American Democracy*. New York: Thomas Dunne Books, Saint Martin's Press, 2002.
- Langbein, John H. *The Origins of Adversary Criminal Trial*. Oxford and New York: Oxford University Press, 2003.
- Taslitz, Andrew E. *Rape and the Culture of the Courtroom*. New York: New York University Press, 1999.
- Van Kessel, Gordon, *Hearsay Hazards in the American Criminal Trial: An Adversary-Oriented Approach*, 49 Hastings Law Journal 477 (1998).
- Zimmerman, Clifford E. "From the Jailhouse to the Courtroom. The Role of Informants in Wrongful Convictions." In *Wrongly Convicted: Perspectives on Failed Justice*, edited by Sandra D. Westervelt and John A. Humphrey, 55–76. New Brunswick, NJ: Rutgers University Press, 2001.

See also **Due Process**

HECKLER'S VETO PROBLEM IN FREE SPEECH

Heckling, along with picketing, booing, and other similar forms of expression, often arise when individuals disagree with a speaker's message. Although the First Amendment protects the right of the speaker to convey an unpopular message free from government intervention, so long as the speech does not contain unprotected fighting words, the government may nevertheless be tempted to regulate the speech out of fear that listeners hostile to the message will be disorderly if the speaker is allowed to continue. Harry Kalven Jr. first described this situation as the "heckler's veto" because police action which silences a speaker based on fear that the message may offend listeners essentially allows the listener to "veto" the protected but unwelcome speech.

Although the Supreme Court endorsed the heckler's veto in *Feiner v. New York* (1951), the Supreme Court later held that charging variable parade fees based on the potential presence of crowds hostile to parade participants violated the First Amendment in *Forsyth County v. The Nationalist Movement* (1992). In so holding, the Supreme Court stated that "[s]peech cannot be financially burdened, any more than it can be punished or banned, simply because it may offend a hostile mob." In *Christian Knights of the Ku Klux Klan v. District of Columbia* (1992), the Court resolved the tension between the police's mandate to protect the public and the Ku Klux Klan's First Amendment rights by finding that the threat of violence was not beyond the police's reasonable control so as to justify restricting speech.

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References and Further Reading

- Kalven, Harry Jr. *The Negro and the First Amendment*. Chicago: University of Chicago Press, 1965.
 Kalven, Harry Jr., and Kalven, Jamie, eds. *A Worthy Tradition*. New York: Harper & Row, 1988.

Cases and Statues Cited

- Christian Knights of the Ku Klux Klan v. District of Columbia*, 972 F.2d 365 (D.C. Cir. 1992)
Feiner v. New York, 340 U.S. 315 (1951)
Forsyth County v. The Nationalist Movement, 505 U.S. 123 (1992)

See also ***Feiner v. New York*, 340 U.S. 315 (1951); Fighting Words and Free Speech**

HELMS AMENDMENT (1989)

In the early 1980s, doctors discovered that a previously unknown virus—subsequently named the human immunodeficiency virus (HIV)—that was responsible for a lethal illness was spreading through the San Francisco gay community. The illness, now known around the world as acquired immunodeficiency syndrome (AIDS), resulted in the deterioration of the human immune system to such an extent that those afflicted with it faced a high risk of dying from pneumonia, an illness that is normally overcome by the human body's natural immune system. Medical authorities soon discovered that HIV was a communicable disease that was spread through the commingling of certain body fluids, and that it was increasingly being discovered among individuals of different sexual orientations who lived outside the San Francisco area. This knowledge convinced many health professionals that public health programs designed to control the spread of HIV should be quickly enacted.

Since HIV is transmitted through body fluids, it became obvious that the sharing of unhygienic needles among intravenous drug users was a high-risk activity. Indeed, a 1995 study reported by the National Academy of Sciences states that “[t]he epidemiologic data indicate that the HIV epidemic in this country is now clearly driven by infections occurring in the population of injection drug users, their sexual partners, and their offspring.” By the end of the 1980s, it had become apparent to many in the field of public health that one of the most effective ways to reduce the spread of the HIV virus would be to provide intravenous drug users with free needles. The merits of this idea were strongly reinforced by a 2004 World Health Organization study which explains that “[p]roviding access to and encouraging utilization of sterile needles

and syringes for [intravenous drug users] is now generally considered to be a fundamental component of any comprehensive and effective HIV-prevention programme.”

Yet in a contrary move spearheaded by Senator Jesse Helms (R-NC), the U.S. Congress enacted an amendment in 1989 that prohibited federal funds from being used to support free needle programs for illicit drug users. This controversial policy, which has remained in effect since that time, was supported by lawmakers who thought that free needle programs would promote the intravenous use of illegal drugs in several important ways. First, if the government provides free needles, then one of the costs normally associated with intravenous drug use would have been eliminated. Second, the threat of acquiring the HIV virus by sharing needles acts as a strong deterrent to intravenous drug use. Finally, free needle programs might convey a message—especially to young people who are not yet intravenous drug users—that the government condones the intravenous use of illegal drugs. These arguments, though, have been strongly challenged by critics of the policy.

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References and Further Reading

- Normand, Jacques, David Vlahov, and Lincoln E. Moses, eds. *Preventing HIV Transmission: The Role of Sterile Needles and Bleach*. Washington, DC: National Academy Press, 1995.
 Szalavitz, Maia. “Death Penalty for I.V. Drug Users.” *Salon.com*, 2005. http://www.salon.com/news/feature/2005/03/24/needle_exchange/.
 Verghese, Abraham. *My Own Country: A Doctor's Story*. New York: Vintage Press, 1995.
 World Health Organization. “Effectiveness of Sterile Needle and Syringe Programming in Reducing HIV/AIDS among Injecting Drug Users.” 2004. http://www.who.int/hiv/pub/prev_care/en/effectivenesssterileneedle.pdf.

HELPER, HINTON (1829–1909)

Hinton Helper, a North Carolinian, authored arguably the strongest criticism of slavery in America at the historic moment when the issue coming to the fore. In *The Impending Crisis of the South: How to Meet It*, published in 1859, he argued that slavery was hindering the progress of the South and should be abolished. His book was especially powerful since the author was a white man of southern stock. It was blamed for the massacre of slaveholders at the hands of John Brown. Also, it arguably led to Abraham Lincoln's election in 1860.

Helper wrote in *The Impending Crisis* that slavery was the root cause of “all the shame, ignorance,

poverty, tyranny and imbecility of the South and nothing short of its complete abolition could save the South from falling into the vortex of utter ruin.”

He used not moral argument but rather carefully selected statistics to indict slavery as strangling the productivity of the South, such as that the hay crop of the North was worth far more than the South’s cotton crop and that the North provided disproportionate amounts of manufactured goods and culture to those southern whites who could afford them. He argued that the slavery system disproportionately harmed the poor whites of the South.

Helper viewed blacks with a caustic disdain. Calling for a pure white race, he argued for segregation of the races (even urging the mandatory repatriation of the slaves to Africa). Helper truly is a paradoxical figure in American history; his work led to the liberation of the very African Americans he so loathed. His book is a reminder that ideas can foster social and political change and lead to the redefinition of government’s role in the protection of personal liberties.

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References and Further Reading

Bailey, Hugh C. *Hinton Rowan Helper: Abolitionist Racist*. University: University of Alabama Press, 1965.

HENTOFF, NAT (1925–)

Nat Hentoff is a journalist and author who specializes in civil liberties issues. For several decades he has written a newspaper column on civil liberties that is syndicated in many newspapers. He is also the author of many books on civil liberties, jazz, and political and social issues.

Hentoff was born in Boston in 1925. He graduated from Northeastern University with a B.A. and did graduate work at Harvard University. He was awarded a Fulbright scholarship and studied at the Sorbonne in Paris in 1950. From 1953 to 1957 he was associate editor of *Down Beat*, a jazz magazine. He was a staff writer at *The New Yorker* magazine for twenty-five years.

Hentoff’s books on civil liberties include *The First Freedom: The Tumultuous History of Free Speech in America* (1980), *Free Speech for Me and Not for Thee: How the American Left and Right Relentlessly Censor Each Other* (1992), *Living the Bill of Rights: How To Be an Authentic American* (1998), and *The War on the Bill of Rights and the Gathering Resistance* (2003). He has also written a number of novels for young people, including *The Day They Came to Arrest the Book* (1983), which deals with censorship in a public school.

Hentoff has also published two memoirs, *Boston Boy* (1986) and *Speaking Freely: A Memoir* (1997), which cover many of his experiences and writings related to civil liberties.

One of Hentoff’s major concerns regarding freedom of speech is the tendency of some liberals and leftwing activists to support censorship of ideas they find offensive. His 1992 book *Free Speech for Me and Not for Thee* addresses this issue in detail, citing a number of cases and controversies from the 1980s. He has been a strong opponent of campus speech codes that restrict expression about racial, ethnic, and gender subjects. Hentoff argues that such codes represent content-based restrictions of speech and expression and that such codes are impermissibly vague in defining what is offensive.

In addition to his civil liberties interests, Hentoff has written a number of books on political figures, including former mayor of New York City, John V. Lindsay and pacifist leader A.J. Muste. With respect to jazz, Hentoff was an editor of *Down Beat* magazine, writes newspaper and magazine articles on jazz, has produced a number of recordings, and has written numerous liner notes for albums.

In direct service to civil liberties, Hentoff served on the board of directors of the American Civil Liberties Union and the New York Civil Liberties Union.

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References and Further Reading

- Hentoff, Nat. *Boston Boy*. New York: Knopf, 1986.
———. *The First Freedom: The Tumultuous History of Free Speech in America*. New York: Delacorte, 1980.
———. *Free Speech for Me and Not for Thee: How the American Left and Right Relentlessly Censor Each Other*. New York: HarperCollins, 1992.
———. *Living the Bill of Rights: How To Be an Authentic American*. New York: HarperCollins, 1998.
———. *The Nat Hentoff Reader*. New York: Da Capo Press, 2001.
———. *Speaking Freely: A Memoir*. New York: Knopf, 1997.
———. *The War on the Bill of Rights and the Gathering Resistance*. New York: Seven Stories Press, 2003.

HERBERT v. LANDO, 441 U.S. 153 (1979)

Colonel Anthony Herbert sued the CBS News program “60 Minutes,” producer Barry Lando, and reporter Mike Wallace for libel in a 1973 broadcast. Herbert alleged that the broadcast depicted him as having made false charges of war crimes during the Vietnam War and false claims that he was removed from his command as retaliation. Prior to trial, Herbert’s lawyers asked Lando questions about internal

editorial decisions. Lando's lawyers argued that thought processes and editorial judgments of the news magazine were protected by the First Amendment guarantees of freedom of speech and freedom of the press. A federal district court ruled that Lando should respond, but a federal appeals court ruled that Lando had a privilege not to answer questions about internal deliberations.

The U.S. Supreme Court ruled, six to three, that journalists have no privilege in libel cases to refuse to answer questions about editorial decisions. Justice Byron White said the earlier case, *New York Times v. Sullivan* (1964), and subsequent rulings required that to recover damages, public figures must prove that a news organization had actual, subjective doubts about a story. The subjective proof, the Court said, was part of showing that a news organization acted with actual malice, which means reckless disregard for the truth or falsity of a report. Examination of editorial judgments was necessary, the Court said, in order to find out whether editors and reporters had doubts about a story. Lando and CBS eventually prevailed when the case returned to the lower courts.

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References and Further Reading

Lewis, Anthony, *New York Times v. Sullivan Reconsidered: Time to Return to "The Central Meaning of the First Amendment,"* 83 Columbia Law Review (1983): 603:610–3.

———. *Discovery from Media Defendants in Public Figure Defamation Actions*, 93 Harvard Law Review (1979): 149.

Smolla, Rodney A. *Suing the Press: Libel, the Media & Power*. New York: Oxford University Press, 1986.

Cases and Statutes Cited

New York Times v. Sullivan, 376 U.S. 254 (1964)

See also **First Amendment and PACs; Freedom of Speech: Modern Period (1917–Present); Freedom of the Press: Modern Period (1917–Present); New York Times Co. v. Sullivan, 376 U.S. 254 (1964); **White, Byron Raymond****

HERNANDEZ v. COMMISSIONER OF INTERNAL REVENUE, 490 U.S. 680 (1989)

Hernandez v. Commissioner of Internal Revenue is a leading Supreme Court decision on taxation and non-profit organizations. The case is also important for the deep questions it raises about both the law's treatment of unconventional religious movements and its broader conceptualization of religion itself.

Hernandez arose out of the Internal Revenue Service's (IRS) rejection of charitable deductions claimed by members of the Church of Scientology for payments they made to branch churches for fundamental practices of the church known as "auditing" and "training." The Scientologists contended that the fees, although fixed in amount and required to obtain those services, were similar to other sorts of religious payments whose deductibility the IRS had long allowed, including pew rents, tithes, and mass stipends. The Supreme Court, however, upheld the IRS's determination.

The Court's statutory analysis centered on section 170(c) of the Internal Revenue Code, which allows a deduction for a "contribution or gift" made to a charitable organization. The Court held that, to qualify as contributions or gifts, payments cannot be made as part of a quid pro quo in expectation of a good or service. The fees for "auditing" and "training" were part of a "quintessential quid pro quo" and were not deductible. Moreover, the Court rejected the Scientologists' submission that this analysis is inappropriate to payments made for purely religious benefits.

The Court also rejected several constitutional challenges to the statutory scheme and its administration. It held that the deductibility provision did not violate the Establishment Clause under either the "facial preference" test of *Larson v. Valente* (1982) or the general three-prong *Lemon* test. It also found no violation of the right to free exercise. Finally, the justices sidestepped the case's most sensitive issue by concluding that the factual record before them was insufficiently developed to assess the claim of discriminatory application based on the deductibility of pew rents and the like.

Hernandez did not end the Scientologists' efforts to vindicate their position, as subsequent litigation focused on the discrimination argument that the Supreme Court had bypassed. In 1993, the IRS entered into a surprise settlement allowing the deductions.

Hernandez is important for reasons beyond its holding. It represents one chapter in a worldwide story of efforts to delegitimize Scientology, which detractors have variously accused of being a cult, a scam, or just not a genuine religion, but which has also attracted influential adherents and principled defenders.

More profoundly, *Hernandez* exposed some of the complexities in the law's understanding of religion. Nonprofits law has always included classed churches as "charities." In some respects, though, they more closely resemble "mutual benefit" organizations such as social clubs, and thus payments by believers to their churches—whether part of a formal quid pro quo or not—often look more like club dues than

gifts. Nevertheless, as the Court implicitly recognized in *Walz v. Tax Commission* (1970), in upholding churches' property tax exemptions, the law's assignment of charitable status to all churches rests less on a simple empirical claim than on an intricate and unique set of considerations, including both a respect for religious autonomy and—as ultimately reflected in the IRS settlement with the Church of Scientology—a healthy reluctance to ascribe undue legal significance to the considerable differences among churches in their practices and modes of organization.

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References and Further Reading

- Aprill, Ellen P., *Churches, Politics, and the Charitable Contribution Deduction*, 42 Boston College Law Review (2001): 843.
- Brown, Michael, *Should Germany Stop Worrying and Love the Octopus? Freedom of Religion and the Church of Scientology in Germany and the United States*, Indiana International and Comparative Law Review 9 (1998): 155.
- Dane, Perry, *The Public, the Private, and the Sacred: Variations on a Theme of Nomos and Narrative*, Cardozo Studies in Law and Literature 8 (1996): 15.
- Samansky, Allan J., *Deductibility of Contributions to Religious Institutions*, Virginia Tax Review 24 (2004): 65.

Cases and Statutes Cited

- Larson v. Valente*, 456 U.S. 228 (1982)
- Walz v. Tax Commission*, 397 U.S. 664, 673 (1970)

See also **Church of Scientology and Religious Liberty; Establishment Clause Doctrine: Supreme Court Jurisprudence; Establishment of Religion and Free Exercise Clauses; Free Exercise Clause Doctrine: Supreme Court Jurisprudence; Lemon Test; Walz v. Tax Commission of City of New York**, 397 U.S. 664, 673 (1970)

HERRERA v. COLLINS, 506 U.S. 390 (1993)

In *Herrera*, the Supreme Court held that neither the Eighth Amendment ban on cruel and unusual punishment nor the Fourteenth Amendment due process clause bars the execution of a person convicted in a fair trial who later discovers new evidence to support his claim of innocence.

Ten years after *Herrera* was sentenced to death for killing two police officers, he discovered new evidence suggesting that his brother was actually the murderer. Since *Herrera* had completed his state court appeals, he attempted to present the new evidence in a habeas

corpus proceeding. However, the federal court of appeals refused to stay his execution.

The U.S. Supreme Court refused to grant *Herrera* relief by a vote of six to three. The Court held that a criminal defendant must demonstrate a constitutional defect in his conviction in order to obtain habeas corpus relief and that the conviction and even the execution of an actually innocent defendant did not itself violate any constitutional provision. The Court observed that an innocent person in *Herrera's* position could request clemency from the governor. Finally, the Court concluded that *Herrera's* new evidence did not convincingly establish his innocence in any event.

As a result of *Herrera*, a convicted defendant who obtains new evidence of his or her innocence can obtain relief only if the state courts allow for the belated presentation of new evidence. Recent exonerations of defendants by DNA technology have created more pressure for state courts to allow defendants to present new evidence of innocence.

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References and Further Reading

- Bandes, Susan, *Simple Murder: A Comment on the Legality of Executing the Innocent*, Buffalo Law Review 44 (1996): 501.
- U.S. Department of Justice, National Institute of Justice. *Convicted by Juries, Exonerated by Science: Case Studies on the Use of DNA Evidence to Establish Innocence After Trial*. Washington, DC: U.S. Department of Justice, 1996.

See also **Cruel and Unusual Punishment (VIII); Due Process; Fourteenth Amendment; Habeas Corpus: Modern History**

HESS v. INDIANA, 414 U.S. 105 (1973)

Where the line falls between protected and unprotected speech advocating lawless action depends on the factual context. In *Hess v. Indiana*, the Supreme Court sought to clarify where that line should be drawn.

While clearing a crowd at an antiwar demonstration, a sheriff heard Hess say either "We'll take the fucking street later" or "We'll take the fucking street again," and arrested him for disorderly conduct. Witnesses reported that Hess had stood facing the crowd without appearing to address anyone in particular, and that he had spoken no louder than any other person. The state courts rejected the argument that the First Amendment protected his speech.

The Supreme Court concluded that Hess's statement did not come within any of the narrow classes of unprotected speech. In the circumstances, his utterance could not be considered obscene; neither could it be construed as fighting words, given that he did not direct his statement at any one person. And the statement did not amount to a public nuisance, as Hess had invaded no substantial privacy interests.

Finally, the statement was not an incitement to violence: "[A]t worst," the Court concluded, "it amounted to nothing more than advocacy of illegal action at some indefinite future time." Relying on *Brandenburg v. Ohio* (1969), the court held that such advocacy falls outside the protections of the First Amendment only when, unlike this case, the speaker aims to produce imminent lawless action and the speech is likely to produce that action.

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References and Further Reading

Chemerinsky, Erwin. *Constitutional Law: Principles and Policies*. 2nd ed. New York: Aspen, 2002.
Sunstein, Cass R. *Why Societies Need Dissent*. Cambridge, MA: Harvard University Press, 2003.

Cases and Statutes Cited

Brandenburg v. Ohio, 395 U.S. 444 (1969)

See also **Brandenburg Incitement Test; Speech and Its Relation to Violence**

HESTER v. UNITED STATES, 265 U.S. 445 (1924)

In this case, the plaintiff Hester claimed that his rights under the Fourth and Fifth Amendments were violated when he was convicted of illegally concealing distilled liquor. The two officers who made the arrest witnessed Hester exchanging jugs with another man. When pursued, Hester dropped his jug, and the officers determined that the jug contained moonshine whiskey. The officers then searched the house but did not find any whiskey inside the house. The plaintiff claimed that the evidence of the jug was inadmissible because the officers did not have a search warrant.

The opinion of the Court, written by Justice Holmes, held that there was no illegal search and seizure because Hester himself disclosed the jug when he dropped it in the field. Even though the examination of the jug took place on land owned by Hester's father, the Court ruled that the Fourth

Amendment protection of "persons, houses, papers, and effects" did not extend to open fields. This became the "open fields" doctrine that has been a precedent for numerous cases involving searches on property outside the immediate surrounds of the home. *Oliver v. United States* (1984) relied on this precedent to conclude that a field where marijuana was growing was not a protected space under the Fourth Amendment.

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References and Further Reading

Cases that upheld the "open fields" doctrine: *United States v. Dunn*, 480 U.S. 294 (1987); *California v. Ciraolo*, 476 U.S. 207 (1986); *Florida v. Riley*, 488 U.S. 445 (1989); *California v. Greenwood*, 486 U.S. 35 (1988).
Landmark cases involving wire tapping that reference *Hester v. United States*: *Olmstead v. United States*, 277 U.S. 438 (1928); *Katz v. United States* 389 U.S. 347 (1967).
The Meaning of the Federal Rule on Evidence Illegally Obtained, Yale Law Journal 36 (1927): 36:536–42.
Murchinson, Kenneth M., *Prohibition and the Fourth Amendment: A New Look at Some Old Cases*. Journal of Criminal Law and Criminology 73 (1982): 2:471–532.

Case Studies and Statutes Cited

Oliver v. United States, 466 U.S. 170 (1984)

See also **Search (General Definition)**

HIP-HOP AND RAP MUSIC

No genre of music has a deeper relationship with the law than hip-hop and rap music. No other genre of music, at least since the folk music of the 1960s, has been so explicitly aimed at prevailing social and legal conditions. And certainly no other genre of music has seen so many of its artists end up in legal battles. While it would be beyond the scope of this entry to explain how hip hop has impacted the law and vice versa, two aspects of the relationship deserve special focus.

Hip Hop and Copyright

One issue at the heart of hip hop's survival as a musical form is the relationship between rap music and the copyright laws. As Chuck D from Public Enemy once famously noted, rap is not actually

music, it is rap over music. From the beginning, rappers have avoided making their own music, instead choosing to borrow music from other sources—known throughout the industry as “sampling.” The 1979 classic “Rapper’s Delight,” by the Sugar Hill Gang, contained music from Chic’s disco hit, “Good Times.” And the development of the musical instrumental digital interface (MIDI) in the early 1980s made sampling commercially feasible even for less affluent artists.

Yet the Copyright Act of 1976 poses a significant problem for sampling. It gives musical authors the exclusive rights to perform, display, distribute, and reproduce their work. (In sampling controversies, there can be two different copyrights at issue. The first is the copyright to the musical composition; the second is the copyright to the actual sound recording.) The act prevents unlicensed users from copying protected works to make substantially similar works.

Throughout hip hop’s early development, little attention was paid to copyright law. It was largely ignored by artists and recording companies, who took a catch-me-if-you-can approach to sampling. That, however, quickly changed. For in 1991, Biz Markie was successfully sued for using three words and a short keyboard riff from Gilbert O’Sullivan’s song “Alone Again (Naturally)” on his track “I Need a Haircut.” This decision shocked the hip-hop industry; it seemed to suggest that all digital sampling, no matter how short, was illegal. Since that point, an attitude of extreme caution has replaced the former attitude of utter abandon; hip-hop artists and their production teams now usually pay considerable figures for licenses for all material they use, no matter how short. Most digital sampling controversies are now settled quickly and out of court; the only real issue is what the purchase price of the sample will be.

And because cases have been so quick to settle, the legal questions surrounding sampling have gone largely unresolved. What exactly is the legal test for infringement? Do very minor samples (like arpeggiated chords) constitute infringement? Should the defenses of fair use and *de minimis* use be recognized—and, if so, to what extent? No dominant approach to these questions has yet emerged.

On a larger scale, the conflict between copyright law and the hip-hop industry reflects a growing uneasiness over copyright law more generally. Copyright was traditionally protected precisely because it was thought to encourage artistic and scientific development; the Constitution, for example, gives Congress the power to create copyright protection so as “to promote the Progress of Science and useful Arts.” Yet, increasingly copyright law is being seen as an obstacle—not a means—to creative freedom.

Sampling may be just another example. If sampling had been categorically considered illegal copyright infringement before 1991, many classic hip-hop albums might have never been made. Public Enemy once claimed that, after the flurry of lawsuits began in the early 1990s, it had to change its style significantly to avoid litigation. To many, this demonstrates how overbroad copyright laws can become inconsistent with free speech. (The Supreme Court, however, has held in *Eldred v. Ashcroft* [2003] that copyright laws will generally not be reviewed under the Free Speech Clause.)

Hip Hop and Censorship

Over the past twenty years, there has been significant controversy over hip-hop lyrics that have been perceived as promoting violence, racism, misogyny, drug use, and homophobia. The strongest objections to hip-hop lyrics have been against their proclivity toward violence. Early hip-hop albums reflected the socially conscious soul music of the 1970s from which they came, and so were not particularly inclined toward violence. But with the rise of artists like Ice-T and NWA (and, later, Tupac Shakur and Notorious B.I.G.), hip-hop lyrics began giving detailed, gritty descriptions of violence. Supporters claimed that these descriptions were merely vivid descriptions of the reality black youth faced; opponents claimed that they glorified and encouraged violence. Confrontations were rare but intense. After NWA released the track “Fuck the Police” on its 1989 album, *Straight ‘Outta Compton*, the FBI sent a warning letter to NWA’s record label. When C. DeLores Tucker, the chairwoman on the National Political Congress of Black Women, led a national campaign against violent lyrics in the 1990s, Tupac Shakur attacked her personally on several of the tracks on his critically acclaimed 1996 album, *All Eyez on Me*.

For much of the last decade, the focus has been on what the government should do to discourage violent lyrics. As the Constitution’s free speech clause likely prohibits direct prohibition, those who oppose violent lyrics have sought to impose restrictive labeling and marketing requirements. The regulation movement has supporters on both the political left and right; it was Joseph Lieberman and Hillary Clinton who, along with some Republican senators, introduced the failed Media Marketing Accountability Act of 2001, which would have directed the Federal Trade Commission to prosecute record companies selling offensive albums to minors. This issue, however, has

largely now slipped into the background, as hip-hop album sales continue to rise and legislators' concerns have shifted to other matters.

Of course, there have been other objections to hip-hop lyricism. For a time, the nation's attention was focused on lyrics that were thought to be far too sexually explicit. In the early 1990s, a 2 Live Crew album was declared obscene by a federal district judge, although that decision was eventually reversed by the Court of Appeals. Later, the country's attention turned to lyrics that vilified gay people. Eminem's 2000 album *The Marshall Mathers LP* created a storm of controversy with its gay-disparaging lyrics—a storm that only began to subside after Eminem performed with Elton John, a notable gay performer, at the Grammy Awards. Indeed, it is fair to say that whenever this country has been concerned with the appropriateness of musical lyrics, it has first cast an eye (and a finger) at hip-hop culture. (Another prominent example of this came in 1992, when the presidential candidate Bill Clinton publicly attacked Sister Souljah, a one-time associate of Public Enemy, for having racist hip-hop lyrics.)

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References and Further Reading

- Garnett, Matthew S., *The Downhill Battle to Copyright Sonic Ideas in Bridgeport Music*, *Vanderbilt Journal of Entertainment Law and Practice* 7 (2005): 8:509–23.
- George, Nelson. *Hip Hop America*. New York: Penguin Books, 1999.
- Grand Upright Music v. Warner Bros. Records*, 780 F. Supp. 182 (S.D.N.Y. 1991).
- Kravis, Randy S., *Does A Song By Any Other Name Still Sound As Sweet? Digital Sampling and Its Copyright Implications*, *American University Law Review* 43 (1993): 4:231–75.
- Nimmer, Melville B., and David Nimmer. *Nimmer on Copyright*. New York: Matthew Bender, 2004.

Cases and Statutes Cited

- Eldred v. Ashcroft*, 537 U.S. 186 (2003).
- Pub.L. 105-298, 1998 Copyright Term Extension Act (codified in scattered sections of 17 U.S.C.)

See also **Civil Rights Laws and Freedom of Speech; Hate Speech; Political Correctness and Free Speech; Public Vulgarity and Free Speech**

HISS, ALGER (1904–1996)

Alger Hiss was born in Baltimore, Maryland on November 11, 1904. Articulate, intelligent, and well-bred, Hiss became the celebrated target of the House Un-American Activities Committee (HUAC) in

well-publicized hearings regarding communists in government in 1948. After earning a law degree at Harvard Law School, Hiss went to Washington, D.C. in 1933 as a “New Dealer,” one of a group of young idealistic attorneys who were attracted to government service in the heady, early days of the New Deal. During his tenure with the federal government, which lasted until the late 1940s, he served with the Departments of Agriculture, Justice, and State. He rose through the ranks, eventually serving as an advisor to Franklin D. Roosevelt at the Yalta Conference in 1944 and secretary-general of the United Nations organizing conference at San Francisco in 1947.

During the 1948 HUAC hearings, a disheveled, dumpy former TIME-Life editor, Whittaker Chambers accused Hiss of having been a member of the Communist Party and of engaging in espionage for the Soviets. Hiss responded immediately with stalwart declarations of his innocence. Hiss's testimony, however, became more and more muddled in subsequent appearances before the committee, including a face-to-face confrontation with Chambers. Chambers ultimately produced microfilm reels of stolen State Department documents that had been typed on Hiss's Woodstock typewriter. Hiss was ultimately convicted of perjury in 1951 and served almost four years in prison.

The melodramatic Hiss–Chambers hearings, the first ever televised, added to the growing pervasive fear of the domestic communist menace that gripped the United States in the years after 1945. The image of a civil servant and diplomat, as well-placed, well-educated, and well-respected as Hiss, serving as a Soviet agent magnified the public's sense of the danger that Communism held for U.S. institutions.

Hiss continued to maintain his innocence, carrying on a campaign for vindication until his death in 1996. Most contemporary scholarship, much of it based on the recently released VENONA decrypts of messages of Soviet agents in the United States, supports Chambers's allegations that Hiss was, in fact, a spy for the Soviets.

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References and Further Reading

- Haynes, John Earl, and Harvey Klehr. *VENONA: Decoding Soviet Espionage in America*. New Haven, CT.: Yale University Press, 1999.
- Swan, Patrick A., ed. *Alger Hiss, Whittaker Chambers, and the Schism in the American Soul*. Wilmington, DE: Intercollegiate Studies Institute, 2003.
- Weinstein, Allen. *Perjury: The Hiss-Chambers Case*. New York: Knopf, 1978.
- White, G. Edward. *Alger Hiss's Looking Glass Wars*. New York: Oxford University Press, 2004.

HISTORY AND ITS ROLE IN SUPREME COURT DECISION MAKING ON RELIGION

“No provision of the Constitution is more closely tied to or given content by its generating history than the religious clause of the First Amendment,” wrote Justice Wiley Rutledge at the outset of the Supreme Court’s establishment clause jurisprudence, *Everson v. Board of Education* (1947). Since *Everson*, Supreme Court justices have continued to rely heavily on the history of the early republic to interpret both the establishment and free exercise clauses of the First Amendment. Those justices upholding strict separation and those favoring greater accommodation of religion have used history in markedly different ways, however. Their opinions in religion cases have thus carried on a sophisticated debate about the proper use of history in constitutional interpretation in general.

The Court has drawn on three main sources of historical documentation in interpreting the Religion Clauses: (1) the personal views of founding era statesmen regarding the relationship between the state and religion, (2) the practices of federal and state governments at the time of ratification of the First Amendment, and (3) the textual development of the clauses as reflected in their legislative histories and the common use of their terms in colonial charters and early state constitutions.

Personal Views of Early Statesmen

Following the first free exercise decision, *Reynolds v. United States* (1879), the *Everson* Court located the “generating history” of the religion clause in the Virginia Assessment Controversy of 1785–1786. But *Everson* went further, relying on the ideological expressions of selected statesmen involved to interpret the motivations behind the Religion Clause. Supporters of both strict separation and expansive accommodation have repeatedly returned to this episode, in part because it inspired a monumental treatise on religious freedom by the chief architect of the First Amendment—James Madison’s “Memorial and Remonstrance Against Religious Assessments”—and in part because its temporal proximity to the Constitutional Convention seemed to give it greater relevance to constitutional interpretation. Protesting a bill to tax citizens for the support of a church of their choice or a general fund for clerical education, Madison articulated the sectarian churches’ position and called on the Virginia legislature to abandon all church taxes.

The legislature was convinced and adopted a “Bill for Establishing Religious Freedom,” based on an earlier draft by Thomas Jefferson, which soon led to the disestablishment of the state church.

Although the *Everson* Court ultimately ruled according to a theory of government neutrality toward religious institutions, both the majority and dissent enunciated a rationale for strict separation by expanding on Jefferson’s characterization of the establishment clause as a “wall of separation between church and state.” Jefferson had penned these words in a letter to the Danbury Baptist Association in 1802, but the Court believed the metaphor to be consistent with the result of the Virginia controversy. Noting that Madison and Jefferson “played such leading roles” in the “drafting and adoption” of the First Amendment, the Court offered citations from their writings as evidence for both the historical “context” and modern meaning of the religion clause.

Critics of *Everson*’s separationist theory, which gained ascendancy over the following generation, objected that historical evidence ought to be more rigorously tied to the ratification of the First Amendment or to the fact patterns of each particular case at hand. They pointed out that Jefferson’s opinions about the meaning of the First Amendment had only a tenuous relationship to constitutional interpretation because Jefferson himself did not take part in the drafting or adoption of the Bill of Rights. To the extent that Jefferson’s opinions were germane, the critics also questioned why his private correspondence should receive greater credence than his public comments or official acts that allowed for practices now banned by the Court’s “wall of separation.” Madison, on the other hand, was a central player in the passage of the First Amendment, but his own proposed wording for the religion clause did not secure Congress’s full approval. It therefore seemed presumptive to ascribe to the First Congress and the states’ ratifying chambers the views Madison had expressed during an earlier controversy in a single state.

Policies of Early Governments

Accommodationists argued that it would be more appropriate to reconstruct the import of the First Amendment by evaluating the official actions of founding leaders while they served in governmental positions. Implicit in this emphasis was a theory that official acts should be given greater interpretative weight because they represent not just the personal conviction of one individual, but the result of the entire government’s democratic deliberation. It also

treated early office holders as interpreters of the Constitution, by which their acts, if legally unchallenged, could indicate “long-standing practice” or serve as instructive democratic precedents in the absence of judicial ones.

Justice Stanley Reed presented the first challenge to the separationists’ use of history in his dissent from *McCollum v. Board of Education* (1948), which barred public schools from offering “released time” for optional religious instruction. While Madison’s “Remonstrance” concerned taxation, a more precise inquiry into public school practices revealed that Jefferson himself had designed a similar program to facilitate student worship when he was rector of the University of Virginia and Madison was a trustee. In the succession of cases banning Bible reading and prayer at public school events, religious symbols on public property, and various forms of aid to religious schools, dissenters quoted many presidents calling the country to prayer in their inaugural ceremonies and Thanksgiving Day proclamations in order to demonstrate the longstanding place of religious commemorations in the civic life of the nation. They also provided evidence that the federal government regularly allocated funds in the nineteenth century to support church schools among the Native Americans.

Faced with these challenges, justices favoring stricter separation reached back further into history, conjuring up the religious strife and persecution of sectarians in Europe that brought many settlers to America’s shores. It was the overarching purpose of the First Amendment to avoid these social evils, they argued, in decisions such as *Engle v. Vitale* (1962) and *Abington v. Schempp* (1963). Thus, the religion clause was to be interpreted in light of possible discrimination in contemporary society, not merely in light of the nation’s early political consensus.

Accommodationists, however, insisted that historical anecdotes should only be instructive if they hew closely to the factual patterns under review. When *Locke v. Davey* (2004) permitted a state to exclude a student of theology from an otherwise unrestricted college scholarship program after citing Virginia’s resolution to the assessment controversy, Justice Scalia contested that the scope of Madison’s argument must be limited to the case that was at hand: Madison convinced the Virginia legislature to abandon a state support program specifically allocated for clerical education, but the Virginians still might have considered it a denial of free exercise to exclude only clergy from generally available state assistance.

Emphasis on governmental policies in the founding era also allowed the Court to take the practices of the states and federal government more systematically into its purview. *Walz v. Tax Commission* (1970), for

example, declined to invalidate tax exemptions for religious groups after acknowledging that most states and the federal government had granted such exemptions as soon as they established tax codes.

Marsh v. Chambers (1983) rested its decision to allow legislative prayer on evidence that the Constitutional Convention and First Congress themselves convened with prayer, a practice emulated by the states. Because the First Congress passed a bill providing for chaplains to open all legislative sessions with prayer just three days before the House resolved the final wording for the First Amendment, the Court reasoned that the authors of the establishment clause could not have intended it to ban prayer from government assemblies.

Critics of this approach have claimed that even the First Congress and early presidents should not be trusted to have consistently abided by the constitutional clauses they authored. But for the *Marsh* majority, the close convergence of relevant legislation with the passage of the First Amendment created a moment when deference to the legislature’s capacity for constitutional interpretation ought to be at its height.

Legislative Histories and Textual Comparisons

More recently, several justices have advocated a thorough revision of the Court’s objective in religion cases after considering the legislative history of the First Amendment and the significance of its terms in other legal documents from the eighteenth century.

Although Madison had been characterized as an absolute separationist since *Everson*, the House report for the First Congress showed that his proposed language for the religion clause would have prohibited the establishment of only a “national religion.” An early Senate version, meanwhile, barred only the preference of one sect over another. At the state level, Virginia’s conclusions about the proper relation between church and state were not universally accepted. Three New England states maintained established state churches for decades after ratifying the First Amendment. Justice Rehnquist concluded from this evidence that those legislators who ratified the establishment clause understood it to bar only the federal government from officially advancing one church over another or from interfering with state church establishments. Insofar as the religion clause had been incorporated by the Fourteenth Amendment, he argued in his *Wallace v. Jaffree* (1985) dissent, all governments had the responsibility to refrain from

advancing one religion over another, but they were not bound to remain neutral between religion and irreligion.

Defenders of the Court's "neutrality" jurisprudence countered this revisionist history of the establishment clause in *Lee v. Weisman* (1982) by arguing that since Congress did not settle on either Madison's or the Senate's version, the First Amendment must have been meant to prohibit governmental advancement of "religion" in general. But since the only documented reasons for rejecting Madison's language were even stronger reservations about protecting the prerogatives of the states, the *Wallace* dissenters maintained that Madison's intention was implicit in the final result.

Like Rehnquist's "non-preferentialism," the "non-coercion" standard that Justice Kennedy advanced in *County of Allegheny v. ACLU* (1989) would have abandoned attempts to divine a line between the secular and religious. Instead, guided by Madison's interpretation of the religion clause during the House debate, the Court would simply ensure that government not "compel men to worship God in any manner contrary to their conscience." When Justice Kennedy included peer pressure as a form of coercion to ban prayer at public school events, however, Justices Scalia and Thomas argued that a historically accurate conception of compulsion necessarily included the "force of law and the threat of penalty."

After *Employment Division v. Smith* (1990) limited the meaning of the free exercise clause to a protection against racial discrimination, proponents of greater accommodation called for reconsideration on the basis of a comparative reading of the First Amendment with "free exercise" clauses in colonial charters and state constitutions. Justice O'Connor's dissent in *City of Boerne v. Flores* (1997) marshaled the state provisions behind an argument that the state ratifying chambers and congressional representatives would have understood "free exercise" to exempt religiously motivated conduct or scruples from generally applicable laws. Noting that many state constitutions included provisos limiting free exercise when the conduct disturbed the "public peace or safety," the accommodationists reasoned that these provisos would have been unnecessary unless the concept of "free exercise" already embraced exemptions from generally applicable regulations. But the majority, basing its position on *Reynolds*, refused to consider that the state provisions could have determined the meaning of the term "free exercise" for the First Amendment. Justice Scalia, the author of *Smith*, contended that the states' free exercise clauses proved only that religious exemptions were permissible, not mandated.

Religion cases have inspired Supreme Court justices to apply more and more refined historical analyses to the constitutional questions that they have faced since *Reynolds* and *Everson*. It is apparent, however, that those opinions challenging the doctrine of *Reynolds* and *Everson* on historical grounds have rarely garnered a majority. Although the Court finds history a ready rhetorical aid for its decisions, history is seldom dispositive. When historical evidence from the Founding Era is in conflict with intervening judicial precedents, a persistent majority in religion cases has shown that the Court prefers to place authority in its own precedents, maintaining its freedom to adapt to contemporary situations.

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References and Further Reading

- Hamburger, Philip, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 *George Washington Law Review* 1992: 915–48.
 ———. *Separation of Church and State*. Cambridge, MA: Harvard University Press, 2002.
 Howe, Mark DeWolfe. *The Garden and the Wilderness: Religion and Government in American Constitutional History*. Chicago: University of Chicago Press, 1965.
 McConnell, Michael, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 *Harvard Law Review* (1990): 1409–517.
 Witte, John, Jr. *Religion and the American Constitutional Experiment: Essential Rights and Liberties*. 2nd ed. Boulder, CO: Westview Press, 2005.

Cases and Statutes Cited

- Abington Township School District v. Schempp*, 374 U.S. 203 (1963)
City of Boerne v. Flores, 521 U.S. 507 (1997)
County of Allegheny v. A.C.L.U., 492 U.S. 573 (1989)
Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990)
Engle v. Vitale, 370 U.S. 421 (1962)
Everson v. Board of Education of the Township of Ewing, 330 U.S. 1 (1947)
Illinois ex rel. McCollum v. Board of Education, 333 U.S. 203 (1948)
Lee v. Weisman, 505 U.S. 577 (1992)
Locke v. Davey, 540 U.S. 712 (2004)
Marsh v. Chambers, 463 U.S. 783 (1983)
Reynolds v. United States, 98 U.S. 145 (1879)
Wallace v. Jaffree, 472 U.S. 38 (1985)
Walz v. Tax Commission of the City of New York, 397 U.S. 664 (1970)

See also Concept of "Christian Nation" in American Jurisprudence; Establishment Clause (I): History, Background, Framing; Free Exercise Clause (I): History, Background, Framing; Judicial Proceedings and References to the Deity; Religion in "Public Square" Debate; Religious Liberty under Eighteenth-Century State Constitutions

**HOFFA v. UNITED STATES,
385 U.S. 293 (1966)**

“The risk of being overheard by an eavesdropper or betrayed by an informer . . . is probably inherent in the conditions of human society. It is the kind of risk we necessarily assume whenever we speak.” Notorious union leader Jimmy Hoffa assumed that risk by telling another Teamsters official, Edward Partin, his plans to influence a federal criminal jury. Hoffa did not know that Partin was a paid government informant.

In a six-to-one decision, the Supreme Court held that criminal defendants have no constitutionally protected interest in a conversation with a secret government informant. Despite the government’s obtaining the same information that would otherwise be available through a “bug,” thus requiring a warrant, the Court found that one necessarily assumes the risk that friends may become traitors.

Dismissing Hoffa’s attack on the use of government informants generally, the Court noted that informants often provide essential evidence that otherwise may be difficult or impossible to obtain. Because this information is voluntarily given by suspects, the Court dismissed the idea that such statements are coerced. Additionally, although informants may have motives to lie (such as monetary rewards or promises of leniency in prosecution), vigorous cross-examination is an adequate remedy.

Hoffa paved the way for “surreptitious recording” of such conversations between government informants and suspects. If the informant can testify without a constitutional violation, then it follows that a recording of the conversation (more accurate than an informant’s memory) should also be admissible.

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References and Further Reading

Kamin, Sam, *The Private is Public: The Relevance of Private Actors in Defining the Fourth Amendment*, 46 Boston College Law Review (2004): 83.

Katz v. United States, 389 U.S. 347 (1967).

United States v. White, 401 U.S. 745 (1971).

See also **Electronic Surveillance, Technology Monitoring, and Dog Sniffs; Wiretapping Laws**

**HOLLAND v. ILLINOIS,
493 U.S. 474 (1990)**

The Sixth Amendment right to an *impartial* jury in a criminal trial is a fundamental protection. An impartial jury has been interpreted by the courts as being comprised of a fair cross section of individuals from

the community in which the crime occurred. A fair cross section is applied to the venire, not the jury. In *Batson v. Kentucky* (1986), the Supreme Court held that the prosecutor violated the Equal Protection Clause by using peremptory challenges to remove members of the defendant’s race from the venire.

During jury selection in *Holland v. Illinois*, the prosecutor, using peremptory challenges, struck two black venire members from the jury. Holland (a white man) objected to the peremptory challenges, claiming a Sixth Amendment violation on the basis of a systematic exclusion of jury members based on their race. The Court asserted that this case did not present an equal protection issue because Holland was not black, and his “claim would be just as strong if the object of the State’s exclusion of jurors had been . . . any other identifiable group.”

An impartial jury, not a representative jury, is assembled from a fair cross section venire. The defense argument, that the fair cross section requirement constitutes a *representative jury*, is an argument that the Constitution does not support. “[T]he constitutional goal of ‘an impartial jury’ would positively be obstructed by a petit jury fair-cross-section requirement, which would cripple the peremptory challenge device.”

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References and Further Reading

Swain v. Alabama, 380 U.S. 202 (1965).

Taylor v. Louisiana, 419 U.S. 522 (1975).

Cases and Statutes Cited

Batson v. Kentucky, 476 U.S. 79 (1986)

See also **Fourteenth Amendment**

**HOLMES, OLIVER WENDELL, JR.
(1841–1935)**

Although he enjoys reputation as a great civil libertarian, primarily because of his position on free speech, Oliver Wendell Holmes’s overall posture in this area is somewhat mixed. The son of a prominent Boston family, Holmes went to Harvard College, served with distinction during the Civil War, and then attended Harvard Law School. He disliked legal practice, however, and managed to earn a living as an editor, writing essays on history and jurisprudence for the *American Law Review* and editing a new edition of James Kent’s *Commentaries on American*

Law. He made his name, however, with *The Common Law* (1881), which has remained one of the most influential treatises in Anglo-American law ever since. After a brief stint teaching at Harvard Law School, he accepted an appointment to the Supreme Judicial Court of Massachusetts, and by 1901 sat as chief justice on that bench. The following year Theodore Roosevelt named him to the U.S. Supreme Court, where he served for thirty years.

During his two decades on the Massachusetts high court, Holmes earned a reputation as a mild progressive, primarily because he believed in judicial deference to legislative policymaking and because he did not share the antiunion sentiments of his colleagues. In one of the few civil liberties cases decided during his tenure, *McAuliffe v. New Bedford* (1892), Holmes upheld the right of a township to discharge a police officer for undesirable political activity. “The petitioner may have a constitutional right to talk politics,” Holmes wrote, “but he has no right to be a policeman.” In *Commonwealth v. Davis* (1895), the Court upheld a prohibition against unlicensed speech making on the Boston Common. For Holmes, “for the legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house.”

Once on the Supreme Court, Holmes gained some renown among progressives for insisting that in matters of economic policy, judges ought to defer to the legislature. In one of his most famous opinions, a dissent in *Lochner v. New York* (1905), he noted that the case had been decided by his colleagues “upon an economic theory which a large part of the country does not entertain.... The Fourteenth Amendment does not enact Mr. Herbert Spencer’s Social Statics.” Throughout his career Holmes upheld the right of legislatures and not courts to determine policy, but he did so from the viewpoint of a skeptic. He did not care much about economic policy, believing that in the long run it made little difference. Every sensible man, he told a friend, “knows that the Sherman law is damned nonsense, but if my fellow citizens want to go to hell, I am here to help them—it’s my job.”

Holmes’s early opinions in civil liberties were mixed, and he was not part of the small group centered around Justice John Marshall Harlan that supported minority rights. In *Bailey v. Alabama* (1911), the Court invalidated a state peonage law that had reduced some African Americans practically to a state of slavery. Holmes saw no problem with the state providing criminal penalties for a breach of a labor contract, implying that black workers were shiftless and often disappeared after accepting an advance

against wages. He reversed his position somewhat in *United States v. Reynolds* (1914), invalidating a comparable practice, the criminal surety arrangement where people could work off fines for minor offenses. Because this practice applied to minors and people with little intelligence, it went too far, but he did not join the Court’s opinion relying on the Thirteenth Amendment. Holmes also displayed little sympathy for the rights of aliens, insisting that they were in the United States at the sufferance of Congress, which had plenary power over immigration, and therefore Congress could impose any limits it wanted on aliens.

Holmes wrote his first speech opinion in *Patterson v. Colorado* (1907), Holmes took a traditional approach, relying as did all American courts at that time on the writings of Sir William Blackstone, who had argued in his *Commentaries* that the right of free speech precluded prior restraint (that is, the government could not stop a person from speaking or publishing ideas), but the law could punish speakers and writers if their expressions tended to harm the public welfare. In *Patterson*, Holmes followed Blackstone’s analysis. Thomas Patterson, a Democratic U.S. senator from Colorado and a newspaper publisher, had written a series of scathing editorials ridiculing the state supreme court for its role in overturning a referendum giving Denver home rule. The Republican state attorney general brought criminal contempt charges against Patterson on behalf of the court, which in turn fined him and his company \$1,000, without allowing him to prove truth as a defense.

Patterson appealed, but Holmes, speaking for the Court, rejected all of his arguments. The First Amendment, Holmes wrote, “prevents all previous restraints upon publication,” but allows “the subsequent punishment of such as may be deemed contrary to the public welfare.” Holmes also dismissed the notion of truth as a defense, an idea that had supposedly been part of American jurisprudence ever since the Zenger case in colonial times. “The preliminary freedom extends to the false as to the true; the subsequent punishment may extend as well to the true as to the false.” In subsequent speech cases before and immediately after World War I, the Court adhered to the Blackstonian view as expounded by Holmes.

In the first postwar case, *Schenck v. United States* (1919), the secretary of the Philadelphia Socialist Party had been indicted for urging resistance to the draft. He had sent out circulars condemning conscription as despotic and unconstitutional and calling on draftees to assert their rights and refuse induction. Under the terms of the Espionage Act, Schenck had urged unlawful behavior; but did the Constitution’s guarantee of free speech protect him? Holmes

attempted to develop a standard based on the common law rule of proximate causation, and he took a fairly traditional view of speech as a limited right. One could not, he pointed out, falsely shout “Fire!” in a theater. In a famous passage, Holmes attempted to define the limits of speech:

The question in every case is whether the words used are used in such circumstances and are of such a nature to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war, many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and no Court could regard them as protected by any constitutional right.

The “clear and present danger” test became the starting point for all subsequent free speech cases, and within a week, the Court sustained two other convictions under this rule. In *Frohwerk v. United States* (1919), a German-language newspaper had run articles attacking the draft and challenging the constitutionality of the war, whereas in *Debs v. United States* (1919), Holmes accepted a jury finding that in a militant antiwar speech, Debs had intended interference with mobilization.

The three decisions, as well as the clear and present danger test, upset defenders of free speech, especially because they had come from a man they believed to be an ardent libertarian. Legal scholars such as Zechariah Chafee, Jr., Ernst Freund, and others attacked Holmes for his insensitivity to the larger implications of free speech. In an influential article (later expanded into a book), “Free Speech in the United States,” Chafee insisted that the framers of the First Amendment had more in mind than simple censorship. They intended to do away with the common law of sedition and make it impossible to prosecute criticism of the government in the absence of any incitement to law breaking. In none of these three cases could one argue that the defendants had been attempting to incite active law breaking.

Holmes, stung by this criticism, agreed to meet with Chafee. The Harvard professor convinced Holmes that free speech served broad social purposes and that the national interest would suffer more from restrictions on speech than from some alleged and vague dangers posed by unpopular thought. Moreover, through a clever, if somewhat inaccurate reading of history, Chafee convinced Holmes that his phrase “clear and present danger” had not only historical roots, but actually was very speech protective. Chafee’s missionary work bore fruit at the next

term, when Holmes, along with Louis D. Brandeis, began reformulating the clear and present danger test.

In *Abrams v. United States* (1919), the defendants had distributed pamphlets in Yiddish and English criticizing the Wilson administration for sending troops to Russia in the summer of 1918. The government had no way to prove that such leaflets actually hindered the war with Germany, but a lower court judge found that they *might* have caused revolts and strikes and thereby diminished the number of troops available to fight the Germans. Seven members of the Court, led by Justice John H. Clarke, agreed that the government had provided sufficient proof to support this charge and that the conviction could be sustained under the *Schenck* test of clear and present danger.

Both Holmes and Brandeis disagreed, and in an eloquent dissent, Holmes limned one of the great defenses of free speech. The “silly leaflets” hardly posed a danger to society, and the fact that the ideas expressed were unpopular or even considered dangerous made no difference:

When men have realized that time has come to upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment.

Holmes’s dissent in the *Abrams* case is often seen as the beginning of the Court’s concern with free speech as a key right in democratic society, and it put forward the notion of democracy resting on a free marketplace of ideas. Some ideas might be unpopular, some might be unsettling, and some might be false. But in a democracy one had to give all ideas an equal chance to be heard, in the belief that the false, the ignoble, and the useless would be crowded out by the right ideas, the ones that would facilitate progress in a democratic manner. Only if society took the guaranty of the First Amendment seriously could that happen.

Holmes’s theory, often dubbed as “the marketplace of ideas,” is a negative view, and reflects the jurist’s basic skepticism. One did not know whether any one idea was true or false, good or bad, so let the people fight it out by words, and the best idea would win. Not until Brandeis’s opinion in *Whitney v. California* (1927) did someone come up with a positive view of First Amendment protection, namely, that free speech was an integral part of a citizen’s duty in a democratic society.

Holmes also receives high marks in the area of criminal justice. In *Silverthorne Lumber Company v. United States* (1920), two men had been arrested after indictment by a grand jury, and the Justice Department, without a warrant, then ransacked their office, removing books, papers, and other documents. Holmes, writing for the Court, branded the government's action an "outrage" and "without any shadow of authority," and blocked any use of the illegally seized documents by the prosecution. Holmes insistence that the materials "shall not be used at all" expanded the exclusionary rule that had first been enunciated in *Weeks v. United States* (1914).

The government's use of new technology, listening in on private telephone conversation through a tap to catch criminals, received the approval of a bare majority of the Court in *Olmstead v. United States* (1928). Holmes joined in the more famous dissent by Brandeis, in which Brandeis laid out the idea of a constitutionally protected right to privacy, but added his own short dissent to state how the practice disgusted him, calling wire tapping "a dirty business."

Holmes also had the satisfaction of seeing one of his dissents adopted by the Court during his tenure. At the time the federal courts exercised almost no supervision over the practices of state courts in criminal trials. The Fourth, Fifth, and Sixth Amendments were still held not to apply to the states. In *Frank v. Mangum* (1915), the Court, over a vigorous dissent by Holmes, refused to review the case of Leo Frank of Georgia, where a lynch mob stood outside the courtroom threatening the jury. In *Moore v. Dempsey* (1923), however, Holmes speaking for the Court overruled the earlier case, and held that federal courts should hear appeals of cases in which due process of law, which did apply to the states through the Fourteenth Amendment, had been violated by mob violence or intimidation.

But the Holmes opinion that has darkened his reputation is his brief and almost brutal approval of forced sterilization in *Buck v. Bell* (1927). The eugenics movement had gained enormous popularity in the country, and a number of states had passed laws requiring the sterilization of mental incompetents in an effort to "improve" the race. The test case arose from Virginia, and involved eighteen-year-old Carrie Buck, who had become pregnant after a rape. The family she lived with had committed her to a state institution, and its director decided to use Buck to test the constitutionality of the law. At the trial, the state presented witnesses to prove Carrie's feeble-mindedness, and one person described the family as part of the "shiftless, ignorant and worthless class of anti-social whites." Neither Carrie, her mother Emma,

nor her daughter Vivien were, according to the charges "normal."

Speaking for an eight-to-one Court (only Justice Pierce Butler dissented), Holmes made short shrift of the defense argument. He dismissed the equal protection claim as "the usual last resort of constitutional arguments," and cited only one case in support of upholding the sterilization law, *Jacobson v. Massachusetts* (1905), which endorsed compulsory vaccination of school children. He wrote:

We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange indeed if it could not call upon those who already sap the strength of the State for these lesser sacrifices. . . . Three generations of imbeciles are enough.

Although Holmes became the darling of eugenics supporters for this opinion, the movement faded with the rise of Nazism in the 1930s, and the case has had a bad odor about it ever since. Critics of Holmes constantly point to this opinion as a "true" indicator of his so-called liberalism, and Catholic scholars in particular have attacked him for falling into the error of abandoning natural law for positivism. But the worst aspect of the case is that years later it turned out that there never had been three generations of imbeciles. The Buck women had been shy and abused, but had normal intelligence.

Holmes continues to be one of the most written about members of the Court, as much if not more for his colorful life and elegant writing style than for his jurisprudence. Although we remember such phrases as "clear and present danger," "fire in a crowded theater," and "a dirty business," these epigrams did little to guide lower courts in explicating issues arising from the Bill of Rights. Holmes caught the popular imagination, but is rarely cited today. Brandeis actually worked out usable theories of free speech and privacy, and these theories helped shaped the jurisprudence of the twentieth century.

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References and Further Reading

- Bickel, Alexander M., and Benno C. Schmidt, Jr. *History of the Supreme Court of the United States: The Judiciary and Responsible Government, 1910–1921*. New York: Macmillan, 1984.
- Chafee, Zechariah, Jr. *Free Speech in the United States*. New York: Atheneum, 1969.
- Frankfurter, Felix. *Mr. Justice Holmes and the Supreme Court*. Cambridge, MA: Harvard University Press, 1938.
- Holmes, Oliver Wendell. *The Mind and Faith of Justice Holmes: His Speeches, Essays, Letters, and Judicial Opinions*, selected and edited, with a new preface and

afterword by Max Lerner. 2nd ed. New Brunswick, NJ: Transaction Books, 1988.

Polenberg, Richard. *Fighting Faiths: The Abrams Case, The Supreme Court, and Free Speech*. New York: Viking, 1987.

White, G. Edward. *Justice Oliver Wendell Holmes: Law and the Inner Self*. New York: Oxford University Press, 1993.

Cases and Statutes Cited

Abrams v. United States, 250 U.S. 616 (1919)

Bailey v. Alabama, 219 U.S. 219 (1911)

Buck v. Bell, 274 U.S. 200 (1927)

Commonwealth v. Davis, 162 Mass. 510 (1895)

Debs v. United States, 249 U.S. 211 (1919)

Frank v. Mangum, 237 U.S. 309 (1915)

Frohwerk v. United States, 249 U.S. 204 (1919)

Jacobson v. Massachusetts, 197 U.S. 11 (1905)

Lochner v. New York, 198 U.S. 45 (1905)

McAuliffe v. New Bedford, 155 Mass. 216 (1892)

Moore v. Dempsey, 261 U.S. 86 (1923)

Olmstead v. United States, 277 U.S. 438 (1928)

Patterson v. Colorado, 205 U.S. 454 (1907)

Schenck v. United States, 249 U.S. 47 (1919)

Silverthorne Lumber Company v. United States, 251 U.S. 385 (1920)

United States v. Reynolds, 235 U.S. 133 (1914)

Weeks v. United States, 232 U.S. 383 (1914)

Whitney v. California, 274 U.S. 357 (1927)

HOMOSEXUALITY AND IMMIGRATION

Like many areas of American law, immigration law has witnessed a transformation over time from being less to more protective of the rights of sexual minorities as our conception of what constitutes a legitimate reason to deny a person entry into our country has evolved. Ever since the first federal immigration law was enacted in 1875, the United States has based its decisions on whether to admit or expel noncitizens on whether it views such individuals as fit to be included within American society. Hence, foreigners convicted of particularly heinous crimes have always been deemed “undesirable” under our immigration law. Beyond criminality, psychological infirmity has also long been a factor rendering some ineligible for admission, in part because of its relationship to criminal behavior. Thus, noncitizens who admitted engaging in same-gender sexual relations were excluded under our immigration law because they were viewed as suffering from a mental disorder rendering them unfit for admission to our polity, which the 1967 Supreme Court affirmed in *Boutilier v. Immigration and Naturalization Service*. When modern science removed homosexuality from its roster of psychological ills, the immigration bar against gays and lesbians

was effectively lifted; no longer could they be barred solely based on their sexual orientation.

Since then, gay and lesbian noncitizens have sought and gained protection through two primary channels involving favorable readings of existing law: first, by being admitted as refugees under our asylum law, which is designed to protect noncitizens from political persecution by their home governments; and second, by being allowed to accompany their same-gender partners who have been admitted as nonimmigrants. In 1990, the Board of Immigration Appeals in *In re Toboso-Alfonso* recognized that homosexuals could constitute a “particular social group” worthy of asylum status to protect them from official persecution in their homeland. In addition, gay partners of nonimmigrants have been allowed to accompany them, which was reaffirmed in 2001 by a State Department directive reminding U.S. consular posts abroad of this option.

These two specific protections for homosexual noncitizens, however, have not led to a more general acceptance of gays and lesbians under our immigration law. Notwithstanding the narrow admissibility granted same-gender partners of nonimmigrants, same-gender foreign couples, as well as partners of U.S. citizens, are prohibited from immigrating to the United States in the way that heterosexual spouses are, even if another country legally recognizes same-gender marriages. In its 1982 ruling in *Adams v. Howerton*, the Ninth Circuit Court of Appeals upheld the traditional reading given to the definition of “spouse” as applying to heterosexual unions only. Congress effectively codified the *Adams* decision by passing the federal Defense of Marriage Act of 1996, which specifically defines “marriage” as the union between a man and a woman, in turn similarly restricting the immigration law’s definition of “spouse.” Time will tell whether recent state and local initiatives to expand the definition of marriage to include unions between same-gender partners translates into a similar liberalization of federal laws, including U.S. immigration law.

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References and Further Reading

Murdoch, Joyce, and Price, Deb. *Courting Justice: Gay Men and Lesbians v. the Supreme Court*. New York: Basic Books, 2001.

Romero, Victor C., *The Selective Deportation of Same-Gender Partners: In Search of the Rara Avis*. University of Miami Law Review 56 (2002): 537–600.

Scaperlanda, Michael A., *Kulturkampf in the Backwaters: Homosexuality and Immigration Law*, Widener Journal of Public Law 11 (2002): 475–514.

Cases and Statutes Cited

Adams v. Howerton, 673 F.2d 1036 (9th Cir. 1982)
Boutillier v. Immigration and Naturalization Service,
387 U.S. 118 (1967)
In re Toboso-Alfonso, 20 I. & N. Dec. 819 (B.I.A. 1990)

See also **Aliens, Civil Liberties of; Sex and Immigration**

HOOVER, J. EDGAR (1895–1972)

J. Edgar Hoover, first head of the Federal Bureau of Investigation (FBI), is recognized for the creation of the first nationally organized federal crime bureau, begun in 1924. Since his death in 1972, Hoover's actions with regard to civil rights and liberties have come under greater scrutiny. But many scholars have come to believe that despite his questionable reputation, Hoover's actions reflect more of who he was and his own personal principles than any kind of malevolent or vindictive motive-driven man that his public may have seen him to be. Nevertheless, whatever his motivations, as director of the FBI he often had very little regard for the civil liberties of American citizens.

Hoover's career began during World War I, when he was hired by the Justice Department's Enemy Alien Bureau to help process the arrest of enemy aliens. After the war, Attorney General A. Mitchell Palmer put Hoover in charge of investigating radicals. He was a key player in the red scare and the Palmer raids of 1919–1920, which led to the arrest of thousands of socialists, labor organizers, aliens, radicals, and social reformers. Subsequently, Palmer and the Justice Department were discredited because of their massive violations of civil liberties, and the Radical Division of the Justice Department was shut down. Hoover, however, stayed in the Department and moved to the Bureau of Investigation in 1922. Attorney General Harry Daugherty appointed Hoover assistant to the director of this new bureau. Daugherty, friend and ally to then-President Harding, was impressed by Hoover's knowledge of the president's political opponents, and his use of this information to gain favor and advance his position. Hoover introduced to Daugherty his knowledge of communist infiltration in America, of which Daugherty was unaware at the time. By impressing government officials with his foresight and expertise in international intelligence, Hoover was able to gain continual attention within the department that would increase in status and power.

Hoover's rigid character and stringent principles set the pace and standards for a then less than upstanding Justice Department. Staff included Jess Smith, Edward McClean, and Gaston B. Means who were each involved in private dealings and illegal

practices that included payoffs by underground alcohol distilleries and drug traffickers. Deception ran rampant throughout the department, including special agents with questionable loyalties to both Germany and Great Britain.

Hoover's first task was to rid the department of questionable characters, who he reasoned were a detriment and liability to the bureau's work and reputation. Hoover's talents of persuasion and tact enabled him to successfully rid the office of dubious characters like Means, who in addition also posed a threat to his own position within the bureau.

Hoover's first recognizable accomplishment and service to the department was the arrest of Edward Kleagle Young Clark, the person responsible for the organization and success of the Klu Klux Klan in Louisiana. Hoover had received word from journalist John M. Parker of a secret visit in 1922 from New Orleans Mayor Paul Wooton to Attorney General Daugherty with a note pleading for protection from the Klan. Daugherty had dismissed Wooton's repeated calls. With the growing threat from white supremacists and little support from the local police force, domestic violence and murder increased through out New Orleans, and Wooton was desperate for help. At least six individuals from the police force had been identified as being members of the Klu Klux Klan. Citizens were being forced to vacate their homes under the premise of racial cleansing; individuals were being beaten, whipped, and brutally murdered; and the number of KKK members was growing. Hoover was anxious to increase his authority and expand investigations. Allegations against the Klan included violating authority and law. In addition, Hoover was intent on putting an end to the contempt he saw from law enforcers. Interestingly enough, Hoover himself was not opposed to the idea of white supremacy. He was, however, outraged by the challenge to authority that he saw taking place among the organized leadership and members of the Klan.

On May 10, 1924, Hoover was promoted to the position of acting director of the Bureau of Investigation. From this point on, Hoover would reorganize the department into a national crime-fighting organization. Early successes would include the arrest of high-profile criminals like Charles "Pretty Boy" Floyd, "Machine Gun" Kelly, and Robert "Big Bob" Brady. Hoover deftly made the bureau's agents into heroes as they sought out famous criminals. As an example, bureau agents were hired to kill John Dillinger on a street in Chicago in July 1934. In 1935, the Bureau was renamed the Federal Bureau of Investigation with Hoover as its director. From the 1930s on, Hoover worked especially well with the media—including the movie industry and later television—to "sell" the FBI

to the American people as the protector of American values and culture. Films included James Cagney's *The G-Men* (1935), the Jimmy Stewart film *The FBI Story* (1959), and the television series *The FBI* (1965–1974), starring Efrem Zimbalist, Jr., which all served to make Hoover's organization seem to be above politics and incorruptible. In fact, of course, Hoover was always deeply involved in politics, leveraging his information to gain power within the federal government, and using his agency to suppress those he feared or hated, whether they were communists, Nazis, or civil rights leaders like Rev. Martin Luther King, Jr.

Hoover's principles and work ethic stood out as unsurpassed in stringency and severity, demanding from his staff a rigid compliance with bureau regulations. Hoover's orders to his agents elicited both a fear and certain control that had never before existed in the bureau. Agents with questionable backgrounds were immediately dismissed, new candidates were required to have degrees in law or accounting, and members of the Bureau with associations to those who posed any threat to Hoover's position were investigated. Work was conducted like clockwork. Memos and correspondence were triple checked for accuracy. Field offices in other states were modeled on the Washington hub, with parallel routine and conduct down to the physical appearance of each office. Hoover was systematic. Orders were carried out without question and the outcomes were beyond comparison to any federal investigative agency that had existed thus far.

Hoover's own personal character was reflected through his work conduct. He expected nothing less from his staff than that which he required of himself. Hoover's belief in authoritative control reflected what would soon brand him to be a hero. America was indebted to him for ridding the country of hoodlums, mobsters, and bandits. Hoover brought to the bureau a new perspective in undercover detective work.

The economic and political climate of the 1930s brought with it uncertainty and distrust. Fascist infiltration became an increasing concern in the minds of Americans who worried about an attack on the heartland. Hoover targeted Nazi groups that were developing bases of support in America, particularly the Bund, under investigation for possible espionage and trading of American intelligence secrets with Nazi Germany. Hoover immediately took action, wire tapping phone lines and positioning secret agents to sever and dismember the party. Hoover proclaimed fascism to be an even greater concern than that of communism, saying that it targeted the very foundation upon which this country was built. Hoover's actions led to the eventual deportation of members

of the Bund, including German-born Americans. This action was subsequently shown to be questionable and without legitimate evidence. Backed by President Roosevelt's growing paranoia over enemy invasion, Hoover was free to exercise whatever tactics he believed necessary to address the issue and alleviate the country's growing concerns.

With the onslaught of the Depression and the decline of the economy, the United States was in a state of near collapse. The crime rate increased while the reality of war and Germany's attacks on Poland, Great Britain, Czechoslovakia, France, Belgium, Holland, Norway, and Denmark ensued. Although the federal law passed in 1934 made wire tapping a felony, Hoover reasoned that its usefulness in uncovering international espionage made it legitimate. President Roosevelt reaffirmed Hoover's decision, sending him a memo expressing his gratitude and appreciation for the bureau's continued efforts and support in protecting America's interests. Subsequently, Hoover was praised for raising an estimated \$3,488,000 to continue the Bureau's investigations of international intelligence, sabotage, and the uncovering of German and Japanese spies.

December 7, 1941, marked a national date of infamy for Americans. On that day Pearl Harbor was attacked, and the United States declared war against Japan and Germany. In the 1930s, Hoover and the FBI investigated Nazis as well as communists and leftist radicals. He gathered information of the arrest of Axis sympathizers, and helped secure arrests immediately after the United States entered World War II. Although notorious for his lack of sensitivity to civil liberties or the rights of minorities, Hoover opposed the Japanese internment on the grounds that the FBI had already arrested or neutralized any potential Japanese saboteurs or spies. Thus, Hoover felt that the relocation and internment camps were unnecessary. However, he did encourage illegal wire tapping inside the relocation centers, and supported secret agents to uncover possible harbored information.

By this time, Hoover had gained a public reputation for his encroachment of civilian privacy, and for good reason. During Roosevelt's administration, in 1942, Hoover suspected First Lady Eleanor Roosevelt of having communist ties. His distrust for her led to an investigation. She was alleged to be having an illicit affair with the charismatic radical Joseph Lash. While on a trip to Chicago, Eleanor's hotel room phone line was tapped. The fabricated evidence, planted recordings of Lash and Eleanor, was revealed and was dismissed by the president. However, Hoover's aggressive tactics continued, and in January 1942 he authorized what came to be known as "black bag jobs." This tactic, of allowing agents to break

into homes legally and conduct surveillance, intruded on the privacy of citizens under the auspices of federal business.

The 1950s held much tension across America as racial segregation and civil rights were brought to the forefront. On December 1, 1955, in Montgomery, Alabama, Rosa Parks, an African-American woman was arrested for refusing to ride in the back of the bus. A seamstress and one-time secretary to the president of the National Association for the Advancement of Colored People (NAACP), her actions precipitated a boycott of the Montgomery bus system. This led to one of the first major movements that Dr. Martin Luther King Jr. would lead for civil rights.

Hoover was reluctant to accept racial equality and made known his feelings to FBI staff members. Hoover was concerned over the growing power of African Americans across the country. He was decidedly against racial intermarriage; holding to his own standards and biases, he sided with whites who were intent on continuing the practice of segregation.

The United States was in a period of high anxiety, in part due to the growing hostilities with Russia, fear of communism, and the danger of a nuclear attack. The country was on high alert and every effort to pursue those suspected of involvement with communism was taken. Hoover also saw this as an opportunity to discredit the civil rights movement and African-American leader Martin Luther King Jr. by tying him to the threat of communism. Hoover used King's close association with Stanley Levison and Levison's hiring of Jack O'Dell to tie him to communism. Hoover's investigation found that O'Dell had ties to the Communist Party; King was then portrayed as a threat to national security.

Obsessed with tying King to communism, Hoover became enraged by Dr. King's questioning of bureau's misconduct and behavior. As King told reporters: "One of the great problems we face with the FBI is that the agents are white southerners.... To maintain their status ... they have to be friendly to the local police and people who are supporting and promoting racial segregation."

Wanting to rectify the situation, and prevent further information from leaking to the press, Hoover phoned King. The African-American leader was reluctant to respond and did not answer phone calls. Enraged by the lack of respect to authority that King exhibited toward Hoover, this slight encouraged the director to pursue King and his followers using tactics and threats harmful to both his reputation as a religious leader and activist. In Hoover's eyes, King needed to be brought to justice for the communistic influence and lies and deceit he was spreading to Americans.

Hoover was successful at influencing Attorney General Robert Kennedy and the president about the potential ties to communism that King had through O'Dell. Both Kennedy and the president tried persuading King to stop communications with O'Dell, but without success. Hoover ordered King's and Levison's phones tapped; many conversations were recorded.

On August 28, 1963, King delivered his speech on Capitol Hill to a quarter million people. The success of King's declaration was nationwide. Millions of Americans across the country listened while King called for equality, uniting citizens with the fundamental understanding of King's vision. In an attempt to soothe Hoover's wrath, Assistant Director Sullivan wrote a memo to the director stating: "We were completely wrong.... I believe in the light of King's powerful demagogic speech yesterday.... We must mark him now ... as the most powerful Negro in the nation." On October 10, 1963, Attorney General Robert Kennedy gave Hoover the permission to tap King's private home. Throughout the following years, Hoover would continue to tie King with communism, and would use whatever methods available to him, illegal or otherwise. Hoover also tried to smear and destroy King's reputation by taping his private moments, including his extramarital relations. For Hoover, King was an enemy of America, like the communists or the Nazis, and thus he was prepared to use any means, fair or foul, to destroy his reputation. This is some evidence that Hoover was going to threaten King with making this evidence public, in order to force King to commit suicide.

By this time, Hoover's reputation was in sharp decline. With the media publicly denouncing his actions toward Reverend King, and Hoover's reputation for privacy encroachment, Hoover was struggling for balance. As *Time Magazine* wrote: "J. Edgar Hoover has many old foes ... has made many new ones.... [U]ndoubtedly there will be pressure on the White House to boot the old fellow out of his job."

The 1960s and early 1970s brought new voices and issues, ranging from Black pride and the Black Panther Party, to young militants in the antiwar and civil rights movements, and the Watergate break-in, all of which the FBI targeted for investigations, among other activities. Hoover's reputation had fallen from grace with attendant cover-ups, sabotage, political blackmail, illegal surveillance, and invasion of privacy, and blatant deception. On May 2, 1972, America's "watchdog" was dead. Hoover's private secretary had fulfilled her last instructions by the director and destroyed all personal files containing dark secrets ranging from black bag jobs and hired killings to itemized reports on royalties and paid vacations.

Later material began to resurface, and Hoover's activities were reexamined; disturbing facts still concern historians today.

Despite his flawed reputation, Hoover wanted to create a Justice Department that would protect the American citizens from what he viewed as criminal activities. Many scholars have come to believe that his obsessions corrupted an otherwise respectable law enforcer. Hoover's flaws and greed for power cannot be denied, yet his performance for ridding the department of disloyal staff and carrying out government orders was stellar. He has been commended on several occasions by various presidents, and his greatest legacy to the United States is the FBI.

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References and Further Reading

- Gentry, Curt. *J. Edgar Hoover: The Man and the Secrets*. New York: W.W. Norton & Company, 1991.
- Hack, Richard. *Puppetmaster: The Secret Life of J. Edgar Hoover*. Beverly Hills, CA: New Millenium Press, 2004.
- Summers, Anthony. *Official and Confidential: The Secret Life of J. Edgar Hoover*. New York: G.P. Putnam, 1993.

HOPT v. UTAH, 110 U.S. 574 (1884)

The nineteenth-century Supreme Court rarely decided criminal procedure issues because it lacked appellate jurisdiction in criminal cases until the end of the century. An exception existed for writs of error to territorial courts, as in *Hopt v. Utah*, a significant early case addressing a number of rights of the accused.

Hopt's first-degree murder conviction in the Utah Territory was overturned during the 1881 October term. After a second conviction, the Supreme Court again reversed. The unanimous Court, in an opinion by Justice John Marshall Harlan I, identified three grounds for reversal, including improper admission of hearsay and flawed jury instructions. Most significantly, the Court held that the trial court erred in excluding Hopt from voir dire challenges to several jurors, declaring that criminal defendants could not waive the right to be present at every stage of the proceedings when substantial rights might be affected. This sweeping dicta has been rejected in subsequent cases, including *Illinois v. Allen* (1970).

Hopt was also the Court's first confession case. In dicta, the Court adopted the common-law voluntariness doctrine, which renders inadmissible confessions induced by threats or promises sufficient to overcome a defendant's free will. Thirteen years later, in *Brams v. United States* (1897), the Court would provide this

right with a constitutional basis in the Fifth Amendment privilege against self-incrimination.

Hopt is also cited for holding that a change in Utah law, enacted after the murder, that made convicted felons competent witnesses did not violate the ex post facto clause.

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References and Further Reading

- LaFave, Wayne R., Jerold H. Israel, and Nancy J. King. *Criminal Procedure*. 2nd ed. St. Paul, MN: West, 1999.

Cases and Statutes Cited

- Bram v. United States*, 168 U.S. 532 (1897)
- Illinois v. Allen*, 397 U.S. 337 (1970)

See also **Coerced Confession/Police Interrogation; Ex Post Facto Clause; Jury Trial Right**

HOSTILE ENVIRONMENT AND EMPLOYMENT DISCRIMINATION ISSUES AND FREE SPEECH

Definition

Employers are liable for allowing conduct and speech that seriously offends employees based on race, religion, and sex. A similar theory is also applicable to speech at universities, places of public accommodation, and apartment buildings and condominium complexes. When, if ever, does such liability violate the First Amendment?

Under hostile environment harassment law, employers are liable to offended employees:

1. if they fail to stop conduct or speech (by managers, coworkers, or patrons) that
2. is severe or pervasive enough
3. to create a hostile, abusive, or offensive work environment
4. based on race, religion, sex, national origin, age, disability, or—depending on the jurisdiction—sexual orientation, political affiliation, or other categories protected by antidiscrimination law
5. for the plaintiff
6. and for a reasonable person.

This can cover conduct, such as physical abuse. It can cover traditionally unprotected categories of speech,

such as threats, fighting words, and obscenity. And it can cover speech that is generally constitutionally protected: racist, sexist, or antireligious political commentary; religious proselytizing; sexually themed humor; and the posting of sexually themed materials, whether pornography or “art.” (Note that the First Amendment applies to civil liability rules as well as criminal laws.)

Similar rules obligate university and K-12 educators, owners of restaurants and other public places, and landlords and condominium associations to prevent (when possible) offensive speech and conduct by employees, students, patrons, and tenants. Hostile environment harassment law is not the same as “quid pro quo” harassment law, which bans sexual extortion (“sleep with me or I’ll fire you”). It’s also unrelated to criminal telephone harassment laws and stalking laws.

Origin

Hostile environment harassment law was largely developed by courts from federal and state statutes that ban discrimination based on race, religion, sex, and other attributes in (among other things) the “terms and conditions” of employment. Courts have held that the work environment is one such condition, so an employer can be held liable for tolerating an environment that is especially offensive for members of a certain group.

Practical Effect

Hostile environment harassment law generally imposes liability only for multiple, “pervasive” statements; it does not punish isolated statements unless they are “severe.” But the law deters individual statements, even when they are not themselves enough to create an offensive environment.

Reasonable employers realize they can be sued for the aggregate of many employees’ statements—for instance, sexual jokes emailed by some employees, sexist statements said in the lunchroom by others, and sexually themed material visible on the computers of others. To prevent such liability, employers cannot simply order employees, “Don’t say things that, when aggregated with others’ statements, are severe or pervasive enough to create an offensive environment based on race, religion, or sex.” Such a policy would not tell employees what to do, because (1) each employee may not know what others are saying, and (2) the terms are too vague.

Instead, the employer must ban individual statements, and define the forbidden statements with specificity. The result is policies that ban even isolated politically offensive statements, sexually themed jokes or art, and the like.

First Amendment Analysis

The Supreme Court has not decided when harassment law may constitutionally impose liability for otherwise protected speech; lower courts have gone both ways.

Hostile environment harassment law is a government-imposed speech restriction: it uses government power to pressure universities, places of public accommodation, landlords, and private employers to restrict speech.

Moreover, the law restricts speech, not just conduct, and covers speech because of its content (and sometimes its viewpoint). Content-neutral restrictions, for instance, on excessive noise, are generally upheld; but harassment law is not content neutral.

Hostile work environment law is generally limited to workplaces, and is thus less severe than a total ban on speech (although it cannot be labeled a “time, place, and manner restriction,” since that label is reserved for content-neutral restraints).

On the other hand, nearly every place is someone’s workplace. Hostile work environment law thus restricts speech even in universities, libraries, television writers’ offices, art schools, and public buildings. Also, most employees spend a third of their waking hours at work. Government-coerced restrictions on expression at work (whether a university or a law office) thus substantially restrict people’s freedom to speak.

A stronger argument in favor of harassment law’s constitutionality is that speech should be more restrictable when listeners are a “captive audience” that is practically unable to avoid the speech. The Court has suggested that some content-based restrictions aimed at protecting captive audiences are constitutional, although it has rarely upheld such restrictions.

It is hard to tell whether the Court will ultimately accept this “captive audience doctrine,” given how often people are “captives” to speech they dislike, at least in the sense of having to hear it every week or month. (Statements may be “pervasive” under harassment law even if they are heard only several times a year.) Because employees are ubiquitous, there will probably be such a “captive” in most places. Moreover, labor picketing—which sometimes includes offensive comments—also targets a captive

audience: Employees may have to see the picket line twice a day or more.

Another defense of harassment law is that the law serves a “compelling government interest” in preserving equal access to work, education, public accommodation, and housing, and that this interest trumps the speaker’s First Amendment rights. Again, the Court has sometimes endorsed such a “compelling interest” argument, but rarely used it to uphold content-based speech restrictions.

It is unclear how willing the Court will be to allow free speech rights to be trumped this way. There are many compelling interests that backers of various restrictions have asserted—promoting a war effort, preventing violence against police officers, and more. Many such interests, like the interest in equality, echo explicit constitutional provisions (the war power, the right to life, and so on). If a future Court decides that such interests should trump speech rights, it may uphold a wide range of restrictions, including harassment law. But if the Court generally thinks that free speech rights trump even really important government interests, then it may be reluctant to carve out an exception for racially, religiously, or sexually offensive speech.

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References and Further Reading

- Balkin, Jack, *Free Speech and Hostile Environments*, 99 *Columbia Law Review* (1999): 2295 (mostly taking a similar view to Epstein’s).
- Browne, Kingsley R., *Title VII as Censorship: Hostile Environment Harassment and the First Amendment*, *Ohio State Law Journal* 52 (1991): 481 (taking the view that hostile work environment harassment law is unconstitutional as to virtually all otherwise protected speech).
- Epstein, Deborah, *Can a “Dumb Ass Woman” Achieve Equality in the Workplace? Running the Gauntlet of Hostile Environment Harassing Speech*, *Georgetown Law Journal* 84 (1996): 399 (taking the opposite view from Browne’s).
- Estlund, Cynthia, *Freedom of Speech in the Workplace and the Problem of Discriminatory Harassment*, *Texas Law Review* 75 (1997): 687 (taking an intermediate position).
- Volokh, Eugene, *Freedom of Speech and Workplace Harassment*, *UCLA Law Review* 39 (1992): 1791, republished in updated form at <http://www.law.ucla.edu/volokh/harass> (likewise takes an intermediate position).
- , *What Speech Does “Hostile Work Environment” Harassment Law Restrict?*, *Georgetown Law Journal* 85 (1997): 627, republished in updated form at <http://www.law.ucla.edu/volokh/harass/breadth.htm> (focusing only on what workplace harassment law covers).
- , *Freedom of Speech, Cyberspace, Harassment Law, and the Clinton Administration*, *Law and Contemporary Problems* 63 (2000): 299, parts III–V, <http://www.law.ucla.edu/volokh/harass/cyberspa.htm> (focusing on what

hostile educational environment harassment law and hostile public accommodations environment harassment law cover).

HOUCHINS v. KQED, INC., 438 U.S. 1 (1978)

In *Houchins v. KQED, Inc.*, the U.S. Supreme Court in a plurality decision ruled that the First Amendment does not require the right of access to government information or sources of information within the government’s control.

Radio and television broadcaster KQED, Inc., contended that its First Amendment right to gather the news implicitly included a right of access to the Santa Rita county jail to investigate horrid prison conditions that allegedly caused one prisoner to commit suicide and contributed to prisoner mental illness. The Supreme Court disagreed, and decided that the restrictions imposed by the county sheriff permitting the media to join other members of the public in monthly tours of the jail, but prohibiting the press from bringing cameras and tape recorders and interviewing the prisoners, were permissible under the First Amendment. While acknowledging the public importance of prison conditions and the media’s role in publicizing those conditions, the Supreme Court emphatically eschewed any First Amendment guarantee of access to sources of information within government control beyond that afforded the public generally.

The decision of the U.S. Supreme Court in *Houchins* is important for two reasons. First, the decision clarifies the reach of the First Amendment by expressly protecting the right of the press to gather and disseminate news, but excluding any corollary obligation by the government to supply or grant access to information. Second, *Houchins* rejects the notion that the press has special status under the First Amendment; rather, the right of the press to promote free discussion of ideas and exchange opinions is neither different from nor greater than the right of the public generally.

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References and Further Reading

- Collins, Tom A., *The Press Clause Construed in Context: The Journalists’ Right of Access to Places*, *Missouri Law Review* (1987): 773–84.
- Pell v. Procunier*, 417 U.S. 817 (1974).
- Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974).
- Schwartz, Bernard, *Is There a Press Right of Access to News That Allows Television of Executions?*, *Tulsa Law Journal* (1994): 313–9.
- The Supreme Court, 1977 Term*, *Harvard Law Review* (1978): 174–84.

HOUSE UN-AMERICAN ACTIVITIES COMMITTEE

The House Un-American Activities Committee (HUAC) was formed on May 26, 1938. Reorganized from its previous incarnations as the Fish Committee and the McCormack-Dickstein Committee, the HUAC, was established under the chairmanship of Martin Dies Jr. (D-Tex.). It was a committee of the U.S. House of Representatives, created to investigate disloyalty and subversive organizations. Relying on its subpoena power, the HUAC used the Smith Act to compel suspected communists to appear and interrogated them regarding their relationships to communist organizations and about the political activities of any and all friends and acquaintances.

In prewar years and during World War II it was known as the Dies Committee. Its work was supposed to be aimed mostly at German-American involvement in Nazi and Ku Klux Klan activities. Instead of the Klan, the HUAC concentrated on investigating the possibility that the American Communist Party had infiltrated the Works Progress Administration, including the Federal Theater Project. The HUAC became a standing committee in 1946. Under the mandate of Public Law 601, passed by the Seventy-ninth Congress, the committee of nine representatives investigated suspected threats of subversion or propaganda that "attacks the form of government guaranteed by our Constitution."

In 1947, the HUAC began an investigation into the Hollywood Motion Picture Industry. The committee's methods included pressure on witnesses to name former associates, vague and sweeping accusations against individuals, and the assumption of an individual's guilt because of association with a suspect organization. Witnesses who refused to answer were cited for contempt of Congress. A highly publicized 1947 investigation of the entertainment industry led to prison sentences for contempt for a group of recalcitrant witnesses who became known as the Hollywood Ten. The Hollywood Ten consisted of notable actors, writers, and directors who refused to cooperate with HUAC's investigations of communist ties of their Hollywood colleagues under the protection of the First Amendment. There were also witnesses who refused to testify on the grounds of the Fifth Amendment privilege against self-incrimination. This, however, was perceived in some circles to be a tacit admission of guilt, and these witnesses were labeled "Fifth Amendment Communists."

In 1948, Whittaker Chambers made sensational accusations of Soviet espionage against former State

Department official Alger Hiss; those hearings provided the first national exposure for committee member Richard Nixon. The high-profile conviction of Alger Hiss for perjuring himself before HUAC while answering questions about his alleged espionage, was followed in 1951 by the convictions of Ethel and Julius Rosenberg for conspiring to pass United States atomic secrets to the Soviet Union.

The Supreme Court generally upheld the actions of the HUAC. In *Dennis v. United States* (1951), the Court upheld the Smith Act convictions of eleven Communist Party leaders. In *Barsky v. Board of Regents* (1954), it upheld New York's termination of a college professor who had refused to cooperate with HUAC. However, in a series of cases in 1956 and 1957, climaxing on what opponents referred to as "Red Monday," four decisions were issued June 17, 1957, which reined in the scope of the HUAC. These decisions had the Court siding with parties challenging anticommunist policies. In *Watkins v. United States* (1957), the Court overturned the contempt conviction of an uncooperative HUAC witness. However, after severe criticism the justices upheld the prison sentence of a Smith Act defendant in 1961. After 1962, the Court, through its decisions indicated that it no longer would tolerate prosecutions based on an individual's refusal to testify to legislative committees regarding communist associations.

The committee, renamed the House Internal Security Committee in 1969, was abolished in 1975, and its functions were transferred to the House Judiciary Committee.

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References and Further Reading

- Borson, Michael. *Red Scared! The Commie Menace in Propaganda and Popular Culture*. San Francisco: Chronicle Books, 2001.
- Fried, Albert. *McCarthyism, The Great American Red Scare: A Documentary History*. New York: Oxford University Press, 1996.
- Navasky, S. Victor. *Naming Names*. New York: Hill and Wang, 2003.
- O'Reilly, Kenneth. *Hoover and the Un-Americans: The FBI, HUAC, and the Red Menace*. Philadelphia: Temple University Press, 1983.

Cases and Statutes Cited

- Barsky v. Board of Regents*, 347 U.S. 442 (1954)
- Dennis v. United States*, 341 U.S. 494 (1951)
- Watkins v. United States*, 354 U.S. 178 (1957)

**HOYT v. MINNESOTA,
399 U.S. 524 (1970)**

See Redrup v. New York, 386 U.S. 767 (1967)

**HUDSON v. LOUISIANA,
450 U.S. 40 (1981)**

Tracy Lee Hudson was convicted of murder by a Louisiana jury. Although the trial judge questioned the sufficiency of the evidence supporting the jury's verdict, under Louisiana law he could neither direct a verdict nor acquit the defendant. Hudson's only means of challenging the sufficiency of the evidence was to move for a new trial. The trial judge granted Hudson's motion, saying: "I heard the same evidence the jury did[;] I'm convinced that there was no evidence, certainly not evidence beyond a reasonable doubt, to sustain the verdict of the homicide committed by this defendant of this particular victim." The new trial resulted in a conviction. Hudson claimed that the second trial constituted double jeopardy.

Justice Lewis F. Powell, Jr. wrote the unanimous opinion, clarifying the meaning of double jeopardy and articulating the rule that protection against a second trial attaches when the first trial concludes with a judicial finding of insufficient evidence.

Louisiana claimed that an earlier decision, *Burks v. United States* (1978), applied when a reviewing court found there was *no* evidence to support a conviction, but not when there was *insufficient* evidence. The state also argued Hudson's case was distinct from *Burks* because it was the trial judge who found a failure of evidence, rather than the reviewing court. The Supreme Court rejected Louisiana's arguments, quoting the judge's statement to show he had not merely acted as a "13th juror."

Hudson establishes that a defendant cannot be retried after a trial judge finds the first conviction to be unsupported by evidence.

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Cases and Statutes Cited

Burks v. United States, 437 U.S. 1 (1978)

See also **Double Jeopardy**

**HUDSON v. PALMER,
468 U.S. 517 (1984)**

In *Hudson v. Palmer*, the Supreme Court held that a prisoner has no Fourth Amendment protection against unreasonable searches and seizures of his or

her prison cell. The prisoner plaintiff alleged that a guard had conducted a "shakedown" search of his cell to harass him, and "intentionally destroyed certain of his noncontraband personal property." The Court unanimously agreed that no procedural due process right arises from unauthorized intentional deprivations if there is a meaningful postdeprivation remedy. It split five to four, however, on the question of whether prisoners retain "any residuum of privacy or possessory rights" (Stevens, J., dissenting).

Writing for the majority, Chief Justice Burger posited that although a prisoner may have a subjective expectation of privacy, society did not recognize it as reasonable in light of institutional security concerns. Accordingly, the Court held that "the Fourth Amendment proscription against unreasonable searches does not apply within the confines of the prison cell," reasoning that affording prisoners a privacy right in their cells would defeat effective, safe prison administration.

In his dissenting opinion, Justice Stevens questioned whether "society" would divest prisoners of all privacy interests in their cells. He eloquently described the practical importance of these interests and the basis for their protection in the Fourteenth, Eighth and First Amendments: "Personal letters, snapshots of family members, a souvenir . . . may enable a prisoner to maintain contact with some part of his past and an eye to the possibility of a better future."

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References and Further Reading

Hall, Kermit L., et al., eds. *The Oxford Companion to the Supreme Court of the United States*. New York: Oxford University Press, 1992.

Boston, John, and Daniel E. Manville. *Prisoners' Self-Help Litigation Manual*. 3rd ed. New York: Oceana Publications, 1995.

Junker, John M., *The Structure of the Fourth Amendment: The Scope of the Protection*, *Journal of Criminal Law and Criminology* 79 (1989): 1105:1163–6.

Katz v. United States, 389 U.S. 347 (1967).

Parratt v. Taylor, 451 U.S. 527 (1981).

See also **Prisoners and Free Speech**

HUGHES COURT (1930–1941)

"We are under a Constitution, but the Constitution is what the judges say it is," noted Governor Charles Evans Hughes of New York, circa 1906. *Lochner v. New York* (1905) had enshrined "freedom of contract" into the Constitution. The Fourteenth Amendment's due process clause guarded only

Mr. Lochner's liberty of sweatshop. *Adkins v. Children's Hospital* carried this laissez faire constitutionalism forward in 1923. Government regulation was anathema to Justices Van Devanter, McReynolds, Sutherland, and Butler. All of this would change in the generation that came of age during the years of Chief Justice Hughes's Court, 1930 to 1941. The Great Depression confounded the judges, as did Franklin Roosevelt and his Court-packing plan. How much these externals influenced the judges is debated among scholars. However, there should be no doubt of the place of the Hughes Court as a bulwark of modern civil liberties. William O. Douglas, a judge of the new generation of Roosevelt appointees, was asked which Supreme Court justice had the greatest influence on him. His answer: "I think probably one of our greatest judges in all history is Charles Evans Hughes, who was Chief Justice when I came on the Court. He was a very bold, courageous judge who saw clearly when it came to human rights, civil rights, the rights of minorities." From *Near v. Minnesota's* (1931) condemnation of prior restraints of speech and press, through Chief Justice Hughes's resounding opinion in *Mitchell v. United States* (1941), shortly before he retired, the torch of civil liberties burned brightly. *Mitchell* reversed the Interstate Commerce Commission and condemned the "essentially unjust" discrimination against a member of Congress on an interstate train "based solely upon the fact that he was a Negro." In *Missouri ex rel. Gaines v. Canada* (1938), Hughes wrote: "Lloyd Gaines is entitled to admission to Missouri's Law School without respect to color." This was a precursor of things to come. The Hughes Court coldly resisted the "haste of the mob." It insisted on the right to counsel, condemned race discrimination in jury selection, and outlawed coerced confessions. It is in the field of civil liberties, the Hughes Court proves, that judicial supremacy finds its enduring justification in American constitutionalism.

Justice Oliver Wendell Holmes's "clear and present danger" test, announced in the *Schenck v. United States* (1919) case, was regularly applied by the Hughes Court to protect the citizen's right to talk, to peaceably assemble, to distribute religious pamphlets, to engage in labor picketing, to practice one's religious beliefs, and to fuss at the government. "Therein lies the security of the Republic, the very foundation of constitutional government," wrote Chief Justice Hughes. When a young woman of nineteen named Stromberg raised the flag of Soviet Russia at a Communist League summer camp, California put her in jail. But there was no incitement to riot; there was no imminent danger. The Hughes Court set her free. Liberty and the First Amendment embrace the

flag as a symbol of protest. Sixty years later, the Supreme Court would extend *Stromberg v. California* (1931) beyond the Hughes Court to protect those who would burn the U.S. flag as a symbol of protest.

Justice Owen Roberts, a central figure on the Hughes Court, reached out to protect Jesse Cantwell, a Jehovah's Witness, from censorship of religion: "In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom." The same Justice Roberts who in the past condemned New Deal economic regulation as unreasonable, now weighed legislative restrictions upon freedom of speech, press, religion, and found them wanting.

After the Court-packing crisis quieted down, Justices Hugo Black, William O. Douglas, and Frank Murphy joined a reconstituted Hughes Court. All were zealous bulwarks of civil liberties. They put civil rights first, and John D. Rockefeller's property second. The same is true for Justice Louis D. Brandeis, a progressive of Woodrow Wilson's era, and Harlan Fiske Stone, sometime dean of the Columbia Law School. Both men sat on the Hughes Court. Justice Stone's dissent in *United States v. Butler* in 1936 shook the very foundation of the Supreme Court's assault on Congress: "The only check upon our own exercise of power is our own sense of self-restraint." But in the field of civil liberties, writing for the Hughes Court, Stone insisted that the government must carry the burden of proving a compelling justification for any restriction of civil liberties, and the government must use the least restrictive means available. Harvard Law School Professor Felix Frankfurter joined the Hughes Court in 1939. Frankfurter's view of the judicial role was narrower. In *Minersville School District v. Gobitis* (1940), he wrote: "Lillian Gobitis must recite the pledge of alliance and salute the national flag notwithstanding her sincere religious convictions, or be expelled from public school." Justice Frankfurter's opinion in the *First Flag Salute Case* baffled Mrs. Roosevelt. Why would Frankfurter, who keenly supported civil rights as a professor, turn his back on religious conscience? The answer lies in Frankfurter's insistence on judicial restraint: to sustain Gobitis's claim "would in effect make us the school board for the country. That authority has not been given to this Court, nor should we assume it." Justice Stone dissented, alone. Three years later, Justices Black and Douglas switched their votes. This time, Justice Robert H. Jackson's ringing opinion in *West Virginia Board of Education v. Barnette* (1943) saved the First Amendment from the Court itself and put freedom of conscience back into the Bill of Rights.

On Lincoln's birthday in 1940, the Hughes Court reversed the death sentences of four "ignorant young

colored tenant farmers” based on coerced confessions, in *Chambers v. Florida*.

Due process of law, preserved for all by our Constitution, commands that no such practice as that disclosed by this record shall send any accused to his death. No higher duty, no more solemn responsibility, rests upon this Court, than that of translating this constitutional shield deliberately planned and inscribed for the benefit of every human being subject to our Constitution—of whatever race, creed or persuasion.

Chief Justice Hughes wrote on a proof copy of Justice Black’s *Chambers* opinion: “Clear as a bell.”

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References and Further Reading

- Freund, Paul A., *Charles Evans Hughes as Chief Justice*, Harvard Law Review 81 (1967): 1:4–43.
 Hendel, Samuel. *Charles Evans Hughes and the Supreme Court*. New York: Columbia University Press, 1951.
 Jackson, Robert H. *The Struggle for Judicial Supremacy*. New York: Knopf, 1941.
 Parrish, Michael. “The Hughes Court, the Great Depression, and the Historians.” *The Historian* 40, no. 2 (1978): 286–308.
 ———. *The Hughes Court*. Santa Barbara, CA: ABC-CLIO, 2002.
 Pusey, Merlo J. *Charles Evans Hughes*. New York: Macmillan, 1951.

Cases and Statutes Cited

- Adkins v. Children’s Hospital*, 261 U.S. 525 (1923)
Chambers v. Florida, 309 U.S. 227 (1940)
Lochner v. New York, 198 U.S. 45 (1905)
Minersville School District v. Gobitis, 310 U.S. 586 (1940)
Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938)
Mitchell v. United States, 313 U.S. 80 (1941)
Near v. Minnesota, 283 U.S. 697 (1931)
Schenck v. United States, 249 U.S. 47 (1919)
Stromberg v. California, 283 U.S. 359 (1931)
United States v. Butler, 297 U.S. 1 (1936)
West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943)
- See also **Brandeis, Louis Dembitz; Brown v. Mississippi**, 279 U.S. 278 (1936); **Butler, Pierce; Cantwell v. Connecticut**, 310 U.S. 296 (1940); **Chambers v. Florida**, 309 U.S. 227 (1940); **Clear and Present Danger Test; Coerced Confessions/Police Interrogation; De Jonge v. Oregon**, 299 U.S. 353 (1937); **Douglas, William Orville; Flag Salute Cases; Flag Burning; Frankfurter, Felix; Freedom of Contract; Hague v. C.I.O.**, 307 U.S. 496 (1939); **Holmes, Oliver Wendell, Jr.; Hughes, Charles Evans; Jackson, Robert H.; Lochner v. New York**, 198 U.S. 45 (1905); **McReynolds, James C.; Murphy, Frank; Near v. Minnesota**, 283 U.S. 697 (1931); **New Deal and Civil Liberties;**

Powell v. Alabama, 287 U.S. 45 (1932); **Prior Restraints; Right to Counsel; Roberts, Owen Josephus; Roosevelt, Franklin Delano; Schenck v. United States**, 249 U.S. 47 (1919); **Scottsboro Trials; Stone, Harlan Fiske; West Virginia Board of Education v. Barnette**, 319 U.S. 624 (1943)

HUGHES, CHARLES EVANS (1862–1948)

Lawyer, reformer, governor, secretary of state, presidential candidate, and twice a member of the U.S. Supreme Court—once as an associate justice and once as chief justice—Charles Evans Hughes played a major role in twentieth-century American jurisprudence. Remembered primarily as the man who led the Court through the constitutional crisis of 1937, Hughes was not a profound thinker, but he was extremely systematic in his thought. While economically conservative, Hughes nonetheless had a deep sympathy for the oppressed and for civil liberties.

Two main themes marked Hughes’s jurisprudence. First, he believed in enhancing the power of state and national governments to deal with the economy. Although in the 1930s he occasionally voted against this belief, over the course of his two different tenures on the Court it remained a consistent motif. Second, he wanted to give substance to the restraints imposed by the Constitution in order to protect the rights of individuals.

During his first term on the Court (1910–1916), he wrote the opinion in *Bailey v. Alabama* (1911) striking down the South’s peonage system, by which blacks could be condemned to a near slave-like bondage through manipulation of debt laws. His solicitude for personal rights also manifested it self in *Truax v. Raich* (1915), in which he spoke for the Court in voiding an Arizona statute limiting the number of aliens a single employer could hire. Although he normally deferred to the legislature in matters of economic regulation, in this case he found the law a blatant form of discrimination against aliens, depriving them of the constitutional “right to work for a living.”

Hughes wrote one of the earliest decisions retreating from the Court’s endorsement of segregation in *Plessy v. Ferguson* (1896). He wrote for a bare majority of the Court in declaring unconstitutional an Oklahoma statute that provided for luxury cars for whites, but none for people of color. Even if only one Negro wanted such an accommodation, Hughes wrote, the railroad had to provide it; if the *Plessy* formula were to be kept, the accommodations, while separate, had to be equal (*McCabe v. Atchison, Topeka & Santa Fe Railway Co.* [1914]).

Hughes left the Court to run unsuccessfully for president on the Republican ticket in 1916, and then returned to New York to open a private law practice. His concern for civil liberties remained, and in 1920, on his own initiative, he volunteered his services on behalf of five elected New York assemblymen who had been denied their seats because they were Socialists. Although unsuccessful in the atmosphere of the red scare hysteria, the gesture nonetheless would be counted an important step in helping to build a civil liberties consciousness in the country.

Named by Herbert Hoover to be chief justice in 1930, Hughes's record on civil liberties is mixed, although for the most part the pro-liberties opinions contributed greatly to a new jurisprudence of rights that would emerge in the 1950s and 1960s. In fact, his appointment to replace Taft reversed a five-to-four majority in a pending case, and established an important doctrine in press clause jurisprudence.

The Minnesota legislature had authorized suppression of "malicious, scandalous and defamatory" newspapers, and Jay Near, the editor of the *Saturday Press*, had challenged the law as a violation of his press freedom. Taft had been willing to uphold the law, but when Hughes took over he voted with the four dissenters, and in his opinion in *Near v. Minnesota* (1931), established two basic principles. First, the press clause of the First Amendment applied to the states through incorporation by the Fourteenth Amendment, and second, there could be no prior restraint by the state on what newspapers published.

That same year, in *Stromberg v. California* (1931), Hughes wrote the Court's opinion voiding a state law prohibiting the flying of so-called provocative flags or symbols. Harry Kalven, Jr. called the decision "the first case in the history of the Court in which there was an explicit victory for free speech."

A majority of the Court, however, continued to regard governmental power superior to individual rights in a number of areas. In 1934, with Hughes dissenting, the majority rejected the appeal of a religious conscientious objector who had been denied citizenship because his pacifism would not allow him to swear that he would take up arms for his new country (*United States v. Macintosh* [1931]). A few years later a unanimous Court upheld the right of the state to require compulsory officers training among male students at state universities (*Hamilton v. University of California Regents* [1934]).

In the mid-1930s, Hughes and the Court were embroiled in the conflict between Congress and the President on the one hand trying to enact reform legislation, and the five-man conservative majority on the Court voting to nullify such legislation, all leading up to the Court-packing plan and

constitutional crisis of 1937. After that the battle had been won, and the Court no longer struck down economic regulation.

In his last years as chief justice, Hughes and the Court began to pay more attention to the questions of civil rights and liberties that would constitute the bulk of the Court's agenda for the next three decades. In an otherwise obscure case, *United States v. Carolene Products Co.* (1938), Justice Stone, in an opinion joined by Hughes, put forward the notion that courts had to apply a stricter scrutiny to matters involving rights and/or minorities. In *De Jonge v. Oregon* (1937), the Court unanimously overturned the conviction of a man for doing no more than attending a Communist Party meeting. In *Herndon v. Lowry* (1938), the Court for the first time overturned a conviction for allegedly illicit speech, claiming that the nature of the speech did not constitute a clear and present danger.

In the 1930s, the National Association for the Advancement of Colored People (NAACP) began its campaign to eliminate segregation, and made a deliberate decision that the only way it could be successful would be by attacking racial prejudice through the courts. In the first major case to reach the Court, Chief Justice Hughes startled the South by insisting that if it wanted to keep segregated schools, then it would have to make them equal as well (*Missouri ex rel. Gaines v. Canada* [1938])—an echo of what he had written nearly a quarter-century earlier in the *McCabe* case.

All told, for a man whose reputation is tied primarily to the constitutional crisis of 1937 and who is seen, properly, as a conservative, Charles Evans Hughes record on civil rights and liberties is important, not only for the decisions themselves, but also for the basis they laid in expanding civil liberties after his tenure.

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References and Further Reading

- Danelski, David J., and Joseph S. Tulchin, eds. *The Autobiographical Notes of Charles Evans Hughes*. Cambridge, MA: Harvard University Press, 1973.
- Paul A. Freund, *Charles Evans Hughes as Chief Justice*, *Harvard Law Review* 81 (1967): 4.
- Hendel, Samuel. *Charles Evans Hughes and the Supreme Court*. New York: King's Crown Press, 1951.
- Pusey, Merlo J. *Charles Evans Hughes*. 2 vols. New York: Macmillan, 1952.

Cases and Statutes Cited

- Bailey v. Alabama*, 219 U.S. 219 (1911)
- De Jonge v. Oregon*, 299 U.S. 353 (1937)

Hamilton v. University of California Regents, 293 U.S. 245 (1934)
Herndon v. Lowry, 301 U.S. 444 (1938)
McCabe v. Atchison, Topeka & Santa Fe Railway Co., 235 U.S. 151 (1914)
Missouri ex rel. Gaines v. Canada, 305 U.S. 339 (1938)
Near v. Minnesota, 283 U.S. 697 (1931)
Plessy v. Ferguson, 163 U.S. 537 (1896)
Stromberg v. California, 283 U.S. 359 (1931)
Truax v. Raich, 239 U.S. 33 (1915)
United States v. Carolene Products Co., 304 U.S. 144 (1938)
United States v. Macintosh, 238 U.S. 605 (1931)

HUNT v. MCNAIR, 413 U.S. 734 (1973)

In *Hunt v. McNair*, the Supreme Court rejected an Establishment Clause challenge to the South Carolina Educational Facilities Authority Act. The act established an Authority to issue revenue bonds to finance construction of facilities at higher education institutions—as long as the facilities would not be used for religious instruction or worship. None of the state’s general revenues were used to support the Authority; however, the interest on the revenue bonds was tax-exempt under both federal and South Carolina law, so the bonds could be marketed to schools at a lower interest rate than if they secured private financing. In January 1970, the Authority preliminarily approved the Baptist College at Charleston’s application for \$3.5 million of revenue bonds for capital improvements.

The South Carolina Supreme Court upheld the act. The U.S. Supreme Court, however, vacated the state court’s judgment and remanded it for reconsideration in light of *Lemon v. Kurtzman* (1971) and *Tilton v. Richardson* (1971), which articulated a new establishment clause test and distinguished between state aid to sectarian K-12 schools (more likely to promote religious indoctrination) and state aid to sectarian higher education institutions (more likely to promote secular ends). On remand, the South Carolina Supreme Court adhered to its earlier decision.

The Supreme Court’s six-to-three decision, authored by Justice Lewis Powell, applied the three-prong establishment clause test adopted in *Lemon*. The act survived the first prong because the Court concluded that it had a secular purpose—public, private, secular, and religious schools alike can promote higher education. The act survived the second prong because the Court found that the primary effect of the law did not promote religion. The Court allowed that state aid to a church-affiliated school was permissible under the second prong as long as the school was not “pervasively sectarian.” Finally, the act survived the third prong because the Court held that the inspections necessary to ensure that the constructed

facilities were not used for religious purposes would not cause impermissible entanglement between the state and the college. In contrast to the church-related elementary schools in *Lemon* that failed this final prong because religious indoctrination was a substantial activity in the schools, the Court concluded that religious indoctrination was not any more significant at the Baptist College than it was at the college in *Tilton*. The Court conceded that the constitutionality of the statute would be a closer question if the Authority were to become involved in the college’s daily financial and policy decisions, but it left that question for another day.

In dissent, Justices Brennan, Douglas, and Marshall argued that the act violated the entanglement prong of the *Lemon* test because it required the state to police the everyday affairs of the college for the duration of the revenue bonds. The dissenters contended that the establishment clause prohibits both indirect aid to religious institutions, like the act’s financing scheme, and direct financial support to such entities.

The Court’s more recent establishment clause cases, in particular *Agostini v. Felton* (1997), call into question the *Hunt* Court’s assertion that government aid to pervasively sectarian institutions is impermissible.

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References and Further Reading

Levy, Leonard Williams. *The Establishment Clause: Religion and the First Amendment*. Chapel Hill: University of North Carolina Press, 1994.
 Collier, Trent, *Revenue Bonds and Religious Education: The Constitutionality of Conduit Financing Involving Pervasively Sectarian Institutions*, Michigan Law Review 100 (2002): 5:1108–55.

Cases and Statutes Cited

Agostini v. Felton, 521 U.S. 203 (1997)
Lemon v. Kurtzman, 403 U.S. 602 (1971)
Tilton v. Roemer, 403 U.S. 672 (1971)

HURLEY v. IRISH-AMERICAN GAY, LESBIAN, AND BISEXUAL GROUP OF BOSTON, 515 U.S. 557 (1995)

March 17 in Boston is St. Patrick’s Day and Evacuation Day, marking Washington’s military victory over the British in 1776 and their departure from South Boston. Until 1947, the city formally sponsored the St. Patrick’s Day-Evacuation Day parade; the city then officially turned sponsorship over to an informal

group, the South Boston Allied War Veterans Council, although through 1992 the city also allowed the group to use the official city seal and provided direct monetary support for the parade.

In 1992, the Irish-American Gay, Lesbian and Bisexual Group of Boston (GLIB) was formed to march in the parade. GLIB's members sought.

to express pride in their Irish heritage as openly gay, lesbian, and bisexual individuals, to demonstrate that there are such men and women among those so descended, and to express their solidarity with like individuals who sought to march in New York's St. Patrick's Day Parade.

Although rejected by the Council, GLIB marched peacefully under their own banner pursuant to a court order, but the Council again rejected their application to march the next year.

GLIB again filed suit against the Council and John J. "Wacko" Hurley, a representative of the Council whom the trial court found made the decisions as to who would march. The court concluded that the parade, a huge event attracting up to a million observers and as many as 20,000 marchers, was a place of public accommodation within the meaning of Massachusetts antidiscrimination statutes, and that the defendants had unlawfully excluded GLIB on the basis of its members' sexual orientation. The state supreme court affirmed, rejecting the defendants' argument that forcing it to accept GLIB violated its rights to free speech or expressive association under the First Amendment to the U.S. Constitution.

The defendants sought review of this decision from the U.S. Supreme Court, which unanimously reversed, holding that applying the state public accommodations law to the parade violated the Council's First Amendment rights. Because GLIB did not challenge the trial court's conclusion that there was insufficient government involvement to count as "state action" and trigger GLIB's own rights under the U.S. Constitution, the only issue was whether the statute as applied violated the parade organizers' First Amendment rights.

The U.S. Supreme Court held that it did. Independently reviewing the factual record because First Amendment rights were at stake, the Court held that parades such as the South Boston St. Patrick's Day-Evacuation Day parade were inherently expressive. It did not matter that the organizers could not show a precise message with which GLIB's participation as a unit would conflict; "a narrow, succinctly articulable message is not a condition of constitutional protection." As coordinators of the parade's message or messages, the Council were in effect the "editors" of the parade, with a First Amendment right to choose

to include only those messages of which they approved. The Council would let GLIB's members march with other units; it was only GLIB's efforts to march under their own message or banner that the Council resisted, and that choice was constitutionally protected. This notion of editorial or speaker autonomy was supported by precedent, and in turn was controversially extended in *Boy Scouts of America v. Dale* (2000).

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References and Further Reading

- Hutchinson, Darren Lenard, *Accommodating Outness: Hurley, Free Speech, and Gay and Lesbian Equality*, University of Pennsylvania Journal of Constitutional Law 1 (1998): 85.
- Madigan, James P., *Questioning the Coercive Effect of Self-Identifying Speech*, Iowa Law Review 87 (2001): 75.
- Sunder, Madhavi, *Authorship and Autonomy as Rites of Exclusion: The Intellectual Propertyization of Free Speech in Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, Stanford Law Review 49 (1996): 143.
- Yackle, Larry W., *Parading Ourselves: Freedom of Speech at the Feast of St. Patrick*, Boston University Law Review 73 (1993): 791.

Cases and Statutes Cited

Boy Scouts of America v. Dale, 530 U.S. 640 (2000)

See also **First Amendment and PACs**

HURTADO v. CALIFORNIA, 110 U.S. 516 (1884)

Hurtado was the first major U.S. Supreme Court case in which a right protected in the U.S. Constitution was *not* extended to the states. The right in question was the right to indictment by a grand jury, on appeal from the Supreme Court of California. The basis was laid in the *Slaughterhouse Cases* (1873), when the Supreme Court reached a decision by selecting one narrow right among many, without finding that the intent of the Fourteenth Amendment had been to extend such protection to all such rights. This gave practical effect to the incorporation doctrine, which holds that the Fourteenth Amendment does not extend all rights to the states.

The decision reflects the advent in the latter nineteenth century of the position of public prosecutor, often called a district attorney, as a full-time official. When the United States was founded, criminal prosecutions were conducted by private lawyers or even by nonlawyers, sometimes compensated from a public fund, but more often pro bono or compensated by

victims of a crime or by public subscription. Elected public prosecutors developed a preference for filing an “information” as an alternative to seeking an indictment from a grand jury. This saves time and money, but risks the prosecution of persons who are innocent, especially by elected prosecutors with ambitions for higher office, who may be careless about making sure that they have the right person.

Most states still use grand juries, many having the right in their state constitutions. California still uses grand juries; at present they are seldom used for indictments but rather to investigate the operations of government, a function that the grand juries of other states lack the time to address.

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References and Further Reading

- Hurtado v. California*, 110 U.S. 516 (1884). Opinion by Justice Matthews (<http://www.constitution.org/ussc/110-516a.htm>), dissent by Justice Harlan (<http://www.constitution.org/ussc/110-516b.htm>).
- Roland, Jon. “Intent of the Fourteenth Amendment Was to Protect *All Rights*.” Constitution Society, September 2000. http://www.constitution.org/col/intent_14th.htm.
- Tooke, John Horne. *Address on Libels, Case of John Horne, 1777*. Constitution Society. <http://www.constitution.org/jury/cmt/took1777/took1777.htm>. (Criticism of indictment by information, rather than by grand jury. May have contributed to requirement for grand juries in U.S. Bill of Rights.)

Cases and Statutes Cited

Slaughterhouse Cases, 83 U.S. 36 (1873)

See also **Grand Jury**

HUSTLER MAGAZINE v. FALWELL, 485 U.S. 46 (1988)

The landmark First Amendment decision in *Hustler Magazine v. Falwell* arose from a battle between Larry Flynt, colorful publisher of the pornography magazine *Hustler*, and the popular conservative televangelist, Reverend Jerry Falwell. Larry Flynt and *Hustler* ran an “advertisement parody” in which Jerry Falwell was depicted as endorsing Campari liqueur. The mock advertisement in crude language depicted Jerry Falwell as having had his first sexual experience with his mother in an outhouse in Lynchburg, Virginia. Falwell and his mother were made out to be drunken, incestuous hypocrites. The ad was labeled “ad-parody—not to be taken seriously,” and was indexed in the table of contents as “Fiction—Ad and Personality Parody.” Falwell sued Flynt in federal

district court in Virginia for appropriation of his name and likeness, defamation, and intentional infliction of emotional distress. At the trial, the jury found that no reasonable person could have understood the ad as meant to describe actual facts about Reverend Falwell, and since the ad would not be understood as making actual factual allegations, it could not be “libel” within the traditional legal meaning of that term. The trial judge also dismissed the claim for appropriation of Falwell’s name or likeness, on the grounds that the appropriation was not done for “commercial purposes.” But the jury did return a victory for Falwell under a different legal theory, “intentional infliction of emotional distress,” awarding Falwell \$100,000 in compensatory damages and \$100,000 in punitive damages.

The case reached the U.S. Supreme Court. In an opinion written by Chief Justice Rehnquist, the Court struck down the jury verdict, holding that the crude parody was expression protected by the First Amendment. Chief Justice Rehnquist began his analysis with an essay on the purposes of the First Amendment. “At the heart of the First Amendment,” he wrote, “is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern.” He then recognized the two principal functions of free speech, the self-fulfillment of the individual speaker, and the broader social search for enlightenment, observing that “the freedom to speak one’s mind is not only an aspect of individual liberty—and thus a good unto itself—but also is essential to the common quest for truth and the vitality of society as a whole.” The Court has been particularly vigilant, he observed, to ensure that ideas remain free from governmentally imposed sanctions, because the “First Amendment recognizes no such thing as a ‘false’ idea.” Chief Justice Rehnquist capped off his introductory remarks by invoking one of the most sacred passages in the First Amendment tradition, the haunting appeal for tolerance by Justice Oliver Wendell Holmes in his dissent in *Abrams v. United States* (1919): “When men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by a free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market.”

If the marketplace of ideas was to be robust and wide open, the Supreme Court reasoned, it had to provide space for even the outrageous antics of characters such as Larry Flynt. The Court noted that in America the prevailing ethos is not to encourage people to enter the public arena by guaranteeing

them shelter from caustic and virulent attack; it is rather to require as a cost of entering the public arena a certain toughening of the hide. Good but sensitive people may be discouraged in America from stepping forward into public life, but that is part of the price of an open society and a spirited democracy. In this nation, a public figure must be able to take as well as give. Public figures, observed Chief Justice Rehnquist, have a substantial capacity to shape events. One of the prerogatives of American citizenship is the right to criticize public persons and measures. And in this country, such criticism will not always be reasoned and moderate. Quoting from *Monitor Patriot Co. v. Roy* (1971), Chief Justice Rehnquist made a point that seemed aimed personally at Jerry Falwell: “‘The candidate who vaunts his spotless record and sterling integrity cannot convincingly cry ‘Foul!’ when an opponent or an industrious reporter attempts to demonstrate the contrary.’” This seemed a diplomatic way of stating to the Reverend Falwell that moralists must expect attacks on their morality. This does not mean, cautioned Chief Justice Rehnquist, that any speech about a public figure is immune from sanction in the form of damages. Speech that is libelous in the conventional sense—speech that contains genuine misstatements of fact and that injures reputation—may be penalized in some circumstances. But even here, Chief Justice Rehnquist admonished, the Constitution requires that the rules of libel be fashioned to provide sufficient breathing space for free speech. Public figures such as Reverend Falwell could not recover civil damages for defamation absent proof that the material was published with knowledge of its falsity or reckless disregard for the truth. Because Flynt’s attack on Falwell was not “false” in the sense required by the law of libel, it was by definition not published with reckless or knowing falsity.

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References and Further Reading

Smolla, Rodney. *Jerry Falwell v. Larry Flynt: The First Amendment on Trial*. New York: St. Martin’s Press, 1988.

Cases and Statutes Cited

Abrams v. United States, 250 U.S. 616 (1919)
Monitor Patriot Co. v. Roy, 401 U.S. 256 (1971)

HUTCHINSON v. PROXMIRE, 443 U.S. 111 (1979)

In 1975, Senator William Proxmire introduced the “Golden Fleece of the Month Award” for organizations squandering federal funds. Early honors went to agencies sponsoring Ronald Hutchinson, a behavioral scientist studying monkey jaw clenching. Proxmire publicized the “award” in a congressional speech, a press release, and newsletters issued to constituents and people outside his home state. Where Hutchinson sued Proxmire for defaming his professional reputation, the senator argued the Constitution’s speech and debate clause protected the publications as legislative activity and the First Amendment guaranteed his right to criticize public figures.

The U.S. Supreme Court clarified that the Speech and Debate Clause preserved legislative independence, but did not throw a blanket over all activities outside Congress’s walls. Chief Justice Warren Burger ruled that the Constitution shielded Proxmire’s Senate speech, but did not immunize the newsletters and press release because informing the public was not essential to internal legislative and deliberative processes. Furthermore, the district court erred in summarily dismissing Hutchinson’s claims under the First Amendment, holding that he was a public figure who failed to show that the defendants acted with actual malice. “Actual malice” questions, Burger noted, require examining a defendant’s state of mind, which “does not readily lend itself to summary disposition.” Moreover, Hutchinson was not a public figure because his research position wielded little public influence and he only had limited access to mainstream media. Reversing the lower federal court rulings, the Supreme Court circumscribed the speech and debate clause’s protections to congressional members’ essential legislative functions on Capitol Hill.

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See also **Defamation and Free Speech; Freedom of Speech: Modern Period (1917–Present); Government Speech; Legislators’ Freedom of Speech; Public Officials; Speech of Government Employees**

I

IDEOLOGICAL AND SECURITY-BASED EXCLUSION AND DEPORTATION

Antidiscrimination and National Security

Immediately after the September 11, 2001, terrorist attacks, hundreds of noncitizens were detained for immigration violations and minor crimes under the rationale of antiterrorism. The administration was criticized for not providing basic information about the whereabouts and exact number of these detainees and worse for not providing basic due process and practicing racial profiling in its antiterrorism efforts.

Historically, the U.S. government has excluded noncitizens on the basis of their membership in certain organizations deemed to pose a threat to national security. This practice implicates freedom of association and First Amendment rights. The Supreme Court's *Brandenburg* holding of 1969 held that the government may not "proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action" (*Brandenburg v. Ohio*, 395 U.S. 444, 447, 1969). The immigration statutory scheme enacted after September 11, 2001, provides the federal government with unprecedented powers, of which ideological exclusion, after a period of being out of favor, has been resurrected.

Legal outcomes in terms of who should be excluded or deported are closely affected by the ideological nature of citizenship rights, an area of study that has traditionally fallen within the purview of citizenship theory rather than the law. On the other hand, the law makes the determination of who does or does not belong in the United States through a balancing of interests. These competing interests are on the one hand the civil rights protections for individuals and on the other the interests of society as a whole. But, the law's process of interpreting these interests has historically been subject to the popular ideology within mainstream politics, culture, and society and to the law's peculiar jurisprudential methods of determining what groups are excludable or includable.

In the post-September 11 era, the concern over global terrorism has resulted in the enactment of a statutory regime in the United States that has pushed (some say exceeded) the boundaries of the traditional balance of interests between individual rights and those of society (here national security) to the edge. Critics of this new statutory scheme, in particular the USA PATRIOT Act, Pub.L. 107-56, 115 Stat. 272 (2001), have argued that aspects of it practice racial profiling and are discriminatory by nature. These changes have had far reaching effects on the immigration controls regulated by administrative agencies and the courts. As in the past, this new national security paradigm's approach to exclusion and deportation has implicated American society's views on race and national origins.

In the aftermath of the September 11 terrorist attacks there was a large increase in the reported

number of hate crimes perpetrated against Middle Easterners and those misidentified as being such. Is this rise in hate crimes a consequence of the federal government's endorsement and practice of racially profiling Middle Easterners? This essay compares some important historic examples of the convergence between popular attitudes towards outsider groups as un-American and the law's role in creating categorizations of these groups as beyond the protections of the law and thus excludable.

The determination that a particular group should be excluded or deported is the tail end of a longer process in which popular and elite ideological views converge with legal processes to identify that group as a threat. The outcome of this determination is that members of such groups are accorded noncitizen status socially (regardless of their actual immigration status) and are at risk of being determined noncitizens legally. The selection of what persons or groups are excluded from the United States depends upon a matrix of factors that include domestic and international conflicts and pre-existing views on immigration, race, and class.

These ideological perspectives have historically played a large role in the law's treatment of different groups in the United States. Therefore, legal frameworks for exclusion and deportation trigger questions of equality and antidiscrimination principles and law. These practices are controlled through statutory schemes and the federal institutions that interpret and apply the laws to individuals and groups on a daily basis. Historically, these institutions have used exclusion and deportation for mixed purposes of short-term political ends, demographic control, and national security. Each of these political and social objectives is subject to ideological views and biases specific to its historical moment.

David Cole cautions that in times of crisis, such as the current era of the "War on Terrorism," the groups that have suffered most when the law has deemed that certain civil liberties should be curtailed for the benefit of improved national security has been noncitizens, a result he defines as a double standard. In the current era, practices such as racial profiling, which normally would be viewed with much scrutiny, are viewed as necessary evils. Cole argues that such shifts in fact harm society as a whole. What we allow our government to do to noncitizens has consequences on how it treats citizens. For example, the Enemy Alien Act of 1798 remains on the books. This act authorizes the president during wartime to detain, deport, or otherwise restrict the liberties of any citizen over fourteen years of age of a country with which the United States is at war, without any individualized showing of disloyalty, criminal conduct, or even

suspicion. The internment of Japanese (two-thirds of whom were citizens) during World War II was an extension of this logic.

Critics have argued that one example of the double standard of treatment is John Walker Lindh, a U.S. citizen of Caucasian descent, coined the "American Taliban," who was taken into custody at Mazar-el Shariff in Afghanistan for fighting on the side of the Taliban against U.S. troops. President Bush opted not to have Lindh tried in a military tribunal—a venue lacking many of the procedural protections of a civilian criminal court. Bush limited military tribunals to noncitizens although there is no such constitutional bar and citizens have been tried in such venues and the Supreme Court has upheld this.

Recent History of Exclusion and Deportation

A broad interpretation of what constitutes "security-based" concerns is necessary to understand the role that race and national origins have played in exclusion and deportation. The important early instances of legal exclusion were based on fears of threat to the domestic labor market by what were deemed inassimilable outsiders. The view that such groups were inassimilable was based on the assumption that the cultural and social practices of these groups, their racial bloodlines, and thus their ability to be a proper part of the American polity posed a threat to American political and cultural sovereignty. Therefore, such groups could not be trusted with full-citizenship status.

The most notorious example of exclusion through the denial of citizenship rights is the U.S. Supreme Court's pre-Civil War case *Scott v. Sandford*, 60 U.S., 393 (1857). *Dred Scott* is not traditionally categorized under the rubric of national security-based exclusion, but it reveals the close jurisprudential and ideological connection between views on race and citizenship rights that are important factors in cases categorized thusly. Therefore, in order to understand the basis of some of the current critiques of the USA PATRIOT Act as practicing racial profiling, it is necessary to understand cases such as *Dred Scott* and other cases involving racial prerequisites and immigration restrictions as part of having similar ideological and legal histories.

Dred Scott upheld the property rights of slaveholders, thus denying African Americans citizenship rights. The plaintiff, Dred Scott, was a slave who escaped to a non-slave-holding state. The Taney Court's rationale was that even a "free Negro" whose ancestors were slaves could not be considered a citizen within the meaning of the Constitution and therefore

lacked standing to sue. Taney balanced the interests of African Americans in being recognized as citizens rather than chattel against what he viewed as broader social interests in the status quo and the stability it implied, finding for the status quo.

The Chinese Exclusion Case

Although *Dred Scott* was roundly criticized, even in its time, there are a series of legal statutory and court decisions after it that exercised the balancing principle and found against the interests of outsider groups on the basis of race and national origin. In the mid-nineteenth century, the multiracial environment in California resulted in competition between European ethnic groups and Asians, Mexicans, Native Americans and blacks. In this environment, ideological views of nonwhite groups as outsiders played an important role in the consolidation of power by European ethnic groups around a white identity. By default, this white identity became established as the norm in terms of who was an American citizen.

On the other hand, groups such as Chinese Americans came to be identified as inassimilable outsiders who posed a threat to free white labor and American democratic ideals. What followed were a series of exclusionary laws and related cases that solidified and sanctioned the popular view that Chinese immigrants posed a threat to democratic ideals of free labor. These legal outcomes were driven by labor competition with labor that had already coalesced around white identity; integral to this was a model of what constituted an appropriate American and the Chinese did not satisfy this. Those that did not fall within the paradigm of American identity were inassimilable and thus were more likely to be perceived as national security threats.

In what has since been categorized as the “Chinese Exclusion Case,” a Chinese American plaintiff argued for the right to re-enter this country. This case is the progeny of The Chinese Exclusion Act. Passed by the U.S. Congress in 1882, the treaty suspended immigration of Chinese laborers for ten years and was renewed through 1952. The act allowed for the departure and return of Chinese laborers already in the United States, requiring that they carry certificates of identity. But six years later, Congress passed a statute that prohibited the re-entry of laborers who had left the United States relying upon the current law and possessing the certificates of identity. In 1888, Chinese laborer Chae Chan Ping, who left for a visit to China before the subsequent passage of the act denying re-entry, was denied re-entry to the United States.

Terrorism and Racial Profiling

The internment of Japanese Americans during World War II represents a moment when important civil liberties such as due process and equal rights were set aside for citizens and noncitizens alike, due to concerns over national security. As with today’s War on Terrorism, the concern then was how to balance individual rights vs. those of society. The case of Japanese internment is relevant to the post-September 11 context since it involved the assumption that Japanese Americans as a racial group were potential enemy aliens regardless of citizenship status. Critics have charged that the detention of noncitizens of Middle Eastern background parallels the internment of Japanese Americans during the Second World War.

Through a similar process in which mainstream ideological views and the law interacted to construct an identity of Asian Americans as inassimilable outsiders who posed a national security threat, people of Middle Eastern descent in the post-September 11 era have become reconstructed as “terrorists.” Leti Volpp describes a process in which, after September 11, 2001, ideology, law, and politics converged with the resulting consolidation of a new identity category grouping together persons who appear “Middle Eastern, Arab, or Muslim.” This consolidation reflects a racialization in which members of this group are identified as terrorists and are thus not identified as citizens regardless of their official citizenship status.

The USA PATRIOT Act’s provisions have allowed indefinite detention of noncitizens, thus providing the attorney general unprecedented power to detain aliens without a hearing and without a showing that they pose a threat to national security or are a flight risk. Given that the Immigration and Naturalization Act (INA) now broadly construes membership in designated “terrorist organizations” and lawful activity in support of such organizations as illegal, the attorney general may indefinitely detain such persons.

The broad INA definitions would result today in the designation of noncitizen supporters of the African National Congress (South African President Nelson Mandela’s organization) as deportable had they been in effect in the 1980s. In addition, the USA PATRIOT Act now allows for the ideological exclusion on grounds of pure speech. It bars noncitizens from admissions under a broad definition in which noncitizens “endorse or espouse terrorist activity” or “persuade others to support terrorist activity or a terrorist organization” when the secretary of state feels that it undermines the U.S. combat of terrorism.

In *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952), the Supreme Court upheld the Alien Registration Act of 1940, which allowed for the deportation of aliens who had been members of a subversive group before entering the United States, regardless of when or for how long they were members (Alien Registration Act of 1940, Ch. 439, § 23(b), 54 Stat. 673). The rationale for this decision is based on Congress's plenary power to admit and exclude aliens as held in *Chae Chan Ping v. United States*, 130 U.S. 581 (1889) and *Fong Yue Ting v. U.S.* (1893).

Thus, in the immigration arena, the Court has shown great deference to Congress. This approach has created a long-standing conflict over the issue of whether noncitizens have the same constitutional protections as citizens. In *Harsiades*, dissenting Justice Douglas critiqued the notion that *Fong Yue Ting* stood for Congress's absolute power to deport aliens, writing that it was "inconsistent with the philosophy of constitutional law which we have developed for the protection of resident aliens. We have long held that a resident alien is a person within the meaning of the Fifth and the Fourteenth Amendments" and has similar rights as a citizen.

Conclusion

Historically, statutes and court holdings have come out on the side against noncitizen outsider groups in their assessment of the relative rights of individuals vs. the whole. What history tells us is that when we limit the rights of individuals for their membership in outsider groups, we also run the danger of limiting the basic rights of individuals in society at large. The previous examples of the process in which blacks are construed as noncitizen property, Chinese are as inassimilable national security threats, and Middle Easterners as terrorists illustrate the role that race and national origin have played in legal outcomes. The balancing of individual rights vs. those of society at large must be exercised with a calculation for the role that discrimination plays in ideology and its effect on perceptions of who is American or not American, who will be loyal or disloyal, and, finally, who belongs or does not belong in this country.

Soon after September 11, Ariel Dorfman wrote that the photographs of those missing in the World Trade Center reminded him of the photographs of the *desparecidos* (the "disappeared") of Chile. Volpp asks what it might mean to expand "who occupies the category of our disappeared, from those killed in the World Trade Center, to consider also those noncitizens in detention? Our government has taken them,

and we do not know where they are," and finally "[w]ho is the 'us' in the U.S.?"

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References and Further Reading

- Almaguer, Tomas. *Racial Faultlines: the Historical Origins of White Supremacy in California*. Berkeley: University of California Press, 1994.
- Bosniak, Linda, *Universal Citizenship and the Problem of Alienage*, Northwestern University Law Review 94 (Spring 2000): 963–1982.
- Cole, David, *Enemy Aliens*, Stanford Law Review 54 (May 2002): 953, 970.
- Gross, Ariela, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South*, Yale Law Journal 108 (1998): 109–180.
- Haney Lopez, Ian. *White by Law: the Legal Construction of Race*. New York: New York University Press, 1996.
- McClain, Charles, *The Chinese Struggle for Civil Rights in Nineteenth Century America: The First Phase: 1850–1870*, California Law Review 72 (1984): 529.
- Omi, Michael, and Howard Winant. *Racial Formation in the United States: from the 1960s to the 1990s*. New York: Routledge, 1994.
- Takaki, Ronald. *Strangers from a Different Shore: a History of Asian Americans*. New York: Penguin Books, 1989.
- Volpp, Leti, *Critical Race Studies: The Citizen and the Terrorist*, UCLA Law Review 49 (June 2002): 1575 at Fn.1.

Cases and Statutes Cited

- Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)
- Chae Chan Ping v. United States*, 130 U.S. 581 (1889)
- Harsiades v. Shaughnessy*, 342 U.S. 580 (1952)
- Scott v. Sandford*, 60 U.S., 393 (1857)
- Alien Registration Act of 1940*, Ch. 439, § 23(b), 54 Stat. 673
- The Chinese Exclusion Act*, May 6, 1882, Ch. 126, 22 Stat. 58
- USA PATRIOT Act*, Pub.L. 107-56, 115 Stat. 272 (2001)

See also Aliens, Civil Liberties of; Citizenship; Due Process in Immigration; Noncitizens and Civil Liberties

ILLEGITIMACY AND IMMIGRATION

Modern constitutional law provides substantial protection to children whose parents are not married; however, immigration law still recognizes distinctions between children who are and who are not "born out of wedlock." Thus, while the Supreme Court has subjected state laws that discriminate against non-marital children to heightened scrutiny under the Fourteenth Amendment's equal protection clause, it has largely deferred to Congress's plenary power over immigration, upholding such distinctions to the extent that they purportedly reflect the legislature's reasonable policy choices. For example, fathers of

marital children are not required to establish that they have a bona fide relationship with their children, a requirement fathers of nonmarital children must fulfill. Immigration law also recognizes gender distinctions between fathers and mothers of nonmarital children. Mothers of nonmarital children, unlike fathers, need not establish a bona fide relationship with their children: that they were present at the birth suffices.

While arguably serving the purpose of preventing the filing of fraudulent immigration petitions, laws that burden nonmarital children have been criticized not only for codifying stereotypical distinctions deemed unconstitutional when enacted by state and local legislatures, but also for perpetuating the commodification of children who depend on their parents for immigration benefits. Critics applaud efforts to give a more meaningful voice to children's perspectives in developing a fair and equitable immigration policy. But there has been some progress. In 1995, Congress amended the immigration code, replacing the terms "legitimate" and "illegitimate" with "child born in wedlock" and "child born out of wedlock," respectively.

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References and Further Reading

Chemerinsky, Erwin. *Constitutional Law: Principles and Policies*, 2nd ed. New York: Aspen Law and Business, 2002.

Fragomen, Austin T., and Steven C. Bell. *Immigration Fundamentals: A Guide to Law and Practice, Fourth Edition*. New York: Practice Law Institute, 2004.

Krause, Harry D., *Equal Protection for the Illegitimate*, Michigan Law Review 65 (1967): 477–505.

Thronson, David B., *Kids Will Be Kids? Reconsidering Conceptions of Children's Rights Underlying Immigration Law*, Ohio State Law Journal 63 (2002): 979–1016.

See also *Fiallo v. Bell*, 430 U.S. 787 (1977); **Sex and Immigration**

ILLINOIS V. GATES, 462 U.S. 213 (1983)

How should courts measure whether information based on an informer's tip establishes "probable cause" to arrest or search?

Illinois police received an anonymous letter saying that Lance and Sue Gates were big-time drug dealers; that on May 3 Sue would drive down to Florida to pick up drugs and load them into the family car; and a that few days later Lance would fly down and drive the car back. When their surveillance confirmed the Gates' unusual travel arrangements, the officers took this information to a judge, who issued a search warrant; when the officers searched the Gates' car, they found a sizable amount of drugs.

According to prior Supreme Court decisions, probable cause could be based on an informant's tip only if the officer offered specific evidence showing that the informant was a truthful person and that he acquired his information in a reliable way. Because the tipster in *Gates* was anonymous and his letter did not say how he had obtained his information, the *Gates*' argument was that there had been no probable cause for the warrant.

The Supreme Court overruled its earlier cases, concluding that whether probable cause existed should be assessed by the "totality of the circumstances," and that under the "totality" test, the warrant was valid. The Court stressed that because the tipster accurately predicted the Gates' unusual travel arrangements, it was likely that the tipster had obtained his information in a reliable way, and because those arrangements were somewhat suspicious anyway, a judge could reasonably conclude that it was sufficiently probable that the tipster was also right in predicting there would be drugs in the car.

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References and Further Reading

Cook, Joseph C. *Constitutional Rights of the Accused*, 3rd ed. 1996 and 2005 supplement, sections 4:23 and 4:36.

LaFave, Wayne R. *Search and Seizure: a Treatise on the Fourth Amendment*, 4th ed. St. Paul, MN: West, 2004, sections 3.2, 3.3(a), 3.3(b).

See also **Probable Cause; Search (General Definition)**

ILLINOIS V. KRULL, 480 U.S. 340 (1987)

The U.S. Supreme Court adopted the Fourth Amendment exclusionary rule in *Mapp v. Ohio*, 367 U.S. 643 (1961), to deter unreasonable searches and seizures. The "good faith" exception to the exclusionary rule, which was created by the U.S. Supreme Court in *U.S. v. Leon*, 468 U.S. 897 (1984), allows evidence seized by the police executing a facially valid search warrant issued by a judge to be admitted in court even though the search warrant was later found to be invalid.

In *Illinois v. Krull*, 480 U.S. 340 (1987), the high court extended the "good faith" exception to cover searches conducted in good-faith reliance upon a state statute that was later determined to be invalid. An Illinois state statute permitted the police to examine the license and records of those who sold motor vehicles and vehicular parts without probable cause or a search warrant. A Chicago Police Department detective arrived at an automobile wrecking yard operated by Krull and, pursuant to the state statute, examined

the vehicles in the yard. The search of the vehicles turned up three that had been stolen.

After his arrest for possession of stolen motor vehicles, Krull filed a motion to suppress the evidence obtained during the search of the vehicles, arguing that the police officer's reliance on the state statute authorizing a warrantless search was unreasonable and in violation of the Fourth Amendment. The state trial court granted the motion to suppress, stating that the warrantless search permitted by the state statute gave police unrestricted discretion and therefore was unconstitutional. The Illinois Supreme Court affirmed the trial court's decision and held that the exclusionary rule was not applicable to the evidence seized during the warrantless search permitted by the state statute.

The U.S. Supreme Court reversed the Illinois Supreme Court and applied the "good faith" exception to those situations in which the police rely upon a state statute authorizing a warrantless search, even though the statute is subsequently held unconstitutional. The Court felt that applying the exclusionary rule in such cases would not deter police misconduct and thus exclusion of the evidence would serve no legitimate purpose.

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Cases and Statutes Cited

Mapp v. Ohio, 367 U.S. 643 (1961)

U.S. v. Leon, 468 U.S. 897 (1984)

See also **Exclusionary Rule**

ILLINOIS V. PERKINS, 496 U.S. 292 (1990)

The Fifth Amendment privilege against self-incrimination prohibits the government's use at trial of a suspect's statements given during custodial interrogation, unless the warnings set forth in *Miranda v. Arizona*, 384 U.S. 436 (1966), were given. These warnings are intended to dispel coercion inherent in a police-dominated atmosphere. In *Illinois v. Perkins*, the Supreme Court held that the use of an undercover officer for interrogation did not implicate concerns about coercion.

While incarcerated on unrelated matters, Perkins told Charlton, a fellow inmate, about a murder he had committed. After learning of this conversation, the police placed an undercover officer and Charlton in the cellblock with Perkins. The undercover officer, under the guise of discussing a possible jail escape, elicited information from Perkins about the murder. Perkins was then charged with the murder, but the

trial court prohibited the government from using his cellblock statements.

Given that compulsion is determined from the suspect's point of view, the Supreme Court reversed, finding that concerns regarding police coercion and self-incrimination were not present when a suspect speaks voluntarily to someone whom he believes is a fellow inmate. The Court distinguished other custodial interrogation cases. Those suspects knew they were speaking to government agents and might have felt coerced as a result. Because Perkins had not been charged with the murder, the Court also noted that he was not protected by the Sixth Amendment right to counsel.

The *Perkins* decision is significant because the Court distinguished police coercion, which is always unconstitutional, from police deception, which may or may not rise to the level of coercion.

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References and Further Reading

Glennon, Charles E., and Tayebe Shah-Mirani, *Illinois v. Perkins: Approving the Use of Police Trickery in Prison to Circumvent Miranda*, Loyola University of Chicago Law Journal 21 (1990): 811-830.

LaFave, Wayne R., Jerold Israel, and Nancy J. King. *Criminal Procedure: Criminal Practice Series*, vol. 2. St. Paul, MN: West Group, 1999, chapter 6, sec. 10(b).

Cases and Statutes Cited

Miranda v. Arizona, 384 U.S. 436 (1966)

See also **Coerced Confessions**; **Jailhouse Informants**; *Massiah v. United States*, 377 U.S. 201 (1964); *Mathis v. United States*, 391 U.S. 1 (1968); **Miranda Warning**; *Orozco v. Texas*, 394 U.S. 324 (1969); *Rhode Island v. Innis*, 446 U.S. 291 (1980); **Rights of the Accused**

ILLINOIS V. WARDLOW, 528 U.S. 119 (2000)

Wardlow was standing in an area of Chicago known for drug dealing. As four police vehicles approached the area he fled, but was stopped by a police officer. During a protective pat-down search of Wardlow for weapons, the officer discovered a handgun and arrested him. Wardlow's lawyer moved to suppress the weapon from evidence, arguing that the stop and search violated the Fourth Amendment of the U.S. Constitution, which prohibits unreasonable searches and seizures.

In *Terry v. Ohio*, 392 U.S. 1 (1968), the Supreme Court held that a police officer may stop and briefly

detain a person if the officer had *reasonable suspicion* to believe that he was engaging or about to engage in criminal activity. During the stop the officer is permitted to conduct a protective pat-down search for weapons. The Court required that the reasonable suspicion must be based on the existence of articulable facts and the inferences the officer could draw from them based on his experience.

The precise issue in Wardlow's case was whether standing in a drug trafficking area and then fleeing when the police vehicles approached supported a finding of reasonable suspicion. In upholding the constitutionality of the stop the Court concluded that 1) while standing in such an area does not, by itself, support a reasonable suspicion of criminal activity, the characteristics of the location were suspicious enough to warrant further investigation; and 2) based on reasonable inferences about human behavior, fleeing from such a location suggested wrongdoing. Together these supported a finding of reasonable suspicion.

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References and Further Reading

- Goldman, Stanley A., *To Flee or Not to Flee—That Is the Question: Flight as Furtive Gesture*, Idaho Law Review 37 (2001): 557–582.
- LaFave, Wayne R., Jerold H. Israel, and Nancy J. King. *Criminal Procedure*, 4th ed. St. Paul, MN: Thomson/West, 2004.
- Nelson, Debra Meek, *Illinois v. Wardlow: A Single Factor Totality*, Utah Law Review (2001): 509–541.

Cases and Statutes Cited

- Terry v. Ohio*, 392 U.S. 1 (1968)
- U.S. Constitution, Amendment IV

See also **Search (General Definition); Seizures; Stop and Frisk**

IMMIGRATION AND MARRIAGE FRAUD AMENDMENTS OF 1986

The perception that immigrants marry U.S. citizens to obtain immigration benefits is longstanding and has been popularized in movies, books, and magazines. In 1986, Congress responded to this perception by enacting restrictions to deter sham marriages. Under the Immigration and Marriage Fraud Amendments (IMFA), spousal sponsorship—a centerpiece of family-based immigration policy—became a two-step process for some applicants. Because Congress believed that sham marriages were unlikely to endure

for two years, all persons who obtain permanent resident status based on a marriage that is less than two years old are deemed “conditional” permanent residents. At the end of two years, both spouses must petition the Department of Homeland Security (DHS) to have the conditional status removed.

DHS then investigates the validity of the marriage. If it finds that the marriage is valid, it removes the conditional status and grants full permanent resident status to the applicant. If it finds that the marriage is fraudulent, legal status is terminated and the applicant is deportable. The petitioning process may compromise applicants' privacy and personal dignity, since applicants must often present items to demonstrate the validity of their marriages, from wedding announcements to evidence of shared expenses. Commentators have also criticized the underlying concept of sponsorship, arguing that it is based on an antiquated patriarchal model of marriage.

When IMFA was enacted, Congress did not anticipate its impact on abused spouses. Domestic violence victims with conditional status may be deterred from reporting abuse for fear that their spouse will refuse to participate in the joint petition to DHS. Subsequent amendments to IMFA have created special procedures for battered spouses and children.

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References and Further Reading

- Aleinikoff, Thomas Alexander, David Martin, and Hiroshi Motomura. *Immigration and Citizenship: Process and Policy*, 5th ed. St. Paul, MN: West, 2003, 308–322.
- Anderson, Michelle J., *A License to Abuse: The Impact of Conditional Status on Female Immigrants*, Yale Law Journal 102 (April 1993): 1401–1430.
- Calvo, Janet, *A Decade of Spouse-Based Immigration: Coverture's Diminishment but not Its Demise*, Northern Illinois University Law Review 24 (Spring 2004) 153–204.

Cases and Statutes Cited

- Immigration and Marriage Fraud Amendments of 1986*, Pub. L. 99-639, 100 Stat. 3537

See also **Due Process in Immigration; Noncitizens and Civil Liberties; Sex and Immigration**

IMMIGRATION AND NATIONALITY ACT AMENDMENTS OF 1965

The Immigration and Nationality Act Amendments of 1965 are considered by many as legislation that dramatically changed the method by which immigrants are admitted into the United States. The U.S.

immigration laws of which this amendment is a part and the Immigration and Nationality Service that executes its authority are gatekeepers for the nation's borders and ports of entry. More generally, INS laws determine who may enter the United States, how long they may stay (if at all), and when they must leave. It also determines whether a person is an alien and his or her associated legal rights, duties, and obligations in the United States. Lastly, it provides the means by which certain categories of aliens can become naturalized with full legal rights as natural born citizens of the United States.

The Act and Purpose

The purpose of the Immigration and Nationality Act (INA) Amendments of 1965 was to amend the 1952 Immigration and Nationality Act by eliminating the "quota and national origin" provisions perpetuated from previous INA laws such as the Quota Act of 1921, the Immigration Act of 1924, the Immigration and Nationality Act of 1952, and the 1790 Naturalization Law. Thirteen years earlier, the 1952 act did just the opposite. It brought together the quota and national origin practices of the early 1920s that governed immigration into the United States. Thus, the 1965 amendments represented an important revision of early U.S. immigration policy that limited immigration from non-European countries to nothing but negligible levels. In repealing these restrictions, the 1965 act eliminated race and ancestry as the primary bases for U.S. immigration policy.

Significance of the Act

The significance of the 1965 INA amendments lies in the fact that they made future immigrants to the United States aware that would be welcomed for criteria such as family, occupational skills, or professions, rather than for their race, ancestry, or countries of origin. They also eliminated the national origins quota system, but established a seven-category preference system under which immigrants would be admitted. A related significance of the 1965 INA is that it was enacted in the shadows of the ongoing civil rights legislation of the early 1960s. Perhaps because of this, it represented the most far-reaching revisions of U.S. immigration policy of its time.

As expected, the change in policy and, ultimately, law shifted the source of the immigration flow away from Europe towards the overpopulated developing

countries. In so doing, it proposed a new principle of numerical restriction with an annual ceiling for which immigrant visas would be issued on a first-come, first-served basis. The new setup established a seven-preference system giving priority first and foremost to family reunification. It also provided for annual ceiling limits of Western Hemisphere immigration at 120 thousand without country limits on immigrants. The new preference system gave priority to: (1) immigrants with relatives residing in the United States, (2) immigrants with occupational skills or training needed in the United States, and (3) refugees.

Historical and Political Context

The circumstances that led to the shift in immigration policy were a complex change in public perceptions and values directing politics and legislative compromise on the issue of immigration policy of 1960. Thus, the near consensus by the legislative and executive branch on the issues of immigration as exhibited in the smooth passage of the 1965 act is noteworthy. The House of Representatives passed the legislation by a vote of 326 to 69; the Senate version was passed by a vote of 76 to 18 before President Lyndon Johnson signed it into law on October 3, 1965.

Undoubtedly aided by the intense civil rights movement climate of that period, abolishing the strict quotas on Asian immigration imposed since the 1882 Chinese Exclusion Act, the 1965 amendment was, indeed, a catalyst for rejuvenating the Asian American community after 1965. Arguably in this context, the 1965 act was a by-product of the "rights revolution" movement of the 1960s tied to congressional politics of the Eighty-Ninth Congress, which produced other notable civil and voting rights legislation in 1964 and 1965. However, U.S. immigration history has always been a cobweb of legal and political jigsaw that, on close examination, reveals more than expected. Thus, given the patchwork of U.S. immigration politics, the 1965 act cannot be understood in isolation without the benefit of other previous acts in the 1920s and 1950s and their respective histories. The same holds true for all other INA amendments passed since 1965.

Conclusion

Summarily passed at the height of the civil rights movements of the 1960s, the INA amendments of

1965 eliminated country-specific quotas and ended discrimination. In doing so, they not only expanded the numerical limits but also opened immigration to the United States to people from parts of the world that previously were denied entry. It also increased the Eastern Hemispheric annual quotas, per country limits, and for the first time created an annual cap for the Western Hemisphere countries. However, special preference rules that made immediate family members exempt from numerical quotas caused the ceiling established under the act to be shattered. Also, the European economic prosperity of the mid-1960s caused European immigration to the United States to drop to less than 20 percent, which consequently propelled Latin America and Asia to become the leading source of U.S. immigration.

To be sure, the 1965 act represented a significant watershed in U.S. immigration history and particularly in its explicit reversal of decades of systematically exclusive and restrictive immigration policies that denied non-European immigrants from Asia, Mexico, Latin America, and other non-Western countries entry into the United States. The act recognized that discrimination could no longer be tolerated; it abolished the quota system and went a step further to include general prohibition against discrimination. For example, Section 202(a) of the INA states that “no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of his race, sex, nationality, place of birth, or place of residence.” Explicit from this section is a clear prohibition “except as specifically provided” in other sections of the act that provide for strict per-country limits. Undeniably, the language of the act is clear as to intent and purpose of U.S. immigration policy; granting or denying immigrant visas to aliens on the basis of their national origin is prohibited.

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References and Further Reading

- Chin, Gabriel J., *The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965*, North Carolina Law Review 75 (1996): 274.
- Graham, Otis L., Jr. “Tracing Liberal Woes to ‘65 Immigration Act.” *Christian Science Monitor*, 88 (1995): 23:19–23.
- Hart–Cellar Act. *Immigration and Nationality Act Amendments*, October 3, 1965, (79 Statutes-at-large 911).
- Kennedy, John F. *Published Papers*, 1964, pp. 594–597.
- Kutler, Stanley. “Immigration Act of 1965.” In *Dictionary of American History*, 3rd ed., vol. 4. New York: Charles Scribner’s Sons, 2003, p. 230.
- Le, C. N. “The New Wave of Asian Immigration.” In *Asian-Nation: The Landscape of Asian America*. <<http://www.asian-nation.org/new-immigration.shtml>>September 2, 2005.

McCarran–Walter Immigration and Nationality Act, Immigration and Nationality Act of June 27, 1952 (INA), 66 Statutes at Large 66 (1952): 163.

Shih, Susan, *Immigration Act of 1965*, Purdue University; <<http://web.ics.purdue.edu/~willough/immgact.htm>>.

U.S. Congress, Senate Committee on the Judiciary. *The Immigration and Naturalization Systems of the United States*. S. Representatives 1515, 81st Cong., 2d Session. Washington, GPO, 1950.

See also Aliens, Civil Liberties of; Citizenship; Race in Immigration; Sex in Immigration

IMMIGRATION AND NATURALIZATION SERVICE V. CHADHA, 462 U.S. 919 (1983)

Jagdish Chadha, then a British citizen of East Indian descent, was lawfully admitted to the United States in 1966 on a nonimmigrant student visa. After it expired, the Immigration and Naturalization Service proceeded to deport Chadha who, although conceding his deportability, applied to the immigration judge for a suspension of deportation. Pursuant to the authority delegated to him by the attorney general, the immigration judge granted Chadha’s application, which allowed him to remain in the United States. The immigration judge then reported this action to Congress, and the House of Representatives decided to nullify the judge’s ruling pursuant to a statutorily granted one-House legislative veto. Chadha challenged this veto power in federal court, arguing its unconstitutionality.

The Supreme Court agreed, holding that vesting veto power in a single chamber of Congress violated the doctrine of separation of powers by giving the House legislative powers that the Constitution expressly assigns to both the Senate and the House, subject to presentment to the president or, in case of the president’s veto, congressional override. From an immigrant rights perspective, the *Chadha* Court’s decision to favor the noncitizen’s rights over Congress’s plenary power over immigration is extraordinary and unusual, for rarely has the Court curtailed Congress’s immigration authority, let alone on constitutional grounds. More likely, *Chadha* expresses the Court’s concern over the Constitution’s allocation of legislative power and how Congress’s creation of a unicameral legislative veto exceeded the permissible scope of its otherwise plenary power over immigration.

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References and Further Reading

- Craig, Barbara H. *Chadha—The Story of an Epic Constitutional Struggle*. Berkeley: University of California Press, 1990.

Legomsky, Stephen H., *Immigration Law and the Principle of Plenary Congressional Power*, The Supreme Court Review (1985): 255–307.

Strauss, Peter L., *Was There a Baby in the Bathwater? A Comment on the Supreme Court's Legislative Veto Decision*, Duke Law Journal (1983): 789–819.

See also **Aliens, Civil Liberties of; Due Process in Immigration**

IMMIGRATION AND NATURALIZATION SERVICE V. LOPEZ–MENDOZA, 468 U.S. 1032 (1984)

In this case, the Supreme Court held that the Fourth Amendment's exclusionary rule did not apply to deportation hearings. The case was brought by two aliens arrested at their place of employment by Immigration and Naturalization Service (INS) agents without a warrant or probable cause. While in the custody of the INS, both men admitted they had entered the United States illegally. The INS moved to deport the two men, and they challenged the order of deportation on the grounds that the evidence used to deport them—their statements that they were in the United States illegally—had been obtained in violation of their Fourth Amendment rights. Thus, the men argued, the exclusionary rule, the principle that fruit of an illegal arrest must be excluded from evidence, required that their statements be suppressed in the deportation hearing.

The Court reasoned, however, that deportation hearings are civil proceedings to decide whether an alien is allowed to remain in the United States, not to punish him or her for unlawfully entry. The Court applied a balancing test to determine whether the exclusionary rule was an appropriate remedy for Fourth Amendment violations in the context of deportation. The Court decided that the social benefits of excluding unlawfully seized evidence to deter future unlawful police conduct were outweighed by the costs that applying the exclusionary rule in deportation hearings would cause by allowing aliens to continue to reside in the United States, even though they had entered illegally. The Court left open the possibility that the exclusionary rule might be appropriate in cases involving egregious violations of the Fourth Amendment.

The case is consistent with prior Supreme Court cases that have refused to give aliens any constitutional protection in deportation or removal hearings, other than minimal procedural due-process protections.

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See also **Aliens, Civil Liberties of; Chae Chan Ping v. U.S.**, 130 U.S. 581 (1889); **Criminal Law/Civil Liberties**

and Noncitizens in the U.S.; Due Process in Immigration; Exclusionary Rule; Fruit of the Poisonous Tree; Noncitizens and Civil Liberties; Seizures, Undocumented Migrants; Warrantless Searches

IMPARTIAL DECISIONMAKER

When a governmental body adjudicates the rights and interests of individuals, it is often said that the decisionmaker—the person who finds the facts and applies the law—should be impartial. This means that he or she should be insulated from improper considerations, which may include personal financial interests, fealty to the executive branch, or sympathy for one class of litigants (for example, the ones in a particular locality or party) over another. Some commentators consider the impartial decisionmaker to be the *sine qua non* of the rule of law and due process; others have argued that impartiality has drawbacks: it necessitates a system of adversary justice that may be slow, expensive, and under many circumstances infeasible.

The ideal of impartiality has come closest to realization in the courts, though not in the smoothest way. English common law traditionally invalidated a decision in which the judge had a personal financial stake, following Coke's maxim in *Bonham's Case* that a person cannot be a judge in his own cause. At the same time, however, English judges collected fees from litigants, which arguably gave them an incentive to attract plaintiffs to their courts. Furthermore, they were at the mercy of the Crown, which could remove them at will, until Parliament granted them life tenure in 1701. Even after that, the Crown's control over appointments and judicial pensions made for a government-minded judiciary. In the North American colonies, this arrangement was even more pronounced: judges depended significantly on fees, and they served at the pleasure of the crown and its agents; colonists viewed a judge as just another political official.

Shortly after the American Revolution, however, the new states began allowing judges to sit for life. (They also started abolishing fees, at least in the more important courts; in this respect, they were ahead of England, which did not do so until 1826.) The U.S. Constitution of 1787 guaranteed federal judges irreducible salary (not fees) and life tenure. In *The Federalist*, Alexander Hamilton explained that such tenure was essential to impartiality, which was, in turn, essential to the federal courts' mission to adjudicate interstate disputes in a vast and diverse country.

Though federal judges remained insulated as Hamilton wished, state governments, swept up in the Jacksonian movement to expand democracy, provided for popular election of many judicial offices ca. 1830–1860. Advocates of this reform insisted that the electorate was sufficiently wise to choose impartial judges, but many judgeships became associated with party machines. While various restrictions later lessened partisan influence, very few states today have fully life-tenured judiciaries.

Meanwhile, the fee systems that had been abolished in the federal and upper state judiciaries continued to flourish in minor criminal courts and small-claims courts well into the twentieth century. In many states in the 1920s, judges in minor criminal courts (enforcing Prohibition) could collect a fee from the defendant if they convicted, but got nothing if they acquitted. Until that time, the U.S. Supreme Court had dealt little with judicial impartiality as a constitutional matter (likely because the Constitution's institutional safeguards prevented the issue from arising among federal judges).

However, now that the Court had grown comfortable applying federal due process to the states through the Fourteenth Amendment, it struck down the criminal-court fee systems in *Tumey v. Ohio*, 273 U.S. 510 (1927). The Court reached the same result in *Ward v. Monroeville*, 409 U.S. 57 (1972), in which fines were a major source of revenue to a locality of which the judge was also the mayor. Federal due process developed more slowly in the civil context than it had in the criminal one: the dependence of small-claims judges on fees from plaintiffs, though abolished in many cities during the Progressive Era (for example, Chicago in 1905), continued in Mississippi until the U.S. Court of Appeals struck it down in *Brown v. Vance*, 637 U.S. 272 (5th Cir. 1981).

Of course, courts do not handle all (or even most) adjudications of individual rights and interests. Given limited resources, it is often necessary for executive officers to decide facts and law without resort to a court. The potential for bias in favor of the state is, by definition, ever present. For the nineteenth century, we do not know a great deal about how the law treated this kind of executive adjudication. In part, this is because courts often chose to stay out of it. They viewed it as their job to protect “rights,” not “privileges” such as public benefits and government jobs. Also, claims by the state against citizens were “public rights” traditionally beyond the judicial sphere, while claims by citizens against the state were originally a legislative matter. Also, at least up to the 1870s, judges generally respected the prerogatives of localities, which accounted for much of the

regulation during that era (for example, fire safety, public health, and town marketplaces).

Even when judges did get involved, the great variety of executive action meant that their inquiries had to be context specific. Ruling that a county commissioner could sit on a board deciding the location of a road that might pass through his town, Chief Justice Lemuel Shaw of Massachusetts explained in *Inhabitants of Wilbraham v. Hampden County Commissioners*, 11 Pick. 322 (Mass. 1831), that the principle of impartiality had to be applied in light of expediency and the wishes of the legislature.

As the nineteenth century turned into the twentieth, executive adjudication grew and changed as the nation industrialized and as new political majorities demanded that the government alter economic outcomes in more systematic ways than it ever had before. By the New Deal of the 1930s, agencies were making decisions on numerous subjects formerly dominated by private law. The concern that these agencies fused prosecutor and judge roles was primarily resolved in Congress rather than in court.

Passed in 1946, the Administrative Procedure Act (APA) created a new corps of “hearing examiners,” later renamed administrative law judges (ALJs). The statute provided that for all programs designated by Congress (which ultimately included much of federal regulation, such as securities and labor), each adjudication would occur before an ALJ. Though employed by their respective agencies, the ALJs, to this day, have no responsibilities besides adjudication; never communicate with investigative or prosecutorial personnel ex parte; and cannot be fired unless the agency convinces an outside board that there is good cause to do so.

One key exception to the ALJ scheme is that the agency's top political appointees can take over any adjudication they wish, deciding facts and law themselves. Though such action is not always practical for the general run of cases, it ensures the political appointees' policymaking role. Due process requires only that political appointees not prejudge the specific facts of the case. In *FTC v. Cement Institute*, 333 U.S. 683 (1948), the federal trade commissioners ordered certain businesses to stop using a certain pricing system. Prior to the case, the commissioners had publicly declared that the type of pricing system at issue was unlawful, but they had not made specific statements about the acts of the businesses involved in the case. The Supreme Court found no improper bias. By contrast, in *Cinderella Career and Finishing Schools v. FTC*, 425 F.2d 583 (D.C. Cir. 1970), the U.S. Court of Appeals found that the agency's chairman acted improperly when he declared publicly, while a case

was pending, that conduct highly specific to the parties was unlawful.

There is also a large residual category of adjudications over which neither a political appointee nor an ALJ presides. In fact, this residual category covers the majority of federal adjudications (the most numerous being immigration hearings). Such matters are decided by officers who lack ALJ protections. In this context, often the sole safeguard for impartiality is constitutional due process, the demands of which are less than those of the APA. For example, in *Marcello v. Bonds*, 349 U.S. 302 (1955), the Supreme Court upheld a deportation even though, as the dissent put it, “the hearing officer adjudicated the very case ... which the hearing officer’s superiors initiated and prosecuted.”

Granted, due process gives protection in some instances. The Supreme Court ruled in *Morissey v. Brewer*, 408 U.S. 471 (1972), that parole revocation must be decided by an official without direct prior involvement in the parolee’s case (which bars the arresting officer). But the fusion of the adjudicator with the investigator was upheld for prison discipline in *Wolff v. McDonnell*, 418 U.S. 539 (1974) and for medical licensing boards in *Withrow v. Larkin*, 421 U.S. 35 (1975). Rejecting the argument that the adjudicator should always be separate from the investigator, *Withrow* declared that the “incredible variety of administrative mechanisms in this country will not yield to any single organizing principle.”

Ward’s prohibition on indirect financial interests was extended to the administrative process in *Gibson v. Berryhill*, 411 U.S. 564 (1973), in which the Supreme Court found that it violated due process for a board composed of independent optometrists to find that their corporate competitors were engaged in unlawful practice. However, the Court upheld an indirect linkage between an agency’s decisions and its income in *Marshall v. Jerico*, 446 U.S. 238 (1980).

After the attacks of September 11, 2001, the executive branch asserted the power to detain indefinitely, as “enemy combatants,” persons it believed to be members of Al Qaeda and associated forces. In *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), a U.S. citizen detained in this way argued that the facts did not show that he was an enemy combatant. The Supreme Court held that due process entitled him to “a fair opportunity to rebut the Government’s factual assertions before a neutral decisionmaker.”

In response, the Defense Department established combatant status review tribunals (CSRTs), each of which was to consist of one judge-advocate and two other military officers, none of whom had previously dealt with the detainee whose status they were to

decide. Within months, the CSRTs exonerated 38 detainees and classified 520 others as enemy combatants. (See *Associated Press v. U.S. Department of Defense*, 2005 WESTLAW 2065171 at *1 [S.D.N.Y.].) As of September 2005, several members of the latter group were challenging the constitutionality of the CSRTs in federal court.

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References and Further Reading

- Asimow, Michael, *The Administrative Judiciary: ALJs in Historical Perspective*, Journal of the National Association of Administrative Law Judges 20 (2000): 157–165.
- Bator, Paul M., *The Constitution as Architecture: Legislative and Administrative Courts Under Article III*, Indiana Law Journal 65 (1989): 233–275.
- Croley, Stephen P., *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, University of Chicago Law Review 62 (1995): 689–794.
- Frye, John H., III., *A Survey of Non-ALJ Hearing Programs in the Federal Government*, Administrative Law Review 44 (1992): 261–353.
- Holdsworth, Sir William. *A History of English Law*, 6th ed., vol. 1. 1938.
- Lemmings, David. “The Independence of the Judiciary in Eighteenth-Century England.” In *The Life of the Law*. P. Birks, ed. 1993, 125–149.
- Novak, William J. *The People’s Welfare: Law and Regulation in Nineteenth-Century America*. Chapel Hill: University of North Carolina Press, 1996.
- Orth, John V. *Due Process of Law: A Brief History*. Lawrence: University of Kansas Press, 2003.
- Pierce, Richard J., Jr., *Political Control Versus Impermissible Bias in Agency Decisionmaking: Lessons from Chevron and Mistretta*, University of Chicago Law Review 57 (1990): 481–519.
- . *Administrative Law Treatise*, 4th ed. New York: Aspen Publishers, 2002, sections 9.8–9.10 (with 2005 supplement).
- Redish, Martin H., and Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, Yale Law Journal 95 (1986): 455–505.
- Rotunda, Ronald E., and John E. Nowak. *Treatise on Constitutional Law: Substance and Procedure*, 3rd ed. St. Paul, MN: Thomson West, 1999, sections 17.8–17.9 (with 2005 pocket part).
- Shepherd, George B., *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, Northwestern University Law Review 90 (1996): 1557–1683.
- Willrich, Michael. *City of Courts: Socializing Justice in Progressive Era Chicago*. New York: Cambridge University Press, 2003.
- Wolfowitz, Paul. “Order Establishing Combatant Status Review Tribunal.” July 7, 2004.
- Wood, Gordon S. *The Creation of the American Republic, 1776–1787*. Chapel Hill: University of North Carolina Press, 1969.
- Zywicki, Todd J., *The Rise and Fall of Efficiency in the Common Law: A Supply-Side Analysis*, Northwestern University Law Review 97 (2003): 1551–1633.

Cases and Statutes Cited

Bonham's Case, 8 Co. Rep. 107a, 118a; 77 Eng. Rep. 638 (1610)
Brown v. Vance, 637 U.S. 272 (5th Cir. 1981)
Cinderella Career and Finishing Schools v. FTC, 425 F.2d 583 (D.C. Cir. 1970)
FTC v. Cement Institute, 333 U.S. 683 (1948)
Gibson v. Berryhill, 411 U.S. 564 (1973)
Hamdi v. Rumsfeld, 542 U.S. 507 (2004)
Inhabitants of Wilbraham v. Hampden County Comm'rs, 11 Pick. 322 (Mass. 1831)
Marcello v. Bonds, 349 U.S. 302 (1955)
Marshall v. Jerrico, 446 U.S. 238 (1980)
Morrissey v. Brewer, 408 U.S. 471 (1972)
Turney v. Ohio, 273 U.S. 510 (1927)
Ward v. Monroeville, 409 U.S. 57 (1972)
Withrow v. Larkin, 421 U.S. 35 (1975)
Wolff v. McDonnell, 418 U.S. 539 (1974)
Administrative Procedure Act (APA), 60 Stat. 237; 5 U.S.C. 551-559, 701-706, 1305, 3105, 3344, 5372, 7521

See also **Due Process**

IMPLIED RIGHTS

Implied rights are those that are not explicitly mentioned in the U.S. Constitution, but have been recognized by the Supreme Court. At least since the 1928 case of *Olmstead v. United States*, 277 U.S. 438 (1928), some justices on the Court sought to recognize rights that could reasonably be implied from rights specifically listed in the first eight amendments of the Constitution. For example, the First Amendment guarantees that Congress will not make laws that prohibit “the right of the people peaceably to assemble, and to petition the government for a redress of grievances.” How can people organize to assemble or petition for redress of grievances if they are not also assured of the right to associate? The two rights that are listed imply that a freedom of association also exists. This logic has been extended, not without controversy, to a number of other “rights” that are not enumerated in the Bill of Rights.

States retained the “police powers” or the power to regulate for the health, safety, and general welfare; as a result, most criminal laws and others statutes that affect health, marriage, education, sexual behavior, and family are made by states. Therefore, the Fourteenth Amendment has frequently become the vehicle for determining what rights are implied as part of preserving due process of law.

Using one theory of interpretation for the due process clause in the Fourteenth Amendment—that of selective incorporation first articulated by Justice Benjamin Cardozo in *Palko v. Connecticut*, 302 U.S. 319 (1937)—those rights that are “implicit in the concept of ordered liberty” or rank as “fundamental

principles of ordered liberty and justice which lie at the base of all our civil and political institutions” are protected by the Fourteenth Amendment’s due process clause. Justice Cardozo intended that this criterion could be used to differentiate between rights that are important from those that are not, such as indictment by a grand jury. Yet, some rights that everyone would agree are fundamental in a democracy, such as the right to vote, are not listed in the Bill of Rights. Surely the right to believe must be cognate to the rights to free exercise of religion and freedom of speech.

A number of implied rights have been recognized as protected by virtue of the due process clause of the Fourteenth Amendment. Among them are the right to travel, the right to marry and have children, the right to association, the right to study a foreign language, the right to educate one’s children, and the right to privacy. As early as 1867, the right to travel interstate was recognized by the Court in *Crandall v. Nevada*, 73 U.S. 35 (1867), as implied by the term “liberty” in the Fifth Amendment. Nearly a century later, the right to travel internationally was incorporated through the Fourteenth Amendment in *Kent v. Dulles*, 357 U.S. 116 (1958), and recognized in *Shapiro v. Thompson*, 394 U.S. 618 (1969). In the latter case Justice William Brennan, writing for the Court, stated that it was unnecessary to “ascribe the source of this right to travel interstate to a particular constitutional provision;” the right to travel was fundamental to the concept of a federal union.

A long list of unenumerated rights was recognized as early as 1923, when the Court struck down a Nebraska statute that banned the teaching of any language other than English until high school. Justice James Clark McReynolds, writing for the majority in *Meyer v. Nebraska*, 262 U.S. 390 (1923), spoke expansively of the broad contours of the term “liberty.” He wrote,

It denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience and to enjoy those privileges ... essential to the orderly pursuit of happiness by free men.

The right to educate children according to parental wishes was subsequently acknowledged as an implied right in the case of *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). In *Pierce* the Court invalidated an Oregon statute requiring that students up to the age of sixteen could only attend public schools. A right to association was incorporated into the meaning of the Fourteenth Amendment’s due process clause in 1958

IMPLIED RIGHTS

by *NAACP v. Alabama*, 357 U.S. 44 (1958), and the right of belief was acknowledged by the 1943 decision in *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943).

Perhaps the most controversial of the implied rights that the Court has recognized are those associated with the right to privacy. The so-called “right to be left alone” as the essence of privacy was asserted by Justice Louis Brandeis in his dissenting opinion in *Olmstead v. United States* in 1928. The Brandeis formulation did not win the support of a majority of the Court until 1965 in the majority opinion of Justice William O. Douglas in the case of *Griswold v. Connecticut*, 391 U.S. 145 (1965). Justice Douglas listed the various unenumerated rights discussed here previously and then proposed that a right to privacy could be found within the penumbras of a number of explicit rights.

The rights of association, to not have soldiers quartered in one’s home, and to be protected from unreasonable searches and seizures and against self-incrimination all implied a right of privacy. Moreover, he asserted that the Ninth Amendment’s statement that the enumeration of rights in the Bill of Rights “shall not be construed to deny or disparage others retained by the people” surely protected marriage and its intimacies from governmental intrusion. Though *Griswold* specifically addressed the ability of married couples to obtain and use contraceptive devices, it is regarded as having acknowledged the right to privacy.

The right to privacy in *Griswold* was later and more controversially used to protect a woman’s right to have an abortion. In the 1973 case of *Roe v. Wade*, 410 U.S. 113 (1973), Justice Harry Blackmun’s opinion for the seven-justice majority traced the right of privacy to a long list of cases. Justice Blackmun refused to link the right in any single amendment, but rather argued that the Fourteenth Amendment’s “concept of personal liberty and restrictions upon state action ... is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”

Justice Blackmun balanced a woman’s right to choose an abortion against legitimate interests of the state and employed a trimester formula to reconcile the competing interests. He accorded the woman and her attending physician the decision during the first trimester, but acknowledged a progressively more significant role for the state to regulate to preserve maternal health in the second trimester and even to prohibit abortion to protect the health of the mother in the third trimester of pregnancy. Subsequently, a number of state laws that placed barriers to a woman’s ability to terminate her pregnancy were invalidated

and approximately an equal number were upheld. Despite changes in public opinion, political climates, and personnel on the Court, the essence of *Roe v. Wade* has not been overturned.

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Cases and Statutes Cited

Crandall v. Nevada, 73 U.S. 35 (1867)
Griswold v. Connecticut, 391 U.S. 145 (1965)
Kent v. Dulles, 357 U.S. 116 (1958)
Meyer v. Nebraska, 262 U.S. 390 (1923)
NAACP v. Alabama, 357 U.S. 44 (1958)
Olmstead v. United States, 277 U.S. 438 (1928)
Pierce v. Society of Sisters, 268 U.S. 510 (1925)
Roe v. Wade, 410 U.S. 113 (1973)
Shapiro v. Thompson, 394 U.S. 618 (1969)
West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943)

INCORPORATION DOCTRINE

In the debates and public discussions that led to the framing and ratification of the Fourteenth Amendment, proponents such as John Bingham, the principal framer of the amendment, proclaimed that its intent was to extend the jurisdiction of the federal courts over *all* of the rights recognized in the U.S. Constitution, including all those in the Bill of Rights, for cases between a citizen and his state. The Supreme Court in *Barron v. Baltimore*, 32 U.S. 243 (1833), had held that while state courts were indeed bound to protect the rights recognized in the Bill of Rights, the Bill of Rights did not amend the omission of cases between a citizen and his state from the list of jurisdictions in Art. III, making them federal questions that could be adjudicated in federal courts. The Fourteenth Amendment was intended in part, its proponents claimed, to correct the precedent of *Barron*.

Opponents of this interpretation argue that the Fourteenth Amendment was primarily designed to protect the citizenship rights of blacks and ban race discrimination, but not to apply the Bill of Rights to the states. Supporters of this notion argued that black freedom could only be accomplished if the civil liberties of blacks and their white southern allies were protected. They further argued that without due-process protections, such as those found in the Bill of Rights, the former slaves and white southern Unionists would have been at the mercy of their former masters. Thus, the claim was made that the framers of the Fourteenth Amendment, especially John Bingham, understood they were protecting black freedom and the civil liberties of all people in the South.

Such extension created a logical problem, however. If rights, or more precisely, immunities against official

action, were all the field of public action not restricted by the delegation of a power to public officials, and every declaration of a right a restriction on delegated powers, then federal immunities would include a vast array, including many that were abridged by the delegations of powers to state officials by state constitutions. If states could abridge any federal privilege or immunity by adopting state constitutional delegations of powers, then the Fourteenth Amendment could be rendered void.

If, on the other hand, there were federal privileges and immunities beyond the reach of state constitutions to abridge, then the Bill of Rights, especially the Ninth and Tenth Amendments, was not sufficiently specific as to which of those privileges and immunities might be of a more fundamental character. The states had adopted broad “police powers” to legislate for the “health, safety, order, and morals” of the people, and the language of such a broad delegation left it to the discretion of the state legislature to abridge almost any federal privilege or immunity.

Beginning with the *Slaughterhouse Cases* of 1872, which found only a very limited set of privileges and immunities inherent in federal citizenship, the U.S. Supreme Court began to reach decisions on such rights that narrowly considered only particular rights, and not the full array of them, and based their decisions not on the privileges and immunities clause of the Fourteenth Amendment, but on its due process clause. It has also expanded upon a distinction, first suggested in *Dred Scott v. Sandford*, 60 U.S. 393 (1856), between substantive and procedural due process. This raised the question of whether the states were bound to the same standards of due process as the federal government was; indeed, the Court did begin to allow the states to deviate from federal standards of due process.

In *Hurtado v. California*, 110 U.S. 516 (1884), the Court refused to protect the right to indict by a grand jury in California. In *Twining v. New Jersey*, 211 U.S. 78 (1908), the Court declined to protect the right against self-incrimination. In *Palko v. Connecticut*, 302 U.S. 319 (1937), it was double jeopardy. In *Adamson v. California*, 332 U.S. 46 (1947), it was the right not to use a defendant’s refusal to testify against himself against him. In *Williams v. Florida*, 399 U.S. 78 (1970), it was the right to a jury of twelve. In *Apodaca v. Oregon*, 406 U.S. 404 (1972), it was the right to a unanimous jury.

Positive incorporation of rights can be traced back to *Chicago, Burlington & Quincy Railway Co. v. Chicago*, 166 U.S. 226 (1897), in which the Supreme Court appeared to require some form of just compensation for property appropriated by state or local authorities. More clearly, in *Gitlow v. New York*, 268

U.S. 652 (1925), the Court expressly held that states were bound to observe First Amendment free-speech protections. Since then, selective incorporation has been made in:

- Near v. Minnesota*, 283 U.S. 697 (1931) (freedom of the press)
- Powell v. Alabama*, 287 U.S. 45 (1932) (assistance of counsel in capital criminal cases)
- DeJonge v. Oregon*, 299 U.S. 353 (1937) (freedom of assembly)
- Cantwell v. Connecticut*, 310 U.S. 296 (1940) (free exercise of religion)
- Everson v. Board of Education*, 330 U.S. 1 (1947) (establishment of religion)
- In re Oliver*, 233 U.S. 257 (1948) (public trial)
- Wolf v. Colorado*, 338 U.S. 25 (1949) (right against unreasonable search and seizure)
- NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958) (freedom of association)
- Mapp v. Ohio*, 367 U.S. 643 (1961) (exclusionary rule)
- Robinson v. California*, 370 U.S. 660 (1962) (cruel and unusual punishment)
- Gideon v. Wainwright*, 372 U.S. 335 (1963) (assistance of counsel in felony cases)
- Malloy v. Hogan*, 378 U.S. 1 (1964) (right against self-incrimination)
- Pointer v. Texas*, 380 U.S. 400 (1965) (right to confront adverse witnesses)
- Klopfer v. North Carolina*, 386 U.S. 213 (1967) (right to speedy trial)
- Washington v. Texas*, 388 U.S. 14 (1967) (right to compulsory process to obtain witness testimony)
- Duncan v. Louisiana*, 391 U.S. 145 (1968) (right to trial by jury in cases with significant criminal penalties)
- Benton v. Maryland*, 395 U.S. 784 (1969) (right against double jeopardy)
- Rabe v. Washington* (1972) (right to notice of accusation)
- Argersinger v. Hamlin* (1972) (right to counsel in imprisonable misdemeanor cases)
- Burch v. Louisiana* (1979) (right to unanimous jury verdict if jury size is only six)

The principal champion for total incorporation of all of at least the enumerated rights recognized in the Bill of Rights and elsewhere in the U.S. Constitution was Justice Hugo Black in his dissent in *Adamson*. Opposing this is the position of Justice Felix Frankfurter, who argued in *Rochin v. California*, 342 U.S. 165 (1952), that the federal courts should apply only those provisions of the Bill of Rights that, if abridged, would “shock the conscience,” which would seem to make incorporation more a matter of emotion than

logic. However, the Frankfurter doctrine has prevailed for the time being, leaving several rights, such as the protections of the Second and Eighth Amendments, unresolved. It also fails to address Ninth Amendment “unenumerated” rights that may be considered fundamental, such as the right to a presumption of nonauthority and to prosecute a public right privately.

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References and Further Reading

- Aynes, Richard, *On Misreading John Bingham and the Fourteenth Amendment*, Yale Law Journal 103 (1993): 57.
- Curtis, Michael. “No State Shall Abridge”: *The Fourteenth Amendment and the Bill of Rights*. Durham, NC: Duke University Press, 1986.
- Lieberman, J. *A Practical Companion to the Constitution*. Berkeley: University of California Press, 1999.
- Roland, Jon. Intent of the Fourteenth Amendment was to Protect *All Rights*. Includes quotes from the framers of the Fourteenth Amendment and the arguments of Justice Hugo Black for full incorporation. http://www.constitution.org/col/intent_14th.htm.
- Symposium on John Bingham and the Meaning of the Fourteenth Amendment*, Akron Law Review 36 (2003): 589–717.

INCORPORATION DOCTRINE AND FREE SPEECH

The First Amendment explicitly protects speech and press from federal government abridgement, but only in 1925, in *Gitlow v. New York*, 268 U.S. 652 (1925), did the Supreme Court find a way to provide federal protection when a state abridges expression. The key was “incorporation,” a new interpretation of Fourteenth Amendment language prohibiting states from depriving “any person of life, liberty, or property, without due process of law.”

Benjamin Gitlow had been convicted of violating New York’s criminal anarchy statute by calling for violent overthrow of the government. The Court upheld Gitlow’s conviction, but also declared that “[f]or present purposes we may and do assume that freedom of speech and of the press ... are among the fundamental personal rights and ‘liberties’ protected by the due process clause of the Fourteenth Amendment from impairment by the States” (p. 666). In other words, the Court interpreted the word “liberty” to include freedom of expression and thus “incorporated” protection of speech and press into the Fourteenth Amendment.

Two years later, in *Fiske v. Kansas*, 274 U.S. 380 (1927), the Court used the Fourteenth Amendment to overturn a state conviction for criminal syndicalism.

In 1931, in *Near v. Minnesota*, 283 U.S. 697 (1931), the Court declared, “It is no longer open to doubt that the liberty of the press and of speech is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action” (p. 707). Without incorporation, many of the most significant free expression cases of the past seventy-five years would never have reached the Court.

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Cases and Statutes Cited

- Fiske v. Kansas*, 274 U.S. 380 (1927)
- Gitlow v. New York*, 268 U.S. 652 (1925)
- Near v. Minnesota*, 283 U.S. 697 (1931)

See also Fourteenth Amendment; Gitlow v. New York, 268 U.S. 652 (1925); *Near v. Minnesota*, 283 U.S. 697 (1931)

INDEFINITE DETENTION

Although the general presumption in the United States is against indefinite detention, there are a number of ways in which persons not convicted of crimes can nevertheless be detained involuntarily for potentially indefinite periods. States have long had the power to commit to mental hospitals any persons with mental illnesses that cause them to pose dangers to themselves or to society. In recent years, a number of states have extended that approach to laws allowing the government to seek civil commitment of certain convicted sex offenders who suffer from mental abnormalities or personality defects that make them likely to engage in future sex crimes and who have completed their term of imprisonment.

In *Kansas v. Hendricks*, 521 U.S. 346 (1997), the Supreme Court sustained one such sex offender detention law from a constitutional challenge. Because persons detained under either approach remain confined until they recover their mental health or no longer pose a danger to themselves or society, their detention may be indefinite. In addition to civil commitment as outlined here, there are other forms of potentially indefinite detention worth studying, especially in light of the War on Terrorism.

Pretrial Detention and Material Witness Detention

In appropriate circumstances, a person who has not yet been convicted of a crime, but who is due to stand

trial on criminal charges, can be detained involuntarily until the conclusion of the trial. In *United States v. Salerno*, 489 U.S. 731 (1987), the Supreme Court ruled that pretrial detention was not automatically unconstitutional, provided there were appropriate procedural safeguards in place, such as availability of defense counsel and findings of dangerousness by the trial court.

Strictly speaking, pretrial detention is of perhaps uncertain duration, but it is not indefinite because there is a clear endpoint: if the detainee is acquitted, detention ceases, and if the detainee is convicted, then further detention is justified as imprisonment pursuant to a criminal sentence. Moreover, the period of pretrial detention is theoretically limited by the constitutional right to a speedy trial. In practice, however, the speedy trial requirements often contain loopholes; in the federal system; for example, the trial judge can effectively suspend the requirement by making findings on the record that delaying the trial would be in the “interests of justice.” Consider, for example, that O. J. Simpson spent about fifteen months in jail while awaiting and during his double homicide trial.

A related form of detention is that as a material witness, under which a person can be detained involuntarily when his or her testimony would be important and when there is reason to believe that the court would not be able to subpoena the person to testify at trial. Following the 9/11 attacks, the federal government detained a number of persons as material witnesses, drawing criticism that it was misusing the material witness statute as a general counterterrorism detention power. Still, material witness detention has a theoretical limit, in that detention is justified to ensure that the witness will be present to provide his or her testimony; thus, the federal statute provides that no one should be held as a material witness if his or her testimony can be adequately preserved through a deposition. While some delay is permissible for the deposition to be taken, this at least represents an end point of detention.

Guantanamo Bay and the War on Terrorism

After the devastating September 11, 2001, terrorist attacks, the United States began a “war on terrorism” that included the capture of thousands of persons in Afghanistan and Pakistan. About one thousand were sent to a U.S. naval base on Guantanamo Bay, Cuba; as of 2005, about five hundred remained there in detention. A small number were designated for war crimes prosecutions in military tribunals, but a

federal judge blocked those military prosecutions on the ground that the composition of the military tribunals violated the Constitution. The vast majority of the Guantanamo detainees were not charged with crimes.

The government’s rationale for detaining them has been that they are “enemy combatants” and that as long as the War on Terrorism continues, they are subject to continued detention. This argument relies on the right of nations during war to detain enemy soldiers as prisoners of war for the duration of the war. There is, however, an important difference between the war on terrorism and traditional nation-state wars; with the latter, there is a sovereign nation with which to negotiate and thereby bring a definitive end to the conflict. In the War on Terrorism, detention as an enemy combatant may truly be indefinite.

In *Rasul v. Bush*, 124 S. Ct. 2686 (2004), the Supreme Court, while not addressing the underlying legality of potentially indefinite detention, concluded that the Guantanamo detainees were entitled to file petitions for writs of habeas corpus to test the lawfulness of their detention. *Rasul* spurred the government to implement military hearings known as “combatant status review hearings” to reassess the classification of Guantanamo detainees as enemy combatants; this resulted in the release of a small number of detainees. The upshot appears to be acceptance of the continuing detention of persons correctly classified as enemy combatants, with ongoing litigation over the procedures underlying such classifications.

The USA PATRIOT Act endowed the government with additional power to detain suspected terrorists. Under Section 412 of that act (codified at Title 8, Section 1226a), the attorney general may detain a noncitizen that he has reasonable grounds to believe is a terrorist. If the alien is unlikely to be deported in the next six months and if the alien’s release would “threaten the national security of the United States or the safety of the community or any person,” the attorney general can continue to detain the alien for up to six months, with the power to renew detention for additional six-month periods.

Conclusion

Indefinite detention (apart from that imposed as a sentence pursuant to a conviction) is among the gravest civil liberties infringement, but at least in most instances, it is tempered by procedural protections aimed at reducing the likelihood of improper detention.

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References and Further Reading

Robinson, Paul, *Punishing Dangerousness: Cloaking Preventative Detention as Criminal Justice*, Harvard Law Review 114 (2001): 1429–1456.

Cases and Statutes Cited

Kansas v. Hendricks, 521 U.S. 346 (1997)
Rasul v. United States, 124 S. Ct. 2686 (2004)
United States v. Salerno, 489 U.S. 731 (1987)
Zadvydas v. Davis, 533 U.S. 678 (2001)
Uniting and Strengthening America by Providing Appropriate Tools Requiring to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, act of Oct. 26, 2001, 115 Stat. 272

See also **Due Process of Law; Gerstein v. Pugh, 420 U.S. 103 (1975), Material Witnesses; 9/11 and the War on Terrorism; Speedy Trial; Suspended Right of Habeas Corpus**

CITY OF INDIANAPOLIS v. EDMOND, 531 U.S. 32 (2000)

Under what circumstances may the police stop vehicles randomly at roadblocks? The use of checkpoints to stop vehicles, question drivers, and search vehicles implicates the Fourth Amendment's prohibition against unreasonable searches and seizures. Highway checkpoints to combat drunk driving and checkpoints to intercept illegal immigrants have been held consistent with the Fourth Amendment. However, the Supreme Court in *City of Indianapolis v. Edmond* held that Indianapolis's highway checkpoint program violated the Fourth Amendment because its primary purpose was to advance the city's general interest in crime control.

Indianapolis began operating vehicle checkpoints in August 1998 in an effort to intercept illegal drugs. Police officers stopped a random group of vehicles at roadblocks on Indianapolis roads. Officers viewed the driver and the vehicle from the outside while narcotics-detection dogs sniffed the vehicle's exterior. Officers generally spent less than five minutes viewing each vehicle. Two individuals who were stopped at a checkpoint filed suit, claiming that the checkpoints were an unlawful search and seizure in violation of the Fourth Amendment.

The Supreme Court noted that there are very limited exceptions to the general rule that the government may not establish checkpoints unless there is particularized suspicion of wrongdoing. Such exceptions include checkpoints that were regulatory in nature, such as for highway safety as in *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444 (1990), or

border control as in *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976). In contrast to these other checkpoints, the primary purpose of Indianapolis's checkpoint was to interdict illegal narcotics. Because the Indianapolis checkpoint's primary purpose was to advance its general interest in crime control, Indianapolis could not stop vehicles without particularized suspicion of wrongdoing as required by the Fourth Amendment.

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References and Further Reading

Meehan, Kevin P., and George M. Dery, III, *The Supreme Court's Curious Math: How a Lawful Seizure Plus a Non-Search Add Up to a Fourth Amendment Violation*, University of Memphis Law Review 32 (2002): 879–925.

Cases and Statutes Cited

City of Indianapolis v. Edmond, 531 U.S. 32 (2000)
Michigan Dept. of State Police v. Sitz, 496 U.S. 444 (1990)
United States v. Martinez-Fuerte, 428 U.S. 543 (1976)

See also **Checkpoints (roadblocks); Michigan Department of State Police v. Sitz, 496 U.S. 444 (1990); Probable Cause; Search (General Definition); Seizures**

INDIAN BILL OF RIGHTS

Congress enacted the Indian Civil Rights Act (ICRA) in 1968 as Title II of the 1968 Civil Rights Act. Portions of the ICRA that substantially mirror the Bill of Rights are popularly called the "Indian Bill of Rights." The Indian Bill of Rights extends most of the constitutional protections of the Bill of Rights to individuals under the jurisdiction of Indian tribal governments. In order to preserve certain aspects of tribal government and sovereignty, some parts of the Bill of Rights were modified or left out. The individual rights protections include:

- rights to free exercise of religion, free speech, press, assembly, and to petition for a redress of grievances
- right to be free of unreasonable searches and seizures without a search warrant to be issued only upon a showing of probable cause
- right to be free from being placed in double jeopardy and from self-incrimination
- right to due process and equal protection
- right to be free from taking of property without just compensation
- rights to a speedy trial, confront witnesses, and the assistance of counsel

freedom from excessive bail and cruel and unusual punishment
 freedom from bills of attainder and ex post facto laws
 right to a jury of at least six persons (less than in federal law) in all criminal cases carrying the possibility of imprisonment

The main differences include the absences of an establishment clause, a right to counsel at the government's expense, and the lack of a right to a jury trial in civil cases. Also, the ICRA prohibited Indian tribes from sentencing convicted criminals to more than six months in prison and \$500 in fines (later amended to one year and \$5,000).

Foundational Cases and Legislative History

The Supreme Court had originally decided in *Talton v. Mayes*, 163 U.S. 376 (1896) that, since tribal sovereignty flowed from a time immemorial and tribes had not participated in the drafting of or consented to the U.S. Constitution, the individual rights protections that limited federal (and later state) governments did not apply to tribal governments. The Court reaffirmed earlier decisions such as *Worcester v. Georgia*, 31 U.S. (6 Pet.) 536 (1832) that labeled Indian tribes as "domestic dependent nations," whose sovereignty derived not from federal or state authority, but flowed from inherent tribal sovereignty that had never been extinguished.

In *Talton*, a non-Indian convicted of murder in the courts of the Cherokee Nation petitioned for a writ of habeas corpus in federal court. He argued that the Cherokee Nation had indicted him with a five-person grand jury. Under Cherokee Nation law, thirteen persons were required to indict a defendant validly for murder. The Court rejected the petition on the basis that the Fifth Amendment, by its terms, only applies to the federal government, not tribal governments.

In the 1950s, non-Indians had brought several cases to the federal courts seeking a civil rights remedy for actions taken against them by tribal governments. In *Martinez v. Southern Ute Tribe* (249 F.2d 915, 10th Cir. 1957, cert. denied, 356 U.S. 960, 1958), for example, the Tenth Circuit Court rejected a due-process challenge to a tribal decision to deny membership rights to an individual Indian. In that case, the Southern Ute Tribe allegedly refused to allow a woman with a tribal member mother and a nonmember Indian father to participate pro rata in the economic benefits of the tribal corporation.

In *Native American Church v. Navajo Tribal Council*, 272 F.2d 131 (10th Cir. 1959), the Tenth Circuit

ruled that the Navajo Nation was not bound by the First Amendment and could prohibit the ritual use of peyote by members of the Native American Church within its territory. Members of the church had argued that they had used peyote for religious purposes from time immemorial. In *Barta v. Oglala Sioux Tribe* (259 F.2d 553, 8th Cir. 1958, cert. denied, 358 U.S. 932, 1959), the Eighth Circuit Court ruled that the Fifth Amendment's due process clause and the Fourteenth Amendment's equal protection clause did not restrict an Indian tribe from imposing a tax on non-Indians for use of tribal lands, but not on tribal members. In that case, non-Indian lessees of tribal trust lands on the Pine Ridge Reservation sought to avoid a grazing and farming license tax imposed by the tribe.

In 1961, the Senate Subcommittee on Constitutional Rights began an investigation of constitutional rights in Indian Country by sending out two thousand questionnaires to persons familiar with Indian tribes, followed thereafter by a series of hearings in states with relatively large tribal populations that took place over several years. Judicial concern over civil rights violations by tribal courts in criminal cases came to a head when the Ninth Circuit Court decided *Colliflower v. Garland*, 342 F.3d 369 (9th Cir. 1965). In that case, the Gros Ventre tribal court sentenced a woman to five days in jail for failure to remove her cattle from land leased to another person.

The Ninth Circuit took jurisdiction over the case—even though the events took place on the reservation and the parties were all tribal members—on the theory that the federal government had funded the tribal jail. It is likely that the court took the case because the tribal court had not allowed Colliflower to have an attorney or to confront witnesses against her—serious civil rights violations. Normally, federal and state courts would not have had jurisdiction over these internal tribal matters.

The Senate's concern related to tribal government practices centered on the criminal procedure provided by tribal courts. The Senate took testimony that suggested that most tribal courts were relatively crude in comparison to state and federal courts. Tribal judges rarely had legal training and tribal court records were poor at best. The Senate pounced on the fact that most criminal defendants before tribal courts confessed easily and without the advice of counsel. But this ignores the fact that, in nearly all tribal communities, the concept of punishment for criminal acts is a foreign notion. Under tribal traditions and customs, those who commit crimes are taught to admit the infraction with the understanding that they will not be severely punished. Tribal criminal jurisprudence is more restorative than retributive.

Many Senators and advocates were also more generally concerned of the possibility that somewhere in the United States were enclaves in which there were no civil rights protections from governmental activity. The Senate took testimony from numerous individuals who claimed to have been treated unfairly by tribal governments. Others were concerned that many Indian tribes did not provide an independent adjudicative body apart from the tribal council. Though the Senate hearings were replete with much anecdotal evidence of tribal government unfairness and concerns about tribal government structures, the legislature was far more concerned with procedural rights of criminal defendants in tribal courts. The provision for habeas corpus review of tribal court convictions evidences that this concern weighed more heavily with Congress than civil cases did. Significantly, the ICRA makes no other provision for federal court jurisdiction over tribal court decisions or for civil rights violations by tribal governments.

Specific provisions in the final version of the ICRA strongly imply that Congress intended to preserve as much of tribal culture as possible. Congress left out a provision equivalent to the establishment clause in order to preserve the rights of tribes to form and maintain theocratic government structures if they wished, as some tribes had. Even in the area of criminal procedure, the Senate subcommittee explicitly questioned whether imposition of certain criminal procedures would injure tribal culture or exert a significant impact on the tribal governmental capability. On the question of whether Indian tribes should be obligated to provide attorneys to indigent defendants, the subcommittee appeared particularly concerned that Indian tribes did not have the financial capacity to fund public defender offices. The Department of Justice also testified that few attorneys were available on reservations and that, since most tribal prosecutions dealt with tribal customary and traditional law, attorneys were not necessary.

***Santa Clara Pueblo v. Martinez* and the Development of Tribal Courts**

After the enactment of ICRA, numerous individuals brought civil rights cases in federal court that attempted to vindicate the rights protected in the ICRA. In *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), Julia Martinez brought a sex discrimination claim under the ICRA against her tribe, seeking membership for her children. The Pueblo had enacted an enrollment ordinance that denied membership to the children of women who were tribal members when

the father was not a member. Conversely, children of Santa Clara Pueblo men and nonmember women would be enrolled. The father of Martinez's children was a Navajo man and the Pueblo denied her children membership.

The Supreme Court held that Congress, in enacting the ICRA, did not confer federal court jurisdiction to resolve civil rights complaints against tribal governments and, in any event, tribal sovereign immunity barred Martinez's claim. The Court, per Justice Marshall, stated that complainants against tribal government actions must pursue a tribal forum. The Court also noted the possibility that individual officers of Indian tribes could be sued for prospective equitable relief, similar to how federal officials could be sued under *Ex parte Young*, 209 U.S. 123 (1908).

Following *Martinez*, many Indian tribes began to develop their tribal courts more intensely. Tribes began to incorporate their versions of the Bill of Rights into new or amended tribal constitutions. As a result, tribal courts apply their tribal customs and traditions to civil rights cases. For example, the Navajo Nation Supreme Court in *Navajo Nation v. Crockett*, 7 Navajo Reporter 237 (1996), applied Navajo traditional principles in upholding a restriction on free speech enacted by the Navajo Tribal Council. In *Snowden v. Saginaw Chippewa Indian Tribe*, 32 Indian Law Reporter 6047 (2005), the tribal court applied important tribal values to a civil rights case related to a long-standing membership dispute. The Turtle Mountain Band of Chippewa Indians in *Turtle Mountain Judicial Board v. Turtle Mountain Band of Chippewa Indians* (No. 04-007, Turtle Mountain Band Appellate Court, 2005), adopted sophisticated rules relating to judicial independence from the political branches of the tribe.

Not all Indian tribes provide a tribal court for the resolution of disputes. Shortly after the Court decided *Martinez*, the Tenth Circuit decided *Dry Creek Lodge v. Arapahoe and Shoshone Tribes* (623 F.2d 682, 10th Cir. 1980, cert. denied, 449 U.S. 1118, 1981). There, the tribal council had blocked a road on the reservation that led to the private property of non-Indians who had built a resort on the parcel. The parcel had once been owned by an Indian family that resided on the reservation, but they had lost it due to a tax foreclosure. The tribal council refused to grant the property owners access to the tribal court for review of their decision, forcing them to seek a federal court injunction.

Ignoring *Martinez*, the court took jurisdiction and granted the injunction on the basis that the tribes' action had been egregious and that there was no tribal dispute resolution forum available. The Tenth Circuit has limited *Dry Creek Lodge* to its facts and has not

invoked this so-called “exception” to *Martinez* again. Other federal circuits, such as the Ninth Circuit in *Johnson v. Gila River Indian Community*, 174 F.3d 1032 (9th Cir. 1999), refuse to adopt this holding, questioning its validity.

Habeas Corpus Review of Tribal Detention

The lone federal cause of action contained in ICRA is the provision allowing individuals convicted of a tribal offense to petition for a writ of habeas corpus in federal courts. The meaning of this phrase has been extended by some federal courts to include banishment or exclusion from reservation lands. In *Poodry v. Tonawanda Band of Seneca Indians* (85 F.3d 874, 2nd Cir., cert. denied, 519 U.S. 1041, 1996), the Second Circuit Court granted a petition for a writ of habeas corpus when the tribal council banished several tribal members for treason. The council also stripped them of their property and citizenship within the tribe. The banished individuals received no hearing prior to being deprived of their membership and property.

The court concluded that the order requiring the members to leave the reservation amounted to a restraint on liberty sufficient to invoke the habeas corpus review provision in the ICRA. The tribe argued that summary banishment was consistent with tribal customary law and that federal court intervention into tribal affairs violated the spirit and intent of the ICRA. The court rejected that argument, noting that Congress, through its enactment of the ICRA, had already limited tribal customary law by imposing the series of individual rights and the possibility of habeas review—both of which were Anglo-American legal concepts—upon Indian tribes. One federal district court, however (in *Alire v. Jackson*, 65 F. Supp. 2d 1124, D. Or. 1999), declined to extend federal habeas review to a Warm Springs Indian Reservation tribal council order excluding a nonmember. The tribal council based its exclusion on the fact that the petitioner had been convicted of child abuse and had been employed as a caregiver to children on that reservation.

Others have sought habeas review of tribal court decisions in matters resulting in civil fines. In *Moore v. Nelson*, 270 F.3d 789 (9th Cir. 2001), a Yurok Indian who had violated a tribal court order not to harvest timber on the Hoopa Valley Reservation sought review of that court’s order to impound his logging equipment and fine him over \$18,000. The Ninth Circuit refused to grant the petition, emphasizing that the petitioner had never been criminally

prosecuted or sentenced and never subjected to detention of any kind. Similarly, in *Shenandoah v. Halbritter* (366 F.3d 89, 2nd Cir. 2004, cert. denied, 125 S. Ct. 1824, 2005), the Second Circuit refused to grant habeas review to a petitioner who claimed her house had been condemned by the Oneida Indian Nation in retaliation for her political activities. In contrast to *Poodry*, the court held that the action taken against the petitioner’s home did not amount to a restraint on liberty sufficient to invoke the ICRA habeas provisions.

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References and Further Reading

- Carpenter, Kristen A., *Considering Individual Religious Freedoms under Tribal Constitutional Law*, Kansas Journal of Law and Public Policy 15(3) (2005): 561–590.
- Garrow, Carrie E., and Sarah Deer. *Tribal Criminal Law and Procedure*. Lanham, MD: Altamira Press, 2004.
- Goldberg, Carole E., *Individual Rights and Tribal Revitalization*, Arizona State Law Journal 35(3) (2003): 889–938.
- Indian Bill of Rights and the Constitutional Status of Tribal Governments*, Harvard Law Review 82(6) (1968): 1343–1373.
- Pevar, Stephen L. *The Rights of Indians and Tribes*, 3rd. ed. Carbondale: University of Southern Illinois Press, 2002, 260–291.

Cases and Statutes Cited

- Alire v. Jackson*, 65 F. Supp. 2d 1124 (D. Or. 1999)
- Barta v. Oglala Sioux Tribe*, 259 F.2d 553 (8th Cir. 1958), cert. denied, 358 U.S. 932 (1959)
- Colliflower v. Garland*, 342 F.3d 369 (9th Cir. 1965)
- Dry Creek Lodge, Inc. v. Arapahoe and Shoshone Tribes*, 623 F.2d 682 (10th Cir. 1980), cert. denied, 449 U.S. 1118 (1981)
- Johnson v. Gila River Indian Community*, 174 F.3d 1032 (9th Cir. 1999)
- Martinez v. Southern Ute Tribe*, 249 F.2d 915 (10th Cir. 1957), cert. denied, 356 U.S. 960 (1958)
- Moore v. Nelson*, 270 F.3d 789 (9th Cir. 2001)
- Native American Church v. Navajo Tribal Council*, 272 F.2d 131 (10th Cir. 1959)
- Navajo Nation v. Crockett*, 7 Navajo Reporter 237 (1996)
- Ordinance 59 Ass’n v. United States Dept. of Interior*, 163 F.3d 1150 (10th Cir. 1998)
- Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874 (2nd Cir.), cert. denied, 519 U.S. 1041 (1996)
- Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978)
- Shenandoah v. Halbritter*, 366 F.3d 89 (2nd Cir. 2004), cert. denied, 125 S. Ct. 1824 (2005)
- Snowden v. Saginaw Chippewa Indian Tribe*, 32 Indian Law Reporter 6047 (2005)
- Talton v. Mayes*, 163 U.S. 376 (1896)
- Turtle Mountain Judicial Board v. Turtle Mountain Band of Chippewa Indians*, No. 04-007 (Turtle Mountain Band Appellate Court 2005)
- Worcester v. Georgia*, 31 U.S. (6 Pet.) 536 (1832)
- Ex parte Young*, 209 U.S. 123 (1908)

INDIAN BILL OF RIGHTS

Blackfeet Tribe of the Blackfeet Indian Reservation of Montana Constitution and By-Laws, Art. VIII
Cherokee Nation of Oklahoma Constitution, Art. II
Chickasaw Nation Constitution, Art. IV
Civil Rights Act of 1968, act of April 11, 1968, Pub. L. 90-284, Tit. II, 82 Stat. 77, codified as 25 U.S.C. §§ 1301-1303
Grand Traverse Band Constitution, Art. X
Sisseton-Wahpeton Sioux Tribe, South Dakota Constitution and By-Laws, Art. IX

See also *Barron v. Baltimore*, 7 (U.S.) 243 (1833); **Bill of Rights: Structure; Habeas Corpus: Modern History; Plenary Power Doctrine; Santa Clara Pueblo v. Martinez**, 436 U.S. 49 (1978)

INEFFECTIVE ASSISTANCE OF COUNSEL

The Sixth Amendment provides that a criminal defendant shall “have the Assistance of Counsel” for his defense. The Supreme Court has interpreted this clause as guaranteeing the effective assistance of counsel, beginning with one of the appeals from a trial in the *Scottsboro* cases (*Powell v. Alabama*, 287 U.S. 45, 1932). The modern standard for evaluating claims of ineffective assistance of counsel was set in 1984 in *Strickland v. Washington*, 466 U.S. 668.

Strickland involved an appeal from a habeas corpus petition filed by a capital defendant who claimed that his lawyer had been ineffective at trial. The lawyer did not investigate potential mitigating evidence that might have persuaded the trial judge to impose a sentence of life imprisonment, rather than death. The Supreme Court set out a two-part test for evaluating claims of ineffective assistance of counsel.

First, the defendant must show that his or her lawyer failed to provide reasonably effective assistance. The reasonableness of the lawyer’s performance is to be evaluated with reference to prevailing professional norms, and courts should be reluctant to second-guess the lawyer’s tactical judgments. Perhaps in hindsight, it appears that a lawyer should have pursued a particular line of investigation or tried a different strategy at trial, but if the decision was reasonable under the circumstances at the time it was made, the lawyer’s performance should not be judged ineffective. The Court declined to adopt a set of rules for the evaluation of counsel’s performance at trial out of concern for restricting the flexibility a defense lawyer must have in making tactical decisions. It also emphasized that review of counsel’s performance should be highly deferential, with a heavy presumption in favor of a finding of effective representation.

The second prong of the *Strickland* test is that the defendant will not be entitled to reversal of the conviction unless the lawyer’s deficient performance resulted in prejudice to the defendant. To make a showing of prejudice, the defendant must establish that, except for the lawyer’s errors, there is a reasonable probability that the result of the proceeding would have been different. As the Court recognized, it is possible to avoid the first prong of the test entirely and resolve a case on prejudice. If the evidence of guilt against the accused is overwhelming, it is unlikely that even a serious error of counsel would change the result of the proceedings. Following *Strickland*, lower federal courts frequently resolved ineffective assistance claims on the prejudice prong.

In certain cases, prejudice is presumed. The most significant category of these cases involves the attorney’s representation of conflicting interests. If a conflict of interest actually affects the lawyer’s performance, the defendant need not show prejudice to obtain a new trial (*Cuyler v. Sullivan*, 446 U.S. 335, 1980). The requirement of showing actual effect means that the defendant must specifically identify some act or omission that is traceable to the lawyer’s multiple loyalties. Courts have been unwilling to expand the categories of cases in which prejudice is presumed, and the Supreme Court has actually suggested that only the concurrent representation of clients with conflicting interests should trigger the presumption of prejudice (*Mickens v. Taylor*, 535 U.S. 162, 2002).

The Court’s approach to ineffective assistance of counsel has been criticized on a number of grounds. First, by deferring to the norms prevailing in the practicing bar, the Court has abandoned any attempt to improve the standards of practice of criminal defense lawyers. If the overall performance of the criminal defense bar is deficient, a given lawyer’s performance may not violate the first prong of *Strickland*.

Because of the overwhelming caseloads of many public defender offices and lack of adequate funding for indigent defense, it is possible that the average level of competence of lawyers who represent poor people may not be very high. Several notorious cases involving defense lawyers who slept through substantial portions of trials in capital cases brought this problem to public attention. Two recent Supreme Court decisions seem responsive to this concern and may reinvigorate the efforts of courts to set minimum standards for the competence of criminal defense lawyers (*Wiggins v. Smith*, 539 U.S. 510 (2003); *Rompilla v. Beard*, 545 U.S., 2005). Both cases involved inadequate investigations of mitigating circumstances performed by lawyers representing capital defendants.

A related criticism was raised by Justice Marshall, dissenting in *Strickland*. Marshall asked why the rights of the accused depend upon the outcome of the proceeding. Should not the defendant's rights be defined instead in terms of "vigorous and conscientious advocacy by an able lawyer," regardless of whether the defendant is likely to be convicted anyway? Putting it another way, the defense lawyer's role is subordinated to the systemic goal of convicting guilty people, rather than protecting the intrinsic procedural rights of the accused.

Another concern with *Strickland* relates to the prejudice prong. Any single error by counsel is unlikely to have a direct causal relationship with the outcome of the trial. Instead, it is more likely that a series of small errors adds up to a different result. It can also be difficult for a defendant to prove a negative. The trial record will reveal the result of counsel's actual performance, but will offer no clue as to the result of a hypothetical decision. If the lawyer had filed a suppression motion, investigated a line of mitigating evidence, or called a different witness, the result would undoubtedly be different. From the standpoint of a reviewing court, however, it is exceedingly difficult to say how, exactly, the result would have been different. Moreover, the record will be affected by the defense lawyer's incompetence, making it even more likely that prejudice will not be apparent.

Barring a major change in the funding for indigent representation, ineffective assistance of counsel claims are likely to persist. Courts must balance the desirability of enhancing the performance of lawyers against the recognition of the difficulty of establishing ineffectiveness upon appellate and collateral review. The difficulty of this balance is exacerbated by the complexity of the defense lawyer's task and the difficulty of judging tactical decisions in hindsight. *Strickland* may not be entirely satisfactory, but it remains the constitutional framework within which these decisions will be made.

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References and Further Reading

- Bright, Steven B., *Counsel for the Poor: The Death Sentence not for the Worst Crime but for the Worst Lawyer*, Yale Law Journal 103 (1994): 1835–1883.
 Burkoff, John M., and Hope L. Hudson. *Ineffective Assistance of Counsel*. St. Paul, MN: West Group, 2002 and Supp. 2004.

Cases and Statutes Cited

- Cuyler v. Sullivan*, 446 U.S. 335 (1980)
Mickens v. Taylor, 535 U.S. 162 (2002)
Powell v. Alabama, 287 U.S. 45 (1932)

- Rompilla v. Beard*, 545 U.S. (2005)
Strickland v. Washington, 466 U.S. 668 (1984)
Wiggins v. Smith, 539 U.S. 510 (2003)

See also **Habeas Corpus: Modern History; Right to Counsel; Rights of the Accused; Scottsboro Trials**

INFLICTION OF EMOTIONAL DISTRESS AND FIRST AMENDMENT

Intentional infliction of emotional distress upon another person is a civil wrong, for which the victim may recover monetary damages. Because words can inflict emotional injury, there is an inherent conflict between the free-speech guarantee and government imposition of civil liability for this tort. The leading case involving this issue is *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988).

Hustler Magazine, a pornographic publication controlled by Larry Flynt, published a parody of a Campari liqueur advertisement that lampooned the evangelist Jerry Falwell. The actual advertisements featured interviews of celebrities discussing the first time they tasted Campari. *Hustler's* parody used a *faux* interview with Falwell to portray the first time he had sexual intercourse as a drunken encounter with his mother in an outhouse.

The Supreme Court ruled that Falwell's suit to recover damages for his emotional injury was barred by the free-speech guarantee. The Court reasoned that public figures such as Falwell could not maintain such suits by proving that the offending speech was "outrageous," but must prove that it was made with "actual malice": knowledge of its falsity or with reckless disregard for its truth or falsity. The problem with this standard as applied to parody, of course, is that parody is, by nature, intentionally false. Though the Court has not had occasion to rule on the issue, the implication of *Hustler Magazine* is that private figures may freely recover damages for emotional injuries inflicted by words, subject to other free-speech limits that may be applicable.

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References and Further Reading

- Post, Robert, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation and Hustler Magazine v. Falwell*, Harvard Law Review 103 (1990): 603.

Cases and Statutes Cited

- Hustler Magazine v. Falwell*, 485 U.S. 46 (1988)

See also Actual Malice Standard; Falwell, Jerry; Flynt, Larry; Public Figures; Satire and Parody and the First Amendment

IN RE GAULT, 387 U.S. 1 (1967)

In re Gault is the landmark 1967 case in which the U.S. Supreme Court extended several constitutional rights to children prosecuted within juvenile justice systems. While these rights had long been accorded adults prosecuted in criminal courts, American courts had allowed states to skirt such protections in their separate juvenile tribunals.

Fifteen-year-old Gerald Gault was arrested in Arizona in 1964 for making a lewd phone call to a neighbor. He was apprehended while his parents were at work and held several nights at a juvenile detention home. The procedure of the case reflected the informal nature of many states' approaches to juvenile justice. He was not provided specific notice of the charges against him. He was not advised of, or extended, his right to counsel. He was not told of his right to remain silent. He was not allowed to confront witnesses against him. The victim never even appeared in court to testify. His hearing was never recorded or transcribed and, pursuant to state law, he had no right to appeal.

The Supreme Court, which had shown increasing concern for rights of children in the prior term's case, *Kent v. United States*, 383 U.S. 541 (1966) (holding that Washington, D.C.'s provision for transferring juveniles to adult court was inadequate), concluded that this level of informality was constitutionally inadequate. As Justice Fortas argued in his majority opinion, "under our Constitution, the condition of being a boy does not justify a kangaroo court."

The Court concluded that there was still room for a juvenile justice system to operate in a distinct form from the criminal courts, but held that such courts must accord certain basic rights. It ruled that Gault's constitutional rights were violated with respect to his right to fair notice, counsel, silence, and confrontation. On the other hand, the Court reserved judgment on whether a child has a constitutional right to an appeal.

In some respects, *Gault* represents the Court's high-water mark in the protection of children's rights in delinquency. For example, a few terms later, in *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971), the Court held that children being prosecuted in juvenile courts were not entitled to a jury trial.

Since *Gault*, many states have chosen to narrow the jurisdiction of their juvenile courts, reserving them exclusively for very young offenders and those

charged with less serious crimes. Other aspects of these courts have changed as well. In many states, juvenile proceedings have been opened to public view. Juvenile records, once sealed, are increasingly available to the public or for use in later adult proceedings. Some critics argue that these changes are the logical result of *Gault*. In this view, states were willing to treat children less harshly than adults, but only on the condition that they be allowed to impose swift, albeit rough, justice. Whatever the merits of this view, the Court made clear in *Gault* that juvenile justice remains strictly regulated by the Constitution.

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Cases and Statutes Cited

Kent v. United States, 383 U.S. 541 (1966)

McKeiver v. Pennsylvania, 403 U.S. 528 (1971)

IN RE GRIFFITHS, 413 U.S. 717 (1973)

In re Griffiths establishes a lawful permanent resident's right not to be excluded from the practice of law by state and local bar associations. Fre Le Poole Griffiths, a Dutch citizen, longtime U.S. resident, and Yale Law School graduate, applied to take the Connecticut bar exam in 1970. Despite conceding that she was otherwise qualified to sit for the exam, the state of Connecticut rejected Griffiths's application based solely on her immigration status as a non-U.S. citizen. The Supreme Court held that the equal protection clause of the Fourteenth Amendment precluded Connecticut from relying solely on Griffiths's alienage. Subjecting the state's exclusionary laws to strict scrutiny, the majority held that Connecticut failed to adequately justify a link between Griffiths's citizenship and her competence as a lawyer.

While the Court agreed that states have a substantial interest in ensuring that only qualified individuals are allowed to practice law, it rejected the notion that lawful permanent residents may be barred outright. Connecticut had argued that its lawyers perform a unique role as officers of the court—one that could call into question a noncitizen's divided loyalties between client and country. The majority disagreed, noting that attorneys have neither policymaking nor law enforcement authority, but rather are private professionals whose qualifications are already adequately regulated by the state's regular admission procedures and ethics rules. The civil rights legacy of *In re Griffiths* is its opening of the doors of equality to longtime permanent residents who desire to uphold the law through its practice.

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References and Further Reading

Knoppke–Wetzel, Volker, *Employment Restrictions and the Practice of Law by Aliens in the United States and Abroad*, Duke Law Journal (1974): 871–922.

See also **Aliens, Civil Liberties of; Equal Protection of Law (XIV)**

IN RE WINSHIP, 397 U.S. 358 (1970)

In *In re Winship*, twelve-year-old Samuel Winship was charged with delinquency for allegedly entering a locker and stealing \$112 from a woman's pocketbook, a crime that would constitute larceny if committed by an adult. The family court judge acknowledged that the proof against the boy might not establish guilt beyond a reasonable doubt but, as permitted by state statute, adjudicated him delinquent by a preponderance of the evidence. The court committed Winship to a training school for eighteen months, with annual extensions possible until his eighteenth birthday six years later.

The Supreme Court reversed. *Winship* first held that Fourteenth Amendment due process protects criminal defendants against conviction except on proof beyond a reasonable doubt of every fact necessary to constitute the crime charged. The Court then held that due process also requires application of the standard of proof beyond a reasonable doubt in the adjudicatory stage of delinquency proceedings. "The same considerations that demand extreme caution in fact finding to protect the innocent adult apply as well to the innocent child."

Like all other juvenile court proceedings, delinquency proceedings are civil in nature. Delinquency proceedings hold distinct criminal overtones, however, because they charge conduct that would be a crime if committed by an adult and because, as in Samuel Winship's case, adjudication may lead to loss of liberty. Attention focused on delinquency's standard of proof after the Supreme Court held, in *In re Gault*, 387 U.S. 1 (1967), that Fourteenth Amendment procedural due process requires juvenile courts to confer constitutional protections needed to assure "fundamental fairness" in delinquency proceedings. *Winship* applied the fundamental fairness test to the adjudicatory stage of these proceedings, without deciding the standard of proof required during the preliminary and dispositional stages. State law determines the sufficiency of proof during these two stages.

Winship's holding was also limited in other important respects. The Court did not apply due process to juvenile court proceedings that charge caregivers with abusing or neglecting children. Nor did the decision

reach juvenile court proceedings that charge youths with only "status offenses"—conduct such as truancy, incorrigibility, or running away from home, which would not be crimes if committed by an adult. The general civil standard of proof, preponderance of evidence, applies in abuse, neglect, and status offense proceedings unless state law requires a higher standard, such as clear and convincing evidence.

Winship's legacy remains mixed. On the one hand, the decision requires the state to put on greater proof than frequently sustained delinquency adjudications under the traditional view that juvenile court sanctions constituted nonpunitive treatment in the youth's best interests. Despite the juvenile court's traditional rehabilitative mission, *Winship* makes it more difficult to ignore the punitive nature of delinquency dispositions. On the other hand, some question remains about *Winship's* practical impact. Some commentators argue that juvenile court judges sometimes find delinquency on less evidence than would establish guilt beyond a reasonable doubt in criminal cases, particularly when the judge believes the youth would benefit from court-ordered treatment unavailable outside the juvenile justice system.

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References and Further Reading

Davis, Samuel M. *Rights of Juveniles 2d: The Juvenile Justice System*, 2005 ed. St. Paul, MN: West, 2005, 279–284.

LaFave, Wayne R. *Criminal Law*, 4th ed. St. Paul, MN: Thomson West, 2003, 56–57.

Rosenberg, Irene Merker, *Winship Redux: 1970 to 1990*, Texas Law Review 69 (1990): 109.

Sanborn, Joseph B., Jr., *Remnants of Parens Patriae in the Adjudicatory Hearing: Is a Fair Trial Possible in Juvenile Court?* Crime and Delinquency 40 (1994): 599.

Cases and Statutes Cited

In re Gault, 387 U.S. 1 (1967)

See also **Due Process of Law (V and XIV); In re Gault**, 387 U.S. 1 (1967)

INSANITY DEFENSE

The insanity defense is an excuse for crime for those who, because of mental disorder, are not considered blameworthy. It is premised on the intuition that people with serious mental illness are so different from others that they cannot be held accountable for their criminal actions. Yet, many do not share in this intuition, and those who do have disagreed over the best formulation for capturing it.

The insanity defense has ancient roots. Greek and Hebrew civilizations recognized that serious mental illness should have mitigating impact and medieval English kings pardoned murderers who suffered from “madness.” The first modern test for insanity was devised in 1843 by the House of Lords in England. In M’Naghten’s case, the Lords announced that a person should be excused by reason of insanity if a “mental disease or defect” caused “a defect in reason that resulted in the inability to know the nature and quality” of the criminal act or caused the person to “not know that the act was wrong.”

At about the same time, other courts were recognizing insanity claims based on a failure of the will rather than a lack of understanding. Thus, an American court held, in *Parsons v. State*, 81 Ala. 577, 596, 2 So. 854 (1887), that an insanity defense could also succeed if the person “has lost the power to choose between the right and wrong and to avoid doing the act in question, such that free agency is destroyed”—a formulation that came to be called the “irresistible impulse” test for insanity. By the mid-twentieth century, most American jurisdictions had adopted the M’Naghten test or a combination of M’Naghten and the irresistible impulse test.

The M’Naghten and irresistible impulse tests were criticized on the ground that they required almost total impairment in terms of cognition (M’Naghten) or volition (irresistible impulse). In reaction to these complaints, in the 1950s American Law Institute (ALI) fashioned another test for insanity. This “ALI test” defines an insane person as one who, “as a result of mental disease or defect ... lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of the law.” This formulation does not require complete cognitive or volitional incapacity, only “substantial” incapacity. Furthermore, it uses the word “appreciate” rather than M’Naghten’s “know,” a modification that, according to the ALI commentary, was meant to convey “a broader sense of understanding than simple cognition.” Well over half the states, as well as most federal courts, had adopted some version of the ALI test by the end of the 1970s.

The law of insanity changed considerably after John Hinckley’s insanity acquittal in 1982 on the charge of attempting to assassinate President Ronald Reagan. Within a short period after that case, several states had abolished the insanity defense, and many others had narrowed the types of mental disorders that could form the predicate for insanity, eliminated the “volitional prong” of the defense, changed the test language from “appreciate” back to “know,” shifted the burden of proving insanity to the defendant, or adopted some combination of these reforms.

Representative of these efforts is the test promulgated by Congress in the Insanity Defense Reform Act of 1984, which provides that a person is insane if, “as a result of severe mental disease or defect,” he “was unable to appreciate the nature and quality or the wrongfulness of his acts.”

Another post-Hinckley effort at undermining the effect of the insanity defense, adopted in about a dozen states, is the guilty but mentally ill (GBMI) verdict. This verdict is meant to provide juries with a compromise between an insanity finding and a straightforward guilty verdict. Empirical research indicates that the GBMI verdict has not reduced insanity acquittals, but rather merely provides jurors with another way of describing those who are normally found guilty. Furthermore, the verdict is seriously misleading to the extent that jurors or defense attorneys believe that it somehow mitigates sentence. In fact, persons found GBMI are supposed to and do receive the same sentence as if they had been found guilty, and several have been sentenced to death.

Approximately five states have abolished the insanity defense, although they still allow defendants to present psychiatric evidence that might prove the defendant did not intend the offense. This “mens rea” alternative has generally been upheld against constitutional attack, although one state court found it violated due process because it abolishes the (broader) insanity excuse (*Finger v. State*, 117 Nev. 548, 27 P.3d 66, 2001). Also of relevance here is the U.S. Supreme Court’s decision in *Montana v. Egelhoff*, 518 U.S. 37 (1996), which found that a state’s abolition of the intoxication defense did not violate due process primarily because that defense was “of recent vintage.” On this reasoning, the insanity defense, which has ancient origins, might be constitutionally mandated.

From the civil liberties perspective, whether and in what form the insanity defense should be retained is a difficult question to answer. Certainly some mentally ill people are relatively less blameworthy than other offenders, and the defense has historically been a useful method of escaping the death penalty. But in noncapital cases, confinement after an insanity acquittal can last as long as or longer than imprisonment for the same crime, and a broad insanity test might result in pervasive preventive detention of those with mental problems.

While treatment is supposedly provided people found insane, it should also be provided to those mentally ill people who end up in prison; using the insanity defense as a vehicle for obtaining treatment for the tens of thousands of mentally ill people who offend is inefficient and distracts attention away from the treatment needs of offenders who would not be found insane under any formulation of the defense.

Some sort of insanity defense is worth keeping, however, as a recognition that some members of society are so impaired that a society that punished them would be a disgrace and also because cases that raise the issue forces people to confront what it means to be responsible for their actions.

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References and Further Reading

Melton, Gary et al. *Psychological Evaluations for the Courts: A Handbook for Mental Health Professionals and Lawyers*, 2nd ed. New York: Guilford Press, 1997, chapter eight.

Perlin, Michael J. *The Jurisprudence of the Insanity Defense*. Durham, NC: Carolina Academic Press, 1994.

Cases and Statutes Cited

Finger v. State, 117 Nev. 548, 27 P.3d 66 (2001)

Montana v. Egelhoff, 518 U.S. 37 (1996)

Parsons v. State, 81 Ala. 577, 596, 2 So. 854 (1887)

See also **Guilty but Mentally III**

INTELLECTUAL INFLUENCES ON FREE-SPEECH LAW

Free-speech law in America begins with the state of English free-speech law in the seventeenth century. At that time there were two avenues for state control of speech: licensing and libel. Licensing was a prior restraint on publishing. In order to operate a printing press, one had to obtain a license from the king, who could veto any publication based on content. The early advocates for free speech focused on doing away with this prior restraint of licensing. These included Milton, whose (illegally unlicensed) *Areopagitica* cautiously argued against prior restraints on four grounds: (1) They are used by parties, such as opponents of the Reformation, who have weak positions; (2) they deprive citizens of the intellectual exercise provided by studying alternative points of view; (3) they do not succeed in preventing points of view from becoming known; and (4) they discourage healthy curiosity. When Blackstone did away with licensing in the late seventeenth century, he believed freedom from prior restraints ensured freedom of speech.

Unfortunately, the law of libel was an even more pernicious restraint on free speech. There were three libels: sedition, defamation, and blasphemy. These made it a crime to criticize the government (sedition), fellow citizens (defamation), or religion (blasphemy). The law of seditious libel was especially notorious; confessions were often obtained through torture and truth was not a defense. Prosecutions were numerous

and arbitrary, including that of Thomas Paine for publishing *The Rights of Man*. Interestingly, the government showed relatively little interest in prosecuting sexual or bawdy speech. As late as 1708, no law existed in England against obscenity.

Many seventeenth- and eighteenth-century thinkers advocated freedom to criticize the government. For example, the natural rights thinkers, such as John Locke, believed that government only existed to safeguard its citizens' interest in life, liberty, health, and property. When government overstepped its bounds, the people had a right to destroy it. Eighteenth-century Enlightenment thinkers agreed. Thus, criticism of government and institutions is central to the Enlightenment. Locke's notion of the limitations on civil government were central to the American Revolutionaries, embodied by Thomas Jefferson's paraphrasing of Locke in the Declaration of Independence ("... life, liberty, and the pursuit of happiness ...").

The right to voice a dissenting opinion was obviously important to the colonists. In the 1735 sedition trial of Peter Zenger, Andrew Hamilton persuaded the jury to reject the English common law of sedition by accepting truth as a defense. The Americans' value of open criticism of government is reflected in the fact that most of the colonies had bills of rights that protected the freedom of speech by the time the constitutional delegates convened in Philadelphia. When the Constitution was submitted to states' approval and did not include a protection for the freedom of speech, there was a national clamor against it. Elbridge Gerry and George Mason threatened to scuttle the whole thing; Jefferson wrote from Paris that he hoped it would not be ratified without one.

Opponents of a federal bill of rights, such as Roger Sherman, argued that it was not necessary, since the states' protections of free speech were still in effect, and the new Constitution did not repeal them. However, since the federal Constitution was paramount over state constitutions, George Mason and others wanted a federal guarantee. Other opponents of a bill of rights argued that the constitution did not need one because it was organized with the people as sovereign. Since the people gave up no rights to the government, they did not need to specify rights that they reserved. In fact, a bill of rights might be dangerous. By enumerating specific powers not granted to the government, it would imply that all other powers were granted to the government. This was the position taken by Madison, Jay, and Hamilton in *Federalist Papers* no. 84, as well as of James Wilson of Philadelphia. Nevertheless, Mason, Gerry, and Jefferson won out and the Bill of Rights and the First Amendment were passed.

Despite the strong protection of the First Amendment, during times of political crisis the right to dissent

has often been curtailed because of fear that dissent will incite unrest. For example, during World War I, pacifists were imprisoned for opposing the draft on the grounds that their opposition might undermine the war effort. The lawyer Zechariah Chafee argued that the mere possibility of inciting unrest was not enough to justify suppressing the pacifists' dissent. In his view, suppressing speech on "public protection" grounds was only valid when the speech posed an identifiable "clear and present danger," such as yelling for a gunman to pull the trigger. His arguments persuaded Justice Holmes and soon became constitutional law.

Alexander Meiklejohn advocates a theory of free speech that emphasizes the role it plays in keeping the government accountable. Thus, Meiklejohn believes revolutionary agitation is protected by the First Amendment, even if it poses a clear and present danger of inciting a revolution. However, in Meiklejohn's view, the First Amendment is not concerned with purely private experience and therefore art and fiction are not protected by the First Amendment at all. Nevertheless, Meiklejohn does believe people have a due-process right not to have their private speech curtailed unnecessarily. While his theories are consistent and logical, they lead to such extreme results that they have not met with judicial application.

Classical liberalism takes a laissez-faire approach to speech. Thus, in the nineteenth century, John Stuart Mill argued that complete freedom of speech creates a "marketplace of ideas." However, recent scholarship has criticized classical liberalism's laissez-faire take on speech, claiming that liberals are naïve about the effects of power in speech. Thus, Schiffrin rejects the "marketplace of ideas" theory because of its faith in an invisible hand that guides us towards truth. He argues a "market failure" rebuttal: since the rich have more access to media than the poor, an unregulated trade in ideas is inherently unfair. In his view, there should be a positive right for dissenting voices to be heard. Because American law is negative-rights oriented, this position has not taken hold. Other scholars claim that hate speech perpetuates domination by the strong over the weak and should be prohibited. One notable scholar to take this tack was the feminist Andrea Dworkin, who favored a ban on pornography, which she considered an "antifeminist propaganda machine." Others favor restrictions on ethnic or racial slurs.

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References and Further Reading

- Dworkin, Andrea. *Pornography: Men Possessing Women*. New York: Putnam, 1981.
 Hudon, Edward G. *Freedom of Speech and Press in America*. Washington, D.C.: Public Affairs Press, 1963.

Meiklejohn, Alexander. *Free Speech and its Relation to Self-Government*. New York: Harper, 1948.

Nelson, Samuel Peter. *Beyond the First Amendment: The Politics of Free Speech and Pluralism*. Baltimore, MD: Johns Hopkins University Press, 2005.

See also Government Funding of Speech; Hate Speech; Low Value Speech; Meiklejohn, Alexander; National Security and Freedom of Speech; Obscenity; Philosophy and Theory of Freedom of Expression; Prior Restraints; Public Forum Doctrines; Red Scare of the Early 1920s; Seditious Libel; Zenger Trial (1735)

INTELLECTUAL PROPERTY AND THE FIRST AMENDMENT

Intellectual property rights and free-speech rights find explicit support in the Constitution. The First Amendment prohibits the government from "abridging the freedom of speech." Article I of the Constitution grants Congress the power to secure "for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

Congress has protected intellectual property rights through copyright, patent, and trademark laws. Copyright law grants authors exclusive rights to their works for up to seventy-five years after their death. Patent law grants inventors a twenty-year monopoly on the manufacture or sale of their inventions. The law of trademarks—distinctive words or designs identifying the source of goods or services—allows trademark holders to prevent others from using similar words or designs to market similar goods or services.

Intellectual property rights and free-speech rights exist in a symbiotic relationship. Without free-speech protection, authors and inventors might find themselves harshly censored. Yet without intellectual property protection, authors and inventors might not invest their creative energy in works that ultimately benefit the public. In this balance between empowering authorship and empowering speech, there lies the risk that the predominance of one may diminish the other.

Digital communication media could destabilize this balance by changing the ways that people share information. Before the digital age, information sharing was constrained by the practical limits on how many paper copies or tape recordings one could make and distribute. Digital media, however, have largely erased such physical constraints. Some argue that the ease of copying and sharing information threatens intellectual property rights.

Others, however, believe that the rise of digital media will shift the balance in favor of intellectual property rights. Digital rights management (DRM)

technologies allow intellectual property rights-holders to encode restrictions within digital files or digital media. DRM technologies can limit how often or how long the user views a file and can similarly restrict the user's ability to alter, share, copy, print, or save the file. Although DRM technologies are not immune to hackers, the Digital Millennium Copyright Act makes it a crime to create or distribute tools that circumvent DRM technologies.

DRM technologies threaten a critical aspect of the balance between intellectual property and free speech. Under the "fair use" exception to copyright law, people need not receive the author's permission to use copyrighted works for such purposes as criticism, comment, news reporting, teaching, scholarship, and research. The fair use exception allows these important areas of public discourse to benefit from the work of authors and inventors, yet still protects those works against commercial exploitation. If DRM technologies were perfected, they could prohibit the fair uses that have traditionally been considered essential to a healthy public discourse.

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References and Further Reading

- Halbert, Debora J. *Intellectual Property in the Information Age: The Politics of Expanding Ownership Rights*. Westport, CT: Quorum 1999.
- Lessig, Lawrence. *The Future of Ideas: The Fate of the Commons in a Connected World*. New York: Random House 2001.
- Moore, Adam D. *Intellectual Property and Information Control: Philosophic Foundations and Contemporary Issues*. New Brunswick, NJ: Transaction Publishers, 2001.
- Reidenberg, Joel R., *Lex Informatica: The Formulation of Information Policy Rules Through Technology*, Texas Law Review 76 (1988): 553–593.
- Samuelson, Pamela, *Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to Be Revised*, Berkeley Technology Law Journal 14 (1999): 519–566.

INTELLIGENCE IDENTITIES PROTECTION ACT (1982)

The Intelligence Identities Protection Act, P.L. 97-200, became law on June 23, 1982, as an amendment to the National Security Act of 1947. The act was an immediate response to a series of disclosures in the post-Watergate era, placing U.S. covert operatives and others working with them in personal danger. The most famous cases involve disclosures by former CIA operative Philip Agee, leading to the assassination of CIA operative in Greece, and by the editor of a publication, the *Covert Action Bulletin Board*, at a

news conference in Kingston, Jamaica, in 1980, leading to an attack on the U.S. Embassy there. The act thus reflects Congress's judgment that some new deterrent measures were necessary.

It criminalizes the disclosure of covert agents of the United States, establishing three distinct offenses with increasingly severe penalties, reaching up to ten years' imprisonment, \$50,000 in fines, or both. In decreasing order of severity, it distinguishes among the following cases: intentional disclosure by a person who ordinarily has access to classified information concerning the identity of a covert agent; intentional disclosure by a person who has access to classified information and learns of the identity of a covert agent; and, finally, a pattern of activities intended to identify and expose covert agents, with reason to believe that those activities would impair or impede the foreign intelligence activities of the United States. In each case, the government must prove that the defendant knows not only that the information identifies a covert agent, but also that the United States is taking affirmative measures to conceal that agent's relationship to the United States. The defendant can avoid criminal responsibility if he can show that the United States had publicly acknowledged or revealed its intelligence relationship with the identified covert agent.

As the legislative history reveals, with regard to wholly private conduct, the Congress considered the First Amendment interest in publishing actual names of covert agents to be *de minimis*. The legislative history also reveals that Congress intended that prosecution in such cases would require a showing of a "pattern of activities," such as efforts to obtain classified information; a comprehensive counterintelligence effort involving espionage techniques; or systematic collection, collation, and analysis of information from documentary sources. The Congress believed that this requirement would allow the courts to protect expressive, journalistic, and scholarly activities protected by the First Amendment.

In 2003, the act drew public attention in relation to the revelation of the name of a CIA employee, Valerie Plame, whose husband had submitted a report on the possibility of uranium ore transfers from Niger to Iraq at variance with public assertions by the Bush administration. The matter is under investigation, drawing the act into public attention, but this renewed attention bears little relation to the types of disclosures that originally prompted its enactment.

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References and Further Reading

- Michalec, Mitchell J., *The Classified Information Protection Act: Killing the Messenger or Killing the Message?*

Cleveland State Law Review 50 (2002–2003): 455 (offering a recent discussion of the act, its history, and significance).

INTELLIGENT DESIGN

See Creationism and Intelligent Design

INTERMEDIATE SCRUTINY TEST IN FREE-SPEECH CASES

The “intermediate scrutiny” test, which has its origins in equal protection jurisprudence, is now widely used to deal with numerous free-speech problems involving government regulation that does not seek to regulate the content or viewpoint of speech, but that may nonetheless have an incidental impact on freedom of expression. The intermediate scrutiny test generally requires that the government regulation be supported by a “substantial” governmental interest and that the regulation be “narrowly tailored” to effectuate that interest. The concept of “narrow tailoring” in the intermediate scrutiny context, however, does not require the rigorous precision of the “strict scrutiny” test. Specifically, when intermediate scrutiny is applied, the government need not use the “least restrictive means” of regulation. This is often confusing because the languages of the two tests are quite similar.

The general intermediate scrutiny standard borrowed from equal protection jurisprudence often gets slightly adjusted when applied to specific free-speech problems. Such adjustments maintain the general “intermediate” level of judicial scrutiny but tailor the test to include factors particularly important to the nature of the problem at hand.

Perhaps the most common variant of intermediate scrutiny in free-speech cases, for example, is the test used to evaluate the constitutionality of content-neutral “time, place, or manner” regulations. Time, place, or manner regulations do not regulate *what* is said, but merely such matters as *when*, *where*, and *how loud*. The First Amendment allows “reasonable” time, place, or manner regulations. To determine whether time, place, or manner regulations are reasonable, the Supreme Court employs a three-part test. The Supreme Court in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), thus held that “the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.”

Genuine time, place, or manner regulations are by definition content neutral. If the regulation at issue is not content neutral, then it is an error for a court to apply the standard of review applicable to content-neutral regulations. Thus, the Supreme Court in *Hudgens v. NLRB*, 424 U.S. 507 (1976), admonished that

While a municipality may constitutionally impose reasonable time, place, and manner regulations on the use of its streets and sidewalks for First Amendment purposes ... and may even forbid altogether such use of some of its facilities ... what a municipality may *not* do under the First and Fourteenth Amendments is to discriminate in the regulation of expression on the basis of the content of that expression.

Another important variant of intermediate scrutiny is the standard employed in *United States v. O'Brien*, 391 U.S. 367 (1968). The *O'Brien* case dealt with content-neutral laws that have, as their “incidental” impact, some demonstrable burden on speech. *O'Brien* is a “workhorse” case, employed constantly by courts to assess the constitutionality of content-neutral regulations that have an adverse impact on speech. The Court announced the standard in one of the most important passages in the history of First Amendment jurisprudence, stating that “a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.”

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References and Further Reading

Smolla, Rodney. *Smolla and Nimmer on Freedom of Speech*. New York: Thomson/West, 2005, sections 3:1, 8:35; 9:1.
Stone, Geoffrey, *Content Regulation and the First Amendment*, William and Mary Law Review 25 (1983): 189.

Cases and Statutes Cited

Hudgens v. NLRB, 424 U.S. 507 (1976)
United States v. O'Brien, 391 U.S. 367 (1968)
Ward v. Rock Against Racism, 491 U.S. 781 (1989)

INTERNET AND CIVIL LIBERTIES

Since the emergence of the World Wide Web in the early 1990s, the Internet has played an increasingly important role in commerce, politics, and social life.

Within the United States and around the globe, millions of people turn to the Internet each day to transact business, obtain news, conduct research, disseminate information, and otherwise connect with each other. Internet technology continues to develop rapidly, with new applications proliferating in virtually all segments of society. In light of the celerity of technological innovation and the vastly expanding uses for that technology, capturing the various ways in which the Internet implicates civil rights presents a special challenge. Although technological changes will create unforeseen contexts in which new rights claims emerge, some of the most important civil rights claims involving the Internet fall roughly into three categories: speech, privacy, and access.

Speech

The explosive growth in Internet communication over the past decade has sparked a heated debate about regulating the content of cyberspace communication. Many free speech advocates insist that the government must not regulate in any way the substance of Internet communication. In contrast, many legislators argue that the Internet poses special problems involving the proliferation of pornography, hate speech, and commercial advertising, among other concerns, that require governmental intervention. Although the courts have provided limited guidance in a few notable cases, the debate about the level of free speech afforded Internet communication is nowhere close to settled.

Pornography

Some of the earliest and most important speech cases arose out of governmental attempts to regulate pornography on the Internet. In 1996, Congress passed the Communications Decency Act (CDA), which provided criminal penalties for transmission over the Internet of “indecent” or “patently offensive” materials accessible by children. In *Reno v. ACLU*, 521 U.S. 844 (1997), a group of civil rights organizations, newspapers, and technology companies argued that the “indecent” and “patently offensive” standards, which the statute defined only by reference to prevailing community values, improperly criminalized potentially nonpornographic speech in violation of the First Amendment. In a unanimous ruling, the Supreme Court struck down the CDA because the statute’s standards were impermissibly vague and

potentially covered large amounts of materials possessing legitimate educational or social value (for example, an e-mail regarding birth control information sent by a parent to a child away at college).

In response to the Supreme Court opinion in *Reno*, less than two years later Congress passed the Child Online Protection Act (COPA), which prohibited the dissemination over the Internet of any material “harmful to minors” as defined by a new set of community-based standards that closely tracked the Supreme Court’s previously articulated test for identifying obscenity. In *Ashcroft v. ACLU*, civil libertarians and Internet content providers challenged the statute as unduly burdening speech properly protected by the First Amendment. In 2004, following years of litigation, the Supreme Court narrowly upheld the injunction preventing enforcement of COPA because the statute unnecessarily restricted access to protected speech by adults and less restrictive regulatory options were available in any event. While certainly a victory for speech advocates and content providers, the slim five-to-four majority decision made some civil libertarians wary about the approach the Court might take in future Internet speech cases.

Hate Speech

Hate speech provides another important context for the debate about regulation of Internet content. While the Internet serves an enormous array of socially valuable purposes, the technology also facilitates the organization of hate groups and the dissemination of their messages. For many civil libertarians, tolerating hateful speech on the Internet remains necessary in order to ensure the free exchange of ideas generally. For other civil rights groups, such as the Anti-Defamation League (which targets anti-Semitic activity), tolerance of hate speech on the Internet undermines the fundamental goal of social equality.

Although most hate speech finds protection under the First Amendment, some important exceptions exist. For example, in *Planned Parenthood v. American Coalition of Life Activists*, 290 F.3d 1058 (9th Cir. 2003), abortion providers in Oregon brought suit under the federal Freedom of Access to Clinic Entrances Act (FACE) against anti-abortion activists who disclosed the names and addresses of the providers on an Internet Web site called the “Nuremberg Files.”

With bloody images in the background, the site called for holding the doctors who provided abortions responsible for crimes against humanity. The site also

listed the names of doctors who had performed abortions, depicting those who had been murdered with a line through the middle of their names and doctors who had been wounded (but not killed) with their names in gray. Viewers were encouraged to “share your point of view with this ‘doctor.’” In 2002, the Ninth Circuit ruled that the content of the Nuremberg Files constituted a threat of force by calling for the killing of the abortion providers and therefore was not entitled to protection under the First Amendment. Although perhaps circumscribing the reach of the First Amendment in cyberspace, the decision was hailed at least by some civil rights groups as an important step in stemming the spread of hate on the Internet.

Commercial Advertising

Perhaps the most litigated area of Internet communication involves commercial advertising and, in particular, the use of unsolicited bulk e-mails, or “spam,” to sell products and services of every imaginable sort. Recent studies suggest that spam accounts for more than half of all e-mail, with some single advertisers sending hundreds of thousands of spam messages each day. In addition to the increasing annoyance Internet users encounter in sifting through unwanted spam, purported problems include increased risk of consumer fraud, infection by computer viruses, diminished Internet server responsiveness, and the unwanted cost of purchasing spam-blocking computer programs.

In response to public calls to stem the proliferation of spam, more than thirty states have passed some sort of antispam legislation; in 2003, the U.S. Congress passed the Can Spam Act (CSA). The CSA imposes significant restrictions on sending unsolicited commercial e-mail, provides Internet service providers, like America Online, the right to sue for damages resulting from violations of the statute, and calls for the consideration of a “do not e-mail” registry by the Federal Trade Commission. Several lawsuits involving the enforceability and constitutionality of the CSA are working their way through the federal courts. Although the First Amendment provides less protection for commercial speech than for political expression, it remains unclear whether the Can Spam Act will ultimately pass constitutional muster.

There is no doubt that the government can regulate fraudulent or deceitful commercial speech. But some free-speech purists worry that antispam sentiments will provide an unwanted inroad for governmental regulation of truthful expression as well (for example,

e-mail from universities to alumni or prospective students). This concern may become especially pronounced if the boundary between commercial and political speech becomes blurry. Thus, while regulation of spam may seem at the outset a wholly commercial concern, the constitutional analysis the courts provide the CSA and other attempts to limit bulk e-mail may affect the level of protection the First Amendment provides for Internet communication generally.

Privacy

In the context of the Internet, the right to privacy focuses on the collection and dissemination of personal information by companies and governmental entities. Anyone who has used an Internet search engine knows that an enormous amount of personal information is available online. With every keystroke and mouse-click, Internet users add to that store of information by creating “clickstream data,” a trail of electronic tracks or markers generated by each visit to a Web page.

That data may include basic information, such as the type of computer an individual used to access the Internet, the browser utilized, and the identification of each site or page visited. In addition, if an individual were to disclose certain information during the visit, the clickstream data may also include more personalized details, such as passwords, e-mail addresses, social security numbers, credit card numbers, addresses, telephone numbers and other demographic or consumer information. Over time, that clickstream data can be used to build incredibly detailed consumer or personal profiles on anyone who surfs the Web. Companies can use that data to send targeted online advertisements specifically tailored to each Internet user’s consumer profile. That detailed information is also obviously valuable to any governmental or investigative body interested in monitoring an individual’s activity or interests.

Moving beyond simple aggregation of clickstream data, new spying technologies continually develop. Generally dubbed “spyware” or “adware,” these innovative monitoring tools typically rely on information-gathering software that is installed clandestinely on a user’s computer. In addition to those technologies, some more malicious covertly installed programs actually harness the host computers to send e-mail or store unwanted information from external sources. Although a significant market in privacy software has developed to stem unwanted data collection, Internet spying technology continues to evolve quickly,

with the spying technology seemingly just ahead of attempts to block it.

Many state and federal laws attempt to limit the collection and use of personal data obtained online, but those legislative responses have met with limited success in halting privacy invasions. At the federal level, statutes such as the Electronic Communications Privacy Act (ECPA), the Computer Fraud and Abuse Act (CFAA), the Federal Wire Tap Act (wire tap act) and the Children's Online Privacy Protection Act address in some manner the unwanted collection of personal data over the Internet. The incredible speed of innovation in Internet spying technology, however, makes it difficult if not impossible for legislators to keep up with those technological innovations.

For instance, in *In reDoubleClick, Inc. Privacy Litigation*, 154 F. Supp. 2d 497 (S.D.N.Y. 2001)—one of the most significant decisions regarding privacy and the Internet, a class of Internet users alleged that one of the world's largest online advertisers, DoubleClick, Inc., violated the ECPA, CFAA, and wire tap act by depositing "cookies" (small text files used to collect clickstream data) on the computer hard drives of Internet users. Relying on the precise language of the statutes considered, a federal district court in New York dismissed each of the statutory causes of action as inapplicable to the particular data collection technology at issue. Quite simply, the precise statutory mandates in existing statutes often fail to target the latest methods of electronic monitoring. As a result, by continually developing new spying technologies, those interested in mining personal information over the Internet can often evade the restrictions embedded in the privacy statutes.

In light of challenges legislators face in keeping up with technological change, some scholars and lawyers have suggested turning to common law principles (for example, trespass, conversion, etc.) as a platform for holding companies liable for privacy invasions. Although the malleable nature of the common law makes it easier to apply that legal framework to continually changing spying technologies, the limited causes of action perhaps do not provide the full protection many Internet users desire. While statutes and common law principles might work in tandem to afford the most robust protection of privacy rights in cyberspace, the swiftly evolving architecture of the Internet makes securing those privacy rights especially difficult.

On a final note, many privacy rights activists argue that one particular legislative initiative, the USA PATRIOT Act of 2001, represents a significant threat to online privacy. Passed in response to the terrorist attacks of September 11, 2001, the act expands the government's authority to collect information over

the Internet, among other powers, as part of an overall effort to combat terrorism. In contrast to other federal statutes that attempt to protect online privacy interests, the PATRIOT Act favors increased collective security over personal privacy rights. The legislative debate surrounding an extension of the act's provisions underscores the precarious position of privacy rights on the Internet. While many Internet users desire greater privacy safeguards, governmental security concerns and corporate interests may align against robust privacy protection. In the end, the debate about the proper scope of online privacy remains heated; the courts have yet to weigh in on some of the most pressing matters.

Access

While it might seem odd to discuss access to the Internet in the context of civil rights, the increasing importance of Internet communication in economic, political, and social life makes access a true rights concern. Within the United States and in the international arena, scholars describe a "digital divide" that separates those who have access to the Internet and those who do not.

Undercurrents of race, class and gender inequality make the digital divide especially problematic. For instance, within the United States, a U.S. Department of Commerce study estimated that in 2000 the number of African Americans and Hispanics who had access to the Internet fell almost 18 percent below the national average (an even greater disparity than measured two years earlier). Regarding economic class, the same study reported the access rate for people in households with income ranging between \$25,000 and \$35,000 was less than half the rate for people in households with income over \$75,000.

Similarly, access rates for people in rural areas fell far behind those in urban areas. With respect to gender, access concerns often take a different tack, focusing on the disproportionate prevalence of males in creating the structure and content of Internet communication. On the international front, the problems of access become incredibly magnified, with Internet communication available only to the most privileged individuals in some developing countries.

Thus, involving domestic and international components, the debate over access raises basic equality concerns. Couched in that way, the "digital divide" simply provides a new context for presenting some traditional equal rights claims involving race, class, and gender. Although the impact of the digital divide occupies significant scholarly debate, rights of access

are only beginning to garner the attention of courts and legislatures in the United States and around the world.

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References and Further Reading

- Celli, Andrew G., Jr., and Drifach, Kenneth M., *Postcards From the Edge: Surveying the Digital Divide*, *Cardozo Arts and Entertainment Law Journal* 20 (2002): 53–71.
- Finkelman, Paul, *Picture Perfect: The First Amendment Trumps Congress in Ashcroft v. Free Speech Coalition*, *Tulsa Law Review* 38 (2002): 243–61.
- Fishman, Clifford S., *Technology and the Internet: The Impending Destruction of Privacy by Betrayers, Grudgers, Snoops, Spammers, Corporations, and the Media*, *George Washington Law Review* 72 (2004): 1503–1556.
- Isenberg, Doug, *The GigaLaw Guide to Internet Law*. New York: Random House, 2002.
- Lessig, Lawrence. *Code, and Other Laws of Cyberspace*. Basic Books, 1999.
- Li, Joyce H.-S. *The Center for Democracy and Technology and Internet Privacy in the U.S.: Lessons of the Last Five Years*. Oxford: The Scarecrow Press, Inc., 2003.
- Siebecker, Michael R., *Cookies and the Common Law: Are Internet Advertisers Trespassing on Our Computers?* *Southern California Law Review* 76(4) (2003): 893–952.
- Volokh, Eugene, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People From Speaking About You*, *Stanford Law Review* 52 (2000): 1049–1124.
- Wilhelm, Anthony G. *Digital Nation: Toward an Inclusive Information Society*. Cambridge, MA: MIT Press, 2004.

Cases and Statutes Cited

- Ashcroft v. ACLU*, 542 U.S. 656 (2004)
- In re DoubleClick, Inc. Privacy Litigation*, 154 F. Supp. 2d 497 (S.D.N.Y. 2001)
- Planned Parenthood v. American Coalition of Life Activists*, 290 F.3d 1058 (9th Cir. 2003)
- Reno v. ACLU*, 521 U.S. 844 (1997)
- Can Spam Act, 15 U.S.C. §§ 7701-13 (2003)
- Child Online Protection Act, 47 U.S.C. § 231 (1998)
- Children's Online Privacy Protection Act, 15 U.S.C. §§ 6501 et seq. (1998)
- Communications Decency Act, 47 U.S.C. §§ 230, 560-61 (1996)
- Computer Fraud and Abuse Act, 18 U.S.C. § 1030 (2000)
- Electronic Communications Privacy Act, 18 U.S.C. §§ 2701-11 (2000)
- Federal Wire Tap Act, 18 U.S.C. §§ 2511-22 (2000)
- Freedom of Access to Clinic Entrances Act, 18 U.S.C. § 248 (2000)
- USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001)
- See also Commercial Speech; Communications Decency Act (1996); Free Speech and Free Press: The Modern Period (1917–Present); Hate Speech; Reno v. ACLU*, 521 U.S. 844 (1997); *Right of Privacy*

INTERNET AND INTELLECTUAL PROPERTY

Digital home computing and the Internet have brought about a crisis in intellectual property law by raising new issues and multiplying the possibilities for infringement of intellectual property rights. Copyright law is particularly affected, but computers and the Internet also raise trademark, patent, and trade secret issues.

Copyright

Digital computers make it possible to make multiple copies of creative works, including books, music, and movies, in very little time, with no loss of quality. The Internet enables copiers to share these copies with millions of users worldwide. Problems arise, however, when the shared works are protected by copyright.

Recent additions to the U.S. copyright code addressing digital copying include the No Electronic Theft Act, which allows the government to prosecute those who sell copies of copyrighted material and also those who give copies away, and the Digital Millennium Copyright Act (DMCA), which prohibits the circumvention of copy-protection measures and provides safe harbors protecting Internet service providers (ISPs) from liability for copyright infringement by their users.

When an unauthorized person reproduces, distributes, publicly displays or performs, or prepares a derivative work, the copyright is *infringed* unless an exception applies. Infringement may be direct, contributory, or vicarious. In an Internet context, applicable exceptions may include the right to make backup copies, fair use, the first sale doctrine, and the four DMCA safe harbors for ISPs.

Backup copies: While ordinarily the purchaser of a copyrighted work has the right to make a backup copy, Title I of the DMCA has the practical effect of prohibiting the making of digital backup copies of copy-protected recordings.

Fair use: Copying a copyrighted work “for purposes such as criticism, comment, news reporting, teaching, scholarship, or research” is permissible if the use is fair. Fairness is determined by examining four factors: “(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work” (17 U.S.C. § 107).

Copying a music recording one has purchased on to one's computer for personal listening is fair use, but copying music for large numbers of anonymous individuals to access over the Internet is not (*Napster*, 239 F.3d 1004). Copying a movie one has purchased for personal use might be fair use, but if the copying required the circumvention of copy-protection technology, it would still be prohibited under the DMCA (17 U.S.C. § 1201).

First sale doctrine: The copyright holder's control over a lawful copy of the work is limited to its first sale; the purchaser or recipient may dispose of that lawful copy as he or she wishes (17 U.S.C. § 109). The first sale doctrine does not create a right to make copies of the work and does not include the right to display the copy somewhere other than the place where it is located, such as by posting it on the Internet.

ISP safe harbors: Title II of the DMCA protects ISPs from liability for copyright infringement for material passing through their servers if certain requirements are met. There are safe harbors for ISPs for transitory communications, system caching, storage of information on systems or networks at the direction of users, and information location tools (17 U.S.C. § 512). Without these safe harbors, ISPs would be unable to function; policing all content transmitted over, cached on, stored on, or located via a network would be prohibitively time-consuming and expensive. ISPs may be required to remove or block copyright-infringing content once the copyright owner complies with certain notice procedures.

Contributory and vicarious infringement: Third parties may be liable for copyright infringement by others through contributory or vicarious liability. Both require underlying direct infringement by another. Contributory infringement also requires actual or constructive knowledge of the violation and a material contribution to the direct infringer's activities (*Fonovisa*, 76 F.3d 259). Vicarious infringement requires the vicarious infringer to have the right and ability to control the direct infringer's actions and to receive a direct financial benefit from the infringing activity (*Fonovisa*, 76 F.3d 259).

Copyright infringement has been perhaps the most contested battlefield in Internet law. The 1997 No Electronic Theft Act targets direct infringers such as warez traders (who copy and share copyrighted software); some critics claim that a subgroup of warez traders, those who trade in abandonware (software no longer sold, distributed or supported by the copyright owner), actually perform a useful social function by keeping alive programs that might otherwise be lost forever.

The most visible struggle is over peer-to-peer (P2P) file-sharing networks, which allow users to exchange

files, including copyrighted music, movies, photographs, programs, and books, with large numbers of other users. File-sharing technology has evolved in direct response to the law. After the content industry's victory against MP3.com (92 F.Supp.2d 349), the model of a centralized site storing copies for download was abandoned in favor of Napster's model, in which files were stored on users' computers and the central site maintained only a directory of files and search tools.

This model, it turned out, also gave rise to third-party liability for copyright infringement (239 F.3d 1004), so two new models were adopted. In virtual private network (VPN)-based systems, encryption kept the content of the traded files secret from all except the sender and the recipient; a VPN-based system, Aimster, was nonetheless found to give rise to third-party liability. (334 F.3d 643). Second, super-node-based systems place the directory, files, and search tools on the users' computers; there is no central site. This technology powers KaZaA, Grokster, and other popular P2P systems. It survived court challenges in the Netherlands, but in June 2005, the U.S. Supreme Court held that it could give rise to third-party liability under U.S. copyright law, provided the other requirements were met (125 S.Ct. 2764). Further legal battles over file-sharing seem likely.

Trademark

The Internet can assist in traditional forms of trademark infringement (such as the sale of fake Rolex watches), as anyone with an e-mail account knows. It also gives rise to a new form of trademark infringement: the use of trademarks to alter search-engine results. Some search engines (but not Google) use Web site metatags in the search process. These metatags are invisible to most users, but visible to the search engines. Using a competitor's name in a meta-tag may divert traffic from the competitor's site. At the same time, provisions must be made for fair use: for example, it would be difficult for a Volkswagen repair shop to explain its business without using the word "Volkswagen." The Ninth Circuit explained in *Playboy Enterprises, Inc. v. Welles*, 279 F.3d 796 (9th Cir. 2002), that use of a trademarked term is permissible as a nominative fair use if three conditions are met:

First, the product or service in question must be one not readily identifiable without use of the trademark; second, only so much of the mark or marks may be used as is reasonably necessary to identify the product or

service; and third, the user must do nothing that would, in conjunction with the mark, suggest sponsorship or endorsement by the trademark holder (279 F.3d at 801).

Trademark issues also arise when one user registers a domain name that includes or closely resembles a mark. Sometimes this occurs innocently; sometimes it is “cybersquatting”—done deliberately to inconvenience or extort money from the mark holder. The Anti-Cybersquatting Consumer Protection Act provides a test for distinguishing between the two and provides remedies for cybersquatting.

Other Issues

Some controversy has arisen over the granting of “business method patents” for, among other things, Amazon.com’s “one-click” ordering system. Patents of this sort, however, are authorized by the federal circuit’s decision in *State Street Bank & Trust v. Signature Financial Group, Inc.*, 149 F.3d 1368, Fed. Cir. 1999, and arguably required under TRIPs, the World Trade Organization’s intellectual property agreement.

The Internet also provides a cheap, quick, and often untraceable means of destroying a trade secret. As cases like *Religious Technology Center v. Lerma*, 908 F. Supp. 1362 (E.D. Va. 1995), have shown, making a trade secret available online, at least for a few days, is probably enough to deprive the secret of further protection under the Economic Espionage Act or the Uniform Trade Secrets Act.

AARON SCHWABACH

References and Further Reading

- “A Fine Balance: How Much Copyright Protection Does the Internet Need?” *Economist Technology Quarterly* (Jan. 25, 2003): 12.
- Efroni, Zohar, *A Guidebook to Cybersquatting Litigation: The Practical Approach in a Post-Barcelona.com World*, University of Illinois Journal of Law, Technology and Policy (2003): 457.
- Goldman, Eric, *A Road to No Warez: The No Electronic Theft Act and Criminal Copyright Infringement*, Oregon Law Review 82 (2003): 369.
- Leaffer, Marshall. *Understanding Copyright Law*, 3rd ed. New York: Matthew Bender, 1999.
- Lessig, Lawrence. *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity*. New York: Penguin, 2004.
- Litman, Jessica. *Digital Copyright: Protecting Intellectual Property on the Internet*. Amherst, NY: Prometheus, 2000.
- McCarthy, J. Thomas et al. *McCarthy’s Desk Encyclopedia of Intellectual Property*, 3rd ed. Washington, D.C.: Bureau of National Affairs, 2004.

Cases and Statutes Cited

- A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001)
- Amazon.com, Inc. v. Barnesandnoble.com, Inc.*, 239 F.3d 1343 (Fed. Cir. 2001)
- Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259 (9th Cir. 1996)
- In re Aimster Copyright Litigation (Aimster II)*, 252 F. Supp.2d 634 (N.D. Ill. 2002); affirmed in part, 334 F.3d 643 (7th Cir. 2003); certiorari denied sub nom Deep v. Recording Industry Ass’n of America, Inc., 124 S.Ct. 1069 2004
- MGM Studios, Inc. v. Grokster, Ltd.*, 259 F.Supp.2d 1029 (C.D. Cal. 2003), affirmed, 380 F.3d 1154 (2004); reversed, 125 S.Ct. 2764 2005
- Playboy Enterprises, Inc. v. Welles*, 279 F.3d 796 (9th Cir. 2002)
- Recording Industry Association of America v. Diamond Multimedia Systems, Inc.*, 180 F.3d 1072 (9th Cir. 1999)
- Recording Industry Association of America, Inc. v. Verizon Internet Services*, 240 F.Supp.2d 24 (D.D.C. 2003); reversed, 351 F.3d 1229 (D.C. Cir. 2003); certiorari denied, 125 S.Ct. 309 and 125 S.Ct 347 2004
- Religious Technology Center v. Lerma*, 908 F. Supp. 1362 (E.D. Va. 1995)
- Religious Technology Center v. Netcom On-Line Communication Services, Inc.*, 907 F.Supp. 1361 (N.D. Cal. 1995)
- Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 1984
- State Street Bank & Trust v. Signature Financial Group, Inc.*, 149 F.3d 1368 (Fed. Cir. 1999)
- UMG Recordings, Inc., v. MP3.com, Inc.*, 92 F.Supp.2d 349 (S.D.N.Y. 2000)
- Anti-Cybersquatting Consumer Protection Act, 15 U.S.C. § 1125(d)
- Copyright Act of 1976, 17 U.S.C. §§ 101-1332
- Digital Millennium Copyright Act, 16 U.S.C. § 512, 1201-04
- Economic Espionage Act of 1996, 18 U.S.C. § 1831 et seq.
- Lanham Trademark Act, 15 U.S.C. §§ 1052, 1058, 1059, 1125-1127
- No Electronic Theft Act, 17 U.S.C. §§ 101, 506-07
- Patent Code, 35 U.S.C. §§ 1-376
- National Conference of Commissioners on Uniform State Laws, *Uniform Trade Secrets Act*, as amended 1985, available at <http://nsi.org/Library/Espionage/usta.htm> (visited November 16, 2004)
- Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs), Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Apr. 15, 1994, 33 I.L.M. 81 (1994)

See also Copyright Law and Free Exercise; Intellectual Property and the First Amendment; Internet Filtering at Libraries and Free Speech

INTERNET FILTERING AT LIBRARIES AND FREE SPEECH

The Internet provides instant access to content located on servers all over the world. Some of that content is pornographic; some of it is obscene or otherwise illegal in the United States. As the Supreme Court

recently observed in *Ashcroft v. ACLU*, 542 U.S. 656 (2004), blocking and filtering offensive and illegal content may be more effective than attempting to control such content at the supply end.

While the First Amendment protects the right of adults to access offensive but not illegal content, there has been concern over the ease with which the Internet makes pornographic content available to minors. Attempts to control this problem on the supply side, by regulating the providers of Internet content, ran into two problems: The First Amendment limits Congress's authority to regulate content providers within the United States, and Congress lacks authority to regulate content providers outside the United States. In 1998, Congress addressed the problem from the demand side by enacting the Children's Internet Protection Act (CIPA).

CIPA provides discounts of up to 90 percent on Internet access for qualifying schools and libraries under the federally funded e-rate or school and libraries discount, provided that those schools and libraries install filtering and blocking software. Administrators of institutions receiving subsidized Internet access must certify that the school or library

- (1) is enforcing a policy of Internet safety for minors that includes monitoring the online activities of minors and the operation of a technology protection measure with respect to any of its computers with Internet access that protects against access through such computers to visual depictions that are
 - a. obscene
 - b. child pornography
 - c. harmful to minors
- (2) is enforcing the operation of such technology protection measure during any use of such computers by minors (47 U.S.C. § 254(h)(5)(B))

A similar but less restrictive provision applies to adults: the school or library must make an identical certification, except that item III (protection against material harmful to minors) is not required. In addition, a school or library administrator or authorized person "may disable the technology protection measure concerned, during use by an adult, to enable access for bona fide research or other lawful purpose" (47 U.S.C. § 254(h)(5)(D)).

In order to carry out their obligations under CIPA, institutions receiving discounted Internet access are required to purchase and install "technology protection measures" (filtering programs) to filter or block Internet access to specified "visual depictions." Each institution is also required to hold a minimum of one public meeting on Internet safety policies to gather

input and feedback from community members. This requirement of one meeting was perhaps inspired by the "community standards" element of the *Miller* test for obscenity (413 U.S. 24).

Neither obscenity nor child pornography is protected by the First Amendment, but defining material "harmful to minors" in constitutionally permissible terms has always posed a problem. In CIPA Congress defined the term as including:

any picture, image, graphic image file, or other visual depiction that

1. taken as a whole and with respect to minors, appeals to a prurient interest in nudity, sex, or excretion
2. depicts, describes, or represents, in a patently offensive way with respect to what is suitable for minors, an actual or simulated sexual act or sexual contact, actual or simulated normal or perverted sexual acts, or a lewd exhibition of the genitals
3. taken as a whole, lacks serious literary, artistic, political, or scientific value as to minors (47 U.S.C. § 254(h)(5)(G))

CIPA also includes a subtitle, the Neighborhood Children's Internet Protection Act, requiring schools and libraries to adopt policies addressing areas such as minors' access to inappropriate matter on the Web; their safety when using e-mail, chat rooms, and other direct electronic communications (such as instant messaging); and hacking. In keeping with the "community standards" element, the term "inappropriate for minors" is to be determined by a "school board, local educational agency, library, or other authority," rather than by an "agency or instrumentality of the United States Government." These locally adopted policies are not subject to review by these federal agencies or instrumentalities (47 U.S.C. § 254(l)).

CIPA's potential for conflict with First Amendment rights led plaintiffs including the American Library Association to bring suit to enjoin its enforcement, at least as far as libraries and their adult patrons were concerned. With regard to libraries, the plaintiffs argued that CIPA required the imposition of content based restrictions on library patrons' access to constitutionally protected speech. Although patrons could request the unblocking of access to blocked content, placing the burden on the library patron to make the potentially embarrassing request was likely to discourage many patrons from doing so. Also, filtering and blocking programs, inevitably imperfect, would block some content that Congress intended to permit while failing to block some content

that Congress intended to restrict. The plaintiffs also argued that CIPA was an impermissible use of the spending power.

The district court issued the injunction requested by the plaintiffs (201 F. Supp.2d 401), and the case was appealed directly to the Supreme Court, which reversed the decision in June 2003. A four-justice plurality, with two justices concurring in the result, stated that CIPA neither violated the First Amendment nor attached an impermissible condition to Congressional exercise of the spending power.

Chief Justice Rehnquist, writing for the plurality, pointed out that “a public library does not acquire Internet terminals in order to create a public forum for Web publishers to express themselves, any more than it collects books in order to provide a public forum for the authors of books to speak” (539 U.S. at 206). Most libraries, he continued, choose not to acquire pornographic books, and this decision is not subject to heightened scrutiny. “[B]ecause of the vast quantity of material on the Internet and the rapid pace at which it changes, libraries cannot possibly segregate, item by item, all the Internet material that is appropriate for inclusion from all that is not.” The use of software to exclude certain categories of content, Rehnquist stated, “is entirely reasonable” (539 U.S. at 208). The concurring justices also found the statute’s provision for unblocking at an adult patron’s request necessary and constitutionally adequate (539 U.S. at 214, 219-20).

AARON SCHWABACH

References and Further Reading

- Kolbert, Kathryn, and Zak Mettger, eds. *Justice Talking: Censoring the Web: Leading Advocates Debate Today's Most Controversial Issues*. New York: The New Press, 2002.
- Lessig, Lawrence. *Code and Other Laws of Cyberspace*. New York: Basic Books, 1999.
- . *The Future of Ideas*. New York: Random House, 2001.
- Saunders, Kevin W. *Saving Our Children from the First Amendment*. New York: New York University Press, 2004.
- Schachter, Madeleine. *Law of Internet Speech*, 2nd ed. Durham, NC: Carolina Academic Press, 2002.

Cases and Statutes Cited

- American Library Association v. United States*, 201 F. Supp.2d 401 (E.D. Pa. 2002); reversed sub nom *United States v. American Library Association, Inc.*, 539 U.S. 194 (2003)
- Miller v. California*, 413 U.S. 15 (1973)
- Child Online Protection Act, 47 U.S.C. § 231
- Children’s Internet Protection Act, 47 U.S.C. § 254(h)

See also Children and the First Amendment; Miller Test; Miller v. California, 413 U.S. 15 (1973); *Obscenity; State Action Doctrine*

INTERSTATE COMMERCE

Article I, Section 8 of the U.S. Constitution grants Congress the power to regulate interstate commerce. When most people think about the commerce clause, they imagine Congress passing laws regulating the buying and selling of goods. However, many people are surprised to find out that Congress also has used the interstate commerce clause to promote civil rights and civil liberties. In fact, Congress used its power to regulate interstate commerce when it passed Title II of the Civil Rights Act of 1964—one of Congress’s most important pieces of civil rights legislation. Thus, the Constitution’s interstate commerce clause has been instrumental in safeguarding the civil rights and civil liberties of American citizens.

Congress first attempted to eliminate discrimination in public inns and places of public entertainment in the Civil Rights Act of 1875. However, the U.S. Supreme Court ruled in the *Civil Rights Cases of 1883* that the Fourteenth Amendment of the Constitution only applied to “state action.” In other words, the Fourteenth Amendment only prohibited discrimination by the state and did not prohibit discrimination by private individuals. Consequently, this case determined that Congress could not pass laws under the Fourteenth Amendment that would prohibit discrimination in privately owned public accommodations.

Despite the ruling in the *Civil Rights Cases*, some private business owners freely chose not to discriminate against African Americans in their businesses. Nevertheless, in the mid-twentieth century, there still were a significant number of businesses, particularly in the South, who chose to deny access to African Americans. Other businesses chose to segregate their facilities. In an effort to correct these forms of racial discrimination, civil rights activists challenged these discriminatory policies in the courts in the 1950s and 1960s; however, the 1883 ruling in the *Civil Rights Cases* hindered any legal success. In *Peterson v. Greenville*, 373 U.S. 244 (1963), Chief Justice Warren reiterated that the Supreme Court was limited by the “state action” doctrine established in the *Civil Rights Cases*, and thus the Fourteenth Amendment did not prohibit private businesses from discriminating against African Americans.

This put Congress in a bind. It wanted to end racial segregation in private accommodations, but the Supreme Court made it clear that Congress could not base its authority to create such laws under the

Fourteenth Amendment. Thus, Congress decided to anchor its authority to make this type of legislation in its power to regulate interstate commerce. Since the creation of the Constitution, Congress's powers under the interstate commerce clause had expanded significantly.

Over the years, the Supreme Court ruled that Congress could do more than regulate the buying and selling of goods. For instance, in the nineteenth century, the Court ruled that Congress had the authority to regulate the navigation and transportation of goods. In the mid-twentieth century, the Court ruled that Congress had the authority to regulate the manufacturing and production of goods as well as regulate any actions that had a "direct and substantial effect" on the interstate flow of goods and people or an impact on the national economy. Likewise, the Supreme Court asserted that Congress had "national police powers," which gave it the authority to pass any legislation that promoted the health, safety, morality, or general welfare of the nation.

Because Congress's power to regulate interstate commerce had expanded, many members of Congress believed that they could eliminate racial discrimination in public accommodations using their authority to regulate interstate commerce. After all, many members of Congress believed that excluding African Americans had a "direct and substantial" impact on the national economy. Moreover, racial discrimination was a moral wrong that "national police powers" would give Congress power to correct. Using this logic, Congress passed Title II of the Civil Rights Act of 1964, which prohibited racial discrimination and segregation in hotels, motels, restaurants, bars, barbershops, gasoline stations, places of entertainment, and all other forms of public accommodation.

Congress's authority to pass Title II of this act was challenged in the cases of *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964), and *Katzenbach v. McClung*, 379 U.S. 294 (1964). Both of these cases, however, affirmed Congress's power. In these companion cases, the Supreme Court pointed out that Congress had evidence that racial discrimination placed burdens on interstate commerce. For instance, African Americans encountered difficulties when traveling because discriminatory policies often kept them from finding hotels in which they could stay and restaurants in which they could eat. Consequently, African Americans were restricted in their right to travel, since people cannot travel if they cannot find a place to stay or eat. The Court also explained that when African Americans are restricted in their travels, this has a negative impact on the nation's economy, since fewer goods and services are purchased. Furthermore, the Court agreed that Congress could regulate interstate

commerce and intrastate activities that had an impact on commerce, since Congress had the authority to legislate moral wrongs under its "national police power."

With the Supreme Court's approval of Congress's authority to pass Title II of the Civil Rights Act of 1964, Congress continued to use its powers for regulating interstate commerce to pass other legislation promoting civil rights and civil liberties. However, the constitutionality of some of these laws was challenged in the late twentieth century.

For instance, in *United States v. Lopez*, 514 U.S. 549 (1995), the Supreme Court ruled that Congress exceeded its powers under the commerce clause when it passed a law making it illegal to possess a firearm in a school zone. Similarly, in *United States v. Morrison*, 529 U.S. 598 (2000), the Court decided that Congress exceeded its commerce clause power when it passed the Violence Against Women Act, which gave female victims a right to seek a federal remedy for civil rights violations. In both of these cases, the Supreme Court found that these laws were criminal statutes that did not have any economic enterprise. Despite these recent rulings, the interstate commerce clause has been and continues to be an important tool for Congress in the protection of civil rights and civil liberties.

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References and Further Reading

Cortner, Richard C. *Civil Rights and Public Accommodations: The Heart of Atlanta Motel and McClung Cases*. Lawrence: University of Kansas Press, 2001.

Cases and Statutes Cited

Civil Rights Cases, 109 U.S. 3 (1883)
Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964)
Katzenbach v. McClung, 379 U.S. 294 (1964)
Peterson v. Greenville, 373 U.S. 244 (1963)
United States v. Lopez, 514 U.S. 549 (1995)
United States v. Morrison, 529 U.S. 598 (2000)

INTRUSION

Intrusion is one of four privacy torts. The *Second Restatement of Torts* describes intrusion as entering upon the solitude of another of a kind that would be highly offensive to a reasonable person. It is the right "to be left alone." Not all jurisdictions recognize intrusion as a basis for recovery in tort.

The invasion for purposes of intrusion may be physical; intrusion may be analogous to trespass. It may include acts such as eavesdropping—that is,

INTRUSION

prying or snooping by hidden microphone—or peering into residential windows.

Intrusion must concern private affairs of the plaintiff's. No liability exists for matters of a public nature, such as photographing people in public; however, publicity is not required. Additionally, intrusion must be intentional and the interference must be highly offensive; it need not be clandestine.

There are two views of intrusion. Under the first (see *Nader v. General Motors Corp.*, 25 N.Y. 2d 560, 1970), intrusion covers activities that have as their end the gathering of confidential information such as opening a plaintiff's mail. Under the second view found in the *First Restatement of Torts*, intrusion is more expansive. Plaintiffs are protected from repeated acts of surveillance, eavesdropping, and persistent phone calls. Overzealous (or “rough”) shadowing can cross the line into intrusion.

Intrusion cases have resulted from violation of statutes. Federally, Title III of the Omnibus Crime Control and Safe Street Act of 1968 prohibits intentional interception of wire or oral communications. Violators may be subject to criminal and civil actions. Some courts provide common-law protection of the same communications.

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References and Further Reading

- LaMarca, George A., *Overintrusive Surveillance of Plaintiffs in Personal Injury Cases*, American Journal of Trial Advocacy 9 (1985): 1–20.
- Logan, David, *Masked Media: Judges, Juries, and the Law of Surreptitious Newsgathering*, Iowa Law Review 83 (1997): 161.
- Restatement of the Law, Second of Torts*, 2nd ed. St. Paul, MN: American Law Institute Publishers, 1965.
- Speiser, Stewart M. *Lawsuit*. New York: Horizon Books, 1980.
- Warren, Samuel D., and Brandeis, Lewis D., *The Right to Privacy*, Harvard Law Review 4 (1890): 193.

Cases and Statutes Cited

- Nader v. General Motors Corp.*, 25 N.Y. 2d 560 (1970)
- Omnibus Crime Control and Safe Street Act of 1968, 42 U.S.C. § 2510–2520

See also **Privacy**

INVASION OF PRIVACY AND FREE SPEECH

It is generally understood that the constitutional right of privacy has two components: decisional privacy, illustrated by the abortion cases, and “information

privacy”—namely, the capacity of each person to control certain types of information about himself or herself. Many of the decisions addressing the constitutional dimensions of privacy and free speech concern information privacy. A third type of privacy interest—the interest in tranquility and repose, sometimes described as the “right to be left alone”—has also figured in a number of cases presenting conflicts between speech interests and privacy.

At one level, it makes perfect sense that one's right to speak freely about all First Amendment matters might run up against another's interest in protecting personal information from disclosure. Indeed, addressing this tension between speech and privacy has proven to be an important focus of Supreme Court jurisprudence and will be discussed here.

Yet, a right of privacy is undoubtedly central to any meaningful conception of a right of speech. Consider that in order for most people to speak with confidence, they must have space and time to reflect out of the public eye. If one's thoughts, writings, or intimate communications were unprotected from prying eyes and ears, it would be most difficult to develop coherent ideas.

Moreover, consider the constitutional freedom of assembly. Suppose state officials secretly recorded all meetings of the “Organizing Committee to Replace the Government.” If permitted, such unwarranted intrusions into private spaces—spaces necessary for peaceful organizing—would undermine the capacity of citizens to associate and to express themselves effectively against government repression.

A case arising out of the civil rights movement vividly illustrates the close connection between privacy and associational rights. In *NAACP v. Alabama*, 357 U.S. 449 (1958), a state government vehemently opposed to desegregation demanded the membership lists of the local NAACP. The organization refused, fearing the government would harass its members. The Supreme Court held that Alabama could not obtain the lists without first demonstrating a compelling reason, such as criminal behavior, but the state could not.

Nonetheless, sometimes privacy interests collide with First Amendment speech claims. Recall that one of the rationales undergirding the right of free speech is that it protects the search for truth. Does the Constitution therefore protect *truthful* publication of information lawfully obtained, even when publishing that information invades someone's privacy? This question has provoked much debate.

For example, many states allow individuals to sue those who publicly portray them in a “false light”—false but not defamatory assertions that invades an individual's privacy. When the portrayed events are

“newsworthy” on matters of public concern, such as crimes or public events or about “public figures,” claimants alleging invasion of privacy must meet a higher standard of proof than mere negligence: generally, that the false statements were made deliberately or recklessly.

Conflicts between privacy and speech interests have also arisen in the context of statutes prohibiting publishing rape victims’ names. Although recognizing the important interest in shielding rape victims from shame or public exposure, the Supreme Court has not allowed states to punish for the publication of victim names when the names have appeared in public records. One case involved identification of the victim’s name in transcripts of court proceedings; another involved careless posting of the victim’s name on a bulletin board accessible by reporters. In each instance, the Court held that the state could not punish subsequent publication of the victim’s name.

The Court has taken a somewhat different approach to state efforts to protect the kind of privacy defined as tranquility or repose against free speech challenges. When municipalities have sought to protect residential “privacy” by banning all solicitation, marches, or literature distribution, the Court has held that the interests in free communication forbid outright bans. Yet, cities may enact limited protections for residential privacy. For example, sound trucks carrying booming amplifiers may be prohibited in residential communities in order to shield residents from noise intrusions.

In attempting to balance abortion protesters’ rights to march through residential areas against the privacy interests of residents, the Court has allowed municipalities to forbid picketing “targeted” at specific residences, but not to ban residential picketing altogether.

Furthermore, when lower courts enter injunctions to protect patient access to abortion facilities, the injunction may be framed to protect the tranquility of the patients. Judicial efforts to balance the competing claims of patient tranquility vs. speech interests have led to injunctions protecting only against yelling or amplified noise near abortion clinics during clinic hours, but not signs, since patient windows may be screened.

The limited recognition of an individual’s interest in tranquility has also arisen under the guise of a related doctrine, the “captive audience.” The idea is that, generally, people who do not want to be exposed to objectionable communications should be able to shield themselves from repeated intrusions. As long as the communications occur in public spaces, the speech interest generally prevails since individuals can typically avoid exposure.

However, no speaker has a right to force others to listen to his message. This rationale explains the *Rowan* case, which upheld the right of citizens who objected to offensive mailings to ask the Postal Service to order the mailer to remove their names from future solicitations. Other courts have upheld statutes that forbid telemarketers from calling once they have been individually told not to. Although marketers have challenged the constitutionality of “do not call lists”—in which those who do not wish to be contacted by telephone solicitors may list their phone numbers on a general registry—such restrictions will likely be upheld since they protect residential and consumer privacy.

In sum, the complex interplay of different conceptions of privacy and free speech forestalls formulaic descriptions of how these cases will be resolved. Privacy is central to a coherent approach to freedom of speech, yet often one person’s interest in keeping personal information private or being free of intrusive communications conflicts with others’ interest in unfettered speech. With increasingly sophisticated surveillance technologies, these latter conflicts will undoubtedly continue to proliferate.

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References and Further Reading

- Prosser, William L., *Privacy*, California Law Review 48 (1960): 383.
 Singleton, Solveig, *Privacy Versus the First Amendment: A Skeptical Approach*, Fordham Intellectual Property, Media & Entertainment Law Journal 11 (2000): 97–153.
 Stahl, Matthew, *False Light Invasion of Privacy in Docudramas: The Oxymoron Which Must Be Solved*, Akron Law Review 35 (2002): 251.

Cases and Statutes Cited

- Cox Broadcasting v. Cohn*, 420 U.S. 469 (1975)
Florida Star v. B.J.F., 491 U.S. 524 (1989)
Frisby v. Schultz, 487 U.S. 474 (1988)
Griswold v. Connecticut, 381 U.S. 479 (1965)
Madsen v. Women’s Health Center, 512 U.S. 753 (1994)
Mainstream Mktg. Servs. v. FTC, 358 F.3d (1228) (10th Cir. 2004)
Martin v. Struthers, 319 U.S. 141 (1943)
NAACP v. Alabama, 357 U.S. 449 (1958)
Nat’l Fed’n of the Blind v. FTC, 420 F.3d 331 (4th Cir. 2005)
NY Times v. Sullivan, 376 U.S. 254 (1964)
Roe v. Wade, 410 U.S. 113 (1973)
Rowan v. United States, 397 U.S. 728 (1970)
Schneider v. State, 308 U.S. 147 (1939)
Time, Inc. v. Hill, 385 U.S. 374 (1967)

See also Abortion; Abortion Protest Cases; Captive Audiences and Free Speech; Compelling State Interest; Defamation and Free Speech; False Light Invasion of

Privacy; Intellectual Influences on Free Speech Law; Intrusion; Matters of Public Concern Standard in Free Speech Cases; *NAACP v. Alabama Ex Rel. Patterson*, 357 U.S. 449 (1958); National Association for the Advancement of Colored People (NAACP); Picketing; Public Figures; Public Forum Doctrines; *Rowan v. United States Post Office Department*, No. 399, 397 U.S. 728 (1970); Time, Place, and Manner Rule

INVIDIOUS DISCRIMINATION

Invidious discrimination refers to the arbitrarily different treatment of a class of persons by the government. Discrimination is said to be invidious if the law's classification does not rest on a reasonable and just relation to its aims, whatever those aims may be. Discrimination animated solely by bias or prejudice is invidious.

Though the principle of equal protection of law stands as a constitutional commitment to the like treatment by the government of all similarly situated persons, it does not render every legislative classification invalid. Indeed, nearly every law discriminates in some way by differentiating on its face or in its effect

between similarly situated persons—between those who will benefit from the law and those who will be burdened by it. As interpreted and applied by the Supreme Court, however, equal protection forbids only invidious discrimination.

For example, the court has treated as presumptively invidious legislative classifications that disfavor individuals who may be identified by their race or national origin or that undermine the ability of individuals to exercise a fundamental right, such as the right to vote. Experience has shown that these classifications often flow from a desire by the majority to disadvantage a discrete group of persons. Accordingly, these classifications can be justified only by a demonstration of a compelling state interest and only if the means to achieve the government's ends are no broader than necessary.

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References and Further Reading

Tribe, Laurence H. *American Constitutional Law*, 2nd ed. Mineola, NY: Foundation Press, 1988, pp. 1465–1473.

See also Antidiscrimination Laws; Compelling State Interest; Equal Protection of Law (XIV)

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JACKSON V. DENNO, 378 U.S. 368 (1964)

The United States Supreme Court was asked to determine whether it was proper for a jury to decide, along with guilt or innocence, whether a confession to a crime was voluntary. Reversing the court below with an opinion authored by Justice Byron White, the Court held that it was impermissible to leave the voluntariness of a confession to be determined in the first instance by a jury and that due process is satisfied by the so called “orthodox rule,” which provides that the trial judge solely determines the voluntariness of the confession. The Court also determined that a jury need not decide on the voluntariness of a confession once a trial judge had decided that the confession was, in fact, voluntary and thus admissible.

The Court found it doubtful that a jury could fully appreciate the values served by the exclusion of involuntary confessions and to ignore the content of a confession no matter what was determined with regard to its voluntariness. Because there was only a general verdict of guilt, it was impossible to determine whether the jury had focused on the issue of voluntariness and then either had found the confession voluntary and considered it on the question of guilt or had found it involuntary, disregarded it, and reached a guilty verdict on independent evidence.

The Fifth and the Fourteenth Amendments of the Constitution prohibit the use of confessions obtained through unlawful coercion. Although it is often argued that the “ends will justify the means,” the foundation of life and liberty could be endangered if undue coercion is used to convict those thought to

be criminals even more so from the actual criminals themselves.

ROBERT DON GIFFORD

JACKSON V. INDIANA, 406 U.S. 715 (1972)

In *Jackson v. Indiana*, the United States Supreme Court held that the state may confine a criminal defendant found incompetent to stand trial only for that period reasonably necessary to restore him to competency or to determine that he is not restorable. If it is determined that the person is not restorable, the Court held that he must either be civilly committed (which generally will mean transfer from a criminal forensic hospital to a low-security civil hospital) or released. Because Jackson, a person who was both deaf-mute and mentally retarded, had been hospitalized as incompetent for more than three years on charges of petty theft and was not likely to be restored to competence, the Court ordered his release. *Jackson* stands for the very important proposition, based on the due process clause, that the nature and duration of confinement must bear “some reasonable relation” to its purpose. Unfortunately, most states have paid no attention to *Jackson*. Although restoration of competency or a determination of unrestorability should virtually always be possible within six months, defendants found incompetent are routinely confined for much longer periods, especially if their charges are serious. Yet challenges to this practice are rare,

despite the willingness of state doctors (who are anxious to free up beds) to bolster them. The states' blatant violation of *Jackson* is a situation begging for civil rights litigation.

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References and Further Reading

Grant, Morris, and J. Reid Meloy, *Out of Mind? Out of Sight: The Uncivil Commitment of Permanently Incompetent Criminal Defendants*, University of California Davis Law Review 27 (1993): 1–89.

See also *Dusky v. U.S.*, 362 U.S. 402 (1960); *Insanity Defense*

JACKSON V. VIRGINIA, 443 U.S. 307 (1979)

In this case the Supreme Court held that due process mandates reversal of a conviction if, viewing the evidence in the light most favorable to the prosecution, no rational fact finder could have found the defendant guilty beyond a reasonable doubt.

In state court, Jackson was found guilty of first-degree murder, although he presented evidence that he acted in self-defense, or alternatively, was too intoxicated to form the specific intent necessary for first-degree murder.

After failing in his state appeal, Jackson filed a federal habeas corpus petition on the ground of insufficiency of the evidence to support the conviction. The lower federal courts denied the petition using a “no evidence” test, under which a defendant could gain a reversal only if there was a complete lack of evidence to support an element of the offense.

The Supreme Court concluded, five to three, that because under *In re Winship* (1968) the prosecution is required to prove every element beyond a reasonable doubt, reversal is required if no rational fact finder could have found guilt beyond a reasonable doubt. However, under this standard, the Court upheld Jackson's conviction.

As a practical matter, although *Jackson* may induce more appellants to include an insufficiency claim, it is unlikely that it has produced significantly more reversals, which were rare under the “no evidence” standard and continue to be so. There is almost always some evidence to support a guilty verdict; and viewing that evidence in the light most favorable to the prosecution, an appellate court almost always concludes that it was rational for a fact finder to have found guilt beyond a reasonable doubt.

DAVID McCORD

Cases and Statutes Cited

In re Winship, 397 U.S. 358 (1968)

See also **Proof beyond a Reasonable Doubt**

JACKSON, ANDREW (1767–1845)

Presiding over an era of profound political and social change, Andrew Jackson transformed both the perception and the practice of the American presidency. His civil rights legacy is a checkered one; he championed great changes in the American electorate, he fought to protect individual liberty, and he believed in states' rights. Yet he was also sympathetic to slavery, and he oversaw the Indian removal policies of the 1830s.

The primary guiding principle throughout Jackson's life and career was his belief that the majority should govern, an idea emphasized by the 1824 presidential election. In that election, Jackson won the popular vote but did not win a majority of votes cast. The House of Representatives, contrary to Jackson's expectations, elected Jackson's opponent, John Quincy Adams, president. Personally wounded, Jackson believed that democracy had been derailed in favor of regional and partisan considerations.

Four years later, in the 1828 election, Jackson was easily elected. Once in office, Jackson began a campaign to abolish the Electoral College, to place term limits on the presidency, and to restore democratic integrity to the political process. The 1828 Tariff of Abominations provoked his first presidential crisis. Although the Tariff was unpopular all over the South, South Carolina was particularly opposed to it. South Carolinian John C. Calhoun, Jackson's vice-president, resigned from office and wrote an anonymous pamphlet explaining South Carolina's right to nullify, or disregard, federal law. Jackson, although he generally supported states' rights, believed that South Carolina had an obligation to honor the congressionally approved Tariff and sent federal troops to enforce the Tariff. Only a negotiated compromise, which lowered the Tariff, prevented violence.

Jackson also presided over an era of increased suffrage. Sweeping through the country was a wave of reform that lowered or abolished property qualifications for white male suffrage. In short, it became easier for white men to vote. This wave, although it cannot be directly credited to Jackson, certainly met with his approval. He believed that the promise of liberty could only be fulfilled through the widespread, even universal, exercise of the franchise by white men. The wider the electorate, thought Jackson, the more

meaningful the majority. And the more meaningful the majority, the more powerful the mandate.

Jackson was concerned with the balance between liberty and government. A believer that citizens were innately virtuous and capable of governing themselves, Jackson also believed on the right of the people to instruct their leaders. Furthermore, the will of the people (as measured by the majority) was sovereign. And although it might seem paradoxical, Jackson believed that as the country industrialized, it would need a stronger central government to ensure liberty for the minority. That vigorous government could easily grow out of control, so vigilance was also necessary, as well as term limits and rotation of office.

Yet Jackson's support of slavery is a blot on his civil liberties legacy. Owner of approximately 150 slaves himself, Jackson believed that the Constitution expressly protected slavery. As a matter of law, then, slaves were private property. His belief that blacks were intellectually inferior is well documented, as well. Interestingly, although he supported the institution, Jackson was politically astute to foresee that arguments over slavery would one day divide the Union.

Because he presided over the massive Indian Removal, Jackson is often criticized for his brutal and racist views toward Indians. But the truth is, although he, indeed, thought of Indians as inferior to whites, he was no more racist than most Americans of his era. Indeed, he may have been slightly more enlightened than was typical for Jackson's time. Jackson's papers indicate a profoundly paternalistic attitude toward Indians, and they further indicate that his main intent in removing the Indians from their traditional areas was preserving them from extinction. White settlers, greedy speculators, and gold seekers would eventually displace Indians, who had no mechanism to deal with the cultural and territorial intruders. Although historians and others may argue about Jackson's ignorance or hatred, or may assign genocidal intent, neither the facts nor the context support that charge.

Jackson's contemporaries often remarked about his bad temper (and in his own writings, he admitted having one). And his reputation for being stubborn is well deserved. But much of the rest of his record is misunderstood. By the standards of his time, he was neither the unrelenting racist nor the recalcitrant Indian hater he is often believed to have been. His political beliefs and his view of America drove him to decisions that later generations may challenge, but Jackson always believed that he was right, and he always claimed to be working for the preservation of democracy. He did, indeed, preside over America's transition from republicanism to democracy.

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References and Further Reading

Remini, Robert V. *Andrew Jackson and the Course of American Empire, 1767–1821; Andrew Jackson and the Course of American Freedom, 1822–1832; Andrew Jackson and the Course of American Democracy, 1833–1845*. (3 volume series) New York: Harper and Row, 1977, 1981, 1984.

———. *The Legacy of Andrew Jackson: Essays on Democracy, Indian Removal, and Slavery*. Baton Rouge: Louisiana State University Press, 1988.

JACKSON, ROBERT H. (1892–1954)

Robert H. Jackson served on the Supreme Court from 1941–1954. He made notable contributions to constitutional law, particularly in the areas federalism, free speech, and separation of powers. He was known for his pungent, commonsensical judicial opinions.

Legal Career

By the time he joined the Supreme Court, Jackson had experienced perhaps the broadest background as a practicing lawyer of any Justice in the Court's history. He had argued cases everywhere from the small city of Jamestown, New York, to the United States Supreme Court. He often described himself as a "country lawyer," based on his successful practice in Jamestown, where he worked on a broad range of cases. Yet, his later work as a federal official included the most sophisticated areas of legal practice: tax, antitrust, securities law, and constitutional litigation.

Jackson began his legal career at an early age, arguing his first case in court before he was twenty-one. In addition to establishing a successful legal practice, he became active in local Democratic politics and developed a connection with then-Governor Franklin Roosevelt. After Roosevelt became president, Jackson became general counsel to the Internal Revenue Service. He then served in several other positions in the executive branch: special counsel to the Treasury Department and to the Securities Exchange Commission, and in the Justice Department as the head of the Tax and Anti-Trust Divisions.

Jackson's success in these positions and his strong support of Roosevelt brought him to the highest positions in the Justice Department. He became Solicitor General (the government lawyer who argues cases in the Supreme Court) and finally Attorney General. As Solicitor General, he was a strong advocate for the constitutionality of the New Deal, which was only then winning acceptance by the Supreme Court.

While Attorney General, he provided important advice to Roosevelt on the eve of World War II. Thus, Jackson's appointment to the Supreme Court was the culmination of an exceptional legal career.

Even after joining the Supreme Court, Jackson made one final, historic appearance as a lawyer. He took a leave from his position at the Court to lead the U.S. prosecuting team at the Nuremberg war crimes trial. Even before the trial began, he played a leading role in the negotiations that lead to the creation of the tribunal. His opening and closing statements at the trial cogently made the case for punishing the Nazi leaders for war crimes and crimes against humanity. He was less successful in cross-examination, particularly of Hermann Goring, who was able to delay the proceedings with long speeches. Today, the Nuremberg trials are commonly considered to be the foundation of modern international human rights law.

Jackson's most notable contributions to civil liberties involved free speech doctrine and the recurring issue of the President's wartime powers over citizens.

Jackson and Free Speech

In the midst of World War II, Jackson penned one of the great classics of First Amendment jurisprudence. The issue in *Barnette* was whether the children of Jehovah's Witnesses could be expelled from school for refusing to take part in the Pledge of Allegiance and flag salute. Just three years earlier, the Court had soundly rejected a religious freedom claim in a similar case. In *Barnette*, the Court overruled *Gobitis* and held compulsory participation in the Pledge to be unconstitutional.

Several passages in Jackson's opinion have become standard quotations in later free speech cases. For example, in response to the argument that the protection of free speech in such cases was better left to the democratic process, he replied: "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." He added, "One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections." Coming shortly after the Court had withdrawn from protecting property rights under the guise of the due process clause, this passage presaged a new rule for the Court as guardian of civil rights and civil liberties.

The most famous portion of the *Barnette* opinion, however, comes near the end, where Jackson wrote: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." This endorsement of freedom of thought as a foundational constitutional principle has been a favored quotation of later Justices.

In *Barnette*, Jackson seems to have been motivated in part by a desire to distinguish America from its totalitarian foes. One argument in favor of the pledge requirement was that it was needed to instill national unity. Jackson argued that such efforts were ultimately futile, as shown by "the fast failing efforts of our present totalitarian enemies." He observed that those who began such an effort often later became its victims. In the end, he said, the effort to unify opinion by force "achieves only the unanimity of the graveyard."

After the war, Jackson often sided with the government in free speech disputes, which he saw as involving threats to public order rather than freedom of thought. In *Saia*, the majority struck down an ordinance that gave the chief of police complete discretion over granting permits to use loudspeakers. Jackson, however, argued that the defendant had abused his right of free speech by using loudspeakers in a public park, disrupting its use for recreational purposes. Similarly, in *Terminiello*, Jackson voted to uphold the conviction of an anti-Semitic speaker for disturbing the peace. The majority overturned the conviction because of one of the judge's instructions to the jury. The judge had told the jury they could convict if speech "stirred people to anger, invited public dispute, or brought about a conviction of unrest." The majority emphasized that dissent often has such effects. Jackson considered this a hyper-technical, if not contrived, basis for reversing the conviction, especially because the defendant's lawyers had never objected to the instruction. He saw the case instead as involving a replay of prewar street battles in Europe, with a rabid speaker inciting a crowd to violence while equally extremist opponents outside threatened to riot.

The majority opinions in *Saia* and *Terminello* are now part of the First Amendment canon, and Jackson's dissents seem at odds with his rousing defense of free speech in *Barnette*. One reason for the disparity between Jackson's views and current law is that the Court generally considers attacks against a statute on its face, whereas Jackson's concern was whether the particular speaker's rights had been invaded. Jackson was also probably influenced by his experience at Nuremberg, which had impressed him with

the potential for extremist groups like the Nazis to take abuse the rights of speech and assembly to destroy public order and seize power.

Civil Liberties and Executive Power

Jackson's other major opinions regarding civil liberties involved executive powers during wartime. In *Korematsu*, he argued that courts should refuse to endorse the Japanese internment, lest they be seen as approving of racial discrimination. He feared that a judicial endorsement of the program would "for all time" validate the "principle of racial discrimination in criminal procedure." Paradoxically, however, he also thought the courts would be powerless to interfere against purely military enforcement. "If the people ever let command of the war power fall into irresponsible and unscrupulous hands, the courts wield no power equal to its restraint." In terms of civil liberties, Jackson's opinion was a mixed blessing. It forthrightly rejected the constitutionality of the internment but also promised to give the military a blank check to act on its own during wartime.

A clearer message emerged from what is probably Jackson's most influential opinion. In the *Steel Seizure* case, Jackson joined the majority in condemning President Truman's order taking control of the nation's steel mills during the Korean War. Jackson's position was especially noteworthy because of his wealth of experience in the executive branch and his strong support for Presidential initiatives under Roosevelt. But he thought that Truman had gone overboard in claiming executive power. He tartly observed that the Constitution makes the President commander in chief of the military, not of "the country, its industries and its inhabitants." In the course of his opinion, Jackson developed a nuanced analysis of the exercise of presidential power. Although Jackson's was only a concurring opinion, his analysis has had much more impact on the law than the Justice Black's brief majority opinion. The importance of Jackson's approach became clear in the early twenty-first century, when the courts confronted antiterrorist measures that had been issued on the basis of inherent executive authority.

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References and Further Readings

- Desmond, Charles, *et al. Mr. Justice Jackson: Four Lectures in his Honor*. New York: Columbia University Press, 1969.
- Gerhart, Eugene. *America's Advocate*. Indianapolis: Bobbs-Merrill Co., 1958.

- Hutchinson, Dennis, *The Achilles Heel of the Constitution: Justice Jackson and the Japanese Exclusion Cases*, *Supreme Court Review* (2002): 455.
- Jaffe, Louis, *Mr. Justice Jackson*, *Harvard Law Review* 68 (April 1955): 940.

Cases and Statutes Cited

- Korematsu v. United States*, 323 U.S. 214 (1944)
- Minersville School District v. Gobitis*, 310 U.S. 586 (1940)
- Saia v. People of State of New York*, 334 U.S. 558 (1948)
- West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943)
- Youngstown Sheet & Tube Co. v. Sawyer (The Steel Seizure Case)*, 343 U.S. 579 (1952)

See also **Flag Salute Cases; Freedom of Speech: Modern Period (1917–Present)**

JACOBELLIS v. OHIO, 378 U.S. 184 (1964)

Can the elements of the *Roth* test be balanced against one another as an appropriate way of applying the rule? A manager of a motion picture theatre in Ohio was convicted for possessing and showing an obscene film. Ohio's appellate courts upheld the conviction. The Supreme Court reversed on the basis that the state courts misapplied the *Roth* test for obscenity and Brennan's plurality opinion attempts to clarify how the test should be used. The decision generated four different opinions from the majority, who agreed with the judgment, but none garnered more than two justices; there were two dissenting opinions. Stewart's concurring opinion quickly entered American folklore for his comment that criminal laws are constitutionally limited to "hard core pornography," which, while declining to define the term, he nevertheless confidently claimed, "I know it when I see it."

Brennan's ruling reaffirms *Roth*, even though the standard, he acknowledges, "has been the subject of much discussion and controversy." The test is "not perfect," Brennan admits but asserts "any substitute would raise equally difficult problems." The *Roth* test asks "whether, to an average person, applying contemporary community standards, the dominant theme of the material, taken as a whole, appeals to prurient interests." Material alleged to be obscene must be "utterly without redeeming social importance," but if the material "advocates ideas . . . or . . . has literary or scientific or artistic value or any other form of social importance," it is protected under the First Amendment.

Brennan's opinion then lays out the steps *Roth* requires. The constitutional status of allegedly

obscene material does not “turn on a ‘weighing’ of its social importance against its prurient appeal” unless the material is “utterly without social importance.” Material must be found to go “substantially beyond customary limits of candor in description or representation of such matters” before it is declared obscene. In the absence of such a finding, inquiries into the alleged prurient appeal of the work or expression are unnecessary. Finally, “contemporary community standards” cannot be interpreted as referring to particular local communities but to society at large or the public in general. Brennan, paraphrasing John Marshall, declaims “It is, after all, a national Constitution that we are expounding.”

Warren’s dissent, while accepting the *Roth* test, disagreed with the Court’s decision in three ways. First, he disagrees that a national standard can be proven to be the relevant “community standard.” Second, he concludes that “hard core pornography” offers no greater clarity than “obscenity” and puts forward his own view that it is the “use to various materials are put” that determines whether something is obscene or not; a technical treatise on pornography could well be obscene when sold or displayed to children. Third, he concludes that the Supreme Court should limit its reviews of lower court decisions involving obscenity to whether “sufficient evidence” was admitted to implement *Roth*.

Harlan, also dissenting, repeats his view that states should have constitutionally greater latitude when banning material that is obscene than the federal government, which should be subject to rigorous adherence to the *Roth* test. States could ban obscene material, Harlan suggests, as long as the material, taken as a whole, was “reasonably” found in state judicial proceedings to “treat sex in a fundamentally offensive manner under rationally established criteria for judging such material.”

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References and Further Reading

- Alexander, Donald. *The Politics of Pornography*. Chicago: University of Chicago Press, 1989.
- Hixson, Richard F. *Pornography and the Justices: The Supreme Court and the Intractable Obscenity Problem*. Carbondale, IL: Southern Illinois University Press, 1996.
- Mackey, Thomas C. *Pornography on Trial: A Handbook with Cases, Law, and Documents*. Santa Barbara, CA: ABC-Clío, 2002.

Cases and Statutes Cited

- Jacobellis v. Ohio*, 378 U.S. 184 (1964)
- Roth v. United States*, 354 U.S. 476 (1957)

JACOBSON V. MASSACHUSETTS, 197 U.S. 11 (1905)

Any free society must strike a balance between protecting public health and safeguarding civil liberties. In 1894, Massachusetts enacted a law that allowed municipalities to order the compulsory vaccination of its residents during disease outbreaks. The Cambridge Board of Health in 1902 ordered its residents to be vaccinated. Henning Jacobson refused to be inoculated and was arrested and prosecuted. The trial jury found him guilty, and the court fined him five dollars. He appealed his conviction to the Supreme Judicial Court of Massachusetts, which sustained his conviction. Jacobson then appealed to the United States Supreme Court.

The Court, in an opinion written by Justice John Marshall Harlan, upheld the conviction and ruled that the Massachusetts statute authorizing local boards of health to make vaccination compulsory was constitutional. The defendant alleged that the law violated his liberty, “the inherent right of every freeman to care for his own body and health in such way as seems to him best,” as guaranteed by the Fourteenth Amendment.

The Fourteenth Amendment prohibits the states from depriving any person of liberty without due process of law. Justice Harlan explained that each citizen enters into a social contract, according to which he promises to obey the laws in exchange for the benefits of living in a society under law. The Massachusetts legislature determined that an unvaccinated person put all fellow citizens at risk of infection. The law can compel a person to be inoculated even when the vaccine poses a risk of harm or even death. The compulsory vaccination statute was an exercise by Massachusetts of its “police power.” The police power is the power to make laws for the health, safety, morals, and welfare of the people.

The responsibility of the judiciary, said Harlan, is not to examine the medical evidence on its own but to defer to the legislature’s judgment. Following the Court’s decision, additional states required vaccination of all children prior to enrollment in school. The Supreme Court later upheld the authority of states to subject automobile drivers to breath and blood tests to determine intoxication.

The Court’s rejection of a right to control one’s body and to resist governmental intrusion, however, was successfully challenged in a number of other cases. In *Roe v. Wade* (1973) and *Lawrence v. Texas* (2003), the Supreme Court judged that abortion and sodomy did not pose nearly as serious a risk to the common good as unvaccinated persons, and therefore the burden on individual liberty was unjustified.

The terrorist attacks on New York City and Washington, D.C., in September 2001 raised fears of bioterrorism, in which terrorists would introduce viruses or bacteria causing smallpox, anthrax, and other diseases. Within two years, more than thirty states enacted a version of the Model State Emergency Health Powers Act, which permits governors to declare a state of emergency and subject residents to compulsory vaccination.

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References and Further Reading

- Joseph, D. George. "Uses of *Jacobson v. Massachusetts* in the Age of Bioterror." *Journal of the American Medical Association* 290 (2003): 2331.
- Matsumoto, Gary. *Vaccine A: The Covert Government Experiment That's Killing Our Soldiers—And Why GI's Are Only The First Victims*. New York: Basic Books, 2004.
- Silverman, Ross D., *No More Kidding Around: Restructuring Non-Medical Childhood Immunization Exemptions to Ensure Public Health Protection*, *Annals of Health Law* 12 (2003): 277–294.

Cases and Statutes Cited

- Lawrence v. Texas*, 539 U.S. 558 (2003)
- Roe v. Wade*, 410 U.S. 113 (1973)

See also **Abortion; Due Process; Fourteenth Amendment; *Lawrence v. Texas*, 539 U.S. 558 (2003); Police Power of the State; *Roe v. Wade*, 410 U.S. 113 (1973); Sodomy Laws; Terrorism and Civil Liberties**

JACOBSON v. UNITED STATES, 503 U.S. 540 (1992)

When the government participates in the commission of a crime to catch a person committing an illegal act, that person may raise a defense of entrapment. Its agents may only provide an opportunity for a person to commit a crime; they cannot coerce a person into acting. The defense of entrapment will arise when the government has persuaded an otherwise law-abiding person to commit a crime that he or she would not have committed without government intervention. *Jacobson v. United States* provided the United States Supreme Court with the opportunity to explore the degree to which the government could induce unlawful behavior.

Before Congress passed a law banning the receipt in the mail of pornographic materials featuring children, the defendant Jacobson ordered and received two such magazines. During the next two and a half years,

two different governmental agencies set up several fictitious agencies to persuade him to order child pornography. At the end of the twenty-six-month operation, he ordered a magazine and was promptly arrested. He raised the defense of entrapment.

In the trial court, the judge instructed the jury on the defense of entrapment, however, the jury still found Jacobson guilty of violating the law against receipt through the mail of sexually explicit materials featuring children. Jacobson appealed ultimately to the Supreme Court.

The Court stated that during the course of an investigation, "Government agents may not originate a criminal design, implant in an innocent person's mind the disposition to commit a criminal act, and then induce commission of the crime so that the Government may prosecute." A person must have the predisposition to commit a crime before any involvement by the government. In Jacobson's case, the prosecution could not carry the burden of proving beyond a reasonable doubt that he was predisposed to break the law before any involvement by the agents. The contact, itself, may have created a predisposition in Jacobson to break the law. Jacobson placed his order only after twenty-six months of repeated contact by the government's fictitious organizations.

During the effort to enforce the law, "law enforcement officials go too far when they 'implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute.'" The Justices further stated that if a person would never have broken the law without the intervention of the government, the courts should intervene on the person's behalf.

The dissent argued that the government's conduct was not so egregious as to create a defense of entrapment. The action consisted only of sending materials that could have easily been thrown away. When the defendant was given the opportunity to act and place an order with the fictitious company, he did so willingly. This view was rejected by the majority of the Supreme Court.

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References and Further Reading

- Colquitt, Joseph A., *Rethinking Entrapment*, *American Criminal Law Review* 41 (2004): 1389.
- Dillof, Anthony M., *Unraveling Unlawful Entrapment*, *Journal of Criminal Law & Criminology* 94 (2004): 827.
- Marcus, Paul, *The Entrapment Defense*. 2nd Ed. Lexis Publishing.

See also **Due Process; Entrapment by Estoppel; Entrapment and "Stings"**

JAILHOUSE INFORMANTS

When one is housed inside an eight-by-ten foot cell, human nature can trump rationality. A trusting or insecure inmate might recount to his cellmate details of his crimes, seeking advice, assistance, consolation, or confirmation of his masculinity. But the cellmate might encourage disclosures for a different, more selfish reason—to collect information that the government might find helpful. In short, he may be an informant. There have also been several well-publicized cases in which jailhouse informants fabricated confessions, sometimes against innocent defendants.

The admissibility of the informant's testimony at the inmate's criminal trial is governed by several provisions of the federal Bill of Rights, subject to modification by more liberal state constitutional provisions and both federal and state statutory law in some jurisdictions. The Sixth Amendment right to counsel mandates exclusion of the informant's testimony if, at the time he questioned the inmate, (1) the inmate had already been charged with the questioned crime, even if no particular lawyer had been appointed to represent him; (2) the cellmate had prearranged his status as an informant; and (3) the cellmate actively prompted the inmate to speak about his crimes (passive listening to spontaneous utterances will not suffice). The Fifth Amendment's due process clause, which prohibits the use of evidence obtained by outrageous police tactics, will be implicated only if the cellmate threatened the inmate with violence to induce speech. The Fifth Amendment's self-incrimination clause does not apply, because questioning by an undercover agent (such as the cellmate) does not constitute a "coercive police environment" of the kind contemplated by the Supreme Court in *Miranda*. Finally, the Fourth Amendment offers no protection to the loquacious inmate, because the U.S. Supreme Court has consistently held that each of us must assume the risk that our consensual conversation partners are (or will become) traitors. For this reason, questioning by an undercover agent does not constitute a "search," because it violates no reasonable expectation of privacy.

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References and Further Reading

- Tomkovicz, James J., *An Adversary System Defense of the Right to Counsel against Informants: Truth, Fair Play, and the Messiah Doctrine*, U.C. Davis Law Review 22 (1988): 1:1.
- Trott, Stephen S., *Words of Warning for Prosecutors Using Criminals as Witnesses*, Hastings Law Journal 47 (1996): 1381.

Cases and Statutes Cited

- Arizona v. Fulminante*, 499 U.S. 279 (1991)
Hoffa v. United States, 385 U.S. 293 (1966)
Illinois v. Perkins, 496 U.S. 292 (1990)
Kuhlmann v. Wilson, 477 U.S. 436 (1986)
Miranda v. Arizona, 384 U.S. 436 (1966)
United States v. Henry, 447 U.S. 264 (1980)
United States v. White, 401 U.S. 745 (1971)

See also *Arizona v. Fulminante*, 499 U.S. 279 (1991); **Bill of Rights: Structure; Coerced Confessions/Police Interrogation; *Hoffa v. United States*, 385 U.S. 293 (1966); *Illinois v. Perkins*, 496 U.S. 292 (1990); *Miranda v. Arizona*, 384 U.S. 436 (1966); *Miranda* Warning; Right to Counsel (VI); Rights of the Accused; Search (General Definition) Self-Incrimination: *Miranda* and Evolution**

JAMISON V. TEXAS, 318 U.S. 413 (1943)

Ella Jamison, a longtime member of the Jehovah's Witnesses, was distributing pamphlets to Dallas pedestrians, inviting them to hear a speech from another Jehovah's Witness and to contribute money to the Jehovah's Witnesses by buying their books. She was charged with violating a city ordinance prohibiting distribution of pamphlets.

The Corporation Court of Dallas and the County Criminal Court successively convicted her, and she appealed to the United States Supreme Court. The Court held that the Dallas ordinance violated her First Amendment rights of freedom of press and of religion, applied to the states per the Fourteenth Amendment.

The Court rejected both of the city's arguments in favor of the ordinance. First, it said that although cities certainly have much control of travel and public conduct, individuals have the right to express their views "in an orderly fashion" in public spaces. The right to do so is protected, whether in speech or written word.

Second, the Court rejected the city's argument that despite their goal of advancing a religious cause, the invitation to purchase should render the pamphlets commercial and, therefore, proscribable. Following its holding in *Schneider v. Irvington*, the existence of a commercial statement in the pamphlet was not sufficient to interdict it. Purely commercial pamphlets, the Court said, could still be proscribed by the state.

This case is one of several foreshadowing the Court's line of "forum doctrine" cases, which hold (among other things) that communication of ideas in public forums is an important First Amendment right.

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References and Further Reading

Schauer, Frederick, *Principles, Institutions, and the First Amendment*, Harvard Law Review 112 (1998): 84:98–100.
 Stone, Geoffrey R., *Fora Americana: Speech in Public Places*, Supreme Court Review 1974 (1974): 233:233–280.
 Tribe, Laurence H. *American Constitutional Law*, 987. 2nd Ed. Mineola, NY: Foundation, 1988.

Cases and Statutes Cited

Schneider v. Irvington, 308 U.S. 147 (1939)

See also *Hague v. C.I.O.*, 307 U.S. 496 (1939);
Public Forum Doctrines; Public/Nonpublic Forums Distinction

JAPANESE INTERNMENT CASES

Background

On December 7, 1941, Japanese planes and submarines attacked the naval base at Pearl Harbor, Hawaii. The following day, Congress declared war against the Empire of Japan. On February 19, 1941, President Franklin Delano Roosevelt issued Executive Order 9066. The Order authorized military commanders to designate certain regions as “Military Areas” from which “any or all persons may be excluded.” The Secretary of War designated Lieutenant General John DeWitt Military Commander of the Western Defense Command. On March 2, 1942, General DeWitt issued a proclamation reciting that the entire Pacific Coast was particularly subject to attack, invasion, and espionage. The proclamation designated as military areas regions including all of the Pacific coast states and Arizona. Another presidential Executive Order, issued March 18, 1942, created the War Relocation Authority, charged with the creation of a program for the removal, relocation, and supervision of persons excluded from military areas.

On March 21, 1942, Congress ratified the exclusion program with an act making it a misdemeanor to enter, remain in, or leave a military area contrary to the restrictions imposed by the Secretary of War or any military commander. Three days later, General DeWitt issued a proclamation imposing an 8 p.m. to 6 a.m. curfew on all enemy aliens and Japanese Americans within the military areas. Beginning the same day, a series of Civilian Exclusion Orders began the process of removing Japanese Americans from coastal regions and concentrating them in camps. More than

120,000 people, mostly birthright citizens, were ultimately confined, spending an average of three years in the camps.

The constitutionality of these restrictions on the civil rights of Japanese Americans was litigated in four cases: *Yasui v. United States*, *Hirabayashi v. United States*, *Korematsu v. United States*, and *Ex parte Endo*. Divisive at the time, the cases have continued to resonate in the American psyche. Over the years they have been subject to a wide variety of interpretations, and the process continues to this day.

The Cases

The cases deal with three different aspects of the internment program: curfews, exclusion from Military Areas, and detention within camps. *Yasui* and *Hirabayashi*, companion cases, considered the curfew orders.

Minoru Yasui and Gordon Hirabayashi turned themselves in to authorities in Portland and Seattle, respectively, to create test cases. Hirabayashi sought to challenge the exclusion order as well as the curfew, but the Supreme Court declined to decide the validity of that order. The decision to limit the *Hirabayashi* decision to the curfew may have been designed to allow the Court more time to consider the exclusion orders or perhaps to preserve unanimity in *Hirabayashi* itself. (In *Justice Delayed*, Peter Irons reports that Justice Frank Murphy, who had originally intended to dissent in *Hirabayashi*, was won over by Justice Felix Frankfurter’s argument that any dissent would support the enemy.)

On June 21, 1943, the Court unanimously affirmed the validity of the curfew order, although three Justices wrote separate concurrences expressing some reservations. Justice Harlan Fiske Stone, writing for the Court, acknowledged that “[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people....” But the principle that “racial discriminations are in most circumstances irrelevant and therefore prohibited” did not bar the government from drawing lines on the basis of race when such distinctions were in fact relevant. The circumstance of a war with Japan, Stone ruled, afforded “a rational basis” for the curfew order. Yasui’s conviction was affirmed the same day on the authority of *Hirabayashi*.

Unlike Yasui and Hirabayashi, Fred Korematsu was not a willing litigant. Wanting to remain with his Caucasian fiancée, Korematsu refused to report for evacuation in compliance with the exclusion order, altered his draft card, and had minor plastic

surgery in the hopes of evading detection. Arrested on a tip, he was convicted of violating the exclusion order. Although his case was initially argued before the Supreme Court along with those of Yasui and Hirabayashi, it was remanded to the court of appeals and was not reargued until October 1944. At that point, the outcome of the war was no longer in doubt, and the continued detention of Japanese Americans seemed increasingly unnecessary.

As in *Hirabayashi*, the Court limited the issues before it. *Korematsu* argued that the military orders required him to report to an Assembly Center, where he would be confined, and that the exclusion order could not be upheld without considering the legality of the detention. Justice Hugo Black, writing for the majority, restricted his analysis to the exclusion order, and explicitly noted that he was assessing it “as of the time it was made...” After observing that “all legal restriction which curtail the civil rights of a single racial group are immediately suspect,” Black argued that *Korematsu* had not been subject to the exclusion order “because of hostility to him or his race” but rather “because we are at war with the Japanese Empire.”

As it had in *Hirabayashi*, the *Korematsu* Court found a legitimate basis for wholesale exclusion in the military finding that it “was impossible to bring about an immediate segregation of the disloyal from the loyal.” Given this impossibility, Black held that the government had grounds to believe that the exclusion orders were necessary and refused to invoke “the calm perspective of hindsight” to say that they were unjustified. In contrast to *Hirabayashi*, the *Korematsu* Court could not maintain unanimity. Three Justices dissented, and one, Justice Frank Murphy, asserted explicitly that the exclusion orders had exceeded constitutional power and fallen “into the ugly abyss of racism.”

In the third case, *Endo v. United States*, the Court addressed the legality of the detentions, but again it avoided the constitutional issue. Mitsuye Endo had complied with the exclusion order, reporting to the Walerga Assembly Center near Sacramento, from whence she was transferred to the Tule Lake camp near the Oregon border. Endo, who had worked for the state of California and whose brother had been drafted before the Pearl Harbor attack, was identified by the Japanese American Citizens League as an uncontroversially loyal American and thus an appealing litigant. She challenged her detention through a petition for a writ of habeas corpus and refused an early release that would have mooted her lawsuit.

Justice William O. Douglas’s opinion for the Court declined to decide the constitutionality of the detention program. Instead, it focused on the authorization

for the detentions, finding that neither the Executive Orders, nor the Act of Congress ratifying them, granted the War Relocation Authority power to detain loyal citizens. The government conceded Endo’s loyalty, and the Court found her, therefore, entitled to unconditional release. No Justice dissented in *Endo*, but Justice Owen Roberts and Justice Murphy, who had dissented in *Korematsu*, wrote separately to reiterate their claims that the detentions were unconstitutional.

Early Reaction and Doctrinal Development

Justice Robert Jackson, dissenting in *Korematsu*, had argued for a conceptual split between the authority of the military and that of the civil courts. The Court, he argued, should accept its inability to judge military necessities and not try to countermand even an unconstitutional military order. But it should not distort the Constitution to approve that order; it should not allow the military order to be enforced in a civilian court. Jackson’s proposed dichotomy has a peculiar ambivalence to it, and Justice Frankfurter wrote a separate concurring opinion to reject its “dialectic subtleties.” Yet the Court’s careful limitation of the issues in each of the internment cases suggests that it likewise sought some middle course between interfering with a military operation and approving a race-based detention program.

The balancing act could have succeeded. Apparently alerted to the content of the impending *Endo* decision, the War Department announced on December 17, 1944, that Japanese Americans “whose records have stood the test of Army scrutiny during the past two years” would be released from internment. *Korematsu* and *Endo* were announced the next day, at which point the danger of a traumatic showdown between the Court and the military authorities had passed. And had *Endo* offered a constitutional denunciation of the race-based detention of loyal Americans, it might have become the most salient of the internment decisions.

But *Endo* rested on statutory interpretation, and despite Justice Black’s reference to it in *Korematsu* as illustrating the difference between detention and exclusion, *Endo* quickly fell from view. *Korematsu* received the lion’s share of public attention, and the attention was not favorable. Writing almost contemporaneously, Yale Law Professor Eugene Rostow pronounced the Japanese Internment cases a disaster, “our worst wartime mistake.” In 1948, Congress enacted the Japanese American Evacuation Claims Act, which provided compensation to detainees who had lost homes and businesses as a consequence of the

exclusion orders. Widespread sentiment held that the internment program had been a tragic overreaction, and the Court's performance a shameful capitulation.

At the same time as it assumed the role of villain in the public mind, however, the *Korematsu* opinion was embarking on a surprising second career in Supreme Court doctrine. The outcome of the case had been an acceptance of the government's racial classification, of course, but Justice Black had also commented that laws curtailing the civil rights of a single racial group were "immediately suspect" and should be subjected to "the most rigid scrutiny." These phrases persisted in the Court's Equal Protection jurisprudence, and in 1954 the Supreme Court relied on them in a case striking down racial discrimination. That case was *Bolling v. Sharpe*, the federal counterpart to *Brown v. Board of Education*, in which the Court held unconstitutional the racial segregation of the District of Columbia public schools.

Korematsu and *Hirabayashi* had pursued a vision of Equal Protection under which government discrimination was unconstitutional if invidious—motivated by racism or hostility—but acceptable if supported by some legitimate purpose. In an effort to bring greater objectivity to Equal Protection analysis, the Court gradually refined this approach. The direct assessment of discrimination as invidious or noninvidious faded away; instead the Court began applying a demanding means-end fit test to forms of discrimination deemed highly likely to be invidious. Eventually, it settled on the modern form of strict scrutiny: discrimination on the basis of certain "suspect" characteristics such as race or national origin would be upheld only if the government could show that such discrimination was necessary to serve a compelling state interest.

The Court repeatedly cited *Korematsu* as the birthplace of strict scrutiny, giving it a strange place within Supreme Court doctrine. *Korematsu* remains the only Supreme Court case in which discrimination against a racial minority survived purportedly strict scrutiny. At the same time, however, it is acknowledged as the origin of the doctrine relied on in such landmark civil rights cases as *Loving v. Virginia*, which struck down a state ban on interracial marriage. More recently, *Korematsu* was again invoked in the cases extending strict scrutiny to affirmative action, *Regents of the University of California v. Bakke* and *Adarand v. Peña*.

Back to Court: The Second Round of Cases

Korematsu's surprising emergence as a source of protection for racial minorities did nothing to rehabilitate the decision or the internment program in the public

eye. Executive Order 9066 had terminated with the cessation of hostilities, but in 1976 President Gerald Ford issued a proclamation reaffirming the termination and branding the evacuation "wrong." In 1980, Congress created the Commission on Wartime Relocation and Internment of Civilians. A stream of witnesses testified to the hardships and trauma they had suffered. The Commission's report, *Personal Justice Denied*, was issued in 1982. It concluded that the internment had not been justified by military necessity but was rather the product of "race prejudice, war hysteria, and a failure of political leadership." The report characterized the Supreme Court decisions as "overruled in the court of history." The recommendations accompanying the report, released in 1983, included a suggestion that Congress appropriate funds to pay reparations of \$20,000 each to the roughly 60,000 surviving detainees.

At around the same time, an activist movement was seeking redress, if not overruling, not in the court of history but in those of the United States. In 1983, Yasui, Hirabayashi, and *Korematsu* filed petitions in federal district court seeking to have their convictions vacated. Their argument was not simply that the internment had been unjustified. No one seriously disputed that point, but it would not have been enough to set aside the convictions. Instead, their petitions presented a story of government misconduct in the course of the Supreme Court litigation, misconduct severe enough to constitute a fraud on the Court.

Researching a book on the internment cases, Peter Irons had discovered considerable discord among the Justice Department lawyers assigned to the litigation. In internal memos, some lawyers had protested that the Department was engaged in the "suppression of evidence" and that General DeWitt's Final Report on the evacuation, presented to the Supreme Court, contained "lies" and "intentional falsehoods." *Korematsu*'s petition presented two main allegations of misconduct.

First, the Justice Department had argued to the courts that there was insufficient time to distinguish between loyal and disloyal Japanese Americans and that a wholesale evacuation was, therefore, necessary. Irons and Aiko Herzig-Yoshinaga discovered that DeWitt's initial version of the Final Report had made no mention of insufficient time but asserted that there was simply no way to tell the loyal from the disloyal, a more frankly racist claim to which courts might have been less willing to defer. War Department officials revised the report to make it consistent with the Justice Department's litigating position, burned the original version, and destroyed records of its existence.

Second, the War Department and the Justice Department withheld from the courts and *Korematsu*'s

attorneys reports from the FBI, the FCC, and the Office of Naval Intelligence that contradicted DeWitt Report's assertions about disloyalty and espionage activity among the Japanese American population. Given these contradictory reports, Justice Department attorney John Burling concluded that the DeWitt Report's statements about illegal radio transmissions and shore-to-ship signaling were "intentional falsehoods." Burling drafted a footnote for the Justice Department's brief in *Korematsu* stating that the DeWitt Report's factual assertions in support of the claims of military necessity were "in conflict with information in possession of the Department of Justice" and renouncing any reliance on those facts. At the insistence of the War Department, and over the objections of Burling and his superior Edward Ennis, Assistant Attorney General Herbert Wechsler revised the footnote to eliminate any mention of the contradictory reports. As submitted to the Supreme Court, the footnote simply asserted that the Justice Department relied on the DeWitt report only for facts asserted in the brief.

The government did not oppose Korematsu's request that his conviction be vacated, but it urged the court not to delve into the issue of governmental misconduct. In its decision, however, the court explicitly discussed the footnote and its revision, concluding that the government knowingly withheld information from the courts. It granted Korematsu's petition on April 19, 1984. Yasui's conviction was likewise vacated, although the court in his case declined to make any findings of governmental misconduct. Yasui appealed the decision to the Ninth Circuit but died in November 1986 before the case could be resolved. Litigation over the last of the petitions, that of Gordon Hirabayashi, continued until 1988. Ultimately that petition too was granted, with the court announcing that the government had doctored the record submitted to the Supreme Court.

The question of reparations remained. In 1983, the National Council for Japanese American Redress had filed a class action on behalf of 125,000 interned Japanese Americans, requesting a total of \$27 billion in damages. That suit was ultimately dismissed, but in 1988 Congress enacted a bill accepting the recommendations of the Commission on Wartime Relocations and awarded \$20,000 to each surviving detainee.

Continuing Relevance and the Verdict of History

The second round of cases had cast *Korematsu* in a slightly different light, suggesting that perhaps the

blame lay less with a supine Court than with a disingenuous Executive. In the years following the *coram nobis* cases, some defenders of *Korematsu* emerged. In his analysis of civil liberties during wartime, *All the Laws But One*, Chief Justice William Rehnquist suggested that *Korematsu* was understandable as a product of Equal Protection doctrine that had not yet matured. Some years later Judge Richard Posner offered a stronger defense on the grounds that judicial deference to military judgment was appropriate and unavoidable during wartime.

What might have seemed academic speculation acquired real-world relevance after the attacks of September 11, 2001. In the wake of the attacks, the Executive asserted the authority to unilaterally declare American citizens "enemy combatants" and thereafter hold them indefinitely without charges or access to counsel. The constitutional permissibility of such detention came before the Court again in *Hamdi v. Rumsfeld*—not as an Equal Protection case but as one about the scope of Executive power.

Yaser Hamdi, an American citizen born in Louisiana, was seized in Afghanistan by local forces and turned over to the U.S. military. The military initially transferred him to Guantanamo Bay, but on discovering his American citizenship moved him to a naval brig in Norfolk, Virginia. The government asserted that Hamdi had been fighting for the Taliban and that his status as an enemy combatant justified indefinite detention without formal charges or proceedings. Hamdi's father, filing a habeas petition on his son's behalf, responded that he had gone to Afghanistan as an aid worker and had never supported the Taliban. The petition asked for the opportunity to rebut the government's allegations at an evidentiary hearing.

The parallels to the Japanese internment could not have been lost on the Court, but they were made more emphatic by the participation of Fred Korematsu as a friend of the court. Korematsu filed a brief in support of Hamdi, chronicling historical examples of actions taken in the name of military necessity that hindsight had revealed as unnecessary restraints on liberty. He argued that the pattern of overreaction and after-the-fact regret should not persist, and he asked the Court to closely scrutinize the government's asserted justifications to avoid the mistakes of the past.

The Supreme Court ruled that Hamdi was entitled to an opportunity to challenge the government's assertions before a neutral decisionmaker. "[A] state of war," wrote Justice O'Connor, "is not a blank check for the President when it comes to the rights of the Nation's citizens." She cited Justice Murphy's dissent in *Korematsu* for the proposition that the military's

claims, like any others infringing the constitutional rights of the individual, must be subjected to scrutiny through the judicial process.

Korematsu remains a reviled decision. Many such cases, like *Plessy v. Ferguson*, in which the Court upheld racial segregation of railroad cars, have become what could be called antiprecedents. Court majorities tend to cite the dissents in these cases, and their majority opinions are invoked only as epithet or accusation. *Korematsu*'s role in the development of strict scrutiny has spared it that fate, but its appearance in *Hamdi* suggests it has become what might be called a historical antiprecedent. Quite apart from the legal principles it endorsed or inspired, the decision now stands as a reminder that courts must look carefully not only at military infringements on the liberty of American citizens, but also sometimes at civilian defenders of those infringements.

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References and Further Reading

- Commission on Wartime Relocation. *Personal Justice Denied*. Seattle: University of Washington Press, 1983.
- Gotanda, Neil "The Story of *Korematsu*: The Japanese-American Cases" in Dorf, Michael C., ed. *Constitutional Law Stories*. New York: Foundation Press, 2004, pp. 249–295.
- Grodzins, Morton. *Americans Betrayed: Politics and the Japanese Evacuations*. Chicago: University of Chicago Press, 1969.
- Gudridge, Patrick, *Remember Endo?*, Harvard Law Review 116 (2003): 1933.
- Irons, Peter, ed. *Justice Delayed: The Record of the Japanese American Internment Cases*. Middletown: Wesleyan University Press, 1989.
- . *Justice at War*. New York: Oxford University Press, 1983.
- Rostow, Eugene V., *The Japanese American Cases: A Disaster*, Yale Law Journal 54 (1945): 489.
- Yen, Alfred C., *Introduction: Praising with Faint Damnation—The Troubling Rehabilitation of Korematsu*, B.C. Law Review 40 (1998): 1.

Cases and Statutes Cited

- Adarand v. Peña*, 515 U.S. 200 (1995)
- Bolling v. Sharpe*, 347 U.S. 497 (1954)
- Brown v. Board of Education*, 347 U.S. 483 (1954)
- Ex Parte Endo*, 323 U.S. 283 (1944)
- Hamdi v. Rumsfeld*, 542 U.S. 507 (2004)
- Hirabayashi v. United States*, 320 U.S. 81 (1943)
- Korematsu v. United States*, 323 U.S. 214 (1944)
- Loving v. Virginia*, 388 U.S. 1 (1967)
- Plessy v. Ferguson*, 163 U.S. 537 (1896)
- Regents of the University of California v. Bakke*, 438 U.S. 265 (1978)
- Yasui v. United States*, 320 U.S. 115 (1943)

See also **Dewitt, General John; Guantanamo Bay, Enemy Combatants, Post 9/11; Indefinite Detention;**

National Security; Roosevelt, Franklin Delano; World War II, Civil Liberties in

JAY COURT (1789–1795)

The "Jay Court" is the title attributed to the Supreme Court during the tenure of John Jay, who served as Chief Justice of the United States from October 1789 to February 1795. Jay, a prominent New York Federalist and champion of the Constitution's ratification, was the first chief justice. During this period, the Supreme Court formally organized, admitted the first members of the Supreme Court Bar, and established many precedents defining the functions and duties of the institution.

Prominent among the associate justices who served alongside Chief Justice Jay were William Cushing, James Wilson, James Iredell, and William Paterson. Other justices at this time included John Rutledge, John Blair, and Thomas Johnson, each of whom served only briefly. Each of these individuals was selected by President George Washington and considered to be sympathetic to Federalist principles.

The Supreme Court's membership, then only six justices, reflected geographical balance, with jurists selected from each region of the United States. This restrained sectional jealousies and facilitated the circuit riding then required of justices. The justices met twice annually to undertake Supreme Court business, with terms in February and August of each year. The Supreme Court was without a permanent home at this time, meeting in makeshift quarters in New York (1790) and then Philadelphia (1791–1800). Justices were also then required to travel outside the nation's capital twice annually and hold court throughout a designated judicial circuit. This practice was known as "circuit riding."

Circuit riding required justices to interact with the citizenry and to hear arguments in circuit courts alongside district judges. Justices often complained that riding circuit required extensive travel and created difficulties when the Supreme Court considered appeals of the justices' circuit rulings. Proponents of circuit riding asserted that it familiarized the justices with local conditions and enhanced the status of the judiciary. The justices' frequent appeals to Congress for relief from circuit duties were largely unsuccessful in the Jay Court period, although they were excused after 1792 from repeated visits to a single circuit in the same year.

Although justices heard cases while on circuit, the docket of the Supreme Court remained small at this time. The Supreme Court did not decide its first case until 1791, and its caseload did not exceed five cases in

a year while Jay served as chief justice. Decisions during this period were delivered *in seriatim*, with each justice issuing a written opinion declaring his view of the correct outcome. This practice was common for the early Supreme Court and did not subside altogether until the Marshall Court period (1801–1835).

Perhaps the most noteworthy Supreme Court decision from the Jay Court period is *Chisholm v. Georgia* (1793). In this case, the facts of which concerned the state of Georgia's failure to pay its debt to the estate of a creditor, the justices considered whether a state could be sued by a citizen of another state without its consent, particularly in the federal courts. Georgia argued that states enjoyed sovereign immunity and could not be subjected to such suits. The Supreme Court decided to the contrary, ruling that states could be sued in federal courts without the permission of the state. The decision in *Chisholm* was widely opposed, because it represented a clear limitation to state sovereignty. The controversy eventually resulted in the ratification of the Eleventh Amendment (1795) removing suits against states by citizens of other states from the jurisdiction of the federal courts.

Also significant during this period were early instances of judicial review. Although the Supreme Court's decision in *Marbury v. Madison* (1803) is recognized as the first instance in which the Court used judicial review to overturn a federal law, it was the Jay Court that first asserted the institution's power to do so. In *Hayburn's Case* (1792), the Supreme Court considered the constitutionality of the Invalid Pensioners Act (1792). This legislation assigned the federal courts the duty of reviewing pension petitions submitted by veterans of the American Revolution to determine their eligibility for federal pensions. Along with the constitutional issue raised by assigning nonjudicial duties to federal judges, the Invalid Pensioners Act allowed the Secretary of War to review the decisions of the courts. The justices on circuit considered several cases resulting from this legislation, reaching general agreement that the statute was unconstitutional. Ultimately, Justice Wilson's outright refusal to consider pension petitions led to the controversy in *Hayburn*. However, the Supreme Court did not formally decide the merits of the case or the statute's constitutionality. Because of congressional dissatisfaction with the delays associated with judicial consideration, new legislation was crafted to remove the circuit courts from the petition process.

The paltry docket of the Supreme Court during Jay's tenure included little of significance for American civil liberties. However, during this time early indictments and convictions for sedition and other rebellious acts took place in reaction to civic unrest. These indictments relied on federal common law,

which would prove to be controversial. The first such indictment took place in 1792, with the first conviction in 1794. The Supreme Court did not take part in either action. Criminal charges under federal common law were perceived by many as an encroachment on state sovereignty and individual rights. Proponents of federal common law argued that the common law's basis in natural law transcended state boundaries. Opponents of federal common law, however, argued that its establishment would give the federal government—including the judiciary—unacceptably broad jurisdiction. The debate over common-law crimes continued beyond Jay's tenure, later becoming a key conflict between the major American political factions.

In 1794, Chief Justice Jay was selected as envoy to Great Britain and assigned to renegotiate the terms of peace then in place. The terms of the treaty negotiated by Jay were highly controversial and widely viewed as favorable to the British. Jay resigned his judicial office in 1795 to become governor of New York. Jay was briefly succeeded as Chief Justice by John Rutledge, who soon vacated the office after his recess appointment expired, and he failed to achieve confirmation from the U.S. Senate.

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References and Further Reading

- Casto, William R. *The Supreme Court in the Early Republic: The Chief Justiceships of John Jay and Oliver Ellsworth*. Columbia, SC: University of South Carolina Press, 1995.
- Gerber, Scott D., ed. *Seriatim: The Supreme Court before John Marshall*. New York: New York University Press, 1998.
- Goebel, Julius Jr. *History of the Supreme Court of the United States, Volume I: Antecedents and Beginnings to 1801*. New York: The Macmillan Company, 1971.

Cases and Statutes Cited

- Chisholm v. Georgia*, 2 U.S. 419 (1793)
- Hayburn's Case*, 2 Dall. 409 (1792)
- Marbury v. Madison*, 5 U.S. 137 (1803)
- Invalid Pensioners Act, Act of March 23, 1792, 1 Stat. 243

See also **American Revolution; Common Law or Statute; Freedom of Speech and Press under the Constitution: Early History (1791–1917); Judicial Review; *Marbury v. Madison*, 5 U.S. 137 (1803); Natural Law, Eighteenth Century Understanding; Seditious Libel**

JEFFERSON, THOMAS (1743–1826)

Thomas Jefferson, a Virginia planter and legal scholar, was principal author of the Declaration of Independence. He served as representative in the

Virginia House of Burgesses 1769–1775, member of the Virginia House of Delegates 1775–1779, wartime governor of Virginia 1779–1781, member of Congress 1783–1784, Minister to France 1784–1789, Secretary of State under George Washington 1789–1793, Vice-President under John Adams 1797–1801, and as Third President of the United States, 1801–1809, during which he negotiated the Louisiana Purchase, which doubled the land area of the nation.

On his tombstone near his Virginia home, Monticello, however, which he designed and for which he wrote the inscription, there is no mention of the offices he held. Rather, it reads that Thomas Jefferson was “author of the Declaration of American Independence, of the Statute of Virginia for religious freedom, and Father of the University of Virginia.”

He authored many important writings. In 1774, he wrote a political pamphlet, *A Summary View of the Rights of British America*, which brought him attention beyond Virginia. Arguing on the basis of the natural rights theory of John Locke, Jefferson claimed that colonial allegiance to the king was voluntary. “The God who gave us life,” he wrote, “gave us liberty at the same time: the hand of force may destroy, but cannot disjoin them.”

Jefferson was elected to the Second Continental Congress, which met in Philadelphia. He was appointed on June 11, 1776, to head a committee of five in preparing the Declaration of Independence, but the others left the drafting to him. His initial draft was amended, after consultation with Benjamin Franklin and John Adams, and was further altered by Congress, which struck Jefferson’s reference to the voluntary allegiance of colonists to the crown and a clause that censured the monarchy for imposing slavery on America.

While a member of the Virginia House of Delegates, Jefferson introduced a number of bills that were resisted fiercely by conservative planters. In 1776, he succeeded in obtaining the abolition of entail. He proposed to abolish primogeniture, which eventually became law in 1785. Jefferson proudly noted that “these laws, drawn by myself, laid the ax to the foot of pseudoaristocracy.”

Jefferson devised a major revision of the criminal code, although it was not enacted until 1796. His bill to create a free system of tax-supported elementary education for all except slaves was defeated, as were his bills to create a public library and to modernize the curriculum of the College of William and Mary.

In June 1779, Jefferson introduced a bill on religious liberty, which caused intense controversy in Virginia until it was adopted. No other state or nation at that time provided for complete religious freedom. The bill stated “that all men shall be free to profess,

and by argument to maintain, their opinions on matters of religion, and that the same shall in no wise diminish, enlarge, or affect their civil capacities.” Many Virginians considered the bill as an attack on Christianity. It did not pass until 1786, mainly through the perseverance of James Madison. Jefferson, by then in France, congratulated Madison, adding that “it is honorable for us to have produced the first legislature who had the courage to declare that the reason of man may be trusted with the formation of his own opinions.”

Jefferson discussed the bill in his 1821 *Autobiography*:

The bill for establishing religious freedom, the principles of which had, to a certain degree, been enacted before, I had drawn in all the latitude of reason and right. It still met with opposition; but, with some mutilations in the preamble, it was finally passed; and a singular proposition proved that its protection of opinion was meant to be universal. Where the preamble declares, that coercion is a departure from the plan of the holy author of our religion, an amendment was proposed, by inserting the word “Jesus Christ,” so that it should read, “a departure from the plan of Jesus Christ, the holy author of our religion;” the insertion was rejected by a great majority, in proof that they meant to comprehend, within the mantle of its protection, the Jew and the Gentile, the Christian and Mahometan, the Hindoo, and Infidel of every denomination.

While a member of Congress in 1784, as chairman of the committee on the government of western lands, Jefferson proposed an ordinance that provided that the western territories should be self-governing and, when they reached a certain stage of growth, should be admitted to the Union as full partners with the original thirteen states. Jefferson also proposed that slavery should be excluded from all of the American Western territories, including those that would become the southern states west of Georgia, after 1800. Although he himself was a slave owner, he believed that slavery was an evil that should not be permitted to spread. In 1784, the provision banning slavery was narrowly defeated. Had one representative, John Beatty of New Jersey, not been too ill to be present, the vote would have been different. “Thus,” Jefferson later reflected, “we see the fate of millions unborn hanging on the tongue of one man, and heaven was silent in that awful moment.” Although Congress approved the amended ordinance of 1784, it was never put into effect. Its main features were incorporated, however, in the Ordinance of 1787, which established the Northwest Territory, in which slavery was prohibited.

As Minister to France, Jefferson sought commercial treaties with European nations, but only succeeded

in getting a pact, drafted by him, with Russia. He complained in a letter that “They seemed, in fact, to know little about us...They were ignorant of our commerce, and of the exchange of articles it might offer advantageously to both parties.” That letter is evidence that the word “commerce” originally meant only trade in tangible commodities.

Jefferson witnessed the beginnings of the French Revolution and even contributed to it by helping the Marquis de Lafayette draft the *Declaration of the Rights of Man and the Citizen*, which inspired the French republican movement. However, Jefferson foresaw that the French were not prepared to emulate the American Revolution and advised them to make more modest reforms.

Jefferson followed the ratification debates on the Constitution from France, and in letters to James Madison, urged him to propose a Bill of Rights, which seem to have helped overcome Madison’s initial opposition to doing so.

One of the most important of Jefferson’s writings was the draft of the Kentucky Resolutions of 1798, secretly written while he was Vice-President, which was unanimously adopted with minor modifications. It was followed a year later by the Kentucky Resolutions of 1799. They were part of an effort, in which James Madison joined, to oppose the Alien and Sedition Acts of 1798. Their main point was that states should refuse to cooperate in the enforcement of unconstitutional acts of Congress, a doctrine called *nullification*. Its force relied on the fact that the central government depended heavily on state cooperation to enforce its laws. But in the 1798 Resolutions he also made the critical point that the Constitution contained only four delegations of criminal powers: treason, counterfeiting, piracy and felonies on the high seas, and offenses against the laws of nations. (He overlooked discipline of military and militia personnel in federal service, which includes criminal penalties.) His argument was that there was no power delegated to make sedition a crime. Although some states rejected the arguments for nullification, no one disputed that the delegated criminal powers were limited to those few. This is the key to understanding the commerce and necessary and proper clauses and why they do not authorize criminal powers.

Jefferson called his election in 1800 “the second American Revolution,” because it established the “doctrine of 1798” of constitutional interpretation represented by the Kentucky Resolutions of 1798 and 1799, the Virginia Resolution of 1798, and the *Virginia Report* of 1800, the latter two of which were authored by Madison. His two successors, James Madison and James Monroe, continued that doctrine,

and the period 1800–1824 is often called the “Jeffersonian Era” by historians.

Jefferson wrote in 1811 the *Manual of Parliamentary Practice*, which became the basis for the rules of procedure of Congress, and eventually of *Robert’s Rules of Order*, which have served to enable deliberative assemblies to be successful ever since. His longest work was *Notes on Virginia*, and he wrote numerous letters to others, most notably to John Adams, a former rival, using a pantograph to make a duplicate of his letters so that they would be preserved.

It would be difficult to adequately characterize Jefferson’s philosophy. It comes closest to what was called “liberalism” in the nineteenth century, and “classical liberalism” after that term was appropriated by the progressive movement, or to what we call “libertarianism” today, but we should recall his own rejection of such labeling. In a letter to Francis Hopkinson, March 13, 1789, he wrote,

I never submitted the whole system of my opinions to the creed of any party of men whatever in religion, in philosophy, in politics, or in anything else where I was capable of thinking for myself. Such an addiction is the last degradation of a free and moral agent.

However, there is a persistent theme throughout his work and writings that any form of government control, not only of religion, but of individual mercantilism, without strictly construed constitutional authority, was tyranny.

This theme was expressed in a 1787 letter to Abigail Adams, the wife of John Adams:

The spirit of resistance to government is so valuable on certain occasions, that I wish it to be always kept alive. It will often be exercised when wrong, but better so than not to be exercised at all. I like a little rebellion now and then. It is like a storm in the atmosphere.

In a letter to William Smith, Nov. 13, 1787, in which Jefferson expressed approval of Shay’s Rebellion in Massachusetts,

...god forbid we should ever be twenty years without such a rebellion...the tree of Liberty must be refreshed from time to time with the blood of patriots & tyrants. it is natural manure. ...What country can preserve its liberties if its rulers are not warned from time to time that their people preserve the spirit of resistance? Let them take arms. The remedy is to set them right as to facts, pardon & pacify them.

Although it reflects his views, the quote often attributed to Jefferson, “that government is best which governs least” has not been found anywhere in Jefferson’s recorded writings or speeches. It first saw print in 1837, in the editor’s introduction to the first issue of *United States Magazine and Democratic*

Review, and Henry David Thoreau later used it, without attribution, in “On Civil Disobedience.” Another quote often attributed to Jefferson, “Eternal vigilance is the price of liberty” has also not been found.

Jefferson made many important contributions to religious liberty. He believed in a Creator, but his concept of it seems to have resembled the god of deism. His use in the Declaration of Independence of the terms “the laws of nature and of nature’s God” reflects terms commonly used by deists of the time. However, he was skeptical or opposed to many of the influences and practices of organized religion and their efforts to impose their doctrines on people or on the operations of government.

He is often quoted on the subject from several letters. In one to Dr. Benjamin Rush, Sept. 23, 1800, he stated,

They [the clergy] believe that any portion of power confided to me, will be exerted in opposition to their schemes. And they believe rightly; for I have sworn upon the altar of god, eternal hostility against every form of tyranny over the mind of man. But this is all they have to fear from me: and enough, too, in their opinion, . . .

In his 1802 letter, as President, to the Danbury Baptist Association of Connecticut, he stated,

Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legislative powers of government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should ‘make no law respecting an establishment of religion, or prohibiting the free exercise thereof,’ thus building a wall of separation between church and State.

It was written to answer a letter from them, asking why he would not proclaim national days of fasting and thanksgiving, as had been done by Washington and Adams before him. In the letter he took the position that the First Amendment forbade not only financial support for religious organizations but also any indication of official support or preference for any religious position. This was a stronger interpretation than had previously been understood by many for the establishment clause and laid the basis for later Supreme Court decisions, beginning with the *Everson* case.

In a letter to John Adams, April 11, 1823, Jefferson wrote,

The truth is that the greatest enemies to the doctrines of Jesus are those calling themselves the expositors of them, who have perverted them for the structure of a system of fancy absolutely incomprehensible, and without any foundation in his genuine words. And the day

will come when the mystical generation of Jesus, by the supreme being as father in the womb of a virgin will be classed with the fable of the generation of Minerva in the brain of Jupiter. But we may hope that the dawn of reason and freedom of thought in these United States will do away with all this artificial scaffolding, and restore us to the primitive and genuine doctrines of this the most venerated reformer of human errors.

Jefferson’s political views were influenced by many political philosophers and writers, especially John Locke, *Second Treatise on Government*, Algernon Sidney, *Discourses Concerning Government*, Charles Montesquieu, *Spirit of Laws*, and the Scottish Enlightenment writers like David Hume, Adam Ferguson, Samuel Rutherford, and Andrew Fletcher. His legal thinking was based on the common law ideas expressed by Edward Coke and the decisions of Lord Camden (Charles Pratt), called “Whig” at that time and opposed to the “Tory” ideas of William Blackstone and Lord Mansfield (William Murray), who divided on several issues, especially the role of the jury in deciding the law as well as the facts in bringing a general verdict, after hearing all arguments on law being made in their presence, a practice that has been abandoned in modern times. He was apparently an admirer of the reform ideas of the English Society for Constitutional Information, the suppression of the leaders of which, through prosecutions for criminal libel, sedition, and treason, inspired several of the provisions of the Bill of Rights. He also admired the English writer James Burgh, who called for reforms in parliamentary representation and recommended everyone read his *Political Disquisitions*.

In his later years some of his followers called on him to publish more complete guidance to the interpretation of the Constitution, but Jefferson declined, passing that duty to others such as John Taylor of Caroline, “Col. Taylor and myself have rarely, if ever, differed in any political principle of importance,” and expressed his approval of Taylor’s *Construction Construed and Constitutions Vindicated* as “the most logical retraction of our governments to the original and true principles of the Constitution creating them, which has appeared since the adoption of the instrument.”

Toward the end of his life, however, Jefferson became increasingly concerned that the principles of the Revolution were not being preserved. In a letter to Spencer Roane, Sep. 6, 1819, Jefferson wrote:

. . .the pieces signed Hampden [from the *Enquirer*] . . . contain the true principles of the revolution of 1800, for that was as real a revolution in the principles of our government as that of 1776 was in its form; not effected indeed by the sword, as that, but by the rational and peaceable instrument of reform, the suffrage of the people. . . .if I understand rightly your quotation from the

Federalist, of an opinion that “the judiciary is the last resort in relation to the other departments of the government, but not in relation to the rights of the parties to the compact under which the judiciary is derived.”...The constitution, on this hypothesis, is a mere thing of wax in the hands of the judiciary, which they may twist, and shape into any form they please....My construction of the constitution is very different from that you quote. It is that each department is truly independent of the others, and has an equal right to decide for itself what is the meaning of the constitution in the cases submitted to its action;...

In a letter to William Johnson, June 12, 1823, he wrote:

On every question of construction [of the Constitution] let us carry ourselves back to the time when the Constitution was adopted, recollect the spirit manifested in the debates, and instead of trying what meaning may be squeezed out of the text, or intended against it, conform to the probable one in which it was passed.

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References and Further Reading

- Bergh, Albert Ellery, ed. *Writings of Thomas Jefferson*. 19 vols. (1905). <http://www.constitution.org/tj/jeff.htm>
 Original Rough Draught of the Declaration of Independence. <http://www.constitution.org/tj/tj-orddoi.htm>
Declaration of the Rights of Man and the Citizen, Marquis de Lafayette and Thomas Jefferson, 1789. http://www.constitution.org/fr/fr_drm.htm
Manual of Parliamentary Practice. <http://www.constitution.org/tj/tj-mpp.htm>
Robert's Rules of Order Revised—Online version of 1915 edition. <http://www.constitution.org/rror/rror-00.htm>
 See the draft and final versions of the Kentucky Resolutions of 1798, and the Kentucky Resolutions of 1799, in *The Virginia Report*, Ed. J.W. Randolph. <http://www.constitution.org/rf/vr.htm>
 Wall of separation letter to the Danbury Baptist Association, January 1, 1802. http://www.constitution.org/tj/sep_church_state.htm
Everson v. Board of Education, 330 U.S. 1 (1947).
 “Mansfieldism Reconsidered”, by Jon Roland, 2005. http://www.constitution.org/lrev/jdr/mansfield_recon.htm
 “Presumption of Nonauthority and Unenumerated Rights”, by Jon Roland, 2005. <http://www.constitution.org/911/schol/pnur.htm>

See also **Federalization of Criminal Law**

JEHOVAH'S WITNESSES AND RELIGIOUS LIBERTY

Inveterate litigators who have been involved in hundreds of criminal and civil cases over the past century, the Jehovah's Witnesses have prompted courts to establish or reinforce judicial safeguards

shielding a number of core freedoms, including religious liberty. Their formidable contributions in this realm have aided Americans of all faiths.

The Jehovah's Witnesses, whose faith was founded late in the nineteenth century, are millennialists who believe that the temporal world will soon end with a climatic battle pitting Satan against Jehovah God. After the forces of evil are vanquished in this clash, according to Witness doctrine, a kingdom of heaven will exist on earth for most of those who have maintained fidelity to the teachings of the Scriptures. A select group of others will ascend into heaven and sit at the right hand of God.

Among the Witnesses' more controversial beliefs is their conviction that saluting the American flag amounts to idolatry. Members of the faith traditionally have refrained from participating in flag-salute exercises, because they believe that such ceremonies clearly violate Scriptural prohibitions on worshipping any “graven image.”

The Jehovah's Witnesses controversial position on flag saluting helped to spark perhaps the worst outbreak of religious persecution seen in the United States in the twentieth century. Throughout the early and mid-1940s, Witnesses throughout the United States were pummeled in everything from riots involving hundreds of people to scuffles among a handful of men. Witnesses were so widely abused during the World War II era that many observers compared their plight to the persecution of religious minorities in Nazi Germany.

The U.S. Supreme Court's controversial ruling in *Minersville School District v. Gobitis*, 310 U.S. 586 (1940), contributed to the anti-Witness violence of the period. In an opinion written by Justice Felix Frankfurter, the court denied a claim that the enforcement of a public school district's compulsory flag-salute regulation violated the Witnesses' religious liberty. The perceived anti-Witness tenor of Frankfurter's opinion (combined with the nation's wartime anxieties) proved to be an incendiary combination for the Witnesses. In the months immediately after the *Gobitis* ruling was handed down, anti-Witness rioting was reported in all but four states.

The Witnesses' persecution went beyond vigilante attacks. Authorities many states and communities enacted new laws or applied existing ones to suppress their constitutional freedoms. Employers and coworkers often discriminated against Witnesses in their workplaces. Expulsions of Witness pupils from public schools became so widespread that members of the faith in dozens of communities were forced to operate their own makeshift schools. Witness parents were charged with neglect or disorderly conduct after the flag-salute expulsions of their children.

In response to this onslaught of intolerance, the Witnesses pursued judicial recognition of their rights, mounting a sustained legal counterattack against all forms of religious discrimination. The Witnesses' legal efforts resulted in hundreds of favorable rulings in municipal, state, and lower federal courts. A group of Witness attorneys worked tirelessly in courtrooms throughout the country to combat the manifestations of religious bigotry that plagued members of their faith. Although their many lower court victories were significant both practically and symbolically, the Witnesses' most noteworthy accomplishments came before the final arbiter of American constitutional rights, the U.S. Supreme Court. From 1938–1946, the high court handed down twenty-three opinions covering a total of thirty-nine Witness-related cases. Among the most significant of these were *West Virginia v. Barnette*, 319 U.S. 624 (1943) (in which the Supreme Court reversed its unfortunate decision in the *Gobitis* flag-salute case) and *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (in which the justices established the “fighting words” doctrine in free speech cases). Such decisions profoundly affected the evolution of constitutional law by helping to bring minority and individual rights into the forefront of constitutional jurisprudence. *Barnette* in particular was a watershed for American civil liberties. Justice Robert Jackson's majority opinion, in which he eloquently defended the Witnesses' First Amendment liberties, has been cited in numerous subsequent cases involving state encroachment on individual freedoms.

Cantwell v. Connecticut, 310 U.S. 296 (1940), was a particularly significant Witness case of the World War II era. Before *Cantwell*, the U.S. Supreme Court's opinion in *Reynolds v. United States*, 98 U.S. 145 (1878), controlled its religious liberty jurisprudence. Under *Reynolds*, religious beliefs were inviolable, but religious conduct could be subject to state regulation. This doctrine essentially removed religious conduct from the purview of the First Amendment. Impeded by the *Reynolds* precedent, litigants pursuing safeguards for religious conduct were forced to seek shelter under other constitutional protections.

The Jehovah's Witnesses were particularly successful in evading the strictures of *Reynolds* and gaining judicial protections for their religious conduct. When the members of the U.S. Supreme Court shielded the religious conduct of the Jehovah's Witnesses, they typically cited the protections afforded by the First Amendment to speech, press, and assembly rights. In *Cantwell*, however, the Court more directly addressed a religious liberty claim brought by a Witness.

Police in New Haven, Connecticut, arrested Witness Newton Cantwell and his sons Jesse and Russell in 1938 for disturbing the peace and soliciting money

for a charitable cause without having first received approval of the state's public welfare council. They were convicted on both charges in local court, and Connecticut's highest court upheld all of their convictions on the permit requirement charge. (It dismissed the disturbing the peace charges against Newton and Russell Cantwell but upheld Jessie's conviction on that count.)

Witness attorney Hayden Covington appealed the Cantwells' convictions to the U.S. Supreme Court. In two previous cases involving Witness appellants—*Lovell v. Griffin*, 303 U.S. 444(1938) and *Schneider v. New Jersey*, 308 U.S. 147 (1939)—the Court had continued its piecemeal incorporation of First Amendment freedoms into the due process clause of the Fourteenth Amendment. The First Amendment applied only to actions by the federal government, but the absorption of some of its protections into the Fourteenth Amendment meant that they now applied to actions by the states as well. Those cases, however, had involved speech and press freedoms; the right to free exercise of religion had not yet incorporated.

In *Cantwell*, the Supreme Court continued the process of incorporation and barred states from abridging the right to free exercise of religion. Justice Owen Roberts's majority opinion in *Cantwell* by no means indicated that the Supreme Court was totally abandoning its reasoning in *Reynolds*. Roberts echoed Chief Justice Waite's opinion in that earlier religious liberty case by writing that the free exercise clause encompassed “two concepts—freedom to believe and freedom to act. The first is absolute, but in the nature of things, the second cannot be.” In short, the state might exercise control over some forms of conduct even though they were motivated by an individual's religious beliefs. In the context of the Witnesses proselytizing, this regulation might involve the nondiscriminatory regulation of the time, place, and manner of their public solicitation.

Cantwell differed from *Reynolds* in the level of scrutiny applied to the actions taken by the state to limit religious conduct. In the Jehovah's Witness case, the Supreme Court viewed the state's regulation under heightened judicial scrutiny. Using this more rigorous standard, the Court determined that the application of the permit requirements to the Cantwells' religious conduct represented an unconstitutional infringement on their religious liberty. Although the Connecticut permit law at issue was neutral on its face, Justice Roberts wrote for the Court, it was so broadly drawn that public officials had wide latitude to take actions infringing on religious liberty.

Cantwell marked a turning point for religious liberty. Never before had the Supreme Court recognized constitutional protections for religious conduct. But

Cantwell did not signal that the justices were enthusiastic about claims made strictly under the free exercise clause. In subsequent Jehovah's Witness cases, the Court seemed willing to strike down generally applicable laws only if they were challenged as infringements of multiple First Amendment freedoms.

A handful of Jehovah's Witness cases reached the U.S. Supreme Court in the late 1940s and early 1950s, including *Poulos v. New Hampshire*, 345 U.S. 395 (1953), but their collective impact on constitutional jurisprudence was relatively modest. A smattering of cases followed in the late twentieth century, including, most recently, *Stratton v. Watchtower*, 536 U.S. 150 (2002). In that case, the U.S. Supreme Court struck down on free speech grounds an Ohio municipality's efforts to regulate the Witnesses' religious proselytizing.

The many cases litigated by the Jehovah's Witnesses have had a formidable impact on the expansion of judicial protections for civil liberties. Many of the seeds of the "rights revolution" of the 1960s were sown as they repeatedly tested the boundaries of the Bill of Rights during the World War II era. By making it more difficult for states and municipalities to regulate religious conduct and speech, the law they helped to create benefited members of all religious faiths.

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References and Further Reading

- Newton, Merlin Owen. *Armed with the Constitution: Jehovah's Witnesses in Alabama and the U.S. Supreme Court*. Tuscaloosa, AL: University of Alabama Press, 1995.
- Penton, M. James. *Apocalypse Delayed: The Story of Jehovah's Witnesses*, 2nd Ed. Toronto: University of Toronto Press, 1997.
- Peters, Shawn Francis. *Judging Jehovah's Witnesses: Religious Persecution and the Dawn of the Rights Revolution*. Lawrence, KS: University Press of Kansas, 2000.

Cases and Statutes Cited

- Cantwell v. Connecticut*, 310 U.S. 296 (1940)
- Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942)
- Lovell v. Griffin*, 303 U.S. 444 (1938)
- Minersville School District v. Gobitis*, 310 U.S. 586 (1940)
- Poulos v. New Hampshire*, 345 U.S. 395 (1953)
- Reynolds v. United States*, 98 U.S. 145 (1878)
- Schneider v. New Jersey*, 308 U.S. 147 (1939)
- Stratton v. Watchtower*, 536 U.S. 150 (2002)
- West Virginia v. Barnette*, 319 U.S. 624 (1943)

JENKINS V. GEORGIA, 418 U.S. 152 (1974)

Jenkins was convicted of violating Georgia's obscenity law when he showed "Carnal Knowledge" in his motion picture theater. Although the film received

considerable critical acclaim, appeared on many "Top Ten" lists of movies for 1971, and lacked explicit sex scenes (although there was nudity), a local jury found the movie obscene. Georgia's Supreme Court affirmed Jenkins' conviction after noting Georgia's statute was "considerably more restrictive" than the new standard contemporaneously set forth by *Miller v. California* (1973), raising questions as to jurors' interpretations of the standard and appellate review of their conclusions on the basis of these interpretations.

The Supreme Court unanimously reversed the lower court decision but disagreed on why. Rehnquist wrote the opinion that Burger, White, Blackmun, and Powell joined. Douglas and Brennan wrote separately concurring in the judgment but not the majority's reasons; Marshall and Stewart joined Brennan's concurrence.

Rehnquist seeks to clarify the Court's new approach in *Miller*. He agrees with Georgia's high court's conclusion that juries do not have to be instructed in state obscenity law when they apply the standards of a "hypothetical state-wide community." *Miller* approved such instructions but did not mandate them. Rehnquist also agreed with the Georgia court that juror instructions need not specify a "community" when applying "community standards." He points out, "A State may choose to define an obscenity offense in terms of 'contemporary community standards' as defined in *Miller* without further specification. . . or it may choose to define the standards in more precise geographic terms." The choice was up to the state.

The majority could not agree with Georgia, however, that after a jury decides a film appeals to a "prurient interest" and is "patently offensive" that *Miller* "virtually precluded all further appellate review" once the jury settles these "questions of fact." Rehnquist explains that "it would be a serious misreading of *Miller* to conclude that juries have unbridled discretion" in these matters. Moreover, he adds, the Court "took pains" in *Miller* to provide examples of what constituted patent offensiveness. The purpose of these examples was to "fix substantive constitutional limitations" on the depictions or descriptions of sexual conduct that would not be protected under the First Amendment. Juries were not free of appellate review if they ignored these limitations.

Rehnquist concludes by stating that on the basis of the Court's "own viewing" of "Carnal Knowledge" that it did not depict "hard core" sexual conduct nor did it portray the nudity in the film in a patently offensive way. The film thus fell under the protection of the First Amendment, which mandated that the Georgia court's decision be reversed.

Brennan's concurrence reminds the Court that, as he foresaw in *Paris Adult Theatre I v. Slaton* (1973), the reformulated *Miller* test "does not extricate us from the mire of case-by-case determinations of obscenity." The Court's task, moreover, is not confined under *Miller* to part (c) and whether a film or other material lacked serious literary or artistic value. Rather *Miller*, as shown in this present case which involved the screening of "Carnal Knowledge" for the justices, also requires independent appellate review of part (b) and an independent assessment of whether a jury erroneously declares a film or work to be patently offensive. *Miller*, he concludes, has neither reduced the uncertainties of the process nor the "inevitable stress upon the judiciary."

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References and Further Reading

- Alexander, Donald. *The Politics of Pornography*. Chicago: University of Chicago Press, 1989.
- Hixson, Richard F. *Pornography and the Justices: The Supreme Court and the Intractable Obscenity Problem*. Carbondale, IL: Southern Illinois University Press, 1996.
- Mackey, Thomas C. *Pornography on Trial: A Handbook with Cases, Law, and Documents*. Santa Barbara, CA: ABC-CLIO, 2002.

Cases and Statutes Cited

- Jenkins v. Georgia*, 418 U.S. 153 (1974)
- Miller v. California*, 413 U.S. 15 (1973)
- Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973)

JEWS AND RELIGIOUS LIBERTY

Both as individuals and as a group, Jews have stood in the forefront of many important struggles for religious liberty in the United States. The dedication of Jews to American religious freedom reflects their long history of persecution abroad; their position until recently as the only numerically significant non-Christian group in the United States; and their prominence in the legal, political, and intellectual life of the nation. As members of the nation's most visible religious minority, they have been important beneficiaries of the free exercise and establishment clauses. Their treatment by the Christian majority has provided a measuring rod of the limits of American religious toleration.

Since colonial times, Jews have found in America a haven from persecution. Even here, however, Jews have suffered from prejudices and until recent times have encountered various forms of legalized discrimination. The small number of Jews who settled in the

colonies gradually acquired freedom of worship, but all of the colonies at least formally barred Jews from voting and holding public office. In most of the colonies, Jews were required to contribute to the financial support of established churches. The hope of full political emancipation under a republican government may help to explain why Jews tended to favor independence during the American Revolution.

Although most states after the Revolution removed at least some disabilities from Jews, many forms of institutionalized political discrimination lingered for a long while. Since the establishment and free exercise clauses of the federal constitutions served only as limitations on federal power until the middle of the twentieth century, states were not bound by the free exercise and establishment clauses of the U.S. Constitution, even though many state constitutions contained similar provisions. Until well into the nineteenth century, several New England states imposed taxation for the support of Christian religions. Jews could not vote or hold public office in Connecticut until 1818, in Rhode Island until 1842, and in North Carolina until 1868. Meanwhile, many states continued to restrict legal testimony by Jews. Some state courts upheld discrimination against Jews on the ground that Christianity was part of the common law.

Although the Jewish population grew steadily throughout the nineteenth century and burgeoned early in the twentieth century, Jews continued to encounter many painful and ominous reminders that their legal status was precarious. Jewish insecurity was exacerbated by the continuation of persecution of Jews in other nations and by the persistence of anti-Semitic prejudices in the United States. Discriminatory hiring practices and quotas on admission of Jewish students to universities remained widespread until after the Second World War.

Widespread laws requiring the closing of most businesses on Sundays were a special source of frustration throughout the nineteenth century and most of the twentieth. These laws imposed special hardships on the many Jewish business owners who closed their shops on Saturday, the Jewish Sabbath. Although most legal challenges were unsuccessful, the ongoing campaigns against these so called "blue laws" helped to forge a tradition of legal activism in support of religion and strict separation of church and state.

Jewish opposition to Sunday closing laws culminated in two U.S. Supreme Court decisions, *Gallagher v. Crown Kosher Super Market of Massachusetts* (1961) and *Braunfeld v. Brown* (1961), in which the Court rejected arguments by Orthodox Jewish merchants that the closing laws violated both the establishment and free exercise clauses and constituted a

denial of equal protection of the laws. A narrowly divided Court held that the statutes were primarily secular in purpose and that they advanced a legitimate state interest by encouraging a uniform day of rest. The Court contended that exceptions would confer unfair economic advantages and present difficult enforcement problems. In one of the dissents, Justice Potter Stewart complained that the Pennsylvania law "grossly violate[d]" the free exercise clause by offering an Orthodox Jew "a cruel choice" between "his religious faith and his economic survival." Although Sunday closing laws have continued to survive constitutional challenges, legislatures have tended to eliminate them in response to the growing secularism and commercialization of society.

Jews also have been sensitive to Protestant Christian practices in the public schools. Unlike Roman Catholics, who established a widespread network of parochial schools, Jews generally preferred to remain in the public schools, which they regarded as providing unique opportunities for assimilation and the erosion of anti-Semitism. Only since the late twentieth century have Jews created significant number of Jewish day schools. Jewish support for an 1869 Cincinnati ordinance that prohibited religious instruction in public schools culminated in a landmark decision of the Ohio Supreme Court, *Board of Education v. Minor* (1873), which upheld the law on the ground of religious freedom.

Jewish opposition to religious exercises in the public schools contributed to the U.S. Supreme Court's decisions during the early 1960s prohibiting prayer in the public schools and the reading of the Bible for devotional purposes. Jewish individuals and groups were active in opposing the New York Board of Regents' prayer that the Court's decision in *Engel v. Vitale* (1962) found to violate the establishment clause. Two of the five plaintiffs in that case were Jewish, and amicus briefs were submitted to the Court by the National Jewish Community Relations Advisory Council (NJCRAC), the Synagogue Council of America (SCA), the American Jewish Committee (AJC), and the Anti-Defamation League (ADL). The same organizations were the only religious organizations to submit briefs in *School District of Abington Township v. Schempp* (1963), in which the Court declared that the Pennsylvania Bible reading law violated the establishment clause. Jews have remained vigilant in their opposition to religious intrusions in public education.

Even though Jews often have benefited from judicial decisions concerning religious freedom, Jews generally have lost cases before the Supreme Court concerning public accommodation of their special religious concerns. In addition to their rulings in the

Sunday closing cases, the Court in *Goldman v. Weinberger* (1986) upheld an Air Force prohibition on unauthorized head covering that had been challenged by an Air Force psychologist who wore a yarmulke. In its five-to-four decision, the Court emphasized that the judiciary should exercise special deference to the needs of the military. In a sharp dissent, Justice William J. Brennan dismissed as "totally implausible" the military's argument that the wearing of a yarmulke threatened group identity, declaring that "a yarmulke worn with a United States military uniform is an eloquent reminder that the shared and proud identity of United States servicemen embraces and unites religious and ethnic pluralism." The Air Force later repealed the prohibition.

In a 1994 decision, *Kiryas Joel School District v. Grumet*, the Court invalidated a New York law that had created a special public school district for the education of handicapped children who were members of the Satmar Hasidic sect. The state had created the school district because the Orthodox children were uncomfortable attending public schools with persons whose traditions differed from their own. The Court held that the statute violated the establishment clause by conferring governmental benefits and powers on a group that defined itself in terms of religion in a manner that did not necessarily prevent religious favoritism. Three dissenting Justices emphasized that the statute involved no public aid to religion and did not mention religion.

Jewish organizations have achieved widespread acclaim for their active participation in a broad spectrum of cases involving legal and moral issues. Early in the twentieth century, Reform Rabbi Stephen S. Wise was instrumental in establishing the Joint Committee on Social Action, and Conservative Judaism soon formed a counterpart. As early as 1925, the AJC submitted an amicus brief in *Pierce v. Society of Sisters* (1925) in successfully opposing the constitutionality of an Oregon law that required all children to attend public elementary schools. Jewish organizations were particularly vocal in demanding the dissolution of segregation and other barriers to equality for African Americans. Various Jewish organizations have frequently filed briefs on their own behalf and jointly with non-Jewish organizations such as the American Civil Liberties Union. Briefs submitted by Jewish organizations in civil liberties cases have received much praise for their superior quality.

Despite widespread Jewish support for scrupulous separation of government and religion, Jews during recent years increasingly have expressed fear that rigid separation will undermine all religions, erode public morality, and exacerbate interfaith conflict. Although misgivings about separationism have

appeared in all branches of Judaism, hostility against strict separation has been most pronounced among Orthodox Jews. Many Orthodox Jews opposed the Supreme Court's prayer and Bible reading decisions, and others have actively supported public aid to yeshivas and other non-public schools, the placement of menorahs on public property, and school vouchers.

Jews have made major contributions to American law as lawyers, judges, and academics. Seven Jews have served as associate justices of the U.S. Supreme Court: Louis D. Brandeis (1916–1939); Benjamin N. Cardozo (1932–1938); Felix Frankfurter (1939–1962); Arthur J. Goldberg (1962–1965); Abe Fortas (1965–1969); Ruth Bader Ginsburg (since 1993); and Stephen J. Breyer (since 1994).

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References and Further Reading

- Borden, Horton. *Jews, Turks, and Infidels*. Chapel Hill: University of North Carolina Press, 1984.
- Cohen, Naomi W. *Jews in Christian America: The Pursuit of Religious Equality*. New York: Oxford University Press, 1992.
- Dalin, David G., ed. *American Jews and the Separationist Faith: The New Debate on Religion in Public Life*. Washington, D.C.: Ethics and Public Policy Center, 1993.
- Dinnerstein, Leonard. *Anti-Semitism in America*. New York: Oxford University Press, 1994.
- Feldman, Egal. *Dual Destinies: The Jewish Encounter with Protestant America*. Urbana: University of Illinois Press, 1990.
- Sachar, Howard M. *A History of the Jews in America*. New York: Knopf, 1992.

Cases and Statutes Cited

- Board of Education v. Minor*, 23 Granger (23 Ohio St.) 211 (1873)
- Braunfeld v. Brown*, 366 U.S. 599 (1961)
- Engel v. Vitale*, 370 U.S. 421 (1962)
- Gallagher v. Crown Kasher Super Market of Massachusetts*, 366 U.S. 617 (1961)
- Goldman v. Weinberger*, 475 U.S. 503 (1986)
- Kiryas Joel School District v. Grumet*, 512 U.S. 687 (1994)
- Pierce v. Society of Sisters*, 268 U.S. 510 (1925)
- School District of Abington Township v. Schempp*, 374 U.S. 203 (1963)

JIMMY SWAGGART MINISTRIES v. BOARD OF EQUALIZATION OF CALIFORNIA, 493 U.S. 378 (1990)

Many states impose a sales tax on retail sellers for the tangible personal property they sell, California among them. Between 1974 and 1981, Jimmy Swaggart Ministries, a religious evangelical organization, held

numerous religious events across the country, twenty-three of them in California. At these events the Ministries sold books and other merchandise, both religious and nonreligious.

In 1980, California's Board of Equalization informed the Ministries that its sales were not exempt from California's Sales and Use Tax. The Ministries objected, saying that the First Amendment exempted its products from the tax but eventually paid the money it owed. It then filed a petition for redetermination—essentially, a request that the Board review its objection—and petitioned for a refund of the paid amount. The Board denied, and the Ministries sued for a refund.

The lower California courts ruled that the Ministries was entitled to no tax refund, and the California Supreme Court denied a request to use its discretionary review. The United States Supreme Court agreed with the state courts.

For the First Amendment to be violated, the tax would have had to place a “substantial burden on the observation of a central religious belief or practice” that would require a “compelling governmental interest” to withstand the Ministries' challenge. The Court had phrased it so in *Hernandez v. Commissioner of Internal Revenue* the previous year.

The Ministries relied primarily on *Murdock v. Pennsylvania* and *Follett v. Town of McCormick* to argue that a state could not require a religious organization to pay taxes on the religious materials it conveyed to people through evangelical distribution. In *Murdock*, the Court had held unconstitutional a city ordinance requiring licenses to canvass or solicit, because of the burden it placed on Jehovah's Witnesses. The Court said that the practice of handing out religious materials was protected conduct. In *Follett*, the Court struck down an ordinance requiring all booksellers to pay a flat license fee to be permitted to sell books.

The Court distinguished these two cases, saying that although flat licensing fees are unconstitutional because they impose prior restraints on religious liberty, general taxation on activities that might be religious, however, is permissible. Because the tax imposed in this case was on items sold, not general exercise of religious liberty, the Court held the Ministries were not exempt. The Court further noted that the tax was not on the right to exercise religious freedom but rather on the privilege of earning money from selling tangible personal property. The court did not find that implementation of the tax would cripple the Ministries' evangelical efforts or excessively entangle government in its affairs.

The ruling here went against the cases that have been called the Court's “separationist” cases, because

it permits increased state regulation of religious affairs, giving religious organizations less independence from generally applicable laws. This trend culminated in *Employment Division, Dept. of Human Resources of Oregon v. Smith*, where the Court held that generally applicable laws that incidentally burden religious exercise are constitutional.

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References and Further Reading

- Green, Steven K., *Shifting into Neutral? Emerging Perspectives on the Separation of Church and State*, Boston College Law Review 43 (2002): 1111–1112.
- Scharffs, Brett G., *The Autonomy of Church and State*, Brigham Young University Law Review 2004 (2004): 1217–1282.
- Smolla, Rodney A., and Melville B. Nimmer. *Smolla and Nimmer on Freedom of Speech: A Treatise on the First Amendment*. Vol. 2, section 22:23, 3rd Rd. New York and Oakland, Calif.: Matthew Bender, 1996.

Cases and Statutes Cited

- Employment Division, Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990)
- Follett v. Town of McCormick*, 321 U.S. 573 (1944)
- Hernandez v. Commissioner of Internal Revenue*, 490 U.S. 680 (1989)
- Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983)
- Murdock v. Pennsylvania*, 319 U.S. 105 (1943)

See also *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872 (1990); *Establishment of Religion and Free Exercise Clauses*; *Follett v. Town of McCormick*, S.C., 321 U.S. 573 (1944); *Free Exercise Clause Doctrine: Supreme Court Jurisprudence*; *Hernandez v. Commissioner of Internal Revenue*, 490 U.S. 680 (1989)

JOHN BIRCH SOCIETY

The John Birch Society (JBS) carried the mantle of post-World War II extreme anticommunism into later decades. Robert Welch founded this grassroots political organization in 1958. Four years to the month after the censure of Wisconsin Senator Joseph McCarthy, Welch assembled eleven of his prominent conservative friends in Indianapolis. The JBS resulted from this two-day meeting. Welch, a retired candy-maker and former vice-president of the National Association of Manufacturers, led the Society from its inception until his death in 1985.

The “Birchers” took their name from a Baptist missionary to China, who became an intelligence operative for the U.S. Air Force during and after World

War II. The Society regarded John Birch as a martyr and the first casualty of the Cold War because of his death at the hands of Chinese Communists. However, unlike its namesake’s reputation as a staunch guardian of theological precision, the John Birch Society was not primarily concerned with religious matters. The gospel message of the Society at its founding consisted of vehement opposition to Communism.

Much like Senator McCarthy before them, the leadership of the organization indulged in sweeping and imprecise accusations. The group suspected that even the most prominent conservatives acted on behalf of a great Communist plot. In 1960, the *Chicago Daily News* published a letter written by Welch and circulated to Society members. In it Welch expressed his conviction that former President “Dwight Eisenhower is a dedicated, conscious agent of the Communist conspiracy.” Such accusations caused many within the Republican Party to question the Society’s intentions. Even still, the group continued to participate within national politics. The John Birch Society reached its political zenith with its mobilization in support of the unsuccessful Presidential campaign of Barry Goldwater in 1964. The estimated membership of the group peaked between 60,000 and 100,000.

The Society depends on conspiracy theories for its continued existence. Since its inception, the group expressed its opposition to such activities as the United States’ participation in the United Nations on grounds that it was a front for Communist activity. In 1966, Birchers began shifting their focus to another conspiracy against American freedom. Welch and other Society leaders through the rest of the twentieth century elaborated on a 200-year-old theory that a small group of individuals actually control global economics and politics and were behind the rise of Communism itself. This alleged group, often referred to as the Illuminati or the Insiders, still receives attention in JBS publications. Ironically, the right-wing organization is often an integral part of left-wing conspiracy theories as well.

In 1989, the organization moved its headquarters from Belmont, Massachusetts, to Appleton, Wisconsin, Senator McCarthy’s hometown. It continues to oppose internationalism and civil rights initiatives. The JBS is not anti-Semitic, unlike many other radical right groups, and includes Jewish members. Upswings in right-wing populism during the 1990s caused an increase in membership; however, the John Birch Society remains significantly less influential than its heyday during the 1960s.

KEVIN JAMES HOUK

See also *McCarthy, Joseph*

JOHNSON, FRANK MINIS JR. (1918–1999)

Born in the hill country of Winston County, Alabama, Johnson came to nationwide prominence as one of the most effective and progressive federal judges in the 1960s and 1970s. As the son of the only Republican member of the Alabama Legislature, he knew from an early age that it took strength and self-confidence to espouse unpopular views. He graduated from the University of Alabama Law School, served in the U.S. Army in World War II, and joined a small general law practice in northern Alabama. In 1953, President Eisenhower appointed Johnson the federal prosecutor in Birmingham, where he successfully prosecuted modern-day slavery charges against white farmers who held African-American workers in involuntary servitude. Two years later, Eisenhower appointed him to become the federal judge in Montgomery, the Alabama state capital. At thirty-six, he was the youngest federal judge in the country. Within six months, he ruled on litigation stemming from the Montgomery bus boycott, issuing the first opinion that extended to public transportation the *Brown v. Board of Education* rationale that had prohibited racial discrimination in education. Many famous civil rights cases followed, with Johnson ruling on a parade of successful efforts to desegregate public parks, public schools, public facilities, and public employment, including the state troopers, and to expand voting rights. In addition, he issued opinions upholding the right of women to serve on juries and to receive equal treatment in the military.

Although recognized in the national press as a civil rights judge, Johnson also left a profound mark on civil liberties litigation. In 1965, Alabama refused to allow civil rights demonstrators to rally to protest against the state's interference with the right to vote until Johnson ruled that the massive march could use major portions of the public highways to walk from Selma to Montgomery to petition the state government for redress of grievances. In subsequent years Johnson's rulings in cases involving speech and association regularly favored freedom of expression. For example, he reinstated a student editor expelled for criticizing the president of a state university, prevented a public high school from firing a teacher for assigning satirical stories, prohibited university officials from canceling anti-war speakers on campus, and overturned a state law requiring journalists to file financial interest statements before covering the legislature.

Johnson's most important impact on civil liberties appeared not in First Amendment cases, however, but in his rulings affecting institutionalized individuals. In a series of groundbreaking opinions, he ruled that

patients committed to state mental institutions have a constitutional right to adequate and effective treatment. "To deprive any citizen of his or her liberty . . . for . . . therapeutic reasons and then fail to provide adequate treatment violates the very fundamentals of due process," he wrote in *Wyatt v. Stickney*, and issued orders setting minimum constitutional standards for the care of the involuntarily confined mentally ill and mentally retarded. In related litigation, he overturned the Alabama civil commitment statute.

In addition, extensive hearings on prison conditions led Johnson to conclude that Alabama unconstitutionally confined prisoners in facilities unfit for human habitation where they received no medical care and lived in constant fear of violence. His detailed court orders establishing standards to eliminate the persistent unconstitutional conditions in the prisons and mental institutions were innovative and assuredly controversial. As the first judge to enforce the rights of confined individuals by structural injunctions, remedial orders requiring thoroughgoing overhauls of entire state institutional systems, Johnson's precedents had influence on courts and legislatures around the nation. His rulings inspired Congress to authorize the U.S. Department of Justice to sue on behalf of institutionalized persons anywhere in the nation to remedy a pattern of constitutional violations.

Although criticized vituperatively in Alabama and threatened with death so frequently that federal marshals provided around-the-clock protection from 1961–1975, Johnson ultimately received both local and national acclaim as a courageous and fair judge. In 1979, President Carter appointed Johnson to the federal appellate court where he displayed his continued concern with civil liberties. He overturned the Alabama statutes authorizing voluntary prayer in public schools. He wrote the first opinion asserting that undocumented children have the constitutional right to a free public education. His opinion in *Hardwick v. Bowers* emphasized autonomy and privacy rights in striking down the Georgia sodomy statute; it was reversed by the Supreme Court in 1986 but was ultimately approved seventeen years later by the Supreme Court in *Lawrence v. Texas*.

Johnson reduced his judicial workload in 1991, when he took senior status as a judge. He died in Montgomery, Alabama, in 1999.

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References and Further Reading

Bass, Jack. *Taming the Storm: The Life and Times of Judge Frank M. Johnson, Jr., and the South's Fight over Civil Rights*. New York: Doubleday, 1993.

Sikora, Frank. *The Judge: The Life & Opinions of Alabama's Frank M. Johnson, Jr.* Montgomery: Black Belt Press, 1992.

Yarborough, Tinsley E. *Judge Frank Johnson and Human Rights in Alabama.* University: University of Alabama Press, 1981.

Cases and Statutes Cited

Brown v. Board of Education, 347 U.S. 483 (1954)

Hardwick v. Bowers, 760 F. 2d 1202 (11th Cir. 1985), vacated 804 F. 2d 622 (11th Cir. 1986)

Lawrence v. Texas, 539 U.S. 558 (2003)

Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala. 1971)

JOHNSON, LYNDON BAINES (1908–1973)

Lyndon B. Johnson, thirty-sixth president of the United States, took office on November 22, 1963, after the assassination of President John F. Kennedy and served until 1969. From the beginning of his presidency, Johnson had issues in regards to wiretapping and privacy. On one hand, Johnson was seemingly unconcerned with government intrusion into privacy. In more than five years in office, he secretly recorded more than 10,000 conversations without the other parties' knowledge both on the telephone and in his White House office. He did not hesitate to use the FBI to secretly record his political opponents during the 1964 Democratic party convention. He planted bugs in embassies and private residences to monitor Richard Nixon's presidential campaign in 1968. Both FBI and foreign intelligence was gathered by electronic means. Yet Johnson's papers and private conversations on wiretapping and bugging suggested a degree of disgust at the method of information gathering. When asked his preference on wiretapping, Johnson favored a complete ban on all taps, even in the interest of national security. He also wanted a law banning non-phone electronic bugging devices. In May 1966, when IRS commissioner Sheldon Cohen attempted to justify the IRS's use of eavesdropping and wiretapping, Johnson told him to stop all surveillance—microphones, taps, or other hidden devices—legal or illegal, if he was going to work for him. Ramsey Clark described Johnson's outrages about any wiretapping or bugging in domestic areas by saying he did not want to live in a country where people were allowed to use those surveillance devices.

In his 1967 State of the Union address, Johnson stated: "We should outlaw all wiretapping—public and private—wherever and whenever it occurs, except when the security of this Nation itself is at stake and only then with the strictest governmental safeguards.

And we should exercise the full reach of our constitutional powers to outlaw electronic 'bugging' and 'snooping.'" Despite this pronouncement, Johnson had his vice-president's phone, Hubert H. Humphrey, bugged out of fear he would deviate from the party's line on Vietnam during 1968, and he continued to tap him up to and including Humphrey's unsuccessfully bid for the presidency.

In early 1967, Johnson asked Congress to pass the Safe Streets and Crime Control Act, a bill described as increasing crime control. The act also recommended Congress pass the Right of Privacy Act outlawing all public and private wiretapping with the only exceptions being for national security "and then only under the strictest safeguards." Johnson's biographer Robert Dallek posed the question about whether Johnson opposed all tapping and bugging intrusions except for those done by or for himself and whether Johnson believed he alone had the right to monitor private conversations. Dallek argued that Johnson held a "genuine aversion" to wiretapping and the invasions of privacy the FBI had been committing for a long time. It deeply bothered him that anyone, including Hoover and the FBI, had black-mail control over political leaders through information obtained through secretive listening devices.

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References and Further Reading

Beschloss, Michael, ed. *Reaching for Glory: Lyndon Johnson's Secret White House Tapes, 1964–1965.* New York: Simon and Schuster, 2001.

Califano, Joseph. *The Triumph and Tragedy of Lyndon Johnson: The White House Years.* College Station, TX: Texas A&M University Press, 2000.

Dallek, Robert. *Flawed Giant: Lyndon Johnson and His Times, 1961–1973.* New York: Oxford University Press, 1998.

See also **Privacy; Right to Privacy**

JONES v. WOLF, 443 U.S. 595 (1979)

When a local church decides to leave its denomination or when it splits into factions, the underlying conflict frequently revolves around issues of religious doctrine. When the conflicting parties each claim ownership of the church's property, a court often must resolve the dispute and yet it must avoid inquiring into doctrinal issues. For a court to intrude into a doctrinal controversy would result in an entanglement with church affairs that would raise free exercise and establishment clause concerns. In *Jones v. Wolf*, the Supreme Court approved constitutionally valid

methods for resolving these disputes without interfering with church autonomy.

By a majority vote, the congregation of the Vineville Presbyterian church of Macon, Georgia, left its denomination, the Presbyterian Church of the United States, to join a more conservative denomination, the Presbyterian Church in America. The congregation's majority, voting for the change, and the minority, still loyal to the liberal denomination, each claimed ownership of the congregation's assets. In the Georgia state courts, the majority faction prevailed.

The state courts avoided inquiring into church doctrine and instead considered the relevant deeds. All the deeds named the local church's trustees as grantees, except one that named the local church itself as grantee. The trustees complied with the wishes of the majority faction. The courts further agreed that there was no contradictory provision in the local church's corporate charter, state statutes, or the denomination's book of order. According to the courts, a religiously neutral analysis dictated that the majority faction owned the church property. The U.S. Supreme Court found the method of the state courts to be constitutional.

The Court thus reaffirmed its earlier holding in *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church* that it violates the First Amendment for courts to decide theological issues in the process of resolving property disputes. *Presbyterian Church*, in turn, reaffirmed the main ruling in an earlier decision that was not decided on constitutional grounds but reflected an awareness of the philosophy of the First Amendment, *Watson v. Jones*.

The Court also expanded on its statement in *Presbyterian Church* that courts could resolve these disputes by applying the neutral principles of law developed for use in all property disputes, that is, the method used by the Georgia courts. Previously, the Court had also affirmed a case applying neutral principles, but only in a brief *per curiam* opinion, *Maryland & Virginia Eldership of the Churches of God v. Church of God at Sharpsburg, Inc.* Here, in a full opinion, the Court gave approval to using neutral principles of law to resolve a church property dispute.

The Court, however, also acknowledged another method that it had previously authorized for resolving the issue, deferring to the decision of church authorities. Under the deference method, in a hierarchical church, such as the Roman Catholic Church, the determination of the denomination would control. In a congregational church, such as a Baptist denomination, the majority of the local church normally would make the dispositive decision. In addition, a

church could choose some other method for resolving the dispute. For example, a local church may have turned over control of its property to a regional or national board of the denomination. At the same time, the Court neglected to face the recurring issue of determining whether a church is hierarchical or congregational. The Presbyterian denominations, for example, seem to be hybrids of the two organizational models.

Furthermore, the Court stated that still other methods of determination might be permissible. According to the Court, "a State may adapt *any* one of various approaches for settling church property disputes, so long as it involves no consideration of doctrinal matters, whether the ritual and liturgy of worship or tenets of faith." At the same time, the Court voiced its expectation that churches would restructure and state their property relationships in secular terms to permit a court to resolve disputes without encountering ecclesiastical questions.

Jones v. Wolf gives courts some latitude in resolving these difficult disputes while still avoiding intrusion into doctrinal matters. However, the cases often remain difficult ones. The central issue is often doctrinal, and yet a court must find a solution without addressing that issue. With the neutral principles method, courts also often must look to nonreligious language in ecclesiastical documents, even when one party claims that the language is infused with religious meaning.

The Court thus has offered ways to protect religious rights in disputes over church property. However, whether these methods resolve the disputes accurately remains an open question.

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References and Further Reading

- Rotunda, Ronald, John E. Nowak, and J. Nelson Young. *Treatise on Constitutional Law: Substance and Procedure*. Vol. 3. St. Paul, MN: West, 1986, pp. 424-432.
- Sirico, Louis J., Jr., *Church Property Disputes: Churches as Secular and Alien Institutions*, *Fordham Law Review* 55 (1986): 3:335-362.
- , *The Constitutional Dimensions of Church Property Disputes*, *Washington University Law Quarterly* 59 (1981): 1:1-79.
- Tribe, Laurence H. *American Constitutional Law*. 2nd Ed. Mineola, NY: Foundation, 1988, pp. 1232-1242.

Cases and Statutes Cited

- Maryland & Virginia Eldership of the Churches of God v. Church of God at Sharpsburg, Inc.*, 396 U.S. 367 (1970)
- Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 449 (1969)
- Watson v. Jones*, 80 (13 Wall.) 679 (1872)

See also **Free Exercise Clause (I): History, Background, Framing; Free Exercise Clause Doctrine: Supreme Court Jurisprudence; *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1872)**

JOSEPH BURSTYN, INC. v. WILSON, 343 U.S. 495 (1952)

Joseph Burstyn, Inc. v. Wilson represents an important landmark in the development of First Amendment jurisprudence on expressive freedom in mass media. In the 1915 case of *Mutual Film Corp. v. Industrial Commission*, the first Supreme Court controversy involving the motion picture industry, the justices ruled that “the exhibition of moving pictures is a business pure and simple, . . . not to be regarded . . . as part of the press of the country or as organs of public opinion.” Almost contemporaneously, the Court reasoned in the 1922 case of *Federal Baseball Club of Baltimore, Inc. v. National League* that “exhibitions of base ball . . . are purely state affairs” and that transportation facilitating games “between clubs from different cities” is “a mere incident” to interstate commerce. Although oddly contradictory, these proclamations had the effect of insulating both movies and baseball from the jurisdiction of the federal courts. By declaring motion pictures outside the scope of the First Amendment, *Mutual Film* eliminated constitutional protection of the movie industry for a generation.

In the 1948 decision of *United States v. Paramount Pictures, Inc.*, the Supreme Court treated “moving pictures, like newspapers and radio,” as part of the press whose freedom is guaranteed by the First Amendment.” Four years later, the Court would decisively resolve the tension between *Mutual Film* and *Paramount* in favor of constitutional protection of motion pictures. The 1952 decision of *Joseph Burstyn, Inc. v. Wilson* concerned a New York statute that allowed the state department of education to forbid the exhibition of any “film or a part thereof?” that was “obscene, indecent, immoral, inhuman, sacrilegious, or . . . of such a character that its exhibition would tend to corrupt morals or incite to crime.” Joseph Burstyn, Inc., owned the exclusive rights to distribute throughout the United States an Italian film called *The Miracle*. In November 1950, after examining the film, the motion picture division of the education department, issued a license authorizing exhibition of *The Miracle*, with English subtitles, as part of a trilogy called *Ways of Love*. *The Miracle* proved quite controversial, and hundreds of letters, telegrams, and post cards, both protesting and supporting the film persuaded the New York State Board of Regents to review the film.

In February 1951, the regents determined that *The Miracle* was “sacrilegious,” and on that ground ordered the rescission of Burstyn’s license to exhibit the film. New York courts upheld the regents’ action.

On appeal, the U.S. Supreme Court recognized *Burstyn* as “the first to present squarely . . . the question whether motion pictures are within the ambit of protection which the First Amendment, through the Fourteenth, secures to any form of ‘speech’ or ‘the press.’” The Court held “that motion pictures are a significant medium for the communication of ideas.” Writing for the Court, Justice Tom Clark recognized that the movies “may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression.” The movies’ significance “as an organ of public opinion,” the Court observed, “is not lessened by the fact that they are designed to entertain as well as to inform.” Nor would the Court dilute constitutional protection for motion pictures on the ground that they “are published and sold for profit.” Like “books, newspapers, and magazines,” motion pictures won recognition as “a form of expression whose liberty is safeguarded by the First Amendment.” The Court thereupon included “expression by means of motion pictures . . . within the free speech and free press guaranty of the First and Fourteenth Amendments” and overruled contrary language in *Mutual Film*.

Seven years after *Burstyn*, the Supreme Court’s decision in *Kingsley International Pictures Corp. v. Regents* invalidated a ban on nonobscene portrayals of “sexual immorality [as] desirable, acceptable, or proper . . . behavior.” *Burstyn* continues to influence contemporary First Amendment jurisprudence. Landmark cases such as *Red Lion Broadcasting Co. v. FCC* and *FCC v. Pacifica Foundation* have cited *Burstyn* for the proposition that “differences in the characteristics of new media justify differences in the First Amendment standards applied to them.”

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Cases and Statutes Cited

FCC v. Pacifica Foundation, 438 U.S. 726 (1978)
Federal Baseball Club of Baltimore, Inc. v. National League, 259 U.S. 200 (1922)
Kingsley International Pictures Corp. v. Regents, 360 U.S. 684 (1959)
Mutual Film Corp. v. Industrial Commission, 236 U.S. 230 (1915)
Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969)
United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948)
See also ***Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969)**

JOURNALISM AND SOURCES

It could be said that a journalist is only as good as his or her sources. Journalists carefully cultivate a variety of sources to provide their readers and viewers with diverse perspectives and fair, balanced, and complete news stories.

No journalist in a democratic society would be content to rely solely on a press release as the primary source for a story. Sources are not limited to people but can include documents and other fruits of news gathering, such as photographs, audio recordings, and videotapes.

Journalists may use government information such as judicial or executive branch agency records to provide an initial tip or story idea or to corroborate data provided informally by individuals. For example, statutes such as Freedom of Information and Sunshine Laws create affirmative rights of access to government records and proceedings for both the press and the public, and court rules and common law principles, as well as Constitutional provisions, guarantee Access to Judicial Records and Access to Courts. Similarly, a business reporter might consult industry spokespersons to obtain basic information about a corporation but will also contact current and former employees, contractors, government regulators, and consumers to flesh out the story.

Attempts by prosecutors and defense lawyers to issue subpoenas to reporters to obtain their testimony or to compel them to produce unpublished materials are usually resisted, often by relying on state Shield Laws that provide journalists with varying degrees of protection.

Journalists fiercely guard their sources, for competitive as well as ethical reasons. Although the Supreme Court, in *Branzburg v. Hayes* (1972), refused to recognize a comprehensive First Amendment testimonial privilege and in *Herbert v. Lando* (1979) was particularly skeptical of the existence of any privilege in libel cases, most reporters consider a promise of confidentiality to be sacred and will face sanctions, including jail or monetary fines, if necessary to protect the identity of a source. They realize that the failure to honor a promise to a source means that sources will “dry up” and that the public will receive less information as a result. In *Cohen v. Cowles Media* (1991), the Supreme Court held that a promise to conceal a source’s identity could be enforced by a court without violating the First Amendment rights of the journalist.

Sources may also be compromised through the execution of search warrants. In *Zurcher v. Stanford Daily* (1978), the Supreme Court ruled that news organizations are protected from unreasonable searches by the Fourth Amendment, but Congress subsequently passed the Privacy Protection Act

(1980) to ensure that newsrooms would be subject to search only under very limited circumstances.

Journalists must always be on their guard to avoid being “used” by a source to transmit disinformation and must strive to remain sufficiently detached from a story or a source so that their ability to analyze it objectively is not compromised. Reliance on too many confidential or undisclosed sources can undermine the credibility of a story and erode the confidence of readers and viewers.

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References and Further Reading

- Blasi, Vince, *The Newman's Privilege: An Empirical Study*, Michigan Law Review 70 (1971): 229–284.
 Dalglish, Lucy A., ed. *Agents of Discovery: A Report on the Incidence of Subpoenas Served on the News Media in 2001*. Arlington: The Reporters Committee for Freedom of the Press, 2003.
 Kirtley, Jane E. “Shield Laws and Reporter’s Privilege: A National Assessment.” in Surette, Ray, ed. *The Media and Criminal Justice Policy*. Springfield: Charles C. Thomas, 1990, pp. 163–176.

Cases and Statutes Cited

- Branzburg v. Hayes*, 408 U.S. 665 (1972)
Cohen v. Cowles Media Co., 501 U.S. 663 (1991)
Herbert v. Lando, 441 U.S. 153 (1979)
Zurcher v. Stanford Daily, 436 U.S. 547 (1978)

See also Access to Judicial Records; *Branzburg v. Hayes*, 408 U.S. 665 (1972); *Cohen v. Cowles Media Company*, 501 U.S. 663 (1991); Freedom of Information Act (1966); Freedom of Information and Sunshine Laws; *Herbert v. Lando*, 441 U.S. 153 (1979); Media Access to Information; Privacy Protection Act, 94 Stat. 1879 (1980); Reporter’s Privilege; Shield Laws; Subpoenas to Reporters; *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978)

JUDICIAL BIAS

Judges are required to be neutral, impartial, and free of influences that would tend to make it difficult for them to decide cases on their merits. At the same time, American judges do not form a distinct profession, trained and socialized apart from lawyers, as is true in most civil-law systems. When a lawyer becomes a judge, we expect him or her to draw to some extent from his or her personal and professional experience before taking to the bench. The reality is that judges have social and professional connections, financial and personal interests, and views on matters of public concern. This reality is in tension with the ideal of neutrality that is central to the judge’s role.

The law regulating judicial bias attempts to sort out “contaminating” influences from those connections and interests that are thought to be relatively innocuous. Most states have adopted some form of the American Bar Association’s Model Code of Judicial Conduct, which specifies circumstances under which a judge ought to recuse himself or herself from participating in a case. In addition, federal and state statutes and court rules create mechanisms for the litigants to challenge the impartiality of a judge.

The most straightforward cases of judicial bias involve financial entanglements and pecuniary interests that might cause the judge to favor one litigant over another in the hope of realizing personal gain. More difficult cases arise from civic and charitable activities, political and personal associations, and family relationships. It is unreasonable to expect judges to isolate themselves from social clubs and friendships, yet these associations may create the appearance of partiality in some cases. Judges are prohibited from belonging to organizations that practice invidious discrimination but may maintain extrajudicial associations as long as they do not cause the judge’s impartiality to be reasonably questioned. For example, in a memorandum in which he decided that he need not recuse himself from deciding a case in which he had gone duck hunting with Vice President Dick Cheney, Justice Scalia cited a long list of incidents in which judges had maintained cordial relationships with political officials who were parties in cases before those judges (*Cheney v. U.S. District Court*).

Perhaps the most difficult issue of all relates to the tension between the political values of accountability and impartiality. To enhance the accountability of judges to the democratic political process, many states have an elected judiciary, or at least require judges to stand for period retention elections. Although state codes of conduct have attempted to restrict judges from talking about their political views during election campaigns, the Supreme Court has held that some of these restrictions violate the First Amendment (*Republican Party of Minnesota v. White*). It would appear difficult to reconcile the ideal of judicial neutrality with the expectation of voters that candidates for judicial office have political beliefs that bear on how the candidates might decide cases. The *White* decision favors transparency over the approach of the state codes, which was to prohibit reference to political beliefs.

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References and Further Reading

Shaman, Jeffrey M., Steven Lubet, and James J. Alfani. *Judicial Conduct and Ethics*. 3rd Ed. Charlottesville, VA: Lexis Law Publishing, 2000.

Stark, Andrew. *Conflict of Interest in American Public Life*. Cambridge, MA: Harvard University Press, 2000.

Wendel, W. Bradley, *The Ideology of Judging and the First Amendment in Judicial Election Campaigns*, South Texas Law Review 43 (2001): 73–123.

Cases and Statutes Cited

Cheney v. United States District Court, 541 U.S. 913 (2004)
Republican Party of Minnesota v. White, 536 U.S. 765 (2002)

ABA Model Code of Judicial Conduct (2004)

See also **Due Process; Impartial Decisionmaker**

JUDICIAL PROCEEDINGS AND REFERENCES TO THE DEITY

References to the deity are commonplace in American courtrooms. Perhaps the most familiar of these are oaths administered in court, by which jurors swear to perform their duties or witnesses swear to tell the truth “so help me God.” In addition, court proceedings themselves, including proceedings of the U.S. Supreme Court, sometimes begin with the formal invocation of divine aid: “God save this honorable court.” Less frequently, particular judges may sponsor prayers or the display of religious symbols such as the Ten Commandments in their courtrooms. Moreover, attorneys sometimes make arguments that touch on religious imagery, sacred texts—especially the Bible, and miscellaneous religious themes. These various practices raise issues under the free exercise and free speech clauses, as well as the establishment clause.

Concern for the free speech and religious free exercise rights of jurors and witnesses has gradually prompted revision to long-standing forms of oaths in many American courtrooms. Freedom of speech and free exercise of religion have frequently been understood to mean that individuals cannot be forced to utter sentiments to which they do not adhere. Consequently, many courtrooms now permit both witnesses and jurors to affirm their commitment to tell the truth or fulfill the obligations of a juror rather than to swear in the name of God a commitment to do so. Moreover, at least some courts have held that this kind of accommodation is mandated by the free speech clause, the free exercise clause, or both.

Formal or ritualistic references to the deity in court proceedings might also be thought of as violating the establishment clause of the first amendment, which the Supreme Court has variously interpreted as prohibiting government actions with the purpose or effect of significantly advancing religion or of endorsing religion. Nevertheless, the use of oaths invoking

the deity or of formal invocations such as "God save this honorable court" has not been prohibited by the Supreme Court. Although it has not considered these issues specifically, the Court's general holdings concerning public religious practices would suggest that these formal invocations of divine aid would survive a challenge under the establishment clause. In *Marsh v. Chambers* (1984), the Court upheld the practice of having a chaplain chosen by a state legislature offer prayers at the beginning of a legislative session. There, the Court drew attention to the long tradition of such public prayers in American history, emphasizing that legislative prayers had become "part of the fabric of our society." Presumably, the Court would find similar historical blessing for the practice of oaths in the name of God or ritual invocations such as "God save this honorable court." The Court might also rely on the concept of "ceremonial deism" to analyze formal references to God in the courtroom. Justice William Brennan suggested in a concurring opinion to the decision in *Lynch v. Donnelly* (1984) that certain public religious references, such as the designation of our national motto as "In God we trust" and the inclusion of the phrase "under God" in the Pledge of Allegiance, had "lost through rote repetition any significant religious content." References to the deity in formal oaths or ritual invocations at the beginning of court sessions might similarly be thought of as forms of "ceremonial deism" and thus immune from establishment clause challenges.

Less formal references to the deity in judicial proceedings, such as invited prayers from clergy or the display of religious symbols such as the Ten Commandments, pose more serious issues under the establishment clause. These practices can claim less shelter under the mantle of tradition. Moreover, their religiousness has not been blunted by formal repetition. Accordingly, at least some courts have found these kinds of references to violate the establishment clause. In Alabama, for example, in the summer of 2001, the chief justice of the state's supreme court attempted to install a permanent monument to the Ten Commandments in the state judicial building. Lower federal courts declared the display of this monument unconstitutional. When the chief justice refused to comply with a court order that he remove the monument, the other justices on the court intervened to have the monument removed from its public location, and the chief justice was first suspended and then later removed from his judicial office. A few courts have approved the display of the Ten Commandments in or around court buildings, but these have generally involved displays that have been in place for many years. The continued display of religious symbols with a more venerable local history may be thought

of as respecting tradition rather than advancing particular religious sentiments.

Finally, religious references are not uncommon in arguments made by lawyers in the course of trials. Attorneys in death penalty cases, for example, will sometimes tender Biblical texts in support of, or in opposition to, the application of the death penalty; and the discussion of these texts will sometimes include references to God. A few jurisdictions declare these religious comments off-limits for lawyers. Nevertheless, the more common result has been for courts to permit lawyers to make passing references to God or to passages or illustrations from the Bible, treating these references as falling within the general rhetorical vocabulary of American culture.

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References and Further Reading

- Curry, Thomas J. *Farewell to Christendom: The Future of Church and State in America*. Oxford: Oxford University Press, 2001.
- Hamburger, Philip. *Separation of Church and State*. Cambridge: Harvard University Press, 2002.
- Levine, Samuel J., *Religious Symbols and Religious Garb in the Courtroom: Personal Values and Public Judgments*, *Fordham Law Review* 66 (1998): 1505-1540.
- Levy, Leonard W. *The Establishment Clause: Religion and the First Amendment*. 2nd Rev. Ed. Chapel Hill: University of North Carolina Press, 1994.

Cases and Statutes Cited

- Lynch v. Donnelly*, 465 U.S. 668 (1984)
- Marsh v. Chambers*, 463 U.S. 783 (1983)

See also **Ceremonial Deism; Civil Religion; Establishment Clause Doctrine: Supreme Court Jurisprudence; Forced Speech; Lemon Test; Lynch v. Donnelly, 465 U.S. 668 (1984); Marsh v. Chambers, 463 U.S. 783 (1983); No Endorsement Test**

JUDICIAL RESOLUTION OF CHURCH PROPERTY DISPUTES

Throughout American history, courts have been called on to adjudicate disputes between members of a religious organization, particularly disputes involving control of the organization's property. Such disputes typically arise when a local church splits into two factions over a theological issue and both factions claim ownership of the church's property. These cases pose serious difficulties for courts, because they raise concerns of judicial intrusion on the rights of the members of the religious organizations to define their own identity. Courts have differed with regard

to the appropriate standard to apply when called on to resolve such disputes.

The U.S. Supreme Court first addressed the question of the role of courts in resolving such property disputes in *Watson v. Jones* (1872). The *Watson* case arose when the Walnut Street Presbyterian Church in Louisville, Kentucky, divided over its denomination's position on slavery. Both the proslavery and the anti-slavery factions claimed exclusive use of the church property. Litigation ensued, eventually reaching the U.S. Supreme Court. The Court in *Watson* articulated several principles that would have a significant impact on subsequent jurisprudence pertaining to the judicial resolution of church property disputes. First, the Court concluded that if the property in question had been given to the church with the *express* condition that the property be "devoted to the teaching, support, or spread of some specific form of religious doctrine or belief," then "it will be the duty of the court in such cases...to inquire whether the party accused of violating the trust is holding or teaching a different doctrine, or using a form of worship which is so far variant as to defeat the declared objects of the trust." In most cases, however, there is not an express trust in place; absent such a trust, the Court concluded that civil courts should not resolve the question whether there had been a departure from the doctrinal position of the original donor.

In taking this position, the Court rejected the English implied trust doctrine pursuant to which church property was deemed to be held in trust for the propagation of the particular religious doctrines of the church's founders. Under this implied trust doctrine, civil courts, when called on, had the responsibility to determine which group of contemporary church members maintained fidelity to those original religious doctrines—even if the founders had not expressly required such fidelity. The Court in *Watson* rejected this view that members of a church are impliedly bound to conform to the doctrines adhered to by the church founders and that civil courts must enforce that obligation—and that civil courts should determine whether there has been a substantial departure from such prior doctrines adhered to by the church.

The Court in *Watson* further held that absent an express condition, a civil court asked to resolve a church property dispute should examine the polity structure of the church in question. If the church has adopted a congregational polity, pursuant to which each local church independently governs its own affairs, then the conflict should be resolved in accordance with the principles that govern voluntary associations, such as majority rule. In such a case, therefore, the court should simply defer to the judgment of the majority, rejecting arguments that the

majority has departed from the "true" doctrine of the church. On the other hand, if the church in question has adopted a hierarchical polity, as was the case with the Presbyterian Church, pursuant to which each local church is subordinate to a broader church structure, then the civil court must defer to the position taken by the church hierarchy. In sum, the Court in *Watson* concluded that civil courts should resolve church property disputes by deferring to the judgment of the highest appropriate authority in the church structure—which will vary depending on whether the church has adopted a congregational or a hierarchical polity.

The effect of the *Watson* decision was to limit the role of civil courts in the resolution of church property disputes. Although the *Watson* decision technically applied only to federal courts, the dictates of the decision were widely followed by state courts confronted with similar disputes. Moreover, although the *Watson* Court did not specifically consider the First Amendment, the Court in subsequent cases—in particular *Kedroff v. St. Nicholas Cathedral* (1952) and *Kreshik v. St. Nicholas Cathedral* (1960)—made clear that the First Amendment imposed limitations on the ability of civil courts to resolve ecclesiastical disputes that involve an interpretation of church doctrine.

The Supreme Court has continued to rely on the framework established in *Watson*, although in recent years, the Court has further clarified the proper role of civil courts in adjudicating disputes involving church property. First, in *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church* (1969), the Court affirmed the principle articulated in *Watson* that civil courts should avoid resolving doctrinal disagreements when adjudicating disputes over church property, noting that "the First Amendment forbids civil courts from playing such a role." In the *Blue Hull* case, two local churches in the Presbyterian Church in the United States had sought to leave that denomination and take their church property with them. A state court in Georgia had awarded the local churches the property on the grounds that the national denomination, in the view of the court, had departed from the traditional doctrines of the Presbyterian Church. The Supreme Court reversed, concluding that a civil court could not resolve doctrinal matters without infringing the religion clauses of the First Amendment. However, the Court did state, without elaborating, that a civil court could resolve religious property disputes if it could do so with reference to "neutral principles of law." A few years later, though, in *Serbian Eastern Orthodox Diocese v. Milivojevic* (1976), the Court continued to use the deference approach articulated in *Watson*.

But in *Jones v. Wolf* (1979), the Court elaborated on the “neutral principles” approach mentioned in *Blue Hull*. *Jones* involved yet another schism in a local Presbyterian church and a dispute over which faction should possess the church property. In *Jones*, the Court held that although civil courts could continue to defer to the church hierarchy when resolving church disputes consistent with *Watson*, they were also free to resolve these types of disputes by reference to the “neutral principles of law” approach articulated in *Blue Hull*. Under this neutral principles approach, civil courts could examine deed language, state statutes governing church property, and terms in local church charters and general church constitutions as a means of resolving property disputes. The Court explained: “In undertaking such an examination, a civil court must take special care to scrutinize the document in purely secular terms, and not rely on religious precepts...[If] interpretation of the instruments of ownership would require the civil court to resolve a religious controversy, then the court must defer to the resolution of the doctrinal issue by the authoritative ecclesiastical body.” The four dissenters in *Jones* urged that the Court to retain the view first articulated in *Watson* that civil courts should defer to the judgment of the church hierarchy when called on to resolve church property disputes.

In the aftermath of *Jones*, civil courts resolving disputes over church property need not defer to the decisions of church authorities if the court can rely instead on authoritative documents that the court can interpret without having to make a religious judgment. In the wake of *Jones*, lower state and federal courts have adopted various approaches to the problem of church property disputes. Some courts continue to follow the deference principle first articulated in *Watson*, giving deference to the view of the highest appropriate authority in the church. Other courts have followed the neutral principles test developed in *Jones* and have sought to resolve property disputes by interpreting relevant documents in accord with general principles of property and trust law, so long as such interpretations do not require a religious judgment. After the *Jones* decision, either approach is acceptable under the First Amendment.

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References and Further Reading

- Gerstenblith, Patty, *Civil Court Resolution of Property Disputes Among Religious Organizations*, American University Law Review 39 (1990): 513–572.
Greenawalt, Kent, *Hands Off! Civil Court Involvement in Conflicts Over Religious Property*, Columbia Law Review 98 (1998): 1843.

Montgomery, Sarah M., *Drawing the Line: The Civil Courts’ Resolution of Church Property Disputes, The Established Church, and All Saints’ Episcopal Church*, *Waccamaw*, South Carolina Law Review 54 (2002): 203.

Cases and Statutes Cited

- Jones v. Wolf*, 443 U.S. 595 (1979)
Kedroff v. St. Nicholas Cathedral, 344 U.S. 94 (1952)
Kreshik v. St. Nicholas Cathedral, 363 U.S. 190 (1960)
Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440 (1969)
Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976)
Watson v. Jones, 80 U.S. 679 (1872)

JUDICIAL REVIEW

Judicial review in the United States is generally understood to be the authority of a court to review legislative enactments and actions by governmental officials, and, if they are inconsistent with the constitution, to invalidate the challenged acts. A key factor that undergirds the notion of judicial review is acceptance of a hierarchy of laws and that those on the lower rungs must not conflict with those on the higher ones. Higher laws will always prevail over lower ones, and the Constitution is the highest law in the land.

Judicial review is typically regarded as an innovation in political institutions that had its origins in the United States, but there are earlier examples elsewhere of higher tiered laws gaining recognition as constraining monarchs and parliaments. English Lord Chief Justice Coke, speaking in *Dr. Bonham’s Case* in 1610, is frequently cited for his statement that “when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it and adjudge such Act to be void.” Judges and the judicially crafted common law or the higher law of right and reason could control acts of the legislature. Sweden in the seventeenth century may not have asserted that judges could police constitutional infringements, but the fundamental law or constitution was seen as holding a place above all other laws, everlasting and unchangeable.

Judicial Review in the United States

Judicial review cannot be found explicitly mentioned in the U.S. Constitution, but there is ample evidence

that the authors of the Constitution understood and assumed its place. There are multiple allusions to such judicial authority recorded in the constitutional debates, but one example demonstrates the assumptions of the Framers. When a proposed Council of Revision that could revise unwise laws passed by Congress was debated, Elbridge Gerry argued that the judiciary should not be represented on the council since, as Max Farrand quotes in *The Records of the Federal Convention of 1787*, the judiciary “will have a sufficient check against encroachments on their own department by their exposition of the Laws, which involved a power of deciding on the constitutionality.” The Council of Revision did not survive into the final constitutional text, but the expectation that the courts had the authority to police constitutional violations was clearly recognized. That understanding was echoed by the authors of the *Federalist Papers*. In *Federalist No. 78*, Alexander Hamilton unambiguously asserts that “no legislative act, therefore, contrary to the Constitution, can be valid,” and discusses the rights of the courts to pronounce such legislative acts void.

Judicial review was, in other words, presumed to be a feature of the Constitution. It was not, however, asserted for the purpose of invalidating an act of Congress until 1803 in the famous case of *Marbury v. Madison*. William Marbury, who was a Federalist Party appointee to a newly created justice of the peace court in Washington, D.C., did not receive his commission before the Federalist Party turned over power to the Jeffersonian-Republicans after the election of 1800. He sued under the original jurisdiction of the U.S. Supreme Court for a writ of *mandamus* to order the new Secretary of State James Madison to deliver the commission to him. Marbury’s suit for the writ was filed in the Supreme Court, because Section 13 of the Judiciary Act of 1789 provided that the Court could issue such a writ under its original jurisdiction. Without belaboring the technicalities that led Chief Justice John Marshall to deny Marbury the writ, the Chief Justice declared Section 13 of the Judiciary Act of 1789 unconstitutional and therefore invalid. Mr. Justice Marshall’s *tour de force* opinion declared that Constitution was a “superior paramount law, unchangeable by ordinary means” and that “a legislative act contrary to the constitution is not law.” The supremacy clause in Article VI of the Constitution clearly supported that position. The trickier question revolved around who had the power to make that determination, but Chief Justice Marshall boldly declared the “it is emphatically the province and duty of the judicial department to say what the law is If two laws conflict with each other, the courts must decide on the operation of each.” Thus, *Marbury*

v. Madison became the first instance in which judicial review was used in the United States to invalidate an action of Congress.

Marshall’s assertion of the power of judicial review was not universally accepted. A dissenting opinion by Justice John Bannister Gibson of the Pennsylvania Supreme Court in *Eakin v. Raub* is usually cited as embodying the major arguments against judicial review. Gibson argued that the judicial branch’s power to review legislation is restricted solely to the form of enactment, because the legislative branch represents the sovereign people and holds the power to construe the constitution and to determine the constitutionality of its own enactments. The legislature can be held accountable by the real sovereign, the people, at the ballot box and through public opinion. Should it act wrongly, its errors can be corrected by the public’s insistence on repeal of the offending law. The judiciary is subject to no such remedy, and “the judiciary is not infallible.”

The Supreme Court did not declare another congressional enactment unconstitutional until 1857, in *Dred Scott v. Sandford*. Scott was a Missouri slave who had accompanied his owner to military posts in Illinois and other federal territories north of the line demarcating slave from nonslave states, and, therefore, alleged that his presence in free states released him from slavery. In a highly controversial decision, both then and now, Chief Justice Roger Taney wrote for the seven-justice majority. He denied that Scott had standing to sue because he was Negro and a slave and, subsequently, not a citizen. Taney further declared the Missouri Compromise unconstitutional. Many observers claim that this decision hastened the onset of the Civil War, and it was overturned only after that war by the Thirteenth Amendment that abolished slavery.

The Supreme Court’s exercise of judicial review has been more sparse in some eras than in others and has not yet reached 175 congressional laws. In some time periods, the Court’s actions have been more controversial than in others. For example, the Court annulled some forty-seven U.S. statutes between 1874 and 1930, but these did not typically touch on topics that gave rise to significant political ire. However, in the first years of the Hughes Court (1930–1940) a handful of laws central to President Franklin Roosevelt’s New Deal were invalidated, and there was a hue and cry about undemocratic judges, “nine old men,” blocking the will of the majority. Indeed, the President called for saving “the Constitution from the Court.” The President proposed to alter the composition of the Court through a “court-packing” plan, whereby he would be allowed to appoint one additional justice for each justice

seventy years of age or older, which would have increased the Court from nine justices to fifteen. The “court-packing” plan never was realized, but a majority of the Court began to view New Deal legislation favorably.

The Warren Court (1953–1969) was highly controversial because of its invalidation of laws on racial segregation, the rights of the criminally accused and church and state relations, but most of those involved state laws. In its fourteen years, the Warren Court overruled only twenty-five federal laws, but 150 state ones. The more moderate Burger Court declared far more congressional enactments unconstitutional (thirty-four) and almost 200 state laws. The Rehnquist Court (1986–present) through the end of 2003 had invalidated more than thirty federal laws and a much smaller number of state ones. In the more recent years of the Rehnquist Court, many of the federal laws that were struck down involved, according to a majority of the Court, encroachments into the sovereign immunity of the states protected by the Eleventh Amendment. Little political reaction followed.

Although judicial exercise of judicial review remains controversial in the United States, it is accepted as a reality. Lawyers, politicians, and scholars complain of judicial activists who fail to show proper deference to the democratically elected legislative branch, when programs they favor fall victim to judicial review. The labels of judicial activism and judicial restraint were created to describe the proper role of judges in their relationship with the other branches of government, but now have become laden with ideology. Champions of judicial review cite the importance of an unelected body to uphold the law, particularly when protecting the rights of minorities. Detractors refer to judges who impose their will over that of Congress as super-legislators. The debate will continue, undoubtedly, although its contours will alter as different issues are adjudicated before the nation’s highest court.

Judicial Review Abroad

Despite the debates that the exercise of judicial review breeds in the United States, it has been widely imitated abroad. The form and substance has varied dramatically, though, as the practice has been transplanted elsewhere. For example, another form of judicial review has emerged in Great Britain since the middle of the twentieth century, one that is quite different from understandings in the United States. “Judicial review” in the British context refers to a

review by courts of the legality, not the constitutionality, of a decision by an administrative authority rather than a legislative enactment. It is a review, not an appeal, and does not extend to a decision on the merits of the complaint. It is a check on the executive rather than on the legislature.

What Americans call judicial review is more commonly known as constitutional review, particularly in Europe. Constitutional review was largely rejected on the European Continent until after World War II, because it was considered to interfere with parliamentary sovereignty. The exception was a brief experiment in Austria before the German occupation in the early twentieth century. The Austrian form of review was designed by jurisprudential scholar Hans Kelsen and involved what he called “centralized judicial review.” Kelsen saw the U.S. system of judicial review as a decentralized system, whereby any court could find a law unconstitutional even though the Supreme Court has the final say. Kelsen devised a system whereby a constitutional court was created separate from the rest of the judiciary. When a question of an unconstitutional law arose in the course of deciding a case, the court hearing the controversy would refer the question to the constitutional court for a definitive answer as to the constitutionality of the law or the proper interpretation of the constitution. After World War II, variations on Kelsen’s constitutional court were introduced in Germany and Italy and later in the European Union’s Court of Justice and in Spain.

Another variation was introduced in France in the 1958 Constitution of the Fifth Republic. A Constitutional Council, staffed by politicians rather than lawyers or judges, resides within Parliament. Once a law has passed, both chambers of the French Parliament, certain office-holders, or a percentage of members of either chamber can refer the law in question to the Constitutional Council for a determination of constitutionality *before* it is enacted into law. The Council has emerged as a tool of the parliamentary opposition but preserves at least a veneer of parliamentary sovereignty. Once a law has been duly enacted and signed by the President of the Republic, it cannot be declared unconstitutional.

Judicial institutions to review the constitutionality of laws that are more like the U.S. Supreme Court have been created in Japan, Portugal, and some of the new democracies of Central Europe and in a number of Latin American countries.

Although judicial/constitutional review will continue to be a controversial institution in democratic systems, many nations have obviously come to accept that democratically elected legislators need the check that it provides, particularly to protect minorities or

unpopular positions. Judges exercising judicial review maintain the integrity of a hierarchy of laws, in which the constitution rates above normal laws and lend a permanence to constitutional structures; they check not only the legislature but also executives.

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References and Further Reading

- Abraham, Henry J. *The Judiciary: The Supreme Court in the Governmental Process*. New York: New York University Press, 1996.
- O'Brien, David M. *Constitutional Law and Politics: Struggles for Power and Governmental Accountability*. New York: W.W. Norton & Company, 2003.
- Jackson, Donald W., and C. Neal Tate, (eds. *Comparative Judicial Review and Public Policy*. Westport, CT: Greenwood Press, 1992.
- Schwartz, Bernard. *A History of the Supreme Court*. New York: Oxford University Press, 1993.

Cases and Statutes Cited

- Dred Scott v. Sandford*, 60 U.S. 393 (1857)
- Dr. Bonham's Case*, 8 Co. Rep 114a, at 118 (1610)
- Eakin v. Raub*, 12 Sargeant & Rawle 330 (PA. 1825)
- Marbury v. Madison*, 5 U.S. 137 (1803)

JUREK V. TEXAS, 428 U.S. 262 (1976)

Jurek v. Texas supplemented the Court's decision in *Gregg v. Georgia*, 428 U.S. 153 (1976), by holding that statutory aggravating and mitigating factors were not required for a state's capital punishment scheme to be constitutional. A jury convicted Jurek of murder and sentenced him to death. The Court of Criminal Appeals of Texas affirmed the death sentence.

In upholding the constitutionality of the death penalty in *Gregg*, the Court approved of Georgia's statutory scheme, which provided aggravating and mitigating factors for the jury to consider. In *Jurek*, Justice Stevens found that Texas' legislative scheme was equally sufficient to guard against the arbitrary and capricious application of the death penalty. Because Texas provided a narrowed definition of capital murder, Justice Stevens said that Texas effectively required at least one aggravating circumstance to exist before a death sentence could be considered. Once in a sentencing hearing, the jury was required to answer three specific questions, one of which, according to Justice Stevens, allowed the jury to consider any and all mitigating circumstances. Therefore, Texas' death penalty statute appropriately focused the sentencing jury on the particularized circumstances of the individual offense and the individual offender.

The *Jurek* Court's approval of Texas' capital punishment scheme expanded on *Gregg* and provided further guidance for other states to follow in drafting or amending their death penalty statutes.

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Cases and Statutes Cited

Gregg v. Georgia, 428 U.S. 153 (1976)

See also **Capital Punishment; Capital Punishment and the Equal Protection Clause Cases; Capital Punishment Reversed; Capital Punishment: Due Process Limits; Capital Punishment: Eighth Amendment Limits; Capital Punishment: History and Politics**

JURISDICTION OF THE FEDERAL COURTS

Constitutional and Congressional Limitations on Federal Court Jurisdiction

A court's "subject matter jurisdiction" is its power (and duty) to adjudicate a case: without jurisdiction, the court lacks power to proceed, and whenever a defect in its subject matter jurisdiction is discovered, the court must dismiss the case without reaching the merits. Unlike state courts of first instance, which typically possess general jurisdiction over any case that comes before them, Article III of the Constitution and the federal statutes that implement it both strictly limit the subject matter jurisdiction of the federal courts. Thus, no federal court has jurisdiction over a case unless it falls within Article III's list of the kinds of "cases and controversies" that comprise the judicial power of the United States *and* Congress has enabled the constitutional provision by granting the court statutory jurisdiction over the case. From this it follows, as the Court held in *Marbury v. Madison*, (1803), that Congress may not expand the jurisdiction of the federal courts beyond the limits of Article III. As for the lower federal courts (district courts and courts of appeal), Article III has been interpreted to give Congress the power both to "ordain and establish" them and to control the kinds of cases that they can hear (*Sheldon v. Sill*, 1850). And although Article III directly establishes the institution of the Supreme Court and grants it original jurisdiction over certain narrow types of disputes, that article also gives Congress the power to make "exceptions" to, and provide "regulations" for, the Court's appellate jurisdiction. The Supreme Court has interpreted the latter

language as authorizing Congress to define its appellate jurisdiction by statute. Hence, the Supreme Court will have appellate jurisdiction only if the case before it falls within Article III *and* Congress has granted it jurisdiction by statute (*Ex parte McCordle*, 1869).

All of this seems to leave the federal courts' jurisdiction vulnerable to Congressional abridgement for political reasons and has led to the introduction of literally scores of bills in Congress over the past fifty years seeking to restrict access to the Supreme Court and/or to the lower federal courts in such politically controversial areas as subversive activities, legislative apportionment, school busing, school prayer, abortion rights, and gay marriage. Although none of these bills has yet become law, there is an extensive debate in academic and political circles about the limits, if any, on Congress' power to strip the federal courts of jurisdiction over cases involving the assertion of federal constitutional rights. At a minimum it is generally agreed that Congress lacks the power to give the federal courts jurisdiction to decide a case according to an unconstitutional rule of decision (*United States v. Klein*, 1871), especially if the rule of decision unconstitutionally impinges on the judicial power itself (*Plaut v. Spendthrift Farm, Inc.*, 1995). Nor may Congress exercise its power to control federal court jurisdiction to deny aggrieved persons at least *some* access to courts (whether federal or state) for the assertion of their constitutional claims. And although Congress can and has given jurisdiction over certain cases falling within Article III to administrative agencies and legislative courts such as military tribunals, this power is limited and seems to require, at a minimum, that a duly constituted Article III court have jurisdiction to conduct judicial review of these entities' decisions (*Northern Pipeline Construction Co. v. Marathon Pipe Line*, 1982). Finally, Article III's use of the practically synonymous terms "case" and "controversy" has been read to deny the federal courts the power to issue advisory opinions (*Flast v. Cohen*, 1968) and to require the adoption of the doctrines of standing, ripeness, and mootness to assure the existence of a concrete and live dispute—a "case"—between the parties (see Ripeness in Free Speech Cases, Standing in Free Speech Cases).

Jurisdiction of the Federal District Courts

The federal district courts are the courts of first instance (trial courts) in the federal judicial system. Much of their original jurisdiction derives from §1332 of the Judicial Code (28 U.S.C.), which deals with Article III's categories of controversies between

citizens of different states and between a citizen of a state and foreign citizens or subjects (diversity jurisdiction). The "general federal question" jurisdiction of §1331 is far more important in the context of civil rights enforcement, however. Although §1343 specifically grants the district courts original jurisdiction over civil actions to enforce the substantive provisions of certain federal civil rights statutes, jurisdiction over these types of cases is also given by §1331, a fact that renders the former section essentially superfluous. Closely tracking the language of Article III, §1331 provides that "the district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States," without regard for the amount in controversy. In federal question cases the district courts also have supplemental jurisdiction (under §1367) over closely related claims based on state law. The general federal question jurisdiction provided by §1331 is not exclusive, which means that most civil rights plaintiffs can choose to file their claims either in federal court or in state court. On the other hand, claims brought in state court that fall within the district court's original jurisdiction, including claims brought under 42 U.S.C. §1983, are subject to Removal to Federal Court at the instance of the defendant. The district courts also have jurisdiction under §2241 over petitions for habeas corpus filed by prisoners held in custody in violation of the Constitution or laws of the United States, including prisoners detained by executive order and prisoners held pursuant to a judgment of conviction by a state court (§2254). A full description of this important heading of district court jurisdiction over claims for the deprivation of civil rights can be found in *Habeas Corpus: Modern History*.

There are many limitations on the district courts' federal question jurisdiction. To mention only a few of the most important ones: (1) §1331 itself creates no substantive claims but only provides jurisdiction for claims that have been created elsewhere, whether by statute, by treaty, by federal common law, or by Implied Rights derived from the Constitution itself, as in *Bivens v. Six Unknown Named Agents* (1971); (2) original federal question jurisdiction is subject to the "well-pleaded complaint rule," *Louisville & Nashville R.R. Co. v. Mottley*, (1908), which requires that the federal question in the case arise as part of the plaintiff's *claim* and not merely by way of an anticipated defense to a state law claim; (3) the Anti-Injunction Act (§2283) prohibits federal courts from enjoining pending state court proceedings except in certain narrow circumstances; (4) several prudential (judge-made) rules require a federal district court with jurisdiction to abstain from exercising it, either because state law is unsettled and should be clarified

before being attacked on federal grounds, *Railroad Commission of Texas v. Pullman Co.*, (1941), or because the federal plaintiff is seeking to interfere in an ongoing state criminal proceeding conducted in good faith, *Younger v. Harris*, (1971), or because the court deems it prudent to defer to parallel state court proceedings, *Colorado River Water Conservation District v. United States*, (1976); (5) the “political question doctrine” requires the federal courts to defer to Congress or the President if a particular constitutional question is committed by the text of the Constitution to another branch of government or if the courts lack judicially discoverable standards for resolving the question, *Baker v. Carr*, (1962); and (6) the Eleventh Amendment to the Constitution has been interpreted to deny the federal courts jurisdiction over suits for damages brought by individuals against a state or state agency, unless the state has given its consent or Congress has effectively abrogated the state’s constitutional immunity.

Although 42 U.S.C. §1983 does not authorize suits against states or state agencies, it does permit civil rights claimants to seek damages in federal (or state) court against local governments and state and local officials in their “personal” capacity on account of their violations of constitutional rights. However, actual recovery of damages is often impeded by the defendant’s imposition of various doctrines of “official immunity” (see *Harlow v. Fitzgerald* [1982]). As for suits seeking purely prospective relief (including injunctions) against ongoing or future unconstitutional actions by the states, the *Ex parte Young*, (1908) doctrine avoids the bar of the Eleventh Amendment by allowing the plaintiff to sue the appropriate state official by name, in his “official” capacity. Because the United States also enjoys sovereign immunity to the extent that it has not been waived, the same rule applies to suits seeking injunctions or mandamus (§1361) against federal officials: the plaintiff is allowed to sue the federal official responsible for the allegedly unconstitutional federal practice by name, thus avoiding the bar of federal sovereign immunity (*Shields v. Utah Idaho Central R.R.*, 1938). Moreover, in 1976, Congress amended 5 U.S.C. §702 of the Administrative Procedure Act to waive the sovereign immunity of the United States in any federal court action seeking an injunction against an “agency” of the United States. And in the Federal Tort Claims Act (FTCA) the United States also waives its immunity for suits seeking damages against it for certain torts committed by federal employees, including some civil rights violations, although liability is subject to the many exceptions listed in §2680; exclusive jurisdiction over cases brought under the FTCA is granted to the district courts by §1346(b).

Jurisdiction of the Supreme Court and Courts of Appeal

The Supreme Court has discretionary jurisdiction under §1257 to review, by writ of *certiorari*, any final judgment rendered by the highest court of a state in which judgment may be had (usually the state’s supreme court), but only to the extent that there is a dispositive federal question in the case. Generally speaking, the Court has no power to review state court decisions that only concern questions of state law (*Murdock v. City of Memphis*, 1875). Among other things, this means that state supreme courts are free to give broader protections to civil rights under their state constitutions than the Supreme Court has afforded under the federal Constitution, and so long as the state court makes it clear that its interpretation of state law does not rely on federal law, the Supreme Court is powerless to review (*Michigan v. Long*, 1983).

Within the system of federal courts, §1291 gives twelve of the thirteen current courts of appeal jurisdiction to review appeals from the final decisions of the district courts that are located within their respective geographical areas. Appeals before judgment (“interlocutory appeals”) are permitted only in certain narrow circumstances, such as the grant or denial of an injunction (§1292). The jurisdiction of the nonspecialized courts of appeal (the First through Eleventh Circuits, plus the D.C. Circuit) is limited by §1295, which gives the specialized Court of Appeal for the Federal Circuit exclusive jurisdiction to review the final decisions of the district courts in patent cases and in cases in which the United States is a party, and by §§2284 and 1253, which allow an appeal directly to the Supreme Court of any decision by a three-judge district court granting or denying an injunction in a legislative apportionment case. Cases in the courts of appeal are subject to discretionary review in the Supreme Court, pursuant to §1254, by petition for *certiorari* by any party, either before or after the rendition of judgment. The procedures and time limits for these various modes of seeking appellate review are specified in the Federal Rules of Appellate Procedure and in the Rules of the Supreme Court of the United States.

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References and Further Reading

- Fallon, Richard H., Daniel J. Meltzer, and David Shapiro. *Hart and Wechsler’s The Federal Courts and the Federal System*. 5th Ed. New York: Foundation Press, 2003.
- Hart, Henry M., *The Power of Congress to Limit the Jurisdiction of the Federal Courts: An Exercise in Dialectic*, Harvard Law Review 8 (1953): 1362:1362–1402.

Irmas, Sydney, and Erwin Chemerinsky. *Federal Jurisdiction*. 4th Ed. Boulder: Aspen Publishing, 2003.
 Wright, Charles A., and Mary Kay Kane. *Law of Federal Courts*. 6th Ed. St. Paul: West Group, 2002.

Cases and Statutes Cited

Baker v. Carr, 369 U.S. 186 (1962)
Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971)
Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976)
Flast v. Cohen, 392 U.S. 83 (1968)
Harlow v. Fitzgerald, 457 U.S. 800 (1982)
Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149 (1908)
Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)
Ex parte McCordle, 74 U.S. (7 Wall.) 506 (1869)
Michigan v. Long, 463 U.S. 1032 (1983)
Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590 (1875)
Northern Pipeline Construction Co. v. Marathon Pipe Line, 458 U.S. 50 (1982)
Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995)
Railroad Commission of Texas v. Pullman Co., 312 U.S. 496 (1941)
Sheldon v. Sill, 49 U.S. (8 How.) 441 (1850)
Shields v. Utah Idaho Central R.R., 305 U.S. 177 (1938)
United States v. Klein, 80 U.S. (13 Wall.) 128 (1871)
Ex parte Young, 209 U.S. 123 (1908)
Younger v. Harris, 401 U.S. 37 (1971)
 United States Constitution: Art. III; Eleventh Amendment
 5 U.S.C.: §702
 28 U.S.C.: §§1253; 1254; 1257; 1291; 1292; 1331; 1332; 1343; 1346; 1361; 1367; 2241; 2254; 2283; 2284; 2680
 42 U.S.C.: §1983

See also **Civil Rights Act of 1866; Civil Rights Act of 1875; Habeas Corpus: Modern History; Implied Rights; Judicial Review; Removal to Federal Court; Ripeness in Free Speech Cases; Standing in Free Speech Cases**

JURY NULLIFICATION

In essence, “jury nullification” implies the power to disregard the law and acquit a presumably guilty defendant. However, the term is something of a misnomer in the sense that juries do not actually “nullify” anything—especially not the law itself; what juries actually do, when what we refer to as “jury nullification” takes place, is exercise the discretion granted to them and refuse to *apply* the law to the defendant. The power to deliberately not extend the law to cover a situation where it technically applies is both highly controversial (in that it appears to flout our abiding legal principles) and enormously consequential (in that acquittals are final—because of the double jeopardy clause, the state may not bring charges a second time for the same offense).

The roots supporting the power to nullify run deep into the colonial era in this country and back to the

early 1600s in England. At this time, juries were asked to both determine the facts of the case *and* to define the law as they deemed fit. Such role expectations were predicated on deeply populist assumptions, placing considerable power in the hands of citizens and thus allowing the people to maintain a check on the power of the government by perhaps acquitting even those who had technically violated the law. And, significantly—then and now—jurors could not *themselves* be prosecuted for acquitting “guilty” defendants, a doctrine that can be traced back to the trial in England against William Penn for preaching a Quaker sermon.

Perhaps the most noted historical example of jury nullification was the trial of John Peter Zenger in colonial New York. The essence of the story is that Governor William Cosby of New York had suspended the chief justice for political reasons and then replaced him with an ally whose strings he could pull from the executive mansion. This event, among many others, drew the attention of the people and those journalists willing to risk prosecution for seditious libel for criticizing an elected official. Zenger, the editor of the *New York Weekly Journal*, lambasted Cosby in his newspaper, and Cosby’s appointment to the court tried twice to convince a grand jury to indict Zenger for libel, but failed both times. Eventually, Cosby simply had Zenger arrested and the trial began. Zenger’s counsel, the noted Philadelphia attorney, Andrew Hamilton, conceded that the *facts* were not in question; Zenger admitted to publishing the material and was, therefore, technically “guilty” of libel in that the criticism did bring disrepute on Cosby. But Hamilton desired to demonstrate to the jury that the published claims were, in fact, *true* and should not thus be considered “libelous.” However, he was not allowed by the judge to introduce such evidence and so in the end he openly appealed to the jury to scrutinize the nature and implications of such a libel standard and, more importantly, the gross abuse of power exhibited by the governor and to then provide redress for Zenger. In finding Zenger not guilty, the jury set an important precedent for the power of the jury to send a message in such circumstances.

From the discussion of the theoretical basis and historical origins of jury nullification, it is important to also contemplate more modern examples—especially as issues of race have affected nullification tendencies. The Civil Rights Movement, for example, was fueled in large part by the consistent acquittals (by all white juries) in state criminal courts in the American South in the early 1960s. In examples ranging from rape to assault to murder, juries seemed reluctant to *apply* the law to defendants they knew to be guilty—as an effort, it seems, to maintain a

particular social order and resist the unwanted federal presence and intervention by outsiders. Race also figured prominently in the trial of O. J. Simpson in 1995, in which a majority black jury found the defendant “not guilty,” leading to allegations of nullification by experts and members (primarily *white* members) of the general public. Perhaps the jury was sending a message to the Los Angeles Police Department with its verdict; or perhaps the prosecutors simply failed to prove their case “beyond a reasonable doubt”—and thus the jury was faithfully doing its job.

Indeed, the Simpson verdict portrays the mystery that still attaches to the practice of jury nullification, because other than postverdict interviews, books, or perhaps documentaries or studies conducted *during* the deliberative process, the public does not necessarily know *why* a jury returns the verdict it does. And thus, particularly in hot-button cases that receive extensive pretrial attention—where, for example, it seems that the verdict has already been rendered in (and perhaps *by*) the media—it is often difficult to understand why or how a jury came to its announced conclusion, whether it understood and accepted various facts, or whether it respected or dismissed the law as stated by the judge. The jury might have arrived at a result that strikes most people as egregiously wrong, but this does not necessarily imply that the jury engaged in “nullification.” The jury might simply have gotten it “wrong”; for “nullification” to have occurred, there would have to be a deliberate *intent* to disregard the law in the case at hand—and that is quite difficult to demonstrate.

For this reason it is difficult to gather data as to the prevalence of jury nullification. Evidence does suggest that certain urban areas (for example, the Bronx, Detroit, Washington, D.C.) have higher acquittal rates—especially for certain offenders—but the multitude of variables and the key missing information (justification from the jury itself) make it difficult to infer that some communities are more or less inclined to “nullify” than others. Questions regarding the frequency of this practice are at the heart of the active debate in the criminal justice community as to whether or not jurors should be made aware of their discretion in this regard. Members of the jury might know this from crime novels or TV shows, but should the system itself apprise them of this power? On this question, the jury is still out.

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References and Further Reading

Butler, Paul., *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, Yale Law Journal 105 (1995): 677.

Conrad, Clay. *Jury Nullification: The Evolution of a Doctrine*. Durham: Duke University Press, 1998.

Horowitz, Irwin, and Thomas E., Willging. *Changing Views of Jury Power: The Nullification Debate, 1787–1988*, Law and Human Behavior 15 (1991): 167.

Marder, Nancy, *Deliberations and Disclosures: A Study of Post-Verdict Interviews of Jurors*, Iowa Law Review 82 (1997): 480.

Cases and Statutes Cited

The People of the State of California v. Orenthal James Simpson (1995)

See also Jury Nullification and Capital Punishment; Jury Trial; Jury Trial Right; Jury Trials and Race; Zenger Trial (1735)

JURY NULLIFICATION IN CAPITAL PUNISHMENT

Through jury nullification, the jury chooses to ignore the law as provided by the judge, and instead returns a verdict based on its sense of justice. This practice is infrequent, and although courts refuse to endorse nullification, they nonetheless recognize the jury’s power to do so. Reasons for nullification, which has roots in early England and America, are moral and religious considerations, preventing an unjust exercise of official power, and perceived unfairness of the law. Opponents argue that it is lawless and anarchic conduct, a violation of juror oaths to follow the law, allows the jury to apply their own notions of the law (quasilegislative function), and are based on out-of-court considerations like sympathy and prejudice.

In a capital case, the jury, after first assessing guilt in the trial phase, next moves to the penalty phase of the trial; where they weigh both “aggravating” and “mitigating” factors in determining whether the death penalty or life imprisonment is appropriate. Aggravating factors may include heinousness of the crime and prior record, whereas mitigating factors might address childhood exposure to physical abuse or parental alcoholism and drug addiction.

A capital jury, notwithstanding a preponderance of aggravating factors, may decide that life imprisonment is appropriate. Media depictions of the wrongfully convicted/incarcerated may persuade the jury to err on the side of caution. Recognition that other Western societies prohibit capital punishment may play a role. Defense counsel’s successfully “humanizing” the defendant may be an explanation. These and other considerations, known only to the jury, may account for why an abundance of “aggravating”

factors, consistent with imposition of the death penalty, will nonetheless be ignored (nullified) by the jury.

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References and Further Reading

- Clark, Sherman J., *The Courage of Our Convictions*, Michigan Law Review 8 (1999): 97: 2381–2447.
- Conrad, Clay, *Jury Nullification the Evolution of a Doctrine*. Durham: Carolina Academic Press, 1999.
- Haynie, Erick J., *Populism, Free Speech, and the Rule of Law: The Fully Informed Jury Movement and its Implications*, Journal of Criminal Law and Criminology 11 (1997): 1: 343–379.
- Nadler, Janice, *Flouting the Law*, Texas Law Review 83 (2005): 5: 1399–1441.
- Pepper, David A., *Nullifying History: Modern-Day Misuse of the Right to Decide the Law*, Case Western Reserve Law Review 50 (2000): 3 :599–644

See also **Capital Punishment; Gregg v. Georgia, 428 U.S. 153 (1976); Jury Trials and Race**

JURY SELECTION AND *VOIR DIRE*

Juries are at the foundation of the American justice system. The U.S. Constitution's Sixth Amendment, applicable to the states since the 1968 case *Duncan v. Louisiana*, guarantees criminal defendants the right to be tried by an impartial jury drawn from a fair cross-section of the community. The Fifth and Fourteenth Amendments' due process clauses are understood to similarly guarantee an impartial jury for civil litigants. The Fourteenth Amendment's equal protection clause also grants prospective jurors the right not to be excluded from a jury on account of race or gender. State constitutions provide similar guarantees.

How then are the people who serve on juries chosen? Generally, government officials create a source list of names and addresses from publicly available records. Some of these people, usually selected randomly, are sent jury qualification questionnaires to create a list of qualified prospective jurors, sometimes referred to as the jury wheel, who meet statutory requirements such as residency and citizenship. From the list of qualified jurors, prospective jurors, again usually selected randomly, are summoned to the courthouse to form a panel, commonly known as the venire. In *voir dire*, the judge or attorneys question members of the venire regarding their demographics and personal beliefs. The judge may excuse some potential jury members for cause, because of occupation, undue hardship, or because they are perceived as unable to be impartial. The judge may excuse others

based on a party's exercise of a peremptory challenge. The remaining members of the venire will be eligible to serve on the jury, sometimes referred to as the petit jury to distinguish it from a grand jury. Each stage of this process might result in disproportionate inclusion or exclusion of different categories of people, resulting in concerns that minorities, women, and the economically disadvantaged are inadequately represented on today's juries.

Composing the Venire

The Supreme Court in *Thiel v. Southern Pacific Co.* observed that "[t]he American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community." This right to an impartial jury drawn from a cross-section of the community was codified federally by the Jury Selection and Service Act (JSSA).

Originally, jury service was often limited to white men who were property owners or taxpayers. In the landmark case of *Strauder v. West Virginia*, the Supreme Court said that blacks could not be prohibited from serving on juries on account of race. In contrast, however, the Court reached out to note that states could confine jury "selection to males, to freeholders, to citizens, to persons within certain ages, or to persons having educational qualifications."

It was not until 1898 that the first state, Utah, permitted women to serve on a jury. The Supreme Court did not rule until 1975 in *Taylor v. Louisiana* that laws that discriminated against women serving on juries were unconstitutional. Louisiana had prevented women from being called for jury service unless they had affirmatively stated that they wanted to be called for service. The JSSA now expressly provides that no citizen shall be excluded from jury service in United States district courts on account of not only sex but also of race, color, religion, national origin, or economic status.

Before an impartial jury can be selected, prospective jurors must be identified and summoned to the courthouse. The process of forming a venire varies in different jurisdictions. The JSSA governs the process for litigation in federal courts.

Government officials create source lists from databases like voter registration lists, lists of actual voters, telephone books, census lists, or driver license records. Source lists should be both inclusive and representative. Voter registration lists, used federally and in most states, tend to overrepresent the relatively wealthy and underrepresent racial minorities and

women compared with the general population. Some contend that this overrepresentation is desirable, because it is based on excluding those uninterested enough in their government to bother registering to vote. Jurisdictions that are not persuaded by this logic sometimes use additional lists as a supplemental source of names. "Key man" systems have also been used, whereby prominent members of the community choose people they know to appear on the source lists.

Officials then create a master file of names selected from the source list. In federal courts and in most state courts, names are selected randomly. As master files are only created every fourth year, the master file may not remain representative of the community, as represented by the source list, if the community is changing rapidly. Some states update as frequently as every year. Officials then determine whether people on the master file are qualified to be jurors. Federally, this is determined through jury qualification questionnaires, but states may also use personal interviews or the official's personal knowledge.

To qualify for federal jury service, a prospective juror must be a U.S. citizen; eighteen years or older; able to speak, read, and write English; and have no prohibiting mental or physical infirmity. In addition, the prospective juror may not be a convicted felon, or even have a pending felony charge, or work in specified occupations, like the military, police, or firefighters. Prospective jurors who do not wish to serve may request exemptions from jury service on grounds such as undue hardship or extreme inconvenience. States add other criteria, like state or county residency or citizenship, or being of good character or sound judgment. Even the objective criteria may result in the disproportionate exclusion of different groups of people. For example, people who move frequently are less likely to receive questionnaires, and thus less likely to complete them and be selected.

People drawn from the list of qualified prospective jurors, or jury wheel, are summoned to a venire at the courthouse. Federally and in most states, the people selected must be chosen randomly. Prospective jurors are again screened for statutory qualifications. In a criminal trial a defendant may challenge a venire that fails to reflect the community under the Sixth Amendment's fair cross-section provision. Some courts have also adopted the Sixth Amendment procedure for civil trials as well. A party challenging the composition of the venire under the JSSA must show a substantial failure to comply with the Act.

To bring a fair cross-section challenge, the Court said in *Duren v. Missouri* that a defendant must show the systematic exclusion of a "distinctive group" in

the community such that their representation on venires is not "fair and reasonable" in relation to the number of such persons in the community. The state then has the opportunity to show that attaining a fair cross-section of the community is incompatible with a significant state interest.

Alternately a defendant may challenge the composition of a venire against the states under Fourteenth Amendment equal protection grounds and against the federal government as incorporated by the Fifth Amendment's due process clause. The test is similar to the fair cross-section test; however, the defendant must also demonstrate that the underrepresentation of the distinctive group occurred over a significant period of time and resulted from intentional or purposeful discrimination. Underrepresentation of a group on the venire caused by group members' failure to respond to summons or complete questionnaires is inadequate. Discriminatory purpose may be presumed, however, based on the statistical showing of underrepresentation, which shifts the burden to the state to demonstrate that there was either no discriminatory purpose or effect.

A "distinctive group" must be sufficiently numerous and may not be singled out on the basis of an unreasonable classification. Race, color, and gender are obvious distinctive groups, and the Supreme Court has also accepted day laborers as a distinctive group. Social, religious, political, and geographical groups may also be distinct.

Underrepresentation of a distinctive group can be determined in several ways. Absolute disparity is the difference between the percentage of the group in the community and the percentage called to serve. Therefore if women make up fifty percent of the community but only thirty percent of those called to serve, there is an absolute disparity of twenty percent. A more sophisticated but rarely used measure involves statistical decision theory, which determines the likelihood of the underrepresentation occurring by chance. The composition of the community is often determined on the basis of the U.S. census, although these data reflect the community as whole rather than the community eligible to serve as jurors. Some have also argued that minorities are underrepresented in census data.

How much underrepresentation is not "fair and reasonable"? Although there is no absolute rule, some courts have held that a ten percent or greater absolute disparity passes the threshold. The Supreme Court in *Jones v. Georgia* held that a 14.7% absolute disparity was unacceptable. Arguably, a Sixth Amendment claim should require a lower threshold, because there is no requirement that the state harbor a discriminatory purpose.

Voir Dire

Voir dire, meaning “to speak the truth” in French, is the questioning of venire members to determine their fitness to serve on a jury. Courts administer *voir dire* in widely divergent ways. The judge, lawyers, or both may conduct *voir dire*. Proponents of judge-conducted *voir dire* argue that it is more efficient and that attorneys often use *voir dire* for inappropriate purposes, such as ingratiating themselves to a jury or to justify an improper peremptory challenge. Supporters of attorney-conducted *voir dire* note that attorneys will be more familiar with the case and thus better able to establish a prospective juror’s impermissible bias. Occasionally prospective jurors will complete questionnaires intended to speed up the *voir dire* process.

The Supreme Court recognized in *Rosales-Lopez v. United States* that *voir dire* plays a critical function in assuring an impartial jury able to follow the court’s instructions and weigh the evidence. That said, trial courts have broad discretion in determining the scope of *voir dire*. *Voir dire* must create a reasonable assurance of discovering whether a prospective juror is impartial, with reversal granted only if there was an abuse of discretion. For example, inquiries about prospective jurors’ racial prejudices are not necessarily required, even in situations where the defendant and victim are of different races. In general, questions regarding specific subjects, like racial prejudice, ethnic identity, or religious or political affiliation will only be required when they are particularly relevant to the case to be tried. One such case, *Ham v. South Carolina*, involved a black defendant with a beard whose defense was that he had been framed because of his race and civil rights activities. After the trial court refused to ask several questions about bias, the Supreme Court reversed Ham’s conviction on constitutional grounds. Questions about racial bias were constitutionally required; questions about prejudice against men with beards were not required.

The preceding is the constitutional minimum—states and the federal courts may require more. The Supreme Court has said, based on its power to supervise the federal courts, that questions about racial or ethnic prejudice should be allowed if the total circumstances suggest a reasonable possibility that such prejudice would affect the jury.

Challenges for Cause

Given that the Constitution requires a fair and impartial jury, a juror must be capable of objectively

evaluating the evidence. The Supreme Court concluded in *Reynolds v. United States* that a prospective juror must be excused for cause if the prospective juror discloses an opinion likely to raise the presumption of partiality. Impartiality does not require neutrality; rather it simply requires a lack of inappropriate or overly strong biases. The trial court has broad discretion, however, in determining whether a prospective juror is or is not sufficiently impartial.

Potential jurors in capital cases are also “death-qualified.” Anyone with views on capital punishment that would prevent or substantially impair the performance of his or her duties in accordance with law is automatically excused from the jury for cause. Critics have long argued on the basis of empirical research that a death-qualified jury is much more likely to convict than one that is not death-qualified, and thus death qualification violates both the fair cross-section and impartiality requirements of the Constitution. The Supreme Court rejected this argument in *Lockhart v. McCree*.

The Court also explicitly held in *Holland v. Illinois* that a defendant has no constitutional right to a fair cross-section of the community on the actual jury, merely that the jury will be drawn from a fair cross-section.

Peremptory Challenges

A peremptory challenge is used to excuse a potential juror that a party believes may be less favorable to their position than the likely alternative. Traditionally, a party could exercise a peremptory challenge on an arbitrary or capricious basis without having to provide any reason at all. Often challenges were based on nothing more than invidious prejudice. Clarence Darrow himself advised lawyers on the use of racial and ethnic stereotypes for jury selection. Now, however, parties occasionally do have to provide reasons for their peremptory challenge.

In *Swain v. Alabama* the Supreme Court first held that the prosecutor’s peremptory challenge on the basis of race of a potential juror of the same race as the defendant would violate the Constitution. The Court imposed such an onerous evidentiary burden on the defendant, however, that the issue was revisited twenty-one years later in *Batson v. Kentucky*. In *Batson*, the Court established that the moving party must first present a *prima facie* case that the opposing party has used a peremptory challenge on the basis of race. The judge then asks the party exercising the

peremptory challenge to provide neutral reasons for the challenge. If the reasons are nondiscriminatory, the judge must then decide whether the moving party has carried the burden of establishing purposeful discrimination. A nondiscriminatory reason is any reason, no matter how silly or nonsensical, not solely associated with a particular race. For example, in *Hernandez v. New York*, a plurality of the Court held that striking prospective Hispanic jurors because they spoke Spanish was a race-neutral reason, because some non-Hispanics also speak Spanish.

Later Supreme Court cases applied the *Batson* framework to civil cases and to peremptory challenges exercised by criminal defendants. Peremptory challenges are also no longer permitted on the basis of the prospective juror's gender or ethnic origin, in addition to race. Courts have split on the question of whether parties may exercise peremptory challenges on the basis of the potential juror's religious beliefs. These restrictions on the use of the peremptory challenge are not primarily to protect litigants' rights, but rather the potential jurors' equal protection rights.

The Court's approach to the discriminatory use of the peremptory challenge has been heavily criticized. The underlying criticism is that judges are not well equipped to detect a party's discriminatory use of the peremptory challenge. This can be because providing a nondiscriminatory reason is too easy for anyone who wishes to strike on the basis of race or gender.

Many commentators and judges have recommended abolishing or at least reconsidering the use of the peremptory challenge, including Justice Breyer in *Miller-El v. Dretke* and Justice Marshall in *Batson*. Although originally adopted from English common law, England and Wales abolished the peremptory challenge in 1989. Arguments against eliminating the peremptory challenge include the notion that participating in the selection of the jury assists with the losing party's and the community's acceptance of the verdict. In addition, some have asserted that the peremptory challenge is a necessary tool to prevent extremists from sitting on a jury, and thus the risk of hung juries is reduced.

Other commentators have recommended changes such as guaranteeing a minimum level of minority representation on the jury, or having parties affirmatively select jurors rather than reject them. Another suggestion is to guarantee places on the jury to people drawn from smaller areas, thereby likely increasing racial and economic diversity.

ANTONY PAGE

References and Further Reading

- Abramson, Jeffrey. *We the Jury: The Jury System and the Ideal of Democracy*, Cambridge: Harvard University Press (2000 reissue).
- Altschuler, Albert W., *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, University of Chicago Law Review 56 (Winter, 1989) 153–233.
- Forde-Mazrui, Kim, *Jural Districting: Selecting Impartial Juries through Community Representation*, *flanderbilt Law Review* 52 (1999): 353–404.
- Fukurai, Hiroshi, and Richard Kroot. *Race in the Jury Box: Affirmative Action in Jury Selection*. Albany: SUNY Press, 2003.
- Goode, Barry P., *Religion, Politics, Race, and Ethnicity: The Range and Limits of Voir Dire*, *Kentucky Law Journal* 92 (2003–2004): 601–701.
- Hans, Valerie P., and Neil Vidmar. *Judging the Jury*. New York: Plenum Publishing, 1986.
- Howe, Scott W., *Juror Neutrality or an Impartiality Array? A Structural Theory of The Impartial Jury Mandate*, *Notre Dame Law Review* 70 (1995): 1173–1245.
- Jonakit, Randolph N. *The American Jury System*. New Haven: Yale University Press, 2004.
- Muller, Eric L., *Solving the Batson Paradox: Harmless Error, Jury Representation, and the Sixth Amendment*, *Yale Law Journal* 106 (October 1996): 93–150.
- Page, Antony, *Batson's Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, *Boston University Law Review* 85 (2005) 155–263.
- Starr, V. Hale, and Mark McCormick. *Jury Selection*. New York: Aspen Law and Business, 2001.

Cases and Statutes Cited

- Batson v. Kentucky*, 476 U.S. 79 (1986)
- Duncan v. Louisiana*, 391 U.S. 145, 149 (1968)
- Duren v. Missouri*, 439 U.S. 357, 364 (1979)
- Ham v. South Carolina*, 409 U.S. 524 (1973)
- Hernandez v. New York*, 500 U.S. 352 (1991)
- Holland v. Illinois*, 493 U.S. 474 (1990)
- J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994)
- Jones v. Georgia*, 389 U.S. 24 (1967)
- Lockhart v. McCree*, 476 U.S. 162 (1986).
- Miller-El v. Dretke*, 545 U.S. ___, 125 S.Ct. 2317 (2005)
- Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981)
- Reynolds v. United States*, 98 U.S. 145 (1878)
- Strauder v. West Virginia*, 100 U.S. 303 (1880)
- Swain v. Alabama*, 380 U.S. 202 (1965)
- Taylor v. Louisiana*, 419 U.S. 522, 528 (1975)
- Thiel v. Southern Pacific Co.*, 328 U.S. 217 (1946)
- Jury Selection and Service Act, Pub. L. No. 90-274, § 101, 82 Stat. 54 (1968) (codified at 28 U.S.C. §§ 1861-1869 (1994))
- See also Batson v. Kentucky*, 476 U.S. 79 (1986); **Darrow, Clarence**; *Duncan v. Louisiana*, 391 U.S. 145 (1968); **Grand Jury**; *Holland v. Illinois*, 493 U.S. 474 (1990); **Jury Trial**; **Jury Trials and Race**; *Lockhart v. McCree*, 476 U.S. 162 (1986); *Reynolds v. United States*, 98 U.S. 145 (1878); *Rosales-Lopez v. United*

States, 451 U.S. 182 (1981); *Swain v. Alabama*, 380 U.S. 202 (1965); *Taylor v. Louisiana*, 419 U.S. 522 (1975)

JURY TRIAL

Trial by jury has been part of our legal tradition from the time the colonists first settled in America. The colonists brought the jury trial with them from England, but it assumed particular importance when the colonists sought their independence from England.

Although judges were appointed by the Crown, jurors were selected by local authorities. Thus, the jury trial was one way to resist imposition of the law by the Crown and leave such decisions to local citizens. The jury trial also reassured citizens who were being prosecuted that twelve fellow citizens would decide their case, rather than a judge appointed by a ruler thousands of miles away.

In colonial times, the jury trial was seen as a bulwark against tyranny. As one U.S. Supreme Court Justice explained: "Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge" (*Duncan v. Louisiana* 391 U.S. 145, 156 [1968] [White, J.]).

When the French writer Alexis de Tocqueville visited the United States in the 1830s, he observed the importance of the jury trial. The jury trial, according to Tocqueville, served as a "free school," teaching jurors important lessons about citizenship and allowing them to participate in self-governance.

Today, the jury continues to serve as a free school. Service and voting are the main ways in which citizens participate in democracy. Jurors see the parties before them and know that their decision will have significance. Thus, the jury trial allows jurors to see democracy in action.

The jury trial is important not only for the lessons that it teaches jurors but also for the assurance that it provides a defendant that he or she will receive a fair trial before an impartial decision maker.

In criminal jury trials in federal courts and in most state courts, juries consist of twelve jurors. These twelve jurors are ordinary citizens summoned for the purpose of serving on a jury.

They do not know the parties, and they have no stake in the outcome. They will listen to the evidence presented at trial, and, eventually, they will enter a jury room where they will deliberate in secret. In most criminal cases, the defendant can be convicted only if the jury reaches an unanimous verdict. If even one

juror disagrees with the other eleven, the jury can be declared a hung jury. The prosecutor must then decide whether to retry the case.

Even today, when we no longer have to worry about the tyranny of the Crown, we still have the protection of the jury system, including its protection against government arbitrariness or overreaching. The defendant charged with a serious crime knows that he or she will be judged by twelve citizens, who have no connection to the case and who will decide whether the government has met its burden only after they have heard all the evidence, deliberated in secret, and reached an unanimous decision.

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References and Further Reading

- Abramson, Jeffrey, *We, the Jury*. New York: Basic Books, 1994.
 Tocqueville, Alexis de. *Democracy in America*. 13th Ed. Mayer, Jacob Peter, and Max Lerner, eds. New York: Harper & Row, 1969, 1850.
 Yeazell, Stephen C., *The New Jury and the Ancient Jury Conflict*, University of Chicago Legal Forum (1990): 87–117.

Cases and Statutes Cited

- Duncan v. Louisiana*, 391 U.S. 145 (1968)
Taylor v. Louisiana, 419 U.S. 522 (1975)

See also ***Duncan v. Louisiana*, 391 U.S. 145 (1968); Grand Jury in Colonial America; Impartial Decision-maker; Jury Trial Right; Jury Trials and Race; Public Trial; Speedy Trial; Trial in Civil Cases (VII)**

JURY TRIAL RIGHT

The right to a jury trial is guaranteed by two amendments to the United States Constitution. The Sixth Amendment guarantees a defendant charged with a serious crime the right to a "speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed." The U.S. Supreme Court has interpreted the Seventh Amendment to guarantee a jury trial to parties in a civil dispute if the action (or an analogous action) would have received a jury trial in 1791, when the Seventh Amendment was enacted.

Even though the Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial," the U.S. Supreme Court has explained that this right is limited to "serious crimes." A defendant has a right to a jury

trial for a serious crime, but not for a petty one. The key question, then, is what constitutes a serious crime? Through case law, the U.S. Supreme Court has given guidance to lower court judges to help them determine whether the defendant has been charged with a serious crime. The defining feature of a serious crime is that the maximum penalty that the defendant can receive is more than six months of imprisonment. This focus on the maximum penalty takes into account whether the legislature considers the crime to be serious, because the legislature sets maximum penalties. Although a court can consider other penalties, such as fines or probation, in deciding whether a crime is serious, the main focus is the maximum authorized prison time. The reason for this, according to the U.S. Supreme Court, is that prison time is different from other penalties; it involves a loss of liberty.

Although the right to a jury trial in criminal and civil matters is guaranteed by different amendments, criminal and civil juries are selected in the same manner and afford parties many of the same protections. For example, in jury selection in both criminal and civil cases, the venire, or panel, from which the petit jury is selected must be drawn from a fair cross section of the community. The U.S. Supreme Court has interpreted this to mean that no group can be systematically excluded from the venire. The idea is that if the venire is drawn from a broad swath of the community, the petit jury will have a broad range of ideas and perspectives to consider when it deliberates. A venire drawn from a fair cross section also assures the defendant that the government cannot stack the jury in its favor. The defendant also hopes that there is at least one person on the jury who will view the case from the defendant's perspective.

Similarly, in the selection of both criminal and civil juries, both sides have a certain number of peremptory challenges that allow them to remove from the petit jury a certain number of prospective jurors without, in most cases, having to give a reason. The peremptory challenge allows each side to feel that it has "selected" its jury and removed those jurors less likely to be sympathetic to its case. The number of peremptory challenges that each side is given varies depending on whether the case is in federal or state court and whether it is a criminal or civil case. Although the peremptory challenge is not constitutionally mandated, it has been part of our legal tradition since before this nation's founding. Defendants, in particular, view the peremptory challenge as a protection; it allows defendants to feel comfortable with the jury selected. However, over the past forty years, there has been much debate about the peremptory challenge, particularly because for many years, lawyers used

peremptory challenges to excuse African Americans from serving on juries. Because peremptory challenges do not require reasons, attorneys could use peremptory challenges to excuse African Americans without having to explain why. This led some critics of the peremptory challenge, including Justice Thurgood Marshall, to suggest their elimination. Instead, the Supreme Court decided that if it appears that an attorney is exercising a peremptory challenge on the basis of race, gender, or ethnicity, the other side could challenge this use of the peremptory. Attorneys can no longer exercise peremptory challenges on the basis of a prospective juror's race, ethnicity, or gender.

Another subject of debate is jury nullification. Jury nullification is when the jury decides not to follow the law as the judge has explained it to the jury. It is often difficult to know when a jury has engaged in nullification, because juries typically return only a general verdict (either guilty or not guilty in criminal cases or liable or not liable in civil cases). If the judge suspects that the jury engaged in nullification in a civil case or in criminal case in which it convicted the defendant, then the judge can take action to alter what the jury has done. However, in a criminal case in which the jury engaged in nullification and acquitted, the judge cannot take any further action.

The debate has centered on whether jurors should be told by the judge or attorneys that they have the power to nullify. The current practice is to tell the jurors the opposite. Jurors take an oath to follow the law, and the judge instructs them that it is their job to find the facts and to apply the law, as the judge explains it to them. There has been a movement to inform jurors of their power to nullify. Some grassroots organizations have distributed leaflets at the courthouse door, explaining to prospective jurors that they have the power to nullify, regardless of the instructions that the judge will give them. Some members of the African-American community have called for African-American jurors to nullify in certain victimless crimes when the defendant is African American. They have taken this position as a means of protesting the number of African-American men being sent to jail, particularly for violations of the drug laws.

All the federal circuit courts have held that judges should not instruct jurors on their power to nullify. Recently, the Second Circuit held that if a deliberating jury sends the judge a note indicating that a juror intends to nullify, the judge must interview that juror and determine whether that juror's view is based on nullification or reasonable doubt. If the juror intends to nullify, the judge must remove that juror and replace him with another, even though the jury is already deliberating.

A jury may be inclined to nullify when it does not agree with the law at issue, when it does not believe the law should be applied to the particular defendant, or when it wants to use its verdict to protest some aspect of the justice system. Judges, who have sworn to uphold the law, and legislators, who pass the laws, are generally opposed to nullification. However, a jury that engages in nullification after careful deliberation may provide an important safety valve, because laws are drafted for the general case and cannot always take account of a particular case, as a jury can do.

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References and Further Reading

- Butler, Paul, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, Yale Law Journal 105 (1995): 677–725.
- Hoffman, Morris B., *Peremptory Challenges Should Be Abolished: A Trial Judge's Perspective*, University of Chicago Law Review 64 (1997): 809–871.
- Marder, Nancy S., *The Myth of the Nullifying Jury*, Northwestern University Law Review 93 (1999): 877–959.
- U.S. Const. amend. VI.
- U.S. Const. amend. VII.

Cases and Statutes Cited

- Batson v. Kentucky*, 476 U.S. 79 (1986)
- Blanton v. City of North Las Vegas, Nevada*, 489 U.S. 538 (1989)
- J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994)
- Local No. 391 v. Terry*, 494 U.S. 558 (1989)
- Peters v. Kiff*, 407 U.S. 493 (1972)
- Swain v. Alabama*, 380 U.S. 202 (1965)
- Taylor v. Louisiana*, 419 U.S. 522 (1975)
- United States v. Dougherty*, 473 F.2d 1113 (D.C. Cir. 1972)
- United States v. Nachtigal*, 507 U.S. 1 (1993)
- United States v. Thomas*, 116 F.3d 606 (2d Cir. 1997)
- See also Batson v. Kentucky*, 476 U.S. 79 (1986); *Holland v. Illinois*, 549 U.S. 474 (1990); **Impartial Decisionmaker; Jury Nullification; Jury Nullification in Capital Punishment; Jury Selection and Voir Dire; Jury Trial; Jury Trials and Race; Marshall, Thurgood; Public Trial; Race and Criminal Justice; Sex and Criminal Justice; Speedy Trial; Taylor v. Louisiana, 419 U.S. 522 (1975); **Trial in Civil Cases (VII); War on Drugs; Zenger Trial (1735)****

JURY TRIALS AND RACE

Jury trial was an early development of the English common law. Under the Magna Carta, which was implemented in 1215, no freeman could be detained

and incarcerated unless he had been judged by his peers. As such, to decide, on reasonable grounds, who was deemed as suitable to be tried, a group of freemen from the area where the crime was committed would be brought together to examine the facts of the case and establish whether the charges had any merits. Hence, the grand jury was created as a check against arbitrary prosecution by a judge who might be co-opted by the power elite. The notion of the grand jury was transported by the early settlers of the American colonies. Later on, with the ratification of Bill of Rights in 1791, the first ten amendments to the American Constitution, the Fifth and Sixth Amendment of the United States Constitution guarantee the right to a jury trial for all defendants accused of serious crimes. However, it is important to examine jury trials and race.

During 1863–1877, the period of Reconstruction in the South, the abolitionists viewed juries as the guardian of the rights and liberties of Americans. Yet, in many instances, in trials where all of the juries were white, the juries would refuse to impeach or convict white defendants accused of crimes against blacks. One main reason why blacks were not a part of the jury system was because of peremptory challenges, which were used to exclude African Americans from hearing cases in which the defendants were also African Americans. *Swain v. Alabama* is a case in point. In 1965, Swain, a black man, was convicted in Talladega County, Alabama, of raping a white woman. He was sentenced to death. The case was petitioned to the Supreme Court on the basis that there were no blacks on the jury. The Supreme Court denied the appeal. In fact, the Court based its decision, as provided by Alabama's law, that the jury was selected from a panel of 100 persons including eight blacks. The Supreme Court ruled that the presence of eight blacks showed "the overall percentage disparity has been small and reflects no studied attempt to include or exclude a specified number of blacks."

The exclusion of blacks from jury trials made it impossible to achieve justice in the courts, especially southern courts. Nevertheless, the courts did not see it as necessary or desirable to abandon the jury trials. Eventually, there were some attempts by the government to eliminate the many barriers that prevented blacks' participation in the legal system and the rights of blacks to serve as jurors. However, the justice system continued to overlook peremptory challenges and for many years; there were two competing views among the Supreme Court Justices on whether a juror's race might sway his or her view of a case. It was not until 1986, in the landmark case of *Batson*

v. Kentucky, that the Court claimed that the equal protection clause prohibits a prosecutor in criminal cases from using his peremptory strikes against a potential juror on the basis of race. Since this decision by the court, many defendants have raised the issue of race discrimination in the use of peremptory challenges. The Court extended *Batson v. Kentucky* to a variety of related cases.

In the 1991 case of *Powers v. Ohio*, the Court held that it was unconstitutional to exclude juries on the basis of race even when the defendant and the juror were of different races. Also, it asserted that a white defendant could challenge the discriminatory striking of black jurors. As is expected, these cases continued to provoke the prevailing disagreement among the Justices on whether a juror's race might influence his or her view of a case. Justice Anthony M. Kennedy flatly rejected such a notion that a jury's race matters in the determination of the outcome of a case. This was emphasized in *Powers v. Ohio*, in which he claimed that any acceptance that a jury's race matters would be to recognize "the very stereotype that the law condemns."

In the same year, in the case of *Edmonson v. Leesville Concrete Co.*, the Court held that a private party in a civil action might raise peremptory challenges on the basis of race by defendants' attorneys in criminal cases. As such, in *Edmonson v. Leesville*, Justice Kennedy concluded that our "progress as a multiracial democracy" authorizes that public prosecutor "satisfy themselves of a jury's impartiality without using skin color as a test." Although Kennedy's position, during this period, coincided with the majority of the Justices' views, Justice Sandra Day O'Connor took the opposite view. She contended that race should never be relevant in jury trials, but we cannot delude ourselves "of the painful social reality that, sometimes, it may be." In the 1992 *Georgia v. McCallum* decision, the Court prohibited the exercise of peremptory challenges on the basis of race by defense attorneys in criminal cases.

In the end, concerns about jury trials and race remain a huge element of America's justice system. Many minorities are angered because of white juries' verdicts in the acquittal of white defendants of crimes against racial minorities. The Rodney King's trial is a case in point.

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References and Further Reading

- Foner, Eric. *Reconstruction America's Unfinished Revolution 1863-1877*. New York: Harper and Row Publishers, 1988.
- Haden, George, Joseph Senna, and Larry Siegel., *Prosecutorial Discretion in Peremptory Challenges: An Empirical*

Investigation of Information Use in the Massachusetts Jury Selection, New England Law Review 13 (1978):768.

Siegel, Larry, and Joseph Senna. Belmont, CA: Wadsworth, a Division of Thomas Learning, 2004.

JUSTICE, WILLIAM WAYNE (1920-)

Williams Wayne Justice, senior judge on the U.S. District Court for the Eastern District of Texas, is best known for his decisions for his controversial decisions on school desegregation (*U.S. v. Texas*), prison reform (*Ruiz v. Estelle*), the treatment of juveniles in Texas reform schools (*Morales v. Turman*), and public school education for undocumented aliens (*Doe v. Plyer*). In his more than thirty years on the bench, Justice recognized those whose voices were rarely heard in the Courts, and he received enormous criticism as a result.

Born in 1920 in Athens, Texas, Judge Justice attended the University of Texas School of Law, graduating in 1942. He served four years in the Army before joining his family's law practice in Athens, where he remained in private practice for fifteen years. During that time, Justice began to dip into the pond of public service, serving twice as City Attorney for Athens. In 1961, he was appointed U.S. Attorney for the Eastern District of Texas, where he served until his appointment to the federal bench by Lyndon Johnson in 1968.

Shortly after taking his seat on the bench, Justice made it obvious that he was willing to take on controversial issues, crafting consent decrees requiring the State of Texas to make a multitude of changes to various institutions. In a 1992 speech at the George Washington University National Law Center, Justice claimed "my name has appeared on the 'ten most wanted list' of judicial activists for much of my nearly quarter century on the bench." In fact, he has never shied away from this label, wearing it as a badge of honor instead.

In 1969, the U.S. Justice Department filed suit in Judge Justice's Court arguing that the Tatum Independent School District was out of compliance with federal civil rights law. In 1970, Justice issued orders in the case of *U.S. v. Texas* requiring that the Texas Education Agency cease approving discriminatory school district boundaries and withhold funds from school districts for noncompliance, a position the Agency firmly opposed.

Judge Justice used the consent decree throughout his career to force the Texas state government to make changes that they did not necessarily support. He required Texas to overhaul its juvenile reform schools in 1974 (*Morales*) and required the Texas Department of Corrections to revamp its prisons in 1980 (*Ruiz*). In

fact, the Texas prison system was run under Justice's consent decree for two decades.

Judge Justice is well aware that his decisions are often contentious, pointing out that "[s]everal of my own decisions have been made into campaign issues in Texas gubernatorial races and numerous local political contests," but such controversy doesn't seem to scare Justice. As Texas civil rights lawyer David Richards put it, "[t]here were two federal judges in the South who kicked ass and took names" in the late 1960s and '70s. "They were Frank Johnson and Wayne Justice."

ERIC J. WILLIAMS

References and Further Reading

Kemerer, Frank. *William Wayne Justice: A Judicial Biography*. Austin, TX: University of Texas Press, 1991.
Wayne, Justice William., *The Two Faces of Judicial Activism*, *George Washington University Law Review* 61 (1992): 1:1–12.

Cases and Statutes Cited

Doe v. Plyer, 458 F. Supp. 569 (E.D. Texas 1978)
Morales v. Turman, 383 F. Supp 53 (E.D. Tex. 1974)
Ruiz v. Estelle, 503 F. Supp. 1265 (S.D. Tex. 1980)
U.S. v. Texas, 321 F. Supp. 1043 (E.D. Tex. 1970)

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KAMISAR, YALE (1929–)

Yale Kamisar began teaching law at the University of Minnesota in 1957. He joined the University of Michigan faculty in 1965, where he quickly distinguished himself as one of the nation's two or three greatest criminal justice scholars and where he taught until his retirement in 2004. For more than forty-five years, he has been a leading influence on the ways in which the judiciary, the legal academy, practicing lawyers, and law students thought about constitutional criminal procedure.

Since 1964, Kamisar has been a co-author of a widely popular constitutional law casebook—now in its ninth edition—and, since 1965, the lead author of the most widely used and most frequently cited criminal procedure casebook—now in its eleventh edition. Over the past forty-five years, at least thirty-two Supreme Court decisions and more than 100 decisions of the federal courts of appeals have cited Kamisar's scholarship. Most impressive are several landmark criminal procedure decisions that have rested—at least in part—on Kamisar's work. Foremost among them is *Miranda v. Arizona*, where the Court adopted the reasoning and doctrinal framework of Kamisar's article, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure*, en route to holding that the Fifth Amendment right against compelled self-incrimination requires police to advise a suspect of his or her right to remain silent and to counsel before any inculpatory statements made by the suspect may be used against him or her at trial.

In addition to the law of interrogation, Kamisar has written extensively on the law of search and

seizure, the exclusionary rule, and challenging social policy issues, such as mandatory drug testing, flag burning, and euthanasia.

JEAN-CLAUDE ANDRÉ

References and Further Reading

- Choper, Jesse H., et al., eds. *Constitutional Law: Cases, Comments, and Questions*. Ninth Edition. St. Paul: West, 2001.
- Kamisar, Yale. "Equal justice in the gatehouses and mansions of American criminal procedure." in Howard, A.E. Dick, ed. *Criminal Justice in Our Time*. Charlottesville: University Press of Virginia, 1965.
- Kamisar, Yale, et al., eds. *Modern Criminal Procedure: Cases, Comments, and Questions*. 11th Ed. St. Paul: West, 2005.
- Tributes. *Yale Kamisar*, Michigan Law Review 102 8 (August 2004): 8:1673–1792.
- Tributes. *Yale Kamisar*, Ohio State Journal of Criminal Law 2 (Fall 2004): 1:1–66.

Cases and Statutes Cited

Miranda v. Arizona, 384 U.S. 436 (1966)

See also **Exclusionary Rule; *Miranda v. Arizona*, 384 U.S. 436 (1966); Rights of the Accused; Self-Incrimination: *Miranda* and Evolution**

KATZ V. UNITED STATES, 389 U.S. 347 (1967)

The Fourth Amendment to the United States Constitution prohibits the government from engaging in "unreasonable searches and seizures." Before courts

ask whether a given search is “reasonable,” however, they must determine whether a “search” or a “seizure” occurred. The Supreme Court’s decision in *Katz v. United States* revolutionized the constitutional analysis of when governmental action amounts to a search and thus implicates the protections of the Fourth Amendment.

The FBI (correctly) suspected Charles Katz of being involved in an illegal gambling operation, whereby he would make calls from a public telephone to transmit information concerning bets. The FBI tapped the phone by attaching a receiver to the outside of the booth and recorded Katz’s voice during one such call. Katz was tried and convicted of the interstate communication of wagers and appealed his conviction, alleging that the conversation was illegally intercepted and, therefore, should not have been admitted against him at trial.

Justice Potter Stewart authored the majority opinion, which was joined by Chief Justice Earl Warren and Justices William Douglas, John Harlan, William Brennan, Byron White, and Abe Fortas. The Court held that tapping the phone was a search, even though there had been no entry into the phone booth. Thus, the opinion rejected the “trespass” doctrine, which had prevailed until *Katz* in cases such as *United States v. Olmstead*, whereby government action did not trigger the Fourth Amendment unless there was a physical invasion of a private space.

Although the Court was clear that physical trespass was no longer the sole factor for determining whether a search occurred, it was less clear about how future cases should be resolved. It stated that someone who enters a phone booth “shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world.” And the Court also stated that something that a person “knowingly exposes to the public” is not private, and, therefore, police discovery of it does not constitute a search. But these statements were unhelpful in providing police and lower courts with a test to apply to future cases.

That test came in Justice Harlan’s concurrence, which has routinely been applied by the Supreme Court in subsequent decades. Under the test stated by Justice Harlan, a search occurs whenever the government invades an individual’s “reasonable expectation of privacy.” That question, in turn, is composed of two subsidiary questions: whether the individual had an expectation of privacy in the area searched, and whether society treats that expectation of privacy as “reasonable” or “legitimate.” Justice Harlan’s test has been enormously influential but raises difficult analytical problems. Most seriously, it

invites the Justices to write their ideas of privacy into constitutional law in determining when a particular expectation of privacy is “reasonable.” As Justice Scalia wryly commented in *Minnesota v. Carter*, “unsurprisingly, those ‘actual (subjective) expectation[s] of privacy’ ‘that society is prepared to recognize as “reasonable,”’ bear an uncanny resemblance to those expectations of privacy that this Court considers reasonable.

Having determined that a “search” occurred, the Court then had to assess whether the “search” was “reasonable.” The Court held that the police’s failure to obtain a warrant made the search unreasonable, and for that reason the Court reversed Katz’s conviction. The Court maintained that searches conducted “without prior approval by judge or magistrate[s] are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.” Because no exception was applicable here, the search was unconstitutional.

Justice Hugo Black dissented. In his view, the Fourth Amendment protects against only tangible items—things that can be “searched” or “seized.” Because a conversation is not tangible, he would have held that the Fourth Amendment does not regulate police eavesdropping, electronic or otherwise.

Post-*Katz* cases have asked whether certain expectations of privacy are “reasonable.” *United States v. White* held that a person has no reasonable expectation of privacy in conversations if the other party to the conversation consents to its being recorded or transmitted to others. *California v. Greenwood* held that one has no legitimate expectation of privacy in garbage left on the curb. *United States v. Miller* held that one’s bank records are not something about which one has a reasonable expectation of privacy, and *Smith v. Maryland* applied *Miller* to hold that there is no reasonable expectation of privacy in the numbers one dials on a home telephone. *United States v. Place* and *Illinois v. Caballes* held a trained dog’s sniff for the scent of contraband is not a search. *United States v. Knotts* held that police use of a beeper to trail a suspect along public roads infringed on no reasonable expectation of privacy, but *United States v. Karo* did find a reasonable expectation of privacy if a similar beeper disclosed information about movements in the interior of a home, and *Karo* was expanded in *Kyllo v. United States* to cover thermal imaging of houses.

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References and Further Reading

Amsterdam, Anthony G., *Perspectives on the Fourth Amendment*, *Minnesota Law Review* 58 (1974): 3:349–477.

Hall, John Wesley, Jr. *Search and Seizure*. 3rd Ed. Charlottesville, VA: LEXIS Law Publishing, 2000, vol. 1, pp. 20–23, 58–91.

LaFave, Wayne R. *Search and Seizure: A Treatise on the Fourth Amendment*. 4th Ed. St. Paul, MN: Thomson-West, 2004, vol. 1, pp. 422–445.

Sundby, Scott E., ‘Everyman’s’ Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?, *Columbia Law Review* 94 (1994): 6:1751–1812.

Cases and Statutes Cited

California v. Greenwood, 486 U.S. 35 (1988)
Illinois v. Caballes, 543 U.S.?, 125 S. Ct. 834 (2005)
Kyllo v. United States, 533 U.S. 27 (2001)
Minnesota v. Carter, 525 U.S. 83 (1998)
Smith v. Maryland, 442 U.S. 735 (1979)
United States v. Karo, 468 U.S. 705 (1984)
United States v. Knotts, 460 U.S. 276 (1983)
United States v. Miller, 425 U.S. 435 (1976)
United States v. Olmstead, 277 U.S. 438 (1928)
United States v. Place, 462 U.S. 696 (1983)
United States v. White, 401 U.S. 745 (1971)

See also **Exclusionary Rule; Privacy; Search (General Definition)**

KAUFMAN, IRVING ROBERT (1910–1992)

Irving Robert Kaufman was the presiding judge over one of the most controversial trials in American history, the trial of Julius and Ethel Rosenberg. At the age of eighteen, Kaufman graduated from Fordham College, then graduated from law school two years later (one year before he was even eligible to take the Bar Exam). As a judge, Kaufman gained a reputation for imposing harsh rulings and strict sentences, although he was also considered a champion for civil liberties. In 1961, Kaufman was promoted to the Second Circuit Court of Appeals, where he finished his judicial career.

The Rosenberg trial began on March 6, 1951, at the height of the infamous McCarthy Era in the United States. In what seemed an unusually harsh sentence, Kaufman sentenced the Rosenbergs to death in the electric chair after finding them guilty of conspiring to deliver atomic-bomb secrets to the Soviet Union. They were the first American civilians to be put to death for espionage in the United States. Although the fairness of the Rosenberg proceedings was questioned at the time of the trial, the later publication of an autobiography by one of the prosecutors, Roy Cohn, served to discredit the proceedings further. Cohn claimed that his influence led to Kaufman (a family friend) being appointed to the case and that Kaufman had imposed the death penalty on Cohn’s personal (and *ex parte*) advice. Extrajudicial contacts

between judges and prosecutors are unethical under rules of professional conduct.

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References and Further Reading

Burnett, Betty. *The Trial of Julius and Ethel Rosenberg: A Primary Source Account*. New York: Rosen Publishing Group, 2003.

Hoffman, Nicholas Von. *Citizen Cohn*. New York: Bantam Books, 1988.

Meeropol, Robert. *An Execution in the Family: One Son’s Journey*. New York: St. Martin’s Press, 2003.

Radosh, Ronald, and Joyce Milton. *The Rosenberg Files*. 2nd Reprint Ed. New Haven: Yale University Press, 1997.

Zion, Sidney. *Autobiography of Roy Cohn*. Secaucus, NJ: Lyle Stuart, 1988.

KENDALL, AMOS (1789–1869)

Amos Kendall was born in Dunstable, Massachusetts, to an old New England family and spent much of his youth working on his father’s farm. Despite minimal primary education, he enrolled at Dartmouth College at age eighteen and, in 1811, graduated at the top of his class. After studying law with William Merchant Richardson in Groton, Massachusetts, Kendall moved to Kentucky, working first as a tutor in the home of Henry Clay and then cultivating an eclectic career that would ultimately encompass the law, journalism, politics, and business. Formerly a Clay Whig, Kendall shifted his political allegiance to Andrew Jackson in 1826 and helped Old Hickory carry Kentucky in the presidential election of 1828. For his part in the Democratic ascendancy, Kendall was chosen to take his adopted state’s electoral votes to Washington, D.C., where he loyally served the Jackson regime for over a decade. Acting as fourth auditor for the treasury and, later, as postmaster-general, Kendall eventually became the most trusted and influential member of Jackson’s famous cadre of advisors, popularly known as the “Kitchen Cabinet.”

At the height of Kendall’s influence in the White House, antislavery petitions were being successfully tabled by southern representatives. Stymied in the House, the American Anti-Slavery Society decided to flood the country, and particularly the South, with their tracts and periodicals. On July 29, a steamship carrying bundles of this literature arrived in Charleston Harbor. After discovering and confiscating the “incendiary” cargo, the city’s postmaster-general, Alfred Huger, promptly wrote to Kendall for advice. Although an angry mob seized and publicly burned the tracts, Kendall’s response to Huger’s

letter more or less defined the federal government's policy toward controversial mailings up to the Civil War. Acknowledging that he had no legal authority to censor the mail, regardless of its contents, Kendall nonetheless concluded that the security of communities, which he assumed abolitionist propaganda threatened, superseded the law. Although the mailings were designed to persuade whites of the evil of slavery rather than to incite slave rebellion, such distinctions failed to impress white southerners, for whom the memory of Nat Turner was all too fresh.

Despite the passage of a federal mail law prohibiting state interference, southerners continued to censor and destroy abolitionist literature, even as its flow ebbed after 1835. In the southern interpretation of the law, federal protection ended at the point of reception; once mail reached its destination, that is, local authorities withheld the right to review and dispense with it as they saw fit. Most northerners shared southerners' distaste for abolitionists, and they initially supported Kendall's policy of federal noninterference. Many in the North, however, eventually came to see sinister implications in the censorship and destruction of literature that southern authorities deemed "incendiary."

The mail controversy ultimately helped to link the abolitionist cause more firmly than ever with civil liberties as they applied to white Americans. The constitutional provisions for freedom of speech and freedom of the press commanded national attention during Kendall's tenure as postmaster-general, and in the controversy over abolitionist mailings, in particular, he played a prominent, albeit ignoble, role.

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References and Further Reading

- Anderson, Frank Maloy. Amos Kendall. *Dictionary of American Biography*. Vol. 5, Dumas Malone, ed. New York: Charles Scribner's Sons, 1933, pp. 325–327.
- Kendall, Amos. *Autobiography of Amos Kendall*. William Stickney, ed. Boston: Lee and Shepard, Publishers, 1872.
- Nye, Russel B. *Fettered Freedom: Civil Liberties and the Slavery Controversy, 1830–1860*. East Lansing, MI: Michigan State College Press, 1949, pp. 54–69.
- Remini, Robert V. *Andrew Jackson and the Course of American Democracy, 1833–1845*. Vol. 3. New York: Harper & Row, Publishers, 1984, pp. 258–263.

KENNEDY, ANTHONY MCLEOD (1936–)

Both whom and what he knew made Anthony McLeod Kennedy an apt candidate for high judicial office. The best man at his parents' wedding was

Roger Traynor, the groom's law school classmate, who would become the Supreme Court of California's greatest Chief Justice. As a boy in Sacramento, young Kennedy came to know the legal elite of California's government, including Earl Warren, Governor and eventual Chief Justice of the United States. At Stanford, Kennedy was elected to Phi Beta Kappa, and between university and law school, he spent a year at the London School of Economics. His law degree from Harvard was awarded cum laude. After brief sojourns practicing in San Francisco and serving in the army, he returned to Sacramento and his father's law practice. Soon afterward, he joined the faculty at McGeorge College of the Law where, on a part-time basis, he regularly taught constitutional law. Meanwhile, he had come to the attention of Ronald Reagan, and, when a vacancy occurred on the United States Court of Appeals for the Ninth Circuit, Reagan recommended him to President Ford.

Circuit Judge Kennedy was confirmed by the Senate in April of 1975. Only thirty-eight years old at the time, he became the youngest federal appellate judge in the country. He served on the court of appeals for more than twelve years and during that time wrote many influential opinions, including *Chadha v. United States* (1978), in which the court found unconstitutional a one-house congressional veto for administrative decisions. That decision was subsequently affirmed by the Supreme Court. In *Pacemaker Diagnostic Clinic of America, Inc. v. Instromedix, Inc.* (1984), Kennedy articulated a theory, based on a person's constitutional right to be heard by a life-tenured judge, for judicial review of Congressional assignment of claims to government tribunals other than courts. It would be adopted by the Supreme Court two years later in *Commodity Futures Trading Commission v. Schor* (1986). Dissenting in *United States v. Harvey* (1983), he advocated an exception to the exclusionary rule for evidence obtained by police unlawfully but in good faith. The Supreme Court made such an exception part of the law of the Fourth Amendment a year later in *Massachusetts v. Sheppard* (1984).

Kennedy was nominated for the Supreme Court on November 30, 1987, and confirmed by a unanimous Senate on February 3, 1988. He took his seat on the Court on February 18, 1988. He was nominated by President Reagan, as were Justices O'Connor and Scalia, but the three have hardly voted as a bloc. If Scalia's record tends to prove that, once on the Supreme Court, justices tend to vote in important cases harmoniously with the political values of the President that nominated them, Kennedy's record tends to prove the exception to that rule. After thirteen terms, his role in pivotal cases of constitutional

rights has made him the Federal judiciary's lightning rod for the dissatisfaction of conservative Republicans.

Kennedy's independence of judgment might not have been a complete surprise to the White House. After all, he was only nominated for the seat opened by Justice Powell's retirement after two earlier and presumably preferred nominees, Circuit Judges Bork and Ginsberg, failed to win the Senate's advice and consent. Nevertheless, Kennedy came to Washington with a reputation for judicial restraint and a record that bespoke a preference for law and order. It did not take him long on the Supreme Court to act contrary to both. In the view of many, Kennedy has gone against type in cases arising in several constitutional contexts. Among the earliest of his disagreements with members of the Court with whom he was presumed to share ideology came in *Texas v. Johnson* (1989), where his vote was crucial to a decision that constitutional protection of political dissent extended even to burning the American flag.

In *Planned Parenthood v. Casey* (1992), a coalition of those opposed to abortion mounted a spirited attack on *Roe v. Wade* (1973), anticipating its overruling by a Supreme Court repopulated by Presidents openly in their camp. The ensuing judgment of the Court proved for social conservatives a victory Pyrrhic at best. *Roe* was upheld because Kennedy, along with O'Connor and Souter, formed a majority with their more liberal brethren. The three issued a joint opinion upholding the judgment in *Roe*, but proposing a less stringent test for the constitutionality of government restrictions on abortion. After *Casey*, legislatures have in theory greater latitude to curtail abortion services; restrictive regulations are now unconstitutional only if they impose on pregnant women an "undue burden." But the decision was surely a bitter pill for abortion's enemies. Although Kennedy (and his two co-authors) might be said in *Casey* to have left the constitutional right to an abortion less secure as a matter of law, they also denied to its opponents the sweeping victory of an explicit overruling and left any legislative curtailing of abortion access for judicial scrutiny only on a case-by-case basis.

Perhaps for social conservatives nothing makes Kennedy more the maverick than the positions he has taken in cases about homosexuality. While on the Ninth Circuit, Kennedy wrote in *Beller v. Middendorf* (1980) that the Constitution permits the Navy to make dismissal from the service a consequence of homosexual conduct. In hindsight, this case deserves less attention for its holding than for the qualification that came with it, because Kennedy took care to make clear that the question of whether homosexual

conduct was constitutionally protected private conduct turned on the military setting in which the question was presented. In the Supreme Court, Kennedy declined to join Rehnquist, Scalia, and Thomas in upholding an amendment to Colorado's constitution forbidding any action by state agencies or officials to protect homosexuals from discrimination or afford them special treatment as members of a disadvantaged minority. Instead, he wrote for the majority in *Romer v. Evans* (1996) that such an amendment violated the Fourteenth Amendment's equal protection clause. Purporting to apply the tolerant test of constitutionality appropriate whenever no fundamental right is at stake and no constitutionally protected minority is disadvantaged, Kennedy's opinion for the Court nevertheless held the amendment to a higher standard, signaling sympathy for the homosexuals marginalized by Colorado's action. Seven years later, Justice Kennedy wrote for the majority in *Lawrence v. Texas* (2003) that the Supreme Court had misconstrued the claims of the homosexual defendant in *Bowers v. Hardwick* (1986) that his conviction for sodomy violated the Fourteenth Amendment and that, in light of *Casey* and *Romer*, *Bowers* had to be overruled. According to the Court in *Lawrence*, for homosexual adults sodomy is a liberty protected from government interference by the Fourteenth Amendment's due process clause.

In the eyes of its critics, not the least of the faults to be found in Kennedy's opinion in *Lawrence* is its proposition that what ought to be constitutionally protected as a fundamental human right can be ascertained by reference to values America "shares with a wider civilization." Kennedy's readiness to listen to the viewpoints of jurists and experts elsewhere appears also in his opinion for the Court in *Roper v. Simmons* (2005), in which it was held that the Eighth Amendment ruled out the death penalty for juvenile offenders. Kennedy's was truly the "swing" vote. He had earlier been one of the bare majority in *Stanford v. Kentucky* (1989) that had held to the contrary.

If Kennedy has on several occasions disappointed those who saw him at the time of his Supreme Court confirmation as a champion of judicial restraint and law and order, he has not always disappointed them. His was the deciding vote in *Bush v. Gore* (2000) against a recount of the Florida ballots in the presidential election of 2000. For Kennedy, the First Amendment's establishment clause does not dictate a wall between church and state. In his view, expressed first in *County of Allegheny v. ACLU* (1989) and later, for the Court, in *Lamb's Chapel v. Center Moriches Union Free School District* (1993), government is free to endorse religion in general as long as it refrains

from favoring any religion in particular and so long as government does not coerce participation. He has turned out to be no fan of affirmative action, joining the Court in *City of Richmond v. J.A. Croson Co.* (1989) in its ruling that the equal protection clause forbids a city from favoring minority vendors in the award of municipal contracts, and refusing in *Grutinger v. Bollinger* (2003) and *Gratz v. Bollinger* (2003) to sanction either of the University of Michigan's attempts to increase diversity through admissions programs favoring minority applicants.

His approach to issues of criminal procedure also defies easy labeling. He has played an important part in restricting the writ of habeas corpus, writing for the Court in *McClesky v. Zant* (1991) that the Constitution entitled a prisoner to more than one such review only when a subsequent claim of constitutional error could not have been part of the earlier petition, and he supplied the fifth vote in *Murray v. Giarrantano* (1989), in which the Court held that indigent death-row prisoners were not entitled to the assistance of counsel for habeas corpus petitions to state courts. On the other hand, in a speech to the American Bar Association in 2003, Justice Kennedy called into question much of the contemporary American system of corrections. He questioned the sheer number of persons incarcerated in America, the disproportionate presence in that population of African Americans, as well as the cost of such a penal system and its inadequate funding. He questioned the lengthening of sentences that resulted from the federal sentencing guidelines and lamented the atrophying of the pardon power. He argued for renewed attention to the goal of rehabilitation, and he challenged the entire American bar to pursue broad reforms in sentencing and clemency.

In the eye of a beholder, the constitutional progress of Anthony Kennedy has been either a disappointing detour from judicial restraint or else a laudable search for the higher path of judicial decision making. That choice is still history's.

JOHN PAUL JONES

References and Further Reading

- The Current Court: Anthony M. Kennedy.* The Supreme Court Historical Society, <http://www.supremecourthistory.org/myweb/justice/kennedy.htm>
- Ahmar, Akhil, *Justice Kennedy and the Ideal of Equality*, Pacific Law Journal 28 (1997): 515.
- Cushman, Claire, ed. "Anthony M. Kennedy" in *The Supreme Court Justices: Illustrated Biographies, 1789–1993*. Washington D.C.: Congressional Quarterly (1993): 516–520.
- Jones, John Paul. "Anthony McLeod Kennedy" in Urofsky, Melvin I., ed. *The Supreme Court Justices:*

A Biographical Dictionary. New York: Garland Publishing Co., 1994, pp. 277–279.

Review of the Supreme Court's Term. The United States Law Week (annually, in several serial installments). Washington, D.C.: The Bureau of National Affairs, Inc., 1992–2004.

Savage, David G. *Turning Right: The Making of the Rehnquist Court*. New York: John Wiley & Sons, 1992.

Cases and Statutes Cited

- Beller v. Middendorf*, 632 F.2d 788 (9th Cir. 1980)
- Bowers v. Hardwick*, 478 U.S. 186 (1986)
- Bush v. Gore*, 531 U.S. 98 (2000)
- Chadha v. INS*, 634 F.2d 408 (9th Cir.1978)
- City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989)
- Commodity Futures Trading Commission v. Schor*, 478 U.S. 833 (1986)
- County of Allegheny v. ACLU*, 492 U.S. 573 (1989)
- Gratz v. Bollinger*, 539 U.S. 244 (2003)
- Grutinger v. Bollinger*, 539 U.S. 306 (2003)
- Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993)
- Lawrence v. Texas*, 539 U.S. 558 (2003)
- Massachusetts v. Sheppard*, 468 U.S. 981 (1984)
- McClesky v. Zant*, 499 U.S. 467 (1991)
- Murray v. Giarrantano*, 492 U.S. 1 (1989)
- Pacemaker Diagnostic Clinic of America, Inc. v. Instromedix, Inc.*, 725 F.2d 537 (9th Cir. 1984)
- Planned Parenthood v. Casey*, 505 U.S. 833 (1992)
- Romer v. Evans*, 517 U.S. 620 (1996)
- Roper v. Simmons*, 125 S. Ct. 1183 (2005)
- Stanford v. Kentucky*, 492 U.S. 361 (1989)
- United States v. Harvey*, 711 F.2d 144 (9th Cir. 1983)

KENT V. DULLES, 357 U.S. 116 (1957)

The Supreme Court's decision in *Kent v. Dulles* established the right to travel abroad as a liberty protected by the due process clause of the Fifth Amendment. The case involved two passport applications that the Secretary of State, acting under statutes authorizing the President to regulate the issuance of passports, had denied on the basis of applicants' alleged affiliations with the Communist Party. In a five-to-four decision, the Court concluded that the Secretary was not authorized to adopt regulations that, in effect, denied passports to citizens on the basis of political belief and associations.

Because the petitioners' passport applications involved the exercise of a constitutionally protected activity, the Court applied a narrow rule of construction for the powers delegated to the Secretary of State. Accordingly, it concluded that without an explicit provision articulated by Congress, it was impermissible for the Secretary to use political belief and associations as a standard in restricting citizens' freedom of movement. With this conclusion, the decision did not address the constitutionality of the particular

restrictions involved in the case. Allegiance to the United States and applicant's participation in illegal activity were recognized as valid grounds for refusing a passport. However, neither was found to be relevant to this case.

Kent established travel abroad as a constitutionally protected activity and became the basis for subsequent decisions involving regulation of passports and travel to certain countries. However, later cases emerging in the context of international crises upheld the President's authority to restrict international travel in accordance with foreign policy interests.

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References and Further Reading

Laursen, Thomas E., *Constitutional Protection of Foreign Travel*, Columbia Law Review 81 (1981): 902–931.

Cases and Statutes Cited

Kent v. Dulles, 357 U.S. 116 (1957)

See also *Aptheker v. Secretary of State*, 378 U.S. 500 (1964); *Due Process; Freedom of Speech: Modern Period (1917–Present)*; *Haig v. Agee*, 453 U.S. 280 (1981); *Right to Travel*

KENTUCKY AND VIRGINIA RESOLVES

The Kentucky and Virginia Resolves were issued in response to the Alien and Sedition Acts that, after continuous criticism by the Republicans during the Quasi-War with France, had been enacted by President John Adams and the Federalist majority in Congress. A fear that immigrants might spread the French Revolution to America inspired passage of the Alien Acts. The Sedition Act made criticism of government officials a crime. In the sedition trials, lawyers failed to persuade the Federalist federal judges, through judicial review, to strike down the Sedition Act as unconstitutional for violating the First Amendment. Federalists contended that the First Amendment was to be understood in a common law context wherein the right to freedom of the press would prevent prior constraint of publication by the government, such as censorship, but not subsequent constraint of publication, such as seditious libel. Furthermore, they defended the Sedition Act as an improvement on the common law by accepting truth as a defense, considering the defendant's intent, and allowing juries to determine both law and fact.

Republicans, using state legislatures where they had strong majorities, passed the Virginia Resolves in 1798 written anonymously by James Madison and

the Kentucky Resolves in 1798 and 1799 written anonymously by Thomas Jefferson. The Virginia legislature also followed with a report, mostly written by Madison, that explained the resolutions. The documents attested to a strong attachment to the Constitution and the union and asserted that states through conventions were parties of the compact that ratified the Constitution and that the people of the states granted specific enumerated powers to the federal government (U.S. Constitution, Article I, Section 8) and reserved other powers to the states (Tenth Amendment).

The compact theory was used later for South Carolina nullification and for secession. Although Jefferson used the words “void, and of no force” and “nullification” in his resolutions, as Madison explained, they were not calling for actual nullification. Indeed, the Virginia government allowed a federal sedition trial to take place in the state. Instead, they were asserting the doctrine of interposition, that states, being parties of the compact, had the right to give an opinion on the constitutionality of an act of the federal government. In this case, they declared unconstitutional the Alien Acts for violating separation of powers by mixing executive, judicial, and legislative functions, and the Sedition Act, for violating the First Amendment.

The Sedition Act, according to the Virginia Resolves, exercises “a power not delegated by the constitution, but on the contrary expressly and positively forbidden by [the First Amendment]. . . a power which more than any other ought to produce universal alarm, because it is leveled against that right of freely examining public characters and measures, and of free communication among the people thereon, which has ever been justly deemed, the only effectual guardian of every other right.” In the Report, Madison added, the First Amendment should protect writers who intend to bring politicians into disrepute.

He wanted freedom of the press to be understood outside the context of the common law (which, being a law that covered the entire field of legislation, he considered to be unconstitutional at the federal level). By this interpretation, the First Amendment prohibited the federal government from engaging in either prior or subsequent constraint of publication.

Through the nineteenth century, the actions of Kentucky and Virginia took on mythical proportions as a grand states-rights stand for liberty against the abuse of power. At the time, however, given the popularity of the Federalists, the Kentucky and Virginia Resolves did not receive a consensus of support in America. Indeed, even in the Virginia legislature, a minority report written by John Marshall defended the Sedition Act as constitutional. Also, the Resolves did not initiate a movement to end seditious libel.

This was not a story of Republican “good guys” versus Federalist “bad guys.” Although the Sedition Act was not renewed after the election of 1800, Republicans in power prosecuted Federalist editors for seditious libel at the state level and in a federal case that led to *United States v. Hudson and Goodwin*.

The Kentucky and Virginia Resolves are significant, first, for the defense of federalism and an important role for the states. Second, in the twentieth century, the Supreme Court moved beyond the common law meaning of freedom of the press and accepted Madison’s interpretation that the First Amendment applied to both prior and subsequent constraint of publication. This has become the Resolves’ main contribution to civil liberties.

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References and Further Reading

- Elkins, Stanley M., and Eric McKittrick. *The Age of Federalism*. New York: Oxford University Press, 1993.
- Koch, Adrienne. *Jefferson and Madison: The Great Collaboration*. New York: Knopf, 1950.
- Levy, Leonard W. *Emergence of a Free Press*. New York: Oxford University Press, 1985.
- Miller, John C. *Crisis in Freedom: The Alien and Sedition Acts*. Boston: Little Brown, 1951.
- Rutland, Robert A. *James Madison: the Founding Father*. New York: Macmillan, 1987.
- Smith, James Morton. *Freedom’s Fetters: The Alien and Sedition Laws and American Civil Liberties*. Ithaca: Cornell University Press, 1956.
- Watkins, William J., Jr. *Reclaiming the American Revolution: The Kentucky and Virginia Resolutions and Their Legacy*. New York: Palgrave Macmillan, 2004.

Cases and Statutes Cited

United States v. Hudson and Goodwin, 7 Cranch 32 (1812)

See also Alien and Sedition Acts (1798); Constitution of 1787; Freedom of the Press: Modern Period (1917–Present); Jefferson, Thomas; Judicial Review; Madison, James; Marshall, John

KEVORKIAN, JACK (1928–)

Jack Kevorkian, the son of Armenian immigrants, graduated from the University of Michigan Medical School in 1952 with a degree in pathology and soon earned the name Doctor Death from his efforts to take pictures of the eyes of dying patients to determine what, if anything, they saw. By the 1980s, Kevorkian had published a number of articles on death and dying and began advertising in the Detroit newspapers as a “physician consultant” for “death

counseling.” In 1988, he published “The Last Fear-some Taboo: Medical Aspects of Planned Death,” proposing that people who wanted to die should be allowed to do so in “suicide clinics.”

During the 1980s, the idea of a “right to die” began to be accepted by both the public and by the courts. The very first such case, *In re Quinlan* in 1976, had brought the issue of allowing terminally ill patients to die to the forefront of public opinion; in the *Cruzan* case (1990), the Supreme Court ruled that while a right to die existed, it could be regulated by the state’s interest in preserving life.

If terminally ill patients on life support had the right to end their treatment and suffering, Kevorkian argued, then sick people who were not on life support ought to be allowed to have a physician assist them in ending their lives. In 1989, using \$30 worth of scrap parts, he built his “suicide machine,” and the following year helped Janet Adkins, a fifty-four-year-old Portland, Oregon, woman with early signs of Alzheimer’s disease, kill herself using his machine (consisting of three tubes containing lethal doses of medication, operated by the patient) in his 1968 Volkswagon van near Holly, Michigan. She would be the first of more than 100 people that Kevorkian helped to die, either through use of the machine or, after his medical license was suspended so he could not get the medications, by inhalation of carbon monoxide.

Kevorkian’s methods, disapproved by nearly all respectable physicians, nonetheless touched off a debate over individual autonomy. Suicide was no longer a crime in American jurisdictions, but assisting suicide remained a felony in many states. The AIDS crisis had focused attention of people who wanted to end their suffering yet were not on life support and so could not just “pull the plug.” While Kevorkian and his methods remained on the fringes, more respectable groups and individuals began lobbying for the idea that physician-assisted suicide, similar to what was available in The Netherlands, ought to be a part of the individual autonomy protected by the due process clause of the Fourteenth Amendment. The idea of a constitutional right to physician-assisted suicide, however, was vetoed by the Supreme Court in 1997 in *Washington v. Glucksberg*.

Despite continued harassment by police, Kevorkian managed to avoid conviction on a variety of charges, because he had been careful not to administer the drugs himself. Then he decided to push the envelope, and on November 22, 1998, the CBS show *60 Minutes* aired a videotape, provided by Kevorkian, showing him giving a lethal injection to Thomas Youk, age fifty-two, who suffered from Lou Gehrig’s disease. Kevorkian made it very plain that he

expected the police to arrest him and that his trial would make it clear to the American people that physician-assisted suicide belonged among the inalienable rights of man.

At his trial, however, Kevorkian insisted on defending himself and threatened to starve himself if he was sent to jail. On April 13, 1999, a jury found Kevorkian guilty of second-degree murder, and the judge sentenced him to ten to twenty-five years in prison; he would be eligible for parole in six years.

Although Kevorkian apparently failed in his crusade, he did contribute to opening a dialogue on quality of life and a right to death. So far, only one state has decriminalized assisted suicide, and the statistics from Oregon show that relatively few people take advantage of the state's laws.

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References and Further Reading

- Betzold, Michael. *Appointment with Dr. Death*. Troy, MI: Momentum Books, 1993.
 Urofsky, Melvin I. *Lethal Judgments: Assisted Suicide and American Law*. Lawrence: University Press of Kansas, 2000.

Cases and Statutes Cited

- Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261 (1990)
Quinlan, In re, 355 A.2d 647 (N.J. 1976)
Washington v. Glucksberg, 521 U.S. 702 (1997)

KING, MARTIN LUTHER, JR. (1929–1968)

On January 15, 1929, Martin Luther King, Jr. was born to Rev. and Mrs. Martin Luther King, Sr. As was the custom, MLK, Jr. was born in the family home located at 501 Auburn Avenue, N.E. in Atlanta, Georgia. He was the second child and first son born to Rev. and Mrs. King, Sr. At birth, MLK, Jr. was named “Michael” Luther King, Jr. after the Senior King. When MLK, Jr. was five years old, the Senior King changed both of their first names from “Michael” to “Martin.”

MLK, Jr. excelled in his studies from an early age—he skipped both the ninth and twelfth grades of high school, and, as a result, he entered Morehouse College (Atlanta, Georgia) at fifteen years old. In 1948, he earned his BA degree in Sociology from Morehouse. In 1951, he earned a Bachelor of Divinity degree from Crozier Theological Seminary (Chester, Pennsylvania). At Crozier, among his various accolades, he was both senior class president and valedictorian.

Four years later, in 1955, MLK, Jr. earned his Ph.D. degree in Systemic Theology from Boston University.

Having been ordained into the Baptist Ministry in 1948 (at nineteen years old)—that year, MLK, Jr. accepted the position of assistant pastor at Ebenezer Baptist Church (Atlanta, Georgia)—the “family” church. MLK, Jr. served as assistant pastor at Ebenezer for approximately seven years. Both MLK, Jr.’s grandfather and father—Rev. MLK, Sr.—served as pastor of Ebenezer (MLK, Sr. served as pastor for a total of forty-four years—even after MLK, Jr.’s death).

MLK, Jr. and Coretta Scott were married in 1953. They later had four children (born from 1955 through 1963). After completing his Ph.D. studies in 1954, Dr. King accepted the position of pastor at Dexter Avenue Church (Montgomery, Alabama). He served as pastor from 1954 until 1959.

In 1959, MLK, Jr. resigned as pastor of Dexter Avenue Baptist Church to return to Atlanta to become a more full-time director of the Southern Christian Leadership Conference (SCLC) that he had founded in 1957. He remained associated with SCLC until his death in 1968. In addition, Rev. King, Jr. served as copastor (with his father) of Ebenezer Baptist Church from 1960 until 1968.

From the mid-1950s until his assassination in 1968, Dr. MLK, Jr. became internationally known for his incredible efforts and strides toward civil rights for those living in poverty and facing racial discrimination within the United States. Throughout his lifetime, MLK, Jr. espoused and followed the teachings and philosophy of “passivist resistance” or “non-violent noncooperation” as espoused by Mohandas Gandhi (1869–1948), who was known as the “Father of Nonviolent Agitation.”

It should be noted that Dr. MLK, Jr.’s activities, merits, and efforts are too numerous to completely detail in encyclopedic form. As president of the Montgomery Improvement Association, Dr. King launched the successful Montgomery Bus Boycott protesting the fact that black riders were forced to sit or stand in the back of the bus and use the back door for entry while White patrons sat in the front and used the front door (the front seats remained empty when no White riders were present). The protest was sparked by the refusal of Ms. Rosa Parks to remove herself to the back of the bus and relinquish her seat to a White patron. After a 381-day protest, black riders won equal access to public transportation services in Montgomery, Alabama.

During the boycott, Dr. King, Jr. was arrested—at that time, it was illegal in the State of Alabama to boycott. This would be the first of more than thirty arrests that Dr. King, Jr. would endure in his efforts to bring freedom and equality to all citizens.

In 1963, Dr. King led sit-in demonstrations to desegregate lunch counters and eating facilities in Birmingham, Alabama. He was arrested during one such demonstration, ironically that particular march was in commemoration of the 100th anniversary of the Emancipation Proclamation—in April 1963; while imprisoned, he wrote his famous *Letter from a Birmingham Jail*. The Letter has been praised as “one of the most important documents of nonviolent protest in the civil rights movement.” As an apt illustration of Martin Luther King, Jr.’s philosophy of nonviolence and a Christ-like acceptance of personal responsibility, in part, the *Letter* states:

One who breaks an unjust law must do so openly, lovingly, and with a willingness to accept the penalty. I submit that an individual who breaks a law that conscience tells him is unjust, and who willingly accepts the penalty of imprisonment in order to arouse the conscience of the community over its injustice, is in reality expressing the highest respect for the law.

MLK, Jr. encouraged citizens from all corners of society to engage in nonviolent protest with equality for all as the goal. Assisting in the Birmingham march and sit-ins throughout the South were members of the Student Non-Violent Coordinating Committee (SNCC), which had been founded in 1960 by college students to organize lunch counter sit-ins and other antisegregation demonstrations. In May of 1963, the U.S. Supreme Court held that the Birmingham, Alabama, segregation ordinances (including lunch counters) were unconstitutional.

Decrying inequality between the races, on August 28, 1963, the now-famous “March on Washington” was held. At that time, Black unemployment was eleven percent, whereas White unemployment stood at five percent. Similarly, on average, White families earned \$6,500 per year, whereas an average Black family earned \$3,500 per year. During the March on Washington, MLK, Jr. made his historic *I Have a Dream* Speech from the steps of the Lincoln Memorial. This integrated protest march drew more than 250,000 protestors to the Washington Monument in Washington, D.C.—at that time, the largest march and protest of its kind.

To oppose racial inequality in voting rights, in March of 1965, Rev. King and about 4,000 members of the SCLC held a march from Selma to Montgomery, Alabama (the “Selma-to-Montgomery March”)—with the protection of federal troops—before reaching their destination, nearly 30,000 supporters swelled the ranks of the march. At the capitol, Dr. MLK, Jr. gave his well-known *How Long? . . . Not Long?* Speech. During this time, and as a testament to the teachings and labors of MLK, Jr., the Voting

Rights Act of 1965 was enacted by President Lyndon B. Johnson. In honorarium, MLK, Jr. and other civil rights activists were present at the Presidential bill signing.

In July of 1967, due largely to the efforts of Dr. King, Jr. and members of the SCLC, it was reported by the Justice Department that—in the states of Alabama, Georgia, Louisiana, Mississippi, and South Carolina—more than fifty percent of all eligible African-American residents were registered to vote.

In April of 1968, Dr. King was in Memphis, Tennessee, to help lead a protest by sanitation workers against low pay rates and substandard working conditions. In late-March, Dr. King, Jr. had led 6,000 protestors through downtown Memphis in support of the striking sanitation workers. With a predictive title, Dr. King delivered his final public speech—*I’ve Been to the Mountaintop*—in Memphis on April 3, 1968. In prophetic terms, The Rev. Dr. Martin Luther King, Jr. exclaimed:

Well, I don’t know what will happen now. We’ve got some difficult days ahead, but it really doesn’t matter to me now because I’ve been to the mountaintop. And I don’t mind. Like anybody, I would like to live a long time, longevity has its place. But I’m not concerned about that now. I just want to do God’s will. . . I may not get there with you. But I want you to know tonight that we, as a people, will get to the Promised Land! And so I’m happy tonight! I’m not fearing any man! Mine eyes have seen the glory of the coming of the Lord!

The following day, on April 4, 1968, Martin Luther King, Jr. was shot and killed by James Earl Ray while standing on the balcony of his room at the Lorraine Motel.

Four days after Dr. MLK, Jr.’s assassination, Rep. John Conyers (D-MI) introduced the first bill in the United States Congress proposing the creation of a federal holiday in honor of Martin Luther King, Jr. It would take another two decades for Rep. Conyers’ dream to become a reality.

During his lifetime, MLK, Jr. was awarded innumerable awards and honorary degrees—both nationally and internationally. For example, he was named *Time Magazine’s* Man of the year in 1963. In addition, as perhaps the ultimate testament to his efforts, the Rev. Dr. Martin Luther King, Jr. was awarded the Nobel Peace Prize in 1964. At thirty-five years old, he was the youngest man to earn this honor and was only the second American so awarded.

In addition to his public works for civil rights and peace, in a short ten-year time-span, Dr. King wrote and published six books and numerous articles. The titles, publication dates, and general topics of the

books are as follows: *Stride Towards Freedom*, 1958 (Montgomery Bus Boycott); *The Measure of a Man*, 1959 (selected sermons); *Why We Can't Wait*, 1963 (Birmingham Campaign); *Strength to Love*, 1963 (selected sermons); *Where Do We Go From Here: Chaos or Community?*, 1967 (world-related issues); and *The Trumpet of Conscience*, 1968 (posthumously) (Massey Lectures).

States began to hold statewide (and state-sanctioned) celebrations of the MLK, Jr. Holiday beginning with Illinois in 1973. Finally, after nearly twenty years in the making, to commemorate the life and works of Dr. Martin Luther King, Jr., in 1986, President Ronald Reagan signed the legislation enacting the Martin Luther King, Jr. National Holiday. Unfortunately, some states like Arizona, Mississippi, and New Hampshire took many years to acknowledge the holiday.

In August of 1994, President William Clinton enacted the Martin Luther King, Jr. Federal Holiday and Service Act. The intent of the law is to expand the purpose of the King Holiday to encompass "community service, interracial communication, and youth anti-violence initiatives." To this end, the King Center entreats every American "to commemorate this Holiday by making your personal commitment to serve humanity.... And with our hearts open to this spirit of unconditional love, we can indeed achieve the 'Beloved Community' of Martin Luther King, Jr.'s dream."

On December 8, 1999, a jury in Memphis, Tennessee, concluded that governmental agencies (including the City of Memphis, the State of Tennessee, and the federal government) were part of a conspiracy to assassinate The Rev. Dr. Martin Luther King, Jr.

If we make the right choice, we will be able to transform the jangling discords of our world into a beautiful symphony of brotherhood. If we make the right choice, we will be able to speed up the day, all over America and all over the world, when justice will roll down like waters, and righteousness like a mighty stream.

MLK, Jr., *Beyond Vietnam*, (at the Riverside Church, NYC) April 4, 1967

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References and Further Reading

- Branch, Taylor. *Parting the Waters: America in the King Years (1954–1963)*. New York: Simon & Schuster, 1988.
- . *Pillar of Fire: America in the King Years (1963–1965)*. New York: Simon & Schuster, 1998.
- Carson, Clayborne, and David J. Garrow et al., eds. *Eyes on the Prize Civil Rights Reader: Documents, Speeches, and Firsthand Accounts from the Black Freedom Struggle, 1954–1990*. New York: Penguin Books, 1991.

- Frady, Marshall. *Martin Luther King, Jr.* New York: Penguin Group, 2002.
- Hooks, Benjamin, with Jerry Guess. *The March for Civil Rights: The Benjamin Hooks Story*. Chicago: ABA Publishing, 2003.
- The King Center, <http://www.thekingcenter.org> (last accessed July 16, 2005).
- McWhirter, Darien A. *The Legal 100: A Ranking of the Individuals Who Have Most Influenced the Law*. Secaucus, NJ: Carol Publishing Group, 1998.
- Meacham, Jon, ed. *Voices in Our Blood: America's Best on the Civil Rights Movement*. New York: Random House, 2001.
- O'Reilly, Kenneth, and David Gallen, eds. *Black Americans: The FBI Files*. New York: Carroll & Graf Publishers, Inc., 1994.
- National Park Service. *Martin Luther King Jr. Historic Site*, <http://www.nps.gov/malu/> (last accessed July 16, 2005).
- Pepper, William F. *An Act of State: The Execution of Martin Luther King*. London: Verso, 2003.
- Quarles, Benjamin. *The Negro in the Making of America*. 3rd Ed. New York: Simon & Schuster, 1987.
- Smith, Marcia A. *Black America: A Photographic Journey—Past to Present*. San Diego: Thunder Bay Press, 2002.
- Stanford University. *The Martin Luther King, Jr. Papers Project*. <http://www.stanford.edu/group/King/> (last accessed July 16, 2005).
- Washington, James M., ed. *A Testament of Hope: The Essential Writings and Speeches of Martin Luther King, Jr.* San Francisco: Harper Collins Publishers, 1986.
- Williams, Cecil J. *Freedom Justice: Four Decades of the Civil Rights Struggle as Seen By a Black Photographer of the Deep South*. Macon, GA: Mercer University Press, 1995.
- Williams, Juan. *Eyes on the Prize: America's Civil Rights Years, 1954–1965*. New York: Penguin Books, 1988.

See also Demonstrations and Sit-Ins; Marches and Demonstrations; Segregation

KINGSLEY INTERNATIONAL PICTURES CORPORATION v. REGENTS OF THE UNIVERSITY OF NEW YORK, 360 U.S. 684 (1959)

The Motion Picture Division of the New York State Education Department was authorized to issue licenses for the exhibition, sale, lease, or distribution of motion pictures. Licenses could be denied to any motion picture portraying in whole or in part, either "expressly or impliedly" immoral, perverse, or lewd sexual acts as "desirable, acceptable, or proper patterns of behavior." When Kingsley International Pictures submitted a filmed version of H. D. Lawrence's novel, *Lady Chatterley's Lover* to the Education Division for a license, it was denied on the grounds that isolated scenes were immoral. The corporation appealed to the University of New York Regents who upheld the decision after they concluded the film

presented adultery as acceptable and proper behavior. A lower court annulled the Regents' decision, but a sharply divided New York Court of Appeals reinstated the rescission and upheld the Regents. The Court of Appeals declared that although *Lady Chatterley's Lover* was not obscene, it nevertheless "alluringly portrays adultery as proper behavior."

The Supreme Court reversed the New York court and struck down the statute's new sections. As Justice Potter Stewart in his lead opinion stated, "Once again the Court is required to consider the impact of New York's motion picture licensing law upon First Amendment liberties." While Stewart delivered the Court's opinion, there were five written concurring opinions. Justices Black, Frankfurter, and Clark wrote separately. Justice Douglas' concurrence was joined by Justice Black. Justice Harlan's opinion was joined by Justices Frankfurter and Whittaker.

Justice Stewart's brief opinion quickly dismissed the notion that a motion picture could be denied a license because it approvingly portrayed an adulterous relationship "quite without reference to the manner of its portrayal." To conclude otherwise, he declared, would mean New York could suppress *Lady Chatterley's Lover* on the basis that it "advocates an idea—that adultery under certain circumstances may be proper behavior. Yet the First Amendment's basic guarantee is of freedom to advocate ideas. The State, quite simply, has thus struck at the very heart of constitutionally protected liberty."

Black and Douglas shared the view that New York's law involved prior censorship of motion pictures and thus violated the precedent set in *Near v. Minnesota* (1931) barring prior restraint. Black wrote separately to lament the Court's "individualized determination" of whether publications or motion pictures were obscene had converted it into a "Supreme Board of Censors." Frankfurter and Harlan agreed with the majority's judgment but not its rationale. Both thought the Court's opinion failed to address the issue of "vagueness," which had been the grounds for earlier decisions against New York's law; that the opinion misconstrued the views of the New York courts; and that even though they agreed, New York's law was constitutional its application to *Lady Chatterley's Lover* exceeded constitutional bounds.

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References and Further Reading

- Gossett, John S., and Juliet Dee. "Near v. Minnesota." in Parker, Richard A., ed. *Free Speech on Trial*. Tuscaloosa: University of Alabama Press, 2003.
- Rembar, Charles. *The End of Obscenity: The Trials of Lady Chatterley, Tropic of Cancer, and Fanny Hill*. New York: Random House, 1968.

Cases and Statutes Cited

- Kingsley International Pictures Corp. v. Regents of the University of New York*, 360 U.S. 684 (1959)
- Near v. Minnesota*, 283 U.S. 697 (1931)

KIRBY v. ILLINOIS, 406 U.S. 682 (1972)

A suspect's right to counsel's presence during an eyewitness identification procedure was established in *United States v. Wade* in 1967 to avert suggestive procedures and prevent convicting the innocent. *Wade and Gilbert v. California* involved lineups conducted after the suspects were indicted. But in *Kirby*, the identification procedure took place just after arrest and before formally charging. Police often seek an identification to confirm police suspicions before formally charging. Kirby argued the suggestive influences at issue in *Wade-Gilbert* were equally likely in this time setting; indeed, the witness identified him in a highly suggestive one-on-one show-up confrontation. However, the Court majority refused Kirby's request to extend the *Wade-Gilbert* right to counsel to preformal-charging eyewitness identification procedures, although the Court had provided a right to counsel to persons during preformal-charging interrogation procedures in *Escobedo v. Illinois* and *Miranda v. Arizona*. The Sixth Amendment right to counsel applies "in all criminal prosecutions," and the Court majority finds the criminal prosecution begins only at or after the initiation of adversary criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment. Once a formal charge occurs, an identification procedure will constitute a critical stage in the criminal prosecution such that the right to counsel applies. Kirby's definition of the onset of the criminal prosecution in the Sixth Amendment forced a recharacterization of the *Miranda* right to counsel as a judicially created Fifth Amendment right to counsel and limited the availability of counsel in other settings. *United States v. Ash* later limits *Wade-Gilbert-Kirby*.

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References and Further Reading

- American Law Institute. *A Model Code of Pre-Arrestment Procedure, Proposed Official Draft and Commentary*. (1975): 419–458.
- Grano, Joseph D., et al., *Do Any Constitutional Safeguards Remain Against the Danger of Convicting the Innocent?*, Michigan Law Review 72 (1985): 717–798.
- Levine, Felice J., and June L. Tapp, *The Psychology of Criminal Identifications: The Gap from Wade to Kirby*, University of Pennsylvania Law Review 121 (1973): 1079–1131.

Panel Discussion, *The Role of the Defense Lawyer at a Lineup in Light of the Wade, Gilbert, and Stovall Decisions*, Criminal Law Bulletin 4 (1968): 273–296.

Cases and Statutes Cited

Escobedo v. Illinois, 378 U.S. 478 (1964)
Gilbert v. California, 388 U.S. 263 (1967)
Miranda v. Arizona, 384 U.S. 436 (1966)
Moore v. Illinois, 434 U.S. 220 (1977)
United States v. Ash, 413 U.S. 300 (1973)
United States v. Wade, 388 U.S. 218 (1967)

See also **Eyewitness Identification; Line-ups**

KLEINDIENST v. MANDEL, 408 U.S. 753 (1972)

If authorized by Congress, the Executive Branch can deny noncitizens entry into the United States on ideological grounds even when the denial is inconsistent with First Amendment norms.

Mandel, a Belgian journalist and self-described revolutionary Marxist, was invited to speak to academics in the United States. The government denied his visa application because he was excludable under the Immigration and Nationality Act, which barred advocates of the doctrines of world communism from entering the United States. The Attorney General refused to waive the exclusion provision on the ground that Mandel had flagrantly abused a previous visa by engaging in activities “far beyond the stated purposes of his trip.”

Mandel asked the Court to address the following question: “Does the [government’s] action in refusing to allow an alien scholar to enter the country to attend academic meetings violate the First Amendment rights of American scholars and students who had invited him?” Sidestepping that question, the Court concluded that Congress’ plenary power over issues of admission, exclusion, and deportation of aliens trumped the legitimate First Amendment rights at stake at least in this case where the government had provided a “facially legitimate and bona fide” reason for refusing to waive the exclusion ground.

The plenary power doctrine continues to give the political branches deference to shape immigration law and policy even in ways inconsistent with cherished constitutional values and civil liberties.

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References and Further Reading

Scanlan, John, *Aliens in the Marketplace of Ideas: The Government, The Academy and the McCarran-Walter Act*, Texas Law Review 66 (1988): 1481–1546.

Scaperlanda, Michael, *Justice Marshall and the Legacy of Dissent in Federal Alienage Cases*, Oklahoma Law Review 47 (1994): 55–74.

Shapiro, Steven, *Ideological Exclusions: Closing the Border to Political Dissidents*, Harvard Law Review 100 (1987): 930–945.

See also **Academic Freedom; Aliens, Civil Liberties of; Bill of Rights: Structure; Chae Chan Ping v. U.S., 130 U.S. 581 (1889) and the Chinese Exclusion Act; Freedom of Press: Modern Period (1917–Present); Freedom of Speech: Modern Period (1917–Present); Marketplace of Ideas Theory; National Security; National Security and Freedom of Speech; 9/11 and the War on Terrorism; Noncitizens and Civil Liberties; Plenary Power Doctrine; Terrorism and Civil Liberties**

KLOPFER v. NORTH CAROLINA, 386 U.S. 213 (1967)

More than a year after an individual’s state court trial ended in a mistrial because of the jury’s inability to reach a verdict, the prosecutor asked the court to permit him to take a “nolle prosequi with leave,” a procedural device that discharged the accused from custody but did not permanently terminate the proceedings against him. Even though the prosecutor did not offer any justification for his request, the trial court, over the accused’s objection, granted the request, thereby allowing the prosecutor to reinstate proceedings at a future date.

In *Klopper v. North Carolina*, the U.S. Supreme Court held that the due process clause of the Fourteenth Amendment incorporates the Sixth Amendment right to a speedy trial (which itself applies only to federal prosecutions) and makes that provision applicable to the States. It also held that the procedural device in question denied the accused his federally guaranteed right to a speedy trial. The Court noted that the right to a speedy trial “has its roots at the very foundation of our English law heritage,” and it traced the history of the right from the twelfth century into the jurisprudence of this country, pointing out that every State guarantees its citizens the right to a speedy trial. The Court concluded that the right to a speedy trial is “fundamental” and “one of the most basic rights preserved by our Constitution,” and it pronounced that it is to be enforced in state prosecutions according to the same standards as in federal prosecutions.

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References and Further Reading

LaFave, Wayne R., Jerold H. Israel, and Nancy J. King. *Criminal Procedure*. 4th Ed. St. Paul, MN: Thompson-West, 2004, pp. 858–859, 864.
Recent Decision, Brooklyn Law Review 34 (1968): 2:316-328.

See also **Fourteenth Amendment; Incorporation Doctrine; Speedy Trial**

KOIS V. WISCONSIN, 408 U.S. 229 (1972)

Kois edited the “Kaleidoscope,” an underground, radical newspaper in Madison, Wisconsin. He was convicted and sentenced to two consecutive one-year terms in prison and fined \$2,000 for publishing two photographs that accompanied a story in the interior of the paper dealing with the arrest of the paper’s photographer for possessing obscene material and for publishing on a separate occasion a poem recalling the author’s recollection of sexual intercourse. The Supreme Court in a *per curiam* opinion reversed Wisconsin’s Supreme Court that had affirmed Kois’ conviction. Justice Douglas concurred only in the judgment.

The *per curiam* explained the Wisconsin court erred with regard to the first offense, because it failed to recognize that the photographs only illustrated the theme or point of the story. “We do not think it can fairly be said, either considering the article as it appears or the record before the state court, that the article was a mere vehicle for the publication of the pictures.” The opinion then added, “A quotation from Voltaire in the flyleaf of a book will not constitutionally redeem an otherwise obscene publication. . . .” In the instance of the “Kaleidoscope” article and the two photographs, however, no similar subterfuge had been attempted.

As for the sexually explicit poem, the second offense for which Kois was convicted, the lower court erred by ignoring *Roth’s* emphasis that “sex and obscenity are not synonymous. . . . The portrayal of sex. . . is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press.” In essence, the lower court failed to “look at the context of the material as well as its content.” The opinion then added, given the placement and location of the poem in the paper, “we believe it bears some of the earmarks of an attempt at serious art.” Context and indications of seriousness might factor into assessments of whether the “dominant” theme of the material appeals to prurient interests, because “the ‘dominance’ of the theme is a question of constitutional fact.”

Douglas’ concurrence protested the problems he thought *Roth* and its progeny had created for the Supreme Court, lower courts, law enforcement, and private individuals by trying to carve out an exception to the First Amendment. This case, he pointed out, provided ample proof of “the morass in which this Court has placed itself in the area of obscenity. Men are sent to prison under definitions which they cannot understand and on which lower courts and members of this Court cannot agree.”

ROY B. FLEMMING

Cases and Statutes Cited

Kois v. Wisconsin, 408 U.S. 229 (1972)
Roth v. United States, 354 U.S. 476 (1957)

KOLENDER V. LAWSON, 461 U.S. 352 (1983)

Terry v. Ohio 392 U.S. 1 (1968) permits police to stop and frisk persons on less-than-probable cause, so long as the police have at least “reasonable suspicion” that a crime may have occurred. A number of states have statutes that also purport to allow police to stop or arrest persons who appear to be loitering or wandering about without purpose. Between March 1975 and January 1977, Edward Lawson, a black businessman crowned with dreadlocks, was held and questioned by San Diego police at least fifteen times. Mr. Lawson enjoyed walking late through exclusive residential neighborhoods at night, a hobby that eventually resulted in two prosecutions, and a misdemeanor conviction for violation of California Penal Code § 647(e), a statute that required persons who loiter or wander the California streets to provide “credible and reliable” identification and to “account for their presence.” A number of states have similar statutes, sometimes referred to as “stop and identify” statutes. Lawson filed a civil action seeking a declaratory judgment that 647(e) was unconstitutionally vague.

The United States Supreme Court held the California statute was void for vagueness because it “vests virtually complete discretion in the hands of the police to determine whether the suspect has satisfied the statute and must be permitted to go on his way in the absence of probable cause to arrest.” In particular, the statute failed to specify what was meant by the requirement that a suspect provide “credible and reliable” identification and failed to give “fair and adequate notice” of the type of conduct prohibited. The statute allowed excessive police discretion in determining what constituted reasonable suspicion as to whether the suspect fulfilled the identification request.

PETER A. COLLINS

References and Further Reading

- Hallock, Alan D., *Stop-and-Identify Statutes After Kolender v. Lawson: Exploring the Forth and Fifth Amendment Issues*, Iowa Law Review 69 (1984): 1057–1080.
- Silvestrini, Leslie V. F., *Kolender v. Lawson: Fourth and Inches on Fourth Amendment Issues and Supreme Court Punts*, Journal of Contemporary Law 10 (1984): 239–253.
- Stormer, Dan, and Paul Bernstein, *The Impact of Kolender v. Lawson on Law Enforcement and Minority Groups*, Hastings Constitutional Law Quarterly 12 (1984): 71: 105–125.

Cases and Statutes Cited

Terry v. Ohio, 392 U.S. 1 (1968)

See also **Stop and Frisk; Void-for-Vagueness**

KONIGSBERG V. STATE BAR OF CALIFORNIA, 366 U.S. 36 (1961)

Argued December 14, 1960, decided April 24, 1961, by a vote of five to four, Justice Harlan delivered the opinion for the Court, with Justice Black, Chief Justice Warren, Douglas, and Brennan dissenting. The Court held that Konigsberg's application for admission to the State Bar, denied because of his refusal to answer questions surrounding his connection to the Communist Party, did not violate the Fourteenth Amendment. The decision signifies the remnants of McCarthyism and the Court's refusal to connect free speech and association to the Fourteenth Amendment.

Under California law, the California Committee of Bar Examiners certifies those able to practice law in the State of California. The State Supreme Court may review any applicant's qualifications. In hearings by the Committee, Konigsberg refused to answer any questions pertaining to his membership in the Communist Party, not on the ground of self-incrimination, but on the ground that such questions were beyond the purview of the Committee's authority and infringed rights of free thought, association, and expression assured him under the State and Federal Constitutions. Konigsberg was denied admission to practice.

Justice Harlan argued that the Fourteenth Amendment's protection against arbitrary state action does not forbid a State from denying admission to a bar applicant so long as he refuses to provide unprivileged answers to questions having a substantial relevance to his qualifications. Harlan went on to explain that it was the responsibility of the State of California to determine whether an applicant for license to practice law might be interested in the violent overthrow of the government.

Justice Black, Chief Justice Warren, Douglas, and Brennan dissented. Black's dissent argued that the majority decision was now asking Konigsberg to defend himself against unsubstantiated accusations. Konigsberg's attempt to connect his First Amendment free speech issues with the protections of the Fourteenth Amendment was persuasive to Black. Black wrote, "Nothing in this record shows that Konigsberg has ever been guilty of any conduct that threatens our safety. Quite the contrary, the record indicates that we are fortunate to have men like him in this country for it shows that Konigsberg is a man of firm convictions who has stood up and supported this country's freedom in peace and in war. The writings that the record shows he has published constitute vehement protests against the idea of overthrowing this Government by force. No witness could be found throughout the long years of this inquisition who could say, or even who would say, that Konigsberg has ever raised his voice or his hand against his country. He is, therefore, but another victim of the prevailing fashion of destroying men for the views it is suspected they might entertain."

AARON R. S. LORENZ

KU KLUX KLAN

The organization known as the Ku Klux Klan has hidden behind many masks since its inception during the years after the Civil War. Behind the images of sheets, masks, and symbols, the Klan has targeted many different groups. In fact, the Ku Klux Klan has had several different phases. The Klan has evolved from being a strictly southern institution that targeted African Americans and the Republican Party to a nationwide organization with a wide variety of objectives. Ironically, the Klan has also faced many groups attempting to infringe on its civil liberties as well.

The first Klan became an important institution during the Reconstruction Era. The Klan was founded in Pulaski, Tennessee, in 1866 as a social fraternity designed to provide mutual aid to Confederate families devastated by the war. However, the Klan soon changed into a vehicle to challenge the emancipation and new political rights of the freed slaves. The name Ku Klux Klan was derived from a Greek word for "circle" or "band." Former Confederate soldiers and officers helped to convert the Klan into a more organized band with the purpose of challenging Republican government in the South. As more and more Southern states elected Republican governments, the Klan rapidly spread.

The leadership of the Klan usually came from the leaders of communities all over the South. Elite

landholders easily persuaded many others to join their cause by “uniting” under the banner of being white southerners. Initially, the Klan used their outlandish outfits to play on the supposed superstitions of southern blacks. Some of the first Klan actions involved showing up on porches in the middle of the night and parading as ghosts to frighten innocent citizens. Soon, however, these “practical jokes,” turned into real night terrors, as Klan night riders dragged people from their homes and administered the whip or otherwise assaulted them. Blacks were not the only target of the Klan; white Republicans and others that sympathized with the former slaves also became targets.

In response to Klan activities, local governments were usually either themselves involved in the Klan or powerless to stop it. In most cases, federal intervention was needed to break up Klan activity. The federal government used many means to stop, or at least disrupt, Klan activity by congressional legislation, military action, and trials. In 1870 and 1871, the federal government began a concerted effort to stamp out Klan violence. Congress began by enacting laws designed to enforce the Fourteenth and Fifteenth Amendments, which guaranteed rights to all citizens. Congress also passed new legislation that made it a federal offense to interfere with voting rights. The most powerful initiative passed by Congress came in April of 1871, which was popularly called the Ku Klux Klan act, which enabled the president to suspend habeas corpus rights and send in federal troops to suppress armed resistance.

With these added powers, the Grant administration effectively ended the power of the first Ku Klux Klan movement. Grant only used his powers to suspend habeas corpus in nine South Carolina counties, but he did effectively use federal troops to arrest thousands of suspected Klansmen. With the onset of federal power, the Klan lost much of its momentum and appeal in the South.

The second Ku Klux Klan developed in an era of fear and upheaval in the years before World War I. The founder of the second Klan was the son of a poor Alabama physician, William Joseph Simmons. He was a man who had tried his hand in many occupations such as farming, preaching as a Southern Methodist Episcopal minister, and finally as the lead organizer for the Atlanta area chapter of the Woodmen of the World, a fraternal aid society. In October 1915, Simmons officially began the second Ku Klux Klan with a handful of followers. Part of the inspiration for the founding of the second Ku Klux Klan was a racist film entitled, *Birth of a Nation*, by D. W. Griffith, which hailed the early Klan as having saved the nation from freed slaves threatening to destroy the nation.

In the following years, Simmons struggled to expand his organization, but by 1920, with the aid of several strong organizers, the second Klan’s membership erupted. To sell the idea of the Klan, Simmons and his followers promised white supremacy, Christianity, and male bonding, but also played on national fears surrounding the atmosphere of World War I. The Klan proclaimed itself to be the great defender of everything American, such as patriotism, old-time religion, and morality. They played on the fears of organized African Americans, Jews, and the Catholic Church. The Klan also found a new enemy in Bolshevism. All these fears helped fuel Klan membership. The members proclaimed themselves to be part of a great movement to secure the birthright of all Anglo-Saxon Protestant Americans. With this message, the ranks of Klan expanded to include as many as 4 million Americans by 1924, including its female auxiliary, Women of the Ku Klux Klan.

The second Ku Klux Klan differed in many ways from the original. From its southern beginnings, the second Klan spread above the Mason-Dixon Line. As many blacks moved to northern cities, they soon faced much of the same racism as they did in the South. Besides African Americans, Klan literature told of vast conspiracies involving Jews and Catholics. According to many Klan texts, Jewish bankers were extorting the American public for millions of dollars. Catholics also became a target, as Klan members accused priests and nuns of preying on Protestant children in orphanages around the country. Much of the Klan’s literature was also directed toward changing attitudes in America. During the 1920s, there was a sexual awakening in many parts of the country, and Klan literature reflected their attitudes toward this opening up of sexual mores. The Klan railed against supposed sexual abuses of whites and Protestants at the hands of African Americans and Catholic priests in many of their writings.

One aspect of the second Ku Klux Klan that is often overlooked is the level of violence. Many historians have pointed out that the second Klan was much less violent than the first, and in many cases this is true. Most Klan members did not participate in violent acts, but they expressed their views in other ways. Many marched in parades and participated in such activities as Klan barbecues and rallies. The second Ku Klux Klan was also responsible for establishing the most famous image of the Klan, the burning cross. Contrary to popular belief, the first Klan did not burn crosses, but the idea seemed to have been born in the novel *The Clansmen*, by Thomas Dixon. The symbol of the burning cross is still an issue in the courts of the United States. Recently, the Supreme

Court ruled in cases in Virginia that cross burnings are legal expressions of free speech as long as there is no intent to intimidate any group. The cross burning was deemed legal because it took place on private property with the owner's consent. The Court has upheld the idea that even hateful speech is constitutionally protected.

The second Klan also became much more politically involved than the first. The Klan ran its own political candidates for office, and in many cities prominent citizens backed the Klan candidates. Through 1926, the Klan elected many officials in states such as Texas, Oklahoma, Indiana, Oregon, and Maine.

Despite many of its members not participating in violent acts, the second Klan did have its share of violence, particularly in Southern areas. Many Klansmen turned to violence to "prove" that in a rapidly changing world, they still had power. They acted out of what they believed was the world's rejection of their values and turned to violence to assert their power. In many areas, one of the most effective violent tools the Klan used was lynching. The numbers of lynchings in the South were very low before 1915, but by the early 1920s the number was on the rise. One case, in 1921, involved a Georgia man by the name of John Lee Eberhart. Eberhart was sought for the murder of a white farmer's wife near the city of Athens. Until this point, the local NAACP (National Association for the Advancement of Colored People) assured residents that Athens was an area where lynchings were very unlikely. There was very little evidence against Eberhart, but a gathering crowd of Klan members was certain of his guilt. He was abducted from the Athens jail while a crowd of police and sheriffs deputies looked on. At this point, he was taken by the mob and tortured to death by fire. Shortly after his death, conclusive evidence showed Eberhart was not guilty, but the mob and the Klan had already issued its sentence.

Another famous lynching case involved Leo Frank, who was wrongfully accused of the murder of a young girl, Mary Phagan. The girl was murdered in the basement of a pencil factory in Atlanta, Georgia, in 1913, and two years later, the Klan lynched Leo Frank for the murder. The Leo Frank case spurred many important Supreme Court rulings dealing with civil liberties. The Court has argued issues such as an inflamed public and the admissibility of perjured testimony, with its roots in the Leo Frank case.

Another target of Klan violence, especially in the South, was against those trying to organize labor. The Klan targeted labor leaders for trying to destroy "white harmony" by insinuating that white and African American workers should come together in an

effort for better wages. Local Klan chapters harassed organized labor leaders with burned crosses in their yards or more extreme measures such as beatings. The attacks on labor became so frequent that the American Federation of Labor adopted resolutions condemning the activities of secret societies, and named the Klan specifically.

The Klan is most well known for its opposition to the Civil Rights Movement. Because many African Americans worked for Civil Rights in the South, the Klan rose up in opposition. The new Klan adopted violence early on as one its major tools, and African Americans, along with those hoping to secure their rights, became the target. The most infamous use of Klan violence against Civil Rights workers occurred in Philadelphia, Mississippi, in 1964. During that year, many northern whites working alongside southern blacks attempted to register new voters and push for the end of segregation. On June 21, 1964, three Civil Rights workers were murdered by the Klan. Their bodies were buried beneath a pond dam but later discovered. Events such as these prompted many Americans to despise the Klan and actually helped to further the Civil Rights Movement.

The Klan has also faced its own issues in regard to civil liberties. Often the Klan has argued that national, local, and state governments have violated its rights to free speech and the freedom to peacefully assemble. The principal accusations made by the Klan have involved laws not allowing them to march, as well as anti-mask laws.

Anti-mask laws in many states have been on the books since the mid 1800s. The Klan has argued before the courts that these laws violate the principles of free speech. One of the most famous cases was in the state of New York in 1999. The city of New York refused to issue the Klan a permit to gather if they would not remove their masks. The New York Civil Liberties Union sued on behalf of the Klan, but a federal district court upheld the 1845 anti-mask law. The Klan has successfully sued to remove anti-mask laws in the states of Tennessee and Pennsylvania, arguing that the masks were part of their right to free speech and expression.

The three eras of the Ku Klux Klan have all been an effort to stem the tide of diversification and democratization of the United States. The Klan has attempted through violence, fraud, and political motivation to further their goals. All three entities of the Klan have failed in their various missions. The first Klan was thwarted by the federal government, while the second and third often failed because of their own actions. Today, the Ku Klux Klan is a splintered organization that still vows to promote white supremacy and decries the actions of Jews and African

Americans. However, the modern Klan lacks much of the broad-based support the organization once enjoyed.

CHRISTOPHER TINGLE

References and Further Reading

- Chalmers, David. *Hooded Americanism: The History of the Ku Klux Klan*. F. Watts Company, 1981.
- MacLean, Nancy. *Behind the Mask of Chivalry: The Making of the Second Ku Klux Klan*. New York: Oxford University Press, 1994.

KUNSTLER, WILLIAM M. (1919–1995)

A hero to some, an enemy to others, William M. Kunstler, was known for his extreme radical views of the antiwar and antidiscrimination movements of the 1960s and 1970s. Committed to social justice and social change, his practice and success in law has given him a formidable reputation, contributing to the effects of counterculture development in the United States.

Kunstler's progressive beliefs in the struggle against inequality and injustices have been a character trademark that he has carried through out his personal life and career. Identifying with his association to the less fortunate, in his book, Kunstler writes: "I developed a concern for people who seemed to be in a weaker position and who needed my help" (Kunstler, 56); Kunstler was an impassioned man for the minority.

Graduating from Yale Law School in June 1941, Kunstler went on to pursue a brief career in the military, where he would be employed as a cryptographer decoding overseas messages for the military. Kunstler remained in the military for four years and ended his term as a major.

Shortly after returning home, Kunstler and his brother Michael began a small family law practice in 1948, Kunstler & Kunstler. In 1950, William Kunstler went on to teach law at New York Law School, where he ironically was asked to draft a will for a friend's associate, Senator Joseph McCarthy, Kunstler's eventual nemesis.

The 1960s brought with it a wave of oppression and discrimination to the country. FBI Director J. Edgar Hoover was in hot pursuit of political rights activists, the Black Panther Party was driving violence-provoked riots, the antiwar movement was in full swing, and the government was targeted for precipitating civilian massacres and mass blood baths.

In October 1968, FBI Director J. Edgar Hoover issued warrants for the arrest of eight political rights

activists who were all charged with conspiring against the Federal antiriot statute. Among the eight prosecuted were Abbie Hoffman, who was the founder of National Mobilization to End the War in Vietnam (MOBE), Dave Dellinger, Bobby Seale, a Black Panther chairman, and student, Lee Weiner. Kunstler was asked by Abbie Hoffman, one of the leaders of "Yippie," a youth international party whose purpose was to spur political upheaval, as defense lawyer. Kunstler's ability in tact to outfox a politically crafted and manipulated jury and judge using humanist expression was a talent he would continue to use and become known for through out his career.

February 18, 1970, the Chicago trial "turned out to be a monumental victory" (Kunstler 36). Defendants had been acquitted of charges, ultimately demonstrating to the country, nationwide, that the power of justice lay in the people. Among those who did receive sentences and fines were Abbie Hoffman and Dave Dellinger with a penalty of five years in prison and a \$5,000.00 fine. The jury ultimately could not deny the defendants' expressions and beliefs in political freedom. Their exhibition of refusing to be silenced in the courtroom for what they believed in contributed to their release.

Kunstler would go on to represent many more significant individuals who have brought liberation to the justice system. Among them, Martin Luther King Jr., Lenny Bruce, El Sayyid Nassir (accused of murdering Rabi Meir Kohane), Marlon Brando's son, and Malcom X. In addition, Kunstler's fervor for seeking cases that involve obstruction of civil rights included those of convicted felons, namely the inmates of Attica Correctional Facility in New York.

September 1973 would mark another notch for the public rally for the war against civil injustices. One thousand two hundred inmates composed of a group of Latinos, African Americans, and whites protested the injustices and abuse of prisoners by the Administration in the institution. Public company included Congressmen, politicians, news people, and newspapers. The public was interested, and the country would witness another atrocity of maltreatment by the justice system.

According to Kunstler, who was nominated acting representative, the inmate party was surprisingly democratic about their deliberations and demands, one of which was amnesty from criminal prosecution. Tension was rising, and state troopers were shooting at inmates to control hostilities. Helicopters loomed above the facilities, and police officers were blaring orders over loudspeakers. On September 13, Governor Nelson Rockefeller issued commands to inmates, ordering the group to lie down and no violence would come to them. At that moment, state troopers rushed

in scattering thirty-two-caliber bullets into both inmates and hostages, killing forty-three people, ten of whom were innocent bystanders. Millions of Americans watched the brutality of the police force, witnessing insurrection being counterbalanced by blatant and criminal acts on the part of the government. Kunstler's voice raises the question of government control over insurgency in the country, yet also expresses the government's inability to deal with and solve criminal behavior. As he has indicated, the crime rate is increasing and institutions are on the up rise around the country.

Kunstler worked with civil rights activists and pursued political agendas that reflected his passion for liberation. He has gone down in history for helping those with vision to speak openly and without fear toward the justice system. Among other civil rights groups Kunstler supported were Gay Rights activists, Islamic political leaders, and Hispanic minorities.

Before he died at age 76, Kunstler's last speech given at The School of Architecture and Planning, State University of New York, clearly expresses who he was and what he has endowed to the country: "We sit here today in the comparative freedom of this institution and, yea, I'll say this country for the moment (though I don't believe it, too much), but I will say it, because of better men and women than we who went down in the dust somewhere in the line. They died or rotted in prisons, were expatriated, but they kept going. They were the Ishmaels of their time and our time" (Jackson).

MARIA STILSON

References and Further Reading

- Bernstein, Dennis, and Julie Light. "The Life and Times of William Moses Kunstler: Interview by Dennis Bernstein and Julie Light." <http://zena.secureforum.com/Znet/zmag/articles/oct95bernstein.htm>
- Jackson, Bruce. "Bill Kunstler's Last Great Speech: Public Ethics and the Bill of Rights". <http://buffaloreport.com/articles/030427kunstler.html>. Online. October 1995.
- Kunstler William M., and Sheila Isenberg, eds. *My Life as a Radical Lawyer: William M. Kunstler*. New York: Birch Lane Press, 1994.
- WGBH Archives. http://main.wgbh.org/saybrother/programs/sb_0416.html

KYLES v. WHITLEY, 514 U.S. 419 (1995)

In *Kyles*, the Supreme Court clarified *Brady v. Maryland* by holding that the due process clause requires a retrial when the government withholds exculpatory information from a criminal defendant that, when viewed cumulatively, would have made a different outcome reasonably likely.

At Kyles' murder trial, the prosecution presented four eyewitnesses and physical evidence, including the murder weapon, found in Kyles' apartment and in his trash. Kyles claimed that a man known as "Beanie" committed the murder and framed Kyles.

After his conviction, Kyles discovered that the government had withheld exculpatory information, including statements from eyewitnesses whose descriptions did not match Kyles and contradictory statements from Beanie demonstrating that Beanie had inside knowledge about the murder. However, the lower courts denied Kyles a new trial.

The Supreme Court reversed Kyles' conviction by a vote of five to four, holding that the lower courts had misapplied the test developed in *United States v. Agurs* and *United States v. Bagley* for deciding whether a *Brady* violation requires a new trial. The Court held that the lower courts erred by deciding whether each piece of withheld evidence, in isolation, would have made an acquittal reasonably likely instead of evaluating the cumulative effect of the withheld evidence. The Court concluded that all of the withheld evidence, considered together, likely would have changed the outcome.

Kyles thus rejected an approach that some lower courts had applied to *Brady* violations. After *Kyles*, courts must consider the entire picture to decide whether withheld evidence requires a new trial.

DAVID A. MORAN

References and Further Reading

- Imwinkelried, Edwin, and Norman Garland. *Exculpatory Evidence*. 2nd Ed. Michie, 1996.
- Stacy, Tom, *The Search for Truth in Constitutional Criminal Procedure*, Columbia Law Review 91 (1991): 1369.

Cases and Statutes Cited

- Brady v. Maryland*, 373 U.S. 83 (1963)
- United States v. Agurs*, 427 U.S. 97 (1976)
- United States v. Bagley*, 473 U.S. 667 (1985)

See also *Brady v. Maryland*, 373 U.S. 83 (1963); *Due Process*; *Fourteenth Amendment*; *United States v. Agurs*, 427 U.S. 97 (1976)

KYLLO v. UNITED STATES, 533 U.S. 27 (2001)

Having been enlisted in a surveillance effort led by federal law enforcement agencies investigating alleged illegal drug operations, an Oregon National Guard sergeant used a thermal-imaging device to monitor heat emissions coming from inside the home of

Danny Lee Kyllo. With the aid of the device, which is able to detect heat emissions from sources that are invisible to the naked eye (for example, people standing behind doors, ovens in use, steam from hot water), the sergeant noticed considerable heat loss coming through the roof and one wall, leading him to infer that Kyllo was growing marijuana. Federal agents then acquired a search warrant for the home and charged Kyllo with multiple drug offenses.

Writing for the Court majority, Justice Antonin Scalia found that the authorities had overstepped their bounds, exceeding the normal allowance for surveillance with the naked eye and violating one of the core principles of the Fourth Amendment: “the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.” Of note as well, however, is the dissent written by Justice John Paul Stevens, who asserted a constitutionally significant distinction between direct observations (that is, what one might see or hear) of a private area, on the one hand, and *indirect deductions*, or

“thought processes used to draw inferences from information in the public domain,” on the other.

Although *Kyllo* makes a strong case for the assumption of privacy within the home, the debate over what constitutes an “invasion” will continue, especially as law enforcement agencies draw on ever-more sophisticated surveillance technology.

BRIAN K. PINAIRE

References and Further Reading

Amar, Akhil Reed. *The Constitution and Criminal Procedure*. New Haven: Yale University Press, 1997.

Cases and Statutes Cited

Kyllo v. United States, 533 U.S. 27 (2001)

See also **Electronic Surveillance, Technological Monitoring, and Dog Sniffs; Privacy; Search (General Definition)**

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LA FOLLETTE, ROBERT MARION, SR. (1855–1925)

Early Life and First Political Experience

Robert Marion La Follette was the supreme champion of progressivism in state and national politics at the turn of the twentieth century and an “agitator” for free speech during World War I. La Follette was born in Primrose, Wisconsin, on June 14, 1855, to a farming family with roots in both Indiana and North Carolina. His father died during his early years, and his stern stepfather raised him on the family farm in Dane County, Wisconsin. He was able to attend the University of Wisconsin due in part to farm profits and the help from a local benefactor. While in college, La Follette excelled in oratory, which brought him notice in the local and regional newspapers. He attended law school and passed the bar in 1880. During this time, he met and married Belle Case, who was the first female graduate of the University of Wisconsin Law School. Together, the La Follettes began to understand and to promote the ideals of racial and sexual equality within their communities. After graduation, he won his first political position as District Attorney for Dane County as a Republican. He would hold this position for four years, until his election to the U.S. House of Representatives in 1884.

During his tenure as a Republican member of Congress, Bob La Follette’s reform ideals continued

to grow and mature in his work on the House floor. He promoted women’s suffrage and their involvement in politics. He was a friend of Booker T. Washington and other African-American leaders and spoke out against the actions of Southern Representatives to limit African-American participation in the political process. After being exiled on the Indian Affairs Committee, he pushed for greater protection of Native American property rights against lumber companies. He was soon appointed to the Ways and Means Committee and worked with Theodore Roosevelt on tariff legislation. In 1890, his support helped to ensure the passage of the Sherman Anti-Trust Act. Despite his excellent record, he was voted out of office in 1890 because of the Democratic sweep of political offices in Wisconsin, which was in part due to state Republican support of “English only” school policies.

Fight against Corruption and the Wisconsin Idea

Bob La Follette returned back to his growing law practice in Wisconsin and was content to work as a lawyer, until one event transformed his life and political career. His brother-in-law was a judge who was presiding over a case involving men connected to Senator and lumber millionaire Philetus Sawyer. On September 17, 1891, Senator Sawyer offered La Follette fifty dollars to personally intervene in the case, and La Follette refused this request. Quickly,

La Follette spread the word of this attempted bribe to his supporters and local Republicans. This outrage energized La Follette to re-enter politics to limit the power of the old network political caucuses and local “bosses.” He believed that the direct election of candidates was the only way to ensure the survival of representative government. La Follette, through his oratory, became a force within the progressive wing of the local Republican Party. The “Madison Ring” of political bosses and businessmen became the primary target of his speeches and campaigning. He remained true to the state Republican Party and worked to support the candidacy of William McKinley in 1892.

After the re-election of Grover Cleveland, La Follette’s stature continued to grow within the state. He tapped into the large Scandinavian population in Wisconsin by supporting a Norwegian-born candidate for governor and being able to converse in their language. La Follette led the charge to support William McKinley for presidency in 1896, while the other Republican national candidate had the support of the Sawyer faction in the state. With McKinley’s nomination confirmed, “Fighting Bob” now focused his energy to win the governor’s office in his native state. In both 1896 and 1899, La Follette was defeated in his goal to lead his beloved state. In 1896, the old party faction bribed members of his delegation to the party caucus to swing the vote to Edward Scofield. In the gubernatorial campaign of 1899, La Follette pushed himself even harder to campaign directly to the people and to continue his active law practice, but his health failed him. An extended sickness and exhaustion cut short this second quest for the governor’s chair, as well as the efforts of the old political machine to remain in power. By his third attempt in 1899, La Follette’s support grew even more with conservative Republicans coming aboard his campaign. He directed his speeches closer to moderate Republican issues and picked up support from many of Governor Scofield’s party regulars. On November 5, 1900, Robert M. La Follette was elected the twentieth governor in the history of Wisconsin and its first native-born governor.

On January 10, 1901, Bob La Follette broke with political tradition and delivered his two-hour inaugural address to the Wisconsin legislature. This speech, in effect, declared war on the old system of running state government. His speech began a political thought known as the “Wisconsin Idea.” This idea was that state government was to be a servant of the people and a defender against political corruption. The state would have a new partner to assist its efforts to reform itself and that partner would be its public university. The University of Wisconsin would become a “fourth branch of government” to assist and supervise the actions of state government. Efforts

were made to introduce professionalism into all branches of Wisconsin state government and to remove political patronage from the governance of the state. Even though La Follette continued to use patronage to reward supporters, the public believed that the governor and his government were truly dedicated to their welfare.

Governor La Follette spoke about nearly two dozen topics of reform for the Commonwealth of Wisconsin but zeroed in on two main reforms: railroad tax valuation and primary election reform. These two main issues would consume the legislative activities of the state and her governor for nearly five years and three gubernatorial terms. Much of his legislative battles would be an internal fight between La Follette’s “progressives” and the “stalwarts,” who represented the old party supporters in the legislature. For five years, the governor battled the stalwarts to pass these two reform measures and survived two attempts to unseat him in political caucuses during the gubernatorial elections of 1902 and 1904. The direct primary system of electing candidates was finally passed in 1903 and was approved by referendum during the 1904 election.

A New Political Stage

During the 1905 legislative session, railroad tax valuation was passed, and a railroad commission was established to regulate the industry after much political fighting. This final success was completed while La Follette served as both governor and U.S. Senator representing Wisconsin. In the final election by the Wisconsin legislature for the U.S. Senate, the state representatives and senators elected La Follette as U.S. Senator. He quickly chose to serve his first year as U.S. Senator in Madison, Wisconsin, to finish the work of the 1905 Legislative Session. By January 1906, he resigned his position of Governor of Wisconsin to begin his nineteen-year career in the U.S. Senate.

His arrival in Washington, D.C., marked the beginning of La Follette’s fight to push a more radical version of progressivism onto the national stage. His efforts quickly ran into problems with the “old guard” in the U.S. Senate and the national leadership of the Republican Party. Bob La Follette quickly broke with Senate tradition by giving long speeches against business trusts and the power of the railroad companies over interstate commerce. He became known for his long filibusters on the senate floor against legislation that was crafted under President Theodore Roosevelt’s legislative supporters. La Follette’s relationship with Roosevelt and William Howard Taft began to sour as

“Fighting Bob” pushed them to forward “progressive” ideals further than their conservative positions. La Follette saw Roosevelt’s “Square Deal” as not going far enough to punish the big trusts and their “bosses” for their extreme profits and power. In the 1909 Republican national primary, La Follette came in second to William Howard Taft, and as with previous elections, but La Follette continued to support his Republican Party in the general election.

During the Presidential Administration of Taft, La Follette continued to work against trusts and pushed his progressive agenda aggressively on the national stage. Increasingly, La Follette saw President Taft as an incompetent leader and unwilling to push the progressive agenda advocated by Theodore Roosevelt and La Follette. Former President Roosevelt also shared his view of President Taft, and soon the progressive wing of the Republican Party had two rivals fighting over its direction. La Follette was seen as the radical leader with socialistic connections with friendships with Eugene V. Debs and Lincoln Steffens. Roosevelt became the leader of the moderate progressives, who sought to retake the White House to push “New Nationalism.”

In 1911, La Follette helped to create the National Progressive Republican League to challenge Taft for the Republican nomination for President. La Follette sought to get Roosevelt’s support for that organization, but the two leaders continued to argue over the direction of the progressive movement. In February 1912, La Follette gave a speech in Philadelphia, Pa., which was harsh, long, and unorganized in its content. Even though the speech was due to La Follette’s illness and stress, the local newspaper reporters described it as “political suicide.” The speech allowed Roosevelt to step in as the voice of reason within the progressives. The supporters of La Follette and Roosevelt split the progressive vote, which allowed William Howard Taft to win the 1912 Republican nomination for President. Instead of supporting his party, La Follette chose to support the Democratic candidate Woodrow Wilson for the general election, while Theodore Roosevelt attempted a Third party candidacy with the “Bull Moose Party.”

International Crisis and Free Speech

With the election of Woodrow Wilson, La Follette refocused his efforts to combat railroad companies and support American labor in the U.S. Senate. La Follette agreed with most of President Wilson’s progressive efforts, even though he was a Democrat. The rising international crisis began to overtake the

domestic progressive agenda pushed by American politicians. La Follette had taken an antiwar stance earlier in discussions over the European conflict, which was similar to positions advocated by William Jennings Bryan and Woodrow Wilson.

Unrestricted German submarine warfare and the Zimmerman telegram inflamed pro-war supporters in the nation, such as Theodore Roosevelt. Senator La Follette continued to support President Wilson’s efforts to end the war in Europe and to maintain American neutrality. As President Wilson’s views turned toward a possible American involvement in World War I, La Follette saw himself as the lone campaigner for reason during this time of crisis. La Follette staged filibusters to stop efforts to position the United States toward military intervention. On April 2, 1917, President Wilson called the U.S. Congress into special session to consider a declaration of war against Germany and her allies. Senator La Follette took this opportunity to fight to keep his nation from going to war. With an American flag on his lapel, La Follette gave a long speech protesting the course leading to war and attacked the American press for calling for bloodshed. Despite his efforts, war was declared on Germany, and La Follette became a target of the press and the pro-war lobby.

With the war a forgone conclusion, he turned his efforts to protect individual liberties during wartime. He attempted to stop the passage of the Espionage Act and was concerned that his own newspaper, *La Follette’s Weekly*, could be subjected to closure. Starting in September 1917, pro-war senators worked to have La Follette expelled from the U.S. Senate based on the text of La Follette’s remarks given in St. Paul, Minn., against American participation in World War I. La Follette fought back with his fiery oratory through his speech on “Free Speech in Wartime” in October 1917. The efforts to remove La Follette lasted from 1917–1919, as President Wilson’s legislative supporters continued to push the issue to a vote. The expulsion charge failed, and the Senate voted to dismiss all charges. At the end of the conflict, Senator La Follette sought to limit the involvement of the United States in post-war treaties. He spoke against President Wilson’s attempts to negotiate the Treaty of Versailles and led the senatorial opposition against American involvement in the League of Nations.

One Last Charge

With the election of Warren Harding as President, Senator La Follette was riding a wave of popularity

due to his opposition to Wilson's involvement in World affairs and his emphasis on domestic policies. He even entertained the notion for running for Governor of Wisconsin again. Unfortunately, the hard pace of his style of politics was bringing even more bouts of sickness, which was concerning his wife and his supporters. La Follette fought hard to repair the damage that his antiwar stance had caused him and his allies back in Wisconsin. He, again, focused his energies on monitoring the railroad and oil companies. His belief was that it was his duty to protect the common laborer against the sins of capitalism. He helped to initiate the investigation on leasing of public oil fields to private companies. His work led to the discovery of leasing of the Teapot Dome oil field to Monmouth Oil Company and the discovery of corruption in the Harding administration.

In preparation for a future run for the presidency in 1924, La Follette toured Europe and made an extended visit to the Soviet Union with Lincoln Steffens and Jo Davidson. With the rejection of progressive planks from both Democratic and Republican platforms, La Follette created the Progressive Party in 1924 to support his run for the Presidency. His efforts served only to pull votes away from the Democratic challenger, and Calvin Coolidge easily won re-election in 1924. "The Little Lion of the Northwest" found himself completely exhausted and weak from the constant campaigning. La Follette had been bothered by heart problems before World War I and suffered a series of heart attacks in the spring of 1925. Surrounded by his family, Robert La Follette passed away on June 19, 1925.

WILLIAM H. BROWN

References and Further Reading

- Buenker, John D. *The History of Wisconsin*. Volume 4: *The Progressive Era, 1893–1914*. Madison: State Historical Society of Wisconsin, 1998.
- Doan, Edward N. *The La Follettes and the Wisconsin Idea*. New York: Rinehart, 1947.
- Greenbaum, Fred. *Robert La Follette*. Boston: Twayne Publishers, 1975.
- La Follette, Belle C., and Fola La Follette. *Robert M. La Follette*. 2 vols. New York: Macmillan, 1953.
- Thelan, David P. *Robert M. La Follette and the Insurgent Spirit*. Boston: Little, Brown, 1976.
- Unger, Nancy C. *Fighting Bob La Follette: The Righteous Reformer*. Chapel Hill: University of North Carolina Press, 2000.

See also **National Security and Freedom of Speech; State Constitutions and Civil Liberties**

LABOR PICKETING

See *Picketing*

LAMBDA LEGAL DEFENSE AND EDUCATION FUND

Lambda was the first, and remains the primary, legal advocacy group championing, according to its mission statement, the "full recognition of the civil rights of lesbians, gay men, bisexuals, transgender people and those with HIV." This task began immediately, when the group's 1973 application for state recognition as a public interest law firm was unanimously denied. Lambda became its own first client, challenging the court's denial of its right to exist.

Winning its appeal, Lambda became authorized to practice on October 18, 1973. Lambda's organizational highlights include a move from its original location in the Manhattan apartment of founder Bill Thom into shared offices with the New York American Civil Liberties Union (ACLU) in 1979—an association that prompted the ACLU to create its Lesbian and Gay Rights Project—and finally into its own offices in 1987. An initial satellite branch in Los Angeles opened its doors in 1990, with more to follow in Chicago, Dallas, and Atlanta. Lambda ceased to be a purely volunteer organization in 1978 when it created its first paid staff position; a managing attorney was added to the roster in 1983. Whereas at its founding Lambda functioned "more or less on the edge of insolvency," for the 2004 fiscal year it reported income in excess of \$11.6 million.

The talent of the organization to devise and implement a legal strategy over the long term is best evidenced through its attack on sodomy laws. From its inception Lambda had challenged the constitutionality of sodomy laws, scoring the occasional win such as that in *People v. Onofre*, 424 N.Y.S.2d 566 (1980), which struck down the New York sodomy statute. These early victories encouraged Lambda to support challenges in federal courts on privacy grounds, an argument that was rejected by the U.S. Supreme Court in *Bowers v. Hardwick*, 478 U.S. 186 (1986). Lambda persevered in its strategy, however, and, in a round of courtroom brinkmanship, won the reversal of *Bowers* in *Lawrence v. Texas*, 539 U.S. 558 (2003).

The cumulative impact of Lambda's courtroom challenges has secured greater recognition of civil liberties for its constituents outside the arena of sodomy legislation. For example, its arguments in *Romer v. Evans*, 517 U.S. 620 (1996), persuaded the Court to overturn Colorado's Amendment 2, which would

have excluded gay men and lesbians from the legislative process.

Beyond the issues of sodomy laws and political participation amendments, the range of cases confronted by Lambda attorneys has been wide, whether in cases initiated by the organization or when working with others such as the Gay and Lesbian Advocates and Defenders (GLAD). Topics include the stunning victory in securing same-sex marriage in Massachusetts (*Goodridge v. Dept. of Public Health*, 440 Mass. 309 [2003]), to recognizing second-parent adoptions, protection of students from harassment, as well as asylum and immigration problems. In short, practically every significant legal case advocating the rights of sexual minorities—both won and lost—has benefited from the active participation of Lambda.

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References and Further Reading

Andersen, Ellen Ann. *Out of the Closets & into the Courts: Legal Opportunity Structure and Gay Rights Litigation*. Ann Arbor: University of Michigan Press, 2005.
Lambda Legal, www.lambdalegal.org.

Cases and Statutes Cited

Bowers v. Hardwick, 478 U.S. 186 (1986)
Goodridge v. Dept. of Public Health, 440 Mass. 309 (2003)
Lawrence v. Texas, 539 U.S. 558 (2003)
People v. Onofre, 424 N.Y.S.2d 566 (1980)
Romer v. Evans, 517 U.S. 620 (1996)

See also *Bowers v. Hardwick*, 478 U.S. 186 (1996); *Gay and Lesbian Rights*; *Lawrence v. Texas*, 539 U.S. 558 (2003); *Romer v. Evans*, 517 U.S. 620 (1996); *Same-Sex Marriage Legalization*; *Sodomy Laws*

LAMBERT v. CALIFORNIA, 355 U.S. 225 (1957)

Lambert v. California is one of the Supreme Court's most fundamental decisions in support of civil liberties, but also one of its most poorly understood. Virginia Lambert had been living continuously in California for seven and one-half years when she was arrested and charged under an ordinance that made it unlawful for a person with a felony conviction to be in Los Angeles for more than five days without registering with the police. The trial judge instructed the jury that Lambert's complete ignorance of the registration requirement was no defense, and she was convicted. The Supreme Court overturned her conviction in ringing language: "A law which punished conduct which would not be blameworthy in the average member of the community would be too severe

for that community to bear." *Id.* at 229 (quoting Oliver Wendell Holmes, Jr., *The Common Law* 50 (1981)) (internal quotation marks omitted).

Most observers have agreed that the Court rightly overturned a profoundly unjust conviction. The puzzle, though, which the opinion did not answer, is *why* Lambert's conviction was unconstitutional. Was it because she did not realize what she did was wrong? Was it that, rather than doing something, she was being punished for failing to do something? Was it that her conduct was too "innocent?" Each of these principles has its defenders, but they share a common problem: taken seriously, each of these principles would eliminate a large number of crimes and conflict with a substantial body of law. For this reason, the dissent charged that *Lambert* would turn into "a derelict on the waters of the law." *Id.* at 232 (Frankfurter, J., dissenting).

One possible answer, a novel one but one consistent with other Supreme Court cases, is that the statute in *Lambert* essentially punished a protected constitutional right—in this case the right to travel. In this view, assuming it would be unconstitutional for Los Angeles to bar convicted felons from the city entirely, it cannot make a crime simply by adding an element (failing to register), unless the defendant has some culpability (such as purpose or knowledge) with regard to that additional element.

ALAN C. MICHAELS

See also *Due Process*; *Ex Post Facto*; *Right to Travel*

LAMBERT v. WICKLUND, 520 U.S. 292 (1997)

Lambert v. Wicklund is one of a long line of abortion cases handed down by the U.S. Supreme Court. In the historic case of *Roe v. Wade*, the Supreme Court determined that a woman has a right to an abortion, subject to some limitations. The question remained, however, as to whether a minor had the same right to an abortion as an adult woman. In *Planned Parenthood of Central Missouri v. Danforth*, the Court recognized that a minor has a right to an abortion, but that the right is subject to more limitations than the right of an adult woman. The question remained as to what form these additional limitations could take. The case of *Ohio v. Akron Center for Reproductive Health* provided a partial answer. There the Court upheld as constitutional an Ohio statute that required a minor to notify one of her parents before obtaining an abortion. However, a minor could avoid the notification requirement through use of the statute's

judicial bypass provision, which allowed the minor to petition a Court to waive the notice requirement.

The *Lambert* case at issue here continues to examine the question of which limitations on a minor's right to an abortion are permissible. The *Lambert* case originated in Montana, where, in 1995, the legislature enacted the Parental Notification of Abortion Act. Among other things, this statute required that, before performing an abortion on a minor, a physician notify one of her parents of the physician's intention. However, a minor could avoid the notification requirement if she could demonstrate to the Court that "the notification of a parent or guardian is not in the best interests of the [minor]." After its enactment, many persons found the statute to be objectionable. Consequently, some physicians who performed abortions, along with other medical personnel, sued to prevent enforcement of the act on the grounds that it violated the Constitution. In particular, they claimed that it violated a minor's right to an abortion.

In an opinion in which there were no dissenting justices, the Court found that, contrary to the contentions of the physicians and medical personnel, Montana's limitation on a minor's right to an abortion was permissible. It explained that Montana's statute was indistinguishable in any relevant way from the Ohio statute that the Court had upheld in the *Akron* case. Specifically, both statutes allow a minor to avoid the notification requirement if she can demonstrate that such notification is not in her best interests. Because the Court had previously found the Ohio statute to be permissible, by definition, the Montana statute was permissible.

Thus, the Court continued to uphold a minor's right to an abortion, subject to at least one limitation that would not have been permissible if it had been applied to an adult. Although the Court has found this one limitation to be permissible, a parental notification requirement with a bypass procedure, it has yet to determine the tougher question of whether a parental notification statute *must* include some sort of bypass provision to be constitutional.

JANET W. STEVERSON

Cases and Statutes Cited

Ohio v. Akron Center for Reproductive Health, 497 U.S. 502 (1990)

Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976)

Roe v. Wade, 410 U.S. 113 (1973)

See also *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52 (1976); *Reproductive Freedom*; *Roe v. Wade*, 410 U.S. 113 (1973)

LAMB'S CHAPEL v. CENTER MORICHES UNION FREE SCHOOL DISTRICT, 508 U.S. 384 (1993)

Lamb's Chapel v. Center Moriches Union Free School District (1993) is an important case concerning religious speech on public property. In it the Supreme Court held that even in a nonpublic forum the state cannot discriminate against religious viewpoints when allowing use of public facilities. It also held that permitting religious speech, even in a public school facility, does not violate the establishment clause as long as religious and nonreligious speeches are treated the same. This dual holding of the Court, in which granting religious speech equal access is permissible under the establishment clause and required under the free speech clause, has been recognized in four other recent cases, demonstrating the Court's commitment to granting full protection to religious speech.

In *Lamb's Chapel* a church sought permission to use public school facilities to show a film series on child-rearing and family values from a Christian perspective. School district rules authorized use of school property during non-school hours for "social, civic, and recreational uses" and "use by political organizations," but prohibited use for religious purposes. The school district denied the church's requested use, considering the film series to be a church-related activity and therefore prohibited under its rules. The church sued, alleging a violation of the First Amendment.

A unanimous Supreme Court held that the church's free speech rights were violated. It began by noting that the school facility might well be a designated public forum, because a number of other community groups were allowed to meet there. For purposes of analysis, however, it treated the school as a nonpublic forum, saying that government can control access to nonpublic forum property if distinctions on who can use the property are reasonable and treat all viewpoints the same. Denying access to the church for its film series failed that test, however, because it constituted viewpoint discrimination. Showing a film series on child rearing clearly qualified as a social or civic use of the property, permitted under school district rules. The only reason the church's request was denied was because it would be shown from a religious perspective. Therefore, the effect of the school district rules was to permit discussion of child rearing from a secular perspective but prohibit discussion from a religious perspective. This constituted unconstitutional viewpoint discrimination.

The Supreme Court also held that permitting the church to show the film series on school property would not violate the establishment clause. It noted that the film would not be shown during school hours

and was not sponsored by the school itself. In addition, a wide variety of community groups had repeatedly used school property. Under these circumstances, there was no realistic danger that the community would perceive that the school was endorsing religion, and any benefit to the church would be incidental.

Lamb's Chapel reflects the position taken by the Supreme Court in a number of recent decisions, such as *Widmar v. Vincent* (1981), *Westside Board of Education v. Mergen* (1990), *Rosenberger v. Rector and Visitors of the University of Virginia* (1995), and *Good News Club v. Milford Central School* (2001). In each of these cases the Court held that the free speech clause prohibits schools from discriminating against religious viewpoints and that granting religious speech access to public facilities and forums on the same terms as other speech does not violate the establishment clause.

MARK W. CORDES

Cases and Statutes Cited

- Good News Club v. Milford Central School*, 533 U.S. 98 (2001)
Rosenberger v. Rector and Visitors of the University of Virginia, 515 U.S. 819 (1995)
Westside Board of Education v. Mergens, 496 U.S. 226 (1990)
Widmar v. Vincent, 454 U.S. 263 (1981)

LANZETTA v. NEW JERSEY, 306 U.S. 451 (1939)

Criminal laws that are vague and uncertain in scope, meaning, or application violate the due process clause of the Fourteenth Amendment. In *Lanzetta v. New Jersey*, the Supreme Court considered whether a state law was void for vagueness. In 1937, seeking to crack down on criminal gangs of that era, the State of New Jersey enacted a law establishing the following crime: "Any person not engaged in any lawful occupation, known to be a member of any gang consisting of two or more persons, who has been convicted at least three times of being a disorderly person, or who has been convicted of any crime in this or in any other State, is declared to be a gangster" *Lanzetta* and others were convicted under this law and declared to be gangsters. They were sentenced to five to ten years of hard labor in prison. The state courts upheld their convictions.

The Supreme Court reversed the convictions, explaining that no one may be required at the peril of life, liberty, or property to speculate as to the meaning

LANZETTA v. NEW JERSEY, 306 U.S. 451 (1939)

of penal statutes. A statute creating an offense must be sufficiently explicit to inform those subject to the law what conduct will render them subject to penalties. A statute defined in terms so vague that people of common intelligence must necessarily guess at its meaning and differ as to its application violates due process of law.

The Supreme Court observed that the statute did not define the term "gang." Meanings in dictionaries and other sources were varied and numerous, and the term was not defined elsewhere in the law. The state courts relied on the prior state case of *State v. Gaynor*, which used dictionary definitions and descriptions to ascertain the legislative meaning of the terms "gang" (that is, a company of persons acting together for some purposes, usually criminal, or a company of persons who go about together or who act in concert, mainly for a criminal purpose) and "gangster" (that is, a member of a gang of roughs, hireling criminals, thieves, or the like). But the *Gaynor* decision was decided after the defendants' trial and did not provide a general statutory interpretation.

Moreover, the state courts' descriptions and illustrations were insufficient to constitute definitions for the terms. The adopted dictionary definitions of "gang" and "gangster" only extended to people acting together for some purpose "usually criminal" or "mainly for criminal purposes," meaning some gangs could have legitimate purposes such as groups of workers engaged in lawful activities. Also, the statute did not declare all members to be gangsters, only those with prior convictions as defined. The provision "known to be a member" was also ambiguous as to whether actual membership was required. It also failed to indicate what constituted membership or how one might join a "gang." The law, condemning no specific act or omission, was unconstitutionally vague.

Lanzetta was a seminal case stating the constitutional rule requiring that criminal statutes must be sufficiently certain so people have notice of what the law commands or forbids.

VINCENT L. RABAGO

References and Further Reading

- LaFave, Wayne R., and Austin W. Scott, Jr. *Substantive Criminal Law* § 2.3 (1986) (explaining the requirements of the void for vagueness doctrine).
Jeffries, John, *Legality, Vagueness, and the Construction of Penal Statutes*, *Virginia Law Review* 71 (1985): 189.
Note, *Vagueness Doctrine in the Federal Courts*, *Stanford Law Review* 26 (1974): 855.
Note, *The Void-For-Vagueness Doctrine in the Supreme Court*, *University of Pennsylvania Law Review* 109 (1960): 67.

Cases and Statutes Cited

State v. Gaynor, 197 A. 360 (1938)

See also **Due Process; Due Process of Law (V and XIV); Fourteenth Amendment; Rights of the Accused**

LATE CORPORATION OF THE CHURCH OF JESUS CHRIST OF LATTER DAY SAINTS v. UNITED STATES, 136 U.S. 1 (1890)

The death-knell of the Church of Jesus Christ of the Latter Day Saints' (Mormons) hope for accommodation of its religiously based practice of polygamy and its goal of statehood for a polygamous Utah came with the Supreme Court's decision in *Late Corp. of the Church of Jesus Christ of Latter-day Saints v. United States* (1890). This case was the capstone of a series of Court defeats that began in 1878 with *Reynolds v. United States* (1878) and which remain the law of the land today (see *Reynolds v. United States*). The case must also be seen in the context of a series of increasingly draconian federal laws enacted in response to the church's public espousal of polygamy, which began in 1852.

Although the case was primarily an exploration of the extent of Congressional power in the Territories, the Court also addressed and rejected the Mormons' claim that polygamy was protected by the free exercise clause of the First Amendment to the Constitution.

Acting pursuant to the Edmund-Tucker Act of 1887, the federal government had dissolved the church as an incorporated charitable entity and began proceedings to escheat virtually all property of the church over to the United States. When the church appealed the government's success at trial in Utah, the Supreme Court held that Congress had the power to repeal the church's charter, on the basis of its plenary power to govern the territories and that it also had the power to seize the church's property. Finally, after a lengthy discussion of the doctrine of charitable uses, it held that Congress could also use the church's property to benefit public schools in the Territory.

The Court again revealed its feelings toward the church and polygamy. Polygamy was "a crime against the laws, and abhorrent to the sentiments and feelings of the civilized world." Polygamy, the Court continued, "is contrary to the spirit of Christianity and of the civilization which Christianity has produced in the Western world."

Therefore, the church's free exercise argument as "altogether a sophistical plea." The Court warned

that tolerance of polygamy would mean approval of the "Thugs of India" (the Hindu cult of assassin-priests who victimized travelers) and suttee (the Hindu practice of a widow throwing herself upon the funeral pyre of her husband), as well as the practice of "our own ancestors in Britain" of human sacrifice.

Largely as a result of this resounding judicial defeat the church renounced polygamy in 1890, and the territorial legislature enacted an anti-polygamy provision for the state constitution that remains part of Utah's constitution today.

KEITH E. SEALING

References and Further Reading

Ostling, Richard, and Joan Ostling. *Mormon America: The Power and the Promise*. Harper, 1999.

Sealing, Keith, *Polygamists Out of the Closet: Statutory and State Constitutional Prohibitions Against Polygamy are Unconstitutional Under the Free Exercise Clause*, Georgia State University Law Review 17 (2001): 691.

Van Wagoner, Richard. *Mormon Polygamy: A History*. Signature Books, 1989.

LAWRENCE v. TEXAS, 539 U.S. 558 (2003)

Justice Anthony Kennedy announced the U.S. Supreme Court's decision in *Lawrence v. Texas* on June 26, 2003, the last day of the Court's term, in what David Savage reported as "a moment of rare drama and emotion." The decision sent a welcome message to the lesbian and gay community that their most intimate sexual expressions would no longer be criminalized by any state in the nation. The reach of *Lawrence*, however, extends to the private and personal liberty rights of all citizens.

A report of a weapons disturbance sent law enforcement officers in Harris County, Texas, to the apartment of John Geddes Lawrence. When officers entered the apartment, they found Lawrence engaged in a sexual act with Tyron Garner. The men were arrested and charged with a misdemeanor violation of the Texas statute that criminalizes "deviate sexual intercourse" by persons of the same sex. At trial, the defendants argued unsuccessfully that the Texas sodomy law violated the equal protection clause of the Fourteenth Amendment and a similar clause in the Texas Constitution. Lawrence and Garner submitted a plea of nolo contendere and were fined \$200 each in addition to court costs.

Represented by Lambda Legal, a national lesbian and gay rights advocacy organization, Lawrence and Garner appealed. A three-judge state court panel found the statute unconstitutional under the Equal

Rights Amendment of the Texas Constitution. However, sitting en banc on rehearing, the intermediate court of appeals reversed the panel's decision. After the highest state court refused to hear their case, Lawrence and Garner sought review by the U.S. Supreme Court, which granted a writ of *certiorari* and set argument for March 26, 2003.

The Supreme Court was asked to decide three issues. First, did the Texas law violate the equal protection clause by criminalizing sexual activity by same-sex couples while not criminalizing the same behavior by different-sex couples? Second, does the due process clause protect the privacy and liberty interests of the petitioners in their intimate sexual relations? Finally, should the Court's 1986 decision in *Bowers v. Hardwick*, declaring that homosexuals have no fundamental right to engage in sexual acts, be overruled? Thirty-three amicus curiae briefs were submitted to the Court by organizations ranging from the Alliance of Baptists and the American Family Association to the National Lesbian and Gay Law Association and Human Rights Campaign.

By a six-to-three vote, the Supreme Court struck down the Texas law as unconstitutional. Five justices joined the majority opinion crafted by Justice Kennedy while Justice Sandra Day O'Connor concurred in the judgment, but on different grounds. Justice Antonin Scalia was joined by Chief Justice William H. Rehnquist and Justice Clarence Thomas in dissent. Justice Thomas also wrote separately.

The majority decision rests on an individual's broad right to liberty under the due process clause of the Fourteenth Amendment. Relying heavily on Justice John Paul Stevens's dissent in the *Bowers* case, Justice Kennedy recognizes that the petitioners' right to liberty under the due process clause protects them from governmental intrusion into their private and personal conduct. Additionally, the Court finds that the statute did not further any legitimate state interest that could justify governmental interference with the private sexual conduct of consenting adults.

Justice Kennedy disputes the historical analysis of sexual regulations that the Court made so much of in *Bowers*, choosing instead to focus on an "emerging awareness that liberty gives substantial protection to adult persons" in their private sexual lives (521). He notes that two cases decided in the years since *Bowers* further undermine the earlier decision. In *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992), the Court recognized the constitutional protection afforded to personal liberty and autonomy under the due process clause. And in *Romer v. Evans* (1996), the Court used a class-based argument grounded on the equal protection clause to strike

down an anti-gay amendment to the Colorado constitution.

Justice Kennedy acknowledges a nexus between the equal protection and equal treatment issues of *Romer* and the autonomy and liberty interests espoused by *Casey*. He opts to rely on the latter, however, suggesting that an equal protection argument would not go far enough in protecting personal liberty. In applying a due process argument, the Court thus recognizes a broader liberty interest that extends to both heterosexuals and homosexuals. In doing so, the Court directly overrules *Bowers*.

Justice O'Connor joined in declaring the Texas statute unconstitutional but did not agree with the majority's reliance on the due process clause nor did she vote to overrule *Bowers*. Instead, she based her argument on the equal protection clause and the failure of the state to satisfy the rational basis test. Although Texas had argued that the statute furthered the promotion of morality, a legitimate governmental interest, O'Connor rejected the state's argument outright and suggested that it was simply a claim "to justify a law that discriminates among groups of persons" (528).

The dissenting opinion by Justice Scalia takes issue with nearly every aspect of the majority and concurring opinions, from the majority's willingness to overrule *Bowers* on principles of *stare decisis* to the Court's alleged misapplication of the substantive due process doctrine and its reliance on the rational basis test. Arguing that because both men and women, regardless of their sexual orientation, are prohibited by Texas law from enjoying same-sex relations, Justice Scalia avows that no equal protection violation exists. He issues a pointed warning in his concluding comments that *Lawrence* "effectively decrees the end of all morals legislation" (539). More significantly, Justice Scalia views the *Lawrence* opinion as "the product of a Court . . . that has largely signed on to the so-called homosexual agenda" and "has taken sides in the culture war" (541).

Justice Thomas's two-paragraph dissent rests on his theory of judicial restraint, namely that the legislature should change the law rather than the judiciary, and on his continued rejection of a constitutional right to privacy or the "liberty of the person" (543).

Those concerned with the legal fragility of past privacy decisions are likely to view the expression of a broader liberty right in *Lawrence* as a positive development. Only time will bear out the full ramifications of the case for gay and lesbian rights in both the legal and political arenas, yet there is little doubt that the *Lawrence* decision will enter the history books as a landmark ruling.

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References and Further Reading

- Barnett, Randy E. "Justice Kennedy's Libertarian Revolution: *Lawrence v. Texas*." The Boston University School of Law Working Paper Series, Public Law & Legal Theory, Working Paper No. 03-13. <http://www.bu.edu/law/faculty/papers>.
- James, Bernard, *Privacy and Education: 'Lawrence,' 'Bollinger,'* The National Law Journal (August 4, 2003): S8-10.
- Turley, Jonathan, *Not as Radical as All That*, The National Law Journal (July 4, 2003): 31.

Cases and Statutes Cited

- Bowers v. Hardwick*, 478 U.S. 186 (1986)
- Lawrence v. State*, 41 S.W.3d 349 (Tex. App. Houston 14th Dist., 2001)
- Planned Parenthood of Southeastern Pennsylvania v. Casey* 505 U.S. 833 (1992)
- Romer v. Evans*, 517 U.S. 620 (1996)
- See also *Bowers v. Hardwick*, 478 U.S. 186 (1986); **Due Process of Law (V and XIV); Equal Protection of Law (XIV); Gay and Lesbian Rights; Kennedy, Anthony McLeod; Lambda Legal Defense and Education Fund; O'Connor, Sandra Day; Planned Parenthood v. Casey, 505 U.S. 833 (1992); **Privacy; Rehnquist, William H.; Romer v. Evans, 517 U.S. 620 (1996); **Same-Sex Marriage Legalization; Scalia, Antonin; Sodomy Laws; Stevens, John Paul; Thomas, Clarence******

LAWYER ADVERTISING

Lawyers in the United States have historically advertised their services, but before the end of the nineteenth century they had little need for mass-media advertising. Lawyers mostly attracted business through word-of-mouth referrals in the local community. The increasing size and diversity of the legal profession at the end of the century created the need in some cities for lawyers to use means of attracting clients other than enhancing their reputation.

The last few decades of the nineteenth century also witnessed the beginning of the organized bar movement. Elite lawyers were concerned that the country was awash in mediocre practitioners, many of whom were vigorously entrepreneurial, if only marginally competent. But the organized bar exercised relatively little control over the standards for entry to the profession, which was largely in the hands of local judges. Concerns about the quality of many newly licensed lawyers, as well as the competitive pressures created by these new entrants to the bar, is one plausible explanation for the antipathy toward advertising that arose around the beginning of the twentieth century.

The American Bar Association's Canons of Professional Ethics, published in 1908, declared circulars, advertisements, and in-person solicitation of

prospective clients to be reprehensible and offensive to the traditions of the bar. State regulations and the ABA's Model Code of Professional Responsibility, adopted in 1969, were similarly restrictive. In general, lawyers were permitted to use unobtrusive, dignified signs, business cards, and professional announcements in newspapers, as long as they did not make any representations about the quality of their services, identify themselves as specialists in any field of practice, or otherwise make false, misleading, or deceptive claims. State rule makers and professionalism committees devoted considerable energy to policing the line between dignified announcements and prohibited hucksterism.

Starting with the *Bates* decision, the Supreme Court has significantly restricted the latitude of states to regulate advertising (*Bates v. State Bar of Arizona*). Consistent with the First Amendment, a state may prohibit deceptive or misleading claims but may not prohibit the provision of truthful information, including information about fees charged by the lawyer, areas of specialty, and the lawyer's willingness to represent clients in particular types of cases. Some states have read *Bates* more narrowly than others and continue to enforce regulations designed to ensure that advertisements are tasteful and dignified. In-person solicitation of prospective clients may be limited in circumstances in which the contact poses a risk of undue influence or intimidation by the lawyer (*Ohralik v. Ohio State Bar Association*).

Supporters of continued restrictions on lawyer advertising believe it diminishes the public's respect for the legal profession. The Supreme Court has appeared receptive to this argument in some situations and has upheld a state rule imposing a thirty-day waiting period before lawyers may contact accident victims (*Florida Bar v. Went For It, Inc.*) Opponents of advertising restrictions emphasize the role of advertising in providing information about legal services to unsophisticated potential clients.

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References and Further Reading

- Andrews, Lori B., *Lawyer Advertising and the First Amendment*, American Bar Foundation Research Journal 1986 (1986): 967-1021.
- Friedman, Lawrence M. *A History of American Law*. 2nd Ed. New York: Touchstone, 1985.
- Hazard, Geoffrey C., Russell G. Pearce, and Jeffrey W. Stempel, *Why Lawyers Should Be Allowed To Advertise: A Market Analysis of Legal Services*, NYU Law Review 58 (1983): 1084-1113.
- Wolfram, Charles W. *Modern Legal Ethics*. St. Paul, MN: West, 1986.

Cases and Statutes Cited

Bates v. Arizona State Bar, 433 U.S. 350 (1977)

Florida Bar v. Went For It, Inc., 515 U.S. 618 (1995)

Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978)

ABA Model Rules of Professional Conduct, Rules 7.1–7.5 (2002)

See also *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); **Commercial Speech**

LEE v. WEISMAN, 505 U.S. 577 (1992)

Thirty years after the Supreme Court ruled prayer in public schools to be inconsistent with the establishment clause in *Engel v. Vitale*, 370 U.S. 421 (1962), the Court ruled, in *Lee v. Weisman* (1992), this prohibition included public school graduations. Secondary principals in the public schools of the Providence, Rhode Island, customarily invited members of the clergy to give invocations and benedictions at graduation ceremonies. Robert E. Lee, the Nathan Bishop Middle School principal, invited Rabbi Leslie Gutterman to offer prayers at the graduation of Deborah Weisman's class. Lee provided the rabbi with a pamphlet, "Guidelines for Civic Occasions" prepared by the National Conference of Christians and Jews. Furthermore, he advised him the prayers should be nonsectarian. The girl's parents disagreed with this practice, and four days before the ceremony sought a temporary restraining order to prevent it. The U.S. District Court for Rhode Island denied their motion and, despite their objections, the family attended the ceremony, where the rabbi's prayers were straightforward and simply thanked God for the freedom Americans enjoyed and asked for blessings on the students, teachers, and administrators of the school.

In July 1989, the month after the ceremony, the Weismans filed suit seeking to put an end to the practice of clergy-led prayers at graduation. The American Civil Liberties Union and other like-minded groups supported their suit. The Federal District Court for Rhode Island and the First Circuit Court of Appeals both found the prayers unconstitutional on the basis of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), in which the Court had established a three-prong test to determine whether a governmental practice violated the First Amendment's establishment clause.

The issue for the Court was whether including clergy-offered prayers as part of the official public school graduation ceremony was consistent with the religion clauses of the First Amendment, as well as the Fourteenth Amendment, which makes the clauses applicable to states and their school districts. In the end, the Court held that the prayers were, indeed, a

violation. Initially, it should be noted, Justice Anthony Kennedy was assigned to write the majority opinion for a five-to-four court upholding the prayers. After several months, he communicated to Justice Harry Blackmun that his (Kennedy's) opinion looked wrong, and his new draft became the opinion for a five-to-four court declaring the prayers unconstitutional.

The opinion held the prayers were a violation of the establishment clause and that the Court did not need to revisit relevant precedents, including *Lemon*. The school official, a surrogate of the state, had chosen to have prayers at graduation, invited clergy, provided the pamphlet, as well as provided advice about the prayers. The Court held that through the delivery of the pamphlet with instructions that Lee was directing and controlling the prayers' content. Kennedy's opinion held the government was failing in its duty to guard and respect that sphere of inviolable conscience and belief that is the mark of a free people, so subjecting citizens to state-sponsored religious exercises. It was an undeniable fact that the school district's supervision and control of the ceremony placed public and peer pressure on attending students to stand as a group.

For Kennedy, the critical issue was whether there was present coercion to attend and participate in the graduation ceremony that contained a religious element. The opinion relied quite heavily on the argument that there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools. Furthermore, the opinion cited psychological research supporting the common assumption that adolescents are often susceptible to pressure from peers toward conformity. The Court's reasoning was that the districts supervision and control of a middle or high school graduation ceremony places subtle and indirect pressures on attending students to stand as a group or maintain respectful silence during the invocation and benediction. A reasonable dissenter of high school age could believe that standing or remaining silent signified personal participation in, or approval of, the group exercise, rather than respect for it. In the opinion, the Court acknowledged that if the affected citizens were mature adults, the choice to stand or remain seated during the prayers could be viewed differently. It was the reasoning revolving around public and peer pressure that the dissenting opinion, authored by Justice Antonin Scalia, criticized strongly, arguing that most of the students would ignore the content of the prayer, thus it would not present any mental or psychological harm.

A position put forward by the school district cited the option of not attending the ceremony if one

objects to the prayers. The Court held that claiming a teenage student in our society has a real choice not to attend his or her high school graduation is formalistic to the extreme. The opinion continued that the constitution forbid the school district to exact religious conformity from a student at the price of attending ones' own graduation. A basic tenet of the First Amendment is that the state and school district cannot require one of its citizens to forfeit his or her rights and benefits as the price of resisting conformity to state-sponsored religious practice.

The majority opinion concluded by making the point that no holding by the Court suggests that a public school district can compel a student to participate in a religious exercise and that was the effect of inviting clergy to offer prayers at graduation ceremonies.

Thousands of public high schools across the country had, for years, used prayers at graduation ceremonies. Since June 1992, if a school district is to be in compliance with the ruling of the Court, this is a practice that has ceased to exist. The reasoning in *Lee* continues to be used by the Court in guiding its decisions. In *Sante Fe Independent School District v Doe*, 530 U.S. 290 (2000), the Court struck down a district policy allowing for prayers at football games using the coercion and attendance reasoning used in *Lee*.

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References and Further Reading

- Fisher, Louis. *Religious Liberty in America: Political Safeguards*. Lawrence, KS: University Press of Kansas, 2002.
- Levy, Leonard. *The Establishment Clause: Religion and the First Amendment*. Chapel Hill, NC: University of North Carolina Press, 1994.
- Miller, William Lee. *The First Liberty: America's Foundation in Religious Freedom*. Washington, D.C.: Georgetown University Press, 2003.

Cases and Statutes Cited

- Engel v. Vitale*, 370 U.S. 421 (1962)
- Lee v. Weisman*, 505 U.S. 577 (1992)
- Lemon v. Kurtzman*, 403 U.S. 602 (1971)
- Sante Fe Independent School District v. Doe*, 530 U.S. 290 (2000)

LEGAL AID SOCIETY OF NEW YORK

In addition to being the oldest and largest provider of legal services to the poor in the United States, the Legal Aid Society of New York has a long-standing reputation for zealous advocacy. Founded in 1876 to

protect the rights of German immigrants in New York City, Der Deutscher Rechts-Schutz Verein (The German Legal Aid Society) initially focused on civil legal assistance, although early on the organization expressed an interest in criminal matters as well. Soon the organization extended beyond its initial client base, dropped the word "German" from its name, and solidified its financial footing by soliciting help from top-notch New York law firms and the Association of the Bar of the City of New York.

At present, the Legal Aid Society's work is divided into three major areas: Civil Practice, Criminal Practice, and Juvenile Rights Practice. According to data compiled by the organization, on an annual basis it handles more than 200,000 indigent criminal cases, serves as law guardian for children in more than 30,000 cases before the Family Court, and is involved in more than 30,000 civil cases for families, individuals, and community groups. Moreover, the Society conducts class action litigation on behalf of numerous groups, including foster children, elderly poor, and inmates at Rikers Island.

The Society represents its clients through offices located in eighteen facilities throughout New York City's five boroughs, and employs roughly 800 attorneys. With ninety percent of its funding stemming from public sources, the Society's fiscal fortunes have tended to ebb and flow with the political currents. Even in the face of financial obstacles, however, the Society's devotion to indigent New Yorkers seemingly never wavers.

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References and Further Reading

- "About the Legal Aid Society," available at <http://www.legal-aid.org/DocumentIndex.htm?docid=98> (last accessed July 27, 2005).
- Houseman, Alan W., *Civil Legal Assistance for Low-Income Persons: Looking Back and Looking Forward*, Fordham Urb. Law Journal 29 (2002): 1213.
- , *Political Lessons: Legal Services for the Poor—A Commentary*, Georgia Law Journal 83 (1995): 1669.
- Maguire, John. *Lance of Justice: A Semi-Centennial History of the Legal Aid Society 1876–1926*, 1928.
- Mirsky, Chester L., *The Political Economy and Indigent Defense: New York City, 1917–1998*, 1991 Annual Survey American Law 891.
- Tweed, Harrison. *The Legal Aid Society: New York City 1876–1951*, 1954.

LEGAL REALISTS

The Legal Realists were a group of influential early twentieth century lawyers and legal scholars who reacted against an orthodox style of legal reasoning

known as “formalism.” Formalism holds that particular legal results are “objectively” deducible from abstract principles.

In contrast, Realists viewed legal outcomes to be a function of reasons not unique to law, including such factors as morality and social and economic perspectives. Realists also emphasized the importance of understanding law in practice: how do legal rules affect society? Realists attacked formalism both for its reliance on deductive reasoning, as well for the particular outcomes generated by classical judges. In result, formalist judges typically favored corporations over consumers, assisted businesses in their fight against collective labor organizing, and interpreted the “due process” clause of the Constitution to limit state legislation on economic matters such as setting minimum wages and maximum hours. Many, but not all, Realists were politically progressive.

The most famous precursor to the Realists and harsh critic of formalism was Oliver Wendell Holmes, Jr. Holmes urged that judges acknowledge explicitly what they inevitably did implicitly—to decide cases on the basis of legislative policy. One of Holmes’ most famous quotes, “The life of the law has not been logic, it has been experience,” has frequently been read as frontal assault on the formalist focus on deduction from abstract principles.

The early 1920s saw a remarkable increase in scholarship from what eventually became known as Legal Realists. Legal scholars such as Walter Wheeler Cook, Jerome Frank, Morris Cohen, Karl Llewellyn, and Underhill Moore, as well as the economist Robert Hale and the philosopher Felix Cohen, became identified with Legal Realism. Many Realists—including Frank, William O. Douglas, and Felix Frankfurter—served in government during the New Deal and helped develop many administrative agencies.

During the “Lochner era” of the early twentieth century, the Supreme Court invalidated social welfare legislation, outcomes frequently justified using formalist logic. Legal Realists challenged the Court’s judgment as wrongheaded, arguing that the Constitution did not embody a particular economic theory. Legal Realists provided intellectual grist that persuaded the Court finally, by 1937, to accept the judgment of Congress and state legislatures on most economic legislation.

In contrast, the early twentieth century Supreme Court gave scant protection to civil liberties. Two justices influenced by Realist thinking, Holmes and Louis D. Brandeis, both wrote dissenting opinions in free speech cases that proved extremely influential to justices who came later. Both Frankfurter and Douglas eventually served on the Warren Court that recognized many new individual rights.

The “school” of Legal Realism petered out in the 1940s in the United States. Yet the long-term impact of Legal Realism—especially on contemporary law and legal thinking—has been profound. Most legal scholars today embrace much Realist insight: that legal rules are derived from considerations such as moral perspectives, as well as economic and social principles; judges should consider carefully the impact of their decisions on society. Although the earlier Realists wrote little about Constitutional law, their influence can be seen in the ferment of the Warren Court era and the willingness of that Court to transform civil rights and civil liberties into their modern form.

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References and Further Reading

- Fisher, William, Morton Horwitz, and Thomas Reed. *American Legal Realism*. New York: Oxford University Press, 1993.
- Holmes, O. W. *The Common Law*. 1881.
- Horwitz, Morton J. *The Transformation of American Law 1870–1960: The Crisis of Legal Orthodoxy*. New York: Oxford University Press, 1992.
- Kalman, Laura. *Legal Realism at Yale, 1927–1960*. Chapel Hill: University of North Carolina Press, 1986.
- Leiter, Brian R. “American Legal Realism,” in Edmundson, W., and M. Golding, eds. *The Blackwell Guide to Philosophy of Law and Legal Theory*. Oxford: Blackwell, 2003.

See also Brandeis, Louis Dembitz; Douglas, William Orville; Frankfurter, Felix; Freedom of Speech: Modern Period (1917–Present); Holmes, Oliver Wendell, Jr.; Warren Court

LEGAL SERVICES CORPORATION v. VALESQUEZ, 531 U.S. 533 (2001)

In 1974, Congress enacted the Legal Services Corporation Act. This law established the Legal Services Corporation (LSC), a federal corporation that was authorized to award funds to local legal aid organizations providing free legal services to the poor in non-criminal legal proceedings. Beginning in 1996 (and every year thereafter), Congress enacted appropriations legislation containing a rule prohibiting the LSC from distributing money to legal aid organizations that were representing clients in proceedings involving statutory or constitutional challenges to state and federal welfare laws. Legal aid organizations were prohibited from bringing challenges even when questions regarding the welfare law’s validity arose after the commencement of the proceeding, or when that portion of the proceeding involving the challenge was

being handled by joint counsel not affiliated with—or paid by—the legal aid organization. On February 28, 2001, the U.S. Supreme Court announced in a five-to-four decision that the distribution rule was unconstitutional.

The Court distinguished the distribution rule in *Velasquez* from the “gag order” upheld in *Rust v. Sullivan*. It concluded that *Rust* stands for the proposition that the government can place conditions on how government subsidies can be spent when those funds are intended to promote specific programmatic messages. In such contexts, government regulations that impose content and viewpoint-biased restrictions on speech are constitutional. In *Velasquez*, however, the Court concluded that LSC funds were not intended to articulate a specific government endorsed programmatic message but instead to promote the varied interests and perspectives of indigent private actors involved in legal proceedings. The Court argued that Congress never intended legal aid attorneys receiving LSC funds to become the mouthpieces of the government and to “stay on message.” There simply was no programmatic message at play, and in legal proceedings the government’s viewpoint would be articulated by government lawyers.

The monetary distribution rule also raises separation of powers and federalism concerns by intruding on the judicial powers of state and federal courts. If legal aid organizations representing the poor cannot challenge the statutory and constitutional validity of welfare policies, then judges will be deprived of full and complete information about the nature of welfare policy law suits. The funding limit will corrupt the adversary process by distorting the range of views expressed in judicial forums. This, in turn, will decrease the likelihood that cases will be decided in a legally correct manner, thereby undermining the judiciary’s ability to act consistent with the rule of law. The Court considered it unrealistic to believe that indigents would be able to pursue welfare policy challenges without the free services provided by legal aid organizations receiving LSC funds. Without adequate representation, welfare challenges would less frequently find their way into the judiciary—a result that would, again, frustrate the ability of courts to perform their duties. In short, the likely effect of the LSC distribution rule was that of impermissibly shielding federal policy from full and fair judicial review.

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Cases and Statutes Cited

Rust v. Sullivan 500 U.S. 173

LEGION OF DECENCY

The National Catholic Legion of Decency (LOD) originated in 1933 and served as a campaign agency dedicated to cleaning up and censoring films produced by the motion picture industry. Concerned with the lack of adequate censoring of Hollywood movies by the Hays Production Code of 1930, the LOD threatened a national Catholic boycott of the film industry by holding large rallies and using church pulpits to announce concerns over film content. As a result, the offices of the Hayes Production Code hired Catholic Joseph Breen as a liaison between the LOD and the Hays agencies, which curbed a threat by the LOD to bring an antitrust lawsuit against Hollywood and motion picture producers.

The agency encouraged American Catholics to sign and uphold a written pledge commissioning churchgoers to boycott any films considered immoral or unfit for viewing. Catholics were also told to avoid patronizing local theaters that had previously showcased objectionable films. Because of the widespread reach of the LOD, film companies and producers were required to make movies that could pass the scrutiny of the censoring board and at times would even rename films or delete scenes considered objectionable for viewing. Films receiving the approval of the agency were generally those reflecting mid-nineteenth century Catholic values and the theology of the Roman Catholic Church.

Although the LOD attempted to keep American Catholics away from inappropriate material on screen, the national controversies that emerged as a result of the work of the Legion drew even larger crowds to theaters to view the banned films. The agency continued to promote the censoring and reviewing of films into the 1970s.

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References and Further Reading

- Black, Gregory D. *Hollywood Censored: Morality Codes, Catholics, and the Movies*. New York: Cambridge University Press, 1994.
- Skinner, James. *The Cross and the Cinema: The Legion of Decency and the National Catholic Office for Motion Pictures, 1933–1970*. Westport, CT: Praeger, 1993.

LEGISLATIVE PRAYER

State-sanctioned prayer given in legislative chambers, often led by state-paid chaplains, likely represents one of the more curious anomalies in federal establishment clause jurisprudence. In other contexts, the Supreme Court has indicated that few practices strike closer to the heart of the nonestablishment principle

than state-sanctioned and organized worship activity. As the Court wrote in 1962, the Framers of the First Amendment “tried to put an end to government control of religion and prayer . . . [G]overnment should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance.”

Despite this frequently repeated admonition, the Court in 1983 upheld the practice of prayers given in legislative chambers by state-paid chaplains. In *Marsh v. Chambers*, the Court relied on an “unambiguous and unbroken history of more than 200 years” of both state-paid legislative chaplains and devotional legislative prayer. Significant for the Court was the fact that the First Congress enacted a law authorizing the appointment and payment of chaplains only three days before finalizing the wording of the First Amendment. The majority reasoned that the Framers could not have “intended the establishment clause to forbid what they had just declared acceptable.” In so ruling, the high court declined to apply the more traditional analytical standard for evaluating alleged establishment clause violations, the “Lemon test,” which asks whether the government action has the purpose or effect of advancing religion or excessively entangles government with religious matters. Critics of the decision charged that the Court adopted a historical analysis because legislative prayer “clearly violate[d]” any other legal standard. As Justice William Brennan wrote in dissent, the practice:

intrudes on the right of conscience by forcing some legislators either to participate in a prayer opportunity, with which they are in basic disagreement, or to make their disagreement a matter of public comment by declining to participate. It forces all residents of the State to support a religious exercise that may be contrary to their own beliefs. It requires the State to commit itself on fundamental theological issues And it injects religion into the political sphere by creating the potential that each and every selection of a chaplain, or consideration of a particular prayer, . . . will provoke a political battle along religious lines and ultimately alienate some religiously identified group of citizens.

Justice Brennan’s critique aside, the Supreme Court has never reconsidered its *Marsh* ruling. Additionally significant, the *Marsh* holding did not turn on whether the prayers could be considered more solemnizing than worshipful. Although the decision seemed to assume that legislative prayers would usually be nondenominational and nonproselytizing (and that a sectarian purpose behind a prayer practice would be unconstitutional), the opinion went on to say that “it is not for [courts] to embark on a sensitive evaluation or to parse the content of a particular prayer.” This

aspect of the ruling has created some confusion among lower courts as to whether legislative bodies can impose limitations on the content and tone of allowable prayers. After the *Marsh* decision, lower courts have generally upheld government limitations on the types of prayers that may be given. In *Snyder v. Murray City Corp.* (1998), the city invited individuals from a “broad cross section of religious faiths” to open city council meetings with a short prayer. However, a city attorney blocked a proposed prayer that criticized city policies, including the prayer opportunity, a move upheld by the U.S. Tenth Circuit Court of Appeals. The court read *Marsh* as approving a “religious genre” of prayer, such as “the traditional kind of invitational legislative prayers . . . and traditional governmental invocations.” The plaintiff’s proposed prayer was appropriately excluded because it “aggressively proselytized for his particular religious views and strongly disparaged other religious views.” More recently, the Fourth Circuit Court of Appeals upheld a county’s denial of a proposed Wiccan prayer to be given at the beginning of its public meetings, even though the county had a policy allowing invocations by residents scheduled on a first-come, first-served basis. The court held that *Marsh* authorized prayers that “fit broadly within ‘the Judeo-Christian’ tradition” that “bring the unifying aspects of our heritage to the difficult task of public deliberation.”

Lower courts have also struggled with how far to apply the *Marsh* holding outside the particular context of legislative prayers. Courts have generally extended the rule to allow prayers at city councils and county commissions—those entities with legislative functions—but have been less willing to do so for school board meetings, particularly if public school students are in regular attendance. In *Lee v. Weisman* (1992), striking invocations and benedictions at public school graduations, the Court refused to rely on *Marsh* as grounds for upholding the practice, noting that the historical pedigree supporting legislative prayer was relatively unique.

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References and Further Reading

- Chemerinsky, Erwin. *History, Tradition, the Supreme Court, and the First Amendment*, Hastings Law Journal 44 (1993): 901–919.
- Epstein, Steven B. *Rethinking the Constitutionality of Ceremonial Deism*, Columbia Law Review 96 (1996): 2083.
- McConnell, Michael W. *On Reading the Constitution*, Cornell Law Review 73 (1988): 359.
- Note. *Constitutional Law—Establishment Clause—Tenth Circuit Holds that City May Deny Opportunity to Deliver Proselytizing Legislative Prayers*, Harvard Law Review 112 (1999): 2025–2030.

Cases and Statutes Cited

Lee v. Weisman, 505 U.S. 577 (1992)

Marsh v. Chambers, 463 U.S. 783 (1983)

Simpson v. Chesterfield County Board of Supervisors, 404 F.3d 276 (4th Cir. 2005)

Snyder v. Murray City Corp., 159 F.3d 1227 (10th Cir. 1998)

See also *Marsh v. Chambers*, 463 U.S. 783 (1983)

LEGISLATORS' FREEDOM OF SPEECH

Under the speech or debate clause of our Constitution, members of Congress are absolutely immune from being prosecuted or formally questioned by the executive branch, grand juries, or the courts for any speech or debate in either House. This broad protection for legislators' freedom of speech derives from events that occurred in England and the colonies beginning more than 200 years before independence. Responding to a private criminal complaint brought against a member of the House of Commons for a vote he had cast, Parliament in 1512 established that its members could not be indicted in court for actions taken in Parliament. Over time, the parliamentary privilege of free speech and debate was invoked primarily by legislators who criticized Crown policies and conduct as protection against punishment by the executive.

In the century preceding the American Revolution, colonial assemblies occasionally asserted the free speech privilege during a conflict with their royal governors. At the Constitutional Convention, the speech or debate clause was incorporated with no opposition and with little substantive discussion.

Today, the key public policy rationale for conferring this absolute immunity remains the need to protect responsible and uninhibited legislative judgment. Members of Congress are regularly accountable (through elections) in their special capacity as legislators. The speech or debate clause contemplates the possibility that the public, or executive branch officials, may overreact when disappointed or offended by what senators or representatives have said or done as legislators. The clause guards against the risk that individuals or groups frustrated by legislators' performance will seek to vent their frustrations in court rather than the voting booth.

Although the language of the clause refers only to speech or debate in either House, the Supreme Court in a series of decisions in the 1960s and 1970s extended the immunity to many forms of legislative conduct that contribute to our lawmaking enterprise. In addition to covering speeches on the House or Senate

floor, the clause also protects votes cast on bills, participation in committee hearings, circulation of information to fellow members of Congress, and issuance of investigatory subpoenas.

On the other hand, the clause does not encompass all official responsibilities performed by legislators. Important congressional functions that have been deemed unprotected include sharing legislative materials with the public and communicating with administrative agencies on behalf of constituents. Thus, for instance, the Court has held that a senator may be sued for defamation on the basis of something he or she said in a press release or constituent newsletter even if the exact same words spoken on the Senate floor are protected by the clause.

As set forth in 1972 in *Gravel v. United States*, the Court's test when reviewing legislators' assertions of absolute immunity is whether the speech or conduct in question is an integral part of the deliberative and communicative processes by which members participate in lawmaking activity. One could certainly argue that newsletters or press releases aimed at raising public awareness on key legislative issues, or complaints to agencies on behalf of constituents about the failure to enforce or abide by a statute, are important parts of the business of legislating. The Court, however, has emphasized that these activities also have other purposes (like increasing name recognition among potential voters, or exerting control over agency performance) that extend beyond lawmaking itself.

Unless the clause's absolute protection for legislators' speech is limited in some way, it could cover almost everything senators and representatives do in their quest for legislative success. Members of Congress have broad authority under Article I of the Constitution, and they have on occasion shown they are capable of abusing that authority. The Court's reservations as to what is an integral part of members' legislative performance may at bottom reflect a concern that the Bill of Rights must impose certain restraints on congressional investigations into the lives and affairs of citizens. Because legislators' mistreatment can harm the civil rights of private individuals, the Court has taken a relatively narrow view of what is integral so as to reduce the circumstances in which absolutely privileged legislative conduct would infringe on other constitutionally protected interests.

One unresolved issue concerning the speech or debate clause is whether it covers legislators' personnel actions (hiring or firing of staff). The Supreme Court has held that members' key staff, who function in effect as legislative *alter egos*, are themselves entitled to protection under the clause in appropriate circumstances. Some commentators have argued that the Court should shield congressional employment

decisions that involve this inner circle of advisors, because senators and representatives must have total discretion to select such loyal and trusted aides to fulfill their core legislative responsibilities. Others contend that employment decisions should never be protected by the clause, because the selection of staff is not an integral part of the legislative process even if such staff are an essential precondition to sound legislative decision making. Lower federal courts are divided on this issue, and the Supreme Court has yet to address it.

Forty-three state constitutions contain a provision similar to the speech or debate clause. Although many of these states' clauses have never been applied in the courts, some recent state court interpretations have been less protective of legislators' free speech than the settled federal approach to these matters. For instance, two trial courts in New York have held that their state's speech or debate clause protects legislators from liability, but legislators may still be compelled to testify in a lawsuit to which they are not a party. And in Michigan, an appellate court has held that the state's speech or debate clause shelters individual legislators' records and files but does not protect legislative committee materials during civil litigation. These interpretations, and others narrowly construing state speech or debate clause protections, suggest that state senators and representatives may not always enjoy the same degree of protection for their speech as members of Congress do.

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References and Further Reading

- Clarke, Mary Patterson. *Parliamentary Privilege in the American Colonies*. New Haven: Yale University Press, 1943.
- Gordon, Sir Charles, ed. *Ersine May's Treatise on the Law, Privileges, Proceedings, and Usage of Parliament*. 20th Ed. London, Butterworths, 1983.
- Brudney, James J., *Congressional Accountability and Denial: Speech or Debate Clause and Conflict of Interest Challenges to Unionization of Congressional Employees*, *Harvard Journal on Legislation* 36 (1999) 1–76.
- Huefner, Steven F., *The Neglected Value of the Legislative Privilege in State Legislatures*, *William and Mary Law Review* 45 (2003) 213–309.
- Reinstein, Robert J., and Harvey A. Silverglate, *Legislative Privilege and the Separation of Powers*, *Harvard Law Review* 86 (1973) 1113–1182.

Cases and Statutes Cited

- Abrams v. Richmond Co. S.P.C.C.*, 479 N.Y.S.2d 624 (Sup. Ct 1984)
- Browning v. Clerk, U.S. House of Representatives*, 789 F.2d 923 (D.C. Cir 1986)
- Davis v. Passman*, 544 F.2d 865 (5th Cir. 1977), *rev'd on other grounds* 442 U.S. 228 (1979)

- Doe v. McMillan*, 412 U.S. 306 (1973)
- Dombrowski v. Eastland*, 387 U.S. 82 (1967)
- Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491 (1975)
- Gravel v. United States*, 408 U.S. 606 (1972)
- Hutchinson v. Proxmire*, 443 U.S. 111 (1979)
- Kilbourn v. Thompson*, 103 U.S. 168 (1880)
- Lincoln Building Associates v. Barr*, 147 N.Y.S.2d 178 (Mun.Ct 1955)
- Michigan Mutual Insurance Co. v. Dept. of Treasury*, nos. 178228, 178230, LEXIS 2245 (Mich. App.Ct 1996)
- United States v. Brewster*, 408 U.S. 501 (1972)
- United States v. Johnson*, 383 U.S. 169 (1966)
- U.S. Constitution, Article I, section 6, clause 1

LELAND v. OREGON, 343 U.S. 790 (1952)

In *Leland v. Oregon*, the U.S. Supreme Court held that a state rule requiring the defendant to prove insanity beyond a reasonable doubt did not violate the due process clause of the Fourteenth Amendment. Subsequent Court decisions (for example, *In re Winship*, 1970, *Mullaney v. Wilbur*, 1975) requiring that the prosecution bear the burden of proving essential elements of the crime cast doubt on this holding. But in *Rivera v. Delaware* (1976), the Court dismissed, for want of a substantial federal question, an appeal of a conviction under an instruction placing the burden of proving insanity on the defendant by a preponderance of the evidence. Thus, under the federal constitution, the defendant may be required to bear the burden of proving insanity, a position that most jurisdictions have adopted. Most require the defendant to prove insanity by a preponderance, but some (including the federal courts) impose the higher clear and convincing standard of proof on defendants. Empirical evidence leaves some doubt as to whether the placement of the burden of proof makes a practical difference in the insanity context. However, there is no justification for imposing a heavier burden on those who assert insanity than on those who assert other defenses; in fact, juries probably tend to be more skeptical of insanity claims than any other defensive claim.

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References and Further Reading

- American Bar Association Criminal Justice Mental Health Standards. Washington, D.C.: ABA Press, 1989, pp. 383–88.

Cases and Statutes Cited

- In re Winship*, 397 U.S. 358 (1970)
- Mullaney v. Wilbur*, 421 U.S. 684 (1975)
- Rivera v. Delaware*, 429 U.S. 877 (1976)
- See also **Insanity Defense; Mullaney v. Wilbur, 421 U.S. 684 (1975); Proof beyond a Reasonable Doubt**

LEMON TEST

The Lemon Test is part of a very unstable and hotly debated area of constitutional law: whether government aid to religion in the form of grants to or partnership with religious schools violates the constitutional prohibition against establishing religion. In 1971, the Lemon Test was the final word on the subject, but as the political debate about the separation of church and state grew more contentious in the 1980s and 1990s, other tests, such as the Endorsement test and the Coercion test, have been proposed, and there remains no firm resolution of the issue.

Originating in the 1971 case *Lemon v. Kurtzman*, 403 U.S. 602 (1971), this test is meant to determine whether government subsidies to religious organizations violate the establishment clause of the First Amendment. The establishment clause states that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” As explained in the 1947 case *Everson v. Bd. of Ed.*, 330 U.S. 1 (1947), this clause means at least four things: (1) that neither the state nor federal government can set up an official church, (2) that a person cannot be forced either to practice or not to practice religion, (3) that government cannot give aid to religion, and (4) that government cannot participate in the affairs of religion. In *Everson*, a New Jersey law allowed a subsidy to religious schools for student bus transportation. The Court held that the subsidies did not violate the Constitution because they were intended for a secular aspect of the schools’ mission—student transportation. Thus, the holding distinguished between secular and sacred activities by the schools; where the subsidies were only used for secular purposes that were “indisputably marked off from the (schools’) religious function,” they were constitutionally permissible.

Following *Everson*, it was permissible for the government to subsidize a religious organization, but only after determining that the aid served a secular, not religious end. *Lemon v. Kurtzman* revolves around this problem of whether government subsidies to religious organizations aid a secular or sacred purpose. *Lemon* involved Rhode Island and Pennsylvania subsidies to private religious school teachers for teaching secular subjects. In contrast to the result in *Everson*, the Court held that these subsidies were unconstitutional. Although the teachers testified that they did not inject religion into their secular classes, Justice Burger wrote that the only way to prove they did not would be for government to carefully audit and supervise the curricula. This level of government involvement in religious school curricula would

amount to excessive entanglement between church and state.

The Lemon test requires any government subsidy to a religious organization to meet three tests: (1) it must have a good faith secular purpose, (2) it must not have the principle effect of aiding or inhibiting religion, and (3) it must not create an excessive entanglement between government and religion. The test does not invalidate a subsidy for having a religious purpose, as long as it has a bona fide secular purpose as well. Neither does it invalidate a subsidy that aids religion, so long as that is not its principal effect. In this sense, it concedes to the accommodationist view that the “wall of separation” is permeable.

The Court had several opportunities to apply the Lemon test again in the 1980s. Several of these decisions involved the government’s display of religious symbols. In *Lynch v. Donnelly*, 465 U.S. 668 (1984), the Court considered a creche in Pawtucket, Rhode Island’s, annual Christmas display. The Court found that the creche did not run afoul of the establishment clause because, taken in context of a holiday display that also included secular images of Christmas, it did not have the principal effect of advancing religion. This decision also introduced the Endorsement test, which has existed as a parallel to the Lemon Test ever since. However, in *County of Allegheny v. ACLU*, 492 U.S. 573 (1989), the Court found that a creche erected all by itself in a prominent location on the steps of a downtown courthouse did violate the establishment clause. The *Allegheny* creche’s prominence and the fact that its religious message was undiluted by the presence of secular images of Christmas meant that it had the principal effect of advancing Christianity, in violation of the Lemon Test. Justices Rehnquist, Scalia, Kennedy, and White believed the majority’s application of the Lemon Test unjustifiably hostile to religion. In another case, *Bowen v. Kendrick*, 487 U.S. 589 (1988), the Court held that the “Chastity Act,” which provided government funds to religiously affiliated non-profits to teach abstinence and adoption as alternatives to abortion, was not unconstitutional because it met the three prongs of the Lemon Test.

Evangelical Christians interpret the result of *Lemon* and the associated school prayer and religious display cases as discrimination against religion. In response to this concern, President George W. Bush pushed with some success for a variety of legislation that would seem to fly in its face. This includes school vouchers that can be used to pay for private religious schools and “charitable choice,” an effort to end the “discrimination” against religious non-profits in receiving federal grants.

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Cases and Statutes Cited

Bowen v. Kendrick, 487 U.S. 589 (1988)
Capital Square Review Board v. Pinette, 515 U.S. 753 (1995)
County of Allegheny v. ACLU, 492 U.S. 573 (1989)
Everson v. Bd. of Ed., 330 U.S. 1 (1947)
Lemon v. Kurtzman, 403 U.S. 602 (1971)
Lynch v. Donnelly, 465 U.S. 668 (1984)
McCreary v. ACLU of Kentucky
Van Orden v. Perry

See also **Legislative Prayer; Public School Curricula and Free Exercise Claims; Religious Symbols on Public Property; Secular Purpose; School Vouchers; State Aid to Religious Schools; Teacher Speech in Public Schools; Teaching Evolution in Public Schools**

LEYRA v. DENNO, 347 U.S. 556 (1954)

The principle that coerced confessions in criminal trials violate the Fourteenth Amendment's guarantee of due process was previously established. This case broke new ground by declaring that evidence gained after a coerced confession could also be found inadmissible. Camilo Leyra was convicted of first-degree murder for killing his elderly parents and sentenced to death, but his convictions were reversed by a state appeals court on the grounds that his confession was coerced. After his parents' death, Leyra had been interrogated almost continuously for several days on end, and he was physically and emotionally exhausted when a psychiatrist with hypnosis skills managed with threats, assurances of leniency, and leading questions to draw out a confession. Leyra was tried a second time, using as evidence his later confessions to the police and prosecutors. The court let the jury decide as a question of fact whether the later confessions were voluntary or similarly coerced; the jury convicted and again imposed the death penalty, and the New York appeals court affirmed. Leyra challenged the state courts' decision, charging that his later confessions were also coerced. The Supreme Court agreed, saying that the confessions were closely related in time and circumstances, enough for the later conversations to be tainted by the coerced confession to the psychiatrist. The lower courts left this question to the jury, as the dissenters in the Supreme Court would have done, but the majority thought that the threats to individual liberty were sufficiently serious to warrant the extra protection by invalidating all his confessions.

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Cases and Statutes Cited

Leyra v. Denno, 347 U.S. 556 (1954)

See also **Capital Punishment; Capital Punishment: Due Process Limits; Capital Punishment for Felony Murder; Capital Punishment Reversed; Coerced Confessions/Police Interrogation; Due Process; Due Process of Law (V and XIV); False Confessions; Police Power of the State; Substantive Due Process**

LILBORNE, JOHN (FREEBORN JOHN) (1614–1657)

John Lilborne (also Lilburne, Lilbourne) secured the privilege against self-incrimination, the right to be confronted with one's accusers, and the right to be informed of the accusation in the English courts. Lilborne was born in Sunderland, in Northern England, in either 1614 or 1615. He was the third child and second son of a prominent Puritan family. He was apprenticed to a London tailor at the age of sixteen. In 1637, under the reign of Charles I, he became involved in Puritan politics. He met John Bastwick and arranged to print Bastwick's tract, the *Letany*, in Holland and to smuggle copies to England. He was caught and was brought before the Court of the Star Chamber at age twenty-three on the charge of distributing seditious and libelous books. Star Chamber officers and later the Archbishop of Canterbury himself demanded that Lilborne take the oath *ex officio mero*, by which he would swear to answer truthfully the Court's inquiries. When asked to take the oath, Lilborne replied,

Lilborne: "To what?"

The Court: "That you shall make true answer to all things that are asked of you."

Lilborne: "Must I so, sir? But before I swear, I will know to what I must swear."

The Court: "As soon as you have sworn, you shall [know], but not before."

Lilborne refused to take the oath and refused to answer the Court's questions. He argued that as a "freeborn Englishman," he had the right to know the accusation against him. He asserted that the Court's attempt to prove his guilt through his answers rather than permitting him to confront his accusers violated his rights as an Englishman, Magna Carta, the "goode olde" laws of England, and the Holy Bible.

The Star Chamber Court found him in contempt. Lilborne was sentenced to the pillory and to be whipped through the streets of London between the Fleet Prison and the pillory. Two weeks after his

sentencing, Lilborne was tied to a cart, stripped to the waist, and began his journey. The route was crowded with spectators and his sympathizers. Lilborne used this opportunity to declare himself a martyr and to speak out against the injustice of scourging a man for remaining silent. He excoriated the High Church and the Catholic Church from the pillory until a jailer shoved a rag into his mouth and silenced him. From that day he was known as “Freeborn John.”

During his imprisonment, Lilborne, now a hero, wrote numerous pamphlets describing his ordeal and arguing on behalf of the right of conscience and against the abuses of the Star Chamber. Two and a half years later, Lilborne was released by the Long Parliament after Oliver Cromwell’s speech on his behalf. Parliament abolished the Star Chamber and High Commission (Ecclesiastical) courts.

After the execution of King Charles I, radical Presbyterians won control of Parliament and attempted to establish Presbyterianism as the state church. Suffering criticism from what had become a free press, the House of Commons enacted a licensing law that restricted publication. Lilborne then became a leading defender of the freedom to publish. He published both legal and illegal tracts critical of the Presbyterian Church, the House of Commons, and his old protector, Oliver Cromwell. For his efforts, he was charged with treason and three times put on trial for his life.

During his confinements, petitions flowed to the House of Commons demanding his release. Lilborne again refused to answer questions put to him by a committee of the House and even refused to enter a plea at his trial, asserting that to compel him to answer guilty or not guilty would violate his right of conscience.

Although Lilborne was acquitted, Cromwell ordered him imprisoned in the Tower of London without the privilege of habeas corpus. Lilborne was later transported to prison on the Isle of Jersey, where he died in 1657.

Lilborne’s life was remarkable. He inspired those who followed him to assert the privilege against self-incrimination in the common law courts. After 1640, the House of Commons abolished the oath *ex officio*. English judges respected the accuseds’ assertions that they should not be compelled to incriminate themselves, that they should be advised of the accusations against them, and that they should be confronted by their accusers. All three rights became established in English common law. Lilborne is remarkable, too, because he maintained a principled stance against infringements of liberties, attacking those in power, whether Catholic or Protestant, who would abuse them.

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References and Further Reading

- Gibb, M. A. *John Lilborne, The Leveller*. London: Lindsay Drummond, Ltd., 1947.
- Gregg, Pauline. *Free-born John*. London: George G. Harrap & Co., Ltd., 1961.
- Levy, Leonard W. *Origins of the Fifth Amendment: The Right Against Self-incrimination*. New York: Oxford University Press, 1968.

See also **Confrontation Clause; Puritans; Rights of the Accused**

LILLY v. VIRGINIA, 527 U.S. 116 (1999)

The confrontation clause of the Sixth Amendment guarantees the right to cross-examine witnesses. The Court in *Lilly* had to balance the Fifth Amendment privilege against self-incrimination with the Sixth Amendment right to cross-examine witnesses.

Benjamin Lilly and his brother, Mark, were charged with robbery, abduction, and capital murder. On arrest, the police questioned both men, and Mark confessed to several of the related crimes but maintained that Benjamin had shot and killed the victim. At Benjamin’s trial, the prosecution called Mark to testify, and he invoked his Fifth Amendment privilege against self-incrimination. The prosecution then admitted Mark’s confession into evidence, over defendant’s objection, and the jury convicted Benjamin of capital murder and sentenced him to death.

Out-of-court statements made by unavailable witnesses are hearsay and are inadmissible unless the evidence falls within a firmly rooted exception or contains particularized guarantees of trustworthiness. The Court reversed the trial court and held that Mark’s confession was improperly admitted because it did not fall within an exception to the hearsay rule. The Virginia Supreme Court had found that the confession fell within an exception because Mark’s confession was against his penal interest, but the Court disagreed explaining that such confessions are inherently unreliable, especially when serving to shift blame to another.

The Court was unanimous in the judgment but mustered only a plurality of four in the reasoning. The application of *Lilly* remains unsettled, although the Court recognized that cross-examination remains the greatest legal engine ever invented for the discovery of the truth.

References and Further Reading

- Gore, Kimberly G., *Interpreting the Confrontation Clause: Is There Dissension Among the Ranks?*, Mississippi College Law Review 21, Fall (2001): 83–119.

Kirst, Roger, *Appellate Court Answers to the Confrontation Questions in Lilly v. Virginia*, *Syracuse Law Review* 53 (2003): 87–169.

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Cases and Statutes Cited

Lilly v. Virginia, 527 U.S. 116 (1999)

See also **Confrontation Clause; Defense, Right to Present; Hearsay Evidence**

LIMITATIONS ON CLERGY HOLDING OFFICE

The proper role of clergy in politics has long been a controversial one in America. Although clergy have been actively involved in politics since our founding, a number of early state constitutions prohibited clergy themselves from holding various political offices. Seven of the original thirteen states imposed such restrictions, and six other states that entered the union in the early decades of the nineteenth century also included such restrictions. These restrictions took various forms, but most commonly prohibited clergy from being in the state legislature. Several states went further and prohibited clergy from holding any statewide office.

These prohibitions were likely modeled in part on the English practice of barring clergy from the House of Commons, where the Crown's authority over the Church of England created concerns that clergy in the Commons might undermine that body's independence. In the new United States the prohibitions on clergy holding office served two apparent purposes. First, several state constitutions that banned clergy from office specifically stated it was for the purpose of ensuring that ministers not be "diverted from the great duties of their service" to God. The second and more likely reason was to ensure a proper separation of church and state. Almost all of the states banning clergy from office were Southern or border states, and many in those states believed that New England clergy were too actively involved in politics. The ban on clergy in office arguably sought to avoid that being repeated elsewhere and to prevent any particular religious group from exerting too much power. There is also speculation that some Southern states feared that clergy in the legislature might promote abolition of slavery.

Two of America's most prominent founding fathers, Thomas Jefferson and James Madison, were initially deeply divided on whether clergy should be banned from political office. Jefferson strongly

supported such restrictions, believing that when clergy had become "ingrafted into the machine of government," they had become a "formidable engine" against the rights of others. Madison, on the other hand, believed that any special restriction on clergy holding office violated a "fundamental principle of liberty" by depriving them of a civil right enjoyed by others. Much later in life Jefferson changed his view and agreed with Madison, stating that experience had shown that clergy should be treated the same as others, and thus share the same rights to hold elective office.

Interest in banning clergy from political office began to wane in the middle of the nineteenth century. No state added such a provision after 1828, and, starting with New York in 1846, states that previously had such restrictions began to remove them from their constitutions. By the end of the nineteenth century only two states, Maryland and Tennessee, retained prohibitions on clergy holding political office. The Maryland provision was held unconstitutional by a federal district court in 1974.

The one remaining state prohibition, Tennessee's, which precluded clergy from serving in the state legislature, was held unconstitutional by U.S. Supreme Court in *McDaniel v. Paty*, 435 U.S. 618 (1978). The Court was unanimous in finding the provision unconstitutional, but divided in its reasoning. Four members of the Court said the provision violated the free exercise clause of the First Amendment; two said it violated both the free exercise and the establishment clause; another said it violated the establishment clause; and a final justice found it violated the equal protection clause. A majority of the justices specifically rejected the state of Tennessee's argument that the prohibition was justified by establishment clause principles. As stated by Justice Brennan in a concurring opinion, the establishment clause "does not place religious discussion, association, or political participation in a status less preferred than rights of discussion, association, or political participation generally."

The Court's decision in *McDaniel* highlights the unconstitutionality of states placing limitations of clergy holding office. Neither our secular form of government nor our national commitment to separation of church and state require that anyone be precluded from political life because of religious views or affiliation. Although religion cannot be given a preferred status within our public life, neither can it be disadvantaged relative to other views. Instead, constitutional principles of free exercise of religion and free speech require that religious adherents have equal access to the political process. Anything less than

this is, in the words of James Madison, “a deprivation of a civil right,” and inconsistent with our national commitment to a free and open political process.

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References and Further Reading

Stokes, Anson P. *Church and State in the United States*. New York: Harper and Row, 1950.

Cases and Statutes Cited

McDaniel v. Paty, 435 U.S. 618 (1978)

See also **Disestablishment of State Churches in the late Eighteenth Century and Early Nineteenth Century; Religious Tests for Officeholding (Article 6, Cl. 3)**

LIMITED PUBLIC FORUMS

A limited public forum is a kind of designated public forum. A designated public forum is an area voluntarily opened by the government as a place for expressive activity. It requires affirmative action by the government, in contrast to the “traditional” public forum that acquires its character from its historical use. The government may also designate a forum for specific types of communications or available for specific groups; these are limited public forums. Although the Court applies the same strict scrutiny to infringements on speech in these forums, the major distinction of a limited public forum is government can limit the subject matter, or content, of speech in these forums while it cannot usually in a traditional public forum.

The Supreme Court first delineated the three types of forums: traditional public, designated public and nonpublic in *Perry Education Association v. Perry Local Educators Association*, 460 U.S. 37 (1983). Although it has allowed government to limit subject matter in limited public forums, the Court has struck down attempts to permit only particular viewpoints (*Rosenberger v. Rector*, 515 U.S. 819 [1995] [student activity fees could not be limited to groups promoting a belief about a deity]).

The doctrine has led to disagreements almost since its inception (see *Cornelius v. NAACP Legal Defense and Education Fund*, 473 U.S. 788 (1985) (majority found federal workers charity fund drive that limited participants a nonpublic forum; dissent criticized “circular” reasoning and found it a limited public forum). Courts still wrestle with whether the government’s intent to allow limited expressive activity or the compatibility of the forum with particular speech activities should determine a limited public forum.

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References and Further Reading

Shiffrin and Choper. *The First Amendment: Cases, Commentaries and Questions*. 3rd Ed. West Group, 2001.

Kovic, et al. *The American Constitutional Order: History, Cases and Philosophy*. 2nd Ed. West Group, pp. 974–973.

LINCOLN, ABRAHAM (1809–1865)

In rankings of American presidents, Abraham Lincoln is often listed as the greatest President of all time. The rationale for that title has to do with his leadership at difficult times, particularly leadership during the bloodiest war ever fought in the Americas, the American Civil War. Much is made of the fact that the Civil War was about holding the American nation together, or as Lincoln put it in his Gettysburg Address, “testing whether any nation so conceived and so dedicated can long endure.” What is missed in the nationalism observation, however, is that the war was fought for principle in Lincoln’s mind, not just for nationalism. The “so conceived and so dedicated” line has to do with human rights, and particularly with Lincoln’s reference to “liberty” and the aspiration that “all men are created equal.” In other words, what stands behind the war for nationalism is human rights. And it is the dedication to human rights, above all else, that earns Lincoln’s high ranking in the roster of American presidents.

Until 1858, Lincoln had been a little known person outside of his region of Illinois. Lincoln was born in rural Hardin County, Kentucky, on February 12, 1809, the son of Thomas Lincoln and Nancy Hanks Lincoln. The family lived in poverty as his father scraped out a living as a farmer. He moved to Illinois as a young man and there married Mary Todd on November 4, 1842. They had four sons, although only one lived to adulthood. Lincoln had practiced law in Springfield and had served two terms in the U.S. Congress from 1847–1851, where he had opposed the expansion of slavery beyond the state where it was then legal. This position had been significant because of the acquisition of the American Southwest in the Mexican War and the rapid westward expansion that resulted. Eventually, Lincoln believed, the obvious contradictions between slavery and the ideals of the Constitution would lead to emancipation, but he did not advocate abolition of slavery at that time.

Lincoln–Douglas Debates

In 1858, Lincoln ran against the nationally known incumbent Senator Stephen A. Douglas for a senate seat in Illinois. In accepting his nomination for that

seat, Lincoln delivered his famous “house divided” speech in which he argued that the nation could not continue to exist “half slave and half free.” In July 1858, Lincoln proposed that the two candidates engage in a series of formal debates, a proposal that Douglas reluctantly accepted. During that summer, the two men encountered one another in seven debates. The intellectual discussion of slavery that resulted expanded the national debate about slavery beyond any public discussion up to that point. Lincoln forced Douglas to engage the apparent contradiction between slavery and a free society. The infamous Dred Scott decision had been handed down by the Supreme Court only the year before and had declared that slaves were not citizens and therefore could not sue for freedom. When challenged to define his position on that case, Douglas did not disavow the decision but then added that “slavery cannot exist a day or an hour anywhere unless it is supported by local police regulations.” His position accepted the constitutional force of Dred Scott, but suggested that if the ruling was unpopular, it should not be enforced. Lincoln saw the slavery issue as a core moral issue rather than as a practical political problem: “it is the eternal struggle between these two principles—right and wrong throughout the world.” In the debates, Lincoln tried to balance the moral issue and his antislavery beliefs with the practical problem of race adjustment that would result from the end of slavery. While Douglas argued for the status quo, Lincoln forced the debates to raise the discussion on slavery to a new level. Lincoln’s party actually won more votes than did Douglas’s party, but senators were then selected by the state legislatures. Because of gerrymandered districts, Douglas won reelection to his seat. Lincoln’s performance in the debates was widely covered and well reported in the national press. The debates made him politically prominent in the Northern free states and catapulted him into leadership within the Republican party.

Lincoln won the nomination of the Republican Party for the presidency in 1860 and was elected to the presidency on an abolitionist platform. He won an election that showed the deep divisions of the nation on the slavery issue, and his election spurred action in southern states that led to their seceding from the union. Lincoln believed it his duty to preserve the union, and the Civil War broke out.

Suspension of Habeas Corpus

Although his commitment to human rights was the basis of his election, the beginning of the Civil War challenged his commitment to civil liberties. After the

war began, Lincoln claimed emergency powers and suspended the right of citizens to request a writ of habeas corpus after their arrests. This right, requiring that a judge determine the legality of an imprisonment, was seen by Lincoln as a threat to the security of the nation during the early days of the war. He claimed the prerogative to suspend the writ because of the crisis. The military was free to arrest and detain anyone suspected of assisting the confederates indefinitely. Lincoln’s action was immediately controversial and has caused debate among constitutional scholars ever since. Lincoln offered several justifications for suspending habeas corpus. First, he argued that a “doctrine of necessity,” predicated on his oath to preserve, protect, and defend the Constitution, allowed him to take a “big picture” view of executive authority. Just as sometimes limbs must be amputated to preserve life, presidents may be forced to violate the letter of the Constitution to save it over the long run. Second, he made more formal constitutional claims for his actions. The President, he noted, has the duty to “faithfully execute” the nation’s laws. Disloyal citizens could preclude such faithful law enforcement, and thus, to serve a larger purpose, he could suspend their right to habeas corpus. Also, the commander-in-chief power allowed him, in time of war, “to take any measure which may best subdue the enemy.”

In May 1861, a union general named George Cadwalader ordered the arrest of a John Merryman for being “an active secessionist sympathizer.” Merryman was held in a military prison by order of Cadwalader. Chief Justice Roger B. Taney, who had administrative supervision over the prison, asked for Cadwalader to allow him to judge the legality of Merryman’s detention. Cadwalader cited Lincoln’s orders and refused Taney’s request. Taney cited Cadwalader for contempt of court, but Union soldiers refused to allow the order to be served. Subsequently, Taney, the man who had also authored the Dred Scott decisions, wrote of his outrage in the *Ex parte Merryman* opinion.

In his opinion, Taney addressed Lincoln’s arguments for expanded executive authority, directly disputing Lincoln’s claim that the faithful execution of law justified the suspension of habeas corpus. That power, Taney wrote, did not permit him to “execute them himself, or through agents or officers, civil or military.” Rather, the president’s duty was only to make certain that outside forces do not interfere with law enforcement. Accordingly, for example, the president would be obliged to help the judicial branch if some outside force threatened the judicial power, but the president could not use the military to usurp judicial authority.

Similarly, Taney challenged Lincoln's assertion that emergencies create a prerogative power. Taney found that if the executive branch could, under any circumstances, overstep the powers of the other branches, then "the people of the United States are no longer living under a government of laws." The constitution was not simply a suggestion regarding government operations but was instead a document of imperatives, constraining executive authority at all times. If presidents were able to ignore the Constitution "upon any pretext or under any circumstances," the Constitution would be meaningless.

Finally, and most importantly, Taney declared that the Framers never intended for a president to be able to suspend habeas corpus. It defied any understanding of the events that led to the American Revolution to think that the Framers would support such expanded executive authority. They had just declared independence from an English King whom they believed had acted in a despotic manner. They distrusted any powerful executive authority, and most especially the authority to arrest citizens and hold them indefinitely without trial. "I had supposed it to be one of those points of constitutional law upon which there was no difference of opinion, and that it was admitted on all hands, that the privilege of the writ could not be suspended, except by act of Congress."

Many of Lincoln's defenders concede that Lincoln's position on the suspension of the writ of habeas corpus was an extreme one, one that expanded presidential authority beyond its rightful limits. Were it the case that this action was the last in the field of human liberty, perhaps history would judge Lincoln more harshly. However, it was not the Lincoln's last word on human rights.

Emancipation Proclamation

As the War escalated, so did the issues surrounding the war. Despite Lincoln's own personal commitment to abolitionism, he wished to keep the rhetoric surrounding the war to the narrow issue of national unity. However, it soon became clear that the moral cause undergirding the conflict should be addressed. On January 1, 1863, he issued the Emancipation Proclamation, declaring that all slaves residing in territory in rebellion against the federal government should be free. The action itself freed very few people because it did not apply to slaves in border states fighting on the union side. The states in the Confederacy obviously did not act on Lincoln's order. However, the

proclamation did demonstrate to Americans and the world that the Civil War was now being fought to end slavery. Although the preservation of the union always remained at the center of Lincoln's rhetoric, the real issue of slavery now had also become public.

Lincoln had reluctantly concluded that he should issue the proclamation. His initial tactic of portraying the war primarily in terms of preserving the Union, however, did not satisfy the abolitionist leadership in Congress and did not dramatize the war for other nations. As pressure for abolition mounted in Congress, however, Lincoln embraced the idea. By September 22, 1862, he had issued a preliminary proclamation announcing that emancipation would take effect on January 1, 1863, in those states that remained in rebellion against the nation. The Emancipation Proclamation was a tactical document; Lincoln well understood that it had primarily symbolic importance at the time it went into effect. However, it did make the abolition of slavery an inevitable consequence of a union victory in the war. And, more tangibly, within the Proclamation, Lincoln sought to encourage black men to join the Union military forces in battle. By the end of the war, nearly 200,000 African Americans had fought for the Union cause, and Lincoln referred to them as indispensable in ensuring Union victory.

Immediately on completion of the war, after Lincoln's death, the broad application of abolition was accomplished in the passage of the Thirteenth Amendment to the Constitution, passed on December 18, 1865. That amendment became a part of Lincoln's legacy and helped justify his primacy in the roster of American presidents.

Lincoln's Legacy

Lincoln's legacy in human rights and liberties thus sends mixed messages. On the one hand, he expanded presidential authority in the suspension of basic liberties, a legacy that continues to foster debate even in modern times. On the other hand, more than any American president, he expressed a passionate view of the centrality of basic human rights. In his famous words: "As I would not be a slave, so I would not be a master. This expresses my idea of democracy. Whatever differs from this, to the extent of the difference, is no democracy." Lincoln did not live to see the end of the Civil War. He was assassinated by John Wilkes Booth on April 15, 1865, just weeks before the end of the war.

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References and Further Reading

- Beverage, Albert J. *Abraham Lincoln* (4 volumes). New York: Houghton Mifflin, 1928.
- Donald, David Herbert. *Lincoln*. New York: Simon and Schuster, 1995.
- Goodwin, Doris Kearns. *Team of Rivals: The Political Genius of Abraham Lincoln*. New York: Simon and Schuster, 2005.
- Sandburg, Carl. *Abraham Lincoln: The Prairie Years and the War Years*. New York: Harcourt Brace, 1954.
- Farber, Daniel A. *Lincoln's Constitution*. Chicago: University of Chicago Press, 2003.

Cases and Statutes Cited

- Dred Scott v. Sandford*, 60 U.S. 393 (1857)
- Ex Parte Merryman*, 17 F.Cas.144 (1861)

See also ***Dred Scott v. Sandford*, 60 U.S. 393 (1857); Habeas Corpus: Modern History; Slavery and Civil Liberties**

LINE-UPS

Eyewitness identification procedures are a principal investigative tool for law enforcement agencies. Lineups, or identification parades as they are known in Britain, involve presenting persons before those who witnessed a crime to give the witness an opportunity to ascertain whether the culprit who committed the crime is among the group assembled. This is distinguished from a show-up, in which a single suspect is presented to an eyewitness, or a photo spread, in which only photos are displayed.

An eyewitness' selection of a suspect will generally lead to prosecution, and an incourt identification will often lead to conviction. Numerous studies have shown that mistaken eyewitness identification is the most frequent source of wrongful convictions of the innocent. Before 1967, the reliability of eyewitness identification testimony was simply a matter to be brought out in direct and cross-examination at trial and argued to the jury. But in 1967, the Supreme Court recognized eyewitness identification was rife with risk of error (*United States v. Wade*) and sought to reduce the risk of mistake by preventing the suggestive influences that may gratuitously inject mistake into an already risky process. The Court provided a right to counsel's presence during lineups in *Wade* and agreed that due process violations may occur when the police have used unnecessarily suggestive procedures that were conducive to irreparable mistaken identification (*Stovall v. Denno*, *Manson v. Brathwaite*).

Many empirical studies were conducted on the lineup process in the 1980s and 1990s in an effort to prevent false identifications. Professional associations that have studied the issue, particularly the American

Psychology/Law Society (AP/LS), recently issued recommendations tied to this research in a report entitled "Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads." The AP/LS's four recommendations to enhance the reliability of the lineup process are: (1) "The person who conducts the lineup or photospread should not be aware of which member of the lineup or photospread is the suspect (a "double-blind procedure"). (2) Eyewitnesses should be told explicitly that the person in question might not be in the lineup or photospread and therefore should not feel that they must make an identification. They should also be told that the person administering the lineup does not know which person is the suspect in the case. (3) The suspect should not stand out in the lineup or photospread as being different from the distractors based on the eyewitness' previous description of the culprit or based on other factors that would draw extra attention to the suspect. (4) A clear statement should be taken from the eyewitness at the time of the identification and prior to any feedback as to his or her confidence that the identified person is the actual culprit." The Department of Justice has recently published its own report entitled *Eyewitness Evidence: A Guide for Law Enforcement* that incorporates some, but not all, of the AP/LS recommendations. There is a growing consensus that reforms are needed if we are to achieve a more reliable criminal justice system.

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References and Further Reading

- Borchard, E. M., *Convicting the Innocent: Sixty-five actual errors of criminal justice* (1932).
- Connors, Edward, et al., *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial*, U.S. Dept. of Justice NCJ 161258 (1996).
- Gross, Samuel H., *Loss of Innocence: Eyewitness Identification and Proof of Guilt*, *Journal of Legal Studies* 16 (1987): 395-453.
- Judges, Donald P., *Two Cheers for the Department of Justice's Eyewitness Evidence: A Guide for Law Enforcement*, *Arkansas Law Review* 53 (2000): 231-297.
- Koosed, Margery M., *The Proposed Innocence Protection Act Won't—Unless It Also Curbs Mistaken Eyewitness Identifications*, *Ohio State Law Journal* 63 (2002): 263-314.
- Rattner, Arye, *Convicted but Innocent: Wrongful Convictions and the Criminal Justice System*, *Law and Human Behavior* 12 (1988): 283-293.
- U. S. Department of Justice, *Eyewitness Evidence: A Guide for Law Enforcement*, www.ncjrs.org/txtfiles1/nij/178240.txt. (1999).
- Wall, P., *Eyewitness Identification in Criminal Cases* (1965).
- Wells, Gary L., et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, *Law and Human Behavior* 22 (1998): 603-647.

Cases and Statutes Cited

Manson v. Brathwaite, 430 U.S. 98 (1977)
Stovall v. Denno, 388 U.S. 293 (1967)
United States v. Wade, 388 U.S. 218 (1967)

See also **Due Process; Eyewitness Identification; Right to Counsel**

CITY OF LITTLETON v. Z.J. GIFTS D-4, L.L.C (2004)

The City of Littleton, Colorado, adopted an “adult business” licensing ordinance that required the businesses to submit information about their activities to the city; that they comply with local zoning rules restricting their location; and other specific circumstances outlining when the city could deny a license, plus time limits for city officials to reach a final licensing decision. The ordinance targeted the secondary effects of adult businesses, and licenses were required before their opening.

Z. J. Gifts opened a store selling adult toys, novelties, lotions, magazines, and movies in a location not zoned for adult businesses. Rather than apply for a license, Z. J. Gifts challenged the constitutionality of the ordinance, arguing among other things that the ordinance imposed a lengthy licensing system that did not provide for prompt judicial review when licenses were denied. The federal district court in Colorado rejected the challenge and ruled in favor of the city. On appeal, the Tenth Circuit reversed the lower court, holding that Littleton’s preapplication procedures and judicial review requirements constituted unconstitutional restraints under the First Amendment.

The fractured decision in *FW/PBS Inc. v. City of Dallas* (1990) generated uncertainty and divisions among the circuit courts regarding judicial review in regulatory regimes of adult businesses. As the Tenth Circuit framed it, one unsettled issue was whether the constitutional standard for “prompt judicial review” based on *Freedman v. Maryland* (1965) meant a “prompt decision” or according to *FW/PBS v. City of Dallas* the “possibility of prompt judicial review” or access to judicial review if a license were denied. The circuit court unanimously concluded that “we are not persuaded by those circuits that have concluded that mere ‘access’ to judicial review is sufficient in licensing cases. Following the Fourth, Sixth, and Ninth Circuits, we hold that, in the event that an adult-business license is denied, *FW/PBS* requires a prompt final judicial decision regarding the validity of the denial.” [Emphasis in original.]

A unanimous Supreme Court reversed the Tenth Circuit. Writing for the Court, Breyer concluded the

“ordinance before us, considered on its face, was consistent with the First Amendment’s demands.” Breyer dismisses the distinction made between *Freedman* and its requirement that regulatory regimes involving the First Amendment “assure a prompt final judicial decision” and O’Connor’s plurality opinion in *FW/PBS* where she referred to the “possibility of judicial review.” The distinction “makes too much of too little,” Breyer notes; both cases, properly interpreted, require “a prompt judicial decision.”

The crux of Breyer’s opinion is that “nothing in *FW/PBS* or in *Freedman* requires a city or a State to place judicial safeguards all in the city ordinance that sets for a licensing scheme.” Littleton’s ordinance remains constitutionally valid because “In our view, Colorado’s ordinary judicial review procedures suffice as long as the courts remain sensitive to the need to prevent First Amendment harms and administer those procedures accordingly.” Colorado’s courts, Breyer writes, are “aware of the constitutional need to avoid ‘undue delay’” that may arise from licensing adult businesses that lead to “unconstitutional suppression of protected speech.” If problems should arise, he advises, “federal remedies would provide an additional safety valve.”

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Cases and Statutes Cited

City of Littleton v. Z.J. Gifts D-4, L.L.C., 2003-058 (2004)
FW/PBS Inc. v. City of Dallas, 493 U.S. 215 (1990)
Freedman v. Maryland, 380 U.S. 51 (1965)

LLOYD CORPORATION v. TANNER, 407 U.S. 551 (1972)

Four years after its attempt in *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza* (1968) to harmonize the conflict between the First Amendment rights of persons to speak and the rights of private property owners to exclude individuals from their property, the Court reexamined this question and severely limited the scope of that decision. In *Lloyd Corp.*, five protesters entered a fifty-acre shopping mall and distributed handbills criticizing the Vietnam War. When threatened with arrests for trespass, the five sued in district court claiming that the distribution of handbills at the shopping center was protected by the First and Fourteenth Amendments under the Court’s decisions in *Marsh v. Alabama* and *Logan Valley*.

The Supreme Court distinguished *Lloyd Corp.* from *Logan Valley* in two significant ways. First, the Court stated that in contrast to the hand billing in

Lloyd, the picketing in *Logan Valley* had been specifically directed at a store in the mall and concerned the policies of that store. Thus, unlike *Lloyd Corp.*, the free speech activity directly related to the use to which the shopping center was being put. Second, the Court stated that the *Logan Valley* pickets had no other reasonable opportunity to reach their intended audience other than by access to private property, because they were specifically targeting the labor policies of a particular store located in the mall. In contrast, the protesters in *Lloyd Corp.* could have exercised their rights to protest the Vietnam War in other locations within the community. The Court in *Lloyd Corp.* took pains to distinguish, but not overrule, *Logan Valley*. Although four years later in *Hudgens v. NLRB* (1976), the Court found that the two cases were incompatible and that the holding of *Lloyd* amounted to a total rejection of the earlier case.

Although made shortly after *Lloyd Corp.*, the *Hudgens* decision significantly realigned First Amendment jurisprudence and state action doctrine. The major distinction that the Court's opinion in *Lloyd Corp.* drew from *Logan Valley* was inconsistent with a basic premise of the First Amendment. If free speech rights within a shopping center depended on the connection between the subject of the speech and the purposes to which the shopping center was opened to the public, then the government regulation of speech would depend on its content. Basic to the Court's First Amendment doctrine is a suspicion of content-based regulation, which is often susceptible to control of expression because of the government's preference for or dislike of certain ideas. Accordingly, the Court's holding in *Lloyd Corp.* would have triggered an evaluation of speech rights at odds with fundamental First Amendment principles—a course that the Court recognized and corrected in *Hudgens*.

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References and Further Reading

- Chemerinsky, Erwin. *Constitutional Law Principles and Policies*. 2nd Ed. New York, NY: Aspen, 2002, pp. 498–502.
 Garvey, John H. *What are Freedoms For?* Cambridge, MA: Harvard University Press, 1996, pp. 242–251.
 Tribe, Lawrence H. *American Constitutional Law*, 1708–1711. 2nd Ed., Mineola, NY: Foundation, 1988.

Cases and Statutes Cited

- Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza*, 391 U.S. 308 (1968)
Hudgens v. NLRB, 424 U.S. 507 (1976)

- Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972)
Marsh v. Alabama, 326 U.S. 501 (1946)

See also **First Amendment; Lloyd Corporation v. Tanner**, 407 U.S. 551 (1972); **State Action Doctrine**

LOAN ASSOCIATION v. TOPEKA, 87 U.S. 655 (1875)

In 1872, the Kansas legislature passed acts authorizing cities to fund private enterprise to improve and develop the cities of Kansas. Topeka issued \$100,000 in bonds to encourage an iron bridge manufacturer to build a factory within the city. The bonds were to be funded through public taxation. Topeka stopped repaying the bonds after the first payment, and the Citizens' Savings and Loan Association of Cleveland, who had bought the bonds, sought redress through the federal courts under diversity of citizenship jurisdiction.

The district court judge held that legislatures had no power to compel citizens, through taxation, to subsidize a purely private enterprise and that doing so also violated a provision of the Kansas state constitution prohibiting abuses of power.

The Loan Association appealed the decision to the U.S. Supreme Court and Justice Samuel F. Miller wrote the decision for the majority affirming the decision of the district court. The Court found that general principles of natural law denied legislatures the power to tax to fund purely private enterprise.

The Court held that its cases upholding the use of taxation to fund private industry such as railways, canals, and roads did not support an unlimited power to tax. In each case the question before the Court was whether the tax-funded private individuals and corporations to engage in acts which had a public character accepted by "time and the acquiescence of the people" or purely to aid private interests.

The Court found that unlike transportation where the community can gain a public benefit from infrastructural improvements "[n]o line can be drawn in favor of the manufacturer which would not open the coffers of the public treasury to the importunities of two-thirds of the business men of the city or town." The use of the taxation power to fund them was a violation of the citizen's private right and "none the less a robbery because it is done under the forms of law and is called taxation."

He found this private right, not in the specific textual guarantees of the constitution or the potentially elastic clauses of the Ninth or the Fourteenth Amendments but in the manner of John Locke, Miller asserted that "there are such rights in every free

government beyond the control of the State . . . which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name.”

Justice Nathan Clifford wrote a dissent attacking the Court for nullifying “an act of the State legislature on the vague ground that they think it opposed to a general latent spirit supposed to pervade or underlie the constitution, where neither the terms nor the implications of the instrument disclose any such restriction.”

The arguments presented in the majority and dissent can be seen as foreshadowing the controversy over the use of substantive due process, based on an underlying spirit of the constitution, to strike down statutes in violation of unenumerated economic or privacy rights without a specific textual basis.

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References and Further Reading

- Collins, Michael G., *Before Lochne—Diversity Jurisdiction and the Development of General Constitutional Law*, Tulane Law Review 74 (2000) 1263–1324.
- Fairman, Charles. *Reconstruction and Reunion, 1864–88 (The Oliver Wendell Holmes Devise History of the Supreme Court of the United States, Vols. 6–7)*. MacMillan Library Reference; 2nd Ed., 1987.

See also **Due Process of Law (V and XIV); Griswold v. Connecticut, 381 U.S. 479 (1965); Lochner v. New York, 198 U.S. 45 (1905); Privacy; Privacy, Theories of; Retained Rights (Ninth Amendment); Right of Privacy**

LOCHNER v. NEW YORK, 198 U.S. 45 (1905)

Adam Smith’s *Wealth of Nations* recites an axiom heralded in *Lochner v. New York*: A man’s labor is his property. *Lochner* struck down New York’s Bakeshop Act limiting a baker’s labor to ten hours a day. The Act denies liberty of contract in violation of due process of law, it exceeds the limits of the police power, it is substantively bad. “There is, in our judgment,” Justice Peckham’s majority opinion exclaims, “no reasonable foundation for holding this to be necessary or appropriate as a health law to safeguard the public health or the health of the individuals who are following the trade of a baker.” “We do not believe in the soundness of the views which uphold this law.” To the contrary, Justice Peckham, and especially Justice Brewer, believed in the “survival of the fittest” philosophy of English sociologist and philosopher Herbert Spencer, whose *The Man Versus the*

State (1884) decried hours of labor legislation as so much nonsense. Thus five justices liberated Joseph Lochner to work his bakeshop employees as he saw fit. Government had no business protecting bakers as a class, or their unions. Such a motive, Peckham hints, lay behind the Bakeshop Act.

Justice John Marshall Harlan dissented. He put the burden of proof on Lochner to establish that the statute is “plainly and palpably in excess of legislative power.” Citing Professor Hirt’s treatise on *Diseases of Workers*, Harlan notes that the labor of bakers is among the most laborious imaginable. “Nearly all bakers are pale-faced and of more delicate health than the workers of other crafts, which is chiefly due to their hard work and their irregular and unnatural mode of living.” Many reasons of substantial character support the legislative policy of the Bakeshop Act. For Harlan, White, and Day that is the end of the matter.

Justice Holmes dissented, alone: “This case is decided upon an economic theory which a large part of the country does not entertain.” Neither Adam Smith nor Herbert Spencer determines the scope of Liberty: “The Fourteenth Amendment does not enact Mr. Herbert Spencer’s Social Statics.” “[A] constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*.”

Lochner’s restricted view of the police power held sway in constitutional law for a generation. It was not open to government to aid unions (*Adair v. United States*, 1908), or laborers (*Coppage v. Kansas*, 1915). Justice Sutherland’s opinion in *Adkins v. Children’s Hospital* (1923), striking down the District of Columbia Minimum Wage Act, is of a piece with the philosophy of *Lochner v. New York*. The era of abstract liberty and equality of working classes ended with the Great Depression, the New Deal, and Chief Justice Hughes’s opinion in *West Coast Hotel v. Parrish* (1937). The old order of the negative State was gone, replaced by Franklin Roosevelt, the Welfare State, and the Hughes Court. Today, the ghost of *Lochner* is heralded by those who attack *Roe v. Wade*, while economic libertarians urge *Lochner*’s resurrection.

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References and Further Reading

- Bernstein, David E., *Lochner Era Revisionism, Revised: Lochner and the Origins of Fundamental Rights Constitutionalism*, *Georgetown Law Journal*, 92 (2003): 1:1–60.
- Frankfurter, Felix, *Hours of Labor and Realism in Constitutional Law*, *Harvard Law Review* 29(1916): 4 :353–373.
- Gillman, Howard. *The Constitution Besieged*. Durham and London: Duke University Press, 1993.

- Kens, Paul. *Judicial Power and Reform Politics: The Anatomy of Lochner v.* New York: Lawrence: University Press of Kansas, 1990.
- Phillips, Michael J. *The Lochner Court, Myth and Reality.* Westport and London: Praeger, 2001.
- Pound, Roscoe, *Liberty of Contract*, Yale Law Journal 18 (1909): 7:454–487.
- Siegan, Bernard H. *Economic Liberties and the Constitution.* Chicago and London, University of Chicago Press, 1980.
- Strauss, David A, *Why Was Lochner Wrong?*, University of Chicago Law Review 70 (2003): 1:373–386.
- Sunstein, Cass R. *Lochner's Legacy*, Columbia Law Review 87 (1987): 5:873–919.
- Symposium: Lochner Centennial Conference*, Boston University Law Review 85 (2005): 3: 671–1015, Introduction by David J. Seipp, contributors Jack M. Balkin, Lynn A. Baker, Pamela S. Karlan, Keith E. Whittington, Barry Cushman, Larry Yackle, David E. Bernstein, Howard Gillman, Daniela Caruso, Gerald Leonard.
- Symposium. The 100th Anniversary of Lochner v.* New York, 198 U.S. 45 (1905), New York University Journal of Law and Liberty 1 (2005): 1:323–669 [includes photographs], Foreword by Randy Barnett, contributors Richard A. Epstein, Jonathan Lurie, James W. Ely, Jr., Paul Kens, Wayne McCormack, Matthew S. R. Bewig, Daniel A. Crane, Ellen Frankel Paul, Rebecca Brown, Jonathan Klick, Francesco Parisi, Todd Zywicki, Asheesh Agarwal.

Cases and Statutes Cited

- Adair v. United States*, 208 U.S. 161 (1908)
- Adkins v. Children's Hospital*, 261 U.S. 525 (1923)
- Coppage v. Kansas*, 236 U.S. 1 (1915)
- West Coast Hotel v. Parrish*, 300 U.S. 379 (1937)

See also Carolene Products v. United States, 304 U.S. 144 (1938); **Due Process of Law (V and XIV); Economic Regulation; Economic Rights in the Constitution; Freedom of Contract; Harlan, John Marshall, the Elder; Holmes, Oliver Wendell, Jr.; Hughes, Charles Evans; Judicial Review; Locke, John; New Deal and Civil Liberties; Police Power of the State; Roe v. Wade**, 410 U.S. 113 (1973); **Roosevelt, Franklin Delano; Slaughterhouse Cases**, 83 U.S. (16 Wall.) 36 (1873); **Theories of Civil Liberties**

LOCKE v. DAVEY, 540 U.S. 712 (2004)

Locke v. Davey is a significant U.S. Supreme Court holding that represents the juxtaposition of three strains of First Amendment religion clause jurisprudence: the history of state constitutional provisions barring public financial assistance to sectarian institutions; the Court's more recent holdings approving funding of religious institutions through vouchers and other private choice mechanisms; and the Court's free exercise rulings prohibiting the targeting of religious conduct for disparate treatment. In the end, the *Locke* decision affirmed that these competing

jurisprudential strains were not so irreconcilable as to deny states the ability to interpret their state constitutional provisions independently of federal standards.

Locke involved the Washington state "Promise Scholarship Program" that provides financial grants to academically gifted students attending public and private colleges in the state, including religiously affiliated colleges. To be consistent with the Washington Constitution, the authorizing statute allows the scholarship monies to be spent in any academic program except for a "degree in theology." Article I, section 11 of the Washington Constitution provides that "[n]o public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment." Joshua Davey was awarded a Promise Scholarship and chose to enroll in a Bible college and pursue a degree in pastoral ministries. After he was declared ineligible, Davey sued in federal court alleging his exclusion violated his rights under the free exercise, free speech, and equal protection clauses. The state acknowledged that pursuant to the U.S. Supreme Court decision in *Zelman v. Simmons-Harris* (2002) permitting state vouchers for religious education, the federal establishment clause would not bar Davey's use of the scholarship in a ministerial program. The state argued, however, that it was entitled to interpret its own constitutional provisions more strictly than required under the federal constitution and find that Davey's proposed use of the scholarship would violate Article I, section 11. A lower federal appeals court disagreed, holding that the state had singled out religion for unfavorable treatment in violation of the free exercise clause.

Despite having upheld the constitutionality of vouchers only two years earlier, the Supreme Court by a seven-to-two vote affirmed the state's denial of the scholarship. Writing for the majority, Chief Justice William Rehnquist noted that although the free exercise and establishment clauses are frequently in tension, "there are some state actions permitted by the establishment clause but not required by the free exercise clause." This was such a case of "play in the joints" between the two constitutional principles. The majority held that the mere singling out of religion for differential treatment, without more, was not equivalent to discriminate against religion. In contrast to laws that penalized religious practice, "the State's disfavor of religion (if it can be called that) is of a far milder kind." Rather than seeking to punish religion, the state had "merely chosen not to fund a distinct category of instruction" on the basis of adherence to its constitutional requirements.

The Court also held that even though the Washington Constitution "draws a more stringent line than

that drawn by the United States Constitution,” its interest in not funding the training of ministers was part of a long-established tradition reaching back to the earliest state constitutions. As the Court concluded:

The State’s interest in not funding the pursuit of devotional degrees is substantial and the exclusion of such funding places a relatively minor burden on Promise Scholars. If any room exists between the two religion clauses, it must be here.

The Court majority side-stepped the third issue about the underlying legitimacy of the Washington constitutional provision. Davey and his amici had argued that the Washington Constitution had been enacted in 1889 in the wake of the failed Blaine Amendment, of 1876. Davey argued that the Blaine Amendment, which would have prohibited public funding of sectarian schools nationwide, had been motivated by anti-Catholic animus as had the Enabling Act of 1889, which had required Washington to include a nonfunding provision in its constitution as condition for admission as a state. Interestingly, in the 2000 case of *Mitchell v. Helms*, a Court plurality that included Chief Justice Rehnquist had characterized the Blaine Amendment as “born in bigotry.” In the *Locke* majority opinion, however, Rehnquist wrote that Davey had failed to establish a “credible connection between the Blaine Amendment and Article I, § 11,” and that there was nothing in the history or text of the state constitution or the scholarship program that suggested animus toward religion.

This last part of the *Locke* decision is particularly significant, because a majority of state constitutions contain provisions like those in the Washington Constitution that are more explicit and potentially more stringent in their application of the no-funding principle. These state constitutional provisions may serve as a bar to possible funding of religious schools and institutions, even though such funding might be permissible under the federal establishment clause. The *Locke* majority refused to presume any improper motive behind such provisions as Davey had urged. The *Locke* decision therefore renders pyrrhic much of the victory for religious school voucher programs that was gained under the *Zelman* decision, because voucher opponents can continue to rely on more restrictive state constitutional provisions to block voucher and other aid programs. The *Locke* decision also indicates that the Supreme Court will not presume that programs that differentiate along religious lines necessarily violate the free exercise clause. In some instances this may benefit religious institutions by authorizing legislative accommodations of religious

practice. In other instances, however, it may mean that religious institutions will be ineligible to participate in government programs.

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References and Further Reading

- Green, Steven K., ‘*Blaming Blaine: Understanding the Blaine Amendment and the No-Funding Principle*, First Amendment Law Review 2 (2003): 107–151.
- , *Locke v. Davey and the Limits to Neutrality Theory*, Temple Law Review 77 (Winter 2004): 913–955.
- Hamburger, Philip. *Separation of Church and State*. Cambridge, MA: Harvard University Press, 2002.
- Jeffries, John C., and James E. Ryan, *A Political History of the Establishment Clause*, Michigan Law Review 100 (2001): 279–370.
- Laycock, Douglas, *Theology Scholarships, The Pledge of Allegiance, and Religious Liberty*, Harvard Law Review 118 (2004) 155–218.
- Lupu, Ira C., and Robert W. Tuttle, *Zelman’s Future: Vouchers, Sectarian Providers, and the Next Round of Constitutional Battles*, Notre Dame Law Review 78 (2003): 917–994.
- Ravitch, Frank S., *Locke v. Davey and the Lose-Lose Scenario: What Davey Could Have Said, But Didn’t*, Tulsa Law Review 40 (2004): 55.
- Tushnet, Mark, *Vouchers After Zelman*, Supreme Court Review 2000 (2000) 1–39.

Cases and Statutes Cited

Zelman v. Simmons-Harris, 536 U.S. 639 (2002)

See also **Blaine Amendment**

LOCKE, JOHN (1632–1704)

Perhaps no other single person has had as much impact on political philosophy and thinking as John Locke. Thomas Jefferson acknowledged Locke’s influence on his own political thought; George Mason named Locke as a primary influence on his work; Thomas Paine used Lockean notions of liberty in his writing.

Born outside London to a minor gentry family, Locke was educated at Christ Church, Oxford. His primary contribution to politics and political science is his presentation of Natural Law theory and the Social Contract. Natural Law, although not a concept original to Locke, found one of its most fervent disciples in Locke. He defined Natural Law as a moral basis for human behavior; in other words, the way man *should* (but does not always) act. Respect for the Natural Rights of others, including property and the preservation of human life, were basic rights given to man by God.

In a state of Nature, that is, in a precivilization context, man existed independent of communities. Although each person had the same rights, namely the right to life, the right to keep and own property, and the right to live unaffected by the choices of all other persons, it also fell on each individual person to defend those rights. For the sake of convenience, man entered into a state of Society, whereby he surrendered some of those rights to the state. For example, it being difficult and inconvenient for a person living in close proximity to 1,000 other persons with property and rights to defend himself against all other persons, he created a simple government. By giving the government the power and authority to act in his own name, the man entered into the Social Contract. The state, then, took the responsibility of mediating disputes about property or incidents whereby one citizen was damaged in some way by another.

It is critical to recognize the limits to the social arrangement: under Social Contract theory; the state could never possess more authority to act in any citizen's name than that citizen possessed himself. For example, the state could not take property from one citizen or give it to another without authority. The state was authorized to proscribe laws for the good of society, but those laws could not provide unfair advantage to one citizen over another. For the purpose of proscribing laws, a legislature of some fashion was the favored method; legislators were theoretically beholden to the electorate and could be held accountable for their actions.

In addition, seen in the context of a theoretical contract, the agreement could be broken by either party. The right of the people to rebel under a government, for example, was inherent, because ultimate authority rested in the people. A king or some other ruler could (and should) be overthrown if that ruler became tyrannical, and Locke was explicit about the conditions under which tyranny existed: when a king or ruler used his power in ways that benefited his or her interest instead of the common interest, that ruler was a tyrant; and when a ruler exercised his power or used force in a way that exceeded his or her authority, that ruler was tyrannical. Under conditions of tyranny, citizens had the right and the obligation to overthrow the ruler, but because the ruler was the one who had violated the contract, the citizens who rebelled were not strictly rebels (a term that implies extralegal activity) but citizens taking back the power they had previously ceded to the ruler. The king, said Locke, was the one in rebellion.

For Locke's contemporaries, political authority came from one of two places: God or the people. Locke rejected the Divine Right school of thought and believed that ultimate authority, whether by

king or some other executive, rested in the people. The logical extension of that argument placed Parliament (indeed, any elected legislative body) properly as sovereign over a king. A Divine Right king, as conceived of by Locke and his contemporaries, had undue power over a legislature: he could refuse to call the legislature into session; he could veto legislative activity; or he could apply undue influence or pressure to ensure a specific legislative outcome. All were unsatisfactory under a proper state of society.

Locke published his philosophies in a series of essays, the most important of which were the *Two Treatises on Government* and *An Essay on Human Understanding*. Both were read widely in the American colonies, but even more colonists were exposed to Lockean thought when public leaders incorporated Locke's ideas in pamphlets, sermons, and public speeches. Without question, the idea that citizens could lawfully rebel under conditions of tyranny, and without question American colonists saw parallels between Locke's theoretical construction of popular sovereignty and the political situation in London.

JAMES HALABUK, JR.

References and Further Reading

- Brown, Gillian. *The Consent of the Governed: The Lockean Legacy in Early American Culture*. Cambridge, MA: Harvard University Press, 2001.
Chappell, Vere, ed. *The Cambridge Companion to Locke*. Cambridge: Cambridge University Press, 1994.

LOCKETT v. OHIO, 438 U.S. 586 (1978)

This case recognizes the unique individuality of every criminal defendant convicted of capital murder by requiring that juries consider mitigating factors before sentencing a defendant to death.

Sandra Lockett was the getaway driver in the robbery of a pawnshop, which inadvertently resulted in the death of the pawnshop owner. She was subsequently charged with capital murder. The jury found Lockett guilty as charged. Under Ohio law then in existence, the trial judge determined whether she should be sentenced to death. In making this determination, Ohio law permitted the judge to consider only three mitigating factors: (1) that the victim had induced or facilitated the offense, (2) that the defendant committed the offense under duress, coercion, or strong provocation, or (3) that the offense was primarily the product of the defendant's mental illness. Other factors, such as Lockett's age, her lack of a prior criminal record, any remorse she may have expressed, her relatively minor role in the crime, and

the fact that she had no specific intent to kill the pawnbroker were not allowed to be considered.

The Supreme Court held that the Ohio law was invalid and that the sentencer could not be precluded from considering, "as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." According to the Supreme Court, if the sentencer is unable to consider all potentially mitigating factors, the risk is high that death will be imposed despite factors that may call for a less severe penalty.

This case has allowed capital defendants to put forth a host of potentially mitigating factors, such as their abusive upbringing and mental deficiencies. In addition, it set the stage for future decisions specifically mandating the consideration of age and adjustment to prison as mitigating factors.

KENNETH A. WILLIAMS

Cases and Statutes Cited

Eddings v. Oklahoma, 455 U.S. 104 (1982)

Skipper v. South Carolina, 476 U.S. 154 (1994)

See also **Capital Punishment; Capital Punishment and the Equal Protection Clause Cases; Capital Punishment: Due Process Limits; Capital Punishment: Eighth Amendment Limits; Capital Punishment: History and Politics**

LOCKHART v. MCCREE, 476 U.S. 162 (1986)

Lockhart v. McCree addresses the constitutionality of death qualification, the removal of prospective jurors whose opposition to capital punishment may prevent or substantially impair the performance of their duties at the sentencing phase.

Ardia McCree filed a habeas corpus petition after being convicted of capital felony murder and sentenced to life without parole in Arkansas. At trial, eight prospective jurors were removed for their stated belief that they could not impose the death penalty under any circumstance. McCree argued that his right to an impartial jury selected from a representative cross-section of the community was violated and cited empirical studies that suggest death-qualified juries are conviction prone. The lower courts found these studies persuasive and held that death-qualified juries are unconstitutional. A. L. Lockhart, the Director of the Arkansas Department of Correction, appealed this decision to the Supreme Court.

The Supreme Court criticized the empirical studies but held that, even assuming their validity, death

qualifying does not violate the Sixth and Fourteenth Amendments. The Court found that the fair cross-section requirement applies to venirees and that death-qualified jurors are not a distinctive group. To McCree's argument that impartiality requires balancing predispositions, the Court wrote that defining impartiality as such is illogical and outweighed by the state's interest in administrative efficiency and the benefit of residual doubt. The Court distinguished *Lockhart* from *Witherspoon v. Illinois* and *Adams v. Texas*, both of which dealt with capital sentencing, not guilt.

The dissent in *Lockhart* and subsequent commentaries criticize the Court's disregard of empirical evidence and high regard for judicial economy over defendants' rights. *Lockhart* was decided before the Court became aware of the high frequency of error in capital cases. The risk of death qualifying is perhaps greater than the Court envisioned.

JANE EGGERS

References and Further Reading

Bersoff, Donald N., and David J. Glass, *The Not-So Weisman: The Supreme Court's Continuing Misuse of Social Science Research*, University of Chicago Law School Roundtable 2 (1995): 279, 297–300.

Ellsworth, Phoebe. "Unpleasant Facts: The Supreme Court's Response to Empirical Research on Capital Punishment," in *Challenging Capital Punishment*, Ed. Place, 1988, pp. 177–211.

Haney, Craig, Aida Hurtado, and Luis Vega, "Modern" *Death Qualification: New Data on Its Biasing Effects*, *Law and Human Behavior* 18 (1994): 619–633.

Liebman, James S., *The Overproduction of Death*, *Columbia Law Review* 2030 (2000): 100: 2097, n. 164.

Cases and Statutes Cited

Adams v. Texas, 448 U.S. 38 (1980)

Wainwright v. Witt, 469 U.S. 412, 424 (1985)

Witherspoon v. Illinois, 391 U.S. 510 (1968)

LOG CABIN REPUBLICANS

The "Log Cabin Republicans," so named in honor of Abraham Lincoln's birthplace, is an organization of gay and lesbian Republicans dedicated to working within the Republican Party for equal rights. Founded in California in 1978 in response to the anti-gay Briggs Initiative, which sought to ban gay teachers from public schools, the group has grown in size over the past thirty years to more than 12,000 members and is now the strongest voice for gay rights within the Republican Party.

The group is largely composed of gays and lesbians committed to traditional GOP principles—national defense, fiscal conservatism, and libertarian social policies—but who are dedicated to making the party more inclusive and to bucking its traditional anti-gay stance.

In the 1980s, the organization focused on educating GOP members about gay and lesbian issues while urging self-reliance and individual responsibility as part of the response to the AIDS epidemic. But what sparked the group's rapid growth in the mid-1990s was the anti-gay tone of the 1992 Republican Convention in Houston, Texas. The convention motivated gay Republicans to take a more active role in the party's leadership, leading to the establishment of the national office of the Log Cabin Republicans in Washington, D.C. shortly thereafter. They received considerable media attention in 1996 when Republican Senator and presidential candidate Bob Dole, who eventually received the organization's endorsement after accepting the contribution, initially returned a \$500 campaign from the group. In that same year, the Log Cabin Republicans won a verdict in Texas District Court against the Texas GOP, which had excluded them from filling a booth at the state party convention.

Although the Log Cabin Republicans supported John McCain for President, they were initially pleased with George W. Bush's positions on gay and lesbian issues, applauding his \$15 billion plan to combat AIDS around the world, for example. However, the Log Cabin Republicans strongly opposed President Bush's plan to enact a constitutional amendment banning same-sex marriage. The proposed language of the Federal Marriage Amendment, as the group interprets it, would also deny the legal benefits of same-sex civil unions. The organization points out that no constitutional amendment has even been used to "discriminate" against a class of people, and that the proposal "tramples" on federalism and represents an invasion of states' rights. The group spent more than \$1 million on radio and television advertisements to oppose the change, and pointedly voted against endorsing the President for a second term in office.

The Log Cabin Republicans have not focused solely on the Federal Marriage Amendment but are actively working within the Republican Party to reorient its position in respect of other legislative priorities. The organization has lobbied for the enactment of the Employment Non-Discrimination Act (ENDA), which would prohibit discrimination against gays or lesbians in the workplace. Another focus of the group has been eliminating the "Don't Ask, Don't

Tell" policy, which, the group contends, unfairly discriminates against homosexuals in the U.S. military.

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References and Further Reading

Neuman, Johanna. "A Short History of the Gay Right." *Los Angeles Times*, June 12, 2005, LAT Magazine Desk. Log Cabin Republicans website, at <http://online.logcabin.org/>.

See also **Gay and Lesbian Rights**

LO-JI SALES, INC. v. NEW YORK, 442 U.S. 319 (1979)

In *Lo-Ji*, an officer obtained a warrant based on probable cause for the search and seizure of two obscene videos on sale at the defendant's bookstore. The officer further alleged that additional obscene materials were in the store, and a second, blank warrant was issued for the seizure of these materials. The Town Justice actively participated in the search and allowed the police to seize materials without first determining their obscenity himself. More than 800 items were seized. The trial court denied the defendant's motion to suppress all evidence seized under the second warrant. The Supreme Court unanimously reversed, holding the warrant invalid because of not satisfying the particularity and neutrality requirements of the Fourth Amendment warrant clause.

In its analysis, the Court likened the warrant to "the general warrant or writ of assistance of the 18th century" and faulted it for not particularly describing the things to be seized, instead leaving the choice to the officers' discretion. Because of First Amendment concerns, the Court held that the original videos, on their own, did not create probable cause for a general search, and because the search was intentionally so broad, the plain view doctrine also could not apply. The Court further invalidated the warrant for the Town Justice's lack of neutrality, warning that warrant application and execution processes cannot be streamlined; they must remain distinct to preserve the neutrality that is the essence of Fourth Amendment warrants. *Lo-Ji's* holding remains virtually undisturbed, although later cases have defined its outer limits.

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References and Further Reading

Thomas, George C. III, *The Poisoned Fruit of Pretrial Detention*, NYU Law Review 61 (1986): 3: 413-461.

Wilkins, Richard G, *Defining the 'Reasonable Expectation of Privacy': An Emerging Tripartite Analysis*, *Vanderbilt Law Review* 40 (1987): 5: 1077–1129.

See also **Impartial Decisionmaker; Obscenity; Plain View; Probable Cause; Search (General Definition); Search Warrants; Seizures; Warrant Clause**

LONG, HUEY PIERCE (1893–1935)

Born August 30, 1893, in Winn Parish, Louisiana, Long died September 10, 1935, by an assassin's bullet. From 1918 to 1935 Long built a local and national political power base that influenced Louisiana politics throughout the twentieth century.

After a stint as a traveling salesman, Long enrolled at Tulane University Law School for one year. Although he completed only two courses for credit, Long studied numerous law courses and convinced the state bar examiners to administer a special examination, which he passed. Armed with a license to practice law, Long started running for public office.

In 1918, he was elected to the Louisiana Railroad Commission, which became the Public Service Commission. While serving as Public Service Commissioner, Long argued a case before the U.S. Supreme Court and attracted the attention of Chief Justice William Howard Taft, who remarked that Long possessed a legal mind and an ability to argue a case as fine as anyone he had encountered. Using the Public Service commission as a springboard, Long became Governor in 1928. As Governor, Long survived impeachment and was elected in 1930 to the U.S. Senate, where he positioned himself for a run at the Presidency in 1936, only to be assassinated in 1935.

From 1928 until his death, Long steadily built a political machine based on power and patronage that dominated Louisiana politics. As the champion of the working man, Long fought Standard Oil, built hospitals, revised the state tax code, built schools, gave free school books to students, built more than 3,000 miles of paved roads and more than forty bridges, and devised Share Our Wealth, a system for the redistribution of assets to make every man a king. He used his dominance over the legislative and executive branches of state government to gain control over state agencies, state hospitals, state militia, state police, and even local governmental authorities.

His opponents compared him to Stalin, Hitler, and Mussolini and described him as dictator, despot, demagogue, fascist, populist, Bolshevik, and socialist. Declaring himself the Kingfish after a radio show character, Long described himself as *sui generis*. Long craved power, and as he gained power, he

used it not only to promote his political programs but also to punish his enemies.

Frustrated by criticism of his political agendas, Long systematically attacked the free press by lashing out at his most vocal enemies, the daily newspapers published in the larger Louisiana cities. Exercising his domination over the Louisiana legislative and executive branches from his position in the U.S. Senate, Long engineered the passage of a tax on the gross receipts from advertising sales in daily newspapers with circulations of more than 20,000 copies per week. A lawsuit ultimately decided by the U.S. Supreme Court challenged the law as censorship through taxation. On February 10, 1936, the same day Long's widow was sworn in to fill the unexpired term of her deceased husband, a unanimous Court in *Grosjean v. American Press Co.* declared the tax to be an unconstitutional violation of freedom of the press.

Long's attempts at abridging the freedom of the press did not stop with the newspaper advertising tax. After a letter critical of Long's tactics was submitted to the Louisiana State University *Reveille* for publication, Long had the letter suppressed and had the university's president appoint a faculty member to serve as censor. Twenty-six journalism students protested and were dismissed from the school. Although most were allowed to return, seven students refused to capitulate. These seven were provided funds from an anonymous source to enroll at the University of Missouri School of Journalism.

In January 1935, martial law was declared in Baton Rouge after armed anti-Long protestors overtook the courthouse because of Long's firing of local government employees. As part of the conditions of martial law, newspapers could not publish articles critical of state employees, and citizens could neither assemble nor carry guns.

As part of Long's state legislative agenda, in April 1935, the legislature created the State Printing Board whose members were appointed by the governor. The board determined which newspapers would receive lucrative publishing fees as the official journals of state and local governmental agencies. That same year a State Board of Censors whose members were appointed by the governor was created to censor any motion picture or newsreel being shown in Louisiana.

For Long the ends justified the means. But in the end, his abuse of power and his curtailment of liberties led to his destruction.

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References and Further Reading

Cortner, Richard C. *The Kingfish and the Constitution: Huey Long, the First Amendment, and the Emergence of*

Modern Press Freedom in America. Westport: Greenwood Press, 1996.

Hair, William Ivy. *The Kingfish and His Realm: The Life and Times of Huey P. Long*. Baton Rouge: Louisiana State University Press, 1991.

Long, Huey P. *Every Man a King: The Autobiography of Huey P. Long*. New Orleans: National Book Company, 1933.

Williams, T. Harry. *Huey Long*. New York: Alfred A. Knopf, 1969.

Cases and Statutes Cited

Grosjean v. American Press Co., 297 U.S. 233 (1936)

LOS ANGELES v. LYONS, 461 U.S. 95 (1983)

Article III of the Constitution empowers federal courts to only hear “cases and controversies.” When determining whether there is a case or controversy, federal courts will determine whether the plaintiff has standing, which requires, *inter alia*, that a government practice caused or will cause an actual or imminent injury. In *City of Los Angeles v. Lyons*, the Supreme Court extended this doctrine to hold that the plaintiff must have standing not only to file suit, but also to seek injunctive relief.

Adolph Lyons, an African-American man, was stopped after committing a minor traffic offense. The Los Angeles Police Department had a practice of placing nonviolent offenders in choke holds, even though the practice killed sixteen people—twelve of whom were African-American men. Thus, although Lyons did resist arrest, they placed him in a choke hold. Lyons lost consciousness.

Lyons then filed a federal civil rights lawsuit. He sought compensatory and injunctive relief, that is, he asked the federal court to force the LAPD to stop choking nondangerous offenders. Although the Supreme Court recognized that Lyons had standing to seek money damages, a five-to-four Court held that he lacked standing to seek an injunction. Justice White wrote for the Court that it was “no more than speculation to assert either that Lyons himself will again be involved in one of those unfortunate instances [].” Consequently, Lyons did not face an imminent injury and therefore lacked standing to seek an injunction. Under *Lyons*’ standing requirement, plaintiffs seeking to wholesale stop a dangerous practice face an almost insurmountable hurdle.

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References and Further Reading

Fan, Mary D., *Risk Magnified: Standing Under the Statist Lens*, Yale Law Journal 112 (2003).

Tribe, Lawrence H. *American Constitutional Law*. 3rd Ed. 1999, pp. 411.

Cases and Statutes Cited

City of Los Angeles v. Lyons, 461 U.S. 95 (1983)

See also **Jurisdiction of the Federal Courts; Race and Criminal Justice**

LOVEJOY, ELIJAH (1802–1837)

Elijah Lovejoy was born on November 9, 1802, in Albion, Maine. He graduated from Waterville (now Colby) College in 1826 and later traveled to St. Louis, Missouri, to work both as a newspaper editor for the *St. Louis Times* and as a vocal advocate for the right to freedom of speech and the press. In 1831, Lovejoy left St. Louis for Princeton Theological Seminary in New Jersey to study for the Christian ministry.

After graduation, Lovejoy returned to St. Louis as the minister of a local Presbyterian Church and as editor of an upstart religious newspaper called the *St. Louis Observer*. As editor, Lovejoy returned to writing columns advocating the rights of Americans to enjoy freedom of speech and of the press as guaranteed by the U.S. Constitution. He also condemned the activities of local Roman Catholics and promoted the gradual abolition of all African-American slaves.

Lovejoy used his newspaper as a forum for anti-slavery sentiment and religious opinion. In 1836, a group broke into the offices of the newspaper destroying the press. Fearing for the safety of his family, Lovejoy moved to Alton, Illinois, to resume work as editor of the newly formed *Alton Observer*. The local citizens of Alton were concerned that Lovejoy planned to make the town a center for abolitionist ideologies and practices. During the following year additional presses were destroyed and thrown into the Mississippi River.

On November 7, 1837, a new press arrived by steamboat in Alton. That evening a large group of men demanded Lovejoy hand over his printing press. The crowd began to throw stones at the building as both sides exchanged demands. Gunfire erupted, and Lovejoy was shot and killed. He was buried two days later in an unmarked grave at a local Alton cemetery.

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References and Further Reading

- Dillon, Merton. *Elijah P. Lovejoy, Abolitionist Editor*. Urbana, IL: The University of Illinois Press, 1961.
 Simon, Paul. *Freedom's Champion, Elijah Lovejoy*. Carbondale, IL: The Southern Illinois University Press, 1994.

LOVING v. VIRGINIA, 388 U.S. 1 (1967)

The Fourteenth Amendment, ratified in 1868, attempted to change the status of blacks in the United States from a position of inferiority to one of equality with whites. The Supreme Court, however, refused to give the amendment its full meaning until nearly a century later, when it began to strike down as unconstitutional state laws based on the inferiority of the black race, including school segregation in *Brown v. Board of Education* (1954). In 1967, sixteen states barred marriage between persons of different races. That year, the Court, under the leadership of Chief Justice Earl Warren, invalidated anti-miscegenation laws as forms of invidious racial discrimination. Warren noted that over the past fifteen years fourteen states had repealed their laws banning interracial marriage.

Richard and Mildred Loving, a white man and a black woman, were married in 1958 in Washington D.C. because their home state of Virginia prohibited racially mixed marriages. After their wedding, they moved to Caroline County, Virginia, and lived as husband and wife. In 1959, they were arrested, prosecuted, and convicted of violating Virginia's anti-miscegenation law. The trial court sentenced each of them to one year in jail. They challenged the law as a violation of the equal protection of the laws clause of the Fourteenth Amendment. In 1966, the Virginia Supreme Court of Appeals upheld the law, but in June of 1967 the U.S. Supreme Court unanimously ruled the law unconstitutional.

The American colonies banned interracial sexual relations and marriage beginning in the seventeenth century. In 1664 Maryland, seeking to avoid the question of whether the offspring of a free white and a black slave was free or slave, enacted a statute prohibiting interracial marriage. In following years, Massachusetts, Pennsylvania, North Carolina, South Carolina, and Virginia instituted anti-miscegenation laws. After the Civil War and the abolition of slavery, thirty-three states kept or enacted laws barring marriages between the races. The state of California in 1880 banned marriage between whites and persons of Asian descent. Colonial and state governments never succeeded in enforcing these laws, however. It is

estimated that seventy percent of African Americans have at least one white ancestor.

State courts repeatedly upheld these laws against constitutional challenges. Judges and legislators noted that such marriages were unnatural and a violation of God's will. The sentencing judge in the *Loving* case observed, "Almighty God created the races white, black, yellow, Malay and red, and he placed them on separate continents . . . He did not intend for the races to mix." The most frequent reason given for keeping the races from cohabiting was the need to preserve the integrity and supremacy of the white, European race. The Supreme Court of Appeals of Virginia in *Loving* said that the state's legitimate purposes were "to preserve the racial integrity of its citizens," and to prevent "the corruption of blood," "a mongrel breed of citizens," and "the obliteration of racial pride." The court noted that the law treated blacks and whites equally. It was a crime for either to marry someone of the other race. The state appellate court also ruled that marriage was a matter left by the Tenth Amendment of the Constitution to the states, which could regulate it under their police power, the power to make laws for the welfare, safety, health, and morals of the people.

Chief Justice Warren dismissed evidence that at least some of the framers of the Fourteenth Amendment thought that it permitted the states to continue to ban interracial marriage. Warren reasoned that the equal protection clause in both intent and in plain meaning obliterated all forms of state-sponsored invidious discrimination between the races. Citing *Korematsu v. U.S.* (1944), he noted that all laws discriminating on the basis of race are presumed unconstitutional and subjected to strict judicial scrutiny. Only a compelling governmental interest could save such a law, and the state failed to make any such justification.

The Supreme Court held that not only were anti-miscegenation laws inconsistent with equal protection of the laws but they also infringed a fundamental right guaranteed by the due process clause of the Fourteenth Amendment. "Marriage," declared Warren, is one of the 'basic civil rights of man,' fundamental to our very existence and survival."

Those who advocate a constitutional right of homosexuals to marry rely heavily on the Court's reasoning in *Loving v. Virginia*. They argue that state bans on gay marriage are based on the moral inferiority and deviance of homosexuals and, as such, are invidious forms of discrimination. Secondly, they contend that such prohibitions deny gays and lesbians the fundamental right to marry.

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References and Further Reading

- Anti-Miscegenation Laws*. Encyclopedia of African-American Civil Rights. New York: Greenwood Press, 1992.
- The Loving Case: Virginia's Anti-Miscegenation Statute in Historical Perspective*. Virginia Law Review 52 (1966): 1189–1223.
- Moran, Rachel F. *Interracial Intimacy: The Regulation of Race and Romance*. Chicago: University of Chicago Press, 2001.
- Newbeck, Phyl. *Virginia Hasn't Always Been for Lovers: Interracial Marriage Bans and the Case of Richard and Mildred Loving*. Carbondale: Southern Illinois University Press, 2004.
- Wallenstein, Peter. *Law and the Boundaries of Place and Race in Interracial Marriage: Interstate Comity, Racial Identity, and Miscegenation Laws in North Carolina, South Carolina, and Virginia, 1860–1960s*. Akron Law Review 32 (1999): 557–576.

Cases and Statutes Cited

- Brown v. Board of Education*, 347 U.S. 483 (1954)
- Korematsu v. United States*, 323 U.S. 214 (1944)

See also **Equal Protection of Law (XIV); Gay and Lesbian Rights; Marriage, History of; Police Power of the State**

LOW VALUE SPEECH

Traditionally, the U.S. Supreme Court categorized various forms of speech as either worthy or unworthy of protection under the First Amendment. Speech that addressed political or social issues was clearly worthy of full protection under the First Amendment, and efforts by government to regulate such speech would be subject to strict judicial scrutiny. Some forms of speech, however, were characterized as being wholly outside the protection of the First Amendment. Thus, in *Chaplinsky v. New Hampshire*, *Valentine v. Chrestensen*, and *Roth v. United States*, respectively, the Court ruled that government could regulate or even prohibit “fighting words,” commercial advertising, and obscenity without regard to the First Amendment.

In recent decades, however, the Court has ruled that some categories of speech have sufficient expressive content to warrant a more limited form of protection than political speech. In two 1976 decisions, *Virginia State Board of Pharmacy* and *Young v. American Mini-Theaters*, the Court ruled, respectively, that commercial speech and non-obscene pornography are “low value speech” that must receive some degree of protection under the First Amendment.

In a subsequent decision, the Court has applied slightly differing forms of intermediate scrutiny to

judge the validity of commercial speech and pornography. Regulation of commercial speech is judged under the *Central Hudson* line of cases, which may be characterized as having increased the protection afforded such speech over time, as illustrated by cases such as *Discovery Network* and *44 Liquormart*. Regulation of pornography is normally judged under the *O'Brien* Rules, as illustrated by cases such as *City of Renton* and *Pap's A.M.*

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References and Further Reading

- Loewy, Arnold H., *The Use, Nonuse, and Misuse of Low Value Speech*, Washington & Lee Law Review 58 (2001): 1: 195–225.
- Shaman, Jeffrey M., *The Theory of Low-Value Speech*, Southern Methodist Law Review 48 (1994–95): 1: 297–348.

Cases and Statutes Cited

- Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980)
- Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942)
- City of Cincinnati v. Discovery Network*, 507 U.S. 410 (1993)
- City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000)
- City of Renton v. Playtime Theatres*, 475 U.S. 41 (1986)
- 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996)
- Roth v. United States*, 354 U.S. 476 (1957)
- United States v. O'Brien*, 391 U.S. 367 (1968)
- Valentine v. Chrestensen*, 316 U.S. 52 (1942)

LYNCH v. DONNELLY, 465 U.S. 668 (1984)

In *Lynch v. Donnelly*, the Supreme Court for the first time considered the constitutionality of government use or display of religious symbols. The Court held that a government-owned creche or nativity scene could constitutionally be displayed in a public area at Christmastime as an acknowledgement of the nation's religious traditions. The holding has commonly been interpreted as also requiring that to be permissible, displays of religious symbols must be part of larger, holiday displays that include secular symbols. Although *Lynch* addressed a practice common in many communities, the decision is most significant for its development of a new analytical approach for judging establishment clause challenges, called the “endorsement test.”

Lynch involved a challenge to a Christmas display in the downtown shopping district of Pawtucket, Rhode Island. The display, comprising secular and religious holiday figures and decorations commonly associated with Christmas (including a Santa Clause

house, a reindeer sleigh, candy cane poles, a Christmas tree, and a banner reading "Seasons Greetings") was a cooperative effort of the City of Pawtucket and the local retail merchants association. The City owned all components of the display, including the near-life size creche that depicted the traditional birth of Jesus, and the items were placed on a park owned by a nonprofit group located in the heart of the shopping district. Even though the display was on private property, the Court treated the issue as one involving a government-sponsored display involving religious items. The plaintiffs, resident taxpayers, challenged the display as creating the appearance of official sponsorship of Christianity in violation of the establishment clause.

In a five-to-four decision written by Chief Justice Warren Burger, the Court upheld the constitutionality of the display. The Court used a historical analytical approach to the problem, noting the "unbroken history of official acknowledgement by all three branches of government of the role of religion in American public life from at least 1789." These "official references" to religion, found in practices such as Thanksgiving Day declarations and the references to God in the national motto and in the Pledge of Allegiance indicated the legitimacy of such acknowledgements. The Court declared that it had declined to adopt "a rigid, absolutist view of the establishment clause," but instead, must take an approach that acknowledged the nation's traditions and "encourage[d] diversity and pluralism in all areas." Because the City lacked a purpose to advance Christianity and provided what the Court described as only an "incidental" benefit to religion, the display did not contravene the establishment clause. The Court also expressed concern that a holding to the contrary would expose to challenge a host of other official and unofficial acknowledgements of the nation's religious heritage.

The majority opinion's lack of a clear analytical standard or limiting principle to government uses of religious symbolism led Justice Sandra Day O'Connor to write a concurring opinion to explain when permissible government uses of religion crosses over into impermissible advancements of religion. Justice O'Connor urged that the appropriate constitutional inquiry should be on whether the government's action has the purpose or effect of conveying a message of either endorsement or disapproval of religion. Subsequently called the "endorsement test," the inquiry asks whether a reasonable observer, later modified to be a reasonable nonadherent familiar with the history of the challenged practice, would perceive the government action as communicating a

message of official approval or disapproval of religion. The constitutional concern, according to Justice O'Connor, is to ensure that government actions do not appear to "make religion relevant, in reality or public perception, to [one's] status in the political community." Because of the mix of secular and religious objects and the overall context of the holiday display, Justice O'Connor indicated that a reasonable observer would not likely perceive the Pawtucket creche as an endorsement of religion.

Justice O'Connor's concurrence was clearly the superior opinion, and the Court applied her endorsement test in subsequent establishment clause challenges to public religious displays. In *Allegheny County v. ACLU* (1989), a Court plurality used the endorsement test to strike down the private display of a singular creche in a county courthouse but to uphold a larger holiday display in a government building involving a menorah, a Christmas tree, and other holiday decorations. In *Capitol Review and Advisory Board v. Pinette* (1995), involving a display of a Ku Klux Klan cross on the public grounds of the Ohio state capitol, a Court plurality argued that the endorsement test should never apply to privately owned religious displays, but Justice O'Connor commanded a majority by insisting that establishment clause may be violated through official endorsements of private religious expression. The endorsement test has found less application outside the religious display context, although the High Court has used it in controversies involving public school-sponsored religious activities (see *Wallace v. Jaffree* [1985]; *Santa Fe Independent School District v. Doe* [2000]). Justice O'Connor has urged its use in other establishment clause contexts, such as with challenges to government funding of religious institutions, but she has been unable to command a majority for its application in most other establishment clause areas. The endorsement test has been most influential with lower courts, however, with judges commonly employing an endorsement analysis, often in tandem with other analytical approaches, in many establishment clause cases that are never reviewed by the Supreme Court.

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Cases and Statutes Cited

- Allegheny County v. ACLU*, 492 U.S. 573 (1989)
Capitol Review and Advisory Board v. Pinette, 515 U.S. 753 (1995)
Fe Independent School District v. Doe, 530 U.S. 290 (2000)
Wallace v. Jaffree, 472 U.S. 38 (1985)

**LYNG v. NORTHWEST INDIAN
CEMETERY PROTECTIVE
ASSOCIATION, 485 U.S. 439 (1988)**

How does the constitution resolve a conflict between the government's property rights and the right of groups to engage in religious practices on lands they consider sacred? The Supreme Court answered that question in favor of the government's property rights in *Lyng v. Northwest Indian Cemetery Protective Association* when it ruled that the free exercise clause of the First Amendment did not prohibit the federal government from permitting road construction and logging activities on federal lands, even though the activities would have a devastating impact on the traditional religious practices of several Native American tribes.

The case arose when the U.S. Forest Service proposed to build a road through national forest land in California. Aware that the area had historically been used for various religious ceremonies by the Yurok, Karok, and Tolowa Indians, the Forest Service commissioned a study. The study concluded that use of the area was "an integral and indispensable part" of the tribal members' religious practices, that the tribal members' religious use of the area was "dependent upon . . . privacy, silence and an undisturbed setting," and that, consequently, the construction of the road would cause "serious and irreparable damage" to the tribal members' "belief systems and lifeway." The report, therefore, recommended that the road not be built. Although it made efforts to keep the route as far as possible from sites used for specific spiritual activities, the Forest Service rejected the recommendation and decided to proceed with the road and to permit logging activities in the area. The Forest Service's decision was challenged on various grounds by various groups, including several members of the affected tribes.

Focusing primarily on the Free Exercise challenge, the U.S. Supreme Court, by a five-to-three vote, rejected the tribal members' claims. The Court reasoned that even though the tribal members' religious beliefs were sincere and even though the government's proposed action would have "severe adverse affects" on their religious practices, the free exercise clause did not require the government to demonstrate a "compelling need" to justify its proposed actions (something the Court had required in other free exercise cases, such as *Sherbert v. Verner*), because those actions had "no tendency to coerce [tribal members] into acting contrary to their religious beliefs." Instead, the Court concluded, the tribal members were attempting to dictate how the government structured "its own internal affairs," something the free exercise

did not require, as *Bowen v. Roy* made clear. In that regard, the Court found it significant that the lands in question were owned by the United States, rather than the Tribes, noting that a ruling in favor of the tribal members would in essence grant them "de facto beneficial ownership of some rather spacious tracts of public property." Thus, the Court concluded, even if the proposed actions would "virtually destroy the Indians' ability to practice their religion," the tribal members' were not entitled to relief, because the constitution afforded them no right to "divest the Government of its right to use what is, after all, its land." The Court also rejected the tribal members' claims that the proposed actions violated the American Indian Religious Freedom Act (AIRFA), concluding that AIRFA created no judicially enforceable individual rights.

The Court's ruling in *Lyng* weakened the protection afforded religious practices (as opposed to beliefs) in several respects. First, it narrowed the scope of cases to which the compelling interest test applied, foreshadowing the almost wholesale abandonment of that test in religious practices cases a few years later in *Employment Division of Oregon v. Smith*. Second, the ruling severely limited the constitutional protection afforded sacred sites by linking that protection to ownership rights. This portion of the ruling is especially harmful to Native American religions, because Native Americans are more likely to consider lands sacred, their sacred sites are mostly within U.S. territory, and they have been dispossessed of so much of their property over the past three centuries. The ruling also adversely affected Native American religious practices by rendering largely meaningless the provisions of AIRFA, which many had hoped would provide protection for the unique aspects of Native American religions. Thus, although *Lyng* had some impact on the development of the law for all religious groups, it was especially devastating for Native American religions. The Court's ruling demonstrates the difficulties Native Americans have had in using the U.S. judicial system to protect their religious practices. Interestingly, the proposed road was never constructed (although some timber was removed) because Congress subsequently added the area to the national wilderness system.

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References and Further Reading

- Brown, Brian Edward. *Religion, Law, and the Land: Native Americans and the Judicial Interpretation of Sacred Land*. Westport, CT: Greenwood, 1999, pp. 119–170.
- Falk, Donald. *Lyng v. Northwest Cemetery Protective Association: Bulldozing First Amendment Protection of*

Indian Sacred Lands, Ecology Law Quarterly 16 (1989): 2:515–570.

Nowak, John E., and Ronald Rotunda. *Constitutional Law*. St. Paul, MN: West, 2000, pp. 1373–1403.

Worthen, Kevin J. *Protecting Sacred Sites of Indigenous Peoples in U.S. Courts: Reconciling Native American Religion and the Right to Exclude*, St. Thomas Law Review 13 (2000): 1:239–258.

Cases and Statutes Cited

Employment Division of Oregon v. Smith, 494 U.S. 872 (1990)

Sherbert v. Verner, 374 U.S. 398 (1963)

Bowen v. Roy, 476 U.S. 693 (1986)

See also *Bowen v. Roy*, 476 U.S. 693 (1986); *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872 (1990); Free Exercise Clause Doctrine: Supreme Court Jurisprudence; Native Americans and Religious Liberty; *Sherbert v. Verner*, 374 U.S. 398 (1963)

LYNUMN v. ILLINOIS, 372 U.S. 528 (1963)

Beatrice Lynumn was a tenant in an apartment building known to James Zeno. Zeno, a twice-convicted felon, had been caught by Cook County police officers with narcotics in his possession. To better his situation, Zeno agreed to “finger” another person

who dealt drugs. Lynumn was called and offered a payment of money owed to her by Zeno. After Zeno entered the building and returned with a small amount of marijuana, the police officers entered the building and searched the Lynumn’s apartment finding drugs. On being arrested, Lynumn, who was unfamiliar with criminal procedure, denied giving Zeno anything. But under pressure from the officers and Zeno and threatened with the possible loss of her children, Lynumn confessed that she gave the marijuana to Zeno. Lynumn was convicted and sentenced to ten years. Her conviction was upheld by the Illinois Supreme Court.

The U.S. Supreme Court’s opinion reversed the lower courts. The Court stated that Lynumn’s confession was not “voluntary,” as required by the Fifth Amendment, because of the totality of the circumstances. Lynumn was surrounded by three officers and a convicted felon, unfamiliar with criminal procedures, and threatened with the loss of her children. This rendered her confession involuntary and thus inadmissible. A coerced confession obtained by a promise the suspect will not lose custody of her children and will keep her welfare benefits was not voluntary.

MARTHÉ L. MCCOY

See also **Coerced Confessions/Police Interrogations; Miranda Warning**

M

MABRY v. JOHNSON, 467 U.S. 352 (1984)

James Mabry of Arkansas was convicted of burglary, assault, and murder. The Supreme Court set aside the murder charge, and plea bargain negotiations ensued. The prosecuting attorney offered a reduced charge of accessory to murder, a sentence recommendation of twenty-one years served concurrently with existing sentences. Mabry's counsel informed him of the offer, which he accepted. When the prosecutor was informed of Mabry's acceptance, he stated the plea bargain offer was an error and withdrew it, instead offering a sentence recommendation of a consecutive sentence of twenty-one years. This offer was rejected. A mistrial was declared and Mabry eventually accepted the second offer.

Mabry filed a writ of habeas corpus, arguing that the prosecutor could not withdraw the first plea offer without violating the prohibition on double jeopardy. The court dismissed the case. The court of appeals reversed, holding that the prosecution's withdrawal of the initial plea after Mabry had accepted it was unfair. The Supreme Court upheld the court of appeals, holding that Mabry was fully aware of the consequence upon pleading guilty and that requiring Mabry to live with the consequences after the mistrial was unjust.

PAMN M. MADARIETA

See also **Guilty Plea; Plea Bargaining**

MACKINNON, CATHARINE (1946–)

Catharine MacKinnon, along with feminists such as Andrea Dworkin, emerged in the late 1970s and

the early 1980s as one of the staunchest feminist advocates for the censorship of pornography. With Dworkin, she authored an antipornography ordinance adopted by Minneapolis and Indianapolis before a court of appeals struck down the Indianapolis ordinance. According to MacKinnon in her 1997 book, *In Harm's Way* (coauthored with Dworkin), although pornography leads to pervasive violations of women and children in private life, it often remains unacceptable to publicly criticize it. She argues that pornography has stature as a public, available, and effectively legal entity, but its damaging effects are denied as nonexistent.

In 1983, the city of Minneapolis, Minnesota, employed MacKinnon and Dworkin to construct a law citing pornography as a human rights violation. In the ordinance, the two women defined pornography as the sexually explicit subordination of women, either graphically or in words. Pornography, under their law, is the practice of sexual discrimination, thus making it a violation of civil rights. The ordinance formulated pornography's harms as human rights deprivations, thus arguing for its treatment as a human rights violation. MacKinnon emphasized that in order for pornography to be made, pornographic acts had to be done to someone. Potentially, if even one person is victimized in the process of making pornography because of his or her sex, then as a member of a sex-defined group, that person is discriminated against on the basis of his or her sex. MacKinnon, along with Dworkin, opposes pornography for what they state is the harm it does to those coerced into making it, those forced to consume it,

and those assaulted or physically harmed because of it.

MacKinnon, like much of the conservative right wing, argues for the censorship of pornography. However, she has stated that unlike the right wing's approach, which focuses heavily on issues of morality, her approach, which she calls the civil rights approach to pornography, was created to permit those injured by pornography access to the courts in order to prove its harm. Through their antipornography ordinance, MacKinnon and Dworkin asserted that, for the first time, a law articulated how pornography used and affected women. They argued that the First Amendment cannot protect pornography because if it did, it would be protecting human exploitation. Under such a definition, pornography is thus sexual exploitation that produces sexual abuse and sexual discrimination and falls outside First Amendment protection because the amendment should not protect those with power against the claims of those seeking equality. The Minneapolis ordinance thus constructed pornography as a form of group libel that should be restricted to protect the reputation and image of women.

For the first time, individuals deemed radical feminists—such as Andrea Dworkin and Catharine MacKinnon—led the call for censorship. Unlike for conservatives, for antipornography feminists pornography had little to do with sex and everything to do with power. MacKinnon and other procensorship feminists focused on what they believed to be pornography's effect on women rather than on the morality and virtue of women argued by antipornography conservatives. Thus, according to MacKinnon, pornography reflects and reinforces the subordination of women to male sexuality and power.

The concept of equality is key to understanding MacKinnon's interpretation of pornography. Pornography, she contends, dehumanizes women as a group through the use of demeaning depictions, thus socially constructing women subjectively in a way that makes them objects of male pleasure and power with no autonomy. According to MacKinnon and Dworkin, pornography expresses the underlying violent reality of male power. Pornography exemplifies a violent, male sexuality that is the most important factor in causing the subordination of women as a group. MacKinnon maintains that pornography is harmful in itself because it may trigger specific sexual violence—direct harm, in other words—and because it constitutes an ideological tool of male domination that generates and reinforces subordination of and discrimination against women in broader, systematic ways. In this view, pornography actively subordinates

women by creating a sexual dynamic that puts down, suppresses, and ultimately brutalizes women while purporting to be what sex is.

MacKinnon argues that what pornography does, it does in the real world and not in the mind. Because pornography is used as sex, it is thereby sex. By this definition, pornography does not simply express or interpret experience. It substitutes for the experience. Thus invoking all feminists and ignoring feminists against the censorship of pornography, such as American Civil Liberties Union president Nadine Strossen, MacKinnon claims that pornography “in the feminist view” is a form of forced sex, a practice of sexual politics, and an institution of gender inequality. MacKinnon and Dworkin viewed their legislation as a way to empower women by giving them the option of bringing a civil suit against those whose involvement with pornography caused harm to women. It intended to give women a choice to confront pornography directly and to initiate civil suits against those who cause harm by trafficking in pornography, coercing individuals into pornography, forcing pornography on people, or assaulting people in a way directly caused by specific porn.

Yet, only alleged victims could legally initiate lawsuits, and they would have to prove that the challenged materials actually subordinated women in their making or their use. For MacKinnon and Dworkin, pornography is not an idea but sexual reality, not only discriminating against women but also institutionalizing the inferiority and subordination of one group (women) to another (men). According to MacKinnon, men have sex with their image of a woman. When pornography portrays violence, sexual arousal becomes conditioned to violence and internal prohibitions against acting upon such violent fantasies lessen.

MacKinnon and Dworkin's antipornography ordinance passed in Minneapolis, Minnesota, and Indianapolis, Indiana. The passage of the law in Indianapolis became the test case for the use of the civil liberties argument to limit or to prohibit pornography. The ordinance defined pornography as a discriminatory practice based on sex that denies women equal opportunities in society and, as such, works as a systematic practice of exploitation and subordination based on sex that differentially harms women. MacKinnon and Dworkin based this definition on their belief that pornography is central to creating and maintaining sex as a basis for discrimination.

When tested in district court, the Indianapolis ordinance was struck down as, in actuality, regulating speech instead of the conduct involved in producing pornography. According to the court, speech could

be regulated only if Indianapolis proved a compelling interest in reducing sex discrimination by their ordinance. The city failed to prove this interest to the court. Furthermore, the court declared the ordinance vague, overly broad, and an unconstitutional prior restraint of speech. Indianapolis appealed this finding of the lower court to the Seventh Circuit Court of Appeals. In 1985, upon hearing *American Booksellers Association, Inc., et al. v. William H. Hudnut II*, 84-3147 (1985), a unanimous federal appeals court upheld the district court's finding, also finding the ordinance to be too broad and in violation of the First Amendment.

MacKinnon argues that protecting pornography means protecting sexual abuse as speech while, simultaneously, pornography and its protection function to deprive women of speech. She contends that there is a deliberate connection between the silence imposed on these women and what she terms the "noise" of pornography that saturates society and "parodies," to use her term, as something deserving constitutional protection. She believes the First Amendment protection of pornography allows those with power to intimidate the powerless into silence and that these elites use the state to wield such power.

In her work *Only Words*, MacKinnon explores what she sees as the irony of pornographic words and images being termed as "only words" because social inequality is created and enforced through words and images. Such a social hierarchy cannot exist without its meanings and expressions embedded in communication. MacKinnon argues that pornography functions in the real world and not in the mind; what it takes to make pornography and what happens through the use of pornography function in reality. It is not the ideas in pornography that assault women; it is the men who are made, changed, and impelled by pornography that do. MacKinnon posits that pornography contains ideas like any other social practice, but it does not work as a thought. Pornography's place in abuse requires an understanding of it in more active rather than passive terms. Pornography does not express or interpret experience; it substitutes for it and stands in for reality. MacKinnon says that to call pornography representative of sex rather than actual sex alienates reality and gives license to anything and everything portrayed within.

According to MacKinnon, although obscenity is a moral idea, pornography is a concrete, political practice. It is a form of forced sex, a practice of sexual politics, and an institution of gender inequality. According to this view, pornography is much more potent than mere harmless fantasy or an expression of a healthy sexuality. It constructs men's power over

women and thereby defines, for men, who women can be. In pornography, women are violated and possessed, and men who consume pornography are invited to view women likewise and are validated in acting upon those assumptions. Pornography is an act of male supremacy and its harm is, in part, the difficulty of seeing male supremacy within it because of the pervasiveness and "success" of the saturation of pornography.

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References and Further Reading

- Cornell, Drucilla, ed. *Feminism and Pornography*. New York: Oxford University Press, 2000.
- Dworkin, Andrea, and Catharine MacKinnon. *Pornography and Civil Rights: A New Day for Women's Equality*. Minneapolis, MN: Organizing Against Pornography, 1988.
- , eds. *In Harm's Way: The Pornography Civil Rights Hearings*. Cambridge, MA: Harvard University Press, 1997.
- Lacombe, Dany. *Blue Politics: Pornography and the Law in the Age of Feminism*. Toronto: University of Toronto Press, 1994.
- MacKinnon, Catharine. *Feminism Unmodified: Discourses on Life and Law*. Cambridge, MA: Harvard University Press, 1987.
- . *Toward a Feminist Theory of the State*. Cambridge, Mass.: Harvard University Press, 1989.
- . *Only Words*. Cambridge, MA: Harvard University Press, 1993.

Cases and Statutes Cited

American Booksellers Association, Inc., et al v. William H. Hudnut II, 84-3147 (1985)

See also American Civil Liberties Union; Dworkin, Andrea; Obscenity; Strossen, Nadine

MADISON, JAMES (1751–1836)

James Madison was the fourth president of the United States, generally acknowledged as "father of the Constitution," and one of the authors of *The Federalist*. He was important in the passage of the Virginia Statute of Religious Freedom and was the main author of the Bill of Rights.

Madison was born in Port Conway, King George, Virginia, son of James Madison, Sr. and Nelly Conway Madison. He graduated from Princeton (College of New Jersey). A patriot during the Revolution, he became a member of the Virginia Convention of 1776, represented Orange County in the Virginia legislature, 1776–1777 and 1784–1786, served in the governor's council, 1777–1780, and represented Virginia

in the Confederation Congress, 1780–1783 and 1786–1788. He attended the Annapolis Convention, the Constitutional Convention of 1787, and the Virginia Ratifying Convention, served in Congress again, in the House of Representatives, 1789–1797, and again in the Virginia legislature, 1799–1800. He married Dolley Payne Todd. He served as secretary of state during the presidency of Thomas Jefferson, 1801–1809, and was president 1809–1817. James and Dolley Madison then moved back to their home, Montpelier, in Virginia. He came out of retirement to attend the Virginia Convention of 1829–1830, and he arranged for the posthumous publication of his book, *The Debates in the Federal Convention of 1787*.

Religious Freedom

The young Madison's first public contribution was in the area of religious freedom. In the convention that drafted the Virginia Constitution of 1776, he presented a motion, which was adopted, to revise the section in the Virginia Declaration of Rights, the state bill of rights, on religious toleration by adding that "all men are equally entitled to the free exercise of religion."

On the issue of religious freedom, Madison waged a political battle in the state legislature with the supporters of the popular leader and governor, Patrick Henry. During the Revolution, there was discussion of disestablishing the Anglican Church in Virginia. Henry supported a bill in which the government would give support to all the churches in the state. Madison worked for a separation of church and state. He, and other opponents of Henry's bill, appealed to the Baptists, Presbyterians, Methodists, Quakers, and even some Anglicans in the state. Petitions, with thousands of signatures, were sent to the legislature.

In Madison's remonstrance, a pamphlet entitled "Memorial and Remonstrance Against Religious Assessments," he argued that neither government nor religion needed the support of the other, and that the connection of the two had only led to tyranny, servility, bigotry, and persecution. He said religious freedom was a natural right that must be protected from government power or from a majority trespassing on the rights of a minority. He concluded that, because of the threat to religious freedom, the act violated Virginia's bill of rights. In 1785, the bill *was* defeated, and Madison used the occasion to promote a bill on religious freedom that had been drafted earlier by his friend, Jefferson. Madison always remembered the defeat of Henry's bill and the passage of the Virginia Statute of Religious Freedom as major accomplishments of his public career.

Diversity and Pluralism

With the exception of the statute of religious freedom, Madison, like others who became Federalists in the 1780s, was frustrated by policies pursued at the state level and looked for remedies at the federal level. In *Vices of the Political System of the United States*, he asserted that most of the problems or vices in the system were the result of the states. He believed that minorities suffered from popular leaders and their factions in state governments. Granted, one should remember that the minorities he had in mind included wealthy property owners, merchants, and creditors, but the system he would advocate worked to protect any minority. Madison rejected the view ascribed to Montesquieu that liberty and rights were most secure in a small republic. Madison believed that individual and minority rights could be easily abused by a tyranny of the majority in a small republic.

In *Vices*, Madison advanced the idea that an extended federal republic would better safeguard liberty and rights. He stated that "[a]ll civilized societies are divided into different interests and factions, as they happen to be creditors or debtors—rich or poor—[farmers], merchants or manufacturers—members of different religious sects—followers of different political leaders—inhabitants of different districts—owners of different kinds of property." In a large society, such as the whole of America, it would be difficult for a common interest to be predominant in a majority. Instead, the variety of interests would check each other.

Madison played an active role in the calling of the Annapolis Convention and the Constitutional Convention of 1787 in Philadelphia. He was the main author of the Virginia Plan, which gave the Philadelphia Convention a plan to use in drafting the Constitution of 1787. He was one of the most active participants in the convention, and was a key player in the ratification process. Along with Alexander Hamilton and John Jay, he contributed essays to *The Federalist*. Madison's essays emphasized the division and separation of power, checks and balances, and the value of diversity and pluralism in protecting individual and minority rights.

As he had in *Vices*, in *The Federalist* essay 10, Madison, the pluralist, again analyzed American society into differing political, religious, and economic interests and advocated the idea of the "extended republic" that the larger the area, more interests would be represented and could check each other. He believed that the best security for religious freedom and civil rights was through the multiplicity of interests and religious sects.

In essays in *The Federalist* (particularly 10 and 51) and later in *The National Gazette* (particularly “Government of the United States”), Madison set forth a theory of checks and balances being the best constraint on power. In America, first, government was divided between federal and state. Second, each government was divided into legislative, executive, and judicial branches. Then each legislature was divided into two houses. Madison explained how the interest of the office or the division of government would incline politicians to defend their power and check the expansion of power by another government division.

Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself (*The Federalist*, essay 51).

Bill of Rights

In the winter and spring of 1788, with ratification uncertain, a compromise was worked out in several state ratifying conventions, including Virginia’s, to address the main weakness of the Constitution, long stressed by its opponents: its lack of a bill of rights. The Constitution would be ratified with the agreement that through the Article V amendment process the first Congress would send out a bill of rights to be ratified by the states. Although he questioned the value of a bill of rights, Madison supported the compromise.

In the Virginia Ratifying Convention, and later in the First Congress, Madison pointed out his reservations about a bill of rights. First, it was not needed because the federal government only had an enumerated grant of powers, described in the Constitution, Article I, Section 8, rather than power in general, and, in America’s federal system, state governments were already in place that could check the federal government. Second, he believed that history and recent experience showed that a bill of rights was only an ineffective paper or “parchment barrier” against power. He concluded from his study of American politics that every state had violated its bill of rights.

They did not protect individuals or minorities against governments that were the instruments of the power of majorities. Madison noted, for example, that religious freedom in America came from the multiplicity of religious sects, not from being protected by state bills of rights, and it would not be guaranteed by a bill of rights being added to the Constitution. If a majority sought to persecute a minority, he warned, a bill of rights would be a poor protection.

In the First Congress, however, believing that the compromise agreed to in state ratifying conventions should be carried out, Madison drew up and presented a list of amendments. He considered the rights in what became the First Amendment to be the most important, calling them the “essential rights.” He also believed it was essential that these rights should not be violated by the states as well as by the federal government. He still hoped the Constitution could check the “vices” of the states. Madison’s proposal regarding the states failed, however. The proposed amendments would only apply to the federal government. After a process of revision by both houses, ten amendments, generally known as the Bill of Rights, were sent out and ratified by the states.

Freedom of Speech: The Virginia Resolutions of 1798

While serving in the House of Representatives during the 1790s, Madison founded the Republican Party and, in the *National Gazette*, explained the need for political parties as an extension of checks and balances. Parties could check each other so that government would not favor one interest or combination of interests at the expense of another.

Because of continuous criticism by the Republicans, during the quasiwar with France, President John Adams and the Federalist majority in Congress passed the Alien and Sedition Acts. The Sedition Act made criticism of government officials a crime. (Federalists said in their defense that the act was a modification of common-law libel and slander, but this did not resolve the problem because there was no federal common law.) Republicans and lawyers for defendants being tried under the Sedition Act argued that it violated the freedom of speech protected by the First Amendment, but Federalist federal judges refused to engage in judicial review. Republicans were afraid that the act would hamper their ability to defeat Federalist candidates in upcoming elections.

Madison saw that another application of checks and balances was needed, this time to check a wrongful

act by the federal government. Using the Virginia and Kentucky legislatures, where they had strong majorities, Republicans passed the Kentucky and Virginia Resolves, which declared that the Alien and Sedition Acts were unconstitutional. According to the Virginia resolutions, written by Madison, the Sedition Act exercises “a power not delegated by the constitution, but on the contrary expressly and positively forbidden by [the First Amendment] . . . a power which more than any other ought to produce universal alarm, because it is leveled against that right of freely examining public characters and measures, and of free communication among the people thereon, which has ever been justly deemed, the only effectual guardian of every other right.”

After retiring from Congress and drafting the Virginia Resolves, Madison served again as a member of the Virginia legislature and drafted the Virginia Report, which explained the state’s action. Madison’s Virginia resolutions and report have been important for advancing (1) the doctrine of interposition, the right of a state to give an opinion on the constitutionality of an act of the federal government; (2) the compact theory that the federal government and the states derive their power from the people of the states, who, in state conventions, ratified the Constitution; and (3) the interpretation of the First Amendment that the federal government is prohibited from prior constraint of publication, such as censoring the press, and subsequent constraint of publication, such as punishing an author or press for publications. Madison declared that the federal government had no authority to protect itself by restraining negative criticism and abuse from speech and the press.

In the late 1790s, the Federalists were popular and, as a result, no great opposition arose through America to the Alien and Sedition Acts. No broad support arose for the Kentucky and Virginia Resolves as well. The Sedition Act demonstrated the weakness of “parchment barriers.” Madison knew that against a tyranny of the majority a bill of rights was useless. Only through an appeal to political interests could the Republicans prevail over the Federalists, which they did in the election of 1800.

Wartime President Upholding the First Amendment

Madison did not believe that the actions of the Federalists demonstrated that the grant of power to the federal government was too extensive. He did not join other Republicans in calling for constitutional amendments to weaken the government structure.

Rather, he thought that the Federalists had badly administered the federal government, and the election of 1800 gave the Republicans the opportunity to run it correctly.

After eight years of service as Jefferson’s secretary of state, Madison followed as president. As president, he vetoed several measures by Congress, including an act incorporating an Episcopal church in the District of Columbia and another reserving land for a Baptist church. In his veto messages he made it clear that, if an act by the United States supported a “religious society” in any way, he considered it in violation of the First Amendment establishment clause. He had begun his political career in Virginia working for the separation of church and state and was still serving the cause as president. Of course, if he had had his way, the First Amendment would have applied to the states as well as to the federal government.

Madison’s presidency was dominated by foreign affairs, specifically the War of 1812. He was proud that he showed that a wartime president need not violate the Constitution by expanding executive powers or compromising First Amendment rights. He did not restrict the press despite criticism, opposition to the war effort, and calls for the secession of New England states. This was in great contrast to the Federalist Sedition Act during the quasiwar. Madison considered this to be one of the great precedents he had set. Of course, future presidents would not follow his example and Americans have not remembered him as he had hoped. Instead of being seen as an exemplary model of a constitutional president during war, he has been seen as weak.

Madison made significant contributions to civil liberties, but he can be accused of inconsistency or hypocrisy. He was part of the slave-owning Virginia elite. Holding a pessimistic view of humanity, he was no champion of democracy or social reform. Indeed, he was a reluctant supporter of the Bill of Rights. As secretary of state and president, he was an imperialistic expansionist; as president, he administered a process of defeating the Indians and acquiring land from them. He did continuously support, however, the separation of church and state. He saw how social diversity, or the multiplicity of interests and religious sects represented in a governmental structure with checks and balances, could protect the civil liberties of individuals and minorities from government tyranny or the tyranny of the majority.

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References and Further Reading

Banning, Lance. *The Sacred Fire of Liberty: James Madison and the Founding of the Federal Republic*. Ithaca, NY: Cornell University Press, 1995.

- Brant, Irving. *Life of James Madison*. 6 vols. Indianapolis, IN: Bobbs-Merrill, 1941–1961.
- Hamilton, Alexander, John Jay, and James Madison. *The Federalist Papers* (1787). <http://lcweb2.loc.gov/const/fed/fedpapers.html>, 1996.
- Ketcham, Ralph. *James Madison, A Biography*. New York: Macmillan, 1971.
- Koch, Adrienne. *Jefferson and Madison: The Great Collaboration*. New York: Knopf, 1950.
- Madison, James. “Memorial and Remonstrance Against Religious Assessments.” 1785. http://religiousfreedom.lib.virginia.edu/sacred/madison_m&r_1785.html, 2001.
- . *Vices of the Political System of the United States*. 1787. <http://press-pubs.uchicago.edu/founders/documents/v1ch5s16.html>, 1987.
- . *The Debates in the Federal Convention of 1787*. <http://www.yale.edu/lawweb/avalon/debates/debcont.html>, 1996.
- Matthews, Richard K. *If Men Were Angels: James Madison and the Heartless Empire of Reason*. Lawrence: University Press of Kansas, 1994.
- McCoy, Drew R. *The Last of the Fathers: James Madison and the Republican Legacy*. Cambridge: Cambridge University Press, 1989.
- Meyers, Marvin, ed. *The Mind of the Founder: Sources of the Political Thought of James Madison*. Indianapolis, IN: Bobbs-Merrill, 1973.
- Miller, William Lee. *The Business of May Next: James Madison and the Founding*. Charlottesville, VA: University Press of Virginia, 1992.
- Rakove, Jack N. *James Madison and the Creation of the American Republic*. New York: Harper Collins, 1990.
- Rutland, Robert A. *James Madison: the Founding Father*. New York: Macmillan, 1987.
- . *The Presidency of James Madison*. Lawrence: University Press of Kansas, 1990.
- Stagg, J. C. *Mr. Madison's War: Politics, Diplomacy, and Warfare in the Early American Republic*. Princeton, NJ: Princeton University Press, 1983.
- Wills, Garry. *James Madison*. New York: Times Books/Henry Holt and Co., 2002.

See also Alien and Sedition Acts (1798); Baptists in Early America; Barron v. Baltimore, 32 U.S. 243 (1833); Bill of Rights: Structure; Constitutional Convention of 1787; Constitution of 1787; Disestablishment of State Churches in the Late Eighteenth Century and Early Nineteenth Century; Establishment Clause (I): History, Background, Framing; Freedom of Speech: Modern Period (1917–Present); Hamilton, Alexander; Jefferson, Thomas; Kentucky and Virginia Resolves; Madison's Remonstrance (1785); Montesquieu; Virginia Declaration of Rights (1776)

MADISON'S REMONSTRANCE (1785)

The “Memorial and Remonstrance” was essentially a petition to gather signatures indicating popular opposition to a bill that would have provided state tax monies for clergy salaries, and its success led directly to the enactment of the Virginia *Statute for Religious Freedom*.

From the time he was elected to the Virginia House of Burgesses in 1776, James Madison (1751–1836) opposed the idea of an established church and was part of the assembly that disestablished the Anglican Church that same year. While the Assembly debated George Mason's proposal for a state Declaration of Rights, Madison argued that Mason's call for religious toleration did not go far enough; religious liberty constituted a natural and inalienable right, immune to any governmental constraints. While he was able to change the wording of part of Mason's proposal, Madison failed to win over the assembly to his views of prohibiting religious establishments and deleting specific references to Christianity, in order to protect non-Christians. He backed Jefferson's *Statute for Religious Freedom* when it was first proposed in 1779 and continued to believe that only a complete break between church and state would secure a true liberty of conscience.

In 1784, Madison's rival, Patrick Henry, proposed a tax to support the clergy, who were impoverished because of the Revolution. The bill would provide support to ministers of all Christian faiths, and individual Virginians could declare themselves as non-Christians in order to be exempt from the tax. Groups that had previously opposed establishment—such as the Quakers, Baptists, Mennonites, and Presbyterians—now faltered as it seemed that they too would benefit from Henry's proposed tax. Madison brilliantly fought the tax scheme. First, he supported Henry for governor, thus removing his powerful oratory from the legislative debate. More importantly, in May 1785, at the suggestion of George Mason and others, he wrote and anonymously circulated a “Memorial and Remonstrance Against Religious Assessment.” The “Memorial” gathered thousands of signatures and led to other groups backing similar petitions to the Assembly.

Madison offered fifteen objections to the Henry tax, starting with the assertion that it violated the freedom of conscience guaranteed under Virginia's Declaration of Rights. Madison anticipated arguments he would later explicate more fully in *Federalist* No. 10 regarding minority rights. Such a tax, he declared, would “overleap the great Barrier which defends the rights of the people,” and even if a majority of the state supported establishment (which Madison defined as any governmental support of organized religion), the legislature lacked the authority to enact such a measure.

The petition recalled to the citizens the recent history of such taxes: when they were a colony, the government, at the behest of the Anglican Church, had treated Protestant dissenters, Catholics, and non-Christians harshly. The Henry bill posed the danger

that what had been detested under George III might arise again: "Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians?"

The "Memorial" attacked establishment on other grounds, not least of which was Madison's contention that establishment threatened the prospects of the new, republican society then being built in the independent United States. Establishment had been a product of the Old World, where it had bred centuries of religious bigotry, persecution, and even warfare. Roger Williams had supported separation in order to keep religion free from the taint of the secular; Madison and his allies, especially Jefferson, wanted a wall of separation to keep the secular state free from the biases of religion. Establishing religion—even supporting multiple establishments, as Henry proposed—would "enervate the laws in general, and slacken the bands of Society."

In appealing to those dissenting sects that had at one time opposed the Anglican establishment, he warned that a coercive tax would not be to the advantage of Christianity. He pointed out the history of religious warfare in Europe, in which the intrusion of the state to enforce the views of one group had inevitably sapped the moral force of all religion. Instead of men being governed by true moral and religious values, they fell prey to "superstition, bigotry, and persecution." Interestingly, Madison also made a very practical argument in noting that religious tolerance in the New World had been one of the magnets that drew people across the Atlantic. Do away with it, he warned, and Virginia would neither attract new settlers nor retard the emigration from the state that was at the time a great concern of the Assembly.

By the fall of 1785, the "Memorial" and its related petitions had amassed over ten thousand signatures in opposition to Henry's proposed assessment bill. When the Assembly next met, Henry had gone to the governor's mansion, and a narrow majority of the Assembly, aware of the strong opposition to his bill, defeated it when it came up for a vote. Buoyed by the victory, Madison reintroduced Thomas Jefferson's Statute for Religious Freedom, guided it through both houses of the Assembly, and defeated efforts to exclude non-Christians from its protections. The statute, passed in 1786, would serve as a model when Madison, then a member of Congress, drafted the religion clauses of the First Amendment in 1789.

The "Memorial and Remonstrance" reflected not only Madison's political skill. By delaying Henry's popular assessment proposal until he could take the issue to the people (as he would three years later as the chief coauthor of the *Federalist*), he showed how

public sentiment could be used to affect policymaking in a republican society. But the "Memorial" also spoke for Madison's deeply held convictions about religious liberty. Throughout his adult life he opposed establishment and use of the state in any way to further religion. He fought for the Statute of Religious Freedom and the First Amendment in order to secure "the rights of Conscience in the fullest latitude" and, as president from 1809 to 1817, consistently opposed even the smallest efforts to use the resources of government in aid of religion.

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References and Further Reading

- Alley, Robert S., ed. *James Madison on Religious Liberty*. Buffalo: Prometheus Books, 1985.
 Curry, Thomas J. *The First Freedoms: Church and State in America to the Passage of the First Amendment*. New York: Oxford University Press, 1986.
 Rutland, Robert Allen. *James Madison, the Founding Father*. New York: Macmillan, 1987.

MADSEN v. WOMEN'S HEALTH CENTER, 512 U.S. 753 (1994)

In response to virulent protests at an abortion clinic, a Florida state court judge issued an injunction prohibiting protesters from blocking or interfering with public access to the clinic and from physically abusing those who entered or left the clinic. Six months later the judge broadened the injunction as a result of repeated violations by protesters of the earlier court order. The protesters appealed to the Florida Supreme Court and then to the U.S. Supreme Court on the grounds that the injunction violated their freedom of speech under the First Amendment.

The Court split on the issues, upholding some parts of the injunction and overturning others. In a six-to-three decision Chief Justice William Rehnquist's majority opinion held that the injunction was content neutral. That is, it did not prohibit speech because the content of that speech was opposed to abortion; it prohibited speech because it intruded upon the rights of those entering and leaving the clinic. Normally a content-neutral regulation limiting speech would be judged on the basis of whether there was a significant governmental interest in infringing upon the speech, that the means were narrowly tailored, and that the regulation left open ample alternative channels of communication. Because this regulation was an injunction and not a legislative enactment, five of the justices in the majority concluded that a more stringent standard should apply: the governmental end

must be significant and the means could burden no more speech than necessary.

Using this standard, the majority concluded that the state's ends were significant (protect the rights of women to seek medical care, ensure public safety and order, promote the free flow of traffic on streets and sidewalks, protect private property, protect medical privacy). In evaluating the means, the majority upheld parts of the injunction establishing a 36-foot buffer zone around the clinic in which protesters could not congregate and a restriction on noise levels (such as bullhorns). However, the majority declared unconstitutional a ban on picket signs or other observable images such as pictures of aborted fetuses, a ban on protesters approaching anyone within 300 feet of the clinic, and a ban on picketing or demonstrating within 300 feet of the residences of clinic staff.

Concurring in part and dissenting in part, Justice John Paul Stevens urged that a more lenient standard be applied to injunctions than legislation or ordinances in that such injunctions are applied only to those who have engaged in illegal activity and not, as in the case of general legislation, to everyone.

Justice Antonin Scalia, joined by justices Clarence Thomas and Anthony Kennedy, also concurred in part and dissented in part. Justice Scalia urged the Court to subject injunctions to even stricter scrutiny than that in the majority opinion. He noted that injunctions are imposed by a single individual and not by a legislative body, so the opportunity for abuse was greater. Consequently, the justice would require strict scrutiny of injunctions, meaning that the ends must be compelling and the means to achieve them necessary and narrowly tailored. Under that standard, the three-justice minority would have declared all of the provisions unconstitutional.

The precedent established in this case is used to balance the rights of those seeking the services of abortion clinics and the rights of those seeking to protest, including the case of *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1997).

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References and Further Reading

Lively, Donald E. et al. *First Amendment Law: Cases, Comparative Perspectives, and Dialogues*. Cincinnati, OH: Anderson, 2003, pp. 343–358.
Sullivan, Kathleen M., and Gerald Gunther. *Constitutional Law*, 14th ed. New York: Foundation Press, 2001, pp. 1215–1218.

Cases and Statutes Cited

Schenck v. Pro-Choice Network of Western New York, 519 U.S. 357 (1997)

See also **Anti-Abortion Protest and Freedom of Speech; Content-Neutral Regulation of Speech; Freedom of Speech: Modern Period (1917–Present); Freedom of the Press: Modern Period (1917–Present); *Frisby v. Schultz*, 487 U.S. 474 (1988); *O'Brien* Content-Neutral Free Speech Test**

MAGNA CARTA

Magna Carta, or the Great Charter of King John, was sealed on June 15, 1215. Great not for its size but for its significance, the document is extraordinary in several respects. Resulting from a rebellion of the aristocracy against John for having purportedly abused his proper authority, the Magna Carta established individual liberties relative to the state; it is the closest equivalent to a written constitution the British have; and it became the constitutional foundation for modern states throughout the world. The American Declaration of Independence and Bill of Rights are rooted in the Magna Carta.

Historical Background

There were three main sources of social and political tension in thirteenth-century England. A rapidly expanding economy unleashed ambition among nobles who made increasing demands upon a strong and self-serving Angevin monarchy. Embers of discontent brought forth fires of rebellion. The overwhelming power of the monarchy brought forth constitutional limitations on that power. At the same time, tensions had mounted between the papacy and the Crown. William, duke of Normandy, had appealed for papal authorization to invade England in 1066, which was granted on the promise of separation of church courts from secular courts. Those two courts operated under two separate laws (canon and common) and procedures, which gave rise to competition over jurisdiction and eventual dispute between church and king.

Finally, internal and external trade gave birth to a number of mercantile towns whose inhabitants enjoyed theretofore unknown liberties and political influence that threatened the feudal landholding order prevalent throughout the country. Although King John had recently granted these towns special privileges, his measures were not enough to appease the merchants and their armies. Indeed, while John managed to alienate various elements within England, including the church and merchants of London, it was the baronial rebellion of 1215 that ultimately forced him to grant the concessions and “liberties”

contained within the Magna Carta. Importantly, through all of this tumult, civil rights and representative government were unborn notions. No part of Magna Carta, which essentially codified the laws regulating England's feudal system, was intended for the vast majority of people who, as peasants, were considered property of the tiny aristocracy on whose land they lived and worked.

The Document

On August 5, 1100, Henry I approved the "Coronation Charter," which was meant to resolve land grievances of the nobility against his recently deceased brother William II. That charter, sometimes called the blueprint for Magna Carta, promised to "abolish all the evil customs by which the kingdom of England has been unjustly oppressed," spelling out fourteen such offenses for the important bishops, barons, and "faithful vassals" of England. Magna Carta followed a similar format. King John addressed himself to "the archbishops, bishops, abbots, earls, barons . . . and faithful subjects." and articulated fully sixty-three concessions. The first article stipulated that "the English church shall be free, and shall have its rights undiminished and its liberties unimpaired . . . We have also granted to all free men of our kingdom, for ourselves and our heirs for ever, all the liberties written below."

The document went on to articulate fully sixty-three concessions by the Crown. None of the four remaining copies of this document are divided into separate articles, though most modern translations are presented with an introductory greeting to the relevant notables and sixty-three subsequent paragraphs. The most important clauses of the document are those declaring: "No freeman shall be arrested or imprisoned . . . except by the lawful judgment of his peers and by the law of the land," and "to none will we sell, to none will we refuse or delay right or justice." It is here that we find the beginnings of "due process" of law.

The Aftermath

It soon became evident that King John had no intention of honoring the Magna Carta. The aristocracy rebelled yet again, inviting the French to their aid and thus provoking civil war. Upon John's death in October of 1216, advisers to his nine-year-old son persuaded the nobility to accept Henry III rather than a

Frenchman as king, a task achieved by reissuing a revised Magna Carta. Indeed, the document was revised at least three times: in 1216 following John's death, again in 1217, and definitively in 1225. All of the reissues dropped several of the original articles.

In particular, articles ten and eleven (interest payments on debts to Jews), twelve and fourteen (money paid by vassals in lieu of military service), fifty (removal of certain foreigners from office), fifty-six through fifty-nine (pertaining to Welshmen and Scots), and portions of fifty-five through sixty-one (the enforcement powers of a twenty-five person baronial council) were all dropped. Articles forty-four, forty-seven, and forty-eight, pertaining to "all evil customs connected with forests and warrens," were dropped but later restored in the sixteen articles of the 1217 "Charter of the Forest" and thereafter always issued in conjunction with the Magna Carta. At subsequent times of tension between the king and his realm, the document was brought forth as a reminder that the king was not above the law. This was necessary, in 1297, when Henry III's son Edward I suffered protests for financial abuse.

The "Myth"

Magna Carta has taken on mythical status as the font of individual liberty, the British Parliament, and common law. Just what rights and liberties were contained within Magna Carta has been debated ever since its issuance. Certainly the Great Charter is regarded as having not only limited the power of the Crown while ensuring individual rights and liberties, but, in the words of Sir Edward Coke, Magna Carta was "declaratory of the principal grounds of the fundamental laws of England." Indeed, centuries of reference to the Magna Carta have established it as England's higher law, despite its original more limited purpose as a safeguard of feudal order and "liberties" for the privileged classes.

The extent to which Magna Carta sowed the seeds of England's modern Parliament, the attempt "to obtain the common counsel of the kingdom," is also contested. The document's longest article, by far, was number sixty-one, stating that "the barons shall choose any twenty-five barons of the kingdom they wish, who must with all their might observe, hold and cause to be observed, the peace and liberties which we [the king] have granted and confirmed to them by this present charter." Parliament evolved gradually over the following years; grounding that development in the Magna Carta becomes difficult upon realizing that article sixty-one was struck from the revised 1216 document

and all subsequent versions. Furthermore, with the Settlement of 1689 and the conclusion of the Glorious Revolution, supreme power was transferred from Crown to Parliament in a way that was antithetical to the doctrine of fundamental law. Yet, in spite of its critics, the tradition of Magna Carta survives.

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References and Further Reading

- Drew, Katherine Fischer. *Magna Carta*. Westport, CT: Greenwood Press, 2004.
 Pallister, Anne. *Magna Carta, the Heritage of Liberty*. Oxford: Clarendon Press, 1971.
 Turner, Ralph V. *Magna Carta Through the Ages*. London: Pearson, 2003.

MAHER v. ROE, 432 U.S. 464 (1977)

Under its Medicaid program, Connecticut paid the medical expenses associated with pregnancy and childbirth, but refused to pay for any abortions except first trimester abortions certified by a physician as medically necessary. Two indigent pregnant women otherwise eligible for Medicaid assistance but who were unable to obtain the required physician's certificate, challenged the Connecticut regulation as a denial of equal protection and due process.

In an opinion written by Justice Powell, the six-to-three Court concluded that neither equal protection nor due process was offended. Connecticut had no duty to subsidize medical expenses for anybody and could choose to subsidize childbirth rather than abortion. The plaintiffs' indigent condition was not a suspect classification, so the Connecticut regulation was presumptively valid, and it was rationally related to the legitimate governmental objective of funding childbirth expenses of indigent women. Nor did Connecticut's regulation infringe upon the constitutional fundamental abortion right. Said the Court:

The Connecticut regulation places no obstacles . . . in the pregnant woman's path to an abortion. An indigent woman who desires an abortion suffers no disadvantage as a consequence of Connecticut's decision to fund childbirth; she continues as before to be dependent on private sources for the service she desires. The State . . . has imposed no restriction on access to abortions that was not already there. The indigency that may make it difficult—and in some cases, perhaps, impossible—for some women to have abortions is neither created nor in any way affected by the Connecticut regulation.

Justice Brennan, joined by Justices Marshall and Blackmun, dissented. They argued that the practical effect of Connecticut's regulations was to "coerce indigent pregnant women to bear children they

would not otherwise choose to have" and that Connecticut had thereby "inhibited their fundamental right to make that choice free from state interference."

Maier was followed three years later by *Harris v. McRae*, 448 U.S. 297 (1980), in which the Court upheld a federal law, the Hyde Amendment, that forbade the use of federal Medicaid funds to pay for abortion except when necessary to save the pregnant woman's life or the pregnancy resulted from rape or incest. In *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), decided in 1989, the Court used much the same reasoning as in *Maier* and *Harris* to uphold a Missouri law that prohibited the use of public employees and facilities to perform or assist abortions that were not necessary to save the pregnant woman's life. In *Rust v. Sullivan*, 500 U.S. 173 (1991), the Court extended *Maier* and *Harris* to uphold a federal rule that forbade recipients of federal family planning funds to counsel people about abortion. The majority result in each of these cases has been much criticized, and several states have interpreted their state constitutions to require the state, when providing medical financial aid to indigents, to treat abortion and childbirth alike. The analytical problem posed by these cases is one facet of the "unconstitutional conditions" problem. This doctrine holds that governments may not penalize the exercise of a constitutional right but may refrain from subsidizing the exercise of a constitutional right.

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References and Further Reading

- Epstein, Richard. *Bargaining With the State*. 1993.
 Kreimer, Seth. *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, University of Pennsylvania Law Review 132 (1984): 1293.
 Perry, Michael. *Why the Supreme Court Was Plainly Wrong in the Hyde Amendment Case: A Brief Comment on Harris v. McRae*, Stanford Law Review 32 (1980):1113.
 Sullivan, Kathleen. *Unconstitutional Conditions*, Harvard Law Review 102 (1989): 1413.
 Westen, Alan. *Correspondence*, Stanford Law Review 33 (1981): 1187.

Cases and Statutes Cited

- Harris v. McRae*, 448 U.S. 297 (1980)
Rust v. Sullivan, 500 U.S. 173 (1991)
Webster v. Reproductive Health Services, 492 U.S. 490 (1989)
See also Abortion; Equal Protection of Law (XIV); Harris v. McRae, 448 U.S. 297 (1980); *Right v. Privilege Distinction; Rust v. Sullivan*, 500 U.S. 173 (1991); *State Constitution, Privacy Provisions; Unconstitutional Conditions; Webster v. Reproductive Health Services*, 492 U.S. 490 (1989)

**MALLORY v. UNITED STATES,
354 U.S. 499 (1957)**

Federal officers arrested Andrew Mallory on rape charges. After questioning him and obtaining a confession roughly seven hours later, they brought him to a magistrate for arraignment.

In *McNabb v. United States*, 318 U.S. 332 (1943), the Supreme Court ruled that confessions elicited during a period of “unnecessary delay” between arrest and arraignment could be excluded. A few years later, Congress adopted Rule 5(a) of the Federal Rules of Criminal Procedure, echoing *McNabb*’s “unnecessary delay” guidelines.

Mallory v. United States reaffirmed the *McNabb* decision and clarified Rule 5(a). A unanimous Court held that detaining a defendant for several hours in order to extract a confession from him while there was a magistrate “readily accessible” constituted an “unnecessary delay.” Thus, Mallory’s confession was found inadmissible.

Justice Felix Frankfurter, writing for the Court, explained that the purpose of a prompt arraignment is to safeguard individual rights since unwarranted detentions have often led to “intensive interrogation, easily gliding into the evils of the ‘third degree.’” Frankfurter also noted the importance of deterring officers from arresting suspects “at large” and then using an “interrogating process at police headquarters in order to determine whom they should charge before the committing magistrate on “probable cause.”

Since *Mallory* implicated statutory law rather than constitutional doctrine, Congress was able to pass legislation in 1968 severely weakening what became known as the *McNabb–Mallory* rule. The Supreme Court nonetheless continued to expand rights of the accused; *Mallory v. United States* anticipated the more sweeping (and just as controversial) procedural due-process rulings of *Escobedo v. Illinois*, 378 U.S. 478 (1964), and *Miranda v. Arizona*, 384 U.S. 436 (1966).

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References and Further Reading

Fisher, Louis. *American Constitutional Law*. Durham, NC: Carolina Academic Press, 1990.

Cases and Statutes Cited

Escobedo v. Illinois, 378 U.S. 478 (1964)
McNabb v. United States, 318 U.S. 332 (1943)
Miranda v. Arizona, 384 U.S. 436 (1966)
Rule 5(a), Federal Rules of Criminal Procedure, 327 U.S. 821 (1946)
82 Stat. 210 (1968); 18 U.S.C. §3501(c)(2000)

See also Arraignment and Probable Cause Hearing; Arrest; Due Process; *Escobedo v. Illinois*, 378 U.S. 478 (1964); *McNabb v. United States*, 318 U.S. 332 (1943); *Miranda v. Arizona*, 384 U.S. 436 (1966); Rights of the Accused; Self-Incrimination (V): Historical Background; Self-Incrimination: *Miranda* and Evolution; Speedy Trial

**MANDATORY DEATH SENTENCES
UNCONSTITUTIONAL**

Mandatory death sentences have been utilized throughout history. At common law, death was imposed for all convicted murderers. Recognizing that the culpability of convicted murderers varied, in 1794 Pennsylvania became the first state to abolish capital punishment for most murders. The state mandated death for only those killings that were “willful, deliberate and premeditated.” Every other state followed Pennsylvania’s lead. Jurors balked, however, at being forced to impose death in cases that were inappropriate for capital punishment. As a result, they engaged in jury nullification by simply refusing to convict the defendant.

In order to address the problem of jury nullification, legislatures granted almost total discretion to the jury in sentencing the defendant. Jurors in California were told, for instance, that the law “commits the whole matter of determining which of the two penalties [death or life imprisonment] shall be fixed to the judgment, conscience, and absolute discretion of the jury.” Capital defendants argued to the Supreme Court that the lack of standards to control jury sentencing discretion was a violation of due process, an argument that the Court rejected.

Just one year after deciding that jury discretion in sentencing was not a violation of due process, the Supreme Court concluded that statutes vesting unguided sentencing discretion in juries and trial judges had become unconstitutional. The Court concluded that as a result of these statutes, the death penalty was being imposed in a discriminatory, wanton, and freakish manner. This decision had the effect of imposing a moratorium on capital punishment in the United States since each state empowered the jury with unfettered discretion in determining whether a defendant should be sentenced to death. As a result of this decision, thirty-five states reformulated their sentencing provisions in an attempt to overcome the objections the Court had articulated. A few states responded by returning to mandatory death sentences.

For instance, North Carolina mandated death for any willful, deliberate, and premeditated killing, or

any killing that occurred during the commission of rape, robbery, arson, kidnapping, burglary, or other felony. North Carolina also enacted a mandatory death sentence statute for first-degree rape. The Supreme Court held that mandatory death sentences were a marked departure from contemporary standards of decency and as a result they constituted cruel and unusual punishment in violation of the Eighth Amendment. The Court rejected the argument that mandatory death sentences eliminated the risk of arbitrary and discriminatory application; it reasoned that jury nullification was certain to occur in the event that death was mandatory, referring to the historical experience. The Court indicated that there was no way that the judiciary could check the arbitrary and discriminatory use of jury nullification. Finally, the Court refused to permit mandatory death sentences because they do not allow for the consideration of mitigating circumstances.

Louisiana responded to *Furman v. Georgia*, 408 U.S. 238 (1972), by enacting a statute more narrowly defined than the North Carolina statute. The Supreme Court, however, found that Louisiana's narrower definition of capital murder was not "of controlling constitutional significance" and held it to be unconstitutional for the same reasons it rejected the North Carolina statute.

The Supreme Court has refused to permit mandatory death sentences in any context. For instance, in *Sumner v. Sherman*, while serving a life sentence without possibility of parole for first-degree murder, the defendant was convicted of the capital murder of a fellow inmate. Under Nevada law then in effect, he was automatically sentenced to death. The Court held that the mandatory sentence was unconstitutional, in part, because it did not allow the defendant to present mitigating evidence and the sentencer to consider such evidence.

The Supreme Court's decisions invalidating mandatory death sentences established two important principles. First, as a result of the fundamental respect for humanity underlying the Eighth Amendment, capital defendants are allowed to present evidence of mitigating circumstances and the sentencer is required to listen to that evidence. Thus, a death sentence is invalid if the sentencer was precluded from considering mitigating evidence or refused to consider such evidence. Second, these decisions were based upon the principle that "death is different." Because death is different, the need for reliability in the determination that death is the appropriate punishment is even greater. As a result, the Court has adopted heightened procedural requirements in capital cases.

The greatest challenge for the court has been and will continue to be the elimination of arbitrariness

and discrimination in the death penalty process. Its decisions prohibiting mandatory death sentences have been a part of that endeavor. The Court, however, has not succeeded. Before retiring from the Court, Justice Blackmun concluded that "the death penalty remains fraught with arbitrariness, discrimination, caprice and mistake."

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Cases and Statutes Cited

Callins v. Collins, 510 U.S. 1141 (1994)

McGautha v. California, 402 U.S. 183 (1971)

Roberts v. Louisiana, 428 U.S. 325 (1976)

See also Capital Punishment; Capital Punishment and the Equal Protection Clause Cases; Capital Punishment: Due Process Limits; Capital Punishment: Eighth Amendment Limits; Capital Punishment: History and Politics; Capital Punishment Reversed

MANDATORY MINIMUM SENTENCES

Statutes that define the boundaries of criminal sentences in the United States typically set a minimum and maximum prison term, leaving the sentencing judge to select a sentence within that range in each case. Mandatory minimum sentencing laws set the minimum above zero, at some substantial prison term. Legislatures that pass these laws generally intend to restrict the power of judges to impose lenient sentences.

In state codes, certain serious crimes such as sexual assault and homicide have traditionally carried substantial prison terms as the minimum sentence. However, the volume of cases sentenced under these laws increased greatly when legislatures in the middle of the twentieth century started attaching mandatory minimum terms to narcotics crimes. Among the states, the New York legislature took a leading role in the use of mandatory minimum sentences for narcotics crimes when it enacted the *Rockefeller Drug Laws* in 1973. Mandatory minimum sentences played a substantial role in the enormous prison population growth in the United States between 1975 and 2005.

Legislators who enact mandatory minimum sentencing laws hope to accomplish several objectives. They want to prevent judges from denigrating the seriousness of certain crimes. Because the laws simplify the factors that sentencing judges may consider, they promote more uniform outcomes and send clear signals that might strengthen the deterrent power of the criminal law.

Criticism of mandatory minimum sentences is widespread and cuts across partisan lines. According

MANDATORY MINIMUM SENTENCES

to these detractors, mandatory minimum sentences reduce the necessary power of the sentencing judge to individualize the sentence imposed on each offender. In particular, the laws direct the judge's attention only to the details of the offense and ignore many features of an offender's background. For this reason, mandatory minimum sentences are consistently unpopular with judges.

Mandatory minimum sentences also highlight the importance of prosecutorial discretion to choose among the available charges, some of which include mandatory minimums and others that do not. The prosecutor's selection of charges can lead to unequal sentencing outcomes for defendants who commit identical crimes. Because police officers and prosecutors often aim to avoid the use of these laws in some eligible cases, mandatory statutes lead to fewer arrests for the designated crimes, fewer charges filed, and more dismissals of charges. These statutes also undermine the power of sentencing guidelines to produce reasonable uniformity among sentences while still accounting for important individual differences.

The prospects are limited for ways to ameliorate these ill effects. Governors have not often exercised their pardon and commutation powers. The courts have shown reluctance to overrule severe minimum sentences under the cruel and unusual punishment clauses of the federal and state constitutions. For instance, the Supreme Court in *Ewing v. California*, 538 U.S. 11 (2003), upheld a twenty-five-year sentence for an offender with prior convictions who stole three golf clubs.

Ultimately, the best hope for checking the effects of mandatory minimum penalties rests in the legislature. In 1970, the U.S. Congress repealed most of the existing federal mandatory minimum laws, an effort supported by then-Congressman George H. W. Bush. The political environment, however, does not often allow legislators to repeal these laws. Despite apparent widespread agreement in the New York state legislature about the need to revise the Rockefeller drug laws, the reforms languished for several years and finally passed in 2004 only in weakened form.

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References and Further Reading

- Cassell, Paul G., *Too Severe? A Defense of the Federal Sentencing Guidelines (and a Critique of Federal Mandatory Minimums)*, Stanford Law Review 56 (April 2004): 1017–1048.
- Hatch, Orrin G., *The Role of Congress in Sentencing: The U.S. Sentencing Commission, Mandatory Minimum Sentences, and the Search for a Certain and Effective Sentencing System*, Wake Forest Law Review 28 (1993): 185–198.

Parent, Dale, Terence Dunworth, Douglas McDonald, and William Rhodes. *Key Legislative Issues in Criminal Justice: Mandatory Sentencing*. Washington, D.C.: National Institute of Justice, 1997.

Schulhofer, Stephen J., *Rethinking Mandatory Minimums*, Wake Forest Law Review 28 (1993): 199–222.

Twentieth Century Fund Task Force on Criminal Sentencing. *Fair and Certain Punishment*. New York: McGraw-Hill, 1976.

U.S. Sentencing Commission. *Mandatory Minimum Penalties in the Federal Criminal Justice System*. Washington, D.C.: U.S. Government Printing Office, 1991.

Cases and Statutes Cited

Ewing v. California, 538 U.S. 11 (2003)

Rockefeller Drug Law, New York Penal Law §§ 220.21, 220.43, 1973 New York Laws 371, 380–381

See also **Cruel and Unusual Punishment (VIII); Cruel and Unusual Punishment Generally; Pardon and Commutation; Prison Population Growth; Sentencing Guidelines; Three Strikes/Proportionality**

MANN ACT

The Mann Act, sometimes called the White Slave Traffic Act, was introduced in Congress in 1909 and passed the following year. Its drafting was prompted by a number of social concerns that came to prominence in the United States during the late nineteenth and early twentieth centuries. Initially, it developed as a response to growing concerns about increased prostitution linked to white slavery, immigration, urbanization, and the resulting changing status of women. These concerns were exacerbated by the publication of lurid and sensational stories about vice rings appearing in muckraking magazines of the era. Progressive reformers responded to the issue's increasing prominence by sponsoring city ordinances outlawing prostitution and by supporting the passage of related laws at the state level.

The federal Mann Act was introduced in the U.S. House of Representatives by Congressman James Mann, who represented the Illinois congressional district that included Chicago. He based the law on the provisions of the commerce clause, which authorized Congress to regulate interstate commerce, and on the terms of an international treaty that focused on the suppression of the international prostitution rings. The law was passed by Congress with minimal opposition and remained in effect until it became essentially worthless in the 1960s, a result of lack of enforcement and repeated passage of amendments limiting its reach. The Mann Act made it a crime to

transport women in interstate or foreign commerce for immoral purposes or with the goal of persuading the female to participate in immoral acts. Efforts at enforcement were to be facilitated by the law's provision authorizing immigration officials to maintain records of instances in which individuals appeared to be attempting to procure women for immoral purposes. It also attempted to secure the assistance of proprietors of brothels by specifying that, if they provided the government with requested information on foreign prostitutes, they would be deemed immune from prosecution under the Mann Act.

Although the extent of the problem of white slavery in the United States in the early twentieth century was not as serious as supporters of the bill contended, its enforcement during the first two decades prompted arrests, the amassing of records, and the eventual prosecution of traders in white slavery. At least two significant U.S. Supreme Court decisions resulted from such prosecutions, both of which not only upheld the constitutionality of the Mann Act, but in so doing also expanded the powers of Congress under the commerce clause.

In 1913, the Court heard on appeal the case of *Hoke v. U.S.*, 227 U.S. 308 (1913), which dealt with the conviction of a man who had transported a young woman from Louisiana to Texas for the purpose of having her engage in prostitution. The plaintiff argued that the Mann Act was unconstitutional because Congress had overextended its authority under the commerce clause by legislating in an area (morality) that was an issue reserved for state regulation. The U.S. Supreme Court rejected his contention and thus broadened the reach of the commerce clause.

Justice William McKenna, writing for a unanimous Court, stated that this was a situation in which, because of the involvement of interstate transport, no single state could regulate effectively. He cited as precedents federal rulings upholding Congress's power to regulate lottery tickets and obscene materials. Justice McKenna wrote that the "broad and universal power" of Congress to regulate in the area of interstate commerce had been so frequently upheld that there should be little question of its extent. He also noted that the action of Congress in such cases did not interfere with the power of states to legislate on moral issues within their boundaries.

A few years later, Justice William R. Day, writing for the majority in *Caminetti v. U.S.*, 242 U.S. 470 (1917), significantly broadened the application of the Mann Act. This case concerned the trial and conviction of two young men from California who had transported two young women to Nevada for the purpose of having sexual intercourse. Having been charged with violating the Mann Act, the young

men argued in their defense that the law did not apply because the young women had participated in the trip knowingly and willingly. Justice Day rejected this contention, arguing that the law was not intended to punish only those expeditions undertaken for the purpose of financial gain. He wrote that the wording of the law was so plain that there was no question of Congress's intent. He further argued that Congress had power to keep the "channels of commerce" free from immoral activity.

Although the Mann Act was not used extensively to prosecute activities such as those resulting in these two cases, the precedents set in *Hoke* and *Caminetti* were cited repeatedly in the ensuing decades as evidence of the intent of the U.S. Supreme Court's support for a broad interpretation of the power of Congress under the commerce clause. The act gradually fell into disuse and, by the 1960s, was no longer enforced.

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References and Further Reading

- Criminal Law Statutory Offenses. Liability of Women Transported for Conspiracy to Violate Mann Act*, Harvard Law Review 46 (January 1933): 520–521.
Interstate Immorality: The Mann Act and the Supreme Court, Yale Law Journal 56 (May 1947): 718–730.
 Langum, David. *Crossing Over the Line: Legislative Morality and the Mann Act*. Chicago: University of Chicago Press, 1994.

Cases and Statutes Cited

- Caminetti v. U.S.*, 242 U.S. 470 (1917)
Hoke v. U.S., 227 U.S. 308 (1913)

See also **Interstate Commerce; Rape; Sex and Criminal Justice**

MANSON v. BRATHWAITE, 432 U.S. 98 (1977)

Because eyewitness identification is rife with risk of error (*United States v. Wade*, 388 U.S. 218, 1967), the U.S. Supreme Court monitors identification procedures to reduce the risk of mistaken identification testimony yielding an unjust conviction. In *Manson v. Brathwaite*, the Court set forth a due-process test for the admission of eyewitness identification testimony. Police investigators presented an undercover police officer witness with a single photo of their suspect, rather than presenting several photos of varying individuals to him in a photo array.

Though the single photo identification practice was unnecessarily suggestive, the Court majority refused to exclude the undercover officer's testimony about his

out-of-court photographic identification of the defendant, nor his in-court identification. The lower appellate court had interpreted earlier due-process rulings in *Stovall v. Denno*, 388 U.S. 293 (1967), and *Neil v. Biggers*, 409 U.S. 188 (1972), to require exclusion of testimony relating to an unnecessarily suggestive out-of-court identification procedure, thus encouraging use of a more reliable means of identification when available.

But the *Manson* majority rejected this per se exclusionary rule as too severe. Instead, testimony regarding the out-of-court and in-court identification would be excluded only when there is a substantial likelihood of misidentification. This likelihood is determined by weighing the corrupting effect of the suggestive identification procedure against the factors relating to reliability (the witness's opportunity to observe, degree of attention, level of certainty, the accuracy of the prior description, and the time lapse between the crime and the identification procedure). The dissenters urged a greater deterrent of unreliable procedures. This debate continues.

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References and Further Reading

- Gross, Samuel H., *Loss of Innocence: Eyewitness Identification and Proof of Guilt*, *Journal of Legal Studies* 16 (1987): 395–453.
- Koosed, Margery M., *The Proposed Innocence Protection Act Won't—Unless It Also Curbs Mistaken Eyewitness Identifications*, *Ohio State Law Journal* 63 (2002): 263–314.
- Rattner, Arye, *Convicted but Innocent: Wrongful Convictions and the Criminal Justice System*, *Law and Human Behavior* 12 (1988): 283–293.
- Wells, Gary L., and Donna M. Murray. “What Can Psychology Say About the *Neil v. Biggers* Criteria for Judging Eyewitness Accuracy?” *Journal of Applied Psychology* 68 (1983): 34.

Cases and Statutes Cited

- Neil v. Biggers*, 409 U.S. 188 (1972)
- Stovall v. Denno*, 388 U.S. 293 (1967)
- United States v. Wade*, 388 U.S. 218 (1967)

See also **Due Process; Eyewitness Identification; Line-Ups**

MANUAL ENTERPRISES, INC. v. DAY, 370 U.S. 478 (1962)

By a six-to-one vote (Justices Frankfurter and White did not participate), the Supreme Court reversed lower court decisions sustaining the authority of the postmaster general under the Comstock Act to seize

and bar from the mails magazines deemed as obscene because they contained photographs of nude or near nude males published by Manual Enterprises for homosexuals (and which contained the addresses of the photographers).

Justice Harlan, applying the *Roth* standard (*Roth v. United States*, 354 U.S. 476, 1957), declared that, after “our own independent examination,” the magazines were not obscene. He added, however, a new qualifier to the standard. The post office and lower courts misapplied *Roth* by making “prurient interest” the sole test of obscenity. Justice Harlan argued that an “essential” element was the “patent offensiveness” of materials and whether the materials were “so offensive on their face as to affront current community standards of decency.” *Roth* requires two “distinct” elements: patent offensiveness and prurient interests; both must be conjoined before challenged material can be declared obscene and barred from the mails under the Comstock Act. The relevant “community” under the federal statute, Justice Harlan added, was a “national standard of decency.”

The Comstock Act also proscribed “obscene advertising.” The secondary issue in the case was scienter—namely, whether the postal authorities could presume Manual Enterprises was aware the third-party advertisers whose addresses were included the magazines were in possession of “hard core” photographs. Justice Harlan concluded that actual proof was necessary to establish that the publisher knew the advertisers were offering obscene material.

Justice Brennan's concurrence stressed that this was the first time the Court had given plenary review to the question of whether the post office could order material “nonmailable” after it determined it to be obscene. Procedural safeguards, he stated, “loom large in the wake of an order such as the one before us.” The factual question at the center of his concurrence was whether Congress had “in fact conferred upon postal authorities any power to exclude matter from the mails upon their determination of its obscene character.” Justice Brennan concluded that legislative history showed that Congress had not granted the postmaster general this authority.

Justice Clark's dissent proclaimed that the Court's holding “requires the U.S. Post Office to be the world's largest disseminator of smut and Grand Informer of the names and places where obscene material may be obtained.” Disagreeing with Justice Brennan, Justice Clark emphasized that the wording of the Comstock Act and subsequent postal regulations clearly authorized the post office to declare material obscene and to bar it from the mails. Clark also declared that facts of the case rendered concerns about the sender's scienter irrelevant and pointed out

that Manual Enterprises was knowledgeable about the purposes of the advertisements in its magazines and that the publishing firm was no “Jack and Jill” operation. The facts were equally evident to the justice (quoting Milton: “O dark, dark, dark amid the blaze the noon”) that with “no social, educational, or entertainment qualities,” the magazines, “designed solely as sex stimulants for homosexuals,” were obscene and thus appropriately nonmailable through the post office.

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References and Further Reading

- Alexander, Donald. *The Politics of Pornography*. Chicago: University of Chicago Press, 1989.
- Hixson, Richard F. *Pornography and the Justices: The Supreme Court and the Intractable Obscenity Problem*. Carbondale: Southern Illinois University Press, 1996.
- Mackey, Thomas C. *Pornography on Trial: A Handbook With Cases, Law, and Documents*. Santa Barbara, CA: ABC-CLIO, 2002.

Cases and Statutes Cited

- Manual Enterprises, Inc. v. Day*, 370 U.S. 478 (1962)
- Roth v. United States*, 354 U.S. 476 (1957)

MAPP v. OHIO, 367 U.S. 643 (1961)

This landmark case established that federal and state courts must exclude evidence seized in violation of the Fourth Amendment. Police received a tip that a suspect was hiding in Dollree Mapp’s home. Officers knocked on Mapp’s door and demanded entrance. She called her lawyer, who instructed her not to allow the police into the home without a warrant. She followed this advice and, in response, the police surrounded her home for hours. They again sought entrance and, when Mapp did not immediately come to the door, police forcibly entered. When Mapp demanded a warrant, an officer held up a paper. When Mapp grabbed it, officers handcuffed her. During the widespread unlawful search that ensued, police recovered “obscene materials.” At trial, Mapp was convicted of possession of those materials. The prosecution never produced a warrant.

The Supreme Court reversed Mapp’s conviction and established the “exclusionary rule” requiring that trial courts suppress evidence obtained by means of unlawful searches or seizures. The Court reasoned that the Fourth Amendment would be an “empty promise” without the remedy of exclusion. Furthermore, since *Boyd v. United States*, 116 U.S. 616 (1886)

and *Weeks v. United States*, 232 U.S. 383 (1914) established the rule in federal prosecutions, *Mapp*’s expansion of exclusion to state courts would create parity. Finally, the Court focused on preserving “judicial integrity,” stating that convicting even the guilty with unconstitutionally obtained evidence would reduce respect for the judiciary and undermine the rule of law.

The dissent complained on several grounds. First, it argued that the Court’s action violated states’ rights. The Court posited that the Fourth Amendment was applicable to the states by means of the “incorporation doctrine”—the notion that ratifying the Fourteenth Amendment made the Bill of Rights (including the Fourth Amendment) enforceable against the states. The dissent countered that state court convictions arise out of a sovereign judicial system, which the Constitution’s federalist system protects. Second, the dissent noted that the exclusionary rule would distort trials’ truth-seeking function. Nothing would undermine “judicial integrity” more than trials that excluded truth. Finally, the dissent took issue with the Court’s fusion of the Fourth and Fifth Amendments to conclude that the Fourth required exclusion. Although constitutional provisions should be construed in light of each other, a Fifth Amendment violation occurs with the admission at trial of coerced statements. A Fourth Amendment violation, however, is the unlawful search or seizure. Thus, the remedies for violation of the two provisions should diverge.

Present-day commentators such as Professor Akhil Reed Amar have focused on the lack of textual or historical bases for the exclusionary rule. Nowhere in the Fourth Amendment’s text is there an exclusion requirement. Furthermore, the amendment’s drafters were aware of the common-law remedy of trespass suits as redress for search and seizure improprieties. Thus, exclusion would have been unthinkable. Furthermore, *Mapp*’s goal of deterring police misconduct has not been fully realized; exclusion has not curtailed Fourth Amendment violations. Subjecting the government to liability for improper searches and seizures by means of civil tort actions, the commentators assert, would better curtail abuses than the exclusionary rule. In addition, it would restore trials to their intended function: a search for the truth using *all* evidence.

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References and Further Reading

- Amar, Akhil Reed, *Fourth Amendment First Principles*, Harvard Law Review 107 (1994): 757.
- Johnson, Sheri Lynn, *Of Myths and Mapp: A Response to Professor Magee*, Cap. University Law Review 23 (1994): 221.

- Katz, Lewis R., *Mapp After Forty Years: Its Impact on Race in America*, Case Western Reserve Law Review 52 (2001): 471.
- Magee, Robin K., *The Myth of the Good Cop and the Inadequacy of Fourth Amendment Remedies for Black Men: Contrasting Presumptions of Innocence and Guilt*, Cap. University Law Review 23 (1994): 151.
- Stewart, Potter, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search and Seizure Cases*, Columbia Law Review 83 (1983): 1365.

Cases and Statutes Cited

- Boyd v. United States*, 116 U.S. 616 (1886)
- McNabb v. United States*, 318 U.S. 332 (1943)
- Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920)
- Weeks v. United States*, 232 U.S. 383 (1914)
- Wolf v. Colorado*, 338 U.S. 25 (1949)

See also *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971); **Exclusionary Rule; Incorporation Doctrine; Search (General Definition); Search Warrants; Seizures**

MARBURY v. MADISON, 5 U.S. 137 (1803)

Marbury put the Supreme Court's imprimatur on the doctrine of judicial review. The case was brought under the Judiciary Act of 1789's grant to the Supreme Court of original jurisdiction in cases in which writs of mandamus were sought against high federal officers. William Marbury, who had been appointed by President John Adams as a justice of the peace for the District of Columbia, asked that Secretary of State James Madison be ordered to deliver his commission. The Court decided that Marbury had a right to his commission and that a writ of mandamus was the proper remedy, but it concluded that it could not issue that writ because the power to do so was not among Article III grants to the Supreme Court of original jurisdiction. The Judiciary Act's delegation of that power to the Supreme Court, then, was unconstitutional.

Chief Justice Marshall's opinion justified the Court's exercise of judicial review along the lines offered by Alexander Hamilton in *The Federalist* No. 78: The statute and the constitutional provision were conflicting laws, he said, and the Court had to decide which of them to give effect. Since the Constitution had been enacted by a higher authority than had the Judiciary Act, it must be given effect despite the conflicting provision of the act.

The section of Chief Justice Marshall's opinion in which he sided with Marbury on the merits of his

claim to his commission was very controversial at the time. President Thomas Jefferson and Secretary Madison rightly understood it as a rebuke to them.

Marbury did not mark the first time an American court had exercised judicial review. It did not even mark the first time a federal court, or a Supreme Court justice, had done so. It was, however, the first case in which the Supreme Court claimed that power, and it has stood for the federal courts' power of judicial review ever since.

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References and Further Reading

- Gunther, Gerald, ed., *John Marshall's Defense of McCulloch v. Maryland*.
- Gutzman, Kevin R. C. "Old Dominion, New Republic." Ph.D. diss., University of Virginia, 1999.
- Hobson, Charles F. *The Great Chief Justice: John Marshall and the Rule of Law*.
- Hobson, Charles F. et al., eds., *The Papers of John Marshall*.
- Smith, Jean Edward. *John Marshall: Definer of a Nation*.

MARCHES AND DEMONSTRATIONS

The civil rights years are commonly determined to be the decade from the early 1950s through the end of the 1960s. The marches and demonstrations that marked the civil rights years were primarily to protest segregation and racial inequality, as exemplified by the so-called "Jim Crow" laws that still existed throughout the South and the racial discord and hostility in evidence in large portions of the North. Segregation has been aptly defined as "the way which a society tells a group of human beings that they are inferior to other groups."

In December 1955, as president of the Montgomery Improvement Association (MIA), Dr. Martin Luther King, Jr. launched the successful Montgomery bus boycott protesting the fact that black riders were forced to sit or stand in the back of the bus and use the back door for entry while white patrons sat in the front and used the front door (the front seats remained empty when no white riders were present). The protest was sparked by the arrest of Rosa Parks due to her refusal to move to the back of the bus and relinquish her seat to a white patron. As stated by Dr. King in his book, *Stride Toward Freedom*, more than fifty thousand African Americans chose "to substitute tired feet for tired souls and walk the streets of Montgomery until the walls of segregation were finally battered by the forces of justice." After a 381-day protest, black riders won equal access to public transportation services in Montgomery, Alabama.

After the 1954 U.S. Supreme Court decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), the National Association for the Advancement of Colored People (NAACP), the Southern Christian Leadership Conference (SCLC), the Congress of Racial Equality (CORE), and the Fellowship of Reconciliation (FOR) made varied attempts to engage and educate college students about passive resistance and nonviolent protest.

In the summer of 1961, CORE and FOR staged the so-called "freedom rides," which involved an interracial group riding public interstate buses to protest segregated transport and their related facilities. The trip was planned from Washington, D.C. to New Orleans, Louisiana. On the Atlanta to Birmingham leg of the trip, the group was mobbed and beaten and one of the two buses was fire-bombed. Even with eventual intervention by President Kennedy, an agreement by Alabama Governor John Patterson to protect them, and the freedom riders being accompanied by a presidential representative, a subsequent group of freedom riders were relentlessly beaten by a mob of white segregationists when their bus reached Montgomery, Alabama, a week after the demonstration began. The presidential representative and Justice Department official, John Seigenthaler, was not spared; during the melee while trying to pull two female freedom fighters to safety, he was beaten unconscious and left lying in the street for half an hour. Throughout the summer of 1961, more than three hundred freedom riders rode the interstate buses throughout the South protesting segregation and attempting to integrate interstate transportation as ordered by the U.S. Supreme Court in a 1947 decision.

In 1963, Dr. Martin Luther King, Jr. led sit-in demonstrations to desegregate lunch counters and eating facilities in Birmingham, Alabama. May of 1963 marks a poignant and chilling period in which black men, women, and children alike were attacked and bitten by police dogs controlled by police officers and lashed by water sprayed from fire hoses held by fire fighters in the streets of Birmingham. Via television and newspaper reports, America got a glimpse of the Deep South, its public officials, and those sworn to serve and protect.

During this same time period, Martin Luther King, Jr. was arrested during a demonstration in Birmingham; in April 1963, while imprisoned, he wrote his famous "Letter From a Birmingham Jail." The letter has been praised as "one of the most important documents of nonviolent protest in the civil rights movement."

Assisting in sit-ins throughout the South were members of the Student Non-Violent Coordinating Committee (SNCC), which had been founded in

1960 by college students to organize lunch counter sit-ins and other antisegregation demonstrations. The protesters were harassed, bullied, beaten, and often arrested as a result of their silent and nonviolent protests. To publicize Southern sit-ins and to support the plight of their southern counterparts, college students in northern cities staged sympathy sit-ins and picketed local establishments. In May 1963, the U.S. Supreme Court held that the Birmingham segregation ordinances (including lunch counters) were unconstitutional.

Decrying inequality between the races, on August 28, 1963, the now famous "march on Washington" was held. At that time, black unemployment was 11 percent while white unemployment stood at 5 percent. Similarly, on average, white families earned \$6,500 per year while an average black family earned \$3,500 per year. During the march on Washington, Martin Luther King, Jr. made his historic "I have a dream" speech from the steps of the Lincoln Memorial. This integrated protest march drew over two hundred fifty thousand protestors to the Washington Monument—at that time, the largest march and protest of its kind.

To oppose racial inequality in voting rights, in March of 1965, Rev. King and about four thousand members of the SCLC held a march from Selma to Montgomery, Alabama (the "Selma-to-Montgomery march"), with the protection of federal troops; before they reached their destination, nearly thirty thousand supporters swelled the ranks of the march. At the capital, Dr. King gave his well-known "How long? . . . not long" speech. During this period, the Voting Rights Act of 1965 was enacted by President Lyndon B. Johnson. Dr. King and other civil rights activists were present at the presidential bill signing.

In July 1967, due largely to the efforts of Dr. King and a broad coalition of civil rights groups, the Justice Department reported that more than 50 percent of all eligible African-American residents were registered to vote in the states of Alabama, Georgia, Louisiana, Mississippi, and South Carolina.

In April 1968, Dr. King was in Memphis, Tennessee, to help lead a protest by sanitation workers against low pay rates and substandard working conditions. In late March, he had led six thousand demonstrators through downtown Memphis in support of the striking sanitation workers. With a prophetic title, Dr. King delivered his final public speech, "I've been to the mountaintop," in Memphis on April 3, 1968. On April 4, 1968, Martin Luther King, Jr. was shot and killed by James Earl Ray while King was standing on the balcony of his room at the Lorraine Motel.

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References and Further Reading

- Carson, Clayborne, and David J. Garrow et al., eds. *Eyes on the Prize Civil Rights Reader: Documents, Speeches, and Firsthand Accounts From the Black Freedom Struggle, 1954–1990*. New York: Penguin Books, 1991.
- Fraday, Marshall. *Martin Luther King, Jr.* New York: Penguin Group, 2002.
- Hooks, Benjamin, with Jerry Guess. *The March for Civil Rights: The Benjamin Hooks Story*. Chicago: ABA Publishing, 2003.
- The King Center, <http://www.thekingcenter.org> (last accessed July 16, 2005).
- Quarles, Benjamin. *The Negro in the Making of America*, 3rd ed. New York: Simon & Schuster, 1987.
- Smith, Marcia A. *Black America: A Photographic Journey—Past to Present*. San Diego: Thunder Bay Press, 2002.
- Williams, Cecil J. *Freedom & Justice: Four Decades of the Civil Rights Struggle as Seen by a Black Photographer of the Deep South*. Macon, GA: Mercer University Press, 1995.
- Williams, Juan. *Eyes on the Prize: America's Civil Rights Years, 1954–1965*. New York: Penguin Books, 1988.

See also **Demonstrations and Sit-Ins; King, Martin Luther, Jr.; Segregation**

MARCHETTI v. UNITED STATES, 390 U.S. 39 (1968)

May an individual refuse to purchase an occupational tax stamp for fear that the government's knowledge of his employment would lead to his arrest? The Supreme Court said yes, overruling prior decisions in *United States v. Kahriger*, 345 U.S. 22 (1953), and *Lewis v. United States*, 348 U.S. 419 (1955), that stated that the Fifth Amendment protection against self-incrimination does not prevent this.

James Marchetti was a bookmaker who made money by taking bets from individuals. Under federal law, he was required to register with Internal Revenue Service, indicating that he accepted wagers, and also to pay an annual occupational tax. He was indicted for failure to do either and he contended that because the registration and payment of the tax would be reported to other law enforcement agencies who might prosecute him for illegal bookmaking, the two federal laws constituted a violation of his Fifth Amendment right against self-incrimination.

Justice Harlan wrote for the majority that agreed with Marchetti. Harlan noted that in *United States v. Kahriger* and *Lewis v. United States*, the Court had upheld the requirement to register and purchase tax stamps for similar illegal activities. In those cases the Court noted that no violation of the Fifth Amendment had occurred because individuals were given the

choice between whether one wishes to commence wagering activities at the cost of a constitutional privilege.

In *Marchetti*, the Court rejected this logic. Instead it argued that because it was clear that Congress intended information about registration and the payment of the occupational tax to be given to law enforcement officials, Marchetti had a real and substantial fear of prosecution and therefore it was appropriate for him to raise the Fifth Amendment protection against self-incrimination as a defense. The Court did note, though, that if an individual did not face substantial hazards of prosecution, then these registration and tax laws would not be unconstitutional.

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References and Further Reading

- Garcia, Alfredo. *The Fifth Amendment: A Comprehensive Approach*. Westport, CT: Greenwood Press, 2002.

Cases and Statutes Cited

- Lewis v. United States*, 348 U.S. 419 (1955)
United States v. Kahriger, 345 U.S. 22 (1953)

See also **Miranda Warning**

MARITAL RAPE

The marital rape exemption, traditionally under common law, sets forth that a husband who forcibly engaged in sexual intercourse against the will and without the consent of his wife was not socially or legally accountable for rape. This exemption derives from three main justifications: the property rationale, marital unity, and, most influential, the marriage contract and implied consent theories.

According to early Judeo-Christian tenets, rape was a legitimate means of acquiring wives, so marital rape was accepted and common. These early views of marital rape are rooted in a property rationale. Whether as fathers or husbands, men owned women as chattel. A wife's sexuality and reproductive capacity were property interests of her husband, so no legal basis existed to prosecute a husband for raping his wife since he did not infringe on another's property rights.

The marital "unities" doctrine underlies this property rights rationale. Under the "unities" doctrine, husband and wife became one person in law upon

marriage. More precisely, a woman's legal existence disappeared upon marriage or, more precisely, became incorporated into her husband's existence, with the husband completely controlling their joint existence. Therefore, the "unities" doctrine justified and legitimized the rape exemption because a man could not rape his wife, just as he could not rape himself.

The most prevalent justification for the marital rape exemption derives from the treatise written by Lord Matthew Hale, the chief justice of England in the seventeenth century, which contemplates the notions of marriage as contract and, subsequently, a wife's implied consent to sex with her husband at any time within the marriage. Hale's theory has been the justification for marital rape for more than three hundred thirty years, and courts throughout the United States have cited his theory to justify upholding the marital rape exemption. According to Hale, "[T]he husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract."

Hale's contract and consent theory for marital rape exemptions relied on marital status law. Marital status rules fixed marital rights and obligations automatically so that "opting-out" was not an option while the marriage existed. The fact that a husband or wife did not wish to abide by, or attempted to contract around, these default state rules was legally irrelevant. The only opportunity for actual agreement or, in this case, a woman's consenting or not consenting to sex, was the initial decision to marry. However, this decision subjected wives and husbands to very different obligations and rights, giving the husband a right of sexual access to his wife and bestowing an obligation to submit by the wife.

The notion that marriage entailed the wife's "irrevocable" or "implied" consent to sex once she made the decision to marry acknowledged the potential divergence between this decision and her actual state of mind at any point within the marriage. Therefore, according to Hale, a woman's marriage triggered the enforcement of the legal presumption of consent to sex with her husband, an idea that formed the basis for the common law marital rape exemption.

Challenges to the marital rape exemption began in the late 1970s, when all state legislatures considered and most passed changes in their common law based rape statutes and when feminism gained footing as a movement. Many of the challenges to and reforms of rape law and, more specifically, marital rape laws were due to the advocacy of alliances formed among feminist groups, victims' rights groups, and organizations promoting general justice.

Currently, twenty-six states, including the District of Columbia, have abolished the marital exemption for sexual offenses. These states' statutes are silent as to the marital status between the victim and defendant in sexual offenses, which allows a state to criminalize marital and nonmarital sexual assault in equal ways, or are explicit, providing for prosecution of spouses or stating that marital status is not a defense. The remaining twenty-four states retain some form of the marital rape exemption. Although all have abolished the per se exemption under common law, many still make it more difficult to convict husbands of sexual offenses committed against their wives. The statutes, although varied, essentially have separate statutes for marital rape, implying different standards for marital rape and other rape, or include extra requirements for marital sexual offenses.

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References and Further Reading

- Anderson, Michelle J., *Marital Immunity, Intimate Relationships, and Improper Inferences: A New Law on Sexual Offenses by Intimates*, *Hastings Law Journal* (2003): 1465–1557.
- Eskow, Lisa R., *The Ultimate Weapon? Demythologizing Spousal Rape and Reconceptualizing Its Prosecution*, *Stanford Law Review* 48 (1996): 677–709.
- Hale, Matthew. *The History of the Pleas of the Crown*, 1st American ed. Philadelphia: Robert H. Small, 1847.
- Hasday, Jill Elaine, *Contest and Consent: A Legal History of Marital Rape*, *California Law Review* 88 (2000): 1373–1505.
- Segal, Lalenya Weintraub, *The Marital Rape Exemption: Evolution to Extinction*, *Cleveland State Law Review* 43 (1995): 351–378.
- Sitton, Jane, *Old Wine in New Bottles: The "Marital" Rape Allowance*, *North Carolina Law Review* 72 (1993): 265.

Cases and Statutes Cited

- Commonwealth v. Fogerty* 74 Mass. (8 Gray) 489 (1857)
- Frazier v. State*, 86 S.W. 754, 755 (Tex.Crim.App. 1905)
- State of New Jersey in the Interest of M.T.S.*, 609 A.2d 1266, 1274–1275 (N.J. 1992)
- State v. Haines*, 25 So. 372, 372 (La. 1899)

See also **Domestic Violence; Rape; Sex and Criminal Justice**

MARKETPLACE OF IDEAS THEORY

The marketplace of ideas theory stands for the notion that, with minimal government intervention—a laissez faire approach to the regulation of speech and expression—ideas, theories, propositions, and movements will succeed or fail on their own merits. Left to

their own rational devices, free individuals have the discerning capacity to sift through competing proposals in an open environment of deliberation and exchange, allowing truth, or the best possible results, to be realized in the end.

The Biography of the Marketplace of Ideas

While obviously predating modern *economic* (marketplace) theory, John Milton's *Areopagitica*—imagining a “contest” of forces and arguing against Parliament's efforts to license the press—offered the initial theoretical predicate for modern marketplace theory. John Stuart Mill expanded on the notion, arguing that free expression was valuable on individual and social grounds because it served to develop and sustain the rational capacity of man and, in an instrumental sense, facilitated the search for truth. The influence of Milton and Mill is evident in Justice Oliver Wendell Holmes, Jr.'s dissent in *Abrams v. United States*, 250 U.S. 616 (1919), the case that formally established the marketplace of ideas as a legal concept.

Reversing course from recent opinions in which he had expressed support for state restrictions on speech tending toward a “clear and present danger,” Justice Holmes contended that that the distribution of fliers expressing hostility to the United States and urging resistance to the war effort in the case of *Abrams v. United States*, 250 U.S. 616 (1919) did not constitute the sort of danger that Congress had the right to regulate. On a theoretical level, however, the justice observed that while it may be “perfectly logical—or a kind of human inclination—to stamp out dissent and muffle the opposition, one should be wary of such aspirations of certainty. Indeed, he suggested:

When men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test for truth is the power of the thought to get itself accepted in the competition of the market; and that truth is the only ground upon which their wishes safely can be carried out.

Such a notion, Justice Holmes argued, “. . . is the theory of our Constitution,” acknowledging—in the spirit of marketplace logic itself—that “[i]t is an experiment, as all life is an experiment.” Thus, with this turn of phrase, Justice Holmes carved into law what would become the defining metaphor for freedom of speech jurisprudence in the twentieth century.

Critics of the Marketplace Theory

Critics of marketplace theory question its assumptions and the potential for its actualization, focusing primarily on the soundness of the economic analogy; the nature of input introduced to the market; and the essence of the output rendered through the course of these exchanges. With respect to the “market” metaphor and incumbent imagery, some question whether the laws and values governing “trade” in goods and services in the financial realm should properly be extended to the social realm and the “trade” in ideas.

When buying products in the economic market, this argument goes, human beings make choices based on tastes and preferences, but in the marketplace of *ideas*, the same rational decision-making capacity is expected to be the engine that drives the “exchange”—allowing one to distinguish true from false and good from bad. Thus, it is essential that individuals be willing and able to apply their faculties in such a manner. Scholars of communications and cognitive processes question this assumption by pointing out that humans are much like “pack rats.” They gather bits and pieces of information as they follow a political campaign, for example, but in the mental storage of data they tend to mix that which they get from the news and that which they get from partisan advertisements. In other words, “packaging” matters as well, and perhaps they are not fully aware of the influences skewing their selections and perceptions.

Other critics focus their attention on the nature, extent, and potential of the input that is introduced to the market arena. Importantly, for the full range of social benefits to be achieved through individual-level exchanges, consumers must willingly come to market; they must desire to peddle their wares (ideas). But, in an increasingly complicated and global society, for example, citizens often lack the public or common place for meeting and exchanging ideas (what the Greeks knew as the “agora”). On another level, what about input that has the potential to disrupt or destroy the marketplace? Should incendiary or threatening ideas be allowed to compete as well? Does the state have a legitimate role in protecting the market from itself? That is, as with the economy, is government regulation of market contributions sometimes called for in the interest of promoting freer, fuller, and safer exchanges of ideas?

Finally, with regard to marketplace output, assuming that there is such a thing as “truth”—the end to which exchanges are putatively directed, critics wonder how one knows that this result has arrived. If it is the *process* of exchange that is to yield the substantive product of truth, then is it simply that that which wins

out in the end is, by definition, “true”? Is something good by this logic because it has won acceptance, or has it been accepted because it is good? If the intention of the marketplace is to allow for petitioning and persuasion, then is the market not so much a “test for truth” as it is a barometer of popularity?

Such criticism notwithstanding, the idea of a marketplace—emphasizing individual liberty, choice, possibility, and the potential for aggregate social benefits resulting from such “free exchanges”—defines the way in which the Supreme Court and citizens generally think about issues of freedom of expression in the United States.

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References and Further Reading

- Cole, David, *Agon at Agora: Creative Misreadings in the First Amendment Tradition*, Yale Law Journal 95 (1986): 857.
 Ingber, Stanley, *The Marketplace of Ideas: A Legitimizing Myth*, Duke Law Journal (1984): 1–90.
 Pinaire, Brian K., *A Funny Thing Happened on the Way to the Market: The Supreme Court and Political Speech in the Electoral Process*, The Journal of Law & Politics 17 (Summer 2001): 489–551.
 Smolla, Rodney. *Free Speech in an Open Society*. New York: Alfred Knopf, 1992.

Cases and Statutes Cited

Abrams v. United States, 250 U.S. 616 (1919)

See also Abrams v. United States, 250 U.S. 616 (1919); **Freedom of Speech: Modern Period (1917–Present)**; Holmes, Oliver Wendell, Jr.; Mill, John Stuart; *Schenck v. United States*, 249 U.S. 47 (1919)

MARRIAGE, HISTORY OF

Marriage is a private relationship and a public contract stating who can marry, when, and to whom; who can officiate; obligations of married people, rights of each spouse; ownership and inheritance of property; legitimate sexual relationships; and grounds for divorce. Since revolutionary days in the United States, marriage has been connected to one's status in the community, and the community assumed and later formalized the rules of the marriage contract. The U.S. Constitution leaves marriage and family law to the individual states.

Influence of English Common Law

The moral and political climate of the early colonies and later territories and states influenced marriage

laws. From the beginning colonial revolutionaries favored the tenets and assumptions of English common law with the exception of divine right. Colonists defined marriage as a contract with assumed mutual consent, husbands' support and wives' services, spousal rights and obligations, and parental responsibilities and rights over children. Colonists assumed that males had naturally superior skills in reason and judgment and that women excelled in gentle manners and nurturing, supporting the man's dominion over his wife and children. Wives did not have rights to own property in their names, to vote, to serve on juries, or to inherit. When a woman married her property reverted to her husband's ownership and control—a procedure known as “coverture.”

Influence of Christianity

Christianity dominated the moral codes of the American colonies and provided the framework for early American stipulations and assumptions about marital and family roles. Christian morality dictated monogamy between spouses. Early Americans settled among Native American Indians who practiced informal marriage and divorce, followed matrilineal inheritance patterns, and shared responsibility for children. Early settlers needed to define themselves as separate from Great Britain and as more civilized than the indigenous natives. Christian marriage distinguished settlers from the “wild heathens.” Christianity continues to influence marital laws in the United States to this day.

Informal Marriages and Self-Divorce

Most states did not have formal marriage laws until about 1750. Marriages were often sanctified by “reputation and cohabitation” when people moved in together or had a child. Families kept dates of marriages and births in individual family Bibles, and some parish records exist. Informal marriage was common in the territories, and several formerly frontier states still have common-law marriage laws. These were written to allow people to move in together and get community support when the preacher was not available to marry people.

Just as informal marriages were common, so was self-divorce and abandonment. People often married again after self-divorce or abandonment; technically, they could be labeled bigamists, but local communities enforced the local standards, and few people objected to this pattern of serial marriages.

Era of Slavery

Most African-American slaves could not marry legally, a major civil rights violation, and their unions and the futures of their children depended on their slave masters. The northern states that freed slaves gradually after the American Revolution did recognize slave marriages, but southern states did not. After the ban on importing slaves in 1808, many plantation owners encouraged conjugal relations and reproduction, and slave masters and their sons also fathered children of their slaves. Those mulatto children were not considered white and did not have civil rights. The United States also criminalized intermarriage on the basis of race or color when one party was white, to keep the legitimate white race unmixed. An Indiana Law of 1840 prohibited marriage between a white and another person with as little as one-eighth “Negro blood.” With emancipation more African Americans formed formal marriages and many informal marriages existed between whites and African Americans despite the miscegenation laws. The local communities exercised control through acceptance or rejection.

Emerging Divorce Laws

By the early 1800s, thirteen states recognized grounds for divorce including adultery, desertion, and cruelty. Legal divorce laws also defined the obligations of former spouses to each other and their children and provided guidelines for the division of property. The petitioner for divorce usually had to document the injuries of the other and prove himself or herself free from blame. Divorce was not easy to obtain, and desertions continued to end many marriages.

Emancipation, Women’s Rights, and Redefined Marriage Laws

The era surrounding the Civil War prompted reforms in civil rights and in marriage and divorce laws. People who opposed slavery also focused on rights of marriage more generally because slavery and marriage were considered “domestic relations.” Criticisms of slavery led to an examination of the power of men over women in marriage, as well as the general lack of civil liberties for women in society. Suffragettes Elizabeth Cady Stanton, Susan B. Anthony, and Lucretia Mott had important roles in the abolition movement. The Seneca Falls meeting in 1848

called for the right of women to vote and raised the issue of wives’ submission of their property and their bodies to their husbands. Women’s rights meetings received mocking publicity and ridicule, but they made inroads on the power disparity between wives and husbands.

At roughly the same time, utopian communities sprang up around the country advocating “free love” and rejection of the long-standing commitment of Christian marriage vows to monogamy and life-long marriage bonds. For example, the Oneida community eliminated the exclusive pairing of couples. Utopian communities drew small numbers, but their lifestyle created more debate about marriage and the power differences between men and women.

Debate continued with the controversy about admitting Utah to the United States. Mormon polygamy offered a challenge. Marriage and family laws were reserved to the states, but the majority of the U.S. population did not want a state that sanctioned multiple wives. Eventually, Congress passed a bill to regulate marriage in the territories that made bigamy and polygamy crimes in the territories, including Utah. This set the stage for Utah’s admission to the union.

The Thirteenth Amendment to the U.S. Constitution forbids slavery and forced servitude. By 1864, freed slaves were entitled to valid marriages, recorded in the individual states. This change granted a civil right denied to African Americans, but laws prohibiting intermarriage of whites still remained. The federal government took responsibility for postwar conditions through the Bureau of Refugees, Freedmen and Abandoned Lands. In 1865, the Freedmen’s Bureau issued rules of marriage to encourage former slaves to adopt the obligations of marriage, including husbands’ support of wives and rights to her service. Many former slaves legitimized their unions, often in mass weddings. Others ignored the opportunities to register a marriage and continued to have informal marriages and self-divorce. The bureau aimed to get universal compliance with marriage laws, and some states made cohabitation without marriage illegal.

The First Part of the Twentieth Century

During the early part of the twentieth century, reform movements slowly gained momentum and women gained rights to own property in their own names and, eventually in 1920, the right to vote. Husbands no longer always spoke for wives, but they were still entitled to domestic service. Industrialization, the Great Depression, and the two world wars greatly influenced families. Also, new immigrant groups

began to enter the country, bringing their families and customs.

After industrialization fewer families lived and depended on farms every year. Industrialization took the primary job out of the home to the factory. Most jobs were held by men or unmarried women. Families became dependent on the paycheck from the factory or business. This concentrated economic resources and power in husbands' hands. Wives' roles became much more exclusively home based with children and chores. This change decreased the time fathers spent with wives and children. Because women had to ask for money from husbands to purchase goods, their overall power in the family declined.

In the late 1800s and early 1900s, there was a huge influx of immigrants for the new factory jobs. Eventually, factory workers and communities lobbied for better working conditions, public health laws, domestic relations laws, and child welfare laws that restricted the hours and ages at which children could work in the factories. Men legally held control over a woman's body, and in many places attempts to provide birth-control information were thwarted, or doctors required a husband's consent. Men held rights to correct their wives and many believed that men had rights to hit their wives. But, divorce became increasingly available to women in cases of extreme abuse.

The Great Depression led families to suffering as millions of people lost their jobs. Families experienced unemployment and doubled up on housing. The Civilian Conservation Corps employed many family men and housed them in camps far away from their families. Social workers increasingly intervened to enforce the husband/father's obligation to support his family and to monitor the home lives of poor children. Women's employment rose during the 1930s, but usually working women had to leave their jobs when they got married. Congress passed the Social Security Act in 1935, bringing relief through unemployment and retirement benefits. Aid to Dependent Children (ADC) was set up to aid poor children, primarily in single-parent families. Men continued to hold more powerful positions in the family and in the community.

Modern Marriage Law

The last fifty years of the twentieth century marked more change in women's roles and in families than in any other single period in U.S. history. Changes came with World War II, the civil rights movement, the anti-Vietnam War movement, the sexual revolution, and the women's movement.

When men left for World War II, they left for the duration of the war, leaving wives and children largely on their own. The factories needed women to produce war goods and women responded. "Rosie the Riveter" symbolized that work force. Many of these women had small children and factories opened day-care centers to help. During the four years of World War II, many women gained financial independence and confidence, which they were hesitant to give up after the war, even in the face of the postwar conservative family trend. Men returned from war anxious for normalcy, and they married and divorced in record numbers in the late 1940s.

The 1950s have been idealized in the media as the period of strong families, large numbers of children, stay-at-home moms, large church memberships, and prosperity. It is important to remember, however, that this period was also marked by segregation; threats to the civil rights of African Americans, homosexuals, and other minorities; and abuse of women and children behind closed doors. Housewives began to feel isolated in suburbs, overburdened and undervalued.

The 1960s saw calls for civil rights reforms leading eventually to marches, sit-ins, and demonstrations. The initial response was militant opposition and some violence, but eventually, the Civil Rights Act of 1964 was narrowly passed by the U.S. Congress. Many activists from the civil rights movement later organized themarches and demonstrations in opposition to the Vietnam War. The revolutionary spirit extended to sexual norms as well. Premarital sex became much more common and accepted in this decade. Women in the antiwar movement found they were asked to do the traditional women's activities like cooking and secretarial duties, while men led the organizations. Those same women agitated for women's rights and formed the basis for the women's movement. The overall effect of the 1960s revolutionary spirit was to undermine the authority of religion, traditional family forms, education, and governmental dictates on family matters.

From the 1960s to the end of the twentieth century, family structures changed tremendously. First, the divorce rate began a steady climb in 1962 that only leveled off in 1982. Married women and mothers flocked to colleges, jobs, and careers. The rates and acceptance of cohabitation increased dramatically. Marriage rates and birth rates declined gradually, and remarriages and stepfamilies increased their numbers. Interracial marriage and single parenthood increased, particularly among minorities. By the beginning of the twenty-first century, nearly a third of children were born whose parents were not married.

This same period also saw dramatic changes in marriage and family law. Miscegenation laws were gradually eliminated; the last one was overturned by the courts in 1967. Divorce reform led every state to adopt some form of no-fault divorce, and child support orders and enforcement of them increased. Family violence laws increased to include marital rape, and states began to bring charges for domestic abuse perpetrators if evidence existed. Custody arrangements for children following divorce became more complex, including joint custody, split custody, and alternating custody. States continued to try to enforce child-support agreements through garnisheeing, fines, and imprisonment, but many support orders were still not paid in full. States eliminated the condition that husbands approve birth control and abortions, and in 1973 the *Roe v. Wade* (410 U.S. 113, 1973) case made abortions legal in all states. Finally, women had a distinct set of civil rights laws that protected them from earlier biases in marital laws.

Increasingly, gay persons claim civil rights to the benefits of marriage, child custody, and adoption. In 2004, Massachusetts temporarily sanctioned gay marriage and San Francisco issued marriage licenses, but controversy continued. Several other states do or shortly will legitimize gay relationships and offer domestic partnerships to ensure some of the benefits of marriage. Many people oppose gay marriages, especially evangelical Christians, and they try to influence the political process to prevent them. Christianity in the United States continues to play an important role in shaping ideas about marriage, but religious groups vary. Many religious groups support civil rights for homosexuals and other changes that support equity in marriage and civil rights for all family members.

In 2004, the President and Congress funded extensive state programs to promote marriage among low-income families. This controversial set of policies may help stabilize the families of low-income children and/or create greater disruptions with multiple marriages and divorces.

Public authorities do shape marriage, but married people also refine definitions of rights and responsibilities in personal terms. Marriage is expected to change, but not to disappear. Each year individual states mold the marriage laws in response to community standards and to calls for increased civil rights.

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References and Further Reading

Cott, Nancy F. *Public Vows: A History of Marriage and the Nation*. Cambridge, MA: Harvard University Press, 2000.

Hareven, Tamara K. *Family, History and Social Change*. Boulder, CO: Westview, 2000.

Levitan, Sara, and Richard S. Belous. *What's Happening to the American Family?* Baltimore: Johns Hopkins Press, 1981.

MARSH v. CHAMBERS, 463 U.S. 783 (1983)

In *Marsh v. Chambers*, the U.S. Supreme Court upheld the practice of prayers given in legislative chambers by state-paid chaplains. *Marsh* is a significant case in the Court's establishment clause jurisprudence because it exempts a government practice that might otherwise be considered to violate a central religion clause value: the prohibition on the government employing a member of the clergy to conduct worship services. The question raised by *Marsh* is whether it is a legal anomaly or has greater application in related areas such as prayer in public schools or other government acknowledgements of religion.

Marsh was a challenge to the constitutionality of the state-paid chaplain in the Nebraska legislature. The chaplain—at the time, a Presbyterian minister who had held the position for sixteen years—received an annual salary paid by the state and regularly offered prayers at the daily openings of the unicameral legislature. Thus, the challenge involved two related issues: the constitutionality of prayer or other devotional activity as part of an official government function and the constitutionality of state-paid chaplains. The federal district court found that the existence of a chaplain and the saying of prayers in legislatures constitutional, but that the state paying for such services was not. The court of appeals found that all practices violated the establishment clause.

By a six-to-three vote, the Supreme Court upheld the constitutionality of the legislative prayers and the state-paid chaplain. Significantly, the majority opinion, written by Chief Justice Warren Burger, declined to apply one of the Court's established analytical tests (for example, the *Lemon* test) for assessing the constitutionality of religious practices. Instead, the Court majority appealed to "the unambiguous and unbroken history of more than two hundred years" of legislative chaplains. Specifically, the Court looked to actions of the First Congress which passed a law authorizing the appointment and payment of chaplains only three days before finalizing the wording of the First Amendment. The majority reasoned that the Constitution's framers could not have "intended the establishment clause to forbid what they had just declared acceptable."

Turning to the case before them, the Court majority found that the appointment of a chaplain from one

denomination for sixteen years did not, on its own, indicate state preference for one faith over others. Rather, the majority noted, the long tenure merely indicated that the legislature found the chaplain's services satisfactory. Moreover, the chaplain regularly invited ministers of other faiths to give invocations, further indicating the lack of denominational preference in the practice. As for the prayers, the majority noted that the customary practice was for the prayers to be of a nondenominational and ecumenical nature. However, the majority wrote that the particular content of the prayers "is not of concern to judges where, as here, there is no indication that the prayer opportunity has been exploited or proselytize or advance any one, or to disparage any other, faith or belief." Consequently, the majority did not rest its holding on the fact that the prayers could be considered more solemnizing than worshipful.

In dissent, Justice William Brennan criticized the majority's reliance on history, arguing that the practices were unquestionably unconstitutional if one applied "settled doctrine":

Legislative prayer clearly violates the principles of neutrality and separation that are embedded within the Establishment Clause It intrudes on the right of conscience by forcing some legislators either to participate in a prayer opportunity, with which they are in basic disagreement, or to make their disagreement a matter of public comment by declining to participate. It forces all residents of the State to support a religious exercise that may be contrary to their own beliefs. [And] it requires the State to commit itself on fundamental theological issues.

The questions left unanswered by *Marsh* are several. Are legislative prayers constitutional only if they are nondenominational and nonproselytizing? On one hand, the opinion suggests that a sectarian, proselytizing prayer would fail constitutionality, but then the opinion goes on to say that "it is not for [courts] to embark on a sensitive evaluation or to parse the content of a particular prayer." However, following the *Marsh* decision, lower courts have upheld government limitations on the types of prayers that may be given.

A second question concerns the reach of the *Marsh* holding outside the particular context of legislative prayers. Lower courts have generally extended the rule to allow prayers at city council and county commission meetings, but have been less willing to do so for school board meetings, particularly if public school students are in regular attendance. In *Lee v. Weisman*, 505 U.S. 577 (1992), striking invocations and benedictions at public school graduations, the Court refused to rely on *Marsh* as grounds for upholding the practice, noting that the historical

pedigree supporting legislative prayer was relatively unique. Finally, whether the historical rationale used in *Marsh* applies to other government acknowledgments of religion—for example, the national motto on currency and "under God" in the Pledge of Allegiance—remains unclear. In the 2005 Ten Commandments case, *Van Orden v. Perry*, 125 S. Ct. 2854 (2005), the Court majority applied a historical analysis to uphold the display on the Texas Capitol grounds, but also found that other factors mitigated against the religiosity of the display.

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References and Further Reading

- Chemerinsky, Erwin, *History, Tradition, the Supreme Court, and the First Amendment*, *Hastings Law Journal* 44 (1993): 901–919.
- Epstein, Steven B., *Rethinking the Constitutionality of Ceremonial Deism*, *Columbia Law Review* 96 (1996): 2083.
- McConnell, Michael W., *On Reading the Constitution*, *Cornell Law Review* 73 (1988): 359.
- Note. *Constitutional Law—Establishment Clause—Tenth Circuit Holds That City May Deny Opportunity to Deliver Proselytizing Legislative Prayers*, *Harvard Law Review* 112 (1999): 2025–2030.
- Note. *With History, All Things Are Secular: The Establishment Clause and the Use of History*, *Case Western Reserve Law Review* 52 (2001): 573–598.

Cases and Statutes Cited

- Lee v. Weisman*, 505 U.S. 577 (1992)
- Marsh v. Chambers*, 463 U.S. 783 (1983)
- Simpson v. Chesterfield County Board of Supervisors*, 404 F.3d 276 (4th Cir. 2005)
- Snyder v. Murray City Corp.*, 159 F.3d 1227 (10th Cir. 1998)
- Van Orden v. Perry*, 125 S. Ct. 2854 (2005)

See also **Legislative Prayer**

MARSHALL COURT (1801–1835)

The Marshall Court, the era of the Supreme Court from 1801 to 1835 associated with the chief justiceship of John Marshall—long considered America's first great chief justice—is significant in the development and prestige of the Court.

Chief Justice Marshall limited the practice of seriatim opinions by getting the justices together in conference to discuss and often come to an agreement on the legal questions of a case. He usually wrote the opinion of the Court or assigned it to an associate justice. The Marshall Court was important in the development of judicial review, the process by which courts review and rule in the law on the constitutionality of acts of the legislative and executive branches,

giving the judiciary a key constitutional role in American government. Although beginning in state courts in the 1780s, given the chief justice's brilliant explanation and justification of it in his opinion for the Court, *Marbury v. Madison*, 1 Cranch 137 (1803) (which struck down as unconstitutional the mandamus clause of Section 13 of the Judiciary Act of 1789) became the main precedent for judicial review.

When the Marshall Court began, it consisted of all Federalist justices, with Thomas Jefferson president and the Republicans in control of Congress. Afraid that the Federalists would use the judiciary to check the other branches, Republicans were apprehensive over *Marbury*, where potentially a mandamus court order could be issued to James Madison, secretary of state. Although the Court backed down, not wanting a conflict that could weaken it and the national government, many Republicans remained critical of Federalist judges. Appointed during John Adams's presidency, Marshall had earlier defended the Sedition Act and opposed the Virginia Resolutions of 1798; Samuel Chase was remembered for the partisan way he had presided over Sedition Act cases. Indeed, the extreme wing of the Republican Party impeached Chase but failed to convict him in the Senate trial.

The Marshall Court was successful in achieving two major Federalist goals. First, it applied a constitutional check on the states. Also, the Court broadly interpreted the Constitution to develop the national government. In the best example, in a double judicial review case, *McCulloch v. Maryland*, 4 Wheaton 316 (1819), the Court used implied powers to uphold a federal action while striking down a state action. Except for *Marbury*, all of the Court's judicial review cases striking down legislative acts were against states. Many of these came to the Supreme Court upon a writ of error through Section 25 of the *Judiciary Act of 1789*. The Court became engaged in a test of wills with the Virginia high court and its leading judge, Spencer Roane, over judicial review and federal appellate power over state courts in cases such as *Martin v. Hunter's Lessee* (1 Wheaton 304, 1816) and *Cohens v. Virginia* (6 Wheaton 264, 1821). The Court was highly criticized for its nationalist decisions by the states' rights Old Republicans and Jacksonian Democrats.

Second, the Marshall Court pursued the Federalist goal of supporting commercial and creditor interests against state support for popular, farmer, and debtor interests. The Court used the contract clause—"No State shall . . . pass any . . . Law impairing the Obligation of Contracts"—as the main protection for property rights against the states. State actions were struck down in cases such as *Fletcher v. Peck* (6 Cranch 87, 1810), *Dartmouth College v. Woodward* (4 Wheaton 518, 1819), and *Sturges v. Crowninshield* (4 Wheaton

122, 1819). In *Fletcher*, Chief Justice Marshall, in the opinion of the Court, said that in its restrictions on the states, Article I, Section 10 "contains what may be deemed a bill of rights for the people of each state."

He broadly defined contracts to include not just private contracts between citizens but also public ones including government grants of land, and, in *Dartmouth College*, to include charters of incorporation. He stated that individuals' property rights conferred by the contract clause were to be protected at court. In *Sturges*, which involved a state bankruptcy law, The chief justice returned to the Federalist view of the creditor-debtor relations of the 1780s and recalled the stay laws, the issue of paper money, making paper and commodities legal tender, and all of "the peculiar evils of the day." Against "so much mischief," the Constitutional Convention of 1787 "intended to establish a great principle, that contracts should be inviolable."

The Marshall Court also struck down state acts in violation of other clauses in Section 10 such as "No state shall . . . emit Bills of Credit" as in *Craig v. Missouri*, 4 Peters 410 (1830). The Court, however, did not review state actions in terms of common-law rights or the Bill of Rights. Republicans opposed the assertion of a federal common law and were relieved when, in *United States v. Hudson and Goodwin*, 7 Cranch 32(1812), the Court ruled that the federal judiciary did not have a common-law criminal jurisdiction. In *Barron v. Baltimore*, 7 Peters 243 (1833), the Court ruled that the Bill of Rights did not apply to the states. Chief Justice Marshall looked to "the history of the day." It was "universally understood" that during the ratification debate the anti-Federalists demanded a bill of rights, almost every ratifying convention recommended amendments, and Congress proposed and the states ratified the Bill of Rights with safeguards against the new federal government, not the states.

As Federalists left, to be replaced by Republican appointments, the Court benefited from having Joseph Story, a professor of law at Harvard who wrote learned court opinions and legal and constitutional treatises. As the Court shifted, however, from consisting of Federalist to Republican and Democrat appointments, with changing political and ideological views, The chief justice found it harder to maintain agreement among the justices. The Court became divided and dissents increased. With the Court, as with the country, it appeared that much of what Chief Justice Marshall had worked for was threatened by the ascendancy of Andrew Jackson and states' rights Democrats.

The Marshall Court did not leave a strong legacy in the protection of civil liberties. It was active in property rights but this became less valued by the

Court in the twentieth century, and the *Barron* doctrine has been practically reversed. Its precedents, however, would be used later for federal judicial power. The Marshall Court's main contribution to civil liberties was laying a foundation for nationalism, a broad interpretation of the Constitution, and judicial review.

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References and Further Reading

- Amar, Akhil Reed. *The Bill of Rights: Creation and Reconstruction*. New Haven, CT: Yale University Press, 1998.
- Ely, James W., Jr. *The Guardian of Every Other Right: A Constitutional History of Property Rights*, 2nd ed. New York: Oxford University Press, 1998.
- Faulkner, Robert Kenneth. *The Jurisprudence of John Marshall*. Princeton, NJ: Princeton University Press, 1968.
- Hobson, Charles F. *The Great Chief Justice: John Marshall and the Rule of Law*. Lawrence: University Press of Kansas, 1996.
- Johnson, Herbert A. *The Chief Justiceship of John Marshall, 1801–1835*. Columbia: University of South Carolina Press, 1997.
- Smith, Jean Edward. *John Marshall: Definer of a Nation*. New York: Henry Holt and Company, 1996.
- White, G. Edward. *The Marshall Court and Cultural Change, 1815–1835*. New York: Oxford University Press, 1991.

Cases and Statutes Cited

- Barron v. Baltimore*, 7 Peters 243 (1833)
- Cohens v. Virginia*, 6 Wheaton 264 (1821)
- Craig v. Missouri*, 4 Peters 410 (1830)
- Dartmouth College v. Woodward*, 4 Wheaton 518 (1819)
- Fletcher v. Peck*, 6 Cranch 87 (1810)
- Marbury v. Madison*, 1 Cranch 137 (1803)
- Martin v. Hunter's Lessee*, 1 Wheaton 304 (1816)
- McCulloch v. Maryland*, 4 Wheaton 316 (1819)
- Sturges v. Crowninshield*, 4 Wheaton 122 (1819)
- United States v. Hudson and Goodwin*, 7 Cranch 32 (1812)

See also ***Barron v. Baltimore*, 32 U.S. 243 (1833); Bill of Rights; Structure; Chase, Samuel; Constitutional Convention of 1787; Jackson, Andrew; Jefferson, Thomas; Judicial Review; Kentucky and Virginia Resolves; Madison, James; Marbury v. Madison, 5 U.S. 137 (1803); Marshall, John; McCulloch v. Maryland, 17 U.S. 316 (1819); Story, Joseph**

MARSHALL, JOHN (1755–1835)

John Marshall was born September 24, 1755, in Fauquier County, Virginia, and grew up in the frontier counties of that colony. He was educated at home by his father, Thomas, the land agent for

Lord Fairfax and a tutor. In 1775, John joined the Virginia militia, which later became incorporated into the Continental Army, where he served as an officer with General George Washington and Daniel Morgan. Marshall participated in many of the major early campaigns of the Revolution, including Great Bridge, Brandywine, Monmouth, and Valley Forge. As one of his biographers, Jean Smith, notes, this service in the army molded Marshall's nationalism: "I was confirmed in the habit of considering America as my country and Congress as my government. I had imbibed these sentiments so thoroughly that they constituted a part of my being" (Smith, p. 5).

In 1780, Marshall turned his attention to the study of law. He enrolled at the College of William and Mary, where he studied under George Wythe, arguably the leading teacher of the law in the new nation. Following roughly three months of studying, Marshall proceeded to build a thriving private practice in Richmond. He became a successful lawyer and land speculator, ably defending the interests of the purchasers of the former Fairfax estates, which included some of his family members and him. The issue of protecting individual property rights from state taking would come back to visit Marshall while he was chief justice of the U.S. Supreme Court, especially in the cases of *Martin v. Hunter's Lessee* (1 Wheaton 304, 1816), *Fairfax's Devisee v. Hunter's Lessee* (1818), and *Fletcher v. Peck* (6 Cranch 87, 1810).

Chief Justice Marshall recused himself from the first two cases, but wrote the opinion in the last case. He argued that when a state sold land to an individual, that sale constituted a contract, one that could only be ended if the two parties to the contract agreed to dissolve it. These early decisions helped pave the way for *Dartmouth College v. Woodward* (4 Wheaton 518, 1819), which reinforced the binding nature of contracts. The impact of these later decisions was to offer firm protection of private property from state control and to encourage the growth of a capitalist economy.

Before Marshall became chief justice, he enjoyed success as a politician and government minister. He served as a Federalist delegate in the Virginia constitutional convention of 1788, where he supported the new federal constitution with three speeches and his vote. Marshall's experience in the Continental Army, especially viewing the weakness of the Continental Congress and the later Confederation Congress, made him appreciate the need for a strong central government. His conservatism and aristocratic world view also made him deeply suspicious of democracy, and thus events such as Shays' Rebellion of 1786–1787 reinforced his belief in a stronger national government that would curb the popular passions of the people.

During the 1790s, Marshall served in the Virginia House of Delegates; as an envoy to France in 1797–1798, in what became known as the “XYZ Affair”; as a representative from Virginia in the U.S. House of Representatives; and finally as secretary of state under President John Adams. One of the interesting developments in this phase of Marshall’s career was his public disagreement with the high Federalists over the Sedition Act of 1798, which Marshall believed to be a political blunder. He did not attack the law’s constitutionality, noting in the Marshall–Lee paper that the First Amendment protected freedom of religion and the press, but not freedom to print libel.

The culmination of Marshall’s career, though, was as chief justice of the Supreme Court. He served in this role from 1801 until his death in 1835. His decisions and political skills helped him protect the Supreme Court’s independence from the political battles of the Federalists and Republicans in the first decade of the nineteenth century. In particular, the decision in *Marbury v. Madison* (1 Cranch 137, 1803), though perceived as unimportant at the time, asserted the right of judicial review for the Court. The Supreme Court thus acquired the right to pass judgment on the constitutionality of acts passed by Congress. The Marshall Court built upon this foundation of judicial review by declaring in two key cases—*Martin v. Hunter’s Lessee* (1816) and *Cohens v. Virginia*, 6 Wheaton 264 (1821)—that the Supreme Court had the power to review the decisions of state courts and to overturn these decisions if they were in error with federal constitutional interpretation.

Chief Justice Marshall, who wrote about half of the decisions involving constitutional interpretation, also strengthened the power of the national government at the expense of the states. This latter development can be clearly seen in the decisions in *McCulloch v. Maryland* (4 Wheaton 316, 1819) and *Gibbons v. Ogden*, 22 U.S. 1 (1824). The first case involved the national bank, while the second concerned itself with steamship lines between New York and New Jersey. The chief justice was not always successful in weakening state power, as the case of *Worcester v. Georgia* (1832) revealed. Though the Court ruled against the state of Georgia, without the support of President Jackson, there was no way for the Court to enforce its decision.

Finally, Chief Justice Marshall also played a role in establishing the law on treason when he presided over the trial of Aaron Burr in 1807, which resulted in Burr’s acquittal because the government failed to produce two witnesses to an overt act of treason against the United States. The chief justice’s nationalism had its limits. In 1833, the Marshall Court ruled in *Barron v. Mayor of Baltimore* (7 Peters 243) that the Bill of Rights did not apply to the states. This case involved

the seizure of property by the city of Baltimore and whether or not the Fifth Amendment forbade such a seizure. None of the amendments in the Bill of Rights could limit state power, argued Chief Justice Marshall. The Bill of Rights had been written to protect individual liberties from abuse by the national government, not the states. This case reflected the decline of nationalism in the jurisprudence of the Marshall Court from its heyday in the years from 1819 to 1824.

John Marshall’s influence upon the Supreme Court and the nation was immense. He strengthened the Court and made it an equal branch of government with the executive and legislative branches. His Court’s decisions also strengthened the powers of the national government, protected private property, and paved the way for the economic expansion in the last sixty-five years of the century.

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References and Further Reading

- Newmyer, R. Kent. *The Supreme Court Under Marshall and Taney*. Arlington Heights, IL: Harlan Davidson, Inc., 1968.
- . *John Marshall and the Heroic Age of the Supreme Court*. Baton Rouge: Louisiana State University Press, 2001.
- Smith, Jean Edward. *John Marshall: Definer of a Nation*. New York: Henry Holt and Company, 1996.
- Stites, Francis N. *John Marshall: Defender of the Constitution*. Boston: Little Brown and Company, 1981.
- White, G. Edward. *The Marshall Court and Cultural Change, 1815–1835*. New York: Oxford University Press, 1991.

Cases and Statutes Cited

- Barron v. Mayor of Baltimore*, 7 Peters 243 (1833)
- Cohens v. Virginia*, 6 Wheaton 264 (1821)
- Dartmouth College v. Woodward*, 4 Wheaton 518 (1819)
- Fairfax’s Devisee v. Hunter’s Devisee* (1818)
- Fletcher v. Peck*, 6 Cranch 87 (1810)
- Gibbons v. Ogden* (1824)
- Marbury v. Madison*, 1 Cranch 137 (1803)
- Martin v. Hunter’s Lessee*, 1 Wheaton 304 (1816)
- McCulloch v. Maryland*, 4 Wheaton 316 (1819)
- Worcester v. Georgia* (1832)

MARSHALL, THURGOOD (1908–1993)

Early Life and Career as Civil Rights Advocate

Preeminent civil rights lawyer, federal appellate judge (1962–1965), solicitor general (1962–1965), and associate justice of the Supreme Court (1967–1991),

Thurgood Marshall was the most visible and effective civil rights litigator of the twentieth century. While making historic contributions to equal protection jurisprudence, Marshall also expanded the judicial recognition of core constitutional protections of individual civil liberties.

Born into an African-American family in Baltimore, Marshall shortened his birth name “Thoroughgood” to Thurgood as a boy. He vividly remembered early experiences with racism and later described Baltimore as the most segregated city in the country. His father, a food service worker, counseled active resistance to racism and encouraged an interest in politics and law.

He graduated with honors from Lincoln University in Pennsylvania and enrolled at the law school at Howard University, which Charles Hamilton Houston had recently transformed from a municipal school specializing in training African-American lawyers to represent African Americans into a dynamic institution devoted to raising the profile of black lawyers and on training a new generation of lawyers to fight for equal rights.

After graduating first in his class from law school in 1933, Marshall opened a law office in Baltimore, but the economic depression and limited legal opportunities for African-American lawyers forced him to moonlight as a file clerk. He played a leading role in reviving the Baltimore chapter of the National Association for the Advancement of Colored People (NAACP).

Within months of graduating from law school, Marshall was actively seeking legal opportunities to challenge Maryland’s segregated university system. NAACP challenges to Jim Crow laws were supported by the Garland Fund administered by Roger Baldwin (founder of the American Civil Liberties Union). In 1935, Marshall and Charles Hamilton Houston sued in Maryland state court for an order directing Maryland’s state law school to admit Donald Murray, an African-American graduate of Amherst College whose application had been denied. They won at the trial and the appellate levels, establishing that the state’s obligation to provide legal education could not be satisfied by sending Murray to an out-of-state school.

In 1936, Marshall joined Houston as staff counsel at the NAACP office in New York. He developed rapidly into an effective litigator and public speaker, serving as the NAACP’s sole full-time lawyer for several years after Houston left in 1938, and presiding as chief counsel over a growing legal staff until 1961. Soon after his arrival, the NAACP’s legal office was separately reorganized to maintain its tax-exempt status as the Legal Defense Fund.

As NAACP litigator, Marshall coordinated and participated in many of the leading civil rights cases of the mid-twentieth century. He acquired a reputation as a master trial lawyer and consummate appellate advocate. Counting his later work as solicitor general, he argued more than thirty cases before the Supreme Court.

Marshall also influenced NAACP strategy. For many years the American Civil Liberties Union informally forwarded race cases to the NAACP. Initially, the NAACP restricted its defense of criminal defendants to individuals who were innocent and the victims of racial discrimination. While Marshall was sensitive to the political cost of representing wrongdoers, he recognized the importance of individual rights. The NAACP mounted a broad opposition to peonage and successfully challenged coerced confessions in *Chambers v. Florida*, 309 U.S. 227, 241 (1940); *Canty v. Alabama*, 309 U.S. 629 (1940); and *White v. Texas*, 309 U.S. 631 (1940)—cases that laid the foundation for the Supreme Court’s later ruling in *Miranda v. Arizona*, 348 U.S. 436 (1966).

The NAACP obtained signal victories in state courts, such as when California courts ruled that closed-shop unions could not exclude African Americans. It presented creative constitutional arguments supporting the expansion of minority rights. For example, in *Morgan v. Virginia*, 328 U.S. 373 (1946), Marshall successfully argued that the commerce clause prohibits segregated facilities on interstate public transportation; in *Shelley v. Kramer*, 334 U.S. 1 (1948), the Supreme Court expanded its view of state action to ban the judicial enforcement of private agreements prohibiting property sales to African Americans. During Marshall’s leadership, the NAACP mounted successful challenges to laws excluding African Americans from voting, persuading the Supreme Court to adopt a broader view of state action in a series of decisions definitively repudiating the constitutionality of white Democratic primaries.

NAACP legal strategy in the 1930s focused heavily on education with twin tactics of challenging unequal pay for black teachers and the exclusion of qualified black applicants from graduate and professional programs. Employing the prevailing constitutional doctrine of “separate but equal,” Marshall won many equalization cases challenging the lower salaries of African-American teachers. Following his success in desegregating Maryland’s law school, he mounted successful challenges in other states to the nonexistent or substantially unequal educational opportunities for African-American graduate and professional students.

Marshall always understood that segregated facilities, regardless of their quality, were designed to

isolate African Americans and stigmatize them as an inferior race. In the 1940s, he began direct challenges to the constitutional foundations of legalized segregation. Public support grew after World War II for the NAACP's opposition to segregation, and the Justice Department began to file briefs supporting the NAACP in some cases. In *Sweatt v. Painter*, 339 U.S. 629 (1950), the Supreme Court did not expressly outlaw segregation, but it held that Texas must admit a qualified African-American applicant to its historically white law school because its new all-black law school was not "equal." The Court's opinion suggested that segregated professional schools might never be truly equal, hinting that the Court might be prepared to overrule the doctrine of "separate but equal."

Marshall directed legal strategy in and personally argued and reargued the cases that resulted in the definitive end to the Supreme Court's approval of segregated public schools in *Brown v. Board of Education*, 347 U.S. 483 (1954). Southern politicians adopted a policy of massive resistance, defying their constitutional obligation to dismantle state-run segregated programs. The Arkansas governor closed the Little Rock public schools rather than integrate them. Marshall took the case before the Supreme Court in *Cooper v. Aaron*, 358 U.S. 1 (1958). The Supreme Court unanimously required Arkansas to reopen its schools and issued a forceful opinion vindicating the constitutional right of children to attend integrated schools and prohibiting Arkansas' attempt to violate that right by indirect means.

Political resistance indefinitely postponed the realization of the rights secured by many of Marshall's courtroom victories, and unlawful remnants of dual school systems remained in operation at the time of his death. Nevertheless, his legal victories altered the framework of legal debate, limiting the power of legislative bodies openly to discriminate against racial minorities through the pretext of separate but equal facilities, and opened a wide range of opportunities for individuals that were previously denied to them based on their race.

In the 1950s, Marshall became a prominent spokesman for civil rights, traveling and speaking throughout the country. In 1960, he visited Kenya and then spent seven weeks in London helping draft the new constitution for Kenya. He wrote the whole schedule of rights, which provided strong protections for the white minority and established free legal remedies for landowners whose lands were improperly taken.

Marshall's civil rights career provided a role model for other public interest lawyers. The NAACP's successes led it to be targeted by hostile state politicians. Its ultimate vindication before the Supreme Court in

NAACP v. Button, 371 U.S. 415 (1963), established an important precedent recognizing public interest litigation as an expressive activity and as a vehicle for securing rights protected by the First Amendment.

Judicial Career

In 1961, President Kennedy nominated Marshall to the U.S. Court of Appeals for the Second Circuit. After delays caused by southern senators, he was confirmed later that year. He sat on the court until 1965 and authored more than 130 opinions. His opinion in *Hetenyi v. Wilkins*, 348 F.2d 844 (2d Cir. 1965), expanded the scope of the double jeopardy clause and announced the theme of later opinions that courts must be "faithful to the evolution of our societal values."

President Johnson appointed Marshall solicitor general in 1965. He served for two years in that capacity, arguing eighteen cases to the Supreme Court. In 1967, Johnson nominated Marshall to be an associate justice on the Supreme Court. He played an active role on the court until his retirement in 1991, first contributing to the Court's liberal majority under Chief Justice Earl Warren and then frequently dissenting against the conservative turn of the Burger and Rehnquist Courts.

Justice Marshall championed important expansions of civil liberties. In *Stanley v. Georgia*, 394 U.S. 557 (1969), he wrote the opinion that recognized that the First Amendment protects the right to possess certain materials: "this right to receive information and ideas, regardless of their social worth . . . is fundamental to our free society." He dissented in *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984), when the Court upheld government regulations that prevented homeless advocates from organizing sleeping camps on park property. He objected to the narrowing of the "least restrictive means" test by the majority in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989). In *Amalgamated Food Employees v. Logan Valley Plaza*, 391 U.S. 308 (1968), he wrote the opinion establishing that shopping malls should be treated as public areas for purposes of free-speech rights. He dissented as a conservative majority limited and eventually overruled *Logan Valley Plaza* in *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972), and *Hudgens v. NLRB*, 424 U.S. 507 (1976).

In appeals from desegregation orders and in later cases questioning affirmative action programs, Justice Marshall consistently maintained that deeply entrenched patterns of racial discrimination made it reasonable for states and the federal government to

adopt broad remedial programs aimed at ending the continuing effects of discrimination. He insisted that the history and the purposes of the equal protection clause permitted such programs. He wrote stinging dissents in *Regents of University of California v. Bakke*, 438 U.S. 265 (1978), and other cases criticizing the Court's refusal to sustain affirmative action programs.

The justice's experience with the unequal application of capital punishment led him to oppose it from an early age. On the Court he and Justice William Brennan consistently maintained that the death penalty violated the Eighth Amendment prohibition against cruel and unusual punishment. In the face of legislative efforts restoring capital punishment, he argued forcefully in his dissent in *Gregg v. Georgia*, 428 U.S. 153 (1976), that capital punishment violates evolving standards of informed citizens, that such punishment is inherently irrational, and that it is evil because it assumes "the total denial of the wrongdoer's dignity and worth."

Sympathetic to the economic goals of the New Deal and the social reform goals of Johnson's Great Society programs, Justice Marshall exercised judicial restraint in reviewing government and state actions that he believed were reasonable or benevolent in motive. He defended the constitutionality of broad limits on campaign spending in his separate opinion in *Buckley v. Valeo*, 424 U.S. 1 (1976), and he joined the dissent in *Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869 (1985), where the Supreme Court held that Alabama could not discriminate against nonresident insurance companies by imposing higher taxes.

At the same time, he was sensitive to the ways that laws could mask hostility to disfavored groups or individuals, and he engaged in more active judicial review of claims advanced by the powerless and disadvantaged. He wrote the opinion holding that states could not prevent citizens from voting who had not resided in state for one year (*Dunn v. Blumstein*, 405 U.S. 330, 1972). He employed equal protection arguments to strike down a Chicago ordinance that prevented picketing near schools except for labor disputes (*Police Department of Chicago v. Mosley*, 408 U.S. 92, 1972). He did not believe that legal procedures that were not supported by any reason or policy other than long-standing tradition were compatible with due process. He wrote the opinion in *Shaffer v. Heitner*, 433 U.S. 186 (1977), which required that state court jurisdiction must in all cases satisfy general constitutional standards of reasonableness and fairness.

As a former trial lawyer, Justice Marshall recognized the special importance of the Sixth Amendment right to counsel. He opposed the onerous standards

erected by the Supreme Court to prove "ineffective assistance of counsel" because he understood that these prevented meaningful review of cases in which criminal defendants did not receive adequate counsel at trial.

In Fourth Amendment cases he routinely voted with civil libertarians in requiring warrants and limiting exceptions to warrant requirements. In his dissent in *Schneekloth v. Bustamonte*, 412 U.S. 218 (1973), he argued that consensual-search exceptions to the warrants should require informing suspects of their right to refuse to consent. In *Florida v. Bostick*, 501 U.S. 429 (1991), he similarly dissented from a decision admitting a dragnet search in which he perceived elements of police coercion.

Justice Marshall was a reliable supporter of First Amendment rights, though some scholars have questioned whether he developed a theoretically consistent approach to the First Amendment. Professor Smith concludes, "Whether he approached a case from a realist or a formalist position, the end result was nearly always a call for more liberty." Professor Wells theorizes that the justice's sympathy for First Amendment claims reflected his commitment to "the value of speech in promoting individual self-realization in a democratic society."

Justice Marshall worked to move the Court away from the prevailing formalism in its equal protection analysis that routinely affirmed disparate state treatments of classes not defined by race. Mark Tushnet, Justice Marshall's biographer and former clerk, maintains that the justice's most important contribution to constitutional doctrine was his "sliding-scale" theory of equal protection rights. Under prevailing equal protection analysis, legal distinctions based on race are suspect and are constitutional only when they clearly advance a compelling and legal state policy. In contrast, legal distinctions on other grounds are constitutional when they are supported by any lawful state policy. Justice Marshall proposed a more flexible standard that provided real protection for other disfavored persons besides racial minorities and that also respected valid state political goals.

In dissenting opinions he offered the vision of broader constitutional rights, including equal educational opportunity and access to medical treatment. He dissented from a decision permitting the exclusion of women from draft registration and from a decision approving laws that mandated retirement at a certain age.

Marshall's career exhibited an unflagging recognition that a free society, "true democracy," required genuine equality. Accordingly, he viewed the Fourteenth Amendment guarantee of equal protection and the incorporation of the Bill of Rights under the due

process clause as providing “a new, more promising basis for justice and equality” for all.

Marshall married Vivian (“Buster”) in 1929. She died of lung cancer in February 1955. He married Cecilia Suyatt in December 1955 and they had two children, Thurgood, Jr. and John.

Despite the passage of time and the eclipse of progressive and egalitarian values on the Supreme Court, Justice Marshall’s reputation endures among civil libertarians and legal theorists. He is venerated by the marginalized communities to whom he gave a voice. While his immediate effect on the Supreme Court was limited, his legacy endures in the vision of the power of constitutional law to secure freedom in a democratic political system marked by deep racial and social divisions.

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References and Further Reading

- Ball, Howard. *A Defiant Life: Thurgood Marshall and the Persistence of Racism in America*. New York: Crown Publishers, Inc., 1999.
- Bland, Randall Walton. *Private Pressure on Public Law: The Legal Career of Thurgood Marshall*. Prot Washington, Kennikat Press, 1973.
- . *Thurgood Marshall: Crusader for Liberalism: His Judicial Philosophy 1908–1993*. Bethesda, MD: Academia Press, 2001.
- Green, Bruce A., and Daniel Richman, *Of Laws and Men: An Essay on Justice Marshall’s View of Criminal Procedure*, Arizona State Law Journal 26 (1994): 369.
- Marshall, Thurgood, *Reflections on the Bicentennial of the U.S. Constitution*, Harvard Law Review 101 (1987): 1.
- . *Thurgood Marshall: His Speeches, Writings, Arguments, Opinions, and Reminiscences*. Mark V. Tushnett, ed. Chicago: Lawrence Hill Books, 2001.
- . *Supreme Justice: Speeches and Writings*. J. Clay Smith, Jr., ed. Philadelphia: University of Pennsylvania Press, 2003.
- Mello, Michael. *Against the Death Penalty: The Relentless Dissents of Justices Brennan and Marshall*. Boston: Northeastern University Press, 1996.
- Smith, J. Clay, Jr., *Justice Thurgood Marshall and the First Amendment*, Arizona State Law Journal 26 (1994): 461–478.
- Steiker, *The Long Road up From Barbarism: Thurgood Marshall and the Death Penalty*, Texas Law Review 71 (1993): 1131.
- Tushnett, Mark V. *Making Civil Rights Law: Thurgood Marshall and the Supreme Court, 1936–1961*. New York: Oxford University Press, 1994.
- . *Making Constitutional Law: Thurgood Marshall and the Supreme Court, 1961–1991*. New York: Oxford University Press, 1997.
- Wells, N. Douglas, *Thurgood Marshall and “Individual Self-Realization” in First Amendment Jurisprudence*, Tennessee Law Review 61 (1993): 237–287.
- Williams, Juan. *Thurgood Marshall: American Revolutionary*. New York: Random House, 1998.

Cases and Statutes Cited

- Amalgamated Food Employees v. Logan Valley Plaza*, 391 U.S. 308 (1968)
- Brown v. Board of Education*, 347 U.S. 483 (1954)
- Buckley v. Valeo*, 424 U.S. 1 (1976)
- Canty v. Alabama*, 309 U.S. 629 (1940)
- Chambers v. Florida*, 309 U.S. 227, 241 (1940)
- Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984)
- Cooper v. Aaron*, 358 U.S. 1 (1958)
- Dunn v. Blumstein*, 405 U.S. 330 (1972)
- Florida v. Bostick*, 501 U.S. 429 (1991)
- Gregg v. Georgia*, 428 U.S. 153 (1976)
- Hetenyi v. Wilkins*, 348 F.2d 844 (2d Cir. 1965)
- Hudgens v. NLRB*, 424 U.S. 507 (1976)
- Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972)
- Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869 (1985)
- Morgan v. Virginia*, 328 U.S. 373 (1946)
- NAACP v. Button*, 371 U.S. 415 (1963)
- Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972)
- Regents of University of California v. Bakke*, 438 U.S. 265 (1978)
- Schneekloth v. Bustamonte*, 412 U.S. 218 (1973)
- Shaffer v. Heitner*, 433 U.S. 186 (1977)
- Shelley v. Kramer*, 334 U.S. 1 (1948)
- Stanley v. Georgia*, 394 U.S. 557 (1969)
- Sweatt v. Painter*, 339 U.S. 629 (1950)
- Ward v. Rock Against Racism*, 491 U.S. 781 (1989)
- White v. Texas*, 309 U.S. 631 (1940)

See also ***Brown v. Board of Education*, 347 U.S. 483 (1954); Capital Punishment; Fourteenth Amendment; National Association for the Advancement of Colored People (NAACP)**

MARTIN v. OHIO, 480 U.S. 228 (1987)

After being assaulted by her husband, the defendant killed him as he approached her. The trial court instructed the jury that it must find that the prosecution established, beyond a reasonable doubt, the following elements of aggravated murder in order to return a guilty verdict: with purpose and with prior calculation and design, causing the death of another. The jury was also instructed that although it could consider the defendant’s evidence of self-defense in determining the defendant’s guilt, she bore the burden of persuasion on proving to the jury, by a preponderance of the evidence, the defense of self-defense. The jury returned a verdict of guilty, which two state appellate courts affirmed.

Affirming the conviction, the Supreme Court ruled that since the jury could consider self-defense even if the defendant did not meet her burden of persuasion, and that proving self-defense did not disprove any of the elements of the offense, allocating the burden of persuasion to the defendant did not violate

constitutional standards of due process. Although the imminence element of self-defense (requiring a defendant to believe the victim posed an imminent danger) might typically negate the element of prior calculation and design, the Court found that it would not invariably do so. As a result, constitutionally the prosecution need not bear the burden of persuasion on disproving a defense unless the defense *directly* and *explicitly* negates an element of the offense. However, *Martin's* influence has been limited; most states allocate the burden of persuasion on self-defense to the prosecution.

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References and Further Reading

Fletcher, George P. *Basic Concepts of Criminal Law*. New York: Oxford University Press, 1998.

Robinson, Paul H. *Criminal Law Defenses*. St. Paul, MN: West Publishing Co., 1984.

See also *Patterson v. New York*, 432 U.S. 197 (1977); *Self-Defense*; *Ulster County Court v. Allen*, 442 U.S. 140 (1979)

MARYLAND "DECLARATION OF RIGHTS" (1776)

See *Bills of Rights in Early State Constitutions*.

MARYLAND TOLERATION ACT (1649)

In 1629, George Calvert, first Lord Baltimore, established the Maryland colony as a haven for English Catholics. George died in 1632 and his son, Cecilus, or Cecil, Calvert, second Lord Baltimore, developed the colony and became its first proprietor. Cecil, Lord Baltimore, sent his younger brother, Leonard Calvert Maryland, to run the colony. The Stuart monarch supported this colony, but religious freedom for Catholics was undermined by the English Civil War. With the death of Leonard Calvert in 1647, Puritans seized the colony, arrested a number of Catholic leaders and priests, and brought an end to toleration in Maryland. However, in 1649, control of the colony reverted back to the Calverts. At this point Cecil, Lord Baltimore, wrote "An Act Concerning Religion," which is better known as the Maryland Toleration Act. The Maryland legislature adopted this law on September 21, 1649.

The Maryland Toleration Act is often cited as the beginning of religious freedom in America. This understanding of the act is true, but only in the most

limited ways. Officially titled An Act Concerning Religion, this law was designed to protect Trinitarian Christians in the Maryland colony. The law provided that "noe person or persons whatsoever within this Province . . . professing to believe in Jesus Christ, shall from henceforth bee any waies troubled, Molested or dicountenanced for or in respect of his or her religion nor in the free exercise thereof." At the time, Catholics faced severe persecution in England. Thus, the act was a significant step forward in the struggle for religious liberty. This was also the first use of the term "free exercise thereof," which would later be used in the First Amendment.

The act did not however, offer religious freedom in the modern sense of the term. The law was draconian in its punishment of dissenters and people of other faiths. The statute provided that anyone who should

deny our Saviour Jesus Christ to bee the sonne of God, or shall deny the holy Trinity the father sonne and holy Ghost, or the Godhead of any of the said Three persons of the Trinity or the Unity of the Godhead, or shall use or utter any reproachfull Speeches, words or language concerning the said Holy Trinity, or any of the said three persons thereof, shalbe punished with death and confiscation or forfeiture of all his or her lands and goods.

Jews, Unitarians, skeptics of any kind, and of course any nonbelievers might be executed under this provision. Later in the century, a Jewish merchant would be sentenced to death for his faith, but in the end he would merely be expelled from the colony.

The law also tried to regulate religious discussion. Thus, anyone who might "utter any reproachfull words or Speeches concerning the blessed Virgin Mary the Mother of our Saviour or the holy Apostles or Evangelists" could be fined, imprisoned, or whipped; have his property confiscated; or be expelled from the colony. Fines and imprisonment might also be meted out to anyone who

in a reproachful manner or Way declare call or denominate any person or persons whatsoever inhabiting, residing, traffiqueing, trading or comerceing within this Province . . . an heritick, Scismatick, Idolator, puritan, Independant, Prespiterian popish prest, Jesuite, Jesuited papist, Lutheran, Calvenist, Anabaptist, Brownist, Antinomian, Barrowist, Roundhead, Separatist, or any other name or terme in a reproachfull manner relating to matter of Religion.

Finally, the statute provided penalties for anyone who might "prophance the Sabbath or Lords day" by swearing, being drunk, working unnecessarily, or failing to attend church.

The goal of the statute was to create harmony between Protestants and Catholics in a colony that

had been founded by a Roman Catholic proprietor, Lord Baltimore, but was populated mostly by Protestants. The act did not accomplish much. In 1654, the Puritan-controlled colonial legislature repealed the act and banned Roman Catholics from living in the colony. However, Oliver Cromwell interceded and once again restored the Calverts to power. In 1658, Maryland reenacted the Toleration Act. After the Glorious Revolution, the Catholic Calverts lost all control of the colony, and in 1692 the newly appointed royal governor removed all Catholics from power by requiring all office holders to take a Protestant oath. By 1702, the Church of England had been established as the official church of the colony. Catholics were allowed to settle in Maryland and practice their faith, but could not hold office, and after 1718 could not vote. By the time of the Revolution, Maryland had distanced itself from its brief flirtation with some form of religious toleration.

The act of 1649 illustrates the limited notions of religious freedom in the seventeenth century, while at the same time demonstrating that some leaders understood that religious toleration could produce a peaceful society. In the act, Lord Baltimore explained why such legislation was necessary. Baltimore wrote that: “the inforcing of the conscience in matters of Religion hath frequently fallen out to be of dangerous Consequence in those commonwealths where it hath been practised, And for the more quiett and peaceable governement of this Province, and the better to preserve mutuall Love and amity amongst the Inhabitants” free exercise for Trinitarian Christians would be protected in the colony.

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References and Further Reading

- Curry, Thomas J. *The First Freedoms: Church and State in America to the Passage of the First Amendment*. New York: Oxford University Press, 1986.
- Krugler, John D. “Lord Baltimore, Roman Catholics, and Toleration: Religious Policy During the Early Catholic Years, 1632–1649.” *Catholic Historical Review* 65 (1979): 49–75.

MARYLAND v. BUIE, 494 U.S. 325 (1990)

Police officers making an in-home arrest may face danger from other, unknown, persons present who could attack the officers during or after the arrest. Consequently, officers in such circumstances usually conduct a cursory inspection of the premises to ensure their safety. This is referred to as a “protective sweep.” Historically, this sweep included the entire structure in which the arrest took place.

In *Maryland v. Buie* the U.S. Supreme Court placed some restrictions on the police protective sweep authority. The Court held that police officers may, incident to an arrest in a home, conduct a limited protective sweep of any areas “immediately adjacent” to where the arrest takes place without probable cause or even reasonable suspicion that an attack is imminent. This protective sweep was justified as incident to the arrest, per the rule developed in *Chimel v. California*, 395 U.S. 752 (1969). Additionally, the Court held that, in order for police officers to conduct a more extensive search of the entire residence, they must have a “reasonable and articulable” suspicion that someone may be hiding there.

Maryland v. Buie gives officers the ability to protect themselves and others from potential danger during an arrest while at the same time preserving Fourth Amendment rights to freedom from unreasonable searches. The Court used the *Terry v. Ohio*, 392 U.S. 1 (1968), reasonable suspicion test to place some limits on the police authority to rummage throughout a home simply because an arrest occurred there. Unfortunately, the Supreme Court neglected to define “immediately adjacent,” leaving this to lower courts to sort out.

VALERIE R. BELL

Cases and Statutes Cited

Chimel v. California, 395 U.S. 752 (1969)

See also **Probable Cause; Search (General Definition); Stop and Frisk; Warrantless Search**

MARYLAND v. CRAIG, 497 U.S. 836 (1990)

Craig was convicted in a Maryland state court for sexually abusing a child. During the trial the judge permitted the girl to testify out of court on a one-way closed-circuit television pursuant to a state statute that permitted this procedure in cases in which the trial judge finds that the child would suffer trauma if she were required to testify in court in the presence of the defendant. The issue was whether this procedure violated the Sixth Amendment’s confrontation clause. In upholding the conviction (five to four), the U.S. Supreme Court held that the procedure did not violate Craig’s confrontation rights.

The Court observed that the clause’s primary purpose is to ensure the reliability of evidence by subjecting it to rigorous adversarial testing. In furtherance of this purpose the confrontation right encompasses several rights such as physical presence in court and

cross-examination, but does not include an *absolute* right to face-to-face confrontation with a witness. Instead, an arrangement such as the one used in this case is acceptable when necessary to further an important government policy and the other aspects of the confrontation right, such as cross-examination, are preserved. Protecting a child from the trauma that might result from testifying in court is a sufficiently important interest so long as there was evidence to support the judge's findings regarding that child. Inasmuch as the trial judge in this case made the specific findings as required by the statute and the other aspects of the confrontation right were protected, the procedure did not violate the confrontation clause.

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References and Further Reading

- Cecchetti–Whaley, Gail D., *Note: Children as Witnesses After Maryland v. Craig*, Southern California Law Review 65 (1992): 1993–2037.
- Goodhue, George K., *Comment: Maryland v. Craig: Balancing Sixth Amendment Confrontation Rights With the Rights of Child Witnesses in Sexual Abuse Trials*, New England Law Review 26 (1991): 497–528.
- LaFave, Wayne R., Jerold H. Israel, and Nancy J. King. *Criminal Procedure*, 4th ed. St. Paul, MN: Thomson/West, 2004.

Cases and Statutes Cited

- Maryland Courts and Judicial Procedure Code Annotated Section 9-102 (1989)
- U.S. Constitution, Amendment VI

See also **Confrontation Clause; Defense, Right to Present**

MASON, GEORGE (1725–1792)

A sometimes grouchy Virginia gentleman who always preferred to stay at home and keep to himself, George Mason nonetheless allowed himself on several occasions to be lured into public service. Mason's father died when Mason was eleven years old, and he left Mason a sizable plantation on the banks of the Potomac River, only a few miles from Mount Vernon and Mason's Virginia neighbor, George Washington.

Bothered as an adult by gout, impatience, and a generally cantankerous disposition, Mason had few friends outside his family, but he was respected within his community for his education, his good judgment, and his business sense. A man of deep conviction, on several occasions he refused nomination for public office, since he also disliked the compromise and minutiae that often accompanied political service.

When the British parliament passed the Stamp Act in 1766 requiring American colonists to pay a tax on all legal or public documents, Mason and others were infuriated. Decrying Parliament's authority to tax colonists, who had no representation in Parliament, Mason wrote letters to other influential citizens of Virginia and formed a base of organized resistance. At first they focused on rationalizing their position on British common law and tradition, and when Parliament repealed the act, it was seen as a victory for colonial civil rights. But the Declaratory Act, which reaffirmed Parliament's right to pass legislation for the American colonies, made Mason and other colonial constitutionalists even angrier.

Mason and Washington drew up a set of nonimportation resolves, a voluntary association of Virginia planters and merchants that aimed to put economic pressure on British merchants and, ultimately, on Parliament. To enforce the boycott, Mason suggested posting a public list of all those Virginians who violated the agreement and subjecting them to public scorn, but Washington disagreed and changed Mason's mind. The resolves did organize local watchdog committees to ensure that all Virginians who had political aspirations complied, and they reported violators.

After the Boston Tea Party, Parliament again asserted its authority over the colonies by passing the Intolerable Acts and closing Boston harbor. Mason responded by writing twenty-four resolutions, which he had Washington introduce into the Virginia House of Burgesses. The Fairfax Resolves invoked the colonists' rights as Englishmen, emphasized their right to resort to extralegal measures if those rights were threatened, and called for an extensive boycott on British goods. When Washington was appointed as commander in chief of the Continental army, Mason was elected to fill his Fairfax County seat in the House of Burgesses.

When reconciliation with England began to look unlikely, and when leaders from the Continental Congress sent word to the states that they should begin constructing state constitutions, other burgesses looked to Mason. Assigned to a committee in the spring of 1776 to draft the new constitution, Mason and his committee quickly wrote the preamble, also known as the *Virginia Declaration of Rights*. Mason favored the first ten articles, which began, "That all men are by nature equally free and independent, and have certain inherent rights . . ."

Besides declaring equality before the law for all citizens of the state and reminding the government that all power and sovereignty reside in the citizens and therefore that the government serves at the pleasure of its citizens, Mason's articles established a three-branch government and guaranteed rights for

persons accused of a crime. The committee added six other articles affirming freedom of the press and religion and then presented it to the other burgesses for consideration. It passed unanimously after the House removed two of the articles added by the committee. Bearing unmistakable similarities to John Locke's writings some one hundred years before, the Declaration of Rights was based on a long tradition of value for basic human rights of life, liberty, and the right to enjoy one's property.

Several weeks after the Virginia Constitution was ratified, Thomas Jefferson and his committee sat down in Philadelphia to write the Declaration of Independence. Jefferson opened his document with language similar to Mason's: "We hold these truths to be self-evident, that all men are created equal . . ." Historians know that Jefferson had a copy of Mason's Declaration with him as he wrote his document, and he frequently admitted that Mason, Locke, and others influenced his work.

After the Revolution was over and the Articles of Confederacy proved to be a failure, politicians (including Mason) again congregated in Philadelphia, this time to write a new constitution. For months they argued and debated as they drafted a new founding document. Mason made his opinions known frequently, but when the document was finished, Mason vehemently disliked it. Stating that he would rather cut off his right hand than sign the document, Mason faulted it for its failure to include a bill of rights; he felt the Constitution gave too much power to the judicial branch, and he believed it formed a powerful aristocracy that would tend to retain power too long. The Constitution was distributed to the states anyway, having passed with the requisite two-thirds majority; each state was to vote on the issue of ratification. Mason and Patrick Henry conducted a campaign against ratification, but his neighbor and political ally, George Washington, campaigned equally strenuously in favor of ratification. The Constitution was eventually ratified over Mason's protests, by merely ten votes, and Mason retired to Gunston Hall. He lived at home in retirement until he passed away in 1792.

Abrasive and impatient, Mason was never adored like Washington, even in his own state. His uncompromising personality made him more enemies than allies during his career. But he always sought to protect liberty from the encroachment of government, first against the oppressive British powers, then against the U.S. government. He hated politics, and he only reluctantly served in official positions. But he wrote a document in Virginia that captured the thinking of revolutionary intellectual thought, and he provided inspiration for one of the country's most celebrated documents. He was, perhaps, the

grandfather of the Declaration of Independence, the U.S. Constitution, and the Bill of Rights.

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References and Further Reading

Rutland, Robert A. *George Mason, Reluctant Statesman*. Baton Rouge: Louisiana State University Press, 1961.

MASSACHUSETTS BODY OF LIBERTIES OF 1641

For approximately the first decade of the Massachusetts Bay Colony's existence, there was considerable internal strife over what manner of a legal system ought to exist. Also, during that time, the British government had made two attempts to revoke the charter that existed in the colony. For these reasons, the settlers sought to write their own laws. Most of the Puritans, including John Winthrop, wanted a theocratic oligarchy, while others sought after a more representative government. Eventually, Nathaniel Ward, a leading English Puritan minister who was trained as a lawyer and had practiced law in the courts in England, drew a great deal on the code of law proposed by John Cotton in 1636.

This code was based on Mosaic principles and the common law, the early English law. The early English law was developed by judges. It integrated Anglo-Saxon tribal custom, feudal rules and practices, and the everyday rules and behavior of the local people. The merging of the Mosaic principles and the common law resulted in the Massachusetts Body of Liberties of 1641, a detailed document that was one of the most important and underappreciated documents in America's history. It was established by the Massachusetts General Court in December 1641 under the administration of Richard Bellingham, who was then the governor. It was the first code of about ninety-eight articles that were established as the basis for justice in seventeenth-century colonial New England. It comprised civil and criminal laws that governed specific behavior and punishment. The Massachusetts Body of Liberties, in the words of Winthrop, was "a body of grounds of law in resemblance to a Magna Carta."

The Massachusetts Body of Liberties provided for freedom of speech and the right to assembly and petition at public meetings. In fact, the liberties had their roots in biblical teachings, and were a declaration of the "liberties that the Lord Jesus had given to the church." Particularly noteworthy in this regard of the ninety-eight articles of the Body of Liberties was Section 11, Article 95, which, for the first time, gave

ministers legal authority to assemble to discuss controversial issues that pertained to the Bible and religious teachings. In addition, Section 4 of Article 95 stated that “every church hath free liberty of admission, recommendation, dismissal, and expulsion, or deposal of their officers and members, upon due cause, with free exercise of the discipline and censures of Christ according to the rules of his Word.”

It was not surprising, then, that in regard to offenses that were undertaken in the courts, the law was based on the moral interpretation of the Bible. In this respect, references to books, chapters, and verses from the Bible were supplied to channel the interpretation of the law during the court trials. In addition, the Massachusetts Body of Liberties provided for the liberties of men, women, children, servants, foreigners, and animals, and “every man whether inhabitant or foreigner, free or not free” had the “liberty to come to any public Court, Council or Town meeting, and either by speech or writing to move any lawful, seasonal and material question, or present any necessary motion, complaint, petition or Bill or information, whereof that meeting has proper cognizance.”

As well, it guaranteed the defendant’s right of a trial by a jury and to have the right of legal counsel. In addition, it recognized that individual liberty depended on the right to appeal to the courts as the final option. These rights and liberties were “audibly read and deliberately weighed at every General Court that [were] held.” Nevertheless, the Massachusetts Body of Liberties did not make these rights explicitly inalienable. In other words, they could have been altered by the legislature. However, they persisted in Massachusetts for many generations and later appeared in the writings of Samuel Adams, a leader of the Boston Tea Party, and his contemporaries.

Eventually, in 1684, King Charles II was successful in revoking the Body of Liberties and the English law was restored. Two years later, King James established a government in Massachusetts and made Sir Edmond Andros the governor of the colony for a short period. The Massachusetts Body of Liberties served its intended purpose and remained in force until 1692 with the advent of the Provincial Charter. More importantly, the Massachusetts Body of Liberties provided a benchmark for the Bill of Rights and the U.S. Constitution of 1787. The Constitution is looked upon by Americans as the fabric of American democracy.

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References and Further Reading

Black, Barbara, A. “The Concept of a Supreme Court: Massachusetts Bay. 1630–1686.” In *The History of the*

Law in Massachusetts: The Supreme Judicial Court 1692–1992, Russell K. Osgood, ed. Boston: Supreme Judicial Court Historical Society, 1992.

Fischer, David, H. *Albion’s Seed: Four British Folkways in America*. New York: Oxford University Press, 1989.

Fischer, Kirsten, and Hindertaker, eds. *Colonial American History*. Massachusetts: Blackwell Publishing Ltd., 2002.

Wall, Robert E. *Massachusetts Bay: The Crucial Decade, 1640–1650*. New Haven: Yale University Press, 1972.

MASSES PUBLISHING COMPANY v. PATTEN, 244 U.S. 535 (1917)

This case represents an early step in refining the circumstances under which the federal government might punish a person for publishing materials deemed to be likely to incite action against the government or its programs and activities. Because of concerns that antiwar activity would compromise U.S. efforts to pursue its objectives in World War I, Congress passed the Espionage Act of 1917 and subsequently extended its provisions with the Sedition Act of 1918. The law punished efforts to interfere with the armed forces or with the draft. It also authorized certain forms of censorship, including allowing banning from the mails, at the discretion of the postmaster general, of materials considered treasonous or seditious. A large number of prosecutions and convictions resulted from vigorous use of the law, and it ultimately was the basis for a number of groundbreaking court rulings on freedom of expression.

The issue that prompted the *Masses* suit was vigorous use of the law, and it ultimately was the basis for a number of groundbreaking Court rulings on freedom. It arose when the New York postmaster invoked provisions of the Espionage Act to refuse to distribute the radical magazine *The Masses*, which he described as “nonmailable.” Under the editorship of antiwar leftist Max Eastman, the *Masses* was described by its editorial staff as a “revolutionary” publication, often publishing material by such left-leaning authors as Big Bill Haywood, leader of the Industrial Workers of the World, and communist journalist John Reed. Postmaster Patten contended that the magazine’s contents, including articles and cartoons critical of U.S. participation in World War I, constituted a violation of all three clauses of Title I, Section 3, of the Espionage Act, which made it a crime to do anything to obstruct the war effort.

The magazine brought suit challenging the ban in the Federal District Court for the Southern District of New York, presided over by Judge Learned Hand. The judge granted the requested injunction against the postmaster. In so doing, he struck an early blow for protection of freedom of expression, although he

did not base his decision on the First Amendment. Rather, Judge Hand rejected the postmaster's interpretation of the law as punishing material that had a "bad tendency." The judge acknowledged the validity of the postmaster's contention that the law might well arouse unrest among the people, causing them to criticize the war effort and the draft, and to wish to follow the lead of well-known antiwar demonstrators. Yet, he refused to accept the contention that such action constituted obstruction of the war effort. Judge Hand was concerned with the vagueness inherent in the bad-tendency doctrine, contending that its lack of specificity in defining actions that were illegal would make it virtually impossible for alleged violators to defend themselves against the government's charges. He contended that language should be deemed punishable only if it constituted direct advocacy of antiwar actions or direct interference with the draft.

Judge Hand's decision did not win over other judges. A circuit judge stayed the injunction while rejecting the judge's argument, and the full Second Circuit Court of Appeals reversed his opinion altogether. The judge changed course a few years later, becoming an advocate of the clear-and-present-danger test established by Justice Oliver Wendell Holmes, Jr., in his majority opinion in *Schenck v. U.S.*, 249 U.S. 47 (1919).

Judge Hand's opinion in *Masses* was significant because it rejected a blanket interpretation of the Espionage Act of 1917 to allow the government to punish any and all types of expression critical of the U.S. war effort in World War I. While Hand was willing to acknowledge that the government might restrict freedom of expression in wartime, he argued that the laws passed in so doing must be interpreted carefully so as not to be overbroad in their application. The decision reflects current thinking that freedom of speech should be interpreted to apply primarily to political speech and that the common law, rather than the First Amendment, should be regarded as its basis.

The judge's decision in *Masses*, although an important early step in what would become a long and difficult process in defining the reach of free speech, was out of step with the prevailing judicial thinking at the time, which was reflected in a series of U.S. Supreme Court decisions upholding enforcement of the Espionage Act against antiwar activists. It was to be several decades before judicial thinking eventually devised a much broader definition of freedom of expression, a process that some scholars argue culminated with the Supreme Court's decision in *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

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References and Further Reading

Gunther, Gerald, *Learned Hand and the Origins of the Modern First Amendment: Some Fragments of History*, Stanford Law Review 27 (1975): 719–773.
———. *Learned Hand: The Man and the Judge*. New York: Knopf, 1994.

Cases and Statutes Cited

Brandenburg v. Ohio, 395 U.S. 444 (1969)
Schenck v. United States, 249 U.S. 47 (1919)

See also **Bad Tendency Test**; *Brandenburg v. Ohio*, 395 U.S. 444 (1969); **Clear and Present Danger Test**; *Hand*, (Billings) **Learned**; *Holmes*, Oliver Wendell, Jr.; *Schenck v. United States*, 249 U.S. 47 (1919)

MASSIAH v. UNITED STATES, 377 U.S. 201 (1964)

The Sixth Amendment guarantees an accused person the effective assistance of counsel. In *Massiah v. United States*, the Supreme Court found that the Sixth Amendment could apply even when the accused is unaware that he needs assistance.

After being indicted for violating federal narcotics law, Massiah retained a lawyer and was released on bail. Prior to a meeting with Massiah and without his knowledge, codefendant Colson, who was cooperating with government agents, allowed a federal agent to install a radio transmitter under the front seat of his automobile. This transmitter allowed the agent to overhear conversations in Colson's car, including one in which Massiah made incriminating statements. At Massiah's trial, the agent testified to these statements, over defense counsel's objection, and Massiah was convicted.

The Court determined that the government's use of Massiah's statements denied him Sixth Amendment protection. Earlier cases had described the assistance of counsel as vital during the period between arraignment and trial. Although Massiah did not realize that a government agent was listening, the Court reasoned he was still entitled to counsel because he had been indicted. The Court held that the Sixth Amendment bars the use at trial of a criminal defendant's statements when those statements have been deliberately elicited by federal agents after indictment and in the absence of counsel.

Later cases expanded *Massiah* by holding that a criminal defendant's right to counsel arises when adversarial judicial proceedings have been initiated against him, not just after indictment. This right

applies to deliberate elicitation, surreptitious or not, by government agents.

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References and Further Reading

- American Jurisprudence*, 2nd ed., vol. 21A (Criminal Law), sec. 1206 (West Group, 1998), and vol. 29A (Evidence), sec. 750 (Lawyers Cooperative Publishing, 1994).
 Dressler, Joshua. *Understanding Criminal Procedure*, 3rd ed. LexisNexis Publishing, 2002, pp. 508–523.
 LaFave, Wayne R., Jerold Israel, and Nancy J. King. *Criminal Procedure*, vol. 2. Criminal Practice Series. St. Paul, MN: West Group, 1999, chapter 6, sec. 4(b-e).
Maine v. Moulton, 474 U.S. 159 (1985).
 Tomkovicz, James J., *An Adversary System Defense of the Right to Counsel Against Informants: Truth, Fair Play, and the Massiah Doctrine*, University of California Davis Law Review 22 (1988): 1–92.

Cases and Statutes Cited

- Brewer v. Williams*, 430 U.S. 387 (1977)
Kirby v. Illinois, 406 U.S. 682 (1972)
Kuhlmann v. Wilson, 477 U.S. 436 (1986)
Powell v. Alabama, 287 U.S. 45 (1932)
United States v. Henry, 447 U.S. 264 (1980)

See also **Coerced Confessions/Police Interrogations; Due Process of Law (V and XIV); Rights of the Accused; Right to Counsel; *Spano v. New York*, 360 U.S. 315 (1959)**

MATERIAL WITNESSES

A material witness is an individual who has unique information about a crime, beneficial to defense or prosecution. Without this person to provide testimony, the matter may not be resolved. The term is most often used when there is a concern that this witness may flee or otherwise become unavailable to testify and the government seeks to have the witness held against his or her will to ensure the presence at trial or grand jury. While many states have respective material witness statutes, the current federal material witness statute went through its biggest revision as a part of the Bail Reform Act of 1984 and is codified at Section 3144 of Title 18 of the U.S. Code.

Generally, in order for the government to obtain a material witness warrant, it is necessary that a party demonstrate that the witness has information “material” to a criminal proceeding—whether at trial or grand jury proceeding—and that it may become impracticable to secure the witness’s presence at the proceeding by normal subpoena. Once arrested, a material witness may be detained for a reasonable period, until his testimony can be secured. Material

witnesses who are to be considered for detention are entitled to certain basic procedural safeguards which include the right to counsel, notice of the allegations relied upon for detention, a hearing before a magistrate judge, the opportunity to be heard in person and to present witnesses and documentary evidence, and written findings by the judge as to the reason for any adverse decision detaining the witness.

While one of the cornerstones of the American justice system is the requirement that a person be neither subjected to an unreasonable seizure nor deprived of liberty without due process of law, a witness could conceivably be held indefinitely while a grand jury or successive grand juries investigated a case. The Supreme Court has stated that a statute that permits indefinite detention of people, except in such cases as a criminal conviction or a finding that a person poses a threat to himself or others as the result of mental illness, would raise a serious constitutional problem under the due process clause (*Zadvydas v. Davis*, 533 U.S. 678, 690, 2001). With the attacks on the United States on September 11, 2001, material witness laws have been brought to the forefront as an investigatory tool for the government; it is anticipated that further litigation and legislation will continue to grow from this once rarely used law.

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References and Further Reading

- Carlson, Ronald L., *Jailing the Innocent: The Plight of the Material Witness*, Iowa Law Review 55 (1969–1970): 1.
 Studnicki, Stacey M., and John P. Apol, *Witness Detention and Intimidation: The History and Future of Material Witness Law*, St. John’s Law Review 76 (2002): 483.

Cases and Statutes Cited

- Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) 18 U.S.C. 3144
 The First Judiciary Act of Sept. 24, 1789, ch. 20 §§ 30, 33, 1 Stat. 73

MATHIS v. UNITED STATES, 391 U.S. 1 (1968)

While he was in state prison, the petitioner was visited and questioned by an agent from the Internal Revenue Service for a “routine investigation” of tax returns he filed in 1960 and 1961. Without being warned of his right to remain silent, his right to counsel, or that any information he might give could be used against him, the petitioner responded to the agent’s questions. Statements and documents obtained from the petitioner during these visits were later used as evidence to

convict him of knowingly filing false tax returns. The court of appeals affirmed the conviction.

The U.S. Supreme Court reversed. Pursuant to its decision in *Miranda v. Arizona*, 348 U.S. 436 (1966), the Court held that when an individual is in government custody and interrogated on matters that may incriminate him, he must be warned beforehand of his right to remain silent and his right to counsel. Any information obtained, absent these warnings, must be excluded from trial. The Court's decision therefore extended the *Miranda* warning requirement in two important ways. First, it was made clear that tax investigations of people in government custody necessitate a *Miranda* warning. Under the Court analysis, since tax investigations are often made in contemplation of a criminal prosecution, the person under investigation needs to be warned of his or her rights. Second, the Court's decision made it clear that a *Miranda* warning is required to be given to a person in custody even when, as here, the investigation is unconnected to the reason why the person is in custody.

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References and Further Reading

Israel, Jerold H., and Wayne R. LaFare. *Criminal Procedure in a Nutshell*. St. Paul, MN: West, 2001.

Cases and Statutes Cited

Miranda v. Arizona, 348 U.S. 436 (1966)

See also **Coerced Confessions/Police Interrogations; Miranda Warning; Self-Incrimination: Miranda and Evolution**

MATTERS OF PUBLIC CONCERN STANDARD IN FREE SPEECH CASES

The public concern standard has operated primarily in two categories of free-speech cases: those involving speech by government employees and those involving defamation. In both, the public concern standard limits the constitutional protection of speech. The Supreme Court has held that government employee speech must relate to a matter of public concern to be protected from retaliation by employers (*Pickering v. Board of Education*, 391 U.S. 563, 1968).

If speech meets this threshold test of public concern, a balancing test is applied. If the interests of the employer in providing efficient government outweigh the employee's speech interests, the employer can discipline the employee based on the speech. In defamation cases, the Court held in *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749 (1985), that the First Amendment is not implicated when the plaintiff

claiming defamation is not a public figure and the allegedly defamatory speech does not relate to a matter of public concern. Accordingly, the plaintiff need not prove actual malice to obtain damages under state law.

Determining when speech is a matter of public concern has not proved to be an easy task. In *Connick v. Myers*, 461 U.S. 138 (1983), the Court indicated that matters of public concern are those of "political, social or other concern to the community." The content, form, and context of the speech will determine whether it is protected, with content the most important factor. The manner, time, and place of delivery are encompassed within this test. The speaker's motive alone does not determine whether speech is protected, but may be a relevant factor.

The standard has been applied most frequently in employee speech cases. In *Connick*, the Court concluded that speech that relates to an employee's personal grievance does not rise to the level of public concern, even if it raises questions about the efficient functioning of the government, for every employee complaint is not a constitutional matter. But in *Ran-kin v. McPherson*, 483 U.S. 378 (1987), the employee's statement to a coworker about the attempted assassination of President Reagan that "if they go for him again, I hope they get him" met the threshold. The Court noted that the statement was in the context of a discussion on the president's policies and just after the attempt on his life. Additionally, the Court indicated in *Givhan v. Western Line Consolidated School District*, 439 U.S. 410 (1979), that discrimination is inherently a matter of public concern.

In the October 2005 term, in *Garcetti v. Ceballos* (361 F.3d. 1168, 9th Cir. 2004, cert. granted, 125 S. Ct. 1395, 2005), the Court considered whether an employee's speech in the course of his job duties is protected when it deals with a matter of public concern. The employer is arguing that such speech is not protected; instead, the protection only inheres in citizen speech by a government employee. If this argument prevails, some employee speech designed to bring governmental wrongdoing to public light will lose protection. Regardless of the outcome, the decision in this case will provide further guidance to the lower courts, employers, and employees in determining what is protected employee speech and it may modify the public concern requirement in government employee speech cases.

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References and Further Reading

Deskbook Encyclopedia of Public Employment Law. Malvern, PA: Center for Education and Employment Law, 2005.

Estlund, Cynthia Y., *Speech on Matters of Public Concern: The Perils of an Emerging First Amendment Category*, George Washington Law Review 59 (1990): 1.
 Smolla, Rodney A. *Smolla and Nimmer on Freedom of Speech*, vol. 2. Eagan, MN: Thomson/West, 2005.

Cases and Statutes Cited

Connick v. Myers, 461 U.S. 138 (1983)
Dun & Bradstreet v. Greenmoss Builders, 472 U.S. 749 (1985)
Garcetti v. Ceballos, 361 F.3d. 1168 (9th Cir. 2004), cert. granted, 125 S. Ct. 1395 (2005)
Givhan v. Western Line Consolidated School District, 439 U.S. 410 (1979)
Pickering v. Board of Education, 391 U.S. 563 (1968)
Rankin v. McPherson, 483 U.S. 378 (1987)

See also **Defamation and Free Speech; Disciplining Public Employees for Expressive Activity; *Pickering v. Board of Education*, 391 U.S. 563 (1968); *Rankin v. McPherson*, 483 U.S. 378 (1987); Speech of Government Employees**

MCCARRAN–WALTER ACT OF 1952

The McCarran–Walter Act, formally known as the Immigration and Nationality Act of 1952, was a comprehensive reworking of the nation’s immigration laws. Passed at the height of the cold war, the law reflected anxiety about the large numbers of refugees from southern and eastern Europe who entered the United States following World War II and their possible connection to Soviet Communism. It also removed many of the racial exclusions, primarily affecting Asians, of earlier immigration laws. The act prohibited immigration of any person found to be a member of a subversive organization by the attorney general and allowed for the deportation of resident aliens who were, or had been, members of communist and “communist-front” organizations.

The McCarran–Walter Act built upon earlier prohibitions regarding radical aliens. U.S. immigration law had prohibited admission of anarchists since 1903, and the Smith Act of 1940 had allowed for exclusion of members of organizations advocating the violent overthrow of the government. The act specifically allowed for the admission of a formerly communist alien if that individual had been actively opposed to Communism for at least five years or had joined the Communist Party under threat or compulsion.

The McCarran–Walter Act provided for greater administrative discretion in exclusions and deportations and curtailed federal courts’ ability to review immigration decisions. All grounds for deportation were made retroactive, and noncitizens might be

deported for acts that were legal at the time committed. These provisions caused President Harry Truman to veto the act, stating that its lack of adequate judicial safeguards departed from the traditional American insistence on established standards of guilt. Congress overwhelmingly overrode his veto, and the McCarran–Walter Act set America’s immigration standards until 1965.

The act also provided for the denial of a visa of any person who advocated Communism or the violent overthrow of the U.S. government, while allowing for a waiver under the attorney general’s authority. This section was used to exclude a number of foreign intellectuals from touring the United States and speaking or teaching at universities. It was upheld by the Supreme Court in *Kleindienst v. Mandel*, 408 U.S. 753 (1972), but was limited by amendments in 1977 and repealed in 1990, though restrictions remained on travel from Cuba. A similar provision, allowing the government to deny visas to those advocating or publicly endorsing terrorist activity, was enacted in the USA PATRIOT Act of 2001.

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References and Further Reading

Hull, Elizabeth. *Without Justice for All: The Constitutional Rights of Aliens*. Westport, CT: Greenwood, 1985.

Cases and Statutes Cited

Kleindienst v. Mandel, 408 U.S. 753 (1972)
 Immigration and Nationality Act of 1952, 66 Stat. 163 (1952)
 USA PATRIOT Act, 115 Stat. 272 (2001)

MCCARTHY, JOSEPH (1908–1957)

A United States senator from Wisconsin, Joseph McCarthy from 1950 to 1954 led a campaign against communists in government that was routinely disdainful of civil liberties. He was so ruthless and effective that the term “McCarthyism” was applied to all of his era’s red-baiting and, more abstractly, to outbursts in later eras of rabid political labeling employing innuendo, assigning guilt by association, and lying shamelessly.

McCarthy was born in Grand Chute, Wisconsin, the son of devout Catholics who were struggling farmers. He received his early education in a one-room schoolhouse and quit school at fourteen. However, after unsuccessful ventures as a grocer and chicken farmer, he returned to school at the age of twenty and managed to complete four years of high school in only one year. He then enrolled at Marquette University in

Milwaukee, Wisconsin, where he worked part and even full time, enjoyed poker and amateur boxing, and graduated with a law degree in 1935. When running for class president, he and his opponent agreed that each would vote for the other. When McCarthy won by two votes, he admitted that he had voted for himself.

After admission to the Wisconsin bar, McCarthy hung his shingle in the northern Wisconsin towns of Waupaca and Shawano. Three years later he was elected as a circuit judge. He then became known throughout the state for his willingness to issue quick and easy divorce decrees, something much sought in the final years of the fault divorce regime. Milwaukee divorce lawyers were said to drive carloads of clients to McCarthy's Shawano County court.

In 1942, McCarthy took a leave of absence from the bench and was commissioned as a first lieutenant in the Marines. He served in military intelligence in the Pacific, but when he left the Marines in 1945, he altered and, some would say, improved his military record. He claimed he had begun as a "buck private," served as a tail gunner, and was wounded in action.

McCarthy employed the sobriquet "tail gunner Joe" in his victorious campaign for the U.S. Senate in 1946. In the Republican primary he defeated incumbent Robert M. LaFollette, Jr., scion of Wisconsin's most distinguished political family. In the November general election he spoke out against New Deal bureaucrats and also argued that his Democratic opponent, Howard McMurray, was "communistically inclined."

When McCarthy arrived in Washington, D.C., he found the decorum, cordiality, and seniority system of the Senate stifling. Freshmen senators were supposed to remain deferential, but McCarthy was too irascible and ambitious for that. Indeed, he took on fellow senators publicly, often allowing his hot temper to boil over. Some senators considered him a renegade, while others considered him a menace.

McCarthy worried little about what his fellow senators thought of him, but he did worry about finding an issue that would enhance his prominence and assure his reelection. The issue on which he settled was the presence of communists in the government. In a legendary speech delivered on February 9, 1950, in Wheeling, West Virginia, he alleged that the United States, the leader of "the democratic Christian world," was losing the cold war against the Soviet Union and its allies because the government had been infiltrated by communists, fellow travelers, and other traitorous subversives. McCarthy claimed to have a list of 205 State Department employees whom he knew to be communists. The number turned out to be inaccurate, and most of the named individuals no longer worked

in the State Department. But in this instance as well as in many subsequent instances, the naming and labeling more than the accuracy and precision was politically potent.

Many took eagerly to McCarthy's positions and claims, and within only a few months of the Wheeling speech he was the country's most discussed cold war politician. The Republican Party played off McCarthy to cast itself as the party that, unlike the pusillanimous Democratic Party, would stand firm against Communism. Even Dwight D. Eisenhower, who had great distaste for McCarthy's style and lack of character, appeared with him in the 1952 election campaign. Both won easily.

In the Senate, McCarthy showed virtually no interest in drafting and sponsoring legislation. Instead, as chairman of the Senate Committee on Government Operations and its Subcommittee on Investigations, he used investigations and hearings to pursue his enemy—former communists, suspected communists, and, occasionally, actual communists. His methods were anathema to civil liberties. McCarthy was rude and insulting to witnesses, sometimes ostentatiously reading newspapers while they gave statements and frequently badgering, ridiculing, and challenging them. One of McCarthy's favorite tactics was to announce to the hungry press what a witness was going to say before the witness actually testified. This undermined witnesses' subsequent testimony and irreparably harmed their reputations.

The targets of McCarthy's investigations included but were not limited to the Signal Corps, the Central Intelligence Agency, the Government Printing Office, and the International Information Agency, but McCarthy finally went too far when he launched an investigation of the Army. McCarthy's specific concern was the Army's alleged interference with an earlier investigation of a research center in Fort Monmouth, New Jersey. He was perhaps surprised to learn that the Army had its own allegations. According to Army records, on forty-four occasions McCarthy, his staff director Frank Carr, and his chief committee counsel Roy Cohn had attempted to obtain special treatment for David Schine, an inductee, unpaid staff member, and Cohn's best friend.

The hearings took place during April, May, and June of 1954 and, much to McCarthy's detriment, were televised. A smaller percentage of Americans had televisions than in the present, but one survey showed that two-thirds of the families with televisions were watching the hearings. Retailers also reported a huge surge in television sales. McCarthy attacked and belittled witnesses in his customary fashion, but his sweaty, discourteous aggressiveness came across badly on television.

In addition, McCarthy met his match in the person of Joseph Welch, a sixty-three-year-old Boston lawyer, who served as counsel for the Army. As sly as he was courtly, Welch confronted McCarthy directly on June 4, 1954, when McCarthy brought to light the earlier membership in a leftist organization of Fred Fisher, a promising young lawyer in Welch's firm. Welch deplored McCarthy for needlessly scarring the reputation of "the lad." Welch rhetorically asked McCarthy, "Have you left no sense of decency?" The assembled legislators burst into loud applause, leaving McCarthy grimly embarrassed.

After the hearings the Senate, offended for years by McCarthy's conduct and now realizing he was vulnerable, moved against him. On June 11, 1954, Senator Ralph Flanders of Vermont, a member of McCarthy's party, introduced a resolution to censure McCarthy. Censure carried no formal penalty, and even after censure, a senator could maintain his or her seniority, positions on committees, and right to vote in the Senate. Nevertheless, censure is a harsh symbolic gesture; prior to the McCarthy resolution, only five senators had been censured in American history. McCarthy fought the resolution, employing distinguished Washington, D.C. lawyer Edward Bennett Williams as counsel. The resolution carried sixty-seven to twenty-two, with all of the Senate's Democrats and half of its Republicans voting in favor. McCarthy's behavior was characterized as "contemptuous, contumacious, and denunciatory" and he was deplored for obstructing "the constitutional processes of the Senate."

McCarthy had four more years to serve in his second term, but he had virtually no remaining clout and standing in the Senate. Even more disappointing to McCarthy was the severe decline in his popularity with the general public. He no longer filled lecture halls, and his comments and allegations no longer made headlines. On one painful occasion he showed up at a dinner for Vice President Richard Nixon at a Milwaukee hotel and was asked to leave because he did not have an invitation. Newsmen later found McCarthy sobbing in an alley. Always a drinker, McCarthy was most likely an alcoholic when he came to Washington, D.C. His censure and decline pushed him over the edge, and he drank from morning to night. He died on May 2, 1957, with his wife and a priest at his side. Doctors listed the cause of death as "acute hepatitis."

Why did McCarthy achieve such great power and prominence in the early 1950s? Surely he was not the originator of rabid anticommunist politics; as early as the red scare of the early 1920s, the government deported and persecuted suspected communists. However, with the cold war as a backdrop, McCarthy stoked the fear of internal communist subversion

more effectively than any other politician. Although his cause was self-serving, he appears to have believed in it. More importantly, he had a genuine talent for demagoguery. He was bolder than others, smarter than opponents thought, and more reckless than expected. He also had the knack of producing names, numbers, and allegations that the mass media could serve to consumers worried about the communists. McCarthy's supporters often shared his disdain for civil liberties, a reminder of how fragile those liberties are in wartime and, perhaps, in general.

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References and Further Reading

- Doherty, Thomas. *Cold War, Cool Medium: Television, McCarthyism, and American Culture*. New York: Columbia University Press, 2003.
- Fried, Richard. *Nightmare in Red: The McCarthy Era in Perspective*. New York: Oxford University Press, 1990.
- Morgan, Ted. *Reds: McCarthyism in Twentieth-Century America*. New York: Random House, 2003.
- Oshinsky, David M. *A Conspiracy so Immense: The World of Joe McCarthy*. New York: The Free Press, 1983.
- Reeves, Thomas C. *The Life and Times of Joe McCarthy: A Biography*. Landam: Madison Books, 1997.

See also Cohn, Roy; Communism and the Cold War; Extremist Groups and Civil Liberties; Freedom of Association

McCLESKEY v. KEMP, 481 U.S. 277 (1987)

In *McCleskey v. Kemp*, the Court was confronted with the invidious nature of racism in the legal system, the limits of equal protection, and the algebra of death in the United States.

Warren McCleskey was convicted by the state of Georgia of the crimes of robbery and murder. More specifically, McCleskey, a black man, was convicted of killing a white police officer during the course of a robbery and was sentenced to death. The procedural posture of McCleskey's case was complex, with multiple petitions to the U.S. Supreme Court. Ultimately, two years after his conviction, the Supreme Court accepted his writ of habeas corpus petition. McCleskey presented two arguments. First, he argued that his death sentence was unconstitutional because Georgia had violated his right to equal protection under the Fourteenth Amendment of the Constitution because the sentencing process was "administered in a racially discriminatory manner." Second, McCleskey argued that his death sentence constituted "cruel and unusual punishment" in violation of the Eighth Amendment.

In support of his claims, McCleskey presented a now famous statistical study (the Baldus study) performed by Professors David C. Baldus, Charles Pulaski, and George Woodworth. The study found that in the state of Georgia, race was a determinant factor in whether (i) a prosecutor would seek the death penalty, and (ii) a death sentence would be imposed after conviction. In part, the study found that prosecutors sought the death penalty in 70 percent of cases where the defendant was black and the victim white compared to seeking the death penalty in 19 percent of the cases where the defendant was white and the victim black. Furthermore, the study demonstrated that in the former situation, black defendants were sentenced to death 22 percent of the time; in the latter situation, white defendants were sentenced to death 1 percent of the time.

Writing for the majority, Justice Powell upheld McCleskey's death sentence and rendered his argument ineffective despite accepting the statistical validity of the Baldus study. The majority arrived at its holding by requiring that McCleskey prove that the state of Georgia "acted with discriminatory purpose" in his case.

A year earlier, in *Batson v. Kemp*, the, 476 U.S. 79 (1986), Court articulated the requirements for a showing of purposeful discrimination on the part of the state and consequently a violation of a defendant's equal protection under the law in the jury selection process. The *Batson* Court required that the defendant show that "the totality of the relevant facts gives rise to an inference of discriminatory purpose." Such showing could include evidence reflecting that "[the defendant] is a member of a racial group being singled out for different treatment." Once the defendant met his burden, that burden would then shift to the state. The *Batson v. Kemp* majority reiterated the tenor of *Washington v. Davis*, 426 U.S. 229 (1976), that "[c]ircumstantial evidence of invidious intent may include proof of disproportionate impact." From that, a trial court can reasonably shift the defendant's burden of proof to the state, which would then have to "come forward with a neutral explanation" that goes beyond a simple denial of discriminatory motive or intent.

The majority disregarded the calculus of *Batson v. Kemp* and proceeded with a conceptual analysis that would make it impossible for McCleskey to satisfy his burden. Because jury deliberations are secret and "discretion is essential to the criminal justice process," the majority placed the white supremacist valuation of life in Georgia death penalty cases beyond the possibility of scrutiny. If the operation of white supremacy in Georgia death penalty cases cannot be

proved by statistical study (even statistical studies accepted as valid by the Court) or by piercing the veil of the secret jury deliberation (even of a jury system charged with meting out the ultimate sanction of death), then the operation of white supremacy in Georgia death penalty cases is proved to be a valid form of racial discrimination under the U.S. constitutional system.

Equal protection analysis in cases involving racial discrimination requires "strict scrutiny." However, as Justice Brennan pointed out, the majority proceeded with a lesser level of scrutiny, focusing on the state of Georgia's interest in sentencing a murderer to death. The majority felt that discretion in every aspect of McCleskey's case, from the state's decisions to the jury's recommendation in the capital sentencing process was important to protect. Furthermore, the majority felt that the appeal system establishes "statutory safeguards" against the violation of civil liberties. Effectively, the majority foreclosed a *Batson v. Kemp* analysis, which would have shown that the evidence presented by McCleskey proved that "he is a member of a group that is a recognizable, distinct class, singled out for different treatment"; (ii) that there was "showing of a substantial degree of differential treatment"; and (iii) that criminal procedure in his case was "susceptible to" abuse. The majority foreclosed the analysis because "McCleskey's claim, taken to its logical conclusions, throws into serious question the principles that underlie our entire criminal justice system." Thus, the Court was able to hold that there were no Eighth or Fourteenth Amendment violations in McCleskey's case.

McCleskey v. Kemp was the last significant challenge to the use of the death penalty in the United States until the Court invalidated execution of the mentally retarded and minors.

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References and Further Reading

- Baldus, David C., George G. Woodworth, and Charles Pulaski, Jr. *Equal Justice and the Death Penalty: A Legal and Empirical Analysis*. Boston: Northeastern University Press, 1990.
- Kennedy, Randall, *McCleskey v. Kemp: Race, Capital Punishment and the Supreme Court*, Harvard Law Review 101 (1988): 1388.
- Lazarus, Edward. *Closed Chambers*. New York: Times Books, 1998.

Cases and Statutes Cited

- Batson v. Kemp*, 476 U.S. 79 (1986)
- Washington v. Davis*, 426 U.S. 229 (1976)

See also **Capital Punishment; Capital Punishment and the Equal Protection Clause Cases; Capital Punishment and Race; Capital Punishment: Due Process Limits; Capital Punishment: Eighth Amendment Limits; Capital Punishment: History and Politics; Race and Criminal Justice**

McCOLLUM v. BOARD OF EDUCATION, 333 U.S. 203 (1948)

The eight-to-one Supreme Court ruling in *McCollum v. Board of Education* declared the use of public school time and property for devotional religious instruction to be unconstitutional. The legal precedent restricted organizations from using compulsory education for the dissemination of religious ideals. It also set the standard for the application and interpretation of the First Amendment's nonestablishment of religion clause in public school settings.

In 1940, members of the Jewish, Catholic, and Protestant communities in Champaign, Illinois, formed the Champaign Council on Religious Education. This group struck an agreement with the board of education whereby public school students would receive religious instruction. The council provided rabbis, priests, and ministers to teach the classes; the school system provided the students. Parents received a release form on which they indicated whether their child should be given Jewish, Catholic, or Protestant instruction. Children whose parents did not consent to the program were given what amounted to an additional study hall once a week while the other students attended their respective classes. Vashti McCollum, a mother, taxpayer, and resident of Champaign, found this arrangement unacceptable. She filed legal suit against the school board for its approval of "released time" religious instruction as violations of her child's First and Fourteenth Amendment rights.

The Supreme Court sided with McCollum after the case was argued in December 1947. Justice Hugo Black delivered the Court's decision. He described the situation as the clear "utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith." The ruling denounced the school board's arrangement as a violation of Jefferson's famous "wall of separation" between church and state.

In fact, the Court had resuscitated the phrase when ruling on a closely related case only a year before. Justice Black also authored the majority opinion in *Everson v. Board of Education*, 330 U.S. 1 (1947). In this case he referenced the "wall of separation" to

ensure that New Jersey's statutes did not establish a state church by denying parochial school children transportation on public school buses. Justice Frankfurter, who dissented in the *Everson* decision, further clarified the position of the Court in the *McCollum* case. He wrote that the wall of separation should remain a wall, not a "fine line easily overstepped" and declared it the role of the court to maintain this absolute partition.

This case is often overshadowed by more prominent decisions regarding church and state matters, but it has a judicial legacy of its own accord. Here, the Supreme Court first articulated that the state's failure to assist a religious group is not tantamount to hostility toward religion. In addition, the *McCollum* decision is sometimes cited as an early example of "legislating from the bench," or interpreting existing law so as to achieve unforeseen applications. However, the opinion of the Court offered in *McCollum v. Board of Education* provided a model for future jurisprudence and for the protection of religious freedom.

KEVIN JAMES HOUK

McCORMEY, NORMA (JANE ROE) (1947–)

Norma McCorvey was the lead plaintiff, "Jane Roe," of the controversial U.S. Supreme Court decision *Roe v. Wade*, 410 U.S. 113 (1973), that legalized abortion in the United States. McCorvey was raised in a poor, broken home in Louisiana and Texas. She dropped out of high school in the ninth grade, abused drugs and alcohol, and worked at a variety of jobs including as a respiratory therapist, cleaning person, and a carnival barker. In 1969, McCorvey became pregnant for the third time at the age of twenty-one. Family members had adopted her first two children. McCorvey's doctor refused to provide her with information about abortion because of the strict Texas laws prohibiting the practice. The doctor referred her to an adoption attorney who then arranged a meeting for McCorvey with Sarah Weddington and Linda Coffee, attorneys in search of a pregnant woman to challenge the Texas law banning abortion. Soon after the meeting, McCorvey signed on as the lead plaintiff.

On June 17, 1970, the U.S. District Court for the Northern District of Texas held that the state ban on abortions was unconstitutional, but would not issue an injunction against enforcement of the anti-abortion laws. Because of this, Weddington and Coffee appealed the decision to the U.S. Supreme Court. On January 23, 1973, in a seven-to-two decision, the Court ruled that a woman's right to terminate her

pregnancy during the first trimester was constitutionally protected under the right to privacy rooted in the Fourteenth Amendment's concept of personal liberty. The Court further held that the state could regulate abortion during the second trimester to protect the health of the mother. During the third trimester, the state could proscribe abortion except in cases when the mother's life or health was at risk. The decision came after McCorvey had given birth to a daughter, whom she gave up for adoption.

In the 1980s McCorvey, who by now had announced that she was Jane Roe, worked with pro-abortion activists and found employment at various jobs, including positions at abortion clinics. In 1995, the pro-life group Operation Rescue opened an office next door to the abortion clinic where McCorvey was employed. McCorvey met and effectuated friendships with several of the pro-life advocates. Soon thereafter, McCorvey became a Christian and later converted to Roman Catholicism. Following her conversion, she dedicated herself to the pro-life cause. McCorvey worked with Operation Rescue for two years and in 1997 began her own pro-life group, Roe No More.

On June 17, 2003, the thirty-third anniversary of the original Texas lawsuit, McCorvey announced that she would petition the court to reopen the *Roe* case on the grounds that scientific knowledge and medical technology had advanced far beyond the 1973 standards to prove that life begins at conception and to show the harmful effects of abortion on women. Days later a federal court dismissed her claim on the grounds that it was not made within a reasonable amount of time after the 1973 decision. To this day, McCorvey continues her battle for the rights of women and the unborn.

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References and Further Reading

- Faux, Marian. *Roe v. Wade: The Untold Story of the Landmark Supreme Court Decision That Made Abortion Legal*. New York: Macmillan Publishing Company, 1988.
- McCorvey, Norma, with Andy Meisler. *I Am Roe: My Life, Roe v. Wade, and Freedom of Choice*. New York: Harper Collins Publishers, 1994.
- McCorvey, Norma, with Gary Thomas. *Won by Love: Norma McCorvey, Jane Roe of Roe v. Wade, Speaks out for the Unborn as She Shares Her New Convictions for Life*. Nashville: Thomas Nelson Publishers, 1997.

Cases and Statutes Cited

Roe v. Wade, 410 U.S. 113 (1973)

See also **Abortion; Abortion Laws and the Establishment Clause; Abortion Protest Cases; *Roe v. Wade*, 410 U.S. 113 (1973); Weddington, Sarah Ragle**

McCULLOCH v. MARYLAND, 17 U.S. 316 (1819)

McCulloch arose out of the decades-old dispute concerning the extent of congressional power under Article I, Section 8 of the federal Constitution. As early as 1791, Alexander Hamilton and Thomas Jefferson had debated the question whether Congress might charter a banking corporation in President George Washington's cabinet, and the denial of that power was one of the chief planks on which the platform of the Jeffersonian Republicans was built. Although President Washington signed the first bank bill into law in 1791, Republicans then in control of Congress killed the bill to recharter the bank in 1811. However, difficulties in financing the War of 1812 led some Republicans, including President James Madison, to change their minds, and the Second Bank of the United States received a charter from a Republican Congress in 1816.

In *McCulloch*, the Supreme Court faced the questions whether Congress might constitutionally charter a bank and, if so, whether a state could tax it. Adopting reasoning very similar to Hamilton's, Chief Justice John Marshall ruled that yes, the bank bill was constitutional, and no, a state (in this case, Maryland), could not tax the bank.

Justice Marshall's opinion relied upon purported intentions of the framers of the Constitution. Ironically, Luther Martin, the counsel for Maryland, was one of the Constitution's framers, and his understanding of Congress's powers tracked the Republican argument Jefferson had made in 1791. According to Martin, Congress could exercise only those powers that it was expressly granted by the Constitution, and neither the power to charter a bank nor the power to charter any other kind of corporation was among them.

Justice Marshall said, however, that the bank bill's end was clearly contemplated by the Constitution and that the means—chartering a bank—were not prohibited. Under his broad reading of the necessary and proper clause, it might be justified as related to some of the economic powers in Article I, Section 8. One could not expect, he lectured, for a constitution to enumerate every single act a legislature might have to take; "it is a constitution we are expounding," as he put it. Thus, he concluded, the bill was constitutional. Like many of the justice's other opinions, this one infuriated the reigning Jeffersonian Republicans, for whom the limitation of congressional powers to those expressly delegated was an article of faith. Yet, their vehement protests against *McCulloch* came to naught, and congressional power has been interpreted thus broadly ever since.

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References and Further Reading

- Gunther, Gerald, ed. *John Marshall's Defense of McCulloch v. Maryland*.
Gutzman, Kevin R. C. "Old Dominion, New Republic." Ph.D. diss., University of Virginia, 1999.
Hobson, Charles F. *The Great Chief Justice: John Marshall and the Rule of Law*.
Hobson, Charles F. et al., eds. *The Papers of John Marshall*.
Smith, Jean Edward. *John Marshall: Definer of a Nation*.

McDANIEL v. PATY, 435 U.S. 618 (1978)

In the earliest days of the Republic, a number of colonies (and then states) disqualified ministers from holding public office, purportedly to further the disestablishment of the church from the state. Over time, states gradually moved toward the position advanced by James Madison that religious liberty meant clergy should not be forced to choose between their ministerial calling and serving the public through office-holding. In *McDaniel v. Paty*, the Supreme Court abolished clergy disqualification provisions, holding they unconstitutionally violated ministers' First Amendment free exercise rights.

At issue in *McDaniel* was a Tennessee statute that barred ministers from serving as delegates to Tennessee's 1977 constitutional convention. (The statute arose as a cousin to a long-standing state constitutional provision barring ministers from serving as legislators.) Paul McDaniel, an ordained Baptist minister from Chattanooga, Tennessee, filed as a candidate to the convention. An opposing candidate, Selma Cash Paty, sued for a declaratory judgment that McDaniel should be disqualified from serving and that his name should be removed from the ballot. The lower court held that the statute violated the First Amendment (as applied to the states by the Fourteenth Amendment in *Cantwell v. Connecticut*, 310 U.S. 296, 1940) and permitted McDaniel to remain on the ballot. On appeal (after McDaniel convincingly won the election), the Tennessee Supreme Court reversed, holding the clergy disqualification statute constitutional. McDaniel appealed to the U.S. Supreme Court.

All eight justices who heard the case voted to reverse, permitting McDaniel to serve as a delegate to the convention, but they did not agree on a rationale. The four-member plurality opinion, authored by Chief Justice Burger, held that the clergy disqualification statute violated McDaniel's free exercise right to act upon his religious beliefs by conditioning that action upon the surrender of his right to seek public office. McDaniel could not constitutionally be forced to choose between these two rights. The plurality averred that McDaniel's freedom to act upon his

McGAUTHA v. CALIFORNIA, 402 U.S. 183 (1971)

religious beliefs could be limited only by government "interests of the highest order" (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 1972). Tennessee attempted to meet this compelling interest test by asserting an establishment clause interest in preventing the establishment of a state religion. But when balanced against McDaniel's free-exercise right to act upon his religious beliefs (including vocationally), the state interest was insufficient and outdated, the Court held.

The plurality did not think that *Torcaso v. Watkins*, 367 U.S. 488 (1961), which it said held the "freedom of belief" to be inviolable, governed. The plurality stated that Tennessee's statute did not affect McDaniel's belief but rather operated specifically against his *status* as a minister. Three other justices, in concurrences, thought *Torcaso* was directly controlling because the Tennessee statute created an impermissible classification based upon religion, which was specifically disallowed by *Torcaso*. Two of those justices also thought the state's act of setting up religious classifications violated the establishment clause.

Read together, *Torcaso* and *McDaniel* provide a sort of symmetry on religious neutrality: Just as the state cannot require office holders to subscribe to a certain religious belief, neither can it exclude them for having a religious belief.

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References and Further Reading

- Hamburger, Philip. *Separation of Church and State*. Cambridge, MA: Harvard University Press, 2002.
Stokes, Anson Phelps. *Church and State in the United States*, 1950.
Witte, John, Jr., *Religion and the American Constitutional Experiment*, 2nd ed., Westview, 2005.

Cases and Statutes Cited

- Cantwell v. Connecticut*, 310 U.S. 296 (1940)
Torcaso v. Watkins, 367 U.S. 488 (1961)
Wisconsin v. Yoder, 406 U.S. 205 (1972)

See also **Belief–Action Distinction in Free Exercise Clause History; Compelling State Interest; Incorporation Doctrine; Limitations on Clergy Holding Office; Wall of Separation**

McGAUTHA v. CALIFORNIA, 402 U.S. 183 (1971)

In *McGautha v. California*, the Supreme Court of the United States ruled that sentencing schemes granting capital juries unfettered discretion to determine whether a defendant should be sentenced to death did not violate the due process clause of the Fourteenth Amendment. As the Court explained, the jury

represents the link between the community and the criminal justice system and, to perform its proper role, the jury must be free to express its desire for mercy. Standards to guide the jury's discretion, the Court reasoned, would unduly limit the jury because countless factors could influence its sentencing decision. The Court further expressed its belief that it was impossible to devise a set of standards that would distinguish between death-worthy and non-death-worthy crimes with precision. Previous legislative attempts to draw such a distinction had failed, largely because sentencing juries began to engage in jury nullification—ignoring the law in order to exercise mercy.

McGautha was effectively overruled one year later by *Furman v. Georgia*, 408 U.S. 238 (1972), which held that unbridled jury discretion resulted in arbitrary and discriminatory sentencing decisions in violation of the Eighth Amendment. In *Gregg v. Georgia*, 428 U.S. 153 (1976), the Court subsequently ruled that legislatures must limit and guide the jury's discretion as it determines whether a defendant is eligible for the death penalty. But the Court later made clear that the government may not limit the jury's ability to consider, and the jury may not decline to consider, any relevant mitigating circumstances that might justify a sentence less than death.

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References and Further Reading

- Kirchmeier, Jeffrey L., *Aggravating and Mitigating Factors: The Paradox of Today's Arbitrary and Mandatory Capital Punishment Scheme*, William and Mary Bill of Rights Journal 6 (Spring 1998): 345–459.
- Steiker, Carol S., and Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, Harvard Law Review 109 (December 1995): 355–438.

Cases and Statutes Cited

- Furman v. Georgia*, 408 U.S. 238 (1972)
- Gregg v. Georgia*, 428 U.S. 153 (1976)

See also **Capital Punishment: Due Process Limits; Capital Punishment: Eighth Amendment Limits; *Furman v. Georgia*, 408 U.S. 238 (1972); *Gregg v. Georgia*, 428 U.S. 153 (1976); Jury Nullification in Capital Punishment; *Lockett v. Ohio*, 438 U.S. 586 (1978)**

McGOWAN v. MARYLAND, 366 U.S. 420 (1961)

See *Sunday Closing Cases*

McKEIVER v. PENNSYLVANIA, 403 U.S. 528 (1971)

In *McKeiver v. Pennsylvania*, the Supreme Court held that Fourteenth Amendment due process does not require a jury trial in juvenile court delinquency proceedings, which charge that a youth has committed an act that would be a crime if committed by an adult. *McKeiver* concluded that jury trials were not necessary to assure accurate fact finding in the rehabilitative juvenile court. Only three years earlier, the Court, in *Duncan v. Louisiana*, 391 U.S. 145 (1968), had called the criminal jury a “fundamental right, essential for preventing miscarriages of justice and assuring that fair trials are provided.”

A few states have granted alleged delinquents a general right to jury trial under the state constitution or by statute or court rule. In most states, however, delinquency proceedings (like other juvenile court proceedings) are decided by the judge sitting without a jury.

States have enacted sweeping “get tough” juvenile justice legislation since *McKeiver*, but lower courts have rejected contentions that this legislation has made delinquency dispositions so much more punitive that the federal and state constitutions must now guarantee alleged delinquents a general right to a jury trial. In *In re C.B.*, 708 So.2d 391 (La.1998), however, the Louisiana Supreme Court held that the state constitution guarantees the right to a jury trial when the adjudicated delinquent may be incarcerated in an adult prison before or after reaching majority. In *Monroe v. Soliz*, 939 P.2d 205 (Wash.1997), however, the Washington Supreme Court held that potential adult incarceration does not trigger a state constitutional right because “[t]he nature of incarceration remains juvenile regardless of the custody venue.”

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References and Further Reading

- Abrams, Douglas E., and Sarah H. Ramsey. *Children and the Law—Doctrine, Policy and Practice*, 2nd ed. St. Paul, MN: Thomson West, 2003, pp. 1178–1187.
- Davis, Samuel M. *Rights of Juveniles 2d: The Juvenile Justice System*, 2005 ed. St. Paul, MN: West, 2005, pp. 271–279.

Cases and Statutes Cited

- Duncan v. Louisiana*, 391 U.S. 145 (1968)
- In re C.B.*, 708 So.2d 391 (La.1998)
- Monroe v. Soliz*, 939 P.2d 205 (Wash.1997)

See also **Due Process of Law (V and XIV); *In re Gault*, 387 U.S. 1 (1967); Jury Trial; Jury Trial Right**

McLAUGHLIN v. FLORIDA, 379 U.S. 184 (1964)

In a majority opinion authored by Justice Byron White, the U.S. Supreme Court ruled that a Florida law that punished interracial cohabitation more severely than cohabitation by individuals of the same race violated the Fourteenth Amendment equal protection clause. Appellants were convicted, fined, and imprisoned for violating this statute. The statute proscribed the following conduct: habitual occupation of a room at night by a Negro and a white person who are not married. No couple other than an interracial one (that is, black and white) could have been convicted under this statute. Moreover, there were no other statutory provisions that proscribed this sort of conduct for individuals of the same race. In fact, the appellants' conduct would not have been illegal if they had both been white or both been black.

At issue in this case was a classification based on race and embodied in a criminal statute. In its analysis, the Court noted that classifications based on race are constitutionally suspect and subject to the most rigid scrutiny. Such classifications will only be upheld if they are necessary to the accomplishment of a legitimate state policy. Although each member of the interracial couple was subject to the same penalty under the law, the Court looked to whether or not the classifications drawn in the statute were reasonable in light of its purpose. The state argued that the purpose of the statute was to prevent breaches of basic concepts of sexual decency (that is, pre- or extramarital promiscuity).

Despite this argument, the Court found no overriding statutory purpose to proscribe interracial cohabitation, but not cohabitation by couples of the same race. In essence, there was nothing that made it essential to punish the promiscuity of one racial group and not that of another. Simply put, mere disapproval of a singular group of people was not a sufficient justification for banning conduct specific to that group. Thus, as the Court went on to hold, the appellants were denied equal protection under the law. Of particular note, two of the justices (Stewart, joined by Douglas, concurring) went further than the majority opinion. Neither justice could ever conceive of a valid legislative purpose that makes the color of a person's skin the test of whether his conduct is a criminal offense.

The state of Florida also argued that the interracial cohabitation law was ancillary to its currently valid miscegenation law, which banned interracial marriages. However, the Court refused to address the question of that statute's validity. Nevertheless, it is

clear that this decision paved the way for the Supreme Court's eventual invalidation of state laws prohibiting interracial marriages in the 1967 *Loving v. Virginia* (388 U.S. 1, 1967) case. Overall, *McLaughlin* affirmed the notion that racial classifications are constitutionally suspect and will only be upheld if they are necessary to serve a legitimate state interest. The application of criminal statutes must be even handed; regulating the particular conduct of one race and not another, solely because of race, is unconstitutional.

KERRY L. MUEHLENBECK

References and Further Reading

Cruz, Barbara C., and Berson, Michael J. "The American Melting Pot? Miscegenation Laws in the United States." *OAH Magazine of History* 15(4) (Summer 2001).
Harvard Civil Rights-Civil Liberties Law Review, <http://www.law.harvard.edu/students/orgs/crcl/>. "Remember the Legalization of Interracial Couples." www.lovingday.org.

Cases and Statutes Cited

Loving Et Ux. v. Virginia, 388 U.S. 1 (1967)

McNABB v. UNITED STATES, 318 U.S. 332 (1943)

A major issue in criminal law is determining when confessions should be excluded from trial evidence. American courts ask whether confessions are "voluntary," while also incorporating the Fourth Amendment exclusionary rule, the Fifth Amendment self-incrimination right, and the Fifth and Fourteenth Amendment due process clauses. A prominent case addressing confession admissibility is *McNabb v. United States*, 318 U.S. 332 (1943), where the Supreme Court determined that confessions can be excluded if obtained after "unnecessary delay" in arraigning suspects.

The *McNabb* petitioners confessed to killing a federal officer, but were never brought before a magistrate upon arrest, though federal legislation required prompt arraignment. Relying on the congressional statute, the Court excluded the confessions, holding that they were made during unlawful detentions. *McNabb* was reaffirmed by *Mallory v. United States*, 354 U.S. 449 (1957). Accordingly, the *McNabb-Mallory* doctrine prohibits "undue delay" in arraignment and invalidates confessions derived from lengthy delays.

In *Malloy v. Hogan*, 378 U.S. 1 (1964), the Court held that self-incrimination protections apply to the states, thus paving the way for *Miranda v. Arizona*,

384 U.S. 436 (1966), where the Court stated that the Fifth Amendment requires notification of constitutional rights before interrogation. In reaction to *Miranda* and *McNabb–Mallory*, Congress passed the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. § 3501), which contradicted the decisions by applying only the traditional “voluntariness” standard for confession admissibility. In *Dickerson v. United States* (530 U.S. 428, 2000), however, the Court invalidated that act, stating that Congress could not nullify Supreme Court decisions.

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References and Further Reading

- Baker, Liva. *Miranda: Crime, Law and Politics*. New York: Atheneum, 1983.
- Brandt, Charles. *The Right to Remain Silent*. New York: St. Martin's Press, 1988.
- Grano, Joseph D. *Confessions, Truth, and the Law*. Ann Arbor: University of Michigan Press, 1996.
- Hancock, Catherine. *Due Process Before Miranda*, *Tulane Law Review* 70 (1996).
- Hogan, James E., and Joseph M. Snee. *The McNabb–Mallory Rule: Its Rise, Rationale, and Rescue*, *Georgetown Law Journal* 47 (Fall 1958).
- Imwinkelried, Edward J., Paul C. Giannelli, Francis A. Gilligan, and Fredric I. Lederer. *Courtroom Criminal Evidence*, 3rd ed. Philadelphia: Michie Publishing, 2003.
- Inbau, Fred Edward, John E. Reid, and Joseph P. Buckley. *Criminal Interrogation and Confessions*. Baltimore, MD: Williams & Wilkins, 1986.
- Macnair, Michael R. T., *The Early Development of the Privilege Against Self-Incrimination*, *Oxford Journal of Legal Studies* 10 (1990).
- Rutledge, Devallis. *Criminal Interrogation: Law and Tactics*. Placerville, CA: Copperhouse Publishing, 1994.
- Wigmore, John Henry. *A Treatise on the Anglo-American System of Evidence in Trials at Common Law*, 3rd ed. 1940.

Cases and Statutes Cited

- Dickerson v. United States*, 530 U.S. 428 (2000)
- Malloy v. Hogan*, 378 U.S. 1 (1964)
- Mallory v. United States*, 354 U.S. 449 (1957)
- McNabb v. United States*, 318 U.S. 332 (1943)
- Miranda v. Arizona*, 384 U.S. 436 (1966)
- 18 U.S.C. § 3501

See also **Coerced Confessions/Police Interrogations; Miranda Warning; Self-Incrimination (V): Historical Background**

McREYNOLDS, JAMES C. (1862–1946)

Cantankerous and highly individualistic, James C. McReynolds was one of the most controversial individuals to ever sit on the Supreme Court. Although known for his generally conservative economic and social views, McReynolds nonetheless made some

significant contributions to the evolution of civil liberties in the United States.

McReynolds was born in Elkton, Kentucky, the son of a prominent surgeon. After private schooling in Elkton, he attended Vanderbilt University. An excellent student, McReynolds was active in debate societies and finished first in his graduating class, winning the Founder's Day Medal in 1882. Although he studied the natural sciences at Vanderbilt, he decided upon a legal career and entered the University of Virginia School of Law in 1883. There, McReynolds was influenced by Professor John B. Minor, whose teaching stressed personal morality and protection of economic rights and personal liberty from governmental encroachment.

Upon graduation in 1884, McReynolds served for two years as secretary to Senator Howell E. Jackson of Tennessee. He then settled in Nashville and established a law practice in that community. His practice was primarily devoted to commercial and corporate law, and he usually represented local business interests. In 1900, he was named professor of law at Vanderbilt, where he taught commercial and insurance law. Active in Democratic Party politics, McReynolds unsuccessfully sought a seat in the House of Representatives in 1896. A “sound money” Democrat, McReynolds was appalled at the populist campaign of William Jennings Bryan.

Early in the twentieth century McReynolds's career moved in a new direction. Despite his Democratic Party affiliation, he was appointed assistant attorney general by President Theodore Roosevelt in 1903. Monopolistic business combinations had become a major issue in American politics. As assistant attorney general, McReynolds successfully prosecuted a number of cases under the Sherman Anti-Trust Act and appeared frequently before the Supreme Court. In 1907, while in private practice in New York City, he accepted a special assignment to prosecute the tobacco trust, prevailing before the Supreme Court four years later. Although he primarily sought to preserve competition, McReynolds gained a public reputation as something of a radical on business-related matters.

McReynolds returned to private practice in 1912 and campaigned actively for the election of Woodrow Wilson as president that year. In 1913, Wilson appointed McReynolds attorney general. In that post he continued to seek vigorous enforcement of antitrust policy by litigation and negotiated settlements. His often abrasive personality, however, irritated other members of the Wilson cabinet and Democratic Party leaders.

In the summer of 1914, Wilson appointed McReynolds to replace Horace H. Lurton as a member of the Supreme Court. Historians have long

speculated about the reasons for Wilson's choice, with some suggesting that the president wished to remove a troublesome person from his cabinet. In fact, Wilson continued to hold Justice McReynolds in high regard and, on the basis of his trust-busting record, was confident that he was a liberal at heart. McReynolds was promptly confirmed by the Senate, with strong backing from Democratic senators.

Wilson, of course, was badly mistaken about Justice McReynolds's constitutional jurisprudence. Intensely committed to individual freedom, the justice usually voted to restrain the reach of government. He looked skeptically at the expansion of congressional power under the commerce clause and at the growth of the administrative state. Treating property rights and contractual freedom as essential elements of individual liberty, he believed that the market economy was most compatible with the rights secured by the Constitution. Given these views, it is not surprising that the justice consistently voted against the validity of New Deal-era legislation. In *Nebbia v. New York* (1934), for example, he wrote a forceful dissenting opinion that maintained that a state price-fixing scheme for milk was an unconstitutional interference with economic liberty. Indeed, Justice McReynolds is best remembered as a stalwart conservative and a foe of economic regulatory power by government.

Still, the justice's concern for individual liberty was not confined to economic matters. In two leading cases he insisted that liberty guaranteed by the Fourteenth Amendment embraced a number of personal rights, such as the right to pursue common occupations, to marry, and to bring up children. At issue in *Meyer v. Nebraska*, 262 U.S. 390 (1923), was a state law that prohibited the teaching of German to primary school children. Writing for the Court, Justice McReynolds struck down the law on the grounds that the state could not interfere with the right of parents to have their children instructed in a foreign language in a private school. In *Pierce v. Society of Sisters*, 368 U.S. 510 (1952), he ruled that an Oregon law that required every pupil to attend a public school was an unreasonable interference with the liberty of parents to direct the upbringing of their children secured by the Fourteenth Amendment. In reaching this conclusion Justice McReynolds invoked the "fundamental theory of liberty upon which all governments in this Union repose" (p. 535). He clearly viewed the due process clause of the Fourteenth Amendment as protecting certain fundamental individual rights against state abridgement.

The justice had no hesitancy in affirming what would later be termed "substantive due process," and much the same reasoning would be used to invalidate economic regulations. *Meyer* and *Pierce* become

important precedents as the Supreme Court moved toward a more civil libertarian position in the mid-twentieth century. The continued vitality of these decisions was demonstrated in a line of decisions recognizing a substantive due process right to privacy concerning sexual behavior.

Justice McReynolds's record on other civil liberties issues was mixed. He joined in *Gitlow v. New York*, 268 U.S. 652 (1925), which started the process of incorporating the First Amendment as among the liberties protected by the due process clause. Yet he was strongly committed to federalism and states rights. He generally resisted application of the criminal procedural guarantees in the Bill of Rights to state court proceedings. In *United States v. Miller*, 307 U.S. 174 (1939), the most important case addressing the scope of the Second Amendment, the justice upheld the restrictions of the National Firearms Act and ruled that the right to bear arms protected only the ownership of firearms that were ordinary militia weapons.

Justice McReynolds's tenure on the Court was marred by his intolerant attitude. Rude and self-righteous, he had generally poor relations with fellow justices. He was openly anti-Semitic and racist. He was disinterested in claims of equal rights from racial minorities. Yet, even unlikable persons can promote the cause of civil liberties, as in *Meyer* and *Pierce*.

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References and Further Reading

- Bond, James E. *I Dissent: The Legacy of Justice James Clark McReynolds*. Fairfax, VA: George Mason University Press, 1992.
- Hutchison, Dennis J., and David J. Garrow. *The Forgotten Memoir of John Knox: A Year in the Life of a Supreme Court Clerk in FDR's Washington*. Chicago: University of Chicago Press, 2002.
- Jones, Calvin P. "Kentucky's Irascible Conservative: Supreme Court Justice James Clark McReynolds." *Filson Club History Quarterly* 57 (1983): 20–30.
- Ross, William G. *Forging New Freedoms: Nativism, Education, and the Constitution, 1917–1927*. Lincoln, NE: University of Nebraska Press, 1994.

Cases and Statutes Cited

- Gitlow v. New York*, 268 U.S. 652 (1925)
- Meyer v. Nebraska*, 262 U.S. 390 (1923)
- Pierce v. Society of Sisters*, 368 U.S. 510 (1952)
- United States v. Miller*, 307 U.S. 174 (1939)

MEDIA ACCESS TO INFORMATION

Although information has played a pivotal role in the affairs of humankind since the dawn of civilization,

the notion of access to information as a civil right is a uniquely modern invention. But based upon the liberal concepts of the autonomy of the individual and the sovereignty of the people in politics, access to information is an organizing principle of democratic societies. Cato's letters on "Freedom of Speech," published in England prior to the American Revolution, energized the Framers of the First Amendment with the assertion that it "ought to be the Ambition, of all honest magistrates, to have their Deeds openly examined, and publicly screened." James Madison echoed these sentiments, remarking that the right to "freely examine public characters and measures, and of free communication thereon" was "the only effectual guardian of every other right."

However, since most citizens have neither the time nor inclination to attend public meetings, inspect public records, or personally cultivate a familiarity with newsworthy events, the media are the surrogates through which the individual citizen's right to know is vindicated. The media's legal and philosophical claim to a right of access to information may properly be characterized as a *civil right* because of its derivation from the right of the public generally to receive ideas, opinions, and facts that make their participation in community affairs and democratic self-governance meaningful. While there are many theories undergirding freedom of expression, two in particular are pertinent to the media's right of access to information. The marketplace model, which is reflected in Justice Holmes's famous declaration in *Abrams v. United States* (250 U.S. 616, 1919) that "the best test of truth is the power of the thought to get itself accepted in the competition of the marketplace," implies a right to gather information to enhance the quality of marketplace discourse. Similarly, the democratic model, often associated with Professor Alexander Meiklejohn, values speech because it is essential to self-government, which depends upon an informed electorate that has access to a diversity of ideas and opinions.

Thus, the right of access to government-controlled information is a natural corollary to the political purposes of the First Amendment. Although the Supreme Court first recognized the essential link between the First Amendment and self-government as early as 1936 (*Grosjean v. American Press Co.*, 297 U.S. 233, 1936), the Court has been reticent in extending a constitutional right of access to a broad spectrum of government information and institutions. The Court has acknowledged that "news gathering is not without its First Amendment protections" (*Branzburg v. Hayes*, 408 U.S. 665, 1972), but has

not clearly defined the parameters of this rather ambiguous affirmation. The seminal case recognizing the media's right of access is *Richmond Newspapers v. Virginia* (448 U.S. 555, 1980), in which the Court recognized a right to attend criminal trials. The Court subsequently extended this access right to other judicial proceedings, but a right of access to most other public bodies and official records remains primarily a function of legislatively enacted public records and "sunshine" (open meetings) laws. Such access is thus a product of the democratic process, but it can be limited in the same manner.

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References and Further Reading

- Branscomb, Anne Wells. *Who Owns Information? From Privacy to Public Access*. New York: Basic Books, 1994.
- Dienes, C. Thomas, Lee Levine, and Robert C. Lind. *News-gathering and the Law*, 2nd ed. Charlottesville, VA: Lexis Law Publishing, 1999.
- Dyk, Timothy B., *Newsgathering, Press Access, and the First Amendment*, Stanford Law Review 44 (1992): 927-960.
- Emerson, Thomas, *Toward a General Theory of the First Amendment*, Yale Law Journal 72 (1963): 877-956.
- Hayes, Michael J., *What Ever Happened to "the Right to Know"? Access to Government-Controlled Information Since Richmond Newspapers*, Virginia Law Review 73 (1987): 1111-1143.
- Levy, Leonard W. *Emergence of a Free Press*. New York: Oxford University Press, 1985.
- Meiklejohn, Alexander. *Political Freedom: The Constitutional Powers of the People*. New York: Harper, 1960.
- Middleton, Kent R., William E. Lee, and Bill F. Chamberlin. *The Law of Public Communication*, 2003 ed. Boston: Pearson Education, Inc., 2003.
- Note, *the First Amendment Right to Gather State-Held Information*, Yale Law Journal 89 (1980): 923-939.
- Splichal, Slavko. *Principles of Publicity and Press Freedom*. Lanham, MD: Rowman & Littlefield, 2002.

Cases and Statutes Cited

- Branzburg v. Hayes*, 408 U.S. 665 (1972)
- Grosjean v. American Press Co.*, 297 U.S. 233 (1936)
- Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980)
- See also *Abrams v. United States*, 250 U.S. 616 (1919); **Access to Government Operations Information; Access to Judicial Records; Access to Prisons; *Branzburg v. Hayes*, 408 U.S. 665 (1972); Cameras in the Courtroom; Free Press/Fair Trial; Freedom of Information Act (1966); Freedom of Information and Sunshine Laws; Media Access to Judicial Proceedings; Media Access to Military Operations; *Pell v. Procunier*, 417 U.S. 817 (1974); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); *Saxbe v. Washington Post*, 417 U.S. 817 (1974)**

MEDIA ACCESS TO JUDICIAL PROCEEDINGS

Though the First Amendment to the Constitution appears to afford no right of access to official proceedings, the Supreme Court decided in a string of cases from 1979 to 1986 that the public and media have a presumptive constitutional right to witness criminal judicial proceedings, independent of the Sixth Amendment right of the accused to a public trial.

In *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980), the keystone case, a plurality ruled improper a trial closure upon the defendant's motion. Under the Court test, a right of public access depends first on an "uncontradicted history," or experience, of open proceedings, and second on a logical "function" served by openness, such as building public confidence in the judiciary or fostering community catharsis.

If the test is met, then any closure order must be narrowly tailored to achieve a compelling state interest, such as ensuring a fair trial. A judge must consider alternatives to closure, such as careful voir dire, change of venue, or sequestration, and must make written findings on the record in support of closure.

The Court held that the test satisfied for criminal jury selection and a criminal pretrial suppression hearing. Lower courts have extended *Richmond Newspapers* to civil cases. Federal courts have divided over access to administrative deportation hearings and have held that access does not entail a right to photograph or videotape.

A common-law right of access to judicial proceedings may pertain when the constitutional right does not, but the common-law right may be outweighed by countervailing interests.

RICHARD J. PELTZ

Cases and Statutes Cited

Gannett Co. v. DePasquale, 443 U.S. 368 (1979)
Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982)
Press-Enterprise Co. v. Superior Court (I), 464 U.S. 501 (1984)
Press-Enterprise Co. v. Superior Court (II), 478 U.S. 1 (1984)
Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980)

See also Access to Judicial Records; Access to Prisons; Burger Court; Cameras in the Courtroom; Discovery Materials in Court Proceedings; Duty to Obey Court Orders; Gag Orders in Judicial Proceedings; Media Access to Information; Media Access to Military Operations; *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); Right of Access to Criminal Trials; Sealed Documents in Court Proceedings; State Courts

MEDIA ACCESS TO MILITARY OPERATIONS

Journalists have no First Amendment right to cover American military operations. The amount of press access and the extent to which press reports are subject to military censorship depend upon the attitudes of the president, secretary of defense, and military commanders in the field. Over the course of American military history, press access has varied considerably.

The greatest amount of press access to military operations occurred during the Vietnam War. Accredited journalists were generally permitted to travel with troops and their reports were not subject to military censorship. Many military officials, however, believed the largely unrestricted press coverage in Vietnam turned American public opinion against the military. Consequently, in the 1983 invasion of Grenada, reporters were excluded from the invasion force. Similarly, during the 1991 Persian Gulf War, journalists were largely kept away from scenes of breaking news and their reports were subject to military censorship. During the 2003 invasion of Iraq, though, nearly seven hundred journalists were "embedded" or placed within military units. The Pentagon allowed this extensive access to shape public opinion about the war and counter Iraqi claims of American atrocities. As in other wars, journalists agreed to follow a lengthy set of ground rules to protect troop safety. For example, embedded reporters agreed not to report information about tactics or specific numbers of troops and equipment.

Press organizations have rarely challenged limits on access to military operations and facilities. The few challenges that have occurred have been unsuccessful; no court has ruled unconstitutional a Pentagon policy limiting access to combat operations or facilities. Judicial support for a First Amendment right to gather information in military settings has merely been in the abstract; some courts have suggested that this right could be recognized in an appropriate case in the future. Other courts, however, have ruled that the Pentagon is under no obligation to open military operations to the press. Consequently, press access remains at the discretion of government officials.

In *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), the U.S. Supreme Court ruled that the public had a First Amendment right to attend criminal trials. The Court found that there was a long-standing tradition of open judicial proceedings and the presence of the public enhanced the integrity of trials. In *Pell v. Procunier*, 417 U.S. 817 (1974), however, the Court held that the press is not entitled to information unavailable to the public. In *JB Pictures, Inc. v. Department of Defense*, 86 F.3d 236 (D.C. Cir.

1996), a restriction on public access to a military base was upheld because military bases do not share the tradition of openness of courtrooms. Moreover, the restriction on public access, like that in *Pell*, applied equally to the press and the public.

In *Flynt v. Rumsfeld*, 355 F.3d 697 (D.C. Cir. 2004), a federal appellate court upheld restrictions on press access to American military forces operating in Afghanistan. The appellate court noted that military battlefields, unlike trials, have not been traditionally open to the public. "There is nothing we have found in the Constitution, American history, or our case law" to support the claim that the press has a First Amendment right to accompany troops into combat, the appellate court wrote. Similarly, in *Getty Images News Services v. Department of Defense*, 193 F. Supp. 2d 112 (D.C. 2002), a federal district judge upheld U.S. military restrictions on press access to prisoners held as "unlawful combatants" at the Guantanamo Bay Naval Base. In light of the "unique military context," the court held that press access to the prisoners was not guaranteed by the First Amendment. However, if the military granted some members of the press access to the facility, the selection procedures must be reasonable, the court wrote.

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References and Further Reading

- Cassell, Paul A., *Restrictions on Press Coverage of Military Operations: The Right of Access, Grenada, and "off-the-Record" Wars*, Georgetown Law Review 73 (1985): 931-973.
- Jacobs, Matthew A., *Note: Assessing the Constitutionality of Press Restrictions in the Persian Gulf War*, Stanford Law Review 44 (1992): 675-726.
- Smith, Jeffery A. *War and Press Freedom: The Problem of Prerogative Power*. New York: Oxford University Press, 1999.

Cases and Statutes Cited

- Flynt v. Rumsfeld*, 355 F.3d 697 (D.C. Cir. 2004)
- Getty Images News Services v. Department of Defense*, 193 F. Supp. 2d 112 (D.C. 2002)
- JB Pictures, Inc. v. Department of Defense*, 86 F.3d 236 (D.C. Cir. 1996)
- Pell v. Procunier*, 417 U.S. 817 (1974)
- Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980)
- See also **Guantanamo Bay, enemy Combatants, Post 9/11**

MEDIA LIABILITY FOR CAUSING PHYSICAL HARM

If a journalist or entertainer directly injures another person or damages property while pursuing a news story or performing, legal liability arises just as in any

other setting. Engaging in expressive activity creates no shield or immunity for such harms as assault or trespass for which any other perpetrator would have to compensate a victim. Hard questions arise, however, when media activity is blamed for having indirectly caused physical harm, such as when the assailant has just watched a violent movie, played a violent video game, or read a book that offers detailed instructions for murder.

Victims have frequently brought suit against the creator, producer, or distributor of the violent material that allegedly caused them harm, claiming that a legal duty of care had been breached and thus created a wrong for which damages should be recoverable. The courts have dismissed almost all such lawsuits, typically because the requisite causal link between the violent material and the injury could not be established; in virtually all such cases someone else's unlawful act inflicted the injury, whatever material that person may have read or seen. Some courts have added their concern that, even if the causal link could be proved, imposing such liability on the media or entertainment purveyors would severely chill freedom of speech and press. Indeed, only three courts have ever ruled that such liability could be imposed; most recently a federal appeals court allowed a murder victim's family to sue the publisher of a book (*Hit-Man Manual*) that a hired assassin had followed in committing the homicide.

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References and Further Reading

- O'Neil, Robert M. *The First Amendment and Civil Liability*. Bloomington: Indiana University Press, 2001.

MEESE, EDWIN, III (1931-)

Edwin Meese, III served as attorney general of the United States under President Ronald Reagan from 1985 to 1988. Meese worked in various capacities in the Reagan administration before his appointment to the cabinet, but he first came to Reagan's attention during the 1960s while the latter was governor of California. As a deputy district attorney for Alameda County, California, Meese was a stern handler of student protesters at the University of California at Berkeley, directing the arrest of over seven hundred fifty antiwar activists.

After serving on the president's National Security Council, among other positions, Meese acceded to attorney general after lengthy, contentious hearings that stalled his nomination for over a year. Meese

shared Reagan's political views, and as a long time confidante with close access to the president, he pressed the president's conservative agenda. Meese was opposed throughout his term by such groups as the American Civil Liberties Union for his views on civil rights and the Constitution.

Meese's legal ideology found its moorings in the "jurisprudence of original intention," a position that advocated interpretation of the Constitution in line with the plain meaning of the constitutional text and the intentions of the Framers. His view that "the Constitution said what it meant and meant what it said" led him to contend that the Bill of Rights was designed only to apply to national government. As such, Meese bucked the Supreme Court's jurisprudential trend since the 1960s, which viewed most of the rights' provision of the Constitution as "incorporated" by the Fourteenth Amendment and thus applicable to the states. Meese also advocated the reversal of the Court's *Miranda v. Arizona* (384 U.S. 436, 1966) and *Mapp v. Ohio* (367 U.S. 643, 1961) decisions, contending famously that the latter "only helps guilty defendants." Meese had little success, though, in effecting a fundamental shift in the Supreme Court's civil rights jurisprudence.

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References and Further Reading

- Jenkins, John A. "Mr. Power." *The New York Times*, October 12, 1986, sec. 6, p. 19.
- McBride, James, *Religion and the First Amendment: An Inquiry Into the Presuppositions of "the Jurisprudence of Original Intention,"* Journal of Law and Religion 6 (1988).
- Meese, Edwin, II, *The Supreme Court of the United States: The Bulwark of a Limited Constitution*, South Texas Law Review 27 (1985–1986): 455.

Cases and Statutes Cited

- Mapp v. Ohio*, 367 U.S. 643 (1961)
- Miranda v. Arizona*, 384 U.S. 436 (1966)

MEGAN'S LAW (FELON REGISTRATION)

"Megan's law" is the popular term for provisions requiring selected criminal offenders to register with local law enforcement authorities and mandating that these agencies notify the community of the offenders' presence. The first Megan's law was passed in New Jersey in 1994 after Jesse Timmendequas, a convicted sex offender, raped and killed his neighbor, seven-year-old Megan Kanka. The story captured

the interest of national media, igniting broad public outrage. New Jersey swiftly adopted a community notification statute. Other states and the federal government quickly followed suit. By 1999, every state had adopted some form of Megan's Law.

Although they are typically cast as child-protection provisions, the actual scope of the statutes is somewhat different. Every state registration and community notification law covers all offenders convicted of serious sex crimes against adults or children and those convicted of crimes of violence against children. In some states, however, these laws include other serious violent offenses or less serious sexual offenses such as adult prostitution.

Notification procedures varied widely in the early years. While some states maintained offender data at local police stations, subject to review by community members, others distributed handbills, posted notices, and provided the information via the Internet. In recent years, states have increasingly utilized publicly available Web-based databases. In 2005, the federal government created a National Sex Offender Public Registry.

Megan's laws are best seen as the product of "moral panic": intense public anxiety about a problem exceeding its actual scope. In fact, the sorts of cases embodied by the Kanka murder—child abduction and violence perpetrated by people who are not family members—are actually very rare. Nonetheless, the surge of public anxiety caused by media portrayals of the problem made Megan's laws effectively unstoppable.

Critics of these provisions have offered a number of arguments against Megan's laws, chief among them that they are ineffective and create a false sense of security for the public. Other criticisms include the argument that notification laws violate the constitutional protections against double jeopardy and ex post facto punishment; that they apply a permanent stigma to offenders that is morally unjustifiable and counterproductive; that they might spur vigilante justice against offenders; and that they have a racially disparate impact.

Defenders of the laws say that they provide a public service and are an important check against recidivism. They argue that the privacy rights of offenders are outweighed by the need for communities to defend themselves against serious crime. They also argue that sexual offenders have uniquely high recidivism rates and thus must be monitored more closely than other offenders.

Whatever their efficacy, Megan's laws remain very popular. Public concern about sexual violence against children ebbs for periods, but the national media have found such cases to be highly engaging. When new crimes occur and receive broad public scrutiny,

interest in Megan's laws surges and legislators attempt to fashion new initiatives to expand their reach.

DANIEL M. FILLER

References and Further Reading

Filler, Daniel M., *Silence and the Racial Dimension of Megan's Law*, Iowa Law Review 89 (2004): 1535–1594.

See also **Rape; Sex and Criminal Justice**

MEIKLEJOHN, ALEXANDER (1872–1964)

Few philosophers of civil liberties have had such a major impact on the Supreme Court's jurisprudence of the First Amendment as Alexander Meiklejohn. His views on what the speech and press clauses mean were almost fully adopted in the Court's landmark decision in *New York Times v. Sullivan*, 376 U.S. 254 (1964).

Born in England, Meiklejohn was eight years old when his parents emigrated to Rhode Island. After completing undergraduate studies at Brown University, he earned a doctorate in philosophy at Cornell in 1897. Upon graduation, he accepted an assistant professorship at Brown, and four years later became dean. In 1912, Amherst College offered him its presidency.

His eleven years at Amherst were marked by curriculum innovation, and his educational reforms in many ways tracked the civil liberties arguments he would later enunciate. As at Brown he spent a great deal of time on student matters and won a national reputation as a motivator of young men. During World War I he brought controversial speakers to campus, and insisted that the opponents of American entry into the fray should be given equal time with those in support. He brought younger faculty onto the campus, who proved—to his and the students' delight—to be not only excellent teachers but also thought provoking. Meiklejohn did not believe that education consisted of indoctrination, but rather of providing students with the basic tools they needed to think and to challenge the accepted pieties. He also hired the first-ever college writer-in-residence, the poet Robert Frost.

Given the politically charged atmosphere of the war years, it is no surprise that the conservative trustees, led by financier Dwight Morrow, disapproved of Meiklejohn's leadership and fired him on the morning of commencement in June 1923. The firing triggered an uproar. A dozen students refused to accept their degrees, several faculty members resigned that day,

and newspapers in Boston and New York carried the story, with both sides stating their cases, for weeks. After his dismissal, Meiklejohn, reportedly a spell-binding speaker, traveled around the country, giving a number of talks on academic freedom and his ideas as to what constituted a good education, and he published a number of these in *Freedom and the College* (1923).

In 1926, Meiklejohn accepted an invitation to join the faculty at the University of Wisconsin and to found a college that would implement his pedagogical ideas. He ran the Experimental College, as it was called, from 1927 to 1932; while in the short run the effort proved unsuccessful, many of its ideas would later be incorporated into the curricula of a number of American schools. The students in the school lived together in designated dorms and, unlike the regular students, had no required classes or even examinations. In the first year they studied ancient Athens in the age of Pericles; the following year they explored contemporary American society. They did this through a variation of the English system of tutorials and papers. In their third year they rejoined the regular undergraduates or transferred to another college.

The Experimental College brought a great deal of national attention to Meiklejohn and his ideas, and he even made the cover of *Time* magazine. But like his work at Amherst, it roused the opposition of traditionalists, especially among faculty and administrators wedded to the idea of lectures, set curricula, and graded examinations. They in turn began to tell Wisconsin parents that children educated in the Experimental College would be unfit to earn their livings or function in the outside world after graduation. As a result, enrollment fell and the university ended the experiment in 1932.

Meiklejohn wrote of his experience at Wisconsin and of his belief in a core curriculum in *The Experimental College* (1932). His ideas, which struck many as radical, were really not fitted for a large state university. The use of tutorials is labor intensive and requires a student-to-faculty ratio that one normally finds only at small private colleges. But the idea of a core curriculum was later picked up and proved successful at Columbia, from which it spread to a number of other schools. The great books curriculum has been the hallmark of St. John's College in Annapolis, where it was installed by one of Meiklejohn's former students. The two-year nonrequirement curriculum is at the heart of the Echols Scholars Program at the University of Virginia and at the interdisciplinary Evergreen State College in Washington State.

After leaving Wisconsin, Meiklejohn moved to Berkeley, California, where he lived and worked until his death. He continued his educational reforms

through a privately financed program in adult education, the San Francisco School of Social Studies. He also wrote widely, and books such as *What Does America Mean?* (1935) and *Education Between Two Worlds* (1942) are extensive critiques of American society and education. He considered many of the problems a result of what he termed “Protestant capitalist civilization.” Scholars who have analyzed his work conclude that Meiklejohn was not a Marxist; in fact, he did not fit easily into any defined school of social thought or philosophy. He admired and developed ideas from Jean-Jacques Rousseau and Immanuel Kant, both of whom wrote about the role of education and the moral life.

From the start Meiklejohn had been interested in and a champion of civil liberties and had antagonized conservatives at Amherst by his insistence that opponents of World War I have the opportunity to present their case. Now he began to devote more of his energies to that field. He founded and for a number of years headed the northern California chapter of the American Civil Liberties Union, one of the earliest chapters in the ACLU’s history and from the beginning one of its most active. During the “red scare” of the 1940s and 1950s, Meiklejohn was among the very few defending the right of communists to speak their views, and he opposed the national ACLU’s expulsion of an admitted communist from its board. He also defended University of California faculty members who refused to sign a loyalty oath pledging that they had never been communists.

He also began to think more about the philosophical basis of free speech, and wrote about it in a number of articles and in two very important books, *Free Speech and Its Relation to Self-Government* (1948) and *Political Freedom: The Constitutional Powers of the People* (1960).

The jurisprudence of free speech in the United States was still in its rather early stages when Meiklejohn began writing. As late as 1907, in *Patterson v. Colorado*, 205 U.S. 454 (1907), the Supreme Court held that the First Amendment did little more than prohibit prior censorship of a statement; once uttered or printed, however, the speaker or writer could be prosecuted for libel. In the World War I cases, Justice Oliver Wendell Holmes, Jr. (who had also written the opinion in *Patterson*) laid out the idea of a “clear-and-present danger” test. Initially, the justice used this test to justify governmental suppression of free speech in wartime, but later converted it to a more speech-protective standard. For Justice Holmes, free speech was necessary so that various notions could be presented in the marketplace of ideas.

Meiklejohn appears to have been influenced by Justice Louis D. Brandeis’s opinion in *Whitney v.*

California, 274 U.S. 357 (1927), in which the justice laid out the notion of free speech as necessary in a democratic society. Certainly much of Meiklejohn’s theory tracks Justice Brandeis’s ideas, although he would in the end go much further in what he considered the types of speech that the First Amendment protects.

Like Justice Brandeis, Meiklejohn considered the free exchange of ideas necessary for a democratic society to function. Citizens had to make decisions, and in order to make those decisions intelligently, they needed to have information and to hear all sides of an issue before making up their minds. For Justice Brandeis, this meant freedom of speech for the speaker, even the speaker of unpopular ideas. Meiklejohn expanded this to include a “right to hear.” No matter how heated an issue, no matter how unpopular the ideas of one side or the other might be, the public had a right to hear any point of view, since knowledge is essential in democratic decisionmaking. This overrides any governmental interest in silencing a particular point of view, and Meiklejohn emphatically rejected Justice Holmes’s “clear-and-present danger” test.

Meiklejohn did not argue that the speaker had a right to speak the truth or that the public had a right to hear the truth, but rather that for the people to be their own rulers, they had to have access to different truths. Many ideas are subjective, such as the best tax rate to spur economic growth or to protect middle-income families. Is capitalism the best system to promote happiness and well-being? The people could, in the end, decide that they really did in fact like and want to keep in the current system, but in order for them to make a wise decision they needed to hear all sides of the arguments.

Meiklejohn initially believed that freedom of expression ought to be confined to governmental or political issues, and this would have allowed regulation of other forms of speech, such as obscenity. He later refined his position to say that in order to make decisions about government and political issues, discussion of issues related to education, philosophy, arts, science, and so forth was necessary. In fact, one could never be sure just what issues would prove to be important, so Meiklejohn eventually moved to a near-absolutist position similar to the one espoused by Justices Hugo L. Black and William O. Douglas.

To allow this much speech, of course, could lead to raucous interactions, and Meiklejohn was prepared to accept that as one of the prices of democracy. Perhaps the best exposition of this notion came in Justice Brennan’s opinion in the landmark case of *New York Times v. Sullivan* (376 U.S. 254, 1964), in which the justice described discussion in a free society as “wide

open and robust.” If it at times it seemed overly noisy or disjointed, and even if at times misguided ideas were shouted about, that was all right too. The opinion, which struck down traditional libel limits on criticism of public officials, tracked Meiklejohn’s ideas closely, and when he heard of the decision, he declared it “an occasion for rejoicing in the streets.”

Few philosophers not only have seen their work influence the jurisprudence of the Supreme Court, but also have that influence acknowledged by the justices. When Meiklejohn received the Presidential Medal of Freedom from John F. Kennedy in 1963, four members of the Court came to the White House to join the ceremony. After his death, Justice Brennan wrote a tribute in which he acknowledged the importance of Meiklejohn’s ideas in developing First Amendment jurisprudence.

Since Meiklejohn’s death the Supreme Court has retreated in large measure from his equation of the “right to hear” with the “right to speak,” and First Amendment jurisprudence is focused primarily on the speaker rather than the listener. This has been especially true in cases involving the press clause. Justice Potter Stewart took a very “Meiklejohnian” approach in his idea of the press as an institutional entity, in which the press reported to the people information they needed but which they could not necessarily secure themselves. For example, it is important to have open and free coverage of trials so that people know that the criminal justice system is working properly, although it is clear that the vast majority of the citizenry could neither take the time to attend nor, if they could, be accommodated in the courtroom. The people had a right to know, and the press served the institutional role of providing that information.

Because he died before the Court began dealing with other types of speech, it is unclear how much protection Meiklejohn would have given to nonpolitical speech or how far he would have been willing to go to allow that some forms of art, for example, might have political components. But his influence in education and civil liberties theory remains important; if the Court is no longer as attached to Meiklejohn’s principles as it used to be, the heart of First Amendment jurisprudence still derives primarily from Justice Brandeis’s *Whitney* opinion and Meiklejohn’s elaboration and expansion of those ideas.

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References and Further Reading

Brennan, William J., *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, Harvard Law Review 79 (1965): 1.

Kalven, Harry, Jr. *A Worthy Tradition: Freedom of Speech in America*. New York: Harper & Row, 1988.

Nelson, Adam R. *Education and Democracy: The Meaning of Alexander Meiklejohn, 1872–1964*. Madison: University of Wisconsin Press, 2001.

Schauer, Frederick. *Free Speech: A Philosophical Enquiry*. New York: Cambridge University Press, 1982.

MENNA v. NEW YORK, 423 U.S. 61 (1975)

The Fifth Amendment to the U.S. Constitution prohibits double jeopardy, wherein criminal defendants are prosecuted twice for the same crime. In *Menna v. New York*, 423 U.S. 61 (1975), Menna appealed his case to the U.S. Supreme Court, claiming that his Fifth Amendment right was violated. When he was before a grand jury, Menna refused to answer questions in connection with a murder conspiracy investigation. He was then given immunity from prosecution and ordered to return to the grand jury and testify about the same investigation. He refused to obey the court order and was charged with contempt of court and sentenced to jail for a period of thirty days.

The grand jury then indicted Menna for refusing to answer questions before them. Menna pleaded guilty to the indictment and was sentenced, but appealed his case under the double jeopardy clause of the Fifth Amendment. Menna claimed that it was unconstitutional for the grand jury to indict him on charges on which he had already plead guilty and served his sentence. The New York Court of Appeals, based on the merits of *Tollett v. Henderson*, 411 U.S. 258 (1973), upheld the conviction. *Tollett* held that a double jeopardy claim was “waived” when a defendant pleaded guilty.

The U.S. Supreme Court reversed the New York court and precluded the state from prosecuting individuals more than once on the same charge. The Court thus ruled that under federal law, a conviction must be set aside even if the petitioner pled guilty.

NATALIE R. GREGG

Cases and Statutes Cited

Tollett v. Henderson, 411 U.S. 258 (1973)

See also **Double Jeopardy (v) Early History, Background, Framing**

MENTALLY ILL

People with mental illness are subject to special treatment in all three settings in which the law deprives people of liberty. In criminal cases, only people with mental illness have a special defense (insanity). In the

preventive detention setting, only people with mental disorders can be subject to long-term police power commitment based on a prediction that they are dangerous to others. In most jurisdictions, only people with mental illness are presumed incompetent and thus subject to involuntary hospitalization or guardianship under the state's *parens patriae* power. The impact of insanity defense on civil liberties is discussed in that entry.

Police power commitment at one time was reserved for people whose impairment was so serious they would be considered insane were they to commit a crime. But in *Kansas v. Hendricks*, 521 U.S. 346 (1997), the U.S. Supreme Court held that even sane individuals, such as sex offenders, may be subject to prolonged detention based on a prediction of danger, as long as they have a “mental abnormality” that makes them “dangerous beyond their control.” With respect to the state's *parens patriae* authority, the Court held in *O'Connor v. Donaldson*, 422 U.S. 563 (1976), that the state may not commit someone merely because he or she is mentally ill or if he or she can survive safely in freedom with the help of relatives or friends. Nonetheless, in many jurisdictions, homeless people who would rather be on the streets can be hospitalized, and people who are committed can be forcibly medicated even if they give plausible reasons for not wanting the medication.

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References and Further Reading

Melton, Gary et al. *Psychological Evaluations for the Courts: A Handbook for Mental Health Professionals and Lawyers*, 2nd ed. New York: Guilford Press, 1997, chapter ten.

Cases and Statutes Cited

Kansas v. Hendricks, 521 U.S. 346 (1997)
O'Connor v. Donaldson, 422 U.S. 563 (1976)

See also *Dusky v. U.S.*, 362 U.S. 402 (1961); *Guilty but Mentally Ill*; *Insanity Defense*; *Jackson v. Indiana*, 406 U.S. 715 (1972); *Riggins v. Nevada*, 504 U.S. 127 (1992)

METRO–GOLDWYN–MAYER STUDIOS (MGM) v. GROKSTER, 545 U.S. (2005)

Copyright law started with the printing press. Once copies could be multiplied more rapidly than a scribe could write, someone could charge for making copies of books composed by others. Copyright gives the author the exclusive right to authorize multiplication and distribution of copies. As technology changes,

law needs to balance giving the author enough incentive so that he will write and publish his work, promoting investment in new distribution technologies by not allowing copyright holders power to block change in distribution methods, and providing the public with reasonably priced access to cultural materials. For example, at the beginning of the twentieth century, music distribution was revolutionized by the first technology allowing live music without the aid of a trained performer: the player piano. Composers and sheet music publishers were outraged when the U.S. Supreme Court held that manufacturers of player piano rolls were not required to pay copyright royalties (*White-Smith v. Apollo Company*, 209 U.S. 1, 1908).

A related recurring problem is when someone should be held liable for another's infringement (“secondary liability”). The U.S. copyright statute has never been explicit on secondary liability, but the courts have used their common-law power to create two basic doctrines: vicarious and contributory infringement. Person C is liable for contributory infringement when someone else infringes, C knows of the infringement, and C gives the infringer material help. Person C is liable for vicarious infringement when someone else infringes, C makes money from the infringement, and C has the right and ability to supervise the infringer. Under these rules, landlords who rent stores were not held liable if their tenants sell infringing records, but the operator of a department store was held liable for infringement by the person operating the record department as a concession. People running dance halls were held liable when the bands played copyrighted music without paying royalties. The operator of a swap meet was held liable when one of the vendors sold infringing music recordings.

Secondary liability and technological change meet when a copyright holder claims that someone should be liable because he provided equipment or technology used by its purchasers to infringe copyright. The technology provider does not control the customers. Making him liable would chill the development of technology that may provide major social value in the future; for example, such a claim could have been used to ban reprographic copiers or player pianos. In 1984, the Supreme Court considered such a claim brought by major motion picture studios against the manufacturer of the first video home recorder (VCR), *Sony v. Universal City Studios* (464 U.S. 774).

The Court borrowed a doctrine from the patent statute; it held that providing a device capable of infringing and “substantial noninfringing uses” does not create secondary liability. The noninfringing uses of

the VCR included taping programs whose copyright holders did not object and “time shifting”—making copies of programs broadcast on free TV for the purpose of seeing the programs at more convenient times. With the legal immunity created by the *Sony* doctrine, VCRs became ubiquitous and movie studios obtained an unexpected major source of revenue from providing VCR copies of movies for home viewing. The *Sony* doctrine is also credited with encouraging venture capitalists to back the commercialization of new technologies, including the digital video recorder and various computer applications.

With the development of the Internet, many people began swapping unlicensed music through peer-to-peer networks (P2P)—computing uses where the infringing files are scattered among the computers of the users, as opposed to being hosted on a central server operated by a large entity. Napster, the first very popular P2P system, depended on a central index of files available for swapping. Because Napster maintained the index, it was held secondarily liable for its users’ copyright infringement, *A&M Records v. Napster* (239 F.3d 1004, 9th Cir. 2001). Later P2P software eliminated the need for a central index. Once users had the software, they could continue to swap files even if the software supplier vanished. Federal courts disagreed on how to apply secondary liability rules to these decentralized systems. The central dispute was how to decide when noninfringing uses were sufficiently “substantial” to trigger *Sony*.

The Supreme Court was expected to clarify the *Sony* doctrine in a case involving two decentralized P2P systems, *Grokster* and *StreamCast* (*MGM v. Grokster*). Instead, the unanimous Court borrowed another patent doctrine; it ruled that *Grokster* and *StreamCast* should be forced to defend the assertion that they had “induced” others to infringe by taking “affirmative steps” for the “object of promoting” users of their software to infringe, such as advertising their services to Napster’s former customers as the “new Napster” and advising their customers on how to copy specific copyrighted songs. Two concurring opinions discussed *Sony*. Three justices read *Sony* narrowly; three justices read *Sony* broadly. Since a legal rule is not law unless five justices agree, the meaning of *Sony* is still unclear. However, promoters of new technology definitely face a new type of secondary liability based on “inducement” of infringing conduct.

MALLA POLLACK

Cases and Statutes Cited

A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001)

Sony Corporation of America v. Universal City Studios, Inc., 464 U.S. 774 (1984)

White-Smith Music Publishing Co. v. Apollo Company, 209 U.S. 1 (1908)

See also **Common Law or Statute**

MEYER v. NEBRASKA, 262 U.S. 390 (1923)

Meyer v. Nebraska addressed the constitutionality of a state law that prohibited the teaching of any foreign languages in any private, denominational, parochial, or public school to any child who had not completed the eighth grade. The petitioner, an instructor at a private school, was tried and convicted of unlawfully teaching German to a ten-year-old child. The statute at issue provided that “[n]o person, individually or as a teacher, shall, in any private, denominational, parochial or public school, teach any subject to any person in any language other than the English language” (262 U.S. at 396). A conviction under this statute would result in a fine or confinement in a jail for up to thirty days. Enacted in the wake of World War I, the apparent purpose of the statute was to prevent the inculcation of ideas and sentiments foreign to the best interests of the United States.

The Court considered whether the statute, as construed and applied, unreasonably infringed on the liberty guaranteed by the Fourteenth Amendment. In finding the statute unconstitutional, the Court first considered the meaning of “liberty.” Liberty “denotes not merely the freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness” (262 U.S. at 398). Thus, at issue were the right of teachers to teach, the right of students to acquire desired knowledge, and the right of parents to control the education of their children.

The due-process doctrine established by the Court holds that “this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect” (262 U.S. at 399–400). Indeed, as the Court explained, mere knowledge of a foreign language cannot reasonably be regarded as harmful. It recognized that the state may go very far “in order to improve the quality of its citizens, physically, mentally and morally,” including prescribing a school curriculum, compelling school attendance, and

requiring that instruction be given in English. The Court nevertheless stated that the fundamental rights of the individual “must be respected” (262 U.S. at 401). While the state’s purported purpose—universal understanding of English and the promotion of civic development—may be desirable, it cannot be promoted by prohibited means.

Meyer v. Nebraska is significant for many reasons. It was the first time the Supreme Court invoked the substantive due-process doctrine to protect noneconomic personal liberties. In so doing, it opened the door for the recognition of numerous other personal liberties and paved the way for the process of incorporation of the Bill of Rights into the Fourteenth Amendment (*Gitlow v. New York*, 268 U.S. 652, 666, 1925). *Meyer* was the first case to recognize parents’ due-process liberty interest in raising and educating their children and it continues to be followed today (*Troxel v. Granville*, 530 U.S. 57, 63, 2000; “the liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court”). Along with *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), *Meyer* set the precedent for the right to privacy cases beginning in the 1960s—for example, *Griswold v. Connecticut* (381 U.S. 479, 1965, penumbra or zone of privacy includes married couple’s right to use contraceptives) and *Roe v. Wade* (410 U.S. 113, 1973, invalidating anti-abortion statute on right to privacy grounds).

Not only is the *Meyer* case significant for its far-reaching impact on personal liberties, but it also continues to be relevant in cases involving parental rights and education. The Supreme Court continues to recognize that the state may control the classroom curriculum, subject to certain constitutional limits (for example, *Epperson v. Arkansas*, 393 U.S. 97, 1968, invalidating a law prohibiting the teaching of Darwinian theory). Indeed, it remains the only Supreme Court case involving school curriculum, other than cases involving issues of religion, such as school prayer and Bible recitations.

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References and Further Reading

Ross, William G., *A Judicial Janus: Meyer v. Nebraska in Historical Perspective*, University of Cincinnati Law Review 57 (1988): 125–204.

Cases and Statutes Cited

Epperson v. Arkansas, 393 U.S. 97 (1968)
Gitlow v. New York, 268 U.S. 652, 666 (1925)

Meyer v. Nebraska, 262 U.S. 390 (1923)
Pierce v. Society of Sisters, 268 U.S. 510 (1925)
Roe v. Wade, 410 U.S. 113 (1973)
Troxel v. Granville, 530 U.S. 57 (2000)

MIAMI HERALD PUBLISHING CO. v. TORNILLO, 418 U.S. 241 (1974)

In 1972, the *Miami Herald* printed two editorials that were critical of Pat Tornillo’s candidacy for the Florida House of Representatives. Tornillo wanted to invoke his “right to reply” pursuant to Florida Statute Section 104.38, which required a newspaper to give equal space free of charge to a candidate for political office when a newspaper publishes criticism about the candidate.

The Dade County Circuit Court held the statute unconstitutional because it infringed on the freedom of the press, but the Florida Supreme Court reversed. Chief Justice Burger delivered a unanimous decision in which the U.S. Supreme Court reversed the Florida Supreme Court’s decision and articulated four reasons why the “right to reply” statute violated the First Amendment’s free press guarantee. First, the statute was effectively telling a newspaper what it must publish even if “reason” says that it should not be published. Second, by forcing a newspaper to publish certain information, the statute worked the same as a statute that restricts what a newspaper can publish. Third, the statute was exacting a penalty against the newspaper by forcing the paper to spend money and take up space in the paper. Fourth, the statute intruded on an editor’s decision about what material should go into a newspaper and chilled coverage of controversial issues.

This decision has effectively prevented states from intruding on a newspaper’s decision about what to publish and has curtailed any right of access to newspapers.

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References and Further Reading

Cook, Timothy E., ed. *Freeing the Presses: The First Amendment in Action*. Baton Rouge: Louisiana State University Press, 2005.
 Garry, Patrick M. *Scrambling for Protection*. Pittsburgh: University of Pittsburgh Press, 1994.
 Hayes, John, *The Right to Reply: A Conflict of Fundamental Rights*, Columbia Journal of Law and Social Problems 37 (2004): 551–583.
 Tedford, Thomas L., and Dale A. Herbeck. *Freedom of Speech in the United States*, 4th ed. State College, PA: Strata Publishing, Inc., 2001.

Cases and Statutes Cited

Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94 (1973)

Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974)

Mills v. Alabama, 384 U.S. 214 (1966)

New York Times Co. v. Sullivan, 376 U.S. 254 (1964)

Red Lion Broadcasting Co. v. Federal Communications Commission, 395 U.S. 367 (1969)

See also **Anonymity and Free Speech; Anonymity in Online Communication; Application of First Amendment to States; Balancing Approach to Free Speech; Broadcast Regulation; Cable Television Regulation; Compelling State Interest; Freedom of the Press: Modern Period (1917–Present); Freedom of Speech and Press: Nineteenth Century**

MICHIGAN DEPARTMENT OF STATE POLICE v. SITZ, 496 U.S. 444 (1990)

Sitz was argued February 27, 1990 and decided June 14, 1990 by a vote of six to three. Chief Justice Rehnquist delivered the opinion for the Court, with Justices Brennan, Marshall, and Stevens dissenting. The Court held that while highway sobriety checkpoints allow for a “seizure,” the seizure is reasonable under the Fourth Amendment. The decision signifies that the Court recognizes the state’s “grave and legitimate interest in curbing drunk driving” (p. 444).

Michigan State Police established a highway sobriety checkpoint with guidelines governing checkpoint operations, site selection, and publicity. During the time frame at issue, 126 vehicles passed through the checkpoint with an average delay of twenty-five seconds, and two drivers were arrested for driving under the influence of alcohol.

Using the rationale from *U.S. v. Martinez–Fuerte*, 428 U.S. 543 (1976), Chief Justice Rehnquist argued that the degree of intrusion is minimal in comparison to the state’s interest. “No one can seriously dispute the magnitude of the drunken driving problem or the States’ interest in eradicating it. Media reports of alcohol-related death and mutilation on the Nation’s roads are legion. The anecdotal is confirmed by the statistical. ‘Drunk drivers cause an annual death toll of over 25,000 and in the same time span cause nearly one million personal injuries and more than five billion dollars in property damage.’” The empirical data coupled with the brief intrusion, Chief Justice Rehnquist reversed the Michigan Court of Appeals and affirmed the constitutionality of sobriety checkpoints.

Justices Brennan, Marshall, and Stevens dissented. The dissent focused on the suspicionless seizure of

motorists. Differentiating with *Martinez–Fuerte*, Justice Brennan noted that, in *Sitz*, the element of surprise played a large role. The majority decision gave unlimited discretion to detain the driver on the slightest suspicion. The dissent went on to argue that the majority misapplies the balancing test by assuming there is no difference between a routine stop at a permanent checkpoint and a surprise stop at a sobriety checkpoint. “This is a case that is driven by nothing more than symbolic state action—an insufficient justification for an otherwise unreasonable program of random seizures. Unfortunately, the Court is transfixed by the wrong symbol—the illusory prospect of punishing countless intoxicated motorists—when it should keep its eyes on the road plainly marked by the Constitution.”

AARON R. S. LORENZ

See also **Checkpoints (roadblocks); City of Indianapolis v. Edmond**, 531 U.S. 32 (2000); *Delaware v. Prouse*, 440 U.S. 648 (1979)

MICHIGAN v. DEFILLIPPO, 443 U.S. 31 (1979)

The Supreme Court adopted the Fourth Amendment exclusionary rule in *Mapp v. Ohio*, 367 U.S. 643 (1961), to deter unreasonable searches and seizures. The exclusionary rule states that evidence seized in violation of the Fourth Amendment will be excluded. The “good faith” exception to the exclusionary rule, created by the Supreme Court in *U.S. v. Leon*, 468 U.S. 897 (1984), allows evidence seized by the police executing a facially valid search warrant issued by a judge to be admitted in court even though the search warrant was later found to be invalid.

In *Michigan v. DeFillippo*, 443 U.S. 31 (1979), the Supreme Court extended the “good faith” exception to cover searches conducted in good-faith reliance upon a city ordinance that was later determined to be unconstitutional. A Detroit city ordinance authorized police officers to stop and question a person if there was “reasonable cause” to believe that the person’s behavior justified further investigation for criminal activity. Detroit police officers discovered DeFillippo in a compromising situation in an alley with a woman. When asked for identification, DeFillippo failed to identify himself properly, which resulted in his arrest. A subsequent search of DeFillippo turned up illegal drugs.

DeFillippo filed a motion to suppress the evidence obtained during the search, arguing that the police officers’ reliance on the city ordinance authorizing a

warrantless search violated the Fourth Amendment. The trial court denied the motion to suppress. The court of appeals reversed the trial court's decision and held that the city ordinance was unconstitutionally vague, thus making the arrest and search invalid.

The Supreme Court reversed the Michigan Court of Appeals decision and applied the "good faith" exception to those situations where the police rely upon a city ordinance authorizing a warrantless search, even though the city ordinance was later found to be unconstitutional. The Court felt applying the exclusionary rule in such cases would not deter police misconduct because the police officers were following the law as written, and thus exclusion of the evidence would serve no legitimate purpose.

JENNIFER J. ASHLEY

Cases and Statutes Cited

Mapp v. Ohio, 367 U.S. 643 (1961)
U.S. v. Leon, 468 U.S. 897 (1984)

See also **Exclusionary Rule**

MICHIGAN v. LUCAS, 500 U.S. 145 (1991)

In *Lucas*, the Supreme Court held that a criminal defendant's Sixth Amendment right to present defense evidence may be forfeited by his failure to follow procedural rules.

Charged with sexual assault, Lucas announced at the beginning of trial that he intended to prove that he had a prior sexual relationship with the complainant in order to support his claim that she had consented on this occasion. Under Michigan's "rape-shield" statute, however, evidence of the complainant's prior sexual activity with the defendant is admissible only if the defendant reveals his intent to present such evidence well in advance of the trial. Since Lucas gave no advance notice, the judge excluded the evidence, and Lucas was convicted. The state appeals court reversed, reasoning that the exclusion of relevant evidence violated Lucas's right to present a defense.

The Supreme Court reversed that decision by a vote of seven to two. The Court agreed, as it had in *Chambers v. Mississippi*, 410 U.S. 284 (1973), that Lucas had a right to present relevant evidence. The Court concluded, however, that Michigan had valid reasons to require rape defendants to give advance notice of their intent to introduce evidence of complainants' prior sexual activity and that the evidence could be excluded for failure to provide that advance notice. *Lucas*, therefore, is one in a series of cases, including *Williams v. Florida*, 399 U.S. 78 (1970), and

Taylor v. Illinois, 484 U.S. 400 (1988), holding that a defendant's right to present a defense does not insulate him or her from reasonable procedural rules designed to prevent unfair surprise to the prosecution.

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References and Further Reading

Westen, Peter, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, Harvard Law Review 91 (1978): 567.

Cases and Statutes Cited

Chambers v. Mississippi, 410 U.S. 284 (1973)
Taylor v. Illinois, 484 U.S. 400 (1988)
Williams v. Florida, 399 U.S. 78 (1970)

See also ***Chambers v. Mississippi*, 410 U.S. 284 (1973); Defense, Right to Present; *Taylor v. Illinois*, 484 U.S. 400 (1988)**

MICHIGAN v. MOSLEY, 423 U.S. 96 (1975)

The power of a criminal suspect to refuse to answer police questions is well known. The police may not question suspects who have invoked their so-called *Miranda* right to silence. But does the *Miranda* right to silence mean that the police are foreclosed at some later time from seeking a suspect's waiver of that right? That is the question the Supreme Court addressed in *Michigan v. Mosley*, 423 U.S. 96 (1975).

Mosley was arrested for several robberies and received the requisite *Miranda* warnings. He invoked his right to silence and the police did not try to change his mind. Two hours later, at another location within the precinct, another detective sought to question Mosley about an unrelated murder. Mosley was again told of his right to remain silent and thereafter gave an incriminating statement. The Supreme Court had two paths it could take in addressing Mosley's argument that the second interrogation violated his right to silence: *Miranda*'s right to silence disallows any and all questioning once that right has been invoked; or the suspect's invocation of the right to silence mandates only the immediate cessation of questioning, but that a resumption of interrogation would in appropriate circumstances be permitted after some passage of time. The Court chose the latter path, ruling against Mosley and, in so doing, clarifying what *Miranda* actually offers a criminal suspect.

"The critical safeguard [of *Miranda*]," the Court said, "is a person's right to 'cut off questioning.'"

That power effectively gives the suspect the ability to control the flow of the interrogation. The rule that police interrogators must “scrupulously honor” a suspect’s invocation of the right to silence—that is, to refrain from further questioning—“counteracts the coercive pressures of the custodial setting.” The power to control the flow of the interrogation does not mean any and all police-initiated questioning is forever foreclosed. As long as a reasonable amount of time has passed—a cooling-off period, if you will—and fresh warnings are given, the resumption of questioning may not violate the “scrupulously honor” test. Suspects may again insist that questioning cease or they may now change their minds and answer questions. What *Mosley* reflects is the view that the coercion that so concerned the Court in *Miranda* is deflated when the suspect is given a genuine power to cease interrogation whenever it becomes too oppressive. This means the line between voluntary and involuntary statements is one drawn by the suspects.

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References and Further Reading

Dressler, Joshua. *Understanding Criminal Procedure*, 3rd ed. 2002.
Michigan v. Mosley, 423 U.S. 96 (1975).

See also **Exclusionary Rule**; *Miranda v. Arizona*, 384 U.S. 436 (1966); **Miranda Warning**; **Self-Incrimination (V)**; **Historical Background**

MICHIGAN v. SUMMERS, 452 U.S. 692 (1981)

In *Summers*, the police executed a search warrant for narcotics at the defendant’s house and detained him for the duration of the search. After finding narcotics in the basement, the police arrested and searched the defendant, finding heroin in his coat pocket. On the defendant’s motion, the trial judge suppressed the heroin as fruit of an illegal search and was affirmed on appeal. The Supreme Court reversed, five to three, announcing a bright-line rule that search warrants for contraband carry with them implied limited authority to detain the occupants of the premises for the duration of the search.

The central issue before the Court was whether police can detain a suspect during a search without an arrest warrant when he is not inside the premises at the time the search begins. After looking at the individual privacy rights and government interests involved, the Court applied a reasonableness test to determine the constitutionality of the detention. The

Court likened this case to the detentions in *Terry v. Ohio* (392 U.S. 1, 1968) and *Adams v. Williams* (407, U.S. 143, 1972), while contrasting it with *Dunaway v. New York* (442 U.S. 200, 1979), and held that while this stop constituted a seizure within the meaning of the Fourth Amendment, it was sufficiently limited in scope and justified by special law enforcement needs not to require a warrant. The dissent argued that the detention of a suspect without an arrest warrant for the duration of a search is not sufficiently justified by unique law enforcement needs to constitute an exception to the general rule against warrantless seizures.

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References and Further Reading

Paul, Launice, *Case Developments: Criminal Law—Search and Seizure—in the Execution of a Search Warrant for Contraband Police May Detain Occupants of the Premises While a Proper Search Is Conducted*: *Michigan v. Summers*, *Howard Law Journal* 25 (1982): 143–158.

Cases and Statutes Cited

Adams v. Williams, 407, U.S. 143 (1972)
Dunaway v. New York, 442 U.S. 200 (1979)
Terry v. Ohio, 392 U.S. 1 (1968)

See also **Arrest**; **Arrest without a Warrant**; *Florida v. Royer*, 460 U.S. 491 (1983); **Fruit of the Poisonous Tree**; **Probable Cause**; **Search (General Definition)**; **Search Warrants**; **Seizures**; **Warrant Clause (IV)**

MILITARY LAW

Perhaps no area of American law better illustrates the limits of the Bill of Rights than military law. While Abe Fortas memorably stated in *Tinker v. Des Moines School District*, 393 U.S. 503 (1969), that students do not “shed their constitutional rights to freedom of speech . . . at the schoolhouse gate,” these and other civil liberties are routinely withheld from military personnel.

The guiding principle, stated most clearly in *Orloff v. Willoughby*, 354 U.S. 83 (1953), is that the military is “a specialized community governed by a separate discipline from that of the civilian.” As a separate society, the military is not bound by customary civil liberties conventions and is allowed to infringe upon individual rights to a degree unheard of in civilian settings. This separation is so stark that civilian courts generally will not even hear cases filed by service personnel unless they have exhausted their military justice system appeals.

Furthermore, the military receives nearly total deference from civilian courts. The Supreme Court starkly outlined its deferential approach in *Burns v. Wilson*, 346 U.S. 137 (1953): “the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty, and the civil courts are not the agencies which must determine the precise balance to be struck in this adjustment.” Departures from this approach are rare; while the Court briefly imposed a rule that the military could not court-martial service personnel for non-service-related offenses committed in peacetime (invalidating the court-martial of an army sergeant accused of rape in *O’Callahan v. Parker*, 395 U.S. 258, in 1969), this rule was discarded in 1987 in *Solorio v. United States*, 483 U.S. 435 (1987).

Consequently, normal application of American civil liberties is invariably subordinated to military imperatives. In *Goldman v. Weinberger*, 475 U.S. 503 (1986), the Court acknowledged the invasion of the religious rights of a Jewish Air Force chaplain barred from wearing his yarmulke under his uniform cap, but nevertheless held that military esprit de corps trumped the free exercise clause. Military discretion also won out over civil rights claims in *Chappell v. Wallace*, 462 U.S. 496 (1983), in which the courthouse door was barred for naval enlisted men who filed a civil lawsuit accusing their commanding officer of taking their race into account when meting out discipline.

The Court has even grafted dubious military interests onto otherwise blatant civil liberties violations. In *United States v. O’Brien*, 391 U.S. 367 (1968), the Court prioritized the purported military necessity of maintaining a bureaucratically efficient draft system ahead of the free-speech rights of an antiwar protestor who burned his draft card. They did so notwithstanding voluminous evidence in the Congressional Record that the authors of the legislation were trying to censor antiwar speech and not trying to streamline Selective Service procedures.

Deference to the military, while overwhelming, is not absolute. Civilian courts will freely correct the military if it is attempting to court-martial individuals over whom it does not have authority, such as dependents of military personnel or civilian employees of the military. Additionally, this tradition of deference ebbs when there is an intersection of military life and civilian life. In *Flower v. United States*, 407 U.S. 197 (1972), the Court reversed a military order barring an antiwar leaflet from a public street that ran through an open army post. On the other hand, in *Greer v. Spock*, 424 U.S. 828 (1975), the Court rejected the argument that the military had created a public forum by opening up parts of Fort Dix to civilian

access and held that the military could permissibly ban political protests from these unrestricted areas.

Arguably, the most controversial dimension of military law is the use of military tribunals. In comparison with civilian juries, military commissions may meet in secret, need not follow ordinary evidentiary rules, and may convict with less than a unanimous vote. During World War II, the Court sanctioned the trial of eight accused Nazi saboteurs by military tribunal in *Ex Parte Quirin*, 317 U.S. 1 (1942); all eight were convicted, and six were electrocuted. After the events of September 11, 2001, President George W. Bush authorized trial by military tribunal for any non-U.S. citizen accused of terrorism or accused of harboring terrorists. While this order has not yet had occasion to be evaluated by the Supreme Court, the Court rebuffed the government in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). Noting the unconventional nature of the war on terrorism, the Court observed that the government’s asserted ability to hold Yaser Hamdi as an “enemy combatant” for the war’s duration without allowing him to contest his detention could result in Hamdi’s indefinite confinement without trial. If nothing else, *Hamdi* and its companion cases make clear that this aspect of military law is undergoing comprehensive contemporary reassessment.

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References and Further Reading

- Fisher, Louis. *Military Tribunals and Presidential Power: American Revolution to the War on Terrorism*. Lawrence: University of Kansas Press, 2005.
- Scheppele, Kim Lane, *Law in Time of Emergency: States of Exception and the Temptations of 9/11*, University of Pennsylvania Journal of Constitutional Law 6 (May 2004): 1001.
- Turley, Jonathan, *The Military Pocket Republic*, Northwestern University Law Review 97 (2002): 1.

Cases and Statutes Cited

- Burns v. Wilson*, 346 U.S. 137 (1953)
Chappell v. Wallace, 462 U.S. 496 (1983)
Ex Parte Quirin, 317 U.S. 1 (1942)
Flower v. United States, 407 U.S. 197 (1972)
Goldman v. Weinberger, 475 U.S. 503 (1986)
Greer v. Spock, 424 U.S. 828 (1975)
Hamdi v. Rumsfeld, 542 U.S. 507 (2004)
O’Callahan v. Parker, 395 U.S. 258 (1969)
Orloff v. Willoughby, 354 U.S. 83 (1953)
Solorio v. United States, 483 U.S. 435 (1987)
Tinker v. Des Moines School District, 393 U.S. 503 (1969)
United States v. O’Brien, 391 U.S. 367 (1968)

See also **Freedom of Speech: Modern Period (1917–Present); Free Exercise Clause Doctrine: Supreme**

Court Jurisprudence; Military Tribunals; *Tinker v. Des Moines School District*, 393 U.S. 503 (1969); *United States v. O'Brien*, 391 U.S. 367 (1968)

MILITARY TRIBUNALS

A military tribunal is a court created or established to hold trials of members of enemy armed forces or others subject to the court's jurisdiction during a time of war. On November 13, 2001, President George Bush signed a military order that authorized the creation of military tribunals to try some of those individuals seized during the war on terrorism. The presidential order was a reaction to the terrorist attacks on New York City on September 11, 2001. The order included specific findings that a state of emergency existed and set out many of the terms under which noncitizens would be detained, treated, and tried by the military tribunals.

Many have questioned the use of military tribunals to try persons charged with terrorist acts. In part, these are concerns about the status of those who are acting as warriors but who may not be wearing the distinctive identification of legitimate state combatants. Questions have included whether or not the traditional laws of war apply to such combatants and whether or not it would be more appropriate to try these combatants under the established criminal laws of the United States or other nations.

What Type of Tribunal Is Established?

These courts can be compared to and contrasted with the nation's civilian judiciary. The military tribunals are created under the authority of provisions in Articles I and II of the U.S. Constitution. Article I, Section 8, grants to the Congress the powers to declare war, raise and support army and naval forces, and make laws governing the conduct of the nation's armed forces. Article II confers the executive power upon the president and makes him the nation's military commander in chief.

The president's order gives exclusive jurisdiction to the military tribunals over these seized persons. The tribunals are not ordinarily bound by the procedures followed in civilian courts. Among the significant differences, for example, are the lesser standards for admissible evidence. Defendants are not allowed to appeal decisions to the federal courts. The president,

furthermore, retains the power of final review. A series of Military Commission Instructions setting the organizational rules, procedural rules, and the elements of the crimes that could be tried by the tribunals were issued by the Department of Defense on April 30, 2003.

Have Military Tribunals Been Used Before?

The use of military tribunals is controversial. They have, however, been used in some form in every prior American war. Military tribunals were used extensively during and after the Civil War to try combatants and noncombatant civilians. The U.S. Supreme Court, shortly after the Civil War, ruled on the constitutionality of trials of citizens by military tribunals. But it was only with World War II that the Court ruled on the constitutionality of the use of military tribunals to try foreign belligerents.

Lambin Milligan, an Indiana resident, was tried and convicted by a military tribunal and sentenced to death for alleged disloyal activities during the Civil War. His sentence was later commuted to life imprisonment. Employing the Habeas Corpus Act of 1863, Milligan appealed to the federal courts. The U.S. Supreme Court did not decide the basic issue of the jurisdiction of a military tribunal or the power of military tribunals to try civilians. The Court held, however, that the president did not have the authority to try civilians in military tribunals in a state that was not in rebellion.

The next major case arose during World War II. President Roosevelt had issued a proclamation subjecting enemy combatants who entered the United States to trial by military tribunal. Eight German nationals trained in sabotage techniques were secreted into the United States. The eight were captured before they were able to carry out their plans. On appeal to the U.S. Supreme Court, the petitioners argued that they were entitled to a trial by civil courts following the precedent set in *Milligan*. The Supreme Court, in *Ex Parte Quirin*, 317 U.S. 1 (1942), upheld the constitutionality of military trials for offenses against the United States during time of war. The Court, however, reserved the right of the federal courts to review the constitutionality of further appeals in individual cases.

The Supreme Court did later affirm the constitutionality of military tribunals to try foreign combatants in *In Re Yamashita*, 327 U.S. 1 (1946). The Court found that Congress had legally authorized the creation of military tribunals to try violations of the law of war.

Despite the extensive prior use of military tribunals, the perpetrators of the 1993 World Trade Center bombing in New York City and those accused of bombing two U.S. embassies in Africa in 1998 were all tried in the federal civilian courts. In addition, one of the accused September 11 hijackers, a French citizen, was also tried in federal court.

Are Military Tribunals Justified Today?

The use of military tribunals is controversial. The Court in *Milligan* asked the question whether American citizens should be subjected to military tribunals when the civilian courts are functioning. Human rights concerns are also raised when non-citizens are held for trial by the nation's military. With concerns like these in mind, the U.S. Supreme Court has agreed to rule on the constitutionality of the military tribunals. This appeal is a test of presidential wartime authority. On November 7, 2005, the Supreme Court agreed to hear the appeal in *Hamdan v. Rumsfeld* (415 F.3d 33, D.C. Cir. 2005, cert. granted, 74 U.S.LawW. 3284, U.S. Nov. 8, 2005, No.05-184), an appeal from the D.C. Circuit Court.

In *Hamdan*, the U.S. Supreme Court will be asked whether the noncitizen may be tried by the military tribunal; whether the military tribunal established to try alleged war crimes in the war on terror is authorized under provisions of the U.S. Constitution and federal law; and whether petitioners and others similarly situated can obtain civilian judicial enforcement from an Article III court of rights in an action for a writ of habeas corpus challenging the legality of their detention by the executive branch. A decision by the U.S. Supreme Court in *Hamdan* will be issued in 2006.

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References and Further Reading

- Council on Foreign Relations. *Terrorism Questions & Answers: Military Tribunals*. New York, 2004. (<http://cfrterrorism.org/responses/tribunals.html>).
- Crona, Spencer J., and Neal A. Richardson, *Justice for War Criminals of Invisible Armies: A New Legal and Military Approach to Terrorism*, Oklahoma City University Law Review 21 (1996): 349-407.
- Fisher, Louis. *Military Tribunals: Historical Patterns and Lessons*. (Report RL32458) Washington, D.C.: Congressional Research Service, July 2004. (The report is available at <http://www.fas.org/irp/crs/RL32458.pdf>).
- Tushnet, Mark, ed. *The Constitution in Wartime: Beyond Alarmism and Complacency*. Durham, NC: Duke University Press, 2005.

Cases and Statutes Cited

- Ex Parte Milligan*, 71 U.S. (4 Wall.) 2 (1866)
- Ex Parte Quirin*, 317 U.S. 1 (1942)
- Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005), cert. granted, 74 U.S.LawW. 3284 (U.S. Nov. 8, 2005) (No.05-184)
- In Re Yamashita*, 327 U.S. 1 (1946)
- Habeas Corpus Act of 1863*, 12 Stat. 755 (1863)

MILKOVICH v. LORAIN JOURNAL CO., 497 U.S. 1 (1990)

In *Milkovich v. Lorain Journal Co.*, the Supreme Court clarified how the First Amendment affects state defamation law as relates to opinions. Milkovich, a high school wrestling coach, sued the *Lorain Journal* for libel after a sports writer for its newspaper wrote a column implying the coach committed perjury at a public hearing. The Ohio Court of Appeals upheld the dismissal of the suit because the article constituted an "opinion" protected by the First Amendment. In an eight-to-two decision, the U.S. Supreme Court reversed, holding the First Amendment did not create a special constitutional privilege for opinion.

The controversy over whether such a constitutional privilege exists is traceable to a dictum in an earlier Supreme Court opinion, *Gertz v. Robert Welch*, 418 U.S. 323 (1974). The Court in *Milkovich* decided *Gertz* did not create such a privilege. Otherwise, a person could escape liability by couching defamatory statements as opinion. The Court decided that opinion is defamatory if it is based on provably false facts. Because the connotation that Milkovich committed perjury was sufficiently susceptible to being proved true or false, it remanded the case to the Ohio courts for resolution.

The chief significance of *Milkovich* is that the Court found it unnecessary to create a new constitutional privilege to protect free speech. The Court noted that opinions not containing a provably false factual connotation enjoy full constitutional protection.

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References and Further Reading

- Smolla, Rodney A. *Smolla and Nimmer on Freedom of Speech*, vol. 2, St. Paul, MN: Thomson West, 2005, sections 23-100-23-115.

Cases and Statutes Cited

- Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974)

MILL, JOHN STUART (1806–1873)

Background

John Stuart Mill was born in London, the son of English philosopher and historian James Mill. The elder Mill believed that by educating his son in advanced subjects from a very young age and shielding the boy from the distraction of other children, he could train the boy to be a great thinker. Under his father's strict tutelage, the young John Stuart became extremely precocious. His feats of scholarship included mastering Latin and Greek by age ten and beginning his work on logic and political economy in his early teens.

Like his father, John Stuart Mill believed fervently in the utilitarian principles of Jeremy Bentham. At seventeen, John Stuart founded the *Westminster Review* with Bentham to educate the public about utilitarianism. However, at the age of twenty-one John Stuart suffered a nervous breakdown that he attributed to the extraordinary intellectual discipline of his childhood and his failure to cultivate feelings or sentiment. This experience taught him the importance of taking pleasure in day-to-day life, and he found special spiritual solace in the poetry of Wordsworth.

Mill was a devoted husband and collaborated with his wife, Harriet Taylor, on many of his best works. He worked in the British East India Company most of his life and wrote in his spare time. From 1865 to 1868 he represented Westminster in Parliament, in which capacity he advocated for women's rights, women's suffrage, and anticolonialism. He loved to test his opinions in rhetorical contests with his peers and set up a kind of moot court for that purpose.

Relationship with American Civil Liberties

Mill's relationship with American civil liberties is complex and indeterminate because he never lived in America and wrote little about it. However, his influence on America during the nineteenth and twentieth centuries was very great. Mill worked in the same libertarian tradition as Locke and Smith that influenced America's founding fathers. However, Mill differed from Locke and Smith in important ways that mirror the ways that American law diverged from classical liberalism in the twentieth century. For example, Mill believed that a free market economy must be supplemented by government regulation. Furthermore, his defense of freedom was not based on an imaginary "social contract" or "natural

law," but on the principle of utility. Mill feared the tendency of mercantilism to promote conformity, due partially to his reading of de Tocqueville. Mill's metaphor of the "marketplace of ideas" has been extensively used in American jurisprudence, especially when dealing with issues of free speech.

Writings

Mill's writings are range too broadly to do justice in the format of an encyclopedia entry. Only those writings most relevant to American civil liberties have been summarized.

Utilitarianism

In *Utilitarianism* Mill explained the principle of utility as a foundation for all ethics. He said the highest moral principle is that "actions are right in proportion as they tend to produce happiness, wrong as they tend to produce the reverse of happiness." From this principle one can extrapolate secondary principles, such as "do not steal." These secondary principles govern everyday actions. Only in a difficult moral dilemma need one refer to the first principle. The principle of utility gives structure to judgments of guilt or innocence. It is the result of an act that matters, not the actor's intention.

The difference between utilitarianism and natural law is that Mill did not believe that freedom is good when it produces the "reverse of happiness." Thus, Mill believed in state-subsidized education and foundations to serve the public good, since consumers' free choices in the market may not produce happiness. However, Mill also believed that the state only had the power to coerce to prevent harm to another, not harm to oneself. Thus, theoretically Mill would have opposed the use of state power to force people to wear safety belts or not to use drugs.

On the Subjection of Women

In *On the Subjection of Women*, Mill described male domination of women as a last vestige of early law, which was really a regularization of primitive systems of rights and obligations based on power. Europeans had largely outgrown other vestigial forms of domination, such as slavery and feudalism. However, those systems only directly benefited the king and those with property. The male domination of women benefited every man with a wife, and was therefore more

pernicious. However, Mill believed that depriving one half of the species of any legal rights or capacity to participate in civic and political life was a great handicap and did not produce any benefit but plenty of suffering.

On Liberty

In *On Liberty*, Mill argued for complete freedom to act on one's conscience. Mill argued that society has no right to interfere with the individual except to prevent harm to someone else. Thus, one should be completely free in matters of religion, speech, lifestyle, and conduct that only concerns oneself. Mill's main argument was that suppressing beliefs contrary to accepted wisdom assumes that accepted wisdom is infallible. However, history shows that accepted wisdom is not infallible.

Mill fairly summarized the main arguments against complete liberty in order to refute them. First, some might object that the enforcing of wisdom poses no threat to contrary truths because when a contrary opinion really is true, it wins out in the long run anyway. This was the case with modern cosmology, which struggled mightily with Earth-centered cosmology but eventually carried the day. Mill agreed, but felt suppression causes needless suffering and can set the truth back hundreds of years. Second, some might say one has a duty to correct error, and one cannot believe every contrary opinion is the new truth. Mill agreed, but said complete freedom to refute a belief was the very thing that justifies believing it in the first place. Error is better corrected by experience and open discussion. Third, some might say certain beliefs are too important to public safety to suffer dissent. Mill countered that it is possible for one to be wrong about how salutary a belief is. Finally, some might say free expression is good in general, but not when "pushed to an extreme." On the contrary, Mill argued that unless the arguments for free speech were true in an extreme case, they were not true in any case.

Thus, Mill believed in a "marketplace of ideas," in which all opinions were free to enter and compete for adherents, becoming sharper and stronger in the process. Mill was the best example. Because of his rigorous testing of his ideas in rhetorical contests with his associates, Mill was very good at summarizing the arguments against his positions and refuting them. This openness to entertaining opposing views, obvious from the clarity and respect with which he treated them, is the illustration of his argument. Because of Mill's openness, his arguments were on sounder footing, and he truly did acquire good judgment by listening to the arguments against him.

Aesthetic Experience

Mill believed that analytical thinking could only get one so far and that, to achieve true understanding, the intellect must be supplemented by the cultivation of feelings. He believed Wordsworth had illuminated areas of human experience not known to philosophy. Mill believed that there was utility in nonintellectual sensation for its own sake. It is here that the criticism that Mill thought people were just acting on intellectual beliefs about proper conduct misses the point. As described in his *Autobiography*, Mill's humane vision was that variety of experience for its own sake produces happiness. He believed happiness occurs when one is busy doing something else; one must be open to new sensation. Thus, in his "Inaugural Address at St. Andrews," Mill encouraged the students to cultivate their aesthetic senses as well as their intellects.

Mill's career was long and very influential. His writings are an eloquent defense of liberty as fresh and relevant today as they were in the nineteenth century.

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References and Further Reading

- Mill, John Stuart. *A System of Logic, Ratiocinative and Inductive: Being a Connected View of the Principles of Evidence, and Methods of Scientific Investigation*. London: J. W. Parker, 1843.
- . *Essays on Some Unsettled Questions of Political Economy*. London: J. W. Parker, 1844.
- . *Principles of Political Economy*. Boston: C. C. Little & J. Brown, 1848.
- . *On Liberty*. London: J. W. Parker and Son, 1859.
- . *Considerations on Representative Government*. New York: Harper, 1862.
- . *Utilitarianism*. London: Longmans, Green, Reader, and Dyer, 1864.
- . *On the Subjection of Women*. New York: D. Appleton & Co., 1869.
- . *Autobiography*. London: Longmans, Green, Reader, and Dyer, 1873.
- . *Three Essays on Religion*. New York: H. Holt, 1874.

See also English Tradition of Civil Liberties; Freedom of Expression in the International Context; Freedom of Speech and Press under the Constitution: Early History (1791–1917); Freedom of Speech: Modern Period (1917–Present); Freedom of Speech and Press: Nineteenth Century; Low Value Speech; Philosophy and Theory of Freedom of Expression; Self-Governance and Free Speech; Theories of Civil Liberties; Theories of Civil Liberties, International; Theories of Free Speech Protection; Theories of Punishment

MILLER TEST

The *Miller* test defines obscene material that is left outside the First Amendment's freedoms of speech and press. The test asks the trier of fact in an obscenity prosecution to determine

(a) whether the "average person applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest . . . ; (b) whether the work depicts, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.

The test draws its name from *Miller v. California*, 413 U.S. 15 (1973), which while a major step in its delineation, was but one of a series of cases in that development.

Roth v. United States, 354 U.S. 476 (1957), recognized that obscenity is unprotected and began the process of defining that category. *Roth* rejected the test from the English case *Regina v. Hicklin*, L.R. 3 Q.B. 360 (1868), that had judged obscenity based on the effect of even isolated passages on the most susceptible person. *Roth* only excluded from protection material appealing to the average person's prurient interest and required that the work be considered as a whole. *Roth* also defined "prurient" as material likely to excite lustful thoughts. *Memoirs v. Massachusetts*, 383 U.S. 413 (1966), added a requirement that, to be obscene, material must be "utterly without redeeming social value." *Miller* changed that aspect by considering the work as a whole and requiring serious value. Even with *Miller* the development was not complete. While the test's first two prongs employ community standards, *Pope v. Illinois*, 481 U.S. 497 (1987), explained that the test of serious value does not vary from community to community.

The first prong of the test has raised interesting issues. The doctrine of variable obscenity was adopted to allow the test to depart from the "average person" standard in cases in which the materials were marketed or distributed to specific groups. *Mishkin v. New York*, 383 U.S. 502 (1966), held that material directed at a sexually deviant group is to be judged by appeal to the prurient interests of that group. *Ginsberg v. New York*, 390 U.S. 629 (1968), similarly held that material sold to minors should be judged based on appeal to the prurient interests of minors, as well as offensiveness and value for minors.

More recently, the Court has addressed the community standards issue. While originally included so as not to require more socially conservative areas of the country to accept what would be acceptable in more tolerant areas, the application of the *Miller* test to the Internet raised the concern that, since access

cannot be limited on a geographic basis, the most conservative areas would control the content of the Internet for the entire country. The Court addressed this concern, at least in the context of children, in *Ashcroft v. A.C.L.U.*, 535 U.S. 564 (2002), and held that the inability to limit access community by community does not in itself prohibit regulation of the Internet.

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Cases and Statutes Cited

Ashcroft v. A.C.L.U., 535 U.S. 564 (2002)
Ginsberg v. New York, 390 U.S. 629 (1968)
Memoirs v. Massachusetts, 383 U.S. 413 (1966)
Miller v. California, 413 U.S. 15 (1973)
Mishkin v. New York, 383 U.S. 502 (1966)
Pope v. Illinois, 481 U.S. 497 (1987)
Regina v. Hicklin, (1868) L.R. 3 Q.B. 360
Roth v. United States, 354 U.S. 476 (1957)

MILLER v. CALIFORNIA, 413 U.S. 15 (1973)

Marvin Miller was convicted by a state court jury in Orange County, California, of distributing obscene material. He mailed five unsolicited advertising brochures for adult books and a film to a restaurant whose manager complained to the police. The brochures displayed an array of photographs of sexual activity. The conviction was affirmed by a state appeals court.

Although the charge against Miller was only a misdemeanor and the state courts did not issue any written decisions, the U.S. Supreme Court agreed to hear Miller's case. The reason was that a new majority of the Court, led by Chief Justice Warren E. Burger, was ready to reconsider the relationship between the First Amendment guarantee of freedom of speech and government censorship of sexually explicit material.

For a dozen years before *Miller*, the Supreme Court had wrestled with the definition of obscenity. In 1957, in *Roth v. U.S.*, the Supreme Court, in an opinion by Justice William J. Brennan, Jr., said that obscene material was outside the protection of the First Amendment; the Court defined obscenity as sexual material that appeals to the "prurient interest" and stressed that this category should be narrow in scope. This effort at setting a standard satisfied no one on the Court or elsewhere, so throughout the 1960s the justices repeatedly revisited the issue and tried to refine or revamp the legal definition of obscenity.

This effort led ultimately to the *Miller* decision. Writing for a five-to-four majority, Burger said his aim was to "formulate standards more concrete than those

in the past.” The result was a three-part test cobbled together from various prior decisions, but also modifying those precedents. To find material obscene, illegal, and unprotected by the First Amendment, Burger said, the legal questions are (1) whether the “average person” using “contemporary community standards” would find that the material appealed to the “prurient interest”; (2) whether sexual conduct regulated by a state’s law is shown or described in a “patently offensive” way; and (3) whether the work viewed in its entirety “lacks serious literary, artistic, political, or scientific value.” Burger said that definitions would be left to the states, but that the term “patently offensive” in the second part of the test might include descriptions or depictions of actual or simulated “ultimate sexual acts” and of “masturbation, excretory functions, and lewd exhibition of the genitals.”

Burger’s opinion attempted to make a number of things clear about obscenity law. First, it contemplated that obscenity prosecutions would not involve a uniform, national standard but would vary from state to state, according to contemporary community standards and state law for each locale. “It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas or New York City,” Burger wrote.

Second, Burger rejected a more speech-protective standard that a plurality of the Court had adopted in 1966. In *Memoirs v. Massachusetts*, the plurality said a work could only be obscene if it were “utterly without redeeming social value,” but Burger said in *Miller* that there was no reason to adhere to the standard since it had never garnered majority support.

From the decision in *Roth* until *Miller*, it was Justice Brennan who tried repeatedly to come up with a workable standard to differentiate between sexually explicit material protected by the First Amendment and obscene material that was unprotected. But even as the majority in *Miller* settled on a new place to draw that line, Brennan decided that there was no way to distinguish. In a dissent in the companion case to *Miller*, *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973), Brennan said obscenity could not be defined with sufficient clarity and that the First Amendment should not permit prosecution of obscenity involving consenting adults.

The *Miller* test has required some tune-ups but remains the operative standard for obscenity cases. In *Jenkins v. Georgia*, 418 U.S. 153 (1974), one year later, the Court made clear that the term “patently offensive” did not confer unbridled discretion on local juries and had to implicate “hard core” sexual activity. In *Pope v. Illinois*, 481 U.S. 497 (1987), the Court said that the third part of the test involving the

“value” of the work was not intended to be a local standard but should be based on the values of the “reasonable person.”

The *Miller* ruling seems to have resolved few of the issues and problems that existed prior to the decision. “Virtually every word and phrase in the *Miller* test has been the subject of extensive litigation and substantial commentary in the legal literature,” the Attorney General’s Commission on Pornography observed in 1986.

One thing the decision accomplished is that the Supreme Court got out of the practice it followed in the 1960s of having to review every obscenity appeal to weigh the evidence and make a determination of whether the material was obscene. The Court was able to step back and decide obscenity cases only when the legal standard needed changing or fine-tuning.

But four themes developed in the wake of *Miller* and have remained central in debate over obscenity. One is the criticism that government has failed to adequately prosecute obscenity cases. On several occasions since *Miller*, U.S. attorneys general have announced stepped-up efforts to focus on obscenity prosecutions, but the results are difficult to quantify. Related to this issue, a second theme is how to deal with the vast proliferation of sexually explicit material available through new technologies that were not prevalent when *Miller* was decided, from the Internet to cable television to handheld video players. A third theme is a long-running debate over whether sexually explicit material should be viewed as harmful to women—whether it actually causes gender violence or contributes to the degradation of the status of women.

A fourth theme is the continuing values debate over the degree to which sexually explicit material should be considered protected not just by free-speech standards but also by societal notions of personal privacy. The Supreme Court’s 2003 decision striking down a Texas sodomy law (*Lawrence v. Texas*, 539 U.S. 558) fueled the legal argument that consensual sexual activity involving adults should be protected by privacy doctrines.

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References and Further Reading

- Cohen, Daniel Mark. *Unhappy Anniversary Thirty Years Since Miller v. California: The Legacy of the Supreme Court’s Misjudgment on Obscenity*. St. Thomas Law Review 15 (2003): 545.
- Final Report of the Attorney General’s Commission on Pornography*. 1986.
- Hixson, Richard F. *Pornography and the Justices: The Supreme Court and the Intractable Obscenity Problem*. Carbondale: Southern Illinois University Press, 1996.

Strossen, Nadine. *Defending Pornography: Free Speech, Sex, and the Fight for Women's Rights*. New York: Scribner, 1995.

Cases and Statutes Cited

Jenkins v. Georgia, 418 U.S. 153 (1974)
Lawrence v. Texas, 539 U.S. 558 (2003)
Memoirs v. Massachusetts, 383 U.S. 413 (1966)
Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973)
Pope v. Illinois, 481 U.S. 497 (1987)
Roth v. U.S., 354 U.S. 476 (1957)

See also A Book Named “*John Cleland’s Memoirs of a Woman of Pleasure*” v. *Massachusetts*, 383 U.S. 413 (1966); Burger, Warren E.; *First Amendment and PACs; Freedom of Speech: Modern Period (1917–Present)*; *Jenkins v. Georgia*, 418 U.S. 153 (1974); *Paris Adult Theatre v. Slaton*, 413 U.S. 49 (1973); *Pope v. Illinois*, 481 U.S. 497 (1987); *Privacy*; *Roth v. United States*, 354 U.S. 476 (1957)

MILLS v. ALABAMA, 384 U.S. 214 (1966)

Mills v. Alabama helped establish the role of the press in the electoral system. Mills, editor of the *Birmingham Post-Herald*, published an election-day editorial supporting a proposition changing city government from commission to mayor–council form and criticizing the mayor. The editorial violated an Alabama criminal statute prohibiting soliciting votes for or against candidates or ballot proposals on election day. The trial court determined that a conviction would violate the state and federal constitutions, but the Alabama Supreme Court reversed, finding the statute a reasonable restriction on the press.

The U.S. Supreme Court said that a major purpose of the First Amendment is protecting free discussion of government affairs and that the press serves as a “powerful antidote” to abuse of government power. The act “muzzle[d] one of the very agencies the Framers . . . thoughtfully and deliberately selected to improve our society and keep it free.” This occurred at the time the press could be most effective and denied the opportunity to respond to charges or arguments offered the day before an election. The importance of the role of the press in the political process made the act an “obvious and flagrant abridgment of the constitutionally guaranteed freedom of the press.”

The related issue of requiring newspapers to allow candidate response to allegations is addressed in *Miami Herald v. Tornillo*, 418 U.S. 241 (1974). The *Mills* Court also noted that the case did not address conduct at polling places, an issue later addressed in *Burson v. Freeman*, 504 U.S. 191 (1992).

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Cases and Statutes Cited

Burson v. Freeman, 504 U.S. 191 (1992)
Miami Herald v. Tornillo, 418 U.S. 241 (1974)

MINCEY v. ARIZONA, 437 U.S. 385 (1978)

It is often said that warrantless searches are per se unreasonable under the Fourth Amendment, “subject only to a few specifically established and well-delineated exceptions” (*Katz v. United States*, 389 U.S. 347, 357, 1967). Entering and searching a home in an emergency situation—an exigent circumstance, in the parlance of Fourth Amendment jurisprudence—qualifies as an exception to the warrant requirement. In *Mincey v. Arizona*, 437 U.S. 385 (1978), the Supreme Court underscored the importance of exigency in warrantless searches of the home.

Ten plainclothes police officers came to Rufus Mincey’s apartment to arrest him for narcotics offenses. A shootout ensued, leaving one officer dead and Mincey injured. For four days and without a search warrant, the police searched Mincey’s entire apartment, opening drawers, closets, and cupboards, pulling up the carpet, digging bullet fragments out of the walls and floors. “In short,” the Court said, “Mincey’s apartment was subjected to an exhaustive and intrusive search.” The state argued that a search of a homicide scene, which Mincey’s apartment was, “should be recognized as . . . an exception [to the warrant requirement].”

The Court refused to add a crime-scene exception to the growing list of exceptions to the warrant requirement. With no emergency impelling the search here, the Court “decline[d] to hold that the seriousness of the offense under investigation itself creates exigent circumstances of the kind that under the Fourth Amendment justify a warrantless search.” The warrantless search must end when the exigency ends. The Court’s refusal to “sacrifice[d]” the privacy people have in their homes “in the name of maximum simplicity in enforcement of the criminal law” reflects the settled understanding that the Fourth Amendment regards the sanctity of the home as the apex of privacy.

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References and Further Reading

Dressler, Joshua. *Understanding Criminal Procedure*, 3rd ed. New York: LexisNexis, 2002.

Cases and Statutes Cited

Katz v. United States, 389 U.S. 347 (1967)
Mincey v. Arizona, 437 U.S. 385 (1978)

See also **Exclusionary Rule; Search (General Definition); Seizures; Warrantless Searches**

MINNESOTA v. DICKERSON, 508 U.S. 366 (1993)

This case further defined the parameters of a pat-frisk under *Terry v. Ohio* (392 U.S. 1, 1968). Police encountered Dickerson as he left a “notorious ‘crack house.’” Dickerson walked towards police but abruptly changed course when he saw them. Suspicious, police stopped him. One officer pat-frisked Dickerson, finding no weapons but feeling a small lump in Dickerson’s nylon jacket. The officer later testified that he could tell, through the jacket, that the lump was crack-cocaine in cellophane. The officer retrieved a bag of cocaine from the pocket.

Appealing his conviction, Dickerson asserted that the search violated the Fourth Amendment’s prohibition of unreasonable searches, claiming it exceeded the limits of a permissible *Terry* pat-frisk. The Supreme Court reaffirmed (six to three) that police may pat-frisk an individual when reasonable suspicion arises. The search’s purpose is to find weapons, and police may seize any items found in that search in “plain view” whose unlawful nature is readily apparent. Because the officer had to manipulate, squeeze, and slide the lump to discern its illicit nature, the search exceeded *Terry*’s scope since these actions were unnecessary to find weapons. The Court reversed Dickerson’s conviction since the exclusionary rule compels suppression of unlawfully obtained evidence.

Justice Scalia’s concurrence articulated a central pillar of his constitutional philosophy. Reasoning that the original intent of the Fourth Amendment controlled, he questioned *Terry*’s propriety given that a “pat-frisk” would likely have been unlawful when the Constitution was adopted. The justice has favored this same rationale in intimating that he would abandon the exclusionary rule altogether.

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References and Further Reading

- Cooper, Frank Rudy, *Cultural Context Matters: Terry’s “Seesaw Effect,”* Oklahoma Law Review 56 (2003): 833, 858–859.
- Dery, George M., III, *The Uncertain Reach of the Plain Touch Doctrine: An Examination of Minnesota v. Dickerson and Its Impact on Current Fourth Amendment Law and Daily Police Practice*, American Journal of Criminal Law 21 (1994): 385.
- Harris, David A., *Using Race or Ethnicity as a Factor in Assessing the Reasonableness of Fourth Amendment Activity: Description, Yes; Prediction, No*, Mississippi Law Journal 73 (2003): 423.

Urbonya, Kathryn R., *Rhetorically Reasonable Police Practices: Viewing the Supreme Court’s Multiple Discourse Paths*, American Criminal Law Review 40 (2003): 1387.

Wallin, Howard E., *Plain View Revisited*, Pace Law Review 22 (2002): 307.

Cases and Statutes Cited

Mapp v. Ohio, 367 U.S. 643 (1961)
Michigan v. Long, 463 U.S. 1032 (1983)
Terry v. Ohio, 392 U.S. 1 (1968)
Ybarra v. Illinois, 444 U.S. 85 (1979)

See also **Arrest without a Warrant; Exclusionary Rule; Mapp v. Ohio, 367 U.S. 643 (1961); Plain View; Scalia, Antonin; Search; Terry v. Ohio, 392 U.S. 1 (1968); Warrantless Searches**

MINNESOTA v. OLSON, 495 U.S. 91 (1990)

Minnesota v. Olson addressed an important procedural question in Fourth Amendment litigation: Is the person seeking to challenge the legality of the search or seizure the “victim” of the governmental activity?

A person must have a legally protected interest in the area searched to be able to challenge a governmental search of that area. Olson was an overnight guest in another person’s home when the police entered the house without a warrant and arrested him. That warrantless entry violated the Fourth Amendment. But did Olson have any right to complain because it was not his home? The Supreme Court held that he did, reasoning that his status as an overnight guest created a reasonable expectation of privacy in the home. The Court observed: “We will all be hosts and we will all be guests many times in our lives.” It accordingly believed the long-standing social custom of having such guests was recognized as valuable by society.

Olson gives protection against unreasonable governmental intrusions to individuals when they travel and stay in another’s home. Left unanswered by *Olson* is whether other social guests have protection. In a subsequent case, *Minnesota v. Carter*, 119 S. Ct. 469 (1998), the Court was divided on that question. Some justices saw *Olson* as the absolute limit of protection, while other justices believed that almost all social guests would have an expectation of privacy in another’s home. In *Carter*, the Court held that a person who was in another’s apartment for a short time to package cocaine did not have a protected interest. Which other visitors have a protected interest in someone else’s home has yet to be answered by the Court.

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References and Further Reading

- Clancy, Thomas K., *What Does the Fourth Amendment Protect: Property, Privacy, or Security?* Wake Forest Law Review 33 (1998): 307.
- Weinreb, Lloyd L., *Your Place or Mine? Privacy of Presence Under the Fourth Amendment*, Supreme Court Review (1999): 253.

Cases and Statutes Cited

- Jones v. United States*, 362 U.S. 257 (1960)
- Minnesota v. Carter*, 119 S. Ct. 469 (1998)
- Minnesota v. Olson*, 495 U.S. 91 (1990)

See also **Exclusionary Rule; Search (General Definition)**

MIRANDA v. ARIZONA, 384 U.S. 436 (1966)

The *Miranda* case included three other cases from across the country, all of which dealt with police interrogation of persons suspected of a crime.

Phoenix police officers arrested Ernesto Miranda at his home on suspicion of rape and kidnapping. He was transported to the police station and placed in an interrogation room. After two hours of interrogation the police obtained a written confession from Miranda. He was convicted of the charges and his attorney appealed, stating that he was not advised of his constitutional rights, namely his Fifth Amendment right to be free from self-incrimination and his Sixth Amendment right to counsel. The Arizona Supreme Court affirmed the trial court. In its analysis, great weight was given to the fact that Miranda had not specifically requested counsel. However, during the trial, the police admitted that Miranda had not been advised that he had the right to have counsel present.

If the Fifth Amendment of the Constitution states, in part, “No person . . . shall be compelled in any criminal case to be a witness against himself,” and the Sixth Amendment states, “the accused shall . . . have the Assistance of Counsel,” why were these defendants confined and interrogated by law enforcement? Isolated and given incomplete or nonexistent information about their constitutional rights, they were convicted on the confessions obtained from this process.

Though *Miranda* is sometimes characterized as a giant leap by the Supreme Court, it was at best a small hop, as a child hops from one stone to another to cross a creek. To understand this one must understand a bit of history. Two years previously the Supreme Court decided *Escobedo v. Illinois*, 378 U.S. 478, which involved a defendant under very similar circumstances. Handcuffed and forced to remain

standing, he was interrogated until a confession was obtained four hours later. The police failed to honor his request to speak with an attorney and, furthermore, prevented him from speaking to his retained attorney when the attorney arrived at the police station. The Court held that this violated the defendant’s Fifth and Sixth Amendment rights and his confession was inadmissible. Thus, the Supreme Court affirmed *Escobedo* in deciding *Miranda*. However, a difference lies in the fact that in the *Miranda* consolidated cases there was no prevention of counsel from speaking with the client. *Miranda*’s roots, therefore, lie in the Fifth Amendment—the right to be free from self-incrimination.

The Supreme Court held that under two circumstances a person must be given precautionary warnings, creating the two-prong test of *Miranda*. The first prong is custody, which is when a person is in the custody of law enforcement or his or her freedom of movement is restricted by law enforcement. The second prong is interrogation, which is when the person is then questioned about a criminal matter in which he or she is involved. If the two-prong test is met, the precautionary warnings must be given if the information obtained is to be admissible. The warnings are as follows:

The person must be advised of his right to remain silent and that anything said could be used in court against him.

The person has the right to have an attorney present during questioning, whether he can afford one or not.

The person can waive his rights but only if it is done in a knowing, voluntary, and intelligent manner.

If the person does not waive his rights, the police may not question him.

The facts from the consolidated line of cases appear obvious in the sense that all of the defendants were questioned without being advised of their constitutional rights. Yet the Court in its holding relied on other evidence to support the conclusion that a warning should be given. Among the most poignant were police training manuals, which advocated police officers honoring a defendant’s initial request to remain silent, but then pointing out how guilty it made the defendant look. If a defendant requested an attorney, the police officer was to advise the defendant that he or she should first be honest with the officer before involving the lawyer. Many of the manuals also advocated a “good cop, bad cop” approach with the bad cop using trickery, intimidation, and threats. From this evidence it appeared the problem was systemic, a

conclusion that influenced the Court to hold that the warnings need be uniform and apply broadly.

Police departments abhorred the *Miranda* decision initially. Many said the guilty would go free and police would be powerless to obtain confessions. Though this is still argued, what is true is that it has demanded a more professional police force and ensured that the amendments of the Constitution are more than just words. Although *Miranda* has been controversial, the Court reaffirmed it by a seven-to-two vote in *Dickerson v. United States*, 530 U.S. 428 (2000).

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References and Further Reading

- Hogrogian, John G. *Miranda v. Arizona: The Rights of the Accused*. San Diego, CA: Lucent Books, 1999.
- Sobel, Nathan R. *The New Confession Standards, Miranda v. Arizona; a Legal Perspective, a Practical Perspective*. Jamaica, NY: Gould Publications, 1966.
- Stuart, Gary L. *Miranda: The Story of America's Right to Remain Silent*. Tucson: University of Arizona Press, 2004.

Cases and Statutes Cited

- Dickerson v. U.S.*, 530 U.S. 428 (2000)
- Escobedo v. Illinois*, 378 U.S. 478 (1964)
- Miranda v. Arizona*, 384 U.S. 436 (1966)

MIRANDA WARNING

The arrest and interrogation of Ernesto Miranda would cause reverberations in the criminal justice system and create defendants' rights that are still enforced to the present day. *Miranda v. Arizona* created the Fifth Amendment right against self-incrimination; the Fifth Amendment of the U.S. Constitution says no one "shall be compelled in any criminal case to be a witness against himself." The U.S. Supreme Court acknowledged the only safeguard against overzealous police interrogation tactics. Chief Justice Earl Warren wrote the *Miranda* opinion. Justice Warren became one of the great judicial activists in the history of the Supreme Court.

History

The doctrine of the right against self-incrimination has its history in English common law. During the reign of Charles I (1625–1649), the right emerged as a response to the repressive measures taken by the government. English trial judges restricted the use of

involuntary confessions, but in 1783 it became written law. English judges were keenly aware of physical and psychological coercion and its effect on involuntary confessions. The law presumed that judges could determine whether a confession was voluntary or involuntary. The voluntariness rule became prevalent in American jurisprudence as well. In the nineteenth century, during a major reform period in the English criminal justice system, judges had the right to review police interrogation practices. In 1848, by parliamentary act, preliminary interrogation of suspects was subject to judicial review. In contrast, American jurisprudence was far less sophisticated and took nearly a century to subject police interrogations to judicial review. The right against self-incrimination would develop even later.

The United States did recognize a right against torture in a 1783 case, *Commonwealth v. Dillon*. However, the Supreme Court did not review state prosecutions until the passage of the Fourteenth Amendment in 1868. The Fourteenth Amendment due process clause prevents states from depriving "... any person of life, liberty or property without due process of the law." The Supreme Court limited its review of depriving a person of the due-process rights to federal prosecutions. The Court did not establish a common law rule against torture until it overturned a murder conviction and death sentence in *Hopt v. Utah*.

The Court continued to have a narrow view of when the Fourteenth Amendment should be applied. In 1895, Justice Melville Fuller wrote in *Wilson v. United States* that a voluntary statement was not rendered inadmissible by the mere failure to provide the suspect with a lawyer during questioning to advise him that he need not answer questions posed to him and that any statement he made would be used against him. The Supreme Court began one of the most conservative eras in its history with the landmark decision of *Plessy v. Ferguson*, 163 U.S. 537 (1896), which created the Jim Crow separate-but-equal doctrine. With few exceptions the Court began a hands-off approach to state and federal prosecutions.

Twentieth Century

The Supreme Court did an about-face in *Bram v. United States* (1895) and applied the Fifth Amendment right against self-incrimination. Justice White wrote the opinion that overturned a murder conviction after finding that the accused's statements introduced into evidence as a confession of guilt were involuntarily made. The Court relied on the principle that the Fifth Amendment was meant to exclude "all

manifestations of compulsion whether arising from torture or moral causes.” However, the Court again retreated from uniformly applying the Fifth Amendment to inadmissible confessions. In 1902, the Court affirmed a murder conviction and rejecting the defendant’s claim in *Hardy v. United States* that his statements were involuntary. The Court made no reference to the Fifth Amendment. The Court went further in *Twining v. New Jersey*, 211 U.S. 78 (1908), and rejected outright the contention that the right against self-incrimination was applicable to the due process clause of the Fourteenth Amendment. The Court began a complete turnaround from *Bram v. United States*.

The Court eventually rejected *Bram*’s rationale entirely. Starting in *Powers v. United States*, the Court held that the Fifth Amendment guarantee was not violated by the admission of voluntary statements made at the preliminary hearing, even though the accused was not warned that the statements he made could be used against him. The Court began to retreat against taking any action in federal cases. In a 1923 deportation case, *United States ex rel Bilokumsky v. Tod*, Tod alleged that absence of counsel at the preliminary hearing and the failure of officers to apprise the defendant of his right to remain silent violated his due-process rights. The Supreme Court disagreed. Justice Brandeis found that, absent a rule forbidding interrogation or requiring counsel, “a mere examination does not render the hearing unfair.”

While the Court did reverse the murder conviction in *Ziang Sung Wan v. United States*, it did not apply the federal Constitution. The police held Wan in a hotel room incommunicado for one week under relentless interrogation and used coercive methods such as sleep deprivation to garner a confession eventually admitted into evidence. The Court would remain silent for years on the use of the Fourteenth Amendment due process clause and the right against self-incrimination.

The 1930s saw a judicial revolution take place. The Supreme Court began to address the horrible and brutal legacy of race in the southern criminal justice system. The infamous Scottsboro case became the first of several cases the Supreme Court decided in the defendants’ favor. In the 1932 case, *Powell v. Alabama*, 287 U.S. 45 (1932), several young black men were charged and convicted of the rape of two white women. The trial court assigned local attorneys for all nine defendants. The trial court found them guilty, sentenced them to die, and set the execution date. The Supreme Court reversed the convictions and found that defendants had the Sixth Amendment right to the assistance of counsel in death penalty cases. The right to counsel at the interrogation phase

would not come until some years later. *Brown v. Mississippi*, 297 U.S. 278 (1936), was the seminal case that raised the question of coerced confessions to a constitutional level. The U.S. Supreme Court determined that law enforcement would not be able to use torture as a coercive tactic to garner confessions.

In *McNabb v. United States*, 318 U.S. 332 (1943), the Court held that police were to show “with reasonable promptness” some legal cause for holding persons. The Court would not allow convictions to stand when the police failed to allow defendants a prompt preliminary hearing. The Court extended the *McNabb* rule in *Mallory v. United States*, 354 U.S. 499 (1957). The Supreme Court reversed a rape conviction and death sentence. The Court held that federal law that required Mallory be brought before a magistrate “without unnecessary delay” had been violated. The *McNabb–Mallory* rule put law enforcement on notice that a statement obtained from a defendant during a period of unnecessary delay in having a probable cause determination should be excluded.

The Court began to eek out procedural safeguards for defendants. The Court guaranteed representation in death penalty cases, would exclude confessions that were physically coerced, and guaranteed defendants the right to be brought to court without delay. It would take Justice Earl Warren to create the modern doctrine of defendants’ rights.

Miranda v. Arizona

Prelude

Justice Warren began to carve out fundamental rights for defendants and challenge conventional law enforcement procedures. In *Gideon v. Wainwright*, 372 U.S. 335 (1963), Gideon was charged with breaking and entering a poolroom with intent to commit—a felony under Florida law. Appearing in court without funds and without a lawyer, Gideon asked the court to appoint him counsel. The court refused and Gideon represented himself. The jury found him guilty and he received a five-year prison sentence. Justice Black succinctly stated, “The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.”

The Court began to give a nuanced definition of what it meant to have counsel. A Mexican immigrant and murder suspect continued to request his attorney while being interrogated, but the police refused his request. The Supreme Court held that once a suspect

becomes the target of an investigation and is not warned about his constitutional rights, he is entitled to representation under the Sixth and Fourteenth Amendments. *Escobedo v. Illinois*, 378 U.S. 478 (1964), gave suspects the right to counsel during the interrogation phase. The Court began to grant constitutional guarantees at the critical interrogation phase for defendants.

However, *Escobedo* required several criteria be met in order to conclude that denial of representation had taken place:

The investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied "the Assistance of Counsel" in violation of the Sixth Amendment to the Constitution as "made obligatory upon the States by the Fourteenth Amendment."

Escobedo left categories of suspects without recourse; if they were not the target of specific investigation, they could not seek the assistance of counsel. The unprotected category included witnesses, potential witnesses, and sources of information or investigative leads. Only when the subject became the target of the investigation was he entitled to constitutional protection. The critical investigation and interrogation phase left many suspects without rights.

Facts

A bank teller was abducted from a parking lot in downtown Phoenix. She unlocked her driver's side door and was met with a short, slender Hispanic man wielding a knife. The man drove the car into an alley. He attempted to assault the teller, but she successfully fought back and told him to take the money in her purse. The man took eight dollars from her purse and left the car. Three months later, an eighteen-year-old telephone dispatcher was getting into her car when a short Hispanic male forcefully entered it. He held a small knife to her throat and demanded money. He then began to tear at her clothes and she screamed and scared the man away. A week later, an eighteen-year-old woman getting off the bus in mid Phoenix was accosted by man in a car. He grabbed her and placed her in the car and drove to the desert. She was assaulted and later returned to her neighborhood.

The police received a lead about a young Hispanic male driving a car in the area where the last woman

was assaulted. Police went to Ernest Miranda's home and asked whether he would accompany them to the police station. He agreed. Once he was placed in the interrogation room, the police immediately began to question him about the assault and abduction of the eighteen-year-old woman. Miranda was asked to participate in a lineup. He agreed. Two victims could not conclusively identify him. The police told Miranda that they had identified him. Miranda then wrote a confession regarding assaulting the eighteen-year-old and verbally confessed to the robbery. The police reviewed with Miranda a standard statement form that stated the confession was free from coercion and given with knowledge of his legal rights.

Miranda had separate trials for robbery and assault. The trial courts found him guilty of all charges and sentenced him to prison. Defense counsel raised issues about the confession used in the trial; the major issue was whether Miranda was informed of his constitutional rights. The Arizona Supreme Court affirmed the conviction. The Supreme Court accepted the case for review.

Opinion

Justice Warren held that the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. Justice Warren's opinion became the verbatim *Miranda* warnings that are so well known today:

An individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation.

If an individual indicates that he wishes the assistance of counsel before any interrogation occurs, the authorities cannot rationally ignore or deny his request on the basis that the individual does not have or cannot afford a retained attorney.

It is necessary to warn the individual not only that he has the right to consult with an attorney, but also that if he is indigent a lawyer will be appointed to represent him.

Aftermath

Miranda created a firestorm of debate that still rages today. In 1966, Congress attempted to overrule

MIRANDA WARNING

Miranda through legislation (18 U.S.C. § 3501). Congress enacted the statute that was intended to overrule the requirement that officers give *Miranda* warnings to suspects by once again making voluntariness, rather than the recitation of warnings, the touchstone for the admissibility of confessions. It set forth a nonexclusive list of factors, including whether the suspect was advised of his constitutional rights, that courts could consider in determining voluntariness. Although this statute was enacted in 1968, it was largely ignored by federal prosecutors. Thus, the *Miranda* warnings requirement remained intact simply by default.

Miranda opponents eagerly awaited a case that would overrule the landmark case and establish the congressional statute as law—it came in 2000. *Dickerson v. United States*, 530 U.S. 428 (2000), became one of the most anticipated cases to be argued before the Supreme Court in several years.

The FBI arrested James Dickerson for bank robbery after an eyewitness gave a license plate number that matched Dickerson's car. The agents went to Dickerson's house with guns drawn. They entered his apartment without a warrant and without Dickerson's consent. The agents took him to an FBI field office and failed to give him his *Miranda* warnings. Agents continued to talk to Dickerson and informed him that his apartment was being searched. Dickerson gave them a statement. The agents advised him of his rights after the statement was given.

Dickerson's attorney successfully had the statement suppressed before trial. The Fourth Circuit reversed the suppression of the statement using the language from Section 3501. Dickerson appealed to the Supreme Court.

The Supreme Court held that Section 3501 could not be enforced because the warnings component of the *Miranda* decision was a constitutional ruling. The debate rages about whether the Supreme Court would in future consider overturning *Miranda*. The *Dickerson* Court chose to yield to the original intent of Justice Warren.

The Future

The globalization of criminal procedures has become evident in the war on terror and in the investigation of the attack on September 11, 2001. In the era of Al Qaeda and a protracted war, the government has the power to suspend the civil liberties of its citizens by invoking enemy combatant status. Once the status is invoked, the person is placed outside the purview

of American law and jurisprudence. An enemy combatant is not allowed to have regular contact with an attorney, has no judicial review, and may be detained indefinitely.

The government has taken two methods with American citizens accused of Al Qaeda activity. John Anthony Lindh became the first American charged with activities linked to the terrorist organization. The FBI treated him as any American citizen is entitled, including being advised of his *Miranda* rights and right to counsel. The government charged Lindh with treason and he pled to lesser charges. Counsel on both sides prepared for a trial in which questions of the voluntariness of Lindh's statement would have come into dispute.

Jose Padilla and Yaser Esam Hamdi are designated enemy combatants who have not been given the same level of protections as Lindh enjoyed. Padilla and Hamdi continue to fight to be under the purview of American jurisprudence and all the rights that are afforded them as American citizens. The Supreme Court has given the U.S. government leeway to designate Padilla and Hamdi as enemy combatants until the president deems that they are American citizens with rights under the Constitution again.

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References and Further Reading

Godsey, Mark A., *Rethinking the Involuntary Confession Rule: Towards a Workable Test for Compelled Self-Incrimination*, California Law Review 93 (March 2005): 465.

Stuart, Gary. *Miranda: The Story of America's Right to Remain Silent*. 2004.

Cases and Statutes Cited

Brown v. Mississippi, 297 U.S. 278 (1936)

Miranda v. Arizona, 384 U.S. 436 (1966)

Powell v. Alabama, 287 U.S. 45 (1932)

18 U.S.C. § 3501

See also **Coerced Confessions/Police Interrogations; Due Process**

MIRANDA, ERNESTO ARTURO (1941–1976)

The name "Miranda" is now permanently linked to the requirement that police inform suspects of certain Fifth and Sixth Amendment rights before interrogating them. The recital of the so-called "*Miranda* rights" has become a ritual accompanying the act of placing someone under arrest, introducing a

new verb, to “mirandize,” into the language. The connection between the name and the rights is at least partially due to the vagaries of chance: *Miranda v. Arizona*, 384 U.S. 436 (1966), just happened to be listed as the first of three cases considered together by the Supreme Court. As a result of that landmark decision, when police detain a suspect they almost inevitably recite the now familiar litany: “You have the right to remain silent. If you give up the right to remain silent, anything you say can and will be used against you in a court of law. You have the right to an attorney, and to have the attorney present during questioning. If you cannot afford an attorney, one will be appointed for you.”

Ernesto Miranda probably had very little idea of how his case would affect criminal justice in the United States. Unlike Clarence Earl Gideon of *Gideon v. Wainwright*, 372 U.S. 335 (1963), Miranda did not play an active role in his appeal. Certain members of the Supreme Court were looking for cases like Miranda’s in order to clarify the implementation of previous decisions, including *Gideon* and *Escobedo v. Illinois*, 378 U.S. 478 (1964). Lawyers from the American Civil Liberties Union assisted in the appeal process, filing an amicus curiae brief for the Supreme Court.

There was nothing extraordinary about the case, other than the prosecution’s reliance on Miranda’s confessions. A young woman was abducted and raped. Although she was mildly retarded, she was able to give police a description that fit Miranda and later identified him in a lineup. Miranda was charged with kidnapping and rape. He was also charged with robbery, when another victim identified him as the man who had robbed her at knifepoint. When police told Miranda that the victims had identified him, he confessed to both crimes. His version of events substantially matched those of the victims.

There was never any allegation that the police coerced the confessions; Miranda did not ask for an attorney as happened in the *Escobedo* case. At issue was whether a suspect detained by the police could waive his or her right against self-incrimination without the advice of a lawyer, and at what point in an investigation the police should be required to inform suspects of their rights. This was the basis of the defense strategy deployed by Miranda’s court-appointed attorney, Alvin Moore. Moore moved unsuccessfully to have the confessions excluded. He cross-examined the police officers, asking whether they had informed Miranda of his right to legal counsel.

Although the guilty verdicts for kidnapping and rape were overturned, Miranda remained incarcerated

while the appeals were considered. The conviction for the robbery charge was never overturned. In the Court’s opinion, Chief Justice Warren argued, among other things, that confessions were not essential to good police work and successful prosecution. As if to underscore that point, Miranda was almost immediately retried, this time without the confessions, and was again convicted. He was sentenced, for the second time, to concurrent prison terms of twenty to thirty years.

Ernesto Arturo Miranda was in many ways typical of the occupants of prison. Raised in a somewhat disrupted family environment (his mother died when he was young, and he never developed close relationships with his father or stepmother), he did not do well in school and began getting into trouble with the law after dropping out of the ninth grade at age fourteen. He was in and out of reform school, jail, and prison. At the time of the arrest, he was living with his common-law wife, working as a truck driver, and appeared to have settled down. Psychiatric diagnoses conducted while he was awaiting trial described him as immature, lacking impulse control, and possibly suffering from a mental illness. His common-law wife testified for the prosecution in the second trial, following an incident in which Miranda had written to the state welfare authorities, suggesting that she was an unfit mother.

Freed on parole in 1972, Miranda felt cheated that he never profited from the famous case. At one point he tried to sell autographed cards printed with the *Miranda* warnings. He never adjusted to life outside prison; he was arrested once and was once reincarcerated for violating the terms of his parole. Miranda was murdered following a dispute over a three-dollar poker bet in Phoenix in 1976. Although his contribution to the development of civil liberties was not heroic, his name symbolizes the restraint of state power prized by civil libertarians.

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References and Further Reading

- Cortner, Richard C., and Clifford M. Lytle. *Modern Constitutional Law*. New York: Free Press, 1971.
 Richard, R. Leo, and George C. Thomas, eds. *The Miranda Debate: Law, Justice, and Policing*. Boston: Northeastern University Press, 1998.
 Walker, Samuel. *Sense and Nonsense About Crime and Drugs*, 5th ed. New York: Wadsworth, 2001.

Cases and Statutes Cited

- Escobedo v. Illinois*, 378 U.S. 478 (1964)
Gideon v. Wainwright, 372 U.S. 335 (1963)
Miranda v. Arizona, 384 U.S. 436 (1966)

See also *Escobedo v. Illinois*, 378 U.S. 478 (1964); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Right to Counsel*; Warren Court; Warren, Earl

MISCEGENATION LAWS

Miscegenation laws, sometimes referred to as antimiscegenation laws, regulated interracial sexual relations. The term “miscegenation” was first used in an 1863 New York pamphlet “Miscegenation: The Theory of the Blending of the Races, Applied to the American White Man and Negro” and is derived from the Latin words *miscere* (to mix) and *genus* (race), though the pamphlet advocated miscegenation as a way to end racial differences in America.

Laws regulating interracial sexual relationships have existed in many countries and at many times. In the twentieth century, Nazi Germany, apartheid South Africa, and the United States were notable proponents of such laws.

The nature and scope of miscegenation laws varied between jurisdictions. The history of miscegenation laws in the United States began in colonial times when Virginia passed a law in 1662 making the punishments for interracial fornication twice as harsh as intraracial fornication. In 1664, Maryland passed a law prohibiting whites and blacks from intermarrying. Generally miscegenation laws prohibited interracial fornication and marriage. These laws spread throughout the colonies, in the North and the South, before and after the American Revolution. As the United States expanded, so too did the number of states with miscegenation laws, before and after the civil war, with forty-one states having had laws prohibiting interracial marriage by 1914.

Miscegenation laws were introduced to prevent mixed-race offspring and were frequently justified as necessary to protect the purity of the white race under theories of racial superiority. In slave states the presence of mulattoes posed problems for the existence of racial slavery over whether mulattoes were freeborn because of their white parent or subject to slavery because of their black parent. Departing from English common law, mixed-race children gained their status from their mother. This placed the onus of maintaining the system of racial slavery onto white women, the protection of whose virtue was often cited as further justification for miscegenation laws. The illegitimate offspring of white men and black slave women were slaves. Despite rhetoric and public pronouncements to the contrary, sexual relations between white men and black slaves were common in the antebellum south. The most famous is the reputed relationship between Thomas Jefferson

and Sally Hemmings, though public knowledge of such relationships then would have created a scandal.

During reconstruction the status of miscegenation laws was called into question by the passage of the Civil Rights Acts of 1866 and 1875, and the Fourteenth Amendment, which the Alabama Supreme Court used to strike down a miscegenation law in 1872 before being quickly reversed. However, the consensus was that these measures were not intended to prohibit miscegenation laws because they applied to all races equally.

After Reconstruction more states introduced miscegenation laws and, especially within the South, the existing laws were toughened and more vigorously applied. Criminal penalties ranged from fines to imprisonment and banishment from the state. The marriage could be declared void. This increased the stakes for civil enforcement of the statutes because voiding marriages nullified any spousal property claims and rendered any children illegitimate, thus affecting the inheritance of property.

Miscegenation laws were primarily aimed at preventing whites from mixing with blacks, but in some states white’s marrying Asians, Native Americans, and mulattoes was also prohibited. Sometimes the laws prohibited all races from marrying members of any other race. These laws required specific determinations as to one’s race; standards differed but could be as strict using “one drop of blood” to determine that a person was not white.

Pennsylvania repealed its miscegenation laws in 1780 and in the nineteenth century a few states repealed their miscegenation laws, starting with Massachusetts (1843) and ending with Ohio (1887). Oregon was the next state to repeal its miscegenation laws, but not until 1951. However, in 1912 and 1913, Vermont and Massachusetts passed laws voiding interracial marriages for nonstate residents to prevent interracial couples trying to avoid miscegenation laws in their own states. California was the only state to forbid interracial marriage and fully recognize such a union from a jurisdiction where it was legal.

In 1948, the California Supreme Court used the federal constitution to strike down the state’s miscegenation law in *Perez v. Sharp*, 32 Cal.2d 711 (1948). The U.S. Supreme Court appeared ready to enter the fray in 1955 when it accepted *Naim v. Naim*, 875 E. 2nd 749 (Va. 1955); 350 U.S. 891 (1955); 350 U.S. 985 (1956)—a challenge to the Virginia miscegenation laws. The Court later used a procedural device to avoid ruling on its constitutionality. It is thought that this was to avoid exacerbating the tensions caused by the Court’s recent ruling in *Brown v. Board of Education*, 347 U.S. 483 (1954), 349 U.S. 294 (1955).

Public opinion was turning, however, and between 1951 and 1967, fourteen states repealed their miscegenation laws, leaving sixteen states with active bans on interracial marriage. In *McLaughlin v. Florida*, 379 U.S. 184 (1964), the U.S. Supreme Court struck down an interracial fornication statute and in 1967 the Court used *Loving v. Virginia*, 388 U.S. 1 (1967), to declare that miscegenation laws prohibiting interracial marriage violated the Fourteenth Amendment's due process and equal protection clauses, thus ending the enforcement of miscegenation laws in the US.

In the time after *Loving*, many states removed their now unenforceable miscegenation laws and state constitutional provisions. Alabama was the last state to remove the miscegenation provision from its constitution in 2000, though approximately 40 percent voted to retain the clause.

The history of miscegenation laws is seen as potentially significant for same-sex marriage legalization, with many advocates of same-sex marriage drawing an explicit comparison. Opponents deny any such analogy on the grounds that marriage has only ever been between a man and a woman; miscegenation laws imposed an additional impediment, whereas same-sex marriage would require a redefinition of the fundamental meaning of marriage. States prohibiting any sort of same-sex unions are in a similar position to states with miscegenation laws in deciding whether or how to avoid acknowledging same-sex couples married in other states that do permit such unions.

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References and Further Reading

- Bardaglio, Peter W. *Reconstructing the Household: Families, Sex, and the Law in the Nineteenth-Century South*. Chapel Hill: University of North Carolina Press, 1995.
- Kennedy, Randall. *Interracial Intimacies: Sex, Marriage, Identity and Adoption*. New York: Pantheon Books, 2003.
- Koppelman, Andrew. *Same-Sex Marriage and Public Policy: The Miscegenation Precedents*, Quinnipiac Law Review 16 (1996): 105–151.
- Wadlington, Walter. *The Loving Case: Virginia's Anti-Miscegenation Statute in Historical Perspective*, Virginia Law Review 52 (1966): 1189–1223.

Cases and Statutes Cited

- Brown v. Board of Education*, 347 U.S. 483 (1954), 349 U.S. 294 (1955)
- Loving v. Virginia*, 388 U.S. 1 (1967)
- McLaughlin v. Florida*, 379 U.S. 184 (1964)
- Naim v. Naim*, 875 E. 2nd 749 (Va. 1955); 350 U.S. 891 (1955); 350 U.S. 985 (1956)
- Perez v. Sharp*, 32 Cal.2d 711 (1948)

See also **Substantive Due Process**

MISHKIN v. NEW YORK, 383 U.S. 502 (1966)

Mishkin was convicted for publishing and intending to sell publications of “hard core pornography” that depicted heterosexuality, homosexuality, sadomasochism, fetishism, etc. New York's appellate court upheld Mishkin's conviction. Justice Brennan, writing for the majority, affirmed the court decision; his opinion was the third of a trio of decisions handed down on the same day (*Ginzburg v. United States*, 383 U.S. 463, 1966; *Memoirs of a Woman of Pleasure v. Attorney General of Massachusetts*, 383 U.S. 413, 1966).

Mishkin argued the publications did not appeal to the prurient sexual interests of the “average person” and therefore were not obscene under the *Roth* ruling (*Roth v. United States*, 354 U.S. 476, 1957). Justice Brennan described this as “an unrealistic interpretation” of the prurient appeal requirement. The test is met if material is “designed for and primarily disseminated to a clearly defined deviant sexual group, rather than the public at large.” References to “average” or “normal” persons in *Roth* were intended merely to express the majority's rejection of *Hicklin's* (*Regina v. Benjamin Hicklin*, Law Reporter 3 Queen's Bench 360, 1868) “most susceptible person” standard. In this case, the *Roth* standard is adjusted to the “social realities” that material should be assessed “in terms of the sexual interests of its intended and probable recipient group.” This clearly excludes “sexually immature persons,” so Justice Brennan claimed it avoided the problems found with the *Hicklin* standard. Since the publications in question were intended to appeal to the erotic interests of “sexually deviant groups,” they are obscene under *Roth*.

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Cases and Statutes Cited

- A Book Named “John Cleland's Memoirs of a Woman of Pleasure” v. Attorney General of Massachusetts*, 383 U.S. 413 (1966)
- Ginzburg v. United States*, 383 U.S. 463 (1966)
- Mishkin v. New York*, 383 U.S. 502 (1966)
- Regina v. Benjamin Hicklin*, Law Reporter 3 Queen's Bench 360 (1868)
- Roth v. United States*, 354 U.S. 476 (1957)

MISTRETTA v. UNITED STATES, 488 U.S. 361 (1989)

The 1984 Sentencing Reform Act revised the prior system of indeterminate sentencing in favor of fixed sentencing guidelines to be promulgated by a new Sentencing Commission. In *Mistretta v. United States*,

the Supreme Court, with only Justice Scalia dissenting, upheld the constitutionality of the commission in the face of challenges from convicts awaiting sentencing under the guidelines.

Mistretta argued that the commission was unconstitutional because Congress unlawfully delegated authority to it and because it was established in violation of the doctrine of separation of powers. Mistretta's first argument, which implicated the *non-delegation doctrine*, was rejected because the Court found that Congress satisfied the requirements for lawful delegations set forth in *J. W. Hampton, Jr., & Co. v. United States*, which permits delegations of legislative authority as long as Congress articulates an "intelligible principle" the recipient of the delegation must follow.

The Court rejected Mistretta's second argument by finding that placement of the commission within the judicial branch was proper given the judiciary's traditional role in sentencing. The justices found no problem with the fact that the commission's membership consisted of a mixture of federal judges and political appointees.

The implications of this decision were to validate a system of determinate sentencing that for nearly twenty years generally resulted in the imposition of lengthier sentences for offenders that judges were not at liberty to reject. More recently, however, the Court in *United States v. Booker* held that the guidelines violate the Sixth Amendment right to jury trial and relegated them to "advisory" status.

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References and Further Reading

Aman, Alfred C., Jr., and William T. Mayton. *Administrative Law*. St. Paul, MN: West Group, 2001.
Madison, James. *The Federalist*, Nos. 47 and 51.

Cases and Statutes Cited

J. W. Hampton, Jr., & Co. v. United States, 276 U.S. 394 (1928)
United States v. Booker, 125 S. Ct. 738 (2005)

See also **Sentencing Guidelines**

MITCHELL v. HELMS, 463 U.S. 793 (2000)

Mitchell v. Helms concerned an as-applied challenge to a federal assistance program that provided educational materials and equipment, such as library media materials and computer software and hardware,

to public and private schools, including religious schools. The plaintiffs alleged that the loan of the equipment and materials violated the First Amendment prohibition against religious establishments by subsidizing the education of religious and parochial schools. *Mitchell* is significant because the Supreme Court, in upholding the constitutionality of the funding program, significantly loosened the earlier prohibitions on public funding of religious elementary and secondary schools.

During the 1970s, the Supreme Court had adopted a firm "separationist" position on the issue of public funding of religious and parochial schools, striking most programs while allowing only the most incidental forms of assistance. Generally, the Court prohibited direct financial support for even arguably secular programs in religious schools on the ground that most schools were "pervasively sectarian," in that they integrated religious doctrine and values throughout the curriculum and had a primary purpose of religious indoctrination. Although the Court permitted some forms of assistance, the aid had to be discrete and supplemental to the schools' educational programs and the public monies had to contain safeguards to ensure that public funds did not pay for religious activity. Thus, while the Court had upheld the loan of secular textbooks to and the provision of health and diagnostic services in parochial schools, it had prohibited tuition subsidies, building construction and maintenance grants, and the loan of educational materials and equipment that could be diverted to religious uses (see *Meek v. Pittenger*, 421 U.S. 349, 1975).

Starting in the mid-1980s, an increasingly conservative Supreme Court began to adopt a more "accommodating" position toward funding programs that benefited religious schools. In 1983 and 1986, the Court signaled that forms of indirect financial assistance provided through the "private choices" of beneficiaries satisfied many establishment clause concerns (*Mueller v. Allen*, 463 U.S. 388, 1983; *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481, 1986). In 1993, the Court allowed a state-paid sign-language interpreter to provide services in a parochial school.

The most significant deviation from earlier case law occurred with the 1997 case of *Agostini v. Felton* (521 U.S. 203). In that case, the Court took the extraordinary step of reversing earlier holdings prohibiting state-paid employees from entering parochial schools to provide supplemental remedial and enrichment services. The *Agostini* majority held that the criteria for determining whether a funding program violated the establishment clause had "significantly changed" over the years. Rather than assuming that all direct state aid would advance religion or result in excessive

entanglement between church and state, the Court would now look to see whether the aid program resulted in “government-sponsored indoctrination.”

The services provided in *Agostini* had been under the control of state-paid employees, thus providing assurance that public monies would not be spent on religious activities. The issue in *Mitchell* was whether the new principles announced in *Agostini* extended to assistance that remained under the control of religious school officials, particularly since some of the materials being provided (for example, computers) could easily be diverted for religious uses. By a six-to-three margin, the Court held that those principles did apply and upheld the aid. The vote belied the deep division on the Court, however. A four-justice plurality, written by Justice Clarence Thomas, urged an even more accommodating rule that assistance to religious schools was permissible, provided it was administered under a program that was neutral toward religion and available to public and private institutions alike. “If the religious, irreligious, and areligious are all alike eligible for governmental aid, no one would conclude that any indoctrination that any particular recipient conducts has been done at the behest of the government,” Thomas wrote. The plurality also urged the rejection of the pervasively sectarian principle, calling it a doctrine “born of bigotry” due to its anti-Catholic antecedents in the nineteenth century.

Writing in concurrence for herself and Justice Stephen Breyer, Justice Sandra Day O’Connor characterized the plurality’s opinion as being of “unprecedented breadth.” “Reduced to its essentials, the plurality’s rule states that government aid to religious schools does not have the effect of advancing religion so long as the aid is offered on a neutral basis and the aid is secular in content . . . [T]he plurality’s approval of actual diversion of government aid to religious indoctrination is in tension with our precedents.” For Justices O’Connor and Breyer, the actual diversion of public funds for religious activities was still prohibited under the establishment clause.

Finally, writing in dissent, Justice David Souter agreed with much of the sentiment in Justice O’Connor’s concurrence, but argued that the risk of diversion for religious purposes was too great, and the amount of assistance crossed the line from supplementing to supplanting the educational functions of the parochial schools. *Mitchell* revealed that four justices were prepared to dispense with most prohibitions on public funding of religious schools; however, a majority of the justices insisted that the establishment clause still prohibited government-funded religious activity, even under an otherwise neutral funding program.

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References and Further Reading

- Gedicks, Frederick Mark, *A Two-Track Theory of the Establishment Clause*, Boston College Law Review 43 (2002): 1071–1109.
- Green, Steven K., *The Constitutionality of Vouchers After Mitchell v. Helms*, New York University Annual Survey of American Law 57 (2000): 57–73.
- Jeffries, John C., and James E. Ryan, *A Political History of the Establishment Clause*, Michigan Law Review 100 (2001): 279–370.
- Lupu, Ira C., *The Lingering Death of Separationism*, The George Washington Law Review 62 (1994): 230–279.
- McConnell, Michael W., *Religious Freedom at the Crossroads*, University of Chicago Law Review 59 (1992): 115.
- Monson, Stephen V., ed. *Church–State Relations in Crisis: Debating Neutrality*. New York: Rowman & Littlefield Pub., 2002.
- Ravitch, Frank S., *A Funny Thing Happened on the Way to Neutrality: Broad Principles, Formalism, and the Establishment Clause*, Georgia Law Review 38 (2004): 489.

Cases and Statutes Cited

- Agostini v. Felton*, 521 U.S. 203 (1997)
- Meek v. Pittenger*, 421 U.S. 349 (1975)
- Mueller v. Allen*, 463 U.S. 388 (1983)
- Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986)
- Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993)
- See also State Aid to Religious Schools; Zelman v. Simmons–Harris*, 536 U.S. 639 (2002)

MITCHELL, JOHN (1913–1988)

In the late 1960s and early 1970s, John Newton Mitchell climbed to the height of American jurisprudence with an appointment as the U.S. attorney general and promptly descended into controversy as an architect of the break-in of the Democratic Party’s national headquarters in the Watergate Hotel in Washington, D.C., and its subsequent cover-up, for which he served time in prison.

Mitchell was born on September 5, 1913, in Detroit, Michigan. He studied law at Fordham University in New York, earning his degree and commencing the practice of law in 1938. He served in the Navy during World War II and was awarded the Silver Star for gallantry. After his military service, he continued to practice law in New York City and eventually, in 1967, his law firm merged with Richard Nixon’s firm.

The following year, he served as Nixon’s presidential campaign manager. In January 1969, President Nixon appointed Mitchell as the sixty-seventh attorney general of the United States, a post he served in

until 1972, when he resigned to manage the president's successful campaign for reelection.

Mitchell ardently asserted the power of government in matters that he felt involved the duration of the Republic, while persistently showing restraint on government involvement in civil rights issues. Consequently, he felt that civil liberties were rightfully restricted in cases involving the preservation of national security. In addition to engineering illegal searches of the offices and files of his political rivals; Mitchell attempted to silence the voices of anti-Vietnam war protesters in Washington, D.C., by having them arrested in mass.

Perhaps, his most pointed attack on the First Amendment came in 1971 with his role in attempting to suppress the publication of portions of the Pentagon Papers. Specifically, the *New York Times* and the *Washington Post* were prohibited by the attorney general from publishing the classified documents detailing political and military relations between the United States and Vietnam between 1945 and 1967. The Supreme Court of the United States subsequently found that this injunction was a direct violation of the First Amendment of the Constitution.

Mitchell died at the age of seventy-five on November 9, 1988, and was buried with full military honors at Arlington National Cemetery.

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References and Further Reading

Kutler, Stanley. *The Wars of Watergate: The Last Crisis of Richard Nixon*. New York: Knopf (distributed by Random House), 1990.

Reeves, Richard. *President Nixon: Alone in the White House*. New York: Simon & Schuster, 2001.

MODERN POLITICAL AND LEGAL PHILOSOPHY, CIVIL LIBERTIES IN

It has been said that to the political philosophers of the ancient world, such as Plato and Aristotle, the most important question was, “*Who* shall govern me?” To the political philosophers of the eighteenth and nineteenth centuries—those who profoundly influenced America’s founding generation, the U.S. Constitution, and our contemporary notions of civil liberties—the most important questions were, “How much government shall there be?” and “What rights does the individual retain against the larger society?”

The ancient philosophers such as Plato and Aristotle taught that the communal well-being of the *polis*, or city-state, was paramount to the individual. By contrast, modern political and legal philosophy (that which emerged during and since the Enlightenment)

upholds the primacy of the individual. It begins from the key conceptual premise that human beings are innately free and independent; each is his own master and the sole judge of how best to lead and preserve his life. Organized societies and their governments exist not as natural phenomena, but rather as matters of convention; humans establish them as a means to the end of better protecting their lives and property. By chartering governments, humans agree to cede a defined and limited portion of the liberty they enjoyed in the “state of nature” in order to conduct their lives amid greater order, tranquility, and security.

Individual Liberty

In the ancient worlds, freedom referred to the ability to participate in the life of the Republic. In modern political philosophy, by contrast, liberty is thought to inhere in each individual. Philosophers such as John Locke (1632–1704), Benjamin Constant (1767–1830), and John Stuart Mill (1806–1873) believed that the health and vitality of a society depended primarily on the ability of individuals to pursue life according to their own lights, to gain property, and to participate in the market.

Locke distinguished between natural liberty, which humans enjoyed before they voluntarily came together to form societies, and civil liberty, or “the liberty of man in society.” Locke’s notion of a social contract required the sovereign to obey the agreed-upon limits to government authority; otherwise, there would be no advantage over existence in the state of nature. Government is not the creator of rights and liberty, but rather their safeguard, and government becomes illegitimate when it infringes liberty for any purpose other than to protect life and property. Arbitrary or tyrannical government is illegitimate because it mocks the core capacity on which all human endeavor is based: the capacity for reason.

The Enlightenment’s Influence on America

The Declaration of Independence, written primarily by Thomas Jefferson, drew on deep wells of Enlightenment thought. It articulates a philosophy of natural rights that continues to inspire libertarians, even if it has little to do with the modern jurisprudence of civil liberties. The Declaration invokes “the Laws of Nature and of Nature’s God.” It declares “self-evident” the principle that humans are “endowed by their Creator with certain unalienable Rights,” among

them “Life, Liberty and the Pursuit of Happiness.” Governments derive their “just Powers from the Consent of the Governed.” When government decays into despotism, it is the people’s right “to throw off such Government, and to provide new Guards for their future.”

Given its limited conception of the power of government over the life of the individual, Enlightenment philosophy assumed the need for a large sphere of personal privacy. As the twentieth century theorist and historian of philosophy Isaiah Berlin explained, the libertarian philosophers of the eighteenth and nineteenth centuries assumed,

There ought to exist a certain minimum area of personal freedom which must on no account be violated; for if it is overstepped, the individual will find himself in an area too narrow for even the minimum development of his natural faculties which alone makes it possible to pursue, and even to conceive, the various ends which men hold good or right or sacred. It follows that a frontier must be drawn between the area of private life and that of public authority.

Although it would take several centuries for Western law to formally recognize a legal “right to privacy,” such a notion seems implicit even in the teaching of William Blackstone (1723–1780), the great expositor of English common law, who called civil liberty “the great end of all human society and government . . . that state in which each individual has the power to pursue his own happiness according to his own views of his interest, and the dictates of his conscience, unrestrained, except by equal, just, and impartial laws.” Battles over civil liberties typically come down to differing understandings about what constitute “equal, just, and impartial laws.”

Mill, the “Harm Principle,” and Tyranny of the Majority

One of the political philosophers most closely associated with contemporary ideas and discourse about civil liberties is John Stuart Mill, whose masterpiece, *On Liberty*, defined the appropriate limits of government power according to the “harm principle”: the idea that “the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.” The individual is accountable to society through law only for conduct that directly affects others. “In the part which merely concerns himself, his independence is, of right, absolute.”

Applied strictly and literally, the harm principle obviously would sweep away vast amounts of regulation and “morals legislation” that Americans continue to accept from their local, state, and federal governments. (What objective harm does anyone suffer, for example, if two members of the same sex decide to marry—something forbidden by law in most states?) While governments have long sought to regulate morality in the name of tradition, consensus, and majoritarian values, civil libertarians wield the harm principle to demand better and more reasoned justifications for laws that intrude on individual autonomy. Some version of the harm principle, albeit a highly compromised one, can be discerned in modern American constitutional jurisprudence in the requirement that laws that infringe certain “fundamental” rights must be justified by “compelling” governmental interests.

Consistent with his belief that liberty was necessary to the development of human creativity and genius, Mill warned against the potentially coercive nature of political majorities. He held that “it is only the cultivation of individuality which produces, or can produce, well-developed human beings.” Society needs a creative minority because “[t]here is always need of persons not only to discover new truths, and point out when what were once truths are true no longer, but also to commence new practices, and set the example of more enlightened conduct, and better taste and sense in human life.”

The Enlightenment’s faith in human reason also explains why separation of church and state is a defining characteristic of modern civil liberties. The capacity for reason that makes all persons equal as subjects before the law also means that beliefs and behavior may not be dictated by mere clerical authority, any more than by a tyrannical sovereign. Applied to contemporary polity, this principle by no means requires excluding religious voices from the public square. It simply means that any government policy must, in the end, be supportable by an adequate secular purpose because it is unethical for religious believers to use the machinery of law and government to coerce others who do not share their beliefs. The contemporary theorist Robert Audi argues that a law or policy is secular to the extent that it derives its legitimacy from its appeal to human reasoning, the only true common denominator in a diverse and democratic society.

Since civil liberties are not always popular and majoritarian political processes cannot be relied upon to protect individual rights, civil libertarians believe that an independent judiciary is critical to a just and effective democracy. John Marshall, the Supreme Court’s first great chief justice, wrote that the

“very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.” The suspicion of tyranny of the majority that animated the thought of philosophers like Mill has been echoed in some of the great legal decisions of the twentieth century that have articulated the American philosophy of civil liberties. As Justice Robert Jackson wrote in a decision upholding the religious liberty of Jehovah’s Witnesses not to salute the flag:

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials, and to establish them as legal principles to be applied by the courts. One’s right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

Civil Liberties and Democratic Values

The vigorous defense of individual liberty is in tension with social visions that emphasize stronger commitments to community; to the notion that the welfare of society must override the desires of the individual; or to what is sometimes called “civic republicanism”—the idea, advocated by contemporary theorists such as Michael Sandel, that government should actively inculcate the virtues of character necessary for effective citizenship. Other critiques of liberal philosophy question whether individual liberty as a value above all others can be reconciled with social conditions in which individuals may lack the leisure, education, or economic resources to enjoy liberty usefully and responsibly. Locke, with his enshrinement of rights over private property, has been criticized as less concerned with liberty for all than with protection of the economic interests of the bourgeoisie. The desire to be left alone by government or by one’s fellow citizens may be a mark of high civilization, but what of those citizens who are unable to feed or shelter themselves? What about those times when society is under grave threat from domestic disorder or external enemies?

The eighteenth- and nineteenth-century philosophers recognized that if civil liberties depend on a social contract, the extent to which those liberties are valued and flourish may depend on the extent to which the members of society share a common sense of history, culture, and nationhood, if not common ethnicity or religion. A related and even more basic question is when certain liberties must yield to other

social imperatives such as health, social order, and security against external threats. An obvious tension exists between the principle that government should infringe as little as necessary on individual liberty, and the need for government to protect against social anarchy (and against modern threats such as terrorism). As Chief Justice Charles Evans Hughes wrote in a 1941 decision, “Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses.”

The ongoing philosophical dilemmas of civil liberties were perhaps best encapsulated by James Madison, the key architect of the Constitution, who wrote in Number 51 of *The Federalist*:

But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.

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References and Further Reading

- Audi, Robert. *Religious Commitment and Secular Reason*. Cambridge: Cambridge University Press, 2000.
- Barnett, Randy E. *Restoring the Lost Constitution: The Presumption of Liberty*. Princeton, NJ: Princeton University Press, 2003.
- Berlin, Isaiah. *Four Essays on Liberty*. Oxford: Oxford University Press, 1969.
- Germino, Dante. *Machiavelli to Marx : Modern Western Political Thought*. Chicago: University of Chicago Press, 1979.
- Perry, Richard L., ed. *Sources of Our Liberties*. Buffalo: Hein, 1990.
- Ten, C.L. *Mill on Liberty*. Oxford: Oxford University Press, 1980.

MOMENT OF SILENCE STATUTES

Moment of silence statutes require or permit the observance of moments of silence in public school classrooms. These statutes must be considered in light of the Supreme Court’s constitutional doctrine concerning prayer in public schools. In a long line of decisions, the Court has ruled that the establishment clause of the First Amendment forbids the public schools from sponsoring prayer or other religious exercises, even when student participation is designated as voluntary. Among the Court’s concerns is the risk of subtle and indirect coercion, which might

impair dissenting students' religious liberty or liberty of conscience. Public school students are required to attend; they are of an impressionable age; and they are readily influenced not only by their teachers, but also by social pressure, including peer pressure. As a result, students may feel obliged to participate in religious exercises despite their formal right to decline. Indeed, even when attendance is formally voluntary, as, for example, at a graduation ceremony, the Supreme Court noted in *Lee v. Weisman*, 505 U.S. 577 (1992), that a dissenting student might feel "that she is being forced by the State to pray in a manner her conscience will not allow."

The Court in *Weisman* also reiterated as a "cornerstone principle" that "it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government." Another core principle of the establishment clause is that the government cannot prefer one religion over another. More broadly, the establishment clause generally forbids the government, including the public schools, from promoting religion over irreligion, even if there is no preference for any particular religion. At the same time, however, private religious activity, even in the public schools, is protected by the free exercise clause of the First Amendment. Accordingly, the Supreme Court has stated that public schools are free to accommodate the private religious activity of students, as long as the schools do not promote or endorse that activity. Moment of silence statutes have been challenged on the ground that they go beyond accommodation of religion by impermissibly promoting prayer, but the Supreme Court has suggested that most such statutes are constitutional.

The leading case is *Wallace v. Jaffree*, 472 U.S. 38 (1985), decided in 1985. In *Wallace*, the Supreme Court invalidated an Alabama moment of silence statute on a vote of six to three, but the Court's decision was narrowly tied to the legislative history of the enactment. Preexisting Alabama law had already authorized silent "meditation," and the challenged statute did little more than add a provision for "voluntary prayer." Indeed, the chief legislative sponsor conceded that he had no purpose except that of "returning voluntary prayer to public schools." Writing for a majority of five, Justice John Paul Stevens found that the challenged statute was "entirely motivated by a purpose to advance religion." As such, it violated the secular purpose requirement of the establishment clause, as set forth in the often cited constitutional test of *Lemon v. Kurtzman* (403 U.S. 602, 1971).

Despite the Court's holding in *Wallace*, the justices indicated that other moment of silence statutes would stand on a different footing. Taking account of the

views expressed not only in the majority opinion, but also in five separate opinions (both concurring and dissenting), a majority of the justices suggested that they would approve most moment of silence laws. Perhaps the most important opinion was that of Justice Sandra Day O'Connor, who joined the Court's invalidation of the Alabama statute, but emphasized its exclusively religious motivation. In other circumstances, she declared, the establishment clause would not preclude a moment of silence statute, even if it explicitly stated that the moment could be used for prayer as well as meditation or reflection. Utilizing the no endorsement test that she had first proposed in *Lynch v. Donnelly*, 465 U.S. 668 (1984), Justice O'Connor wrote:

The relevant issue is whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of prayer in public schools A moment of silence law that is clearly drafted and implemented so as to permit prayer, meditation, and reflection within the prescribed period, without endorsing one alternative over the others, should pass this test.

A majority of the states have enacted moment of silence statutes. Most refer simply to a period of silence for meditation or reflection, but others include references to prayer. Some statutes make the moments of silence mandatory. Others merely authorize such moments, leaving their implementation to school boards or individual teachers. Despite their diverse provisions, most of these statutes appear to satisfy the analysis of Justice O'Connor and therefore probably do not violate the establishment clause. Indeed, lower courts have so concluded, upholding moment of silence statutes as long as their legislative histories do not suggest the improper purpose of promoting or endorsing religion. In *Bown v. Gwinnett County School District*, 112 F.3d 1464 (11th Cir. 1997), for example, the Eleventh Circuit approved a Georgia statute requiring "a brief period of quiet reflection," and in *Brown v. Gilmore*, 258 F.3d 265 (4th Cir. 2001), the Fourth Circuit upheld a Virginia statute requiring a "minute of silence" for students to "meditate, pray, or engage in any other silent activity."

Critics contend that moment of silence statutes are thinly veiled attempts to promote prayer and that they are likely to have that effect. Thus, students who might not be inclined to pray may feel social and peer pressure to do so. Moreover, moments of silence may have the effect of promoting some religions over others, thereby violating a core policy of the establishment clause. Brief silent prayer is commonplace in Judaism and Christianity, for example, but Islamic prayer may not easily fit this model.

Conversely, one can argue—and it seems that the Supreme Court has implicitly concluded—that neutrally crafted moment of silence statutes are an acceptable constitutional compromise. Although there is a risk of coercion, any such coercion is subtle indeed; students are free to sit silently and think about anything they like. The potential preference for some religions over others is a separate concern, but, like nonreligious students, religious students whose religion does not countenance silent prayer during this period are free to engage in nonreligious reflection. The government is not “compos[ing] official prayers for any group of the American people to recite.” Rather, it is permitting interested students to compose silent prayers of their own, an activity protected by the free exercise clause.

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References and Further Reading

- Davis, Derek H. “Moments of Silence in America’s Public Schools: Constitutional and Ethical Considerations.” *Journal of Church and State* 45 (2003): 429–442.
- Dellinger, Walter, *The Sound of Silence: An Epistle on Prayer and the Constitution*, Yale Law Journal 95 (1986): 1631–1646.
- Education Commission of the States. “School Prayer, Moment of Silence, Other Policies Concerning Religion, July 2000,” <http://www.ecs.org/clearinghouse/13/38/1338.htm>.
- Smith, Rodney K., *Now Is the Time for Reflection: Wallace v. Jaffree and Its Legislative Aftermath*, Alabama Law Review 37 (1986): 345–389.

Cases and Statutes Cited

- Bown v. Gwinnett County School District*, 112 F.3d 1464 (11th Cir. 1997)
- Brown v. Gilmore*, 258 F.3d 265 (4th Cir. 2001)
- Lee v. Weisman*, 505 U.S. 577 (1992)
- Lemon v. Kurtzman*, 403 U.S. 602 (1971)
- Lynch v. Donnelly*, 465 U.S. 668 (1984)
- Wallace v. Jaffree*, 472 U.S. 38 (1985)

See also **Establishment Clause Doctrine: Supreme Court Jurisprudence; Establishment Clause (I): History, Background, Framing; Establishment of Religion and Free Exercise Clauses**

MONROE v. PAPE, 365 U.S. 167 (1961)

Monroe v. Pape is a seminal case concerning the enforcement of constitutional rights. It declared no new rights, but its holding established an effective means for remedying violations of constitutional rights (42 U.S.C. § 1983).

Section 1983 was first passed as Section 1 of the Ku Klux Klan Act of 1871. In relevant part, it then provided: “Every person who, under color of a statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured.” In the ensuing ninety years, Section 1983 fell into desuetude. The belief was that the “under color of law” language required formal legal authorization to commit the constitutional deprivation. But most deprivations did not enjoy the imprimatur of law; they were isolated acts of individual state employees. Such violations were thought to be redressable, if at all, only through ordinary state-law claims (such as tort or contract).

Monroe v. Pape arose from a classic violation of rights. Chicago police suspected James Monroe of murder. Early on October 29, 1958, thirteen police officers, led by Detective Frank Pape, burst through the door of Monroe’s home. Pape was a colorful cop. His adventures had inspired *M Squad*, a popular detective drama of the 1950s. In his career he killed nine suspects in gun battles and later remarked, “Everybody I shot and killed deserved it. I slept like a baby after every one.”

Pape broke into the bedroom where Monroe and his wife were sleeping, pointed his gun, and ordered the Monroes to stand naked in the living room. He and other officers manhandled the Monroes’ children, beat Monroe, and called him racial epithets. The officers ransacked every room. They dragged Monroe off and interrogated him for ten hours. He was denied access to a lawyer and was never brought before a judge. Pape had no search or arrest warrant and never charged Monroe for the murder.

The Monroes brought suit against the officers and the City of Chicago. Alleging violations of their rights under the Fourteenth Amendment, they used Section 1983 to enforce those rights. The district court dismissed the case, and the court of appeals affirmed.

The Supreme Court reversed, holding that Section 1983 could be used to redress constitutional deprivations that were not sanctioned by state law or custom. Specifically, Justice Douglas’s opinion found that the “under color of law” language encompassed authorized and unauthorized deprivations. The Court observed that Section 1983 was intended to accomplish three aims. First, it overrode state laws that directly infringed on constitutional rights. Second, it provided a remedy when state law contained no adequate remedy. Third, and most controversially, Section 1983 “provide[d] a federal remedy where the state remedy, though adequate in theory, was not available

in practice” (365 U.S. at 174). The Court traced the legislative history of the statute, noting Congress’s concern with state officials who were unable or unwilling to enforce state law in the face of the Ku Klux Klan. Therefore, the Court concluded that inadequacy of state-law remedies was a motivating factor behind Section 1983.

The Court then made its critical move: It did not make litigants demonstrate that state-law remedies were *actually* inadequate before invoking Section 1983. “It is no answer that the state has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked” (365 U.S. at 183). The Court’s move required a logical leap, but the decision not to require proof of state-law inadequacy gave Section 1983 its broad scope as a remedial statute: “Congress, in enacting [Statute 1983], meant to give a remedy to parties deprived of constitutional rights, privileges and immunities by an official’s abuse of his position” (365 U.S. at 172).

In a separate holding, *Monroe* stated that the City of Chicago was not a “person” within the meaning of Section 1983. That holding was overruled in 1978. Today municipalities can be sued under Section 1983 in limited circumstances.

Although they thought the issue “very close indeed” (365 U.S. at 192), Justices Harlan and Stewart concurred in the decision. Justice Frankfurter’s vigorous dissent established the baseline for counterarguments that have influenced the Court in later, narrower interpretations of aspects of Section 1983. Invoking principles of federalism, Justice Frankfurter argued that Section 1983 should not be available to redress constitutional deprivations when state law provided a remedy. He feared that state laws that had traditionally provided redress would be pushed aside, and the power to protect individuals would shift from the state to the federal level. Only when state law failed to provide a remedy – in other words, when the deprivation was authorized “under color of” state law or custom – should Section 1983 apply.

Section 1983 is not the only statute that enforces civil rights. Its scope is limited, most notably in its application only to constitutional violations by state or local (not federal) officials. Nonetheless, it is the most important vehicle for enforcing rights, largely because it authorizes compensation for past constitutional violations. Invoked in about 10 percent of federal cases, it has become the most widely used remedial statute in federal court. The meaning and breadth of Section 1983 have also become the focus of a forty-five-year battle on the Supreme Court. The Court has decided myriad cases further interpreting

the statute, and their outcomes wobble between the enforcement impulses of Justice Douglas and the federalist concerns of Justice Frankfurter. A lightning rod of controversy, Section 1983 occupies a central place in continuing arguments over the scope of American constitutional rights and the role of federal courts in controlling the actions of state and local officials.

Monroe v. Pape ushered in this modern era of enforcing constitutional rights. Frank Pape felt the decision’s sting. He paid the Monroes \$8,000 for his actions.

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References and Further Reading

- Brief for Petitioners, *Monroe v. Pape*, 365 U.S. 167 (1961) (No. 39).
- Fallon, Richard H., Jr. et al. *Hart & Wechsler’s The Federal Courts and the Federal System*, 5th ed. 2003, pp. 1067–1097.
- “Frank Pape, Top Chicago Detective, Dies at 91,” *New York Times*, A49 (Mar. 12, 2000).
- Jeffries, John C., Jr. et al. *Civil Rights Actions*, 2000, pp. 26–43.

MONTESQUIEU (1689–1755)

Baron de Montesquieu, Charles-Louis Secondat, was an eighteenth-century French political philosopher who had a crucial impact on the development of liberalism, civil liberty, and democratic constitutionalism. He is perhaps most revered for his theory of the separation of powers, which influenced the framers of the American Constitution.

Montesquieu was born into a French family of nobility and affluence (1689) and studied law in Bordeaux and Paris. He presided over the criminal division of the Parlement of Bordeaux from 1716 to 1727, intimately familiarizing himself with the machinery and administration of criminal justice in pre-Revolutionary France. Montesquieu published his *Persian Letters* in Amsterdam in 1721, assuring him of a literary career, and thereafter pursued political and philosophical writing in earnest. While *The Spirit of the Laws* did not appear until 1748, it was a great (and controversial) success and has earned Montesquieu a permanent place in the history of Western political philosophy. He died in 1755.

Skeptical of governmental power, Montesquieu argued that individuals should be as free from restraint as possible as long as existing laws were adequate for the provision of public tranquility and personal safety. Many of Montesquieu’s ideas about individual liberty and public tolerance anticipated those of

the English political philosopher, John Stuart Mill (1806–1873). Those who see the Bill of Rights of the U.S. Constitution, for example, as the heart and soul of American civil liberty can appreciate Montesquieu's early defense of liberal freedoms. But Montesquieu's most important contribution was to thinking about political structures and the forms of government in their relationship to democratic rule. It is the body of the U.S. Constitution, prior to the first Ten Amendments, where the blueprint for liberal rule is laid out and without which no regime of civil liberty could survive. The separation of powers, for example, a concept pioneered by Montesquieu, puts in place a system of checks and balances that by limiting concentrations of governmental power, limits the ability of the state to deprive citizens of legitimate freedoms and interests.

One need only consider the historical fate of civil liberty under “states of exception”—regimes where conventional safeguards on the power of the executive are temporarily suspended—to see just how fragile individual freedom and legal rights can become, dependent as they are upon a liberal system of free institutions grounded in separated governmental powers. Contemporary Italian political philosopher Giorgio Agamben has demonstrated the increasing reliance upon states of exception in the political management of liberal democracies in the past half century. Thus, one can argue that Montesquieu and his critique of the forms of government are as relevant today as ever.

There is an alternate (primarily French) and rather significant reading to be had of Montesquieu. Relying upon a close analysis of Montesquieu's writing, especially the generally ignored, “Notes on England,” as well as earlier research by Charles Eisenmann and Louis Althusser, Iain Stewart argues that contrary to a common criticism made of Montesquieu's historical foundations, the author of the “Notes on England” understood the true nature of British constitutionalism “but knew that British politics were thoroughly corrupt.” Conventionally understood, the basic notion of separating government powers would hardly cure the British system of its worst defects.

Why? Analogizing Montesquieu's Britain to the republican regime at Venice, Althusser quotes from *The Spirit of the Laws*: “But the mischief is, that these [three] different tribunals are composed of magistrates all belonging to the same body; which constitutes almost one and the same power . . .” (Althusser, 90–91). The heart of the problem is what Althusser calls “a political problem of relations of forces, not a juridical problem concerning the definition of legality and its spheres” (Althusser, 91). Whether one contrasts a purely formal and legalistic treatment of the

separation of powers to a genuinely political analysis, as do Stewart, Eisenmann, and Althusser, or to a sociological critique, as does Franz Neumann, the fact is that the radical potential of Montesquieu's political theory has been systematically ignored, according to these writers, and a kind of harmless mythology put in its place.

In short, with contemporary American government in mind, what does the separation of powers mean when each of the separated powers is beholden to, or even run by, millionaires? The French think Montesquieu had already seen through the misuse of separation theory—its purely juridical reconstruction as a veil or mask for the concentration, not separation, of power. How much difference can there be, in terms of possible implications for civil liberty, between the notorious state of exception described by Agamben and the simulacrum of checks and balances, the mere projection of an image of separated powers onto a political screen, like the shadows in Plato's cave?

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References and Further Reading

- Agamben, Giorgio. *State of Exception*. Translated by Kevin Attell. Chicago: University of Chicago Press, 2005.
- Althusser, Louis. *Montesquieu, Rousseau, Marx*. Translated by Ben Brewster. London: Verso, 1982.
- Eisenmann, Charles. *La Pensee Politique et Constitutionnelle de Montesquieu*. Paris: Recueil Sirey, 1952.
- Neumann, Franz. *The Democratic and the Authoritarian State*. New York: Free Press, 1957.
- Stewart, Iain. *Montesquieu in England: His Notes on England, With Commentary and Translation*. Oxford University Comparative Law Forum 6 (2002).

MOONEY v. HOLOHAN, 294 U.S. 103 (1935)

Mooney v. Holohan clarified the requirements of due process of law under the Fourteenth Amendment and held that exhaustion of state remedies was required before an inmate in state prison could file a petition for writ of habeas corpus in federal court. Mooney was convicted of murder and originally sentenced to death, but his sentence was later commuted to life imprisonment.

Mooney charged that he was denied due process of law by the prosecution's knowingly using perjured testimony to obtain his conviction and suppressing evidence that would have impeached that false testimony. In response, the attorney general of California stated that proper notice and hearing were all that was necessary to satisfy the requisites of due process

of law. After discussing the importance of due process as a fundamental concept of justice, the Court held that it could not be satisfied by mere notice and hearing if a state deprived a defendant of liberty by deliberately deceiving the court and jury.

The Court declared that a state must afford corrective judicial process to remedy wrongs flowing from the denial of due process of law. Mooney, however, had never applied for a writ of habeas corpus on the grounds he asserted to the Supreme Court. Therefore, a remedy was still available in California, and Mooney was required to exhaust his remedies there.

Mooney emphasized the importance of due process of law and the role of the state in safeguarding it, and also instructed inmates that exhaustion of state remedies was required for writs of habeas corpus.

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See also Due Process; Habeas Corpus: Modern History

MOORE v. EAST CLEVELAND, 431 U.S. 494 (1977)

A plurality of the U.S. Supreme Court (Justices Powell, Brennan, Marshall, and Blackmun) held that an East Cleveland housing ordinance limiting the occupancy of a dwelling unit to members of a single family, but defining “family” to include only certain categories of relatives, was unconstitutional because it violated the substantive due process guaranteed by the Fourteenth Amendment. Moore lived in her East Cleveland home with her two children and two grandchildren, who were cousins. In 1973, she received a notice of violation from the city, stating that one of her grandsons was an “illegal occupant” according to the housing ordinance. When Moore failed to remove the child from the home, the city filed a criminal charge. She was convicted and sentenced to a fine and jail time.

The U.S. Supreme Court distinguished this case from previous cases on the basis that other cases affected only unrelated individuals. The Court held that when the government intrudes on choices concerning family living arrangements, the usual deference to the legislature was inappropriate, and that the Court should carefully examine the objectives of the ordinance and the extent to which those objectives are served. The government argued that the ordinance addressed overcrowding, traffic congestion, and the financial burden imposed on the school system. The Court found that, contrary to the government’s assertions, the city’s interests were only marginally served by the ordinance. The Court pointed out that the

ordinance distinguished upon grounds of the traditional nuclear family and that traditional families with a large number of children would not be subject to the limits placed by the ordinance, but families comprising extended family members choosing to reside in one residence would be in violation of it.

In making its finding of unconstitutionality, the Court balanced the tenuous relationship to the government’s objectives vs. the strong constitutional protection of the sanctity of the family, as established by numerous Supreme Court decisions, extending the constitutional protection provided in other situations to the family choice involved in this case and not confined to the arbitrary limits of the nuclear family. The Court found support for its holding from careful “respect for the teachings of history [and] solid recognition of the basic values that underlie our society” and that the nation’s history and tradition compelled a larger conception of the family. The Court concluded that the choice of relatives in such a degree of kinship to live together may not lightly be denied by the government.

Justice Stevens concurred in the outcome of unconstitutionality, but found that, under previous cases, an ordinance could only be declared unconstitutional if it were clearly arbitrary and unreasonable as having no substantial relation to the public health, safety, morals, or general welfare. Justice Stevens concluded that the city had failed to explain the need for a rule that would allow a homeowner to have grandchildren live with her if they are brothers but not if they are cousins, and that the ordinance constituted a taking of property without due process and without compensation.

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References and Further Reading

Rubinfeld, Jed, *The New Unwritten Constitution*, Duke Law Journal 1 (2001): 289.

MORAN v. BURBINE, 475 U.S. 412 (1986)

The Cranston, Rhode Island, police arrested the detainee in connection with various crimes. Prior to each interrogation, the police reminded him of his *Miranda* rights, and at no time did the detainee request an attorney. The detainee made various incriminating statements that were used in the eventual conviction. The U.S. Supreme Court, overturning the decision of the Rhode Island Supreme Court, held that the police’s failure to inform a detainee of an attorney’s unilateral efforts to contact the detainee did not deprive him of his ability to knowingly waive his Fifth Amendment

rights to remain silent and to the presence of counsel. Once it is demonstrated that a suspect's decision not to rely on his rights was not coerced, that the detainee at all times knew he could stand mute and request a lawyer, and that the detainee was aware of the state's intention to use his statements to secure a conviction, the analysis is complete. A detainee's Sixth Amendment right to counsel does not attach only after the first formal charging procedure.

The police's actions were not so offensive as to deprive the detainee of the fundamental fairness guaranteed by the due process clause of the Fourteenth Amendment because the actions did not shock the sensibilities of civilized society. Events occurring outside the presence of a suspect—and entirely unknown to the suspect at the time of an interrogation—can have no bearing on the detainee's capacity to comprehend and knowingly relinquish a constitutional right.

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References and Further Reading

- Godsey, Mark A., *Miranda's Final Frontier—The International Arena: A Critical Analysis of United States v. Bin Laden, and a Proposal for a New Miranda Exception Abroad*, *Duke Law Journal* 51 (2002): 1703.
- Leo, Richard A. "From Coercion to Deception: The Changing Nature of Police Interrogation in America." *Crime, Law and Social Change* 18 (1992): 35–59, Springer Science & Business Media B.V.

Cases and Statutes Cited

- Beckwith v. United States*, 425 U.S. 341 (1976)
- Berkemer v. McCarty*, 468 U.S. 420 (1984)
- Brewer v. Williams*, 430 U.S. 387 (1977)
- Edwards v. Arizona*, 451 U.S. 477 (1981)
- Escobedo v. Illinois*, 378 U.S. 478 (1964)
- Fare v. Michael C.*, 42 U.S. 707 (1979)
- Hill v. Lockhart*, 474 U.S. 52 (1985)
- Johnson v. New Jersey*, 384 U.S. 719 (1966)
- Johnson v. Zerbst*, 304 U.S. 458 (1938)
- Kirby v. Illinois*, 406 U.S. 682 (1972)
- Maine v. Moulton*, 474 U.S. 159 (1985)
- Massiah v. United States*, 377 U.S. 201 (1964)
- McMann v. Richardson*, 397 U.S. 759 (1970)
- Michigan v. Tucker*, 417 U.S. 433 (1974)
- Miranda v. Arizona*, 384 U.S. 436 (1966)
- New York v. Quarles*, 467 U.S. 649 (1984)
- North Carolina v. Butler*, 441 U.S. 369 (1979)
- Oregon v. Elstad*, 470 U.S. 298 (1985)
- Rochin v. California*, 342 U.S. 165 (1952)
- Schneekloth v. Bustamonte*, 412 U.S. 218 (1973)
- Snyder v. Massachusetts*, 291 U.S. 97 (1934)
- State v. Beck*, 687 S.W.2d 155 (Mo. 1985)
- State v. Burbine*, 451 A.2d 22 (1982)
- State v. Jones*, 19 Wn.App.850 (1978)
- United States v. Cronin*, 466 U.S. 648 (1984)
- United States v. Gouveia*, 467 U.S. 180 (1984)

- United States v. Wade*, 388 U.S. 218 (1967)
- United States v. Washington*, 431 U.S. 181 (1977)
- 28 U.S.C. § 2254(d)

See also **Coerced Confessions/Police Interrogations; Right to Counsel**

MORMONS AND RELIGIOUS LIBERTY

Overview

Mormons made, if unwillingly, much of the religious law of nineteenth century America in precisely the same way that minorities have always forced progress in the development of religious and civil rights: by being skunks at the garden party hosted by more conventional people in charge of the feast. In a world then dominated by monogamous capitalists—unbridled capitalists at that—the Mormons practiced polygamous marriage within a Christian communal theocracy. During the ensuing century, American governments, state and federal, would wage a relentless, ferocious war upon the Mormons. Within that century, women, immigrant groups, Native Americans, and people of color would still be excluded from significant participation. They would be invited to the party only midway through the twentieth century.

Mormons would experience the full weight of an invasion by the American Army and be denied the vote, the right to jury trial, the right of spousal immunity from being forced to testify against a mate, the right to hold political office without a religious test that demanded the renunciation of one's faith—all rights embedded within the original text of the American Constitution. They would survive an extermination order of the governor of an American state as well as the seizure and the destruction of their homes, farms, and livestock. They would see their homes and meeting houses seized and often burned and destroyed. As has been true in the experience of most religious and racial or ethnic minorities in this country, the mobs of the night were often the soldiers and the officers of the law by day.

Imprisoned en masse, the leadership of the church would send messages from inside prison to believers on the outside, exhorting members to keep the faith while others conducted the governance of their congregations and communities as outlaws in exile in western badlands or from Mormon colonies in Canada and Mexico. In the end, the Mormons had to give up polygamous marriage and their Christian socialism.

They accepted the ways of twentieth-century America, initially with reticence and then with such an excess that few traces of the nineteenth-century church, as reflected by those characteristics of difference and of conflict with American society, now exist in the practice of its twenty-first century successor.

What remains is a stark reminder of the limits of law to accomplish benign social change. The savagery employed by those who fashioned and enforced laws of such excess did not eradicate the so-called evils identified by the government for extermination. Some levels of Mormon theocratic ways remain, to the consternation of those, including Mormons, of a more pluralistic, democratic mind. More troubling to the moral majority, however, is the fact that there are more people of Mormon heritage presently practicing polygamy within the American West than ever practiced it during the height of the persecution of the Mormons. One legacy of the persecution is its lingering social cost.

As society, including the twentieth- and twenty-first-century Mormon faith that renounced polygamy as a necessary cost of statehood, first made criminal and then excommunicated and exiled nonconformists to the badlands, the exiles have since heard only their own echo. Marginalized and deprived of the civilizing influence of education, interaction with other faiths, and civic dialogue, these fringe Mormons now raise their children in an incestuous and monotonic culture far removed from that of the increasingly cosmopolitan towns. As the divide between the religion of the hinterlands and that of the towns grows, Mormons in the centers of power react with yet more outrage and more legal restraints, while the exiled, correspondingly, begin to behave more like real outlaws. Tragic as the effect on the Mormon fringe has been, however, it is the cost as measured in mainstream Mormonism that is most lamentable. This is a loss of a unique form of Christian socialism that Tolstoy predicted would revolutionize the world if given a chance.

Mormonism began in New York State. Its founder and prophet, Joseph Smith, Jr., was born in Sharon, Windsor County, Vermont. With his father, Joseph Smith, Sr., he moved with his family to Palmyra, Ontario (now Wayne) County, and then to Manchester. There, in his fifteenth year, in the midst of the revivals then sweeping New York and New England, Joseph entered a grove of trees near his family's farm and prayed for guidance regarding the competing claims of the Methodist, Presbyterian, and other groups active in the area. Joseph said that God and His Son appeared to him in answer to his prayer. Over the next several years, Joseph received a series of revelations that included an additional book of

scripture, the *Book of Mormon*, to be used along with the Bible in directing the organization and functioning of a new American religion.

The Mormon practice of polygamy came to be the lightning rod for the violent repression visited upon the Mormons by state governments and finally by the national government. This might be expected. But in the early, pre-Utah years, it was the Mormon inclination toward economic and political communality that perhaps most inflamed the Mormons' neighbors. While Freud would find this hard to believe, Karl Marx would understand. The Mormons' communal and economic structures were part and parcel of a faith that sought to bring about a new world order, Zion, in the here and now—an earthly, palpable reality, not simply a finger-hold in heaven. As those practicing a gathered community have always believed—this is true of the first Christians, the early followers of Muhammad, and the followers of the Dalai Lama as well as of the Mormons—the power of conversion is most effective when multiplied in a community of believers. This is true even if such communities must live in tents, build new homes, and endure exile.

All such communities must also somehow come to terms with the dominant and often dominating larger communities. This usually entails anguishing compromise with the vision of the founders. What truly is the bedrock of the faith? What is the foundational theology of the group, the infrastructure, as contrasted with the sociological superstructure that can be jettisoned? In fact, all governments face this challenge as societies move through time and space. Persecution by a dominant culture may exacerbate such a crisis but does not change the central issue of continuity and change.

For the first-century Christians, the precipitating crisis was the phenomenon of Gentile Christianity. Should the Mosaic law, and especially circumcision, be required of the new Gentile convert? To the Jewish Christian, and for that matter Jews of any time, circumcision was and is the token of the covenant with Yahweh. Could this sacred act ever be seen as sociological superstructure and hence something that Gentile members could omit? St. Paul said yes (Acts 15). The Pauline Christianity that thereby survived this crisis thus became a world religion and began to distinguish itself from its Jewish parent. That choice, to a Christian observer looking back from the twenty-first century, may seem obvious. But to the first-century church led by men and women of Jewish background, the answer was anguishing and anything but obvious.

For early Utah Mormons, the practice of polygamy, which they believed continued into the next life

and was essential for attaining ultimate salvation, was as central to their faith as circumcision was to many Jewish Christians. Like circumcision, it would be sacrificed in the interest of the survival and spread of the Latter-day Saints (LDS) faith. So too would be their communal economy, which they believed was essential for the establishment of the kingdom of God in the here and now. The arrival of that kingdom would have to await forces more powerful than those the Mormons could raise against the U.S. Army.

Before its demise, the Mormon social and economic order gave rise to a unique system of dispute resolution through “home teachers,” a pair of men assigned to every family in each ward (parish). In the nineteenth century, these home teachers mediated all Mormon disputes of a civil nature: all actions in tort, property, marriage and family law, water law, contracts, and taxation. Those conflicts not amenable to mediation—a small portion of the whole—were appealed to a local congregational court, the bishop’s court that was composed of the lay bishop and his two counselors. Beyond this, one could appeal to the diocesan level, the Mormon stake, if unanimity could not be reached in amity. The only sanction of these courts was loss of some portion of church privilege for a time.

These methods of conciliation, mediation, and fact-finding were fast, fair, and cheap. The Mormon church of the nineteenth century forbade going to Caesar’s courts, as did St. Paul (1 Corinthians 6), under threat of excommunication. Even more innovative and potentially revolutionary was the Mormon practice of shared property. Under the United Order, as it was known, each gave according to his capacity and received according to his needs, with the church acting as gathering house and dispensary. In contrast to contemporary Communism, living the United Order was voluntary, even within the church. Also unlike Communism, it was empowered by shared belief. All this and more was lost as the price to pay for citizenship within the American democracy.

In view of the loss of such effective social structures, the dominant culture must ask what degree of social, political, and religious uniformity is essential, at the *minimum*, in order to preserve a society’s original vision? How can the larger society avoid such debasement or, at least such dilution, of the existing order as to make inclusion of the new group not worth the cost? For nineteenth-century America, distinguished from its predecessor by a notable lack of vision at the top, the Mormons were too tribal to assimilate. In forcing America to address the question of assimilation, the Mormons, along with Irish Catholics and Jews from Eastern Europe, would push America’s legal system to the limits. In the process, the free exercise and nonestablishment clauses of the First Amendment would

come to enjoy new importance and be interpreted with greater robustness than ever before.

History of Early Mormon–Government Relations

Although the LDS Church was officially organized in 1830 in upstate New York, the earliest significant gathering of the Mormons began a year later in Kirtland, Ohio. It was here that the Mormons built the first of several towns, more or less from the ground up. Among the important events of the Kirtland period was the construction of the first LDS temple. The Kirtland period was a critical one for the establishment of a central community of believers, for the introduction of new theology surrounding the temple and its ordinances, and for the expansion of the church’s missionary efforts, which contributed vital new blood to the young church. All of these activities, in LDS thinking, were part of the building of a new Zion, which was an economic and social paradigm as much as it was one of belief, and this fact inevitably brought the Mormon community into conflict with its neighbors.

Of critical importance to understanding the non-Mormon opposition is the fact that at this time the Mormons did not openly practice polygamy. They did, however, enjoy a form of socialist economic practice, with community-owned enterprises and communal manufacture and commerce. For example, the Mormons formed their own bank, the Kirtland Safety Society. Like the majority of settlers of the western lands, these largely Jacksonian Democrats were debtors, not creditors. When the state of Ohio refused to grant a charter to the Kirtland Safety Society, the Mormons issued their own notes. A period of intense innovation and activity, the Kirtland years lasted only until 1838. Inaugurating what was to become standard practice, non-Mormons who feared the latter’s growing economic power and who were angry over the Mormons’ tribal inclination to conduct economic and legal transactions within their own community, forced the Mormons to relocate to Missouri—the first of several steps toward the frontier.

The subtitle of the Missouri period might be “out of the frying pan and into the fire,” for it was in Missouri that the Mormons would face their most ferocious opposition to date. In addition to their insular habits and communally oriented industry, the Mormons were overwhelmingly from New England and the British Isles, and almost all opposed slavery. (This particular demographic would later

change, after the Missouri period, as Mormon missionaries began going into the southern states). Missouri was divided between those favoring and opposing the expansion of slavery. The early Mormon practice of seeking proselytes among Native Americans and black slaves resulted in such opposition within Missouri that the Mormon prophet, Joseph Smith, who had permitted the baptism and ordination of blacks, soon stopped this in an effort to preserve his community within the state. This temporary act of acquiescence was to become reified after the murder of Joseph Smith. While the baptism of blacks continued, the church withheld its priesthood from them until 1978. The divisive and hurtful exclusion of blacks from the Mormon priesthood, ironically, is one of the many legacies of the persecution of Mormons—exile and abuse begetting other forms of the same.

The Mormons came to see Missouri, and particularly Jackson County, as *the* gathering place for the Mormon people. Indeed, Joseph Smith claimed to have received revelation to the effect that the New Jerusalem would be built in Independence, which it also transpired, was the site of the Garden of Eden. Early Mormon settlement in Independence, Missouri, had begun already in 1831, in parallel with the development of Kirtland. But, as in Kirtland, the Mormons' theocratic socialism brought them into conflict with their neighbors. In 1833, the leaders of Independence, Missouri, formally asked the Mormons to leave the state. The Mormons refused, and violence soon followed. As Mormon farms were attacked, livestock killed, and barns burned, the Mormons asked Governor Daniel Dunklin for military protection of their farms and communities. He told them simply to rely upon the courts and sue for relief. Local judges refused to help the Mormons and Mormon businesses, homes, and farms continued to be burned and destroyed. The Mormons were finally forced to flee Jackson County and settle across the Missouri River in November 1833.

The Mormons then petitioned President Andrew Jackson for relief, requesting that federal troops be sent to restore them to their homes and farms and to protect them until an adequate state response could maintain the peace. Jackson refused, stating that he possessed no power to call out federal troops to enforce state laws. Many Mormons then settled in Caldwell County, Missouri. But there too, the rapid growth of the Mormon population soon caused conflict with neighbors, who early on had welcomed the Mormons. This time, the Mormons began arming themselves and fighting back. As word reached Missouri Governor Lilburn Boggs that the Mormons were arming themselves and that violence was

increasing, he issued an extermination order against the Mormon people, unless they would leave the state. Late in October 1838, somewhere between eighteen and twenty-six Mormons were massacred at Haun's Mill in Caldwell County. The following day a mob, led by the state militia, surrounded the Mormons in far west in Caldwell County and arrested most of the Mormon leaders. With their leaders in jail, the Mormons emigrated from Missouri to Quincy, Illinois.

In Illinois, the Mormons concluded that seeking a redress of grievances and restoration of their property in Missouri, whether through state or local courts or the state legislature, was futile. They initiated a novel legal proceeding to impeach the state of Missouri and petitioned the governors of the other states for support. The action of impeachment was to be accomplished by the federal government in Congress and the presidency. A Mormon delegation left Illinois for Washington in October 1839 with a petition demanding redress by the national government. This was the United States before the Civil War and the Thirteenth, Fourteenth, and Fifteenth Amendments before the civil rights legislation that followed and before the incorporation doctrine had begun a process by which the civil rights of the people would become nationalized with the United States as the guarantor.

The answers they received from the president and the Congress were foredoomed. What President Martin Van Buren told the Mormon delegation, whom he received a day after they arrived in Washington, was reflective of the constitutional law of the time, though probably motivated by political concerns more than national jurisprudence. His answer also explains why there are so few Van Buren streets within Mormon settlements to this day. He told the Mormons that "your cause is just, but I can do nothing for you." The Mormon efforts towards Congress culminated in three days' debate within the Judiciary Committee of the Senate. Legitimate concerns about Senate jurisdiction and less legitimate concerns about the politics of siding with the Mormons led to a rejection of the Mormon petition.

Failure to find protection or redress of grievances at local, state, and national levels of government led the Mormons to turn ever more inward. They decided to found a new community of their own in southern Illinois. That community, Nauvoo, came to be one of the largest cities in the state, comparable to Chicago in population. The Nauvoo City Charter had more of the elements of a modern state constitution than of a municipal charter. In it, the Mormons formally sought the power to govern themselves with Mormon institutions. At one point, facing increasing pressure

from mobs and law enforcement agencies, the Nauvoo City Council passed ordinances granting itself power to declare void any writ executed by any court in the state.

The charter was an interesting experiment in the use of legal fictions in their own defense (usually Mormons were on the receiving end of such fictions), but proved to be of little value as the seemingly inescapable opposition to their presence began to rise in Illinois as well. But this time, the Mormons faced opposition from dissident Mormons as well. Some of these established a newspaper, the *Nauvoo Expositor*, which published an edition loaded with allegations against Joseph Smith and other Mormon leaders, accusing them of a number of offenses, including the practice of polygamy. (Though the Mormons denied the allegation as to the practice of polygamy and continued to do so for a few years after they had reached the Great Basin, in fact this accusation was true.) In response, Joseph Smith directed the council to authorize Nauvoo's law enforcement officials to destroy the type of the *Expositor*. This led to such an outcry from around Nauvoo that Joseph Smith, his brother, Hyrum, and other Mormon leaders were imprisoned. Shortly after their arrest, Joseph and Hyrum were murdered by elements of the state militia and other residents of surrounding communities.

Once again, the Mormons fled. In 1846, under the direction of Smith's successor, Brigham Young, they began their trek of thirteen hundred miles into the Great Basin and the valley of the Great Salt Lake, when they left, a part of Mexico. It was their intent to put problems with unruly America behind them by leaving the country altogether. But by the time they arrived in the desert that was to be Salt Lake City, the war with Mexico had occurred, and the territory of Utah had been incorporated into the Union. In what seems like a macabre joke, the Mormons, well along the journey that would see hundreds die of disease, accident, malnutrition, weather, and other hardships of travel on foot, were asked to contribute a contingent of men to fight in the war. Brigham Young agreed. The Mormon Battalion, as this group came to be known, did not see hostile action, but did perform the longest march in American military history, from the American Midwest to California, and played an important role in securing California in particular for the Union. Among other things, they helped put an end to John C. Fremont's abortive attempt to make California into a separate nation.

Free at last, as they supposed, to build a true Zion society, the Mormons launched a program of settlement and development across much of the West, reclaiming marginal steppe land for farms, founding

cities and towns, damming streams, digging canals, and building homes, temples, and meeting houses of astonishing beauty. The impact of this effort remains today. While most of the farms of the later homesteaders and the towns of the miners have returned to the desert, the Mormon communities have almost all survived. The reason is the communality that caused the Mormons such trouble east of the Mississippi. The Mormons came as group, acted as a group, and survived. The others came and acted as individuals and by and large failed in the harsh environment of the West.

If theocratic socialism was the flash point for conflict with non-Mormons prior to 1847, polygamy was to be the issue for the remainder of the century. While Mormons officially acknowledged the doctrine and practice of polygamy in 1852, the Morrill Act, the first of several federal laws passed by Congress to eliminate polygamy, was still a decade away. Brigham Young's Utah territory was still too remote to be high on anyone's list of priorities. When the Morrill Act finally made its appearance, the Civil War was in full swing. The Mormons thus had two decades in which to build their utopia without serious opposition. The end of the Civil War, however, brought renewed national attention to the West. The long-awaited transnational railway was completed in 1869. The Union Pacific and Southern Pacific sections came together in, of all places, Promontory, Utah, right under Brigham Young's nose.

A mixed blessing, the railway brought wealth to Utah but also put Brigham Young's hitherto isolated kingdom within easy reach of the national government. Losing no time, President Andrew Johnson inaugurated the postwar effort to bring Mormons under control by dispatching an army to Utah. Mormons fought back by sabotaging army supplies and preparing to destroy their cities, including Salt Lake City. The parties ultimately reached a mediated settlement. The army was saved from starvation only by the kindness of the Mormons whom they had been sent to whip into conformity.

The federal government then brought an action against Brigham Young's secretary, George Reynolds, for violating the Morrill Act, a piece of legislation designed to eliminate polygamy. While this was one of only two cases successfully prosecuted under this flawed law, the conviction of Reynolds, hitting so close to Brigham Young, caused repercussions throughout the Mormon empire.

In reviewing this case, the Supreme Court upheld Reynolds's conviction and the Morrill Act, dismissing Mormon arguments that polygamy was protected as religious expression under the free exercise clause of the First Amendment. Most American law schools today begin their discussion of the free exercise

clause with an examination of this famous case. The Morrill Act, though upheld by the Supreme Court in *Reynolds*, was too ineffective to be the instrument through which the government could destroy Mormon polygamy. In 1887, Congress passed the Edmunds Act, which created the federal offense of unlawful cohabitation, thus relieving law enforcement officials from proving an unlawful marriage, as had to be done under the *Morrill Act*.

While *Edmunds-Tucker* provided that only wives willing to testify against their husbands be allowed to give evidence, Utah judges, appointed by non-Mormons, held Mormon women in contempt of court and jailed them until they would agree to testify against their husbands. Most refused. Many went to jail, and some bore children there. By 1893, after the Mormons had officially renounced polygamy and prosecutions had nearly ceased, there had been 1,004 convictions for unlawful cohabitation and 31 for polygamy. In its effort to eradicate the Mormon theocracy and polygamy, the government had imprisoned most Mormon leaders and had denied Mormons in general many of their rights as U.S. citizens. The antipolygamy acts, for example, contained provisions that disallowed practicing Mormons from serving on juries, thus not only violating a fundamental constitutional right but also making it easier to convict other Mormons of polygamy. The acts denied active Mormons the right to hold elective or public office or to vote. They denied children of Mormon polygamous parents rights of inheritance. They prohibited (but did not stop) the immigration of Mormons to the United States and barred foreign-born Mormons from obtaining citizenship.

The federal government acted not only against individual Mormon leaders and members but also against the church. In an effort to preserve the Mormon Church from legal attack, the assembly of the state of Deseret (which included not only prestatehood Utah but also surrounding areas) had passed an ordinance in 1851 incorporating the Mormon Church. This allowed the church to hold and manage many of the industries and properties of the Utah territory. Under various acts of Congress directed against the Mormons thereafter, much of Mormon property became vulnerable to federal seizure. The Morrill Act, for instance, revoked the charter incorporating the Mormon Church. The Edmunds-Tucker Act directed the Mormon Church to abandon polygamy or face seizure of its property, including communal farms and businesses, houses of worship, and even Mormon temples.

Facing complete destruction, the church decided that it would have to abandon polygamy, and, in 1889, issued the "Manifesto" that, at least officially,

ended Mormon polygamy and with it federal persecution. Utah's admission to the Union in 1896 recognized the new peace. Though not forced to do so, the Mormons also began abandoning institutions of distinction in favor of integration into the American Republic. These disappeared not at the point of a gun but at the cash register. Protecting unique Mormon economic institutions from outside competition proved impossible. Gone, for example, are the communal businesses and farms, as well as church-based forms of dispute resolution by mediation and conciliation.

The costs of the savage suppression of the Mormons will never be known. One can tally the numbers killed or lost in the westward trek, the numbers of fathers and mothers imprisoned, and the numbers of those who chose instead to flee to Mexico or Canada. One can gain some feeling for the general suffering through surviving diaries and journals. But the unique, indigenous American religious culture that fascinated Leo Tolstoy, Richard Burton, and other world-wise visitors died in its infancy. What the industrious Mormon blending of communitarian theocratic and democratic governmental influences might have achieved—as an alternative to a capitalistic system that creates great wealth for a few, some wealth for many, and great poverty for many more—will never be demonstrated, at least by the Mormons.

Years ago, Daniel Boorstin (p. 3) noted, "The American Puritans' City Upon a Hill prospered because it was a City on the Sea. How different the story of New England, or of America, might have been if they had built their Zion in a sequestered inland place, some American Switzerland, some mountain-encircled valley!" Brigham's Zion, the Mormon City of God, was exactly that interior city. No indication of what the Mormons might have accomplished can be had from their descendents today. The Mormons of the twentieth and twenty-first centuries are profoundly conservative and ally themselves with hardcore capitalists and neofundamentalists. Nothing in their theology dictates this—quite the contrary. Contemporary Mormon conservatism is rather the result of the politics of isolation.

If anything was central to early Mormonism, it was the idea of Zion. The faith of Joseph Smith and Brigham Young was not in a hereafter only but in the imperfect but perfectable present. In this regard, Mormonism might well be considered *the* American religion. Sir Henry Maine, the first great modern legal historian of the English language, once described the movement from a more static feudal society to modernity as the movement from status to contract. Modern history is built upon the notion that individuals can act so as to determine their destiny. Young agreed. He said, "I have Zion in my view constantly.

We are not going to wait for angels, or for Enoch and his company to come and build Zion, but we are going to build it!" Jedediah Grant, a counselor to Brigham Young, said the same, "If you want a heaven, go to and make it!" Mormons came from a sturdy, self-reliant class of laborers and artisans, empowered by their capacity to build a home and a community. They rejected the idea of mediation by an educated, professional clergy. If heaven was achievable at all, they could get there through their own dedicated industry. It is not the least of the losses of America's penchant for enforced conformity that the early Mormons did not have a chance to build their City of God.

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References and Further Reading

- "Allegiance and Stewardship: Holy War, Just War, and the Mormon Tradition in the Nuclear Age." *Dialogue: A Journal of Mormon Thought* 16 (1983): 47.
- Allen and Leonard. *The Story of the Latter-day Saints*. Salt Lake City: Deseret Book Company, 1976.
- Arrington, Leonard. *Great Basin Kingdom: An Economic History of the Latter-day Saints*. Cambridge, MA: Harvard University Press, 1958.
- . *Brigham Young: American Moses*. New York: Alfred Knopf, 1985.
- Arrington, Leonard, Fox, and May. *Building the City of God: Community and Cooperation Among the Mormons*. Salt Lake City: Deseret Book Company, 1976.
- Bankcroft, Hubert Howe. *History of Utah*. Salt Lake City: Deseret Book Company, 1964.
- Boorstin, Daniel. *The Americans: The National Experience*. New York, Vintage Books, 1965, p. 3.
- Brown, Hugh B. *The Memoirs of Hugh B. Brown: An Abundant Life*. Salt Lake City: Signature Books, 1999.
- "Discipleship in the Nuclear Era, Sunstone, January, 1987; Violence and the Gospel: the Teachings of the Old and New Testaments." *Brigham Young University Studies* 25 (1986): 31.
- Firmage, E.B. "MX and the Destruction of Society's Values." In *That Awesome Space: Human Interaction With the Intermountain Landscape*. Chicago: Westwater Press, 1981.
- . "The Judicial Campaign Against Polygamy and the Enduring Legal Questions." *Brigham Young University Studies* 27 (1987): 91.
- . *Free Exercise of Religion in Nineteenth Century America: The Mormon Cases*, *Journal of Law and Religion* 7 (1989): 281.
- , ed. "Reconciliation, the Monsignor McDougall Lecture, Delivered at the Cathedral of the Madeleine, Salt Lake City, Utah, 7 March 1989." *Dialogue: A Journal of Mormon Thought* 22 (1989): 130.
- . *Religion and the Law: The Mormon Experience in the Nineteenth Century*, *Cardozo Law Review* 12 (1991): 765.
- . "God: CEO or Master of the Dance?" *Dialogue: A Journal of Mormon Thought* 28 (1995): 59.
- . "Seeing the Stranger as Enemy." *Dialogue: A Journal of Mormon Thought* 30 (1997): 27.
- . "Reflections on Mormon History: Zion and the Anti-Legal Tradition." *Dialogue: A Journal of Mormon Thought* 31 (1998): 53.
- . "Why Didn't the Watchdogs Bark?" In *God and Country, Politics in Utah*, Jeffery E. Sells, ed. Salt Lake City: Signature Books, 2004, chapter 12.
- . *MX: Democracy, Religion and the Rule of Law: My Journey*, *Utah Law Review* 1 (2004).
- . "MX: A Personal Essay, Beehive History." *Utah State Historical Society* 28: 25–31.
- Firmage, E.B., and Mangrum. *Zion in the Courts: A Legal History of the Church of Jesus Christ of Latter-day Saints, 1830–1900*. Carbondale: University of Illinois Press, 2001.
- Quinn, Michael. *The Mormon Hierarchy: Origins of Power*. Salt Lake City: Signature Books, 1994.
- "Violence and the Gospel: the Teachings of the Old Testament, the New Testament, and the Book of Mormon." *Brigham Young University Studies* 25 (1985): 31.
- Young, Brigham. *Journal of Discourses*, vol. 9, p. 284; vol. 3, p. 6.

MOTES v. UNITED STATES, 178 U.S. 458 (1900)

In *Motes v. United States*, the U.S. Supreme Court held that an accused has been deprived of his Sixth Amendment right to confront his accuser when the witness who had testified against the accused disappeared prior to allowing the accuser an opportunity to cross-examine the witness.

After a preliminary trial before the U.S. commissioner in which Jasper Taylor testified to the guilt of Walter Motes and him, and for which testimony Motes had the opportunity to cross-examine Taylor, Motes and Taylor were formally accused of murder and conspiracy to murder. At the actual trial, Taylor was called to testify against Motes, but disappeared an hour before his testimony due to the negligence of the officer guarding him. The prosecution submitted Taylor's previous testimony from the preliminary trial to the jury over the objection of Motes's counsel. Motes was convicted and appealed unsuccessfully to the court of appeals and to the Supreme Court.

The Supreme Court held that Motes had not procured the absence of the witness and had been denied the opportunity to cross-examine the witness before the jury. However, the Court affirmed the conviction due to Motes's voluntary confession as to his guilt. In addition, the Court found that in criminal cases a question of interpretation of a constitutional right cannot depend upon the rules of evidence prevailing in the courts of the state in which the crime was committed, but is controlled by the Constitution and the Court's interpretations of the Constitution.

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References and Further Reading

Nance, Dale A., *Rethinking Confrontation After Crawford*, International Commentary on Evidence 2(1) Article 2., <http://www.bepress.com/ice/vol2/iss1/art2> (2004).

Cases and Statutes Cited

American Construction Co. v. Jacksonville Railway Co., 158 U.S. 372
Ex parte Yarborough, 110 U.S. 651
Logan v. United States, 144 U.S. 263
Lowe v. State, 86 Ala. 47
Pruitt v. State, 92 Ala. 41
Regina v. Scaife, 2 Den. Cr. C. 281
Reynolds v. United States, 98 U.S. 145
United States v. Rider, 163 U.S. 132
United States v. Waddell, 112 U.S. 76
 Revised Statutes of the United States, §§ 5508-9

See also **Confrontation Clause**

MOVIE RATINGS AND CENSORSHIP

It is not uncommon to hear parents express concerns about the content of movies that their minor children can view on television, personal computers, and at the local mall's cineplex. Due to the belief that minors are more impressionable than adults, parents often worry that their children are at risk of mimicking the vulgar language and coarse attitudes expressed in many modern films. In addition, parents express concern about the substantial number of films containing significant amounts of graphically violent and sexually explicit material, as well as themes glorifying drug use, alcohol consumption, criminal activity, and other forms of destructive behavior. Parents also worry that movies are often demeaning toward women; racial, ethnic, and religious groups; gays and lesbians; and other marginalized groups. In fact, some people believe that the widespread consumption of modern films by adolescents and teenagers—who are in their prime socialization years—constitutes a significant threat to the psychological health and well-being of the next generation.

These fears and concerns are not, though, unique to the twenty-first century. In fact, since the first nickelodeons began playing films more than 100 years ago, parents and social reformers have worried about the substance of the material on display and the impact it would have on minors (Grieverson, 2004; Heins, 2003). Not surprisingly, almost immediately after the introduction of motion pictures in the early twentieth century, local and state governments began to develop regulations and licensing schemes to govern the content and public dissemination of films (Grieverson, 2004; Heins, 2003). These regulations

typically required those who wanted to distribute and/or exhibit a film to first secure a license from a government board that had reviewed and approved the film. In its first opportunity to assess the constitutionality of these forms of regulation, the U.S. Supreme Court concluded that they did not violate any free-speech rights protected by federal and state constitutions.

In *Mutual Film Corp. v. Industrial Commission of Ohio*, 236 U.S. 230 (1915), the Court argued that motion pictures could be subjected to substantial government regulation because they are typically exhibited in theaters with a mixed-gender audience of adults and children. Justice McKenna, in his opinion for the Court, explained that state lawmakers had legitimate reasons to be concerned about these exhibitions because “there are some things which should not have pictorial representation in public places and to all audiences.” He added that “[w]e would have to shut our eyes to the facts of the world to regard the precaution unreasonable.” The Court concluded its analysis by asserting that movies were a novel and unique form of communication that warranted regulation by the state. Justice McKenna wrote:

It cannot be put out of view that the exhibition of moving pictures is a business, pure and simple, originated and conducted for profit, like other spectacles, not to be regarded, nor intended to be regarded by the Ohio Constitution, we think, as part of the press of the country, or as organs of public opinion. They are mere representations of events, of ideas and sentiments published and known; vivid, useful, and entertaining, no doubt, but, as we have said, capable of evil, having power for it, the greater because of their attractiveness and manner of exhibition. It was this capability and power . . . that induced the state of Ohio . . . to require censorship before exhibition . . . We cannot regard this as beyond the power of government.

The Court's decision in *Mutual Film* gave state and local governments the green light to expand their regulatory control over films and film exhibitors. For the next thirty-five years, films in the United States were closely scrutinized, although the eyes performing the scrutiny were not limited to government agents. For example, the Catholic church became actively involved in monitoring the content of movies, and its Legion of Decency (Catholic adherents who pledged not to attend movies that priests and bishops had deemed immoral) arguably had a significant effect on the content of movies (Heins, 2003). In addition, the film industry's major studios developed the Production Code in the early 1930s as a way to monitor the content of films. Stephen Vaughn (1988, 1990) argues that the movie studio's efforts at “self-censorship” resulted substantially

from pressure exerted by the financiers of Hollywood studios—who in turn were strongly influenced by members of the clergy.

The effort to control the content of films was dealt a substantial blow, however, when the Supreme Court announced its decision in *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952). This was the first Supreme Court decision to address film licensing regulations since the First Amendment was held applicable to the states in *Gitlow v. New York*, 268 U.S. 652 (1925). In *Burstyn*, the Court considered whether a New York license that had previously been issued to the distributors of the film *The Miracle* could be revoked by state authorities who subsequently concluded that the film was “sacrilegious.” Overriding the wishes of the New York State Catholic Welfare Committee (which had filed an amicus curiae brief in the case), the Court unanimously overruled its earlier decision in *Mutual Film* and directed state authorities not to revoke the film’s license. The Court concluded that films are entitled to significant protection from prior restraint and other forms of government regulation. As Justice Clark explained in *Burstyn*:

It cannot be doubted that motion pictures are a significant medium for the communication of ideas. They may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression. The importance of motion pictures as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as to inform.

In particular, the Court was troubled by the vague and ambiguous nature of New York’s movie licensing statute. The cryptic nature of the word “sacrilegious” failed to provide government agents with the requisite guidance to channel their discretion when deciding whether to issue licenses to distributors of films. It would be too easy for government agents to approve licenses for films containing religious themes that they favored and deny licenses to films they disfavored. Justice Clark explained in *Burstyn* that “the censor is set adrift upon a boundless sea amid a myriad of conflicting currents of religious views, with no charts but those provided by the most vocal and powerful orthodoxies.”

Over the next fifteen years, compliance with the Production Codes declined and fewer and fewer state and local authorities vigilantly enforced film regulations. Foreign films, which did not need to be submitted for approval under the codes, became increasingly prevalent in the U.S. market. Moreover, the Supreme Court decided several cases that made it increasingly difficult for government authorities to regulate film distribution and exhibition. For

example, in *Kingsley International Pictures Corp. v. Regents*, 360 U.S. 684 (1959), the Court held that New York authorities could not refuse to issue a license to a film simply because, in their opinion, it contained views that condoned adultery.

More importantly, in *Freedman v. Maryland*, 380 U.S. 51 (1965), the Court held that film regulations must require the government to shoulder the burden of proving that a film is not protected expression—and in most instances this meant that the government would need to demonstrate that the film was obscene (see *Ginsberg v. New York*, 390 U.S. 629, 1968) or constituted child pornography (*New York v. Ferber*, 458 U.S. 747, 1982). The Court also held in *Freedman* that film regulations must provide prompt court review of any agency decision denying a license. Thus, although the Court concluded in *Time Film Corp. v. Chicago*, 365 U.S. 43 (1961), that the First Amendment does not entirely prohibit government authorities from reviewing the content of films prior to their exhibition, the collective weight of its decisions by the mid-1960s did impose heavy procedural burdens on government authorities.

As a result of these and other court decisions, government censorship boards largely faded away by the end of the 1960s. This process was accelerated when, on November 1, 1968, the Motion Picture Association of America (MPAA), the National Association of Theatre Owners (NATO), and the International Film Importers & Distributors of America (IFIDA) began implementing a voluntary movie rating system (Valenti, n.d.). The MPAA’s rating process is quite rudimentary. A group of eight to thirteen parents from Encino, California, view films and then rate them according to their suitability for individuals under the age of seventeen. Jack Valenti, the chair and CEO of the MPAA, explains the work of the ratings board in the following manner:

There are no special qualifications for Board membership, except the members must have a shared parenthood experience, must be possessed of an intelligent maturity, and most of all, have the capacity to put themselves in the role of most American parents so they can view a film and apply a rating that most parents would find suitable and helpful in aiding their decisions about their children’s movie going.

The decisions of the rating board can be appealed by movie producers to the Rating Appeals Board (a body comprising individuals from the movie industry), and the board’s decisions are final. Today, the MPAA has five rating categories: G (all ages admitted); PG (all ages admitted, although parental guidance is suggested); PG-13 (all ages admitted, although parents are strongly cautioned that these films may be

unsuitable for children, especially those under age thirteen); R (restricted to patrons above age sixteen or those accompanied by a parent/guardian); and NC-17 (no one seventeen and under admitted). Of course, it is highly unlikely that a small group of parents from the suburbs of southern California can accurately gauge what the “average American parent” considers appropriate for his or her children. Nevertheless, the MPAA ratings provide rough approximations about the content of films, and parents can use this information to monitor what their children watch.

From a civil liberties perspective, however, one can raise serious questions about the MPAA ratings—particularly whether the ratings are truly voluntary. After all, it appears that one of the primary reasons for their initial development was that of warding off more intrusive and rigorous government regulation (Valenti, n.d.) This implies that, in the absence of government pressure, the film industry might never have developed its movie rating program. If this is true, then the MPAA ratings are not an example of purely private censorship. Rather, they seemingly constitute an indirect form of government censorship, which one could argue presents a serious First Amendment problem.

Of course, one might question whether the MPAA movie rating system (even if created out of fear of government regulation) should qualify as government “censorship”—with all of the negative bag and baggage that that word conveys. After all, the ratings are just that, ratings. They do not force screenplay writers, directors, or producers to alter or compromise the content that they wish to include in films. In fact, studios are not required to subject their films to the MPAA rating process. Instead, they are free to release their products to the general public without any rating—or with a rating of their own making (although they cannot attach one of the MPAA’s copyrighted rating labels).

Nevertheless, one should not forget that the film industry is one whose revenue is largely determined by the box office success of its products. To maximize revenues, most film industry personnel recognize that movies need to be viewable by the widest possible audience. Consequently, movie studio executives will sometimes exert pressure on screenwriters and directors to avoid including content that will trigger one of the more severe ratings. Compounding this problem is the fact that many cinemas will not run films with an NC-17 rating, and such films are not sold by some of the larger DVD retailers such as Wal-Mart and Blockbuster. In short, there is a strong financial incentive in the movie industry to produce films that will not be tagged with ratings beyond PG or PG-13.

Since movie ratings do not appear to be in the artistic or financial interest of the film industry, perhaps the MPAA should disband and walk away from its nearly four-decade effort of rating films. Indeed, and somewhat paradoxically, the film industry might be subject to fewer constraints if it stepped aside and let the government take over the ratings game. After all, any ratings scheme that the government developed would have to be consistent with the First Amendment. Despite *Time Film Corp. v. Chicago* and *Ginsberg v. New York*, there is good reason to believe that the Supreme Court’s extant free-speech doctrine would prevent the government from rating films in any substantial manner (and probably much less than they are regulated today under the MPAA’s standards).

Obviously, though, this would not prevent private individuals and organizations from developing their own rating systems and disseminating their results to the broader public. This already happens on a widespread basis today, and some of these rating schemes are much more detailed than are the MPAA’s. The First Amendment protects these private rating activities, just as it protects the rights of film critics to review movies in newspapers and on television. In many respects, the MPAA’s rating scheme crowds out these lesser known rating sources—and that may be a reason the MPAA does not want to exit the ratings business any time soon.

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References and Further Reading

- Grieverson, Lee. *Policing Cinema: Movies and Censorship in Early-Twentieth-Century America*. Berkeley: University of California Press, 2004.
- Heins, Marjorie. “The Miracle: Film Censorship and the Entanglement of Church and State.” The Free Expression Policy Project (<http://www.fepproject.org/>), 2003.
- MPAA. n.d. The Motion Picture Association of America. (<http://www.mpa.org/home.htm>).
- Valenti, Jack. n.d. “How It All Began.” (<http://www.film-ratings.com/>).
- Vaughn, Stephen. “Financiers, Movie Producers, and the Church: Economic Origins of the Production Code.” In *Current Research in Film: Audiences, Economics, and Law*, vol. 4. Bruce Austin, ed. Norwood, NJ: Ablex Publishing Corp, 1988.
- . “Morality and Entertainment: The Origins of the Motion Picture Code.” *Journal of American History* 77 (1990): 44.

Cases and Statutes Cited

- Ginsberg v. New York*, 390 U.S. 629 (1968)
- Gitlow v. New York*, 268 U.S. 652 (1925)
- Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952)
- Kingsley International Pictures Corp. v. Regents*, 360 U.S. 684 (1959)

Mutual Film Corp. v. Industrial Commission of Ohio, 236 U.S. 230 (1915)
New York v. Ferber, 458 U.S. 747 (1982)
Time Film Corp. v. Chicago, 365 U.S. 43 (1961)

**MOZERT v. HAWKINS COUNTY
BOARD OF EDUCATION,
827 F. 2D 1058 (1987)**

This case arose under the free exercise clause of the First Amendment. The plaintiffs consisted of a group of parents of public school children who objected to various religious materials contained in their children's reading curriculum that offended their religious beliefs. The parents claimed that by forcing their children to be exposed to these materials in the curriculum, the school system had violated their rights to the free exercise of religion, as guaranteed by the First Amendment. The U.S. District Court for the Eastern District of Tennessee entered an injunction that required the schools to excuse objecting students from participating in reading classes where the textbooks were used and awarded the parents monetary damages.

The U.S. Sixth Circuit Court of Appeals reversed the judgment of the district court, finding that mere exposure of materials found to be objectionable to the religious beliefs of students and their parents did not amount to a violation of the free exercise clause by placing a burden on the students' and parents' rights of free exercise of religion. In reaching its conclusion, the court of appeals relied primarily on three cases.

The Sixth Circuit distinguished *Sherbert v. Verner*, 374 U.S. 398 (1963), on the basis that in *Sherbert* the objecting party's rights to free exercise were burdened when the government required an employee to work on the party's Sabbath day or forfeit benefits. The Sixth Circuit observed that the government had denied the employee a benefit, whereas in *Hawkins*, the only burden was a threat of exposure to offensive materials.

The Sixth Circuit also distinguished *Torcaso v. Watkins*, 367 U.S. 488 (1961), where the state of Maryland had denied a public office to a person because of the person's refusal to declare a belief in God. The Court stated that in this case, the students had not been required or compelled to profess or deny any religious belief. The Court found that the students had not been coerced into doing an act forbidden by their religion or to affirm or disavow a belief prohibited by their religion.

In *Wisconsin v. Yoder*, 406 U.S. 205 (1972), a group of Amish students objected to being compelled to attend school in violation of their religious beliefs.

The Supreme Court found that the requirement to attend school presented a real threat of undermining the Amish community and religious practices. The Court found that the students would abandon their belief or be forced to migrate to some other, more tolerant region. The Sixth Circuit distinguished *Yoder* by noting the narrowness of the decision and the particular set of facts presented. Additionally, the Sixth Circuit found that in *Yoder*, the students had no other options, but the students in this case were provided two options to accommodate their beliefs.

The Sixth Circuit concluded that when students are not required to affirm or deny a belief or engage or refrain from engaging in a practice forbidden by their religion, no unconstitutional burden on the right to free exercise can be established. This holding has been interpreted and extended to various settings to allow public schools almost unlimited authority to decide subjects taught there and to limit parental intrusion on that authority. Furthermore, *Hawkins* has been the basis for numerous court decisions upholding legislation affecting religious institutions as not violating the establishment clause.

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References and Further Reading

Mawdsley, Ralph D. *Education and the Law*, vol. 14, Numbers 1-2. New York: Routledge, 2002, pp. 77-82.

Cases and Statutes Cited

Sherbert v. Verner, 374 U.S. 398 (1963)
Torcaso v. Watkins, 367 U.S. 488 (1961)
Wisconsin v. Yoder, 406 U.S. 205 (1972)

**MT. HEALTHY CITY SCHOOL
DISTRICT BOARD OF EDUCATION v.
DOYLE, 429 U.S. 274 (1977)**

In *Mt. Healthy v. Doyle*, the U.S. Supreme Court overturned a federal appeals court ruling that reinstated a teacher's position with back pay when the teacher had been dismissed by the board of education based, in part, on constitutionally protected speech.

In the case at hand, a teacher had made a phone call to the media complaining of actions taken by the board of education. The board then sought to dismiss the teacher based on the phone call and other actions brought to the attention of the board by school administrators.

Before making its finding on the protected speech issue, the Supreme Court addressed issues of jurisdiction and immunity. First, the Court held that in order

to meet the damages requirements of 28 U.S.C. Section 1331, at the time the suit was filed it was far from a “legal certainty” that the teacher would not have been entitled to an amount in satisfaction of Section 1331. Second, the Court found that a board of education is not immune from suit because it is “more like a county or city than it is an arm of the state.”

Finally, the Court held that although the teacher had engaged in protected speech, the other complaints brought up by the board of education could have been sufficient to sustain the dismissal; because the board did not need a reason to dismiss the untenured teacher, the district court should not have put the teacher in a better position than he would have been in if he had not engaged in protected speech.

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Cases and Statutes Cited

Bell v. Hood, 327 U.S. 678 (1946)
Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971)
Board of Regents v. Roth, 408 U.S. 564
Edelman v. Jordan, 415 U.S. 651 (1974)
Ford Motor Co. v. Dept. of Treasury, 323 U.S. 459 (1945)
Kenosha v. Bruno, 412 U.S. 507 (1973)
Liberty Mutual Ins. Co. v. Wetzel, 424 U.S. 737 (1976)
Lincoln County v. Luning, 133 U.S. 529 (1890)
Louisville & Nashville R. Co. v. Mottley, 211 U.S. 149 (1908)
Lyons v. Oklahoma, 322 U.S. 596 (1944)
Monroe v. Pape, 365 U.S. 167 (1961)
Montana–Dakota Utilities Co. v. Northwestern Pub. Serv. Co., 341 U.S. 246 (1951)
Moore v. County of Alameda, 411 U.S. 693 (1973)
Nardone v. United States, 308 U.S. 33 (1939)
Parker v. North Carolina, 397 U.S. 790 (1970)
Perry v. Sindermann, 408 U.S. 593 (1972)
Pickering v. Board of Education, 391 U.S. 563 (1968)
St. Paul Indemnity Co. v. Red Cab Co., 303 U.S. 283 (1938)
Weathers v. West Yuma County School Dist., 387 F.Supp. 552 (Colo. 1974)
Weinberger v. Wiesenfeld, 420 U.S. 636 (1975)
Wong Sun v. United States, 371 U.S. 471 (1963)
 28 U.S.C. § 1331
 28 U.S.C. § 1343
 42 U.S.C. § 1983
 Ohio Rev. Code Ann. § 2743.01
 Ohio Rev. Code Ann. § 3317
 Ohio Rev. Code Ann. § 133.27
 Ohio Rev. Code Ann. §§ 5705.02, 5705.03, 5705.192, 5705.194

MUELLER v. ALLEN, 463 U.S. 388 (1983)

Prior to the 1980s, the Supreme Court had frequently struck down laws that had the effect of providing aid to religious institutions. Exceptions to this general pattern existed. For example, in *Everson v. Board of Education*, 330 U.S. 1 (1947), the Court upheld the

reimbursement of transportation expenses for parents of school children, including the reimbursement of the costs of transporting children to religious schools. Moreover, in *Board of Education v. Allen*, 392 U.S. 236 (1968), the Court affirmed the loan of secular textbooks to all school children in a state, including those attending religious schools. But generally, the Court wielded the three-part test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), requiring that laws have a secular purpose and effect as well as no excessive entanglement between religion and government, to invalidate aid to religious schools.

Mueller inaugurated a new trend in the Court’s jurisprudence. At issue in *Mueller v. Allen* was a state law that permitted taxpayers to deduct from their gross income certain educational expenses relating to tuition, textbooks, and transportation necessary to send the taxpayer’s children to school. In practice, the principle beneficiaries of the deduction were parents of children in private, religious schools. A majority of the Court, in an opinion by then Associate Justice William Rehnquist, upheld the law from a challenge under the establishment clause. Applying the *Lemon* test, the Court concluded that the law had a secular purpose and effect and did not excessively entangle government and religion.

Justice Rehnquist’s opinion highlighted two factors that would become prominent in the decisions of the Court over the next two decades. First, he emphasized that the challenged income tax deduction was only one of many deductions available to taxpayers and that it was a deduction available to all parents of school-aged children, whether their children attended public or private schools, including private religious schools. Second, he noted that the deduction funneled state assistance, in the first instance, to the parents rather than to the private, religious schools. These schools received money as a result of the independent choices of parents. In light of these two considerations, Rehnquist’s opinion found it of no constitutional consequence that most of those taking advantage of the educational deduction were parents of children in religious schools.

Mueller’s focus on the choices of individual recipients of aid in funneling the aid to religious institutions became a prominent part of the Court’s jurisprudence over the next twenty years. In particular, *Mueller*’s reasoning anchored the opinion of the Court’s majority, also written by now Chief Justice Rehnquist, in *Zelman v. Simmons–Harris*, 536 U.S. 639 (2002). In *Zelman*, which involved the constitutionality of a school voucher program that allowed students to use expense vouchers to attend a school of their choice, the Court upheld the program largely

because the aid received by religious schools under the program came to them by virtue of the independent choices of individual parents. Also, the Court reiterated *Mueller's* conclusion that the constitutionality of the voucher program was not threatened by the mere fact that the majority of parents using the vouchers had sent their children to religious schools.

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References and Further Reading

- Choper, Jesse H. *Securing Religious Liberty: Principles for Judicial Interpretation of the Religion Clauses*. Chicago: University of Chicago Press, 1995, pp. 169–188.
- Nowak, John E., and Ronald D. Rotunda. *Constitutional Law*, 7th ed. St. Paul, MN: Thomson–West, 2004, pp. 1429–1458.

Cases and Statutes Cited

- Board of Education v. Allen*, 392 U.S. 236 (1968)
- Everson v. Board of Education*, 330 U.S. 1 (1947)
- Lemon v. Kurtzman*, 403 U.S. 602 (1971)
- Zellman v. Simmons–Harris*, 536 U.S. 639 (2002)

See also **Accommodation of Religion; *Everson v. Board of Education*, 330 U.S. 1 (1947); *Lemon Test*; *Secular Purpose*; *State Aid to Religious Schools*; *Zellman v. Simmons–Harris*, 536 U.S. 639 (2002)**

MULLANEY v. WILBUR, 421 U.S. 684 (1975)

Mullaney v. Wilbur is one of a series of cases decided in the 1970s, including *In re Winship* (397 U.S. 358, 1970) and *Sandstrom* (442 U.S. 510, 1979), that strengthened protection to defendants by strictly construing the due-process requirement that the government bear the burden of proof in criminal cases. In *Mullaney* the Supreme Court reviewed a Maine statute that created a conclusive presumption that a defendant had acted with malice aforethought if the government proved the killing was unlawful and intentional. That conclusive presumption could be rebutted, but only if the defendant proved by a preponderance of the evidence that he acted in the heat of passion on sudden provocation.

In *Mullaney* the defendant claimed he killed Claude Hebert in the latter's hotel room because Hebert made a homosexual advance toward him. He argued this constituted a sudden provocation. However, he offered no evidence for the defense other than what was contained in the police report offered by the prosecution. He was convicted. The

Court unanimously held that Maine's conclusive presumption was unconstitutional because it transferred the burden of proof from the state to the defendant on an essential element of the crime—state of mind. The significance of *Mullaney* was diminished by a later decision in *Patterson v. New York*, 432 U.S. 197 (1977), in which the Court declined to apply *Mullaney* to a statute providing an affirmative defense of extreme emotional distress. Nevertheless, *Mullaney* continues to stand for the proposition that the government has the burden of proof on all elements of the crime charged.

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References and Further Reading

- Bibas, Stephanos, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, Yale Law Journal 110 (2001): 1097–1185.
- Leahy, William J., and M. Speer Brownlow, *An End to Burden-Shifting Presumptions: The Signal Criminal Law Achievement of the Post-Warren Court*, Boston Bar Journal 35 (Nov./Dec. 1991): 10–14.
- Mueller, Christopher B., and Laird C. Kirkpatrick. *Evidence*, 3rd ed. New York: Aspen Publishers, 2003, pp. 130–149.

Cases and Statutes Cited

- In re Winship*, 397 U.S. 358 (1970)
- Patterson v. New York*, 432 U.S. 197 (1977)
- Sandstrom v. Montana*, 442 U.S. 510 (1979)

See also **Due Process; *In re Winship*, 397 U.S. 358 (1970); *Patterson v. New York*, 432 U.S. 197 (1977); *Proof beyond a Reasonable Doubt*; *Sandstrom v. Montana*, 442 U.S. 510 (1979); *Self-Defense***

MURPHY, FRANK (1890–1949)

Frank Murphy, a renowned civil libertarian who served as an associate justice of the U.S. Supreme Court during the Roosevelt and Truman presidencies, was born and raised in Harbor Beach, Michigan, located on Lake Huron in rural northern Michigan. His father, John, was a lawyer, as well as the town Democrat and populist who, even in a heavily Republican community, was elected twice to serve as the county's prosecuting attorney. His mother, Mary, was a deeply religious Catholic woman who instilled in Frank a sense of social justice, personal integrity, and abstinence from alcohol and tobacco. He had two brothers and a sister, with whom he remained very close throughout his public life. In short, Murphy came from “small town, middle class, and politically alert America” (Howard, p. 3).

After attending public schools where he played football and other sports, Murphy enrolled at the University of Michigan in 1908. Three years later, he graduated and entered the University of Michigan Law School. Murphy was, by all accounts, an average student, but he was also an outstanding orator with a wide breadth of interests in college life. During what biographer Sidney Fine called his “years of the purest gold” (1975, p. 18), Murphy forged many friendships with men and women at Michigan, who would later become his political associates, advisers, and appointees to government posts.

Murphy served a brief stint in World War I, mostly in Germany after combat operations had ceased. In 1919, he was appointed first assistant U.S. attorney for the Eastern District of Michigan, based largely upon his experiences as a military prosecutor. He ran unsuccessfully as a Democrat for Congress in 1920 when national and state Republicans swept Michigan, but he used the race to build a political base. Meanwhile, he began a private law practice of criminal and civil cases with law school classmate Edward Kemp. By 1923, he drew upon his legal reputation and growing political connections to win a seat on Recorder’s Court, Detroit’s criminal court.

Frank Murphy as Judge, Politician, and New Deal Reformer

Murphy’s seven years as a criminal court judge were generally uneventful, with one notable exception. In 1925, shortly after becoming presiding judge, he assigned to himself the trial of Dr. Ossian Sweet, his wife, and eight other African-American relatives and friends who were charged with murder, resulting from a white mob’s attack of Dr. Sweet’s house in an all-white Detroit neighborhood. Murphy’s rulings from the bench and charges to the jury were scrupulously fair, and the Sweets were eventually acquitted. The national attention drawn to this case, including close monitoring by the NAACP and the ACLU, brought Murphy increased visibility and new political networks that would prove invaluable in later elections.

Reeling from the effects of the Great Depression and local corruption, Detroit was a city in turmoil when Murphy was elected mayor in 1930 by piecing together a progressive coalition; a year later, the popular Murphy was easily re-elected. As mayor, Murphy was a champion of public relief for the unemployed and fiscal integrity. He implemented local work projects and food and clothing distribution centers, while also leading a national urban lobby for federal relief. He was an early and enthusiastic

supporter of FDR, helping Roosevelt to become the first Democratic presidential candidate to win the state of Michigan. By 1933, the reward of a big government job was waiting. Murphy wanted to be FDR’s attorney general but settled instead for the high-paying and prestigious position of governor-general of the Philippines.

Although criticized for his lack of relevant experience and knowledge of Asian affairs, Murphy became a charismatic and highly popular leader in the Philippines. He was a natural champion of the underdog who served as an anti-imperialist colonial governor. During his tenure, Congress passed a law granting independence to the Philippines by 1946, and Murphy played a key role in securing presidential approval of a new Filipino constitution and in improving relations with Washington.

By 1936, FDR asked Murphy to run for governor of Michigan. A reluctant candidate, Murphy campaigned as a New Deal reformer and was elected by a narrow margin. Shortly thereafter, sit-down labor strikes were called by the United Auto Workers at plants in Flint, Michigan, and elsewhere. Murphy was eventually able to negotiate some measure of industrial peace, but his prolabor sympathies cost him many votes in industrial areas and led to his defeat for re-election in 1938. A few weeks later, FDR selected Murphy to be his attorney general.

Murphy’s ambitious agenda for the Justice Department included improvement in the administration of justice nationwide, morality in government, and a firm commitment to civil liberties. Indeed, he created a new civil liberties unit within the Justice Department. But he also formed an unexpected alliance with FBI Director J. Edgar Hoover to fight crime and public corruption. By most accounts, Murphy was a better political evangelist than executive manager of the Justice Department. Rumored to be a possible presidential candidate in 1940 (if FDR chose not to seek a third term) and a Supreme Court nominee on several occasions, Murphy was nominated by FDR to the Court in January 1940. He was confirmed by voice vote of the Senate eleven days later. Eager to finish his work as attorney general, he continued on the job for another month, exasperating FDR and political associates. Murphy finally took the oath of office at a White House ceremony where his political rival, Robert Jackson, was installed as attorney general.

Justice Frank Murphy

As the fifth of FDR’s nine appointees, Murphy became part of the “Roosevelt Court,” which upheld

the government's power to regulate virtually all aspects of the economy, established ground rules for industrial disputes, and aggressively protected the rights of unpopular religious, racial, and political minorities. His early years on the Court were marked by a degree of tentativeness and uncertainty, unusual for the decisive Murphy but customary for new justices. He did assemble a majority and write the opinion in *Thornhill v. Alabama*, 310 U.S. 88 (1940), in which the Court invalidated an Alabama statute that prohibited peaceful picketing by labor. Justice Murphy's opinion temporarily brought picketing under the constitutional protection of the First Amendment. But subsequent Supreme Court decisions whittled away at these protections, and the issues eventually passed to the supervision of Congress.

In *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), a cautious Justice Murphy wrote for a unanimous Court that there are, indeed, limits to the First Amendment, including "... the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words." The Court upheld Chaplinsky's conviction for calling police "fascists" in public when he was arrested while distributing religious pamphlets for Jehovah's Witnesses. Ironically, this opinion authored by the civil libertarian Murphy is still cited today by the Supreme Court and legal scholars for the "fighting words" exception to free speech.

A more seasoned Justice Murphy found his voice for the protection of civil rights and liberties in cases involving the government's conduct during World War II. Here, even while serving as an informal adviser to FDR on labor and Philippines policy until Roosevelt's death in 1945, he demonstrated the kind of independence from the president who appointed him that has aggravated so many presidents.

Justice Murphy is perhaps best known for his dissent in *Korematsu v. United States*, 323 U.S. 214 (1944). In *Korematsu*, a six-person majority of the Court led by Justice Hugo Black upheld FDR's Executive Order 9066, which provided for the exclusion and relocation of more than one hundred thousand Americans of Japanese ancestry living on the West Coast. Murphy argued that in the absence of martial law this policy should not be approved, declaring—in now famous words—that the exclusion "goes over 'the very brink of constitutional power,' and falls into the ugly abyss of racism." Justice Murphy was particularly troubled by the racist stereotypes, prejudices, and assumptions about Japanese Americans that guided the military judgments.

In cases involving the military draft and conscientious objection during World War II, Justice Murphy regularly dissented from the Court's decisions. In

Falbo v. United States, 320 U.S. 549 (1944), his eight Court colleagues upheld a conviction and prison sentence for a Jehovah's Witness minister who was classified by his local draft board as a conscientious objector rather than as a minister (and therefore required to report for civilian service camp duty). The justice warned that "in time of war individual liberties cannot always be entrusted to uncontrolled administrative discretion." His dissent in *Falbo* is particularly poignant because Justice Murphy served in World War I and underwent military training in the infantry reserve during his 1942 summer recess from the Court.

Justice Murphy was not always a dissenter. More often than not, he joined the Court's majority, either in unanimous cases or as part of a fluid bloc of liberal justices who dominated the Court during the Roosevelt years. He also wrote concurring opinions (twenty-one in all), in which he joined the Court's holdings but not its reasoning, often urging that the cases be decided on broader constitutional grounds. Indeed, he acknowledged using concurring opinions as an educational device to lecture about the evils of racism. For example, in *Duncan v. Kahanamoku*, 327 U.S. 304 (1946), Justice Murphy happily concurred in the Court's ruling that a statute authorizing martial law in Hawaii did not include the power to replace civilian courts with military tribunals. But he denounced arguments in favor of military tribunals that rested upon assumptions about the loyalties of Japanese Americans, who could not, by law, be excluded from serving on juries in civilian courts. "Especially deplorable," the justice wrote, "is this use of the iniquitous doctrine of racism to justify the imposition of military trials. Racism has no place whatever in our civilization."

Justice Murphy had a complex set of relationships with the other justices on the Roosevelt Court. He was not well regarded intellectually by Chief Justice Stone, who was reluctant to assign him leading opinions, and he did not get along with Justice Owen Roberts, a holdover from Hoover. Justice Robert Jackson had been his political adversary in the Roosevelt cabinet, and Justice Murphy was constantly at odds—in his opinions and views of the role of the Court—with Justice Felix Frankfurter, an intellectual giant and political iconoclast who believed strongly in judicial restraint. Eventually, he gravitated toward the more liberal justices Hugo Black and William O. Douglas, but both men had intellects and persona that overshadowed the more humble Justice Murphy. It was not until Wiley Rutledge arrived on the Court in 1943 that the justice found a good friend, warm colleague, and natural political ally.

Justice Murphy's tenure on the Court is not without critics and controversies. His most severe critics charged that he was a result-oriented jurist: a politician in a black robe who had little knowledge of, or interest in, jurisprudence and little regard for legal precedent. Other critics point to his work habits on the bench, where he relied more heavily than most justices on his law clerks to draft opinions, while also taking on outside speeches and presidential advising. The justice was in poor health during his last year on the bench. He suffered several lengthy hospitalizations and probably became addicted to pain-killing prescription drugs, during which time he used his clerks and Justice Rutledge to help complete his opinions. More recently, some observers have suggested that Justice Murphy was probably the first gay Supreme Court justice. Based largely upon his being single and rooming at times with friend and adviser Edward Kemp, who also never married, this assertion is not supported by the biographies of Murphy that link him repeatedly with women throughout his life; indeed, he was engaged to be married at the time of his death.

What is not in dispute is Frank Murphy's lifelong commitment, as a municipal judge, mayor, governor, U.S. attorney general, and Supreme Court justice, to civil rights and civil liberties. In each position, he became increasingly supportive of rights for the laborer, racial equality, and social justice. As biographer Howard observes of Justice Murphy's tenure on the Supreme Court, "His vote and impassioned pen were key elements in a revolutionary development of civil liberties" (p. 490).

JOHN PAUL RYAN

References and Further Reading

- Boyle, Kevin. *Arc of Justice*. New York: Henry Holt, 2004.
 Fine, Sidney. *Frank Murphy: The Detroit Years*. Ann Arbor: The University of Michigan Press, 1975.
 ———. *Frank Murphy: The New Deal Years*. Chicago: The University of Chicago Press, 1979.
 Potts, Margaret H. "Justice Frank Murphy: A Reexamination." *Supreme Court Historical Society Yearbook* (1982): 1–12.
 Woodford, Howard, J., Jr. *Mr. Justice Murphy: A Political Biography*. Princeton, NJ: Princeton University Press, 1968.

Cases and Statutes Cited

- Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942)
Duncan v. Kahanamoku, 327 U.S. 304 (1946)
Falbo v. United States, 320 U.S. 549 (1944)
Korematsu v. United States, 323 U.S. 214 (1944)
Thornhill v. Alabama, 310 U.S. 88 (1940)

MURRAY, JOHN COURTNEY (1904–1967)

Murray, a Roman Catholic priest, was the lead author of *Dignitatis Humanae* (DH), the Declaration on Religious Freedom. DH was promulgated by an overwhelming majority of the world's Roman Catholic bishops at the close of the Second Vatican Council in Rome in December 1965. In contrast to the church's preconiliar teaching that only Catholics should possess the right to public worship, DH recognized every human person's right to religious freedom. Murray provided the argument that persuaded the bishops to abandon the traditional claim that only true religion (that is, Catholicism) had rights. The First Amendment to the U.S. Constitution profoundly influenced Murray and the content of the declaration.

Murray was born in New York City on September 12, 1904. He entered the Society of Jesus (the Jesuits) in 1920 and was ordained a Roman Catholic priest in 1933. He was professor of theology at Woodstock College in Maryland from 1937 until his death in 1967. He died of a heart attack in a taxicab in New York City on August 16, 1967.

Intercredal Cooperation and Indifferentism

During the 1940s, Murray's writings addressed the difficult problems associated with intercredal cooperation, the collaboration of Catholics and non-Catholics in the work of social justice. Some Catholics feared that such cooperation encouraged religious indifferentism—that is, the belief that religions are equally true. Indifferentism was unacceptable because the church taught that Catholicism was the one true religion. Murray caused some controversy within the church with his argument that individuals of different faiths can cooperate for justice while agreeing to disagree about theology.

Separation of Church and State

This early analysis of religious pluralism and cooperation led Murray to study church–state questions. The separation of church and state posed special problems for American Catholics. The church taught that the one true religion should be the established religion. Moreover, the Roman pontiffs had vigorously condemned the separation of church and state

in Europe. Before Vatican II, Catholics were taught to tolerate the nonestablishment of Catholicism but to aspire to establishment. In other words, they could accept the First Amendment's separation as a matter of expediency but should prefer an established Catholic Church (like Spain's) as a matter of principle.

Murray creatively challenged the ban on separation in a series of scholarly articles published in the 1940s and 1950s. He set the church–state debate in historical context by arguing that the popes' condemnation of European liberalism should not extend to the American setting. In Europe, separation of church and state had restricted the freedom of the church. In contrast, in the United States, separation of church and state protected religious liberty. Hence, Murray argued, American Catholics should not merely tolerate the First Amendment, but instead accept it enthusiastically, as good law that promoted freedom.

Murray's conclusions were too controversial for the church. In 1955, Vatican officials ordered him to cease writing about church and state, and a major article on that subject was withdrawn from publication.

In the United States, however, Murray's views were celebrated. In 1960, his book, *We Hold These Truths: Catholic Reflections on the American Proposition*, received significant attention. John F. Kennedy's aides consulted with Murray before the presidential candidate gave his famous speech espousing separation of church and state to Baptist ministers in Houston. Murray appeared on the cover of *Time* magazine after Kennedy's election; the priest and the president had demonstrated in different ways that Catholicism was compatible with the U.S. Constitution. The president, however, who opposed federal aid to religious schools, was a stricter separationist than the priest, who supported it.

Religious Freedom

Within the church, Murray's ideas faced continued opposition. When Pope John XXIII convened the church's bishops to the Second Vatican Council in October 1962, Murray was absent, disinvited by his opponents. Eventually, the American bishops secured Murray's presence as an expert at the Council's Second Session in 1963. He then collaborated with Father Pietro Pavan, of the Lateran University in Rome, to draft the Declaration on Religious Freedom.

After the Council ended, Murray explained that the "development of doctrine" had been the "sticking point" for many Catholic bishops and theologians. They believed that the church could not change its

teaching, that only the true religion had the right to religious freedom, and that erroneous religions had no right to public worship. Murray ingeniously developed an argument that protected the church's claims to truth while allowing it to recognize the religious freedom of non-Catholics.

Murray's solution was legal and political, not theological. He explained that the human right to religious freedom is rooted in human dignity, not in truth. Because every person possesses human dignity, everyone has the right to religious freedom. Moreover, that legal right must be recognized and defended by the government.

Murray described the individual's right to religious freedom as a double immunity from coercion and from restraint. First, the government may not coerce the individual conscience into belief. Second, it may not restrain the individual from the practice of religion. Although the Catholic Church had accepted that first immunity from coercion before Vatican II, the second immunity, from restraint, was the new concept that Murray persuaded the bishops to adopt at the Council. Murray attributed the second immunity to the First Amendment. Hence, the American experience of religious freedom persuaded the international gathering of bishops to change the teaching of the Roman Church.

Selective Conscientious Objection and Contraception

Murray devoted his last years to numerous topics of social concern. He was one of only two participants on an advisory commission to President Lyndon Johnson to endorse the right of selective conscientious objection. Murray also voiced support for the Papal Birth Control Commission members who recommended a change in the church's ban on artificial contraception. He supported the decriminalization of contraception and, drawing parallels to his work at the Council, argued that contraception was a matter of religious liberty in a pluralistic society.

Murray's lucid analyses of social questions remain influential among many American Catholics, who continue to assert his relevance to current debates about religious pluralism.

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References and Further Reading

Love, Thomas T. *John Courtney Murray: Contemporary Church-State Theory*. New York: Doubleday, 1965.

- Murray, John Courtney. *We Hold These Truths: Catholic Reflections on the American Proposition*. New York: Sheed & Ward, 1960.
- , ed. *Religious Liberty: An End and a Beginning*. New York: Macmillan Co., 1966.
- , trans. “*Dignitatis Humanae* (The Declaration on Religious Freedom).” In *The Documents of Vatican II*. Walter M. Abbott and Joseph Gallagher, eds. New York: America Press, 1966, pp. 674–698.
- . *Religious Liberty: Catholic Struggles With Pluralism*. J. Leon Hooper, ed. Louisville, KY: Westminster/John Knox Press, 1993.
- . *Bridging the Sacred and the Secular*. J. Leon Hooper, ed. Washington, D.C.: Georgetown University Press, 1994.
- Pelotte, Donald E. *John Courtney Murray: Theologian in Conflict*. New York: Paulist Press, 1975.

See also Catholics and Religious Liberty; Establishment Clause (I): History, Background, Framing; First Amendment and PACs; Free Exercise Clause (I): History, Background, Framing

MUSEUMS AND EXPRESSION

The intersection among civil rights, museums, and expression usually focuses on the right of artists to make controversial works and museums to offer them to the public. The First Amendment protects all speech, with narrow exceptions. However, since aesthetic appreciation is often considered a luxury, the right to aesthetic expression is often given less First Amendment protection than the right to speak a political opinion. Outright censorship, though rare, has been practiced in America. While the prohibition against “obscenity” is very narrowly construed and almost never used, there are famous examples of artistic works being banned under the obscenity rules in America. Henry Miller’s books were banned in America for their strong sexual content, and William S. Burroughs’s book *Naked Lunch* was also prosecuted for obscenity. The issue of controversial books in public libraries is another recurrent theme in American politics.

The arts can also serve as a surrogate battlefield for broader political struggles. For example, during the French Terror, when expressing sympathy for the *ancien regime* was dangerous, the conservative critic Boutard did so obliquely by praising rococo art (associated with the old aristocracy) and condemning the neoclassical (associated with the revolutionaries). Even when not intentionally encoded, artistic and critical practice necessarily reflects and confronts the political issues of its time. For example, during the National Endowment for the Arts (NEA) crisis of the late 1980s, the work of homosexual artists became the focal point of a broader crisis over the visibility of

homosexuality in society. Earlier in the century, the critic Clement Greenberg’s history of modern painting bespoke a Marxist belief in historical dialectic, while Lionel Trilling’s belief that good literature could exist only in untroubled times was anti-Marxist. The critic Hilton Kramer’s insistence on objective standards in art reflects an exasperation with the egalitarianism of sixties counterculture.

Ironically, the low value placed on artistic expression can also insulate it from political threats. During the censorious political climate of the Terror, when artistic news was considered too frivolous for journalistic coverage and relegated to the margins of the journals, art critics were freer to speak their minds than other commentators. In America during the first half of the twentieth century, public anxiety about immigration and Communism led to an expansion of the “imminent threat” doctrine, which allowed prohibition of political speech that advocated the violent overthrow of the government. However, during the same period, artistic expression was relatively free.

The biggest threat to a robust public debate about matters of aesthetic experience is often not the government, but the vicissitudes of the marketplace. For example, radio stations around the country are controlled by a handful of operators with tested profit models, and therefore it is difficult for more sophisticated programmers to enter or survive in the market. Similarly, museums increasingly face the same problem, where more and more institutions subscribe to traveling “blockbuster” exhibitions that are curatorially unsophisticated. Therefore, when artists compete for a finite opportunity to be heard, the less complex and challenging will often prevail. While this is not necessarily a civil liberties issue, it is intrinsically tied up with the civil liberty of free enterprise. If one considers artistic quality to be a valuable public resource, then its lack of support would seem to constitute a market failure.

There has long been a power struggle between the art establishment and emerging artists and forms. This struggle goes all the way back to the first secular art institutions that arose in the sixteenth century, such as Cosimo de Medici’s Accademia delle Arte del Disegno in Florence (which opened in 1563) and Accademie Royale Le Peintre in Paris (which opened in 1648). The Accademie, with its public salons, had grown extremely powerful in French culture by the eighteenth century. Success at the salon was crucial for an artist’s career; however, the Accademie was stylistically conservative and unreceptive to new trends. Artists who felt they had been unjustly excluded from the salon created alternative exhibits. It was at these alternative exhibits that the most important new styles of the eighteenth and nineteenth centuries

were incubated, including neoclassicism, impressionism, and postimpressionism.

Meanwhile, the most successful “academics” of the same period, such as William Bouguereau, have been mostly forgotten. This power struggle between the art “establishment” and emerging artists and art institutions continues to this day. Venerable institutions such as the Museum of Modern Art soak up most of the resources and smaller venues, which take more risks on emerging forms and young artists, fight to stay alive.

The issue of public subsidies for art is a recurrent crisis in American society. It is a complex civil liberties issue. While the public cannot constitutionally prohibit an artist from expressing himself in a certain way, it is under no constitutional obligation to subsidize his expression. The question is whether, by discriminating based on viewpoint in giving out subsidies, the government is really “abridging” speech it does not like, in violation of the First Amendment, or simply encouraging speech it likes. This issue comes up whenever a community tries to exclude controversial books from the public library or controversial curricula from public universities or schools. It also comes up in the perennial debate over the NEA.

Similarly, when the government licenses broadcasting rights, it is free to regulate content without running afoul of the First Amendment. Through the FCC, the government prohibits nudity, sexual content and language in television and radio and has enforced “equal time” rules for political broadcasting.

The rights of free expression and private property often come into conflict. Mall owners consider it a taking when the government forces them to allow protesters inside their property; protestors argue that because American life increasingly takes place within privately owned structures, it is impossible for them to speak anywhere else. Shopkeepers and subway operators consider it a defacement of private property when graffiti artists use their walls as a canvas; the artists argue they have a right to express themselves artistically.

First Amendment issues also arise with regard to the ownership of speech. Creative expression is a form of property that can be bought and sold, and the owner of speech can prevent others from using it by copyright or trademark. Power struggles often occur over who has the right to certain speech. Artists and writers claim that they are forced into unfair contracts with dealers and publishers, who make much more money from their creative works than the artists do. Some artists also advocate for “moral rights”: the right not to have their work altered or defaced in a way that changes its political or stylistic meaning.

While the doctrine of moral rights is widely accepted in Europe, it has never been accepted in America.

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References and Further Reading

- Bazin, Germain. *The Museum Age*. New York: Universe Books, 1967.
- Bolton, Richard. *Culture Wars: Documents From the Recent Controversies in the Arts*. New York: New University Press, 1992.
- Brenson, Michael. *Visionaries and Outcasts: The NEA, Congress, and the Place of the Visual Artist in America*. New York: New Press, 2001.
- Lorente, Jesus Pedro. *Cathedrals of Urban Modernity*. Brookfield, VT: Ashgate, 1998.
- Sherman, Daniel J., and Irit Rogot, eds. *Museum Culture: History, Discourses, and Spectacle*. Minneapolis: University of Minnesota Press, 1984.

See also **Broadcast Regulation; Freedom of Speech and Press under the Constitution: Early History (1791–1917); Freedom of Speech: Modern Period (1917–Present); Government Funding of Speech; Intellectual Property and First Amendment; Low Value Speech; National Endowment for the Arts v. Finley, 118 S. Ct 2168 (1998); Obscenity; Public Vulgarly and Free Speech**

MUSLIMS AND RELIGIOUS LIBERTIES

A commonly held belief in the United States is that serious violations of Muslim civil rights started after September 11, 2001. In fact, Muslims in this country have endured a long history of civil rights violations, especially with respect to their first freedom, the freedom of religion. The first wave lasted several hundred years and was perpetrated against African Muslims who were forcefully removed from their countries to America and enslaved. Many of them became subject to a policy of forced conversion, and some were able to generate support to regain their freedom in part by promising to go back and preach the Gospel in Africa. Those who returned tended to revert to their faith upon arrival. Those who remained behind often practiced their faith secretly.

The second wave of civil rights violations began in the 1990s, culminating in the Antiterrorism and Effective Death Penalty Act of 1996, which was passed after the bombing of a federal building in Oklahoma by Timothy McVeigh, who was associated with the Christian identity movement. The act, which applies to citizens and noncitizens, reintroduces guilt by association by making it a crime to provide any

material support (except for medicine and religious material) to humanitarian and political activities of any group designated by the secretary of state as “terrorist”—a concept broadly defined to include virtually any use of force. Since the designation by the government is based on national security considerations (another broadly defined concept), the courts are reluctant to review it. To date, almost all of the entities designated as “terrorist” under this act are Muslim.

According to Robert Allison, author of *The Crescent Obscured*, Islam was viewed in the eighteenth century as a wicked religion which had fostered bad government and indolent people. Plays featured fictional Muslim spies or oppressed Muslim women. Today, Islam is viewed by prominent religious leaders, such as Revs. Pat Robertson, Jerry Falwell, and Franklin Graham, as promoting violence, not indolence. In one ingenious stroke, this shift effectively removes First Amendment protections from American Muslims. Muslims are now portrayed by various commentators as untrustworthy spies or members of “sleeper cells” of terror. Bearded men and veiled women are challenged daily in the workplace, in schools, and on the street. Employment discrimination is rising, so are hate crimes. Islamic centers and mosques are being vandalized and sometimes burned. Racial profiling has taken root, and some Muslims have been removed from airplanes due to suspicion based on their appearance. Modest women have been invasively searched at airports or forced to remove their head cover. Less fortunate Muslims have been physically assaulted, raped, or killed. Those who look like them, such as the Sikh, have gravely suffered the consequences of mistaken identification.

The events of September 11 ushered in a policy that has effectively induced reverse immigration by Muslims to their countries of origin through detentions, interrogations, and deportations. Around one thousand persons were detained soon after September 11, but their names and their exact number were not released. When some were ultimately charged, most of the charges turned out to be minor criminal and immigration charges. Fear spread in the Muslim community. In 2002, the National Security Entry-Exit Registration System (NSEER) was instituted, requiring males within a specific age bracket from predominantly Muslim countries to report to immigration services for registration. When they did, there were further mass arrests and deportations, again on minor immigration charges. Those detained were often treated poorly and, in at least one case, fed pork, a religiously prohibited food. Other Muslims began leaving this country instead of reporting.

The interaction between the act and immigration laws and practices has also contributed to an erosion of free speech and the free flow of information by denying visas to attend conferences and meetings to persons associated with groups designated as terrorist, even if these persons are not involved in violence. The denial of due process to the noncitizen alien remains the most salient feature of the act. The act gave the Department of Justice the power to use secret evidence in the deportation of noncitizens, even if unconstitutionally obtained, but required the government to provide the noncitizen a summary of that evidence. The summary arrangement has many shortcomings, not the least of which is the problem of cross-examination.

The act also has a provision requiring banks to freeze assets of designated organizations and their agents. It was used repeatedly prior to September 11. But the freezing of the assets of Islamic charities subsequent to September 11 cast a deep chill over charitable giving among Muslims, even to their families abroad. In light of the fact that charitable giving (*zakat*) is one of the five pillars of Islam, the present situation has placed undue burden on Muslims in the free exercise of their religion. Guidelines issued by the government to alleviate this problem are ineffective because of the broad disclaimer at their conclusion. Today, a Muslim who wants to give *zakat* safely to a Muslim child for humanitarian aid is advised to do so through an American non-Muslim charitable organization.

After September 11, 2001, the USA PATRIOT Act was hastily passed in Congress. Its enhanced surveillance provisions have caused great concern. It permits significant delay in the notice of execution of search and seizure, severely limits habeas corpus petitions, and does not require agents to demonstrate “probable cause” to believe that a person is engaged in terrorist activity. After its passage, law enforcement in northern Virginia raided many homes, a school, and places of business owned by Muslims. Those present were interrogated and restricted in their movement for hours. Computers and other items were confiscated, but no charges have been made so far. Many women subjected to these searches have received trauma counseling.

Under the USA PATRIOT Act, law enforcement has also acquired authority to search library and bookstore records relating to citizens as well as non-citizens, as well as to issue a gag order on the owner not to reveal these searches. Most recently, the Clear Law Enforcement for Criminal Alien Removal (CLEAR) Act has been proposed; this gives local police the authority to enforce civil immigration laws or risk

losing federal funding. If passed, this act would have an adverse impact on Muslim women in particular, who would then refrain from reporting domestic violence for fear of deportation. More importantly, two events that took place in December 2004 raise the concern of American Muslims about their civil liberties to a new level. They are the *Intelligence Reform Bill*, signed into law by President Bush in December 2004 and the results of a Cornell University poll indicating that 44 percent of all Americans are in favor of curtailing the civil rights of American Muslims.

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References and Further Reading

- Akram, Susan M., and Kevin R. Johnson, *Migration Regulation Goes Local: The Role of States in U.S. Immigration Policy: Race, Rights and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, N.Y.U. Annual Survey of American Law 58 (2002): 295.
- Alexander, Scott, *Inalienable Rights? Muslims in the U.S. Since September 11th*, Journal of Islamic Law and Culture 7 (Spring/Summer 2002): 103.
- Al-Hibri, Azizah Y., *Islamic and American Constitutional Law: Borrowing Possibilities or a History of Borrowing?* University of Pennsylvania Journal of Constitutional Law 1 (1999): 492 (describes a hostile climate towards Islam in eighteenth-century America).
- Allison, Robert. *The Crescent Obscured*. 1995.
- Austin, Allan D. *African Muslims in Antebellum America*. 1997.
- Chang, Nancy et al. *Silencing Political Dissent: How Post-September 11 Anti-Terrorism Measures Threaten Our Civil Liberties*. 2002.
- Cole, David. *Enemy Aliens*. 2003.
- , *The New McCarthyism: Repeating History in the War on Terrorism*, Harvard C.R.-C.L.L.Review 38 (2003): 1.
- , et al. *Terrorism and the Constitution: Sacrificing Civil Liberties in the Name of National Security*. 2002.
- Council for American-Islamic Relations, www.cair-net.org (detailed up-to-date information on discrimination against Muslims).
- Diouf, Sylvia A. *Servants of Allah: American Muslims Enslaved in the Americas*. 1998.
- District of Columbia, Maryland, and Virginia Advisory Committees to the U.S. Commission on Civil Rights, "Civil Rights Concerns in the Metropolitan Washington, D.C., Area in the Aftermath of the September 11, 2001, Tragedies." <http://www.usccr.gov/pubs/sac/dc0603/main.htm>.
- KARAMAH: Muslim Women Lawyers for Human Rights, "Liberty, Security, and the Constitution: A Town Hall Meeting for the Muslim Community," www.karamah.org/news_town_hall_meeting.htm (discusses the raids in Northern Virginia).
- Muslim Public Affair Council, *A Review of U.S. Counterterrorism Policy: American Muslim Critique and Recommendations*, http://mpac.org/home_article_display.aspx?ITEM=600.
- Shaheen, Jack G. *Reel Bad Arabs: How Hollywood Vilifies a People*. 2000.
- Weikel, Dan. "INS Judge Frees Iraqi Dissident Held for 4 Years." *Los Angeles Times*, August 19, 2000, B1, B5.

Cases and Statutes Cited

- Al-Najjar v. Ashcroft*, 273 F.3d 1330 (11th Cir 2001)
- American-Arab Anti-Discrimination Comm v. Reno*, 70 F. 3d 1045 (9th Cir. 1995), 119 F. 3d 1367 (9th Cir. 1997)
- Kiareldeen v. Reno*, 71 F. Supp.2d 402 (D.N.J. 1999)
- Matter of Ahmed*, No. A90-674-228, slip op. At 20 (U.S. Immigration Ctr. May 5, 1997)
- Rafeddie v. INS*, 880 F.2d 506 (D.C. Cir. 1989)

MUTUAL FILM CORPORATION v. INDUSTRIAL COMMISSION OF OHIO, 236 U.S. 230 (1915)

In 1913, Ohio established a board of censors for motion pictures under the auspices of the state's Industrial Commission. Mutual Film Corporation, after a state court refused its request for an interlocutory injunction to stop the law's implementation, appealed to the U.S. Supreme Court. A unanimous Court affirmed the lower court's decision.

Mutual Film Corporation operated a motion picture exchange, leasing or selling annually roughly five thousand prints of films to exhibitors in Ohio and Michigan. The prints could not be exhibited in Ohio without the censor board's approval and all the films were reviewed at the corporation's expense. The Supreme Court dismissed Mutual Film's contentions that Ohio's law impeded interstate commerce, violated freedom of speech and publication under Ohio's constitution, and delegated legislative power to the board of censors.

In this decision the Supreme Court upheld the authority of an administrative body to develop rules and standards to implement general laws intended to deter the public distribution or exhibition of indecent or immoral motion pictures. This posture was consistent with the Comstock Act and the power it gave U.S. postal officials to declare material obscene and thus unmailable. Of more importance, the Court ruled the censorship statute did not violate Ohio's Constitution; motion pictures did not warrant the same protections of free speech and publication guaranteed by the Constitution.

The "power of amusement," the Court concluded, could make motion pictures "more insidious in corruption by a pretense of worthy purpose . . . a prurient interest may be excited and appealed to. Besides, there are some things which should not have pictorial representation in public places and to all audiences." The Court thus dismissed the notion that freedom of speech, writing, or publication under Ohio's Constitution included motion pictures. Motion pictures

“may be mediums of thought,” the Court conceded, but then “so are many things.” To accept the appellant’s argument would mean “the theater, the circus, and all other shows and spectacles” would be brought “by like reasoning under the same immunity from repression of supervision of the public press.”

Justice McKenna, the opinion author, concluded:

The exhibition of moving pictures is a business, pure and simple, originated and conducted for profit, like other spectacles, not to be regarded, nor intended to be regarded by the Ohio Constitution, we think, as part of the press of the country, or as organs of public opinion. They are mere representations of events, of ideas and sentiments published and known; vivid, useful, and entertaining, no doubt, but, as we have said, capable of evil, having power for it, the greater because of their attractiveness and manner of exhibition.

In *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952), which involved the licensing authority of the state of New York to suppress motion pictures deemed obscene or immoral, the Supreme Court declared that

motion pictures were protected by the guaranty of the First Amendment, stating “To the extent that language in *Mutual Film Corp v. Industrial Comm[ission]* . . . is out of harmony with the views here set forth, we no longer adhere to it.”

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References and Further Reading

Hixson, Richard F. *Pornography and the Justices: The Supreme Court and the Intractable Obscenity Problem*. Carbondale: Southern Illinois University Press, 1996.

Mackey, Thomas C. *Pornography on Trial: A Handbook With Cases, Law, and Documents*. Santa Barbara, CA: ABC-CLIO, 2002.

Cases and Statutes Cited

Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952)

Mutual Film Corp. v. Industrial Commission of Ohio, 236 U.S. 230 (1915)

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NAACP v. ALABAMA EX REL. PATTERSON, 357 U.S. 449 (1958)

Although the text of the First Amendment makes no mention of association or affiliation, the Supreme Court's recognition of freedom of association as an implicitly protected expressive interest was hardly surprising. The only surprises were the unanimity of such recognition, and the fact that it did not occur until 1958. The opportunity arose from Alabama's insistence that the National Association for the Advancement of Colored People (NAACP), as a condition of doing business in the state, submit a list of the names and addresses of its Alabama members. Association officials readily complied with all other conditions imposed on an out-of-state entity, but refused to provide such a roster because such a disclosure would abridge important interests of its members. The Alabama courts rejected that argument, and the Supreme Court agreed to review the case.

Standing to raise such a constitutional claim was a potentially serious impediment. The NAACP has sought standing both in its own right and as representative of the interests of its members. The Supreme Court strongly favored the latter rationale, ruling that the Association "argues more properly the rights of its members." Turning quickly to the merits, Justice Harlan seemed untroubled by the novelty of the constitutional claim, noting that "effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association," citing much earlier cases based on the explicit First Amendment guarantee of freedom to

assemble. Such a nexus between free speech and the right to associate existed "whether the beliefs sought to be advanced ... pertain to political, economic, religious or cultural matters." This newly defined liberty clearly applied here, since "compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association" as the blunter sanctions invalidated elsewhere.

Three critical issues remained. Alabama insisted that its demand for membership lists was not aimed at expression, and that if any chilling resulted, the cause was "private community pressure" and not governmental action. The Court rejected both claims, noting that government acts may abridge speech, "even though unintended" or even when the challenged action "may appear to be totally unrelated to protected liberties." Moreover, even though the reprisals that Alabama NAACP members most feared were indeed mainly private, "the interplay of governmental and private action" warranted intervention here. Finally, none of the asserted state interests justified such an intrusive demand, especially of an organization that had fully complied with every other request.

Such easy and unequivocal recognition that the First Amendment included a freedom of association has contributed in at least two distinct ways to later constitutional development. For one, the NAACP case legitimized the process of implication, of finding expressive interests that were not specifically enumerated in the Bill of Rights. So, a decade later, the Supreme Court would confer protection on symbolic or nonverbal communication, finding no need to

apologize for extending First Amendment guarantees well beyond the printed and spoken word. And when the justices were ready, another decade hence, to grant partial protection to commercial speech—despite an earlier categorical insistence that mere advertising had no place in the First Amendment—the recognition of freedom of association must again have lent comfort to the expansive process.

The more immediate impact of the NAACP ruling has also been profound, especially in the political realm. Barely two years had passed before the Court—now sharply divided—built on NAACP as the basis for recognizing anonymity as a protected expressive interest, a position the Court would reaffirm periodically thereafter. And while sustaining in the mid-1970s the post-Watergate campaign reform measures in *Buckley v. Valeo* (1976), the Court cautioned that the generally valid reporting and disclosure requirements could pose freedom-of-association problems for minor political parties.

The justices have also drawn from NAACP an expressive right not to be compelled to associate, in contexts such as holiday parades and social organizations—although importantly qualified by compelling governmental interests in equality of access. Most recently, the Court ruled that states may not mandate a single “open” or “blanket” primary in which all candidates and voters must participate. Relying directly on the NAACP decision, some forty-two years later, the Court declared that “representative democracy is unimaginable without the ability of citizens to band together in promoting ... the candidates who espouse their political views.” Any lingering doubts about the durability and vitality of freedom of association should thus have been allayed.

ROBERT M. O'NEIL

References and Further Reading

- Boy Scouts of America v. Dale*, 530 U.S. 640 (2000).
California Democratic Party v. Jones, 530 U.S. 567 (2000).
 Emerson, Thomas I., *Freedom of Association and Freedom of Expression*, Yale Law Journal 74 (1964): 1.
Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557 (1995).
 Issacharoff, Samuel, *Private Parties with Public Purposes: Political Parties, Associational Freedoms, and Partisan Competition*, Columbia Law Review 101 (2001): 274.
Talley v. California, 362 U.S. 60 (1960).
Tinker v. Des Moines School District, 393 U.S. 503 (1969).
Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976).

Cases and Statutes Cited

- Buckley v. Valeo*, 424 U.S. 1 (1976)

NAACP v. BUTTON, 371 U.S. 415 (1963)

For many years the Virginia branch of the National Association for the Advancement of Colored People (NAACP) had supported litigation designed to end racial segregation in the public schools. In 1956, the General Assembly tightened a longstanding ban against the solicitation of legal business, by expressly forbidding any organization to retain a lawyer in connection with litigation to which it was not a party and in which it had no pecuniary interest. The Virginia courts sustained this amendment as applied to the NAACP, despite the organization's plea that its litigation program was not covered by the law and, if it were covered, any sanctions would abridge freedoms of expression. The Supreme Court, by a six-to-three vote, struck down the law on First Amendment grounds.

The core of Justice Brennan's opinion in the NAACP's favor was recognition that in this context, “litigation is not a technique of resolving private differences [but] is a means for [achieving] equality of treatment [for] the members of the Negro [community]” and deserves recognition as “a form of political expression.” Building on the Court's recent recognition of freedom of association as a right implicit in the First Amendment, Justice Brennan now declared that association “for litigation may be the most effective form of political association” and thus claimed a full measure of constitutional protection, especially in the context of the NAACP's school desegregation program in Virginia.

Recognizing that a compelling interest might justify such a constraint, the Commonwealth argued that the need to sustain high standards in the legal profession validated regulating all forms of “solicitation” of legal business. The Supreme Court majority rejected that claim, conceding the importance of ethical norms for lawyers, but finding the NAACP practices targeted by the new law a far cry from such clearly regulable transgressions as fomenting litigation or deception of prospective clients. Where only public interest litigation was involved, such concerns vanished.

Justices Harlan, Clark, and Stewart dissented, insisting that freedom of association had been stretched too far if it prevented a state from imposing high ethical standards on its attorneys. In their view, the amended Virginia law did “no more than prohibit [the NAACP from] soliciting legal business for its staff attorneys”—and that was an activity which they believed could be regulated consistent with the First Amendment.

The applications of *NAACP v. Button* have been legion and important. Recognition of litigation as a protected form of expression was to have profound

consequences. Its reach would extend well beyond the uniquely appealing civil rights context that had spawned the doctrine, and to which some observers believed it would be confined. The very next term, the Court struck down Virginia's attempt to forbid a railroad workers' union from informing injured workers, or the survivors of workers killed on the job, of the availability of legal representation by an attorney recommended by the union. As in *Button*, such a program could not constitutionally be banned as "solicitation" without abridging the union members' First Amendment rights. While the public interest element may have been less immediate in the union program than it had been with the NAACP, the two cases seemed to the majority indistinguishable. Two dissenters insisted that the programs were quite different, and the majority's analogy therefore flawed.

Fifteen years later, the Court would invalidate South Carolina's reprimand of an American Civil Liberties Union (ACLU) lawyer who had written to a recently sterilized woman advising her of the ACLU's willingness to represent her in a suit challenging a program to sterilize pregnant mothers as a condition of Medicare eligibility. Applying *Button*, the Court ruled that the state failed to show that compelling interests in regulating attorney conduct and ensuring integrity justified such a sanction in the public interest setting.

On the same day, however, the justices drew an important distinction by sustaining Ohio's ban on "ambulance chasing" by lawyers—the practice of giving unsolicited advice regarding legal options to a potential client, and then accepting that client's business on the basis of such advice. Nothing in *Button*, said the Court, immunized such practices from high ethical standards imposed on the legal profession. And in the mid-1980s, the Court extended that exception by sustaining a \$10 limit on the fee that could be charged by an attorney or agent representing a veteran who sought Veterans Administration benefits for a service-related disability. Distinguishing the railway union case, the majority noted that in the earlier case, "the First Amendment interest [was] primarily the right to associate collectively for the common good."

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References and Further Reading

- Brotherhood of Railroad Trainmen v. Virginia State Bar*, 377 U.S. 1 (1964).
 Camisa, V., *The Constitutional Right to Solicit Potential Class Members in a Class Action*, *Gonzaga Law Review* 25 (1990): 95.
 Epstein, L., *Interest Group Litigation During the Rehnquist Court Era*, *Journal of Law & Politics* 9 (1993): 639.

In re Primus, 436 U.S. 412 (1978).

Kalven, Harry, Jr. *The Negro and the First Amendment*. Columbus: Ohio State University Press, 1965.

Ohralik v. Ohio State Bar Association, 436 U.S. 447 (1978).

Simon, Roy D., Jr., *Fee Sharing Between Lawyers and Public Interest Groups*, *Yale Law Journal* 98 (1989): 1069.

Stoffregen, E., *Client Solicitation and the First Amendment*, *Journal of the Legal Profession* 19 (1994): 351.

Stone, Roger A., *The Mass Plaintiff: Public Interest Law, Direct Mail Fundraising and the Donor/Client*, *Columbia Journal of Law & Social Problems* 25 (1992): 197.

Walters v. National Association of Radiation Survivors, 473 U.S. 305 (1985).

NAIM v. NAIM, 875 E. 2ND 749 (VA. 1955); 350 U.S. 891 (1955); 350 U.S. 985 (1956)

"Miscegenation" or "antimiscegenation" laws prohibit marriages between persons of different races. More than a decade before the U.S. Supreme Court held them unconstitutional in *Loving v. Virginia* (1967), the Court confronted a challenge to Virginia's antimiscegenation law in *Naim v. Naim* (Va. 1955), vacated and remanded (1955), affirmed (Va. 1956) (per curiam), and appeal dismissed (1956) (per curiam).

Naim arose because the laws of the Commonwealth of Virginia made it unlawful for white persons to marry nonwhite persons. Therefore, to get married, Ruby Elaine, a woman described as white, and Han Say, a man described as Chinese, traveled from Virginia to North Carolina, which had no such law. Some time after the Naims returned to Norfolk, Virginia to live as husband and wife, Ruby Naim decided she wanted out of her marriage to Han Naim. Rather than file for divorce, Ruby sued in Virginia state court to have her marriage to Han annulled on the grounds that their races rendered them ineligible to marry in the first place.

Han defended on the ground that Virginia's miscegenation law violated the due process clause and equal protection clause of the U.S. Constitution and so could not be relied upon in the annulment suit. The Virginia courts rejected his argument, instead concluding that the Tenth Amendment to the Constitution reserves to the states the authority to regulate marriage. In its first judgment in *Naim*, the Virginia Supreme Court of Appeals relied on an almost unbroken string of lower court cases upholding antimiscegenation laws, including the 1883 U.S. Supreme Court decision in *Pace v. Alabama*, which rejected an equal protection challenge to a state law punishing interracial fornication and adultery more harshly than intraracial fornication and adultery; and dicta in Supreme Court cases on racial segregation such as

Plessy v. Ferguson (1896). Noting that more than half the states prohibited interracial marriage, the Virginia Court concluded that nothing in the Constitution

denies the power of the State to regulate the marriage relation so that it shall not have a mongrel breed of citizens. We find there no requirement that the State shall not legislate to prevent the obliteration of racial pride, but must permit the corruption of blood even though it weaken or destroy the quality of its citizenship.

Han then appealed to the U.S. Supreme Court, which had mandatory jurisdiction over the suit. (Later in the twentieth century, Congress provided that the Supreme Court had discretion to choose whether to hear almost all appeals.) The case came before the Court in November 1955, less than a year and a half after the Supreme Court's decision in *Brown v. Board of Education* (1954). Unless the Court were to dismiss the appeal as not presenting a substantial federal question, it would have to decide the highly volatile issue of the constitutionality of antisegregation laws. This was at a time when its desegregation decisions were still subject to "massive resistance" throughout the South, and many segregationists were rallying opposition to school integration on the ground that it would lead to interracial relationships and "race mixing" or "amalgamation."

Several justices were inclined to hear the *Naim* case on the merits. Yet when they met in private to discuss it, Justice Frankfurter exhorted the Court not to take the case. Recognizing the straightforward legal argument supporting the assertion of jurisdiction, his prepared statement argued that it was outweighed by "moral considerations . . . , those raised by the bearing of adjudicating this question to the Court's responsibility in not thwarting or seriously handicapping the enforcement of its decision in the segregation cases." Frankfurter believed that the Court's rendering a decision on the merits would "very seriously embarrass the carrying-out of the Court's decree" in *Brown* and its companion cases. Justice Clark was persuaded and, with Frankfurter's input, drafted an opinion asserting that a supposed lack of clarity of the record about the Naims' citizenship precluded the Court from addressing the issue "'in clean-cut and concrete form.'" The opinion, ultimately issued per curiam without dissent after Chief Justice Earl Warren abandoned his planned dissent, went on to vacate the judgment of the Virginia Supreme Court of Appeals and remanded the case so that court could send it back to the trial court "for action not inconsistent with this opinion."

The Supreme Court's legal extemporizing was arcane but unsatisfactory, both to academic critics and to the Virginia Supreme Court of Appeals. The latter insisted that the record was indeed adequate for

resolving the constitutional issues presented, noted there was nothing in state law authorizing reexamination by the trial court, and reaffirmed its judgment. When Naim then returned to Supreme Court, requesting either modification of its earlier mandate or scheduling of his case for full argument, the Court dismissed the appeal. Its short per curiam order claimed fairly disingenuously that the Virginia Supreme Court of Appeals' second decision left the case without "a properly presented federal question."

Naim v. Naim thus deferred Supreme Court consideration of the constitutionality of antisegregation laws until *Loving v. Virginia*. In the intervening twelve years, the number of states with such laws dropped from twenty-nine to sixteen, signaling to the Court that it would not be thwarting a national majority if it invalidated antisegregation laws. The president and Congress had weighed in against racial segregation in a variety of contexts, signaling that the Court would not stand alone among the branches of the federal government. The Court did not feel as under threat in 1967 as it did the year after *Brown*. Even world opinion in the form of a U.N. Educational, Scientific and Cultural Organization (UNESCO) report had strongly condemned racism, and the Court noted this at oral argument in *Loving*. *Naim* thus stands today only as a testament to the power of prudential concerns in Supreme Court decision making and to the rather limited extent to which the Court has historically led the country rather than followed it in the face of true majoritarian opposition.

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References and Further Reading

- Bickel, Alexander. *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*. Indianapolis: Bobbs-Merrill, 1962.
- Hutchinson, Dennis J., *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948-1958*, *Georgetown Law Journal* 68(1979): 1:62-6, 95-6.
- Schwartz, Bernard. *Super Chief: Earl Warren and His Supreme Court—A Judicial Biography*. New York: New York University Press, 1983.
- Spindelman, Marc S., *Reorienting Bowers v. Hardwick*, *North Carolina Law Review* 79 (2001): 359.

Cases and Statutes Cited

- Brown v. Board of Education*, 347 U.S. 483 (1954)
- Loving v. Virginia*, 388 U.S. 1 (1967)
- Pace v. Alabama*, 106 U.S. 583 (1883)
- Plessy v. Ferguson*, 163 U.S. 537 (1896)

See also *Brown v. Board of Education*, 347 U.S. 483 (1954); *Due Process; Equal Protection of Law (XIV); Loving v. Virginia*, 388 U.S. 1 (1967)

NAPUE v. ILLINOIS, 360 U.S. 264 (1959)

In *Napue*, the Supreme Court held that the Fourteenth Amendment due process clause bars prosecutors from knowingly presenting false testimony and obligates them to correct such testimony when it occurs.

The prosecution alleged that Napue participated in a robbery that resulted in the death of a police officer. At Napue's murder trial, the prosecution's star witness was Hamer, one of the other robbers, who had already been convicted and sentenced to 199 years in prison. The prosecutor recommended a reduction in Hamer's sentence in exchange for his testimony against Napue, but Hamer falsely testified at Napue's trial that the prosecutor had made no such promises. After Napue was convicted, he discovered that the prosecutor had promised to help Hamer, but the state courts refused to grant Napue a new trial.

Napue appealed to the U.S. Supreme Court, which unanimously and emphatically reversed. The Court stressed that a defendant's due process rights are violated both when a prosecutor knowingly presents false testimony and when he knowingly fails to correct such perjury. The Court also held that the same rule applies even when the false testimony concerns only the witness's credibility, since "a lie is a lie, no matter what its subject." The emphasis in *Napue*, and in *Alcorta v. Texas* (1957), on the prosecutor's duty to present the truth paved the way for the Court's later cases, such as *Brady v. Maryland* (1963) and *Kyles v. Whitley* (1995), requiring the prosecution to disclose evidence favorable to the defendant.

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References and Further Reading

Imwinkelried, Edwin, and Norman Garland. *Exculpatory Evidence*. 2nd ed. Charlottesville, VA: Michie, 1996.
Stacy, Tom, *The Search for Truth in Constitutional Criminal Procedure*, Columbia Law Review 91 (1991): 1369.

Cases and Statutes Cited

Alcorta v. Texas, 355 U.S. 28 (1957)
Brady v. Maryland, 373 U.S. 83 (1963)
Kyles v. Whitley, 514 U.S. 49 (1995)

See also Alcorta v. Texas, 355 U.S. 28 (1957); *Brady v. Maryland*, 373 U.S. 83 (1963); **Due Process; Fourteenth Amendment; Kyles v. Whitley**, 514 U.S. 419 (1995)

NARDONE v. UNITED STATES, 308 U.S. 338 (1939)

In a previous decision in the same case, the U.S. Supreme Court decided that evidence taken in

violation of Section 605 of the Communications Act of 1934 could not be used as a "vital part of the prosecution's proof" to help secure a conviction for frauds on revenue. After a new trial, the accused attempted to discover to what extent the illegal evidence had been used. The Court looked broadly at the question at hand: whether or not evidence improperly taken under Section 605 of the Communications Act of 1934 precludes any use of the evidence by the prosecution.

In resolving the question, the Court sought to balance the apparent disharmonious goals of the stern enforcement of criminal law, and the protection of privacy guaranteed by the Constitution and other laws. The Court explained that in order to properly balance these goals, meaning must be given to statutory language, even if not explicitly stated, so as to effectuate the policy behind the law. The Court held that where evidence is taken in violation of the law, any use by the prosecution should be forbidden; otherwise, the Court would "invite the very methods deemed inconsistent with ethical standards and destructive of personal liberty." The Court found that the accused carries the initial burden of proving that the evidence was unlawfully employed and that the use provided a substantial portion of the case against the accused. The government would then have the opportunity to show that its use had an independent origin.

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References and Further Reading

Charles, D.M. "Informing FDR: FBI Political Surveillance and the Isolationist-Interventionist Foreign Policy Debate, 1939-1945." *Diplomatic History* 24, no. 2 (2000): 211-32.
Gouled v. United States, 255 U.S. 298 (1921).
Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920).

See also Electronic Surveillance, Technological Monitoring, and Dog Sniffs; Exclusionary Rule

NATIONAL ABORTION RIGHTS ACTION LEAGUE (NARAL)

This is the longest-running formal organization in the United States framed specifically with reference to abortion policy. It was originally formed in 1969 as the National Association for Repeal of Abortion Laws by Illinois physician Caroline Rulon "Lonny" Myers, head of the first U.S. organization for repeal of the national abortion laws, the Illinois Citizens for the Medical Control of Abortion (ICMCA), and New York Democratic activist Lawrence (Larry) Lader. They had become acquainted through the Association

for the Study of Abortion (ASA). NARAL was born at a national conference sponsored by the ASA in 1969 to consider the question of abortion law repeal. The conference itself responded to recent events, including the Supreme Court decision of *Griswold vs. Connecticut* (1965), which enshrined a “right to privacy” for married couples in contraceptive decision making, the constitutional basis of which appealed to some lawyers as a basis for abortion law repeal. Similarly, certain states, including New York, were then considering model legislation to repeal the state-by-state abortion prohibitions. NARAL’s first steering committee included physicians such as Bernard Nathanson and Lonny Myers; political and pro-choice activists Larry Lader, Ruth Proskauer Smith, and Ruth Cusack; New York politician Percy Sutton; philanthropist Stewart Mott; and the first president of the National Organization for Women, Betty Friedan. From 1968 to 1973, NARAL focused both on getting repeal legislation passed through numerous legislatures but also in setting up the conditions for test cases challenging existing abortion prohibitions. These actions included working with Dr. Alan Guttmacher and Roy Lucas, chair of NARAL’s Legal Committee, to get legal abortion clinics set up in New York and other states. In these litigation efforts, it worked mainly with the American Civil Liberties Union. Ultimately, NARAL became the central national umbrella lobby group for abortion rights.

Some have noted that NARAL in its first iteration worked frame its existence based on women’s rights and their need to have control over their reproductive lives. This contrasts with the early “population control” ethos of other parts of the contraception/abortion rights movement such as Planned Parenthood. On the other hand, at a certain point even the women’s rights frame did not go far enough for some activists such as Lucinda Cisler who wished to see NARAL also advocate for taking control of abortion out of physicians’ hands.

While NARAL was active in creating the conditions for and ensuring litigation of state abortion prohibitions, it was not active in the Texas case that ultimately brought about the Supreme Court’s *Roe v. Wade* (1973) ruling. It was thus in a somewhat reactive mode when the sweeping decision was announced. The association kept the same acronym but changed its name to the National Abortion Rights Action League, reflecting an emphasis on keeping abortion legal. One of NARAL’s early strategic foci from 1973 onward, working with Planned Parenthood, was to work to make and keep abortion procedures accessible to all, including ensuring that trained physicians performed the surgery at reasonable fees. It also worked with Planned Parenthood to teach interested clinic

operators how to set up safe, efficient clinics such as those in New York that had been legalized in 1971. In 1973, NARAL set up a lobbying office in Washington to convey its presence and be able to respond instantly to congressional actions.

By the mid-1970s, it was clear that anti-abortion forces were going to use both state and national staging grounds to try to change the effects of *Roe*. In 1975, NARAL moved its head office from New York to Washington, D.C., and in 1977 created a political action committee to contribute to campaigns. NARAL became involved in working to get Congress to defeat the Hyde Amendment of 1976 (prior to which one-third of all abortions in the United States were under Medicaid, that is, publicly funded). The strategy was to try to retain pro-choice support in Congress by showing how a “divide and conquer” strategy would lead to the situation where abortion was a constitutional right, but in practical terms not equally available to all. By the mid-1970s, NARAL was working to institutionalize itself as a leader in the pro-choice movement. In addition to establishing a political action committee (PAC), it began a highly successful direct-mail strategy to increase its membership and to strengthen its base in the states.

NARAL kept much of the same thematic emphasis throughout the 1980s, working to keep abortion rights in the public eye as an urgent issue that could be severely curtailed by one congressional vote or Court decision. To this end, it became involved in trying to retain congressional pro-choice support and to “wake up” the U.S. public as to the potential harm to be wrought to *Roe* when the Supreme Court announced it would hear a challenge to the Missouri statutes. In advance of the Webster decision of 1989 (*Webster v. Reproductive Health Services*), NARAL had a press conference on the day that the Supreme Court announced its intent to grant review to the Missouri case and announced “a campaign to get one million Americans to sign a pledge to work to support *Roe*.” By this point, indeed by the mid-1980s, NARAL was able to play a central role in coordinating the national pro-choice coalition. At the same time, outside of the highly publicized national events, NARAL was also working in carefully targeted areas to undo anti-abortion lobbying successes, primarily at state and city levels.

Most recently, reflecting a desire to broaden its presence in various areas of reproductive policy, NARAL changed its name in 2003 to “NARAL Pro-Choice America.” It recently hired a new president after the long tenure of activist Kate Michelman. The new president, Nancy Keenan, was a former Montana state legislator and superintendent of

Education. As she said on the NARAL website, “I am excited to build the strength of our powerful grassroots presence across the country.” It was clear that the new president brought a strong knowledge of state political processes to her appointment. Similarly, according to its website, as of this writing, NARAL counted “nearly 400,000 members and supporters nationwide,” making it both the largest pro-choice organization in the United States but also one of the largest feminist organizations as well.

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References and Further Reading

- Garrow, David. *Liberty and Sexuality: The Right to Privacy and the Making of Roe v. Wade*. New York: Macmillan, 1994.
- Gerber Fried, Marlene, ed. *From Abortion to Reproductive Freedom: Transforming a Movement*. Boston: South End Press, 1990.
- Hausman, Melissa. *Abortion Politics in North America*. Boulder, CO: Lynne Rienner Publishers, 2005.
- Staggenborg, Suzanne. *The Pro-Choice Movement: Organization and Activism in the Abortion Conflict*. New York: Oxford University Press, 1991.
- Tribe, Laurence H. *Abortion: The Clash of Absolutes*. New York: W.W. Norton & Co., 1992.

Cases and Statutes Cited

- Griswold v. Connecticut*, 381 U.S. 479 (1965)
- Roe v. Wade*, 410 U.S. 113 (1973)
- Webster v. Reproductive Health Services*, 492 U.S. 490 (1989)

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE (NAACP)

The National Association for the Advancement of Colored People (NAACP)—originally named the National Negro Committee—was founded in 1909 by a multiracial and multicultural group of civil and political activists as an effort of the so-called Niagara Movement. The NAACP was principally founded by Ida Wells-Barnett, W.E.B. DuBois, Henry Moscowitz, Mary White Ovington, Oswald Garrison Villiard, and William English Walling in response to bigotry and racial hatred in the United States epitomized by the significant number of lynchings during that era, particularly in the southern states. The NAACP’s mission statement seeks to “ensure political, educational, social and economic equality of rights of all persons and to eliminate racial hatred and racial discrimination.” Accordingly, its vision involves “a society in

which all individuals have equal rights and there is no racial hatred or racial discrimination.” To popularize and publicize its actions, the NAACP publishes *The Crisis*, a national magazine, and the NAACP’s official organ. As found in the NAACP’s constitution, the principal objectives of the Association are:

- To ensure the political, educational, social and economic equality of all citizens
- To achieve equality of rights and eliminate race prejudice among the citizens of the United States
- To remove all barriers of racial discrimination through democratic processes
- To seek enactment and enforcement of federal, state and local laws securing civil rights
- To inform the public of the adverse effects of racial discrimination and to seek its elimination
- To educate persons as to their constitutional rights and to take all lawful action to secure the exercise thereof, and to take any other lawful action in furtherance of these objectives, consistent with the NAACP’s Articles of Incorporation and this Constitution

For nearly a hundred years, the NAACP—through its leaders and supporters alike—has been a leader in civil rights advocacy. The NAACP is the nation’s oldest civil rights organization.

After thirty years of sustained effort fighting for equality, the NAACP established the NAACP Legal Defense and Education Fund, Inc. (LDF) in 1939 to carry out the organization’s tax-exempt activities, particularly high-profile and high-impact legal cases. Its focus ranged from school desegregation (for example, in South Carolina in 1930, the state spent ten times more on white children than on black children), pay and employment inequity (federal, state, and private), housing disparity; state and federal public works spending inequalities, and inadequate and segregated transportation and public accommodations, to voting disenfranchisement. Thurgood Marshall served as the director-counsel of the LDF from 1939 to 1961 when he was appointed to serve as a judge on the U.S. Court of Appeals for the Second Circuit by President John F. Kennedy. Of course, the LDF’s legacy in the courtroom culminated in the victory before the U.S. Supreme Court in *Brown v. Board of Education (Brown I)* (1954) (ruling that segregation in public schools was unconstitutional). While the NAACP itself used the public at large (through sit-ins, marches, and economic boycotts), the streets, and the ballot box to gain civil rights, the LDF used the courts to reach its goals of equality. The LDF was completely divorced from the NAACP in the mid-1960s.

Throughout its history, NAACP leaders have held the attention and support of U.S. presidents and first ladies—for example, when World War II began in 1941, Eleanor Roosevelt assisted in convincing President Franklin D. Roosevelt to end discrimination in war-related industries and federal employment (after leaving the White House, Eleanor Roosevelt joined the NAACP's board of directors, and later chaired its life membership campaign and served as vice president of the LDF).

After *Brown II* (1955), a number of southern states began a deliberate campaign against the NAACP by attempting to curb its ability to operate within their borders. For example, the Alabama state legislature ordered NAACP leaders to disclose membership lists. The U.S. Supreme Court unanimously held that a lower court's order finding the NAACP in contempt for failure to disclose its membership would have a deterrent effect on the right of association under the First Amendment (*NAACP v. Alabama ex rel. Patterson* [1958]). From 1959 through the mid-1960s, the NAACP had to wage courtroom battles (most of which were ultimately decided by the U.S. Supreme Court) against legislation passed in several states for similar invidious purposes (including inciting lawsuits under the principle of barratry)—perhaps most notably in Alabama, Arkansas, Florida, Louisiana, Texas, and Virginia.

In addition, during the post-Brown era as a direct testament to the NAACP's fight for equality, between 1954 and 1962 state legislatures responded positively: thirteen states adopted enforceable fair employment practices acts, ten states adopted public accommodation statutes, and five states adopted fair housing laws that applied to private housing. Notably, in 1955, NAACP member Rosa Parks was arrested and fined for refusing to give up her seat on a segregated bus in Montgomery, Alabama—this event is often noted as the catalyst for the largest grassroots civil rights movement in the United States.

The NAACP's legacy of voting rights extended through the 1980s (in 1982 alone, NAACP workers registered 850,000 new voters), through the 1990s (in opposition to David Duke, an avowed racist seeking election to the U.S. Senate, 76 percent of all registered African Americans in Louisiana voted), and into the new millennium (in January 2000, the largest civil rights demonstration ever held in the South occurred in South Carolina in opposition to the official flying of "Old Glory"—the Confederate Battle Flag; and for the 2000 presidential election, the NAACP facilitated the largest turnout of African American voters in over twenty years).

In keeping with its history of advocacy and opposition to U.S. Supreme Court nominees who do not promote the NAACP's vision of equality and justice for all (which the organization began in 1930 against nominee John Parker), in 1991, the NAACP opposed President George H.W. Bush's nomination of Judge Clarence Thomas to the U.S. Supreme Court to fill the vacancy created by the retirement of Justice Thurgood Marshall.

By 2004, the NAACP had more than 500,000 members, and operated through more than 2,200 branches, including youth and college divisions.

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References and Further Reading

- Countryman, Vern. *Discrimination and the Law*. Chicago: University of Chicago Press, 1963.
- Davis, Abraham L., and Barbara Luck Graham. *The Supreme Court, Race and Civil Rights*. Thousand Oaks, CA: Sage Publications, 1995.
- Delaney, David. *Race, Place, and the Law, 1836–1948*. Austin: University of Texas Press, 1998.
- Gillette, Michael L. "National Association for the Advancement of Colored People." In *Handbook of Texas Online*, 2001. <http://www.tsha.utexas.edu/handbook/online/articles/view/NN/ven1.html>.
- McCord, John H., ed. *With All Deliberate Speed: Civil Rights Theory and Reality*. Urbana: University of Illinois Press, 1969.
- McKay, Robert. *Nine for Equality Under Law: Civil Rights Litigation*. New York: Ford Foundation, 1977.
- National Association for the Advancement of Colored People. Website, 2005. <http://www.naacp.org>.
- Roosevelt, Eleanor. "National Association for the Advancement of Colored People (NAACP)." The Eleanor Roosevelt Papers. In *Teaching Eleanor Roosevelt*, edited by Allida Black, June Hopkins, et al. Hyde Park, NY: Eleanor Roosevelt National Historic Site, 2003. <http://www.nps.gov/elro/glossary/naacp.htm>.
- Ward, Etta. *National Association for the Advancement of Colored People (NAACP)*, 2005. <http://www.learningto-give.org/papers/index.asp?bpid=183>.
- Watson, Denton L. *Lion in the Lobby: Clarence Mitchell, Jr.'s Struggle for the Passage of Civil Rights Laws*. Lanham, MD: University Press of America, 2002.
- Williams, Juan. *Eyes on the Prize: America's Civil Rights Years, 1954–1965*. New York: Viking Penguin, 1987.

Cases and Statutes Cited

- Brown v. Board of Education (Brown I)*, 347 U.S. 483 (1954)
- Brown v. Board of Education (Brown II)*, 349 U.S. 294 (1955)
- NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958)
- See also **Freedom of Association; NAACP v. Alabama Ex Rel. Patterson**, 357 U.S. 449 (1958); **NAACP v. Button**, 371 U.S. 415 (1963)

NATIONAL ENDOWMENT FOR THE ARTS v. FINLEY, 118 S.CT 2168 (1998)

This case brought into focus the constitutional problem of government funding for private speech. The National Endowment for the Arts (NEA) was created in 1965 to disburse government grants in support of a climate of freedom of thought, artistic excellence, and public appreciation for the arts. In 1989, two exhibitions that were indirectly supported by NEA grants led to public outcry: Andres Serrano's photograph "Piss Christ," which depicted a crucifix immersed in urine, and Robert Mapplethorpe's exhibition "The Perfect Moment," which included many homoerotic photographs. Congress reacted with U.S.C. Section 954(d)(1), requiring the chair of the NEA to "take into consideration general standards of decency and respect for the diverse beliefs and values of the American people." Finley was one of four artists who had been judged worthy of a grant by the NEA's initial review panels, but who were later rejected during the political controversy over objectionable art but prior to the enactment of Section 954(d)(1). The artists objected to Section 954(d)(1) on its face, alleging (1) that it introduced viewpoint-based discrimination into the grant-making process, in violation of the First Amendment, and (2) that it was void for vagueness. The Supreme Court held that Section 954(d)(1) was constitutional.

Writing for the majority, Justice O'Connor found the artists' argument inadequate to overturn the statute on its face. She noted that the facial challenge was traditionally "strong medicine," reserved for extreme cases of congressional misstep. Ordinarily, the Court refrains from overturning a statute without an objection to the statute as applied to a specific case. She found that part of the NEA's mission is to educate the public, and that questions of "educational suitability" are a legitimate reason to consider decency in making government grants (citing *Board of Education, Island Trees Union Free School District No. 26 v. Pico* [1982]). Furthermore, she found that Section 954(d)(1), by itself, was unlikely to introduce viewpoint-based discrimination to the grant-making process because such discrimination could just as easily be veiled under the guise of "artistic excellence." Furthermore, she noted that Section 954(d)(1) did not require the NEA to deny grants based on standards of decency, only exhorted the chair to take decency into consideration.

The artists cited *Rosenberger v. Rector and Visitors of University of Virginia* (1995), where the Court held that by creating a Student Activities Fund, a university had created a "limited public forum," from which it could not exclude students based on viewpoint.

Thus, it was impermissible for the university to deny students access to the Student Activities Fund to aid them in creating a Christian student newspaper. The artists argued that the government had created a limited public forum by establishing the NEA and could not exclude based on viewpoint. However, O'Connor distinguished this case from *Rosenberger* by noting the competitive nature of NEA grants.

Justice O'Connor concluded by noting that if the NEA actually used Section 954(d)(1), in practice, to engage in viewpoint-based discrimination, that the outcome might well have been different. She noted that the First Amendment does have an effect on the government as a patron of speech, but its force was considerably less than when the government acted as a regulator of speech.

Justice Scalia, joined by Justice Thomas, concurred with the result but faulted the majority for wishy-washiness on the issue of whether 954(d)(1) was constitutional. In Scalia's view, the government can discriminate all it wants in disbursing funds, because by patronizing one view over another the government is not "abridging" speech.

In dissent, Justice Ginsburg found that the constitutional question was whether "the government has adopted a regulation of speech because of disagreement with the message it conveys" (citing *Ward v. Rock Against Racism* [1989]). In this case, he found that government was motivated to discourage speech that was not respectful of common standards of decency, which was a perfect example of viewpoint-based discrimination. Ginsburg believed that the fact that "standards of decency" is just a consideration is not redemptive. If the statute said, "taking into account whether the artist is a communist," she believed the Court would have ruled differently.

It is interesting that both Scalia and Ginsburg agreed that the purpose of the statute was to disfavor art like Serrano's and Mapplethorpe's, but that Scalia thought that was perfectly fine while Ginsburg did not.

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References and Further Reading

Bolton, Richard. *Culture Wars: Documents from the Recent Controversies in the Arts*. New York: New Press, 1992.
Brenson, Michael. *Visionaries and Outcasts: The NEA, Congress, and the Place of the Visual Artist in America*. New York: New Press, 2001.

Cases and Statutes Cited

Board of Education, Island Trees Union Free School District No. 26 v. Pico, 457 U.S. 853 (1982)

Rosenberger v. Rector and Visitors of University of Virginia, 515 U.S. 819 (1995)

Ward v. Rock Against Racism, 491 U.S. 781, 790 (1989)

See also **Book Banning and Book Removals; Content-Based Regulation of Speech; Content-Neutral Regulation of Speech; Dworkin, Andrea; Freedom of Speech: Modern Period (1917–Present); Government Funding of Speech; Museums and Expression; Obscenity; Symbolic Speech; Traditional Public Forums**

NATIONAL LABOR RELATIONS BOARD

The National Labor Relations Board (NLRB) is a federal administrative agency created by the National Labor Relations Act (Wagner Act) on July 5, 1935. The purpose of its creation was to govern the relations between labor unions and employers in the private sector involved in interstate commerce. Specifically, the act was created to protect the existence of labor unions, to promote collective bargaining, and to ensure employees could decide whether they want to participate. Critics claimed that the act was unconstitutional because it violated the right to contract, injured the property of employers, and denied employers due process of law. Nevertheless, the Supreme Court upheld the constitutionality of the act and the board itself on April 12, 1937 in *National Labor Relations Board v. Jones and Laughlin Steel Corporation*. The act and the NLRB protected the civil liberties rights of workers by protecting their free speech rights to picket and strike, and their rights of freedom of association to join unions.

The NLRB is made up of three members who are appointed by the president with the advice and consent of the Senate for five-year terms. Separate from the board is the general counsel, who is also appointed by the president with the advice and consent of the Senate, but only for four years. Primarily, the general counsel is responsible for the investigation and prosecution of violations of the National Labor Relations Act, such as unfair labor practices cases.

The NLRB has two primary functions. First, the “honest ballot association” allows an employee to decide by secret ballot vote whether they want to be represented by a union, and if so, by which union. Second, the NLRB acts as a public law enforcer. Only the board, not employees, employers, or unions can enforce the laws established by the National Labor Relations Act. The board investigates actions or allegations of unfair business practices entered by

any of the three parties, employers, employees, and unions. Remedies can be imposed by the NLRB to cease the unfair labor practice. If the actions continue, further civil or criminal penalties may be invoked.

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References and Further Reading

Boyce, Timothy, and Ronald Turner. *Fair Representation, the NLRB, and the Courts*. Philadelphia: University of Pennsylvania, 1984.

Johnson, Julia. *The National Labor Relations Act*. New York: H.W. Wilson Company, 1940.

Miller, Edward. *An Administrative Appraisal of the NLRB*. Philadelphia: University of Pennsylvania, 1981.

Tomlins, Christopher L. *The State and the Unions: Labor Relations, Law, and the Organized Labor Movement in America, 1880–1960*. New York: Cambridge University Press, 1985.

Cases and Statutes Cited

National Labor Relations Board v. Jones and Laughlin Steel Corporation, 301 U.S. 1 (1937)

NATIONAL MOTTO “IN GOD WE TRUST”

The phrase “In God We Trust” has enjoyed a long usage in American history, eventually becoming the national motto. Legal challenges arguing that the government’s use of the phrase violates the establishment clause have consistently failed.

In 1814, Francis Scott Key wrote “The Star Spangled Banner” (which Congress would designate as the national anthem in 1931) while watching the bombardment of Fort McHenry in Baltimore during the War of 1812. The final stanza of Key’s work provides in part: “And this be our motto—‘In God is our trust.’” With the onset of the Civil War, many people urged the federal government to stamp the nation’s coins with a motto stating America’s trust in God. In response, Secretary of the Treasury Salmon Chase wrote the director of the mint: “No nation can be strong except in the strength of God, or safe except in His defense. The trust of our people in God should be declared on our national coins.” In 1864, the phrase “In God We Trust” first appeared on an American coin, the two-cent piece, and the following year, Congress enacted legislation that made it lawful, but not mandatory, for the director of the mint to use “In God We Trust” on all coins.

In 1907, the administration of Theodore Roosevelt did not use “In God We Trust” on some newly

minted coins. Roosevelt explained his opposition to the use of the phrase as follows: "[T]o put such a motto on coins, or to use it in any kindred matter, not only does no good but does positive harm, and is in effect irreverence which comes dangerously close to sacrilege." Roosevelt approved of the use of "In God We Trust" on "our great national monuments, in our temples of justice, in our legislative halls," but thought its use on coins tended "to cheapen" the phrase. But Congress responded in 1908 by making it mandatory that "In God We Trust" appear on all gold and silver coins minted in the United States.

In 1955, at the height of the cold war, Congress went further and required that "In God We Trust" appear on all paper currency as well as coins. The legislation's sponsor explained his rationale:"

In these days when imperialistic and materialistic communism seeks to attack and to destroy freedom, it is proper for us to seek continuously for ways to strengthen the foundation of our freedom.... As long as this country trusts in God, it will prevail. To remind all of us of this self-evident truth, it is proper that our currency should carry these inspiring words..."

The following year, Congress officially established "In God We Trust" as the national motto. The House Report accompanying the legislation noted that "the phrase 'E pluribus unum' has also received wide usage in the United States," but concluded that "'In God We Trust' [is] a superior and more acceptable motto for the United States." The House Report noted that "In God We Trust" had been widely used not just on coins, but also on postage stamps, including the 1928 two-cent Valley Forge stamp that contained a vignette of George Washington kneeling in prayer.

On at least three occasions, lawsuits have been filed arguing that the use of the phrase "In God We Trust" on coins and currency or as the nation's national motto offends the establishment clause. On each occasion, a federal appeals court has rejected the constitutional claim (*Gaylor v. United States* [1996], *O'Hair v. Murray* [1979], *Aronow v. United States* [1970]).

Although the U.S. Supreme Court has never squarely considered the constitutionality of the use of "In God We Trust" as the national motto or on American coins and currency, several justices of the Supreme Court have suggested in dicta that the phrase does not violate the establishment clause. In 1963, Justice William Brennan noted in dicta in *Abington School District v. Schempp* (1963), that"

the use of the motto "In God We Trust" on currency, on documents and public buildings and the like may not offend the [establishment] clause.... The truth is that we have simply interwoven the motto so deeply into the

fabric of our civil polity that its present use may well not present that type of involvement which the First Amendment prohibits.

In *Wooley v. Maynard* (1977), Chief Justice Warren Burger, writing for six justices, suggested in dicta that the display of "In God We Trust" on the currency did not violate the establishment clause because the "bearer of currency is ... not required to publicly advertise the national motto." Justice William Rehnquist, in a dissenting opinion, agreed: "The fact that an atheist carries and uses United States currency does not, in any meaningful sense, convey any affirmation of belief on his part in the motto 'In God We Trust.'" In *Lynch v. Donnelly* (1984), Justice Sandra Day O'Connor noted in dicta that use of the phrase "In God We Trust" served "the legitimate secular purposes of ... expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society" and did not convey "government approval of particular religious beliefs," while Justice William Brennan in the same case observed that use of the phrase "In God We Trust" can "best be understood ... as a form of 'ceremonial deism,' protected from establishment clause scrutiny chiefly because [it has] lost through rote repetition any significant religious content." In 1989, Justice Harry Blackmun noted in *County of Allegheny v. Greater Pittsburgh ACLU* (1989), that "[o]ur previous opinions have considered in dicta the [national] motto ... characterizing [it] as consistent with the proposition that government may not communicate an endorsement of religious belief."

In recent years—particularly after September 11, 2001—some state legislatures have considered legislation requiring or permitting the display the words "In God We Trust" in public schools, while Georgia has put the words on its state flag. At least one state supreme court—that of New Hampshire—has concluded that the display of "In God We Trust" in public schools does not offend the establishment clause (*Opinion of the Justices* [1967]), as has a federal district court in Virginia (*Myers v. Loudoun County School Board* [2003]). Similarly, the U.S. Court of Appeals for the Fourth Circuit has upheld the use of "In God We Trust" on the facade of a county government center (*Lambeth v. Board of Commissioners* [2005]). Other legal challenges will undoubtedly follow.

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References and Further Reading

- Epstein, Steven B., *Rethinking the Constitutionality of Ceremonial Deism*, Columbia Law Review 96 (1996): 2083–2174.
- Stokes, Anson Phelps, and Leo Pfeffer. *Church and State in the United States*. New York: Harper and Row, 1964.

NATIONAL MOTTO “IN GOD WE TRUST”

Warren, Charles Gregory, *No Need to Stand on Ceremony: The Corruptive Influence of Ceremonial Deism and the Need for a Separationist Reconfiguration of the Supreme Court's Establishment Clause Jurisprudence*, Mercer Law Review 54 (2003): 1669–718.

Cases and Statutes Cited

Abington School District v. Schempp, 374 U.S. 203 (1963)
Aronow v. United States, 432 F.2d 242 (9th Cir. 1970)
County of Allegheny v. Greater Pittsburgh ACLU, 492 U.S. 573 (1989)
Gaylor v. United States, 74 F.3d 214 (10th Cir. 1996)
Lambeth v. Board of Commissioners, 407 F.3d 266 (4th Cir. 2005)
Lynch v. Donnelly, 465 U.S. 668 (1984)
O'Hair v. Murray, 588 F.2d 1144 (5th Cir. 1979)
Opinion of the Justices, 108 N.H. 97 (1967)
Myers v. Loudoun County School Board, 251 F. Supp. 2d 1262 (E.D. Va. 2003)
Wooley v. Maynard, 430 U.S. 705 (1977)

See also **Establishment Clause (I): History, Background, Framing**

NATIONAL ORGANIZATION FOR WOMEN

The National Organization for Women (NOW) was officially established on June 30, 1966, in Washington, D.C., by a group of twenty-eight attendees at the Third National Conference of the Commission on the Status of Women. Its startup budget, collected from these founding members, was \$140. By the end of its first year, its membership had increased to approximately 1,200. Nearing its fortieth year, in 2005 it claimed more than 500,000 dues-paying members and 550 chapters in 50 states. It remains the largest and most well-established American feminist organization.

The organization arose out of frustration at the slow pace with which women's inequality was being addressed through established channels. The issue of discrimination against women was already widely recognized when NOW was formed: by the mid-1960s, most states had established women's commissions, and women's workplace rights had been addressed at the federal level in Title VII of the Civil Rights Act of 1964, barring sex discrimination in employment. However, many felt that these measures were little more than window dressing, and that no real change would occur unless a new organization, dedicated to women's equality, ensured that women's issues were given higher priority.

Among NOW's founders was its first president, Betty Friedan, a journalist and author of the bestselling book, *The Feminine Mystique*. Other founders had strong ties to the labor and civil rights movements, and

to networks of lawyers, teachers, government workers, and other professional groups. While white middle-class women were overrepresented, particularly in its early years, the group included women and men from a range of backgrounds. For example, Aileen Hernandez, an African-American woman with experience in the labor movement, was an early NOW leader who served as organization's second president. Rev. Pauli Murray, the first African-American woman Episcopal priest, was also a founding member. She co-authored NOW's original statement of purpose which begins as follow:

The purpose of NOW is to take action to bring women into full participation in the mainstream of American society now, exercising all privileges and responsibilities thereof in truly equal partnership with men.

As a national organization, NOW operates through a chapter structure. Local and state chapters organize their members around a range of issues, and send representatives to participate and vote in national NOW gatherings. Binding these chapters together is a set of official NOW priorities and issue-oriented task forces. These priorities include pressing for a constitutional equal rights amendment; achieving economic equality for women; championing abortion rights, reproductive freedom, and other women's health issues; and ending violence against women. In the late twentieth and early twenty-first centuries, NOW has provided particular leadership in defending abortion providers against attacks from anti-choice radicals such as Operation Rescue and in leading efforts to secure federal legislation to address violence against women. NOW's grassroots structure facilitates these efforts. In the case of clinic defense work, individual NOW chapters provide escorts and local on-the-ground assistance while the national organization presses for more effective federal enforcement. In successfully lobbying for enactment and subsequent reauthorization of the federal Violence Against Women Act, NOW similarly enlisted its extensive grassroots network to mobilize support for the legislation.

NOW's issue priorities have at times provoked some internal strife. For example, in 1967, some members who disagreed with NOW's emphasis on protecting women's right to abortion left the organization and formed the Women's Equity Action League, a now-defunct organization focused on women's economic rights. Another faction protested when, in the late 1960s, NOW first articulated its support for lesbians' rights. The priority given to the constitutional equal rights amendment has also proven controversial among members who believe that the current federal constitution is adequate and that organizational energy could be better spent on other issues.

NOW's emphasis on action, including grassroots action and civil disobedience, distinguishes it from many other women's organizations. In addition to electoral and lobbying work on the federal, state, and local levels, NOW also participates in litigation and organizes mass marches, rallies, and pickets. NOW's record of mounting mass actions is particularly notable. A decade after Martin Luther King Jr.'s assassination and the ill-fated Poor Peoples' March on Washington of 1968, the NOW-organized 1978 march in support of the equal rights amendment drew more than 100,000 people to Washington, D.C. National Marches for Women's Lives, which was co-organized by NOW, drew 500,000 reproductive rights supporters in 1989, 750,000 in 1992, and more than one million in 2004.

Philosophically, NOW generally ascribes to the "equal treatment" branch of feminist thought, rejecting public policies that give women special treatment because of perceived differences from men. For example, in the Supreme Court case of *California Federal Savings & Loan Association v. Guerra* (1987), NOW argued that a state law granting women extra work leaves on account of pregnancy constituted sex discrimination. Instead, argued NOW, the law should give women and men the same benefits. Similarly, NOW has been a leader in efforts to eliminate gender-based insurance rates, disputing actuarial tables that justify such sex-based rate making, and which, in some instances, inure to women's financial benefit. According to NOW, use of sex as a rate-making tool masks the utility of lifestyle factors that would be even more accurate, such as smoking and exercise habits, and that would avoid status-based discrimination. Finally, NOW has opposed a return to the pre-Title IX days of single-sex public education, arguing that girls do not need special treatment and special classes to thrive, but that they should be given equal treatment in stereotype-free coeducational settings.

Despite its focus on formal equality, however, NOW acknowledges the special issues that face women. Its support of legislation to address domestic violence is based on the understanding that such violence is overwhelmingly directed at women. Likewise, NOW has championed efforts to expand government support for childcare in recognition of the fact that women generally bear the burden of caregiving within a family.

In the twenty-first century, NOW has increased its efforts to diversify its ranks, hosting a series of conferences focused on issues of concern to young women, women of color, and other allies whose views were not well represented in earlier iterations of the organization. Although participation in activist organizations is on the wane nationally, and NOW

must struggle to maintain its vitality in the face of the growing power of conservative women's organizations, NOW remains a force for women's equality in the political and popular arena and at every level of government.

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References and Further Reading

- Barakso, Maryann. *Governing NOW: Grassroots Activism in the National Organization for Women*. Ithaca, NY: Cornell University Press, 2004.
- Barker-Plummer, Bernadette. "News as a Feminist Resource? A Case Study of the Media Strategies and Media Representation of the National Organization for Women, 1966–1980." In *Gender, Politics and Communication*, edited by Anabelle Sreberny and Liesbet van Zoonen, 121–60. Cresskill, NJ: Hampton Press, 2000.
- Berkeley, Kathleen C. *The Women's Liberation Movement in America*. Westport, CT: Greenwood Press, 1999.
- National Organization for Women. Website. <http://www.now.org>.

Cases and Statutes Cited

- California Federal Savings & Loan Association v. Guerra*, 479 U.S. 272 (1987)
- Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e, et seq.
- Title IX of the Education Amendments of 1972, 20 U.S.C. Sections 1681–1688

See also **Abortion; Abortion Protest Cases; Antidiscrimination Laws; Domestic Violence; Reproductive Freedom**

NATIONAL ORIGINS QUOTA SYSTEM

With the passage of the Immigration Act of 1924 (Johnson-Reed Act), immigration restrictionists achieved their long-sought goal of establishing a permanent nationality-based system of quotas to limit the number of immigrants admitted to the United States. Reflecting the ideology of "scientific" racism prevalent during the Progressive Era, which viewed ethnicity in hierarchical terms, the quotas strongly favored northern Europeans over those from eastern and southern Europe, and excluded most Asians.

The implementation of the quotas proceeded in steps beginning in 1921. The permanent system, which took effect in 1929, capped immigration at approximately 150,000 people annually. It allotted these spaces based on the supposed national origins (ethnicity) of the American population in 1920 as determined by a study of dubious validity that analyzed surnames. Immigration of members of Asian races was severely limited or prohibited entirely.

NATIONAL ORIGINS QUOTA SYSTEM

Throughout its history, critics denounced the quota system as un-American and discriminatory due to its unequal treatment of individuals based on, in President Kennedy's words, "accident of birth." By the late 1950s, the racist ideologies that served as the system's intellectual basis had lost favor, and its system of national preferences had proven a diplomatic liability in the context of the cold war. The Immigration and Nationality Act of 1965 revamped the nation's immigration laws by eliminating race and race-based national quotas as a consideration for admission.

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References and Further Reading

- Daniels, Roger. *Guarding the Golden Door: American Immigration Policy and Immigrants Since 1882*. New York: Hill and Wang, 2004.
- Kennedy, John F. *A Nation of Immigrants*, revised and enlarged edition. New York: Harpers, 1964.
- Ngai, Mae M. *Impossible Subjects: Illegal Aliens and the Making of Modern America*. Princeton, NJ: Princeton University Press, 2004.

See also **Immigration and Nationality Act Amendments of 1965; Race and Immigration**

NATIONAL RIFLE ASSOCIATION (NRA)

The National Rifle Association (NRA) was founded in 1871 by two Civil War-era generals who, critical of their own troops' marksmanship, wished to start a group whose goal would be to "promote and encourage rifle shooting on a scientific basis." The NRA built its first practice ground on Long Island, with a grant of \$25,000 from the State of New York. From these humble beginnings, the NRA has transformed into a powerful organization boasting a membership of nearly four million and which proclaims itself "America's foremost defender of Second Amendment rights."

Before mid-century, the NRA was largely a hunters' and sportsmen's club. The NRA organized shooting clubs around the country (including at colleges, universities, and military academies), built shooting ranges, conducted hunter education programs, published member magazines, and organized large-scale shooting matches at its facilities. In the mid-1950s, the group also conducted firearms training for law enforcement officers, although the collaborative relationship between the two came undone when national police organization supported restricting armor-piercing bullets and assault weapons. Nevertheless, the NRA claims to have trained over 1.5

million police officers as well as 17 million hunters. The group still conducts civilian gun training program and initiated the "Eddie Eagle® Gun Safety Program" to teach gun safety to children.

The NRA is perhaps most visible in its legislative action and lobbying capacity, which has expanded considerably beginning in the 1950s. The passage of the Gun Control Act of 1968 in the wake of the assassinations of President John F. Kennedy and Rev. Martin Luther King, Jr. precipitated a split in the NRA that set it on a course for more vigorous legislative advocacy of gun rights. The NRA leadership at the time supported handgun ownership for self-defense, but viewed the organization's primary role as being to support recreational use of guns for sporting purposes. A reaction to increasing federal assertiveness in pushing for gun control legislation, a new group of leaders took control of the NRA in 1977 in what became known as the "Cincinnati revolt." Since this time, the NRA has actively propounded its absolutist view of gun rights.

The Institute for Legislative Affairs, created in 1975, is the main instrument of the NRA's lobbying campaign to oppose any national or local statutes limiting the Second Amendment rights of American citizens. And its story over the past thirty years has largely been one of success, although it has seen some setbacks. The group has enjoyed the membership of Dwight Eisenhower, and George H.W. Bush, while Ronald Reagan, also a member, was the first sitting president to address an NRA annual meeting. Through aggressive fund raising, marketing, and outreach efforts, the NRA nearly tripled in size, from 940,000 members in 1977 to its current size. As a single-issue organization, it can levy the entire weight of its political machine to great effect against politicians seen as being unfriendly to gun rights. Throughout the 1970s and much of the 1980s, the NRA managed to defeat every major attempt at federal gun control. The NRA lost ground in the late 1980s and 1990s, as Congress passed restrictions on handguns, while the Brady Bill of 1994 mandated background checks and waiting periods for the purchase of certain firearms and placed restrictions on automatic and semiautomatic weapons. The NRA has enjoyed some success on the state level in encouraging state governments to pass "concealed-carry laws" that permit individuals to obtain licenses to carry concealed weapons.

Although the NRA does not oppose reasonable gun licensing or existing limitations on gun ownership by minors, for example, it understands the Second Amendment to confer upon law-abiding Americans a right to bear arms for the purpose of self-defense. They decisively reject the "collective rights" arguments of

gun control advocates who posit that the provision must be read as providing a right only in connection with organized military units. The NRA's view is rooted in the belief that the framers of the Constitution intended the right to bear arms to accrue to individuals as a means of defending themselves against other citizens, as well as their own government. The provision was meant as a check against the tyranny of the state, and to provide for an armed citizenry from which a militia may be drawn. Under this construction, the "well-regulated militia" language is incidental to rather than a qualifier of the individual right. The NRA points to Court decisions such as *United States v. Miller* (1939) and *United States v. Emerson* (5th Cir. 2001), both of which appear to support the individual rights approach, as evidence of the correctness of their position. The NRA received a further boost recently when Attorney General John Ashcroft issued a memorandum in December 2004 favoring the individual rights interpretation of the Second Amendment.

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References and Further Reading

- Crooker, Constance Emerson. *Gun Control and Gun Rights*. Westport, CT: Greenwood Press, 2003.
 Reynolds, Glen Harlan, *A Critical Guide to the Second Amendment*, Tennessee Law Review 62 (1994–1995): 461.
 Sugarmann, Josh. *National Rifle Association*. Washington, D.C.: National Press Books, 1992.

Cases and Statutes Cited

- United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001)
United States v. Miller, 307 U.S. 174 (1939)

NATIONAL SECURITY

The inevitable tension between national security and civil liberties plays out in many constitutional provisions. Beginning with the Alien and Sedition Acts of 1798, and particularly in times of war or crisis, federal and state governments have used their criminal powers to suppress speech critical of government, but it was not till 1919 that this became a First Amendment issue (*Schenck v. United States* [1919]). Constitutional protections of such speech have waxed and waned with the seriousness of the perceived threat, as the Court moved from the *bad tendency* test to the *clear and present danger* test to the more speech-protective *incitement* test (*Brandenburg v. Ohio* [1969]).

More recently, First Amendment claims typically resist government efforts to block publication of purportedly sensitive information, such as the

Pentagon Papers, already in the hands of the press (*New York Times Co. v. United States* [1971]), prevent leaks from within the government (*Snepp v. United States* [1980]), or seek access to information that the government regards as sensitive. As to the last, the Constitution does not expressly declare a "right to know," and the Supreme Court has never found an implied one, so public access to national security information is governed by a hodgepodge of common law cases, federal statutes such as the Freedom of Information Act and the Privacy Act, and executive orders governing national security information.

Fourth Amendment issues are raised by the Foreign Intelligence Surveillance Act, which lowered the standards for authorizing searches in security investigations, but restricted the uses to which the evidence obtained may be put, and more recently by the USA PATRIOT Act, which removed some of those restrictions and made it easier to conduct certain wiretaps and physical searches. The Fifth Amendment's indictment clause and the habeas corpus guarantee (Article I, Section 9) became an issue when prisoners were detained without trial at Guantanamo Bay. The due process clause was implicated in *Department of the Navy v. Egan* [1988], which affirmed a congressional scheme authorizing summary dismissal of federal employees—no hearing, no appeal—in the interests of national security. The Sixth Amendment right to a speedy and public trial has been raised in cases stemming from the Guantanamo detentions. Federalism issues arise occasionally when states enact laws that duplicate, complement, or conflict with federal security law (*Hines v. Davidowitz* [1941]).

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References and Further Reading

- Dycus, Stephen, Arthur L. Berney, William C. Banks, and Peter Raven-Hansen. *National Security Law*. 3rd ed. New York: Aspen, 2002 (and annual supplements).
 Moore, John Norton, and Robert F. Turner, eds. *National Security Law*. 2nd ed. Durham, NC: Carolina Academic Press, 2005.

Cases and Statutes Cited

- Brandenburg v. Ohio*, 395 U.S. 444 (1969)
Department of the Navy v. Egan, 484 U.S. 518 (1988)
Hines v. Davidowitz, 312 U.S. 52 (1941)
New York Times Co. v. United States, 403 U.S. 713 (1971)
Schenck v. United States, 249 U.S. 47 (1919)
Snepp v. United States, 444 U.S. 507 (1980)

See also National Security and Freedom of Speech; National Security Prior Restraints; 9/11 and the War on Terrorism

NATIONAL SECURITY AND FREEDOM OF SPEECH

The constant tension between the protection of the state and the rights of the individual is particularly acute in the realm of free expression as governments from time immemorial have attempted to silence or punish, in the name of national security, speech perceived as harmful to, or merely critical of, the state. Philosophers and judges have spent many words trying to define the line that separates protected speech from seditious libel or punishable conduct.

Free speech issues relating to national security fall primarily into two broad categories: post-publication punishment and prior restraint. The former is, as the phrase suggests, punishing with criminal sanctions, after the fact of publication, expression—whether speech or writing—regarded as a threat to national security. Prior restraint, on the other hand, attempts to prevent specific information or opinion from being published in the first place. There is no clean line between the two: the ultimate goal of post-publication punishment is to deter other allegedly harmful speech from being uttered or disseminated in the future, and prior restraint typically entails post-publication punishment for having violated the restraining order. Nevertheless, the concepts are sufficiently discrete to permit them to be discussed and analyzed separately. National security prior restraints are discussed as a separate topic in this encyclopedia, so this entry deals primarily with constitutional limitations on the post-publication punishment of expression. It concludes with a brief discussion of a third intersection between free speech and national security—where laws not directly regulating speech are said to chill or discourage the exercise of First Amendment rights.

Post-Publication Punishment

The protection of free speech and the right to criticize the government began, on these shores, in 1734 with the trial of John Peter Zenger. Charged with seditious libel for having published, in his *New-York Weekly Journal*, “divers scandalous, virulent, false and seditious reflections” against New York’s colonial governor, William Cosby, Zenger was acquitted after Andrew Hamilton persuaded the jury that the criticisms were true (a fact that was legally irrelevant, as the only question put to the jury was whether Zenger had printed the statements, which he obviously had done). Often described as a precedent establishing freedom of the press in America, the case is, more accurately, a prime example of jury nullification, of no precedential value whatever, but it demonstrated

the colonists’ interest in free expression and became a symbol of the right to criticize government officials.

The first major free speech controversy under the new Constitution arose when the Federalist-controlled Congress enacted the Alien and Sedition Acts of 1798. The Sedition Act, in particular, was widely regarded, at least by Republicans, as unconstitutional, but it was much less harsh than the seditious libel laws of England and other European countries, in that only false statements were actionable, knowledge of a statement’s falsity and an intent to defame were elements of the offense, and the defendant was expressly permitted to introduce evidence of the statement’s truth.

The Sedition Act proved very unpopular and probably contributed to the Federalists’ defeat in 1800, when the Republicans gained the White House and both houses of Congress. Only ten persons were convicted under it, and President Jefferson promptly pardoned every one. The Republican Congress refunded all the fines levied under it and allowed it to expire under its own terms in 1801. The Supreme Court said in 1964 in *New York Times Co. v. Sullivan*, a landmark libel case, “Although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history.”

It is often said that nothing significant happened by way of free expression between the Sedition Act of 1798 and the World War I Espionage Act of 1917, but in fact there were numerous attempts to suppress speech, especially during the Civil War and then during the half-century that followed it. The most famous post-Civil War prosecution was of William McCordle (*Ex parte McCordle* [1869]), a newspaper editor in Mississippi whose editorials regularly criticized the military government and the Reconstruction Act that had established it. He was arrested and charged with disturbing the peace, inciting rebellion, libel, and impeding reconstruction, and he defended on the ground that the Reconstruction Act, under which he was arrested, was unconstitutional. What might have been an interesting free speech case instead played out as a question of congressional authority over Supreme Court appellate jurisdiction when Congress, fearful that the Court would strike down the act, stripped the Court of jurisdiction to hear McCordle’s appeal in his habeas corpus proceeding. The Court acknowledged Congress’s authority to do so and dismissed the case; the Army released McCordle, and the case went away.

During the half-century that followed *McCordle*, socialism was on the rise in Europe, and the federal and state governments reacted by routinely prosecuting syndicalists, anarchists, trade unionists, and other radicals for their speeches and publications, even in

the absence of incitement to criminality or violent acts. The federal government used the 1903 Alien Immigration Act, passed after President McKinley's assassination, to deport labor activists, among others, and local police routinely interrupted speeches and rallies in public parks and squares, often before the speech had begun, and arrested the speakers.

These prosecutions do not appear to have raised any serious constitutional issues, and state and federal courts routinely affirmed convictions with little or no discussion. Even a U.S. senator, Thomas Patterson, was convicted of criminal contempt for a series of editorials in his *Rocky Mountain News* criticizing a decision of the Colorado Supreme Court. The U.S. Supreme Court upheld the conviction, deferring to state law and finding no federal issue. The case is interesting in that Justice Holmes, later very influential in the development of the freedom of speech, found the First Amendment inapplicable, not only because it might not apply to the states (a question he did not decide) but because it prohibited only prior restraints, not subsequent punishments. This reflected a view of freedom of speech that goes back at least as far as the eighteenth century and Blackstone's *Commentaries on the Laws of England*: "The liberty of the press is essential to the nature of a free state; but this consists in laying no previous restraint upon publications, and not in freedom from censure for criminal matter when published." (The subsequent punishment may extend as well to the true as to the false, Holmes added, making truth irrelevant as a defense.)

In *Schenck v. United States* (1919), the Court upheld a conviction under the Espionage Act of 1917 for circulating a pamphlet opposing the draft. Holmes for the first time acknowledged a broader function for the First Amendment: "It well may be that the prohibition of laws abridging the freedom of speech is not confined to previous restraints, although to prevent them may have been the main purpose...." Nevertheless, he continued, in one of the most (mis) quoted lines in constitutional law:

The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force. The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.

Although the phrase "clear and present danger" has allowed some to argue that Holmes was trying to create a rule more protective of speech, *Schenck* was

probably no more than a restatement of the bad tendency test that was in wide use at the time.

In *Gitlow v. New York* (1925), the court assumed, for the first time, that the First Amendment's protections of speech and press applied to the states through the Fourteenth Amendment ("No State will make or enforce any law which will abridge the privileges or immunities of citizens of the United States; nor will any States deprive any person of life, liberty, or property, without due process of law...."), but nevertheless granted the state legislature "every presumption" in determining the validity of the criminal anarchy act. Holmes and Justice Brandeis dissented, preferring the clear and present danger test. In *Whitney v. California* (1927), Brandeis, concurring in sustaining a conviction under California's criminal syndicalism act, formulated a test somewhat more protective of speech: "There must be reasonable ground to believe the danger apprehended is imminent. There must be the probability of serious danger to the State." He would not allow a conviction "where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be acted on. The Court purported to adopt Brandeis's *Whitney* formulation twenty-four years later, in *Dennis v. United States* (1951), testing the antiradical, anticommunist Smith Act, but adapted Brandeis's language to Judge Learned Hand's famous balancing test that appears in so many contexts: "In each case, [the court] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." A few years later, in another Smith Act case, *Yates v. United States* (1957), Justice Harlan interpreted the act's prohibition of advocacy of the violent overthrow of government to mean only "advocacy of action," not "advocacy of abstract doctrine or ideas." This was somewhat more protective of speech but was merely an exercise in statutory interpretation, which Congress is always free to overturn, rather than a matter of First Amendment law.

Relying on *Dennis* and *Yates*, the court in *Brandenburg v. Ohio* (1969) overturned convictions under Ohio's criminal syndicalism statute for advocating violence in industrial disputes: A state may not "forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such actions." *Brandenburg* is currently the leading case on First Amendment protection of speech that the government may want to suppress or punish on national security grounds. Its meaning is not clear, though. Some see it purely as an incitement test: pure speech is protected, but the

government may punish incitement to violence, which crosses the line from pure speech to action or “speech-plus.” Others see in *Brandenburg* a blending of an incitement test with the clear and present danger test: Not only must the speaker be inciting to lawless action, but the context must establish imminence and a probability of the serious evil the law seeks to prevent. Critical reaction, too, has been mixed. Civil libertarians have criticized *Brandenburg* as too vague and not protective of speech. Others have argued that it requires courts to make judgments about imminence or danger that are best left to elected or law-enforcement officials.

Punishing Symbolic Speech

The issues discussed so far, whether relating to post-publication punishment or prior restraints, deal with laws aimed directly at speech. Sometimes a law punishing conduct will be challenged as infringing freedom of speech. *United States v. O'Brien*, for example, sustained a conviction for burning a draft card, rejecting the defendant’s argument that the act was protected “symbolic speech.” (O’Brien argues that by burning the card he expressed his opposition to the Vietnam War.) Without deciding whether such acts are protected speech, the Court held that when a proscribed activity includes both speech and conduct, the government may regulate the conduct if the regulation is within the government’s constitutional powers and furthers an important or substantial governmental interest, if that interest is unrelated to the suppression of speech, and if the regulation is no greater than necessary to further that interest. The Court found that the Selective Service Act’s ban on destroying draft cards served a legitimate and substantial interest unrelated to speech, was not overly broad, and was therefore constitutional.

Chilling Effects

Some laws not directly related to speech have been challenged on the ground that they “chill” First Amendment rights or other interests by discouraging people from engaging in speech or research on controversial issues. Section 215 of the USA PATRIOT Act, for example, made it considerably easier for federal investigators to gain access to “tangible things” in the course of an investigation concerning international terrorism and prohibited the person providing the information from disclosing the request. Librarians

quickly realized that this would include library patron records, and the American Library Association launched a highly visible public campaign to call attention to the access and secrecy provisions. Other professional organizations, representing academics, journalists, and scientists, among others, have objected to the impact that national security laws can have on academic freedom, freedom of the press, and scientific research.

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References and Further Reading

- American Association of University Professors. “Academic Freedom and National Security in a Time of Crisis.” Reprinted in *Academe* 89, no. 6 (2003), <http://www.aaup.org>.
- Dycus, Stephen, Arthur L. Berney, William C. Banks, and Peter Raven-Hansen. *National Security Law*. 3rd ed. New York: Aspen, 2002 (and annual supplements).
- Moore, John Norton, and Robert F. Turner, eds. *National Security Law*, 2nd ed. Durham, NC: Carolina Academic Press, 2005.
- Near v. Minnesota*, 283 U.S. 697 (1931).
- New York Times Co. v. United States*, 403 U.S. 713 (1971).
- Patterson v. Colorado*, 205 U.S. 454 (1907).
- Rabban, David M. *Free Speech in Its Forgotten Years*. New York: Cambridge University Press, 1997.
- Snepp v. United States*, 444 U.S. 507 (1980).
- Stone, Geoffrey R. *Perilous Times, Free Speech in Wartime from the Sedition Act of 1798 to the War on Terrorism*. New York: Norton, 2004.
- United States v. Marchetti*, 466 F.2d 1309 (1972).
- United States v. The Progressive, Inc.*, 467 F.Supp. 990, 486 F.Supp. 5 (1979).

Cases and Statutes Cited

- Brandenburg v. Ohio*, 395 U.S. 444 (1969)
- Dennis v. United States*, 341 U.S. 494 (1951)
- Ex parte McCordle*, 74 U.S. 506 (1869)
- Gitlow v. New York*, 268 U.S. 652 (1925)
- New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)
- Schenck v. United States*, 249 U.S. 47 (1919)
- United States v. O'Brien*, 391 U.S. 367 (1968)
- Whitney v. California*, 274 U.S. 357 (1927)
- Yates v. United States*, 354 U.S. 298 (1957)

See also **National Security Prior Restraints; Ripeness in Free Speech Cases**

NATIONAL SECURITY PRIOR RESTRAINTS

A prior restraint in constitutional law is, loosely speaking, a prohibition or restriction on publication before the material is published (as opposed to punishment after publication). It typically takes one of two forms—an administrative licensing requirement

or a judicial injunction. Many regard prior restraint as the more pernicious, as it prevents the words in question from ever being uttered; if subsequent punishment chills speech, prior restraint freezes it. Furthermore, post-publication defendants are free to challenge the constitutionality of the law and escape the sanction if they are right, but, under the collateral bar rule, violating a judicial order brings its own punishment, even if the order is eventually determined to be illegal or unconstitutional. Post-publication punishment is discussed in more detail in a separate entry, National Security and Freedom of Speech.

As early as 1769, Blackstone, in his *Commentaries on the Laws of England*, had written that “liberty of the press ... consists in laying no previous restraints upon publication” In the United States, it was generally accepted that the First Amendment went at least that far. Even the Sedition Act of 1798 made no effort to establish a licensing system alongside its severe post-publication penalties for seditious libel. The White House version of the Espionage Act of 1917 contained a “press censorship” clause that would have made it an offense to publish information that the president had determined “is or might be useful to the enemy.” After bitter criticism from the press and civil libertarians, who objected to the unfettered discretion granted to the president, Congress removed the provision, although it retained others that raised serious concerns among civil libertarians and that became the basis of controversial prosecutions during and after World War I.

It was not clear until 1939 that the First Amendment strongly disfavored injunctions as well as licensing. *Near v. Minnesota* (1931), which overturned a state’s attempt to prevent a scandal sheet from publishing scurrilous, anti-Semitic material, had no direct relevance to national security, but, in a famous dictum, Chief Justice Hughes made clear that, like most constitutional rules, the prohibition on prior restraints was not absolute and that an injunction might legitimately prevent, for example, the publication in wartime of sailing dates or the location of troops.

For four decades after *Near*, prior restraints were litigated in a number of other contexts: obscenity (which is not protected speech under the First Amendment) and efforts by state or local government to control public demonstrations and the distribution of literature. To survive judicial scrutiny, a licensing scheme had to be content neutral, have an important governmental purpose, allow administrative officials virtually no discretion, and provide procedural safeguards including a prompt hearing and judicial review. Judicial injunctions were occasionally upheld as well when the state could show that the release of

certain information could interfere with a criminal defendant’s Sixth Amendment right to a fair trial.

Then in 1971, U.S. District Judge Murray Gurfein, in his first case since being appointed to the bench, became the first federal judge in U.S. history to prohibit a newspaper from publishing particular information. He issued a temporary restraining order (TRO) against the *New York Times*, which had begun publishing installments of the Pentagon Papers, a 7,000-page, forty-seven-volume “History of U.S. Decision-Making Process on Vietnam Policy, 1945–1967,” which Daniel Ellsberg, one of the study’s compilers, had copied and passed to the *Times*. The government persuaded the judge that further publication would undermine national security. After the *Times* complied with the TRO, the *Washington Post* began publishing the papers. Judge Gerhard Gesell refused to grant a TRO or an injunction on the ground that the government had not identified any material that would injure the United States and was misusing the Espionage Act of 1917 (discussed above) in an effort to censor the press. The Supreme Court quickly agreed to hear the case, *New York Times Co. v. United States* (1971). Meanwhile, at least nine other papers began to publish excerpts. The Supreme Court held, six-to-three in a per curiam opinion, that the *Times* and the *Post* could resume publication because the government had not satisfied its “heavy burden of showing justification” for a prior restraint on the press. Critics have suggested that this was, in the long run, a defeat for the press in that the opinion substituted a balancing test for *Near*’s almost absolute disapproval of prior restraints, particularly as it offered no guidance on how the “heavy burden” might be satisfied. Some justices who voted to allow the publication wondered whether the injunction might have been upheld had there been authorizing congressional legislation.

In 1979, an article in *The Progressive* purporting to show how to build a hydrogen bomb presented a case as close as one might hope to get to Hughes’s troopship dictum in *Near*. The case had the potential to resolve two open questions from the Pentagon Papers case: how to define the government’s burden, and whether Congress could authorize such injunctions. The government argued in *United States v. The Progressive, Inc.* (1979) that material in the article was classified, even though it had all been gathered from public sources, and persuaded a federal district judge that its publication would violate the Atomic Energy Act. As *The Progressive* was preparing an appeal from the preliminary injunction, the article was published by others overseas and the case became moot, so the appeal was dismissed. There has been widespread speculation that the government was relieved

to see the case dismissed, as it feared that it would lose and even that portions of the Atomic Energy Act would be declared unconstitutional.

In a fair-trial case tangentially related to national security, a federal court in Florida enjoined CNN from broadcasting conversations between Manuel Noriega, Panama's deposed president, and his attorney taped in a U.S. prison where Noriega was awaiting trial on drug charges (*Cable News Network Inc. v. Noriega* [1990]; *United States v. Noriega* [1990]). The Court of Appeals refused to intervene, as did the Supreme Court. Two justices, Thurgood Marshall and Sandra Day O'Connor, dissented, however, because the trial court had issued the TRO "without any finding that suppression of the broadcast was necessary to protect Noriega's right to a fair trial, reasoning that no such determination need be made unless CNN surrendered the tapes for the court's inspection." CNN went ahead and broadcast the tapes anyway, the court lifted the order, and CNN was eventually convicted of criminal contempt.

Yet another technique for keeping national security information from leaking has been upheld by the courts—contract law—but it is effective only against government employees, not the press. Since 1972, the courts have upheld secrecy agreements in which incoming and outgoing employees of the Central Intelligence Agency (CIA) agree not to divulge classified information or to publish any information whatsoever without first obtaining clearance from the CIA. In *United States v. Marchetti* (1972), the Court of Appeals upheld an injunction against a former agent, but stressed that it could apply only to classified information not previously disclosed, that the CIA must act promptly to approve or disapprove the submissions, and that the author was entitled to judicial review of the CIA decision. The Supreme Court declined to review the decision, but eight years later, in *Snepp v. United States* (1980), it not only upheld the validity of the secrecy agreements but authorized the government to establish a constructive trust to impound any royalties from any work published without CIA clearance.

WILLIAM V. DUNLAP

References and Further Reading

- Dycus, Stephen, Arthur L. Berney, William C. Banks, and Peter Raven-Hansen. *National Security Law*. 3rd ed. New York: Aspen, 2002 (and annual supplements).
- Milton, John. *Areopagitica, A Speech of Mr. John Milton for the Liberty of Unlicensed Printing, to the Parliament of England*. Vol. III, Part 3. The Harvard Classics. New York: P.F. Collier & Son, 1909–14. Bartleby.com, 2001. <http://www.bartleby.com/3/3/>.

Moore, John Norton, and Robert F. Turner, eds. *National Security Law*. 2nd ed. Durham, NC: Carolina Academic Press, 2005.

Rabban, David M. *Free Speech in Its Forgotten Years*. Cambridge: Cambridge University Press, 1997.

Stone, Geoffrey R. *Perilous Times: Free Speech in Wartime from the Sedition Act of 1798 to the War on Terrorism*. New York: Norton, 2004.

Cases and Statutes Cited

Cable News Network Inc. v. Noriega, 498 U.S. 976 (1990);

United States v. Noriega, 752 F. Supp. 1045 (1990)

Near v. Minnesota, 283 U.S. 697 (1931)

New York Times Co. v. United States, 403 U.S. 713 (1971)

Snepp v. United States, 444 U.S. 507 (1980)

United States v. Marchetti, 466 F.2d 1309 (1972)

United States v. The Progressive, Inc., 467 F.Supp. 990, 486 F.Supp. 5 (1979)

See also **National Security and Freedom of Speech**

NATIONAL TREASURY EMPLOYEES UNION v. VON RAAB, 489 U.S. 656 (1989)

Employee drug testing is common in the United States, particularly in government agencies. Advocates contend that testing programs increase job safety, reduce costs, and support drug law enforcement, while opponents argue that these schemes intrude on privacy and violate constitutional rights. In *National Treasury Employees Union v. Von Raab*, the Supreme Court held that a drug testing program for U.S. customs agents was consistent with the Fourth Amendment.

Von Raab addressed urinalysis testing for employees who carried firearms or were directly involved in drug interdiction. Because this search served special needs beyond ordinary law enforcement, the legal analysis was based on a balancing of governmental interests and individual privacy expectations. According to the Court, privacy concerns were diminished by the operational realities of the customs service and the nonintrusive testing procedures. In turn, the government had a compelling interest in preventing employees who use drugs from serving on the front lines of interdiction due to their susceptibility to bribery or blackmail and possible apathy toward drug enforcement goals. The government had a similar interest in those agents who carried firearms and thereby posed risks to innocent citizens from impaired perception and judgment. For these reasons, the Court found the program constitutional in the absence of warrants and individualized suspicion.

Since *Von Raab* and its companion case, *Skinner v. Railway Labor Executives' Association* (1989), the Court has considered four additional drug testing

regimes, upholding two and striking down two. The resulting jurisprudence has produced a level of uncertainty in the lower courts.

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References and Further Reading

Symposium: Drug Testing in the Workplace, William & Mary Law Review 33 (1991): 1–252.
 Welfing, John B., *Employer Drug Testing: Disparate Judicial and Legislative Responses*, Albany Law Review 63 (2000): 799–832.

Cases and Statutes Cited

Skinner v. Railway Labor Executives' Association, 489 U.S. 602 (1989)

See also *Administrative Searches and Seizures; Board of Education v. Earls*, 536 U.S. 822 (2002) (students); *Chandler v. Miller*, 520 U.S. 305 (1997) (candidates); *Drug Testing; Search (General Definition); Skinner v. Railway Labor Executives' Association*, 489 U.S. 602 (1989); *Vernonia School District v. Acton*, 515 U.S. 646 (1995); *War on Drugs; Warrant Clause (IV); Warrantless Searches*

NATIVE AMERICANS AND RELIGIOUS LIBERTY

There is no single Native-American religion. Religions beliefs and practices vary considerably among the hundreds of Indian tribes in the United States. Yet, many Native-American religions share common features that distinguish them from non-Native-American religions. These distinctive features of Native-American religions have not been fully protected by the laws that have provided more complete religious liberty to more mainstream religions. While the religion clauses of the First Amendment apply in theory with full force to government actions affecting Native-American religions, and while some legislation has been enacted specifically to promote Native-American religious practices, the application of these provisions has often resulted in little actual protection for those religions.

The way in which traditional First Amendment and legislative standards have failed adequately to protect some of the distinctive, and yet essential, features of many Native-American religions is illustrated by the manner in which the courts and Congress have dealt with Native-American sacred sites, Native-American peyote use, and the holistic nature of many Native-American religions.

Unlike most mainstream religions in the United States, many Native-American religions view land as

a living, sacred thing, and consider specific sites not only as the necessary location for important religious rites and ceremonies, but holy in and of themselves. Such lands can fulfill their full religious functions only if access to, and use of, the lands are carefully controlled. Otherwise, others may use the lands in ways that desecrate them or disturb those who use them for religious purposes. Unfortunately, Native Americans often do not possess the property rights to these lands, most of which are federal lands. Native Americans are, therefore, often unable to control use of the lands through the property law scheme, and they can preserve their religious connection to them only if they either convince federal land managers to control the lands in a manner that protects their sacred nature or persuade courts that the free exercise clause of the First Amendment requires the land managers to do so.

Native Americans' ability to do the latter was severely curtailed by the U.S. Supreme Court's ruling in *Lyng v. Northwest Indian Cemetery Protective Association* (1988), when the Court rejected a free exercise challenge to a federal government plan to construct a road through an area considered sacred by several northern California tribes. Even though the Court conceded that the construction and use of the road might "virtually destroy the Indians' ability to practice their religion," it concluded that because the plan did not coerce the tribal members into acting contrary to their religious beliefs, the plan did not violate the constitution. Relying on its earlier ruling in *Bowen v. Roy* (1986), the Court concluded that the Native Americans' religious liberty interests were outweighed by the government's right to structure its own internal affairs and property. Thus, Native Americans' distinctive view of the nature of sacred lands, along with their lack of property rights in those lands, have combined to make it difficult for them to obtain full protection of their religious practices in judicial proceedings.

Native Americans have had more success in convincing federal land managers and those who direct them to adopt land use policies that are sensitive to Native-American religious needs. In 1996, President Clinton issued an executive order directing federal agencies to "accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners." Some federal agencies have adopted plans asking visitors to voluntarily refrain from secular activities on certain federal lands considered sacred by local tribes (such as the Bear Lodge or Devil's Tower in Wyoming) in order to facilitate Native-American religious practices at certain times. Moreover, Congress itself has provided protection for Native-American religious activities in some specific

locations, at times by placing the lands in trust for the tribe, thereby allowing the tribe considerable control over use and access to the sacred areas (such as the Blue Lake in New Mexico), and in other instances by authorizing federal land managers to close some lands to the general public, from time to time, to allow Native-American religious activities to be carried out in private (such as the El Malpais National Monument in another part of New Mexico). Furthermore, the Religious Land Use and Institutionalized Persons Act (RLUIPA) may provide some additional protection for Native-American sacred sites, as it limits the federal government's authority to enforce land use regulations "in a manner that imposes a substantial burden" on religious activities.

However, legislation that would have provided broader protection for all sacred sites on federal lands was rejected in the 1990s, and many of the accommodating actions taken by the political branches have given rise to claims that these actions violate the establishment clause by preferring or promoting Native-American religions. Although these claims have by and large been rejected by lower federal courts, the challenges themselves further evidence the difficulty that Native Americans face when relying on traditional First Amendment tools to protect their distinctive religious views and practices.

A similar pattern—lack of success in the judicial arena, followed by gains in the political arena, which are then challenged in court—is found in the development of the law with respect Native-American religious use of peyote. Although many Native-American religions do not attach any religious significance to peyote, others, particularly those with roots in the Southwest, view peyote as not only an essential sacramental object, but as an object of worship itself. As the California Supreme Court explained in *People v. Woody* (Ca. 1964), in traditional peyote religions, "prayers are devoted to [peyote] much as prayers are devoted to the Holy Ghost" in Christian religions. Thus, for many Native Americans, the religious use of peyote is the sine qua non of their religion, and lower courts (including the court in *Woody*) initially indicated that such use was protected from governmental interference by the free exercise clause. However, in *Employment Division of Oregon v. Smith* (1990), the Supreme Court held that the State of Oregon did not violate the free exercise clause by criminalizing the religious use of peyote by Native Americans, nor by denying unemployment benefits to employees who were dismissed for violating that law. Thus, while there were some early judicial victories, Native Americans using peyote for religious purposes have ultimately received little judicial assistance in their quest for religious liberty.

As has been the case with protection for sacred sites, Native Americans who use peyote for religious purposes have had more success with the political branches of the federal government. However, in like fashion, these accommodations have themselves given rise to judicial challenges. In part as a response to *Smith*, Congress enacted the Religious Freedom Restoration Act (RFRA), which reinstated the strict scrutiny test for federal or state actions that "substantially burden" a person's free exercise rights, thereby providing more protection not only for the religious use of peyote by Native Americans, but also for a wide variety of religious practices by all persons. However, in *City of Boerne v. Flores* (1997), the Supreme Court held that Congress's effort to apply this test to state action was itself unconstitutional. How that ruling will apply to RFRA's application to federal actions (which are typically the source of problems for Native American religions) is somewhat unclear, although early lower court decisions have upheld the act in this respect.

Congress also enacted a more specific response to *Smith* when it enacted a post-*Smith* amendment to the American Indian Religious Freedom Act (AIRFA), which provided an express exemption from federal and state drug laws for the "use, possession, or transportation of peyote by an Indian for bona fide traditional ceremonial purposes in connection with the practice of a traditional Indian religion." However, once again, the Native Americans' success in obtaining protection from the political branches of government has prompted judicial challenges, in this case by non-Native Americans who claim that the exception violates both the establishment clause of the First Amendment and the equal protection clause of the Fourteenth Amendment because it prefers Native Americans and their unique religious practices over the religious practices of others. Those claims have not yet been definitively resolved.

Another distinctive feature of many Native American religions that has proven to be a problem under traditional First Amendment jurisprudence is the common Native-American view that religion permeates all aspects of life. Unlike many mainstream religions that separate, both geographically and temporally, religious activities from secular pursuits, many Native American religions are more holistic. For many Native Americans, religion informs every aspect of life; there is no such thing as nonreligious activity. Thus, even seemingly day-to-day tasks, such as hunting, fishing, or preparing food, are religious activities infused with sacred meaning. Failing to understand this factor, some lower courts have refused to provide constitutional protection to Native-American religious practices because the courts

concluded that the activities were merely manifestations of tribal culture, which like most secular activities can be regulated extensively, rather than religious activities entitled to First Amendment protection. Moreover, in cases involving the possession of eagle feathers and other objects that some Native Americans gather and use for religious purposes, the quest for religious liberty is made even more complicated by society's interest in preserving endangered species, which some (although not all) lower courts have found outweighs the Native Americans' right to exercise their religion free from government constraint.

Even some features of Native American religious beliefs and practices that are not as distinctive as use of sacred sites or peyote use have not fared well under traditional jurisprudence despite initial signs of promise. In 1978, Congress enacted the AIRFA, which committed the United States to the policy of "protect[ing] and preserve[ing] for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indians." However, the statute has had little practical impact because the U.S. Supreme Court in *Lyng* concluded that AIRFA created no judicially enforceable rights. Similarly, following some initial success in lower court decisions by Native-American prisoners who claimed that prison regulations concerning hair length violated their sincerely held religious beliefs, lower courts began to apply a less favorable test (developed by the Supreme Court in *Turner v. Safley* (1987) in a non-Native-American, non-religious liberty context) and, as a result, began more consistently to deny Native-American prisoners the right to wear long hair or headbands, to possess religious objects (such as pipes or medicine bags), and to have access to sweat lodges and other Native-American religious ceremonies. Native-American hopes that courts would be more accommodating to such claims after the enactment of RFRA proved largely unfounded, and, following the invalidation of that statute's application to state action (including state prisons), Congress enacted RLUIPA, which in addition to changing the rules for land-use planning decisions, revived the strict scrutiny test for government activities that substantially burden the religious activities of persons incarcerated in federal or state prisons. The extent to which this statute will provide meaningful protection to Native-American prisoners, as well as the constitutionality of the statute, has yet to be fully determined.

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References and Further Reading

Deloria, Vine Jr. *God Is Red: A Native View of Religion*. 2nd ed., Golden, CO: North American Press, 1992.

- Dussias, Allison M., *Ghost Dance and Holy Ghost: The Echoes of Nineteenth-Century Christianization Policy in Twentieth-Century Native American Free Exercise Cases*, *Stanford Law Review* 49 (1997): 4:773–852.
- Epps, Garrett. *To an Unknown God: Religious Freedom on Trial*. New York: St. Martin's Press, 2001.
- Martin, Joel W. *The Land Looks After Us: A History of Native American Religion*. New York: Oxford University Press, 1999.
- Stewart, Omer C. *Peyote Religion: A History*. Norman: University of Oklahoma Press, 1987.
- Winslow, Anastasia P., *Sacred Standards: Honoring the Establishment Clause in Protecting Native American Sacred Sites*, *Arizona Law Review* 38 (1996): 1291–343.

Cases and Statutes Cited

- Bowen v. Roy*, 476 U.S. 693 (1986)
- City of Boerne v. Flores*, 521 U.S. 507 (1997)
- Employment Division of Oregon v. Smith*, 494 U.S. 872 (1990)
- Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988)
- People v. Woody*, 394 P.2d 813 (Ca. 1964)
- Turner v. Safley*, 482 U.S. 78 (1987)
- See also *Bowen v. Roy*, 476 U.S. 693 (1986); *City of Boerne v. Flores*, 521 U.S. 507 (1997); *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872 (1990); Free Exercise Clause Doctrine: Supreme Court Jurisprudence; *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988); Religious Freedom Restoration Act; Religious Land Use and Institutionalized Persons Act of 2000; *Turner v. Safley*, 482 U.S. 78 (1987)**

NATURAL LAW, EIGHTEENTH-CENTURY UNDERSTANDING

The concept of natural law describes universal laws that exist independent of human-created laws. It is a highly contested idea both in philosophy and legal theory. Natural law as it influenced early American thinking on civil liberties was largely the product of the European Enlightenment as it was received and reinterpreted by the founders.

The study of natural law had been dominated by Catholic scholasticism for centuries. Expressed in the thinking of theologians such as Thomas Aquinas, natural law was analyzed in terms of God-given laws, and what that meant for human institutions. The Enlightenment forced the study of natural law towards secular rationality and individualism, with a new attention to political rights, and no Enlightenment philosopher influenced the American colonists more than John Locke.

Locke created a wealth of new natural rights ideas, imagining a "state of nature" that predated government, and describing the natural rights that arose

therein. Locke's theories also envisioned government as a social compact requiring the "consent of the governed." Locke's theory of the "consent of the governed" strongly influenced the intellectual forbears of the nascent republic, who oftentimes deployed Lockean natural rights rhetoric when arguing for the dissolution of ties with Britain. The Declaration of Independence provides a good example of this kind of reasoning, such as where it expresses that the British have deprived the colonists of "the separate and equal station to which the Laws of Nature and of Nature's God entitle them."

Natural Law and the Constitution

There is debate, however, among historians of the early American republic about the extent to which natural law influenced the drafters of the Constitution. As mentioned above, the Declaration of Independence certainly included natural law language, but the Constitution eschewed such rhetoric for much more formal legalistic terms, and natural law is not mentioned in any significance in the ratifying debates. One explanation, proffered by John Hart Ely, is that the functions of the documents were fundamentally different. The Declaration was an announcement of grievances, and an argument that those grievances could only be redressed by resort to revolution. By contrast, the Constitution, drafted after long debate and deliberation, was meant to be the written fundamental law of the new nation. We might conclude that while many of the framers of the early republic valued natural law individually, they thought that human-written laws were the only sources of state-enforced obligations.

One important concept for civil liberties that permeates natural law theory is the idea that positive, human-written laws do not exhaust the limits of individual rights against government. This means that there are universal, individual rights that cannot be violated by government. This insight is important to understanding the continuing vitality of natural law theories for protecting civil liberties in the modern United States. Some of these modern theories suppose that if there are preexisting natural rights, then these natural rights form an "unwritten constitution" that underlies the written constitution, but has as much or more force as the document itself.

There is a conflict between this view and the view that whatever natural rights there are, they are adequately protected by a written constitution. This struggle is evident in the debate over the inclusion or exclusion of a bill of rights. Those who would have

excluded the Bill of Rights were not foes of individual liberties, but in fact thought those liberties would be best protected *without* a bill of rights. Alexander Hamilton, in *The Federalist* 84, gave expression to this very idea when he spoke of the danger of attempting to list all individual rights against government—an effort he thought impossible. Ultimately, those in favor of listing individual rights against government prevailed, and natural law was not significantly invoked by the judiciary in its interpretations of the Bill of Rights.

Natural Rights

However, this debate was not fully resolved by the framers of the Constitution, as evinced by the existence of the Ninth Amendment. That amendment states simply, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." If we think that the fundamental law of the land is stated by the Constitution, then where would these rights "retained by the people" come from? Furthermore, should the vague provisions of the Fourteenth Amendment give rise to broad judicial protection of rights not listed in the Constitution? To some scholars, natural law answers these questions in the affirmative.

Such a theory has been embraced by some modern constitutional scholars, but in the framing period, appeals to natural law found only rare and fleeting traction in the U.S. Supreme Court, and the Ninth Amendment itself has been very rarely invoked. The 1798 case of *Calder v. Bull* (1798) is famous for juxtaposing the views of Justices Chase and Iredell, who come to opposite conclusions regarding the merits of using natural law as a source of constitutional law, with Chase in favor and Iredell opposed. That Justice Iredell prevailed in that case is testament to the strong tradition of legal positivism on the Supreme Court, which is marked by the belief that only the *written* Constitution is enforceable.

This view was dominant until the twentieth century (with a few exceptions), when a quasi-natural law conception of the Constitution was revived, principally by late twentieth-century legal academics. The only justification for enforcing the "unenumerated rights" created by the Warren and Burger Courts seemed to be a revival of natural law. Whether this is a valid source of constitutional law continues to be a lively and intense debate both within and outside of the legal academy. Fundamentally, however, this debate is the culmination of long-unsettled questions about whether the fundamental law of the United States is

exhausted by the text of the Constitution, or whether the text and history of its drafting invite judges to protect rights not written in the Constitution, and guaranteed by natural law.

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References and Further Reading

- Bailyn, Bernard. *The Ideological Origins of the American Revolution*. Cambridge, MA: Harvard University Press, 1967.
- Ely, John Hart. *Democracy and Distrust: A Theory of Judicial Review*. Cambridge, MA: Harvard University Press, 1980.
- Rossiter, C., ed. *The Federalist Papers*. New York: Penguin Putnam, 1961.
- Wood, Gordon S. *The Creation of the American Republic 1776–1787*. Chapel Hill: University of North Carolina Press, 1969.

Cases and Statutes Cited

Calder v. Bull, 3 U.S. 386 (1798)

See also Calder v. Bull, 3 U.S. 386 (1798); *Constitution of 1787*; *Declaration of Independence*; *Locke, John*; *Ninth Amendment*; *Roe v. Wade*, 410 U.S. 113 (1973); *Substantive Due Process*; *Warren Court*

NEAR v. MINNESOTA, 283 U.S. 697 (1931)

Freedom of the press is not absolute; for example, the possibility of being sued for the tort of defamation makes a newspaper careful not to something that a plaintiff might consider to constitute libel. Whether a plaintiff can prevent something defamatory from being published, in advance of its publication—the notion of prior restraint—is an issue that predates the Constitution.

A Minnesota statute provided that anyone engaged in the publication of a “malicious, scandalous and defamatory newspaper” was guilty of nuisance, and allowed either a county attorney or an aggrieved private citizen to seek an injunction to prevent publication of such material.

Near, the owner of a newspaper in Minneapolis, published a series of articles and editorials in which he claimed that Jewish gangsters were in control of the city. The articles charged that the mayor, chief of police, county attorney, and several other officials were either derelict in their law enforcement duties or were taking bribes from this gangster. The officials sought an injunction to prohibit further publication of material of this type.

The Supreme Court agreed that the material was scandalous and defamatory. However, the prior restraint of publication was the type of censorship that had been prohibited in England long before the American Revolution, and the Framers of the First Amendment certainly intended to preserve that freedom.

The Court said that prior restraint might be allowed in cases of national security, citing *Schenck v. United States* (1919), or to prevent the publication of obscenity. Here, however, the plaintiffs’ sole remedy was an action for defamation, after the fact.

ELI C. BORTMAN

Cases and Statutes Cited

Mason’s Minnesota Statutes, 1927, 10123-1 to 10123-3
Schenck v. United States, 249 U.S. 47 (1919)

See also Blackstone and Common Law Prohibition on Prior Restraints; Defamation and Free Speech; National Security Prior Restraints; Obscenity; Prior Restraints

NEBBIA v. NEW YORK, 291 U.S. 502 (1934)

The New York legislature created the New York Milk Control Board in 1933, which decreed it unlawful for milk to be sold retail at less than nine cents per quart. Leo Nebbia owned and operated a small grocery store in Rochester, New York, where he was convicted of a misdemeanor criminal violation for selling two bottles of milk at a lower price. The U.S. Supreme Court affirmed the conviction on appeal from the New York Court of Appeals. The majority held that New York’s price fixing scheme did not abridge Nebbia’s right to due process or equal protection under the Fourteenth Amendment, with four justices dissenting.

The case held that a state’s police power permitted it to regulate and fix prices where the state deemed that a public interest in the long-term stability of milk prices outweighed the private rights of consumers and business owners to be free of state interference in trade. The Court rested its holding on the principle that a

state is free to adopt whatever economic policy may be reasonably deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislature, to override it.

Although this principle of judicial restraint was viewed as a significant departure from substantive due process precedent by the dissenting justices, it is

now viewed as a precursor of decisions upholding key elements of the New Deal. *Nebbia* remains the archetype of contemporary constitutional adjudication with respect to economic liberties.

LAWRENCE G. SALZMAN

See also **Economic Regulation; Economic Rights in the Constitution; Substantive Due Process**

NEBRASKA PRESS ASSOCIATION v. STUART, 427 U.S. 539 (1976)

Although decided over twenty-five years ago, one of the most important cases for resolving the conflict between free press and fair trial remains *Nebraska Press Association v. Stuart*.

A young man was arrested for the brutal killing of six members of one family in their home in Sutherland, Nebraska, a small town of about 850 people. News of the crime attracted widespread publicity, and the lower court issued an order prohibiting the press from reporting certain information about the defendant and the crime until the jury was impaneled.

In *Nebraska Press Association v. Stuart*, the Supreme Court considered whether it violated the First Amendment for a court to issue an injunction against the press to stop pretrial reporting. The Court unanimously struck down this restraint on the press. The majority noted that prior restraints are presumptively invalid under the First Amendment. To overcome this presumption, those seeking the restraint must prove (1) that the publicity generated in the absence of such an order would be so prejudicial that the defendant could not receive a fair trial, (2) that there are no alternative measures to mitigate the effect of the publicity, and (3) that the prior restraint would be effective in ensuring a fair trial. According to the majority, the restraining order here failed because none of these elements were satisfied.

The Nebraska Press standard has proven virtually impossible to satisfy. Questions remain, moreover, about the application of the test, and whether gag orders on trial participants, rather than the press, are a constitutionally acceptable way of reconciling the conflict between freedom of the press and the right to a fair trial.

MARCY STRAUSS

NEUTRAL REPORTAGE DOCTRINE

Unless a defendant who defamed another came with in a common law privilege, the defendant could not escape liability by claiming that the defamation was

newsworthy. Furthermore, the person repeating a defamation originating with another could also be liable for defamation. To protect those who reported governmental activities, the common law created a qualified privilege as long as they provided a fair and accurate report or summary of executive, legislative, or judicial proceedings and were not solely motivated by malice. An absolute privilege already protected these public officials for what they said and wrote in the course of their duties.

With the rise of mass media some advocates sought to expand the privilege beyond the reporting of governmental proceedings to any newsworthy item. The U.S. Court of Appeals for the Second Circuit in *Edwards v. National Audubon Society* (1977) adopted this expanded “neutral reportage privilege.” The Second Circuit held that when a responsible organization makes serious charges against a public figure, the First Amendment protects the neutral reporting of those charges even if the reporter has serious doubts about their truth.

The Supreme Court has not adopted neutral reportage and most jurisdictions do not use the doctrine. Those courts rejecting it have noted that it contradicts Supreme Court decisions and that the media are already amply protected against defamation lawsuits. Uncertainty exists as to whether the doctrine extends to the defamation of private persons, how far a reporter can go in acting maliciously, or who decides what is newsworthy.

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References and Further Reading

- Dobbs, Dan B. *The Law of Torts*. St. Paul, MN: West Group, 2000.
- Polelle, Michael J., and Bruce L. Ottley. *Illinois Tort Law*. 3rd ed. Newark, NJ: LexisNexis Publishing, 2003.
- Sanford, Bruce W. *Libel and Privacy*. New York: Law & Business/Harcourt Brace Jovanovich, 1985.

Cases and Statutes Cited

- Edwards v. National Audubon Society*, 556 F.2d 113, 120 (2d Cir.), cert. denied, 434 U.S. 1002 (1977)

NEW DEAL AND CIVIL LIBERTIES

Although in power for more than twelve years, the administration of Franklin D. Roosevelt had little concern for civil liberties per se, nor did it have much interest in civil rights. Economic recovery constituted the chief item on the agenda of the New Deal from March 1933 until September 1939, and after that preparation for and winning a world war shoved all

other issues to the side. While the Roosevelt administration's record does not compare badly to Wilson's heavy-handed assault on dissent, it still left much to be desired. The fact that attorneys general like Francis Biddle, Frank Murphy, and Robert Jackson did care about civil liberties no doubt ensured that at least some attention would be paid to the matter.

During the prewar years, labor appeared to be the chief beneficiary of the New Deal. As late as 1934, the American Civil Liberties Union (ACLU) noted pessimistically that "alarms are widely expressed over alleged dictatorship by the President, the abrogation of States' rights and the vast economic power of the federal government." By 1936, however, the ACLU recognized that the government had done a complete turnabout; the greatest threat to liberty came not from the government, but from "the resort to force and violence by employers, vigilantes, mobs, troops, private gunmen, and compliant sheriffs and police."

The change in the Roosevelt administration's attitude resulted from its disillusionment with the actions by business owners and managers during the first New Deal. Management had been willing enough to take the benefits offered by the government, but it had not kept its part of the bargain in regard to labor. The second New Deal, with its commitment to labor through the Wagner Act and the National Labor Relations Board, scrutinized far more critically the gross violations of civil liberties that workers suffered at the hands of anti-union management, often aided by state and local authorities.

In early 1936, a Senate subcommittee chaired by Robert M. LaFollette, Jr., of Wisconsin, began to investigate charges that workers' rights, especially free speech and assembly, had been violated. The LaFollette committee detailed the lengths to which management had gone to crush labor, including the use of private armies, spies, intimidation, and agents provocateurs, as well as the involvement of corrupt local officials. Following the violence of the Little Steel strike of 1937, the committee publicized how employers had continuously flouted the Wagner Act, broken the laws, and disregarded civil liberties. These practices, of course, had been employed for nearly a half-century, ever since workers had seriously begun organizing into unions. But now, for the first time, workers could look past hostile bosses and uncaring local officials to the federal government for help; the Wagner Act put the law on their side. Moreover, the Depression had led to a loss of faith in business, so that the public now viewed with suspicion management's claims that radicals and subversives caused labor strife.

Much of the civil liberties agitation in the mid- and late 1930s resulted from efforts by American workers

to organize and bargain collectively. Unlike previous periods of labor unrest, however, workers now had potent allies. The national government, especially the Department of Labor and the Labor Relations Board, actively supported organized labor, as did much of the Democratic majority in Congress. The Roosevelt appointees to the Court fully sympathized with labor goals, unlike the anti-union justices of the Taft years. Labor in particular and civil liberties in general also received strong support from academics and from younger lawyers who had imbibed the attitudes of the "realists" or the civil liberties views of such influential law teachers as Ernst Freund, Felix Frankfurter, and especially Zechariah Chafee, Jr.

Civil libertarians, remembering the Wilson administration's attacks on speech and press and the Palmer campaign against aliens, dreaded the prospect of American involvement in another war. The fact that war required some limits on individual rights could hardly be denied, although opinions varied widely on where to draw the line. Many people wanted to shut down the activities of American fascist groups, and the administration did investigate, harass, and suppress the speech of pro-Nazi speakers. As historian Richard Steele noted, "[T]he dozens victimized for their utterances and associations during World War II did not approach the thousands prosecuted for sedition during World War I." But the memory of the excesses of the earlier war remained vivid in the minds of Justice Department officials, and for the most part they refused to prosecute all but the most pro-Nazi groups.

The example of the European dictatorships provided a salutary warning of what should not be allowed to happen here. Despite the Dies Committee's calls to act against dissidents, the president's public promise to sustain free speech and press, the definite civil liberties commitment of Attorney General Francis Biddle, and the absence (except on the West Coast) of the anti-alien hysteria that had swept the country in 1917–1918 all contributed to sustaining a relatively healthy civil liberties climate during the war.

Since many of the worst abuses during World War I had resulted from prosecutions of alleged subversives under state criminal laws, the Roosevelt administration moved quickly to assert sole federal control over internal security, mainly through the Alien Registration Act of 1940. At the 1940 Governors' Conference, the states acceded to the administration's request that all enforcement of internal security essentially be left in the hands of the federal government. A few months later the Supreme Court confirmed federal supremacy in *Hines v. Davidowitz* (1941). The Court overturned a Pennsylvania alien registration law on the grounds that the federal statute had

preempted the field. Attorney General Biddle promoted a policy of cooperation between federal and state law enforcement agencies, but he made it clear that the states should leave alien control, sedition, and other security—related matters to the national government.

The Justice Department did, however, try to control the activities of naturalized citizens of German and Italian origin who had manifested either disloyal or merely dissident behavior. The government sought to revoke their citizenship on the grounds that current disloyal behavior proved they had secured citizenship either illegally or under false pretenses. Within a year of American entry into the war, the Justice Department had initiated over two thousand investigations, and had secured the denaturalization of forty—two people.

As it turned out, the case testing this campaign, *Schneiderman v. United States* (1943), involved neither a Nazi nor a fascist sympathizer, but a communist; the government based its case on the claim that his Communist Party membership proved that the defendant did not have the “true faith and allegiance to the United States” that citizenship demanded. Wendell Willkie, the 1940 Republican candidate for President, represented Schneiderman and eloquently pleaded with the Court not to establish the principle that a person could be punished for alleged adherence to abstract principles. Writing for a six-to-three majority, Justice Murphy rejected the government’s case. While naturalization constituted a privilege granted by Congress, once a person became a citizen he or she enjoyed all the rights guaranteed by the Constitution, especially freedom of thought and expression. Membership in the Communist Party had not been illegal at the time Schneiderman had taken out his papers, nor had it been established that current membership was “absolutely incompatible” with loyalty to the Constitution. In order to denaturalize a person, the government had to provide “clear, unequivocal and convincing evidence” of illegality or fraud, a burden that it had failed to carry.

The Court also proved cool to prosecutions arising under the old Espionage Act of 1917, with its laundry list of subversive activities apparently aimed as much at punishing deviant behavior as at catching spies or traitors. In *Hartzel v. United States* (1944), a five-to-four vote overturned the conviction of a man who had distributed racist literature vilifying Jews, Englishmen, and the president, and calling on the United States to form an alliance with Nazi Germany. Although the literature had reached the hands of Army officers, Justice Murphy ruled that the government had failed to prove that the petitioner had intended to subvert the war effort. Murphy insisted on a literal

application of the clear and present danger test, and despite the scurrilous nature of the material, he pointed out that Hartzel’s activities had posed no real danger. The Court’s insistence in this and other cases that the government show a clear and present danger, with clear, unequivocal and convincing evidence, for the most part discouraged the Justice Department from prosecuting persons merely for voicing unpopular or even noxious doctrines.

Despite the neutrality legislation, Roosevelt had not been altogether passive, and took steps to protect the internal security of the country. In the summer of 1936, the president met with J. Edgar Hoover, director of the Federal Bureau of Investigation (FBI), who told him that the government had no intelligence data on either communist or fascist activities in the country. Acting on the president’s orders, the FBI, in cooperation with the Department of State, began secretly collecting data on potential subversives. In the next few years, the government secured important information on the identities and activities of foreign agents, and made good use of those files when the nation later went to war.

Congress had similar concerns about subversion, but patriotic zealots there acted with little sense of restraint. In May 1938, the House created a special Committee on Un—American Activities under the chairmanship of Martin Dies of Texas. The highly partisan committee charged that the national government had been riddled with communists, fascists, radicals, and other dangerous persons whom only a thoroughgoing exposure would eliminate. Despite promises from Dies to observe fundamental procedural rights, the committee rode roughshod over civil liberties in its headlong rush to ferret out alleged radicals. It accomplished nothing in terms of identifying subversives, and like other witch hunts, it often smeared innocent people.

Roosevelt, disgusted with the Dies Committee from the start, took much of the wind out of its sails by openly authorizing the FBI to investigate the German—American Bund and other groups under the Foreign Agents Registration Act. Through executive order, he also gave the FBI official supervision of all espionage investigations. As the threat of war increased, congressional concern led to other action, some of it of dubious value. In 1939, Congress tacked on to the Hatch Act a provision prohibiting the employment of communists by the government. In March 1940, Congress updated the 1917 Espionage Act by adding penalties for peacetime violations. In June, an Alien Registration Act aimed primarily at communists included a section allowing the Justice Department to prosecute not only those actually conspiring to overthrow the government, but also anyone

who advocated or conspired to advocate its overthrow. Although the government registered and fingerprinted 5 million aliens, it did so courteously and sympathetically. The two attorneys general responsible for alien registration, Robert Jackson and Francis Biddle, tried not to offend the rights and sensibilities of these persons, the large majority of whom proved completely loyal to the nation.

The worst civil liberties violation resulted from the forced relocation of 110,000 men, women, and children of Japanese origin from the West Coast. The relocation program constituted the most serious invasion of individual rights by the federal government in the history of the country. The entire operation proceeded on racist assumptions and brought forth such astounding statements as that of Congressman Leland Ford of California that “a patriotic native-born Japanese, if he wants to make his contribution, will submit himself to a concentration camp.” Despite the absence of even a shred of evidence of disloyalty, the entire Japanese—American population—including native-born citizens—stood condemned, because, as General DeWitt so eloquently put it, “A Jap is a Jap.” In a series of heavily criticized decisions, the Supreme Court approved the program.

In contrast to the treatment of Japanese on the West Coast, it is instructive to see what happened to Italians on the East Coast. After Mussolini’s declaration of war against the United States in December 1941, some 600,000 Italians—more than 10 percent of the entire Italian-American community—remained Italian citizens and were automatically labeled as “enemy aliens.” But the Roosevelt administration had been actively cultivating Italian voters, and the president instructed Attorney General Biddle to cancel that designation. The announcement was made to a cheering 1942 Columbus Day crowd in Carnegie Hall, New York, just weeks before the congressional elections.

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References and Further Reading

- Auerbach, Jerold S. *Labor and Liberty: The La Follette Committee and the New Deal*. Indianapolis: Bobbs-Merrill, 1966.
- Corwin, Edward S. *Total War and the Constitution*. New York: Knopf, 1947.
- Irons, Peter. *Justice at War*. New York: Oxford University Press, 1983.
- Steele, Richard W. *Free Speech in the Good War*. New York: St. Martin’s Press, 1999.
- Tomlins, Christopher L. *The State and the Unions: Labor Relations, Law, and the Organized Labor Movement in America, 1880–1960*. New York: Cambridge University Press, 1985.

Cases and Statutes Cited

- Hartzel v. United States*, 322 U.S. 680 (1944)
- Hines v. Davidowitz*, 312 U.S. 52 (1941)
- Schneiderman v. United States*, 320 U.S. 118, 165 (1943) (Rutledge, J., concurring)

NEW HAMPSHIRE CONSTITUTION OF 1784

The history of early constitution making in New Hampshire was marked by popular mistrust of political authority. The interim constitution of January 5, 1776, which established a two-house legislature (without an executive) for the duration of the conflict with Great Britain, was vigorously opposed within the colony. Initially condemned by some in Portsmouth as an unnecessary and impertinent statement of independence, the 1776 constitution was also rejected by the western inhabitants of the New Hampshire Grants, who objected to its eastern-centric apportionment of representation.

In 1778, 1781, and 1782, the New Hampshire Assembly presented drafts of permanent constitutions to the state’s town meetings, each time falling short of popular expectations. It was not until October 31, 1783 that the assembly proposed a plan for government that received the majority assent needed for ratification. Formally accepted in June, the New Hampshire Constitution of 1784 opened with a “bill of rights.”

John Locke, whose philosophy deeply informed early American understandings of government and liberty, had argued people had originally existed in a state of nature and were endowed by Providence with certain natural rights. When, in order to serve the common good and secure their liberties, individuals formed and consented to governments, they necessarily agreed to surrender a portion of their autonomy. Nonetheless, their most basic rights remained inalienable according to Locke. Like many in revolutionary America, New Hampshire freeholders were not satisfied by constitutional recognitions of the people’s sovereignty, which only implicitly assured the protection of personal liberty.

In accordance with the Whig conception of power as ever encroaching upon liberty, it was imperative to the New Hampshire town meetings that their constitution contained an explicit enumeration of “first principles,” provisions that would secure the natural rights of its consenting citizens. Perhaps chief among these were the security of private property and freedom of religion. The prohibition of unreasonable searches and seizures and the firewall against an established church that the 1784 New Hampshire

bill of rights set up suggest the primacy of these principles. Nonetheless, trial by jury, freedom of the press, freedom of speech (in the legislature), and the right of citizens to assemble and petition their representatives were also expressly safeguarded in the document.

Due to the dissent of its fastidious property-holding populace, New Hampshire did not form a permanent constitution until after the Revolutionary War had been won. The Constitutional Convention would not meet in Philadelphia until 1787, however, and the centrality of the federal Bill of Rights to the ratification of the Constitution of the United States was presaged in the history of constitution making in New Hampshire.

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References and Further Reading

- Vexler, Robert I., ed. *Chronology and Documentary Handbook of the State of New Hampshire*. Dobbs Ferry, NY: Oceana Publications, 1978.
- Wood, Gordon S. *The Creation of the American Republic, 1776–1787*. Chapel Hill: University of North Carolina Press, 1998 [1968].

NEW JERSEY v. T.L.O., 469 U.S. 325 (1985)

In *New Jersey v. T.L.O.*, the Supreme Court held that the assistant vice principal's search of a student's purse in his office did not violate the Fourth Amendment. The Court held that the amendment's prohibition on unreasonable searches and seizures applies to searches conducted by public school officials, but that school officials need not obtain a warrant before searching a student who is under their authority.

T.L.O. held that the legality of a school official's search of a student depends not on probable cause, but "simply on the reasonableness, under all the circumstances, of the search." Reasonableness, in turn, depends on a two-part inquiry: Was the search "justified at its inception," and was the search as actually conducted "reasonably related in scope to the circumstances which justified the interference in the first place"? Ordinarily a search of a student by a teacher or other school official is justified at its inception when "there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school." The search is permissible in scope when "the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction."

T.L.O. determined only students' Fourth Amendment rights. As the Pennsylvania Supreme Court later held in *In re F.B.* (1999), a search valid under the amendment might violate state constitutional guarantees.

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References and Further Reading

- Abrams, Douglas E., and Sarah H. Ramsey. *Children and the Law—Doctrine, Policy and Practice*. 2nd ed. St. Paul, MN: Thomson West, 2003.
- Davis, Samuel M. *Rights of Juveniles: The Juvenile Justice System*. 2nd ed. St. Paul, MN: Thomson/West, 2005.
- LaFave, Wayne R., Jerold H. Israel, and Nancy J. King. *Criminal Procedure*. 4th ed. St. Paul, MN: Thomson/West, 2004.

Cases and Statutes Cited

In re F.B., 726 A.2d 361 (Pa. 1999)

See also *In re Gault*, 387 U.S. 1 (1967); Search (General Definition); Search Warrants

NEW RIGHT

The New Right designates, first, a political grassroots movement that moved to the right of the political spectrum sometime in the 1960s, and culminated in the elections of Ronald Reagan and Margaret Thatcher. The term refers, second, to an intellectual movement that provided support for the policies enacted by new majorities disenchanted with the welfare state.

The New Right has a classic liberal (or libertarian) strand. This is shown by its endorsement of private property rights and freedom of contract against government regulation. The libertarian critique of the welfare state is central to the New Right, and in the realm of constitutional law it is reflected in the New Right's occasional attempts to vindicate *Lochner v. New York* (1905). (This case is prized by the New Right for its protection of freedom of contract, not necessarily as an example of judicial activism, which the New Right rejects.) However, the New Right has a conservative strand as well. Promoting personal responsibility is the New Right's response to welfare policies, and promoting moral values is the New Right's response to left-leaning social policies that, it thinks, have caused social ills such as family disintegration.

The New Right also tends to endorse *originalism*, the view that courts should respect the original intent of the framers of the Constitution and not infer rights or powers not expressly recognized in the

constitutional text. This view is more conservative than libertarian, because it recommends judicial restraint and discourages judicial innovation.

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References and Further Reading

- King, Desmond S. *The New Right: Politics, Markets, and Citizenship*. London: MacMillan, 1987.
- Kymlicka, Will. *Contemporary Political Philosophy*. 2nd ed. Oxford: Oxford University Press, 2002.
- Scalia, Antonin. *A Matter of Interpretation—Federal Courts and the Law: An Essay*. Princeton, NJ: Princeton University Press, 1997.
- Schwartz, Bernard. *The New Right and the Constitution*. Boston: Northeastern University Press, 1987.

Cases and Statutes Cited

Lochner v. New York, 198 U.S. 45 (1905)

NEW YORK EX REL. BRYANT v. ZIMMERMAN, 278 U.S. 63 (1928)

General principles governing freedom of association in the United States are implied from express guarantees of free speech and assembly, and rights to petition the government for redress of grievances that are found in the First Amendment. Vigorous discussion of the nature and scope of those principles was prompted by Justice Brandeis's rejection of the majority's reasoning in *Whitney v. California* (1927).

In *Bryant*, decided one year later, members of the Ku Klux Klan challenged the constitutionality of a New York statute requiring all oath-bound organizations exceeding twenty members to annually register a list of officers and roster of members with the secretary of state. The Klan resisted the mandate to provide a list of its rank-and-file members. The New York Court of Appeals upheld the law as a valid regulation finding that "the legislature may take notice of the potentiality of evil in secret societies and may regulate them reasonably." The U.S. Supreme Court affirmed, finding that there was a "manifest tendency to make the secrecy surrounding its purposes and membership a cloak for acts and conduct inimical to personal rights in public welfare..."

Thirty years later, in *NAACP v. Alabama ex rel. Patterson* (1958), state officials also demanded an organization's membership list. Procedurally, both cases came before the Court upon challenge to a state government's demand for a complete list of the organization's members. In *NAACP*, the Court

affirmed its earlier recognition of a state's interest in remaining generally apprised of group activities within its jurisdiction. However, the Court was careful to distinguish the relevant facts surrounding the two cases. Accordingly, those distinctions produced entirely different outcomes. The line drawn by the Court establishes the government's obligation to maintain public confidence in the unbiased performance of official duties while exercising state police powers, particularly in the areas of public safety and law enforcement.

These landmark cases dealt with membership lists as they related to a state government's attempts at regulation and involvement with Klan activity, respectively. The Court in *Bryant* noted that the New York legislature had uncontroverted evidence that:

The Klan exacted of its members an oath to shield and preserve white supremacy ... [declaring] any person actively imposing its principles to be a dangerous ingredient in the body politic ... and an enemy to the weal of our national commonwealth; that it was conducting a crusade against Catholics, Jews and Negroes and stimulating hurtful religious and race prejudices, that it was striving for political power and assuming a sort of guardianship over the administration of local, state and national affairs and that at times it was taking into its own hands the punishment, of what some of its members conceived to be crimes.

Justice Harlan, writing for a unanimous Court in *NAACP v. Alabama*, took judicial notice of the need to protect members of the plaintiffs' civil rights organization. The Court denied Alabama's authority to compel production of the names and address of the NAACP's members, based on a finding that its production order was the result of a government conspiracy with private actors, such as the Klan, to violate the plaintiffs' civil and human rights.

The *Bryant* Court declared, and the Court in *NAACP* confirmed, that the right of membership in an association, like most other personal rights must yield to the rightful exertion of police power: "There can be no doubt that under that power, the state may prescribe any reasonable regulation calculated to confine [an organization's] purposes and activities within limits which are consistent with the rights of others and the public welfare."

ROBIN D. BARNES

Cases and Statutes Cited

NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958)

Whitney v. California, 274 U.S. 357 (1927)

NEW YORK TIMES CO. v. SULLIVAN, 376 U.S. 254 (1964)

L.B. Sullivan, a Montgomery, Alabama city commissioner, sued the *New York Times*, claiming that he had been libeled by statements contained in an advertisement that appeared in the March 29, 1960 issue of the *Times*. The advertisement, which appealed for funds to support the civil rights movement, said that “thousands of Southern Negro students” were engaged in “non-violent demonstrations in positive affirmation of the right to live in human dignity as guaranteed by the U.S. Constitution” but were encountering a “wave of terror” from “those who would deny ... that document.” Several paragraphs described the “wave of terror”; two of these paragraphs referred to actions taken by the police in Montgomery, Alabama, and they formed the basis of Sullivan’s complaint. He claimed that since he was the city commissioner who supervised the Montgomery Police Department, references to actions taken by the police accused him of contributing to the alleged “wave of terror.”

Sullivan’s case went to trial; the jury found for Sullivan, awarding him \$500,000 in damages. The *New York Times* appealed to the Alabama Supreme Court, which upheld the verdict, and then to the U.S. Supreme Court. The issue before the Court was whether the law applied by the trial court violated the First Amendment. Under Alabama law, a publication was libelous per se if the words used tended to injure someone “in his reputation”; if the person was a public official like Sullivan, this standard was met if the words were such as to injure him “in his public office.” The jury had to find that the words at issue concerned Sullivan, but since he was a public official his position justified their finding that his reputation was damaged by statements reflecting on the agency he directed, that is, the Montgomery Police. Once Sullivan established libel per se, the *Times*’s only defense was to persuade the jury that the statements in the advertisement were “true in all their particulars,” which was not the case.

The Supreme Court held that Alabama’s law violated the First Amendment:

The constitutional guarantees require ... a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with “actual malice”—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

In arriving at this result, the Court noted the nation’s “profound commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,” and found that criticism of

public officials is an essential part of this commitment, even when the criticism contains factual error. It explained that a rule compelling critics of official conduct to guarantee the truth of all their assertions “on pain of libel judgments virtually unlimited in amount” would lead to “self-censorship” that would inhibit public debate on essential issues.

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References and Further Reading

Rosenberg, Norman L. *Protecting the Best Men: An Interpretative History of the Law of Libel*. Chapel Hill: University of North Carolina Press, 1986.
Rothenberg, Elliot C. *The Taming of the Press*. Westport, CT: Praeger, 1999.

Cases and Statutes Cited

New York Times Co. v. Sullivan, 273 Ala. 656, 144 So.2d 25 (Alabama Supreme Court 1962), reversed by *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)

See also **Bill of Rights: Structure; Content-Based Regulation of Speech; Content-Neutral Regulation of Speech; Freedom of Speech and Press: Nineteenth Century; Freedom of Speech and Press under the Constitution: Early History (1791–1917); Freedom of Speech: Modern Period (1917–Present); Freedom of the Press: Modern Period (1917–Present); Philosophy and Theory of Freedom of Expression; Self-Fulfillment Theory of Free Speech; State Courts; Theories of Free Speech Protection**

NEW YORK TIMES CO. v. UNITED STATES, 403 U.S. 713 (1971)

Factual Background

In June 1967, Secretary of Defense Robert McNamara had Department of Defense staff undertake a study of the history of the American involvement in Vietnam. The study, universally known as “The Pentagon Papers,” was essentially complete by January 1969 and contained 7,000 pages of historical studies and documents spread over forty-seven volumes. It was classified “top secret-sensitive” and only fifteen copies were made; two ended up at the RAND Corporation.

In late 1969, Daniel Ellsberg—a former Marine, Defense Department employee, and RAND employee—and Anthony Russo surreptitiously copied the entire report. In March 1971, Ellsberg provided a copy to *New York Times* reporter Neil Sheehan. After protracted internal debate, the *Times* began to print excerpts in the newspaper for Sunday, June 13. By Thursday, Ellsberg had provided some 4,000 pages of the papers to the *Washington Post*, which started to run excerpts on Friday, June 18, and other newspapers followed suit.

Initially, President Nixon saw the publication as more useful politically, given its unflattering portrait of prior administrations, than harmful to national security. However, nudged by Henry Kissinger and Assistant Attorney General Robert Mardian, Nixon soon decided to seek a judicial injunction against further publication by the *Times*.

Legal Background

To prohibit publication of truthful, politically salient information raises obvious concerns under the First Amendment, particularly if the prohibition is a prior restraint, *preventing* communication rather than penalizing it after the fact. In an understanding usually traced back to Blackstone, prior restraints are seen as antithetical to principles of free speech. In *Near v. Minnesota* (1931), the Supreme Court had held unconstitutional a state court order enjoining publication of articles about corruption and incompetence in law enforcement. But *Near* observed that the prohibition on prior restraints is “not absolutely unlimited,” and does not apply in “exceptional cases” such as publication of the number and location of troops. The First Amendment question in the *Pentagon Papers Case* was whether the threat to national security rendered this one of the “exceptional cases.”

Another constitutional issue was also present. No statute authorized the executive to seek or the judiciary to grant the requested injunction. The newspapers’ lawyers argued that under separation of powers principles those branches lacked inherent authority to proceed without legislative authorization.

The Litigation

On Tuesday, June 15, the Justice Department obtained a temporary restraining order (TRO) against further publication by the *Times* from U.S. District Judge Murray Gurfein in Manhattan. On

Saturday, after a one-day trial, Gurfein denied a preliminary injunction because the evidence “did not convince” him that publication of “these historical documents would seriously breach the national security.” A Court of Appeals judge ordered that the TRO remain in place, however, and on June 22 the full Court of Appeals, voting five to three, ruled against the *Times*, remanding to Judge Gurfein to consider whether disclosure posed “such grave and immediate danger to the security of the United States as to warrant” an injunction.

On Friday, June 18, the government sought a TRO against the *Washington Post*. District Judge Gerhard Gesell denied the request, but within hours was reversed by a Court of Appeals panel. The following Monday, Gesell heard testimony and denied an injunction. Two days later the full Court of Appeals, voting seven to two, agreed that an injunction was not warranted.

The next day, Thursday, June 24, the *Times* and the government sought Supreme Court review of the New York and District of Columbia decisions, respectively. The Court granted review on Friday, consolidated the two cases, and heard oral argument on Saturday, a faster schedule than for any other case in its history. The Court released its decision on Wednesday, June 30. The setting, the clash of powerful forces, the intersection of law and politics, and the Court’s stunning speed made this a case rivaled as drama only by *Bush v. Gore* (2000) two decades later.

The Supreme Court Opinions

The justices were badly splintered. A barebones three-paragraph per curiam opinion merely stated that the government had not met the “heavy burden” required to justify a prior restraint. Each justice wrote an opinion; none was joined by more than two other justices.

Justice Black’s opinion, joined by Justice Douglas, was rhetorically stirring and doctrinally straightforward. Commending the newspapers for fulfilling their essential role in a democratic society, he called the injunctions a “flagrant, indefensible, and continuing violation of the First Amendment.” Black’s opinion, his last as a Supreme Court justice (and what he is reported to have considered his most important First Amendment opinion), was typical of his absolutist approach to free speech cases: Prior restraints are per se impermissible. Justice Douglas, joined by Black, also asserted that prior restraints are always unconstitutional. Acknowledging that the disclosures in this instance “may have a serious impact,” he

stressed their importance to the political debate about the war and described “[s]ecrecy in government” as “fundamentally anti-democratic.”

Justice Brennan articulated a standard that left some small room for prior restraints. Speech can be prospectively enjoined only if it will “inevitably, directly, and immediately” produce an extraordinary harm. That extremely high standard had not been met here.

Justices Stewart and White, who joined each other’s opinions, also thought the necessary showing for a prior restraint had not been made, although they found the case much closer. Stewart thought primary responsibility for balancing the secrecy necessary for effective foreign policy against the need for a well-informed public lay with the executive itself. The judicial role was limited: absent a statute or regulations for the judiciary to enforce, courts could enjoin disclosure only on proof that “disclosure ... will surely result in direct, immediate, and irreparable damage to our Nation or its people.”

Justice White was confident that further disclosures “will do substantial damage to public interests” but joined the majority because a prior restraint requires a particularly heavy justification, Congress had not authorized such a remedy, and, given the “massive breakdown in security,” the value of an injunction was “doubtful at best.” White stressed, however, that the First Amendment would not bar criminal sanctions and even identified provisions of the U.S. Code under which a prosecution might be brought. (A later prosecution of Ellsberg and Russo was dismissed because of government misconduct.)

Only Justice Marshall focused on separation of powers issues rather than the First Amendment. He concluded that the courts were powerless because Congress had neither prohibited the challenged conduct nor authorized the executive to seek an injunction.

Chief Justice Burger, Justice Harlan, and Justice Blackmun wrote dissenting opinions; Harlan’s opinion was joined by his two colleagues. All three strongly objected to the haste with which the courts had ruled. They would have enjoined publication to allow full trials and deliberate review. Each voiced concern over the harm that would flow from publication, Blackmun doing so with particular forcefulness. Only Harlan (who, like Black, was writing the final opinion of his career) articulated a legal standard. Describing judicial review of executive decision making in foreign affairs as strictly limited, Harlan argued that if a relevant department head personally determines that disclosure of certain information would “irreparably impair the national security,” the courts must accept that determination. The judicial

role would be only to ensure that a foreign relations concern is present and that an authoritative determination has been made.

Impact

Assessments of the decision’s impact are mixed. Almost universally at the time, and in general since, the *Pentagon Papers Case* has been considered a major victory for press freedom. Yet this is in part the result of how it *looked* (and how the press, including the victorious litigants, portrayed it). The lack of consensus among the justices, the emptiness of the per curiam opinion, and the fact that three justices in the majority would probably have voted the other way had the case not involved a prior restraint and/or had Congress authorized an injunction, combine to limit the case’s doctrinal impact. Still, the rejection of Justice Harlan’s approach was enormously important, and the case stands out as one of the few instances in which the Supreme Court has *not* yielded to the government’s claim that a particular limitation on civil liberties was necessitated by concerns of national security. The opinions, the outcome, and the extraordinary speed with which the Court acted sent three influential messages: hostility to prior restraints, the need for independent judicial evaluation of the government’s claims of necessity, and the importance of the press to a functioning democracy.

The incident was of enormous historical importance. In direct and indirect ways it led to Watergate and so, ultimately, President Nixon’s resignation. Creation of the Special Investigations Unit known as the “The Plumbers” in July 1971 was a response to the leak of the papers, and one of its early undertakings was the September 1971 burglary of Ellsberg’s psychoanalyst’s office. Nixon’s preoccupation with leaks, hatred of the press, paranoia, and aggressive attacks on his political enemies—the attitudes and activities that led to his downfall—shifted from simmering to full blown with the *Pentagon Papers* fight.

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References and Further Reading

- Blanton, Thomas S., ed. *The Pentagon Papers: Secrets, Lies and Audiotapes*. National Security Archive Electronic Briefing Book Number 48. <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB48/>.
- Ellsberg, Daniel. *Secrets: A Memoir of Vietnam and the Pentagon Papers*. New York: Viking Press, 2002.
- Gora, Joel M., *The Pentagon Papers Case and the Path Not Taken: A Personal Memoir on the First Amendment and*

the Separation of Powers, Cardozo Law Review 19 (1998): 4:1311–32.

Henkin, Louis, *The Right to Know and the Duty to Withhold: The Case of the Pentagon Papers*, University of Pennsylvania Law Review 120 (1971): 2:271–80.

Rudenshtine, David. *The Day the Presses Stopped: A History of the Pentagon Papers Case*. Berkeley: University of California Press, 1996.

Ungar, Sanford J. *The Papers and The Papers: An Account of the Legal and Political Battle Over The Pentagon Papers*. New York: Columbia University Press, 1989.

Cases and Statutes Cited

Bush v. Gore, 531 U.S. 98 (2000)

Near v. Minnesota, 283 U.S. 697 (1931)

See also Absolutism and Free Speech; Access to Government Operations Information; Balancing Approach to Free Speech; *Bartnicki v. Vopper*, 532 U.S. 514 (2001); Classified Information; Freedom of the Press: Modern Period (1917–Present); *Haig v. Agee*, 453 U.S. 280 (1981); National Security and Freedom of Speech; National Security Prior Restraints; Philosophy and Theory of Freedom of Expression; Political Correctness and Free Speech; Self-Governance and Free Speech; *Snepp v. United States*, 444 U.S. 507 (1980); *United States v. The Progressive, Inc.*, 467 F. Supp. 990 (W.D. Wis. 1979)

NEW YORK v. BELTON, 453 U.S. 454 (1981)

In *New York v. Belton*, the Supreme Court examined the permissible scope of a search incident to arrest, particularly in the context of a vehicle search. The Court had previously developed the search incident to arrest rule primarily to address officer safety concerns and to minimize the potential for destruction of evidence.

Belton was a passenger in a vehicle stopped for speeding. The arresting officer suspected that the car was stolen and ordered all occupants out of the vehicle. He searched the passenger compartment, including a jacket belonging to Belton and discovered cocaine. The trial court found the search permissible under the Fourth Amendment and the Supreme Court affirmed. In a departure from *Chimel v. California* (1969), in which the Court had limited the permissible scope of a search incident to arrest to “the area within the immediate control of the arrestee,” the *Belton* Court emphasized the importance of establishing a “workable rule” that is readily applicable to police officers.

The Court determined that an officer may permissibly search the entire passenger compartment of a

vehicle, including any closed containers within it, following the arrest of a recent occupant of the vehicle. The Court established this bright-line rule where vehicles are concerned, even though the arrestee may be detained outside the car at the time and may pose no danger of accessing a firearm or other contraband from within the vehicle. In a noteworthy dissent, Justices Brennan and Marshall criticized the majority for abandoning the careful case-by-case analysis of *Chimel* and its progeny in favor of an “arbitrary ‘bright-line’ approach.”

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References and Further Reading

Lunney, Leslie A., *The (Inevitably Arbitrary) Placement of Bright Lines: Belton and Its Progeny*, Tulane Law Review 79 (2004): 365.

Mokovitz, Myron, *A Rule in Search of a Reason: An Empirical Reexamination of Chimel and Belton*, Wisconsin Law Review 2002 (2002): 657.

Shapiro, Eugene L., *New York v. Belton and State Constitutional Doctrine*, West Virginia Law Review 150 (2002): 131.

Terry v. Ohio, 392 U.S. 1 (1968).

United States v. Robinson, 414 U.S. 218 (1973).

Cases and Statutes Cited

Chimel v. California, 395 U.S. 752 (1969)

See also Arrest; Arrest without a Warrant; Automobile Searches; *Chimel v. California*, 395 U.S. 752 (1969); Exclusionary Rule; Search (General Definition); Seizures; *Terry v. Ohio*, 392 U.S. 1 (1968)

NEW YORK v. FERBER, 458 U.S. 747 (1982)

Policymakers’ concern over child pornography was negligible to nonexistent during the 1960s and early 1970s. The 1970 report of the Commission on Obscenity and Pornography, organized by President Lyndon Johnson in 1968, gave little attention to the issue. By 1982, however, nearly all of the states and the federal government had targeted the production or distribution of child pornography. Congress, for example, passed the Protection of Children from Sexual Exploitation Act in 1977 prohibiting anyone from employing or inducing a minor to participate in sexual conduct or in the making of pornography. However, the material had to be obscene under the *Miller v. California* (1973) rule. As a direct result of the Supreme Court’s ruling in *New York v. Ferber* (1982), in 1984, Congress removed the need to prove obscenity when it passed the Child Protection Act.

At the time of the *Ferber* decision, at least half of the forty-seven state laws banning the production of sexually explicit material involving juveniles or minors did not require proof of obscenity; twenty of the thirty-five states prohibiting the distribution of this material lacked this requirement. New York's law made it a criminal offense to distribute any material depicting sexual performances by minors under sixteen years of age, and listed examples of the proscribed sexual conduct. Like many other states, the law did not require that the depictions or portrayals be obscene. A jury convicted Ferber of two counts of violating this law after he sold police officers films showing young boys engaged in one of the proscribed behaviors. New York's high court, the Court of Appeals, reversed Ferber's conviction and struck down the law as underinclusive and overbroad, based on its interpretation of *Miller v. California*.

A unanimous Supreme Court reversed New York's high court, but the majority opinion attracted only five votes as Brennan, Marshall, Blackmun, and Stevens concurred only in the judgment. The concurring opinions expressed concerns that New York's law might be overbroad and that it and others like it, as interpreted by the majority opinion, could be applied to works of serious value involving children.

This was the first time that the Supreme Court confronted the issue of child pornography. In conference, Burger noted that traditional obscenity statutes, prohibiting the manufacture, distribution, or in some instances possession of obscene material by adults, did not apply to the persons performing sexual acts. He voted to reverse but the conference split four to four with White passing. White later decided to reverse and was assigned the opinion by Burger.

The Court held that visual depictions of live sexual performances by minors are unprotected by the First Amendment. According to White, states are entitled to "greater leeway" when regulating pornography involving the participation of minors or juveniles, and provides several reasons for why states have compelling interests in these regulations. One is the well-being of minors and the prevention of their exploitation and abuse. The distribution of child pornography, which "is intrinsically related to the sexual abuse of children," creates economic incentives that encourage this abuse; "severe" criminal penalties, he claims, are needed to "dry up the market." The social value of live performances or photographic reproductions of children engaged in lewd sexual behavior, moreover, is "exceedingly modest, if not *de minimus*." Finally, placing child pornography outside the ambit of the First Amendment's protections because of the "content" of the performance is not inconsistent with earlier Court decisions. Content-based classifications

are not rare and may be particularly appropriate when "the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake."

It follows, then, that sexually explicit material involving minors requires adjustments in the *Miller* test. First, the trier of fact need not find that the material appeals to the prurient interest of an average person; second, the material need not depict sexual conduct in a patently offensive way; and third, the material in question does not have to be considered as a whole. White's opinion, therefore, ratifies the absence in New York's law of the need to establish "obscenity" as defined by *Miller*. Moreover, nonobscene performances, actual or simulated, as well as depictions of nonobscene sexual conduct involving minors could be banned or prohibited. To limit the reach of this ruling, White stipulates that the kind of conduct states may seek to regulate must be "adequately defined" by the law and confined to performances or depictions of these sexual conducts by children under a specific age.

New laws regarding child pornography soon appeared on the books. In 1985, Congress, recognizing the emerging role of computers as a means of distributing and transmitting child pornography, passed the Computer Pornography and Child Exploitation Act. A further political push came in 1986, when President Ronald Reagan's attorney general, Edwin Meese, released the report of his Commission on Pornography. The Commission gave the issue of child pornography considerably more attention than the 1970 Commission and urged vigorous law enforcement to clamp down on the market for this kind of sexually explicit material.

In 1988, Congress responded with the Child Protection and Obscenity Enforcement Act, which prohibited the use of children in the production of pornographic works. This act also barred the distribution of any obscene material through cable or subscription television regardless of whether minors were involved in it or not. Congress has remained active in this area. For instance, the Child Pornography Prevention Act of 1996 made it illegal to distribute or receive child pornography, including virtual child pornography, by any means, although in *Ashcroft v. American Civil Liberties* (2002), the Supreme Court struck down provisions of the law that banned virtual child pornography.

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References and Further Reading

- Fraleigh, Douglas. "Reno v. ACLU." In *Free Speech on Trial*, edited by Richard A. Parker, 298–312. Tuscaloosa: University of Alabama Press, 2003.
- Jenkins, Philip. *Beyond Tolerance: Child Pornography on the Internet*. New York: New York University Press, 2003.

Kende, Mark S. "The Supreme Court's Approach to the First Amendment in Cyberspace: Free Speech as Technology's Hand-Maiden." *Constitutional Commentary* 14, no. 3 (1997): 465–80.

Cases and Statutes Cited

Ashcroft v. American Civil Liberties, 535 U.S. 564 (2002)
Miller v. California, 413 U.S. 15 (1973)
New York v. Ferber, 438 U.S. 747 (1982)

NEW YORK v. QUARLES, 467 U.S. 649 (1984)

After a woman told officers that she had been raped and that the perpetrator had run into a store carrying a gun, a police officer chased and caught Quarles, the defendant. When he frisked him, the officer noticed that Quarles was wearing an empty gun holster, so after handcuffing him, he asked where the gun was. Quarles responded, "The gun is over there." The gun was recovered and Quarles was read his *Miranda* rights. The statement and the gun were excluded from evidence by the trial court as illegal fruits of that statement, which was affirmed by the appellate division of the New York Supreme Court and the New York Court of Appeals.

The lower courts based their decisions on the Supreme Court determination that in the course of making an arrest, the Fifth Amendment of the U.S. Constitution requires certain protections against compulsory self-incrimination to individuals who are interrogated by police. Because the nature of custodial interrogation is inherently coercive, the court in *Miranda v. Arizona* (1966) determined that prior to such interrogation a suspect must be warned of his rights. In the case of *New York v. Quarles*, the Supreme Court reversed the lower courts' decisions, finding a "public safety" exception to the *Miranda* requirement that warnings be read to a suspect before custodial interrogation. This exception allows police officers to act in exigent circumstances where there is a threat to the safety of the public while permitting admission of evidence gathered.

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References and Further Reading

Weisselberg, Charles, *Saving Miranda*, Cornell Law Review 84 (1998): 109.

Cases and Statutes Cited

Miranda v. Arizona, 384 U.S. 436 (1966)

See also **Coerced Confessions/Police Interrogations; Miranda Warning**

NEWSROOM SEARCHES

The Supreme Court has held that nothing in the Constitution prevents police from raiding newsrooms if they have a valid search warrant (see *Zurcher v. Stanford Daily* [1978]). The Court rejected arguments by major news organizations that such searches threaten freedom of the press. In dissent, Justice Stewart, joined by Justice Marshall, argued that the press clause of the First Amendment precluded such searches unless there is reason to believe the news organization would not produce the evidence in response to a valid subpoena. Justice Stevens argued that the Fourth Amendment precluded such searches not just of newsrooms, but of premises of all third parties not themselves suspected of crime, unless it was shown that a subpoena would be impractical. But the majority said that the Fourth Amendment applies no differently to third parties than to suspects, and argued that the usual requirement that search warrants be issued only by a magistrate after a showing of probable cause was sufficient to protect against any special dangers to the press arising from newsroom searches.

The decision caused consternation throughout the news industry. Editors and news directors feared that newsroom searches might become a vehicle for disruption and harassment by police and prosecutors. More importantly, they feared that searches would compromise their ability to protect the confidentiality of sources. Because the search warrant procedure provides no opportunity for an advance hearing, journalists argued that confidences could be breached before they have an opportunity to invoke the protections provided by shield statutes or the emerging First Amendment privilege to protect reporter's sources.

The media outcry over the *Zurcher* decision led Congress to limit newsroom searches by passing the Privacy Protection Act of 1980, 42 U.S.C., Section 2000aa. The statute forbids any official, federal or state, from searching for or seizing "material possessed by a person reasonably believed to have a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication...." There are some exceptions. The statute does not apply if the person in possession of the materials is a suspect in the offense to which the materials relate, or to evidence necessary to prevent death or serious injury. Materials other than work product may be seized to prevent the material from being destroyed, or if the possessor has failed to turn them over in obedience to a subpoena after exhausting all appeals.

A number of states also passed statutes restricting newsroom searches. These may limit searches by state

and local officials even more than the federal statute does. For example, the Texas statute forbids all newsroom searches except for weapons, drugs, or other contraband (see Texas Code Criminal Procedures, Section 18.02).

Since the passage of these statutes, newsrooms searches have been infrequent, and the organizations whose premises were searched have sometimes won lawsuits against the searchers (see, for example, *Steve Jackson Games, Inc. v. United States Secret Service* [W.D.Tex. 1993], *aff'd* 36 F.3d 457 [5th Cir. 1994]).

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References and Further Reading

Bayh, Birch, *Congressional Response to Zurcher v. Stanford Daily*, Indiana Law Review 13 (1980): 835.
Teeter, Dwight L., and S. Griffin Singer, *Search Warrants in Newsrooms*, Kentucky Law Journal 67 (1979): 847.

Cases and Statutes Cited

Steve Jackson Games, Inc. v. United States Secret Service, 816 F.Supp. 432 (W.D.Tex. 1993), *aff'd* 36 F.3d 457 (5th Cir. 1994)
Zurcher v. Stanford Daily, 436 U.S. 547 (1978)

9/11 AND THE WAR ON TERRORISM

After the September 11, 2001, attacks by al-Qaeda on the World Trade Center and the Pentagon, President George W. Bush announced a “war on terrorism”—a prolonged fight to disband terrorist cells throughout the world. The Bush administration’s principal weapon in this war has been the asserted exclusive and unreviewable constitutional right to summarily detain, interrogate, and eavesdrop on terrorist suspects, achieved mostly by executive order, military regulation, or other more informal methods.

Despite its express constitutional authority to share warmaking responsibilities with the president, Congress has generally been acquiescent toward the executive on these matters, as exhibited by its fall 2001 enactments of the Authorization for Use of Military Force (AUMF) and the USA Patriot Act. The AUMF enables the president to use “all necessary and appropriate force” against “nations, organizations or persons” that he believes had a role in 9/11, in order to thwart future acts of terrorism. The Patriot Act, which gives federal officials broad and increased authority to intercept communications and conduct surveillance, includes controversial provisions such as secret “sneak and peek” searches of an individual’s home for an indefinite time period; access without a warrant to medical, library, education, and

other records; and the ability to seize, using “national security letters,” a variety of business and financial records while imposing a gag order on recipients. These provisions, widely criticized as an abridgement of privacy and free speech, were drafted by the executive and passed with little consideration by Congress. While some of the most controversial Patriot Act provisions were to sunset on December 31, 2005, Congress agreed to a five-week extension of the Act while it considered legislation that, essentially, reauthorized the provisions with little change.

Primary among the administration’s tools in combating terrorism is the use of preventive detention, often holding individuals, including U.S. citizens, incommunicado, indefinitely, and without probable cause, in military prisons. The Bush administration has relied on presidential war powers to justify these detentions, claiming that these practices are unreviewable by courts.

For example, “enemy combatant” detentions have been used to hold individuals in military prisons incommunicado without any right to counsel or judicial review of status. The designation is unilaterally determined by the president, and because enemy combatants are not considered prisoners of war, they are, under the Bush administration doctrine, denied Geneva Convention rights. Special military commissions have been created by executive order to prosecute enemy combatants for war crimes, but the commission rulings evade civilian review, do not fully comply with courts martial procedures, and otherwise ignore due process norms.

The administration’s claim of unreviewable preventive detention authority has been limited by the Supreme Court. In *Rasul v. Bush* (2004), the Court ruled that alien detainees outside the geographic United States have access to federal courts to challenge their detention through habeas corpus petitions. In *Hamdi v. Rumsfeld* (2004), the Court held that Hamdi, a U.S. citizen captured during combat in Afghanistan and held incommunicado without counsel or process, has the right to counsel and to challenge his status through due process protections before a neutral fact finder.

Perhaps even more important than their holdings, were the Supreme Court’s statements in *Rasul* and *Hamdi*, most clearly articulated by Justice O’Connor, that “[a] state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens” and the Constitution “most assuredly envisions a role” for courts “when individual liberties are at stake.”

After *Rasul* and *Hamdi*, Combatant Status Review Tribunals (CSRTs) were established by the military attempting to encompass the due process requirements

established by those cases to ensure the lawfulness of enemy combatant detentions. In *In re Guantanamo Detainee Cases* (2005), one district court held that those CSRTs were so lacking in procedural fairness that they, too, abridged due process. As of this writing, that decision was on appeal.

Two more enemy combatant cases were pending in the Supreme Court as of this writing. In *Hamdan v. Rumsfeld* (D.C. Cir. 2005), the Court will consider the lawfulness of the executive's creation of the special military commissions to try enemy combatants. In *Padilla v. Hanft* (4th Cir. 2005), a certiorari petition is pending seeking further review of application of the enemy combatant standard to U.S. citizens arrested on U.S. soil.

Individuals have also been detained by the Bush administration indefinitely without probable cause through the use of material witness warrants to testify in terrorism-related grand jury proceedings. In *United States v. Awadallah* (2nd Cir. 2003), the Second Circuit reversed a lower court ruling, holding that these detentions violate the Fourth Amendment's prohibition against arrests without probable cause. Material witness warrants continue to be widely used to detain terror suspects indefinitely.

Serious allegations of torture have also arisen in the administration's detention policies. The atrocities at Abu Ghraib, detainee treatment at Guantanamo Bay, and the aggressive interrogation of prisoners held in secret Central Intelligence Agency "black sites," have raised serious concerns about the executive's violation of the antitorture convention and laws.

In response, legislation proposed by Senator John McCain (R-Ariz.) was passed as part of the 2006 Defense Authorization Bill, applying Geneva Convention standards prohibiting cruel, inhuman, or degrading treatment of detainees, although a further rider to that legislative proposal, the Graham-Levin-Kyl amendment, undercuts detainee ability to judicially challenge their treatment, and otherwise limits the kind of habeas jurisdiction recognized by the Supreme Court in *Rasul*.

A further assertion of exclusive and unreviewable executive authority in the war on terror derives from the president's assertion of the right without seeking judicial warrants to spy on U.S. citizen domestic communications made to locations abroad. Bipartisan congressional critics have claimed that this presidential surveillance flatly contradicts warrant requirements of the Foreign Intelligence Surveillance Act, which expressly provides that it is the exclusive method for conducting intelligence surveillance of U.S. citizens and that abridgement of that statute is subject to criminal sanctions.

Terrorism is concededly a serious threat. The surveillance and detention practices undertaken unilaterally by the President have, nevertheless, raised serious constitutional concerns. The courts and Congress have begun to find that some balance must exist between rights and security. The struggle to accommodate these seemingly conflicting goals remains an ongoing central issue of the war on terrorism.

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References and Further Reading

- Abrams, Norman. *Anti-Terrorism and Criminal Enforcement*. 2nd ed. St. Paul, MN: Thomson/West Publishing, 2005.
- Michaels, C. William. *No Greater Threat: America After September 11, and the Rise of a National Security State*. 2nd ed. New York: Algora Publishing, 2005.

Cases and Statutes Cited

- Authorization for Use of Military Force (AUMF), Pub. L. 107-40, Sections 1–2, 115 Stat. 224 (Sept. 18, 2001)
- Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention Against Torture), G.A. Res. 46, U.N. GAOR, 39th Sess., U.N. Doc. E/CN.4/1984/72, Annex (1984)
- Foreign Intelligence Surveillance Act, 50 U.S.C.S. Section 1801 (West 2003 and Supp. 2005)
- Geneva Convention Relative to the Treatment of Prisoners of War, 75 U.N.T.S. 135 (Aug. 12, 1949)
- Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005), *cert. granted* 163 L. Ed. 2d 504 (2005)
- Hamdi v. Rumsfeld*, 542 U.S. 507 (2004)
- In Re Guantanamo Detainee Cases*, 355 F.Supp. 2d 443 (D.D.C. 2005) *appeal docketed*, (D.C. Cir. 2005)
- Padilla v. Hanft*, 423 F.3d 386 (4th Cir. 2005) *petition for cert. filed*, 74 USLW 3275 (U.S. Oct. 25, 2005) (No. 05-533)
- Rasul v. Bush*, 542 U.S. 466 (2004)
- United States v. Awadallah*, 349 F.3d 42 (2nd Cir. 2003)
- Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA Patriot Act), Pub. L. No. 107-56, 115 Stat. 272 (Oct. 26, 2001)

See also Due Process; Extremist Groups and Civil Liberties; Grand Jury; Indefinite Detention; National Security; Preventive Detention

NINTH AMENDMENT

That the Constitution of the United States as originally adopted by the Philadelphia convention and submitted to Congress on September 17, 1787, contained no bill of rights is the starting point for considering the meaning of the Ninth Amendment. In his letter of December 20, 1787, to James Madison,

NINTH AMENDMENT

Thomas Jefferson objected that, “[A] bill of rights is what the people are entitled to against every government on earth, general or particular, and what no just government should refuse....” In his letter of October 17, 1788, to Thomas Jefferson, James Madison acknowledged that a “constitutional declaration of most essential rights” would probably have to be added. He wrote that his “own opinion had always been in favor of a bill of rights; provided that it be so framed as not to imply powers not meant to be included in the enumeration,” although he did express the reservation that “experience proves the inefficacy of a bill of rights on those occasions when its controul [sic] is most needed.” He added the skeptical view that “[r]epeated violations of these parchment barriers have been committed by overbearing majorities in every State.”

Indeed, on June 24, 1788, in the Virginia Convention called to consider the ratification of the new Constitution, Patrick Henry was prescient about Madison’s concerns for the implication of specific constitutional language contributing to incorrect inference. “What is the inference when you enumerate rights which you are to enjoy?” His answer was, “That those that are not enumerated are relinquished.” Alexander Hamilton also thought that a Bill of Rights might be dangerous. Hamilton argued in *Federalist* 84 that the specification of rights, “would contain various exceptions to powers not granted; and on this very account would afford a colorable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do?” One answer to these concerns can be found in the Ninth Amendment.

The Ninth Amendment (agreed to on September 27, 1789) contains a straightforward declaration: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” On August 17, 1789, Elbridge Gerry had said that the declaration ought to be “deny or impair,” rather than “deny or disparage,” because the word “disparage” had no plain meaning, but his revision was not adopted. Madison’s first proposal of this article (June 8, 1789) follows:

The exceptions here or elsewhere, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people; or as to enlarge the powers delegated by the constitution; but either as actual limitations on such powers, or as inserted merely for greater caution.

Each version contains the same kernel of meaning: the listing of rights in the Constitution does not mean that there are no others, although Madison’s first version goes further than the eventual provision.

The plain declaration of the Ninth Amendment, and also of Madison’s first proposed formulation of the provision, is consistent with Madison’s understanding of what sort of constitutional government was wanted. Prior to the creation of constitutional government, the people possessed the political power that they might choose to vest in government or retain unto themselves. Thus, by “ordaining and establishing” the Constitution, the people vested only the powers of the federal government that are listed in Article I, Section 8. To be sure, the necessary and proper clause in that section describes the occasion for certain implied powers, but only with reference to the powers previously delegated in Section 8. Indeed, the text of the Tenth Amendment carries forward a provision from the Articles of Confederation which confirms that “the powers not delegated to the United States or prohibited by it to the States are reserved to the States respectively or to the people,” but with the following important differences: (1) that the word “expressly” is not included as a limited on delegated powers, as confirmed in John Marshall’s opinion in *McCulloch v. Maryland* (1819); and (2) that the state “sovereignty” is not mentioned.

Just as powers flow from the people to the Constitution, the rights held by the people precede the Constitution, and the listing of rights in the Bill of Rights acknowledges their possession by the people, not the creation of them. That additional nonexpressed rights exist and are retained by the people is the declaration of the Ninth Amendment, and clearly this was consistent with the understanding of Madison and other proponents of a bill of rights, but discovering what rights are retained has been a persistent difficulty.

A leading law review article by law professor John Choon Yoo argues that the Ninth Amendment originally referred chiefly to the affirmative rights of the people to exercise their majoritarian rights through representative government. In part, he inferred this conclusion from the “mini-Ninth Amendments” that were added to state constitutions after the ratification of the federal Constitution. Indeed, even during the debates on ratification of the Constitution certain states, including Pennsylvania, Vermont, and Virginia proclaimed that the people had an inalienable right to reform, alter, or abolish the governments they previously had created. These inalienable rights are the essential rights of a sovereign people to create, alter, or abolish governments. Thus, the rights retained by the people as described in the Ninth Amendment were then seen chiefly as the collective rights of a popular majority, at least in Yoo’s analysis.

It was usually later that individual rights were invoked under the Ninth Amendment. For example, abolitionists argued that natural rights of all men

included the right of personal security, the right to personal liberty, and the right to own and enjoy property—hence slavery was a violation of fundamental natural rights protected by the Ninth Amendment. Yoo also argues that the reconstruction Congress intended through the Fourteenth Amendment to make another declaration of unenumerated rights by referring to the protection against state action of the privileges or immunities of citizens of the United States, which, according to its chief architect, Representative Charles Bingham, would also have made the first eight amendments of the Bill of Rights applicable to the states. The fundamental rights acknowledged by the Ninth Amendment were believed to include both natural and common law rights, such as Blackstone's enumeration of the rights to personal security, personal liberty, and to acquire and enjoy property.

As it later happened, the Ninth Amendment eventually came to be associated most clearly with the right of privacy, that is, the right to be left alone unless a government can demonstrate some compelling reason for interference. While the right of privacy has had several manifestations, the most difficult one has been the right to reproductive freedom, first with respect to contraception in *Griswold v. Connecticut* (1965), and then at its most controversial in the instance of *Roe v. Wade* (1973), involving a woman's right to terminate a pregnancy.

And the controversy about the rights retained protected by the Ninth Amendment continues still.

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References and Further Reading

- Abraham, Henry J., and Barbara A. Perry. *Freedom and the Court: Civil Rights and Liberties in the United States*. 8th ed. Lawrence: University Press of Kansas, 2003.
- Hamilton, Alexander. *The Federalist* (No. 84). New York: Cambridge University Press, 2003.
- Yoo, John Choon, *Our Declaratory Ninth Amendment*, Emory Law Journal 42 (1993): 967–1043.

Cases and Statutes Cited

- Griswold v. Connecticut*, 381 U.S. 479 (1965)
- McCulloch v. Maryland*, 17 U.S. 316 (1819)
- Roe v. Wade*, 410 U.S. 113 (1973)

NIX v. WILLIAMS, 467 U.S. 431, 104 (1984)

Historically, in applying the exclusionary evidence rule (which prohibits the prosecution from using evidence seized in violation of a defendant's constitutional

rights), the courts have also applied the “fruit of the poisonous tree” doctrine. This doctrine, which is also referred to as the “derivative evidence rule,” is discussed more fully under the entry entitled “Fruit of the Poisonous Tree” doctrine.

Nix v. Williams established the so-called “inevitable discovery” exception to the derivative evidence rule. This exception provides that, when the police engage in illegal conduct to obtain evidence, they are prohibited from using not only the principal evidence (that was the object of the illegal action), but any evidence derived from the unconstitutional conduct. Basically, if the police can demonstrate that they would have inevitably found the evidence sought to be excluded, then the derivative evidence rule should not apply. In other words, the evidence can be admitted to help determine defendant's guilt.

The *Nix* case provides not only the foundation for the inevitable discovery doctrine, but its classic illustration. In that case, a man with mental problems was accused of murdering a young girl. At the time of his apprehension, neither the girl nor her body had been found. While the police were transporting the suspect from one city to another, a police officer deliberately elicited a confession from the suspect in violation of his Sixth Amendment right to counsel. From the confession, the police learned the whereabouts of the body and subsequently took gruesome pictures that they sought to introduce at the suspect's trial. The suspect sought to exclude the evidence based on the derivative evidence rule. The court overruled the request, finding that a full-scale search was then being conducted for the body, which would have inevitably been found regardless of the illegality.

The difficulty in most inevitable discovery cases is in proving that the discovery was “inevitable” as opposed to merely “possible.” In *Nix*, the illegal police conduct (in that case, an illegally obtained confession) led the police to the body, thereby obviating the need for a further search. As a result, the Court could only speculate about whether the body would inevitably have been found had the illegal confession not been obtained. The Court found that the discovery was inevitable because the police had mapped out broad areas that included the place where the body was ultimately found, and were systematically searching the areas. As they finished one area, they proceeded to the next. The Court presumed that the search would have proceeded, as planned, and therefore that the body would have been found. As a result, the Court admitted the evidence.

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References and Further Reading

- Weaver, Russell L., Leslie W. Abramson, John M. Burkoff, and Catherine Hancock. *Principles of Criminal Procedure*. St. Paul, MN: Thomson/West, 2004.
- Weaver, Russell L., Leslie W. Abramson, Ronald Bacigal, John M. Burkoff, Catherine Hancock, and Donald E. Lively. *Criminal Procedure: Cases, Problems & Exercises*. 2nd ed. St. Paul, MN: Thomson/West, 2001.

See also **Exclusionary Rule**

NIXON, RICHARD MILHOUS (1913–1990)

Richard Milhous Nixon, thirty-seventh president of the United States and a controversial political figure, was born in 1913 in Yorba Linda, California into a Quaker family. After graduating from Whittier College and earning a law degree in 1937 from Duke Law School, the young attorney returned to Whittier to practice law. During World War II, Nixon went to Washington where he served in the Office of Price Administration. He subsequently served as an officer with the U.S. Navy in the Pacific and, he returned home to Whittier after the war to resume his law practice.

Nixon's lifelong passion for politics surfaced in 1946 when he was tapped by a committee of Republican business and professional men to challenge Democratic incumbent, Jerry Voorhis, for a seat in the House of Representatives. In his campaign, the young contender began early on to hone his "take no prisoners" political skills as he exploited the increasingly popular issue of anticommunism. The strategy worked, and he soundly defeated the five-term congressman. In the House, he enhanced his reputation as one of the nation's leading anticommunist crusaders by serving on the House Un-American Activities Committee (HUAC). He acquired national recognition as HUAC's star investigator in the Whittaker Chambers–Alger Hiss hearings. The serious young congressman received accolades for his dogged, yet careful, sober examination of witnesses.

Anticommunism was also the decisive issue in his senatorial victory in 1950 in a campaign in which Nixon challenged Democrat Helen Gahagan Douglas. Both candidates slung broadsides at each other with wide-ranging accusations of procommunist leanings. Nixon's reputation, however, as a ruthless anticommunist was significantly advanced with his distribution of the infamous "pink sheet" that detailed the similarities between Douglas's voting record and that of Socialist (and probable communist) congressman, Vito Marcantonio. Nixon's red-baiting strategy was enormously successful; he won the Senate seat with a

healthy plurality. After only two years in the Senate, Nixon's solid anticommunist credentials brought him to the attention Republican presidential candidate Dwight D. Eisenhower, who needed a running mate that would mollify the conservative wing of the party.

Nixon performed loyally for the Republican Party as vice president, especially as an energetic campaigner for both the President and the Republican Party. In 1960, however, he lost his bid to succeed Eisenhower when charismatic Democrat John F. Kennedy defeated the vice president in an extraordinarily close election. Two years later in 1962, Nixon lost another election, this time to incumbent Democratic California governor, Edmund S. (Pat) Brown. In a maudlin, self-pitying press conference after his defeat, Nixon offered a clue to the problems that would plague his later political career when he blamed the press for his loss, declaring that they would not have him to kick around anymore.

Nixon, however, was not finished with politics and, in spite of his promise that his political career was over, for the next six years he remained a Republican stalwart and loyal campaigner for Republican candidates. By 1968 he had become the titular leader of the party and its candidate for president. He engineered a close victory over Democrat Hubert H. Humphrey with his "Southern strategy," which targeted southerners and northern blue collar workers, former members of the New Deal coalition, who had had enough of Democratic liberalism and youthful war protest. Nixon's appeal to this silent majority changed forever the political complexion of the two major parties and shifted the political center significantly to the right.

This political realignment, however, would not be the distinguishing characteristic of Richard Nixon's political career. Neither would he be most remembered for his considerable foreign policy achievements in his first term: détente with the Soviet Union, diplomatic recognition of the People's Republic of China, withdrawal of most U.S. forces from Vietnam, and Secretary of State Henry Kissinger's mostly skillful navigation through the minefield of Arab–Israeli hostility. It would be the politics of Nixon's "imperial presidency" and his misuse and abuse of executive power that would come to define both his presidency and political career.

The presidential administration of Richard Nixon was focused on politics and political combat. Nixon seemed to view himself always as a victim, under attack by enemies, such as the Congress, the Eastern liberal establishment or the media, who were out to undermine his presidency and blemish his image. This siege mentality, which was exacerbated by Nixon's isolated management style and reliance on a very

loyal White House staff, created a *modus operandi* in the administration that would result in the wholesale abuse of presidential power, based to a significant degree on a wide-ranging disregard for civil liberties and constitutional limitations.

Within the first year of his administration, the president indicated that he wanted in place a domestic intelligence system to be coordinated out of the White House. The Huston Plan (after its author, White House staffer, Thomas Charles Huston), which was presented to Nixon in July 1970 proposed a permanent interagency committee that would oversee a broad range of surveillance activities such as mail openings, burglaries, and infiltration in the pursuit of keeping track of administration “enemies.” The White House did, in fact, maintain a list of such persons who became targets of such surveillance, as well as harassment by various government agencies. Although the plan never got off the ground because of the civil liberties concerns of FBI Director J. Edgar Hoover, the activities that Huston proposed would become part of White House solutions to various problems.

Especially troublesome to Nixon and his staff were leaks to the media. Nixon and his two closest advisors, Robert Haldeman and John Ehrlichman, became obsessed with tracking down administration employees who fed information to the press. Wiretaps were routinely installed on the telephones of both staffers and journalists beginning with national security employees in 1969. Wiretapping, however, was not used just for press leaks. Other administration “enemies” such as antiwar protestors and black militants were also the target of electronic surveillance, all in the alleged interests of national security.

The culmination of this paranoia about leaks came with the organization of what came to be called the “Plumbers” unit in 1971. Nixon was enraged when antiwar activist Daniel Ellsberg leaked the Pentagon Papers to the *New York Times*. Although the papers dealt with the Vietnam policy of previous administrations, Nixon was concerned that he would be pictured as having no control over either his staff or the bureaucracy. He called for the creation of a group that originally was to focus on plugging leaks to the media, although ultimately its members became engaged in covert operations against many other of the administration’s perceived enemies. The group’s first major project was the illegal break-in of Daniel Ellsberg’s psychiatrist’s office in pursuit of information that could be used to discredit Ellsberg. The Plumbers were also used against political targets, especially in the 1972 re-election campaign, working closely with the Committee to Re-Elect the President.

Reprisal against White House “enemies” was not just limited to wiretaps and “black bag jobs.” Nixon

and his White House staff blithely used various government agencies to harass administration opponents. The Internal Revenue Service was very frequently asked to conduct audits on journalists, liberal lobbying groups, recalcitrant Democrats, and any other individual or organization that opposed Nixon policies. The FBI was also called into service for electronic surveillance or the harassment of White House opponents through unnecessary background checks. Pressure was put on the Federal Communications Commission (FCC) to monitor network programs with regard to “fairness,” and transcripts of Oval Office tapes indicate that Nixon expressed interest in using FCC licensing requirements to retaliate against enemies such as the *Washington Post*.

The crescendo of this abuse of executive power and its accompanying disregard for constitutional liberties reached its peak during the 1972 presidential re-election campaign. Although Nixon and his staff established a separate organization to coordinate the campaign, the Committee to Re-Elect the President (CREEP), it was clearly the White House and the president who were in charge. From the very beginning, White House staffers saw to it that Democratic contenders were harassed with all varieties of “dirty tricks,” such as sending out invitations to nonexistent Democratic functions and planting false stories in the newspapers about Democratic candidates and their families. The campaign worked diligently at squeezing money out of Republican supporters, sometimes almost to the level of extortion. It was, however, the continuing obsession with “intelligence” that would bring down the Nixon White House. When a team of burglars, tied to CREEP, and ultimately linked to the White House, was apprehended on a bugging mission at the headquarters of the Democratic National Committee in the Watergate office complex in June 1972, the resulting cover-up, with the knowing participation of the president of the United States, was eventually exposed by two young *Washington Post* reporters and involved the White House in a tangled web of lies and obfuscations. The denouement of the ugly incident came in August 1974 after months of investigations, not only by the press, but also by judicial authorities, a Senate special committee, and a special prosecutor, when Richard M. Nixon, faced with impeachment by the House of Representatives, became the first president to resign. In the course of these probes, the revelation and release of recordings of Oval Office conversations made clear not only the extent of Nixon’s participation in the cover-up of the Watergate break-in, but also the wide-ranging abuse of power in which the White House had been engaged during the president’s tenure. The Articles of Impeachment, passed by the House Judiciary Committee in the last

days of July, charged the president with offenses related directly to the obstruction of justice with regard to Watergate, but also more generally with abuse of presidential power in “repeated ... conduct violating the constitutional rights of citizens, imparting the due and proper administration of justice and the conduct of lawful inquiries, or contravening the laws governing agencies of the executive branch and the purposes of these agencies.”

Nixon spent his post-presidential years in California, where he focused on engineering a revived reputation as the U.S. senior expert on foreign policy, and publishing a number of books on the subject. In the final analysis, however, Richard Nixon remains an enigmatic figure. Although passionate about politics, a masterful political strategist and, often intelligent master of public policy, his willingness to go to excessive lengths in pursuit of political success as well as policy objectives certainly diminished the achievements of his presidency.

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References and Further Reading

- Ambrose, Stephen E. *Nixon: The Education of a Politician, 1913–1962*. New York: Simon and Schuster, 1987.
- . *Nixon: The Triumph of a Politician, 1962–1972*. New York: Simon and Schuster, 1989.
- Bernstein, Carl, and Bob Woodward. *All the President's Men*. New York: Warner Paperback Library, 1975.
- Kutler, Stanley I. *The Wars of Watergate: The Last Crisis of Richard Nixon*. New York: Alfred A. Knopf, 1990.
- . *Abuse of Power: The New Nixon Tapes*. New York: Free Press, 1997.
- Nixon, Richard M. *RN, The Memoirs of Richard Nixon*. New York: Grosset and Dunlap, 1978.

NLRB v. CATHOLIC BISHOP OF CHICAGO, 440 U.S. 490 (1979)

Despite the Catholic Church's often-eloquent advocacy of labor unions and of workers' rights, the Catholic hierarchy of the Archdiocese of Chicago refused to accord its lay (nonclerical) faculty teaching in the Church's primary and secondary schools the fundamental human and federal labor law right to unionize. The Church refused to recognize the faculty union, and, consequently, refused to bargain collectively with the union regarding the teachers' wages, hours, and terms and conditions of employment. This bitter labor-management struggle for the better part of the decade of the 1970s resulted in a critically important case of first impression decided by the Supreme Court in 1979.

In *NLRB v. Catholic Bishop of Chicago*, the Supreme Court was faced with whether the National Labor

Relations Board (NLRB) had the authority to assert jurisdiction over labor-management relations and practices in Church-operated schools, and thus protecting the right of the teachers to unionize and to bargain collectively.

Chief Justice Burger wrote for the five-to-four majority, finding that the NLRB did not have jurisdiction to investigate the unfair labor practice charges that the teachers had brought against the Bishop, their employer, for the Church's refusal to recognize the union in violation of the National Labor Relations Act.

The NLRB had earlier found that the Bishop had committed such unfair labor practices. The Bishop successfully challenged the NLRB's jurisdiction over the Church as the employer of the teachers in the Church's schools; the U.S. Court of Appeals for the Seventh Circuit in Chicago reversed the NLRB's decision. The Supreme Court affirmed the Seventh Circuit's decision in favor of the Catholic Bishop of Chicago.

The Supreme Court majority carefully scrutinized the legislative history of the National Labor Relations Act. Chief Justice Burger examined First Amendment separation of church and state underlying principles, summarizing that “the absence of an ‘affirmative intention of the Congress clearly expressed’ fortifies our conclusion that Congress did not contemplate that the Board would require church-operated schools to [recognize] unions as bargaining agents for their teachers.” Because nothing in the legislative history of the National Labor Relations Act affirmatively and expressly stated that the NLRB had jurisdiction over the labor relations of church-operated schools, the Court majority concluded that the board lacked jurisdiction.

Chief Justice Burger concluded:

Accordingly, in the absence of a clear expression of Congress' intent to bring teachers in church-operated schools within the jurisdiction of the Board, we decline to construe the [National Labor Relations] Act in a manner that could in turn call upon the Court to resolve difficult and sensitive questions arising out of the guarantees of the First Amendment religion clauses.

The dissent by Justice Brennan, joined by Justices White, Marshall, and Blackmun, excoriated the majority for neglecting the history of the broad authority of the NLRB over labor-management relations.

The Catholic Church first addressed the rights of workers during the Industrial Revolution. Pope Leo XIII wrote the first great labor encyclical in 1891, *Rerum Novarum, On the Condition of the Working Class*. This landmark encyclical recognized the primacy of human labor as ends over the means of capital. Pope Leo demanded that the human, civil, and labor

rights of workers and their families be protected, including the right to unionize, and the right to just wages and safe working conditions. Virtually every Pope since Leo XIII has reiterated and reaffirmed these rights, perhaps most eloquently Pope John Paul II. In 1981, he commemorated the ninetieth anniversary of *Rerum Novarum* with his encyclical *Laborem Exercens, On Human Work*. He insisted on the fundamental dignity and rights of workers, and the subordination of the means of capital to the proper ends of human needs. Pope John Paul also acknowledged the importance of unions and the effectiveness of the strike mechanism in labor disputes. In the pastoral letter on Catholic social teaching and the American economy in 1986, *Economic Justice for All*, the U.S. Conference of Bishops demanded that all church institutions fully recognize the rights of employees to organize and bargain collectively. Thus, the labor rights for all workers were advocated with specificity by the bishops to protect those working in Church-related institutions.

In light of the Church's unequivocal and powerful pro-labor social teaching, the Chicago *Bishop* case is particularly pernicious for the cause of human, civil, and labor rights. The Church hierarchy in Chicago took advantage of First Amendment constitutional law in order to avoid collective bargaining with its lay faculty school teachers, blatantly contrary to the Church's century of social and labor teachings.

The Church as an employer has continued to rely on the precedent of *NLRB v. Catholic Bishop of Chicago*. This hypocrisy is glaringly obvious. Catholic employers must courageously begin to practice what the Church has continuously preached. Only then can Catholic labor theory begin to fulfill its promise to transform both itself and the workforce, and to enhance and further human, civil, and labor rights.

Meanwhile, the pernicious ramifications of this decision extend far beyond the labor-management relations within Catholic schools. Indeed, all employees within religiously-affiliated institutions, ranging from hospitals to homeless shelters, can be deprived of their rights to unionize and to bargain collectively under the National Labor Relations Act, trumped by the First Amendment potential for excessive entanglement of government oversight with the internal practices and beliefs of the religiously affiliated employer.

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References and Further Reading

Gregory, David L., *Catholic Labor Theory and the Transformation of Work*, Washington and Lee Law Review 45 (1988): 119.

———, *Catholic Social Teaching on Work*, Labor Law Journal 49 (1998): 912.

Gregory, David L., and Charles J. Russo, *The First Amendment and the Labor Relations of Religiously-Affiliated Employers*, Boston University Public Interest Law Journal 8 (1999): 612.

Note: *NLRB Regulation of Parochial Schools: A Practical Free Exercise Accommodation*, Yale Law Journal 97 (1987): 135.

Pope Leo XIII. "Rerum Novarum (On the Condition of Labor)." 1891. Papal Encyclicals Online. <http://www.papalencyclicals.net>.

Pope John Paul II. "Laborem Exercens (Concerning Human Work)." 1981. Papal Encyclicals Online. <http://www.papalencyclicals.net>.

U.S. National Conference of Catholic Bishops. *Economic Justice for All: Pastoral Letter on Catholic Social Teaching and the U.S. Economy*. 1986. Catholic Social Teaching, Office for Social Justice. <http://www.osjspm.org/cst/eja.htm>.

Cases and Statutes Cited

U.S. Const., First Amendment

National Labor Relations Act, 28 U.S.C. 151 et seq.

See also **Religion in the Workplace**

NO COERCION TEST

During the 1970s and 1980s, an growing number of legal commentators began to criticize the dominant *Lemon v. Kurtzman* (1971) test for evaluating claims under the First Amendment's establishment clause. The *Lemon* test forbade any law whose "primary effect" was to "advance religion," a principle that the Court used to strike down prayer and other religious elements in public schools. Conservative critics of *Lemon*, convinced that the test is both analytically incoherent and hostile to religion, have proposed as one alternative that the government may advance, favor, or endorse religion as long as it does not coerce anyone to assent to a religious belief or participate in a religious exercise. This standard would validate many government actions that create no real coercive pressure on citizens: creches or menorahs in municipal holiday displays, posting of the Ten Commandments in public buildings, and official statements with religious content such as the national motto "In God We Trust."

The Court first expanded its establishment clause interpretation beyond coercion in the original school prayer case, *Engel v. Vitale* (1962). Although the state there argued that teacher-led prayers in public schools were permissible because students could decline to participate, the Court answered that "the Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental

compulsion.” Likewise, the Court struck down a government display of a creche in *County of Allegheny v. American Civil Liberties Union* (1989), even though Justice Kennedy’s dissent pointed out that “[p]assersby [were] free to ignore” the creche. The majority held that notwithstanding the absence of coercion, the government “may not celebrate Christmas ... in a way that endorses Christian doctrine.”

Most recently, the majority of the justices confirmed their reading of the establishment clause as extending beyond coercion, when they prohibited a courthouse display of the Ten Commandments that—although not coercive—reflected a government purpose to promote the religious views contained in the Commandments (*McCreary County v. American Civil Liberties Union* [2005]). However, four justices dissented on the ground that “[n]o one was compelled to observe or participate in any religious ceremony or activity.” With the replacement of Justice O’Connor—the key swing vote and proponent of the broader “no endorsement” test—by the more conservative Samuel Alito, the future Court may still narrow the establishment clause’s restrictions to cases of government coercion.

Even if a no coercion standard is ultimately adopted, proponents likely would disagree on some of its specifics. The Court in *Engel*, after stating that the establishment clause reached beyond “direct coercion,” noted that classroom prayers involved subtle, “indirect” pressure even if students in theory could opt out. In *Lee v. Weisman* (1992), the Court held that school-sponsored prayers at graduation ceremonies also were coercive because there was “social pressure” on a dissenter to stand silently during the prayer—which might be interpreted as acquiescence in its sentiments—even though no one had to join in reciting it. In contrast to this broad definition of coercion, Justice Scalia and two other dissenters would have limited the establishment clause to cases of coercion “by force of law and threat of penalty.”

The coercion test also is ambiguous in cases about government financial aid to religious entities, which involve arguable coercion either way: funding of religious entities requires taxpayers to support them (along with other entities), but denying funding to religious entities while funding secular alternatives arguably pressures citizens to receive education or social services in a nonreligious setting when they would prefer a religious provider.

The debate over the coercion test includes arguments over the original understanding of the establishment clause. Proponents of the coercion analysis point to the long history of government actions passively endorsing or favoring religion. These include presidential proclamations of prayer and

thanksgiving, invocations at legislative and court sessions, and the appointment of congressional chaplains—many of which were adopted or approved by the First Congress, which also drafted the First Amendment. Such practices, it is argued, can only be explained by a principle allowing noncoercive endorsements of religion.

Opponents of the coercion test argue that, as in other instances, the framers may have failed to follow all the implications of their constitutional principles, permitting religious actions supporting generalized Protestantism largely because there were few non-Protestants to object. Opponents also point to point to state-level disputes in which programs of support for religion were rejected as “establishments,” even though they did not force anyone to participate in a religion unwillingly. For example, in the 1780s, Virginia and Maryland rejected proposals for tax-supported payments to churches even though, in Professor Laycock’s words, the taxpayer had “the right to designate the recipient of the tax, to pay the tax to secular uses, and in Maryland, to escape the tax altogether by declaring unbelief.” Proponents of the coercion test respond that the Virginia and Maryland bills, like any others involving mandated tax payments, were coercive and were disapproved on that basis.

Turning to analytical arguments, proponents of the coercion test claim that because government can and does endorse many nonreligious moral ideals, forbidding noncoercive endorsements of religion creates “hostility to religion.” For example, if government can celebrate the secular aspects of Christmas but not the religious ones, this will arguably make government an agent of secularizing Christmas. Opponents of the coercion test respond that keeping government “secular” does not make it antireligious, and that ample means exist for private groups to advance religion and counter secularization through displays without government sponsorship.

Opponents of the coercion test also argue that permitting noncoercive endorsements of religion is difficult to harmonize with another central establishment clause principle: that government may not prefer one religious view over others. The Court has called such “denominational” neutrality “the clearest command of the Establishment Clause” (*Larson v. Valente* [1982]). The conflict arises because virtually any government acknowledgment of religion, however passive or noncoercive, inevitably acknowledges a particular religion. Even generalized references to “God” leave out nontheistic religions and those that worship many gods, and they may also be objectionable to citizens whose religious beliefs are more particular and less ecumenical. Justice Scalia responded in

McCreary that the principle of “no preference between religions” applied only to cases involving financial aid to religion, and not to noncoercive acknowledgments of a general monotheism. Proponents of noncoercive endorsements sometimes also suggest that government endorse many faiths—for example, that it erect a creche, a menorah, and other symbols during the winter holidays. But one can question whether such government actions could ever capture the range and nuances of America’s many religious views.

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References and Further Reading

- Laycock, Douglas, “Noncoercive” Support for Religion: Another False Claim about the Establishment Clause, *Valparaiso Law Review* 26 (1991): 37–69.
- , “Nonpreferential Aid” to Religion: A False Claim About Original Intent, *William and Mary Law Review* 27 (1986): 875–921.
- McConnell, Michael W., *Coercion: The Lost Element of Establishment*, *William and Mary Law Review* 27 (1986): 933–41.
- Paulsen, Michael Stokes, *Lemon Is Dead*, *Case Western Reserve Law Review* 43 (1993): 795–863.

Cases and Statutes Cited

- County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573 (1989)
- Engel v. Vitale*, 370 U.S. 421 (1962)
- Larson v. Valente*, 456 U.S. 228 (1982)
- Lee v. Weisman*, 505 U.S. 577 (1992)
- Lemon v. Kurtzman*, 403 U.S. 602 (1971)
- McCreary County v. American Civil Liberties Union of Ky.*, 545 U.S. ____ (2005)

NO ENDORSEMENT TEST

The “no endorsement test” holds that government violates the establishment clause of the First Amendment if it speaks or acts in ways that endorse or disapprove of religion. First announced in 1984 in a concurring opinion by Justice Sandra Day O’Connor, the doctrine has achieved widespread (although far from unanimous) acceptance among judges and legal scholars. The doctrine has recently provoked controversy when applied by federal courts to invalidate the words “under God” in the Pledge of Allegiance and the placement of Ten Commandments monuments on public property.

Evolution of the Test

The “no endorsement” doctrine grew out of dissatisfaction with earlier establishment clause jurisprudence.

In *Everson v. Board of Education* (1947), the Supreme Court’s first modern establishment clause case, the Court interpreted the First Amendment as erecting a “wall of separation” between church and state that prohibited the state from aiding religion, but the Court did not distill its conclusions into any formal doctrine. *Everson* did not focus on *expressions* or *symbolic actions* by the government; and indeed, five years later in *Zorach v. Clauson*, the Court itself famously declared that “[w]e are a religious people whose institutions presuppose a Supreme Being.” Later, in *Lemon v. Kurtzman* (1971), the Court announced a three-part test for assessing establishment clause challenges: a law needed to have (1) a secular purpose and (2) a primary effect that neither advanced nor inhibited religion, and also (3) has to avoid excessive entanglement between government and religion. Again, the *Lemon* doctrine did not explicitly address the validity of expressions or symbolic actions by government.

In ensuing years, application of the three-prong *Lemon* test produced what critics widely viewed as chaotic results. In *Lynch v. Donnelly* (1984), concurring in the decision upholding a city-sponsored Christmas display that included a creche, Justice O’Connor noted this dissatisfaction and proposed the “no endorsement” test as a “clarification” of existing doctrine. In essence, she proposed a shift from the earlier emphasis on a challenged law’s material consequences to its expressive or symbolic aspects—to the “message” it sends. Thus, a law perceived as endorsing religion would be unconstitutional even though it gives no material aid; conversely, a law that does not endorse religion might be upheld, O’Connor said, even though “it in fact causes, even as a primary effect, advancement or inhibition of religion.”

In later cases, Justice O’Connor continued to advocate the “no endorsement” approach in concurring opinions, and in *County of Allegheny v. American Civil Liberties Union* (1989), a second nativity scene case, a majority of justices appeared to embrace it. Later cases both in the Supreme Court and in lower courts have viewed “endorsement of religion” as a factor that can invalidate a law, program, or symbol. However, the courts have not adopted O’Connor’s original suggestion that the establishment clause look to endorsement *instead of* more material consequences; rather, they have treated endorsement as an additional basis of invalidity.

Whose Perceptions Count?

Because perceptions of a law’s “message” can differ among observers, and because in a religiously diverse

country almost anything that government does may be perceived by someone as endorsing or disapproving of religion, in applying the “no endorsement” test the Supreme Court has been forced to consider whose perceptions should control. Since the First Amendment is presumably supposed to protect the rights of individuals and minorities, it would seem perverse to say that a law is invalid only if a *majority* of citizens perceives an impermissible endorsement. But to say that *any citizen’s* perception of endorsement or disapproval is enough to invalidate a law would be a recipe for governmental paralysis: What law or action could survive that test?

Justice O’Connor sought to avoid this dilemma by suggesting that the controlling perceptions should be those of an “objective” or “reasonable” observer. Perhaps of necessity, other justices have likewise accepted some such hypothetical observer as the test of validity. Predictably, judges and citizens often disagree about whether a “reasonable observer” would perceive endorsement of religion.

The difficulty was already evident in the nativity scene cases in which the “no endorsement” test originated. In *Lynch*, Justice O’Connor concluded that a city’s Christmas display did not endorse religion, apparently because the creche was surrounded by other traditional Christmas figures, including reindeer, a Santa Claus sleigh, and a talking wishing well. But later, in *Allegheny County*, she found religious endorsement in a creche standing alone. The other justices who favored the test concurred. But in the same case they disagreed about the constitutionality of a separate display in which an eighteen-foot-tall Jewish menorah stood alongside a forty-five-foot-tall Christmas tree. Justice Blackmun thought that the tree was in itself a secular symbol, and that its comparatively larger size tended to neutralize the potentially religious message of the menorah. Justice Brennan drew the opposite conclusion, among other reasons because he believed that the menorah was unusually large *for a menorah* while the tree was of average size *for a tree*.

The interpretation of what a reasonable observer would perceive is thus a common and central question—and often a hotly disputed one—in “no endorsement” cases. The question bears directly on the often controversial debates about traditional and seemingly religious public expressions or symbolism, such as the national motto (“In God We Trust”) printed on currency or the words “under God” in the Pledge of Allegiance. Justices have said in dictum that these expressions are permissible because they have lost their religious significance through long usage and serve mainly to express confidence in the country or hope for the future. Critics often—and lower courts occasionally—find these saving explanations implausible.

The Pros and Cons of “No Endorsement”

The “no endorsement” test has attractive features that appear to have generated acceptance by a majority of the judges and commentators who have considered it. In her *Lynch* concurrence, Justice O’Connor linked the doctrine to a constitutional commitment to inclusiveness and equal treatment of citizens. The fundamental meaning of the establishment clause, she suggested, was that religion should not affect a person’s “standing in the political community.” But if government endorses religion, it violates this principle by “send[ing] a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.”

Other justices and commentators have frequently repeated this “inclusiveness” rationale, and they have sometimes supported the doctrine on other (perhaps overlapping) grounds as well. Government messages endorsing religious can be divisive, and the establishment clause is often thought to be designed to avoid such divisiveness. The clause has also repeatedly been said to mean that government must be “neutral” toward religion, and “no endorsement” seems to be a natural corollary of a commitment to neutrality. Finally, the “no endorsement” doctrine is said to be a logical implication of the assumption that government is incompetent, in both a legal and more ordinary sense of the term, to act or pronounce upon religious questions.

Critics have challenged the “no endorsement” doctrine on a variety of grounds. One common objection focuses on the “reasonable observer” device: this hypothetical observer, critics contend, is manipulable and incapable of providing clear guidance. In addition, the device arguably thwarts the purpose of doctrine. As noted, the “no endorsement” doctrine seeks to prevent exclusionary messages that will alienate some citizens. But the “reasonable observer” device means, in effect, that when courts reject claims of endorsement (as they do, and inevitably must, in some cases), they add insult to injury: The courts in effect tell litigants not only that they have lost but that the reason they have lost is that they are not “reasonable” observers.

Another common objection argues that the “no endorsement” doctrine departs from longstanding American traditions reflected not just in occasional expressions such as the Pledge of Allegiance and the national motto or in practices such as legislative prayer or Thanksgiving proclamations, but also in landmarks of our constitutional heritage. Lincoln’s

revered Second Inaugural Address, engraved on the wall of the Lincoln Memorial, was a profoundly religious expression from beginning to end. The Declaration of Independence appeals to the “Creator” and “nature’s God,” and some scholars argue that these religious references are not cosmetic but are central to the Declaration’s argument. Indeed, Jefferson’s celebrated Virginia Statute for Religious Liberty began by declaring its essential premise—that “Almighty God hath created the mind free,” so that any infringement of that freedom would depart from “the plan of the Holy author of our religion.” The perverse consequence of the “no endorsement” test, critics contend, is that it would render unconstitutional—as a violation of religious freedom, ironically—the seminal enactment in this country’s achievement of religious freedom.

Prospects

Although relatively recent as a constitutional doctrine, the “no endorsement” test is by now well entrenched in the law. Recurring disputes over matters like the Pledge of Allegiance or the Ten Commandments probably ensure, however, that the test will remain controversial for the foreseeable future.

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References and Further Reading

Choper, Jesse H., *The Endorsement Test: Its Status and Desirability*, *The Journal of Law & Politics* 18 (2002): 499–536.
 Smith, Steven D., *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the “No Endorsement” Test*, *Michigan Law Review* 86 (1987): 266–332.

Cases and Statutes Cited

County of Allegheny v. American Civil Liberties Union, 492 U.S. 573 (1989)
Everson v. Board of Education, 330 U.S. 1 (1947)
Lemon v. Kurtzman, 403 U.S. 602 (1971)
Lynch v. Donnelly, 465 U.S. 668 (1984)
Zorach v. Clauson, 343 U.S. 306 (1952)

See also **Ceremonial Deism; Establishment Clause (I): History, Background, Framing; Establishment Clause Doctrine: Supreme Court Jurisprudence; *Everson v. Board of Education*, 330 U.S. 1 (1947); *Lemon Test*; *Lynch v. Donnelly*, 465 U.S. 668 (1984); O’Connor, Sandra Day; Pledge of Allegiance (“Under God”); Religion in “Public Square” Debate; Religious Symbols on Public Property; Secular Purpose; Ten Commandments on Display in Public Buildings; *Zorach v. Clauson*, 343 U.S. 306 (1952)**

NONCITIZENS AND CIVIL LIBERTIES

The extent to which noncitizens enjoy civil liberties in the United States is a complex and unsettled question whose answer may depend on the context in which civil liberties are asserted, the noncitizen’s status, and whether it is the federal or state government regulating the noncitizen. Civil liberties include free expression and association rights, equal protection rights, and procedural and substantive due process rights. Our concept of civil liberties has evolved through time, the modern period reflecting, perhaps, the most expansive view of civil liberties. Similarly, the extent to which noncitizens have enjoyed civil liberties in the United States has changed through time. Different periods of time have generated different levels of protection for the civil liberties of both citizens and noncitizens at the legislative and judicial level. For example, early in the nation’s history, the Alien and Sedition Acts targeted both aliens and seditious speech. The Alien Act granted the president broad authority to deport any alien he judged a danger to the United States. The Sedition Act prohibited any person to utter, print, write, or publish any disloyal, profane, scurrilous, or abusive language intended to cause contempt or scorn for the United States, the Constitution, or the flag. At the time, the constitutionality of both acts was vigorously debated with James Madison and Thomas Jefferson taking the view that both were unconstitutional and that aliens or noncitizens enjoyed the full protection of the constitution. Others, notably Federalist party leaders, expressed the view that aliens or noncitizens were not parties to the Constitution and, thus, were not protected by it. This debate continues today. Notwithstanding the debate between those who contend that noncitizens are entitled to enjoy the same civil liberties as citizens and those who contend that the Constitution does not protect noncitizens, neither act would likely survive constitutional scrutiny today; seditious libel is protected speech under the First Amendment and most resident aliens or noncitizens are entitled to some degree of due process prior to being deported.

One’s civil liberties may be protected by both legislation and judicial review. Noncitizens, however, may be dependent on Congress for the exercise of civil liberties in a way that citizens are not. Generally, citizens are entitled to enforcement of their civil liberties by the federal courts. Federal courts protect civil liberties by enforcing the various constitutional norms that guarantee them, enshrined particularly in the Bill of Rights, and the Thirteenth, Fourteenth, Fifteenth, and Nineteenth Amendments. Noncitizens, however, are not always entitled to strong judicial

enforcement of their civil liberties. In fact, in some contexts, noncitizens may enjoy no or few civil liberties other than those granted to them by Congress.

The Supreme Court has held that aliens or noncitizens in the United States are entitled to constitutional protection under the Fifth and Fourteenth Amendments to the Constitution. This view is consistent with the plain language of the amendments that extend protection in the relevant clauses to “persons,” not “citizens.” Even noncitizens who are undocumented are guaranteed protection by these amendments under the Constitution. However, the extent of protection provided will be affected by the context in which civil liberties are affected. In a series of cases heard by the Court in the late nineteenth century, the Court interpreted the Constitution to give Congress plenary power to provide for the admission and exclusion of aliens to and from the United States. In early expressions of the plenary power doctrine, the Court concluded that in the context of immigration-related decisions, such as decisions involving admission to the United States, exclusion from the United States, and deportation from the United States, noncitizens enjoyed little or no constitutional protection, other than what Congress chose to grant them. Modern federal court treatment of federal regulation of noncitizens in immigration-related matters applies minimal due process protections to noncitizens, but continues to recognize that Congress has great discretion in determining the conditions upon which a noncitizen may remain in the United States and in determining what conduct will result in a noncitizen’s deportation. Thus, the critical difference between a citizen and a noncitizen is that the noncitizen always remains subject to deportation or removal from the United States. The Court has yet to rule that the substantive reasons for deportation or removal are subject to constitutional constraints.

Other civil liberties, such as First Amendment rights, Fourth Amendment rights, or substantive due process rights, when raised in the context of immigration decisions, similarly receive a much lesser level of protection than when raised in nonimmigration contexts. For example, the Court has held that detention of noncitizens, when tied to their deportation or removal from the United States, is not held to the same constitutional standard that would be applied to detention of citizens. Thus, noncitizens may be detained in prisons for long periods of time, without the possibility of bail, while the government determines whether or not they are entitled to reside in the United States. Detention of noncitizens in other, nonimmigration contexts, such as involuntary commitment due to mental illness or in the criminal law context, when arrested for commission of a criminal

offense, would be subject to the same extent of constitutional protections accorded to citizens.

The extent to which noncitizens enjoy civil liberties may depend as well on the status of the noncitizen. Noncitizens include persons who have been granted the right to reside permanently in the United States and to become citizens after five years of permanent residence. Noncitizens also include persons who have been granted the right to reside temporarily in the United States whether to engage in tourism, business, employment, or education. Some of these temporary entrants stay in the United States after their visas have expired and become unauthorized aliens. Noncitizens also include persons who have entered the United States without authorization or without documents but who have established de facto residence in the United States. The extent of protection the noncitizen receives may depend, in part, on whether she is a permanent resident alien, a temporary visitor, or an undocumented or unauthorized alien. For example, the Court has reasoned that illegal or undocumented immigrants as a class for equal protection purposes are generally entitled only to rational basis review; thus, laws that target undocumented noncitizens are presumed to be constitutional and require no more than that the government in enacting the legislation have a legitimate interest that is rationally related to the legislative measure. Permanent residents generally enjoy the same civil liberties that U.S. citizens enjoy, including privacy, intimacy, expression, association, equal protection, and due process rights.

Since the federal power over immigration is viewed as plenary with Congress, the Court has distinguished between state regulation of noncitizens and federal regulation of noncitizens. Thus, generally, the Court rigorously scrutinizes state regulations that discriminate against noncitizens who are permanent residents of the United States.

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References and Further Reading

- Alien Act, Chapter 58, 1 Statute 570 (1798).
- Henkin, Louis H., *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, Columbia Law Review 84 (1984): 1.
- Johnson, Kevin R., *Los Olvidados: Images of the Immigrant, Political Power of Noncitizens and Immigration Law and Enforcement*, Brigham Young University Law Review 1993 (1993): 1139.
- Neuman, Gerald, L. *Strangers to the Constitution: Immigrants, Borders and Fundamental Law*. Princeton, NJ: Princeton University Press, 1996.
- Romero, Victor C. *Alienated—Immigrant Rights, the Constitution, and Equality in America*. New York: New York University Press, 2005.
- The Sedition Act, Chapter 74, 1 Statute 596 (1798).

Cases and Statutes Cited

Fong Yue Ting v. United States, 149 U.S. 698 (1893).
Wong Wing v. United States, 163 U.S. 228 (1896).
Yick Wo v. Hopkins, 118 U.S. 356 (1886).

Suffrage, University of Pennsylvania Law Review 141
 (April 1993): 1391–470.
Spragins v. Houghton, 3 Ill. (2 Scam.) 377 (1840).

NONCITIZENS AND THE FRANCHISE

Although the right to vote is commonly thought to be only reserved for U.S. citizens, no provision in the U.S. Constitution requires U.S. citizenship for the franchise. In fact, noncitizens were able to vote in the United States during early colonial times, and continued to do so through the nineteenth century. Rather than determining voting rights based on citizenship, the criteria used at the time included property ownership, race, and residence. At least one state supreme court countenanced the right to vote of an “unnaturalized foreigner” under its state constitution. In that same case, the court noted that noncitizens voted under the constitutions of ten states were able to vote, since they were “inhabitants” or “freemen” in their respective states. However, by the late 1920s, as a result of nationwide anti-immigrant movements, many state constitutions were amended to disenfranchise noncitizens.

Noncitizens who reside permanently in the United States are members of the political community and are subject to democratic duties such as the payment of taxes and service in the U.S. military. Thus, arguably, they should be able to exercise the right to vote in face of their civic obligations. This argument has met with limited success, and mostly at the local level, where noncitizens have been allowed to vote for particular elections. For example, noncitizen parents of schoolchildren are eligible to vote for school board members in Chicago and New York City. Some localities in Maryland also allow noncitizens to vote and even to hold municipal office.

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References and Further Reading

105 Illinois Comp. Stat. Ann. 5/34-2.1(d)(ii).
 Aylsworth, Leon E. “The Passing of Alien Suffrage.” *American Political Science Review* 25, no. 1 (1931): 114–6.
 Harper-Ho, Virginia, *Noncitizen Voting Rights: The History, the Law and Current Prospects*, Journal of Law and Inequality 18 (Summer 2000): 271–322.
 Kettner, James H. *The Development of American Citizenship, 1608–1870*. Chapel Hill: University of North Carolina Press, 1978.
 Neuman, Gerald, “We are the People”: *Alien Suffrage in German and American Perspective*, Michigan Journal of International Law 13 (Winter 1992): 259–95.
 New York Education Law, Section 2590(c)(3).
 Raskin, Jamin B., *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien*

NONCITIZENS AND LAND OWNERSHIP

Private ownership of land occupies a central position in American law, and in the nineteenth century West Coast states, a link emerged between property ownership and citizenship, which is exemplified by how the 1859 Oregon Constitution declared that no “China-man” shall ever own land in Oregon.

An “Alien Land Law” was passed by the California legislature in 1913, granting aliens eligible for U.S. citizenship plenary property ownership rights, but limiting “aliens ineligible to citizenship” to those rights explicitly granted by treaties—here, the relevant 1911 U.S.–Japan treaty did not mention protecting property rights in agricultural land of Japanese residing in the United States.

While facially neutral, this law relied on the federal racial prerequisite to naturalization—one had to be a “free white person” to become naturalized—to bar Japanese farmers from land ownership, and was a response to the success of the Japanese truck farmers in California in the early twentieth century.

Despite the 1913 law, Japanese landholdings increased as Japanese farmers used strategies to circumvent the law such as assigning title in the name of citizen children, with land held in trusts or guardianships, as well as forming title-holding agricultural corporations with noncitizen farmers as shareholders. By 1920, anti-Japanese activists placed an initiative on the ballot outlawing methods used to circumvent the 1913 law. The 1920 initiative passed with a majority in every California county, and resulted in a decline in acreage under Japanese ownership throughout the decade.

Other western states soon followed. Arizona had enacted an Alien Land Law in 1917. Between 1921 and 1925, Washington, Louisiana, Oregon, Idaho, Montana, and Kansas had passed such similar laws. During World War II, Wyoming, Utah, and Arkansas passed Alien Land Laws.

In 1923, the U.S. Supreme Court opined on the constitutionality of these laws. In *Terrace v. Thompson* (1923), the Supreme Court upheld the Washington Alien Land Law on the ground that a state could rightly restrict property ownership to U.S. citizens and that doing so did not amount to impermissible racial discrimination. *Porterfield v. Webb* (1923) upheld California’s 1920 initiative amending the 1913 Alien Land Law. In *Webb v. O’Brien* (1923), *Frick v.*

Webb (1923), and *Cockrill v. California* (1925), the Court upheld the 1920 initiative's various restrictions on circumventions of the Alien Land Law.

After World War II, the California law was challenged in *Oyama v. California* (1948), wherein the U.S. Supreme Court overturned a provision of the 1920 initiative that forbade an "alien ineligible to citizenship" from being a guardian to a minor U.S.-born child on equal protection grounds. The California Supreme Court finally overturned the entire 1920 law in *Fujii v. California* (1952), and Oregon and Montana followed suit in *Namba v. McCourt* (1949) and *Montana v. Oakland* (1955).

Washington's Alien Land Law was repealed in 1966 by ballot initiative. The Wyoming legislature was successfully lobbied by the Alien Land Law Project of the University of Cincinnati Law School in 2001 to repeal its Alien Land Law.

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References and Further Reading

- Aoki, Keith, *No Right to Own? The Early Twentieth-Century "Alien Land Laws" as a Prelude to Internment*, Boston College Law Review 40 (1998): 40.
 Lazarus III, Mark L., *An Historical Analysis of Alien Land Law: Washington, Territory & State, 1853–1889*, University of Puget Sound Law Review 12 (1989): 197.
 Yamamoto, Eric K., Margaret Chon, Carol L. Izumi, Jerry Kang, and Frank H. Wu. *Race, Rights and Reparation: Law and the Japanese American Internment*. New York: Aspen, 2001.

Cases and Statutes Cited

- Cockrill v. California*, 268 U.S. 258 (1925)
Frick v. Webb, 263 U.S. 326 (1923)
Fujii v. State, 38 Cal. 2d 718 (1952)
Montana v. Oakland, 129 Mont. 347 (1955)
Namba v. McCourt, 204 P. 2d 569 (1949)
 Oregon Constitution, Article XV, Section 8 (1859, repealed 1946)
Oyama v. California, 332 U.S. 633 (1948)
Porterfield v. Webb, 263 U.S. 225 (1923)
Terrace v. Thompson, 263 U.S. 197 (1923)
Webb v. O'Brien, 263 U.S. 313 (1923)

See also **Aliens, Civil Liberties of**

NONPREFERENTIALISM

The Supreme Court has struggled since the mid-twentieth century to articulate some single principle that might guide its decision of cases construing the First Amendment's establishment clause. In *Everson v. Board of Education* (1947), for example, the Court announced that the clause should be understood to

have erected the "wall of separation" between church and state. But a metaphor, however helpful, lacked the precision necessary to resolve specific issues such as the Court confronted in *Everson*. Accordingly, the majority opinion in *Everson* more specifically interpreted the principle of separation to forbid laws that aid one religion or all religions, prefer one religion over another, or prefer religion generally over nonreligion. It summed up the essence of the establishment prohibition as requiring government to maintain a posture of neutrality both among various religions and between religion and nonreligion.

Neither *Everson's* catalogue of prescriptions nor its principle of neutrality seemed sufficient to resolve the myriad establishment issues that the Court was called upon to decide in the decades after *Everson*. Eventually, it codified in *Lemon v. Kurtzman* (1971) a test for interpreting the establishment clause. This test prohibited government action lacking a secular purpose or secular effect, or which amounted to an excessive entanglement between government and religion. Still later, Justice Sandra Day O'Connor convinced the Court—at least for a time—to supplement the *Lemon* test with a reformulation of its essential prohibition articulated in terms of a ban on government endorsement of religion. According to O'Connor, the essence of the establishment prohibition was to prevent government from making an individual's beliefs or lack of belief relevant to that individual's standing as a citizen.

More than a few observers of these doctrinal developments have expressed dissatisfaction with the overall tenor of the Court's establishment clause jurisprudence, insisting that the Court's decisions have been pervasively hostile to religious belief and practice. Some of the Court's critics have argued that its various doctrinal formulations are inconsistent with long-established forms of government support for religion, such as congressional chaplains and presidential proclamations establishing national days of thanksgiving and prayer. The same critics have been quick to note that the Court's own sessions begin with a religious invocation: "God save this honorable Court." They suggested an alternative interpretation of the establishment clause, one that would permit government to support religion, so long as the support is nonpreferential. This view—known as nonpreferentialism—specifically repudiates the idea that government must remain neutral as between religion and nonreligion. So long as government maintains neutrality among various religions, it has satisfied the requirement of the establishment clause. The nonpreferentialism position has the support of several scholars and has been offered as the correct reading of the establishment clause by one Supreme Court justice—Justice William Rehnquist.

The Rehnquist Dissent in *Wallace v. Jaffree*

Then-Associate Justice Rehnquist chose a dissent in *Wallace v. Jaffree* (1985) as the occasion for urging a fundamental re-examination of the meaning of the establishment clause. The case involved one of the varieties of “moment of silence” laws that sprang up in the wake of the Court’s school prayer cases—*Engel v. Vitale* (1962) and *Abington School District v. Schempp* (1963). In *Engel*, the Court invalidated the state-sponsored recitation of a prayer in public schools composed by the state’s board of regents. Subsequently, in *Abington*, the Court extended this holding to declare unconstitutional state-sponsored Bible readings and recitations of the Lord’s Prayer in public schools. Opponents of these decisions argued that the Court had banished prayer from the public schools and, after attempts to gain passage of a constitutional amendment allowing state-sponsored prayer failed, began to champion in the 1980s laws creating “moments of silence” in which school children might, if they chose, either meditate or pray. In *Wallace v. Jaffree*, the Court held unconstitutional an Alabama statute that had provided for a “moment of silence” in public schools. Most of the justices of the Court, in separate opinions, expressed the view that at least some such statutes might be constitutional. Nevertheless, a majority of the justices concluded that the legislative history of the Alabama law revealed an intent on the part of the state legislature to return prayer to public schools. The law thus lacked a secular purpose in the eyes of the Court’s majority, and was unconstitutional under the *Lemon* test.

In a dissenting opinion, Justice Rehnquist proposed that the Court revisit its jurisprudence under the establishment clause. In particular, he urged the Court to dismantle the “wall of separation,” which he claimed was a metaphor that distorted the meaning of the First Amendment. Parsing the debates about the proposed amendment in the First Congress, Rehnquist concluded that these debates revealed only an intent on the part of Congress to prohibit the establishment of a national church or the preferential treatment of one religion over another. He also argued that the separation metaphor ignored a variety of historical practices in the United States, reaching back to the founding period, such as the designation of national days of thanksgiving and prayer. Rehnquist was confident about what the clause did not prohibit: It did not require government to remain neutral between religion and nonreligion, and it did not prohibit nondiscriminatory aid to religion. Since the “moment of silence” statute at issue in *Wallace*

amounted to no more than nondiscriminatory support of religion generally, it did not, in Rehnquist’s view, violate the establishment clause.

The Arguments against Nonpreferentialism

Many scholars believe that the nonpreferentialism position does not do justice either to original understanding of the First Amendment or to the diversity of American religious experience. Although nonpreferentialists claim the authority of history, critics of the position dispute the nonpreferentialist reading of the nation’s early history. For example, James Madison is sometimes recruited in support of nonpreferentialism, partially through his original suggestion that the First Amendment prohibit establishment of a national religion. Nevertheless, it is clear from Madison’s letters and—even more—from his *Detached Memoranda*, discovered only in the twentieth century, that he believed that practices such as the appointment of chaplains for the houses of Congress and the declaration of national days of prayer were national establishments of religion and, thus, unconstitutional. Furthermore, as Justice David Souter argued in his concurring opinion in *Lee v. Weisman* (1992), the First Congress considered variant readings of the establishment clause that would have clearly embraced the nonpreferential position. That body, however, rejected these readings in favor of the final prohibition against laws “respecting an establishment of religion,” a formulation that is arguably the most expansive prohibition of all it considered.

Many opponents of the nonpreferential position contend that the various historical practices on which it relies are themselves contrary to the establishment clause. Madison himself, who authorized a national day of prayer and thanksgiving during the War of 1812, later concluded in his *Detached Memoranda* that this authorization was not consistent with the establishment clause. He was apparently willing to tolerate some deviations from the antiestablishment principle as *de minimus* violations. Others have suggested similar grounds for accepting certain forms of civic religiosity. Justice William Brennan, for example, argued in his dissent to the Court’s opinion in *Lynch v. Donnelly* (1984) that some forms of public religiosity amount to “ceremonial deism”—that is, forms of religious expression that have, through ceremonial repetition, largely lost their religious content. Other observers have insisted that all forms of public support for religion, no matter how trivial, amount to breaches in the “wall of separation” and therefore violations of the establishment clause.

The nonpreferentialism position argues that government ought to be allowed to provide nondiscriminatory aid to religion. Nevertheless, the very possibility of there being forms of support for religion that are, in fact, nonpreferential is itself a dubious proposition, certainly in the context of modern American religious diversity. For example, it is doubtful whether there are any prayers agreeable to all believers or any support for some religions that is not, at the same time, contrary to the beliefs of other religions. So-called nondenominational prayers almost always privilege particular theological visions over others, such as a personal God over an impersonal one, for instance. At most, nonpreferential support for religion amounts to support compatible with a number of religions, and not targeted to please a narrow spectrum of religious sensibilities.

Although Justice Rehnquist argued in his *Wallace* dissent for the adoption of nonpreferentialism, he did not subsequently reiterate this position. Moreover, no other justice on the Court has signified support of this specific position, although Justices Antonin Scalia, Anthony Kennedy, and Clarence Thomas, along with Chief Justice Rehnquist, have been largely hospitable to attempts to recognize a greater latitude for government to support religious belief and practice. A majority of the Court, though, continues to reject the nonpreferentialism position in favor of the requirement that government remain neutral not only between religions but also between religion and nonreligion. Nevertheless, the Court still occasionally approves practices such as legislative prayer that are not readily consistent with its stated doctrine.

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References and Further Reading

- Adams, Arlin M., and Charles J. Emmerich. *A Nation Dedicated to Religious Liberty: The Constitutional Heritage of the Religion Clauses*. Philadelphia: University of Pennsylvania Press, 1990.
- Cord, Robert L. *Separation of Church and State: Historical Fact and Current Fiction*. Grand Rapids, MI: Baker Book House, 1988.
- Curry, Thomas J. *Farewell to Christendom: The Future of Church and State in America*. Oxford: Oxford University Press, 2001.
- Garry, Patrick M., *Religious Freedom Deserves More than Neutrality: The Constitutional Argument for Nonpreferential Favoritism of Religion*, *Florida Law Review* 57 (2005): 1–52.
- Laycock, Douglas, “Nonpreferential” Aid to Religion: a False Claim about Original Intent, *William and Mary Law Review* 27 (1985/1986): 875–923.
- Levy, Leonard W. *The Establishment Clause: Religion and the First Amendment*. 2nd rev. ed. Chapel Hill: University of North Carolina Press, 1994.
- Marsh v. Chambers*, 463 U.S. 783 (1983).
- Smith, Rodney K., *Nonpreferentialism in Establishment Clause Analysis: A Response to Professor Laycock*, *St. John’s Law Review* 65 (1991): 247–63.

Cases and Statutes Cited

- Abington School District v. Schempp*, 374 U.S. 203 (1963)
Engel v. Vitale, 370 U.S. 421 (1962)
Everson v. Board of Education, 330 U.S. 1 (1947)
Lee v. Weisman, 505 U.S. 577 (1992)
Lemon v. Kurtzman, 403 U.S. 602 (1971)
Lynch v. Donnelly, 465 U.S. 668 (1984)
Wallace v. Jaffree, 472 U.S. 38 (1985)

See also **Accommodation of Religion; Ceremonial Deism; Civil Religion; Establishment Clause (I): History, Background, Framing; Establishment Clause: Theories of Interpretation; No Endorsement Test; Rehnquist, William H.; Wallace v. Jaffree, 472 U.S. 38 (1985)**

NORTH CAROLINA CONSTITUTION OF 1776

By April 1776, advocates of American independence from Great Britain had assumed a dominant role in North Carolina politics. As a result, planning for a new state government there moved rapidly in the spring, summer, and fall of that year. On May 11, the provincial legislature passed an interim constitution, establishing a council of safety, composed of only thirteen members, in which complete authority was vested pending the convention of a popularly elected legislature on November 12. Before the elections, voters were informed that the representatives they chose were to meet with the express purpose of drafting and adopting a permanent constitution. In little more than a month, the new legislature accomplished its task. Under pressure from constituent instructions, the body had been compelled to include a “declaration of rights” explicitly enumerating and safeguarding a number of “first principles.” At the outset of the American Revolution, many colonists harbored deep suspicions of political authority, and they sought to ensure the observance of natural rights in the face of what they saw as the encroaching essence of power.

Until the late seventeenth century, the Crown had been sovereign in the British Empire. After the Glorious Revolution of 1688–1689, however, ultimate governing authority resided in Parliament. Things were to be different in the aspiring new nation across the Atlantic, and the first article of the North Carolina declaration of rights vested sovereignty not in the executive or legislature, but in the people. The American conception of mixed government was also clearly articulated in the Constitution of 1776, which

provided for the balancing of separate and distinct branches of government. This represented an important departure from the unwritten English constitution, in which a balance of social orders as embodied in the king, House of Lords, and House of Commons was the ideal. In addition to these theoretical and structural features, North Carolina's declaration of rights contained securities for several specific civil liberties. Protection against arbitrary imprisonment, the right to trial by jury, freedom of the press, the right to bear arms (and the absence of a standing army), freedom of assembly, the right to instruct representatives and petition them for the redress of grievances, and freedom of religious worship were all expressly acknowledged in the document.

The articles of North Carolina's declaration of rights were hardly conceived *de novo*. Rather, they reflected the ideological landscape of colonial British North America generally and the influence of the Virginia, Pennsylvania, and Maryland constitutions in particular. Nonetheless, the influence of the Whig view of power and Lockean natural rights philosophy are manifest in the document. Along with similar sections in several other early state constitutions, the declaration of rights in the North Carolina Constitution of 1776 provided a model for the federal Bill of Rights.

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References and Further Reading

- Adams, Willi Paul. *The First American Constitutions: Republican Ideology and the Making of the State Constitutions in the Revolutionary Era*. Chapel Hill: University of North Carolina Press, published for the Omohundro Institute of Early American History and Culture, 1980.
- Vexler, Robert I., ed. *Chronology and Documentary Handbook of the State of North Carolina*. Dobbs Ferry, NY: Oceana Publications, 1978.
- Wood, Gordon S. *The Creation of the American Republic, 1776–1787*. Chapel Hill: University of North Carolina Press, published for the Omohundro Institute of Early American History and Culture, 1998.

NORTH CAROLINA v. ALFORD, 400 U.S. 25 (1970)

When defendants in criminal cases enter pleas of guilty, they are generally doing so because they committed the crime with which they are charged. However, there are some circumstances under which a defendant might decide that it is in his best interest to enter a plea of guilty even if he has not committed a crime. In *North Carolina v. Alford*, the U.S. Supreme Court addressed the issue of whether a court could

accept a guilty plea if the defendant claims that he did not commit the charged offense.

Henry C. Alford was charged with first-degree murder, a crime that carried a potential death sentence if convicted by a jury. The prosecutor agreed to accept a guilty plea to second-degree murder in the case, a charge that carried a possible sentence of two to thirty years' imprisonment. Alford agreed to accept this plea offer because, although he claimed innocence, he feared that he would be convicted and sentenced to death if he took his case to trial. The trial court accepted the guilty plea, but the appellate court overturned Alford's conviction. The U.S. Supreme Court agreed to hear the case and held that a defendant need not admit guilt to enter a plea of guilty in a criminal case, as long as the guilty plea represents a voluntary and intelligent choice among alternatives available to the defendant, and there are sufficient facts to support the conviction.

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References and Further Reading

- Cohen, Neil P., and Donald J. Hall. *Criminal Procedure: The Post-Investigative Process, Cases and Materials*. 2nd ed. New York: LEXIS Publishing, 2000.
- Cook, Julian A., *All Aboard! The Supreme Court, Guilty Pleas, and the Railroad of Criminal Defendants*, *University of Colorado Law Review* 75 (2004): 863.

See also Guilty Plea

NORTH CAROLINA v. PEARCE, 395 U.S. 711 (1969)

In *North Carolina v. Pearce*, the Supreme Court addressed two issues involving the sentencing upon reconviction of individuals who have successfully attacked their original convictions: whether the Constitution requires that they be given credit toward the new sentence for time already served on the original sentence, and the constitutional limitations on imposition of a harsher sentence for the same offense after retrial.

Justice Stewart writing for the Court found the double jeopardy clause of the Fifth Amendment as applied to the states through the Fourteenth Amendment "protects against multiple punishments for the same offense" (citing *Ex parte Lange* [1894]). A failure to give full credit toward the new sentence for the portion of the original sentence served violates this protection. Thus, all time previously served by the individual on the original sentence must be subtracted from the sentence imposed at retrial.

On the second question, the Court held neither the protection against double jeopardy nor the equal protection clause of the Fourteenth Amendment provides an absolute prohibition against imposition of a longer sentence upon reconviction. Justice Stewart held that vindictiveness or the punishment of an individual for successfully challenging his original conviction would be a patent violation of the due process clause of the Fourteenth Amendment. As a protection against such motivation, the Court required that the imposition of a longer sentence upon retrial must be accompanied by a statement in the record of the judge's reasons for a harsher sentence. The court also indicated these reasons must be based upon "identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding." Subsequent

cases have limited the application of the presumption of vindictiveness from a silent record.

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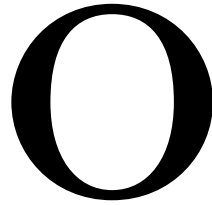
References and Further Reading

Alabama v. Smith, 490 U.S. 794 (1989).
North Carolina v. Pearce, 395 U.S. 711 (1969).
Stone v. Powell, 428 U.S. 465 (1976).
Texas v. McCullough, 475 U.S. 134 (1986).
United States v. Goodwin, 457 U.S. 368 (1982).

Cases and Statutes Cited

Ex parte Lange, 85 U.S. 163; 18 Wall. 163 (1894)

See also **Double Jeopardy: Modern History; Due Process**



O'BRIEN CONTENT-NEUTRAL FREE SPEECH TEST

In *United States v. O'Brien* (1968), a federal statute that made the destruction of a draft card a crime was challenged by a demonstrator who burned his card as a symbolic act of protest against the Vietnam War. The Court upheld this application of the statute by invoking a novel standard that has come to be known as the “*O'Brien* rules” or the “*O'Brien* content-neutral free speech test.” Although the standard was announced for that particular case, the rules were not by their terms limited to regulations of symbolic expression and the Court has used the *O'Brien* rules to determine the validity of various types of content-neutral time, place, and manner regulations.

Under the *O'Brien* rules, government regulation that applies to a form of expression is constitutional if: (1) it is within the constitutional power of government, (2) it furthers an important or substantial governmental interest, (3) that interest is unrelated to the suppression of speech, and (4) the restriction it incidentally imposes on speech is no greater than necessary to further that interest. Note that the *O'Brien* rules do not explicitly require that the regulation be content neutral. In *Members of the City Council v. Taxpayers for Vincent* (1984), however, the Court upheld an ordinance that prohibited the posting of signs on various kinds of public property by first characterizing the ordinance as content neutral and then applying the *O'Brien* rules. That case implicitly suggests that a requirement of content (or at least viewpoint) neutrality is to be added to the rules

when they are used to test a time, place, and manner regulation. This view finds further support in cases such as *Clark v. Community for Creative Non-Violence* (1984), a case sustaining a prohibition against camping in certain public parks as applied to demonstrators, and *Ward v. Rock Against Racism* (1989), dealing with restrictions on volume of sound at outdoor performances, where the Court said that the standards governing content-neutral time, place, and manner regulations are “essentially the same” as the *O'Brien* rules.

This essential similarity between the *O'Brien* rules and the Court’s “normal” “time, place or manner” test is particularly important in determining what standard of scrutiny is appropriate under the fourth prong of the *O'Brien* rules: that “the restriction it incidentally imposes on speech is no greater than necessary to further that interest.” While the plain language of this prong sounds like the “least restrictive alternative” test normally employed in heightened scrutiny, the Court in *Ward* stated clearly that content-neutral time, place or manner regulations should be judged under the “narrowly tailored” standard, rather than the “least restrictive alternative” test. Accordingly, if the *O'Brien* rules and the test for content-neutral regulations are essentially similar, then prong four of *O'Brien* should be read as requiring only that the regulation be narrowly tailored.

The Court derived the *O'Brien* rules in a case that involved symbolic expression, burning a draft card as an expression of political protest, and has subsequently applied the rules to regulation of various types of

symbolic speech. In *Texas v. Johnson*, for example, the Court struck down a Texas statute prohibiting anyone from defacing or damaging a flag "in a way that the actor knows" will be offensive to observers. Justice Brennan's majority opinion held that the law was unconstitutional, in part because the flag desecration statute failed *O'Brien's* third prong: the statute was not "unrelated to the suppression of speech"; rather, it was explicitly aimed at preventing desecration of the flag as a form of protest. One year later, in *United States v. Eichman* (1989), the Court struck down a federal statute, enacted in reaction to *Texas v. Johnson* (1989), that criminalized defacing, defiling or burning the flag, with Justice Brennan again writing a majority opinion finding that the statute had the impermissible purpose of seeking to suppress desecration of the flag as a form of expression.

The Court's application of the *O'Brien* rules to regulation of nude and topless dancing has engendered significant criticism, however. In a 1991 case, *Barnes v. Glen Theatres, Inc.* (1991), the Court upheld an Indiana statute that banned public nudity, which had been challenged by the owners of two adult cabarets on the ground that it infringed on their constitutional right to present the nonobscene erotic messages conveyed by totally nude dancing. Here, applying the *O'Brien* rules, Justice Rehnquist's plurality opinion emphasized that the statute was aimed at regulating conduct rather than at suppressing speech and was justified by the state's traditional interest in regulating conduct to promote order and morality. The plurality conceded that nude dancing was expressive conduct within the outer perimeters of the First Amendment, but argued that this did not undercut its validity because the measure was not aimed at preventing nude dancing, but at banning nudity. The effect of the ordinance on nude dancing was incidental, the plurality held, because the requirement that a dancer wear pasties and a G-string did not deprive her dance of whatever erotic message it was intended to convey. It simply made the message less graphic. But Justice White's dissent on behalf of four members of the Court argued that the statutory ban was premised on the erotic content of the message conveyed by nude dancing. It therefore discriminated on the basis of content and thus should not be evaluated under the *O'Brien* rules for content-neutral regulations but rather under strict scrutiny, which it could not survive.

The Court revisited the nude dancing issue again in 2000 in *City of Erie v. Pap's A.M.* (2000), involving a Pennsylvania statute similar to the one upheld in *Barnes*, that had been ruled unconstitutional by the Pennsylvania Supreme Court because it had the "unmentioned purpose" of suppressing erotic expression. The Court upheld the statute, with a

plurality affirming that government restrictions on public nudity should be evaluated under the *O'Brien* rules for content-neutral restrictions on symbolic speech.

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References and Further Reading

- Braverman, Daan, William C. Banks, and Rodney A. Smolla. *Constitutional Law: Structure and Rights in Our Federal System*. 5th ed. Newark, NJ: LexisNexis, 2005.
- Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981).
- Ross, Susan, *Reconstructing First Amendment Doctrine: The 1990 [R]Evolution of the Central Hudson and O'Brien Tests*, *Hastings Communications and Entertainment Law Journal*, 23 (2000–2001): 4:723–50.
- Society for Krishna Consciousness v. Lee*, 505 U.S. 672 (1992).

Cases and Statutes Cited

- Barnes v. Glen Theatres, Inc.*, 501 U.S. 560 (1991)
- City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000)
- Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984)
- Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984)
- Texas v. Johnson*, 491 U.S. 397 (1989)
- United States v. Eichman*, 486 U.S. 310 (1989)
- United States v. O'Brien*, 391 U.S. 367 (1968)
- Ward v. Rock Against Racism*, 491 U.S. 781 (1989)

O'BRIEN FORMULA

The *O'Brien* formula originated from the case *United States v. O'Brien* (1968). In that matter, O'Brien burned his draft registration card in protest of the Vietnam War. He was arrested and convicted for violating a federal law criminalizing the destruction of draft cards. O'Brien argued that his actions were protected as symbolic speech under the First Amendment's freedom of expression. In a seven-to-one decision, however, the Supreme Court upheld the conviction by establishing a test to determine when governmental regulation involving symbolic speech (conduct combining both "speech" and "nonspeech" elements) is justified.

The *O'Brien* formula states that conduct combining both elements can be regulated if four requirements are met:

1. The regulation is within the constitutional power of the government.
2. It furthers an important or substantial governmental interest.
3. That interest is unrelated to the suppression of free expression.

4. The incidental restriction on First Amendment freedoms is no greater than is essential to the furtherance of the governmental interest.

In its *O'Brien* decision, the Supreme Court reasoned that First Amendment guarantees do not permit destruction of a draft registration certificate. The Court maintained that regulation of the draft is within the government's constitutional power and that the government's interest in the efficient functioning of the Selective Service System is substantial. Since the government has a substantial interest in regulating draft registration, any infringement on O'Brien's right to symbolic speech was merely incidental. Therefore, O'Brien could be charged with criminal conduct for burning his draft registration card.

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References and Further Reading

- Arbetman, Lee P., and Edward L. O'Brien, eds. *Street Law: A Course in Practical Law*. 6th ed. Lincoln, IL: National Textbook Company, 1999.
- Texas v. Johnson*, 491 U.S. 397 (1989).
- Tribe, Laurence H. *American Constitutional Law*. 3rd ed. New York: West Publishing Company, 1999.
- Willis, Clyde E. *Student's Guide to Landmark Congressional Laws on the First Amendment*. Westport, CT: Greenwood Press, 2002.

Cases and Statutes Cited

- United States v. O'Brien*, 391 U.S. 367 (1968)

OBSCENITY

Introduction

Despite the various uses of the word "obscene," the Anglo-American law of obscenity since the mid-nineteenth century has been concerned primarily with the sexual connotations of the word. Obscenity laws regulate sexually explicit materials. Among the enduring questions of political theory that such laws implicate are speculations on the essence of human nature, the relationship between law and morals, and the appropriate role of the state in a democratic society that values certain fundamental individual liberties (most notably in this context freedom of expression).

If one of the purposes of law is to provide order and security to society, an inevitable question arises: What are the threats to society posed by such materials? One might intuitively answer that individuals

immersed in sexually explicit material may be incited to commit a variety of crimes, sexual or otherwise (such as violence against women). But even in the absence of overt antisocial behavior, may not such materials demean the individual and blunt his or her moral and aesthetic feelings, in turn leading to a general weakening of the moral fabric of society? Consider, however, the 1970 report of the Commission on Obscenity and Pornography, a presidential commission appointed by Lyndon B. Johnson to investigate the possible harms created by what at the time was considered an unprecedented flood of sexually explicit material. The report (delivered to Richard Nixon, Johnson's successor) concluded that there was no evidence that "exposure to explicit sexual materials plays a significant role in the causation of delinquent or criminal behavior." The report also doubted whether obscenity causes other types of antisocial behavior. In fact, given evidence that repeated exposure to such materials led to *lowered* levels of arousal, the commission concluded that ending legal restraints might also lead to a diminished interest in pornography.

President Nixon rejected the commission's conclusions and recommendations, characterizing them as "morally bankrupt," and analogized the relationship between free speech and pornography to that between liberty and anarchy. As Richard F. Hixson notes in *Pornography and the Justices*, it must have been "unthinkable for Americans, who have always felt a need to regulate obscenity, to cease and desist.... Empirical data pitted against belief structure seldom wins the day." (But as Nixon undoubtedly understood, playing to belief structures wins on election day.)

In 1986, President Reagan's attorney general, Edwin Meese, headed a new commission on pornography and reported on experimental studies concluding that exposure to violent pornography was related to greater willingness to behave violently in laboratory experiments. Critics responded that the most such studies show is that depictions of any violence, erotic or not, correlate with more violence in laboratory experiments. These critics also pointed to the continuing lack of evidence that nonviolent sexual depictions increase aggressive or violent behavior.

Early Legal Concepts and Developments

All of the states that ratified the First Amendment had laws making either blasphemy or profanity a crime, and some states made it a crime, in the words of the Massachusetts Bay Colony statute, to disseminate "any filthy, obscene, or profane song, pamphlet,

libel or mock sermon.” In the early nineteenth century, many municipalities also made criminal distribution of obscene printed materials—although none of these laws, state or local, defined “obscurity.”

In Anglo-American law, the first widely accepted judicial test for deciding obscenity derived from an English case, *Regina v. Hicklin* (1868). Lord Chief Justice Cockburn described the test for obscenity in this way: “whether the tendency of the matter ... is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall.” The work involved in this case was a familiar anti-Catholic diatribe, *The Confessional Unmasked; Shewing the Depravity of the Romanish Priesthood, the Iniquity of the Confessional and the Questions Put to Females in Confession*. The tract was far more political and religious than sexual, but Cockburn found it obscene because it would suggest to young persons (of either sex) “impure and libidinous” thoughts.

Under the *Hicklin* test, obscenity was decided on the basis of the impact of parts of the offending material (rather than the work as a whole) on the most susceptible individuals. The test took no account of the author’s intent. If the work was adjudged obscene, improper motive was implied. In essence, the basis for censorship became isolated passages, and their potential to corrupt was measured by the corruptibility of the most innocent and vulnerable.

At about the same time in America, an expanding market for pornography after the Civil War collided with a quintessential American Puritan, Anthony Comstock, who spearheaded a crusade for direct government involvement in the suppression of obscenity. Comstock’s overwhelming concern was sexual, as opposed to religious, obscenity. In 1865, Congress had passed the first statute prohibiting the shipment of obscene books and pictures through the mails. In 1873, Congress passed the so-called “Comstock Act,” an omnibus antiobscenity bill. In 1876, the Act was amended to label obscene publications “non-mailable.” Comstock was appointed a special agent by the postmaster general to enforce the law, which he did with sometimes manic fervor until his death in 1915.

American judges followed their English counterparts and allowed seizure of or prosecution for materials that tended to deprave and corrupt those whose minds were susceptible to immoral influences, especially sexual influences. Among the typical materials seized as obscene in this era (1873–1936) were advertisements for contraceptives, descriptions of the biology of human reproduction, sympathetic discussions of homosexuality, and accounts of incidents of fornication or sodomy.

In 1896, the U.S. Supreme Court began its foray into obscenity law when it reviewed two lower-court convictions. In one, it upheld the conviction of a New York publisher who had mailed “indecent” pictures of women in violation of the Comstock Act. Justice John Marshall Harlan (I) approved of the trial judge’s use of the *Hicklin* test. Six weeks later, the Court overturned the conviction of a defendant who mailed a newspaper article containing language that the Court found “coarse and vulgar” but not obscene. Obscenity, the Court held, concerns words that “signify that form of immorality which has relation to sexual impurity.”

In 1913 in a federal district court case, *United States v. Kennerly*, Judge Learned Hand characterized the *Hicklin* test as consistent with mid-Victorian morals but not contemporary American ones. Hand lamented its tendency “to reduce our treatment of sex to the standard of a child’s library in the supposed interest of a salacious few...”

Hand did not suggest a better test, but in 1933, in *United States v. One Book Entitled “Ulysses,”* Federal District Judge John M. Woolsey proposed a test that would examine the impact or dominant effect of the whole book on the average reader of normal sexuality, coupled with an evaluation of the author’s intent. Using that test, Woolsey concluded that James Joyce’s *Ulysses*, while unusually frank in some of its passages, was not written solely for the purpose of sexual exploitation. Woolsey’s opinion was upheld by the Second Circuit Court of Appeals. Judge Augustus Hand (a cousin of Learned Hand), approving the “work as a whole” approach, argued that the sexually explicit passages in the book portrayed the thoughts and feelings of the novel’s characters and were not meant “to promote lust or portray filth for its own sake.”

Judge Learned Hand (who by now had been promoted to the Second Circuit Court of Appeals) returned to the fray in 1936 in *United States v. Levine*. The “isolated passages” approach, Hand wrote, was one that “[n]o civilized community not fanatically puritanical would tolerate....” The work in question must be judged in its totality. “If it is old, its accepted place in the arts must be regarded; if new, the opinions of competent critics in published reviews or the like must be considered.”

As early as 1930 in *Near v. Minnesota*, the Supreme Court had suggested (without directly addressing the question) that obscenity is not protected by the First Amendment, but it was not until 1941 that the Court said so directly and unequivocally (although still relying on assumption rather than reasoned constitutional argument). The case was *Chaplinsky v. New Hampshire*. The opinion by Justice Frank Murphy is

based on what came to be known as the two-tiered theory of the First Amendment—some speech is protected, some is not. The case involved a conviction for using so-called “fighting words” (defined by Murphy as “those which by their very utterance inflict injury or tend to incite an immediate breach of the peace”). Murphy argued that fighting words are similar to obscenity and lewdness and libel. All such expressions “are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.” Note that as lower-level “worthless” speech, totally outside the realm of constitutional protection, obscenity could be punished without any proof of threat to society. Unlike “fighting words,” the Court offered no definition of obscenity. (In a 1952 case, *Beauharnais v. Illinois*, Justice Felix Frankfurter, without any further definition or elaboration, equated obscenity and group libel, describing both as outside “the area of constitutionally protected speech.”)

Following World War II, not only babies were booming. Pornography came into its own—soldiers carried pornography home from overseas, and a whole new generation of pulp literature flourished. The first issue of *Playboy*, featuring a buxom Marilyn Monroe on the cover, appeared in December 1953, followed soon by less pretentiously smutty scandal magazines like *Confidential* and *Keyhole*. At the same time, lurid paperbacks proliferated. And again, *eros* and *thanatos* clashed, with a new wave of decency campaigns worthy of Comstock’s crusaders. But the new Comstockians now seemed like throwbacks out of the mainstream. The battleground shifted from Times Square to the courtrooms as efforts by law enforcement officials to suppress pornography brought a new wave of litigation, making inevitable and necessary the Supreme Court’s addressing directly the question of the definition of obscenity and the precise constitutional status of obscene expression.

From *Roth-Alberts* to *Miller*

In 1957, the Court decided two cases, *Roth v. United States* and *Alberts v. California*, involving respectively a federal and a state obscenity statute. Justice William J. Brennan, writing for the Court, argued that the First Amendment protected all ideas “having even the slightest redeeming social importance....” Obscenity, however, had been condemned by history and by the Court (citing *Chaplinsky*), and thus Brennan held that it was “not within the area of constitutionally protected speech.”

Brennan went on to reject the argument that the state bears the burden of proving that any given allegedly obscene material was related to antisocial conduct; if obscenity is without constitutional protection, then the government can control it without any further justification.

The Court also drew an important (and frequently misunderstood) distinction between sex and obscenity. Sex is a vital component of the human experience, and portrayals of sex (as in art, literature, or scientific works) are entitled to full constitutional protection, unless the work “deals with sex in a manner appealing to prurient interest,” in which case it is obscene. Elaborating on this distinction, Brennan articulated what came to be known as the *Roth-Alberts* test for obscenity: “[W]hether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.”

Essentially, Brennan held that material is obscene and thus entitled to no constitutional protection if it appeals to a prurient interest in sex, has no redeeming value (either literary, artistic, political, or scientific), and is (in its totality, not just in isolated portions) offensive to the average person reflecting contemporary community standards.

Thus, a single word—“prurient”—became the key to distinguishing between allowable discussions or portrayals of sex and sexual activity, and proscribed obscenity. Justice Brennan defined the word in this way: “[i]tching; longing; uneasy with desire or longing; of persons, having itching, morbid, or lascivious longings; of desire, curiosity, or propensity, lewd....” As Professors Nowak and Rotunda observe, it is “possible that material can be prurient and political; that it can be possessed of a tendency to excite lustful thoughts and contain profound social commentary....” That insight, they surmise, explains Chief Justice Earl Warren’s concurrence in these cases, in which he argued that the conduct of the defendant, not the obscenity of the material, is (or should be) the primary concern of the courts. Justice Harlan (II) in a separate opinion pursued this point, arguing that obscenity is an abstraction that cannot be solved in the generalized way Brennan chose. Instead, Harlan opted for a case-by-case approach that would allow courts to take into account the unique value and individuality of every communication. The constitutional standards “do not readily lend themselves to generalized definitions” so that “the constitutional problem in the last analysis becomes one of particularized judgments” to be made by appellate courts themselves. (He also argued that states have considerably more leeway to regulate obscenity, consistent with the Fourteenth Amendment, than the federal government possesses under the First Amendment.)

Finally, Justices William O. Douglas and Hugo Black dissented, and what they wrote is often cited as a prime example of their First Amendment absolutism. They averred that obscenity, however defined and in whatever context, is still a form of expression, and no expression can be punished under our constitution unless “it is so closely brigaded with illegal action as to be an inseparable part of it....” (Eleven years later Douglas would make a similar criticism of the Court’s revised clear and present danger test in *Brandenburg v. Ohio* [1969].) Allowing the state to punish speech that has an undesirable impact on *thoughts* “is drastically to curtail the First Amendment....”

Some critics denounced the *Roth* decision as another example of the Warren Court’s liberal activism, paving the way for pornographers to ply their trade with few restraints. Others welcomed the effort to make obscenity standards more precise, and thus give some notice to those who dealt in sexually explicit materials, as well as providing some guidelines for legislators and prosecutors who did not want to run afoul of the First Amendment. Many cautioned that the decision raised more questions than it answered.

A foreshadowing of future difficulties came in 1964 in *Jacobellis v. Ohio*. The Court held that a trial court’s finding that material was obscene was not binding on review; the appellate court taking the case would have to watch the movie or read the book to make “an independent constitutional judgment on the facts of the case as to whether the material involved is constitutionally protected.” The definitional problems were vividly illustrated by Justice Potter Stewart’s comment in *Jacobellis*: “I shall not today attempt further to define the kinds of material I understand to be embraced [by the word obscenity] and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.” (Stewart further muddled the waters when he equated obscenity with pornography, though he qualified pornography with the adjective “hard-core”—also presumably identifiable only through the Stewart eyeballing test). It was becoming painfully obvious that the Supreme Court could not agree on any more precise formula to apply consistently to allegedly obscene material.

In 1966 in *A Book Named “John Cleland’s Memoirs of a Woman of Pleasure” v. Attorney General of Massachusetts*, the Court reviewed the conviction under a Massachusetts obscenity statute of the book known as *Fanny Hill*. In overturning the conviction, Justice Brennan held that each of the three elements of the *Roth-Alberts* rule had to be applied independently, and material cannot be obscene if it meets any one of them. The work in question was something of a

classic of ribald literature, written in 1748–1749 in England, and Brennan concluded that therefore it could not be found “utterly without redeeming social value” (Emphasis in original). Now, it seemed, the prurency of the work was *not* the focus of inquiry as it had appeared to be in *Roth*.

That same year, Justice Brennan wrote for the Court again in *Ginzburg v. United States*. The materials involved here were arguably not obscene, and possessed of social value, but Brennan focused on the publisher’s efforts to market the materials, which Brennan characterized as “commercial exploitation of erotica solely for the sake of their prurient appeal.” Paradoxically, Brennan did not even discuss the question of the social value of the publications, grounding his decision only on what he characterized as “pandering” by publisher Ralph Ginzburg, and leaving unanswered the question of why intent to appeal solely to prurient interests can outweigh the social value of the materials.

The Court in this period also disagreed on the proper understanding of “contemporary community standards.” Some justices favored a national community standard (and some only for federal prosecutions); others favored local community or state standards, with greater or lesser degrees of flexibility.

Beginning with *Redrup v. New York* in 1967, the Court overturned an obscenity conviction in a per curiam decision without an opinion—a practice that would be followed thirty times over the next six years. As Justice Brennan would later explain (in 1973 in *Paris Adult Theatre I v. Slaton*), convictions were reversed for any materials “that at least five members of the Court, applying their separate tests, deemed not to be obscene.”

The Miller Test

By 1973, the Warren Court had given way to the Burger Court, and several other changes in personnel made it possible for a five-justice majority, for the first time since *Roth*, to coalesce on a new test for obscenity. The case was *Miller v. California*.

Chief Justice Warren Burger wrote the opinion of the Court. Burger began with certain fundamentals, affirming, for example, that there are “few eternal verities” in matters literary, artistic, political, or scientific, and that courts must remain sensitive to any infringements on freedom of speech or the press. Thus, statutes designed to regulate obscenity must be carefully limited. Nonetheless, the fundamental notion of *Roth* remained—obscenity is not protected by the First Amendment.

Burger then articulated the test for obscenity (one that continues to be followed). The “basic guidelines” for trial courts determining obscenity must be

(a) whether ‘the average person, applying contemporary community standards’ would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.

Element (c) of Burger’s formulation was a reaction to the “utterly without redeeming social value” test utilized in earlier decisions. Burger argued that the standard required the prosecution to prove a negative (the work has absolutely *no* social value)—a burden “virtually impossible to discharge under our criminal standards of proof.” Presumably the shift from “utterly” to “serious” was meant to give juries a bit more leeway to find materials obscene. (In *Pope v. Illinois* in 1987 the Court held that, unlike prurience, the value of a work does not vary from community to community—the standard is whether a “reasonable person” would find value in the material taken as a whole.)

The Court gave examples of patent offensiveness: “(a) Patently offensive representations of ultimate sexual acts, normal or perverted, actual or simulated; (b) Patently offensive representations of masturbation, excretory functions, and lewd exhibition of the genitals.” (In *Ward v. Illinois* [1977], an obscenity case involving sadomasochistic materials, the Court held such materials could be constitutionally proscribed even though they were not among those listed in *Miller*. The Court argued that the *Miller* specifics “were offered merely as ‘examples’ ..., they ‘were not intended to be exhaustive.’”))

Particularly interesting is Justice Brennan’s dissent in another obscenity case handed down the same day as *Miller*. Brennan’s primary concern was that all of the Court’s obscenity standards, from *Roth* to *Miller*, were intolerably vague and therefore threatening to fundamental First Amendment values. He would not say that the state’s interests in this area are trivial or nonexistent, but nonetheless “these interests cannot justify the substantial damage to constitutional rights ... that inevitably results from state efforts to bar the distribution even of unprotected material to consenting adults.” Brennan allowed an exception for “distribution to juveniles or obtrusive exposure to unconsenting adults....” Additionally, he would allow state regulation of the manner of distribution of sexually oriented material. But the tastes of consenting adults were off limits. A more pristine example of John Stuart Mill’s “harm principle” is difficult to imagine. (In a 1990 interview with Nat Hentoff,

Brennan stated: “I put 16 years into that damn obscenity thing.... I tried and I tried, and I waffled back and forth, and I finally gave up. If you can’t define it, you can’t prosecute people for it.”)

Special Problem Areas

Protection of Minors; Private Possession: Even Justice Brennan conceded that when it came to minors, different rules may apply. In *Ginsberg v. New York* (1968), the Court found constitutional a statute that defined obscenity in terms of an appeal to the prurient interest of minors. But the Court has also held in a variety of contexts that statutes designed to protect children must be narrowly drawn and must meet familiar First Amendment proscriptions on overbreadth and vagueness.

A more recent concern has been child pornography and the frequent abuse of children used to create such materials. In 1982 in *New York v. Ferber*, the Court in essence created a new category of speech that was unprotected by the First Amendment—sexually explicit but not constitutionally obscene materials depicting sexual activity by minors. The Court upheld Ferber’s conviction under a New York state statute making it a crime to knowingly promote sexual performances by children under the age of sixteen by distributing material depicting such performances. Ferber himself was not engaged in the production of child pornography; he merely sold pornographic films. To Ferber’s dismay, one of his customers was an undercover police officer.

Justice Byron R. White wrote for the Court, arguing that the state’s interest in protecting the physical and psychological health of minors is a compelling one, and that the harm to children used in the production of such materials is magnified by their sale and distribution, and concomitant increase in demand for the product. White added that if there is a legitimate need to portray sexual conduct by minors, it can be achieved through the use of models over the statutory age who look younger.

Relying on *Ferber*, the Court in *Osborne v. Ohio* in 1990, held that the state could prohibit the possession and viewing of child pornography at home. The defendant had cited a 1969 Supreme Court decision, *Stanley v. Georgia*, which had held that “mere private possession of obscene matter” in one’s home is not a crime. The Court thought the distinction between the two cases was clear—in *Osborne*, unlike *Stanley*, the state was not relying for its defense of the statute on the paternalistic interest in regulating Osborne’s

thoughts and feelings. Rather, the state's purpose was to protect the child victims of such pornography by destroying the market at every point in the production/distribution chain, right down to private ownership and use of the material.

In *Ashcroft v. Free Speech Coalition* (2002), the Court overturned part of the Child Pornography Protection Act of 1996 (CPPA) that included within the realm of federally prohibited child pornography so-called "virtual pornography," that is, sexually explicit images which appear to be real children but are created either by using adults who look like children or by using computer imaging. To the extent that the law prohibited virtual child pornography it was unconstitutional because the materials were not produced through the exploitation of real children.

The Internet and Sexually Explicit Materials: In 1997 the Court overturned various provisions of the Communications Decency Act of 1996 (CDA) in the case of *Reno v. American Civil Liberties Union*. Congress passed the legislation to protect minors from allegedly "indecent" and "patently offensive" material on the Internet. Some in Congress relied on an earlier Supreme Court decision, *FCC v. Pacifica* (1978), which upheld the power of the Federal Communications Commission (FCC) to sanction a broadcaster for transmitting "indecent" but not obscene material during a time when children were likely to be in the audience.

The CDA made it a federal crime to transmit indecent or obscene material over the Internet, and specifically prohibited the knowing transmission of such material to any recipient under 18 years of age. Another section criminalized patently offensive messages. The law did not apply to those who took reasonable measures to restrict access by minors to such communications, and also exempted those who restrict access to such materials by requiring certain specific forms of proof of age, such as a verified credit card.

The Court held that the prohibition on indecent material over the Internet was unconstitutional. Distinguishing *Pacifica*, Justice John Paul Stevens (writing for himself and six other justices) argued that the CDA applies to all hours of the day or night, and involves criminal penalties, rather than the milder regulatory sanctions imposed by the FCC in *Pacifica*.

Stevens emphasized the statute's vagueness. "Could a speaker confidently assume that a serious discussion about birth control practices, homosexuality, or the consequences of prison rape would not violate the CDA? This uncertainty undermines the likelihood that the CDA has been carefully tailored to the congressional goal of protecting minors from potentially harmful materials." Another overriding

concern for Stevens was the statute's overbreadth. "Its open-ended prohibitions embrace all nonprofit entities and individuals posting indecent messages or displaying them on their own computers in the presence of minors." The broad terminology Congress used covers "large amounts of nonpornographic material with serious educational or other value."

In response to the decision in *Reno v. American Civil Liberties Union*, Congress passed the Child Online Protection Act (COPA), which requires operators of commercial websites to limit children's access to sexually oriented material that the average person "applying contemporary community standards" would determine panders to a minor's prurient interest. Unlike the CDA, this law applies only to commercial websites and defines offensiveness in relation to community standards. The law requires such websites to take measures (for example, age verification services, credit card validations) to exclude children. Also unlike the CDA, no material is prohibited—if the website takes steps to keep children out.

A federal district court and the U.S. Court of Appeals for the Third Circuit found the law unconstitutional because the use of contemporary community standards constituted a considerable restriction on speech when applied to a nationwide (indeed worldwide) medium such as the Internet, which cannot be limited to users in a particular geographic area.

In 2002, the Supreme Court in *Ashcroft v. American Civil Liberties Union (I)* held that use of the "community standards" approach was not overbroad under the First Amendment, and returned the case to the Third Circuit for additional proceedings. This time, the Third Circuit found that the law was not narrowly tailored and therefore was overbroad and therefore unconstitutional. The government appealed, and in 2004 in *Ashcroft v. American Civil Liberties Union (II)*, the Supreme Court in a five-to-four decision returned the case to the District Court in Philadelphia for further scrutiny of what Justice Anthony Kennedy called "plausible, less restrictive alternatives" to COPA. In the interim, the injunction against enforcement of COPA that had begun in 1998 would remain in effect. While not addressing the ultimate question of the law's constitutionality, the Court strongly hinted that the speech restrictions that the law imposes are overbroad in light of less restrictive, technology-based filters currently available.

Pornography and Feminism: Two prominent feminists, Catharine MacKinnon and Andrea Dworkin, have argued for a new exception to the First Amendment—pornography that graphically and explicitly portrays the sexual subordination of women. Such pornography, while not meeting the current legal definition of obscenity, is nonetheless in their view

a form of sex discrimination against women and should be prohibited.

While the Supreme Court has not yet directly passed on the issue, an ordinance embodying the MacKinnon-Dworkin theory was enacted in Indianapolis, and in 1985 the U.S. Court of Appeals for the Seventh Circuit found it unconstitutional in *American Booksellers Assn. v. Hudnut*. The court held that the ordinance amounted to improper viewpoint discrimination, noting that “[s]peech treating women in the disapproved way—as submissive in matters sexual or as enjoying humiliation—is unlawful no matter how significant the literary, artistic, or political qualities of the work taken as a whole. The state may not ordain preferred viewpoints in this way.” (Not all feminists support censorship of such speech, and many question MacKinnon’s and Dworkin’s assumption that the category of “women” can be subsumed under a common identity. These feminists argue that not all women, regardless of race/ethnicity, culture, class, or beliefs, are automatically subordinated to a male patriarchy.)

Zoning Ordinances: The Supreme Court has indicated that some sexual speech is of such low value that, while not proscribable as obscenity, it is still subject to greater degrees of regulation. The most notable example involves zoning ordinances used by local governments to limit the location of adult bookstores and movie theaters.

In *Young v. American Mini-Theaters, Inc.* in 1976 the Court upheld a city ordinance that limited the number of adult theaters that could be located on any given block and excluded such businesses from residential areas. In 1986 in *City of Renton v. Playtime Theaters, Inc.*, the Court relied on *Young* to uphold an ordinance that forbade adult movie theaters within 1,000 feet of any residential, zone, church, park, or school. While the result of the ordinance was to place off-limits for such theaters about 95 percent of the land in Renton (a city in which the remaining 5 percent was hardly suitable for or available to such theaters), the Court rejected First Amendment arguments, holding that its conclusion followed inexorably from *Young*.

Conclusion

Justice John Marshall Harlan (II) once characterized the obscenity problem that he and his fellow justices (and their successors) attempted to deal with as “intractable.” Perhaps “insoluble” would have been a more appropriate description (as some have concluded). Most American judges, though, have persisted

in their attempts to strike a balance between public law and private morality. In the process, they have gradually relaxed some of the restrictions on the public portrayal of sexuality. By the mid-1960s, there remained very few legal barriers against sexual expression—with the notable and not inconsiderable exception of materials deemed “obscene.” Thus, the Puritan strain that runs through American history seems alive and well, and after reviewing all that the courts have done in this area of law, one might be forgiven for concluding, with H.L. Mencken, that the essence of American Puritanism (popular and political) is “the lurking, lingering fear that somewhere, someone may be happy.”

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References and Further Reading

- Chemerinsky, Erwin. *Constitutional Law: Principles and Policies*. 2nd ed. New York: Aspen Law and Business, 2002.
- Easton, Susan M. *The Problem of Pornography*. London: Routledge, 1994.
- Hixson, Richard F. *Pornography and the Justices*. Carbondale: Southern Illinois University Press, 1996.
- Lipschultz, Jeremy Harris. *Broadcast Indecency*. Boston: Focal Press, 1997.
- Nowak, John E., and Rotunda, Ronald D. *Constitutional Law*. 7th ed. St. Paul, MN: Thomson West, 2004.
- Wallace, Jonathan, and Mangan, Mark. *Sex, Laws, and Cyberspace*. New York: Henry Holt and Company, 1996.

Cases and Statutes Cited

- A Book Named “John Cleland’s Memoirs of a Woman of Pleasure” v. Attorney General of Massachusetts*, 383 U.S. 413 (1966)
- Alberts v. California*, 354 U.S. 476 (1957)
- American Booksellers Association v. Hudnut*, 711 F.2d 323 (1985)
- Ashcroft v. American Civil Liberties Union (I)*, 535 U.S. 564 (2002)
- Ashcroft v. American Civil Liberties Union (II)*, 542 U.S. 656 (2004)
- Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002)
- Beauharnais v. Illinois*, 343 U.S. 250 (1952)
- Brandenburg v. Ohio*, 395 U.S. 444 (1969)
- Chaplinsky v. New Hampshire*, 315 U.S. 468 (1942)
- Child Online Protection Act of 1998, 37 U.S.C. Section 609
- Child Pornography Act of 1996, 18 U.S.C. Section 2252A
- City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986)
- Communications Decency Act of 1996, 47 U.S.C. Section 223
- Comstock Act of 1873, 18 U.S.C. Section 1462M
- FCC v. Pacifica*, 438 U.S. 726 (1978)
- Ginsberg v. New York*, 390 U.S. 629 (1968)
- Ginzburg v. United States*, 383 U.S. 463 (1966)
- Jacobellis v. Ohio*, 378 U.S. 184 (1964)
- Miller v. California*, 413 U.S. 15 (1973)
- Near v. Minnesota*, 282 U.S. 697 (1931)
- New York v. Ferber*, 458 U.S. 747 (1982)

OBSCENITY

Osborne v. Ohio, 495 U.S. 103 (1990)
Paris Adult Theatre I v. Slaton, 413 U.S. 166 (1973)
Pope v. Illinois, 481 U.S. 497 (1987)
Redrup v. New York, 386 U.S. 767 (1967)
Regina v. Hicklin, L.R. 2 Q.B. 360 (1868)
Reno v. American Civil Liberties Union, 521 U.S. 844 (1997)
Roth v. United States, 354 U.S. 476 (1957)
Stanley v. Georgia, 394 U.S. 557 (1969)
United States v. Kennerly, 209 F. 119 (1913)
United States v. Levine, 83 F. 2d 156 (1936)
United States v. One Book Entitled "Ulysses," 72 F.2d 705 (1934)
Ward v. Illinois, 431 U.S. 767 (1977)
Young v. American Mini-Theaters, Inc., 427 U.S. 50 (1976)

See also *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts*, 383 U.S. 413 (1966); *American Booksellers Association, Inc. et al. v. Hudnut*, 771 F. 2nd 323 (1985); *Brandenburg v. Ohio*, 395 U.S. 444 (1969); Burger, Warren E.; Communications Decency Act (1996); *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978); *Fighting Words and Free Speech*; *Ginsberg v. New York*, 390 U.S. 629 (1968); Hand, (Billings) Learned; *Jacobellis v. Ohio*, 378 U.S. 184 (1964); *Miller v. California*, 413 U.S. 15 (1973); *Near v. Minnesota*, 283 U.S. 697 (1931); *New York v. Ferber*, 458 U.S. 747 (1982); *Paris Adult Theatre v. Slaton*, 413 U.S. 49 (1973); *Redrup v. New York*, 386 U.S. 767 (1967); *Regina v. Hicklin*, L.R. 2 Q.B. 360 (1868); *Reno v. ACLU*, 521 U.S. 844 (1997); *Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986); *Roth v. United States*, 354 U.S. 476 (1957); Warren, Earl; *Young v. American Mini-Theaters, Inc.*, 427 U.S. 50 (1976)

OBSCENITY IN HISTORY

English Roots of American Obscenity Law

The regulation of obscenity in America is rooted in the censorship that prevailed during the reign of Henry VIII in sixteenth-century England. The notorious Court of the Star Chamber used licensing and other methods to censor books and theater productions. The Star Chamber was concerned mainly with religious heresy and sedition—works that offend the church or state, rather than with sexual content. By the seventeenth century, though, the increasing sexual explicitness of English theater and literature led to demands for control over content that was immoral or concerned bad manners. As a result, at the start of the nineteenth century, the common law crime of

obscene libel had developed and could be used to suppress content that was sexual rather than religious or political. Thus, obscenity regulation split off from its religious and political origins.

Sexually explicit content was controlled mainly because it was presumed to have harmful effects on its audience. This was illustrated in an early definition of obscenity that emerged from *Regina v. Hicklin*, an English case decided in 1868 that concerned an anti-Catholic pamphlet. The test for obscenity was whether the alleged obscenity would deprave or corrupt audience members who were susceptible to this type of influence, rather than whether the material would have such an influence on members of the general public.

Colonial America and the Early Republic

The law of obscenity developed in the American colonies in a manner similar to its development in England, with the original emphasis on religious speech. Laws that criminalized blasphemy or heresy began to appear in the early eighteenth century and emerged in all colonies. Obscenity was also prohibited by the states. The first reported conviction for the common law crime of obscene libel, *Commonwealth v. Sharpless*, occurred in 1815 in Pennsylvania. Sharpless was accused of exhibiting for money a painting of a man and a woman in an "indecent posture." This behavior threatened the peace and dignity of all residents of Pennsylvania, and had the potential to corrupt and subvert its youth, according to the court. The court looked to English precedent and held that obscene libel was a crime in the commonwealth as well. "The courts are guardians of the public morals," the court stated. Similarly, in *Commonwealth v. Holmes*, the Supreme Judicial Court of Massachusetts in 1821 assumed that obscene libel was a common-law misdemeanor over which it had jurisdiction. Holmes was accused of publishing a book containing an obscene print that threatened to debauch and corrupt the morals of youth and other citizens of the commonwealth. Both *Sharpless* and *Holmes* relied on the *Hicklin* standard that gauged the harmfulness of obscene content on its likely effect on the vulnerable, such as youth, rather than on the population in general. By the nineteenth century, state legislatures began to pass laws to control the spread of obscene material, which had become more widely available. Contributing to the increased availability of obscene content were the diminished influence of the Church

and increased access to public education, which increased literacy.

Prosecutions for obscenity remained rare, however, until after the Civil War, when reformer Anthony Comstock began his campaign to ban bawdy content. He created an extraordinarily influential organization called the New York Society for the Suppression of Vice. Comstock pushed Congress to pass federal legislation to control obscenity, and the result was the Comstock Act, passed in 1873, that prohibited the mailing of obscene publications. As a special agent of the Post Office, Comstock oversaw the destruction of hundreds of thousands of pieces of obscene material. Active enforcement of obscenity laws thus characterized late nineteenth-century America. Courts continued to rely on the *Hicklin* standard for obscenity, which focused on the effect of obscenity on the susceptible, rather than on the average person.

Developments in the Twentieth Century and Beyond

Most obscenity cases considered by the U.S. Supreme Court arose in the twentieth century for two key reasons. First, it was during the twentieth century that the media of mass communication burgeoned in the nation, increasing the channels through which obscene content was available. Second, this was the century in which the Supreme Court began to establish its First Amendment jurisprudence. Throughout these years, debate over the control of obscenity has arisen each time a new medium of communication has gained widespread use. The rationale for this content-based regulation of speech has continued to be obscenity's presumed potential for inciting social disorder, crime, and juvenile delinquency.

From the start, the Court grappled with the definition of obscenity. It first discussed the matter in *Winters v. New York* in 1948, which arose from the sale of allegedly obscene magazines. In *Winters*, the Court struck down as too vague a state statute prohibiting the distribution of obscene material. Because it provided criminal penalties, the law needed to make clearer the type of conduct that violated the law.

Similarly, in *Butler v. Michigan* (1957), the Court deemed as too broad another state law restricting obscenity. The law criminalized the distribution of materials "tending to corrupt the morals of youth," to anyone, including adults. The court said the law, which protected the "reading public against books not too rugged for grown men and women in order to shield juvenile innocence," went too far. In a

well-known statement, Justice Felix Frankfurter, writing for the court, stated: "Surely, this is to burn the house to roast the pig." The *Hicklin* standard was thus found unconstitutional.

The court engaged in its first extended discussion of whether obscenity was unprotected speech under the First Amendment in *Roth v. United States*, decided in 1957, and held that it was not. Roth was a New York bookseller who mailed advertisements to attract sales. He was charged with mailing obscene advertising circulars as well as an obscene book, in violation of federal and state obscenity statutes. The court defined obscenity as "material which deals with sex in a manner appealing to prurient interest." This definition left open the possibility of First Amendment protection for the portrayal of sex in art, literature, and scientific works.

These decisions were followed by the sexual revolution of the 1960s, a time in which social strictures over sexual activity were greatly relaxed. In previous decades, print materials had prompted obscenity prosecutions; at this time, film, which began to portray nudity, became the catalyst for prosecutions. Although the Court had previously considered movie censorship in *Burstyn v. Wilson* (1952) and held that the medium was protected by the First Amendment, the nature of the content was at issue in *Jacobellis v. Ohio*, decided in 1964. In this case, the Court held that a French film including an explicit love scene was an artistic work protected by the First Amendment. In a concurrence, Justice Potter Stewart mentioned the continuing difficulty of defining obscenity, but, in a well-known statement, wrote, "I know it when I see it."

Although the Court maintained that obscenity was outside the scope of First Amendment protection, it rejected the notion that mere possession of obscene material was a crime. *Stanley v. Georgia* (1969) arose from a police search of the home of a man accused of bookmaking. The search turned up several reels of film. Upon viewing the films, police deemed them obscene and seized them. The homeowner was convicted of possession of obscene material, but the Supreme Court overturned the conviction. "If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch," stated Justice Thurgood Marshall. "Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds." Marshall wrote the opinion on behalf of a Court headed by Chief Justice Earl Warren. The Warren Court has been widely perceived as a liberal one that made unprecedented expansions of individual rights.

The Court tackled the problem of defining obscenity again in *Miller v. California* (1973), which stemmed from the mailing of sexually explicit advertising brochures. This time a more conservative Court led by Chief Justice Warren Burger made the decision. The Court expanded on the ideas in *Roth* and developed a three-part test for obscenity: (a) whether the average person, applying contemporary community standards, would deem the work as appealing to the prurient interest; (b) whether the work depicted sexual conduct, as defined by state law, in a patently offensive way; and (c) whether the work as a whole lacked serious literary, artistic, political, or scientific value. The *Miller* test continued as the standard at the start of the twenty-first century.

The *Miller* Court explicitly rejected the notion that the sexual revolution obviated the need for regulation of patently offensive, hard-core pornography. Rather, in a case decided that same year, *Paris Adult Theatre I v. Slaton*, the Burger Court recognized the state's interest in regulating obscenity in places of public accommodation. The case arose from the screening of two sexually explicit films at an adult theater that restricted attendance to those twenty-one and older. The court said the theater's efforts to limit exposure to the film to consenting adults were not enough to safeguard the quality of life in the community. Writing for the Court, Chief Justice Burger said there was "at least an arguable correlation between obscene material and crime." It was not necessary, Burger said, for the state legislature to provide scientific data to demonstrate the adverse effects of obscenity on society. "From the beginning of civilized societies, legislators and judges have acted on various unprovable assumptions," he wrote.

Another limit on sexually explicit material was drawn in *New York v. Ferber*, decided in 1982. The Court upheld a state criminal statute forbidding the promotion of sexual performances by children through the distribution of material depicting such performances. Child pornography is outside the scope of First Amendment protection, the Court stated, because protection of children is a legitimate state interest. Distribution of photographs and films depicting sexual abuse of children also exacerbate the abuse by making a permanent record of it, the Court said.

Conspicuously absent from the obscenity case law have been cases arising from the broadcast media. The reason is that freedom of speech in broadcasting has been restricted since Congress passed the Radio Act of 1927. The act was superseded by the Communications Act of 1934, but federal statutes maintained the government's power to prohibit obscenity on the airwaves. The act created an independent agency, the

Federal Communications Commission (FCC), that was responsible for broadcast regulation. The FCC also has regulatory power over television, cable, and telephones. Because of the statutory prohibition of obscenity on these media, questions about sexually explicit content have centered on indecency. In *Federal Communications Commission v. Pacifica* (1978), the Supreme Court held that the FCC had the power to regulate a radio broadcast that was indecent but not obscene. The broadcast in question was the "Filthy Words" monologue of humorist George Carlin, who repeated over and over a series of expletives that were banned from the airwaves. The FCC deemed the broadcast indecent rather than obscene because, as social satire, it was not lacking in serious political value. But government still had the right to regulate it because of the unique circumstances presented by a radio broadcast. The audience is constantly tuning in and out, the Court said, and children may be in the audience. The "uniquely pervasive presence" of the broadcast media makes them difficult for unwilling audience members to avoid, warranting additional control over their content, according to the Court.

The circumstances of communication continued to play a role as the Court dealt with the regulation of other electronic media. In *Sable Communications of California v. Federal Communications Commission* (1989), the Court struck down a federal ban on indecent commercial telephone messages, more commonly known as "dial-a-porn." The FCC's restrictions on callers, which required credit cards and access codes, were deemed sufficient to protect children from unsuitable messages. In *United States v. Playboy Entertainment Group* (2000), the Court found unconstitutional a provision in the Telecommunications Act of 1996 that placed severe restrictions on the transmission of sexually oriented programming over cable television. Cable operators were already using technological means to limit access to paying customers. The occasional technological failures that sometimes arose, exposing nonsubscribers to a sexual image now and then, did not warrant the law's extensive restrictions.

As a new medium of communication, the Internet has been the focus of considerable legislation at the turn of the twenty-first century, with much attention being directed to control over content. Although federal law criminalizes obscenity, Congress sought to further restrict obscenity and the Internet with the Communications Decency Act. The act was part of the wide-ranging regulatory reform legislation known as the Telecommunications Act of 1996. The Communication Decency Act sought to protect children from "indecent" and "patently offensive" communications

on the Internet by criminalizing the transmission of such content to them. The Court, however, held in *Reno v. American Civil Liberties Union* (1997) that the law abridged free speech protected by the First Amendment. As with so many other cases, the Court said that, in trying to protect children, the law suppressed a great deal of protected speech that adults had a constitutional right to receive and share. Similarly, the Court struck down provisions of the Child Pornography Prevention Act in *Ashcroft v. Free Speech Coalition* (2002), including a ban on virtual child pornography. This is sexually explicit imagery that appears to depict minors but was produced without using any real children, as might be done with computer technology.

Congress responded to the decision in *Reno* by passing the Child Online Protection Act. But again, the Court found the legislation was not the least restrictive means available for protecting children from harmful content on the Internet. In *Ashcroft v. American Civil Liberties Union* (2004), the court let stand a preliminary injunction preventing enforcement of the law due to its apparent conflict with the First Amendment.

The Court, did, however, uphold a statute requiring any public library receiving federal funds for Internet access to install software that blocks obscenity and to prevent minors from accessing harmful information. This type of condition is a legitimate part of Congress's spending power, the Court stated in *United States v. American Library Association* (2003). Congress can require libraries to use funds for materials of appropriate quality, the court stated, upholding the Children's Internet Protection Act.

In most cases, restrictions on speech, including sexually explicit speech, have been considered potential threats to the civil liberties of citizens. However, another important school of thought views pornography as a violation of the civil rights of women. A leading proponent of this viewpoint has been Catharine A. MacKinnon, a law professor and feminist. MacKinnon views pornography as harmful to women, and believes that women should be able to seek redress through civil legal action. From this perspective, the harm caused by pornography outweighs the interest in free speech. Control of pornography is thus seen not as a violation of First Amendment freedoms, but as supporting the civil rights of women.

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References and Further Reading

Hixson, Richard F. *Pornography and the Justices: The Supreme Court and the Intractable Obscenity Problem*. Carbondale: Southern Illinois University Press, 1996.

Kalven, Harry Jr. *A Worthy Tradition: Freedom of Speech in America*. New York: Harper & Row, 1988.
MacKinnon, Catharine A. *Women's Lives, Men's Laws*. Cambridge, MA: Harvard University Press, 2005.
Schauer, Frederick F. *The Law of Obscenity*. Washington, D.C.: Bureau of National Affairs, Inc., 1976.

Cases and Statutes Cited

Ashcroft v. American Civil Liberties Union, 542 U.S. 656 (2004)
Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002)
Burstyn v. Wilson, 343 U.S. 495 (1952)
Butler v. Michigan, 352 U.S. 380 (1957)
Child Online Protection Act of Oct. 21, 1998, 112 Stat. 2681
Child Pornography Prevention Act of 1996, 110 Stat. 3009
Children's Internet Protection Act of 2001, 114 Stat. 2763 (2000)
Commonwealth v. Holmes, 17 Mass. 336 (1921)
Commonwealth v. Sharpless, 2 Serg. & Rawle 91; 1815 Pa. LEXIS 81
Communications Act of 1934, 48 Stat. 1064
Communications Decency Act of Feb. 8, 1996, 110 Stat. 133
Comstock Act of 1873, 17 Stat. 599
Federal Communications Commission v. Pacifica, 438 U.S. 726 (1978)
Jacobellis v. Ohio, 378 U.S. 184 (1964)
Miller v. California, 413 U.S. 15 (1973)
New York v. Ferber, 458 U.S. 747 (1982)
Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973)
Radio Act of 1927, 44 Stat. 1162
Regina v. Hicklin, [1868] L.R. 3 Q.B. 360
Reno v. American Civil Liberties Union, 521 U.S. 844 (1997)
Roth v. United States, 354 U.S. 476 (1957)
Sable Communications of California v. Federal Communications Commission, 492 U.S. 115 (1989)
Stanley v. Georgia, 394 U.S. 557 (1969)
Telecommunications Act of February 8, 1996, 110 Stat. 56
United States v. American Library Association, 539 U.S. 194 (2003)
United States v. Playboy Entertainment Group, 529 U.S. 808 (2000)
Winters v. New York, 333 U.S. 507 (1948)

See also Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002); *Burger, Warren E.; FCC v. Pacifica Foundation*, 438 U.S. 726 (1978); *Frankfurter, Felix; Jacobellis v. Ohio*, 378 U.S. 184 (1964); *MacKinnon, Catharine; Marshall, Thurgood; Miller v. California*, 413 U.S. 15 (1973); *New York v. Ferber*, 458 U.S. 747 (1982); *Obscenity; Paris Adult Theater v. Slaton*, 413 U.S. 49 (1973); *Regina v. Hicklin*, L.R. 3 Q.B. 360 (1868); *Reno v. ACLU*, 521 U.S. 844 (1997); *Roth v. United States*, 354 U.S. 476 (1957); *Stanley v. Georgia*, 394 U.S. 557 (1969); *United States v. Playboy Entertainment Group*, 529 U.S. 803 (2000); *Warren, Earl*

O'CONNOR, SANDRA DAY (1930–)

Sandra Day O'Connor, an Associate Justice of the U.S. Supreme Court from 1981 until 2005, cast the swing vote in many civil liberties decisions. O'Connor's sensitivity toward the factual context of cases and her tendency to prefer broad standards and balancing tests over bright-line rules often made her votes unpredictable, and generated criticism that her opinions were inconsistent and lacked a coherent judicial philosophy. Ultimately, her civil liberties jurisprudence may reflect a balance between a fundamental libertarianism and her strong recognition for public order, combined with a firm belief in federal judicial deference to state legislatures. On a wide range of issues, including criminal justice, religious freedom, and racial equality, O'Connor was a centrist whose opinions helped to preserve and sometimes expand the scope of civil liberties. During the final years of her long tenure, she tended to strike this balance more often in favor of individual liberty.

Born on an Arizona ranch in 1930, O'Connor graduated from Stanford University and Stanford Law School. Although O'Connor ranked third in her law school class, the elite law firms at which she sought employment during the middle 1950s rejected her because they refused to hire women. After serving in various governmental posts and practicing law in her own small firm in Phoenix, O'Connor became an Arizona state senator in 1969, quickly rising to the post of majority leader. She served as trial judge in Phoenix and later as a member of the Arizona Court of Appeals before President Reagan nominated her to the Supreme Court in 1981.

O'Connor was the first of many Supreme Court nominees whose views on abortion were an issue in the confirmation process. Although O'Connor expressed her personal opposition toward abortion in her testimony before the Senate Judiciary Committee, opponents of abortion were concerned because she had voted in favor of an abortion measure during her tenure as an Arizona senator. In her early opinions involving abortion, O'Connor was sharply critical of the trimester framework developed in *Roe v. Wade* (1973), and she maintained that only regulations that imposed an "undue burden" on abortion should be subject to the Court's strict scrutiny.

Ultimately, however, O'Connor was instrumental in preserving the constitutional right to abortion first announced by the Court in *Roe*. In *Planned Parenthood v. Casey* (1992), O'Connor jointly authored an opinion with Justices Anthony M. Kennedy and David H. Souter asserting that the principle of stare decisis justified retention of *Roe* because Americans for the past two decades had "organized intimate

relationships and made choices ... in reliance on the availability of abortion in the event that contraception should fail." This opinion also observed that women's "ability to control their reproductive lives" had facilitated their ability "to participate equally in the economic and social life of the Nation." O'Connor, Kennedy, and Souter joined Justices Harry A. Blackmun and John Paul Stevens in voting to overturn a Pennsylvania statute requiring married women to notify their husbands before obtaining an abortion, but they voted with four other justices to sustain other restrictions in the statute. O'Connor's support of abortion rights keenly disappointed many conservatives, who had hoped that she would vote to overturn *Roe*.

During her tenure on the Court, O'Connor also gradually emerged as something of a champion of the rights of homosexuals. Although O'Connor in *Bowers v. Hardwick* (1986) cast the swing vote to sustain the constitutionality of a Georgia statute prohibiting homosexual sodomy, she was part of the Court's six-to-three majority seventeen years later in *Lawrence v. Texas* (2003), which overturned a similar law. Although five members of the Court in *Lawrence* contended that a Texas sodomy statute violated due process, O'Connor argued in a concurring opinion that the statute denied equal protection because it branded "all homosexuals as criminals, thereby making it more difficult for homosexuals to be treated in the same manner as everyone else." Since O'Connor continued to maintain that the Fourteenth Amendment's due process clause did not impose any substantive limit on the state to enact laws regulating sexual activity, she contended that the vote in *Lawrence* was not inconsistent with her vote in *Bowers*. O'Connor also joined the Court's six-to-three majority in *Romer v. Evans* (1996), which invoked the equal protection clause to invalidate a Colorado law that prohibited all legislative, executive, or judicial action to bar discrimination based on sexual orientation.

In cases involving religion, O'Connor also was a pivotal figure. Her major contribution was her development of the so-called "endorsement test," in which the Court considers whether the government has endorsed a practice that is challenged under the establishment clause. O'Connor began to develop this test in her concurring opinion in *Lynch v. Donnelly* (1984), a five-to-four decision in which the Court held that a city did not violate the establishment clause by including a creche in a Christmas display in a park. In a later case, *Allegheny County v. Greater Pittsburgh American Civil Liberties Union* (1989), the Court adopted O'Connor's endorsement analysis in a five-to-four decision, joined by O'Connor, holding that

the prominent display of a creche in a courthouse was unconstitutional.

O'Connor relied on the endorsement test in her concurring opinion in *McCreary County v. American Civil Liberties Union* (2005), in which she cast the deciding vote to determine that the posting of the Ten Commandments in a courthouse violated the establishment clause. O'Connor similarly relied upon this test in voting with the majority in the Court's six-to-three decision in *Van Orden v. Perry* (2005), holding that the display of the Ten Commandments among various historical memorials in a park was not unconstitutional.

In cases involving public aid to religiously affiliated schools, O'Connor also occupied an intermediate position. Although she maintained that the Constitution prohibited direct public aid to such schools, she was more tolerant of aid that was filtered through students or their parents. O'Connor was the swing vote in the Court's 2002 decision in *Zelman v. Simmons-Harris*, which upheld the constitutionality of vouchers for the payment of tuition at religiously affiliated schools.

In cases involving criminal procedure, O'Connor's experience as a trial judge informed her awareness of the delicate balance between the exigencies of law enforcement and fairness toward the accused. As a proponent of the Rehnquist Court's so-called "new federalism," O'Connor also urged restraint by federal courts in their review of state criminal decisions. In particular, she was an influential advocate of the theory that a defendant exhaust his state court remedies before seeking relief in federal court.

In death penalty cases, O'Connor moved with the Court toward stricter scrutiny of capital punishment laws. Although she concurred in *Stanford v. Kentucky* (1989), upholding the death penalty for juvenile offenders, she voted with the majority in *Roper v. Simmons* (2005) to strike down a similar law. Likewise, she voted to permit execution of mentally retarded persons in *Penry v. Lynaugh* (1989), but joined the Court's contrary ruling thirteen years later in *Atkins v. Virginia* (2002).

O'Connor tended to be skeptical of the constitutionality of affirmative action programs and cast the deciding vote in *Adarand Contractors, Inc. v. Peña* (1995), which announced that the Court would strictly scrutinize affirmative action programs instituted by state or federal governments, and had the effect of ending most public programs that gave preferences to minority contractors. In *Grutter v. Bollinger* (2003), however, O'Connor wrote the Court's opinion for a five-to-four majority in holding that a public law school had a compelling interest in achieving a diverse student body and therefore could use race as a factor in student admissions. In a companion case, *Gratz v.*

Bollinger (2003), which held that a public university could not automatically award racial minorities points for use in admissions, O'Connor wrote a concurring opinion arguing that the procedure was unconstitutional because it failed to provide "a meaningful individual review of applicants."

In several five-to-four decisions concerning voting districts designed to promote the election of African Americans, O'Connor voted with the majority in holding that the equal protection clause prohibits legislatures from using race/ethnicity as the predominate factor in drawing district boundaries. O'Connor wrote the opinion in the Court's seminal opinion in *Shaw v. Reno* in 1993.

In another case involving equal protection of voting rights, *Bush v. Gore* (2000), O'Connor cast the decisive vote in holding that a manual recount of certain Florida votes in a contested presidential election would be unconstitutional. In the wake of the Court's decision, Albert Gore, Jr. conceded the election to George W. Bush.

In the Court's first so-called "right to die" decision, *Cruzan v. Director, Missouri Department of Health* (1990), O'Connor cast the deciding vote in support of the Court's ruling that a state could require clear and convincing evidence that a permanently unconscious person would have wanted the withdrawal of life support systems, but she wrote a separate concurring opinion emphasizing that terminally ill persons have a liberty interest in refusing unwanted medical treatment. She reiterated this theme in her concurring opinions in *Washington v. Glucksberg* and *Vacco v. Quill* in 1997, which held that the Constitution confers no right of physician-assisted suicide.

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References and Further Reading

- Brownstein, Alan, *A Decent Respect for Religious Liberty and Religious Equality: Justice O'Connor's Interpretation of the Religion Clauses of the First Amendment*, *McGeorge Law Review* 32 (Spring 2001): 837–75.
- Davis, Peggy Cooper, and Carol Gilligan, *A Woman Decides: Justice O'Connor and Due Process Rights of Choice*, *McGeorge Law Review* 32: (Spring 2001): 895–914.
- Maveety, Nancy. *Justice Sandra Day O'Connor: Strategist on the Supreme Court*. Lanham, MD and London: Rowman & Littlefield, 1996.

Cases and Statutes Cited

- Adarand Contractors, Inc. v. Peña*, 515 U.S. 200 (1995)
- Allegheny County v. Greater Pittsburgh American Civil Liberties Union*, 492 U.S. 573 (1989)
- Atkins v. Virginia*, 536 U.S. 304 (2002)
- Bowers v. Hardwick*, 478 U.S. 186 (1986)

Bush v. Gore, 531 U.S. 98 (2000)
Cruzan v. Director, Missouri Department of Health, 497 U.S. 261 (1990)
Gratz v. Bollinger, 539 U.S. 244 (2003)
Gutter v. Bollinger, 539 U.S. 306 (2003)
Lawrence v. Texas, 123 S.Ct. 2472 (2003)
Lynch v. Donnelly, 465 U.S. 668 (1984)
McCreary County v. American Civil Liberties Union of Ky., 545 U.S. ___ (2005)
Penry v. Lynaugh, 492 U.S. 302 (1989)
Planned Parenthood v. Casey, 505 U.S. 833 (1992)
Roe v. Wade, 410 U.S. 113 (1973)
Romer v. Evans, 517 U.S. 620 (1996)
Roper v. Simmons, 543 U.S. 551 (2005)
Shaw v. Reno, 509 U.S. 630 (1993)
Stanford v. Kentucky, 492 U.S. 361 (1989)
Vacco v. Quill, 521 U.S. 793 (1997)
Van Orden v. Perry, 125 S. Ct. 2854 (2005)
Washington v. Glucksberg, 521 U.S. 702 (1997)
Zelman v. Simmons-Harris, 536 U.S. 639 (2002)

O'CONNOR v. ORTEGA, 480 U.S. 709 (1987)

Officials at Napa State Hospital, after placing Dr. Magno Ortega on administrative leave pending an investigation into possible workplace improprieties, searched his office. Information found in the office was later used in an administrative proceeding that led to Dr. Ortega's dismissal. Dr. Ortega then filed an action in federal court against hospital officials alleging that the search violated the Fourth Amendment. On a motion for summary judgment, the district court ruled against Dr. Ortega, finding that the search was proper. On appeal, the circuit court found that the search did violate the Fourth Amendment, and remanded the case to the district court for a determination of damages.

The Supreme Court found both lower courts to be in error. Under the Court's analysis, while public employees have legitimate workplace privacy interests protected by the Fourth Amendment, these must be balanced against the public employer's interest in supervision, control, and the efficient operation of the workplace. The Court here makes a key distinction between searches by law enforcement officials, which are held to a probable cause standard, and searches by public employers, which are held to a less stringent reasonable standard. According to the Court, public employers' searches are valid if done for noninvestigatory work related matters or to investigate workplace misconduct, are reasonably justified, and the scope of the search is reasonably related to the objective of the intrusion. Under this standard, the Court found that the district court erred by failing to first determine the context of the search and the

circuit court erred by not evaluating the reasonableness of the search and its scope.

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References and Further Reading

Israel, Jerold H., and Wayne R. LaFave. *Criminal Procedure in a Nutshell*. St. Paul, MN: West, 2001.

See also **Search (General Definition); Warrantless Searches**

OHIO v. ROBINETTE, 519 U.S. 33 (1996)

Robinette was stopped for speeding by an Ohio deputy sheriff on drug interdiction patrol. The deputy approached Robinette's car, asked for and received his driver's license, and returned to his cruiser and ran a records check that revealed no outstanding warrants. The deputy then returned to the Robinette's car, ordered him out of the vehicle, told him he was going to let him go with a warning, and handed back Robinette's license. The deputy then asked Robinette if Robinette would consent to a vehicle search. Robinette consented, drugs were found, and Robinette was arrested. At trial and on appeal, Robinette sought to have the drugs excluded as the product of an unlawful seizure, claiming his consent was obtained unlawfully. The Ohio Supreme Court concluded that the search of Robinette's car violated the Fourth Amendment because his consent was invalid, as the deputy did not make it clear to Robinette that the lawful detention (the traffic stop) had ended and that Robinette was free to leave before the deputy sought consent to search the car.

The Supreme Court reversed the Ohio court, holding that the Fourth Amendment does not require a police officer to tell a motorist when a lawful detention has ended and a consensual encounter has begun. The Court has consistently maintained a distinction between Fifth and Sixth Amendment rights to remain silent and have counsel (where police are required to inform suspects of their rights through the Miranda warnings) and Fourth Amendment rights (which the Court has consistently held impose on the police no affirmative duty to inform). Thus police officers need not inform a suspect he or she may refuse to consent to a search, or that a lawful detention such as a traffic stop or investigatory stop has ended. This decision has implications for civil liberties, as law enforcement agencies use drug interdiction patrols and pretext stops as means of searching for drugs. Police officers, under *Whren v. United States* (1996), are allowed to stop a vehicle for any reason so long as there exists a lawful basis for the stop. Under *Robinette*, law

enforcement officers may take advantage of a lawful detention to attempt to turn it into a full-blown search, if consent is given, without first making it clear to the suspect that he or she is free to leave.

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References and Further Reading

Hemmens, Craig, and Jeffrey R. Maahs, *Reason to Believe: Ohio v. Robinette*. Ohio Northern University Law Review 23 (1997): 2:309–46.

Cases and Statutes Cited

Whren v. United States, 517 U.S. 806 (1996)

See also **Warrantless Searches**

OLMSTEAD v. UNITED STATES, 277 U.S. 438 (1928)

Roy Olmstead was a suspected bootlegger, selling alcoholic beverages in violation of the National Prohibition Act. U.S. government agents installed telephone wiretaps on the homes and offices of Olmstead and others. The wires were inserted along the telephone wires and accomplished without trespass on the property of the defendants. Evidence collected over five months, resulting in 775 typewritten pages of transcripts, demonstrated that Olmstead and his co-defendants employed at least fifty people, owned two sea-going vessels in addition to a number of smaller coastal boats, and had a large inventory of illegal liquor. Their business was thriving, with annual sales of more than two million dollars.

Olmstead and his co-defendant claimed that the wiretaps violated the Fourth Amendment's protection against unreasonable searches and seizures and the Fifth Amendment's guarantee against self-incrimination. Chief Justice William Howard Taft wrote the majority opinion, narrowly interpreting the reach of the Fourth Amendment to "material things—the person, the house, his papers or his effects." Even though the chief justice recognized that the Fourth Amendment also extends to sealed letters, he rejected the suggestion that a letter and a telephone conversation are similar; sealed letters, he noted, are in the custody of the Post Office Department, which is forbidden to open them. It is, according to the chief justice, "a paper, an effect" that is in the custody of the government. Telephone conversations are not, he asserted, in the custody of the government and there was no searching or seizing, just "hearing and that only." Therefore, he concluded, that the Fourth Amendment could not be extended to include

telephone wires. Should Congress wish to secure the privacy of telephone conversations, it could have done so through legislation, as it had done for sealed letters. Since Congress had not done so, wiretapping in this case was not covered by the Fourth Amendment's protection against unlawful searches and seizures.

Even though the evidence was obtained in a way that violated laws of the State of Washington, which made intercepting telegraph or telephone messages a misdemeanor, Justice Taft argued that under common law rules, the admissibility of evidence is not affected by the illegality of the means by which it was obtained. There was, at that time, no case that could sustain the proposition that evidence could not be admitted in a trial because it was unethically secured. The Chief Justice argued that, if the Fourth Amendment had not been violated—and he asserted that it had not—then the Fifth Amendment was not relevant to the Court's decision.

Only five justices joined Taft in the majority, and over the years, *Olmstead v. United States* has become best known for the dissent written by Justice Louis Brandeis. The famous dissent by Brandeis began by emphasizing that the words of the Constitution must adapt to a changing world and conditions that the authors had not known. He drew on Chief Justice John Marshall's words in *McCulloch v. Maryland* (1819) that constitutions are "designed to approach immortality as nearly as human institutions can approach it." At the time that the Constitution and its first ten amendments were written, Brandeis explained, force and violence were the only means available for coercing a confession and force and entry were the only ways to search and seize. Wiretaps constituted a more sophisticated approach to achieve both confessions and searches, and he predicted that even newer methods would undoubtedly be found for government espionage.

Brandeis relied heavily on *Boyd v. United States* (1886) to argue that the essence of the Fourth and Fifth Amendments was to protect against all invasions by the government into the "sanctities of a man's home and the privacies of life ... and of his indefeasible right of personal security, personal liberty and private property." Whereas the chief justice had distinguished between the postal service and the telephone service, Brandeis asserted that both were public services furnished by the government and, quoting the appeals court judge below, said that there was no difference between a sealed letter and a telephone conversation: "[O]ne is visible, the other invisible; the one is tangible, the other intangible; the one is sealed, and the other unsealed; but these are distinctions without a difference." Indeed, Brandeis continued, the invasion of one's privacy through

wiretaps is far greater, because the people at both ends of the line are affected. A confession can be compelled through wiretapped conversations, because the accused believes that he is having a private conversation.

Central to Brandeis's thesis is that the Fourth and Fifth Amendments have at their bases the broad intention "to secure conditions favorable to the pursuit of happiness"; "they conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men." Intrusions by the government into a person's right to privacy violates the Fourth Amendment, and when it is used in a criminal proceeding, the information obtained violates the Fifth Amendment's protection against self-incrimination. To solidify his argument, Brandeis noted that the federal officers who authorized the wiretaps themselves violated the laws of the State of Washington: "[T]he crimes of these officers were committed for the purpose of securing evidence with which to obtain an indictment and to secure a conviction." The Eighteenth Amendment that authorized prohibition did not authorize anyone to violate the laws of a state. "A court will not," he continued, "redress a wrong when he who invokes it has unclean hands." Justices Holmes, Stone, and Butler also dissented.

Olmstead was extended in 1942 to the use of dictaphones, the wires of which led to an adjacent office, and to detectaphones, devices that would enable one to hear a conversation on the other side of a wall, in the case of *Goldman v. United States* (1942). There was no trespass and, therefore, no illegal search or seizure. Finally, however, in *Katz v. United States* in 1967, the requirement that a warrant must be obtained prior to installing a wiretap was imposed and recognized "reasonable expectations of privacy" in the course of telephone conversations. *Olmstead* was overruled, and Brandeis's arguments from forty years earlier prevailed.

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Cases and Statutes Cited

Boyd v. United States, 116 U.S. 616 (1886)
Goldman v. United States, 316 U.S. 129 (1942)
Katz v. United States, 389 U.S. 347 (1967)
McCulloch v. Maryland, 17 U.S. 316 (1819)

O'LONE v. ESTATE OF SHABAZZ, 482 U.S. 342 (1987)

Religious freedom constitutes one of the most valued civil liberties, and no less so among inmates. Incarceration, however, has historically imposed numerous

restrictions on their practice of religion. Some restrictions have ample justification as necessary security measures; other restrictions have rested on prejudice, ignorance, or exaggerated security concerns. Aggrieved inmates could not secure relief from onerous and arbitrary restrictions until the federal judiciary abandoned its self-imposed and aptly named "hands-off" doctrine. In 1972 the Supreme Court in *Cruz v. Beto* invited judicial protection of inmates' religious freedom. Twenty-five years would pass before the Court in *O'Lone v. Shabazz* established a governing standard for determining which restrictions on prisoners' free exercise rights violated the First Amendment. Left to their own devices in the interim, the U.S. courts of appeals had divided over a governing standard.

The *Shabazz* plaintiffs complained about prison policies that indirectly barred their attendance at Jumu'ah, a Muslim congregational service held inside the walls of their New Jersey prison on Fridays. Because of their minimum security status, the plaintiffs worked outside the prison walls. In turn, their work status barred them from returning to the facility before the close of the workday and, consequently, during or before the religious services. The trial court found no First Amendment violation, but the court of appeals reversed and remanded because defendant prison officials failed to address alternative methods for accommodating the inmates' attendance at the Jumu'ah services. Siding with prison officials, the Supreme Court in *Shabazz* reversed the circuit court ruling. A five-to-four Court found that the challenged restrictions on prisoners' free exercise of religion did not violate the Constitution.

To resolve this free exercise claim, the *Shabazz* Court used the test employed in *Turner v. Safley* (1987) to permit severe limitations on inmate-to-inmate correspondence but strike down a ban on the marriage of inmates. By the *Shabazz* Court's own admission, it selected the *Turner* test to further its policy of "ensur[ing] that courts afford appropriate deference to prison officials." In stark contrast to the close scrutiny usually applied to First Amendment infringements in the civilian community, the standard employed in *Shabazz* requires restraints on free exercise to be reasonably related to legitimate prison goals. To make this determination, the *Shabazz* Court considered four factors delineated earlier in *Turner*. The first addresses whether the rule or policy bears a "rational connection" to a government interest that is both legitimate and neutral regarding religion. If the plaintiff demonstrates the absence of a connection, the inquiry ceases and the challenged rule or policy violates the free exercise clause. If the connection does exist, a court balances the remaining

factors: whether there exists an alternative means for the plaintiffs to exercise their religious beliefs; the impact on prison staff, inmates, and penal resources of accommodating the asserted right; and the existence of a de minimis alternative to the challenged rule or policy.

In its application of the four-part reasonableness test, the Court largely adopted the arguments of the defendant prison officials. First, assigning inmates to outside work details and forbidding their return to the prison before the end of their workday eased overcrowding, prevented congestion at the prison's main entrance, and instilled rehabilitative work habits. Second, prison officials had made various accommodations, such as a pork-free diet, to enable the affected Muslim inmates to otherwise practice their faith. Third, accommodating the plaintiffs' asserted right to attend religious services would lead to charges of favoritism and tax the already overburdened staff. Fourth, there were no easy, de minimis alternatives to the challenged prison regulations.

The impact of *Shabazz* has been diminished by congressional legislation safeguarding religious practices. Enacted in 1993, the Religious Freedom Restoration Act (RFRA) prohibited the federal government and the states from substantially burdening religious practices unless they employed the least restrictive means in furtherance of a compelling state interest. The Supreme Court in *City of Boerne v. Flores* (1997) ruled the RFRA unconstitutional under the separation of powers doctrine in its application to the states. In 2000, Congress passed the Religious Land Use and Institutionalized Persons Act (RLUIPA), which in relevant part reimposes the compelling state interest/least restrictive means standard on state governments when they substantially burden the religious freedom of prisoners and other institutionalized persons. RLUIPA has thus far survived constitutional challenge, including on establishment clause grounds before the Supreme Court in *Cutter v. Wilkinson* (2005).

Notwithstanding the enactment of RFRA and RLUIPA, *Shabazz* presaged a broad application of the reasonableness standard formulated in *Turner v. Safley*. The *Turner* Court had indicated that its reasonableness standard should be used whenever prison rules and regulations are challenged. In *Shabazz*, the Court took the first of several new steps in that direction by extending the reach of the reasonableness standard to free exercise claims. Subsequently, the Court used this governing standard to address a host of alleged rights violations, including prisoners' claims arising from severely restricted prison visitation, censorship of books, and involuntary medical treatment with antipsychotic drugs.

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References and Further Reading

- Blischak, Matthew P., *O'Loone v. Estate of Shabazz: The State of Prisoners' Religious Free Exercise Rights*, *American University Law Review* 37 (Winter 1988): 453–86.
- Branham, Lynn S., *Go Sin No More: The Constitutionality of Governmentally Funded Faith-Based Prison Units*, *University of Michigan Journal of Law Reform* 37 (Winter 2004): 291–352.
- Buss, William G., *An Essay on Federalism, Separation of Powers, and the Demise of the Religious Freedom Restoration Act*, *Iowa Law Review* 83 (January 1998): 391–434.
- Chiu, Anne Y., *When Prisoners Are Weary and Their Religious Exercise Burdened, RLUIPA Provides Some Rest for Their Souls*, *Washington Law Review* 79 (August 2004): 999–1027.
- Clear, Todd R., Patricia L. Hardyman, Bruce Stout, Karol Lucken, and Harry R. Dammer. "The Value of Religion in Prison." *Journal of Contemporary Criminal Justice* 16, no. 1 (2000): 53–75.
- Developments in the Law—In the Belly of the Whale: Religious Practice in Prison*, *Harvard Law Review* 115 (May 2002): 1891–913.
- Giles, Cheryl Dunn, *Turner v. Safley and Its Progeny: A Gradual Retreat to the "Hands-Off" Doctrine?*, *Arizona Law Review* 35 (Spring 1993): 219–36.
- Laycock, Douglas, and Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act* *Texas Law Review* 73 (December 1994): 209–45.
- McConnell, Michael W., *The Origins and Historical Understanding of Free Exercise of Religion*, *Harvard Law Review* 103 (May 1990): 1409–517.
- McNeil, Matthew, *The First Amendment Out On Highway 61: Bob Dylan, RLUIPA, and the Problem with Emerging Postmodern Religion Clauses Jurisprudence*, *Ohio State Law Journal* 65 (2004): 1021–56.
- Mushlin, Michael B. *Rights of Prisoners*, vol. 1, 3d ed. St. Paul, MN: West Group, 2002.
- Pepper, Stephen, *Taking The Free Exercise Clause Seriously*, *Brigham Young University Law Review* 1986 (1986): 299–336.
- Solove, Daniel J., *Faith Profaned: The Religious Freedom Restoration Act and Religion in the Prisons*, *Yale Law Journal* 106 (November 1996): 459–70.

Cases and Statutes Cited

- City of Boerne v. Flores*, 521 U.S. 507 (1997)
- Cruz v. Beto*, 405 U.S. 319 (1972)
- Cutter v. Wilkinson*, 544 U.S. ____ (2005)
- Religious Freedom Restoration Act of 1993, 42 U.S.C. Sections 2000bb–2000bb-4 (2000)
- Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C.A. Section 2000cc et seq.
- Turner v. Safley*, 482 U.S. 78 (1987)

See also Equal Protection Clause and Religious Freedom; Establishment Clause (I): History, Background, Framing; Establishment Clause Doctrine: Supreme Court Jurisprudence; Establishment of Religion and Free Exercise Clauses; Free Exercise Clause (I): History, Background, Framing; Free Exercise Clause Doctrine: Supreme Court Jurisprudence; Prisoners and

Free Exercise Clause Rights; Religious Freedom Restoration Act; Religious Land Use and Institutionalized Persons Act of 2000; *Turner v. Safley*, 482 U.S. 78 (1987)

OMNIBUS CRIME CONTROL AND SAFE STREETS ACT OF 1968 (92 STAT. 3795)

In response to soaring crime rates, urban riots, and public demand for federal action in the late 1960s, Congress passed the Safe Streets Act, its largest anticrime package to date. Initially, President Johnson and liberal Democrats had proposed the bill to combat the social roots of crime. However, the final version focused almost entirely on increasing police effectiveness. Through large federal grants and stiffer laws, the legislation aimed to reduce crime in urban poverty areas inhabited mostly by the black underclass.

The federal government had no jurisdiction to control crime in the states, so as part of the bill, Congress authorized the creation of the Law Enforcement Assistance Administration (LEAA) to add federal funding to local law enforcement. State law enforcement officials received block grants allowing them autonomy to spend grant monies under broad headings such as police planning, training, and crime prevention research.

While block grant funding was the mainstay of the legislation, Congress intended several provisions of the act to increase the legal efficiency of police. One aspect gave police fewer restrictions during identification line-ups and interrogation. A police officer was no longer required to read a suspect "*Miranda* warnings" before questioning. Furthermore, the bill limited federal judges' power to review state court rulings on voluntary confessions and, when review was permitted, they had to follow narrow standards for determining "voluntariness."

Because judges now had more complicated rules for deciding "voluntariness," critics argued that the new law challenged previous Supreme Court decisions in *Miranda v. Arizona* (1966) and *United States v. Wade* (1967). However, in 2000, after a panel of the U.S. Court of Appeals for the Fourth Circuit admitted into evidence a confession obtained without *Miranda* warnings, the Supreme Court, in *Dickerson v. United States*, definitively decreed that *Miranda* warnings must be the standard of "voluntariness," not the provisions in the Safe Streets Act.

Congress also intended the bill to reduce organized crime. The act permitted wiretapping and electronic eavesdropping with a warrant in a wider variety of

criminal investigations. However, a warrant was not required for forty-eight hours if police suspected organized criminal activity or if national security was threatened.

Finally, regulations on the sale of handguns over interstate borders tightened up. Like many aspects of the bill, this one attempted to crack down on criminals since they would not as easily be able to appropriate weapons. Yet, a loophole allowing continued interstate traffic in rifles and shotguns undermined this provision.

In 1981, Congress cut funding for the Safe Streets Act. The nation had expended enormous amounts of tax dollars and had rolled back the rights of criminal suspects, yet no reduction in crime rates had occurred. In fact, crime rates climbed during the tenure of the act. In the end, analysts have suggested that the legislation failed for two main reasons. First, politicians and experts did not understand how actually to reduce crime, and second, the block grant mechanism turned out to be too clumsy.

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References and Further Reading

Cronin, Thomas. *U.S. v. Crime in the Streets*. Bloomington: Indiana University Press, 1982.
National Commission on the Causes and Prevention of Violence. *Law and Order Reconsidered*. Washington D.C.: Government Printing Office, 1970.

Cases and Statutes Cited

Dickerson v. United States, 530 U.S. 428 (2000)
Miranda v. Arizona, 384 U.S. 436 (1966)
United States v. Wade, 388 U.S. 218 (1967)

See also Dickerson v. United States, 530 U.S. 428 (2000); *Miranda v. Arizona*, 384 U.S. 436 (1966); *United States v. Wade*, 388 U.S. 218 (1967)

ON LEE v. UNITED STATES, 343 U.S. 747 (1952)

On Lee was working, while awaiting trial on a narcotics charge, at his laundry business in Hoboken, New Jersey. His old acquaintance, Chin Poy, entered and began a conversation with Lee. Unbeknownst to Lee, Poy was an "undercover agent" who was wired with a radio transmitter. During the course of the conversation in the laundry and later on the sidewalk, Lee made statements that were highly incriminating to himself. These statements, overheard by another officer via the radio transmitter, were later used to help convict Lee at trial.

The court of appeals affirmed the conviction. The U.S. Supreme Court found the analysis of the lower courts to be constitutional, holding that the conduct of the federal agents did not amount to a violation of the Fourth Amendment. Under the Court's analysis, a trespass did not occur because (1) Poy presumably entered the laundry with On Lee's consent, and (2) the use of devices to overhear conversations is appropriate where entry onto the premises is legal. The Court went on to find that because there was no obstruction of "a communication facility" under the control of Lee, the Federal Communications Act had not been violated. The Court's opinion was important in defining when exactly an unlawful trespass by government officers occurs, when courts should consider conversations overheard by devices to be unlawful, and under what circumstances a court might consider excluding admissible evidence that was obtained by government officers who acted beyond the bounds of lawful behavior.

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References and Further Reading

Tasltitz, Andrew E., and Margaret L. Paris. *Constitutional Criminal Procedure*. Los Angeles: Foundation Press, 2003.

Cases and Statutes Cited

The Communications Act, Act of June 19, 1934, 48 Stat. 1064

See also **Electronic Surveillance, Technology Monitoring, and Dog Sniffs; Search (General Definition); Wiretapping Laws**

OPEN FIELDS

The Fourth Amendment protects against unreasonable searches and seizures by law enforcement of "persons, houses, papers, and effects." When officers enter property that is outside someone's home, any Fourth Amendment concerns center on whether this property falls within "curtilage" or "open fields." The Supreme Court has held that open fields fall outside the protection of the Fourth Amendment, while curtilage is protected. Law enforcement officers can lawfully enter and search an open field without a warrant.

Open fields can include unoccupied or undeveloped land, even wooded areas, outside the curtilage, the area generally associated with and surrounding the home. Common law distinguished the two by considering curtilage an extension of a person's home and thus his privacy; open fields were generally

considered accessible to the public. In *Hester v. United States*, the Court found that the Fourth Amendment did not protect open fields because they are neither "houses" nor "effects" within the amendment's meaning. In later reaffirming *Hester*, the Court additionally noted a person could not legitimately expect that his activities would be private in open fields. A search, in Fourth Amendment terms, does not occur unless a person has a reasonable expectation of privacy in the place searched. While posting a "No Trespassing" sign may protect common law property rights, the Court found that this has no bearing on whether Fourth Amendment protections apply.

Because the open fields doctrine is a bright-line rule, later cases have considered how to define the extent of the curtilage by determining whether the area is intimately connected to the home.

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References and Further Reading

California v. Ciraolo, 476 U.S. 207 (1986).

Dressler, Joshua. *Understanding Criminal Procedure*. 3rd ed. Newark, NJ: LexisNexis Publishing, 2002.

LaFave, Wayne R., Jerold Israel, and Nancy J. King. *Criminal Procedure: Criminal Practice Series*. Vol. 2. St. Paul, MN: West Group, 1999).

Oliver v. United States, 466 U.S. 170 (1984).

Saltzburg, Stephen A., *Another Victim of Illegal Narcotics: The Fourth Amendment (as Illustrated by the Open Fields Doctrine)*, University of Pittsburgh Law Review 48 (1986): 1–25.

United States v. Dunn, 480 U.S. 294 (1987).

Cases and Statutes Cited

Hester v. United States, 265 U.S. 57 (1924)

See also **Exclusionary Rule; Florida v. Riley**, 488 U.S. 445 (1989); **Katz v. United States**, 389 U.S. 347 (1967); **Plain View; Search (General Definition)**

OPERATION RESCUE

Formed in 1987, this organization has been a vocal one, representing the most recent type of pro-life (or anti-abortion) organizing since the 1980s. The "first wave," active before the Supreme Court's 1973 *Roe v. Wade* decision, consisted largely of individuals either affiliated with the Catholic Church or in the medical professions, some of whom later founded or joined national organizations. Some examples include Father Paul Marx (active since the 1950s, ultimately founding Human Life International in 1981), Jack Willke, M.D. (ultimately the organizer of the National Right to Life

Committee in 1973), and Mildred Jefferson, M.D., of Boston. Early victories for the second wave were found in the Jackson and Hyde Amendments prohibiting public funds for abortion. Key groups in this wave included Human Life International and the National Right to Life Committee (joined by smaller, women-headed groups such as the Eagle Forum, founded in Illinois in 1972, and Concerned Women for America, founded in San Diego in 1979).

The third wave of organizing in this stream began in the mid-1980s. It stemmed from impatience with mainstream legislative and court actions and veered into the realm of directly confrontational tactics. The forerunner in this sector was Joseph Scheidler of Illinois, who pioneered direct-action techniques, including clinic blockades and "sidewalk counseling" through his group, the Pro-Life Action League. Operation Rescue was founded at a conference of the Pro-Life Action Network in 1987 by Scheidler and Randall Terry of Project Life, in Binghamton, New York. Operation Rescue was closely modeled on the ethos and strategies of the Pro-Life Action League. Operation Rescue has been described as a militant alternative to the National Right to Life Committee, which did not support its type of confrontational tactics. For Operation Rescue, the bodies of anti-abortion protesters were used as the barrier to clinics and their operations. Terry often described his organization as participating in a civil rights struggle for the unborn and in precipitating a civil war over the abortion question in the United States.

While Operation Rescue disavows the use of guns and bombs at abortion clinics, it has used many types of mechanisms to disrupt clinic practices. This organization can be viewed as an extremely provocative group among third-wave organizations, willing to push the legal envelope as to the amount of permitted interaction between clients and protesters. The group has been active at local, national, and international levels. For example, in 1990, statistics were given that Operation Rescue had participated in clinic actions in 173 cities in forty-four states and the District of Columbia, and in two Canadian provinces. Its actions have included "the use of truth teams," whereby group members have made appointments at clinics and once inside, worked to "dissuade clients from having abortions"; and activities at the Democratic National Conventions, including clinic blockades in Atlanta and the delivery of a fetus to presidential nominee Bill Clinton at the New York Convention in 1992. In Canada, Operation Rescue first participated in a blockade against the clinic operated by Dr. Henry Morgentaler in Toronto in October 1988 and participated in such blockades throughout the 1980s and 1990s. One such example was in 1997

when Operation Rescue participated in clinic blockades at the Elizabeth Bagshaw center in Vancouver, British Columbia, bolting clinic doors shut with kryptonite, with protesters chaining themselves to a cement block outside the door and chaining themselves together with kryptonite. The idea of civil disobedience by protesters to both protest the practice of abortion and attempt to call public attention to their views resulted in numerous arrests over time. It was shown that there were many repeat players in the blockades, such that one group which was keeping arrest statistics noted that "of 32,000 arrests in 1988-89, about twelve thousand people were arrested only once while 5,750 people accounted for the remaining 20,000 arrests."

Operation Rescue's willingness to use many quasi-legal tactics in its civil disobedience strategy made it a key actor in the evolution of constitutional doctrine in two specific ways. The first line of cases had to do with the claims of Operation Rescue (and other similar organizations in this stream) that its First Amendment rights of free speech were being curtailed by buffer zones outside clinics. In the first such case, *Bray v. Alexandria Women's Health Clinic* (1993), clinic operators had tried to enjoin Operation Rescue from blockading the clinics and harassing clients. They used the vehicle of the 1871 Civil Rights Act, originally passed to ensure the civil rights of freed slaves and tried to analogize between those originally covered by the legislation and women seeking to access their constitutional rights to abortion. The Supreme Court disagreed, noting that women were not among the original class to be protected under the 1871 law, and stopped federal judges from using the act to enjoin anti-abortion protests. However, one year later in the *Madsen v. Women's Health Center* (1994), the Supreme Court upheld the suit brought by the Aware Women's Health Center for Choice in Melbourne, Florida whereby a state court judge had enjoined the protesters (including Operation Rescue) from appearing within a thirty-six-foot buffer zone. The Supreme Court upheld most of this injunction, except that which forbade access to private property surrounding the clinic.

The second area of court cases concerning Terry of Operation Rescue and Scheidler of the Pro-Life Action League has been that based on a new use of the powerful federal Racketeer Influenced and Corrupt Organizations (RICO) statute of 1970 by the National Organization of Women (NOW) to try to assess damages against these men, and has included probably the longest-running court case in the abortion rights area, from 1986 until the time of this writing (2005). NOW first brought suit against Joseph Scheidler of the Pro-Life Action League and Randall Terry of Operation Rescue in 1986 under RICO,

a powerful federal statute aimed at thwarting economic conspiracies (such as by the Mafia). In taking action against Scheidler and Terry, NOW argued that the RICO statute applied because the two men were in an ideological conspiracy to shut down certain businesses, that is, abortion clinics. RICO allows plaintiffs to seek criminal charges and if successful, receive triple damages. The first suit went through the Seventh District Court (having been initially dismissed for lack of an economic motive, appealed by NOW) to the Supreme Court, where in 1994 the Supreme Court unanimously ruled that plaintiffs did not need to prove an economic motive to successfully bring suit under the RICO statute.

This decision also allowed the trial of Scheidler and Terry to begin in the federal District Court of Illinois, where it had originally been filed in 1986. In 1994, NOW filed briefs to expand the claim to link the defendants to shootings and arson. In 1997, NOW successfully argued to the District Court that *N.O.W. v. Scheidler* should be given the status of a class-action lawsuit. In this instance, the judge certified NOW as the class representative of both NOW members but also of all women "whose rights to the services of women's health centers in the United States at which abortions are performed have been or will be interfered with by defendants' unlawful activities." Within Operation Rescue, internal discord brought about the end to Terry's leadership, with Flip Benham assuming control of the organization in 1994 (and renaming it Operation Save America).

Randall Terry filed for bankruptcy in 1998 to avoid paying any judgments that might be levied against him. He was also subject to a permanent injunction against his activities by the district court, the violation of which would lead to future fines.

In 1998, the federal District Court of Illinois upheld NOW's RICO arguments against Terry and Scheidler, finding that "the defendants engaged in a nationwide conspiracy to deny women access to medical facilities." The jury found that Operation Rescue and the Pro-Life Action League should be held liable for the triple damages allowed under the statute, and the following year the district court judge issued the first nationwide injunction against these groups, preventing them from committing more violence.

Since that time, while Operation Rescue has gone bankrupt, the issues of whether future violence may be prevented by injunctions and RICO can be used to punish noneconomic crimes are yet to be settled. The same case has gone to appeal to the Supreme Court in 2002, back through the Seventh Circuit Court of Appeals and down to the District Court of Illinois.

As of this writing, it rests with the U.S. Supreme Court, which agreed to hear Scheidler's appeals beginning November 30, 2005.

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References and Further Reading

- Baker, Ann. "Pro-Choice Activism Springs from Many Sources." In *From Abortion to Reproductive Freedom: Transforming a Movement*, edited by Marlene Gerber Fried, 179–84. Boston: South End Press, 1990.
- Melich, Tanya. *The Republican War Against Women*. New York: Bantam Books, 1998.
- Mezey, Susan Gluck. *Elusive Equality: Women's Rights, Public Policy, and the Law*. Boulder, CO: Lynne Rienner Publishers, 2003.
- Planned Parenthood. Website. <http://www.plannedparenthood.org>.
- Staggenborg, Suzanne. *The Pro-Choice Movement: Organization and Activism in the Abortion Conflict*. New York: Oxford University Press, 1991.
- Tatalovich, Raymond. *The Politics of Abortion in the United States and Canada*. Armonk, NY: M.E. Sharpe, 1997.
- Tribe, Laurence H. *Abortion: The Clash of Absolutes*. New York: W.W. Norton & Company, 1992.
- Willke, Jack. "A History of Pro-Life Leadership: For Better or Worse." In *Back to the Drawing Board: The Future of the Pro-Life Movement*, edited by Teresa Wagner, 123–36. South Bend, IN: St. Augustine's Press, 2003.

Cases and Statutes Cited

- Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993)
- Madsen v. Women's Health Center*, 512 U.S. 753 (1994)
- Roe v. Wade*, 410 U.S. 113 (1973)
- N.O.W. v. Scheidler*, 510 U.S. 249 (1994); 267 F.3d 687, 705 (7th Cir. 2001); Mem. Op. & Order (N.D. Ill. Mar. 28, 2001)

See also **Abortion; National Organization for Women (NOW); *Roe v. Wade*, 410 U.S. 113 (1973)**

OREGON'S DEATH WITH DIGNITY ACT (1994)

Genesis of the Act

In 1994, Oregon voters were presented with a referendum, denoted Ballot Measure 16, that proposed to create a statutory right for a mentally competent adult to terminate his or her life with the assistance of physician-prescribed medicine should that adult become terminally ill. The proposal won the vote of a narrow majority of Oregonians that year (51.43 to 48.7 percent), and began a national odyssey, as Oregon became

the first state to legalize physician-assisted suicide in the United States. The act was known as the Oregon Death with Dignity Act (ODWDA), and more than a decade after its passage, other states are beginning to explore the possibility of following Oregon's example (most notably, California, as of 2005).

Controversial from its beginnings, Oregon's legislative assembly attempted to repeal the act in 1997 with another referendum—Ballot Measure 51—which was defeated by an even greater margin than the original vote to establish the act (roughly 59.9 to 40.0 percent). On October 27, 1997, the act finally went into effect, and has been legal and valid in Oregon since that time, despite numerous state and federal challenges both in legislatures and in courts.

The Statute's Requirements

The statute contains many requirements and checks upon the use of the "right" conferred, meant to deter the possibility of abuse and to avoid giving the impression that the state was encouraging elder suicide in any way. First, the statute creates a right only for use by a mentally capable adult who voluntarily expresses his or her wish to die. Second, an attending physician must confirm that the adult patient has an incurable and irreversible disease and will die within a six-month period, and this medical opinion must then be confirmed by a different consulting physician. These two physicians must also separately evaluate and establish the mental competence of the adult patient, and either physician may demand an evaluation by a psychiatrist if she or he is unsure. Third, two witnesses who are not the aforementioned physicians must be present at the drafting of the written request for life-ending medication by the adult patient. Fourth, the attending physician is required to inform the adult patient upon his or her request for the medication of its likely consequences, and of the availability of alternative treatments and hospice and comfort care, along with a host of other information required to be provided to the patient. Fifth, there are two mandatory waiting periods: one between the initial oral request and the writing of the prescription (fifteen days), and another between the time of the adult patient's witnessed written request, and the writing of the prescription (forty-eight hours). Sixth, at any time the adult patient may rescind his or her request for the medication, without restriction. There are many other safeguards and requirements listed in Oregon Statutes 127.800–897, but these are the most pertinent for evaluating the procedures built into the act.

The Moral and Political Debate over Physician-Assisted Suicide

There is considerable disagreement in moral philosophy over whether human beings have a right to kill themselves, and how this may or may not differ from the long-established common law right to refuse treatment for medical conditions. Religion offers no refuge from the debate, with some traditions supporting the Oregon Act, while many religious traditions oppose physician-assisted suicide on the ground that suicide is forbidden by their religious texts or authorities.

Overlapping the moral and philosophical debates, there is also a vibrant national political debate over physician-assisted suicide. The passage of the ODWDA came at a time of a growing national debate over whether physician-assisted suicide should be supported by the state or criminalized, with many diverse viewpoints on the subject. When social conservatives argued primarily against the establishment of regimes such as Oregon's, they often infused their arguments with statements deriving from the "pro-life" movement, which was concerned with criminalizing abortion throughout the nation. Their criticisms focused on the effect that Oregon's statute might have on devaluing respect for life itself both in law and policy, and took a stand against the very notion of what they saw as state-sanctioned murder. American social liberals and libertarians typically supported the passage of acts similar to Oregon's, arguing for a commitment to personal autonomy and the right to decide the course of the end of one's life without criminalization.

Practical Results of the Act

More pragmatically, issue has been taken over whether statutes such as Oregon's would lead to rampant elder suicides, abuse by physicians who conceivably might care less about a terminal patient who has the alternative of suicide, and the corresponding deterioration of care and respect for those who are terminally ill.

However, publicly available studies by the Oregon government and other nonpartisan institutions show that the act has apparently increased the quality of care for the terminally ill, and has brought new saliency to issues of elder care in the state. To date, records do not show that the act has been found to have been used in any improper way. Pursuant to the text of the statute, records of the activities under its provisions are permanently recorded and issued in annual reports by the Oregon government, and made available to the general public on the Internet.

Federal Government Activity

From the time of its passage to the present day, socially conservative politicians have sought to use federal power to prohibit Oregon from enforcing the ODWDA. In both 1998 and 1999, pending legislation in Congress would have preempted the law federally and eliminated its validity. These laws either never made it to the House or Senate floor (in the former instance), or passed the House but never made it to the Senate floor (in the latter instance).

In 1996, Senator Orrin Hatch of Utah and Representative Henry Hyde of Missouri, along with many other federal lawmakers, wrote to the Drug Enforcement Agency requesting that the U.S. Department of Justice bar enforcement of the ODWDA, threatening to take away the medical license of Oregon doctors who continued to write prescriptions under the act. They cited the Controlled Substances Act (CSA) as being the federal statute potentially violated by the doctors. This tactic flowed from the provisions of the ODWDA requiring the use of prescribed medicine to hasten the death of the patient, which Hatch and Hyde argued was an illegitimate reason for prescribing otherwise controlled medications. Attorney General Janet Reno denied the request, stating in a memorandum in June 1998 that Oregon and the rest of the states were entitled to write their own laws regarding end-of-life options for the terminally ill. Reno's decision came on the heels of the U.S. Supreme Court decision in *Washington v. Glucksberg* (1997), which held, among other things, that the states were the appropriate levels of government for such experimental legislative enactments.

During the first term of Republican President George W. Bush in 2001, Attorney General John Ashcroft renewed the attempts to stymie the Oregon Act, reversing Attorney General Reno's previous decision. On November 9, 2001, Ashcroft issued a memorandum generally referred to as the "Ashcroft directive" that essentially threatened to strip doctors of their licenses if they acted under the color of the ODWDA, and labeled the Oregon law itself as violating the CSA.

These threats were halted by Judge Robert E. Jones of the U.S. District Court for the District of Oregon, pursuant to a lawsuit filed by the State of Oregon, and various physicians and patients against Attorney General Ashcroft. Judge Jones enjoined enforcement of the Ashcroft directive against Oregon physicians, ruling that the Ashcroft directive exceeded the scope of the CSA as it was drafted by Congress. Judge Jones's reasoning and decision were affirmed

by the U.S. Court of Appeals for the Ninth Circuit on appeal, and was subsequently appealed to the U.S. Supreme Court, which heard oral argument in the case on October 5, 2005. The Ninth Circuit affirmed on the ground that there was no sign of an "unmistakably clear" intent behind the CSA to abrogate the traditional state-level regulation of medical practice. At the time of this writing, the outcome of the case in the Supreme Court appeared to be in limbo. Retiring Justice Sandra Day O'Connor was considered a swing vote on end-of-life issues such as this one; her replacement Samuel Alito, a conservative, is less likely to be a swing vote on such issues.

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References and Further Reading

- Gonzalez v. Oregon*, No. 04-623, 125 S. Ct. 1299 (2005) (granting certiorari).
- Oregon Department of Human Services. Website for Physician-Assisted Suicide. <http://egov.oregon.gov/DHS/ph/pas/index.shtml>.
- Oregon v. Ashcroft*, 192 F.Supp. 2d 1077 (D. Or. 2002).
- Oregon v. Ashcroft*, 368 F.3d 1118 (9th Cir. 2004).

Cases and Statutes Cited

- "Ashcroft Directive," 66 Fed. Reg. 56,607 (AG Order No. 2534-2001)
- Oregon Revised Statutes 127.800-897 (2003)
- Washington v. Glucksberg*, 521 U.S. 702 (1997)
- See also Assisted Suicide; Washington v. Glucksberg*, 521 U.S. 702 (1997)

OROZCO v. TEXAS, 394 U.S. 324 (1969)

Four armed police officers arrived at Orozco's home at 4 A.M. to question him about a murder. The officers entered Orozco's bedroom, woke him up, and questioned him without reading *Miranda* warnings. Orozco admitted to being present at the murder scene, owning a firearm, and told the officers its whereabouts. Tests revealed that the firearm was the gun that fired the fatal shot.

At trial, an officer testified that from the moment questioning began, Orozco was under arrest and not free to leave. Orozco's statements were admitted and he was found guilty. Orozco appealed, arguing that his statements were given while he was "in custody," thus violating *Miranda v. Arizona* (1966).

When is a suspect in custody? According to *Miranda*, custody takes place when a suspect is deprived of freedom of movement in any significant way.

To elucidate this standard, the *Orozco* Court looked at a variety of situational factors, including the time of day, the number of officers present, and the officers' intent. Because the questioning took place at 4 A.M. with four armed officers, and an officer testified that Orozco was under arrest, the Court held that Orozco was in custody.

The *Orozco* decision clarifies the definition of "custody" by elaborating on when and how a suspect's freedom of movement is deprived in a significant way. The decision illustrates how custody can take place in a suspect's home. Finally, it provides criteria for determining whether a suspect is in custody for purposes of *Miranda*.

STEPHEN L. SARAZIN

References and Further Reading

Johnson v. New Jersey, 384 U.S. 719 (1966).
LaFave, Wayne, Jerold Israel, and Nancy King. *Criminal Procedure*. 4th ed. St. Paul, MN: West, 2004.
Mathis v. United States, 391 U.S. 1 (1968).
Saltzburg, Stephen, and Donald Capra. *Constitutional Criminal Procedure*. 7th ed. St. Paul, MN: West, 2004.

Cases and Statutes Cited

Miranda v. Arizona, 384 U.S. 436 (1966)

See also **Arrest; Coerced Confessions/Police Interrogation; Mathis v. United States, 391 U.S. 1 (1968); Miranda v. Arizona, 384 U.S. 436 (1966); Miranda Warning**

OSBORNE v. OHIO, 495 U.S. 103 (1990)

The Supreme Court in *Stanley v. Georgia* (1969) constitutionally protected the private possession of obscene materials by individuals in their residences. *New York v. Ferber* (1982) declared that sexually explicit materials or performances involving minors, regardless of whether they were obscene or not, had "exceedingly modest, if not *de minimus*" social value compared to compelling state interests in the welfare of minors, and thus did not warrant First Amendment protections.

Osborne's appeal asked whether *Stanley* trumped *Ferber*: Was the private possession of sexually explicit photographs of minors constitutionally protected? Osborne was convicted of violating Ohio's law, which stated: "No person shall ... [p]ossess or view any material or performance that shows a minor who is not the person's child or ward in a state of nudity." The police armed with a search warrant found four photographs of nude male adolescents in sexually

explicit positions in Osborne's house. His trial conviction was affirmed by Ohio's appellate courts.

The Supreme Court reversed Pope's conviction and remanded the case for further consideration. This ruling, however, did not rest on Osborne's First Amendment arguments, which the majority found "unpersuasive," but on due process grounds; the jury was not properly instructed on the elements of Ohio's law that had to be proved. The vote was six to three, with White writing for Rehnquist, Blackmun, O'Connor, Scalia, and Kennedy. Brennan wrote a dissent that Marshall and Stevens joined.

White argues that *Stanley* does not extend to Pope's possession of photographs of nude minors by distinguishing Ohio's law from Georgia's law. The latter prohibited the private possession of obscenity because of Georgia's concerns that obscenity "would poison the minds of its viewers," and accordingly was unconstitutional since the law sought to control a person's private thoughts. Ohio's law, in contrast, in order to protect the victims of child pornography was designed to "destroy a market for the exploitative use of children" by making it a crime to possess and view photographs of nude adolescents. As White notes, *Ferber* made Ohio's law necessary because the Court's decision drove the market for child pornography underground; nineteen other states as a consequence passed laws similar to Ohio's.

White also dismissed Pope's argument that the law was overbroad. Ohio's Supreme Court had interpreted the law as limited to the lewd exhibition of or graphic attention to the genitals of nude minors who were neither the children nor wards of the persons charged with violating the law. Persons viewing or possessing "innocuous photographs of naked children," White emphasized, would not be penalized under the law.

ROY B. FLEMMING

Cases and Statutes Cited

New York v. Ferber, 438 U.S. 747 (1982)
Stanley v. Georgia, 394 U.S. 557 (1969)

OTIS, JAMES (1725–1783)

James Otis was a leading defender of individual and charter rights in the American colonies, and an opponent of general search warrants and parliamentary taxation. The son of a prominent Massachusetts assemblyman, Otis was born in Barnstable, educated at Harvard and trained as a lawyer. He became both an attorney for Boston's merchant community and the advocate general of the Boston Vice-Admiralty Court, which adjudicated customs violations. In 1760, Otis

resigned his official post to petition the Massachusetts Assembly for the relief of ship owners whose cargoes had been seized and sold as contraband. He argued that customs collectors had illegally used writs of assistance as general warrants to search suspects' property at will. In February 1761, after King George II died and the surveyor of customs applied to the Massachusetts Superior Court for renewal of the writs, Otis testified against the law itself, arguing that writs of assistance were arbitrary extensions of royal power over British subjects' property and violated both the British constitution and natural law. Chief Justice Thomas Hutchinson upheld the constitutionality of the statute and the legality of the writs, but Otis's address did help him win election to the provincial Assembly, where he became a leader of the faction opposed to Hutchinson.

In 1762 Otis drafted a legislative report criticizing Massachusetts's royal governor, Francis Bernard, for spending provincial funds without legislative approval, arguing that not even the king could arbitrarily transgress the colony's laws. In 1764, after passage of the Sugar Act, Otis published *The Rights of the British Colonies Asserted and Proved*, an influential pamphlet arguing that Parliament had no right to deprive men of their property without their consent, and therefore could not legitimately tax colonists who were not represented in that body. Otis helped organize an intercolonial congress in response to the 1765 Stamp Act, and there helped write a remonstrance to Parliament that proclaimed the stamp tax unconstitutional. In 1768 he supported Samuel Adams's circular letter calling for united colonial resistance to new parliamentary taxes, and joined ninety-one other legislators in defying Governor Bernard's order to rescind it.

In 1769 a customs commissioner whom Otis had criticized in the press, James Robinson, confronted Otis in a Boston coffeehouse and administered a caning from which the victim never fully recovered. Increasingly wracked by mental illness, Otis became a recluse, and died in Andover in 1783. Meanwhile, Whig essayists made Otis's denunciation of taxation without representation into one of the main colonial grievances against the British government, and judges in other colonies, following Otis's arguments against writs of assistance, refused to issue them. Commenting on Otis's speech against the writs, John Adams asserted that it was "then and there the child independence was born."

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References and Further Reading

Adams, Adams, ed. *The Works of John Adams*. 10 vols. Boston: Little, Brown, 1850–1856.

Galvin, John. *Three Men of Boston*. New York: Thomas R. Crowell Co., 1976.

Tudor, William. *Life of James Otis, of Massachusetts*. New York: Da Capo Press, 1970.

See also **General Warrants; Writs of Assistance Act**

OVERBREADTH DOCTRINE

Under the overbreadth doctrine, a litigant may challenge the constitutionality of a law, even if the law could be properly applied to him or her. This is an important exception to normal principles of constitutional litigation.

The Court allows overbreadth challenges to laws impacting free speech "[b]ecause overbroad laws ... deter privileged activit[ies]" (*Grayned v. City of Rockford* [1972]). As Justice Brennan famously wrote for the Court in *NAACP v. Button* (1963), "[Free speech is] delicate and vulnerable, as well as supremely precious in our society." Thus, judges will assume "that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression" (*Broadrick v. Oklahoma* [1973]).

To bring a successful overbreadth challenge, the litigant must show that the law is substantially overbroad, which means that it "prohibits a significant amount of protected expression" (*Ashcroft v. Free Speech Coalition* [2002]), when judged in relation to the law's legitimate coverage (and as it has been interpreted by a state's highest court) (*Osborne v. Ohio* [1990]). That is, "the mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge" (*Members of City Council of City of Los Angeles v. Taxpayers for Vincent* [1984]). Generally, if the law covers a substantial amount of protected expression, it must usually pass strict scrutiny.

However, Professor Richard Fallon argued in *Making Sense of Overbreadth*, that a statute's overbreadth should be measured in relation to the type of speech harmed. Under his approach, courts should require less overbreadth in laws impacting especially important speech, such as political dissent, than would be required in laws impacting low-value speech.

Schad v. Borough of Mt. Ephraim (1981) best illustrates the overbreadth doctrine. In *Schad*, owners of an adult bookstore that offered live nude dancing brought a free speech-based challenge to a law that banned all live entertainment. Although nude dancing was not, at the time of *Schad*, protected expression, a

OVERBREADTH DOCTRINE

seven-to-two Court nonetheless invalidated the law because its coverage would have prohibited protected expression. Justice White noted that since the law disallowed “plays, concerts, musicals, dance, or any other form of live entertainment,” all of which is protected speech, the adult bookstore owners were “entitled to rely on the impact of the ordinance on the expressive activities of others as well as their own.” Since there was an insufficient justification for banning all forms of expression.

In *New York v. Ferber* (1983), the Court declined to invalidate a criminal prohibition of the production or possession of child pornography even though the scope of the law might have encompassed some protected speech, namely, material that would otherwise have serious literary, artistic, or educational value under *Miller v. California* (1973). The Court held that law in *Ferber* was not overbroad in relation to its legitimate prohibition of child pornography.

The overbreadth doctrine, although infrequently used to invalidate a law, gives courts a powerful way to invalidate laws restricting speech. But by requiring

substantial overbreadth, the doctrine ensures that duly enacted laws are only rarely invalidated.

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References and Further Reading

Fallon, Richard, *Making Sense of Overbreadth*, Yale Law Journal 100 (1991): 853.

Cases and Statutes Cited

Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002)
Broadrick v. Oklahoma, 403 U.S. 601, 610 (1973)
Grayned v. City of Rockford, 408 U.S. 104, 11 (1972)
Members of City Council of City of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1984)
Miller v. California, 413 U.S. 15 (1973)
NAACP v. Button, 371 U.S. 415, 433 (1963)
New York v. Ferber, 458 U.S. 747 (1983)
Osborne v. Ohio, 495 U.S. 103 (1990)
Schad v. Borough of Mt. Ephraim, 452 U.S. 61 (1981)

See also Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002); **Standing in Free Speech Cases; Vagueness Doctrine**

P

PACIFISTS AND NATURALIZATION

Federal law, as codified in the Naturalization Act of 1952, exempts pacifist applicants for citizenship from pledging to bear arms on behalf of the United States if their conscientious objection to war is based upon “religious training and belief.” The present statute was enacted after a lengthy political and legal struggle by pacifists to obtain exemption from earlier statutes which omitted any specific dispensation for conscientious objectors.

The Naturalization Act of 1906 required an applicant for citizenship to declare under oath that he or she would “support and defend the Constitution and laws of the United States against all enemies, foreign and domestic ...” During the First World War, the Naturalization Service began to ask all applicants for citizenship whether they were willing, if necessary, “to take up arms” in defense of the nation.

The constitutionality of these measures was first challenged in a lawsuit by Rosika Schwimmer, a Hungarian refugee who was a pacifist activist and former Hungarian ambassador to Switzerland. In her application for naturalization, Schwimmer stated that she could not in good conscience take up arms to defend the United States, although she was willing to take the oath of allegiance. In his opinion for the Court in *Schwimmer v. United States*, 279 U.S. 644 (1929), Justice Pierce Butler explained that “it is the duty of citizens by force of arms to defend our government against all enemies whenever necessity arises” and that “[w]hatever tends to lessen the willingness of citizens to discharge their duty to bear arms in the

country’s defense detracts from the strength and safety of the government.”

In a pungent dissent, Justice Oliver Wendell Holmes pointed out that Schwimmer, a fifty-two-year-old woman, “would not be allowed to bear arms if she wanted to” and that she did not subscribe to subversive political views. Although Holmes acknowledged that some of Schwimmer’s opinions “might excite popular prejudice,” he declared that “if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate.” Holmes also observed that pacifists had made significant contributions to the nation and expressed bemusement over the expulsion of persons who “believed more than some of us do in the teachings of the Sermon on the Mount.”

The Court reaffirmed its decision in *Schwimmer* two years later in five-to-four decisions in *United States v. Bland*, 283 U.S. 636 (1931), and *United States v. Macintosh*, 283 U.S. 605 (1931). In those cases, the Court upheld the denial of naturalization to Canadians who were willing to bear arms for national defense only if they felt that a war was morally justified. Emphasizing that naturalization is a privilege rather than a right, Justice George W. Sutherland’s opinion explained that the petitioners had failed to meet their burden of demonstrating that the naturalization permitted any exception for pacifists. Treating the issue primarily as a question of statutory interpretation, Sutherland gave short shrift to claims of

religious liberty. The nation, he wrote, had a right to temper religious freedom with its "duty to survive."

These decisions were at odds with the Court's general tendency during this period to demonstrate solicitude for the civil liberties of those who were not political radicals because neither petitioner lacked patriotism or presented any apparent threat to the political order. Douglas Clyde Macintosh, a Baptist minister and professor of theology at Yale, had made wartime speeches in favor of the Allies, and Marie Bland, a devout Anglican, had nursed American soldiers in France during World War I.

The Court's opinion in *Macintosh* inspired what was perhaps the most impassioned dissent written by Charles Evans Hughes during his eleven years as chief justice. Perhaps recalling the steadfast moral principles of another Baptist minister, his father, Hughes argued for a statutory exception that would protect religious liberty. In his dissent, joined by Justices Holmes, Brandeis, and Stone, Justice Hughes pointed out that Congress had made exemptions for conscientious objectors in selective service statutes, and he observed that there were "other and most important methods of defense, even in time of war, apart from the personal bearing of arms" that would satisfy the statutory requirement of support for the Constitution against its foes. Emphasizing that liberty of conscience was central to religious liberty, Hughes found no evidence that Congress had intended to depart from its long-standing policy of "avoiding unnecessary clashes with the dictates of conscience." In discussing the importance of religious liberty, Hughes declared that the "essence of religion is belief in a relation to God involving duties superior to those arising from any human relation."

MacIntosh provoked considerable criticism. In avowed defiance of it, an Ohio county judge in 1933 granted citizenship to a pacifist in a ruling that won widespread acclaim. Despite these protests, Congress re-enacted the 1906 naturalization act in 1940 without making specific exemptions for conscientious objectors. Hughes's dissent became the law, however, when the Court overruled its three earlier decisions in *Girouard v. United States*, 328 U.S. 61 (1946). In that case, the Court held that the U.S. Court of Appeals had improperly denied naturalization to James Girouard, a Seventh-Day Adventist who had stated in his application for naturalization that he would not be willing to bear arms to defend the United States. Although Girouard contended that combatant military duty would violate his religious scruples, he had not claimed exemption from all military service, and he was willing to take the requisite oath of allegiance.

In a decision by Justice William O. Douglas, the Court ruled that neither the text nor the legislative

history of the 1940 naturalization statute indicated that Congress intended to preclude the citizenship of persons whose religious scruples prevented them from promising to bear arms in the nation's defense. The Court pointed out that the naturalization oath did not specifically require that naturalization applicants promise to bear arms and that the bearing of arms was not the only manner in which a naturalized person could fulfill the oath to defend the nation against its enemies. The Court explained that "those whose religious scruples prevent them from killing are no less patriots than those whose specific traits or handicaps result in their assignment to duties far behind the fighting front."

Pointing out that Congress had traditionally attempted to accommodate the rights of conscientious objectors, Douglas also declared that the First Amendment's guarantee of religious freedom was the product of age-old struggles in which "men have suffered death rather than subordinate their allegiance to God to the authority of the State." In dissent, Justice Stone argued that Congress intended to prevent the naturalization of aliens who refused to promise to bear arms because Congress had failed to make exemptions for conscientious objectors after the Court, in its previous decisions, had found no such exemption.

Although the Court in *Girouard* based its decision on statutory interpretation, the Court suggested that the statute would violate the First Amendment's guarantee of religious freedom if it denied naturalization to persons who refused for religious reasons to bear arms. *Girouard* was consistent with other decisions of the same period in which the Court was expanding the scope of the First Amendment's religion clauses. In 1952, Congress eliminated the ambiguity of the earlier statutes by making clear that conscientious objectors are not required to pledge that they will bear arms. The statute (Title 8, Section 1448, of the United States Code) presently provides that a conscientious objector who can prove "by clear and convincing evidence ... that he is opposed to the bearing of arms in the Armed Forces ... by reason of religious training and belief" is not required to take the oath required of other applicants "to bear arms on behalf of the United States when required by the law."

Such a person is required only to swear that he or she would be willing to perform noncombatant duty in the armed forces or "to perform work of national importance under civilian direction when required by the law." The statute states that the phrase "religious training and belief" means "an individual's belief in relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code."

The limitation of the statute's exemptions to conscientious objection based upon religious belief remains controversial, particularly because the statute's exemption does not appear to embrace all forms of religious objections to war. In a 1992 decision, for example, a federal court denied naturalization to a Syrian Muslim, Mahmoud Kassas, who declared that he would not participate in any war against fellow Muslims. The court based its decision upon the Supreme Court's decision in *Gillette v. United States*, 401 U.S. 437 (1971), in which the Court held that persons who had religiously based objections to the Vietnam War, rather than war in general, were not exempt from military service under the Selective Service Act's exemption for persons whose objections to war were based on "religious training and belief."

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References and Further Reading

- Anderson, Jeffrey M., *Conscience in the Court, 1931–1946: Religion as Duty and Choice*, *Journal of Supreme Court History* 26 (2001): 1:25–52.
 Flowers, Ronald B. *To Defend the Constitution: Religion, Conscientious Objection, Naturalization, and the Supreme Court*. Lanham, MD: Scarecrow Press, 2003.

Cases and Statutes Cited

- Gillette v. United States*, 401 U.S. 437 (1971)
Girouard v. United States, 328 U.S. 61 (1946)
Petition for Naturalization of Mahmoud Kassas, 788 F.Supp. 993 (M.D.Tenn. 1992)
United States v. Bland, 283 U.S. 636 (1931)
United States v. Macintosh, 283 U.S. 605 (1931)
United States v. Schwimmer, 279 U.S. 644 (1929)
 8 U.S.C. sec. 1448 (2000)

PAINE, THOMAS (1737–1809)

Born in Norfolk, England, into a working-class Quaker family, Thomas Paine left home at age seventeen and by twenty-two had opened his own stay-making business. A few years later, however, he secured a post as an excise officer, assessing and collecting import taxes. After he was fired from his post, he took up a new customs post in Sussex. He quickly came to believe that customs officers were unfairly treated and poorly paid, so he wrote the first of many activist pamphlets, *Case of the Officers of Excise*. The booklet suggested substantial reform in the customs department, but when Paine tried to have the matter heard before Parliament, they refused and

he was fired. It was merely the first of many occasions when Paine was punished for speaking his mind.

After his wife died, Paine sailed to America, encouraged by a meeting in England with Benjamin Franklin. Upon Franklin's recommendation, a Philadelphia publisher hired Paine as an editor. By January 1776, Paine had observed the growing tension between American colonies and Parliamentary assertions of authority, and he wrote *Common Sense*, a logical rejection of monarchical government and a call for colonial independence. Some 150 thousand copies were printed and sold in America alone, and the document is credited with the arousal of patriotic fervor leading to increased enlistments in Washington's Continental Army. It also led, a few months later, to the colonies' decision to declare independence.

In 1787, Paine returned to England, where he continued his political agitation. He wrote *Rights of Man*, an even more explicit attack on the monarchy and a call for revolution in England like the one in America. For his ideas, he was convicted of sedition, then branded an outlaw. He fled to France in 1792, where he was elected to the National Assembly. Upon taking his seat in the assembly, Paine spoke out in favor of banishment, not execution, of Louis XVI. Decidedly in the minority, Paine was again arrested and imprisoned and spent the next year in jail. Before leaving France, Paine wrote *The Age of Reason*, a critical attack on religion, revelation, and the divinity of Jesus Christ.

Arriving in America, Paine found that public opinion had turned against him as a result of his attack on religion. *Common Sense* had made him a hero to many, but *The Age of Reason* had severely damaged his reputation and made him nearly an outcast. When Paine died in 1809, the local Quaker cemetery, where Paine had expressed his wish to be buried, refused to allow it, and he was interred on the ground of his farm in New York. Profoundly gifted rhetorically, Paine spent most of his life attacking those institutions that violated natural law by oppression or tyranny. In America, he was applauded, then vilified; in England and France he was persecuted.

JAMES HALABUK, JR.

References and Further Reading

- Aldridge, Alfred Owen. *Man of Reason: The Life of Thomas Paine*. Philadelphia: J. B. Lippincott Company, 1959.
 Foner, Eric. *Tom Paine and Revolutionary America*. London: Oxford University Press, 1976.
 Wilson, Jerome D., and William F. Ricketson. *Thomas Paine*. Boston: Twayne Publishers, 1978.

PALMER, A. MITCHELL (1872–1936)

A. Mitchell Palmer, U.S. attorney general in 1920, is generally credited with engineering the first major “red scare” in the United States and setting the pattern for anticommunist crusades of the twentieth century. A lifelong Democratic activist, Mitchell began his career as an attorney in Stroudsburg, Pennsylvania, and was elected to the Congress in 1908, where he functioned as Woodrow Wilson’s man in the House of Representatives. During World War I Wilson appointed Mitchell alien property custodian and then, in 1919, attorney general.

The postwar environment in the United States reflected the xenophobia of the war years, connecting fear of aliens with radical threats to national security. In 1919, Russian Communists organized the Comintern, the purpose of which was to export the Bolshevik Revolution around the world. As a result Socialist Party radicals, many of whom were alien workers, organized Communist parties in the United States. All this occurred against a background of labor unrest that peaked with a wave of strikes in 1919 and included a general strike in Seattle in January and a nationwide steel strike.

Public fears of alien radicalism were further exacerbated during the spring of 1919 when a series of bombs were sent to prominent public officials, including one on June 2 that destroyed the entrance to the Palmer home. The new Communist Party was blamed and inflamed public sentiment called for stronger measures against the radicals. Much of this pressure fell upon Attorney General Palmer, who was ordered in October to report on the Justice Department’s progress against the bombers and other radicals.

Palmer first organized the Radical Division in the department, headed by energetic young attorney J. Edgar Hoover, who was tasked with assessing and dealing with the radical threat. Then, with the wartime Alien and Espionage Acts about to expire, Mitchell set about dealing with the radical problem under the auspices of the Immigration Act of 1918, which allowed for the deportation of aliens because of membership in suspicious organizations. In November of 1919, raids were launched in a number of major U.S. cities against the Union of Russian Workers, rounding up suspects and documentary evidence. Setting the model for subsequent operations, detainees were treated roughly and often held without hearings for long periods of time. Although the majority of those arrested were ultimately released, almost two hundred, as well as some previously detained radicals, including anarchist Emma Goldman, were deported. The *U.S.S. Buford*, dubbed by the press, “the Soviet

Ark,” transported 249 undesirables to Russia in December of 1919.

By the end of the year, Palmer was lauded as the savior of the American republic and enjoyed overwhelming public admiration, further boosting his interest in entering the presidential race in 1920. Thus encouraged, Palmer staged the most spectacular of his antiradical operations. On January 2, 1920, thousands of government agents, assisted by state deputies and zealous volunteers, raided Communist headquarters in thirty-eight cities in thirty-three cities. Over five thousand radicals were herded, without warrants, into detention centers that offered intolerable conditions. Detainees were physically abused, held incommunicado, and denied legal counsel. The dragnet nature of the raids brought the detention of many who had little association with radicalism, much less being a danger to American security. The widespread violation of civil liberties did not go unnoticed, and the acting labor secretary, who was responsible for deportation hearings, ultimately engineered the release of most of the detainees.

The public hysteria, as well as Palmer’s political prospects fizzled out as the traditional “red” May Day celebration came and went without the predicted Communist revolutionary uprising. A number of prominent American attorneys issued a report criticizing Palmer’s abuse of civil liberties, while Democratic politicians bypassed him in selecting the Democratic presidential nominee. Palmer did remain active in political activities. He wrote the Democratic platform of 1932 and was working on the 1936 platform when he died in Washington, D.C., in 1936.

KAREN BRUNER

References and Further Reading

- Coben, Stanley. *A. Mitchell Palmer, Politician*. New York: Columbia University Press, 1963.
- Morgan, Ted. *Reds: McCarthyism in Twentieth-Century America*. New York: Random House, 2003.
- Murray, Robert K. *Red Scare: A Study in National Hysteria, 1919–1920*. Minneapolis: University of Minnesota Press, 1954.
- Schrecker, Ellen. *Many Are the Crimes: McCarthyism in America*. New York: Little, Brown and Company, 1998.

PAPACHRISTOU v. CITY OF JACKSONVILLE, 405 U.S. 156 (1972)

In *Papachristou*, the Supreme Court struck down a city ordinance against vagrancy. Justice William O. Douglas’s opinion is memorable as a paean to non-conformity and for its defense of liberty at the most

basic level: the citizen's freedom to walk the streets and to live the life he or she chooses.

As a matter of law, Papachristou held that under the Fourteenth Amendment's due process guarantee, the Jacksonville ordinance was impermissibly vague. The Court said that the measure, which targeted "rogues," "vagabonds," and "loafers," was unconstitutional because it failed "to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden" and "because it encourages arbitrary and erratic arrests and convictions."

Justice Douglas, himself an inveterate rambler and proud nonconformist, observed that the behavior the ordinance sought to criminalize, such as "night-walking" and loitering, can be perfectly innocent. "Persons 'wandering or strolling' from place to place," he wrote, "have been extolled by Walt Whitman and Vachel Lindsay." Such activities "are historically part of the amenities of life.... They are not mentioned in the Constitution or in the Bill of Rights. These unwritten amenities have been in part responsible for giving our people the feeling of independence and self-confidence, the feeling of creativity.... They have encouraged lives of high spirits rather than hushed, suffocating silence."

Laws must not arbitrarily target disfavored groups, Douglas cautioned, because "[t]he rule of law, evenly applied to minorities as well as majorities, to the poor as well as the rich, is the great mucilage that holds society together."

STEVE SANDERS

See also Vagrancy Laws; Vagueness and Overbreadth in Criminal Statutes

PARDON AND COMMUTATION

Pardons and commutations are distinct varieties of clemency available in nearly every American jurisdiction. Both are official acts that usually originate in the executive branch of government. To varying degrees, pardons and commutations remit punishment for crimes. Although the term "pardon" is sometimes used to refer generally to all nonjudicial reductions in punishment, it is more accurate to think of pardon, like commutation, as a discrete aspect of the executive clemency authority. A pardon is the broadest type of clemency recognized under American law. It releases the offender from punishment and is generally understood to eliminate moral guilt for the offense. By contrast, a commutation simply substitutes a lesser punishment for a greater one. Pardons and commutations protect individual civil liberties by curtailing governmental power when it has been employed mistakenly or harshly.

The authority to grant pardons and commutations in the United States can be traced directly to the prerogative of the British monarch. Historically, the English Crown used pardons to soften penalties imposed under the common law, to garner the support of key nobles and clerics, and even to provide cheap labor for the American colonies through the use of conditional pardons. Pardons were also used as incentives to persuade accomplices to incriminate codefendants.

Federal Pardons and Commutations

Although legal theorists such as Blackstone asserted that the clemency power could not exist in a democracy because there was no official who was "above" the law, the drafters of the U.S. Constitution vested in the president the authority "to Grant Reprieves and Pardons for offenses against the United States, except in cases of Impeachment" (Article II, Section 2). As Alexander Hamilton observed in *Federalist No. 74*, this power was intended to be expansive so that exceptions in favor of "unfortunate guilt" could readily be made. Presidential pardons may be granted before or after conviction, or with conditions attached. Although the Constitution only mentions pardons and reprieves, the U.S. Supreme Court has confirmed that the president also has the power to grant commutations (*Biddle v. Perovich*, 274 U.S. 480, 1927).

Despite a decline in the number of pardons and commutations granted in recent decades, the clemency power historically has been employed in a variety of ways. In 1795, President Washington granted unconditional pardons to many of the participants in the Pennsylvania Whiskey Rebellion. The clemency power was also used freely after the Civil War to heal the wounds of a divided nation. President Lincoln, and his successor, Andrew Johnson, pardoned many who had fought against the Union, conditioned on their swearing to uphold the Constitution. In response, Congress sought to limit the clemency power through legislation. However, Congress's efforts to restrict the clemency authority were frustrated in cases such as *Ex parte Garland*, 71 U.S. 333 (1866), in which the U.S. Supreme Court held that the pardon power "is not subject to legislative control."

As a practical matter, the issuance of pardons and commutations is subject only to the constraints that each president chooses to recognize, which has led to some controversial uses of the power. The most famous of these was President Gerald Ford's pardon, prior to prosecution and conviction, of former President Richard Nixon for all federal crimes he had

committed in connection with the Watergate scandal. However, the federal clemency power is seldom used. Indeed, the *Code of Federal Regulations* specifies that a request for pardon typically may not be filed until “at least five years after the date of the release of the petitioner from confinement.” Commutations are granted even more rarely and may be sought only in exceptional circumstances.

State Pardons and Commutations

After the Revolution, states initially rejected the British model of vesting the pardon and commutation power solely in an executive. Eight of the first thirteen states placed the authority to remit punishment for state law violations in a legislative council and the governor jointly, or in the legislature alone. However, perhaps influenced by the federal Constitution, most states that thereafter joined the union allocated the clemency authority to the governor.

Today, the governor retains the clemency power in a majority of jurisdictions, typically pursuant to state constitutions. Many of these states, while granting primary clemency authority to the governor, have established advisory boards that process pardon and commutation applications and make nonbinding recommendations. In the remaining states, the governor shares the power to pardon and commute with an administrative board, or it is placed in the hands of an administrative body alone.

Few formal constraints are imposed on the issuance of pardons apart from limitations on the types of offenses for which clemency can be granted (treason and impeachable crimes are often excluded) and the timing of pardons (some states permit clemency only after conviction). Notwithstanding this wide latitude, in recent years the number of pardons and commutations issued has declined steeply, particularly in controversial cases such as those involving the death penalty. Former Governor George H. Ryan of Illinois proved a notable exception to this trend when he issued four pardons and 167 commutations to prisoners on Death Row shortly before he left office in 2003.

Pardons and Commutations in Practice

Pardons at the state and federal level are usually sought by persons who have completed their punishment, have proved to be law-abiding citizens for a

substantial period of time, and desire to be free of the civil disabilities that often accompany a criminal conviction. The disabilities typically imposed on those who have been convicted of a crime include prohibitions against voting, serving on juries, holding public office, and owning firearms. Though local laws vary widely, in most jurisdictions a pardon is an effective means for restoring these privileges. Because of the political repercussions that sometimes attend the granting of pardons, the manifestation of broad community support for a pardon—especially from the victim, prosecutor, or sentencing judge—can be crucial in obtaining relief. However, because pardons are usually seen as wiping out guilt entirely, they are seldom used to release prisoners from incarceration apart from rare situations when there is a compelling show of innocence.

Commutations are most often used to remit ongoing punishment. Typical grounds for commuting sentences include the existence of extreme sentence disparities, pervasive doubts about guilt or the fairness of judicial proceedings, or changes in the law that render a punishment suspect. Because a commutation sets aside punishment imposed through a legal system replete with procedural protections and other safeguards against error, such grants of clemency are highly unusual in most jurisdictions. However, a few states have used commutations with some frequency in order to meet exigencies unrelated to the situations of individual defendants. For example, Oklahoma and Kentucky recently sought to reduce spiraling prison costs by commuting the sentences of large numbers of nonviolent offenders, and South Dakota issued numerous commutations to prisoners who performed work for the state.

Procedures to be followed when applying for pardons and commutations vary from jurisdiction to jurisdiction. Applicants who seek a presidential pardon or commutation must complete an FBI background check before the Justice Department will consider their application and make a nonbinding recommendation to the president. Various states likewise require that clemency requests be investigated and also mandate that specified individuals, such as the prosecuting attorney, the sentencing judge, or the victim, be notified before a pardon or commutation can be granted.

In certain cases, particularly when minor offenses are involved and the punishment has been completed, it may be possible to prepare a request for pardon without the assistance of an attorney. In more complicated cases or when a commutation is sought, employing a professional advocate to assist in making the argument for clemency is desirable.

Conclusion

Pardons and commutations are the official embodiment of mercy and flexibility in our systems of justice, but they currently play a limited role in the remission of punishment. However, given the fallibility of judges, juries, and attorneys, as well as the modern tendency to punish harshly, pardons and commutations will no doubt remain an important tool in restoring civil rights and safeguarding liberty in individual cases.

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References and Further Reading

- Duker, William F., *The President's Power to Pardon: A Constitutional History*, William and Mary Law Review 18 (1977): 475–538.
- Humbert, W. H. *The Pardoning Power of the President*. Washington D.C.: American Council on Public Affairs, 1941.
- Kobil, Daniel T., *The Quality of Mercy Strained: Wrestling the Pardoning Power from the King*, Texas Law Review 69 (1991): 569–641.
- Moore, Kathleen D. *Pardons: Justice, Mercy, and the Public Interest*. New York: Oxford University Press, 1989.
- Sarat, Austin. *Mercy on Trial: What it Means to Stop an Execution*. Princeton: Princeton University Press, 2005.

Cases and Statutes Cited

- Biddle v. Perovich*, 274 U.S. 480 (1927)
- Ex parte Garland*, 71 U.S. 333 (1866)
- 28 Code of Federal Regulations §1.2 (2005)

PARIS ADULT THEATRE v. SLATON, 413 U.S. 49 (1973)

Obscenity has been regulated by the states since the early history of our country. The origins of these laws are primarily religious and designed to maintain some level of public morality. However, it was not until 1957 in *Roth v. United States*, 354 U.S. 476 (1957), that the U.S. Supreme Court addressed the issue of whether obscenity was protected by the First Amendment and subsequently determined that it was not. The Court in *Paris Adult Theatre I* affirmed the *Roth* conclusion that obscenity can be regulated without regard to First Amendment concerns of censorship, although it was the *Miller v. California* case (*Miller v. California*, 413 U.S. 15, 1973), decided the same day, that attempted to establish a definition of obscenity to distinguish it from constitutionally protected pornography.

Two adult movie theaters and their owners and managers were subject to civil complaints in Atlanta, Georgia, in 1971 for violating a state law prohibiting

the distribution of obscene materials. For purposes of the litigation it was assumed that the obscene films were exhibited to paying adults only and that the public was given ample warning of the nature of the films. However, the Georgia Supreme Court held that the showing of these films should have been enjoined because the First Amendment does not protect hardcore pornography. The U.S. Supreme Court agreed with Georgia that obscene materials are not protected by the First Amendment, but vacated and remanded the case for reconsideration of whether the two films at issue were actually obscene under the constitutional definition adopted by the Court that same day in the *Miller* decision. Expert testimony is not required to decide whether the films are obscene under this standard because the materials are sufficient evidence by which to make this determination.

The Court made it clear that even though the films were shown only to consenting adults, states retain a legitimate interest in regulating obscene material for reasons other than keeping juveniles and unconsenting adults from being exposed to such material. The states have an interest in preserving “the quality of life and the total community environment, the tone of commerce in the great city centers, and, possibly, the public safety itself.” Thus, states are allowed to use their police power to regulate obscene expression to protect the health, safety, morals, and welfare of the community. Defending public morality is justified as necessary to preserve a decent society and to guard against secondary effects, such as sex crimes and other antisocial behavior, which may result from exposure to obscene material.

Proof of a scientific correlation between the exhibiting of obscene films and antisocial behavior was unnecessary and instead the Court accepted the state legislature’s reasonable conclusion that such a link might exist and it allowed Georgia to act to preserve public morality. The Court found ample evidence to support a legislative conclusion “that a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality, can be debased and distorted by crass commercial exploitation of sex.”

There is no fundamental privacy interest of a consenting adult to publicly view obscene material. Even though the Court in *Stanley v. Georgia*, 394 U.S. 557 (1969), recognized an individual’s right to view obscene material in the privacy of the home, the *Paris Adult Theatre I* Court refused to extend this privacy right into a place of public accommodation. Preventing the public showing of the obscene films was not deemed to be the state’s attempt to control the thoughts or intellect of a person interested in viewing this material. The state may regulate the

constitutionally unprotected display of obscene material despite the fact that the regulation incidentally has an impact on some human thought.

In conclusion, the Court reaffirmed *Roth*'s holding that obscene material is not protected by the first amendment and that states may regulate obscene material, defined according to the standards established in *Miller*, even though the material is shown to consenting adults only. The *Miller* standards continue to be used to determine whether material is protected under the first amendment or is obscene and not protected.

The *Paris Adult Theatre I* decision supports state regulation of certain conduct to preserve public morality. For example, the Court in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), cited *Paris Adult Theatre I* as authority for upholding an Indiana public indecency statute, legitimately designed to protect public morality. Although a plurality in *Barnes* recognized that nude dancing is expressive conduct under the First Amendment, the Court upheld the state statute requiring dancers to wear pasties and G-strings to achieve the state purpose of prohibiting public nudity. Indiana was justified in regulating public nudity based upon the Court's conclusion in *Paris Adult Theatre I* that the state has a legitimate interest in regulating public morality. The Court in *Bowers v. Hardwick*, 478 U.S. 186 (1986), also upheld Georgia's legislative decision to prohibit homosexual sodomy based on a moral choice and noted that the law is "constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the due process clause, the courts will be very busy indeed."

The *Paris Adult Theatre I*, *Miller*, and *Barnes* cases were all five-to-four decisions. With the recognition of the right of privacy in decisions such as *Griswold v. Connecticut*, 381 U.S. 479 (1965), *Eisenstadt v. Baird*, 405 U.S. 438 (1972), and *Roe v. Wade*, 93 410 U.S. 113 (1973), and the overruling of *Bowers v. Hardwick* by *Lawrence v. Texas*, U.S. 123 S.Ct. 2472, 2003), the viability of the *Paris Adult Theatre I* pronouncement that states have a legitimate interest in regulating public morality remains valid but is prudently qualified when public morality is sought to be enforced in the home. The Court in *Lawrence*, quoting *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992), recognized a "realm of personal liberty which the government may not enter" and determined that the Texas ban on same-sex sodomy when applied to behavior in private did not further a legitimate state interest sufficient to "justify its intrusion into the personal and private life of the individual."

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References and Further Reading

- Leading Cases I. Constitutional Law, D. Freedom of Speech and Expression*, Harvard Law Review 116 (2002): 262.
 Richards, David A. J., *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, University of Pennsylvania Law Review 123 (1974): 45.
 Robbins, H. Franklin, Jr., and Steven G. Mason, *The Law of Obscenity—or Absurdity?* St. Thomas Law Review 15 (2003): 517.
 Tribe, Laurence. *American Constitutional Law*, 2nd ed. 1988, §§ 12-16 to 12-18.
 Wolfe, Christopher, *Public Morality and the Modern Supreme Court*, American Journal of Jurisprudence 45 (2000): 65.

Cases and Statutes Cited

- Barnes v. Glen Theatre*, 501 U.S. 560 (1991)
Bowers v. Hardwick, 478 U.S. 186 (1986)
Eisenstadt v. Baird, 405 U.S. 438 (1972)
Griswold v. Connecticut, 381 U.S. 479 (1965)
Miller v. California, 413 U.S. 15 (1973)
Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992)
Roe v. Wade, 93 410 U.S. 113 (1973)
Roth v. United States, 354 U.S. 476 (1957)
Stanley v. Georgia, 394 U.S. 557 (1969)

PATRIOT ACT

The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act) was signed into law just weeks after the September 11, 2001, attacks on America and letters laced with weaponized anthrax powder were sent to several media and congressional offices. Although at the time the act enjoyed broad bipartisan support (98–1 in the Senate and 357–66 in the House), some of its provisions have since been criticized by civil liberties groups. The 2001 act incorporated a "sunset" provision, under which sixteen sections of the act were to expire on December 31, 2005, unless renewed by Congress. The merits of those sections (and others) and their effect on civil liberties will likely be a subject of an ongoing national debate over the appropriate balance between liberty and security interests.

The USA PATRIOT Act's ten titles span some 131 pages in the Statutes at Large. It builds on the Antiterrorism and Effective Death Penalty Act of 1996 and the Omnibus Diplomatic Security and Antiterrorism Act of 1986.

Title I ("Enhancing Domestic Security Against Terrorism") creates a counterterrorism fund and expands the National Electronic Task Force Initiative.

Title II (“Enhanced Surveillance Procedures”), which contains the several controversial sections, establishes new authority and procedures for electronic surveillance.

Title III contains the International Money Laundering Abatement and Anti-Terrorist Financing Act of 2001.

Title IV (“Protecting the Border”) was later supplemented by the Homeland Security Act of 2002.

Title V (“Removing Obstacles to Investigating Terrorism”) raises the limits on monetary rewards the government may pay to combat terrorism.

Title VI (“Providing for Victims of Terrorism, Public Safety Officers and Their Families”) amends the 1994 Victims of Crime Act and provides a fund for compensating victims of terrorist attacks.

Title VII (“Increased Information Sharing for Critical Infrastructure Protection”) expands regional federal–state–local law enforcement information sharing in responses to terrorist attacks.

Title VIII (“Strengthening the Criminal Laws Against Terrorism”) adds a definition of “domestic terrorism” to the existing definition of “international terrorism,” defines several new crimes of terrorism, enhances penalties for acts of terrorism, amends the related property forfeiture laws, and extends the statutes of limitations for terrorism crimes.

Title IX (“Improved Intelligence”) brings international terrorist activities within the scope of the National Security Act of 1947.

Anticipating recommendations from the 9/11 Commission, it calls for better intelligence and information sharing. Its provisions were supplemented by the Intelligence Reform and Terrorism Prevention Act of 2004.

To appreciate the meaning and effect of the USA PATRIOT Act, at least two other statutes must be considered. Electronic surveillance by federal law enforcement personnel investigating general criminal activity is generally controlled by Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (“Title III”) and the Electronic Communications Privacy Act of 1986. Title III prohibits electronic eavesdropping without a warrant. Title III warrants for wiretaps to record conversations may be issued by a federal court only upon a showing of probable cause. Court orders for less intrusive measures, such as pen registers and trap and trace devices (which record the phone numbers of outgoing and incoming

calls, but not the content of those calls) do not present similar Fourth Amendment concerns and are issued under a less demanding standard. Those orders can extend to e-mail and other Internet activity. Warrants for physical searches in criminal investigations are governed by other rules, including FRCrP 41. The USA PATRIOT Act amended FRCrP 41 to permit federal courts to issue search warrants that may be exercised beyond the district court’s jurisdiction (that is, nationwide warrants) in cases involving terrorist activities.

By contrast, federal electronic surveillance and physical searches in the United States designed to gather foreign intelligence information on foreign powers (including international terrorist organizations) and their agents, to protect against national security threats, espionage, sabotage and terrorism, are controlled by the procedures set out in the Foreign Intelligence Surveillance Act (FISA) of 1978. Warrants for electronic or physical searches in such cases are issued by a special court established under FISA. The differing standards, procedures, and courts in national security and criminal investigations sometimes raise questions regarding the extent to which information gathered pursuant to a FISA warrant may be used in a criminal prosecution.

The USA PATRIOT Act and Civil Liberties

Provisions of the USA PATRIOT Act that raise concerns for civil liberties include:

Section 206 grants the FISA court authority, in cases involving foreign intelligence investigations, to authorize wiretaps that are not limited to a single phone or device.

Section 213 permits judges issuing warrants for searches of property to authorize a reasonable delay in notifying the person whose property was searched.

Section 215 authorizes the FISA court to issue orders compelling certain businesses to turn over business records concerning suspected terrorists or foreign agents.

Section 218 relaxes restrictions on information sharing on terrorism activities between U.S. law enforcement and foreign intelligence officers.

Section 505 allows law enforcement officials greater access to electronic mail records of terrorist suspects.

Other provisions, such as those allowing the federal government to detain non-U.S. citizens suspected

of terrorism or relaxing the restrictions on disclosing grand jury testimony, raise additional concerns.

In examining the effect of the USA PATRIOT Act on civil liberties, it is important to bear in mind that no act of Congress can abrogate rights protected by the U.S. Constitution. With few exceptions, therefore, the debate is not over whether the act denies constitutional rights but rather the extent to which it alters protective provisions in other federal statutes and court rules or otherwise fails, from a policy perspective, to strike an appropriate balance between security and civil liberties.

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References and Further Reading

- Etzioni, Amitai. *How Patriotic Is the Patriot Act? Freedom Versus Security in the Age of Terrorism*. New York: Routledge Group, 2004.
- U.S. Congressional Research Service. *The USA PATRIOT Act: A Legal Analysis*, CRS Rep. No. RL31377. Washington, D.C.: U.S. Government, 2002.
- U.S. Department of Justice. *Report from the Field: The USA PATRIOT Act at Work*. Washington, D.C.: U.S. Government, 2004, available at: http://www.lifeandliberty.gov/docs/071304_report_from_the_field.pdf.

See also **9/11 and the War on Terrorism; Privacy; Search (General Definition)**

PATTERSON v. NEW YORK, 432 U.S. 197 (1977)

Observing his wife partially undressed with a man, the defendant killed him. The defendant was charged with murder, which contains the two elements of intending to cause the death of another and causing the death of another. The trial court instructed the jury that to hold the defendant guilty of murder it must find that the prosecution established every element of the offense beyond a reasonable doubt. The jury was also instructed that if it believed that the defendant established, by a preponderance of the evidence, that he killed under an extreme emotional disturbance (EED), then it could only find the defendant guilty of the lesser offense of manslaughter. The jury returned a guilty verdict for murder, which two state appellate courts affirmed.

Upon appeal to the Supreme Court, the defendant argued that the trial court's jury instruction was an unconstitutional violation of due process by requiring the defendant to disprove his guilt. Affirming the conviction, the Court ruled that, constitutionally, the prosecution need only bear the burden of persuasion to establish every element of the offense but need

not disprove a defense unless the defense negates an element of the offense. Because EED negates neither element of murder, the defendant bears the burden of persuasion on the defense. The danger *Patterson* poses to a defendant's presumption of innocence is that a state might choose to reclassify traditional elements of an offense as defenses and thereby allocate the burden of persuasion on those elements to the defendant.

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References and Further Reading

- Fletcher, George P. *Basic Concepts of Criminal Law*. New York: Oxford University Press, 1998.
- Robinson, Paul H. *Criminal Law Defenses*. St. Paul, MN: West Publishing Co., 1984.

See also ***Martin v. Ohio*, 480 U.S. 228 (1987); Proof beyond a Reasonable Doubt; Self-Defense; *Ulster County Court v. Allen*, 442 U.S. 140 (1979)**

PAUL v. DAVIS, 424 U.S. 693 (1976)

Title 42 U.S.C. § 1983 provides a federal cause of action against governmental officials who subject another to the deprivation of rights guaranteed by the U.S. Constitution. The plaintiff filed a claim against a chief of police for the distribution of an "active shoppers" flyer. The plaintiff claimed a Fourteenth Amendment due-process violation in that the flyer defamed his reputation and deprived him of a "liberty" as well as invaded his privacy. Although the plaintiff had been arrested for shoplifting, thus leading to the distribution of the flyer with his name and picture, the shoplifting charges were subsequently dismissed without any conviction.

The U.S. Supreme Court rejected the plaintiff's claim, holding that damage to reputation as alleged in the complaint was not a violation of any liberty or privacy interest protected by the due process clause. Noting that damage to reputation claims are generally state defamation actions, the Court's majority reasoned that damage to reputation alone, without any other tangible loss, simply did not rise to the level of constitutional protection. The dissenters argued that a person's interest in a good name and reputation qualifies as a liberty interest under the Constitution and statute.

This case is significant on two levels. It is an example of the Court's efforts to find a limit to constitutionally protected interests. Also, as noted in the recent decision in *Conn. DPS v. Doe*, 538 U.S. 1 (2003), regarding sex offender reporting, the *Davis*

case stands for the proposition that reputation is not a protected interest.

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Cases and Statutes Cited

Connecticut Department of Public Safety v. Doe, 538 U.S. 1 (2003)

Title 42 § 1983. Civil action for deprivation of rights (R. S. § 1979; Dec. 29, 1979, P.L. 96-170, § 1, 93 Stat. 1284)

See also **Due Process; Due Process of Law (V and XIV); Fourteenth Amendment; Privacy**

PAYTON v. NEW YORK, 445 U.S. 573 (1980)

Payton consists of two appeals challenging the constitutionality of a New York statute authorizing police to enter a suspect's home to make routine felony arrests without a warrant. In both cases, the police entered the suspects' homes with probable cause, but without consent, to make warrantless arrests and discovered incriminating evidence. Both defendants argued that the evidence should be suppressed because the statute authorizing the search was unconstitutional. The trial court upheld the statute, and the appellate court agreed, distinguishing between the intrusions posed by warrantless home searches and warrantless home arrests. The Supreme Court reversed (five to three), holding that the statute violated the Fourth Amendment's reasonableness requirement.

Writing for the majority, Justice Stevens stated, "In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house." He examined the historical treatment of warrantless home arrests, noting that only one state other than New York had found such arrests constitutional. He reasoned that the same concerns present in warrantless home searches apply to warrantless home arrests, and they should therefore receive the same Fourth Amendment protections. The dissents disagreed with the majority's analysis of the Fourth Amendment's text and history and questioned the Court's elevation of the form of warrants over the substance of probable cause. *Payton*'s holding was expanded in *Steagald v. U.S.*, 451 U.S. 204 (1981) to require arrest warrants for arrests at third-party residences when the police have reason to believe the suspect is there.

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References and Further Reading

LaFave, Wayne R., *Seizures Typology: Classifying Detentions of the Person to Resolve Warrant, Grounds, and Search Issues*, Symposium: Fourth Amendment Reform, University of Michigan Journal of Law Reform 17 (1984): 417-463.

Cases and Statutes Cited

Steagald v. U.S., 451 U.S. 204 (1981)

See also **Arrest; Arrest Warrants; Arrest without a Warrant; Privacy; Search (General Definition); Search Warrants; Warrant Clause (IV); Warrantless Searches**

PELL v. PROCUNIER, 417 U.S. 817 (1974)

In *Pell v. Procunier*, 417 U.S. 817 (1974), the U.S. Supreme Court held that a California prison regulation prohibiting interviews between journalists and specifically identified prisoners did not violate the First or Fourteenth Amendment rights of either prisoners or journalists. Analyzing the issue for the majority, Justice Stewart (joined by Justices Burger, White, Blackmun, and Rehnquist) balanced the interests of the prisoners and journalists against the legitimate penological objectives of the prison.

Although prisoners retain those rights not inconsistent with their status as prisoners, the fundamental necessity of maintaining secure prisons outweighed the prisoners' First Amendment rights, especially because the prisoners enjoyed other forms of communication. They could communicate—even with the press—by mail and could meet with family, clergy, attorneys, or friends, communicating with the press through these visitors. Because journalists could visit minimum and maximum security wings, interviewing the prisoners encountered there, and because they could also interview randomly selected prisoners, the regulation did not amount to state interference with a free press.

Justice Powell agreed that the prisoners' rights were not violated, but distinguished the journalists' rights, concluding that the regulation did abridge these unconstitutionally. In his dissent, Justice Douglas (joined by Justices Brennan and Marshall) acknowledged that prison security is essential, but condemned the prison regulation as unconstitutionally overbroad and as violating the guarantee of a free press.

Pell suggests that legitimate penological interests may trump fundamental constitutional rights, a

conclusion further articulated in the seminal prisoner rights case, *Turner v. Safley* (482 U.S. 78, 1987).

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Cases and Statutes Cited

Turner v. Safley, 482 U.S. 78 (1987)

See also **Access to Prisons; Freedom of Speech and Press: Nineteenth Century; Media Access to Information; Prisoners and Freedom of Speech**

PENN, WILLIAM (1644–1718)

William Penn, a champion of liberty in the Old and New Worlds, is often held up as an exemplary figure of the Enlightenment views of equality and limited government. His upbringing in England, along with his religious views, created a desire within him to change the world. Penn received the opportunity to make real changes in the world when he became the absolute proprietor of a territory nearly as large as England, in 1681.

William Penn was born October 16, 1644, in London. Penn was raised by his mother and father, who served as an admiral in the British Navy. Penn's father was a very influential naval officer and served the Stuart kings, as well as their bitter enemy, Oliver Cromwell. With his father's hectic life in the British Navy, young Penn was often left to himself, and during this time he became very interested in religion. Penn was especially attracted to a mystical Protestant sect known as the Quakers that emphasized a direct relationship with God and believed that an individual's conscience, not the Bible, was man's greatest moral authority. His relationship with the Quakers caused Penn to question many of the authorities around him, including the officials at Oxford University, which led to his expulsion in 1641. Penn's quest for spiritual peace continued to cause him a great deal of trouble. He was arrested in 1667 while attending an illegal meeting of the Quakers. While in prison, Penn wrote many pamphlets that became staples in the underground Quaker church. Many of these pamphlets centered around religious toleration and the most famous of these was entitled, *No Cross, No Crown*.

The quest for religious toleration consumed much of Penn's early life. He traveled extensively through England, Germany, and Holland examining various Quaker groups. He eventually brought his ideas to Parliament, asking for religious toleration, but his views were not considered. Penn realized that his quest for religious toleration in England was fruitless,

so he approached King Charles II and asked for a charter to establish an American colony. Charles II agreed to grant him the charter to cancel a substantial debt he owed Penn's father. Penn was granted land west of the Delaware River and north of Maryland in exchange for a percentage of potential mineral rights mined in the colony.

The new colony of Pennsylvania was governed by Penn's vision of limited government that protected the rights of the individual. The first government document adopted in the colony, called the *First Frame of Government*, guaranteed that a person could not be forced from his estate without his consent. In Pennsylvania, Penn established a colony that promoted morality, virtue, and Christian values; unlike the majority of New England colonies, it supported the complete separation of church and state.

By the time of Penn's death in 1718, Pennsylvania was no longer a Quaker haven, but had turned into America's first melting pot. Many different European groups flocked to this colony as a place to escape persecution of all kinds. Pennsylvania became a place that embodied most of the same values that would be adopted by the new U.S. government in 1776.

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References and Further Reading

- Hull, William I. *William Penn*. New York: Ayer Publishing Company, 1937.
- Soderlund, Jean. *William Penn and the Founding of Pennsylvania, 1680–1684*. Philadelphia: The University of Pennsylvania Press, 1982.

PENNSYLVANIA v. SCOTT, 524 U.S. 357 (1998)

In a case with significant implications for law enforcement and corrections personnel, the Supreme Court held that the exclusionary rule does not apply in parole revocation hearings. Scott was on parole after serving ten years in prison. Five months after his release, probation officers received information that he had weapons in his possession, which would constitute a violation of the terms of his parole. Probation officers searched Scott's residence without probable cause or a warrant and found several weapons.

At his parole revocation hearing Scott sought to have the weapons excluded as the product of an unlawful search. The parole board and the district court refused, but the state court of appeals ordered the evidence excluded. The Pennsylvania Supreme Court, however, ordered the weapons suppressed, on the

ground that the exclusionary rule should apply in parole revocation hearings whenever probation officers conduct searches of known parolees without at least “reasonable suspicion” of criminal activity. Application of the exclusionary rule in these cases, the court felt, would deter probation officers from engaging in illegal searches.

The U.S. Supreme Court reversed the state court and held that the exclusionary rule does not apply to parole revocation hearings. The majority opinion written by Justice Thomas stressed the Court’s traditional reluctance to extend the judicially created remedy to nontrial proceedings and the limited deterrent value of the rule in such proceedings. The Court felt suppression would have only a minimal deterrent effect on parole officers, while having the effect of turning revocation hearings into minitrials. The Court also noted that applying the exclusionary rule to parole revocation hearings would unnecessarily hamper the state’s legitimate interest in ensuring parolees do not violate the terms of their parole.

The dissent argued that the effect of the ruling was to leave probation officers with virtually unchecked power to interfere in the lives of parolees, absent any individualized suspicion of wrongdoing. Nothing in the decision limits it to parole revocation hearings, so it is likely that the Court would hold similarly regarding probation revocation hearings. This is a significant decision because more than three million people are currently on probation or parole, all of whom potentially face revocation hearings.

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References and Further Reading

Hemmens, Craig, Katherine Bennett, and Rolando V. del Carmen. “The Exclusionary Rule and Parole Revocation Hearings: The Supreme Court Says No.” *Perspectives* 23 (1999): 36–42.

See also **Exclusionary Rule; Search (General Definition); Warrantless Searches**

PENTAGON PAPERS CASE

See New York Times v. United States, 403 U.S. 713 (1971)

PENUMBRAS

A penumbra is normally understood as a partial or imperfect shadow surrounding a complete shadow cast by a solid body, but it has taken on a different meaning in U.S. constitutional law. Justice Oliver

Wendell Holmes referred to a penumbra of the Fourth and Fifth Amendments in his 1928 dissent in the case of *Olmstead v. U.S.*, 277 U.S. 438 (1928). The concept of penumbras extending from some of the provisions of the Bill of Rights was given its place in the canon of constitutional law in the majority decision of Justice William Douglas in *Griswold v. Connecticut*, 391 U.S. 145 (1965).

The Court had grappled with the meaning of due process in Amendment Fourteen since 1873, when it first decided the *Slaughterhouse Cases*, 83 U.S. 36 (1873). Various formulae had been proposed to capture precisely what was meant by the statement “nor shall any state deprive a person of life, liberty or property without due process of law.” The proper interpretation was complicated by the use of the exact same language with reference to the national government in Amendment Five. In his dissent in *Hurtado v. California*, 110 U.S. 516 (1884), Justice John Marshall Harlan, Sr. had argued that the due process clause in Amendment Four referred to all of the provisions in the first eight amendments or a system of total incorporation. Justice Benjamin Cardozo had proposed in *Palko v. Connecticut*, 302 U.S. 319 (1937) that due process referred to those portions of the first eight amendments to the Constitution that “were fundamental of a scheme of ordered liberty and justice.” Application of Cardozo’s formula has been labeled “selective incorporation” and permitted inclusion of only those truly important rights enumerated in the Bill of Rights.

When Douglas approached his opinion in *Griswold*, neither of those tests would apply to intrusions into the intimacies of marriage, specifically the decision to use contraceptive devices. He proposed that “specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.” To buttress his argument, Justice Douglas noted that the Court had found the right to educate one’s children as one chooses in *Pierce v. Society of Sisters* (268 U.S. 510, 1925), a right to study the German language in *Meyer v. State of Nebraska* (262 U.S. 390, 1923), a right to association and privacy of those associations in *NAACP v. Alabama* (357 U.S. 44, 1958), and a right of belief in *West Virginia Board of Education v. Barnette* (319 U.S. 624, 1943).

Those earlier decisions led Justice Douglas to the conclusion penumbras for other parts of the first eight amendments created a right to privacy. The right of association, derived from Amendment One, implies a zone of privacy, as does the provision in Amendment Three against quartering soldiers in homes during peacetime. Amendment Four guarantees that one’s person, house, papers, and effects are safe from

unlawful searches and seizures and thus created a zone of privacy, as did the guarantee in Amendment Five against self-incrimination. To complete the argument, Justice Douglas relied on Amendment Nine, which provides that “the enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.” Those guarantees, taken together, protected the marriage relationship, which lies within the zone of privacy created by these various rights.

Justice Douglas concluded that the Connecticut law forbidding the use of contraceptives by married couples was unconstitutional. Nonetheless, his formulation did not carry the full weight of the Court; five justices concurred in the result, but not with the reasoning in the majority opinion, and two others dissented. That left the value of the penumbras argument somewhat in question, but the term and its related meaning have passed into our understanding of constitutional law. The concept that enumerated rights in the first eight amendments are not the only ones encompassed by due process in Amendment Four has come to be known as the theory of total incorporation plus. Since no single theory of incorporation beyond a flexible case-by-case “fairness” approach has yet won the backing of a majority Court, the concept of penumbras emanating from the enumerated rights remains one viable theory.

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Cases and Statutes Cited

Griswold v. Connecticut, 391 U.S. 145 (1965)
Hurtado v. California, 110 U.S. 516 (1884)
Meyer v. Nebraska, 262 U.S. 390 (1923)
NAACP v. Alabama, 357 U.S. 44 (1958)
Olmstead v. U.S., 277 U.S. 438 (1928)
Palko v. Connecticut, 302 U.S. 319 (1937)
Pierce v. Society of Sisters, 268 U.S. 510 (1925)
Slaughterhouse Cases, 83 U.S. 36 (1873)
West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943)

PERSONAL LIBERTY LAWS

Personal liberty laws were extant in New England and in some other northern states prior to the Civil War to prevent runaway slaves from being kidnapped by slave catchers and taken back to southern bondage. These laws were also designed to frustrate the implementation of the fugitive slave clause of the Constitution, as well as the federal laws of 1793 and 1850 governing the return of runaway slaves. During the 1820s, New York, New Jersey, and Pennsylvania all passed personal liberty laws designed to guarantee

that free blacks would not be taken from the state and that fugitive slaves could not be removed without a fair hearing and clear evidence. In theory, many of these laws were declared unconstitutional in *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842), in which Justice Joseph Story declared that under the supremacy clause the federal fugitive slave laws took precedence over state personal liberty laws.

As part of the compromise of 1850, Congress enacted a new Fugitive Slave Act that gave Southerners and slave catchers even greater powers to seize runaway slaves. The act, condemned by the growing antislavery movement in the North, led to a variety of responses. All six of the New England states, as well as Ohio, Michigan, and Wisconsin, passed new personal liberty laws, making it difficult if not impossible to enforce the fugitive slave law. Massachusetts prohibited any lawyer in the state from representing a slave owner and, following Justice Story's suggestion in *Prigg*, prohibited any state official from cooperating with slave catchers. Since many of the federal commissioners named to help enforce the act were also state office-holders and lawyers, they could lose their jobs or their law licenses if they cooperated. Many states also closed the use of their jails to slave catchers.

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References and Further Reading

Morris, Thomas D. *Free Men All: The Personal Liberty Laws of the North, 1780–1861*. Baltimore, MD: Johns Hopkins University Press, 1974.

Cases and Statutes Cited

Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842)

PETITION CAMPAIGN

The Great Petition Campaign to end slavery in the United States and its territories, which spanned the years 1833 to 1844, ranks as perhaps the most significant instance in American history of the use of the right of petition to claim and expand civil liberties. By gathering signatures to support their remonstrances to Congress, abolitionists exploited the potential of the right of petition to mobilize public opinion against the slave power. By employing the right of petition rather than the right of suffrage in their attempt to influence Congress and the American public, abolitionists circumvented moral compromises required by electoral politics and enabled the participation of significant disenfranchised sectors of the abolitionist constituency, namely, free blacks and women.

The groundwork for the abolitionists' systematic petition campaign of the 1830s was laid before the birth of the nation. Slaves submitted antislavery petitions, which emphasized the contradiction between Revolutionary ideology and the keeping of slaves. Petitioning by abolitionist organizations was begun by Quakers, who were among the earliest whites to condemn slavery as a sin. Philadelphia Quakers, for example, petitioned the Continental Congress in 1783 to end the slave trade, only to be informed that under the Articles of Confederation the central government had no power to regulate commerce. Quaker antislavery petitions met better reception in state legislatures, where during the late 1780s they led to passage of a number of laws against the foreign slave trade.

About the same time that Americans started petitioning the Continental Congress, events were occurring in Great Britain that would profoundly affect the future of antislavery petitioning in the United States. Unlike Americans, who sent a few petitions to Congress each year, as early as 1787 male British abolitionists petitioned en masse for an end to the slave trade. Petitioning allowed British abolitionists to draw on the power of the public rather than having to rely on private attempts to influence individual political leaders. By the 1830s in England, the process of gathering signatures and presenting petitions demanding parliamentary action had developed into an elaborate ceremony, wherein the petitions symbolized a mobilized people and provided a tangible measure of public opinion.

In the United States, however, antislavery petitioning remained intermittent until 1819 when there was a burst of petitioning against admission of the Missouri Territory to the Union as a slave state. Admission of Missouri as a slave state would have upset the balance of power between slave and free states in Congress; because it would have created the first new state from Louisiana Purchase land, its status as slave or free carried considerable symbolic importance. Former Tennessee slaveholder Charles Osborn, a Quaker, organized a petition campaign and used his reform newspaper, *The Philanthropist*, to rally Ohioans to hold public meetings to draw up petitions against admitting Missouri as a slave state. In New York, some two thousand people met in a hotel to exercise their conjoined First Amendment rights of assembly, speech, and petition to denounce permitting slavery in new states and to compose a petition to Congress. Similar petitions were sent from Pennsylvania, Connecticut, New Jersey, Delaware, and Vermont.

Further groundwork for mass antislavery petitioning was laid in 1827 when Benjamin Lundy organized a campaign in Baltimore that asked Congress to pass a law providing that all children thereafter born to

slaves in the District of Columbia be declared free at a certain age. The House of Representatives tabled the petition, but Lundy was undeterred. In 1828, he launched a lecture tour through the North to encourage further antislavery petitioning. Lundy succeeded in encouraging a young newspaper reporter named William Lloyd Garrison to adopt the strategy of petitioning. In October 1828, Garrison sent petition forms to Vermont postmasters, who paid nothing for their mail, requesting them to gather signatures and send the petitions to Congress.

Garrison and other opponents of slavery submitted enough petitions in 1828 to stir debate in Congress. Petitions for abolition in the District also flowed from citizens of Washington, D.C., as well as New York, Ohio, and Pennsylvania. Free blacks, such as those in Adams County, Pennsylvania, lent their names to petitions, and the free black press praised the signature-gathering efforts of the predominantly white antislavery societies. When Garrison published the first edition of his antislavery newspaper, *The Liberator*, on January 1, 1831, he urged readers to petition Congress to rid the nation's capital of the "rotten plague" of slavery. A year later when Garrison contributed to the founding of the New England Anti-Slavery Society, he and seventy-one men (among whom about a quarter were free blacks) signed a constitution pledging "to inform and correct public opinion" through a variety of methods, including petitioning.

Many other antislavery societies formed in New England and the West during the early 1830s incorporated pledges to petition in their founding documents. Abolitionists adopted this strategy because although early in its history the right of petition was put into practice by individuals making requests of their rulers for redress of personal grievances, by the advent of the Jacksonian era, men frequently used organized mass petitioning to agitate public opinion in order to achieve their political goals. Petitioning, moreover, fit hand in glove with immediate abolitionists' strategy of moral suasion, which called for the use of moral appeals to awaken public sentiment to induce slaveholders to forsake human bondage.

Male abolitionist leaders endorsed the strategy of petitioning at the national level in December 1833 at the founding convention of the American Anti-Slavery Society. Members resolved "to urge forward without delay" a petition to Congress for abolition in the District of Columbia and named specific congressmen into whose hands the memorials should be entrusted. They also urged the president of the convention to write letters to members of Congress beseeching them to present petitions and to "fearlessly advocate" passage of abolition measures.

Calls to petition issued by the AASS and other male abolitionist organizations at the beginning of the campaign were directed at men and made no attempt to encourage women to participate in the effort. Nonetheless, inspired by the success of English women who, from 1830 to 1833 sent hundreds of thousands of signatures to Parliament requesting an end to slavery in the British dominions, by 1834 growing numbers of American women signed antislavery petitions addressed to Congress. In so doing they departed significantly from the custom of women limiting their petitioning to individual requests about private matters. By petitioning collectively on an issue of national policy women also pushed the limits of antebellum gender norms, which usually constrained them from overt political action out of fear they would be branded unwomanly or immoral. Facing such obstacles, the petition offered women an especially suitable means to participate in the abolition movement because they could use the right of petition—a right that, unlike the ballot, they were generally understood to possess—to apply the force of their supposedly superior morality to reform public opinion on the subject of slavery.

Furthermore, the supplicatory nature of the right of petition held radical potential for women, for natural law assumed that all subjects (and later citizens) possessed the right of petition and that rulers (and later representatives) were obliged to receive and respond to petitions regardless of the subject of their prayer. Abolitionist women relied on the first assumption to claim and defend their right to petition amidst an environment in which their political status, like that of free blacks, was undergoing constant renegotiation.

Women added fifteen thousand signatures to those sent by men in 1835 and 1836, swelling to a flood what was previously a trickle of memorials. As day after day the petitions continued to flow into the House, impeding legislative business, representatives became increasingly irritated. Southern members, many of them slaveholders, insisted on ridding the House of the petitions because they perceived any debate about slavery as hostile to their region. Most northern members wanted to sweep the abolition memorials under the carpet in the interest of political harmony. Because abolitionists strategically composed their petitions to focus on the District of Columbia, where Congress possessed sole authority, representatives who opposed reception of the petitions were unable to use the argument that slavery was a matter for the states to decide.

On May 18, 1836, the House adopted a gag rule to squelch abolition petitions. It stated, "*Resolved*, That all petitions, memorials, resolutions, propositions or

papers, relating in any way, or to any extent whatever, to the subject of slavery, or the abolition of slavery, shall, without being either printed or referred, be laid upon the table, and that no further action whatever shall be had thereon." The House renewed the gag rule at the beginning of each session of Congress and in 1840 made it a standing rule. From the start, Representative John Quincy Adams, elected to the House after having served as president of the United States, vehemently opposed imposition of the gag rule and waged an enduring oratorical battle against gag until it was rescinded in December 1844.

Rather than posing an obstacle, the gag rule provided just the issue abolitionists needed to expand their appeal among the public. The gag allowed abolitionists to link the popular right of petition with the unpopular cause of immediate abolitionism. Moreover, the gag provided evidence for abolitionists' claim that the South was conspiring to destroy northerners' civil rights in order to perpetuate the peculiar institution. Whether or not they were genuinely concerned about the plight of the slave, more northerners became sympathetic to abolitionism when the gag rule demonstrated that slavery threatened their civil rights. Not only did the petitions lead Congress to discuss slavery, but the debate over slavery and suppressing petitions also stirred indignation and discussion of antislavery issues among the public at large. "Wherever the reports of the proceedings in Congress are circulated and read," explained an 1836 report of the Starksborough (Vermont) Anti-Slavery Society, "there will be a knowledge of the doings in relation to those petitions extended; and this circumstance will serve to stir up the spirit of inquiry in relation to our objects, our principles, and measures, in many places where the merits of the Anti-Slavery Society have heretofore been but little known."

Petitioning also enabled abolitionists to reach people who would remain untouched by other forms of abolitionist rhetoric. Indeed, petitions were probably read by more people—congressmen, abolitionists, and members of the public to whom appeals were made for signatures—than was any other form of antislavery literature. Antislavery lectures, newspapers, and pamphlets often reached only persons already converted to the cause, when abolitionists were circulating petitions they spoke face to face with people who would never attend an antislavery lecture or read an antislavery tract. The signing of petitions, moreover, often resulted in multiple benefits because, as one abolitionist explained, a signature on a petition served a "three-fold purpose": "You not only gain the person's name, but you excite inquiry in her mind and she will excite it in others; thus the little circle imperceptibly widens until it may embrace a whole town."

The Great Petition Campaign not only played an important role in the growth of the antislavery movement, but also fostered women's social activism and the securing of their civil liberties. Due in large part to the struggles of female abolitionists, petitioning Congress had become an acceptable means of political action for women, and it continued to be a crucial and persistent outlet employed by women determined to participate in politics despite the fact that neither the Constitution nor custom recognized them as full citizens. Indeed, well before they secured the right to vote, women employed their right of petition. For example, they petitioned to demand that Congress deny a reputed polygamist a seat in the House; they also petitioned to press for federal anti-lynching laws. Ultimately, women employed the right of petition as a major means of persuading Congress and the American public to recognize their right to vote.

The Great Petition Campaign, in which abolitionists gathered hundreds of thousands of signatures on antislavery petitions to Congress from 1833 to 1844, constitutes one of the first uses of mass petitioning to force social change. It contributed, therefore, to the ongoing transformation of the right of petition from an individual request to redress a personal grievance to a tool employed collectively by organized groups to mobilize public opinion and pressure members of Congress. Moreover, this campaign sought to end the greatest abrogation of American freedom—slavery—and in the course of so doing, afforded women the opportunity to assert their right of petition and to lay claim to citizenship. The Great Petition Campaign, then, stands as a major event in the quest for civil liberties during the early nineteenth century and beyond.

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References and Further Reading

- Barnes, Gilbert H. *The Antislavery Impulse, 1830–1844*. New York: Harcourt, Brace, and World, 1933.
- Frederick, David C., *John Quincy Adams, Slavery, and the Disappearance of the Right to Petition*, *Law and History Review* 9 (Spring 1991): 113–155.
- Higginson, Stephen A., *A Short History of the Right to Petition Government for the Redress of Grievances*, *Yale Law Review Journal* 96 (1986): 142–166.
- Ludlum, Robert P. "The Antislavery 'Gag Rule': History and Argument." *Journal of Negro History* 26 (April 1941): 202–243.
- Miller, William Lee. *Arguing About Slavery: The Great Battle in the United States Congress*. New York: Knopf, 1996.
- Nye, Russel B. *Fettered Freedom: Civil Liberties and the Slavery Controversy, 1830–1860*. East Lansing: Michigan State University Press, 1949.
- Rable, George G. "Slavery, Politics, and the South: The Gag Rule as a Case Study." *Capitol Studies* 3 (Fall 1975): 69–87.

Zaeske, Susan. *Signatures of Citizenship: Petitioning, Antislavery, & Women's Political Identity*. Chapel Hill: University of North Carolina Press, 2003.

PETITION OF RIGHT (1628)

The first major English constitutional document since Magna Carta, the Petition of Right grew out of problems raised by England's war with France in 1627. The Crown, short of money, dredged up soldiers from the scum of society and then forced private citizens to quarter them in their homes. The soldiers misbehaved terribly in the homes and in the streets, and when the government, trying to restore order, imposed martial law in port towns, proud merchants appealed to their allies in Parliament for relief against Charles I.

The petition was entirely a work of Parliament, but technically it was neither a statute nor strictly legislative. Its authors, fearing a royal veto if it were presented as a bill, used the form employed by individuals seeking special royal grace for the redress of specific grievances. Its drafters also insisted that no new rights were claimed, only that old ones were recognized.

Fairly brief, it had only four sections, all of which dealt with royal power and phrased in the negative: No person should be required to pay a tax without parliamentary approval; no person should be imprisoned without cause being shown (and the royal command did not amount to sufficient cause); no troops should be quartered in private homes without the consent of and compensation to the owner; and the Crown could issue no commissions for proceedings by martial law.

Hard-strapped for cash to carry on his war, Charles I had little choice but to agree, but gave his assent in the phrase common to individual requests, "Soit droit fait," rather than the legislative "Le roi le vault." Despite this matter of form, the Petition of Right has come to be regarded as a statute and an essential part of the English Constitution.

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References and Further Reading

- Lovell, Colin Rhys. *English Constitutional and Legal History: A Survey*. New York: Oxford University Press, 1962.

PHILADELPHIA NEWSPAPERS, INC. v. HEPPS, 475 U.S. 767 (1986)

From May 1975 to May 1976, the *Philadelphia Inquirer* published a series of articles about Maurice Hepps, the principal stockholder of a corporation that owned

a franchise of beverage and snack stores. Hepps was said to have connections to organized crime that unduly interfered with administrative and legislative state government. Hepps brought suit for defamation of character. In a five-to-four vote, the U.S. Supreme Court held that private figures, in matters of public concern, must prove that the allegedly defamatory statements are false.

In the majority opinion, written by Justice Sandra Day O'Connor and joined by Justices William Brennan, Thurgood Marshall, Harry Blackmun and Lewis Powell, the court ruled that placing the burden of proving a statement true on a media defendant violates the U.S. Constitution. The Court, in rejecting the common-law presumption that defamatory statements are presumed to be false, held that the First Amendment protects true speech, thereby allowing discussion of public concern to be uninhibited. The court expressed concern that media defendants might be unable to prove the truth of some statements, even in cases in which the allegations are without merit. The dissent, written by Justice John Paul Stevens and joined by Chief Justice Warren Burger and Justices Byron White and William Rehnquist, argued that the majority's holding would protect media defendants that act negligently or maliciously and prevent individuals from protecting their reputations. The *Hepps* case stands for the idea that private individuals bear the burden of proving allegedly defamatory statements false when the information is related to matters of public concern.

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References and Further Reading

- O'Brien, David M. *Constitutional Law and Politics: Civil Rights and Civil Liberties, Volume Two*. New York: W. W. Norton & Co., 2000.
- Overbeck, Wayne. *Major Principles of Media Law*. Belmont, CA: Thomson Wadsworth, 2005.

Cases and Statutes Cited

- Philadelphia Newspapers, Inc., et al. v. Hepps et al.*, 475 U.S. 767 (1986)
- U.S. Const. Amend. I

PHILLIPS, WENDELL (1811–1884)

Wendell Phillips, abolitionist activist and orator, was born in 1811 into a prominent family on Boston's Beacon Hill, son of a lawyer who served as mayor and a mother who came from a wealthy background. He was educated at Harvard College and Harvard Law School, and he opened a law office in Boston.

But in 1835 he watched a mob nearly lynch abolitionist publisher William Lloyd Garrison, and he soon became deeply involved in the fight against slavery. After he married an antislavery activist, Ann Greene, he moved deeper into the abolitionist camp.

His involvement became visible in late 1837 when he spoke at a Faneuil Hall rally to protest the murder in Illinois of abolitionist Elijah Lovejoy. When the Massachusetts Attorney General spoke in defense of the mob that killed Lovejoy, Phillips defended Lovejoy's freedom of the press to publish antislavery material and assailed "the tyranny of this many-headed monster, the mob." Lovejoy, he said, "took refuge under the banner of liberty—amid its folds; and when he fell, its glorious stars and stripes, the emblem of free institutions, around which cluster so many heart-stirring memories, were blotted out in the martyr's blood."

The eloquence of his Faneuil Hall speech established Phillips as a leading orator, a skill for which he won high praise throughout his life. Some observers at the time said his oratory outdid even the more famous Daniel Webster. Although he came to lecture on a variety of subjects, his antislavery orations often were in the voice of a dissident, and audiences were sometimes thin or even hostile. But of his later years, historian James McPherson wrote that, in 1862 Phillips, whom he described as "the most radical" of the abolitionists, lectured in northern states to "packed houses" and appeared in Washington, D.C., where he was formally introduced in the U.S. Senate and met with President Abraham Lincoln.

Phillips quickly staked out an intellectual turf in the antislavery fight. With Garrison, he became a leading proponent of the view that the Constitution was a conscious proslavery document and was not entitled to respect; he even declined to vote because it was perpetuating a proslavery government structure. He outlined this view in 1844 in a pamphlet, *The Constitution, a Pro-Slavery Compact*, arguing that the nation could not exist as a unified country because the very existence of government under the Constitution supported slavery. His position placed him in opposition to the view that the Constitution should somehow be understood as antislavery because it was subject to the natural rights of individuals. When Massachusetts lawyer Lysander Spooner argued in an 1845 essay that slavery was unconstitutional, Phillips responded in a lengthy essay.

Phillips and Garrison remained allied for most of the period before the Civil War. But Phillips eventually criticized Lincoln's commitment to eliminating slavery, breaking ranks with Garrison. Phillips argued that the slaves needed more than freedom; they needed education, property, and full rights,

measures that neither Lincoln nor Reconstruction planned to provide.

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References and Further Reading

- Bartlett, Irving H. *Wendell Phillips, Brahmin Radical*, Westport, CT: Greenwood Publishing Group, 1973.
- Ericson, David F. *The Debate Over Slavery: Antislavery and Proslavery Liberalism in Antebellum America*, New York, New York University Press, 2000, 62–90.
- McPherson, James M. *Battle Cry of Freedom: The Civil War Era*. New York, Oxford University Press, 1988, 120, 227, 495, 700–701.
- Stewart, James Brewer. *Wendell Phillips: Liberty's Hero*, Baton Rouge, LA, Louisiana State University Press, 1986.

See also **Garrison, William Lloyd; Lincoln, Abraham; Lovejoy, Elijah; Slavery**

PHILOSOPHY AND THEORY OF FREEDOM OF EXPRESSION

Within the United States, free speech is perhaps the preeminent right among all of the rights included in the Bill of Rights. In many cases it may take precedence over other important constitutional or legal rights, including the constitutional right of copyright (Art. I §9), the legal protection of personal reputation, or efforts to control publicity as a means of assuring a fair trial under the Sixth Amendment. Free speech has also, at times, preempted other constitutional rights, including a tendency of the courts to protect free exercise of religion claims grounded in expressive conduct under the rubric of free speech as opposed to free exercise.

The term “free speech” is, however, a popular misnomer for a concept more properly identified under the heading of freedom of expression. Free expression, in turn, represents an extremely complex, multi-dimensional construct whose popular acceptance, under the label of free speech, masks a significant level of controversy and conceptual confusion. With the exception of those few commentators and advocates who, like Justice Hugo Black, hold an absolutist view of free expression (that is, that the Constitution’s prohibition on laws limiting free speech means that no legal restrictions can be imposed), the difficulty within the legal concept of freedom of expression resides in determining how to draw the line between protected and nonprotected expression.

In determining how to protect expression, the state will have to consider the nature and function of expression in relation to the values held by that society. That is, determining what types of expression should

be protected depends not only upon the purpose for protecting free expression in a liberal democracy (that is, why), but also upon a proper understanding of the nature of free expression (that is, what it is and how it functions). These constructs are so interrelated that one could start with any of the three (that is, why, what, or how). Here, we will begin by considering what constitutes expression and how it functions. This is a descriptive task based on the nature of expression. We then explore why society should protect expression: what the social values advanced by free expression are. We then consider how these three factors relate in developing our ideas on regulating expression, along with certain pragmatic limitations imposed by the nature of regulating expression. Finally, we consider what forms of expression ought to be protected to advance those social values.

The Nature of Expression

In deciding what types of expression should be protected (that is, free), the first question is what do we mean by free expression? This determination involves describing what expression is and how it functions in a liberal democracy. That is to say, the nature and function of expression will determine what type of expression should be protected. For example, if the function of free expression is to educate, then those forms of expression that do not fulfill that function specifically (that is, education for a specific purpose) or generally (that is, provide a general quality) may not deserve protection.

One way to define expression is to describe the elements or characteristics of expressive behavior (that is, what it is). These include: communication, information, and influence or persuasion.

Communication. Expression, according to its simplest understanding, involves communication from one person to at least one other person. Thus, two elements of expression may invoke protective rights: the right to express and the right to hear that expression. The two may or may not be equally protectable or even mutually protected in the same event.

Information. The object of communication is to provide information or receive information. The most obvious form of communication is speech: the expression of ideas through words, whether written or oral. However, ideas can also be expressed in nonverbal forms: symbols, visual expressions, music, and expressive acts, though the substantive content of those ideas will be

very different. Thus, the state's definition of the types of ideas protectable may define the types of expression protectable.

Persuasion. Finally, expression involves persuasion or influence, an effort to change the reality or position of the receiver of the expression. The most obvious example of persuasion is a rational argument that attempts to convince the hearer of the merits of the speaker's position (or person). However, other forms of expression such as story telling, ritual practice, or artistic practice may also be persuasive through the invocation of emotion rather than reason. For example, even at its most abstract, a great work of visual art is said to change the way a viewer sees the world.

The second way of understanding the nature of expression is to consider how it functions in the social setting. The possibilities may be divided into two broad categories: individual focused and social.

The personal function. The first function expression may serve is personal or self-centered.

Expression may constitute an essential function of self-identity: the ability to express oneself as a means of constructing the self. We may be thought of as helping to create our sense of self, self-identity, and/or self-worth through our capacity to create works of art or express our opinions in public. Efforts to restrict self-expression are, therefore, potentially damaging to the individual. Similarly, the individual interest may be in the right to be exposed to the expression of others. One develops a sense of the self out of one's engagement with the ideas of others. One's sense of self and self-identity may also emerge out of the freedom to hear and to pick and choose among the widest possible number of viewpoints. Finally, free expression in terms of the self may simply represent a fundamental liberty interest of the individual as against the state, where the state simply has no authority or right to intrude upon the individual's expressive interests.

The social function. The second possible function of expression is that it advances or supports some important social activity or function of the communities' polity. The simplest function for free expression may be that it facilitates communal living by imposing the least upon the inherent liberty of the individual, what may be referred to as the libertarian function. Second, freedom of expression supports the existence of the public square—that forum in which governmental policies and activities are

discussed and debated with the goal of influencing one's fellow citizens and/or the government. Clearly, the public square cannot function without the participation of the citizens. Removing restrictions or impediments to expression encourages the widest possible participation in the public square and the greatest potential diversity of expressions. Related to this is the most popular and famous formulation of the purpose of free expression—that it creates a free marketplace for ideas. As discussed by Justice Oliver Wendell Holmes in *Abrams v. United States* (250 U.S. 616, 1919) and by John Stuart Mill, this marketplace for ideas helps to promote knowledge and truth by subjecting all ideas to the challenges of public examination and debate. Moreover, repressing expression has the perverse effect of magnifying its power because it is allowed to exist without exposure to public challenge.

The Values or Utility of Freedom of Expression

The second fundamental question regarding freedom of expression is why society should protect expression. What are the values to society embodied in the types of expression for which protection is sought? Societies protect those functions that advance their interests. The interests may be complex or multifaceted; hence, society may adopt a variety of values in conjunction one with the other or varying according to specific situations. The decision to protect certain forms of expression according to what functions they serve ultimately reflects that nature and values of that society. Here again, in analyzing the possibilities, the two broad categories of personal interests vs. social interests are helpful.

Personal interests. Each decision to protect expression because of its personal interest function reflects a particular conception of the appropriate relationship between individuals and the state chosen from among a number of options. Those conceptions (or values) range across a continuum from a minimalist, libertarian/liberal relationship to a communitarian/perfectionist one of profound engagement between the state and the individual.

Libertarian. The minimalist or libertarian social conception views the state as having limited authority over the individual. Therefore, the

state would have only limited rights to intrude upon the expression rights of the individual due to social necessity (that is, to prevent violence or harm to others within society).

Liberal. The next, or liberal conception, shifts the perspective taken from a focus upon the isolated rights of the individual to be free of the state to the obligations of the state towards the individual. While still imposing a limited view of state-individual interaction, the liberal conception understands the state as standing in a position of subservience where the state has a duty to respect the individual. While still compelling a strong recognition of freedom in relation to expression, the liberal position lessens the claim of right by relativizing it to what is needed to respect the individual. Thus, while libertarianism demands that the state refrain from interfering in the liberty of the individual, liberalism would simply require procedural and/or egalitarian treatment respectful of the individual.

Communitarian. The communitarian or common good perspective posits a more interactive relationship between the individual and the state. The state and its citizens are engaged in a cooperative relationship of self-governance. The state regulates behavior according to more general concerns of creating or sustaining a specific understanding of the common good. Thus, the state may be concerned with the effect of expression upon the individual and how that advances or inhibits the creation or maintenance of a beneficial, peaceful social environment meeting the social needs of the citizens.

Perfectionist. The perfectionist understanding of the state views the individual as a product of social conditioning. As previously advocated in its most extreme form by communist revolutionaries, the goal of the state is to engineer society so as to create new, liberated individuals. Under a perfectionist conception, the state would view expression as a tool in the manipulation or character formation of its citizens as better people and/or as good citizens (for example, educated, informed, critical thinkers, etc.).

Social interests. Protecting expression according to the social interests served also covers a spectrum of state/individual interaction ranging from a minimalist, social libertarian ideal to one of strong engagement. These social interests generally reflect varying degrees of participation in social self-governance and, with the exception of the social libertarian model, all involve the

creation and support of a public square as a necessary element in politics.

Social libertarian. The social libertarian ideal fundamentally segregates the individual from the state. The focus is upon protecting the autonomy of the individual independent of any association with state governance. This is a social interest, as opposed to an individual interest, insofar as this segregation is viewed as a useful tool for social organization. That is, the idea of protecting the liberty interests of individuals (including their expressive interests) may be socially useful as a method of limiting social conflict or to facilitate state interests resting upon individual initiative or action.

Political. The idea of the public square reflects a politics in which individuals and social organizations participate in the public discussion of issues of public concern with the goal to analyze, critique, shape, or influence the development, enactment, or enforcement of public policy. The range of purposes or activities that the public square serves can vary enormously. They would include, for example, serving as a counterbalance to the state (for example, by exposing corruption and inefficiencies), educating and informing the public about issues of public concern, serving as a pressure release for social pressure or anxieties, and/or creating a marketplace for ideas to establish truth and falsity of political ideas.

Application of Values

As previously noted, in determining how to protect expression, the state will have to consider the nature and function of expression in relation to the values held by that society. This will involve an assessment of the expression involved according to its nature or function and whether or not it advances the values of the society. It may also be necessary to determine whether or not the suggested function (for example, determining truth through a marketplace of ideas) is, in fact, effective overall or in relation to this specific expressive practice.

Balanced against this assessment, the state must determine what limits may be imposed due to conflicts between the free expression interest and other socially important interests. The more value given to the free expressive interest, the harder it becomes to restrict it and vice versa. Thus, when the free expressive act reflects an important social value, restricting that act would require the identification of an equally

compelling value that would be harmed by the expressive act.

Determining the value of expression is, of course, difficult. Indeed, since one of the major objects of free expression is to facilitate the social determination of the good, it may not be possible for participants or regulators to make an accurate determination of value prior to the conclusion of the expressive act/transaction. Moreover, expression in the public square exists within a complex web of public discourse. The impact of one expressive act upon others may be virtually impossible to determine in advance. For example, in the latter part of the twentieth century, changes in literature contributed to changes in literary criticism that in turn influenced political theory and judicial interpretation. Finally, given the uncertainty of value and indeterminacy of effect, efforts to regulate expression may have unintended consequences in restricting expression.

When free expression is deemed an important value, these cumulative concerns often justify the development of a prophylactic policy of protecting free expression. The state may refrain from regulating expression—not because the particular expressive act advances a social value or interest—but rather out of concern that the attempt to control that expressive act may have the unintended consequence of limiting or “chilling” other expressions that would advance society’s interests.

Alternately, given the intangibility of free expression, the state may adopt the prophylactic of the “slippery slope”—an approach that resists the adoption of limitations on a right based on the fear that the first breach in the wall of protection represents the first step on a slippery slope of declining freedom. Since the virtues and harms of free expression are contestable in both specifics and general application, a principle of strong protection stands guard against inadvertent erosions that cumulatively would be extremely harmful.

Types of Protectable Expression

In identifying and analyzing the types of expression to be protected under the freedom of expression principle, it is useful to start with political expression, the type most associated with the social value identified with expression. We will then consider nonexplicitly political expression, public expression, private expression, and, finally, nonprotectable expression.

Political expression. The idea of free expression is inherently linked to politics and the ideals of

self-governance. It is not only included in the First Amendment to the U.S. Constitution, but also is a central tenet of the International Bill of Human Rights (that is, the Universal Declaration of Human Rights and the International Covenant of Civil and Political Rights) and is considered by most commentators as a fundamental human right. It involves all three of the principle characteristics of expression: the communications of political ideas among the citizenry; the transfer of important political information; and its use to persuade those citizens of the merits (or demerits) of a particular political position or idea. The social function of political expression is to advance political action through the tool of the public sphere or public forum. There are four types of political expression: political speech, expressive speech, expressive conduct, and free press. Each is slightly different, involving differing characteristics and/or values. What unifies the four is that the content is explicitly concerned with political ideas, including the advocacy of state policies, criticism of state action, and promotion of political representatives.

Political speech. Political speech involves verbal expression, written or oral, of political ideas between the speaker and the audience of the speaker. This is the purest expression of the free expression ideal involving the communication of ideas from one to another.

Expressive political speech. Expressive political speech includes all forms of fictional and/or nonverbal recorded expression addressing political topics, such as paintings, music, or fictional books or movies. They differ from political speech insofar as their ability to convey information is limited by their form of expression. Thus, while Picasso’s *Guernica* conveys powerful ideas about the horrors of war, perhaps persuading citizens against a too ready acceptance of war, it does not provide significant information about weapon systems useful in discussing arms limitations treaties or international relations between countries facing conflict.

Expressive conduct. Expressive conduct involves actions performed by one person with the object of making a nonverbal political statement. This would include the famous examples of burning one’s draft card or the American flag to protest U.S. war policies during the Vietnam War. Expressive conduct differs from expressive political speech in that conduct is less inherently

expressive (that is, less effective at communicating ideas) and it takes place in a public setting. Thus, expressive conduct frequently relies upon provocation (that is, taking something with particular symbolic meaning and emotional importance and using it in an offensive way) in the face of an audience sensitive to that provocation.

Free press. The free press concept varies from political speech in that it reflects the rights and responsibilities of the media as a conduit for the political speech of others. The media will, of course, also include political speech on its own behalf (as a corporate or individual citizen). However, what makes this type of expression difficult is determining the extent of the media's protections as an agent of the public in gathering and disseminating political ideas on behalf of the public. (This is a highly contested area.) As a general rule, because it embodies a central value for self-governance, political expression will be accorded the greatest levels of protection by the state.

Nonexplicitly political expression. Expression that is not explicitly directed towards political topics may nonetheless implicate political concerns. For example, a democratic polity requires not only a public that is informed of the issues, but also one informed about a range of nonpolitical ideas and capable of critically reflecting about political and nonexplicitly political ideas. Thus, the state may seek to protect nonexplicitly political expression to advance the values of politics and self governance. However, it may also justify protection on the individual interest grounds of communitarian interest or perfectionism of the individual. Types of nonexplicitly political speech would include the arts, education, and popular nonpolitical media.

Private expression. Private expression involves the state in protecting expression on individual or social libertarian grounds. That is, private expression is protected not for its content, but rather for its value to the individual. Thus, one may protect individual expression because it reflects the self-expression or self-creation of the individual or out of respect for the rights of the individual to be left alone by the state. A state adopting a social libertarian view would protect virtually all expression (including nonexplicitly political expression) as private expression. In terms of the general principles of freedom of expression, the greatest import of private expression is not the protections of expression but rather on the aspects of privacy.

Thus, the state may protect individuals and their expressive acts from mass media exploitation and/or from state intrusion.

Limiting expression and nonprotectable expression.

As is the case with any right, the principles of freedom of expression creates a presumption of protection whose strength varies according to how effectively a particular type of expression embodies a value important to that society. That presumption may then be overcome when it conflicts with a competing right or interest of comparable or greater value. Thus, for example, political speech (the highest valued form of expression) is protected even when it interferes with the rights of reputation accorded to individuals, whereas private speech generally would not be protected. Similarly, protecting the rights of the accused under the Sixth Amendment allows for some restrictions on the free press. There are cases where the nature of the expression is so devoid of social value that the expression is deemed nonprotectable:

Danger-creating expression. Some expression does not deserve protection because it creates palpable risks or harm. The classic example given by Justice Holmes in *Schenck v. United States* (249 U.S. 47, 1919) would be shouting "fire" in a crowded movie theatre. The expression creates unacceptable risks without advancing any discernable social values.

Hate speech. Throughout most of the civilized world, states do not protect speech that is intended to create or advance hatred directed towards groups based on race, ethnicity, religion, culture, or other characteristics. In those states it is generally agreed that hate speech, like danger-creating expression, creates unacceptable risks of harm without advancing any discernable social values. In the United States, the Supreme Court has adopted the approach that the best shield against hate speech is a functioning free marketplace of ideas (*Abrams v. United States*, 1919). Specifically, the court assumes that exposing hateful ideas to public debate will lead to their being discredited, while repressing those ideas through legal prohibition risks increasing their impact among those holding such ideas.

Obscenity. The third principal form of nonprotectable expression is obscenity. By definition, obscenity is a form of expression involving sexually explicit, prurient material totally lacking in socially redeeming characteristics. Over the years, the category of expression found to be obscene has steadily

shrunk within the United States as these forms of expression have been found to involve private speech (for example, the right to view sexually explicit materials within the home) or nonexplicitly political expression in the sense of providing a social commentary on the state.

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References and Further Reading

- Black, Hugo L. *A Constitutional Faith*. New York: Alfred A. Knopf, 1968.
 Mill, John Stuart. *On Liberty in Utilitarianism and Other Writings*. New York: New American Library, 1962.
 Schauer, Frederick. *Free Speech: A Philosophical Enquiry*. Cambridge: Cambridge University Press, 1982.

Cases and Statutes Cited

- Abrams v. United States*, 250 U.S. 616 (1919)
Schenck v. United States, 249 U.S. 47 (1919)
 Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948)
 International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976

See also **Hate Speech; Obscenity**

PHYSICIAN-ASSISTED SUICIDE

In 1991, in *Cruzan v. Director, Missouri Department of Health* (497 U.S. 261), the U.S. Supreme Court ruled that the right to die was a constitutionally protected liberty interest under the Fourteenth Amendment. The case held that terminally ill patients had a right to voluntarily cease treatment; moreover, under proper safeguards, surrogates could make the decision to terminate treatment or turn off life-support equipment for patients in a permanent vegetative state.

The decision confirmed practices and procedures already adopted in most states, but it also triggered a debate over what many libertarians saw as the next phase—namely, whether patients who were not terminally ill had a right to commit suicide and to do so with the assistance of a doctor. They argued that if people suffered greatly from a physical ailment and wanted to end that suffering, they should be allowed to do so. Since many such people were physically or mentally unable to take their own lives, they should be entitled to the help of those who could most effectively and painlessly end their suffering. There should be no difference between a person who, because his or her illness had advanced to terminal stage could turn off life support or cease treatment and die, and a

person who had an illness that was not immediately life threatening, but nonetheless suffered greatly from disease.

The debate was not new; historically, doctors had always practiced euthanasia, helping their patients end their lives when physical distress grew too great. But in the years after World War II the discovery of new wonder drugs as well as the development of radical new means of treating disease through surgery, radiation, and other methods meant that hitherto deadly or debilitating conditions could be remedied, giving patients hope not only of living, but also of living usefully and free of pain. The emphasis in medical schools changed, and emphasis on curing disease and saving life eclipsed the older notion of euthanasia.

But as life grew longer it did not necessarily grow better. Illnesses that would earlier have claimed lives could now be treated, but people who survived did not necessarily live well. The argument that quality of life mattered more than the simple matter of living began to pick up momentum, and advocacy groups like the Hemlock Society began lobbying for more permissive laws regarding ending of life. Although all states repealed their laws criminalizing suicide, nearly all kept statutes on the book that made assisting suicide a crime. The American Medical Association formally disapproved of physician-assisted suicide; in practice, many doctors continue to help sick and suffering patients end their lives, usually through the prescription of drugs that, if taken in sufficient quantity, would prove lethal.

Advocates of physician-assisted suicide based their arguments around the notion of autonomy—that each person should have maximum control over his or her life. If, because of physical debilitation resulting from disease or advanced age, a person no longer found life worth living or was suffering great pain, then he or she should have the right to end that life and a right to assistance in doing so. They did not make a similar claim for people suffering from mental distress, but argued that a competent person, acting without duress, enjoyed full discretion over whether he or she wished to live or not.

Opponents of physician-assisted suicide responded primarily with moral arguments. Suicide, they claimed, was condemned by God and disfavored by all Western religions. There would be pressure from family to have the elderly and infirm end their lives so as to prevent further drain on scarce resources or depletion of an inheritance. Opponents of abortion saw the general right to die as well as the more specific idea of assisted suicide as two sides of the same coin—killing the unwanted unborn and killing the unwanted elderly or sick. Advocates for disability groups argued that assisted suicide was the opening wedge in a

campaign similar to that of Nazi Germany, in which the weak, helpless, disabled, and different would be killed.

During the 1990s, two developments focused the public's attention on physician-assisted suicide. One was the widely publicized example of medical practice in The Netherlands, in which doctors actively helped patients to die. The practice had long been widespread, although technically not legal. The police, however, did not enforce the law and the Dutch public widely supported the practice. Eventually, the Dutch legislature amended the law to make physician-assisted suicide legal. American media gave extensive coverage to stories about the Dutch experience.

Second, Dr. Jack Kevorkian (b. 1928) launched a one-man crusade to make assisted suicide legal and easily attainable. Between 1990 and 1998, Kevorkian helped more than one hundred people commit suicide, initially using a device he called a "Thanatron," by which patients pressed buttons that allowed lethal doses of barbiturates to enter their bodies through an intravenous hook-up. When Michigan officials managed to block his access to those drugs, he switched to a "Mercitron," which released carbon monoxide into a closed space.

Kevorkian's career as "Dr. Death" came to an end when he allowed a video tape of him administering a lethal injection to a willing patient to be shown on national television. Under state law, this constituted murder, and Michigan authorities finally managed to put Kevorkian away in prison. Nonetheless, his activities, as well as the Dutch experience, contributed to the growing national debate on physician-assisted suicide.

Advocacy groups began going to court in the mid-1990s to challenge state laws against assisting suicide. A Seattle-based group called Compassion in Dying, which counseled patients wanting to end their lives, filed suit against a Washington State law prohibiting suicide assistance; after protracted litigation, it got the Court of Appeals for the Ninth Circuit to agree that a person had a liberty interest under the due process clause of the Fourteenth Amendment to end his or her life, and if necessary to secure and have help in doing so (*Compassion in Dying v. Washington*, 79 F.3d 790, 9th Cir. 1996).

On the East Coast, Dr. Timothy Quill, who had gained national renown as an advocate for physician-assisted suicide, challenged a New York State law under the equal protection clause of the Fourteenth Amendment. Quill argued, and the Court of Appeals for the Second Circuit agreed, that a person who was suffering from illness but not terminally ill had as equal a right to die as did a person in the final stages of an illness or on life support, who could

terminate treatment (*Quill v. Vacco*, 97 F.3d 708, 2nd Cir. 1996).

The Supreme Court took both cases on appeal and, in *Washington v. Glucksberg*, 521 U.S. 702 (1997), and *Vacco v. Quill*, 521 U.S. 793 (1997), unanimously ruled that under neither the equal protection clause nor the due process clause did a constitutional right to assisted suicide exist. The opinions by Chief Justice William Rehnquist relied primarily on history—namely, that such a right had not been recognized at the time the Fourteenth Amendment had been adopted and could not be read into the document now; that the existence of a right to die recognized in *Cruzan* did not lead to such a right; and that states had the authority under their police power to forbid and criminalize the assistance of suicide.

But the unanimity in result is deceptive. Five justices wrote concurring opinions that in effect were dissents. They argued that while a right to physician-assisted suicide did not yet exist and the states had the power to ban such activity, if states tightened up end-of-life choices for the ill, then they would be willing to reopen the matter. Justice David Souter in his opinion explained how new rights could be developed under the Fourteenth Amendment and laid out the criteria for doing so. Those criteria, he believed, had not at the moment been met.

Also, the justices made it quite clear that this was an issue for the states and that if a state wanted to permit physician-assisted suicide, then it could so. Rehnquist pointed to the fact that Oregon had only recently adopted such a law and that it was within its authority to do so. In effect, the Court was trying to avoid the mistake it had made with abortion, deciding a question on broad constitutional grounds before the states had a chance to work out reforms at the local level.

Oregon had passed its law in 1997 as a result of two separate referendums. The law allowed physicians to prescribe lethal doses of barbiturates to patients who met very clearly delineated criteria. They had to be terminally ill, defined as being within six months of death by the best estimate of the attending physician; they had to be mentally capable; they had to make the request twice, and it had to be approved by two doctors; and so forth. The resulting deaths would not be considered suicide for insurance purposes, and neither the prescribing physician nor the pharmacist filling the prescription could be held criminally or civilly liable. Doctors could prescribe the medication, but could not administer the lethal doses.

Despite cries that Oregon would become the death capital of the world, in the first seven years that the law was in operation, only 208 persons (an average of about 30 persons a year) actually ingested their

medication. The median age of those doing so was seventy. A larger number received prescriptions, but died before using them or chose not to take them. All in all, the careful conditions laid down by the law appear to have prevented abuse, and polls show that many people are happy that the law exists, even if they do not know whether they would use it. It provides a security blanket if they become terminally ill and risk losing quality of life. Moral critics decry the act as murder, while libertarians argue it should be extended to all sick and suffering persons, not just to the terminally ill.

Reflecting his moral views, John Ashcroft, attorney general in the first term of President George W. Bush, tried to negate the Oregon law by claiming that he had authority to punish doctors who prescribed the medication under federal law. A federal district court as well as the Court of Appeals for the Ninth Circuit rejected his claim, and in essence declared that he was an intermeddling busybody without any power over the states in this area. The Supreme Court took the case on appeal.

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References and Further Reading

- Rosenfeld, Barry. *Assisted Suicide and the Right to Die: The Interface of Social Sciences, Public Policy, and Medical Ethics*. Washington, D.C.: American Psychological Association, 2004.
- Urofsky, Melvin I. *Lethal Judgments: Assisted Suicide and American Law*. Lawrence: University Press of Kansas, 2000.

PICKERING v. BOARD OF EDUCATION, 391 U.S. 563 (1968)

Pickering, a high school teacher, was dismissed from his position by the board of education for sending a letter critical of the board and of recently proposed tax increases to benefit schools to the editor of the local newspaper. The board held a hearing on the dismissal, as required by Illinois law and determined that the allegations made by Pickering were false and damaging to the board and administration. The Illinois Supreme Court rejected Pickering's claim that his dismissal violated his freedom of speech as guaranteed by the First and Fourteenth Amendments.

The Supreme Court found that most of the statements made by Pickering were true, and that the false statements were not made knowingly or recklessly and did not harm the school system. The Court ruled that threat of dismissal from public employment constitutes a damper on the right of free speech. In

cases where the speaker's job is only tangentially and insubstantially related to the subject of the speech, the speaker will be regarded as a member of the general public and his speech subject to the actual malice standard set out in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). Pickering's dismissal violated his rights to free speech.

The decision of the Illinois Supreme Court was reversed and the case remanded. Justice White filed an opinion concurring in the result, but dissenting on the grounds that once Pickering's false statements were found to be neither reckless nor knowing, the question of harm to the school system was irrelevant.

Pickering was a watershed case in freedom of speech jurisprudence, extending to public employees the protections afforded the general public by the *New York Times* case.

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References and Further Reading

- Hudson, David L., Jr. "Balancing Act: Public Employees and Free Speech." *First Reports* 3 (2002): 1-46.

Cases and Statutes Cited

- New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)

PICKETING

Picketing is a form of organized, nonviolent protest marked by marching or standing near a place of employment, government agency, or another protest target. Individuals or groups can picket by carrying signs or distributing literature. Pickets seek to publicize their grievances against the target and, sometimes, to dissuade others from doing business with the target. As a form of "expressive conduct," picketing involves communication protected under the First Amendment speech, petition, and assembly clauses. Yet, because picketing also involves "conduct," courts have often permitted governments to regulate picketing somewhat more than other forms of communication.

In contrast to many types of communicative activities, picketing often is designed to pressure the target into changing its behavior by discouraging others from crossing the picket line. For some, picketing raises special First Amendment concerns because, like boycotts, picketing is a form of pressure the courts are reluctant to put on the same plane as less confrontational speech activities like writing letters or books, speaking before an assembled group, or even

passing out literature. In addition, picketing can be employed in labor disputes, consumer protests, or political conflicts—distinctions that have proven important.

Since much picketing occurs in public places, there is a close relationship between picketing and the traditional public forum. Under the forum doctrine, streets and parks have “immemorially been held in trust” for the public to assemble and communicate. Traditional public forums are presumptively open for communicative activities, including picketing. This means that the government cannot simply prevent public streets from being used for picketing without compelling justification. Indeed, in *Frisby v. Schultz*, 487 U.S. 474 (1988), the Supreme Court noted that “we have traditionally subjected restrictions on public issue picketing to careful scrutiny.”

In *Edwards v. South Carolina*, 372 U.S. 229 (1963), for example, nearly two hundred students were arrested and convicted of “breach of the peace.” The students had peacefully picketed on the grounds of the South Carolina State House, protesting discrimination against African Americans. Reversing the convictions, the Supreme Court held that the First Amendment “does not permit a State to make criminal the peaceful expression of unpopular views.” *Edwards* illustrates two principles: open access to a public forum for the expression of (at that time) controversial views; and a government opposed to those views may not target the speakers for punishment.

In some instances, states or municipalities have attempted to ban picketing in certain places. In *Carey v. Brown*, 447 U.S. 455 (1980), the Court overturned a statute that banned picketing in residential areas, but that exempted “the peaceful picketing of a place of employment involved in a labor dispute.” The Court held that the statute unconstitutionally favored certain communications over others (in this case, labor speech) and thus fell within the general rule that government may not discriminate for or against certain speech based on the content of the communication. Since *Carey* addressed the unequal treatment of two communications, however, the ruling might have permitted total bans on picketing in residential areas.

In *Frisby*, the Court foreclosed such a result while considering an ordinance prohibiting all picketing “before or about” any residence. The ordinance did not exempt any type of picketing, so did not violate the “nondiscrimination” principle of *Carey*. In order to avoid running up against First Amendment concerns, the *Frisby* Court interpreted the ordinance narrowly. Since public streets are presumptively open for speech activities under the public forum

doctrine, the Court held the ordinance must be interpreted to prohibit only “targeted” picketing, defined as picketing directed at a specific residence. Thus limited, the ordinance was constitutional because it was narrowly tailored to achieve an important governmental interest: protecting residential privacy.

The clear import of the *Frisby* decision is that pickets have a constitutional right to march in the “traditional public forum,” even including residential areas. Government may restrict “targeted” residential picketing, but may not generally restrict picketing in a residential neighborhood or even picketing that cycles throughout a neighborhood but does not target a particular residence.

Regulating the “Time, Place, or Manner” of Picketing

Although picketing in the public forum may not be completely banned, the Court has allowed regulations of public forum picketing based on time, place, and manner (TPM) of the communication. TPM rules permit the government to accommodate “conflicting demands on the same place.”

To be valid, TPM regulations must be content neutral. In addition, such regulations must meet three tests: (1) they must serve important governmental goals; (2) the means chosen must reasonably relate to the ends sought; and (3) the regulations must leave open sufficient other outlets for the communications.

Generally, reasonable efforts to accommodate conflicting demands for use of public spaces are constitutional provided the government does not choose on the basis of the content of the communication. For example, if the Nazi and Christian groups wish to use the bandshell of a public park that is typically open for use by community groups, a municipality could choose between them based on which group asked first (that is, a content neutral reason), but could not choose the Christian group because the official liked Christians or disliked Nazis.

The government may also take limited steps to protect passersby or others in the vicinity from being held “captive” to a picket’s message. Furthermore, the government may prohibit obstruction of the streets, loud noises that seriously interfere with other activities, or disorderly conduct, provided again that it applies such regulations consistently across the board and enforces them neither specifically against pickets (and no one else) nor against certain pickets and not other pickets. In *Grayned v. City of Rockford*,

408 U.S. 104 (1972), for instance, the Court upheld an ordinance prohibiting making loud noises adjacent to school if the noise threatened to disturb school operations. The regulation was upheld as a neutral TPM regulation and was valid because it applied equally to loud construction and loud demonstrations and was necessary to protect the functioning of the school.

Consider how the Court evaluated a District of Columbia regulation that prohibited the display of any sign within 500 feet of a foreign embassy if the sign tended to cast “public odium” or “public disrepute” upon the foreign government. The ordinance was overturned as content based because only certain messages that triggered that response were banned. The District had argued that the ban functioned like a “place” regulation, but this was rejected. Essentially, if one must read the sign or hear the message in order to know whether a regulation is violated, it is content based and subject to searching judicial review.

In contrast, the Court upheld as a valid place regulation another aspect of the District’s ordinance that prohibited three or more persons from congregating within 500 feet of an embassy. The Court found that the no-congregating rule had been applied only to groups who targeted an embassy that the authorities reasonably believed presented a threat to the peace or physical security of the embassy.

Sometimes the Court’s decisions in this area have been inconsistent. In *Cox v. Louisiana*, 379 U.S. 559 (1965), a case arising at the height of the civil rights movement, two thousand students gathered near a courthouse jail to protest the prior day’s arrest of 23 black students who had picketed stores that maintained segregated lunch counters. Their leader was convicted of violating a state statute that prohibited any person from picketing or parading near a courthouse “with the intent of interfering with, obstructing, or impeding the administration of justice.” Although the conviction was overturned on other grounds, the Court suggested in dictum that the state had a compelling interest in protecting the administration of justice from the appearance that proceedings had been influenced by the demonstrations.

Cox should not be read as forbidding criticism rendered against judges, or outrage at the judicial process. Indeed, in *Bridges*, decided a few years earlier, the Supreme Court overturned “contempt” sanctions issued against the head of a union who published his telegram to the secretary of labor threatening to call a strike that would shut down the entire Pacific Coast to shipping if a particular legal ruling against the union were enforced. The *Bridges* Court determined that

before such publications could be punished as an intimidation of courts, the probability that a judge would feel threatened would need to be much greater. As Laurence Tribe has argued, “if *Bridges*’s threat to cripple the economy of the entire West Coast did not present danger enough, the lesson of [*Bridges*] must be that almost nothing said outside the courtroom is punishable as contempt.”

The *Cox* Court distinguished *Bridges* on the ground that *Bridges* involved “mere” publication, whereas a crowd of two thousand demonstrators picketing outside a courthouse is more likely to “threaten the judicial process.” The Court’s analysis is problematic, for it is not clear why peaceful picketing would be any more “threatening” to the judicial process than proposing to shut down the economy of the West Coast. Nonetheless, if understood as a limited “place” regulation, the *Cox* decision might be defensible: picketing “near” a courthouse may increase the risk of intimidation of judges, jurors, or witnesses because of the proximity of the demonstrators to the courthouse and their number. By analogy, the Court has also upheld 100-foot distance limitations upon picketing or distribution of literature near polling stations on election days.

Such limited restrictions upon picketing targeted at specific “places” find support in *Frisby*, discussed earlier, as well as in *Boos v. Barry*, 485 U.S. 313 (1988), upholding the District of Columbia ordinance restricting congregation within 500 feet of an embassy. In contrast, the Court overturned a restriction on carrying signs on the sidewalks outside the Supreme Court building, since the rule did not sufficiently advance the asserted purposes of maintaining order, protecting the building and grounds, or insulating judicial decision-making from undue influence.

Picketing Abortion Clinics

Picketing has also figured in demonstrations outside abortion clinics. In *Madsen v. Womens’ Health Center*, 512 U.S. 753 (1994), a lower court issued an injunction forbidding protesters from picketing within 36 feet of clinics, blocking entrances, holding aloft images of fetuses, and making loud noises with bullhorns. The lower court also enjoined picketing within 300 feet of clinic employee residences. The injunction had been issued after the lower court heard substantial evidence that the demonstrators had physically blocked entrances and interfered with access to the clinic building and parking lot.

Applying a slightly higher standard of review to the injunction because a potential prior restraint was

involved, the Supreme Court found that the 36-foot “buffer zone” to protect access to clinic entrances was a valid “place” regulation. Evidence had shown that the picketers were interfering with entrance to and egress from the clinic. The noise regulation was also upheld because of its impact on patients and the performance of medical procedures. However, other portions of the injunction, such as the prohibition on picketing within 300 feet of residences and the ban on “images observable” from the clinic were overturned as burdening “more speech than is necessary” to serve the government’s interest.

In *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1997), the Court considered another injunction that prohibited anti-abortion protestors from demonstrating within 15 feet of an abortion clinic’s entrances and driveways or approaching within 15 feet of vehicles and patients entering or leaving a clinic. The goal of promoting the free flow of traffic on streets and sidewalks and protecting women’s freedom to seek health-related services was substantial enough to warrant the injunction, given evidence that the demonstrators repeatedly obstructed access to the clinics. The Court struck down the “approach” part of the injunction, however, because it “would restrict the speech of those who simply line the sidewalk or curb in an effort to chant, shout, or hold signs peacefully.” In short, as long as the pickets did not interfere with others’ capacity to travel the sidewalk, enter the clinics, or obtain medical services, the pickets could not be prohibited.

More recently, in *Hill v. Colorado*, 530 U.S. 703, 730 (2000), the Court encountered a “place” regulation affecting medical facilities, this time involving the validity of a statute rather than an injunction. A Colorado statute established special rules involving approaching persons within a 100-foot radius of the entrance to any health care facility. Within that radius, the statute made it unlawful “knowingly [to] approach” within 8 feet of anyone entering or leaving any health care facility, without that person’s consent, “for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person.”

Abortion protesters contended that the statute was targeted at abortion opponents and argued the statute was therefore invalid as a “viewpoint” discrimination. Rejecting their argument, the Court pointed out that the statute applied to all persons, regardless of viewpoint, and the reach of the statute was not confined to abortion clinics. When evaluated as a “place” regulation, the state’s interests—protecting access to the clinic and privacy of the patients—were sufficiently strong to validate the law as a TPM regulation.

The First Amendment and Labor Picketing

The courts have permitted governments more latitude to regulate picketing in labor disputes than picketing on public issues. Although this distinction is a “content based” distinction, courts have permitted the government to regulate labor pickets more stringently. From the perspective of the judiciary, labor picketing is a tool of economic bargaining. Since the 1930s, the courts have allowed the government substantially greater leeway under the Constitution to regulate economic affairs as opposed to political communications, and this general distinction has carried over to communicative activities by labor unions as well. Picketing by workers objecting to working conditions or pay is regarded as a form of economic conflict subject to greater regulation than what the Court has called “public issue” picketing.

In view of the distinction between “labor” and “public issue” picketing, it is ironic that the first Supreme Court case protecting picketing arose in a labor context. In *Thornhill v. Alabama*, 310 U.S. 88 (1940), a labor picket was convicted for violating a municipal ordinance that banned loitering or picketing for the purpose of influencing others not to patronize a place of business, or to attempt to injure a business. The Court overturned the conviction:

Every expression of opinion on matters that are important has the potentiality of inducing action in the interests of one rather than another group in society. But the group in power at any moment may not impose penal sanctions on peaceful and truthful discussion of matters of public interest merely on a showing that others may thereby be persuaded to take action inconsistent with its interests.

In subsequent cases, however, the Court has not been as solicitous of labor picketing. In several cases, for example, the Court has confronted issues of “secondary” boycotts and pickets. A primary boycott is directed at the place of employment. Secondary boycotts, in contrast, focus on the companies doing business with the primary company, seeking to pressure the secondary company to cease doing business with the primary one. Many secondary boycotts violate a statute known as the National Labor Relations Act. Because picketing is a means by which the public and other laborers are alerted to the secondary boycott, the Court has allowed the government to restrict even peaceful picketing directed at the secondary employer. The basis of the Court’s ruling is that the legislature may prohibit picketing directed towards an unlawful end—drawing the secondary employer into the labor dispute.

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References and Further Reading

- Baker, C. Edwin, *Unreasoned Reasonableness: Mandatory Parade Permits and Time, Place, and Manner Regulations*, Northwestern University Law Review 78 (1984): 937.
- Estlund, Cynthia, *What Do Workers Want? Employee Interests, Public Interests, and Freedom of Expression Under the National Labor Relations Act*, University of Pennsylvania Law Review 140 (1992): 921.
- O'Neill, Kevin Francis, *Disentangling the Law of Public Protest*, Loyola Law Review 45 (1999): 411.
- Pope, James, *The Three-Systems Ladder of First Amendment Values: Two Rungs and a Black Hole*, Hastings Constitutional Law Quarterly 11 (1984): 189.
- Tribe, Laurence H. *American Constitutional Law*, 2nd ed. Mineola, NY: Foundation Press, 1988.

Cases and Statutes Cited

- Boos v. Barry*, 485 U.S. 313 (1988)
- Burson v. Freeman*, 504 U.S. 191 (1992)
- Carey v. Brown*, 447 U.S. 455 (1980)
- Cox v. Louisiana*, 379 U.S. 559 (1965)
- Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568 (1988)
- Edwards v. South Carolina*, 372 U.S. 229 (1963)
- Frisby v. Shultz*, 487 U.S. 474 (1988)
- Grayned v. City of Rockford*, 408 U.S. 104 (1972)
- Hill v. Colorado*, 530 U.S. 703, 730 (2000)
- Madsen v. Womens' Health Center*, 512 U.S. 753 (1994)
- NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982)
- Perry v. xxx*, 460 U.S., at 45
- Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972)
- Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1997)
- Schneider v. State*, 308 U.S. 147, 163 (1939)
- Thornhill v. Alabama*, 310 U.S. 88 (1940)
- United States v. Grace*, 461 U.S. 171 (1983)
- Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989)
- National Labor Relations Act*, § 8(b)(4) of the NLRA, 29 U.S.C. § 158(b)(4) (1988)

See also Abortion Protest Cases; Anti-Abortion Protest and Freedom of Speech; Captive Audiences and Free Speech; Civil Rights Laws and Freedom of Speech; Clear and Present Danger Test; Content-Based Regulation of Speech; Content-Neutral Regulation of Speech; *Cox v. Louisiana*, 379 U.S. 536 (1965); Demonstrations and Sit-ins; *Edwards v. South Carolina*, 372 U.S. 229 (1963); Freedom of Access to Clinic Entrances (FACE) Act, 108 Stat. 694 (1994); *Frisby v. Schultz*, 487 U.S. 474 (1988); *Hague v. C.I.O.*, 307 U.S. 496 (1939); Hate Speech; Heckler's Veto Problem in Free Speech; *Madsen v. Women's Health Center*, 512 U.S. 753 (1994); Marches and Demonstrations; Public/Nonpublic Forum Distinction; Public Forum Doctrines; Speech and Its Relation to Violence; Speech versus Conduct Distinction; Symbolic Speech; Time, Place, and Manner Rule; Traditional Public Forums; Tribe, Laurence H.

PIERCE v. SOCIETY OF SISTERS, 268 U.S. 510 (1925)

Pierce v. Society of Sisters addressed the constitutionality of a state statute requiring children's attendance in public schools. The Oregon law required every parent or guardian of a child between eight and sixteen years to send that child to a public school. Under this law, a parent or guardian would be guilty of a misdemeanor for each day a student failed to attend public school. The plaintiffs, a Catholic school serving orphans and a military academy, argued that the state was depriving them of property and their ability to remain in business, and thus sought a preliminary injunction barring enforcement of the statute. The two schools taught the same subjects traditionally pursued in the public schools with some additional instruction.

In a unanimous decision, the Supreme Court held that the Oregon law was unconstitutional because it exceeded the type of reasonable regulation of education under the state's police powers. Relying on the due process clause of the Fourteenth Amendment, the Court held that the statute deprived private schools of their property interests to remain in business and the parents of their liberty interest in deciding how best to raise their children:

No question is raised concerning the power of the State reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, ... and that nothing be taught which is manifestly inimical to the public welfare (268 U.S. at 534).

The Court rejected the state's argument that the statute was required to effectuate compulsory education, noting that private and public schools can, and have, existed in harmony. Following *Meyer v. Nebraska*, 262 U.S. 390 (1923), the Court found that the Oregon statute unreasonably interfered with the liberty of parents, individually and as a group, to guide their children intellectually and religiously (*Pierce*, 268 U.S. at 534). Thus, as in *Meyer*, the Court applied a mere rationality test rather than any type of strict scrutiny to invalidate the statute. The state's power to legislate in the area of education did not give it the right to prohibit and suppress private schools that are qualified to provide students with an education. The state does not have the power to "standardize its children," by forcing public instruction on them (268 U.S. at 535). Nevertheless, the Court recognized that states, in their interest in developing an educated citizenry, could regulate private schools, requiring them to meet minimum standards of instruction also required of public schools.

The *Pierce* case has been cited in most cases concerning compulsory school attendance, where nonpublic school attendance or home schooling is involved, and in cases involving government interference with the family realm. Together with *Meyer v. Nebraska*, states cannot interfere with private school practices unless such practices are harmful to the public welfare. The case is also significant for its early use of the substantive due-process doctrine in the area of noneconomic rights (parental rights).

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Cases and Statutes Cited

Meyer v. Nebraska, 262 U.S. 390 (1923)

PLAIN VIEW

The Fourth Amendment guarantees, among other things, that “[t]he right of the people ... against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” In *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), the Supreme Court carved out an exception to the Fourth Amendment’s warrant requirement, holding that “under certain circumstances the police may seize evidence in plain view without a warrant.”

Following *Coolidge*, most lower courts agreed that a warrantless seizure would be upheld under the plain view doctrine when the following four conditions were satisfied:

The police must show that they did not violate the Fourth Amendment in arriving at the place from where the evidence could be plainly viewed. Thus, seizures of items observed in plain view are permissible during the execution of a search or arrest warrant or when a valid exception to the warrant requirement exists.

The evidence must be in plain view, or the police must otherwise have a lawful right of access to the evidence. To this end, a police officer may stand on a public sidewalk and observe incriminating evidence by looking through a window without violating the Fourth Amendment. But the officer would still need a warrant to enter and seize the evidence because the officer’s location on the sidewalk does not give him or her access or authority to seize the evidence observed in plain view.

The incriminating character of the evidence seized must be immediately apparent. Reaffirming *Coolidge*, in *Arizona v. Hicks*, 480 U.S. 321 (1987), the Court clarified that this condition is satisfied only if, after an inspection of “what is already exposed to view,” the police are able to determine that the evidence is incriminating. According to *Hicks*, an officer may not move an object even a few inches without running afoul of the Fourth Amendment’s warrant requirement unless the incriminating character of the item was apparent before the officer moved it.

Most lower courts interpreting *Coolidge* held that the evidence’s discovery must have been inadvertent. Nearly twenty years after *Coolidge* and just three years after *Hicks*, in *Horton v. California*, 496 U.S. 128 (1990), the Court rejected the inadvertence requirement. Thus, a plain view seizure will now be upheld if the first three conditions noted previously are satisfied.

In *Minnesota v. Dickerson*, 508 U.S. 366 (1993), the Court expanded the plain view doctrine to include plain touch seizures. The requirements for such seizures are nearly identical to those required for a plain view search. First, a police officer must lawfully be in the position from which he or she touched the evidence. Second, the evidence’s incriminating character must be immediately apparent when touched. Finally, the officer must have a lawful right of access to the evidence. Several lower courts have expanded *Dickerson* and recognized “plain smell” and “plain hearing” corollaries to the plain view and plain touch doctrines. The “plain smell” corollary has been used most frequently in cases where the smell of marijuana has been immediately apparent to officers lawfully in the marijuana’s vicinity—for example, outside a vehicle transporting large amounts of marijuana—or when officers were conducting a lawful detention of the possessor of marijuana. Likewise, the “plain hearing” corollary has been used in cases where officers were lawfully in the vicinity of incriminating remarks—for example, in an adjacent hotel room.

While courts’ recognition of the plain smell and plain hearing corollaries demonstrates an emerging expansion of the plain view doctrine, discernable limits have already been demarcated. Most significantly, the Supreme Court has held that police officers may not use sense-enhancement technologies not in “general public use” to aid their detection of incriminating evidence. In *Kyllo v. United States*, 533 U.S. 27 (2001), which rejected the government’s argument that its use of a thermal imager to detect an indoor marijuana cultivation operation was a plain view search, the

PLAIN VIEW

Court stressed that, until a sense-enhancement technology becomes readily available to the public, individuals' privacy expectations against the use of such technologies remain protected by the Fourth Amendment's warrant requirement.

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References and Further Reading

- Hilber, Katherine A., *Casenote, Criminal Law—Fourth Amendment—Search Under “Plain Touch” Corollary to “Plain View” Must Stay Within the Confines Under Which It Originated*, University of Detroit Mercy Law Review 71 (Spring 1994): 713–731.
- Kamisar, Yale, Wayne R. LaFave, Jerold H. Israel, and Nancy J. King, eds. *Modern Criminal Procedure: Cases, Comments, and Questions*, 11th ed. St. Paul, MN: West, 2005.
- Sorenson, Quin M., *Comment, Losing a Plain View of Katz: The Loss of a Reasonable Expectation of Privacy Under the Readily Available Standard*, Dickinson Law Review 107(1) (Summer 2002): 179–207.
- Wallin, Howard E., *Plain View Revisited*, Pace Law Review 22(2) (Spring 2002): 307–345.

Cases and Statutes Cited

- Arizona v. Hicks*, 480 U.S. 321 (1987)
- Coolidge v. New Hampshire*, 403 U.S. 443 (1971)
- Horton v. California*, 496 U.S. 128 (1990)
- Kyllo v. United States*, 533 U.S. 27 (2001)
- Minnesota v. Dickerson*, 508 U.S. 366 (1993)

See also *Arizona v. Hicks*, 480 U.S. 321 (1987); *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); *Kyllo v. United States*, 533 U.S. 27 (2001); *Minnesota v. Dickerson*, 508 U.S. 366 (1993); Warrant Clause (IV); Warrantless Searches

PLANNED PARENTHOOD

See *Planned Parenthood (“Nuremberg Files”) Litigation; Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52 (1976); *Planned Parenthood v. Ashcroft*, 462 U.S. 506 (1983); *Planned Parenthood v. Casey*, 112 S.Ct. 2791 (1992); *Sanger, Margaret*

PLANNED PARENTHOOD

(“NUREMBERG FILES”) LITIGATION

The Freedom of Access to Clinic Entrances Act (FACE) proscribes using threat of force to intimidate a person accessing reproductive health services. In 1995, abortion providers sued several anti-abortion organizations and individuals for violating FACE by means of threatening posters and a Website.

The defendants were responsible for posters containing the caption “WANTED” or “unWANTED,” along with an abortion provider's name, address, and other personal information. Shortly after some of those posters appeared, the featured physicians were killed by anti-abortion extremists. The defendants were also responsible for the “Nuremberg Files” Website, which identified a number of abortion providers. The names of those providers who had been killed were crossed out, and the names of those who had been wounded were grayed out.

The physicians won a verdict of \$107 million, but the defendants contended that the posters and Website were protected speech under the First Amendment and therefore could not be punished. The defendants won initially on appeal before a panel of the Ninth Circuit Court of Appeals, but subsequently lost after rehearing by a larger panel. That court decided that the context of anti-abortion violence had to be taken into account in determining whether the posters and Website were illegally threatening violence, as opposed to (permissibly) endorsing others' violent acts. A true threat, unprotected by the First Amendment, is one that a reasonable person would expect the listener to understand as an expression of intent to harm, though the speaker need not have the intention of carrying it out. Since the posters and the Website met the criteria of true threats, the defendants had violated FACE and the verdict was upheld.

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References and Further Reading

- Elrod, Jennifer, *Expressive Activity, True Threats, and the First Amendment*, Connecticut Law Review 36(2) (2004): 541–608.

Cases and Statutes Cited

Freedom of Access to Clinic Entrances Act, 18 U.S.C. § 248

See also **Anti-Abortion Protest and Freedom of Speech; Freedom of Speech and Press: Nineteenth Century; Freedom of Access to Clinic Entrances (FACE) Act, 108 Stat. 694 (1994); Threats and Free Speech**

PLANNED PARENTHOOD OF MISSOURI v. DANFORTH, 428 U.S. 52 (1976)

In its first abortion case after *Roe v. Wade*, the Supreme Court in *Planned Parenthood of Missouri v. Danforth*, reviewed seven components of Missouri's

new, post-*Roe* abortion law. The Court struck down requirements of parental and spousal consent, a ban on a common method of abortion called saline amniocentesis, and a criminal penalty on doctors who fail to seek to preserve the life and health of the fetus at all stages of pregnancy. It sustained the statute's viability definition, informed patient consent requirement, and medical recordkeeping and reporting obligation.

Danforth is best known for its analysis of spousal consent and parental-consent requirements. Justice Blackmun wrote for a six-member majority that requiring a husband's written consent unconstitutional afforded him authority to veto his wife's choice, a power that "the state itself is absolutely and totally prohibited from exercising" during the first trimester and thus cannot delegate to the husband. The Court recognized that, ideally, both spouses would agree whether to continue a pregnancy, but underscored that when they do not, "the view of only one of the two marriage partners can prevail." In such a case, the woman, who physically bears the child, must have the choice.

A five-member majority applied a similar rationale to the requirement that a pregnant minor obtain her parent's written consent as a condition of terminating a pregnancy. Missouri did not require parental consent for any other medical procedure, and the Court held that requiring it for abortion violated *Roe*. Justices Stewart and Powell, concurring, suggested that a parental consent requirement might be constitutional if it provided for a "judicial bypass" of the requirement when a court determined "that the minor is mature enough to give an informed consent without parental concurrence or that the abortion in any event is in the minor's best interest." Justice Stevens parted with the majority on the parental-consent requirement, which he viewed as justified by the state's interest in the welfare of its youth.

A six-member majority also struck the saline amniocentesis prohibition and fetal protection requirement. The Court found no valid health rationale for barring saline amniocentesis, noting that it was safer than permitted alternative methods, less risky than childbirth, and was the most common, medically accepted method of second-trimester abortions. The requirement that doctors seek to preserve the life of the fetus to the same extent that they would a child intended to be born alive effectively precluded even abortions before viability, also in conflict with *Roe*.

The Court unanimously sustained the three remaining provisions. The statute set viability as "when the life of the unborn child may be continued indefinitely outside the womb by natural or artificial life-supportive systems," which the Court held was

consistent with *Roe*'s concept of viability as "a matter of medical judgment, skill, and technical ability." The Court concluded that Missouri's requirement that a woman obtaining an abortion during the first twelve weeks of pregnancy certify in writing "that her consent is informed and freely given and is not the result of coercion" was consistent with woman's reproductive choice. The Court also upheld the requirement that doctors record and report to public health authorities the numbers and types of abortions performed as "reasonably directed to the preservation of maternal health" while properly respecting women's confidentiality and privacy.

Justice White, joined in dissent by Chief Justice Burger and Justice Rehnquist, would have upheld every provision of the Missouri statute, leaving the regulation of abortion primarily in the hands of state legislators.

In the decades since *Danforth*, many states have enacted restrictions, including parental and spousal involvement requirements, on providers and on women seeking abortions. The *Danforth* concurrence's suggestion that parental consent cannot be required absent provision for a prompt, confidential judicial bypass has been embraced by a majority of the Court. (See *Planned Parenthood Assn. of Kansas City v. Ashcroft*, 462 U.S. 476, 1983.) Under the flexible modern standard of *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 112 S.Ct. 2791 (1992), the Court also has reaffirmed the unconstitutionality of spousal consent requirements first struck down in *Danforth*.

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Cases and Statutes Cited

Planned Parenthood Assn. of Kansas City v. Ashcroft, 462 U.S. 476 (1983)

Planned Parenthood of Missouri v. Danforth, 428 U.S. 52 (1976)

Planned Parenthood of Southeastern Pennsylvania v. Casey, 112 S.Ct. 2791 (1992)

Roe v. Wade, 410 U.S. 113 (1973)

See also **Abortion; *Planned Parenthood v. Ashcroft*, 462 U.S. 476 (1983); *Planned Parenthood v. Casey*, 112 S.Ct. 2791 (1992); *Roe v. Wade*, 410 U.S. 113 (1973)**

PLANNED PARENTHOOD v. ASHCROFT, 462 U.S. 476 (1983)

Following the Supreme Court's decision in *Roe v. Wade* (410 U.S. 113, 1973) recognizing a woman's right under the due process clause of the Fourteenth Amendment to terminate her pregnancy, several

states, including Missouri, enacted legislation aimed at discouraging women from choosing abortion over childbirth. Some of the barriers placed by Missouri included a requirement that second-trimester abortions be performed in hospitals, that tissue removed during the abortion be examined by a pathologist, that a second physician be present during third-trimester pregnancies, and that minors secure parental or judicial consent. These rules imposed additional costs for and delay in the performance of abortions. In *Planned Parenthood v. Ashcroft*, the Supreme Court struck down the hospital requirement but sustained the other restrictions.

Planned Parenthood Association of Kansas City, Missouri, two physicians who performed abortions, and an abortion clinic filed a suit in federal district court challenging several sections of the Missouri abortion statutes as unconstitutional. The trial court invalidated all the sections except the pathology requirement. The U.S. Court of Appeals upheld the requirement that a minor secure parental or judicial consent to an abortion.

In *Akron v. Akron Center of Reproductive Health*, 462 U.S. 416 (1983), decided the same day as *Planned Parenthood v. Ashcroft*, the Court invalidated a city ordinance requiring physicians to perform all second-trimester abortions in a hospital. Such a restriction, said the Court, unreasonably infringes upon a woman's constitutional right to obtain an abortion. Abortion clinics are a safe, reasonable, and much less costly alternative. The Court found the Missouri hospital requirement unconstitutional for the same reason.

The Court found that the requirement that a second physician be in attendance when a doctor is performing a late-term abortion furthers the state's compelling interest in protecting potential human life. The Court acknowledged that a small percentage of abortions performed after the fetus has reached the point of viability (the stage in which it can survive outside the mother's womb) result in live births. The purpose of the second physician's attendance is to save the life of the child born under such circumstances while the first doctor attends to the needs of the mother. The Court struck down efforts by states to ban late-term, or partial-birth, abortions in *Stenberg v. Carhart*, 530 U.S. 914 (2000).

Immature minors do not enjoy the same constitutional rights as adults. In *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976) the Court held unconstitutional Missouri's parental-consent requirement for all unmarried minors. In response Missouri passed a new statute that included a judicial bypass procedure. In *Planned Parenthood v. Ashcroft*, the Court upheld the revised statute, saying that a state can

require that adolescent girls obtain the consent of one parent or a judge before procuring an abortion. After finding that the minor is not mature enough to make her own decision, the juvenile court will give consent if it finds that the abortion is in the best interest of the minor. The involvement of the juvenile court furthers the state's interest in protecting the well-being of children.

The Court held that the small additional cost of a pathologist's examination of tissue removed during an abortion was outweighed by the substantial benefits obtained. Because the pathologist's microscopic examination might reveal the presence of cancer or other serious disease, the requirement of such an examination advances the state's interest in safeguarding the woman's health. None of the restrictions upheld by the Court was a serious obstacle to the exercise of the abortion right found in *Roe v. Wade*.

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References and Further Reading

- Buss, Emily, *The Parental Rights of Minors*, Buffalo Law Review 48 (2000): 785-833.
- Dolgin, Janet L., *The Fate of Childhood: Legal Models of Children and the Parent-Child Relationship*, Albany Law Review 61 (1997): 345-431.
- Katz, Kathryn D., *The Pregnant Child's Right to Self-Determination*, Albany Law Review 62 (1999): 1119-1166.
- Tradition of Choice: Planned Parenthood at Seventy-Five*. New York: Planned Parenthood Federation of America, Inc., 1991.

Cases and Statutes Cited

- Akron v. Akron Center of Reproductive Health*, 462 U.S. 416 (1983)
- Planned Parenthood v. Danforth*, 428 U.S. 52 (1976)
- Roe v. Wade*, 410 U.S. 113 (1973)
- Stenberg v. Carhart*, 530 U.S. 914 (2000)

See also **Abortion**; *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983); **Due Process of Law (V and XIV)**; *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52 (1976); *Roe v. Wade*, 410 U.S. 113 (1973); *Stenberg v. Carhart*, 530 U.S. 914 (2000)

PLANNED PARENTHOOD v. CASEY, 112 S.CT. 2791 (1992)

The Supreme Court assessed the constitutionality of five provisions of the Pennsylvania Abortion Control Act of 1982 (amended in 1988 and 1989). The Court upheld four of the five provisions, rejecting the third one (which required spousal notification for an abortion) based on the *undue burden* standard: "A finding

of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.”

This standard departs from *Roe v. Wade*, 410 U.S. 113 (1973), and its progeny, which required that abortion restrictions be subject to strict scrutiny: limits on abortion must be essential to meeting a compelling state interest. The *Casey* Court claimed that its holding was more consistent with the spirit and letter of *Roe* than most of the Court’s post-*Roe* abortion opinions.

Thus, the Court held that a state may restrict abortion by passing laws that may not withstand strict scrutiny but do not result in an undue burden for the pregnant woman. The Court upheld provisions in the Pennsylvania statute that would have most likely not survived strict scrutiny: “a woman seeking an abortion [must] give her informed consent prior to the abortion procedure, and ... she [must] be provided with certain information at least 24 hours before the abortion is performed” (that is, she must be given the facts of fetal development, risks of abortion and childbirth, and information about alternatives), and “the Act imposes certain reporting requirements on facilities that provide abortion services.” The other two surviving provisions would likely have passed strict scrutiny: parental informed consent for minors (with a judicial bypass option) and a medical emergency exemption from the 24-hour informed consent and the parental and spousal notification provisions.

Although the Court upheld *Roe* as precedent, it rejected not only *Roe*’s strict scrutiny standard but also its trimester framework (which *Webster v. Reproductive Health Services*, 492 U.S. 490, 1989) had already discarded). This framework, according to the Court, was too rigid as well as unnecessary to protect a woman’s right to abortion. The Court did reaffirm *Roe*’s claim that fetal viability is the place in pregnancy when the state has a compelling interest in protecting prenatal life. But this is at the state’s discretion, since, according to the Court, the Constitution does not require that a state protect prenatal life after viability and prior to birth.

Casey affirmed abortion as a liberty grounded in the Fourteenth Amendment’s due process clause, though it offered two reasons why the Court could not overturn *Roe*. First, because people arrange their lives with the abortion right in mind, they have a reliance interest in the preservation of the right. Second, overturning *Roe* would result in the Court losing respect and legitimacy in the public’s eye, even if rejecting *Roe* would have in fact corrected a constitutional error.

Casey is an important decision because it upheld *Roe* while at the same allowing for some restrictions

on abortion that would not likely have passed the strict-scrutiny standard of prior Courts.

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References and Further Reading

- Beckwith, Francis J. “*Roe v. Wade*: Its Logic and Its Legacy.” *The Southern Baptist Journal of Theology* 7.2 (Summer 2003): 4–29.
- Boonin, David. *A Defense of Abortion*. New York: Cambridge University Press, 2002.
- Bradley, Gerard V. “Shall We Ratify the New Constitution? The Judicial Manifesto in *Casey* and *Lee*.” In *Benchmarks: Great Constitutional Controversies in the Supreme Court*, ed. Terry Eastland. Washington, D.C.: Ethics & Public Policy Center: Grand Rapids, MI: Eerdmans, 1995.
- Dworkin, Ronald. *Life’s Dominion: An Argument About Abortion, Euthanasia, and Individual Freedom*. New York: Random House, 1993.
- George, Robert P., *Public Reason and Political Conflict: Abortion and Homosexuality*, Yale Law Journal 106 (1997).
- Lee, Patrick. *Abortion and Unborn Human Life*. Washington, D.C.: Catholic University of America Press, 1996.
- Pojman, Louis P., and Francis J. Beckwith, eds. *The Abortion Controversy 25 Years After Roe v. Wade: A Reader*, 2nd ed. Belmont, CA: Wadsworth, 1998.
- Simmons, Paul D. “Religious Liberty and Abortion Policy: *Casey* as ‘Catch-22.’” *Journal of Church and State* 42.1 (Winter 2000).
- Tribe, Laurence. *Abortion: The Clash of Absolutes*. New York: W. W. Norton, 1990.

Cases and Statutes Cited

- Pennsylvania Abortion Control Act of 1982*, 18 Pa. Cons. Stat. §§ 3203–3220 (1990)
- Roe v. Wade*, 410 U.S. 113 (1973)
- Webster v. Reproductive Health Services*, 492 U.S. 490 (1989)
- See also Abortion; Due Process; Due Process of Law (V and XIV); Privacy; Reproductive Freedom; Roe v. Wade*, 410 U.S. 113 (1973); *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989)

PLEA BARGAINING

Plea bargaining is the process by which the parties in a criminal case settle a case before trial. As the term suggests, it is a negotiation between the prosecutor and the defense attorney concerning whether, and if so the conditions under which, the defendant will agree to plead guilty (or sometimes “no contest” through a plea of *nolo contendere*) and thus waive the right to contest the charges at a trial. Although plea bargaining can cover a number of issues, most negotiation centers on (1) which charges, if any, the

prosecutor will reduce or dismiss; (2) which charges the defendant will admit to; and/or (3) the sentence that the parties will recommend to the judge.

Notwithstanding the constitutional guarantee of a trial in every criminal case, over 90 percent of all criminal cases in the United States are resolved by a guilty plea. Whether this is good or bad has been long debated, but the reasons for the phenomenon are clear. First and probably foremost is necessity. The courts would soon be overwhelmed if every criminal case had to be tried. Formal plea procedures require very little of a court's time, typically less than an hour. In contrast, a jury trial even of a simple case ordinarily takes several hours at a minimum, and trials of complicated cases can last weeks, even months. Absent a dramatic increase in judges, courtrooms, and support staff, plea bargaining is a permanent part of the system.

Beyond necessity, there are systemic and individual benefits that flow from guilty pleas. For both parties, a guilty plea provides certainty. For the defendant, a trial may result in an acquittal, but it may also end with a conviction bringing substantially greater punishment than that resulting from a guilty plea to less serious charges accompanied by a prosecutorial promise to seek a lesser sentence. A defendant who pleads guilty can accept responsibility (perhaps causing the judge further to reduce the punishment) and can conclude the matter much earlier than if the case is tried. For the prosecutor, beyond avoiding possible acquittals, guilty pleas permit focusing limited trial resources on fewer cases. More controversially, plea bargaining provides an opportunity for prosecutors—through charging and sentencing concessions—to secure the cooperation of defendants as witnesses against other criminal defendants in cases that might be far more difficult or impossible to prove without such cooperation.

In view of the high percentage of criminal cases resolved by guilty pleas, it is perhaps surprising that there is very little formal regulation of the plea-bargaining process. While criminal trials are governed by a complex set of rules designed to protect a defendant's rights, the system presumes that the mutuality of advantage and risk that informs parties in plea bargaining will assure an acceptably fair result. What constitutional limits there are flow from the right to a trial and the right to effective assistance of counsel.

Before a guilty plea can be accepted, the judge must be assured in open court that there is sufficient evidence supporting each charge; that the defendant has voluntarily decided to waive the right to trial and its associated protections; that in making this decision the defendant has been informed of and understands

these trial rights as well as the consequences of the guilty plea; and that the defendant is satisfied with the lawyer's advice. The parties must also inform the judge of the plea agreement—usually some reduction of charges, dismissal of charges, and/or limitation of sentencing recommendation—and the judge then decides whether to accept the agreement in the interests of justice. Other than perhaps to indicate to the parties why a rejected plea agreement is not acceptable, the judge plays no part in the bargaining process.

Plea bargaining is thus left to the prosecutor and the defendant, ordinarily represented by counsel, and it is principally up to the profession to regulate the process. The American Bar Association has promulgated standards for plea bargaining, and the states' respective rules of professional conduct have provisions applicable to plea bargaining. These rules and standards are designed to assure, as much as possible, a fair process in which the defendant is able to make the kind of informed and voluntary plea decision on which the system's confidence in the process rests. Thus, in the course of plea discussions, neither party may make false statements to the other.

The prosecutor may not withhold from the defendant information otherwise required to be disclosed and may not seek to gain bargaining leverage by bringing charges unsupported by the evidence or threatening to bring further charges. Defense counsel may not initiate plea bargaining without the consent of the defendant and must ensure that the defendant is able to make an informed decision concerning a plea. Defense counsel must fully investigate the case and communicate the results to the defendant, must keep the defendant informed of the plea discussions, and must provide advice to the defendant in a manner that permits the defendant to make a rational, fully informed decision about whether to plead guilty or go to trial.

Notwithstanding these protections and plea bargaining's ostensible benefits, critics doubt its fairness. By design, plea bargaining reduces a defendant's exposure to punishment. While this provides a benefit to a defendant who pleads guilty, some argue that it punishes a defendant who asserts the right to trial and that it results in uneven treatment of defendants similarly situated. Some believe that, particularly when high mandatory sentences are involved, the process is heavily skewed in favor of the prosecution, leaving a defendant little choice but to accept the offered bargain. Also, when the result of a plea bargain is an agreement by a defendant to testify against another, some view this as little better than a bribe. Nevertheless, no one has yet suggested a viable alternative to plea bargaining. There are simply too many

criminal cases to try every one, and thus reform is aimed principally at curbing the excesses and abuses of plea bargaining, not its abolition.

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References and Further Reading

- ABA Standards for Criminal Justice—Pleas of Guilty*, 3rd ed. 1999.
- Easterbrook, Frank, *Plea Bargaining as Compromise*, Yale Law Journal 101 (1992): 1969–78.
- LaFave, Wayne, Jerold Israel, and Nancy King. *Criminal Procedure*, 4th ed. St. Paul, MN: West, 2000.
- Schulhofer, Stephen, *Plea Bargaining as Disaster*, Yale Law Journal 101 (1992): 1979–2009.
- Scott, Robert, and William Stuntz, *Plea Bargaining as Contract*, Yale Law Journal 101 (1992): 1909–1968.
- , *A Reply: Imperfect Bargains, Imperfect Trials, and Innocent Defendants*, Yale Law Journal 101 (1992): 2011–2015.

Cases and Statutes Cited

- Bordenkircher v. Hayes*, 434 U.S. 357 (1978)
- Brady v. United States*, 397 U.S. 742 (1970)

See also **Due Process; Right to Counsel; Sentencing Guidelines**

PLEDGE OF ALLEGIANCE ("UNDER GOD")

One of the more contentious legal issues in recent years has been the question whether the words “under God” in the Pledge of Allegiance render recitation of the pledge in public schools a violation of the establishment clause.

Francis Bellamy, a Baptist minister, drafted the initial Pledge of Allegiance in 1892 for use in the public schools. Fifty years later, in 1942, the U.S. Congress officially recognized the pledge as part of its efforts to “codify and emphasize existing rules and customs pertaining to the display and use of the flag of the United States of America.” In doing so, Congress approved the following language for the pledge: “I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one Nation indivisible, with liberty and justice for all.” The following year, the U.S. Supreme Court decided that Jehovah Witness schoolchildren who had religious objections to reciting the Pledge of Allegiance could not be required to do (*West Virginia v. Barnette*, 319 U.S. 624, 1943).

In 1954, Congress amended the Pledge of Allegiance by joint resolution to include the words “under God” after the words “one Nation.” Enacted at the height of the cold war, many favored the change

PLEDGE OF ALLEGIANCE (“UNDER GOD”)

as a way of distinguishing the United States from the “godless” Soviet Union. The House report accompanying the legislation stated that the purpose of the new language was to “recognize the guidance of God in our national affairs” and to affirm “the dependence of our people and our Government upon the moral directions of a Creator.” The Senate sponsor of the amendment explained the purpose as recognizing “the Creator who we really believe is in control of the destinies of this great Republic.”

Over the years, the pledge has been frequently recited on government property under the direction of government officials. For example, many public schools conduct a daily recitation of the pledge. Similarly, many governmental meetings, such as legislative sessions, begin with a recitation of the pledge. In recent years, however, questions have been raised whether the inclusion of the words “under God” in the pledge when recited under the direction of a governmental official such as a school teacher violates the establishment clause. The U.S. Supreme Court considered a case raising this issue in 2004, but ultimately dismissed it without reaching the constitutional question, concluding that the plaintiff, a noncustodial parent of a child in a school in which the pledge was recited, did not have standing to bring a legal challenge (*Elk Grove Unified School District v. Newdow*, 542 U.S. 1, 2004).

In that case, three justices—William Rehnquist, Sandra Day O’Connor, and Clarence Thomas—rejected the majority’s standing argument and considered the merits of the plaintiff’s claim. These justices concluded that the recitation of the pledge with the “under God” language did not offend the establishment clause. (A fourth justice, Antonin Scalia, recused himself in the case because of prior public comments critical of the lower court’s ruling that the pledge recitation with the “under God” language was unconstitutional.)

Chief Justice Rehnquist, in a concurring opinion joined by Justice O’Connor, concluded that the use of the “under God” language did not violate the establishment clause because the recitation of the pledge was not a “religious exercise.” “Instead,” wrote Rehnquist,

It is a declaration of belief in allegiance and loyalty to the U.S. flag and the Republic that it represents. The phrase “under God” is in no sense a prayer, nor an endorsement of any religion.... Reciting the Pledge, or listening to others recite it, is a patriotic exercise, not a religious one; participants promise fidelity to our flag and our Nation, not to any particular God, faith, or church.

Justice O’Connor, in addition to joining the Rehnquist opinion, filed her own concurring opinion,

PLEDGE OF ALLEGIANCE (“UNDER GOD”)

arguing that the recitation of the pledge did not violate the endorsement test. O'Connor concluded that the “under God” language in the pledge constituted an expression of “ceremonial deism” that did not offend the establishment clause:

I believe that the government can, in a discrete category of cases, acknowledge or refer to the divine without offending the Constitution. This category of “ceremonial deism” most clearly encompasses such things as the national motto (“In God We Trust”), religious references in traditional patriotic songs such as the Star-Spangled Banner, and the words with which the Marshal of this Court opens each of its sessions (“God save the United States and this honorable Court”).

Finally, Justice Thomas filed his concurring opinion in which he argued that under the Court's prior precedents, particularly *Lee v. Weisman*, 505 U.S. 577 (1992), the recitation of the pledge did violate the establishment clause because it “coerced” young children “to declare a belief” that this is “one Nation under God.” Hence, for Thomas, “as a matter of our precedent, the Pledge ... is unconstitutional.” But, Thomas went further, arguing that *Lee v. Weisman* was wrongly decided because the establishment clause does not apply to the states. Thomas recognized that the Court in prior cases had “incorporated” the establishment clause through the Fourteenth Amendment to apply to the states, but he concluded that that incorporation was inappropriate as a matter of history. Because, in Thomas's view, the establishment clause does not apply to the states, the recitation of the pledge in the California public schools did not offend the Constitution.

Because the Supreme Court in the *Newdow* case dismissed the case on standing grounds, we do not have a conclusive decision from that court on the constitutionality of the recitation of the pledge in a governmental context. But some federal courts of appeal have also considered the question of the constitutionality of the “under God” language in the pledge. The U.S. Courts of Appeals for the Fourth and Seventh Circuits have found that the use of “under God” in the pledge recited by schoolchildren does not violate the establishment clause so long as the children are free to refrain from joining the recitation (*Sherman v. Community Consolidated School District 21 of Wheeling Township*, 980 F.2d 437, 7th Cir.1992; *Myers v. Loudon County Public Schools*, 418 F.3d 395, 4th Cir. 2005). On the other hand, the U.S. Court of Appeals for the Ninth Circuit has found that the use of the phrase “under God” in the pledge does violate the establishment clause even if schoolchildren are free not to participate in the recitation (*Newdow v. U.S. Congress*, 292 F.3d 597, 2002).

The issue of the constitutionality of the Pledge of Allegiance remains highly controversial. In September 2005, a federal district court judge in California concluded that the recitation of the pledge in the public schools with the “under God” language violated the establishment clause (*Newdow v. Congress of the United States*, 383 F. Supp. 2d 1229, E.D. Cal., 2005). The controversy is likely to continue.

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References and Further Reading

- Sanford, Bill W., Jr., *Perspective: Separation v. Patriotism: Expelling the Pledge from School*, St. Mary's Law Journal 34 (2003): 461–503.
- Thompson, John E., *Note. What's the Big Deal? The Unconstitutionality of God in the Pledge of Allegiance*, Harvard Civil Rights–Civil Liberties Law Review 38 (2003): 563–597.
- Werhan, Keith, *Navigating the New Neutrality: School Vouchers, the Pledge, and the Limits of a Purposive Establishment Clause*, Brandeis Law Journal 41 (2003): 603–629.

Cases and Statutes Cited

- Elk Grove Unified School District v. Newdow*, 542 U.S. 1 (2004)
- Lee v. Weisman*, 505 U.S. 577 (1992)
- Myers v. Loudon County Public Schools*, 418 F.3d 395 (4th Cir. 2005)
- Newdow v. Congress of the United States*, 383 F. Supp. 2d 1229 (E.D. Cal. 2005)
- Newdow v. U.S. Congress*, 292 F.3d 597 (2002)
- Sherman v. Community Consolidated School District 21 of Wheeling Township*, 980 F.2d 437 (7th Cir.1992)
- West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943)

See also Ceremonial Deism; Establishment Clause (I): History, Background, Framing

PLEDGE OF ALLEGIANCE AND THE FIRST AMENDMENT

When Congress first adopted an official “Pledge of Allegiance” in 1942 as part of the U.S. Flag Code, it based the pledge on the words of Francis Bellamy, who penned them for a Columbus Day ceremony in 1892. States thereafter enacted laws stipulating that teachers in public schools should lead their students in daily recitations of the pledge. In 1954, however, after legislators felt the need to distinguish the pledge from slogans propagated by communist governments, Congress amended it by adding the words “under God” so that it would read in full: “I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all.”

With this amendment, Congress made more explicit the pledge's rhetorical resonances with Lincoln's Gettysburg Address. Congress also wished to use the pledge's image of a nation standing under the sovereignty of God to "acknowledge the dependence of our people and our Government upon the moral directions of the Creator." These moral directions, Congress noted in the House report, were the basis for individuals' "inalienable rights," which the American government recognized "no civil authority may usurp." Congress's invocation of this natural law tradition was to provide a direct counterpoint to "the atheistic and materialistic concepts of Communism with its attendant subservience of the individual."

States' policies enforcing the recitation of the pledge in public schools promptly raised constitutional challenges over the freedom of religious exercise. Soon after the pledge was first codified, Jehovah's Witnesses brought suit against schools that expelled or punished them for refusing to recite the pledge. Jehovah's Witnesses regarded such an act as an idolatrous misplacement of allegiance. In *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), the Supreme Court acknowledged the potential for expressions of patriotic devotion to place the same burden upon the conscience as expressions of religious devotion. It was inconsistent with free exercise of religion to force students to participate in a civic exercise contrary to their faith. Students could freely refrain from reciting the pledge by remaining silent in class.

Since the 1954 amendment, the Pledge has also been scrutinized for potential violations of the establishment clause because it leads school children to invoke the name of God. In *Sherman v. Cnty. Consol. Sch. Dist.*, 21, 980 F.2d 437 (1992), the Seventh Circuit ruled that official recitation of the pledge does not compel religious expression so long as students are entitled to remain silent. The Ninth Circuit, however, ruled in *Newdow v. U.S. Congress*, 292 F.3d 597 (2002), that the pledge is unconstitutional because Congress left the impression, when codifying the amendment, that it endorsed or preferred monotheism over other beliefs such as atheism. It also applied a definition of coercion, used to ban prayer at school ceremonies in *Lee v. Weisman*, 505 U.S. 577 (1992), that embraced situations of potential peer pressure. Although the Supreme Court did not overturn the latter ruling on its merits, it has acknowledged in dicta in prior opinions that the pledge is not inconsistent with the First Amendment because it qualifies as a civic act rather than a prayer.

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References and Further Reading

Ellis, Richard. *To the Flag: The Unlikely History of the Pledge of Allegiance*. Lawrence: University Press of Kansas, 2004.

Cases and Statutes Cited

Elk Grove Unified Sch. Dist. v. Newdow, 124 S. Ct. 2301 (2004)
Lee v. Weisman, 505 U.S. 577 (1992)
Newdow v. U.S. Congress, 292 F.3d 597 (2002)
Sherman v. Cnty. Consol. Sch. Dist., 21, 980 F.2d 437 (1992)
West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943)
 4 U.S.C.S. Chapter 1.
 H.R.REP. 83- 1693, 1-3 (83rd Cong. 1954)

See also Establishment Clause Doctrine: Supreme Court Jurisprudence; Establishment of Religion and Free Exercise Clauses; Free Exercise Clause Doctrine: Supreme Court Jurisprudence

PLENARY POWER DOCTRINE

The plenary power doctrine arose from the 1824 Supreme Court opinion in *Gibbons v. Ogden*, 22 U.S. 1 (1824), in which Justice Marshall wrote that "... the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, ..." Ever since, lawyers and courts have seized on that phrase to argue for a broad construction of congressional power. The word "plenary" historically means "full, complete, or unrestricted." But is a delegation of power to, say, regulate "commerce among the states" really unrestricted as long as what is "regulated" is "commerce"? Is the discretion of Congress really unlimited, within a subject, or is it constrained by some standard of reasonableness or public purpose? This question can be more easily answered by examining a different delegation of power:

The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing [sic] Senators.

Would it really be constitutional for Congress to "alter such regulations" to, say, restrict the time to a single microsecond, or the place to the Moon, or the manner to restrict ballot choices to those approved by some political body? Such regulations would be semantically within the delegation if it is considered plenary, but they would clearly be abuses of discretion, and it is not an answer to say that the remedy is political rather than judicial. The people cannot vote

out abusive officials if they do not have a choice or cannot vote. Clearly, for at least this delegation, the power is not plenary. It may legitimately be exercised only in the direction of making voting more efficient, convenient, and fair. It is thus constrained to what is reasonable and for a legitimate public purpose.

If its direction is otherwise, that would be an abuse of discretion that is justiciable. Is this delegation exceptional in this respect? No. Other delegations are also worded in a way that indicates the delegation is not plenary, but constrained by a reasonable purpose.

The word “unreasonable” is used in the Fourth Amendment, which also uses the term “probable cause,” to require that the power to issue warrants is constrained to be exercised only in reasonable ways and not as a plenary delegation of power.

Consider the power to tax. The Constitution states, “The Congress shall have Power to lay and collect Taxes, ...”, but does not define what or who may and may not be taxed, or how, other than to prohibit taxes on imports from states or to require that “direct” taxes be “apportioned” without defining what “direct” means. Is that a delegation of a plenary power to tax anyone and anything? No. Courts have held that “fundamental” rights are not taxable if the tax imposes a burden on the exercise of the right. But which rights are “fundamental” and which are not? The Constitution makes no such distinction, and the Ninth Amendment suggests there may be some fundamental rights that are not even specifically mentioned in the Constitution or its other amendments. A historian can conclude from reading the legal and political literature of the era that only certain kinds of profitable activities and articles were deemed suitable objects of taxation, and that some parties, such as eleemosynary organizations, should not be taxed. There was historical precedent for a small “head” tax on every individual, just for being alive, but trying to tax people on every breath they take would incite an insurrection.

Furthermore, the tax clause has a purpose restriction, “to pay the Debts and provide for the Common Defence and General Welfare of the United States; ...” Is this a delegation of a plenary power to spend money for anything? It has been argued that it is, even in the early years of the Republic, but Madison refuted that position in his veto message to Congress, in which he stated that it was not a delegation of a power but a restriction of the power to spend in a way that did not favor or disfavor any state or region. It was the complaint of the violation of this clause in the ways tariffs were imposed to disadvantage the South that was given as a main justification for secession in 1861. There is no explicit delegation of a power to

spend, only to lay and collect taxes and a restriction on the purpose for doing that, which we can take as a restriction on the power to tax. The only question would then be whether a violation is justiciable or only a “political question” for the courts to refuse to hear and decide.

Consider the militia clauses. They delegate power “to provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, ...” but the Second Amendment declares that “the right of the people to keep and bear Arms, shall not be infringed.” Does this mean Congress could authorize the president call up everyone, permanently, and then order them all to disarm? No. That might seem to fall within the delegation if it were considered plenary, but in stating that “a well regulated Militia, being necessary to the security of a free State, ...” they were clearly expressing the intent that any regulation be only in the direction and for the purpose of enhancing the effectiveness of militia, and not to impair it, to make militia “well regulated.” If the intent of the Fourteenth Amendment was to extend the protection of all rights to the states, including the Second Amendment and the militia clauses, then the states may also not impair the effectiveness of militia, which founder George Mason declared were “the whole people, except for a few public officials.”

Finally, consider the clause, “All legislative Powers herein granted shall be vested in a Congress of the United States, ...” Does Congress have the legislative power to delegate its legislative powers to officials of other branches or to staff members of Congress? It has long been understood, although not explicitly stated in the Constitution, that legislative and judicial powers are not subdelegatable. Yet they have designated administrative agents to exercise powers beyond what the Constitution and statutes seem to allow, maintaining it is not really a delegation because their actions are subject to the supervision of courts bound by the Constitution and statutes. But they then allow the courts to “defer” to the agents in a way that allows them to exercise almost unlimited discretion. This is the basis of the administrative state, against which some posit the nondelegation doctrine.

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References and Further Reading

- Debates in Virginia Convention on Ratification of the Constitution*, vol. 3. Elliot, June 16, 1788. http://www.constitution.org/rc/rat_va_13.htm.
- Gibbons v. Ogden*, 22 U.S. 1 (1824). <http://www.constitution.org/ussc/022-001.htm>.
- Madison, Veto Message to Congress, March 3, 1817. http://www.constitution.org/jm/18170303_veto.htm.

U.S. Const. Art. I Sec. 4 Cl. 1. <http://www.constitution.org/cons/constitu.htm#con1.4.1>.

U.S. Const. Art. I Sec. 8, Cl. 15 & 16. <http://www.constitution.org/cons/constitu.htm#con1.8.15> ; Second Amendment. <http://www.constitution.org/cons/constitu.htm#bor4>.

U.S. Const. Fourth Amendment. <http://www.constitution.org/cons/constitu.htm#bor6>.

PLESSY v. FERGUSON, 163 U.S. 537 (1896)

Plessy was a U.S. Supreme Court case declaring state laws mandating “separate but equal” facilities based on race as constitutionally permissible. This case regarding civil rights and liberties imposed a narrow interpretation of the Fourteenth Amendment to the U.S. Constitution, as well as sanctioned segregation laws passed by state governments in the era of “Jim Crow.”

Along with other southern states, Louisiana segregated railroad cars by mandating “equal but separate accommodations for the white and colored races.” The law was subsequently challenged by *Plessy*; even though he appeared white, he was classified as “colored” under Louisiana state law because he was one-eighth black. After being arrested for not moving to the colored car in a prearranged encounter with railroad officials, *Plessy* argued that his constitutional rights under the Thirteenth and Fourteenth amendments were violated by the Louisiana law. Specifically, *Plessy* argued that the state law reimposed a form of slavery on him, thus violating the Thirteenth Amendment, and that he was denied the “equal protection of the laws” as mandated by the Fourteenth Amendment. State courts rejected his arguments, and *Plessy* appealed to the U.S. Supreme Court.

Upon appeal, a majority of the justices used a narrow interpretation of both Civil War amendments to allow the Louisiana law to stand. In rejecting the arguments concerning the Thirteenth Amendment’s prohibition on slavery, Justice Brown held that all distinctions based on race were not necessarily acts of slavery, thus dismissing the claim of Thirteenth Amendment violations. Justice Brown also rejected the notion that the “equal but separate” law violated the Fourteenth Amendment’s equal protection clause. The justice declared that “in the nature of things [the Fourteenth Amendment] could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races unsatisfactory to either.” This judicial opinion rested upon an 1847 case involving the segregation of blacks from Boston schools. In the end, the U.S. Supreme

Court sanctioned the concept that state governments could impose requirements mandating separate facilities based on race because laws were “powerless to eradicate racial instincts or to abolish distinctions based upon physical differences.”

In his dissent, Justice John Marshall Harlan sought to uphold the protection of the civil rights for blacks against state discrimination and chastised his brethren on the Court for consenting to racial discrimination in the guise of “separate but equal.” Harlan wrote that the U.S. Constitution was “color blind” by the fact that the Civil War amendments removed all distinctions based on race. Citing the case that heralded the Civil War, Harlan believed that the *Plessy* decision would be equal to the *Dred Scott* decision (19 How., 60 U.S., 393, 1857).

The *Plessy* decision enshrined the concept of “separate but equal” in racial terms within American law. This decision would be used in later cases and statutes to deny blacks their constitutional and legal rights within many venues of American society. From birth in a hospital through education to the cemetery, Jim Crow laws were written to regulate and discriminate between the races. In other U.S. Supreme Court cases, the use of *Plessy*’s doctrine upheld racial classification and separation in educational settings (*Cumming v. Richmond County Board of Ed* (GA), 175 U.S. 528, 1899; *Gong Lum v. Rice*, 274 U.S. 78, 1927).

As one scholar has noted, however, blacks used *Plessy* to fight against segregated schooling, particularly by challenging states to uphold the “equal” part of “separate but equal.” Through organizations such as the National Association for the Advancement of Colored People, blacks would challenge *Plessy*’s “separate but equal” finding through the first half of the twentieth century. Again, the focus on educational opportunities would serve as the foundation for these challenges, starting with graduate education and law schools (*Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 1938; *Sweatt v. Painter*, 339 U.S. 629, 1950; *McLaurin v. Oklahoma State Regents*, 339 U.S. 816, 1950). Ultimately, these challenges culminated in the U.S. Supreme Court’s declaration, in *Brown vs. Board of Education* (347 U.S. 483, 1954), that “in the field of public education, the doctrine of ‘separate but equal’ has no place. Separate educational facilities are inherently unequal” and thus the rejection of the *Plessy* decision.

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References and Further Reading

Fireside, Harvey. *Separate and Unequal: Homer Plessy and the Supreme Court Decision That Legalized Racism*. New York: Carroll & Graf, 2004.

Lofgren, Charles A. *The Plessy Case: A Legal-Historical Interpretation*. New York: Oxford University Press, 1987.

Medley, Keith Weldon. *We as Freeman: Plessy v. Ferguson*. Gretna, LA: Pelican Publishing, 2003.

Cases and Statutes Cited

Brown v. Board of Education of Topeka, KS, 347 U.S. 483 (1954)

Cumming v. Richmond County Board of Ed., (GA) 175 U.S. 528 (1899)

Gong Lum v. Rice, 274 U.S. 78 (1927)

McLaurin v. Oklahoma State Regents, 339 U.S. 816 (1950)

Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938)

Sweatt v. Painter, 339 U.S. 629 (1950)

PLYLER v. DOE, 457 U.S. 202 (1982)

Undocumented immigrants have long been criticized as one of the main problems in U.S. immigration policy. As a matter of fact, very few public benefits have been granted to them. In *Plyler*, the U.S. Supreme Court refused to do more damage and take away their (children's) right to public education.

In 1975, the Texas legislature revised its education statutes to deny free public education (enrollment and state funds) to children who were illegally admitted into the United States. *Plyler* was a class action on behalf of a group of school-age children of Mexican origin, and it complained of the exclusion of such children from public schools. The district court held that illegal aliens were entitled to the protection of the equal protection clause of the Fourteenth Amendment and that the discrimination embodied in the Texas statutes failed a rational-basis test and violated the equal protection clause. The court of appeals upheld the district court's decision.

The Court affirmed and held that "the protections of the Fourteenth Amendment extend to anyone, citizen or stranger, who is subject to the laws of a State, and reaches into every corner of a State's territory." Unlike their parents, who entered the nation illegally, the Court recognized that children in this case "can affect neither their parents' conduct nor their own status" and there is no rational justification to punish them in concord with conceptions of justice. Though education is not a right granted to individuals by the Constitution, the Court believed that education has a fundamental role in society and that, denied proper education, children of illegal entrants would likely become locked into their low socioeconomic status and never be able to move ahead.

In its balance test, the Court turned down the state's claimed interest in the preservation of limited resources for the education of its lawful residents. The

Texas education statutes failed to offer an effective means to cure the claimed problems caused by the influx of illegal immigrants. The record failed to show that illegal entrants imposed any significant burden on the state's economy and that exclusion of undocumented children was likely to improve the overall quality of education in the state. Moreover, given the fact that many of these children potentially could remain in the states and become lawful residents or citizens, minimal savings that might be achieved by denying them proper education would not counter potentially more substantial costs suffered by these children, the state, and the nation.

Justices Marshall, Blackmun, and Powell filed separate opinions supporting a more fundamental status for education. Justices Burger, White, Rehnquist, and O'Connor dissented in their opinion and argued that the majority crossed the political boundary of the Court and acted for Congress in establishing a national policy. The dissenters believed that the claimed interest by the state bore a rational relationship to its legislation and therefore passed the constitutional test.

Plyler was a major victory for illegal immigrants. By safeguarding their children's educational right, the Court reaffirmed its traditional responsibility to protect politically powerless minorities.

BIN LIANG

References and Further Reading

Biegel, Stuart, *The Wisdom of Plyler v. Doe*, *Chicano-Latino Law Review* 17 (1995): 46-63.

Bryce, Brendan M., *Plyler v. Doe: Progressivism and Undocumented Aliens*, *Widener Law Symposium Journal* 4 (1999): 357-400.

DeSipio, Louis, and Rodolfo O. de la Garza. *Making Americans, Remaking America: Immigration and Immigrant Policy*. Westview Press, 1998.

Hull, Elizabeth, *Undocumented Alien Children and Free Public Education: An Analysis of Plyler v. Doe*, *University of Pittsburgh Law Review* 44 (1983): 409-432.

Perry, Michael J., *Equal Protection for Illegal Aliens: Equal Protection, Judicial Activism, and the Intellectual Agenda of the Constitutional Theory: Reflections on, and Beyond Plyler v. Doe*, *University of Pittsburgh Law Review* 44 (1983): 329-350.

POE v. ULLMAN, 367 U.S. 497 (1961)

Poe v. Ullman challenged the constitutionality of Connecticut's 1879 law that prohibited using or giving advice about contraceptive devices, but it is best known for its definition of justiciability or the authority of courts to decide only bona fide cases and controversies. A number of separate challenges to the

anticontraception law were combined under this single title: one involving a married couple who had given birth to three children, all of whom died shortly after birth due to congenital abnormalities; a second involving a married woman who had been pregnant once and suffered a critical illness as a result, leaving her partially paralyzed and with impaired speech; and a third initiated by an obstetrician who alleged that he could not prescribe appropriate birth control materials for fear of prosecution. All asked that the U.S. Supreme Court declare the law invalid.

The five-justice majority chose not to decide the constitutionality of the case, but rather refused to hear it because it was not a real and substantial controversy involving adversarial parties. Justice Felix Frankfurter called the lawsuits unreal because of the lack of immediacy of any threat of prosecution. He noted that though the law had been on the books for more than three quarters of a century, there had only been one prosecution because of a seeming tacit agreement whereby Connecticut did not enforce the statute. The case was, therefore, abstract and hypothetical and not a truly adversarial contest involving honest antagonistic assertions of rights. Neither the doctor nor the individuals bringing suit had any realistic fear of prosecution. It did not, in short, qualify as a real case or controversy as required by Article III of the Constitution.

Justices Harlan, Douglas, Stewart, and Black disagreed and would have decided the cases on their merits. Justice Douglas argued in his dissenting opinion not only that the cases met all of the requisites for legitimate cases or controversies, but also that the concept of “liberty” in the Fourteenth Amendment’s due process clause extended to rights not included in the first eight amendments to the Constitution. The right to travel and the right to marry and have children were not enumerated rights and yet had received judicial protection from an intrusive state. Justice Harlan’s dissent also argued that the case was not a hypothetical, friendly, or feigned suit and that it did not lack “ripeness.” He also would have struck down the law since “making it a criminal offense for married couples to use contraceptives is an intolerable and unjustifiable invasion of privacy” and prohibited by the due process clause of the Fourteenth Amendment.

Notably, just four years later, the same gynecologist-obstetrician was involved in another challenge to the anticontraception statute, *Griswold v. Connecticut*, 391 U.S. 145 (1965), for which Justice Douglas wrote the majority decision; the statute was declared unconstitutional as a violation of the right to privacy.

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Cases and Statute Cited

Griswold v. Connecticut, 391 U.S. 145 (1965)

POELKER v. DOE, 432 U.S. 59 (1977)

This case involved the right to privacy as it has been applied to a woman’s right to an abortion, as upheld by the Supreme Court in *Roe v. Wade*. Jane Doe was an indigent woman who attempted to obtain a non-therapeutic abortion at one of two public hospitals owned and operated by the city of St. Louis, Missouri. Notably, the hospital used many doctors and medical students from St. Louis University School of Medicine, a Jesuit-operated institution that opposes abortion, in the obstetrics and gynecology clinic. The policy of the city’s hospitals was to prohibit abortions except when there was a threat of significant physical injury or death to the mother. Doe also brought a class action suit against the mayor of St. Louis and the director of health and hospitals, but was unsuccessful in her constitutional challenge at the district court level. However, the court of appeals decided in her favor on both the facts and the legal issues.

The U.S. Supreme Court reversed, issuing only a *per curiam* decision that represented the views of six members of the Court. Though the court of appeals had based its decision in favor of Doe on an equal protection argument and asserted that the city hospitals’ policies discriminated against women who chose not to carry their pregnancies to term and against indigent women who could not afford to pay for a privately funded abortion, the majority of the Supreme Court concluded that the guiding precedent was *Maher v. Roe*, 432 U.S. 464 (1977). In the *Maher* case, the Court had decided that a state’s refusal to offer Medicaid benefits for abortions while offering them for childbirth was constitutional. The Constitution does not forbid a state or a city to express a preference, through the democratic process, for childbirth.

Justices Marshall, Blackmun, and Brennan dissented; the essence of their dissent was that, under this ruling, an indigent woman can be barred by a city policy from exercising her constitutional right to choose to terminate her pregnancy. Justice Brennan further noted that during 1975 only about 18 percent of public hospitals in the country offered abortion services and that in ten states there were no public hospitals that would perform abortions. Thus, according to Justice Brennan, policies such as the one upheld by the majority presented an “insurmountable obstacle to indigent women” who attempted to exercise their constitutional rights.

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References and Further Reading

O'Brien, David M. *Storm Center: The Supreme Court in American Politics*. New York: W. W. Norton & Company, 1986.

Cases and Statutes Cited

Maher v. Roe, 432 U.S. 464 (1977)
Roe v. Wade, 410 U.S. 113 (1973)

POLICE INVESTIGATION COMMISSIONS

Independent commissions to investigate the police have been an important part of the history of the American police. Commissions have been created to investigate local law enforcement agencies and also at the national level to examine the law enforcement profession as a whole. Commission investigations generally publish a report with recommendations for police reform.

In the twentieth century, commissions adopted a social scientific approach, utilizing recognized police scholars and often engaging in extensive data collection and analysis. The first investigating commission of this type was the Cleveland Survey (1922). The first national investigating commission was the National Commission on Law Observance and Enforcement (known popularly as the Wickersham Commission, 1929–1931). Its report on police abuse of citizens' rights had a major influence in stimulating police reform. In 1967, the President's Commission on Law Enforcement and the Administration of Justice published a task force report on the police that also had a major impact on reform.

There have been many local police investigation commissions. The New York City Police Department was the subject of several investigations of police corruption in the twentieth century. The most famous recent police investigating commission was the 1991 Christopher Commission, which investigated the Los Angeles Police Department after the highly publicized beating of Rodney King by Los Angeles Police officers.

The weakness of investigating commissions is that they have no power to implement their recommendations for reform. Nonetheless, commissions have played a major role in the reform of the police by documenting existing problems and recommending reforms that have guided the efforts of federal, state, and local officials.

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References and Further Reading

Chin, Gabriel J., ed. *New York City Police Corruption Investigation Commissions, 1894–1994*. William S. Hein & Co., 1997.
Christopher Commission. *Report of the Independent Commission to Investigate the Los Angeles Police Department*. Los Angeles: Christopher Commission, 1991.
Cleveland Foundation. *Criminal Justice in Cleveland*. Cleveland, OH: The Cleveland Foundation, 1922.
National Commission on Law Observance and Enforcement. *Lawlessness in Law Enforcement*. Washington, D.C.: Government Printing Office, 1931.
President's Commission on Law Enforcement and Administration of Justice. *Task Force Report: The Police*. Washington, D.C.: Government Printing Office, 1967.
Walker, Samuel. "Setting the Standards: The Efforts and Impact of Blue-Ribbon Commissions on the Police." In *Police Leadership in America: Crisis and Opportunity*, William A. Geller, ed. New York: Praeger, 1985, pp. 354–370.

POLICE POWER OF THE STATE

The term "police power" is usually defined as a broad power to legislate for the health, safety, order, and morals of the public and includes civil and criminal powers. State constitutions generally delegate such powers, leaving it to the discretion of the state legislature to exercise its judgment on how best to do that, restrained only by political pressures from voters. Since such legislation normally requires only a simple majority to adopt, this has often led to legislation that operates to the disadvantage of individuals and minorities. Such abuse was part of the motivation for the Fourteenth Amendment, which was intended to extend the jurisdiction of federal courts to cases between a citizen and his state that involved a federally protected right and delegated to Congress the power to legislate civil and criminal remedies for such abuses of rights.

Prior to the twentieth century, general police powers were usually held to be confined to the states and, for the federal government, to its nonstate territories and enclaves created under U.S. Const. Art. I Sec. 8 Cl. 17. Starting with *New York v. Miln* (1837) the Supreme Court developed the notion of state police powers that exempted states from the reach of the commerce clause. Thus, under the police powers doctrine, antebellum states were able to regulate the sale of liquor and the influx of poor immigrants. The slave states asserted their police power to prohibit free blacks—even those who were citizens of other states or foreign nations—from entering their jurisdiction. Similarly, the northern states asserted their police powers to emancipate the slaves of visiting masters to pass personal liberty laws to protect their black

residents from being kidnapped or seized as fugitive slaves. However, for about the last 100 years, Congress has increasingly been asserting the power to legislate police powers on state territory, usually on the alleged authority of the commerce clause and the necessary and proper clause, the interpretation of which has been extended to include almost anything. This has led to the adoption of criminal legislation that would previously have been deemed unconstitutional.

Many of the cases before the federal courts that invoke the Fourteenth Amendment against a state are complaints about the exercise by the state of its claimed police powers. Most of these cases, following a line of precedents that emphasize the equal protection and due process clauses of the Fourteenth Amendment and ignore or deprecate the privileges and immunities clause and the Ninth Amendment, have resulted in overturning or restricting the application of many state statutes and practices. They have also brought the doctrine of "rational basis" as a test for whether the statute or practice is reasonable, pursuant to a legitimate public interest, and not an undue burden on the exercise of a protected public right. Thus, state police powers are coming to be seen as not plenary.

This has, however, provoked many persons to complain that such federal court decisions infringe on the reserved powers of the states and threaten the federal system of divided power between state and central governments. The argument is that, even if the states infringe a right, it is better that the federal courts not intervene and, by not intervening, compel dissatisfied parties to use the political process to enact reforms at the state or local level. They express fears that it is unhealthy for people to become too dependent on the federal courts for redress. This has led to many recent decisions of the U.S. Supreme Court to defer to states or decline to intervene, even when it would seem logical it should, on constitutional grounds, making a prudential rather than a constitutional determination that it is unwise to intervene when the political processes to remedy the complaint at the state level are available.

One of the effects of ever broader exercise of such police powers by states has been to depart in significant ways from the standards established for criminal prosecutions in the common law tradition. This tradition prescribed that to convict someone of a crime, the state had to prove guilt beyond a reasonable doubt, to a jury of twelve, which had to render a unanimous verdict on five elements:

mens rea, or criminal intent
actus reus, or actual commitment of the act

concurrence of mens rea and actus reus in location and time
harm done to some actual victim
causation of the harm by the act

These elements are for offenses that are *mala in se*, or inherently bad, but state police powers have been invoked to adopt legislation to make some things *mala prohibita*, or bad because they are prohibited, and to relax the requirements for all of the elements listed previously. Behaviors that cause no demonstrable injury to individuals have been made subject to criminal or civil penalties because they offend a prevailing view of what is moral or in good taste, present a nuisance, reduce property values, or appear to pose a risk of future public injury based on a theory of risk that may not be scientifically valid. While people in the founding era were certainly familiar with laws that imposed civil penalties not for past acts but to prevent possible future injury, they were generally adverse to imposing criminal penalties for preventive purposes. This was discussed by Charles de Montesquieu in his treatise, *Spirit of Laws*, under the topic of "sumptuary laws," which he held to be bad public policy and likely counterproductive, even if well-intended.

The "police powers" are the broad powers of regulation. As stated in *Lawton v. Steele*, 152 133 (1894):

The extent and limits of what is known as the "police power" have been a fruitful subject of discussion in the appellate courts of nearly every state in the Union. It is universally conceded to include everything essential to the public safety, health, and morals, and to justify the destruction or abatement, by summary proceedings, of whatever may be regarded as a public nuisance.

The police powers are a power of the state (and its local county and municipal manifestations.) In *U.S. v. Knight Co.*, 156 U.S. 11, the Court declared:

It cannot be denied that the power of the state to protect the lives, health and property of its citizens and to preserve good order and the public morals, the power to govern men and things within the limits of its dominion, is a power originally and always belonging to the state, not surrendered to the general [federal] Government, nor directly restrained by the Constitution of the United States, and essentially exclusive.

The potential for conflict between the police powers and fundamental rights is an ongoing area for controversy. This appears in the case of *Reynolds v. United States* (98 U.S. 145, 1878). Reynolds was a Mormon man who claimed that he had a religious duty to commit polygamy, even though this was outlawed by a federal statute. The Supreme Court ruled against Reynolds and, in the opinion of the Court, Chief Justice Waite stated,

Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? Or if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice? So here, as a law of the organization of society under the exclusive dominion of the United States, it is provided that plural marriages shall not be allowed. Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.

In the case of *Gitlow v. New York*, 268 U.S. 562 (1925), Benjamin Gitlow, the appellant and a member of an American communist organization, was indicted and convicted of “criminal anarchy.” This case arose as part of the “red scare,” an intense fear of Communism spreading to the United States during the 1920s and 1930s, motivated in large part by opposition to labor unions. Gitlow held that the statute ran contrary to the due process clause of the Fourteenth Amendment. In the opinion of the Court, Justice Stanford held that though the First Amendment protects the freedom of speech and press as fundamental rights and liberties, these rights are not absolute and can be abridged in the interest of preserving the government or cultural identity of the United States. The main effect of the decision, however, was to incorporate the First Amendment under the Fourteenth Amendment.

In the case of *Stanley v. Georgia*, 394 U.S. 561 (1969), the Supreme Court reversed a lower court conviction for knowing “possession of obscene material.” Justice Marshall delivered the Court’s opinion, which stated that the First Amendment “prohibits making the private possession of obscene material a crime.” Justice Marshall went on to state that the mere fact that the materials were considered “obscene” was not enough of a justification to invade the personal rights of citizens that possess them. In this decision, the justice makes the bold claim that the state is not interested in what is morally right (a concept that would later be expounded in *Lawrence v. Texas*, U.S. 123 S.Ct. 2472, 2003) by stating that:

Yet in the face of these traditional notions of individual liberty, Georgia asserts the right to protect the individual’s mind from the effects of obscenity. We are not certain that this argument amounts to anything more

than the assertion that the State has the right to control the moral content of a person’s thoughts. To some, this may be a noble purpose, but it is wholly inconsistent with the philosophy of the First Amendment.

In the Court’s opinion in *Lawrence v. Texas* (2003), Justice Kennedy made the point that “freedom extends beyond spatial bounds,” and that “liberty presumes an autonomy of self that includes freedom of thought, belief, expression and certain intimate conduct.” Justice Kennedy’s opinion makes it clear that the people of the United States should be free to choose and pursue their preferred way of life. This decision also made it clear that mere appeals to morality were not enough to restrict a person’s liberties, and that the only clear outer boundary to personal liberties would be the harming of a nonconsenting party. This was of particular importance because homosexuality is widely held to be immoral and is a controversial topic among many Americans, particularly those of strongly conservative religious convictions.

We need a doctrine to identify those powers that the people of the states may, if they choose, delegate to their state governments by means of their state constitutions without violating the Constitution of the United States. The most obvious power of states that follows from the original meaning of the privileges or immunities clause is the power to prohibit any violations by some citizens of the liberties or rights of other citizens. In addition to the power of prohibiting wrongful conduct, the power of states may also properly include the power of regulating rightful behavior.

In 1868, the same year in which the Fourteenth Amendment was enacted, the first edition of Thomas M. Cooley’s *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the United States of the American Union* was published. Cooley sought to address the question of “conflict between national and State authority” as well as the question of “whether the State exceeds its just powers in dealing with the property and restraining the actions of individuals.” The answers to these questions turned on the content of the police power, which he defined in light of previous judicial opinions as follows:

The police of a State, in a comprehensive sense, embraces its system of internal regulation, by which it is sought not only to preserve the public order and to prevent offences against the State, but also to establish for the intercourse of citizen with citizen those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own, so far as is reasonably consistent with a like enjoyment of rights by others.

After Cooley, the leading nineteenth-century theorist of the police power was Christopher Tiedeman. In his 1886 *Treatise on the Limitations of Police Power in the United States*, he repeatedly relied on the power to prevent rights violations to identify reasonable and therefore constitutional exercises of the police power. To explain the police power and its limits he began with the concept of natural rights:

The private rights of the individual, apart from a few statutory rights, which when compared with the whole body of private rights are insignificant in number, do not rest upon the mandate of municipal law as a source. They belong to man in a state of nature; they are natural rights, rights recognized and existing in the law of reason.

Tiedeman contended that legislation prohibiting gambling “would be open to serious constitutional objections. Gambling or betting of any kind is a vice and not a trespass, and inasmuch as the parties are willing victims of the evil effects, there is nothing that calls for public regulation.” According to this view, “[n]o law can make vice a crime, unless it becomes by its consequence a trespass upon the rights of the public.” For Tiedeman, the protection of rights is the measure of proper police power regulations.

Tiedeman discusses at some length why temperance laws were not only bad policy, but also beyond the state’s police power. “[N]o trade can be subjected to police regulation of any kind,” he wrote, “unless its prosecution involves some harm or injury to the public or to third persons, and in any case the regulation cannot extend beyond the evil which is to be restrained.” Moreover, “no trade can be prohibited altogether, unless the evil is inherent in the character of the trade, so that the trade, however conducted, and whatever may be the character of the person engaged in it, must necessarily produce injury upon the public or upon individual third persons.” The implication of this argument is that it is beyond the police power to license occupations, for that is tantamount to prohibiting the occupation unless it is permitted.

After a lengthy examination of the effects of the use and sale of alcohol, Tiedeman concluded that prohibition was not constitutionally justified under these principles of the police power. “[T]he liquor trade can not ... be prohibited entirely, unless its prosecution is essentially and necessarily injurious to the public. Even the prohibition of saloons, that is, where intoxicating liquor is sold and served, to be drunk on the premises, cannot be justified on these grounds.” Although the courts of his day rejected this view, Tiedeman contended that it was “the duty of a constitutional jurist to press his views of constitutional law upon the attention of the legal world, even

though they place him in opposition to the current of authority.”

How can a proper regulation of rightful activity be distinguished from an improper abridgment of the private rights of the people? As with the federal laws, the key is whether state laws are a pretext for purposes other than the prevention of future or rectification of past rights violations. Charles Bufford, in “The Scope and Meaning of Police Power,” said, “[A] regulation in the exercise of the police power must not be unreasonably or unnecessarily burdensome, and must have some appreciable tendency towards accomplishing a result within the scope of police power.” One sign that a law is pretextual is when it benefits a particular group rather than the general public.

Glenn Reynolds and David Kopel summarize the contrast between the position of Tiedeman with that of another legal scholar, Ernst Freund, as follows: “[T]he traditional view, espoused by Tiedeman, was that state power could legitimately be employed to protect individuals from direct harm; the newer view, represented by Freund, was that the state could regulate even to permit harms that might not occur, or that might not have been considered a harm at all by the common law.” Reynolds and Kopel note, however, that even Freund, “the expositor of the broad police power theory that dominated legal thought in the twentieth century, emphasized that judicial review was still essential.” As Freund put the matter:

Effective judicial limitations on the police power would be impossible, if the legislature were the sole judge of the necessity of the measures it enacted.... [T]he maintenance of private rights under the requirements of the public welfare is a question of proportionateness of measures entirely. Liberty and property yield to the police power, but not to the point of destruction.... The question of reasonableness usually resolves itself into this: is the regulation carried to the point where it becomes a prohibition, destruction, or confiscation?

This position would therefore seem to argue against court deference to legislative findings, including the deference of federal courts to the findings of state courts or legislatures. The state may regulate, as opposed to prohibit, a rightful exercise of liberty, but such a regulation would have to be shown to be necessary to the protection of the rights of others. A bare assertion that the conduct in question is immoral is inadequate.

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References and Further Reading

Barnett, Randy, *The Proper Scope of the Police Power*, Notre Dame Law Review, 79 (August 21, 2003). <http://ssrn.com/abstract=437201>.

- Becraft, Lowell, Jr., *Limits of Congressional Powers*, <http://www.constitution.org/becraft/limits1.htm>.
- Bufford, Charles, *The Scope and Meaning of Police Power*, California Law Review 4 (1916): 269–272.
- Cooley, Thomas M. *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Powers of the States of the American Union*, 1868, 1883.
- de Montesquieu, Charles. *The Spirit of Laws*, 1748, tr. Thomas Nugent 1752.
- Finkelman, Paul. *An Imperfect Union: Slavery, Federalism, and Comity*. Chapel Hill: University of North Carolina Press, 1981.
- Freund, Ernst. “The Police Power.” *Public Policy and Constitutional Rights* 6 (1904).
- Hastings, W. G. “The Development of Law as Illustrated by the Decisions Relating to the Police Power of the State.” *Proceedings of the American Philosophical Society*, 39 359 (1900): 359–360.
- <http://www.constitution.org/cm/sol.htm>.
- Morris, Thomas D. *Free Men All: The Personal Liberty Laws of the North, 1780–1861*. Baltimore, MD: Johns Hopkins University Press, 1974.
- Reynolds, Glenn H., and David B. Kopel, *The Evolving Police Power: Some Observations for a New Century*, Hastings Con. L. Q. 27 (2000): 512.
- Tiedeman, Christopher G. *A Treatise on the Limitations of Police Power in the United States: Considered From Both a Civil and Criminal Standpoint*, 1886.

POLITICAL CORRECTNESS AND FREE SPEECH

The First Amendment’s guarantee of free speech has long been qualified by the exclusion of protection for “fighting words”—expression that constitutes a threat of violence and invites a violent reaction. Spurred by what is often described as a concern with political correctness, many public institutions have sought to extend the fighting words rationale to restrict speech that may be considered offensive or insensitive, especially as perceived by women or minorities.

Borrowing legal terminology from cases involving workplace harassment under Title VII of the Civil Rights Act of 1964, some state-supported universities have adopted speech codes aimed at preventing expression that could create the perception of a hostile environment on the part of members of protected classifications. Such codes are commonly couched in terms of banning “hate speech” and provide for sanctions against violators, up to and including suspension or termination.

The fundamental problem with such codes—irrespective of whether they expressly restrict students’ speech or purport merely to regulate their conduct—is that they necessarily amount to content based restriction of expression, thereby conflicting with core First Amendment values. The Supreme Court has shown little tolerance for such restrictions. Indeed,

in its 1992 decision in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), the Court rejected a traditional “fighting words” rationale in striking down a statute aimed at banning the use of racial epithets, since the law targeted a particular type of expression based on its content. Nevertheless, speech codes have proliferated on college campuses since the 1980s.

No constitutional challenge to a campus speech code has come before the Supreme Court, but such measures have not fared well in the lower courts. Typical is *Bair v. Shippensburg University*, 280 F. Supp.2d 357 (M.D.Pa., 2003), wherein a federal court in Pennsylvania enjoined the enforcement of a school’s speech code because its vague directives (such as requiring students to communicate their beliefs in a “nonprovoking manner”) were unconstitutionally overbroad. The court of appeals reached a similar result in *Dambrot v. Central Michigan University*, 55 F.3d 1177 (6th Cir.1995), holding that a ban on “stigmatiz[ing] or victimiz[ing]” individuals was overbroad, despite a provision that the code would not be enforced inconsistently with the First Amendment.

The tension between political correctness and free speech extends into many other realms of public discourse, of which only a small sample can be mentioned here. University faculty members as well as students have run afoul of restrictions on classroom discussion. Although courts normally afford greater latitude to the regulation of student speech in public high schools than in institutions of higher learning, a federal court in West Virginia held, in *Bragg v. Swanson*, 371 F.Supp.2d 814 (S.D.W.Va., 2005), that a high school’s prohibition of clothing displaying the Confederate flag was overbroad. Absent any evidence of racial animus or disruptive incidents stemming from such displays, the court held that equating display of the flag with racism violated the students’ First Amendment rights. School mascots derived from Native American prototypes have been challenged as offensive, and references to such mascots (in particular, “redskins” and variations thereon) have been banned from personalized license plates in several states.

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References and Further Reading

- Kors, Alan Charles, and Harvey A. Silvergate. *The Shadow University: The Betrayal of Liberty on America’s Campuses*. New York: Harper Perennial, 1998.
- Robbins, Wayne Lindsey, Jr., *When Two Liberal Values Collide in an Era of “Political Correctness”: First Amendment Protection as a Check on Speech-Based Title VII Hostile Environment Claims*, Baylor Law Review 47 (1995): 789.

Cases and Statutes Cited

- Bair v. Shippensburg University*, 280 F.Supp.2d 357 (M.D. Pa., 2003)
Bragg v. Swanson, 371 F.Supp.2d 814 (S.D.W.Va., 2005)
Dambrot v. Central Michigan University, 55 F.3d 1177 (6th Cir.1995)
R.A.V. v. City of St. Paul, 505 U.S. 377 (1992)
 Civil Rights Act of 1964, Pub. L. 88-352 (Title VII), 42 USC § 2000e (1964)

POLITICAL PATRONAGE AND THE FIRST AMENDMENT

Traditional political patronage was the exchange of government jobs for political support—in other words, hiring people who belong to the party or faction of a candidate for political office and requiring them to do electoral work and/or give financial support, and firing them if they do not. The Democratic Party Organization of Cook County, Illinois, for example, totally dominated Chicago city government in this way under Mayor Richard J. Daley from 1955 to 1976. Daley controlled about thirty-five thousand patronage jobs and used the power to hire and fire to secure election of his candidates. City and county employees were required to buy tickets to party fundraising events and to work the precincts before elections. In this fashion, the Cook County political “machine” was able to mobilize the vote for Daley and his candidates every election day and exercised a virtual monopoly over Chicago politics.

Following the common patronage practice, in 1970 the newly elected Democratic sheriff of Cook County, Richard Elrod, fired various Republican employees of the sheriff’s office. The dismissed employees filed a lawsuit, on the grounds that firing them for their political affiliation constituted an unacceptable burden upon an employee’s First Amendment rights. How could employees feel free to associate with the party of their choice, support the candidates of their choice, even say what they thought, if their jobs hung in the balance?

In *Elrod v. Burns*, 427 U.S. 347 (1976), the U.S. Supreme Court agreed. Drawing upon its earlier cases finding that it was unconstitutional to require a loyalty oath as a condition of public employment, the Court held that politically motivated firing violated the rights of the individual employee and harmed the electoral process as a whole, discouraging present employees as well as anyone who might want to seek a public job from the free exercise of their rights of speech and association. Under the standard applied to government actions interfering with First Amendment rights, a public employer could do so only if it was necessary to a compelling governmental interest.

In *Branti v. Finkel*, 445 U.S. 507 (1980), the Court made an explicit exception to *Elrod* for policymaking employees, thus permitting employment decisions on political grounds for positions where loyalty to and identification with the goals of a candidate were important to carrying out his or her program.

It was not until 1990 that the Supreme Court found that it was also unconstitutional to hire public employees on political grounds—or to promote, transfer, or take other adverse job actions against them. Ironically, that case, *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990), also came out of Illinois but involved patronage practices engaged in by the Republican governor instead of the Cook County Democratic machine. Four judges dissented in *Rutan*, however, arguing that patronage was essential to the operation of democratic politics and the American party system.

After *Elrod* and *Rutan* had made patronage hiring and firing illegal, contract patronage became more important. Many governmental functions were being privatized in the 1980s anyway, and the contracts to fulfill those functions (waste hauling, for example) were awarded to persons and companies who were political supporters of the party or faction in power and contributed to its coffers. The money received could be used to pay for the television ads, mass mailings, and telemarketing that were beginning to replace door-to-door campaigning.

In a pair of cases decided in 1996, the Supreme Court held that the prohibition against patronage hiring and firing extended to contract patronage as well. In one case, *O’Hare Truck Service v. City of Northlake*, 518 U.S. 712 (1996), a contract to do business for the city had been taken away from a trucking company whose owner supported the candidate opposing the incumbent mayor. The Court found that this was directly prohibited by *Elrod*.

In the other case, *Board of County Commissioners of Wabaunsee County v. Umbehr*, 518 U.S. 668 (1996), an exclusive trash-hauling contract had been terminated because the company’s owner had repeatedly and publicly criticized the county board. In other words, Umbehr was punished for speech, rather than for association with a particular party. The Supreme Court held that this case should be decided not under the *Elrod* line of cases, but instead under the *Pickering* balancing test (*Pickering v. Board of Education*, 391 U.S. 563, 1968) applied to speech by public employees, which is easier for employers to satisfy. Under that test, if a governmental employer’s interest in workplace discipline outweighs the employee’s interest in commenting on matters of public concern, the employee may be fired despite the impact upon his or her First Amendment rights.

The decision in *Umbehr* thus opened up a competing standard that may be applied to public employees exercising their First Amendment rights. As Justice Scalia commented in his dissenting opinion, this creates a confusing situation for courts and for potential litigants, who must distinguish between an employee's or contractor's exercise of the First Amendment rights of political association (which is protected for all but policymaking employees) and of free speech (which may be outweighed by the employer's need for workplace discipline).

The prohibition of political patronage was unpopular with political parties, and there is evidence that the practice has persisted in some areas of the country, including Chicago. As the dissenting justices in *Elrod*, *Branti*, and *Rutan* pointed out, patronage was a practice of long standing that had played a major role in the American political party system, especially in big cities. Yet patronage also resulted in excluding later arriving minority groups (African Americans and Latinos, for example) from the political process in many areas, as earlier groups (such as the Irish) were able to make government offices into their private preserve. Awarding contracts or hiring friends in return for money or political favors often leads to corruption, inefficiency, and unduly costly government as well. Finally, and most important, political patronage impairs the functioning of the electoral process by discouraging political opposition and criticism of the party in power, reducing the electoral chances of opposition candidates, and entrenching the party in power—abuses the guarantees of the First Amendment were designed to prevent.

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References and Further Reading

- Bowman, Cynthia Grant. "The Supreme Court's Patronage Decisions and the Theory and Practice of Politics." In *The U.S. Supreme Court and the Electoral Process*, David K. Ryden, ed. Washington, D.C.: Georgetown University Press, 2000, 124–141.
- Royko, Mike. *Boss: Richard J. Daley of Chicago*. New York: Dutton, 1971.

Cases and Statutes Cited

- Board of County Commissioners of Wabunsee County v. Umbehr*, 518 U.S. 668 (1996)
- Branti v. Finkel*, 445 U.S. 507 (1980)
- Elrod v. Burns*, 427 U.S. 347 (1976)
- O'Hare Truck Service v. City of Northlake*, 518 U.S. 712 (1996)
- Pickering v. Board of Education*, 391 U.S. 563 (1968)
- Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990)

See also *Branti v. Finkel*, 445 U.S. 507 (1980); *Elrod v. Burns*, 427 U.S. 347 (1976); *Pickering v. Board of Education*, 391 U.S. 563 (1968); *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990); *Speech of Government Employees; Unconstitutional Conditions*

POLITICS AND MONEY

The relationship of money to politics has always been conceded and so, too, the effect on speech of restricting political money. The relationship became a source of active contention when, in the latter half of the last century, the Congress enacted comprehensive campaign finance controls to address corruption or its appearance. Many states rapidly followed suit. Those restrictions included strict limits on contributions to candidates and on spending by political parties. Long-standing prohibitions on union and corporate spending were strengthened, and public disclosure requirements were tightened and extended.

The Supreme Court subsequently heard a number of claims that this expansive regulation of political money undermined the right to speech and association. In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Court held that some limits, such as limits on how much of their own money candidates could spend, indeed infringed on those rights. The Court distinguished for constitutional purposes between "contributions" to candidates—which it termed "speech by proxy" and hence entitled to lesser constitutional protection—and more fully protected "expenditures."

Congress has since enacted additional restrictions, including restrictions on "soft money"—certain monies raised and spent by parties for general party activities. When this law was challenged, the Supreme Court in *McConnell v. FEC*, 124 S.Ct. 619 (2003), appeared to adopt a more permissive test for regulation than the one favored by the *Buckley* Court. By 2003, when this case was decided, the law had perceptibly shifted in favor of those who would strike the balance between political regulation and speech more in favor of the former.

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References and Further Reading

- Drew, Elizabeth. *Politics and Money*. 1983.
- Hasen, Richard L. *Supreme Court and Election Law: Judging Equality from Baker v. Carr to Bush v. Gore*. 2003.
- Redish, Martin H. *Money Talks: Speech, Economic Power and the Values of Democracy*. 2001.
- Sorauf, Frank J. *Inside Campaign Finance: Myths and Realities*. 1994.

Cases and Statutes Cited

Buckley v. Valeo, 424 U.S. 1 (1976)
McConnell v. FEC, 124 S.Ct. 619 (2003)

POPE v. ILLINOIS, 481 U.S. 497 (1987)

The three-part test for judging if sexually explicit material is obscene as enunciated in *Miller v. California*, 413 U.S. 15 (1973), required an assessment of “whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.” *Pope v. Illinois* posed the question of whether judges could instruct juries to use community standards when they decided this “value question.”

Two employees of an adult bookstore were separately charged of the offense of “obscenity” under Illinois law after they sold magazines to police detectives. At their trials, the judges instructed the juries to determine the value of the magazines based on how they thought “ordinary adults in the whole State of Illinois” would view them. The defendants argued *Miller’s* value question should be judged “solely on an objective basis,” which the trial courts and state appellate courts rejected.

The Supreme Court, voting six to three, vacated Pope’s conviction and remanded the case to the state courts for reconsideration. Justice White’s majority opinion was joined by Justices Rehnquist, Powell, O’Connor, Scalia (who wrote a concurring opinion), and Blackmun, who concurred in part and dissented in part. Justice Brennan dissented, as well as Justice Stevens whose dissent was joined by Justices Brennan, Marshall, and Blackmun.

Justice White flatly declared, “There is no suggestion in our cases that the question of the value of an allegedly obscene work is to be determined by reference to community standards. Indeed, our cases are to the contrary.” The justice stressed that the majority opinion in *Miller* was “careful to point out” that the First Amendment protects works of serious value “regardless of whether the government or a majority of the people approve of the ideas these works represent.” The value of such work, moreover, does not vary from community to community according to whether or to what degree the work wins public acceptance.

Justice White concluded that the “proper inquiry,” contrary to the approach taken in Illinois, did not rest on how “ordinary members” of a particular community view the social value of an allegedly obscene work; rather it depended on whether a “reasonable person,” using by implication a national standard, found social value in the work taken as a whole. In a footnote, Justice White, trying to clarify his

position, stated that “the mere fact ... only a minority of a population may believe a work has serious value does not mean the ‘reasonable person’ standard” would not be met.” The justice’s adoption of this legal fiction in effect followed Justice Brennan’s holding in *Jacobellis v. Ohio*, 503 U.S. 540 (1964), where he stated *Roth’s* (*Roth v. United States*, 354 U.S. 476, 1957) three elements had to be separately applied; the Illinois courts conflated *Miller’s* second and third elements by answering the value question according to community standards.

Justice Scalia agreed only with Justice White’s interpretation of the intent of the *Miller* test but quickly cast doubts on whether an objective assessment of literary or artistic value was possible and suggested the “fabled ‘reasonable man’” will be of “little help” in the inquiry. Justice Brennan’s dissent restated his view that criminalizing the sale of obscene materials to consenting adults is unconstitutional. Justice Stevens’ lengthy dissent critiqued Justice White’s incorporation of the “reasonable person” into the *Miller* test. He stressed in particular the improbability that this legal fiction would produce a consensus on obscenity that had eluded the justices’ best efforts or allow purveyors of pornography like Pope to know when a magazine or other material crossed the legal threshold and became obscene and thus when they were violating the law.

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References and Further Reading

Hixson, Richard F. *Pornography and the Justices: The Supreme Court and the Intractable Obscenity Problem*. Carbondale: Southern Illinois University Press, 1996.
 Mackey, Thomas C. *Pornography on Trial: A Handbook With Cases, Law, and Documents*. Santa Barbara, CA: ABC-CLIO, 2002.

Cases and Statutes Cited

Jacobellis v. State of Ohio, 503 U.S. 540 (1964)
Miller v. California, 413 U.S. 15 (1973)
Pope v. Illinois, 481 U.S. 497 (1987)
Roth v. United States, 354 U.S. 476 (1957)

**POSADAS DE PUERTO RICO
 ASSOCIATION v. TOURISM
 COMPANY OF PUERTO RICO, 478
 U.S. 328 (1986)**

In *Posadas*, a key commercial speech case, the Court confronted the question of whether Puerto Rico could limit the scope of advertising by casinos so as to shield residents from the advertising. The operator of a

casino sought a declaratory judgment that the regulations governing casino advertising violated the First Amendment. Although prior to *Posadas* the Court had tended to construe the regulatory power relatively favorably to commercial speakers and thus to protect most truthful speech against governmental interference, in *Posadas* the Court found the state's purpose rational and its limitations were largely upheld. Justice Rehnquist also suggested a controversial justification. He noted that because Puerto Rico could undoubtedly have banned casino gambling altogether, it seemed axiomatic that it could regulate advertising of gambling under the theory that the greater power to ban must include the lesser power to regulate.

Some observers initially thought the decision heralded the emergence of a "vice exception"—that is, a willingness to accept more paternalistic speech restrictions when the subjects of regulation were items that had always been subject to stricter regulatory control such as alcohol and gambling. However, this speculation was ended in the Court's later repudiation, in the *44 Liquormart v. Rhode Island* (517 U.S. 484, 1996) case, of some of the reasoning in *Posadas*. In *44 Liquormart* the majority characterized the First Amendment analysis in *Posadas* as "erroneously performed." The *44 Liquormart* opinion is generally regarded as a shift from greater deference to regulatory efforts to more protection for commercial speech.

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References and Further Reading

- Epstein, Richard A., *Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, Harvard Law Review 102 (1988): 5.
- Langvardt, Arlen W., and Eric L. Richards, *The Death of Posadas and the Birth of Change in Commercial Speech Doctrine: Implications of 44 Liquormart*, American Business Law Journal 34 (1997): 483.
- Vladeck, David C., *Lessons From A Story Untold: Nike v. Kasky Reconsidered*, Case Western Reserve Law Review 54 (2004): 1049.

Cases and Statutes Cited

44 Liquormart v. Rhode Island, 517 U.S. 484 (1996)

POWELL v. ALABAMA, 287 U.S. 45 (1932)

It was not until 1963, in the seminal case of *Gideon v. Wainwright*, that the Supreme Court finally decided that indigent criminal defendants in state courts had the constitutional right under the Sixth Amendment

to have counsel appointed for their defense. But, as far back as 1932, in *Powell v. Alabama*, the Court decided, under the Fourteenth Amendment to the Constitution, that counsel must be appointed for indigent defendants in capital cases and that such counsel had to provide "effective" assistance.

The *Powell* decision involved the criminal trial of the so-called "Scottsboro Boys," a prosecution of seven poor, illiterate, black teenagers accused of the gang rape of two teenage white girls on a freight train on its way through Alabama on March 25, 1931. Despite the existence of an Alabama state statute requiring the appointment of counsel in capital cases, no defense counsel was actually appointed for any of the defendants until the morning of trial; then, without any investigation on their behalf and only six days after their indictment, their trials began. Each of these trials was completed within a day, and each resulted in a death sentence for each defendant. In a setting rife with heated racial animosity, as the Court observed, "the proceedings, from beginning to end, took place in an atmosphere of tense, hostile, and excited public sentiment."

A majority of the Court, in an opinion authored by Justice Sutherland, concluded that the denial of counsel in these circumstances violated the due process clause of the Fourteenth Amendment. Although the Sixth Amendment had not yet been selectively incorporated to apply to the states as it would later be in *Gideon*, the Court held:

[W]here the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble-mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law; and that duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case.... The prompt disposition of criminal cases is to be commended and encouraged, ... [b]ut, in reaching that result a defendant, charged with a serious crime, must not be stripped of his right to have sufficient time to advise with counsel and prepare his defense. To do that is not to proceed promptly in the calm spirit of regulated justice but to go forward with the haste of the mob.

In addition to the subsequent application of the Sixth Amendment's "right to counsel" clause to the states in 1963, the Supreme Court also expanded in a 1984 decision, *Strickland v. Washington*, 466 U.S. 668 (1984), upon the meaning of the requisite "effective" assistance of counsel language used in *Powell*. In *Strickland*, the Court concluded that a criminal defendant is denied effective assistance of counsel under the Sixth Amendment when he demonstrates that his or

her counsel's performance was deficient in that it fell below an objective standard of reasonableness, and that such deficiency prejudiced the defendant by creating a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different.

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See also ***Betts v. Brady*, 316 U.S. 455 (1942); Due Process; Fourteenth Amendment; *Gideon v. Wainwright*, 372 U.S. 335 (1963); Ineffective Assistance of Counsel; Race and Criminal Justice; Right to Counsel; Scottsboro Trials**

POWELL v. TEXAS, 392 U.S. 514 (1968)

Leroy Powell was arrested for, charged with, and convicted of "intoxication in a public place" in violation of Texas law. Powell appealed the conviction claiming that he suffered from the disease "chronic alcoholism," which did not allow him control over his drinking and that to charge him for public drunkenness would be cruel and unusual punishment. The trial judge held that "chronic alcoholism" was not a defense and affirmed the conviction.

The Supreme Court of the United States affirmed the state court's decision, holding that since there was little consensus within the medical field that "chronic alcoholism" was a disease that rendered an individual unaccountable for his behavior, it would be improper for the Court to make this determination. The Court also refused to create a constitutional "chronic alcoholism" defense, saying that to do so would interfere in an area generally considered within the power of states to decide. Finally, the Court differentiated between punishment that targets a mere status such as being a chronic alcoholic and punishment that targets behavior that society deems inappropriate such as being drunk in public. Under this analysis and in light of that fact that there was no viable alternative to treatment of public drunkenness at the time, the Court found that the Texas statute, which punished Powell for being drunk in public, was not cruel and unusual punishment.

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References and Further Reading

Loewy, Arnold H. *Criminal Law in a Nutshell*. St. Paul, MN: West, 2003.

Cases and Statutes Cited

Texas Penal Code, Art. 477 (1952)

See also ***Cruel and Unusual Punishment Generally; Due Process***

POWELL, LEWIS FRANKLIN, JR. (1907–1998)

Lewis Powell, a very successful lawyer in Richmond, Virginia, had no desire to go on to the U.S. Supreme Court, especially at age 64, but he finally gave in to the entreaties of the Nixon administration, and the Senate quickly confirmed the nomination by a vote of eighty-nine to one. Powell served fifteen years and when he retired declared it the saddest day of his life. He had easily adapted to the role of justice, and during most of his tenure provided the swing vote in numerous five-to-four decisions.

Prior to joining the Court Powell had been involved in Virginia school affairs in Richmond and on the state level. During the days of massive resistance to the Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), Powell had worked quietly but effectively to keep the schools open in the city and in most of the state. Although the snail's pace of desegregation did not satisfy leaders of the black community, they came to admire Powell and at his confirmation hearings testified to his integrity, his ability to reach across racial lines, and his concern for the common people.

Once on the Court, Justice Powell continued to show these concerns. According to one scholar,

[Powell's] jurisprudence was governed to a considerable degree, indeed a decisive one, by his strivings for fairness, compassion, equity, and an adherence to his perception of genuine societal consensus. Lewis Powell quickly came to be regarded as the conscience of the Court on such emotion-charged issues as race and gender, as well as the omnipresent contentious questions of religion, suffrage, and criminal justice.

It is impossible to label Justice Powell a judicial liberal or a judicial conservative. He voted occasionally with the liberal bloc headed by Justice William Brennan, and just as often with the conservatives led by William Rehnquist. He refused to put a label on his jurisprudence, but a key is the fact that his judicial hero was the second John Marshall Harlan. Powell had known him and believed in the same cautious, case-by-case evaluation; like Justice Harlan, Justice Powell was a centrist, moderately conservative, and historically conscious. As Justice Sandra Day O'Connor, who joined him in the center, said upon his retirement, "at times he may have been willing to sacrifice a little consistency in order to reach for justice in a particular case."

Justice Powell's most famous opinion—indicative of his entire approach—was in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). Joined by the four conservative members of the Court, he held that racial quotas in affirmative action

programs could never meet constitutional scrutiny. Then, joined by the four liberal justices, he ruled that race could be a consideration in college admission programs. Although often derided as a Jesuitical opinion that split hairs and evaded the real issue, over time the wisdom of the justice's cautious approach came to be more widely appreciated, and the Court reconfirmed Powell's position in *Grutter v. Bollinger* (539 U.S. 306, 2003).

While Justice Powell usually voted in favor of giving women equal rights, he was not willing to give Justice Brennan a fifth vote in *Frontiero v. Richardson*, 411 U.S. 677 (1973), to make gender a suspect classification along with race. Rather, reflecting his cautious views on the matter, he went along with giving gender classifications an "increased" rather than a "strict" scrutiny standard. In another five-to-four decision in which his was the key vote, Justice Powell refused to recognize privacy rights for homosexuals in *Bowers v. Hardwick*, 478 U.S. 186 (1986). After his retirement he told an interviewer that he regretted the vote he had cast in that case and would now have voted differently. In 2003, the Supreme Court reversed *Bowers* in *Lawrence v. Texas*, U.S. 123 S.Ct. 2472 (2003).

In civil liberties, Justice Powell's greatest influence lay in First Amendment cases involving the religion clauses. As a proud son of Virginia, he believed fervently in Thomas Jefferson's Statute for Religious Freedom (1786). Although he was not an absolutist, there had to be very good reason provided to him before he would violate the idea of a strict wall of separation between church and state. In the thirty establishment clause cases decided during his tenure, Justice Powell was on the winning side in all of them. In nineteen, the Court found that various state actions violated the clause, and in the rest the Court supported what the state had done.

Unlike his more conservative brethren on the Court, Justice Powell found Chief Justice Burger's three-pronged test in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), to be a perfect measure for evaluating potential violations of the establishment clause. To him it made perfectly good sense to ask whether the challenged law had a secular legislative purpose; whether its primary purposes would neither advance nor inhibit religion; and whether it did not foster an excessive entanglement between religion and the government. The *Lemon* test allowed him in *Mueller v. Allen*, 463 U.S. 388 (1973), to support a Minnesota law allowing tax deductions to parents of all elementary and secondary schoolchildren, whether in public or parochial schools, for legitimate educational expenses such as secular textbooks, tuition, and instructional materials. On the other hand, his was the

key vote in striking down a Grand Rapids, Michigan, law that authorized state payments for personnel, supplies, and materials to forty religious schools (*Grand Rapids School District v. Ball*, 473 U.S. 373, 1985), since here the money could potentially underwrite religious activities.

While the justice joined a highly criticized opinion by Chief Justice Burger upholding the constitutionality of a city-government-sponsored display of a crèche in a Christmas display in a public park (*Lynch v. Donnelly*, 465 U.S. 668, 1984), he fully agreed with the majority in *Edwards v. Aguillard*, 482 U.S. 578 (1987), that Louisiana's "balanced treatment" law requiring the teaching of "creationism" along with evolution in the public schools violated the First Amendment. In a concurring opinion Justice Powell elaborated eloquently on the work of Jefferson and James Madison to secure religious freedom and a ban on any form of religious establishment.

Because of his prior experience as a member of the city and state school boards in Richmond, Justice Powell played a key role in the various education cases that came before the Court in the 1970s and 1980s. Aside from those involving aid to religious schools, there were cases on finance and local control that the Court addressed. Here, the justice's basic conservatism and his respect for localism determined his vote, and in nearly all cases he wanted to know whether the action under consideration furthered the education of children. Education cases well reflect Justice Powell's careful, case-by-case manner and his effort to weigh all of the competing constitutional interests.

The most important decision he wrote in this area is *San Antonio School District v. Rodriguez*, 411 U.S. 1 (1973). Latino parents in San Antonio challenged how Texas funded its public schools, mainly through local property taxes. As a result the funds available for instruction, buildings and maintenance, and supplies were far greater on a per-pupil basis in the rich districts than in poorer areas. The plaintiffs claimed that Texas violated the Fourteenth Amendment's equal protection clause in that their children did not receive an education of the same quality as did those living in wealthier districts.

Justice Powell wrote for a five-to-four majority that refused to add poverty to the list of suspect classification covered by equal protection. While admitting that education played an important role in contemporary society, he found no evidence that it constituted a basic right protected by the Fourteenth Amendment. States could, as Texas had done, establish minimum funding requirements and then provide state aid to bring the poorest districts up to that level; but it had no obligation to raise those districts to the

funding level of richer districts or force the wealthier districts to cut back on the amount they spent. Education had always been a state matter and, aside from overt constitutional violations such as racial segregation or the imposition of religious activities, control of education should remain in state and local hands.

This view also informed the justice's vote in other education cases. He wrote a strong dissent in *Mississippi University for Women v. Hogan*, 458 U.S. (1982), in which the majority, led by Justice O'Connor, ordered what had been primarily a women's school of nursing to admit a male student and to end its policy of gender segregation. The decision, based on the Civil Rights Act of 1964, offended Powell in several ways. He believed that the law allowed traditional single-sex schools to remain as such. He wrote in praise of the educational benefits found in single-sex schools, but above all, he believed that as long as an alternative existed for male nursing students, then the state should decide whether it wanted to continue a single-sex school. Neither the Constitution nor the civil rights law required that principles of federalism in the control of education be overridden.

Justice Powell's belief in local control led him to leave disciplinary matters in the hands of local school authorities (*Ingraham v. Wright*, 430 U.S. 651, 1977) and also to determine what books should or should not be in a school library (*Board of Education v. Pico*, 457 U.S. 853, 1982). Nonetheless, perhaps an example of what Justice O'Connor termed his sacrificing of consistency for the sake of justice, is his vote in the rather remarkable case of *Plyler v. Doe*, 457 U.S. 202 (1982). There he concurred with Justice Brennan upholding the right of minor children of undocumented aliens to receive a free public school education. But in his concurrence the justice re-emphasized his views in *Rodriguez*—namely, that education was not a fundamental right. Instead he spoke to the practical concerns of the issue and the profound consequences of denying educational opportunity to thousands of children who, in all likelihood, would grow up and continue to live in the United States.

In criminal justice, Justice Powell also adopted a balancing approach. He often took a "tough" stance in favor of the police forces and believed that the Bill of Rights did not require the nation to sacrifice public safety. He therefore opposed what he considered excessive multiple habeas corpus appeals in *Stone v. Powell*, 428 U.S. 465 (1976); *Wolff v. Rice*, 428 U.S. 465 (1976); and *United States v. Janis*, 428 U.S. 433 (1976). While he believed strongly in procedural fairness, he also felt that constitutional safeguards had to be interpreted in a common-sense manner and thus joined his vote to create the "good faith" limitations on the exclusionary rule in *United States v. Leon*, 468

U.S. 897 (1984), and *Massachusetts v. Sheppard*, 468 U.S. 981 (1984).

Although he was an opponent of the death penalty, Justice Powell's jurisprudence required deference to legislative policy-making absent any clear constitutional prohibition. He was one of the four dissenters in *Furman v. Georgia*, 408 U.S. 238 (1972), which outlawed capital punishment as then applied. In his dissent he attacked the majority for what he termed their flagrant disregard of the "root principles" of precedent, judicial restraint, separation of powers, and federalism. When every state that had the death penalty revised its statutes to conform to the *Furman* decision, Justice Powell, in the lead opinion for the seven-to-two majority in *Gregg v. Georgia*, 428 U.S. 153 (1976), upheld the right of the legislatures to impose capital punishment as long as they adhered to due process of the law.

In the 1979 case of *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979), a split Court rejected a newspaper publisher's challenge to a court order closing the courtroom to the press during a trial. Although concurring in the result, Justice Powell wrote separately to examine the First Amendment implications and suggested that in order to ensure a fair trial, courts ought to find other means than barring the press. The absence of the press, he believed, undermined the public's confidence in the fairness of the criminal justice system. The following year, seven members of the Court adopted his view in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), and held that while a defendant was entitled to a fair trial, the public also had a right, as exercised through the press, to witness the trial and judge its fairness for themselves.

Justice Powell's fifteen years on the bench created what had long been absent on the Court: an influential center. He more often than not was the key vote in five-to-four decisions and was rarely on the losing side. In *Bakke* he constituted the middle by himself. By the time he retired, Sandra Day O'Connor stood poised to take over that role, and she was soon joined by others. Justice Powell's case-by-case analysis and his balancing of facts and interests do not provide the stuff of a consistent jurisprudence. But in terms of civil liberties, they allowed him on more than one occasion to choose justice over doctrinal consistency.

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References and Further Reading

- Gunther, Gerald, *A Tribute to Lewis F. Powell, Jr.*, Harvard Law Review 101 (1987): 409.
- Jeffries, John Calvin, *Justice Lewis F. Powell, Jr.: A Biography*. New York: Scribner's, 1994.
- Wilkinson, J. Harvie, III, *Serving Justice: A Clerk's View*. New York: Charterhouse, 1974.

Cases and Statutes Cited

Board of Education v. Pico, 457 U.S. 853 (1982)
Bowers v. Hardwick, 478 U.S. 186 (1986)
Brown v. Board of Education, 347 U.S. 483 (1954)
Edwards v. Aguillard, 482 U.S. 578 (1987)
Frontiero v. Richardson, 411 U.S. 677 (1973)
Furman v. Georgia, 408 U.S. 238 (1972)
Gannett Co. v. DePasquale, 443 U.S. 368 (1979)
Grand Rapids School District v. Ball, 473 U.S. 373 (1985)
Gregg v. Georgia, 428 U.S. 153 (1976)
Ingraham v. Wright, 430 U.S. 651 (1977)
Lemon v. Kurtzman, 403 U.S. 602 (1971)
Lynch v. Donnelly, 465 U.S. 668 (1984)
Massachusetts v. Sheppard, 468 U.S. 981 (1984)
Mississippi University for Women v. Hogan, 458 U.S. 718 (1982)
Mueller v. Allen, 463 U.S. 388 (1973)
Plyler v. Doe, 457 U.S. 202 (1982)
Regents of the University of California v. Bakke (1978)
Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980)
San Antonio School District v. Rodriguez, 411 U.S. 1 (1973)
Stone v. Powell, 428 U.S. 465 (1976)
United States v. Janis, 428 U.S. 433 (1976)
United States v. Leon, 468 U.S. 897 (1984)
Wolff v. Rice, 428 U.S. 465 (1976)

PRAYER IN PUBLIC SCHOOLS

Few issues have generated more intense feelings than prayer in public schools. Although it was once a common practice in many public schools, the Supreme Court in two landmark cases in the early 1960s held that state-sponsored prayer in public schools was unconstitutional. In a series of subsequent decisions the Court has continued to prohibit any government effort to promote prayer in public schools. This has included instances where students recite government composed prayers and also clergy-led prayers at graduation ceremonies and student-led prayer at athletic events. At the same time the Court has emphasized that truly voluntary student prayer in schools is constitutionally permissible and, in some circumstances, even protected speech. This distinction between voluntary student prayer on the one hand and state-sponsored prayer on the other is the central consideration in analyzing school prayer cases and best balances the competing constitutional concerns that are present.

The debate over prayer in public school long preceded the Supreme Court's involvement with the issue. As originally envisioned in the mid-nineteenth century, public education in America was to be "non-sectarian," although it was commonly understood that Bible readings could be used as the basis of a common morality. In reality, however, many schools went beyond this, often incorporating a distinctly Protestant piety in the classroom, especially in the post-Civil War years. At times this included Bible readings, devotional exercises, and prayer.

Almost twenty states in the late nineteenth and early twentieth centuries took the issue a step further, passing laws that mandated prayer and Bible readings in public schools. Most of these laws went unchallenged, but lawsuits were initiated in several states, with state courts splitting as to the constitutionality of such laws. More generally, the issue of prayer in public schools, whether mandated by law or not, continued to be a volatile one throughout the first half of the twentieth century, with a number of state courts eventually addressing the issue. Although most courts held the practices constitutional, a substantial minority of lower court decisions struck them down as contrary to our freedoms and constitutional order.

The Early Supreme Court Decisions

The Supreme Court first addressed and struck down school prayer as unconstitutional in two landmark cases in the early 1960's: *Engel v. Vitale*, 370 U.S. 421 (1962), and *Abington School District v. Schempp*, 374 U.S. 203 (1963). In *Engel* the Court reviewed a school board policy requiring that a prayer, adopted by the New York State Board of Regents, be said aloud by each class at the start of the school day. In finding that this practice violated the establishment clause, the Court primarily focused on the fact that students were required to recite a government-composed prayer. The Court stated that, at a minimum, the establishment clause means that "it is no part of the business of government to compose official prayers for any group of the American people to recite as part of a religious program carried on by government."

The Court noted that the practice of government-composed prayers by the Church of England was a major impetus for early colonists to come to this country. Thus, according to the Court, the First Amendment was in part designed to prohibit government from using its power "to control, support or influence the kinds of prayer the American people can say."

Significantly, the Court did not rest its holding on the coercive effect such prayers would have on students. It acknowledged that even when students were asked to be excused there might be a significant indirect coercion to conform to the officially approved religion, but the Court emphasized that the establishment clause went much further than prohibiting coercive activities. Unlike the free exercise clause, which the Court suggested requires a showing of government coercion, the establishment clause is violated by establishing an official religion, whether or not it

coerces nonobserving individuals. Thus, even though the Court acknowledged that indirect coercion might have existed in *Engel*, it rested its decision on the official establishment of religion through prescribed prayer.

In *Schempp*, decided one year after *Engel*, the Court again struck down a religious exercise in a public school, this time involving a Bible reading over a school intercom followed by recitation of the Lord's Prayer by students in their classrooms. The Court began its analysis by stating that the government must be neutral toward religion, requiring that government actions have a secular purpose and "a primary effect that neither advances nor inhibits religion." The religious exercise before the Court clearly failed that test, since it appeared designed to promote religion and the state sponsorship of such activities clearly advanced religion. Moreover, the exercises violated the neutrality principle emphasized by the Court throughout the opinion since the state was actively involved in promoting religion.

The Court's Continuing Resolve

Engel and *Schempp* established that state-sponsored prayer in public schools is unconstitutional, at least when it involved a state-promoted and prescribed prayer on a daily basis. It would be more than two decades before the Court again addressed the question of school prayer, leaving some uncertainty of the scope of the earlier decisions. When the Court finally addressed the issue again, in a series of cases beginning in 1985, it left no doubt that the constitutional prohibition applied to all state-promoted efforts at prayer, no matter how minor they might appear to some. At the same time, however, the Court clarified that voluntary student prayer in schools was permissible and, in some circumstances, even constitutionally protected.

The first of these cases, *Wallace v. Jaffree*, 472 U.S. 38 (1985), involved an Alabama statute that required a minute of silence in public elementary and secondary schools for the purpose of "meditation or voluntary prayer." Even though the statute avoided some of the more coercive features found in *Engel* and *Schempp*, the Court said it violated the establishment clause. The Court stated that to be constitutional, the statute must have a secular purpose according to *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The Alabama statute, however, was clearly designed to promote prayer, which the constitution prohibits the state from doing in schools. The legislative record lacked any purpose other than promoting prayer, a

fact acknowledged in the legislative record by the bill's sponsor. In addition, a prior Alabama statute already required a minute at the start of the school day for meditation; the only difference between the two statutes was the added words "or voluntary prayer" in the statute reviewed in *Wallace*. The Court concluded that adding these words served no purpose other than "to convey a message of state approval of prayer," which the Constitution does not permit.

Wallace made clear that the state could not promote school prayer in any manner, even when it left the content entirely up to the individual student. It is important to emphasize, however, that *Wallace* did not declare all moment of silence statutes unconstitutional, but only those designed for no other purpose than to promote prayer. The Court approvingly spoke of the earlier statute permitting truly voluntary prayer during a moment of silence. Moreover, in concurring opinions Justices Powell and O'Connor explicitly stated that moment of silence statutes can be constitutional, even if individual students use them to pray. Such a position makes sense, since the statute is not promoting prayer as such, but a moment of silence, which might serve several secular purposes. Moreover, the choice to pray as well as the content of the prayer would belong solely to the student.

The Court's next school prayer decision, *Board of Education of Westside Schools v. Mergens*, 496 U.S. 226 (1991), presented a scenario quite distinct from the earlier cases. In *Mergens* a student religious club sought permission to meet in a high school for the stated purpose of fellowship, Bible study, and prayer. Although a number of other student clubs were allowed to meet, the school denied access to the religious club because of establishment clause concerns. The Supreme Court held for the students, stating that when a school creates a forum for student speech, which it did when it allowed other clubs to meet, it cannot deny a group based on the religious content of the speech. Importantly, it also held that the establishment clause is not violated when a school permits a religious club to meet as part of a broader forum, since religion is being treated neutrally compared to other speech. Moreover, any decision to engage in prayer in such an instance would be initiated by students, rather than the school, and is therefore permissible.

Mergens is an important decision because it clarifies the distinction between government-promoted prayer, which is always unconstitutional, and student-initiated prayer, which is permissible and at times protected. As stated in Justice O'Connor's plurality opinion, "there is a crucial difference between *government* speech endorsing religion, which the establishment clause forbids, and *private* speech

endorsing religion, which the free speech and the free exercise clauses protect.” This does not mean that students can pray whenever and wherever they want, since their speech rights are subject to reasonable controls to protect the school’s educational mission. Yet, the Court indicated that when other student speech is allowed, religious speech, including prayer, must be accommodated.

The two most recent school prayer cases, *Lee v. Weisman*, 505 U.S. 577 (1992), and *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000), involve more conventional fact patterns and demonstrate the Court’s resolve in finding any state-promoted prayer in public schools unconstitutional. In *Lee* the Court reviewed a school’s decision to have a rabbi deliver a prayer at a middle-school graduation. The Court held this was unconstitutional, stating that the prayer was a state-sponsored religious exercise that was coercive on those attending the ceremony. They began their analysis by finding that the prayer, though delivered by a private clergyman, could be attributed to the state in three ways: the school principal made the decision to include a prayer, the principal decided who would pray, and principal gave the rabbi a pamphlet containing guidelines for graduation prayers. Thus, unlike the situation in *Mergens*, this was a state-initiated rather than private prayer.

Second, the Court emphasized the coercive nature of the prayer, which pressured students to participate. After noting the heightened concerns that subtle coercive pressure presents in public elementary and secondary schools, the Court stated that the school’s extensive involvement in the ceremony put substantial pressure on students to engage in actions, such as standing during the prayer, that the students would consider participation. Although this pressure was indirect, since no one was required to stand, it was nonetheless real and substantial. Moreover, the fact that graduation ceremonies were not compulsory did little to address the problem of coercion since high school graduations play a uniquely important role in our society and cannot truly be considered voluntary. Thus, the Court concluded that the graduation prayers in this case constituted substantial, albeit indirect, coercion of dissenting students that violated the basic tenets of the establishment clause.

The Court’s most recent school prayer case, *Santa Fe*, involved a challenge to a school district policy governing prayer at football games. The policy, which was an attempt to shift the decision on whether to pray from school officials to students, provided for a bifurcated student election on prayer. Students would first vote by secret ballot on whether to have a prayer at games, and if the students chose to have a prayer, a second election was held to elect a student to

pray. Pursuant to this policy the students elected to have a prayer at games and chose a student to deliver the prayer.

The Supreme Court held this policy violated the establishment clause, applying the same two-part coercion analysis used in *Lee*. The Court began by holding that the prayer was attributable to the state, notwithstanding the school’s argument that the election acted as a “circuit breaker” cutting off state involvement. The Court noted that even posing the question to students promoted prayer, since it initiated a process that, in all likelihood, would result in prayer. This involvement was reinforced by the prayer being delivered at a school function using the school’s public address system, which fostered perceptions of the state’s sponsorship. The Court then discussed the prayer’s coercive effect on students, reiterating the concerns voiced in *Lee*. It rejected the idea that attendance at football was a truly voluntary activity, noting the important role it played in high school, and stated that the state cannot take advantage of social pressure to coerce those in attendance to participate in what amounted to a state-promoted prayer.

Why the Prayer Decisions Make Sense

Santa Fe demonstrates the Court’s continuing commitment to prohibit any type of state-promoted prayer in public schools, even in what might be considered more subtle forms. This resolve makes sense because the issue of school prayer reflects the intersection of two highly compelling concerns: the avoidance of state-created religious orthodoxy and the particularly impressionable status of public school children. The first of these concerns is that the state has no business promoting prayer because of the threat it poses to religious freedom, a proposition that is historically sound and eminently sensible. Despite the uncertainty surrounding the religious clauses, one very clear purpose was to preserve religious freedom and avoid any state-approved orthodoxy in religious matters. Yet, to tell people how to pray or even whether to pray creates a form of government orthodoxy in an area central to religious expression. There is perhaps no more personal aspect to religion than prayer, and to many it is closely related to the act of worship. Government involvement with prayer is therefore government involvement with a core religious practice.

The danger of state-created religious orthodoxy is present even when prayer and worship are not compelled, but only promoted by the state in a voluntary

setting. The state is still trying to direct and influence core religious practices. This is a form of state orthodoxy—the state is putting its stamp of approval on a particular belief as correct and is trying to influence its citizens in that regard. This path is constitutionally and historically a very dangerous one to follow since, as innocent as it may appear, it might well lead to substantial infringement of religious liberty at some point. This concern was at the heart of the Court’s analysis in *Engel* and *Schempp* and was strongly affirmed in *Lee*.

For these reasons state involvement in prayer is a bad idea and raises concerns at the heart of the establishment clause. Yet what makes school prayer especially problematic is its intersection with children, who are particularly susceptible to the impacts of such state involvement. The impressionable and vulnerable nature of school children has often been noted by the Court, requiring that it be particularly sensitive to the coercive nature of school prayer activities. This includes the possibility that not only students will feel coerced to participate in religious activities, but also that children will easily perceive state endorsement of religion in such situations. Taken together, the dangers of state-created orthodoxy and the impressionable nature of school children have properly led the Court to be extremely vigilant in guarding against any state-promoted prayer in public schools.

At the same time, however, the Court has also emphasized that voluntary student prayer is constitutionally permissible. This is most apparent in *Mergens*, where the Court held that voluntary student prayer not only was constitutionally permissible, but also was constitutionally protected when a speech forum was created. But in other cases the Court has similarly drawn a distinction between state-promoted prayer, which is unconstitutional, and voluntary student prayer, which is permitted and might be protected. As stated by the Court in *Santa Fe*, “Thus, nothing in the Constitution as interpreted by this court prohibits any public school student from voluntarily praying at any time before, during, or after the school-day. But the religious liberty protected by the Constitution is abridged when the State affirmatively sponsors the particular religious practice of prayer.” This distinction between voluntary student prayer and state-promoted prayer is the central consideration in the school prayer cases and best balances the competing interests at stake.

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References and Further Reading

Boston, Robert. *Why the Religious Right Is Wrong About Separation of Church & State*. Buffalo, NY: Prometheus Books, 1993.

Morgan, Richard E. *The Supreme Court and Religion*. New York: The Free Press, 1972.

Smith, Rodney K. *Public Prayer and the Constitution*. Wilmington, Del., 1987.

Cases and Statutes Cited

Abington School District v. Schempp, 374 U.S. 203 (1963)
Board of Education of Westside Schools v. Mergens, 496 U.S. 226 (1990)

Engel v. Vital, 370 U.S. 421 (1962)

Lee v. Weisman, 505 U.S. 577 (1992)

Santa Fe Independent School District v. Doe, 530 U.S. 290 (2000)

Wallace v. Jaffree, 472 U.S. 38 (1985)

See also *Abington Township School District v. Schempp*, 374 U.S. 203 (1963); *Board of Education of Westside Community Schools v. Mergens*, 496 U.S. 226 (1990); *Engel v. Vitale*, 370 U.S. 421 (1962); *Lee v. Weisman*, 505 U.S. 577 (1992); *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000); *Wallace v. Jaffree*, 472 U.S. 38 (1985)

PREFERRED POSITION

The “preferred position” (aka “preferred freedoms”) doctrine is a judicially created interpretive rule that hierarchically ranks—prefers—some constitutional rights over others. While Chief Justice Stone first used the phrase, dissenting in *Jones v. City of Opelika*, 316 U.S. 584 (1942), and the rule received its widest application during Chief Justice Warren’s tenure (1953–1969), its antecedents are traceable to earlier twentieth century views.

Justice Holmes’s disparate approach to reviewing statutes foreshadowed the preferred position doctrine. Dissenting in *Lochner v. New York*, 198 U.S. 45 (1905), Holmes argued that statutes regulating economic activities should be presumed constitutional so long as they have a rational basis. By contrast, dissenting in *Abrams v. U.S.*, 250 U.S. 616 (1919), Justice Holmes contended that statutes regulating speech should not be presumed constitutional but be held to a stricter standard. Justice Cardozo articulated Justice Holmes’s approach as a hierarchy in *Palko v. Connecticut*, 302 U.S. 319 (1937), distinguishing federal constitutional rights not enforceable (incorporated) against state statutes under the Fourteenth Amendment—because such rights are not “of the very essence of a scheme of ordered liberty”—from rights “so rooted in the traditions and conscience of our people as to be ranked as fundamental.”

Justice Stone penned the most often quoted statement of the doctrine in his footnote 4 to *U.S. v. Carolene Products Co.*, 304 U.S. 144 (1938). Starting from

Justice Holmes's *Lochner* presumption regarding "regulatory legislation affecting ordinary commercial transactions," Justice Stone famously continued: "There may be a narrower scope for operation of the presumptions of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments ..."

The doctrine's critics claim that it results in an arbitrary standard, a double standard, or a shifting standard—in effect no standard at all.

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References and Further Reading

- Currie, David P., *The Constitution in the Supreme Court: The Preferred-Position Debate, 1941–1946*, Catholic University Law Review 37 (Fall 1987): 39.
- Ely, John Hart. *Democracy and Distrust: A Theory of Judicial Review*. Cambridge, MA: Harvard University Press, 1980.
- Mendelson, Wallace. *Justices Black and Frankfurter: Conflict in the Court*. Chicago: University of Chicago Press, 1961.

PREJEAN, SISTER HELEN (1939–)

Born on April 21, 1939, in Baton Rouge, Louisiana, Sister Helen Prejean joined the Sisters of St. Joseph of Medaille in 1957. A Roman Catholic nun, writer, lecturer, and community organizer, Prejean has lived and worked in Louisiana all her life. She received her bachelor's degree in education and English at St. Mary's Dominion College in New Orleans in 1962. In 1973, she received her master's degree in religious education at St. Paul's University in Ottawa, Canada. She has dedicated her life to uplifting the poor of New Orleans.

As a Roman Catholic nun, Sister Prejean began ministering to prisoners in 1981. In 1983, she wrote a letter to an inmate on Louisiana's death row, and the man wrote back. Thus, while working at a St. Thomas housing project, she became pen pals with Elmo Patrick Sonnier, a convicted killer of two teenagers who was sentenced to die in the electric chair at Louisiana's Angola State Prison. Upon Sonnier's request, Prejean repeatedly visited him as a spiritual advisor. She turned her experience into the book, *Dead Man Walking: An Eyewitness Account of the Death Penalty in the United States*. Her memoir was nominated for the 1993 Pulitzer Prize, spent thirty-one weeks as the *New York Times* number one bestseller, and was made into a film starring actress Susan Sarandon in the role of Sister Prejean.

While some victims' families launched letter-writing campaigns to the New Orleans Archdiocese to protest Prejean's public stance against the death penalty, Prejean received nominations for the Noble Peace Prize in 1998 and 1999. After her experience with Sonnier, she has continued to counsel inmates on death row as well as families of murder victims. She argues that the effect of capital punishment is as destructive upon those individuals who administer it as it is on those executed. She also stresses that it is a basic human right not to be tortured or killed by anyone, including the state.

Prejean grew up in Baton Rouge, Louisiana, in the 1940s and 1950s with her parents, a brother, and a sister, and was educated in a Catholic school. She came to Saint Thomas as part of a reform movement in the Catholic church seeking to integrate religious faith and social justice. In 1980, her religious community, the Sisters of St. Joseph of Medaille, committed to standing with the community of the poor. Prejean stated that she initially struggled with this recasting of her role in what she felt to be less the role of a nun and more the role of a social worker, but she soon became committed to the cause of social justice.

Prejean tells her account of prison mentorship in the memoir *Dead Man Walking*. While teaching high school dropouts in 1982, Chava Colon of the Prison Coalition in Louisiana asked Prejean to become a pen pal to a death row inmate. Prejean wrote to Elmo Patrick Sonnier on death row at the Louisiana State Penitentiary. In 1977, Sonnier and his younger brother abducted a teenage couple, raped the woman, and shot and killed both of them. In 1982, Prejean received permission from prison authorities to become Sonnier's spiritual advisor, and she then arranged for her first visit to death row. After the Fifth Circuit Court in New Orleans denied Sonnier's appeal in October 1983, Prejean called attorney Millard Farmer of Atlanta, who defends death-row inmates, to take Sonnier's case. Farmer and Prejean were with Sonnier when the state of Louisiana executed him just past midnight on the early morning of Wednesday, April 4, 1984.

Prejean argued that the state's death penalty made no one responsible for Sonnier's death, for anyone from the governor to the warden could argue they were just doing a job and thus did not see themselves as personally responsible. Prejean spoke widely on her experience of witnessing what she termed the premeditated execution of Sonnier on Louisiana's death row and officials' continual submersion of personal convictions for what many termed public service. Prejean argues that there are rights fundamental to humans, such as the right not to be tortured or killed, that everyone, including governments, should respect. She

contends that the moral foundation of a society erodes if its government is allowed to treat what she sees as fundamental, nonnegotiable rights as a privilege to dispense based upon an individual's behavior. She supports the Universal Declaration of Human Rights adopted by the United Nations General Assembly, which argues for the right of every human not to be killed, tortured, or punished cruelly.

In response to criticism that Prejean did not reach out to the victims' families, she helped initiate a yearly mass for the victims of violent crime at the Catholic Diocesan Office in Lafayette, Louisiana. Prejean also contends that evidence that executions do not deter crime is conclusive, and she uses this point to continue her crusade against the death penalty. Following Sonnier's execution, Prejean worked with students at her ministry's Hope House to publish a newsletter and a book of residents' poetry. Prejean also conducted a training session for people interested in becoming spiritual advisors to death-row inmates.

Prejean argued that while public action is the first step, the task of informing people in schools, churches, and civil groups is the crux of agitating against the death penalty in America. She contends that the media and politicians distort the public perception of crime, that the execution of prisoners costs more than their life imprisonment, and, finally, that if a society believes murder is wrong and inadmissible in society, then it must be wrong for everyone, individuals and governments alike. Prejean focuses her concern on the poor and her desire to translate faith into social action. After the execution of Robert Willie, another death-row inmate for whom Prejean served as spiritual advisor following Sonnier, Prejean appeared in a nationally broadcast interview with Peter Jennings on *ABC Evening News*. Prejean continues to work giving lectures, serving as spiritual advisor to death-row inmates, conducting workshops, and organizing public demonstrations for the abolition of the death penalty.

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References and Further Reading

- Foley, Michael. *Arbitrary and Capricious: The Supreme Court, the Constitution, and the Death Penalty*. Westport, CT: Praeger, 2003.
- Prejean, Sister Helen. *Dead Man Walking: An Eyewitness Account of the Death Penalty in the United States*. New York: Random House, 1993.
- Steelwater, Eliza. *The Hangman's Knot: Lynching, Legal Execution, and America's Struggle With the Death Penalty*. Boulder, CO: Westview Press, 2003.

See also Capital Punishment; Cruel and Unusual Punishment Generally

PRESS CLAUSE (I): FRAMING AND HISTORY FROM COLONIAL PERIOD UP TO EARLY NATIONAL PERIOD

The freedom of the press enjoyed by American citizens is instituted in the First Amendment's declaration that "Congress shall make no law ... abridging the freedom ... of the press." This pronouncement had its origin in previous American theory and practice, which in turn drew on earlier English roots. In all cases, the freedom was understood to include limits on what could be published, but over time political struggles and philosophical developments decreased many of the limits on political expression. Laws against certain verbal crimes, such as conspiracy, obscenity, and threats, were generally accepted as legitimate and were rarely challenged or even discussed.

The printing press was introduced in England during the fifteenth century and by 1538 Henry VIII instituted the first comprehensive royal licensing system. Licensing required that all printed works receive prior approval from a government censor before publication would be considered legal. For decades this licensing system was effective, if imperfect. Black-market printing occurred (a third of sixteenth-century books went unlicensed) and importation for politics and profit was also a problem for Crown authorities. But for most sixteenth-century Englishmen, the idea that subjects should have the privilege of publishing their sentiments was seen as dangerous. Nevertheless, by 1600, members in Parliament, at least, had freedom of speech, though debates would sometimes erupt over whether this allowed them to discuss certain topics, such as the royal succession. In any event, printing these debates was still illegal and rare.

The political turmoil of the 1640s and especially the English Civil War (1642–1651), left the king and Parliament unable to regulate the press. As a result, political and religious radicals found the press available to them and pamphlet literature exploded, increasing almost one hundred times over from 1640 to 1642. This practical freedom would continue throughout the decade, despite repeated attempts by Parliament to reestablish control.

The prevailing assumption of most Britons was that the liberty of the press led to division and disorder. The printed controversies and bloody violence of the English civil war only reinforced this view. Radical thinkers argued, to the contrary, that liberty of the press would allow the truth—the one truth, God's truth—to prevail and that this truth would unite the country. Radicals like John Lilburne also claimed that if Parliament could speak freely, the people should be able to print freely.

The return of order and ultimately the restoration of the Crown brought the return of moderately effective licensing laws. When these laws expired in 1694 they were not renewed, largely due to practical concerns, including the expanding market for imported publications. Most people still feared the power of the press to bring disorder; accordingly, the government continued to assert the authority to punish authors and printers after publication for dangerous or provocative printed matter that challenged the political or religious order.

The end of prior censorship in England, however, did not change the law for its colonies in America. Colonial governors would traditionally receive the same “instructions” from the king, requiring that they or their appointed censors approve and license all printed matter before it was published. Colonial governors were usually willing to comply because they were also suspicious of press liberty. After the arrival of North America’s first printing press in 1638, governors of Massachusetts Bay saw to it that the press was adequately supervised, feeling it was their duty to God to punish pernicious authors. Punishments then included “bodily correction,” such as whipping, tongue-boring, or ear-cropping.

The paramount reason for this sort of control of expression was that the state had to be preserved, and this in turn required keeping the peace as well as maintaining social, political, and moral institutions. Also, in the small, cohesive communities of early America, the good reputation of any individual, public or private, was critical to his practical ability to interact with anyone in that community. Nevertheless, during the seventeenth and into the eighteenth centuries, enforcement was increasingly more lenient than the statutes suggested.

By the 1720s, the royal instructions requiring prior licensing were being ignored; laws against blasphemy (language that offended religious orthodoxy) were rarely if ever enforced. Subsequent punishment for seditious libel (words that tended to threaten or undermine the authority of government) or breach of legislative privilege (words that offended a sitting legislature) were now the chief response to radical printers and authors. Even these punishments were confined to fines and imprisonment. The first newspaper in America had arrived in 1704 and by 1721 Boston, then the biggest and most developed town, had three newspapers. The entry of the third, the *New-England Courant*, brought a freer world of print. James Franklin, Benjamin’s older brother, and his radical friends actively took to criticizing the colonial government. James was fined, imprisoned and even banned from publishing a newspaper (at which point Benjamin became the nominal editor in

addition to his continuing role as a secret contributor). The fact that this opposition newspaper continued in spite of punishments made it clear that governments would now have a much more difficult time restraining the press.

The philosophical justifications for these practical efforts to expand the liberty of the press largely came from colonial interpretations of British advocates of greater press liberty. While prior licensing was no longer seriously proposed, the nature and extent of subsequent punishment was hotly contested. The most influential source for radical arguments was *Cato’s Letters*, a series of essays written for publication in London newspapers by two Britons (John Trenchard and Thomas Gordon) who wrote under the pseudonym “Cato.” Cato argued that press liberty was a birthright of Englishmen and that it included the right to print one’s sentiments, leaving it to others to judge the merits. Drawing on the radicals of the English civil war, Cato maintained that the truth—for him, political as well as religious truth—would prevail. Accordingly, this individual right was also a public right because criticism of government would allow the political truth to emerge and thus to protect the public from a despotic government (a constant concern of the opposition theorists that colonial radicals chiefly followed). The *New-England Courant* and other opposition newspapers took to reprinting these essays—and other similar British and colonial essays—frequently.

One such newspaper was John Peter Zenger’s *New-York Weekly Journal* (1734). As in Boston, a controversy between political authorities and their critics led to a new, opposition newspaper and soon an expansion in the theory and practice of freedom of the press. From a strictly legal standpoint, Zenger did not have a leg to stand on: He admittedly had printed criticism of the governor and, under the usual British common-law understanding, any “reflections” on the government or its officers were illegal. The truth of the matter was at best immaterial and at worse an aggravation of the offense (since true critiques of government were even more likely to undermine its authority and thus had the “bad tendency” to bring a breach of peace).

Zenger’s attorneys, James Alexander and Andrew Hamilton, challenged this long-standing doctrine and maintained, following earlier theorists, that the truth ought to be allowed to prevail. Accordingly, the truth of the libel was central to the case, in their view. Since the jurymen were likely to believe in the truth of the criticisms of the unpopular governor, this argument greatly helped Zenger’s case. But traditional doctrine also held that a jury in a libel case could not issue a general verdict (guilty or not guilty of seditious libel)

but rather a “special verdict” limited to the question of publication only (a point that Zenger’s counsel had conceded). Juries, however, had long had a powerful role as populist counterweight to the conservative authority of the rule of law. Zenger’s jury followed the defense’s pleadings and found Zenger not guilty. This bold action did not set a legitimate legal precedent, but it did solidify a new political culture of a broader free press; Zenger’s would be the last seditious libel trial to appear before a colonial jury.

The Pre-Revolutionary Crisis

As political life became more secular and more popular during the 1740s and 1750s, the public sphere of print expanded and the practice of press liberty was spread more widely. Over time, the popularly elected lower houses of the various colonial legislatures developed into defenders of the people’s liberty against the royal governor and his allies. This fit with the increasingly common opposition, or “Whig,” notion that the people’s liberty is always threatened by royal or ministerial power. But it raised a problem for freedom of the press: What if someone printed criticism of the popularly elected assemblymen?

On one view, this was simply freedom of the press, an individual’s right to voice his sentiments. But on another view, any criticism that undermined the people’s faith in the assembly was abusing one safeguard of the people’s liberty (a free press) to undermine another (the popular branch of the legislature). In keeping with this second logic, popular assemblies throughout the colonies reprimanded, fined, and even occasionally imprisoned their critics during the first half of the century. Though this tension in the theory of press liberty would not be completely resolved before the Revolution, the complexities involved made this a much less useful—and thus much less common—curb on freedom of the press during the 1750s and 1760s.

The Stamp Act (March 22, 1765) presented a simple and much more dire threat to freedom of the press. These taxes on paper goods of all sorts, combined with the difficulty of getting legally stamped paper, seemed a type of censorship particularly aimed at opposition newspapers (which were less able to pay since they were less likely to profit from government printing contracts). These and other new laws and actions seemed to reveal an unfolding conspiracy for arbitrary power on the part of the British ministry, the royal governors, and their “Tory” allies in the colonies. The people, led by outraged newspaper editors, condemned the Stamp Act and worked to

subvert it. This controversy and others like it divided the people into two sides. Even with the news of the repeal of the Stamp Act in May 1766, relations failed to return to normal.

As the crisis deepened in the late 1760s and early 1770s, the press teamed with provocative newspaper articles and political pamphlets on both sides. Limits on the press were still debated, but neither the royalist Tories nor the opposition Patriots could gain enough power to control the press. Tories insisted that they defended an individual’s right to print his political views, even if some Patriots might see those printed views as royalist propaganda aimed at gaining the king’s ministers a complete tyranny over the colonists. Where would freedom of the press be then, the Patriots asked. No, they insisted, freedom of the press was properly used to protect the people’s liberty from an overreaching government, as it always had been. True, the Patriots conceded, the truth will prevail, but only if there is a fair fight. With Tories propagandizing their way to complete tyrannical power, all of the people’s liberties—including freedom of the press—were at risk. Rather than risk this, Patriots took to intimidating and even terrorizing Tory printers and authors.

With the commencement of open hostilities on April 19, 1775, the very real threat to the people’s liberties from ministerial forces became unmistakable. Both sides took to allowing only their partisans to print on their side of the war front. But during the war, within a given side, press freedom largely existed as Patriots, for example, debated whether to declare independence and then on what terms to conclude a peace.

The State Constitutions

The Revolution brought significant changes to American society. New, more radical leaders took power and average people entered into public life—and political debate—as they never had before. Members of the revolutionary committees became elected assemblymen and had to answer to the voters, which now usually included white men of all ranks of society. The people expected to have a greater say in the actions and policies of government officials, but the language of the press clauses of the new state constitutions drew on established themes.

The first press clause written in Revolutionary America is found in George Mason’s *Declaration of Rights* for Virginia (1776) and employs the traditional theory, drawn from Cato and others, that a free press is meant as the protector of the people’s liberty from

tyrannical power: “The freedom of the Press is one of the greatest bulwarks of liberty, and can never be restrained but by despotick Governments.” Pennsylvania’s radical constitution (1776) was more specific, insisting that the “printing presses shall be free to every person who undertakes to examine the proceedings of the legislature, or any part of government.” But the early constitutions also voiced the long-standing view that freedom of the press was simply a basic, individual right to print what one pleased. Pennsylvania’s constitution also declared that “the people have a right to freedom of speech, and of writing, and publishing their sentiments; therefore the freedom of the press ought not to be restrained.”

Having just started a war to rid themselves of what they took to be a tyrannical power, the former colonists were careful to emphasize that the people, not a king or even the legislatures, were sovereign. The notion that “the people” were the ultimate source of political power and authority had roots in the English civil war and was a staple of radical theory. But as this idea of popular sovereignty became more widespread in the Revolutionary era, it took on a new cast. Public officials were now “servants” and the people their “masters.” More importantly, one begins to find suggestions of the manner of oversight implied by such a relationship. Virginia’s *Declaration of Rights* (1776), for example, proclaims in its second clause “that all power is vested in, and consequently derived from, the People; that magistrates are their trustees and servants, and at all times amenable [that is, answerable] to them.” In keeping with this emerging logic, many of the new state constitutions called for larger legislatures that better represented the people; some constitutions even gave the people the right to “instruct” their representatives on how they should vote on legislative proposals.

These expansions of the theory of popular sovereignty occasioned new understandings of the role of the press and the nature of freedom of the press. Radical thought had long considered the press, like the popular assembly, primarily as a bulwark against ministerial or royal tyranny. More precisely, the press was seen as a last resort if the more moderate, more continuous safeguard provided by the representative legislature should fail. Pamphlets, broadsides, and especially newspapers were the place for dire warnings rallying the troops against an imminent assault on the people’s liberties. This role for the press would certainly continue, but with the advent of broad-based, annual elections for larger, more representative, and more powerful legislatures, the people’s duty and the press’s role now centered on *maintaining and shaping* rather than simply *defending* the republics the former colonists had established.

As always, a crucial, difficult question was how far this liberty should go. The press clauses in the early state constitutions did not specify any particular limit and the later constitutions were no more explicit. The Massachusetts constitution (1780), for example, declared that “The liberty of the press is essential to the security of freedom in a State; it ought not, therefore, to be restrained in this commonwealth.” (The New Hampshire constitution’s press clause [1783] is almost identical.) While this clause does not enumerate limitations, it is worth noting that the language practically quotes the traditionalist English jurist Sir William Blackstone, but where he insists on subsequent punishment of “dangerous or offensive writings,” these clauses reject constraint.

Even the French revolutionaries, in their *Declaration of the Rights of Man and Citizen* (1789), explicitly include the traditional notion of post facto responsibility for “abuse” of press liberty—but not the American state constitutions. Although we do have evidence of how common people understood their press clause, as we do in the town meeting discussions of the Massachusetts constitution, it is clear that they read the clause to allow no subsequent legal responsibility whatsoever. It was this understanding that led a number of towns to resolve that the clause should be explicitly amended to provide legal damages for defamation of private individuals.

Ultimately, the Massachusetts constitution was not amended to support explicitly the notion of private libel (defaming publications concerning a person’s private matters or characteristics), but the issue would not go away. A person’s private reputation was still seen as sacred and this created complications for freedom of the press in a republic. It soon became clear that if the people are to use the press not merely as a bulwark against tyrannical government, but also as a medium for active, continual, and spirited contribution to the public debate of the republic, some acceptable and relatively distinct dividing line must be fashioned between a people exercising its sovereignty and an individual scandalizing his enemies.

This distinction became more difficult to make as citizens of the new American republic began to wonder whether the truth would really prevail in a raucous, wide-open press. People generally still praised a press open to all sides, believing that even if the press permitted some objectionable or even untrue things to be printed, the benefits of an open press far outweighed the costs and risks of limiting it. Yet there was also an increasing awareness of the disadvantages as well as the advantages of press liberty. Elite figures found their private characters defamed in the press and felt there was little they could do but wait for the truth eventually to prevail and redeem their reputations.

The First Amendment

As the 1780s wore on, many leaders saw weaknesses in the loose union created by the Articles of Confederation (1781), the nation's first constitution. The desire for a stronger, more stable union led to interest in a new constitution with a more powerful central government. Calling themselves "Federalists," these advocates for a stronger national government met in Philadelphia in 1787 and—exceeding their authority to propose revisions to the Articles—crafted a new constitution, which was to be ratified by conventions in the several states. Opponents of ratification came to be called Anti-Federalists; few of them were at the convention. Many of the Anti-Federalists championed maintaining stronger state governments, where popular control was more direct, as a way to ensure limited government and the protection of rights, press liberty chief among them.

Originally, the federal Constitution had no protection for freedom of the press. Anti-Federalists criticized this weakness repeatedly and to great effect in the ratification debates, but the Federalists insisted that the new national government would only have those powers expressly given to it. All other powers and rights would implicitly be reserved to the people and the states. Press liberty, Federalists repeatedly insisted, was thus beyond federal authority; including a provision protecting it would, at best, be unnecessary and, at worst, would mistakenly suggest a federal power over the press. Many Anti-Federalists maintained the traditional republican view that governmental power continuously and inexorably struggles to expand, and thus without a clear declaration protecting press freedom, the national government would soon seek to limit freedom of the press. Such a limitation, they feared, would undermine the more engaged oversight of the government that they expected of republican citizens.

Critics of the Constitution were more likely than its supporters to stress the advantages of an active press. The Anti-Federalists were not merely being naïve about the benefits of an unrestricted press. They admitted that publications might be used for abusive language and false claims, but the political advantages (not to mention the scientific and literary ones) outweighed the disadvantages to the people. Moreover, the disadvantages of an unlimited political press simply had to be borne, since they were interwoven with the advantages. Federalists, on the other hand, were more likely than their critics to stress the disadvantages of an unrestricted political press. The Federalist suspicion of an open press was in part a function of their suspicion of taking republican theory too far

and giving too much real power to an ill-informed citizenry.

Though he was the "father of the Constitution" and a coauthor of the famous *Federalist Papers*, James Madison came to see the importance of a bill of rights protecting basic liberties, freedom of the press especially. After ratification of the Constitution, Madison proposed a number of amendments as a member of the first House of Representatives. He saw more clearly than anyone that while there was still a threat that the government—even though now republican, not monarchical—might tyrannize the people, the bigger threat was that a majority of the people would tyrannize over a minority of controversial printers and authors.

One of Madison's draft press clauses, to be inserted into the body of the text, read: "No State shall infringe the equal rights of conscience, nor the freedom of speech, or of the press, nor of the right of trial by jury in criminal cases." Some Anti-Federalists in the House objected that the federal Constitution already had too much influence over the states, but Madison replied that the clause was "the most valuable amendment on the whole list" of proposed amendments. Madison reasoned that the state governments, since they were more directly tied to the people, were most likely to engage in majority tyranny over individual dissenting voices.

Madison also proposed to add another clause to the body of the Constitution, declaring that "the people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable." The House passed both of Madison's press clauses with nothing more than a slight change in wording. The Senate rejected Madison's prized state-limiting clause and changed the latter press clause to the now familiar First Amendment appended, with the rest of the Bill of Rights, to the end of the Constitution. We have little record of Senate debates to elucidate the meaning given to the clause in that house, but the Senate did reject another version of the clause that would have suggested the possibility of subsequent punishment for libel. Still, it is clear that many Federalists—and perhaps others—understood "freedom of the press" to allow for such limitations.

The Sedition Act Crisis and Beyond

The broad language of the final version of the First Amendment left its meaning unclear. Differences over the proper interpretation of constitutional press

liberty became heated as competing parties emerged and the future of the fledgling republic seemed to hang in the balance. The Federalists, led by men such as Alexander Hamilton and John Adams, spent the 1790s debating policy and exchanging newspaper attacks with the emerging opposition party, the Democratic-Republicans (led by Thomas Jefferson and James Madison). Newspaper impartiality—never pure or perfect—became a victim of increasing partisanship, and editors started ridiculing, for the first time, the very idea of impartiality. By 1798, the Federalists used the pretext of a “quasiwar” with France to pass a number of draconian measures, including the Sedition Act (July 14, 1798), which was intended to silence Republican printers and other government critics.

The Sedition Act criminalized—along with actual sedition and insurrection—“any false, scandalous and malicious writing or writings against the government of the United States ... or Congress ... or the President, with the intent to defame ... or to bring them ... into contempt or disrepute.” The act has long been seen as the embodiment of Federalist arrogance and autocracy. But the Federalists were drawing on a wealth of British and, in some cases, American arguments and precedents. Indeed, the law included provisions that echoed the Zenger trial’s successful defense: evidence of the truth of the alleged libel could be presented by the defense and the jury could issue a general verdict, not merely a “special verdict” on the fact of publication only. Despite these provisions, the sedition law seemed despotic to many people.

The Federalists did not see themselves as despotic or even partisan, but rather loyal to the elected government. Still, the political nature of the sedition law was evident from its specified expiration date as well as its execution. The act was to expire not at the end of the international crisis with France, but at the end of President Adams’s current term. Moreover, only Republicans were indicted, and most of the major opposition papers and several minor ones were targets. The act and its execution were timed with hopes that the trials would take place, and thus silence the editors, before the election of 1800. With the help of a Federalist judiciary and some packed juries, the result was a legal attack on opposition voices and the newspapers.

In defending their approach to freedom of the press, the Federalists drew on some traditional concerns about press abuse, adapted to their view of the new republican theory of government. To them, the Republican critics of government were not defending the people, but attacking them through their elected officials. More importantly, the Federalists maintained that America’s republican form of government

made regulating the press even more important than in any other form of government, since elective government ultimately rested on a truthfully informed electorate. The general public’s limited information and education were good reason, Federalists maintained, to mandate constrained and decorous press discourse, lest the people be confused or deceived. For the Republicans, to the contrary, limited information was good reason to foster more wide-open political debate. A republican form of government did not rely merely on elections every few years, they contended, but on continuing debate of public men and measures.

That debate, Federalists observed, had led to a world of deceptive half-truths and outright lies. The political discourse of the 1790s was among the most vitriolic and partisan of any era in America. Accordingly, the Federalists maintained, the truth would *not* emerge, at least not until much too late. As a result, seditious libel had a bad tendency to undermine the people’s confidence in their chosen officials, making it impossible for the government—the democratically elected government—to carry out its public mandate.

Republicans—like the Anti-Federalists before them—increasingly conceded that the truth did not always immediately prevail, but they responded to the Federalists’ theory in a number of ways. First, the centuries-old logic that the “bad tendency” of words might bring a breach of peace was oppressive: It could support the most draconian restrictions on press liberty, since just about any criticism could tend to induce someone to violence. More profoundly, Jefferson, Madison, and their followers maintained that opinion, not “truth,” was really at issue in political debates. Factual truths that could be proven in a court of law were rarely if ever central to a seditious libel case; thus, interpretations of freedom of the press that included protections for provable truth—such as the *Sedition Act*—were really despotic limitations on press liberty.

Moreover, Republicans insisted that the liberty of the press and its licentiousness—its use and abuse—were inseparable: One simply could not separate and punish what was false and abusive without undermining the necessary and salutary critiques of a spirited, democratic press. One simply had to permit the occasional public (though not purely private) libel.

Republicans like James Madison, then, were formulating and defending a broad notion of press liberty that allowed for civil suits for private defamation, but dispensed with the notion of public libel. Only actual, overt acts of violence or rebellion would be punishable crimes. But this theory was developed by the opposition party at its most extreme and embattled. Once in power, President Jefferson pardoned the victims of the

expired Sedition Act, but soon also encouraged a few seditious libel cases against critics of his administration. A few of these cases actually rested on the claim that the federal government, now lacking the statutory jurisdiction of the Sedition Act, could have common law jurisdiction over seditious libel cases; in *U.S. v Hudson and Goodwin*, 7 Cranch 32 (1812), the Supreme Court held that the Constitution granted no common-law criminal jurisdiction. The few other cases drew on state rather than federal law and so were seen as independent of the First Amendment's declaration that "Congress shall make no law ... abridging the freedom ... of the press."

One of these cases, *People v. Croswell* (3 Johns. Cas. 337, NY, 1804), gave rise to the theory of press liberty that would animate most states throughout the nineteenth century. Defending the Federalist printer Harry Croswell on appeal, Alexander Hamilton espoused principles that were more restrictive than those that came out of the Zenger trial seventy years earlier and had recently been included in the disputed Sedition Act. Hamilton's theory of freedom of the press permitted seditious libels laws that gave the jury uncontested authority to find a general verdict and made truth a justification if "published with good motives and for justifiable ends." Hamilton lost the case but this standard soon became law in New York and many other states.

Until the twentieth century, the First Amendment's press clause was not understood to apply to these state laws. Nor did it stop the federal postal service from effectively closing the mail to abolitionist newspapers sent to the South, where state laws also criminalized transmission of publications that could be interpreted as inciting slave revolts. It is worth noting that during the War of 1812, in the face of successful British attacks on American soil and arguably treasonous discussions of New England secession, the Madison administration made no attempt to enact federal restrictions on the press. Nevertheless, despite the libertarian theories of Frederick Grimke and Thomas Cooley later in the century, this view of a nearly absolute political press liberty would not hold sway until the twentieth century.

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References and Further Reading

- Bailyn, Bernard. *Ideological Origins of the American Revolution*. Cambridge, MA: Harvard University Press, 1967.
- Eldridge, Larry D. *A Distant Heritage: The Growth of Free Speech in Early America*. New York: New York University Press, 1994.

- Levy, Leonard. *Emergence of a Free Press*. New York: Oxford University Press, 1985.
- Martin, Robert W. T. *The Free and Open Press: The Founding of Democratic Press Liberty, 1640–1800*. New York: New York University Press, 2001.
- Rabban, David M. *Free Speech in its Forgotten Years, 1870–1920*. New York: Cambridge University Press, 1999.
- Rosenberg, Norman L. *Protecting the Best Men: An Interpretive History of the Law of Libel*. Chapel Hill: University of North Carolina Press, 1986.
- Schlesinger, Arthur M. *Prelude to Independence: The Newspaper War on Britain, 1764–1776*. New York: Knopf, 1958.
- Smith, James Morton. *Freedom's Fetters: The Alien and Sedition Laws and American Civil Liberties*. Ithaca, NY: Cornell University Press, 1956.
- Smith, Jeffery A. *Printers and Press Freedom: The Ideology of Early American Journalism*. New York: Oxford University Press, 1988.

Cases and Statutes Cited

- People v Croswell*, 3 Johns. Cas. 337 (NY, 1804)
- U.S. v Hudson and Goodwin*, 7 Cranch 32 (1812)
- Sedition Act 1 Statutes at Large 596 (1798)

See also Alien and Sedition Acts (1798); Bill of Rights; Structure; Bills of Rights in Early State Constitutions; Freedom of Speech and Press under the Constitution; Early History (1791–1917); Legislators' Freedom of Speech; Ratification Debate, Civil Liberties in

PREVENTATIVE DETENTION

Traditionally, our system has recognized that an accused in a noncapital offense has a right to freedom before conviction so long as there is adequate assurance he will be available for trial and any subsequent sentencing. This was based on the presumption of innocence, the Eighth Amendment proscription against excessive bail, and the theory that an individual should not be punished for future acts. The exception to this was in the juvenile justice system where virtually all states had some provision for the pretrial preventative detention of juveniles. Many opponents of preventative detention have argued that any attempt to predict future violent or dangerous behavior is unreliable. However, the late 1970s and early 1980s saw a move on the part of several jurisdictions to allow pretrial detention to prevent crime and protect the public. This came to culmination in the form of a federal statute and two U.S. Supreme Court decisions.

The Federal Bail Reform Act of 1984 provides that, under specified circumstances, the accused may be detained following a hearing and written findings

based on clear and convincing evidence that no other combination of conditions will reasonably assure the individual's appearance at trial or the safety of others or the community. A hearing must be held if requested by the government in a case involving (1) a crime of violence; (2) a crime for which the maximum sentence is life imprisonment or death; (3) drug offenses with a maximum of ten years or greater; or (4) in any other felony if the accused was previously convicted of two or more of these offenses. In addition a hearing is required in cases where there is an allegation of a serious risk of flight, obstruction of justice, or intimidation of perspective witnesses or jurors.

In *Schall v. Martin*, 467 U.S. 253 (1984), Justice Rehnquist, writing for a six-to-three court, upheld the constitutionality of a New York statute allowing pretrial detention of juveniles in delinquency proceedings. *Schall* affirmed the applicability of due process to juvenile proceedings but stressed *parens patriae* interest in protecting the welfare of the child and the interests of the community. Central to the decision was the Court's finding that the statute contained extensive due-process protections and that it was regulatory in nature, not punitive.

The Supreme Court addressed the issue of preventative detention in the adult criminal justice system three years later in *United States v. Salerno*, 481 U.S. 739 (1987). Again writing for a six-to-three majority, Chief Justice Rehnquist rejected a facial challenge that the Federal Bail Reform Act of 1984 violated the due process clause of the Fifth Amendment and the Eighth Amendment proscriptions against excessive bail. The Court concluded that while pretrial punishment is unconstitutional, the due process clause does not bar all pretrial detention. In balancing the government's regulatory interest in community safety and the individual's liberty interest, the Court determined that Congress intended the statute to address a pressing societal problem, preventing danger to the community, and again held that the goal of the statute was regulatory in nature, not punishment.

Chief Justice Rehnquist concluded that the narrow focus of the statute, individuals charged with a specific category of serious offenses, and the safeguards built into the process (right to counsel, an adversary hearing, and proof by clear and convincing evidence) comported with substantive due process. With respect to the Eighth Amendment claim, the Court held the prohibition against excessive bail was just that and did not prevent "the government from pursuing other admittedly compelling interests through regulation of pretrial release" subject to the limitation that the "conditions of release or detention not be 'excessive' in light of the perceived evil."

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References and Further Reading

- Alshuler, Albert W., *Preventive Pretrial Detention and the Failure of Interest-Balancing Approaches to Due Process*, Michigan Law Review 85 (1986): 510.
 Fagan, Jeffrey, and Guggenheim, Martin, *Preventive Detention and the Judicial Prediction of Dangerousness for Juveniles: A Natural Experiment*, Journal of Criminal Law and Criminology 86 (1996): 415.
 Miller, Marc, and Guggenheim, Martin, *Pretrial Detention and Punishment*, Minnesota Law Review 75(1990): 335.

Cases and Statutes Cited

- Schall v. Martin*, 467 U.S. 253 (1984)
United States v. Salerno, 481 U.S. 739 (1987)
 Federal Bail Reform Act of 1984, 18 U.S.C. §§ 3141-3150 (2005)

See also **Bail; Sentencing Reform Act**

PRINCE v. MASSACHUSETTS, 321 U.S. 158 (1944)

Prince, her two children, and a young girl in her legal custody were Jehovah's Witnesses. Each week, Prince distributed religious magazines on the streets. She permitted her children to participate in the preaching with her on the sidewalks. In particular, the child at issue held up the magazines in her hand for passers-by to see. On the side of her bag was printed, "Watch-tower and Consolation 5 cents per copy."

Prince was charged with violating a state child labor law, which prohibited children from selling or offering for sale any magazines, newspapers, or other merchandise in any street or public place. The statute punished any parent or guardian who compelled or permitted the child to work in violation of the statute.

The question presented was whether the state statute, as applied, contravened the Fourteenth Amendment by denying or abridging the appellant's freedom of religion or denying her the equal protection of the laws. Prince further claimed the state violated her parental right as secured by the due process clause of the Fourteenth Amendment, arguing that the Fourteenth Amendment guaranteed her liberty, to bring up her child teaching the child the tenets and practices of her faith, and her child's liberty, to observe those tenets and practices.

In rejecting Prince's claims and affirming the lower court, the Supreme Court held that, as applied, the statute neither violated freedom of religion nor denied equal protection of the laws (321 U.S. at 167). The Court recognized the need to balance the freedom of religion and this case, the parental right to control the upbringing of children, with the authority of the state

to protect the children's welfare. While the Supreme Court has recognized the rights of children to exercise their religion and of parents to give religious instructions, *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), and the rights of parents to provide their children religious and private secular schooling, *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (recognizing the private realm of family life), the state also has a recognized interest in protecting the welfare of children (*Pierce v. Society of Sisters*, 268 U.S. 510, 1925 [requiring school attendance]; *Sturges & Burn Mfg. Co. v. Beauchamp*, 231 U.S. 320, 1913 [prohibiting child labor]). In this case, the Court recognized the state's interest in protecting children from the "crippling effects of child employment," "especially in public places, and the possible harms arising from other activities subject to all the diverse influences of the street" (*Prince*, 321 U.S. at 168). The Court rejected the equal protection argument because all children, not only Jehovah's Witnesses, are excluded from engaging in prohibited conduct.

The significance of *Prince* was its recognition that while parents have a liberty interest in care and nurturing of their children, the state may nevertheless regulate some areas of family life in the interest of the child's welfare.

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Cases and Statutes Cited

Commonwealth v. Prince, 313 Mass. 223, 46 N.E.2d 755 (1943)

Pierce v. Society of Sisters, 268 U.S. 510 (1925)

Prince v. Massachusetts, 321 U.S. 158 (1944)

Sturges & Burn Mfg. Co. v. Beauchamp, 231 U.S. 320 (1913)

West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943)

PRIOR RESTRAINTS

Prior restraints are legal actions by the government to prevent publication, in advance, of words, pictures, or other communications. There are two principal types of prior restraint: licensing and injunctions. Licensing schemes require that one seek permission from a state agent prior to speaking. An injunction is a court order that, when applied to communications, forbids future publication or distribution of a particular communication.

A system of prior restraint stands in contrast to a system providing for subsequent punishment. That is, "prior restraint" refers to the timing of regulation: a prior restraint may be unconstitutional even though the particular communication might be validly

restricted under a system of subsequent punishment. Because of the special harms associated with prior restraints, they are presumptively unconstitutional.

The First Amendment was enacted against a background of English press licensing. English law once required submission of all publications to government officials in advance of publication. Anything published without a license was a crime—even if the censor would have approved the publication had it been properly submitted. In 1769, William Blackstone, the renowned English law scholar, criticized licensing schemes because they subject the press "to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion, and government."

In 1694, English law had abandoned the system of prior restraint—a hundred years before the First Amendment was adopted. Yet, many scholars have debated whether the framers of the First Amendment intended to prohibit anything more than prior restraints. The better view is that the Framers were also reacting to English "seditious libel," the crime of criticizing the behavior of the government or government officials.

Special Harms Associated with Licensing; Procedural Safeguards

Prior restraints embody harms unassociated with subsequent punishment. For example, licensing schemes grant enormous discretion to a single person or agency to decide what ideas may be circulated to the public. In *Lovell v. Griffin* (303 U.S. 444, 1938), for example, the Supreme Court invalidated a city ordinance that prohibited distribution of "literature of any kind" within the city without first obtaining written permission from the city manager. The Court emphasized the sheer breadth of the ordinance, which covered any type of publication, anywhere in the city, at any time, through any means of distribution, at the city manager's sole discretion. In other cases, the Court has underscored "the difficulty of effectively detecting, reviewing, and correcting content based censorship, without standards by which to measure the licensor's action."

When preclearance is required, abuse of power is very difficult to prevent. When the censor is charged with keeping "obscenity" (for example) out of circulation, the pressures all tilt towards overinclusion. With a stroke of a pen, it is easy to ban problematic publications; the censor is likely to face less trouble if he or she denies publication rights to marginal cases, and censors tend to respond more to the immediate

pressure of containing “dangerous ideas,” than to an abstract interest in “free speech.”

Licensing schemes are also pernicious because they often lead to self-censorship by speakers. When those who wish to communicate must seek permission before publishing, they often anticipate how the censor will respond and thus “reform” their communication before even seeking a license. If one is turned down for a license, he or she must start the process all over again or else fight with the censor. Meanwhile, the effort takes time and energy, and whatever benefits lodged with timely communications are lost. The system of communication thus risks becoming trite, routine, and responsive only to the arbitrariness of the censor’s personal predilections.

The fact that licensing schemes are *presumptively* unconstitutional does not mean that they are *invariably* unconstitutional. The harms of licensing may be ameliorated if the licensing official is given “objective” standards to administer and incorporates other procedural safeguards.

In one case (*Freedman v. Maryland*, 380 U.S. 51, 1965), a distributor had exhibited a movie without first submitting the picture to the censorship board, violating Maryland’s statutes forbidding the exhibition of obscene films. He was convicted for failing to obtain preclearance, even though the state would have licensed the movie had it been properly submitted. In its review, the Court emphasized the “heavy presumption” against licensing, but described procedural requirements (in addition to the “objective standards”) that would save such a statute from a finding of unconstitutionality. First, the burden rests with the censor. Second, the censor must expeditiously act to grant the license or to seek a judicial determination that the communication may be barred. Furthermore, the final determination must be made by a court, not the censor, and any temporary restraint on publication must be severely limited to the time absolutely essential to prompt judicial resolution.

These *Freedman* guidelines have proven important in contexts other than obscenity. The end result is that government *may* adopt licensing schemes to guard against certain carefully delineated harms of speech, but must adopt appropriate procedures designed to forestall arbitrary censorship decisions.

Injunctions

A second major type of prior restraint is injunctions against speech activities, classically illustrated by *Near v. Minnesota*, 283 U.S. 697 (1931). In *Near*, a

Minnesota statute authorized prosecutors to seek “abatement” against nuisance “malicious, scandalous and defamatory” publications. A newspaper published several articles charging that gangsters controlled Minneapolis and that law enforcement failed in its duties. The publication made vague allegations against the chief of police, including “illicit relations with gangsters [and] participation in graft.” Acting on the authority of the statute, a prosecutor sought an order of abatement against the newspaper, and a state judge permanently enjoined the publishers from circulating in the future any “malicious, scandalous or defamatory” publication.

On the basis of past offenses, the order forbade all future publications that might, after the fact, be found “scandalous.” Thus, the publishers would have to take the risk that anything they ever published in the future might violate the lower court’s order. The Supreme Court held that by setting up a system of prior restraint, the statute violated the First Amendment, as did any injunctions issued under the statute’s authority.

The Court reached a similar result in the *Keefe* case (*Organization for a Better Austin v. Keefe*, 402 U.S. 415, 1971), where it held invalid as a prior restraint an injunction preventing distribution of eighteen thousand pamphlets attacking alleged “blockbusting” real estate activities. As the Court later described, the injunction against Keefe “operate[d], not to redress alleged private wrongs, but to suppress, on the basis of previous publications, distribution of literature ‘of any kind’ in a city of 18,000.”

One of the key characteristics of an injunction is that violation is punishable by a contempt prosecution, a violation separate from the underlying offense. Consider *Walker v. City of Birmingham* (388 U.S. 307, 1967), a case arising out of the civil right movement in 1963. In Birmingham, Alabama, a group of black ministers, including the Rev. Martin Luther King, Jr., refused to obtain a parade permit prior to marching during Good Friday. City officials wishing to stop the march obtained an injunction from a cooperative state court judge, who, without hearing from the marchers, issued an order requiring them to comply with the vaguely worded city ordinance. Indeed, the city’s ordinance was ultimately found unconstitutional as an invalid licensing scheme. However, rather than comply with the judge’s order, the marchers openly flouted it and were held in contempt.

The Supreme Court held that the marchers could be held in contempt of the injunction ordering compliance with the ordinance, even though the ordinance was unconstitutional. Moreover, they were not permitted to defend against the contempt charges by asserting the unconstitutionality of the ordinance.

This latter rule, adopted five to four by the Court in *Walker*, became known as the “collateral bar rule.”

Because injunctions are so powerful, the Court has emphasized the very limited circumstances under which courts may grant them in cases involving speech. For example, the procedure followed in *Walker* in obtaining the injunction—that is, without giving the marchers notice or an opportunity to be heard—is unconstitutional in all but the most extreme circumstances, such as lack of time or inability to notify. A similar procedure was found unconstitutional in *Carroll v. President & Commissioners of Princess Anne*, 393 U.S. 175 (1968), when local officials obtained an injunction forbidding a rally. They feared violence because, at a rally the previous day, the right-wing organizers made “militantly racist” speeches to a crowd of whites and blacks and promised to continue the next day. The Supreme Court held that even in those circumstances, injunctions barring speech activities may not be issued unless the speakers are given an opportunity to be heard.

Although many injunctions against speech might qualify as “prior” restraints, not all injunctions restricting speech activities are prior restraints. The key question is often whether there has been a full adjudication of the merits prior to the issuance of an injunction. Consider a judicial determination that particular materials are obscene and thus may be regulated by the government. May further distribution of the obscene material be enjoined? The answer is yes: the Court has upheld the use of injunctions to restrain continued publication of material deemed obscene. In *Kingsley Books v. Brown*, 354 U.S. 436 (1957), the Court distinguished *Near v. Minnesota* as a case in which a state had “empowered its courts to enjoin the dissemination of future issues of a publication because its past issues had been found offensive.”

A similar result occurred when a newspaper published “help wanted” job listings under headings designating job preference by sex, which was illegal in the jurisdiction. The Court explained in *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973), that an injunction forbidding the practice was not a prior restraint where the lower court had enjoined the practice only after a full hearing on the merits that the underlying practice was unlawful. On the basis of the *Pittsburgh* case, some scholars have argued that only *preliminary* injunctions are presumptively unconstitutional. On this reading, injunctions entered against communications are not prior restraints if they follow a full hearing on the merits that the communication may constitutionally be regulated.

In the obscenity context and *Pittsburgh Press*, courts enjoined particular publications that were

unprotected communications. A related issue concerns a context in which a speaker has in the past engaged in unprotected communicative activities, and an injunction is sought to prevent the speaker from engaging in future similar behavior. An injunction issued in such a context begins to resemble the *Near* injunction, which predicated a future-oriented injunction against the press based on the newspaper’s past behavior.

The Court has wrestled with this problem in addressing several abortion-related protests. In *Madsen v. Womens’ Health Center*, 512 U.S. 753 (1994), abortion protesters surrounded an abortion clinic, obstructing entrances and public thoroughfares and interfering with the rights of patients entering the clinic to seek medical assistance. The state court issued an injunction to protect access to the clinic, including erecting a 36-foot “buffer zone” around the clinic, after narrower orders had not succeeded in protecting clinic access. The injunction applied to the leaders of the protest “and all persons acting in concert” with them.

On appeal, the Supreme Court concluded that the injunction was not a prior restraint because it had been issued “not because of the content of” the demonstrator’s expression, but “because of their prior unlawful conduct” in earlier demonstrations. Yet, because injunctions against speech activities pose “greater risks of censorship and discriminatory application than do general ordinances,” the Court reviewed the injunction with a heightened standard of review. The test is whether the injunction “burdens no more speech than necessary” to protect the important governmental interest.

Applying this standard, the *Madsen* Court upheld the buffer zone around street and sidewalk entrances to the clinic, but reversed the order as it applied to the side and rear of the clinic because access had not been impeded in those areas. In this and several subsequent cases, the Court has affirmed a fixed 15-foot protected zone around clinic entrances, but overturned a 15-foot “floating bubble” injunction—one that followed persons entering or leaving clinics. The Court has also overturned a ban on carrying signs or other images outside clinics, but affirmed a noise ban that protected patients within a clinic from raucous noises likely to interfere with medical treatment.

The doctrine of prior restraint came into play in 1977 when Neo-Nazis announced their intention to march through the largely Jewish community of Skokie, Illinois, where one in six residents was a Holocaust survivor. The village obtained an injunction against the Nazis banning parading in uniform, displaying swastikas, or distributing pamphlets that “promote hatred against persons of Jewish faith.”

PRIOR RESTRAINTS

State courts refused to stay the injunction pending appeal. The Supreme Court reversed, concluding that the delay of a year or more while the case was appealed was a burden on the Nazis' First Amendment rights and that the state was required to adopt "strict procedural safeguards" including immediate appellate review of any such injunctions restraining speech activity.

In general, injunctions restraining speech activity are not always invalid, but because they restrict communicative activity, lower courts must ensure that procedural protections are afforded. Reviewing courts, in turn, must evaluate such injunctions to ensure that they restrict no more speech than necessary to protect important governmental interests.

Injunctions to Protect National Security

An important context in which the appropriateness of a previous restraint forbidding speech has arisen is national security. In *Near*, the Court had suggested that an injunction might be properly issued against speech to "prevent actual obstruction to [the government's] recruiting service or the publication of the sailing dates of transports or the number and location of troops."

Subsequently, in the important decision in *New York Times Co. v. United States*, 403 U.S. 713 (1971), the Supreme Court explored the extent to which "national security" could justify a prior restraint on publication. The government sought to enjoin publication of a series of studies called "The Pentagon Papers," which analyzed the history of U.S. involvement in Indochina, from clandestine operations in the 1950s to the invasion of Vietnam. By the time of the 1971 study, the American invasion of Vietnam involved over a half-million troops and incited the mobilization of millions of Americans in antiwar protests. The government asserted that publication could interfere with national security, risk lives, and prolong the war. The newspapers countered that, at most, publication would embarrass government officials, but would satisfy the extraordinary public interest in the history of how the war started and was maintained.

The Supreme Court ruled six to three against the government. In addition to an opinion by the Court, every justice authored a separate opinion. Because the majority did not speak with one voice, the reasoning of the justices varied. Some justices argued that a prior restraint is never justified. Others argued that, in any event, no injunction could ever be justified based on bald assertion: the government would have

to prove a great threat to national security. Another key group of justices argued that, in the absence of a statute authorizing the issuance of an injunction, the Court had no authority to act. The three dissenting judges were unhappy about the race through the courts and were willing to trust the national security assertions by government officials. Nonetheless, because of the splits on the Court, the key question left open for a future case is whether an injunction would have been granted if Congress had authorized such an extraordinary remedy.

This latter question was addressed in *United States v. Progressive*, 467 F.Supp. 990 (W.D. Wisc. 1979), a case that did not get to the Supreme Court. A monthly magazine, *The Progressive*, planned to publish a technical article on hydrogen bomb design in an article entitled, "The H-Bomb Secret: How We Got It, Why We're Telling It." *The Progressive* claimed that the article merely summarized information already available to the public, but at the request of the government a lower federal court issued a preliminary order forbidding publication. The lower court ruled that the case was different from the Pentagon Papers case because the earlier case had involved historical material; the government had not proved that publication affected national security; here, there was a statutory basis for issuing an injunction. *Progressive* never reached final decision, however. Before a full hearing, a different magazine published similar information, and the government abandoned its case.

Even if it cannot prevent the press from publishing merely embarrassing information, may the government prevent its employees from disclosing secrets? In *Snepp v. United States*, 444 U.S. 507 (1980), a former CIA employee had agreed not to publish any information without obtaining preclearance from the agency. Without doing so, he published a book about his activities while he was an agent in Vietnam. Even though the book contained no classified information, the Court regarded the government's preclearance procedure as a reasonable means of enforcing its interests in protecting state secrets. It then granted the CIA the relief it sought: all Snepp's profits from the sale of his book, *Injunctions to Ensure Fair Trials, Protect Functioning of Governmental Offices, & Guard Privacy* were turned over to the CIA.

In addition to national security cases, some courts have issued injunctions to protect the right to a fair trial. The Constitution guarantees criminal defendants the right to a fair trial, which includes the presumption of innocence. Extensive pretrial coverage can jeopardize these rights, especially when potential jury members are likely to be prejudiced against the accused by pretrial publicity.

In *Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976), a trial court attempted to protect the fair trial rights of the accused by prohibiting the press from publishing the accused's confessions or any other facts "strongly implicative" of guilt. The Supreme Court overturned the order. Although finding that publicity might impair the defendant's rights, the Court held that alternatives were available short of a gag order on the press that would have protected the defendant without impeding the important public interest in reporting on criminal trials. Such alternatives included moving the trial to another location; sequestering jurors; and issuing gag orders directed to participants in the criminal trial, including the lawyers, police, and witnesses in the case.

Indeed, such gag orders directed to trial participants, which operate like prior restraints, are frequently issued in criminal trials. The Court upheld gag orders directed at lawyers in *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991), holding that lawyers participating in an active case can be prohibited from making statements that have "substantial likelihood of materially prejudicing" the outcome.

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References and Further Reading

- Blackstone, William. *Commentaries on the Laws of England*, 151–152.
 Blasi, Vincent, *Toward a Theory of Prior Restraint: The Central Linkage*, Minnesota Law Review 66 (1981): 11.
 Chafee, Zechariah. *Free Speech in the United States*. 1941.
 Jeffries, John C., *Rethinking Prior Restraint*, Yale Law Journal 92 (1983): 409.
 Levy, Leonard. *Emergence of a Free Press*. 1985.
 Monaghan, Henry P., *First Amendment "Due Process,"* Harvard Law Review 83 (1970): 518.
 Redish, Martin, *The Proper Role of the Prior Restraint Doctrine in First Amendment Theory*, Virginia Law Review 70 (1984): 53.
 Symposium: *National Security and the First Amendment*, William & Mary Law Review 26 (1985): 715.
 Tribe, Laurence H. *American Constitutional Law*, 2nd ed. Mineola, NY: Foundation Press, 1988.

Cases and Statutes Cited

- Bantam Books v. Sullivan*, 372 U.S. 58 (1963)
Carroll v. President & Commissioners of Princess Anne, 393 U.S. 175 (1968)
City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750 (1988)
Freedman v. Maryland, 380 U.S. 51 (1965)
Kingsley Books v. Brown, 354 U.S. 436 (1957)

- Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988)
Lovell v. Griffin, 303 U.S. 444 (1938)
Madsen v. Womens' Health Center, 512 U.S. 753 (1994)
National Socialist Party v. Skokie, 432 U.S. 43 (1977)
Near v. Minnesota, 283 U.S. 697 (1931)
Nebraska Press Association v. Stuart, 427 U.S. 539 (1976)
New York Times Co. v. United States, 403 U.S. 713 (1971) [The Pentagon Papers Case]
Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971)
Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations, 413 U.S. 376 (1973)
Poulos v. New Hampshire, 345 U.S. 395 (1953)
Schenck v. Pro-Choice Network of Western New York, 519 U.S. 357 (1997)
Snepp v. United States, 444 U.S. 507 (1980)
United States v. Progressive, 467 F.Supp. 990 (W.D. Wisc. 1979)
Walker v. Birmingham, 388 U.S. 307 (1967)

See also **Abortion Protest Cases; Anti-Abortion Protest and Freedom of Speech; Blackstone and Common-Law Prohibition on Prior Restraints; Captive Audiences and Free Speech; Content-Based Regulation of Speech; Content-Neutral Regulation of Speech; Freedom of Access to Clinic Entrances (FACE) Act, 108 Stat. 694 (1994); Gag Orders in Judicial Proceedings; Gag Rule; King, Martin Luther, Jr.; Madsen v. Women's Health Center, 512 U.S. 753 (1994); Marches and Demonstrations; Movie Ratings and Censorship; National Security and Freedom of Speech; National Security Prior Restraints; Near v. Minnesota, 283 U.S. 697 (1931); New York Times Co. v. United States, 403 U.S. 713 (1971); Obscenity; Picketing; Public Forum Doctrines; Snepp v. United States, 444 U.S. 507 (1980); Traditional Public Forums; United States v. The Progressive, Inc., 467 F. Supp. 990 (W.D. Wis. 1979); Viewpoint Discrimination in Free Speech Cases**

PRISON POPULATION GROWTH

The growth in prison population in the United States during the past eighty-five years has been startling. From the 1920s until the mid-1970s, prison populations remained remarkably stable. But beginning in the mid-1970s, there was a veritable explosion in defendants being sent to prison. The figures speak for themselves. In the first period, incarceration rates hovered around one hundred per one hundred thousand. By 2002, the incarceration rate was 476 per 100,000. Whereas in the 1920s the U.S. rate was comparable to those of many other Western nations, today we have become the "leader" (by a big margin) in incarceration.

There are many hypotheses proffered to explain the dramatic increase. First, the “politicization” of crime in the 1970s led to a clamor for tougher sentences. This in turn led to a proliferation of mandatory sentencing and “three strikes” laws, which required a fixed period of incarceration for particular offenses and very long sentences for defendants with multiple convictions (often even if for minor felonies). Second (and relatedly), the sentencing reform movement that gathered steam late in the 1970s often resulted in fixed (and lengthier) sentences for many offenders, coupled with substantial increases in the time a defendant would serve before becoming eligible for parole. Third, the explosion in drug use and/or dramatically increased enforcement of drug laws—and sentencing guidelines that mandated imprisonment for drug offenders—flooded the state and federal prisons with inmates.

Incarceration rates increased from the 1970s on, even during periods in which crime levels remained constant. Typically, states were spending increasing amounts for prisons while simultaneously cutting expenditures in other areas (including higher education). Some states now are “rediscovering” the possibility that rehabilitation can be a legitimate goal of criminal justice. There seems to be a renewed interest in limiting the actual costs incurred by incarcerating so many; this has taken the form of revisiting the wisdom of some mandatory sentences for some offenders, of developing new “alternatives” to prison, and of reconsidering the wisdom of all drug criminalization programs.

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References and Further Reading

- Blumstein, Alfred. “Prisons: A Policy Challenge.” In *Crime*, James Q. Wilson and Joan Persilia, eds. Oakland, CA: ICS Press, 2002, pp. 451–482.
- Bureau of Justice Statistics, “Prison and Jail Inmates at Midyear 2004.” *Bureau of Justice Statistics Bulletin*. Washington, D.C.: U.S. Department of Justice—Office of Justice Programs, April 2005.
- Bureau of Justice Statistics. *Sourcebook of Criminal Justice Statistics—2002*. Washington, D.C.: U.S. Department of Justice—Office of Justice Programs, 2004.
- The Sentencing Project, “Ten Leading Nations in Incarceration Rates” and “Rate of Incarceration in Selected Nations,” Washington, D.C.: The Sentencing Project, 2005. Available: www.Sentencingproject.org.
- Tonry, Michael. *Sentencing Matters*. New York: Oxford University Press, 1996.
- . *Thinking About Crime*. New York: Oxford University Press, 2004.

See also *Harmelin v. Michigan*, 501 U.S. 957 (1991); **Mandatory Minimum Sentences; Race and Criminal Justice**

PRISONERS AND FREE EXERCISE CLAUSE RIGHTS

Prisoners’ freedom to practice their religious beliefs confronts two distinguishing features of imprisonment. First, imprisonment necessarily entails limitations on the rights of inmates. Second, having isolated prisoners from the civilian community, imprisonment renders them dependent on prison staff to accommodate their religious beliefs.

The historical and criminological foundation of the American prison rested in significant part on the exercise of religion. Benjamin Rush—the “father” of the American penitentiary—sought to impart Christian love through a disciplined prison regime. Rush and his allies believed that religious instruction, alongside silence and labor, would return offenders to moral virtue. His prototype prison, Philadelphia’s Walnut Street Jail of the 1790s, prophetically demonstrated that order could not beget virtue: noble aspirations gave way to the prison’s persistent function: warehousing the rabble. The promise of the prison as a rehabilitative institution would be reborn on repeated occasions during the nineteenth and twentieth centuries, but prison staff and penal policymakers came to envisage a largely secular prison.

The drafting and ratification of the Bill of Rights, despite its First Amendment guarantee of the free exercise of religion, did little to benefit prisoners with faiths other than the mainstream Protestant denominations. Historically, prison officials have selectively accommodated the religious beliefs of their wards, with Jews, Catholics, Muslims, and other religious “outsiders” experiencing unfair treatment. The complaint of a Muslim plaintiff in *Pierce v. LaValle* (293 F.2d 233, 2d Cir., 1961, on remand, 212 F. Supp. 865, N.D.N.Y. M 1962, aff’d per curiam, 319 F.2d 844, 2d Cir. 1963) that prison staff denied him a Koran as well as access to a spiritual advisor represented the norm, not the exception.

Until the late 1960s, federal courts refused to safeguard inmates’ civil liberties, including their rights under the free exercise clause. Judges advanced several explanations for keeping their “hands off” prisoners’ civil rights actions, including judges’ lack of expertise in penal issues and the potential for undermining the authority of correctional officers.

Inmates experiencing religious oppression figured prominently in the collapse of the hands-off doctrine. Litigation on their behalf reached the Supreme Court in *Cruz v. Beto*, 405 U.S. 319 (1972). A Buddhist inmate had complained that Texas prison officials operated a religious program open only to Protestant, Roman Catholic, and Jewish inmates. The Supreme Court ruled that the equal protection clause accorded

him a “reasonable opportunity of pursuing [his] faith comparable to the opportunity afforded fellow prisoners who adhere to conventional religious precepts.” By implication and in dicta, the Court acknowledged that inmates enjoy free exercise rights. Thereafter, lower federal courts extended the boundaries of prisoners’ free exercise rights to embrace religious dress, diets, assembly, and correspondence and visitation with spiritual advisors.

To secure protection under the free exercise cause, the claimants’ beliefs must be religious in nature and sincerely held. In distinguishing religious beliefs from other discourses, federal courts typically use one of two tests. The “definition-by-analogy” test looks for attributes resembling those of mainstream religions, such as the equivalent of the Bible, clergy, and holidays. This approach employs a content based methodology that disfavors unorthodox beliefs. By contrast, the “state-of-mind” test inquires whether the beliefs in question occupy a place in the claimants’ world view comparable to that of adherents of mainstream religions. Claimants’ characterization of their beliefs as “ultimate concerns” or “divine commands,” however unconventional their content, often satisfy this test.

Courts also determine whether a claimant is sincere. Other motivations include gaining special privileges or concealing illicit activities. Courts have yet to find agreement on a governing test. Case law does suggest two key attributes of sincerity: claimants’ familiarity with their religion’s principal tenets and adherence to the principal tenets.

Securing the protection of the free exercise clause by no means frees inmates from a host of prison rules that directly or incidentally limit the practice of religion. The Supreme Court addressed the scope of prisoners’ free exercise rights in *O’Lone v. Estate of Shabazz*, 482 U.S. 342 (1987). At issue were prison rules that had the incidental effect of excluding inmates assigned to working offsite from a Muslim congregational celebration, Jumu’ah, held inside the prison on Fridays. Prison officials countered that overcrowding and staff shortages dictated offsite work crews and that gate congestion as well as other concerns dictated that the work crews not return until the close of the day. The *Shabazz* Court employed the four-part reasonableness standard first used in *Turner v. Safely*, 482 U.S. 78 (1987), in which the Court resolved challenges to prison rules forbidding the marriage of inmates and most inmate-to-inmate correspondence. The *Turner* and *Shabazz* Courts spoke of the reasonableness standard as a means of ensuring judicial deference to the judgments of prison officials.

The *Shabazz* Court determined that the plaintiffs’ exclusion from Jumu’ah found support in each of four factors comprising the reasonableness test.

The threshold inquiry addressed whether the challenged rule or policy bears a “rational connection” to a government interest that is legitimate and neutral regarding religion. Finding no infirmity in this respect, the Court balanced the three remaining inquires—that is, the availability of alternative means of practicing the asserted right, the impact of accommodating the asserted right of prisoners and prison staff, and whether a ready alternative to the challenged rules can be instituted with little expense and inconvenience.

Complaints that the Supreme Court had under-protected religious freedom in the civilian community led the Congress to enact the Religious Freedom Restoration Act (RFRA) in 1997. In relevant part, it barred the states as well as the federal government from imposing a substantial burden on religious exercises unless doing so advanced a compelling state interest through the least restrictive means. In *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Supreme Court held RFRA unconstitutional in its application to the states. The Court found that the act exceeded Congress’s authority to remedy state-sanctioned discrimination under Article V of the Fourteenth Amendment.

In 2000, Congress drew upon its broad authority under the spending and commerce clauses of the Constitution to pass the Land Use and Institutionalized Persons Act (RLUIPA). In relevant part, it reimposed the compelling state interest/least restrictive means standard on the states when they place a “substantial burden” on the exercise of religion by institutionalized persons. The statute is silent on what constitutes such impairment and the case law is divided over whether the affected religious practice must be a central tenet of faith. Case law regards prison security concerns as a compelling government interest under RLUIPA; other penal objectives that would be acceptable under *Shabazz*, such as administrative and financial considerations, are unlikely to meet this high standard. Similarly, overinclusive restrictions on inmates’ free exercise rights that would be permitted under *Shabazz*’s reasonableness standard run afoul of RLUIPA’s least restrictive means test.

RLUIPA has survived constitutional challenges. Lower federal courts have held that Congress did not exceed its powers under the spending and commerce clauses in enacting RLUIPA. In *Cutter v. Wilkinson*, 125 S. Ct. 2113 (2005), a unanimous Supreme Court overturned a circuit court ruling that RLUIPA advanced religion in violation of the establishment clause. The *Cutter* Court held that RLUIPA permissibly accommodates institutionalized persons, who must look to government for fulfillment of their religious needs.

Enactment of RFRA and RLUIPA coincided with the growth of privately sponsored religious programming in prisons. Typically grounded in Christian evangelism, faith-based programs such as Prison Justice Ministries' InnerChange Freedom Initiative provide religious instruction, counseling, job training, and postrelease counseling. Critics have argued that such programs provide services and amenities otherwise unavailable to the prison population and thereby favor religion in violation of the First Amendment's establishment clause.

As Justice Brennan observed in his dissenting opinion in *Shabazz*, prisoners' "membership in a spiritual community" may well be their "last source of hope for dignity and redemption." Acquiring that membership through faith-based programs or other religious practices does not necessarily comport with the rule-based, bureaucratic prison where efficiency takes precedence over free exercise rights. Consequently, prisoners' free exercise rights will continue to require protection, be it statutory or judicial.

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References and Further Reading

- Blischak, Mathew P., *O'Lone v. Estate of Shabazz: The State of Prisoners' Religious Free Exercise Rights*, *American University Law Review* 37 (Winter 1988): 353–386.
- Branham, Lynn S., *Go Sin No More: The Constitutionality of Governmentally Funded Faith-Based Prison Units*, *University of Michigan Journal of Law Reform* 37 (Winter 2004): 291–352.
- Buss, William G., *An Essay on Federalism, Separation of Powers, and the Demise of the Religious Freedom Restoration Act*, *Iowa Law Review* 83 (January 1998): 391–434.
- Chiu, Anne Y., *When Prisoners Are Weary and Their Religious Exercise Burdened, RLUIPA Provides Some Rest for Their Souls*, *Washington Law Review* 79 (August 2004): 999–1027.
- Clear, Todd R., Patricia L. Hardyman, Bruce Stout, Karol Lucken, and Harry R. Dammer. *The Value of Religion in Prison*, *Journal of Contemporary Criminal Justice* 16 (2000): 53–75.
- Developments in the Law—In the Belly of the Whale: Religious Practice in Prison*, *Harvard Law Review* 115 (May 2002): 1891–1913.
- Giles, Cheryl Dunn, *Turner v. Safley and its Progeny: A Gradual Retreat to the "Hands-Off" Doctrine?* *Arizona Law Review* 35 (Spring 1993): 219–236.
- Laycock, Douglas, and Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, *Texas Law Review* 73 (December 1994): 209–245.
- McConnell, Michael W., *The Origins and Historical Understanding of Free Exercise of Religion*, *Harvard Law Review* 103 (May 1990): 1409–1517.
- McKelvey, Blake. *American Prisons*. Montclair, NJ: Patterson Smith, 1977.
- McNeil, Matthew, *The First Amendment Out on Highway 61: Bob Dylan, RLUIPA, and the Problem With Emerging Postmodern Religion Clauses Jurisprudence*, *Ohio State Law Journal* 65 (2004): 1021–1056.
- Meranze, Michael. *Laboratories of Virtue*. Chapel Hill: University of North Carolina Press, 1996.
- Mushlin, Michael B. *Rights of Prisoners*, 3rd ed., vol. 1, St. Paul, MN: West Group, 2002, 673–777.
- Pepper, Stephen, *Taking the Free Exercise Clause Seriously*, *Brigham Young University Law Review* 1986 (1986): 299–336.
- Rothman, David J. *The Discovery of the Asylum: Social Order and Disorder in the New Republic*. Boston: Little, Brown, 1971.
- Solove, Daniel J., *Faith Profaned: The Religious Freedom Restoration Act and Religion in the Prisons*, *Yale Law Journal* 106 (November 1996): 459–470.

Cases and Statutes Cited

- City of Boerne v. Flores*, 521 U.S. 507 (1997)
- Cruz v. Beto*, 405 U.S. 319 (1972)
- Cutter v. Wilkinson*, 125 S. Ct. 2113 (2005)
- O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987)
- Pierce v. LaValle*, 293 F.2d 233 (2d Cir. 1961), on remand, 212 F. Supp. 865 (N.D.N.Y. M 1962), aff'd per curiam, 319 F.2d 844 (2d Cir. 1963)
- Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb-2000bb-4 (2000)
- Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C.A. ss2000cc et seq

See also **Accommodation of Religion; City of Boerne v. Flores**, 521 U.S. 507 (1997); **Equal Protection Clause and Religious Freedom; Establishment Clause Doctrine: Supreme Court Jurisprudence; Establishment Clause (I): History, Background, Framing; Establishment of Religion and Free Exercise Clause; Free Exercise Clause Doctrine: Supreme Court Jurisprudence; Free Exercise Clause (I): History, Background, Framing; O'Lone v. Estate of Shabazz**, 482 U.S. 342 (1987); **Religious Freedom Restoration Act; Religious Land Use and Institutionalized Persons Act of 2000; Turner v. Safley**, 482 U.S. 78 (1987)

PRISONERS AND FREEDOM OF SPEECH

Imprisonment has historically imposed severe restrictions on freedom of speech. Nineteenth-century doctrine regarded inmates as "slaves of the state" and thus lacking freedom of speech. Well into the twentieth century, courts refused to adjudicate prisoners' suits under a self-imposed "hands-off" doctrine. Federal courts have since granted prisoners limited freedom of speech under the First Amendment.

Three rulings by the Supreme Court define the constitutionally protected boundaries of prisoners'

freedom of speech. In *Procunier v. Martinez*, 416 U.S. 3976 (1974), the Court prohibited censorship of non-legal correspondence sent from prisoners to civilians unless the censorship is “no greater than necessary” and reasonably advances an “important or substantial government interest.” The *Martinez* Court thus applied a level of judicial review one step below the “compelling interest” test usually used in free speech cases. Moreover, the Court held that censorship triggers the following procedural safeguards: notice to the affected inmates that their correspondence has been censored; an opportunity to object to the censorship; and, finally, third-party review of the protested censorship.

In limiting the reach of the *Martinez* ruling to nonlegal correspondence sent by prisoners to civilians, *Turner v. Safley*, 482 U.S. 78 (1987), permitted severe restrictions on all other First Amendment communication involving prisoners. The *Turner* Court upheld a nearly total ban on inmate-to-inmate correspondence. *Turner* employed the lowest level of scrutiny—that is, whether the restraint in question “is reasonably related to legitimate penological interests.” The majority opinion mandated a four-step inquiry into the reasonableness of the challenged censorship: (1) whether the regulation limiting free speech rationally advances the governmental interest in rehabilitating offenders or safeguarding the public, staff, and inmates; (2) the availability of an alternative means of exercising freedom of speech; (3) the impact of accommodating the asserted right; and (4) the absence of a ready alternative to the challenged regulation.

Later, in *Thornburgh v. Abbot*, 490 U.S. 401 (1989), the Supreme Court applied *Turner*’s reasonableness test to prison rules barring certain publications sent to prisoners from civilians. Once again, the Court found the challenged government censorship constitutionally acceptable.

In applying the *Procunier*, *Turner*, and *Thornburgh* rulings to subsequent litigation, U.S. district and circuit courts have permitted censorship of prisoner speech having sexual, criminal, or disruptive content. On the other hand, lower federal courts have struck down vague criteria for censoring inmate speech and categorical exclusion of newspapers and magazines. Critics argue that judicial scrutiny has nonetheless failed to prevent excessive regulation of prisoners’ speech.

In conclusion, federal courts have given prison staff extensive but not unlimited authority to engage in prior restraint of speech. Prisoners therefore experience a degree of censorship unanticipated by the Framers of the First Amendment.

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References and Further Reading

- Branham, Lynn S. *Cases and Materials on the Law of Sentencing, Corrections, and Prisoners’ Rights*, 6th ed. St. Paul, MN: West Group, 2002.
- Feeley, Malcolm M., and Edward L. Rubin. *Judicial Policy Making and the Modern State*. New York: Cambridge University Press, 1998.
- Jacobs, James B. *New Perspectives of Prisons and Imprisonment*. Ithaca, NY: Cornell University Press, 1983.
- McKelvey, Blake. *American Prisons*. Montclair, NJ: Patterson Smith, 1977.
- Mushlin, Michael B. *Rights of Prisoners*, 3rd ed., vol. 1. St. Paul, MN: West Group, 2002, 587–672.
- Robertson, James E., *Catchall Prison Rules and the Courts: A Study of Judicial Review of Prison Justice*, St. Louis University Public Law Review 14 (1994): 153–173.
- , *The Majority Opinion as the Social Construction of Reality: The Supreme Court and Prison Rules*, Oklahoma Law Review 53 (Summer 2000): 162–196.
- Smith, Christopher E. *Law and Contemporary Corrections*. Belmont, CA: Wadsworth, 2000.
- Welch, Michael. *Corrections: A Critical Approach*. New York: McGraw-Hill, 1996.

Cases and Statutes Cited

- Procunier v. Martinez*, 416 U.S. 3976 (1974)
- Thornburgh v. Abbot*, 490 U.S. 401 (1989)
- Turner v. Safley*, 482 U.S. 78 (1987)

See also **Judicial Review; Prior Restraints; *Thornburgh v. Abbot*, 490 U.S. 401 (1989); *Turner v. Safley*, 482 U.S. 78 (1987)**

PRIVACY

Essentially, the right of privacy involves the right of individuals to be let alone, at least when governments or others fail to demonstrate some compelling reason for intruding. The right of privacy places a high value on individual autonomy and holds that autonomy ought to prevail across a range of decisions—for example, those involving intellectual pursuits, religious and moral choices, family matters, and sexual conduct of adults. Privacy usually is seen as highly individualist in nature and thus is consistent with the traditionally individualistic U.S. social and political culture; however, privacy interests usually cannot be protected except by balancing interests of individuals, groups, and governments. These days, privacy has come to be seen as a potentially important obstacle against technological intrusions; for example, the protection of personal data potentially retrievable through various electronic means is regarded as a pressing contemporary problem.

In private lawsuits, the right of privacy has sustained recovery for (1) intrusion into a person’s private affairs, (2) public disclosure of private facts

about a person's life, (3) publishing materials that place a person in a false light in the eyes of the public, and (4) exploiting, especially for commercial purposes, a person's name or likeness. These four instances have been enshrined in the Restatement of the Law of Torts (1981).

As a right protected by the U.S. Constitution, the privacy issue has focused most prominently on reproductive freedom, although the right is also important in protecting against other unwarranted intrusions by government officials, especially in instances of eavesdropping or searches.

The Seminal Warren/Brandeis Article

Most scholars cite the key contribution of Samuel Warren and Louis Brandeis in their 1890 article in *Harvard Law Review*, "The Right to Privacy," to the conceptualization of a right of privacy in American jurisprudence, but there were a few other important antecedents. For example, an advocacy group currently working for privacy rights suggests that the English Justices of the Peace Act (1361) was founded on privacy when it provided for the arrest of "peeping toms and eavesdroppers." One recent text suggests that Thomas Cooley's idea of the "right to be let alone," written in 1888, was a foundation stone, but one which was inferred from English common-law decisions. For example, in his 1765 opinion in *Entick v. Carrington*, 19 Howard State Records 1029 (K.B. 1765), voiding a warrant issued by a minister of the government of the day (rather than a magistrate) to enter a home and search for personal papers thought to contain a libel, Chief Justice Camden wrote, "We can safely say there is no law in this country to justify the defendants in what they have done; if there was, it would destroy all the comforts of society, for papers are often the dearest property any man can have."

Warren and Brandeis also cited English precedents, but their article was chiefly concerned with intrusions on privacy through unauthorized publication of private materials, especially photographs. For example, they cited the case of *Prince Albert v. Strange* (1849) for the common-law rule that prohibited not only reproductions of etchings that Prince Albert and Queen Victoria had made for their private use and enjoyment, but also even publication of a description of them. The justices did concede that the right to privacy ought not to prohibit publication of any matter that is truly of public or general interest. However, in their view, if the publication is of purely private information, neither the truth of the matter published nor the absence of malice of

the publisher should be a defense. For this view they cited the common-law view that a man "is entitled to be protected in the exclusive use and enjoyment of that which is exclusively his." Their conclusion was that "the principle which protects personal writings and all other personal productions, not against theft and physical appropriation, but against publication in any form, is in reality not the principle of private property, but that of an inviolate personality."

The remedies Warren and Brandeis proposed were damages, tangible actual damages as well as compensation for "injury to feelings." They also called for the use of injunctions in certain cases.

Interpretations by the Supreme Court of the United States

In *Boyd v. U.S.*, 116 U.S. 616 (1886), Justice Bradley liberally construed the Fourth Amendment protection against unreasonable searches to raise a privacy interest in the protection of a businessman's private papers and invoices. This privacy interest was viewed as one aspect of common-law property rights, citing *Entick v. Carrington* (discussed earlier in the context of Thomas Cooley's "right to be let alone"). In 1891, only a year after the Warren and Brandeis article, Justice Gray, writing for a majority of the U.S. Supreme Court, confirmed "the right to be let alone" in the case of *Union Pacific Railway Co. v. Botsford*, 141 U.S. 250 (1891). The railroad had sought a court order for a surgical examination to determine the extent of injuries to a plaintiff who had claimed head injuries from falling from an upper berth in a sleeping car. Gray found this to be "an indignity, and assault and a trespass" upon the plaintiff. This decision was, of course, prior to modern pretrial discovery procedures.

Yet, more than thirty years later in *Olmstead v. U.S.*, 277 U.S. 438 (1928), a majority of the U.S. Supreme Court failed to recognize wiretapping of private telephone conversations as a breach of the Fourth Amendment's protection against unreasonable searches and seizures because there had been no physical trespass in the electronic intrusion. But change was coming, for Justice Brandeis had joined the Supreme Court in 1916, and his dissenting opinion in *Olmstead* viewed the invasion of privacy as the critical aspect of the case and the requirement of a physical trespass and seizure to be outmoded. He wrote that "every unjustifiable intrusion by the Government on the privacy of the individual, whatever the means employed" must be seen as a violation of the Fourth Amendment. He noted, presciently, that

“discovery and invention have made it possible for the government, by means far more effective than stretching upon the rack, to obtain disclosure in court of what is whispered in the closet.” Eventually, Congress passed the Federal Communications Act of 1934, which made the interception and divulgence of telephone or telegraphic messages a federal crime. However, the FBI took the position that it could continue with wiretaps so long as the messages were not divulged in criminal prosecutions.

Critics nonetheless have long argued that the U.S. Constitution is silent as to a right of privacy, although the Ninth Amendment says that the “enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.” These “retained rights,” which presumably existed prior to constitutional government, have been held to include the right of privacy. Moreover, in addition to the Fourth Amendment protection against unreasonable searches and seizures, privacy interests have been found to be protected by the First Amendment (freedom of speech, religion, assembly, and association), the Fifth Amendment (protection against self-incrimination), and—as to state governments—by the due process clause of the Fourteenth Amendment.

In his dissent in *Poe v. Ullman*, 367 U.S. 497 (1961), in which a majority of the U.S. Supreme Court refused on narrow procedural grounds to take a case challenging the 1879 Connecticut statute prohibiting the use of birth control measures, Justice Harlan wrote that the law violated “what by common understanding throughout the English-speaking world, must be granted to be the fundamental aspect of ‘liberty,’ the privacy of the home in its most basic sense.”

Sexuality and the Right of Privacy

The key case in which a majority of the Court supported a broadly conceived constitutional right of privacy was *Griswold v. Connecticut*, 391 U.S. 145 (1965). Justice Douglas wrote in *Griswold* that the right of privacy could be found in the “penumbras” (shadows) cast by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments. Douglas’s vivid, emphatic rhetoric is worth repeating:

We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or worse, hopefully enduring, and intimate to the degree of being sacred.

Other members of the majority in *Griswold* relied chiefly on privacy as a “retained right” under the Ninth Amendment, but, whatever their differences as to the reasons, the majority agreed that decisions of a married couple concerning birth control were none of the business of the government. Harlan repeated his view from *Poe v. Ullman* that the statute violated the due process clause of the Fourteenth Amendment by violating “basic values ‘implicit in the concept of ordered liberty.’” But Chief Justice Warren and Justice Brennan joined with Justice Goldberg’s opinion that the “language and history of the Ninth Amendment reveal that the framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the [Bill of Rights].” Thus, the right of privacy “in the marital relation is fundamental and basic—a personal right ‘retained by the people’ within the meaning of the Ninth Amendment.” Justice Douglas relied on a broader view of the Ninth Amendment, a position that by itself create federally enforceable rights, but that may be part of the foundation for the rights that may be encompassed within the liberty guaranteed by the due process clause of the Fourteenth Amendment.

It should be noted that Justice Stewart joined Justice Black’s dissent in *Griswold*, which protested that the use of the due process clause of the Fourteenth Amendment and of the Ninth Amendment simply provided the opportunity for the Supreme Court to strike down “all state laws that it considers to be arbitrary, capricious, unreasonable or oppressive.” Judgments made on the basis of natural justice, rather than on specific provisions of the Constitution, might be appropriate for legislators, Justice Black argued, but not for judges. It was in this sense that the justice was a strict constructionist. He was not sympathetic with the possibility that our constitutional founders believed in natural, though sometimes unspecified, rights.

Following *Griswold* in the 1971 case of *Eisenstadt v. Baird*, 405 U.S. 438 (1972), the Supreme Court declared unconstitutional a state law that prohibited the sale of contraceptive devices to unmarried persons. This was found to be discriminatory against single persons, but Justice Brennan went further in writing that “if the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”

Before *Griswold* there were several important decisions that, in retrospect, appear to implicate privacy, though each was decided on other grounds. These

included the right of parents to decide where and how their children should be educated (*Pierce v. Society of Sisters*, 268 U.S. 510, 1925) as well as the right of private associations to refuse to disclose their membership lists to authorities, absent some compelling justification (*NAACP v. Alabama*, 357 U.S. 449, 1958).

Reasonable Expectations of Privacy

In the 1967 decision in *Katz v. U.S.*, 389 U.S. 347 (1967), the U.S. Supreme Court relied on the “reasonable expectation of privacy” as the basis for protecting against police interception of telephone calls when no probable-cause warrant had been issued. This decision concluded that eavesdropping through a microphone attached to the wall of an enclosed public telephone booth, while technically not a trespass as customarily required by the Fourth Amendment protection against unreasonable searches and seizures since the 1928 *Olmstead* decision, clearly violated an objectively justifiable expectation for the privacy of the conversation in the booth. Thus, whatever a person “seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.”

The reasonable expectation of privacy has since been a core determinant of whether a governmental intrusion constitutes a violation of the Fourth Amendment, but it should be noted that the rule has sometimes had unpredictable outcomes. In the 1979 case of *Smith v. Maryland*, 442 U.S. 735 (1979), the Supreme Court held that the use of a “pen register,” which, when connected to a telephone line, records phone numbers called (but not the content of the calls), was not an unlawful search because the phone subscriber, in the Court’s view, does not have a reasonable objective expectation of privacy in the numbers called. This certainly was not a strong affirmation of the right of privacy.

The Supreme Court also has held that there may be no reasonable expectation of privacy even when law enforcement officers have committed a technical trespass. Thus, in 1984 in *Oliver v. U.S.*, 466 U.S. 170 (1984), the “open fields” doctrine sustained a search and seizure without warrant of a field in which marijuana was growing on the grounds that there can be no objectively justifiable expectation of privacy for such an open field (even though the field was behind a locked gate posted with a “No Trespassing” sign). Furthermore, in 1986 in *California v. Ciraolo*, 476 U.S. 207 (1986), the Supreme Court held that there was no reasonable expectation of

privacy against police surveillance from a helicopter. However, *Kyllo v. U.S.*, 121 U.S. (1986), held that the use of thermal imaging (from outside a house) by federal agents to detect heat lamps in a house that were being used to grow marijuana was an unreasonable search in the absence of a probable-cause warrant. Altogether, the outcomes relying on a reasonable expectation of privacy are mixed and seem inconsistent.

Another application of the expectation of privacy, though in this instance under the First Amendment, came in a 1969 decision in *Stanley v. Georgia*, 394 U.S. 561 (1969), that held that, while holding that the public sale, display, or distribution of obscenity was not protected by freedom of expression, the possession of pornographic materials in the privacy of one’s home could not be the subject of a search, seizure, or consequent arrest (with the notable exception of child pornography). Thus, Justice Marshall wrote for a unanimous Supreme Court, “If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his house, what books he may read or films he may watch.” This ruling did not apply to pornographic films that were shown in a public “adults only” movie theatre.

Roe v. Wade and Its Consequences

By far the most controversial application of the right of privacy has been in the extension of reproductive freedom to include the termination of pregnancy. The 1973 decision of the U.S. Supreme Court in *Roe v. Wade*, 410 U.S. 113 (1973), has been the subject of continuing controversy for more than forty years. Unlike the decision in *Griswold*, the court’s majority recognized that the respect for the prospect of life and societal concerns about terminating a pregnancy had to be taken into account in determining limits on a woman’s autonomy in making decisions concerning her body. Justice Blackmun’s opinion balanced these by adopting a trimester rule. A woman’s autonomy was respected and protecting during the first trimester of pregnancy. During the second trimester, government could intrude, but only for the purpose of protecting the life and health of the woman; during the third trimester, government could intervene to protect the interest of the unborn child and to prohibit abortions not required for protecting the life or health of the woman.

Justice Blackmun thus concluded that the right of personal privacy includes the decision whether to terminate a pregnancy, but that the right was not

unqualified. While the state of Texas claimed in *Roe* that life “begins at conception and is present throughout pregnancy” and therefore the state had the right to protect life “from and after conception,” the justice concluded that the Court “need not resolve the difficult questions of when life begins.” During the first trimester, before the viability of the fetus, the woman’s right to choose prevailed.

It probably was the extratextual and innovative character of the trimester rule that chiefly outraged legal commentators who purport to be textual purists. During the hearings on his nomination to the Supreme Court, Robert Bork testified against a creative interpretation of the Ninth Amendment:

I do not think you can use the Ninth Amendment unless you know something of what it means. For example, if you had an amendment that says “Congress shall make no” and then there is a ink blot and you cannot read the rest of it and that is the only copy you have, I do not think the Court can make up what might be under the ink blot if you cannot read it.

In commenting on this quote, law professor Randy Barnett has argued that our constitutional framers had an understanding of the rights retained by the people that rested on natural law—natural rights that are boundless—that is, they are beyond complete specification. Barnett proposed that such an understanding can readily be translated into a simple presumption in favor of liberty. Such a presumption would require that governments demonstrate a compelling justification for interfering with individual liberty. It is interesting that Barnett’s conclusion is quite consistent with the right to be left alone, absent compelling justification, that was the original basis of the right of privacy. His conclusion was:

Adopting the presumption of liberty would enable us finally to acknowledge the Ninth Amendment’s unique constitutional function by resisting legislative or executive usurpation of the unenumerated rights “retained by the people” while, at the same time, avoiding unfettered judicial discretion.

Many opponents of *Roe v. Wade*, however, are moralists who believe that the effort to protect potential life is indeed sufficiently compelling to overcome any presumption of liberty. Their firm conviction that life begins at conception precludes all abortions (except for those who reluctantly concede that abortions might be appropriate in the instance of forcible rape or incest). Efforts to put justices on the Supreme Court who might vote to repeal *Roe v. Wade* have been a continuing feature of the conservative social agenda in American politics. On the other side, the “right to choose” has been a litmus test of liberal political views.

The core of the *Roe* decision has often rested on the views of one or two justices, most notably on the view of Justice Sandra Day O’Connor, the first woman to serve on the U.S. Supreme Court. In a dissenting opinion in 1983, Justice O’Connor wrote that the “trimester approach is a completely unworkable method of accommodating the conflicting personal rights and compelling state interests that are involved in the abortion context.” The decisive votes on the Supreme Court have moved toward an “undue burden” rule proposed by Justice O’Connor in *Maher v. Roe* (432 U.S. 464) in 1977: “*Roe* did not declare an unqualified ‘constitutional right to an abortion.’ ... Rather, the right protects the woman from unduly burdensome interference with her freedom to decide whether to terminate a pregnancy.”

Thus the question that must be decided is whether a state regulation or limitation on abortion represents an undue burden on a woman’s autonomy. One example that has been held an undue burden was a state requirement of spousal notification as a condition to a woman’s choice to terminate a pregnancy (*Planned Parenthood v. Casey*, 112 S.Ct. 2791 (1992); in the same case the Supreme Court upheld a state requirement of informed consent by one parent when the pregnant woman was a minor, although it required a judicial bypass when a minor could show sufficient maturity to make a decision on her own or that parent notification and consent was not in her best interest.

The Supreme Court also has ruled that neither the federal nor state governments have any obligation to provide public funds for nontherapeutic abortions (*Maher v. Roe*, 1977 [state], and *Harris v. McRae*, 448 U.S. 297, 1980 [federal—the Hyde Amendment]).

Sexual Orientation

Individual autonomy concerning sexual conduct has also proven controversial with respect to homosexuals. The U.S. Supreme Court’s decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986), upheld a Georgia sodomy statute that criminalized sodomy even for adults in the privacy of a home. The majority refused to recognize a fundamental right for adults to engage in private sexual conduct.

Writing for the Court Justice White failed to find any fundamental rights for homosexuals to engage in sodomy. He noted that sodomy was a criminal offense in the common law of England and was against the laws of the thirteen states that ratified the original U.S. Bill of Rights. Justice White was unwilling to consider the possible voiding of all sexual crimes

committed in private, such as adultery or incest. In his view traditional morality provided an adequate rational for such laws. Above all, he was quite unwilling to extend the right of privacy to protect private homosexual conduct of consenting adults. Chief Justice Burger went even further in finding the criminalization of sodomy to be “firmly rooted in Judeo-Christian moral and ethical standards.” He added that homosexual sodomy had been a capital offense under Roman law.

The four dissenters in *Bowers* said that the case was not about a fundamental right to engage in homosexual conduct, but rather it was simply about the “most comprehensive of rights and the right most valued by civilized men, namely the right to be let alone.” The majority view in *Bowers* did not last long, for in 2003 the U.S. Supreme Court reconsidered in *Lawrence and Garner v. Texas*, U.S. 123 S.Ct. 2472 (2003).

In this instance a Texas statute criminalized only sodomy by homosexuals. Most provisions respecting regulation of private adult heterosexual conduct had been decriminalized. The court’s majority voided the Texas statute apparently on grounds of equal protection of the law and of privacy. Justice Kennedy noted that despite almost twenty years of controversy, the Court had sustained in *Planned Parenthood v. Casey* (1992) the central holding of *Roe v. Wade* that “our laws and tradition afford constitutional protection to decisions affecting marriage, procreation, contraception, family relations, child rearing and education.” The justice also noted that the Court’s decision in *Romer v. Evans*, 517 U.S. 620 (1996), had struck down legislation directed at homosexuals as a class. The extension of equal protection to cover sexual orientation, particularly in the concurring opinion of Justice O’Connor, was a key development, but the affirmation of the right of privacy in Justice Kennedy’s opinion was a direct repudiation of *Bowers v. Hardwick*.

Thus, Justice Kennedy wrote that “liberty protects the person from unwarranted government intrusions into a dwelling or other private places.... Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. He concluded that “*Bowers* was not correct when it was decided, and it is not correct today”—a conclusion that found Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, in dissent, upholding the correctness of the holding in *Bowers*. Justice Thomas also wrote separately, saying that while he found the Texas statute to be “uncommonly silly,” he could find no “general right of privacy” within the Constitution with which to strike it down.

Data Privacy

The advent of high-speed information technology in the past few decades also has raised a number of pressing concerns about privacy, especially the capacity of powerful government-owned computer systems to scan huge amounts of information. The first legislation addressing these concerns came in the early 1970s, with the first U.S. law coming in 1974. One advocacy report notes that all such laws require that personal information must be: (1) obtained lawfully, (2) used only for the intended purpose, (3) not excessive for the intended purpose, and (4) destroyed once the purpose is served.

The post 9/11 world has made data privacy concerns even more compelling. For example, the U.S. PATRIOT Act relies significantly on database surveillance, including, for example, the prospect of examining records of public libraries to see what books its patrons are reading. Any transmission that uses Web technology or airwave transmission is open to government surveillance and the ramifications for privacy have not yet been determined. The U.S. government has led efforts to limit privacy and to enhance surveillance by law enforcement. Federal law formerly relaxed probable-cause requirements in the instance of investigation of foreign intelligence and for special courts to hear cases in national security electronic surveillance. The PATRIOT Act and its extensions proposed by the second Bush administration would extend surveillance to nonstate actors who may be engaged in preparing or executing acts of terrorism. However, the surveillance net cast by the administration has potential application to the private records of millions of Americans, an outcome immediately challenged in federal court.

Issues involving personal identity have also come to the fore. Whether the issue is identity theft or national or international identity registration systems, privacy concerns raise important issues. The retrieval of biometric data, including DNA—or facial features identification—is at the cutting edge, with appropriate rules and regulations yet to be determined.

The recitation of developments in the past several paragraphs demonstrates that the privacy concerns raised by Warren and Brandeis in 1890 may still be relevant in abstract principle, but quaint in the details. Technology-driven social changes promise to outstrip the capacity of the law to enforce effective controls. Perhaps most ominous is the reality that individuals today lack the capacity to protect their privacy. Probably the only way to monitor electronic surveillance and intrusion is through countervailing institutions and programs that themselves require sophisticated

technology, large resources, and their own technocratic personnel; of course, these might have much the same capacity to intrude on personal privacy as the governmental institutions that they would watch. The old question—Who will watch the watchers?—has taken on new meaning and relevance. This question moves transnational and international protection of privacy rights to first order of importance.

Privacy rights have been recognized in Article 12 of the Universal Declaration of Human Rights (1948) (“No-one should be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks on his honor or reputation”), in the International Covenant on Civil and Political Rights, and in regional rights documents such as the European Convention on Human Rights and Freedoms (1950), the American Convention of Human Rights, and the American Declaration of the Rights and Duties of Man (1965). The most extensive application of privacy rights in these documents, so far, has been through Article 8(1) of the European Convention, which provides for protection of private and family life, home and correspondence, while Article 8 (2) provides that any interference with these must be (1) “in accordance with the law”; (2) permitted only “in the interest of national security, public safety or economic well-being of the country”; and (3) “necessary in a democratic society.” Cases interpreting these words have been prominent among decisions of the European Court of Human Rights.

As noted in a recent text, it is interesting that entirely circumscribing the family with the right of privacy may have the consequence of limiting the rights of children; thus, the U.N. Convention of the Rights of the Child has had the purpose, in part, of separating the rights of children from the rights of families and treating children sometimes as independent “rights actors” relative to their parents and governments. Indeed, it is characteristic of privacy claims that they almost always involve the balancing of competing interests, as we have seen in this entry.

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References and Further Reading

- Abraham, Henry and Barbara Perry. *Freedom and the Court*, 8th ed. Lawrence: University Press of Kansas, 2003.
- Amar, Akhil Reed. *The Bill of Rights: Creation and Reconstruction*. Cambridge, MA: Yale University Press, 1998.
- Cogan, Neil H., ed. *The Complete Bill of Rights: The Drafts, Debates, Sources and Origins*. New York: Oxford University Press, 1997.
- Feldman, David. *Civil Liberties and Human Rights in England and Wales*, 2nd ed. Oxford University Press, 2002 (see, especially, Ch. 9, “The Scope of Legal Privacy”).

Prosser, William L., *Privacy*, California Law Review 48 (1960): 383–423.

Warren, Samuel D., and Louis D. Brandeis, *The Right to Privacy*, Harvard Law Review IV (1890): 193–220.

Cases and Statutes Cited

- Bowers v. Hardwick*, 478 U.S. 186 (1986)
- Boyd v. U.S.*, 116 U.S. 616 (1886)
- California v. Ciraolo*, 476 U.S. 207 (1986)
- Cooley v. Board of Wardens, Port of Philadelphia*, 53 U.S. 299 (1852)
- Eisenstadt v. Baird*, 405 U.S. 438 (1972)
- Entick v. Carrington*, 19 Howard State Records 1029 (K.B. 1765)
- Griswold v. Connecticut*, 391 U.S. 145 (1965)
- Harris v. McRae*, 448 U.S. 297 (1980)
- Katz v. U.S.*, 389 U.S. 347 (1967)
- Kyllo v. U.S.*, 121 U.S. (2001)
- Lawrence and Garner v. Texas*, U.S. 123 S.Ct. 2472 (2003)
- Maher v. Roe*, 432 U.S. 464 (1977)
- NAACP v. Alabama*, 357 U.S. 449 (1958)
- Oliver v. U.S.*, 466 U.S. 170 (1984)
- Olmstead v. U.S.*, 277 U.S. 438 (1928)
- Pierce v. Society of Sisters*, 268 U.S. 510 (1925)
- Planned Parenthood v. Casey*, 112 S.Ct. 2791 (1992)
- Poe v. Ullmann*, 367 U.S. 497 (1961)
- Roe v. Wade*, 410 U.S. 113 (1973)
- Romer v. Evans*, 517 U.S. 620 (1996)
- Smith v. Maryland*, 442 U.S. 735 (1979)
- Stanley v. Georgia*, 394 U.S. 561 (1969)
- Union Pacific Railway Co. v. Botsford*, 141 U.S. 250 (1891)

PRIVACY PROTECTION ACT, 94 STAT. 1879 (1980)

Although nominally concerned with privacy, in reality the Privacy Protection Act of 1980 (PPA) is intended to protect the First Amendment rights of journalists. In short, the act ensures that journalists are free from search warrants seeking to discover notes, drafts, tapes, photographs, or other work products that may provide evidence of criminal activity. Although the act was passed in direct response to the Supreme Court’s decision in *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978), its origins can be traced to a decision rendered a decade earlier.

For most of the twentieth century, search warrants could only be obtained to discover contraband, instrumentalities, or fruits of criminal activity (*Boyd v. U.S.*, 116 U.S. 616, 1886). In 1967, the Supreme Court ruled that search warrants could also extend to searches for “mere evidence” of crime (*Warden v. Hayden*, 387 U.S. 294, 1967). This expansion placed journalists directly in the path of future search warrants. Journalists are often in possession of evidence of crimes, such as tapes of informants, photographs, notes, and recordings. The ability of law enforcement

agencies to obtain search warrants to seek mere evidence of crime meant it was only a matter of time before journalists would be targeted.

In 1971, the district attorney's office in Santa Clara, California, obtained a search warrant for the offices of Stanford University's student-run paper, *The Stanford Daily*. The warrant was related to a recent clash between police and students on the Stanford campus. The paper had run a series of stories about the clash and included a number of photographs depicting police and student violence. During the protest, some officers were injured by students and the police were eager to uncover the identity of some of the perpetrators. The *Stanford Daily*'s office was searched in the hope of finding more photographs, that had not been published, which might aid in the identification of students that had attacked the police. Although no photographs were found, the *Stanford Daily* filed suit claiming First and Fourth Amendment violations in connection with the search. The Supreme Court in *Stanford Daily* ruled the search warrants valid but noted that nothing prevented Congress from establishing "nonconstitutional protections" for journalists.

In 1980, Congress took the Supreme Court's invitation and passed the PPA. According to the act, no government officer may search or seize material in the private possession of any individual that intends to use that material for "public dissemination." The act, however, contains numerous exceptions. Searches and seizures will not violate the PPA when: (1) The only materials searched or seized are contraband, instrumentalities, or fruits of crime; (2) the seizure is necessary to prevent serious injury; (3) there is probable cause to believe that the person in possession of the protected materials has committed or is committing the crime under investigation; or (4) a subpoena proves or will prove unable to produce the materials in question. When a search is done in violation of the PPA, the aggrieved party may bring a civil suit but there is no exclusionary rule for the evidence.

Since its enactment in 1980, few lawsuits have been brought under the PPA and, among those that have been brought, few have been successful. In most of these cases, the individual in question is also a "suspect" in the criminal investigation and, as a result, falls under the "suspect exception" outlined here. Modern technology has given rise to some new questions: (1) whether a private citizen's intent to publicly disseminate information via a Web page falls under the PPA's protections; and (2) whether seizures of PPA-protected materials commingled with nonprotected materials—for example, on a computer hard-drive—gives rise to liability. In the few cases that have raised these questions, courts have generally found

that the PPA's protections do encompass the Internet-related activities of nonjournalists but that seizures of PPA-protected materials commingled with nonprotected materials on a hard-drive do not give rise to liability, although law enforcement is forbidden from searching the protected materials (*Mink v. Salazar*, 344 F. Supp. 2d 1231, D. Colo. 2004; *Guest v. Leis*, 255 F.3d 325, 6th Cir., 2001).

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References and Further Reading

- Emerson, Thomas I., *The Right of Privacy and Freedom of the Press*, Harvard Civil Rights—Civil Liberties Law Review 14 (1979): 329–353.
U.S. Department of Justice, "Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations" <http://www.cybercrime.gov/s&smanual2002.htm> (2005).

Cases and Statutes Cited

- Boyd v. U.S.*, 116 U.S. 616 (1886)
Guest v. Leis, 255 F.3d 325 (6th Cir. 2001)
Mink v. Salazar, 344 F. Supp. 2d 1231 (D. Colo. 2004)
Warden v. Hayden, 387 U.S. 294 (1967)
Zurcher v. Stanford Daily, 436 U.S. 547 (1978)
Privacy Protection Act of Oct. 13, 1980, c. 21A, 94 Stat. 1879

See also **Anonymity and Free Speech; Anonymity in Online Communications; *Boyd v. United States*, 116 U.S. 616 (1886); Congressional Protection of Privacy; Exclusionary Rule; Freedom of the Press: Modern Period (1917–Present); Freedom of Speech and Press: Nineteenth Century; Journalism and Sources; Newsroom Searches; Obscenity; Privacy; Search (General Definition); Search Warrants; Seizures; *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978)**

PRIVACY, THEORIES OF

The right of privacy is identified as the underpinning for a number of rights recognized under the Constitution in Supreme Court decisions. Grounded at least in part on a right to privacy, various cases have recognized the rights of a person

- to be free from unjustified governmental intrusions into house, papers, and effects, and
- unreasonable searches and seizures
- not to be a witness against oneself
- not to be deprived of life or liberty without due process of law
- not to be deprived of the privileges and immunities of the citizens of the states or the United States

not to be required to quarter troops without
 consent
 to associate freely
 to speak one's views
 to have access to contraceptives
 to decide whether to have an abortion
 to choose intimate partners and to raise one's
 children
 to control the use of one's name or likeness
 to decline life-sustaining medical treatment when
 one is terminally ill
 to pursue seclusion free from intrusion

Because the panoply of privacy rights derives from
 or affirms different interests, commentators debate
 whether privacy describes a disparate and unrelated
 collection of individual rights or whether the concept
 is amenable to a coherent, unifying rationale.

Rights recognized under the privacy rubric have
 their roots in ancient principles, natural law, the com-
 mon law, modern popular expectations, evolving in-
 ternational social norms, historical understandings of
 the Constitution, and principles derived from practi-
 cal human experience. Some of the privacy rights
 reflect interests in physical or spatial privacy—for
 example, the right to be free from governmental intru-
 sions into one's home. Others reflect an interest in
 informational privacy—in being able to keep private
 information that a person does not want the govern-
 ment or others to know. A corollary to this notion is
 the interest in being able to project only the informa-
 tion one wishes others to know—to control what
 image others might form. Control over information
 also denotes a proprietary interest in the material.

Still other privacy rights reflect an interest in deci-
 sional autonomy—the right of access to contracep-
 tives, to decide whether to have an abortion, to
 decline life-sustaining medical treatment, and to
 choose intimate partners. The rights to choose one's
 associates, to use contraceptives, and to speak also
 affirm personal autonomy and personhood. Some of
 these privacy rights derive from more than one of the
 sets of interests. For example, physical privacy is
 essential to having a meaningful right to exercise the
 decisional autonomy to choose intimate partners.

Some interests protected under the privacy rubric
 flow from the notion that the person or individual has
 the right to be protected from actions or requirements
 imposed by external sources such as government or
 social norms. This aspect of privacy can be viewed as
 “inward looking” and examples include the interests
 in physical privacy and decisional autonomy. This
 notion stands in contrast to the other aspect of priva-
 cy, which seeks to protect the individual's right to
 control his or her interaction or projection on the

public from an “outward-looking” perspective. Free-
 dom in choosing one's associates and controlling the
 dissemination of information about oneself reflects
 this outward-looking perspective. The right to bear
 and raise one's children reflects the outward and
 inward dimensions of the right to privacy.

All of these theories assume that it is possible or
 desirable to distinguish those aspects or activities of
 human existence that are inherently “private” from
 the pursuits that take place in the “public” or social
 sphere. As noted, some activities or aspects of “priva-
 cy” operate in the public and the private spheres.
 Historically, privacy has been the rationale for the
 law's failure to protect the rights of women and others
 viewed as acting entirely within the “private” sphere.

The seminal attempt to establish a theoretical basis
 for recognizing privacy right in U.S. law is the Warren
 and Brandeis article published in 1890 in the *Harvard
 Law Review*. The authors described the interests to be
 protected by recognizing a right of privacy as the
 “right to be let alone” and suggested that privacy
 protected an individual's “inviolable personality.”
 These rationales derive from notions of conventional
 morality and natural law philosophy and seek to
 employ the law in affirming the human dignity of
 the individual.

Recognition of tort protection for violations of
 various interests in privacy was one explicit goal
 of the Warren and Brandeis article. The availability
 of statutory or common law tort claims for certain
 invasions of privacy does not resolve the question of
 whether certain inalienable, fundamental rights of
 privacy that merit constitutional protection exist.

The Supreme Court has employed a number of
 theories and interpretive tools to justify the privacy
 rights it has identified in various contexts. To some
 extent the persuasiveness of the theories has depended
 upon the nature of direct textual support in the
 Constitution for the interest in question. While it is
 possible to debate whether Fourth Amendment pro-
 tection exists from government physical searches of a
 person's home in a particular factual circumstance, no
 one doubts that there is clear textual support for such
 a right in the Constitution. When there is such specific
 textual support for the privacy right in question, then
 the theoretical rationale for protecting the interest,
 while not irrelevant, becomes less important.

Interpretive questions become more difficult and
 the theoretical justifications become more salient when
 the Court seeks to apply less specific rights, such as the
 liberty interests protected in the due process clauses of
 the Fifth and Fourteenth Amendments. Finding the
 reach of the associational interests protected in
 the First Amendment poses similar analytical chal-
 lenges. In *Griswold v. Connecticut*, 381 U.S. 479

(1965), Justice Goldberg's opinion sought justification for such extrapolations in the Ninth Amendment's recognition that the Constitution protects other fundamental rights even though not specifically enumerated in the Bill of Rights. At the very least, the Ninth Amendment provides a useful rule of construction even if it does not operate independently as a source of specific rights.

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References and Further Reading

Chemerinsky, Erwin. *Constitutional Law: Principles and Policies*, 2nd ed. New York: Aspen, 2002, 534–535, 808–810, 946–950.

Tribe, Laurence H. *American Constitutional Law*, 2nd ed. Mineola, NY: Foundation Press, 1988, 774–780, 1302–1435.

Turkington, Richard C., and Allen, Anita L. *Privacy Law: Cases and Materials*, 2nd ed., St. Paul, MN: West, 2002, 1–76, 722–959.

See also **Abortion**; *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983); **Birth Control**; *Bowers v. Hardwick*, 478 U.S. 186 (1986); **Brandeis, Louis Dembitz**; *Chemerinsky, Erwin*; *Cruzan v. Missouri*, 497 U.S. 261 (1990); **Due Process of Law (V and XIV)**; *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Harris v. McRae*, 448 U.S. 297 (1980); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Moore v. East Cleveland*, 431 U.S. 494 (1977); **Ninth Amendment**; *Olmstead v. United States*, 277 U.S. 438 (1928); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Planned Parenthood v. Casey*, 112 S.Ct. 2791 (1992); **Privacy**; **Right of Privacy**; *Skinner v. Oklahoma*, 316 U.S. 535 (1942); **Sodomy Laws**; *Stenberg v. Carhart*, 530 U.S. 914 (2000); **Substantive Due Process**; *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986); *Washington v. Glucksberg*, 521 U.S. 702 (1997); *Webster v. Reproductive Health Services*, 492 U.S. 490, (1989)

PRIVATE DISCRIMINATORY ASSOCIATION

Should private groups be able to exclude members they do not want on the basis of criteria deemed invidiously discriminatory by the government? The conflict between the freedom of association and antidiscrimination laws has its roots in the 1950s and 1960s. The Court's protection of the freedom of association began in earnest in *NAACP v. Alabama*, 357

U.S. 449 (1959), in which the Court held that the First Amendment protected the NAACP from having to disclose its membership list to hostile Alabama authorities. At the same time, antidiscrimination laws at the state and federal levels gradually expanded in two important ways. First, they began to cover not only employment and traditional public accommodations (like inns and common carriers), but also large private clubs where business networking occurs. Second, antidiscrimination laws also expanded to prohibit more types of discrimination.

These two legal developments—the rise of the freedom of association and the expansion of antidiscrimination law—crossed paths in a series of cases starting in the 1980s. In *Roberts v. United States Jaycees* (468 U.S. 609, 1984), the Court held that the all-male Jaycees could be forced under state antidiscrimination law to admit female members. The Court held that infringement of a group's associational rights could be justified by “compelling state interests” (like eliminating bias against women) unrelated to the suppression of ideas that cannot be served through means less restrictive of the private group's freedom. Similarly, in *Board of Directors of Rotary International v. Rotary Club* (481 U.S. 537, 1987) and *New York State Club Ass'n v. City of New York* (487 U.S. 1, 1988), the Court held that large private clubs organized largely to promote commercial endeavors could be forced to comply with antidiscrimination laws applied to their membership.

However, in two more recent cases the Court upheld the right of a private group to exclude gays. In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston* (515 U.S. 557, 1995), the Court upheld the right of private organizers of a St. Patrick's Day Parade to exclude a contingent marching behind a banner identifying themselves as an Irish gay group. In *Boy Scouts of America v. Dale* (530 U.S. 640, 2000), the Court upheld the right of the Boy Scouts to exclude an openly gay scoutmaster. In both of these cases, the Court stressed the freedom of the group to send its own messages and the impairment that inclusion of gays would have on the communication of that message (even if the group simply wanted to say nothing about homosexuality).

The Court appears to be adopting a bifurcated approach toward private discriminatory association. When the private association is organized essentially for commercial purposes (for example, as a forum for business networking), the Court has held that the group's expressive interests are weak and that the state's interest in eradicating discrimination is strong. When the private association is organized essentially for expressive purposes (for example, transmitting moral values to young boys), the Court has

held that the group's expressive interests are strong and that the state's antidiscrimination interest is weak.

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References and Further Reading

- Bernstein, David E., *Defending the First Amendment From Antidiscrimination Laws*, N. C. L. Review 82 (2003): 223.
- Brody, Evelyn, *Entrance, Voice, and Exit: The Constitutional Bounds of the Right of Association*, University of California Davis Law Review 35 (2002): 821.
- Carpenter, Dale, *Expressive Association and Anti-Discrimination Law After Dale: A Tripartite Approach*, Minnesota Law Review 85 (2001) 1515.
- Hunter, Nan D., *Accommodating the Public Sphere: Beyond the Market Model*, Minnesota Law Review 85 (2001): 1591.
- Koppelman, Andrew, *Signs of the Times: Dale v. Boy Scouts of America and the Changing Meaning of Nondiscrimination*, Cardozo Law Review 23 (2002): 1819.
- Vischer, Robert K., *The Good, the Bad and the Ugly: Rethinking the Value of Expressive Associations*, Notre Dame Law Review 79 (2004): 949.

Cases and Statutes Cited

- Board of Directors of Rotary International v. Rotary Club*, 481 U.S. 537 (1987)
- Boy Scouts of America v. Dale*, 530 U.S. 640 (2000)
- Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995)
- NAACP v. Alabama*, 357 U.S. 449 (1958)
- New York State Club Ass'n v. City of New York*, 487 U.S. 1 (1988)
- Roberts v. United States Jaycees*, 468 U.S. 609 (1984)
- See also Boy Scouts of America v. Dale*, 530 U.S. 640 (2000); *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995); *NAACP v. Alabama Ex. Rel. Patterson*, 357 U.S. 449 (1958); *Roberts v. United States Jaycees*, 468 U.S. 609 (1984); *Rotary International v. Rotary Club of Duarte*, 481 U.S. 537 (1987)

PRIVATE POLICE

While the public police provide us with familiar symbols of government authority, they were not always the primary guarantors of security and order. Before public police departments became firmly established in American cities during the nineteenth century, individuals relied on the loosely organized constable-watch system, and also turned to the services of private guards and detectives. Yet even after the public police became widespread, the private assumption of policing tasks did not disappear. Indeed, in the late nineteenth and early twentieth centuries, private police achieved

great notoriety because of their employment by coal, steel, and other industrial interests in quelling labor disputes. Their often violent tactics prompted congressional investigations, first in 1892, and then once again in 1936. While these inquiries resulted in public rebuke, the private police did not disappear so much as they reduced or altered their involvement in labor unrest.

Despite this early infamy, private police today are employed in large numbers and play an important role in crime control. There are approximately three times the number of private security guards as there are public police, and reliable estimates suggest that the money spent on private policing is at least twice that spent on public police budgets. While some of the empirical uncertainty can be attributed to the absence of reliable data, another source of ambiguity can be traced to disagreement about the term's definition. While some use the term "private police" to refer to for-profit companies offering crime prevention and order-maintenance services, others also include volunteer neighborhood patrols and even private military companies.

Even if the focus remains on for-profit services, many legal, social, and political questions remain unresolved. While the Fourth, Fifth, Sixth, and Fourteenth Amendments of the federal Constitution provide individuals with certain protections in their encounters with the public police, these protections generally do not apply to the private police. The state action doctrine of constitutional law limits the application of constitutional rights to actions of government and not to those of private actors. The main legal constraints on private police, then, arise from contract, property, and tort law, as well as the criminal laws that apply to all persons. State regulations of private police vary widely, and most focus on licensing requirements of prospective employees.

At the same time, private police are increasingly relied upon to perform tasks often identical to those of public police. Private police guard private property, and many investigate crimes and, in the aftermath of the September 11, 2001, terrorist attacks, engage in counterterrorist policing at the behest of their employers. Yet the appropriate role of private police in a democratic society remains controversial. Some defend their use as a private supplement to perceived inadequacies in the public provision of crime control or simply as a cheaper alternative. Others, however, see the use of force in private hands, without the direct oversight of public accountability, as a fundamental challenge to the traditional monopoly over the legitimate use of force in the modern nation-state.

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References and Further Reading

- Cunningham, William C. et al. *Private Security Trends, 1970 to 2000: The Hallcrest Report*, 1990.
- Joh, Elizabeth E., *The Paradox of Private Policing*, Journal of Criminal Law and Criminology 95 (2004): 49.
- Shearing, Clifford D. "The Relation Between Public and Private Policing." In *Modern Policing* 51, Michael Tonry and Norval Morris, eds., 1992.
- Shearing, Clifford D., and Phillip C. Stenning. *Private Security and Private Justice: The Challenge of the 80s: A Review of the Policing Issues*. 1982.
- Skllansky, David, *The Private Police*, UCLA Law Review 46 (1999): 1165.

PRIVATE POSSESSION OF OBSCENITY IN THE HOME

In *Stanley v. Georgia*, 394 U.S. 557 (1969), the U.S. Supreme Court struck down a Georgia statute that made it a crime "knowingly" to possess obscene material. The decision had its roots in common law, as well as in earlier Supreme Court decisions.

A decade earlier, in *Roth v. United States*, 354 U.S. 476 (1957), the Court had held that while all "ideas having even the slightest redeeming social importance" are protected by the First Amendment, those protections do not extend to obscenity. The *Roth* Court explained that "implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance." This statement reflects the history of obscenity at common law: In the seventeenth century, British law created four new crimes that were designed to control the content of speech: obscenity, blasphemy, seditious libel, and criminal libel. The American colonists brought these crime labels with them to the new world; in the decades after the Revolution, which brought a new system of government and the adoption of the Bill of Rights, most of them fell into disrepute and disuse. Obscenity, though, survived and became the focus of a number of state and federal statutes adopted in the nineteenth century. Surprisingly, it was not until the middle of the twentieth century, in *Roth*, that the Court was required to decide whether the First Amendment barred prosecutions under these statutes; the Court held that it did not because the content of obscenity does not warrant such protection.

In 1968, Robert Stanley was convicted of possessing obscene material in violation of Georgia law and appealed to the Supreme Court, claiming his conviction violated the First Amendment. The Court noted that while obscenity is not protected by the First Amendment, none of its prior decisions addressed

"private" conduct; they all involved the propriety of regulating public actions such as distributing obscenity. *Roth* was not controlling because it dealt with regulating the commercial distribution of obscenity, not private possession. After noting that the Constitution protects the right to receive information and ideas, the Court explained that "in the context of this case—a prosecution for mere possession of printed or filmed matter in the privacy of a person's own home—that right takes on an added dimension. For also fundamental is the right to be free ... from unwanted governmental intrusions into one's privacy." It also explained that if "the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds."

The Supreme Court rejected Georgia's argument that it should be able to protect individual minds from obscenity and held that the First Amendment prohibits "making mere private possession of obscene material a crime." The Court has applied this holding in subsequent cases, including *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002).

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References and Further Reading

- Easton, Susan M. *The Problem of Pornography: Regulation and the Right to Free Speech*. New York: Routledge, 1994.
- Hixson, Richard F. *Pornography and the Justices: The Supreme Court and the Intractable Obscenity Problem*. Carbondale: Southern Illinois Press, 1996.

Cases and Statutes Cited

- Roth v. United States*, 354 U.S. 476 (1957)
- Stanley v. Georgia*, 394 U.S. 557 (1969)

See also Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002); **Bill of Rights: Structure; Child Pornography; Content-Based Regulation of Speech; Content-Neutral Regulation of Speech; Defamation and Free Speech; Freedom of Speech and Press under the Constitution: Early History (1791–1917); Freedom of Speech: Modern Period (1917–Present); Freedom of the Press: Modern Period (1917–Present); Freedom of Speech and Press: Nineteenth Century; Obscenity; Obscenity in History; Philosophy and Theory of Freedom of Expression; Roth v. United States, 354 U.S. 476 (1957); Seditious Libel; Self-Fulfillment Theory of Free Speech; State Courts**

PRIVATE RELIGIOUS SPEECH ON PUBLIC PROPERTY

Religious speech by private citizens or groups on public property is protected by the free speech and free exercise clauses of the First Amendment. While the free exercise clause may provide somewhat different or greater protection for worship services and other ritual speech on private property, cases involving private religious speech on public property generally have been decided under the free speech clause. They most often address whether religious speakers have the same access to public property as nonreligious speakers.

Government may not exclude private religious speech from public places or programs solely because that speech is religious or contains a religious perspective. Content based restrictions on religious speech in traditional or designated public forums are subject to strict judicial scrutiny. Such restrictions are constitutional only if they are justified by a compelling governmental interest and if they are the least speech-restrictive means available to achieve that interest.

Traditional public forums are public places traditionally open for private expressive activities, such as streets, sidewalks, and parks. Designated public forums include government property or programs that the government has opened for use by the public for expressive activities. The First Amendment generally requires that private religious speakers be treated no differently in traditional or designated public forums than private nonreligious speakers. The Supreme Court held in *Widmar v. Vincent*, 454 U.S. 263 (1981), that a state university that makes its facilities generally available to student groups may not deny equal access to student groups desiring to use the facilities for religious worship and discussion.

Granting religious speakers access to traditional and designated public forums on terms equal to those of nonreligious speakers does not constitute an unconstitutional establishment of religion. The Court in *Widmar* rejected the university's argument that it had a compelling interest in excluding such groups to avoid violating the establishment clause. By opening a forum to a broad class of religious and nonreligious student groups, the university would remain neutral, not placing its imprimatur on any particular group or ideology. The Supreme Court followed the same reasoning in *Board of Education of Westside Community Schools v. Mergens*, 496 U.S. 226 (1990), which upheld the federal Equal Access Act. The act prevents any public school that receives federal funding and opens its facilities to noncurricular student groups from denying equal access to student religious groups.

The Court reasoned that the act did not advance or endorse religion in violation of the establishment

clause because secondary school students can understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis. Courts have taken a similar approach in cases involving the private placement of religious symbols on public property. In *Capitol Square Review Board v. Pinette*, 515 U.S. 753 (1995), the Supreme Court held that a state could not deny the Ku Klux Klan permission to erect a cross in a state-owned plaza surrounding the state capitol that was used for other secular and religious public speeches and displays. The plurality and concurring justices agreed that the display did not create the perception that the state was endorsing religion, despite its close proximity to state capitol.

Even if the government property or program is not a traditional or designated public forum, excluding religious speakers may amount to impermissible viewpoint discrimination. Government may limit speakers or subjects in a nonpublic forum (or limited public forum) to preserve the purpose for which the property or program was created only if the restrictions are reasonable and viewpoint neutral. The Supreme Court in *Lamb's Chapel v. Center Moriches Union Free School District* (508 U.S. 384, 1993) held that a school district could not deny a private religious group permission to use its facilities after hours to show a film series teaching Christian family values when other social and civil organizations were permitted to use the facilities for their expressive activities. The Court assumed that even if the after-hours program was *not* a public forum, the ban on religious speech was unconstitutional viewpoint discrimination because it barred religious perspectives on family and child-rearing issues but allowed secular perspectives. As in *Widmar*, the Court rejected the school's establishment clause defense because no endorsement or support could be inferred from the state's neutral treatment of religious and secular viewpoints.

Religious speech also was considered a viewpoint in *Rosenberger v. Rector and Visitors of the University of Virginia* (515 U.S. 819, 1995). The university used student activity fees to pay the costs of printing extracurricular student-edited publications, but refused to fund a student Christian magazine. The Supreme Court held that the funding restriction constituted impermissible viewpoint discrimination because it disfavored student publications with religious perspectives, while encouraging a diversity of views from secular student publications. The university would not violate the establishment clause if it paid the printing costs of the student religious publication because religious and nonreligious speakers would be treated evenhandedly, the students' religious speech

could not reasonably be attributed to the school, and no state funds would go directly to the magazine.

Government may not avoid viewpoint discrimination by adopting facility-use programs that permit private religious speakers to hold meetings for discussion of secular matters from a religious perspective, but deny use for religious worship or instruction. The Supreme Court in *Good News Club v. Milford Central School* (533 U.S. 98, 2001) rejected such a distinction as constitutionally insignificant. The school offered a limited public forum for the use of its facilities after hours, but denied the use of such facilities to a private Christian children's club on the ground that their meetings involved religious worship, instruction, and prayer. Following *Lamb's Chapel* and *Rosenberger*, the Court held that the school discriminated against the religious group because of its religious viewpoint.

Private religious speech on public property generally enjoys the same constitutional protection as private nonreligious speech. To exclude such speech simply because of its religious nature or content constitutes impermissible subject or viewpoint discrimination under the free speech clause. While giving private religious speech *preferential* access to a public forum may violate the establishment clause, the Supreme Court repeatedly has rejected the claim that granting religious speakers *equal* or *neutral* access to a public forum constitutes an establishment of religion.

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References and Further Reading

- Brownstein, Alan, *Protecting Religious Liberty: The False Messiahs of Free Speech Doctrine and Formal Neutrality*, *Journal of Law & Politics* 18 (2002): 119.
- Gey, Steven G., *When Is Religious Speech Not "Free Speech?"* *University of Illinois Law Review* (2000): 379.
- Laycock, Douglas, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, *Northwestern University Law Review* 81 (1986): 1.

Cases and Statutes Cited

- Board of Education of Westside Community Schools v. Mergens*, 496 U.S. 226 (1990)
- Capitol Square Review Board v. Pinette*, 515 U.S. 753 (1995)
- Good News Club v. Milford Central School*, 533 U.S. 98 (2001)
- Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993)
- Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995)
- Widmar v. Vincent*, 454 U.S. 263 (1981)
- Equal Access Act, 28 U.S.C. § 4071

See also **Public Forum Doctrines; Religion in Public Universities; *Rosenberger v. Rector and Visitors of the***

***University of Virginia*, 515 U.S. 819 (1995); Viewpoint Discrimination in Free Speech Cases**

PRIVILEGES AND IMMUNITIES (XIV)

The privileges and immunities of citizenship are mentioned twice in the Constitution. Article IV, Section 2, states that "[t]he citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." Section 1 of the Fourteenth Amendment to the Constitution also refers to the privileges and immunities of citizens when it declares that "[n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States ..." While these provisions reflect similar principles, they have their own peculiar histories and roles in protecting, or failing to protect, the civil rights and liberties of American citizens.

Article IV was part of the original constitution. That article, which also contained the full-faith and credit and fugitive slave clauses, was designed to protect citizens of one state when they journeyed to sister states. It reflected the founding period's state-based ideas of citizenship and federalism that protected state sovereignty and racial slavery. The Fourteenth Amendment, on the other hand, represented the rejection of slavery—the slavery-protecting version of federalism. The amendment was worded to protect U.S. citizens, including African Americans, from violations of their basic privileges even by their state of residence. Yet, despite these differences in origin, the two clauses have had a parallel history of confusion in constitutional law, a history rich in potential but impoverished in real legal effect. This entry will first consider the history of the privileges and immunities clause of Article IV. It will then review the history of the privileges or immunities clause of the Fourteenth Amendment. Finally, it will conclude with a short discussion of the current role of both clauses in the protection of civil rights and liberties under modern constitutional law.

Privileges and Immunities under Article IV

The privileges and immunities clause of Article IV of the constitution received little comment during the Constitutional Convention and was modeled after a similar clause in the Articles of Confederation. The phrase "privileges and immunities" had long been used in Anglo-American law, including in colonial charters and documents, to reflect the basic rights,

privileges, and immunities held by a British subject or a colonial denizen. It did not, however, have a precise meaning even then and seems to have gained longevity in large part because of its generality.

The central question raised by the vagueness of the clause is whether it requires only that states grant equality of privileges to persons from other states or whether it establishes a basis for securing fundamental privileges of American citizenship. Although scholars have found support for the idea that the drafters of the Constitution presumed that some unspecified level of fundamental rights, privileges, and immunities was inherent in free citizenship within each state, those drafters probably meant for the privileges and immunities clause of Article IV to focus on the nondiscrimination of outsiders with respect to rights and privileges that a state granted its citizens. This is, after all, one reason for the clause appearing in Article IV alongside other provisions involving state comity.

This point is also supported by Alexander Hamilton's comments in *Federalist Paper Number 80*, where, in justifying federal judicial power over disputes between citizens of different states, he declared that the privileges and immunities clause formed "the basis of the union" because it established "equality of privileges and immunities to which the citizens of the Union [were] entitled" in cases where citizens from one state needed to secure rights in their nonresident state.

The courts during the first part of the nineteenth century largely supported this nondiscrimination view of the Article IV clause, and in 1833 Justice Joseph Story wrote in his highly regarded *Commentaries on the Constitution* that the clause gave outsiders "all the privileges and immunities, which the citizens of the same state would be entitled to under the same circumstances." An alternative understanding of the clause occasionally appeared, however. For example, in *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230), a lower court opinion written by Supreme Court Justice Bushrod Washington (the first president's nephew), the court described the clause as protecting rights that were "fundamental ... [and] belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose the Union." Justice Washington then enumerated several of these fundamental rights, including rights to life, liberty, property, the pursuit of happiness, commerce, and even suffrage, although he also granted that the states could place restrictions on these for the general good.

Justice Washington's language eventually became a touchstone for the authors of the Fourteenth

Amendment. But the case did not represent a shift in judicial understandings of the privileges and immunities clause of Article IV. In the rather limited number of cases in which the clause has arisen, before and after the Civil War, it has mainly been in the context of persons asserting a right to conduct business or engage in leisure activities as out of state residents, with the Court focusing on whether a state has a substantial reason for discriminating against them in the way it allocates those privileges it chooses to grant to its citizens. As the Supreme Court said in *Toomer v. Witsell* (334 U.S. 385, 395) in 1948, the clause "was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy." Thus, the modern Supreme Court has relied on the privileges and immunities clause to bar states from placing heavier tax burdens on in-state income earned by out of state residents or from granting employment preferences to in-state residents.

The Court has, however, found substantial reasons for discrimination against out of state residents in upholding state residence restrictions on voting, obtaining a divorce, and holding elective office. Most notably for the area of civil liberties, in *Doe v. Bolton*, 410 U.S. 179 (1973), a case decided on the same day as *Roe v. Wade*, 410 U.S. 113 (1973), the Court employed an Article IV analysis to reject a state restriction barring nonresidents from obtaining medical services of an abortion because the state permitted state residents to obtain that same medical service. *Doe*, however, remains a rare case of protection of civil liberties under Article IV's privileges and immunities clause outside the areas of business and employment areas that the Court has at times hinted are fundamental privileges, at least under Article IV.

Privileges and Immunities under the Fourteenth Amendment

If the fundamental rights interpretation of the privileges and immunities clause of Article IV has never really blossomed in the courts, it did have its day in the sun in the Civil War and Reconstruction congresses. For the Republican abolitionists who became the moving force during Reconstruction and spearheaded the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution, the privileges and immunities of citizenship were seen as the legal language best designed to establish full citizenship for former slaves. The drafters of the Fourteenth Amendment's Section 1 cited Justice Washington's fundamental rights exposition in *Corfield* to illustrate

the nature of the rights they were seeking to protect and, in particular, for why they chose language parallel to the Article IV privileges and immunities clause.

Some commentators see this evidence as indicating that the privileges or immunities clause was meant to establish and facilitate national protection of the rights, liberties, and privileges fundamental to American citizenship. This view is bolstered by the fact that the Fourteenth Amendment affirmatively establishes U.S. citizenship by birth in the citizenship clause. Only then does it assert that the privileges or immunities of that national citizenship cannot be abridged by the states, suggesting that the most important citizenship privileges were ones attaching to federal citizenship. Moreover, the subsequent congresses assumed that the clause, combined with Section 5 of the amendment, which granted Congress power to enforce the first four sections, enabled Congress to enforce access to a host of fundamental privileges.

Under the Civil Rights Act of 1875, for instance, Congress protected access for all citizens to public accommodations in inns, theaters, and public transportation, and in other statutes of the period Congress protected rights of assembly and rights to protection against violence intended to deny people their federal rights. Indeed, it has been effectively argued by scholars that the authors of the amendment assumed that the liberties and rights protected by the Bill of Rights as against federal action were, under the privileges or immunities clause, henceforth protected against infringement by the states as well. It would, however, take many years for the Supreme Court to rule that the Fourteenth Amendment applied the Bill of Rights to the states; even so, the Court did so piecemeal through the incorporation doctrine under the due process clause rather than through the privileges or immunities clause.

Despite the strong evidence that the drafters employed the privileges or immunities clause to grant affirmative rights to all U.S. citizens, some commentators have argued—not without support—that the clause merely expanded the equality aspects of the Article IV clause to ensure that all the citizens within a state would be guaranteed state-created privileges regardless of race. Certainly the clause was meant to include this right to equal treatment: It very specifically was drawn to combat the so-called black codes, laws written by postwar southern whites that aggressively restricted the freedoms of former slaves. Congress wanted a firm constitutional basis for its first civil rights law, the Civil Rights Act of 1866, which sought to protect the “full and equal

enjoyment” of the laws and to give all citizens the rights of contract, property, and court access “as is enjoyed by whites.”

The Supreme Court, however, quickly quashed the fundamental rights and equality approaches. In the first case raising the issue after ratification of the Fourteenth Amendment (the *Slaughterhouse Cases*, 83 U.S. 36, 1872), the Court asserted that the only federal privileges and immunities under this clause were those that already existed in the Constitution or in other federal laws; the privileges and immunities fundamental to free citizenship were the stuff of state privileges and immunities. Four justices dissented, arguing eloquently, if at times disingenuously, in favor of a broader, fundamental rights view of the clause. Yet, when all was said and done, the Supreme Court in *Slaughterhouse* had taken the newly minted clause into a form of time travel whereby the state-based federalism central to the antebellum Constitution and interpretation of Article IV again controlled. The Court performed similar work in the *Civil Rights Cases* (109 U.S. 3) in 1883, in which the Court rejected congressional power to pass the Civil Rights Act of 1875 under the Thirteenth or Fourteenth Amendments, over a strong dissent by Justice John Marshall Harlan.

For a long time the *Slaughterhouse* Court’s defanging of the privileges or immunities clause seemed complete. The Court did little to revive the clause, choosing instead to promote its shifting versions of fundamental rights jurisprudence with the due process clause through the largely procapitalist jurisprudence of *Lochner v. New York*, 198 U.S. 45, in 1905 and through the later development in the 1960s and 1970s of the right to privacy and other substantive rights in cases such as *Griswold v. Connecticut* (381 U.S. 479, 1965) and *Roe v. Wade* (410 U.S. 113, 1973).

Congress also chose other grounds on which to build legislative protections of rights and liberties, most conspicuously by using the commerce clause power to support civil rights legislation such as the Civil Rights Act of 1964. While the privileges or immunities clause received occasional attention in the Court—it briefly appeared in the probusiness case of *Colgate v. Harvey* (296 U.S. 404) in 1935, only to return to dormancy when the case was overruled four years later in *Madden v. Kentucky* (309 U.S. 83, 1940) and it garnered support of a minority of justices in some cases, including *Edwards v. California* (314 U.S. 160, 1941) and *Hague v. C.I.O.* (307 U.S. 496, 1939)—at no point prior to 1999 did the Court wholly embrace the clause as having independent value.

Current Status of Privileges and Immunities Clauses

Despite the fact that the drafters of the Fourteenth Amendment probably intended the privileges or immunities clause to be more important and protective of citizens' rights and liberties than the privileges and immunities clause of Article IV, the Supreme Court has treated the former clause as almost meaningless. The Court has in fact issued far more opinions employing Article IV to protect citizens than it has opinions using the Fourteenth Amendment's clause.

This appeared to change when the Court, in the 1999 case of *Saenz v. Roe*, 526 U.S. 489, relied on the privileges or immunities clause for the first time to protect a citizen's rights. In that case the Court upheld the right of citizens who had recently moved to a state to receive the same welfare payments as citizens who had resided in the state for a longer time. In *Saenz*, the Court attempted to clarify the constitutional basis for a general right to travel that the Court had long found to be essential and fundamental. The Court argued that while Article IV's privileges and immunities clause protected the citizen's right to travel into other states, the privileges or immunities clause of the Fourteenth Amendment, along with the citizenship clause, protected the right to reside in any state of one's choosing and not be treated as anything less than a full citizen.

While *Saenz* renewed the possibilities of the protection of civil liberties by breathing some life into the privileges or immunities clause, the Court did not deal conclusively with the problem of when a state could justifiably burden the liberties or interests of a new resident. The Court argued that benefits such as education are easily "portable" and so could be restricted by in-state tuition preferences. In the Court's view welfare payments were not so easily portable—they were usually spent within the state—and could not be restricted to long-term residents. Importantly, however, the Court did not rely on a right to welfare or on the basic fundamental nature of subsistence payments to distinguish the benefits in *Saenz*, despite the fact that the closest precedent, *Shapiro v. Thompson* (394 U.S. 618) in 1969, had appeared to do just that. The *Saenz* Court instead focused carefully on the right to travel to a state and make it one's residence. Thus, while the case did reinvigorate the potential of the privileges or immunities clause, it did little to make the clause capable of the heavy lifting needed for a provision of the constitution to protect civil rights and civil liberties reliably.

The future of both clauses protecting the privileges and immunities of citizenship remains uncertain. In as much as the Article IV clause enables courts to police the burdens states place on out-of-state visitors and travelers, there is no reason to think the Supreme Court will change its approach by limiting or by expanding civil liberties protections. The clause will likely remain a means of enforcing equal treatment for nonresidents, but the substance of that treatment will be left to individual states.

The Fourteenth Amendment's clause is situated somewhat differently in terms of potential development. First, Congress could still try, under its powers from Section 5 of the amendment, to define and protect more specifically the privileges of citizenship—for instance, by specifically grounding privacy-protecting legislation in the clause. As seen in *City of Boerne v. Flores* (521 U.S. 507, 1997), however, the modern Court has not been very supportive of this type of congressional power under Section 5, and it is unclear how willing Congress would be to assert such power. Alternatively, the Court could push development of the law under the clause beyond what it did in *Saenz*. For example, it could use the language in some of its modern opinions under Article IV, in which the Court has hinted at a fundamental right to seek employment, to find such a right generally under the Fourteenth Amendment. Alternatively, the Court could, as Justice Thomas hinted in his dissent to *Saenz*, increase protections of property rights through this clause.

Finally, a Court more supportive of civil liberties generally could employ the clause to expand upon the liberties already recognized. None of these avenues seems likely, however. No matter how well one could articulate a broader meaning for the underutilized concept of constitutional privileges and immunities, it is most likely that the concept will remain one largely of historical study and unrealized potential.

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References and Further Reading

- Amar, Akhil Reed. *The Bill of Rights*. New Haven, CT: Yale University Press, 1998.
- Curtis, Michael Kent. *No State Shall Abridge*. Durham, NC: Duke University Press, 1986.
- Finkelman, Paul. *An Imperfect Union: Slavery, Federalism, and Comity*. Chapel Hill: University of North Carolina Press, 1981.
- Kettner, James H. *The Development of American Citizenship, 1608–1870*. Chapel Hill: University of North Carolina Press, 1978.
- Maltz, Earl M. *Civil Rights, The Constitution, and Congress, 1863–1866*. Lawrence: University Press of Kansas, 1990.
- Ross, Michael A. *Justice of Shattered Dreams: Samuel Freeman Miller and the Supreme Court During the Civil*

War Era. Baton Rouge: Louisiana State University Press, 2003.
 Tribe, Laurence H. *American Constitutional Law*. Mineola, NY: Foundation Press, 1988.

Cases and Statutes Cited

City of Boerne v. Flores, 521 U.S. 507 (1997)
Civil Rights Cases, 109 U.S. 3 (1883)
Colgate v. Harvey, 296 U.S. 404 (1935)
Corfield v. Coryell, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230)
Doe v. Bolton, 410 U.S. 179 (1973)
Edwards v. California, 314 U.S. 160 (1941)
Griswold v. Connecticut, 381 U.S. 479 (1965)
Hague v. C.I.O., 307 U.S. 496 (1939)
Lochner v. New York, 198 U.S. 45 (1905)
Madden v. Kentucky, 309 U.S. 83 (1940)
Roe v. Wade, 410 U.S. 113 (1973)
Saenz v. Roe, 526 U.S. 489 (1999)
Shapiro v. Thompson, 394 U.S. 618 (1969)
Slaughterhouse Cases, 83 U.S. 36 (1872)
Toomer v. Witsell, 334 U.S. 385, 395 (1948)
 Civil Rights Act of 1866, Act of April 9, 1866, c. 31, 14 Stat. 27
 Civil Rights Act of 1875, Act of Mar. 1, 1875, c. 114, 18 Stat. 335
 Civil Rights Act of 1964, Pub. L. 88-352, Act of July 2, 1964, 78 Stat. 241

PROBABLE CAUSE

Probable cause is the standard of proof required, in most instances, for a valid search, seizure, or arrest. The text of the Fourth Amendment of the Constitution prohibits the issuance of warrants except upon probable cause. The Supreme Court has extended the requirement of probable cause to warrantless searches, seizures, and arrests. There are some exceptions to the probable cause requirement. In some instances, a reduced level of proof will justify a brief detention of a person or property. Some searches and seizures require no suspicion at all, although the Supreme Court has limited such suspicionless searches to situations involving special need.

In *Brinegar v. United States*, 338 U.S. 160 (1949), the Supreme Court explained the competing policy considerations involved with the probable cause requirement. Like the warrant requirement, it serves as a check on the power of the government to intrude on the privacy of the people. The American colonial experience with general warrants and writs of assistance—which could be issued without a showing of cause and without naming the thing or person to be searched or seized—in effect allowed the British government to search and seize any person or piece of property. The Fourth Amendment codified the intention of the Framers to end these practices and to

permit intrusions into people's lives and liberties only upon a showing of more than mere suspicion. However, probable cause has emerged as a flexible standard that gives police the ability to investigate crime, arrest criminals, and seize evidence without being required to meet an overly burdensome standard. Probable cause is therefore a compromise. A stricter standard of proof would leave police powerless to investigate crime and arrest criminals. A lesser standard would give police nearly limitless authority to intrude on the private affairs of law-abiding citizens.

The Supreme Court has tried to avoid defining probable cause in a technical or legalistic fashion. An assessment of probable cause must sometimes be made in a split second. Accordingly, probable cause requires the officer or court to look at probabilities, not conclusive proof. Its substance is reasonableness, judged on the basis of the facts of each individual encounter and case. While probable cause requires more than mere suspicion, it does not require the same amount or quality of evidence as would be needed at trial. In hindsight, an officer or magistrate may have been incorrect in his or her belief as to the existence of an offense. However, probable cause is a standard that permits mistakes to be made, provided they are reasonable. It is a practical and common-sense standard that is flexible and does not require formal modes of proof.

To arrest a person, a police officer must have probable cause that a crime has been committed and that the arrestee is the person who committed it. An officer's subjective belief, hunch, or suspicion of wrongdoing is not sufficient. Rather, there must be objective evidence that would lead a reasonably prudent person to believe that the arrestee has committed a crime. If the officer does not have a warrant at the time of the arrest, *Gerstein v. Pugh* (420 U.S. 103, 1975) requires a judicial determination of probable cause if the arrestee will continue to be detained pretrial or if he or she is released with burdensome conditions.

A search or seizure of property likewise requires probable cause in most instances. The proof relates to the property, its connection to an alleged crime, and its present location. There must be evidence that would lead a reasonable person to believe that a crime has been committed and that the property sought is evidence of that crime. The police cannot violate a person's privacy in order to engage in a suspicionless "fishing expedition." Nor can they use an after-the-fact discovery of incriminating evidence or contraband to justify their initial, suspicionless intrusion. Furthermore, there must be proof that would lead a reasonable person to conclude that the property is where the officer believes it to be. The

timeliness of the information used to support probable cause is therefore critical.

The fruits of an arrest or search made without probable cause will, in most instances, be subject to suppression under the exclusionary rule. A defendant challenging the probable cause for an arrest, search, or seizure will ordinarily file a motion to suppress. The court's duty in hearing the motion is to assess the quality and quantity of evidence known to the officer at the time of the search or arrest or presented to the magistrate at the time of the issuance of the warrant.

One of the Supreme Court's most recent pronouncements about probable cause occurred in 1983 when it decided *Illinois v. Gates* (462 U.S. 213, 1983). In *Gates*, a magistrate issued a warrant for the search of the defendants' home and car based on an anonymous letter alleging that the defendants were engaged in drug trafficking. The police corroborated major portions of the letter, including predictions the writer had made about the defendants' upcoming activities. The Court held that sufficient probable cause existed based on the "totality of the circumstances." It noted that probable cause is a "fluid concept," depends on the facts of a particular case, does not readily lend itself to rigid rules, and requires nontechnical, factual, and practical considerations. The Court rejected the so-called *Aguilar-Spinelli* test, which had required an issuing magistrate to assess the informant's veracity or reliability, as well as his or her basis of knowledge. Instead, the Court stated that these considerations are mere factors that should be considered in an analysis of the totality of the circumstances. The Court thus reaffirmed the principle that probable cause is a flexible standard.

The value of probable cause as a check on governmental oppression necessarily depends on the definition courts ascribe to it. Courts' adherence to a flexible standard based on probabilities—in deference to the societal value of enabling police to fight crime—means that there is a risk that innocent people and their property may be searched and detained.

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References and Further Reading

Black's Law Dictionary, 8th ed., s.v. "probable cause."
LaFare, Wayne R. "Probable Cause." In *Search and Seizure: A Treatise on the Fourth Amendment*, 4th ed., vol. 2, St. Paul, MN: Thomson/West, 2004, Ch. 3.

Cases and Statutes Cited

Aguilar v. Texas, 378 U.S. 108 (1964)
Brinegar v. United States, 338 U.S. 160 (1949)
Gerstein v. Pugh, 420 U.S. 103 (1975)
Illinois v. Gates, 462 U.S. 213 (1983)
Spinelli v. United States, 393 U.S. 410 (1969)

See also Administrative Searches and Seizures; Airport Searches; Arrest; Arrest Warrants; Automobile Searches; Exclusionary Rule; General Warrants; *Gerstein v. Pugh*, 420 U.S. 103 (1975); *Illinois v. Gates*, 462 U.S. 213 (1983); Proof beyond a Reasonable Doubt; Search (General Definition); Search Warrants; Seizures; Warrant Clause (IV); Warrantless Searches; Writs of Assistance Act

PROFESSIONAL ADVERTISING

Advertising by "professionals"—a term used here to denote occupations licensed by the state such as attorneys and physicians—was virtually prohibited by state laws from the early twentieth century until the U.S. Supreme Court recognized a limited First Amendment right in such activity. *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), first explicitly applied free speech rights to the advertisements of professionals—lawyers in that instance.

The Court in *Bates* ruled that a total prohibition on price advertising of routine services by lawyers, enforced by the Arizona Supreme Court, violated the First Amendment. The Court rejected the argument that advertising by professionals was sufficiently different from other kinds that the decision in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976), did not apply to such advertising. In the *Virginia* case, the Court overturned its earlier rulings that "purely commercial" speech—that is, speech that simply proposes a commercial transaction—was not covered by the First Amendment. Although false and misleading statements in advertising are unprotected, regulations that "prohibited the free flow of truthful information" via advertising are subject to First Amendment scrutiny. The application of this standard to lawyers in *Bates* covers advertisements by other members of the licensed occupations, but the vast majority of cases involving professional advertising concern lawyers. In *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978), the Court held that in-person solicitation by lawyers was not given the First Amendment protection of lawyer ads because of the intrusive nature of such contacts. However, targeted solicitation of clients by mail was protected in *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988).

Lawyer advertising has always been subject to a standard not applied to other advertisements; statements of comparative quality of legal services are not allowed in lawyer advertisements (and presumably not in advertising by other professionals). The concern is that there is no meaningful measure of

quality. In recent years, lawyer advertising has been subject to more intense review by the Court than other forms of advertising. In *Florida Bar v. Went-For-It*, 516 U.S. 619 (1995), the Court, upheld, by a five-to-four vote, a Florida rule that prohibited personal injury lawyers from sending targeted direct mail solicitations to victims or their relatives for thirty days following an accident or disaster.

There are strong ideological differences among those who advocate greater freedom for lawyer advertising and those who urge strong curbs on its use. The latter see advertising by attorneys as basically not “professional” and believe it is a factor in the low regard for lawyers that many people have. The counterargument is that the advertisements that are most frequently the subject of litigation are those of personal injury lawyers who generally represent lower income clients with less information and access to lawyers than more affluent people, who have access to more information about lawyers. Thus, limiting lawyer advertising will limit information about access to justice to those probably most in need of it.

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Cases and Statutes Cited

Bates v. State Bar of Arizona, 433 U.S. 350 (1977)
Florida Bar v. Went-For-It, 516 U.S. 619 (1995)
Ohralik v. Ohio State Bar Ass’n, 436 U.S. 447 (1978)
Shapero v. Kentucky Bar Ass’n, 486 U.S. 466 (1988)
Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 478 (1976)

PROFILING (INCLUDING DWB)

“Profiling,” as we will see, has evolved from an anticipated and lauded method of criminal investigation to a practice many equate with racism. Tracing the course of this development, it is important to stress three phenomena: the transition from reactive to proactive profiling; the shift away from profiling as the exclusive province of trained experts; and the widening array of criminal activities for which “profiles” have come to be constructed. Let us now consider the original conception of criminal profiling and then the emergence of racial profiling.

Criminal Profiling

Detective novels from the early 1800s (for example, the Sherlock Holmes novels) are appreciated for their detailing of the manner by which inspectors drew

inferences from data and demonstrated intuition, insight, and perspicacity as they solved the riddles presented by criminal cases. This was “profiling” in its earliest form—that is, the technique of relying on clues, signals, and a sophisticated understanding of human behavior and tendencies to develop a frame for understanding the features and characteristics of the likely offender.

Criminal profiling as a law enforcement tool in the early part of the twentieth century was predicated on the same skills and abilities. The famous case of the “Mad Bomber” in New York City in the 1940s and 1950s was solved, for example, because Dr. James A. Brussel, a Connecticut psychiatrist, was able to look at the evidence and environment of previous attacks and thus construct a profile that (correctly) predicted the appearance, inclinations, and motivations of the attacker, leading police to narrow their search and eventually arrest the offender. Profiling of this sort was the province of experts, especially members of the Behavioral Sciences Unit (B.S.U.) of the F.B.I.—a group of individuals trained in psychology, criminology, and forensics who focused their attention on only specific types of crimes (for example, murders, rapes, and arson, usually by serial offenders) and responded to criminal activities in a *reactive* manner—that is, solving crimes that had already taken place.

But a different form of criminal profiling is carried out by police officers, a form that is more experiential (based on their time spent walking the “beat”) than scientific (based on academic studies and analysis) and one that is more proactive in nature—positioned to ward off threats and perceive potential dangers before they occur. (See *Terry v. Ohio*, 392 U.S. 1, 1968, for the Warren Court’s discussion on such police tactics and the constitutional nature of “stop and frisk” practices so long as the officer is able to articulate facts sufficient to demonstrate a “reasonable suspicion” that a crime has occurred or may soon occur.) In this regard, one of the central issues that makes profiling so complicated is that officers of the law are supposed to be observant, insightful, and wary; they are trained to notice things out of place, to rely on their intuition, and to have a heightened sense of suspicion due to their familiarity with the environment and its inhabitants.

One of the ways that such skills can discourage crimes from even occurring is that officers recognize individuals deemed “symbolic assailants” by the criminologist Jerome Skolnick in the classic study, *Justice Without Trial*. Describing such assailants, Skolnick explains that policemen develop “perceptual shorthand to identify certain kinds of people as symbolic assailants,” or people who “use gesture,

language, and attire that the policeman has come to recognize as a prelude to violence.” Thus, criminal profiling in various forms is infused in the history and role expectations of elite forensic experts and ordinary “cops on the street.” But profiling, in practice, was transformed in its extension to new arenas and in response to different criminal endeavors.

Specifically, the “skyjacker” profile was instituted in the early 1970s to prevent airplane hijackings, which had increased significantly. Characteristics drawn from a study of all hijackings allowed a special task force to devise a profile of likely offenders and thereby reduce the number of hijackings by 50 percent the next year. The success of the skyjacker model inspired its application to the “War on Drugs.” In an effort to stem the flow of illegal drugs into the United States through the nation’s airports, the “drug courier profile,” devised by Detroit Drug Enforcement Agency (D.E.A.) Special Agent Paul Markonni, was instituted. This profile, culling together the “primary” (for example, traveling from or to “source cities,” use of an alias) and “secondary” (for example, use of public transportation, immediate phone call upon arrival) characteristics of likely offenders.

But the drug courier profile in particular differed in important ways from earlier forms. Most importantly, it was not created by experts trained in the social and behavioral sciences, but rather was assembled based on the perspectives of enforcement agents. It also took on a more amorphous form, marked by “characteristics” so open ended and at times internally contradictory that they allowed agents vast discretion in finding a “fit” or pegging individuals to one or more of the features of the profile.

Racial Profiling

What we know as racial profiling was born out of this increase in individual-level discretion as well as the extension of the “drug courier profile” to the nation’s highways and interstates, where it was interpreted and applied by an even broader array of individual agents. It is in this context that the term “driving while black” (DWB) emerged in the mid-1990s, as the highway patrol in several states (especially New Jersey, Maryland, and Florida) were criticized for pulling over disproportionate numbers of minority—primarily black—motorists and subjecting them to pretextual stops, or stops ostensibly related to violations in the motor vehicle code, but actually motivated by racial bias.

Of course, such intentions are difficult to prove, especially given the murkiness of U.S. Supreme Court

opinions during the 1970s and 1980s with respect to the drug courier profile (for example, *U.S. v. Sokolow*, *Reid v. Georgia*), but more recently the decision in *Whren v. United States*, 517 U.S. 806 (1996), wherein the Court unanimously accepted the “could have” over the “would have” standard with respect to pretextual stops. This means that as long as an officer is able to articulate a particular violation of the motor vehicle code for which a driver could have been pulled over (regardless of whether or not the driver regularly would have been stopped), then the officer, in effect, has sufficient justification to detain the driver and investigate the situation.

The practical effect of *Whren* was to afford law enforcement agents greater discretion with respect to those who, within the larger domain of motorists who theoretically could be stopped, actually are stopped, thus simultaneously making allegations of racial bias more common and more difficult to prove. (It is worth noting here that one study of highway stops in Maryland found that of the 93 percent of motorists who “could have” been stopped [a group that was 17 percent African American and 74.7 percent Caucasian], 73 percent of those who were stopped were black, while only 20 percent of the stops involved whites.

As we conclude, then, let us consider the complicated question lurking in the background of this discussion: Is profiling “legal”? The short, but probably unsatisfactory, answer to that query is that it is hard to say. The Supreme Court has consistently declined to address this practice head on and rulings have seemed to run in different directions. What we do know is that for suspicion to be considered “reasonable” enough to constitute probable cause, an officer must still be able to articulate the particular features of the situation (see *Terry v. Ohio*)—as opposed to merely having an “inchoate hunch”—to a court that will contemplate the officer’s basis in light of the unique facts and the “totality of the circumstances” of the case. A “profile” predicated on the driving of a Toyota, membership in a certain ethnic group, or simply looking “funny” would thus be insufficient. But traveling with expired tags, dressing in a way inconsistent with the weather (for example, wearing a heavy coat during the summer), having out-of-state plates, acting erratically at the sight of an officer, etc. might be enough—in light of other specific facts of the situation—to generate reasonable suspicion and thereby pass constitutional muster.

Therein lies the rub: Profiles represent the composite of an officer’s experience in law enforcement. But one would also expect any experienced, seasoned, and savvy officer to be able to articulate the “particular” reasons for stopping a motorist, whether genuine or

PROFILING (INCLUDING DWB)

not—especially if (following *Whren*) nearly every vehicle on the road or every driver during the course of travel is guilty of some violation of the motor vehicle code and is thus within the class of offenders who could have been pulled over in the first place.

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References and Further Reading

- Harris, David, “*Driving While Black*” and *All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops*, *Journal of Criminal Law and Criminology* 87 (1997): 544.
- Heumann, Milton, and Lance Cassak. *Good Cop, Bad Cop*. New York: Peter Lang Publishing, 2003.
- Skolnick, Jerome. *Justice Without Trial*. New York: Macmillan, 1967.
- Turvey, Brent. *Criminal Profiling*. San Diego: Academic Press, 1999.

Cases and Statutes Cited

- Terry v. Ohio*, 392 U.S. 1 (1968)
- Whren v. United States*, 517 U.S. 806 (1996)
- See also *Terry v. Ohio*, 392 U.S. 1 (1968); Warren Court

PROFITT v. FLORIDA, 428 U.S. 242 (1976)

The death penalty does not violate the Eighth Amendment as long as certain minimal procedural requirements are met.

Charles William Proffitt was sentenced to death for committing a murder during the course of a burglary. He argued that his death sentence was unconstitutional because of the arbitrary manner in which the death penalty is imposed. The Supreme Court rejected his argument. Crucial to the Court’s holding was the fact that Florida had procedures in place to ensure that the death penalty was not imposed in an arbitrary and capricious manner. First, a separate evidentiary hearing was held after a defendant was found guilty, during which aggravating and mitigating evidence was presented. According to the Court, this ensured that the defendant received individualized consideration. Second, the trial judge was required to find that the aggravating circumstances outweighed mitigating circumstances in order to impose a death sentence. Finally, after death was imposed, the sentence was subject to appellate review by the state’s highest court.

The Court concluded that, as a result of these procedures, “it is no longer true that there is ‘no meaningful basis for distinguishing the few cases in

which [the death penalty] is imposed from the many cases in which it is not.” This conclusion, however, has not been proven to be true and it remains just as difficult to distinguish the few cases in which it is imposed from the many in which it is not.

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See also **Capital Punishment; Capital Punishment and Equal Protection Clause Cases; Capital Punishment: Due Process Limits; Capital Punishment: Eighth Amendment Limits; Capital Punishment: History and Politics**

PROHIBITION (1920–1933)

Proponents of Prohibition expected to end misery and boost the economic well-being of the nation by banning the manufacture, sale, or transportation of intoxicating beverages through the Eighteenth Amendment to the Constitution. The ban took effect on January 16, 1920, with the Volstead Act defining the legal features of Prohibition. Offensive enforcement practices subsequently created strong public opposition to the alcohol ban. Prohibition was repealed by the Twenty-First Amendment on December 5, 1933.

Prohibition had deep roots in American society. The temperance movement was one of the major reform efforts of the nineteenth century, with opponents of alcohol generally preferring persuasion over coercion. In 1851, Maine became the first state to ban the manufacture and sale of alcoholic beverages. Twelve states followed Maine’s lead as a desire for government interference in private life replaced an emphasis on individual will. By the time of the Civil War, these laws had disappeared because of public opposition or court rulings. In the 1880s, the prohibition movement revived.

The drive for a prohibition amendment to the Constitution began in 1913 following a string of state prohibition laws. State prohibition could not be effectively enforced with “wet” states next to “dry” strongholds. National prohibition was designed to outflank the wet states by imposing national authority.

Proponents of the law promised an end to the problems historically associated with alcohol: family abuse, poverty, crime, illness, and low worker productivity. On December 18, 1917, Congress passed the prohibition amendment and sent it to the states for ratification. The Eighteenth Amendment was formally ratified on January 16, 1919, and scheduled to go into effect one year later. Congress refused to wait for ratification. It enacted the Wartime Prohibition Act on November 21, 1918 (after the war had ended on November 11), which barred the sale of intoxicants

beginning in July 1919. Congress passed the Volstead Act, officially known as the National Prohibition Act, to define alcoholic beverages. The definition of an alcohol content of 5 percent eliminated virtually all alcoholic drinks, including beer and wine, from production and sale as beverages.

Resistance to the law began almost immediately, in many forms. By allowing the home production of nonintoxicating cider and fruit juices, Prohibition created an extremely strong demand for grapes suitable for shipping to urban, ethnic neighborhoods. People accustomed to drinking wine with meals, such as immigrants from Mediterranean countries, were forced to produce their own wine to ensure an adequate supply of what they viewed as a necessary commodity. Additionally, local police were sporadic in their efforts to crack down on illegal traffic in alcohol and juries were reluctant to convict fellow citizens for behavior that did not seem especially criminal.

Enforcement of Prohibition was assigned to the Treasury Department. Field agents were empowered to declare as public nuisances buildings, vehicles, and other property used to manufacture, move, sell, or store illegal alcohol and to seize, sell, or close them for up to one year. To catch violators, the agents wiretapped telephones, conducted warrantless searches of automobiles, employed informers, and placed poisons in industrial alcohol. In one notorious case, Prohibition agents operated the Bridge Whist Club in New York City for several months and sold liquor to anyone who asked for it. The agents later made arrests with information gathered at the club. Not all violators were arrested, however. The Prohibition agents, exempted from civil service laws, were infamous for taking bribes. By 1931, over 8 percent of the agents had been dismissed for bribery or drunkenness.

Prohibition failed to eliminate drinking and create a more orderly society. Consumption of alcohol virtually stopped in rural states, but the refusal of many people in cities to alter their drinking habits created a ready black market for illegal liquor and contributed to the rise of crime syndicates. People had to pay more for alcohol and many chose to purchase products that offered more potency, including dangerous homemade moonshine. Black market distillers made liquor from potatoes, corn, and squash as well as industrial liquor, antifreeze, and paint. Many consumers went blind or died as a result of drinking such beverages. Crime patterns also shifted. Less serious crime, such as vagrancy and malicious mischief, did diminish by half, but crimes involving violence or theft of property increased by 13.2 percent during

the Prohibition years, while homicides increased 16.1 percent and robbery rose 83.3 percent. The number of prisoners housed in federal prisons, reformatories, and camps grew from 3,889 in 1920 to 13,698 in 1932. Most federal criminal cases in the 1920s involved Volstead Act violations. Lastly, despite the arrests, it remained fairly easy to locate alcohol in cities. In the 1920s, it was rumored that the best way to locate the local bootlegger was to ask the cop on the street corner.

Opposition to Prohibition rose throughout the 1920s. The Association Against the Prohibition Amendment argued that giving federal and state authorities the power to control an individual's choice of drink put too much power in governmental hands. The Women's Organization for National Prohibition Reform objected to government intrusion into private life. Worried about the effect of the breakdown of law and order upon children, they challenged the idea that all women backed Prohibition.

Upon taking office in 1929, President Herbert Hoover appointed the National Commission on Law Observance and Enforcement (Wickersham Committee) to study Prohibition. When the committee issued its report in 1931, it expressed support for the law but the individual statements of members revealed skepticism as to whether the law was enforceable at an acceptable cost.

By 1931, the U.S. was trapped in the Great Depression. In the midst of the economic crisis, many hoped that the return of alcohol industry jobs would assist recovery. The liquor trade had been the nation's seventh largest industry before law-abiding liquor-related jobs were eliminated. In 1933, Congress adopted an amendment repealing Prohibition. Most states offered voters slates of candidates in favor of and opposed to ratification of the repeal. Seventy-three percent of voters approved repeal and the Twenty-First Amendment became law.

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References and Further Reading

- Kyvig, David E. *Repealing National Prohibition*. Kent, OH: Kent State University Press, 2000.
- Neumann, Caryn E. "The End of Gender Solidarity: The History of the Women's Organization for National Prohibition Reform in the United States, 1929–1933." *Journal of Women's History* 9(2) (Summer 1997): 31–51.
- Pegram, Thomas R. *Battling Demon Rum: The Struggle for a Dry America, 1800–1933*. Chicago: Ivan R. Dee, 1998.
- Sinclair, Andrew. *Prohibition: The Era of Excess*. New York: Harper and Row, 1962.

See also **Search (General Definition); Search Warrants**

PROOF BEYOND A REASONABLE DOUBT

Under the due process clause of the Fifth Amendment, no individual may be convicted of a crime unless the prosecution can prove his guilt beyond a reasonable doubt. That standard is designed to reduce the possibility of false conviction by requiring jurors to acquit whenever there is reasonable doubt of the defendant's guilt, no matter how strong the prosecution's proof might otherwise be. The standard thus represents, as Justice Harlan wrote in the seminal case, *In re Winship* (397 U.S. 358, 1970), the "fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free."

Although the Supreme Court has held that courts are constitutionally required to instruct jurors to apply the standard of proof beyond a reasonable doubt, it has never mandated a particular formulation of the standard. As a result, courts differ substantially in how they explain the prosecution's burden of proof to jurors. Most attempt to differentiate between reasonable and unreasonable doubts, instructing jurors that a reasonable doubt is "something more than a guess or a surmise" or "a kind of doubt that would cause a reasonable and sensible person to hesitate before acting upon a matter of importance in his or her own affairs." A minority of courts focus on how strong the prosecution's case must be for the reasonable-doubt standard to be satisfied, instructing jurors that they need to be "firmly convinced" of the defendant's guilt in order to convict. Finally, a few courts make no attempt to explain the standard at all, leaving it to jurors to apply the standard as they see fit.

Despite the Supreme Court's reluctance to micro-manage the reasonable-doubt standard, empirical research indicates that jurors interpret the government's burden of proof very differently depending on the kind of instruction they receive. One study, for example, found that mock jurors presented with a weak murder case never convicted when given a "firmly convinced" instruction, but convicted nearly half the time when given an instruction that focused on the definition of reasonable doubt. Another study found that nearly one third of actual jurors who were given an instruction that did not explain the reasonable-doubt standard believed that the burden of proof was on the defendant to prove his innocence.

These studies are indicative of the fact that jurors generally underestimate how strong the prosecution's case must be in order to satisfy the reasonable-doubt standard. The standard is the most restrictive in American law; judges generally agree that jurors should not convict unless they are at least 90 percent

certain that the defendant is guilty. Nevertheless, jurors often set the threshold for proof beyond a reasonable doubt far lower, sometimes as low as 50 to 55 percent and rarely higher than 80 percent. Indeed, jurors often believe that the reasonable-doubt standard is no more demanding than the clear-and-convincing standard used in civil cases—the standard that the Supreme Court found inconsistent with the presumption of innocence in *Winship*.

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References and Further Reading

- Shapiro, Barbara J. *Beyond Reasonable Doubt and Probable Cause: Historical Perspectives on the Anglo-American Law of Evidence*. Berkeley: University of California Press, 1991.
- Solum, Lawrence M., *Refocusing the Burden of Proof in Criminal Cases: Some Doubt About Reasonable Doubt*, *Texas Law Review* 78 (1999): 105–147.

Cases and Statutes Cited

In re Winship, 397 U.S. 358 (1970)

See also **Due Process**

PROPORTIONAL PUNISHMENT

Western culture at its core embraces proportionality. The ancient Greeks, especially Pythagoras, saw the universe as a *kosmos*: well ordered, measurable, proportional. Good order could only be maintained by imposing limits on the chaotic and unlimited. It is this way, too, with punishment. Proportionality operates as an aspiration and limitation. Although, like-for-like, "an eye for an eye," exact 1:1 reciprocity was simplest, some crimes required less symmetric measures: "If the guilty man deserves to be beaten," Deuteronomy declares, "the judge shall cause him to lie down and be beaten with a number of stripes in proportion to his offense" or, in another translation, "according to the measure of his wickedness." The Magna Carta (1215) continued this commitment to proportionality in punishment: "A free man shall be amerced for a small fault only according to the measure thereof, and for a great crime according to its magnitude." But how does one compare the fault to the severity of the sanction?

The European Enlightenment embraced liberty and rationality. Instead of beating a person in proportion to the offense, the new punitive proportionality consisted of depriving the criminal of units of freedom. Thus, as Foucault described it, "The pain of the body itself is no longer the constituent element

of the penalty. From being an art of unbearable sensations punishment has become an economy of suspended rights." The infant American Republic embraced this rational proportionality by building penitentiaries and substituting prison time for bodily punishment.

Although several early state constitutions specifically included proportionality principles—"All penalties ought to be proportioned to the nature of the offence," declared New Hampshire's in 1784—the U.S. Constitution nowhere explicitly commands proportional punishment. The Eighth Amendment, however, does prohibit "excessive bail," "excessive fines," and "cruel and unusual punishment."

In 1892, declaring the Eighth Amendment "directed" not only at torture, but "against all punishments that by their excessive length or severity are greatly disproportioned to the offenses charged," Justice Field, dissenting, would have prohibited Vermont from sentencing a seller of unlicensed liquor to 54 years at hard labor (*O'Neil*). Such a harsh punishment, "six times as great as any court in Vermont could have imposed for manslaughter" and "appropriate only for felonies of an atrocious nature," was "greatly disproportioned to the offense" and therefore "cruel and unusual." How can judges know disproportionality? The thought of imposing this punishment for that crime would cause "any man of right feeling and heart" to "shudder."

These last hundred years, the U.S. Supreme Court has divided sharply over whether the judiciary can determine that a popular, legislatively enacted punishment is or is not truly proportional to the particular crime to which it responds. Controversy still swirls about the constitutional status of "proportionality" for punishment generally and capital punishment particularly. In the leading case (*Harmelin v. Michigan*, 501 U.S. 957, 1991), the U.S. Supreme Court affirmed Michigan's right to mandate life without parole for simple possession of a little more than a pound of cocaine. "The Eighth Amendment contains no proportionality guarantee," insisted Justice Scalia, joined by Chief Justice Rehnquist. "There is no objective standard of gravity." So-called "proportionality" was a nonconstitutional means for justices to impose their "subjective values."

"Courts have not baldly substituted their own subjective moral values for those of the legislature," countered Justice White, joined by Justices Blackmun and Stevens, dissenting in *Harmelin*. Michigan, with no death penalty, could not constitutionally reserve the same punishment for drug possession as it had for first-degree murder. "The Eighth Amendment does not require strict proportionality between crime and sentence," declared Justice Kennedy, joined by

Justices O'Connor and Souter, upholding Harmelin's life sentence but occupying middle ground. "Rather, it forbids only extreme sentences that are 'grossly disproportionate' to the crime." In the "rare case" where "a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality," a judge should compare "the sentences imposed on other criminals in the same jurisdiction and sentences imposed for the same crime in other jurisdictions." More recently in *Ewing v. California*, 538 U.S. 11 (2003), the court again split into three factions, a majority (five to four) affirming California's right to its popular "three strikes and you're out" life sentence for a career criminal whose latest crime was shoplifting three golf clubs.

Essentially unrevised for four decades, the Model Penal Code's "new approach" now calls for "punishment within a range of severity proportionate to the gravity of offenses, the harms done to crime victims, and the blameworthiness of offenders." The official commentary attacks "the toothless standard of 'gross disproportionality' that has taken root in federal constitutional law," while reaffirming an essential connection between proportionality and retribution. Just deserts should provide the floor *and* ceiling to a range of permissible punishments. The commentary continues:

[Although] moral intuitions about doing justice in specific cases are almost always rough and approximate, most people's moral sensibilities, for most crimes, will orient them toward a range of permissible sanctions that are "not undeserved." At the perimeters of the range, some punishments will appear clearly excessive to do justice, and some will appear clearly too lenient—but there will nearly always be a gray area between the two extremes.

Proportionality advocates are left with unsettling and unsettled questions in balancing the seriousness of the crime against the severity of the punishment. What makes a crime more serious—the defendant's intention and motives, his prior criminal record, the harm he caused? What makes a punishment disproportionately harsh? Although courts and commentators typically focus on the length of the prison sentence, Justice Field had located disproportionality in the "excessive length or severity." Severity of prison depends upon the quality of life inside, not only on how long but also on how intense the deprivation of liberty. Three years in a dungeon at hard labor might be more severe than twenty years in an air-conditioned cell with canteen privileges and color TV. Perhaps most intractable, how can a judge substitute an independent objective judgment of proportionality for the legislature's?

Pythagoras could only maintain the *kosmos* by going beyond the strictly rational to embrace an incommensurably richer real but “irrational” or “non-rational” realm. Centuries later, Plato and Aristotle emphasized equity—a nonrational, richer justice. Although a majority of the Court has adopted Justice Field’s “gross disproportionality” limit while also attempting to ban the emotional and intuitive from that assessment, justices really committed to “objective” Constitutional proportionality may also need to embrace Field’s intuitive, emotive measuring device or something like it: A punishment is grossly disproportionate and unconstitutional when the thought of its imposition for the particular crime would make any person of right feeling and heart shudder.

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References and Further Reading

- Blecker, R. “Roots.” In *America’s Experiment With Capital Punishment*, 2nd ed. Durham, NC: Duke University Press, 2003, Ch. 6.
Ewing v. California, 538 U.S. 11 (2003).
 Foucault, M. *Discipline and Punish* (A. Sheridan, trans.) New York (1979).
Harmelin v. Michigan, 501 U.S. 957 (1991)
Robinson v. California, 370 U.S. 660 (1962)
Rummel v. Estelle, 445 U.S. 263 (1980)
Solem v. Helm, 463 U.S. 277 (1983)
Trop v. Dulles, 356 U.S. 86 (1958)

See also **Capital Punishment: Proportionality; Proportionality Reviews**

PROPORTIONALITY REVIEWS

Under the Eighth Amendment, all criminal sentences are subject to a proportionality review—an evaluation of the appropriateness of a sentence for a particular crime. In deciding whether a particular sentence is appropriate, the Supreme Court has looked to the gravity of the offense and the severity of the penalty imposed for other crimes and to sentencing practices in other jurisdictions. The Court has occasionally performed proportionality reviews in order to determine whether a sentence is proportionate when applied to certain classes of offenders.

The Supreme Court has performed proportionality reviews of death sentences in several cases. It has held that a death sentence is not per se disproportionate to the crime of murder. The Court, however, has held that the Eighth Amendment does not require that a particular death sentence be compared to sentences that have been meted out in similar cases. Had it imposed such a requirement, a death sentence could have been reversed on the ground that similarly

situated defendants were not sentenced to death. By statute or under their constitution, several states have required their highest court to perform proportionality reviews of death sentences as a means of ensuring that death sentences are not being imposed arbitrarily.

The Court has held that a death sentence is disproportionate to the crimes of rape and robbery. It has also held that the imposition of the death penalty would be disproportionate in the case of a person who participated in the commission of a felony but who had not killed, attempted to kill, intended to kill, or not acted with extreme indifference to human life. The Court has also held that because of their diminished ability to reason and lesser culpability, death is a disproportionate punishment for offenders younger than eighteen years old and for the mentally retarded.

Some jurisdictions have expanded the death penalty to include crimes not involving murder, such as espionage, treason, drug trafficking, and the rape of a child less than twelve years old. The argument will be made in the case of a defendant who commits one of these crimes that death is a disproportionate punishment for these offenders since their crimes do not involve the taking of human life. The Supreme Court will be forced to resolve these issues in the coming years under its proportionality jurisprudence.

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Cases and Statutes Cited

- Coker v. Georgia*, 433 U.S. 584 (1977)
Gregg v. Georgia, 428 U.S. 153 (1976)
Pulley v. Harris, 465 U.S. 37 (1984)
Roper v. Simmons, 543 U.S. 551 (2005)
Sinclair v. State, 657 So.2d 1138 (Fla. 1995)
Tison v. Arizona, 481 U.S. 137 (1987)
 Ala. Code 13A - 5-53(b)(3)
 Del. Code Ann. tit. 11, 4209(g)(2)(a)
 Ga. Code Ann. 17-10-35(c)(3)
 Ky. Rev. Stat. Ann. 532.075(3)(c)
 Wash. Rev. Code. Ann. 10.95.130(2)(b)

PUBLIC FIGURES

In *New York Times v. Sullivan*, 376 U.S. 254 (1964), the Supreme Court required that public officials suing for defamation prove “actual malice.” Subsequent appeals questioning whether the *Times-Sullivan* rule applied to public figures resulted in plurality opinions that left the law unsettled. In *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), and *Associated Press v. Walker*, 388 U.S. 130 (1967), the Court required actual malice. Chief Justice Warren’s concurring opinion defined public figures as those intimately involved in

the resolution of important public questions or who by reason of their fame shape events in areas of concern to society. Another Supreme Court plurality opinion, *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971), appeared to require actual malice even when a private individual was suing, as long as the issue was one of public concern.

The Supreme Court next took up the issue in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), where it recognized a distinction between public and private figures. As to public figures, it found that individuals can be universal public figures due to general notoriety or limited public figures when they thrust themselves into a matter of public controversy. A public figure, whether universal or limited, must prove actual malice to recover for defamation.

Since *Gertz*, the Supreme Court has decided that a party to litigation is not necessarily a public figure (*Time, Inc. v. Firestone*, 424 U.S. 448, 1976) and that an individual who did not voluntarily thrust himself into a public controversy is not a public figure (*Hutchinson v. Proxmire*, 443 U.S. 111, 1979). Courts continue having difficulty distinguishing between private and public figures, with one lower court commenting it is “much like trying to nail a jellyfish to the wall.”

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References and Further Reading

- Dobbs, Dan D. *The Law of Torts*, 1174–1178. St. Paul, MN: Thomson West, 2000.
- Smolla, Rodney A. *Smolla and Nimmer on Freedom of Speech*, vol. 2. St. Paul, MN: Thomson West, 2005, 23–24–23–82.

Cases and Statutes Cited

- Associated Press v. Walker*, 388 U.S. 130 (1967)
- Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967)
- Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974)
- Hutchinson v. Proxmire*, 443 U.S. 111 (1979)
- New York Times v. Sullivan*, 376 U.S. 254 (1964)
- Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971)
- Time, Inc. v. Firestone*, 424 U.S. 448 (1976)
- Rosanova v. Playboy Enterprises*, 411 F. Supp. 440 (S.D. Ga. 1976), aff'd 480 F.2d 859 (5th Cir. 1978)

PUBLIC FORUM DOCTRINES

According to the public forum doctrines, the government may not exclude all expressive activities from property that it owns and manages. The Supreme Court first articulated this principle in *Hague v. Committee for Industrial Organization*, 307 U.S. 496 (1939), where it struck down a municipal ordinance that prohibited citizens from assembling in public streets or

parks without a permit. Writing for the plurality, Justice Owen J. Roberts noted that although the government holds literal title to streets and parks, citizens traditionally have had a right of access to these locations to gather and express their opinions. “Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights and liberties of citizens,” Justice Roberts explained. The Court voided the permit ordinance as an arbitrary limitation on speech because it gave city officials complete discretion to grant or deny permit requests.

More recently, the Court in *Perry Education Association v. Perry Local Educators’ Association*, 460 U.S. 37 (1977), identified three categories of public forums where speech activities may take place, each subject to different First Amendment rules. Traditional public forums include places such as streets and parks that historically have been associated with assembly and debate. Citizen speech within traditional public forums is entitled to the strongest First Amendment protection. The government may not close these quintessential public forums, nor may it impose content based restrictions on speech therein unless those regulations advance a compelling state interest pursuant to the strict scrutiny test. Other places identified by the Court as traditional public forums include open areas near a state capitol (*Edwards v. South Carolina*, 372 U.S. 229, 1963), public space surrounding a foreign embassy (*Boos v. Barry*, 485 U.S. 312, 1988), and public sidewalks adjoining the Supreme Court building (*U.S. v. Grace*, 461 U.S. 171, 1983). On the other hand, the Court ruled in *International Society for Krishna Consciousness v. Lee*, 505 U.S. 672 (1992), that city airport terminals are not traditional public forums because they have not “historically been available for speech activity.”

The Court’s second forum category, limited public forums (sometimes also referred to as designated public forums), consists of government property that the state has chosen to make available for expressive purposes. Unlike the traditional public forum, the state is free to open and close limited public forums at its discretion. Nonetheless, the state may not impose content based restrictions on speech within a limited public forum unless those regulations are narrowly drawn to achieve a compelling state interest. The Court first recognized the limited public forum concept in *Southeastern Promotions v. Conrad*, 420 U.S. 546 (1975), where it overturned Chattanooga city officials’ refusal to allow the musical *Hair* to be performed in a municipal auditorium. The Court held that the auditorium, which the city previously had rented for diverse activities, was a designated public forum and that the city’s decision constituted an unjustified prior restraint on speech.

Although traditional public forums must be open to all speakers, the government may impose reasonable access restrictions in limited public forums. In *Widmar v. Vincent*, 454 U.S. 263 (1981), the Court noted that although a state university had created a limited public forum by allowing student groups to conduct meetings on its premises, the university was free to deny nonstudent groups similar use of those facilities. The Court, however, invalidated as an unconstitutional content restriction the university's policy of allowing all student organizations except religious groups to use its meeting rooms. That limited public forums need not have a physical location was established in *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819 (1995). In that case, the Court held that by using mandatory student activity fees to pay printing costs for various student publications, the university established a "metaphysical" limited public forum for student expression. The university had committed unconstitutional viewpoint discrimination, the Court concluded, by authorizing the use of student activity fees to finance secular, but not religious, student publications.

Whereas content and viewpoint discrimination are forbidden in traditional or limited public forums, content neutral regulation of the time, place, and manner of speech will be allowed if the limitations serve a significant government interest, are narrowly tailored to achieve that interest, and leave open ample alternative channels for similar communication. For example, the Court in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), upheld content neutral city regulations that limited the volume of amplified music emanating from a limited public forum, in this case a city park bandshell.

The final forum category, the nonpublic forum, consists of publicly owned property that has not traditionally been used or set aside by the state for public expression. Speech in the nonpublic forum receives a significantly lower level of First Amendment protection. According to the Court in *Perry*, the state may restrict speech in a nonpublic forum if the restriction is "reasonable" and viewpoint neutral. Content based regulations on speech are therefore permissible in the nonpublic forum context. Places identified by the Court as nonpublic forums include army bases (*Greer v. Spock*, 424 U.S. 828, 1976), private homeowners' mailboxes (*U.S. Postal Service v. Greenburgh Civic Association*, 453 U.S. 114, 1981), and a public school's internal mail system (*Perry*).

The crucial question, then, under the public forum doctrine becomes how to distinguish a limited public forum, where speech receives a high level of First Amendment protection, from a nonpublic

forum, where speech can be restricted for any viewpoint-neutral purpose deemed reasonable by the state. In answering this question, the Court has given great deference to the government's purported intent. In *Cornelius v. NAACP Legal Defense & Education Fund*, 473 U.S. 788 (1985), for example, a plurality of the Court upheld an executive order that excluded legal defense and political advocacy groups from participating in a federal charity drive. The Court accepted the government's argument that although it allowed certain "appropriate" agencies to participate in the drive, it never meant to create a limited public forum for charitable solicitation. As a result, although the government would not normally be allowed to exclude offensive speakers from a limited public forum, a danger exists that the government may be able to accomplish this result by simply denying any intention to establish a limited public forum in the first place.

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References and Further Reading

- Cásarez, Nicole B., *Public Forums, Selective Subsidies, and Shifting Standards of Viewpoint Discrimination*, Albany Law Review 64 (2000): 501-581.
- Farber, Daniel A., and John E. Novak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, Virginia Law Review 70 (1984): 1219-1266.
- Tedford, Thomas L., and Dale A. Herbeck. *Freedom of Speech in the United States*, 4th ed. State College, PA: Strata Publishing Inc, 2001.

Cases and Statutes Cited

- Boos v. Barry*, 485 U.S. 312 (1988)
- Cornelius v. NAACP Legal Defense & Education Fund*, 473 U.S. 788 (1985)
- Edwards v. South Carolina*, 372 U.S. 229 (1963)
- Greer v. Spock*, 424 U.S. 828 (1976)
- Hague v. Committee for Industrial Organization*, 307 U.S. 496 (1939)
- International Society for Krishna Consciousness v. Lee*, 505 U.S. 672 (1992)
- Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37 (1983)
- Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819 (1995)
- Southeastern Promotions v. Conrad*, 420 U.S. 546 (1975)
- U.S. Postal Service v. Greenburgh Civic Association*, 453 U.S. 114 (1981)
- U.S. v. Grace*, 461 U.S. 171 (1983)
- Ward v. Rock Against Racism*, 491 U.S. 781 (1989)
- Widmar v. Vincent*, 454 U.S. 263 (1981)

See also **Public/Nonpublic Forums Distinction; Universities and Public Forums**

PUBLIC/NONPUBLIC FORUMS DISTINCTION

The distinction between a “public forum” and a “nonpublic forum” is at the heart of “public forum doctrine”—the set of rules used by courts to determine when government may regulate speech on public property. If public property is deemed to be a “public forum,” courts are quite protective of speech and give heightened scrutiny to the government’s reasons for and means of restricting speech in the forum. (A public forum can be a “traditional” public forum like streets, sidewalks and parks or a “designated”/“limited” public forum like public-university meeting rooms and municipal theaters.) In contrast, if public property is deemed instead to be a “nonpublic forum,” then courts apply only a low level of scrutiny to the government’s speech restrictions on that property, requiring merely that the government regulation be reasonable in light of the purpose of the forum and not discriminate against a particular viewpoint.

Since speech in a “nonpublic forum” receives relatively little protection by the courts, freedom of speech depends very much on how a court initially categorizes the public property on which the government would restrict speech. “Nonpublic forum” serves as the default category for all public property that is neither a traditional public forum nor a designated/limited public forum. Thus, if the property has not been used historically for purposes of assembly, communication, and discussion (as a traditional public forum) or intentionally opened by the state for use by the public for expressive activity (as a designated or limited public forum), the property is classed as a “nonpublic forum.” Examples of nonpublic forums include airport terminals, polling places, prisons, military bases, lampposts, Internet access on computers in public libraries, political debates on public television, and the sidewalks leading up to a post office. The public/nonpublic forums distinction has long been criticized by judges, lawyers, and academics for being inconsistently applied and easily manipulated and thus for failing to safeguard speech, particularly from covert government viewpoint discrimination.

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References and Further Reading

- Ayers, Irene Segal, *What Rudy Hasn’t Taken Credit for: First Amendment Limits on Regulation of Advertising on Government Property*, Arizona Law Review 42 (2000): 607.
- Gey, Steven G., *Reopening the Public Forum—From Sidewalks to Cyberspace*, Ohio State Law Journal 58 (1998): 1535.
- Montgomery, Suzanne Stone, *Note, When the Klan Adopts a Highway: The Weaknesses of the Public Forum*

Doctrine Exposed, Washington University Quarterly 77 (1999): 557.

Post, Robert, *Between Governance and Management: The History and Theory of the Public Forum*, UCLA Law Review 34 (1987): 1713.

Smolla, Rodney A. *Smolla and Nimmer on Freedom of Speech*, vol. 1. St. Paul, MN: West Group, 2003, 8:1–52.

Stoll, David A., *Public Forum Doctrine Crashes at Kennedy Airport, Injuring Nine*: International Society for Krishna Consciousness, Inc. v. Lee, Brook. Law Review 59 (1993): 1271.

Tribe, Lawrence H. *American Constitutional Law*, 2nd ed. Mineola, NY: Foundation Press, 1988, 986–997.

See also **Categorical Approach to Free Speech; Designated Public Forums; *Hague v. C.I.O.*, 307 U.S. 496, (1939); Limited Public Forums; Public Forum Doctrines; *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 1995); Traditional Public Forums**

PUBLIC OFFICIALS

In *New York Times v. Sullivan* (1964), the Supreme Court held that public officials suing for defamation must prove by clear and convincing evidence that the defendant acted with “actual malice.” Actual malice means the defendant knew the statement was false or acted with reckless disregard for its truth or falsity. It required this high degree of defendant culpability to protect the First Amendment rights of persons who criticize public officials and to encourage a robust debate on matters of public concern. Otherwise, citizens might be inhibited from criticizing the government. The Court was concerned that state defamation law would have a chilling effect on the exercise of freedom of speech and press.

Subsequent decisions have identified categories of individuals who fall within the definition of public official. They include elected officials on state and federal levels, candidates for public office, and government employees who appear to have substantial responsibility for control of public affairs. What is not so clear is which lower level government employees are public officials. In cases involving police officers, public school teachers, and principals, for example, lower courts have reached inconsistent conclusions.

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References and Further Reading

- Dobbs, Dan B. *The Law of Torts, 1173–1174*. St. Paul, MN: Thomson West 2000.

Veilleux, Danny R., *Annotation, Who Is "Public Official" for Purposes of Defamation Action?* American Law Reports (Fifth Series) 44 (1996): 193.

Cases and Statutes Cited

Monitor Patriot Co. v. Roy, 401 U.S. 265 (1971)
New York Times v. Sullivan, 376 U.S. 254 (1964)
Rosenblatt v. Baer, 383 U.S. 75 (1966)

PUBLIC SCHOOL CURRICULA AND FREE EXERCISE CLAIMS

Public school curricular decisions have frequently been challenged by parents and students alleging violations of the free exercise clause of the First Amendment. The standard courts use to assess free exercise claims changed substantially with the Supreme Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990). As a general matter, *Smith* made it more difficult to prove free exercise violation. However, plaintiffs have faced significant difficulties trying to win curriculum cases before and after *Smith*.

The Supreme Court has interpreted the First Amendment's religion clauses to mean that government must be neutral towards religion. (See *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 216, 1963; *Comm. for Public Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 792-93, 1973 ["proper respect for both the free exercise and the establishment clauses compels the State to pursue a course of 'neutrality' toward religion"]; *Wallace v. Jaffree*, 472 U.S. 38, 60, 1985 ["government must pursue a course of complete neutrality toward religion"].) When it comes to the operation of public schools, the Court has recognized that judicial intervention requires "care and restraint" (*Epperson v. Arkansas*, 393 U.S. 97, 104, 1968), but it has also stated that "the vigilant protection of constitutional freedoms is nowhere more vital" than in public schools (*Shelton v. Tucker*, 364 U.S. 479, 487, 1960).

Until 1990, courts analyzing challenges to curricula under the free exercise clause used the test articulated in *Sherbert v. Verner*, 374 U.S. 398 (1963). Under *Sherbert*, courts first examined the burden on the religious practices or beliefs of the party challenging the government action. If the burden was substantial, then the government needed to satisfy the strict scrutiny test: it had to have a compelling interest, and its practice had to be narrowly tailored to further that interest. (See, for example, *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058, 1063, 6th Cir., 1987 [citing *Sherbert*].) In cases involving public school curricula, courts measured the burden on religion by

asking whether the curricula had a coercive effect on the student, forcing the student to declare his belief or nonbelief in religion or to compel the student to take action inconsistent with his beliefs (*Mozert*, 827 F.2d at 1063-64; *Grove v. Mead School Dist. No. 354*, 753 F.2d 1528, 1533, 9th Cir., 1985, cert. denied, 474 U.S. 826, 1986). When students were not forced to declare their belief or nonbelief or perform acts inconsistent with their beliefs, the government's compelling interest in providing quality public education was found to outweigh the alleged burden (*Mozert*, 827 F.2d at 1065; *Grove*, 753 F.2d at 1533).

In 1990, the Supreme Court decided *Employment Div. v. Smith*, 494 U.S. 872, 878-82 (1990), holding that a law neutral on its face and applied generally did not violate the free exercise clause, regardless of the law's burden on religion. The Court reiterated this in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993), holding that a "law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." The Court in *Smith* distinguished free exercise-only claims from "hybrid claims" that combined a free exercise challenge with another constitutional claim, such as due process. In "hybrid rights" cases, courts could take into account the burden on the plaintiff's religion (*Lukumi Babalu Aye* at 882. After *Smith*, laws challenged on free exercise grounds alone must be upheld if they are facially neutral and generally applicable.

Since *Smith* was decided, most courts faced with free exercise clause challenges involving public school curricula have concluded that the issue is whether the curricular decision is facially neutral and generally applicable, rather than whether it imposes an unacceptable burden on the free exercise of religion. In *Brown v. Hot, Sexy and Safer Productions, Inc.*, 68 F.3d 525, 530 (1st Cir. 1995), the court found that a one-day sex education program was a "neutral requirement that applied generally to all students" (*Brown* at 539). Because this requirement was neutral and generally applicable (and because it was not a "hybrid claim"—that is, the free exercise claim was not accompanied by another constitutional claim), the plaintiffs' free exercise rights were not violated.

In *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1280 (10th Cir. 2004), a Mormon student challenged an acting class requirement that she be forced to use offensive words and take God's name in vain. Like the first circuit, the tenth circuit applied the *Smith* test and asked whether the requirement was neutral and generally applicable. On the facts, the court of appeals held that the plaintiff was entitled to try her

claim that the requirement she adhere to the script during an acting class was not truly neutral and generally applicable, but instead disguised religious discrimination (*Axson–Flynn*, at 1294).

At least one circuit has continued to use the *Sherbert* balancing test, even after the decision in *Smith*. The seventh circuit heard a free exercise clause challenge to public school curriculum in *Fleischfresser v. Dirs. of Sch. Dist. 200*, 15 F.3d 680 (7th Cir. 1994). The court found that the burden on the parents was “at most, minimal,” finding that the reading program at issue did not “compel the parents or children to do or refrain from doing anything of a religious nature” (*Fleischfresser*, 15 F.3d at 690). Applying the *Sherbert* test without discussing why *Smith* did not apply, the seventh circuit held that a reading program that did not compel or coerce students did not violate the free exercise clause.

Regardless of whether the *Sherbert* or the *Smith* test is applied, it is apparent that the Court’s more fundamental principle of neutrality towards religion has been the key issue in free exercise clause cases involving public school curricula. Such challenges have tended to fail under either test, unless the plaintiff can show (as was claimed in *Axson–Flynn*) that school officials have departed from the neutrality demanded by the First Amendment.

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References and Further Reading

- Blumhofer, Edith L., ed. *Religion, Education, and the American Experience: Reflections on Religion and American Public Life*. Tuscaloosa: University of Alabama Press, 2002.
- Lechlitter, Michael E., Note: *The Free Exercise of Religion and Public Schools: The Implications of Hybrid Rights on the Religious Upbringing of Children*, Michigan Law Review 103 (2005): 2209–2241.

Cases and Statutes Cited

- Axson–Flynn v. Johnson*, 356 F.3d 1277 (10th Cir. 2004)
- Brown v. Hot, Sexy and Safer Productions, Inc.*, 68 F.3d 525 (1st Cir. 1995)
- Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993)
- Comm. for Public Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973)
- Employment Division v. Smith*, 494 U.S. 872 (1990)
- Epperson v. Arkansas*, 393 U.S. 97 (1968)
- Fleischfresser v. Dirs. of Sch. Dist. 200*, 15 F.3d 680 (7th Cir. 1994)
- Grove v. Mead School Dist. No. 354*, 753 F.2d 1528 (9th Cir. 1985), cert. denied, 474 U.S. 826 (1986)
- Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058 (6th Cir. 1987)
- Sch. Dist. Of Abington Twp. v. Schempp*, 374 U.S. 203 (1963)

- Shelton v. Tucker*, 364 U.S. 479 (1960)
- Sherbert v. Verner*, 374 U.S. 398 (1963)
- Wallace v. Jaffree*, 472 U.S. 38 (1985)

PUBLIC TRIAL

The right of a criminal defendant to a public trial is found in the Sixth Amendment to the Constitution, which states that “in all criminal prosecutions, the accused shall enjoy the right to a public and speedy trial.” This right has been made applicable to the states through the due process clause of the Fourteenth Amendment. The right to a public trial is derived from English common law, where the practice of holding open trials predated even the rights now guaranteed to criminal defendants by the Constitution.

Several purposes underlie the utility of a public trial in American society. Opening trials to the public protects the rights of the defendant, in that public scrutiny will encourage judges and prosecutors to ensure that trials are fundamentally fair. In addition, public trials reinforce the public’s faith in the fairness of the judicial system. Knowledge of the ability to attend criminal trials allows for public confidence that the judicial process deals with crime in a manner that takes into account the interests of the accused and the public. Furthermore, full knowledge of trial procedures and outcome allows the community to react to and process the resolution of criminal acts that disrupt the fabric of lawful society.

Courts have dealt with the right to a public trial in the contexts of when a defendant can request a closed trial and when the government can close a trial over the objection of the defendant. The Supreme Court has held that the right to a public trial is a personal right of the defendant that he can waive in conjunction with the prosecution and the court. Several reasons exist to encourage a criminal defendant to request a closed trial, chief among these the desire to avoid negative publicity that may affect the impartiality of the proceedings. Nevertheless, members of the press argue that the First Amendment grants a right of access to judicial proceedings. In response to these arguments, the Supreme Court has held that a defendant can request a closed trial only after specific findings of a substantial probability that the defendant’s case will be prejudiced by negative publicity and that no reasonable alternatives exist to protect his or her rights.

Conversely, criminal defendants have challenged the propriety of the government’s ability to close judicial proceedings to the public. The government’s reasons for wanting a closed trial may include the need to protect sensitive government information, the desire to protect the identity of witnesses, and

the desire to protect juveniles within the justice system (especially as victims and witnesses). Because the right to a public trial is a clearly delineated constitutional right, courts have held that the government can close a trial only when a compelling government interest exists. Furthermore, the means and methods of closing the trial must be narrowly tailored to accomplish that interest. Finally, the government must consider alternative methods, short of closing a trial to the public, to achieve the compelling interest.

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References and Further Reading

- Gannett Co. v. DePasquale*, 443 U.S. 368 (1979).
Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984) (Press Enterprise I).
Press-Enterprise Co. v. Superior Court, 478 U.S. 1 (1986) (Press-Enterprise II).
Waller v. Georgia, 467 U.S. 39 (1984).

Statutes and Cases Cited

- U.S. Constitution, Amendment VI
 U.S. Constitution, Amendment XIV

See also **Balancing Approach to Free Speech; Bill of Rights; Structure; Cameras in the Courtroom; Classified Information; English Tradition of Civil Liberties; Free Press/Fair Trial; Gag Orders in Judicial Proceedings; Grand Jury; Jury Trial; Media Access to Judicial Proceedings; Right of Access to Criminal Trials**

PUBLIC VULGARITY AND FREE SPEECH

Although speech that meets the legal definition of obscenity can be proscribed by the state, the public utterance of words that are merely profane or vulgar is generally protected by the First Amendment. This was established in the landmark case of *Cohen v. California* (1971), in which the Supreme Court overturned the breach-of-the-peace conviction of a man arrested in a Los Angeles courthouse for wearing a jacket emblazoned with the words "Fuck the Draft." While acknowledging that the jacket displayed an "unseemly expletive," the Court held that the First Amendment strictly limits the government's ability to remove "unseemly" words from public discourse. This is so, Justice John Marshall Harlan II reasoned in his opinion for the Court, because the First Amendment requires that questions of taste be left in the hands of individuals and not dictated by the state. It would be impossible for the government to

distinguish objectively between offensive and nonoffensive speech because, in Justice Harlan's words, "one man's vulgarity is another man's lyric."

Additionally, the Court recognized that the First Amendment protects the emotional as well as the rational content of public communication, noting that "words are often chosen as much for their emotive as their cognitive force." Audience members who object to vulgar language in public places must learn to avert their eyes, the Court concluded.

Similarly, the Court held in *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988), that the publication of an insulting parody of a public figure was protected by the First Amendment. The Court stated in its unanimous decision that the "fact that society may find speech offensive is not a sufficient reason for suppressing it."

Crude remarks meant to provoke a violent response from the listener are theoretically regulable if they rise to the level of "fighting words," which the Supreme Court held are unprotected by the First Amendment in *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). Since *Chaplinsky* was decided, however, the Court has taken an extremely narrow approach to the fighting words doctrine, holding in later cases that it applies only to words likely to cause an immediate breach of the peace uttered in face-to-face encounters. Merely vulgar or distasteful language would rarely, if ever, qualify under this definition of fighting words.

In certain situations involving captive audiences, the Court has allowed the government to protect unwilling listeners from public vulgarity. For example, in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), the Court upheld an FCC order requiring broadcasters to limit nonobscene, "indecent" programming to late-night hours. The Court based its decision on what it termed the "pervasive" nature of the broadcast media, which intrudes into private homes, as well as on broadcasting's accessibility to children. Members of a captive audience cannot simply close their eyes or ears when confronted with vulgar speech, according to the Court. Rather, Justice John Paul Stevens wrote that "[t]o say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow."

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References and Further Reading

- Bezanson, Randall P. *Speech Stories: How Free Can Speech Be?* New York: New York University Press, 1998.
 Hentoff, Nat. *Free Speech for Me—But Not for Thee: How the American Left and Right Relentlessly Censor Each Other*. New York: Harper Collins Publishers Inc., 1992.

Kalven, Harry Jr. *A Worthy Tradition: Freedom of Speech in America*. New York: Harper & Row, Publishers, 1988.

Cases and Statutes Cited

Chaplinsky v. New Hampshire, 315 U.S. 568 (1942)

Cohen v. California, 403 U.S. 15 (1971)

FCC v. Pacifica Foundation, 438 U.S. 726 (1978)

Hustler Magazine v. Falwell, 485 U.S. 46 (1988)

See also **Campus Hate Speech Codes; Hate Speech; Threats and Free Speech**

PULLEY v. HARRIS, 465 U.S. 37 (1984)

In this case the Supreme Court refused to mandate a comparative proportionality review by an appellate court before a death sentence is carried out. The defendant was convicted of capital murder as a result of the killing of two teenage boys in order to use their car in a bank robbery. The defendant argued that the Eighth Amendment required that a particular death sentence had to be compared to sentences imposed in similar cases whenever so requested by the defendant in order to ensure that the death penalty was not being imposed discriminatorily or arbitrarily.

Although several states required their highest court to perform such a review, the Supreme Court refused to hold that a proportionality review was constitutionally required whenever the defendant requested it because there were other procedures in place that minimized the risk of arbitrary, capricious, or freakish sentences. For instance, a defendant could not be sentenced to death unless the jury found at least one special circumstance—for instance, that the murder was committed for profit or that the victim was a police officer—beyond a reasonable doubt. Thus, the death penalty was limited to a small subclass of cases. Furthermore, each death sentence had to be reviewed by the trial judge and the state supreme court in order to ensure that the evidence supported the finding of special circumstances before it could be carried out.

As a result of this and other holdings of the Supreme Court, a state's death penalty scheme will pass constitutional muster as long as the state limits death sentences to a small class of cases, provides a bifurcated proceeding to consider the issues of guilt-innocence and sentencing separately, and provides for trial court and appellate review of the sentence.

KENNETH A. WILLIAMS

See also **Capital Punishment; Capital Punishment and Equal Protection Clause Cases; Capital Punishment:**

Due Process Limits; Capital Punishment: Eighth Amendment Limits; Capital Punishment: History and Politics

PURITANS

The Puritans were a group of religious reformers that arose in England during the late sixteenth century. They wanted to reform the Church of England and bring it closer to the views of John Calvin. Amid persecution for their religious views, the Puritans emigrated to British North America. The church leaders believed that they carried the true message of God and that the Lord would bless them as they established the “true” church, away from the bishops of the Church of England. The Puritans have often been subjected to fierce criticism for being intolerant of others and enforcing their views on the population.

The leader of the Puritan mission to the New World was John Winthrop, who shrewdly managed to bring with him the royal charter of the colony. By having possession of the royal charter, the Puritans were able to establish their society with little interference from the Crown. As the Puritans sailed towards Massachusetts Bay in 1630, Winthrop preached a sermon entitled, “A Model of Christian Charity,” in which he outlined the purpose of the Puritan mission. This mission had the goal of founding the “city on a hill” where the world could view a place where God blessed those living under the covenant of grace.

Puritan family life developed around the ideas of a close-knit community revolving around family life and the church. Families in New England were extremely patriarchal, and often the father closely monitored the fates of his children. One way that fathers used their control was to refuse to give land grants to their sons until their deaths, therefore forcing adult sons to live with them or take on risky ventures of their own.

As the Puritan church evolved, the most important point became the idea of conversion. The idea was that if a person did not have a life-changing moment, then his or her salvation was not real. After listening to captivating sermons describing fantastic conversion experiences, the Puritans began to judge their worthiness by the conversion experience. Churches began to test members for the validity of their conversions and soon developed a standard within the church. Puritans used their experiences to try to establish themselves as a “saint,” or person who had achieved salvation by church guidelines. People who fell outside church guidelines were often pushed to the margins of Puritan society.

PURITANS

Every important decision made in the Puritan community was made at the meeting house, which was used as a place of worship and business. Usually on Mondays, citizens met to make decisions that affected the town. They decided on such things as which roads needed repairing and which new lands needed surveying. During these meetings the leaders decided who got land, and how much. Most of these decisions were made by the leadership of the community: a group of men known as “selectmen.” The meeting house belonged to all the people and, whether a person belonged to the church or not, everyone paid for its upkeep.

The Puritans of New England developed a society that kept religion at its core. The founders of the Puritan church succeeded, at least initially, in founding a society where religion was at the center of people’s lives. However, the strict rules of the Puritan church led to a great deal of discontent, seen in the persons of Roger Williams and Anne Hutchinson. The case of Hutchinson especially demonstrates the patriarchal dominance of Puritan society. She claimed that Puritan leaders were teaching a false gospel and leading people to hell. Hutchinson was put on trial and, because she claimed to have spoken to God directly, was banished.

Perhaps the leading tragedy of the Puritan era was the various witch trials culminating with the Salem witch trials. The idea of putting men and women on

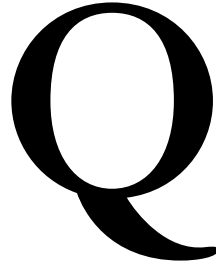
trial for their ideas is seen as very incongruous to the notion of civil liberties in the United States. Often women aroused suspicion as being witches by “flamboyant dress” or being outspoken in the community. The case of Bridget Bishop exemplifies how the civil liberties of many were violated in Puritan society. Bishop violated many of the “norms” of Puritan women. She wore colorful clothing, was married three times, and owned a tavern. She was accused of being a witch, and many male witnesses testified to seeing visions of her at night. Bishop was convicted and the town of Salem witnessed her hanging in 1692.

The Puritan communities in North America played an important part in the development of American society. However, many of their views, such as the strict enforcement of church law and patriarchal ideals, took away the rights of many people.

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References and Further Reading

- Greven, Philip. *Four Generations: Population, Land, and Family in Colonial Andover, Massachusetts: Population, Land, and Family Colonial Andover, Massachusetts*. Ithaca, NY: Cornell University Press, 1972.
- Lockridge, Kenneth. *A New England Town: The First Hundred Years, Dedham, Massachusetts, 1636–1736*. New York: Norton Press, 1985.
- Morgan, Edmund. *Visible Saints: The History of a Puritan Idea*. Ithaca, NY: Cornell University Press, 1965.



QUAKERS AND RELIGIOUS LIBERTY

The Quaker struggle for religious liberty gave rise to the twin constitutional pillars of religious liberty in American jurisprudence and freedom of individual conscience and separation of church and state.

Adherents of the Quaker faith in England were persecuted due to their open refusal to subscribe to the tenets of the state-sponsored Anglican Church. Friends were imprisoned for violating laws prohibiting attendance at Quaker meetings and for refusing to take oaths; they were fined for declining to pay tithes to the Church of England. One of the most outspoken Quakers, William Penn, was expelled from Christ Church College at Oxford University for publicly criticizing the religious ceremonies of the Anglican Church and imprisoned six times for advocating religious liberty. Penn was internationally recognized for his views on religious toleration and his many writings revolved around two themes that later would be codified as bedrock American constitutional principles. The first was that religious obligations are beyond the control of the state because sovereignty over conscience rests in God, not in any human or governmental authority. Second, the stability of the body politic is enhanced, rather than threatened, by religious toleration and the resultant diversity of faith traditions.

The persecution of Quakers was not uniformly remedied by their journey to the American colonies. In 1656, the General Court of the Massachusetts Bay colony passed the first anti-Quaker legislation, which authorized the jailing, whipping, and deportation of Quakers who found their way into the colony, as well

as the imprisonment of persons who assisted the infiltration of the Quakers. Legislation in the succeeding two years provided for increasing punishment of banished Quakers who returned, ranging from lopping off an ear and boring a hole in the tongue with a hot iron to death by hanging. Quakers were expelled as nonbelievers in Puritan Connecticut and suffered persecution in the Virginia colony as well.

Safe haven for Quakers in colonial America was afforded when William Penn received the charter to Pennsylvania from King Charles II in 1681 as repayment of a debt of sixteen thousand pounds the King owed to Penn's father. Pennsylvania colonial laws protected the right to pursue Quaker religion and exempted the Quakers from general secular obligations that conflicted with their religious tenets, such as administering or taking legal oaths. Quaker fidelity to pacifism was shielded initially by the absence of any militia and later by laws providing for a voluntary armed force.

While sheltering Quakers from religious persecution, Penn did not aspire simply to create a Quaker analog to the established Anglican Church. Instead, he actively recruited worshipers outside the Quaker faith from all parts of Europe. As a consequence, the colony was a bastion of religious pluralism.

Pennsylvania became home to Penn's "holy experiment," a moral yet tolerant society granting freedom of individual conscience to its colonists with no state-sponsored or government-financed religion.

Pennsylvania colonial charters generously protected individual religious liberty against governmental

interference and repudiated governmental levies to subsidize sectarian institutions. In 1701, Penn promulgated the Charter of Liberties, which remained in effect until 1776, when the first Pennsylvania constitution was written. The very first provision of the charter enshrined individual religious liberty, providing that “[N]oe person ... who shall Confesse and acknowledge one Almighty God the Creator upholder and Ruler of the world and professe him or themselves Obligated to live quietly under the Civill Government, shall be in any case molested or prejudiced in his ... person or Estate because of his ... Conscientious perswasion or practice.” The charter likewise ensured separation between church and state, guaranteeing that no citizen “be compelled to frequent or maintaine any Religious place or Ministry contrary to his ... mind or doe or suffer any other act or thing, contrary to theire Religious perswasion.” Pennsylvania became one of only four colonies without an established state church and afforded greater asylum to religious liberty than the laws of any other colony.

Even though the Quakers ceased to control the state government following the Revolutionary War, the Pennsylvania constitution perpetuated the twin prongs of Penn’s vision. Section 2 of the Pennsylvania Declaration of Rights of the 1776 Constitution codified the broad ambit of religious liberty for minority and majority faiths alike, protecting the “natural and inalienable right to worship Almighty God to the dictates of their own consciences” free of governmental interference or control of that right. At the same time, those who believed in God were protected from compulsion to “attend any religious worship, or erect or support any place of worship, or maintain any ministry.” The 1776 Constitution continued to respect the Quaker religious objection to military service, exempting “any man who is conscientiously scrupulous of bearing arms from being compelled to do so.”

Dual protections of religious liberty similar to those embodied in the Pennsylvania colonial charters and the state’s 1776 constitution were added to the United States Constitution through the Bill of Rights. The First Amendment provides generally that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” Notwithstanding the ratification of the federal Bill of Rights in 1791 and twentieth-century United States Supreme Court decisions finding these rights to guard against state as well as federal incursion, the more explicit provisions for freedom of individual conscience and separation of church and state in the Pennsylvania constitution continue to provide independent and more overarching protection of religious liberty to the citizens of Pennsylvania. Thus, even

today, residents of the commonwealth remain beneficiaries of the Quaker legacy of religious liberty.

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References and Further Reading

- Brinton, Howard. *Friends for 300 Years*. New York: Harper & Brothers, 1952.
- Dunn, Richard S., and Mary Maples Dunn, eds. *The World of William Penn*. Philadelphia: University of Pennsylvania Press, 1986.
- Gormley, Ken, Jeffrey Bauman, Joel Fishman, and Leslie Kozler, eds. *The Pennsylvania Constitution: A Treatise on Rights and Liberties*. Philadelphia: George T. Bisel Company, 2004.
- Noonan, John T., Jr. *The Lustre of our Country: The American Experience of Religious Freedom*. Berkeley: University of California Press, 1998.
- Sharpless, Isaac. *A History of Quaker Government in Pennsylvania*. Philadelphia: T. S. Leach & Co., 1900.

QUARTERING OF TROOPS (III)

The Third Amendment to the Constitution bans the quartering of troops in the homes of American citizens without the owner’s consent during times of peace, but it allows the legislature to prescribe quartering by law in times of war. At the time of independence, Americans complained that the British had imposed the presence of troops into colonial homes and had kept a standing army in the colonies without the consent of the legislatures of the colonies. This grievance was listed in the Declaration of Independence, decrying the practice as “rendering the Military independent of and superior to the Civil power” by quartering large numbers of troops in the American colonies, with the only check on their military power “mock Trial.” British troops in colonial homes were effectively above the law. The effect of the quartering of troops in the colonies ranged from mere inconvenience to murders that went unpunished. Because the quartering of troops was one of the principal objections to British rule that led to the revolution, it is not surprising that it was contained in the Bill of Rights.

The troop quartering amendment can be viewed as a compromise between competing values. On one hand, the framers had come to value privacy in the home, the often quoted notion that “a man’s home is his castle.” The excesses of the British made it clear that this right had to be protected within the Constitution. On the other hand, there was a realistic notion prevalent that marching troops, in times of peace or war, had to have a place to stay, a position advocated by pragmatic founding father Roger Sherman of Connecticut. The Framers recognized that the demands

of war would raise the need for army presence in the country among the citizenry.

Therefore, the Third Amendment balances between the goal of privacy and military exigencies of the future by banning the quartering of troops during peace outright, while leaving wartime quartering to legislators, who could weigh the need for quartering and provide safeguards where necessary. This reflects the fact that, when individual rights are balanced against a wartime need to station troops, the governmental interest in the military trumps. Such balancing goes on often in constitutional law, where the nature of the constitutional right is weighed against the seriousness of the governmental interest. The Third Amendment effectively means that American citizens will not have to provide for troops, unless war-based demands outweigh that fundamental right of privacy.

As for the contemporary legacy of the Third Amendment, it is notable that the Third Amendment was one of the constitutional clauses cited by Justice William O. Douglas in the landmark privacy case *Griswold v. Connecticut*, 381 U.S. 479 (1965), which held that there was a fundamental right to privacy that banned governmental regulation of the use of contraceptives in the bedroom. The *Griswold* case later was the precedent upon which was built *Roe v. Wade*, which found that a woman's right to choose whether to have an abortion was within the fundamental right to privacy. Under *Roe* and its progeny, the Court has struggled to weigh the interest in privacy against the government's interest in protecting life. Although the privacy right has expanded to encompass things never imagined by the founders, legislatures and courts continue to weigh the fundamental right against governmental interest in protection of society. The history of the Third Amendment suggests that such balancing has always been necessary when it comes to privacy.

JAMES F. Van ORDEN

QUICK BEAR v. LEUPP, 210 U.S. 50 (1908)

Quick Bear v. Leupp illustrated the complexity of protecting First Amendment religious rights for American Indians by tacitly supporting the establishment of Catholic education on the Rosebud Reservation.

By 1908, the U.S. government had for more than a century pursued assimilation policies for Native Americans. Such policies included establishing schools and other educational programs and encouraging Christian missionary activity among tribes. By the late 1800s, the government provided funding for a

number of sectarian schools on reservations using a combination of public money, money from treaty payments to tribes, and, at least in the case at hand, money from a trust fund generated by the sale of Sioux land. During the 1890s, opposition to spending public funds on sectarian Indian education led Congress to begin phasing out the practice in 1895. In 1899, Congress made its final appropriation of public funds for Native American sectarian education.

On the Rosebud Sioux Indian Reservation in South Dakota, this left tribal funds as the only support for the St. Francis Mission Boarding School. The Bureau of Catholic Indian Missions applied to the Bureau of Indian Affairs for a contract to provide education at Rosebud, which it supported with a petition signed by 212 tribal members. Meanwhile, non-Catholic clergy and Rosebud residents affiliated with the Indian Rights Association opposed continued funding of sectarian schools and fought the contract. Reuben Quick Bear, a Protestant, and two other Lakotas filed suit against Francis E. Leupp, commissioner of Indian Affairs, and others requesting a permanent injunction to prevent using treaty and trust fund monies to support sectarian schools.

They believed such funding violated the aforementioned policy, specifically the Indian Appropriations Act (1897), which said, "[I]t is hereby declared to be the settled policy of the government to hereafter make no appropriation whatever for education in any sectarian school." The plaintiffs argued that the Rosebud Sioux tribe had not requested the expenditure. Rather, the Department of Interior approved the payments from tribal treaty and trust funds. Because treaty obligations required the U.S. government to provide educational services, the plaintiffs argued that the government's action converted tribal funds into public funds used to establish a religion.

The defendants argued that treaty and trust fund monies were not public funds and could be used to fulfill governmental treaty obligations. Furthermore, they pointed to the petition and argued that the 212 signatories held claims to tribal funds exceeding the value of the St. Francis Mission School contract. The supreme court of the District of Columbia approved using trust money, but not treaty funds. On appeal, the district court approved use of treaty and tribal funds.

In affirming the lower court's ruling, Chief Justice Melville W. Fuller, writing for the U.S. Supreme Court, found that treaty and trust fund monies belonged to the Sioux and were not public funds. Native Americans, Fuller ruled, should be able to spend their money as they chose in educating their children. Furthermore, Fuller found that preventing use of tribal funds for sectarian education would

amount to prohibiting free exercise of religion. Critics have argued, though, that the decision supported the establishment of Christianity at Rosebud. Although Fuller did not try to overrule emerging case law holding the Bill of Rights did not apply to Native Americans, he came closer to that point than any of his Supreme Court brethren had to date.

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References and Further Reading

- Deloria, Vine, Jr., and Clifford M. Lytle. *American Indians, American Justice*. Austin: University of Texas Press, 1983.
- Hagan, William T. *Theodore Roosevelt and Six Friends of the Indian*. Norman: University of Oklahoma Press, 1997.
- Wilkinson, Charles F. *American Indians, Time, and the Law: Native Societies in a Modern Constitutional Democracy*. New Haven, CT: Yale University Press, 1987.
- Wunder, John R. "Retained by The People": *A History of American Indians and the Bill of Rights*. New York: Oxford University Press, 1994.

QUINLAN, KAREN ANN (1954–1985)

On April 15, 1975, twenty-one-year-old Karen Ann Quinlan of Landing, New Jersey, went out with friends. During the course of the evening, Quinlan consumed a mix of alcohol and prescription and over-the-counter drugs. Later that night, Quinlan lost consciousness and slipped into a coma. After doctors established that Quinlan would remain in a persistent vegetative state, her parents asked her doctors to remove her respirator, arguing that Quinlan's life was being artificially sustained by extraordinary means. The doctors refused.

Quinlan's parents, Joseph and Julia, then petitioned the New Jersey Superior Court to appoint Joseph as his daughter's legal guardian. On November

10, 1975, Judge Robert Muir, Jr. refused, ruling that the court could not authorize the withdrawal of life-sustaining techniques under its equity jurisdiction or the constitutional rights of free exercise of religion, right to privacy, or privilege against cruel and unusual punishment.

The Quinlans appealed the decision to the New Jersey Supreme Court. On March 31, 1976, the supreme court held that under the Constitution's right to privacy, Quinlan's legal guardian and family could exercise Quinlan's right to privacy on her behalf. The Quinlans removed the respirator on May 22, 1976. Quinlan lived for nine more years; on June 11, 1985, she succumbed to pneumonia. She was thirty-one years old.

Although not binding in other states, the decision in *In The Matter of Karen Quinlan* was a landmark case for the rights of patients to control their medical decisions and treatment. Following the decision, many states passed patients' rights statutes that included provisions for living wills, thus allowing individuals the right to decide in advance what medical procedures would be permitted if they became incompetent.

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References and Further Reading

- Battelle, Phyllis Harry. "Karen Ann Quinlan Ten Years Later." *Ladies Home Journal* April (1985): 118–119.
- In the Matter of Karen Quinlan: The Complete Legal Briefs, Court Proceedings, and Decision in the Superior Court of New Jersey*. Arlington: University Publications of America, 1975.
- In the Matter of Karen Quinlan*, 70 N.J. 10; 355 A.2d 647 (1976).
- Quinlan, Joseph, and Julia Quinlan, with Phyllis Battelle. *Karen Ann: The Quinlans Tell Their Story*. New York: Doubleday, 1977.

See also *Cruzan v. Missouri*, 497 U.S. 261 (1990)

R

RABE v. WASHINGTON, 405 U.S. 313 (1972)

Rabe was convicted under Washington's antiobscenity law for showing *Carmen Baby*, a motion picture and adaptation of the opera, *Carmen*, which included sexually frank scenes, at his outdoor drive-in theatre where the film could be seen by passing motorists and by teenagers watching from outside the fence surrounding the theatre. The state's Supreme Court affirmed Rabe's conviction. The U.S. Supreme Court in a per curiam opinion authored by Justice Douglas reversed the lower court; Chief Justice Burger wrote a concurring opinion.

The Court's per curiam noted that the Washington Supreme Court did not hold the movie to be obscene under either the *Roth* (*Roth v. United States* [1957]) or *Memoirs* (*A Book Named "John Cleland's Memoirs of a Woman of Pleasure"* v. *Attorney General of Massachusetts* [1966]) standards. The state court, "uncertain" as to whether the movie was offensive according to these standards and unsure of its artistic or literary value, concluded that if *Roth* were applied the movie would pass the definitional standard of obscenity "if the viewing audience consisted only of consenting adults." Still, despite this conclusion, the Washington court upheld Rabe's conviction because of the "context of its exhibition" rendered the movie obscene (*italics in original*).

The flaw in the court's finding lay in the absence of any mention of "context" in the state's antiobscenity

law. Thus, if the constitutional "vice" of vagueness were to be avoided, the statute had to give "fair notice" that certain conduct was proscribed. "The statute, so construed," Douglas wrote, "is impermissibly vague ... because of its failure give [Rabe] fair notice that criminal liability is dependent upon the place where the film is shown." The Supreme Court, for this reason, felt no need to address the constitutional questions put to the Court by the parties.

Burger takes the opportunity in his concurrence, after agreeing with the majority's ruling, to highlight his view that *Carmen Baby* and other public displays of sexually explicit material "are not significantly different from any noxious public nuisance." Narrowly drawn statutes aimed at protecting the public, especially adults unwilling to view the material and juveniles, "involve no significant countervailing First Amendment considerations."

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References and Further Reading

- Alexander, Donald. *The Politics of Pornography*. Chicago: University of Chicago Press, 1989.
- Hixson, Richard F. *Pornography and the Justices: The Supreme Court and the Intractable Obscenity Problem*. Carbondale, IL: Southern Illinois University Press, 1996.
- Mackey, Thomas C. *Pornography on Trial: A Handbook with Cases, Law, and Documents*. Santa Barbara, CA: ABC-CLIO, 2002.

Cases and Statutes Cited

A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. *Attorney General of Massachusetts*, 383 U.S. 413 (1966)

Roth v. United States, 354 U.S. 476 (1957)

RACE AND CRIMINAL JUSTICE

Issues of race and ethnicity in the criminal justice system raise a number of important civil liberties issues. Allegations of discrimination in the administration of justice regarding African Americans, Latinos, and Native Americans involve all components of the criminal justice system: the police, prosecution and sentencing in the courts, corrections agencies, the death penalty, and the juvenile justice system. There are also issues related to the denial of due process that disproportionately affect minorities. People of color are also underrepresented among employees in virtually all criminal justice agencies. Social science research has confirmed the existence of patterns of discrimination in all of these areas, although there is debate among scholars over the exact nature and seriousness of such discrimination.

While there is much research on African Americans and the criminal justice system, the data on Latino Americans is very limited. Until recently, most criminal justice agencies did not collect data on Latinos as a distinct group. Following the standards set by the federal government, agencies classified Latinos as "white," combining them with non-Hispanic whites. Most research on criminal justice followed this pattern, collecting data on "white" and "black" or "African Americans" and the criminal justice system. There has been relatively little research on Native Americans and Asian Americans and the criminal justice system.

The Police

Racial and ethnic controversies over the police include allegations of discrimination in arrests, stops and frisks of citizens, traffic enforcement, and the use of both deadly and nonlethal force, along with discrimination in employment.

Racial and ethnic minorities are disproportionately arrested in terms of their presence in the U.S. population. Research has found that these disparities are partly explained by the higher involvement in crime on the part of minority peoples and partly explained by bias on the part of the police. Racial and ethnic

disparities in arrest are strongest with regard to drug-related offenses, and the so-called "war on drugs" has had a particularly strong impact on young African-American males.

In the 1990s national attention focused on race discrimination in traffic enforcement. Civil rights activists accused the police of engaging in "racial profiling," meaning that police officers stopped vehicles because of the race of the driver and not because of any violation of the law. A number of states passed laws requiring police departments to collect and report data on traffic stops. The controversy stimulated academic research on police traffic enforcement practices. Most studies found racial disparities in the percentage of drivers stopped by the police relative to the resident population. Even greater racial disparities have been found in the subsequent searches of drivers and vehicles.

There are also racial disparities with respect to police use of nonlethal force. Civil rights activists often refer to the use of excessive force as "police brutality." Research has consistently shown that the police are more likely to use nonlethal force against young African-American males, compared with other demographic groups.

The strongest patterns of racial disparities in police practices exist with respect to the use of deadly force. In the 1960s, African Americans were six times more likely to be shot and killed by police than were white Americans. As a result of new policies restricting the use of deadly force that began to be implemented in the 1970s, the racial disparity among persons shot and killed by the police has narrowed to about three to one.

A major grievance among African Americans is their perception that police departments do not thoroughly or fairly investigate citizen complaints about police conduct. As a result, civil rights leaders have demanded the creation of independent citizen oversight agencies to handle citizen complaints. By 2005 the police departments in virtually all of the major cities in the United States were subject to some form of independent citizen oversight.

Prosecution and Courts

Civil rights leaders have alleged discrimination against racial and ethnic minorities in all phases of the court proceedings in the criminal justice system. This includes bail practices, plea bargaining, the dismissal of criminal cases, and sentencing. Research has found evidence of racial and ethnic disparities in

the handling of cases, but these disparities are confounded with other legally relevant factors. African Americans, for example, are generally treated more harshly than whites in all phases of court proceedings, but this is often due to the fact that they are involved in more serious crimes and have more serious prior criminal records.

With respect to bail, researchers have found that males and African Americans and Latinos are more likely to face higher bail requirements than are females and whites. A similar pattern exists with respect to plea bargaining and the dismissal of cases. Females and whites are often given more lenient consideration than males and African Americans.

With respect to sentencing, racial and ethnic disparities are found with respect to persons sentenced to prison. As is the case with bail and plea bargaining, these disparities are confounded with legally relevant variables such as the seriousness of the offense and offenders' prior criminal histories. The most serious racial and ethnic disparities in non-capital crime cases involve drug offenses. The so-called war on drugs has affected sentencing as well as policing, and there is evidence of harsher treatment of African Americans in particular. The impact of the Federal Sentencing Guidelines on drug offenses has been the subject of considerable controversy. The Guidelines provide for much longer sentences for persons convicted of possession or sale of "crack" cocaine compared with powdered cocaine. Since African Americans are involved with crack cocaine at a much higher rate than white Americans, the result is a serious racial disparity with regard to the length of prison terms.

Corrections

As a result of racial disparities in arrest, prosecution, and sentencing, African Americans are overrepresented in American corrections agencies. Although African Americans are only 14 percent of the U.S. population, they represent about half of all persons in prison. Similar disparities are found among persons on probation and on parole. Many prisons are characterized by the existence of gangs organized along racial and ethnic lines. Prison gangs are responsible for some violence among inmates.

Some criminologists argue that the overrepresentation of racial and ethnic minorities in prisons is a result of cumulative disadvantage. This concept holds that small disparities at each stage of the criminal process are amplified by similarly small disparities at

each succeeding stage. The end results are large racial and ethnic disparities in persons in prison, on probation, and on parole.

The effectiveness of probation and parole is affected by the larger patterns of discrimination in American society. Both programs are designed to reintegrate offenders into society. African American and Latino probationers and parolees, however, are placed in their home communities that are affected by lack of employment opportunities and discrimination in employment, housing, and other services.

African Americans have been severely affected by state laws denying the right to vote to persons with felony convictions. Although most states have procedures allowing felons to regain the right to vote, they are often cumbersome and difficult to use. It is estimated that as many 1.4 million African-American males, or 14 percent of all African-American men, are denied the right to vote. Many experts argue that the practice of denying felons the right to vote denies them the most fundamental right of a democratic society. Additionally, denying an ex-felon the right to vote presents a major obstacle to reintegrating that person into a law-abiding life, thereby thwarting the basic goals of probation and parole.

The Death Penalty

The death penalty has been an area of great controversy over racial discrimination. In the 1960s, the NAACP launched a legal attack on the constitutionality of the death penalty. It sponsored research by criminologist Marvin Wolfgang that documented significant racial disparities in persons executed in the United States since 1930. The majority of executions occurred in the southeastern states where institutionalized segregation prevailed until the 1960s. The most serious disparities involved African-American men convicted of the crime of rape.

The Supreme Court decisions in *Furman v. Georgia* (1972) and *Gregg v. Georgia* (1976) declared existing state capital punishment laws unconstitutional as they were administered. The Furman decision compelled states to enact new laws with provisions guiding the exercise of discretion in capital cases. In *Gregg*, the Supreme Court upheld the constitutionality of the new death penalty laws. Research on post-*Furman* cases, however, found that racial disparities continued to exist. Specifically, studies found that the likelihood of a death sentence was greatest in cases where an African American was convicted of murdering a white person. Conversely, a sentence of death was

least likely when a white person was convicted of murdering an African American. In a landmark decision (*McCleskey v. Kemp* [1987]), the Supreme Court refused to accept statistical data on general patterns of racial disparities as sufficient evidence to overturn the conviction of one particular defendant.

Juvenile Justice

With respect to the juvenile justice system, there has been considerable concern over what has been labeled disproportionate minority confinement. This refers to the fact that African-American and Latino juveniles are more likely to be confined to juvenile institutions rather than being diverted into less restrictive alternatives. As is the case with adult imprisonment, disproportionate minority confinement is the end result of disparities in arrest, prosecution, conviction, and sentencing.

Latino Americans

Latino or Hispanic Americans have experienced violations of civil liberties within the American criminal justice system. The exact nature and extent of discrimination is not known. Until very recently, criminal justice agencies did not collect data on Latinos or Hispanics. They were classified as “white” and as a result data on arrests, convictions, and imprisonment do not distinguish between non-Hispanic whites and Latino or Hispanic whites.

Native Americans

The question of Native Americans and criminal justice is extremely complex. Native American tribes hold the legal status of semisovereign nations within the boundaries of the United States. On many legal issues they are subject to tribal law rather than state or federal law. Many tribes operate separate tribal police and tribal court systems. As a result, the application of the federal Bill of Rights to individual Native Americans is ambiguous. It is not always clear whether an individual Native American is protected by the federal Bill of Rights, which emphasizes individual rights, or tribal law, which is more communal in orientation. In 1968 Congress enacted the Indian Civil Rights Act, but the law has not succeeded in clarifying all of the issues.

Employment in Criminal Justice Agencies

Racial and ethnic minorities are underrepresented in employment in virtually all criminal justice agencies. As a result of federal laws outlawing discrimination in employment, together with court-ordered affirmative action plans, progress has been made in the employment of African-American and Latino police officers. In some police departments, non-Hispanic whites are a minority among officers. Tribal police departments on Native American reservations are not subject to federal equal employment opportunity laws. Native Americans represent a majority of tribal police officers. African Americans and Latinos are underrepresented in the legal profession, and as a consequence are underrepresented among prosecutors, defense attorneys, and judges. Racial and ethnic minorities are better represented in corrections agencies, that is, prison guards, and probation and parole officers.

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References and Further Reading

- Cole, David. *No Equal Justice: Race and Class in the American Criminal Justice System*. New York: New Press, 1999.
- Gross, Samuel R., and Robert Mauro. *Death and Discrimination: Racial Disparities in Capital Sentencing*. Boston: Northeastern University Press, 1989.
- Harris, David. *Profiles in Injustice: Why Racial Profiling Won't Work*. New York: New Press, 2001.
- Kennedy, Randall. *Race, Crime, and the Law*. New York: Vintage Books, 1998.
- Russell, Kathryn. *The Color of Crime*. New York: New York University Press, 1998.
- Tonry, Michael. *Malign Neglect: Race, Crime, and Punishment in America*. New York: Oxford University Press, 1995.
- Walker, Samuel, Cassia Spohn, and Miriam DeLone. *The Color of Justice: Race, Ethnicity, and Crime in America*. 3rd ed. Belmont, CA: Wadsworth, 2004.

Cases and Statutes Cited

- Furman v. Georgia*, 408 U.S. 238 (1972)
- Gregg v. Georgia*, 428 U.S. 153 (1976)
- McCleskey v. Kemp*, 481 U.S. 279 (1987)

RACE AND IMMIGRATION

Apart from the regulated importation of African slaves that predated the founding, formal restrictions on the immigration of racial minorities in American law began with the Immigration Act of 1875. Since then, race has figured prominently in determining which noncitizens may enter and must exit the

country based on the law's perception of a racial group's assimilability into the predominantly white European culture of the United States. Economic downturns also precipitated the strongest backlash against immigration, much of it racial.

The earliest targets of racially restrictive immigration law were the Chinese, whose important work on the railroads and in the laundries of the West were blamed as a significant cause for the country's economic woes during the late 1800s. This economic scapegoating, coupled with the perception that the Chinese were clannish, inscrutable beings who would not and could not assimilate, prompted Congress in the 1875 Act to make contracting to supply Chinese laborers a felony. This criminal provision was followed by the Chinese Exclusion Act of 1882, which banned the importation of Chinese laborers for ten years, provided for the deportation of Chinese who did not possess proper immigration documents, and prohibited Chinese nationals from becoming naturalized U.S. citizens. The Supreme Court upheld these laws in *Chae Chan Ping v. United States* (1889) and *Fong Yue Ting v. United States* (1893), ruling that Congress had plenary power over immigration law as an incident of federal sovereignty, thereby allowing the legislature to pass laws restricting the admission, and requiring the deportation, of individuals based on their racial ancestry. The Court has never repudiated the plenary power doctrine, and hence has never struck a federal immigration law for exceeding Congress's mandate.

Supported by the Court, Congress expanded existing law in 1917 to create an "Asiatic barred zone," thereby excluding all Asians from immigrating to the United States. While a similar bill to ban "all members of the African or black race" passed the Senate, extensive lobbying by the NAACP halted progress of the bill. Instead, Southern and Eastern Europeans were effectively excluded by a 1921 law temporarily confining immigration to Northern and Western Europeans, which was later promulgated permanently in the National Origin Act of 1924. Establishing the "national origins quota system," the 1924 Act fixed a nation's immigration quota as a percentage of its population already within the United States; it also allowed for the exclusion of all those not eligible for naturalization, which effectively halted Asian immigration. On the deportation side, lawful Mexican immigrants and U.S. citizens of Mexican descent became a target group during the Depression and then again during the 1950s pursuant to "Operation Wetback." Although no law forbade Mexican immigration, federal officials enacted programs of ostensible "repatriation" of Mexicans and Mexican Americans, leading to the deportation of millions.

Formal racial restrictions on immigration law were lifted in 1965 when Congress repealed the national origins quota system, leading to the modern boom in Asian and Latin American immigration to the United States that continues to the present day. Still, purposeful discrimination based on race is constitutionally permissible because the plenary power doctrine created by the anti-Chinese cases *Chae Chan Ping* and *Fong Yue Ting* has never been repudiated. Although post-1965 immigration from Asia and Latin America has substantially changed the complexion of contemporary American society, and while the overt vestiges of racial discrimination have been excised from immigration and nationality law, national origin distinctions still serve to privilege some groups over others, mirroring the traditional racial divide. For example, under the Visa Waiver Program, individuals from several Western European nations are allowed to visit the United States for an extended time without a tourist visa, while most Asian and Latin American nationals are not. Additionally, the Diversity Visa lottery, which purports to diversify the immigrant stream, disproportionately benefits Europeans and Africans.

During the period immediately following the September 11, 2001 terrorist attacks, race appeared to be a strong proxy for disloyalty and terrorism in the government's deployment of its immigration power. Many Arab and Muslim noncitizens were detained and questioned in connection with the attack, a majority of whom have since been deported for technical immigration violations. With the reassignment of both the service and enforcement functions of the federal government's immigration wing to the Department of Homeland Security, the question will be whether, over time, the government is able to find a comfortable balance between using its immigration power to help secure the nation's borders and ridding itself of American immigration law's racist legacy.

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References and Further Reading

- Chin, Gabriel J., *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, UCLA Law Review 46 (1995): 1-74.
- Haney López, Ian F. 1996. *White by Law: The Legal Construction of Race*. New York: New York University Press.
- Johnson, Kevin R. 2004. *The "Huddled Masses" Myth: Immigration and Civil Rights*. Philadelphia: Temple University Press.
- Olivas, Michael A., *The Chronicles, My Grandfather's Stories, and Immigration Law: The Slave Traders Chronicle as Racial History*, St. Louis Law Journal 34 (1990): 425-41.

Cases and Statutes Cited

Chae Chang Ping v. United States, 130 U.S. 581 (1889)
Fong Yue Ting v. United States, 149 U.S. 698 (1893)

See also **Equal Protection of Law (XIV)**

RALEY v. OHIO, 360 U.S. 423 (1959)

In the context of criminal cases, courts strictly adhere to the maxim “ignorance of the law is no excuse.” Under this rule, accused persons cannot claim lack of criminal responsibility because they were not aware that their actions violated the law. However, in *Raley v. Ohio*, the Supreme Court recognized a narrow exception to this rule, sometimes referred to as “entrapment by estoppel.”

The defendants in *Raley v. Ohio* were all called as witnesses before the Ohio Un-American Activities Commission to answer questions regarding alleged subversive government activities. Despite the fact that an Ohio statute (Contempt Statute) prohibited witnesses appearing before state legislative committees from refusing to answer questions, the defendants were all informed by the commission that they were entitled to assert their state constitutional privilege against self-incrimination, if necessary. The defendants all refused to answer questions in reliance on this privilege and, although the commission accepted these assertions without question, the defendants were charged with and convicted of violating the Contempt Statute. The Ohio Supreme Court affirmed these convictions, holding that the defendants were presumed to have knowledge of the Contempt Statute and its requirements. The U.S. Supreme Court, however, reversed the convictions, holding that the prosecution of these defendants for engaging in conduct that state officials had advised was legal violated due process.

The Supreme Court’s holding in *Raley* was significant because it recognized that it is fundamentally unfair for the government to approve certain conduct, and then prosecute an individual for engaging in that conduct.

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References and Further Reading

Cohen, Mark S., *Entrapment by Estoppel*, Colorado Lawyer 31 (2002): 45–48.
Cox v. Louisiana, 379 U.S. 559 (1965).
Miller v. Commonwealth, 492 S.E.2d 482 (Va. 1997).
Parry, John T., *Culpability, Mistake, and Official Interpretations of Law*, American Journal of Criminal Law 25 (1997): 1–78.

Pasano, Michael S., Walther J. Tache, and Thierry Oliver Desmet, *Using the Defense of Entrapment by Estoppel*, Champion 26 May (2002): 20–24.

See also **Due Process; Entrapment by Estoppel**

RANKIN v. MCPHERSON, 483 U.S. 378 (1987)

In *Rankin v. McPherson*, the U.S. Supreme Court held that public employees have a First Amendment right to express their political views without fear of discharge.

Ardith McPherson was a probationary clerical worker employed in a constable or law enforcement office. In 1981, upon hearing the news that there was an attempted assassination on President Reagan, she commented to a coworker that, “If they go for him again, I hope they get him.” Her comments were reported to the Constable Walter Rankin who fired her. McPherson sued in federal district court for back pay and for reinstatement to her job, contending that she had been dismissed for exercising her free speech rights.

Writing for the Supreme Court in a five-to-four decision, Justice Thurgood Marshall cited *Perry v. Sindermann* (1972) and stated that the government may not discharge an employee for exercise of her First Amendment rights. This was the case even if she was a probationary employee. According to *Pickering v. Board of Education* (1968), the Court stated that the test for determining whether a public employee had been correctly dismissed for exercising free speech rights involves a balance between the rights of the former as a citizen in commenting on matters of public concern versus the rights of the government to maintain efficiency and discipline in the workplace. Here, McPherson’s comments were on a matter of public concern, and because there was no evidence that they interfered with the order and efficiency of the workplace, or that they were overheard by the public, the Court ruled that her First Amendment free speech rights had been violated.

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References and Further Reading

Hentoff, Nat. *Free Speech for Me—But Not for Thee*. New York: Harper Perennial, 1993.

Cases and Statutes Cited

Perry v. Sindermann, 408 U.S. 593 (1972)
Pickering v. Board of Education, 391 U.S. 563 (1968)

See also **Freedom of Speech: Modern Period (1917–Present)**

RAP MUSIC

See Hip-Hop and Rap Music

RAPE

See Marital Rape; Rape, Naming Victim; Statutory Rape

RAPE: NAMING VICTIM

When a serious violent crime has been committed and a suspect is taken into police custody, the names of both the accused and the victim are routinely, and often quickly, disclosed. Americans have viewed such disclosure as in the public good. It may help free an innocent person, it may bolster the prosecution's case, and it serves to show the functioning of the criminal justice system. With the crime of rape or sexual assault, different concerns surface.

Most rapes are committed by men against women. This crime of forced intercourse inflicts both physical and mental anguish that continues after a victim reports the crime. Medical exams are followed by police questioning that requires the victim to describe the particulars of the experience. If the accused rapist is well known, there will be a flurry of media activity surrounding the incident, the accused, and the victim. Within days, the victim may be identified, and her picture may be posted on Internet websites. Some people criticize these disclosures saying that rape victims' identities should be protected, at least until trial. Others assert that here, as with other crimes, there are valid reasons for disseminating the information. Most media organizations have policies against revealing the identities of rape victims, but some have argued that this is not enough and that laws are needed to protect the identities of rape victims.

A few states, including South Carolina, Florida, and Georgia, have statutes prohibiting news media from disclosing rape victims' identities prior to trial. These laws have been criticized as restrictions on freedom of the press but also defended vigorously. Despite deciding cases based on a number of earlier laws of this type, the U.S. Supreme Court has not established a broad rule saying that rape victims' identities must always be protected or that the media may always disclose this information. In the most recent decision in this area, *Florida Star v. B.J.F.* (1989), the Supreme Court ruled that one such statute was unconstitutional. However, the Court recognized that it was important for states to protect victims' identities and suggested that there could be a similar, more narrow law that would be constitutional.

Supporters of laws protecting rape victim identities contend that rape is a unique crime that is so demeaning and traumatic that victims should be spared public humiliation. They also argue that rape victims will be more likely to report their crimes if they believe that their names will be protected. Some of the arguments against these laws are that identifying rape victims will eliminate the stigma of rape, that the victim's name makes a news story more credible, that decisions like these are best left to the media, that it is not fair to the accused rapist, and that it is too large an interference with freedom of the press.

The legislators who have enacted laws protecting a rape victim's identity believe that the emotional and physical pain suffered because of the extreme sexual assault justifies the need for greater privacy. The victim historically has been, sadly often, blamed for the crime, with some people assuming that she was somehow to blame for the violent assault. Rape victims may be shunned by their friends and family or threatened by supporters of the accused rapist. In response, opponents of these laws say that although rape is a terrible crime, there are valid reasons for disclosure that outweigh a victim's concerns. To be sure, some people claim that revealing the names of rape victims will reduce the stigma associated with this crime by making it less shameful and more like other crimes. Rape victim identity law supporters counter that any decision about disclosure should be made by the victim. They think that it is unfair to expect someone who has already suffered so greatly to bear the burden of changing society's views and behavior.

Some are concerned that because victims fear public humiliation they will be less likely to report a rape unless they know that their names will be protected. Still, there is no evidence that preventing disclosure encourages victims to report rapes. Some studies have shown no significant difference between states that punish disclosure and those that do not. However, this view does not consider the fact that even in states that do not forbid disclosures, media organizations generally do not report rape victims' identities anyway. This situation, thus, makes it hard to really see the effects of disclosure laws on the decisions of rape victims. Also, other studies show that victims are more likely to report rapes if their identities are protected, and that most women and men support these limiting laws.

One important question is whether the identity of the victim is an important detail that adds credibility to a news story, thereby promoting the free speech values found in the First Amendment. It is, certainly, the mission of reporters to set out as many facts as they can. Critics of this argument note that it is easy

to provide other details that will make a story credible and that with good reporting a victim's identity is not needed.

Another matter of genuine debate is whether limiting disclosure is due to gender bias. Proponents of this argument feel that it is as if the media is patronizing the rape victim. Those who disagree say that the argument might be valid if we lived in a world where rape victims were shameless, but that is not the situation today so that privacy is still necessary.

Criminal defense lawyers often point out that protecting the name of the victim is unfair to the accused rapist. The accused is presumed innocent but is forced to undergo careful scrutiny surrounding the accusations. Hence, when individuals accuse others of serious crimes they should be treated similarly. However, critics of this argument say that revealing the name of the alleged perpetrator does not balance the situation, it just makes it worse for the alleged victim.

Although high-profile sexual assault accusations receive the most attention, any time someone is raped media organizations must make a decision about disclosing the victim's identity. The debate continues over policies and laws that prevent disclosure.

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References and Further Reading

- Denno, Deborah W., *Perspectives on Disclosing Rape Victims' Names*, Fordham Law Review 61 (1993): 1113.
Marcus, Paul, and Tara L. McMahon, *Limiting Disclosure of Rape Victims' Identities*, Southern California Law Review 1019 (1991).

RASTAFARIANS AND THE FREE EXERCISE OF RELIGION

Most Americans asked about Rastafarianism think of unbridled marijuana (ganja) consumption, dreadlocks, and the musical idiom of reggae. Not surprisingly, dreadlocks and marijuana have most often brought Rastafarians within the ambit of the U.S. legal system. Therein, their arguments that both practices are protected by the First Amendment's guarantee of the free exercise of religion have not generally fallen on fertile ground.

Leonard P. Howell (1898–1981) is generally credited as the founder of Rastafarianism, and the date of its origin is generally set in 1932, when Howell returned to the then-British colony of Jamaica from New York City proclaiming Haile Selassie, the newly crowned Emperor of Ethiopia, to be the Black Messiah. Without question, the spread of Rastafarianism outside

Jamaica, beginning in the 1970s, was spearheaded by the popularity of reggae, particularly as performed by Bob Marley and the Wailers.

Howell's movement was strongly influenced by another Jamaican native, Marcus Garvey, who founded the Universal Negro Improvement Association in 1914 and made it the largest black movement in history. Another influence was Athlyi Rogers, author of *The Holy Piby*. The influence of Rogers' "Blackman's Bible" was so strong, in fact, that Howell has been often accused of plagiarizing from it in his *Promised Key*. Both Rogers and Howell attempted to add a religious component to Garvey's social and political vision of social redemption and economic power for Africans.

The tenets of Rastafarianism include the holiness of Haile Selassie (before he was crowned king of Ethiopia in 1930, Selassie's name was Tafari and his rank was *ras* [chief]; hence, the term Rastafarian); Afrocentrism and repatriation to Ethiopia; black pride; the wearing of dreadlocks and/or similarly matted beards; a special diet that took various forms by various followers but could be vegetarian and if not, at least avoided pork, prohibited alcohol and tobacco, avoided processed foods, and prohibited eating of foods prepared by women who were menstruating; nonviolence; and the smoking of marijuana as a religious sacrament. Rastafarians cite passages in the Christian Bible that support various beliefs, in particular the wearing of dreadlocks and the use of marijuana.

The first hurdle in any free exercise case is establishing that the belief system in question qualifies as a "religion," and Rastafarianism has been considered—or at least assumed to be—a religion since at least the mid-1980s in the lower courts and by the U.S. Court of Appeals for the Ninth Circuit in *United States v. Bauer* (1996), which noted that it was included in Gordon Melton's *Encyclopedia of American Religions*. Nevertheless, Rastafarian litigants are hindered by the fact that the smoking of marijuana and, to a lesser extent, the wearing of dreadlocks, have been adopted by a number of non-Rastafarians.

In a series of prison and school cases, Rastafarians have most often been denied the right to wear dreadlocks. Although Rastafarians enjoyed mixed success in lower courts in New York—in one case they were allowed to tie back their hair for prison photos but were required to shave their beards—more typical was the Court of Appeals for the Third Circuit, which upheld prison safety arguments, including the argument that long hair would incite homosexual attacks, to justify cutting dreadlocks in *Wilson v. Schillinger* (1985). Free exercise cases involving

dreadlocks have also been rejected in a number of federal district courts but have never faced Supreme Court scrutiny.

Similarly, the argument that Rastafarian use of marijuana is protected by the First Amendment has been rejected. Marijuana use falls squarely within the ambit of the “Smith test” of *Employment Division, Department of Human Resources of Oregon v. Smith* (1990), the controversial case in which the U.S. Supreme Court, Justice Scalia writing for the majority, held that sacramental consumption of the hallucinogen peyote by members of the Native American Church was not protected by the free exercise clause because religious beliefs do not exempt one from “compliance with an otherwise valid law prohibiting conduct that the State is free to regulate.” The free exercise justification of marijuana use has been rejected in three federal circuits, and has been distinguished from the use of peyote by members of the Native American Church in a Kansas case (where peyote use is allowed under state law).

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References and Further Reading

- Lee, Hélène. *The First Rasta: Leonard Howell and the Rise of Rastafarianism*. Trans. by Lily Davis. Chicago: Lawrence Hill Books, 2003.
- Maragh, G.G. (Leonard Howell). *The Promised Key*. Brooklyn, NY: A&B Publishers, [1935] 2001.
- Rogers, Robert Alythi. *The Holy Piby*. Kingston, Jamaica: Research Associates School Times Publication, [1924] 2000.
- O'Brien, Derek, and Vaughan Carter, *Chant Down Babylon: Freedom of Religion and the Rastafarian Challenge to Majoritarianism*, *Journal of Law and Religion* 18 (2002): 219.

Cases and Statutes Cited

- Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990)
- Wilson v. Schillinger*, 761 F.2d 921 (3d Cir. 1985)

RATIFICATION DEBATE, CIVIL LIBERTIES IN

The Constitution that the Philadelphia Convention transmitted to the Confederation Congress for consideration on September 28, 1787 contained a number of provisions protective of individual rights and liberties. Article I, Section 9 affirmed that the writ of habeas corpus should not be suspended except in cases of rebellion or invasion “when the public safety may require it.” It also prohibited Congress from passing bills of attainder or ex post facto laws. Article

I, Section 10 placed a similar ban on the states. Article III, Section 2 provided for trial by jury in criminal cases in the newly created federal courts. Section 3 defined treason narrowly, and required the testimony of two witnesses or confession in open court for conviction of the crime. In addition, it said that conviction could not work corruption of blood nor forfeiture except during the life of the person attainted. Article VI declared that no religious test should ever be required as qualification for any federal office. Although the provision applied only to members of Congress, one might also point to Article I, Section 6, which immunized senators and representatives from criminal or civil liability for “any speech or debate in either house.” One might consider this as a freedom of speech provision for members of Congress. Perhaps too the prohibition on titles of nobility may be considered as a freedom for members of Congress. Some at the time, such as Alexander Hamilton for example, saw this as a provision securing liberty.

Proposals for the inclusion of additional civil liberties provisions were brought before the convention for consideration but commanded little support. On August 20, Charles Pinckney of South Carolina introduced resolutions calling, among other things, for a ban on the quartering of soldiers in houses in peacetime and a declaration in favor of freedom of the press. They were referred to committee but never made their way into any proposed constitutional text. Toward the end of deliberations, Elbridge Gerry of Massachusetts urged that jury trial be guaranteed in civil as well as criminal cases in the federal courts. George Mason of Virginia thought this impracticable, but said he would support a motion to preface the Constitution with a bill of rights. A declaration of rights “would give quiet to the people,” he stated, and could be quickly prepared since there were many state charters of rights that could be drawn on for suitable language. (Mason was the principal author of Virginia’s own Declaration of Rights.) A motion by Gerry, seconded by Mason, to appoint a committee to prepare a bill of rights failed to win the vote of a single state delegation, however. On the convention’s last day of deliberations, Gerry and Pinckney made a final effort to have a guarantee of jury trial in civil cases added to the Constitution, but their motion also failed unanimously.

The matter of securing additional rights and liberties came up again during Congress’s consideration of the Constitution. Richard Henry Lee of Virginia, making reference to “the various bills or declarations of rights whereon the governments of the various states are founded,” urged the wisdom of grounding the new Constitution on a similar declaration. Specifically, he asked that before its submission to the

states, the Constitution be amended to guarantee the right of conscience in matters of religion, freedom of the press, the right of jury trial in civil cases, the right of peaceable assembly, and the freedom from unreasonable searches and seizures. He sought also a prohibition on standing armies in times of peace unless assented to by two-thirds of both houses of Congress. But Lee's proposals were not acted upon, and the Constitution was submitted to the states for consideration in unaltered form.

Among a people as rights conscious as were eighteenth-century Americans (most of the state constitutions that had been adopted in the period after the Revolution included declarations of rights), it is not surprising that one of the chief points of contention during the ensuing debates on ratification was whether the 1787 Constitution adequately protected individual rights and liberties. Some took aim at the very size and structure of the proposed new republic. The creation of a central government with vastly enhanced powers and the radical (as they saw it) subordination of the states to that government in and of itself posed a threat to civil liberties. The states, men like Samuel Adams and Luther Martin thought, were the true protectors of liberty. James Madison argued famously, to the contrary, that the new nation, with its large territory, multiplicity of interests, and divided government, was a place where individual rights and liberties would thrive. The more common complaint, heard repeatedly during the debates, was that the new Constitution lacked a declaration of rights or, a more focused variation on the same theme, had failed to provide explicit protection for specific cherished rights and liberties. Pennsylvania, Massachusetts, Virginia, and New York were the most significant contributors to the discussion of this topic, and this essay will concentrate on the debates in those states. But first a further word about George Mason.

Mason was one of the first to sound the alarm about rights and liberties during the ratification period. Shortly after the convention adjourned, Mason—who had refused to sign the Constitution—penned a paper entitled, "Objections to the Constitution," in which he set forth his reservations about the new document. Lack of civil liberties protection was certainly not his only objection. He was very disturbed by the plenary power over commerce given the national government, for example, arguing that it would lead to the economic ruination of the southern states. Nonetheless, civil rights and liberties were a principal concern as is clear from the paper's opening sentence. "There is no declaration of rights," Mason wrote, "and the laws of the general government being paramount to the laws and constitutions of the several states, the declarations of rights in the separate states

are no security." Specifically, there was "no declaration of any kind for preserving the liberty of the press, the trial by jury in civil causes; nor against the danger of standing armies in time of peace." Mason's "Objections" began to circulate widely in manuscript form in early October both in his home state and elsewhere, and became, as the historian Lance Banning has put it, "a starting point for Antifederalists throughout the country."

Pennsylvania

Mason's pamphlet was certainly read in Pennsylvania, the first state to summon a ratification convention, and a state where there was considerable opposition to the Constitution, much of it centering on the lack of a bill of rights. Several members of the Pennsylvania legislature, who had tried to prevent the calling of a convention, published a manifesto on September 29, the day after the call for a convention went out, urging their constituents to look soberly at the proposed constitution, paying particular attention to such questions as jury trial, liberty of the press, and standing armies (the phrasing made clear that they thought the Constitution did not satisfactorily deal with each) and to ask themselves "whether in a plan of government any declaration of rights should be prefixed or inserted." And on October 5, Samuel Bryan, writing under the pen name "Centinel," published a caustic article in a Philadelphia newspaper, drawing an unfavorable comparison between the solicitude for rights found in the Pennsylvania Constitution and the neglect of those rights in the Philadelphia document. The drafters, he complained in particular, had "made no provision for the liberty of the press, that grand palladium of freedom and scourge of tyrants."

Determined to respond to these and other attacks, James Wilson, one of the Constitution's chief drafters, delivered a speech to a public meeting of supporters held in Philadelphia on October 6. It may be considered something of an opening salvo of proponents in the war over ratification.

Wilson addressed first the large issue of whether the Constitution ought to contain a bill of rights. Sounding a theme that would be sounded and expanded on some months later by Alexander Hamilton, Wilson distinguished the proposed new federal government from those set up by the various state constitutions. The latter governments had every right and power that the people of the states had not expressly reserved to themselves. But the proposed new federal government was one of limited, delegated

power and here the reverse of that proposition applied. Every power not expressly delegated was retained by the people. A bill of rights would therefore be superfluous. Liberty of the press, he commented, had become “a source of declamation and opposition,” but how, he asked, could such liberty be threatened by the new government? It had been given no authority whatsoever over the press. As to the complaint about the failure to provide for jury trial in civil cases, he dismissed out of hand the accusation that the Constitution prohibited such trials. Given the different ways in which the states dealt with this question, it had simply proved “impracticable to have made a general rule.” As to standing armies, he said he did not know of a nation in the world that did not wish “to maintain the appearance of strength” even in peaceful times. Besides, he noted, the Constitution placed the military under restrictions and controls.

Critics were quick to respond to Wilson’s speech, an account of which appeared the next day in the Philadelphia press, some acerbic in tone. “Centinel” weighed in again, characterizing Wilson’s defense of the omission of a declaration securing liberty of the press and other rights as “an insult on the understanding of the people.” If Wilson was correct that every power not given was reserved, then this proposition should have been expressly affirmed. “I lay it down as a general rule,” he went on, “that whenever the powers of a government extend to the properties of the subject, all their rights ought to be clearly and expressly defined—otherwise they have but a poor security for their liberties.”

The debate continued on the floor of the Pennsylvania Convention, which met from November 20 to December 15. Wilson argued again that a declaration of rights was unnecessary. Indeed, he said it would be imprudent. A bill of rights was a statement of powers reserved by the people. Anything not listed was presumably given away. An incomplete or imperfect enumeration would by implication leave rights unprotected. But then, asked John Smilie, a leading opponent of ratification, why had the convention seen fit to protect the privilege of the writ of habeas corpus and to secure trial by jury in criminal cases? How did this square with Wilson’s precept that it was dangerous to attempt an enumeration? A bill of rights was highly useful, Smilie declared, because it offered “a plain, strong, and accurate criterion by which the people might determine when, and in what instance, their rights were violated.” Smilie’s question as to why the Constitution, which, its defenders insisted, did not need a bill of rights, nonetheless included a partial one would be echoed by other speakers in other states during the ratification contests.

As the convention drew to a close, Robert Whitehill, another opposition leader, presented a petition from the citizens of Cumberland County, urging that the Constitution not be ratified without the inclusion of a bill of rights. He then moved that the convention adjourn pending the consideration of adding certain articles to the Constitution, among them amendments securing freedom of religion, speech, and the press; in criminal cases prohibiting excessive bail and cruel and unusual punishment affirming the right of the accused to a speedy trial by a jury of the vicinage, his right to confront his accusers, to be represented by counsel, and to refuse to give evidence against himself; and finally, an amendment stating that “the people have a right to bear arms for the defense of themselves and their own state.” Whitehill’s motion was rejected and Pennsylvania went on to vote to ratify the Constitution. Whitehill, Smilie, and their confederates, however, had not given up the fight. They and nineteen other delegates who had voted against ratification published a lengthy statement of the reasons for their opposition, including in it the list of their proposed amendments.

The Pennsylvania debates concerning ratification in general, and rights and liberties in particular, take on a special importance. Pennsylvania was the first state in which there was extensive debate about ratification. The arguments for and against received considerable attention outside the state (the “Dissent of the Minority,” for example, was widely circulated around the country). These galvanized proponents and opponents elsewhere. They also played a large role in setting the parameters of debate. They created, in the words of one historian, “the terms of discourse, the grammar, syntax, and vocabulary of ratification.”

Massachusetts

Massachusetts does not particularly stand out for the vigor of its debates on the subject of civil rights and liberties, but is noteworthy because it was the first state to recommend amendments touching on the subject. Civil liberties occasioned little discussion in the state convention, which opened on January 9, 1788. During the debates, Samuel Adams did propose that the Constitution be amended to guarantee freedom of the press, the right to bear arms, freedom from unreasonable search and seizure, and the right to petition the legislature. But he withdrew these proposed amendments when it was clear they could not win support.

There was some discussion out of doors. James Winthrop, who wrote a series of critical articles on

the constitution for the *Massachusetts Gazette* under the pen name "Agrippa" between November 1787 and February 1788, complained in one of them about the lack of requirement that federal criminal trials be tried by a jury of the vicinage in the county where the crime was allegedly committed. The defendant would be put on trial before strangers, who would have no way of knowing "whether he is habitually a good or bad man ... and whether the action was performed maliciously or accidentally." In another he demanded as a condition of ratification the addition of an amendment stating that citizens should carry into the federal courts the rights accorded them by their own state constitutions."

Massachusetts voted to ratify on February 6 in a very close vote. The resolution of ratification, the first to do so, recommended that certain amendments be added to the Constitution. They would, it was said, offer a shield against "an undue administration of the federal government"; these amendments were designed, it was said, "to remove the fears and quiet the apprehensions" of the people. (Note the similarity to Mason's words in the Philadelphia Convention.) Most concerned the structure of government or aimed to better protect the rights of the states vis-à-vis the national government. Two dealt with civil liberties. One declared that no one should be prosecuted for a capital or "infamous" crime except upon grand jury indictment. The other affirmed the right of jury trial in civil cases in the federal courts in all "actions at common law."

A few months later, New Hampshire followed the lead of its New England neighbor, recommending the addition of amendments in its resolution of ratification. These tracked closely those recommended by Massachusetts, but included as well a ban on standing armies, a prohibition against the quartering of troops in private homes, and an affirmation of freedom of conscience. One proposed amendment constituted the most unqualified endorsement of the right to bear arms to emerge from the ratification debates, stating: "Congress shall never disarm any citizen unless such as are or have been in rebellion."

Virginia

The most intense discussion of civil rights and liberties in Virginia occurred on the floor of the state ratifying convention. The chief opponent of ratification was Patrick Henry. Henry, a died-in-the-wool enemy of the whole constitutional project (there seemed hardly a clause of the proposed constitution that he did not consider objectionable), addressed the

civil liberties question in several passionate speeches. The Constitution was bringing a revolution, as radical as the war for independence, he thundered in one such speech, threatening to destroy "all pretensions to human rights and privileges." He railed against its tolerance for standing armies and the absence of any limitation on the quartering of troops. The partial bill of rights contained in Article I, Section 9 failed to secure "the great objects of religion, liberty of the press, trial by jury [gone in civil cases, he said, not really secured on the criminal side], interdiction of cruel punishments and every other sacred right." There was no adequate protection against general search warrants, no requirement of trial by a jury of the vicinage, nor other necessary protections for the criminal defendant such as the right to know fully the accusation against him. As to the Federalist argument that a bill of rights was not necessary because everything not given up was retained, Henry pointed to the habeas corpus clause of Section 9, which said the writ could be suspended in certain situations. That implied that absent the exception, the writ could be suspended in all cases. "It reverses the position of the friends of this Constitution," he argued. His mind would not be quieted, he declared, until he saw a substantial bill of rights.

Edmund Randolph, something of a late convert to the cause of ratification, took the lead in addressing Henry's civil liberties objections. The rights of criminal defendants were clearly implied by the constitutional text, he contended. The right to know the accusation against oneself and to confront witnesses followed from the requirement of jury trial in criminal cases. A criminal trial could not proceed without accusation and witnesses. There was no need for express prohibitions of excessive bail or cruel punishments or general search warrants since it was unreasonable to think that members of the legislature or judiciary would ever tolerate such abuses. Randolph's arguments on freedom of the press and of religion and on civil juries paralleled those of Alexander Hamilton in *The Federalist*, and he may have drawn on them (Hamilton's essays appeared in print in late May; the Virginia Convention convened June 2). Freedom of the press and religion were secure because the national government had been given no power over these domains. Silence on civil juries did not mean they were precluded.

Randolph was one of the few to address the question of why some rights had been specified in the 1787 Constitution but not others. Those specified, he contended, were exceptions from particular powers expressly granted Congress in the Constitution and necessitated by that grant. Thus, the prohibition on suspending habeas corpus and the ban on bills of

attainder were exceptions to specific power given Congress to regulate courts or to maintain a system of criminal justice.

The arguments of Henry and others must have had some impact because Virginia's resolution of ratification, passed June 26, 1788, included a recommendation that the first Congress to assemble under the new Constitution consider amending the document to add a "Declaration or Bill of Rights asserting and securing from encroachment the essential and unalienable rights of the people." The list of rights deemed worthy of recognition closely paralleled those recognized in Virginia's own bill of rights. They included, in addition to those referred to in the Henry/Randolph colloquy, freedom of assembly, a requirement of unanimous consent for conviction in criminal trials, the right to refuse to bear arms on grounds of conscience, and something in the nature of a due process clause, providing that no one should be deprived of life, liberty, or property, "but by the law of the land." Virginia thus became the third state to recommend the addition of civil liberties amendments in its ratification resolution.

New York

The public debate on the Constitution in New York, it has been observed, was among the fullest in all the states, and it produced some of the most intelligent and penetrating discussion of the subject both by Anti-Federalist opponents and Federalist supporters. It began in the fall of 1787, months before the legislature had voted to call a convention and consisted of newspaper articles, pamphlets, and public speeches. On the Anti-Federalist side, the most thoughtful commentary came from writers using the pen names, respectively, of "Brutus" and "the Federal Farmer" (the true identity of these two has ever been satisfactorily established).

In a series of essays that appeared in the *New York Journal* between October 1787 and April 1788, Brutus offered an analysis of the Constitution in all its parts. He took up the lack of a bill of rights in his second essay. He found it astonishing that "this grand security for the rights of the people," as he called it, was not to be found in the proposed constitution. History had shown that it was the natural inclination of those who governed "to enlarge their powers and abridge the public liberty." An express reservation of rights was therefore a necessity, he declared. (If it was not necessary, he asked, echoing Pennsylvania's Robert Whitehill, why had the authors secured certain of these such as the habeas corpus privilege?)

Among the rights that should have been explicitly reserved, Brutus argued, were the privilege against self-incrimination, the right to confront one's accusers, and the right to be tried in the place where the crime one was accused of was allegedly committed (otherwise, one might be "carried from Kentucky to Richmond for trial for an offense," he declared). He also scored the authors for failing to include a ban on excessive bail or cruel punishment or a requirement that search warrants be supported by oaths. He thought that provision for jury trial in civil cases was essential for securing property. A particular concern of his was the Constitution's implicit endorsement of standing armies, and in several articles he warned against the dangers that they posed to liberty.

The Federal Farmer's essays appeared in a small New York newspaper but were reprinted in pamphlet form and widely distributed. This writer was less hostile to the Constitution than Brutus and somewhat more tentative in his recommendations. While he acknowledged there were difficulties in the way of the project, he thought a complete bill of rights both wise and "very practicable." There might be some force in the argument that all powers not delegated were reserved (on this question men would take such sides as suited their purposes, he wrote), but the prudent thing to assume, he averred, was that those who governed would construe their powers most broadly, and it was therefore the better part of wisdom to carefully delineate "the powers parted with and the powers reserved." He favored an enumeration of "the most essential rights" and, to hedge against the possibility that some might be overlooked in the listing, a declaration that all not expressly surrendered were reserved. There was yet another reason for including a bill of rights, the Farmer wrote. Such declarations established, "in the minds of the people truths and principles which they might never otherwise have thought of, or soon forgot." They constituted a kind of declaration of first principles and as such deserved to be prominently proclaimed.

The partial declaration already contained in the 1787 Constitution ought to be extended to secure freedom of religion, some sort of protection of the press against oppressive taxation, freedom from unreasonable searches, the right to confront one's accusers in criminal trials, and the right to trial by jury in civil cases. Juries were important not only because they protected individuals against abuse of their rights but also—and this was a point other defenders of the civil jury made—because they offered ordinary citizens yet another means of participating in public affairs. (It is important to note that at the time, juries had the authority to decide the law as well as the facts.)

The most powerful commentary in support of the Constitution to appear in New York or anywhere else for that matter during the ratification debates was doubtless that contained in *The Federalist Papers*. The brainchild of Alexander Hamilton and aimed primarily at influencing the debate in his home state, these essays were published in New York City newspapers between October 1787 and May 1788. As is well known, they were a showcase for his and James Madison's dazzling rhetorical talents and produced some of the most brilliant political advocacy ever written. The two that dealt most directly with the subject of rights and liberties were Hamilton's Nos. 83 and 84, both of which first appeared in the second volume of collected Federalist essays, published toward the end of May 1788.

Hamilton devoted all of No. 83 to defending the Constitution against those who criticized it for its lack of provision for jury trial in civil cases, "the objection to the plan of the convention, which has met with most success," as he noted. He dismissed with scorn those who argued that the Constitution if adopted would abolish civil juries, some even going so far as to say that it did away with juries in the state courts. Mere silence did not mean abolition, and the Congress would be totally free to make whatever provisions it wished for the trial of civil cases in the federal courts. Hamilton expressed doubt as to whether the lack of provision for civil juries was a civil liberties issue at all. It was the criminal jury, he declared, that protected individuals against the arbitrary exercise of power by the state, the true domain of personal liberty. Civil juries had little or nothing to do with such matters. Still he acknowledged that civil juries might serve as a kind of additional security against corruption in the trial of civil causes, and so he felt compelled to explain why the drafters of the Constitution had not seen fit to provide for them. The main problem, he said, was a practical one. Because there were such great variations "between the limits of the jury trial" in the different states, "no general rule could have been fixed upon." Nor did he find the Massachusetts proposal that juries be guaranteed in actions at common law very helpful because different states defined actions at common law in different ways. The sorting out of matters like this were best left to the discretion of the legislature, he argued.

Federalist No. 84, which dealt with the more general question of why the Constitution contained no bill of rights, reprised many of the same themes that James Wilson had broached in his State Yard Speech. Bills of rights were "in their origin, stipulations between kings and their subjects," "reservations of rights not surrendered to the prince." They had no application to constitutions such as that proposed, in

which the people retained every power they had not given to the sovereign. Indeed, a declaration of rights would be dangerous, he averred. By stating exceptions to powers not granted, it would supply "a colorable pretext" for claiming powers not granted in the first place. A statement that the liberty of the press should not be restrained, for example, might furnish the government with the pretext for claiming a right at least to regulate. The security of the press depended on "public opinion and the general spirit of the people." The same consideration applied to those who feared oppression of the press through taxation. It would be wrong to say that newspapers should pay no taxes and no mere declaration could protect a paper against oppressive taxation.

New York voted to ratify the Constitution on July 26 by a margin of three votes. The act of ratification advocated additional protection for civil rights and liberties but in a fashion so convoluted and with language so opaque that it is impossible to characterize it any less generally than that.

Conclusion

Civil rights and liberties were not the only issue around which debate swirled during the ratification period, but they were a very important one. And by the time the First Congress assembled in March 1789, a powerful momentum in favor of adding amendments securing rights and liberties had built up. Some seven states had recommended such amendments in their ratification acts. (A guarantee of the right to jury trial in civil cases, interestingly, was the one endorsed by more states than any other.) James Madison, once as negative as Wilson and Hamilton on the wisdom of including a declaration of rights, had changed his mind. During his campaign for a seat in the House of Representatives in 1788, he promised that if elected he would make the introduction of a bill of rights one of his highest legislative priorities. He proved true to his word. On June 8, he introduced a set of amendments incorporating most, but not all, of the civil liberties provisions that proponents had been arguing for during the ratification period.

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References and Further Reading

- Albert, Peter J., and Ronald Hoffman, eds. *The Bill of Rights: Government Proscribed*. Charlottesville: University Press of Virginia, 1997.
- Bailyn, Bernard, ed. *The Debate on the Constitution*. New York: Library of America, 1993.

- Dumbauld, Edward. *The Bill of Rights and What It Means Today*. Norman: University of Oklahoma Press, 1957.
- Gillespie, Michael A., and Michael Lienesch, eds. *Ratifying the Constitution*. Lawrence: University Press of Kansas, 1989.
- Hunt, Gaillard, and James Brown Scott, eds. *Debates in the Federal Convention of 1787*. Union, NJ: Law Book Exchange, [1920] 1999.
- Jensen, Merrill, John Kaminski, and Gaspare Saladion, eds. *Documentary History of the Ratification of the Constitution*. 18 vols. Madison, WI: State Historical Society of Wisconsin, 1976–.
- Ketcham, Ralph. *James Madison: A Biography*. Charlottesville and London: University Press of Virginia, 1990.
- Levy, Leonard W. *Origins of the Bill of Rights*. New Haven and London: Yale University Press, 1999.
- McDonald, Forrest. *E Pluribus Unum: The Formation of the American Republic, 1776–1790*. Indianapolis: Liberty Fund, 1979.
- Rakove, Jack N. *Original Meanings: Politics and Ideas in the Making of the Constitution*. New York: Alfred A. Knopf, 1996.
- Rossiter, Clinton, ed. *The Federalist Papers*. New York: New American Library, 1961.
- Storing, Herbert J., ed. *The Anti-Federalist*. Abridgment by Murray Dry. Chicago and London: University of Chicago Press, 1981.

RAUH, JOSEPH L., JR. (1911–1992)

Joseph L. Rauh, Jr. was born in Cincinnati, Ohio, the son of a clothing manufacturer. He graduated from Harvard College (1933) and the Harvard Law School (1935), where he ranked first in his class and came under the influence of Professor Felix Frankfurter. At the latter's urging, he joined the administration of Franklin Roosevelt in 1935 and served briefly in the general counsel's office at the new Securities and Exchange Commission. Soon, however, he was recruited by Benjamin V. Cohen and Thomas G. Corcoran, among the New Deal's keenest legal minds, to help defend the constitutionality of the Public Utilities Holding Company Act, a victory eventually secured in the U.S. Supreme Court.

In 1937, Rauh served as law clerk to Supreme Court Justice Benjamin Cardozo during the turbulent term in which Roosevelt announced his "court-packing" plan, and the justices sustained major state and federal laws directed at the nation's economic problems, including minimum wage legislation, the National Labor Relations Act, and the Social Security Act. He nursed Cardozo through his final, fatal illness a year later, and when his old mentor Frankfurter took Cardozo's seat on the Supreme Court in 1939, Rauh became his first law clerk.

He served in three other government posts before enlisting in the Army following Pearl Harbor. In the general counsel's office of the Wage and Hours

Division of the Department of Labor, he drafted and defended broad interpretations of the Fair Labor Standards Act that extended the scope of its coverage over American workers. At the Federal Communications Commission, working closely with chairman Lawrence Fly, he vigorously defended Supreme Court decisions that narrowed the government's authority to engage in wiretapping (see *Nardone v. United States* [1937]). And in the Lend Lease Administration, where he first met labor leader Walter Reuther, he sided with those New Dealers who sought rapid conversion of domestic industries to war production.

In the Pacific theatre from 1942 to 1945, he served as a civil affairs officer on the staff of General Douglas MacArthur, most notably as the temporary mayor of the city of Manila following the Allied defeat of the Japanese in the Philippines. In that capacity, he negotiated a political truce among contending Filipino groups and saved the city's inhabitants from immediate starvation by distributing excess flour stored in military warehouses.

Returning to Washington, D.C. in 1945, Rauh went into private practice with a former Harvard classmate, Irving Levy, both specializing in labor, civil liberties, and civil rights cases. He raised funds that year for Reuther's United Automobile Workers Union (UAW) in their strike against General Motors, but declined the union's invitation to become its general counsel in Detroit, a position soon filled by Levy. Following the latter's death, Rauh became Reuther's top lawyer at the UAW and acquired a brilliant new partner, John Silard, as well as a talented young associate, Dan Pollitt, a future law professor at the University of North Carolina.

Although labor litigation and the UAW account kept the Rauh firm solvent in the 1950s and 1960s, its senior partner devoted the greater part of his energy to defending clients ensnared in the expanding government machinery of the domestic cold war. Along with Arthur M. Schlesinger, Jr., Eleanor Roosevelt, James Loeb, and others, he launched Americans for Democratic Action (ADA) in 1948, a staunch anti-communist, liberal organization dedicated to expanding the domestic agenda of the New Deal, defending civil liberties, and defeating Henry Wallace's third-party campaign for the presidency. While attacking Wallace and his communist supporters, Rauh leveled equally harsh criticism against the FBI, its director J. Edgar Hoover, and President Truman's Loyalty and Security Program that permitted the government to fire employees accused of disloyalty on grounds of their "sympathetic association" with persons or organizations listed as subversive by the U.S. attorney general.

Representing clients before assorted federal loyalty boards, Rauh became an outspoken critic of their procedures, which denied to those accused the right to see incriminating FBI files or to confront and cross-examine their accusers. He successfully defended James Kutcher, a disabled, decorated veteran, whose speeches on behalf of the American Trotskyites had led to his dismissal from the Veterans Administration. He won vindication in loyalty hearings as well for William Remington, an economist in the Commerce Department, who had been accused by Elizabeth Bentley of spying for the Soviet Union. Remington, however, was later charged with perjury, convicted, and sent to prison where other inmates murdered him.

Rauh took two major loyalty/security cases to the Supreme Court, where he narrowly missed achieving a constitutional milestone. Representing Dr. John Peters, blacklisted by the U.S. surgeon general, and Charles Allen Taylor, denied security clearance by the Pentagon, he asked the justices to rule that the government's failure to allow both victims access to FBI files denied due process of law, a ruling that would have seriously crippled the entire program. The justices held for Peters, but only on technical grounds (*Peters v. Hobby* [1955]). The Defense Department, fearing defeat, restored Taylor's clearance before oral argument. The Supreme Court therefore dismissed his suit for mootness (*Taylor v. McElroy* [1959]), but on the same day endorsed Rauh's due process argument in the companion case of *Greene v. McElroy* (1959).

Before the red hunters who ran the House Committee on Un-American Activities (HUAC), Rauh defended three notable clients—Lillian Hellman, Arthur Miller, and John Watkins—all of whom faced the unpalatable legal choice of cooperating with their interrogators, risking contempt if they refused, or invoking their privilege under the Fifth Amendment. The third choice would brand them “a Fifth Amendment communist.” He devised Hellman's strategy of offering to speak frankly about herself, but not others, an offer rejected by HUAC, which forced the playwright to take the Fifth. Doing so, she also issued a statement to the press, drafted by Rauh, that cast the Committee in the negative role of witch-hunting tyrants. She escaped further harassment by the Committee or legal consequences.

Miller and Watkins both refused to respond to questions from the Committee, were found in contempt, and convicted. On appeal, Rauh prevailed. The Court of Appeals for the District of Columbia overturned Miller's conviction on grounds that HUAC had failed to inform him of the consequences of his refusal to testify. Watkins became a Supreme

Court landmark when the Warren Court reversed his conviction and reprimanded HUAC for employing its powers of investigation solely for the purposes of exposure and humiliation (*Watkins v. United States* [1957]).

A longtime labor lawyer, with close ties to Reuther and the autoworkers, Rauh incurred the wrath of many union leaders in the 1970s and 1980s, when he skillfully used the Landrum-Griffin Act to promote union democracy and fair elections for insurgent candidates inside the United Mine Workers Union (UMW), the United Steelworkers, and the UAW itself. He won a new election for Jock Yablonski, the reform leader in the UMW, including critical access to union publications, shortly before the union leadership hired gunmen who murdered Yablonski, his wife, and daughter. He represented Ed Sadlowski in his bid to topple the old guard in the steelworkers' union and he nearly prevailed in a major Supreme Court case that would have allowed union reformers to seek financial support outside the existing union membership (*United Steelworkers of America v. Sadlowski* [1982]). His endorsement of Jerry Tucker's campaign inside the UAW made him an outcast among his old union allies in Detroit.

Although ill health prevented him from carrying his last civil liberties case to its conclusion in the early 1990s, Rauh's tenacity and skill won a significant victory for a group of Canadian citizens for whom he sued the Central Intelligence Agency (CIA) for negligence, and forced the agency to a financial settlement rather than a public trial. The Canadians had been subjected to illegal and dangerous drug experiments at McGill University during the 1960s when they sought legitimate medical treatment at a clinic funded by the CIA as part of its experiments in brainwashing. The Canadian government, also implicated in the cover-up of the program, made restitution to its own citizens shortly after Rauh died in 1992.

MICHAEL E. PARRISH

References and Further Reading

Parrish, Michael E., *A Lawyer in Crisis Times: Joseph L. Rauh, Jr., the Loyalty-Security Program, and the Defense of Civil Liberties in the Early Cold War*, North Carolina Law Review 82 (2004): 1799.

Cases and Statutes Cited

Greene v. McElroy, 360 U.S. 474 (1959)
Nardone v. United States, 392 U.S. 379 (1937)
Peters v. Hobby, 349 U.S. 331 (1955)
Taylor v. McElroy, 360 U.S. 474 (1959)

**R.A.V. v. CITY OF ST. PAUL,
505 U.S. 377 (1992)**

In *R.A.V. v. City of St. Paul*, the Supreme Court struck down a St. Paul, Minnesota ordinance that proscribed cross burning and other actions, “which one knows or has reasonable grounds to know” will cause “anger, alarm or resentment in others on the basis of race, color, creed, religion or gender.” The Court unanimously held that the law was unconstitutional, but the justices agreed about little else. Four members of the Court—Justices White, Blackmun, Stevens, and O’Connor—concurred in the judgment of the Court, but did so solely on the grounds that the ordinance was overly broad, sweeping within its proscription expression that should be protected. The other five members of the Court, in the majority opinion of Justice Scalia, reached farther and found that the St. Paul ordinance was an unconstitutional content-based regulation of speech.

In *R.A.V.*, the defendant Robert Viktora, then a minor, was accused of burning a cross on the lawn of Russell and Laura Jones and their children, an African-American family who had recently moved into the neighborhood. In moving to dismiss the indictment, Viktora asserted both that the ordinance was overbroad and that it was an unconstitutional, content-based restriction on speech. The Minnesota Supreme Court rejected the overbreadth challenge because that court construed the ordinance to apply only to “fighting words,” expression not protected by the First Amendment. The majority opinion by Justice Scalia accepted this construction, and thus reached the content-based challenge.

Justice Scalia utilized a limited categorical approach to the First Amendment. Acknowledging that “fighting words,” along with other categories of expression such as obscenity and defamation, are not entitled to full First Amendment protection, Justice Scalia asserted that these forms of expression nevertheless enjoy some limited protection and are not “entirely invisible to the Constitution.” Within any of these categories, expression may be proscribed only on the basis of its categorical nature and not on the basis of its content.

Justice Scalia’s approach to the content neutrality doctrine purports not to require the government to proscribe either all forms of proscribable speech or none at all. Rather, he identified two exceptions to the general unacceptability of content-based restrictions on expression. First, choices may be made as to which *forms* of speech to proscribe so long as these choices do not address the content of the expression. Second, regulations may address content for the “very reason

the entire class of speech at issue is proscribable” in the first place. For example, a regulation prohibiting only obscenity, “which is the most patently offensive *in its prurience*” would be permissible.

Justice Scalia found that the St. Paul ordinance fell within neither exception. He concluded that the ordinance was aimed directly at racist speech and biased beliefs rather than at “fighting words” generally or at a subgroup of “fighting words” selected for reasons other than the content of those words. He thus held that the ordinance impermissibly chose sides in the debate over racial prejudice. “St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensbury Rules.”

The ultimate reach of *R.A.V.* was substantially limited by the Court’s decision one year later in *Wisconsin v. Mitchell* (1993) upholding the Wisconsin bias crime law.

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Cases and Statutes Cited

Wisconsin v. Mitchell, 508 U.S. 476 (1993)

**RAWLINGS V. KENTUCKY,
448 U.S. 98 (1980)**

In order for a person to be entitled to suppress evidence that has been seized unconstitutionally by the police and is going to be used against him or her in a criminal trial, that person must have “standing” to raise the issue. Standing exists *only* when and if a person’s own constitutional rights have been violated, not when the police have violated another person’s constitutional rights. Put another way, there is no “vicarious standing.”

The *Rawlings* case is a classic example. Police officers entered a home with an arrest warrant for the owner. Rawlings, a visitor, was present and just prior to the officers’ arrival, he asked another visitor, Cox, to let him put his drugs in her purse. The police subsequently ordered Cox to dump out the contents of her purse, exposing the narcotics. Rawlings tried to have these drugs suppressed, arguing that the police search and seizure was unconstitutional.

The Supreme Court held that Rawlings lacked standing to raise the issue. Then-Justice Rehnquist, for the majority, held that Rawlings did not have a legitimate expectation of privacy in Cox’s purse necessary for standing because he had only known her for a few days, had never used her purse before, she had

let another friend go through her purse that morning, the transaction was precipitous, and Rawlings had not taken “normal precautions” to maintain the privacy of his drugs.

The *Rawlings* decision reflects a narrow view of when a legitimate expectation of privacy exists, a view that has not always been followed so grudgingly by the Court. For example, the Court subsequently held that overnight visitors in an apartment have a reasonable expectation of privacy sufficient for standing to raise the issue of the constitutionality of searches and seizures on those premises.

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See also **Exclusionary Rule; Privacy; Search (General Definition)**

RAWLS, JOHN BORDLEY (1929–2002)

John Bordley Rawls, philosopher and political theorist, was born in Baltimore, Maryland on February 21, 1929, and died November 24, 2002. He married Margaret Warfield Fox and they had four children. Rawls earned a Ph.D. in 1950 in philosophy from Princeton University. He taught there, and then at Cornell University and MIT. In 1962 he joined the faculty of Harvard until his retirement. His work encompasses social contract theory including principles of justice, civil liberties, economics, religion, social science, international relations, human rights, just war criteria, and ethics. His theory reflects moral and egalitarian presuppositions, and his philosophical perspective pervades and enriches his thought.

Rawls sought to create a theory that could supplant that of utilitarianism with its inherent inequities. He wrote *A Theory of Justice* (1971), which offers a social contract theory for modern pluralistic democracies. Rawls’s principles of justice apply to the basic structure of society, which refers to major social institutions of society such as the political constitutions and major social and economic arrangements. Rawls’s theory is comprehensive, coherent, and internally consistent.

Justice and Liberties

Rawls’s principles of justice are chosen by rational contractors in a theoretical construct that he terms the “original position,” which is designed to foster impartiality in the choice of principles. In this

hypothetical context, to ensure that the contractors do not select principles of justice that would preference their own individual self-interests, Rawls places them behind a “veil of ignorance.” They do not know what their social positions will be, or their religious beliefs, philosophical commitments, moral convictions, level of intelligence, or degree of wealth, the knowledge of which would enable the rational contractors to select principles of justice that would further their own interests. The principles are chosen in a context that eliminates bias, and are those that Rawls believes would be chosen in this situation.

Rawls’s two principles of justice guarantee that political liberties are to be equally held by all citizens. The first principle of justice specifies that each is to have a right to basic liberties that is compatible with the basic liberties of others. This principle takes priority over the second principle, which ensures equality of fair opportunity in respect to the attainment of offices and positions as well as specifying that social and economic inequalities are to be arranged so that they benefit the least advantaged. Over time, this tends to reduce inequalities among citizens by improving the lot of the least advantaged. It reflects the egalitarian perspective that pervades Rawls’s thought.

Rawls conceives of persons as rational, free, equal, having intrinsic worth and dignity, and possessed of two moral powers. These powers are a capacity for a sense of justice and the ability to conceive of the good and to rationally seek it. Liberties enable people to develop these moral powers. He envisions a well-ordered society as one in which equal citizens act according to a shared conception of justice, with cooperation and mutual respect prevailing. Rawls’s work moves from a consideration of social contract theory to a narrower focus on political liberalism’s capacity to achieve a stable society despite the pluralism intrinsic to modern democracies.

Rawls’s basic liberties include freedom of political speech and press, freedom of assembly, liberty of conscience, freedom of thought, and freedom of association. Rights and liberties are covered by the rule of law. The liberty and integrity of persons is violated by slavery and serfdom. Rawls sees liberties protected by the U.S. Constitution’s First Amendment as essential to control the misconduct of government. Basic liberties are inalienable and cannot be justly denied to any person, group, or all citizens by the majority. Free and equal citizens may vote as they wish.

Rawls discusses freedom of political speech and regards libel and defamation of private, not political, figures as private wrongs with no significance for the basic structure of society that is central to his theory.

Free political speech combined with the just political procedures specified by a constitution offer a way to avoid revolution and the use of force. He cites within the history of constitutional doctrine fixed points regarding free speech: the protection of the advocacy of subversive and revolutionary doctrines, unrestrained freedom of the press, with few exceptions, and that seditious libel is a nonexistent crime. If it were, this would impede free discussion that informs voters. Political, religious, and philosophical discussions are not to be censored.

If subversive advocacy is suppressed, the reasons being proposed for revolution are made unavailable to citizens who are then unable to judge from this perspective the justice of their society. This violates freedom of thought. The clear and present danger rule entails a consideration of the proximity and degree to which subversive advocacy will result in lawlessness. Rawls rejects these criteria and states that for free speech to be suppressed, there must be a constitutional crisis of the sort in which democratic institutions fail to function adequately, and emergency procedures are inoperable. He rejects appeals to emergencies even involving the possible destruction of the state as not offering sufficient reason to override freedom of speech. Rawls suggests that in the United States, historically free political institutions have continuously functioned and the requisite constitutional crisis justifying the suppression of free speech has not arisen.

Rawls strongly objects to Supreme Court rulings (*Buckley v. Valeo* [1976] and *First National Bank v. Bellotti* [1978]) that held unconstitutional components of the Election Act Amendment of 1974 which placed limits on campaign expenditures. The Supreme Court deemed these limitations a restriction of free speech.

Rawls advocates limits to political campaign donations. The equal opportunity component of his principles of justice in which all are equally to have access to political and social positions of power is undermined when the wealthy have an advantage over others in the electoral process and spheres of influence. All should have equal representation, which is essential to protect basic rights.

Rawls affirms the importance of due process, impartiality, and open and fair trials. He connects the rule of law with liberty. People have a right to own personal property. Rawls regards this liberty as providing a sense of independence and self-respect as well as enhancing moral powers. Significantly, the moral power of rationally determining and seeking one's good does not limit "good" to a moral designation, but expands it to include primary goods, which encompass not only liberties, rights, and

opportunities, but things such as income and wealth, which people make rational plans to acquire in order to pursue desirable types of lives.

In the area of reproductive freedom, Rawls approves of abortion in the first trimester, because of the equality of women, which allows them to make this decision during the early stage of pregnancy. He views the role of the family to be one of not only raising and caring for children, but also of instilling within them a moral sense and an ability to fit into the culture and become good citizens. This does not require a particular form of family. Families that foster these values may be monogamous or heterosexual. Gay and lesbian rights and duties that are in this sphere of orderly family life are admissible.

Political Liberalism

Freedom of conscience is a significant theme in Rawls's work. He consistently and strongly advocates ensuring this liberty. Concerned with the divisive nature of the wars of religion arising from the multiplicity of religions in the aftermath of the Reformation, Rawls sought a way of obtaining a well-ordered democratic society in the face of rampant pluralism, not only of religions, but of cultural backgrounds and philosophical convictions. He removes these elements from the political sphere and places them in what he terms "comprehensive doctrines." These encompass religious, philosophical, and moral convictions and commitments that are central to people's conceptions of the good and impart meaning to their lives. Justice as fairness is a political conception of justice and not part of any comprehensive doctrine. By separating the political from privately held convictions in comprehensive doctrines, divisive elements are removed from the political sphere. This contributes to social stability, as does the fact that there is an overlapping consensus on the subject of justice by citizens with widely conflicting convictions within their comprehensive doctrines. Rawls does not advocate suppression of free speech regarding them, but disallows them as part of the political agenda. The enormously divisive issues in society, such as abortion, have not resulted in civil war. The government continues to function despite significant social problems. This may be attributable to the stabilizing influence of a shared acceptance and recognition of the value of the Constitution. This overlapping consensus leads to changes being sought within the system rather than by revolution. Rawls does not claim that an

overlapping consensus on the subject of justice leads to a harmonious ideal society, but only that it fosters stability in the face of a multiplicity of exceedingly incompatible and divisive convictions.

The political virtues include fairness, tolerance, being ready to meet others halfway, and cooperation based on mutual respect, which is reflected by Rawls's conception of reciprocity. He stresses that social cooperation is for mutual benefit. Reciprocity ensures that each benefits and citizens mutually cooperate. The basic structure of society is based on fair terms of cooperation.

Religious Voices in the Public Sphere

While advocating freedom of speech, Rawls offers a proviso which requires that religious and nonreligious elements of comprehensive doctrines be permitted in political discussion only if they may ultimately be supported by proper public political reasons, and not reasons solely within comprehensive doctrines. He confines public reasoning to the domain of a political conception of justice. It entails public political deliberation that reflects political values such as justice and the common welfare, which are not components of comprehensive doctrines.

Rawls's political liberalism regards both rational secular arguments and religious ones in the same way: they do not provide public reasons and are outside the realm of the public political domain. Public justification is entailed; in addition to the requirement of valid reasoning, religious and secular arguments must also offer premises and conclusions that could be reasonably accepted by others. This transforms privately held convictions into ones that are compatible with public reason in the political domain. This requirement that others see the arguments as reasonable leads to concurrence by eliminating divisive stances that are unsupported by public reason and on which there is no agreement. This restriction disallows religious convictions that may not meet his proviso's criterion, but nonetheless could be considered reasonable within their own conceptual schemes, such as systematic theologies. Rawls's requirement does not counter his advocacy of freedom of conscience, but his narrow construal of "reasonable" may circumscribe the extent to which religious voices could be heard in public policy discussions.

Rawls advocates religious toleration, which mitigates conflicts both between religion and democracy, and among religious doctrines. His conception of justice protects religious liberty. The separation of church and state protects the church from the

state and citizens from their churches (they may change their faiths and even apostatize), as much as it protects the secular culture from religious influence.

This separation strengthens democracy. The principles supporting it are those that citizens in a pluralistic society can endorse. Civil society need not be based on a religious establishment. The school prayer issue involves the type of reasons citizens offer to justify political choices. Given the pluralism of modern democracies, citizens would not accept religious reasons for school prayer.

Human Rights and Just War Criteria

In *The Law of Peoples* (1999), Rawls extends his theory to include international relations. He regards liberty of conscience as a human right and this stance concurs with the Universal Declaration of Human Rights of 1948, which includes the right to life, liberty, and security of the person, and prohibits torture and degrading treatments and punishments. Both the Declaration and Rawls's theory share the concepts of persons as free, rational, and equal in dignity and rights.

Rawls revises traditional powers of sovereignty including the right to go to war and unrestricted political autonomy. His just war thought limits the right to go to war to the criterion of self-defense. Well-ordered peoples may wage war against outlaw states whose expansionist aims threaten the security of well-ordered states, or, in grave cases, to protect human rights. The political and moral force of human rights extends to all nations, peoples, and societies. Outlaw states that severely violate them may face intervention by well-ordered states. Internal autonomy does not extend to suspending human rights.

Rawls's theory is comprehensive, cogent, and consistent, and has had inestimable influence in a number of fields including philosophy, law, and political theory. He is widely regarded as the most significant political theorist of the twentieth century.

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References and Further Reading

- John Rawls. *A Theory of Justice*. Cambridge, MA: Belknap Press of Harvard University Press, 1971.
- . *Political Liberalism*. New York: Columbia University Press, 1993.
- . *The Law of Peoples*. Cambridge, MA: Harvard University Press, 1999.
- . *Collected Papers*. Edited by Samuel Freeman. Cambridge, MA: Harvard University Press, 1999.

Cases and Statutes Cited

Buckley v. Valeo, 424 U.S. 1 (1976).

First National Bank v. Bellotti, 435 U.S. 765 (1978).

REAPPORTIONMENT

Apportionment—the division of a state into districts for the purposes of electing legislative representatives—raises profoundly important political and legal questions. The democratic right of individuals to cast equally valuable votes, and the republican commitment to equal representation are sometimes complementary, and sometimes conflicting, values. When changes in population necessitate the redrawing of the boundaries of electoral districts—reapportionment—the process is fraught with controversy. Since the 1960s, the courts have played an increasingly prominent role in legislative reapportionment. This is because legislators have often been more concerned with protecting their political power than protecting the civil liberties of voters.

The Court Enters the “Political Thicket”

Reapportionment was traditionally considered an issue to be resolved by the political branches of government. After World War II, as American society experienced significant population shifts from rural to urban areas there was increasing pressure on the courts to intervene and protect the fundamental civil liberty of honest representation. Legislative remedies were not forthcoming; the rural interests that dominated legislatures were unwilling to reapportion districts because this would reduce their political power.

By the late 1950s, at least ten states had sought to remedy this electoral discrimination by giving their courts responsibility for legislative apportionment. The effects were limited, however, because the federal courts were reluctant to become involved. They adhered to the Supreme Court’s 1946 decision in *Colegrove v. Green*, in which Justice Felix Frankfurter wrote that legislative apportionment was a “political thicket” that courts should avoid entering. It was, said Frankfurter, a subject matter that constituted a purely “political question”; in brief, it was an issue to be settled by the ballot box, not judicial opinion.

In 1962, the Court’s landmark decision in *Baker v. Carr* overruled *Colegrove*. Despite decennial censuses showing that Tennessee had experienced a significant

increase in its urban population and an accompanying decline in rural areas, the districts for its state legislature were still apportioned according to the 1901 census. This created a situation whereby voters living in rural areas enjoyed a far greater share of legislative seats than those living in the more heavily populated urban districts. In *Baker*, although the Court did not determine whether this plan was constitutional, it did decide that this was a question that could be reviewed by a court—legislative apportionment was, the Court held, a justiciable issue. Convinced that the Court’s decision in *Colegrove* had been correct, in a dissenting opinion in *Baker*, Frankfurter wrote: “[I]n a democratic society like ours, relief must come through an aroused popular conscience that sears the conscience of the people’s representatives.” The Court responded that however strong were the people’s calls for relief they went unheard by the legislators, in whose own interests the malapportioned districts were drawn.

Chief Justice Earl Warren later stated that *Baker* was the most significant decision made by the Court during his sixteen years as chief justice.

The 1963/1964 Reapportionment Cases

The majority of the reapportionment cases decided before *Baker* addressed the republican ideals that the guarantee clause of Article IV wrote into the Constitution. In *Baker*, the Court avoided this provision that guaranteed every state a republican form of government; instead it overcame the political question doctrine by using the democratic values of the equal protection clause of the Fourteenth Amendment. Between 1962 and 1964, in a series of major decisions, the Court expanded its involvement by ruling on the merits of specific apportionment plans. These decisions demonstrated the “fundamental” and democratic nature of the basic civic liberty of honest electoral representation through equal worth of individual votes, and the republican value of equal legislative representation.

The decisions in *Gray v. Sanders* (1963) and *Wesberry v. Sanders* (1964) represented the transition from *Baker* to the landmark cases decided in June 1964. In *Gray* the Court heard a challenge to Georgia’s system of counting primary election votes based on county units, a system that greatly benefited the residents of rural counties. Writing for the Court, Justice William O. Douglas concluded that “political equality from the Declaration of Independence, to Lincoln’s Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only

one thing—one person, one vote.” Eleven months later, in *Wesberry v. Sanders*, the Court modified this standard and applied it to elections nationwide when it concluded that the Constitution required that “as nearly as is practicable” votes in congressional elections should carry equal weight.

In six cases decided in June 1964, headed by *Reynolds v. Sims*, the Court applied these principles to the states, ruling that the Constitution required per capita apportionment in both houses of every bicameral state legislature. The Court’s opinion, written by Chief Justice Warren, effectively ended legislators’ attempts to rationalize malapportionment. His opinion declared, “Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests.” The Court categorized equal political representation as a “fundamental” right of the individual voter, protected by the equal protection clause. As the Court said, “The right to vote freely for the candidate of one’s choice is of the essence of a democratic society.” Traditionally, the Court had rarely required the government to present anything more than a rational justification for actions challenged under this provision of the Constitution. In *Reynolds*, labeling this right “fundamental” meant applying the standard of strict scrutiny that now required the government to show that its actions were narrowly tailored to further a compelling state interest. There could be no such interest in apportionment that was not per capita because, Warren concluded, “To the extent that a citizen’s right to vote is debased, he is that much less a citizen.”

Frankfurter left the Court in 1962, but the position he took in *Baker*—that reapportionment was a purely political question—was maintained by Justice John Marshall Harlan II, who dissented alone in *Reynolds*. In the accompanying cases, however, the Court was split over whether its decisions actually reflected democratic or republican values. This division was clearest in *Lucas v. Forty-Fourth General Assembly of Colorado*, involving an apportionment plan that became a state constitutional amendment after adoption, by referendum, by a majority of the voters in every county of the state. The plan only provided for per capita apportionment in the lower house of the state legislature. The Court maintained that this plan was unconstitutional because, as in *Reynolds*, individuals’ votes were not equally weighted. Dissenting in *Lucas*, Justice Potter Stewart rejected this, saying that the cases decided with *Reynolds* “have nothing to do with the denial or impairment of any person’s right to vote.” Instead, they involved the limits that the equal protection clause places on states’ choices of apportionment plans.

In *Reynolds*, the Court was committed to the fundamental civil liberties principle that “the basic aim of legislative apportionment” is “fair and effective representation for all citizens.” It recognized, however, that differences among the states made it unreasonable to insist on “a strict population standard” if there existed “legitimate considerations incident to the effectuation of a rational state policy” that could justify “deviations from the equal-population principle.” Although this rational basis standard of judicial review made it easier for a state to defend its redistricting actions than would have been the case if the Court imposed strict judicial scrutiny, the Court warned that “neither history alone, nor economic or other sorts of group interests, are permissible factors in attempting to justify disparities from population-based representation. Citizens, not history or economic interests, cast votes.” This observation would have significant consequences, in later decades, as the Court considered whether these rules applied when the “group interests” were based on ethnicity or race.

The reapportionment cases of 1963 and 1964 received the public support of Presidents John F. Kennedy and Lyndon B. Johnson, who integrated the broad civil liberties principles of the decisions into civil rights agendas. Many members of Congress, however, agreed with Frankfurter and Harlan that malapportionment remedies should be sought at the ballot box, not through judicial action. There were repeated congressional calls, during 1964 and 1965, for punitive legislation or constitutional amendments to prevent future judicial involvement in legislative apportionment. Support for these changes was lacking, however, as attention turned to the passage of major civil rights legislation, in particular the Voting Rights Act of 1965 (VRA). Representing the spirit of both the Fifteenth Amendment, which prohibits the denial of voting rights based on race, and the vote dilution concerns of *Baker* and its 1964 progeny, the VRA placed greater protections on the voting rights of minorities (initially blacks, then other groups), and required states to seek Justice Department approval for any electoral representation changes involving the “effectiveness” of votes.

Where and How to Draw District Boundaries

Since 1965, reapportionment challenges have usually involved one of two issues—the mathematical equality of district populations, and the factors that may be used to determine where boundaries are drawn. In *Lucas*, the Court said that “one of the

most undesirable features” of Colorado’s apportionment was the requirement that counties with multiple legislative seats were required to hold at-large county elections. This debased the votes of the residents in the most populous counties, because, the Court observed, “No identifiable constituencies within the populous counties resulted, and the residents of those areas had no single member of the Senate or House elected specifically to represent them.” Critical that the Court’s decision ignored the more important, and traditional geographical considerations for reapportionment, the dissenters argued that if “the goal is solely that of equally ‘weighted’ votes,” then the preferable remedy is “the abolition of districts and the holding of all elections at-large.” Responding to this debate, in 1967 Congress passed legislation requiring single-member districts for congressional elections in states with more than one seat.

The Court has traditionally placed greater importance on the mathematical equality of the populations of congressional districts than those created for state legislative elections. In 1983, in *Karcher v. Daggett*, a five-justice majority rejected the reapportionment of New Jersey into districts, the largest and smallest of which were separated by less than four thousand votes. The Court concluded that “absolute population equality” was “the paramount objective of apportionment” for congressional seats under Article I of the Constitution. However, it retained the recognition, made in *Reynolds*, that differences among the states permitted greater deviation from mathematical equality for state legislative apportionment.

Gerrymandering

Taking its name from the salamander-shaped district created in 1811 by Massachusetts Governor Elbridge Gerry in an attempt to maximize his political power, “gerrymandering” is the practice of drawing the boundaries of legislative districts in order to favor or disadvantage a political party or group. Traditionally used as a negative term describing discriminatory reapportionment practices, or bizarrely shaped districts, litigation usually involves either partisan or racial gerrymandering.

Recognizing that reapportionment always involves political motives, the courts have been reluctant to decide the legality of redistricting that favors one political party at the expense of another. The continuing importance of honest representation has led the Court to hold that partisan gerrymandering is a justiciable issue—*Davis v. Bandemer* (1986). In this

case, however, the Court found that an Indiana state legislative apportionment plan did not dilute the votes of Democrats. To show that a plan “substantially disadvantages certain voters in their opportunity to influence the political process effectively,” the Court said, required “evidence of continued frustration of the will of a majority of the voters or effective denial to a minority of voters of a fair chance to influence the political process.” The Court found that this evidence did not exist in Indiana.

Since the 1960s, the Court has been more willing to consider whether such disadvantages exist when reapportionment is challenged based on race. In 1960, in *Gomillion v. Lightfoot*, the Court struck down a plan that redrew the boundaries of the city of Tuskegee, Alabama, to exclude black residents and maintain whites’ control of the city’s politics, creating, in the words of the Court, a district that was an “uncouth twenty-eight-sided figure.” The Court unanimously ruled that state redistricting could not constitutionally violate a right protected by federal law—in this case the voting rights protections of the Fourteenth and Fifteenth Amendments. Two decades later, in *Mobile v. Bolden* (1980), the Court ruled that reapportionment could only be found to violate either of these amendments because of race if there was evidence of a legislative *intent* to engage in such discrimination. In 1986, the Court expanded the opportunities for racial minorities to mount successful challenges to reapportionment plans when it decided, in *Thornburg v. Gingles*, that the *effects* of redistricting could be used to prove racial discrimination. It is important to note, however, that *Gingles* was limited to claims based on the VRA. It was a reaction to amendments to that law; as such, it left *Bolden* untouched because that case involved a constitutional, rather than statutory, claim.

Although answering some important questions about racially discriminatory reapportionment, these cases did not consider the contentious question of whether legislative districts could be drawn to *increase* minority power. Did the “one man, one vote” guarantee mean that every individual’s one vote carried equal weight, or was it necessary to provide political advantages to groups whose votes, because of discriminatory practices, did not actually result in equal legislative representation?

“Majority-Minority” Districts

Beginning in the 1970s, the federal government, through its enforcement of the VRA, promoted the creation of so-called “majority-minority” districts.

When they reapportioned their states, legislators were encouraged to create districts that contained a majority of residents of ethnic or racial minorities. One result was a sharp increase in the number of blacks and Hispanics elected to the House of Representatives. Following the 1990 census, a number of states redrew the boundaries of their legislative constituencies in order to include majority-minority districts after their initial reapportionment plans were rejected by the Justice Department. In *Shaw v. Reno* (1993) and *Miller v. Johnson* (1995), a closely divided Court concluded that these efforts to create political communities out of racial communities were unconstitutional, and that residents must create any such communities voluntarily, without a state assumption “that voters of a particular race, because of their race, “think alike, share the same political interests, and will prefer the same candidates at the polls” (*Miller*, quoting from *Shaw*).

In *Shaw*, the Court was confronted with a North Carolina reapportionment plan that contained, in the Court’s words, “district boundary lines of dramatically irregular shape,” creating one district whose shape was described by some, the Court observed, as resembling a “bug splattered on a windshield.” Politically, the plan benefited minorities because it created two districts that sent black members to Congress from North Carolina for the first time in the twentieth century. However, from a legal perspective, the Court concluded, the plan violated the constitutional protections that existed to protect the civil liberties of everyone in American society. “Racial gerrymandering,” wrote Justice Sandra Day O’Connor, “even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire.” Therefore, she concluded, “race-based districting by our state legislatures demands close judicial scrutiny”—the test that required such plans to be defended as narrowly tailored to further a compelling state interest.

Two years later, in *Miller*, the Court explained that its objections to the North Carolina plan in *Shaw* were not confined to the bizarre shape of the districts. Again confronted with the creation of majority-minority districts, this time in Georgia, the Court, through Justice Anthony M. Kennedy, stated that a reapportionment plan was unconstitutional when race was found to be “the predominant factor” in determining the boundaries of districts. In *Hunt v. Cromartie*, in 1999, the Court further clarified that the existence of a majority of blacks in a district was not, on its own, proof of racially motivated redistricting.

Reapportionment: A Continuing Controversy

In reapportionment cases, the Supreme Court has had a longstanding affinity for the protection of the civil liberties of individuals rather than community interests. *Shaw* and *Miller* demonstrated that this tradition faces its strongest challenge when the group interests at stake are defined by race or ethnicity. The four dissenters in both cases concluded, as Justice Ruth Bader Ginsburg wrote in *Miller*, “Apportionment schemes, by their very nature, assemble people in groups.... That ethnicity defines some of these groups is a political reality.”

In the 1990s, a majority of the Supreme Court agreed that Americans “share both the obligation and the aspiration of working toward” the goal of “eradicating invidious discrimination from the electoral process” (*Miller*). Yet, it is unclear what this means for the law and politics of reapportionment. It is clear, however, that the judicial branch will continue to play a major role in protecting the voting rights of individuals. This is because legislators cannot be guaranteed to do so, and because it is a fundamental premise of America’s constitutional democracy that “[c]ourts sit to adjudicate controversies involving alleged denials of constitutional rights” (*Lucas*).

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References and Further Reading

- Buchman, Jeremy. *Drawing Lines in Quicksand: Courts, Legislatures, and Redistricting*. New York: Peter Lang, 2003.
- Davidson, Roger H., and Walter J. Oleszek. *Congress and Its Members*. 10th ed. Washington, D.C.: CQ Press, 2005.
- Epstein, Lee, and Thomas G. Walker. *Constitutional Law for a Changing America: Rights, Liberties, and Justice*. 5th ed. Washington, D.C.: CQ Press, 2004.
- Knowles, Helen J., *May It Please the Court? The Solicitor General’s Not So ‘Special’ Relationship—Archibald Cox and the 1963–1964 Reapportionment Cases*, *Journal of Supreme Court History* (July 2006).
- Peacock, Anthony A., ed. *Affirmative Action and Representation: Shaw v. Reno and the Future of Voting Rights*. Durham: Carolina Academic Press, 1997.
- Ryden, David K., ed. *The U.S. Supreme Court and the Electoral Process*. Washington, D.C.: Georgetown University Press, 2000.
- Yarbrough, Tinsley E. *Race and Redistricting: The Shaw-Cromartie Cases*. Lawrence: University Press of Kansas, 2002.

Cases and Statutes Cited

- Baker v. Carr*, 369 U.S. 186 (1962)
- Colegrove v. Green*, 328 U.S. 549 (1946)
- Davis v. Bandemer*, 478 U.S. 109 (1986)

Gomillion v. Lightfoot, 364 U.S. 339 (1960)
Gray v. Sanders, 372 U.S. 368 (1963)
Hunt v. Cromartie, 526 U.S. 541 (1999)
Karcher v. Daggett, 462 U.S. 725 (1983)
Lucas v. Forty-Fourth General Assembly of Colorado, 377 U.S. 713 (1964)
Miller v. Johnson, 515 U.S. 900 (1995)
Mobile v. Bolden, 446 U.S. 55 (1980)
Reynolds v. Sims, 377 U.S. 533 (1964)
Shaw v. Reno, 509 U.S. 630 (1993)
Thornburg v. Gingles, 478 U.S. 30 (1986)
Wesberry v. Sanders, 375 U.S. 1 (1964)
 Single-Member District Act of 1967, 2 USC Sec. 2c.
 Voting Rights Act Amendments of 1982, Pub. L. 97-205, 96 Stat. 131
 Voting Rights Act of 1965, Pub. L. 89-100, 79 Stat. 437

See also **Equal Protection of Law (XIV); Voting Rights (Compound); Warren Court**

RED LION BROADCASTING CO. v. FCC, 395 U.S. 367 (1969)

Over-the-air radio and television broadcasters receive generally fewer constitutional safeguards than their counterparts in printed media. This disparity in First Amendment jurisprudence originated in the 1969 case of *Red Lion Broadcasting Co. v. FCC*. That decision upheld the Federal Communications Commission's (FCC) fairness doctrine, which comprised two distinct rules. The "personal attack" rule required an FCC-licensed broadcaster to offer an opportunity to respond to any public figure who had been personally attacked during a broadcast. The "political editorializing" rule required a broadcaster who endorsed or opposed a political candidate to offer reply time to all disfavored candidates.

Red Lion upheld the fairness doctrine. Mindful of physical limits on the extent of the electromagnetic spectrum, Justice Byron White observed that "only a tiny fraction of those with resources and intelligence can hope to communicate by radio at the same time." This scarcity, held the Court, justified limits on the First Amendment rights of broadcasters: "Where there are substantially more individuals who want to broadcast than there are frequencies to allot, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish."

The Supreme Court has never upheld a right-of-reply regime of the sort at issue in *Red Lion* in any context outside broadcasting. Five years later, in a decision that did not cite *Red Lion*, the Supreme Court in *Miami Herald Publishing Co. v. Tornillo* (1974) invalidated a state right-of-reply law that was functionally identical to the fairness doctrine at issue

in *Red Lion*. The *Tornillo* Court found that a compulsory right of reply impermissibly impaired the editorial freedom of newspaper publishers. In the 1998 case of *Arkansas Educational Television Commission v. Forbes*, the Court observed that "broad rights of access for outside speakers" to nonbroadcast facilities are "antithetical" to publishers' constitutional rights. In a 1987 proceeding called *In re Syracuse Peace Council*, the FCC repealed the fairness doctrine as a matter of administrative law.

The scarcity rationale that justified *Red Lion*'s endorsement of the fairness doctrine has faced withering criticism in lower court decisions and in the academic literature. Every communicative medium is scarce in the sense that not every willing speaker will have access. The "analytical confusion" that has surrounded *Red Lion*'s scarcity rationale, as Judge Robert Bork observed in 1986, arises from the Supreme Court's fruitless "attempt to use a universal fact as a distinguishing principle."

Although broadcasters are no longer required to follow the fairness doctrine, *Red Lion* retains enormous importance within free speech jurisprudence. Together with the 1943 case of *National Broadcasting Co. v. United States*, *Red Lion* stands for the proposition that "differences in the characteristics of new media justify differences in the First Amendment standards applied to them." This endorsement of medium-specific approaches to the First Amendment all but dictated the Supreme Court's decision to uphold a "must-carry" regime for cable television in the *Turner Broadcasting System, Inc. v. FCC* controversy. As illustrated in the 1996 case of *Denver Area Educational Telecommunications Consortium, Inc. v. FCC* and in the 2000 case of *United States v. Playboy Entertainment Group, Inc.*, however, the Supreme Court has never equated the constitutional status of cable television with that of broadcasting. Nor has the Court used *Red Lion* to justify a reduction in constitutional protection for sexually explicit speech on the Internet. Indeed, the Court has blocked full enforcement of the Communications Decency Act of 1996 and the Child Online Protection Act of 1998 on constitutional grounds.

Perhaps *Red Lion*'s most enduring legacy is its blueprint for judicial evaluation of novel communications conduits. As summarized in the 1997 case of *Reno v. ACLU*, which invalidated the Communications Decency Act, *Red Lion* invites courts to examine the history of regulation within a particular medium (such as conventional broadcasting, cable television, or the Internet), the scarcity of available channels for expression, and the extent to which a medium has an "invasive" impact on its audience. Despite the limited reach of the so-called "broadcast model" of free speech jurisprudence and the decline of the fairness

doctrine, *Red Lion* can be expected to figure prominently in any case that contests the constitutional status of a new communications medium for the first time.

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References and Further Reading

- Benjamin, Stuart Minor, *The Logic of Scarcity: Idle Spectrum as a First Amendment Violation*, Duke Law Journal 52 (2002): 1.
- Bloch, Susan Low, *Orphaned Rules in the Administrative State: The Fairness Doctrine and Other Orphaned Progeny of Interactive Deregulation*, Georgetown Law Journal 76 (1987): 59.
- Chen, Jim, *Conduit-Based Regulation of Speech*, Duke Law Journal 54 (2005).
- , *Liberating Red Lion from the Glass Menagerie of Free Speech Jurisprudence*, Telecommunications and High Technology Law Journal 1 (2002): 293.
- Robinson, Glen O., *The Electronic First Amendment: An Essay for the New Age*, Duke Law Journal 47 (1998): 899.
- Van Alstyne, William W., *The Möbius Strip of the First Amendment: Perspectives on Red Lion*, South Carolina Law Review 29 (1978): 539.
- Weinberg, Jonathan, *Broadcasting and Speech*, California Law Review 81 (1993): 1103.
- Yoo, Christopher S., *The Rise and Demise of the Technology-Specific Approach to the First Amendment*, Georgetown Law Journal 91 (2003): 245.

Cases and Statutes Cited

- Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666 (1998)
- Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727 (1996)
- In re Syracuse Peace Council*, 2 F.C.C.R. 5043 (1987)
- Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974)
- National Broadcasting Co. v. United States*, 319 U.S. 190 (1943)
- Reno v. ACLU*, 521 U.S. 844 (1997)
- Telecommunications Research & Action Center v. FCC*, 801 F.2d 501 (D.C. Cir. 1986) (Bork, J.)
- Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994)
- Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997)
- United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000)
- See also *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974); *Turner Broadcasting Sys. Inc. v. FCC* (Turner I), 512 U.S. 622 (1994); 520 U.S. 180 (1997) (Turner II)

RED SCARE OF THE EARLY 1920s

The signing of an armistice in November of 1918 marked the official end of the “Great World War”

and might have promised a new era of peace and global stability. For Americans the years of 1919 and 1920 were in fact years of turmoil, fear, and hysteria. The context of this first red scare was one of economic dislocation (the impact of war and demobilization), high levels of immigration, rising union membership, nationwide strikes, and the ripple effects of the Russian Revolution of 1917.

Fear of a spreading communist revolutionary movement was exacerbated by the growing presence of immigrants from Southern and Eastern Europe and Russia. Over thirteen million immigrants arrived in the United States between 1901 and 1920, and among them were small numbers of anarchists, socialists, and revolutionaries. Immigrants, labor organizers, and political activists played a part in the significant opposition that arose to the decision of President Wilson to join the war in 1917. Likewise, they were among those who opposed the wartime draft. They soon became the target of official reprisal. Federal legislation was devised to secure a minimum of opposition to the draft and the war; the Immigration Act (1917), the Espionage Act (1917), and the Sedition Act (1918) were some noteworthy examples. Many states followed suit. Meanwhile, labor unrest reached new peaks—in 1919 alone there were 3,600 strikes involving over four million workers. The public was primed by government-supported propaganda to expect violent uprisings at any time.

Promoting Americanism by Prosecution

The implementation of federal law fell to Attorney General A. Mitchell Palmer, a former vice chair of the Democratic National Committee. Prior to May 1919, Palmer’s views on civil liberties attracted little attention. Then in late April, a bombing campaign was launched by radicals against prominent officials and businessmen. Among the targets (most of whom were unscathed) were Supreme Court Justice Oliver Wendell Holmes, Jr., John D. Rockefeller, and J.P. Morgan. Another target was the attorney general himself; the bomber who approached his house tripped on a step, killing himself in the explosion that followed. At a time when the government was already promoting true “Americanism” and antiradical propaganda, the bomb attacks struck a raw nerve. Subsequent antiradical rioting in major cities heightened the stakes for government, and generated more public fear.

The policies of the attorney general now turned draconian. He created the General Intelligence Division (the forerunner of the Federal Bureau of Investigation) and chose a young bureaucrat,

J. Edgar Hoover, to run it. Thus began a systematic government investigation of the politics and behavior of thousands of dissidents, dissenters, communists, radicals, labor organizers, socialists, aliens, and anyone else who might be labeled “un-American.” Then came the arrest campaigns: the first was an eighteen-city event involving few warrants and the invasion of hundreds of homes and businesses. In 1920, the second “Palmer raid” took place; by Patrick Renshaw’s account, there were 10,000 arrests in seventy cities. Palmer arranged for a very public deportation of some aliens caught in his dragnet, but the number of deportees, 250, suggested his raids had overreached. Prosecutions from this period frequently focused on political beliefs (for example, speeches, magazines, leaflets), not on criminal or violent activities. The legal philosophy adopted by Palmer was that emergencies created power in the executive branch, power to which the Bill of Rights had to bend.

The Supreme Court Responds

The red scare was the context of the federal courts’ seminal engagement with one of the central meanings of the free speech guarantee. The problem for the courts was how to reconcile the First Amendment’s guarantee of free speech with government prosecution of dissent, revolutionary speech, opposition to war, and opposition to the draft. In March 1919, the Supreme Court decided the landmark case of *Schenck v. United States*. The petitioner had distributed leaflets encouraging opposition to the draft during wartime. Justice Holmes rejected his free speech claim, pointing out that the “most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.” He determined that speech would lose First Amendment protection when words were used “in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.” One week later, relying on the same reasoning, Holmes upheld the conviction of the leader of the Socialist Party, Eugene Debs. The Debs conviction was based on a political speech in which he had expressed admiration for draft resisters; his conviction led to a ten-year prison sentence. The influence of Holmes on the course of First Amendment doctrine cannot be underestimated. While he nominally relied on the clear and present danger test in later cases, he found himself dissenting more often. His skepticism about government’s latitude in radical speech cases was evident as early as

November 1919 when he dissented in *Abrams v. United States*.

In a ten-year period beginning in 1919, the Supreme Court decided again and again in favor of the government’s power to punish radical speech—*Schenck*, *Debs* (*Debs v. United States* [1919]), *Frohwerk* (*Frohwerk v. United States* [1919]), *Abrams*, *Pierce* (*Pierce v. United States* [1920]), *Schaefer* (*Schaefer v. United States* [1920]), *Gilbert* (*Gilbert v. State of Minnesota* [1920]), and *Gitlow* (*Gitlow v. New York* [1925]) were all punished for expression. Nevertheless, while protection for opponents of government policy was more theoretical than real, the seeds for a new more liberal First Amendment jurisprudence were being sown. It was Justice Holmes who developed the analogy of “free trade in ideas,” as a rationale for minimal government interference in political debate. Holmes, joined by Justice Brandeis, wrote the dissents in *Abrams* and *Gitlow v. New York* that had a profound impact later in the twentieth century. One of the few federal judges to rule in favor of dissenters in this period was District Court Judge Learned Hand (see *Masses Publishing Co. v. Patten* [1917]). The hysteria of the red scare was also the major catalyst in an ongoing conversation on the jurisprudence of free speech among constitutional experts Holmes, Hand, Zechariah Chafee, Ernst Freund, and Harold Laski.

For all the strikes, riots, arrests, and prosecutions that marked the red scare, little was found to suggest a real threat of violent government overthrow. Many of those sentenced in the early phase (for example, Debs) were released by presidential pardons in 1922–1923. Prominent law professors such as Roscoe Pound, Felix Frankfurter, and Zechariah Chafee spoke out against the Palmer raids as early as the fall of 1920. Palmer himself, hoping to use his anti-red crusade as a stepping stone to the White House, lost the Democratic Party’s nomination battle in 1920.

In the words of the historian Robert K. Murray, “[F]ew occurrences in modern American history ... have involved so much exaggeration and fear.” There can be little doubt that the influence of the red scare in the twentieth century could be seen, as Murray puts it, in the “continued insistence upon ideological conformity, suspicion of organized labor, public intolerance toward aliens, and a hatred for Soviet Russia.” The ability of the government to manipulate fear and rile the public into support for reactionary policies remains a key concern for advocates of civil liberties. The story of the red scare is a cautionary one; despite the guarantees of the Bill of Rights and despite the independence of the federal

judiciary, the choice to openly voice opposition to government was a choice laden with danger.

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References and Further Reading

- Allen, Frederick Lewis. *Only Yesterday: An Informal History of the Nineteen-Twenties*. New York: Harper & Row, 1957.
- Asinof, Eliot. *1919: America's Loss of Innocence*. New York: D.I. Fine, 1990.
- Coben, Stanley. *A. Mitchell Palmer: Politician*. New York: Columbia University Press, 1963.
- Murphy, Paul L. *World War I and the Origin of Civil Liberties in the United States*. New York: Norton, 1979.
- Murray, Robert K. *Red Scare: A Study in National Hysteria, 1919–1920*. Minneapolis: University of Minnesota Press, 1955.
- Neuborne, Burt. *The Role of Courts in Time of War*. New York University School of Law Review of Law and Social Change 29 (2005): 555–72.
- Polenberg, Richard. *Fighting Faiths: The Abrams Case, the Supreme Court, and Free Speech*. New York: Viking, 1987.
- Renshaw, Patrick. *The Longman Companion to America in the Era of the Two World Wars, 1910–1945*. London; New York: Longman, 1996.
- Stone, Geoffrey R., *The Origins of the "Bad Tendency" Test: Free Speech in Wartime*, Supreme Court Review (2002): 411–53.

Cases and Statutes Cited

- Abrams v. United States*, 250 U.S. 616 (1919)
- Debs v. United States*, 249 U.S. 211 (1919)
- Espionage Act of June 15, 1917, c. 30, 40 Stat. 217
- Frohwerk v. United States*, 249 U.S. 204 (1919)
- Gilbert v. State of Minnesota*, 254 U.S. 325 (1920)
- Gitlow v. New York*, 268 U.S. 652 (1925)
- Immigration Act of February 5, 1917, 39 Stat. 874
- Masses Publishing Co. v. Patten*, 244 F.535 (S.D.N.Y. 1917)
- Pierce v. United States*, 252 U.S. 239 (1920)
- Schaefer v. United States*, 251 U.S. 466 (1920)
- Schenck v. United States*, 249 U.S. 47 (1919)
- Sedition Act of May 16, 1918, Chapter 75, 40 Stat. 553

See also *Abrams v. United States*, 250 U.S. 616 (1919); Anti-Anarchy and Anti-Syndicalism Statutes; Bad Tendency Test; Bill of Rights: Structure; Brandeis, Louis Dembitz; Chafee, Zechariah, Jr.; Clear and Present Danger Test; Communist Party; Debs, Eugene V.; *Debs v. United States*, 249 U.S. 211 (1919); Extremist Groups and Civil Liberties; Frankfurter, Felix; Freedom of Speech: Modern Period (1917–Present); *Gitlow v. New York*, 268 U.S. 652 (1925); Hand, (Billings) Learned; Holmes, Oliver Wendell, Jr.; Hoover, J. Edgar; Ku Klux Klan; *Masses Publishing Co. v. Patten*, 244 U.S. 535 (1917); Palmer, A. Mitchell; Sacco and Vanzetti; *Schenck v. United States*, 249 U.S. 47 (1919); *Whitney v. California*, 274 U.S. 357 (1927); Wilson, Woodrow; World War I, Civil Liberties in

REDRUP v. NEW YORK, 386 U.S. 767 (1967)

Redrup consolidated three obscenity cases from New York, Kentucky, and Arkansas; the first two cases involved appeals of criminal convictions for selling allegedly obscene material while the third appealed a civil action enjoining the distribution of various magazines and their destruction. In a per curiam opinion, the Court reversed the three lower courts' decisions; Harlan's dissent was joined by Clark.

The Court granted certiorari and review because it presumed the material in question was "obscene in the constitutional sense," but ultimately concluded that the assumption was invalid. It then decided the cases on a common basis, declaring the distribution of the publications in the cases was protected from governmental suppression, whether criminal or civil, *in personam* or *in rem*.

The Court noted that the cases did not involve juveniles; the sale or distribution of material sufficiently obtrusive that unwilling individuals could not avoid exposure to it; and there was no suggestion of "pandering," which the Court considered significant in *Ginzburg v. United States* (1966). This itemization of what the cases did not involve led many observers to consider *Redrup*, despite being a per curiam decision, as important in sorting out the Court's previous obscenity decisions; sexually explicit material or its sale featuring one or more of these facts was unlikely to be protected under the First Amendment.

For the justices, *Redrup* provided grounds for the summary disposition of a stockpile of cases during the 1966 term and other cases later on (for example, *Cain v. Kentucky* [1970] or *Hoyt v. Minnesota* [1970]). As to whether *Redrup* extricated the Court from the controversies its decisions created is another matter, as the *Redrup* opinion explicitly revealed the different, conflicting views among the justices regarding whether and how to apply the *Roth* standard; these divisions would reappear in subsequent cases.

The justices who voted to reverse the lower court in *Redrup* focused originally on the scienter requirement that the government prove *Redrup* knew the books he sold were obscene. Fortas, convinced that the obscenity exception to the First Amendment should be limited only to instances of pandering, was assigned to prepare the Court's per curiam opinion and accordingly wrote a draft on this basis. Brennan circulated a memorandum supporting Fortas's approach but upon different scienter grounds. Stewart distributed a memorandum arguing that the books were not obscene. In the end, because the justices could not agree on a common constitutional definition of scienter, the majority, except for the two dissenters, coalesced

around Stewart's position and, using a per curiam opinion, reversed the lower courts because the books Redrup sold were not obscene. Harlan, who had prepared a long dissent that attacked the majority's scienter rationale, instead issued a brief one criticizing the majority's handling of *Redrup* and the other cases.

In *Miller v. California* (1973), a major transition in the Court's obscenity jurisprudence, Chief Justice Burger appended a footnote to his ruling that attacked the use of per curiams based on *Redrup*. "Thirty-one cases have been decided in this manner," he complains, but "no justification has ever been offered in support of the *Redrup* 'policy.' ... The *Redrup* procedure has cast us in the role of an unreviewable board of censorship for the 50 States, subjectively judging each piece of material brought before us." In *Paris Adult Theatre I v. Slaton* (1973), the companion decision to *Miller* and released on the same day, Brennan, in dissent, lamented that, although justices could support *Roth* in the abstract, they differed in specific cases and thus

resorted to the *Redrup* approach, which resolves cases as between the parties, but offers only the most obscure guidance to legislation, adjudication by other courts, and primary conduct. By disposing of cases through summary reversal or denial of certiorari, we have deliberately and effectively obscured the rationale underlying the decisions. It comes as no surprise that judicial attempts to follow our lead conscientiously have often ended in hopeless confusion.

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References and Further Reading

- O'Brien, David M., *Justice John Marshall Harlan's Unpublished Opinions: Reflections of a Supreme Court at Work*, Journal of Supreme Court History (1991): 27-49.
Teeter, Dwight L., and Don R. Pember, *The Retreat from Obscenity: Redrup v. New York*, Hastings Law Journal 21 (1969): 175.

Cases and Statutes Cited

- Cain v. Kentucky*, 397 U.S. 319 (1970)
Ginzburg v. United States 383 U.S. 463 (1966)
Hoyt v. Minnesota, 399 U.S. 524 (1970)
Miller v. California, 413 U.S. 15 (1972)
Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1972)
Roth v. United States, 354 U.S. 476 (1957)

REFUSAL OF MEDICAL TREATMENT AND RELIGIOUS BELIEFS

Under the free exercise clause, individuals may refuse medical attention, even that which is necessary to save their lives, as an incident to their religious

convictions. As with other religious freedoms, the government may limit this freedom under a strict scrutiny standard, requiring a compelling government interest. In cases where there is no compelling government interest, such as with adults of sound mind, the government should not order unwanted medical procedures. On the other hand, courts have considered the state's obligation to the health and safety of minor children as a compelling interest. When it is determined that a compelling state interest exists, the religious beliefs are not recognized, and the medical treatment is ordered.

Arguments against court-ordered medical procedures rooted in the free exercise clause regularly fail under the states' right to protect public safety and health. In *Reynolds v. United States* (1878), the U.S. Supreme Court enunciated the supremacy of public health laws over religious practices. The Court held that although laws "cannot interfere with mere religious beliefs and opinions, they may with practices."

Another argument against court-ordered medical procedures, particularly in the case of minors, is based on fundamental parental rights. The U.S. Supreme Court in *Wisconsin v. Yoder* (1972) recognized the wide latitude afforded to parents in determining their children's education. The Court in *Prince v. Massachusetts* (1944), however, stated that, "[T]he family itself is not beyond regulation of public interest." The doctrine of *parens patriae* (recognizing the government's interest in a child's welfare) provides a basis for overriding religious objections in court-ordered medical procedures. The extent of treatment that may be ordered, however, is subject to the compelling government interest test.

In the most common cases, the life interest of a child is paramount to the religious interest of the child's parents. While this satisfies the requirement for minor children faced with life-threatening conditions or illnesses, a different test must be used for non-life-threatening diseases. The state power to protect the health and safety of its population, including minors, provides a state interest, but the extent to which that interest meets the compelling interest requirement is not necessarily a settled issue.

Life-threatening conditions are virtually always subject to court intervention. Generally, those interventions are possible only through a finding of neglect on the part of the parents, followed by a court ordered procedure while the child is a ward of the state. Inconsistencies exist, however, when courts determine the extent to which nonemergency medical treatment may be ordered. Courts are often reluctant in such situations to order risky, invasive, and life-threatening treatment. Even as it relates to blood transfusions, which are regularly ordered even when the situation is

not life threatening, some courts have refused to order blood transfusions where death was not highly probable.

The current trend among courts, however, is to intervene in situations where treatment is certainly advisable. For example, the Minnesota Supreme Court even upheld an ordered enrollment of a minor in a speech therapy program. The trend of ordering treatment appears to be limited to situations where there is no serious medical disagreement about either the necessity of treatment or the preferred course of therapy. This trend does not apply to complex medical situations and unconventional treatments.

Courts must also balance the religious rights of the minor. In cases where a minor is mature enough to make medical decisions based on his or her religious faith, courts are often willing to allow refusal of treatment when the court would have rejected parental objections. For example, in a case involving a seventeen-year-old Jehovah's Witness who refused blood transfusions with parental support, the court recognized the distinctiveness of the case because it involved a mature minor, not a younger child. On the whole, however, courts retain more discretion to order medical treatment in cases involving older minors than in cases involving adults.

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Cases and Statutes Cited

Prince v. Massachusetts, 321 U.S. 158 (1944)
Reynolds v. United States, 98 U.S. 145 (1878)
Wisconsin v. Yoder, 406 U.S. 208 (1972)

REGENTS OF UNIVERSITY OF CALIFORNIA v. BAKKE, 438 U.S. 265 (1978)

Background

Beginning in the 1960s, states and the federal government began to adopt "affirmative action" programs. These programs, typically justified as a means to counteract the lingering effects of pervasive racial discrimination, offered preferential treatment in education and employment to racial minorities. Opponents of the programs attacked them as "reverse discrimination," and charged that they violated the principles of equal protection. In 1978, the Supreme Court decided its first major affirmative action case, *Regents of the University of California v. Bakke*.

Bakke's analysis greatly influenced the development of affirmative action jurisprudence and still controls admissions policy in higher education.

The U.C. Davis Medical School adopted a special admissions program designed to increase the representation of "disadvantaged" students. The special admissions program was open to "Blacks," "Chicanos," "Asians," and "American Indians." Members of these groups could qualify for the program if the chairman of the special admissions committee found that their applications demonstrated "economic or educational deprivation." By faculty vote, sixteen spaces in an entering class of 100 were allocated to students admitted through the special program.

Alan Bakke, a white male, applied for admission to Davis in 1973 and 1974. In each year, his application was considered under the general admissions program and was rejected. Bakke sued in California state court, arguing that the special admissions program violated the state and federal constitutions and Title VI of the Civil Rights Act of 1964. The Supreme Court of California ultimately resolved the case only on federal constitutional grounds, ruling that the special admissions program violated the equal protection clause of the Fourteenth Amendment. It enjoined Davis from considering race in its application process and ordered Bakke's admission.

The Supreme Court Decision

The U.S. Supreme Court produced a strikingly fractured opinion. Justice John Paul Stevens, joined by Chief Justice Warren Burger and Justices Potter Stewart and William H. Rehnquist, would have affirmed the order to admit Bakke on the grounds that the special admissions program violated Title VI, without reaching the constitutional issue. Justices William Brennan, Byron White, Thurgood Marshall, and Harry Blackmun would have reversed both parts of the California Supreme Court's order. In their view, strict scrutiny was appropriate for racial classifications that stigmatized or injured politically weak groups: such classifications should survive only if narrowly tailored to serve a compelling state interest. However, they argued that benign discrimination, like the special admissions program, should be permitted if it substantially furthered an important state interest, the same "intermediate" level of scrutiny applied to sex-based discrimination. They believed that Davis's interest in "remedying the effects of past societal discrimination" was sufficiently important to justify the special admissions program.

Justice Lewis F. Powell, writing in large part only for himself, rejected the idea that the level of scrutiny under the equal protection clause should turn on factors such as stigma, political power, or a history of discrimination. He asserted that all racial classifications should receive strict scrutiny. "It is far too late to argue that the guarantee of equal protection to all persons permits the recognition of special wards entitled to a degree of protection greater than that accorded others." He thus asked whether Davis could demonstrate a compelling state interest, and he did not believe that overcoming the effects of societal discrimination qualified. Instead, Powell found that a medical school had a compelling interest, rooted in academic freedom, in promoting diversity to "enrich the training of its student body and better equip its graduates to render with understanding their vital service to humanity." This was not, however, "an interest in simple ethnic diversity," but rather "a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element." Davis's special admissions program, he found, was not necessary to this goal and indeed "would hinder rather than further attainment of genuine diversity." As an alternative model, Powell recommended the Harvard College program, which "considers race only as one factor" among many.

Powell's split votes led the Court to reverse the injunction against the use of race in the admissions process but affirm the order admitting Bakke.

Bakke's Legacy

Despite the lack of a clear majority opinion, *Bakke's* impact on equal protection jurisprudence has been immense. Justice Powell's argument that "[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color" provided the rationale adopted by the Supreme Court in *City of Richmond v. J.A. Croson Co.* (1989) and *Adarand v. Peña* (1995), holding that all racial classifications should receive strict scrutiny.

In the specific context of higher education, *Bakke's* effect was understandably even more profound. Many, if not most, race-conscious admissions programs, like that of Davis, had been adopted out of a desire to promote equality or remedy societal discrimination. Powell's rejection of this "amorphous concept" as insufficient to constitute a compelling interest forced admissions committees to justify their programs on grounds of diversity, regardless of the actual

motive. The merits and nature of diversity became a central issue in the political debate over affirmative action, and the key concept in designing both admissions programs and litigation strategies. Commentators suggested that *Bakke* had produced pervasive subterfuge and prevented a frank discussion of the costs and benefits of affirmative action.

When the Supreme Court revisited the issue, in *Gratz v. Bollinger* (2003) and *Grutter v. Bollinger* (2003), it endorsed Justice Powell's analysis of diversity. The Court struck down the University of Michigan's undergraduate admissions system, but it upheld the Law School's program, reaffirming that race-conscious admissions programs are constitutionally permissible as long as they offer applicants individualized consideration and weigh race as one factor among many. The prohibition of "mechanical" quantitative systems prevents race from being an overt deciding factor in any individual case, although presumably it will be decisive in some. Because individualized assessment is more expensive and time consuming, the *Gratz-Grutter* rule also raises the cost of affirmative action programs for schools. Like *Bakke* itself, the Court's current position on affirmative action is less a stable compromise than the temporary stalemate of starkly opposed forces. Time will tell how long it endures.

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References and Further Reading

- Calabresi, Guido, *Bakke as Pseudo-Tragedy*, Catholic University Law Review 28 (1979): 427.
- Korematsu v. United States*, 323 U.S. 214 (1944).
- Sedler, Robert A., *Affirmative Action, Race, and the Constitution: From Bakke to Grutter*, Kentucky Law Journal. 92 (2003): 219.
- Symposium on Affirmative Action*, University of California-Los Angeles Law Review 43 (1996): 1745.

Cases and Statutes Cited

- Adarand v. Peña*, 515 U.S. 200 (1995)
- City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989)
- Gratz v. Bollinger*, 539 U.S. 244 (2003)
- Grutter v. Bollinger*, 539 U.S. 306 (2003)

See also Academic Freedom; Affirmative Action; Compelling State Interest; Invidious Discrimination

REGINA v. HICKLIN, L.R. 2 Q.B. 360 (1868)

In the early nineteenth century, the Society for the Suppression of Vice in Great Britain mobilized to control pornography and to promote morality

through vigorous enforcement of existing laws and adoption of new ones. In 1857, Parliament enacted the Obscene Publications Act, commonly referred to as “Lord Campbell’s Act” after John Campbell, the Chief Justice of the Queen’s Bench, who as a member of the House of Lords had introduced the bill. Before the law’s passage, Britain had relied on local courts and the common law offense of “obscene libel” to regulate indecent or immoral material. The new statute brought Parliament into the regulation of pornography and centralized public authority over the control of “obscene books, pictures, prints, and other articles.” In particular, the law empowered local magistrates to confiscate and destroy material deemed to be obscene. Simple possession was sufficient for prosecution under the law in addition to selling or making it available to others, but as Lord Campbell assured Parliament only material “corrupting the morals of youth and of a nature calculated to shock the common feelings of decency in a well regulated mind” would fall under the law’s ambit.

Regina v. Hicklin’s significance rests in the definition or test of what constitutes “obscene” material by the Queen’s Court. The case involved a salacious anti-Catholic pamphlet and the trial had as much to do with quelling political unrest as protecting the morals of British citizens. The tract, “The Confessional Unmasked: Shewing the Depravity of the Romanish Priesthood, the Iniquity of the Confessional and the Questions Put to Females in Confession,” purported to expose what Catholic priests talked about with young women during their confessions. The tract was part of a wider campaign led by a militant Protestant, William Murphy, who stoked the anti-Catholic sentiments of the working and lower-middle classes that erupted in Irish-Protestant riots during 1867–1869. A local magistrate ordered the seizure of the pamphlets; the order was appealed to Benjamin Hicklin, a Recorder’s Court judge, who reversed the decision and suspended the order. Hicklin did not disagree that the tract was licentious; however, he declined to suppress the pamphlet, despite its indecency, because of the tract’s political purposes.

Three Queen’s Bench judges affirmed the magistrate’s decision. Alexander Cockburn, who succeeded Lord Campbell as chief justice of the Queen’s Bench, speaking for the court announced what became known as the Hicklin rule. In Cockburn’s formulation, “The test of obscenity is whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall.” The implications of the decision, because the pamphlet’s “obscene” aspects were subsumed by its larger political purposes, were that

material could be declared obscene if isolated parts rather than the publication taken as a whole contained immoral or indecent material. The ruling further meant that the test depended on the impact the material would have on the most susceptible audience, not the average reader. The Hicklin test entered American legal doctrine in the Court of Appeals case, *United States v. Bennett* (1879), and its place was consolidated by the Supreme Court in *Rosen v. United States* (1896).

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References and Further Reading

- Kendrick, Walter. *The Secret Museum: Pornography in Modern Culture*. Berkeley: University of California Press, 1996.
- Marcus, Steven. *The Other Victorians: A Study of Sexuality and Pornography in Mid-Nineteenth Century England*. New York: Basic Books, 1966.
- Rembar, Charles. *The End of Obscenity: The Trials of Lady Chatterley, Tropic of Cancer, and Fanny Hill*. New York: Random House, 1968.
- Robertson, Geoffrey. *Obscenity: An Account of Censorship Laws and Their Enforcement in England and Wales*. London: Weidenfeld and Nicolson, 1979.

Cases and Statutes Cited

- Regina v. Benjamin Hicklin*, Law Reporter 3 Queen’s Bench 360 (1868).
- Rosen v. United States*, 161 U.S. 29 (1896).
- United States v. Bennett*, 24 F.Cas. 1093 (1879).

REHNQUIST COURT (1986–2005)

Yet to go beyond the language of the Constitution, and the meaning that may be fairly ascribed to the language, and into the consciences of individual judges, is to embark on a journey that is treacherous indeed.—William H. Rehnquist (October 1, 1924–September 3, 2005)

The Supreme Court: How It Was, How It Is

With his passing at the age of eighty from thyroid cancer and after thirty-three years on the U.S. Supreme Court, with nineteen of them as the sixteenth chief justice, William Hobbs Rehnquist left a conservative mark on the Court, just as Chief Justice Earl Warren shaped a liberal Court in the 1960s. Rehnquist served as a law clerk to Supreme Court Justice Robert H. Jackson, practiced law in Phoenix, and was active in local politics, which led to a friendship with and

speech writing for Senator Barry Goldwater. After a stint in the Justice Department's Office of Legal Counsel, Rehnquist was nominated to the U.S. Supreme Court at the age of forty-seven by President Richard M. Nixon and confirmed by the U.S. in a sixty-eight to twenty-six vote in 1972 to a seat vacated by Justice John Marshall Harlan. Rehnquist was elevated to chief judge in 1986 by President Ronald Reagan and confirmed by a Democratic-controlled Senate to become the third-longest serving chief justice, with a record of working with sixteen other justices during his tenure on the high court.

Like the stylistic touch of adding gold stripes to the sleeves of his black robe in 1995 after being inspired by the robes worn by the Lord Chancellor in a production of the Gilbert and Sullivan operetta *Iolanthe*, Justice Rehnquist's position on many fronts and dissents earned him the nickname "Lone Ranger." Justice Rehnquist at one time stood alone against the rest of the Supreme Court in trying to curb the direction that individual rights took over societal interests, and after nearly two decades as its chief, he transitioned the Court's direction on individual rights by not recognizing any new suspect classifications that would otherwise call for an intermediate or strict scrutiny review. It can also be noted that the Court under Chief Justice Rehnquist did not create any serious expansions of individual protections beyond those established by the Burger and Warren Courts of the 1960s up through the mid-1980s.

Judge Rehnquist dissented when the Court struck down all state death penalty laws in 1972, when the right to abortion was considered a constitutional guarantee of personal liberty in the 1973 decision of *Roe v. Wade*, in 1992 in *Planned Parenthood v. Casey*, and in *Stenberg v. Carhart* (2000), a five-justice majority with O'Connor striking down a Nebraska state law banning what critics called "partial birth" abortions.

Decisions in the Rehnquist era have also rejected nearly every affirmative action plan in whole or in part involving education scholarships, voting districts, public contracts, and even law school admission programs. The Rehnquist Court was also not as aggressive as the Warren or Burger Courts in affirmative action as a vehicle that has been viewed as remedying past discrimination.

Justice Rehnquist, a longtime critic of the Court's ruling in 1966 that requires police to give crime suspects "*Miranda* warnings" of the right to remain silent, came to accept such warnings as "a part of our national culture" in *Dickerson v. United States* (2000) by finding that Congress could not legislatively reverse the Court's long-held decision of *Miranda v. Arizona* (1966) and supported the continuance of the now well-known *Miranda* rights.

In the twilight of his leadership, Rehnquist himself was still on the dissenting side in several major rulings, including those favoring gay rights in 2003 and congressional limits on campaign contributions in 2004. In the 2005 term, he dissented in a ruling that said federal antidrug laws trumped state laws that allow "medical marijuana," and another that allows governments to use their eminent domain powers to seize property for private economic development. He also opposed the Court's ban on capital punishment in 1972 and was with the majority when the Court reinstated it four years later.

When William H. Rehnquist joined the U.S. Supreme Court, less conservative justices outnumbered him. But as President Ronald Reagan made appointments—Sandra Day O'Connor in 1981, Antonin Scalia in 1986, and Anthony Kennedy in 1988—the views of the Court's majority quickly merged with those of Rehnquist. During the final years of the twentieth century, Rehnquist, Scalia, and Clarence Thomas, an appointee of the President George H.W. Bush in 1991, have made up the core of the court's conservative wing, often joined by O'Connor and Kennedy. Those five justices were in the majority in one of the Court's biggest decisions, and that may very well be the case most representative of the Rehnquist era, a five-to-four ruling in *Bush v. Gore* (2000) in which the Court stopped the recounts of presidential ballots in Florida and handed Republican George W. Bush the White House. For a Court that normally focused on ensuring states' rights, the decision was a dramatic statement of federal power. It also raised questions about whether the decision was a reflection of partisan politics as much as it was law. Rehnquist was clearly uncomfortable with the Court's role in the election dispute—and perhaps by how his Court's legacy would be marked by it. He said in his year-end report on January 1, 2001, that he hoped the Court would never be in such a position again.

Just as the Warren Court worked to define and give new direction to the protections of what was viewed as the fundamental rights of the individual, the Rehnquist-era Court has done so as well in a different direction with decisions that have shaped the country. Chief Justice Rehnquist articulated and guided the Supreme Court in a direction toward what some consider a narrower view of the "plain meaning" of the Constitution.

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References and Further Reading

Chermerinsky, Erwin, *Access to Justice. The Rehnquist Court and Justice: An Oxymoron?* Washington University Journal of Law & Policy 1 (1999): 37.

- Dean, John W. *The Rehnquist Choice: The Untold Story of the Nixon Appointment that Redefined the Supreme Court*. New York: New York University Press, 2001.
- Friedelbaum, Stanley H. *The Rehnquist Court: In Pursuit of Judicial Conservatism*. Westport, CT: Greenwood Press, 1994.
- Lazarus, Edward. *Closed Chambers: The Rise, Fall, and Future of the Modern Supreme Court*. New York: Penguin Press, 1998.
- Rehnquist, William H. *The Supreme Court: How It Was, How It Is*. New York: Morrow, 1987.
- Starr, Kenneth W. *First Among Equals*. New York: Warner Books, 2002.
- Woodward, Bob, and Scott Armstrong. *The Brethren: Inside the Supreme Court*. New York: Simon & Schuster, 1979.

Cases and Statutes Cited

- Bush v. Gore*, 531 U.S. 98 (2000)
- Dickerson v. United States*, 530 U.S. 428 (2000)
- Miranda v. Arizona*, 384 U.S. 436 (1966)
- Planned Parenthood v. Casey*, 505 U.S. 833 (1992)
- Roe v. Wade*, 410 U.S. 113 (1973)
- Stenberg v. Carhart*, 530 U.S. 914 (2000)

REHNQUIST, WILLIAM H. (1924–2005)

William Rehnquist grew up in a Republican suburb of Milwaukee, Wisconsin. After serving in the Army Air Corps during World War II, he attended Stanford University on the G.I. Bill, where he earned bachelor's and master's degrees in political science. After earning a second master's in government at Harvard University, he returned to Stanford for law school, where he graduated first in his class in December 1951. After graduation, he served for sixteen months as a clerk for Supreme Court Justice Robert Jackson. Afterward, he moved to Phoenix, Arizona, joined a local law firm, married and had three children, and became involved in Republican politics. When Richard Nixon won the presidency in 1968, Rehnquist was one of a number of former Barry Goldwater supporters who traveled to Washington to assume positions in the Department of Justice. Rehnquist himself took charge of the Office of Legal Counsel, a prestigious but not very public position providing legal advice to the president.

He was the surprise nominee for the last Supreme Court vacancy during the Nixon administration in October 1971. In the years prior to his nomination, confirmation battles over Supreme Court appointments had become common and intense. Organized opposition quickly arose to the conservative Rehnquist's confirmation, and nearly two months after his nomination he was confirmed by a divided Senate.

On the Court, Rehnquist met the expectations of friends and foes alike, establishing a reputation for an excellent legal mind and iconoclastic conservative views. In the 1970s, he became known as the “Lone Ranger” for his frequent solo dissents. When Chief Justice Warren Burger decided to retire in 1986, officials in Ronald Reagan's administration had no doubt as to his preferred replacement. After another prolonged and bitter confirmation fight, the Republican-controlled Senate approved Rehnquist's elevation to chief justice. As chief justice, Rehnquist helped guide the Court in a generally more conservative direction.

In addition to his judicial opinions on the bench, Rehnquist also spoke and wrote frequently off the bench. He first came to public attention with a 1957 article in *U.S. News and World Report* decrying the influence of liberal law clerks on the work of the Supreme Court. While serving as associate justice, his speech criticizing the “notion of a living constitution” and calling for a more restrained judiciary gained particular notoriety. After being elevated to chief justice, he indulged his more scholarly and historical interests with books on the history of the Supreme Court, the disputed presidential election of 1876, historical impeachments, and civil liberties in times of war. The latter works proved surprisingly timely, as they were soon followed by the impeachment of President Bill Clinton (with the chief justice presiding over the subsequent trial in the Senate) and the launch of the war on terrorism, respectively. The book on the election of 1876 followed the election dispute of 2000.

From the moment he joined the Supreme Court, Rehnquist became perhaps the most prominent critic of the liberal jurisprudence of the Warren Court and early Burger Court. In his written opinions and public speeches, Rehnquist warned against judicial activism and policymaking. Rather than being the “voice and conscience of contemporary society,” Rehnquist urged judges to see their role as a more limited one of deciding cases in accord with the values “derived from the language and intent of the framers” of statutes and the Constitution. In a pluralistic society, people will necessarily differ on judgments of moral values and political principle. Such judgments have a “moral claim ... upon us as a society” only as they derive from their “having been enacted into positive law.” The exercise of judicial review based on value judgments that cannot fairly be derived from the Constitution “is genuinely corrosive of the fundamental values of our democratic society” and “an end run around popular government.” The only alternative for judges is the discipline of the legal text read in light of its original meaning. More substantively,

Rehnquist argued, the Constitution is most notably a grant of power to government to resolve social problems through democratic deliberation. The central purpose of judicial review, in his view, is to uphold the balance established in the Constitution between government power and individual liberties. The Court “upholds the Constitution” just as much when it rules in favor of the government as when it rules in favor of individual liberties. In these arguments, Rehnquist echoed the Progressive critics of the Court of the early twentieth century, who similarly complained that judges were insufficiently deferential to legislative majorities, excessively prone to reading their own moral judgments into the law, and too willing to act as a “third legislative branch.”

Rehnquist staked out firm positions in a variety of areas of constitutional law. In addressing separation of powers and federalism, Rehnquist was guided by a distinct sense of the respective responsibilities of the different branches and levels of government. He was relatively protective of what he regarded as important to the president’s ability to carry out his duties. The chief justice wrote the opinion upholding the independent counsel statute, however, arguing that the independent counsel neither unduly interfered with the performance of the president’s constitutional duties nor signified the encroachment of another branch of government on the president’s prerogatives. From his service as a law clerk through his tenure as chief justice, Rehnquist insisted that the Court is the “ultimate expositor of the constitutional text.” Although he argued that the Court should exercise restraint when facing controversial social issues or innovative claims of new constitutional rights, he believed that the judiciary should act more aggressively in patrolling the boundaries of authority among the various branches of government and between the state and national governments. In particular, Rehnquist was a strong supporter of reviving judicial enforcement of constitutional limits on federal power vis-à-vis the states. He was briefly able to win the support of a majority of the justices for this view in the 1976 decision in *National League of Cities v. Usery*, which prevented the application of the federal Fair Labor Standards Act to state government employees. That decision was later overturned, but in the 1990s the chief justice found a stable five-person majority that imposed a variety of new constitutional restrictions on congressional power relative to the states.

The federalism decisions of the Rehnquist Court have particular implications for civil liberties, especially when combined with Rehnquist’s understanding of the substantive content of individual rights. As Rehnquist concluded in one such case, “Congress may not legislatively supersede our decisions

interpreting and applying the Constitution” by, for example, altering judicially determined protections against coerced confessions for criminal defendants in state courts. Rehnquist led the Court in arguing that Congress is limited in its authority to allow private lawsuits against state and local governments in the federal courts or to create new rights for individuals against the state governments. The states, under this approach, are primarily constrained by the judiciary’s understanding of civil liberties, not by the federal legislature’s.

Rehnquist also took influential positions on a number of substantive civil liberties. He was generally skeptical of the expansion of civil liberties undertaken by the Court since the late 1950s, especially those that are not clearly found on the face of the constitutional text or in historical practice. He also urged his colleagues to adopt a strong presumption of constitutionality for the acts of government challenged in civil liberty cases so as to allow elected representatives to balance the competing concerns of individual rights and the public welfare.

Rehnquist was more successful in winning support for his views on civil liberties in some areas than in others. One area of relative success was criminal justice, where Rehnquist’s support for law enforcement was shared by Richard Nixon, Ronald Reagan, and their judicial appointees. Rather than “incorporating” the requirements of the Bill of Rights into the due process clause of the Fourteenth Amendment and applying them to the states, Rehnquist favored a more conservative approach to due process requirements that emphasized fundamental fairness. Such fairness to individual criminal defendants could be achieved by a variety of procedures, including some that the Court would not accept under the Bill of Rights if implemented by the federal government. To Rehnquist, the Court should accept a “healthy pluralism” in the states with minimal federal review. In keeping with this approach, Rehnquist helped expand the authority of police officers to search suspects for weapons and evidence and to carve out exceptions to the exclusionary rule, by which evidence unconstitutionally seized by the police is kept out of criminal trials. He likewise helped limit the application of the *Miranda* rule and its protections against self-incrimination. He favored a streamlined appellate process in death penalty cases, and accepted both the death penalty and long sentences for “career criminals” as consistent with the constitutional ban on cruel and unusual punishment.

Rehnquist also found allies for his accommodationist view of church and state issues. He strongly argued against the “wall of separation between church and state” that guided the Court from the

late 1940s as unworkable in practice and based on bad history. The establishment clause of the First Amendment is better understood, according to Rehnquist, as prohibiting governmental preferences among religious sects or the establishment of a single national religion but allowing the government to pursue “legitimate secular ends through nondiscriminatory sectarian means.” This would allow, for example, religious schools to participate in student voucher programs. Rehnquist would also have allowed governments to express a generalized preference for religion over non-religion, but this was firmly rejected by Justice Sandra Day O’Connor, among others. In relation to the free exercise clause, Rehnquist argued that the government should not be required to grant exemptions from generally applicable laws that happen to burden religious beliefs, although the state may voluntarily grant such exemptions. This position was later adopted by the Court.

Rehnquist read the free speech and press clauses of the First Amendment narrowly. He was willing to balance the public interest in social order against various forms of expressive conduct, such as flag burning or nude dancing, although he also wrote the opinion protecting a scandalous political parody in *Hustler* magazine. When the government acts in something other than its capacity as a legislator—for example, when operating a school, library, prison, or army—he was willing to give it a freer hand to regulate speech. Rehnquist was willing to give the government substantial discretion in passing commercial regulations that affect speech. He wrote the opinion for the Court allowing states to require private shopping malls to open their doors to petition signature collectors, for example. He was sharply opposed to the initial extension of First Amendment protection to “commercial speech,” arguing that the Constitution was concerned with “public decisionmaking as to political, social, and other public issues, rather than with the decision of a particular individual as to whether to purchase one or another kind of shampoo.” He also emphasized that corporations enjoy free speech protections only to the extent that they advance “the societal interest in receiving information and ideas.” Although Rehnquist recognized political speech as central to the First Amendment, leading him to object to campaign finance regulations that circumscribe donations to political parties; for example, he was still willing to accept various restrictions on how that speech is organized and exercised, such as government regulation of fundraising for political causes and door-to-door political canvassing.

In keeping with his general approach to constitutional interpretation and civil liberties, Rehnquist was

particularly critical of the Court’s jurisprudence on “unenumerated rights” or “substantive due process.” To Rehnquist, such rights were the legacy of the Court’s economic liberty decisions in the early twentieth century, which were abandoned under political pressure during the New Deal. In his first judicial encounter with such a case, in *Roe v. Wade* (1973), which established a constitutional right to abortion, Rehnquist argued that all “unwanted state regulation of consensual transactions,” whether contracts for labor or medical services, were subject to a common standard of deferential judicial review to ensure only that the law in question was rationally related to a valid state objective. He continued to complain in such cases that, quoting Justice Byron White, the “Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution.” But he also came to accept the existence of some “fundamental rights and liberties” that require more searching judicial scrutiny under the due process clause of the Fourteenth Amendment, although he held that these must be deeply rooted in “our Nation’s history, legal traditions, and practices,” such as the right to marry or to refuse unwanted medical treatment.

In interpreting the equal protection clause of the Fourteenth Amendment, Rehnquist similarly urged his colleagues to avoid the temptation to engage in “endless tinkering with legislative judgments” simply because legislators could have drafted “a fairer or a better law.” To Rehnquist, the only “area of the law which the Framers [of the equal protection clause] obviously meant it to apply” was in the context of “classifications based on race or national origin, the first cousin of race.” Any governmental classification by race, notably including affirmative action programs, therefore faced strict judicial scrutiny and was presumptively invalid. He denounced efforts to move beyond this core area of equal protection concern as creating “out of thin air” doctrines that are “so diaphanous and elastic as to invite subjective judicial preferences or prejudices relating to particular types of legislation.” In particular, he dissented from the Supreme Court decisions of the mid-1970s extending heightened judicial scrutiny to governmental classification by gender, arguing that such doctrinal innovations were inconsistent with the history and purpose of the Fourteenth Amendment. By the mid-1990s, however, he had accepted this extension of the equal protection clause as well settled and wrote a concurring opinion in the case striking down the male-only admission policies of the Virginia Military Institute and the majority opinion allowing Congress to use the Fourteenth Amendment as a justification

for applying federal family leave requirements to state governments.

From his initial appointment to the Supreme Court in 1971, Rehnquist was a powerful advocate of a more conservative constitutional philosophy. In conflicts between the individual and the government, he typically showed deference to the government. Wary of the possibility of judges imposing their own values on society, he urged the Court to read individual rights narrowly and uphold the decisions of democratic majorities. Rehnquist was willing for the Court to play a more active role in umpiring disputes between government institutions. In this context, he often favored protecting the discretion of state and local governments from national interference in order that they might respond to the preferences of their particular communities.

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References and Further Reading

- Bradley, Craig, ed. *The Rehnquist Legacy*. New York: Cambridge University Press, 2005.
- Davis, Sue. *Justice Rehnquist and the Constitution*. Princeton, NJ: Princeton University Press, 1989.
- Irons, Peter H. *Brennan vs. Rehnquist: The Battle for the Constitution*. New York: Alfred A. Knopf, 1994.
- Rehnquist, William H., *The Notion of a Living Constitution*, *Texas Law Review* 54 (1976): 693–706.
- , *Government by Cliché*, *Missouri Law Review* 45 (1980): 379–93.
- , *The Supreme Court: How It Was, How It Is*. New York: William Morrow and Company, 1987.
- , *Grand Inquests: The Historic Impeachments of Justice Samuel Chase and President Andrew Johnson*. New York: William Morrow and Company, 1992.
- , *All the Laws But One: Civil Liberties in War Time*. New York: Vintage Books, 2000.
- , *Centennial Crisis: The Disputed Election of 1876*. New York: Knopf, 2004.

Cases and Statutes Cited

- Roe v. Wade*, 410 U.S. 113 (1973)
- National League of Cities v. Usery*, 426 U.S. 833 (1976)

REID v. COVERT, 354 U.S. 1 (1957)

Clarice Covert, a civilian, killed her husband, a U.S. Air Force sergeant, at an English airbase. Covert was tried by a court-martial, convicted of murder, and sentenced to life imprisonment. Covert petitioned for a writ of habeas corpus on the ground that the Constitution prohibited trial of civilians by court-martial or military tribunal. The District Court granted the petition and released Covert.

On direct appeal to the Supreme Court, the U.S. government contended that a treaty between the United States and Great Britain required, and that the Constitution permitted, U.S. courts-martial to exercise exclusive jurisdiction over crimes committed in Great Britain by members of the U.S. armed forces and their dependents.

The Court, while recognizing the government's power to create courts-martial to prosecute *military* defendants, nonetheless held, based on historical analysis of protections afforded to civilian criminal defendants under the English tradition of civil liberties, the drafting and ratification of the Constitution, and the plain text of that document, that civilian criminal defendants are under all circumstances entitled by the Fifth Amendment to the protection of indictment by a grand jury and by the Sixth Amendment right to trial by a civilian jury. Analyzing the history of state practice, relevant case law, and the framers' original intent, the Court concluded that a "deeply rooted and ancient opposition in this country to the extension of military control over civilians" mandated that Covert, although the spouse of an individual subject to military criminal jurisdiction, was a civilian not amenable to prosecution by court-martial.

In affirming Covert's release, the *Reid* Court elaborated the broader principle that all treaties and laws of the United States must comply with the provisions of the Constitution, strongly suggesting that the individual rights elaborated in that document are the supreme sources of law in our governmental framework.

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See also English Tradition of Civil Liberties; Grand Jury Indictment (V); Habeas Corpus: Modern History; Jury Trial Right; Military Tribunals; Rights of the Accused

REID v. GEORGIA, 448 U.S. 438 (1980)

Reid v. Georgia involved a question of search and seizures. Early one morning, the petitioner arrived at the Atlanta Airport for a commercial flight. While there, a federal narcotics agent from the Drug Enforcement Agency (DEA) noticed that the man occasionally looked back at a second man, both of whom was carrying a shoulder bag with no other luggage. The two men then proceeded to leave the terminal together when the agent approached the men and asked for identification. Both men consented to a search of their shoulder bags. However, Reid tried

to run away before the search of his belongings began. While running, he abandoned his bag in one of the terminals. His bag was found to contain cocaine and he was later apprehended and charged with possession. The Georgia Court of Appeals reversed the ruling of a lower court and determined that stopping Reid was permissible under the law since he fit the profile of a drug smuggler according to the accounts of the federal agent.

The Supreme Court reversed the ruling of the Georgia Court of Appeals. According to the legal interpretation of reasonable suspicion, the Court held that the agent could not have reasonably suspected Reid of criminal activity based on the circumstances. The actions that the agent saw could be applicable to almost any traveler. The cocaine could not be introduced as evidence because the Court found that it was obtained in violation of the petitioner's Fourth and Fifth Amendment Rights.

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References and Further Reading

- Garcia, Alfredo. *The Fifth Amendment: A Comprehensive Approach*. Westport, CT: Greenwood Press, 2002.
 LaFave, Wayne R. *Search and Seizure: A Treatise on the Fourth Amendment*. 4th ed. St. Paul, MN: West, 2004.
 Wilson, Bradford P. *Enforcing the Fourth Amendment: A Jurisprudential History*. New York: Garland Press, 1986.

See also **Airport Searches; Probable Cause; Profiling (including DWB); Search (General Definition)**

RELEASE TIME FROM PUBLIC SCHOOLS (FOR RELIGIOUS PURPOSES)

Relationships between religious institutions and public schools have taken many forms and presented various First Amendment issues over the years. One frequently arising issue is whether a public school violates the establishment clause or the free exercise clause when it releases students from school before the usual end of the school day to attend a religious education class.

Religious educators began a movement early in the twentieth century to expand their religious education programs by adding weekday classes. Proponents argued that public schools had included some aspect of religious education until late in the nineteenth century, but that was no longer the practice. Many clergy claimed that only a small proportion of school-age children were attending religious classes on Sundays. They said they could increase attendance at religious

classes if they could offer weekday religious classes in the churches and synagogues. To encourage religious class attendance, they proposed that students who wanted to attend these classes be released early from their public school classes.

One such program started in White Plains, New York, in the early 1920s. Joseph Lewis, president of the Free Thinkers Society, challenged the program as violating the provision of the New York Constitution that prohibited the "use of property or money in aid of" religious schools. (Clarence Darrow wrote to Lewis in 1925, and offered to assist him in this case, as soon as he was finished with the Scopes Monkey Trial.) The New York Court of Appeals rejected Lewis's argument, since the program did not use public school buildings or public money. (This case, decided in 1927, predated the application of the First Amendment to states, at least for the religion clauses, which might explain why Lewis did not seek U.S. Supreme Court review of the New York decision.)

In 1940, clergy from several faiths persuaded the school board in Champaign, Illinois to allow them to conduct religious education classes in the public schools. If parents consented, their children would attend these classes, which were forty-five or sixty minutes once a week. Children who were released for the religious classes were required to attend them—absences were reported to the school administration and to the parents. Children who did not sign up for these classes went elsewhere in the building for other activities.

A challenge to the Illinois program reached the Supreme Court in 1948 in the case of *McCollum v. Board of Education*. The Court pointed out that they had recently decided, in *Everson v. Board of Education* (1947), that the religious clauses of the First Amendment applied to the states. Following *Everson*, the Court ruled that the combination of the use of public school buildings and compulsory school attendance machinery violated the establishment clause.

At about the same time the Illinois program began, the New York legislature considered a bill that would allow local school boards to adopt released time programs. The New York plan, however, provided that the classes were to be held in the religious institutions, not in the public schools. During the debate on this legislation, one proponent argued that this concept was not novel—similar programs were in effect in forty-one other states, and in many communities in New York State. Some opponents objected to the bill because they opposed any reduction in the time students spent in school. Some objected on constitutional grounds, arguing that the schools would be endorsing religion by participating in such a program.

Some religious leaders opposed the plan for what seemed to be competitive reasons—that their particular denominations did not have sufficient staff or facilities to offer weekday programs.

The *McCollum* decision prompted opponents of the New York program to go to court. In *Zorach v. Clauson* (1952), the Court distinguished the New York program from the Illinois program, primarily on the basis that the religious instruction took place in the religious institution, not in the public school. The Court also pointed out that schools neither encouraged students to participate nor penalized those who did not.

Zorach is the most recent Supreme Court case involving a released time program. There have been several lower court decisions in cases challenging released time programs. These have addressed such issues as whether religious program recruiters can come onto school grounds to publicize their programs (*Doe v. Shenandoah County School Board* [1990]), whether the public school can give credit toward graduation requirements for religious classes taken in the released time program (*Lanner v. Winner* [1981]), and how involved public school officials can get in recruiting students for released time classes (*Smith v. Smith* [1976]) or enforcing attendance (*Lanner*).

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References and Further Reading

- Kurland, Philip, *The Supreme Court, Compulsory Education, and the First Amendment's Religion Clauses*, West Virginia Law Review 75 (1973): 213.
Note: The "Released Time" Cases Revisited: A Study of Group Decisionmaking by the Supreme Court, Yale Law Journal 83 (1974): 1202.

Cases and Statutes Cited

- Doe v. Shenandoah County School Board*, 737 F. Supp. 913 (W.D. Va. 1990)
Everson v. Board of Education, 330 U.S. 1 (1947)
Lanner v. Wimmer, 662 F.2d 1349 (10th Cir. 1981)
McCollum v. Board of Education, 333 U.S. 203 (1948)
Smith v. Smith, 523 F.2d 121 (4th Cir. 1975) cert. denied, 423 U.S. 1073 (1976)
Zorach v. Clauson, 343 U.S. 306 (1952)

RELIGION IN NINETEENTH-CENTURY PUBLIC EDUCATION (INCLUDES "BIBLE WARS")

The development of public schools in northern states in the first half of the nineteenth century offered well-intentioned reformers an opportunity to mold

children into upstanding, morally responsible adults. As long as most of the children provided that education were Protestant, daily readings without comment from the King James Bible were accepted as a tool to teach both reading and lessons in morality. The influx of Roman Catholics to the United States disrupted this arrangement, and resulted in the "Bible wars."

The first of the Bible wars occurred in New York City in 1840. The Public School Society, a private organization established to teach the poor children of New York City, operated free common schools. Historians of the conflict estimate that over 10,000 Roman Catholic children of school age in New York City did not then attend school. Although some Catholic schools existed, they were not sufficient in number or size to teach all Catholic children. One reason that Catholic children did not attend the schools operated by the Public School Society was the manifestly bigoted views of Catholics and Roman Catholicism promoted by many of the textbooks. Another reason was the use of King James Bible to teach reading and moral instruction, which Catholics rejected in favor of the Douay Bible. In January 1840, New York Governor William Seward urged the creation of schools that attended to the needs of children "professing the same faith." The Public School Society responded to this political pressure by offering to black out those textbook passages offensive to Catholics. The Society refused to eliminate its use of King James Bible or to allow the Douay Bible to act as a substitute for Catholic pupils. Because the Society barred any commentary on or interpretation of passages read from the King James Bible, it claimed that the use of the King James Bible was nonsectarian. Although the prohibition of commentary on the King James readings may have resolved any theological disputes among various Protestant faiths, this was irrelevant to Catholics. Consequently, Catholics charged that the Society was sectarian, and requested money from the New York City Common Council to fund Catholic schools. After statewide elections, the New York legislature adopted a bill displacing the Public School Society and creating local districts controlling public education. However, the law forbade those districts from funding schools that engaged in sectarian religious education. Reading from the King James Bible was declared nonsectarian, for more than one Protestant faith desired its use in public schools. Catholic teachings were sectarian, and thus Catholic schools were excluded from the public school fund. Catholics then greatly expanded their school system in New York City. Subsequently, reading from the King James Bible was

made mandatory in New York for any school funded by the public school fund.

The Bible war in New York was political only. In Philadelphia, the "war" led to violence. In 1843, the local Board of Controllers allowed students to read from a version of the Bible chosen by their parents. By March 1844, this action was declared an attempt to eliminate the use of the Bible in public institutions, including schools. Two months later, an anti-Catholic riot left a substantial number dead or wounded. In other parts of the United States during the remainder of the nineteenth century, the issue of the constitutionality of the use of the King James Bible in a public or common school was tested in courts. It was not until the 1850s that the first appellate case was heard concerning the use of the King James Bible in a public school. In *Donahoe v. Richards* (1854), Bridget Donahoe, a Roman Catholic, refused to read from the King James Bible. She was then expelled. She sued, claiming a constitutional right to be exempted from this duty. The Maine Supreme Judicial Court rejected Donahoe's claim of liberty of religious conscience. Any such right, concluded the court, would "undermine ... the power of the State," and force the will of the majority to bow to the conscience of the minority, contrary to democratic principles.

In the same year that Donahoe was decided, the Know-Nothing Party swept elections in Massachusetts. This nativist group intended to legislate in favor of native-born (and usually Protestant) Americans and against Catholics and immigrants. It largely bungled the job, although the party did manage to adopt legislation in 1855 requiring the reading of the Bible in the "common English version" (the King James version) in public schools. This legislation was tested five years later, when a teacher was charged with assaulting an eleven-year-old student who for religious reasons refused to read from the King James Bible. The lower court hearing the case held that requiring one to read the King James Bible did not interfere with the Roman Catholic student's constitutional right to religious liberty. Indeed, the court declared that any decision to grant the student's request to read from the Catholic Douay Bible would constitute an impermissible discrimination in favor of a particular religion contrary to the Massachusetts Constitution. Therefore, the teacher had a right to discipline the child, and the charges were dismissed. Although Massachusetts was the only state to require Bible reading in public schools by statute during the nineteenth century, use of the Bible in public schools was commonplace throughout the United States.

The remaining Bible reading cases arose in the last third of the nineteenth century. Of the half-dozen or so cases concerning the constitutionality of reading

the King James Bible in the common school during the last half of the nineteenth century, only one declared that the practice unconstitutional. In *State ex rel. Weiss v. District Board* (1890), the Supreme Court of Wisconsin declared reading the King James Bible "without restriction" constituted sectarian instruction. The court noted that although much of the Bible was not sectarian, the King James Bible contained numerous sectarian passages, and distinguished the decisions in other states on the ground that the Wisconsin Constitution barred a direct prohibition of sectarian instruction.

The Blaine amendment of 1876, offered by Republican James G. Blaine, proposed banning any state from, among other things, appropriating funds to any school "wherein the particular creed or tenets of any religious or anti-religious sect ... shall be taught." The amendment also declared that "[t]his article shall not be construed to prohibit the reading of the Bible in any school or institution." Although the Blaine amendment was overwhelmingly adopted in the House of Representatives, it failed to meet the necessary two-thirds vote in the Senate, whose members voted the party line. Between 1875 and the early 1900s, the amendment was offered in Congress more than twenty times, although it never received more votes than it did in 1876. Although the Blaine amendment failed in Congress, thirty-three states adopted a version of the amendment in their constitutions between 1877 and 1933.

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References and Further Reading

- Ariens, Michael S., and Robert A. Destro. *Religious Liberty in a Pluralistic Society*. 2nd ed. Durham, NC: Carolina Academic Press, 2002.
- Billington, Ray Allen. *The Protestant Crusade, 1800–1860*. New York: Rinehart [1938], 1952.
- Cremin, Lawrence A. *American Education: The National Experience, 1783–1876*. New York: Harper and Row, 1980.
- Lannie, Vincent P. *Public Money and Parochial Education: Bishop Hughes, Governor Seward, and the New York School Controversy*. Cleveland, OH: Press of Case Western Reserve University, 1968.
- McAfee, Ward. *Religion, Race and Reconstruction: The Public School in the Politics of the 1870s*. Albany: State University of New York Press, 1998.
- Ravitch, Diane. *The Great School Wars*. New York: Basic Books, 1974.

Cases and Statutes Cited

- Donahoe v. Richards*, 38 Me. 379 (1854)
- State ex rel. Weiss v. District Board*, 76 Wis. 177 (1890)

RELIGION IN “PUBLIC SQUARE” DEBATE

In the United States, as in any vibrant democracy, the government is profoundly impacted by the public square—that forum in which the people discuss, debate, and evaluate public activities with the idea of persuading their compatriots and influencing the state in the development, enactment, and enforcement of public policy. It is a forum, by definition, available to all, whether citizens or not, including those who represent them (such as the media or organized groups). The state also participates in the public square in its efforts to explain or justify its policies or activities.

The place of religion in the public square has generated great controversy. In essence, the debate centers on one fundamental question: In a religiously pluralistic country with a policy of separation between religion and the state, what place should religion have in a forum in which state action is debated, shaped, and, to some extent, implemented? That is to say, if we accept that the state should not adopt or implement religious positions or policies, to what extent should religious language, concepts, or beliefs be used to publicly justify, support or opposed government actions or policies? How do we distinguish between religious advocacy in the public square and state implementation (if that occurs)?

Most people assume that this question raises First Amendment concerns. Citing the popular Supreme Court dicta in *Everson v. Board of Education* (1947) that the First Amendment erects a “wall of separation” between church and state, they assume that the law prohibits religion being invoked by a participant in the public square. However, simply reading the provisions of the First Amendment reveals this to be an error. The First Amendment provides that “Congress shall make no law respecting an establishment of religion [the establishment clause] or prohibiting the free exercise thereof [the free exercise clause].” Under the Fourteenth Amendment, this prohibition has been extended to cover the states as well.

Thus, the amendment targets state action, as evidenced by the vast litigation over establishment and free exercise cases. This jurisprudence carefully segregates the state from the public square (a domain also protected by the free speech clause of the First Amendment) in two ways. First, it shields the public square from undue governmental influence. The government cannot publicly endorse one religion over another, religion over nonreligion, nor nonreligion over religion. The state cannot justify a law solely on religious ground, nor can it use a law to repress the free exercise rights of a religion. Finally, the government cannot favor or disfavor religion within an

open public forum that it creates. Second, the courts have protected the viability of the state and the public domain by assuming a clear distinction between the two and adopting a presumption that state actions are motivated by secular reason (absent clear proof to the contrary). The state is thereby protected against having every justification for public policy offered in the public domain imputed to it, with an obligation to refute or deny those justifications that suggest some form of religious freedom violation. At the same time, religious participants in the public square are freed from the fear that religiously grounded advocacy for a public policy might prove counterproductive simply because the courts could use the religious nature of the advocacy to defeat the state’s adoption of the policy.

The legal question with respect to individuals (or religious groups) is similarly clear. The state cannot prohibit an individual or groups representing that individual from participating in the public square, supporting or opposing public actions based on religious grounds, or using religious arguments to advance those positions. This is true, even in the case where the individual is a government official, so long as that official is speaking on his or her own behalf.

To say that the state cannot preclude people of faith from advancing their religious beliefs within the process of public policy formation does not address the wisdom or morality of doing so. Indeed, many critics argue that the unique characteristics of traditional religion are so disruptive of the public polity as to justify a moral prohibition against the participation of religion in the public square. Their arguments can be summarized as follows.

Violence

First, many secularists argue that the purpose of church and state separation was to avoid the violence of religiously inspired conflict. They cite the historic religious wars and their current manifestations in areas such as Afghanistan, the Middle East, Bosnia, and Northern Ireland. In this country, they cite the violence surrounding abortion and the radical right to life movement.

Authoritarianism

One critic of a governmental bioethics panel’s interaction with religious representatives complained that the sole task of religion is “theological hermeneutics—the

interpretation of sacred texts.... [Religion] abolish[s] the hard ethical questions” because the answers are to be found in the texts of revelation. This cuts religious believers off from the public square because they neither contribute meaningfully to public discussion of public policy issues (other than to cite their religious proof text), nor can they learn from the public discourse because it stands apart from their grounding belief.

Accessibility

Related to the issue of authority, many critics argue that religious arguments are not accessible to non-believers. That is to say, they do not provide information sufficient for the nonreligious person to evaluate and understand the arguments being made by the person of faith. Insofar as governmental action should rest on arguments that are acceptable and understandable by those subject to them, then a justification based on religious faith would not satisfy this requirement.

Religious Argument Prevents Public Discussion

A more serious version of the accessibility critique is that the use of religious argument precludes public discussion and prevents political consensus. Michael Perry adopts a version of this argument when he argues that people of faith should be prepared to offer secular reasons for their judgments without imposing a similar requirement on people of non-faith. He argues that because people of nonfaith do not believe, they cannot be expected to offer religious reasons for their positions.

Religion Is Not Shared

One of the rationales supporting the demand for secular justification is that it is assumed that secular reasoning is neutral—that it is shared by all members of society. Religion, on the other hand, is distinctly idiosyncratic, unique to each separate believer and/or his or her tradition. Clearly, arguing from vastly different grounding perspectives (for example, an argument between a radical marxist and a radical capitalist) is unlikely to result in agreement in that neither side shares enough common understanding

with the other to provide a basis for agreement. More significantly, the process of democratic governance requires a sense of community. Individuals must make sacrifices (for example, paying taxes) for the benefit of the common good. Discourse that emphasizes difference and the lack of commonality interferes with this necessary sense of community.

Religion Is Divisive

Many people believe that religion is uniquely divisive. It evokes passions and emotion as well as reason and judgment. As acknowledged by Michael McConnell, “in the current political climate, many of the most heated political controversies involve a clash between largely religious forces of cultural traditionalism and largely secular forces of cultural deconstruction. It would be difficult to say which side in these conflicts was more strident, more intolerant, or more absolutist.”

Factionalism

The founders of the American Republic feared political factionalism as one of the great threats to stable government. A “zeal for different opinions concerning religion” was Madison’s first example in *Federalist No. 10* of the causes of this type of factionalism. This argument is, essentially, the political extension of the decisiveness argument. Religion is not only a potential source of passionate conflict, but also a unifying force giving that conflict political power. It is not just that religion has the power to divide individuals, one against the other, but that it may lead to political conflict between religious groups.

Religious advocates challenge that each of the foregoing arguments can be individually rebutted as resting on one of two major misconceptions about religion. First, many of the arguments present an incomplete or distorted understanding of religion and religious belief. For example, the fact that a person of faith uses religious scripture as a starting point for their moral or political reflections does not necessarily mean they will be any less reasonable or rational than a person starting from any other comprehensive philosophy. Both could be unreasonable or irrational, but neither must be. Second, and related to the first, separatist critics draw unwarranted distinctions between the religious and the secular, in large part by assuming that the secular is religiously neutral. However, as noted by thinkers such as

McConnell, the secular is not neutral—it is competitive with religion, reflecting a particular worldview of a particular group of people. Indeed, in many instances secular worldviews function in religion-like ways, including serving as ideological goads toward violence and conflict (for example, Stalin's purges, the Chinese Cultural Revolution, the killing fields of Cambodia).

Some critics, such as Robert Audi, respond that the problem is not any one individual critique of religion, but rather the multiplicity of arguments arising around religious (particularly theistic) belief. While some may agree, it remains unclear how this, in fact, distinguishes religion from any other powerful worldview.

A much more persuasive reading of the situation suggests that separationists and religious advocates approach the public square with radically differing understandings of the public square and the nature of public discourse. Specifically, advocates for a secular public square favor the use of abstract reason and logical argument, while appearing suspicious of—if not hostile to—passion. Religion, as the ultimate expression of emotional commitment, represents a powerful threat to this vision of dispassionate discourse. This has led separationists to attempt to repress religion by finding a single, common (that is, secular) belief system that all citizens can share that is free from deep emotional commitments to particularist communities.

Religious advocates reject this approach, believing that it is impossible to separate out their deepest beliefs and commitments from their approach to the public square. They appear to stand on strong historical footing. Passionate disagreement is a part of American history and the political process. From the Revolutionary War and the conflict between Loyalists and the Revolutionaries, through the abolitionist movement, the Civil War, the early labor movement, the civil rights movement, and the antiwar movement, it has been a feature of American governance. While religion was present in some of these conflicts, it was not in others. Restricting religious participation will not end the reality that people of conviction bring their passion to the political arena.

Moreover, the effort to secularize the public sphere has alienated many people of faith creating a backlash feeding the emergence of the religious right. As argued by Stephen Carter, "Nothing creates political energy quite so well as insults, and nothing makes [members of the religious right] harder to slow than the ignorance of their critics."

Religionists, specifically the Christian right, appear prone to a historicist essentialism that is equally troubling. They tend to blur the traditional hegemony of Christianity in America with a normative reading of

the First Amendment, ignoring the reality of religious evolution in the United States. They lose sight of the need not only for tolerance of difference, but of respect for those who are different.

In summary, individually the arguments of constitutional morality do not demonstrate that religion is disruptive of the public square—or at least no more so than competing secular worldviews. However, the vehemence of the arguments does suggest that significant problems exist within the public square itself. Current discourse appears intolerant of diversity, that is, unwilling to acknowledge the importance (or even the acceptability) of arguments reflecting the religious and nonreligious pluralism of the nation. Moreover, the sense of community, the fabric of civilization necessary to sustain public engagement and sacrifice for the common good, appears fragile and growing thinner. Arguments against religious participation in the public square reflect this deeper malaise.

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References and Further Reading

- Audi, Robert. *Religious Commitment and Secular Reason*. New York: Oxford University Press, 2000.
 Carter, Stephen. *The Culture of Disbelief*. New York: Basic Books, 1993.
 ———. *God's Name in Vain*. New York: Basic Books, 2000.
 McConnell, Michael, *Five Reasons to Reject the Claim that Religious Arguments Should Be Excluded from Democratic Deliberation*. *Utah Law Review* 1999 (1999): 619.

Cases and Statutes Cited

Everson v. Board of Education, 330 U.S. 1 (1947)

See also Establishment Clause (I): History, Background, Framing; Free Exercise Clause (I): History, Background, Framing; Public Forum Doctrines

RELIGION IN PUBLIC UNIVERSITIES

What do the First Amendment clauses, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof" mean in the context of religion in public universities? Accommodationists believe government may aid or support religion in a neutral or nonpreferential way. Separationists reject any special accommodation or direct support of religion since they may jeopardize the principle of a strict separation of church and state. These contradictory interpretations inspire debate over the extent to which religious activities merit government support or accommodation in public universities and schools.

The Supreme Court first ruled voluntary state-sponsored prayer in public schools unconstitutional in *Engel v. Vitale* (1962). According to Justice Hugo Black, writing for the eight-to-one majority, “the constitutional prohibition against laws respecting an establishment of religion must at least mean that in this country it is not part of the business of the government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by the government.” Justice Potter Stewart disagreed and argued that the school prayer was voluntary, part of a long American tradition and, as he wrote in another dissent (*Abington v. Schempp*), a “compulsory state educational system so structures a child’s life that if religious exercises are held to be an impermissible activity in schools ... [this will be] seen, not as a realization of state neutrality, but rather as the establishment of a religion of secularism.”

The Court has consistently expressed special concern for impressionable students (K–12) who might be influenced by religious activities (prayers, state-funded bus trips for sectarian schools, and until the 1980s, provision of university or public school facilities for religious extracurricular groups) appearing to be sponsored or funded by the government. However, it has also ruled that protection of free exercise of religion should not subordinate to the nonestablishment clause. (See *Mitchell v. Helms* [2000], *Mueller v. Allen* [1983], and *Zelman v. Simmons-Harris* [2002], for example, for cases that allowed formerly excluded state provision of secular books, tuition coverage, and scholarships.)

Accommodation of religion at the university level reemerged with a few changes in Court personnel in the 1980s. In *Widmar v. Vincent* (1981), Justice Lewis Powell found protection of religious activity elsewhere in the First Amendment (in the free speech component). Powell, writing for the majority, held that “a state university, which makes its facilities generally available for the activities of registered student groups, may not close its facilities to student groups desiring to use the facilities for religious worship and discussion.” Powell concluded that enabling participation of university religious groups had a “secular purpose” (advancing education), did not have the “primary effect” of advancing religion, and did not excessively entangle government with religion. This result met the requirements of the Court’s 1971 *Lemon* test that attempted to clarify what constituted “establishment of religion.”

Finding the idea of protecting religion via the principles of free speech and equal participation compelling, the U.S. Congress passed the Equal Access Act (1984). According to the Act, “It shall be

unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access [to] any students who wish to conduct a meeting within that limited public forum on the basis of religious, political, philosophical or other content of the speech at such meetings.”

Since the Supreme Court rules on the constitutionality of such legislation, school boards had to wait until 1990 (*Board of Education v. Mergens* [1990]) to understand the extent to which “equal access” applied. In *Mergens* the Court (eight to one) held that since the school board allowed “noncurriculum related student groups” to meet on campus, the high school must allow Christian student groups similar access. The Court found it permissible for public schools to accommodate religious activity in a neutral, nonendorsing, and noncoercive atmosphere. Equal access would only violate the establishment clause if it coerced students to participate in religious activity or gave benefits “directly” to a religion. Justice Sandra Day O’Connor, writing for the majority, stated, “We think secondary school students are ... likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis.”

The Court thus edged away from the hyperseparationist *Lemon* test, which assumed that even incidental government benefit to religion advanced religion or entangled government and religion impermissibly, toward a neutrality or noncoercion test. This shift toward neutral accommodation of religion and protection of equal access manifested itself also at the university level in *Rosenberger v. University of Virginia* (1995). Here the Court ruled that government may not discriminate against religion in excessive zeal to isolate itself completely from religion. In this case, the University of Virginia had prohibited funding for a student newspaper with a “Christian perspective” because it “primarily promotes or manifests a particular belie[f] in or about a deity or ultimate reality.”

According to Justice Anthony Kennedy, writing for the five-to-four majority, to deny funding denied the religious group its “right of free speech” and equal access. Referring to *Lamb’s Chapel* (1993) and *Widmar*, Kennedy wrote, “The University may not discriminate based on the viewpoint of private persons whose speech it subsidizes.” The Court concluded:

A public university does not violate the establishment clause when it grants access to its facilities on a religion neutral basis to a wide spectrum of student groups, even if some of those groups would use the facilities for

devotional exercises.... We have long held that the guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse.... [W]e have rejected the position that the establishment clause even justifies, much less requires, a refusal to extend free speech rights to religious speakers who participate in broad-reaching government programs neutral in design.

Clarence Thomas reminded dissenters of “our Nation’s long tradition of allowing religious adherents to participate on equal terms in neutral government programs.”

The dissenters (Justices Souter, Stevens, Ginsburg, and Breyer) argued otherwise: “[T]he Court today, for the first time, approves direct funding of core religious activities by an arm of the state.... Using public funds for direct subsidization of preaching the word is categorically forbidden under the establishment clause.” The dissenters saw the university’s funding of the “frankly evangelistic” Christian-perspective newspaper as equivalent to support for its proselytizing mission and thus unconstitutional. Following this logic that prohibits almost any support of religious activity would, of necessity, lead the university to end support for campus religious clubs. However, the dissenters did not worry about this because they feared religious evangelism, while the equally proselytizing viewpoints of marxists, feminists, or any brand of secular group could not jeopardize the “no establishment” clause because they were not “church[es].”

Such arguments wash out the right of religious voices to be included in university conversations. Despite specific protection of the right to express and exercise one’s religion in the First Amendment, the dissenters would prohibit public university (government) support of a religious group’s expression, while other groups could express at will under government subsidy. Dismissing this unequal prohibition, the Court in *Rosenberger* ruled against viewpoint discrimination. While this round in the war between the religion clauses went to a neutral accommodation of religion by public universities, lack of clarity remains. At the time of this writing, simmering in the lower courts are cases regarding college student groups’ “right” to choose those who share their faith-based doctrine as leaders even while thus “discriminating” against those who do not share their view, “voluntary” prayer at Virginia Military Institute, and a college teacher’s “right” to identify his religious orientation in the classroom.

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References and Further Reading

- Alley, Robert. *The Constitution and Religion: Leading Supreme Court Cases on Church and State*. Amherst, NY: Prometheus Books, 1999.
- Hamburger, Philip. *Separation of Church and State*. Cambridge, MA: Harvard University Press, 2002.
- McConnell, Michael, John H. Harvey, and Thomas C. Berg. *Religion and the Constitution*. New York: Aspen Publishers, 2002.
- Witte, John Jr. *Religion and the American Constitutional Experiment*. Boulder, CO: Westview Press, 2000.

Cases and Statutes Cited

- Abington Township School District v. Schempp*, 374 U.S. 203 (1963)
- Board of Education of Westside Community School District v. Mergens*, 495 U.S. 226 (1990)
- Engel v. Vitale*, 370 U.S. 421 (1962)
- Lamb’s Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993)
- Lemon v. Kurtzman*, 403 U.S. 602 (1971)
- Mitchell v. Helms*, 530 U.S. 793 (2000)
- Mueller v. Allen*, 463 U.S. 388 (1983)
- Rosenberger v. Rectors of University of Virginia*, 515 U.S. 819 (1995)
- Widmar v. Vincent*, 454 U.S. 263 (1981)
- Zelman v. Simmons-Harris*, 536 U.S. 639 (2002)

See also Equal Access Act; Establishment Clause (I): History, Background, Framing; First Amendment and PACs; Free Exercise Clause (I): History, Background, Framing; Freedom of Speech: Modern Period (1917–Present); Kennedy, Anthony McLeod; Lemon Test; O’Connor, Sandra Day; Powell, Lewis Franklin, Jr.; Rehnquist, William H.; Souter, David Hackett; Stewart, Potter; Thomas, Clarence; Viewpoint Discrimination in Free Speech Cases

RELIGION IN THE WORKPLACE

Religion in the workplace is best understood through the case law that has interpreted the First Amendment of the Constitution and Title VII of the landmark Civil Rights Act of 1964.

The First Amendment famously begins as follows: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” An enormous body of case law has proliferated in the continuing endeavor to interpret and apply the First Amendment, whether the Jeffersonian “wall of separation” between church and state or whether accommodation of religion designed to bring religious values into the otherwise “naked public square.” The classic tension between the antiestablishment and the free exercise clauses of the First Amendment thus overarches the application and contour of religion in

the workplace. Perhaps more immediately, Title VII of the Civil Rights Act of 1964—which protects against, and prohibits, discrimination in employment on the basis of religion—gives the role and reality of religion in the workplace more tangible meaning. Title VII also has several exemptions for religious institutions, permitting them to discriminate in their internal employment in favor of those who are members in good standing of the particular religion. For example, Section 702a provides that Title VII's prohibition of discrimination on the basis of religion "shall not apply ... to a religious corporation, association, education institution, or society with respect to the employment of individuals of a particular religion to perform work connected with carrying on" such activities of the entity. The specific exemption within Title VII for such religious institutions from Title VII's protection against discrimination on the basis of religion makes membership in good standing of the religion of the particular religiously affiliated institutional employer a "bona fide occupational qualification" in order to obtain, and retain, the employment with the religiously affiliated institutional employer. Most classically, the "ministerial" exemption allows a synagogue, for example, to hire as rabbi an ordained rabbi in good standing, and to reject an academically superbly qualified, armed with several doctorates, who happens to be, for example, alternatively, an atheist, a believer but one who is not an ordained rabbi, or a believing Catholic or Muslim.

These classic First Amendment and Title VII precepts and themes can be best understood through elucidation of the salient case law from the Supreme Court over the course of the past several decades.

The U.S. Supreme Court has consistently demonstrated great judicial deference to institutional employers' interests, at the expense of employees' right to the free exercise of their religion in the workplace and of their right not to be discriminated against in employment on the basis of their religion. The Supreme Court dramatically subordinated employees' rights to the prerogatives of institutional employers in a series of important decisions beginning in 1977. As the tenure of Chief Justice Warren Burger evolved and matured, jurisprudence of the Court debilitated First Amendment and Title VII rights of individual employees—rights that theoretically were designed respectively to protect free exercise of religion and to protect against employment discrimination on the basis of religion. After a decade passed, and as Chief Justice William Rehnquist succeeded Warren Burger in 1986, the initially sharply polarized cases of the late 1970s were unproblematically accepted, largely without dissent, by virtually all

members of the Court. Several cases that were decided between 1977 and 1987 powerfully exemplify these troubling jurisprudential diminutions of the free exercise and Title VII rights of employees.

Trans World Airlines, Inc. v. Hardison (1977) marked the beginning of this trend in the Court's debilitation of employees' Title VII protections against discrimination on the basis of an employee's religion. Justice Byron White wrote for the seven-member Court majority, with Justices William Brennan and Thurgood Marshall in dissent.

Trans World Airlines (TWA) hired Larry G. Hardison to work in TWA's Stores Department. The Stores Department was crucial to TWA's operations and therefore had to operate twenty-four hours a day, every day of the year. TWA employees had to be flexible. Hardison was subject to a seniority system designed through a collective bargaining agreement that TWA had negotiated with the union of the International Association of Machinists and Aerospace Workers. Under the agreement the most senior employees had first choice for job and shift assignments.

In spring 1968, Hardison joined the Worldwide Church of God, which forbade work on the Sabbath (Saturday) and proscribed work on specified religious holidays. Hardison told his supervisor of the problem, which was temporarily resolved by moving Hardison to a different shift. However, Hardison subsequently transferred to a different area, where he did not have enough seniority to avoid working on his Sabbath. Hardison was asked to work, and he refused to report. After a hearing, Hardison was discharged for insubordination for refusing to work his designated shift.

Hardison sued both TWA and the union. He claimed that his discharge constituted unlawful religious discrimination in violation of Title VII of the federal Civil Rights Act of 1964. Hardison also claimed that the union discriminated against him by failing to represent him adequately in his dispute with TWA and by depriving him of his right to exercise his religious beliefs. Hardison's claim of religious discrimination was based on the 1967 guidelines of the federal Equal Employment Opportunity Commission (EEOC), which required employers "to make reasonable accommodations to the religious needs of employees whenever such accommodations do not constitute 'undue hardship.'"

The Supreme Court held that TWA's discharge of Hardison did not violate Title VII. The Court explained the requirements mandated by the EEOC guidelines. Under the guidelines an employer must make reasonable accommodations of employees'

religious needs. The EEOC, however, did not suggest what sort of accommodations would be “unreasonable.”

The Court opined that TWA made reasonable efforts to accommodate the employee’s religious practices and Sabbath observance as required by Title VII and, in addition, that TWA had done all it reasonably could to accommodate the employee’s religious practices within the bounds of the seniority system in the collective bargaining agreement. Therefore, stated the Court, the duty to accommodate Hardison’s religious observance and refusal to work on Saturday did not require TWA to take steps inconsistent with the seniority system of the valid collective bargaining agreement.

The Court, placing great weight on the seniority system, agreed that religious observances are a reality. However, religiously observant employees cannot always get first choice of shifts. If there are not enough employees to work Saturdays, the seniority system made seniority the determinative factor. If not, then the senior person would be denied his or her rights under the collective bargaining agreement.

Title VII does not stand for the proposition that a company can deprive employees of labor contract rights in order to accommodate other employees’ religious preferences. Neither the employer nor the labor union was required by Title VII to make special exception to the labor contract’s seniority system in order to accommodate the employee’s religious obligations. The Court found that “to require TWA to bear more than a de minimis cost in order to give Hardison Saturdays off is an ‘undue hardship’ not required by Title VII.” The costs of giving certain employees days off to accommodate their religion—by abandoning the seniority system—would result in preferential treatment of employees on the basis of religion.

The dissent, written by Justice Marshall and joined by Justice Brennan, stated that the majority opinion was a fatal blow to the requirement to accommodate religious practices in the workplace. Notably, the dissent argued that accommodation should not be rejected simply because it involved unequal treatment. Title VII of the federal Civil Rights Act required employers to grant privileges as part of the accommodation process, and a huge carrier like TWA could have borne the burden of the extra costs without undue hardship.

With the Hardison decision, however, the employer’s Title VII duty to reasonably accommodate the religious practices of the observant employee was utterly minimized by the Court. Any accommodation measure that resulted in more than a de minimis cost to the employer was an unreasonable “undue

hardship” and thus was not required of the employer by Title VII. This effective judicial relief for the employer from its federal statutory duty to reasonably accommodate the employee’s religious observance, practice, and belief was made even more complete by the Supreme Court in 1986. Chief Justice Rehnquist wrote for the seven-member majority in *Ansonia Board of Education v. Philbrook* (1986), with only Justices Marshall and Stevens filing opinions concurring in part and dissenting in part.

Philbrook had been employed by the Ansonia School Board since 1962 to teach business classes. In 1968 he was baptized into the Worldwide Church of God. The church required its members to refrain from working during designated holy days, which caused Philbrook to miss six school days per year.

Pursuant to the collective bargaining agreement between the school board and the teacher’s union, teachers were granted three days of annual leave for observance of religious holidays, but they could not use any accumulated sick leave for religious observances. Philbrook used the three days granted for religious holidays each year. Since he needed three more days to observe his religion, he asked the school board either to adopt the policy of allowing use of three days for personal business or, in the alternative, to allow him to pay the cost of a substitute and to receive full pay for additional days off for religious observances. The school board rejected Philbrook’s request. Philbrook sued, alleging that the prohibition on the use of “necessary personal business” leave for religious observance violated sections 703(a)(1) and (2) of Title VII. He sought both damages and injunctive relief.

Although the Supreme Court remanded the case for further factual findings and thus did not issue a dispositive decision, it reiterated that the employer met statutory obligations by offering a reasonable accommodation for religious practices, observances, and beliefs to the employee. Significantly, the employer is not required to acquiesce to the employee’s most desired, most beneficial accommodation. As Chief Justice Rehnquist summarized:

Thus, where the employer has already reasonably accommodated the employee’s religious needs, the statutory inquiry is at an end. The employer need not further show that each of the employee’s alternative accommodations would result in undue hardship. As Hardison illustrates, the extent of undue hardship on the employer’s business is at issue only where the employer claims that it is unable to offer any reasonable accommodation without such hardship.

Through these two important decisions the Supreme Court essentially relieved the employer of its statutory duty to reasonably accommodate the

religious employee; anything beyond de minimis cost caused by the accommodation will be an “undue hardship” to the employer, which is beyond the employer’s Title VII duty of reasonable accommodation of the observations, practices, and beliefs of the religious employee.

When the employer is a recognized, mainstream religious institution, the Supreme Court has been even more deferential to the employer—again at the expense of the rights of the employees. Indeed, those who advocate strict separation between church and state may see the Court’s accommodation of the religious institutional employer as a violation of the establishment clause of the First Amendment. That, obviously, is not a perspective shared by the Supreme Court, which instead prefers to accommodate the prerogatives of the religiously affiliated institutional employer.

In *National Labor Relations Board v. Catholic Bishop of Chicago* (1979), Chief Justice Burger, writing for a bare five-member majority of the Court, asserted that the federal National Labor Relations Board (NLRB) did not have jurisdiction to investigate unfair labor practice charges brought against the Catholic bishop of Chicago. The bishop was the employer of the complaining faculty members who were employed in the schools operated under the auspices of the Catholic Church.

Although the prerogatives of this powerful institutional employer could have been constrained if it had been subject to the federal National Labor Relations Act, the Court majority was extremely sensitive to the free exercise and establishment clauses of the First Amendment. Chief Justice Burger summarized:

Accordingly, in the absence of a clear expression of Congress’ intent to bring teachers in church-operated schools within the jurisdiction of the Board, we decline to construe the Act in a manner that could in turn call upon the Court to resolve difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses.

In 1974 and 1975, separate representation petitions were filed with the National Labor Relations Board (NLRB) by the faculty union. The Catholic bishop challenged the board’s assertion of jurisdiction. The U.S. Court of Appeals for the Seventh Circuit agreed with the Catholic bishop. The free exercise and establishment clauses of the First Amendment of the Constitution precluded the NLRB from exercising jurisdiction over the schools of the Catholic Church and over the Catholic bishop as the institutional employer.

In his opinion for the majority of the Court, Chief Justice Burger pointed to the legislative history of the National Labor Relations Act, which revealed nothing to indicate that church-operated schools

would be within the NLRB’s jurisdiction. The chief justice referred specifically to the debate behind an amendment to the Act, which reflected certain First Amendment guarantees, and argued, “the absence of an ‘affirmative intention of the Congress clearly expressed’ fortifies our conclusion that Congress did not contemplate that the Board would require church-operated schools to [recognize] unions as bargaining agents for their teachers.”

Within less than a decade, the increasingly accommodationist Court cavalierly sustained, without dissent, the religiously affiliated institutional employer’s prerogative to terminate—summarily—competent, long-service employees in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos* (1987).

Christine J. Amos was an employee of Beehive Clothing Mills, a profit-making company. Frank Mayson was a custodian at the Deseret Gymnasium, a nonprofit facility open to the public. Both enterprises were owned and operated by the Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints and by the Corporation of the President of the Church of Jesus Christ of Latter-Day Saints. Amos, three other Beehive Clothing Mills employees, and Mayson challenged their individual firings, which were based on their failure to obtain a temple recommend (a standard for determining members’ eligibility to attend a temple). The individuals failed to have the district court declare them to be a class.

The defendant church and presiding bishop argued that a temple recommend was a legitimate requirement for working in what was essentially a religious institution. The Supreme Court felt that there were insufficient findings of fact at the district court regarding the religious or nonreligious character of the activities at Beehive Clothing Mills, but it proceeded to judgment concerning the activities at the Deseret Gymnasium, where Mayson worked. Thus, despite the fact that the employment status of Amos was not at issue, the Court retained Amos’s name in the caption of the case.

Both the Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints and the Corporation of the President of the Church of Jesus Christ of Latter-Day Saints were religious entities associated with an unincorporated religious association sometimes called the Mormon Church. Frank Mayson worked at the Deseret Gymnasium for approximately sixteen years, but he was discharged in 1981 because he failed to qualify for a temple recommend. Mayson then brought suit alleging unlawful discrimination on the basis of religion. The church moved to dismiss, maintaining that Section 702 of

the federal Civil Rights Act of 1964 shielded it from liability. Mayson argued that the Civil Rights Act should not be construed to permit religious employers to discriminate on religious grounds in employment of persons for obviously nonreligious, secular jobs. Mayson believed that such an interpretation of Section 702 of Title VII would violate the First Amendment, as an establishment of a religion.

Without dissent, the Supreme Court reversed the decision of the lower federal court, which had found in favor of former employee Mayson. The Court examined whether Section 702 of Title VII of the federal Civil Rights Act of 1964—which exempts religious organizations from Title VII’s prohibition of religious discrimination in employment—was unconstitutional in light of the establishment clause of the First Amendment. Specifically, did Section 702’s statutory exemption from Title VII have the primary effect of unconstitutionally advancing religion, in violation of the establishment clause? The Court resolved the question in the negative.

The Court measured the facts and the statute against the establishment clause, according to the classic multipart test set forth in the landmark case of *Lemon v. Kurtzman* (1971). The *Lemon* test comprises three parts, or prongs: (1) Does the law at issue serve a “secular legislative purpose”? (2) Does the law in question have a “principal or primary effect that neither advances nor inhibits religion”? (3) Does the law in question “impermissibly entangle Church and State”?

The Court concluded that, under the first prong of the *Lemon* test, it was permissible for the Congress to attempt to minimize governmental “interference with the decisionmaking process in religions.” Under the second prong, the Court stated that a law is not necessarily unconstitutional simply because it allows churches to advance religion. In order to violate this prong, the Court reasoned that it would be necessary to show that the government itself had advanced religion through its own activities and influence. Finally, under the third prong of the *Lemon* test, the Court concluded that there was no unconstitutional entanglement raised by Section 702 of Title VII.

Justice O’Connor suggested that a new approach be applied to the *Lemon* test: The inquiry should be “whether government’s purpose is to endorse religion and whether the Statute actually conveys a message of endorsement,” as judged by an objective observer. This accommodationist thinking has proved increasingly influential among additional members of the Court since the *Amos* decision in 1987, but has yet to lead to the Court’s repudiation of the *Lemon* test in its establishment clause jurisprudence.

For the most part, as a result of these salient cases the exercise and observance of religion in the workplace has been made very tenuous as a matter of law. The legal protections of religion, and the rights of religious observer employees in the workplace, are, at best, precarious. On both conceptual and practical levels, labor law doctrine, the First Amendment religion clauses, and Title VII protections against discrimination in employment because of religion have all been debilitated by the Court. The only consistent winners in these cases have been the institutional employers.

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References and Further Reading

- Gregory, David L., *Catholic Labor Theory and the Transformation of Work*, Washington and Lee Law Review 45 (1988): 119.
 Laycock, Douglas, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, Columbia Law Review 81 (1981): 1373.

Cases and Statutes Cited

- Ansonia Board of Education v. Philbrook*, 479 U.S. 60 (1986).
Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987).
Lemon v. Kurtzman, 403 U.S. 602 (1971).
National Labor Relations Board v. Catholic Bishop of Chicago, 440 U.S. 490 (1979).
Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977).
 Title VII of the Civil Rights Act of 1964, 42 USC 2000e et. seq.

RELIGIOUS FREEDOM IN THE MILITARY

The opening clause of the First Amendment (“Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof”) stands for the proposition that, with few restrictions, American citizens have the right to choose both their religion and the way they wish to observe it.

Supreme Court jurisprudence, however, is less clear concerning the extent to which military personnel are afforded the same constitutional rights. Although *Chappel v. Wallace* (1983) recognized that “citizens in uniform cannot be stripped of basic rights simply because they have doffed their civilian clothes,” Article I of the Constitution gives plenary power to Congress “to make rules for the Government and Regulation of the land and naval Forces.”

The Court has traditionally deferred to professional military judgment regarding such regulations.

The doctrine of military necessity supersedes a soldier's right to freely practice his or her religion. In both *Johnson v. Robison* (1974) and *Gillette v. United States* (1988), the Supreme Court found that military necessity is such a fundamental goal that the government need show only that the policy implemented is designed to further a *substantial* government interest. Therefore, the government need not meet the higher standard promulgated in *Sherbert v. Verner* (1963), which requires it to demonstrate that restrictions on religious practices are in furtherance of a *compelling* state interest, whose purpose cannot be achieved by means of less restrictive methods. In *Employment Division, Oregon Department of Human Resources v. Smith* (1990), however, the Court ruled that the federal government has the power to limit religious practices when the regulation is a "valid neutral law of general applicability."

In *Goldman v. Weinberger* (1986), a military clinical psychologist, an Orthodox Jew, brought an action in federal court seeking an against that would allow him to wear a yarmulke (skullcap) while on duty. Deferring to military judgment, the Supreme Court ruled (five to four) against Goldman. It held that the regulation was being enforced in order to achieve a legitimate end, taking into consideration the individual's religious needs: The "Air Force's interest in uniformity renders the strict enforcement of its regulation permissible." Shortly after the *Goldman* decision, however, Congress ordered the secretary of defense "to minimize the potential conflict between the interests of members of the armed forces in abiding by their religious tenets and the military interest in maintaining discipline." Subsequently, the secretary relaxed the restrictions so long as the apparel is neat and conservative and would not interfere with the performance of military duties.

Currently, the military's religious accommodation policy is outlined in a Department of Defense directive, which allows for free exercise that "will not have an adverse impact on military readiness, unit cohesion, standards, or discipline." This standard places a high value on the right of military personnel to practice their religion, and prohibits discrimination in the form of jokes, compulsory services, religious exclusion, and purposeful failure to make arrangements for alternative religious services. So long as the practice does not interfere with a military objective, it is generally permitted.

Thus, for example, Jewish military personnel are now generally permitted to wear yarmulkes with their uniforms. Other variations in the uniform dress code, such as the wearing of rings that display religious

symbols and necklaces containing crosses, are likewise currently permitted.

The free exercise clause of the First Amendment has been held to compel Congress to ensure that chaplains are available to military personnel wherever they are deployed. The Department of Defense also requires that accommodations be made for the various faiths' religious services and holidays. In the absence of a general policy it considers individual requests, using a five-part test to determine (1) the importance of military requirements in terms of individual and unit readiness, (2) the religious importance of the accommodation to the individual, (3) the cumulative impact of repeated accommodations of a similar nature, (4) alternative means available to meet the requested accommodation, and (5) previous treatment of the same or similar requests. During wartime, religious accommodation is much harder to provide, and often religious worship is sacrificed for the good of the mission.

Service people whose religion has dietary restrictions are similarly accommodated. With the aid of military chaplains (who are ordained in one faith but often must minister to others), troops stationed around the world are able to request certain prepackaged meals that would allow them to observe the dietary rules mandated by their religions.

Military personnel may not refuse medical treatment during wartime, especially routine inoculations, even if their sincere religious beliefs do not allow it. In peacetime, exceptions are permitted on a case-by-case basis.

Exemptions from military service are granted, however, to American citizens who can demonstrate a sincere objection to warfare—the so-called conscientious objection rule. This exemption was first recognized during World War I and allowed people whose faith forbids them from participating in war to avoid combat service. During the 1960s, many draftees sought exemptions because they objected specifically to the war in Vietnam. In *Gillette*, the Supreme Court held that the free exercise clause in the First Amendment does not require exemption from military service of those conscientiously opposed to participation in particular wars; it is sufficient that the government's interests relate directly to the burdens its regulations imposed on free exercise rights. In *Robison*, the Court upheld a statute that denied education benefits to conscientious objectors who performed alternative service.

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References and Further Reading

- 10 USC 774 (1987).
- Department of Defense Directive Number 1300.17 (Accommodation of Religious Practices Within the Military

Services), issued February 3, 1988; certified as current, November 21, 2003. <http://www.dtic.mil/whs/directives>.
 Lasson, Kenneth, *Religious Liberty in the Military: The First Amendment Under "Friendly Fire,"* *Journal of Law & Religion* 9 (1992): 471, 493.
 O'Neal, Robert M., *The Tenth Charles L. Decker Lecture in Administrative and Civil Law: Civil Liberty and Military Necessity—Some Preliminary Thoughts on Goldman v. Weinberger*, *Military Law Review* 113 (1986): 31.
 Rabinowitz, Stephen Lewis, *Goldman v. Secretary of Defense: Restricting the Religious Rights of Military Servicemembers*, *American University Law Review* 34 (1985): 881.

Cases and Statutes Cited

Chappel v. Wallace, 462 U.S. 296 (1983)
Employment Division, Oregon Department of Human Resources v. Smith, 494 U.S. 872 (1990)
Gillette v. United States, 484 U.S. 1011 (1988)
Goldman v. Weinberger, 106 S. Ct. 1310 (1986)
Johnson v. Robison, 415 U.S. 361 (1974)
Sherbert v. Verner, 372 U.S. 398 (1963)

See also **Chaplain: Military**

RELIGIOUS FREEDOM RESTORATION ACT

The Religious Freedom Restoration Act of 1993 (RFRA) was the most expansive federal law aiding religious entities in U.S. history. The RFRA imposed strict scrutiny, including the compelling-interest test and the least restrictive means test, on every law in the country that substantially burdened religious conduct. It was held unconstitutional in *City of Boerne v. Flores* (1997).

The RFRA was passed in response to the Supreme Court's decision in *Employment Division v. Smith* (1990). The Court held that generally applicable, neutral laws may be applied to religious entities, even if they result in an incidental burden on religion. The case involved the application of unemployment compensation laws and narcotics laws to state-employed drug counselors and Native American church members who used peyote, an illegal narcotic, during church services. The Court held that the drug counselors could be denied unemployment compensation benefits where the law prohibited compensation when an employee broke a state law, and the men had broken a generally applicable and neutral narcotics law by using the peyote.

The principle that generally applicable, neutral laws may be applied to religious entities was drawn from the "vast majority" of the Court's previous free exercise cases, and from the seminal free exercise case,

Reynolds v. United States (1879), which declared that holding that religious believers were not subject to generally applicable laws would be "in effect to permit every citizen to become a law unto himself." Yet, *Smith* sparked an outcry from civil liberties and religious groups, who argued that the Supreme Court had provided more expansive protection for religious groups against all laws in *Sherbert v. Verner* (1963). *Sherbert* held that a state unemployment compensation law could not be applied to a sabbatarian, and introduced the compelling interest test to free exercise jurisprudence. Even though the test in *Sherbert* was not applied in many later cases, popular wisdom believed that the compelling interest test was to be applied in every free exercise case. That understanding of the free exercise clause informed those who rebelled against *Smith* and pushed for the RFRA.

Congress, at the urging of the coalition of civil liberties and religious organizations, passed the RFRA in direct response to *Smith*. First proposed in 1990, the law was passed in 1993. The purpose was plainly to overrule or displace *Smith*. The legislative record contains page after page of denunciations of the Supreme Court's decision.

The RFRA was employed in a variety of cases, with the largest number of cases in its short history involving claims brought by prison inmates. The leap in the level of review was most pronounced in the prison context, where the Court had been explicit in prior cases that prison regulations were subject to very low-level scrutiny (*O'Lone v. State of Shabazz* [1987], or, in some circumstances, intermediate scrutiny (*Turner v. Safley* [1987])). Because of the RFRA's fee-shifting provision, many law firms were willing to take such cases, resulting in the large number filed.

In 1997, the Supreme Court decided *Boerne v. Flores*, and held that the RFRA was beyond the power of Congress under Section 5 of the Fourteenth Amendment. In a historic states rights decision, the Court clarified the standards for congressional law-making pursuant to Section 5, which states, "The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." First, Congress was not permitted to regulate the states pursuant to Section 5 unless the states had engaged in widespread and persisting constitutional violations. This predicate for Section 5 could be proved by common knowledge or a record created in Congress. The Court found the brief, anecdotal record created in support of RFRA to fall far short of showing widespread free exercise violations in the states. Second, the law Congress passed pursuant to Section 5 was to be "congruent and proportional" to the constitutional harm engendered by the states. In the words of the Court, "RFRA cannot be considered remedial,

preventive legislation, if those terms are to have any meaning. The RFRA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior.”

The *Boerne* decision further held that the RFRA violated the separation of powers pursuant to *Marbury v. Madison* (1803), and that it infringed the amendment procedures required in Article V by effecting a change in the Constitution through simple majority vote. These elements of the opinion bring into question the validity of the RFRA against federal law, but no court has yet held it unconstitutional as applied to federal law, and the Supreme Court has not ruled on the issue.

Following the RFRA's invalidation, proponents lobbied the state legislatures to pass similar legislation. As of 2004, thirteen states have enacted state religious liberty laws, including Alabama, Arizona, Connecticut, Florida, Idaho, Illinois, Missouri, New Mexico, Oklahoma, Pennsylvania, Rhode Island, South Carolina, and Texas. Additionally, the Religious Liberty Protection Act (RLPA) was introduced in the U.S. Congress in three successive years, 1998, 1999, and 2000. It would have predicated the RFRA's strict scrutiny standard on Section 5 of the Fourteenth Amendment, the commerce clause, and the spending clause. The RLPA was never passed, but in 2000, Congress passed and President Clinton signed the Religious Land Use and Institutionalized Persons Act, which applies strict scrutiny to land use laws and prison regulations that substantially burden religious individuals and institutions.

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References and Further Reading

- Berg, Thomas C., *What Hath Congress Wrought? An Interpretive Guide to the Religious Freedom Restoration Act*, Villanova Law Review 39 (1994): 1.
- Bybee, Jay, *Taking Liberties With the First Amendment: Congress, Section 5, and the Religious Freedom Restoration Act*, Vanderbilt Law Review 48 (1995): 1539.
- Eisgruber, Christopher V., and Lawrence G. Sager, *Why the Religious Freedom Restoration Act Is Unconstitutional*, New York University Law Review 69 (1994): 437.
- Hamilton, Marci A., *The Religious Freedom Restoration Act Is Unconstitutional, Period*, University of Pennsylvania Law Journal 1. (1998).
- , *City of Boerne v. Flores: A Landmark for Structural Analysis*, William and Mary Law Review 39 (1998): 699.
- , *The Religious Freedom Restoration Act: Letting the Fox into the Henhouse Under Cover of Section 5 of the Fourteenth Amendment*, Cardoso Law Review 16 (1994): 357.
- Laycock, Douglas, *Conceptual Gulfs in City of Boerne v. Flores*, William and Mary Law Review 39 (1998): 743.

Cases and Statutes Cited

- City of Boerne v. Flores*, 521 U.S. 507 (1997)
- Employment Division, Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990)
- O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987)
- Marbury v. Madison*, 1 Cranch 137 (1803)
- Reynolds v. United States*, 98 U.S. 145 (1879)
- Sherbert v. Verner*, 374 U.S. 398 (1963)
- Turner v. Safley*, 482 U.S. 78 (1987)
- Religious Freedom Restoration Act, 42 U.S.C. section 2000bb et. seq.
- Religious Liberty Protection of 1998 (Introduced in Senate), S. 2148, 105th Congress, 2d Session. <http://thomas.loc.gov/cgi-bin/query/D?c105:2:/temp/~c105Wb2Ov1> (see House version, H.R. 4019, same website; subsequent versions, found at <http://thomas.loc.gov>)
- U.S. Constitution, Amendment 14, Section 5

RELIGIOUS GARB IN COURTROOMS AND CLASSROOMS

In a nation that guarantees and values civil liberties reflecting a wide variety of religious traditions, beliefs, and practice, American courts have decided many complex cases relating to the public display of religion, including cases involving challenges to restrictions on religious garb in public courtrooms and classrooms. Courts have generally protected the rights of parties to a case to wear religious garb in the courtroom, but have largely been less protective of the rights of attorneys to appear in court while dressed in religious clothing. In the public school context, although courts have expressed a range of approaches to dress codes that prohibit religious garb, they have often provided greater protection for the rights of students than for those of teachers.

In the courtroom setting, most published decisions have held that the rights of a party to wear religious garb outweigh any potential concern of security, decorum, or juror prejudice. For example, within a two-month period in 1978, courts in Rhode Island (*In re Palmer*) and New York (*Close-It Enterprises, Inc. v. Weinberger*) held that trial courts had improperly ordered the removal of religious head covering by parties who identified themselves, respectively, as a Sunni Muslim and a devout adherent to the Jewish faith. The courts emphasized both the free exercise rights of the parties and the absence of a sufficiently counterbalancing threat to decorum, security, or fairness. These and other courts have also endorsed the use of jury instructions to prevent any prejudice that may result from a party's wearing religious garb in the courtroom. In *Joseph v. State* (1994), a Florida court broadly interpreted constitutional protections to extend to dress requirements based on religious beliefs that were clearly not mainstream. Nevertheless, in

Spanks-El v. Finley (1988), Illinois federal courts held that the compelling interest in courtroom security outweighed a party's religious objection to temporarily removing a fez from his head at a security checkpoint. In addition, in *State v. Hodges* (1985), the Tennessee Supreme Court suggested that a party's desire to dress "like a chicken" may be so bizarre as to exceed the bounds of free exercise protections.

A more complex issue relates to the rights of attorneys to wear religious garb in the courtroom, often in the context of priests who wish to appear in clerical collars. This issue is most notably illustrated in the saga of Vincent LaRocca, a Roman Catholic priest and a lawyer in New York, whose repeated attempts to wear his clerical collar when serving as an attorney spawned years of litigation before numerous New York State and federal courts. Ultimately, in *LaRocca v. Lane* (1975), the New York Court of Appeals upheld the lower court order that prohibited LaRocca from wearing his collar when representing a criminal defendant. The court found that the lower court's decision protected the rights of both the defendant and the government, preventing the potential danger of jury bias that could have resulted from LaRocca's clerical status as a priest. In contrast, however, the court acknowledged that this reasoning might not preclude an attorney from appearing in court while donning nonclerical religious garb. Moreover, as *O'Reilly v. New York Times Co.* (1982), a New York federal appeals case, and *Ryslik v. Krass* (1995), a New Jersey state case, suggest, courts are more likely to permit priests to wear their collars when appearing in court pro se, consistent with the protection generally afforded parties who wish to wear religious garb. Both of these courts accepted the utility of jury instructions to address and prevent any jury prejudice.

Finally, courts appear to vary in their approach to restrictions on religious garb in public schools. In *Cooper v. Eugene School District* (1986), the Oregon Supreme Court upheld statutes pursuant to which a special education teacher in Oregon public schools, who identified herself as a Sikh, was suspended for wearing religious garb in performance of her duties as a teacher. The court engaged in a historical survey of wide-ranging attitudes of courts addressing the issue of religious symbolism in public schools. The Oregon court concluded that although courts generally found that a teacher's religious garb alone does not demonstrate improper sectarian influence in the classroom, at the same time, rules against such dress were generally permitted to avoid the appearance of sectarian endorsement. Thus, the court held that the Oregon statute served the legitimate concern that the teacher's regular or frequent appearance in religious garb may be perceived to signal the school's endorsement of the

teacher's religious commitment. In a more recent case, however, *Nichol v. Arin Intermediate Unit 28* (2003), a federal court granted injunctive relief in favor of an instructional assistant who wore a cross on a necklace and was therefore suspended pursuant to a Pennsylvania School Code prohibiting teachers and certain other public school employees from wearing religious garb or symbols. The court found that the school policy improperly discriminated against the free exercise and expression of religion, without counterbalancing justification, such as a demonstration of resulting disruption, controversy, or disturbance, or any evidence of perceived government endorsement of the teacher's religion. As concerns of endorsement are less likely in the context of the religious garb of students, several courts have held that that school dress codes may not unduly burden the sincerely held religious beliefs of student. Thus, in *Chalifoux v. New Caney Independent School District* (1997) and *Alabama and Coushatta Tribes of Texas v. Trustees of Big Sandy Independent School District* (1993), Texas federal courts have found unconstitutional school dress regulations that did not exempt students who wore rosaries or long hair as a form of religious expression.

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References and Further Reading

Levine, Samuel J., *Religious Symbols and Religious Garb in the Courtroom: Personal Values and Public Judgments*, Fordham Law Review 66 (1998): 1505.

Cases and Statutes Cited

- Alabama and Coushatta Tribes of Texas v. Trustees of Big Sandy Independent School Dist.*, 817 F. Supp. 1319 (E.D. Tex. 1993)
Chalifoux v. New Caney Independent School Dist., 976 F. Supp. 659 (S.D. Tex. 1997)
Close-It Enterprises, Inc. v. Weinberger, 407 N.Y.S.2d 587 (App. Div. 1978)
Cooper v. Eugene School District, No. 4J, 723 P.2d 298 (Or. 1986)
In re Palmer, 386 A.2d 1112 (R.I. 1978)
Joseph v. State, 642 So. 2d 613 (Fla. Dist. Ct. App. 1994)
LaRocca v. Lane, 338 N.E.2d 606 (N.Y. 1975)
Nichol v. Arin Intermediate Unit 28, 268 F. Supp.2d 536 (W.D. Pa. 2003)
O'Reilly v. New York Times Co., 692 F.2d 863 (2d Cir. 1982)
Ryslik v. Krass, 652 A.2d 767 (N.J. Super. Ct. App. Div. 1995)
Spanks-El v. Finley, No. 85-C9259, 1987 U.S. Dist. LEXIS 3374 (N.D. Ill. Apr. 23, 1987), aff'd, 845 F.2d 1023 (7th Cir. 1988)
State v. Hodges, 695 S.W.2d 171 (Tenn. 1985)
 24 Pa. Stat. Ann s. 11-1112
 ORS 342.650 and 342.655

RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT OF 2000

The Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) was passed for the purpose of aiding religious landowners and prisoners in bringing challenges to laws that substantially burden their religious conduct. RLUIPA is the successor statute to the Religious Freedom Restoration Act (RFRA), which mandated strict scrutiny against every law in the United States that substantially burdened religious entities. RFRA was held unconstitutional in *City of Boerne v. Flores* (1997), on states rights, separation of powers, and Article V grounds.

RLUIPA creates a cause of action for religious landowners to challenge land use laws and for prisoners to challenge prison regulations, and requires the application of strict scrutiny to those laws. It was intended to circumvent the constitutional defects of RFRA, and it provided the same incentive to lawyers to bring lawsuits for religious institutions, a fee-shifting provision, which accounts in part for the relatively large number of cases filed under it.

RLUIPA is an odd pairing of interests, to be sure. It was the result of religious organizations that were disappointed when RFRA was held unconstitutional, but incapable of persuading Congress to mount another law with the same scope. Concerns about RFRA's impact on children and other issues made the broad-based approach of RFRA untenable. The religious organizations then focused on two particular arenas: land use and prisons, and succeeded in getting that combination passed. President Clinton signed the bill into law in September 2000.

The land use provisions were premised on Section 5 of the Fourteenth Amendment, the commerce clause, and the spending clause. The spending clause is rarely invoked, because little federal funds go toward local land use planning. With respect to Section 5, RLUIPA's sponsors relied on hearings held on the never-enacted Religious Liberty Protection Act (RLPA), at which religious entities testified regarding difficulties faced by religious institutions in the land use process. The commerce clause is invoked through a "jurisdictional element," which states the law applies to "any case in which ... the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, even if the burden results from a rule of general applicability."

The primary impediment for religious entities seeking relief under RLUIPA's land use provisions has been the burden of proving that the application of the particular land use law imposed a "substantial

burden." In *Civil Liberties for Urban Believers v. Chicago* (2003), the U.S. Court of Appeals for the Seventh Circuit explained the standard as follows:

[I]n the context of RLUIPA's broad definition of religious exercise, a land-use regulation that imposes a substantial burden on religious exercise is one that necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise—including the use of real property for the purpose thereof within the regulated jurisdiction generally—effectively impracticable.

Constitutional challenges to the land use provisions are working their way through the courts, with no decisions in the federal courts of appeals as of early 2004. The challenges argue that RLUIPA is an unconstitutional exercise of Congress's power under Section 5 of the Fourteenth Amendment and the commerce clause, and violates states rights, the establishment clause, and the equal protection clause.

The prison provisions were premised on the commerce clause and the spending clause. It prohibits the imposition of a substantial burden on the religious exercise of a prisoner in any case which, "the substantial burden is imposed in a program or activity that receives Federal financial assistance; or the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes."

Judicial decisions in response to constitutional challenges to date have focused on whether RLUIPA's prison provisions violate the First Amendment's establishment clause. To date, at least four circuits have addressed the question, with the U.S. Court of Appeals for the Sixth Circuit holding it is unconstitutional (*Cutter v. Wilkinson* [2003]), while the Fourth Circuit in *Madison v. Riter* (2003), the Seventh Circuit in *Charles v. Verhagen* (2002), and the Ninth Circuit in *Mayweathers v. Newland* (2002) have upheld RLUIPA's constitutionality. The Supreme Court is likely to take up the issue in the near future.

There were virtually no hearings on prisons during the hearings on RLPA, making a defense of the law under Section 5 of the Fourteenth Amendment virtually impossible.

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References and Further Reading

- Geller, Joshua R., *The Religious Land Use and Institutionalized Persons Act of 2000: An Unconstitutional Exercise of Congress's Power Under Section Five of the Fourteenth Amendment*, New York University Journal of Legislation and Public Policy 6 (2003): 561.
- Hamilton, Marci A., *Federalism and the Public Good: The True Story Behind the Religious Land Use and Institutionalized Persons Act*, Indiana Law Journal 78 (2003): 311.

———, *How Congress Undermined the American Dream: The Effect of the Religious Land Use and Institutionalized Persons Act on Residential Neighborhoods*, Findlaw's Writ: Commentary, <http://writ.news.findlaw.com/hamilton/20030424.html>.

Hook, Diane K., *The Religious Land Use and Institutionalized Persons Act of 2000: Congress' New Twist on "Speak Softly and Carry a Big Stick"*, *Urban Law* 34 (2002): 829.

Storzer, Roman P., and Anthony R. Picarello, Jr., *The Religious Land Use and Institutionalized Persons Act of 2000: A Constitutional Response to Unconstitutional Zoning Practices*, *George Mason Law Review* 9 (2001): 929.

Zucco, David B., *Note: Super-Sized with Fries: Regulating Religious Land Use in the Era of Megachurches*, *Minnesota Law Review* 88 (2003): 416.

Cases and Statutes Cited

Charles v. Verhagen, 220 F.Supp.2d 937 (W.D. Wis. 2002)
City of Boerne v. Flores, 521 U.S. 507 (1997)

Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752 (7th Cir. 2003)

Cutter v. Wilkinson, 349 F.3d 257 (6th Cir. 2003)

Madison v. Riter, 2003 U.S. App. LEXIS 24629 (4th Cir. 2003)

Mayweathers v. Newland, 314 F.3d 1062 (9th Cir. 2002)

Religious Land Use and Institutionalized Persons Act, 42 U.S.C. Section 2000cc et. seq.

See also *City of Boerne v. Flores*, 521 U.S. 507 (1997)

RELIGIOUS LIBERTY UNDER EIGHTEENTH-CENTURY STATE CONSTITUTIONS

The religion clauses of the eighteenth-century state constitutions reveal a ferment of activity lying barely beneath the surface of the U.S. Constitution's First Amendment. Although most of these constitutions progressed far along the path toward disestablishment, some still enshrined protections for the Protestant religion, allowed taxes to be levied in support of clergy, or imposed religious tests upon those assuming office. At the same time, many included provisions ensuring the equality of free exercise and requiring that individuals' privileges and immunities not be enlarged or contracted on the basis of religion. During the dormancy of the First Amendment's free exercise and establishment clauses, which were not substantially litigated until the nineteenth century, and not applied to the states until the twentieth century, the state constitutions thus supplied a basis for claims of religious equality and the freedom of religious practice while only gradually leading toward the separation of church and state.

Disestablishment and Separation

Despite Thomas Jefferson's renowned reference to the First Amendment as "building a wall of separation between church and state" (Letter to the Danbury Baptist Association), legal historians have emphasized that the state constitutions ratified around the time of the founding effected a measured disestablishment rather than a complete separation. Indeed, according to Philip Hamburger's *Separation of Church and State*, the twentieth-century focus on separation distorted the nature of eighteenth-century religious liberty debates, in which separation "first appeared ... not as a demand but as an accusation." The employment of one metaphor rather than the other may not be determinative; Kent Greenawalt contends, for instance, that Hamburger overemphasized the difference between disestablishment and separation, and, likewise, maintains that each idea is sufficiently broad in its historical development to encompass the vast majority of the concepts that the other comprehends.

At the same time, however, the notion of disestablishment better suits the nature of the trajectories from colonial contexts to state constitutions. Rhode Island's refusal of an official state religion under the influence of founder Roger Williams, who maintained that the purity of the true church would be tainted through association with civil government, remained the exception rather than the rule. In several states, inhabitants were obliged to support religious ministers, although usually of their own denomination, even after ratification of the U.S. Constitution, and some constitutions required office holders to take oaths attesting to specific religious beliefs. The Maryland Constitution of 1776, for example, allowed the legislature to levy "a general and equal tax for the support of the Christian religion" but left "to each individual the power of appointing the payment over of the money, collected from him, to the support of any particular place or worship or minister" (Maryland Constitution, Article 33). Delaware abandoned its religious test for entry into office soon after the constitution was ratified; the 1792 constitution abolished an earlier requirement that members of either house of the legislature, as a condition of entering into office, swear or affirm that "I, A.B., do profess faith in God the Father, and in Jesus Christ His only Son, and in the Holy Ghost, one God, blessed for evermore; and I do acknowledge the holy scriptures of the Old and New Testament to be given by divine inspiration" (Delaware Constitution of 1776, Article 22).

The expansion of religious liberty in South Carolina, described in detail by James Lowell Underwood's

article “The Dawn of Religious Freedom in South Carolina,” furnishes a particularly apt example of the path away from establishment. While the seeds of freedom had been sown by the Carolina Charters and the *Fundamental Constitutions of Carolina*, composed in part by John Locke, it was not until the Constitution of 1790 that disestablishment was officially completed. During the colonial period, the Church of England, the favored denomination, received funds out of the public fisc; likewise, religious tests were, at various points, imposed upon candidates for office and even upon voters, and laws were enacted requiring Sunday worship. The Constitution of 1778 equalized the treatment of all Protestant sects, but refrained from entirely abandoning establishment (South Carolina Constitution of 1778, Article 38). Instead, it specified criteria by which any Protestant group commanding fifteen or more adherents could achieve official recognition and support, and it announced that “all denominations of Christian Protestants in this State, demeaning themselves peaceably and faithfully, shall enjoy equal religious and civil privileges” (South Carolina Constitution of 1778, Article 38). Under this schema, non-Protestants, including Catholics and Jews, remained marginalized. The Constitution of 1790, adopted shortly after the federal First Amendment, rectified the situation by eliminating the Protestant establishment (South Carolina Constitution of 1790). Even this constitution did not, however, result in the complete separation of the political sphere from the Christian church.

Statutory relics of establishment remained in several states into the nineteenth century. These included laws criminalizing blasphemy and prohibiting commerce on Sundays. Scattered judicial opinions also invoked the notion that Christianity remained part of the common law, but, as Stuart Banner has shown, this mantra lacked substantive underpinnings.

Free Exercise, Equal Protection, and Equal Privileges and Immunities

On the side of the individual believer, Locke’s seventeenth-century *Letter Concerning Toleration* had distinguished between the liberty of conscience he espoused and freedom of religious practice by depicting religious belief as “an inward persuasion of the Mind,” placed under the sole jurisdiction of sacred authority, in peaceful coexistence with the proper sphere of the civil magistrate. Although a few of the eighteenth-century state constitutions partially revisited this division by assuring the rather limited right

of all to “worship ... God according to the dictates of their own consciences” (North Carolina Constitution of 1776, Article 19), most, including the 1776 Virginia Declaration of Rights and the Georgia Constitution of 1777, provided more expansively for religious practice through ensuring the free exercise of religion. Many likewise insisted that each person’s religious liberty should be equally protected and that no citizen’s civil rights or privileges and immunities should be enlarged or reduced on account of religion. According to one differentiation between the respective meanings of “equal protection” and equal civil rights or privileges and immunities in the eighteenth century, according to Hamburger, “equal protection of the laws was a lesser degree of equality—an equality only of the protection provided by civil law for natural liberty,” whereas “equal civil rights was a standard so rigorous it prevented civil laws from allocating either protection or privileges on the basis of religious differences.” Both degrees of equality were, however, available—with certain important limitations—under the state constitutions.

The Virginia Declaration of Rights announced that “all men are equally entitled to the free exercise of religion, according to the dictates of conscience” (Virginia Declaration of Rights of 1776, Article 16). Employing the rhetoric of equal protection, the Maryland Constitution insisted that, “as it is the duty of every man to worship God in such manner as he thinks most acceptable to him; all persons, professing the Christian religion, are equally entitled to protection in their religious liberty; wherefore no person ought by any law to be molested in his person or estate on account of his religious persuasion or profession, or for his religious practice....” (Maryland Constitution of 1776, Article 33). Focusing instead on civil rights and privileges and immunities, the Pennsylvania Constitution forbade “any man, who acknowledges the being of a God” from being “deprived or abridged of any civil right as a citizen, on account of his religious sentiments or peculiar mode of religious worship” (Pennsylvania Constitution of 1776, Declaration of Rights, Article 2); the New Jersey Constitution likewise stated that “no Protestant inhabitant of this Colony shall be denied the enjoyment of any civil right, merely on account of his religious principles, [and all members of Protestant sects] shall fully and freely enjoy every privilege and immunity, enjoyed by their fellow subjects” (New Jersey Constitution of 1776, Article 19). New Jersey and Maryland were not alone in restricting their protection to all Protestants, or all Christians, rather than extending them to worshippers of all faiths. Such limitations were, indeed, far from infrequent.

Questions involving the equal protection of religious liberty were adjudicated less often than those concerning the privileges and immunities and civil rights of religious adherents. This latter issue arose most frequently in the context of assessing witnesses' qualifications to testify; under the common law, only Christians had been permitted to serve as sworn witnesses, but some judicial decisions under the state constitutions insisted that this requirement impermissibly reduced individuals' civil capacities on the basis of religion. A decision of the Virginia General Court, construing the 1776 Bill of Rights, which the first article of the Virginia Constitution of 1830 incorporated, explained that even an individual who refused to acknowledge a future state of rewards and punishments should be considered competent as a witness; to refuse to allow him to testify would diminish his civil capacity on the basis of religion (*Perry v. Commonwealth* [1846]).

Scholars have also debated whether the state constitutions' vision of religious equality was formal or substantive—that is, whether they deemed any unequal burden placed upon different religious denominations discriminatory or considered unequal only those laws specifically aimed at discouraging a particular religious practice. According to one interpretation, comprehensively articulated by Michael McConnell in his article, “The Origins and Historical Understanding of Free Exercise of Religion,” the state constitutions allowed religious adherents exemptions from general laws. These included not only religiously based exceptions to oath requirements for, among others, Quakers, Mennonites, and Jews, but also exemptions from military service and, in states with an established church, from religious assessments.

It was not, however, unheard of, for state courts to deem the legislature's promulgation of a religiously based exemption for one group a violation of the state constitutional provision for equality among religious denominations. A later Louisiana case, adjudicated under the 1868 Bill of Rights, which was adopted during reconstruction, provides a dramatic example of such reasoning. In *City of Shreveport v. Levy* (1874), the Louisiana Supreme Court invalidated a Sunday law providing an exemption for Saturday Sabbatarians, insisting that “[b]efore the constitution Jews and Gentiles are equal; by the law they must be treated alike, and the ordinance of a City Council which gives to one sect a privilege which it denies to another, violates both the constitution and the law, and is therefore null and void.”

The liberty of religious practice that the state constitutions protected was not, in any case, unlimited.

Rather, each placed certain restrictions on free exercise. The most common included prohibitions against infringing on the rights of others (Maryland Constitution of 1776, Article 33), disturbing the peace of the State (Massachusetts Constitution of 1780, part I, Article 2), or pursuing treason and sedition (North Carolina Constitution of 1776, Article 34). A few incorporated more expansive language, maintaining that freedom of conscience could not “excuse acts of licentiousness” (New York Constitution of 1777, Article 28). Contemporary controversy has focused on whether the notion of disturbing the state's peace was isomorphic with that of violating general laws, and therefore supports a formal rather than substantive interpretation of religious equality under the state constitutions. Whereas some commentators, including McConnell—and Justices of the Supreme Court—contend that the clauses referring to the state's peace “support[] the view that impositions on religious conscience may be enforced only if they serve the fundamental interests of the state,” others insist, and Justice Scalia did in *City of Boerne v. Flores* (1997), that they signify only that “religious exercise shall be permitted *so long as it does not violate general laws governing conduct*.” Several of the cases discussing these limitations, like *Lindenmuller v. People* (1861) in New York and *Commonwealth v. Kneeland* (1838) in Massachusetts, suggest that protecting the peace and the equal rights of others constituted something different than simply requiring that religious adherents follow the law, although what the “equal rights of others” consisted in remained subject to debate in the early republic.

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References and Further Reading

- Antieau, Chester James, Arthur T. Downey, and Edward C. Roberts. *Freedom From Federal Establishment: Formation and Early History of the First Amendment Religion Clauses*. Milwaukee: Bruce Publishing Co., 1963.
- Banner, Stuart, *When Christianity Was Part of the Common Law*, *Law and History Review* 16 (1998): 1:27–62.
- Borden, Morton, *Jews, Turks, and Infidels*. Chapel Hill: University of North Carolina Press, 1984.
- Esbeck, Carl, *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic*, *Brigham Young University Law Review* 2004 (2004): 4:1385–592.
- Greenawalt, Kent, *History as Ideology: Philip Hamburger's Separation of Church and State*, *California Law Review* 93 (2005): 1: 367.
- Hall, Timothy, *Separating Church and State: Roger Williams and Religious Liberty*. Urbana: University of Illinois Press, 1998.

- Hamburger, Philip. *Separation of Church and State*. Cambridge, MA: Harvard University Press, 2002.
- , *Equality and Diversity: The Eighteenth-Century Debate about Equal Protection and Equal Civil Rights*, *Supreme Court Review* 1992 (1992): 295–393.
- , *A Constitutional Right of Religious Exemption: An Historical Perspective*, *George Washington Law Review* 60 (1992): 4:915–48.
- Hamilton, Marci A., *Religious Institutions, the No-Harm Doctrine, and the Public Good*, *Brigham Young University Law Review* 2004 (2004): 4:1099–216.
- Jefferson, Thomas. Letter to the Danbury Baptist Association (1802).
- King, Andrew J., *Sunday Law in the Nineteenth Century*, *Albany Law Review* 64 (2000): 2:675–772.
- Laycock, Douglas, *The Many Meanings of Separation*, *University of Chicago Law Review* 70 (2003): 2:1667.
- Levy, Leonard, ed. *Blasphemy in Massachusetts: Freedom of Conscience and the Abner Kneeland Case*. New York: Da Capo Press, 1973.
- Locke, John. *A Letter Concerning Toleration*. Trans. William Popple. Indianapolis: Hackett Press, 1983.
- McConnell, Michael W., *Freedom from Persecution or Protection of the Rights of Conscience? A Critique of Justice Scalia's Historical Arguments in City of Boerne v. Flores*, *William and Mary Law Review* 39 (1998): 3:819–48.
- , *The Origins and Historical Understanding of Free Exercise of Religion*, *Harvard Law Review* 103 (1990): 7:1409–517.
- Meyler, Bernadette, *The Equal Protection of Free Exercise: Two Approaches and Their History*, *Boston College Law Review* 47 (forthcoming 2006).
- Underwood, James Lowell, *The Dawn of Religious Freedom in South Carolina: The Journey from Limited Tolerance to Constitutional Right*, *South Carolina Law Review* 54 (2002): 1:111–80.

Cases and Statutes Cited

- City of Boerne v. Flores*, 521 U.S. 507, 550 (1997)
- City of Shreveport v. Levy*, 26 La. Ann. 671, 1874 WL 7860 (1874)
- Commonwealth v. Kneeland*, 37 Mass. (20 Pick.) 206, 220, 1838 WL 2655 (1838)
- Lindenmuller v. People*, 21 How. Pr. 156 (1861)
- Perry v. Commonwealth*, 44 Va. (3 Gratt.) 632, 1846 WL 2406 (Va. Gen. Ct. 1846)
- Delaware Constitution of 1776, Article 22
- Delaware Constitution of 1792, Article 1, sect. 2
- Fundamental Constitutions of Carolina (1669)
- Georgia Constitution of 1777, Article 66
- Maryland Constitution of 1776, Article 33
- Massachusetts Constitution of 1780, Part I, Article 2
- New Jersey Constitution of 1776, Article 19
- New York Constitution of 1777, Article 38
- North Carolina Constitution of 1776, Article 34
- Pennsylvania Constitution of 1776, Declaration of Rights, Article 2
- South Carolina Constitution of 1778, Article 38
- South Carolina Constitution of 1790
- Virginia Declaration of Rights of 1776, Article 16
- Virginia Constitution of 1830, Article 1

RELIGIOUS SYMBOLS ON PUBLIC PROPERTY

Disputes involving the display of religious symbols on public property are resolved under the establishment clause of the First Amendment: does the government's display of a religious symbol, like a crèche, constitute an establishment of religion? The justices of the U.S. Supreme Court have not settled upon any one standard for resolving these disputes, but rather have articulated and applied a variety of tests. Partly because of the unsettled nature of the legal doctrine, the results in these cases have been unpredictable.

In *Lemon v. Kurtzman*, a 1971 decision, the Court articulated a three-part test to determine whether a governmental action, such as a statute, violates the establishment clause. The *Lemon* test provided as follows: “First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster ‘an excessive government entanglement with religion.’” For approximately a decade, the *Lemon* test remained the standard for resolving establishment clause issues, but it has since been subject to severe criticisms. Regardless, the Court still occasionally applies this test and has never expressly or fully repudiated it. The uncertainty surrounding *Lemon* has provided the doctrinal context for the Court's decisions regarding religious symbols.

Religious Symbol Cases

The seminal religious-symbol case is *Lynch v. Donnelly*, decided in 1984. The city of Pawtucket, Rhode Island, constructed a Christmas display in a public park. The display was “essentially like those to be found in hundreds of towns or cities across the Nation—often on public grounds—during the Christmas season,” the Court explained. It consisted of “many of the figures and decorations traditionally associated with Christmas, including, among other things, a Santa Claus house, reindeer pulling Santa's sleigh, candy-striped poles, a Christmas tree, carolers, cutout figures representing such characters as a clown, an elephant, and a teddy bear, hundreds of colored lights, a large banner [reading] ‘SEASONS GREETINGS,’ and the crèche.” The Court focused solely on whether the governmental display of the crèche violated the establishment clause.

The Court's opinion in *Lynch* revealed the justices' ambivalence regarding the appropriate doctrine for adjudicating an establishment clause issue. The Court began with a review of American history

showing that government and religion have often been entwined despite the establishment clause: "There is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789." The Court, however, did not rely solely on that history to uphold the governmental action. Instead, the Court presented the *Lemon* test, noting that it has often been "useful" in establishment clause cases. "But," the Court added, "we have repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area."

The Court then applied the *Lemon* test to the facts. Yet, when applying the first *Lemon* prong, the purpose prong, the Court again stressed history. In reasoning that the display of the crèche had a secular purpose, the Court cast Christmas as a historical event rather than a Christian holiday: "[Pawtucket], like the Congresses and Presidents ... has principally taken note of a significant historical religious event long celebrated in the Western World. The crèche in the display depicts the historical origins of this traditional event long recognized as a National Holiday." Then, in analyzing the second prong—whether the primary effect of the crèche was to advance religion—the Court yet again adverted to history. If the governmental display of the crèche were to fail the effects prong, the Court reasoned, then many other traditional forms of governmental support for religion would have to be deemed unconstitutional. Finally, the Court concluded that the display of the crèche did not amount to excessive governmental entanglement with religion, the third prong of *Lemon*. Administrative entanglement did not exist because governmental officials were not involved in religious affairs. Moreover, the crèche display did not generate political divisiveness among the Pawtucket citizens, the Court explained, because nobody had previously complained about the display, even though it had been erected for forty years. Of course, despite the Court's reasoning, non-Christian religious outsiders might have previously remained silent not because they happily accepted the Christmas display but because they feared the reprisals that might follow from protest. In fact, when the *Lynch* lawsuit was initiated, many Pawtucket citizens and officials reacted angrily. The mayor denounced the suit as "a petty attack aimed at taking Christ out of Christmas," and the *Pawtucket Evening Times* labeled the suit "absurd." The Court, in any event, held that the governmental display of the crèche satisfied all three prongs of the *Lemon* test and therefore was constitutional.

Because of dissatisfaction with *Lemon*, Justice O'Connor wrote a concurrence in *Lynch* that recommended the adoption of an alternative approach: an

endorsement test. O'Connor's new test had two prongs: first, does the state action create excessive governmental entanglement with religion, and second, does the state action amount to governmental endorsement or disapproval of religion. The endorsement test can be read in at least two different ways. Under one reading, the endorsement test merely reformulates the *Lemon* test. Under a second reading, the endorsement test stresses that the establishment clause should protect an individual's connection to or standing within the political community. At least as applied by O'Connor, however, the endorsement test tends to produce the same results as *Lemon*. For instance, in *Lynch*, O'Connor, concurring in the majority's conclusion, reasoned that the crèche "cannot fairly be understood to convey a message of government endorsement of religion."

Over the next several years, the Court continued to apply the *Lemon* test to resolve most establishment clause issues, but simultaneously, the endorsement test gathered greater support among the justices. In *County of Allegheny v. American Civil Liberties Union*, decided in 1989, the constitutional question of governmental displays of religious symbols once again was explicitly raised. Two separate displays were challenged. The first was a crèche that stood alone on a staircase in a county courthouse. The second was a Jewish Chanukah menorah placed with a Christmas tree and a sign saluting liberty just outside a governmental building. A majority of justices was unable to agree on any one test for determining the constitutionality of these displays. The Court's opinion articulated both the *Lemon* and the endorsement tests while suggesting that the latter refined the former. Yet, a plurality opinion in the same case not only fully accepted the endorsement test but also argued that a majority of justices previously had accepted it, though never in one majority opinion. Finally, Justice Kennedy, concurring and dissenting, advocated that the Court adopt yet a different approach to establishment clause issues. Kennedy's so-called coercion test had two parts: "[G]overnment may not coerce anyone to support or participate in any religion or its exercise; and it may not, in the guise of avoiding hostility or callous indifference, give direct benefits to religion in such a degree that it in fact 'establishes a [state] religion or religious faith, or tends to do so.'"

Allegheny County suggested that the constitutionality of governmental displays of religious symbols would be determined in an ad hoc fashion, with the result depending upon the specific facts of each case. The Court held that the display of the crèche was unconstitutional because it stood alone, unlike the crèche in *Lynch* which had been part of a larger

“Christmas display.” Since the *Allegheny County* crèche stood apart, “nothing in the context of the display detracts from the crèche’s religious message.” Using similar reasoning, the Court then held that the display of the menorah was constitutional because it was accompanied by a Christmas tree and a sign saluting liberty. The religious message of the menorah, the Court reasoned, was dissipated since the menorah stood within the larger holiday display.

Special Situations

Two special situations bear mentioning. First, the Court has acquiesced when nongovernmental actors place religious symbols on governmental property. In *Capitol Square Review and Advisory Board v. Pinette* (1995), the Court held that a private actor, the Ku Klux Klan, could constitutionally display a large Latin (Christian) cross on public property. Second, the Court has been especially wary of any religious activities or symbols in public elementary and secondary schools. In *Stone v. Graham* (1980), the Court considered the constitutionality of a state statute that required the biblical Ten Commandments to be posted on public classroom walls. The Court applied the *Lemon* test. But whereas the *Lynch* Court insisted that a governmental action failed the purpose prong of *Lemon* only if the government was “motivated *wholly* by religious considerations,” the *Stone* Court reasoned otherwise. The legislature in *Stone* had explicitly articulated a secular purpose for the Ten-Commandments statute, yet the Court nonetheless held the statute unconstitutional. The government’s purpose, the Court reasoned, was predominantly to promote religion despite any possible secular justifications.

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References and Further Reading

- Chemerinsky, Erwin. *Constitutional Law: Principles and Policies*. 2nd ed. New York: Aspen Law & Business, 2002.
- Feldman, Stephen M. *Please Don’t Wish Me a Merry Christmas: A Critical History of the Separation of Church and State*. New York: New York University Press, 1997.
- Sullivan, Winnifred Fallers. *Paying the Words Extra: Religious Discourse in the Supreme Court of the United States*. Cambridge, MA: Harvard University Press, 1994.
- Swanson, Wayne R. *The Christ Child Goes to Court*. Philadelphia: Temple University Press, 1990.
- Karst, Kenneth. *The First Amendment, the Politics of Religion and the Symbols of Government*, *Harvard Civil Rights-Civil Liberties Law Review* 27 (1992): 503–30.

Cases and Statutes Cited

- Capitol Square Review and Advisory Board v. Pinette*, 515 U.S. 753 (1995)
- County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573 (1989)
- Lemon v. Kurtzman*, 403 U.S. 602 (1971)
- Lynch v. Donnelly*, 465 U.S. 668 (1984)
- Stone v. Graham*, 449 U.S. 39 (1980)

RELIGIOUS TESTS FOR OFFICE-HOLDING (ARTICLE 6, CL. 3)

Article VI, Clause 3, of the U.S. Constitution says that “no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.” At the Constitutional Convention of 1787, this provision, proposed by Charles Pinckney of South Carolina, had been overwhelmingly approved. Only North Carolina voted no, and the Maryland delegation was divided. Only one delegate, Roger Sherman of Connecticut, objected to it, not because he favored religious tests but because he thought “it unnecessary, the prevailing liberality being a sufficient security against such tests.” In retrospect, Sherman’s assessment of the situation seems too optimistic, for religious tests were then used by most of the states, and the Article VI ban on their use by the federal government turned out to be one of the more controversial provisions in the new Constitution.

Religious tests for holding office had long been part of the Anglo-American tradition. In England they had been used to support the established Anglican Church by prohibiting non-Anglicans from holding office. In American, even after gaining their independence from England, eleven of the thirteen states prescribed such tests. Seven states required most public officials to be Protestants. Three required them to be Christians. Only New York and Virginia had no religious test for holding public office. Catholics and atheists were prohibited from holding office for the same reasons that John Locke had given a century earlier in his “A Letter Concerning Toleration.” The loyalty of Catholics to the American polity was in doubt because they were committed to obeying the Pope, the head of a foreign state. Atheists were suspect because, not believing in God, they had no incentive, it was thought, to keep their word or live virtuous lives. Although during the 1780s some religious groups—Quakers, Moravians, Baptists, Jews, and Catholics—protested religious tests as violations of liberty of conscience, their complaints usually fell on deaf ears.

Given the longstanding and widespread use of religious tests in America, the ban on them in Article VI

of the Constitution was historically unprecedented and truly radical. Not surprisingly, several Anti-Federalist opponents of the Constitution, and even some Federalist defenders, condemned the ban on the grounds that it would allow Catholics, Jews, Muslims, pagans, and/or atheists to hold office. Although the objectors, for the most part, were not political leaders, their objections were expressed so often and widely that a number of leading Federalists, including Oliver Ellsworth of Connecticut, Isaac Backus of Massachusetts, Edmund Randolph of Virginia, and James Iredell of North Carolina, defended the test ban, either in published writings or speeches at state conventions convened to ratify the Constitution. They gave both principled and practical reasons for the ban. The main principle that they emphasized was religious equality. Iredell, for example, said, "This article is calculated to secure universal religious liberty, by putting all sects on a level." Backus emphasized that the ban would prevent any one religion from being established at the national level. Randolph agreed that it "puts all sects on the same footing." The defenders of the ban also argued that as a practical matter a religious test could not prevent a wicked person from holding office, because he would not hesitate to affirm falsely any required religious belief, and, on the other hand, that it would often serve to prevent persons of ability and character from holding office.

In short, the presence of the religious test ban in Article VI engendered a vigorous and thoughtful debate over the meaning of religious liberty, but the debate was decisively won by those who favored the ban. The Constitution, including the ban, was ratified. Although a number of the ratifying conventions proposed amendments to the Constitution, none of them proposed that the ban be removed. After the debate, moreover, between 1789 and 1793, four states abandoned their religious tests for office-holding, and one modified its test to exclude only atheists. By 1798, of the then fifteen states only seven required such tests, and early in the nineteenth century most of them dropped or failed to enforce the tests. Not surprisingly, therefore, a few years after the Constitution was ratified, Mercy Warren, a leading Anti-Federalist, wrote that Americans generally favored "liberty of conscience without religious tests."

In spite of the emerging consensus against religious tests, one issue remained unresolved—whether the Article VI ban was meant to prohibit belief in God as a condition for holding office. Those scholars who believe that early Americans understood religious liberty to mean only no establishment or preference of one religion over others emphasize that the ban in Article VI is immediately preceded by a clause that

says that all government officials "shall be bound by Oath or Affirmation, to support this Constitution...." Moreover, as James Iredell, a defender of the test ban, explained, an oath was universally understood at that time as a "solemn appeal to the Supreme Being, for the truth of what is said, by a person who believes in the existence of a Supreme Being and in a future state of rewards and punishments...." Affirmations were also considered to be religious in nature, for they were authorized to accommodate not atheists but Quakers, Moravians, and Mennonites who believed that the Bible forbids "swearing," but not "affirming," before God. In short, as James Madison admitted, a religious test is implicitly involved in an oath. For this reason, the South Carolina Ratifying Convention proposed, albeit unsuccessfully, that Article VI should be amended to read "no *other* religious test shall ever be required..."

Even if the Article VI ban on religious test was not intended to eliminate laws requiring belief in God as a condition for holding office in the federal government, in 1961 in *Torcaso v. Watkins* the Supreme Court held that such laws violated the freedom of religion guaranteed by the First Amendment.

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References and Further Reading

- Bradley, Gerard V., *The No Religious Test Clause and the Constitution of Religious Liberty: A Machine That Has Gone of Itself*, Case Western Reserve Law Review 37 (1987): 674–747.
- Dreisbach, Daniel, *The Constitution's Forgotten Religion Clauses: Reflections on the Article VI Religious Test Ban*, Journal of Church and State 38 (Spring 1996): 261–95.
- Kramnick, Isaac, and R. Laurence Moore. *The Godless Constitution: The Case Against Religious Correctness*. New York: W.W. Norton, 1996.

Cases and Statutes Cited

Torcaso v. Watkins, 367 U.S. 488 (1961)

See also Baptists in Early America; Non-preferentialism; Quakers and Religious Liberty; Ratification Debate, Civil Liberties in; Religious Liberty under Eighteenth-Century State Constitutions

REMOVAL TO FEDERAL COURT

"Removal" is a federal statutory procedure that allows the *defendant* to transfer a case from state court to federal district court against the plaintiff's wishes, even if she is a civil rights claimant who prefers to remain in state court. Certain specialized kinds

of cases cannot be removed (28 U.S.C., Section 1445); nor is removal available if jurisdiction is based solely on diversity of citizenship and at least one defendant is a citizen of the forum state (Section 1441[b]). The defendant (or all co-defendants) in any other state civil action “of which the district courts of the United States have original jurisdiction” can, within thirty days of receiving the complaint, file a “notice of removal” with the federal district court embracing the place where the action was filed (Section 1441[a]). The notice automatically effects removal and deprives the state court of jurisdiction over the case. The plaintiff can move to “remand” to state court under Section 1447(c) if the notice of removal was untimely (Section 1446) or if the case lies beyond the district court’s jurisdiction. Federal officials sued or prosecuted in state court for acts committed under color of office are also allowed to remove (Section 1442); otherwise, the presence of federal defenses to state law claims or prosecutions is insufficient for removal. Finally, defendants sued or prosecuted in state court without being able to enforce their rights under federal laws providing for racial equality can remove, as can those who are sued or prosecuted in state court for enforcing or following such laws (Section 1443).

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References and Further Reading

- Fallon, Richard H., Daniel J. Meltzer, and David Shapiro. *Hart and Wechsler’s The Federal Courts and the Federal System*. 5th ed. New York: Foundation Press, 2003.
- Irmas, Sydney, and Erwin Chemerinsky. *Federal Jurisdiction*. 4th ed. Boulder, CO: Aspen Publishing, 2003.
- Wright, Charles A., and Mary Kay Kane. *Law of Federal Courts*. 6th ed. St. Paul, MN: West Group, 2002.

Cases and Statutes Cited

28 U.S.C. Sections 1441, 1442, 1443, 1445, 1446, 1447.

See also **Due Process; Jurisdiction of the Federal Courts; State Courts**

RENO v. ACLU, 521 U.S. 844 (1997)

In *Reno v. ACLU*, the Supreme Court struck down two provisions of the 1996 Communication Decency Act (CDA) as violating the First Amendment. The CDA, which was intended to protect children from exposure to harmful material on the Internet, made it a crime punishable by up to two years in prison per offense to knowingly transmit “obscene or indecent” messages to anyone under eighteen years old or to display “patently offensive” materials that depict or

describe “sexual or excretory activities or organs” in a manner that is accessible to anyone under eighteen years old. The CDA exempted from prosecution those who took “good faith, reasonable, effective, and appropriate actions” to restrict minors’ access to prohibited communications and those who required proof of age before allowing access to those communications.

Two lawsuits challenging the constitutionality of the CDA were consolidated before a three-judge panel of the District Court for the Eastern District of Pennsylvania. The court granted the plaintiffs’ motion for a preliminary injunction against the law’s enforcement—except for those provisions prohibiting obscenity and child pornography. The court reasoned that the CDA violated the First Amendment because it was overbroad and violated the Fifth Amendment because it was vague. The government appealed the lower court’s decision directly to the Supreme Court as provided in the CDA’s review provisions.

The Supreme Court’s nine-to-zero decision, authored by Justice John Paul Stevens, affirmed the district court’s judgment on First Amendment grounds, but did not reach the Fifth Amendment question. The Court first distinguished the CDA’s regulation of the Internet from government regulation of other broadcast media. In contrast to the New York statute prohibiting the sale of obscene magazines to minors under seventeen years old that the Court upheld in *Ginsberg v. New York* (1968), the CDA swept too broadly. The CDA interfered with parental authority by restricting a parent’s ability to permit his or her child access to prohibited communications; was not limited to commercial transactions; was not restricted to prohibiting communications that were “utterly without redeeming social importance for minors;” and it applied to minors who were a year closer to the age of majority. In contrast to the Federal Communication Commission’s order sanctioning the radio broadcast of George Carlin’s “Filthy Words” monologue that the Court upheld in *FCC v. Pacifica Foundation* (1978), the CDA applied to a medium that had no history of limited First Amendment protection and imposed criminal sanctions, not civil ones. In contrast to the zoning ordinance restricting adult movie theatres in residential neighborhoods that the Court upheld in *City of Renton v. Playtime Theatres, Inc.* (1986), the CDA was not a “time, place, and manner” regulation because it applied to the entire Internet. Indeed, the Court concluded that those precedents “provide no basis for qualifying the level of First Amendment scrutiny that should be applied to [the internet].” Moreover, the Court held that the Internet was sufficiently different from traditional broadcast media that extensive

government regulation was unwarranted—the Internet has never been subject to government supervision, as have other media; communications over the Internet must be solicited and so are not as invasive as are radio and television transmissions; and the Internet is not a scarce commodity as is the broadcast spectrum.

Having determined that Internet communications are deserving of full First Amendment protection, the Court explained that the two provisions of the CDA were unconstitutional because they were ambiguous and overbroad. The Court declined to consider the plaintiffs' Fifth Amendment challenge to the statute, but concluded that Congress's failure to define the terms "indecent" and "patently offensive" in the CDA raised First Amendment concerns. Indeed, the language of the CDA swept more broadly than the definition of obscenity that the Court adopted in *Miller v. California* (1973). The CDA required neither that patently offensive material be "specifically defined by the applicable state law" nor that indecent materials "lack serious literary, artistic, political, or scientific value." The Court found that the CDA's vagueness was problematic because ambiguous content-based restrictions have a chilling effect on constitutionally protected speech. The fact that the statute carried strict criminal penalties only increased that likelihood. The Court concluded that the "burden [the CDA places] on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve."

Even allowing that government has a legitimate interest in protecting children from harmful materials, the Court found that the CDA was not sufficiently narrowly tailored to that purpose. Given the size of the audience for messages and postings on the Internet, a sender of an indecent or offensive message could be charged with knowing that at least one minor is likely to view their communication. Moreover, since there is currently no technology to allow a sender to prevent minors from accessing communications or to accurately check the age of a message recipient, the only way a sender could be sure to evade the CDA would be to refrain from sending any messages that are arguably indecent or offensive—even to other adults. The Court was not convinced that Congress tried hard enough to find less restrictive alternatives to the "wholly unprecedented" coverage of the CDA.

The Court held that the CDA could not be saved by the fact that it left open alternative channels for communicating indecent or offensive messages, by the fact that the statutory language could be read narrowly by enforcers, or by the government's

contention that the communications prohibited by the CDA would almost always be lacking in scientific, educational, or other redeeming social value. Moreover, the statute's exemption from prosecution for those who attempted to comply with its provisions did not reduce its scope sufficiently to redeem the otherwise unconstitutional law. Finally, the Court held that the CDA's severability clause could only be applied to save its prohibition of obscene speech on the Internet, not to the rest of the statute.

Justices O'Connor and Rehnquist concurred in the judgment and dissented in part. Those justices argued that the Court was right to strike down the CDA as applied to Internet communications between adults, but that the law should have been sustained to the extent that it prohibited indecent communications between an adult and one or more minors.

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References and Further Reading

- Heins, Marjorie. *Not in Front of the Children: "Indecency," Censorship, and the Innocence of Youth*. New York: Hill and Wang, 2001.
- The Supreme Court 1996 Term*, Harvard Law Review 111 (1997): 1:329–39.

Cases and Statutes Cited

- City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986)
- FCC v. Pacifica Foundation*, 438 U.S. 726 (1978)
- Ginsberg v. New York*, 390 U.S. 629 (1968)

RENO, JANET (1938–)

Janet Reno became the first female attorney general of the United States with her appointment to the post in 1993 by newly elected president William Clinton. Having attended Cornell for her undergraduate degree, she later earned a law degree at Harvard—one of sixteen women in a class of over five hundred students—and at the age of thirty-nine, in 1977, she became the first female state attorney of Florida.

Reno took office at the Department of Justice during the third week of vigil by the Federal Bureau of Investigation (FBI) at Waco, Texas. On April 17, 1993, Reno approved an FBI assault on the seventy-acre compound where cult messianic leader David Koresh (also known as Vernon Howell) had been barricaded with around one hundred followers by his side, including several children, for several weeks. When the attack took place on April 19, a fire of controversial origin broke out, and in the aftermath, only nine cult members, all adults, fled the

inferno. The FBI later recovered seventy-five charred bodies, including twenty-five children.

Under FBI Director J. Edgar Hoover's tenure, the bureau had expressly forbid homosexual agents from being hired. While the ban was supposedly dropped in 1979, the institutional bias against gay men and lesbians continued to linger. The FBI policy for screening employees permitted homosexuality to be a determining factor in hiring, retaining, and promoting a federal agent. According to the policy, the bureau argued an agent's hidden homosexuality could invite blackmail, although they did not address the fact that had the Bureau allowed agents to openly acknowledge their homosexuality, they could not have been subjected to potential blackmail. In 1990, agent Frank Buttino, working in San Diego, sued the FBI for firing him. The bureau closed his security clearance when he lied when presented with a copy of a letter sent anonymously to his boss that he had written in response to an advertisement in a gay publication in 1988. His lawsuit expanded into a class action suit on behalf of all gay agents forced to deny or hide their homosexuality because of the bureau's practices. As the trial opened in December 1993, Reno announced the sexual orientation would not longer receive special scrutiny during FBI and Justice Department security checks.

In her first year at Justice, Reno spoke to a Senate Commerce Committee about pending bills to regulate violent programming on network television. Reno testified that the bills were constitutional, and she threatened networks with crackdowns if they did not begin to police themselves. She called television violence a central theme in young people's lives.

In 1996, the U.S. Congress passed the Telecommunications Act of 1996, Title V of which became known as the Communications Decency Act (CDA). Title V made it a federal crime to knowingly transmit by personal computer obscene or indecent communication to anyone under eighteen. Thus, it became a federal crime to send anyone under eighteen years of age any communication in context, in depiction, or in description which could be construed as "patently offensive" by community standards of sexual or excretory activities or organs. The American Civil Liberties Union (ACLU) filed a suit citing the CDA as a violation of the First Amendment. In the 1997 case *Janet Reno, Attorney General of the United States, et al. v. American Civil Liberties Union et al.*, major sections of the CDA were struck down in a seven-to-two decision by the U.S. Supreme Court. One justice likened the regulations imposed by the CDA to burning down a house in order to roast a pig. The Court ruled that government regulation of speech was more likely to interfere with the free exchange

of ideas than encourage it and that, in a democracy, the interest of encouraging the freedom of expression must outweigh any unproven benefits of censorship. Later, the ACLU fought in court to declare the Child Online Protection Act (COPA) illegal. The law banned sending minors web material construed as "harmful to minors." COPA intended to replace the more broadly worded CDA which had been declared unconstitutional in 1998. While COPA did allow websites to distribute pornography, it required websites distributing material "harmful to minors" to verify the adult status of its users in an approved manner. The ACLU argued that COPA violated the free speech clause of the First Amendment.

Reno remained attorney general through President Bill Clinton's second term, stepping down in January 2001 when Republican George Bush assumed the presidency.

MELISSA OOTEN

References and Further Reading

- Anderson, Paul. *Janet Reno: Doing the Right Thing*. New York: J. Wiley, 1994.
Wright, Stuart, ed. *Armageddon in Waco: Critical Perspectives on the Branch Davidian Conflict*. Chicago: University of Chicago Press, 1996.

Cases and Statutes Cited

Janet Reno, Attorney General of the United States, et al. v. American Civil Liberties Union et al., 117 S. Ct. 2329 (1997)

See also *American Civil Liberties Union; Reno v. ACLU*, 521 U.S. 844 (1997); *Strossen, Nadine*

CITY OF RENTON v. PLAYTIME THEATRES, INC., 475 U.S. 41 (1986)

The City of Renton, Washington, using its zoning authority, prohibited adult motion picture theaters from locating within 1,000 feet of any residential zone, church, park, or school. When the ordinance was challenged by Playtime Theatres, the federal district court upheld the constitutionality of the ordinance, relying on *Young v. American Mini Theatres, Inc* (1976) and on *United States v. O'Brien* (1968). The Ninth Circuit Court of Appeals reversed the lower court based on a different interpretation of the four-part test in *O'Brien*. The appellate court concluded Renton improperly relied on studies of other cities to establish the secondary-effects of adult motion picture theaters and thus also failed to establish the

substantial government interest required to justify the ordinance. Finally, Renton's interest appeared to be related to the suppression of protected activity.

The Supreme Court reversed the Court of Appeal by a vote of seven to two with Rehnquist writing the majority opinion, which Burger, White, Powell, Stevens, and O'Connor joined. Blackmun concurred in the result but did not write separately. Brennan's dissent was joined by Marshall.

"In our view," Rehnquist states, "the resolution of this case is largely dictated by our decision in *Young v. American Mini Theatres, Inc.*" As in this earlier case, the Renton ordinance was a content neutral time, place, and manner regulation that served a substantial government interest, preventing the secondary effects of adult motion picture theatres in the city's neighborhoods. The ordinance was not aimed at suppressing free expression but merely the location of the theatres and minimizing their secondary effects. Because the ordinance is content-neutral, only intermediate scrutiny rather than strict scrutiny is required. Moreover, because the ordinance is "narrowly tailored" to affect only specific categories of theaters "shown to produce the unwanted secondary effects," it avoids the flaw of other regulations that were found to be overbroad in *Schad v. Borough of Mount Ephraim* (1981) and *Erznoznik v. City of Jacksonville* (1975).

As for the empirical determination of these effects, which would establish the government's interest in controlling them, Rehnquist declared that Renton's reliance on studies from other cities was appropriate. "The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies ... so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem the city addresses." In 2002, O'Connor, writing for a plurality in *City of Los Angeles v. Alameda Books, Inc.*, specifically reaffirmed Rehnquist's view while deploying more generally the same analytical framework as *Renton v. Playtime Theatres*.

In his dissent, Brennan complained that the Court incorrectly analyzed this case. In particular, the Court sidestepped the issue that Renton's ordinance rests on the content of the expression being regulated by claiming it addresses only the secondary effects of particular kinds of theaters. While secondary effects may provide a compelling reason to regulate the establishments producing them, it does not follow that Renton's regulations are content neutral. For instance, the ordinance does not cover other forms of "adult entertainment," such as bars, massage parlors, or adult bookstores, which indicates Renton's ordinance is "under-inclusive," one of the problems the Court noted in *Erznoznik v. City of Jacksonville*

(1975), but also "cogent evidence" that the ordinance was aimed at the content of films in adult movie theaters.

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References and Further Reading

- Alexander, Donald. *The Politics of Pornography*. Chicago: University of Chicago Press, 1989.
- Hixson, Richard F. *Pornography and the Justices: The Supreme Court and the Intractable Obscenity Problem*. Carbondale: Southern Illinois University Press, 1996.
- Mackey, Thomas C. *Pornography on Trial: A Handbook with Cases, Law, and Documents*. Santa Barbara, CA: 4/21/2006, 2002.

Cases and Statutes Cited

- City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002)
- Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975)
- Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981)
- United States v. O'Brien*, 391 U.S. 367 (1968)
- Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976)

REPORTER'S PRIVILEGE

The reporter's privilege, also known as the journalist shield privilege or the newspaperman's privilege, protects a member of the media from being forced to testify as to the identity of, or information provided by, a confidential source.

Absent a statute or rule to the contrary, a reporter—like any other subpoenaed person—has a legal duty to provide truthful and complete testimony before a court, grand jury, or other governmental entity, notwithstanding an agreement with a third-party to the contrary. In *Branzburg v. Hayes* (1972), a plurality of the Supreme Court held that the First Amendment does not protect a member of the media who has been subpoenaed, in good faith, by a grand jury. The fractured nature of the *Branzburg* opinion has led to uncertainty about the scope of First Amendment protection for reporters with respect to their confidential sources.

Some states have elected, as a matter of public policy, to create a qualified privilege to protect reporters from compelled disclosure as to the identity of, or information provided by, an informer. Statutes are typically limited to information that the reporter received in confidence in his or her professional capacity. Most statutes require disclosure when the information is necessary for a criminal defendant to present his or her case. States with a reporter's privilege include California and New York.

REPORTER'S PRIVILEGE

The reporter's privilege demonstrates the tension between the truth-seeking function of a court or other governmental body and the competing interests of protecting whistleblowers and enabling the media to investigate public and private wrongdoing.

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References and Further Reading

- "Witnesses." In *American Jurisprudence*. Vol. 81, 2nd ed. St. Paul, MN: Thomson/West, 2004.
- Black's Law Dictionary*. 8th ed. St. Paul, MN: West, 2004 (s.v. "privilege," "shield law").
- Eclavea, Romualdo P. "Privilege of Newsgatherer Against Disclosure of Confidential Sources or Information." In *American Law Reports*, 3rd ser. vol. 99, 37–114. St. Paul, MN Thomson/West, 1980.
- Marcus, Paul, *The Reporter's Privilege: An Analysis of the Common Law, Branzburg v. Hayes, and Recent Statutory Developments*, Arizona Law Review 25 (1984): 4:815–67.
- New York Consolidated Laws Service, Civil Rights Law*, vol. 40, section 79-h. Matthew Bender 2001 and 2005 supp.

Cases and Statutes Cited

Branzburg v. Hayes, 408 U.S. 665 (1972)

California Evidence Code, Section 1070

See also **Free Press/Fair Trial; Freedom of Speech and Press: Nineteenth Century; Freedom of the Press: Modern Period, (1917–Present); Media Access to Information; Press Clause (I): Framing and History from Colonial Period up to Early National Period; Subpoenas to Reporters**

REPRODUCTIVE FREEDOM

Sterilization and Contraception

The Supreme Court's constitutional treatment of reproduction has addressed rights to have children as well as rights not to. State-sponsored involuntary sterilization in the early 1900s received constitutional approval in *Buck v. Bell* (1927), in which the Supreme Court sustained Virginia's sterilization of Carrie Buck who, like her mother and grandmother, had been officially deemed "feeble minded." Justice Holmes notoriously quipped in his opinion that "three generations of imbeciles are enough." In *Skinner v. Oklahoma* (1942), however, the Court invalidated involuntary sterilization of "habitual criminals" because the

law arbitrarily exempted certain white-collar crimes. Without expressly overruling *Buck*, the *Skinner* Court recognized the "right to have offspring" as "a sensitive and important area of human rights," and described marriage and procreation as "basic civil rights of man."

Contraceptive devices have been legally available in most of the United States since the 1930s, and by the time the Supreme Court decided *Griswold v. Connecticut* (1965), Connecticut and Massachusetts were the only states with criminal bans on contraceptives. Connecticut prosecuted Planned Parenthood staff for providing contraceptives to married couples, and the defendants in *Griswold* successfully challenged the ban. The Court recognized a "right of privacy older than the bill of rights" protecting married couples' use of contraceptives. *Griswold* located the privacy right in various constitutional provisions, including the First, Third, Fourth, Fifth, and Ninth Amendments, which it held created "zones of privacy" in their "penumbras, formed by emanations from those guarantees that help give them life and substance." In *Eisenstadt v. Baird* (1972), the Court extended contraceptive rights to unmarried persons, recasting the analysis in terms of women's fundamental autonomy rights: "If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."

The Key Abortion Cases: *Roe*, *Webster*, *Casey*, and *Stenberg*

The Supreme Court first recognized a fundamental constitutional right to an abortion in *Roe v. Wade* (1973). Justice Blackmun, writing for a seven-member majority, struck down an 1854 Texas law that prohibited abortion except when it was necessary to save the mother's life. In the companion case, *Doe v. Bolton* (1973), the same majority invalidated Georgia's abortion reform law, modeled on the American Law Institute's Model Penal Code, which provided exceptions for cases of rape or incest, serious fetal deformity, or to protect the mother's health or life. The Court held that a privacy right "founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action ... is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." The Court noted the broad medical, philosophical and theological disagreement on the "difficult question of when life begins," and so declined to resolve it in any categorical manner. Laws

prohibiting abortion infringe a woman's fundamental rights, the Court explained, in part because "[m]aternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child."

Roe's abortion right, however, was "not unqualified" and the Court held that it "must be considered against important state interests in regulations." As a pregnancy progresses, the Court held, two state interests become sufficiently compelling to justify narrowly drawn regulations: (1) protecting the life and health of the mother, and (2) protecting potential life. The Court explained the impact of those interests on the abortion right in terms of the medically current "trimester" framework. Under *Roe*, a State's interest in the woman's health and life could support regulation of abortion after the first trimester (approximately twelve weeks), and by the third trimester (starting at approximately twenty-four to twenty-eight weeks) a state could regulate to protect fetal life, provided that, if fetal and maternal interests conflict, the woman's freedom to choose to protect her own health and life remained paramount. The two dissenters in *Roe* would have left the issue to be resolved by state legislation, subject only to highly deferential judicial review.

Even though *Roe* recognized a fundamental constitutional right to abortion protected by strict constitutional scrutiny, the right has never been made fully effective for poor women. The Court in several cases, including *Maher v. Roe* (1977) and *Harris v. McRae* (1980), has consistently upheld governmental health care funding schemes that pay poor women's childbirth expenses while denying funding for even medically necessary abortions. The Court reasoned that it is women's own indigence, as opposed to limits on government funding, which makes abortion inaccessible to poor women. Critics of the funding decisions contend that abortion generally is less costly than childbirth, and that it is inconsistent with women's reproductive rights to use government funds with the purpose and effect of pressuring women where the Constitution ostensibly protects their freedom to decide.

Government remains free to use its resources to discourage the exercise of the abortion right first announced in *Roe*, yet generations of women have come to rely on that right as a cornerstone of our ability to plan and control the most important aspects of our lives, and to participate fully in public as well as family life. *Roe* has, however, been the subject of prolonged and heated debate, and has become a defining and polarizing issue in national politics.

Opponents criticize *Roe* as lacking adequate bases in the Constitution's text or history, as illegitimately displacing the legislative authority of the States, and even as countenancing murder. At their most extreme, antiabortion activists have hindered abortions through harassment, obstruction, and assault of providers and patients, and even bombings of abortion clinics and murders of abortion providers. *Roe's* supporters contend that the Court has uncontroversially protected many individual rights not spelled out in the Constitution, and that *Roe* followed logically from previous cases recognizing a right to privacy in reproductive autonomy. They also emphasize that reproductive choice is key to women's liberty and equality, and that such a basic right must not be left to the vagaries of majoritarian politics. Even supporters of abortion rights, however, have not been entirely uncritical of *Roe*, viewing it, for example, as overly solicitous of the judgments of medical doctors as opposed to pregnant women themselves, and faulting its failure adequately to ground the right in equality as well as autonomy, or for taking the wind out of the sails of a broad-based political mobilization in support of abortion rights that some claim would have made the right available to women across the country in due time.

As the abortion debate continued, the composition of the Court was changing. With three new justices on the Court, President Ronald Reagan's lawyers joined the State of Missouri in *Webster v. Reproductive Health Services* (1989), to urge the Supreme Court to overrule *Roe*. In a set of fractured opinions, the Court upheld Missouri's law declaring that life begins at conception, restricting public funding for abortions, and requiring viability testing. Four justices expressed their willingness to overturn *Roe*. Justice O'Connor provided the fifth vote, but read Missouri's restrictions narrowly so as to comport with *Roe*, and concluded that "there is no necessity to accept the state's invitation to reexamine the constitutional validity of *Roe*." The four dissenters noted that the abortion right remained intact "for today," but expressed "fear for the future," and warned that "the signs are evident and very ominous, and a chill wind blows."

By the early 1990s, with two new justices appointed by the first President Bush, commentators speculated that there might be a fifth vote to overturn *Roe*. In *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992), the Bush administration urged the Court to overrule *Roe*. In an unusual move, however, three justices—O'Connor, Kennedy, and Souter—jointly authored an opinion (also joined by Justices Blackmun and Stevens) that reaffirmed *Roe's* pre-viability abortion right, albeit with a less stringent level

of constitutional protection. The Court held that “the essential holding of *Roe v. Wade* should be retained and once again reaffirmed.” The majority emphasized the importance of *stare decisis*, declaring at the outset that “liberty finds no refuge in a jurisprudence of doubt,” and decrying the fact that “19 years after our holding [in *Roe*] that the Constitution protects a woman’s right to terminate her pregnancy in its early stages ... that definition of liberty is still questioned.”

While preserving *Roe*’s core, however, *Casey* reformulated and narrowed the abortion right. The plurality scrapped the trimester framework and no longer applied traditional fundamental-rights analysis. It instead focused on the viability line, and replaced strict scrutiny with an “undue burden” standard that gave states more leeway to regulate. A state regulation that “has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus” would, under the Court’s definition, pose an undue burden. Justices Blackmun and Stevens, concurring in the judgment, would have reaffirmed *Roe*’s trimester framework and fundamental right approach.

The decrease in constitutional protection for abortion rights under the undue burden standard was immediately apparent. The Court under *Roe* had consistently invalidated mandatory waiting periods on the ground that they render abortions more costly and delay them for women who must arrange time off from school or work, who must travel, or who face harassment or opposition. It had also consistently struck down laws requiring that specific, abortion-discouraging information be provided as part of “informed consent.” *Casey*, however, upheld a biased counseling provision and a mandatory twenty-four-hour delay.

At the same time the Court in *Casey*, as it had under *Roe*, struck down a requirement that women notify their husbands prior to getting an abortion, even while it upheld a parental-consent requirement. The plurality noted that the vast majority of married women voluntarily tell their husbands when they become pregnant, but also acknowledged that domestic violence is widespread and is often triggered by news of an unplanned pregnancy, such that the subgroup of women affected by the notice requirement (that is, those who would not otherwise tell their husbands) is unduly burdened by it. The Court continued to recognize, as it had under *Roe*, that when spousal preferences conflict, women must be permitted to make their own choices about their bodies. The Court upheld the parental consent requirement, however, because the statute excepted cases of medical emergency, and provided for a “judicial bypass”—a procedure by which a court may authorize an abortion

for a pregnant minor when it finds her mature enough to make the decision, or that an abortion would be in her best interests. The Court’s decision to sustain a requirement of parental involvement even while it invalidated a spousal-involvement provision recognized that states validly may reinforce parents’ authority over children, but may not “give a man dominion over his wife.”

Chief Justice Rehnquist, and Justices Scalia, White, and Thomas concurred in the judgment in *Casey* to the extent that it sustained the abortion regulations, and dissented from invalidation of the spousal notice rule. These four justices would have applied rational-basis review. They would have distinguished abortion from the constitutionally fundamental rights of marriage, procreation and contraception on the basis that abortion involves termination of a potential life.

The “undue burden” standard has been criticized as unclear. Indeed, while the majority saw itself as embracing *Roe*’s “essential holding,” Chief Justice Rehnquist characterized the plurality as having retained only “the outer shell” of *Roe* while “beat[ing] a wholesale retreat from the substance of that case.” Some *Roe* supporters agreed. The following decade yielded little Supreme Court guidance on *Casey*’s application, with President Clinton appointing two Justices to replace Justices Blackmun and White, and the Court deciding only one additional abortion case.

Stenberg v. Carhart (2000), invalidated Nebraska’s effort to criminalize an abortion method except where the procedure was necessary to save a woman’s life. The so-called “partial birth abortion” law barred “deliberately and intentionally delivering into the vagina a living unborn child, or a substantial portion thereof, for the purpose of performing a procedure that the person performing such procedure knows will kill the unborn child and does kill the unborn child.” As Justice Ginsburg saw it, Nebraska’s law, which neither protects women’s health nor saves any fetus from destruction, was enacted “because the State legislators wish to chip away at the private choice shielded in *Roe v. Wade*.” The Court struck it down for want of a health exception, which rendered it an undue burden on women’s reproductive rights. The Court also held that the law was unconstitutional because its prohibition was written so broadly that it would have prohibited abortions using the most common method of previability second-trimester abortions, used as early as twelve weeks of pregnancy, called the dilation and evacuation (D&E) method, in addition to a variation of the D&E sometimes referred to as intact D&E, or dilation and extraction (D&X).

Whereas *Casey* was a six-to-three decision, *Stenberg* was five to four, and the difference between the opinions of Justice O'Connor, concurring, and Justice Kennedy, dissenting, may illuminate the degree to which abortion rights jurisprudence stands to shift in light of Justice O'Connor's resignation. Justice O'Connor in *Stenberg* focused on women's right to a health exception and doctors' need for clear statutory guidance. Justice Kennedy, in contrast, rejected the lower courts' factual findings that intact D&E is sometimes necessary to protect a woman's health. Eschewing what he viewed as too neutral clinical language, Justice Kennedy took pains to describe in vivid detail both the D&E and intact D&E procedures, apparently viewing both procedures as morally reprehensible even if, in the case of D&E, constitutionally protected under the Court's precedents. The other three dissenting justices persisted in their conviction that *Roe* should be overruled and abortion regulation broadly permitted.

Current Law and Future Directions

The states have continued to enact abortion regulations, many of which are subject to constitutional challenge. Common types of laws impose mandatory delay and biased counseling laws, parental involvement requirements, record-keeping and reporting mandates, special medical procedure regulations, public funding restrictions, and bans (including a federal ban) on procedures, like that at issue in *Stenberg*. These various types of abortion restrictions have simultaneously discouraged doctors from providing abortions and intensified the burdens on women seeking them. Those burdens are especially acute for women who are young or poor, or who face domestic abuse. For many women, the need for repeated trips to clinics or hospitals that are fewer and farther between, and whose services are more costly and elaborate, delays and hampers abortions and may even make them unavailable as a practical matter. Some states have only one doctor willing to perform abortions. Meanwhile, bills in Congress propose to restrict underage women's ability to obtain abortions outside their home states.

Legal restrictions on reproductive choice reach beyond the abortion procedure itself. In many states, women have been criminally prosecuted for neglect or even manslaughter if they consumed alcohol or controlled substances while pregnant; South Carolina is, however, the only state whose high court has thus far upheld such a prosecution. The federal Unborn Victims of Violence Act treats crimes against

pregnant women as crimes against two people—the woman and the fetus—thereby expressly conferring personhood on a fetus. Laws in several states now grant “conscience rights” to pharmacists and health care providers to refuse to facilitate abortions or even to fill prescriptions for contraceptives if they personally are opposed to such practices. Other states have responded by enacting laws to protect women's access to prescription medication notwithstanding the beliefs of individual personnel within the health care system.

Meanwhile, women have lobbied for state laws and brought federal sex discrimination lawsuits seeking “contraceptive equity,” that is, to require that health insurers cover prescription contraception (which thus far has only been developed for women) in otherwise comprehensive plans that typically pay for male-only medications such as Viagra. Medical development of emergency contraception, or “Plan B,” which a woman can take in the privacy of her own home, has the potential to facilitate reproductive choice for women. The Food and Drug Administration (FDA), however, under political pressure from the religious right, has denied approval for over-the-counter sales of emergency contraception. Another drug that has facilitated reproductive choice, the early-abortion pill, mifepristone, or RU-486, was approved by the FDA in 2000 for prescription use.

Accurate health education can help to make abortion less necessary by teaching teens about reproduction and birth control; such education has, however, been vigorously opposed by the religious right, leaving some states requiring uninformative, “abstinence only” programs. Social support for parenting also can make childbirth a tenable choice, even for women with unplanned pregnancies, by ameliorating the conflicts between women's autonomy and well-being and the demands of caring for children. Fathers' willingness to share equally in childrearing; government child-support enforcement, family leave entitlements, and parental tax benefits; employers offering flex-time, flex-place, and part-time jobs with benefits; and programs providing affordable childcare and extended-day school programs, all have potential to ease parenting burdens. Federal, state, and private sector support for such measures remains equivocal.

As of this writing, the second President Bush has appointed two additional justices, one of them replacing the moderately pro-choice Justice O'Connor, speculation about the fate of women's reproductive choice has again intensified. Most commentators agree that, whether the Court overrules *Roe* altogether or continues to cut it back incrementally, the Supreme Court will limit abortion rights increasingly in the years to come. One issue of fundamental

importance will be whether the Court leaves reproductive rights up to Congress and to the states, under their own constitutions and laws, or whether, alternatively, the Court will announce a fundamental fetal right to life, which could foreclose recognition of abortion rights even by the states or the political process.

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References and Further Reading

- Balkin, Jack M., ed. *What Roe Should Have Said*. New York: New York University Press, 2005.
- Bradford, C. Steven, *What Happens If Roe Is Overruled? Extraterritorial Regulation of Abortion by the States*, *Arizona Law Review* 35 (1993): 87.
- Cherry, April L., *Roe's Legacy: The Nonconsensual Medical Treatment of Pregnant Women and Implications for Citizenship*, *University of Pennsylvania Journal of Constitutional Law* 6 (2004): 723.
- Ely, John Hart, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, *Yale Law Journal* 82 (1973): 920.
- Ginsburg, Ruth Bader, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, *North Carolina Law Review* 63 (1985): 375.
- McDonagh, Eileen, *Breaking the Abortion Deadlock: From Choice to Consent*. New York: Oxford University Press, 1996.
- Noonan, John, Jr., *The Root and Branch of Roe v. Wade*, *Nebraska Law Review* 63 (1984): 668.
- Olsen, Frances, *Unraveling Compromise*, *Harvard Law Review* 103 (1989): 105.
- Siegel, Reva B., *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, *Stanford Law Review* 44 (1992): 261.
- Thompson, Judith Jarvis. "A Defense of Abortion." *Philosophy and Public Affairs* 1 (1971): 47.
- Tribe, Laurence H. *Abortion: The Clash of Absolutes*. New York: Norton, 1990.
- Williams, Joan C., and Shauna L. Shames, *Mothers' Dreams: Abortion and the High Price of Motherhood*, *University of Pennsylvania Journal of Constitutional Law* 6 (2004): 818.

Cases and Statutes Cited

- Buck v. Bell*, 274 U.S. 200 (1927)
- Doe v. Bolton*, 410 U.S. 179 (1973)
- Eisenstadt v. Baird*, 405 U.S. 438 (1972)
- Griswold v. Connecticut*, 381 U.S. 479 (1965)
- Harris v. McRae*, 448 U.S. 297 (1980)
- Maier v. Roe*, 432 U.S. 464 (1977)
- Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992)
- Roe v. Wade*, 410 U.S. 113 (1973)
- Skinner v. Oklahoma*, 316 U.S. 535 (1942)
- Stenberg v. Carhart*, 530 U.S. 914 (2000)
- Webster v. Reproductive Health Services*, 452 U.S. 450 (1989)

See also *Buck v. Bell*, 274 U.S. 200 (1927); *Doe v. Bolton*, 410 U.S. 179 (1973); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479

(1965); *Harris v. McRae*, 448 U.S. 297 (1980); *Maier v. Roe*, 432 U.S. 464 (1977); *Privacy; Planned Parenthood v. Casey*, 112 S.Ct. 2791 (1992); *Roe v. Wade*, 410 U.S. 113 (1973); *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Stenberg v. Carhart*, 530 U.S. 914 (2000); *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989)

RESTRICTING ACTIONS OF LEGAL SERVICES LAWYERS

In 1974, Congress created the Legal Services Corporation (LSC) through the Legal Services Corporation Act. The LSC's purpose is to fund nonprofit organizations allowing them to serve indigent people in legal matters.

Since its creation, the LSC prevented grantees from providing certain legal services. These initial restrictions included the prohibition of legal assistance in fee-generating cases, criminal cases, certain abortion matters, desegregation of elementary or secondary schools, and proceedings involving violations of the Selective Service Act.

In 1996, Congress included new restrictions preventing LSC grantees from providing service to several populations. The 1996 prohibitions included class action lawsuits, attorney's fees collection, representation of certain immigrants, representation of incarcerated persons, representation of people evicted from public housing because of drug-related activity, and challenges to laws related to welfare reform.

The LSC would allow restricted services only if non-LSC funds were used and activities were conducted in separate facilities with separate leadership and separate staff using separate equipment.

LSC grantees challenged the 1996 restrictions on First Amendment grounds. In 2001, the U.S. Supreme Court affirmed a circuit court ruling that upheld most of the restrictions. A provision that precluded lawyers from challenging welfare laws during representation in a denial of benefits case was ruled as impermissible viewpoint discrimination.

In 2004, the U.S. District Court, Eastern District of New York, ordered a preliminary injunction preventing the LSC from requiring grantees using non-LSC funds to maintain separate offices for restricted activities. The injunction was granted because the separation requirement was an undue burden on free speech.

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Cases and Statutes Cited

- Velazquez v. Legal Services Corporation*, 164 F.3d 757 (2d Cir. 1998)

Velazquez v. Legal Services Corporation, 531 U.S. 533 (2001)

Velazquez v. Legal Services Corporation, 349 F.Supp. 2d 566 (E.D.N.Y. 2004)

Legal Services Corporation Act, 42 U.S.C., Section 2996 et seq.

Regulations Governing the Legal Services Corporation, 45 C.F.R. Part 1600 to 1644

Restrictions on LSC Grantees, 42 U.S.C., Section 2996f

See also Viewpoint Discrimination in Free Speech Cases

RESTRICTIVE COVENANTS

The term “covenant” has various meanings, but for purposes of this entry the term refers to a promise to do or not to do something with regard to real property. The covenant might at a later point be seen as infringing upon one’s constitutionally protected rights and liberties. A covenant requiring that a property be used only for residential purposes, for example, could be seen as a limitation on the religious freedom of somebody hoping to operate a church on the premises. A covenant prohibiting signage might seem an interference with freedom of speech and expression. In general, courts have been unreceptive to these arguments if the parties knowingly and willingly entered into the covenant or knew of the covenant when purchasing the property.

At present, only restrictive covenants barring the sale or rental of property to members of a given race routinely meet with judicial disapproval. After courts ruled in the late nineteenth century that the states could not by law prevent members of a race from living in one area or another, private racially restrictive covenants of this sort became *the* most common variety of real property covenant in America. African Americans were the most likely to be excluded as renters and buyers from certain neighborhoods and even whole towns, but in California and elsewhere covenants were also directed against Jews, Mexicans, Puerto Ricans, Hawaiians, Chinese, Japanese, and Filipinos. The Supreme Court found such covenants unconstitutional in *Shelley v. Kraemer* (1948), stating that the enforcement of such covenants by courts would be a denial of the equal protection of the law guaranteed by the Fourteenth Amendment. Subsequent litigants argued that, even though courts could not enforce a covenant, private parties could sue one another for damages derived from breach of a restrictive covenant. The Supreme Court rejected this argument in *Barrows v. Jackson* (1953). Since then, restrictive covenants have ceased to be used, but their earlier use played a major role in keeping minorities

RETAINED RIGHTS (NINTH AMENDMENT)

out of certain communities and enabling those communities to remain entirely white.

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References and Further Reading

Allen, Francis A., *Remembering Shelley v. Kraemer*, Washington University Law Quarterly 67 (1989): 709–35.

Cases and Statutes Cited

Barrows v. Jackson, 346 U.S. 249 (1953)

Shelley v. Kraemer, 334 U.S. 1 (1948)

See also Buchanan v. Warley, 245 U.S. 60 (1917); *Vinson Court*

RETAINED RIGHTS (NINTH AMENDMENT)

The term “retained” rights appears once in the Constitution in the Ninth Amendment, which reads: “The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.” The historical evidence shows that the term referred to natural or inherent rights—what today might be called “human rights”—and that, in this context, natural rights were “liberty rights,” as opposed to positive claims on government. The Ninth Amendment mandates that these liberty rights not be disparaged or denied, thereby strongly suggesting they be treated in the same manner as those rights that were enumerated.

Retained Rights Equals Natural Rights

When explaining to the House of Representatives the nature of the various rights contained in the amendments he proposed be made to the text, Representative James Madison stated that “[i]n [some] instances, they specify rights which are retained when particular powers are given up to be exercised by the Legislature.” Madison’s notes for this part of his speech read: “Contents of Bill of Rhts.... 3. Natural rights retained as speach [sic].” For Madison, then, even some of the rights enumerated in the Bill of Rights, such as the freedom of speech, were “retained” or natural rights. Additional evidence that the term “retained” rights referred to natural rights can be found in the deliberations of the select committee that the House of Representatives appointed to draft amendments to the Constitution. A draft bill of rights

authored by Madison's fellow committee member Roger Sherman began as follows: "The people have certain natural rights which are retained by them when they enter into Society...." Understanding exactly why the Ninth Amendment was included in the Constitution will further help to establish what was meant by the natural rights "retained by the people."

Natural Rights Equals Liberty Rights

When Anti-Federalist opponents of the proposed constitution objected that it lacked a bill of rights, its Federalist defenders argued vociferously that any effort to enumerate rights would be dangerous because the rights of the people were *literally* boundless. James Wilson, a member of the constitutional convention and the first professor of law at the University of Pennsylvania, was an ardent adherent to natural rights. Nevertheless, when defending the Constitution against those who complained about the absence of a bill of rights, Wilson explained, "[T]here are very few who understand the whole of these rights." None of the classical natural rights theorists, he said, claim to provide "a complete enumeration of rights appertaining to the people as men and as citizens.... Enumerate all the rights of men! I am sure, sir, that no gentleman in the late Convention would have attempted such a thing." And before the Pennsylvania ratification convention, Wilson observed:

In all societies, there are many powers and rights, which cannot be particularly enumerated. A bill of rights annexed to a constitution is an enumeration of the powers reserved. If we attempt an enumeration, everything that is not enumerated is presumed to be given. The consequence is, that an imperfect enumeration would throw all implied power into the scale of the government; and the rights of the people would be rendered incomplete.

The same argument was made by Charles Pinckney in the South Carolina House of Representatives:

[W]e had no bill of rights inserted in our Constitution: for, as we might perhaps have omitted the enumeration of some of our rights, it might hereafter be said we had delegated to the general government a power to take away such of our rights as we had not enumerated.

Future Supreme Court Justice James Iredell told the North Carolina ratification convention: "Let any one make what collection or enumeration of rights he pleases, I will immediately mention twenty or thirty more rights not contained in it."

What conception of rights explains all these statements? The claim that natural rights are unenumerable

and dangerous to enumerate makes complete sense if the terms "inherent rights" or "natural rights" are used as a kind of synonym for "liberties." The term "retained" rights itself supports the view that natural rights are liberty rights. For these are rights that people have against each other *before* they form a government; they are not the "positive" rights created by government. That "natural rights" was synonymous with "liberties" is exemplified in the official letter to Congress by the members of the Constitutional Convention who wrote that "[i]ndividuals entering into society must give up a share of *liberty* to preserve the rest.... It is at all times difficult to draw with precision the line between those *rights* which must be surrendered, and those which may be reserved." Others also used the terms interchangeably. In a speech to the Connecticut ratification convention, Oliver Wolcott observed: "What is government itself but a restraint upon the *natural rights* of the people? What constitution was ever devised that did not operate as a restraint on their *original liberties*?" (all emphases added).

Understanding natural rights as liberty rights explains their unbounded nature. For the founders, natural rights define a private domain within which persons may do as they please, provided their conduct does not encroach upon the rightful domain of others. As long as their actions remain within this domain, other persons—including government officials—should not interfere without a compelling justification. Because people have a right to do whatever they please within the boundaries defined by natural rights, the rights retained by the people are limited only by their imagination and could never be completely specified or enumerated.

To be clear, not all constitutional rights are liberty rights. Without question, the Constitution creates positive rights and imposes on the government enforceable duties to respect these rights. But the "rights ... retained by the people" to which the Ninth Amendment refers are liberty rights.

The Ninth Amendment's Protection of Retained Rights

When Anti-Federalists objected to the absence of a bill of rights, Federalists responded, not only that enumerating certain rights would be dangerous because the rights or liberties of the people were unenumerable and any rights that would be omitted would be rendered insecure, but also that a bill of rights was unnecessary because the Congress was had only limited powers. "Why, for instance," asked Hamilton, "should it be said that the liberty of the press shall not

be restrained, when no power is given by which restrictions may be imposed?" Nevertheless, the Federalists were forced to promise a bill of rights to obtain enough support for ratification.

When James Madison sought to honor this commitment in the first Congress, he needed to solve the difficulty that Federalists had asserted just two years earlier. Here is how Madison stated the problem when he introduced his proposed amendments to the House:

It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow, by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure. This is one of the most plausible arguments I have ever heard urged against the admission of a bill of rights into this system; but I conceive, that it may be guarded against.

Madison then referred his colleagues to the portion of his proposal that read:

The exceptions here or elsewhere in the constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people, or as to enlarge the powers delegated by the constitution; but either as actual limitations of such powers, or as inserted merely for greater caution.

Madison's placement of this provision is revealing. He proposed putting it at the end of the list of specific individual rights which he proposed be inserted in Article 1, Section 9 immediately after the two individual rights already listed there—the rights of habeas corpus and the rights against bills of attainder and ex post facto laws—but before the other prohibitions of government power listed in Section 9 that are not easily conceived as individual rights, such as the prohibition on granting titles of nobility. This placement suggests that “retained” rights refers to the same sorts of individual liberty rights that were explicitly enumerated in the constitution and this injunction was on a par with the other provisions in that section.

The wording of the original proposal also conveys information about the nature of both enumerated and unenumerated rights. Due to his tendency to run parallel ideas together in a single sentence, Madison's original proposal is a bit difficult to follow. When disentangled, it shows that the rights enumerated in the Bill of Rights were of at least two kinds. First were those rights that provided additional or “actual limitations” on the delegated powers beyond those that already existed. For example, prior to its amendment, the Constitution did not require jury trials in civil

cases. In his speech to the House, Madison categorized these actual limitations as “positive rights” and gave the example of trial by jury. Second were those rights that were enumerated “merely for greater caution.” As Madison explained, these refer to “those rights which are retained when particular powers are given up to be exercised by the Legislature.”

Therefore, from how Madison used the term “retained” rights, we know that the “other” unenumerated rights “retained by the people” mentioned in the Ninth Amendment fall into the second category of his original proposal. They are the natural rights “which are retained when particular powers are given up to be exercised by the Legislature.” A very few of these rights were included in the Bill of Rights “for greater caution” but most were left unenumerated.

Madison's speech to the House also clarifies that constitutional rights, whether enumerated or unenumerated, can limit both the *ends* of government and also the *means* by which the legitimate ends of government are executed. As Madison explained (in another sentence combining parallel ideas), “the great object in view is to limit and qualify the powers of Government, by excepting out of the grant of power those cases in which the Government ought not to act, or to act only in a particular mode.” Disentangling this passage, we find that *ends* constraints “*limit ... the powers of Government*” by specifying when “the Government *ought not to act*.” *Means* constraints “*qualify the powers of Government*” by specifying when “Government ought ... to *act only in a particular mode*.”

In addition to placing “actual” or *additional* limits on the means by which government can accomplish its legitimate ends, constitutional rights provide a “redundant” or cautionary safeguard in the event that delegated powers of government are given an overly expansive interpretation. Constitutional rights help hold government to its legitimate enumerated ends in two ways. Rights can prevent the adoption of an expansive interpretation of enumerated powers in the first instance. Failing this, once a power has been expansively interpreted, the direct judicial protection of enumerated and unenumerated rights hold government within some limits.

Madison's Use of the Ninth Amendment

Madison himself used the Ninth Amendment to check an expansive construction of necessary and proper clause during the debate over the constitutionality of the national bank. Near the end of his speech he observed: “The latitude of interpretation required by

the bill is condemned by the rule furnished by the Constitution itself.” As one authority for this “rule” of interpretation, Madison cited the Ninth Amendment (then pending ratification as the Eleventh Amendment):

The explanatory amendments proposed by Congress themselves, at least, would be good authority with them; all these renunciations of power proceeded on a rule of construction, excluding the latitude now contended for.... He read several of the articles proposed, remarking particularly on the 11th [the Ninth Amendment] and 12th [the Tenth Amendment], *the former, as guarding against a latitude of interpretation*; the latter, as excluding every source or power not within the Constitution itself. (Emphasis added)

Thus, for Madison, the Ninth and Tenth Amendments each played distinct roles. The Tenth Amendment is authority for the claim that Congress could only exercise a delegated power. The exercise of a power not there, he said, “involves the guilt of usurpation.” In contrast, Madison viewed the Ninth Amendment as preventing providing a loose construction of these powers when legislation affected the rights retained by the people. Even “if the power were in the Constitution, the immediate exercise of it cannot be essential.”

Three years later, in 1794, Madison would again argue in Congress that the unenumerated rights retained by the people directly constrained congressional power. When Congress sought to censure the activities of certain self-created societies for their participation in the Whiskey Rebellion earlier that year, Madison contended that: “When the people have formed a Constitution, they retain those rights which they have not expressly delegated.” Here Madison was asserting that the unenumerated retained right to hold opinions constrained the power of Congress to issue a censure, in the same manner as “the liberty of speech, and of the press.” Indeed, “the censorial power is in the people over the Government, and not in the Government over the people.” Strong words on behalf of supporters of insurrection.

The uses of the Ninth Amendment by its author, James Madison, show that, like the few natural rights that were enumerated, the unenumerated rights retained by the people provide a twofold check on government power. Their existence argues against a latitudinarian interpretation of enumerated powers when those powers are used to restrict the liberties of the people; and the direct protection of the liberties of the people also reinforces limits on both the ends of government and the means by which these ends can legitimately be pursued.

The Equal Treatment of Retained Rights

The Ninth Amendment does not merely refer to these “retained” unenumerated natural rights and affirm their existence; it also mandates how they are to be treated: they are not to be “denied or disparaged.” On its face, this wording compels the conclusion that enumerated and unenumerated liberties are to be treated equally. To the degree that enumerated rights receive protection from Congress, so too should those that were left unenumerated. In contrast, today the Supreme Court employs a “presumption of constitutionality” toward all legislation except that which infringes upon some, but not all, of the enumerated rights and a few unenumerated rights the Court has deemed to be “fundamental.” Unless a fundamental liberty is violated, the benefit of the doubt goes to the government. This approach violates the Ninth Amendment’s mandate to equally protect of all liberties, whether enumerated or unenumerated.

It must be remembered that, like the rest of the Bill of Rights, the Ninth Amendment originally applied only to the federal government. For many reasons, including the existence of slavery, Congress and the federal courts were given only very limited powers in the Constitution to protect the liberties of citizens from infringement by their own state governments. The Fourteenth Amendment changed all this. In the privileges or immunities clause we find the jurisdiction of the federal government expanded to protect from infringement by states the very same natural liberty rights referred to in the Ninth Amendment as well as other positive rights created by the Constitution itself.

Both of these now ignored protections of retained rights could be implemented by adopting a presumption of liberty that would afford the benefit of the doubt to any rightful exercise of liberty by an individual and place the burden on the government to show its restriction is both necessary and proper. How such a doctrine might work is suggested by the Supreme Court’s decision in *Lawrence v. Texas* (2003), striking down a state statute criminalizing homosexual “sodomy” under the Fourteenth Amendment. Texas’s sole justification for its prohibition was that the conduct in question was “immoral.” The Court in *Lawrence* found this justification inadequate because the actions banned neither harmed others, nor took place in the public sphere where government must balance competing uses by different citizens. Justice Kennedy’s opinion in *Lawrence* is especially noteworthy because it protected *liberty*, rather than privacy, without any discussion of whether that liberty was “fundamental.” Having identified the conduct as “liberty,” it then placed the burden on the government to justify its

restriction. Because, it was unable to do so, the statute was stricken and the retained rights of same-sex couples was protected.

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References and Further Reading

- Barnett, Randy E., ed. *The Rights Retained by the People: The History and Meaning of the Ninth Amendment*. Fairfax, VA: George Mason University Press, 1989 (vol. 1), 1993 (vol. 2).
- . *Restoring the Lost Constitution: The Presumption of Liberty*. Princeton, NJ: Princeton University Press, 2004.
- Massey, Calvin R. *Silent Rights: The Ninth Amendment and the Constitution's Unenumerated Rights*. Philadelphia: Temple University Press, 1995.

Cases and Statutes Cited

Lawrence v. Texas, 123 S.Ct. 2472 (2003)

RETRIBUTION

Retribution—literally “pay back”—persists as punishment’s essential measure, justification, *and* limit. Naturally grateful, we reward those who bring us pleasure. Instinctively resentful, we punish those who cause us pain. Retributively, society intentionally inflicts pain and suffering on criminals because and to the extent they deserve it. But only to the extent they deserve it.

The basic retributive measure—like for like—“as he has done, so shall it be done to him” (*Leviticus* 24); “giving a person a taste of her own medicine”; “fighting fire with fire”—primally satisfies. Critics have commonly equated retribution with revenge—disparaging “an eye for an eye” as barbaric. But retribution is not simply revenge. Revenge may be limitless and misdirected at the undeserving, as with collective punishment. Retribution, however, must be limited and in its more mature measurement, proportional—no more (or less) than what’s deserved. The Biblical “eye for an eye,” originally understood as *no more* than an eye for an eye, exemplifies retribution as a *restriction* as much as justification of punishment.

Retributivists disagree among themselves about the calculus of desert. Immanuel Kant would count only the actor’s intent. Most retributivists, however, also factor in the actual harm willingly caused. Accordingly, all other things equal, murder is worse than attempted murder, and thus deserves greater punishment. In common, retributivists disregard punishment’s future costs or benefits, resting justice—limited, proportional punishment—exclusively on a

criminal’s *past* moral culpability. Thus retributivists reject Hobbes’s classic utilitarian claim that “the aim of punishment is not revenge but terror.” They dismiss contemporary utilitarians who declare it “irrational” to cry over spilt blood, and rebut the challenge that certain punishments are pointless—“what good will it do to inflict more pain”—as itself beside the point. Justice, a moral imperative in itself, requires deserved punishment.

According to Kant’s classic retributivism, we impose punishment as an abstract duty without any emotion. By punishing, we dignify the transgressor, acknowledging the free will that produced the crime. The murderer must die, Kant insists, but “his death must be kept free from all maltreatment.” Kant rejects giving the condemned the option to submit to dangerous medical experiments on condition that his life be spared if he survived, insisting that we always treat human beings as ends in themselves, and never as a means to our ends. Following Kant’s lead, contemporary retributivists reject general deterrence as a sufficient justification for punishment—for then we would be making an example of a person, in order to change others’ future behavior.

More persistent and popular than Kant’s abstract retributivism, emotive/intuitive retributivism has deeper roots. “The voice of your brother’s blood cries out to me from the ground,” *Genesis* proclaims. In other words, “Blood pollutes the land.” Like the ancient Greeks and ancient Hebrews, contemporary emotive retributivists *feel* polluted if vicious murderers walk free, or fail to get their just deserts.

Retributivists’ urge to punish stems from a projected empathy with the victim’s suffering. “Our heart adopts and beats time to his grief,” declared Adam Smith in *A Theory of Moral Sentiments* (1759). “So is it likewise animated with that spirit ... to drive away and destroy the cause of it.” Retributive death penalty supporters, haunted by the victim’s suffering, cannot forget or forgive: “We feel that resentment which we imagine he ought to feel and which he would feel, if in his cold and lifeless body there remained any consciousness of what passes upon earth,” Smith explained in the first great work of modern retributive psychology. “His blood, we think, calls aloud for vengeance.”

Unlike Kantian retributivists, emotive retributivists insist that every moral question is ultimately an emotional one. The humane capacity to punish justly, this great moral faculty, requires us to apply our informed emotions, sympathy, pity, righteous indignation. Fitzjames Stephen, the nineteenth-century English judge and great historian of the criminal law detested heinous criminals and declared it “highly desirable” to design punishments “to give expression to that hatred.”

Embracing human dignity as their primary value, emotive retributivists like Adam Smith emphasize “a humanity that is more generous and comprehensive,” “oppos[ing] to the emotions of compassion which they feel for a particular person, a more enlarged compassion which they feel for mankind.” Thus, unwarranted “mercy to the guilty is cruelty to the innocent.”

While U.S. Supreme Court justices have personally rejected retribution, especially emotive retributivism as an affirmative justification for punishment, a majority has consistently acknowledged each state’s right to punish retributively. And often without labeling it, Justices have embraced retribution as the essential constitutional *limit* to punishment. Thus, U.S. Supreme Court majorities categorically outlawed the death penalty as “morally” disproportionate to “culpability” of rapists (of adult women) (*Coker* [1977]); getaway car drivers who had no intention or expectation that their robbery victims would be killed (*Enmund* [1982]) (*Ford* [1986]); mentally retarded killers (*Atkins* [2002]); all killers under eighteen (*Roper* [2005]).

Long scorned by the scholars but embraced by the people, retribution has made a twenty-first-century comeback. The proposed new Model Penal Code now explicitly incorporates retribution as punishment’s primary justification: “Under the new scheme, no utilitarian or restorative purpose of sentencing may justify a punishment more or less severe than that *deserved* by an offender in light of the gravity of the offense, the harm to the crime victim, and the blameworthiness of the offender” (emphasis added). Legislatures are to “consult their own moral judgment” and apply their own “intuitions of desert” to design punishments within “the retributive range.”

Ideally satisfying, popular and persistent, retribution fundamentally fails in the actual administration of punishment. Every department of corrections in the United States officially rejects retribution, declaring public safety and rehabilitation as their primary missions. Typically, prison guards proclaim that “what a man did out there is none of my business. How he acts inside determines how he’ll be treated here.” And while the more heinous crimes generally do carry longer prison sentences, in fact the most vicious criminals serving life sentences often have the best jobs, best hustles, and easiest lifestyles, while they prey on the younger, weaker, less vicious offenders. In short, largely unnoted even by retributivists themselves, inside prisons, daily life mocks retribution: Those who deserve it most suffer least. Thus, prison administration today across the United States largely severs the connection between crime and punishment on which retribution essentially rests.

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References and Further Reading

- Acker, James R., ed. *America’s Experiment with Capital Punishment*. Durham, NC: Carolina Academic Press, 2003.
- Beccaria, C. *An Essay on Crimes and Punishments*. Boston: [1769] 1992.
- Blecker, R., *Haven or Hell? Inside Lorton Prison: Experiences of Punishment Justified*, *Stanford Law Review*, 49 (1990): 1149.
- Hegel, G.F. *Philosophy of Right*. Trans. T.M. Knox. New York: Oxford University Press, 1967.
- Henberg, M. *Retribution: Evil for Evil in Ethics, Law, and Literature*. Philadelphia: Temple University Press, 1990.
- Kant, I. *Groundwork of the Metaphysics of Morals*. Trans. Paton. New York: 1964.
- . *The Metaphysical Elements of Justice*. Trans. J. Ladd. Indianapolis: 1965.
- Smith, Adam. *The Theory of Moral Sentiments*. New York: Oxford University Press.
- Mackie, J.L., *Morality and the Retributive Emotions*, *Criminal Justice Ethics* 1 (1982): 310.
- Pillsbury, Samuel H., *Emotional Justice: Moralizing the Passions of Criminal Punishment*, *Cornell Law Review* 74 (1989): 655.
- Stephen, Fitzjames, II. *A History of the Criminal Law of England*. 1883.
- Westermarck, E. *Ethical Relativity*. Paterson: [1932] 1960.

Cases and Statutes Cited

- Atkins v. Virginia*, 536 U.S. 304 (2002)
- Coker v. Georgia*, 433 U.S. 584 (1977)
- Enmund v. Florida*, 458 U.S. 782 (1982)
- Ford v. Wainwright*, 477 U.S. 399 (1986)
- Roper v. Simmons*, 543 U.S. 551 (2005)

REYNOLDS v. UNITED STATES, 98 U.S. 145 (1878)

Reynolds v. United States (1878) was a test case put forward by the Church of Jesus Christ of Latter-Day Saints (the Mormons) in an attempt to prove that the Morrill Act of 1862 was a violation of the First Amendment’s guarantee of the free exercise of religion. It was the first of a series of cases in which the U.S. Supreme Court rejected the Mormons’ First Amendment claims. The Morrill Act, which made the Mormons’ religiously based polygamy a crime throughout the United States and the Territories, was the first in a series of laws enacted by Congress attacking the Mormon’s practice of polygamy.

These laws were enacted, and these cases tried, in an atmosphere of anti-Mormon hysteria that gripped the nation from the time that Brigham Young, who as successor to founder Joseph Smith, had led the Mormons to what is now Utah, publicly announced the church’s advocacy of polygamy in 1852 to at least 1890 when the church ostensibly banned the practice.

The cases suggest that the Court was also in the grip of this hysteria.

The plaintiff, Reynolds, the private secretary of Brigham Young, pleaded not guilty to polygamy. In the subsequent trial, obviously polygamous jurors were struck for cause, and jurors with fairly obvious antipolygamous opinions were allowed to remain on the jury. The judge's jury instructions bear repetition:

I think it not improper, in the discharge of your duties in this case, that you should consider what are to be the consequences to the innocent victims of this delusion. As this contest goes on, they multiply, and there are pure-minded women and there are innocent children, innocent in a sense even beyond the degree of the innocence of childhood itself. These are to be the sufferers; and as the jurors fail to do their duty, and as these cases come up in the Territory, just so do these victims multiply and spread themselves over the land.

Following these instructions, a jury verdict of guilty was inevitable, and Reynolds was sentenced to two years of hard labor and a \$500 fine. Nevertheless, the Supreme Court, rejecting a variety of procedural appeals, concluded that Reynolds had been tried by an impartial jury.

In its examination of Reynolds's free exercise clause argument, the Court first noted that "religion" had not been defined in the Constitution, suggesting that the Mormon practice of polygamy might not enjoy free exercise clause protection because Mormonism was not a religion. But the Court did not pursue this line of argument.

The Court instead focused on free exercise as the right to *believe* in any religion as opposed to the right to *act* in any way as part of the practice of religion. The Court found the origin of this "thought-action dichotomy" in Thomas Jefferson's 1784 Virginia "Bill for Establishing Religious Freedom," which later was embodied in the First Amendment. Thus, the Court reasoned, "Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order."

The Court noted that polygamy had always been a crime, punishable by death, in England and that Virginia, after passage of the above-mentioned Religious Freedom Act, adopted the English statute making it a capital felony.

The Court next applied the "slippery slope" argument, outlining the horrors that would result if the exercise of religiously based polygamy were allowed. Human sacrifice and Suttee, the Hindu practice, banned by the British in colonial India, of a widow throwing herself upon the burning funeral pyre of her dead husband, were cited.

Perhaps the Court's biases are further exposed by the statement that "[p]olygamy has always been odious among the northern and western nations of Europe," but was "exclusively a feature of the life of Asiatic and of African people."

Of small solace to Reynolds and the Mormons, reacting to a petition for rehearing, the Court concluded that Reynolds's imprisonment should not be "at hard labor" because the Morrill Act called for imprisonment only.

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References and Further Reading

- Sealing, Keith, *Polygamists Out of the Closet: Statutory and State Constitutional Prohibitions against Polygamy Are Unconstitutional under the Free Exercise Clause*, Georgia State University Law Review 17 (2001): 691.
- Ostling, Richard, and Joan Ostling. *Mormon America: The Power and the Promise*. San Francisco: HarperSan Francisco, 1999.
- Van Wagoner, Richard. *Mormon Polygamy: A History*. 2nd ed. Salt Lake City, Utah: Signature Books, 1989.

RHODE ISLAND v. INNIS, 446 U.S. 291 (1980)

Innis clarified "interrogation" under *Miranda v. Arizona* (1966), which required police to apprise a suspect of the Fifth Amendment right to silence during custodial interrogation. Police officers arrested *Innis* for the murder of a taxi driver. They repeatedly read *Innis* his rights, and he requested an attorney. Two officers later conversed in *Innis*'s presence about the missing murder weapon. One officer mentioned a school for disabled children in the area, stating "God forbid one of them might find a weapon with shells and ... hurt themselves." This conversation continued until *Innis* disclosed the firearm's location. A conviction resulted from this evidence.

On appeal, *Innis* argued that introduction of his statements was error. Given that *Miranda*'s custody component was met, the issue was whether the conversation constituted interrogation. The Supreme Court defined interrogation as "not only express questioning, but also ... any words or actions ... police should know are reasonably likely to elicit an incriminating response...." Although this test is objective, the suspect's subjective susceptibilities are also relevant.

The Court (six to three) construed the police comments as offhand remarks that were not particularly evocative. Thus, they were not the "functional equivalent" of interrogation since a reasonable person would not have been moved to forgo the right of silence. Justices Marshall and Brennan dissented,

agreeing with the formulation of the interrogation rule, but disagreeing that the conversation was not interrogation. Justice Stevens vociferously dissented, asserting that the interrogation definition should be far broader.

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References and Further Reading

- Helderman, Alexander S., *Revisiting Rhode Island v. Innis: Offering a New Interpretation of the Interrogation Test*, Creighton Law Review 33 (2000): 729.
- Jenning, Janice L., *Note: Conversation between Police Officers Eliciting Admission by Suspect Not a Miranda Interrogation Unless the Officers Should Have Known Their Words or Actions Were Reasonably Likely to Elicit and Incriminating Response*, St. Mary's Law Journal 12 (1980): 544.
- Leo, Richard A., *Questioning the Relevance of Miranda in the Twenty-First Century*, Michigan Law Review 99 (2001): 1000.

Cases and Statutes Cited

- Brewer v. Williams*, 430 U.S. 387 (1977).
- Massiah v. United States*, 377 U.S. 201 (1964).
- Miranda v. Arizona*, 384 U.S. 436 (1966)

See also **Mapp v. Ohio**, 367 U.S. 643 (1961); **Marshall, Thurgood; Miranda Warning; Rights of the Accused; Self-Incrimination (V): Historical Background**

RICE v. PALADIN PRESS ("HIT MAN" CASE), 940 F.SUPP. 836 (D.Md. 1996)

In *Rice v. Paladin Enterprises, Inc.*, often called the "Hit Man case," the core of the plaintiffs' claim was that the publisher of a murder manual entitled *Hit Man: A Technical Manual for Independent Contractors* had aided and abetted murder when the instructions in that manual were used by a contract murderer as the blueprint for three murders. The plaintiffs claimed that the publisher had marketed the manual to attract and assist criminals, and that it knew and intended that the manual would be used, upon receipt, by real murderers to plan and execute killings.

The U.S. Court of Appeals Fourth Circuit held that a viable cause of action in tort for aiding and abetting murder existed against the publisher, and that if the allegations of the plaintiffs were true, the First Amendment did not insulate the publisher from liability. Following the Court of Appeals ruling, the publisher settled the case rather than go through a jury trial, agreeing to cease marketing the book, and paying the plaintiffs an undisclosed sum in money damages.

For the purposes of testing the First Amendment issue, the publisher had stipulated in a motion for summary judgment that it marketed the manual to attract and assist criminals, and that it knew and intended that the manual would be used, upon receipt, by real murderers to plan and execute killings. The murder manual was originally published in 1983, but the murders at issue did not take place until 1993. The alleged murderer apparently purchased the murder manual in 1992, several months before the killings. The Court of Appeals held that in these circumstances the First Amendment did preclude the imposition of liability.

In the course of its ruling, the court engaged in an extended discussion of the "incitement" standard set forth *Brandenburg v. Ohio* (1969) and whether that standard could or should be applied to the fact pattern presented, engaging in a close examination of the alleged role that the murder manual played in the killings. On the night of March 3, 1993, readied by the instructions in *Hit Man* and steeled by its "seductive adjurations," the Court noted, the "hit man," James Perry, brutally murdered Mildred Horn, her eight-year-old quadriplegic son Trevor, and Trevor's nurse, Janice Saunders, by shooting Mildred Horn and Saunders through the eyes and by strangling Trevor Horn. Perry was a contract killer, a "hit man," hired by Mildred Horn's ex-husband, Lawrence Horn, to murder Horn's family so that Horn would receive the \$2 million that his eight-year-old son had received in settlement for injuries that had previously left him paralyzed for life. At the time of the murders, this money was held in trust for the benefit of Trevor, and, under the terms of the trust instrument, the trust money was to be distributed tax-free to Lawrence in the event of Mildred's and Trevor's deaths. The court stated that in "soliciting, preparing for, and committing these murders, Perry meticulously followed countless of *Hit Man's* 130 pages of detailed factual instructions on how to murder and to become a professional killer."

Throughout the *Hit Man* litigation, both sides expended considerable energy over the motivations of the publisher. On one level, the publisher's motivation was simply to sell as many books as possible and make as much money as possible. The plaintiff's readily conceded this point, stipulating that in order to increase revenues, the murder manual was marketed to many readers who were not planning to use it to kill people. The plaintiffs argued, however, that one of the publisher's motivations was to market and sell the book to criminals and would-be criminals like James Perry who would indeed use it to commit murder, and that this was enough to defeat any First Amendment defense. The court agreed, observing

that “every court that has addressed the issue, including this court, has held that the First Amendment does not necessarily pose a bar to liability for aiding and abetting a crime, even when such aiding and abetting takes the form of the spoken or written word.”

The Court thus accepted the argument of the plaintiffs that the *Brandenburg* requirement of “imminence” need not be satisfied in those instances in which the speaker provides substantial detailed assistance in the commission of a crime with the intent that the information will be used to commit the crime, holding that

Paladin’s astonishing stipulations, coupled with the extraordinary comprehensiveness, detail, and clarity of *Hit Man*’s instructions for criminal activity and murder in particular, the boldness of its palpable exhortation to murder, the alarming power and effectiveness of its peculiar form of instruction, the notable absence from its text of the kind of ideas for the protection of which the First Amendment exists, and the book’s evident lack of any even arguably legitimate purpose beyond the promotion and teaching of murder, render this case unique in the law. In at least these circumstances, we are confident that the First Amendment does not erect the absolute bar to the imposition of civil liability for which Paladin Press and amici contend.

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References and Further Reading

Smolla, Rodney. *Deliberate Intent: A Lawyer Tells the True Story of Murder by the Book*. New York: Crown Publishers, 1999.

Cases and Statutes Cited

Brandenburg v. Ohio, 395 U.S. 444 (1969)

RICHARDS v. WISCONSIN, 520 U.S. 385 (1997)

The Fourth Amendment protects individuals against unreasonable searches and seizures. Courts have struggled, however, to determine what makes searches and seizures “unreasonable”. An important case addressing this issue is *Richards v. Wisconsin*, where the Court rejected Wisconsin’s blanket exception in drug searches to the requirement that police officers knock and announce their presence before forcibly entering a home.

Two years before *Richards*, the Court decided in *Wilson v. Arkansas* (1995) that the Fourth Amendment requires police to knock and identify themselves

before executing search warrants. However, the Court added that “no-knock” entries may be justified by factual circumstances in some cases, leaving it to lower courts to determine when such entries were justified. Wisconsin responded by mandating blanket approvals of “no-knock” entries in drug cases.

In *Richards*, officers executing a search warrant forcibly entered Richards’ hotel room without knocking and announcing their presence. Richards was arrested when officers found cocaine in the bathroom. The trial court denied Richards’ motion to suppress the evidence because of the “no-knock” entry and the Wisconsin Supreme Court affirmed.

The Supreme Court held, however, that no-knock entries must be justified on a case-by-case basis. Only when police believe announcing their presence may be dangerous, futile, or result in the destruction of evidence, are “no-knock” entries justified. Although the Court rejected Wisconsin’s blanket exception to the knock and announce rule, it upheld Richards’ conviction, stating that particular “no-knock” entry did not violate the Fourth Amendment.

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References and Further Reading

Biskupic, Joan. “High Court Limits Brutality Liability.” *Washington Post*, April 29, 1997, p. A1.
Greenhouse, Linda. “Court Rejects Special Rules for Drug Searches.” *New York Times*, April 29, 1997, p. A14.
Memorandum for M. Edward Whelan III, Acting Assistant Attorney General, Office of Legal Counsel, from Cynthia R. Ryan, Chief Counsel, Drug Enforcement Administration. *Re: Authority of Federal Judges to Issue “No-Knock.” Warrants*, October 26, 2001.
“Opinions of the U.S. Supreme Court.” *Criminal Law Reporter* 61, no. 5 (April 30, 1997).

Cases and Statutes Cited

Wilson v. Arkansas, 514 U.S. 927 (1995)

See also **Privacy; Search (General Definition)**

RICHMOND NEWSPAPERS, INC. v. VIRGINIA, 448 U.S. 555 (1980)

In this case a criminal defendant had been tried unsuccessfully three times for murder. He was convicted at his first trial but the conviction was overturned by an appellate court; the subsequent two trials ended in mistrials. At his fourth trial, the defendant’s attorney made a motion to close the trial to the public and the prosecutor did not object. Consequently, the judge closed the trial and denied the Richmond Newspapers, Inc.’s motion that the trial be open.

The issue for the U.S. Supreme Court to decide in this case was whether the public and the press have a constitutional right to attend criminal trials. By a seven-to-one majority (Justice Lewis Powell did not participate), the Court held that there was a First Amendment right of the public and the press to attend a criminal trial “absent an overriding interest articulated in findings.” Although six of the seven justices in the majority wrote opinions, all agreed that the U.S. Constitution guaranteed the right of the public and the press to attend a criminal trial and that this right may be restricted only if the interest in closing a trial is a compelling one. Not only were open proceedings long “recognized as an indispensable attribute of an Anglo-American trial,” they were also necessary in order to ensure the integrity of the judicial process. All seven justices additionally agreed that there was no overriding interest that justified closing the trial in this case.

The *Richmond Newspapers* case has become a significant precedent in subsequent cases in which legislatures or judges attempted to close portions of trial and pretrial proceedings.

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References and Further Reading

Cohen, William, and David J. Danelski. *Constitutional Law: Civil Liberty and Individual Rights*. 5th ed. New York: Foundation, 2002.

Sullivan, Kathleen M., and Gerald Gunther. *Constitutional Law*. 14th ed. New York: Foundation, 2001.

See also **Cameras in the Courtroom; Freedom of the Press: Modern Period (1917–Present); Free Press/Fair Trial; Freedom of Speech and Press: Nineteenth Century; Press Clause (I): Framing and History from Colonial Period up to Early National Period; Rights of the Accused**

RICKETTS v. ADAMSON, 483 U.S. 1 (1987)

At the beginning of his trial for first-degree murder, Adamson and the prosecutor reached a plea agreement whereby he would plead guilty to second-degree murder and testify against others involved in the murder. Adamson understood that if he refused to testify the original charge would be automatically reinstated. Adamson testified and his accomplices were convicted of first-degree murder. The Arizona Supreme Court threw out their convictions, however, and ordered a new trial. Adamson believed his obligation to testify terminated when he was sentenced and refused to testify at the second trial.

The trial court did not compel him to testify and the government filed new information reinstating the initial charge of first-degree murder. He tried to quash the information on double jeopardy grounds. Adamson then offered to testify at his accomplices’ retrial, but this offer was denied and he was convicted of first-degree murder and sentenced to death. Adamson sought federal habeas relief, asserting that the reinstatement of first-degree murder charges after his conviction on second-degree murder was a violation of double jeopardy.

The U.S. Supreme Court reversed and held that Adamson’s prosecution for first-degree murder did not violate double jeopardy principles, since his breach of the plea agreement removed the double jeopardy bar that otherwise would prevail.

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Cases and Statutes Cited

Blackledge v. Allison, 431 U.S. 63, 75 (1977)

Boykin v. Alabama, 395 U.S. 238, 242 (1969)

United States v. Scott, 437 U.S. 82 (1978)

See also **Double Jeopardy: Modern History; Guilty Plea; Plea Bargaining**

RICO

The Racketeer Influenced and Corrupt Organizations Act (RICO), passed in 1970 as part of omnibus anti-crime legislation, was enacted to combat organized crime. As the title suggests, its goal was to prevent organized crime from influencing an organization, and to pursue then-existing corrupt organizations, usually unions. Although hardly a concern today, when RICO was passed, members of organized criminal gangs, known as the Mafia, had used threats and violence to infiltrate and seize control of legitimate businesses. Members of these criminal organizations would then use these formerly legitimate businesses to forward unlawful ends. Union dues would often serve as capital for mobsters to run loan-sharking operations.

RICO was drafted much more broadly, however, and many of its provisions were vague. Civil libertarians feared that RICO’s application would soon expand beyond organized crime. Ira Glasser of the American Civil Liberties Union called RICO “the most comprehensive assault on civil liberties principles of any statute I’ve seen in many years.” In *Sedima, S.P. R.L. v. Imrex Co., Inc.* (1985), these fears were soon realized: the Supreme Court held that RICO could be applied against legitimate businesses.

RICO also provides civil remedies, and as Professor Pamela Bucy has correctly observed, “RICO can be a prosecutor’s powerhouse and a civil plaintiff’s

dream” since RICO’s language is extremely broad. The Supreme Court said in *Sedima, S.P.R.L. v. Imrex Co., Inc.*, that RICO must be “read broadly.” Almost the only thing limiting RICO’s expansion into new areas of law is lawyerly and prosecutorial creativity.

RICO prohibits any person or organization from (1) using or investing proceeds from a pattern of racketeering activity; (2) acquiring or maintaining control of an organization through a pattern of racketeering activity; (3) conducting affairs through a pattern of racketeering activity; or (4) conspiring to do (1) to (3). “Racketeering activity”—referred to usually as predicate acts—includes over fifty-five felonies, ranging from traditional conduct associated with racketing, such as murder, arson, and loan sharking, to the extremely broad mail and wire fraud statutes. What constitutes a pattern of racketeering activity is not specifically defined, but courts have generally held that two predicate acts are required over at least a seven-month period. Thus, a “pattern” of racketeering activity is generally understood to be two racketeering acts over a seven-month to ten-year period.

RICO also requires there to be an enterprise affecting interstate commerce, although the commerce requirement is de minimus. A RICO enterprise includes any person or other legal entity. Any formal business and almost any informal network of individuals will fall under this requirement. In sum, RICO prevents someone from using a business to commit a crime, or to commit a crime to take control of a business.

RICO provides stiff criminal and civil penalties. A person convicted under RICO can face twenty years in prison, substantial fines, and forfeiture of any property obtained from illegally obtained proceeds. A defendant also faces having his assets seized pre-trial, thus preventing him from mounting a successful defense. A person found civilly liable under RICO is responsible for treble damages and attorney’s fees.

There are several civil liberties-related concerns with RICO. One criticism of RICO is that a RICO defendant faces greater punishment than if he or she had been convicted only of the underlying predicate acts. That is, a RICO defendant who is alleged to have committed two counts of wire fraud faces greater punishment than if he or she had been prosecuted under the wire fraud statutes. Moreover, RICO allows the government to turn a garden variety mail and wire fraud case into a RICO case, even though RICO was directed at organized crime. Given that courts have, as Judge Newman of the Second Circuit noted, “tolerated an extraordinary expansive of mail and wire fraud statutes,” RICO thus allows “federal prosecution for conduct that some thought was subject only to state criminal and civil law.”

A RICO prosecution also allows the government to avoid the double jeopardy clause, which prohibits successive prosecutions for acquitted or convicted conduct. Thus, courts generally treat the elements of underlying predicate acts as separate elements from the underlying elements of a RICO claim. The government can also bring both a civil and criminal RICO case against the same actor for the same conduct.

Finally, RICO allows private parties to become de facto prosecutors. Justice Thurgood Marshall potentially noted in *Sedima, S.P.R.L. v. Imrex Co., Inc.*: “[T]wo fraudulent mailings or used of the wires occurring within 10 years of each other might ... lead[] to civil RICO liability.” In other words, RICO allows a litigant to bring a private enforcement action, that is, to enforce federal laws. Indeed, private litigants have sought to use RICO to chill protected expression. In *Scheidler v. National Organization for Women, Inc.* (2003), abortion protestors were sued under the theory was that by blocking abortion clinic entrances, they deprived the clinic of property within the meaning of the Hobbs Act. Since the Hobbs Act was a predicate act under RICO, the clinics sought to hold the protestors liable for money damages, and they sought to enjoin them from further protests.

Had the plaintiffs’ interpretation been accepted, many protests would be at danger. During oral argument the solicitor general, arguing as *amicus* for this expansive interpretation, conceded that many of the civil rights sit-ins of the 1960s would fall under RICO. That Martin Luther King and others could have been prosecuted or sued for sitting at lunch counters amply demonstrates RICO’s problems. Thus, Rachel King, legislative counsel at the American Civil Liberties Union (ACLU), testified before Congress that the ACLU “has had a long-standing concern about the RICO statute” since its sweeping conspiracy provision allows for prosecution under a theory of ‘guilty by association.’”

Moreover, RICO provides the prosecution a way around to turn a state case into a federal case. During the first RICO prosecution of mobster John Gotti, the federal government used acquitted state court conduct as a predicate act under RICO. Although John Gotti is hardly a sympathetic example, his prosecution illustrates how easily a state offense can become federal, and how creative lawyers and prosecutors can stifle free speech and find exceptions to constitutional restrictions on government conduct.

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References and Further Reading

Bucy, Pamela H., and Steven T. Marshall, *An Overview of RICO*, Alabama Lawyer 51 (1990): 238–9.

Giventer, Lorrie. *Crime and Punishment in Business: A Conference, Civil Justice Memo No. 17*. Washington, D.C.: Manhattan Institute, October 1989.

King, Rachel. *Testimony by Legislative Counsel Rachel King before the House Judiciary Committee on the Anti-Terrorism Act of 2001*. Washington, D.C., September 24, 2001.

Lynch, Gerald. *RICO: The Crime of Being a Criminal, Parts I and II*. Columbia Law Review 87 (1987): 661.

———, *RICO: The Crime of Being a Criminal, Parts III and IV*. Columbia Law Review 87 (1987): 920.

United States v. Weiss, 752 F.2d 777, 791 (2d Cir. 1985) (Newman, J., dissenting).

Cases and Statutes Cited

Scheidler v. National Organization for Women, Inc., 537 U.S. 393 (2003)

Sedima, S.P.R.L. v. Imrex Co., Inc. 473 U.S. 479, 479–98 (1985) (Marshall, J., dissenting)

Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C., Section 1961 et seq.

See also **Criminalization of Civil Wrongs; Federalization of Criminal Law**

RIGGINS v. NEVADA, 504 U.S. 127 (1992)

For some time many courts barred trial of mentally ill defendants who were found competent to stand trial solely because they were taking antipsychotic medication. Then, from the late 1960s to the 1990s, most courts held that forcible medication of criminal defendants is permissible if the medication is necessary to restore the individual to competency, given the state's interest in prosecuting those charged with crime. In *Riggins v. Nevada*, the U.S. Supreme Court took a more cautious stance, holding that when the state wants to medicate a defendant to restore competence, it must establish that the medication is medically appropriate, the least restrictive means of restoring competency, and appropriately titrated so that it does not diminish the defendant's ability to consult with his attorney, follow the trial process, or testify. Because the trial judge had not been sensitive to these issues during Riggins's capital murder trial (despite the fact that Riggins had received heavy doses of antipsychotic medication prior to and during the trial), the Supreme Court remanded the case, and strongly suggested the conviction should be reversed. *Riggins* is an important protection against the state's misuse or overuse of powerful antipsychotic medication, which can often have sedative effects and also can have other very serious side effects. In a later decision, *Sell v. United States* (2003), the Court further restricted use of these medications for purposes of competency restoration, holding that forcible

medication is permissible only when the defendant is dangerous to self or others or when the state's interest in prosecution is "compelling." The latter situation, the Court indicated, "may be rare."

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References and Further Reading

Klein, Dora W., *Trial Rights and Psychotropic Drugs: The Case against Administering Involuntary Medications to a Defendant during Trial*, Vanderbilt Law Review 55 (2002): 165–218.

Cases and Statutes Cited

Sell v. United States, 123 S.Ct. 274 (2003)

See also **Dusky v. U.S., 362 U.S. 402 (1960); Insanity Defense**

RIGHT OF ACCESS TO CRIMINAL TRIALS

A public right of access to criminal trials is rooted in history, in the Sixth Amendment right to a "public trial," and, since the Supreme Court's 1980 ruling in *Richmond Newspapers, Inc. v. Virginia*, in the First Amendment. Without the freedom to attend criminal trials, the Court said, "important aspects of freedom of speech and of the press could be eviscerated." The Court's plurality opinion based the right on the long tradition of open trials and on the important functional role public access plays in the judicial process.

The right is not absolute and may be outweighed by countervailing interests such as national security, privacy concerns, or a defendant's Sixth Amendment right to a fair trial. The Court ruled in 1982 in *Globe Newspaper Co. v. Superior Court* that trial closure must be decided on a case-by-case basis and must be based on a finding that a compelling governmental interest requires closure, alternatives to closure fail to adequately protect the interest, and the scope of closure is no broader than necessary.

The *Richmond Newspapers* ruling applied only to criminal trials, although the Court later extended the access right to pretrial proceedings (preliminary hearings and jury selection) associated with criminal trials. Some lower courts have since extended the Court's reasoning to other types of judicial proceedings, and in 1999, the California Supreme Court used *Richmond Newspapers* to find a general First Amendment right of access to civil proceedings, based on a history of openness and the functional role access can play.

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References and Further Reading

- Bunker, Matthew D. *Justice and the Media: Reconciling Fair Trials and a Free Press*. Mahwah, NJ: Lawrence Erlbaum Associates, 1997.
- Cerruti, Eugene, "Dancing in the Courthouse": The First Amendment Right of Access Opens a New Round, *University of Richmond Law Review* 29 (1995): 237–325.
- Liotti, Thomas F., *The Second Circuit Review: 1996–97 Term: First and Sixth Amendments: Closing the Courtroom to the Public: Whose Rights Are Violated?* *Brooklyn Law Review* 63 (1997): 501–50.

Cases and Statutes Cited

- Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982)
- Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980)
- See also **Media Access to Judicial Proceedings; *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980)**

RIGHT OF PRIVACY

In 1965, in the landmark case, *Griswold v. Connecticut*, the U.S. Supreme Court, for the first time in the nation's history, firmly established the right of privacy as a fundamental constitutional right. Although a majority of justices could agree that the Constitution protected this right as fundamental (six to three), a majority could not agree on exactly where the Constitution did so guarantee. Thus, one justice argued a "penumbra" of the Bill of Rights as a source; three would cite the Ninth Amendment as affording such protection, while two others would cite to the Due Process clause of the Fourteenth Amendment. The fact that the Court could agree that there was such a right, but could not agree on where it came from, underscores the continuing controversy surrounding the decision and the right of privacy. Should the Supreme Court create "unarticulated" constitutional rights?

The Court appeared to resolve the issue as to the constitutional source in another landmark decision, *Roe v. Wade* (1973), by concluding that the right of privacy was "founded in the Fourteenth Amendment's concept of personal liberty," or "substantive due process." The *Roe* decision protecting a woman's right of choice in regard to abortion, raised another and just as controversial issue. What privacy interests are so significant as to be deemed fundamental, and how should the Court go about making such a determination?

Unarticulated Constitutional Rights

The right of privacy rests at the root of a constitutional debate as to how a nonelected Supreme Court, enforcing the supremacy of the Constitution as fundamental law, should interpret the document in light of the framers intent and contemporary needs in a democratic society. Although most citizens today are well aware of the moral controversy extending from the abortion debate, very few are likely aware that among those who study the Court and the Constitution it is the issue of judicially created unarticulated constitutional rights that affords the greatest controversy. This has been emphasized in the contemporary Senate confirmation process of Supreme Court nominees, where candidates views on the right of privacy have been center stage.

Offhand it might seem that the creation of unarticulated rights could only be beneficial in affording protection of individual rights via a living and contemporary Constitution. To support the framers' intent in this regard, we can cite to the Constitution's broad clauses: "due process," "liberty," "equal protection," or the Ninth Amendment's guarantee that the rights created were not exhaustive. Justice Douglas's assertion in *Griswold* that a reading of the documents as a whole leaves one with an inescapable feeling that the framers intended that the sanctity and privacy of the individual should be protected from unjustified intrusion by the state, seems to relate a legitimate truth.

To this view, Justice Learned Hand would respond that it would be "most irksome to be ruled by a bevy of Platonic Guardians," fearing such power in a nonelected body with life tenure. Those asserting a more clause-bound basis for judicial interpretation, limited to the original intent of the framers themselves, cite to the repudiation of the Court's creation of the "liberty to contract" as an unarticulated right in *Lochner v. New York* in 1905. The creation of this unarticulated right by the Court's substantive application of the due process clause of the Fourteenth Amendment has been often criticized as an example of the danger in allowing the creation of such rights. The activism generated during the "Lochner era," where the Court read "laissez-faire" capitalism as if it were a constitutional mandate, is the traditional armor for those who stand against the *Griswold* and/or *Roe* decisions. The application of "substantive due process" to create unarticulated rights that a Court might find "implicit in our concept of ordered liberty," are the controversial tools of this trade.

The reader should recognize that this never-ending debate stirs the juice that flows beneath the right of privacy.

Which Privacy Interests Are Fundamental?

The decision in *Roe* brings us to the next issue. Of a milieu of individual privacy interests, which interests should be deemed fundamental and protected as constitutional rights, and how should the Court go about so deciding? Of interest is the fact that this activist expansion of the right of privacy has taken place under the tenure of a Supreme Court that has fashioned itself, quite to the contrary, as an advocate of judicial restraint. This somewhat conservative posture has nonetheless offered us the best insight into what interests would be deemed fundamental. Here the Court has tended to apply “substantive due process” to conserve traditional social values, or to deem privacy interests as fundamental based upon a “respect for the teachings of history [and] solid recognition of the basic values that underlie our society” (*Moore* [1977]). Family, for example, is deemed a fundamental privacy interest “precisely because the institution of the family is deeply rooted in this Nation’s history and tradition” (*Planned Parenthood of Southeastern Pa. v. Casey* [1992]). Ultimately, based upon these themes, the Court has extended fundamental right protection “to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education” (*Planned Parenthood* [1992]).

This never-ending constitutional debate will perhaps be resolved by the evolving nature of constitutional law that is dependent upon just who is appointed to the Court. Of interest, in this regard, was the Court’s opinion in *Lawrence v. Texas* (2003), finding a Texas statute that criminalized only homosexual acts as “sodomy” unconstitutional based on the fundamental right of privacy because,

When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.

To this Justice Scalia dissented and argued “that homosexual sodomy is not a right deeply rooted in our Nation’s history and tradition,” and that to conclude that it was “implicit in the concept of ordered liberty is, at best, facetious.” Here the majority’s more generalized view of the nature of the right provided a much more expansive view of protected rights than did Scalia’s more specific inquiry. With *Griswold* opinion well settled within the confines of stare decisis, the resolution of the more general versus specific distinction is perhaps where the answers in the future may lay.

Yet, the narrow five-to-four majority in *Lawrence* certainly emphasizes the continuing controversy and debate surrounding the right of privacy and judicial protection of “unarticulated constitutional rights.”

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References and Further Reading

- Bork, Robert, *Neutral Principles and Some First Amendment Problems*, Indiana Law Journal 47 (1971).
 Ely, John Hart, *Democracy and Distrust*. Cambridge, MA: Harvard University Press, 1980.
 Ely, John Hart, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, Yale Law Journal 82 (1973): 920.
 Grey, Thomas C., *Do We Have an Unwritten Constitution?*, Stanford Law Review 27 (1975): 703.
 Hand, Learned B. *The Bill of Rights*. Cambridge, MA: Harvard University Press, 1958.
 Strauss, David A., *Abortion, Toleration, and Moral Uncertainty*, Supreme Court Review 1993 (1993): 1.
 Tribe, Laurence, *Forward: Toward a Model of Roles in the Due Process of Life and Law*, Harvard Law Review 87 (1973): 1.

Cases and Statutes Cited

- Griswold v. Connecticut*, 381 U.S. 479 (1965)
Lawrence v. Texas, 539 U.S. 558, 2003 (2003)
Lochner v. New York, 198 U.S. 45 (1905)
Moore v. City of East Cleveland, 431 U.S. 494 (1977)
Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992)
Roe v. Wade, 410 U.S. 113 (1973)

RIGHT TO BEAR ARMS (II)

The words that compose the Second Amendment trace a lineage back through early American governance. The issues raised in the amendment were discussed not only in the First Congress, but in the Constitutional Convention of 1787, and in state governments, as they arose in colonial society, and from the British heritage.

The British Heritage

The British Parliament enacted the British Bill of Rights, also known as the Declaration of Rights, in 1689, in which various grievances against King James II were listed, including that he “did endeavor to subvert and extirpate the Protestant Religion and the Laws and Liberties of this Kingdom.... By causing several good Subjects, being Protestants, to be disarmed at the same Time when Papists [Catholics] were both armed and employed contrary to Law.” The

right defined in Article VII of this document was “That the subjects which are protestants, may have arms for their defence suitable to their conditions, and as allowed by law.” This provision from the British Bill of Rights is that cited as the forerunner of America’s Second Amendment, although there is no direct evidence that America’s founders treated it as the source of what became the Second Amendment.

The Colonial Experience

The mistrust of standing armies, partly inherited from bitter European experiences, was a common sentiment in America during the colonial period, and was directly related to the bearing of arms by citizens in militias, a practice that took on greater significance as the colonies approached the Revolution when citizen-soldiers became synonymous with the revolutionary spirit. The Virginia Declaration of Rights, for example, written in 1776, said that “standing armies, in time of peace, should be avoided, as dangerous to liberty.”

Militias were defined as adult males of fighting age (roughly between eighteen and forty-five) who were obligated to enroll with the government for military service. They received limited training, served for a few months out of the year, were only covered partially by military law, and were generally under state command. By comparison, professional soldiers were usually volunteers who enlisted for several years, received extensive military training and pay, served even in peacetime, were under federal control and full military discipline.

From colonial times on, militia forces were composed of two parts: the general or unorganized militias, and the organized or select militias. The first was defined as the entire body of eligible males that participated in the minimum required service. The select militias were volunteer units that organized and trained more rigorously, often with their own equipment, uniforms, and unit loyalty. These more professionalized militias were subject to periodic criticism from those who feared that they bore too close a resemblance to a professional army.

American mistrust of standing armies was magnified by the behavior of British troops on American soil. American outrage over the excesses of British troops was expressed in the Declaration of Independence of 1776 where Thomas Jefferson complained that “He [the King] has kept among us, in Times of Peace, Standing Armies, without the consent of our Legislatures. He has affected to render the Military independent of and superior to the Civil Power.” The Declaration also complained that the British were

“quartering large Bodies of Armed Troops among us” and “protecting them, by a mock Trial, from Punishment for any Murders which they should commit on the Inhabitants of these States.” Not surprisingly, the British also took any and every opportunity to seize American weapons and ammunition.

As a consequence, America fought the Revolutionary War with a combination of the Continental Army, which served as the core fighting unit, and state militias. While the reliance on militias was politically satisfying, it proved to be an administrative and military nightmare. State detachments could not be easily combined into larger fighting units; soldiers could not be relied on to serve for extended periods, and desertions were common; militia detachments would often enter the army encampment, consume food and supplies, and then leave before battle; officers were elected, based on popularity rather than experience or training; discipline and uniformity were almost nonexistent. Owing to the militias’ popularity, Commander-in-Chief George Washington defended the militia in public, but made his real sentiments brutally clear in correspondence with Congress, in which he complained bitterly about the militias’ lack of discipline and skill, unwillingness to fight, and general unreliability.

Despite the militia handicap, America won its independence, owing to the size of its force (over 400,000 men participated during the course of the war), the protracted nature of the conflict, the adoption of tactics appropriate to American terrain and the army’s irregular nature, the assistance of the French, British difficulties related to distance and supply, and the American “home court advantage.” This latter fact was particularly important to the militias, which generally fought best when they were fighting near their homes.

The Constitution

The first constitution, the Articles of Confederation (1777–1789), reflected suspicion of standing armies, and of a strong national government. The articles gave most power to the states, including the primary burden of national defense. The articles stipulated that “every state shall always keep up a well regulated and disciplined militia, sufficiently armed and accoutred” (Article VI) and that Congress’s military powers could only be exercised by a vote of nine of thirteen states (Article IX). No specific provision was made for a national standing army.

These and other shortcomings of the articles eventually led to the Federal Constitutional Convention of 1787, and the adoption of the modern Constitution.

The military issue was resolved in the new Constitution by recognition of both the militia and a standing army. In Article I, Section 8, Congress was given the power to “raise and support armies,” “provide and maintain a Navy,” and to finance and regulate both. In an important departure from the Articles, Congress would now have key authority over the state militias, as it could “provide for calling forth the Militia” in order “to execute the Laws of the Union, suppress Insurrections and repel Invasions”; and it could “provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States.” The states retained only limited control, as the Constitution reserved “to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress” (Article I, Section 8). In addition, the president would serve as commander-in-chief of the military forces, including the militia (Article II, Section 2).

Defenders of the new Constitution sought to calm fears and counter criticisms in the *Federalist Papers*. In *Federalist No. 24*, Alexander Hamilton, who served as George Washington’s aide during the Revolution, argued that it would be a mistake to restrict or ban standing armies in times of peace, citing constant threats the young nation faced along its vast frontiers and the necessity of allowing Congress appropriate latitude to meet variable but persistent military threats. In *No. 25*, Hamilton argued forcefully that standing armies were naturally superior on the battlefield, the Revolutionary War notwithstanding, and were similarly superior in dealing with civil unrest (*No. 28*). Further, Hamilton noted in *No. 29* that the federal government must have the power to impose uniformity on the militias in order for them to be effective and efficient. Both he and Madison dismissed the fear that a standing army would deprive the states of their sovereignty, or citizens of their liberties. To critics who predicted that a standing army would produce the downfall of state governments, Madison in *No. 46* computed that the United States could at the time raise at best an army of 30,000 men—a force that could be opposed by state militias totaling a half-million men.

The Federalist–Anti-Federalist Debate and the Bill of Rights

No dispute during America’s formative years was more important than that between the Federalists, who embraced a stronger national government as

established in the new Constitution, and the Anti-Federalists, who opposed the new Constitution, and who supported a more decentralized governing system. This debate was the root of concerns that gave rise to the Second Amendment.

The adoption of the Constitution enshrined within it the dual militia–standing army military system, but it did not resolve the nagging question of federalism; that is, the new Constitution not only created a national standing army, but gave the federal government vast new power over the militias. Anti-Federalists were extremely concerned that this power might be used not only to undercut the effectiveness and independence of state militias (for example, by federal government refusal to organize, arm or train them, although Federalists asserted that the states would retain such powers if the federal government failed to act), but to gut state power entirely.

These fears found voice in several state ratifying conventions, most particularly that of Virginia, where Anti-Federalists led by Patrick Henry sought assurance that Virginia, and other states, could arm their own militias if the federal government failed to do so. George Mason pressed the Virginia convention to obtain a specific guarantee of such a state right. This, in a nutshell, was the purpose of what became the Second Amendment. The Virginia convention passed this wording when it ratified the Constitution:

That the people have a right to keep and bear arms; that a well regulated Militia composed of the body of the people trained to arms is the proper, natural and safe defence of a free State. That standing armies in time of peace are dangerous to liberty, and therefore ought to be avoided, as far as the circumstances and protection of the Community will admit; and that in all cases the military should be under strict subordination to and governed by the Civil power.

Following Virginia’s lead, four other states—New Hampshire, New York, North Carolina, and Rhode Island—adopted similar resolutions to obtain greater protections for the continued existence and viability of state militias. The central question giving rise to the Second Amendment was whether congressional authority over state militias could surpass that of the state governments and whether this new federal military power (over both the militia and the federal-controlled professional army) might be used to limit state sovereignty and power. In particular, the southern states were anxious to make sure that they would have the ability to mobilize adequately armed state militias to suppress slave revolts, since they were suspicious that a national government dominated by northern interests would not be willing to commit

federal troops and supplies to keep African Americans in the bondage of slavery.

The pressure for a Bill of Rights to limit federal authority and retain states rights escalated, and on June 8, 1789, Madison introduced in the House of Representatives of the First Congress a proposed list of rights to be added to the Constitution. Drawn heavily from Virginia's 1776 Declaration of Rights, the list included the wording below, originally to be inserted in Article 1, Section 9 (a section of the Constitution that lists several limits on the federal government, and that followed the section dealing with military matters):

The right of the people to keep and bear arms shall not be infringed; a well armed, and well regulated militia being the best security of a free country: but no person religiously scrupulous of bearing arms, shall be compelled to render military service in person.

As reported out of House committee on July 28, the amendment said:

A well regulated militia, composed of the body of the people, being the best security of a free State, the right of the people to keep and bear arms shall not be infringed, but no person religiously scrupulous shall be compelled to bear arms.

On August 24, the House passed this wording:

A well regulated militia, composed of the body of the People, being the best security of a free State, the right of the People to keep and bear arms, shall not be infringed, but no one religiously scrupulous of bearing arms, shall be compelled to render military service in person.

This and the other amendments then went to the Senate, where the final wording of what became the Second Amendment emerged:

A well regulated militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed.

The debate in the First Congress surrounding the Second Amendment dealt with a few familiar questions, all dealing with military matters: whether the amendment wording should codify the right of conscientious objectors to opt out of military service for religious reasons; the relationship among militias, standing armies, and liberty; the need to subordinate the military to civilian authority; and the military unreliability of the militia as compared with a professional army. To judge by the brief debate about and modest wording changes in the amendment's versions quoted above, the basic sentiment was held throughout—that citizens have a constitutionally protected right to serve in militias when called into service by, and in defense of, state and country.

Thus, the Second Amendment is founded on federalism, balancing powers between the federal government and the states, and on military necessity, developing a political compromise between politically popular and state-controlled militias, and a politically unpopular but militarily necessary national professional army. Missing from this extended history is any connection between the Second Amendment and any personal, private, or individual use of firearms, for purposes including hunting, sporting, recreation, or even personal protection, which was already covered by the eighteenth century in common law. The Second Amendment's purpose, like the Bill of Rights as a whole, was to place limits on the federal government, and strike a balance between national power and state power. Its only connection to what might be termed an "individual right" was that individuals would need to retain the ability to fulfill the civic obligation to respond to a call from the government.

The Decline of the Old Militia System

Soon after the ratification of the Bill of Rights in 1791, Congress moved ahead to establish rules and procedures governing the militias in the Uniform Militia Act of 1792, which defined the nation's militia as "every free able-bodied white male citizen of the respective states" between the ages of eighteen and forty-five. Militiamen were legally obligated in the act to provide their own weapons, ammunition, and accoutrements. Even though the Constitution said that Congress bore responsibility for arming the militia (Article I, Section 8), Madison noted that "arming" did not necessarily mean that the federal government had to literally furnish arms. The government could, of course, provide arms if it chose to do so, and from the mid-nineteenth century on, it invariably did.

Despite these efforts, by the close of the eighteenth century it was clear that the militias were impractical, if not obsolete. Almost without exception, the states failed to implement the terms of the Uniform Militia Act. The system of fines imposed to impel men to arm and uniform themselves, and to ensure that they showed up for drill, failed to achieve these objectives, and were almost never enforced.

The reputation of the citizen militias suffered a final, crippling blow as the result of their terrible performance in the War of 1812. Even as a supplement to the regular army, the general militia system was considered useless. Neither the federal government nor the states took much interest in continuing universal militia training and service, although the social

structure of the militia system continued for decades. Local militias continued to gather for “musters” throughout much of the nineteenth century, but such gatherings were primarily social occasions often held at local taverns. Instead, the government relied on its professional army and elite corps of volunteers, the select or “organized” militias.

No significant legal changes occurred until 1903, when Congress passed the Militia Act, which legally separated the “organized militia,” now formally dubbed the National Guard, from the “reserve militia,” also called the unorganized militia, even though the unorganized militia had by now been discarded as a viable military entity, as defense needs could no longer be given over to ill-trained amateurs. The balance of the act provided for federal arming, training, and drilling of the National Guard. In 1916, Congress passed the National Defense Act, which mandated that the National Guard would be organized in the same method as the “Regular Army.” It also placed state Guards under federal guidelines.

Gaps in modern military needs have been met by the selective service system—the military draft—rather than activation of the old-style militias. This history and interpretation of militias is described and ratified in the Supreme Court cases of *Maryland v. United States* and *Perpich v. Department of Defense* (1990).

In sum, the possession of firearms referred to in the Second Amendment comes into play only at such time as (1) the unorganized militia is activated by a state or the federal government, a practice effectively abandoned before the Civil War, and (2) the government fails to provide weapons for that force.

Supreme Court Rulings

The Second Amendment has generated relatively little constitutional law. In a few instances, however, the Supreme Court has ruled directly on the meaning of this amendment. In the first case, *United States v. Cruikshank* (1876), Cruikshank and two other defendants were charged with thirty-two counts of depriving blacks of their constitutional rights, including two counts claiming that the defendants had deprived blacks of firearms possession, in violation of the Force Act of 1870. The Court in this case established two principles which it and lower federal courts have consistently upheld: first, that the Second Amendment poses no obstacle to at least some regulation of firearms; and second, that the Second Amendment is not “incorporated,” meaning that it pertains only to federal power, not state power. Admittedly, the

Supreme Court did not begin to incorporate parts of the first ten amendments (that is, applying them to the states through the Fourteenth Amendment) until 1897. But the Court has never accepted the idea of incorporating the entire Bill of Rights, and it has never incorporated the Second Amendment, despite numerous opportunities to do so.

Ten years later, the court ruled in *Presser v. Illinois* (1886) that an Illinois law that barred paramilitary organizations from drilling or parading in cities or towns without a license from the governor was constitutional, and did not violate the Second Amendment. Herman Presser challenged the law after he was arrested for marching and drilling his armed fringe group through Chicago streets. In upholding the Illinois law, the Court reaffirmed that the Second Amendment did not apply to the states, citing *Cruikshank*. Justice Woods explained:

It is undoubtedly true that all citizens capable of bearing arms constitute the reserved military force or reserved militia of the United States as well as of the States; and, in view of this prerogative ... the States cannot, even laying the constitutional provision in question out of view, prohibit the people from keeping and bearing arms, so as to deprive the United States of their rightful resource for maintaining the public security, and disable the people from performing their duty to the General Government. But, as already stated, we think it clear that the sections under consideration do not have this effect.

The court denied that Presser and his associates had a right to organize with others as a self-proclaimed and armed military organization, since such activity “is not an attribute of national citizenship. Military organization and military drill and parade under arms are subjects especially under the control of the government of every country. They cannot be claimed as a right independent of law.” To deny the government the power to define and regulate militias would, according to the court, “be to deny the right of the State to disperse assemblages organized for sedition and treason, and the right to suppress armed mobs bent on riot and rapine [pillaging].” Thus, the *Presser* case confirmed the understanding that the right to bear arms came into play only in connection with the formation and conduct of the militia, as formed and regulated by the government. The court emphatically rejected the idea that citizens could create their own militias, much less that the Second Amendment protected citizens’ rights to own weapons for their own purposes. In 1894, the Supreme Court ruled in *Miller v. Texas* (1894) that a Texas law “prohibiting the carrying of dangerous weapons” did not violate the Second Amendment. Again, the court said that the right to bear arms did not apply to the states.

The most recent Supreme Court case is *United States v. Miller* (1939). The *Miller* case was founded on a challenge to the National Firearms Act of 1934, which regulated the interstate transport of various weapons. Jack Miller and Frank Layton were convicted of transporting an unregistered 12-gauge sawed-off shotgun (having a barrel less than eighteen inches long) across state lines in violation of the 1934 Act. They challenged the act's constitutionality partly by claiming that it was a violation of the Second Amendment.

The unanimous court rejected the defendants' claims, and ruled that firearm registration was constitutional, as was the 1934 law. Beyond this, the court was unequivocal in saying that the Second Amendment must be interpreted by its "obvious purpose" of assuring an effective militia as described in Article I, section 8 of the Constitution. Speaking for the court, Justice McReynolds wrote:

In the absence of any evidence tending to show that possession or use of a "shotgun having a barrel of less than eighteen inches in length" at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense.

Thus, the Court stated that citizens could only possess a constitutional right to bear arms in connection with service in a militia.

The Second Amendment also received brief mention in *Lewis v. United States* (1980), when the court upheld the constitutionality of a 1968 law that barred felons from owning guns, saying that the law did not violate the Second Amendment, citing *United States v. Miller*. In a challenge to the Gun Control Act of 1968, the Court said that gun regulations were allowable as long as there was some "rational basis" for them, meaning that the regulations merely had to serve some legitimate purpose. This standard is significant because it is one that is easily met, especially as compared with the higher standard the court has set for laws that might conflict with other Bill of Rights freedoms.

Other Court Rulings and the Individualist View

Lower federal courts have followed the Supreme Court's reasoning on the meaning of the Second Amendment in over forty cases handed down from

the 1940s to the present. Challenges to gun regulations and related efforts to win a broader interpretation of the Second Amendment (including efforts to incorporate the Second Amendment) have been uniformly turned aside. Federal courts of appeal, according to *United States v. Nelson* (1988), "have analyzed the Second Amendment purely in terms of protecting state militias, rather than individual rights." In 2001, however, a federal court did, for the first time, accept an individual rights interpretation of the Second Amendment in *United States v. Emerson*. Even in this case, however, the defendant claiming a Second Amendment right was found guilty of unlawful gun possession. The primary basis for this ruling was a series of writings, mostly appearing in law journals, that argued that the Second Amendment protected an individual right to own guns aside from citizen militia service. The first published article advancing this argument appeared in 1960; since the 1980s, more such articles have appeared in print. This argument was also accepted by President George W. Bush's attorney general, John Ashcroft. The individualist view has been strenuously pushed in recent years by gun rights groups, led by the National Rifle Association.

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References and Further Reading

- Bogus, Carl T., *The Hidden History of the Second Amendment*, University of California Davis Law Review 31 (Winter 1998): 309-408.
- , ed. *The Second Amendment in Law and History*. New York: New Press, 2002.
- Carter, Gregg, ed. *Encyclopedia of Guns in American Society*. 2 vols. Santa Barbara, CA: ABC-CLIO, 2002.
- Cooper, Jerry. *The Rise of the National Guard*. Lincoln: University of Nebraska Press, 1997.
- Cornell, Saul, ed. *Whose Right to Bear Arms Did the Second Amendment Protect?* Boston: Bedford/St. Martin's, 2000.
- DeConde, Alexander. *Gun Violence in America*. Boston: Northeastern University Press, 2001.
- Finkelman, Paul, "A Well Regulated Militia": *The Second Amendment in Historical Perspective*, Chicago-Kent Law Review 76 (2000): 195-236.
- Kennett, Lee, and James LaVerne Anderson. *The Gun in America*. Westport, CT: Greenwood, 1975.
- Levinson, Sanford, *The Embarrassing Second Amendment*, Yale Law Journal 99 (December 1989): 637-59.
- Rakove, Jack N., *The Second Amendment: The Highest Stage of Originalism*, Chicago-Kent Law Review 76 (2000): 103-66.
- Schworer, Lois G., *To Hold and Bear Arms: The English Perspective*, Chicago-Kent Law Review 76 (2000): 27-60.
- Shy, John. *A People Numerous and Armed*. Ann Arbor: University of Michigan Press, 1990.

RIGHT TO BEAR ARMS (II)

- Spitzer, Robert J. *The Right to Bear Arms*. Santa Barbara, CA: ABC-CLIO, 2001.
- . *The Politics of Gun Control*. 3rd ed. New York: Chatham House, 2003.
- . *The Second Amendment “Right to Bear Arms” and U.S. v. Emerson*, St. John’s Law Review 77 (Winter 2003): 1–27.
- Uviller, H. Richard, and William G. Merkel. *The Militia and the Right to Arms*. Durham, NC: Duke University Press, 2002.
- Wills, Garry. *A Necessary Evil*. New York: Simon and Schuster, 1999.

Cases and Statutes Cited

- Lewis v. United States*, 445 U.S. 90 (1980)
- Maryland v. United States*, 381 U.S. 41 (1965)
- Miller v. Texas*, 153 U.S. 535 (1894)
- Perpich v. Department of Defense*, 496 U.S. 334 (1990)
- Presser v. Illinois*, 116 U.S. 252 (1886)
- United States v. Cruikshank*, 92 United States 542 (1876)
- United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001)
- United States v. Miller*, 307 United States 174 (1939)
- United States v. Nelson*, 859 F.2d 1318 (8th Cir. 1988)

See also Ashcroft, John; **Bill of Rights: Structure; Constitutional Convention of 1787; Declaration of Independence; Fourteenth Amendment; Hamilton, Alexander; Incorporation Doctrine; Jefferson, Thomas; Madison, James; Mason, George; National Rifle Association (NRA); *United States v. Cruikshank*, 92 U.S. 542 (1876); *United States v. Miller*, 307 U.S. 174 (1939); Virginia Declaration of Rights (1776)**

RIGHT TO COUNSEL

Pre- and Posttrial Proceedings

As recounted in the article on the evolution of the right to counsel (Sixth Amendment), a defendant’s right to retain the services of counsel for trial has always been acknowledged in American courts, but not the right to have counsel regardless of financial ability to procure it. At the beginning of the process of ensuring that further right, the Supreme Court applied it to capital cases in *Powell v. Alabama* (1932) and declared the period “from the time of ... arraignment until the beginning of ... trial, when consultation, thoroughgoing investigation and preparation [are] vitally important,” to be “perhaps the most critical period of the proceedings” and affirmed that a defendant “requires the guiding hand of counsel at every step in the proceedings against him.”

A generation later, as it was concluding the process of ensuring trial counsel for the indigent in all felony cases (*Gideon v. Wainwright*, 1963) and in misdemeanor cases if prison is imposed (*Argersinger v. Hamlin* [1972]), the Court also addressed the question of right to counsel in pretrial proceedings.

The two basic issues are the point at which the right to counsel attaches (that is, the point at which the accused is entitled to its protection), and the pretrial events at which it applies. The Court’s initial approach was articulated in *United States v. Wade* (1967) where, emphasizing that the Constitution guarantees the accused “the assistance of counsel for his defence,” it affirmed that accused persons are entitled to counsel at any critical stage of the proceedings against them, in or out of court—that is, at any proceeding at which the absence of counsel would inhibit his or her ability to provide effective assistance at trial. Wade’s case involved a lineup in which he had been required to appear, and the Court held that to be a critical stage because of the real danger of intentional or unintentional unfairness and an attorney’s consequent need to cross-examine witnesses about the circumstances of their identifications of the defendant as the culprit. The Court significantly narrowed its formulation five years later, however, when it ruled in *Kirby v. Illinois* (1972) that “a person’s Sixth and Fourteenth Amendment right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against him ... whether by way of formal charge, preliminary hearing, indictment, information, or arraignment,” because the right is granted “in all criminal prosecutions” and the initiation of formal proceedings is the point at which criminal prosecutions begin. There is thus no right to counsel for a preindictment lineup. Refining this interpretation in *United States v. Ash* (1973), the Court ruled that since the right to counsel was intended to provide protection *at trial*, it applies only to those pretrial proceedings that are comparable, and thus does not apply at an out-of-court photo lineup at which the defendant is not present. The right to counsel thus attaches only after the initiation of formal criminal proceedings, and then applies only at adversary proceedings where the accused must confront the forces of the prosecution—even though Justice William J. Brennan (author of the *Wade* decision) argued that neither criterion is relevant to the determination of a suspect’s need for counsel at pretrial proceedings in order to preserve his or her rights at trial.

Application of these criteria means that the right to counsel applies at some formal pretrial proceedings but not others. It applies at arraignment if rights may be lost there and at preliminary hearings if the

accused clearly needs assistance or if the absence of counsel would prejudice the defendant's rights at trial, but it does not apply at probable cause hearings to determine the legality of a warrantless arrest. The vast majority of defendants strike a plea bargain during the pretrial phase, and the right to counsel for the process of negotiating and entering a plea of guilty is unchallenged. Outside the courtroom, the right applies at lineups if it has attached (that is, adversary proceedings have commenced), but not at grand jury appearances, the taking of handwriting exemplars and various forms of physical evidence from suspects, or photo-identification displays for witnesses. At its discretion, however, the government may permit some form of participation by counsel at such events.

The issue of counsel for pretrial interrogation has been especially contentious. When the right has attached, a suspect cannot be interrogated in the absence of counsel unless that right has been waived. In a controversial decision in 1964, the Supreme Court enforced this rule in a situation where the suspect had no opportunity to consult or waive counsel, as incriminating statements were elicited from him by a former accomplice now functioning as an undercover agent of the state (*Massiah v. United States*). Several years later, the Court also found a violation of the right to counsel when a vulnerable murder suspect did not waive it but did succumb to a police officer's suggestion that he should reveal the location of the victim's body so that she could receive a Christian burial (*Brewer v. Williams* [1977]). The violation common to both cases was the deliberate elicitation of incriminating information from a suspect by an agent of the state, in the absence of counsel. When an officer or informer makes no effort to elicit information and merely listens, however, suspects have no right to counsel and their statements are admissible against them.

In the same year as *Massiah*, the Court extended the right to counsel to suspects undergoing interrogation prior to the initiation of formal charges "when the process shifts from investigatory to accusatory—when its focus is on the accused and its purpose is to elicit a confession" (*Escobedo v. Illinois* [1964]). It soon abandoned that approach, however, in favor of the limited Fifth Amendment right to counsel for custodial interrogation it created in *Miranda v. Arizona* [1966].

When the right to counsel does attach, it does so automatically. The government has some control over attachment, however, as it determines the timing of the initiation of adversary proceedings. The Sixth Amendment right is, moreover, offense specific. That is, the fact that a suspect's right to counsel has

attached for one offense does not mean that he or she has that right with respect to other offenses for which formal proceedings have not yet commenced, even if those offenses are closely associated with the one for which the right has attached. The suspect thus has no Sixth Amendment right to counsel for interrogation about such latter offenses (but may assert a *Miranda* right to counsel and to silence). Once the Sixth Amendment right has attached, it can be waived only by the knowing, intelligent, and voluntary act of the accused.

After trial, sentencing hearings are also critical stages of the process, and convicted defendants are therefore entitled to appointed counsel if they cannot afford it. Hearings on the revocation of probation or parole, on the other hand, are not deemed adversarial, and there is no guarantee of counsel there unless, as a matter of due process, the absence of counsel would render the proceedings fundamentally unfair. If a probationer's actual sentence is not determined until the point of revocation, however, counsel must be present.

Douglas v. California (1963) held that as a matter of due process and equal protection, counsel must be supplied for all appeals of right (first appeals of a conviction that the government chooses to grant to all convicted persons). There is no constitutional guarantee of counsel for further appeals to higher state appellate courts or the U.S. Supreme Court, which have discretion to hear or reject them, or for habeas corpus actions or other forms of collateral attack on a conviction, but indigents challenging a state or federal death sentence in a federal post-conviction proceeding do have a statutory right to appointed counsel.

Choice and Effectiveness of Attorneys

Defendants who retain counsel have a broad but not unfettered right to an attorney of choice, for "the essential aim of the [Sixth] Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers" (*Wheat v. United States* [1988]). Thus, for example, one may not be represented by the counsel of choice if the trial judge determines that the attorney has a conflict of interest. Defendants for whom counsel is appointed have considerably less discretion, for the Supreme Court has "reject[ed] the claim that the Sixth Amendment guarantees a 'meaningful relationship' between an accused and his counsel" (*Morris v. Slappy* [1983]).

A confidential relationship, however, has long been considered essential to an effective right to counsel. The attorney-client privilege permits the client, and requires the attorney, to refrain from revealing any confidential communication between them (subject, under the rules of various states, to such narrow exceptions as an attorney's knowledge of a client's intention to commit a serious crime).

This restriction of the right to competent representation does not derogate the choice of self-representation at trial, for the Court has concluded that the structure of the Sixth Amendment—a compendium of *personal* rights, including the *assistance* of counsel—requires acknowledgment of the right to defend oneself. That right, however, is not unfettered, either, as persons representing themselves can be held to the normal standards of protocol and procedure, and standby counsel can be imposed on them if necessary to achieve compliance. Persons who represented themselves cannot, moreover, appeal convictions on the grounds of ineffective assistance of counsel.

The right to counsel is the right to effective assistance of counsel at any proceeding at which the right pertains. Convicted persons who had retained or appointed counsel can—presumably with a new lawyer—appeal adverse judgments on the basis of ineffective assistance but face formidable barriers to success. Under most circumstances, appellants must identify specific acts or omissions of the attorney that fell below a reasonable standard of professional assistance (overcoming a general presumption of professional competence) and establish a reasonable probability that, but for the deficiency, the outcome of the proceeding would have been different.

Such appeals are only rarely successful. Supporters of the high standard agree that “the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation [but] simply to ensure that criminal defendants receive a fair trial” (*Strickland v. Washington* [1984]) whose result is presumably accurate; critics such as William S. Geimer fault the standard for “fostering tolerance of abysmal lawyering” that negates the presumption of an accurate result. Even if the result is accurate, however, a further question remains, posed by Justice Thurgood Marshall dissenting in *Strickland*: whether the Sixth Amendment is “violated when a manifestly guilty defendant is convicted after a trial in which he was represented by a manifestly ineffective attorney.” Emphasizing procedure as much as result, Marshall thought that it is.

Despite *Strickland's* tolerant conception of adequate performance, there is widespread recognition of a serious problem of the quality of counsel provided for indigent defendants. Public defender

offices are often overworked and underfunded, systems of court-appointed attorneys often provide minimal compensation and lack quality control, and legal services companies that contract for defense services may be compensated on a lump-sum rather than fee-for-service basis and thus have an incentive to minimize time and effort spent on individual cases. The problem seems particularly acute in capital cases, where the procedures and substance of the law are especially complex and the costs of effective representation are significantly higher. A study commissioned by the U.S. Senate Committee on the Judiciary and led by James Liebman found that in 4,578 appeals of death sentences in the 1973–1995 period, 68 percent were overturned; the study cited “egregiously incompetent defense lawyers” as one of two principal causes. Many states have launched efforts to upgrade the quality of defense services in the past two decades, and in late 2004 Congress enacted the Justice for All Act, which sets standards for competent representation and authorizes federal grants to states for the improvement of systems of providing counsel to indigents in capital cases. Improvements have been spotty, however, and much remains to be done.

Counsel for Enemy Combatants

The decision in *Gideon v. Wainwright* (1963) guaranteed the availability if not competence of counsel for defendants in criminal cases, but in the aftermath of the terrorist attacks of September 11, 2001, the question of access to counsel arose for a new category of suspects. As a result of the war in Afghanistan and the attempt to dismantle the al-Qaeda network, the U.S. government designated hundreds of persons, almost all captured abroad, as enemy combatants and asserted the right to detain them indefinitely without access to counsel or the ability to contest their detention in court. The government's rationale was that the detainees were military prisoners (although not entitled to the protections of the Geneva Convention) and that no rights applied because it had not initiated criminal proceedings; access to counsel would undermine the government's goal of gaining intelligence from them and might even provide a conduit for their participation in terrorist activities.

There is no Sixth Amendment right to counsel in civil proceedings, or in proceedings in the criminal justice system that are not defined as prosecutions, even where confinement may result. There may, however, be a due process right to counsel that is

unqualified, as in juvenile delinquency proceedings, or case-by-case as fundamental fairness requires, as in proceedings for deportation, termination of parental rights, revocation of probation, and civil commitment (for which there is typically a statutory right to counsel as well). Even where there is no guaranteed right, civil litigants can usually be represented by retained counsel if they can afford it, but the government adopted a much harsher position with respect to enemy combatant detainees, contending that they could be denied both access to and the services of counsel. Attorneys nevertheless filed cases on their behalf, three of which reached the Supreme Court in 2004.

Two of those cases involved American citizens. The Court ruled that the president had the authority to detain Yaser Esam Hamdi, captured in Afghanistan, as an enemy combatant, but that Hamdi had a right to a hearing before a neutral decisionmaker and was entitled to access to counsel for that purpose. By that point, the government had allowed him to meet with counsel—as a matter of discretion, not of right—presumably because it had completed its interrogation for intelligence purposes. The issue of counsel went no further in this case, as the government chose to release Hamdi rather than contest his petition for habeas corpus. The situation of the other American, José Padilla, was different because he had been apprehended at O'Hare International Airport in Chicago, held as a material witness in New York, and granted counsel before being reclassified as an enemy combatant, transferred to military custody in South Carolina, and denied further access to his lawyer. He was eventually allowed to see his attorney, but the Supreme Court declined to rule on his claim of a right to counsel and a hearing because it had been filed in federal court in New York rather than South Carolina. The case was refiled and as of this writing, a federal district court in South Carolina has ordered Padilla's release because it ruled that the president had no authority to detain an American citizen, apprehended in the United States, as an enemy combatant. Padilla will in all likelihood be detained while the government's appeal goes forward. Alternatively, the government could continue to hold him by reinstating his status as a material witness or by formally charging him with a crime; in either case, Padilla's right to counsel would be clear.

Virtually all other enemy combatant detainees were aliens, several hundred of whom were held at the American Naval Base at Guantánamo, Cuba. The sole question decided by the Court in their case was whether or not federal district courts have jurisdiction to hear habeas corpus petitions on behalf of persons in that location (which the government

appears to have chosen to avoid the sphere of constitutional protection), and it ruled that they do. The government then allowed access to counsel as a matter of policy but in further proceedings in federal district court argued that the detainees nevertheless had no *constitutional right* to counsel or a hearing and that district courts must therefore deny their petitions—a position that would render the Supreme Court decision nugatory. As an alternative, the government had already established Combatant Status Review Tribunals, composed of three military officers, to provide the hearing before a neutral decision maker stipulated in *Hamdi v. Rumsfeld* (2004). In these forums, detainees have a personal representative who is neither a lawyer nor an advocate, and are denied other procedural rights as well. As of this writing, one judge in a preliminary ruling has upheld the detainees' right to counsel, a second has ruled in favor of the government's position that there is no way detainees can challenge their detention in federal court, and a third has ruled that they are entitled to due process and that Combatant Status Review Tribunals do not meet that constitutional standard. These issues seem destined to return to the Supreme Court.

Government action in the wake of 9/11 also raised new issues with respect to the scope of the attorney-client privilege. The settled understanding had been that the government was prohibited from monitoring attorney-client conversations unless it had obtained a court order by establishing probable cause to believe that the parties were furthering a crime. In the wake of the terrorist attacks, however, the government promulgated a new rule of the Federal Bureau of Prisons under which the attorney general may order the monitoring of such conversations if the head of a federal law enforcement or intelligence agency has determined that there is reasonable suspicion that a particular inmate might use meetings with his or her attorney to further acts of terrorism. Advance notice of monitoring is to be given, communications are to be screened by a privilege team independent of the prosecution, and the team is not to disclose any information without the approval of a federal judge unless necessary to forestall an imminent act of violence or terrorism. As of this writing, the government does not acknowledge a right to counsel for enemy combatants in military custody, and that issue is still in litigation. Where it allows consultation as a matter of discretion, however, the government frequently monitors the meetings.

Enforcement of the right to counsel has engendered less controversy than enforcement of many other fundamental rights, perhaps because it relates more obviously to procedure than to result. Issues of

RIGHT TO COUNSEL

its scope, as to both the persons it covers and the extent of that coverage, will, however, continue to arise and to occupy the courts.

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References and Further Reading

- Bernhard, Adele. "Effective Assistance of Counsel." In *Wrongly Convicted: Perspectives on Failed Justice*, edited by Sandra D. Westervelt and John A. Humphrey. New Brunswick, N.J.: Rutgers University Press, 2001.
- Geimer, William S., *A Decade of Strickland's Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel*, William and Mary Bill of Rights Journal 4 (1995): 91–178.
- Harlow, Caroline Wolf. *Defense Counsel in Criminal Cases*. U.S. Department of Justice Bureau of Justice Statistics Special Report. Washington, D.C., 2000. <http://www.ojp.usdoj.gov/bjs/id.htm>.
- Liebman, James, Jeffrey Fagan, and Valerie West. *A Broken System: Error Rates in Capital Cases, 1973–1995*. A Study Commissioned by the U.S. Senate Judiciary Committee. Washington, D.C., 2000. <http://justice.policy.net/proactive/newsroom/release.vtml?id=18200>.
- Taylor, John B. *Right to Counsel and Privilege against Self-Incrimination: Rights and Liberties under the Law*. Santa Barbara, Calif.: ABC-CLIO Press, 2004.
- Tomkovicz, James J. *The Right to the Assistance of Counsel: A Reference Guide to the United States Constitution*. Westport, Conn.: Greenwood Press, 2002.

Cases and Statutes Cited

- Argersinger v. Hamlin*, 407 U.S. 25 (1972)
- Brewer v. Williams*, 430 U.S. 387 (1977)
- Douglas v. California*, 372 U.S. 353 (1963)
- Escobedo v. Illinois*, 378 U.S. 478 (1964)
- Gideon v. Wainwright*, 372 U.S. 335 (1963)
- Hamdi v. Rumsfeld*, 542 U.S. 507 (2004)
- Kirby v. Illinois*, 406 U.S. 682 (1972)
- Massiah v. United States*, 377 U.S. 201 (1964)
- Miranda v. Arizona*, 384 U.S. 436 (1966)
- Morris v. Slappy*, 461 U.S. 1 (1983)
- Powell v. Alabama*, 287 U.S. 45 (1932)
- Strickland v. Washington*, 466 U.S. 668 (1984)
- United States v. Ash*, 413 U.S. 300 (1973)
- United States v. Wade*, 388 U.S. 218 (1967)
- Wheat v. United States*, 486 U.S. 153 (1988)

RIGHT TO COUNSEL (VI)

English and American Origins

During the seventeenth and early eighteenth centuries in England, criminal trials in the common-law courts

were brief, informal affairs in which victims, their relatives, or, occasionally, hired attorneys prosecuted charges against defendants, who were assumed to be guilty unless they could successfully refute the charges. That was difficult, as defendants typically were incarcerated until trial, not informed of formal charges or evidence against them, and unable to compel the testimony of witnesses. A major additional handicap was that persons accused of felonies and treason, for which death and forfeiture of estate were a likely penalty, were forbidden to employ counsel to assist them. It has been suggested that trials were considered sufficiently simple and straightforward for laymen to handle, and that judges were deemed capable of protecting the interests of all parties, but these explanations do not square with the right of persons accused of trespasses or misdemeanors (including lesser political offenses) to retain counsel. This curious disparity is best explained by the conclusion that, especially in the revolutionary seventeenth century, the government placed such a premium on security that it was unwilling to grant any significant advantage in the trial contest to those offenders who presented a serious threat to the authority of the regime.

With the restoration of political stability after the Glorious Revolution of 1688, and in the wake of a series of false treason charges prosecuted by trained attorneys for the Crown, Parliament passed the Treason Act of 1695, granting defendants the right to retain counsel in treason cases and requiring courts to provide counsel if requested. This first legislative modification of the common-law rule of counsel was followed by a gradual change in judicial practice in felony cases, which were increasingly prosecuted by aggressive attorneys employed by the state, or sometimes by private parties. To redress the resulting imbalance in expertise, judges began to allow the appearance of defense counsel, a practice that had become common by the end of the eighteenth century. The role as well as the appearance of defense counsel, however, remained at the discretion of trial judges. There was considerable variation from one case and court to another, but counsel were typically confined to examining and cross-examining witnesses and arguing questions of law while prohibited from addressing the jury and arguing or interpreting matters of fact. The traditional expectation that innocent defendants could give a good account of themselves persisted, and defendants were thus called upon to speak for themselves on these matters.

The gradual transition from common-law practice to statutorily enacted right continued until 1836, when an act of Parliament established the right

to the full assistance of counsel for all criminal defendants. The final step was taken in 1903, when Parliament established the right of indigent defendants to appointed counsel.

During the seventeenth century, trial procedures in the American colonies were essentially the same as in England. Few trained lawyers were available, so private parties typically prosecuted those who had offended against them, and the accused defended themselves. Procedures were formalized in America earlier than in England, however, and by the turn of the eighteenth century every colony was represented by professionally trained public prosecutors in criminal cases. With lawyers more numerous and the status of the profession enhanced as the need to protect the rights of colonists against the oppression of the British authorities grew clearer, defendants were increasingly represented by counsel. Rhode Island granted a statutory right to retained counsel in 1660, Delaware, Pennsylvania, and South Carolina enacted that right for serious cases early in the eighteenth century, and after independence, North Carolina, Virginia, Massachusetts, and New Hampshire enacted some form of protection. Meanwhile, Delaware and Pennsylvania created a constitutional right to counsel in their charters of 1701, and after independence Delaware, New Jersey, Maryland, New York, Massachusetts, and New Hampshire adopted constitutional guarantees of counsel. By the time of the adoption of the Bill of Rights, therefore, eleven states recognized a general right to counsel by statute, constitutional provision, or both; Connecticut abided by a deep common law tradition to the same effect; and several states made at least some provision for appointment of defense counsel by the state. Only Georgia continued to adhere to the discretionary common-law practice of the British—a defect that would be remedied by the adoption of a constitution in 1798.

Throughout the process in which the First Congress proposed, and the states ratified, constitutional amendments that would become the Bill of Rights in 1791, James Madison's language with respect to counsel—"in all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defence"—remained unchanged and went undiscussed. Since the states had already come to the conclusion that the right was fundamental (Georgia did not participate in ratification), such consensus without debate—while disappointing to those seeking guidance from the intent of the framers—is not surprising. Two caveats must, however, be noted. First, because the Federal Crimes Act of 1790 provided for the appointment of counsel for persons

accused of treason and other capital offenses, it is clear that the framers of the Sixth Amendment saw it as an affirmation of the right to retain counsel but not as a guarantee of the assistance of counsel regardless of ability to pay. Over the next century and a half, federal courts increasingly did provide counsel in felony cases, but there was no federal statutory or constitutional guarantee of representation for the indigent. Second, as the decision in *Barron v. Baltimore* (1833) would make clear, the Bill of Rights bound only the federal government, and the Sixth Amendment right to counsel would not apply to the states—where most criminal prosecutions occur—until 1963. State constitutional provisions did not guarantee representation of the indigent, either, although legislation and judicial practice did so to some extent. In both state and federal jurisdictions, then, the right to retain counsel had been secured by the end of the 1790s, but the scope of the right and the availability of counsel for indigents would vary among jurisdictions until well into the twentieth century.

Development of the Modern Right to Counsel at Trial

The Fourteenth Amendment to the U.S. Constitution, ratified in 1868, contains the prohibition that "[n]o State shall ... deprive any person of life, liberty, or property, without due process of law," and litigants soon began to argue that rights protected against federal invasion by the Bill of Rights were a part of due process of law and thus now protected against state invasion as well. The Supreme Court rejected this interpretation in *Hurtado v. California* (1884) but gradually relented and, over the next nine decades, incorporated most provisions of the Bill of Rights into the due process clause and thus applied them to the states, including the right to counsel in 1963. The groundwork for that result was laid much earlier, however, for in criminal cases in the 1920s the Court began to hold the states to a more rigorous standard of due process as fundamental fairness, independent of specific provisions of the Bill of Rights.

The elaboration of the modern right to counsel by the Supreme Court began in *Powell v. Alabama* (1932), an appeal from the notorious Scottsboro trials in which nine young and severely disadvantaged black men were falsely convicted of the rape of white women and sentenced to death by all-white juries in the old rural South. Disregarding other serious procedural shortcomings, the Court focused on the

facts that the defendants were incapable of defending themselves, had no realistic opportunity or ability to retain an attorney, and were represented by court-appointed counsel who did not meet them until the morning of the trial and, without preparation, merely went through the motions of conducting a defense. In view of the circumstances—defendants who were ignorant and in some cases illiterate, imprisoned in a hostile environment far from home and out of touch with family and friends—the Court overturned the convictions because it found violations of due process in both the trial judge’s failure to afford the defendants a reasonable opportunity to secure counsel and, assuming their inability to do so, in his failure to make an effective appointment of counsel. Due process includes the right to a hearing, the Court ruled, and the right to a hearing includes the right to be assisted by counsel.

The issue of indigent defendants’ constitutional right to counsel had thus come to the fore, and it would be handled differently for state and federal trials. The *Powell* opinion asserted that

even the intelligent and educated layman has small and sometimes no skill in the science of law.... He lacks both the skill and knowledge adequately to prepare his defense, even though he had a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.

The logical corollary of that interpretation is that every criminal defendant is entitled to counsel, regardless of circumstances, and in *Johnson v. Zerbst* (1938) the Court held that the Sixth Amendment requires federal courts to appoint counsel for defendants unable to obtain it unless they intelligently waive that right.

The holding in *Powell*, as opposed to its rhetoric, led, however, to a more complex and torturous course of constitutional development in state cases. *Powell* did not incorporate the Sixth Amendment right to counsel and apply it to the states, but rather held that the lack of counsel could amount to a denial of due process (as in that case, where defendants facing capital charges were unable to defend themselves or retain counsel). The question then became, under what circumstances was due process denied by the absence of counsel? The Court was soon asked to hold that the lack of counsel was per se a denial of due process, but in *Betts v. Brady* (1942) it declined to do so, on the basis of an exhaustive review of colonial and state history and practice indicating that provision of counsel was regarded as a matter of policy and not as an essential component of a fair trial. This

result was compatible with *Zerbst*, the Court argued, because due process “formulates a concept less rigid and more fluid” than the “specific guarantees found in the Sixth Amendment,” one which avoids the “danger of ... formulating the guarantee into a set of hard and fast rules, the application of which in a given case may be to ignore the qualifying factors therein disclosed.”

Betts thus established a subjective standard for the right to counsel in state cases: due process required the appointment of counsel for indigent defendants only when the circumstances of the offense, the defendant, or the law were such that a trial in the absence of counsel would be fundamentally unfair—the special circumstances rule. The justices quickly agreed that a capital offense was such a special circumstance, but in a series of cases over the next two decades they were unable to formulate a coherent standard of special circumstances or to achieve a consistent line of decisions. Newly appointed justices rejected the *Betts* approach, and the Court agreed to reconsider that decision in a case from Florida, *Gideon v. Wainwright* (1963).

The cases were remarkably similar, involving unschooled men defending themselves against uncomplicated charges of theft, but *Gideon*’s was far more dramatic, as his petition was printed in pencil on prison stationery and filed *in forma pauperis* (in the manner of a pauper, for which normal fees and technical standards are waived). Prominent Washington attorney (and later Supreme Court Justice) Abe Fortas, assigned by the Court to represent *Gideon*, made two principal arguments: that representation by counsel is always essential for a fair trial, and that the special circumstances rule in practice had led to error, confusion, unfairness, and frequent reversals and retrials that burdened both states and defendants. A unanimous Supreme Court overturned *Gideon*’s conviction, overruled *Betts v. Brady*, and incorporated the Sixth Amendment right to counsel into the due process clause of the Fourteenth Amendment, thereby applying it to the states. For indigent defendants in state courts, the decision meant that they had the same right to a lawyer as defendants in federal court. For the states, it meant no great doctrinal change, as most had already made provision for counsel for the indigent (and of twenty-four states filing amicus curiae briefs in the case, all but two had supported *Gideon*). Many states did upgrade their defense services, however. For Clarence Earl *Gideon*, the decision meant a new trial in Florida, in which he was acquitted with the aid of W. Fred Turner, a competent local attorney.

On the same day that it decided *Gideon*, the Court also held in *Douglas v. California* (1963) that the equal

protection and due process clauses require that counsel be supplied to indigents for appeals of right (appeals to which all convicted persons are entitled). Eleven years later, however, it held in *Ross v. Moffitt* (1974) that there is no constitutional right to appointed counsel for further appeals that are heard at the discretion of appellate courts.

A final component of the evolution of the right to counsel at trial concerned the issue of petty offenses, which reflected a more fundamental issue of federalism. Supreme Court decisions regulating state criminal justice procedures, especially in the era of the Warren Court, occurred in a context of similar regulation in the fields of desegregation, separation of church and state, and legislative apportionment that engendered significant political and philosophical opposition to perceived federal encroachment on state prerogatives. The *Gideon* decision, which applied to felonies, did not exacerbate that sentiment because states had generally adopted the same policy of their own accord, but the extension of the right to appointed counsel to persons facing lesser offenses would entail a much greater policy shift and a much larger administrative and financial burden.

The Court confronted this issue in *Argersinger v. Hamlin* (1972) and devised a formula that struck a balance between concern for the rights of the accused and deference to state policy making: “absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial.” States may not impose a sentence of imprisonment on an indigent defendant for whom counsel was not supplied, but they may choose where to draw the line between offenses for which they will supply counsel and those for which they will not. In *Scott v. Illinois* (1979), the Court affirmed that counsel is required only when imprisonment is actually imposed, not when it is authorized but not imposed.

The *Gideon*, *Douglas*, and *Argersinger* decisions mark the major boundaries of the process by which the Sixth Amendment right to the assistance of counsel was extended to defendants in state as well as federal cases, regardless of ability to pay, for trials and appeals of right. In the same period, *In re Gault* (1967) held that minors facing juvenile delinquency proceedings that may result in confinement have an equivalent right to counsel as a matter of due process (although they commonly waive it in practice). It is also important to note that in *Miranda v. Arizona* (1966), the Supreme Court created a limited Fifth Amendment right to counsel that applies in some circumstances where the Sixth Amendment right

does not, for it may be invoked by any suspect taken into custody and facing interrogation, as a means of protecting the privilege against compelled self-incrimination (though once again, the right is waived by a large majority of suspects). Further issues of the applicability and scope of the contemporary Sixth Amendment right to counsel are explored in an article on that topic.

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References and Further Reading

- Beane, William M. *The Right to Counsel in American Courts*. Ann Arbor: University of Michigan Press, 1955.
 Heller, Francis. *The Sixth Amendment to the Constitution of the United States*. New York: Greenwood Press, [1951] 1969.
 Lewis, Anthony. *Gideon's Trumpet*. New York: Random House, 1964.
 Taylor, John B. *Right to Counsel and Privilege against Self-Incrimination: Rights and Liberties under the Law*. Santa Barbara, Calif.: ABC-Clio Press, 2004.
 Tomkovicz, James J. *The Right to the Assistance of Counsel: A Reference Guide to the United States Constitution*. Westport, CT: Greenwood Press, 2002.

Cases and Statutes Cited

- Argersinger v. Hamlin*, 407 U.S. 25 (1972)
Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833)
Betts v. Brady, 316 U.S. 455 (1942)
Douglas v. California, 372 U.S. 353 (1963)
Gideon v. Wainwright, 372 U.S. 335 (1963)
Hurtado v. California, 110 U.S. 516 (1884)
In re Gault, 387 U.S. 1 (1967)
Johnson v. Zerbst, 304 U.S. 458 (1938)
Miranda v. Arizona, 384 U.S. 436 (1966)
Powell v. Alabama, 287 U.S. 45 (1932)
Ross v. Moffitt, 417 U.S. 600 (1974)
Scott v. Illinois, 440 U.S. 367 (1979)

See also **Right to Counsel**

RIGHT TO DIE

See *Physician-Assisted Suicide*

RIGHT TO KNOW

The right to know is also referred to as “freedom of information” or “government in the sunshine.” The right to know encompasses two rights of citizenship: the right to examine records and documents possessed by governments and the right to participate in government proceedings. The first is typically guaranteed

RIGHT TO KNOW

by a state constitution or a freedom of information act or public records act. The right to participate refers to the right to observe deliberations of government and public bodies and to comment audibly or in writing on matters before them. While the right to know is protected by various state statutes and constitutional provisions, and various federal statutes as well, it does not receive direct protection under the First Amendment. That is to say, the Supreme Court has refused to treat the First Amendment as a “Freedom of Information Act.”

Access to information in the possession of governmental bodies and observation of the proceedings and deliberations of governmental bodies ensure that government actions are transparent. When actions are transparent, the official who is responsible for them will be fully accountable for them.

Governments restrict the right to know in various ways. These include restrictive definitions of “public documents,” and of “public bodies,” and by excluding classes of documents or matters from public examination. These exemptions have been based upon claims of invasion of privacy, trade secrets, proprietary information, ongoing law enforcement investigations, national security, “records that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function,” and other evidentiary privileges. Governments may also limit the enforcement of a right to know by requiring fees for examination and copying of documents, by failing to give notice of meetings, and by imposing upon citizens the costs judicial enforcement of the right.

The most expansive right in the United States is found in the Constitution of the State of Montana. It guarantees “the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure,” and “the right to expect governmental agencies to afford such reasonable opportunity for citizen participation in the operation of the agencies prior to the final decision as may be provided by law.” Montana also requires offending governments to pay the attorneys’ fees of a person who prevails in an action to enforce the right to know.

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Cases and Statutes Cited

California Constitution, Article I, Section 3
Montana Constitution (1972), Article II, Sections 8, 9
New Hampshire Constitution (1784) (as amended), Article 8

See also **Freedom of Information Act (1966); Freedom of Information and Sunshine Laws**

RIGHT TO PETITION

The First Amendment provides that “Congress shall make no law ... abridging ... the right of the people ... to petition the Government for a redress of grievances.” Under modern Supreme Court jurisprudence, the right to petition has been almost completely collapsed into freedom of speech. Yet the right was meant to have independent scope.

Before it was explicitly recognized in the Constitution, the right to petition had a long-standing Anglo-American pedigree as a right independent of general free speech and press rights. The Magna Carta first formally recognized the right to petition the king. Initially, the right applied only to certain nobles. Later, Parliament claimed the right to petition as a *quid pro quo* for its approval of royal requests for new taxes. In 1669, Parliament recognized the right of every British subject to petition Parliament, and in 1689 the Declaration of Rights established that not only is it “the right of the subjects to petition the king,” but that “all commitments and prosecutions for such petitioning is illegal.” At a time when the king was considered above the law, petitions were the only method short of revolt to seek redress for illegal royal action.

By the late seventeenth century, petitions were the public’s primary means of communicating with government officials and were directed to all levels of government, including the royal bureaucracy and Parliament. Moreover, the king and Parliament generally treated petitions seriously and worked to resolve legitimate grievances raised by petitions. Much of the legislation passed by Parliament over a period of centuries was introduced in response to petitions from the public.

Petitioning naturally spread to the American colonies. In 1642, the Massachusetts Body of Liberties became the first colonial charter to provide explicit protection for the right to petition. By the time of the American Revolution, five other colonies—Delaware, New Hampshire, North Carolina, Pennsylvania, and Vermont—had followed suit. The other colonies recognized the right informally. Throughout British North America, petitioning was an important way for individuals to express their views to the local governing bodies, especially colonial assemblies. The assemblies, following English tradition, treated petitions seriously and often referred them to committees for further action. Petitions were not always granted, but they were always answered.

In 1774, the Declaration and Resolves of the First Continental Congress proclaimed that the colonists “have a right peaceably to assemble, consider of their grievances, and petition the King; and that all prosecutions, prohibitory proclamations, and commitments for the same, are illegal.” The emphasis on the government’s lack of power to punish a citizen for petitioning made the right to petition more robust in the Revolutionary era than the more general right to freedom of speech. Colonial governments generally recognized the right to freedom of speech, but this typically meant only that laws could not create prior restraints on speech. The right to petition, however, had a full legal pedigree. When considering the Bill of Rights, Congress approved the right to petition with little controversy.

The right to petition only guarantees that citizens can communicate with the sovereign through petitions. It does not guarantee that the sovereign will respond in any particular way, or indeed, at all. Parliament and colonial legislatures nevertheless felt obligated to respond to every petition, but that was because those bodies had judicial as well as legislative functions. In the American constitutional scheme, judicial power rests solely in the judicial branch, and the judiciary is the only branch of government that is always obligated to consider and respond to petitions submitted to it. The executive branch (including for these purposes the independent regulatory agencies) may arguably have the obligation to respond to petitions when, in the modern administrative era, it is exercising judicial-like functions.

Congress initially took petitions very seriously, following the tradition of its colonial forebears. The House of Representatives scheduled time into its regular business in order to hear petitions on the floor. Typically, the Representative of the petitioner’s state would assume the role of referring the petition to a special committee for consideration. The committee considered petitions and reported to Congress, resulting either in a consideration of a bill or rejection of the petition.

The exception was in petitions regarding slavery. A pattern developed by which Congress responded to petitions by sending them to committee, where they ultimately died without being answered, rejected, or denied. In 1836 the House adopted a rule that “all petitions relating ... to the subject of slavery or the abolition of slavery shall, without being either printed or referred, be laid upon the table and that no further action whatever by had thereon.” In 1840, the House ruled that it would not receive abolitionist petitions at all. After a fierce debate over the right to petition, led in part by Congressman John Quincy Adams, the

House repealed the “gag rule” in 1844, but thereafter antislavery petitions simply died in committee as before. Unlike those from the abolitionist movement, petitions regarding such issues as the National Bank, expulsion of Cherokees from Georgia, and the Alien and Sedition Acts, among many others, were duly considered by Congress.

The right to petition became less important, as modern democratic politics gradually replaced petitioning and public protests as the primary means for constituents to express their views to their representatives. Today, Congress treats most petitions in a pro forma way. A representative may present a petition on behalf of a private party to the Clerk of the House who enters it in the Journal.

Although the right to petition is somewhat anachronistic in modern times and has largely been subsumed in the right to freedom of speech, it continues to have some independent weight. Most important, under the *Noerr-Pennington* doctrine an effort to influence the exercise of government power, even for the purpose of gaining an anticompetitive advantage, does not create liability under the antitrust laws (*Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.* [1961], *Mine Workers v. Pennington* [1965]). The Supreme Court initially adopted this doctrine under the guise of freedom of speech, but it more precisely finds its constitutional home in the right to petition. Unlike speech, which can often be punished in the antitrust context, as when corporate officers verbally agree to collude, the right to petition confers absolute immunity on efforts to influence government policy in a noncorrupt way. *Noerr-Pennington* has been expanded beyond its original antitrust context to all situations in which plaintiffs attempt to use a defendant’s lobbying activity or filing of a lawsuit (provided the lawsuit was not a sham) as evidence of illegal conduct. For example, trade associations cannot be held liable in tort for lobbying the government for lenient safety standards for their industry.

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References and Further Reading

- Amar, Akhil. *The Bill of Rights: Creation and Reconstruction*. New Haven, CT: Yale University Press, 1998.
- Hague v. CIO*, 307 U.S. 252 (1941).
- Lawson, Gary, and Guy Seidman, *Downsizing the Right to Petition*, *Northwestern University Law Review* 93 (1996): 739.
- Mark, Gregory A., *The Vestigial Constitution: The History and Significance of the Right to Petition*, *Fordham Law Review* 66 (1998): 2153.
- Smith, Don L. “The Right to Petition for the Redress of Grievances: Constitutional Development and

RIGHT TO PETITION

Interpretations.” Ph.D. diss., 1971 (University Microfilms International).
United States v. Cruikshank, 92 U.S. 542 (1875).

Cases and Statutes Cited

Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961)
Mine Workers v. Pennington, 381 U.S. 657 (1965)

RIGHT TO REPLY AND RIGHT OF THE PRESS

Although it has never been the First Amendment’s concern that the press be fair, that issue has emerged as a serious concern with the increased monopolization of newspapers in their circulation areas. If the injured person cannot respond to an editorial’s personal accusations in another paper of equal stature and audience, does the editorializing newspaper’s refusal to print the response in its own pages undermine the purposes of the free press clause’s protections?

This was the question considered by the U.S. Supreme Court in *Miami Publishing Co. v. Tornillo* (1974). In *Tornillo*, a Florida political candidate invoked a state right-to-reply law after the *Miami Herald* editorialized against his election. The *Herald*’s refusal was taken to the Supreme Court, which ruled against *Tornillo*. In its decision, the Court held the right-to-reply law unconstitutional for three reasons.

First, reply rights of candidates would impose costs on newspapers. To make room for the reply, the paper might forgo publishing other content, or incur expenses to publish the added content. Second, reply rights would chill editorial speech. If an editor knew that the newspaper would be required to publish a response, he or she might decide to forgo the critical editorial completely.

Most importantly, a mandated right to reply intrudes on editorial autonomy. Although the parameters of constitutionally protected “editorial judgment” were left unelaborated by the Court, it relied on broad principles. The First Amendment on its face proscribes state action, but does not require press responsibility. In other words, the free press clause means that the press must be free, not fair.

Two contradictory justifications for the press’s constitutional protections collide in this decision. On the one hand, it is common to hear that the press guarantees are designed to foster vibrant political debate. In the airing of different positions on matters of public concern, citizens become informed on important questions, and thus better prepared to make wise decisions regarding public policy. From this

perspective, the intentions of the First Amendment are furthered, not hindered, by a right-to-reply statute.

Alternatively, the Constitution envisions the press serving as a “check” on the abuses of government, earning the press the sobriquet of the “Fourth Estate.” This was the face of the press most famously on display during the Watergate investigations. This function would be seriously compromised if the government could control content in the press, and thus a right-of-reply statute must fall.

The Court implicitly found in *Tornillo* that the balance favored the checking function over the informed debate function. Because conditions have changed since 1974, however, it should not be presumed that the balance today favors the same outcome.

The reluctance to impose a fairness requirement on the press made more sense when alternative outlets were easily available. Few markets today have more than one newspaper, and thus a refusal to publish a reply is tantamount to preventing an alternative viewpoint from becoming known to the public. Similar limited accessibility allowed the Supreme Court, in *Red Lion Broadcasting Co. v. FCC* (1969), to uphold a fairness rule imposed on broadcast media. (This rule was repealed administratively in 1987.) As print outlets approach the scarcity of broadcast frequencies, the *Tornillo* rationale to reject right-to-reply statutes might require rethinking.

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References and Further Reading

Bezanson, Randall P. *How Free Can the Press Be?* Urbana: University of Illinois Press, 2003.
Powe, Lucas A., Jr. *The Fourth Estate and the Constitution: Freedom of the Press in America*. Berkeley: University of California Press, 1991.

Cases and Statutes Cited

Miami Publishing Co. v. Tornillo, 418 U.S. 241 (1974)
Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969)

See also **Freedom of Speech and Press: Nineteenth Century; Press Clause (I): Framing and History from Colonial Period up to Early National Period**

RIGHT TO TRAVEL

Some cherished individual rights do not appear in the U.S. Constitution. One prominent example is the right of privacy; another is the right to travel. Former U.S. Supreme Court Justice William Douglas observed, “[f]reedom of movement is the very essence

of our free society, setting us apart.... [I]t often makes all other rights meaningful.”

The right to travel, while not expressly contained in the text of the U.S. Constitution, is ingrained throughout this nation’s history. Regardless, many have had trouble interpreting the basis for this now commonly accepted right.

When Judge Bushrod Washington handed down his famous decision in *Corfield v. Coryell* (1823), the right to travel was a matter of first impression in American jurisprudence. The court held that the State of New Jersey could prevent nonresidents from raking oysters in its waters, whereas in dictum it proscribed prohibition of interstate travel under the protections afforded by the Article IV privileges or immunities clause. The court articulated the perimeters of the rights therein, finding that the privileges or immunities clause protects the right to travel as well as the rights of citizens who have arrived or relocated in a new state.

In 1873, the Court decided the *Slaughterhouse Cases*, which dealt with Louisiana’s quasi-monopoly of in favor of the slaughtering business. Competing businesses challenged the state’s action, contending that the contract award constituted “involuntary servitude” in violation of privileges and immunities and in defiance of equal protection of the law. Moreover, competitors accused the state denying them the right to liberty and property without due process of law. The Supreme Court held that the alleged monopoly violated neither the Thirteenth nor Fourteenth Amendments. For the most part, the Court devoted its opinion to the narrow construction of the privileges and immunities clause, which it interpreted as applicable to national citizenship, not state citizenship. This distinction has fostered much confusion in courts’ application of this ruling.

In *Edwards v. California* (1941), the Supreme Court looked to the commerce clause as an alternate source of protection. The Court held that a law prohibiting importations of indigents into California exceeded the scope of a state’s police power, thus unconstitutionally interfering with interstate commerce.

In *Shapiro v. Thompson* (1969), the Supreme Court declared the conditioning of welfare aid on various residency requirements unconstitutional under the Fourteenth Amendment’s equal protection clause. While the comprehensiveness of *Shapiro* has been tested over time, courts have consistently deemed durational residency requirements unconstitutionally burdensome on the right to travel. Gradually, the Court has expanded the scope of *Shapiro*’s protection so as to render unconstitutional state-prescribed deterrents to resettlement in other states.

Recently, the Supreme Court revived the Fourteenth Amendment privileges or immunities clause, which had largely remained dormant since the *Slaughterhouse Cases*. In 1999, the Court held that the Fourteenth Amendment protects the right to travel in three ways: permitting citizens to move freely about the states, securing the right to be treated equally in all states when visiting, and ensuring the rights of new citizens to be treated the same as long-established residents of a state. In *Saenz v. Roe* (1999), plaintiffs, having moved to California for the purposes of seeking employment sought to enjoin the state’s use of a durational residency requirement which as applied would have limited plaintiffs’ welfare benefits to the amount received in their former states of residence. The district court granted the injunction and the Ninth Circuit affirmed. The U.S. Supreme Court granted certiorari and in a seven-to-two decision affirmed. The Court explained that by paying first-year residents the same welfare benefits as those collected in their state of origin, states created two classes of residents and rendered services discriminatorily.

While the right to travel is sometimes difficult to interpret, or ground in a specific part of clause of the U.S. Constitution, it is an enduring “right” within American constitutional jurisprudence.

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References and Further Reading

- Harrold, Marc M., *Constitutional Law—“Right to Travel”—Fourteenth Amendment Privileges or Immunities Clause Invalidates a State’s Durational Residency Requirement for Full Welfare Benefits*, Mississippi Law Journal 69 (Winter 1999): 993.
- Strasser, Mark, *The Privileges of National Citizenship: On Saenz, Same-Sex Couples, and the Right to Travel*, Rutgers Law Review 52 (Winter 2000): 553.

Cases and Statutes Cited

- Aptheker v. Secretary of State*, 378 U.S. 500, 520 (1964) (Douglas J., concurring).
- Corfield v. Coryell*, 6 F. Cas. 546 (E.D. Pa. 1823)
- Edwards v. California*, 314 U.S. 160 (1941)
- Saenz v. Roe*, 526 U.S. 489 (1999)
- Shapiro v. Thompson*, 394 U.S. 618 (1969)
- Slaughterhouse Cases*, 83 U.S. 36 (1873)

RIGHT TO VOTE FOR INDIVIDUALS WITH DISABILITIES

The right to vote is basic to our democratic way of life yet many individuals with disabilities find themselves unable to vote confidentially and independently.

Early Statutory Protections

Congress has been tackling the problem of voting rights for individuals with disabilities since 1965. The 1965 Voting Rights Act contains a provision requiring that “[a]ny voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by a person of the voter’s choice.” (See Voting Rights Act of 1965 [amended 1984].) The 1965 statute did nothing to correct the problem of access to polling places. It simply eliminated the secret ballot requirement for individuals with disabilities.

Voting Accessibility for the Elderly and Handicapped Act

In 1984, Congress focused more specifically on the problem of access to polling places with enactment of the Voting Accessibility for the Elderly and Handicapped Act (VAEHA). The purpose of this act was “to promote the fundamental right to vote by improving access for handicapped and elderly individuals to registration facilities and polling places for federal elections.” It only applies to *federal elections*.

With respect to voter registration, the act requires each state to make available: (1) instructions, printed in large type, conspicuously displayed at each permanent registration facility and each polling place, and (2) information by telecommunication devices for the deaf. The VAEHA also provides that states must permit disabled voters to vote by absentee ballot *without* notarization or medical certification, *unless* the individual desires: (1) to automatically receive an application or a ballot on a continuing basis, or (2) to apply for an absentee ballot after the deadline has passed.

The act defines “disability” broadly as including anyone who has “a temporary or permanent physical disability.” A temporary, broken leg is therefore a disability under the 1984 Act even though it is not a disability under the Americans with Disabilities Act (ADA). Although absentee voting may not be the desirable or preferable option for an individual with a disability, the 1984 Act does provide that it must be an option for disabled voters.

The 1984 Act also contains provisions that were designed to improve the accessibility of polling places. It provides that each political subdivision responsible for conducting elections must assure that *all* polling places for federal elections are accessible to disabled voters. It also provides that disabled voters may make

an advance request to be assigned to an accessible polling place or be provided with an alternate means of casting a ballot on the day of the election if they have been assigned to an inaccessible polling place.

Americans with Disabilities Act

Some voting rights litigation has also been brought under the ADA, which prohibits public entities from engaging in discrimination. In 2000, the New York Attorney General brought a suit on behalf of disabled voters to require several counties to make their polling places compliant with the ADA. This suit resulted in injunctive relief and set the important precedent that a state attorney general could sue on behalf of disabled voters (*People of New York ex rel. Spitzer v. County of Delaware* [2000]). Unlike cases brought under other statutes, the ADA can be used to make polling places accessible for *state* elections.

Help America Vote Act

President George W. Bush signed the Help America Vote Act (HAVA) into law on October 29, 2002. HAVA gives states significant financial incentives to implement accessibility. It also requires that every polling place in the county must have at least one voting system that is accessible to individuals with disabilities by January 1, 2006.

HAVA is stronger than previous laws in specifying that individuals are to have access to secret and independent voting opportunities. It states that voting systems shall be “accessible for individuals with disabilities, including nonvisual accessibility for the blind and visually impaired, in a manner that provides the same opportunity for access and participation (including privacy and independence) as for other voters.”

Constitutional Protection

In *Tennessee v. Lane* (2004), the Supreme Court implied that access to voting booths is a fundamental right under the U.S. Constitution. Possibly, litigants will use that ruling in the future to challenge accessibility barriers that limit their ability to vote.

Prior to the *Lane* decision, however, litigation was not a fruitful option for disabled voters. For example, Michigan voters challenged a state statute that provided that the state may require that a blind person

accepts assistance to mark his or her ballot. They argued that this statute violated their right to vote in secrecy, and that they must be provided with technology which would permit them to vote independently and privately. The Sixth Circuit held that the Michigan statute was lawful and constitutional (*Nelson v. Miller* [1999]). But in *American Association of People with Disabilities v. Smith* (2002) the Court held that state election officials failed to approve voting systems that would permit visually and manually impaired voters to vote without assistance, and in *American Association of People with Disabilities v. Hood* (2004), the Court held that a county elections supervisor had violated ADA regulations in utilizing optical scan voting system—visually impaired voters could not use optical scan system without third-party assistance and manually impaired voters could have voted unassisted using touch screen technology.

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Cases and Statutes Cited

American Association of People with Disabilities v. Smith, 227 F.Supp.2d 1276 (M.D. Fla. 2002)
American Association of People with Disabilities v. Hood, 310 F. Supp. 2d 1226 (M.D. Fla. 2004)
Nelson v. Miller, 170 F.3d 641 (6th Cir. 1999)
People of New York ex rel. Spitzer v. County of Delaware, 82 F. Supp.2d 12 (N.D.N.Y. 2000)
Tennessee v. Lane, 124 S. Ct. 1978, 1993 (2004)
 Help America Vote Act, 42 U.S.C., section 15301 et seq.
 Voting Accessibility for the Elderly and Handicapped Act, 42 U.S.C. Section 1973ee-1(b)

See also **Voting Rights Act of 1965**

RIGHT v. PRIVILEGE DISTINCTION

The distinction between rights and privileges was not well established during the founding era, when rights were often regarded as conferred by monarchs rather than by nature or the social contract, and the language reflected this, even as the natural rights philosophy of John Locke and others was becoming ascendant. However, as political philosophers and legal scholars thought through the implications of their ideas, they came to realize that they needed to make a distinction among legal claims based on the sources of those claims.

One of the early political philosophers to develop the distinction was Algernon Sidney:

The Israelites, Spartans, Romans and others, who thus framed their governments according to their own will, did it not by any peculiar privilege, but by a universal right conferred upon them by God and nature.

Although he did not make it as explicit as he could have, Locke laid the basis for two sources of rights: nature and the social contract. He identified three primary rights: life, liberty, and property, but left open the impression that the source for all of them was nature, when some further thought reveals that if property is title and not just possession, that survives the loss of possession, then it only makes sense in the context of a society, which suggests the source is the social contract.

Some of the rights not discussed by Locke are due process and the right to a presumption of nonauthority implicit in the common law prerogative writs, mainly of habeas corpus, quo warranto, mandamus, prohibito, procedendo, and certiorari, as recognized in the Ninth Amendment. Again, these rights only make sense in the context of a society or its government, which suggests their source is either the social contract or the constitution of government, or a combination thereof.

Some claims called “rights” only make sense in the context of government, such as the citizenship rights of voting and holding public office. Others, such as the rights of denizenship, of remaining at and returning to one’s place of residence, can make sense in the context of a society in exclusive dominion of a territory, which need not have a government.

That leaves legal claims that arise from private contracts and from statutes or other acts of government officials. A monopoly on the use of a business name is clearly not one that is a “right” in the same sense as life or liberty. Thomas Jefferson recognized this in the Declaration of Independence when he stated that the rights of life, liberty, and the pursuit of happiness, are “inalienable,” with a more fundamental status than holding public office or a license to hunt on public land. To distinguish between rights proper, which can be disabled or deprived only by due process, and claims that are conferred by government and may be withdrawn at any time by government, a different term was needed, and the word usually chosen was “privilege.”

This distinction can be seen in the language of the Fourteenth Amendment, which uses the terms “privileges and immunities.” By ancient usage, an “immunity” was a right against the positive action of government, and by the time the amendment was drafted in 1868, it was understood that all of the “rights” recognized by the Constitution and Bill of Rights were actually claims against the positive action of government that could not be withdrawn, and were therefore “immunities.” But the framers of the Fourteenth Amendment also wanted to include claims that were conferred by government, that is, privileges.

Since then, however, there has been a steady movement to reduce rights, or immunities, to privileges, and to restrict or withdraw them. It was once considered a matter of common right to engage in an occupation or profession of one's choice, but today many professions, such as the practice of medicine or law, are licensed, although the way the practice of law is "licensed" is handled more like a combination of a custom and a private contract. People used to regard themselves as being able, as a matter of common right, to erect a house, or improve one, on his own land. Today, one typically has to get a permit and have the work inspected by a government official.

The right-privilege distinction has long adversely impacted individuals within the public sector in protecting themselves against arbitrary governmental action. Justice Oliver Wendell Holmes, Jr., declared the doctrine of unconstitutional conditions for a "privilege" to which substantive due process is inapplicable. In 1892, Justice Holmes, speaking for the Massachusetts Supreme Judicial Court in *McAuliffe v. Mayor of New Bedford* (1892), dismissed the petition of a policeman who had been fired for violating a regulation which restricted his political activities:

The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.... There are few employments for hire in which the servant does not agree to suspend his constitutional right of free speech, as well as of idleness, by the implied terms of his contract. The servant cannot complain, as he takes the employment on the terms which are offered him.

More recently, in 1954, the Supreme Court upheld the suspension of a physician's license. The physician had been convicted of contempt of Congress for declining to produce certain papers for a committee of the House of Representatives. His license was suspended on the basis of this conviction, without a showing that his actions related to his competence or professional integrity as a physician, and the Court deferred to the police power of the state:

The practice of medicine in New York is lawfully prohibited by the state except upon the conditions it imposes. Such practice is a privilege granted by the State under its substantially plenary power to fix the terms of admission.

A person may sometimes successfully rely on an independent right to procedural due process to avoid some of the harsh consequences of the right-privilege distinction. One may have no right to talk politics while in the public service, but still he may not be discharged without an adequate hearing which may fairly determine whether in fact he had been talking politics.

Under the equal protection clause, however, it seemingly makes no difference that the threatened interest is a privilege rather than a right. Even a privilege, benefit, opportunity, or public advantage may not be granted to some but withheld from others where the basis of classification and difference in treatment is arbitrary.

A response to this tendency to convert immunities into privileges has been the "doctrine of unconstitutional conditions," that whatever an express constitutional provision forbids government to do directly forbids government to do indirectly, such as by setting conditions on the conferring of some privilege that requires a person to relinquish an immunity. By this doctrine it would be unconstitutional to require a person to relinquish his right against warrantless search of his lodgings as a condition for receiving public welfare, or to relinquish his right to political speech while off-duty as a condition for public employment, or to relinquish his right against self-incrimination as a condition for employment as a law enforcement officer. At the very least, this principle, when combined with a right to procedural due process, would entitle a person facing the loss of a privilege to a hearing to decide whether the unconstitutional conditions principle has been violated.

Under the equal protection clause, it seemingly makes no difference that the threatened interest is a privilege rather than a right. Even a privilege, benefit, opportunity, or public advantage may not be granted to some but withheld from others where the basis of classification and difference in treatment is arbitrary. Justice Clark stated in *Wieman v. Updegraff* (1952), in striking down a state loyalty oath read as containing no requirement of scienter:

We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory.

The relation between rights and privileges has played out in voting, which was originally established not as a right but as a privilege. There might be a right not to be taxed without representation in the taxing body, but that did not require that one personally have the right to vote in elections to that body. It was considered sufficient for dependents, such as children, women, wage workers, and slaves, to be represented in voting by their father, husband, employer, or master. However, the Fifteenth Amendment, in establishing a right not to be denied the "right" to vote on the basis of "race, color, or previous condition of servitude, confused the distinction by terming voting a "right" rather than a "privilege," even while

indicating it could be withheld on other grounds than those it prohibited. We have to recognize that in using the word “right” the Fifteenth Amendment did not make it one. It only prohibited the withholding of the privilege on certain grounds, thereby creating a right not to have it withheld on those grounds. Similarly, the Nineteenth Amendment established a right not to be denied the privilege of voting on the basis of sex, the Twenty-Fourth Amendment established a right not to be denied the privilege of voting on the basis of nonpayment of a tax, and the Twenty-Sixth Amendment established a right not to be denied the privilege of voting on the basis of being under the age of eighteen. The fact that the term “right” was used instead of “privilege” in each of those amendments indicates, however, that one cannot rely on the terms to be used carefully in legal discourse.

Conflation of the terms “right” and “privilege” as synonymous has a long history in English law, in which originally all “rights” were considered privileges granted by the sovereign, that is, the monarch. With independence of the American colonies, however, making the people the sovereign, and their adoption of the Constitution, came acceptance in law that the rights, or more precisely, immunities, recognized and protected in the Constitution precede the Constitution, and are either natural, preceding society and government, or arise out of the social contract that created the society. Nevertheless, the legacy of monarchy lingers in the language sometimes used by legislators and judges.

Most attempts to reduce immunities to privileges, and then often to withdraw them, are done through exercise of a power to regulate or tax, or at the state level, by exercise of the state “police powers.” Thus, while U.S. and state constitutions might recognize a “right to keep and bear arms,” their legislatures have tried to make it a privilege to acquire or convey title or possession to them. Congress in 1937 adopted legislation that imposed a \$200 tax on certain types of firearms, and made it illegal to possess a firearm on which a tax had not been paid, and then delegated the power to executive officials to effectively prohibit the weapons by refusing to accept payment of the tax. This was done in defiance of the ancient principle that a right may not be taxed in a way that imposes an undue burden on its exercise. Congress has since prohibited acquisition or possession of similar weapons manufactured after 1985, under the alleged authority of the Commerce and necessary and proper clauses, on the argument that, following the precedent in *Wickard v. Filburn* (1942), they have a “substantial effect on interstate commerce.” Some states have argued that, since militia commanders may direct the use or nonuse of weapons by persons in called up

militia status, they have the power to prohibit the acquisition or possession of any weapons even for persons not on militia duty, and to not recognize as militia those not called up by officials with the authority to impose penalties for failing to respond to a call-up. This is in conflict, however, with the ancient principle that the authority for militia, that is, defense activity, is not officials or the law, but a threat to public safety and the constitution of the state or United States, and every person aware of such a threat has not only the right but duty to defend against it, alone or in concert with others, regardless of whether officials concur or cooperate. Indeed, the concept contemplates that the officials may become the threat to which a defensive response is required.

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References and Further Reading

- Barsky v. Board of Regents*, 347 U.S. 442, 451 (1954).
Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 185 (1961) (concurring opinion).
Murdock v. Pennsylvania, 319 U.S. 105 (1943). Commentary by Jon Roland. <http://www.constitution.org/ussc/319-105jr.htm>.
 Sidney, Algernon. *Discourses Concerning Government*, Chapter 1, Section 16 (1698). http://www.constitution.org/as/dcg_116.htm.
 Van Alstyne, William W., *The Demise of the Right-Privilege Distinction in Constitutional Law*, Harvard Law Review 81 (1967): 1439.

Cases and Statutes Cited

- McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 220, 29 N.E. 517, 517 (1892)
Wickard v. Filburn, 317 U.S. 111 (1942)
Wieman v. Updegraff, 344 U.S. 183, 192 (1952)

See also Due Process

RIGHTS OF THE ACCUSED

The best way to understand what rights our criminal justice system accords the accused is to investigate the process by which accused persons are brought into court and their alleged culpability adjudicated. The criminal justice process exists to justify society’s imposition of punishment upon an individual. In a free and just society, stripping an individual of her liberty—that is, punishing through imprisonment—must be legitimated by a legal process that is fair and accurate. Sometimes promoting fairness harmonizes with the pursuit of accuracy in adjudication; sometimes not. For example, ensuring free and adequate legal representation for indigent criminal defendants strikes us as fair; but it also serves society’s irrevocable commitment to ensuring that no innocent person is convicted, a risk that is heightened when an accused

person must undergo a trial process without, as the Supreme Court put it in *Gideon v. Wainwright* (1963), the “guiding hand of counsel.” Conversely, while it might be “fair” to suppress relevant evidence at a criminal trial because the police violated the constitutional rights of the accused, that judicial remedy hinders the system’s pursuit of adjudicatory accuracy.

Complicating things further, we demand not just fairness and accuracy, but also a certain level of efficiency in the criminal justice process. What kind of efficiency? We want law enforcement to prevent crime, and to the extent that is not possible, we want criminals swiftly apprehended and swiftly punished. We want the criminal justice process to incapacitate criminals and deter would-be offenders. Important as this objective is, single-minded attention to efficiency would lead us to adopt what might be called an “administrative tribunal system of justice,” where the focus is exclusively on fact-finding, and those rights of the accused that impede that goal would be jettisoned. Even accuracy could be sacrificed in an efficiency-obsessed system, since efficiency may well require that we tolerate higher risks of error in the adjudicatory process than we currently do.

No criminal justice system pursues one objective and ignores the others. Balancing the competing objectives, through evaluation of society’s values and needs, is a perennial feature of the administration of justice. Fairness, accuracy, and efficiency are elusive objectives that compete for our concern. And what rights we accord the accused exist within this triangle of concerns.

No adjudicatory process could command our allegiance if it did not pursue the very important goal of discovering the truth. No doubt, many of the rights of the accused promote this goal. As noted above, anyone facing felony charges (typically a criminal accusation that brings with it the possibility of at least six months incarceration) is entitled to have a lawyer, free of charge if the accused is too poor to pay counsel’s fee (which is true of most criminal defendants). The accused may even be entitled to the services of an investigator and necessary experts, also paid for by the taxpayers, so as to mount a challenge to the prosecution’s case. The accused may demand of the prosecution that it disclose any information it has that might be favorable to the defense, and any failure by the prosecution to disclose favorable evidence that undermines confidence in the outcome would require a new trial. At the trial itself, defense counsel must be given the opportunity to cross-examine the prosecution witnesses. Cross-examination has been called the “greatest engine of truth ever devised.” Guaranteed by the Sixth Amendment to the U.S. Constitution, the right of cross-examination exists in tandem with

another truth-promoting right—the right of compulsory process, which empowers the accused to subpoena necessary witnesses. The right to confront witnesses and the right to compulsory process are species of the larger right to present a defense, including the right of the accused to offer his own testimony.

The goal of discovering the truth is part of the overarching objective that the criminal-justice process render accurate results—that is, convicting the guilty and exonerating the innocent. But the notion of the “truth” is too slippery on which to build an elaborate adjudicatory process. Sometimes according an accused the right to counsel and the right to have counsel vigorously attack the prosecution’s case through cross-examination and through motions to suppress reliable and competent evidence undermines the pursuit of truth. But our commitment to fairness, a commitment to an adjudicatory process that accords the accused the right to participate in the proceedings in a way that permits such attacks upon the prosecution’s case, demands that we not allow ourselves to be overwhelmed by the idea that uncovering the truth should guide every decision regarding process. The fundamental precept that each individual defendant has dignity and may not be treated as a means to an end that might seem laudable or necessary requires that the adjudicatory process include the irrevocable right to be heard and to participate in the trial proceedings.

But leaving aside these considerations of fairness and dignity, often we can never know the “truth,” only versions of the truth as told by witnesses who have their own infirmities and biases that undoubtedly affect their reliability and credibility. The *accuracy* objective demands a societal judgment about risk: *What risks are we willing to tolerate of convicting the innocent or exonerating the guilty?* Because our society is committed to the proposition that it is better to exonerate the guilty than convict the innocent—on a ten-to-one ratio, the famous maxim goes—the accused has certain rights that reflect this risk aversion. Most notable are the cluster of rights centering on the prosecution’s burden of proof. The accused has the right to be presumed innocent, unless and until the prosecution can prove guilt through competent evidence. The presumption of innocence means that the fact-finder (typically the jury) must evaluate the prosecution’s case from the point of view that the accused is, in fact, innocent. The fact-finder must be persuaded of the accused’s guilt as opposed to having a pre-existing suspicion of guilt ratified by the proof. Not only that, the prosecution must persuade the fact-finder with proof so compelling that there exists no reasonable doubt as to the accused’s guilt. Even if the jury thinks the accused is probably guilty, the accused

is entitled to an acquittal because the prosecution has failed to prove guilt *beyond a reasonable doubt*. Moreover, the prosecution may not satisfy its burden of proof by insisting on questioning the accused or by commenting on the accused's silence as indicative of guilt. The accused has a Fifth Amendment right to silence that extends beyond the interrogation room of a police precinct, but into the courthouse as well. That means neither the prosecution nor the judge may compel the accused to testify, and the accused may not suffer any prejudice by the decision not to testify or otherwise remain silent about the accusation. Undoubtedly, this rigorous burden of proof has sometimes led to acquittals of the factually guilty. But it would be misleading to say that the system has failed in its goal of promoting accuracy in the adjudicatory process. Accuracy in this context takes into account society's values about the power of government to strip individuals of their liberty. Acquitting the factually guilty because of a *bona fide* reasonable doubt in the accusations is an accurate result because we have decided that the risks of convicting the innocent are too great to lower that burden of proof.

Other rights reinforce this notion of risk aversion. The accused has a Sixth Amendment right to be tried by a jury for any offense that could lead to imprisonment of at least six months. Empaneling a jury is time consuming and costly. Sometimes, in complex white-collar crime cases, jurors are less equipped to handle the fact-finding task than a judge or a panel of experts. But community participation in the adjudicatory process, plus the demands for unanimity or near-unanimity in the verdict, protect the accused against government overreaching. In fact, the accused's right to certain pretrial screening procedures reflect our "accuracy" objective. The police may not under the Fourth Amendment take an individual into custody without probable cause of criminality, and under the Fifth Amendment that probable cause may not be built upon investigatory procedures that produce involuntarily rendered incriminating confessions. Whatever charges that are brought against an accused must be screened either by a magistrate in a preliminary hearing or by a grand jury consisting of members of the community.

Similarly, the right against double jeopardy can be understood in part as a safeguard against erroneous convictions. Subjecting an individual to multiple prosecutions for the same offense increases the chances of a conviction. In some instances a conviction in a second or third trial may be the "accurate" result insofar as the accused is factually guilty and secured an "erroneous" acquittal in the first proceeding. But the risk exists that an innocent defendant is factually innocent but cannot defeat the prosecution's quest for

a conviction in a subsequent trial. In that sense, the right against being put twice in jeopardy reflects yet again our aversion to the risk of convicting the innocent.

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References and Further Reading

- Amar, Akhil Reed, *The Future of Constitutional Criminal Procedure*, American Criminal Law Review 33 (1996): 1123.
- Dressler, Joshua. *Understanding Criminal Procedure*. 3rd ed. Newark, NJ: LexisNexis, 2002.
- Duff, R.A. *Trials and Punishments*. Cambridge; New York: New York University Press, 1986.
- Packer, Herbert. *The Limits of the Criminal Sanction*. Stanford, NJ: Stanford University Press, 1968.
- Uviller, H. Richard. *The Tilted Playing Field: Is Criminal Justice Unfair?* New Haven, NJ: Yale University Press, 1999.

Cases and Statutes Cited

- Gideon v. Wainwright*, 372 U.S. 335 (1963)

RIPENESS IN FREE SPEECH CASES

Ripeness is a justiciability doctrine concerned with identifying cases that are premature for judicial review because the injury that the plaintiff seeks to prevent—typically through injunction or declaratory judgment—is merely speculative and may never occur. In free speech cases, if the defendant government argues that the case is unripe because the challenged law has not been enforced, the plaintiff argues that the law inhibits speech and the courts should decide its constitutionality before it is enforced.

It is often difficult to distinguish ripeness cases and discern an underlying principle. Three Supreme Court free speech cases exemplify this: *United Public Workers v. Mitchell* (1947) involved a challenge to the Hatch Act, which barred federal employees from political activity. Only one plaintiff had been disciplined; the others' claims were dismissed as unripe because the court could "only speculate" about the kinds of activity and speech they wanted to engage in and about how the law would be enforced.

In *Adler v. Board of Education* (1952), New York City schoolteachers challenged a state law requiring dismissal of anyone who advocated overthrowing the government by force or violence or who belonged to an organization that did. No one had yet been dismissed, yet the court found the case ripe for adjudication and sustained the law.

In *Cramp v. Board of Public Instruction* (1961), the Court implicitly found ripeness by invalidating a Florida law requiring every employee to take an oath that he had never lent “aid, support, advice or influence to the Communist Party.” The court found that the law was vague and could potentially inhibit speech.

One possible unifying theme of these cases is that if the justices consider the challenged law to be clearly facially unconstitutional (*Cramp*) or constitutional under any conceivable set of circumstances (*Adler*), ripeness is not an issue, but when the outcome may hinge on the nature of a plaintiff’s activity or speech and on the circumstances of the enforcement (*Mitchell*), the Court may defer judicial review until (if ever) an appropriate case presents itself.

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References and Further Reading

- Chemerinsky, Erwin. *Constitutional Law: Principles and Policies*. 2nd ed. New York: Aspen Law & Business, 2002.
- Nowak, John E., and Ronald D. Rotunda. *Constitutional Law*. 7th ed. St. Paul, MN: West, 2004.
- Tribe, Laurence. *American Constitutional Law*. 3rd ed., vol. 1. St. Paul, MN: West, 2000.

Cases and Statutes Cited

- Adler v. Board of Education*, 342 U.S.485 (1952)
- Cramp v. Board of Public Instruction*, 368 U.S. 278 (1961)
- United Public Workers v. Mitchell*, 330 U.S. 75 (1947)

See also **Hatch Act; Standing in Free Speech Cases**

COUNTY OF RIVERSIDE v. McLAUGHLIN, 500 U.S. 44 (1991)

Arrests are justified if the police have probable cause, which is defined as meaning “facts and circumstances within the officer’s knowledge that are sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense.” When a warrant is used, the issuing magistrate determines if there is probable cause. When the police act without a warrant, they do so without such a determination.

Gerstein v. Pugh (1974) established that the Fourth Amendment required that a person detained after a warrantless arrest must be given a prompt judicial hearing to establish probable cause for continued detention. In *McLaughlin*, the Court was called on to interpret what “prompt” means.

McLaughlin was a class action complaining about the policy of the County of Riverside, California, which required such hearings within two days of arrest. The policy excluded from computation weekends and holidays. Thus, a person arrested late in the week could be held as long as five days before the hearing. Over the Thanksgiving holidays, a seven-day delay was possible. The Court concluded that judicial determinations of probable cause within forty-eight hours of a warrantless arrest usually are reasonable. This conclusion was a practical compromise between the government’s interest of detaining dangerous individuals and the individual’s liberty interest.

McLaughlin provides a needed benchmark. The forty-eight-hour rule gives assurances to state and local jurisdictions that, if they comply, they will be immune from systematic challenges to their probable cause hearing procedures. It also gives meaning to the promise made by *Gerstein* to detainees that there will be a prompt determination whether continued detention is justified.

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References and Further Reading

- Michigan v. DeFillippo*, 443 U.S. 31, 37 (1979).

Cases and Statutes Cited

- Gerstein v. Pugh*, 420 U.S. 103 (1974)

See also **Arrest; Arrest Warrant; Due Process; Seizure**

RIZZO v. GOODE, 423 U.S. 362 (1976)

Philadelphia in the 1970s was rife with controversy over alleged police misconduct toward minority residents. During this period, city residents brought two class-action lawsuits against the mayor and police commissioner of Philadelphia, claiming the officials allowed unconstitutional police misconduct, including arrests without probable cause and use of excessive force, through inadequate supervision of their officers. The trial court agreed, finding that the city’s existing citizen complaint procedures were inadequate and should be overhauled. The Supreme Court reversed this injunction for several reasons. First, the Court declared the plaintiffs lacked a “personal stake” in the outcome because the defendants in this case, the city officials, were not directly responsible for the plaintiffs’ distress, while the police officers who were responsible were not sued. Second, the lower court’s conclusion that the number of incidents of police misconduct was “unacceptably high” and

thus unconstitutional overstated the problem, since levels of police misconduct in Philadelphia were similar to those in other major cities. Finally, the Court ruled that the injunction was an unjustified federal intrusion into the local discretion of police authority. By declining to extend federal authority to the supervision of police departments for misconduct, the Court departed most notably from previous decisions that had created federally supervised busing of schoolchildren to facilitate desegregation. This case marks an important example where concern for local independence from the federal government, a principle known as federalism, overruled the Court's sensitivity to issues of social justice. The case became known afterward as a nearly absolute bar to individual suits against municipal police forces.

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References and Further Reading

Baddeley, Jeffrey, *Parents Patriae Suits by a State under 42 U.S.C. § 1983*, Case Western Reserve Law Review 33 (1983): 431–57.

Council of Orgs. on Philadelphia Police Accountability and Responsibility v. Rizzo, 357 F. Supp. 1289 (E.D. Pa. 1973).

Note: *The Changing Social Vision of Justice Blackmun*, Harvard Law Review 96 (1983): 717–36.

See also **Jurisdiction of the Federal Courts; Police Investigation Commissions; Police Power of the State; Race and Criminal Justice**

ROBERTS v. UNITED STATES JAYCEES, 468 U.S. 609 (1984)

Roberts v. United States Jaycees established a framework for a First Amendment defense against anti-discrimination laws, based on what an organization expresses via its membership policies. In *Roberts*, the national organization of the Jaycees had a policy of male-only membership. Two local chapters in Minnesota admitted women. The national organization threatened to revoke their charters. The local chapters charged sex discrimination, under a Minnesota statute.

The U.S. Supreme Court delineated two distinct interests protected by First Amendment freedom of association. The first is a right of “intimate association.” This is an element of personal liberty, protecting certain intimate relationships from undue intrusion by the state. Marital and familial relationships are leading examples. The Jaycees is not small, selective, or exclusive, however, so its claim did not fit this category.

“Expressive association” also derives from the First Amendment. This right protects a group's efforts toward shared goals, be they political, social, economic, educational, religious, or cultural. The Jaycees' interest in its membership requirements was of this type. Minnesota's antidiscrimination law intruded by forcing the association to accept members—women—whom the Jaycees did not want. The right to expressive association is not absolute, however, and can be infringed on to further compelling state interests. These must be unrelated to suppression of viewpoint, and the state's law must be the least restrictive means of achieving the state's goals. Minnesota's interest in eradicating sex discrimination was a compelling interest. The Jaycees' expressive association was not seriously burdened by the anti-discrimination law, because the exclusion of women did not involve any symbolic message and the club's policies were unlikely to be altered by the participation of women members.

The right of intimate association has not had much success in court. Expressive association is another matter. In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group* (1995), it was an alternative rationale for protecting the exclusion of an Irish gay group from a privately organized St. Patrick's Day parade. In *Boy Scouts of America v. Dale* (2000), the Boy Scouts' policy of excluding of gay men as adult leaders was protected as expressive association; forcing the inclusion of gay men pursuant to an antidiscrimination statute would have violated this right.

After *Dale*, commentators returned to Justice O'Connor's concurring opinion in *Roberts*. She drew a distinction between organizations whose purpose is expressive and organizations whose purpose is commercial. The more commercial an association, the less right it has to assert First Amendment protection against antidiscrimination laws. If applied expansively, the doctrine of expressive association threatens to undermine antidiscrimination laws *Forum for Academic and Institutional Rights v. Rumsfeld* (2005) may further clarify its scope.

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References and Further Reading

Board of Directors of Rotary International v. Rotary Club of Duarte, 481 U.S. 537 (1987).

Koppelman, Andrew, *Should Noncommercial Associations Have an Absolute Right to Discriminate?* Law and Contemporary Problems 67 (2004): 67.

Cases and Statutes Cited

Boy Scouts of America v. Dale, 530 U.S. 640 (2000)

Forum for Academic and Institutional Rights v. Rumsfeld, 319 F.3d 219 (3d Cir. 2004), cert. granted, 125 S.Ct. 1977 (2005)

Hurley v. Irish-American Gay, Lesbian and Bisexual Group, 515 U.S. 557 (1995)

See also **Freedom of Association; Marches and Demonstrations; NAACP v. Alabama Ex Rel. Patterson**, 357 U.S. 449 (1958)

ROBERTS, OWEN JOSEPHUS (1875–1955)

An exponent of fidelity to precedent and judicial restraint, Roberts sided frequently enough with the underdog to forge a solid if unspectacular record in civil liberties cases.

Owen J. Roberts was born in Germantown, Pennsylvania, on May 2, 1875. He graduated Phi Beta Kappa from the University of Pennsylvania in 1895 and received a law degree from the same institution in 1898. On May 9, 1930, President Herbert Hoover selected the Republican lawyer for the Supreme Court following the failed nomination of Judge John J. Parker. On May 20, 1930, the Senate confirmed Roberts.

Roberts was joined in the same year by Charles Evans Hughes, who became chief justice. Both justices emerged as central figures in the modern history of civil liberties. For example, shortly after reaching the bench, Roberts voted with Hughes in *Stromberg v. California* (1931). The case involved a California statute that banned red flags, a symbol of the Communist Party. For the first time, the Court extended the Fourteenth Amendment to incorporate a First Amendment protection. Roberts also joined Hughes in *Near v. Minnesota* (1931) to strike down a Minnesota state “gag” law and hold that freedom of the press was within the due process clause of the Fourteenth Amendment.

Roberts first important majority opinion came in a Fourth Amendment case, *Grau v. United States* (1932). As was typical of rights of the accused cases during these years, *Grau* had significant libertarian overtones. In considering a search warrant issued under the National Prohibition Act, Roberts held the warrant invalid because it failed to state a probable cause.

Two years later, Roberts followed with a sharp dissent in a Sixth Amendment case, *Snyder v. Massachusetts* (1934). “The concept of due process,” he wrote, “is not technical.... It is fundamental that there can be no due process without reasonable notice and a fair hearing.” Roberts was also careful not to exaggerate the reach of the judiciary in such cases.

He spoke for the Court in *Betts v. Brady* (1942), holding that states did not have to provide legal assistance for noncapital felonies.

Roberts usually was sympathetic to First Amendment claimants. For example, he wrote for the Court in *Herndon v. Lowry* (1937), decided by a vote of five to four. Angelo Herndon was a black organizer convicted under a Georgia statute of attempting to incite insurrection by seeking to persuade others to join the Communist Party’s campaign to establish separate black states in the South. Roberts overturned Herndon’s conviction on the grounds that the evidence in the case failed “to establish an attempt to incite others to insurrection,” even at some indefinite future time. According to Roberts, the clear and present danger test applied to laws that addressed forbidden acts; the bad tendency test applied to laws that addressed forbidden language. The decision enhanced civil liberties because in general the most punitive forms of legislation dealt with acts rather than language.

Roberts wrote for a plurality in *Hague v. Committee for Industrial Organization* (1939) in voiding a Jersey City, New Jersey ordinance that required labor organizers to have a permit to conduct a public meeting and distribute print materials in the streets. Roberts held that labor had the right to organize and that streets and parks were public forums protected by the Fourteenth Amendment under the privileges and immunities clause.

The same year, Roberts also spoke for the Court in *Schneider v. State* (1939). The case involved attempts by municipal authorities to control demonstrations and the distribution of radical literature by charging that these activities contributed to unsightly streets and public places. Roberts, however, insisted that the First Amendment secured freedom of speech and of the press against abridgment by the states through the Fourteenth Amendment. The purpose of keeping the streets neat was insufficient to justify an ordinance that prohibited a person rightfully from handing literature to persons willing to receive it.

Roberts was unwilling to extend the concept of protected speech to commerce. In *Valentine v. Chrestensen* (1942), his majority opinion upheld a city ordinance prohibiting distribution of “commercial and business advertising matter” on public streets. Without even mentioning the First Amendment, Roberts held that “[t]he Constitution imposes no ... restraint on government as respects purely commercial advertising.”

Roberts also expanded religious liberty through his unanimous opinion in *Cantwell v. Connecticut* (1940). Newton Cantwell and his sons were Jehovah’s Witnesses, charged with violating a Connecticut statute

that made it illegal to solicit money for any cause without a certificate issued by the state.

Roberts's opinion held that while a state might regulate the time, place, and manner of soliciting contributions and holding meetings in the streets, it could not forbid them. "Such a censorship of religion as the means of determining its right to survive," Roberts wrote, "is a denial of liberty protected by the First Amendment and included in the liberty which is within the protection of the Fourteenth." Simply because the Cantwells' speech was offensive, Roberts explained, it did not follow that it was dangerous.

His opinion was important for two reasons. First, it reinforced the proposition that the free exercise clause of the First Amendment applied to the states through the due process clause of the Fourteenth Amendment. Second, it suggested that the free exercise clause protected not only beliefs but some actions. The protection of the former was absolute; the protection of the latter could be limited by appropriate state action.

Roberts's history of support for civil liberties, however, was tarnished by the two flag salute cases, *Minersville School District v. Gobitis* (1940) and *West Virginia State Board of Education v. Barnette* (1943). In both instances, his sensitivity to precedent and judicial restraint outweighed his usual sympathy for individual expression. Moreover, with the appointment of Felix Frankfurter to the Court in 1939, Roberts found a jurisprudential soul mate, a relationship that strengthened with the departure of Hughes and the appointment of Stone as chief justice in 1941.

The principal opponents of the Nazi-like flag salute were the Jehovah's Witnesses, the same group that Roberts had supported in *Cantwell*. This tightly knit evangelical sect refused to worship graven images, including the flag. In *Gobitis*, Justice Frankfurter, speaking for an eight-to-one majority, reiterated the Court's previous support for the flag salute, a position in which Roberts silently agreed. In *Barnette*, however, the Court, by a vote of six to three, overturned compulsory flag saluting. Justice Frankfurter wrote an impassioned dissent; Roberts silently joined him again.

Roberts struggled to balance his commitment to *stare decisis* with his respect for civil liberties produced a mixed record where race was involved. On the one hand, he supported Herndon and agreed to admit a black student to the all-white University of Missouri law school. On the other hand, he upheld the use of race to discriminate against voters in primary elections, even after the Court in *Smith v. Allwright* (1944) held that citizens had a right to vote in such elections free of racial discrimination.

In *Korematsu v. United States* (1944), however, Roberts dissented when the Court upheld the war-time detention of American citizens of Japanese ancestry. Hugo Black and Frankfurter, the two justices regarded as the best and the brightest of the era, led the six-vote majority. Its decision, however, failed to ensure that liberty was a paramount value in war as well as in peace. Roberts rejected the majority's position on the grounds that the internment laws had subjected Korematsu to conflicting orders to leave the military area and to stay put, an obvious violation of due process.

The Court's divisions in the Japanese internment and flag salute cases revealed the brittle relationships among the justices. Although Roberts and Frankfurter disagreed on certain issues, they had found themselves emotionally united in their dislike of William O. Douglas and Black and constitutionally allied in their belief that the Roosevelt Court disregarded settled law. To underscore that fact, in his last full term, Roberts dissented fifty-three times, or in almost one-third of the nonunanimous cases.

Roberts wearied of the contentious infighting and resigned on July 31, 1945. He left without the traditional farewell letter from his colleagues, a victim of the pettiness of Black and Douglas, who claimed his jurisprudence lacked principles. Roberts became dean of the University of Pennsylvania law school and president of the American Philosophical Society.

Roberts was an honest man, especially with himself. "I have no illusions about my judicial career," he wrote. "But one can only do what one can. Who am I to revile the good God that he did not make me a Marshall...." In 1951, he authored *The Court and the Constitution* that summarized his adherence to *stare decisis* and concluded that in matters of civil liberties it was "regrettable that in an era ... whose greatest need [was] steadfastness of ... purpose, this court ... should ... become the breeder of fresh doubt and confusion in the public mind as to the stability of our institutions."

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References and Further Reading

- Burner, David. "Owen J. Roberts." In *The Justices of the United States Supreme Court: Their Lives and Major Opinions*. Vol. 3, edited by Leon Friedman and Fred L. Israel, 2253–67. New York: Chelsea House Publishers, 1995.
- Bybee, Jay S. "Owen J. Roberts." In *The Supreme Court Justices: Illustrated Biographies, 1789–1995*, edited by Clare Cushman, 122–35. Washington, D.C: Congressional Quarterly, 1995.
- Grovey v. Townsend*, 295 U.S. 45 (1935).

Leonard, Charles. *A Search for a Judicial Philosophy: Mr. Justice Roberts and the Constitutional Revolution of 1937*. Port Washington, NY: Kennikat Press, 1971.
Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938).
Roberts, Owen. *The Court and the Constitution*. Cambridge: Harvard University Press, 1951.
Rotunda, Ronald D., ed. *Six Justices on Civil Rights*. New York: Oceana Publications, Inc., 1983.
United States v. Macintosh, 283 U.S. 605 (1931).

Cases and Statutes Cited

Beets v. Brady, 316 U.S. 455 (1942)
Cantwell v. Connecticut, 310 U.S. 296 (1940)
Grau v. United States, 287 U.S. 124 (1932)
Hague v. Committee for Industrial Organization, 307 U.S. 496 (1939)
Herndon v. Lowry, 301 U.S. 242 (1937)
Korematsu v. United States, 323 U.S. 214 (1944)
Minersville School District v. Gobitis, 310 U.S. 586 (1940)
Near v. Minnesota, 283 U.S. 697 (1931)
Schneider v. State, 308 U.S. 147 (1939)
Smith v. Allwright, 321 U.S. 649 (1944)
Snyder v. Massachusetts, 291 U.S. 97, 123 (1934)
Stromberg v. California, 283 U.S. 359 (1931)
Valentine v. Chrestensen, 316 U.S. 52 (1942)
West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943)

ROBINSON v. CALIFORNIA, 370 U.S. 660 (1962)

In *Robinson*, the U.S. Supreme Court held that the Eighth Amendment precludes punishment for a “status offense” in the absence of criminal behavior. The defendant was charged under a California statute that forbade “one to be addicted to the use of narcotics.” At the close of evidence, the judge instructed the jury that it could convict if it found that the defendant had merely been addicted to illegal narcotics while in the court’s jurisdiction. The defendant was convicted and sentenced to serve ninety days in jail.

In a fractured opinion, the Supreme Court held that the conviction violated the defendant’s Eighth and Fourteenth Amendment rights. The Court distinguished a state’s authority to punish a defendant for *using* narcotics from the state’s authority to punish him for *being addicted to* narcotics. Finding addiction to be more like a status than an act, the Court drew a parallel between addiction and mental illness, reasoning that punishment for addiction would be akin to punishing the insane for their insanity. Even though the Court found that a state may lawfully confine a mentally ill person for medical treatment, the justices differentiated treatment from punishment, reasoning that “[e]ven one day in prison would be cruel and unusual” as punishment for a status similar

to mental illness. *Robinson* later provided foundation for the Court’s 2002 conclusion that execution of mentally ill defendants would be cruel and unusual (*Atkins v. Virginia* [2002]).

Shortly after issuing the *Robinson* decision, the Court narrowed the scope of its holding, refusing to constitutionalize an insanity test and holding that punishment of an act somewhat compelled by addiction could survive constitutional scrutiny (*Powell v. State of Texas* [1968]).

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References and Further Reading

Furman v. Georgia, 408 U.S. 238 (1972).

Cases and Statutes Cited

Atkins v. Virginia, 536 U.S. 304 (2002)
Powell v. State of Texas, 392 U.S. 514 (1968)

See also **Bill of Rights: Structure; Capital Punishment: Eighth Amendment Limits; Cruel and Unusual Punishment (VIII); Cruel and Unusual Punishment Generally; Fourteenth Amendment; *Furman v. Georgia*, 408 U.S. 238 (1972); *Powell v. Texas*, 392 U.S. 514 (1968); Status Offenses**

ROCHIN v. CALIFORNIA, 342 U.S. 165 (1952)

Police officers entered Rochin’s home and forced their way into this bedroom. When he grabbed two capsules from a table and put them in his mouth a struggle ensued. After failing to forcibly recover the capsules from Rochin’s mouth, the officers took him to a hospital where the capsules, which contained morphine, were recovered from his stomach by chemically induced vomiting. Over the objection of his lawyer the capsules were admitted into evidence, and Rochin was convicted of drug possession. The state court of appeal found that although the officers were guilty of various crimes such as assault and battery, it upheld the conviction.

Applying the due process provision of the Fourteenth Amendment, the Supreme Court overturned Rochin’s conviction. While aware of the criticism that the inherent vagueness of the due process concept entails a risk that federal judges will impose an amorphous body of “natural law” or their own personal values on state courts, it concluded that police conduct, such as that which occurred here, which shocks the Court’s conscience violates the norms of decency and fairness that underlie due process.

In concurring opinions, Justices Black and Douglas criticized the Court's reliance on the due process provision and, instead, urged the Court to apply the Fifth Amendment's protection against self-incrimination to state criminal prosecutions. A decade later this view became the majority view when the Court, under the leadership of Earl Warren, applied most of the provisions of the Bill of Rights to the states through the Fourteenth Amendment.

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References and Further Reading

- LaFave, Wayne R., Jerold H. Israel, and Nancy J. King. *Criminal Procedure*. 4th ed. St. Paul, MN: Thomson/West, 2004.
- Rubin, Peter J., *Square Pegs and Round Holes: Substantive Due Process, Procedural Due Process, and the Bill of Rights*, Columbia Law Review 103 (2003): 833–92.

Cases and Statutes Cited

- U.S. Const., Fourteenth Amendment
U.S. Const., Fifth Amendment

See also **Due Process; Self-Incrimination (V): Historical Background; Warren, Earl**

ROCK v. ARKANSAS, 483 U.S. 44 (1987)

In *Rock v. Arkansas* the Supreme Court struck down a per se rule from the Supreme Court of Arkansas that would preclude a witness, even the defendant, from testifying on any matters about which her memory may have been affected by hypnosis. Petitioner Vickie Rock was accused of murdering her husband. She claimed that the shooting was an accident; the gun had misfired.

In an attempt to recover some more precise memory of the shooting she underwent tape-recorded hypnosis sessions with a licensed neuropsychologist. As a result, Rock claimed to remember that her finger had not been on the trigger at the time of the shooting. An expert examination of the gun revealed that the gun would indeed misfire under certain conditions. The trial judge would not, however, let the defendant testify as to any of the events of that day on the grounds that the hypnosis session rendered her testimony unreliable. Rock was convicted and the conviction was upheld by the Arkansas Supreme Court on the grounds that hypnosis necessarily rendered the testimony unreliable. The U.S. Supreme Court, relying on the Fifth and Sixth Amendments, in particular the defendant's right to testify in her own defense, held that a per se ban was unconstitutional. While

the Court was prepared to agree that preclusion would sometimes be appropriate, the facts did not support exclusion of Rock's testimony and thus a per se ban was overbroad. The decision had implications for child abuse cases involving the controversial recovered memory syndrome.

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References and Further Reading

- Faigman, David L., David H. Kaye, Michael J. Saks, and Joseph Sanders. *Science in the Law: Social and Behavioral Science Issues*. St. Paul, MN: West Group Publishing, 2002.
- Kuplicki, Francis P., *Fifth, Sixth, and Fourteenth Amendments—A Constitutional Paradigm for Determining the Admissibility of Hypnotically Refreshed Testimony*, Journal of Criminal Law and Criminology 78 (1988): 853.
- Loftus, Elizabeth F., *Memory Distortion and False Memory Creation*, Bulletin of the American Academy of Psychiatry and the Law 24 (1996): 281.

See also **Defense, Right to Present; Due Process**

ROE v. WADE, 410 U.S. 113 (1973)

In the decades immediately following the Civil War (1861–1865), a majority of the states enacted criminal statutes prohibiting the termination of pregnancies. These laws placed grave burdens on women who wished to avoid childbirth. In the 1960s, women began filing lawsuits in state and federal courts challenging their constitutionality. In *Roe v. Wade*, the Supreme Court held that the decision to abort a pregnancy was a personal liberty protected by the Fourteenth Amendment. The Court, however, said that this right was not absolute and permitted the states to impose some regulations on its exercise in order to further their interests in safeguarding women's health and protecting potential human life. The scope of the state's power in this area, however, is very limited, and, as a consequence of *Roe*, abortion became freely available as an option to pregnant women throughout the country.

Roe v. Wade proved to be the most controversial decision that the Court made following the retirement of Chief Justice Earl Warren in 1969. It helped galvanize many Protestant fundamentalists and Roman Catholics into an unprecedented level of political activity that contributed to a movement of the Republican Party to the right of the political spectrum. Failing in their attempt to nullify *Roe* by means of a constitutional amendment, conservative Republican presidents and members of Congress sought to change the makeup of the Supreme Court by nominating and confirming justices committed to overturn

the decision. A Supreme Court nominee's position on *Roe* became the focus of Senate confirmation hearings, with supporters of the Court's decision opposing any nominee who they feared would vote to overturn it. Once on the Court, even conservative justices, however, are reluctant to violate the rule of precedent and to deprive women of a constitutional right on which they have relied for decades, regardless of their views of the constitutional soundness of the reasoning underpinning *Roe*.

An unmarried pregnant woman who wished to terminate her pregnancy by abortion, using the pseudonym Jane Roe, filed a lawsuit in the federal district court in Dallas, Texas, asking the Court to declare the state's criminal abortion law unconstitutional. The Texas statute permitted abortion only when necessary to save the life of the mother. The special three-judge district court agreed that the law was inconsistent with the Fourteenth Amendment of the U.S. Constitution. On appeal, the Supreme Court, in a seven-to-two decision, affirmed the district court's judgment. Justice Harry Blackmun wrote the opinion for the Court. The Texas statute criminalizing abortion had remained unchanged since 1857. In a companion case, *Doe v. Bolton* (1973), the Court invalidated a Georgia statute enacted in 1968, even though it reflected more modern thinking about abortion, because it also placed too many constraints on the woman's right to end her pregnancy.

The principal issue before the Court was whether the Constitution recognizes a right of women to abort their pregnancies. The constitution, acknowledged Justice Blackmun, does not mention abortion. Section 1 of the Fourteenth Amendment, however, prohibits the states from depriving any person of liberty without due process of law. Following ratification of the Fourteenth Amendment in 1868, the Supreme Court at first interpreted the language as authorizing state authorities to deprive individuals of their freedom, for example through incarceration, but only after affording them a fair trial. This approach was known as the "procedural due process" understanding of the Fourteenth Amendment. In the 1880s, however, the Supreme Court began to strike down state laws that constricted people's economic liberties on the grounds that they were unfair. An excellent example is *Lochner v. New York* (1905), where the Court found a New York law limiting the number of hours that bakers could work unconstitutional. This interpretation became known as the "substantive due process" reading of the Fourteenth Amendment. After 1937, the Court began employing the substantive due process doctrine to invalidate state laws, such as the one challenged in *Roe*, that intrude upon non-economic, or personal, liberty.

In *Griswold v. Connecticut* (1965), in an appeal brought by a married couple, the Supreme Court held that a state law prohibiting the use of contraceptives denied a liberty protected by the due process clause of the Fourteenth Amendment, a freedom that the Court extended to the unmarried in 1972 (*Eisenstadt v. Baird*). In *Loving v. Virginia* (1967), the Court ruled that men and women have a constitutional right to marry whomever they wish, regardless of race. In *Roe*, Justice Blackmun explained that contraception, marriage, and abortion were personal freedoms belonging to a subset of liberty that could be described as the right of privacy. He pointed out that, although the Constitution never uses the term "privacy," it implicitly recognizes zones of privacy. Justice Louis Brandeis first referred to privacy as a constitutional right in 1928 in a dissent in a Fourth Amendment case, *Olmstead v. United States*, which he described as the right to be let alone by the government. Privacy is, therefore, an implied right, found in the shadows, or penumbras, cast by such explicit provisions of the Bill of Rights as the First Amendment's guarantee of freedom of speech and press, the Fourth Amendment's ban on unreasonable searches and seizures, and the Fifth Amendment's right to remain silent during governmental interrogation. The district court also had referred to the Ninth Amendment which recognizes that individuals enjoy rights in addition to those explicitly mentioned in the first eight amendments of the Constitution (Bill of Rights). Justice Blackmun, however, grounded the abortion right in the concept of personal liberty guaranteed against state action by the due process clause of the Fourteenth Amendment.

The next issue faced by the Court was whether the fetus is a human being and, as such, enjoys the right to life protected by the same due process clause of the Fourteenth Amendment on which Jane Roe was relying. Justice Blackmun held that human life does not begin until birth, and thus denied any constitutional rights to the embryo or fetus.

Justice Blackmun regarded the Constitution as a living, evolving document, whose meaning changes with the needs of society and popular attitudes. He noted that there was a flurry of activity in the state legislatures during the Victorian age to make abortion a crime. This punitive treatment of abortion stood in sharp contrast with the English common law that existed at the time the Constitution was drafted and in the laws of ancient Greece and Rome and the original position of the Catholic Church, all of which permitted abortion at least until the moment of quickening, when the mother could feel the fetus move on its own within the womb. As the medical procedure of abortion became safer, however, and

women began asserting their interests, states began in the 1960s to make abortion more readily available, either through legislative action or judicial decision. The *Roe* decision joined this progressive trend in the expansion of women's choices.

The Court rejected the more extreme claim made by the plaintiff that women have a constitutional right to do what they want with their bodies. In earlier decisions, for example, the Supreme Court had upheld the right of states to make immunization compulsory. Justice Blackmun said that the appropriate standard to use in measuring restraints upon such a fundamental right as abortion is whether the state has a compelling interest in restricting its exercise. He found two such compelling interests: the health of the mother and preservation of potential human life. In order to strike a reasonable balance between the woman's personal liberty and the state's interests in restraining that liberty, Justice Blackmun divided human gestation into three periods, or trimesters. During the first trimester, abortions are safer than childbirth. Therefore, the woman has an unlimited right to terminate her pregnancy as long as she can find a qualified medical professional to perform the procedure. Because abortions performed after the twelfth week of pregnancy pose greater risk to the woman's health, the state can intervene by prescribing the kind of facility where abortions can be procured. After viability, the point where the fetus could live on its own outside the mother's womb, which occurs approximately at the end of the second trimester, the state can prohibit all abortions except those necessary for the woman's life or health. Health, however, includes mental health. The decision whether a late-term abortion is necessary to preserve a woman's mental health, or well-being, is one for the attending physician to make alone, as a matter of professional judgment. The physician can consider such variables as the woman's age, income, marital status, and the potential burden of rearing an unwanted child. The result of the Court's reasoning in *Roe* is that women enjoy, for all practical purposes, nearly an absolute right to abortion, in spite of Chief Justice Warren Burger's statement in his concurring opinion that *Roe* does not give women a right to abortion on demand.

The Supreme Court has allowed some restrictions on the abortion right. In 1989 in *Webster v. Reproductive Health Service*, the Court upheld a Missouri law prohibiting public facilities and public employees from being used to perform abortions. The Court, in *Hodgson v. Minnesota* (1990), ruled that states can require minors to notify a parent prior to procuring

an abortion or obtain the consent of a judge if parental notification would be unwise. In *Planned Parenthood v. Casey* (1992), the Court upheld a Pennsylvania requirement that a physician must provide state-scripted information about abortion to a woman twenty-four hours in advance of the procedure.

In *Lawrence v. Texas* (2003), homosexuals relied on the right to sexual privacy, developed in *Roe*, to challenge successfully state laws treating sodomy as a criminal act. The Court has yet to develop the full scope of the right to privacy, a right invoked by advocates of assisted suicide and in other areas where states continue to limit personal choice.

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References and Further Reading

- Balkin, Jack M., ed. *What Roe v. Wade Should Have Said: The Nation's Top Legal Experts Rewrite America's Most Controversial Decision*. New York: New York University Press, 2005.
- Faux, Marian. *Roe v. Wade*. New York: Cooper Square Press, 2000.
- Garrow, David J. *Liberty and Sexuality: The Right to Privacy and the Making of Roe v. Wade*. Berkeley: University of California Press, 1998.
- Hull, N.E.H., and Peter Charles Hoffer. *Roe v. Wade: The Abortion Rights Controversy in American History*. Lawrence: University Press of Kansas, 2001.
- Weddington, Sarah. *A Question of Choice*. New York: Penguin, 1993.

Cases and Statutes Cited

- Doe v. Bolton*, 410 U.S. 179 (1973)
Eisenstadt v. Baird, 405 U.S. 438 (1972)
Griswold v. Connecticut, 381 U.S. 479 (1965)
Hodgson v. Minnesota, 497 U.S. 417 (1990)
Lawrence v. Texas, 539 U.S. 558 (2003)
Lochner v. New York, 198 U.S. 45 (1905)
Loving v. Virginia, 388 U.S. 1 (1967)
Olmstead v. United States, 277 U.S. 438 (1928)
Planned Parenthood v. Casey, 505 U.S. 833 (1992)
Webster v. Reproductive Health Services, 492 U.S. 490 (1989)
- See also Abortion; Due Process of Law (V and XIV); *Doe v. Bolton*, 410 U.S. 179 (1973); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Loving v. Virginia*, 388 U.S. 1 (1967); *Olmstead v. United States*, 277 U.S. 438 (1928); *Planned Parenthood v. Casey*, 112 S.Ct. 2791 (1992); Reproductive Freedom; Right of Privacy; Substantive Due Process; *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989)**

ROEMER v. MARYLAND BOARD OF PUBLIC WORKS, 426 U.S. 736 (1976)

This case involved a challenge to a Maryland provision of annual grants to private colleges and universities, including religiously affiliated institutions, as long as (1) no funds were used for “sectarian purposes,” (2) no institution awarded “only seminarian or theological degrees,” and (3) the state determined eligibility for aid and compliance with the statute.

Anti-aid plaintiffs appealed to the Supreme Court which held (five to four) that the First Amendment establishment clause did not prohibit the aid statute. Justice Harry Blackmun, writing for the court, noted that the Maryland statute had a secular purpose (to support higher education); and did not have the primary effect of advancing religion since the autonomous Catholic institutions were not “pervasively sectarian,” did not require chapel attendance or classroom prayers, chose faculty and students “without regard to religion,” and supplemented mandatory religion classes with a wide range of liberal arts courses. Further, aid did not create “excessive” church/state entanglement (the colleges performed “essentially secular educational functions” and compliance audits were similar to generic college accreditation processes).

In his summation, Blackmun lectured on the necessary distinction between a scrupulous state neutrality “regarding religion and an impossible hermetic separation of the two.” He highlighted the Court’s past recognition that “religious institutions need not be quarantined from public benefits that are neutrally available to all,” and the state may sometimes “act in such a way that has the incidental effect of facilitating religious activity.” Neutrality with respect to religion meant only “the state must confine itself to secular objectives ... neither advance nor impede religious activity,” and avoid “such an intimate relationship with religious authority that it appears either to be sponsoring or to be excessively interfering with that authority.” Despite some inconsistency in demarcating acceptable and unacceptable church/state relations, the Court has usually held “neutral” aid to sectarian schools for secular activities and facilities permissible. In prior cases (*Tilton v. Richardson* [1971], *Hunt v. McNair* [1973], and *Board of Education v. Allen* [1968]), it found no constitutional bar against secular textbook subsidies for private schools or building grants for religious colleges.

Roemer dissenters, William Brennan, Thurgood Marshall, John Paul Stevens, and Potter Stewart, argued that the Maryland statute directly aided religious institutions and thus advanced religion—an establishment clause violation.

The debate over the extent to which a state may accommodate (without endorsing) religion in efforts to enhance education resurfaced repeatedly since *Roemer*. The Court ruled (1) state provision of textbooks and various health, remedial, guidance, and diagnostic services to students attending church-related schools (*Wolman v. Walter* [1977]); (2) tax breaks for church-related school tuition costs (*Mueller v. Allen* [1983]); (3) rehabilitation aid to a blind student in pastoral studies at a Christian college (*Witters v. Washington* [1986]); (4) provision of sign language interpreters for private school students (*Zobrest v. Catalina* [1993]); (5) provision of public school teachers for remedial instruction on parochial school campuses (*Agostini v. Felton* [1997]); and (6) government loans of “nonideological” educational material and equipment to sectarian schools (*Mitchell v. Helms* [2000]) did not violate the establishment clause.

These cases indicated that government aid that crosses paths in a neutral way and for secular purposes with church-related schools does not endorse or establish religion. They continued in the accommodationist understanding Blackmun revealed in his reminder in *Roemer* of the inevitable entanglement of church and state. He wrote:

A system of government that makes itself felt as pervasively as ours could hardly be expected never to cross paths with the church. In fact, our State and Federal Governments impose certain burdens upon, and impact certain benefits to, virtually all our activities, and religious activity is not an exception. The Court has enforced a scrupulous neutrality by the State, as among religions, and also as between religious and other activities, but a hermetic separation of the two is an impossibility it has never required.

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References and Further Reading

- Alley, Robert. *The Constitution and Religion: Leading Supreme Court Cases on Church and State*. Amherst, NY: Prometheus Books, 1999.
- Levy, Leonard. *The Establishment Clause*. New York: Macmillan, 1986.
- McConnell, Michael, John H. Harvey, and Thomas C. Berg. *Religion and the Constitution*. New York: Aspen Publishers, 2002.

Cases and Statutes Cited

- Agostini v. Felton*, 521 U.S. 203 (1997)
- Board of Education v. Allen*, 392 U.S. 236 (1968)
- Hunt v. McNair*, 413 U.S. 734 (1973)
- Mitchell v. Helms*, 530 U.S. 793 (2000)
- Mueller v. Allen*, 463 U.S. 388 (1983)

Tilton v. Richardson, 403 U.S. 672 (1971)
Witters v. Washington Department of Services for the Blind,
 474 U.S. 481 (1986)
Wolman v. Walter, 433 U.S. 229 (1977)
Zobrest v. Catalina Foothills School Dist., 509 U.S. 1 (1993)

See also Establishment Clause (I): History, Background, Framing; First Amendment and PACs; Marshall, Thurgood; Stevens, John Paul; Stewart, Potter

ROMER v. EVANS, 517 U.S. 620 (1996)

In a statewide referendum in 1992, Colorado voters adopted “Amendment 2” to the state constitution. The impetus for the amendment was the adoption of legislation in various Colorado municipalities aimed at eliminating discrimination in housing, employment, education, and various forms of public accommodation on the basis of sexual orientation. The amendment effectively repealed these municipal ordinances and prohibited the enactment or official recognition of a “protected status” based on sexual orientation by the state or any of its political subdivisions. The Colorado Supreme Court enjoined enforcement of the amendment on the grounds that it impermissibly denied homosexuals the fundamental right to participate in the political process.

On appeal to the U.S. Supreme Court, the state argued that Amendment 2 merely restored the status quo ante—homosexuals would enjoy the same protections afforded other individuals, but no *special* protection based on their sexual orientation. In this way, according to the state, the amendment sought to respect the rights of citizens more broadly, including landlords and employers, who wished to refrain from associating with homosexuals. It would also allow the state to conserve its resources to combat other forms of discrimination.

The Court held that Amendment 2 violated the equal protection clause of the Fourteenth Amendment, failing to satisfy even the most deferential standard of constitutional review. Specifically, the broad scope of Amendment 2, spanning both the public and private spheres, was not commensurate with the meager rationales offered to support it. Instead, “its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects.” Thus, although homosexuals do not constitute a “suspect class” triggering heightened constitutional scrutiny, the Court could not discern even a rational relationship between Amendment 2 and a legitimate state interest. Moreover, far from restoring homosexuals to a position of equality with other citizens, the

amendment imposed a “special disability” on homosexuals, uniquely denying them the means of legal and political redress available to other citizens. “A State cannot so deem a class of persons a stranger to its laws.”

In a vigorous dissent, Justice Scalia chided the Court for taking sides in the culture wars. Where, as here, neither the Constitution nor historical tradition condemns the challenged provision, it is not the Court’s role to second-guess the value judgments of democratic decision makers. Further, Scalia noted the Court’s failure to reconcile its rejection of Amendment 2 with its earlier holding in *Bowers v. Hardwick* (1986), which permitted states to criminalize homosexual conduct. “If it is constitutionally permissible for a State to make homosexual conduct criminal, surely it is constitutionally permissible for a State to enact other laws merely *disfavoring* homosexual conduct.” Indeed, because homosexuals would continue to be protected against discrimination by laws of general applicability, Amendment 2 merely placed them on equal footing with other citizens by denying them special treatment. In addition, Amendment 2 did not deny them access to the political process to any greater degree than other citizens unfavorably affected by duly enacted state constitutional provisions. Equal protection of the laws, including equal access to the political process, does not require that citizens be able to pursue their legislative agenda at the most local and accessible level of political decision making. Finally, despite the Court’s disapproving tone, the state was readily able to meet the burden of providing a legitimate justification for Amendment 2—the moral disapproval of homosexual conduct by a majority of Coloradans.

By deciding *Romer* on equal protection grounds, the Court was able to avoid a direct confrontation with its holding in *Bowers* that the criminalization of homosexual conduct is constitutionally permissible. In 2003, however, the Court revisited the question presented in *Bowers*. In *Lawrence v. Texas*, the Court invalidated a criminal prohibition on homosexual sodomy, invoking the substantive component of the due process clause of the Fourteenth Amendment. The Court noted that *Romer*’s equal protection analysis provided viable grounds for invalidating the Texas statute, but it determined that the rights of homosexuals would be better secured by a recognition of their fundamental right to privacy in intimate relationships. In this way, *Romer* was a key decision in the Court’s evolving jurisprudence of sexual privacy rights. Drawing on a handful of equal protection decisions that seemed to apply heightened constitutional scrutiny to legislation disadvantaging unpopular groups, including retarded persons and “hippies”

living communally, *Romer* signaled the Court's growing intolerance for laws it judges to be "born of animosity toward the class of persons affected."

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References and Further Reading

Farber, Daniel, and Suzanna Sherry, *The Pariah Principle*, Constitutional Commentary 13 (1996): 257.
Sullivan, Kathleen M., and Gerald Gunther. *Constitutional Law*. 15th ed. New York: Foundation Press, 2004.

Cases and Statutes Cited

Bowers v. Hardwick, 478 U.S. 186 (1986)
Lawrence v. Texas, 539 U.S. 558 (2003)

See also *Bowers v. Hardwick*, 478 U.S. 186 (1986); **Equal Protection of Law (XIV); Gay and Lesbian Rights; Privacy; Sodomy Laws; Substantive Due Process**

ROOSEVELT, FRANKLIN DELANO (1882–1945)

Franklin Delano Roosevelt, thirty-second president of the United States (1933–1945), cited the protection and expansion of civil liberties throughout the world as a justification for U.S. entry into World War II, broadened liberty to include entitlement to public benefits, such as food and shelter, and appointed justices to the Supreme Court who played critical roles in the expansion of civil liberties into the 1970s. At the same time, Roosevelt's record on civil liberties is deeply blemished. He authorized the internment of more than 100,000 Japanese Americans during the war, most of whom were U.S. citizens, even though there was no evidence of disloyalty or criminal activity on the detainees' part, an act repudiated by the U.S. Congress in 1988.

Franklin D. Roosevelt was born on January 30, 1882, at his family's estate at Hyde Park, New York, overlooking the Hudson River. His mother came from a wealthy family, and his father was a successful businessman, with an interest in Democratic politics. He was schooled by tutors at home until the age of fourteen. A graduate of Groton School and Harvard College, he supported the vice-presidential and presidential campaigns of his cousin, Theodore Roosevelt, in 1900 and 1904. He attended Columbia University Law School and practiced law in New York City. In 1905, he married his distant cousin, Anna Eleanor Roosevelt, niece of President Theodore Roosevelt, who was present at the ceremony.

He won election to the New York State Senate in 1910. At the state capitol in Albany, he became known as a champion of economic and social reform. Roosevelt campaigned for Woodrow Wilson in the 1912 presidential election and was rewarded by the victorious Wilson with appointment as assistant secretary of the Navy. In 1920 Roosevelt sought and won the Democratic nomination for the vice presidency but was forced to return to private life after the Republican Warren Harding's victory. In August 1921 he was struck down by poliomyelitis and was never able again to walk unaided. He soon returned to politics and was elected governor of New York in 1928.

In 1932, Roosevelt received the Democratic presidential nomination. In his acceptance speech delivered at the convention in Chicago, he promised a New Deal for Americans. The New Deal was his response to the crisis of the Great Depression and signified that the federal government would become involved in social and economic regulation at an unprecedented level. Roosevelt easily defeated Republican President Herbert Hoover and began the first of four presidential terms in March 1933.

Roosevelt's presidency (1933–1945) resulted in the expansion and redefinition of civil liberties in the United States. The New Deal introduced far-reaching reforms within the economy and represented the beginning of what was later termed "the welfare state." As leader of the Democratic Party, he transformed it from an institution associated with conservative principles and laissez-faire capitalism into the chief vehicle for the promotion of liberal policies, including government regulation of the economy and protection of the poor, unemployed, and aged against hardship and deprivation. He empowered the labor movement by including protections for union organizing in the New Deal. The National Labor Relations Act of 1935 gave federal protection to the right of workers to organize and bargain through unions.

Roosevelt, in his 1941 State of the Union Address, delivered before a joint session of Congress on January 6, focused understandably on the threat to national security posed by the aggressive acts of the Axis Powers, Germany, Italy, and Japan. By the end of the year the United States would be at war with all three countries. Toward the end of his speech, he shifted from a presentation of foreign and defense policy to domestic issues. He pointed out that the rise of dictators in Italy, Germany, and elsewhere in the 1920s and 1930s was due to economic and social problems, problems that spawned a social revolution. He described the foundations of a healthy and strong democracy: equality of opportunity, the ending of special privilege for the few, jobs, a rising standard

of living, security, and the preservation of civil liberties. He asked Congress to expand old-age pensions and unemployment insurance and widen the opportunities for adequate medical care. He closed his address by saying that he looked forward to a world founded upon four essential human freedoms: freedom of speech and expression, freedom of religion, freedom from want, and freedom from fear. “Freedom,” he concluded, “means the supremacy of human rights everywhere.” Roosevelt continued this theme in the Atlantic Charter, issued jointly with British Prime Minister Winston Churchill on August 14, 1941. The charter promised the peoples of the world suffering from the hardships of World War II improved economic conditions, freedom from fear, and the disarmament of the aggressor nations.

Not only did Roosevelt cite the preservation and restoration of civil liberties, especially freedom of speech and religion, as a justification for going to war against the Axis dictatorships, more importantly, he redefined liberty itself. James Madison, author of the Bill of Rights, in 1787 had conceived liberty as a person’s right to be left alone by government. Freedom had an essentially negative meaning. Government may not intrude upon an individual’s expression of political or religious opinions. Government may not prescribe modes of worship or establish an official religion. Freedom was something enjoyed by individuals in the private sphere and was dependent upon the absence of governmental restraint. While acknowledging the value of this form of liberty, Roosevelt believed that human beings were not truly free if they were hungry, homeless, idle and in fear of their lives or property. He called for a positive role for government in securing civil liberties by making government responsible for meeting the needs of the poor, the elderly and the disabled—needs previously met primarily by families or private charities. This package of government provided benefits came to be known as the social safety net. Roosevelt established the welfare state through legislation enacted during his first term (1933–1937), the most important of which was the Social Security Act of 1935. The act provided unemployment insurance, an old-age pension system, and financial assistance for dependent children and the blind. The funds needed to finance such extensive programs of public assistance were supplied by taxes, including payroll taxes shared equally by employers and employees.

Roosevelt’s recasting of liberty as consisting of both negative and positive rights played an enormous role in the way that many Americans came to understand civil liberties. In *Roe v. Wade* (1973), for example, the Supreme Court recognized the negative right of a woman to terminate her pregnancy, free of the

threat of criminal sanction. This decision lay within what the Court referred to as a zone of privacy protected by the Fourteenth Amendment, which guaranteed that no person would be deprived of liberty without due process of law. In *Harris v. McRae* (1980), four dissenting justices expressed the opinion that, for a poor woman, the freedom to terminate a pregnancy is meaningless unless the government is willing to pay for her abortion. The Constitution, they claimed, does not protect individual rights without obliging the government to provide to the indigent the means of enjoying them. A majority of the justices of the Supreme Court, however, has refused to accept that there is a necessary linkage between civil liberties and government entitlements.

Two justices who embraced an expanded view of individual freedom were Roosevelt appointees—Hugo Black and William Douglas. Roosevelt’s appointment of liberal justices to the Supreme Court had an enormous and enduring impact on the expansion of civil liberties. Roosevelt was able to transform the Court from a conservative bastion of laissez-faire economics into a champion of civil liberties and the welfare state because of his demand expressed in 1937 that Congress increase the size of the tribunal from nine to fifteen justices. Although Congress ultimately failed to enact his “court-packing” plan, two of the jurists who had opposed the New Deal, Chief Justice Charles Evans Hughes and Associate Justice Owen Roberts, in response to the president’s campaign against the High Court, changed their minds and began voting in favor of the constitutionality of New Deal legislation, a change known as “the switch in time that saved nine.” Now in the minority, the anti-New Deal “four horsemen of the Apocalypse”—Justices George Sutherland, James McReynolds, Pierce Butler, and Willis Van Devanter—began to retire from the high bench, leaving vacancies for the president to fill with like-minded justices.

Roosevelt appointed Black to the Court in 1937. Black, as a Democratic senator from Alabama, had strongly supported the New Deal, including the Fair Labor Standards Act which established a minimum wage and maximum hours for workers. Black took an absolutist view of the First Amendment, declaring that neither Congress nor the state legislatures could make any law abridging freedom of speech or the press. He opposed governmental controls over what had been considered offensive or dangerous speech, such as obscenity, defamation and sedition. He also supported racial desegregation, the separation of church and state and the rights of the criminally accused, including, in *Gideon v. Wainwright* (1963), the right of indigent defendants to a government-appointed attorney. In his opinion for the Court,

Black expressed the view that the right to counsel, guaranteed by the Sixth Amendment, was a positive right, requiring government involvement if it was to have any meaning for the poor.

William O. Douglas served on several federal regulatory commissions from 1934 until 1939. In 1939, Roosevelt appointed him as an associate justice of the Supreme Court. Douglas, one of the most liberal justices ever to serve on the Court, supported the Supreme Court's ban on prayers in public schools (*Engel v. Vitale* [1962]), saw a right of privacy implied in the Bill of Rights (*Griswold v. Connecticut* [1965]) and expanded the definition of speech to include symbolic expression, such as the burning of a draft card to protest the war in Vietnam (*United States v. O'Brien* [1968]). Douglas also viewed tax exemptions for churches as unconstitutional governmental subsidies for religion (*Walz v. Tax Commission of the City of New York* [1970]).

Roosevelt, Black, and Douglas, however, were not consistent supporters of civil liberties. In *Korematsu v. United States* (1944), Black wrote the opinion for the Court, an opinion in which Douglas joined, supporting President Roosevelt's order to remove all Japanese Americans from the western coast of the United States and place them in detention camps during the course of the war. After the Japanese surprise attack on American naval facilities at Pearl Harbor, Hawaii, on December 7, 1941, there was widespread fear of disloyalty by Japanese citizens and resident aliens living in the United States. On February 19, 1942, the president, citing the danger of espionage and sabotage, issued Executive Order 9066 authorizing military authorities to remove persons of Japanese ancestry from the West Coast. The army detained and relocated 120,000 Japanese Americans to camps in the interior of the country. Ironically, the military authorities did not arrest and remove Japanese Americans living in Hawaii, the U.S. territory with the highest percentage of persons of Japanese descent and the site of the Japanese attack. Moreover, residents of German and Italian ancestry were not removed. More than 60 percent of the Japanese Americans who were forcibly taken away from their homes were U.S. citizens.

Many Japanese Americans lost their property and means of livelihood during their long confinement in the relocation centers. Following the war, many of them demanded reparations and, in 1980, Congress established the Commission on Wartime Relocation and Internment of Civilians. The commission found that there was no military necessity for the internment and blamed it on racial prejudice, an irrational fear of a Japanese invasion and the failure of President Roosevelt to exercise proper leadership. In 1988,

President Ronald Reagan signed the Civil Liberties Act of 1988, which provided an apology from the federal government and compensation of \$20,000 to each surviving internee.

Roosevelt, Black, and Douglas's support for the deprivation of freedom on the basis of one's race illustrates the dilemma that supporters of civil liberties face in time of war. Roosevelt's action is often placed with Abraham Lincoln's suspension of the writ of habeas corpus during the Civil War and Woodrow Wilson's suppression of free speech during World War I as the three most egregious examples of violation of civil liberties during wartime.

Roosevelt died in Warm Springs, Georgia, on April 12, 1945, of a cerebral hemorrhage, only three months into his unprecedented fourth term as president.

KENNETH M. HOLLAND

References and Further Reading

- Black, Conrad. *Franklin Delano Roosevelt: Champion of Freedom*. New York: Public Affairs, 2003.
- Kersch, Kenneth I. *Constructing Civil Liberties: Discontinuities in the Development of American Constitutional Law*. New York: Cambridge University Press, 2004.
- McMahon, Kevin J. *Reconsidering Roosevelt on Race: How the Presidency Paved the Road to Brown*. Chicago: University of Chicago Press, 2004.
- Rehnquist, William H. *All the Laws but One: Civil Liberties in Wartime*. New York: Knopf, 1998.

Cases and Statutes Cited

- Engel v. Vitale*, 370 U.S. 421 (1962)
- Gideon v. Wainwright*, 372 U.S. 335 (1963)
- Griswold v. Connecticut*, 381 U.S. 479 (1965)
- Harris v. McRae*, 448 U.S. 297 (1980)
- Korematsu v. United States*, 323 U.S. 214 (1944)
- Roe v. Wade*, 410 U.S. 113 (1973)
- United States v. O'Brien*, 391 U.S. 367 (1968)
- Walz v. Tax Commission of the City of New York*, 397 U.S. 664 (1970)

See also **Douglas, William Orville; Japanese Internment Cases; New Deal and Civil Liberties; World War II, Civil Liberties in**

RORTY, RICHARD (1931–)

Richard Rorty is one of America's most distinguished, broad-ranging, and controversial philosophers. Born in New York City, he received his bachelor's and master's degrees from the University of Chicago, in 1949 and 1952, respectively, and his doctorate from Yale University in 1956. He is

currently professor of comparative literature at Stanford University, and he has had previous academic appointments at Virginia, Princeton, and Wellesley College.

Rorty views his philosophy as following in the pragmatist tradition that includes the American philosophers William James, Charles Sanders Peirce, and, Rorty's philosophical hero, John Dewey. His work, however, also draws upon the writings of several other philosophers (whom he claims as philosophical allies), in both the analytic and continental philosophical traditions, including Wittgenstein, Sellars, Quine, Davidson, Kuhn, Heidegger, Nietzsche, and Derrida. His writings have two main components: a destructive project that seeks to debunk certain entrenched, mainstream philosophical ideas, and a constructive project that seeks to present a vision of social, cultural, and political life without these entrenched ideas.

On the destructive side, Rorty's pragmatism is perhaps best described as "anti-essentialist" in that it attempts to show that core philosophical problems—and the concepts they invoke such as truth, knowledge, reality, justification, good, moral, right—are thoroughly contingent and dispensable rather than perennial and necessary. According to Rorty, modern philosophy, from around the time of Descartes to the present, has been obsessed with attempting to discover the one true description of reality. This obsession manifests itself, for example, in epistemological accounts that search for infallible knowledge, metaphysical accounts that search for the nature of reality or mind, and truth theories that define truth as correspondence to reality or the facts. Those who focus on whether our descriptions represent reality, he argues, have been led astray by a picture of inquiry that he refers to metaphorically as "mirroring," as in whether our descriptions "reflect" reality. (The title of his now-classic book on this subject is *Philosophy and the Mirror of Nature*.)

Rorty sees this concern with something external to humans—that is, the "world" or "reality" or "the facts" or "science"—as a vestige of pre-Enlightenment religious thinking. He describes humanity as maturing when it realized that it did not need an external God to give it laws or morality. But, he suggests, humanity replaced its religious impulses by creating a replacement deity out of the idea of objective reality, that is, replaced one external source telling humanity how it is with another. Thus, he sees a second stage of maturity or enlightenment occurring when humanity realizes that the world does not privilege one description or vocabulary, scientific or otherwise, over all others. Instead, Rorty sees our descriptions as bound up in various linguistic, scientific, and other social practices. And the vocabularies

generated by these practices are to be viewed as tools for achieving certain human purposes. Therefore, they, like other tools, should be judged by the practical aid they provide in navigating and coping with our environment rather than whether they get reality right.

What, then, does Rorty's world look like once humanity gets over God *and* science? It is one in which we stop looking backward for extrahuman authority and instead look forward for different visions of how we might want to live. It emphasizes human solidarity and social hope. Rather than filled with arguments about what is required, it involves democratic competition over different utopian dreams, competition over which future we would like to bring about, to make true. Rorty has criticized the American academic left, in particular, for focusing too much on negative critiques rather than on offering positive visions of such possible futures.

His vision is one that is unabashedly leftist, but not radical. It aims at liberal piecemeal reforms that increase freedom while decreasing suffering, cruelty, and humiliation. These aims in turn allow for human flourishing, publicly and privately. They engender a public sphere in which cultural institutions and objects can continue to evolve and supplant previous ones, and in which alternate futures can compete for the public imagination. And they allow everyone a private sphere in which they have the freedom to create themselves. Rorty presents this vision while taking the ironic stance that none of it is required or true or right, acknowledging that it and our views are just as historically contingent as anything else.

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References and Further Reading

- Brandom, Robert B., ed. *Rorty and His Critics*. Oxford: Blackwell, 2000.
- Rorty, Richard. *Philosophy and Social Hope*. London: Penguin, 1999.
- . *Achieving Our Country: Leftist Thought in Twentieth Century America*. Cambridge: Harvard University Press, 1998.
- . *Truth and Progress*. Vol. 3, *Philosophical Papers*. Cambridge: Cambridge University Press, 1998.
- . *Essays on Heidegger and Others*. Vol. 2, *Philosophical Papers*. Cambridge: Cambridge University Press, 1991.
- . *Objectivity, Relativism, and Truth*. Vol. 1, *Philosophical Papers*. Cambridge: Cambridge University Press, 1991.
- . *Contingency, Irony, and Solidarity*. Cambridge: Cambridge University Press, 1989.
- . *Consequences of Pragmatism*. Minneapolis: University of Minnesota Press, 1982.
- . *Philosophy and the Mirror of Nature*. Princeton, NJ: Princeton University Press, 1979.

ROSALES-LOPEZ v. UNITED STATES, 451 U.S. 182 (1981)

On December 10, 1978, Humberto Rosales-Lopez was arrested for participation in a scheme to smuggle three Mexican aliens into southern California. Prior to trial, Rosales-Lopez, who is of Mexican descent, requested that the trial judge, in conducting voir dire, question potential jurors as to their possible prejudice against Mexicans. The trial judge refused to ask that specific question but did question potential jurors as to their possible prejudice against aliens. Rosales-Lopez was subsequently tried and convicted on all charges. Rosales-Lopez appealed, arguing that the trial judge's refusal to ask potential jurors on possible prejudice against Mexicans was an error. The Court of Appeals rejected that argument and affirmed the conviction.

The U.S. Supreme Court agreed with the lower courts. The Court, reaffirming its holdings in *Aldridge v. United States* (1931) and *Ristaino v. Ross* (1976), held that while a federal judge, in having an intimate connection with the trial, has ample discretion in conducting a voir dire examination, is constitutionally required in "special circumstances" where racial issues are "inextricably bound up with the trial" to question potential jurors about their racial and ethnic biases. The Court went on to say, absent such "special circumstances" a trial judge's failure to ask questions concerning racial or ethnic bias is only an error where there is a "reasonable possibility" that race or ethnic prejudice might influence the jury's impartiality. Although the determination of what constitutes a "reasonable possibility" should be done by the trial judge on a case-by-case basis, the Court suggested inquiries are required in cases of violent crimes involving members of different racial or ethnic groups.

MARCEL GREEN

Cases and Statutes Cited

Aldridge v. United States, 238 U.S. 308 (1931)
Ristaino v. Ross, 424 U.S. 589 (1976)

ROSE v. LOCKE, 423 U.S. 48 (1975)

In a *per curiam* opinion, the U.S. Supreme Court held that a Tennessee statute proscribing "crimes against nature" was not unconstitutionally vague as applied to the act of cunnilingus (oral stimulation of the vulva or clitoris). The Supreme Court's decision was without plenary review; thus, it disallowed the parties the opportunity for oral arguments. Three justices dissented: Brennan, Marshall, and Stewart.

Respondent Locke was convicted and sentenced to five to seven years imprisonment under Tennessee's criminal code for having committed a "crime against nature." The evidence showed that under threat of knifepoint, he forced his female neighbor to submit to him twice performing cunnilingus upon her. The respondent challenged the Tennessee statute's proscription of "crimes against nature" on due process grounds: he claimed that the language "crime against nature" was so vague, that it did not give citizens fair warning of just what sort of acts were prohibited. According to the respondent, the main vice with the Tennessee statute was that several states differed as to whether the words "crime against nature" were narrowly or broadly construed. A narrow construction limited the offense to sodomy; a broad construction included many other forms of sexual activity.

The Supreme Court was unconvinced with the respondent's vagueness argument. It held that the challenged statutory phrase, "crime against nature" was no vaguer than many other terms describing criminal offenses at common law. In fact, all that the due process clause required, in terms of notice, is that laws give "sufficient warning that men may conduct themselves so as to avoid that which is forbidden." Furthering its position, the Court cited three specific instances giving the respondent sufficiently clear notice that his conduct would be included within the Tennessee statute's proscription. First, in the 1955 *Fisher* case, the Tennessee courts rejected the claim that "crime against nature" did not include fellatio. Thus, this decision extended the statute's scope beyond the traditional common law definition of "crime against nature," which was limited to anal sex. Second, in the 1959 *Sherril* case, the Tennessee state courts further emphasized that the "crime against nature" language was to be given the broadest meaning possible. Third, in the 1959 *Townsend* case, a Maine statute, which the Tennessee courts had twice previously equated with its own, was made applicable to cunnilingus. Although Tennessee courts had never previously applied their statute to the act of cunnilingus, other jurisdictions had; and this was enough notice to the respondent.

The vagueness language of the *Rose* decision has been frequently cited in subsequent Supreme Court decisions. In contexts other than the First Amendment, it is sufficient that a statutory proscription only make out a rough area of prohibited conduct.

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References and Further Reading

U.S. Const., Fourteenth Amendment.

Cases and Statutes Cited

Fisher v. State, 197 Tenn. 594 277 S.W. 2d 340 (1955)
Sherril v. State, 204 Tenn. 427, 429, 321 S.W. 2d 811, 812 (1959)
State v. Townsend, 145 Me. 384, 71 A. 2d 517 (1950)

ROSENBERG, JULIUS AND ETHEL

On June 19, 1953, shortly after 8 P.M., in the Sing Sing Correctional Facility in Ossining, New York, Julius and Ethel Rosenberg were executed. A little more than two years before, both had been convicted for passing to the Soviet Union atomic secrets related to U.S. development of a nuclear weapon (the Manhattan Project), in violation of Section 2 of the Espionage Act of 1917. Both were sentenced by U.S. District Court Judge Irving Kaufman to die by electrocution in Sing Sing's electric chair. The Rosenbergs maintained their innocence to the very end. Although certain facts of the case remain contested to the present day, some factual matters seem to have been resolved when, in 1995, the National Security Agency released declassified translations from the "Venona Project." It now seems clear that Julius Rosenberg had indeed passed information to Soviet agents, although the actual harm to U.S. security caused by his actions remains contested. Ethel Rosenberg's knowing involvement in any espionage activity, however, seems very much in doubt.

At the time of the Rosenbergs' arrest and trial, the United States was in the grip of an increasing level of fear. On September 29, 1949, President Truman announced to the American public that the Soviet Union had exploded an atomic bomb. The specter of the communist nation, now armed with an atomic bomb, much sooner than anyone expected, generated anxiety at all levels of American society. The Cold War was now fully engaged. An increasingly virulent anticommunism manifested itself in the prosecution under the Smith Act of several Communist Party members toward the end of 1948 (see *Dennis et al. v. United States* [1951]). And the Rosenberg prosecution itself contributed to the emergence of a second "red scare" associated with the brief national ascendance of Wisconsin Senator Joseph McCarthy.

The origins of the Rosenberg prosecution can, perhaps, be traced to the early days of 1950 and the conviction for perjury of former State Department official Alger Hiss. Two years earlier, Hiss was named as once having been involved in unlawful clandestine Communist Party activity by former Communist Party member Whittaker Chambers, in testimony given before an executive session of the

House Un-American Activities Committee (HUAC). Later testifying before both the HUAC and a subsequently convened federal grand jury, Hiss denied, under oath, any past or present involvement with the Communist Party. Chambers was able, however, to produce compelling evidence to the contrary and Hiss was ultimately charged and convicted on two counts of perjury, for which he served the majority of a five-year sentence in federal prison. Despite Hiss's continued protestations of innocence, and despite continued support for Hiss from various quarters, the attention given to Chambers's accusations and Hiss's subsequent conviction provided a platform for anticommunist crusaders such as Senator McCarthy, who alleged extensive communist infiltration at the highest levels of government. Then, within a month of Alger Hiss's conviction, the British physicist Klaus Fuchs was arrested and charged with passing atomic secrets to the Soviet Union. The information was related to Fuchs's work as a nuclear scientist on the Manhattan Project, begun in New York City and brought to completion in the New Mexico desert at the Los Alamos facility. Confronted with evidence obtained from the "Venona Project"—evidence that indicated he had been transferring detailed nuclear secrets to an American chemist and Soviet agent named Harry Gold—Fuchs soon confessed. He was convicted of espionage and sentenced to fourteen years in prison, of which he served nine years. Gold, too, quickly provided a voluntary confession regarding his role in receiving and transmitting information from Fuchs as well as other activity; he was sentenced to thirty years in prison. Exposure of the Fuchs–Gold connection at Los Alamos began to clear a trail that would also lead to the Rosenbergs.

When questioned by the Federal Bureau of Investigation (FBI), Harry Gold provided information of an un-named American soldier who had worked at the Los Alamos facility and who had provided Gold with important information regarding an "implosion lens" for an atomic weapon. Further investigation revealed the name of the soldier, Gold's contact, to be David Greenglass. Greenglass was Ethel Rosenberg's brother. In June 1950, during FBI questioning, David Greenglass confessed to passing secret information to Harry Gold; he also identified others whom he alleged were involved in the "spy ring," among them, his brother-in-law, Julius Rosenberg. Indeed, Greenglass maintained that Rosenberg was the one who initially encouraged and would later direct his illegal activity. Greenglass's testimony would prove crucial in the government's prosecution of the Rosenbergs. He received a fifteen-year sentence and, in 2001, would admit that he falsely implicated his older sister Ethel Rosenberg, under pressure from

the FBI, in order to protect his wife Ruth from potential prosecution.

Within a month of Greenglass's initial questioning, Julius Rosenberg was picked up at his New York apartment for questioning. Rosenberg, the son of Polish immigrants, grew up in very modest circumstances in Manhattan's lower east side. While a student at New York's City College, Rosenberg became involved in leftist politics, joining the college's Young Communist League (YCL). It was through his involvement with the YCL that Rosenberg would meet his future wife, Ethel Greenglass. And, it was also City College where Rosenberg initially met and became friends with Morton Sobell. Sobell would later stand trial as a co-defendant with the Rosenbergs. Convicted and sentenced to thirty years in prison, Sobell continued to maintain his innocence after his release from prison in 1969.

Unlike Fuchs, Gold, and Greenglass, Julius Rosenberg refused to admit involvement in any illegal activity, and refused to name names of those who might be involved in such activity. On July 17, 1950, within a month after the FBI first questioned him, and based in part on further information provided by David Greenglass and his wife Ruth, Julius Rosenberg was arrested while at home with his family. Rosenberg continued to deny the allegations against him. Less than a month later, on August 11, 1950, Ethel Rosenberg was arrested by the FBI as well. Although the evidence against her was limited, many historians have suggested that Ethel Rosenberg's arrest was initially premised on the belief by the FBI that she could be used to leverage a confession from her husband. If this was the plan, it failed, and U.S. Attorney Irving Saypol, fresh from his successful prosecution of Alger Hiss, along with Assistant U.S. Attorney Roy Cohn, secured grand jury indictments on January 31, 1951, and commenced with the federal prosecution that culminated in the trial of Julius and Ethel Rosenberg, and Morton Sobell, in the New York federal courthouse on March 6, 1951.

In a jury trial lasting nearly a month, the prosecution relied heavily on testimony by Ruth and David Greenglass, and Harry Gold. Julius and Ethel Rosenberg testified in their own behalf and were the only witnesses called by defense attorney Emanuel Bloch. Closing statements by both the prosecution and defense were marked by appeals to the jurors' emotions. Emanuel Bloch, whose zealous advocacy on behalf of the Rosenbergs has become legendary, urged members of the jury to set aside any anticommunist biases they might have held, but then sought, in the harshest of language, to direct the jurors' emotions against the principal prosecution witness, David Greenglass. In so doing, Bloch seemed to gesture

toward another law, one of family and blood relations, something violated by Greenglass's testimony. Bloch seemed to want to use Greenglass's tragic "betrayal" of his older sister and her husband as a way to push the Rosenbergs' alleged betrayal of their country to the margins of the jurors' consciousness. Irving Saypol, on the other hand, sought to underscore the Rosenberg's Communist Party membership. This was an ideological affiliation, according to Saypol that, once understood, would explain the Rosenbergs' behavior. Their loyalties, said Saypol, were to the Soviet Union and the cause of worldwide communist revolution. The trial ended on March 28, 1951 and a jury of eleven men and one woman would, the next day, find all three defendants guilty, under the Espionage Act of 1917, of "conspiring to commit espionage in wartime."

Judge Irving Kaufman imposed the death sentence against the Rosenbergs on April 5. In his sentencing statement, Judge Kaufman characterized the Rosenbergs' crime as "worse than murder." According to Kaufman, the Rosenbergs put an atomic bomb into the hands of the Soviet Union "years before our best scientists predicted." In other words, the monopoly on atomic weapons enjoyed by the United States and its allies had ended as a result of the Rosenbergs' actions and, as Kaufman understood it, they were, therefore, directly responsible for endangering the entire country, putting at risk millions of innocent people—a betrayal that, said Kaufman, "undoubtedly ... altered the course of history to the disadvantage of our country."

Over the next two years, Emanuel Bloch unsuccessfully appealed the Rosenberg's conviction. Thousands of others—including the Rosenbergs' own small children—marched in support of the couple, urging political intervention on the Rosenbergs' behalf. On June 19, 1953, the couple's efforts were exhausted, however, as the U.S. Supreme Court vacated a stay of execution that had been entered two days before by Justice William O. Douglas. They were executed later that evening.

WILLIAM ROSE

References and Further Reading

- Gaddis, John Lewis. *The Cold War: A New History*. New York: Penguin Press, 2005.
- Haynes, John Earl, and Harvey Klehr. *Venona: Decoding Soviet Espionage in America*. New Haven, CT: Yale University Press, 2000.
- Meeropol, Robert, and Michael Meeropol. *We Are Your Sons: The Legacy of Ethel and Julius Meeropol*. 2nd ed. Urbana-Champaign: University of Illinois Press, 1987.
- Meeropol, Robert. *An Execution in the Family: One Son's Journey*. New York: St. Martin's Press, 2003.

Nizer, Louis. *The Implosion Conspiracy*. Garden City, NJ: Fawcett Books, 1973.
 Radosh, Ronald, and Joyce Milton. *The Rosenberg File*. 2nd ed. New Haven, CT: Yale University Press, 1997.
 Roberts, Sam. *The Brother: The Untold Story of the Rosenberg Case*. New York: Random House, 2003.

Cases and Statutes Cited

Dennis, et al. v. United States, 341 U.S. 494 (1951)
Rosenberg v. United States, 346 U.S. 273 (1953)
United States v. Rosenberg, 195 F.2d 583 (2nd Cir., 1952)
United States v. Rosenberg, 200 F.2d 666 (2nd Cir., 1952)
 18 U.S.C. Section 792 et seq.

ROSENBERGER v. RECTOR AND VISITORS OF THE UNIVERSITY OF VIRGINIA, 515 U.S. 819 (1995)

The Student Activities Fund (SAF) of the University of Virginia (UVA) subsidizes student publications by paying outside contractors for printing costs; SAF funds come from mandatory student fees. Wide Awake Productions (WAP), a Christian student organization that publishes a newspaper, *Wide Awake: A Christian Perspective at the University of Virginia*, was denied SAF funding because the newspaper “primarily promotes or manifests a particular belief in or about a deity or ultimate reality.” UVA contended that subsidizing “Wide Awake” would violate the establishment clause of the Constitution. A five-to-four majority of the Supreme Court disagreed, ruling that UVA’s denial constituted impermissible viewpoint discrimination prohibited by the free speech clause of the First Amendment, and was not required by the establishment clause.

Conflict over state financial and other aid to religious institutions has been a continuing strain in American life and law. Even prior to adoption of the Constitution, Americans struggled to reconcile the deep religiousness of the American people with an equally profound awareness of the need for church–state separation in a nation with widely varying faiths.

Education at all levels has been perhaps the most frequent battleground, and the many Supreme Court decisions on state aid to religion have traced an inconsistent and often baffling line. The difficulties and resulting inconsistencies appeared in the Supreme Court’s first decision for state aid to religious schools. In *Everson v. Board of Education* (1947), the Court seemed to espouse a “no aid” principle as a result of which, neither a state nor the federal government “can pass laws which aid one religion, aid all religions, or prefer one religion over another.” Despite the apparent comprehensiveness of that statement, however, a five-to-four majority of the Court in

Everson allowed public funding for bus transportation to religious schools.

In 1971, the Court developed what became known as the “*Lemon* test” for state aid to religious entities. The test focused on the purpose and effect of the state support, and whether monitoring the aid would excessively “entangle” the government in religious matters (*Lemon v. Kurtzman* [1971]).

Ten years later, an eight-to-one majority ruled that religious worship and instruction were entitled to full constitutional protection under the free speech clause. If a university allowed student groups generally to meet in university classrooms, it created a limited public forum. If it then denied religious groups use of the classrooms, even if for specifically religious prayer, this was deemed to be unconstitutional viewpoint discrimination (*Widmar v. Vincent* [1981]). Justice Byron White protested against allowing prayer and religious instruction full First Amendment protection, but he was alone. The Court subsequently extended the “public forum” logic of *Widmar* to require a public school district to provide a religious group with the same facilities for showing films on family values from a religious perspective, as it offered to groups that discussed these issues from a non-religious point of view (*Lamb’s Chapel v. Central Moriches Union Free School District* [1993]).

Rosenberger extended these principles into the financial subsidization context. Writing for a majority of five, Justice Anthony Kennedy first stressed that WAP was not classified by UVA as a “religious organization,” but had qualified as an independent student group normally entitled to SAF funds just like other groups. He likened the SAF funding to “a metaphysical” forum in which all viewpoints were entitled to be represented. The university’s refusal to fund WAP because of “Wide Awake’s” religious perspective was thus unconstitutional viewpoint discrimination. He rejected the four dissenters’ view that since the university barred all publications that took a position on a “deity or ultimate reality,” there was no viewpoint discrimination.

The Court of Appeals had also found viewpoint discrimination, but upheld UVA’s contention that the establishment clause prohibited it from paying “Wide Awake’s” printing expenses because that amounted to direct monetary subsidization of religious activities. Justice Kennedy dismissed this claim, without even mentioning the *Lemon* test. While recognizing “dangers where the government makes direct money payments to sectarian institutions,” he emphasized that the benefit received by the religious group was a service and not cash; the subsidization was thus indirect. Moreover and apparently of central importance to the majority, the service was provided on a neutral

basis, which distinguished it from a general tax levied for the support of a church or churches, or a cash payment directly to a church. It thus entailed no endorsement of religion by the university, a position stressed by Justice Sandra Day O'Connor in a concurring opinion.

In a lengthy opinion by Justice David Souter, four justices sharply disagreed. Citing numerous examples from *Wide Awake*, Justice Souter concluded that the publication openly proselytized for evangelical Christianity and "preached the word"; SAF payment for the printing costs thus provided direct monetary support for a religious activity. This, he asserted, was "categorically forbidden" by a long line of cases and history. The fact that the subsidization was available on a neutral basis to sixteen diverse publications was considered by the dissenters to be irrelevant to the constitutionality of the payment; they also saw no merit to the distinction between direct and indirect monetary support, or between a general tax and a mandatory student payment to the SAF.

Rosenberger left many questions open, particularly the significance of neutral distribution of governmental benefits, the scope of the "metaphysical" open forum, and the continued viability of the *Lemon* test. These uncertainties have been compounded by the Court's 2004 decision in *Locke v. Davey* (2004). There, the Court refused to require Washington State to extend a scholarship program to a student majoring in theology that was taught from a perspective that was "devotional in nature or designed to induce religious faith," while allowing other scholarship recipients to use the scholarship for all other purposes. Some have contended that the decision is inconsistent with *Rosenberger*'s stress on neutrality.

HERMAN SCHWARTZ

References and Further Reading

- Layock, Douglas, *Comment: Theology Scholarship, The Pledge of Allegiance and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, Harvard Law Review 118 (2004): 155.
- Redlich, Norman. "The Religion Clauses: A Study in Confusion." In Herman Schwartz, ed. *The Rehnquist Court*. New York: Farrar Strauss and Giroux, 2002.
- The Supreme Court, 1994 Term*, Harvard Law Review 109 (1995): 111:210.

Cases and Statutes Cited

- Everson v. Board of Education*, 330 U.S. 1 (1947)
- Lamb's Chapel v. Central Moriches Union Free School District*, 508 U.S. 384 (1993)
- Lemon v. Kurtzman*, 403 U.S. 602 (1971)
- Locke v. Davey* 540 U.S. 712 (2004)
- Widmar v. Vincent*, 454 U.S. 263 (1981)

See also Establishment Clause Doctrine: Supreme Court Jurisprudence; Establishment of Religion and Free Exercise Clauses; Government Funding of Speech; Lemon Test; Religion in Public Universities; Viewpoint Discrimination in Free Speech Cases

ROSS v. MOFFITT, 417 U.S. 600 (1974)

In *Ross v. Moffitt*, the Supreme Court addressed a question expressly held open in the Court's earlier decisions: whether the constitutional right to counsel as recognized in *Douglas v. California* (1963) should be extended to require appointment of counsel beyond a first level of appeal after a criminal conviction. The Court held that the right should not be extended to that level of appeal. The Court held that there is no right to the appointment of counsel at subsequent appellate steps, that is, in seeking to convince a higher state appellate court to hear a criminal case (a discretionary state appeal) or for application for that same kind of review in the U.S. Supreme Court (by a petition for certiorari). The Supreme Court thus reversed the decision of the U.S. Court of Appeals for the Fourth Circuit, which had held that appointment of counsel was required by the due process and equal protection clauses of the Fourteenth Amendment.

In *Ross*, the defendant had pleaded not guilty in two cases and was represented by a court-appointed lawyer. He was convicted and took separate appeals to the state court of appeals, where he was again represented by a court appointed lawyer. His convictions were affirmed. On one of the appeals, he sought further review in the North Carolina Supreme Court and asked the court to appoint counsel to help him do so. The court refused to appoint counsel at state expense. The defendant then tried to appeal this ruling, first to the higher state courts and then to the federal courts. When he asked the court to appoint a lawyer to prepare a petition for a writ of certiorari to the U.S. Supreme Court and for postconviction remedies in the state courts on this issue, the court again refused. The North Carolina court of appeals reversed, holding that Ross was entitled to a lawyer at state expense both on his petition for review in the North Carolina Supreme Court and on his petition for certiorari to the U.S. Supreme Court.

In an opinion by Justice Rehnquist, the majority disagreed and reversed this holding. It refused to extend its holding in *Douglas*. That is, the Court held that the appointment of counsel was only required on an appeal that is granted as of right, without needing permission of the appellate court. The Court also distinguished the situation of a defendant

at the trial stage and at the appellate stage of a proceeding. It explained that counsel is required as a matter of due process when it is the attorney for the state who prosecutes the case but that, on appeal, it is the defendant who starts the process of seeking review. The Court also recalled that appeals are not even required by due process of law. On appeal, then, unfairness results only if poor people are treated differently from rich people in a way that denies them an adequate opportunity to present their claims.

Moreover, according to the Court, there is no real need for counsel on discretionary appeals so that the absence of counsel is not constitutionally unfair. As the Court explained, on discretionary appeals—requests for review by the states' highest courts and by the U.S. Supreme Court by way of certiorari—a poor person already has had the help of a lawyer in preparing briefs on the first level of appeal. The discretionary review will be based on those briefs. In addition, the poor person will already have had a transcript of the record in the trial court reproduced at state expense, because this is required under the Supreme Court's decision in *Griffin v. Illinois* (1956). There may also be a decision written by the first appellate court that the higher courts can use to review the issues. Taken together, these materials are adequate to ensure that the request for review by the higher courts is meaningful. The sufficiency of these materials for review was particularly true in North Carolina, in fact, because the critical issue before the North Carolina Supreme Court when a defendant is seeking permission to appeal there is whether the appeal has "significant public interest or major significance to the jurisprudence of the state." Similarly, in the U.S. Supreme Court, a grant of certiorari depends on many factors other than the correctness of the judgment below. And, moreover, the right to appeal is conferred by federal statute, not by the state, so that it would appear that the obligation to provide counsel is a federal one. Yet the Supreme Court regularly decides petitions without the appointment of counsel.

Justice Douglas, joined by Justice Brennan and Marshall, dissented. He relied on and agreed with the opinion of Chief Judge Haynsworth, for the unanimous panel in the Court of Appeals, who held that the most meaningful review of a criminal conviction occurs at the North Carolina Supreme Court stage so that counsel is essential. To the dissenters, the review of a conviction by a state's highest court is extremely important and fairness therefore requires the assistance of counsel at that stage. For other reasons, the dissenters believed that assistance of counsel was required on petition for certiorari to the U.S. Supreme Court. At that stage, the existing briefs and records do not address the issue that the Supreme Court has

to decide: whether the case is worthy of its review, not because of any error, but because of the national importance of the issue or the need for Supreme Court resolution of the issue for the nation. That is a more sophisticated set of arguments that may not have been covered in the other previously filed documents. Counsel is also necessary at that stage because preparing a petition for certiorari has many technical requirements that a pro se defendant may be unable to negotiate. Finally, it would be a relatively easy matter for counsel appointed on an earlier appeal to remain as counsel in the later stages of appeal. Accordingly, Justice Douglas would have held that due process fairness and equal protection equality would require counsel in discretionary appeals.

LISSA GRIFFIN

Cases and Statutes Cited

Douglas v. California, 372 U.S. 353 (1963)

Griffin v. Illinois 351 U.S. 12 (1956)

See also *Betts v. Brady*, 316 U.S. 455 (1942); *Douglas v. California*, 372 U.S. 353 (1963); *Due Process; Equal Protection of Law (XIV)*; *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Griffin v. Illinois*, 351 U.S. 12 (1956); *Powell v. Alabama*, 287 U.S. 45 (1932); *Right to Counsel*

ROTARY INTERNATIONAL v. ROTARY CLUB OF DUARTE, 481 U.S. 537 (1987)

This case illustrates how the Supreme Court weighs the First Amendment right to private association and expressive association against government antidiscrimination laws that are asserted to interfere with those rights. The approach is to give strong weight to the interests forwarded by the government regulation, then to determine if enforcing the regulation will infringe significantly the expressive association rights of the challenging group. If it will, the regulation violates the First Amendment. If not, the regulation stands.

In this case, Rotary International (RI), a worldwide organization of service clubs, terminated the membership of its Duarte, California club because that club, contrary to RI policy of that time, had admitted women members. The club sued RI, claiming the termination violated California's Civil Rights Act.

The Court first determined that this was not a matter involving private association rights. As to expressive association, it found that admitting women would not infringe significantly the associational rights of club members. It would not change club goals of humanitarian service, goodwill, and ethical professional behavior. Moreover, women were allowed to

attend meetings, give speeches, and otherwise participate in club activities, although not as full members. Therefore, any infringement of associational rights would be very minor and easily outweighed by the state's compelling interest in eliminating discrimination against women. The Court also noted that Rotary Club meetings were public events, often attended by significant numbers of nonmembers and covered by the media. The activities of the club were more public than private.

The decision in this case is similar to that rendered by the Court earlier in *Roberts v. U.S. Jaycees* (1984), and cited in *Duarte*. However, applying the rule of those cases will not always result in victory for a public accommodations statute. Notably, in *Boy Scouts of America v. Dale* (2000), the Court, by five to four, held that applying New Jersey's equal accommodations law to the Boy Scouts, and thereby compelling them to admit open homosexuals, was an unconstitutional infringement of the First Amendment right to expressive association. A rule intended to eliminate discrimination against a particular group, would place a "serious burden" on the right of expressive association, the First Amendment outweighs the public accommodation law. The dissenting judges did not disagree with that; they believed that the Boy Scouts had not provided sufficient evidence to show that the organization's principles would be significantly infringed by requiring open homosexuals to be admitted to membership.

Thus, the right to expressive association trumps equal accommodations laws—but only when enforcing those laws significantly infringes the basic principles of the association in question.

GERALD J. THAIN

Cases and Statutes Cited

Boy Scouts of America v. Dale, 530 U.S. 640 (2000)

Roberts v. U.S. Jaycees, 468 U.S. 609 (1984)

See also *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000); *Freedom of Association*; *Roberts v. United States Jaycees*, 468 U.S. 609 (1984)

ROTH v. UNITED STATES, 354 U.S. 476 (1957)

In 1953, when Justice William Brennan sat on the New Jersey Supreme Court, he wrote in *Adams Theatre Co. v. Keenan* (1953), "The standard 'lewd and 'indecent' is amorphous" and warned that "[t]here is ever present ... the danger that censorship upon that ground is merely the expression of the censor's own highly subjective view of morality ... or may be a

screen for reasons unrelated to moral standards." In this decision, the Court, reasoning that a burlesque show was a form of speech, ruled the City of Newark violated the First Amendment when it refused a license to a theater because city officials thought it would present indecent burlesque shows.

In 1942, fifteen years before Justice William Brennan joined the U.S. Supreme Court, the Court, ruling in *Chaplinsky v. New Hampshire* (1942), stated,

There are certain well defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the *lewd* and *obscene*... (Emphases added)

With these two words, the Court set in motion a train of complex cases centered around "lewd" and "obscene," for how these words were defined would determine how "narrowly limited" classes of sexually explicit speech would be and their protection, if any, under the First Amendment. *Roth v. United States* was Brennan's opportunity to define the terms and to clarify when the "lewd" and the "obscene" might be protected by the First Amendment.

Just months before *Roth* was announced, however, Justice Felix Frankfurter in *Butler v. Michigan* (1957) tolled the death knell for the *Hicklin* rule (*Regina v. Hicklin* [1868]). Under Michigan's law, selling a book to the general public containing material "tending to the corruption of the moral of youth" was a misdemeanor. Frankfurter struck down the law for being overly broad; it would "burn the house to roast the pig." The legislation was not reasonably restricted "to the evil with which it is said to deal." The effect of the law if left to stand, Frankfurter concluded, would "reduce the adult population of Michigan to reading only what is fit for children." As the purpose of the *Hicklin* test was to stop "those whose minds are open to ... immoral influences" from reading allegedly obscene material, Frankfurter's ruling for a unanimous Court in effect repealed the *Hicklin* test.

Roth v. United States was argued and decided at the same time as *Albert v. California* (1957) and *Kingsley Books, Inc. v. Brown* (1957); the Court's decisions, in accordance with *Chaplinsky*, restated that pornography was not protected by the First Amendment. This meant, however, that the criterion for identifying obscenity became a critical issue. In *Roth*, the vote was six to three with Brennan delivering the majority opinion, joined by Burton, Clark, Frankfurter, and Whittaker. Chief Justice Warren voted with the majority but wrote a separate concurring opinion. Black and Douglas dissented with Douglas writing a dissent. Harlan, who also dissented, wrote separately. Brennan's "opinion coalition" in *Roth* was a

minimum winning coalition of five justices, and *Roth* was the last time he mustered majorities for his views as the Court grew increasingly fractured and fractious in subsequent obscenity cases.

According to Brennan, *Roth* squarely presented the Supreme Court for the first time with the “dispositive question” of whether obscenity was “utterance within the area of protected speech and press.” The answer based on earlier court cases, past and current laws, as well as legal tradition, was clearly “no,” for despite its “unconditional phrasing,” Brennan declared, the First Amendment “was not intended to protect every utterance.” Nevertheless, because the First Amendment was designed to foster an “unfettered interchange of ideas for the bringing about of political and social changes desired by the people,” all ideas with “even the slightest redeeming social importance” fell within “the full protection of the guaranties.” Obscene speech or indecent publications “utterly without redeeming social importance” were beyond the pale, however. The issue therefore was finding a line between “obscene” and “nonobscene” utterances that minimized the restrictive impact of suppressing obscenity on the free and full exchange of ideas.

The first step line was to recognize that “sex and obscenity are not synonymous.” The portrayal of sex per se was not sufficient to warrant suppression; rather sexual activities or images had to be depicted “in a manner appealing to prurient interest” in order to cross the line into obscenity. The next step was to accept the view of Augustus and Learned Hand in *United States v. One Book Entitled “Ulysses”* (1934) that rejected the Hicklin standard’s emphasis on the effects of isolated obscene passages within larger works on susceptible persons. Brennan’s test in *Roth* thus states that material is obscene according to whether from the perspective of an average person, applying contemporary community standards, the dominant theme of the material, taken as a whole, appeals to prurient interest.

Chief Justice Warren’s concurring opinion demurred with respect to the focus of the majority’s decision. Warren felt that the focus on a book or a picture was misplaced; the rightful focus should be on the conduct of the defendant. This shift, Warren wrote, was consistent with the laws at issue in both cases which prohibited individuals from “purveying textual graphic matter openly advertised to appeal to the erotic interest of their customers.” Warren concluded that the state and federal governments could constitutionally prohibit “the commercial exploitation of the morbid and shameful craving for materials with prurient effect.” As it was clear from the record that *Roth* actively participated in this commerce,

Warren felt there was no need for the Court to have gone beyond this aspect of the cases.

One reason for Harlan’s dissent was his critical view of the majority’s definition of obscenity as something “utterly without redeeming social importance.” He felt the standard was too broad and only superficially specific. He complained that the “Court seems to assume that ‘obscenity’ is a peculiar *genus* of ‘speech and press,’ which is as distinct, recognizable, and classifiable as poison ivy is among other plants.” The judgment as to whether something was obscene, moreover, could not be reduced to a general formula. The constitutional suppression of some “tangible form of expression,” Harlan countered, is an “individual matter” demanding “particularized judgments.” He went to say, “In short, I do not understand how the Court can resolve the constitutional problems now before it without making its own independent judgment upon the character of the material upon which these convictions were based.”

For Douglas, the new test inflicted criminal punishments for “thoughts provoked, not for overt acts nor [for] antisocial conduct.” He objected that defining obscene material as that “which deals with sex in a manner appealing to prurient interest” failed to make a nexus with actions a legislature can regulate or prohibit. To compound the problem, the test also turned on whether material offended community standards, Douglas argued, juries could “censor, suppress, and punish what they don’t like, provided the matter relates to ‘sexual impurity’ or has a tendency ‘to excite lustful thoughts.’ This is community censorship in one of its worst forms. It creates a regime where, in the battle between the literati and the Philistines, the Philistines are certain to win.”

Roth opened the floodgates to further litigation that with each round raised new questions about the various elements of the test propounded by Brennan. Beginning with *Roth*, the Supreme Court over the next ten years decided thirteen cases that produced fifty-five separate opinions as the justices struggled to clarify what *Roth* meant. As the test became more complex, the Court also increasingly struck down convictions in state courts, adding to the controversy surrounding the issue Brennan thought he had laid to rest.

ROY B. FLEMMING

References and Further Reading

- Alexander, Donald. *The Politics of Pornography*. Chicago: University of Chicago Press, 1989.
- Herbeck, Dale. *Chaplinsky v. New Hampshire*. In *Free Speech on Trial*, edited by Richard A. Parker, 85–99. Tuscaloosa: University of Alabama Press, 2003.

- Hixson, Richard F. *Pornography and the Justices: The Supreme Court and the Intractable Obscenity Problem*. Carbondale: Southern Illinois University Press, 1996.
- Mackey, Thomas C. *Pornography on Trial: A Handbook with Cases, Law, and Documents*. Santa Barbara, CA: ABC-CLIO, 2002.
- Rembar, Charles. *The End of Obscenity: The Trials of Lady Chatterley, Tropic of Cancer, and Fanny Hill*. New York: Random House, 1968.

Cases and Statutes Cited

- Adams Theatre Co. v. Keenan*, 96 A.2d 519, 521 (N.J. 1953)
- Albert v. California*, 354 U.S. 476 (1957)
- Butler v. Michigan*, 352 U.S. 380 (1957)
- Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942)
- Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1957)
- Regina v. Hicklin*, L.R. 2 Q.B. 360 (1868)
- United States v. One Book Entitled "Ulysses,"* 72 F.2d 705 (2d Cir. 1934)

ROVIARO v. UNITED STATES, 353 U.S. 53 (1957)

The Supreme Court recognized in *Roviaro* held that the government must sometimes disclose the identity of its confidential informants in order to ensure a fair trial for the defendant. *Roviaro* thus placed an important limitation on the long-recognized "informer's privilege."

Roviaro was charged with illegally transporting narcotics after he allegedly sold a packet of heroin to "John Doe," an undercover informant. At trial, the government presented the testimony of several police officers who had observed the alleged sale but refused to disclose the identity of John Doe on the ground that Doe was still acting as an undercover informant in other cases.

After being convicted, Roviaro appealed to the U.S. Supreme Court, which reversed his conviction by a vote of six to one. The Court observed that it had long recognized that the informer's privilege furthers effective law enforcement by encouraging citizens to report crimes without fear of being identified. However, the Court concluded, the privilege must yield to a criminal defendant's right to a fair trial when the informer does not merely observe a crime but, as John Doe did, actively participates in it. Since that active participation made Doe a material witness to the alleged crime, Roviaro was entitled to learn Doe's identity so that he could decide whether he wished to call Doe as a defense witness. Although the decision in *Roviaro* was formally based on the Court's supervisory power, most lower courts and commentators have regarded the decision as compelled by the due process clause.

DAVID A. MORAN

References and Further Reading

- Westen, Peter, *The Compulsory Process Clause*, Michigan Law Review 73 (1974): 71.

See also **Defense, Right to Present; Due Process**

ROWAN v. UNITED STATES POST OFFICE DEPARTMENT, NO. 399, 397 U.S. 728 (1970)

In 1967, Congress passed legislation commonly referred to as the "Anti-Pandering Act" or the "Pandering Advertisement Act." This act allowed persons who felt advertisements mailed to them were "erotically arousing or sexually provocative" to instruct the Post Office to order the senders to remove their names and addresses from their lists and to cease any future mailings.

The appeal was brought by fourteen petitioners besides Rowan, who operated the American Book Service, and included publishers, mail order houses, mailing list brokers and other businesses or organizations involved in mass mail marketing challenged the constitutionality of the act. A three-judge federal district court had decided the law was constitutional. The Supreme Court's unanimous decision, affirming the lower court, was written by Chief Justice Warren Burger who had been nominated by President Nixon and confirmed by the Senate for the Supreme Court in 1969 to replace the retired Earl Warren. This was Burger's first majority opinion in an obscenity case.

The act permitted parents to remove the names of their children under nineteen from these lists. This was important to Burger. In his first draft of the opinion (which Burger assigned to himself, a prerogative of being chief justice), he included a strong statement on parents' rights to censor their children's mail, going so far as to describe this right as "absolute." He told Brennan that parents should closely supervise their children and, if they had, perhaps the disorder and excesses of that time might not have occurred. In a note to Burger, Harlan stated that he was "gun-shy" of absolutes, found them "distasteful," and objected to Burger's statement, which Burger deleted from the final opinion.

In the course of Burger's opinion, he points out "the right of every person 'to be left alone'" must be weighed against the right of others to communicate. He stresses that in a complex society where citizens are often "inescapably captive audiences for many purposes" there is a need to preserve "a sufficient measure of individual autonomy" to permit "every householder to exercise control over unwanted mail." The Court, he claims, has traditionally

respected the right of householders to bar solicitors from their property. "Nothing in the Constitution compels us to listen to or view any unwanted communication, whatever its merit," he argues; the federal law was thus constitutional.

Brennan's concurrence, joined by Douglas, demurs from Burger's broad interpretation of the law and cautions against the possibility that the law might be used by parents to prevent their children, even those eighteen and older, from receiving political, religious, or other materials the parents find offensive. The statute, he writes, is not without constitutional difficulties for this reason, although it was not challenged on this ground nor did the record showed evidence of the statute being used in this way.

ROY B. FLEMMING

References and Further Reading

- Alexander, Donald. *The Politics of Pornography*. Chicago: University of Chicago Press, 1989.
- Hixson, Richard F. *Pornography and the Justices: The Supreme Court and the Intractable Obscenity Problem*. Carbondale: Southern Illinois University Press, 1996.
- Mackey, Thomas C. *Pornography on Trial: A Handbook with Cases, Law, and Documents*. Santa Barbara, CA: ABC-Clio, 2002.
- Schwartz, Bernard. *The Ascent of Pragmatism: The Burger Court in Action*. New York: Addison-Wesley, 1990.

RUBY RIDGE INCIDENT

In 1992 a federal force of U.S. Marshals, Federal Bureau of Investigation, and Bureau of Alcohol, Tobacco and Firearms (BATF) agents conducted an assault on the Idaho homestead of Randy and Vicki Weaver, resulting in the deaths of Vicki and their son, Sammy. This incident has raised serious questions about the abusive use of force by federal agencies against U.S. citizens, and aroused a dissident activist movement to resist such abuses.

The incident began when Randy Weaver was asked to act as an informant for the government on the activities of local militant groups in northern Idaho, and he refused. Weaver was then approached by an informant of the BATF to sell him sawed-off shotguns. Weaver apparently relented after refusing several times. He sold two shotguns to the informant in October 1989. According to the FBI, the shotguns were 0.25 short of the barrel length, below which a transfer tax becomes due on the sale, and the nonpayment of which makes the weapon "illegal," even though the well-known policy of the BATF is to refuse to accept payment of the tax. Weaver contended that they were not that short at the time he

handed them to the informant, raising the question of whether the FBI fabricated the evidence, a question that has been raised in many other cases.

Weaver was given notice to appear in court on the weapons charges, but with an incorrect date. Rather than correcting the error, the federal officials declared him a fugitive. A federal judge ruled after the siege at Ruby Ridge that the weapons charges amounted to entrapment by the FBI. The incorrect court date appeared to be a deliberate attempt by federal authorities to initiate a confrontation.

On August 21, 1992, deputy marshals engaged in surveillance after entering the Weaver property, without a warrant, in military dress, and armed with night vision devices and fully automatic weapons. While Randy Weaver, his fourteen-year-old son, Sammy, and a family friend, Kevin Harris, were walking the property with the family dog, the dog caught wind of the intruders, and began barking. Following standard practice, the dog was shot by one of the marshals, apparently Art Roderick, from cover, without the agents first showing or identifying themselves.

Enraged by the death of his dog by an unknown and unseen assailant, Weaver's son Sammy fired back with his deer rifle. Randy Weaver fired his shotgun into the air and screamed for Sammy to return to the cabin. As Sammy turned to run, he was shot in the back, apparently by U.S. Marshall William Degan, and died at the scene. It was then that Harris returned fire. It was alleged this shot killed Degan, but some have contended Degan was killed by a stray round from one of his colleagues.

The FBI were called to the scene the next day, August 22, and an FBI sharpshooter, Lon Horiuchi, shot Weaver's wife Vicki as she stood with an infant in her arms in the doorway of her cabin. Horiuchi had contended, up until the time a Senate hearing began, that he had been aiming at an armed man, later said to be Harris, who was threatening a helicopter, but invoked the Fifth Amendment against self-incrimination when he took the stand. The judge in the criminal trial of Weaver and Harris found this testimony so blatantly false that he ordered the charges related to the testimony to be dismissed. (The helicopter was nowhere near where Weaver or Harris could have shot at it.)

The rules of engagement were also changed the night before by FBI commanders. The new rules instructed FBI sharpshooters in part that they "could and should" use deadly force against any armed male spotted in the open. The standard rules of engagement for the FBI are such that they can only use deadly force in situations to protect themselves or the lives of innocent people. Originally, the FBI concluded that its own sharpshooter had followed the

standard procedures and not the modified rules of engagement handed down at Ruby Ridge. However, Horiuchi violated even the modified rules by firing on an unarmed female standing behind an open door.

Horiuchi would later be charged with voluntary manslaughter by the county district attorney, but prosecution was blocked when a federal judge seized jurisdiction, under the alleged authority of the supremacy clause of the U.S. Constitution, and then dismissed the case, following the standard practice when local prosecutors seek to prosecute federal agents for a crime committed while the agent is “on duty,” on the theory that they are protected by “official immunity” for all of their actions while on duty, even if they act outside their lawful authority.

The government tried Randy Weaver and Harris on conspiracy and murder charges. They were acquitted on all counts, after their defense attorney, Gerry Spence, rested his case without presenting any evidence. Weaver was convicted of failing to appear for trial on an earlier weapons charge and did serve a short prison term. Testimony at the Weaver trial about the days that followed the shooting of Vicki and Sammy disclosed that the FBI would taunt Weaver, knowing that his wife and son were dead, by directing a loudspeaker toward the cabin, saying things such as “Good morning Mrs. Weaver—we’re having pancakes, what are you having for breakfast?”

The U.S. government later settled a civil suit by the Weaver family for \$3.1 million.

JON ROLAND

References and Further Reading

Constitution Society. “Ruby Ridge.” Documents and links, n.d. <http://www.constitution.org/ruby/ruby.htm>.
Walter, Jess. *Ruby Ridge: The Truth and Tragedy of the Randy Weaver Family*. New York: Regan Books, 2002.

RULE OF LAW

The term *rule of law* is probably one of the most widely cited terms in the field of civil rights throughout the world without a clear consensus as to what it means. Popular slogans with great emotional appeal, such as “a nation of laws not of men,” merely mask the confusion.

At its simplest level, rule of law identifies a regulatory system under which the state asserts control over the social and political life of its citizens through a system of legally enacted laws applicable to, and open to review by, all citizens and monitored by an effective juridical system. Such a system provides stability and predictability. One can safely plan one’s

actions according the parameters provided by disclosed law and can rely upon the state to enforce that law. This system substitutes law and legal enforcement for anarchic exercise of force and violence by individual actors. Most countries throughout the world accept this understanding of rule of law.

In the West, particularly in the United States, many assume that the term includes more substantive content. Since the concept emerged as a shield against the arbitrary authority of the despot, by implication it bore within itself concepts protective of individual liberty. According to this understanding, rule of law should include concepts such as equality before the law for all citizens, procedural and substantive due process, and subservience of all (including sovereigns and those wielding governmental authority) to the authority law.

At its most extreme, substantive rule of law would include principles of justice, often drawn from ideas of natural law.

DAVID E. GUINN

References and Further Reading

Tamanaha, Brian A. *On the Rule of Law: History, Politics, Theory*. New York: Cambridge University Press, 2004.

See also **Due Process; Equal Protection of Law (XIV)**

RUSH, BENJAMIN (1746–1813)

Benjamin Rush, early America’s most renowned physician, was a distinguished scientist and educator, an ardent patriot and politician, as well as an untiring social reformer and opponent of slavery. Born on January 4, 1746 in Byberry Township near Philadelphia, he was the fourth child of John Rush, a farmer and gunsmith of Quaker descent, and Susanna (Hall) Harvey Rush. After John Rush’s death at an early age, Susanna sent Benjamin to Nottingham Academy, a private school run by the Presbyterian minister James Finley in Cecil County, Maryland. Upon Rush’s graduation in 1759, Finley arranged for his admission to the College of New Jersey (later Princeton University) from which he obtained his bachelor’s degree in 1760. At Nottingham and the College of New Jersey, Rush received a classical education as well as a firm grounding in science and mathematics. He also imbibed strong religious beliefs that reinforced his lifelong commitment to charity and social reform.

Upon his return to Philadelphia in 1761, Rush apprenticed himself for five years to Dr. John Redman,

a disciple of the Dutch physician and advocate of bloodletting Hermann Boerhaave. He also attended lectures by Dr. William Shippen, Jr. and Dr. John Morgan at the College of Philadelphia, and he supported the patriot cause during the Stamp Act crisis. In 1766, Rush set sail for Britain to study medicine under Dr. William Cullen at the University of Edinburgh. After receiving his medical degree in September of 1768, Rush held residencies at Middlesex Hospital and St. Thomas's Hospital in London. Encouraged by Benjamin Franklin to visit Paris, Rush toured France. He became committed to Enlightenment principles and developed a firm belief in human progress.

Returning to America in 1769, he joined the faculty of the College of Philadelphia and became the first professor of chemistry in the United States. He also began his medical career as a private practitioner, initially serving the poor but gradually expanding his practice to include members of the Presbyterian Church that he attended and some of Philadelphia's elite. He was appointed attending physician for the Philadelphia Almshouse in 1772 and the Society for Inoculating the Poor in 1774. He held these positions until his death.

In the early 1770s, Rush emerged as a leading social reformer and a prolific writer. In 1772, he published *Sermons to Gentlemen upon Temperance*, which influenced the nineteenth-century temperance movement including the Women's Christian Temperance Union. In 1773, he initiated his campaign against slavery, publishing his *Address to the Inhabitants of the British American Settlements, upon Slave-Keeping* and, following a storm of criticism, *A Vindication*, a pamphlet in which he defended his antislavery views. These works contributed to the founding of America's first antislavery society, the Pennsylvania Society for Promoting the Abolition of Slavery and the Relief of Free Negroes Unlawfully Held in Bondage.

The onset of the imperial crisis witnessed Rush's fervent embrace of the patriot cause. After the passage of the Tea Act, he published a series of articles under the pseudonym of Hampden and encouraged Thomas Paine's writing of *Common Sense*. Following the battles of Lexington and Concord, Rush became one of Pennsylvania's first and strongest proponents of independence. Elected to Philadelphia's Committee of Safety, he was also a member of the Continental Congress, a signer of the Declaration of Independence, and the physician general for the middle department of the Continental Army, a post he resigned after a dispute with the Army's chief physician, Dr. Shippen, Jr. After the Battle of Brandywine, Rush became mired in the infamous Thomas Conway

scheme, which sought the removal of George Washington as the leader of the Continental forces. In 1776, Rush married Julia Stockton, the daughter of Richard Stockton of New Jersey. They had thirteen children, four of whom died in infancy.

Although in the 1780s Rush focused on expanding his private practice, he remained active in political and social affairs. As a delegate to the Pennsylvania convention on ratification, he was outspoken in favor of adopting the Constitution. He continued his support of the temperance movement and became secretary, and later president, of the Pennsylvanian Abolition Society. After developing extensive records on the mentally disturbed at the Pennsylvania Hospital where he was appointed staff physician in 1783, he wrote *An Enquiry into the Physical Causes upon the Moral Faculty* (1786).

Rush's detection of the correlation between disease and uncovered polluted waters precipitated his involvement in municipal improvement projects. He campaigned for the cleanup of Dock Creek, a mosquito-ridden sewer that ran through Philadelphia. A strong believer in a virtuous and informed citizenry, he became one of the first American advocates of state-financed education. He helped to found Dickinson College as well as Franklin (and Marshall) College. He also advanced the idea of a federal university and proposed an expanded curriculum for women's education. Late in the decade, he embarked on a campaign for the reform of the penal system and criminal justice, attacking public punishment and demanding the elimination of the death penalty except for first-degree murder. In 1789, he published his most famous professional work, *Medical Inquiries and Observations*.

In the 1790s, Rush extended his efforts for social reform to the advancement of the religious and educational welfare of African Americans. He supported the founding of the African Episcopal Church of St. Thomas, the first African-American Episcopal Church in the United States. In 1794, he made a heroic, yet ill-designed, attempt to stem the epidemic of yellow fever in Philadelphia through the application of herbal purges and bloodletting, treatments that unfortunately may have increased the death rate. His efforts led to a bitter court battle with William Cobbett. Rush, a leading Republican in the mid-1790s, sued the arch-Federalist publisher for libel following the latter's vicious attacks on his bloodletting treatments. The public criticism hurt Rush's practice and distanced him from the College of Physicians of Philadelphia from which he eventually resigned. Although Rush won a settlement of \$8,000 in court, he received only half of the amount before Cobbett fled to England to avoid financial ruin.

In his final years, Rush pursued his interest in mental illness and published a comprehensive work entitled *Medical Enquiries and Observations upon the Diseases of the Mind* (1812), which served as the first American text on psychiatry. Rush is still recognized as “the father of American psychiatry.” He continued private practice, acted as president of the Pennsylvania Abolition Society, promoted veterinary medicine, and assumed the position of treasurer of the United States Mint. Committed to disinterested public service, Rush expressed disillusionment with the rising importance of “interests” during the new nation’s remarkable economic expansion in the early nineteenth century. Rush died in Philadelphia on April 19, 1813, and was buried in Christ Church Burial Ground. In the late nineteenth century, temperance reformers marked his grave with a memorial plaque acknowledging him as the “instaurator of American Temperance Reform.”

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References and Further Reading

- Binger, Carl Alfred Lanning. *Revolutionary Doctor: Benjamin Rush, 1746–1813*. New York: W.W. Norton and Company, 1966.
- D’Elia, Donald J. *Benjamin Rush, Philosopher of the American Revolution*. Philadelphia: American Philosophical Society, 1974.
- Fox, Claire G., Gordon L. Miller, and Jacquelyn C. Miller, comps. *Benjamin Rush, M.D.: A Bibliographic Guide*. Westport, CT: Greenwood, 1996.
- Risjord, Norman K. *Representative Americans: The Revolutionary Generation*. Madison, WI: Madison House Publishers, 2001.

RUST v. SULLIVAN, 500 U.S. 173 (1991)

Title X of the Public Health Service Act authorizes the U.S. Department of Health and Human Services (HHS) to fund a range of family planning services but prohibits the use of Title X funds in programs where abortion is a method of family planning. In 1988, HHS promulgated new regulations prohibiting projects receiving Title X funding from referring pregnant women to abortion providers, even upon specific request. The regulations also prohibit these entities from engaging in activities advocating for the availability of abortion through lobbying, distributing materials, or participating in litigation.

In *Rust v. Sullivan*, a majority of the U.S. Supreme Court rejected claims that these regulations violated the First Amendment free speech rights of Title X fund recipients, their staffs, and their patients by conditioning the receipt of government funds on the

expression of specific viewpoints. The Court also held that the regulations did not interfere with the Fifth Amendment substantive due process rights of Title X clients to choose to terminate a pregnancy.

In raising these First and Fifth Amendment claims, the challengers sought to invoke the principle that the government may not condition a benefit on the requirement that the recipient relinquish a constitutional right, nor penalize a person for exercising a constitutional right (*Regan v. Taxation with Representation of Washington* [1983]). This unconstitutional conditions doctrine has not been consistently applied by the Supreme Court. The Court has sought to draw a line between content-based regulation of speech, which the Court has held unconstitutional (*Legal Services Corporation v. Velazquez* [2001]), and cases in which the government has refused to subsidize the exercise of a constitutional right to engage in a constitutionally protected activity, such as speech or obtaining an abortion (*Harris v. McRae* [1980]). Writing for the *Rust* majority, Chief Justice Rehnquist stated that through the Title X regulatory prohibitions on referrals for abortion, the government was not discriminating on the basis of viewpoint, but choosing to fund one activity and not others. The Court has subsequently described *Rust* as involving the government using private speakers to transmit specific information pertaining to a government program. Under such circumstances, the government may say what it wants (*Rosenberger v. Rector of the University of Virginia* [1995]). In upholding these restraints on speech, *Rust* is inconsistent with traditional notions of free exchange of information between patients and health care professionals and contributes to the confused state of the unconstitutional conditions doctrine.

If one views the funding conditions at issue in *Rust* as the government funding some services and not others, the Court’s decision seems consistent with the cases in which the Supreme Court consistently has concluded that federal or state governments may constitutionally implement a value judgment of discouraging abortion by funding childbirth-related health care services while declining to fund abortion services. In these cases, the Supreme Court has stated that a government decision not to subsidize the exercise of a fundamental right does not infringe the right (*Harris v. McRae* [1980], *Maier v. Roe* [1977]).

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References and Further Reading

- Chemerinsky, Erwin. *Constitutional Law: Principles and Policies*. 2nd ed. New York: Aspen, 2002.

Cases and Statutes Cited

Harris v. McRae, 448 U.S. 297 (1980)
Legal Services Corporation v. Velazquez, 531 U.S. 533 (2001)
Maher v. Roe, 432 U.S. 464 (1977)
Regan v. Taxation with Representation of Washington, 461 U.S. 540 (1983)
Rosenberger v. Rector of the University of Virginia, 515 U.S. 819 (1995)
42 U.S.C., Sections 300 to 300a-6
42 C.F.R., Sections 59.8 to 59.10 (1989)

See also **Abortion; Birth Control; Chemerinsky, Erwin; Content-Based Regulation of Speech; Due Process of Law (V and XIV); Government Funding of Speech; Government Speech; *Harris v. McRae*, 448 U.S. 297 (1980); Privacy; *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995); Unconstitutional Conditions**

RUTAN v. REPUBLICAN PARTY OF ILLINOIS, 497 U.S. 62 (1990)

Although *Rutan* was not the first case about political patronage to reach the Supreme Court, it was the most farreaching. In 1976, the Court had decided in *Elrod v. Burns* (1976) that it was unconstitutional to fire a public employee based upon political affiliation. *Elrod* arose out of the Democratic political machine in Chicago; ironically, *Rutan* was a suit alleging political hiring, promotions, and transfers by the Republican governor of Illinois.

The Court of Appeals found that the challenged practices in *Rutan* did not burden the First Amendment rights of a job seeker as severely as did the firing in *Elrod* and thus were not unconstitutional. The Supreme Court split five to four in overturning this decision. These practices placed an impermissible burden on free speech and association, it held, and were not necessary to further a vital governmental interest, as required to pass scrutiny under the very high level of review given to state actions interfering with First Amendment rights.

The majority opinion evoked a vehement dissent by Justice Scalia, on the grounds that patronage was as old as the United States and had played an important role in democratizing politics and maintaining the party system. The lower courts did not appear to like the majority holding in *Rutan* either, and many refused to extend its logic to the awarding of government contracts in return for political support and financial contributions. The Supreme Court held that practice to be unconstitutional as well in *O'Hare Truck Service v. City of Northlake* (1996).

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RUTLEDGE, WILEY BLOUNT, JR. (1894–1949)

References and Further Reading

Bowman, Cynthia Grant, *The Law of Patronage at a Crossroads*, *Journal of Law and Politics* 12 (1996): 2:341–63.
Freedman, Anne. *Patronage: An American Tradition*. Chicago: Nelson-Hall Publishers, 1994.

Cases and Statutes Cited

Elrod v. Burns, 427 U.S. 347 (1976)
O'Hare Truck Service v. City of Northlake, 518 U.S. 712 (1996)

See also *Elrod v. Burns*, 427 U.S. 347 (1976); **Political Patronage and First Amendment**

RUTLEDGE, WILEY BLOUNT, JR. (1894–1949)

Born in Cloverport, Kentucky, the son of a Baptist preacher, Wiley Blount Rutledge, Jr. was appointed to the Supreme Court in 1943 by Franklin D. Roosevelt and became—most notably as a dissenter—one of the most far-reaching proponents of civil liberties and civil rights in the Court's history. Rutledge grew up in Tennessee, attending Maryville College; graduated from the University of Wisconsin in 1914; and began law school at Indiana University. He contracted tuberculosis, however, and, after treatment in North Carolina, married his Maryville Greek teacher, Annabel Person, and chased the cure by heading west to Albuquerque, New Mexico, to teach high school. In 1920, the young couple moved to Boulder, Colorado, where Rutledge completed law school, practiced law for two years, and joined the University of Colorado law faculty. (Years later, Roosevelt would exclaim, "Wiley, you have a lot of geography!")

Legal Educator

In 1926, Rutledge became a professor of law at Washington University in St. Louis and served as dean from 1931 to 1935. Well liked and respected by students and faculty, he taught business organizations and legal ethics, raised admission standards, reformed the curriculum, and promoted interdisciplinary studies, especially law and social work. Rutledge also was active in the community. He served on the Social Justice Commission of St. Louis and campaigned for reform of Missouri's criminal justice system, seeking to update the criminal code, make women eligible for jury duty, and establish a voluntary defender plan. His most dogged efforts, however, were on behalf of the Child Labor Amendment submitted to the

states by Congress years earlier (and never adopted), authorizing Congress to set minimum ages and maximum hours for children in the workplace—a reform the Supreme Court had twice struck down as unconstitutional.

In 1935, Rutledge became dean of the College of Law at the University of Iowa, where again he reformed the curriculum and was highly regarded. He pressed the Association of American Law Schools to support legal aid for the poor, and, as an enthusiastic New Dealer, he supported Roosevelt's Court-packing plan in 1937. Earlier, while in St. Louis, he had caught the attention of Irving Brant, editorial page editor of the *St. Louis Star-Times*, who was particularly impressed by Rutledge's support of the Child Labor Amendment and by a speech Dean Rutledge gave in 1936 attacking the Supreme Court's decision eviscerating the Agricultural Adjustment Act. A friend and supporter of Roosevelt, Brant urged the president to consider Rutledge for the Supreme Court in 1938 if the favorite, Felix Frankfurter, were found unsuitable. Frankfurter was selected, so Brant pushed Rutledge for the next vacancy in 1939, filled by William O. Douglas. As runner-up, however, Rutledge was named to the U.S. Court of Appeals for the District of Columbia (later the District of Columbia "Circuit"). There, he established himself as a strong supporter of First Amendment rights and, upon the resignation of Justice James F. Byrnes, was appointed to the Supreme Court in 1943.

Supreme Court Justice: First Amendment Cases

Within a month of his investiture, Rutledge helped form a five-to-four majority in the *Jones v. Opelika* (1943) and *Murdock v. Pennsylvania* (1943) cases that struck down under the First Amendment's "free exercise" clause the requirement that Jehovah's Witnesses pay municipal taxes and licences when selling religious literature. He then joined the majority in *West Virginia Board of Education v. Barnette* (1943), invalidating a West Virginia requirement that schoolchildren, objecting on religious grounds, salute the American flag. However, in writing for the majority in *Prince v. Massachusetts* (1944), another Jehovah's Witness case, Rutledge upheld a Massachusetts statute imposing criminal fines on adults who allowed children to distribute religious literature on the street—a statute Rutledge perceived as a child labor, not a "free exercise" regulation. Rutledge also stood firmly for separation of church and state under the First Amendment's establishment clause, dissenting

in *Everson v. Board of Education* (1948) when the Court sustained five to four a New Jersey ordinance authorizing reimbursement of transportation expenses for children attending Catholic as well as public schools.

In other First Amendment decisions, Rutledge joined those who held that freedom of speech had a "preferred position" among the rights entitled to constitutional protection. Using perhaps the strongest language of his time to that effect, he wrote for the majority in *Thomas v. Collins* (1945), reversing five to four the criminal contempt conviction of a labor organizer who had disobeyed a court order forbidding him to address a mass gathering without obtaining a state-required organizer's card.

Wartime Decisions

In the 1940s, the Supreme Court overturned several lower court decisions that had revoked the naturalized American citizenship of alleged communists or Nazis. The Court concluded that the government had not met its burden of proving that citizenship had been illegally procured. Taking an absolutist position, however, Rutledge argued in *Schneiderman v. United States* (1943), *Knauer v. United States* (1946), and *Klapprott v. United States* (1949) that naturalized citizenship, once granted, could never be revoked for actions prior to naturalization, but only for actions "taking place afterward" (as also could happen to native-born Americans). He rejected "two classes of citizens, one superior, the other inferior" as if in "suspended animation" vulnerable to erasure.

In the more infamous cases arising out of World War II, Rutledge's record is mixed. He joined not only the unanimous Court in *Hirabayashi v. United States* (1943), upholding the West coast curfew imposed on persons of Japanese ancestry, but also the six-to-three majority in *Korematsu v. United States* (1944), sustaining the Japanese-American evacuation program, a vote he never really explained. On the other hand, in perhaps his most heralded opinion—citing the Articles of War, the Geneva Convention, and Fifth Amendment due process—Rutledge dissented from the Court's deference to the military commission conviction of Lieutenant General Tomoyuki Yamashita (*In re Yamashita* [1946]), the Japanese commander in the Philippines, who was sentenced to death for failure to prevent atrocities in Manila at the end of the war.

Rutledge also is known for three other wartime dissents. He voted to reverse the convictions of John L. Lewis and the United Mine Workers (*United States*

v. United Mineworkers [1947]) for contempt of court in refusing to honor a federal court order enjoining a national coal strike. In *Yakus v. United States* (1944), he voted to declare unconstitutional a criminal price control statute that barred the accused from challenging the price ceilings while defending the accusation. Congress accepted Rutledge's analysis and amended the statute. Finally, in *Ahrens v. Clark* (1948), Rutledge dissented from an opinion by Douglas, who rejected petitions for writs of habeas corpus by German nationals awaiting deportation after hostilities had ceased. Douglas reasoned that the statute required the habeas petition to be filed in New York, the district where the prisoners were held, not in the District of Columbia, where the *Ahrens* petition had been filed. Rutledge stressed, to the contrary, that precedent called for filing the petition in a jurisdiction where the jailer could be found, which included the District of Columbia, home of the attorney general. Eventually, *Ahrens* was overruled. More recently, the Supreme Court's decision in *Rasul v. Bush* (2004)—holding that U.S. courts have jurisdiction over challenges to the legality of the detention of foreign nationals captured abroad while fighting for the Taliban and incarcerated at the U.S. Navy base at Guantánamo Bay, Cuba—is traceable to Justice Rutledge's dissent in *Ahrens*.

Criminal Cases

Rutledge sided with criminal defendants 80 percent of the time compared to the Court's 52 percent during his tenure there. Especially when the death penalty was involved, Rutledge would construe an ambiguous statute against the government, or grant the defendant a generous interpretation of due process, or even invoke the Court's inherent supervisory power over the administration of criminal justice to achieve what he deemed the just result. The justice also argued for an expanded right to counsel in criminal cases, in state as well as federal courts, and worked hard to achieve federal court review of state criminal proceedings. He deserves credit, through dissents in *Parker v. Illinois* (1948) and *Marino v. Ragen* (1947), for successfully pressing the Court eventually to mandate the reform of Illinois' byzantine criminal appellate system—a system so complex that no defendant could know for sure how to exhaust state court remedies, a requirement for seeking relief in the Supreme Court.

Rutledge also advocated broadening criminal due process in state as well as federal courts. He dissented in *Foster v. Illinois* (1947), for example, when the

Court held, five to four, that Fourteenth Amendment due process did not guarantee an indigent criminal defendant the right to be informed that state law entitled him to a free lawyer upon request. Had Foster been tried in federal court, however, the Sixth Amendment would have guaranteed him the right to counsel, a situation presenting the question whether the entire Bill of Rights, not just some of them as previously held in *Palko v. Connecticut* (1937), should apply to the states through the Fourteenth Amendment due process and privileges and immunities clauses. In *Adamson v. California* (1947), the Court reaffirmed *Palko*, five to four, over the dissent of Justice Hugo Black, who opined that the Fourteenth Amendment incorporated the Bill of Rights fully, not selectively. Rutledge joined Justice Frank Murphy, who dissented separately, agreeing that the Fourteenth Amendment incorporated the entire Bill of Rights, but explaining that the amendment did not impose a Bill-of-Rights ceiling; due process might well guarantee additional rights in state courts. Rutledge also strongly supported the Fourth Amendment's "exclusionary rule," barring admission of unlawfully seized evidence in federal court. Dissenting in *Wolf v. Colorado* (1949), he argued that the rule was applicable in state courts as well (a view that eventually prevailed).

Equal Protection of the Laws

In his dissent (discussed above) concluding that the indigent defendant, Foster, had been denied due process, Rutledge added that Foster had been denied equal protection of the laws, one of the earliest pronouncements by a Supreme Court justice premising denial of equal protection on poverty. Later, dissenting in *Goesaert v. Cleary* (1948), Rutledge wrote the first modern gender discrimination opinion. He found a denial of equal protection when the majority upheld a Michigan statute forbidding any female to tend bar unless she was the "wife or daughter of the male owner." Rutledge also stood against discrimination based on blood line and race. In *Kotch v. Board of River Port Pilot Commissioners* (1947), he dissented from Black's opinion upholding a Louisiana system permitting a river pilots' association, required by law to guide Mississippi River boats near New Orleans, to choose all new pilots from among family and friends. And in *Fisher v. Hurst* (1948), he was the lone dissenter when the Court rejected Thurgood Marshall's petition for a writ of mandamus to compel Oklahoma's compliance with the Court's earlier mandate to provide the African-American petitioner a legal education "as

soon as it does for applicants of any other group.” Rutledge interpreted the mandate to mean that the law school must be shut down entirely unless the petitioner was admitted, not left open to second- and third-year students as the Oklahoma courts were allowing. Only in voting rights cases did Rutledge balk at an equal protection remedy. In *Colegrove v. Green* (1946) and *MacDougall v. Green* (1948), he joined colleagues who concluded that unequal voting districts and discriminatory signature requirements for getting a political party onto the ballot violated equal protection. But in each case, Rutledge perceived that the proposed remedy—at-large election or last-minute access to the ballot—would create inequities of their own barring relief.

Commerce Clause Decisions

When Michigan prosecuted a charter boat company under its civil rights act for refusing to carry African-American schoolchildren upriver from Detroit to an island in Canada, Rutledge wrote for a majority that sustained Michigan’s action against a defense that the commerce clause, standing alone, forbade such regulation of foreign commerce (*Bob-Lo Excursion Co. v. Michigan* [1948]). In other contexts, Rutledge had become the Court’s most thoughtful student of the commerce clause, writing expositions in *Freeman v. Hewitt* (1946) that maximized state taxation of interstate transactions and in *Prudential Insurance Co. v. Benjamin* (1946) that maximized both federal and state actions affecting interstate commerce. Both rationales have survived.

Creative Constitutional Jurisprudence

When the Court considered a challenge to a federal statute expanding federal “diversity” jurisdiction to include suits not only between citizens of different “states,” as specified in Article III, but also citizens of the District of Columbia and the territories, the Court upheld the statute five to four in *National Mutual Insurance Co. v. Tidewater Transfer Co.* (1949). The majority cobbled together an opinion by Justice Robert Jackson finding authority in the “District clause” (Article I, Section 8, Clause 1) and an opinion by Rutledge, joined by Murphy, finding authority in Article III. Rutledge thus deemed the District of Columbia a “state” for this purpose, as in other instances (such as the Sixth Amendment right to a speedy criminal trial) where constitutional rights

applicable to the “states” had been extended to the District of Columbia. Unlike the others, therefore, Rutledge and Murphy saw the availability of federal diversity jurisdiction as an access to justice—a civil rights—issue.

Wiley Rutledge had unswerving faith that law could deliver justice, but only if the Constitution, like the common law, received an evolving, not a static, interpretation and only if, as he once wrote, the Constitution “places the rights to life and to liberty above those of property.” His jurisprudence, ultimately, was derived from his love of people—regardless of station—with considerable depth of feeling. Significantly, on an acrimonious Court, he was the only justice who had both the personal and the intellectual respect of all his colleagues.

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References and Further Reading

- Ferren, John M. *Salt of the Earth, Conscience of the Court: the Story of Justice Wiley Rutledge*. Chapel Hill: University of North Carolina Press, 2004.
- Harper, Fowler V. *Justice Rutledge and the Bright Constellation*. Indianapolis: Bobbs-Merrill, 1965.
- Pollak, Louis H. “Wiley Blount Rutledge: Profile of a Judge.” In *Six Justices on Civil Rights*, edited by Ronald D. Rotunda, 177. London: Oceana, 1983.
- Rutledge, Wiley. “The Federal Government and Child Labor.” *Social Service Review* 7 (1933): 555.
- . “Social Changes and the Law.” *Proceedings, American Association of Collegiate Schools of Business* 88 (1934).
- . *Significant Trends in Modern Incorporation Statutes*, Washington University Law Quarterly 22 (1937): 305; University of Pittsburgh Law Review 3 (1937): 273.
- . *A Declaration of Legal Faith*. Lawrence: University of Kansas Press, 1947.
- Stevens, John Paul. “Mr. Justice Rutledge.” In *Mr. Justice*, edited by Allison Dunham and Philip Kurland, 177. Chicago: University of Chicago Press, 1958.
- A Symposium to the Memory of Wiley B. Rutledge (1894–1949)*, Indiana Law Journal 25 (1950); Iowa Law Review 35 (1950).

Cases and Statutes Cited

- Adamson v. California*, 332 U.S. 46 (1947)
- Ahrens v. Clark*, 335 U.S. 188, 193 (1948) (Rutledge, J., dissenting) (*overruled by Braden v. 30th Judicial Circuit of Kentucky*, 410 U.S. 484 (1973); see generally *Rasul v. Bush*, 72 U.S.L.W. 4596 (U.S. June 28, 2004) (Nos. 03-334 and 03-043))
- Bob-Lo Excursion Co. v. Michigan*, 333 U.S. 28 (1948)
- Colegrove v. Green*, 328 U.S. 549, 564 (1946) (Rutledge, J., concurring in result)
- Everson v. Board of Education*, 330 U.S. 1, 28 (1948) (Rutledge, J., dissenting)
- Fisher v. Hurst*, 333 U.S. 147, 149 (1948) (Rutledge, J., dissenting)

Foster v. Illinois, 332 U.S. 134, 141 (1947) (Rutledge, J., dissenting)
Freeman v. Hewitt, 329 U.S. 249, 259 (1946) (Rutledge, J., concurring) (cited with approval in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 [1977])
Goesaert v. Cleary, 335 U.S. 464, 467 (1948) (Rutledge, J., dissenting)
Hirabayashi v. United States, 320 U.S. 81, 114 (1943) (Rutledge, J., concurring)
In re Yamashita, 327 U.S. 1, 41 (1946) (Rutledge, J., dissenting)
Jones v. Opelika, 319 U.S. 103 (1943) (per curiam)
Klapprott v. United States, 335 U.S. 601, 616 (1949) (Rutledge, J., concurring in result)
Knauer v. United States, 328 U.S. 654, 675 (1946) (Rutledge, J., dissenting)
Korematsu v. United States, 323 U.S. 214 (1944)
Kotch v. Board of River Port Pilot Commissioners, 330 U.S. 552, 564 (1947) (Rutledge, J., dissenting)
MacDougall v. Green, 335 U.S. 281, 284 (1948) (Rutledge, J., concurring in result)
Marino v. Ragen, 332 U.S. 561, 563 (1947) (Rutledge, J., dissenting) (followed in *Lofthus v. Illinois*, 334 U.S. 804 (1948) (per curiam) and *Young v. Ragen*, 337 U.S. 235 [1949])
Murdock v. Pennsylvania, 319 U.S. 105 (1943)
National Mutual Insurance Co. v. Tidewater Transfer Co., 337 U.S. 582, 604 (1949) (Rutledge, J., concurring)
Palko v. Connecticut, 302 U.S. 319 (1937)
Parker v. Illinois, 333 U.S. 571, 577 (1948) (Rutledge, J., dissenting)
Prince v. Massachusetts, 321 U.S. 158 (1944)
Prudential Insurance Co. v. Benjamin, 328 U.S. 408 (1946) (cited with approval in *U.S. Dep't of the Treasury v. Fabe*, 508 U.S. 491 [1993])
Rasul v. Bush, 72 U.S.L.W. 4596 (U.S. June 28, 2004) (Nos. 03-334 and 03-043)
Schneiderman v. United States, 320 U.S. 118, 165 (1943) (Rutledge, J., concurring)
Thomas v. Collins, 323 U.S. 516 (1945) (cited with approval in *Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton*, 536 U.S. 150 [2002])
United States v. United Mineworkers, 330 U.S. 258, 342 (1947) (Rutledge, J., dissenting)
West Virginia Bd. of Education v. Barnette, 319 U.S. 524 (1943)
Wolf v. Colorado, 338 U.S. 25, 47 (1949) (Rutledge, J., dissenting) (overruled by *Mapp v. Ohio*, 367 U.S. 643 [1961])
Yakus v. United States, 321 U.S. 414, 460 (1944) (Rutledge, J., dissenting)

See also Aliens, Civil Liberties of; Bill of Rights: Structure; Capital Punishment; Children and the First Amendment; Citizenship; Common Law or Statute; Conscientious Objection, the Free Exercise Clause; Constitution of 1787; Criminal Law/Civil Liberties and Noncitizens in the United States; Denaturalization; Douglas, William Orville; Due Process; Due Process of Law (V and XIV); Equal Protection of Law (XIV); Establishment Clause Doctrine: Supreme Court Jurisprudence; *Everson v. Board of Education*, 330 U.S. 1 (1947); Exclusionary Rule; Flag Salute Cases; Fourteenth Amendment; Frankfurter, Felix; Free Exercise

Clause Doctrine: Supreme Court Jurisprudence; Freedom of Speech: Modern Period (1917–Present); Habeas Corpus: Modern History; Incorporation Doctrine; Jackson, Robert H.; Japanese Internment Cases; Jehovah's Witnesses and Religious Liberty; Jurisdiction of the Federal Courts; Marshall, Thurgood; Murphy, Frank; *Prince v. Massachusetts*, 321 U.S. 158 (1944); Privileges and Immunities (XIV); Right to Counsel; Right to Counsel (VI); Roosevelt, Franklin Delano; State Aid to Religious Schools; State Courts; Voting Rights (Compound); Wall of Separation; *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943); World War II, Civil Liberties in

RYAN, GEORGE (1934–)

George Ryan was inaugurated as the thirty-ninth governor of Illinois on January 11, 1999 following a thirty-year career in public service. During a speech given at Northwestern University on January 11, 2003, a mere two days before leaving office, he commuted the sentences of all of Illinois' death row inmates while citing the "demon of error," the error in both determining guilt and deciding who among the guilty should die, inherent in the capital punishment system as his reason. His commutation affected 156 death row inmates in Illinois and eleven others sentenced to die as well. Ryan himself was the outgoing Republican governor, having not sought reelection in 2002.

Ryan joined the Illinois state legislature in the 1970s and fully supported the death penalty at that time. While running for governor in 1998, however, news of Anthony Porter made headlines in the state. Porter, with an IQ of 51, was spared execution two days before his death was scheduled. With the help of Northwestern University professor David Protess and his students, Porter's innocence was proven, and he was freed after spending nearly two decades in prison. This incident jolted Ryan, and while he wavered on backing a full-scale review of the Illinois justice system, he did support a fund that would ensure inmates such as Porter access to investigative resources. Within a few months, however, two more death-row inmates had been exonerated with conclusive evidence proving their lack of guilt. Calls for a state moratorium on executions rose as state judiciary officials began their own investigation. When the attorney general next called to schedule an execution, Ryan refused. Then, in fall 1999, sources at the *Chicago Tribune* revealed that since 1977, one-third of all capital punishment convictions had been reversed due to errors. Ryan then called for a moratorium in January 2000.

Capital punishment itself in Illinois had been under the microscope after journalism students at Northwestern University began researching specific death penalty cases in the state in the late 1990s. Ryan had first declared a moratorium on death row executions in Illinois in 2000. He appointed a panel to examine capital punishment in the state and to review the cases of all death row inmates. The panel concluded its findings in 2002, and reported that Illinois had applied capital punishment too often since its reestablishment in the state in 1977.

Ryan's commutations left all but three inmates with sentences of life imprisonment without parole. The three remaining individuals received forty years to life imprisonment. Ryan's actions were seen by some as the most significant statement questioning capital punishment in thirty years. Ryan stated that

he was struck by Supreme Court justice Harry Blackmun's 1994 statement: "I no longer shall tinker with the machinery of death." Ryan was nominated for a Nobel Peace Prize in 2003.

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References and Further Reading

- Banner, Stuart. *The Death Penalty: An American History*. Cambridge, MA: Harvard University Press, 2002.
- Garvey, Stephen, ed. *Beyond Repair? America's Death Penalty*. Durham, NC: Duke University Press, 2003.
- King, Rachel. *Don't Kill in Our Names: Families of Murder Victims Speak Out against the Death Penalty*. New Brunswick, NJ: Rutgers University Press, 2003.

See also **Capital Punishment; Prejean, Sister Helen**

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SACCO AND VANZETTI

Nicola Sacco and Bartolomeo Vanzetti were executed in Charlestown, Massachusetts, in 1927, having been tried and convicted for the 1920 robbery and murder of a payroll clerk and his guard. The crime was hardly newsworthy at the time. However, when Sacco and Vanzetti were arrested a few weeks later, the fact that they were Italian immigrants, active in anarchist circles, gave the case national and international political significance. Their 1921 trial was what we would call today a “media event.” There were demonstrations, protests, and even bombings, in the United States and around the world, from the time of the trial, through the long appeals process, until after their execution.

The controversy continues to this day about whether Sacco and Vanzetti were guilty or were unfairly convicted of a crime they did not commit because of prejudice against foreigners who held unpopular political beliefs.

The early years of the twentieth century were years of unrest and violence in the United States. Labor organizers and various radical groups agitated for causes such as workers’ rights, opposition of American involvement in World War I, and even overthrow of both the capitalist system and of the government. Many members of these movements were recent immigrants, a fact that furthered fueled prejudice against foreigners. State and federal Anti-Anarchy and Anti-Syndicalism Acts made some types of political protest illegal. Violators were subject to imprisonment, and foreigners could be deported. Government harassment of these radical groups

reached a high point with the Palmer Raids in late 1919 and early 1920, when thousands were arrested and deported.

In the afternoon of April 15, 1920, a payroll clerk and his guard walked on a street in Braintree, Massachusetts, an industrial town near Boston, each carrying a box of payroll envelopes. Two men approached them and shot them. Several accomplices in a waiting getaway car picked up the killers, and they made a clean escape, with a total of nearly \$16,000.

Although there were numerous eyewitnesses, their conflicting accounts gave the police little to go on. When the getaway car was discovered several days later, a series of pieces of circumstantial evidence led the police to watch for someone coming to claim a second car from a repair shop near where the getaway car had been found. Sacco and Vanzetti and two other men fell into this trap on the evening of May 5. The police arrested Sacco and Vanzetti. (The other two men had solid alibis for April 15 and were neither arrested nor charged.)

Sacco and Vanzetti did not tell credible stories about why they had gone to get this car or why they were carrying handguns when they were arrested. Although the police interrogation first focused on Sacco’s and Vanzetti’s political beliefs, the prosecutor decided to charge them with the payroll robbery and murders.

At the trial, a very aggressive prosecutor badgered reluctant witnesses to identify Sacco and Vanzetti as the culprits. He belittled alibi witnesses, many of

whom testified in Italian, telling the jury that they could assume that Italians would lie to protect their friends. A state ballistics expert testified that one of the bullets removed from the body of the dead guard probably came from Sacco's gun. The defense presented an expert who testified to the contrary and later suggested that this bullet had been switched.

The prosecution said that the fact that Sacco and Vanzetti lied to police about where they were going the night they were arrested showed "consciousness of guilt"—they lied because they had something more serious to hide. Sacco and Vanzetti testified that they had lied because, with a new round of Palmer Raids coming, they feared deportation.

The most dramatic part of the trial was Sacco's testimony about his patriotism and his involvement in the anarchist movement. The prosecutor questioned Sacco at length about why, if he loved this country, he and Vanzetti had gone to Mexico during World War I to avoid the draft. Defense counsel objected that these questions were irrelevant and prejudicial. The trial judge showed his prejudice here by repeating each of the prosecutor's questions, saying he wanted to be sure he understood whether defense counsel was objecting to each of these inflammatory questions.

Although the trial lasted six weeks, the jury took less than three hours to return guilty verdicts. Motions for a new trial on the basis of later discovered evidence and the judge's prejudice were all denied. The Massachusetts Supreme Judicial Court affirmed those decisions. Responding to the public's outcries about the case, the Governor convened a special committee to review the case and advise him whether the trial had been fair. When that committee supported the court decisions and several justices of the U.S. Supreme Court turned down petitions for that court's review, Sacco's and Vanzetti's fates were sealed.

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References and Further Reading

Bortman, Eli C. *Sacco and Vanzetti*. Beverly, MA: Commonwealth Editions, 2005.

See also **Aliens, Civil Liberties of; Anti-Anarchy and Anti-Syndicalism Statutes; Race and Criminal Justice**

SAENZ v. ROE, 526 U.S. 489 (1999)

The Supreme Court's decision in *Shapiro v. Thompson* (1969) ruled that welfare waiting period requirements were unconstitutional. However, residency requirements emerged again in the late 1980s as states

experienced budget crises and dissatisfaction with the welfare system. States aiming to prevent the influx of welfare-dependent persons through residency requirements attempted to circumvent the *Shapiro* ruling by avoiding the specific provisions invalidated by the Court. In *Saenz v. Roe*, the Court reviewed a California statute under which new residents, for the first year of their residency, would be limited to the maximum amount of benefits received in the state of prior residence. This was challenged by recent residents claiming that their monthly Aid to Families with Dependent Children benefits would be substantially lowered under the statute. Also under review was the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) of 1996, which in effect approved the statutory requirement.

The Court's seven-to-two decision held that California's statute violated the right to travel guaranteed under the Fourteenth Amendment and that PRWORA does not resuscitate the constitutionality of the statute. Central to the decision was the privileges and immunities clause of the Fourteenth Amendment, which prohibits differential treatment of citizens on the basis of length of residence—California's legitimate purpose in saving money did not justify discriminating among equally eligible citizens. The Court affirmed the right of all citizens to acquire and enjoy the benefits of citizenship on establishing residence in a state of their choice.

Saenz signaled a departure from the Court's reliance on the equal protection clause in reviewing welfare residency requirements. However, this change in the Court's approach did not affect its view of welfare residency requirements as unconstitutional.

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References and Further Reading

Lashbrook, April D. *Back from a Long Vacation: The Privileges and Immunities Clause of the Fourteenth Amendment in Saenz v. Roe*. *Capital University Law Review* 29 (2001): 481–521.

Cases and Statutes Cited

Shapiro v. Thompson, 394 U.S. 618 (1969)

See also *Edwards v. California*, 314 U.S. 160 (1941); **Right to Travel**

SALVATION ARMY AND RELIGIOUS LIBERTY

No Gilded Age group fought more doggedly for open-air speech and assembly rights than did the Salvation Army, a religious and social welfare organization

founded in response to the social and religious changes that accompanied urbanization.

As cities grew and neighborhoods split along class lines during the nineteenth century, many established churches abandoned poor neighborhoods and followed wealthy congregant uptown. Church services changed in tone as well as location, becoming increasingly exclusive. Poor and working-class city dwellers often felt alienated and drifted beyond the fold.

The Salvation Army, which began in England in 1865 and subsequently invaded the United States, sought to become “[t]he church of the churchless.” Aided by its evangelical fervor, its attention to the welfare needs of the urban down-and-out, its organizational efficiency, and its irrepressible zeal, the group flourished. By the mid-1890s, the Army’s American branch contained more than 500 local corps.

Military-style parades and energetic outdoor meetings were central to the group’s success. “[W]e do not wait for [the churchless masses] to come to us,” an Army officer explained, “but we go to them.” Although designed to spread religious feelings, these assemblies were so noisy and disruptive that they often provoked “the chief qualities of irreligion—wrath, profanity, and hatred of one’s fellow man.” To unappreciative ears, such Salvationist rites as the “Grand-hallelujah eye-opener” sounded less like devotional acts than like “preaching clap-jack” accompanied by “brayings from brass instruments blown by players who have received their only instruction from ‘the Spirit!’” As the *Nation* reported in 1897, “the noises of the Army are unpopular everywhere.”

The Salvation Army’s cacophonous ministry collided with the resolve of Gilded Age cities to keep order on their streets. The result of this clash, in the words of one Salvationist, was “Arrests! Arrests! Arrests!” Determined to “march to prison or anywhere Jesus would call them,” Salvationists purposefully violated open-air speech ordinances. One Ohio Salvationist put on old clothes before attending open-air meetings “so as to be ready for the lock-up.” Similarly anticipating arrest, members of a Jersey City corps marched with a reporter, a lawyer, and two men ready to furnish bail. Colorado Salvationists, when asked what they planned to do about a newly restrictive open-air assembly ordinance, replied that the local jail staff “may as well prepare supper for about fifty.”

The religious ardor that underlay the Salvationists’ willingness to break the law affected the way in which they thought about legal issues. Army members strongly believed that the nation’s constitutions protected their street preaching. Almost without exception, however, when discussing their cases in and out of court, they invoked the constitutional provisions

regarding *religious* liberty, not ones pertaining to speech or assembly.

Judges were generally unsympathetic to the Army’s freedom-of-religion approach to open-air speech disputes. In 1889, a Massachusetts court held that: “The provisions of the Constitution which are relied on, securing freedom of religious worship, were not designed to prevent the adoption of reasonable rules and regulations for the use of streets and public places.” In the same year, after another Salvationist claimed that an open-air ordinance in Bloomington, Illinois, violated religious freedom, a unanimous state court “fail[ed] to see . . . that any such question is involved.”

In contrast to religious liberty, which appeared repeatedly and explicitly in Salvationist arguments, the liberties of speech and assembly were all but absent from Salvationist briefs, except (arguably) for occasional and vague assertions that city measures violated “private right,” were “oppressive,” or were generally “unconstitutional.” Because Salvationists did not make free speech claims, judges did not decide them. By the turn of the twentieth century, then, the American branch of the Salvation Army could claim an achievement that, in retrospect, seems rather unusual: it had fought vigorously, and in some cases successfully, for the right to speak in the open air, while making virtually no impression on the formal constitutional law of free speech.

Around 1900, Salvationists began to drop off of court dockets. By no means, however, did they disappear from street corners. Rather, cities opened enforcement loopholes large enough to accommodate Salvationist bass drums. By the early 1920s, the Army was allowed to conduct unlicensed open-air meetings “almost everywhere” in urban America. Later, even enclosed shopping malls, not known for First Amendment solicitude, often created special exceptions that permitted Salvationist bell-ringers to set up their kettles. Consequently, political activists and labor organizers replaced the Salvation Army on the front lines of the legal battle for open-air speech and assembly rights in the United States.

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References and Further Reading

- Booth-Tucker, Frederick. *The Salvation Army in America: Selected Reports, 1899–1903*. New York: Arno Press, 1972.
- McKinley, Edward H. *Marching to Glory: The History of the Salvation Army in the United States of America, 1880–1980*. San Francisco: Harper & Row, 1980.
- Taiz, Lillian. *Hallelujah Lads and Lassies: Remaking the Salvation Army in America, 1880–1930*. Chapel Hill: University of North Carolina Press, 2001.

Winston, Diane. "Living in the Material World: The Changing Role of Salvation Army Women, 1880–1918." *Journal of Urban History* 28:4 (2002): 466–487.

Cases and Statutes Cited

Commonwealth v. Plaisted, 148 Mass. 375 (1889)

Lloyd Corp. v. Tanner, 407 U.S. 551 (1972)

Mashburn v. City of Bloomington, 32 Ill. App. 245 (1889)

SAME-SEX ADOPTION

Same-sex adoption, joint adoption, or second parent adoption as it is more commonly known is the adoption of a child by two partners of the same sex, each with full and equal rights and responsibilities as parent. The adopted child may be related to one of the couple; indeed, as advances in artificial insemination have been made, it has become more common for same-sex couples to have a child that is biologically related to one partner, but in most cases the child is not biologically related to either partner.

Opponents of homosexuals adopting children say that it is simply not in the best interests of a child to be placed in a homosexual household. Objections include concerns that the child would be potentially exposed to pedophilia in the home, that having homosexual adopted parents could expose the child to bullying and ridicule at school, that an openly homosexual environment might affect the child's sexuality, and that both a mother and father are needed for the development of the child.

Proponents of adoption by homosexuals characterize opposition as outmoded prejudice and cite numerous studies have shown no link between homosexual adoption and pedophilia or affect on the sexual orientation of the child. They stress that insisting on placing a child with both a mother and a father is both hypocritical, because single heterosexuals are able to adopt in almost every state, and cruel because there are simply not enough heterosexual couples willing to adopt to meet the demand, leading many children to be placed in state institutions or a succession of foster homes. They argue that same-sex couples can provide a supportive and loving environment for adopted children, a position supported by organizations such as the American Academy of Pediatrics, the American Academy of Family Physicians, the American Psychiatric Association, and the Child Welfare League of America.

Historically homosexuals have not been permitted to adopt children in the United States. For most of the history of the United States homosexual sodomy has been a crime, and homosexuals have been discriminated against. Homosexuals may have adopted

children in the past, but the first recorded instance of an openly homosexual person successfully adopting a child in the United States was in California in 1982.

When considering whether to grant an adoption, the courts' paramount concern is the "best interests of the child." It is the interpretation of these best interests, rather than specific statutory language, that poses a problem to homosexuals adopting. As of 2004, only one state, Florida, had legislation prohibiting a homosexual from adopting a child as an individual (New Hampshire passed a similar provision in 1987, but this was repealed in 1999). In every other state an individual could theoretically adopt as a single person, irrespective of their sexual orientation. In practice, homosexuals in many states find it much harder to adopt children as a result of their sexuality, with some state court and welfare systems considering homosexuality to be a negative factor when considering the suitability of the would-be adoptive parent. In addition, private couples and some religious groups have fundamental moral objections to placing children with a homosexual adoptive parent. Homosexuals do experience more success when adopting severely handicapped and interracial children, groups that are traditionally shunned by those seeking to adopt.

All states allow and, indeed, prefer children to be adopted by a couple rather than an individual. Having two adoptive parents is thought to provide the child with a more stable home environment, although many argue that an equally stable environment can be created by a single parent or a parent and their unrelated spouse. No one disputes that a child is more secure when they have two parents however. If anything should happen to one parent, the child already has another that is fully recognized by the state. This recognition carries with it many extensive rights that cannot be replicated by other legal means, such as entitlements to benefits, health insurance, inheritance, child support, legal standing, and the ability to make medical decisions. The general rule with adoptions is that they can only be shared between married spouses; this creates a problem for a homosexual couple wanting to adopt and provide the same security as a married heterosexual couple.

Second parent adoptions began in California in 1986; in these cases the courts allowed children to be adopted by two people of the same sex, both with full and equal parental rights. This relatively novel idea has since spread to many other states and in 2004 was permissible across nine states and the District of Columbia as well as in some jurisdictions within a further fifteen states. Legislation barred second parent adoption in Florida, Mississippi, where same-sex

couples were barred from adoption, and Utah, where only couples married according to state law could adopt as a couple, and appellate courts in Colorado, Ohio, Nebraska, and Wisconsin found such adoptions incompatible with state law. Most states had yet to formulate any widespread systematic response to demands for second couple adoptions. The situation was further complicated by the rise of same-sex unions and the status of those unions in determining eligibility to adopt as a couple.

Second parent adoptions are particularly problematic for those opposed to recognition of same-sex unions as marriage with all of its attendant benefits and responsibilities. One of the chief arguments for the state granting special privileges to married couples, such as tax breaks, rests on the time, money, and effort spent by parents raising the next generation of citizens. If same-sex couples are in civil unions with children adopted by both partners, then the argument for state recognition of same sex unions as marriage becomes stronger.

The fractured approach of states to same-sex unions and second parent adoptions is potentially most destructive when the relationship between the same-sex parents deteriorates: there are well-established procedures for dealing with issues of custody, support, and access after a divorce, both within and between states. How states that refuse to recognize same-sex unions and second parent adoptions would respond if one partner fled with the adopted child into their jurisdiction is unclear.

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References and Further Reading

- Ball, Carlos A. *The Morality of Gay Rights: An Exploration in Political Philosophy*. New York: Routledge, 2003.
- Lambda Legal Defense and Education Fund. <http://www.lambdalegal.org>, (1997–2004).
- Mallon, Gerald P. *Gay Men Choosing Parenthood*. New York: Columbia University Press, 2004.
- “National Center for Lesbian Rights: Adoption by Lesbian, Gay and Bisexual Parents: An Overview of Current Law.” <http://www.nclrights.org>, (1999–2004).

Cases and Statutes Cited

Fla. Stat. § 63.042(3)

See also **Child Custody and Adoption; Child Custody and Foster Care; Defense of Marriage Act; Family Values Movement; Gay and Lesbian Rights; Homosexuality and Immigration; Lambda Legal Defense and Education Fund; Marriage, History of; Privacy; Reproductive Freedom; Same-Sex Marriage Legalization; Sodomy Laws**

SAME-SEX MARRIAGE LEGALIZATION

Beginning in the 1970s, same-sex couples who had formed common households began to seek legal recognition for their relationships, and some sought marriage licenses from the state in which they resided. Legal recognition was deemed important not only for the vast array of rights and benefits and responsibilities that accompany legally married status but also as a sign of social recognition and acceptance of such relationships.

The Constitutional and Statutory Framework for Marriage

In the United States, the definition of marriage has traditionally been a matter of state law. States have restricted the choice of marital partners on the basis of age, closeness of genetic relationship, race, and penal status. The former two restrictions have generally not been questioned. The later two were challenged successfully on Constitutional grounds in *Loving v. Virginia*, 388 U.S. 1 (1967), concerning racial intermarriage, and *Turner v. Safley*, 482 U.S. 78 (1987), concerning the right of prisoners to marry. The Supreme Court made clear that the right to marry is one of the most basic rights of adults in our society, and the state must have a compelling justification, such as protection of minors or prevention of incest, to interfere with individual preferences in such matters.

When marriage is relevant for purposes of federal law, the federal government has traditionally treated as married any couple whose marriage was valid in the place where it was celebrated. Federal laws in which rights or responsibilities turn on marriage usually do not contain any definition of marriage. In 1996, however, Congress passed and President William J. Clinton signed the “Defense of Marriage Act,” which adopts the first federal statutory definition of marriage, providing that for all purposes of federal law, only marriages between one man and one woman will be considered valid, regardless of whether any state authorizes same sex marriages. The Act, commonly referred to as DOMA, also purports to excuse the states from having to recognize same sex marriages contracted in other states, which they might otherwise be obligated to do under the Constitution’s full faith and credit clause.

The Supreme Court has never addressed the question whether same sex couples would be entitled to marry, either as a matter of statutory construction or constitutional principle. When the Supreme Court

ruled in *Lawrence v. Texas*, 123 S.Ct. 2472 (2003), that laws forbidding private acts of consensual sodomy between adults violate the liberty protected by the due process clause of the Fourteenth Amendment, dissenting Justice Antonin Scalia suggested that the Court's rejection of moral disapproval as a rational justification for sodomy laws would remove the principle argument against a constitutional right for same-sex marriage. Writing for a majority of the Court, Justice Anthony M. Kennedy, Jr., rejected the contention that the Court's decision necessarily decided the issue whether gay people are entitled to legal recognition for their relationships, and, writing only for herself in concurrence with the result, Justice Sandra Day O'Connor asserted that the state's desire to preserve traditional marriage might justify treating same-sex relationships differently from opposite sex relationships without violating Equal Protection requirements.

Before the 1990s, the statutory and common law of almost all states approached this issue through indirection. Same-sex marriage was not imagined and not mentioned. Traditional domestic relations statutes spoke of "husband" and "wife" or "man" and "woman" in referring to marital applicants and partners, and in specifying their rights and obligations. For much of our history, those rights and obligations differed depending on whether one was speaking of the husband or the wife, and the woman's legal identity was merged into her husband's identity. One of the struggles of the women's rights movement was to reform the law to provide equal rights and benefits to wives and husbands, and one result was a wave of legislative modernization resulting in the adoption of gender-neutral marriage statutes in many jurisdictions, but still at a time when legislatures were neither thinking in terms of same-sex marriage nor evidencing any direct intentions to make it available. Thus, although many modern domestic relations laws are gender neutral, they cannot be said affirmatively to authorize same-sex marriage, at least by virtue of their legislative history and the original intentions of their drafters.

Litigation by Same-Sex Couples for the Right to Marry: The First Wave

Since the 1970s, there have been two "waves" of same-sex marriage litigation, the first completely unsuccessful, the second notably more successful, at least to the extent of suggesting that same-sex marriage will probably become a reality in the United States.

Gay liberationists filed the early marriage cases in the first flush of excitement of the newly emerging militant gay rights movement of the 1970s. In Kentucky (*Jones v. Hallahan*, 501 S.W.2d 588 [1973]), Minnesota (*Baker v. Nelson*, 191 N.W.2d 185 [1971]), and Washington State (*Singer v. Hara*, 522 P.2d 1187 [1974]), appellate courts ruled that despite gender-neutral language, marriage laws did not authorize same-sex marriage, which was not within the contemplation of the legislatures, and that no federal constitutional right was violated by denying same sex partners the right to marry. Some courts treated the issue as one of traditional definition: a marriage was defined in American history and culture as the union of one man and one woman, so what the plaintiffs were seeking was not a marriage. The Washington court, in a jurisdiction that had banned sex discrimination by constitutional amendment, pointedly rejected the argument that forbidding same-sex couples to marry was sex discrimination, because men and women were equally forbidden from marrying members of their own sex.

These defeats discouraged further litigation. In addition, lesbian and gay rights public interest law firms, which were in the best position to mount test-case litigation, were notably uninterested in pursuing marriage, being then focused on challenging sodomy laws and establishing rights of association and non-discrimination in the workplace. Many leaders in these organizations had strongly felt ideological objections to marriage, which they saw as an inherently conservative institution that would stifle the creativity of gay relationships.

The Second Wave of Marriage Litigation

Beginning in the mid-1980s, the epidemic of acquired immuno deficiency syndrome (AIDS), coinciding with the widespread phenomenon of lesbians having children through donor insemination, sparked new interest in marriage in the gay community.

Opponents of same-sex marriage have usually grounded their overt opposition on concern for children, arguing that the elaborate legal structure of rights and responsibilities surrounding marriage has been built up to ensure the welfare of children being raised by married parents. Such a realization undoubtedly helped motivate lesbian mothers to be interested in obtaining marriage rights, even while ardent feminists in the gay academic and legal communities were arguing against marriage as a patriarchal institution. Patriarchal it may have been, but being married provided advantages for a family that included children.

Marriage is also crucially important during periods of illness and death, as the AIDS epidemic brought home to gay men and their lesbian caretakers in a wide range of circumstances. Lacking a legally recognized relationship proved detrimental to same-sex partners denied access to their hospitalized mates, excluded from medical information and decision making, sometimes evicted from their homes and treated as strangers or outsiders by the birth families of their dying or deceased partners. The lack of a marital relationship also caused problems for tax and inheritance purposes that could not necessarily be resolved through estate planning.

These two streams came together by the late 1980s in strong community agitation for the right to marry, symbolized during the National March on Washington for Lesbian and Gay Rights in October 1987 by a mass wedding ceremony performed in front of the Internal Revenue Service by the Rev. Troy Perry, founder of the gay-oriented Metropolitan Community Church of America. Although gay rights litigation groups continued to resist calls to file lawsuits, individual community members initiated their own litigation in Washington, D.C., New York, Hawaii, and Alaska. The Washington case, *Dean and Gill v. District of Columbia*, 653 A.2d 307 (D.C.App. 1995), suffered utter rejection in the courts of the District, and the New York case, *Storrs v. Holcomb*, 666 N.Y. S.2d 835 (N.Y. App. Div. 1997), foundered on procedural flaws, but the Hawaii and Alaska cases showed the first glimmerings of success.

In *Baehr v. Lewin*, 852 P.2d 44, the Hawaii Supreme Court ruled in 1993 that a trial judge erred in granting summary judgment to the state. Hawaii had adopted an Equal Rights Amendment, making all governmental classifications based on sex “suspect” in the eyes of the Supreme Court, and a majority of that court accepted the argument that government restriction on the gender of marital partners was a sex-based classification. The court’s ruling led to a trial in October 1996, at which expert witnesses for both sides focused on the state’s argument that its compelling interest in providing the best possible families for raising children justified denying marriage licenses to same sex partners. In an unofficially published opinion, *Baehr v. Miike*, 1996 Westlaw 694235 (Haw. Cir. Ct., 1st Cir. Dec. 3, 1996), the trial judge found for the plaintiffs, noting that many same sex partners were raising children, that studies showed that their children were not harmed by being raised in such households, and concluding that denial of marriage to their parents actually worked a disadvantage to the children, who were denied the panoply of rights and benefits that society bestows on families headed by legally married partners. Shortly

thereafter, a trial judge reached a similar conclusion in the Alaska case, *Brause v. Bureau of Vital Statistics*, 1998 WL 88743 (Alaska Super. Feb. 27, 1998).

However, the politics of Hawaii and Alaska were not ready for same-sex marriage. In both states, the legislatures placed constitutional amendments before the public to remove this issue from the judicial forum, and both constitutional amendments were passed by comfortable margins. However, the 1993 Hawaii Supreme Court ruling created widespread concern by opponents of same-sex marriage that either Hawaii or another state would eventually authorize same-sex marriage, and that other states would then be required under the federal Constitution’s Full Faith and Credit Clause to recognize such marriages. Full Faith and Credit is a notably underdeveloped area of constitutional law, and its application to the issue of marriage recognition is a matter of considerable debate, as is the scope of Congress’s authority to legislate about the substantive operation of this constitutional doctrine. There was also a widespread belief that a state could escape the obligation to recognize same-sex marriages from other jurisdictions if it had enacted a clear statement of public policy opposing them. These views combined to fuel bipartisan passage of the federal Defense of Marriage Act (DOMA) during the 1996 presidential election campaign, and the “mini-DOMAs” passed by about two-thirds of the states beginning shortly after the Hawaii Supreme Court decision and continuing to the present, with a few pending as this is being written.

The Test Cases

The near success of the Hawaii litigation led the gay litigation groups to change course and consider affirmative test-case litigation for marriage. Lambda Legal Defense & Education Fund (Lambda Legal) joined the plaintiffs’ legal team in Hawaii to assist with the trial on remand. Gay and Lesbian Advocates and Defenders (GLAD), the New England public interest firm, then devised a test case with carefully selected plaintiffs in Vermont, believed to be the state with the best legal and constitutional framework to advance this issue. At the time the lawsuit was filed, Vermont law prohibited sexual orientation discrimination, and state employees in Vermont enjoyed domestic partnership benefits for their non-marital partners. Vermont had repealed its sodomy law in 1977. Both the legislature and the governorship were under Democratic Party control, and key leaders were seen as receptive to same-sex marriage. Vermont was the only state with an openly gay statewide elected

official, State Auditor Edward Flanagan. The state constitution had a unique equal benefits clause in which to ground the theory of the case.

The Vermont Supreme Court announced in *Baker v. State of Vermont*, 744 A.2d 864 (1999), that lesbians and gay men were entitled to the same rights and benefits accompanying marriage as other Vermonters. The court also concluded that the legislature should be given an opportunity to determine how such rights were to be afforded, with only one partially dissenting judge arguing that the court should simply open up marriage to same-sex partners. The result was an intense political struggle, culminating in passage of the Civil Union Act, which creates a “separate but almost equal” legal status for same-sex partners. Because the statute expressly states that marriage is reserved for opposite sex couples, it deprives same-sex partners of the ability to claim that they are entitled to any of the rights and benefits provided to married couples under federal law. The uniqueness of the civil union status also left considerable doubt about its portability or potential respect in other jurisdictions. But the Vermont Supreme Court saw it as sufficient to meet state constitutional requirements and ended the litigation.

GLAD took the next step of filing a test case in Massachusetts, *Goodridge v. Department of Public Health*, and Lambda Legal devised and filed its own test case in New Jersey, *Lewis v. Harris*. The American Civil Liberties Union of Indiana also filed a test case on same-sex marriage, *Morrison v. Sadler*.

The Massachusetts case was the first to be decided. In *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. Sup.Ct., Nov. 18, 2003), the court voted four to three that exclusion of same sex couples from marriage violated the state constitution on equal protection grounds and gave the legislature 180 days in which to take action it deemed “appropriate.” The legislature, panicked, did nothing to adjust state law to accommodate the decision during the 180-day period, instead voting to recommend to the public an amendment to the state constitution banning same sex marriages and authorizing civil unions. The measure narrowly passed the legislature but would have to be approved in identical wording by a subsequently elected legislature before it could be placed on the ballot. (In September 2005, the subsequently elected legislature defeated the amendment by a decisive margin, but opponents of same-sex marriage received the go-ahead from the attorney general to begin circulating petitions to put their own measure on the ballot.) Meanwhile, the Supreme Judicial Court responded negatively to a certified question from the state Senate as to whether a Vermont-style civil union statute would satisfy state constitutional requirements,

and the court’s decision went into effect on May 17, 2004. Thus, Massachusetts became the first jurisdiction in the United States in which same-sex couples could marry as a matter of state law.

However, the governor and attorney general insisted that out-of-state couples could not marry in Massachusetts because of an obscure, previously unenforced provision of the marriage law dating to 1913, under which nonresidents may not be issued a Massachusetts marriage license if their marriage would not be recognized as valid in their state of residence. After some initial resistance, local town clerks fell into line with this ruling, and a new lawsuit was initiated to challenge the constitutionality of the 1913 provision, which was pending before the Supreme Judicial Court as this is written.

Meanwhile, the Massachusetts ruling set off alarm bells around the nation. President George W. Bush included a call for a Federal Marriage Amendment to adopt a uniform national definition of marriage in his 2004 State of the Union Address. Attending that address was the newly elected mayor of San Francisco, Gavin Newsom, who found the president’s statement so offensive that he persuaded San Francisco city officials to announce in February that they had concluded that the exclusion of same-sex couples from the right to marry violated the California constitution, and the city began issuing marriage licenses to same-sex couples. Thousands were married at San Francisco City Hall before the courts put a stop to the activity at the behest of the state’s attorney general. (The California Supreme Court later ruled that none of those marriages were valid, holding that the mayor and city government did not have the authority to issue licenses that were contrary to state law without first getting a judicial invalidation of the state law.) However, the San Francisco activity was the tip of an erupting volcano, as local officials in New Paltz, New York, Multnomah County (Portland), Oregon, and Santa Fe, New Mexico, briefly took similar action before being reigned in by higher authority.

In the ensuing controversy, more than a dozen states enacted constitutional amendments banning same-sex marriage during 2004 election cycles (some going even further to ban civil unions and domestic partnerships), while marriage litigation ensued in California, Oregon, Washington State, New York, and Florida, as existing cases continued in New Jersey and Indiana. The results of the litigation were mixed, but as of the time of this writing, none of the cases had resulted in a final decision following the lead of Massachusetts, although a Supreme Court ruling was imminent in Washington State, and argument was to be held shortly in the New Jersey Supreme Court.

Perhaps more significant than the unfolding litigation, however, was the action of the California legislature during the summer of 2005. Although a legislative proposal to open up marriage to same-sex partners had initially been unsuccessful, and many had argued that it could not be enacted through normal legislation because of a popularly enacted ban on same-sex marriage just a few years before, Proposition 22, late in the summer of 2005 the proposal was revived and narrowly passed both houses of the state legislature. For the first time, a legislative body in the United States had affirmatively acted to make marriage available to same-sex partners. However, Governor Arnold Schwarzenegger, who had previously stated that he had “no problem” with same-sex marriage, promptly indicated his intention to veto the measure, on the ground that “the people” had spoken through Proposition 22 and that pending litigation challenging the constitutionality of that measure was the appropriate method to resolve the issue. Although at the time of writing the governor was expected to veto the bill, the very fact of its passage through the legislature signaled an important new stage in the developing story of same-sex marriage. What had been widely considered political poison, never to be achieved through a normal legislative process, had now become politically conceivable. This gave heart to same-sex marriage proponents in other jurisdictions as they plotted strategy toward the long-term goal of equality for same-sex partners.

During the summer of 2005, opponents of same-sex marriage in the federal Congress took two routes to advance their views, promoting the Federal Marriage Amendment and a bill that would strip federal courts of jurisdiction to hear constitutional challenges to the Defense of Marriage Act. Both of those efforts fell short, with many members saying that they were premature, especially because the few federal courts to confront the issue had rejected constitutional challenges to DOMA and refused to accord any recognition to same-sex marriages contracted in Canada or Massachusetts. However, general elections in 2005 and 2006 were expected to bring the enactment of more state constitutional amendments on the subject.

International Developments

The same-sex marriage litigation in the United States was unfolding against a background of increasing legal recognition for same-sex partners—and even the right to marry—abroad. The Netherlands and Belgium had legislated to open up marriage to same-sex partners, and most of Scandinavia provided

registered partnerships that carried most of the rights and responsibilities of marriage. The Hungarian Constitutional Court had opened up the status of “common law” marriage to same-sex partners. The South African courts had required the government to provide recognition to same-sex partners in a variety of contexts, and informed speculation suggested that ultimately the court, ruling under a Constitution that expressly forbids discrimination on the basis of sexual orientation, would mandate opening up marriage.

But the most immediate contribution to placing same-sex marriage in the center of political discussion in the United States came from Canada, where the highest appellate courts of two provinces—British Columbia and Ontario—ruled in the spring of 2003 that the Canadian common law definition of marriage must be immediately changed in compliance with the Canadian Charter of Rights and Responsibilities to allow same-sex marriages, and couples began marrying in those provinces immediately (*Barbeau v. British Columbia [Attorney General]*, *EGALE Canada Inc. v. Canada [Attorney General]*, 2003 BCCA 251, 13 B.C. L.R. [4th] 1, 2003 Carswell BC 1006 [May 1, 2003]; *Halpern v. Canada [Attorney General]*, 2003 Carswell-Ont 2159 [June 12, 2003]). Because there was no residency requirement, same-sex couples from the United States began to travel to Canada to get married, just as many had traveled to Vermont after the Civil Unions Act went into effect in 2000. The ruling Liberal Party in the national Parliament then framed a statute to embody the new common law ruling for uniform application to all the provinces and to provide an exemption for objecting religious institutions who might not want to perform such marriages, and referred the draft legislation to the Supreme Court of Canada for advisory opinions on its constitutionality and potential application. After the Court ruled that such a law would be consistent with the constitution and binding on the provinces, but that no religious group could be required consistent with the Charter of Rights to perform any marriages inconsistent with their religious precepts, the government proceeded to put the measure to a vote, and it was enacted during the summer of 2005, thus making Canada the first country in the Western Hemisphere to authorize same-sex marriage on the national level.

But Canada was not the only country to endorse same-sex marriage during 2005. In 2004, after terrorist bombings in Spain led to the surprising defeat of the incumbent government and the election of a Socialist government that had pledged to support same-sex marriage, the attention of Europe turned to that country, traditionally considered a bastion of

conservative Catholicism. Despite the fervent efforts of the Roman Catholic Church to stir up opposition to the proposal, public opinion polls showed a solid majority of the Spanish public in support of the government's proposal, and it was enacted and went into effect shortly before the Canadian legislation, making Spain the third country in the world (after the Netherlands and Belgium) to embrace same-sex marriage.

Conclusion

The spread of same-sex marriage in the United States seems inevitable. The Massachusetts Supreme Judicial Court's 2003 decision inspired so much activity around the country, and spawned so many lawsuits, that it seemed inevitable that somewhere, perhaps in Washington State or New Jersey, a second state would join the ranks of same-sex marriage jurisdictions. Meanwhile, the California legislature's action in narrowly passing a statutory authorization for same sex marriage, although ultimately unsuccessful because of the governor's veto, signaled that the concept was becoming politically more palatable.

The main policy questions remaining are whether same-sex marriage will have a positive or a negative effect on society and particularly whether it would damage the existing institution of marriage. Evidence from the Netherlands, Belgium, Massachusetts, and Canada, although still early, suggests that a society can accept with equanimity the addition of same-sex married couples, and that little effect on traditional marriages has been seen in the short run, either in their number or their stability. (Indeed, the Massachusetts legislature's vote in September 2005 to reject the proposed anti-same-sex marriage constitutional amendment provided a prime illustration of this point, because many legislators who had previously supported the amendment now took the position that after same-sex couples had been marrying for more than a year without any adverse societal effect, there was no policy justification to pass the amendment.) Existing studies suggest that the impact on children being raised by same-sex partners will be to make them more secure and entitle them to more benefits, particularly crucial health insurance in cases in which their "non-biological" parent is the one whose job is the source of coverage.

Same-sex marriage has not been available long enough in modern times for one to identify its long-term impact, although one can speculate that the existence of same sex marriages is likely to contribute to the continuing evolution of marriage toward an

equal partnership in which the roles of the spouses are not sharply defined or delimited by gender. In other words, same-sex marriage may be one of the inevitable effects of the direction in which the institution of marriage was already evolving before the first case was filed by a same-sex couple seeking a license.

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References and Further Reading

- Cain, Patricia A. *Rainbow Rights: The Role of Lawyers and Courts in the Lesbian and Gay Civil Rights Movement*. Boulder: Westview Press, 2000.
- Eskridge, William N., Jr. *Gaylaw: Challenging the Apartheid of the Closet*. Cambridge, Mass.: Harvard University Press, 1999.
- Leonard, Arthur S. *Sexuality and the Law: An Encyclopedia of Major Legal Cases*. New York: Garland Publishing, 1993.
- Wardle, Lynn D., et al., eds., *Marriage and Same-Sex Unions: A Debate*. Westport, CT: Praeger Publishers, 2003.

Cases and Statutes Cited

- Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993)
- Baehr v. Muike*, 1996 Westlaw 694235 (Haw. Cir. Ct., 1st Cir. Dec. 3, 1996)
- Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971)
- Baker v. State of Vermont*, 744 A.2d 864 (Vt. 1999)
- Barbeau v. British Columbia (Attorney General)*, *EGALE Canada Inc. v. Canada (Attorney General)*, 2003 BCCA 251, 13 B.C.L.R.(4th) 1, 2003 Carswell BC 1006 (May 1, 2003)
- Brause v. Bureau of Vital Statistics*, 1998 WL 88743 (Alaska Super. Ct. Feb. 27, 1998)
- Dean and Gill v. District of Columbia*, 653 A.2d 307 (D.C. App. 1995)
- Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. Sup.Ct., Nov. 18, 2003)
- Halpern v. Canada (Attorney General)*, 2003 CarswellOnt 2159 (June 12, 2003)
- Jones v. Hallahan*, 501 S.W.2d 588 (Ky. 1973)
- Lawrence v. Texas*, 123 S.Ct. 2472 (2003)
- Loving v. Virginia*, 388 U.S. 1 (1967)
- Singer v. Hara*, 522 P.2d 1187 (Wash. App. 1974)
- Storrs v. Holcomb*, 666 N.Y.S.2d 835 (N.Y. App. Div. 1997)
- Turner v. Safley*, 482 U.S. 78 (1987)

See also **Gay and Lesbian Rights; Marriage, History of**

SAME-SEX UNIONS

Beginning in the 1970s, same-sex couples in the United States began to seek recognition for their coupled status from employers, businesses, landlords, and the government. A similar movement began at about the same time in Western Europe, and by the 1980s, the issue had spread to South America, Australia, Israel, and New Zealand. Same-sex couples

in South Africa began to look for legal recognition from the postapartheid government in the 1990s, as did couples in some of the postcommunist states in Eastern Europe.

The Emergence of Same-Sex Couples as an Element of Society

The emergence of this issue is a natural consequence of social developments making it more possible than previously for lesbians and gay men to live openly and establish households together. Principal among those developments has been the demise of sodomy laws penalizing homosexual sex acts, and the social disapprobation they reflected, which had provided strong incentives for lesbians and gay men to conduct their lives in a way that would hide their sexual orientation from public disclosure. Until 1962, private acts of consensual sodomy between adults were serious criminal violations in every state, but beginning in that year states began to decriminalize consensual adult sodomy as they adopted the Model Penal Code. By the time the Supreme Court rejected a constitutional challenge to a sodomy law in *Bowers v. Hardwick*, 478 U.S. 186 (1986), about half of the states had decriminalized, mostly through legislation, in a few cases through court invalidation. In 2003, the process was completed when the Supreme Court ruled in *Lawrence v. Texas*, 539 U.S. 558, that laws penalizing private, consensual adult sexual acts violate the due process clause.

The sodomy laws were a formal corollary of widespread moral disapproval of homosexual conduct and the resulting social stigma characteristic of American society for much of our history. By the early part of the twentieth century, this began to abate as the concept of homosexual orientation gained greater currency and some medical authorities began to argue that such an orientation was due to factors other than the free choice of the actor. A mental illness construction of homosexuality became the dominant mode of discussion by the time of World War II, when U.S. military authorities, considering homosexuality to be a symptom of mental instability, instituted methods to weed out homosexuals from among potential recruits and draftees. This medicalization of homosexuality reached its high point in American law with the 1954 enactment of an immigration exclusion that described homosexuality, based on the testimony of the Public Health Service, as “psychopathic personality,” and authorized Public Health officers to “diagnose” homosexuals as a prerequisite to excluding them from admission to the United States.

When the American Law Institute voted in 1955 to recommend that consensual sodomy carried out in private by adults not be subject to criminal penalties, part of its rationale was that symptoms of illness should not be criminalized. Supreme Court Justice William O. Douglas reflected this view in his dissent in *Boutilier v. Immigration & Naturalization Service*, 387 U.S. 118 (1967), in which the Court rejected a constitutional challenge to the exclusionary policy. By then, the statute had been amended to clarify that it applied to those “afflicted” with “sexual deviation.” But events were already transpiring to undermine the mental illness model. Publication of the “Kinsey Reports” on human sexuality in the immediate post-World War II period shook the public view that homosexuality was a phenomenon affecting insignificant numbers, as Kinsey asserted that a substantial minority of the population engaged in homosexual conduct at some point in their adult lives, and at least 10 percent for some sustained period of years. Then Dr. Evelyn Hooker published psychological research showing that a group of gay men and a control group of self-described heterosexual men did not differ in their responses to standard psychological tests, even though psychologists had confidently used such tests in the past to “diagnose” homosexuals. By the 1960s, voices had emerged in the medical literature arguing that the mental illness model was defective, and the American Psychiatric Association voted in the 1970s to remove “homosexuality” from its Diagnostic and Statistical Manual (DSM), the profession’s official list of mental illnesses. The American Psychological Association followed, and soon the American Bar Association had approved a resolution calling for the repeal of criminal sodomy laws.

The eruption of a publicly visible movement for lesbian and gay rights at the end of the 1960s, supplanting what had been a small, secretive gay rights movement begun after World War II, also contributed to changes in social attitudes, as gay “spokespeople” appeared on television and were quoted in the press, marched in annual Gay Pride Parades in major cities, and began lobbying municipal governments to amend their civil rights laws to include “sexual orientation” as a prohibited ground for discrimination. The first such laws were passed in the mid to late 1970s, and state laws followed in the 1980s. By the time of the *Lawrence* decision in 2003, more than a dozen states, including the largest by population, California, had banned such discrimination, as had most of the nation’s largest cities.

These legal and political changes were mirrored in the personal lives of gay people, as more and more found it possible to be open about their sexuality to family, friends, and coworkers. Under such

circumstances, cohabiting with a same sex partner became increasingly viable. The 2000 national census, the first to make a determined effort to gather data about cohabiting nonmarital partners, discovered several hundred thousand households comprising biologically and legally unrelated same-sex partners, dispersed throughout virtually every census district in the nation.

A Movement for Legal Recognition of Same-Sex Partners

In the new social era of sodomy law reform and civil rights protection, same-sex couples began to be more open about their existence and the ability to live openly in same-sex relationships without incurring severe social and possible criminal sanctions fueled a movement for social equality. Some sought same-sex marriage legalization, and litigation seeking marriage licenses began in the 1970s. More commonly, however, beginning in the 1970s same-sex partners sought legal recognition for their relationships in the context of particular instances of inequality or unfairness where existing social and legal arrangements came together to disadvantage them.

Such disadvantage stems from the presumption underlying our traditional social and legal framework that the legally married couple is the basic social unit, and institutions evolved around that presumption. Population trends show that the presumption is shaky, inasmuch as a substantial portion of the heterosexual population is unmarried, some living with opposite sex partners and many living as singles. In many cases, unmarried partners or single individuals are also raising children. Households headed by married opposite sex couples constitute the largest demographic category, but the other categories are substantial, and family diversity became a ubiquitous characteristic of late twentieth-century America.

But the law's adjustment to these circumstances has been halting, not least due to strong moral objections to recognizing nonmarital partners by religious conservatives and the perception of legislators that the large religious voting blocs would refuse to support politicians who favored revising the laws to accommodate nontraditional families. Both the public and the private sector traditionally treat the married couple as the norm, imposing obligations and according rights and privileges with the expectation that such couples function as a single economic and social unit. (Indeed, for much of our history the legal entity of the married couple was assigned the husband's identity, and the wife's status was merged into the

husband's.) When Congress was debating the Defense of Marriage Act in 1996, some members requested the Congressional Research Service to compile a list of all places in the federal statutes and regulations that invoke marriage as a qualification or basis for a right or obligation, and the resulting list exceeded 1,300 items. The implications of marriage under state laws generate hundreds of similar references. And, of course, marriage has many consequences outside the statutory law, as reflected in voluntary policies adopted by businesses and nonprofit organizations, and social attitudes held by the population at large.

Specific Legal Problems Stemming from Lack of Recognition

As more same-sex couples began to live together, legal issues emerged in specific instances. For example, in New York City, where gay men were hit hard by acquired immune deficiency syndrome (AIDS) in the early 1980s, lack of recognition for same-sex partners generated hardships and litigation. Hospitals excluded all but legal spouses and close relatives from visiting patients in intensive care units, so AIDS patients were excluded from contact with their partners (and vice versa) at critical times when contact was crucially important. Medical personnel refused to recognize the interest of a partner in being briefed about the patient's condition or participating in treatment decisions, where a spouse would be briefed and consulted. There were cases in which patients died and their partners were not notified (as a spouse automatically would be). Struggles ensued between legal family members and partners for access and control, even over rights to participate in funeral and memorial services and burial decisions. It is not surprising that the right most often accompanying domestic partnership registration, at the insistence of gay community lobbyists, was for spousal recognition of registered partners by hospitals.

In New York City, the lack of legal partner recognition caused serious hardship for surviving partners living in rent-regulated apartments at a time of tight housing and upward pressure on rents. Landlords were eager to reclaim vacated apartments, because substantial rent increases were authorized for vacancy turnovers. From early in the AIDS epidemic there were cases in which people died from AIDS and their surviving partners were threatened with eviction, in some cases from apartments where they had lived for years without having formal recognized tenant status. A state regulation provided that family

members were entitled to succeed to the leasehold when a tenant in a rent-controlled apartment died, but landlords argued that surviving partners did not qualify. Litigation ensued, and the New York Court of Appeals ruled in *Braschi v. Stahl Associates Company*, 543 N.E.2d 49 (1989), that the family protection regulation should be interpreted to include financially and emotionally interdependent unmarried adult partners. This was possibly the first appellate ruling anywhere to provide legal recognition for same-sex unions, and it was soon codified by the state agency responsible for enforcing housing rights into regulations specifying eligibility standards for family recognition.

AIDS was not the only disaster that could generate problems for same-sex partners. A Minnesota couple, Sharon Kowalski and Karen Thompson, encountered difficulties when Sharon was rendered quadriplegic in a 1983 automobile accident. Although Sharon and Karen lived together and had celebrated a commitment ceremony, exchanged rings, and were considered a couple in their small college community in St. Cloud, Minnesota, they were not open about their relationship with Sharon's parents, conservative rural residents who thought Karen was Sharon's landlord. Sharon's father, who rejected the idea that Sharon was a lesbian and that Karen was her partner, was appointed guardian. The ensuing struggle between parents and same-sex partner lasted until 1992, and for a period of five years, Karen was barred from any contact with Sharon while Sharon's father exerted total authority. It was not until 1991 that the Minnesota Court of Appeals ruled in *In re Guardianship of Sharon Kowalski*, 478 N.W.2d 790, that Sharon and Karen comprised a "family of affinity which ought to be accorded respect," and Karen was appointed as guardian for Sharon in place of her father. Had Sharon and Karen been in a legally recognized relationship, years of emotional suffering might have been avoided, and there is evidence to suggest that Sharon's treatment and recovery were compromised by the battle between her parents and her partner.

Disputes over child custody and visitation provide another arena where the lack of legal recognition for same-sex unions became increasingly problematic. Beginning in the 1980s, it was increasingly common for same-sex partners to be raising children, either through adoption or through donor insemination in the case of lesbian couples or surrogacy in the case of gay male couples. Most reported legal disputes concerning custody and visitation arose from the breakup of lesbian relationships, when the birth mother wanted to sever not only her own ties with her former partner but her children's ties as well.

In the typical case, the same-sex partner was a full participant in the decision to have children, assisted and was supportive through pregnancy, was present at birth, and served an equal role as mother during the child's early years. (There were cases in which the partner who became pregnant was the one with the more prestigious job and better health insurance coverage, who then would return to work after giving birth leaving the other partner, referred to as a coparent, to be the main daily caretaker of the child.) Although some relationship breakups were amicable and coparents were allowed to maintain ties through visitation agreements, sometimes the opposite was the case and litigation ensued when a coparent sought joint custody or at least the right of regularly scheduled visitation.

Victories for lesbian coparents in such cases were scarce at first, because statutory and common law governing custody and visitation has evolved to shelter legal parents from claims by intermeddling relatives and unrelated third parties, typically limiting the right to seek visitation to legal spouses, adoptive parents, or persons with a close biological relationship to the child. Cases from many states show loving parents unable to maintain contact with children for whose birth they planned, and in whose early lives they played a part, cut off by a former partner who wished to make a new life free from entanglements of the old. A prime example is *Alison D. v. Virginia M.*, 572 N.E.2d 27 (1991), in which New York's highest court labeled the coparent as a "legal stranger" who lacked standing to seek visitation, regardless of whether the child's best interest might be advanced by maintaining their relationship.

One solution would be to allow the coparent to adopt the child, but adoption statutes typically state that former parental rights are extinguished on an adoption. Thus, the birth mother would have to give up her parental rights to allow her same-sex partner to adopt. The only statutory exception in many jurisdictions was for adoption by a stepparent. Thus, when a mother remarried, her new husband could adopt her children without affecting her own parental rights. But if the children's birth father were still alive, his consent would be required unless his own parental rights were previously terminated, and his rights would be extinguished on an adoption. Under this legal regime, a child cannot have two fathers or two mothers. Many courts were reluctant to find exceptions to these standard practices without specific legislative guidance, and legislators proved unwilling to deal with the politically volatile topic of adoption of children by gay adults. (Indeed, the only state legislation directly on point, adopted in New Hampshire and Florida, specifically prohibited adoption by gay people. The

New Hampshire law was subsequently repealed. The Florida law was challenged numerous times in court, but has withstood challenge numerous times, even after the Supreme Court's *Lawrence v. Texas* decision appeared to make the law quite vulnerable.) The issue is politically volatile because a substantial portion of the population continues to believe that homosexuality is a learned behavior and that a child will not be able to make an appropriate psychological adjustment to being raised by a gay parent. Many continue to believe that individuals become "homosexuals" as a result of seduction by gay adults. If same sex partners dissolved their relationship but the coparent was an adoptive parent of their child, of course, the adoptive parent would continue to have standing to seek joint custody or a visitation schedule. Furthermore, the adoption would cement a legal tie, albeit indirect, between the same-sex partners as legal parents of the same child.

However, toward the end of the twentieth century, courts began to perceive the disadvantage to children stemming from lack of ability of their coparent to adopt and the lack of standing for coparents to seek joint custody or visitation after a same sex relationship breaks up. There are now several states, including New York—*Matter of Jacob*, 86 N.Y.2d 651 (1995)—and California—*Sharon S. v. Superior Court of San Diego County*, 73 P.3d 554 (Cal. 2003)—where the highest court has found that the adoption statutes can be construed to allow a same sex coparent to adopt a child without affecting the other parent's continuing legal status. And there are several states (such as Massachusetts, *E.N.O. v. L.M.M.*, 711 N.E.2d 886 [Mass. 1999], and New Jersey, *V.C. v. M.J.B.*, 725 A.2d 13 [N.J. 1999]) that have found ways to accord standing to coparents to seek visitation, even when they had not been able to adopt before the break-up of the relationship. Furthermore, in Vermont, California, and Connecticut, state laws creating special legal statuses for registered same-sex partners now authorize joint adoptions and confer standing to seek visitation after a relationship terminates. However, in much of the United States the traditional legal stance prevails as to both of these issues, and there are jurisdictions in which only one of these solutions is available. For example, an Illinois appellate court ruled in *In re Adoption of A.W., J.W., and M.R., Minors*, 796 N.E.2d 729 (2003), that a coparent can seek to adopt, but if the relationship breaks up before adoption is finalized, the coparent cannot seek visitation, because she is still considered to be a legal stranger rather than a de facto parent by virtue of her actual experience with the child.

Under existing principles of tort law, if a person is the victim of negligence under circumstances where

their spouse is also in the zone of danger or directly observes the incident, the spouse can maintain an action for infliction of emotional distress. If the incident deprives a spouse or child of the injured or defunct spouse's marital services, then the perpetrator may be held liable for loss of consortium. If a person dies as the result of another's negligence, a surviving spouse or child can sue for wrongful death and seek compensation for the ensuing financial losses. All of these legal rights stemming from injury to a spouse may not be available to a same-sex partner whose relationship is not recognized under the law. There is scant legal authority for extending such rights, apart from the Vermont Civil Union Act and provisions of the California Domestic Partnership Code. The California Code embraces legislative proposals stemming from a gruesome incident in San Francisco where a woman was mauled to death by a pair of pit bulls and her surviving same-sex partner sought to hold the caretaker of the dogs liable in negligence for wrongful death. Although there was contrary authority under state law, a trial judge found that she should be accorded standing in a case that was much debated in the press, drew expressions of support from the City Council, and eventuated in state legislation extending the right to sue for wrongful death to registered domestic partners. A New York trial court ruled in *Langan v. St. Vincent's Hospital*, 765 N.Y.S.2d 411 (Nassau County Sup. Ct. 2003), appeal pending, that a man could sue a New York hospital for medical malpractice on the death of his same-sex partner, although this ruling was premised on the prior Vermont civil union ceremony having created a "spousal" relationship between the men in that jurisdiction, which the court held should be recognized for this purpose.

In the field of employee benefits, the availability of health insurance, paid funeral leave, and family and medical leave is routinely expected by employees with legal spouses but is not routinely available in the case of same-sex partners. Most of the change in this area has come voluntarily from the private sector, as large corporations were convinced that the costs of including same-sex partners in such benefits plans were minor compared with the gains in employee satisfaction and the competitive advantage in attracting skilled labor. Private sector employees could not sue to obtain such benefits, because a federal law, ERISA, blocks the courts from considering entitlement claims to employee benefits based solely on state legal principles, such as a state law banning sexual orientation discrimination. However, ERISA does not apply to the working conditions of state and local government employees, so there has been litigation asserting that the failure of government employers to provide such

benefits violates constitutional equality requirements. One such case, *Tanner v. Oregon Health Sciences University*, 971 P.2d 435 (Or. Ct. App. 1998), led the court to find that denial of such benefits constituted sex discrimination in violation of the state's constitution, and another, *Gay Teachers Association v. Board of Education*, 585 N.Y.S.2d 1016 (N.Y.A.D., 1st Dept. 1992), led the City of New York to negotiate benefits for same-sex partners of municipal employees with the relevant labor unions. However, many of these lawsuits have been unsuccessful when courts concluded that the same-sex partners were being treated the same as unmarried opposite sex partners, who were seen by these courts as the appropriate comparators for analyzing the discrimination claim.

Finally, in those jurisdictions where discrimination on the basis of sexual orientation is forbidden by law—seventeen states as of 2005—it is possible to argue that the failure of a covered entity to extend benefits or rights to same-sex partners may violate the law on a theory of disparate impact. The New York Court of Appeals embraced such a view in *Levin v. Yeshiva University*, 754 N.E.2d 1099 (2001), in which a private university provided subsidized housing for married students but refused to allow lesbian or gay students to have same-sex partners living with them in such housing. Although limiting the housing to married students established a requirement that on its face had no reference to sexual orientation, the court found that the obvious disadvantage that the policy imposed on lesbian and gay students could be actionable as discrimination, even if unintended as such.

Some municipalities and states have decided to extend legal recognition to same-sex unions through the mechanism of domestic partnerships. Typically, unmarried adult couples can register their partnership with a municipal official and will receive a certificate that can be used as evidence of their relationship. In some cases, the local law provides no other rights. In others, the partnership status may bestow visitation rights in municipal hospitals and jails, benefits for partners of municipal employees, and recognition under other municipal programs where eligibility or entitlement turns on marital status. The widest-ranging municipal domestic partnership law is in New York City. On the state level, the Vermont Civil Union Law, enacted in 2000 in response to a lawsuit, *Baker v. State of Vermont*, 744 A.2d 864 (Vt. 1999), affords same-sex couples the same rights under state law that are enjoyed by married couples. In 2003, California amended an existing domestic partnership registration law to extend most of the rights enjoyed by married couples under state law, the major exception being spousal status under the state's Tax Code. In 2005, Connecticut enacted a civil union statute as a

compromise between proponents of same-sex marriage and those opponents of marriage who were willing to extend legal recognition to partners so long as the term "marriage" was not used. The Vermont, California, and Connecticut laws provide to those same-sex partners who register their relationships virtually all the rights under state law that are provided to married couples.

The tragedy of September 11, 2001, brought very limited recognition for same-sex unions under federal law, when the administrator of the settlement fund appropriated by Congress authorized some benefits payments to surviving partners of persons who had died in the tragedy at the World Trade Center. But the limitations of legal recognition were emphasized by the unequal treatment afforded a survivor of an employee of the Pentagon, because the administrator based his ruling on New York State's willingness to recognize same-sex partners for certain purposes contrasted with Virginia's unwillingness to do so.

Social and legal recognition of same-sex partners has advanced to the point where the general public appears to support such recognition in specified circumstances where failure to do so is readily seen to cause hardship, but a majority of the public in the United States continues to resist the idea of opening up legal marriage to same-sex partners, which would be the ultimate and complete legal recognition of their unions.

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References and Further Reading

- Cain, Patricia A. *Rainbow Rights: The Role of Lawyers and Courts in the Lesbian and Gay Civil Rights Movement*. Boulder: Westview Press, 2000.
- D'Emilio, John, and Estelle B. Freedman. *Intimate Matters: A History of Sexuality in America*. New York: Harper and Row, 1988.
- Leonard, Arthur S. *Sexuality and the Law: An Encyclopedia of Major Legal Cases*. New York: Garland Publishing, 1993.
- Pinello, Daniel R. *Gay Rights and American Law*. New York: Cambridge University Press, 2003.
- Rubenstein, William B. *Sexual Orientation and the Law*. 2nd Ed. St. Paul, MN: West Publishing Co., 1997.

Cases and Statutes Cited

- A.W., J.W., and M.R., Minors, In re Adoption of*, 796 N.E.2d 729 (Ill. Ct. App. 2003)
- Alison D. v. Virginia M.*, 572 N.E.2d 27 (N.Y. 1991)
- Baker v. State of Vermont*, 744 A.2d 864 (Vt. 1999)
- Boutlier v. Immigration & Naturalization Service*, 387 U.S. 118 (1967)
- Bowers v. Hardwick*, 478 U.S. 186 (1986)
- Braschi v. Stahl Associates Company*, 543 N.E.2d 49 (N.Y. 1989)

SAME-SEX UNIONS

E.N.O. v. L.M.M., 711 N.E.2d 886 (Mass. 1999)
Gay Teachers Assoc.'s v. Board of Education, 585 N.Y.S.2d 1016 (N.Y.A.D., 1st Dept. 1992)
Jacob, Matter of, 660 N.E.2d 651 (N.Y. 1995)
Kowalski, In re Guardianship of Sharon, 478 N.W.2d 790 (Minn. App. 1991)
Langan v. St. Vincent's Hospital, 765 N.Y.S.2d 411 (N.Y., Nassau County Sup. Ct. 2003)
Lawrence v. Texas, 539 U.S. 558 (2003)
Levin v. Yeshiva University, 754 N.E.2d 1099 (N.Y. 2001)
Sharon S. v. Superior Court of San Diego County, 73 P.3d 554 (Cal. 2003)
Tanner v. Oregon Health Sciences University, 971 P.2d 435 (Or. Ct. App. 1998)
V.C. v. M.J.B., 725 A.2d 13 (N.J. 1999)

See also *Bowers v. Hardwick*, 478 U.S. 186 (1986); *Lawrence v. Texas*, 539 U.S. 558 (2003); Same-Sex Marriage Legalization

SANDSTROM v. MONTANA, 442 U.S. 510 (1979)

Along with *In Re Winship* and *Mullaney v. Wilbur*, *Sandstrom*, was one of a triumvirate of cases decided in the 1970s that strengthened protection for criminal defendants by strictly holding the government to its burden of proof beyond a reasonable doubt in criminal cases. In *Sandstrom* the defendant had been convicted in Montana of deliberate homicide and appealed an instruction to the jury that the "law presumes that a person intends the ordinary consequences of his voluntary acts." He argued that this instruction invited the jury to presume that the requisite intent existed rather than to find that the state had proven it. Justice William J. Brennan, writing for a unanimous Supreme Court, noted that even though the instruction did not involve a conclusive presumption, as was the case in *Mullaney*, the jury nevertheless could have interpreted it as shifting the burden to the defendant to prove that he had not acted voluntarily. Such burden shifting, the Court concluded, was unconstitutional, because it did not comply with due process. In so ruling the Court expanded the application of *Mullaney* to permissive as well as conclusive evidentiary presumptions. However, the due process protection extended in *Sandstrom* was later diminished by the Court's holding in *Rose v. Clark* that such an instruction, while unconstitutional, could nevertheless constitute "harmless error."

TAMARA R. PIETY

References and Further Reading

Leahy, William J., and Brownlow M. Speer, *An End to Burden-Shifting Presumptions: The Signal Criminal Law Achievement of the Post-Warren Court*, Dec. Boston Bar Journal 35 (1991): 10–14.

Mueller, Christopher B., and Laird C. Kirkpatrick. *Evidence*. 3rd Ed., New York: Aspen Publishers, 2003, pp. 130–149.

Cases and Statutes Cited

In Re Winship, 397 U.S. 358 (1970)
Mullaney v. Wilbur, 421 U.S. 684 (1975)
Rose v. Clark, 478 U.S. 570 (1986)

See also **Due Process; In Re Winship, 397 U.S. 358 (1970); Mullaney v. Wilbur, 421 U.S. 684 (1975); Patterson v. New York, 432 U.S. 197 (1977); Proof beyond a Reasonable Doubt; Self-Defense**

SANGER, MARGARET HIGGINS (1879–1966)

Margaret Sanger is widely considered to be the founder of the American birth control movement and a driving force behind the development of modern contraceptives. Sanger emphasized birth control and family limitation as a means through which women could determine their own lives and protect their health, as well as an issue that was intrinsically linked to general public health social equality. Her campaigns to disseminate accurate information about and increase access to contraceptives often ran afoul of government censorship and social strictures of her time.

As a nurse and midwife on New York City's Lower East Side, Sanger was profoundly influenced by the destitution and high birth rates among the women with whom she worked. These experiences reinforced Sanger's childhood experiences. The sixth of eleven children in a working class Irish-American family, Sanger believed that the toll of so many pregnancies had contributed to weakening her mother's body and to her succumbing to an early death from tuberculosis. Sanger also observed as a child that local working-class and poor families were often larger than their well-off neighbors, a condition she believed perpetuated poverty, illness, and hunger. Frustrated by her inability to help her patients control their own fertility and, in some cases, avoid life-threatening pregnancies, Sanger resolved to leave nursing and in favor of advocacy.

In 1912, Sanger began writing for the socialist paper *The Call*. Her column on sex education, "What Every Girl Should Know," discussed contraception, sexually transmitted diseases, menstruation, and other traditionally taboo topics. In 1914, Sanger began publishing her magazine *The Woman Rebel* and soon was arrested on criminal charges for violating New York's Comstock law, which forbade sending "obscene" materials through the mail. To avoid a lengthy jail term and the interruption of her

work, Sanger fled to England, where she continued researching birth control advances and policies. On her return to the United States in 1916, Sanger and others opened the nation's first birth control clinic, a direct challenge to the Comstock regulations. The clinic remained open for ten days before Sanger and her cofounders were arrested.

Although Sanger served jail time, the resulting case was a partial victory. On appeal, the state law was interpreted to allow doctors to give contraceptive advice to married women for whom pregnancy might endanger their health. Sanger focused subsequent lobbying on winning support for birth control from the medical profession, social workers, and the liberal wing of the eugenics movement. This increased emphasis on the medicalization of birth control was evident in her championing the medical prescription of the diaphragm and her helping to open a clinic in 1923 that not only dispensed information to individual women but also served as an educational venue for physicians. Physicians were among those who defended Sanger after her clinic was raided in 1929, criticizing the police for interfering with the privacy of the doctor-patient relationship.

In 1921, Sanger founded the American Birth Control League, which would later become the Planned Parenthood Federation of America, a national lobbying and educational clearinghouse organization. The league was often frustrated as it pressed for legislative change, although it saw measured success through litigation, as multiple cases over many years gradually eroded restrictions on the dissemination of birth control information in the United States. Sanger also consistently advocated for the development of simpler and more affordable contraceptives. She helped arrange for the American manufacture of diaphragms she had been smuggling in from Europe, and in subsequent years she helped arrange for funding of research efforts to develop spermicidal gels and hormonal contraceptives. After World War II, Sanger concentrated on international aspects of the birth control movement, helping to found the International Planned Parenthood Federation in 1952.

Sanger died in Tucson, Arizona, on September 6, 1966, only a few months after the Supreme Court's decision in *Griswold v. Connecticut* (1965) found that the right to privacy made birth control legal for married couples. Sanger was eighty-six years old.

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References and Further Reading

Chessler, Ellen. *Woman of Valor: Margaret Sanger and the Birth Control Movement in America*. New York: Simon & Schuster, 1992.

Gordon, Linda. *The Moral Property of Women: a History of Birth Control Politics in America*. Urbana: University of Illinois Press, 2002.

Sanger, Margaret. *An Autobiography*. New York: W.W. Norton & Company, Inc., 1938.

"Margaret Sanger Papers Project," <http://www.nyu.edu/projects/sanger/>, (1985-).

Cases and Statutes Cited

Griswold v. Connecticut, 381 U.S. 479 (1965)

See also **Birth Control; Comstock, Anthony; Griswold v. Connecticut, 381 U.S. 479 (1965); Reproductive Freedom**

SANTA CLARA PUEBLO v. MARTINEZ, 436 U.S. 49 (1978)

Julia Martinez sued the Santa Clara Pueblo in federal court, alleging that the Pueblo's membership ordinance violated the Indian Civil Rights Act. Martinez was an enrolled member of the Pueblo, but her daughter had been denied enrollment on the grounds that her father, a Navajo Indian, was not a member. The membership ordinance denied enrollment to the children of female members who married outside the tribe, but not children of male members who married outside the tribe. Membership rights included the right to vote in tribal elections, land use rights, hunting and fishing rights, rights to irrigation water, and the right to reside in the Pueblo.

At trial, the district court held that the Indian Civil Rights Act conferred federal court jurisdiction on the claim and that the Pueblo was not entitled to sovereign immunity. On the merits, however, the district court ruled in favor of the Pueblo, holding that the ordinance was traditional tribal law and did not violate the equal protection clause in the Act. The Tenth Circuit reversed on the merits, holding that the Pueblo's ordinance, enacted only in 1970, was not justified under the compelling interest test of the equal protection clause.

The Supreme Court, per Justice Marshall, reversed, holding that Congress did not intend to waive the sovereign immunity of Indian tribes through the enactment of the Act and further holding that the Act did not confer subject matter jurisdiction over claimed violations of the Act. The Court relied heavily on the notion that, although Congress had imposed certain constitutional limitations on Indian tribes, the federal policy in favor of tribal self-determination required that claims of alleged violations must be brought in tribal fora, such as tribal courts.

Martinez has far-reaching implications for Indian tribes. It is easily the most heavily cited Indian law case of the modern era and is one of the strongest judicial statements in favor of tribal self-determination and preservation of tribal culture. Although *Martinez* was undeniably an accurate statement of federal Indian law, many scholars are troubled by how it operated to legitimate sex discrimination in Indian Country. Many Indian women affected by its outcome have defended the decision, arguing that real change must come from within, not from Congress or the federal courts.

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References and Further Reading

- MacKinnon, Catharine A. "Whose Culture? A Case Note on *Martinez v. Santa Clara Pueblo*." In *Feminism Unmodified: Discourses on Life and Law*. Cambridge, MA: Harvard University Press, 1987, pp. 63–69.
- Swentzell, Rina, *Testimony of a Santa Clara Woman*, *Kansas Journal of Law & Public Policy* 1 (2004): 14: 97–102.
- Valencia-Weber, Gloria. *Santa Clara Pueblo v. Martinez: Twenty-five Years of Disparate Cultural Visions*, *Kansas Journal of Law & Public Policy* 1 (2004): 14: 49–66.

Cases and Statutes Cited

- Indian Civil Rights Act, 25 U.S.C. §§ 1301–1303
- Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978)
- See also **Indian Bill of Rights**; MacKinnon, Catharine; Marshall, Thurgood

SANTA FE INDEPENDENT SCHOOL DISTRICT v. DOE, 530 U.S. 290 (2000)

Santa Fe Independent School District is an important case on the controversial subject of prayer in public schools. In it the Supreme Court reiterated that any state-promoted prayer in public schools is unconstitutional, even in arguably less intrusive settings. At the same time the Court clarified that truly voluntary student prayer in schools is constitutionally permissible.

Santa Fe involved a challenge to a school district policy governing prayer at football games. The policy, which was enacted as an attempt to shift the decision on whether to have a prayer from school administrators to students, provided for a bifurcated student election on prayer. Students would first vote by secret ballot on whether to have a prayer at games, and if the students chose to have a prayer, a second election was held to elect a student to pray. Pursuant to this

policy the students elected to have a prayer at games and chose a student to say the prayer.

The Supreme Court, in a six-to-three decision, held the policy violated the Establishment Clause, primarily applying a two-part coercion analysis previously developed in *Lee v. Weisman* (1992). That test first examines whether the prayer can be attributed to the state, and second examines whether it results in substantial coercion of nonadherents. The Court found both prongs met.

The Court's analysis began with an extended discussion of why the prayers in question were not merely private student speech but were the result of significant state involvement. It rejected the school district's primary argument that having the students decide whether to pray acted as a "circuit breaker" that cut off any state involvement. It noted that even posing the question promoted prayer, because it initiated a process that in all likelihood would result in a decision to pray. In addition, the setting in which the pregame prayer was delivered, including being part of a school-sponsored function and use of the school's public address system, fostered perceptions of the state's involvement. The Court concluded that an "objective observer" would perceive the prayer as approved by the school.

After establishing that the pregame prayer was attributable to the government and not merely private student speech, the Court explained why it was coercive and therefore unconstitutional. It rejected the school's argument that football games were voluntary and therefore lacked state coercion, noting that many students, such as players, band members, and cheerleaders, were required to attend the games. More importantly, the Court noted the important role played by extracurricular activities in high school, which creates a strong desire to participate and even social pressure to be involved. The Court stated that the state cannot take advantage of this pressure to coerce those in attendance to participate in a religious exercise.

The Court concluded its opinion by giving two additional reasons why the prayer policy was invalid. First, the Court stated the clear purpose of the policy was to promote prayer, which violated the establishment clause requirement that government acts have a secular purpose. Both the terms of the policy and the history leading to its adoption left no doubt that the school district was endorsing the practice of prayer. Second, the Court said the policy was also invalid because the election process permitted a majoritarian view to be imposed on religious minorities.

The Court's decision in *Santa Fe* fits within the Court's previous establishment clause jurisprudence, but is important in several respects. First, it made

clear that simply turning over to students the final decision on whether to pray at school functions does not negate broader concerns about state involvement. Second, the Court clarified that coercion concerns are not limited to mandatory or de facto mandatory activities, such as graduations, but also apply to activities of a more voluntary nature that can be viewed as a part of ordinary student life. Perhaps most important, *Santa Fe* affirmed that the state has no business promoting prayer in public schools and any attempt to do so will be unconstitutional. That message is not new, but *Santa Fe* illustrates just how far the principle applies, extending it to even more subtle forms of state promotion.

At the same time, the Court drew a distinction in its analysis between state-promoted prayer, which is unconstitutional, and voluntary student prayer, which is not only permitted but is protected speech. The Court came back to this distinction several times in its analysis, emphasizing that its decision was not meant to prohibit “any public school student from voluntarily praying at any time before, during, or after the schoolday.” This distinction between voluntary student prayer on the one hand and state-sponsored prayer on the other is the central consideration in analyzing school prayer cases and best balances the competing constitutional concerns that are present.

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References and Further Reading

Cordes, Mark W., *Prayer in Public Schools after Santa Fe Independent School District*, Kentucky Law Journal 90 (2001–2002): 1–73.
Smith, Rodney K. *Public Prayer and the Constitution*. Wilmington: Scholarly Resources, 1987.

Cases and Statutes Cited

Lee v. Weisman, 505 U.S. 577 (1992)

See also **Bible Readings in Public Schools; Establishment Clause Doctrine: Supreme Court Jurisprudence; Prayer in Public Schools; Secular Purpose**

SANTOBELLO v. NEW YORK, 404 U.S. 257 (1971)

A prosecutor must honor promises made in connection with a plea bargain. In *Santobello v. New York*, the United States Supreme Court protected defendants who plead guilty by requiring prosecutors to fulfill their promises.

Defendant Santobello pled guilty in exchange for concessions by the prosecutor. In addition to reducing the charge, the prosecutor promised to refrain from recommending a sentence to the court. A prosecutor newly assigned to the case at sentencing and unaware of the prior promise urged the court to impose the maximum sentence.

Without citing the due process clause or any other constitutional provision, the Supreme Court vacated the conviction and sentence to “safeguard” the defendant. Plea bargaining, the Court said, is not inherently wrong. On the contrary, it is essential. But when a defendant’s plea rests in significant part on a promise by the prosecutor, that promise must be performed. The Court clarified in a later decision, *Mabry v. Johnson*, that the defendant’s guilty plea must be made in actual reliance on the promise in the plea agreement.

If the prosecutor breaks a promise not to recommend a sentence, then the sentencing judge’s statement that he was not influenced by the prosecutor’s recommendation does not make the error harmless. Instead, the remedy is for the trial court either to require specific performance of the promise and resentencing by a different judge or allow the defendant to withdraw his guilty plea and proceed to trial on the original charges.

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Cases and Statutes Cited

Mabry v. Johnson, 467 U.S. 504 (1984)

See also **Due Process; Guilty Plea; Plea Bargaining**

SATIRE AND PARODY AND THE FIRST AMENDMENT

The relationship between satire, parody, and the First Amendment involves two different legal issues. First, can someone publicly attacked in a parody or satire silence the critic? Second, if the attack gains force by mimicking a well-known work, can the work’s copyright holder silence the mimic?

The short answer to the first question is no, at least if the person attacked is a public figure. The leading case concerns a series of advertisements for Campari Liqueur in the format of interviews with famous persons about their “first times.” While raising sexual inferences, the pieces described only the celebrities’ first time drinking Campari. Jerry Falwell is a nationally known minister and spokesperson for the so-called “Moral Majority.” *Hustler Magazine* is a

nationally circulated publication with content leaning strongly toward the sexually explicit. Labeling the item “ad parody—not to be taken seriously,” *Hustler Magazine* used the format of Campari’s first-time series for a piece in which Falwell allegedly described his “first time” as being an incestuous encounter with his mother in an outhouse. Falwell sued *Hustler* and obtained a judgment for \$150,000 on the state tort claim of intentional infliction of emotional distress. The elements of this tort are (1) intentional or reckless conduct by the defendant, (2) which offends generally accepted standards of decency, and (3) causes severe emotional distress to the plaintiff. The United States Supreme Court reversed, *Hustler Magazine v. Falwell*. While accepting the legitimacy of the tort, the Court held that it could not be used to silence “[t]he sort of robust political debate encouraged by the First Amendment,” including the caustic work of “political cartoonists and satirists.”

Turning to the second issue, American copyright law has always had an exception called “fair use.” This doctrine was first stated clearly in a case involving George Washington’s papers, *Folsom v. Marsh*. Without the fair use doctrine, copyright would be a government grant allowing an abridgment of free speech in violation of the First Amendment, *Harper & Row Publishers v. Nation*; *Eldred v. Ashcroft*. The current fair use doctrine is codified at Section 107, Title 17 of the United States Code and requires courts to consider multiple factors including:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; and
- (2) the effect of the use upon the potential market for or value of the copyrighted work.

The first factor includes whether the second author is creating something beneficial to the public but which the first author is unlikely to allow, even if paid, for example, something criticizing or laughing at the first author’s work. The Supreme Court clarified this doctrine in 1994, *Campbell v. Acuff-Rose Music*. The rap group Two Live Crew recorded “Pretty Woman,” a raunchy take-off of the sentimental love song, “Oh, Pretty Woman” by Roy Orbison and William Dees. Despite being offered payment and credit, the copyright holder refused to give Two Live Crew permission. The Supreme Court said that the first fair use factor would be met if the Two Live Crew version was a parody, but not if it was a satire. The difference is that a parody makes fun of the underlying work, so it must reuse that work to exist. A satire laughs at society in general; therefore, it can exist without reusing someone else’s copyrighted

work. The Court also clarified that parody (which helps the defendant) is more important in factor one than being a commercial use (which hurts the defendant). In addition, the Court said that factor four should not include the value of any works the copyright holder would not be inclined to allow, such as other parodies.

The parody/satire distinction has a chilling effect on free speech, because no one can be sure in advance how a court will decide. For example, a book about the O. J. Simpson trial using rhymes reminiscent of Dr. Seuss’ “The Cat in the Hat” was not a parody, *Dr. Seuss v. Penguin Books*. A novel telling the story of “Gone with the Wind” from the point of view of a slave was a parody, *Suntrust Bank v. Houghton Mifflin*. A series of photographs showing Barbie® dolls in suggestive poses with kitchen equipment was a parody, *Mattel v. Walking Mountain Productions*. Some of the pictures are posted at http://creativecommons.org/fc_1.htm.

If Campari Liqueur had sued *Hustler Magazine* for copyright infringement for its attack on Falwell, the fair use defense may not have protected *Hustler*.

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References and Further Reading

- Kaplan, Benjamin. *An Unhurried View of Copyright*. New York: Columbia University Press, 1967.
- O’Neil, Robert M. *The First Amendment and Civil Liability*. Indiana University Press, 2001.
- Patry, William F. *The Fair Use Privilege in Copyright Law*. BNA, 1985.
- U.S. Copyright Office. *In Answer to Your Query: Fair Use*. (GPO 2004), available at <http://www.copyright.gov/fls/fl102.pdf>.

Cases and Statutes Cited

- Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994)
- Dr. Seuss Enterprises, L.P. v. Penguin Books U.S.A., Inc.*, 109 F.3d 1394 (9th Cir. 1997)
- Eldred v. Ashcroft*, 537 U.S. 186 (2001)
- Folsom v. Marsh*, 9 F. Cas. 342 (No. 4,901) (CCD Mass. 1841)
- Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985)
- Hustler Magazine v. Falwell*, 485 U.S. 46 (1988)
- Mattel Inc. v. Walking Mountain Productions*, 353 F.3d 792 (9th Cir. 2003)
- Sun Trust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001)
- See also *Eldred v. Ashcroft*, 537 U.S. 186 (2001); **Fair Use Doctrine and First Amendment**; Falwell, Jerry; **First Amendment and PACs**; **Freedom of Speech: Modern Period (1917–Present)**; *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988); **Intellectual Property and the First Amendment**

SAXBE v. WASHINGTON POST, 417 U.S. 817 (1974)

In *Saxbe v. Washington Post*, 417 U.S. 817 (1974) and *Pell v. Procunier*, 417 U.S. 843 (1974), a five-to-four majority of the Supreme Court allowed Federal and California prison officials to ban all press interviews with specific individual inmates. Writing for the majority, Justice Potter Stewart ruled that because the members of the general public were not entitled to speak to specific inmates, neither could members of the press, citing *Branzburg v. Hayes*, 408 U.S. 665 (1972) for the proposition that journalists have no rights greater than the general public. He stressed that journalists were accorded substantial access in other ways to both the federal and California prisons to report on conditions.

The Court also relied on representations by prison officials that press attention might be concentrated on certain individuals. These inmates thereby became “big wheels,” acquiring great influence among prisoners and creating serious security problems.

Justice Powell wrote for the dissenters. While agreeing that the press had no constitutional rights superior to those of ordinary citizens, he argued that the First Amendment was intended to preserve free and informed public discussion of such vital governmental affairs as the condition and administration of prisons. Because the press served as agent for the general public, the blanket ban constituted an unconstitutional infringement of the public’s right to receive information and ideas. Problems with specific “big wheel” inmates could be handled on an individual basis.

A six-to-three majority of the Court, including Justice Powell, also ruled in *Pell* that inmates had no constitutional right to be interviewed.

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References and Further Reading

Schwartz, Herman, ed. *The Burger Years*. Viking Press, 1987.

Cases and Statutes Cited

Branzburg v. Hayes, 408 U.S. 665 (1972)
Pell v. Procunier, 417 U.S. 843 (1974)

See also *Branzburg v. Hayes*, 408 U.S. 665 (1972); *Pell v. Procunier*, 417 U.S. 843 (1974)

SCALES v. UNITED STATES, 367 U.S. 203 (1961)

In *Scales v. United States*, the Court, in an opinion by Justice Harlan, affirmed a conviction for membership in the Communist Party under the Smith Act. The

Court still turns to *Scales* to resolve issues of membership and free speech or association. Because the Act treaded “so closely upon protected rights,” the Court narrowly construed it to apply only to active membership accompanied by knowledge of the Party’s unlawful objectives and a specific intent to further those objectives. As so limited, prosecution did not impose vicarious guilt inconsistent with due process under the Fifth Amendment, nor did it violate free speech or association under the First Amendment. The Court followed precedents upholding prosecutions for advocacy of the overthrow of the government by force or violence. Chief Justice Warren and Justices Black, Douglas, and Brennan dissented. Black vigorously argued that the Court lacked power to rewrite a vague statute to impose limitations not enacted by Congress, and a prosecution under such a rewritten statute was *ex post facto*; he also reiterated his long-standing objection to balancing free speech and association against other interests. Accordingly, the prosecution was unconstitutional, because it suppressed belief and advocacy, not unlawful conduct. Douglas canvassed the history of writings on free speech and association; he, too, argued that the prosecution was an unconstitutional suppression of belief and advocacy. Brennan dissented for himself the Chief Justice and Justices Black and Douglas on statutory grounds. The *Scales*’ standards remain good law.

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References and Further Reading

Chafee, Zecharia Jr. *Freedom of Speech*. 1st Ed. 1920.
 de Secondat Montesquieu, Charles. *1 Spirit of the Laws*. 1949, pp. 192–193.
 Gellhorn, Walter. *American Rights: The Constitution in Action*. 1960, pp. 82–83.

Cases and Statutes Cited

Dennis v. United States, 341 U.S. 494 (1951)
Yates v. United States, 354 U.S. 298 (1956)
 Smith Act, 18 U.S.C. § 2385

SCALIA, ANTONIN (1936–)

Antonin Scalia was appointed an Associate Justice of the Supreme Court in 1986 by President Reagan and in the years since has become the nation’s most powerful voice for the view that the Constitution should be interpreted as originally understood at the time of enactment. Justice Scalia has earned a reputation as a brilliant thinker, but his caustic lectures on constitutional theory often appear in dissent as his colleagues

apply an ever-changing interpretation of the Constitution to adapt the document to modern society. Justice Scalia's talent for turning a phrase in his opinions is rivaled only by that of Chief Justice Marshall, Justice Holmes, and Justice Jackson, but Justice Scalia's quips are often personally directed at his colleagues, demonstrating his impatience with what he perceives as their lawmaking-concealed-as-constitutional interpretation.

Antonin Scalia was born March 11, 1936, in Trenton, New Jersey. For most of his youth he lived in Queens, New York, where he moved to at age five. After studying at Georgetown University and the University of Fribourg (Switzerland), he enrolled in the Harvard Law School, graduating there in 1960 having been an editor of the *Harvard Law Review*. After completing his schooling, Justice Scalia practiced law in Cleveland, Ohio, and then became a law professor, specializing in administrative law. In 1971, Justice Scalia entered government service as general counsel of the Office of Telecommunications Policy. He subsequently became chairman of the Administrative Conference of the United States and Assistant Attorney General for the Office of Legal Counsel. In 1982, President Reagan nominated Scalia to serve on the United States Court of Appeals for the District of Columbia Circuit. He served in that position until 1986, when Reagan selected him for the position of Associate Justice of the Supreme Court, filling the seat of William Rehnquist, whom Reagan elevated to Chief Justice to replace Warren Burger.

Justice Scalia's opinions reflect an abiding distrust of the capacity of judges to construct public policy; he believes the Constitution leaves choices of policy to the state and federal representatives elected for that purpose. Accordingly, where the Constitution does not directly address a claimed right, Justice Scalia is unlikely to find that the Constitution protects it. Notably, Justice Scalia would read the Constitution as not addressing issues of abortion rights, sexual privacy, or assisted suicide and has used some of his most strident rhetoric against the views of those of his colleagues who would assume the power to make these policy decisions. (See, for example, *Planned Parenthood v. Casey*; *Stenberg v. Carhart*; *Lawrence v. Texas*; *Cruzan v. Director, Missouri Dep't of Health*.) In each instance, Justice Scalia has pointed to years of history that have accepted restrictions on the "right" as informing the meaning of the Constitution. That is, because restrictions on abortion, suicide, and so on have not been thought to be unconstitutional until recently, the Constitution does not authorize or require him to invalidate those restrictions now.

Applying his view that the original understanding of the Constitution is informed by historical practice,

Justice Scalia has pointed to the national government's frequent involvement with religion since 1791 and has been reluctant to find violations of the Establishment Clause when the government in some way expresses particular respect for religion. Sometimes his position has commanded a majority of the Court, as in some cases where the Court has allowed funding of nonreligious activities at religious locations. (See, for example, *Zelman v. Simmons-Harris*; *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 [1993].) Other times he has not been so successful. He would allow public prayer at graduations and other public events, concluding that such exercises do not coerce nonbelievers to participate. Other members of the Court disagreed, however, and have held that such exercises can convey a message that only persons of a preferred faith are fully welcome in the political community (*Lee v. Weisman*; *Santa Fe Independent School District v. Doe*). Responding to the majority of the Court's suggestion that graduation prayers were indeed coercive, Justice Scalia mocked their reasoning, calling it "psychology practiced by amateurs."

In contrast to the establishment clause, where Justice Scalia has found himself as often as not protesting from the sidelines, the free exercise clause was revolutionized by one of Justice Scalia's majority opinions, *Employment Division, Oregon Department of Human Resources v. Smith*. In that case, Justice Scalia held that a state need not make exceptions to "neutral laws of general applicability" for violators who were religiously motivated. In *Smith*, for example, Justice Scalia held that Oregon could punish an American Indian for ingesting peyote, a hallucinogenic drug, even when the individual took the drug as part of a religious ceremony. The policy against drug use was "neutral" and "generally applicable" in that it prohibited everyone from ingesting the drug—not just those who used it as part of a religious exercise. As a result, Oregon did not need to make any exception for Mr. Smith. Because of the *Smith* decision, states may exempt religious worshippers from some restrictions, but they are not forced to do so, as long as the restriction has not singled out religious worship and treated it worse than comparable secular actions.

Where a right does appear in the Constitution, however, Justice Scalia enforces the right, often with vigorous rhetoric, against legislative majorities. Particularly noteworthy in this regard is Justice Scalia's solicitude for certain rights of criminal defendants. Although certainly not a liberal in criminal cases, he sided with the defendant in only 25.3 percent of criminal procedure cases through the 2001 term. According to *The Supreme Court Compendium*, Justice Scalia has not hesitated to write strong opinions protecting

the rights of those accused of crimes when the claimed rights are reflected in Anglo-American legal history and the text of the Constitution. As examples, the Justice has been at the forefront of the recent controversy in which the Court has held by five-to-four margins that the accused has the right to have a jury—rather than a judge—find every fact that determines the sentence to which he will be subject (*United States v. Booker*; *Blakely v. Washington*). In addition, Justice Scalia has protected criminal defendants' right to confront the witnesses against them, even as a majority of the Court was willing to make an exception to allow child abuse victims to testify by closed-circuit television (*Maryland v. Craig*). He has also written opinions protecting Fourth Amendment rights, although only so far as those rights find support in analogous historical practice. Compare, for example, his opinions in *Kyllo v. United States* (protecting the right against warrantless searches of the home); *Arizona v. Hicks* (same); and *Thornton v. United States* (opining that the Court should rethink its decisions allowing the police to search vehicles without probable cause after the suspects have been removed), with *California v. Acevedo* (arguing that the government should be able to make warrantless searches of personal effects carried in public) and *California v. Hodari D.* (holding that a suspect is not "seized" within the meaning of the Fourth Amendment until he is physically restrained or submits to authority).

Justice Scalia has also been open to claims based on the Free Speech Clause of the First Amendment, although the original understanding of the clause seems much less protective of speech than are many of the Justice's opinions. He has embraced doctrine forbidding the government from punishing speech with which it disagrees, as illustrated by his joining the majority in *Texas v. Johnson*, which reversed the conviction of a protestor who burned the American flag. He also supports free-speech rights in the area of campaign finance, causing him to dissent in a series of cases upholding campaign finance regulation, culminating in *McConnell v. Federal Election Commission*. On the other hand, Justice Scalia is occasionally accepting of government actions that burden speech if he can point to a tradition accepting such deprivations, as he has with regard to patronage-based personnel decisions, where the officials in power would reward supporters with jobs formerly held by political opponents (*O'Hare Truck Service v. City of Northlake*; *Rutan v. Republican Party*). Although successive Supreme Court majorities have condemned discrimination on grounds of political affiliation in hiring, firing, and contracting decisions by state and local governments as inconsistent with the First

Amendment, Justice Scalia would uphold it, because it has been practiced for centuries, apparently only recently being considered by many to be a constitutional violation.

In cases interpreting statutes, Justice Scalia is a "textualist." He interprets the statute based primarily on what the statute says (read in its context, to be sure), rejecting legislative history as an unreliable indicator of what the statute means. In Justice Scalia's view, legislative history—materials such as debates and committee reports—is often unread by the legislators themselves and in any event may represent only a minority position among those legislators who voted for the law. Justice Scalia points out that only the law as passed by Congress and signed by the president is law, and concludes from this that courts should rely on the text of statutes to discover statutory meaning.

Throughout his jurisprudence, Justice Scalia has sought to limit the discretion of courts. He wishes to limit judges to the text of statutes and the original understanding of constitutional provisions, so that they do not overreach into policymaking. Justice Scalia's distrust of the judiciary is evident most directly in his support for doctrines that prevent the courts hearing cases at all. In cases such as *Lujan v. Defenders of Wildlife*, he has championed the renaissance of the "standing" requirement, under which courts will not hear a case unless it is brought by a person who is personally harmed by the action he seeks remedied. He has also supported a vigorous use of the "political question" doctrine, according to which a court will not hear a case if there are no judicially manageable standards for deciding it (*Vieth v. Jubelirer*). In other words, if courts cannot create a remedy for a violation of law, then they have no business hearing the case.

If courts cannot hear cases under these theories, the result is that the executive has more discretion to act, because the judiciary will not be watching over his shoulder. And giving more power to the executive is something Justice Scalia has found very appealing. Most famously, he dissented when the rest of the Court upheld the constitutionality of the so-called independent counsel, whose job it was to investigate and, if appropriate, prosecute violations of the law by executive officials. Justice Scalia thought the independent counsel was an unconstitutional interference with the president's ability to execute the laws (*Morrison v. Olson*). Justice Scalia also dissented when the Court struck down the Line-Item Veto Act, which would have permitted the president to cancel certain items of spending from the budget, without having to obtain Congress's approval.

Through his tireless advocacy for originalism and textualism, Justice Scalia has been an incredibly

influential force on American law. Judges and litigators now take arguments based on text and original understanding seriously, even in those areas where Justice Scalia is predictably in dissent. Only time will tell whether the justice will ultimately triumph in advancing his ideal of a Constitution whose principles are static and enduring.

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References and Further Reading

- Brisbin, Richard A. *Justice Antonin Scalia and the Conservative Revival*. Baltimore: Johns Hopkins University Press, 1997.
- Farber, Daniel A., and Susanna Sherry. *Desperately Seeking Certainty: The Misguided Quest for Constitutional Foundations*. Chicago: University of Chicago Press, 2002, pp. 29–54.
- Leahy, James E. *Supreme Court Justices Who Voted with the Government*. Jefferson, NC: McFarland, 1999.
- Ring, Kevin A., ed. *Scalia Dissents: Writings of the Supreme Court's Wittiest, Most Outspoken Justice*. Washington, D.C.: Regnery, 2004.
- Rossum, Ralph A. "Text and Tradition: The Originalist Jurisprudence of Antonin Scalia," in Earl M. Maltz, ed., *Rehnquist Justice: Understanding the Court Dynamic*. Lawrence, KS: University Press of Kansas, 2003, pp. 34–69.
- Scalia, Antonin, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, *Suffolk University Law Review* 17 (1983): 881–899.
- , *Judicial Deference to Administrative Interpretations of Law*, *Duke Law Journal* (1989): 511–521.
- , *A Matter of Interpretation: Federal Courts and the Law*. Princeton, N.J.: Princeton University Press, 1997.
- , *Originalism: The Lesser Evil*, *University of Cincinnati Law Review* 57 (1989): 849–865.
- , *The Rule of Law as a Law of Rules*, *University of Chicago Law Review* 56 (1989): 1175–1188.
- Smith, Christopher E. *Justice Antonin Scalia and the Supreme Court's Conservative Moment*. Westport, Conn.: Praeger, 1993.
- Smith, Christopher E., and David A. Schultz. *The Jurisprudential Vision of Justice Antonin Scalia*. Lanham, Md.: Rowman and Littlefield, 1996.

Cases and Statutes Cited

- Arizona v. Hicks*, 480 U.S. 321 (1987)
- Blakely v. Washington*, 542 U.S. ___, 124 S. Ct. 2531 (2004)
- California v. Acevedo*, 500 U.S. 565 (1991)
- California v. Hodari D.*, 499 U.S. 621 (1991)
- Clinton v. City of New York*, 524 U.S. 417 (1998)
- Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261 (1990)
- Employment Division, Oregon Department of Human Resources v. Smith*, 494 U.S. 872 (1990)
- Kyllo v. United States*, 533 U.S. 27 (2001)
- Lawrence v. Texas*, 539 U.S. 588 (2003)
- Lee v. Weisman*, 505 U.S. 577 (1992)
- Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992)
- Maryland v. Craig*, 497 U.S. 836, 860–70 (1990)

- McConnell v. Federal Election Commission*, 540 U.S. 93 (2003)
- Morrison v. Olson*, 487 U.S. 654 (1988)
- O'Hare Truck Service v. City of Northlake*, 518 U.S. 712 (1996)
- Planned Parenthood v. Casey*, 505 U.S. 833 (1992)
- Rutan v. Republican Party*, 497 U.S. 62 (1990)
- Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000)
- Stenberg v. Carhart*, 530 U.S. 914 (2000)
- Texas v. Johnson*, 491 U.S. 397 (1989)
- Thornton v. United States*, 541 U.S. 615 (2004)
- United States v. Booker*, 125 S. Ct. 738 (2005)
- Vieth v. Jubelirer*, 541 U.S. 267 (2004)
- Zelman v. Simmons-Harris*, 536 U.S. 639 (2002)
- Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993)

SCHAD v. BOROUGH OF MOUNT EPHRAIM, 452 U.S. 61 (1981)

Mount Ephraim's zoning ordinance prohibited all commercial uses except those specifically listed in the ordinance; one of these omitted uses was live entertainment including the commercial production of plays, musicals, and so forth, as well as nude dancing. Schad and his associates operated an adult bookstore and had an amusement license for coin-operated booths where patrons could watch films. When they added a booth for live and usually nude dancing, they were convicted and fined for violating the borough's zoning ordinance. The lower court relied on Stevens' majority opinion in *Young v. American Mini-Theatres, Inc.* (1976) that the "mere fact that the commercial exploitation of material protected by the First Amendment is subject to zoning and other licensing requirements is not sufficient reason for invalidating these ordinances." New Jersey's appellate courts upheld the convictions.

The Supreme Court voting seven to two reversed the convictions. White wrote the majority opinion. Brennan, Stewart, Marshall, Blackmun, and Powell joined White's opinion. Powell, joined by Stewart, wrote a concurring opinion. Stevens concurred with the judgment. Burger, joined by Rehnquist, dissented.

Because Mount Ephraim's zoning ordinance infringed on protected liberties, a higher standard of scrutiny or strict scrutiny is called for compared with when zoning only affects property interests. Thus, the law must be narrowly drawn and further a substantial government interest. Contrary to the lower courts' position, *Young v. American Mini Theatres, Inc.* (1976) does not control this case, White declares, for three reasons. First, Detroit's ordinance restricted only the location of adult theatres and imposed minimal burdens on protected speech. Second,

the restrictions did not affect the total number of adult theatres nor were they banned from the city. Third, the city provided evidence of the secondary effects of concentrations of adult theatres or bookstores. Mount Ephraim's ordinance, in contrast, fails on all three grounds.

The ordinance thus suffers from being overly broad; it bans all live entertainment, violating the strictures of the Court's overbreadth doctrine. Moreover, the borough's secondary effects argument is not internally consistent, because it does not show whether or how live nude dancing would produce more severe social problems than the films already being shown in the same establishment. Finally, its argument that the ordinance imposes reasonable time, place, and manner restrictions also falters. The borough did not explain why live entertainment would be "basically incompatible" with normal activities in a commercial zone; the initial question when determining the validity of time, place, and manner restrictions.

Blackmun writes in concurrence to emphasize that the customary presumption of validity granted zoning ordinances "carries little, if any, weight" where a zoning ordinance "trenches on rights of expression." Burger, in dissent, however, takes the position that an "overconcern about draftsmanship and overbreadth should not be allowed to obscure the central question" before the Court: the citizens of Mount Ephraim "meant only to preserve the basic character of their community."

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References and Further Reading

- Alexander, Donald. *The Politics of Pornography*. Chicago: University of Chicago Press, 1989.
- Hixson, Richard F. *Pornography and the Justices: The Supreme Court and the Intractable Obscenity Problem*. Carbondale, IL: Southern Illinois University Press, 1996.
- Mackey, Thomas C. *Pornography on Trial: A Handbook with Cases, Law, and Documents*. Santa Barbara, CA: ABC-CLIO, 2002.

Cases and Statutes Cited

- Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981)
- Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976)

SCHALL v. MARTIN, 467 U.S. 253 (1984)

In *Schall v. Martin*, the U.S. Supreme Court upheld a New York statute allowing pretrial detention of juveniles presenting a "serious risk" that they may

commit another crime before trial. Martin, a fourteen-year-old boy charged with robbery, assault, and weapons possession, was held pending trial because the court believed he might commit additional offenses in the interim. In essence, the court assumed that Martin was probably guilty.

Martin argued the law violated the U.S. Constitution's due process clause, because it authorized punishment without trial. He also noted that most children subject to preventive detention either had their charges dismissed or were released immediately on being found guilty.

The Court rejected Martin's claims, holding that preventive detention was not punishment. It held that such detentions were an appropriate component of a flexible juvenile justice policy. The Court stressed that states had wide latitude to craft policies protecting such children from themselves.

The decision was notable because it was the first time that the Court explicitly authorized "preventive detention"—the policy of denying a criminal defendant bail for the purpose of preventing future crime, rather than ensuring his or her presence in court. Although the decision itself was not radical—child detention was widely seen as appropriate in cases of poor parental supervision—the Court's analysis opened the door to the more expansive authorization of preventive detention for adults in *United States v. Salerno*, 481 U.S. 739 (1987).

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Cases and Statutes Cited

- United States v. Salerno*, 481 U.S. 739 (1987)

SCHENCK v. UNITED STATES, 249 U.S. 47 (1919)

In 1917, Charles Schenck, General Secretary of the Socialist Party, was indicted for conspiring to violate the Espionage Act of 1917. The Espionage Act made it a federal crime to conspire to "cause or attempt to cause insubordination" in U.S. military or naval forces or to obstruct military recruiting when the country was at war, as it was in 1917; the United States entered World War I in April of 1917. The charge against Schenck was based on his having had circulars sent to men who had been drafted or were eligible for the draft; the Selective Service Act of 1917 had authorized drafting male citizens who were between twenty-one and thirty. The Socialist Party opposed the war and the draft and ordered the

distribution of a circular encouraging opposition to both; Schenck had the circulars printed and sent out. The circulars claimed the draft was unconstitutional and the war was a capitalist plot and encouraged citizens to sign a petition to repeal the Selective Service Act. In a jury trial, Schenck was convicted; he appealed, arguing that the Espionage Act violated the First Amendment's guarantee of free speech.

Justice Holmes wrote the Supreme Court's opinion, which upheld Schenck's conviction. He began by noting that "the character of every act depends upon the circumstances in which it is done The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic." Holmes said the issue was whether the content of the circulars was "of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." He explained that when a country is at war "things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured." As to the case at hand, Schenck had apparently conceded that he could have been convicted of violating the Act if the circulars had actually interfered with the draft. Holmes concluded, therefore, that because Schenck could have been convicted if the circulars had actually obstructed the draft, he could be convicted of conspiring to achieve such results: "[W]e perceive no ground for saying that success alone warrants making the act a crime."

Instead of focusing on the content of the circulars, Holmes used the concept of "speech as attempt" to uphold the conviction. In some instances, the content of speech is criminalized; at common law, for example, seditious libel was a crime. Seditious libel is speech that defames the government and brings it into disrepute; the crime is attacking the government and it is complete as soon as the seditious words have been published. Seditious libel punishes what someone says, not what they do. In *Schenck*, Holmes focused not on the content of the circulars, as such, but on what they sought to achieve.

Criminal law recognizes two types of crimes: inchoate crimes and substantive crimes. A substantive crime is a "true," completed crime; substantive crimes target acts that result in the infliction of some kind of "harm." So if Schenck's circulars had actually obstructed the draft in Philadelphia, that would have been a substantive crime under the Espionage Act; the "harm" would have been interfering with the draft, which was needed for national security. Inchoate crimes, on the other hand, are incomplete; they target conduct that is intended to result in the commission of a substantive crime but does not, either because it is interrupted or because it fails. Attempt

is an inchoate crime, as is conspiracy. The theory is that having inchoate crimes lets law enforcement stop would-be offenders before they commit substantive crimes. So if a husband puts poison in his wife's food, he can be arrested and prosecuting for attempting to kill her even though she did not eat the food.

In *Schenck*, Holmes treated speech (the circulars) as an attempt to commit a crime; the Espionage Act made it a crime to conspire either to obstruct the draft or to attempt to obstruct the draft. According to his analysis, by conspiring with others to encourage resistance to the draft, Schenck conspired to attempt to obstruct the draft. Had his efforts succeeded, Schenck could have been convicted of conspiring to commit the substantive crime, that is, of conspiring to obstruct the draft. Because they failed, it was reasonable to hold him liable for conspiring to attempt to obstruct the draft; his conviction, therefore, rested not on the content of the circulars but on what they sought to achieve.

Fifty years later, in *Brandenburg v. Ohio*, the Supreme Court adopted a version of Holmes' "clear and present danger" test. *Brandenburg*, a Ku Klux Klan leader, was convicted of violating a statute that made it a crime to advocate "unlawful methods" as "a means of accomplishing . . . political reform." The conviction was based on comments he made at a Klan rally; the comments advocated violent action against African Americans and Jews. The Court held that the statute violated the First Amendment because it criminalized the content of speech—"mere advocacy." According to the *Brandenburg* Court, "advocacy" cannot be criminalized unless it "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg* is based on the same premise as Holmes' test but is more protective of speech because it demands a closer connection between speech and unlawful action. To establish incitement under *Brandenburg*, the government must prove that the defendant explicitly advocated immediate unlawful conduct that was likely to occur.

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References and Further Reading

Brandenburg v. Ohio, 395 U.S. 444 (1969).
Greenawalt, Kent. *Fighting Words*. Princeton, NJ: Princeton University Press, 1996.
Lewis, Anthony. *Make No Law: The Sullivan Case and the First Amendment*. New York: Random House, 1991.

See also **Anti-Anarchy and Anti-Syndicalism Acts; Bill of Rights: Structure; Brandenburg Incitement Test; *Brandenburg v. Ohio*, 395 U.S. 444 (1969);**

Content-Based Regulation of Speech; Content-Neutral Regulation of Speech; Freedom of Speech and Press under the Constitution: Early History (1791–1917); Freedom of Speech Exclusions; Freedom of Speech: Modern Period (1917–Present); Freedom of the Press: Modern Period (1917–Present); Incitement to Violence and Free Speech; Ku Klux Klan; Philosophy and Theory of Freedom of Expression; Seditious Libel; Self-Fulfillment Theory of Free Speech; Speech versus Conduct Distinction; Theories of Free Speech Protection; World War I, Civil Liberties in

SCHLAFLY, PHILLIS STEWART

Phyllis Stewart Schlafly, noted author, lecturer, attorney, and political and social activist, was born in St. Louis, Missouri. Raised a Roman Catholic, she graduated Phi Beta Kappa from Washington University in 1944 while working nights at a munitions factory to support her studies. On a scholarship, Schlafly received a master's degree from Radcliffe in 1945. After graduation, Schlafly worked as a researcher in Washington, D.C., and ran a successful congressional campaign for an Illinois Republican in 1946. In 1949, she married Fred Schlafly and embarked on what she has called the most important profession of her life, being a wife and mother to her six children.

While caring for her family, Schlafly continued her involvement in social and political matters. She wrote, lectured, and organized on behalf of issues that were of import to her, including politics, women's rights, national defense, education, family, and child care. In 1964, Schlafly published *A Choice Not an Echo*, chronicling the history of Republican presidential nominations, which many argue led to the nomination of presidential candidate Barry Goldwater. In addition to running for Congress twice, Schlafly began to publish the Phyllis Schlafly Report in 1967, a monthly conservative newsletter. In 1972, she founded the Eagle Forum, a conservative organization committed to influencing public policy and supporting limited government, capitalism, the right to life, traditional marriage, and the Second Amendment.

Schlafly gained greater prominence after Congress passed the Equal Rights Amendment (ERA) in 1972. Supporters of the ERA contended that an amendment to the constitution was needed to create true social, economic, political, and legal equality between the sexes. Motivated by what she believed were attacks on women and their role in the traditional family by radical feminists, Schlafly took up the fight against the ERA. Recognizing that the ERA

had garnered national support, Schlafly organized a grassroots, state-to-state campaign to block ratification of the amendment. In 1972, Schlafly founded the National Committee to Stop ERA, which promoted a pro-family, pro-life viewpoint. Schlafly tapped the resources of housewives, mothers, and nonfeminist career women who were not represented in the radical feminist agenda. With her well-organized forces, Schlafly argued in part that the ERA would destroy the traditional role of women and its benefits. She contended that the ERA would force eighteen-year-old women into the draft and wives and mother's into the workforce, thus compelling mother's to leave their children in daycare. Schlafly argued that the biological differences between men and women created natural roles for the sexes that should be embraced and honored. In 1978, in the midst of her battle against the ERA, Schlafly graduated from Washington University Law School. Schlafly's efforts proved successful. By 1982, the deadline for ratification, the Equal Rights Amendment failed to pass in all thirty-eight states needed for ratification.

To this day, Schlafly remains a political and social activist. As president of the Eagle Forum, Schlafly works tirelessly to promote a conservative agenda, still publishing the Phyllis Schlafly Report. She has testified before Congress and state legislatures numerous times, and she frequently lectures and debates on television and radio and at various political and social events.

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References and Further Reading

- Felsenthal, Carol. *The Biography of Phyllis Schlafly: The Sweetheart of the Silent Majority*. Chicago: Regnery Gateway, 1981.
- Mansbridge, Jane J. *Why We Lost The ERA*. Chicago: University of Chicago Press, 1986.
- Schlafly, Phyllis. *Feminist Fantasies*. Dallas: Spence Publishing Company, 2003.
- . *The Power of a Positive Woman*. New Rochelle, New York: Arlington House Publishers, 1977.
- "Phyllis Schlafly" <http://www.eagleforum.org/misc/bio.html>, downloaded July 22, 2003.

See also **Equal Rights Amendment**

SCHMERBER v. CALIFORNIA, 384 U.S. 757 (1966)

In *Schmerber*, the Supreme Court upheld the constitutionality of the compelled extraction of blood sample evidence from an arrestee. While hospitalized for injuries after an automobile accident, the petitioner

was arrested for driving under the influence of alcohol. The police then instructed doctors to take a blood sample from the petitioner for chemical analysis of his blood alcohol content. Petitioner objected to the withdrawal of his blood and the chemical analysis as violations of his Fourth, Fifth, Sixth, and Fourteenth Amendments rights. The Appellate Department of the California Superior Court rejected the petitioner's challenges and affirmed his conviction.

The Court (five to four) found no violation of the petitioner's Fifth Amendment privilege against compelled self-incrimination because the taking of a blood sample was neither "testimonial" nor "communicative" in nature. Rather, the Court found the blood sample evidence similar to other "real or physical evidence" such as fingerprints, photographs, and handwriting or voice exemplars. The Court further found no Fourth Amendment violation because, although the extraction of blood was a search and seizure, it was justified by the officer's probable cause to arrest the petitioner and the need to prevent the destruction of physical evidence, and the means used to extract the blood (at a hospital, by a doctor) were reasonable. In addition, the Court found that there was no due process violation; and that the Sixth Amendment right to counsel was not implicated, because there was no privilege as to which the petitioner could seek counsel's advice.

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References and Further Reading

- Allen, Ronald J., and Kristin M. Mace, Note, *Criminal Law: The Self-Incrimination Clause Explained and Its Future Predicted*, *Criminal Law & Criminology* 94 (2004): 243.
- Amar, Akhil Reed, and Renee B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, *Michigan Law Review* 93 (1995): 857.
- Hardy, Julie A., Note, *The Admissibility of Mental State Observations Obtained during Unlawful Custodial Interrogation: Drawing the Line on the Real or Physical Evidence Distinction*, *B. C. Law Review* 30 (1989): 1029.
- Matz, Andrew L., Note, *Significant Development: The Sounds of Silence: Post-Miranda Silence and the Inference of Sanity*, *B.U.L. Review* 65 (1985): 1025.

Cases and Statutes Cited

- Breithaupt v. Abram*, 352 U.S. 432 (1957)
- Malloy v. Hogan*, 378 U.S. 1 (1964)
- Mapp v. Ohio*, 367 U.S. 643 (1961)
- Miranda v. Arizona*, 384 U.S. 436 (1966)
- Preston v. United States*, 376 U.S. 364 (1964)

See also **Arrest; Due Process; DWI; Exemplars; Forced Speech; Privileges and Immunities (XIV); Probable Cause; Right to Counsel (VI); *Rochin v. California*,**

342 U.S. 165 (1952); Search (General Definition); Seizures; Self-Incrimination: *Miranda* and Evolution; *Tennessee v. Garner*, 471 U.S. 1 (1985); Warrantless Searches

SCHNECKLOTH v. BUSTAMONTE, 412 U.S. 218 (1973)

Bustamonte clarified the prosecution's burden to demonstrate that consent to a search was voluntarily given under the Fourth and Fourteenth Amendments. Police stopped a car for traffic violations. Bustamonte was a passenger in that car. The owner of the car as well as the driver consented to a search of the car. The police found contraband, and Bustamonte was convicted.

On appeal, Bustamonte argued that the state had to show that not only did consent to the search voluntarily but that the person knew that he had the option not to consent. The Supreme Court (six to three) held that a voluntary search was determined by the totality of the circumstances and cannot be obtained through explicit or implicit threats. The Court rejected the idea that there should be a *Miranda*-like warning required before a consent to search could be validly given. It would not be practical for the police to issue a warning to each person before a search. Furthermore, knowledge of a right to refuse a search is not a prerequisite of a voluntary consent. Consequently, the prosecution only had to show that the consent was voluntary and not coerced. In this case, the prosecution met the burden of voluntary consent to a search—during the search, the atmosphere was friendly, there was no discussion of any crime, and the owner as well as the driver of the car assisted the police in that search, that is, opening various compartments.

Justices Douglas, Brennan, and Marshall dissented with the premise that a verbal assent to the police was not enough because that request was backed by the "force of law."

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References and Further Reading

- Barrio, Adrian J., Note, *Rethinking Schneckloth v. Bustamonte: Incorporating Obedience Theory into the Supreme Court's Conception of Voluntary Consent*, *University of Illinois Law Review* 1997 (1997): 215.
- Godsey, Mark A., *Rethinking the Involuntary Confession Rule: Toward a Workable Test for Identifying Compelled Self-Incrimination*, *California Law Review* 93 (2005): 465.

Cases and Statutes Cited

- Boyd v. United States*, 116 U.S. 616 (1886)
- Bumper v. North Carolina*, 391 U.S. 543 (1968)

Culombe v. Connecticut, 367 U.S. 568 (1961)

Johnson v. Zerbst, 304 U.S. 458 (1938)

Miranda v. Arizona, 384 U.S. 436 (1966)

See also **Miranda Warning; Searches (General Definition); Warrantless Searches**

SCHOOL DISTRICT OF THE CITY OF GRAND RAPIDS v. BALL, 473 U.S. 373 (1985)

In *Grand Rapids School District v. Ball*, the Supreme Court considered whether school sponsorship of two programs violated the establishment clause of the First Amendment. Both programs provided classes to nonpublic school students at public expense in classrooms located in, and leased from, the nonpublic schools. Central to this case was the fact that of the forty-one participating nonpublic schools involved in the programs, forty were religious schools. Moreover, the students attending both programs were the same students who otherwise attended the nonpublic schools where the programs were held.

In writing for the majority, Justice Brennan wrote that one of the few absolutes of the establishment clause is the prohibition of “government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith” (473 U.S. at 385). The Court applied the three-part *Lemon v. Kurtzman* test to evaluate the propriety of the government action. *Lemon* requires that the statute or government action (1) must have a secular legislative purpose, (2) its principal or primary effect must be one that neither advances nor inhibits religion, and (3) it must not foster an excessive government entanglement with religion. In this case, because there was no dispute that the purpose of the two programs was secular, the Court focused on the “effect” test. Citing *Meek v. Pittenger*, which held that a state program located on campus of religious school “entails an unacceptable risk” that the state-funded personnel would “advance the religious mission of the church-related schools in which they serve” (421 U.S. 349, 370 [1975]), the Court found that the challenged programs may impermissibly advance religion in three distinct ways. First, the teachers participating in the programs may become involved in intentionally or inadvertently inculcating particular religious tenets. In this case, many of the teachers participating in one of the programs were also employed full time by the religious schools so the risk was significant. There is a substantial risk that the religious message these teachers are expected to convey during their regular school day

“will infuse the supposedly secular classes they teach after school” (473 U.S. at 387). “The conflict of functions inheres in the situation” *Id.* (citing *Lemon*, 403 U.S. at 617). In the second challenged program, where the teachers were primarily hired by public schools, the risk remained that programs operating in this religious environment would be used for religious educational purposes.

Second, the programs may provide a “crucial symbolic link between government and religion,” suggesting that government supports the religious denomination operating the school. The concern is heightened when, as in this case, the children are of “tender” age because they are more likely to be influenced by this symbolic link. The presence of a “public school” sign in the classrooms was not sufficient to remove this symbolic link. “[E]ven the student who notices the ‘public school’ sign temporarily posted would have before him a powerful symbol of state endorsement and encouragement of the religious beliefs taught in the same class at some other time during the day” (473 U.S. at 391).

Third, the programs have the effect of directly promoting religions by impermissibly providing a subsidy to the primary religious mission of the institutions affected. Quoting *Everson v. Board of Education*, the Court stated that “[n]o tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion” (330 U.S. 1, 16 [1947]). The Court distinguishes between indirect support (for example, loans for secular textbooks for nonsecular students or bus transportation) and direct support, which although intended to promote a secular purpose, directly supports a religious institutions (for example, tuition grants and tax benefits for parents whose children attend religious schools). Thus, the mere possibility of subsidization is not sufficient to invalidate government aid. However, as in *Meek*, the programs at issue in *Grand Rapids* paid for teachers and instructional equipment and materials, providing direct aid to the educational function of the religious school. Thus, the Court held that the two programs had the “primary or principal” effect of advancing religion, and therefore violated the establishment clause.

This case is important, in part, because it further defines the types of permissible and impermissible government aid to religious institutions. It also is important because the Court found that the “tender” age of the children made the symbolic link more problematic, suggesting that such a link may be less of an issue when adults are impacted.

EMILY FROMSON

Cases and Statutes Cited*Everson v. Board of Education*, 330 U.S. 1 (1947)*Lemon v. Kurtzman*, 403 U.S. 602 (1971)*Meek v. Pittenger*, 421 U.S. 349, 370 (1975)**SCHOOL VOUCHERS**

For several decades, local, state, and national governments have considered the enactment of school voucher plans for elementary and secondary school students. The central idea that unites these plans is that government money—that would otherwise be given to public schools—is given to students and their parents, who can use this money to pay for attendance at the schools of their choice.

Eligible schools under school voucher plans may include public, private nonreligious, and private religious schools. If the participating schools are all public in nature, with students and their parents simply empowered to choose among them in disregard of usual attendance boundaries, there are usually few serious civil liberties issues involved. Under such plans, parents are simply given more public choices than they otherwise would have.

If the criteria for participating schools are broadened to include private nonreligious schools, more objections arise. For instance, concerns have been expressed that private voucher-funded schools may engage in discrimination in admissions on the basis of race, ethnicity, gender, or ability, or that the unique role of public schools in fostering a common civic culture will be lost. If a voucher-funded school engages in discrimination on the basis of race, ethnicity, gender, or other protected category, the guarantees of the equal protection clause of the Constitution may be implicated. Otherwise, the civil liberties and educational policy issues that are raised by the school's operation are weighed against the interests of students and parents in public funding for the schools of their choice.

The most difficult civil liberties questions arise when voucher plans permit the participation of religious or "sectarian" private schools. The central tension here is between the claim of religious-school students and their parents that they are entitled to public funding for religious education on a par with that afforded for secular education, on the one hand, and the claim of taxpayers to be free of coercion by government to fund the religions of others, on the other.

In its embodiment of this tension, the school voucher debate is part of a larger, historical struggle over taxpayer funding of religious schools. During the sixty years that the Supreme Court has wrestled

with this issue, several background principles have emerged. First, the giving of substantial, unrestricted, cash grants to taxpayer funds to religious elementary and secondary schools has been consistently held to violate the establishment clause of the First Amendment. Such funding of religious schools has been treated as the equivalent of funding of churches, synagogues, mosques, and other religious institutions.

When public aid to religious schools is "in kind" or otherwise restricted, its constitutionality has traditionally depended on whether the aid was secular in nature and whether it could be "diverted" by the school to religious purposes or functions. For instance, in *Mitchell v. Helms*, 530 U.S. 793 (2000), the Court upheld a federal program in which computers and other technical materials and services were purchased with federal money by local school districts and distributed as "loans" to public, private nonreligious, and private religious schools. The plurality opinion cited as important the facts that the program provided aid that was "secular, neutral, and nonideological," in nature, and that was used in public schools.

In cases involving "indirect aid" to religious schools—that is, aid given not to the schools themselves, but to attending children and their parents—different principles emerged. In early cases, such as *Board of Education v. Allen*, 392 U.S. 236 (1968), the Court upheld these programs if the aid was secular in nature and conferred only incidental benefit on religious schools. This approach remained prominent in "indirect aid" cases until the mid-1980s, when a new theory emerged. Under this new theory, "indirect aid" created no establishment clause problem because it was religious-school children and their parents—not government—who funded religious schools. As Justice Thomas stated in *Mitchell v. Helms*, "[i]f aid to schools . . . is neutrally available and, before reaching or benefiting any religious school, first passes through the hands (literally or figuratively) of numerous private citizens who are free to direct the aid elsewhere, the government has not provided [support to religious schools]." Critics responded that this view failed to consider that these individual parental decisions are in fact anticipated and authorized by the government program, and that they accomplish the goal—the public funding of (private and public) education—which the government has previously identified.

How vouchers would be treated under these conflicting rules was determined in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002). In this five-to-four decision, the Court held that a voucher plan that included religious schools among eligible institutions did not violate the establishment clause. In reaching

this decision, the Court did not remove the general constitutional prohibition on the payment of cash grants to religious institutions. Rather, it held that the passage of voucher money through the hands of parents removes the government from the transaction, for the purposes of the establishment clause. Since (in this view) it is parents (not government) who choose to fund religious schools, there is no establishment of religion by government.

The Court's decision in *Zelman* answers one constitutional question about voucher programs, but leaves others. After *Zelman*, the federal establishment clause presumably presents no barrier to a voucher plan's inclusion of religious elementary and secondary schools. However, beyond the removal of this obstacle, significant questions remain. For instance, many voucher programs purport to exclude schools that discriminate in admissions or hiring on religious grounds, or that advocate intolerance of the religion, race, or ethnicity of others. If a religious group wishes to discriminate in favor of coreligionists in staffing or admissions, can a voucher plan exclude that school without offending the free exercise clause of the First Amendment? Can a religious group whose beliefs are deeply offensive to others—indeed, whose beliefs deny the civil rights of others—be excluded from a public voucher program, without violating free exercise guarantees, free speech guarantees, and the guarantee of equal treatment of all religious groups?

In addition, many state constitutions prohibit public funding of religious institutions, including schools. These provisions, which may stand in the way of religious-school voucher funding, have been attacked as violative of federal constitutional equal treatment guarantees, as rooted in antireligious bias, and as otherwise illegal or unwise. In *Locke v. Davey*, 540 U.S. 712 (2004), the Court upheld the ability of states to recognize antiestablishment interests in the religious-school funding context that are broader than those recognized under the federal Constitution's establishment clause. In *Locke*, the Court held that although a state *could* (under *Zelman* and other cases) give scholarship funds to college students for religious studies, it was not *required* by federal free exercise, antiestablishment, or equal protection guarantees to do so. Although *Locke* did not deal with an elementary or secondary school voucher program, its general principles seem to foreclose effective federal constitutional challenge of state no-funding provisions, absent additional evidence of particular, anti-religious bias in the enactment or enforcement of particular state laws.

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References and Further Reading

- Dwyer, James G. *Vouchers within Reason: A Child-Centered Approach to Education Reform*. Ithaca: Cornell University Press, 2002.
- Jeffries, John C., and James E. Ryan, *A Political History of the Establishment Clause*, Michigan Law Review 100 (2001): 279–370.
- Lupu, Ira C., and Robert W. Tuttle, *Zelman's Future: Vouchers, Sectarian Providers, and the Next Round of Constitutional Battles*, Notre Dame Law Review 78 (2003): 917–993.
- Shiffrin, Steven H., *The First Amendment and the Socialization of Children: Compulsory Public Education and Vouchers*, Cornell Journal of Law and Public Policy 11 (2002): 503–551.
- Underkuffler, Laura S. “Public Funding for Religious Schools: Difficulties and Dangers in a Pluralistic Society.” *Oxford Review of Education* 27 (2001): 577–592.
- , *Vouchers and Beyond: The Individual as Causative Agent in First Amendment Jurisprudence*, Indiana Law Journal 75 (2000): 167–191.
- Viteritti, Joseph P, *Reading Zelman: The Triumph of Pluralism, and Its Effects on Liberty, Equality, and Choice*, Southern California Law Review 76 (2003): 1105–1187.

Cases and Statutes Cited

- Board of Education v. Allen*, 392 U.S. 236 (1968)
- Locke v. Davey*, 540 U.S. 712 (2004)
- Mitchell v. Helms*, 530 U.S. 793 (2000)
- Zelman v. Simmons-Harris*, 536 U.S. 639 (2002)

SCOPES TRIAL

The trial of John Scopes is perhaps the most famous case in American legal history. It was the inevitable conflict of two historical forces: the growing acceptance of modern science and evolutionary theory, and the desire of a fundamentalist religious minority to retain the Bible as the unerring word of God. At the same time, it was a clash of two of the most prominent public figures of the early twentieth century—the great populist and three-time Democratic candidate for president, William Jennings Bryan and Clarence Darrow, the most famous trial lawyer of the period.

The brouhaha began in 1925 when the Tennessee legislature passed the “Butler Bill,” which made it a misdemeanor for a public school teacher to teach any theories that deny the biblical stories of man's creation and to teach, instead, that humans descended from a lower order of animals. The fledgling American Civil Liberties Union (ACLU), looking for a test case to combat growing infringements on academic freedom, advertised to defend anyone willing to challenge the law. The offer was taken up by town boosters in Dayton, Tennessee, who saw a

high-profile trial as an opportunity to bolster business. They, in turn, persuaded John Scopes, a twenty-four-year-old general science teacher and football coach, to act as plaintiff. Long-time antievolutionist Bryan quickly volunteered for the prosecution, which eventually included chief prosecutor Tom Stewart, retired attorney general Ben G. McKenzie, and Bryan's son, William Jennings Bryan, Jr. Bryan's entry enticed avowed agnostic Clarence Darrow to join the defense team of New York attorneys Dudley Field Malone and Arthur Garfield Hays, and local counsel John R. Neal.

During the trial, Judge John T. Raulston sided with the prosecution and barred the live testimony of experts in theology and numerous disciplines in natural science. The defense had hoped that their testimony would show that evolution was compatible with biblical teachings and that the statute was an unreasonable exercise of government power. Stymied, Darrow made the move that would jettison the trial into popular history; he called Bryan to the stand as an expert witness on the Bible. Darrow's persistent questioning about the miracles of the Old Testament—including the Genesis story that claims the earth was created in days of indeterminable length—exposed the inherent inconsistencies arising from a literal interpretation of the Bible. It was the defining moment of the trial.

Judge Raulston, however, ruled Bryan's testimony irrelevant and inadmissible. With no other proof or witnesses to offer, the defense gave up. The jury, which had been excluded for much of the trial, found the defendant guilty, and the judge imposed the minimum fine of \$100. This would prove to be the ACLU's undoing. In the appeal, the Tennessee Supreme Court not only ruled the statute constitutional, they also overturned Scope's conviction on the grounds that it was the duty of the jury, not the judge, to set the fine. When the state attorney general dismissed the prosecution, the ACLU was left with nothing to appeal to the U.S. Supreme Court. The offending statute stayed on the books, largely unenforced, until it was repealed by the Tennessee legislature in 1967.

Although a clash between Biblical literalists and those who supported the teaching of evolution may have been inevitable, historians point to a number of reasons for an increase in antievolution legislation in the early 1920s. Urbanization, demographic changes caused by increased immigration, and the loosening of social mores were threatening the values and way of life of conservatives in rural America. Evangelical Protestants blamed Darwin's theory of natural selection, or "survival of the fittest," for German aggression in World War I and for the new, as yet

undiscredited, science of eugenics, which advocated controlled reproduction as a way to improve the human race. In addition, evolutionary theory was making its way into public education at a time when more and more young people were attending high school. Religious fundamentalists saw Darwin's ideas as threatening the faith and moral values of their children.

The Scopes trial achieved notoriety not only because of its prominent protagonists but also because of the reporting of the hundreds of journalists who attended the "monkey trial." The most famous of these was H. L. Mencken, whose acerbic observations did much to influence popular opinion in favor of the defense. Later, the Scopes trial became better known as the inspiration for "Inherit the Wind," a play that portrays the prosecution of John Scopes as an allegory for the persecution of intellectuals during the McCarthy era of the 1950s.

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References and Further Reading

- Adams, Leslie B. Jr., publisher. *The Scopes Trial*. Birmingham, Ala.: Legal Classics Library, 1984.
- Conkin, Paul K. *When All the Gods Trembled: Darwinism, Scopes, and American Intellectuals*. Lanham, MD: Rowan & Littlefield Publishers, 2001.
- Darwin, Charles. *The Origin of the Species*. New York: Gramercy Books, 1979.
- . *The Descent of Man and Selection in Relation to Sex*. New York: New York University Press, 1990.
- Frye, R. M., ed. *Is God a Creationist? The Religious Case against Creation-Science*. New York: Scribner's, 1983.
- Futuyma, D. J. *Science on Trial: The Case for Evolution*. Sunderland, Mass.: Sinauer Associates, 1995.
- Ginger Ray. *Six Days or Forever?: Tennessee vs. John Thomas Scopes*. London; New York: Oxford University Press, 1974.
- Larson, Edward J. *Trial and Error: The American Controversy over Creation and Evolution*. New York: Oxford University Press, 2003.
- . *Summer for the Gods: The Scopes Trial and America's Continuing Debate over Science and Religion*. New York: Basic Books, 1997.
- Marsden, G. W. *Fundamentalism and American Culture: The Shaping of Twentieth-Century Evangelicalism 1870–1925*. New York: Oxford University Press, 1982.
- Moran, Jeffrey P. *The Scopes Trial: A Brief History with Documents* (The Bedford Series in History and Culture). Boston: Bedford/St. Martin's, 2002.
- Scopes, John T., and James Presley. *The Center of the Storm, Memoirs of John T. Scopes*. New York: Holt, Rinehart and Winston, 1967.

Cases and Statutes Cited

- Scopes v. State*, 154 Tenn. 105, 289 S.W. 363 (1927). Decision of the Supreme Court of Tennessee on appeal from conviction.

“An Act Prohibiting the Teaching of the Evolution Theory in all the Universities, Normals and all Other Public Schools of Tennessee . . . and to Provide Penalties for Violations Thereof.” Public Acts of the State of Tennessee, 1925, Chapter No. 27, at 50.

See also Academic Freedom; Accommodation of Religion; American Civil Liberties Union; Darrow, Clarence; Epperson v. Arkansas, 393 U.S. 97 (1968); *Establishment of Religion and Free Exercise Clauses; Public School Curricula and Free Exercise Claims; Religion in Nineteenth-Century Public Education (Includes “Bible Wars”)*

SCOTTSBORO TRIALS

On March 25, 1931, nine African-American boys and young men who had stowed away on board a freight train were arrested in Paint Rock, Alabama, and accused of raping two white women. The defendants were tried in the nearby town of Scottsboro, and their legal case became a cause célèbre of the American left during the Great Depression. The fate of the “Scottsboro Boys,” as they became known, reveals how civil liberties ironically have been advanced at times through the efforts of radical groups committed to the destruction of liberalism as a form of political organization, in this case the Communist Party.

The nine defendants were poor and uneducated, members of the army of the dispossessed, and they had boarded the Southern Railroad in search of work. Their names were Charlie Weems (aged twenty), Clarence Norris (nineteen), Haywood Patterson (nineteen), Andy Wright (nineteen), Olen Montgomery (seventeen), Willie Roberson (seventeen), Ozie Powell (sixteen), Eugene Williams (thirteen), and Roy Wright (twelve). Some were related by blood; others had known each other previously; others were strangers. The train also sheltered a number of poor white men, as well as two female millworkers, and sometime prostitutes, named Victoria Price (aged twenty-one) and Ruby Bates (seventeen).

As the train moved across northern Alabama, a fight broke out between the black and white vagabonds, probably as a result of white taunts. “We beat the hell out of them,” explained one of the Scottsboro defendants years later, recalling what took place when a group of whites jumped into one of the cars where the blacks had gathered. After being thrown from the moving train, seven of the bedraggled whites reported the incident to the stationmaster in Stevenson, who wired ahead to Paint Rock. There, the train was stopped and searched by a deputized group of whites with rifles, shotguns, and pitchforks. The blacks on

board were arrested and taken to Scottsboro, the seat of Jackson County.

As the posse searched the train, it also discovered Price and Bates. The two women were from the lowest strata of white society, where poverty eroded the division between the races, and as such they typically would have been subject to the disdain of polite society. But to escape contempt and garner sympathy and attention, they made the false accusation that they had been raped by the black stowaways. The explosive charge almost invariably would have led to the death of those accused, through either legal or extra-legal means, so that Southern white honor could be reclaimed.

The trials began on April 6, 1931, before Judge Alfred E. Hawkins. More than 100 soldiers from the Alabama National Guard protected the courtroom from a crowd of thousands of spectators. The defendants offered widely conflicting accounts of what had happened, some pointing the finger at their codefendants, and the prosecution took advantage by dividing the case into four separate trials. In short order, all nine were found guilty, and eight were sentenced to death by electrocution. A mistrial was declared in the case of Roy Wright, a minor, because the all-white jury was deadlocked on whether he should be executed.

In the meantime, the case had attracted the attention of the Communist Party. Seeking to find a rallying cry for American radicalism and to increase its African-American membership, the party used political protest to bring the case to public attention, and shortly after the convictions its legal arm, the Industrial Labor Defense (ILD), edged out the liberal National Association for the Advancement of Colored People and secured the right to represent the defendants. Under ILD leadership, the case was brought to the U.S. Supreme Court, which in *Powell v. Alabama* (1932) reversed seven of the convictions, ruling that the careless way in which Judge Hawkins had appointed the original counsel for the defense had denied the defendants due process of law.

Haywood Patterson, the first to face retrial, came before the court of Judge James Edward Horton in Decatur in March 1933. Criminal defense attorney Samuel Leibowitz, who had been retained by the ILD, tried unsuccessfully to challenge the grand and petit juries on the ground that blacks had been systematically excluded from the jury rolls. At trial, he also challenged Price’s testimony (Bates had recanted her accusation) and presented the testimony of one of the original examining physicians that the two young women had not been raped. In his closing argument, County Solicitor Wade Wright urged the jury to show

“that Alabama justice cannot be bought and sold with Jew money from New York.” The jury found Patterson guilty and sentenced him to die.

Fearing mob violence, Judge Horton postponed the trials of the other defendants. Next came a surprise: influenced by the advice of a second physician who had examined Price and Bates, and who also believed they had not been raped, Judge Horton set aside the decision of the jury and ordered a new trial (he was never again elected to public office). Two of the defendants were then tried and convicted before Judge William Washington Callahan beginning in November 1933. These convictions were later reversed by the U.S. Supreme Court in *Norris v. Alabama* (1935), based on Leibowitz’s challenge that the defendants had been denied equal protection of the laws because blacks had been excluded from the rolls of potential jurors.

After indictments were issued by a new grand jury, four of the Scottsboro defendants were once again tried and convicted. One was sentenced to death, the others for prison terms ranging from seventy-five to ninety-nine years. Another received twenty years for stabbing a deputy sheriff. Charges against the remaining defendants were dropped. Although the “Scottsboro Boys” eventually left the public eye, their ordeal left behind a body of law that advanced the rights of criminal defendants—a signal example of the paradoxical process in which antiliberal political movements have advanced liberal legal ideals—and a symbol of the struggle against racial injustice that nurtured a memory of 1930s political radicalism into the 1960s.

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References and Further Reading

- Carter, Dan T. *Scottsboro: A Tragedy of the American South*. Baton Rouge: Louisiana State University Press, 1969.
- Goodman, James. *Stories of Scottsboro*. New York: Vintage, 1994.
- Norris, Clarence Norris, and Sybil D. Washington. *The Last of the Scottsboro Boys: An Autobiography*. New York: Putnam, 1979.
- Weiner, Mark S. *Black Trials: Citizenship from the Beginnings of Slavery to the End of Caste*. New York: Alfred A. Knopf, 2004.

Cases and Statutes Cited

- Powell v. Alabama*, 287 U.S. 45 (1932)
- Norris v. Alabama*, 294 U.S. 587 (1935)

See also **Capital Punishment: Lynching; Jury Trials and Race; National Association for the Advancement of Colored People (NAACP)**

SEALED DOCUMENTS IN COURT PROCEEDINGS

Whether the media should have access to pleadings filed under seal in court proceedings has been a debated issue in many cases. The argument by media in court proceedings is that all filed court documents are presumptively open to the public. In many cases, for example *United States v. McVeigh*, 918 F. Supp. 1452 (W. D. Okla. 1996), *Associated Press v. United States District Court for the Central District of California*, 705 F.2d 1143, 1145 (9th Cir. 1983), and *Seattle Times Co. v. United States District Court for the Western District of Washington*, 845 F.2d 1513, 1517 (9th Cir. 1988), the media has based its claim on the common law right of access to court documents, the qualified First Amendment right of access to court proceedings, and the extension of this qualified First Amendment right to court documents. The media has maintained that in the event any proceedings or documents are to be sealed, the public should be given the opportunity to object (*McVeigh*, 918 F. Supp. 1452).

Defendants and parties on the side opposite the media have argued that unsealing court documents would divulge attorney work product, give insight to the strategy of the defense, and deprive a party of an opportunity to present a fair defense as guaranteed in cases such as *Washington v. Texas*, 388 U.S. 14, 19 (1967) and *Crane v. Kentucky*, 476 U.S. 683, 690 (1986). If, after the parties have been required to demonstrate justification for sealing or closure, the court, then, rules in favor of closure, the court will make a specific finding on the record to support its decision, as outlined by the Fourth Circuit in *In re Washington Post Co.*, 807 F.2d 383, 390-91 (9th Cir. 1986). Although, historically, there has existed a general policy of openness at (criminal) court proceedings, the “experience and logic” test, as stated in *Press Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) (“Press Enterprise II”) has shown that publicity may threaten a defendant’s right to a fair trial, and, in those cases, the defendant’s rights will override the qualified First Amendment right of access.

Press Enterprise II recognizes a qualified right of access to court proceedings but holds this common law right subject to the supervisory powers of each individual court. Closure is also permitted in cases where it would be “essential to preserve higher values and is narrowly tailored to serve that interest” (*United States v. McVeigh*, 918 F. Supp. 1452, 1463 [W.D. Okla. 1996] [Oklahoma City bombing case trial]). Although the public possesses a legitimate interest in court proceedings, the timing of the disclosure to the public is a significant factor in the balancing of the

affected interest. The stage of the proceedings may determine the questions of access (*Id.* at 1464).

The approach that has been adopted by courts to determine whether previously sealed documents should be unsealed and whether future documents should be sealed consideration of the following factors together. First, the court determines whether a matter involves an activity within the tradition of free public access to information concerning criminal prosecutions. Second, the court looks to see whether public access will play a significant positive role in the activity and in the functioning of the process. Third, the court decides whether there is a substantial probability that some recognized interest of higher value than public access to information would be prejudiced or adversely affected by the disclosure. Fourth, the court inquires whether the need for protection of that interest overrides the qualified First Amendment right of access. Finally, the court determines whether closure is essential to protect the interest considering all reasonable alternatives.

The debate of whether the media should have access to sealed documents in court proceedings has been answered by the courts in a way to try to achieve the correct balance of the interests of all parties. The general rule that has developed is that proceedings are presumptively open to the public, but are closed when cause is shown.

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References and Further Reading

Jones, Stephen, *McVeigh, McJustice, McMedia*, The University of Chicago Legal Forum, Volume 1998: 53–108.

Cases and Statutes Cited

Associated Press v. United States District Court for the Central District of California, 705 F.2d 1143 (9th Cir. 1983)
Crane v. Kentucky, 476 U.S. 683 (1986)
In re Washington Post Co., 807 F.2d 383 (4th Cir. 1986)
Press Enterprise Co. v. Superior Court, 478 U.S. 1 (1986) (“Press Enterprise II”)
Seattle Times Co. v. United States District Court for the Western District of Washington, 845 F.2d 1513 (9th Cir. 1988)
United States v. McVeigh, 918 F. Supp. 1452 (W.D. Okla. 1996)
Washington v. Texas, 388 U.S. 14 (1967)

SEARCH (GENERAL DEFINITION)

The Fourth Amendment to the U.S. Constitution states that “[t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable

cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” As construed by the U.S. Supreme Court, this language means that if a government action is considered a “search” or a “seizure,” it must either be authorized by a warrant issued by a magistrate, or—in emergency situations or for lesser intrusions—there must be some other reasonable justification for the action. However, if the government’s action is not a search or a seizure, then the Fourth Amendment is not implicated. Thus, the definition of these two words is crucial in determining the limitations on government efforts to investigate crime and other activities. This entry discusses the definition of search and the rules that govern searches.

The Property-Based Definition of Search

To the average person, a search is an attempt to find something. But the Supreme Court has never adopted this simple definition of the term in the Fourth Amendment setting. Instead, it has looked to property and privacy concepts in establishing the threshold for constitutional restrictions on government efforts to obtain information about its citizenry.

For some time, the Court relied on property law to determine whether a police action was a search. In *Olmstead v. United States*, (1928), for instance, the Court held that no search occurred when federal agents eavesdropped on a conversation using a tap of telephone wires, because the tap was located outside the premises of the defendants. Similarly, in *Goldman v. United States*, (1942), the Court held that the Fourth Amendment was not implicated when police used a “detectaphone” placed against an office wall to hear private conversations. In neither case was there a physical trespass on the defendants’ privacy. Conversely, in *Silverman v. United States*, (1961), the Court held that electronic bugging carried out with a “spike mike” inserted under the baseboard of a wall until it made contact with a heating duct running throughout the defendant’s house was a search, requiring a warrant. Even physical intrusion was not a search, however, if the defendant consented to it. Thus, in *On Lee v. United States*, (1952), police did not conduct a search when they overheard conversations through a “bug” concealed on an undercover agent, because even though the agent was on the defendant’s property at the time of the overheard conversation, he was there by invitation and no trespass occurred.

Most cases involving traditional, nontechnological police intrusions do involve trespass. Thus, police entry into homes, automobiles, and luggage was

considered a Fourth Amendment search under the property-based approach. However, in *Hester v. United States*, (1924), police trespass on private property beyond the “curtilage” of the home was held not to be a search, because such “open fields” are not a “person, house, paper or effect” explicitly mentioned in the Fourth Amendment and thus are not a “constitutionally protected area.” On the other hand, business premises, which are also not mentioned in the Fourth Amendment, did receive its protections, apparently because they are analogous to homes.

The Reasonable Expectations of Privacy Definition of Search

Katz v. United States, (1967) seemed to change dramatically the Supreme Court’s approach to the Fourth Amendment. In that case, police used electronic means to eavesdrop on a phone call made from a phone booth. The government argued that this surveillance did not constitute a Fourth Amendment search both because a phone booth is not a “constitutionally protected area” identified in the Fourth Amendment and because the bugging device did not physically intrude into the booth. Based on precedent, these arguments should have won. But the Court stated that the Fourth Amendment “protects people, not places,” and found that Katz deserved its protections once he closed the door to the booth and excluded the uninvited ear. In a concurring opinion, Justice Harlan noted that, although the Fourth Amendment protects people, explaining how it does so will usually require reference to a place. Rather than using property law to describe which places are protected, however, Harlan suggested that a search should be said to occur when police infringe “expectations of privacy that society is prepared to recognize as reasonable.” It was this “reasonable expectation of privacy” language that the Court subsequently came to use in defining “search” for Fourth Amendment purposes.

Although the result in *Katz* suggested that the decision would broaden the scope of the Fourth Amendment beyond the constraints imposed by property law, in fact most of the Court’s post-*Katz* decisions are fully consistent with the Court’s earlier jurisprudence. Both *Hester* and *On Lee* have been affirmed since *Katz*, the first holding on the ground that people do not have a reasonable expectation of privacy in private property that is not adjacent to the home and the second because they assume the risk their acquaintances work for the police. The assumption-of-risk rationale was expanded in *Smith v.*

Maryland, (1979), which held that people have no reasonable expectation of privacy in the phone numbers they dial (because they know or should know the phone company records these numbers and may hand them over to authorities) and in *United States v. Miller*, (1976), which held that no search occurs when prosecutors subpoena information disclosed to a bank (because the “depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the government”). Nor does a search occur when police use a dog to sniff luggage, an airplane to spy on a backyard or business cartilage, or an electronic beeper to trace the whereabouts of a car. Furthermore, police do not have to be concerned about the Fourth Amendment when they go through garbage left at curbside or look inside a barn from open fields. Probably none of these actions would have been searches under a trespass analysis either, but the point is that *Katz* changed nothing in these settings.

A few cases suggest that the expectation-of-privacy rubric is somewhat more expansive than property-based analysis. In *Bond v. United States*, (2000), the Court held that police engaged in a Fourth Amendment search when they tried to discern the contents of a soft bag by feeling its contours. Although no physical intrusion occurred and the bag was not moved, the touching of the bag made the police action a search. Similarly, in *Kyllo v. United States*, (2001), the Court concluded that use of a thermal imaging device to detect heat differentials inside a home was a search, even though no physical intrusion occurred and the police using the device were stationed on public property. However, the *Kyllo* opinion also indicated that if the spying of the home interior from a lawful vantage point had been with the naked eye, with a technological device that merely replicated what the naked eye could have seen, or with a technological device that is in “general public use” (a flashlight or binoculars), then no search would have occurred. Thus, even in connection with the most private enclave, the home, the Court’s assessment of “reasonable expectations of privacy” narrowly defines the privacy we can expect from government intrusion.

A reading of the Supreme Court’s cases and lower court cases applying the expectations of privacy test suggests seven factors that might be relevant in deciding whether a search has occurred: (1) the nature of the place observed (for example, a home v. a public park); (2) the steps taken to enhance privacy (for example, a curtained window v. an open porch a few feet from the street); (3) the degree to which the surveillance requires a physical intrusion onto private property (for example, viewing from a tree in the fenced-in backyard of a house v. viewing from

the sidewalk); (4) the nature of the object or activity observed (for example, a conversation v. contraband or outdoor piping); (5) the degree to which any technology used to view the premises is available to the general public (for example, satellite photography v. a flashlight); (6) the extent to which any technology used “replaces” rather than merely “improves” the senses (for example, a device that can see through clothes v. binoculars); and (7) the extent to which the viewing is unnecessarily pervasive, invasive, or disruptive (for example, surveillance of hundreds of people v. surveillance of one person; week-long surveillance v. a brief viewing). Note that many of these factors, especially (2), (3), and (5), make it less likely poor people, who have fewer means of protecting their privacy, will benefit from the Fourth Amendment.

Other Perspectives on the Definition of Search

Because it establishes when the government must abide by the Fourth Amendment, the definition of search is a major determinant of the type of society in which we live. Many commentators disagree with both the property and the privacy approaches to that definition, at least as applied by the Supreme Court. One suggested alternative is to define search in terms of the “positive law,” that is, the law governing relationships between private citizens. That law includes not only the rules of trespass but also the tort and regulatory rules governing third-party access to bank records, phone numbers, garbage, and the like. Another suggested alternative is to base the scope of “expectations of privacy society is prepared to recognize as reasonable” on an empirical assessment of the expectations society actually has. Preliminary research in this vein indicates, not surprisingly, that most people do not expect acquaintances, banks, or phone companies to be government agents, and that most people think that investigative techniques such as binocular surveillance of homes and beeper tracking of cars is much more intrusive than the Court does. A third alternative is to base the definition of search on historical information about what the Framers of the Constitution considered intrusive. Each of these approaches has problems. Positive law may be over or under inclusive (compare laws making any presence on private property a trespass to the absence of laws governing spying into backyards), society’s views can be hard to discern and may be variable, and historical attitudes, even if they can be ascertained, may not have anything to say about modern-day surveillance.

A final approach is to define search as a layperson would: an attempt to find evidence of crime. The main reason the Court has avoided this simple definition is that, once a government action is labeled a search, precedent has usually required that the police have probable cause, a level of certainty akin to a more-likely-than-not finding. Because police look for evidence of crime not only in houses but also in public and quasipublic places, the “lay definition” of search, combined with the probable cause requirement, would severely hamper law enforcement. If, however, the Court were willing to permit less intrusive searches on less than probable cause (and permit the least intrusive searches on little or no suspicion), that tension would be mitigated considerably. However, as discussed later, the Court has been unwilling to adopt this “proportionality” approach to Fourth Amendment jurisprudence.

Rules That Apply When a Government Action Is a Search

As just noted, if a government action is a search, police usually must have probable cause to believe that evidence will be discovered in the place searched. Following is a more detailed summary of the rules governing searches, organized in terms of the Fourth Amendment’s “persons, houses, papers and effects.”

Searches of persons generally require probable cause, but there are several exceptions. A search of a person incident to arrest requires probable cause for the arrest but no independent suspicion for the search. A frisk, or patdown, that occurs after a stop (which is a brief detention short of an arrest) may be based on reasonable suspicion, a standard that requires articulable grounds but not at the probable cause level (*Terry v. Ohio*, 1968). Finally, an inventory search of an individual who has been arrested requires no suspicion as long as it is pursuant to a written inventory policy.

If the search is of a house or a private business, police must usually have a warrant, unless there are exigent circumstances. Such circumstances exist when police are in hot pursuit of a felon, when police have arrested a person inside the home or business and want to check the arrestee’s immediate surroundings for confederates, or when they have reasonable suspicion that a confederate is hiding somewhere else in the vicinity. If the search of the house or business is an administrative inspection (for example, a health or safety inspection), then the probable cause for the warrant need not be “individualized” but can consist of a showing that the structure is in an area or

involved in a type of industry that is due for inspection. Furthermore, warrants are never needed to inspect “pervasively regulated industries” on the theory that owners of such enterprises are on notice they will be subject to search.

At one time searches of papers were prohibited unless they were considered instrumentalities of crime (that is, they were instrumental in carrying out the crime—accounts of bookmaking—rather than “mere evidence” of it). Today, virtually all papers, except perhaps private diaries and the like, may be searched in one of two ways. First, the government may proceed pursuant to a subpoena based on a finding that the papers are “relevant” to a criminal investigation (a level of certainty lower than both probable cause and reasonable suspicion). Second, the government may seek the papers pursuant to a warrant based on probable cause, a method likely to be used when police are concerned the possessor of the papers is likely to destroy them rather than respond to a subpoena, or where the fact that the papers exist is incriminating and thus compelling their production through a subpoena would violate the Fifth Amendment (see *Fisher v. United States*, 1976).

Finally, effects, or personal property, such as cars, luggage, clothing, and the like, can be searched if there is probable cause. If these items are in a house, they need to be listed in a warrant, found in a place where items listed in the warrant may be found, or found in plain view while a valid warrantless search is being carried out. With respect to searches of cars and other moveable vehicles, no warrant is required. But probable cause is, unless the occupants of the car have been arrested or police have reasonable suspicion that the occupants can reach a weapon in the car. Furthermore, if a car is lawfully impounded (because, for example, the occupants have been arrested or there are outstanding parking tickets), it may be inventoried under a written inventory policy.

Standing

Standing doctrine determines when a particular defendant can assert a Fourth Amendment claim. It is related to the definition of search because a criminal defendant’s standing to contest a given police action depends on whether it infringes the defendant’s own legitimate expectations of privacy. Thus, the Supreme Court has held that a defendant cannot challenge the government’s burglarization of a third party’s apartment and briefcase, even though the evidence discovered was used against the defendant, because the defendant had no expectation of privacy in

the third party’s premises or effects. Similarly, the Court held that defendants could not challenge the search of a car that produced bullets and a gun subsequently used against them in court, because they neither owned nor were driving the car at the time of the search.

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References and Further Reading

- Amsterdam, Anthony G., *Perspectives on the Fourth Amendment*, Minnesota Law Review 58 (1974): 349.
 Slobogin, Christopher, *The World without a Fourth Amendment*, UCLA Law Review 39 (1991): 1–107.
 Slobogin, Christopher, and Joseph Schumacher, *Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at “Understandings Recognized and Permitted by Society,”* Duke Law Journal 42 (1993): 727–775.
 Sundby, Scott, “Everyman’s” Fourth Amendment: Privacy or Mutual Trust between Government and Citizen?, Columbia Law Review 94 (1994): 1752–1812.
 Stuntz, William J., *Privacy’s Problem and the Law of Criminal Procedure*, Michigan Law Review 93 (1995): 1016–1078.
 Whitebread, Charles, and Christopher Slobogin. *Criminal Procedure: An Analysis of Cases and Concepts*. 4th Ed. New York, NY: Foundation Press, 2000, chapters 3–14.
 Yeager, Daniel, *Search, Seizure and the Positive Law: Expectations of Privacy Outside the Fourth Amendment*, Journal of Criminal Law & Criminology 84 (1993): 249–309.

Cases and Statutes Cited

- Bond v. United States*, 529 U.S. 334 (2000)
Fisher v. United States, 425 U.S. 391 (1976)
Goldman v. United States, 316 U.S. 129 (1942)
Hester v. United States, 265 U.S. 57 (1924)
Katz v. United States, 389 U.S. 347 (1967)
Kyllo v. United States, 533 U.S. 27 (2001)
Olmstead v. United States, 277 U.S. 438 (1928)
On Lee v. United States, 343 U.S. 747 (1952)
Silverman v. United States, 365 U.S. 505 (1961)
Smith v. Maryland, 442 U.S. 735 (1979)
Terry v. Ohio, 392 U.S. 1 (1968)
United States v. Miller, 425 U.S. 435 (1976)

See also Amsterdam, Anthony G.; *Carroll v. United States*, 267 U.S. 132 (1925); *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); *Drug Testing; Electronic Surveillance, Technological Monitoring, and Dog Sniffs; Exclusionary Rule; Fisher v. United States*, 425 U.S. 391 (1976); *Florida v. Riley*, 488 U.S. 445 (1989); *Hester v. United States*, 265 U.S. 57 (1924); *Hoffa v. United States*, 385 U.S. 293 (1966); *Katz v. United States*, 389 U.S. 347 (1967); *Kyllo v. United States*, 533 U.S. 27 (2001); *Olmstead v. United States*, 277 U.S. 438 (1928); *Open Fields; Privacy; Probable Cause; Search Warrants; Seizures; Terry v. Ohio*, 392 U.S. 1 (1968); *United States v. Miller*, 425 U.S. 435 (1976); *Warrantless Searches*

SEARCH WARRANTS

A warrant is a document issued by judicial officers that authorizes law enforcement officials to make an arrest or carry out a search for evidence of crime. Warrants are an important protection against government abuse of power because, as expressed by Justice Jackson in *Johnson v. United States*, (1948), they require that inferences about criminal activity “be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.” The warrant also assures the individual who is searched or seized that the officer has authority to do so and makes clear the limits of that authority.

When Warrants Are Required

The most important source of law concerning warrants and their use is the Fourth Amendment to the United States Constitution, which states that “[t]he right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized.” The second part of the Fourth Amendment clearly sets out the characteristics of a valid warrant: it must be based on information obtained from a sworn applicant that shows there is probable cause to believe a suspect or evidence of illegal activity will be found. It must also describe with particularity the place to be searched and things to be seized. What the language of the Fourth Amendment does not make clear is when such a warrant is required.

The debate over this issue has been vigorous. One stance, which could be called the “warrant presumption” view, was forcefully advanced by Justice Potter Stewart. In *Katz v. United States*, (1967), he stated that searches and seizures should be authorized by a warrant “subject only to a few specifically established and well-delineated exceptions.” In contrast, the “reasonableness” approach, advocated by Chief Justice Rehnquist, among others, is that warrants are only necessary when failing to obtain one would be unreasonable. As Rehnquist stated in *Michigan v. Clifford*, (1984), there are times when “the utility of requiring a magistrate to evaluate the grounds for a search . . . is so limited that the incidental protection of an individual’s privacy interests simply does not justify imposing a warrant requirement.” The first view emphasizes the second clause of

the Fourth Amendment, whereas the second view relies more heavily on the Amendment’s reasonableness language.

The second view is probably more consistent with the history of the Fourth Amendment. The primary, if not the only, concern of those who drafted the Amendment was the “general warrant.” General warrants were usually issued by executive officers of the British Crown rather than judges, could be based on a “bare suspicion,” and rarely identified a specific place to be searched, thus allowing fishing expeditions by British agents in search of evidence of sedition or possession of uncustomed goods. As Professor Davies states, “the historical concerns were almost exclusively about the need to ban house searches under general warrant[;] the evidence indicates that the Framers understood ‘unreasonable searches and seizures’ simply as a pejorative label for the inherent illegality of any searches or seizures that might be made under general warrants.” Thus, the Fourth Amendment was designed to regulate warrants when they were used, not declare warrantless searches presumptively unreasonable. Indeed, during colonial times most searches for evidence of street crime were warrantless, carried out by constables and ordinary citizens as part of a “Hue and Cry” against persons suspected of a felony.

Whether or not grounded in history, today’s Fourth Amendment jurisprudence recognizes a large number of situations (well over twenty) in which warrants are not required. These “exceptions to the warrant requirement” can be divided into four categories (for cites to the cases see the entries for Search and for Seizure). First, and most numerous, are the exceptions based on exigent circumstances that purportedly make obtaining a warrant impossible or impracticable. Among these are the “hot pursuit” exception (when police are chasing a felon); searches incident to arrest; the “vehicle exception” that allows warrantless searches of moveable vehicles such as cars and boats; the “evanescent evidence” exception that permits warrantless seizure of evidence that is in danger of imminent destruction; and the doctrine that police may stop and frisk suspicious individuals. A second set of exceptions rests on the assumption that the police action does not infringe a substantial privacy interest. Thus, warrantless searches are permitted when the subject voluntarily consents, when the entity being searched is a “heavily regulated industry,” or when the person searched is a parolee, and warrantless stops are permitted in connection with roadblocks for the purpose of detecting illegal immigrants or drunk drivers. Third, there are numerous “special needs” situations—a phrase coined by the U.S. Supreme Court—where a warrant requirement might frustrate legitimate purposes of government other

than crime control (for example, school searches; drug testing of government workers and students; business searches). Finally, there are situations where warrants are considered unnecessary because other devices already curb police discretion (for example, inventory searches of cars or people based on written inventory policies).

As a result of these various exceptions, only about 5 percent of all searches are based on a warrant, and an even smaller proportion of seizures (arrests and stops) are authorized by warrant. Warrants are most often sought in connection with searches of homes. Under U.S. Supreme Court case law, arrest warrants are required to make an arrest in the home, and search warrants are required to search the home for evidence or for a suspect. However, here as elsewhere exigent circumstances permit dispensing with a warrant. Exigency exists when police are pursuing a fleeing felon, evidence of a felony is in imminent danger of being destroyed, or the police or a third party is in imminent danger. Lower courts have permitted warrantless entries when pursuit is not particularly “hot,” when police are responsible for creating the exigency (for instance, when the police make their presence known rather than go to seek a warrant), and even when police only have reasonable suspicion (a level of certainty below probable cause) that a suspect will escape or evidence be destroyed.

The Usefulness of Warrants

The courts’ unwillingness to impose a rigorous warrant requirement may result in part from the concern described by Chief Justice Rehnquist: a warrant requirement may undermine law enforcement efficiency yet not provide appreciable protection beyond the stipulation that searches and seizures be based on probable cause (or reasonable suspicion), a stipulation that is amply enforced through post-search exclusion of illegally seized evidence. A seven-city study of the warrant process found that police often take at least half-a-day to draft a warrant application. Yet magistrates spend, on average, less than three minutes assessing the application and deliberating on whether to issue a warrant. The process often seems to be rubber stamp in nature, with police seeking out those magistrates known to be sympathetic to law enforcement. Less than 10 percent of warrant applications are rejected.

The same research also suggested, however, that the process of justifying a search or seizure before it takes place forces police to be more careful. Many

departments require that warrant applications be reviewed by a prosecutor or supervising officer. Magistrates often require police to amend their applications. In light of these facts, a 5 to 10 percent rejection rate may be reasonable. Although the warrant application process can be cumbersome, it can also be streamlined considerably through the telephonic warrant option. Under this option, the police, often with the prosecutor online, contact the judge by phone and recite the relevant facts; if probable cause is found, the magistrate signs the “original” warrant, and the officer is authorized to sign and serve a “duplicate original warrant.” Research indicates that this process inhibits judge-shopping (because judges rotate through the “duty judge” position), reduces the time needed to obtain authorization from an average of three or four hours to one and one-half hours, and usually produces more information than written affidavits in similar cases.

The question remains whether a warrant is necessary when police know a serious sanction (exclusion of evidence and perhaps a damages action against them) will be imposed if they violate the Fourth Amendment. Professor Stuntz has suggested two reasons for maintaining an *ex ante* (before-the-fact) warrant requirement despite the existence of *ex post* (after-the-fact) sanctions. First, police have been known to lie about the facts relevant to determining whether probable cause existed at the time of the search or seizure. Such lying is more difficult to pull off successfully if *ex ante* review, through a warrant, is required, because police do not yet know what they will find or how they will find it. *Ex post*, on the other hand, shaping the story to fit the facts is much easier. Second, judges deciding whether to exclude evidence are likely to be affected by the fact that the police found the evidence. This hindsight bias makes a neutral determination about probable cause difficult. During *ex ante* review, on the other hand, the judge does not know what the police will find and thus is likely to be more critical of police assertions.

The Elements of a Valid Warrant

To be valid, a warrant must meet several requirements. First, it must be issued by a “neutral and detached” magistrate. The Supreme Court has held that this requirement is not met when the magistrate is also a prosecutor, is paid only when a warrant is issued (but not when one is not issued), or accompanies police to the scene of a search to determine what items should be seized. On the other hand, magistrates need not be legally trained, and many are not.

The Supreme Court held in *Shadwick v. Tampa* (1972) that court clerks may issue arrest warrants for violation of city ordinances.

A second requirement is that the warrant be based on probable cause. Probable cause to arrest exists when the facts and circumstances are sufficient to warrant a prudent person in believing that the person to be arrested has committed or is committing a crime, and probable cause to search exists when the same prudent person would believe that the evidence or persons to be seized are located at the place to be searched. Most courts equate probable cause with a level of certainty akin to a more-likely-than-not standard. A much-litigated issue is the extent to which the probable cause may be based on hearsay. The Supreme Court has held that an application that relies on statements by another police officer or an ordinary citizen generally should be considered credible. However, if the application is based on the assertions of a “confidential informant,” often a criminal himself, the magistrate must generally make further inquiry into the basis of the allegation and the credibility of the informant. This inquiry, outlined in cases such as *Aguilar v. Texas*, (1964), *Spinelli v. United States*, (1969), and *Illinois v. Gates*, (1983), considers whether the application makes clear that the informant personally observed the criminal activity (or at least describes the criminal activity in sufficient detail that the assertions are unlikely to be casual rumors), whether the informant has a record of reliable informing, and whether the informant makes self-incriminating disclosures (which are thought to make the informant’s other assertions more reliable). The magistrate may also consider the extent to which police have corroborated the informant’s assertions, which can include police knowledge of the suspect’s reputation. All of these factors are to be considered in the “totality of the circumstances” in determining whether the informant is sufficiently credible. Although police have been known to doctor warrant applications and even fabricate the existence of confidential informants, courts have rarely required police to produce informants in front of the magistrate, out of fear that a valuable law enforcement resource would thereby be compromised.

To avoid the general warrant of colonial infamy, the warrant must also describe with particularity the place to be searched and the person or thing to be seized. However, in *Maryland v. Garrison* (1987), the Court held that a mistake as to the description of the place to be searched would not invalidate the warrant unless the requesting officers knew or should have known about the error. It has also upheld against a particularity challenge a warrant that listed several items to be seized, but ended with the phrase,

“together with other fruits, instrumentalities and evidence of crime at this [time] unknown” (*Andresen v. Maryland*, 1976).

Finally, the warrant must be executed properly. Federal and most state laws require that warrants be executed during the daytime or early evening unless there are good grounds for executing the warrant at some other time. The warrant must also be executed before it goes stale (see, for example, *Sgro v. United States*, 1932, finding that a delay of three weeks in executing a warrant for search of intoxicants rendered the search invalid). To avoid unnecessary panic, protect the police, and enhance dignity and privacy, police must knock and announce their presence when executing a warrant, unless there is reasonable suspicion to believe knocking and announcing would endanger them or evidence (*Richards v. Wisconsin*, 1995). Police may only search those areas where items in the warrant may be found, although if they see an unlisted item in “plain view” in such an area they may seize it; thus, police with a warrant authorizing only seizure of a rifle may not search in kitchen drawers, but if they come across drugs while looking for the rifle in a closet, they may seize them (*Coolidge v. New Hampshire*, 1971). Finally, federal and most state laws require police to file an inventory of the seized evidence, which is to be given to both the magistrate and the searched party. However, under the USA Patriot Act, § 213(2)(b), police are allowed to undertake “sneak and peak” searches that allow the police to delay notification if they believe notice will compromise an investigation.

When a Warrant Is Insufficient

There are several situations in which even a warrant that meets all the requirements just described is insufficient. Under Title III of the federal Omnibus Crime Control and Safe Streets Act, 18 U.S.C. § 2518, which applies to state officials as well, when the government wants to conduct electronic surveillance, it generally must not only obtain a warrant based on probable cause but show that the surveillance is the only way it can obtain the evidence. When the government wants to obtain evidence located inside someone’s body (for example, a bullet), an adversarial hearing may have to be held at which the court considers the extent to which the procedure threatens the health, safety, and dignity of the individual and the extent to which prohibiting the procedure would affect the community’s interest in fairly and accurately determining guilt or innocence. Similarly, large-scale seizures of pornographic books and films constituting a prior

restraint must be preceded by an adversary hearing on the question of obscenity.

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References and Further Reading

- Davies, Thomas Y., *Recovering the Original Fourth Amendment*, Michigan Law Review 98 (1999): 547–750.
 Grano, Joseph D., *Probable Cause and Common Sense: A Reply to the Critics of Illinois v. Gates*, Michigan Journal of Law Reform 17 (1984): 465.
 Greenhalgh, William W., and Mark J. Yost, *In Defense of the “Per Se” Rule: Justice Stewart’s Struggle to Preserve the Fourth Amendment’s Warrant Clause*, American Criminal Law Review 31 (1994): 1013–1098.
 Stuntz, William J., *Warrants and Fourth Amendment Remedies*, Virginia Law Review 77 (1991): 881–943.
 Van Duizend, Richard, L. Paul Sutton, and Charlotte A. Carter, *The Search Warrant Process: Preconceptions, Perceptions and Practices*. Williamsburg: National Center for State Courts, 1985.

Cases and Statutes Cited

- Aguilar v. State of Texas*, 378 U.S. 108 (1964)
Andresen v. Maryland, 427 U.S. 463 (1976)
Coolidge v. New Hampshire, 403 U.S. 443 (1971)
Illinois v. Gates, 462 U.S. 213 (1983)
Johnson v. United States, 333 U.S. 10 (1948)
Katz v. United States, 389 U.S. 347 (1967)
Maryland v. Garrison, 480 U.S. 79 (1987)
Michigan v. Clifford, 464 U.S. 287 (1984)
Sgro v. United States, 287 U.S. 206 (1932)
Shadwick v. City of Tampa, 407 U.S. 345 (1972)
Spinelli v. United States, 393 U.S. 410 (1969)
Richards v. Wisconsin, 520 U.S. 385 (1997)

See also *Aguilar v. Texas*, 378 U.S. 108 (1964); *Arrest Warrants*; *Carroll v. United States*, 267 U.S. 132 (1925); *Chimel v. California*, 395 U.S. 752 (1969); *Connally v. Georgia*, 429 U.S. 245 (1977); *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); *Exclusionary Rule*; *General Warrants*; *Illinois v. Gates*, 462 U.S. 213 (1983); *Jailhouse Informants*; *Katz v. United States*, 389 U.S. 347 (1967); *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319 (1979); *Payton v. New York*, 445 U.S. 573 (1980); *Search (General Definition) Seizures*; *Warrant Clauses (IV)*; *Warrantless Searches*

SECONDARY EFFECTS DOCTRINE

The secondary effects doctrine is an important principle in current First Amendment jurisprudence. A court applies the doctrine if it finds that the regulation of speech is aimed at the “secondary effects” of the speech and not at the content of the speech itself. Under the doctrine, a court may treat a seemingly content-based speech regulation, which normally is

entitled to strict scrutiny, as a content-neutral regulation, and thus apply the less rigorous intermediate scrutiny. Because content-based regulations are rarely upheld under strict scrutiny and content-neutral regulations are much easier to sustain, the application of the secondary effects doctrine may determine whether a law is constitutional.

The Supreme Court laid the foundation for the secondary effects doctrine in two cases upholding restrictive zoning of adult entertainment. In *Young v. American Mini-Theatres*, a plurality of the Court found that a zoning law that prevented adult theatres from operating within 1,000 feet of any each other or within 500 feet of any residential area was passed to prevent a secondary effect of the speech—avoiding the crime associated with adult entertainment—and not to prevent the dissemination of offensive speech. In *City of Renton v. Playtime Theatres, Inc.*, a majority of the Court embraced the secondary effects doctrine, finding that an ordinance that prohibited adult theatres from being located within 1,000 feet of any residential zone, church or park, or within one mile of any school was not aimed at the content of the films shown at adult motion picture theatres but at the secondary effects of such theatres on the surrounding communities. Thus, the test applied to the zoning regulation was the traditional intermediate scrutiny test: Does the ordinance serve a substantial governmental interest and allow for reasonable alternate avenues of communication?

The secondary effects doctrine has been criticized as being unprincipled and unwise. If the application of a law depends on its content—which it clearly did in *Renton* and *Young*—why should it be treated as content neutral? Moreover, the notion of secondary effects could potentially apply to all speech regulation: the government could always point to some secondary effect of the speech and thus claim that they had no motive to suppress the content of the speech.

Some critics took solace in the fact that the Court seemed to apply the doctrine only to low value, or sexually explicit speech. Since *Renton*, however, the Court has indicated a willingness to expand the doctrine beyond the area of zoning and adult entertainment. For example, in *Boos v. Barry*, the Supreme Court considered whether a District of Columbia law that prohibited the display of signs criticizing foreign governments within 500 feet of their respective embassies violated the First Amendment. The government argued that the ordinance was not based on the content of the speech but rather to protect our international law obligations by preventing speech that offends the dignity of foreign diplomats. Although the Court struck down the law, it accepted the possible application of the secondary

effects doctrine even applied to political speech. The emotive impact of the speech on the audience, however, was not the type of secondary effect referred to in *Renton*. The Court has since applied the secondary effects doctrine to nude dancing and to hate speech regulations.

MARCY STRAUSS

SECULAR HUMANISM AND THE PUBLIC SCHOOLS

Secular humanism can be taught about in the public schools, but not as a preferred way of belief or living. This is the same rule as is applicable to all religions. With this important limit, the decision is for local school boards whether it should be taught about, and if it is, what should be included. There are substantial arguments that there should be education in public schools about religion in general, and perhaps using examples from a few religions. Because of the plurality of religious views and commitments in the United States and around our world, what can be taught about religion will inevitably be controversial.

What can be taught related to religion in the public schools is restricted by the First Amendment establishment clause, which makes clear that government may neither promote nor discourage religion. "Government" is viewed as composed of organizations, agencies, and the people comprising them, that do the work that governments do. Thus not only are legislatures, courts, and executive officers parts of government, but also police, school boards, and public school principals and teachers.

Whether "secular humanism" is deemed a religion or not makes no difference with respect to the First Amendment. Although sometimes referred to as a religion, secular humanism is generally considered to be a belief system that negates religion. Indeed, secular humanism typically views those systems customarily referred to as "religions" as actually inhibiting the best of human learning, activity, and experience. But the Supreme Court has consistently ruled that government actions may neither advance nor inhibit religion.

The most important word in the First Amendment religion clauses is the word "religion." Surely the framers must have thought protection of religion was of exceptional importance to put it first in the Bill of Rights. Not only was it important in the eighteenth century, but obviously it is highly important in the totally different context of the twenty-first century. Yet the Supreme Court has never defined this word for First Amendment purposes. To be sure, definitions are available in dictionaries. But in deciding what is to be protected from government

actions, and how, delineations are generally considered unhelpful.

Not only does "religion" defy a limiting definition, the Supreme Court has made it clear that the truth or falsity of a religious claim is an issue courts cannot litigate. This restriction was made in a case involving mail fraud, but clearly it is applicable in other contexts including public schools. Common religious claims and positions are understood to be matters of "faith," which by definition signifies they are not subject to proof or disproof either by objective evidence, that is, evidence limited to the five senses (sight, sound, touch, smell, taste), or by circumstantial evidence. Yet an obviously sensible lower court judge held that use of marijuana could not be justified as an exercise of religion (any more than could human sacrifice).

As for teaching about religion in the public schools, language from Justice Brennan's concurring opinion in the 1963 case invalidating a state's daily Bible-reading requirements is generally deemed controlling: "The holding of the Court today plainly does not foreclose teaching about the Holy Scriptures or about the differences between religious sects in classes in literature or history. Indeed, whether or not the Bible is involved, it would be impossible to teach meaningfully many subjects in the social sciences or the humanities without some mention of religion." Because of its clarity, this statement has often been referred to and never seriously disputed.

The importance of teaching about literature and history is essential in learning about how best to live usefully and enjoyably. The need for teaching about religion also may be viewed as similar to teaching about music and art. Although not engaged in or appreciated by everyone, these are among the variety of activities and pursuits that enrich many people's lives.

The methods of teaching about a particular religion or religions in general are many and varied. Nonverbal communication by a teacher can be as significant as verbal communication. The issue is whether what the teacher says and/or does promotes or advances or discourages or inhibits. In one lower court case, an elementary school teacher was found to have violated the establishment clause by keeping his Bible on his desk, frequently silently reading from it during the class regular silent reading period, and displaying on the wall a poster that read, "You have only to open your eyes to see the hand of God." Indeed, the Supreme Court has made it clear in several contexts that nonverbal communication by symbols can be as significant in First Amendment cases as verbal communication. An example of the power of nonverbal communication is exemplified in television commercials.

Although secular humanism generally disdains any formal organization, there is an organization known as “The Council for Secular Humanism,” in existence since at least 1980, that claims to serve “secular humanists, atheists, agnostics, freethinkers, rationalists, skeptics, and all those . . . who find meaning and value in life without looking to a god.” Among their themes is “emphasiz[ing] reason and scientific inquiry, individual freedom and responsibility, human values and compassion, and the need for tolerance and cooperation.”

Secular humanists have given particular attention to the issue of teaching about the origin of life, which has been controversial since the famous 1927 Scopes trial, in which a public school teacher was convicted for teaching the theory of evolution in violation of a state statute. The origin of life issue was addressed by the U.S. Supreme Court in the 1987 decision in *Edwards v. Aguillard*. The Court struck down a Louisiana statute because the Louisiana legislature made clear the statute was designed to promote religion. The decision did not prohibit teaching about religious views on creation in a nonscientific (neutral) context.

Surely questions such as “What are we doing here” and “Where did we come from” should be raised and discussed—even though there are no indisputable answers—as matters intrinsic to human curiosity. The focus has been on teaching about “creationism” and “intelligent design,” which are essentially religious explanations, and thus nonscientific—in opposition to evolution and “big bang” theories, which are supportable by scientific evidence. Because secular humanists reject supernatural beliefs, they have been adamant in rejecting nonscientific attacks on science-supported theories. Generally they are not opposed to teaching about religion in a nonscientific context other than being concerned about “the foot in the door.”

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References and Further Reading

The Council for Secular Humanism website, www.secularhumanism.org (last visited Dec. 14, 2005).
Oxford English Dictionary. 2nd Ed. 1989.

Cases and Statutes Cited

Edwards v. Aguillard, 482 U.S. 578 (1987).
Engel v. Vitale, 370 U.S. 421 (1962).
McGinley v. Houston, 361 F.3d 1328 (11th Cir. 2004).
Roberts v. Madigan, 921 F.2d 1047 (10th Cir. 1990).
School District v. Shempp, 374 U.S. 203 (1963).
Torcaso v. Watkins, 367 U.S. 488 (1961).
United States v. Ballard, 322 U.S. 78 (1944).
United States v. Seeger, 380 U.S. 167 (1965).
Welsh v. United States, 398 U.S. 333 (1970).
Zelman v. Simmons-Harris, 122 S.Ct. 2460 (2002).

SECULAR PURPOSE

The U.S. Supreme Court has held that, to withstand challenge under the establishment clause of the First Amendment, a statute “must have a secular legislative purpose” (*Lemon v. Kurtzman*). The Supreme Court has relied on the secular purpose requirement four times to invalidate a state statute.

In *Epperson v. Arkansas*, the Court struck down an Arkansas statute that prohibited the teaching of evolution in public schools and universities. The absence of a secular purpose was fatal to the law:

The overriding fact is that Arkansas’ law selects from the body of knowledge a particular segment which it proscribes for the sole reason that it is deemed to conflict with a particular religious doctrine; that is, with a particular interpretation of the Book of Genesis by a particular religious group.

In *Stone v. Graham*, the Court invalidated a Kentucky statute that required public schools to post in each classroom a copy of the Ten Commandments. Because the Commandments included unquestionably religious edicts (for example, avoiding idolatry), the principal purpose of the law was “plainly religious.”

In *Wallace v. Jaffree*, the Court declared unconstitutional an Alabama law that mandated a period of silence in public schools “for meditation or voluntary prayer.” The Court held that the law “was not motivated by any clearly secular purpose—indeed, the statute had no secular purpose.” The statute’s principal sponsor had said that the bill’s only purpose was religious, and no evidence to the contrary had been offered by the state. Moreover, Alabama law already mandated a moment of silence for “meditation.” The only conceivable purpose of the new law, therefore, was to endorse religion. “The addition of ‘or voluntary prayer’ indicates that the State intended to characterize prayer as a favored practice.”

Edwards v. Aguillard invalidated a Louisiana statute that mandated equal treatment for evolution and “creation science” in public schools. Neither theory was required to be taught, but if a teacher presented one theory, he or she had to give equal attention to the other theory. As in *Epperson*, the Court noted the “historic and contemporaneous link between the teachings of certain religious denominations and the teaching of evolution.” The legislative history revealed a purpose “to change the science curriculum of public schools in order to provide persuasive advantage to a particular religious doctrine that rejects the factual basis of evolution in its entirety.”

These cases are atypical. Two examples show how deferential the Court has usually been to the state’s recitation of a secular purpose. When Sunday closing

laws were challenged in *McGowan v. Maryland*, the Court acknowledged that these laws originally had a religious purpose and that Sunday remains a day of religious significance to many citizens. But “[t]he present purpose and effect of most of [these laws] is to provide a uniform day of rest for all citizens; the fact that this day is Sunday, a day of particular significance for the dominant Christian sects, does not bar the State from achieving its secular goals.” In *Lynch v. Donnelly*, the Court rejected an establishment clause challenge to a municipality’s inclusion of a traditional nativity scene as part of a larger display depicting various observances of the Christmas holiday. “The evident purpose of including the crèche in the larger display was not promotion of the religious content of the crèche but celebration of the public holiday through its traditional symbols.” In both cases, the state’s justification for its law was a thin secular rationalization for an obviously sectarian action, but the rationalization was enough to satisfy the Court.

Four major objections have been raised against the secular purpose requirement. The *rubber stamp objection* holds that nearly anything can satisfy the secular purpose requirement, because a secular rationale can be imagined for almost any law. The *evanescence objection* claims that the “purpose” that the rule seeks either does not exist or is not knowable by judges. Who can know for certain what lawmakers had in mind when they enacted a statute? The *participation objection* argues that the rule makes religious people into second-class citizens by denying them the right to participate in the legislative process. Should a law to shelter the homeless be deemed unconstitutional, this objection asks, if religious people supported it for religious reasons? The *callous indifference objection* holds that the secular purpose requirement, if taken seriously, would forbid the humane accommodation of religious dissenters, such as the exemption of Quakers from military service.

Whether these objections are fatal depends on how the Court resolves an ambiguity in the doctrine: does it concern the subjective purpose of the lawmakers or the objective purpose that is apparent from a reading of the statute? The latter understanding prohibits laws that have no conceivable secular purpose.

The secular purpose requirement, thus understood, follows directly from a principle at the core of the establishment clause: that government may not declare religious truth. Some laws signify government endorsement of a particular religion’s beliefs, and this significance is clear without any inquiry into the authors’ subjective intentions. An easy example is the Ten Commandments statute in *Stone v. Graham*.

This approach answers all four objections. The first three may be disposed of easily. The answer to the rubber stamp objection is that it is sometimes clear what a law is saying, and what is being said may be a claim about religious truth. The evanescence objection also fails, because the secular purpose requirement does not seek subjective legislative intent. The answer to the participation objection is that the secular purpose requirement looks at legislative outcomes rather than political inputs, so that a statute’s constitutionality is not impugned by the mere fact that some people supported it for religious reasons. The callous indifference objection is more complex, but it can be answered. Government can accommodate religion so long as it does so without favoritism, in a way that does not take any position on questions of religious truth.

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References and Further Reading

Koppelman, Andrew, *Secular Purpose*, Virginia Law Review 88, no. 1 (2002): 87–166.

Cases and Statutes Cited

Abington Township v. Schempp, 374 U.S. 203 (1963)
Edwards v. Aguillard, 482 U.S. 578 (1987)
Epperson v. Arkansas, 393 U.S. 97 (1968)
Lemon v. Kurtzman, 403 U.S. 602 (1971)
Lynch v. Donnelly, 465 U.S. 668 (1984)
McGowan v. Maryland, 366 U.S. 420 (1961)
Stone v. Graham, 449 U.S. 39 (1980)
Wallace v. Jaffree, 472 U.S. 38 (1985)

SEDITIONOUS LIBEL

Seditious libel is the crime of publishing material that brings the government into contempt. At common law, truth was no defense to a charge of seditious libel. Because of “the tendency which all libels have to create animosities, and to disturb the public peace,” William Blackstone wrote, “it is immaterial with respect to the offense of a libel, whether the matter of it be true or false.” The crime of seditious libel had only two elements. First, did the defendant publish the writing in question. That was for the jury to determine. Second, did the writing defame the government. That was for the judge to determine. In practice, however, some juries that approved the defamatory content of a writing would refuse to convict.

English law during then Tudor and Stuart periods gave the government numerous means for restricting the press. The most popular during most of the sixteenth and seventeenth centuries were licensing laws

that prohibited publication of any printed material unless approved by the king's censor. As licensing laws became unpopular and increasingly hard to administer, public ministers began turning to the common law of defamation to suppress political criticism. A crucial precedent was established when the Star Chamber in 1606 decided *de Libellis Famosis*. Lewis Pickeringe was brought to trial after he had insulted an archbishop. Lord Coke's opinion in that case suggested that defamation of a public official was not only a personal insult, but a threat to public order. A libel directed at a government official, he wrote, "concerns not only the breach of the peace, but also the scandal of Government; for what greater scandal of Government can there be than to have corrupt or wicked magistrates." Over the next century, these words gradually became interpreted as justifying prosecutions for defaming the government as well as for defaming public officials.

The eighteenth century was the heyday for seditious libel. Licensing was abandoned in 1695, and shortly thereafter a series of favorable decisions made seditious libel the tool of choice for those concerned with political criticism. Led by Lord Holt, English judges made clear that truth was not a defense to a charge of seditious libel and that the judge decided whether the publication in question was defamatory. After 1700, all the jury was legally expected to do was determine publication. Holt justified his aggressive use of libel law by claiming, "if men should not be called to account for possessing the people with an ill opinion of the government, no government can subsist; for it is very necessary for every government, that the people should have a good opinion of it."

Seditious libel had a rough reception in the American colonies. The official law in books or as articulated by judges continued to maintain any defamation of government was a crime, but many American printers behaved as if no law of libel existed, and juries could not be counted on to convict even when they were instructed that their sole responsibility was to determine publication. The famous Zenger trial highlighted both the official and unofficial status of seditious libel before the American Revolution. Zenger was a printer whose newspaper published criticisms of William Cosby, then governor of New York. Zenger was imprisoned for seditious libel, even though he was not personally responsible for writing the criticisms but had merely printed what the owners of the press had delivered. Confronting the charger of publishing "false, scandalous, malicious, and seditious" work, Zenger's lawyers emphasized the word "false" in the indictment and insisted that falsehood was a necessary element of seditious libel. Although the judge instructed the jury that they should find

Zenger guilty if they determined that he "printed and published those papers," the jury verdict in favor of Zenger was interpreted as demonstrating colonial antipathy toward seditious libel. Whether this antipathy reflected a more general commitment to free speech is doubtful. Cosby was a notoriously unpopular governor, and the jurors in the Zenger case agreed with the sentiments that his newspaper published. Printers were far less protected when they attacked popularly elected legislatures and were charged with breaching legislative privilege then they were when they attacked English appointed governors and were charged with seditious libel.

Whether the First Amendment prohibited the federal government from charging people with seditious libel has been the subject of ongoing historical controversy. Leonard Levy insists that the legal meaning of the First Amendment in 1791 was probably limited to a ban on licensing laws. Press practice was free, he asserts, even though press legal freedom was quite limited. Other scholars disagree. Some claim that the Zenger trial and colonial support for Whig proponents of press rights in England demonstrate that "freedom of the press" at the end of the eighteenth century was not limited to a ban on prior restraints, but at a very minimum made truth a complete defense to criminal libel. Other scholars, most notably William Mayton, insist that the Constitution of 1787 did not vest the federal government with the power to prosecute seditious libels. "Speech was protected from suppression by the national government," Mayton writes, "because the Constitution granted this body no power over speech."

The actual intentions of the framers are probably impossible to discern with complete accuracy. One problem is that the persons who drafted and ratified the First Amendment did not define its precise meaning in 1791. Nor did the persons who drafted and ratified the Constitution indicate whether no power over speech meant that the federal government could never regulate speech even when exercising another power or merely that the federal government could not regulate speech for the purpose of suppressing criticism. If the latter is the correct view, then speech restrictions intended to protect the public peace might be constitutional. Moreover, different framers quite frequently articulated broad understandings of free speech when their speech was being restricted and narrow understandings of free speech when they sought to restrict the speech of others.

The turn of the nineteenth century witnessed, by and large, the demise of seditious libel. Parliament in 1792 passed Fox's Libel Act, which authorized jurors to decide whether a publication was defamatory and made truth a defense. Over the next few years,

sedition libel prosecutions petered out in Great Britain. The Federalist party in the United States adopted both reforms when passing the Sedition Act of 1798. Even so, that measure provoked substantial controversy, both for the way it was implemented and for its use of federal power. Madison in his "Report of 1800" declared both that "the federal government" is "destitute of every authority for restraining the licentiousness of the press," and that freedom of the press meant freedom to published opinion as well as truth.

Jefferson's election in 1801 largely ended efforts to enforce variations on the crime of seditious libel in the United States. An attempt to renew the Sedition Act was made, but in a remarkably principled vote, Jeffersonians voted against giving Jefferson this power, whereas Federalists favored the measure. Several Jeffersonian officials attempted to use the common law to prosecute seditious libels, but the Supreme Court declared this unconstitutional in *U.S. v. Hudson and Goodwin* (1812). Almost 150 years later, the Supreme Court in *New York Times v. Sullivan* (1964) officially held that neither the federal government nor the states had the power to pass laws prohibiting seditious libel.

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References and Further Reading

- Hamburger, Philip, *The Development of the Law of Seditious Libel and the Control of the Press*, Stanford Law Review 37 (1985): 661–765.
- Levy, Leonard W. *Emergence of a Free Press*. New York: Oxford University Press, 1985.
- Mayton, William T., *Seditious Libel and the Lost Guarantee of a Freedom of Expression*, Columbia Law Review 84, no.1 (1984): 91–142.

Cases and Statutes Cited

- New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)
- United States v. Hudson & Goodwin*, 11 U.S. 32 (1812)

SEGREGATION

Segregation is separating an individual on the basis of a characteristic or trait. Within the United States, segregation has often been based on racial classification. Segregation has been imposed by legal and governmental action, known as *de jure* segregation, and by habit or custom, or *de facto*. Although most *de jure* segregation has been eliminated by government action in promoting civil rights for racial minorities, *de facto* segregation is still prevalent in today's society.

Segregation: Colonial Era to the Civil War

The practice of segregation in the United States can be dated back to the colonial period and, after the American revolution, was prevalent in both the North and the South. Both sides of the Mason–Dixon line had *de facto* and *de jure* segregation in numerous areas of life, from barring blacks from entering hotels, inns, and restaurants to requiring blacks to sit in reserved sections of theaters and worship in designated pews in white churches.

In addition to restrictions on everyday venues, many northern schools frequently segregated their classrooms on the basis of race, sometimes within the same school building. For example, the state of Ohio, from its inception to 1848, excluded all non-white children from their public school systems. This prompted many blacks, along with whites, who were sympathetic to educational opportunities for black children, to create private schools for black children. This drive for public versus private education lay at the heart of a conflict within the black community, most notably over "the importance of assimilation into the dominant white culture" (Douglas 2005, 19).

In New England, black school children did enroll in public schools, but many were racially separated schools. One notable example was in the Boston school system, where blacks sought a separate school for their children because of prejudice shown by whites, and in 1798, the first all-black school was privately established. After this, other all-black schools were established, and soon the city had separate educational facilities based on race. This system would be challenged by Sarah Roberts and her father, who sought to attend a closer all-white school rather than a school for blacks.

Led by attorney Charles Sumner, a leading abolitionist and future U.S. senator, the lawsuit argued that the "separation of children in the public schools of Boston, on account of color or race, is in the nature of caste, and is a violation of equality." Although the Massachusetts State Supreme Court recognized that separate schools based on color created a system of separation based on people's prejudices, the court's majority in *Roberts v. City of Boston* held that "this prejudice, if it exists, is not created by law, and probably cannot be changed by law." The court denied Roberts' request to enroll at an all-white school and set a precedent for a future national case that would accept state-sanctioned segregation on the basis of race (*Plessy v. Ferguson*). Six years later, the state of Massachusetts would overturn the *Roberts* decision by abolishing, through a legislative act (Mass. Acts 1855, c. 256), the practice of segregated schools.

Imposing Segregation: 1865–1909

After the Civil War and the end of slavery in the United States, southern states sought to reaffirm a segregated society for blacks and whites through the adoption of “Black Codes” in 1865. In response, Radical Republicans won passage of the Civil War Amendments to the U.S. Constitution, particularly the Fourteenth and Fifteenth Amendments. Some Republicans, most notably U.S. Senator Charles Sumner, believed that these amendments would prevent discrimination against blacks. To implement these amendments, the Radical Republicans subsequently passed a series of civil rights acts in 1866, 1870, and 1871. The last piece of legislation, the Civil Rights Act of 1875, sought to protect all Americans, regardless of race, from discrimination in all forms of public accommodations, such as theaters, trains, and restaurants. The 1875 act was aimed at both government action and private individuals’ actions; however, the U.S. Supreme Court would later rule (in *The Civil Rights Cases* of 1883) that Congress had overstepped its power to affect private acts.

During the era of Reconstruction, southern states segregated blacks from whites, most notably in areas of education. After the end of Reconstruction in 1877, southern states implemented “Jim Crow” laws; Jim Crow was a term from minstrel shows with a character who portrayed an uneducated and inferior black. Both constitutional requirements and statutes required that blacks and whites be kept separated in the schoolhouse, railroad cars, train station waiting areas, residential areas, restrooms, on the job, and even separate entrances on entering some public and private buildings. In North Carolina and Florida, textbooks used in white and black schools had to be kept separated, and some state courtrooms often had two Bibles for witnesses to swear on: one for white and one for black witnesses. Laws also sought to deny the right to vote by blacks through the use of literacy tests, property requirements, educational requirements, and “understanding clauses.” In addition, many nonsouthern states had laws imposing segregation as well, with 22 percent of all Jim Crow laws passed from the late 1800s to the mid-1900s. Only fifteen states did not have any Jim Crow laws.

Although many of these laws were challenged in court, the Jim Crow era found legal sanction by the U.S. Supreme Court in two notable cases. The first was the 1883 *Civil Rights Case*, in which the U.S. Supreme Court held that the Fourteenth Amendment’s equal protection clause did not extend to private individuals or organizations that discriminated on the basis of race. This decision overturned the

Civil Rights Act of 1875. The second case upheld a Louisiana law mandating separate railroad cars for whites and blacks. In the 1896 case of *Plessy v. Ferguson*, the court used the logic of the *Roberts* case to declare that a state law using separate but equal facilities did not violate the federal equal protection clause of the Fourteenth Amendment. These cases, along with several other notable cases, gave federal judicial sanction to state laws mandating segregation.

Attacking Jim Crow and *De Jure* Segregation: 1910–Present

With the establishment of the National Association for the Advancement of Colored People (NAACP) in 1909, the blacks organized themselves to fight against Jim Crow laws and racial segregation. Early on, the NAACP contested segregation in *Buchanan v. Warley*, which successfully challenged residential segregation by cities, and *Moore v. Dempsey*, which overturned a conviction of a black after a trial dominated by a mob. It was during the period of 1890 to 1920 that more than 3,100 Americans, predominately blacks, were murdered by acts of lynching. Along with a focus on preventing or seeking prosecution against those who used lynching as a weapon against blacks, the NAACP established the Legal Defense Fund (LDF) in 1939. Under the leadership of Charles Hamilton Houston and Thurgood Marshall, the LDF attacked the concept of separate but equal, by first suing state and local governments to uphold the concept, then attacked the doctrine as being inherently discriminatory.

Although there were unsuccessful challenges to the principle of “separate but equal” (*Gong Lum v. Rice*), the LDF did prevail in attacking segregated education, through such cases as *Pearson v. Murray*, in which the Maryland Court of Appeals held that the University of Maryland’s Law School must grant admission to blacks, and *Missouri ex rel Gaines v. Canada*, in which the U.S. Supreme Court required the state of Missouri to offer equal legal education to its residents, regardless of race. By first challenging graduate and then postsecondary education, the LDF culminated its challenge of “separated but equal” educational policy in the 1954 U.S. Supreme Court decision, *Brown v. Board of Education of Topeka, KS*, in which a unanimous court held that “separate but equal was inherently unconstitutional.”

The LDF also challenged segregation in other venues, such as housing. In 1948, the U.S. Supreme Court held (in *Shelley v. Kraemer*) that restrictions on

who could own private housing violated the Fifteenth Amendment's equal protection clause. That same year, the California Supreme Court struck down a state ban on interracial marriages (*Perez v. Lippold*). In 1950, the U.S. Supreme Court held, in *Henderson v. U.S.*, that separate railroad dining cars violated the Interstate Commerce Act, which made it unlawful for interstate trains to place a passenger in "undue or unreasonable prejudice or disadvantage." Additional cases, such as 1960's *Boynton v. Virginia*, held that blacks had a federal legal right to be served without discrimination in an interstate bus terminal's restaurant.

After the U.S. Supreme Court's *Brown* ruling, Congress began to attack segregation as well, passing civil rights acts in 1957, 1960, and 1964, a voting rights act in 1965, and the 1968 Fair Housing Act that banned discrimination in housing. These acts, particularly the 1964 civil rights and 1965 voting rights acts, were most effective in eliminating segregation laws in many states because of the pressure of the modern civil rights movement and leaders such as the Rev. Martin Luther King, Jr. However, southern officials, like Alabama's governor George C. Wallace (who declared in his first inauguration "segregation now, segregation tomorrow, and segregation forever") used the issue to rally Southern white conservatives to resist federal attempts to dismantle segregation practices.

In 1971, these federal attacks on segregation practices culminated with the U.S. Supreme Court's decision in *Swann v. Charlotte-Mecklenburg Board of Education* that busing could be used as a tool to achieve desegregation. Subsequent court cases, however, began to scale back the impact of judicial challenges to segregation. In 1973, the U.S. Supreme Court held, in *San Antonio Independent School District v. Rodriguez*, that education is not a fundamental constitutional right under the U.S. Constitution. Later that same year, the Supreme Court ruled that absent intentional discrimination, *de facto* segregation based on living patterns did not amount to an equal protection violation. Subsequent court action has dealt with such issues as affirmative action in higher education and for federal contracts. Although the U.S. Supreme Court upheld the use of affirmative action in the 1978 case of *Bakke v. Regents of the University of California*, it did not allow the use of quotas in higher education. Most recently, in 2003, the U.S. Supreme Court upheld affirmative action, which used race as part of an admissions plan within a law school to achieve a diverse student body (*Grutter v. Bollinger*). However, the same court struck down an affirmative action plan at the undergraduate level where points were awarded on the basis of race in admissions (*Gratz v. Bollinger*).

It is notably, however, that although *de jure* segregation has been all but eliminated, *de facto* segregation is still present within American society. Some argue that the most segregated hour of the week still remains during the Sunday morning church hour, and that residential patterns still indicate separation of the races on the basis of housing. In addition, questions regarding policies such as affirmative action and legislative redistricting using factors such as race indicate that racial classifications are still present in American society.

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References and Further Reading

- Chafe, William H., Raymond Gavins, and Robert Korstad, eds. *Remembering Jim Crow: African Americans Tell About Life in the Segregated South*. New York: The New Press.
- Dailey, Jane, Glenda Elizabeth Gilmore, and Bryant Simon. *Jumpin' Jim Crow: Southern Politics From Civil War to Civil Rights*. Princeton: Princeton University Press, 2001.
- Douglas, Davison M. *Jim Crow Moves North: The Battle over Northern School Segregation, 1865–1954*. New York: Cambridge University Press, 2005.
- Fireside, Harvey. *Separate and Unequal: Homer Plessy and the Supreme Court Decision that Legalized Racism*. New York: Carroll & Graf, 2004.
- Graham, Hugh Davis. *The Civil Rights Era: Origins and Development of National Policy 1960–1972*. New York: Oxford University Press, 1990.
- Hale, Grace Elizabeth. *Making Whiteness: The Culture of Segregation in the South, 1890–1940*. New York: Vintage, 1998.
- Klarman, Michael J. *From Jim Crow to Civil Rights: the Supreme Court and the Struggle for Civil Rights*. New York: Oxford University Press, 2004.
- Kluger, Richard. *Simple Justice: The History of Brown v. Board of Education and Black America's Struggle for Equality*. New York: Alfred A. Knopf, 2004.
- Kotz, Nick. *Judgment Days: Lyndon Baines Johnson, Martin Luther King, Jr., and the Laws that Changed America*. New York: Houghton-Mifflin, 2005.
- Lawson, Stephen F. *Black Ballots: Voting Rights in the South, 1944–1969*. New York: Columbia University Press, 1976.
- Litwack, Leon F. *Trouble in Mind: Black Southerners in the Age of Jim Crow*. New York: Vintage, 1998.
- Loevy, Robert D. *Civil Rights Act of 1964: The Passage of the Law that Ended Racial Segregation*. Albany: State University of New York Press, 1997.
- Mann, Robert. *The Walls of Jericho: Lyndon Johnson, Hubert Humphrey, Richard Russell and the Struggle for Civil Rights*. New York: Harcourt Brace, 1996.
- Murray, Pauli, ed. *States' Laws on Race and Color*. Athens, GA: University of Georgia Press, 1997.
- Smith, J. Douglas. *Managing White Supremacy: Race, Politics, and Citizenship in Jim Crow Virginia*. Chapel Hill: The University of North Carolina Press, 2002.
- Smith, John David. *When Did Southern Segregation Begin?* New York: Bedford/St. Martins, 2002.

- Smith, Jessie C., and Carrell Peterson Horton, eds. *Historical Statistics of Black America*. New York: Gale Group, 1995.
- Tushnet, Mark V. *The NAACP's Legal Strategy against Segregated Education, 1925–1950*. Chapel Hill: University of North Carolina Press, 2005.
- Woodward, C. Vann. *The Strange Career of Jim Crow*. New York: Oxford University Press, 1974.
- www.brownvboard.org.
- www.jimcrowhistory.org.

Cases and Statutes Cited

- Bakke v. Regents of the University of California*, 438 U.S. 265 (1978)
- Boynton v. Virginia*, 364 U.S. 454 (1960)
- Brown v. Board of Education of Topeka, KS* 347 U.S. 483 (1954)
- Buchanan v. Warley*, 245 U.S. 60 (1917)
- Civil Rights Cases*, 109 U.S. 3 (1883)
- Gong Lum v. Rice*, 274 U.S. 78 (1927)
- Gratz v. Bollinger*, 539 U.S. 244 (2003)
- Gutter v. Bollinger*, 539 U.S. 306 (2003)
- Henderson v. United States*, 339 U.S. 816 (1950)
- Missouri ex rel Gaines v. Canada*, 305 U.S. 337 (1938)
- Moore v. Dempsey*, 261 U.S. 86 (1923)
- Pearson v. Murray*, 182 A. 590 (Md. 1936)
- Perez v. Lippold*, 32 Cal. 2d 711 (1948)
- Plessy v. Ferguson*, 163 U.S. 537 (1896)
- Roberts v. City of Boston*, 59 Mass. 198 (1849)
- Shelley v. Kraemer*, 334 U.S. 1 (1948)
- Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971)
- San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973)

SEIZURES

The Fourth Amendment to the United States Constitution states that “[t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” As construed by the U.S. Supreme Court, this language means that if a government action is considered a “search” or a “seizure,” it must either be authorized by a warrant issued by a magistrate, or—in emergency situations or for lesser intrusions—there must some other reasonable justification for the action. However, if the government’s action is not a search or a seizure, then the Fourth Amendment is not implicated. Thus, the definition of these two words is crucial in determining the scope of protection from government efforts to investigate crime and other activities. This entry discusses the definition of seizure and the rules that govern seizures.

The Definition of Seizure

According to the Supreme Court, a person is seized for purposes of the Fourth Amendment if a reasonable innocent person, under the same circumstances, would not feel free to terminate the encounter (*Michigan v. Chesternut*, 1988; *Florida v. Bostick*, 1991). Applying this test, the Court has held that a seizure occurs when police stop and frisk an individual (*Adams v. Williams*, 1972), when plainclothes officers confront someone at an airport, ask for the person’s identification and plane ticket and do not return them (*Florida v. Royer*, 1983), and when cars are stopped at a roadblock, even momentarily (*United States v. Martinez-Fuerte*, 1976). On the other hand, no seizure occurs when a person agrees to accompany an officer to where his colleagues are being questioned by another officer (*Florida v. Rodriguez*, 1984), when persons are briefly questioned at their place of work by armed officers (*INS v. Delgado*, 1984), or when a person is briefly questioned by armed officers on a bus and asked if his or her luggage can be searched (*United States v. Drayton*, 2002). In each of these last three cases, the Court viewed the encounter as consensual.

Most people probably do not feel free to leave when confronted by an identified police officer, even if the encounter is casual. The Court has nonetheless held to the contrary to avoid unduly restricting the police. The Court seems to agree with the commentary to the American Law Institute’s Model Code of Pre-Arrest Procedure, which states that police should be allowed to undertake brief suspicionless detentions “to seek cooperation, even where this may involve inconvenience or embarrassment for the citizen, and even though many citizens will defer to this authority of the police because they believe—in some vague way—that they should.”

Arrest

The requirements imposed by the Fourth Amendment when a seizure occurs vary depending on the nature of the seizure. If the action is an arrest, then probable cause must exist. Probable cause is akin to a more-likely-than-not finding, but does not require proof beyond a reasonable doubt, the standard the prosecution must meet to secure conviction at trial. If the arrest is in the home, a warrant is required, and if it occurs in a third party’s home, then both an arrest warrant and a search warrant (based on probable cause to believe the suspect is in the third party’s

home), are required, unless exigent circumstances exist. The best example of exigent circumstances is when the police are in hot pursuit of a suspect. If the arrest is not authorized by a warrant, the police must promptly bring the arrestee in front of a magistrate, normally within forty-eight hours of arrest.

Sometimes it is not clear whether police have made an arrest. Obviously, a statement that “You are under arrest,” accompanied by handcuffs and transportation to the station, constitutes an arrest. The Court has also held that an arrest also occurs when police ask an individual to come to the police station and subject him to an hour-long interrogation preceded by *Miranda* warnings, as well as when police take a seventeen-year-old boy from his house at 3:00 a.m., barefoot and in his underwear, after telling him “we need to go and talk.” Detentions outside the station house can also constitute an arrest. For instance, questioning a suspect for fifteen minutes in a small room off an airport concourse requires probable cause, as does detaining the occupants of a house for forty-five minutes.

On the other hand, a twenty-minute detention of the suspect and his car on a public thoroughfare does not require probable cause, at least when the length of the detention is partly due to the defendant’s attempts to evade police. Nor is probable cause required for a *sixteen-hour* detention, designed to wait out a suspected “drug balloon swallower” who refused to defecate, at least when it occurs at the international border, where constitutional protections have historically been diminished. The Court has also intimated that if the purpose of removing someone from his or her home is to obtain fingerprints rather than interrogate, probable cause is not necessary, although a judicial order may be.

Stops

A seizure that falls short of an arrest usually requires reasonable suspicion, a level of certainty below probable cause, but one that still requires an articulable suspicion that criminal activity is afoot, rather than a mere hunch (*Terry v. Ohio*, 1968). Thus, the detentions in the three cases just described all required reasonable suspicion. The most common type of detention authorized on reasonable suspicion is the investigative stop, which involves police attempts to investigate suspicious activity that has not yet resulted in criminal action.

A number of Supreme Court cases help clarify the difference between probable cause, reasonable suspicion, and situations in which the police have

insufficient suspicion for a seizure of any type. In *Terry v. Ohio*, (1968), an officer saw two men pausing to stare in a store window roughly twenty-four times, consult with one another after passing by the store, and on one occasion consult with a third person who left swiftly and then rejoined them a few blocks away. The Court indicated that, although probable cause to arrest did not exist on these facts, the officer’s suspicion that criminal activity was afoot was reasonable, and thus a stop and frisk could take place. Similarly, in *Illinois v. Wardlow* (2000), the police had reasonable suspicion, but not probable cause, when they saw the defendant standing on a corner in an area known for heavy drug trafficking look in their direction and begin running away from them. In *United States v. Arvizu* (2002), reasonable suspicion, but not probable cause, existed when the driver of a van registered to a residence known for its association with drug smuggling was seen driving on a dirt road often traveled by drug smugglers, along a route that made little sense for normal travelers; the agent also noted that the driver failed to acknowledge him and that the children in the van waved oddly and had their knees in a raised position as if resting on something.

In contrast, in *Sibron v. New York*, (1968), the Court held that the “mere act of talking to a number of known addicts” and reaching into one’s pocket does not give police reasonable suspicion that would justify a stop and a frisk of the pocket. Nor did police have reasonable suspicion when they observed an individual and another man in a “high crime” area walking away from one another when they saw the police, or when they received an anonymous tip that a young black male, standing at a particular bus stop and wearing a plain shirt, would be carrying a gun. In *Reid v. Georgia*, (1980), the Court found that reasonable suspicion did not exist when agents saw a person get off a plane from Ft. Lauderdale (a supposed drug source) with no luggage other than a shoulder bag, apparently make efforts to conceal he was traveling with someone else, and occasionally looked back at that person. In contrast, the Court found reasonable suspicion (but not probable cause) when, in addition to the types of facts that existed in *Reid*, agents noted that the individual paid for his ticket with cash and that he was traveling under an assumed name (*Florida v. Royer*, 1983).

There is no easy way to summarize the Court’s decisions in this area, which are all very fact specific. Although the Court is quite willing to provide the police significant leeway in engaging in preventive and investigative stops, it also has tried to avoid holdings that would allow seizure of large numbers of innocent individuals on the basis of hunches, random guesses, or highly suspect information. Thus, in

addition to the decisions just discussed, it has struck down on vagueness grounds a number of loitering and vagrancy statutes that allow seizures of individuals who are standing in or frequenting a place police think they should leave.

Unfortunately, research suggests that, despite these types of decisions, arbitrary seizures take place on a routine basis. Members of minority communities seem to be particularly likely targets of “aggressive patrolling” strategies that attempt to prevent and inhibit criminal activity, to the point where “driving while black” and “walking while black” have become popular phrases for describing the focus of frontline law enforcement. The laxness of the reasonable suspicion standard may be partly to blame. But also contributing to this state of affairs is the fact that the primary means of enforcing the Fourth Amendment is exclusion of illegally seized evidence, a remedy that comes into play only when prosecution occurs and that has only an indirect effect on police. Very often the intent of police making stops is simply to inhibit criminal activity and seize weapons or drugs, not to charge, so the threat of exclusion does not affect them. If and when they do press charges, the failure to obtain a conviction because of the exclusionary rule hurts the prosecutor much more than it affects the police.

Profiling

Another way of controlling police discretion is to formalize the grounds for stops through reliance on empirically based profiles that indicate the type of behavior most likely to be predictive of criminal behavior. Law enforcement agencies have developed airplane hijacker, drug courier, and terrorist profiles in an attempt to aid identification of criminals. For instance, agents purported to be relying on a drug courier profile in both *Reid* and *Royer*, the airport cases described previously. The Drug Enforcement Administration claims that its profile results in discovery of drug-related crime in connection with more than 30 percent of the stops made pursuant to it, a “success rate” that might be sufficient for reasonable suspicion (but not for probable cause, which presumably would require a success rate closer to 50 percent).

These profiles are problematic for a number of reasons, however. First, they seem to be ad hoc; the profile factors used by agents in drug courier cases, for instance, seem to change from case to case. Second, even assuming the factors are consistent, they are not always all present in a given case, meaning

that the statistical justification for their use, which is based on the presence of all the factors, disappears. Third, use of the profiles allows stops of large numbers of people at airports, on the highways, and in other public places, a large percentage of whom, by definition, are not engaged in criminal activity. Although the definition of reasonable suspicion suggests that a substantial proportion of “misses” is permissible, profiles expose dramatically the amount of discretion that standard affords police.

Seizures Short of a Stop

Sometimes a detention is considered so minor that, even though it is a seizure, neither probable cause nor reasonable suspicion is required. For instance, in *United States v. Martinez-Fuerte* (1976), the Court held that roadblocks set up to detect illegal immigration effect seizures both at the initial stop and at the referral to a secondary checkpoint to scrutinize citizenship documents. But it also held that neither seizure requires reasonable suspicion, because the initial stop generally lasts only a few seconds, long enough for an immigration official to survey the occupants of the car, and the document check takes approximately five minutes. Similarly, stopping motorists at a sobriety checkpoint is permissible without any individualized suspicion, because of the “magnitude of the drunk driving crisis” and the minimal intrusion associated with the roadblock. However, a roadblock away from the border, set up solely for the purpose of implementing “a general interest in crime control” and not involving an “immediate, vehicle-bound threat to life and limb,” is impermissible in the absence of individualized suspicion of each driver stopped.

Police may also order the driver of a car validly stopped for a violation of traffic laws to exit the vehicle. Although such an order effects a seizure, the Supreme Court held that the intrusion is *de minimus*, because a restriction of liberty will occur whether or not the individual stays in the car, and exiting the car exposes little more of the individual. For the same reasons, police can order passengers out of a validly stopped car. Similarly, a brief detention of a driver who has been given a ticket and had his license handed back is permissible to ask him whether he has illicit items in his car.

Finally, the Court has held that there are certain “special needs” situations, where the primary purpose of the government is something other than enforcement of the criminal law, that permit a seizure on less than reasonable suspicion. For instance, the seizure necessary to carry out drug testing at workplaces or in

schools is permissible on a random basis, as long as the government can show that there is a significant drug problem that needs to be addressed and the drug testing procedure is otherwise reasonable.

Seizures of Property

The Fourth Amendment also governs seizures of property. The Court has held that a seizure of property occurs when there is some “meaningful interference” with an individual’s possessory interest. Putting a tracking device in a can of ether belonging to a suspect is not a seizure, but destroying a portion of a suspect’s drugs is. Generally, a seizure is permissible if there is probable cause, which will usually exist if the search that allows discovery of the item is valid (because a valid search usually requires probable cause).

Occasionally, however, a seizure of property will occur independently of a search. Again, probable cause is usually required for such a seizure, although a warrant is usually not. Cars may be seized under a lawful impoundment policy, luggage may be seized when there is probable cause to believe it contains evidence, and even a residence may be “seized” if the police have probable cause to believe it contains criminal evidence and need time to obtain a warrant.

A number of states have also passed statutes requiring forfeiture of property that has a nexus to criminal activity. For instance, the federal forfeiture statute, 21 U.S.C. § 881(a), permits government confiscation of drugs, drug paraphernalia, and any personal or real property used to carry out drug sales and manufacture, as well as any money obtained in its sale. The Supreme Court has generally upheld such statutes, although confiscation of assets far out of proportion to the crime committed may be a violation of the “excessive fines” clause of the Eighth Amendment.

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References and Further Reading

- American Law Institute. *A Model Code of Pre-Arrest Procedure*. Philadelphia: American Law Institute, 1975.
- Cloud, Morgan, *Search and Seizure by the Numbers: The Drug Courier Profile and Judicial Review of Investigative Formulas*, Boston University Law Review 65 (1985): 843.
- Harris, David A., *Particularized Suspicion, Categorical Judgments: Supreme Court Rhetoric versus Lower Court Reality Under Terry v. Ohio*, St. John’s Law Review 72 (1998): 975–1023.
- LaFave, Wayne, “Seizures” *Typology: Classifying Detentions of the Person to Resolve Warrant, Grounds, and Search Issues*, University of Michigan Journal of Law Reform 17 (1984): 409–463.

Maclin, Tracey, *The Decline of the Right of Locomotion: The Fourth Amendment on the Streets*, Cornell Law Review 75 (1990): 1258–1337.

———, “Black and Blue Encounters”—Some Preliminary Thoughts about Fourth Amendment Seizures: Should Race Matter, Valparaiso Law Review 26 (1991): 243.

Cases and Statutes Cited

- Adams v. Williams*, 407 U.S. 143 (1972)
- Florida v. Bostick*, 501 U.S. 429 (1991)
- Florida v. Rodriguez*, 469 U.S. 1 (1984)
- Florida v. Royer*, 460 U.S. 491 (1983)
- Illinois v. Wardlow*, 528 U.S. 119 (2000)
- INS v. Delgado*, 466 U.S. 210 (1984)
- Michigan v. Chesternut*, 486 U.S. 567 (1988)
- Reid v. Georgia*, 448 U.S. 438 (1980)
- Sibron v. New York*, 392 U.S. 40 (1968)
- Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868 (1968)
- United States v. Arvizu*, 534 U.S. 266 (2002)
- United States v. Drayton*, 536 U.S. 194 (2002)
- United States v. Martinez-Fuerte*, 428 U.S. 543 (1976)

See also **Arrest; Arrest without a Warrant; Calero-Toledo v. Pearson Yacht Leasing Co.**, 416 U.S. 663 (1974); **Chicago v. Morales**, 527 U.S. 41 (1999); **Delaware v. Prouse**, 440 U.S. 648 (1979); **Exclusionary Rule; Gerstein v. Pugh**, 420 U.S. 103 (1975); **Kolender v. Lawson**, 461 U.S. 352 (1983); **Michigan v. Summers**, 452 U.S. 692 (1981); **Michigan Department of State Police v. Sitz**, 496 U.S. 444 (1990); **Papachristou v. City of Jacksonville**, 405 U.S. 156 (1972); **Payton v. New York**, 445 U.S. 573 (1980); **Probable Cause; Profiling (including DWB); Rawlings v. Kentucky**, 448 U.S. 98 (1980); **Reid v. Georgia**, 448 U.S. 438 (1980); **Search Warrants; Skinner v. Railway Labor Executives’ Association**, 489 U.S. 602 (1989); **South Dakota v. Opperman**, 428 U.S. 364 (1976); **United States v. Brignoni-Ponce**, 422 U.S. 873 (1975); **United States v. Verdugo-Urquidez**, 494 U.S. 259 (1990); **Vernonia School District v. Acton, Inc.**, 445 U.S. 208 (1980)

SELECTIVE DRAFT CASES (1918), SELECTIVE SERVICE ACT OF 1917

Shortly after his message asking Congress to declare war on Germany in April 1917, Wilson sent Congress a measure providing for the drafting of young men into the army. There had never been national conscription of this sort before, and although Congress enacted the measure, opponents, quickly took the issue to the courts, where it was upheld under the government’s war powers.

Despite their resentment at Wilson’s high-handedness, members of Congress recognized that conscription would be necessary, and on May 17, 1917, Congress enacted Wilson’s draft law, which opponents of the war immediately challenged. Lower

courts expedited the various draft cases; men could not be allowed to die should the law be unconstitutional, nor could the government's mobilization be derailed if it were valid. Six suits, grouped together as the *Selective Draft Law Cases* came before the Supreme Court for argument in December 1917. All involved convictions for obstructing or resisting conscription.

Harris F. Taylor, the chief counsel for the defendants, berated Congress for expanding the executive power. Wilson had already become a political dictator, Taylor charged, and his decision to commit American troops abroad—a power nowhere found in the Constitution—had plunged the country into a military dictatorship as well. Taylor claimed that the militia clause (Article I, Section 8) limited their use “to execute the Laws of the Union, suppress Insurrections and repel Invasions.” Militia troops could not be used, therefore, to prosecute foreign conflicts.

The Court handed down its decision the first week of January 1918; in almost summary fashion, it unanimously dismissed all the arguments raised against the law. Chief Justice Edward White noted Congress's explicit powers in Article I to “provide for the common Defence,” “to raise and support Armies,” “to provide and maintain a Navy,” and “to declare War.” “As the mind cannot conceive an army without the men to compose it,” White asserted, “on the face of the Constitution the objection that it does not give power to provide for such men would seem too frivolous for further notice.” The Court also made short shrift of the argument that the Constitution only allowed a volunteer army and did not authorize conscription. The Chief Justice noted that just as the government owed certain obligations to its citizens, so the people had reciprocal duties to the state, including rendering military service, which the government could compel. Beyond that, Congress could deploy the army anywhere it deemed necessary, even overseas.

Most Americans had expected the Court to sustain the draft law. Yet even if the antidraft arguments failed to persuade a single member of the Court, they did raise at least two issues that would eventually receive more serious attention.

First, the act allowed the president to delegate nearly all the tasks involved in selecting and processing the conscripts to local draft boards. The Court had held laws involving delegation of powers constitutional ever since the question first came before it in *Field v. Clark* (1892), but none of the previous statutes had been as vague in prescribing guidance or oversight. In the various war statutes Congress merely set out general goals and gave the president carte blanche to carry them out. At some point, the Court would

have to determine how much power Congress could delegate and how much discretion the president could exercise.

A second issue involved the generous exemption from the draft that Congress allowed ordained ministers and theology students, as well as exemption from combat granted to members of some sects that opposed war on religious grounds. The Court shrugged off a challenge that this provision violated the First Amendment because it amounted to an establishment of religion. White casually derided the unsoundness of the claim as well as a collateral argument that the limited exemptions violated the free exercise clause. In the future, the Court would wrestle with the problem of conscientious objectors in a number of cases.

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References and Further Reading

Chambers, John Whiteclay, II. *To Raise an Army: The Draft Comes to Modern America*. New York: Free Press, 1987.

Cases and Statutes Cited

Field v. Clark, 143 U.S. 649 (1892)
Selective Draft Law Cases (Arver v. United States), 245 U.S. 366 (1918)

SELF-DEFENSE

Although unfettered in the state of nature, an individual's right to use force on another individual is largely ceded to the state. But the state's monopoly on the legitimate use of force is not absolute. Because the state cannot always prevent aggression, an individual retains the right to use force in self-defense. But this right is also not absolute, because the state owes a duty to protect the autonomy of all its citizens, aggressors and defenders alike. The law of self-defense reflects the attempt to balance the competing interests of aggressor and defender as well as the state's goals of preventing crime and suppressing vigilantism.

Although jurisdictions will vary as to how this balance is best struck, self-defense is widely accepted where: (1) an innocent victim, (2) uses minimally necessary, (3) proportional, and (4) nonlethal force, (5) with the purpose of self-protection, (6) against what the innocent victim reasonably believes, (7) is a wrongful aggressor, (8) posing a present or imminent unlawful threat, (9) from which a safe retreat cannot be effected, and (10) the victim's defensive force does not endanger any innocent bystanders. Although jointly sufficient in nearly all jurisdictions, none of

these are necessary conditions for self-defense in all jurisdictions. Which particular conditions a jurisdiction will require is a function of the subjective assessment of the optimal balance between maximally protecting the autonomy of innocent defenders while minimally disrupting the state's near monopoly on legitimate force. This subjective assessment varies over time and is shaped by changing tides of cultural, geographical, social, racial, and gender-based perceptions of crime and violence.

Although seemingly a fundamental and inalienable right, self-defense is curiously not an express constitutional right. Recent attempts to argue that self-defense is an implicit, even if unenumerated, constitutional right have been rebuffed in two federal appellate decisions. In both cases, prisoners sought to defend against charges of violating prison rules prohibiting fighting among inmates by claiming their use of force was only in self-defense. While conceding the possibility of the validity of their claims of self-defense, the courts cited the overriding imperative of maintaining discipline in prison and ruled that there was simply no constitutional right to self-defense.

Perhaps the most currently contested aspect of self-defense law is implicated in the plight of women battered by their husbands. Typically smaller and weaker than their husbands, battered women's ability to use effective self-protection is hampered by the traditional limitations that defensive force be proportional and used only against an imminent attack. When nonlethal attacks are imminent, the proportionality requirement limits the wife to also using nonlethal force. But because of a size and strength disparity, nonlethal defensive force may be ineffective in thwarting the attack. But if a battered woman waits until such force might be effective, for example, when the husband is sleeping, the woman's defensive force runs afoul of the imminence requirement. Although most states have recognized battered women's syndrome evidence to partially alleviate the difficulty, many states continue to strictly construe the right of self-defense.

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References and Further Reading

- Dressler, Joshua. *Understanding Criminal Law*. 3rd Ed. Newark: LexisNexis, 2001.
- Fletcher, George P. *A Crime of Self-Defense: Bernhard Goetz and the Law on Trial*. New York: The Free Press, 1988.

Cases and Statutes Cited

- Rowe v. DeBruyn*, 17 F.3d 1047 (7th Cir. 1994)
- State v. Norman*, 378 S.E.2d 8 (N.C. 1989)

See also Domestic Violence; Martin v. Ohio, 480 U.S. 228 (1987); *Patterson v. New York*, 432 U.S. 197 (1977); *Proof beyond a Reasonable Doubt*

SELF-FULFILLMENT THEORY OF FREE SPEECH

Scholars and jurists have offered many theories to explain why freedom of speech is an especially important constitutional right. The "marketplace of ideas" metaphor, which justifies freedom of speech on the notion that competition in the marketplace of ideas is the best test of truth, is perhaps the most famous example. The "self-governance" rationale, which links the importance of freedom of speech to the democratic process, is another. A third prominent rationale is the "self-fulfillment" theory. This may also at times be described as the "human dignity" rationale, or the "self-realization" theory.

Under the "self-fulfillment" theory, free speech may be justified as an end itself, an end intimately intertwined with human autonomy and dignity. In *Procunier v. Martinez*, for example, the Supreme Court noted that—"The First Amendment serves not only the needs of the polity but the needs of the human spirit—a spirit that demands self-expression." The self-fulfillment rationale justifies the protection of freedom of speech for reasons that are not connected directly to the collective search for truth or the processes of self-government, or for any other conceptualization of the common good. As Professor C. Edwin Baker thus explains the theory, "Speech is protected not as a means of a collective good but because of the value of speech conduct to the individual." Freedom of speech is thus deemed a right to defiantly, robustly, and irreverently speak one's mind just because it is one's mind. The fulfillment that comes from speech is bonded to man's capacity to think, imagine, and create. The linkage of speech to thought, to man's central capacity to reason and wonder, justifies placing it beyond the routine jurisdiction of the state. As the Supreme Court explained in *Stanley v. Georgia*, the "right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought."

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References and Further Reading

- Baker, C. Edwin, *Scope of First Amendment Freedom of Speech*, U.C.L.A. Law Review 25 (1978): 964, 966.
- Smolla, Rodney. *Free Speech in an Open Society*. New York: Alfred A. Knopf, 1992.
- . *Suing the Press: Libel, the Media, and Power*. New York: Oxford University Press, 1986.

Cases and Statutes Cited

Procunier v. Martinez, 416 U.S. 396 (1974)
Stanley v. Georgia, 394 U.S. 557 (1969)

SELF-GOVERNANCE AND FREE SPEECH

The free speech clause of the First Amendment is not self-defining. Although Congress is required to “make no law” that “abridges the freedom of speech,” a principle that also applies to state and local governments through the process of incorporation, precisely what this prohibition includes is open to debate. Despite what might seem to be its plain textual meaning, the clause cannot signify that government is incapable of making any law that limits or penalizes expressive communication. Such a view would void many widely accepted criminal statutes, such as those proscribing child pornography, blackmail, and incitement to violence, or many common civil regulations, such as truth-in-advertising rules and other limits on commercial speech, or tort actions for defamation. The First Amendment is not a charter for total government inaction in the communicative context, nor was it intended to be, as early constitutional history makes clear, notably the Sedition Act of 1798. Indeed, on its own terms, the Amendment prohibits government from abridging not “speech” but rather “the freedom of speech,” a phrase that embraces only a limited subset of all possible expression—and that requires a principled framework of interpretation to give it content.

Some scholars and jurists have sought to develop this framework by defining “the freedom of speech” in relation to the underlying aims free speech can be said to serve. In this approach, one among many theories of free speech protection, defining the positive constitutional value of speech can help determine as a negative limit what the First Amendment protects against government infringement. Over the course of the twentieth century, three main views on the subject have emerged: that free speech is indispensable for individual autonomy and self-fulfillment; that it facilitates the search for various forms of truth, especially in social and political matters; and that it is essential for democratic deliberation and self-governance. These positions often overlap in legal advocacy and judicial reasoning, and they are not mutually exclusive, but they are distinct and, whether in a First Amendment jurisprudence of absolutism or balancing, they suggest that different levels of judicial protection should be afforded to different types of speech. Before turning to the justification

for protecting speech based on the goal of self-governance—the rationale most widely accepted but, at the same time, generally viewed as too narrow in its protective reach—it is necessary to consider in turn the other two commonly asserted values of free expression.

The view that free speech is necessary for self-fulfillment would grant the widest possible scope of judicial protection for expressive activity. Under this approach, grounded in the value of speech to individuals, the Constitution protects expression to provide the conditions necessary for individuals to decide how to live for themselves, according to their own lights. Only a fully libertarian speech community, the argument runs, will enable as many individuals as possible to achieve their desired ends. Such libertarian openness is especially significant for those whose views about the proper conduct of life require dissident forms of personal expression; but whether or not individuals actually choose to engage in speech frowned on by majorities, having the chance to do so without the sanction of law affirms the general moral ideal of individual liberty on which republican principles of the pursuit of happiness are based. Moreover, from the perspective not of individual speakers but rather of listeners, a fully open expressive environment enables individuals to shape their lives most effectively by facilitating the widest possible range of views and personal styles to take as their standard, from the politically weighty to the aesthetically frivolous. The self-fulfillment argument for free speech thus provides a strong basis for protecting not only political speech, literature, and the arts, and radical, nonideational forms of expression such as nude dancing, pornography, or obscenity, but also commercial speech, an important source of information and opinion.

The argument that free speech is necessary for the effective search for truth is rooted in John Milton’s assertion in *Aeropagitica* (1644) that prior restraint of dissenting religious views was based on a misperception of the ability of Christian truth ultimately to triumph over error: “Let her and Falsehood grapple; who ever knew Truth put to the worst, in a free and open encounter?” This principle of Protestant dissent was easily adapted to secular utilitarian approaches to speech in Victorian Britain—in his classic *On Liberty* (1859), John Stuart Mill argued that dissident opinions be protected so that society could derive the benefit that comes from engaging with them—and to judicial arguments concerning political radicalism in the early-twentieth-century United States, as in the dissent of Justice Holmes in *Abrams v. United States* (1919). Under this truth-based model, the First Amendment protects speech not so much to advance

the moral autonomy of the speaker or listener but rather to ensure the correct outcome of serious debate about society and politics. This view would protect a narrower range of speech than the self-fulfillment rationale—fewer modes and subjects of expression contribute to the search for Truth than are necessary for the full exercise of individual autonomy (for instance, from a truth-based rationale, it would be difficult to justify the absolute protection of commercial speech or of expression that does not contain ideas per se, such as pornography), but some forms of highly controversial speech would receive notable judicial solicitude, especially the antiliberal political advocacy of subversive organizations.

The third position, whose core arguments are widely acknowledged to be consistent with American constitutional principles, although not coextensive with them, asserts that speech has constitutional value especially when it contributes to the orderly discussion of government affairs. From this perspective, the Constitution protects two different types of speech based on two distinct legal mandates. Speech that contributes to democratic decisionmaking, soberly advancing views about political issues, receives absolute judicial protection under the First Amendment; other speech is subject to a greater degree of regulation according to the Fifth and Fourteenth Amendment principle of due process. In the view of Alexander Meiklejohn, the most prominent modern champion of the argument, the pedigree of this valuation of speech is ancient, extending back to Socratic ideals of public discourse about virtue and obedience to the law (“if the *Apology* had not been written . . . the First Amendment would not have been written”). The argument also has a distinctive basis in the democratic principles inaugurated by the American constitutional experiment. As Cass Sunstein has asserted, the popular sovereignty that grounds the United States as a republic presupposes the fully open discussion of issues of public concern. The speech protected by the First Amendment thus is that which makes possible the functioning of the government the Constitution itself established; the free speech clause is that part of the Constitution that safeguards its foundations. As an axiom of democratic government, the view that political speech lies at the core of constitutional protection is broadly accepted.

Meiklejohn famously illustrated his understanding of the value of speech through a portrait, often criticized as an idealization, of the American town meeting, one that also resembles a university seminar in its dialogic principles. “What, then, does the First Amendment forbid?” Meiklejohn asks in *Free Speech and Its Relation to Self-Government* (1948). “[The town meeting] is called to discuss and, on the basis

of such discussion, to decide matters of public policy. For example, shall there be a school? Where shall it be located? Who shall teach? What shall be taught? The community has agreed that such questions as these shall be freely discussed and that, when the discussion is ended, decision upon them will be made by a vote of the citizens. Now, in that method of political self-government, the point of ultimate interest is not the words of the speakers, but the minds of the hearers. The final aim of the meeting is the voting of wise decisions. The voters, therefore, must be made as wise as possible . . . Both facts and interests must be given in such a way that all the alternative lines of action can be wisely measured in relation to one another. As the self-governing community seeks, by the method of voting, to gain wisdom in action, it can find it only in the minds of its individual citizens. If they fail, it fails. That is why freedom of discussion for those minds may not be abridged.” From this perspective, speech is protected by the First Amendment not to advance individual self-fulfillment nor to achieve the outcome of social or political truth, but instead, most importantly, to maintain the collective democratic process (which, in theory, serves “wisdom” by enabling the full airing of opinion).

Two issues typically are raised concerning Meiklejohn’s approach to speech. First, as much as his core goal to protect political speech is acknowledged as fundamental to the Constitution, many see the reach of his theory as insufficiently broad. Most immediately, critics have suggested that viewing speech as important primarily for its role in democratic deliberation provides government too much latitude to abridge nonpolitical expression. The First Amendment, commentators assert, protects far more than the publication of party platforms. What of the arts, for instance? To this assertion, Meiklejohn responded, in a manner widely viewed as unsatisfying, that many other forms of expression provide grist from which “the voter derives the knowledge, intelligence, [and] sensitivity to human values . . . which, so far as possible, a ballot should express”—thus literature and the arts should be protected by the First Amendment, in his view, because “they lead the way toward sensitive and informed appreciation and response to the values out of which the riches of the general welfare are created.” At the same time, though Meiklejohn took a liberal position in the domestic ideological battles of the Cold War (he describes the body that condemned Socrates as “a kind of un-Athenian Subversive Activities Committee”), some have asserted that the self-governance argument legitimizes government restrictions not only on the time, place, and manner of speech—which Meiklejohn approved, so that expression would

accord with deliberative ideals—but also its political content. According to Robert Bork, for instance, it justifies government in prohibiting speech that advocates its own overthrow or “the violation of any law.”

The second issue concerns the extent to which the self-governance theory justifies state regulation of expression to promote democratic ends. On this view, associated especially with Owen Fiss, the principles that underlie the First Amendment justify the intervention of the state into the expressive arena to structure public discourse in ways that enhance democracy or achieve values the Constitution affirmatively demands, such as racial antisubordination. Arguments of this type are consistent with Meiklejohn’s original principles but they are advanced in a political context in which liberals view not Joseph McCarthy but rather structural inequality as the primary obstacle to democratic life, and thus in which they demand not a libertarian but rather an interventionist political agenda on behalf of their ideals. This approach is especially salient in the arena of campaign finance reform, where it is asserted that some abridgements of speech would safeguard the true “freedom of speech” contemplated by the First Amendment, and they have been a source of appeal for the Supreme Court in justifying public media regulation in *Red Lion Broadcasting*. In the view of Robert Post, such “collectivist” arguments typically fail to recognize that “the value of individual autonomy is inseparable from the very aspiration for self-government.” They also rest on a set of broad assumptions that deserve careful scrutiny, especially the notion that the distinction between public and private speech has become incoherent, and that public discourse cannot plausibly be viewed as an open dialogue between free, autonomous persons given the economic inequalities of the political arena. Future advocates of the self-governance approach to free speech will confront these and other criticisms as they maintain this tradition of analysis as a vibrant component of constitutional theory beyond its sixtieth year.

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References and Further Reading

- Bork, Robert H., *Neutral Principles and Some First Amendment Problems*, Indiana Law Journal 47 (1971): 1: 1–35.
 Fiss, Owen, *Free Speech and Social Structure*, Iowa Law Review 71 (1986): 5: 1405–1425.
 Meiklejohn, Alexander, *The First Amendment in an Absolute*, Supreme Court Review 1961 (1961): 245–266.
 ———, *Political Freedom: The Constitutional Powers of the People*. New York: Harper & Brothers, 1960.
 Post, Robert, “Meiklejohn’s Mistake: Individual Autonomy and the Reform of Public Discourse.” In

Constitutional Domains. Cambridge: Harvard University Press, 1995.
 Sunstein, Cass. *Democracy and the Problem of Free Speech*. New York: The Free Press, 1993.

Cases and Statutes Cited

- Abrams v. United States*, 250 U.S. 616 (1919)
Red Lion Broadcasting Co., Inc. v. Federal Communications Commission, 395 U.S. 367 (1969)

SELF-INCRIMINATION (V): HISTORICAL BACKGROUND

European, Colonial, and Constitutional Background

In the Roman Catholic Church’s campaign against heresy on the European continent in the late Middle Ages, ecclesiastical courts used the oath *ex officio*, by which suspects were required to swear to answer truthfully all questions that might be posed, without knowing the accusers, the charges, or the evidence. Refusal to take the oath resulted in condemnation as guilty, and acquiescence posed great risks of self-incrimination or punishment for perjury. Because perjury courted eternal damnation even if temporally unpunished, the oath was a powerful incentive for self-incrimination.

At about the same time, ecclesiastical courts in England, exercising jurisdiction over many secular offenses as well as church matters, sometimes imposed the oath *ex officio* and, more menacingly, in the sixteenth and seventeenth centuries so did the Court of High Commission (focused on heresy but able to impose civil as well as spiritual penalties) and the Court of Star Chamber (a secular court focused on political as well as criminal offenses). These courts also acknowledged, however, an opposing principle, *nemo tenetur prodere seipsum* (or *nemo tenetur seipsum accusare*)—no man should be compelled to betray (or accuse) himself. This principle arose not so much as a right of the accused as a means of requiring a credible basis for charges beyond the suspect’s own words; it stood in opposition to the obligation to answer under the oath *ex officio* but was restricted in application and not a sure safeguard.

The courts of High Commission and Star Chamber were abolished in 1641 and the oath *ex officio* died out, but criminal defendants in common-law courts still faced aggressive pretrial questioning by magistrates

and trial questioning by prosecutors and judges; at neither point were they under oath, but their words (or refusal to speak) could be used against them. Although the practice of trial questioning gradually died out, the absence of defense attorneys meant that the only defense available was to speak on one's own behalf. An effective right to silence did not begin to emerge in England until the late eighteenth century, when trial procedures began to be revolutionized and a norm of excluding involuntary confessions (if only because they might be untrue) began to take hold.

Similar conditions prevailed in the American colonies, including the conflict between the *ex officio* and *nemo tenetur* principles. Heightened antipathy to British mechanisms of oppression, including use of the oath *ex officio* in prerogative courts, led all the newly independent states in the years after 1776 to embody in constitution, bill of rights, or common law some explicit or implicit recognition of a right not to incriminate oneself. When the Bill of Rights was added to the new federal constitution, there was no significant debate over inclusion of the Fifth Amendment provision that "No person . . . shall be compelled in any criminal case to be a witness against himself." These state and federal provisions formalized rather than reformed best current procedure, however, and did not entail the privilege against self-incrimination as we know it. They precluded torture and some other coercive forms of interrogation, and incriminating interrogation under oath—but unlike witnesses, defendants were not under oath at trial. They remained subject to an expectation that the innocent could and would defend themselves, and official pretrial pressures to confess and use of the products thereof were not seen as a violation of rights. The federal constitutional guarantee, moreover, would not apply against the states—which conduct the vast majority of criminal trials—until 1964.

Nineteenth-Century Developments

Although the accused had to defend themselves in court if they lacked counsel, they could not testify under oath in any American jurisdiction until 1864 (because they were not considered disinterested parties). By 1900, the federal government and every state but Georgia had passed laws allowing (but not requiring) defendants to testify, and most of the new statutes stipulated that no adverse inferences could be drawn from a decision not to do so. (A century later, the Court would affirm that those are constitutional rights as well.) Counsel was now much more readily available, and defendants who could afford them

could therefore exercise a genuine right to silence at trial.

The privilege forbade compulsion to testify under oath, but the use of incriminating statements gained through pretrial interrogation was another matter. Courts determined the admissibility of such statements on the basis of their trustworthiness, an assessment resting in large part on their voluntariness. Because pretrial questioning gradually passed out of the hands of magistrates and became the responsibility of newly developing police departments, however, trial judges had only partisan accounts of interrogations and tended to give the benefit of the doubt to police—who had both the incentive and the opportunity to use coercive methods to obtain confessions.

Without reference to the Fifth Amendment, the Supreme Court held in *Hopt v. Utah Territory* that threats, inducements, or promises could render a confession involuntary in federal court; in 1897, it casually announced that the Fifth Amendment embodied the federal standard of admissibility but then ignored that approach for several decades. More significantly, the Court ruled in *Boyd v. United States* that the enforced production of private papers violated the Fifth Amendment and in *Counselman v. Hitchcock* that the privilege could be asserted not only at a criminal trial but in other forums where testimony could be compelled, because such testimony could later be introduced at trial. *Counselman* also held that incriminating testimony could be compelled only with a grant of complete immunity from prosecution for the offense in question (transactional immunity).

Evolution of the Testimonial Privilege

Early in the twentieth century, the Court held that the privilege is restricted to natural persons and cannot be asserted by corporations, labor unions, or other collective entities. It reiterated the view that (like the rest of the Bill of Rights) the Fifth Amendment privilege against self-incrimination did not apply to the states and added that the Fourteenth Amendment guarantee of due process (which does apply to the states) did not include the privilege. By mid-century it was clear that where it does apply, the privilege is not automatic and must be formally invoked. Defendants in criminal trials have an absolute right not to testify, but witnesses in any forum may assert the privilege only when their answers would present a realistic risk of incrimination, either directly or by providing a link in a chain of evidence or a lead to further evidence. Even if the requested information would be incriminating,

it is not privileged if the individual does not face criminal liability, as when immunity has been granted or the statute of limitations has expired. The privilege may not be invoked to avoid any noncriminal consequences, however undesirable, but it is available even to those who maintain complete innocence, because they could be prosecuted on the basis of appearances. Consistently with the *nemo tenetur* principle, it protects individuals from being compelled to incriminate themselves, but not from the compulsion of evidence against them from any other source.

In the latter half of the twentieth century, the Court carved out various other exceptions to the testimonial privilege, first by elaborating the older idea that the privilege does not apply to records that a general regulatory statute requires individuals or organizations to keep. It then refused to expand the *nemo tenetur* principle by holding in *Schmerber v. California* and subsequent cases that the prohibition of compulsion to be a witness against oneself extends only to testimonial or communicative evidence and offers no protection against the compelled production of physical evidence such as blood samples, fingerprints, DNA samples, and even utterances for the purpose of voice recognition.

Drawing on the narrow and literal conception of the privilege in *Schmerber*, the Court undercut the *Boyd* case's protection of private papers in *Fisher v. United States* and subsequent cases, holding that there is no protection against a subpoena for (or search and seizure of) voluntarily prepared private papers because no communicative act has been compelled. The contents of such papers thus enjoy no protection, but where the act of producing them would itself be incriminating, they cannot be subpoenaed without a grant of immunity for the act of production (but not for the contents). The Court also significantly modified the *Counselman* decision by holding in *Kastigar v. United States* that transactional immunity provides more protection than the Fifth Amendment requires and that immunity from the use of testimony and any evidence directly or indirectly derived therefrom—use and derivative use immunity—is all that is required for the compulsion of incriminating testimony. That formulation, the Court concluded, is congruent with the Fifth Amendment privilege as enforced by the exclusionary rule, under which compelled statements and evidence derived therefrom may not be introduced as evidence against the person whose rights were violated, but he or she may still be prosecuted.

The testimonial privilege came most prominently and controversially to public attention in the era of the 1950s, when events such as the spread of communism in Eastern Europe, the Korean War, and Soviet

espionage concerning the atomic and hydrogen bombs brought to fever pitch a relentless investigation of communism in America that came to be known as McCarthyism. Persons suspected of disloyalty were investigated not only by grand juries but also very publicly by congressional committees such as the House Un-American Activities Committee (HUAC), the Senate Subcommittee on Internal Security, and the Senate Permanent Subcommittee on Investigations under Senator Joseph R. McCarthy (R-WI), who in 1954 was censured by the Senate for his conduct. Witnesses could claim the privilege because of the threat of prosecution under the Smith Act, but in *Ullmann v. United States* the Court rejected the argument that it could be used to shield them from “loss of job, expulsion from labor unions, state registration and investigation statutes, [loss of] passport eligibility, and general public opprobrium,” even though these disabilities might be much more severe than the noncriminal consequences previously denied protection. In what is now generally regarded as an atmosphere of paranoid fear often leading to investigations serving little purpose beyond probing the political beliefs and unfairly sully the reputations of their targets, witnesses granted immunity faced the choices of refusing to answer and being punished for contempt, lying, and being punished for perjury or answering truthfully and being subjected to the harsh consequences identified by William Ullmann. The very act of claiming the privilege, even if immunity was not granted and testimony was not required, branded one as probably disloyal. Many persons lost their jobs as a result, and many public and private careers were unjustifiably ruined.

The threat of punishment for contempt is not the only form of compulsion, and as the anticommunist crusade died down, the Court ruled that individuals could not be fired from public employment, prohibited from entering into business contracts with the government, stripped of political party office, or barred from the practice of law simply for asserting the privilege (but could suffer such consequences if they refused to testify under a grant of immunity). In *Albertson v. Subversive Activities Control Board* it struck down a statute requiring members of communist organizations to register with the government and supply information about their activities, distinguishing it from general regulatory reporting requirements not aimed at criminal suspects. In the same spirit, it also upheld the assertion of the privilege with respect to laws requiring registration of gamblers and owners of illegal firearms. The Court opted to protect other values, however, by upholding a common state requirement that persons involved in traffic accidents with property damage stop and provide other drivers

with their names and addresses (*California v. Byers*), and a court order to a mother suspected of serious child abuse to produce the child (*Baltimore City Department of Social Services v. Bouknight*). It also made clear that the privilege protects only those confessions compelled by governmental action and not those resulting from such other sources of compulsion as mental illness.

Evolution of the Law of Coerced Confessions

In 1931, the *Report on Lawlessness in Law Enforcement* by the National Commission on Law Observance and Enforcement (the Wickersham Commission) documented widespread use of brutal third-degree tactics of police interrogation, and a particularly gruesome, racially charged example soon came to the Court in *Brown v. Mississippi*. Three young black men had been convicted of murder and sentenced to death on the basis of confessions elicited by savage beatings; there was no other evidence against them, and all had alibis. Overturning a result upheld by the state supreme court, the Court held that although the Fifth Amendment privilege pertained to testimony under oath and did not apply to the states in any event, use of pretrial confessions gained by force violated the Fourteenth Amendment guarantee of due process of law and in this case had perpetrated “a wrong so fundamental that it made the whole proceeding a mere pretense of a trial and rendered the conviction and sentence wholly void.”

State courts had typically admitted or excluded confessions on the basis of their reliability, considering their voluntariness in making that assessment, but over the next three decades (and particularly in the liberalizing era of Chief Justice Earl Warren), the Court elaborated and enforced a conception of due process in which fair treatment of suspects was the touchstone and voluntariness per se was the criterion of admissibility for confessions. It held that psychological as well as physical coercion could violate due process and gradually abandoned the approach in which the determination of whether various forms and degrees of coercion were excessive depended on the powers of resistance of the suspect in question. The scope of permissible pressure was progressively reduced to rule out techniques of intimidation, protracted and persistent questioning, deprivation of bodily needs, and similar tactics of interrogation, with the ultimate test being whether or not a suspect had confessed of his or her own free will.

The voluntariness criterion in state cases was now so close to the federal standard of not being

compelled to incriminate oneself that the Court relied on the state confession cases in *Malloy v. Hogan*, where it incorporated the self-incrimination clause of the Fifth Amendment into the due process clause of the Fourteenth Amendment and applied it (and its associated doctrines) to the states. In a companion case applicable only within the United States, it held that persons may assert the privilege in one jurisdiction out of fear of prosecution in another, and that a grant of immunity in one jurisdiction applies to other jurisdictions as well.

A major problem remained, however, which was the difficulty trial judges had considering the admissibility of confessions encountered in determining the true nature of interrogations that had occurred in the privacy of police stations. The Court thus took another major step in *Miranda v. Arizona* by holding that the privilege against self-incrimination applies to coerced confessions as well as compelled testimony and devising the *Miranda* warnings to protect the privilege for persons undergoing custodial interrogation.

Ongoing Issues

At the time of *Boyd* in the late nineteenth century, the rationale for the privilege seemed to be the protection of privacy, but subsequent decisions such as *Schmerber* and *Fisher* and those on collective entities and required records have undermined that conception, and there is no consensus on an alternative beyond a general desire to prohibit abusive governmental tactics. Debate over the proper scope of the privilege thus continues, with serious arguments for both expansion (such as restoring protection for private papers) and contraction (such as permitting the use of physical evidence derived from compelled statements). Controversy is compounded by uncertainty about the policy impact of constitutional doctrines. There is, for example, serious disagreement as to whether the *Miranda* initiative has either significantly inhibited police or substantially benefited suspects (most of whom waive their rights and talk to police). Furthermore, new issues concerning the proper scope of the privilege in the context of the war on terror are beginning to emerge. In that effort, the purpose of interrogation (of citizens and aliens, at home and abroad) may be to gather intelligence rather than evidence for prosecution, and the Court has ruled that it is not the use of coercive tactics of interrogation that violates the privilege, but only the use of the products as evidence in a criminal trial. With respect to both enduring and emerging issues, the scope and applicability of the privilege against

self-incrimination will be the subject of continuing controversy.

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References and Further Reading

- Dolinko, David, *Is There a Rationale for the Privilege against Self-Incrimination?* U.C.L.A. Law Review 33 (1986): 1063–1148.
- Fried, Richard M. *Nightmare in Red: The McCarthy Era in Perspective*. New York: Oxford University Press, 1990.
- Helmholz, R. H., et al. *The Privilege against Self-Incrimination: Its Origins and Development*. Chicago: University of Chicago Press, 1997.
- Levy, Leonard W. *Origins of the Fifth Amendment: The Right against Self-Incrimination*. New York: Oxford University Press, 1968.
- Taylor, John B. *Right to Counsel and Privilege against Self-Incrimination: Rights and Liberties under the Law*. Santa Barbara, CA: ABC-CLIO Press, 2004.
- Witt, John Fabian, *Making the Fifth: The Constitutionalization of American Self-Incrimination Doctrine, 1791–1903*, Texas Law Review 77 (1999): 825–922.

Cases and Statutes Cited

- Albertson v. Subversive Activities Control Board*, 382 U.S. 70 (1965)
- Baltimore City Department of Social Services v. Bouknight*, 493 U.S. 549 (1990)
- Boyd v. United States*, 116 U.S. 616 (1886)
- Brown v. Mississippi*, 297 U.S. 278 (1936)
- California v. Byers*, 402 U.S. 424 (1971)
- Counselman v. Hitchcock*, 142 U.S. 547 (1892)
- Fisher v. United States*, 425 U.S. 391 (1976)
- Hopt v. Utah Territory*, 110 U.S. 574 (1884)
- Kastigar v. United States*, 406 U.S. 441 (1972)
- Malloy v. Hogan*, 378 U.S. 1 (1964)
- Miranda v. Arizona*, 384 U.S. 436 (1966)
- Schmerber v. California*, 384 U.S. 757 (1966)
- Ullmann v. United States*, 350 U.S. 422 (1956)

See also **Coerced Confessions/Police Interrogation; Exemplars; Self-Incrimination: *Miranda* and Evolution**

SELF-INCRIMINATION: MIRANDA AND EVOLUTION

The Fifth Amendment to the U.S. Constitution provides in relevant part that—“no person . . . shall be compelled in any criminal case to be a witness against himself . . .” The Fifth Amendment applies to all federal courts and the federal government. The Fourteenth Amendment forbids states from depriving any person of life, liberty, or property without due process of law.

During the counterculture mood of the 1960s, civil and human rights movements, social revolution, and anti-Vietnam war protests occurred across the

country. It was during this time of social unrest that the Supreme Court was called on to settle a then controversial criminal justice issue—interrogation of suspects in custody by police to extract confessions. In essence, to do what the Fifth Amendment precluded—compel the criminal suspect to be a “witness against himself.” The Court interpreted this individual right in the case that was to give rise to what we now know as the “Miranda rights”—*Miranda v. Arizona*.

The underlying facts in *Miranda* were uncomplicated. On March 2, 1963, a twenty-three-year-old Ernesto Miranda drove up to an eighteen-year-old woman walking home from work. Miranda parked his car and approached the woman, grabbed her, and forced her into the back seat of his car where he bound her and threatened her with a knife. Miranda drove the victim to the desert and raped her before returning her to the place from where she was kidnapped.

Miranda was arrested by state police based on the victim’s description of the car. The victim was unable to identify Miranda out of a lineup. However, when Miranda was interrogated by police, he was falsely told that the victim had identified him. He broke down and gave a written confession. At the top of the paper he was given to write out his confession, there was a paragraph stating that Miranda understood his rights and that he was confessing voluntarily. Miranda was never directly informed of his Fifth Amendment rights; he had only a grade-school education.

At his state criminal trial, the prosecution, over the objections of Miranda’s court-appointed lawyer, was allowed to introduce Miranda’s written confession as the key evidence against him. Miranda was convicted of the charges. He was later sentenced to twenty to thirty years. His lawyer appealed the conviction to the Arizona Supreme Court. The convictions were upheld. The American Civil Liberties Union in Phoenix, Arizona, picked up Miranda’s case. And in 1965 the U.S. Supreme Court agreed to review the case, consolidating it with three other cases presenting the same constitutional issue—*Westover v. United States*, *Vignera v. New York*, and *California v. Stewart*. On June 13, 1966, the U.S. Supreme Court issued its opinion reversing Miranda’s conviction and granting him a new trial because his due process rights were violated through the denial of his right against self-incrimination.

The Court held that, because of the due process guarantee of the Fourteenth Amendment (also contained in the Fifth Amendment), “[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation

of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination” The “person in custody must, prior to interrogation, be clearly informed that he has the right to remain silent, and that anything he says will be used against him in court; he must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation, and that, if he is indigent, a lawyer will be appointed to represent him” (*Miranda*, at 467–473). These are the now well-known Miranda Rights and remain unchanged forty years later.

The Court’s decision in *Miranda* was so controversial that it took center stage in the political debates during the 1968 presidential election. The *Miranda* decision and the rationale for its new doctrine have evolved through time and have set off legions of scholarly articles and judicial decisions.

Two years after *Miranda*, Congress tried to erode the basis of the decision by enacting Title 18 U.S.C. § 3501. Section 3501 made the giving of the Miranda Rights but one factor in the determination of the admissibility of custodial statements. Section 3501 tried to return to the voluntariness analysis in confession cases in place before *Miranda* was decided. But this statute was largely ignored by the courts, because it was viewed as unconstitutional in light of *Miranda*. It was not until 2000 that § 3501 was held unconstitutional by the Court in the landmark self-incrimination case of *Dickerson v. United States*, 530 U.S. 428 (2000).

Shortly after *Miranda* was decided, the Court began to retreat from its initial legal rule. In *Harris v. New York*, 401 U.S. 222 (1971), the Court held that statements taken in violation of *Miranda* can still be introduced at trial to impeach a defendant. In *Michigan v. Tucker*, 417 U.S. 433 (1974), the Court held that the Fourth Amendment’s “fruit of the poisonous tree” did not apply to Miranda violations; this ruling reaffirmed in *U.S. v. Patane*, 124 S.Ct. 2620 (2004). In *Edwards v. Arizona*, 451 U.S. 477 (1981), the Court held that once a suspect asks for a lawyer after Miranda rights, all questioning must cease; but, in *Davis v. United States*, 512 U.S. 452 (1994) that invocation must be unequivocal and clear. Then, in *New York v. Quarles*, 467 U.S. 649 (1984), the Court found a public safety exception to the giving of Miranda rights. And in *Duckworth v. Eagan*, 492 U.S. 195 (1989), the Court approved a set of Miranda warnings slightly different from its original set. In *Missouri v. Seibert*, 124 S.Ct. 2601 (2004), the Court struck down a common law enforcement interrogation technique of securing a confession and afterwards to give Miranda warnings and then getting the confession again.

Miranda warnings have remained a staple in American society as a preventive cure to overzealous law enforcement officers. *Miranda* has survived and been reaffirmed at its core in the *Dickerson* and *Seibert* cases.

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References and Further Reading

- Cassell, Paul, and Robert Litt, *Will Miranda Survive?: Dickerson v. United States: The Right to Remain Silent, the Supreme Court, and Congress, Debate at the Georgetown University Law Center* (March 28, 2000). Criminal Law Review 1165 (2000).
- Godsey, Mark A., *Rethinking the Involuntary Confession Rule: Toward a Workable Test for Identifying Compelled Self-Incrimination*, 93 California Law Review 465 (2005): 499–505.
- , *Miranda’s Final Frontier—The International Arena: A Critical Analysis of United States v. Bin Laden, and a Proposal for a New Miranda Exception Abroad*, 51 Duke Law Journal 1703, 1735–1752.
- Levy, Leonard W. *Origins of the Fifth Amendment*. New York: Macmillan–Pulitzer Prize winner, 1969. Reprint 1986.
- Stuart, Gary L. *Miranda: The Story of America’s Right to Remain Silent*. University of Arizona Press (2004).
- White, Welsh S. *Miranda’s Waning Protections*. University of Michigan Press (2003).

See also Coerced Confessions/Police Interrogation; Miranda Warning

SELF-REPRESENTATION AT TRIAL

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.” This provision, which applies to the states through the Fourteenth Amendment, encompasses an independent right of self-representation at trial. That is, a criminal defendant has a constitutional right to proceed without counsel at trial, which precludes the government from forcing a lawyer on an accused when the accused insists on conducting his or her own defense, *Faretta v. California*.

To invoke the right of self-representation, a defendant must make a timely request and must knowingly and intelligently forgo the traditional benefits associated with the right to counsel. This latter requirement does not mean that the accused must have the skill and experience of a lawyer to choose self-representation. The accused need not, for example, be familiar with the relevant rules of evidence and procedure. Rather, the accused merely must understand what he or she is doing and must make the choice

with eyes open. Accordingly, an accused must be aware of the dangers and disadvantages of self-representation, *Faretta v. California*.

The right of self-representation encompasses certain specific rights. Defendants who choose self-representation must be permitted to control the organization and content of their own defense, to make motions, to argue points of law, to participate in the selection of the jury, to examine witnesses, and to address the judge and jury at appropriate points in the trial, *McKaskle v. Wiggins*. Defendants must, however, comply with the relevant rules of evidence and procedure, and they cannot complain after trial that the quality of their own defense amounted to a denial of “effective assistance of counsel.” Moreover, if a defendant deliberately engages in disruptive behavior, the trial judge can terminate the defendant’s self-representation, *Faretta v. California*.

When a defendant elects self-representation, the trial judge may—even over the defendant’s objection—appoint “standby counsel” to aid the defendant if and when the defendant requests help and to be available to represent the defendant if the judge finds it necessary to terminate the defendant’s self-representation, *Faretta v. California*. Nevertheless, the right of self-representation imposes some limits on the extent to which standby counsel may participate in the proceedings without the defendant’s consent. First, the defendant must maintain actual control over the case he or she chooses to present. For example, the defendant must be free to make significant tactical decisions, control the questioning of witnesses, and speak on any matters of importance. Second, in a jury trial, the unwanted participation by standby counsel must not destroy the jury’s perception that the defendant is representing him or herself, *McKaskle v. Wiggins*.

Although the Sixth Amendment guarantees a defendant the right to counsel as well as the right to self-representation, a defendant does not have a constitutional right to “hybrid” representation under which the defendant and an attorney act, in effect, as co-counsel. A trial court may, however, permit hybrid representation, *McKaskle v. Wiggins*.

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References and Further Reading

LaFave, Wayne R., Jerold H. Israel, and Nancy J. King. *Criminal Procedure*. 4th ed. St. Paul: Thompson-West, 2004, pp. 594–600, 995–996.

Cases and Statutes Cited

Faretta v. California, 422 U.S. 806 (1975)
McKaskle v. Wiggins, 465 U.S. 168 (1984)

See also **Incorporation Doctrine; Ineffective Assistance of Counsel; Right to Counsel (VI)**

SENTENCING GUIDELINES

Sentencing guidelines are bodies of law that encourage judges to select sentences in normal cases from a narrow range of preferred sentences, while still allowing judges in unusual cases to choose from a broader range authorized by statute. The impact of sentencing guidelines on civil liberties varies from place to place. They sometimes combine the virtues of reasonably uniform outcomes with the ability to individualize each sentence. In many states, guidelines have become valuable methods for linking punishment policies to available resources, thus limiting the severity of punishments. On the other hand, in some jurisdictions (most prominently, the federal criminal justice system), guideline sentences have contributed to falling trial rates and increasingly severe punishments.

The concept of uniform guidance for sentencing judges originated in the middle of the twentieth century. An early proposal for sentencing guidelines carrying the force of law appeared in a short, but powerful, book published in 1973 by Judge Marvin Frankel, *Criminal Sentences: Law without Order*. Frankel condemned as “lawless” the discretionary sentencing system that gave judges no legal standards for making choices with the most profound effects on liberty. In place of this system, Frankel suggested that a “Commission on Sentencing” enact rules to govern the judicial selection of sentences.

Sentencing guidelines first took effect in a few state systems, including Minnesota and Pennsylvania. In the federal system, the Sentencing Reform Act of 1984 established the U.S. Sentencing Commission and empowered it to create guidelines for federal judges. Now roughly half the states have enacted some form of sentencing guidelines.

The reach of these sentencing guidelines varies. The guidelines all cover felonies, while a few also guide judges in misdemeanor cases, despite the challenges of importing new legal structures into the high-volume world of petty crimes. Guidelines in a few states designate the nonprison punishments for judges to impose. Most guideline states abolish parole and embrace the concept of “truth in sentencing,” which means that the sentence announced publicly in court corresponds closely to the sentence that the offender ultimately serves. In a few states, like Pennsylvania, sentencing guidelines coexist with a continued parole authority to set the maximum prison term.

The binding power of sentencing guidelines also varies. Some are known as “voluntary” guidelines,

leaving judges free to sentence an offender outside the recommended range while staying within the broader statutory maximum and minimum. In contrast to these voluntary guidelines, some jurisdictions use “presumptive” guidelines. The judge who chooses a sentence within the presumptive range faces no appellate review and no obligation to explain the sentence, but a judge who “departs” from the guidelines to impose a higher or lower sentence triggers appellate review of that sentence and must offer a legally sufficient explanation for the departure.

Sentencing guidelines typically originate from an expert sentencing commission. They might take the form of statutes that the commission recommends to the legislature or administrative regulations that the commission creates on its own. The commission also monitors the operation of guidelines over time and amends them to reflect changing conditions or priorities.

Commissions that draft “prescriptive” guidelines, which attempt to change some aspect of preguideline sentences, must develop the political skills to convince judges, prosecutors, and probation officers to support the guidelines. Determined opposition from courtroom actors can lead to inconsistent and ineffective application of sentencing guidelines.

The U.S. Sentencing Commission has not been notably successful in winning the support of judges, defense attorneys, or line prosecutors. The federal guidelines create an elaborate structure to compel judges to consider all of the defendant’s conduct relevant to the “real offense” rather than limiting the relevant wrongdoing to the elements of the charged offense. This structure pushes some of the most important factual issues relevant to punishment out of the trial and into the procedurally informal sentencing hearing. The federal sentencing guidelines are also blamed for major prison population growth in the system, although the heavy use of mandatory minimum sentences contributes heavily to this problem.

The effects of sentencing guidelines in many states have been more positive. They have promoted more transparent connections between sentencing rules and actual sentencing practices, along with clearer explanations for many routine sentencing decisions. On balance, they have probably helped constrain the growth of prisons and have promoted more consistent use of criminal punishments, perhaps even removing some of the racial disparities that plague discretionary sentencing.

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References and Further Reading

Barkow, Rachel, *Administering Crime*, UCLA Law Review 52 (2005): 3: 715–814.

Bowman, Frank, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, Columbia Law Review 105 (2005): 4: 1315–1350.

Frankel, Marvin. *Criminal Sentences: Law without Order*. New York: Hill and Wantg, 1973.

Frase, Richard, *State Sentencing Guidelines: Diversity, Consensus, and Unresolved Policy Issues*, Columbia Law Review 105 (2005): 4: 1190–1232.

Miller, Marc, *True Grid: Revealing Sentencing Policy*, U.C. Davis Law Review 25 (1992): 3: 587–610.

Stith, Kate, and José A. Cabranes. *Fear of Judging: Sentencing Guidelines in the Federal Courts*. Chicago: University of Chicago Press, 1998.

Tonry, Michael. *Sentencing Matters*. New York: Oxford University Press, 1996.

Cases and Statutes Cited

Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1873

See also **Mandatory Minimum Sentences; Prison Population Growth; Three Strikes/Proportionality**

SENTENCING REFORM ACT

The Sentencing Reform Act was passed with overwhelming support in Congress in 1984. The Act’s purpose was to address the appearance (and may be reality) of unwarranted disparity in federal sentences. The Act was supported by politicians on both the left and right of the political spectrum. The former felt that treating similar defendants differently in the courts was simply unjustified; some means had to be found to regularize sentences, to treat defendants with similar backgrounds who committed comparable crimes in a consistent fashion. Proponents on the right of the political spectrum felt that reform of sentencing would lead to tougher penalties and would preclude the kinds of lenient sentences these advocates felt judges often meted out.

To achieve the goal of reducing unwarranted disparity in sentencing, the Sentencing Reform Act created the Sentencing Commission whose membership included both judicial and lay individuals. The Commission in turn promulgated Federal Sentencing Guidelines that became the required handbook for all Federal sentencing after November 1987. The Guidelines were essentially a 2×2 grid, with offender characteristics on one side and offense characteristics on the other. All crimes were said to fall within one of the resultant boxes, and judges were to sentence within the range (25 percent) of sentences indicated in the box. Several other factors are important to note about this sentencing process. First, judges were expected to increase or decrease a sentence after a jury verdict on

a particular charge depending on certain factual matters (for example, the amount of drugs involved in a drug sale). This was to be done after a factual hearing in which the standard of proof was preponderance of the evidence (not the “beyond a reasonable doubt” standard the jury with which the jury was charged). Second, although in principle judges could depart from these Guidelines, the variables that justified these departures were few. If the Commission was said to have considered the variable in its deliberations—and indicated that it was not a ground for departure—the judge could not substitute his or her judgment for the Commission’s. Third, if the defense or prosecution opted for an appeal of a sentence outside the Guidelines, it was now permissible to do so. Appellate review of sentences before Sentencing Reform Act was limited mostly to sentencing “abuse of discretion,” a stringent standard rarely successfully used to overturn a sentence.

Since its implementation, the Guidelines have received mixed reviews. In their favor, they removed some of the difficulty in sentencing for judges. This is to say, judges who agonized over sentencing choices may have welcomed the mechanical nature of sentencing the Guidelines could offer. It could make a judge’s job easier. On the other hand, many criticisms of the Guidelines also surfaced. Judges felt like robots under the Guidelines, simply applying the increasingly complex adding and subtracting that the Guideline grids, and their accompanying rules, dictated. This was particularly difficult for some judges in “equity cases” wherein the judge felt the Guideline sentence was unfairly harsh and yet felt unable to mitigate the required sentence. Finally, judges, and many others, criticized the failure of the Guidelines to actually reduce disparity in sentences, the original animating purpose of the Sentencing Reform Act. Although the Guidelines hamstrung judges, critics noted, they did not appreciably restrict prosecutorial discretion. As a consequence, the power of the U.S. attorneys increased under the Guidelines, and their plea bargaining practices resulted in the very kind of disparity the Guideline’s aimed to reduce.

In January 2005, in *U.S. v. Booker* and *U.S. v. Fanfan*, a divided U.S. Supreme Court required that the major product of the Sentencing Reform Act—the Federal Sentencing Guidelines—needed to be substantially changed. Instead of mandating that judges opt for a particular box in the sentencing grid and then adjust the prescribed sentence depending on specific facts of the offense (facts established by the judge after the jury’s decision on guilt on a particular charge), the Guidelines should merely be advisory to the sentencing judge. The judge should preserve the

discretion to sentence anywhere within the statutory range for a particular jury conviction. Whether in the future this will lead prosecutors to ask the jury to decide on additional factors (and thus limit a judge’s range), or whether in the case of pleas, defendants are expected to stipulate to certain sentencing facts, remains to be seen. Also, and most important, is the matter of whether increased judicial discretion will lead to the kind of “unwarranted sentencing disparity” that gave birth to the Guidelines initially.

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References and Further Reading

- Freed, Daniel, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, The Yale Law Journal 101 (1992): 8: 1681–1754.
 Heumann, Milton, *Empirical Questions and Data Sources: Guideline and Sentencing Research in the Federal System*, Federal Sentencing Reporter 6 (1993): 15–18.
 Stith, Kate, and Jose Cabranes. *Fear of Judging*. Chicago: University of Chicago Press, 1998.
 Tonry, Michael. *Sentencing Matters*. New York: Oxford University Press, 1996.

Cases and Statutes Cited

- Blakely v. Washington*, 542 U.S. (2004), 124 S. Ct. 2531 (2004)
United States v. Booker, No. 04-105, January 12, 2005, 125 S. Ct. 739 (2005)
United States v. Fanfan, (decided together with Booker)

See also Guilty Plea; Jury Trial; Jury Trial Right; Mandatory Minimum Sentences; Sentencing Guidelines

SERVICEMEMBERS LEGAL DEFENSE NETWORK

Servicemembers Legal Defense Network (SLDN) is a national nonprofit organization dedicated to ending discrimination against and harassment of military personnel on the basis of sexual orientation and gender identity. SLDN was formed in 1993, in response to Congress’s statutory enactment of the military’s long-standing gay exclusion in the so-called Don’t Ask, Don’t Tell (DADT) statute.

SLDN’s efforts include policy development, impact litigation, watchdog, and legal aid activities. SLDN engages in policy research, educational efforts, and litigation aimed at lifting the military’s ban on gay service personnel. In court, it has repeatedly challenged the Don’t Ask, Don’t Tell policy as a violation of privacy, Equal Protection, the First

Amendment, and the liberty interest within the due process clauses that was held to be constitutionally protected in *Lawrence v. Texas*. SLDN has also challenged the military sodomy statute as unconstitutional in the wake of *Lawrence (United States v. Marcum)*. In 2005, SLDN worked with congressional leaders to introduce a proposed legislative repeal of the DADT policy, the Military Readiness Enhancement Act. SLDN regularly engages in educational efforts targeting key leaders in all branches of government. It also coordinates an annual lobby day that brings veterans to Capitol Hill to urge Members of Congress to repeal DADT.

Every year, SLDN provides free advice and legal services to many hundreds of active-duty and former military personnel in matters related to sexual orientation and gender identity. Its online *Survival Guide* is a comprehensive resource about DADT for service members. SLDN also produces an important annual report, *Conduct Unbecoming*, available at its website, analyzing the gay discharge-related activities of the various branches of the military and monitoring compliance or noncompliance with the supposedly protective aspects of the DADT law. SLDN has been active in documenting antigay harassment within the military and in pressuring various branches to clarify and enforce their antiharassment policies. SLDN also advocates for more protective privacy policies and for psychotherapist, doctor-patient, and chaplain privileges that would protect service members who discuss their sexual orientation or gender identity with health care providers and religious counselors.

SLDN works in coalition with a number of other advocacy groups. For example, with American Veterans for Equal Rights and the Human Rights Campaign, it cofounded *Documenting Courage*, an online campaign to tell the stories of lesbian, gay, and transgender troops. Working with the Center for the Study of Sexual Minorities in the Military and the Society of American Law Teachers, it established a web page to assist in developing organizing strategies around the Solomon Amendment. SLDN filed an amicus brief in the ongoing litigation challenging the Solomon Amendment (*FAIR v. Rumsfeld*).

SLDN also engages in activities that support service member and veteran pride and increase the visibility of these groups and individuals.

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References and Further Reading

www.sldn.org [website of Servicemembers Legal Defense Network].

Cases and Statutes Cited

Don't Ask, Don't Tell, 10 U.S.C. Sec. 654
Forum for Academic and Institutional Rights v. Rumsfeld,
 319 F.3d 219 (3d Cir. 2004), cert. granted, 125 S.Ct. 1977
 (2005)

Lawrence v. Texas, 539 U.S. 558 (2003)

United States v. Marcum, 60 M.J. 198 (Ct. App. A.F. 2004)

See also **Gay and Lesbian Rights; Right of Privacy; Sodomy Laws**

SEVENTH DAY ADVENTISTS AND RELIGIOUS LIBERTY

The Seventh day Adventist Church is an evangelical Christian denomination that grew out of a diverse family of denominations, Presbyterian, Baptist, Methodist, and Congregational and Bible study movements that arose in the middle of the nineteenth century. This evangelical Christian denomination was sparked by the teachings of Warren Miller (1782–1849). Warren Miller was a farmer who settled in upstate New York after the War of 1812. He was originally a Deist. Miller was convinced the Bible contained coded information about the end of the world and the second coming of Jesus Christ. By interpreting Daniel 8:14, Miller believed the “cleansing of the temple” (the second coming) would occur sometime between two spring equinoxes: March 21, 1843, and March 21, 1844. When the prophecy did not come true, many believers left the movement in what has become known as the Great Disappointment. Miller gradually withdrew from leadership and died in 1849. This group lead by Miller was known as Adventist or Millerites.

On May 21, 1863, the church was formally organized as the Seventh Day Adventist Church. This organization was led by Ellen Harmon White, her husband James White and Joseph Butes.

Early Seventh-day Adventist leaders, including Ellen G. White, taught that those who did not accept the Adventist message before October 22, 1844, would not be saved. This was called the “shut door” doctrine. This doctrine was later rejected.

Victor Houteff joined the Seven Day Adventist Church in 1919. His beliefs deviated from mainstream church doctrine, culminating in his publishing “The Shepherd’s Rod,” the title taken from a passage in Ezekiel. Houteff left the church and formed a new sect in 1929 called the Davidian Seventh Day Adventist. This group eventually split further and led to the organization called the Students of the Seven Seals, popularly known as the Branch Davidians. In 1993,

after a long standoff with the FBI, the Branch Davidian's compound burned down with the sect suffering major losses of life.

Seventh Day Adventists, the main body of the group, believe they have the right to freedom of religion, subject to the equal rights of others. This implies the freedom to meet for instruction and worship, to worship on the seventh day of the week (Saturday), and to disseminate religious views by public preaching or through the media. Every person has a right to demand consideration whenever conscience does not allow the performance of certain public duties, such as requiring the bearing of arms. It has been their belief in Saturday Sabbaths and their consideration of conscience that has led to the majority of their religious liberty legal fights.

The Seventh Day Adventist belief in a twenty-four-hour sunset-to-sunset Sabbath commencing on Friday evening has led to two hallmark Supreme Court Cases, *Sherbert v Verner*, 374 US 398 (1963) and *Hobbie v Unemployment Appeal Commission of Florida*, 480 US 139 (1987). Both Sherbert and Hobbie were dismissed from work because of conflicts with their Sabbath hours. Adeil Sherbert was fired from her job after she refused to work on Saturday. The South Carolina Employment Security Commission denied her benefits, finding unacceptable her religious justification for refusing to work on Saturday. Sherbert sued, and the case went to the Supreme Court. Mr. Justice Brennan writing for the majority held that the state's eligibility restrictions for unemployment compensation imposed a significant burden on Sherbert's ability to freely exercise her faith. Furthermore, there was no compelling state interest that justified such a substantial burden on this basic First Amendment right. The question to ask stated the Court is "whether the law at issue substantially burdens a religious practice and, if so, whether the burden is justified by a compelling state interest," in the case there was not, the state could not "impose a burden on the free exercise of her religion." Paula Hobbie was employed by a jewelry store. After being employed for two years, Ms. Hobbie informed her employer that she was being baptized into the Seventh Day Adventist and, therefore, would be unable to work on her Sabbath day, Saturday. Arrangements were made for her to work Sunday. This arrangement worked until the owner of the company heard of the arrangement and informed Ms. Hobbie she must work Saturday or quit. She refused and was terminated. When Ms. Hobbie sought unemployment benefits, she was refused. Mr. Justice Brennan writing for the majority held that when a state denies receipt of a benefit because of conduct mandated by religious

belief, thereby putting substantial pressure on an adherent to modify his or her behavior and to violate his or her beliefs, that denial must be subjected to strict scrutiny and can be justified only by proof of a compelling state interest. ". . . [R]eceipt of a benefit because of conduct mandated by religious belief . . . must be subjected to strict scrutiny."

The Seventh Day Adventists also held religious liberty versus the state in the case of *Giroud v US*, 328 US 61 (1946). In this case Mr. Giroud, a native of Canada, filed his petition for naturalization in the District Court of Massachusetts. To the question in the application, "If necessary, are you willing to take up arms in defense of this country?" he replied, "No," (noncombatant) Seventh Day Adventist. He explained the answer before the examiner saying "it is a purely religious matter with me, I have no political or personal reasons other than that." He did not claim before his Selective Service board exemption from all military service, but only from combatant military duty. The District Court admitted him to citizenship. The Circuit Court reversed. He was denied naturalization because he declared he would not bear arms to defend the United States but was willing to support and defend the Constitution and the laws in other ways. In this case the Supreme Court declared that the Congress had not intended the promise to bear arms to be a prerequisite to citizenship. Mr. Justice Douglas writing for the majority explained, "The victory for freedom of thought recorded in our Bill of Rights recognizes that in the domain of conscience there is a moral power higher than the State. Throughout the ages men have suffered death rather than subordinate their allegiance to God to the authority of the State. Freedom of religion guaranteed by the First Amendment is the product of that struggle."

The core of the Seventh Day Adventist tradition is their belief in "the Bible and the Bible alone" as the basis for all their doctrine. In this belief they hold firmly to religious liberty and actively work toward maintenance of the constitutional separation of church and state.

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References and Further Reading

- Anderson John. *Religious Liberty in Transitional Societies: The Politics of Religion*, 2003.
 Gaustad, Edwin, ed. *The Rise of Adventism: Religion and Society in Mid-Nineteenth Century America*, 1974.
 Mead, Frank S. *The Handbook of Denominations*, 1995.
 Vance, Laura L. *Seventh-Day Adventism in Crises: Gendered and Sectarian Change in an Emerging Religion*, 1999.

See also *Sherbert v. Verner*, 374 U.S. 398 (1963)

SEX AND CRIMINAL JUSTICE

Female Offenders

Men account for the vast majority of people under the supervision of the criminal justice system. Nevertheless, the female presence in the system is growing at a significantly faster rate than the male presence, 6.4 percent versus 3.9 percent in the past ten years in the jail population alone. More than 100,000 women were under the supervision of prison authorities in 2003, with an average daily jail population of 81,650. Twenty-three percent of all probationers, a total of 936,000, were female, as were 13 percent of all parolees, or 97,000 women. The female arrest rate rose 1.9 percent in that year, whereas male arrests decreased 0.4 percent. The result is more than 1,000,000 females subject to some form of supervision, with more than 2,000,000 having been arrested.

Racial, ethnic, and class disparities characterize this population. Thus, again in 2003, African-American females were five times more likely than white females to be incarcerated, and twice as likely as Hispanic females, even though Hispanic female inmates rose 71 percent between 1990 and 1996 alone. In 2003, approximately 58 percent of female inmates were minorities. The average incarcerated woman is thirty-one years old, undereducated, unemployed at the time of arrest, and unmarried. She is three times more likely to have suffered physical abuse and six times more likely to have suffered sexual abuse after age eighteen than her male counterpart.

Only approximately 18 percent of all arrests for violent crime are of women. Drug offenses thus fuel most of the growth, accounting in New York, for example, for 91 percent of the rise in female prison sentences between 1986 and 1995. Drug or property offenses combined account for the bulk of criminal convictions of females. Women of color are once again affected disproportionately by the war on drugs; notably between 1986 and 1991, the number of women in state prisons for drug offenses rose 828 percent for African Americans, 328 percent for Hispanics, and 241 percent for whites.

Of those females who are incarcerated for acts of violence, many did so against a partner who had sexually or physically abused them. Abused women often turn to drug abuse, which is itself linked to criminality, to avoid dealing with deeper traumas.

Juvenile girls and young women, who are often running away from abusive homes, may become involved in gangs, although they likely constituting

only 10 to 22 percent of all gang members nationwide. Female gang members are more likely than male members to come from families with alcoholic, drug-addicted, or criminally involved siblings or parents. Most female gangs are male gang auxiliaries, although independent "girl gangs" may have become more common and perhaps more central to drug dealing and violence in the 1990s.

Because so much female violent crime is a reaction to abuse, social science studies on the etiology and impact of such abuse have often been seized on by lawyers to aid in crafting their clients' defenses. Perhaps the best-known evidence of this kind is a psychologist's testimony about battered woman syndrome (BWS) and its variants, evidence generally admissible in most jurisdictions. BWS advocates argue that the abused's experience alters her perceptions, thus notably helping to support a self-defense claim (usually requiring that she actually and reasonably perceived herself as facing imminent danger of death or serious bodily injury) or at least a partial defense, perhaps mitigating the crime from murder to manslaughter on grounds of "extreme emotional disturbance."

Prostitution is another important category of female criminality. Although there are occasional crackdowns on the male customers ("johns"), law enforcement policy in this area favors arresting the prostitutes or, where feasible, their male pimps or female madams. In the wake of the AIDS epidemic, many states have passed laws targeting prostitutes who are repeat offenders for enhanced penalties, despite the lack of scientific evidence that female prostitutes are an important source of transmission of the disease in the United States.

Women and their children also often face harsh collateral consequences from current sentencing practices. When males are incarcerated, their children are likely to be raised by their mothers. But when females are incarcerated, the children's care is usually shifted to friends, relatives, or foster care; less than one-third of them reside with their father. The federal system is especially likely to discount family ties in imposing sentences. Yet even an eighteen-month prison sentence can be "a death penalty" for parental rights, given the Adoption and Safe Families Act's mandate of termination proceedings if a child spends fifteen of twenty-two months in foster care, unless certain specified circumstances exist. There are too few people willing to adopt such children, and foster care may not necessarily be better for these children; a Bureau of Justice Statistics Survey found that 87 percent of female prisoners whose childhood was spent in foster care or institutions report being sexually or physically abused. Separation of children from their parents can

lead to guilt, anxiety, anger, depression, shame, and fear, and the children of the incarcerated are more likely than other children to offend. Furthermore, even after release, a single mother convicted of a drug-related offense who avoided termination of her parental rights will in most states be denied federal food stamps, cash assistance, public housing, or aid in paying for private housing or an education. Her conditions of release, such as working or receiving drug treatment, rarely take account of her childcare responsibilities, perhaps resulting in reincarceration for technical violations of probation or parole. Numerous commentators thus worry that harsh sentences for nonviolent female offenders merely encourage increased criminality among them and their children.

Women as Victims of Crime

Females, especially the young, are far more likely than males to be victimized by crime, with most victimizers being male. There are racial disparities as well, the violent crime victimization rate for white females notably is 40.9 per 1,000 females in the population but 44 for Hispanic females and 52.3 for African-American females. Women, are, however, far more frequently victimized than men for particular types of violent crime, with 98 percent of victims of rape and 81 percent of victims of attempted rape being females older than the age of twelve. Women are four times more likely to be stalked and about three times more likely to suffer physical abuse by a spouse or companion than are men. Nearly two-thirds of violent crimes against males are committed by strangers, whereas the corresponding number for females is but one-third. Most victimization of women occurs in their homes or those of friends, relatives, and neighbors rather than on the street. There is reason to believe that these numbers underestimate the absolute and relative victimization rates for women.

Rape is perhaps the most infamous of crimes against women, "date rape"—sexual assault involving individuals who knew each other—is especially difficult to prove. Although the studies done on the incidence of date rape have faced substantial criticisms, many converge on similar results: large percentages of women, often approximately 25 percent of the total, are estimated to have been victimized by rape or attempted rape, with more than 75 percent of their assailants being nonstrangers. The primary issue in these cases is whether the women consented and, if

they did not, whether the men should reasonably have known that. Historically, the law created significant formal obstacles to conviction in rape cases, requiring corroboration of the victim's testimony; admitting evidence of her prior consensual sexual involvement with other men, both to prove her consent in the case at hand and to call her credibility into question; and specially instructing the jury to be cautious in its evaluation of the victim's testimony. Modern statutes and evidence rules, including "rape shield" statutes, frequently forbidding reference to a victim's reputation as promiscuous or reference to specific instances of her specific prior sex acts, generally reject these requirements. Most states still require proof of "force" or its threat, although some have eliminated that element of the crime. Traditionally, a showing of force required proving so much force as to overcome a woman's "utmost" resistance, generally meaning resistance to the point of endangerment of death or serious bodily injury. The law in many states later altered this requirement to showing a mere "reasonable" resistance, and some states have entirely eliminated any overt proof of the accused's use of force. These formal legal changes were largely prompted by an organized rape law reform movement, an arm of the broader feminist movement.

Many feminists saw the legal hurdles to proving rape as a way of, in practice, legalizing male sexual violence against women. Rape reformers hoped that formal legal changes would improve this state of affairs. Reformers also often gained access to counseling for rape victims and their right to submit victim impact statements at sentencing where convictions did occur. A number of states have also adopted statutes permitting the use of an accused rapist's prior acts of sexual violence against him in court to prove his guilt of the currently charged rape. Despite these efforts, various social science studies conclude that legal reform has had modest or no effect in improving rape reporting and conviction rates.

Several explanations have been offered for the failure of the rape law reform movement. Perhaps, most importantly, jurors continue to want corroboration, victim resistance, extreme uses of force, and "proper" stereotypical female behavior as preconditions for believing the woman's version of events and for convicting an accused rapist, even where the law no longer requires such proof. The severity of rape shield and other reform legislation also varies widely, with some statutes permitting sufficient numbers of exceptions or vesting the trial judge with sufficient discretion as to result in the continued admissibility at trial of a woman's sex life as relevant to the consent determination.

Furthermore, battering of female spouses had long been viewed in the United States as a necessary evil for disciplining wayward wives and part of the sacred precincts of “private” family life. Only in the 1970s did battering come to be seen as a serious social problem meriting the criminal justice system’s involvement. Yet this trend has not always been enthusiastically embraced by either the broader public or the police, who are charged with enforcement. This may partly stem from the senses that victims staying with their batterers are partly to blame for their plight and that intrafamilial dysfunction is better addressed by treatment and assistance programs than by criminalization. Victims may also refuse to cooperate because of fear of retaliation by their batterers, fear of losing their economic contribution, or belief that the mere threat of prosecution will solve the problem.

Although police originally generally did not intervene in abuse cases, in the 1960s and 1970s, they started using mediation, reconciliation, or agency referrals as common practice. Fifteen states had, however, moved to mandating arrest laws by the 1990s’ start, with all but a few remaining states amending their laws to permit warrantless misdemeanor arrests in domestic violence cases. Nevertheless, even when arrest is legally mandated, the number of arrests may not increase significantly because of police discretion in deciding what cases qualify and in police resistance, particularly where officers perceive a low likelihood of reprimand. Women also face disproportionate victimization by the crime of stalking, which is committed by the pursuit or harassment of a victim even in the absence of actual physical harm. The relatively new rise of antistalking legislation has resulted in its adoption in all states, the District of Columbia, and the federal government. Although the statutes vary, they generally require repeated harassment that would cause a reasonable person to fear for her safety or that of a family member. The harassment must be intentional, and some states require that the threat be “credible.”

Stalking and domestic violence are closely linked, with 59 percent of female victims being stalked by intimate partners and 81 percent of those so stalked also being physically assaulted by those partners. Only about half of female stalking victims report the crime to the police, with only 12 percent of those crimes being prosecuted. Commentators have suggested that the low stalker prosecution rates demonstrate that the justice system is not taking the crime seriously enough, with police too often viewing stalkers as “pathetic Romeos” rather than criminal offenders.

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References and Further Reading

- Gertner, Nancy, *Women Offenders and the Sentencing Guidelines*, Yale Journal of Law & Feminism 14 (2002): 291.
- Mauer, Marc, et al. *Gender and Justice: Women, Drugs, and Sentencing Policy* (1999) (a report of the *Sentencing Project*).
- Raeder, Myrna, *A Primer on Gender-Related Issues that Affect Female Offenders*, Criminal Journal 20 (2005): 4.
- Rafter, Nicole. *Encyclopedia of Women and Crime*, 2003.
- Taslitz, Andrew E. *Rape and the Culture of the Courtroom*, 1999.

See also **Domestic Violence; Marital Rape**

SEX AND IMMIGRATION

Sex and immigration have long been intertwined, with sex (often in combination with race) being used as a criteria for denying immigration benefits. Indeed, the first federal law restricting immigration, the Page Law of 1875, barred women (mostly Chinese) suspected of entering the country for “lewd or immoral purposes.” Even when sex-based classifications were not explicit, ostensibly neutral categories often masked discrimination on the basis of sex. For example, beginning in the nineteenth century, immigration classifications barring individuals likely to become public charges were used to deter women from immigrating. More recently, women fleeing abuse across borders have struggled to gain recognition of domestic violence and female genital mutilation as grounds for political asylum. Although asylum laws use gender neutral language, these legal standards have long been construed without recognition of women’s particular experiences of abuse and persecution.

Sex-based classifications in immigration law have also extended to undermine aspects of women’s citizenship. For example, until married women were given some legal autonomy within marriage in the nineteenth and early twentieth centuries, immigration laws did not recognize them as individuals separate from their husbands, and they traveled under their husband’s passports. Likewise, until 1934, immigration law permitted transmission of citizenship to children through blood from U.S. citizen fathers but not mothers. And from 1907 to 1922, United States citizen women who married noncitizens lost their citizenship—a policy that was deemed necessary to prevent foreign influences from undermining American society.

Some of these sex-based immigration laws are still in force. Restrictions on immigration of prostitutes and low-income individuals, for example, while modified in the intervening generations, still persist and fall particularly hard on women immigrants. Among

others, women who have been trafficked by third parties or otherwise forced into prostitution may have difficulty entering as immigrants under these rules. Similarly, immigrant women fleeing abuse who must turn to domestic violence shelters or other community assistance for support may run afoul of immigration laws barring entry of those liable to be a public charge. U.S. citizens are also still subject to sex-based laws; for example, paralleling domestic policies that give mothers greater responsibility than fathers for nonmarital children, immigration law permits citizen mothers to freely transmit their citizenship to their foreign-born out-of-wedlock children, while fathers seeking to transmit citizenship must meet a host of specific criteria before the child's eighteenth birthday.

Nevertheless, women make up a significant percentage of new arrivals to the United States, including undocumented immigrants. In 2004, females accounted for 55 percent of new legal permanent residents and 54 percent of persons naturalizing. According to 2002 data, women constituted 41 percent of the adult undocumented population.

The predominance of women immigrants will continue to create pressure to enact laws addressing issues faced disproportionately by women, such as domestic violence. In addition, as the rights of homosexuals continue to expand internationally, U.S. immigration law will face a new set of challenges arising from changing norms of sex and sexuality. For example, although several nations and some states now recognize same-sex marriages or civil unions, United States immigration law continues to limit marriage-based immigration benefits to individuals in heterosexual relationships.

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References and Further Reading

- Abrams, Kerry. *Polygamy, Prostitution and the Federalization of Immigration Law*, Columbia Law Review 105 (2005): 3: 641–716.
- Annual Flow Report, Office of Immigration Statistics, Department of Homeland Security, June 2005.
- Bredbenner, Candice Lewis. *A Nationality of Her Own: Women, Marriage, and the Law of Citizenship*. Berkeley and Los Angeles: University of California Press, 1998.
- Gardner, Martha. *The Qualities of a Citizen: Women, Immigration and Citizenship, 1890–1965*. Princeton, NJ: Princeton University Press, 2005.
- Peffer, George Anthony. *If They Don't Bring Their Women Here: Chinese Female Immigration before Exclusion*. Urbana: University of Illinois Press, 1999.

Cases and Statutes Cited

Page Law of 1875, Act of March 3, 1875, ch. 141, 18 Stat. 477

See also *Fiallo v. Bell*, 430 U.S. 787 (1977); *Illegitimacy and Immigration; Immigration and Marriage Fraud Amendments of 1986*

SHAPIRO v. THOMPSON, 394 U.S. 618 (1969)

Welfare programs requiring a certain length of residence in the state as a condition of eligibility had become a subject of debate in the years following *Edwards v. California* (1941). Some commentators argued that welfare waiting periods, by denying benefits to recent residents, were inconsistent with the constitutional right to travel. In *Shapiro v. Thompson*, applicants to several state welfare programs challenged statutes requiring one year of residence for eligibility for Aid to Families with Dependent Children (AFDC). The Court's six-to-three decision held that these requirements were unconstitutional.

Building on *Edwards*, the majority concluded that "A state may no more try to fence out those indigents who seek higher welfare benefits than it may try to fence out indigents generally." The Court applied the strict scrutiny standard of the equal protection clause to review the States' interference in movement across state borders and found it to be unconstitutional. The statutes in effect served to penalize applicants' exercise of the right to travel, and without showing that waiting periods were necessary to serve the States' fiscal interests, they could not be justified. States' argument that the Congress had authorized states to impose durational residency requirements up to one year in AFDC programs was rejected, because the case involved the constitutionality of state statutes and Congress "may not authorize the states to violate the equal protection clause."

Shapiro settled the debate over the constitutionality of welfare waiting periods, and residency requirements were abolished in subsequent years. In effect, this decision secured the right to travel that was first recognized in *Edwards v. California*.

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References and Further Reading

- Rotunda, Ronald, John E. Nowak, and J. Nelson Young. *Treatise on Constitutional Law: Substance and Procedure*. 3rd Ed., Vol. 3, St. Paul, MN: West, 1999, pp. 775–794.

Cases and Statutes Cited

Edwards v. California, 314 U.S. 160 (1941)

See also *Right to Travel; Saenz v. Roe*, 526 U.S. 489 (1999)

SHAUGHNESSY v. UNITED STATES EX REL. MEZEI, 345 U.S. 206 (1953)

Mezei was a legal permanent resident in the United States for twenty-five years when he left to visit his dying mother in Romania. When he returned to the United States, Mezei was temporarily excluded under the Passport Bill, 22 U.S.C. 223, and then permanently excluded from the country, without a hearing and based on secret evidence. Mezei was considered a threat to national security because he had gone behind the Iron Curtain and had been out of the country for nineteen months. He was indefinitely detained at Ellis Island while the United States refused to admit him, because no other country he applied to would accept him.

Mezei applied for a writ of habeas corpus, which the Supreme Court ultimately denied. The Supreme Court held that legal permanent residents who have left the country for a significant amount of time do not have procedural due process rights. Mezei was treated as an arriving alien rather than a deported alien, and thus the court interpreted his case as an exclusion proceeding. Mezei's holding at Ellis Island gave him no rights, because legal territorial fiction defined him as outside of the country. The Supreme Court denied Mezei habeas corpus and denied him admittance to the United States.

Shaughnessy v. United States ex rel. Mezei is one of the most famous and fought over cases in immigration law, and is one of a trilogy of post-World War II security cases, including *Kwong Hai Chew v. Colding* and *Knauff v. Shaughnessy*. These three cases are among the most important modern cases defining the procedural due process rights of aliens.

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References and Further Reading

Aleinikoff, Thomas Alexander, David A. Martin, and Hiroshi Motomura. *Immigration and Citizenship: Process and Policy*. St. Paul, MN: West, 2003, pp. 460–472.

Cases and Statutes Cited

Kwong Hai Chew v. Colding, 344 U.S. 590 (1953)
Knauff v. Shaughnessy, 338 U.S. 537 (1950)

See also **Aliens, Civil Liberties of; Alien and Sedition Act (1798); Chae Chan Ping v. U.S., 130 U.S. 581 (1889) and Chinese Exclusion Act; Communism and the Cold War; Due Process in Immigration; Habeas Corpus: Modern History; Harisiades v. Shaughnessy, 342 U.S. 580 (1952); Noncitizens and Civil Liberties**

SHAW, LEMUEL (1781–1861)

Lemuel Shaw, nineteenth-century jurist, was born to a Congregationalist minister in Barnstable, Massachusetts, on January 9, 1781. Shaw learned English and how to read the Bible as he helped to maintain the farm in the small town. In 1795, he left his family's farm to prepare for Harvard College. Failing his initial college entry examination, Shaw passed on his second try and was admitted to Harvard in 1796 and graduated in 1800. After college, Shaw became a schoolteacher and prepared for a legal career under the tutelage of attorney David Everett and his law partner Thomas Selfridge.

In 1804, he was admitted to the New Hampshire and Massachusetts bars, which would be the start of a career as a prominent figure in the American judicial system, particularly Massachusetts. Soon after admittance to the bar, he began to practice law in Boston. He was a Federalist in the Massachusetts House of Representatives from 1811 to 1814, 1820, and 1829. He served in the state Senate from 1821 to 1822 and was a delegate to the Massachusetts state convention of 1820–1821.

Shaw, who helped structure the first Boston charter in 1821, would later become chief justice of the Massachusetts Supreme Court from 1830 to 1860. It was in this capacity that he made monumental legal decisions that shaped the American judicial system, particularly Massachusetts. Several of Shaw's notable cases include *Commonwealth v. Hunt* (1842), *Roberts v. City of Boston* (1849), *Commonwealth v. Alger* (1851), and *Brown v. Kendall* (1850).

Before *Commonwealth v. Hunt*, workers were not legally allowed to organize to improve their working conditions. In 1840, seven shoemakers were charged with organizing themselves to extort money from their employer. Guided by precedents set in the 1349 English Statute of Labourers, labor unions were viewed as criminal. In *Hunt*, Shaw abandoned this perception and found that members of labor unions were not engaging in criminal behavior and conspiracies against their employers when they sought better work conditions.

Shaw's ruling in *Roberts v. City of Boston* also would be influential. The case outlined the judicial framework for legalized segregation that would later be adopted in *Plessy v. Ferguson* (1896). Five-year-old Sarah Roberts, after four attempts, was barred from attending the local school because of her color, and her father, Benjamin Roberts, sued the city arguing that it was in violation of the 1845 Boston statute that made any child excluded from public instruction eligible to recover damages. The Court ruled that the issue of race was not perverted, because the case

hinged on the school committee's power to use its judgment to control itself, which included authority to maintain a system of separate white and black primary schools.

Another of Shaw's rulings, *Commonwealth v. Alger*, has been instrumental in shaping and defining constitutional law and police authority. The case stemmed from an indictment of a defendant who built a wharf that extended beyond the boundary set by Boston legislators. Shaw ruled that in certain circumstances, government had the right to regulate private property. The government had the right to protect and promote the general public welfare, and to do so boundaries and limitations on private property could be imposed. Furthermore, the ruling held that the state had the right to reasonably restrict an individual's use of private property for the benefit of the good of the general public and the right to enforce the state's restrictions.

In *Brown v. Kendall*, the plaintiff was struck in the face and injured with a stick while the defendant was attempting to break up a fight between the plaintiff's and defendant's dogs. The ruling in the case established negligence as the main criterion of tort law. In addition, it established that plaintiffs have the burden of proving the negligence of the defendant. Shaw ruled that the act was unintentional and that the plaintiff failed to prove that the defendant was neglect.

Chief Justice Lemuel Shaw of the Supreme Court of Massachusetts was arguably the most influential figure in the American judicial system in the mid-nineteenth century. He is often viewed as a pillar in American legal history, writing more than 2,000 opinions during his career. Shaw died in Boston on March 30, 1861, after an extensive legal career that still affects modern law and times.

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References and Further Reading

- Chase, Frederic Hathaway. *Lemuel Shaw: Chief Justice of the Supreme Judicial Court of Massachusetts, 1830–1860*. Boston: Houghton Mifflin Company, 1918.
- Levy, Leonard W. *The Law of the Commonwealth and Chief Justice Shaw*. Cambridge: Harvard University Press, 1957.

Cases and Statutes Cited

- Brown v. Kendall*, 60 Mass. 292 (1850)
Commonwealth v. Alger, 61 Mass. 53 (1851)
Commonwealth v. Hunt, 45 Mass. 111 (1842)
Roberts v. City of Boston, 59 Mass. 198 (1849)

SHELLEY v. KRAEMER, 334 U.S. 1 (1948)

As a powerful weapon against discrimination, the Fourteenth Amendment of the United States Constitution prohibits only state (not private) actions. The United States Supreme Court decision in *Shelley*, however, made a remarkable effort to eliminate at least some private discrimination.

On February 1911, thirty of thirty-nine owners of property in a district located in St. Louis signed a restrictive covenant, which prohibits "any person not of the Caucasian race" from occupying any part of the property for a term of fifty years. These thirty owners held title to forty-seven parcels, including the contended one in *Shelley*, in a total of fifty-seven parcels. On August 1945, Shelley, who is African American, purchased a parcel in such a district without actual knowledge of the restrictive agreement. Owners of other property brought lawsuit to restrain Shelly from taking possession of the property. The trial court denied their request on the ground that the restrictive agreement had never become complete and final because it failed to collect signatures of all owners. The Supreme Court of Missouri reversed and held the agreement effective.

The issue before the U.S. Supreme Court (the Court) is "whether the equal protection of the Fourteenth Amendment inhibits judicial enforcement by state courts of such restrictive covenants based on race or color." The Court noticed that the restrictive covenant in this case only serves one purpose, that is, to exclude the use of the properties by racial minorities, and it is therefore discriminatory in nature. The Court affirmed that the rights to "acquire, enjoy, own and dispose of property" are essential rights guaranteed by the Fourteenth Amendment. In its precedent, the Court had declared unconstitutional several discriminatory ordinances that denied racial minorities the rights of property. However, the present case did not involve actions by state legislature or city councils. Rather, the agreement was made by a group of individuals and therefore not governed by the Constitution. The focus now is whether the judicial enforcement of such a private agreement is a state action governed by the Constitution. The Court held that actions of state courts and judicial officials are state actions. In *Shelley*, both buyers and sellers were willing parties in a transaction. "But for active intervention of the state courts, supported by the full panoply of state power," Shelley would have been free to occupy the property. As a result, the state had denied Shelley the equal protection of the laws.

Although three Justices did not participate in the case, all other six Justices in the Court agreed on its decision. *Shelley* became a major victory for racial

minorities in the protection of their property rights. In 1994, the Federal Housing Act, 42 U.S.C.A. §§3601-3631, was enacted as Title VIII of the Civil Rights Act of 1968 to impose further restraints against potential discrimination. On the other hand, *Shelley* raised a concern about how broad the Court is willing to interpret the concept of “state action.” Critics are afraid that an overbroad reading of state action may intervene and hamper individuals’ private lives.

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References and Further Reading

Madry, Alan, *Private Accountability and the Fourteenth Amendment: State Action, Federalism and Congress*, University of Missouri Law Review 59 (1994): 499–568.

———, *State Action and the Obligation of the States to Prevent Private Harm: The Rehnquist Transformation and the Betrayal of Fundamental Commitments*, Southern California Law Review 65 (1992): 781–844.

Saxer, Shelley Ross. *Shelley v. Kraemer’s Fiftieth Anniversary: “A Time for Keeping; a Time for Throwing Away”?*, Kansas Law Review 47 (1998): 61–120.

Cases and Statutes Cited

Federal Housing Act, 42 U.S.C.A. §§3601–3631

SHEPARD, MATTHEW (1976–1998)

On the night of Tuesday, October 6, 1998, Matthew Shepard, a young, twenty-one-year-old homosexual male, went into a bar alone for a drink at the Fireside Bar after attending a meeting at the University of Wyoming’s Lesbian, Gay, Bisexual, Transgender Association. Inside, he met two men in their twenties who posed as homosexual men and lured Shepard outside. There, Aaron McKinney and Russell Henderson kidnapped Shepard at gunpoint and drove to a remote area outside Laramie, a small town of 26,000 people in rural Wyoming. They tortured Shepard and left him to die tied to a buck-rail fence in the cold more than 7,000 feet above sea level. He was found the following morning by a mountain biker. Transferred to a hospital in critical condition, Shepard, a native of Casper, Wyoming, died on October 12 from fatal injuries incurred during the attack. The town of Laramie later passed a bias crime ordinance in response to Shepard’s death. His killers, McKinney and Henderson, each received two consecutive life sentences in prison.

Shepard was one of thirty-four gay men and women killed in 1998 for their sexual orientation, and his death in particular became a catalyst for calls for hate crime legislation as a violation of basic

human rights. Activists defined a hate crime as any crime perpetuated on an individual because of the appearance of particular characteristics or because of one’s apparent membership in a particular group. In other words, such crimes overtly functioned to deny a person’s access to human rights. As of 2000, twenty-one states had passed hate crime legislation that covered sexual orientation in their definition. Of the hate crimes reported to the FBI that same year, those crimes based on one’s sexual orientation accounted for the third highest reason for the crimes, at 11 percent, falling behind race with the highest percentage and religion as second.

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References and Further Reading

Kaufman, Moises. *The Laramie Project*. New York: Vintage Books, 2001.

Loffreda, Beth. *Losing Matt Shepard: Life and Politics in the Aftermath of Anti-Gay Murder*. New York: Columbia University Press, 2000.

Swigonski, Mary. *From Hate Crimes to Human Rights: A Tribute to Matthew Shepard*. New York: Harrington Park Press, 2001.

See also **Hate Crime Laws; Hate Crimes**

SHERBERT v. VERNER, 374 U.S. 398 (1963)

Sherbert v. Verner has been rightly termed a “high water mark” in the constitutional protection of minority religious beliefs against state laws not targeted at specific religious practices. *Sherbert* served as the Supreme Court’s standard test in Free Exercises cases from 1963 to 1990, when it was effectively overruled for most cases by *Employment Division, Dept. of Human Resources of Oregon v. Smith*. In *Sherbert*, the Supreme Court held that strict scrutiny would be extended to state laws that applied uniformly to all persons but imposed a substantial burden on minority religious adherents whose religious practice conflicted with those laws.

In 1957, Adell H. Sherbert, a textile mill worker in Spartanburg, South Carolina, became a member of the Seventh-Day Adventist Church, a Christian denomination that requires members to observe Saturdays as the Sabbath and a day of rest. Two years later, the workweek at the mill where she was employed changed to six days; and Sherbert was discharged when she refused to work on Saturday. Sherbert looked for Monday-to-Friday work with the other three mills in Spartanburg but could not find any suitable employment. She filed a claim with

the South Carolina Unemployment Commission, indicating that she would be willing to accept work at other mills or in other industries so long as she was not required to work Saturdays. However, she was denied unemployment compensation because she “failed without good cause . . . to accept available suitable work when offered [her] by the employment office or the employer . . .” as required by the South Carolina unemployment law.

In *Sherbert*, the Supreme Court restated the free exercise clause prohibition against “governmental regulation of religious beliefs” but rejected the view that individuals’ actions in accordance with their religious convictions could not be regulated by the state. This ruling recalled the so-called belief-action distinction announced in *Reynolds v. United States*, a major Free Exercise case that had upheld a Mormon’s conviction for the religious practice of polygamy in the late nineteenth century.

Although it acknowledged that legislatures can regulate religious conduct, the *Sherbert* Court imposed a higher standard on state regulation of such conduct than in previous cases, holding the state could not disqualify Adell Sherbert from unemployment benefits unless it justified any incidental burden on her free exercise of religion by a compelling state interest.

As a threshold requirement, the *Sherbert* Court required that a reviewing court determine whether a religious claimant’s Free Exercise rights had actually been infringed before applying strict scrutiny. Rejecting a distinction between direct and indirect state burdens, the Court held that the burden on Sherbert constituted a constitutional infringement because it “force[d] her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand.” In the Court’s view, to impose such a choice on Sherbert burdened her as much as if the state had fined her for worshipping on Saturday.

This burden was more significant than the burden imposed on Orthodox Jews who had to close their businesses on Saturday for their Sabbath and also under Sunday closing laws, thereby losing an extra day of income, in *Braunfeld v. Brown*.

Applying strict scrutiny to the statute, the Court held that in the proceedings below the state had not offered any compelling interest for its regulation or evidence that such an interest was endangered, such as proof that fraudulent religious claims threatened the unemployment fund or South Carolina employers’ ability to schedule their workforce. Moreover, the Court held, even if such proof was available, the state had the burden of demonstrating that it could not find

alternative regulations to combat such abuses without infringing on religious freedom rights, applying the second prong of the strict scrutiny test.

Although *Sherbert* held out the promise of extraordinary protection for religious minorities forced into a religious Hobson’s choice by state legislatures unaware or unconcerned about their plight, subsequent cases did not bear out that promise. In some cases, the Court directly applied the *Sherbert* test to invalidate the state law, such as in *Wisconsin v. Yoder*, overruling Wisconsin’s demand that Amish children attend school after the eighth grade; and in *Thomas v. Review Bd. of Indiana Employment Security Div* and *Hobbie v. Unemployment Appeals Comm’n of Florida*, cases invalidating unemployment compensation denials to workers whose religious views conflicted with their jobs.

However, in many other cases, the Court refused to extend protection under the *Sherbert* rule, while not discarding it as the constitutional standard. In some cases, the Court did not extend protection to religious claimants because they had not shown a constitutionally sufficient burden on their Free Exercise rights. See, for example, *Lyng v. Northwest Indian Cemetery Protection Ass’n* (federal government not required to use its lands in manner that would protect American Indian religious practices; its action did not coerce or penalize Free Exercise rights); *Bowen v. Roy* (federal government not required to administer Social Security system to respond to religious beliefs of Native Americans who believed that assignment of a social security number would rob their daughter of her spirit; its action did not involve coercion); and *United States v. Gillette* (failure to extend federal conscientious objector exemptions to religious claimants who wishes to object to particular wars imposed only “an incidental burden” on them).

In other cases, involving religious claimants in prison and in the military, the Court simply carved out exceptions to *Sherbert*, holding that deferential review or “reasonableness” standard would be applied in such settings. See, for example, *Goldman v. Weinberger* (rejecting challenge to military dress regulations that forbade the wearing of yarmulkes) and *O’Lone v. Estate of Shabazz* (upholding prison’s refusal to excuse inmates from work requirements to attend worship services). In still other cases, such as *United States v. Lee*, involving the religious challenge of an Amish employer to the requirement that he pay Social Security taxes for his employee, the Court held that the state had met the strict scrutiny test.

In 1990, religious freedom advocates were stunned by the dramatic reversal in the Court’s doctrine in *Employment Division, Dept. of Human Services of Oregon v. Smith*. In *Smith*, the Court held that

Sherbert would not be applicable to challenges to neutral, generally applicable criminal laws that were not targeted at particular religious beliefs. The Court appeared to carve out two exceptions for cases in which *Sherbert* would continue to apply: first, it remains viable law for government programs such as unemployment compensation where the state provides individual exemptions from the rules for others and may not refuse those exemptions to persons with “religious hardships” without a compelling reason. Second, the Court will continue to exercise strict scrutiny in cases such as *Yoder*, where a religious freedom claim is joined with other constitutional rights, such as freedom of speech or the rights of parents to raise their children, so-called hybrid rights cases. *Smith* also continued the practice exercising strict scrutiny to review laws that are not “neutral” and “generally applicable” but are targeted at particular religions or aimed at conduct because it is religious.

After a public firestorm in the wake of the *Smith* decision, Congress attempted to reinstate the *Sherbert* standard in the Religious Freedom Restoration Act (RFRA.) However, in *City of Boerne v. Flores*, the Supreme Court held that RFRA was unconstitutional at least as applied to state laws, because it exceeded Congressional power granted by section 5 of the Fourteenth Amendment to protect Free Exercise as a liberty under the due process clause.

Thus, the *Sherbert* decision has been supplanted by *Smith* in many, but not all, of the cases to which it formerly applied. Many courts have continued to find cases of “individualized assessment” and “hybrid rights” where *Sherbert* applies, and at least some cases have found that and *City of Boerne* does not prevent RFRA from being applied against the federal government. In addition, a number of states have adopted the *Sherbert* test to interpret their own state constitutional provisions guaranteeing free exercise of religion or passed “mini-RFRA” laws that provide heightened judicial protection for Free Exercise claims.

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References and Further Reading

- Abraham, Henry, and Barbara A Perry. *Freedom and the Court: Civil Rights and Liberties in the United States*. 7th ed. New York, NY: Oxford University Press, 1998, pp. 235–265.
- Gaffney, Edward McGlynn, Jr., *Curious Chiasma: Rising and Falling Protection of Religious Liberty*, University of Pennsylvania Journal of Constitutional Law 4 (2002): 394–449.
- Greenawalt, Kent, *Quo Vadis: The Status and Prospects of “Tests” under the Religion Clauses*, Supreme Court Review (1995): 323–391.

Redlich, Norman, John Attanasio, and Joel K. Goldstein, *Understanding Constitutional Law*. 3rd ed. New York, NY: Matthew Bender, 2004, pp. 737–750.

Cases and Statutes Cited

- Bowen v. Roy*, 476 U.S. 693 (1986)
Braunfeld v. Brown, 366 U.S. 599 (1961)
Church of the Lukumi Babalu Aye Inc., v. City of Hialeah, 508 U.S. 520 (1993)
City of Boerne v. Flores, 521 U.S. 507 (1997)
Employment Div., Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990)
Gillette v. United States, 401 U.S. 437 (1971)
Goldman v. Weinberger, 475 U.S. 503 (1986)
Hobbie v. Unemployment Appeals Comm’n of Florida, 480 U.S. 136 (1987)
Lyng v. Northwest Indian Cemetery Protective Ass’n, 485 U.S. 439 (1988)
O’Lone v. Estate of Shabazz, 482 U.S. 342 (1987)
 Religious Freedom Restoration Act, 42 U.S.C.A. § 2000bb et seq. (1990)
Reynolds v. United States, 98 U.S. 145 (1878)
Thomas v. Review Bd. of Indiana Employment Security Div., 450 U.S. 707 (1981)
United States v. Lee, 455 U.S. 252 (1982)
Wisconsin v. Yoder, 406 U.S. 205 (1972)

SHERMAN ACT

The Sherman Act, commonly known as the Sherman Anti-Trust Act, was the first government action taken to limit trust companies, which often monopolized certain industries, and therefore, segments of the economy. Passed in 1890, it was named after Senator John Sherman of Ohio, and made “every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations . . . illegal.” The Sherman Act also placed a burden of responsibility on district courts and government attorneys to investigate possible trust violations and explained the possible consequences to violators.

Changes in manufacturing practices contributed to the Act’s passage. Starting in the late nineteenth century, large corporations integrated horizontally and vertically to form oligopolies and monopolies in their respective areas of industry. Some of the trusts that emerged in the late nineteenth and early twentieth centuries were Standard Oil, American Sugar Refining Company, American Tobacco Company, and United States Steel. Despite its aims, the Sherman Act failed to regulate trusts until Theodore Roosevelt’s presidency because of adverse court rulings.

Roosevelt undertook a trust-busting campaign and overcame the Supreme Court ruling in *United States v. E. C. Knight* (1895), which impaired the

enforcement of the Sherman Act by exempting manufacturing corporations from the Act's authority. However, in 1904, the Supreme Court consented that Northern Securities Company, a railroad monopoly, should be dissolved because it dealt with interstate transportation. President Roosevelt continued to pursue antitrust suits, initiating more than forty antitrust proceedings. Roosevelt's successor, William Howard Taft, also supported trustbusting. Under Taft's presidency there were twice as many antitrust suits as during his predecessor's terms.

The Sherman Act was also used against labor movements. By including all organizations in its original wording, the Act could be used against labor unions during strikes by claiming they unlawfully interfered with commerce. The most famous of such cases was the 1894 Pullman strike near Chicago, Illinois. Employees paid high rent for company-owned housing within the model town of Pullman and suffered from reduced wages simultaneously. Those conditions, among others, caused the workers at the Pullman Palace Car Company, a luxury sleeper rail car manufacturer, to strike. In doing so, the strikers asked the American Railway Union (ARU) to boycott Pullman cars and to disconnect them from every train and depart without them. Once the ARU agreed, the General Managers Association (GMA), formed by twenty-four railway companies to help combat the increasing power of labor unions, claimed only railway managers could determine which cars made up the trains and that they would fire any worker supporting the boycott. These actions resulted in 150,000 ARU members striking, causing rail traffic to halt, and the intervention of the federal government on the side of the GMA. United States Attorney General Richard Olney obtained an injunction against the strikers, claiming the strike prevented mail delivery and violated the Sherman Act by restricting commerce. Persuaded by Olney and fearful of violence, President Grover Cleveland authorized the use of United States marshals and federal troops to protect the trains operated by strikebreakers. Violence increased with the arrival of the troops; railroad property was attacked and burned, and fights broke out in the streets of Chicago between the authorities and strikers. The strike, which had started May 12, ended July 8 with the death of thirty-four people. The use of the injunction made striking illegal and thus in effect denied the union members freedom of expression and freedom of association.

This type of use of the Sherman Act resulted in criticism from organized labor, the People's Party, Progressives in both parties, and liberal academics and political activists. In 1914, during Woodrow Wilson's presidency, the Sherman Act was amended

through the passage of the Clayton Antitrust Act. The latter Act banned practices such as price fixing but also exempted unions and farmers' organizations from prosecution under antitrust laws. Since 1914, the United States Congress passed additional legislation aimed to strengthen the Sherman Act's effectiveness, such as the Robinson-Patman Act of 1936 and the Hart-Scott-Rodino Antitrust Improvements Act of 1976. In June 2004, President George W. Bush signed into law the Criminal Antitrust Penalty Enhancement and Reform Act, which increased the maximum Sherman Act penalties for corporations to \$100 million, for individuals to \$1 million, and for jail terms to ten years. This most recent act also heightened incentives for corporations to self-report criminal activity and aims to enhance the antimonopoly policy.

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References and Further Reading

- Chandler, Alfred D. Jr. *The Visible Hand: The Managerial Revolution in American Business*. Cambridge, Mass.: The Belknap Press of Harvard University Press, 1977.
- "Clayton Anti-Trust Act of 1914." *United States Statutes at Large* (63rd Congress, Session II, Chapter 323), pp. 730–740 and in *Online Serial Essential Documents in American History*, Essential Documents 1492–Present (1997).
- Johnsen, Julia E. *Trade Unions and the Anti-Trust Laws, The Reference Shelf*, Vol. 13, No. 10. New York: H.W. Wilson Company, 1940.
- Labor Law. Application of Sherman Anti-Trust Act to Sit-Down Strikes*, Virginia Law Review, 26 (February, 1940): 4: 518–519.
- Painter, Nell Irvin. *Standing at Armageddon: The United States 1877–1919*. New York: W.W. Norton & Company, 1987.
- Pate, R. Hewitt. "Assistant Attorney General for Antitrust, R. Hewitt Pate, Issues Statement on Enactment of Antitrust Criminal Penalty Enhancement and Reform Act of 2004," http://www.usdoj.gov/atr/public/press_releases/2004/204319.htm, (June 23, 2004).
- "Sherman Anti-Trust Act of 1890." *United States Statutes at Large* (51st Congress, Session I, Chapter 647), pp. 209–210 and in *Online Serial Essential Documents in American History*, Essential Documents 1492–Present (1997).
- Taft, William Howard. *The Anti-Trust Act and the Supreme Court*. New York: Harper & Brothers Publishers, 1914.

SHERMAN, ROGER (1721–1793)

Known for his integrity, persistence, and sensibility, Roger Sherman was a statesman who served as a member of the Continental Congresses, fought for and signed the Declaration of Independence, was instrumental in the drafting of the Constitution, and was a member of the first U.S. Congress. Considered

a political moderate because of his recognition of a need for a strong national government alongside his persistent dedication to the power of governance by the states, Sherman remained an avid believer in democratic rule as a means to ensure against tyranny and called for independence from the crippling hand of the British. Roger Sherman's integrity and work ethic enabled his integral work behind the scenes in attending to the everyday affairs of a country fighting for independence and striving to be a successful democracy. For instance, he was active in congressional committees that dealt with the war effort (particularly providing the necessary supplies to the revolutionary army), the treatment of Western lands, and he dealt closely with the challenging public finance matters such as the use of paper money, and state and national debt. He worked for much-needed stability in the formative years of the nation. Sherman is credited as the first to propose and argue for a bicameral legislature, with representation by colonies, and, concurrently, by population, a compromise that protected the interests of smaller states (such as his home state Connecticut). In fact, at the time of the Constitutional Convention, Sherman called for a national government of limited powers, leaving most matters to the states, out of a fear that a national government would end any notions of equality among disparate states. He believed that the states best represented the intent of the people and resisted any efforts to reduce their power. For similar reasons, he opposed a bill of rights, since he sincerely believed that rights were and would be protected adequately at the state level. In addition, because the Constitution enumerated specific federal powers, Sherman saw no need for any additional limits on government, because the government was, by definition, limited. Although Sherman's prostate position lost out to a strong national government and a bill of rights, Sherman's views provide a basis for the reservation of police powers in the respective states. He believed that if there were even a need for a bill of rights against the government, it would not be a government with real staying power.

Finally, Sherman favored acts of legislature over a strong executive, because a powerful president was, in his estimation, a throwback to British rule. He believed that the veto, which vested absolute decision-making in the hands of one person, represented the kind of absolutism practiced by the British monarchy, the abuses of which had led to the revolutionary war in the first place. Overall, he was suspicious of executive power and urged structural protections such as a limited veto, short terms in office, and a council that could check the president's actions.

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References and Further Reading

- Collier, Christopher. *Roger Sherman's Connecticut: Yankee Politics and the American Revolution*. Wesleyan University Press. 1971.
- Boardman, Roger Sherman. *Roger Sherman: Signer and Statesman*. University of Pennsylvania Press. 1938.

SHIELD LAWS

Shield laws generally allow journalists to refuse to testify in court proceedings to protect confidential sources or information gained in confidence. Shield laws vary widely: Some provide absolute protection for withholding sources or confidential information; others provide a qualified privilege that may be overcome with a showing of need. Shield laws are applied differently in civil and criminal cases.

Maryland enacted the first state shield law in 1896. Now, thirty-one states have such laws, and a majority of states recognize a reporter's privilege, either in their constitutions or common law.

No federal shield law exists, and the U.S. Supreme Court has not recognized a reporter's privilege stemming from the First Amendment. In *Branzburg v. Hayes*, a five-to-four majority ruled against the reporters in three cases decided together. However, parts of Justice Lewis Powell's concurring opinion were consistent with the minority view. That led appellate courts to recognize a constitutional protection of reporter's privilege.

By and large, federal courts have allowed for at least limited First Amendment protections. However, some U.S. Circuit Courts of Appeals have not. In 2001 and 2002, a freelance writer in Houston was jailed for 168 days on contempt charges after she refused to reveal material from an interview with a murder suspect. In 2005, *New York Times* reporter Judith Miller spent eighty-five days in jail for refusing to divulge the source of information related to the leaking of the name of an undercover CIA agent. For legal and political reasons, the case generated much publicity, even though Miller never published a news article.

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References and Further Reading

- Overbeck, Wayne. *Major Principles of Media Law*. Belmont, CA: Thomson Wadsworth, 2005.
- Siegel, Paul. *Communication Law in America*. Boston: Allyn and Bacon, 2002.
- "The Reporter's Privilege: An Introduction." <http://www.rcfp.org/cgi-local/privilege/item.cgi?i=intro>.

Cases and Statutes Cited

Branzburg v. Hayes, 408 U.S. 665 (1972)

SHOPPING CENTERS AND FREEDOM OF SPEECH

Shopping centers have grown from virtual nonexistence in the middle of the twentieth century to a dominant feature on the American landscape today. Along with their growth as commercial centers, modern shopping centers have become important places to engage in expressive activity—political speech, protests, and so forth. Not all speakers are welcome; mall owners have sought to exclude those activities they believe improperly intrude on private property.

Several Supreme Court decisions from 1968 to 1980 took a roundabout path to holding that no First Amendment expressive right is guaranteed in shopping centers by the U.S. Constitution, but the states are free to decide whether their constitutions extend greater rights to the individual. In 1968, the Court held that the First Amendment protected the right to free speech in shopping malls. Four years later, that position started to erode; the Court reconsidered, ruling that the invitation extended by shopping center owners to the public was limited to business-related matters. The original prospeech position fell entirely in 1976; the Court held unequivocally that the Constitution does not protect speech activity in shopping malls.

There is a twist—in 1980, the Court held that States might provide *greater* protection of speech rights than the federal constitution. The Court did not back down from its previous opinions; instead, its central premise was that the limitations on the U.S. Constitution do not also limit a state's authority to offer greater protection of individual liberties. The states have been divided over this question; there is no consensus.

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Cases and Statutes Cited

Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968)
Hudgens v. National Labor Relations Board, 424 U.S. 527 (1976)
Lloyd Corp. v. Tanner, 407 U.S. 551 (1972)
Prune Yard Shopping Center v. Robins, 447 U.S. 74 (1980)

SICURELLA v. UNITED STATES, 348 U.S. 385 (1955)

In times of war, the United States government often has to balance one's individual right to religious expression with the country's need to arm itself sufficiently. Central to this task is determining whether or not a military registrant truly opposes war in all

forms, especially where the registrant's faith demands he or she be prepared for a theocratic war.

Two years after registering with his local draft board, Sicurella was classified for general military service. A Jehovah's Witness since the age of six, the petitioner filed a conscientious objector claim noting that he was already "'serving as a soldier of Jehovah's appointed Commander Jesus Christ,'" which prohibited him from participating in any military war. Asked whether there were circumstances in which he supported war, he replied that he would fight to defend "Kingdom Interests," but only with the weapons of prayer. Although the sincerity of his objections was not doubted, the board denied his claim because he did not demonstrate opposition to war in all forms. On the Department of Justice's advice, the Appeal Board upheld the denial. Sicurella was subsequently prosecuted for refusing to appear for induction.

The fundamental issue before the Supreme Court was whether Sicurella's assertion that he would support war for his Kingdom's defense disqualified his conscientious objector claim on grounds that he did not oppose "participation in war in any form." Justice Tom Clark held that it did not. A former National Guardsman and attorney with the Department of Justice, Clark clarified that the conscientious objector test did not require opposition to all war, but opposition to participating in war on religious grounds. Even though Sicurella averred a willingness to use spiritual weapons in theocratic wars, he consistently opposed any "carnal warfare of this world." Clark insisted that Congress did not intend beliefs in biblical wars to preclude objector status but instead expected claims to be measured against opposition to "real shooting wars . . . between nations of the earth in our time," with tangible weaponry like airplanes, missiles, and guns. He further noted that the Appeal Board must clearly identify the grounds on which it denies an objector's claim; where it fails to do so, rejection on illegitimate or arbitrary grounds could threaten "the integrity of the Selective Service System." In sum, the Supreme Court overruled the lower tribunals because the government could not deny conscientious objector status if a registrant supported spiritual wars that have "neither the bark nor bite" of modern total warfare.

The Supreme Court has not wavered from limiting *Sicurella's* application to conscientious objections to participating in shooting wars on religious grounds. In *Gillette v. United States*, the Court refused to allow a petitioner to object to a particular war (Vietnam) on grounds that he found it "unjust." Furthermore, Clark's call for specified grounds for rejection affected several suits, including Muhammad Ali's much-publicized objector case. The Court reversed Ali's

conviction because it was impossible to determine on which grounds the Appeal Board rejected his claim, especially where two were admittedly invalid.

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Cases and Statutes Cited

Clay v. United States, 403 U.S. 698 (1971)
Gillette v. United States, 401 U.S. 437 (1971)
 Universal Military Training and Service Act, Act of June 24, 1948, 50 U.S.C. Appx 456(j) and 462(a), 62 Stat. 604

See also **Clark, Tom Cambell; Conscientious Objection, the Free Exercise Clause; Jehovah's Witnesses and Religious Liberty**

SIMOPOULOS v. VIRGINIA, 462 U.S. 506 (1983)

In 1973, the United States Supreme Court (the Court) handed down its landmark decision in *Roe v. Wade*, 410 U.S. 113 (1973), holding that the right of privacy, guaranteed by the U.S. Constitution, encompasses a woman's decision whether or not to terminate her pregnancy. The affirmed abortion right, however, never ended the abortion debate. In the next twenty years, for example, the Court had to make twenty-one more abortion decisions, and *Simopoulos* is one of them.

In *Simopoulos*, the appellant was an obstetrician-gynecologist who practiced in Virginia. In November 1979, P.M., a seventeen-year-old high school student, approached the appellant at his unlicensed clinic and requested an abortion. P.M. was five months pregnant (well into the second trimester) and never advised her parents of her decision despite the appellant's advice. After an injection of saline solution by the appellant at the clinic, P.M. aborted her fetus in a motel bathroom, and the police found the fetus later on the same day. As a result, the appellant was indicted for unlawfully performing an abortion during the second trimester of pregnancy outside of a licensed hospital and was convicted by Virginia courts.

On appeal, the Court affirmed the conviction. In its majority opinion, five justices held that Virginia's requirement that the second trimester abortion be performed in licensed hospitals was constitutional. The Court reaffirmed that a state has an "important and legitimate interest in the health of the mother," and it becomes compelling at approximately the end of the first trimester. Such interest allows the state to regulate the facilities and circumstances in which abortions are performed. Distinguishing from its decision in *Akron v. Akron Center for Reproductive*

Health, 462 U.S. 416 (1983), the Court pointed out that the term "hospital," defined by the Virginia Code (not by the Virginia abortion statute itself), was broad enough to include "outpatient hospitals." Unlike provisions in *Akron*, the Virginia regulations did not require that "the patient be hospitalized as an inpatient or that the abortion be performed in a full-service, acute-care hospital." Rather, these regulations seemed to be generally compatible with accepted medical standards, and the Virginia's requirement was not an unreasonable means of furthering the state's compelling interest in protecting women's health and safety. Three more justices also concurred that the Virginia's requirement was not an undue burden on a woman's decision to undergo an abortion and argued that the mandatory hospitalization requirement need not be contingent on the trimester. Justice Stevens dissented and believed that the exact meaning of the Virginia Code was ambiguous and that it requires further clarification.

Handed down along with *Akron* and *Planned Parenthood v. Ashcroft*, 463 U.S. 506 (1983), *Simopoulos* shows once again how the Court has been carefully balancing an individual's rights with the state's legitimate rights, especially in such a delicate abortion issue. Nevertheless, *Simopoulos* and other 1983 abortion decisions unequivocally reaffirmed women's abortion right in *Roe v. Wade*.

BIN LIANG

References and Further Reading

Fox, Laura, *The 1983 Abortion Decision: Clarification of the Permissible Limits of Abortion Regulation*, University of Richmond Law Review 18 (1983): 137-159.
 Harrison, Maureen, and Steve Gilbert, eds. *Abortion Decisions of the United States Supreme Court: The 1980's*. Beverly Hills, CA: Excellent Books, 1993.

Cases and Statutes Cited

Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983)
Planned Parenthood v. Ashcroft, 463 U.S. 506 (1983)
Roe v. Wade, 410 U.S. 113 (1973)

SINCERITY OF RELIGIOUS BELIEF

The category of "religion" has presented particularly thorny legal problems for the last century. The intellectual difficulty arises from the fact that religion triggers heightened constitutional (and more recently, statutory) protections, while at the same time the specific referent of the word is vague and elastic. To fully allow the term's full scope risks paralyzing

government with unending exceptions under the free exercise clause, whereas recognizing only a few threatens not only the principle of religious liberty but also runs afoul of the establishment clause.

The search for a balance initiated at least two discernible responses. First, the Supreme Court tried to define the term according to substantive elements, thereby removing some of its inherent vagueness; and second, it isolated the psychological dimensions of religiosity to be afforded special deference.

"Sincerity of religious belief" belongs to the second phase, during which the Court attempted to fashion a useful standard to identify religion worthy of these legal benefits, and refers to the holding of *U.S. v. Ballard*, 322 U.S. 78 (1944). To place that rule into jurisprudential context, however, it is necessary to know what came before.

The Path to *Ballard*

Before *Ballard*, the definition of religion had been notoriously both ethnocentric and substantive. In general, the successful religious claimant represented majority congregations that espoused specific tenets of faith such as a belief in the Judeo-Christian deity. In the heyday of the anti-Mormon fervor, the Supreme Court announced ever-narrower restrictions on the kinds of activities that could be "religious" and thereby trigger protections under the free exercise clause. *Reynolds v. U.S.*, 98 U.S. 145 (1878), began by emphasizing the idea of one's duty to the Supreme Being, implying that religion was necessarily theistic or including as a tenet of orthodoxy a belief in a nonmaterial, supernatural entity. Only those beliefs should receive constitutional deference.

Davis v. Beason, 133 U.S. 333 (1880), took the criterion of theism from *Reynolds* and raised it to the sine qua non to find religion and the heightened protections it was promised. Furthermore, whereas *Reynolds* had bifurcated religion into two elements of protected belief and unprotected action, *Davis* restricted religion to only the former ("views and obligations"). In contrast, the actions of ritual and behavior were glossed as "cults." This step greatly eased the legal task of identifying what was protected, because the free exercise clause expressly extended only to religion (belief) and excluded all cultic behavior in which those beliefs might find expression.

Finally, *The Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. U.S.*, 136 U.S. 1 (1890), required religion not only to be theistic, but

also "enlightened," necessarily diminishing any expectations of protection by minority sects.

Ballard and Sincerity

A definition of religion that essentially protected only Christianity, or religions structurally and theologically analogous to it, became unwieldy as American society become more multicultural and less parochial. Consequently, a new constitutional direction was taken in 1944 when the Court decided *Ballard*. Guy Ballard represented himself to be "a divine messenger," medium for the "ascended masters" Saint Germain, Jesus, George Washington, and Godfre Ray King. The communicated teachings received through this spiritual mediumship formed the foundation for the "I Am" movement. The Ballards were charged and convicted of mail fraud, accused of soliciting funds "by means of false and fraudulent representations, pretenses and promises" by claiming ability to cure ailments.

The charge hinged on the assertion that the respondents "well knew" that their claimed spiritual powers were false. At trial, the jury charge set aside the question of the truth of the Ballards' religious beliefs; instead, the "issue is: Did these defendants honestly and in good faith believe those things? If they did, they should be acquitted."

The Ninth Circuit reversed the conviction and ordered a new trial, concluding that "the restriction of the issue in question to that of good faith was error," and should have reached to the truth or falsity of the disputed religious tenets. In this, it was imposing a standard that could fit comfortably with *Late Corporation's* dicta that religion must be "enlightened," a finding that entails an evaluative judgment on the religious beliefs claiming resort to First Amendment protections.

The U.S. Supreme Court, however, now repudiated that line of reasoning. Religious truth could not be adjudicated, because "Heresy trials are foreign to our constitution If one could be sent to jail because a jury in a hostile environment found those teachings false, little indeed would be left of religious freedom."

The *Ballard* Court found the pivotal distinction between protected religious practice and unprotected fraud to reside not in the truth of the content of the claims, which would forever be beyond the jurisdiction of the courts, but in the defendant's internal, psychological condition when asserting them. Religions did not have to be empirically true but only sincerely believed.

Sincerity's Post-*Ballard* Elaboration

An immediate implication of this stance is that religion need no longer “look like” Christianity to be protected. This culturally sensitive position, unfortunately, did not resolve the Court’s difficulties with religion but only shifted the field of contest. By what standard could a trier of fact determine whether a party’s religious beliefs were “sincere”? Were such claims even to be adjudicated?

Outside the constitutional context, lower courts grappled with these issues, most significantly in a series of conscientious objector cases from 1943 to 1969. Although decided one year before *Ballard*, *U.S. v. Kauten*, 133 F.2d 703 (2d Cir. 1943), seemed to operationalized the sincerity standard when it defined a religious belief as one “finding expression in a conscience which categorically requires the believer to disregard elementary self-interest and to accept martyrdom in preference to transgressing its tenets.”

When the U.S. Supreme Court tried its hand to construe “religion” in this same statutory context in *U.S. v. Seeger*, 380 U.S. 163 (1965), it reiterated the holding of *Ballard* and held that “the test of belief ‘in a relation to a Supreme Being is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption.” While stopping short of the “martyrdom” standard of *Kauten*, the Court cited the Protestant theologian Paul Tillich’s standard of “ultimate concern” as a tool to find a parallel belief-set to more traditional religious systems. Nothing in this approach, however, required the belief system to focus on traditional theistic spiritual entities, leading the Court to eliminate this criterion in *Welsh v. U.S.*, 398 U.S. 333 (1970).

The other body of judicial decisions occurs in the context of unemployment compensation cases and traces a similarly decreasing reliance on organizational affiliation to find protected beliefs so long as the claims are sincere. Highlights include *Thomas v. Review Board of Indiana Employment Security Division*, 450 U.S. 707 (1981), which held that a person’s protected beliefs were not limited to those shared by the other members of the religious organization. Thomas, a Jehovah’s Witness, had been denied benefits after he refused a work assignment that contributed to weapons manufacturing. The lower court, to characterize his position as a personal philosophy rather than a religious belief and therefore unprotected by the free exercise clause, relied heavily on the fact that other Jehovah’s Witnesses did not object to this work and that Thomas admitted to be struggling

over his beliefs. The U.S. Supreme Court rejected the relevance of those facts in terms reminiscent of *Ballard*:

the guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect. Particularly in this sensitive area, it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation.

Frazee v. Illinois Dept. of Employment Security, 489 U.S. 829 (1989), took this process another step forward. Whereas Thomas had been a member of a recognized church, William Frazee acknowledged membership in no specific denomination. The lower court denied Frazee unemployment benefits after he refused to accept a job that required him to work on Sundays. While acknowledging that his convictions were sincere, the Illinois Appellate Court held that constitutional protections required the tenet to be associated with an “established religious sect” rather than a personal commitment. The U.S. Supreme Court disagreed, ruling that any such requirement violated the free exercise clause. *Frazee* and *Thomas* (as well as *Seeger* and *Welsh*) seemed to firmly establish the principle that sincere belief alone could trigger constitutional analysis rather than organizational membership or any specific constellation of beliefs, including Christian-like theisms.

Fallout from *Ballard*

After the dust settled, protected religion had seemingly come to refer to beliefs in which one sincerely believed, with the test of that sincerity being whether the belief occupied a place within the party’s interior life analogous to that held by unquestionably protected beliefs (that is, Christianity). The specific content of the beliefs, and their presumed truth or falsity, and whether they were shared by others, were not to be part of the inquiry. Under this standard, “religion” had moved from a mere synonym for Christianity to a concept of considerable, even infinite, breadth. Concern over precisely this condition had ironically motivated the *Reynolds* Court to articulate the original belief/action dichotomy that had initiated this line of reasoning that brought about the feared result.

Although the sincerity standard may be satisfactory when using religion as a shield, it creates problems when wielding it as a sword. In other words, this test to find a religious safe harbor works better when hoping to stop the state from requiring the citizen to

act against his or her religious beliefs than it does when the party wishes to do something that the government forbids but that is mandated by a sincerely held religious belief. Public order can better tolerate a broad extension of religion in the former context than the latter. This division, rather than a coarse belief/action distinction, may be the better line to draw.

The Supreme Court, however, perhaps despairing that the confusion could ever be satisfactorily resolved, essentially washed its hands of the matter in *Employment Div., Dept. of Human Resources of Oregon v. Smith (II)*, 494 U.S. 872 (1990). In *Smith*, Justice Scalia drastically curtailed the scope of the free exercise clause by writing that, unless the religious practice had been explicitly targeted by the governmental action, Free Exercise claims would in the future only be successful if coupled with other constitutional provisions (his “hybrid rights cases”). That rule would most likely have required different outcomes in both the conscientious objector and unemployment compensation cases. Legislatures rather than courts, Scalia argued, would be a better venue for the protection of minority religious beliefs, however sincerely they may be held.

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References and Further Reading

- Donovan, James M., *God Is as God Does: Law, Anthropology, and the Definition of “Religion,”* Seton Hall Constitutional Law Journal 6 (1995): 23–99.
- Long, Carolyn N. *Religious Freedom and Indian Rights.* Lawrence: University Press of Kansas, 2000.
- Zock, Hetty. *A Psychology of Ultimate Concern.* Amsterdam: Rodopi, 1990.

Cases and Statutes Cited

- Davis v. Beason*, 133 U.S. 333 (1880)
- Employment Div., Dept. of Human Resources of Oregon v. Smith (II)*, 494 U.S. 872 (1990)
- Frazee v. Illinois Dept. of Employment Security*, 489 U.S. 829 (1989)
- The Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. U.S.*, 136 U.S. 1 (1890)
- Reynolds v. U.S.*, 98 U.S. 145 (1878)
- Thomas v. Review Board of Indiana Employment Security Division*, 450 U.S. 707 (1981)
- U.S. v. Ballard*, 322 U.S. 78 (1944)
- U.S. v. Kauten*, 133 F.2d 703 (2d Cir. 1943)
- U.S. v. Seeger*, 380 U.S. 163 (1965)
- Welsh v. U.S.*, 398 U.S. 333 (1970)

See also **Conscientious Objection, The Free Exercise Clause; Defining Religion; Free Exercise Clause: History, Background, Framing; Free Exercise Clause Doctrine: Supreme Court Jurisprudence**

SINGER v. UNITED STATES, 380 U.S. 24 (1965)

A federal criminal defendant sought to waive a jury trial and be tried before the judge alone. The applicable rule of procedure permitted a waiver only with the approval of the trial court and consent of the prosecutor. Although the trial court was willing to approve the waiver, the prosecutor refused to consent, and the defendant was tried and convicted by a jury.

In *Singer v. United States*, the U.S. Supreme Court held that although the Constitution grants criminal defendants the right to a jury trial, it neither confers nor recognizes a right of defendants to have their cases decided by a judge alone. It acknowledged that the Constitution does not prohibit defendants from waiving their jury trial right, but noted that “[t]he ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right.” It then upheld the applicable procedural rule, finding no constitutional impediment to conditioning a waiver of the jury trial right on the consent of the prosecutor and the trial judge, because “if either refuses to consent, the result is simply that the defendant is subject to an impartial trial by jury—the very thing that the Constitution guarantees him.” The Court cautioned, however, that cases may exist in which a defendant’s reasons for wanting to be tried before a judge alone are so compelling that the prosecutor’s insistence on a jury trial would result in the denial to the defendant of an impartial trial.

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References and Further Reading

- LaFave, Wayne R., Jerold H. Israel, and Nancy J. King. *Criminal Procedure.* 4th ed. St. Paul: Thompson-West, 2004, pp. 1041–1043, 1141.
- Note, *Singer v. United States*, Northwestern University Law Review 60 (1965): 5:722–730.
- Rudstein, David S., C. Peter Erlinder, and David C. Thomas. *Criminal Constitutional Law.* Newark and San Francisco: LexisNexis-Matthew Bender, 1990, 2004, pp. 14–35 to 14–37.

See also **Jury Trial; Jury Trial Right**

SKINNER v. OKLAHOMA, 316 U.S. 535 (1942)

In *Skinner v. Oklahoma*, the Supreme Court considered the constitutionality of a state statute that provided for sterilization of “habitual criminals.” The statute defined a habitual criminal as any person who has been convicted two or more times of felonies of “moral turpitude” either in Oklahoma or any other

state. The statute was enacted on the assumption that criminal traits are inheritable.

The State of Oklahoma found that petitioner had been convicted of felonies of moral turpitude: stealing chickens in 1926, robbery with a firearm in 1929 and again in 1945. Because the jury's only decision was whether petitioner could be sterilized without injury to his general health, it found that Skinner was subject to sterilization.

Petitioner challenged the constitutionality of the statute under the Fourteenth Amendment. Among the grounds argued was that the state could not exercise its police power in this way because of the dearth of scientific evidence on the inheritability of criminal traits. Petitioner argued also that his due process rights were violated when he was not given an opportunity to be heard on the issue of whether he is the potential parent of socially undesirable offspring. Finally, Skinner argued that sterilization was cruel and unusual punishment.

The Supreme Court, however, declined to address any of the above-mentioned claims, unanimously holding that the Oklahoma statute "fail[ed] to meet the requirements of the equal protection clause of the Fourteenth Amendment" (316 U.S. at 538). In discussing the inequalities of the statute, the Court provided one noteworthy example. Larceny was a felony of moral turpitude, and thus a person found guilty of larceny three times could be sterilized. Embezzlement was not a crime of moral turpitude, regardless of the amount taken, and therefore, despite the intrinsic similarity of the two crimes, they are subject to vastly different punishments.

Although recognizing that the states may exercise police powers in a somewhat asymmetrical way, when fundamental rights are the issue, the Court must evaluate the law using strict scrutiny. Thus, although invalidating the statute on equal protection grounds, the Court recognized a fundamental right to procreate, suggesting a substantive due process underpinning to the case. "We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race" (316 U.S. at 541).

Skinner would almost certainly be decided solely on substantive due process grounds today. Indeed, *Skinner*'s significance rests on its recognition of a fundamental right to marry and procreate and that any infringement of these basic liberties must be subject to strict scrutiny. In so doing, the Supreme Court foreshadowed the importance of procreation and marriage as subjects of liberty protection; for example, *Griswold v. Connecticut*, 381 U.S. 479 (1965) (statute forbidding use of contraceptives violates marital zone of privacy); *Zablocki v. Redhail*, 434 U.S. 374

(1978) (invalidating a statute, which required court approval to marry for noncustodial parents with child support obligations).

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Cases and Statutes Cited

Griswold v. Connecticut, 381 U.S. 479 (1965)
Skinner v. Oklahoma, 316 U.S. 535 (1942)
Zablocki v. Redhail, 434 U.S. 374 (1978)

SKINNER v. RAILWAY LABOR EXECUTIVES' ASSOCIATION, 489 U.S. 602 (1989)

Drug testing has become a regular feature of American employment, especially in government jobs. Since the mid-1980s, both federal and state agencies and numerous regulated industries have implemented testing programs for their employees. Although advocates suggest that drug testing increases job safety, cuts costs, and helps fight the "war on drugs," opponents argue that such programs amount to "chemical McCarthyism" and an invasion of personal privacy. In *Skinner v. Railway Labor Executives' Association*, the Supreme Court held that a drug-testing scheme for railroad employees did not violate the Fourth Amendment's search and seizure protections.

The issue in *Skinner* concerned federal regulations promulgated in response to a history of alcohol and drug abuse by railroad employees, resulting in fatal and costly train accidents. Pursuant to these regulations, employees involved in certain accidents were required to undergo blood and urine tests after the event. Testing could also occur when an employee violated particular rules or when a supervisor had reasonable suspicion that the employee was under the influence of drugs or alcohol. Positive results or an employee's refusal to undergo testing could be used in disciplinary proceedings and might result in job-related punishment. Various labor organizations brought suit to enjoin the enforcement of the drug testing regulations.

The Court recognized that the collection of samples (for example, monitoring the act of urination) intruded on personal privacy whereas the chemical analysis of such samples constituted a search by revealing intimate information. The Fourth Amendment does not ban all searches, however, but only unreasonable ones based on a balancing of government prerogatives and individual privacy interests. In particular, the Court cited approvingly its evolving "special needs" doctrine that permitted searches in the absence of warrants and probable cause when "special needs, beyond the

normal need for law enforcement," make these requirements "impracticable."

According to the Court, the government had a compelling interest in the drug-testing program, given that a misstep by an intoxicated worker could cause extensive damage and fatalities without an opportunity for a supervisor to intervene. And although an individual's privacy interests were not trivial, they were diminished by the nonintrusive nature of the testing procedures and the high degree of regulation in the railroad industry. In these circumstances, requiring a warrant would impede the timely analysis of samples and might be beyond the grasp of railroad supervisors. Likewise, obtaining individualized suspicion would be difficult if not impossible in the chaotic aftermath of a train accident. The Court also suggested that the testing regime served a complementary purpose, deterring drug use among employees in the first place.

Since *Skinner* and its companion case, *National Treasury Employees Union v. Von Raab*, the Court has considered four other regimes, upholding student drug testing in the *Acton* and *Earls* decisions and invalidating testing programs for political candidates in *Chandler v. Miller* and for pregnant mothers in *Ferguson v. City of Charleston*. The end result has been a crazy quilt of jurisprudence and a great deal of confusion in the lower courts.

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References and Further Reading

- Coombs, Robert H., and Louis Jolyon West. *Drugs Testing: Issues and Options*. New York: Oxford University Press, 1991.
- Gilliom, John. *Surveillance, Privacy, and the Law: Employee Drug Testing and the Politics of Social Control*. Ann Arbor: University of Michigan Press, 1994.
- Normand, Jacques, Richard O. Lempert, and Charles P. O'Brien. *Under the Influence: Drugs and the American Workforce*. Washington, D.C.: National Academy Press, 1993.
- Schulhofer, Stephen J., *On the Fourth Amendment Rights of the Law-Abiding Public*, Supreme Court Review (1989): 87–163.
- Symposium: Drug Testing in the Workplace*, William & Mary Law Review 33 (1991): 1–252.
- Tunnell, Kenneth D. *Pissing on Demand: Workplace Drug Testing and the Rise of the Detox Industry*. New York: New York University Press, 2004.
- Welfing, John B., *Employer Drug Testing: Disparate Judicial and Legislative Responses*, Albany Law Review 63 (2000): 799–832.

Cases and Statutes Cited

- Board of Education v. Earls*, 536 U.S. 822 (2002)
- Chandler v. Miller*, 520 U.S. 305 (1997)
- Ferguson v. City of Charleston*, 532 U.S. 67 (2001)

National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989)

Vernonia School District 47J v. Acton, 515 U.S. 646 (1995)

See also **Administrative Searches and Seizures**; *Board of Education v. Earls*, 536 U.S. 822 (2002); *Chandler v. Miller*, 520 U.S. 305 (1997); **Drug Testing**; *National Treasury Employee Union v. Von Raab*, 489 U.S. 656 (1989); **Search (General Definition)**; *Vernonia School District v. Acton*, 515 U.S. 646 (1995); **War on Drugs**; **Warrant Clause (IV)**; **Warrantless Searches**

SLAPP SUITS (STRATEGIC LAWSUITS AGAINST PUBLIC PARTICIPATION)

"SLAPP" is an acronym for "strategic lawsuit against public participation," a term coined by Professors George W. Pring and Penelope Canan to describe the growing phenomenon of filing lawsuits to discourage opponents from exercising their free speech and other civil rights. Plaintiffs in SLAPP actions sue in a variety of contexts, defamation, copyright, zoning applications, and land use variance requests. SLAPP suits arise frequently in the environmental arena, in response to opposition against hazardous waste disposal facilities, the loss of natural environmental features, and developments that raise concerns for nearby residents. The concept of SLAPP is ironic in that the party who files the suit seeks to use the law to chill the civil rights of others. In the typical SLAPP suit, an economically dominant party (the SLAPper) files suit against an economic underdog (the SLAP-pee) who has petitioned the government in opposition to the SLAPper's project. The SLAPper has little concern about the ultimate outcome of the action. His purpose is to convince the SLAPpee that opposition is futile and personally disastrous. The First Amendment provides protection against SLAPP suits. A party seeking a dismissal of a suit on the basis that it is a SLAPP typically must establish that plaintiff sued him because he petitioned or planned to petition the government. The SLAPP retaliates against or creates disincentives against petitioning activity by the defendant protected by the First Amendment—read broadly to include protection for citizens expressing views to agencies, legislatures, and courts. For example, *Sierra Club v. Butz*, 349 F. Supp. 934 (N.D. Cal. 1972), rejected a company's counterclaim for interference with an advantageous relationship. In its dismissal, the federal court held that the plaintiff's actions that the defendant claimed interfered with his business relationship constituted a petition to the government. The case thus recognized a common law foundation for the judicial right to dismiss SLAPP suits.

Some states condemn SLAPP suits by statute. At least twenty states, including California, Massachusetts, and New York, have passed anti-SLAPP legislation, establishing sanctions against parties who bring a cause of action for the purpose of squelching the rights of the parties sued. States with anti-SLAPP laws reject SLAPP suits on the basis that such suits intimidate or discourage speech about matters of public interest. The California statute is a good example of legislative protection. It protects acts “in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech . . . in connection with a public issue or an issue of public interest.” State anti-SLAPP statutes authorize courts to dismiss civil claims that infringe on the defendant’s constitutional right of petition. Because everyone has a right to petition by lawsuit (including those accused of SLAPPs), courts navigate difficult factual questions in evaluating dismissal claims on the basis that the suit violates the anti-SLAPP statute. The courts must protect citizens from meritless lawsuits while protecting the right to bring a suit for judicial resolution. Some anti-SLAPP statutes, such as that of New York, also expressly authorize costs and attorney’s fees when the suit lacks a substantial basis. New York Civil Rights Law § 70a (Consol. 2005) also allows compensatory and even punitive damages to the SLAPpee in specified circumstances. The anti-SLAPP provisions facilitate dismissal of retaliatory lawsuits by reducing the burden of proof for dismissal for malicious prosecution or abuse of process. In *Kashian v. Harriman*, 98 Cal. App.4th 892, 120 Cal. Rptr.2d 576 (2002), a California court invoked the state’s anti-SLAPP statute in dismissing a claim by a hospital developer against a lawyer who represented an advocacy organization opposing the developer’s plan.

In addition to statutory penalties, the lawyer who brings a SLAPP suit lacking a basis in fact may receive sanctions under Rule 11 of the Federal Rules of Civil Procedure and the Rules of Professional Conduct in some jurisdictions. The American Bar Association Model Rule of Professional Conduct 3.1, “Meritorious Claims and Contentions,” states: “A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.” Comment 1 to Model Rule 3.1 summarizes the sense of the rule: “The advocate has a duty to use legal procedure for the fullest benefit of the client’s cause, but also a duty not to abuse legal procedure.”

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References and Further Reading

- Jackson, Mark, *The Corporate Defamation Plaintiff in the Era of SLAPPs*: Revisiting *New York Times v. Sullivan*, William & Mary Bill of Rights Journal 491 (2001): 9.
- Kuehn, Robert R., *Shooting the Messenger: The Ethics of Attacks on Environmental Representation*, Harvard Environmental Law Review 417 (2002): 26.
- McBrayer, Lauren, *The Direct TV Cases: Applying Anti-SLAPP Laws to Copyright Protection Cease-and-Desist Letters*, Berkley Technology Law Journal 603 (2005): 20.
- McBride, Edward W. Jr., *The Empire State SLAPPs Back: New York’s Legislative Response to SLAPP Suits*, Vermont Law Review 925 (1990): 17.
- Pring, George W., *SLAPPs: Strategic Lawsuits Against Public Participation*, Pace Environmental Law Review 3, 6–8 (1990): 7.
- Pring, George W., and Penelope Canan, *Strategic Lawsuits Against Public Participation* (“SLAPP”): *An Introduction for Bench, Bar and Bystanders*, Bridgeport Law Review 937 (1993): 12.
- Tobias, Carl, *Environmental Litigation and Rule 11*, William & Mary Law Review 429 (1992): 33.
- Wilson, Paul D., *Of Sexy Phone Calls and Well-Aimed Golf Balls: Anti-SLAPP Statutes in Recent Land-Use Damages Litigation*, Urban Lawyer 375 (2004): 36.

Cases and Statutes Cited

- Kashian v. Harriman*, 98 Cal. App.4th 892, 120 Cal. Rptr.2d 576 (2002)
- Kobrin v. Gastfrind*, 821 N.E. 2d 60, 63 (Mass. 2005)
- Margolis v. Gosselin*, 5 Mass. L. Rptr. 283 (May 22, 1996)
- Novak v. Dept. of Env’tl. Prot.*, 6 Mass. L. Rptr. 273 (Feb. 24, 1997)
- Protect Our Mountain Environment, Inc. v. District Court in and for Jefferson County*, 677 P. 2d 1361 (Colo. 1984)
- Sierra v. Butz*, 349 F. Supp. 934 (N.D. Cal. 1972)
- Webb v. Fury*, 282 S.E. 2d 28 (1981)
- Westfield Partners, Ltd. v. Hogan*, 740 F. Supp. 523 (N.D. Ill. 1990)
- American Bar Association Model Rules of Professional Conduct 3.1 (2003)
- California Civil Procedure Code § 425.16 (Deering 2005)
- Federal Rule of Civil Procedure 11
- Massachusetts General Laws ch. 231, § 59H (2005)
- New York Civil Rights Law § 70a (Consol. 2005)

SLAUGHTERHOUSE CASES, 83 U.S. (16 WALL.) 36 (1873)

The Crescent City Live-Stock Landing and Slaughterhouse Company was created by the Louisiana legislature in 1869 and granted a state-enforced monopoly over the landing and slaughtering of livestock within an 1,100 square mile district surrounding New Orleans. The law, entitled “An Act to Protect the Health of the City of New Orleans, to Locate the Stocklandings and Slaughterhouses, and to Incorporate the ‘Crescent City Company’” provided the

company with the exclusive privilege of conducting livestock landing and slaughtering and required all other slaughterhouses within the district to close. The Act also obligated the company to permit all butchers to use its facilities at statutorily defined fees.

The enactment was challenged in nearly 300 lawsuits, filed primarily by competing butchers who alleged, among other claims, that the monopoly deprived them of the right to engage in their chosen profession. Appeals from the Louisiana Supreme Court were ultimately resolved against the butchers by the five-to-four *Slaughterhouse Cases* decision, which provided the U.S. Supreme Court the first opportunity to adjudicate the recently ratified Fourteenth Amendment. The decision remains the most significant authority on the privileges or immunities clause.

Justice Samuel Miller wrote for the majority, announcing that the enactment was within the police powers of the state and did not violate the Thirteenth Amendment, or the due process, or equal protection clauses of the Fourteenth Amendment. Relying on a long history of English and American precedent, the holding of the case was limited to the conclusion that Louisiana was within settled notions of the police power to grant a monopoly in what was deemed a noxious trade.

The bulk of Miller's analysis turned, however, on the privileges or immunities clause. Although not part of the actual holding of the case, that element of the opinion is the most important because of its subsequent influence. Beginning with a brief discussion of the Civil War, the analysis proceeded from the premise that the Reconstruction Amendments were ratified primarily as a means of establishing and securing the liberty of former slaves. But for the war, the majority posited, none of the amendments would have been suggested and, therefore, the amendments could not reasonably be understood to encompass the wide range of liberties claimed by the butchers on behalf of all citizens. On this foundation, Miller reasoned, only a narrow construction of the Fourteenth Amendment was proper.

The Fourteenth Amendment establishes every person as a citizen of the nation: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." Miller found in this sentence a distinction between national and state citizenship, each consisting of a unique set of individual rights. State citizenship, held the majority, included virtually all civil rights, whereas federal citizenship included only those rights that arise as a result of the federal government, its laws, or the national character of federal citizenship.

The text of the privileges or immunities clause prohibits states from abridging the privileges or immunities of *citizens of the United States*, leading the majority to conclude that the clause was intended to protect only those rights incident to federal citizenship. Were it otherwise, Miller reasoned, the phrase "citizen of the state" would not have been left out of the clause "when it is so carefully used, and used in contradistinction to 'citizens of the United States' in the very sentence which precedes it."

The right to travel to the seat of government, to access ports and courthouses, and the privilege of the writ of habeas corpus were among a short list of examples used to illustrate the unique rights of federal citizenship. The right to engage in a profession of one's choosing, although acknowledged as a genuine privilege, was deemed to be of state origin and not within the ambit of the Fourteenth Amendment. To hold otherwise, Miller stated, would be to remove the protection of nearly all civil rights from the power of the states and place it in the federal government, which he denied could have been the purpose of the Fourteenth Amendment. Rhetorically, the majority asked "where is it declared that Congress shall have the power to enforce that article, was it intended to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States?"

Three separate dissents were filed by Justices Swayne, Bradley, and Field. Justice Field's dissent answered the majority directly, arguing that the purpose of the Fourteenth Amendment was broader than securing emancipation for the slaves. The ratification of the Amendment was intended to alter the hierarchy of state and federal citizenship, placing the vast sweep of civil rights, possessed by all men and not merely former slaves, under the protection of the federal government. Any other interpretation of the privileges or immunities clause, Field insisted, would reduce it to a "vain and idle enactment."

Academic commentary on the *Slaughterhouse Cases* has been predominantly critical of the majority opinion, more often siding with the dissenters understanding of the Fourteenth Amendment. The consensus view is that Justice Miller's reading of the privileges or immunities clause accorded it an improperly narrow construction. The judicial consequence of the *Slaughterhouse Cases*, however, is clear: the Privileges or Immunities clause has been nearly ignored and only recently resuscitated after 125 years by a majority of the Supreme Court in *Saenz v. Roe*. As a result, the *Slaughterhouse Cases* foreclosed any significant role for the privileges or immunities clause in the development of civil rights during the nineteenth and twentieth centuries.

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References and Further Reading

- Aynes, Richard L., *Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the Slaughter-House Cases*, Chicago-Kent Law Review 80 (1995): 627–688.
- Curtis, Michael K., *Resurrecting the Privileges or Immunities Clause and Revising the Slaughter-House Cases without Exhuming Lochner: Individual Rights and the Fourteenth Amendment*, Boston College Law Review 38 (1996): 1–106.
- Labbe, Ronald M., and Jonathan Lurie. *The Slaughterhouse Cases: Regulation, Reconstruction, and the Fourteenth Amendment*. Lawrence, KS: University Press of Kansas, 2003.

Cases and Statutes Cited

Saenz v. Roe, 526 U.S. 489 (1999)

See also **Fourteenth Amendment; Police Power of the State; Privileges and Immunities (XIV); *Saenz v. Roe*, 526 U.S. 489 (1999)**

SLAVERY

Slavery was clearly the most obvious violation of civil liberties in American history. The system denied slaves all civil liberties. With the exception of the right not to be murdered or mutilated (by 1830 both were crimes under the laws of the southern states), slaves had no legal rights. They could not sue or be sued, they could not testify in court against a white or in many places even against a free black. They could own nothing and were instead the subject of ownership. They were property and could be bought and sold, or given away. They could not legally marry and had no control over their children or their family's destiny. Spouses could be separated by sale or removal, and the children of slaves could also be sold away from parents from their children. Some states prohibited separating very young children from their mothers by public sale, but mothers could be sold without their children, and masters often separated toddlers from their parents. Slaves developed their own religious traditions, but masters and state governments suppressed slave religious expression whenever they thought it was necessary or useful to do so. Similarly, masters imposed religion on their slaves, often as a device to control them. Slaves had no free speech rights, and in most southern states it was illegal to teach them to read. Far from having a right of assembly, southern laws prohibited gatherings of slaves or free blacks; and in some states even services in all-black churches had to be observed by a white. Slaves in the end were denied their liberty without due process of law. This was even true in

jurisdictions that were entirely under the control of Congress, such as Washington, D.C., and various federal territories. Although the Bill of Rights presumably prohibited Congress from passing any law to deprive anyone of his or her liberty without due process of law, this provision of the Constitution simply did not apply to slaves.

Although legally considered property, slaves were treated as persons when charged with crimes. Ironically, when charged with a crime slaves were often given trials that were reasonably fair, with some due process protections. Southern courts sometimes overturned the convictions of slaves on the basis of coerced confessions or the lack of effective counsel. These rules may have had the effect of giving some slave defendants due process, but the main purposes of such rules were to protect the integrity of the court system itself, preserve white supremacy, and prevent the needless destruction of the valuable property interest that masters had in their slaves. Slaves had to have lawyers defend them, for example, because otherwise the trial would have been offensive to the notions of how courts should operate, or worse yet, slaves would have had to act as their own attorneys, which would have undermined notions of race and status in the slave south.

Slaves had no expectation that their bodies would be free from physical punishment. Masters were free to whip and beat slaves as they wished, to incarcerate them and chain them up or tie them down. Violence was inherent in the system of slavery. A few masters were punished for murdering their slaves. John Hoover was executed in North Carolina after the state supreme court upheld his conviction for murdering a slave by torturing her, forcing her to work virtually naked outdoors in the winter, and savagely beating her. But Hoover's murder conviction and execution was highly unusual. Most slaves suffered punishments that did not kill them, and they could expect no intervention from the legal system. As Chief Justice Ruffin of North Carolina noted in *State v. Mann* (1829),

The end [of slavery] is the profit of the master, his security and the public safety; the subject, one doomed in his own person, and his posterity, to live without knowledge, and without the capacity to make anything his own, and to toil that another may reap the fruits. What moral considerations shall be addressed to such a being, to convince him what, it is impossible but that the most stupid must feel and know can never be true—that he is thus to labour upon a principle of natural duty, or for the sake of his own personal happiness, such services can only be expected from one who has no will of his own; who surrenders his will in implicit obedience to that of another. Such obedience is the consequence only

of uncontrolled authority over the body. There is nothing else which can operate to produce the effect. The power of the master must be absolute, to render the submission of the slave perfect. I most freely confess my sense of the harshness of this proposition, I feel it as deeply as any man can. And as a principle of moral right, every person in his retirement must repudiate it. But in the actual condition of things, it must be so. There is no remedy. This discipline belongs to the state of slavery. They cannot be disunited, without abrogating at once the rights of the master, and absolving the slave from his subjection. It constitutes the curse of slavery to both the bond and free portions of our population. But it is inherent in the relation of master and slave.

More succinctly, Chief Justice Roger B. Taney of the U.S. Supreme Court declared in *Dred Scott v. Sandford* (1857), under the U.S. Constitution blacks were “a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them.” Thus, it was permissible to treat them as slaves, with no rights at all.

Thus, slavery fits into the history of civil liberties as the most egregious example of the denial of such liberties in our national history. The fact that slavery existed, and was protected by the U.S. Constitution, illustrates the way in which civil liberties were limited and constricted at the nation’s founding.

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References and Further Reading

- Finkelman, Paul. *Slavery and the Founders: Race and Liberty in the Age of Jefferson*. 2nd ed. Armonk, NY: M.E. Sharpe, 2001.
- Morris, Thomas D. *Southern Slavery and the Law, 1619–1860*. Chapel Hill: University of North Carolina Press, 1996.
- Tushnet, Mark. *Slave Law in the American South: State v. Mann in History and Literature*. Lawrence, KS: University of Kansas Press, 2003.

SLAVERY AND CIVIL LIBERTIES

Slavery clearly violated the civil liberties of those held in bondage. (See the entry on “Slavery” in this volume.) It also had a profound impact on the civil liberties of free blacks and whites. Indeed, much of the development of civil liberties in the period before the Civil War can be attributed to slavery.

Slavery affected the understanding of due process in criminal and civil cases; the meaning of freedom of speech, press, and assembly; and the application of the Bill of Rights to the federal territories. It also led,

in *Dred Scott v. Sandford* (1857), to the first articulation of substantive due process by the Supreme Court and one of the Court’s first rulings on the meaning of the “takings clause” of the Fifth Amendment.

The fugitive slave clause of Article IV, Sec. 2 of the Constitution, allowed masters to recover runaway slaves found in other states and prohibited those states from emancipating any slaves who escaped into their jurisdiction. This clause set the stage for various conflicts between the free states and the slave states and also between the free states and the federal government. In 1793, Congress passed a law to enforce this clause. The 1793 law did not require a jury trial or any normal due process procedures for the return of fugitive slaves. Fearful that free blacks might be falsely claimed as fugitives and taken South, in the 1820s and 1830s most of the northern states passed “personal liberty laws” that gave alleged fugitive slaves more due process rights. Through these laws the free states attempted to give free blacks, and fugitive slaves, access to jury trials, the writ of habeas corpus, and other due process protections. In *Prigg v. Pennsylvania* (1842), the U.S. Supreme Court struck down all these laws, arguing that the states could not pass any legislation that would supplement the federal law or interfere with its enforcement. In 1850, Congress passed a new law, which specifically prohibited jury trials or the use of the writ of habeas corpus to interfere in the rendition of fugitive slaves. The alleged slave was allowed to have an attorney, but only if he could afford one or one stepped forward to offer his services. The law did not require the court to appoint counsel, and no judges or federal commissioners hearing cases under the law ever did appoint a lawyer for an alleged fugitive slave. Federal commissioners tried to hold their hearings in secret, early in the morning, and finish them quickly, before anyone could find out that a fugitive slave case was in progress. Although not exactly a secret court, there was no attempt to make a fugitive slave case part of an open court. Furthermore, in what was perhaps the most outrageous denial of fundamental rights, alleged slaves were not allowed to testify on their behalf at the hearing to determine whether they were free or runaway slaves. Equally outrageous, from the perspective of opponents of slavery, was a differential fee schedule in cases involving runaway slaves. If a federal judge or federal commissioner determined the person before him was not a fugitive slave, he would get a five dollar fee. But, if he decided in favor of the person claiming the slave—that is if he decided that the person before him was a fugitive slave—he would get a ten dollar fee. The explanation of this fee schedule made sense—if the judge or commissioner found in favor of the alleged slave, he only had to release him

from custody, but if he found in favor of the claimant, he would have to fill out a great deal of paperwork. But however reasonable this was, the law looked like a blatant attempt to bribe judges and commissioners to help southerners catch slaves or enslave free blacks. This went against the very nature of liberty, as set out in Section 40 of Magna Carta, "To no one will we sell, to no one will we refuse or delay, right or justice." Whites who interfered with the return of fugitive slaves were subject to heavy fines and jail terms. The Supreme Court and the lower federal courts almost always sided with southern masters and against the interests of free blacks, alleged fugitive slaves, or whites who helped them. Both fugitive slave laws and the courts that enforced them trampled on the civil liberties of blacks and often of the liberties of whites who helped them.

Slavery affected free speech in a variety of ways. In the South it led to extraordinary self-censorship. In 1819, for example, a prosecutor in Maryland brought charges against Rev. Jacob Gruber, a Methodist minister, because he gave a sermon that implied that slave holding was sinful and that it was cruel to sell people at auctions like cattle. Rev. Gruber was acquitted, but the very fact that he was prosecuted suggests the precarious nature of civil liberties in the South. In Virginia, a number of ministers and other religiously motivated men would be prosecuted for similar offenses, although few were ultimately convicted. In 1854, Margaret Douglass, a white woman, spent a month in jail in Norfolk for teaching free black children to read the Bible. In 1861, Rabbi David Einhorn fled Baltimore in the middle of the night, threatened by mobs that would no longer tolerate his opposition to slavery. He moved to Philadelphia where he became the chief rabbi at Congregation Keneseth Israel, which was known as the Abolitionist Synagogue.

By the eve of the Civil War it was impossible for whites to debate slavery, because anything that might resemble antislavery literature was banned. Some white northerners were arrested and tried for the mere possession of antislavery literature. In the 1850s, the greatest bestseller of the age, *Uncle Tom's Cabin*, could be read in the North and Great Britain while translations in German, French, Spanish, and other languages made it available almost everywhere in the world. But, in the slave south the book was banned, and possession of it could lead to arrest or a mob attack. In the late 1850s, a native of North Carolina, Hinton Rowan Helper, published *The Impending Crisis of the South: How to Meet It* (1857), a detailed discussion of the dangers of slavery to the white, nonslaveholding class. He argued that slavery and the South's dependence on cotton as harmful to the majority of southern whites, who did

not in fact own slaves. Helper was forced to leave the state of his birth and soon afterwards his brother left as well. In 1860, the North Carolina Supreme Court upheld the conviction, and one-year jail sentence, of Rev. Daniel Worth, also a native of North Carolina, who had circulated Helper's book. Free speech was simply not available to southern whites if they dared to challenge slavery. The southern states also tried to get the free states to ban antislavery speech. In 1831, Georgia offered a \$5,000 reward for the arrest of William Lloyd Garrison, the editor of *The Liberator*, the nation's most radical antislavery paper. In the mid-1830s, Alabama asked the governor of New York to extradite R. G. Williams, of the American Anti-Slavery Society, for helping to distribute *The Emancipator* in that state. Because Williams had never actually set foot in Alabama, the governor of New York refused to arrest him and send him to Alabama for trial. The First Amendment did not apply to the states at this time, so there was no issue of censorship that could have been taken to the federal courts. However, most state constitutions protected basic rights of freedom of expression. In the South, however, these rights simply did not exist for people wishing to debate slavery. In Charleston, South Carolina, mobs attacked the U.S. post office, indiscriminately burning bags of mail from the North, because members of these mobs feared that the mail contained antislavery literature. Postmaster General Amos Kendall refused to condone attacks on the mail and declared that abolitionist propaganda was not technically illegal, but he also declared that any local postmaster who refused to deliver abolitionist mail would be "justified" in doing so and would not be sanctioned. In Charleston and elsewhere, local postmasters in fact refused to deliver mail from the North without inspecting or allowing locally appointed vigilance committees to do so. This kind of censorship went to the heart of civil liberties, by prohibiting the circulation of literature that challenged social institutions. The South's growing police-state mentality also affected the North. In New York, the local postmaster refused to allow antislavery material to be sent South, even though this violated the postal laws. Postmaster General Kendall saw no reason to reverse this policy. In 1850, Arkansas made it a crime to "maintain that owners have not the right of property in their slaves," and in 1859, a South Carolina law provided a one-year jail term for merely receiving antislavery material in the mail. The self-censorship of the South also affected southern universities. Lieber was effectively forced out of the University of South Carolina because he was not sufficiently proslavery, although at no time did he openly challenge the central institution of his adopted state.

In 1856, the president of the University of North Carolina proudly noted that in the previous two decades no students had ever debated the issue of slavery. In 1860, Rev. John G. Fee, the founder of Berea College, fled Kentucky because his opposition to slavery made it unsafe for him to live there. That same year the Rev. Leonidas Polk established the University of the South, in Sewanee, Tennessee, as a place where higher education would teach the value of slavery.

The First Amendment and the rest of the Bill of Rights did apply to the District of Columbia, but here too slavery trumped civil liberties. In 1836, authorities in Washington, D.C., prosecuted Dr. Rueben Crandall, a Quaker from Connecticut, because he was found to possess some antislavery pamphlets. The prosecutor who brought this case was Francis Scott Key, who was the author of the *Star Spangled Banner*, which later became the national anthem. Key lost the case because he could not actually prove that Dr. Crandall had circulated these pamphlets and claimed they were packed into his luggage without his knowledge. By the 1840s, abolitionists had established their right of freedom of the press in the nation's capital, where a leading antislavery paper, *The National Era*, was published. In 1851–1852, this paper published Harriet Beecher Stowe's great antislavery novel, *Uncle Tom's Cabin*, in serial installments.

The First Amendment also suffered in Congress because of slavery. That Amendment protects the right to "petition the Government for a redress of grievances." However, in the 1790s, southern Congressmen successfully prevented the reception of petitions from free blacks. In the 1830s, abolitionists began to send hundreds of petitions to Congress asking the national legislature to pass various laws to restrict slavery. The House of Representatives instead adopted a "gag rule," which prevented these petitions from even being read on the floor of Congress. Congressman John Quincy Adams, who had been elected to the House of Representatives after serving as president, considered the gag rule to be an unconstitutional denial of the right to petition. For nearly a decade, from 1836 until 1844, Adams and a handful of antislavery Congressmen fought the gag rule. Finally in 1844, northern Democrats, who had previously supported the southern wing of their party on this issue, joined northern Whigs to repeal the gag. The debate over the gag rule helped create a climate of civil liberties in the North, as people in that region came to see slavery as a threat to the liberty of free whites, as well as blacks.

Slavery also threatened freedom of expression in the North. In the 1830s, mobs attacked abolitionists throughout the North when they spoke out against slavery. These mobs were often motivated by racist

hatred of blacks, but members of the mobs also feared that antislavery would lead to instability. Northern conservatives understood that verbal and literary assaults on slavery would undermine national harmony and the Union. In Philadelphia a mob burned a building used by the antislavery movement for meetings. In Boston, a mob placed a noose around the neck of the abolitionist editor, William Lloyd Garrison, threatening to hang him. Abolitionist speakers, like Garrison, Wendell Phillips, and Frederick Douglass, were often assaulted in the late 1830s and early 1840s when they tried to give speeches attacking slavery. Mobs in Cincinnati destroyed the printing press of the *Philanthropist* in 1836, but the two editors, James G. Birney and Gamaliel Bailey, escaped without serious injury.

In Alton, Illinois, Elijah P. Lovejoy was not so fortunate. Lovejoy was the editor of the *St. Louis Observer*, a religious paper. In 1836, Lovejoy condemned the lynching of a free black man in St. Louis and attacked a local judge for his failure to vigorously pursue the leaders of the lynch mob. This sort of freedom of expression was not acceptable in the slaveholding city, and a mob attacked his press. Up to this time Lovejoy had not taken a stand on slavery, and even in this incident, he condemned lynching, not slaveholding. But whites in St. Louis saw little distinction between Lovejoy and an abolitionist, and he was forced to leave the city. He moved across the river, to Alton, Illinois, where he planned to publish the *Alton Observer*. However, even before his printing press was unloaded, a mob, made up mostly of men from St. Louis, attacked the crated press and threw it into the River. Lovejoy ordered a second press and at the same time announced had become an opponent of slavery. A mob destroyed this press as well. When a mob attacked the building where he had his third press, Lovejoy defended his property. While trying to put out a fire on his roof, which had been started by the mob, someone in the mob shot and killed Lovejoy. Lovejoy became the antislavery movement's first martyr. His death underscored the threat to the liberty of whites that came from slavery.

The U.S. Supreme Court heard few cases involving civil liberties or the Bill of Rights before the Civil War. In *Prigg v. Pennsylvania* (1842), as already noted, the Court held that persons seized as fugitive slaves were not entitled to a trial with traditional due process guarantees. In *Jones v. Van Zandt* (1847), the Court upheld a civil suit for the value of a slave who was never recovered after Van Zandt, an Ohio farmer, gave the runaway a ride in his wagon. The Court rejected Van Zandt's argument that in Ohio all persons were presumed to be free and thus he could have

had no notice that the person he gave a ride to was in fact a runaway slave.

The Court's most important pronouncement on the Bill of Rights and slavery came in *Dred Scott v. Sandford*. The main issue in *Dred Scott* was the constitutionality of the ban on slavery in the federal territories west of Missouri. Taney's strongest argument for overturning that ban was his assertion that freeing slaves violated the Fifth Amendment. Taney argued that Congress could not deny people living in the territories their fundamental rights guaranteed in the Bill of Rights. He noted: "For example, no one, we presume, will contend that Congress can make any law in a Territory respecting the establishment of religion, or the free exercise thereof, or abridging the freedom of speech or of the press, or the right of the people of the Territory peaceably to assemble, and to petition the Government for the redress of grievances." Similarly, he asserted that Congress could not "deny to the people . . . the right to trial by jury, nor compel any one to be a witness against himself in a criminal proceeding." He then turned to the Fifth Amendment, noting:

These powers, and others, in relation to rights of person, which it is not necessary here to enumerate, are, in express and positive terms, denied to the General Government; and the rights of private property have been guarded with equal care. Thus the rights of property are united with the rights of person, and placed on the same ground by the fifth amendment to the Constitution, which provides that no person shall be deprived of life, liberty, and property, without due process of law. And an act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offence against the laws, could hardly be dignified with the name of due process of law.

Taney continued to make this point in his opinion, writing: "So, too, it will hardly be contended that Congress could by law quarter a soldier in a house in a Territory without the consent of the owner, in time of peace; nor in time of war, but in a manner prescribed by law. Nor could they by law forfeit the property of a citizen in a Territory who was convicted of treason, for a longer period than the life of the person convicted; nor take private property for public use without just compensation."

Taney also asserted that "the right of property in a slave is distinctly and expressly affirmed in the Constitution." Thus, if slave property were protected by the Constitution—as it surely was—then taking that property without due process or compensation would violate the Fifth Amendment. Thus, Taney noted: "And if the Constitution recognizes the right

of property of the master in a slave, and makes no distinction between that description of property and other property owned by a citizen, no tribunal, acting under the authority of the United States, whether it be legislative, executive, or judicial, has a right to draw such a distinction, or deny to it the benefit of the provisions and guarantees which have been provided for the protection of private property against the encroachments of the Government."

This argument was the first time the Supreme Court has ever determined that a law violated the Bill of Rights. Taney was intent on protecting the liberty of the master to continue to own his slave property in any federal territory, arguing that a law that took property away without any judicial hearing or compensation could not be "dignified with the name of due process of law." This was the same analysis that the Supreme Court would use, nearly a century later, to incorporate the Bill of Rights to the states. Members of the new Republican Party reacted to *Dred Scott* with shock and dismay. Lincoln's vigorous and articulate attack on the opinion helped make him a national figure that led to his nomination for president three years later. After the Civil War, the Republicans wrote and ratified the Fourteenth Amendment, which effectively reversed *Dred Scott*. Part of that amendment prohibited the states from denying any person "life, liberty, or property without due process of law." The Supreme Court would ultimately use this clause to expand the Bill of Rights—and fundamental civil liberties—to the states. In this way, theories of law that Taney helped create to protect slavery later became the engine for expanding civil liberties throughout the nation.

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References and Further Reading

- Curtis, Michael. *Free Speech: "The People's Darling Privilege": Struggles for Freedom of Expression in American History*. Durham: Duke University Press, 2000.
- Eaton, Clement. *The Freedom of Thought Struggle in the Old South*. New York: Harper and Row, 1964.
- Finkelman, Paul. *Dred Scott v. Sandford: A Brief History with Documents*. Boston: Bedford Books, 1995.
- Nye, Russell. *Fettered Freedom: Civil Liberties and the Slavery Controversy*. East Lansing: Michigan State University Press, 1964.

SMITH ACT

Formally known as the Alien Registration Act of 1940, the Smith Act was a response to the increasing popularity of both the Communist Party and fascist groups during the 1930s. Calls for a federal statute

like the Smith Act had been constant since 1935, when the McCormack-Dickstein Committee had investigated both left-wing and right-wing activities. Introduced by Rep. Howard Smith of Virginia, the law's passage in 1940 was aided by the Soviet Union's signing of the Ribbentrop-Molotov pact with Nazi Germany and both countries' invasion of Poland. The Smith Act made it a criminal offense for anyone to advocate the violent overthrow of the government of the United States, to organize any association for that purpose, or to become a member of such an association. The law also provided for the deportation of any alien who was convicted of violating any of its criminal provisions.

The earliest use of the Smith Act against a radical group involved members of the Trotskyite Socialist Workers Party in Minneapolis; the jury acquitted many of the defendants and recommended lenient sentences for those convicted. The Great Sedition Trial, a 1944 Smith Act prosecution of twenty-six American fascists, ended in a mistrial after the judge's death. The better-known prosecutions of national and local leaders of the Communist Party of the United States of America (CPUSA) occurred in four waves. Eleven members of the national leadership were tried in New York in 1949 and 1950. After the Supreme Court upheld their convictions in 1951, the Justice Department indicted sixty-eight second-tier communists. The final two waves of prosecutions occurred in 1954 and 1956, both election years. The Smith Act prosecutions of American communists yielded 140 indictments, ninety-three convictions and ten acquittals. Less than half of those convicted served any jail time; most of the sentences were relatively short.

The Supreme Court decided four major cases involving prosecutions under the Smith Act's criminal provisions. In *Dennis v. United States* (1951), the Court sustained the convictions of eleven CPUSA leaders under a broad application of the clear and present danger test, finding that the act of organizing the Communist Party was enough to jeopardize national security, even without overt revolutionary acts on the part of the defendants. In the second major case, *Yates v. United States* (1957), the convictions of several second-string Communist Party leaders were reversed because the Court found the Smith Act prohibited only "advocacy of action," not "advocacy in the realm of ideas," reinterpreting the Smith Act's criminal provisions closer to traditional understandings of conspiracy and solicitation. In *Noto v. United States* (1961), the Court reversed a conviction under the membership clause because there was insufficient evidence that the Party advocated "present," rather than abstract, revolutionary activity. In *Scales v. United States*, decided the same day as *Noto*, the

Court upheld the conviction of Scales, the only person convicted under the Smith Act after *Yates* redefined the law, because of his more concrete advocacy of violent political action, including martial arts demonstrations.

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References and Further Reading

- Belknap, Michal R. *Cold War, Political Justice*. Westport, CT: Greenwood, 1977.
 Stone, Geoffrey R. *Perilous Times: Free Speech in Wartime from the Sedition Act of 1798 to the War on Terrorism*. New York: W.W. Norton, 2004.

Cases and Statutes Cited

- Alien Registration Act of 1940, 54 Stat. 670 (1940)
Dennis v. United States, 341 U.S. 494 (1951)
Noto v. United States, 367 U.S. 290 (1961)
Scales v. United States, 367 U.S. 203 (1961)
Yates v. United States, 354 U.S. 298 (1957)

SMITH v. CALIFORNIA, 361 U.S. 147 (1959)

Can a local or state government make possession of material, later judicially declared to be obscene, a criminal offense without requiring that scienter be established, indicating that the possessor knew the material to be obscene? Smith, a bookstore proprietor, was convicted of violating a Los Angeles City ordinance for having an obscene book in his inventory. Judicial interpretations of the ordinance made simple possession of obscene books unlawful even if the person possessing them had no knowledge of their contents. The ordinance thus did not include scienter as an element and accordingly imposed "strict" or "absolute" criminal liability. The Supreme Court, reversing the state court, struck down the ordinance. Justice Brennan delivered the lead opinion. Justices Black, Frankfurter, and Douglas wrote separate opinions concurring only with the judgment. Justice Harlan concurred in part and dissented in part.

Brennan points out that states may not create strict criminal liabilities in those instances where the elimination of scienter may restrict freedom of speech or of the press. Such laws, he argues, discourage booksellers from including in their inventories any books they had not inspected personally with the consequence that the public's access to books or other reading matter is restricted. The physical limitations of inspecting every book plus the bookseller's "timidity in the face of his criminal liability" would constrain the public's access to books or other material

that “the State could not constitutionally suppress directly.”

As for the argument that the regulation of obscene material would be ineffective if scienter were required, because booksellers would falsely proclaim their ignorance of a book’s obscene qualities, Brennan dismisses it with the observation that “it has been some time now since the law viewed itself as impotent to explore the actual state of a man’s mind.” However, Brennan also denies any need to decide in this case “what sort of mental element is requisite” for constitutionally permissible prosecutions of booksellers who stock obscene books. Then, in a comment that would surface as an issue in later cases, Brennan remarks, “The circumstances may warrant the inference that [the bookseller] was aware of what a book contained, despite his denial.”

In his concurrence, Douglas, citing his dissent in *Roth*, simply dismisses the notion that obscene material or speech falls outside the protections of the First Amendment. Black’s concerns center on the ease with which state or local governments could add “a few new words” to satisfy the need for scienter to prosecute possession of obscene material. Moreover, he argues, the Court’s invalidation of an obscenity statute logically calls for “some indication” by the Court of what form of scienter would be appropriate rather than passing on the issue. To compound the problem, the Court’s suggestion that “awareness” of the obscene nature of material may satisfy scienter provides no more than an “unguiding, vague standard.”

Frankfurter’s concurrence also focuses on the “uncertainties” of the scope of scienter and the “speculative proof” the Court’s opinion seems to require. In particular, Frankfurter objected to the state courts’ refusal to admit expert testimony, which he emphasizes is essential for establishing “prevailing literary and moral community standards” and the “psychological or physiological consequences of questioned literature.” Harlan’s concurrence reprises his view that state power over obscenity has a wider scope than federal power and that considerations of scienter vary accordingly.

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References and Further Reading

- Alexander, Donald. *The Politics of Pornography*. Chicago: University of Chicago Press, 1989.
- Hixson, Richard F. *Pornography and the Justices: The Supreme Court and the Intractable Obscenity Problem*. Carbondale, IL: Southern Illinois University Press, 1996.
- Mackey, Thomas C. *Pornography on Trial: A Handbook with Cases, Law, and Documents*. Santa Barbara, CA: ABC-CLIO, 2002.

Cases and Statutes Cited

Smith v. California, 361 U.S. 147 (1959)

SMITH v. ORGANIZATION OF FOSTER FAMILIES, 431 U.S. 816 (1977)

Individual foster parents and a foster parent organization challenged the New York statutory procedures for removal of foster children from foster homes. They argued that the New York procedures violated the due process clause of the Fourteenth Amendment. According to the Fourteenth Amendment, “no State shall deprive any person of life, liberty, or property, without due process of law.” The majority opinion, delivered by Justice Brennan, held the challenged procedures to be constitutional. Despite the ultimate decision, the case has become more powerful because of the language used by the Court.

Before the Court’s legal analysis, it launched a strong, multiparagraphed disparagement of the foster care system in New York in the 1970s. Relying on empirical studies that demonstrated racial and socioeconomic bias of the foster care system, the Court criticized the seeming “limbo” in which foster children were left to wallow. Cognizant of its limited role in bringing about change, it suggested reform through the legislature.

Turning to the analysis under the Fourteenth Amendment, the court set forth a two-part inquiry: first, does a protected “interest” exist; and if so, what process is due. Accordingly, of initial concern was whether or not a foster family had a “liberty interest” in its survival as a family. Ultimately, the foster parents likened the foster family to that of a more traditional biological family. Curiously, the Court avoided this issue and decided the case on narrower grounds (see later). Nevertheless, dicta in the opinion suggested a particular view on the status of nonbiological families: biological relationships are not the exclusive determination of the existence of a family; the importance of familial relationships stem from the emotional attachments that derive from the intimacy of daily association and from the role it plays in promoting a way of life through the instruction of children; a foster family is not mere collection of unrelated individuals. This language seemed to indicate that a non-traditional family could, in fact, have a liberty interest in its own existence. The court was careful, however, and limited its language by suggesting that whatever liberty interest might exist in the foster family as an institution would not trump an interest derived from a blood relationship should such a conflict arise.

Instead of formally holding that a liberty interest actually existed, the Court simply assumed one did and proceeded to the second phase of its due process inquiry. The Court was next left to determine just what sort of process was due to the foster family in this particular context. Before a person is deprived of a protected interest, he or she must be afforded the opportunity for some kind of hearing. Due process is flexible concept, and as such, the hearing granted must be appropriate to the nature of the case. The Court found that the New York procedures, which included written notice, an opportunity to request a hearing, and the right to appeal, were the appropriate amount of “process” to protect the liberty interest (whatever that may be) of the foster parents.

This case has become a valuable one—not so much because of the ultimate decision, but because of the language used by the Court in two different areas: its description of the foster care system in New York; and its discussion of what constituted a “liberty interest” worthy of constitutional protection.

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References and Further Reading

Guggenheim, Martin, Alexandra Dylan Lowe, and Diane Curtis. *The Rights of Families: The Authoritative ACLU Guide to the Rights of Family Members Today (American Civil Liberties Union Handbook)*. Southern Illinois University Press October 1, 1996.

United States Supreme Court—Parental Rights Cases, <http://www.liftingtheveil.org/supreme-court.htm>.

SNAKE-HANDLING SECTS AND RELIGIOUS LIBERTY

Courts have attempted to reconcile religious freedom with public safety in various cases involving Christians who regard the handling of snakes and consumption of poison as signs, confirmation, and celebration of their religious faith. The use of snakes and poisons is part of the rituals of several small American “holiness” sects, located mostly in Appalachia. The first such organization was founded in rural Tennessee in 1909 by a man who died of snakebite in 1955. Members of these sects base their beliefs and practices on Mark 16:17–18, which reads as follows in the King James version of the Bible:

And these signs shall follow them that believe; in my name shall they cast out devils; and shall Speak with new tongues;

They shall take up serpents; and if they Drink any deadly thing, it shall not hurt them . . .

The number of persons who handle snakes or drink poison in religious ceremonies was estimated in 1995 at 2500. During the past sixty years, scores of persons are known to have died from the effects of these practices and many others have suffered nonfatal injuries. In response to these hazards, several southern states have enacted criminal statutes to restrict or prohibit such practices. State courts have consistently upheld the constitutionality of these laws on the ground that the government’s compelling interest in protecting the safety and health of its citizens outweighs any burden that the laws impose on the free exercise of religion.

In the most recent case, *State ex rel. Swann v. Pack* (Tenn. 1975), the Supreme Court of Tennessee unanimously held that a minister and an elder of a snake-handling sect should be enjoined from handling, exhibiting, or displaying poisonous snakes or from consuming poisons, including strychnine. The court held that a lower court erred in confining the scope of the injunction to the display of snakes in a manner that would endanger the life or health of persons who did not consent to exposure to such danger. The court declared that “the state has a right to protect a person from himself and to demand that he protect his own life.” Although the court emphasized that religious freedom requires the government to tolerate “unusual or bizarre religions,” the court explained that no religion “has an unbridled right to pursue any practice of his own choosing. The right to believe is absolute; the right to act is subject to reasonable regulation designed to protect a compelling state interest.” Such regulations may include “outright prohibition, where it involves a clear and present danger to the interests of society.”

The court’s decision in *Swann* was consistent with an earlier decision of the Supreme Court of Tennessee, *Harden v. State* (Tenn. 1948). Decisions in other states likewise have upheld prohibitions on snake handling, even when precautions were taken to protect bystanders from snakes. As the Supreme Court of North Carolina explained in *State v. Massey* (N.C. 1949), “the case comes down to a very simple question: Which is superior, the public safety or the defendants’ religious practices? The authorities are at one in holding that the safety of the public comes first.” The Court of Appeals of Kentucky upheld a prohibition on snake handling in *Lawson v. Commonwealth* (Ky. 1942), as did the Court of Appeals of Alabama in *Hill v. State* (Ala.App. 1956).

These decisions seem to be consistent with the federal Religious Freedom Restoration Act and its state counterparts, which require that the government must exempt persons from laws that burden their religious beliefs unless the law is the least

restrictive means of promoting a compelling government interest.

In a child custody case, *Harris v. Harris* (Miss. 1977), the Supreme Court of Mississippi held that a mother who was a member of snake-handling sect had a right to indoctrinate her child in her religious beliefs so long as there was no evidence that she exposed her child to the risk of a snake bite. Members of the mother's congregation kept a snake caged and never handled it during their services. In *Kirk v. Commonwealth* (Va. 1947), a Virginia court indicated that a minister could be criminally prosecuted for involuntary manslaughter of his wife, who died after suffering a snake bite during a religious service. The court explained that the trial court properly instructed the jury that "while the law cannot interfere with a person's religious belief or opinion, this is no excuse for an illegal act made criminal by the law of the land, even though such act is based on conscientious religious belief."

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References and Further Reading

- Burton, Thomas G. *Serpent-Handling Believers*. Knoxville: University of Tennessee Press, 1993.
 Kimbrough, David L. *Taking Up Serpents: Snake Handlers of Eastern Kentucky*. Chapel Hill: University of North Carolina Press, 1993.
 La Barre, Weston. *They Shall Take Up Serpents: Psychology of the Southern Snake-Handling Cult*. Minneapolis: University of Minnesota Press, 1962.

Cases and Statutes Cited

- Harden v. State*, 216 S.W.2d 708 (Tenn. 1948)
Harris v. Harris, 343 So.2d 762 (Miss. 1977)
Hill v. State, 88 So.2d 880 (Ala.App. 1956), cert. denied, 88 So.2d 887 (Ala. 1956)
Kirk v. Commonwealth, 44 S.E.2d 409 (Va. 1947)
Lawson v. Commonwealth, 164 S.W.2d 972 (Ky. 1942)
State v. Massey, 51 S.E. 2d 179 (N.C. 1949), appeal dismissed, 336 U.S. 942 (1949), rehearing denied, 336 U.S. 971 (1949)
State ex rel. Swann v. Pack, 527 S.W.2d 99 (Tenn. 1975), cert. denied, 424 U.S. 954 (1976)
 42 U.S.C. sec. 2000bb (2002) (Religious Freedom Restoration Act)

See also **Free Exercise Clause (I): History, Background, Framing; Religious Freedom Restoration Act**

SNEPP v. UNITED STATES, 444 U.S. 507 (1980)

Snepp v. United States establishes that the government by prior agreement can require prepublication review to prevent the disclosure of unclassified but

confidential information when publication of that information would be detrimental to vital national interests by compromising classified information (including intelligence sources or methods). The case thus stands as one of several narrow exceptions to the general prohibition against prior restraints. It operates essentially as a limited waiver by a former government employee of his First Amendment rights. Moreover, unlike other, nonnational security-related prior restraints, which place the burden on the government to obtain a judicial order enjoining publication, this exception has been interpreted by the lower courts to place the burden on the publisher to obtain a judicial determination that governmental clearance had been improperly withheld. See *Snepp v. US*, 897 F.2d 138 (4th Cir. 1990).

Frank Snepp, based on his experiences as a clandestine CIA operative in South Vietnam, published *Decent Interval*, after leaving the CIA but without submitting it to prepublication review. He had, as a condition of his initial employment and in a termination secrecy agreement executed in 1976 before his departure from the CIA, expressly promised not to divulge classified information and not to publish any information without prepublication clearance. The government—conceding, for purposes of Snepp's appeal from a lower court decision finding him in breach of contract, that Snepp had not revealed classified information and had a First Amendment right to publish—argued that there was a compelling state interest in preserving the appearance of confidentiality. Relying on lower court testimony by CIA Director Admiral Stansfield Turner that the publication of Snepp's book had impeded intelligence cooperation for the United States, the Supreme Court judged that reliable and enforceable prepublication review procedures were necessary to provide the advance assurance that foreign intelligence sources needed to cooperate with the United States. The Court judged that prepublication review, even of material that was unclassified at the time of the review, was necessary to allow the CIA to determine whether publication would lead to the disclosure of foreign intelligence sources and methods.

The surprisingly mundane issue before the Court, however, was the remedy for Snepp's breach of contract. The lower courts had determined that, in principle, in addition to ordinary contract damages for the value of Snepp's unperformed promise to comply with prepublication review procedures, punitive damages might be available. The lower courts described Snepp's breach as a violation of a fiduciary relationship—a special relationship of trust and confidence—with the CIA. The Supreme Court feared, however, that under the facts of the case it might be

impossible to determine any real pecuniary loss for the value of the bargain, which as a matter of ordinary contract law would then bar the CIA from obtaining punitive damages as well. Because this would leave the CIA uncompensated and Snapp undeterred, the Supreme Court then relied on its extraordinary powers as a court of equity to fashion a remedy based on the common law of restitution. It found that Snapp's breach would be remedied, and future violations would be effectively deterred, by ordering Snapp to transfer to the government all his gains from the publication of his book, *Decent Interval*.

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References and Further Reading

- McCamus, John D., *Disgorgement for Breach of Contract: A Comparative Perspective*, Loyola of Los Angeles Law Review 943 (Winter 2003): 36 (discussing the Snapp case from the perspective of ordinary contract law).
- Meadow, Jonathan C., *The First Amendment and the Secrecy State: Snapp v. United States*, U. Pennsylvania Law Review 130 (1982): 775, 785, 802 (discussing the Snapp case from the free speech perspective).
- White, Laura A., *The Need for Governmental Secrecy: Why the U.S. Government Must Be Able to Withhold Information in the Interest of National Security*, Virginia Journal of International Law 1071 (Summer 2003): 43 (discussing the Snapp case from the national security perspective).

SODOMY LAWS

Origins and Early Development

There is a long and well-documented tradition of states regulating private sexual acts. In ancient Babylon the code of Hamurabi (cir. 1860 B.C.E.) prohibited adultery and incest. The code of the Hittites (cir. 1650 B.C.E.) also outlawed certain types of bestiality, and the code of the Assyrians (cir. 1075 B.C.E.) required castration for a man who engaged in intercourse with his "brother-in-arms." Proscriptions of bestiality and what would now be termed homosexual behavior indicate that ancient civilizations were interested in regulating sexuality for reasons beyond ensuring parentage and guarding inheritance.

The foundation for laws prohibiting sodomy in Western states is the Bible. The word "sodomy" was first created in the eleventh century and is drawn

from the story of the fall of the city of Sodom in the book of Genesis (19: 1–26). Scholars disagree over the interpretation of this passage; with some citing the sin of Sodom as ill treatment and inhospitality rather than the homosexual behavior with which Sodom became associated.

The principle biblical basis for the condemnation of sodomy is the book of Leviticus (18:22 and 20:13), which requires death for men who "lie with a male as those who lie with a female" for committing an "abomination." The translation and context are disputed, but from early in its history the Catholic Church has maintained that homosexual acts are sinful.

In medieval England, marriage, divorce, and sexual morality were matters for the Church and handled by ecclesiastical courts. This changed when King Henry VIII broke away from the Catholic Church, abolishing the ecclesiastical courts and subsuming their jurisdiction within the crown courts. This made previously religious offenses into crimes against the state, and in 1533 Parliament passed an act making sodomy, or "buggery," a capital crime.

The English colonies in America either adopted statutes forbidding sodomy or simply received the Common law under which sodomy was a crime. Colonial sodomy laws frequently contained biblical justifications or quotations, and there were a number of sodomy prosecutions in early America.

The Scope of Sodomy Laws in the United States

The precise definition of sodomy in English law covered not only anal intercourse between a man and either a woman or a man but also sexual intercourse between a man and an animal; consensual anal intercourse, even between husband and wife, still violated the "buggery" statute. After the revolution, the United States continued with the English understanding but gradually expanded the range of sexual acts that fell under the sodomy laws. The language used in sodomy laws was often vague and frequently included references to acts that were "unnatural" and in the absence of a clear definition were used as justification for the laws to cover acts outside of the English definition of sodomy. Toward the end of the nineteenth century states began to more clearly define the range of acts covered by the sodomy statutes, and whereas the precise definitions varied from state to state, they could be expanded to cover oral

intercourse, both heterosexual and homosexual, mutual masturbation, and the use of objects for sexual gratification.

Punishments for Sodomy

Punishments for conviction of sodomy varied. The death penalty was the original punishment, although evidence suggests that few people were executed for sodomy in later colonial and United States America. Lengthy jail sentences were not uncommon throughout the nineteenth and twentieth centuries. Some eugenic sterilization laws allowed for the involuntary sterilization of persons found guilty of violating sodomy laws. In the mid-twentieth century a number of states viewed same-sex sodomy as evidence of a mental condition and would institutionalize persons involved in an attempt to rehabilitate. In the late twentieth century, a sodomy conviction might result in having to join a sex offenders' register. Having a sodomy conviction was also seen as an indication of immorality and could lead to dismissal from the armed forces or civil service, loss of the right to vote or hold a drivers' license, and deportation in immigration cases.

Reform of Sodomy Laws

In the mid-twentieth century legal opinion in the United States began to push for an end to the criminalization of private consensual sodomy: France had done so in 1810 and was joined much later by England in 1967. In 1955, the American Law Institute published a Model Penal Code that did not criminalize consensual sodomy in private. Whereas a number of states used this as a template, most retained or expanded existing laws criminalizing consensual sodomy, with only Illinois and Connecticut decriminalizing consensual sodomy by 1970.

In *Griswold v. Connecticut*, 381 U.S. 479 (1965), the U.S. Supreme Court found that the Constitution created a right of privacy that precluded state regulation of the intimate activities of married couples, in this case the use of birth control. The Court made it clear in *Eisenstadt v. Baird*, 405 U.S. 438 (1972), that this right extended to unmarried couples.

The right of privacy described in *Griswold* and its progeny placed a question mark over the constitutionality of sodomy laws. Some states responded by either creating a marital exemption from their sodomy laws or through limiting them to criminalize only

homosexual sodomy. Other states repealed their sodomy laws, or they were found to be in violation of the privacy provisions of their state constitutions. The Court faced the issue in *Bowers v. Hardwick*, 478 U.S. 186 (1986), a case involving consensual homosexual sodomy in a private bedroom. In a five-to-four decision, the Court ruled that the Constitution did not grant a right to engage in consensual sodomy and pointed both to the history and traditions of the states and the fact that twenty-five states still had sodomy laws.

The Court changed its position and invalidated a sodomy statute with the due process provision of the fourteenth amendment in *Lawrence v. Texas*, 539 U.S. 558 (2003), noting that only thirteen states retained consensual sodomy laws of which four only criminalized homosexual conduct. After *Lawrence*, the focus for laws criminalizing consensual sodomy has shifted to arguments over what constitutes a private place for the purposes of constitutional protection.

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References and Further Reading

- D'Emilio, John, and Estelle B. Freedman. *Intimate Matters: A History of Sexuality in America*. Chicago: University of Chicago Press, 1997.
- Halsall, Paul. "Internet Ancient History Sourcebook" <http://www.fordham.edu/halsall/ancient/asbook.html>, (1998).
- Jordan, Mark. *Invention of Sodomy in Christian Theology*. Chicago: University of Chicago Press, 1998.
- Leonard, Arthur S., ed. *Homosexuality and the Constitution*. Garland Publishing, 1997.
- Painter, George. "Sodomy Laws" <http://www.sodomylaws.org/index.htm>, (1991).
- Posner, Richard A., and Katherine B. Silbaugh. *A Guide to America's Sex Laws*. Chicago: University of Chicago Press, 1998.

Cases and Statutes Cited

- Bowers v. Hardwick*, 478 U.S. 186 (1986)
- Eisenstadt v. Baird*, 405 U.S. 438 (1972)
- Griswold v. Connecticut*, 381 U.S. 479 (1965)
- Lawrence v. Texas*, 539 U.S. 558 (2003)

See also **Boy Scouts of America v. Dale**, 530 U.S. 640 (2000); **Don't Ask, Don't Tell; Search (General Definition); Felon Disenfranchisement; Gay and Lesbian Rights; Homosexuality and Immigration; House Un-American Activities Committee; Lambda Legal Defense and Education Fund; Megan's Law (Felon Registration); Roemer v. Evans**, 517 U.S. 620 (1996); **Same-Sex Adoption; State Constitution, Privacy Provisions; Stonewall Riot; Substantive Due Process; Victimless Crimes**

SOLEM v. HELM, 463 U.S. 277 (1983)

The Eighth Amendment prohibits, among other things, “cruel and unusual punishments.” Since 1980, the Supreme Court has decided six cases in which the duration of a prison sentence was challenged as being grossly disproportionate to the crime for which the defendant was convicted. In only one of those cases—*Solem v. Helm*—has the Court ruled in favor of the defendant.

In *Solem*, the defendant received a sentence of life without the possibility of parole under South Dakota’s “four-strikes” recidivist statute for passing a “no account” check in the amount of \$100. By itself, Helm’s triggering offense—a felony under South Dakota law—would have been punishable by up to five years in prison. Under South Dakota’s recidivist statute, however, three of Helm’s seven prior convictions “in addition to the principal felony” rendered him eligible for a maximum sentence of life without the possibility of parole.

In striking down Helm’s sentence, the Court held “as a matter of principle that a criminal sentence must be proportionate to the crime for which the defendant has been convicted.” The Court specified that the proportionality standard in recidivist sentence cases should be guided by a three-step process. First, courts must compare “the gravity of the offense and the harshness of the penalty,” with the gravity of the offense being evaluated “in light of the harm caused or threatened to the victim or society, and the culpability of the offender.” Second, courts should “compare the sentences imposed on other criminals in the same jurisdiction” to see whether “more serious crimes are subject to the same penalty, or to less serious penalties.” Finally, the courts should “compare the sentences imposed for commission of the same crime in other jurisdictions.”

The Court found that Helm’s conviction and prior offenses were all minor and nonviolent, that his sentence was the most severe authorized by South Dakota at the time, that Helm had been punished as or more severely than many South Dakota criminals whose crimes were far more serious, and that he had been punished more severely than he would have been in any other state.

Although *Solem* technically remains good law, it has undergone a handful of revisions and has been severely limited by subsequent Supreme Court recidivist sentence cases—*Harmelin v. Michigan*, *Ewing v. California*, and *Lockyer v. Andrade*. These cases sit uneasily with each other, and there remains substantial uncertainty over whether the Court will ever strike down another recidivist sentence. Nonetheless, a handful of state and lower federal courts have

relied recently on *Solem*—notwithstanding *Harmelin*, *Ewing*, and *Andrade*—to do so.

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References and Further Reading

Frase, Richard S., *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: ‘Proportionality’ Relative to What?* Minnesota Law Review 89 (February 2005): 3: 571–651.

Cases and Statutes Cited

Ewing v. California, 538 U.S. 11 (2003)
Harmelin v. Michigan, 501 U.S. 957 (1991)
Lockyer v. Andrade, 538 U.S. 63 (2003)

See also **Cruel and Unusual Punishment Generally; *Harmelin v. Michigan*, 501 U.S. 957 (1991); Three Strikes/Proportionality; Theories of Punishment**

SON OF SAM LAWS

“Son of Sam” laws are designed to prevent criminals from profiting from their misdeeds and to enhance the ability of crime victims to collect tort damages from the persons who cause them harm. New York enacted the first such law in 1977 in response to widespread concern that David Berkowitz, a notorious serial killer popularly known as the “Son of Sam,” might sell the rights to his story for a substantial sum.

The New York law, as later amended, required any entity that contracted with an “accused or convicted” person for a work recounting his crime or describing his thoughts or feelings about his crime to submit a copy of the contract to the state Victims Compensation Board and turn over any monies owed under that contract. The board was required to hold these monies in escrow for the benefit of any crime victim who, within five years of the account’s establishment, brought a civil action against the criminal author. The law was designed to enhance the tort law remedies available to crime victims in two respects: first, the escrow account prevented the authors from spending the profits generated by their crime stories before their victims could obtain judgments against them; and second, once the escrow account was established, the tort statute of limitations recommenced, giving the crime victim additional time to file suit. New York’s law quickly became a national model, and Congress and all but a handful of state legislatures subsequently adopted similar laws.

In 1991, in *Simon & Schuster v. Members of the New York State Crime Victims Board*, the Supreme

Court unanimously invalidated New York's Son of Sam law on First Amendment grounds. The Court found that the law was a content-based regulation of speech and thus could be upheld only if it could withstand strict scrutiny. Although the Court acknowledged that the state interests supporting the law—ensuring that criminals do not profit from their misdeeds and that crime victims are compensated by those who harm them—were both “compelling,” it determined that the law was unnecessarily broad for two reasons. First, the law applied to works on *any* subject or theme that “express the author’s thoughts or recollections about his crime, however tangentially or incidentally.” Second, the law’s “broad definition of ‘person convicted of a crime’ enable[d] the Board to escrow the income of any author who admit[ted] in his work to having committed a crime, whether or not the author was ever actually accused or convicted.” Thus, the law potentially reached many literary works, ranging from St. Augustine’s *Confessions* to *The Autobiography of Malcolm X*, whose commercial value was not attributable to their accounts of criminal activities and whose authors did not owe their fame to criminal activity.

After *Simon & Schuster*, a number of states repealed their Son of Sam laws, while others, including New York, amended their laws in an effort to cure the constitutional defects identified by the Court. Some of these revised laws have since been invalidated by state courts, and it is uncertain whether any content-based law of this kind will be able to withstand First Amendment challenge.

MICHAEL MADOW

Cases and Statutes Cited

Simon & Schuster v. Members of the New York State Crime Victims Board, 502 U.S. 105 (1991)
N.Y. Exec. Law §632-a(1) (McKinney 1982 & Supp. 1991)
18 United States Code § 3681(2005)

See also **Content-Based Regulation of Speech**

SORRELLS v. U.S., 287 U.S. 435 (1932)

“The officer made me do it!” The federal courts did not recognize this common excuse as a possible defense to criminal conduct until *Sorrells v. United States*. In *Sorrells*, a prohibition agent visited the house of the defendant and represented himself as a World War I veteran. During the course of the night, the prohibition agent asked the defendant three times to retrieve some liquor. After declining twice, the

defendant left his home and quickly returned with a half gallon of liquor. The defendant was subsequently convicted of possessing and selling whiskey in violation of the National Prohibition Act. The Supreme Court considered whether the evidence produced at trial was sufficient to create a jury question on the issue of entrapment.

Writing for the majority, Chief Justice Hughes resolved the entrapment issue in terms of statutory construction. The Court explained that Congress could not have intended for government officials to enforce the prohibition statute by coercion or abuse. The Court held that when a government official induces criminal conduct by an otherwise innocent person who lacks the predisposition to commit the crime, the entrapment defense should be submitted to the jury as a matter of law.

Justice Roberts’ concurrence provided a broader reading of the entrapment defense. Roberts emphasized that the entrapment doctrine protects the violation of the principles of justice. Roberts believed that regardless of the defendant’s previous record, the courts must not allow a conviction for a crime instigated by the government’s own agents.

Since *Sorrells*, courts have primarily followed the reasoning in the majority opinion rather than the concurrence. In fact, many jurisdictions have limited the scope and availability of the entrapment defense.

KIRAN RAJ

References and Further Reading

21 Am. Jur. 2d Criminal Law § 247.

Colquitt, Joseph A. *Rethinking Entrapment*, American Criminal Law Review 41 (2004): 1389.

SOUTER, DAVID HACKETT (1939–)

Born in Melrose, Massachusetts, on September 17, 1939, David Hackett Souter was an accomplished student at Harvard College, Oxford University, and Harvard Law School. He then went on to a distinguished career of public service in New Hampshire, serving the Granite State as Deputy Attorney General, Attorney General, trial court judge, and Supreme Court justice. In 1990, when Republican President George H. W. Bush nominated him to serve on the U.S. Court of Appeals for the First Circuit, few people outside his home state had heard of him. Despite this anonymity, President Bush announced just two months later that he was nominating Souter to replace retiring Justice William Brennan on the U.S. Supreme Court. No one predicted it then, but Souter

has followed Brennan's path as an active and successful defender of civil liberties.

When Bush named him to the high Court, Souter was widely perceived as a "stealth nominee"—a reliable conservative ideologue, whose written record was sparse enough to mute any opposition from liberal Senators and interest groups. His actual performance on the bench, however, has confounded the expectations of both his liberal critics and his conservative supporters.

Beginning in 1968, Republican Presidents Nixon, Reagan, and Bush appealed to conservative voters by criticizing liberal judicial activism and by promising to appoint judges who would exercise their power with self-restraint. These new conservative judges, the Republican presidents pledged, would overturn landmark liberal precedents such as *Miranda v. Arizona* (1966) and *Roe v. Wade* (1973) and would stop protecting constitutional rights in a way that unduly limited the democratic will of the American people. Despite ten consecutive Republican appointments to the Supreme Court, however, none of this came to pass, and Souter played an influential role on the Court that reaffirmed *Miranda* and *Roe*.

Souter has tempered Brennan's expansive and evolving rights-based constitutional vision, but he has endorsed it to a surprising degree. Like Brennan, he has led the Court in defending an evolutionary, common law approach to constitutional interpretation that seeks to enforce those fundamental liberties that are essential to individual human dignity or to democratic governance. And like Brennan, Souter has worked persistently behind the scenes, drafting and redrafting opinions in search of a five-justice majority for a reading of the Constitution as close as possible to his own.

Religious Freedom

During his second year on the Court, Souter joined four other Republican appointees in *Lee v. Weisman* (1992) to prohibit the practice of state-sponsored prayer at public school graduation ceremonies. Because conservative political leaders had long been criticizing the Court's school prayer decisions, this result was surprising to many, but Souter's concurring opinion made clear that one of his top priorities on the Court would be to defend the constitutional guarantee of religious liberty. The First Amendment prohibits government from either establishing a state church or interfering with religious exercise, and Souter has expressed a singular determination to preserve the Warren Court's active defense of each of

these guarantees. Although some of his conservative colleagues have insisted that government is constitutionally free to aid religion so long as it does not grant preferential treatment to any particular religion, Souter has sharply disagreed. In *Weisman*, for example, he offered a careful review of both the original understanding of the establishment clause and the Court's precedents to support the holding that the Constitution "forbids state-sponsored prayers in public school settings no matter how nondenominational the prayers may be."

Two years later, Souter wrote for the Court in *Board of Education, Kiryas Joel Village School District v. Grumet* (1994), holding that the State of New York could not constitutionally create a special school district just for members of a Satmar Hasidic sect in the village of Kiryas Joel. In his view, "a State may not delegate its civic authority to a group chosen according to a religious criterion." He acknowledged that the First Amendment requirement of government neutrality toward religion does not prohibit the government from accommodating religious belief and practice but insisted that this particular accommodation of the Satmar community's wishes went too far, "cross[ing] the line from permissible accommodation to impermissible establishment."

Souter has not always been successful in mobilizing a judicial majority to join him in defending the establishment clause. In *Agostini v. Felton* (1997), *Mitchell v. Helms* (2000), and *Zelman v. Simmons-Harris* (2002), Souter's arguments were relegated to dissent, because his more conservative colleagues gave state governments greater leeway to provide nonpreferential aid to religious schools. Similarly, when the Court held in *Rosenberger v. the University of Virginia* (1995) and *Good News Club v. Milford Central School District* (2001) that public schools and universities cannot constitutionally exclude religious organizations from generally available resources, Souter again objected to the Court's abandonment of what he saw as the First Amendment's flat prohibition on government aid to religion.

Souter has played a similar role in the Court's free exercise decisions, urging his colleagues to actively defend a broad conception of religious liberty in cases like *Church of Lukumi Babalu Aye v. Hialeah* (1993). As in other areas of the law, the Rehnquist Court has surprisingly reaffirmed, and even built on, a number of landmark liberal activist precedents on religious freedom, and Souter's votes and opinions have played a key role in these developments. When the conservative justices have succeeded in chipping away at these precedents, Souter has been a leading dissenting voice.

Unenumerated Constitutional Liberties

Although religious liberty is explicitly guaranteed by the constitutional text, Souter has also urged the Court to actively defend a variety of “unenumerated” constitutional rights. Just five days after the *Weisman* decision on school prayer, for example, he joined the same Republican appointees in declaring that “the essential holding of *Roe v. Wade* should be retained and once again reaffirmed.” In a remarkable joint opinion in *Planned Parenthood v. Casey* (1992), Sandra Day O’Connor, Anthony Kennedy, and Souter explicitly rejected the Bush administration’s call for *Roe* to be overturned, thus reaffirming the constitutional jurisprudence that they had been appointed to abolish.

Endorsing a broad and evolutionary reading of the “liberty” that is guaranteed by the due process clause of the Fourteenth Amendment, O’Connor, Kennedy, and Souter closely followed the constitutional jurisprudence laid out by the second Justice Harlan in cases like *Poe v. Ullman* (1961) and *Griswold v. Connecticut* (1965). After Harlan, Souter held in *Casey* and subsequent cases that Fourteenth Amendment liberty encompasses a range of more specific (although unwritten) rights such as the right to an abortion. Also after Harlan, however, he sought to balance this active judicial protection of liberty with a healthy dose of deference to democratic majorities.

In *Washington v. Glucksberg* (1997), for example, Souter joined a unanimous Court in upholding a state statute that outlawed physician-assisted suicide. He wrote separately, however, to make clear that the Court’s holding should be taken as neither a rejection of the Court’s liberty-protecting jurisprudence in general nor a final decision on the question of the “right to die” in particular. On the latter question, he concluded that “while I do not decide for all time that respondents’ claim [of a constitutionally protected right to die] should not be recognized, I acknowledge the legislative institutional competence as the better one to deal with that claim at this time.” On the former, he rejected the claim of some of his fellow Republican appointees that the Court should only defend those liberties explicitly guaranteed by the constitutional text, calling instead for the justices to use their “reasoned judgment” in extending constitutional protection to new liberties in new contexts.

The following year, in *Sacramento v. Lewis* (1998), the Court again unanimously rejected a due process claim, but Souter again made clear that the “reasoned judgment” approach was alive and well. In this opinion, Souter revived the “shocks the conscience” test that Justice Frankfurter had used for evaluating

government conduct in *Rochin v. California* (1952), an opinion that had significantly influenced Harlan’s approach to due process liberty. In subsequent years, Souter regularly concurred in the Court’s decisions protecting parental rights (for example, *Troxel v. Granville* (2000)), abortion rights (for example, *Stenberg v. Carhart* (2000)), and sexual privacy (for example, *Lawrence v. Texas* (2003)).

The Rights of Criminal Defendants

Souter’s jurisprudence in the area of criminal procedure has been more conservative than in other contexts. In *Atwater v. Lago Vista* (2001), for example, he wrote for a bare majority of the Court in upholding the use of a warrantless custodial arrest for a misdemeanor violation of Texas’s seatbelt law. Such decisions make clear that Souter’s vision of liberal constitutionalism is less sweeping than Brennan’s, but this divergence should not be overstated. The entire spectrum of constitutional debate shifted to the right during the Burger and Rehnquist eras, such that no justice would any longer join Brennan in insisting that capital punishment is prohibited by the Constitution. Considered in light of this rightward shift, Souter’s opinions even in the area of criminal procedure have reflected a commitment to defending constitutional rights and liberties. In *Dickerson v. United States* (2000), for example, he joined a seven-justice majority in reaffirming *Miranda*.

Rejecting Conservative Activism

In addition to the surprising survival of liberal activism, the other most noteworthy development on the Rehnquist Court was the emergence of a distinctive style of conservative judicial activism. In a wide variety of constitutional contexts, the conservative justices of the Rehnquist Court declared their support for civil liberties—but civil liberties of a conservative stripe. These conservative justices, for example, have sought to defend the constitutional right of white university applicants to face a race-neutral admissions process, of the Boy Scouts of America to exclude gay members, of religious organizations to have equal access to state resources, of wealthy individuals to contribute large sums of money to political campaigns, of tobacco companies to advertise their product as they see fit, of property owners to be free from onerous zoning laws, and the like. While actively defending liberal constitutional rights in the Warren

Court tradition, Souter has opposed this newer set of conservative rights claims.

The most noteworthy example of the Rehnquist Court's conservative activism was the case deciding the outcome of the 2000 presidential election. Working behind the scenes in *Bush v. Gore*, Souter tried valiantly to persuade O'Connor or Kennedy to provide a fifth vote for allowing the ballot recounts in Florida to continue. His efforts in this regard became clear, at least in hindsight, during the Court's oral arguments, when his questions revealed that he was searching for a compromise resolution in which the Court would send the case back to the Florida courts to resume the manual recount under a more uniform standard for determining the voters' intent. Unlike his dramatic success under similar circumstances in *Casey*, however, here he dramatically failed.

THOMAS M. KECK

References and Further Reading

- Fliter, John A. "Keeping the Faith: Justice David Souter and the First Amendment Religion Clauses." *Journal of Church and State* 40 (1998): 387.
- Garrow, David J. "Justice Souter Emerges." *New York Times Magazine*, 25 September 1994, 41.
- Keck, Thomas M. "David H. Souter: Liberal Constitutionalism and the Brennan Seat." In Maltz, Earl, ed. *Rehnquist Justice: Understanding the Court Dynamic*. Lawrence, KS: The University Press of Kansas, 2003, pp. 185–215.

Cases and Statutes Cited

- Agostini v. Felton*, 521 U.S. 203 (1997)
- Atwater v. Lago Vista*, 532 U.S. 318 (2001)
- Board of Education, Kiryas Joel Village School District v. Grumet*, 512 U.S. 687 (1994)
- Bush v. Gore*, 531 U.S. 98 (2000)
- Church of Lukumi Babalu Aye v. Hialeah*, 508 U.S. 520 (1993)
- Dickerson v. United States*, 530 U.S. 428 (2000)
- Griswold v. Connecticut*, 381 U.S. 479 (1965)
- Lawrence v. Texas*, 123 S. Ct. 2472 (2003)
- Lee v. Weisman*, 505 U.S. 577 (1992)
- Miranda v. Arizona*, 384 U.S. 436 (1966)
- Mitchell v. Helms*, 530 U.S. 793 (2000)
- Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992)
- Poe v. Ullman*, 367 U.S. 497 (1961)
- Rochin v. California*, 342 U.S. 165 (1952)
- Roe v. Wade*, 410 U.S. 113 (1973)
- Sacramento v. Lewis*, 523 U.S. 833 (1998)
- Stenberg v. Carhart*, 530 U.S. 914 (2000)
- Troxel v. Granville*, 530 U.S. 57 (2000)
- Washington v. Glucksberg*, 521 U.S. 702 (1997)
- Zelman v. Simmons-Harris*, 122 S.Ct. 2460 (2002)

See also Establishment Clause (I): History, Background, Framing; Free Exercise Clause (I): History, Background, Framing; Rehnquist Court; Substantive Due Process

SOUTH DAKOTA v. OPPERMAN, 428 U.S. 364 (1976)

Vermillion, South Dakota, had a city ordinance making it illegal to park in certain areas between 2 a.m. and 6 a.m. A vehicle belonging to Opperman was cited for parking in a restricted area and subsequently towed to the police impound lot, where it was then inventoried, per departmental procedure. Within the unlocked glove compartment officers discovered a plastic bag containing marijuana. Opperman was later arrested and charged with possession of marijuana. His motion to suppress the evidence produced by the inventory search was denied, and he was convicted. On appeal, the Supreme Court of South Dakota reversed Opperman's conviction and concluded that the evidence obtained violated respondent's Fourth Amendment right to be free from unreasonable searches and seizures.

The U.S. Supreme Court reversed, upholding the validity of the inventory procedure. The Court noted that less scrutiny is applied to automobile searches than residential searches, police are frequently required to impound vehicles that violate parking ordinances to protect public safety and to keep traffic movement efficient. When a vehicle is impounded, police departments are required to inventory the automobile's contents for three reasons: to protect the occupant's personal property, to protect the police from claims or disputes of lost or stolen property, and to protect the police from a potentially dangerous situation. The Vermillion police officers were lawfully engaging in a caretaking inventory of the vehicle. The inventory was conducted according to proper departmental procedure, and only after the vehicle had been impounded for numerous parking violations, the owner of the vehicle was not present to make other arrangements for the vehicle, and the officer had observed numerous valuable personal items within the vehicle. The court noted the outcome might be different if the impoundment had been merely a pretext concealing an "investigatory police motive." Therefore, the court concluded that the inventory was not "unreasonable" under the Fourth Amendment.

AMANDA FREEMAN

See also Automobile Searches; Exclusionary Rule; Search (General Definition)

SOUTHEASTERN PROMOTIONS, LTD. v. CONRAD, 420 U.S. 546 (1975)

The municipal board responsible for managing and leasing two theaters in Chattanooga, Tennessee, denied Southeastern Promotions, a theatrical production

company, use of the theaters to present *Hair*, a rock musical that played for three years in New York City and toured to more than 140 cities. Southeastern Promotions' request for injunctive relief was denied twice by the federal district court; the second time a jury decided *Hair* was obscene because it included nudity and simulated sexual conduct in violation of city and state laws. The Circuit Court of Appeals, by a divided vote, sustained the lower court.

The Supreme Court by a six-to-three vote reversed the lower court decision. Blackmun wrote the majority opinion and was joined by Brennan (who as senior associate judge in the majority assigned the opinion to Blackmun as part of Brennan's efforts to encourage Blackmun's drift toward more liberal positions) plus Stewart, Marshall, and Powell. Douglas concurred with the judgment but consistent with his absolutist view regarding the First Amendment disagreed with the majority's substantive ruling. White's dissent was joined by Burger; Rehnquist dissented separately.

Both the majority and dissenters ignored the question of whether the jury and lower courts properly interpreted the *Miller* standard. The decision turned instead on differing views as to whether the Chattanooga board exercised prior restraint when it refused to lease the city's theaters to Southeastern Promotions. If prior restraint did occur, the question then hinges on whether the process of denying the lease included adequate constitutional safeguards to protect Southeastern Promotions' First Amendment rights. Because the majority agreed with the petitioner's first contention that prior restraint had been exercised, it did not consider Southeastern Promotions' other claims that *Miller* had been wrongly followed.

Blackmun thus frames his opinion in terms of whether prior restraint had occurred in light of pertinent previous Supreme Court decisions and explains why when First Amendment issues are involved that the presumption against constitutional validity becomes weightier. The absence of proper procedural safeguards in administrative processes that broach censorship concerns was mandated by *Freedman v. Maryland* (1965). The majority, concluding the process in Chattanooga lacked these safeguards, accordingly reversed the decision denying Southeastern Promotions the opportunity to present *Hair*.

The dissenters criticized the majority's willingness to impose on Chattanooga's board what Rehnquist referred to as a "farrago of procedural requirements" that overlook the board's responsibilities under its standard lease agreement that required the board to comply with state and local laws, including those pertaining to public nudity and obscenity. The lower court proceedings, the dissenters argue, were sufficient guarantees that board's decision to deny the

lease was constitutionally adequate and nondiscriminatory. As Rehnquist puts it, "I do not believe fidelity to the First Amendment requires the exaggerated and rigid procedural safeguards which the Court insists upon in this case."

ROY B. FLEMMING

Cases and Statutes Cited

Freedman v. Maryland, 380 U.S. 51 (1965)

Miller v. California, 413 U.S. 15 (1973)

Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975)

SOUTHERN CENTER FOR HUMAN RIGHTS

The Southern Center for Human Rights, a preeminent civil rights organization, engages in litigation, public education, and advocacy to defend persons sentenced to death and protect the civil rights of indigent defendants and inmates. Created in 1976 and located in Atlanta, Georgia, the Center is led by Stephen Bright, a leading opponent of capital punishment and recipient of numerous awards for advocacy on behalf of indigent persons.

The Center, which challenges discrimination against minorities, the poor, the mentally ill, and other disempowered persons, focuses its work in five areas: representing, at trial and on appeal, persons facing the death penalty; challenging unconstitutional conditions in prisons, jails, and children's institutions including physical and sexual assaults, deprivation of food and life-sustaining medication, and severe overcrowding; advocating for adequate legal representation for indigent defendants; advocating for judicial independence, particularly from electoral political pressures; and helping empower prisoners' families.

In addition to litigation in state and federal courts, the Center's staff has testified before Congress and state legislative bodies, taught at law schools, prepared reports and articles, engaged in community organizing, and worked with other organizations and the media to address criminal justice and corrections issues. Former Center attorneys have gone on to lead human rights organizations across the South, including the Equal Justice Initiative in Alabama, the Louisiana Crisis Assistance Center, and the Juvenile Justice Project of Louisiana.

Formerly called the Southern Prisoners' Defense Committee, the Center is a private, nonprofit organization and is known for its egalitarian ethic and modest operational expenses.

SANJAY K. CHHABLANI

References and Further Reading

Documentary Film. "Fighting for Life in the Death-Belt." EM Productions, 2005 (52 min).

Lezin, Katya. *Finding Life on Death Row*. Boston: Northeastern University Press, 1999.

McFeely, William S. *Proximity to Death*. New York: W. W. Norton & Co., Inc., 1999.

Southern Center for Human Rights, <http://www.schr.org>.

See also **Capital Punishment**

SOUTHERN POVERTY LAW CENTER

The Southern Poverty Law Center (the Center) is a civil rights and educational organization. Founded in 1969 by Morris Seligman Dees, Jr., and Joseph L. Levin, Jr., as a small civil rights law firm in Montgomery, Alabama, the Center evolved from the law firm and became incorporated as a nonprofit legal and educational foundation in 1971. The Center has since become an internationally recognized legal, educational, and intelligence-gathering group famous for its legal victories against white supremacist groups, tolerance education programs, and investigations of hate groups. When the Center was formally incorporated in 1971, Dees was initially named its chief counsel and executive director, and Levin became the legal director. Julian Bond, formerly of the Student Nonviolent Coordinating Committee and now Chairman of the Board of the National Association for the Advancement of Colored People (NAACP), became the first president of the Center until 1979. Dees's title later changed to chief trial counsel, the position he continues to hold. With J. Richard Cohen now serving as the Center's president, Levin's title is president emeritus, whereas Bond is a member of the Center's Board of Directors.

Using court challenges as its chief and primary weapon, the Center since its founding has amassed a series of significant legal victories, some at the U.S. Supreme Court. The Center's legal department files civil suits on behalf of anyone that has been a victim of any form of discrimination, but particularly goes after white supremacist organizations by using tort law legal principles that make organizations and their leaders liable for misdeeds of their agents or representatives called vicarious liability. The Center also provides help to other lawyers and various advocacy groups involved in capital punishment defense, civil rights, and poverty cases. Partly in response to the reemergence of Ku Klux Klan and affiliated groups in the late 1970s to early 1980s, and partly because of the limited constitutional reach of U.S. law enforcement agencies (as a result of laws enacted because of J. Edgar Hoover's alleged abuses at the

FBI), the Center began its "Klanwatch" project in 1981 and started investigating and tracking the activities of such groups. Although many of the Center's staff initially disagreed with Dees (the project's chief architect) on its establishment, the Center is now well recognized partly because of this project (now called the "Intelligence Project"). The Center's Intelligence Project publishes the *Intelligence Report*, a quarterly magazine, detailing activities among alleged hate groups and extremist organizations. The *Intelligence Report* is distributed to law enforcement agencies, the media, and the public. The Report is credited with helping obtain criminal convictions in several hate crime cases.

In 1991, the Center created an educational program called "Teaching Tolerance," and according to its website, "to help K-12 teachers foster respect and understanding in the classroom." Teaching Tolerance provides information on the history of the civil rights movement and anti-bias resources to teachers and parents. Under this program, multimedia kits are provided free to schools and community groups. In 2001, the Center launched an online destination, Tolerance.org, to provide additional support for its Teaching Tolerance program. On this interactive website, information on understanding America's multiculturalism, tolerating differences among different social groups, fighting hate on campus, and a host of topics such as school mascots with Native American names and the Confederate flag are extensively provided. The website contains information on how concerned individuals and organizations can work for unity in their communities. It also provides information for parents encouraging them to embrace multiculturalism in raising their children, urging them to live in integrated neighborhoods, and advising them to use culturally sensitive language.

Deciding to memorialize those killed during the Civil Rights Movement, the Center in 1989 commissioned Maya Lin, who designed the Vietnam War Memorial, to design a Civil Rights Memorial that stands at a plaza facing the Center's building in Montgomery. The Memorial contains a black granite fountain with its waters flowing down over the words that Martin Luther King, Jr., had spoken at Riverside Church in New York City in 1967 (a year before his assassination)—"until justice rolls down like waters and righteousness like a mighty stream." The waters then roll over some of the names of those that died in the civil rights struggle. The Memorial is a popular place of attraction in Montgomery, drawing many visitors from around the world. The Center plans to add a new Civil Rights Memorial Center in 2005. Since its formal incorporation, the Center primarily funds its operations from contributions solicited from

individuals through direct mail marketing, sometimes using graphic images from results of violent hate crimes in its solicitation letters.

Legal Fights

On the legal front, both Dees and Levin had handled several pro bono cases before the Center's incorporation. In 1969, Dees on behalf of two African-American cousins, and with the help of Fred D. Gray (the African-American attorney who represented Dr. Martin Luther King, Jr. during the Montgomery bus boycott in 1955), filed a class action suit against the Montgomery branch of the YMCA to integrate the all-white facility (*Smith v. YMCA*, 1972). Although the case was highly unpopular in Montgomery's white communities, the YMCA was found to have violated the equal protection clause of the Fourteenth Amendment. The YMCA was ordered to integrate all its facilities.

In other cases before the Center's formal incorporation, Dees and Levin represented a high school English teacher dismissed for teaching a Kurt Vonnegut story, "Welcome to the Monkey House"; she was subsequently reinstated. They defended a service-woman denied equal pay and other benefits received by her male counterparts, the Defense Department was ordered to change its discriminatory regulations. The case, *Frontero v. Richardson* (1973), reached all the way to the U.S. Supreme Court wherein the Court decided that the particular Air Force regulation was discriminatory and violated the Fifth Amendment guaranteeing due process under the law. The case is regarded as the first successful sex discrimination lawsuit against the federal government. Dees and Levin also filed a class action suit against the *Montgomery Advertiser* for its refusal to print a photo and wedding announcement of an African-American couple in the newspaper's society pages on Sundays instead of on Thursdays in the "negro editions." Arguing that the civil rights statutes did not cover such discrimination, the Court ruled for the newspaper. Nonetheless, the newspaper was shamed into changing its policy.

After the Center's incorporation, three African-American men were accused of raping a white woman in Tarboro, North Carolina, in 1973. They were found guilty and sentenced to death. At Dees's behest, the Center became involved in the case after the men were sentenced. Using the Center's massive resources, Dees hired local counsels, paid for expensive exhibits, and got the North Carolina Supreme Court to order a new trial because of prosecutor's prejudicial conduct. Although the men later agreed

to plea *nolo contendere* to a six-year sentence for assault with intent to rape, Dees negotiated for them to be released immediately, less than two years after they were sentenced to death.

The Center, as well as Dees, first attracted national attention in 1974 as a result of another case involving an African-American woman inmate accused of murdering her white jailer in North Carolina. The prosecutor alleged that the inmate, Joan Little, on August 27, 1974, lured the jailer, Clarence Allgood, into her cell and killed him in cold blood with an ice pick that she had stolen from him earlier on the day of the incident. Little claimed that Allgood had tried to rape her and in her struggle to fend him off and flee, hit him with the ice pick that he had brought to her jail to use in his sexual attack. Little fled and Allgood was found dead in Little's cell with his pants off. Little was later captured and indicted by the grand jury for first-degree murder. Given the racial and sexual overtones of the case and after a *New York Times* article on the case on December 1, 1974, the national and overseas media picked up the story. While investigating the case, Dees interviewed one of Allgood's colleagues, Beverly King, who later became a state witness, and obtained a statement from her. On realizing that during King's testimony on the witness stand she contradicted what she had previously told him, Dees challenged her off the witness stand. When Dees later challenged King on the witness stand, she claimed that Dees had told her to falsely testify. Accusing Dees of subornation of perjury, the judge trying the case dismissed Dees as a defendant attorney from the case. Dees was subsequently charged with felonious subornation of perjury. Although the felony was later dropped, Dees was put off the case for good. Nonetheless, the Center continued to financially assist in Little's defense, and she was subsequently acquitted of the murder charge in 1975.

Employing vicarious liability tort law legal principles, the Center filed a civil suit on behalf of Beulah Mae Donald (*Beulah Mae Donald, as Executrix of the Estate of Michael Donald, Deceased v. United Klans of America et al.*, 1984), mother of Michael Donald who was brutally murdered by two members of the United Klans of America. In 1981, in retaliation for the decision of a mixed jury to acquit an African-American man accused of killing a white man, two members of the United Klans of America, James Knowles and Henry Hays, picked up Michael Donald off a street in Mobile, Alabama, beat him, slit his throat, and hung him on a tree. It turned out that the Klansmen were acting at the urging of Bennie Jack Hays, the South Alabama Grand Titan of the Klan group, which was nationally led by Robert

Shelton, its Imperial Wizard. In exchange for a life sentence, James Knowles turned state witness and testified against his co-murderer, Henry Hays. Hays was found guilty and sentenced to death. Notably, Hays was later executed on June 6, 1997, the first white to be put to death for killing an African American in Alabama since early twentieth century.

Not satisfied with the punishment for the two killers, the Center decided to sue the Klan group. Arguing that the two killers and Bennie Hays were acting as conspiratorial agents to further the history of Klan violence, the Center filed a suit on behalf of Beulah Mae Donald seeking \$10 million in damages against the men, the United Klans of America, and Robert Shelton, the group's national leader. To the Klan's surprise, a federal jury found the defendants liable and awarded \$7 million in damages. Because the Klan group could not provide the damage amount, all its assets (primarily its national headquarters) were sold and transferred to the Donald family. The judgment effectively bankrupted the United Klans of America and put it out of operations while Beulah Mae Donald used the money collected from the sale of the group's assets to buy a new house. During the course of its investigation, the Center also discovered new evidence that was used to obtain indictments against Frank Cox, a third man present during Donald's murder, and Bennie Hays. Cox was subsequently convicted and sentenced to life imprisonment, and Hays died before he could be tried.

Typical of the class action suits that the Center would become famous for filing is the case against the Klan in 1987 (*McKinney, et al. v. Southern White Knights et al.*, 1987). In February 1987, members of white supremacist groups the Invisible Empire, Knights of the Ku Klux Klan, and the Southern White Knights attacked African-American and white peaceful demonstrators honoring Dr. Martin Luther King, Jr., in Forsyth County, Georgia. The Center on behalf of scores of plaintiffs filed a class action against the white supremacist groups. In 1989, the federal court awarded the plaintiffs \$940,000, ordered all the assets and trademarks of the Invisible Empire turned over to the plaintiffs, and asked the Klan group to destroy its membership and publication subscription lists containing approximately 10,000 names. In addition, the court ordered all the Invisible Empire's non-cash assets turned over to the plaintiffs be assigned to a branch of the NAACP and asked the group's leaders to attend a class on race relations. By 1994, the Southern White Knights was equally forced by the court to destroy its membership lists.

Relying on the same vicarious liability law principles used in the Donald case, the Center, joined by the Anti-Defamation League, filed a wrongful death

lawsuit against the White Aryan Resistance (WAR) and some of its leaders in 1989 on behalf of the family of Mulugeta Seraw (*Berhanu v. Metzger*, 1990). Seraw was a twenty-seven-year-old Ethiopian-born black student who was beaten to death in Portland, Oregon, by three members of East Side White Pride, a local group of skinheads that advocated Anti-Semitism and racial separatism. Seraw was spotted being dropped off by two friends. The skinheads attacked Seraw and his friends, repeatedly hit Seraw on his head with a baseball bat. Seraw was pronounced dead at the hospital shortly afterward. As a result of plea bargains, the killers received ten to twenty years' jail sentences each. Nonetheless, the Center decided to institute a civil suit against the convicted killers, Thomas Metzger, the president of WAR, and other leaders of the group. During the civil trial, the Center produced a surprise witness, David Mazella, a WAR member, persuaded by Dees to testify against the skinheads. Mazella testified to being a "direct link" between the local skinhead group and WAR. Claiming that he was 1,200 miles away from the place the murder took place and that the only thing he did was to exercise his First Amendment right of free speech, Metzger argued that he was not responsible for Seraw's death. Rejecting Metzger's argument, the jury returned a verdict of \$12.5 million in damages for Seraw's family. In an amicus curiae brief, the Oregon chapter of the American Civil Liberties Union maintained that the civil suit might have violated Metzger's First Amendment rights. The jury rejected the argument. The defendants appealed the verdict all the way to the U.S. Supreme Court, which denied *certiorari*.

In 1993, the Center successfully challenged the flying of the Confederate battle flag by the Alabama governor over the State Capitol. Relying on old statute authorizing the flying only of the U.S. and Alabama flags, the Center forced the state to remove the confederate flag. The Center also convinced the state to abandon the reintroduction of chain gangs enacted by the state governor in 1995. Whereas the Center continues to litigate various cases on behalf of people who have suffered some form of racial or other form of injustice, it remains popular for instituting civil suits against alleged hate and white supremacist groups.

The History of Morris Dees

Chronicling the history and work of the Center without highlighting Morris Dees makes its story incomplete. Winner of various humanitarian and legal

awards but despised (and at various times targeted for assassination) by white supremacist organizations and its leaders, Dees's personal story is intertwined with the Center's history and achievements. Born on December 16, 1936, in Shorter, Alabama, to farmers, Dees grew up in the segregated South. At an early age, Dees decided that he was going to make himself more financially secure than his parents did for themselves. Thus, by the time he graduated from high school, he had engaged in different activities such as newspaper delivery and farming to earn money. Dees was particularly good at farming, and he was named the Star Farmer of Alabama by the Alabama Future Farmers of America in 1955. Although Dees grew up in a segregated environment, his parents, by his recollections, were never hostile to African Americans. In his autobiography, *A Lawyer's Journey: The Morris Dees Story*, Dees recounted an incident when he was five years old and refused to get off a mule he was riding. Wilson, an African-American field hand, had gently prodded Dees to get off the mule. Dees responded, "You black nigger, you can't tell me what to do." Unknown to Dees, his father happened to be standing behind the mule. Dees's father gave Dees his first whipping in his life and warned him never to call anyone a "black nigger," while ordering him to obey Wilson.

Dees graduated from the University of Alabama at Tuscaloosa in 1958 despite getting married right before he graduated from high school in 1952 and having two children with his first wife during his college years. Dees later graduated from the University of Alabama law school in 1960. While in college, he and Millard Fuller, a college and law school colleague, established a birthday-cake delivery business that they expanded to a business selling fundraising products to clubs and organizations. By the time Dees and Fuller finished law school, they were on their way to becoming wealthy men.

In 1960, Dees and Fuller formed a law partnership in Montgomery, Alabama, while still pursuing various business interests. Because their business interests were flourishing, they did not put that much time into their law practice. In 1963, Dees and Fuller compiled and published *Favorite Recipes of Home Economics Teachers*, which became a popular cookbook. They later established a mail order and book publishing business, Fuller & Dees Marketing Group, which turned out to be one of the largest and most successful publishing companies in the South. Fuller sold out his interest in the business to Dees in 1964 for \$1 million, donated most of his profits to charities, and later founded Habitat for Humanity, an organization that builds housing for the poor. As he recounted in his autobiography, while stranded in a Cincinnati airport

in 1967, Dees had an epiphany to become more involved in civil rights. As a result of his epiphany, Dees increasingly devoted his time to practicing civil rights law and sold the book publishing company to Times Mirror, the parent company of the *Los Angeles Times*, in 1969.

It was after the sale of the business that Dees teamed up with Joseph Levin, Jr., to form a civil rights law firm that later became the Center. Dees has also been actively involved in politics. He was the finance director for the George McGovern's 1972 presidential campaign, helping to raise huge amounts of money from small donors. Dees later served on President Jimmy Carter's 1976 presidential campaign as national finance director, and on Senator Edward Kennedy's 1980 presidential campaign as national finance chairman.

As a result of Dees's efforts leading the Center's court victories against hate groups, Dees became the subject of a made-for-television movie, *Line of Fire: the Morris Dees Story*, which aired on NBC on January 21, 1991. He has also been a recipient of numerous death threats and was reportedly listed at one time as number one on the hit list of the hate group that killed Denver talk show host Alan Berg, an antigay advocate.

Criticisms of the Center

The Center's history is not without controversy, with most centering on Dees's salesmanship and the Center's fundraising tactics. In a highly publicized story in the *Montgomery Advertiser* in 1994, the newspaper, after a two-year investigation, alleged that the Center had not hired enough African Americans in top and leadership positions, that Dees stacked the Center's board with his close friends, and that Dees had offended the civil rights community by lobbying for the appointment of a prodeath penalty federal judge. Among other claims, the *Montgomery Advertiser* complained that during the 1984 to 1994 ten-year period, the Center had raised close to \$62 million in contributions but spent only \$21 million on its poverty and discrimination fighting activities, and that sometimes the Center never spent more than 20 percent on its programs, whereas many nonprofit organizations spent as much as 75 percent on programs. However, the newspaper was unable to cite any specific instance of financial impropriety.

In another article written by Ken Silverstein in *Harper's Magazine* in 2000, Silverstein accused the Center of spending less time defending prisoners facing capital punishment and more time on "relentless

fundraising campaign.” Referencing the *Montgomery Advertiser* article, Silverstein repeated the newspaper’s report that although Beulah Mae Donald ultimately netted \$51,875 from the sale of United Klan of America’s assets, the Center made \$9 million from fundraising activities solicitations related to the case. Other critics of the Center’s financial wealth (more than \$100 million endowment) have accused the Center (and particularly Dees) of profiting from the pain of people that have suffered society’s injustices. Despite these accusations, the Center remains an influential organization in helping various government agencies track down hate groups throughout the nation.

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References and Further Reading

- Chalmers, David. *Backfire: How the Ku Klux Klan Helped the Civil Rights Movement*. Lanham, MD: Rowman & Littlefield, 2003.
- Dees, Morris with Steve Fiffer. *A Lawyer’s Journey: The Morris Dees Story*. Chicago, IL: ABA, 2001.
- Klebanov, Diana, and Franklin L. Jonas. *People’s Lawyers: Crusaders for Justice in American History*. Armonk, NY: M.E. Sharpe, Inc., 2003.

Cases and Statutes Cited

- Beulah Mae Donald, as Executor of the Estate of Michael Donald, Deceased v. United Klans of America et al.* No. 84-0725-C-S (S.D. Ala., filed June 14, 1984)
- Berhanu v. Metzger*, No. A8911-07007, Multnomah County Circuit Court, Oregon (October 25, 1990)
- Frontero v. Richardson*, 411 U.S. 677 (1973)
- McKinney et al. v. Southern White Knights et al.*, No. 1:87-565-CAM (N.D. Ga., filed March 24, 1987)
- Smith v. YMCA*, 462 F.2d 634 (5th Cir. 1972)

SPANO v. NEW YORK, 360

U.S. 315 (1959)

On the evening of February 3, 1957, Vincent Joseph Spano, indicted for first-degree murder, surrendered to the police. Immediately after Spano’s accompanying counsel had departed, police initiated an intensive interrogation that involved multiple officials and lasted throughout the night and into the following morning. As advised by counsel, Spano initially refused to respond and was denied repeated requests to contact his attorney. To facilitate a confession, investigators sought the assistance of a police trainee, an acquaintance of Spano’s, who falsely solicited Spano’s sympathy. In the predawn hours, Spano capitulated, providing written and oral statements of guilt along with the location of his discarded weapon. Spano was

subsequently convicted and sentenced to death. The New York Court of Appeals affirmed.

On *certiorari*, the Supreme Court unanimously reversed. Writing for the Court, Chief Justice Warren ruled the confession involuntary under the totality of the circumstances. Although noting multiple factors, including Spano’s foreign-born status and limited education, Warren’s opinion gave particular emphasis to the relentless, overnight questioning that continued in the absence of requested counsel. This prolonged, postindictment questioning, in combination with the investigators’ ruse, was sufficient to overcome the defendant’s will, thereby rendering his statements impermissible self-incrimination in violation of the Fifth and Fourteenth Amendments. In addition to illustrating the application of the “totality of the circumstances” test in determining the voluntariness of confessions, this case also reveals the Court’s burgeoning recognition of the importance of counsel’s presence during custodial interrogation—a development that would ultimately culminate in *Miranda v. Arizona*, 384 U.S. 436 (1966).

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Cases and Statutes Cited

Miranda v. Arizona, 384 U.S. 436 (1966)

See also **Coerced Confessions/Police Interrogations; Due Process; Miranda Warning**

SPAZIANO v. FLORIDA, 468

U.S. 447 (1984)

Spaziano was indicted and convicted of first-degree murder more than two years after the offense occurred. Under Florida law, the statute of limitations for noncapital offenses was two years. The trial judge declined to instruct the jury on the lesser included offenses of second-degree and third-degree murder and manslaughter, because Spaziano refused to waive the statute of limitations for those offenses. After the jury recommended a life sentence, the trial judge imposed a death sentence. On appeal, Spaziano argued that the omission of lesser included offenses in the jury instructions denied him a fair trial and that judicial override of a life sentence recommendation violates the Fifth Amendment’s double jeopardy provision and the Sixth Amendment’s guarantee of a jury trial.

The Court held that although a lesser included offense instruction is ordinarily an element of a constitutionally fair trial, the principle does not apply where, as here, the defendant cannot be convicted of

the lesser included offenses. Furthermore, the Court denied that the trial judge's rejection of the jury's sentencing recommendation violates a constitutional right. First, because the jury's recommendation is merely advisory, it does not constitute a judgment that triggers double jeopardy. In addition, regardless of whether most jurisdictions rest capital sentencing authority in juries, the Sixth Amendment does not preclude judicial determination of a capital sentence. In subsequent decisions, the Court has held that juries rather than judges must perform the fact-finding role but has left undisturbed its holding in *Spaziano* that the Sixth Amendment does not require jury sentencing.

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References and Further Reading

Ring v. Arizona, 536 U.S. 584 (2002).

See also *Barclay v. Florida*, 463 U.S. 939 (1983); **Capital Punishment and Sentencing; Jury Trial Right**

SPEECH AND EDUCATION

Countervailing Forces

In nineteenth-century America, organized religion frequently exercised its considerable influence to inhibit freedom of speech in higher education. The publication in 1859 of Charles Darwin's theory of evolution, for example, sparked clashes between supporters of the biblical creation story and college professors who sought to teach or write about evolution.

Since then, however, government entities and officials have been responsible for most efforts to control academic speech. Government entities include, for example, federal, state, or local legislative bodies; various nonacademic executive agencies; and public educational institutions themselves, speaking through their governing boards, top administrators, or faculty policy-making bodies. Government officials include, for example, police officers assigned to campus, and public school administrators or faculty members. In the twentieth and twentieth-first centuries, measures to control academic speech have frequently been motivated by desires to ensure loyalty to the government, to protect national security or support the military in times of international conflict, to protect members of the academic community from hate speech, and to promote an intellectual

ideology supported by a majority of members of an academic unit.

Acting as constraints on efforts to control campus speech are several countervailing authoritative or persuasive forces. They include judicial enforcement of statutory or constitutional protections of speech, contractual obligations to protect speech, external pressures from organizations such as the American Association of University Professors (AAUP), and internal pressures stemming from an educational institution's desire to maintain sound educational policies and its reputation as a center of critical inquiry.

Academic Freedom, Educational Policies, and Contractual Obligations

Principles of academic freedom warrant discussion as a threshold matter, because the scope of constitutional protection arguably is influenced by widely accepted values of academic freedom and because those values may be embraced by private institutions that are not subject to constitutional mandates. Broadly defined, academic freedom encompasses (1) the freedom of academic institutions to define their educational missions; to decide who will teach, what will be taught, and who will be admitted to the student body; and to otherwise control their internal affairs; (2) the freedom of faculty to engage in scholarly inquiry and publish the fruits of their research, to control the content of their courses and lectures, and to express their views in other forums; and (3) the freedom of students to determine the course of their studies and to express their views on the topics of study. To some extent, these components of academic freedom constrain one another. For example, acting through its administration or its collective faculty, an institution can designate required courses for a degree program and can define the general content of such courses, partially constraining the freedom of individual faculty to define course content and the freedom of students to define their course of study. Moreover, a classroom instructor can designate the relevant issue for class discussion, thus partially constraining student freedom of expression in the classroom.

American universities imported European traditions of academic freedom in the decades after the Civil War, focusing on faculty freedoms. The AAUP maintained this focus on faculty freedoms when it issued its *1915 Declaration of Principles* and when it later joined with the Association of American Colleges and Universities (AACU) to issue the *1940 Statements of Principles on Academic Freedom and*

Tenure. The publication and promotion of these general principles of academic freedom by the AAUP and the AACU did not transform the principles into binding law. Instead, the AAUP has sought to promote application of the principles through its power of persuasion and the threat of public censure for violations of academic freedom. Partly as a result of these efforts, principles of academic freedom have gained wide acceptance among academic institutions as an element of sound educational policy and sometimes as binding obligations assumed by educational institutions in employment contracts with faculty or tuition contracts with students.

Constitutional or Statutory Protections of Academic Speech

Overview

The First and Fourteenth Amendments to the United States Constitution prohibit governmental interference with freedoms of speech, of the press, and of assembly. These constitutional provisions operate only against government action, such as state or federal legislation, policies issued by public schools, or the coercive actions of individual government officials on campus. Thus, these constitutional provisions do not restrict the power of private colleges or universities to regulate speech on their campuses. Accordingly, some private institutions of higher education, particularly those with religious affiliations, have exhibited a desire to provide educational environments that protect their students from expression that is highly offensive or contrary to the religious tenets that help define the educational mission of the school. By regulating campus speech to a significantly greater extent than would be permissible in a public university, however, a private school risks its very identity as a center of critical inquiry and academic debate. Moreover, a legislature has the power to extend the equivalent of constitutional guarantees of freedom of speech to private campuses. For example, the California Legislature extended the equivalent of constitutional protection to student speech on private campuses by enacting California Education Code § 94367 in 1992.

Where it applies, the constitutional protection of speech is impressive but not absolute. For example, speakers are not constitutionally privileged to convey obscenity, to issue a credible threat of harm to another, or to incite an imminent and unlawful breach of the peace. So long as government regulates such categories of speech with precision and without

selectively regulating a subset of such speech based on its political, religious, or other ideological content or viewpoint, the regulation should meet constitutional requirements. Beyond such categories of unprotected speech, the scope of freedom of speech on campus is a function partly of the context within which the speech takes place.

Student Speech

For example, student speech in public schools may be regulated, consistent with the Constitution, to the extent necessary to avoid disruption of the educational program or interference with the rights of other students. In class discussion, an instructor can require students to address a particular topic relevant to the lesson plan of the moment, rather than a different topic that is intensely important to the student but disruptive of the instructor's pedagogic goals. Indeed, the instructor may teach a mode of discourse that is intellectual in tone and civil in nature and accordingly can interrupt a student who violates the discourse rules of the class with personal insults or profane language.

Moreover, so long as a public school acts neutrally, without regard to the social, political, religious, or other ideological content of speech, it can issue and enforce policies that impose reasonable restrictions on the time, place, and manner of speech on campus. For example, a school could force the relocation of demonstrations that would obstruct pedestrian traffic at a congested intersection on a university campus, and it could ban noisy speech forced on unwilling listeners who seek to study in the library or to rest in their college dormitory rooms.

Greater restrictions on student speech would be permissible in primary and secondary schools, particularly in the lower grades. Courts recognize that schools shoulder the burden of inculcating fundamental social values at those levels, and that the youngest students are not yet prepared to critically evaluate and debate diverse perspectives on provocative topics.

College-level students, however, are sufficiently mature to enter the marketplace of ideas, or at least to learn to do so with proper guidance. Moreover, many locations on a college campus may possess the attributes of traditional public forums in which a free exchange of ideas receives full constitutional protection, subject only to the kinds of restrictions on speech mentioned previously. For example, so long as they do not obstruct traffic or disturb others who are working or learning in offices, classrooms, or libraries, a group of students would enjoy the constitutional right to assemble at an appropriate place on a public

campus, such as a square or lawn, and voice their views on a controversial topic without fear of censorship or disciplinary action. Their message would be available to all persons passing by who care to pause and listen rather than avert their eyes and move on.

Although obscenity is not constitutionally protected, the scope of protected speech in such a campus forum is sufficiently broad to encompass speech that is uncivil and offensive to others, such as the expression of views that others might deem to be profane, unpatriotic, sacrilegious, sexist, racist, heterosexist, or harassing. For example, when campus policies restricting hateful speech became popular in the late 1980s and in the 1990s, courts struck down the policies of several public schools on grounds that the policies permitted administrators to regulate speech that was merely offensive or permitted them to disfavor some speech on the basis of its ideological content or viewpoint. In some ways, the breadth of this conception of freedom of expression is unique to the United States and reached its full fruition only in the latter half of the twentieth century.

Evaluation of Academic Work

Even when speech in an academic forum of a public school, such as student or faculty research or classroom utterances, is constitutionally protected from immediate censorship or discipline, it nevertheless may be subject to academic evaluation. A professor of history, for example, may have a constitutional right to publish his arguments that previous literature has exaggerated the magnitude of the Holocaust; however, this protection from censorship and immediate discipline does not shield the author from critical evaluation of the author's research and analysis. Acting through faculty review committees and academic administrative officers, for example, the educational institution may ultimately deny the author tenure or promotion after finding that the research or analysis fails to meet the standards of excellence of the academic unit. Similarly, a student may be protected from censorship or discipline for expressing a controversial but relevant statement in class or in a research paper, but the student is not entitled to a top grade simply because the speech is protected; the instructor may apply politically neutral standards to award the student a low grade for inadequate research or faulty analysis.

Of course, a student or faculty member would be constitutionally protected from adverse government action if critical evaluations were motivated by the evaluators' ideological opposition to the viewpoint of the student or faculty member, without regard to an objective assessment of the quality of the student or

faculty work. A public school's denial of tenure to a faculty member, for example, would violate principles of free speech if it were based on the political unpopularity of the tenure candidate's published findings about gender-based differences in athletic capabilities, particularly if the school's evaluators conceded that the publication was a model of excellence in research, analysis, and expression. Differentiating between good-faith critiques of the quality of student or faculty work, on the one hand, and discrimination against the work on the basis of its ideological viewpoint, on the other, is often a difficult task. In close cases, however, courts are likely to defer to the professional judgment of academic evaluators if apparently exercised in good faith.

Control of Speech as a Function of Management of the Workplace

In addition to limitations on freedom of academic speech outlined previously, much of the speech of instructors, administrators, and other employees of a school is subject to their employer's managerial control. A public employer has greater constitutional license to control the speech of government employees while managing its workplace than to suppress the speech of others while acting outside of a managerial role. Thus, the First Amendment permits a public school to control the speech of its employees to a greater extent that it permits a police officer to suppress the speech of a nonemployee protestor in a city park.

An employer, of course, can and should prohibit its supervisory employees from using speech or conduct to violate antidiscrimination statutes. A faculty member, for example, has no constitutional privilege to repeatedly subject his secretary to egregious verbal sexual harassment or to instruct African-American students to sit in the back of the classroom.

Those examples of unprotected discriminatory speech, however, are easy cases, because regulation of the speech can be based not so much on the ideological content or viewpoint of the speech as on the speaker's selectively targeting others for adverse treatment because of their membership in a protected class. More deserving of a measure of constitutional protection, and a better test of the constitutional limits of a public employer's managerial control of speech, is public employee speech directed to the general public on a political issue.

The U.S. Supreme Court has defined the degree of protection afforded to public employee speech in a balancing test developed in its 1968 decision on *Pickering v. Board of Education* and further delineated as a

two-part test in its 1983 decision, *Connick v. Meyers*, and its progeny. Under *Pickering/Connick*, public employee speech is constitutionally protected only if (1) the employee is addressing a matter of public concern in the employee's role as a citizen of the community, and (2) the employee's speech interests outweigh the employer's managerial interests in efficiently carrying out its mission. Thus, for example, a public employer can discipline an employee for the employee's circulating speech relating to a workplace grievance that is personal to the employee, for the employee's complaining – as part of his employment duties – to a supervisor about misrepresentations in an affidavit or even for the employee's engaging in speech as a citizen on a political topic of public concern if the employee's interests in speaking on the matter of public concern are outweighed by legitimate managerial concerns that the speech would impede the accomplishment of the employer's mission. If the employer issued a policy banning future speech by employees, thus erecting a prior restraint on speech, a wider array of interests of employees and potential audiences would be weighed against the employer's managerial interests.

The dawning of the twenty-first century has witnessed a division of opinion among different courts and scholarly commentators over the extent to which academic speech by faculty in public schools receives special constitutional protection beyond that provided by the *Pickering/Connick* balancing test. Some passages in twentieth-century Supreme Court opinions seem to support the argument that freedom of thought, inquiry, and expression is more centrally important in the university setting than in other government employment contexts and that principles of academic freedom enjoy elevated status within the First Amendment. Accordingly, several scholarly commentators have argued that faculty comments in the college classroom, for example, should be constitutionally protected if relevant to the course and if conveyed in good faith as part of a pedagogic strategy, without limiting protection to that of the *Pickering/Connick* test.

Other courts or commentators have argued that the statements by Supreme Court justices most strongly supporting special constitutional protection for faculty academic freedoms have appeared in dictum or in dissenting, concurring, or plurality opinions. These courts and commentators have opined that elevated constitutional protection for academic freedom, if any, is limited to special protection for institutional academic freedom. Under this approach, adopted in cases such as *Urofsky v. Gilmore*, the *Pickering/Connick* test would determine the legitimacy of a public school's restrictions on the academic speech of faculty or other employees, and courts would respect institutional academic freedom by

deferring in close cases to the judgments of educational institutions regarding the need to administratively regulate faculty speech. Such deference would be particularly great in primary and secondary schools, allowing school boards to closely control curriculum and to inculcate fundamental community values.

In 2006 the Supreme Court expressly left open the question whether its *Pickering/Connick* test would apply to teaching and scholarship in the same way it applies to other student government. One would not be reckless in predicting, however, that the Supreme Court will develop a standard that recognizes the importance of freedom of faculty thought, inquiry, and expression in academic contexts, at least at the university level. Even if the test of *Pickering/Connick* is destined to apply to faculty speech, it likely will be applied with sensitivity to these values, giving special weight to a faculty member's interests in academic speech.

Moreover, constitutional doctrine defines the minimum protection for academic speech in public schools. To promote intellectual inquiry and the exchange of ideas, educational institutions are free, of course, to adopt policies and even to assume contract obligations that protect academic speech to a greater degree than is required by the First Amendment.

Promotion of an Educational Institution's Views and Noncoercive Appeals for Civil Discourse

The First Amendment is generally not offended if a public educational institution limits the participation of others in the institution's own speech. If a public school conveys its mission and values, for example, in its own newsletter, website, or office bulletin board, the institution may control the message that it conveys, and it thus may exclude the proposed contributions of students or faculty that are inconsistent with the institution's desired message.

Similarly, even when the First Amendment precludes a public school from suppressing controversial speech on campus, the school remains free to voice its own policies and values on the matter in controversy. For example, a university could not discipline a student for appearing in an appropriate forum to express disagreement with the university's affirmative action programs, but university administrators could respond with their own speech, conveying the university's arguments supporting affirmative action. Moreover, a public university would be free to use its verbal powers of persuasion to encourage members of its community to debate the issues of the day in a civil manner befitting a place of intellectual inquiry,

even though the university could not force student protesters in a public forum on campus to adopt its recommendations.

In extreme cases, an administrator's expression of institutional values might be sufficiently coercive in tone and substance to implicate First Amendment principles or at least to offend broader principles of academic freedom and sound educational policy. For example, if the Provost and President of a university not only expressed the institution's support for diversity in its student body but also announced that "arguments against affirmative action are analytically bankrupt," their speech might influence tenure committees to discount the analytic merit of a tenure candidate's publication critiquing affirmative action programs, and it thus might create a chilling effect on academic inquiry. In general, however, an institution's expression of its own policies and values will not interfere with the free speech rights of other members of the campus community.

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References and Further Reading

- Bird, R. Kenton, and Elizabeth Barker Brandt, *Academic Freedom and 9/11: How the War on Terrorism Threatens Free Speech on Campus*, *Communication Law and Policy* 7 (2002): 431–459.
- Buss, William G., *Academic Freedom and Freedom of speech: Communicating the Curriculum*, *Journal of Gender, Race & Justice* 2 (1999): 213–278.
- Chang, Ailsa W., *Resuscitating the Constitutional "Theory" of Academic Freedom: A Search for a Standard Beyond Pickering and Connick*, *Stanford Law Review* 53 (2001): 915–966.
- Calleros, Charles R. *Reconciliation of Civil Rights and Civil Liberties after R.A.V. v. City of St. Paul: Free Speech, Antiharassment Policies, Multicultural Education, and Political Correctness at Arizona State University*, *Utah Law Review* 1992 (1992): 1205–1333.
- Golding, Martin P. *Free Speech on Campus*. MD: Rowman & Littlefield Publishers, Inc., 2000.
- Gordon, Lee, *Achieving a Student-Teacher Dialectic in Public Secondary Schools: State Legislatures Must Promote Value-Positive Education*, *N.Y. Law School Law Review* 36 (1991): 397–426.
- Hiers, Richard H., *Institutional Academic Freedom v. Faculty Academic Freedom in Public Colleges and Universities: A Dubious Dichotomy*, *Journal of College and University Law* 29 (2002): 35–109.
- Hofstadter, Richard, and Walter P. Metzger. *The Development of Academic Freedom in the United States*. New York: Columbia University Press, 1955.
- Jackson, Jim, *Express and Implied Contractual Rights to Academic Freedom in the United States*, *Hamline Law Review* 22 (1999): 467–499.
- O'Neil, Robert. *Free Speech in the College Community*. Bloomington: Indiana University Press, 1997.
- Smith, Stacy E., *Who Owns Academic Freedom?: The Standard for Academic Free Speech at Public Universities*, *Washington & Lee Law Review* 59 (2002): 299–359.

Van Alstyne, William W., *Academic Freedom and the First Amendment in the Supreme Court of the United States: An Unhurried Historical Review*, *Law and Contemporary Problems* 53 (Summ. 1990): 79–154.

Weidner, Donald J., *Academic Freedom and the Obligation to Earn It*, *Journal of Law & Education* 32 (2003): 445–473.

Weinstein, James, *A Brief Introduction to Free Speech Doctrine*, *Arizona State Law Journal* 29 (1997): 461–471.

Cases and Statutes Cited

- Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006)
- Connick v. Meyers*, 461 U.S. 138 (1983)
- Pickering v. Board of Education*, 391 U.S. 503 (1968)
- Urofsky v. Gilmore*, 216 F.3d 401 (4th Cir. 2000)

See also **Campus Hate Speech Codes; Categorical Approach to Free Speech; Content-Based Regulation of Speech; Content-Neutral Regulation of Speech; Public Forum Doctrines; Public/Nonpublic Forums Distinction; Public Officials; *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992); State Action Doctrine; Teacher Speech in Public Schools; Time, Place, and Manner Rule; Universities and Public Forums; Viewpoint Discrimination in Free Speech Cases**

SPEECH AND ITS RELATION TO VIOLENCE

Few problems involving the First Amendment have generated as much dispute as the relationship between speech and violence. May the government punish the advocacy of revolution? What about teaching that revolution is desirable, or even inevitable? May speakers induce others to commit criminal acts against vulnerable minorities or insult others, knowing one will provoke a violent reaction?

Suppose someone contends that the government is corrupt, and the only solution is violent revolution. Does the First Amendment protect the speaker? One might argue that punishing expression of an opinion is never justified, even if inciting words are spoken while standing before an angry crowd carrying weapons, which then riots. This approach has never been followed in the Supreme Court but allows the greatest breathing room for free expression. However, it would allow those who stir angry mobs to violence to escape responsibility for resulting criminal acts.

Alternately, one could punish the speaker, no matter how unlikely the expression will lead to violence. The latter approach maximizes the government's power over all expression, for even innocuous speech might be thought to curry violent thoughts in others. The risk with this latter approach is that the government will use its power to define "violent expression"

to repress unpopular speech, and especially to control dissidents.

Over the past eighty-five years the Court has defined tests that have oscillated between these two extremes. The Court's treatment of speech advocating violence has ranged from extremely deferential to governmental fears, under the "bad tendency" test, to the less deferential—and current—*Brandenburg* approach.

Historical Development: From Clear and Present Danger to 1960s

In the early twentieth century, the Supreme Court allowed the government much leeway to punish unpopular expression. The Court frequently took the position that if the underlying conduct could be forbidden, then advocacy of the conduct could also be forbidden. In *Schenck*, for example, the Court affirmed the conviction of defendants who been convicted of attempting to disrupt the military draft by distributing leaflets that urged potential draftees to "assert your rights" and referred to the recruiting services as the embodiment of despotism.

Writing for the Court, Justice Oliver Wendell Holmes, Jr., framed the "clear and present danger" test: "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." Although framed as a "test," the standard allows a great deal of flexibility in application.

The "clear and present danger" standard was used sporadically and inconsistently by the Court until *Brandenburg* was decided in 1968. Indeed, the same year *Schenck* was decided, both Holmes and Brandeis dissented from a case that affirmed the conviction of Russian anarchists who published leaflets objecting to the 1918 American invasion of Russia and calling for a general strike. In Holmes' view, the government had failed to prove that the "danger" of violent revolution was imminent or even that the speaker desired such a result. In a stirring passage, Holmes explained why the government should not ordinarily be permitted to punish the expression of opinion:

[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas, that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.

A few years later, in *Gitlow*, the Court rejected Holmes' "clear and present danger" test in a case involving distribution of a manifesto urging general strikes in violation of a "criminal syndicalism" law declaring it a crime to advocate, advise, or teach the duty, necessity, or propriety of overthrowing organized government by force or violence. There was no evidence that the tract had any effect on anyone or that its distribution posed any threat whatsoever. Yet, in affirming the defendants' conviction, the Court defined what became known as the "bad tendency" test: "the general provisions of the statute may be constitutionally applied to the specific utterance of the defendant if its natural tendency and probable effect was to bring about the substantive evil which the legislative body might prevent."

The Supreme Court's willingness to defer to legislative judgment regarding the danger of speech advocating violence reached its apex in 1927, in *Whitney v. California*. In *Whitney*, the Court affirmed a conviction under California's criminal syndicalism statute. The defendant, a member of the Communist Party, had attended a Party convention of the where other members voted over her opposition to support change through violence.

As *Whitney* illustrates, one problem with deferring to a legislature's definition of "dangerousness" is that it acts in an ideological way. A legislature will jail even those who promote controversial ideas through the democratic process. As Holmes said, dissenting in *Abrams*, "[p]ersecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition." Yet, Holmes also argued that such an approach is inconsistent with democratic governance.

In a separate opinion concurring in *Whitney*, Justice Brandeis objected to the Court's deference to the legislative judgment of danger. He also put teeth to the "clear and present danger" test, emphasizing that abstract "advocacy" of violence short of "incitement" could not be punished. Brandeis also emphasized the importance of requiring proof of *imminent* harm before the speaker may be restrained. "[E]ven advocacy of [law] violation however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on."

In the 1950s, with the advent of the cold war and the many repressions spawned by McCarthyism, the United States prosecuted the leadership of the Communist Party under the Smith Act, which criminalized advocating the overthrow of the government of the

United States by force and violence. In *Dennis v. United States*, the Supreme Court affirmed the convictions of Party leaders, the crux of the case coming down to the teaching of four volumes of Communist ideology. Seeking to explain the result, a plurality of the Court led by Chief Justice Fred M. Vinson argued that the case must be judged under a “balancing” test—weighing “whether the gravity of the ‘evil’ discounted by its improbability” warrants suppressing the speech and punishing the speaker.

This reformulation of “clear and present danger” meant that any doctrine that taught the desirability of the overthrow of duly constituted government—no matter how remote the possibility—could be criminalized, because it would always be seen as an horrendous threat to the survival of the nation. As Vinson argued, the Government need not “wait until the *putsch* is about to be executed.”

Several other appeals involving criminal prosecutions under the Smith Act followed *Dennis*, but the Court became somewhat less deferential to government fears of Communism. In later cases, the Court reinterpreted *Dennis* to require proof that the defendant had advocated specific violent actions, even if in the future, and not merely the abstract teaching of doctrine. Yet, the Court remained willing to criminalize advocacy of violence. In *Scales*, a criminal conviction for mere membership in the Communist Party—even in the absence of a realistic risk that any violence would take place—was upheld. As Justice Douglas pointed out in *Noto*, unless the Court required proof that the advocacy risked *imminent* violence, the Court in effect was permitting prosecution for mere *belief*.

***Brandenburg* and Current Law**

In 1969, the Supreme Court transformed the constitutional understanding of the relationship between speech and violence. In *Brandenburg*, the Court reversed the conviction of a Ku Klux Klan leader for violating Ohio’s criminal syndicalism law, advocating political change through violence. The leader had urged a march on Washington and suggested that violence might be required to forestall desegregation. A similar criminal syndicalism statute had been upheld in *Whitney*, and *Brandenburg* overruled *Whitney*.

Brandenburg held that advocacy of violence is protected by the First Amendment provided that the advocacy is not directed to inciting others to immediate unlawful action and likely to produce such action. To criminalize such speech, the government must satisfy four requirements: *first*, that the words used

go beyond mere advice or teaching of abstract doctrine, and are understood to *incite* to action; *second*, that the speaker *intends* by his words to incite; *third*, that the speech is likely to produce *imminent* lawless action; and *fourth*, that the words are in fact likely to produce imminent violence.

Cases that have arisen since *Brandenburg* confirm the new and important direction the Court has taken. In *Hess v. Indiana*, the police were clearing the streets of participants in an antiwar demonstration when Hess yelled, “we’ll take the f***ing street later (or again).” Witnesses testified that Hess was facing the crowd, but that his voice, although loud, was no louder than other demonstrators. On appeal to the Supreme Court, Hess’ conviction for disorderly conduct was reversed. The Court evaluated Hess’ words carefully: “At best, the statement could be as counsel for present moderation; at worst it amounted to nothing more than advocacy of illegal action at some indefinite future time.” Thus, because Hess’ advocacy was not directed to producing “*imminent* lawless action,” Indiana could not criminally punish him.

In *Claiborne Hardware*, the Court confronted a civil rights case that stemmed from a series of boycotts and pickets in the community of Port Gibson, Mississippi. In 1966, a local branch of the NAACP organized a boycott of white businesses to pressure the businesses and the local government into improving the conditions for African Americans in the community, including eliminating segregation, hiring black police officers, and the local stores to hire more black employees. In speeches, demonstrations, and pickets, many in the community were induced to stop dealing with the merchants. Blacks who continued to do business were identified and solicited to halt. Some were pressured by threats of ostracism. In speeches, the head of the NAACP threatened violence against those who did not comply with the boycott. On some occasions over the seven-year period of the boycott, on a number of occasions, blacks who continued to deal with merchants were made the target of violence.

The state courts imposed damages on the NAACP and organizers of the boycott, including seven years of lost profits. Overturning the damage award, the Court found that the ends sought (desegregation; more jobs for African Americans) were lawful, and most of the means (picketing; boycott; persuasion) were also lawful. That some participants had been persuaded to join the boycott by speech, by the presence of pickets, by identification, or by threats of social ostracism, did not deprive the communications of protection under the First Amendment. “Speech does not lose its protected character . . . simply because it may embarrass others or coerce them into action.”

More difficult were the acts of violence. As to these, the Court held that anyone who committed acts of violence could be punished or made to pay damages their acts had caused. However, the state courts had lumped the violent acts together with speech-protected acts, and the Supreme Court held that was impermissible. When violent conduct occurs in the context of constitutionally protected activity, "precision of regulation" is required. The state courts may award damages against anyone who committed violent acts, but not for the consequences of constitutionally protected acts. Furthermore, the boycott organizers could not be held responsible for others' violent acts absent a showing they specifically authorized or instigated the violence or knew about the violence and had an intent to promote it. The speeches advocating violence could not be made the basis of liability, because whatever acts of violence that occurred were unconnected in time, and punishing such advocacy did not satisfy the *Brandenburg* test.

Fighting Words, Hostile Audiences, and Threats of Violence

In many of the cases discussed thus far, a speaker is charged with inciting others to violence. But what about contexts in which the speaker insults others, provokes others to fight with the *speaker*, confronts a hostile audience, or threatens others with violence? The Court has confronted many cases of threatened responsive violence instigated by a speaker, and the issues raised are somewhat different from the advocacy of violence cases.

In the 1940s, the Supreme Court's *Chaplinsky* decision defined a class of "fighting words" whose utterance the state could punish: "those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction." The defendant in *Chaplinsky* was prosecuted for saying to the City Marshal of Rochester that he was a "God damned racketeer and a damned fascist." Note that today those exact words might not be construed as "fighting words"—commonly understood to trigger fisticuffs—but the Court's holding indicates that in 1942, when *Chaplinsky* was decided, the words were, indeed, inflammatory.

Subsequently, the Court has repeatedly referred to the fighting words doctrine, but has also emphasized that any fighting words statute must be drafted with care so not to include in the definition inflammatory or merely "offensive" speech. In *R.A.V.*, for example, the Court reversed a "fighting words" conviction

where the ordinance under which the defendant had been prosecuted discriminated among the class of slurs that warranted condemnation.

A more problematic case arises when a speaker confronts an audience that is hostile to the speaker's *ideas*. Should the speaker be shut down because of the risk that the audience would commit violent acts? Or, should the audience be controlled, because it, not the speaker, threatens violence? Should the heckler have veto power over speech?

The Supreme Court's approach to the "hostile audience" problem has not always been consistent. In *Terminiello*, the Court overturned a breach of peace conviction of a defrocked priest who spoke to a large crowd inside an auditorium while hundreds of opponents chanted and screamed outside. The priest denounced Jews and blacks and referred repeatedly to those assembled outside as "scum." The trial judge had instructed the jury that speech violates the statute if it "stirs the public to anger, invites dispute, brings about a condition of unrest or creates a disturbance." In reversing the conviction, Justice Douglas pointed out that a free speech "may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging."

Although the *Terminiello* case suggested that a speaker has significant leeway in challenging his audience, the *Feiner* case, decided two years later, seemed to contradict Douglas' ringing endorsement of the importance of protecting speech that "stirs the public to anger." In *Feiner*, a corner soapbox speaker had attracted a crowd by urging blacks to "rise up in arms and fight for equal rights." He also described various public officials as "bums," and the American Legion as "Nazi Gestapo." The crowd was mixed in their response, and there was some pushing and shoving. A police officer later described the crowd as "stirred up." One onlooker told an officer that if they didn't stop the speaker, he would. The officers thereupon asked *Feiner* to stop speaking, and when he refused, they arrested him. The Supreme Court upheld *Feiner*'s conviction, the majority arguing that he had passed the bounds of persuasion and had "undertake[n] incitement to riot." The *Terminiello* and *Feiner* cases are difficult to square.

The fighting words and the hostile audience reaction cases have required the Court to address the relationship between a vociferous speaker and an auditor who potentially threatens violence. In contrast, the Court has also considered threats of violence cases that potentially inflict injury on a victim but do not necessarily risk responsive violence. In *Watts v. United States*, the Court considered an interpretation

of the statute making it a crime to threaten the life of the president. After a public rally against the Vietnam War, a demonstrator was convicted of making such a “threat” when he said, “If they ever make me carry a rifle the first man I want to get in my sights is L.B.J They are not going to make me kill my black brothers.” The Supreme Court reversed Watts’ conviction, holding that his only offense was a “kind of very crude offensive method of stating a political opposition to the President.”

A different type of case is presented where a defendant truly “threatens” another person with violence. In such cases, the state is attempting to protect victims from the fear of violence and to forestall threatened violence. In *Virginia v. Black*, the Court upheld the constitutionality of a Virginia statute banning cross burning undertaken with “an intent to intimidate a person or group of persons.” The decades-long history of violence preceded by Klan-inspired cross-burning supported the determination that burning a cross as a mechanism of intimidation is a particularly virulent threat to one’s safety.

Although the Court’s current direction in addressing the relationship between speech and violence is more speech protective than the approach followed before the 1960s, a better test of that proposition will come when speech that “threatens” violence to widely held, core social values comes to the Court. The Smith Act prosecutions occurred during an era of deep mistrust of Communism. Perhaps tomorrow’s “threat” will arise from vitriolic speakers who stoke the fire of disenchanted groups. The central question remains: to what extent is the society willing to tolerate speech that has the potential of provoking violence?

JOHN T. NOCKLEBY

References and Further Reading

- Blasi, Vincent, *The Pathological Perspective and the First Amendment*, Columbia Law Review 85 (1985): 449.
 Nockleby, John T., *Hate Speech in Context*, Buffalo Law Review 42 (1994): 653–713.
 Pope, *The Three-Systems Ladder of First Amendment Values: Two Rungs and a Black Hole*, Hastings Constitutional Law Quarterly 11 (1984): 189.
 Rabban, David M. *Free Speech In Its Forgotten Years* Cambridge, U.K.: Cambridge University Press, 1997.
 Stone, Geoffrey R., *Content Regulation and the First Amendment*, William and Mary Law Review 25 (1983): 189.
 Tribe, Laurence H. *American Constitutional Law*. 2nd ed. Mineola, NY: Foundation, 1988.

Cases and Statutes Cited

- Abrams v. United States*, 250 U.S. 616 (1919)
Bachellar v. Maryland, 397 U.S. 564, 567 (1970)
Chaplinsky v. New Hampshire, 315 U.S. 568 (1942)
Cohen v. California, 403 U.S. 15 (1971)

- Cox v. Louisiana*, 379 U.S. 559 (1965)
Dennis Edwards v. South Carolina, 372 U.S. 229 (1963)
Feiner v. New York, 340 U.S. 315 (1951)
Forsyth County v. Nationalist Movement, 505 U.S. 123, 137 (1992)
Gitlow v. New York, 268 U.S. 652 (1925)
Gregory v. City of Chicago, 394 U.S. 111 (1969)
Hague v. CIO, 307 U.S. 496 (1939)
Hess v. Indiana, 414 U.S. 105 (1973)
NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982)
Noto v. United States, 367 U.S. 290 (1961)
R.A.V. v. City of St. Paul, 505 U.S. 377 (1992)
Scales v. United States, 367 U.S. 203 (1961)
Schenck v. United States, 249 U.S. 47 (1919)
Terminiello v. City of Chicago, 337 U.S. 1 (1949)
Virginia v. Black, 538 U.S. 343 (2003)
Whitney v. California, 274 U.S. 357 (1927)
Yates v. United States, 354 U.S. 298 (1957)

See also Abortion Protest Cases; Anti-Anarchy and Anti-Syndicalism Acts; Bad Tendency Test; Balancing Approach to Free Speech; Brandenburg Incitement Test; *Brandenburg v. Ohio*, 395 U.S. 444 (1969); Captive Audiences and Free Speech; *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942); Clear and Present Danger Test; Communism and the Cold War; Communist Party; Content-Based Regulation of Speech; Content-Neutral Regulation of Speech; *Cox v. Louisiana*, 379 U.S. 559 (1965); Cross-Burning, Extremist Groups and Civil Liberties; Fighting Words and Free Speech; Freedom of Access to Clinic Entrances (FACE) Act, 108 Stat. 694 (1994); Freedom of Speech: Modern Period (1917–Present); *Gitlow v. New York*, 268 U.S. 652 (1925); *Hague v. C.I.O.*, 307 U.S. 496 (1939); Hate Speech; Heckler’s Veto Problem in Free Speech; *Hess v. Indiana*, 414 U.S. 105 (1973); Holmes; Oliver Wendell, Jr.; Ku Klux Klan; National Security and Freedom of Speech; *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992); Red Scare of the Early 1920s; *Scales v. United States*, 367 U.S. 203 (1961); *Schenck v. United States*, 249 U.S. 47 (1919); Smith Act; Speech versus Conduct Distinction; Terrorism and Civil Liberties; Threats and Free Speech; Time, Place, and Manner Rule; Traditional Public Forums; Vinson Court; Vinson Fred Moore; *Virginia v. Black*, 538 U.S. 343 (2003); *Watts v. United States*, 394 U.S. 705 (1969); *Whitney v. California*, 274 U.S. 357 (1927); World War I, Civil Liberties in; *Yates v. United States*, 354 U.S. 343 (2003)

SPEECH OF GOVERNMENT EMPLOYEES

For many years, government employment was considered a privilege rather than a right, and, as a result, the government could place restrictions on employee speech that would be unconstitutional if applied to

citizens. An oft-quoted description of this rule is that offered by Justice Holmes in *McAuliffe v. Mayor of New Bedford*: “The petitioner may have a constitutional right to talk politics but he has no constitutional right to be a policeman.” This doctrine began to erode in the 1950s and by 1967, the Court in *Keyishian v. Board of Regents* could firmly state that the doctrine allowing public employers to condition employment on waiver of constitutional rights had been rejected. Accordingly, public employees retain their First Amendment rights.

Nevertheless, the government as an employer has an interest in regulating employee speech that is greater than its interest in regulating citizen speech. The government must be able to control employee speech to ensure effective and efficient delivery of government services. Thus the task becomes determining which governmental restrictions on employee speech are permissible to serve the governmental purposes. The Supreme Court has attempted, with mixed success, to provide the government with traditional employer rights without unduly restricting employee First Amendment rights.

Protected Speech

To warrant First Amendment protection, employee speech must relate to a matter of public concern. Determining what is a matter of public concern has proven to be a difficult task for the courts. The speech must relate to issues of concern to the community and not to personal grievances of the employee or matters of internal office policy. To determine whether speech is protected courts must look to the content, form, and context of the speech. The speech need not relate to the employee’s job duties or the functioning of the government to be protected, although the Supreme Court has noted that government employees may be in a position to contribute importantly to public debate by virtue of the knowledge and information they possess.

Government Regulation Burdening Employee Speech

When government regulation broadly burdens the speech of government employees, the government must show that the interests of potential audiences for government employee speech and the free speech interests of the employees are outweighed by the

impact of the speech on the operation of the government. Applying this test, the Supreme Court struck down a federal statute that barred federal employees from accepting honoraria for speeches or articles in *U.S. v. National Treasury Employees Union*. The Court rejected the government’s argument that the ban was necessary for government efficiency, finding it too broad to constitute a reasonable response to a legitimate concern about misuse of power. The court noted particularly that the ban applied even where the speech was unrelated to the employee’s service.

Employee Discipline Based on Speech

When the issue involves discipline of an individual employee for speech, the government’s burden of justification is less onerous. The Court in *Pickering v. Board of Education* held that the employee’s free speech rights must be balanced against the employer’s interest in “promoting the efficiency of the public services it performs” to determine whether an employer’s discipline of an employee for speech violates the constitution. The Court noted the importance of allowing government employees who have informed opinions on matters of public concern to speak without fear of employer retaliation. Employees can even make public statements critical of their superiors so long as they are not knowingly false or recklessly made and do not interfere substantially with the employee’s job performance or the employer’s operations. Because the test is generally applied after employee discipline for speech, the court will assess the level of disruption or threat of disruption caused by the employee’s speech, that is, did it interfere with his or her job performance or that of others, hamper employee discipline, or damage personal relationships in the workplace necessary to efficient functioning of the operation. If the damage or potential damage is sufficiently severe, discipline will be upheld despite the protected nature of the speech.

When the government claims that the employee discipline was based on reasons other than speech, the employee must show that the protected speech was a motivating factor in the employer’s decision to discipline, *Mt. Healthy City School District Board of Education v. Doyle*. If the employee proves that the speech motivated the employer, the employer can avoid liability by showing that it would have disciplined the employee for legitimate reasons even if the employee had not engaged in the protected speech.

Independent Contractors

These principles for determining the legality of government retaliation for employee speech have been applied to termination of independent contractors as well, *Board of County Comm'rs v. Umbehr*.

Government Employees and Political Activity

Although political speech has a high value under the First Amendment, restrictions on the political participation of government employees have been found constitutionally permissible. The federal Hatch Act, which in its earlier iterations barred virtually all federal employees from engaging in political management or political campaigns, survived constitutional challenge in *United States Civil Service Commission v. National Association of Letter Carriers*. Accordingly, similar restrictions by state and local governments are also constitutional. The Hatch Act does not bar employees from expressing opinions on political subjects and candidates, however. In addition, in 1993, the Hatch Act was revised to permit most federal employees to participate in political campaigns, with specified exceptions. However, with very limited exceptions, federal employees are still barred from running for partisan political office, campaigning while on duty, and soliciting political contributions.

Government employees are free to join political parties and cannot be discriminated against on the basis of their political affiliation unless they serve in high-level positions where party affiliation is a legitimate job qualification, *Rutan v. Republican Party of Illinois*. Elected politicians should be able to appoint high-level advisers and officials that agree with their policy agendas, but employees without such responsibilities are free to choose their party affiliation without fear of retribution from their employer.

In addition, government employees cannot be forced to subsidize political speech with which they disagree, either through union dues, *Abood v. Detroit Board of Education*, or direct political contributions, *Acevedo-Delgado v. Rivera*.

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References and Further Reading

- Deskbook Encyclopedia of Public Employment Law*. Malvern, PA: Center for Education and Employment Law (2005).
- Hudson, David L., Jr.. *Balancing Act: Public Employees and Free Speech*, First Amendment Center (2002).

Smolla, Rodney A. *Smolla and Nimmer on Freedom of Speech*. Vol. 2, Eagan, MN: Thomson/West, 2005.

Cases and Statutes Cited

- Abood v. Detroit Board of Education*, 431 U.S. 209 (1977)
Acevedo-Delgado v. Rivera, 292 F.3d 37 (1st Cir. 2002)
Board of County Comm'rs v. Umbehr, 518 U.S. 668 (1996)
 Hatch Act, 5 U.S.C. Section 7321, et seq
Keyishian v. Board of Regents, 385 U.S. 589 (1967)
McAuliffe v. Mayor of New Bedford, 155 Mass. 216 (1892)
Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977)
Pickering v. Board of Education, 391 U.S. 563 (1968)
Rutan v. Republican Party of Illinois, 497 U.S. 62 (1990)
United States Civil Service Commission v. National Association of Letter Carriers, 413 U.S. 538 (1973)
U.S. v. National Treasury Employees Union, 513 U.S. 454 (1995)

See also Abood v. Detroit Board of Education, 431 U.S. 209 (1977); **Matters of Public Concern Standard in Free Speech Cases**; *Mt. Healthy School District Board of Education v. Doyle*, 429 U.S. 274 (1977); *Pickering v. Board of Education*, 391 U.S. 563 (1968); **Political Patronage and First Amendment**; *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990)

SPEECH VERSUS CONDUCT DISTINCTION

Perhaps one of the most controversial issues is whether the part of the First Amendment that protects free speech should ever protect conduct. In other words, can conduct be a form of speech for First Amendment purposes? A typical model of free speech protection unfolds this way: I stand on my soapbox in the park and share with the world my opinion on a contentious topic of the day. A police officer walking by might like to poke me with his nightstick and encourage me to move on. But the First Amendment can be interpreted as preventing a public authority from interfering with my reasonable use of public space to air my views.

Now consider my using the same soapbox but to stand on while I light and then burn an American flag. One way of distinguishing this case from the previous one is to point out that far more people may be offended by my burning the flag than would be by my views on any given subject, even if shouted at the top of my lungs. Or maybe the key should be the difference between speech and conduct—in the first instance it was “only” speech in which I was engaged, whereas in the second, I was not speaking at all but, instead, doing something physical and engaging in a form of conduct highly repugnant to many citizens

walking by, watching me on the evening news, and so forth.

In one (actually two) of the Supreme Court's most notorious decisions, the justices have ruled that neither state government (*Texas v. Johnson*) nor the federal government (*U.S. v. Eichman*) can criminalize flag desecration without violating the free speech clause of the First Amendment. What was protected by the Constitution in the state case was Joey Johnson's "expressive speech," his act of burning the flag. When Congress, in response to the Court's ruling, passed a federal law authorizing punishment of flag burners it was promptly overruled by the Court as well.

So some forms of conduct constitute acts of expression and even without conventional speech being part of the act, or conduct, may be protected speech. Perhaps the most important question, however, is not what forms of conduct may take on the appearance, or at least categorization, of speech but, more precisely, what forms of conduct may constitute First Amendment-protected speech—in other words, conduct that the courts believe should be given legal protection under the First Amendment free speech clause.

The Vietnam War-era case, *U.S. v. O'Brien*, 391 U.S. 367 (1968), provides a useful counterpoint to the flag burning cases. O'Brien and several comrades, in 1966, burned their draft cards—Selective Service registration certificates—on the steps of the South Boston Courthouse. Their act was witnessed by a large group of people who, fortunately for O'Brien, included FBI agents who rushed him to safety when attacked by several violent onlookers. O'Brien was prosecuted and convicted of transgressing the Universal Military Training and Services Act of 1948, Section 462(b)(3), amended by Congress in 1966 to make it an offense if anyone "forges, alters, knowingly destroys, knowingly mutilates, or in any manner changes" a draft card. The law was amended because of the Vietnam War, and O'Brien publicly burned his draft card because of the Vietnam War. He knowingly destroyed his registration certificate as a means of expressing his view that America's war in Southeast Asia was wrong.

Like Johnson and Eichman, O'Brien engaged in an act of speech—political speech—for the purpose of communicating an unpopular but sincere political opinion. If the First Amendment protects one's right to express political views and the language of the Constitution's free speech clause is interpreted to include forms of expressive conduct as speech, then (in theory) O'Brien should receive as much constitutional protection as Johnson and Eichman. Although O'Brien's conduct on the courthouse steps seemed to

anger some in the crowd, it could hardly be said that draft card burning is any more offensive than U.S. flag burning, even in time of war when draft laws are in effect.

But O'Brien's speech was not protected by the Constitution, or so said the Supreme Court. Why? Because the government had a legitimate, non-speech-related reason for criminalizing his behavior. True, O'Brien burned his card to express an opinion. True, even though O'Brien's opinion was expressed through conduct, some forms of conduct *can* be classified as speech. The Court has been willing to use the First Amendment to protect speech even, on occasion, when that speech comes in the form of expressive conduct—so long as it is designed to communicate the same kind of point of view as a political tract or newspaper headline or stump speech from the courthouse steps.

But O'Brien's Selective Service certificate burning was not only that. It also violated a law that was not designed to interfere with free speech but, rather, to help the government keep track of those young men it would like to send abroad to fight. Some federal legislators may have been pleased that in doing their constitutionally allotted work (raising an army for the national defense, in this instance) they made draft card burning by antiwar critics like O'Brien a little more costly, a little more painful. But that did not change the fact that the law criminalizing flag burning had no legitimate government interest or purpose behind it. Laws against flag burning have as their sole purpose the prohibition of a particularly repellant form of political speech. In the end, the distinction between speech and conduct may not be as crucial as that between speech/conduct violating laws solely designed to prohibit speech and speech/conduct violating laws designed to secure a constitutionally legitimate governmental aim.

ANTHONY CHASE

SPEEDY TRIAL

Although the Sixth Amendment right to a speedy trial is considered to be a fundamental right that applies in both federal and state courts, there are relatively few cases dealing with the topic. It was not until 1972, in the leading case of *Barker v. Wingo*, that the Supreme Court first attempted to establish the standards with which to judge speedy trial claims. An analysis of the right to speedy trial must begin with an analysis of this decision.

In *Barker* the Court pointed out several features of this right that distinguish it from the other procedural rights. First, society's interest in bringing criminal

cases to trial is distinct from the defendant's interests. Delay enhances a defendant's bargaining position and for a defendant on pretrial release, the delay increases the risk of reoffending. Second, being denied a speedy trial does not necessarily disadvantage the defendant. It will benefit the defendant when the delay undermines the state's case as, for example, when a prosecution witness dies, making it a common defense tactic. Third, the speedy trial right is more vague than other procedural rights in the sense that it is "impossible to determine with precision" when it has been violated. Finally, compared with other procedural violations, such as the denial of right to counsel where the remedy would be a new trial, the *only* possible remedy for a violation—dismissal of the criminal charges—is quite drastic.

The Court considered, but rejected, two competing approaches. Establishing a specific period of time, such as six months, was rejected as a constitutional standard, because the right cannot be quantified, although the Court noted that this rule-making approach is appropriate for legislatures and state courts. At the same time, the Court rejected a "demand waiver" approach in which the defendant was obligated to demand a trial and failure to do so constitutes a waiver of the delay. The Court was unwilling to permit the waiver of a fundamental right through inaction. Moreover, inasmuch as a speedy trial is the government's responsibility, it was inappropriate to put on the defendant the entire burden of demanding one. Having rejected these approaches, the Court went on to establish a balancing test.

In each case the Court should consider four factors, none of which is a necessary or sufficient condition to finding a speedy trial violation. The first factor is the *length of delay*. The length of time that must pass before the delay is considered problematic depends on the circumstances, including the nature of the crime. The more complex a case is the more delay can be expected. The second factor is the reason for the delay. The prosecutor's intentional delay for the purpose of pressuring a defendant not on pretrial release to plead guilty, for example, should weigh heavily against the state. A more neutral reason such as crowded court dockets should be given less weight, but in light of the government's responsibility to provide a speedy trial, should still be considered. Some reasons, such as the illness of a necessary witness should excuse some amount of delay. Although the Court decided not to make a speedy trial violation depend solely on whether the defendant made a demand for a trial, the Court found that a demand was sufficiently relevant to make it the third factor. The defendant's demand for a trial should weigh heavily

in favor of finding a speedy trial violation. The failure to demand a trial will make it difficult for a defendant to successfully claim a speedy trial violation. The fourth factor is the matter of prejudice or harm to the defendant that results from any delay. The most serious prejudice is found in cases where the delay undermines the defendant's case. But it is also found where the defendant is incarcerated during the delay and where mental and emotional stress and other problems result from the delay.

In applying the balancing test to the facts of the *Barker* case the Court found that the delay was substantial: more than five years elapsed between Barker's arrest and trial. However, only a small portion of this delay could be classified as justifiable. Balanced against the substantial delay and its problematic justification, the Court found two factors, prejudice and demand, weighed more heavily in the government's favor. Barker was incarcerated for ten months, only small portion of the five-year period, and there was no evidence that the delay otherwise resulted in prejudice. Most important was the fact that Barker's lawyer failed to demand a trial until very late in the period, after the government moved for eleven continuances. This suggested that Barker hoped to gain from the delay. In ruling against Barker the Court held that in cases such as this, where the defendant's failure to demand a trial indicates that he did not want one, violation of the speedy trial right would be found only in extraordinary circumstances, something that did not exist in this case.

In the relatively few speedy trial cases decided subsequent to *Barker*, the Court has applied the same balancing test. The only significant modification is found in the 1992 case of *Doggett v. United States*. In this case, which involved a delay of more than eight years between indictment and arrest, the Court held that with a lengthy delay prejudice might be presumed.

In light of the uncertainties with applying the balancing test, most jurisdictions have enacted speedy trial statutes to address the problem of pretrial delay. Typically, these statutes specify that unless the trial must begin within a specified period of time, 180 days, for example, from arrest for formal charges, the criminal charges must be dismissed. The time period set out in these statutes offers the precision that the *Barker* test lacks, but in practice these statutes do not provide most protection for defendants because typically they include an array of excuses for the delay. If the delay is excused under the statute, the defendant's only recourse is to make a speedy trial claim under *Barker*.

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References and Further Reading

- Allen, Darren, Note: *The Constitutional Floor Doctrine and the Right to a Speedy Trial*, Campbell Law Review 26 (2004): 101–122.
- Elmore, Christopher S, Note: *Glover v. State: A Misinterpretation and Misapplication of the Barker Speedy Trial Balancing Test Results in the Weakening of a Criminal Defendant's Right to a Prompt Trial*, Maryland Law Review 62 (2003): 573–598.
- LaFave, Wayne R, Jerold H. Israel, and Nancy J. King. *Criminal Procedure*. 4th ed. St. Paul: Thomson/West, 2004.

Cases and Statutes Cited

- Barker v. Wingo*, 407 U.S. 514 (1972)
- Doggett v. United States*, 505 U.S. 647 (1992)
- Klopper v. North Carolina*, 386 U.S. 213 (1967).
- United States Constitution, Amendment VI

See also **Bill of Rights: Structure**

SPYING ON CITIZENS

The United States government has long spied on its own citizens. Since World War I, multiple government agencies have collected information on citizens through secretive means. The methods have evolved over time, often incorporating newly developed technologies; however, a singular pattern has emerged in which governmental surveillance, sometimes authorized directly by the president, has expanded during times of perceived danger. Only after the discovery of large-scale operations has Congress placed restrictions on the powers of executive agencies to spy on American citizens, while presidents have continued to authorize new expansions of surveillance.

During World War I, Attorney General Thomas Gregory appealed to the public for information on disloyalty. The Justice Department received a flood of reports and volunteer organizations, such as the American Protective League and the Boy Spies of America, were formed to encourage citizen surveillance. The Federal Bureau of Investigation (FBI) first became involved in surveillance after the Bolshevik revolution. Attorney General A. Mitchell Palmer instructed J. Edgar Hoover to create an index tracking radicals. Hoover's list of more than 200,000 suspected radicals was used during the "Palmer raids" in which thousands of leftists were arrested, with more than 3,000 deported. However, in 1924, Attorney General Harlan Fiske Stone ordered the FBI to cease investigating individuals because of their political activities. Stone's order was reversed by President Franklin Roosevelt in a secret 1936 directive. The FBI began

collecting information on both communists and fascists using undercover agents and informants with the aim of identifying individuals who should be detained to prevent espionage during the coming World War II.

The FBI's interest in Communists only intensified after World War II. In 1954, Attorney General Brownell provided the FBI with broad authorization to use microphones to spy on possible foreign agents, saboteurs, and subversives. Operating without warrants, the FBI, along with the Central Intelligence Agency (CIA), also opened and photographed hundreds of thousands of items of personal mail moving within the United States in twelve different programs conducted between 1940 and 1973. Illegal FBI searches, surveillance, and wiretapping were widespread, targeting the Party, other organizations, and individuals. The FBI often did not obtain warrants, even where obtainable, because its primary objective was the development of intelligence about subversive groups and individuals rather than criminal trials.

The FBI also collected intelligence on suspected communists from former communists, many of whom were on the government payroll, and dispatched undercover agents and paid informers to infiltrate Party meetings. COINTELPRO, an acronym for Counter Intelligence Program, began in 1956 with a focus on the Communist Party and combined surveillance with tactics intended to disrupt target organizations by spreading misinformation, provoking illegal acts, and sowing distrust among members. COINTELPRO was later expanded to target groups as diverse as the Ku Klux Klan, the Socialist Workers Party, Students for a Democratic Society (SDS), and the Black Panther Party. One operation placed Martin Luther King, Jr., under close surveillance on the justification that he was influenced by several alleged communists in his organization. King's home and office telephones were wiretapped, and the FBI placed microphones in King's hotel and motel rooms. Tapes of King's encounters with female admirers were prepared for delivery to King's wife, and tapes of his discussions with advisers were sent to his office to create paranoia. COINTELPRO was ended in 1971 after a burglary at an FBI office revealed many of its operations.

The C.I.A. and the U.S. Army also conducted domestic surveillance during the Vietnam War. The CIA's most extensive effort, entitled CHAOS, ran from 1967 to 1974; it compiled and analyzed information regarding foreign influence on American protest movements, including, but not limited to, the Black Power and anti-war movements. CHAOS also monitored the overseas movements of many Americans at the request of the FBI. In Project MERRIMAC,

CIA agents infiltrated Washington area peace and black activist groups, while Project RESISTANCE compiled information about radical groups around the country. Both programs had stated purpose of identifying threats to CIA installations and activities.

The U.S. Army began intelligence activities in the South in 1963, concerned that it would be asked to calm civil unrest in the region. Later, the Army expanded its intelligence operations to urban areas where military force might be required to end riots. By the late 1960s, Army intelligence had penetrated many major protest demonstrations and dissident groups in virtually every American city, placing an estimated 100,000 individuals under surveillance. The Army's intelligence reports were sometimes distributed to federal and local law enforcement agencies until 1971, when press reports exposed the program, leading to a congressional investigation.

The modern legal framework for domestic surveillance began in 1967, when the Supreme Court found that a warrant was needed for wiretaps in *Katz v. United States*. In 1968, Congress passed the Omnibus Crime Control and Safe Streets Act, which prohibited domestic eavesdropping without a warrant while recognizing the "constitutional power of the President" to engage in warrantless surveillance of foreign sources and for national security purposes. In *United States v. United States District Court* (1972), the Supreme Court found that the Fourth Amendment required a warrant for all searches, including electronic surveillance, performed for domestic intelligence purposes. The Privacy Act, passed in 1974, prohibited all federal agencies, including the military, from maintaining records regarding individuals' political and free speech activities.

In 1974, Seymour Hersh of the *New York Times* published a lengthy article detailing the CIA's collection information on U.S. citizens' political activities and covert operations abroad. Sensitized by the Watergate scandal, which had begun with a White House-authorized illegal search of Democratic Party headquarters, the Senate formed the Select Committee to Study Governmental Operations with Respect to Intelligence Activities, better known as the Church Committee after its chairman, Frank Church of Idaho. Holding hearings in 1975 and 1976, the Church Committee published fourteen lengthy reports covering a broad array of activities by intelligence agencies both within the United States and abroad including assassinations of foreign leaders.

In response to the Church Committee, President Ford ordered the CIA to cease surveillance of American's domestic activities and prohibited National Security Agency interceptions of communications beginning or ending in the United States. Ford's

attorney general, Edward Levi, instituted guidelines restricting FBI investigations to criminal conduct and specifically prohibiting the agency from monitoring organizations or individuals' political activities. In 1978, Congress passed the Foreign Intelligence Surveillance Act, or FISA. FISA created a special court which, operating in secret, would hear government petitions for warrants to engage in surveillance against foreign governments or their agents within the United States; a special appellate court would also hear any appeals when warrants were denied. Those warrants do not have to show "probable cause" that a crime is being committed but rather that the target is the agent of a foreign power. FISA closed the loophole for, under the 1968 Crime Control Act, allowing for presidential discretion to allow domestic intelligence operations without warrants.

After the terrorist attacks of September 11, 2001, President George W. Bush and the Congress moved to expand legal authority for surveillance. The USA PATRIOT Act (2001) eliminating old barriers between information gleaned from domestic and foreign intelligence operations under the original FISA statute by allowing FISA warrants in cases where foreign intelligence is not the primary purpose, so long as there is some relationship to foreign intelligence, or where the target is a nonresident alien. Attorney General John Ashcroft also rescinded the Levi guidelines that had prohibited FBI investigation of political activities.

Since the 2001 attacks, government agencies' attempts to use computer algorithms to search through multiple databases for patterns of suspicious behavior have drawn protest. The technique, also called "data mining," reverses the usual presumptions for searches under the Fourth Amendment, looking through large data set patterns that might incriminate otherwise unsuspected individuals. The Defense Department envisioned one such program, named Total Information Awareness or TIA, which would have used both government databases and many of the large commercial databases, such as credit histories and mailing lists. Both the program's location in the military and its seeming comprehensiveness alarmed many Americans, and Congress prohibited any further spending in 2003. Another program, the Multi-State Anti-Terrorism Information Exchange, or MATRIX, was funded by the federal departments of Justice and Homeland Security but was led by the Florida Department of Law Enforcement. The project envisioned the pooling of the collective databases held by state law enforcement agencies for purposes of identifying patterns of criminal activity. Although it was officially limited to criminal investigative purposes and only used already available government

databases, MATRIX became controversial when it received publicity in 2003. Officials in participating states withdrew from the program, and MATRIX was officially terminated in 2005.

The Bush administration has also encouraged Americans to report on each other. In 2002, Attorney General Ashcroft proposed a Terrorism Information and Prevention System (TIPS) that would train gas and electric meter readers, mail carriers, cab drivers, as well as private citizens to identify suspicious behavior and report it to the authorities. TIPS was abandoned after congressional reaction. A Pentagon office, the Counterintelligence Field Activity, or CIFA, has continued to collect information from civilians and military personnel who suspect others to be potential terrorists. CIFA's system grew from an Air Force program known as "Eagle Eyes" that recruited military personnel, family members, military contractors, and community groups to report suspicious activity near Air Force bases.

In December 2005, the *New York Times* reported on a secret Bush administration program that had used the National Security Agency (NSA) to eavesdrop on communications between individuals in the United States and foreign countries as part of the War on Terrorism. Part of the Defense Department, the NSA's operations, had been explicitly limited to foreign surveillance only. The Bush administration defended the operation as necessary and claimed two legal justifications.

The first justification was the president's constitutional authority as commander-in-chief and obligation to defend the nation from enemy attack. This justification is problematic given Congress's ability to establish law and its purposeful limitation of executive power in the 1968 Crime Control Act and FISA. However, language in the only published appellate opinion by the Foreign Intelligence Surveillance Court of Review, *In re Sealed Case* (2002), speaks of an assumption that the president has "inherent authority to conduct warrantless searches to obtain foreign intelligence information."

The second justification was drawn from congressional passage of the Authorization for Use of Military Force (AUMF) (2001) that preceded U.S. operations in Afghanistan. The AUMF included language that empowered the president to "use all necessary and appropriate force" against terrorists and their sponsors. The administration's broad interpretation of the AUMF has not been shared by the Supreme Court. In *Hamdi v. Rumsfeld* (2004), a case involving indefinite military detention of a U.S. citizen without legal representation, the Supreme Court considered the administration's argument that the AUMF authorized such detentions and declared

that a "state of war is not a blank check for the President."

Congressional investigations and legal challenges to the Bush surveillance program were pending at the time this article went to press.

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References and Further Reading

- Bazan, Elizabeth B., and Jennifer K. Elsea. *Presidential Authority to Conduct Warrantless Electronic Surveillance to Gather Foreign Intelligence Information*. Washington, D.C.: Congressional Research Service, 2006.
- Theoharis, Athan. *Spying on Americans: Political Surveillance from Hoover to the Huston Plan*. Philadelphia: Temple University Press, 1978.

Cases and Statutes Cited

- Authorization for Use of Military Force, 115 Stat. 224 (2001)
- Foreign Intelligence Surveillance Act, 92 Stat. 1796 (1978)
- Hamdi v. Rumsfeld*, 542 U.S. 507 (2004)
- In re Sealed Case*, 310 F.3d 717 (U.S. Foreign Intell. Surveillance Ct. Rev. 2002)
- Katz v. United States*, 389 U.S. 347 (1967)
- Omnibus Crime Control and Safe Streets Act, 82 Stat. 211 (1968)
- Privacy Act, 88 Stat. 1896 (1974)
- United States v. United States District Court*, 407 U.S. 297 (1972)

STANDING IN FREE SPEECH CASES

Article III of the Constitution limits the jurisdiction of federal courts to "cases and controversies." Because of this limit, a litigant must have standing to challenge government conduct. That is, the litigant must show how government conduct directly harms him or her (*Lujan v. Defenders of Wildlife*). Excluding some narrow conceptions, a plaintiff may not litigate the interests of parties not before the court. Justice White wrote in *Broadrick v. Oklahoma*: "Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court. A closely related principle is that constitutional rights are personal and may not be asserted vicariously."

Thus, when a person raises a constitutional objection to some law, he may raise it only as it applies to him or her. There is an important exception to this rule.

In free speech cases, a party may seek to vindicate the rights of parties not before the court: that is, the

litigant has third-party standing. Even if the law could be constitutionally applied to the party before the court, the law may nonetheless be struck down if it could be unconstitutionally applied to others. The rationale for the free speech exception is that speech might be chilled, and free speech is delicate and needs breathing room. In *Broadrick v. Oklahoma*, Justice White wrote “that facial overbreadth adjudication is an exception to our traditional rules of practice.”

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Cases and Statutes Cited

Broadrick v. Oklahoma, 413 U.S. 601, 610 (1973)

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992)

See also **Overbreadth Doctrine; Vagueness Doctrine**

STANLEY v. GEORGIA, 394 U.S. 557 (1969)

The First Amendment protects freedom of speech, yet the Supreme Court has stated in cases such as in *Miller v. California* and *Roth v. United States* that obscenity and obscene materials are not speech and therefore may be banned and made illegal. However, may the government make the mere possession of obscenity in the privacy of one’s own home illegal? In *Stanley v. Georgia*, the Court said no.

In general, the First Amendment guarantees that neither Congress nor state and local governments via the Fourteenth Amendment may infringe or place limits on free speech. Yet what free speech is exactly is not always clear. Over time, the Court has sought to clarify what types of speech the Constitution protects, with political utterances and statements given the most protection, and other types of communication, such as commercial advertising, given less. Yet the Supreme Court has also declared that some types of communication are not protected by the First Amendment, including blackmail, extortion, and, most importantly, obscene materials. Although there is some disagreement regarding exactly what constitutes obscenity, cases such as *Miller v. California* and *Roth v. United States* have both outlined ways to determine what is obscene and declared that such material is not protected under the First Amendment.

At the same time that the Constitution has exempted obscenity from First Amendment protection, the Court has also stated that the right to privacy is a fundamental right. In cases such as *Griswold v. Connecticut* and *Mapp v. Ohio*, the Court has declared, as Justice Louis Brandeis once stated in

Olmstead v. United States, that we have a “right to be left alone.” How can this constitutional right to be left alone be reconciled with the criminalization of obscenity?

In *Stanley v. Georgia*, Robert Stanley’s house was subject to a valid search, with a warrant having been issued to look for evidence of illegal bookmaking. During the search, police discovered three reels of films that they believed to be obscene. He was charged with violation of a state law making it illegal to possess obscene materials. Stanley challenged the law, claiming that its application to the private possession of obscene materials violated his First Amendment rights. The Supreme Court agreed.

Writing for the majority in a nine-to-zero decision, Justice Thurgood Marshall first noted that past decisions made it clear that obscenity was not protected under the First Amendment. Yet citing cases such as *Griswold v. Connecticut*, which had upheld the right of married couples to receive information about birth control, he also stated that individuals have a constitutional right to receive information and ideas, regardless of their social worth or value. In addition, the Court also declared that the Constitution protects a right to privacy in one’s home. Together then, the right to receive information and the right to privacy outweighed any interest the state of Georgia had in making the private possession in one’s home of obscenity illegal.

The Court rejected arguments by the state that obscenity corrupts individuals, asserting that this claim is nothing more than arguing that the government has the right to control the moral content of what people think. For Marshall, the First Amendment unambiguously protects the right of individuals to think what they want, regardless of its value. Finally, the Court also rejected claims that the state could prosecute the private possession of obscenity on the claim that it leads to sexual violence or crimes. Marshall pointed out that there was no proof for this claim and that if it does lead to sex crimes, then criminal punishment was the solution.

Stanley v. Georgia was an important decision rejecting censorship and affirming the right to privacy in the home. However, the decision was limited in future application. In *Bowers v. Hardwick*, the Court upheld a Georgia law that criminalized sodomy among consenting adults of the same sex that takes place in the home, although that decision was overruled in *Lawrence v. Texas*. However, in *Osborne v. Ohio*, the Court ruled that the mere private possession of child pornography in the home was not protected under *Stanley*.

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References and Further Reading

Hentoff, Nat. *Free Speech for Me—But Not for Thee*. New York: Harper Perennial, 1993.

Cases and Statutes Cited

Bowers v. Hardwick, 478 U.S. 186 (1986)
Griswold v. Connecticut, 381 U.S. 479 (1965)
Lawrence v. Texas, 539 U.S. 558 (2003)
Mapp v. Ohio, 367 U.S. 643 (1961)
Miller v. California, 413 U.S. 15 (1973)
Olmstead v. United States, 277 U.S. 438 (1928)
Roth v. United States, 354 U.S. 476 (1957)

See also **Freedom of Speech: Modern Period (1917–Present); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Miller v. California*, 413 U.S. 15 (1973); Obscenity; *Olmstead v. United States*, 277 U.S. 438 (1928); *Osbourne v. Ohio*, 495 U.S. 103 (1990); Right of Privacy**

STANTON, ELIZABETH CADY (1815–1902)

Elizabeth Cady Stanton was the chief feminist and legal philosopher of the nineteenth-century women's movement. Her work catalyzed the demand for civil, political, and social rights for women. Although best known today for her work on behalf of women's suffrage, Stanton advanced a broad platform of civil liberties for women as individuals and citizens, which she argued were distinct from their incidental relations of wife and mother. She sought equal rights for women in marriage and divorce, employment, and education. In addition, she advocated for the reciprocal obligations of citizenship for women, seeking the right of women to sit on juries and to own the marital property for which they were taxed. The vote, for Stanton, was simply one mechanism to obtain a voice for women with which to alter the existing legal and social structure.

Stanton's holistic approach to legal and social liberties grew out of her own experiences. Born on November 12, 1815, in Johnstown, New York, Stanton was the daughter of lawyer and jurist Daniel Cady. Under the tutelage of her father and the law apprentices he trained, Stanton obtained a de facto legal education. In her father's law office, she experienced the injustices of women clients under the law of coverture that denied any legal existence or rights to married women. Educated more than most women of the day, Elizabeth Cady continued to study law with her father until the age of twenty-five when she married abolitionist and lawyer, Henry B. Stanton. Elizabeth had seven children, five boys and two girls, for whom she assumed primary parenting responsibility, because Henry worked away from home for most

of their marriage. Stanton dabbled in temperance and abolition reforms, but always as they related to her prime concern of women's rights. She was a brilliant, witty, and engaging woman who used speeches, political conventions, and written articles to advance women's rights. Her newspaper, *The Revolution*, published from 1869 to 1871, and her eleven years as a lecturer on a national tour, made Stanton a household name as the leader of the women's rights movement.

Stanton's first and most famous act occurred in July 1848 at Seneca Falls, New York, where she organized the first convention on women's rights and drafted its *Declaration of Sentiments* for women's rights. Analogizing to the Declaration of Independence and playing on the accepted rhetoric of the time of women as sentimental rather than rational creatures, Stanton drafted a legal text calling for systemic legal change to break down the patriarchal structure and create civil liberties for women. Her calls for equality in marriage and divorce, property rights for married women, and access to education and employment were unanimously accepted by the convention; only the demand for the vote for women was seen as extreme and even laughable.

Three years later, Stanton teamed up with Susan B. Anthony and together they promoted the right of women's suffrage. After the Civil War, Stanton and Anthony's demand for the vote for women became more radical as they opposed the Fifteenth Amendment enfranchising African-American men. Their opposition stemmed from the passage of the Fourteenth Amendment and its inclusion of language restricting the new civil rights to "male citizens." Stanton rebelled against this "aristocracy of sex" and the betrayal by abolitionist colleagues who had previously worked together for equal suffrage regardless of race or sex. Stanton's opposition to the Fifteenth Amendment, sometimes couched in vitriolic and racist language, alienated her abolitionist colleagues and led, in part, to the division of the women's political movement into Lucy Stone's conservative American Woman Suffrage Association and Stanton and Anthony's more radical National Woman Suffrage Association.

Although the women's movement narrowed in on the right to vote, Elizabeth Cady Stanton continued her broader social agenda of reforming the rights of women within the family. She used arguments from the realm of political liberty and religious tolerance to make the case for individual autonomy and choice in private life. The true focus of reform, she said, was on the marriage relation. Stanton attacked the denial of married women's property rights that were an important component of full citizenship rights in the United States. She advocated for a partnership theory of

marriage that encompassed marital property rights, the elimination of dower, and access to divorce. Stanton saw divorce as the escape route for women from marriages dominated by intemperance, domestic violence, and patriarchy, and thus argued for reform of divorce laws to permit no-fault divorce for the incompatibility of the partners. In the late nineteenth century, Stanton actively opposed the attempts at a constitutional marriage amendment that would have allowed for a national law restricting the right of divorce. In addition, Stanton attacked the symbolic denial of women's liberties in marriage, calling for women to retain their own name at marriage and to refuse to promise "to obey" their husbands in the wedding ceremony. Although Stanton argued for equality of women in the marriage partnership, she focused on a maternal difference to argue for a mother's preference in the custody rights of children on separation or divorce of the parents. At the time, children were legally the property of the father, who was awarded custody of the children regardless of the circumstances of the separation.

In 1889, after decades of feminist agitation, Stanton confronted the core issue that seemed to be the stumbling block for all reforms she sought—the then-accepted biblical commands of women's subordination. Stanton challenged these patriarchal notions by rewriting the Bible with a feminist lens to reveal a Christian theology grounded in equality of genders and individual empowerment. It was this perceived attack on the Bible that resulted in Stanton's ultimate ostracism from the women's movement and from history.

Elizabeth Cady Stanton's work foreshadowed the legal rights that women would ultimately obtain by the late twentieth century. Stanton's legacy is the holistic vision of civil rights as a combination of the norms of law, society, and religion as necessary to achieve individual liberty and autonomy for women.

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References and Further Reading

- Clark, Elizabeth B., *Self-Ownership and the Political Theory of Elizabeth Cady Stanton*, Connecticut Law Review 21 (1989): 4: 905–941.
- Gordon, Ann D., ed. *The Selected Papers of Elizabeth Cady Stanton and Susan B. Anthony*, Vols. I–III. New Brunswick, NJ: Rutgers University Press, 1997–2003.
- Griffith, Elisabeth. *In Her Own Right: The Life of Elizabeth Cady Stanton*. New York: Oxford Univ. Press, 1984.
- Stanton, Elizabeth Cady. *Eighty Years and More: Reminiscences, 1815–1897 (1898)*. Amherst, NY: Humanity Books, 2002.
- . *The Woman's Bible (1895)*. Boston: Northeastern University Press, 1993.

STAPLES v. UNITED STATES, 511 U.S. 600 (1994)

———, and Susan B. Anthony and Matilda Joselyn Gage, eds. *History of Woman Suffrage*, Vols. I–III. Rochester, NY: 1881–1886.

See also **Anthony, Susan B.; Bible in American Law; Voting Rights (Compound)**

STAPLES v. UNITED STATES, 511 U.S. 600 (1994)

Harold Staples had been found in possession of an assault rifle that as manufactured had been only capable of firing one bullet with each separate pull of the trigger. However, at the time of his arrest, the firing mechanism had been modified, with the result that the weapon was now capable of full automatic fire. Staples was charged with violating 26 U.S.C. § 5861(d) of the National Firearm Act, which provides that it is unlawful for any person "to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record." Pursuant to 26 U.S.C. § 5845(a)(6) a "firearm" is defined as, among others, a "machine gun" and pursuant to 26 U.S.C. § 5845(b) a "machine gun" is defined as "any weapon which shoots . . . automatically more than one shot . . . by a single function of the trigger . . ."

At his trial, Staples argued that he was unaware of the modification and that he had never fired the rifle automatically while in his possession. Staples contended that his ignorance of the automatic firing capabilities of the rifle protected him from criminal liability for not registering his rifle as a "firearm." Staples requested that the district court instruct the jury that to convict him under Section 5861(d), the government must prove beyond a reasonable doubt that he knew that the weapon fell within the statutory definition of a machine gun. The district court denied his request, and he appealed.

The Supreme Court held that, before an individual can be convicted of possessing an unregistered firearm under Section 5861(d), where it was alleged that the "firearm" in question was a machine gun under the statute, the government would have to prove beyond a reasonable doubt that the defendant knew that the weapon in question had the peculiar characteristics that brought it within the statutory definition of a "machine gun."

The Court explained that given the silence of § 5861(d) concerning a *mens rea* element requiring that an accused know the facts making the accused's conduct illegal, the role of the common law favoring a requirement of *mens rea* should govern the interpretation of that section in this case. The Court noted that the severe potential penalty involved in violation

of § 5861(d) (ten years) confirmed that the Court's reading of the statute is not involving an attempt by Congress to eliminate a *mens rea* requirement.

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See also **Right to Bear Arms (II)**; *United States v. Miller*, 425 U.S. 435 (1976)

STARE DECISIS

Stare decisis, literally, "to rest upon what has been decided." *Stare decisis* describes the English and American system of adherence to precedent. When an American appellate court reaches a decision in a dispute, it publishes its report of the decision and its reasons for the decision. Later, in cases that have similar facts and similar disputes, the appellate court will follow and apply the rule of the earlier case to reach a like decision.

The principle of *stare decisis*, therefore, acts as a check on arbitrary judicial decisions. Although this protects individual rights against arbitrariness, strict adherence to an unjust precedent may abridge individual rights. This was the case between 1896 and 1954, when United States courts adhered to the "separate but equal" precedent of *Plessy v. Ferguson* (1896) to uphold the legal and customary practices of racial segregation. In *Brown v. Board of Education*, the Court overruled *Plessy*, declining to follow the principle of *stare decisis*. *Plessy*'s long life shows the strength of *stare decisis*; *Brown* shows that it is not an inflexible rule, but a general principle that can be overcome for compelling reasons.

Nevertheless, *stare decisis* ensures a degree of fairness. The doctrine of equal protection of the laws teaches that the law ought to treat people in like circumstances in the same way. In a legal dispute, parties may expect to be treated like those in the earlier case by reason of the doctrine of *stare decisis*.

Finally, *stare decisis* advances the values of standardization and predictability of the law. When an appellate court describes a rule or interprets legislation, its decision educates the public about the law's requirements and prohibitions. *Stare decisis* permits an individual or organization to rely on the decision in their everyday affairs, confident that they are obeying the law.

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References and Further Reading

Allen, Carlton K. *Law in the Making*, 7th ed. Oxford: Clarendon Press, 1964.
Cardozo, Benjamin N. *The Nature of the Judicial Process*. New Haven: Yale University Press, 1949.

Douglas, William O., *Stare Decisis*, Columbia Law Review 49 (1949): 6: 735–758.

Posner, Richard A., and William M. Landes, *Legal Precedent: A Theoretical and Empirical Analysis*, Journal of Law & Economics 19 (1976): 2: 249–307.

Pound, Roscoe, *What of Stare Decisis?* Fordham Law Review 10 (1941): 1: 1–13.

Radin, Max, *Case Law and Stare Decisis, Concerning Präjudizienrecht in Amerika*, Columbia Law Review, 33 (1933): 1: 199–212.

Schauer, Frederick, *Precedent*, Stanford Law Review 39 (1987): 3: 571–605.

Cases and Statutes Cited

Plessy v. Ferguson, 163 U.S. 537 (1896)

See also **Due Process; Judicial Review**

STATE ACTION DOCTRINE

With one exception, the provisions of the United States Constitution, including its amendments, apply to branches, departments, agencies, and officials of *government* and not to *private* individuals, groups, or organizations. (The exception is the Thirteenth Amendment, which simply outlaws slavery in the United States and its territories.) The primary, if not sole, purpose of any constitution is to create, organize, empower, and limit a government, and to the extent that private persons/groups/organizations need to be aided or controlled, a government, once formed by a constitution, can do that through statutes and other kinds of civil laws. If, moreover, the provisions in the U.S. Constitution that restrict the government were interpreted as applying to private entities, that would give the courts in the United States a significant amount of power over private individuals, groups, and organizations, because the courts are responsible for enforcing the Constitution. To limit its own power, among other reasons, the Supreme Court has enunciated the State Action Doctrine, which says that the Constitution, except for the Thirteenth Amendment, applies only to government and not to private entities.

The first case in which the Court explicitly stated the State Action Doctrine was the *Civil Rights Cases* (1883). The issue was whether Congress could pass a law making it a crime for public accommodations, for example, hotels, to discriminate against persons because of their race. Because the Fourteenth Amendment gives it the power to enforce the clause that prohibits states from denying persons "equal protection of the laws," Congress thought it could pass an antidiscrimination law that applies to private businesses and organizations. The Court, however, said

that it could not, because the equal protection clause limits only state governments.

Since then, the Court has consistently adhered to the State Action Doctrine but many times has had to address the issue of what distinguishes government action from private action. Even before deciding the *Civil Rights Cases*, the Court had addressed that issue in *Ex parte Virginia* (1880) and held that even *unauthorized* actions by officials and agencies of government are state actions. In later cases, the Court held that what might seem to be private action classified as state action if it is officially encouraged by the government, located on public property, receives significant public funding or assistance, is heavily regulated by the government, or performs a function normally performed by government. Just how much government involvement is enough to constitute state action has varied from case to case.

Perhaps the most extreme and controversial expansion of the meaning of state action occurred in *Shelley v. Kraemer* (1948), which held that judicial enforcement of private contracts, including restrictive covenants (private contracts not to sell houses to blacks), is state action and, therefore, violates the Fourteenth Amendment's equal protection clause. The decision implied that private persons cannot rely on government agencies, such as the police, to enforce their actions if, were they government actions, they would violate the Constitution. The decision seemed to restrict the freedom of association protected by the First Amendment.

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References and Further Reading

- Buchanan, G. Sidney, *A Conceptual History of the State Action Doctrine: The Search for Governmental Responsibility*, Houston Law Review, Pt. I, 34 (Summer 1997): 333–424; Pt. II, 34 (Fall 1997): 665–775.
- Kauper, Paul G. "Private and Governmental Actions: Fluid Concepts." In *Civil Liberties and the Constitution*, Chap. 4, Ann Arbor, MI: University of Michigan Press, 1966, pp. 127–166.
- Rotunda, Ronald D., and John E. Nowak. "State Action." in *Treatise on Constitutional Law: Substance and Procedure*, Vol. 2, Chap. 16. St. Paul, Minn.: West Group, 1999, pp. 758–821.

Cases and Statutes Cited

- Civil Rights Cases, 109 U.S. 3 (1883)
Ex parte Virginia, 100 U.S. 339 (1880)
Shelley v. Kraemer, 334 U.S. 1 (1948)

See also *Amalgamated Food Employees Union v. Logan Valley Plaza*, 391 U.S. 308 (1968); *Company Towns and Freedom of Speech*; *Lloyd Corporation v. Tanner*, 407 U.S. 551 (1972); *Restrictive Covenants*

STATE AID TO RELIGIOUS SCHOOLS

Public financial assistance to religious schools represents one of the thornier and longer-standing controversies in First Amendment law. Traditionally, the school funding issue has involved requests by Catholic parochial schools for a share of the state public school fund. During the nineteenth century, the controversy over funding parochial schools often pitted Protestant nativists against Catholic immigrants and occasionally resulted in violence. As government involvement in education grew in the twentieth century, Catholic schools increasingly participated in federal and state supplemental funding programs. At the same time that Catholic schooling was becoming more mainstream, there was an expansion in Protestant fundamentalist, Orthodox Jewish, and Muslim religious schools, which also put demands on state assistance.

Since 1947, the United States Supreme Court has issued approximately two dozen decisions on the constitutionality of public funding of religious schools. Over the years, the Supreme Court's approach to the establishment clause's prohibition on the funding of religious institutions has evolved from a separationist "no-aid" position to one that is more accommodating of religious participation in funding programs. More recently, the Supreme Court has upheld the constitutionality of "vouchers" for private school funding. Finally, the Court has consistently distinguished between funding programs that aid religious elementary/secondary schools and religious colleges, finding few constitutional restrictions with aid to the latter institutions.

Background

At the time of the nation's founding, "public" education was essentially nonexistent. Free education was available in a few northeastern cities, usually under a joint public-private-religious operation that involved both public and private financial support. Outside of the northeast, most schooling took place in privately funded church schools that emphasized religious instruction and limited enrollment to children of that particular faith. Early educational reformers such as Benjamin Franklin, Thomas Jefferson, Benjamin Rush, Daniel Webster, and Thomas Knox began calling for universal education with a more secular-based curriculum. In the early nineteenth century, educational reformers created free "common schools," often modeled after the British Lancasterian system, that offered a nonsectarian curriculum designed to attract children of all faiths and backgrounds. In

reality, the early common schools had a Protestant orientation, reflecting the background and biases of the educational leaders.

Initially, the early common schools competed for public assistance with denominational schools. As the common schools grew, they were able to convince public officials to defund the competing religious schools. One of the first controversies occurred in New York City in 1822 where the Free School Society opposed a funding request by a Baptist school. In addition to touting the superiority of its nonsectarian program that was accessible to children of all faiths and backgrounds, the Society claimed that funding of religious schools violated notions of separation of church and state. After considering the Society's memorials and those of several churches and officials, the New York Common Council in 1824 recommended the state legislature discontinue funding for religious schools, opining "whether it is not a violation of a fundamental principle . . . to allow the funds of the State, raised by a tax on the citizens, designed for civil purposes, to be subject to the control of any religious corporation." The following year, the Common Council voted to end the funding of religious schools.

The primary conflict over whether to fund religious schools arose within the context of Catholic parochial schools. With the rise in Irish immigration in the 1830s and 1840s, Church leaders began to create parochial schools as an alternative to the common schools with their Protestant-oriented curriculum and worship exercises. In 1841, New York Catholic Bishop John Hughes, with the support of Governor William H. Seward, petitioned the New York legislature requesting that a portion of the school monies be allocated to his parochial schools. Opposition this time came not only from the Public School Society and Protestant churches—which insisted that only nonsectarian schools should receive public funding—but also from nativist groups that had sprung up in response to the recent Catholic immigration. Despite the support of Seward and State School Superintendent John Spencer, the New York legislature enacted a law in 1842 that prohibited the granting of public funds to any school where "religious sectarian doctrine or tenet shall be taught, inculcated, or practiced." The legislature amended the law in 1843 to prohibit public funds from going to schools "in which any book or books containing sectarian compositions shall be used," thereby inserting into the public policy the notion of nonsectarian education. The pattern of New York was replicated in other places along the eastern seaboard, most notably in Massachusetts, where in 1827 the legislature enacted a law making it unlawful to teach the doctrines

of particular sects in the common schools of Massachusetts, effectively ending public funding of religious schools.

Despite such state laws and constitutional provisions, the funding controversy or "School Question" simmered throughout the nineteenth century as sympathetic elected officials sought to respond to the requests of the growing Catholic immigrant population. At the same time, public school teachers and officials occasionally punished or expelled Catholic students who refused to participate in the nonsectarian exercises, only heightening tension over the issue. In 1875, the controversy came to a head as President Ulysses S. Grant, hoping to secure the Republican nomination for a third term, proposed an amendment to the U.S. Constitution to prohibit the diversion of public funds for parochial school education while requiring universal public education. The idea was championed by Congressman James G. Blaine (R-ME), also a presidential hopeful, who introduced a more modest amendment in Congress in December 1875 (prohibiting only the diversion of monies from state school funds). The School Question became a leading issue in the 1876 campaign, with Republicans seeking to appeal to Protestant and nativist groups by highlighting traditional Democratic ties to the Catholic and immigrant populations. Even though a version of the "Blaine Amendment" passed the House of Representatives, it failed in August 1876 to garner the necessary two-thirds vote in the Senate. In addition to charges that the proposed amendment was anti-Catholic, many people were concerned that the amendment would increase federal involvement in local education. On the other side, many supporters of the amendment sincerely believed that public funding of religious schools would threaten the financial security of public schools and violate the constitutional principle of church-state separation. Later attempts to pass a similar amendment also failed in Congress (the "Blair Amendment" of 1888). However, after 1876, several states enacted their own constitutional provisions prohibiting funding sectarian schools and institutions.

Modern Developments

Although most states prohibited the public subsidy of religious schools by the early twentieth century, a handful of state legislatures enacted modest programs that supplemented the educational expenses of private and religious schools. In 1930, the U.S. Supreme Court upheld a decision by the Louisiana State Board of Education to furnish free textbooks to

children attending religious schools, declaring that the appropriations benefitted the children, not the schools, and thus were for a public purpose (*Cochran v. Louisiana State Board of Education*). In 1947, the Court first considered the constitutionality of a funding program under the establishment clause (*Everson v. Board of Education*). The issue there was the state of New Jersey's reimbursement of transportation costs to parents of parochial school children. Speaking for a slim majority of the justices, Justice Hugo Black wrote in strong terms that: "Neither a state nor the Federal Government . . . can pass laws which aid one religion, aid all religions, or prefer one religion over another No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." Despite this seemingly absolutist language, the Court majority upheld the program on the ground that the establishment clause does not prohibit people from receiving "the benefits of public welfare legislation" because of their religious affiliation.

The *Everson* decision ushered in the modern era of religious funding issues. The question raised by *Everson* was how far state legislatures could go in including religious schools as beneficiaries in supplemental educational funding programs. On the one side, Catholic and libertarian groups lobbied state legislatures to experiment with more funding programs, whereas on the other side, groups opposed to religious school funding such as the National Education Association, the American Civil Liberties Union, the American Jewish Congress, and the newly formed Protestants and Other Americans United for Separation of Church and State challenged the programs in the courts. In 1968, the Supreme Court again upheld the loan of state textbooks to children attending parochial schools, this time under the establishment clause (*Board of Education v. Allen*). Beginning in the 1970s, however, opponents of religious school funding gained the upper hand. Led by attorney Leo Pfeffer of the American Jewish Congress and the Committee for Public Education and Religious Liberty (PEARL), separationists successfully challenged a host of funding programs, including state salary supplements for parochial school teachers of secular subjects (*Lemon v. Kurtzman*, 1971), grants for maintenance and repair of parochial schools (*PEARL v. Nyquist*, 1973), tuition reimbursements and tax credits for parents of parochial school children (*Nyquist*; *Sloan v. Lemon*, 1973), reimbursements for state mandated testing (*Levitt v. PEARL*, 1973), and the loan of instructional equipment and materials to parochial schools (*Meek v. Pittenger*, 1975). The latter decision was highly criticized as the Court struggled to distinguish the loan of

instructional equipment (prohibited) from the loan of textbooks (permitted). In *Meek*, the Court also announced that some religious schools were so "pervasively sectarian"—in that they integrated religion throughout the entire curriculum—that it would be impossible for states to fund the arguably secular functions of the schools.

Between 1975 and 1997, the Supreme Court began to moderate its stance on permissible funding of religious schools. In 1977, the Court reaffirmed the substance of *Meek* but allowed for state-subsidized medical and diagnostic services within parochial schools and therapeutic, guidance, and remedial services for parochial school students conducted off parochial school sites (*Wolman v. Walter*). Three years later, the Court modified its earlier stance by allowing reimbursements for state-mandated and prepared tests given to parochial school students (*PEARL v. Reagan*, 1980). However, in 1985 the Court struck down federal and state programs that sent public school employees into parochial schools to provide supplemental remedial and enrichment courses and paid parochial school employees to teach voluntary enrichment courses after the school day (*Grand Rapids School District v. Ball*; *Aguilar v. Felton*).

By the 1990s, the more conservative Supreme Court appointees of Presidents Nixon and Reagan were having a greater impact on the direction of the Court's establishment clause jurisprudence. In 1993, the high court upheld the constitutionality of a provision of the federally funded Individuals with Disabilities Education Act that allowed a publicly paid sign language interpreter to assist a hearing-impaired student attending a parochial school (*Zobrest v. Catalina Foothills School District*). The most significant shift came, however, in the 1997 case of *Agostini v. Felton*. In *Agostini*, the Court reconsidered its holdings in *Grand Rapids School District v. Ball* and *Aguilar v. Felton*, which had prohibited state-paid employees to enter parochial schools to provide supplemental educational services. Under Title I of the federal Elementary and Secondary Education Act (ESEA), school districts were obligated to provide remedial education services to disadvantaged children, irrespective of the school they attended. However, the *Grand Rapids* and *Aguilar* decisions had forced school districts to offer those services to parochial school students in mobile classrooms off school property, increasing overhead costs. In *Agostini*, the Court took the extraordinary step of reversing portions of its earlier holdings. As Justice Sandra Day O'Connor wrote for the majority, the criteria for determining whether a funding program violated the establishment clause had "significantly changed" over the years. Rather than relying on assumptions that all direct state aid would advance

religion or result in excessive entanglement between church and state, the Court would now look to see whether the aid program results in “government-sponsored indoctrination.” The Court would also look to a program was directed toward religious schools or was generally available to public and non-public beneficiaries alike.

Agostini was a watershed case in the high court’s establishment clause jurisprudence. It dispensed with the general presumption of unconstitutionality of funding programs and replaced it with an emphasis on the neutrality and availability of the benefit flowing under the program. This approach was followed three years later in another case involving the ESEA, which provided computers, educational equipment, and library books to religious schools (*Mitchell v. Helms*, 2000). A four-justice plurality voted to uphold the constitutionality of the program solely on the general availability of the benefit. A two-justice concurrence, written by Justice O’Connor, agreed on the importance of program neutrality but emphasized the additional requirement that the educational items were not diverted for religious activities. The ultimate effect of the holding was that the Court reversed its earlier decisions in *Meek* and *Wolman*.

A second significant strain in the development of the Court’s funding jurisprudence has involved the issue of “private choice.” Under private choice funding programs, such as involving a voucher, the public funds are disbursed to a private third party—usually a parent—who then determines how and where to apply the benefit. Economist Milton Friedman popularized the notion of educational vouchers in the 1950s as a way of expanding educational options and creating competition between public and private schools. Not until the 1970s, however, did the notion of private choice programs gain a following, primarily among Catholic groups who viewed vouchers as a possible exception to the Court’s funding holdings and conservative and libertarian groups interested in breaking the public school “stranglehold” on education. In the 1973 *Nyquist* and *Sloan* decisions, however, the Supreme Court struck down two private choice programs—a tuition reimbursement and a tax credit for tuition expenses—holding that the Court would look more to the ultimate effect of the aid rather than to the mechanism of disbursement: “the fact that aid is disbursed to parents rather than to the schools is only one among many factors to be considered.” Ten years later, however, the Court upheld the constitutionality of a state tax deduction for educational expenses, even though the primary allowable expense was for religious school tuition (*Mueller v. Allen*, 1983). Although deductions for other expenses were arguably available to parents of public school

children, the Court majority was less concerned than in *Nyquist* and *Sloan* that the primary effect of aid program was to benefit religious schools. As the Court noted, any benefit to religion resulted from the “numerous private choices of individual parents of school-age children.”

After the *Mueller* case, a unanimous Court in 1986 upheld the constitutionality of allowing a disabled college student to use his vocational scholarship in a seminary program (*Witters v. Washington Department of Services for the Blind*). There, the Court emphasized the breadth of possible uses of the scholarship, such that there was no financial incentive to undertake religious education, and that the ultimate benefit accrued to the religious college only as a result of “the genuinely independent and private choices of aid recipients.” The private choice aspect was also crucial in the Court’s 1993 decision allowing a state-paid sign-language interpreter accompany a disabled student to his religious school (*Zobrest*).

After the *Mueller* and *Witters* cases, several state legislatures enacted experimental voucher or tax credit programs for low-income parents with children attending low-performing public schools. The first comprehensive voucher program was established in Milwaukee, Wisconsin, in 1989, followed by programs in San Juan, Puerto Rico, Cleveland, Ohio, and in Florida. Under all such programs, religious schools represented the primary alternative to the public schools. Education and civil liberties groups challenged the various programs, usually in state courts raising both federal and state constitutional claims. After ten years of litigation, the Supreme Court finally heard a challenge to one of the programs. In *Zelman v. Simmons-Harris* (2002), a sharply divided Court upheld the constitutionality of vouchers. The Court majority held that funding programs that are not skewed toward religious uses are generally available and rely on the private choice of recipients to determine how the benefits are used are “not readily subject to challenge under the establishment clause.” Although *Zelman* settled the question about the constitutionality of vouchers under the First Amendment, in 2004 the Court affirmed the ability of states to prohibit vouchers for religious education based on independent state constitutional provisions (*Locke v. Davey*).

The final area of public aid to religious schools has occurred at the college level. Since the mid-twentieth century, federal and state governments have provided financial assistance to public, private, and religious colleges in the form of research and construction grants, revenue bonds, scholarships, and governmentally insured loans to students. One of the earlier programs was the federal Higher Education Facilities

Act of 1963, which provided grants and loans to colleges for the construction of academic buildings. In 1971, the Supreme Court upheld participation in the program by church-related colleges, based on language in the law that excluded funds for any building used for religious instruction or worship (*Tilton v. Richardson*). In so holding, the Court distinguished most church-related colleges from elementary and secondary parochial schools, noting that college students are less impressionable and less susceptible to religious indoctrination than younger students and that the colleges primarily taught secular academic subjects and were committed to academic freedom. In two subsequent cases involving public assistance to religious colleges, the Court adhered to this distinction between colleges and elementary and secondary schools (*Hunt v. McNair*, 1973; *Roemer v. Board of Public Works*, 1976). Although the Court did not rule that under no circumstance could a church-related college be considered pervasively sectarian, and thus ineligible for aid, its higher education decisions created the opposite presumption from that attached to religious elementary and secondary schools.

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References and Further Reading

- Bolick, Clint. *Voucher Wars*. Washington, D.C.: Cato Institute, 2003.
- Green, Steven K. *The Illusionary Aspect of "Private Choice" for Constitutional Analysis*, *Willamette Law Review* 38 (2002): 549–577.
- Hamburger, Philip. *Separation of Church and State*. Cambridge, MA: Harvard University Press, 2002.
- Jeffries, John C., and James E. Ryan, *A Political History of the Establishment Clause*, *Michigan Law Review* 100 (2001): 279–370.
- Lupu, Ira C., and Robert W. Tuttle, *Zelman's Future: Vouchers, Sectarian Providers, and the Next Round of Constitutional Battles*, *Notre Dame Law Review* 78 (2003): 917–994.
- Peterson, Paul E., ed. *The Future of School Choice*. Stanford, CA: Hoover Institution Press, 2003.
- Sugarman, Stephen D., and Frank R. Kemerer, eds. *School Choice and Social Controversy: Politics, Policy, and Law*. Washington, D.C.: Brookings Institution Press, 1999.
- Tushnet, Mark, *Vouchers after Zelman*, *Supreme Court Review* 2000 (2000): 1–39.
- Uderkuffler, Laura S., *Vouchers and Beyond: The Individual as Causative Agent in Establishment Clause Jurisprudence*, *Indiana Law Journal* 75 (2000): 167.

Cases and Statutes Cited

- Agostini v. Felton*, 521 U.S. 203 (1997)
- Aguliar v. Felton*, 473 U.S. 402 (1985)
- Cochran v. Louisiana State Board of Education*, 281 U.S. 370 (1930)
- Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973)

- Committee for Public Education v. Regan*, 444 U.S. 646 (1980)
- Everson v. Board of Education*, 330 U.S. 1 (1947)
- Grand Rapids School District v. Ball*, 473 U.S. 373 (1985)
- Hunt v. McNair*, 413 U.S. 734 (1973)
- Lemon v. Krutzman*, 403 U.S. 602 (1971)
- Levitt v. PEARL*, 413 U.S. 472 (1973)
- Locke v. Davey*, 540 U.S. 712 (2004)
- Meek v. Pittenger*, 421 U.S. 349 (1975)
- Mitchell v. Helms*, 530 U.S. 793 (2000)
- Mueller v. Allen*, 463 U.S. 388 (1983)
- Roemer v. Board of Public Works*, 426 U.S. 736 (1976)
- Sloan v. Lemon*, 413 U.S. 825 (1973)
- Tilton v. Richardson*, 403 U.S. 672 (1973)
- Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986)
- Wolman v. Walter*, 433 U.S. 229 (1977)
- Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993)
- Zelman v. Simmons-Harris*, 536 U.S. 639 (2002)

See also **Americans United for Separation of Church and State; Blaine Amendment; *Locke v. Davey*, 540 U.S. 712 (2004); *Mitchell v. Helms*, 530 U.S. 793 (2000); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002)**

STATE AND FEDERAL REGULATION OF IMMIGRATION

Since the end of the nineteenth century, the federal government has regulated the movement of individuals into the United States under the umbrella of immigration law. This regulation has directly implicated the civil liberties of aliens seeking to enter or remain in the United States, as a constraint on the freedom of movement. Federal regulation of immigration has had broader implications for civil liberties as a context in which well-established constitutional norms have been found inapplicable. Immigration law continues to be constitutionally exceptional, a realm in which rights have been diluted to the extent that they are recognized at all.

The states have played a much less significant, although not inconsequential, role in the regulation of immigration. For more than a century, state participation in immigration control has been bounded by the preemptory federal interest in conducting national foreign relations. Consistent with devolutionary trends in other contexts, however, the states may come to play a greater role in immigration regulation.

Before the advent of federal regulation, such control of immigration as existed was found in a patchwork of state laws variously regulating the entry of convicts, the poor, and the sick. Many of these state laws applied to internal as well as international migration, and they were not well enforced. Enacted in 1872 and 1882 and mirroring the criteria of state

exclusion measures, the first federal immigration measures prohibited the entry of prostitutes, idiots, lunatics, and persons likely to become a public charge. The Contract Labor Law of 1885 prohibited engaging the services of aliens before their embarkation to the United States.

But it was with respect to the so-called Chinese Exclusion laws of the 1880s and 1890s that the courts laid the constitutional foundations of immigration exceptionalism. The laws imposed a bar on new immigration from China and provided for the removal of Chinese aliens who could not demonstrate the legality of their presence in the United States. The Supreme Court recognized the federal government's constitutional authority to regulate immigration—a power not specified in the constitutional text—in the 1889 decision in the Chinese Exclusion Case.

In *Fong Yue Ting v. United States*, the Court rejected the rights-based claim of a Chinese resident facing deportation. The Court found deportation not to constitute punishment for constitutional purposes, thus eluding a due process challenge. As the Court held in the Cold War era decision in *United States ex rel. Knauff v. Shaughnessy*, “[w]hatever the procedure authorized by Congress is, it is due process as far as the alien denied entry is concerned.” On the same basis, the Court has rejected invocation of jury trial and Eighth Amendment rights in immigration proceedings. It has also rejected Equal Protection-based challenges to the scheme of federal immigration control, most notably in the modern-era decision in *Fiallo v. Bell*. Only in the context of the removal of legally admitted aliens has the Court held immigration enforcement to the standards of procedural due process.

These decisions aggregate as the plenary power doctrine under which the courts have deferred to the authority of the political branches. “Over no conceivable subject,” the Supreme Court intoned in *Kleindienst v. Mandel*, “is the legislative power of Congress more complete than it is over” the regulation of immigration. The plenary power doctrine is long on the rhetoric of sovereignty, dismissive of otherwise applicable constitutional protections and modest in the assertion of judicial power. The result has been a realm in which civil liberties have been more persistently vulnerable than perhaps any other.

Among examples of practices tolerated in the face of this judicial reticence were the Chinese Exclusion and other race-based exclusions; the national origins quota system applicable to admissions from the 1920s through 1965, which favored immigrants from Northern European countries; and other classifications that would not withstand constitutional scrutiny in other contexts, for instance on the basis of gender,

legitimacy, or disability. Aliens have been excluded on the basis of political speech that would otherwise enjoy core First Amendment protection.

Admissions continue to be subject to national quotas, thus comprising a form of national origins discrimination. Aliens are effectively discriminated against on the basis of wealth, insofar as they must demonstrate adequate sources of support as a condition to entry. Aliens have no right of judicial review when denied visas to travel to the United States. Major immigration reform legislation enacted in 1996 has resulted in the deportation of longstanding legal resident aliens for relatively minor crimes, with no possibility for discretion on the part of immigration enforcement authorities.

The plenary power regime has been the target of withering criticism by academics and immigrant rights advocates. Although the doctrine remains in place, there have been recent signs of slippage. The Court expressed serious constitutional doubts about the indefinite detention of deportable aliens whose home countries refused to take them back in *Zadvydas v. Davis* and applied an ordinary, nonplenary power analysis on the way to upholding a gender classification in the naturalization law in *Nguyen v. INS*. On the other hand, the national security implications of immigration in the wake of the September 11 attacks may retard the mainstreaming of constitutional rights doctrine as applied in the immigration law context.

State regulation of immigration remains of subsidiary importance. Framing the issue as one of national foreign relations, the Supreme Court in *Chy Lung v. Freeman* (1875) denied the capacity of the states to engage in immigration control. In *Hines v. Davidowitz* (1941), the Court struck down a state scheme requiring the registration of aliens on the eve of World War II. The Court has been solicitous of claims brought by aliens challenging discriminatory state benefits regimes, both on preemption and equal protection rationales. The courts show no sign of transplanting new federalism rationales to the immigration law context.

The political branches, however, seem inclined to experiment with state participation in immigration law enforcement. The 1996 welfare reform act delegated to states the authority to determine noncitizen eligibility for certain federally funded benefits. The Immigration and Nationality Act now provides for undertaking cooperative agreements with state and local enforcement agencies with respect to enforcement of federal immigration laws and provides for the deputization of state and local officials in the face of a “mass influx” of aliens. A controversial 1996 opinion of the Office of Legal Counsel, Department

of Justice, concluded that state and local law enforcement officers could undertake immigration enforcement activity even in the absence of expressly delegated authority. As yet, none of these capacities has been significantly exploited. Perceived security priorities in the wake of September 11 have prompted some to argue for greater state participation in immigration enforcement.

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References and Further Reading

- Chin, Gabriel J., *Is There a Plenary Power Doctrine? A Tentative Apology and Prediction for Our Strange But Unexceptional Constitutional Immigration Law*, Georgetown Immigration Law Journal 14 (2000): 257.
- Hutchinson, E. P. *Legislative History of American Immigration Policy 1798–1965*. Philadelphia: University of Pennsylvania Press, 1981.
- Henkin, Louis H., *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, Harvard Law Review 100 (1987): 853.
- Legomsky, Stephen H., *Immigration Law and the Principle of Plenary Congressional Power*, Supreme Court Review 1984 (1985): 255.
- Neuman, Gerald L. *Strangers to the Constitution: Immigrants, Borders, and Fundamental Law*. Princeton: Princeton University Press, 1996.
- , *The Lost Century of Immigration Law (1776–1875)*, Columbia Law Review 93 (1993): 1833.
- Schuck, Peter H., *The Transformation of Immigration Law* Columbia Law Review 84 (1984): 1.
- Spiro, Peter J., *Explaining the End of Plenary Power*, Georgetown Journal of Immigration Law 16 (2002): 339.
- , *The States and Immigration in an Era of Demi-Sovereignties*, Virginia Journal of International Law 35 (1994): 1: 121.

Cases and Statutes Cited

- Chinese Exclusion Case, 130 U.S. 581 (1889)
- Chy Lung v. Freeman*, 92 U.S. 275 (1875)
- Fiallo v. Bell*, 430 U.S. 787 (1977)
- Fong Yue Ting v. United States*, 149 U.S. 698 (1893)
- Graham v. Richardson*, 403 U.S. 365 (1971)
- Harisiades v. Shaughnessy*, 342 U.S. 580 (1952)
- Hines v. Davidowitz*, 312 U.S. 52 (1941)
- The Japanese Immigrant Case, 189 U.S. 86 (1903).
- Kleindienst v. Mandel*, 408 U.S. 753 (1972)
- Landon v. Plasencia*, 459 U.S. 21 (1982)
- Nguyen v. INS*, 533 U.S. 53 (2001)
- Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953)
- United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950)
- Zadvydas v. Davis*, 553 U.S. 678 (2001)

See also Aliens, Civil Liberties of; Citizenship; Immigration and Nationality Act Amendments of 1965; 9/11 and the War on Terrorism; Race and Immigration

STATE CONSTITUTION, PRIVACY PROVISIONS

The words “privacy” and “private” do not appear in the text of the United States Constitution. Accordingly, the Supreme Court in *Griswold v. Connecticut* had to rely on “penumbras, formed by emanations” from other constitutional provisions to establish a basis for the federal constitutional right of privacy. The absence of an explicit textual foundation for the federal privacy right has engendered a continuing debate regarding the propriety of its recognition. But, under the constitutions of ten states, no such debate exists. These states—Alaska, Arizona, California, Florida, Hawaii, Illinois, Montana, Louisiana, South Carolina, and Washington—have adopted state constitutional provisions explicitly guaranteeing an individual’s “privacy,” “private life,” or “private affairs.”

These state privacy provisions were ratified in two separate eras, taking three basic forms. The first ones appeared in the Washington and Arizona constitutions during the Progressive movement in the late nineteenth and early twentieth centuries. Washington Constitution article I, section 7, and Arizona Constitution article II, section 8, both guarantee in identical language that “[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law.” The motivation behind these provisions, as the Washington Supreme Court noted in *Kelleher v. Minshull*, was “to protect individuals in the sanctity of their homes and privacy of their books and papers” from unreasonable governmental searches and seizures.

Eight other states ratified their privacy provisions between 1968 and 1980, in the years after the Supreme Court recognized a federal right of privacy in *Griswold*. Yet, despite their common temporal relationship, provisions adopted during this period are of two distinct types. Five states separated their guarantees from constitutional clauses regarding searches and seizures, thereby carefully enumerating an individual autonomy and informational privacy right. Although none of these five state constitutional provisions are identical—Alaska recognizes a “right of the people to privacy” that “shall not be infringed,” California merely lists “privacy” as one of the “inalienable rights” protected by its state constitution, Florida guarantees a “right to be let alone and free from governmental intrusion into the person’s private life,” and Montana protects a “right of individual privacy,” and Hawaii a “right of the people to privacy” that both cannot “be infringed without the showing of a compelling state interest”—each of these state privacy rights has been granted a textual status divorced from the search and seizure context.

However, the other states that added privacy provisions between 1968 and 1980—Illinois, Louisiana, and South Carolina—incorporated such rights within their constitutional protections against unreasonable searches and seizures. Illinois Constitution article I, section 6, is representative of these clauses, guaranteeing the people a “right to be secure in their persons, houses, papers, and other possessions against unreasonable searches, seizures, invasions of privacy or interceptions of communications.” Although it now has a freestanding privacy right as well, Hawaii’s constitution contains a similar clause, now at article I, section 7, to protect the people’s right to “be secure . . . against unreasonable searches, seizures and invasions of privacy.”

Three separate protections—against unreasonably invasive governmental investigations and detentions, interference with personal autonomy, and collection and disclosure of private information—are evident in the text of these various state constitutional provisions. Nevertheless, courts do not always limit their interpretation to the component or components that a particular guarantee seems to address. As an illustration, although South Carolina embedded its privacy text within its prohibition against unreasonable searches and seizures, the South Carolina Supreme Court in *Singleton v. State* held that this section protected the individual autonomy right of an inmate to refuse to take medication that would render him competent for execution.

Thus, the text of these provisions alone does not define their scope, but an examination of precedent is also necessary for each of the privacy components.

Protection against Searches and Seizures Invading Private Affairs

Most states with explicit privacy guarantees proclaim that their state constitutions provide additional protections from governmental searches and seizures than that provided by the Fourth Amendment. However, although some states have, indeed, established an independent analysis on the basis of their privacy provisions, the supposed difference in others is more often an empty promise.

Washington and Hawaii have used their privacy rights to develop the most independent search and seizure jurisprudence. Washington has rejected the Fourth Amendment’s touchstone of a reasonable expectation of privacy, instead analyzing, under its constitutional text, whether the state unreasonably intruded into a defendant’s private affairs. Hawaii has opined that its explicit privacy guarantee

establishes that a primary purpose of the state exclusionary rule is to protect privacy rights, not merely to deter governmental misconduct as under the Fourth Amendment. These distinct rationales underlying Washington and Hawaii’s search and seizure jurisprudence has led both states to frequently deviate from federal standards. For instance, Washington in *State v. Boland* and Hawaii in *State v. Tanaka* both determined that a warrantless search of a person’s garbage constituted an unreasonable privacy intrusion, although the Supreme Court held in *California v. Greenwood* that there is no reasonable expectation of privacy in garbage. Both states, in *State v. Gunwall* (Washington) and *State v. Rothman* (Hawaii), held that the use of a pen register without a warrant violated their state constitutions, despite *Smith v. Maryland*’s holding that this device did not implicate the federal Constitution. Both states have also rejected the Supreme Court’s holdings in a number of other contexts, typically using their privacy guarantees to explicate these results.

Two other states, Alaska and Montana, have also frequently relied on their privacy clauses to broaden the protection against unreasonable searches and seizures. These states essentially reason that their explicit guarantees correlate into their citizens possessing a heightened reasonable expectation of privacy. Hence, Montana invalidated a warrantless search of an open field in *State v. Bullock* contrary to the Supreme Court’s holding in *Oliver v. United States*, declined in *State v. Sawyer* to follow *South Dakota v. Opperman* allowing automotive inventory searches, and placed additional limitations on using drug-sniffing dogs in *State v. Tackitt*. Alaska decisions have likewise often rejected holdings under the Fourth Amendment when interpreting its state constitutional protection against searches and seizures in conjunction with its privacy clause.

Yet in other states with privacy provisions, the purported difference has only rarely been evident. Illinois in *In re May 1991 Will County Grand Jury Subpoena* stated that its “Constitution goes beyond Federal constitutional guarantees by expressly recognizing a zone of personal privacy,” thereby precluding the grand jury from subpoenaing, in the absence of individualized suspicion, physical evidence from non-suspect witnesses. But despite this occasional willingness to state that its guarantee goes beyond the federal Constitution, Illinois courts have not developed an independent privacy jurisprudence to protect this supposed greater right in the typical search and seizure context, instead almost always treating it as coextensive with the Fourth Amendment.

Such coextensive treatment is in fact required in California and Florida as a result of state

constitutional conformity amendments. California Constitution article I, section 28(d), precludes the California courts from developing a state exclusionary rule, leaving only the federal Constitution to govern evidence exclusion for improper searches. Florida Constitution article I, section 12, is even more explicit, requiring that state constitutional search and seizure issues be construed in conformity with the Fourth Amendment as interpreted by the United States Supreme Court. Thus, California and Florida courts cannot use their privacy guarantees to create any independent state constitutional protection against invasive searches and seizures.

The effect of a privacy guarantee on a state's constitutional search and seizure jurisprudence is thus somewhat muddled. Even among the states with similar types of clauses, the holdings cannot be reconciled. Moreover, some state courts without privacy provisions have likewise rejected the Supreme Court's search and seizure holdings when interpreting their own state constitutions. As a result, a privacy clause, while providing a potential argument for recognizing an enhanced expectation of privacy against governmental searches and seizures, is neither necessary nor sufficient to establish such protection.

Personal Autonomy Rights

Another dimension of privacy protects individual autonomy in making decisions and engaging in conduct related to certain personal and intimate matters, such as marriage, procreation, contraception, abortion, medical care, family relationships, and child rearing. State privacy clauses are frequently asserted as a basis to extend such autonomy rights to new contexts or to heighten the protection of individual liberty for previously recognized rights.

The Alaska Supreme Court's decision in *Ravin v. State* is a famous early example. There, the court held that adult citizens possessed a right to privacy that extended to the possession and ingestion of marijuana for personal use while in their home, "a place where the individual's privacy receives special protection." Although the practical import of *Ravin* today is minimal because the federal Controlled Substances Act preempts its holding, subsequent Alaska cases have refused to extend the right to other drugs such as cocaine, and it has not been followed by any of the other states with privacy clauses, *Ravin* still constitutes an early recognition of the state's role in defining liberty through a privacy guarantee.

The Florida Supreme Court interpreted its privacy provision in a series of decisions involving abortion

rights. Under the federal right to an abortion, state statutes requiring a minor to notify or obtain consent from her parents before obtaining an abortion are constitutional if a judicial bypass procedure exists. The Florida legislature enacted such a parental consent statute, but the state supreme court held in *In re T.W.* that, because Florida's explicit privacy clause embraces more interests and extends more protection than the federal Constitution, a minor had a state constitutional right to an abortion without being hindered by obtaining parental consent or a judicial bypass. The Florida legislature subsequently enacted a parental notification statute, which the court again invalidated. In response, the Florida legislature proposed, and Florida citizens ratified, a state constitutional amendment requiring a minor's right to an abortion to be interpreted in accordance with the decisions of the U.S. Supreme Court. Yet because the amendment only explicitly applies to a minor's right to an abortion, *T.W.*'s adoption of the rigid trimester framework from *Roe v. Wade*, instead of the less protective undue burden standard from *Planned Parenthood v. Casey*, apparently remains the legal standard governing abortion under the Florida Constitution.

Other states with privacy clauses have also extended additional protections to the right to choose under their state constitutions. California relied on its privacy provision to hold a parental consent statute unconstitutional in *American Academy of Pediatrics v. Lungren* and to require public funding of abortions in *Committee to Defend Reproductive Rights v. Myers*. Alaska held in *Valley Hospital Association v. Mat-Su Coalition for Choice* that its privacy guarantee created broader protections for reproductive autonomy than the federal Constitution such that a "quasi-public institution" could not decline to perform abortions because of moral disapproval. Montana similarly concluded in *Armstrong v. State* that its privacy clause necessitated a heightened strict scrutiny analysis of legislation infringing on procreative autonomy rights.

Several jurisdictions have used privacy clauses to establish a state constitutional right to sexual privacy and right to die. The contours of such liberty rights at the federal level are still in flux, as the Supreme Court's holdings in *Lawrence v. Texas* invalidating a statute criminalizing certain same-sex sexual activity and in *Cruzan v. Missouri* upholding a clear and convincing evidence requirement for an incompetent patient's wishes to discontinue life-sustaining treatment left many issues unresolved. Yet several states, including Arizona, California, and Florida, have addressed such issues more frequently under their state constitutions, providing a more thorough jurisprudence.

Each of the states with freestanding privacy rights has thus recognized some autonomy rights exceeding federal protection. Although the states with privacy provisions embedded within search and seizure clauses are more likely to conclude that no greater individual autonomy protection is intended than that provided by federal law, even these states have occasionally provided additional rights. Yet, once again, the existence of a privacy clause is not dispositive. Several other states without such clauses have recognized privacy rights through penumbras or implications from other constitutional provisions, guaranteeing additional or more extensive autonomy rights under their state constitutions than protected by the federal privacy right. A privacy clause thus provides textual support for urging greater autonomy rights, but does not dictate the outcome.

Informational Privacy

Another aspect of privacy is informational privacy, which precludes unreasonable surveillance, collection of personal information, and disclosure of such information. The U.S. Supreme Court has only addressed this component of privacy on a couple of occasions, but the states with privacy clauses have had more opportunities to define this guarantee.

California is at the forefront of protecting this right. Indeed, soon after the adoption of California's privacy provision, *White v. Davis* concluded its primary purpose was precluding unnecessary surveillance and data collection by government and private businesses. California decisions have protected a variety of interests under the privacy clause (sometimes aided by related statutes), including barring intrusive discovery concerning a litigant's sexual history without a showing of need in *Vinson v. Superior Court*, providing a cause of action against a defense attorney for disclosing a victim's confidential mental health records in *Susan S. v. Israels*, and recognizing that some drug testing even by nongovernmental employers may violate privacy rights in *Hill v. National Collegiate Athletic Association*.

California's recognition of constitutional privacy rights against private actors has not typically been accepted by the other states with privacy guarantees. Yet many of these other states do agree that state privacy provisions may shield discovery of confidential information in litigation. For example, Alaska in *Gunnerud v. State* precluded a criminal defendant from invading a witness's privacy by discovering her psychiatric report that was irrelevant to her

credibility. Florida held an AIDS victim could not obtain the identity of blood donors because of their privacy interests in *Rasmussen v. South Florida Blood Services*. Montana used its privacy provision and a statutory privilege in *State ex rel. Mapes v. District Court* to limit the discoverability of a plaintiff's therapy records to those related to his claims, and Illinois in *Kunkel v. Walton* invalidated on constitutional privacy grounds a statute waiving all claims of medical confidentiality for litigants asserting a claim for bodily injury. These and other cases confronting similar issues necessitate a delicate balance between a litigant's need for the information and its confidentiality. In those states with an explicit privacy guarantee, this balance is often slightly shifted in favor of privacy rights.

Nevertheless, other states without privacy clauses have reached similar holdings. Thus, as with other components of the privacy right, explicit clauses are not dispositive. The states with privacy provisions are generally more inclined than other states to provide additional protections under their state constitutions than required by federal law, which seems appropriate, because there would be little purpose in adding a constitutional privacy clause if it did not provide expanded protection at least occasionally. But there is not a consensus on which privacy rights should be recognized or expanded.

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References and Further Reading

- Friedelbaum, Stanley H., *The Quest for Privacy: State Courts and an Elusive Right*, Albany Law Review 65 (2002): 4: 945-989.
- Friesen, Jennifer. *State Constitutional Law: Litigating Individual Rights, Claims, and Defenses*. 3rd ed. Charlottesville, Va.: Matthew Bender & Company, 2000.
- Gormley, Ken, and Rhonda G. Hartman, *Privacy and the States*, Temple Law Review 65 (Winter 1992): 1279-1323.

Cases and Statutes Cited

- American Academy of Pediatrics v. Lungren*, 940 P.2d 797 (Cal. 1997)
- Armstrong v. State*, 989 P.2d 364 (Mont. 1999)
- California v. Greenwood*, 486 U.S. 35 (1988)
- Committee to Defend Reproductive Rights v. Myers*, 625 P.2d 779 (Cal. 1981)
- Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261 (1990)
- Griswold v. Connecticut*, 381 U.S. 479 (1965)
- Gunnerud v. State*, 611 P.2d 69 (Alaska 1980)
- Hill v. National Collegiate Athletic Ass'n*, 865 P.2d 633 (Cal. 1994)
- In re May 1991 Will County Grand Jury*, 604 N.E.2d 929 (Ill. 1992)

In re T.W., 551 So.2d 1186 (Fla. 1989)
Kelleher v. Minshull, 119 P.2d 302 (Wash. 1941)
Kunkel v. Walton, 689 N.E.2d 1047 (Ill. 1997)
Lawrence v. Texas, 123 S.Ct. 2472 (2003)
Oliver v. United States, 466 U.S.170 (1984)
Planned Parenthood of Southeastern Pennsylvania v. Casey,
 505 U.S. 833 (1992)
Rasmussen v. South Florida Blood Servs., 500 So.2d 533
 (Fla. 1987)
Ravin v. State, 537 P.2d 494 (Alaska 1975)
Roe v. Wade, 410 U.S. 113 (1973)
Singleton v. State, 437 S.E.2d 53 (S.C. 1993)
South Dakota v. Opperman, 428 U.S. 364 (1976)
Smith v. Maryland, 442 U.S. 735 (1979)
State v. Boland, 800 P.2d 1112 (Wash. 1990)
State v. Bullock, 901 P.2d 61 (Mont. 1995)
State v. Gunwall, 720 P.2d 808 (Wash. 1986)
State v. Rothman, 779 P.2d 1 (Haw. 1989)
State v. Sawyer, 571 P.2d 1131 (Mont. 1977)
State v. Tanaka, 701 P.2d 1274 (Hawaii 1985)
State v. Tackitt, 67 P.3d 295 (Mont. 2003)
State ex. rel. Mapes v. District Court, 822 P.2d 91 (Mont.
 1991)
Susan S. v. Israels, 67 Cal. Rptr. 2d 42 (Cal. Ct. App.
 1997)
Valley Hosp. Ass'n v. Mat-Su Coalition for Choice, 948 P.2d
 963 (Alaska 1997)
Vinson v. Superior Court, 740 P.2d 404 (Cal. 1987)
White v. Davis, 533 P.2d 222 (Cal. 1975)

See also Penumbra; Privacy; Search (General Definition); State Constitutions and Civil Liberties

STATE CONSTITUTIONAL DISTINCTIONS

Every state's constitution contains many provisions, typically found in its bill of rights, protecting civil liberties. Sometimes these provisions closely resemble provisions of the U.S. Constitution, yet in many cases they differ, sometimes substantially, from provisions found in the federal Constitution or in the constitutions of other states. As a result, state constitutions may protect rights different from those protected by the federal Constitution. For example, the right to an education receives protection under most state constitutions, but not under the U.S. Constitution. State constitutions also may protect the same rights protected by the federal Constitution, but to a greater extent. Thus, police wishing to search for evidence of criminal activity in certain circumstances need not first obtain a warrant under the U.S. Constitution, but must do so under the constitutions of many states. Because of these kinds of distinctions, state constitutions often protect the civil liberties of citizens of their states more robustly than the U.S. Constitution protects the liberties of citizens of the nation.

The scope and distinctiveness of state constitutional rights has varied over time. During the earliest phase of state constitution making, from 1776 to 1789, state constitutions often differed from one another dramatically. After 1790, when new states began seeking admission to the Union, and when older states periodically decided to revise or replace their constitutions, drafters looked frequently to the U.S. Constitution, as well as to the constitutions of the existing states, for models. The routine copying of civil liberties provisions from one constitution to another led slowly to a growing convergence of constitutional texts. This process of convergence was strengthened during the nineteenth century by the influence among state court judges of a natural-law philosophy of individual rights. According to this philosophy, the rights that citizens hold against their governments are dictated by universal principles of Natural Law, and the way in which constitutional drafters happen to express them in various constitutional provisions is thus not particularly significant. As a result, state judges often interpreted provisions of state constitutions to mean the same thing as equivalent provisions of the national or other state constitutions regardless of their actual wording.

The process of state and national convergence in the protection of civil liberties was strengthened again in the mid-twentieth century when the U.S. Supreme Court developed the Incorporation Doctrine, under which provisions of the federal Bill of Rights are deemed to apply to the states. After incorporation, state governments found themselves obliged to observe not only state constitutional provisions protecting liberty but federal constitutional provisions as well. This doctrine made the constitutional protection of civil liberties more uniform across the nation by invalidating any state constitutional provision to the extent it failed to protect liberty as expansively as the corresponding provision of the federal Bill of Rights. Moreover, many state courts increasingly deferred to the Supreme Court's leadership on civil liberties issues, deliberately construing state constitutional provisions to mean whatever the Supreme Court had held the analogous provision of the U.S. Constitution to mean. By the mid-1970s, a judicial consensus seemed to be coalescing around the idea that the United States has essentially a single constitutional regime of civil liberties and that the scope and meaning of individual rights are determined for all Americans by the U.S. Supreme Court.

This consensus soon broke down, however, when the Supreme Court began during the late 1970s and early 1980s to construe federal constitutional rights more narrowly than it had during previous decades. As the Court retreated from the protection of

individual rights, some state judges began to reexamine rights provisions of their state constitutions as potential sources of additional protection. Because the Incorporation Doctrine does not prevent state constitutions from granting greater protection for civil liberties than the U.S. Constitution requires, some state courts began to assert their independence from the Supreme Court by construing state constitutional provisions to protect rights that the Supreme Court had ruled were unprotected by the federal Constitution.

Today, state courts have most actively expanded rights beyond the boundaries protected by the federal Constitution in the area of criminal procedure. Numerous state courts have construed their state constitution's search and seizure provision to bar warrantless searches by state and local police in circumstances in which the Fourth Amendment of the U.S. Constitution permits them. Some courts have construed state constitutions to protect the right to counsel, the right to confront witnesses, and the prohibition on double jeopardy more broadly than the Supreme Court has construed equivalent rights under the U.S. Constitution.

Outside the field of criminal procedure, several state courts have ruled that their state constitutions provide broader protection than does the federal Constitution for the rights of free speech and equal protection. For example, unlike the federal First Amendment, the free speech provisions of the constitutions of California, Colorado, Massachusetts, New Jersey, Oregon, and Washington have all been construed to protect a speaker's right of reasonable access to privately owned shopping malls. Some state courts have relied on state constitutions to expand the rights of gays and lesbians beyond federal boundaries, most recently with respect to the right to form civil unions. And courts in eighteen states have invalidated under their state constitutions aspects of those states' education and educational finance policies that easily pass muster under Supreme Court rulings construing the U.S. Constitution.

At the same time, many state courts have chosen to continue to follow rulings of the U.S. Supreme Court when construing civil liberties provisions of their state constitutions. Sometimes state courts follow federal rulings simply because the text and founding history of the state constitution are so similar to the text and history of the federal Constitution that the interpretive process leads directly to the same results. Other state courts have expressed a reluctance to depart from the path marked out by the Supreme Court, because they believe that uniformity in the enforcement of constitutional liberties is desirable or because

they question the legitimacy of rejecting conclusions reached by the nation's highest court on a vital subject of mutual concern.

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References and Further Reading

- Latzer, Barry. *State Constitutional Criminal Law*. New York: Clark, Boardman, Callaghan, 1995 (with Supplement, 2000).
Tarr, G. Alan. *Understanding State Constitutions*. Princeton: Princeton University Press, 1998.

See also **State Constitutions and Civil Liberties; State Courts**

STATE CONSTITUTIONS AND CIVIL LIBERTIES

When people debate the scope of our liberties, conversations often begin and end with the U.S. Constitution and the Supreme Court's interpretation thereof. This focus is partially legitimate, because our federal government imposes many standards on states. In addition, how the Supreme Court interprets civil rights guarantees influences how states determine their own, similar responsibilities. At the same time, rights protection remains an essential feature of state constitutionalism. Some liberties explicit in state documents are absent or less encompassing in their federal counterpart. Here, the Supreme Court permits states to use the national standard as a minimum and their own standards as a ceiling. Moreover, nationally mandated criteria are relatively new. For most of our history, states had near exclusive responsibility for protecting civil liberties. Their constitutions were initially designed with this purpose in mind, and they maintained this role relatively unimpeded for almost 200 years. Given the preceding, no study of civil liberties would be complete without a discussion of state constitutions.

Scholars generally define civil liberties in terms of the first eight amendments to the U.S. Constitution. This national benchmark partially favors state constitutions, which have, since their inception in 1776, promoted these enumerated liberties by emphasizing them as inalienable and uncontested based on nature and popular consent. The federal constitution's terse list pales in comparison to detailed state accolades. At the same time, states did not uniformly enforce their grandiose parchment guarantees, so much so that subsequent Supreme Court interference rendered many of their grand words insignificant. Yet, the rights provisions found in state

constitutions tell an important story. They suggest how important states were—and still are—in protecting civil liberties.

State Guarantees of “National” Civil Liberties

America’s legal commitment to the civil liberties outlined in the first eight amendments has strong ideological and historical roots. Some principles, like guaranteed trial by jury of one’s peers, date back to the Magna Carta of 1215. Others, like those limiting government’s prosecution powers and those prohibiting excessive bail and cruel and unusual punishment, find their roots in the 1689 English Bill of Rights. Colonists incorporated these ideals and other, related British common law principles into their early charters, and then into their constitutions. Free conscience, a contentious right in Europe, was among the primary reasons people first journeyed to America. Reflective of this, seventeenth-century colonial charters and subsequent revolutionary constitutions codified this as an essential right. Finally, British settlers believed that free assembly, right of government petition, and the like were their English birthrights. Revolutionaries bitterly complained these were being denied them. Aiming to prevent similar tyranny in a newly independent America, constitution writers often incorporated these into founding documents as well.

These early legal protections remain a staple in American constitutional law today. The first eight amendments to the federal constitution, themselves based on state documents and the legal and philosophical traditions influencing them, remain unchanged. Moreover, although state constitutions are frequently amended and sometimes totally rewritten, their declared commitment to these explicit concerns has changed little since independence. Often, delegates meeting to revise existing documents simply reratified original rights declarations without much discussion or debate. Delegates meeting to write new documents or revise specific existing declarations usually looked no further than next door. They then debated which neighbor’s provisions were worthy of incorporating. This informal influence promoted ongoing similarities across civil rights protections.

Despite common philosophical roots and ongoing interdependence, each state has its own history and particular cultural and regional needs. This means not all constitutional features are shared among the fifty states or between them and the United States. Instead, provisions and their implementation have varied across the country, over time.

Life, Liberty, and Property

State documents grant special status to life, liberty, and property. The federal constitution protects their holdings with assurances of due legal process and just compensation. States offer similar legal provisions but often include additional, emphatic declarations that highlight commitment to these ideals. This tradition dates back to 1776 when states used their constitutions to reiterate their allegiance to the Declaration of Independence and to ground their revolutionary causes with righteousness from nature and God. Initially, more than half the states noted, as Virginia did, “[t]hat all . . . have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.” By reiterating that fundamental principle that the British had denied Americans, writers placed purpose and legitimacy into their constitutions. Without this foundation, states were as tyrannous as their motherland. Knowing this, constitutional designers sometimes added declarations like Alabama’s specifying that “the sole object and only legitimate end of government is to protect the citizens in the enjoyment of life, liberty, and property; and when the government assumes other functions, it is usurpation and oppression.”

States continue to emphasize the foundational value of life, liberty, and property. Some early entrants later modified their constitutions to pledge support to these ideals explicitly, as did South Carolinians nearly a century after they joined the union. Others attested to their value at inception, as did states across the mountainous west, where inhabitants still migrate specifically to live freely, far away from government intrusions and population clusters. Alaska, among the very last to write its own constitution, begins by noting its dedication to the principle “that all persons have a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry.”

America’s early history suggests that states took their protective job seriously. Southern responses to slavery infringements, including early nullification and separation threats as well as later, actual succession, exemplify how far states were willing to go. Of course, from a contemporary perspective, states have always selectively enforced their declaratory commitments to life, liberty, and property. For generations, not only southern slaves, but also free men of color, hardly enjoyed a life of liberty and secure property holding. Like these Americans, other selected minorities, such as Chinese railroad workers during the

turn of the last century or Japanese citizens during World War II, experienced state and national infringements of these fundamental liberties.

Historical transgressions aside, states have successfully used their declaratory commitments to life, liberty, and property to justify and explain certain actions. In fact, they have sometimes used them to extend citizen protections beyond what the Supreme Court requires of them. Although hard to comprehend today, protections to slave owners then constituted meaningful protection of property. Furthermore, early state security for western settlers was a form of property protection, even though it harmed the lives, liberties, and properties of Native Americans, then considered members of a separate, hostile nation. Likewise, the protection these declaratory commitments offer now sometimes causes harm to others. For example, this specific clause permits California and other states to justify excluding political canvassers from soliciting private shop owners.

First Amendment Protections

State constitutions also give preeminence to First Amendment concerns. The federal document lumps together freedoms regarding religious exercise, speech, press, assembly, and government petition, forbidding Congress to abridge any of them. In comparison, states generally list each concern separately and emphatically. This delineation originally reflected revolutionary dismay with British infringements. More than concerns deserving legal protection, these were considered natural, fundamental, inalienable rights, belonging to each and every individual by birth, not convention. For example, New Hampshire's first constitution noted that "among the natural rights, some are in their very nature unalienable . . . [O]f this kind are the RIGHTS OF CONSCIENCE." Arkansas's first document specified that "[t]he free communication of thoughts and opinion is one of the invaluable rights of man." States commonly used several declarations—often eight—to iterate the value of First Amendment liberties. At the same time, most constitutions noted that these rights belonged to all except when individual actions disturbed the peace or common good. In concurrence with this caveat, states across America, over time, restricted—either through constitutional or ordinary law—the very liberties to which they declared such emphatic allegiance.

In the case of religious freedom, today we think of free conscience as the liberty to believe in the Almighty or not, to show humility by wearing a veil or not, to observe a Sabbath or not. This kind of religious freedom requires widespread tolerance of

personal practices. However, original settlers escaping religious persecutions in Europe did not seek broad religious tolerance. Rather, they sought and created small religious communities, granting dissenting inhabitants freedom to exit, enter other, or start new societies. Colonial charters incorporated these ideals first by granting a right of conscience, a right reflecting the belief that no sword could engender faith, that true devotion to God was neither outwardly knowable nor truly controllable. Documents then outlined the colony's religious foundation and purpose, requiring individuals to accept these original principles, face penal consequences, or leave.

Although more secular than their colonial counterparts, early state constitutions still promoted religious faith, most often Protestantism. Virginia's first constitution was not exceptional in noting that practicing religion was "the duty which we owe to our Creator." Some states, like Pennsylvania, noted that no one "who acknowledges the being of a God" may be "deprived or abridged of any civil right as a citizen on account of his religious sentiments." Nonbelievers had no guarantees and depended on the mercy of legislators. In Massachusetts not only was it "the duty of all men in society . . . to worship the Supreme Being," but only Christians were granted equal protection of the law. Most state constitutions also restricted office holding, requiring leaders to profess the Christian faith, declare the Divine nature of the Bible, or attest to the Trinity or afterlife. Several did not prohibit church establishment, thereby permitting legislative enactment. Massachusetts constitutionally allowed taxpayer moneys to fund local churches and religious schools. Despite all this, however, revolutionary America secured a religious freedom unthinkable in Europe and worth a dangerous journey to experience.

During the antebellum period, states retracted many constitutional provisions favoring Christians. By the 1830s, no state gave money to a specific church. Constitutional provisions permitting or encouraging this were removed. By 1853, only Maryland and Ohio specifically extended civil rights to Christians only. None specifically required officeholders to proclaim faith in Christianity, although several continued to stipulate, as Mississippi did, that "no person who denies the existence of a Supreme Being shall hold any office in this State." Only a handful of constitutions extended free conscience only to those paying God homage.

Despite this shift, subtle religious biases remained for generations to come. For example, mid-nineteenth century constitutional reforms to secularize schools usually aimed to deny Catholics an education free of Protestant teachings. Similar education maneuverings

arose at the turn of the century when immigrants arrived at record levels, and politicians worried about cultural stability. Today, some Judeo-Christian biases remain, such as prominent court displays of the Ten Commandments, government office closures on Sunday, and property tax exemptions for churches. Even so, religious diversity is a tolerated reality across America. The federal government helps ensure this outcome, but individual state acts play an ongoing role.

Other First Amendment liberties demonstrate similar patterns: early protections that were substantial yet restrictive. For example, since the Revolution, the press enjoyed great freedom covering elections and exercised it liberally. True, malicious claims against candidates required proof, unpleasant truths needed justification, and proven libel resulted in punishment. True too, early enforcements were politically motivated. Yet, since independence, electoral political campaigns have been colorfully covered, sometimes viciously. In contrast, other writings suffered. Until the Civil War, antislavery publications were outlawed across most of America. In the late nineteenth and early twentieth century, state courts upheld legislative banning of birth control topics, declaring them a form of obscenity. They sustained routine denial of speaker permits for socialists, unionists, and women's rights advocates, thereby effectively silencing their views. In all these cases, states constitutionally restrained these activities in the name of peace and the common good.

Most state constitutions still separately enumerate each First Amendment liberty and explicitly acknowledge each's fundamental status. However, some states have since adopted the language found in the U.S. Constitution. For almost two centuries, New York described free conscience in positive and emphatic terms. It separately honored freedom of speech and freedom of press. However, in the mid-twentieth century, New York collapsed these together and described their protective liability together, exactly as the federal document does. This change reflects a widespread phenomenon: Most states—even those with ongoing separately lauded rights—now willingly “lock in step” with the national understanding of First Amendment guarantees. For example, a Supreme Court “test” denies many obscene acts free speech protection. Most states endorse and use this measure. Some, however, rely on their own constitutions and common law practices to evaluate obscenity cases. Their investigations may sustain a particular national ruling, but they may not. Oregon, one of these independent states, has explicitly rejected the Supreme Court's obscenity standards, arguing its own free speech provisions unconditionally protect obscene acts.

Protections for the Accused

Largely because rights for the accused have theoretical grounding in a legal tradition dating back centuries, the union and its states share similar parchment guarantees. Although various states flesh out each right individually, sometimes having fifteen or twenty separately listed protections, they offer few extra parchment guarantees. For example, two-thirds of the states have search and seizure stipulations basically identical to the Fourth Amendment. About the same number prohibit warrants without probable cause in the same manner the United States does. In both instances, only a handful of state constitutions specify protections less inclusive than the federal document. Several offer more detailed provisions on just punishments, jury requirements, and trial procedures.

Because constitutional provisions for the accused originate from the same long-standing philosophical and legal traditions, each state has always extended numerous guarantees, protecting citizens from tyrannous government prosecution. Principles also led to enhanced practical applications. For example, prohibitions against cruel and unusual punishment led states across America to introduce penitentiaries and reduce the number of crimes requiring capital punishment. Some states even outlawed a death penalty. At the same time, variations and misapplications existed. During the antebellum period, juries were under attack. Scholars, jurists, and politicians began questioning whether ordinary people could or should determine the meaning of the law or even guilt in particular criminal cases. Limited constitutional guidelines enabled state legislators and judges to control jury effectiveness by imposing restrictions on the number of jurors, the nature of their deliberation, and the character of their grouping. Here began the new protocol: Judges would interpret law; juries could determine fact. The introduction of plea bargaining further diminished the value of guaranteed trial rights. Marginalized groups especially suffered then and throughout U.S. history. For more than 100 years, women and blacks could not serve as jurors. Men of color often required extra witnesses to prove another guilty. Several states did not offer the poor free legal counsel.

In the past fifty years, some states have revised their constitutions to comply with national standards. For example, Virginia's constitution now enumerates the criminal proceedings that the Supreme Court mandates. Even states without explicit written compliance generally abide by the court's rulings on this and similar matters. However, not all blindly follow directives from above. For example, the Supreme Court denies strong search and seizure protections

to vehicles stopped for traffic violations. Many states nonetheless limit police actions in these circumstances. Moreover, while currently prosecutors may use evidence seized in good faith without a valid warrant, some states reject this privilege, arguing that such evidence is unconstitutional according to their own standards. Finally, certain states reject capital punishment regardless of the crime.

State Guarantees of Other “Civil” Liberties

States protect other liberties not outlined in first eight amendments to the U.S. Constitution. Some of these guarantees also originate from principles that English settlers brought with them to the Americas. Among these is the community’s right to govern itself, a liberty that necessitates voting privileges for individual citizens. No American can forget the revolutionary cry “No taxation without representation!” Pursuant with this exclamation, from declared independence onward, state constitutions have always embraced self-government, along with the franchise, as an essential liberty, necessary to prevent government infringement of all other coveted liberties. In addition, since colonial times, the legal rights and privileges of most everyday affairs have been regional concerns. For example, early charters detailed punishments for adultery and limitations on wife beating; they also included marriage and childrearing responsibilities. Independent states followed suit, constitutionally imposing some requirements and adjudicating others. For most of our union’s history, states determined matters dealing with sexual activity, marriage, divorce, and child rearing.

Self-Government

Nearly all state documents praise popular sovereignty. Most revolutionary constitutions echoed Virginia’s declaration that “all power is vested in . . . the people” and that to protect rights and the common good “a majority of the community hath an indubitable, inalienable, and indefeasible right to reform, alter, or abolish it.” As with other civil liberties, this emphatic allegiance reflects the initial stature of popular sovereignty as a preeminent revolutionary cause. The Declaration of Independence proclaimed its fundamental nature, and state documents followed that example.

The vast majority of revolutionary and antebellum constitutions declared self-government foundationally important. More than half went further,

acknowledging the purpose of popular political influence, proclaiming, as Missouri did, that the people had “the inherent, sole, and exclusive right of regulating the internal government . . . and of altering and abolishing their constitution and form of government whenever it may be necessary to their safety and happiness.” As a result of the Civil War, states now temper the proclaimed purpose of popular sovereignty by denying any secession privilege. Yet, this restriction is always noted separately, leaving original proclamations of self-government’s fundamentally innate and instrumental value unspoiled.

Over the years states have expanded the people’s practical decision-making influence. During the antebellum period, states eliminated property and taxpaying requirements for voters and officers. Many appointed positions became elective. During the progressive era, constitutions granted citizens opportunities to affect legislation directly, through initiatives and referenda. These changes certainly aimed to regulate government’s economic influence, preventing large debt or circumventing special interest development. Yet, everyone recognized that these reforms and the popular sovereignty ideal they reflected were intricately connected to civil liberties. Advocates contended that those without voting or decision-making privileges held their rights precariously, at the whim of the privileged. Critics feared that additional voters or newly offered avenues of popular influence would unwittingly destroy life, liberty, and property. Many documents reflect the reform view, using words similar to North Dakota’s that “[a]ll men . . . have certain inherent rights,” and “to secure these rights governments are instituted among men, deriving their just powers from the consent of the governed.” The revolutionary claim that civil liberty strongly depended on the people’s ultimate sovereignty remains a concept widely acknowledged in state constitutions.

Contemporary skeptics question this euphoric view, arguing that extensive popular control, especially over constitution making and judicial selections, potentially harms civil liberty protections. Permitting constitutional revision by simple ballot measure may obscure rights provisions, polluting constitutions by introducing into them ordinary legislation and even contradicting rights stipulations. For example, extensive restrictions on land development overwhelm property’s preeminence. Additions like California’s Victim’s Bill of Rights unwittingly trammel on the accused. Skeptics further argue that popular sovereignty, especially when unleashed, undermines constitutional government itself. The initiative permits citizens to rewrite protections as public opinion dictates. Judicial reliance on frequent reelection encourages men of law to heed the people’s whim

and thereby treat provisions as pliable words rather than foundational law.

These concerns prohibit many from considering popular sovereignty among the state-protected liberties; yet this conclusion is premature. All rights sometimes conflict with another. Protecting one right, say political speech, sometimes comes at the expense of another, say property or privacy. Furthermore, some features of political voice, namely freedom of speech, assembly, and petition, are nationally recognized as civil liberties, valuable in part because they help prevent government tyranny. The federal constitution's initial silence on the franchise and its exercise does not diminish their equally foundational importance in a free society.

Like other constitutionally enumerated liberties, state implementation of the popular sovereignty ideal did not result in its universal enjoyment across America. Women lacked the vote until late into the nineteenth century, when states, beginning with Wyoming, began extending the privilege to both sexes. Only after the union's nineteenth amendment did all states enfranchise women. The case of African Americans entails an even harsher reality. Initially, many northern states extended suffrage regardless of color. However, the end of property restrictions and the feared migration of newly freed slaves led these states to include only whites. Even when U.S. constitutional edict declared African Americans free citizens, with voting rights privileges, clever state machinations prevented enforcement for generations to come.

Personal Rights

Other important liberties largely under state control include economic and privacy rights. Although ordinary and common law govern many aspects of these affairs, state constitutions also regulate them using stipulations in rights declarations and elsewhere. For example, around the mid-nineteenth century, in response to overzealous and party-motivated involvement in the economy and various industries, several states made just compensation a guiding constitutional principle of adjudication. They and others limited or abolished imprisonment for debt. At the turn of the century, state constitutions introduced rights protecting citizens from railroads, monopolies, and public utilities. Various laws protecting children and factory workers were then upheld by these and other constitutional guarantees.

States have long concerned themselves with privacy issues also. During the nineteenth century, common law principles guided state determinations in

these regards. For example, judges ruled that married women jointly owned their husband's property and that men owed seduced women reparation. In the twentieth century, states introduced constitutional provisions affecting women and marriage. For example, half of the states constitutionally grant men and women equal protection under the law. In response to scattered local sanctions of same-sex marriage, many states added constitutional provisions defining marriage as a union between a man and a woman. Few statutes or constitutional stipulations concern child-rearing directly, but questions of divorce custody and adoption eligibility fall squarely under state jurisdiction, relying on judicial interpretation of ordinary and common law. Moreover, early education, an essential component of child development, is a constitutional matter. Many state documents declare education an inherent right, of fundamental value. Nearly all outline sources for its funding. The Supreme Court, through rulings such as condoning the Amish custom not to educate girls or rejecting mandatory education for illegal immigrant children, continues to reject the unqualified emphasis so many states grant education.

As with other civil liberties, who enjoyed protections, when and where, varied across states. Through much of the nineteenth century, Protestants alone enjoyed free education unencumbered. The practice of separate but equal education relegated many black children to second-rate, poorly funded schools. For more than a century states banned birth control and criminalized abortion. Until an early twenty-first-century ruling, many prohibited sodomy. For generations, states prevented individuals from seeking the mate of their choice. For a short time, western states outlawed marriages between Chinese and whites. In some places, interracial marriage remained a legal taboo until the mid-twentieth century, when the Supreme Court barred miscegenation laws. These restrictions loosened over time, often by state volition alone. Some remain. Segregated education continues, albeit through legal methods of tracking and the like. The majority of states currently forbid same-sex marriage.

Alongside these restraints, personal liberty flourished and expanded. For example, local courts throughout the country redefined common law so that nineteenth-century women gained equality and respect in and outside marriage. They banned marriage to young minors and between close blood relations. Later, these same courts sought to enforce legal and constitutional statutes aimed at protecting children and laborers from excessive factory demands. Throughout the progressive period, constitutions regulated railroads and public utilities as well as corporations, hoping to help citizens retain benefits of

competition. Several permitted women suffrage before the federal amendment. Despite constitutional specifications to the contrary, some local judges continue redefining marriage. Moreover, several state constitutions describe privacy as a fundamental right.

Civil Liberty Protections Today

Because the nation has become the main protector of civil liberties, one easily forgets that for close to 200 years states exercised this job almost exclusively. How the federal government gained and retains this protective authority illuminates what future role states may play.

Neither the federal constitution nor its first twelve amendments sanctioned the government to sidestep states and protect individual liberties. In fact, initial designers of that now-powerful document explicitly argued that civil liberty protection remained eminent state domain. Yet, skeptics immediately recognized that the new government threatened regional autonomy. People then worried not that the federal government would take over rights protection, but that it would overstep its delegated arena of power, pass and enforce laws restricting citizen rights, dominate and destroy states along with their protective abilities, and thereby destroy any semblance of freedom in America. The very eight amendments currently delineating our civil liberties constituted the Federalist response to these fears. Although the initial wording of the First Amendment shows that some founders wanted the nation to help police liberties then under state supervision, the first Congress rejected this.

Despite Congressional insistence that all the initial amendments only restrict federal powers, the scope of the new government's control was soon brought to the Supreme Court. Here, Chief Justice John Marshall determined that the post-founding revisions aimed strictly at preventing national infringements on the people's liberty, that states had independent control in matters outlined in the first eight amendments. This view became the standard for nearly a century thereafter.

As already noted, early state dominance resulted in disparities across the union. Constitutional variations, particularly in implementation, proved harsh and suffocating for certain groups but remained sustainable and tolerable largely because state documents reflected cultural diversity and accommodated popular opinion. The dissatisfied could migrate to a state with preferable laws, mores, and opportunities. Runaway slaves often made this choice during the

antebellum period, as did free men of color later that century. The relative ease of constitutional revision permitted another outlet for the dissatisfied. Citizens could respond to unwanted provisions through the amendment process, something they frequently did throughout our history.

Conflict over slavery, most particularly the war it instigated between the states, initiated the demise of state control over civil liberties. Victorious northerners orchestrated reconstruction amendments that authorized the federal government to delimit and define citizenship and its privileges. Drafters and defenders believed that the Fourteenth Amendment extended nationally the guarantees outlined in the first eight amendments. However, subsequent reality proved the folly of their expectations. Before the end of the century, the Supreme Court determined that the Fourteenth Amendment did not incorporate existing national guarantees. Pursuant with this, the Court overturned national civil rights legislation seeking to minimize racial discrimination. It maintained state laws prohibiting interracial marriage and integration in schools, transportation, and the like. Even in cases not involving race, the Court examined contested acts on a case-by-case basis, exploring individually whether disputed concerns were fundamental and substantive enough to merit national interference.

Fifty years later, the Court began empowering these reconstruction amendments. In the 1920s, it ruled that First Amendment stipulations regarding speech and press applied directly to the states. Only when words resulted in a clear and present danger could state restriction be justified. By the forties, the court began addressing state entanglement with religion, explaining that the First Amendment protected Jehovah's Witnesses who refused to salute the flag on religious grounds. Twenty years later, the Court deemed that mandatory prayer and Bible reading in schools were unconstitutional. In the thirties and again in the sixties, Supreme Court rulings ensured that those accused in state courts enjoyed the same rights as those accused in federal courts. It banned state use of evidence found through unreasonable searches and seizures, granted every American access to free legal counsel, and upheld the privilege against self-incrimination, requiring enforcement agents to remind arrestees across America of this right. Even privacy rights became a national concern, so that now practicing birth control, engaging in sodomy, aborting an unwanted pregnancy are all mandated guarantees.

These clear national directives took away much of the independent power states once had defining and protecting civil liberties. However, just when the power of the Supreme Court seemed final, scholars

and notable judges offered a new directive, urging states to use nationally outlined protections to determine minimal guarantees and to use their own constitutional traditions to extend liberties beyond that. This plea led to subtle variations, with some states, like California and Oregon, granting their inhabitants greater protections than the federal government does. Although few states exercise this independence consistently, its possibility opens the door for future, expanded state involvement in civil liberty protection.

In addition to this potential for increased state influence, other unpredictable factors affect the future power states may have in protecting liberties. Jurisdictions depend on Supreme Court rulings. What currently remains a state concern, say marriage requirements, can easily be incorporated into the national fold. The Supreme Court need only declare that state differentiation between same and different sex couples goes against the equal protection clause, and overnight states would lose this domain. Likewise, any current nationally protected right may be returned to state jurisdiction. The Court has already accepted many state-legislated restrictions on abortion. Permitting even tighter ones could de facto return control to states.

Public opinion, not just Court whim, fosters confusion over the current and future role of state control in matters of civil liberty. History has shown that without voluntary compliance few Supreme Court pronouncements become accepted practice. States and the individuals composing them sometimes ignore national mandates. Presidents desiring reelection rarely go against such defiance. The Court, lacking the power of the sword, can offer no independent enforcement. For example, community schools often defy integration requirements through self-selecting tracking programs. Small religious communities, like the Hasidic ones in Brooklyn, effectively destroy businesses that do not close in observation of their Saturday Sabbath. Many states permit local communities to ban handgun ownership within their borders. In each case, enjoyed civil liberties differ from national standards.

Isolating the civil liberties under state jurisdictions is difficult. Much of the independent power states retain depends on whether the Supreme Court offers specific guidelines, whether local judges choose to "lock in step" with these guidelines, and whether communities exert independent influence. There exist few immutable directives outlining which level of government protects which civil liberty. That protective distribution largely hinges on the fourteenth amendment, which itself elicits ongoing, rigorous debate as to its scope. How much civil liberty protection states exert strongly depends on human determination.

Certainly where states currently have or might reinherit jurisdiction, there exist adequate constitutional guidelines, in place since the beginning of America's independent existence. However, only time will tell whether states—when asked to do so—will successfully and uniformly implement their extensively declared guarantees.

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References and Further Reading

- Bryce, James. *The American Commonwealth*. Two Volumes. 1888, reprint ed., Indianapolis: Liberty Press, 1995.
- Cronin, Thomas E. *Direct Democracy: The Politics of Initiative, Referendum, and Recall*. Cambridge, MA: Harvard University Press, 1989.
- Elazar, Daniel J. *American Federalism: A View from the States*. New York: Thomas J. Crowell, 1972.
- Finkelman, Paul, and Stephen Gottlieb, eds. *Toward a Usable Past: Liberty under State Constitutions*. Athens: University of Georgia Press, 1991.
- Fritz, Christian. *Rethinking the American Constitutional Tradition: National Dimensions in the Formation of State Constitutions*, Rutgers Law Journal 26 (summer 1995): 969–992.
- Hall, Kermit L. *The Magic Mirror: Law in American History*. New York: Oxford University Press, 1989.
- , ed. *By and For the People: Constitutional Rights in American History*. Arlington Heights, IL: Harlan Davidson, Inc. 1991.
- Kruman, Marc W. *Between Authority and Liberty: State Constitution Making in Revolutionary America*. Chapel Hill: University of North Carolina Press, 1997.
- Latzer, Barry. *State Constitutions and Criminal Justice*. New York: Greenwood Press, 1991.
- Lutz, Donald S. *Popular Consent and Popular Control: Whig Political Theory in the Early State Constitutions*. Baton Rouge: Louisiana State University Press, 1980.
- . *The Origins of American Constitutionalism*. Baton Rouge: Louisiana State University Press, 1988.
- Rosenberg, Gerald. *The Hollow Hope: Can Courts Bring About Social Change?* Chicago: University of Chicago Press, 1991.
- Scalia, Laura J. *America's Jeffersonian Experiment: Remaking State Constitutions, 1820–1850*. DeKalb: Northern Illinois University Press, 1999.
- Swindler, William F., ed. *Sources and Documents of United States Constitutions*. Ten Volumes. Dobbs Ferry, NY: Oceana Publications, Inc. 1973.
- Tarr, G. Alan. *Understanding State Constitutions*. Princeton: Princeton University Press, 1998.
- , ed. *Constitutional Politics in the States: Contemporary Controversies and Historical Patterns*. New York: Greenwood Press, 1996.

See also Abolitionist Movement; Accommodation of Religion; American Revolution; Application of First Amendment to States; Ballot Initiatives; Bills of Rights in Early State Constitutions; Child Custody and Foster Care; Church Property after the American Revolution; Defiance of Court's Ban on School Prayer; Disestablishment of State Churches in the Late Eighteenth Century

and Early Nineteenth Century; Economic Regulation; Fourteenth Amendment; Freedom of Speech and Press; Nineteenth Century; Incorporation Doctrine; Jury Trial Right; Jury Trials and Race; Magna Carta; Natural Law, Eighteenth Century Understanding; Religion in Nineteenth-Century Public Education (Includes “Bible Wars”); Ratification Debate, Civil Liberties in; Religious Liberty under Eighteenth-Century State Constitutions; Same-Sex Unions; Self-Governance and Free Speech; Shopping Centers and Freedom of Speech; State Aid to Religious Schools; State Constitution, Privacy Provisions; State Constitutional Distinctions; State Constitutions, Modern History, Civil Liberties under; Ten Commandments on Display in Public Buildings; Theories of Civil Liberties; Virginia Declaration of Rights (1776)

STATE CONSTITUTIONS, MODERN HISTORY, CIVIL LIBERTIES UNDER

Civil liberties under state constitutions did not receive concerted attention from either modern scholars or the judiciary until the close of the Warren Court. From 1897 to 1969, as the Supreme Court federalized civil liberties through the incorporation doctrine that applied provisions of the federal Bill of Rights against the states through the Fourteenth Amendment’s due process clause, state courts seldom turned to the protections of the bills of rights in their own constitutions. Although there were notable exceptions, such as the state courts that adopted the exclusionary rule and the right to counsel before being required to do so, frequently the state courts merely followed the example set by the Supreme Court, even when interpreting their own constitutions. Not surprisingly, then, state constitutions were not a subject of academic interest during most of the twentieth century. In fact, in 1966, Professor Lester J. Mazor noted that no treatise existed on state constitutional law or civil liberties under state constitutions.

However, as the Burger Court replaced the Warren Court, a new awakening regarding the civil liberties protected by state constitutions emerged. Many scholars, state court judges, and even a Supreme Court justice urged the states to not merely parrot the federal interpretation of civil liberties but to engage in their own independent examination of the guarantees contained in their fundamental state charters. Such an independent scrutiny is permissible because, although the U.S. Supreme Court’s decisions are binding on questions of federal law, they are not dispositive of the rights provided by state constitutions, even with

respect to provisions that protect similar rights. As the Supreme Court held in *PruneYard Shopping Center v. Robins* (1980), state constitutions may protect a different scheme of constitutional values as long as the resulting liberty structure does not violate the provisions of the supreme federal Constitution.

PruneYard upheld the California Supreme Court’s determination that its state constitution protected free speech and petitioning rights at a privately owned shopping center, even though the Supreme Court had reached a contrary result under the U.S. Constitution in *Lloyd Corporation v. Tanner* (1972). The shopping center contended, among its other arguments, that *Lloyd* barred the state from granting free speech rights to citizens on its property. But the Supreme Court disagreed, reasoning that while *Lloyd* constrained the reach of free speech rights under the federal Constitution, it was well established that the state could adopt in its own constitution more expansive individual liberties so long as this state constitutional grant did not contravene any provision of the U.S. Constitution. This well-established principle authorizes an independent system of civil liberties under a state constitution. All that remained was to provide a reason to create one.

The New Judicial Federalism Movement

The impetus for an independent state civil rights jurisprudence stemmed at least partially from a desire to preserve the individual civil liberties established by the Warren Court against their erosion by the more conservative approaches used by the Burger Court and later the Rehnquist Court. Although the Burger and Rehnquist Courts did not explicitly overrule Warren Court landmarks, such as *Griffin v. Illinois* (1956), *Mapp v. Ohio* (1961), *Gideon v. Wainwright* (1963), and *Miranda v. Arizona* (1966), these decisions were frequently narrowed by later rulings creating exceptions to their principles. For some proponents, state constitutions, statutes, and judicial decisions held the only promise to continue the progressive liberties revolution of the Warren Court.

Yet it would be unfair to merely characterize this as an ideological movement. The call to examine state constitutions was motivated at least equally by the appropriate dual protection of liberty under the American federal system. James Madison envisioned in *The Federalist Papers* that a “double security” would arise to the “rights of the people” from the division of governmental power between the federal and state governments and among the branches of each. As the federal judiciary established a framework

for judicial enforcement of civil liberties, Madison's federal vision could best be served by an independent judicial examination of the rights guaranteed by the state constitutions. The movement became known as the new judicial federalism, although sometimes either "new" or "judicial" is omitted.

New judicial federalism urged that state constitutional liberties should not be relegated to a subordinate position, especially considering that they were the original source of American freedoms. State bills of rights actually preceded the federal charter, their existence being one of the reasons that the Constitutional Convention of 1787 did not deem a federal statement of rights necessary. The Bill of Rights ratified in 1791 borrowed pervasively from state constitutions, appropriating almost every one of its provisions from an existing state bill of rights. Thus, from a historical perspective, state constitutions were the wellspring of the American conception of civil liberties. The adherents to the new judicial federalism contended this influence should continue even under modern American federalism. The states could secure rights based on the local concerns of their citizens, being more responsive to their needs. The states could also serve as laboratories of experimentation regarding the appropriate level of liberty, without having to establish a uniform federal rule applicable to all fifty states.

The best known and most cited piece of scholarship encouraging new judicial federalism, even though many of its ideas had previously been expressed, is Justice William J. Brennan's article *State Constitutions and the Protections of Individual Rights*. Brennan urged that, despite federal incorporation, the state constitutions should not be forgotten, as they too "are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law." He continued that the Court's decisions should not be considered dispositive of civil liberties guaranteed by state law counterparts. Instead, he urged that, as the Burger Court's decisions had diminished protection of federal civil rights, the state courts needed to respond by increasing their own scrutiny to safeguard liberty.

Many others also provided scholarly commentary encouraging and defending the new judicial federalism, including notable contributions by Professor (later Oregon Supreme Court Justice) Hans A. Linde, California Supreme Court Justice Stanley Mosk, Wisconsin Supreme Court Justice Shirley Abrahamson, and Professor Robert F. Williams. However, not all the commentary has been favorable. Professor Earl M. Malz contended that the new judicial federalism actually does not further principles of federalism, but

instead merely tends to subject state legislative determinations to another level of judicial review, thereby reducing governmental flexibility, breeding uncertainty, and increasing the costs of the legal system. Professor James A. Gardner objected that the very premise of state constitutionalism envisioned by new judicial federalism was flawed, evidenced by the conflict among state constitutional decisions and the refusal of thousands of decisions to engage in an independent analysis of state constitutional liberties. Even supporters of the new judicial federalism had to concede that the states had not consistently embraced the tenets of the movement.

State Judicial Interpretations

Although the number of state judicial decisions interpreting state civil liberties in a different manner than the federal Constitution is now large enough that most have stopped counting, such decisions still represent the minority approach. A 2000 study by Professor James N. G. Cauthen found that state supreme courts during a twenty-five-year period followed the federal analysis in more than two thirds of all cases raising an issue of individual liberties. Thus, although the quest for state judicial independence on civil liberties has met with some successes, it is not the norm.

Nevertheless, the new judicial federalism movement has significantly influenced the judiciary's interpretation of civil liberties in a number of states, including, among others, California, Florida, Massachusetts, Alaska, Hawaii, New Jersey, and Oregon. Some state court decisions even preceded Justice Brennan's article, rejecting or refusing to await federal constitutional decisions and relying instead on state constitutions to protect the rights of their citizens. The most famous early example was *People v. Anderson* (1972), where the California Supreme Court held that the death penalty violated the state constitutional prohibition on "cruel or unusual punishment." The court relied on the California constitutional convention's rejection of the Eighth Amendment's "cruel and unusual" language, the early history of the provision, and conceptions of fundamental justice. Although *Anderson's* result was later overturned by a California constitutional amendment reinstating the death penalty, the case still is an early recognition of the "responsibility to separately define and protect the rights of California citizens" later explicitly articulated by that same court in *People v. Disbrow* (1976).

Other early state court decisions came to similar conclusions. The Alaska Supreme Court in *Baker v. City of Fairbanks* (1970) rejected the application of

the petty offense exception to the right to jury trial under its state constitution, concluding “we are under a duty, to develop additional constitutional rights and privileges under our Alaska Constitution if we find such fundamental rights and privileges to be within the intention and spirit of our local constitutional language and to be necessary for the kind of civilized life and ordered liberty which is at the core of our constitutional heritage.” The Hawaii Supreme Court in *State v. Kaluna* (1974) noted that it had and would continue to “extend the protections of the Hawaii Bill of Rights beyond those of textually parallel provisions in the Federal Bill of Rights when logic and a sound regard for the purposes of those protections have so warranted.” Over the decades since the 1970s, such state judicial declarations of independence have only become more common.

The resulting state court decisions have touched almost every aspect of American constitutional liberties. Particularly significant have been those holdings protecting additional rights for criminal defendants, dismantling unequal school financing schemes, authorizing free speech rights on private property, invalidating exclusionary zoning practices, extending the rights of privacy and equality, expanding religious liberty, requiring state funding for abortions, and recognizing same-sex marriage and unions. Yet, in almost all these situations, two to three times as many state courts have not read their state charters to protect such liberties.

Although many commentators bemoan this divergence, arguably it is an expected consequence of American federalism. The states will vary in the manner in which their citizens balance liberty against security, individual freedom against community morals, and private property against public needs. For some states, the United States Supreme Court has already protected individual rights as far, if not farther, than their preferred balance. For other states wanting to tip the balance more toward liberty, the new judicial federalism is another mechanism to do so. Nevertheless, the fixation on judicial interpretation should not obscure a more direct avenue—state constitutional amendment.

State Constitutional Amendments

Since 1970, some states have enshrined additional civil liberties for their citizens into their state constitutions either by adopting a new constitution or amending an older one. Several states have adopted state constitutional privacy provisions, which provide a textual basis for the protection of privacy in

contrast to the unenumerated federal right of privacy. In addition, fourteen states adopted their own state equal rights amendments during the 1970s, which were very similar to the never ratified federal ERA. Finally, two states, California and Rhode Island, even adopted constitutional amendments specifying that their state constitutional rights were not dependent on the U.S. Constitution.

Conversely, though, other modern state constitutional amendments have been designed to limit or overturn rights previously recognized by judicial decision. In addition to the California constitutional amendment reinstating the death penalty, other California amendments have dispensed with the state constitutional exclusionary rule and limited bus-ing to what is mandated by the federal Constitution. Massachusetts, Florida, Pennsylvania, and Hawaii have also ratified amendments that have modified the judicial interpretation of provisions of their bills of rights.

Thus, in many respects, the modern history of civil liberties under state constitutions is a continuing dialogue. The proponents of the new judicial federalism helped awaken an interest in independent state constitutional adjudication. Although the reception has been mixed, this movement has succeeded in increasing awareness of the potential to secure liberty through either state judicial interpretation or state constitutional amendment.

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References and Further Reading

- Abrahamson, Shirley S., *Reincarnation of State Courts*, Southwestern Law Journal 36, (November 1982): 951–974.
- Brennan, William J., Jr., *State Constitutions and the Protection of Individual Rights*, Harvard Law Review 90 (January 1977): 489–504.
- Cauthen, James N. G., *Expanding Rights under State Constitutions: A Quantitative Appraisal*, Albany Law Review 63 (2000): 4: 1183–1204.
- Gardner, James A., *The Failed Discourse of State Constitutionalism*, Michigan Law Review 90 (February 1992): 761–837.
- Linde, Hans A., *First Things First: Rediscovering the States' Bills of Rights*, University of Baltimore Law Review 9 (Spring 1980): 379–396.
- Maltz, Earl M., *False Prophet—Justice Brennan and the Theory of State Constitutional Law*, Hastings Constitutional Law Quarterly 15 (Spring 1988): 429–449.
- Mazor, Lester J., *Notes on a Bill of Rights in a State Constitution*, Utah Law Review 1966 (September 1966): 326–350.
- Mosk, Stanley, *State Constitutionalism: Both Liberal and Conservative*, Tex. L. Rev. 63 (March/April 1985): 1081–1093.
- Rossiter, Clinton, ed. *The Federalist Papers*. New York: Mentor, 1961.

Tarr, G. Alan. *Understanding State Constitutions*. Princeton: Princeton University Press, 1998.

Williams, Robert F., *In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result*, South Carolina Law Review 35 (Spring 1984): 353–404.

Cases and Statutes Cited

Baker v. City of Fairbanks, 471 P.2d 386 (Alaska 1970)

Gideon v. Wainwright, 372 U.S. 335 (1963)

Griffin v. Illinois, 351 U.S. 12 (1956)

Lloyd Corp. v. Tanner, 407 U.S. 551 (1972)

Mapp v. Ohio, 367 U.S. 643 (1961)

Miranda v. Arizona, 384 U.S. 436 (1966)

People v. Disbrow, 545 P.2d 272 (Cal. 1976)

People v. Anderson, 493 P.2d 880 (Cal.), cert. denied, 406 U.S. 958 (1972)

PruneYard Shopping Center v. Robins, 474 U.S. 74 (1980)

State v. Kaluna, 520 P.2d 51 (Hawaii 1974)

See also **Bills of Rights and in Early State Constitutions; State Constitutions and Civil Liberties**

STATE COURTS

State courts enforce both state and federal constitutional protections. State constitutions typically contain enumerations of protected liberties that echo the federal Bill of Rights, but the state provisions sometimes differ. State courts can interpret state constitutions as either the same or more protective than the federal constitution. Generally, however, identical state and federal provisions are applied to provide the same degree of protection.

State courts also uphold federal constitutional rights. The supremacy clause requires state courts to enforce all federal laws, including the federal constitution. For example, a state court must apply the due process clause to a state civil or criminal case.

State courts have jurisdiction over cases involving federal law. Although Congress can legislate to give federal courts exclusive jurisdiction over matters of federal law, if it does not do so, then state courts have “concurrent jurisdiction.” When jurisdiction is concurrent, state courts usually have the same power to decide federal actions that federal courts possess. For example, a state court can hear an action for damages under 42 U.S.C. section 1983 for civil rights violations.

Decisions by state courts on matters of federal law, including federal constitutional protections, are subject to review by the United States Supreme Court. To review a state court decision, the Court must find a federal question. But the Court will decline to reverse even an erroneous decision of a federal question if it

can find a correct ground in state law for upholding the decision.

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References and Further Reading

Abrahamson, Shirley S., *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, Texas Law Review 63 (March/April 1985): 1141–1193.

Brennan, William J., Jr., *State Constitutions and the Protection of Individual Rights*, Harvard Law Review 90 (June 1977): 489–504.

Clafflin v. Houseman, 93 U.S. 130 (1876) (state obligation to follow federal law).

Martin v. Hunter's Lessee, 1 Wheat. 304, 4 L.Ed. 97 (1816) (Supreme Court authority to review state court decisions).

Murdock v. City of Memphis, 20 Wall. 590, 22 L.Ed. 429 (1875) (Supreme Court authority limited to federal questions; court will affirm on independent state law ground).

Cases and Statutes Cited

42 U.S.C. section 1983

See also **Incorporation Doctrine; Jurisdiction of the Federal Courts; State Constitutions and Civil Liberties; State Constitutions, Modern History, Civil Liberties under; Supremacy Clause**

STATE REGULATION OF RELIGIOUS SCHOOLS

Although “state” can refer to any level of government, for “state regulation of religious schools,” “state” refers to any one of the fifty states to local governmental entities. The Fourteenth Amendment to the Constitution guarantees that “No state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws.” The United States has a uniquely decentralized educational system; it gives individual states the primary responsibility of balancing “fundamental divergence of views concerning the role of the family, the function of the state, and ultimately, the origin and nature of man.” Every state has some form of compulsory education law. In all states, attendance at a private school is permitted as an alternative to public school attendance.

Approximately 80 percent of America’s private schools are religious institutions. A parent’s right to choose a private education is reflected in the statutes of the fifty states; where its well established that the states have the power to regulate these institutions. Under the auspices of the Religious Land Use and Institutionalized Persons Act of 2000, the Senate

explicitly states that “[t]he right to build, buy or rent such a space [for religious exercise] is an indispensable adjunct of the core First Amendment right to assemble for religious purposes.” Those purposes extend to encompass social, charitable, and educational programs.

Under the law of the United States, religious education is forbidden in public schools, except from a neutral, academic perspective. For a teacher or school administrator to endorse one religion is considered an infringement of the “establishment clause” of the First Amendment. However, the U.S. Constitution gives parents the fundamental right to direct the education of their children. In 1925, the Supreme Court recognized that “liberty” protected by the Fourteenth Amendment includes the right to choose a private education. Confronted with an Oregon statute mandating public school attendance, the Supreme Court ruled the statute unconstitutional. In the words of the Court, “The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only” (*Pierce v. Society of Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510 (1925)). In *Wisconsin v. Yoder*, the Court defined the government’s interest in compulsory education as that “degree of education . . . necessary to prepare individuals to be self-reliant and self-sufficient participants in society.” In *Runyon v. McCrary*, the Court limited the *Pierce* holding by asserting that the *Pierce*’s holding “simply affirmed the right of private schools to exist and operate.” And in *Employment Division v. Smith*, the Supreme Court determined that a neutral, generally applicable law that “incidentally” burdens religion is evaluated under the “rational basis” test. The “rational basis” test, asserts the state need only demonstrate that the regulation in question is rationally related to, or reasonably designed to, accomplish a legitimate governmental objective. Challenges to government regulation of private religious schools tend to focus on the test initiated in *Lemon v. Kurtzman* 403 U.S. 602 (1971), the so-called “Lemon test.” Under the Lemon test government regulation violates the establishment clause if it fails any of the following three requirements. First, the regulation must have a “secular purpose.” A regulation motivated, in part, by a religious purpose may be upheld as long as it is “not motivated wholly by religious considerations.” However, the “mere existence of some secular purpose” will not satisfy the test if the policy or practice is “dominated by religious purposes.” The second requirement is that the primary effect of the regulation in question must not be either to advance or inhibit religion. The third part of the test requires

that the regulation in question not result in excessive entanglement of the government in matters of religion.

The Supreme Court has upheld a New Jersey statute that made transportation equally available to both public and private education; upheld a New York statute providing free textbooks on loan to parochial school students; and upheld placement of public school teachers in parochial schools to provide remedial education services under a federal program. Twenty-seven states and the Virgin Islands have provisions permitting public funding of transportation; Idaho law dictates that the costs must be recovered. Seventeen states have the power or duty to loan free textbooks to private school students. Although some states provide significant assistance for health needs such as immunization, vision/hearing services and diagnostic testing. Actual regulation of private schools remains the prerogative of state governments. Successful challenges to governmental regulations usually implicate both a Free Exercise claim and an alleged violation of another constitutionally protected right this is the so-called hybrid claim.

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References and Further Reading

- Cookson, Peter. *School Choice: The Struggle for the Soul of American Education*. New Haven, CT: Yale University Press, 1994.
 DeGraff, Eric A., *State Regulation of Non-Public Schools: Ties that Bind*, *BYU Education and Law Journal* 386 (2003).

Cases and Statutes Cited

- Lemon v. Kurtzman*, 403 U.S. 602 (1971)
Myer v. Nebraska, 262 U.S. 390 (1923)
Pierce v. Society of Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510 (1925)
Wisconsin v. Yoder, 406 U.S. 205 (1972)

STATE RELIGIOUS FREEDOM STATUTES

In the mid- to late 1990s, thirteen states passed enactments designed to protect religious practices from unnecessary government restriction. The state provisions emerged from the dispute over the U.S. Supreme Court’s decision in *Employment Division v. Smith* (1990), which held that the First Amendment’s free exercise clause seldom, if ever, gave religiously motivated conduct protection from the burdens of a “neutral law of general applicability.” The *Smith* holding potentially exposes religious practices—especially those of unfamiliar minorities—to widespread restriction from a host of general secular laws, and

this prospect triggered a congressional remedy in the Religious Freedom Restoration Act of 1993 (RFRA). RFRA reinstated, as a statutory right, the standard of previous constitutional decisions: even a facially neutral law or regulation that imposes a “substantial burden” on religious exercise must be justified on the ground that it serves a “compelling governmental interest” and is the “least restrictive means” of doing so. However, the Supreme Court in *City of Boerne v. Flores* (1997) struck down RFRA in part on the ground that it exceeded Congress’s power to enforce Fourteenth Amendment rights against state and local governments.

Smith and *Boerne* together prompted religious freedom defenders to seek protections from state legislatures themselves through statutes tracking RFRA and its compelling-interest test. Beginning in 1993, but primarily from 1998 through 2000, “state RFRAs” or “mini RFRAs” passed as statutes in eleven states (Arizona, Connecticut, Florida, Idaho, Illinois, Missouri, New Mexico, Oklahoma, Pennsylvania, Rhode Island, South Carolina, and Texas) and as a constitutional amendment in one state (Alabama). Of course, the state-autonomy arguments invoked in *Boerne* to invalidate congressional action are inapplicable when the state places limits on its own laws in the name of religious freedom.

State enactments generally track RFRA’s “substantial burden”/“compelling interest” formulation, but some either narrow or broaden protection. A few exempt certain categories of laws and regulations from scrutiny, sometimes in frequently occurring disputes: South Carolina excludes religious-freedom claims by state prisoners; Texas excludes claims by religious institutions against civil rights laws and claims by churches against local zoning regulations. On the other hand, some statutes seek to keep the “burden” threshold for triggering protection from being set too high: Arizona makes clear that a burden on religion is “substantial” unless it is “de minimis” or technical, and Alabama removes the “substantial” qualifier altogether, likewise suggesting that minor burdens on religious practice still must be scrutinized.

The state enactments to date have been the subject of only a few judicial interpretations. Several appellate decisions note that state-RFRA claims were not raised in the trial court, suggesting that lawyers are not yet familiar with them. A decision of the Florida Supreme Court, however, exemplifies the threat of judges willing to shrink the scope of the statute even by means irreconcilable with its text. Florida’s statute defines religious exercise as “an act or refusal to act that is substantially motivated by a religious belief, whether or not the religious exercise is compulsory or central to a larger system of religious belief.” But the

Florida court in *Warner v. City of Boca Raton* (2004) held that a burden on religion is not “substantial” unless it “compels the religious adherent to engage in conduct that his religion forbids or forbids him to engage in conduct that his religion requires”—thereby reimposing under substantiality the very same restriction, that the conduct be religiously compelled or forbidden, that the legislature had rejected in defining religious exercise.

“Mini RFRAs” offer the promise that states will give religious freedom a degree of protection that the U.S. Supreme Court has been reluctant to give under the First Amendment. But the state enactments will have little effect if they are overlooked by lawyers or whittled down by state judges—or conversely, if protections under federal law rebound from the low point where they seemed to be in the early 1990s.

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References and Further Reading

- Berg, Thomas C., and Frank H. Myers, *The Alabama Religious Freedom Amendment: An Interpretive Guide*, *Cumberland Law Review* 31 (2000–2001): 47–78.
- Dolan, Mary Jean, *The Constitutional Flaws in the New Illinois Religious Freedom Restoration Act: Why State RFRAs Don’t Work*, *Loyola University Chicago Law Review* 29 (2000): 153–197.
- Gildin, Gary S., *A Blessing in Disguise: Protecting Religious Minorities through State Religious Freedom Non-Restoration Acts*, *Harvard Journal of Law and Public Policy* 23 (2000): 411–486.
- Symposium: Restoring Religious Freedom in the States*, *University of California Davis Law Review* 32 (Spring 1999): 511–854 (various articles).

Cases and Statutes Cited

- City of Boerne v. Flores*, 521 U.S. 507 (1997)
- Employment Division v. Smith*, 494 U.S. 872 (1990)
- Warner v. City of Boca Raton*, 887 So. 2d 1023 (Fla. 2004)

STATUS OFFENSES

Status offenses are acts committed by a juvenile that are illegal only because the person committing them is a child. Major examples of such offenses include running away, truancy, ungovernability (incorrigibility or being beyond the control of one’s parents), and underage liquor law violations.

Status offenses are typically handled by special juvenile courts—tribunals originally designed to provide treatment and guidance, rather than punishment. Depending on the state, status offenses may be framed as delinquency matters—where a child is technically charged with a crime—or as dependency

matters. In the latter case, the child is not characterized as a delinquent, and courts do not formally treat the status offense as criminal.

Although the number of status offense cases is dwarfed by the number of delinquency cases handled by juvenile courts, they still constitute a significant portion of juvenile courts' caseload, and their numbers are increasing. In 1996, state juvenile courts formally disposed of approximately 162,000 status offense cases—more than double the number they handled in 1987.

Under federal law, states are required (under penalty of losing federal funds) to treat status offenders differently than delinquents. Under the terms of the Juvenile Justice and Delinquency Prevention Act of 1974, states are required to exclude status offenders from correctional and juvenile detention facilities. The Act requires status offenders to be housed in community "shelter facilities," and detained juveniles must be strictly separated from adult offenders. This provision reflected a social work ethos that has grown less popular in recent years.

Despite diversion and deinstitutionalization mandates, status offenders continue to be detained or institutionalized—or both. In nearly 10,000 of the status offense cases in 1995, the juvenile court ordered the minor detained. Although only half of all status offense cases resulted in conviction (or "adjudication" in juvenile court parlance) and most of those resulted in probation, 16 percent resulted in placement outside the home.

Critics say these practices disproportionately affect minorities, who experience higher detention rates, and girls, who are more likely to be charged with running away. Some policy advocates, including the American Bar Association, have advocated elimination of status offenses. Abolition of status offenses is particularly appropriate if one believes that juvenile courts are unsuitable child welfare agencies. For many, provision of social services is a preferable model to creating a criminal record for young offenders.

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References and Further Reading

Sickmund, Melissa. Juveniles in Court (U.S. Dep't Justice, Office of Juvenile Justice and Delinquency Prevention, June 2003), www.ncjrs.gov/pdffiles1/ojjdp/195420.pdf.

STATUTORY RAPE

Statutory rape is distinguished from the common law offense of forcible rape, of which force and resistance are elements. The state must merely prove beyond

a reasonable doubt that a defendant engaged in sexual intercourse with a person under the statutory age of consent. The nonconsent of the minor is not required, because the minor is deemed legally incapable of giving consent. Thus, statutory rape is a strict liability crime.

Two interrelated policy goals underlie statutory rape laws: (1) to prevent innocent and immature teenagers from consenting to sex in an uninformed manner; and (2) to deter men from preying on young females and coercing them into sexual relationships.

Most state statutes have designated an arbitrary age of consent, ranging from ten to eighteen years old. The age of consent is not tied to physical development, but rather reflects differing views regarding an adolescent's capacity to consent and whether sex with an adolescent is dangerous or morally undesirable.

Some state statutes include two or more age limits, with a harsher penalty when the victim falls within the lower age limit. Others define a range of age differences between adolescent participants inside of which sexual intercourse is lawful, thus excluding from prosecution sexual experimentation between contemporaries. Only five states have gender-specific provisions, justified on grounds of pregnancy prevention and the disproportionate burden that teenage pregnancy places on women. More than a third of states and the Model Penal Code recognize in some instances the defense of reasonable mistake as to age.

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References and Further Reading

Oberman, Michelle, *Regulating Consensual Sex with Minors: Defining a Role for Statutory Rape*, Buffalo Law Review 48 (2000): 703.

Giggetts, Stephanie A. 65 Am. Jur.2d Rape §§ 11–14, 20, 26, 84 (2004).

LaFave, Wayne. 2 Subst. Crim. L. § 17.4(c) (2d ed. 2005).

See also **Rape; Strict Liability**

STAY OF EXECUTION

In civil cases, a stay of execution is a court order that prevents a legal judgment from being carried out until the order is lifted, by either the court that issued the stay or a superior court.

In capital cases, a stay of execution precludes the state from putting a condemned prisoner to death until the stay is dissolved. In addition to judicial stays of execution, executive officials—including some governors and the president—are authorized to grant

reprieves to death row inmates. Virtually all capital prisoners in the United States receive one or more stays of execution before their cases are resolved.

At the Supreme Court level, a minority of four justices is sufficient to grant *certiorari* and to force the Court to conduct a full review of a case. On the other hand, only three justices are required to place a “hold” on any *certiorari* petition that they consider related to a case already pending before the Court. The purpose of the “hold rule” is to ensure that parties to every case still pending on *certiorari* will receive the benefit of whatever changes in the law the Court might announce in an upcoming decision.

When capital prisoners appeal to the Court with an execution date already set, a *certiorari* grant or a hold vote is meaningless unless the Court also grants a stay of execution. In other words, a case the Court decided to hear (by granting *certiorari*) or decided to hold (because issues in a case pending before the Court might benefit the capital petitioner) would be rendered moot by the petitioner’s execution. Absent a stay, which requires five votes, the petitioner would be killed before the Court took final action on his case.

On rare occasions, stays of execution have been issued after the condemned prisoner has been strapped to a gurney and an intravenous saline solution has begun to flow. As Justice William Brennan noted in a written dissent to the Supreme Court’s denial or *certiorari* and refusal to grant a stay of execution to Texas prisoner James Autry.

Mr. Autry has already endured the profound psychological torment of lying strapped to a gurney for over an hour with an intravenous needle in his arm, waiting to be put to death. That wait was brought to an end by the grant of a last-minute stay permitting him time to vindicate his constitutional rights. Following today’s decision [denying a second stay of execution], however, he will again have to under to the same indignity and psychological anguish, knowing that this time will probably be the last.

Justice Brennan’s words proved prophetic, as James Autry was lethally injected not long after Brennan’s dissent in *Autry v. McKaskle*, 465 U.S. 1090 (1984) was completed.

According to a pair of researchers, California’s death row prisoner-turned author, Caryl Chessman, received a telephonic stay after he was strapped into California’s gas chamber. Just before the telephonic reprieve alerted prison officials, the executioner released the cyanide tablets into the acid solution beneath Chessman’s chair. Because there was no way to halt the execution, Chessman died.

In another case involving a California death row inmate Robert Alton Harris, during a nine and one-half-hour period, Harris received four separate stays of execution from various courts. The fourth stay of execution was issued telephonically while Harris was sealed in the gas chamber awaiting death. The state succeeded in getting all four stays of execution overturned, and Harris died in California’s gas chamber twelve hours after the entry of the first stay of execution, and only after the U.S. Supreme Court issued an extraordinary order directing lower courts to desist from issuing any further stays of execution.

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References and Further Reading

- Gray and Stanley. *A Punishment in Search of a Crime*. Avon Books, 1989, p. 153.
Lungren and Krotoski, *Public Policy Lessons from the Robert Alton Harris Case*, U.C.L.A. Law Review 40 (1992): 295, 322–326.

Cases and Statutes Cited

- Autry v. McKaskle*, 465 U.S. 1090 (1984)

STEM CELL RESEARCH/RESEARCH USING FETAL TISSUE

What Are Stem Cells?

Stem cells are unspecialized cells that have the potential to develop into specialized cells that could form any part of the human body.

Why Are They Important?

Stem cells are important precisely because they can develop into any part of the human body. This opens the possibility that they could be used for regenerative therapies to treat illnesses and injuries. Some potential applications of this type of therapy might include the creation or regeneration of damaged organs to eliminate the need for transplantation, the treatment of degenerative neurological conditions such as Parkinson’s and Alzheimer’s disease, and the regeneration of nerves for those with spinal injuries. Although science is only just beginning to investigate

the potential medical applications of stem cells, at this stage their potential seems almost unlimited.

Where Do Stem Cells Come From?

In adults, there are very small quantities of stem cells located inside tissues throughout the body. These cells are difficult to isolate and seem to possess the ability to develop into only a limited number of types of cells determined by their location within the body. Stem cells that can only develop into a limited number of specialized cells are called multipotent stem cells.

Stem cells can be recovered from embryos in the blastocyst stage of development (five to seven days after fertilization). These cells are easier to recover and possess the ability to develop into any type of specialist cell. These are called pluripotent stem cells. Once the cells are isolated, they can be made to produce a theoretically unlimited number of genetically identical stem cells. This self-sustaining group of cells is called a stem cell line. At any time, a group of these cells can be removed and stimulated to grow into the required type of cell.

Stem cells can also be recovered from later stage embryos and fetuses. Such recovery would destroy the viability of the embryo or fetus and usually occurs after an abortion. Fetal stem cells are multipotent but easier to acquire and isolate.

Why Are Stem Cells Controversial?

Embryonic and fetal stem cells are controversial primarily because the process of their collection destroys the embryo or the fetus. This divides opinion roughly along the lines of abortion, although the collection of embryonic stem cells has the additional dimension of the destruction of the embryo possibly leading to lifesaving and life-enhancing therapies for thousands of people. The source of adult stem cells makes them less controversial.

History and Early Use of Stem Cells

Although the potential of stem cells is only just being explored, they have been used for medical purposes for a number of years. Starting in 1959, scientists began successfully transplanting bone marrow, which introduced hematopoietic stem cells (cells capable of developing into blood) into patients whose own stem

cells were destroyed in cases of leukemia or as a side effect of chemotherapy treatments. In the 1990s, these hematopoietic cells were also found to be present in the blood of the umbilical cord, which was also less prone to rejection than cells from adults, leading to the creation of banks to store umbilical cord blood and calls for collection to be made a routine part of child delivery.

Early stem cell procedures mainly involved the transplantation of fetal stem cells, which required a steady stream of aborted fetuses. It was not until 1998 that the University of Wisconsin successfully created the first self-sustaining lines of pluripotent cells, opening the possibility of manufacturing the required cells in a laboratory setting rather than harvesting them directly from the fetus.

Early research focused on embryonic stem cells, with the origin and presence of stem cells in adult tissues remaining a mystery. Scientists later discovered more than forty different types of stem cells in the adult body, each capable of forming a limited variety of specialized cells. This limited ability to develop into other types of cells made them less attractive for study and therapeutic use than the pluripotent embryonic stem cells. More recent studies have shown that adult stem cells are capable of developing into broader range of specialist cells than first thought, although a long-term goal of scientists working with adult stem cells is to find ways to make them pluripotent by reverting them to the blastocyst cell type. If this were to be achieved, it would eliminate the need to harvest stem cells from embryos and fetuses.

Sources of Embryonic Stem Cells

The potential sources of embryonic stem cells are from unwanted in vitro fertilization (IVF) embryos and from embryos created specifically for experimental and therapeutic purposes.

Since IVF techniques were pioneered in the 1970s, one of the hallmarks of the treatment has been the creation of multiple fertilized embryos. Drugs are given to stimulate ovulation and allow for the harvesting of multiple eggs. The eggs are fertilized, frozen, and then implanted one at a time until a successful full-term pregnancy is achieved. Upward of twenty embryos can be produced because of the comparatively low chance of success with any one embryo. Many couples using IVF treatments end up with a number of frozen embryos that they do not intend to use. These embryos are stored and eventually destroyed. Because these frozen embryos are not

going to be used for implantation and are at a very early stage of development, they are seen by some as an ideal source of stem cells, others who believe in the sanctity of life from conception argue that the destruction of any embryo is immoral regardless of any reason behind its destruction.

Apart from harvesting stem cells as a by-product of the destruction of unwanted embryos, the embryonic stem cells can be created for the specific purpose of scientific and therapeutic purposes. This can be achieved with the fertilization of an egg and sperm given expressly for experimental purposes, although the creation of an embryo for the sole purpose of its destruction is viewed by many as highly unethical.

Stem cells can also be created by a process known as therapeutic cloning. This involves removing the nucleus of a donated egg and replacing it with the genetic material of the patient to be treated with the stem cells. The cell is then made to divide and ultimately produce the required cells, which can then be implanted into the patient with no chance of provoking an immunological rejection. The distinction between this and reproductive cloning is that there is no intention to implant the clone into a uterus and ultimately bring about the birth of a genetic clone. However, the unease that many feel about cloning is added to ethical issues surrounding the creation of something that could develop into another human life solely to acquire cells for medical treatment to make this highly controversial.

Ethical Approaches

The principal ethical position against the use of embryonic and fetal stem cells relies on the absolute right of the fetus to life that begins at the moment of conception. For proponents of this position there can never be any factor capable of mitigating the destruction of the fetus/embryo and draw the analogy between this and killing an otherwise healthy person solely to harvest their organs to give to others. This position is associated with many of the more conservative strands of Christianity and in particular with the position of the Catholic Church. They argue that the creation of any human life for scientific experimentation or medical treatment cheapens and commodifies all human life.

Those in favor of the use of stem cells argue for a balancing approach to evaluate its moral status. They argue that a right to life is not an absolute right. It may be a very important right, but it should be balanced against the potential good to be gained from the use of stem cell-based therapies. Some also argue

that an embryo does not have an independent right to life before the point of viability, or that this right to life is lessened until the fetus reaches viability.

Embryonic Stem Cells as a Political Issue

The United States was one of the leading countries in the development of embryonic stem cells and related medical treatments. However, ethical concerns over the development of this branch of science led to this becoming a politically charged issue. In 1995, Congress initiated a ban on the use of federal funds for projects involving the destruction of an embryo. This continued until August 2000, when President William J. Clinton issued guidelines allowing the use of federal funds for embryonic stem cell research if the embryo would have been destroyed anyway and only if private money was used to finance the actual destruction of the embryo and recovery of the cells.

The role of the federal government in funding stem cell research became an issue in the 2000 presidential election and President George W. Bush to announce his compromise policy on the use of federal funding for embryonic stem cell research in his speech on August 9, 2001, stating that federal funds would only be available for research using any of the more than sixty preexisting stem cell lines. This compromise would ensure that federal funding would not aid in the destruction of any future embryos but not ignore the scientific potential offered by stem cells derived from embryos that had already been destroyed. The compromise was criticized by opponents of the use of stem cells claiming that this legitimized the prior destruction of the embryos. Advocates of stem cell research criticized the policy for hampering the development of new stem cell lines and treatments and placing the United States at a disadvantage to other countries in this emerging branch of science. The policy was also criticized for the moral arbitrariness in picking a cutoff date for stem cell lines to be eligible for federal funding.

The Bush compromise on federal funding for stem cell research did not stop the ethical and political debate over whether the U.S. government should sponsor scientific research in this field, and if so, what the extent the sponsorship should be. Several high-profile campaigns by celebrities with diseases or conditions that could potentially benefit from stem cell-based therapies ensured that the issue remained in the media spotlight. Perhaps the most important development was the position of the family of President Ronald Reagan who died in 2004 from Alzheimer's disease. Stem cell-related therapies offer

the possibility of developing a cure for this condition, and the Reagan family, including former First Lady Nancy Reagan, voiced an increasingly public support for federal funding of stem cell research, with Ronald Reagan, Jr. speaking against the compromise in the 2004 Democratic Party convention. This was all the more significant given President Reagan's association with the religious right and strongly pro-life sections of the Republican Party.

Although scientists in the United States were constrained in their research by the Bush compromise, different political climates in other countries have aided stem cell research abroad and placed increasing pressure on the United States to follow suit. In May 2004, Britain became the first country in the world to open its own national stem cell bank as part of its policy of assisting researchers by increasing their access to as many stem cell lines as possible. In July 2004, President Bush announced plans for the United States to create its own national stem cell bank but only containing the stem cell lines created before August 2001.

Stem cell research is a very young field that offers the hope of miraculous leaps in medical capacity. That the clinical applications of its more extreme possibilities are decades away from realization have not dampened the hope and enthusiasm for a new dawn of medicine. The ethical debate over embryonic stem cell use seems to be insoluble, but without great advances in adult stem cell research, the pressure of international competition and the promise of this new age of medicine seems to be pushing the United States toward greater support for its scientific community in this area.

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References and Further Reading

- Green, Ronald M. *The Human Embryo Research Debates: Bioethics in the Vortex of Controversy*. Oxford University Press, 2001.
- Holland, Suzanne, Karen Lebacqz, and Laurie Zoloth, eds. *The Human Embryonic Stem Cell Debate: Science, Ethics, and Public Policy*. MIT Press, 2001.
- Kiessling, Ann A., and Scott C. Anderson. *Human Embryonic Stem Cells: An Introduction to the Science and Therapeutic Potential*. Jones and Bartlett Publishers, 2003.
- The President's Council on Bioethics. "Monitoring Stem Cell Research" (2004–) <http://www.bioethics.gov/reports/stemcell/>
- Ruse, Michael, and Christopher A. Pynes, eds. *The Stem Cell Controversy: Debating the Issues*. Prometheus Books, 2003.
- Snow, Nancy E. *Stem Cell Research: New Frontiers in Science and Ethics*. University of Notre Dame Press, 2004.
- Waters, Brent, and Ronald Cole-Turner, eds. *God and the Embryo: Religious Voices on Stem Cells and Cloning*. Georgetown University Press, 2003.

See also *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52 (1976); *Reproductive Freedom; Roe v. Wade*, 410 U.S. 113 (1973); *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989)

STENBERG v. CARHART, 530 U.S. 914 (2000)

Carhart represents another episode in the continuing abortion controversy. Leroy Carhart, a physician specializing in abortions, filed an action seeking a preliminary injunction against the enforcement of Nebraska's 1997 "Partial-Birth Abortion Statute" because for abortions performed after the sixteenth week he attempts a partial-birth abortion: he delivers alive the body of the unborn child intact, except the head, then crushes the skull and evacuates the contents of the brain so that the compressed skull can be more easily pulled through the cervix.

Justice Breyer, writing for a five-justice majority, held Nebraska's partial-birth abortion ban unconstitutional. According to Justice Breyer, three "established principles" control all abortion cases. "First, before 'viability . . . the woman has a right to choose to terminate her pregnancy.'" "Second, 'a law designed to further the State's interest in fetal life which imposes an undue burden on the woman's decision before fetal viability' is unconstitutional." "Third, 'subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.'"

Applying the three principles to Nebraska's statute, the Court held that the statute violates the Constitution two independent ways: "First, the law lacks any exception 'for the preservation of the . . . health of the mother.'" "Second, it 'imposes an undue burden on a woman's ability' to choose a D&E abortion, thereby unduly burdening the right to choose abortion itself."

The Court held that to pass constitutional muster Nebraska's statute needed a "health of the mother" exception even though the Court acknowledged that (1) "[t]here are no general medical studies demonstrating comparative safety" of the D&X procedure; (2) the American Medical Association has a stated policy announcing "that 'there does not appear to be any identified situation in which the intact D&X is the only appropriate procedure to induce abortion'"; and (3) the American College of Obstetricians' panel "'could identify no circumstances under which [the D&X] procedure . . . would be the only option to

save the life or preserve the health of the mother.’” Despite this supporting medical evidence, the Court held “Nebraska has not convinced us that a health exception is ‘never necessary to preserve the health of women.’”

The Court also opined that because an ambiguity in the statute regarding whether Nebraska’s attempt to ban the rarely used D&X procedure may also cover the commonly used D&E procedure, the ban also places “an undue burden upon a woman’s right to make an abortion decision.”

In her critical swing-vote concurring opinion, Justice O’Connor, commented that “a ban on partial-birth abortion that only proscribed the D & X method of abortion and that included an exception to preserve the life and health of the mother would be constitutional in my view.”

Whether *Carhart* remains an important case essentially establishing abortion on demand will depend on how the Court responds to future legislation narrowly tailored to the D&X procedure, which also includes legislative findings on the health-of-the-mother issue.

RICHARD COLLIN MANGRUM

STEVENS, JOHN PAUL (1920–)

John Paul Stevens took his seat on the Supreme Court of the United States on December 19, 1975. In three decades as associate justice, Stevens has established himself as a highly independent thinker distinguished for his originality and lack of ideology. A prolific writer, Stevens’ opinions have evinced a dedication to restrained decision making in the common law tradition of case-by-case adjudication, a deep faith in the judicial exercise of reason and judgment, and a profound commitment to fulfilling the Constitution’s fundamental purposes, including especially its promise of liberty.

Life

Stevens was born on April 20, 1920, in Chicago, Illinois. He grew up in its Hyde Park neighborhood and attended the nearby University of Chicago Laboratory School from grade school through graduation. He pursued his college education at the university as well, where he studied English literature and graduated Phi Beta Kappa in 1941.

A love of Shakespeare inclined Stevens toward graduate school in English and teaching as a career. However, as Stevens began graduate studies at

Chicago, a dean of the college who was an undercover recruiter for the Navy encouraged him to take a naval correspondence course on cryptography over the summer of 1941. As a result of this coursework, the Navy offered Stevens a commission as an intelligence officer, and he joined the service on December 6, 1941, the day before the attack on Pearl Harbor. In later years, Stevens would joke that his commission provoked the attack, because it demonstrated the country’s desperation.

Stevens served in the Navy at Pearl Harbor as a code breaker deciphering intercepted Japanese transmissions, a task that he enjoyed and that earned him a Bronze Star. During this time, he met a future colleague on the Supreme Court, Byron White, who also was stationed in the Pacific as a naval intelligence officer.

While in the Navy, Stevens received a letter from an older brother asking him to consider a career in law. This older brother, whom Stevens much admired, related from his own experience as a young lawyer the opportunities the profession presented for helping others and serving the public. This appeal won over Stevens, who enrolled at the Northwestern University School of Law after completing his naval service in 1945.

Stevens loved law school and excelled in it. He served as editor-in-chief of the law review and graduated magna cum laude in two years, with the highest grade point average in the history of the law school.

Stevens’ superlative academic performance landed him a Supreme Court clerkship with Justice Wiley Rutledge from 1947 to 1948. That service left an indelible imprint on the future justice, as discussed below.

After the clerkship, Stevens began practicing as a litigator in Chicago with an established law firm and then cofounded his own a few years later. He developed an expertise in antitrust law that earned him national respect and led to his appointment, from 1951 to 1952, as associate counsel to a congressional subcommittee that investigated monopoly power in professional baseball and other markets, and from 1953 to 1955, as a member of an Attorney General committee that also studied antitrust issues. In the meantime, joining his earlier interest in teaching with his professional expertise, Stevens taught antitrust law at Northwestern from 1950 to 1954, and at the University of Chicago Law School from 1955 to 1958, and he published articles in the field.

Stevens continued his highly successful private practice into the 1960s. His reputation in legal circles for excellence and integrity contributed to his appointment, in 1969, to head an investigation into a

bribery scandal on the Illinois Supreme Court. This investigation led to the resignation of two justices of that court, and Stevens' widely praised performance led the following year to his appointment by President Richard Nixon to the Seventh Circuit Court of Appeals.

On the Seventh Circuit, Stevens proved extremely capable of mastering the facts and law in the cases that came before him, deciding them without any apparent agenda, and producing opinions of "consistent excellence" in "an astonishing number of areas," according to an American Bar Association member who evaluated his subsequent nomination to the Supreme Court.

That nomination was suggested on Justice William Douglas' retirement by Attorney General Edward Levi, who had supervised Stevens as former dean of Chicago's law school. President Gerald Ford considered Stevens a natural choice, a nominee whose indisputable merit would help heal divisions in the aftermath of Watergate. On December 17, 1975, the Senate confirmed the president's choice less than three weeks after it was announced, by a vote of ninety-eight to zero.

Jurisprudence

Writing prolifically over thirty years as a justice, Stevens has produced an immense body of opinions that has influenced the development of every major area of law to have come before the Court. To understand Stevens' work and assess its impact, it is perhaps as important if not more so to consider his approach to deciding cases as it is to examine the substance of his decisions. For with Stevens, his method of judging goes far in explaining decades of decisions that resist easy categorization by result or ideology.

Stevens himself has provided what may be the best précis of his method. In a 1956 article on Justice Rutledge, Stevens expressed admiration for many of the characteristics of his former boss' judicial approach that he would later display as a justice. Foremost among these was Rutledge's "habit of understanding before disagreeing," which led to his careful scrutiny of every aspect of a case and bred long opinions stating all of the considerations that informed and qualified his decisions. Relatedly, Stevens underscored Rutledge's aversion to deciding cases broadly based on general principles that fail to account for potential factual and legal distinctions between cases. To Stevens, Rutledge's approach demonstrated both a pragmatic concern against

deciding theoretical rather than actual controversies and a great faith in the ability of judges to decide individual cases through their judicial faculties of reason and judgment.

Not surprisingly, Stevens' work on the bench has strongly reflected the characteristics of Rutledge's approach that he most admired. In deciding cases, Stevens has focused on the factual and legal circumstances particular to each controversy, evaluated the competing arguments and interests at stake, and striven to resolve no more than necessary. Of course, this approach did not originate with Rutledge but falls within an established tradition of common law adjudication with such distinguished past practitioners as Justices Louis Brandeis and Oliver Wendell Holmes, whom Stevens has praised as "two of our greatest Justices." It also accords with a seasoned trial lawyer's sensitivity to the significance of facts, as well as with a personality that colleagues and former law clerks have described as modest, conscientious, and open minded.

Stevens' opinions evaluating free speech claims under the First Amendment provide some of the best examples of his method at work. In this area, Stevens has eschewed an absolutist approach, sometimes favored by the Court, that divides speech into "unprotected" and "protected" categories and that prohibits regulations of protected expression based on content. To Stevens, as he wrote in concurrence in *R.A.V. v. St. Paul* (1992), this all-or-nothing framework "sacrifices subtlety for clarity." Because "the complex reality of expression" cannot fit into simple categories, and because "the meaning of any expression and the legitimacy of its regulation can only be determined in context," Stevens instead has used a balancing approach that assesses and weighs the expressive interests implicated in a particular case against the government interests furthered by regulation.

Under this approach, Stevens has approved of several content-based restrictions on speech. For example, in *Young v. American Mini Theatres* (1976), Stevens authored an opinion upholding a zoning law limiting the location of adult movie theaters. In his judgment, the regulation furthered a considerable government interest in preserving the character of its neighborhoods, an interest that overcame countervailing considerations, for "few of us would march our sons and daughters off to war to preserve the citizen's right to see 'Specified Sexual Activities' exhibited in the theaters of our choice." In this case, as in *FCC v. Pacifica Foundation* (1978), which upheld a regulatory order channeling indecent radio broadcasts to hours that minimized exposure to

children, Stevens emphasized that indecent speech, although of lesser social value than political speech, nonetheless deserved some First Amendment protection and that differences in the content of the restricted expression and the character of the restriction may warrant a different result. Accordingly, in *Reno v. ACLU* (1997), Stevens had no difficulty striking down a congressional ban on indecent and patently offensive communications on the Internet, which in the interest of protecting children cut so broadly into expression among adults that Stevens regarded it as “burning the house to roast the pig,” rather than simply removing the animal from the parlor.

As these cases illustrate, Stevens’ decisions often do not line up neatly by results, but they do adhere to his vision of the limited role and ultimate responsibilities of judging. His opinions in other areas affirm that his fidelity to this vision is the common thread that runs through his jurisprudence. Thus, in the Fourth Amendment context, Stevens has rejected categorical rules that certain kinds of government actions, such as entry into homes without knocking and announcing to execute warrants for felony drug crimes (*Richards v. Wisconsin*, 1997), are always constitutional, whereas other kinds of government actions, such as using sense-enhancing technology to detect information regarding the interior of a home (*Kyllo v. United States*, 2001), are always unconstitutional. Rather, Stevens generally has heeded what his *Kyllo* dissent identified as “the tried and true counsel of judicial restraint,” under which it is “far wiser” to limit the questions a court decides to the facts before it and to leave room for other branches and future courts to grapple with emerging issues than “to shackle them with prematurely devised constitutional constraints.”

In cases involving statutory construction, Stevens has advocated as well a restrained role for the judiciary. But rather than finding restraint in relying solely on the text of statutes to ascertain their meaning, as his colleague Justice Antonin Scalia has done, Stevens has sought guidance from “every reliable source,” including legislative history. His belief, articulated in his *Circuit City v. Adams* (2001) dissent, is that relying on less leaves a court “uninformed, and hence unconstrained,” and thereby risks an interpretation that may be consistent with a court’s own policy preferences, but inconsistent with the purpose for which a legislature enacted a provision.

From Stevens’ opinions, a theme complementary to judicial restraint also appears, and that is respect for other branches and levels of government, at least within their proper spheres. For example, Stevens not only has endeavored to give effect to legislative intent in construing statutes but also has deferred to

legislative findings that support the constitutionality of enactments in areas as diverse as civil rights legislation (for example, *Tennessee v. Lane* [2004]), drug laws (for example, *Gonzales v. Raich* [2005]), and government takings (for example, *Kelo v. City of New London* [2005]).

Stevens has accorded such deference partly out of respect for the work of another branch of government and partly out of recognition of its superior capabilities in studying problems requiring legislation. This recognition of institutional competence also underlays one of Stevens’ most important opinions for the Court, *Chevron v. Natural Resources Defense Council* (1984), a charter for the modern administrative state holding that if a congressional statute is silent or ambiguous on a point that an agency administering it has construed, then a court’s role is not to interpret the statute anew but to determine whether the gap-filling interpretation of the agency more familiar with the law was reasonable.

Beyond institutional respect and competence, Stevens has held an expansive view of congressional power under the commerce clause that has led him to vote consistently to uphold social and economic legislation as constitutionally authorized. As much a nationalist as Chief Justice John Marshall, Stevens has forcefully argued that when the Constitution replaced the Articles of Confederation, it also replaced a loose association of autonomous states with a strong central government that could unify the country politically through leaders directly responsible to the people and economically through a commerce power as vast as the reach of the national economy. Stevens’ majority opinions in cases such as *U.S. Term Limits v. Thornton* (1995) and *Raich* represent the triumph of this position. The latter also cabined prior Rehnquist Court decisions limiting the commerce power and, as a result, substantially reassured the fount of constitutional authority for federal civil rights laws.

While believing in the supremacy of national power under the Constitution, Stevens nonetheless has treated states, in their respective spheres, as vital partners in the federal system. Thus, in his *Michigan v. Long* (1983) dissent, Stevens urged his colleagues to refrain from reviewing state court decisions that do not clearly rest on federal law or that appear to provide greater protection of federal rights than the Court might require. To Stevens, those situations do not pose a threat to federal interests warranting Supreme Court intervention but rather present an opportunity, as envisioned by Brandeis in *New State Ice Co. v. Liebmann* (1932), for states to experiment in democracy by developing state law or expanding federal liberties.

As strong as has been Stevens' commitment to judicial restraint, he also has obeyed an equally strong sense of duty to "say what the law is" as necessary to decide actual cases. Indeed, it is this sense of duty that has driven Stevens to confront and attempt to effectuate constitutional commands as directly as possible, rather than through the filter of judicially created rules that he has felt at best may obscure the reasoning for decisions and at worse may abdicate them.

In support of this mission, Stevens typically has turned to evaluative standards contained in the text of the Constitution itself or, in his view, reflective of its fundamental purposes. For example, Stevens has rejected the Court's three-tiered scheme for reviewing claims under the equal protection clause of the Fourteenth Amendment. Reminding his colleagues in *Craig v. Boren* (1976) that "[t]here is only one equal protection clause," Stevens instead has advocated careful reasoning to determine whether the government has acted consistent with the provision's central point that it "govern impartially." One significant result of such reasoning has been Stevens' approval of racial diversity as a nondispositive factor in university admissions, which made possible the Court's sanction of a law school affirmative action program in *Grutter v. Bollinger* (2003).

In addition, in adjudicating claims under the due process clause of the Fifth and Fourteenth Amendments, Stevens has premised his decisions on the fundamental belief that the "liberty" protected by those provisions refers to "one of the cardinal unalienable rights" that the Declaration of Independence considered endowed by the Creator and that the Constitution charged judges to fathom and protect through the exercise of independent judgment in individual cases. Stevens' discharge of this duty in three decades of cases has contributed considerably to the development of the substance and scope of "liberty."

Construing that term in *Bowers v. Hardwick* (1986), Stevens wrote in dissent that the Constitution protects "intimate choices" by persons whether married or unmarried, whether heterosexual or homosexual, an interpretation embraced by the Court in *Lawrence v. Texas* (2003). Construing provisions of the Bill of Rights enforced against the states as components of "liberty," Stevens has read the Sixth Amendment right to a jury trial to forbid judge-imposed sentences exceeding the statutory maximum possible under facts found by a jury beyond a reasonable doubt (*Apprendi v. New Jersey*, 2000). This reading led to the invalidation of the United States Sentencing Guidelines in his majority opinion in *United States v. Booker* (2005) and of capital schemes in which a judge makes the finding of aggravating

factors required to impose the death penalty (*Ring v. Arizona*, 2002). Also in the death penalty area, Stevens voted in *Gregg v. Georgia* (1976) to uphold the constitutionality of capital punishment. However, by opinion and vote, he has interpreted the Eighth Amendment's prohibition against cruel and unusual punishment to ban the execution of juveniles, a position adopted by the Court in *Roper v. Simmons* (2005); he has construed the same provision to ban the execution of the mentally retarded, first in dissent and later for a majority in *Akins v. Virginia* (2002).

Although Stevens often has emerged as a champion of liberty, consistent with his approach to judging, his support has been neither unequivocal nor uncritical. Nevertheless, there is one cause with which Stevens has consistently sided—keeping the doors of the courts open to uphold the rule of law for litigants large and small. Consequently, his opinion in *Clinton v. Jones* (1997) held that the plaintiff had "a right to an orderly disposition of her claims" of sexual harassment against the President that outweighed considerations for a stay until his term expired, and his opinion in *Rasul v. Bush* (2004) held that alleged terrorism detainees at the Guantánamo Bay Naval Base could challenge the legality of their detention in federal court. Notably, in another terrorism case, *Rumsfeld v. Padilla* (2004), which the Court dismissed on jurisdictional grounds, Stevens argued in dissent that the lower court could review the challenge of an American citizen, captured on American soil, to his indefinite military detention as an "enemy combatant." Moreover, Stevens argued that review of the executive's justification for such detention was essential, for "if this Nation is to remain true to the ideals symbolized by its flag, it must not wield the tools of tyrants even to resist an assault by the forces of tyranny."

In the end, the public at large may best remember Stevens not for the previous opinions but for the famous last words of his dissent in *Bush v. Gore* (2000), the case that effectively decided a presidential election by ending a recount of votes under the supervision of state court judges. Believing that the majority, without foundation, had endorsed "the most cynical appraisal" of the fairness of judges throughout the nation, Stevens wrote with profound sadness: "Although we may never know with complete certainty the identity of the winner of this year's Presidential election, the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law." It is a testament to Stevens' legacy of judging with independence and integrity that such confidence as remains will long outlast his service on the Court.

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References and Further Reading

- Manaster, Kenneth A. *Illinois Justice: The Scandal of 1969 and the Rise of John Paul Stevens*. Chicago: University of Chicago Press, 2001.
- Sickels, Robert Judd. *John Paul Stevens and the Constitution: The Search for Balance*. University Park: Pennsylvania State University Press, 1988.
- Siskel, Ed, “The Business of Reflection,” *The University of Chicago Magazine* 94 (August 2002): 28–31.
- Stevens, John Paul, *The Freedom of Speech*, *Yale Law Journal* 102 (1993): 1293–1313.
- , *Judicial Restraint*, *San Diego Law Review* 22 (1985): 437–452.
- . “Mr. Justice Rutledge,” In *Mr. Justice*, edited by Allison Dunham and Philip B. Kurland, 177–202. Chicago: University of Chicago Press, 1956.
- , *Some Thoughts on Judicial Restraint*, *Judicature* 66 (1982): 177–183.
- , *The Bill of Rights: A Century of Progress*, *University of Chicago Law Review* 59 (1992): 13–38.
- , *The Shakespeare Canon of Statutory Construction*, *University of Pennsylvania Law Review* 140 (1992): 1373–1387.
- , *The Third Branch of Liberty*, *University of Miami Law Review* 41 (1986): 277–293.
- Symposium: A Tribute to Justice Stevens*, *Annual Survey of American Law* (1992): ix–liv.
- Symposium: Perspectives on Justice John Paul Stevens*, *Rutgers Law Journal* 27 (1996): 521–661.
- Symposium: The Jurisprudence of Justice Stevens*, *Fordham Law Review* 74 (2006).

Cases and Statutes Cited

- Aktins v. Virginia*, 536 U.S. 304 (2002)
- Apprendi v. New Jersey*, 530 U.S. 466 (2000)
- Bowers v. Hardwick*, 478 U.S. 186 (1986)
- Bush v. Gore*, 531 U.S. 98 (2000)
- Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984)
- Circuit City v. Adams*, 532 U.S. 105 (2001)
- Clinton v. Jones*, 520 U.S. 681 (1997)
- Craig v. Boren*, 429 U.S. 190 (1976)
- FCC v. Pacifica Foundation*, 438 U.S. 726 (1978)
- Gonzales v. Raich*, 125 S. Ct. 2195 (2005)
- Gregg v. Georgia*, 428 U.S. 153 (1976)
- Grutter v. Bollinger*, 539 U.S. 306 (2003)
- Kelo v. City of New London*, 125 S. Ct. 2655 (2005)
- Kyllo v. United States*, 533 U.S. 27 (2001)
- Lawrence v. Texas*, 539 U.S. 558 (2003)
- Michigan v. Long*, 463 U.S. 1032 (1983)
- New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932)
- Rasul v. Bush*, 542 U.S. 466 (2004)
- R.A.V. v. St. Paul*, 505 U.S. 377 (1992)
- Reno v. ACLU*, 521 U.S. 844 (1997)
- Richards v. Wisconsin*, 520 U.S. 385 (1997)
- Ring v. Arizona*, 536 U.S. 584 (2002)
- Roper v. Simmons*, 543 U.S. 551 (2005)
- Rumsfeld v. Padilla*, 542 U.S. 426 (2004)
- Tennessee v. Lane*, 541 U.S. 509 (2004)
- United States v. Booker*, 543 U.S. 220 (2005)
- U.S. Term Limits v. Thornton*, 514 U.S. 779 (1995)
- Young v. American Mini Theatres*, 427 U.S. 50 (1976)

STEWART, POTTER (1915–1985)

Potter Stewart has confounded constitutional scholars who have sought a jurisprudential ideology in his opinions. This may be because he was the quintessential judicial pragmatist during his career (1959–1981) on the U.S. Supreme Court. He deliberately eschewed labels like “liberal” or “conservative” and insisted that he simply be thought of as “a good lawyer who did his best.” He saw his role as a judge as simply applying objective legal reasoning to the questions before him without reference to his own personal values. When he stepped down from the bench after twenty-two years, journalists and legal scholars still could not find a way to pigeon-hole him.

In terms of civil liberties, Stewart’s record is supportive but not in an easily defined manner. He believed strongly in states’ rights, an almost anachronistic position on the Warren Court and only slightly less so in the Burger years. This tied in to his reluctance in expanding the reach of the Bill of Rights to the states through incorporation. Thus he voted against the incorporation of the privilege against self-incrimination in *Malloy v. Hogan* (1964), against extending the ban on double jeopardy to the states in *Benton v. Maryland* (1969), and the right to trial by jury in *Duncan v. Louisiana* (1968). Similarly, his dissenting votes in *Escobedo v. Illinois* (1964), *Miranda v. Arizona* (1966), and *Gilbert v. California* (1967), all of which defined how police practices had to conform to protections in the Bill of Rights, told less about his concern for the individual than about his commitment to the autonomy of state governments in a federal system.

Despite Stewart’s own commitment to the principles of free speech embodied in the First Amendment, he did not want the Supreme Court limiting the authority of the states in enforcing criminal laws that might impinge on speech. The proper method for resolving the tension between a national standard and the autonomy of states, he believed, lay in case-by-case appellate review and not in broad-scale policymaking by the justices.

This commitment to states rights also explains his limited support for voting rights claims in challenges to poll taxes (*Harper v. Virginia Board of Elections*, 1966), malapportionment (*Reynolds v. Sims*, 1964), and the practices of southern states in restricting the voting rights of black citizens (*Lassiter v. Northampton County Board of Elections*, 1959). Although he joined the majority in a unanimous opinion upholding the 1965 Voting Rights Act (*South Carolina v. Katzenbach*, 1965) and sustained the jurisdiction of federal courts to hear cases under this and the 1964 Civil Rights

Act, he did not support giving either the federal courts or the Justice Department broad authority to govern state electoral systems. To Stewart, a state's election procedures, like its criminal law, constituted an inherent part of its sovereignty. While other justices worried about how to prescribe the correct police procedure in detaining and questioning a suspect or how to ensure that the one-person, one-vote applied at all levels of voting, Stewart worried about why the states should be forced to do either.

One should not think that Stewart supported discriminatory practices or blatant violations of the rights of the accused. Although a believer in judicial restraint, Stewart, unlike Felix Frankfurter, was willing to take on tough issues when properly presented to the Court. Only Stewart, along with William O. Douglas, believed that the Court ought to have heard a challenge to the constitutionality of the Vietnam War (*Mora v. McNamara*, 1967). To Stewart, however, "the law is a careful profession," and good judging, in his view, required that courts should not try "to see around the next corner." Like Louis Brandeis and other advocates of judicial restraint, Stewart believed that the Court should decide only the case before it and not try to erect some great rule to govern in the future. Thus, although he voted with the majority in *Furman v. Georgia* (1972) against the death penalty as applied because of what he termed its "freakish" imposition, he refused to go along with William Brennan and Thurgood Marshall when they wanted to expand the ruling to hold the death penalty per se unconstitutional.

Stewart once declared that of all the things he had done as both a circuit court judge and a justice of the Supreme Court, he would probably best be remembered for the comment he made in one of the obscenity cases. The Warren Court, eager to expand the protections of the First Amendment, had found itself in a quandary trying to determine how, if at all, obscene writings and speech came under the umbrella of First Amendment protection. Only Hugo Black and William O. Douglas believed in an absolutist interpretation of the speech clause and would have prohibited the government from interfering with any and all speech. Stewart joined the Court the year after it had heard the case of *Roth v. United States* (1957), in which Justice Brennan laid down the basis for the modern definition of legal obscenity—"whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."

After Stewart joined the Court in 1959, the docket became crowded with cases testing just what Roth

meant, and the justices constantly split over how to define and apply it. Then in 1964, in *Jacobellis v. Ohio*, the Court overturned the conviction of an Ohio theatre owner for showing the French film *Les Amants* (The Lovers). Brennan, for the majority, added a qualifying phrase to his original definition, that for material to be legally obscene it had to be "utterly without social importance."

In a concurrence, Stewart pointed out that the Court's opinions since 1957 had pointed in the direction of a "hard-core only" test for obscenity, and such a test had evaded the Court and would probably continue to do so. He suggested that any definition would be unworkable and that courts had to deal with the matter on a case-by-case basis. He admitted that he could never come up with a workable definition, "but I know it when I see it, and the motion picture involved in this case is not that."

Although Stewart later complained that people only remembered his "I know it when I see it" test, in fact he had put his finger directly on the central problem of the obscenity issue. He knew what offended him, and this picture did not. Obscenity, like beauty, is in the eye of the beholder, and in an open, tolerant, and pluralistic society, an enormous range of opinion exists over sexually oriented material. Stewart would have preferred leaving this matter to local courts, but the majority of the brethren continued to seek, in vain, a workable general rule. Finally, in *Miller v. California* (1973), the Court made its last stab at a rule and then in essence washed its hands of the issue, leaving it, as Stewart had suggested, for the lower courts to handle on case-by-case basis.

Perhaps Stewart's greatest contribution to civil liberties came in relation to the press clause, by providing a rationale for why democracy needed a free press. Justice Brandeis, in *Whitney v. California* (1927), had tied the meaning of the speech clause to the obligation of the citizenry to be well informed on a variety of public issues so they could act intelligently. When it came to the press clause, however, no one could figure out how to explain and then apply the phrase. Did a "free press" merely mean free speech in written form? Did members of the press enjoy any different or greater protections under the First Amendment than did ordinary citizens?

Stewart has been the only justice to attempt to explicate a special constitutional role for the press. He saw the press as serving a structural role in society, helping to expose corruption, and thus keeping the political process honest. In a lecture he explained that:

The Free Press guarantee is, in essence, a structural provision of the Constitution. Most of the other provisions

in the Bill of Rights protect specific liberties or specific rights of individuals In contrast, the free press clause extends protection to an institution.

Although this “institutional” or “structural” view has never been accepted by a majority of the Court, it has played an implicit role in a number of decisions. It is at the basis of the decision in *Richmond Newspapers v. Virginia* (1980), in which the Court found that reporters had a right of access to trials so that they could serve as surrogates of the people in witnessing whether the criminal justice system worked fairly. Stewart did not join the plurality opinion, because in his opinion Chief Justice Burger tried to frame the issue too narrowly and did not give enough weight to the institutional meaning of the press clause. Justice Douglas, in his dissent in *Branzburg v. Hayes* (1972), also relied on the notion that the press served an institutional role in guaranteeing to people their right to know about important public matters.

Unlike Douglas, Black, or Frankfurter—all of whom served with him during his tenure—Stewart did not leave behind a legacy of a specific jurisprudential ideology. Rather he stood for the common law tradition of flexibility and pragmatism, and although a supporter of civil liberties, did not believe in big rules, such as *Miranda*, to enforce those rights. Rather, they had to be explicated from the facts and in an evolutionary manner.

Such an approach is extremely lawyer-like, the role Stewart himself preferred, but although it may make the resolution of individual cases easier, it does not provide the guidance that the Supreme Court is supposed to give to state and lower federal courts, a task that rules like *Miranda* perform well. If the high court takes too narrow an approach, refusing to look beyond the confines of the case before it, it breeds unpredictability in the law. Stewart may not have been too bothered by this, preferring some unpredictability that could be cleared up in the next case to efforts by the Court to determine large policies. For him, judicial restraint meant just that, and he accepted the view well aware of the assets as well as the liabilities it involved.

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References and Further Reading

- Binion, Gayle, *Justice Potter Stewart on Racial Equality: What It Means to Be a Moderate*, Hastings Constitutional Law Quarterly 6 (1979): 853.
 Borgerson, Ellen, *On the Power of Balance: A Remembrance of Justice Potter Stewart*, Hastings Constitutional Law Quarterly 13 (1986): 173.
 Stewart, Potter, *Or of the Press*, Hastings Law Journal 26 (1975): 631.

Cases and Statutes Cited

- Benton v. Maryland*, 395 U.S. 784 (1969)
Branzburg v. Hayes, 408 U.S. 665 (1972)
Duncan v. Louisiana, 391 U.S. 145 (1968)
Escobedo v. Illinois, 378 U.S. 478 (1964)
Furman v. Georgia, 408 U.S. 238 (1972)
Gilbert v. California, 388 U.S. 263 (1967)
Harper v. Virginia Board of Elections, 383 U.S. 663 (1966)
Jacobellis v. Ohio, 378 U.S. 184 (1964)
Lassiter v. Northampton County Board of Elections, 360 U.S. 45 (1959)
Malloy v. Hogan, 378 U.S. 1 (1964)
Miller v. California, 413 U.S. 15 (1973)
Miranda v. Arizona, 384 U.S. 436 (1966)
Mora v. McNamara, 389 U.S. 934 (1967)
Reynolds v. Sims, 377 U.S. 533 (1964)
Richmond Newspapers v. Virginia, 448 U.S. 555 (1980)
Roth v. United States, 354 U.S. 476 (1957)
South Carolina v. Katzenbach, 383 U.S. 301 (1966)
Whitney v. California, 274 U.S. 357 (1927)

STONE COURT (1941–1946)

The Stone Court is often thought to have laid the groundwork in the areas of civil liberties and civil rights for many of the decisions of the Warren Court. Its most significant area of contribution is likely in the realm of individual rights, particularly in cases unrelated to World War II. The individual rights cases of the Stone Court can be divided into those relating to the war and those that were not.

Those religious groups outside the mainstream benefited more from the Court's decisions in the civil liberties area. More often than not the court ruled in favor of free exercise claims, with *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943) as the most prominent of these. In *Barnette*, the Court overturned a case decided three years earlier and ruled Jehovah Witnesses could not be required to salute the American flag. In 1940, the Court had ruled, on the basis of free exercise grounds, that the statute requiring the flag salute was constitutional, and in *Barnette* the Court ruled, based on free speech grounds, that students could not be compelled to salute the flag.

Several cases came before the Court involving license taxes (imposed on those distributing or selling) that Witnesses were forced to pay. In *Jones v. Opelika*, 316 U.S. 584 (1942) and two companion cases, a five-to-four Court had upheld such a tax because it was imposed on all groups, thus being nondiscriminatory. One year later, and with James Byrnes replacing Justice Wiley Rutledge, the Court heard *Jones v. Opelika*, 319 U.S. 103 (1943) (known as Jones II) and companion cases and this time struck down the license taxes because religious freedom occupies a “preferred

position.” That literature was being sold rather than distributed free did not make the evangelism a commercial enterprise.

In two cases similar to each other—*Marsh v. Alabama*, 326 U.S. 501 (1946) and *Tucker v. Texas*, 326 U.S. 517 (1946)—the Court ruled that criminal penalties could not be imposed for distributing religious literature in a company town or a village owned by the federal government providing housing for those employed in the defense industry.

The Stone Court was not as protective of speech/expression/picketing rights as it was of free exercise. A majority did not view picketing, as such, as a fully protected constitutional right. In *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), the Court unanimously upheld a New Hampshire statute prohibiting offensive language from being directed at persons in a public place. In this case it affirmed the conviction of a man who created a public disturbance by a confrontational speech that denounced all religions as rackets and, when threatened with arrest by police, called an officer a “God-damned racketeer” as well as a “damned Fascist.” In *Bakery and Pastry Drivers Local v. Wohl*, 315 U.S. 769 (1942), the Court struck down an injunction issued by a New York State Court preventing picketing at the site of their employment, but in *Carpenters’ and Joiners’ Union v. Ritter’s Café*, 315 U.S. 722 (1942), it upheld a Texas state court injunction prohibiting union members from picketing at sites other than the site of the labor dispute. In 1945, the Court ruled in *Thomas v. Collins*, 323 U.S. 516 (1945), that labor-organizing activities could not be subjected to a requirement to obtain a permit to conduct such activities. The Court held that the permit system was an invalid interference with the First Amendment’s free speech and assembly provisions.

In companion cases before the Court in 1941, the Court reversed contempt citations arising from a labor dispute in California. The Court held a *Los Angeles Times* editorial siding with unions did not present a “clear and present danger,” and a letter to the secretary of labor threatening a strike if a state court decision came down adverse to a union was allowable there being no state law against commenting on pending cases.

The Stone Court had a somewhat mixed record in the area of the rights of the accused. Perhaps best known is *Betts v. Brady*, 316 U.S. 769 (1942), in which the Court refused to find that the Constitution’s Sixth Amendment guarantee of counsel applied to the state courts. This ruling was overturned by the Warren Court in *Gideon v. Wainwright*, 372 U.S. 335 (1963). The Court moved toward shortening the period of time prisoners can be held by law

enforcement before they appear in court in *McNabb v. United States*, 318 U.S. 332 (1943). There they set aside convictions obtained with statements made by prisoners who had not been promptly taken before a judge, thus denying them their Sixth Amendment right to a speedy trial.

Perhaps the most successful method of preventing blacks from voting in the first part of the twentieth century was “white primaries.” In *Smith v. Allwright*, 321 U.S. 649 (1944), the Court declared even though political parties are voluntary organizations, they conduct primary elections under state statutory authority and because of this, denying blacks the right to vote in primaries denied them of rights guaranteed by the Fifteenth Amendment.

Oklahoma’s Criminal Sterilization Act allowed the state to sterilize persons who had been convicted three or more times of certain felonies. The Court held in *Skinner v. Oklahoma*, 316 U.S. 535 (1942), that because not all felonies were included in this act, there was a violation of the Fourteenth Amendment’s equal protection clause, thus the statute was unconstitutional.

World War II was the catalyst for several cases on the Stone Court’s docket including a couple of the more notorious decisions in the history of the Supreme Court. In 1942, President Franklin D. Roosevelt established a military commission to try eight German saboteurs who had been captured in the United States. While on trial, some of those accused sought leave to file petitions for *habeas corpus*. The Court—in *Ex parte Quirin*, 317 U.S. 1 (1942)—rejected the petition and later in its opinion held that the prisoners had a right to judicial review, that a military trial was justified, and that they were not entitled to a grand jury or a trial by jury. The Court again upheld the use of a military commission in *In re Yamashita*, 327 U.S. 1 (1946). The issue making *Yamashita* slightly different than *Quirin* was that in this instance the Court upheld the use of a military commission after the war had ended.

The dark days of the Stone Court and civil liberties came as a result of executive orders issued by the president allowing Japanese Americans, for the sake of national security, to be relocated away from “military areas,” as well as subjected to a curfew. In *Hirabayashi v. United States*, 320 U.S. 81 (1943) and *Korematsu v. United States*, 323 U.S. 214 (1944) the Court upheld the constitutionality of these executive orders. In *Hirabayashi* it dodged the relocation issue and focused on the curfew, which it viewed as a necessary “protective measure.” However, in *Korematsu*, the Court did not avoid the relocation issue and held that in time of emergency and peril that relocation, although constitutionally suspect, is justified.

Although the Stone Court advanced the causes of several discrete and insular minorities, it will also forever be remembered as the Court that handed down the decisions that adversely affected the condition of Japanese-American citizens.

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References and Further Reading

Abraham, Henry. *Justices, Presidents, and Senators: A History of the U.S. Supreme Court, Appointments from Washington to Clinton*. 4th ed. Lanham, MD: Rowman and Littlefield Publishers, 1999.

Mason, Alpheus Thomas. *Harlan Fiske Stone: Pillar of the Law*. New York: Viking Press, 1956.

Renstrom, Peter G. *The Stone Court: Justices, Rulings, and Legacy*. Santa Barbara, Calif.: ABC-CLIO, 2001.

STONE v. GRAHAM, 449 U.S. 39 (1980)

A 1978 Kentucky statute required that the state superintendent of education (who at the time was James B. Graham) “ensure that a durable, permanent copy of the Ten Commandments shall be displayed on a wall in each public elementary and secondary school classroom in the Commonwealth. The copy shall be sixteen (16) inches wide by twenty (20) inches high.” The law also provided that “in small print below the last commandment shall appear a notation concerning the purpose of the display, as follows: ‘The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States.’” The law further required that these copies of the Ten Commandments be “purchased with funds made available through voluntary contributions made to the state treasurer for the purposes of this Act.”

Sydell Stone, a citizen opposed to the mixing of church and state, sued to enjoin the state from posting the Commandments. A trial court in Kentucky found that there was a “secular” purpose in the act and upheld its constitutionality. On appeal the Kentucky Supreme Court was evenly divided, and thus the lower court decision upholding the monument remained undisturbed. Stone then appealed to the U.S. Supreme Court. Without hearing arguments in the case, and through a *per curiam* decision, the Court summarily reversed the initial finding that the displays were constitutional. Chief Justice Warren Burger, along with Justices Harry Blackmun and Potter Stewart dissented, declaring that the case merited a full hearing by the Court. Justice William Rehnquist wrote a long dissent, essentially setting out why such a display did not violate the First Amendment. He also objected

because of the lack of deference to the state, to what he called “the cavalier summary reversal, without benefit of oral argument or briefs on the merits, of the highest court of Kentucky.”

The *per curiam* decision was based on the establishment clause test set out in *Lemon v. Kurtzman* (the Lemon test). That test had three prongs: “First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . finally the statute must not foster ‘an excessive government entanglement with religion.’” If a statute or action of a state violated any one of these prongs, it would be unconstitutional. The Court concluded that the Kentucky law “requiring the posting of the Ten Commandments in public schoolrooms had no secular legislative purpose, and is therefore unconstitutional.” Because it reached this conclusion, the Court did not consider whether the law also violated the second and third prongs. Clearly, the Court might have struck down the Kentucky law, and its implementation, on both of the other prongs as well. The law advanced religion because it required the placement of a religious text in public schools. Because the state used the traditional Protestant ordering of the Ten Commandments, with a King James Bible translation, Kentucky in effect was entangled in the religious disputes over how to translate the Bible and whether to endorse the traditional Protestant, the Catholic, the Lutheran, the Orthodox, or Jewish versions of the Ten Commandments. By choosing the King James Bible, the state rejected numerous other Protestant translations, as well as the Catholic and Jewish translations.

The Court rejected Kentucky’s “avowed” assertion that the displays had a secular purpose. The Court noted that “The pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature. The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact.” The Court further observed that although some of the commandments were secular, such as the prohibition on stealing, others involved “the religious duties of believers: worshipping the Lord God alone, avoiding idolatry, not using the Lord’s name in vain, and observing the Sabbath Day.” The Court pointed out that it would be constitutionally permissible to teach about the Ten Commandments, as part of a course on religion or history, but that the mere posting of them could not be seen as educational. Rather, it was religious. In reaching this decision the Court also cited the school prayer and Bible reading cases, *Engle v. Vitale* (1962) and *Abington v. Schemp* (1963), noting

that the Bible could be taught as a text but not read for religious purposes.

Stone remained good law for the next twenty-five years. Although the Court narrowly upheld the right of Texas to maintain a Ten Commandments monument in *Van Orden v. Perry* (2005), this decision did not undermine *Stone*, because the circumstances of *Van Orden* were distinctly different. Indeed, on the same day it upheld the Texas monument, the Court, in *McCreary County, Ky. v. ACLU of Kentucky* (2005), struck down another Kentucky law that required the posting of the Ten Commandments in state courthouses.

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References and Further Reading

Finkelman, Paul, *The Ten Commandments on the Court-house Lawn and Elsewhere*, *Fordham Law Review* 73 (2005): 1477.

Green, Steven K., *The Fount of Everything Just and Right? The Ten Commandments as a Source of American Law*, *Journal of Law and Religion* 14 (1999–2000): 525.

STONE, HARLAN FISKE (1872–1946)

Lawyer, law professor and dean, associate, and then chief justice of the U.S. Supreme Court, Harlan Fiske Stone provided one of the key jurisprudential underpinnings that lie beneath modern civil liberties and civil rights law. Although normally considered a liberal, Stone's record in civil liberties is mixed.

After graduation from Columbia Law School in 1899, Stone went into private practice in New York but returned to teach at Columbia and serve as dean in 1910. By all reports, an outstanding teacher and a competent administrator, Stone clashed constantly with the university's autocratic president, Nicholas Murray Butler. In 1923, fed up with the battle, Stone returned briefly to private practice. The next year, however, his college friend, President Calvin Coolidge, asked him to become attorney general and to clean up the mess left by the Harding scandals, especially the problems at Justice created by Harry M. Daugherty. Stone succeeded so well in cleaning up the Justice Department and getting rid of Daugherty's cronies that some Democrats believed his appointment in 1925 to the Supreme Court was sparked by the Republican party's desire to have him "kicked upstairs."

Stone joined a bench headed by William Howard Taft, who believed in "massing the Court" and presenting a unified judicial front by discouraging dissenting or concurring opinions. Stone initially

followed Taft's lead, and critics quickly labeled him as a "safe Republican" and a cipher for Taft. But Stone, a moderate Republican, soon found the conservatism of the chief justice and the "Four Horsemen" (Pierce Butler, James McReynolds, George Sutherland, and Willis Van Devanter) too much, and he began to vote more and more with the Court's two liberals, Oliver Wendell Holmes, Jr., and Louis D. Brandeis. In the 1920s, although he often voted in dissent with them, Stone rarely wrote the opinions. By the mid-1930s, however, with Holmes gone and Brandeis in decline, Stone found his voice. Although he privately opposed many of the New Deal measures, he believed in judicial restraint and wanted the courts to leave policy making to the elected branches. Stone was loathe to strike down a state or federal regulatory measure, but if the legislatures impinged on civil liberties, Stone thought the courts had a special obligation to protect citizen rights under the Constitution.

After the court-packing crisis of 1937, judicial opposition to the New Deal collapsed, and within a few years Franklin Roosevelt had made enough appointments to the bench so that one could talk about a "Roosevelt Court." Around this time, the Court's agenda changed. The economic regulation and property rights issues that had dominated the Court's docket for a half-century gave way to questions of civil liberties which, it turned out, would prove even more divisive than had economic matters. Although the Roosevelt Court shared the view that in matters of economic regulation the judges should be restrained and defer to the elected bodies, issues such as freedom of expression, separation of church and state, and racial justice proved very hard to resolve.

In examining Stone's civil liberties record by the late 1930s, one would have found him consistently voting for greater constitutional protection of free speech and press, but he had not, as yet, written any opinion or dissent in which he spelled out his views on these matters. The turning point came in an otherwise inconsequential case, *United States v. Carolene Products Co.* (1938). The case involved a federal law prohibiting the interstate shipment of "filled milk," that is, skimmed milk mixed with animal fats. Stone, writing for the Court, sustained the statute, but then in a footnote—often called the most famous footnote in all Supreme Court history—he announced that although economic regulations of the sort at issue in the case would be subjected to a fairly low level of constitutional review, statutes dealing with civil liberties and racial issues would be subject to a far more searching examination by the Court. In other words, there would be a double standard: low level (or "rational basis") for economic matters, and a higher level ("strict scrutiny") for matters touching on individual

rights. The footnote encapsulated the economic self-restraint that had been identified with Holmes, Brandeis, and Stone and pointed the way toward the great civil rights and civil liberties opinions of the 1950s and 1960s.

Some commentators believe that the *Carolene Products* decision, and not the Court's reversal in *West Coast Hotel v. Parrish* (1937), marks the great watershed between the "old" and the "new" jurisprudence. Stone himself wrote two opinions, one for the Court and the other a dissent, which epitomized the new jurisprudence. In *United States v. Darby Lumber Company* (1941), Stone dismissed a challenge to the 1938 Fair Labor Standards Act and essentially said that under the powers of the commerce clause, Congress had a wide range of discretion in which to act and that the courts would not second-guess legislative policy. The year before, Stone penned a dissent in the first flag salute case, *Minersville School District v. Gobitis* (1940) that, although practically overlooked at the time, proved a harbinger of the new jurisprudence.

In an eight-to-one decision written by Felix Frankfurter, the Court upheld a Pennsylvania law requiring the compulsory salute of the American flag at the beginning of each school day. Jehovah's Witnesses had objected, claiming that the salute violated their free exercise of religion in that it forced them to symbolically "bow down to an idol" in defiance of God's command. Stone was the only dissenter, and he finished his opinion late (Douglas later said that he and Black would have voted with Stone if they had had the time to see his opinion). In his dissent Stone wrote: "The guaranties of civil liberty are but guaranties of freedom of the human mind and spirit and of reasonable freedom and opportunity to express them If these guaranties are to have any meaning they must, I think, be deemed to withhold from the state any authority to compel belief or the expression of it where that expression violates religious conviction, whatever may be the legislative view of the desirability of such compulsion."

Stone's argument, as well as the increase in attacks on Jehovah's Witnesses as "unpatriotic," led the Court to take on more Witness cases. In *Jones v. City of Opelika* (1942), the Witnesses lost a case challenging the constitutionality of a city license on their door-to-door proselytizing, but the vote was five to four. Not only did Stone dissent, but in a separate dissent Douglas, Black, and Frank Murphy announced that they believed their vote in *Gobitis* had been wrong. The following year the flag salute issue came back before the Court, and this time Stone's dissenting view in *Gobitis* became the six-to-three

majority view in *West Virginia Board of Education v. Barnette* (1943). Stone, who by then had been named by Roosevelt to succeed Charles Evans Hughes as chief justice, graciously allowed Robert Jackson to write the opinion, but Jackson's wording, although more eloquent than that of Stone, nonetheless closely followed Stone's reasoning in *Gobitis*.

Stone's tenure as chief justice proved an unhappy period in his life as he tried to manage an increasingly fractious court. Even if the country had not been at war, the differing views and strong personalities of men like Frankfurter, Douglas, Black, and Jackson would have made it difficult to keep peace within the Court. The war not only exacerbated the problems but brought to the bench cases that in other times might well have been decided differently, especially the Japanese internment cases, in which the Roosevelt administration took 700,000 persons of Japanese ancestry—many of them native-born American citizens—from the West Coast and put them in inland concentration camps. The Court heard three cases on the matter, and in all of them Stone, despite his insistence in Footnote Four about the Court protecting "discrete and insular minorities," backed the government program.

The first case to reach the Court, *Hirabayashi v. United States* (1943), tested the government's curfew orders directed solely against those of Japanese descent. Stone strongly backed the government and used his influence to try to mass the Court in its behalf. He used the notion of judicial restraint to argue that in wartime the Court had no business second-guessing the civilian and military authorities responsible for the program. With Frankfurter and Black pressuring the brethren, Stone managed to get a unanimous Court to approve the curfew, but there were three concurring opinions, by Douglas, Murphy, and Wiley Rutledge, indicating that it would be harder to get unanimity in the next case.

The second case dealt not with the curfew but with the actual relocation. In *Korematsu v. United States*, 323 U.S. 214 (1944), Stone proved unable to get unanimity and found that some of his brethren were taking the lesson of *Carolene Products* far more seriously than its author. Stone assigned the opinion to Black, who like Stone and Frankfurter would not question the military in wartime, but despite their best efforts to achieve unanimity, three justices dissented, Roberts, Murphy, and Jackson.

The relocation cases have been considered a disaster and an embarrassment for the Court ever since and have done a great deal to tarnish Stone's reputation as a civil libertarian. The third case, *Ex parte Endo* (1944), unanimously held that a citizen whose

loyalty had been proven could not be kept incarcerated. By then the tide of war had significantly changed, nonetheless Stone sat on release of the opinion until after the 1944 election so as not to embarrass the president.

Stone showed similar deference to the government in a series of denaturalization cases in which the government tried to strip citizenship from naturalized citizens whom it considered disloyal. In most of these cases, Stone wound up on the losing side, as in *Schneiderman v. United States* (1943). The majority held that as a naturalized citizen Schneiderman enjoyed all the rights of citizenship and could not be punished for unpopular views. Stone's dissent sounded very strange coming from the man who had been the sole dissenter in the *Gobitis* case, for now he said that constitutional rights could be restricted when the government deemed it necessary. Even in the effort to deport West Coast labor leader Harry Bridges (*Bridges v. Wixon* [1945]), Stone conceded that Congress had attempted to do a "rotten thing," but nonetheless in his dissent held that it had the power to do so.

After the capture of the eight Nazi saboteurs, the president ordered a military tribunal to try them in secret. At first the Court planned not to interfere, but Justices Roberts and Black, after meeting with the defendants appointed counsel, decided that the Court, in the name of the rule of law, had to at least hear the case. It was immediately apparent that all nine of the justices would vote to uphold the military tribunal, but they could not agree on a common reasoning. In *Ex parte Quirin* (1942), the Court handed down its decision within a few days of hearing oral argument; Stone's written opinion did not come down until four months later. In it he essentially denied any protection of the Constitution to enemy combatants and gave the president broad authority to decide when military tribunals should be established and who should be tried there.

In sum, Harlan Stone's record on civil liberties remains mixed. His Footnote Four provided the basis by which later courts would be able to expand judicial protection of civil liberties and civil rights, yet except for his defense of the Jehovah's Witnesses, Stone himself seems to have ignored the explicit promise of that statement.

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References and Further Reading

Dunham, Allison. "Mr. Chief Justice Stone." In *Mr. Justice*, edited by Allison Dunham and Philip B. Kurland, 1964.

Irons, Peter. *Justice at War*. New York: Oxford University Press, 1983.

Mason, Alpheus T. *Harlan Fiske Stone: Pillar of the Law*. New York: Viking, 1956.

Pritchett, C. Herman. *The Roosevelt Court: A Study in Judicial Politics and Values, 1937–1947*. New York: Macmillan, 1948.

Urofsky, Melvin I. *Division and Discord: The Supreme Court under Stone and Vinson, 1941–1945*. Columbia: University of South Carolina Press, 1997.

Cases and Statutes Cited

Bridges v. Wixon, 326 U.S. 135 (1945)

Ex Parte, Endo, 323 U.S. 283 (1944)

Hirabayashi v. United States, 320 U.S. 81 (1943)

Jones v. City of Opelika, 316 U.S. 584 (1942)

Korematsu v. United States, 323 U.S. 214 (1944)

Minersville School District v. Gobitis, 310 U.S. 586 (1940)

Quirin, ex parte, 317 U.S. 1 (1942)

Schneiderman v. United States, 320 U.S. 119 (1943)

United States v. Carolene Products Co., 304 U.S. 144 (1938)

United States v. Darby Lumber Company, 312 U.S. 100 (1941)

West Coast Hotel v. Parrish, 300 U.S. 379 (1937)

West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943)

STONEWALL RIOT

In the early hours of Saturday June 28, 1969, New York City Police officers conducted a raid on the Stonewall Inn, a gay bar in the Greenwich Village area of the city. After emptying the club and placing some people under arrest, the patrons of the club began to physically resist the police. Violence ensued and the Tactical Patrol Force, New York's riot control squad, had to be called out to bring the crowd under control. The violent reaction of the crowd was viewed as being unprecedented for gays at the time and is credited as marking the beginning of a more radical gay-lesbian rights movement.

The gay-lesbian rights movement in the United States did not start with the Stonewall riot. In 1924, Henry Gerber launched the Society for Human Rights, although the society was shut down within the year. In 1950, a group of gay men formed the Mattachine Society. Initially they argued for political protest if society failed to recognize homosexuals as a distinct group and respect their rights. However, this approach proved to be too radical for the time, and the group quickly became more concerned with homosexuals assimilating within society and conforming to prevailing social norms. In 1955, a lesbian equivalent, the Daughters of Bilitis, was formed. Throughout the 1950s and 1960s, these groups maintained a low public profile with few public protests principally against

rules preventing the federal government from employing homosexuals, although these protests were muted and centered on showing that homosexuals could be otherwise respectable members of society. In the 1960s, a number of smaller more radical homosexual rights groups formed, encouraged by the approaches of the anti-Vietnam War and civil rights movements, although they were disparate and relatively ineffective.

Homosexuality was taboo in New York in the 1960s; in addition to sodomy laws, state laws prevented licensed premises serving alcohol to homosexuals and prohibited individuals from wearing nongender-appropriate clothing in public. Despite this, there were a number of gay bars and clubs operating in the city. Many operated as private clubs whose members were supposed to bring their own alcohol, and the Stonewall Inn was one such unlicensed business. It is alleged that the Stonewall Inn was one of many run by the Mafia with bribes paid to local police to allow its continued operation.

On Friday June 27, 1969, Judy Garland's funeral was held in New York City. More than 20,000 people waited to view the body of the iconic actress, who was particularly popular with the homosexual community. It was later that night police began the raid of the Stonewall Inn. Raids were not uncommon in such bars across the city and the United States; however, the violent reaction of homosexuals to the police action that night was viewed as being unprecedented. A crowd of approximately 400 patrons and passers-by formed outside of the Stone Inn during the raid. When some of the arrested patrons attempted to resist the police, the crowd began to throw objects, and the eight officers on the raid were forced to take refuge within the club and call for back up. It took a few hours to restore order to the streets outside of the Stonewall Inn.

Crowds gathered outside of the Stonewall Inn the following night and again clashed violently with police, as well as engaging in open displays of gay pride. They called for a change to the laws and society sentiments that left gay bars on the fringes of society, run by the Mafia, having to bribe police, and subject to raids. Protests continued until the following Wednesday, although only on the last night did the protests turn into violent confrontations once more.

The Stonewall riots had a great impact on the development of gay and lesbian rights in the United States. They did not end police raids of gay bars or bring about any changes to the laws affecting homosexuals. They did, however, mark the ascendance of the idea of gay pride, that homosexuality was not something to be ashamed of, and that society should recognize the rights of homosexuals. This found

its expression in the creation of a number of new, more radical, groups, particularly the Gay Liberation Front, who were visible, vocal, and distinctive in their protests for greater recognition of gay and lesbian rights, including annual parades in New York to commemorate the riots. The symbolic resistance in the riots inspired gays in the United States and abroad to actively and openly campaign for gay and lesbian rights.

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References and Further Reading

D'Emilio, John. *Sexual Politics, Sexual Communities: The Making of a Homosexual Minority in the United States, 1940–1970*. Chicago: University of Chicago Press, 1998.
Duberman, Martin. *Stonewall*. New York: Penguin, 1993.

See also American Civil Liberties Union; Antidiscrimination Laws; *Bowers v. Hardwick*, 478 U.S. 186 (1986); *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000); Don't Ask, Don't Tell Exec. Order 107 Stat. 1670, Section 571 (1993); Equal Protection of Law (XIV); *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557 (1995); Lambda Legal Defense and Education Fund; *Lawrence v. Texas*, 539 U.S. 558 (2003); National Association for the Advancement of Colored People (NAACP); *Romer v. Evans*, 517 U.S. 620 (1996)

STOP AND FRISK

In the Constitution, the provision limiting the power of police to search and arrest persons is the Fourth Amendment. Basically, the Fourth Amendment prohibits police conduct that is “unreasonable.” However, the Fourth Amendment, by its terms, applies only to “searches” and “seizures.” If police engage in an activity that does not rise to the level of a “search” or “seizure,” the Fourth Amendment does not apply, and police are free (at least from Fourth Amendment strictures) to pursue that activity. The question arises, does the term search include only full-blown, complete searches of a person, or does it also cover situations where police just do a frisk to check for weapons?

A counterpart to this question arises for seizures. Clearly seizure of a person occurs when police make a formal custodial arrest, but is it also a seizure when police just stop a person in public and detain the person for several minutes for questioning? The legitimacy of police using a “stop and frisk” technique was the issue for the Supreme Court in 1968 in *Terry v. Ohio*.

In the *Terry* decision, the Supreme Court established a new category of police activity for intrusions

STOP AND FRISK

that were less than a full search or arrest but still were covered by the Fourth Amendment. Because the intrusion was less, the activities were authorized by a lower level of grounds than the usual probable cause required for a full search or arrest. The new categories recognized in *Terry* became a significant exception to traditional Fourth Amendment doctrine, which required probable cause before police could act. The Supreme Court used a balancing analysis to establish these new types of activity and to set the grounds to justify them, balancing the government's need to search or seize against the invasion to the individual. Overall, setting up these new categories has been useful to give police more flexibility in dealing with rapidly unfolding confrontations on the street.

In *Terry*, the Court held that police might do a limited seizure of a person if it is justified by reasonable suspicion to believe criminal activity is afoot. Similarly, police may do a limited search of a person (a frisk or pat-down) if it is justified by reason to believe the defendant is armed and dangerous. These more limited intrusions required less ground to justify them. This decision, which created these new categories of police activity, can be usefully represented by the following diagram.

Continuum of Intrusiveness of Police Conduct

Since *Terry* was decided in 1968, the courts have been fleshing out the contours of stop-and-frisk law.

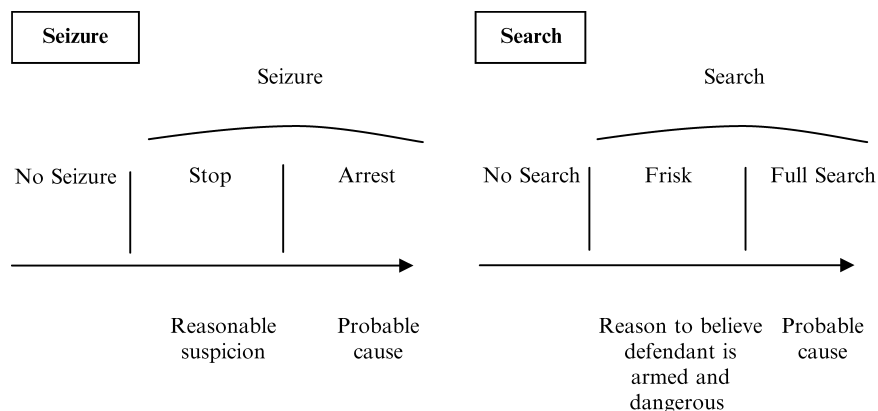
Stops

A stop is an encounter between police and a person that does not amount to an arrest but is intrusive enough to qualify as a seizure and so be subject to

Fourth Amendment requirements. Courts have defined stops as beginning when police approach a person and the interaction is such that a reasonable person would not feel free to leave. A stop generally requires some physical force or show of authority by police. For example, a stop can be said to occur if police “blue-light” a car or use their sirens; flash their badges; brandish weapons; or grab a person’s arm and hold on. A variation of this reasonable-person-would-feel-free-to-leave test applies if the police confront a person in a confined area like the passenger seating of a bus or an airplane. Because a seated passenger cannot be said to feel free to leave, the test is whether a reasonable person would feel free to decline the officer’s requests or otherwise terminate the encounter. So if a person is seated on a bus and the police enter the bus and ask for permission to search the person’s luggage, the encounter qualifies as a stop only if a reasonable person would not feel free to decline the officer’s request.

Assuming the police encounter with a person rises to the level of a stop, police must justify the activity, that is, they must have adequate grounds or reasons for the stop. The grounds required for a stop have been defined by the Supreme Court as an articulable suspicion that criminal activity is afoot; more recently the Court refers to this standard as “reasonable suspicion.” Cases indicate that this level of suspicion is “considerably less” than 50 percent certainty and is also less than the standard of probable cause, which is required for an arrest. The Court has declined to set any more specific contours for the level of certainty required by “reasonable suspicion.”

To determine whether reasonable suspicion exists, courts have indicated police should look to all the circumstances. The fact that some factors are innocent in themselves does not mean that those factors must be excluded. So, for example, if a couple flies from Chicago to Florida and turns right around and drives home the next day, this factor can be used as supporting reasonable suspicion that crime



is occurring; it need not be excluded from the analysis because it is innocent on its face. Courts have often said that the question of whether reasonable suspicion exists is a common sense judgment not dependent on technicalities or formalities. Law enforcement officers are entitled to use their expertise in calculating whether reasonable suspicion exists. For example, if police find a brick-shaped package wrapped in cellophane and duct tape, based on their street experience police may conclude that the package contains illegal drugs. In *Illinois v. Wardlow*, the Supreme Court held that officers had reasonable suspicion where they were in a high-crime neighborhood and a person took off in unprovoked flight after seeing them. One controversial line of cases established what grounds were adequate for the police to stop persons in airports based on suspicion they were drug couriers. The Court held that police established reasonable suspicion to allow them to stop the defendant by showing that (1) the defendant paid \$2,100 for two airplane tickets from a roll of \$20 bills; (2) he traveled under a name that did not match the name under which his telephone was listed; (3) his original destination was Miami, a source city of illicit drugs; (4) he stayed in Miami for only forty-eight hours, even though a round-trip flight from Honolulu to Miami takes twenty hours; (5) he appeared nervous during his trip; and (6) he checked no luggage.

Assuming the encounter rises to the level of a stop and police have adequate grounds (reasonable suspicion) to make the stop, what are the police allowed to do? The content of a stop usually involves police briefly questioning the person about his immediate activities or requesting to see some identification or a license. During stops in airports, police often ask to see the person's ticket.

The stop ends when police let the person go or when the encounter escalates into the more serious type of seizure, an arrest. To define whether a stop has escalated into an arrest, courts have identified several factors. One is the length of time of the stop. Generally stops should be brief, within the twenty-minute range, although courts have steered clear of bright line time limits and have avoided "rigid criteria" in favor of focusing on ordinary human behavior and common sense. Another factor is whether the police moved the person from one location to another. If the police move the defendant, for example, from an airport concourse to a small room, this supports the conclusion that the stop has escalated into an arrest. If the police tell the defendant he is under arrest, again this supports the idea that the stop has become an arrest. (The rationale here is not that police are in charge of characterizing whether the encounter is a stop or an arrest but rather that the impact on the

defendant of a police assertion that he is under arrest escalates the encounter from the defendant's point of view.) Other factors courts have identified include whether the defendant is handcuffed, whether the defendant is moved to an isolated or unfamiliar environment, and whether police are diligent in pursuing investigation during the time the person is detained.

If the encounter does not qualify as a stop (and the Supreme Court has made clear that there can be interactions between citizens and police that do not amount to a stop), then the Fourth Amendment does not apply, and police are free to pursue that activity without explanation. If the encounter does rise to the level of a stop, police must justify the activity by showing reasonable suspicion that crime was occurring. If the encounter escalates from a stop to an arrest, the police face a higher burden to justify the activity, that of probable cause.

On the other hand, if the encounter rises to the level of a stop and police cannot demonstrate reasonable suspicion, or the encounter rises to the level of an arrest and the police cannot demonstrate probable cause, Fourth Amendment law is that any evidence that is a product of the encounter cannot be used against the defendant. For example, assume the police pull over a car by using their lights and siren (a stop). Approaching the driver, the police smell marijuana in the car and see an envelope on the floor labeled "weed." The police now have probable cause to search the car for drugs. When they search it and find drugs, the defendant is arrested for possession. However, if the police cannot justify the initial stop of the car by showing reasonable suspicion to believe crime was occurring, the drugs cannot be used against the defendant, because the police violated the Fourth Amendment. This "exclusionary rule" is designed to deter police from violating the Fourth Amendment by removing any reward that might flow from a violation.

The Court has extended the same analysis that applies to seizures of persons to apply to seizures of things. So, if police take a person's baggage in an airport, for example, to expose it to drug-sniffing dogs, the Court will look to whether the seizure of the luggage was brief and nonintrusive enough to qualify as a stop of the luggage or whether the seizure of the baggage was more extensive and commensurate with the type of seizure known as an arrest.

Frisks

A frisk, also known as a pat-down, occurs when police pat the outside of a person's clothing. The point of a frisk is to check for weapons, and weapons

STOP AND FRISK

only. If police frisk a person and feel an object in a pocket that feels like drugs, police may not look in the pocket or take the package. In contrast, if the police feel an object like a knife or a gun, they may take it.

The grounds required before police can frisk a person is reason to believe the person is armed and dangerous. This standard differs from probable cause in two ways. First, in quantity, this level of certainty is less than probable cause. The theory is that because a frisk is less intrusive than a full search, it can be justified on lesser grounds than those required for a full search. Second, in quality, the grounds for a frisk (reason to believe the defendant is armed and dangerous) is also more limited in focus than probable cause. Probable cause to search allows police to search for any type of evidence of crime, including weapons. In contrast, as noted previously, the grounds for a frisk allow police only to look for weapons.

To establish the grounds to believe a person is armed and dangerous, police may rely on reasonable inferences. For example, in the *Terry* case, the Court held that reason to believe the defendants were armed and dangerous was established because police thought the defendants were walking back and forth, casing a store to set up a robbery. The time was 2:30 in the afternoon. A daylight robbery of a store carries with it a risk that the store clerk will be present and a confrontation will ensue, so grounds to fear a daylight robbery give rise to a reasonable inference that the defendant is armed and dangerous.

Based on reason to believe the defendant is armed and dangerous, police cannot go further than a frisk, in other words, a brief patdown of the person's outer clothing. Based on those grounds, for example, the police cannot justify reading the documents in a person's briefcase. In one case, the Court found police conduct to be unconstitutional as exceeding the scope of a permissible frisk when the officers, feeling a small lump in the defendant's front pocket, determined the lump was crack by squeezing, sliding, and otherwise manipulating the outside of the defendant's pocket even after it was clear there was no weapon in the pocket. The Court held that the police conduct overstepped the bounds of the strictly circumscribed search for weapons allowed by *Terry*.

In this same line of cases, the Court has also authorized what might be called a frisk of an automobile. If police stop a suspect in a car, the police are allowed to search the passenger compartment of the car, limited to areas where a weapon could be found, if the police can show a reasonable belief that the suspect is dangerous and the suspect may gain immediate control of a weapon. The theory here is the same

as in frisking a person: because the search of the automobile is limited, it may be justified on grounds more limited than the traditional probable cause (*Michigan v. Long*).

One current controversy raised by the *Terry* doctrine centers on whether large amounts of drugs will suffice to establish reason to believe the defendant is armed and dangerous. Law enforcement officers argue that if large quantities of drugs are involved, it is reasonable to infer that the drugs are worth a lot of money, and the defendants will be armed and dangerous. The courts generally reject this argument, concluding that while large amounts of drugs would certainly justify a stop of the defendant based on reasonable suspicion that criminal activity is afoot, large amounts of drugs will not justify a frisk of the defendant because the drugs alone will not establish reason to believe the defendant is armed and dangerous.

Overall, the *Terry* exception to traditional Fourth Amendment doctrine allows police more flexibility in confronting citizens. It has become a well-established feature of Fourth Amendment jurisprudence.

SARAH N. WELLING

Cases and Statutes Cited

Florida v. Bostick, 501 U.S. 429 (1991)
Fourth Amendment, U.S. Constitution
Illinois v. Wardlow, 528 U.S. 119 (2000)
Terry v. Ohio, 392 U.S. 1 (1968)
U.S. v. Sokolow, 490 U.S. 1 (1989)

See also *Illinois v. Wardlow*, 528 U.S. 119 (2000); **Race and Criminal Justice; Search (General Definition); Seizures; *Terry v. Ohio*, 392 U.S. 1 (1968)**

STOREY, MOORFIELD (1845–1929)

Born in Roxbury, Massachusetts, in 1845, Moorfield Storey graduated from Harvard College in 1866 and served briefly (1867–1869) as personal secretary to U.S. Senator Charles Sumner, also of Massachusetts. Admitted to the bar in 1869, Storey went on to become a prominent Boston attorney. In the late 1800s, he was a supporter of the Mugwumps, a group of independent Republicans with reformist leanings who generally favored civil service reform, low tariffs, independent politics, and anti-imperialism. As a reformer, Storey also fought political corruption and the mistreatment of Native Americans. By the turn of the century, Storey was an outspoken critic of the mistreatment of African Americans, immigrants, Filipinos, Jews, and other persecuted groups as well.

At the same time, his private legal practice flourished. In 1900, linking together domestic and foreign affairs, Storey unsuccessfully ran for Congress on an anti-imperialist platform. He argued that American imperialism both reflected and continued racial strife at home. Storey later served as president of the Anti-Imperialist League (from 1905–1921), in which capacity he supported independence for the Philippines. Throughout his career, Storey was strongly influenced by Charles Sumner, who argued as early as 1849 that segregation was unconstitutional and that laws should make no racial distinctions. However, Storey was also a supporter of sectional reconciliation until the 1890s, and he only began speaking out against post-Reconstruction southern policies when southerners formalized the Jim Crow system of segregation, disfranchisement, and racial violence. Responding to growing racial violence nationwide, Storey was among the sixty prominent Americans who responded to the call of Mary White Ovington to meet in February 1909 to protest a recent race riot in Springfield, Illinois, Abraham Lincoln's hometown, on the 100th anniversary of Lincoln's birth. This meeting led to the creation of the National Association for the Advancement of Colored People (NAACP), and Storey became its first president in 1910, a position he held until his death in 1929. Also in the early 1910s, Storey successfully ended the exclusion of African Americans from the American Bar Association. Based on his knowledge of history and law, Storey argued against the then-prevalent ideas of white racial superiority, and he suggested instead that mistreatment and unequal opportunities explained the lower status of minorities in the United States. Storey also noted that the southern penchant for violence and discriminatory legislation proved that whites were concerned about the possibility of black achievement. As NAACP president, Storey had little to do with the day-to-day functioning of the NAACP, but his legal skills proved invaluable. He strongly promoted the idea that civil rights could be most easily secured through the court. As NAACP legal counsel, he fought against idea that federal government could not prevent private discrimination and argued that segregation was unconstitutional. For support, he used investigations conducted by local NAACP chapters around the nation and preliminary preparation done by local attorneys. In the end, Storey served as NAACP counsel in its first three important cases before the U.S. Supreme Court. In *Guinn v. U.S.* (1915), Storey argued against the constitutionality of the Oklahoma "grandfather clause." In its ruling, the U.S. Supreme Court struck down the grandfather clause as a violation of the Fifteenth Amendment.

Storey's dedication to civil equality was most apparent in his involvement in the legal preparations of *Buchanan v. Warley* (1917), a case involving residential segregation. In *Buchanan*, Storey suggested that racial purity was a myth and that residential segregation was a violation of the equal protection and "privileges and immunities" clauses of the Fourteenth Amendment, and also a violation of property rights of black property owners. In its decision, the U.S. Supreme Court held that a Kentucky law could not require residential segregation. Storey compared this important victory with the infamous *Dred Scott* decision of 1857. Storey also helped prepare the brief for *Nixon v. Herndon* (1927), against the all-white primary. In this case, the Supreme Court ruled that a 1923 Texas law had unlawfully denied Lawrence Nixon the right to vote in the Democratic primary solely because of his skin color, a violation of the Fourteenth Amendment. This case was an integral part of the long-standing NAACP campaign against the white primary, which ended in victory with *Smith v. Allwright* (1944). Some historians suggest that the NAACP's successful campaign against segregation itself—outlawed by the *Brown v. Board of Education* U.S. Supreme Court decision of 1954—was significantly strengthened by these victories won by Storey.

BRIAN DAUGHERITY

References and Further Reading

- De Wolfe, Mark Antony. *Portrait of an Independent, Moorfield Storey, 1845–1929*. Boston: Houghton Mifflin, 1932.
- Hixson, Jr., William B. *Moorfield Storey and the Abolitionist Tradition*. New York: Oxford University Press, 1972.
- Kluger, Richard. *Simple Justice: The History of Brown v. Board of Education and Black America's Struggle for Equality*. New York: Random House, 1975.
- Storey, Moorfield. *Charles Sumner*. Boston: Houghton Mifflin, 1900.
- . *The Reform of Legal Procedure*. New Haven: Yale University Press, 1912.
- Storey, Moorfield, with Marcial P. Lichauco, *The Conquest of the Philippines by the United States, 1898–1925*. New York: G. P. Putnam's Sons, 1926.

Cases and Statutes Cited

- Buchanan v. Warley*, 245 U.S. 60 (1917)
- Guinn & Beal v. United States*, 238 U.S. 347 (1915)
- Nixon v. Herndon*, 273 U.S. 536 (1927)
- Roberts v. City of Boston*, 59 Mass. 198 (1849)
- Scott v. Sandford*, 60 U.S. 393 (1856)
- Smith v. Allwright*, 321 U.S. 649 (1944)

See also *Brown v. Board of Education*, 347 U.S. 483 (1954); National Association for the Advancement of Colored People (NAACP); Sumner, Charles

STORY, JOSEPH (1779–1845)

Joseph Story served as a justice of the United States Supreme Court from 1812 to 1845. His tenure spanned much of the Marshall Court (1801–1835) and extended into the Taney Court (1836–1864). He was the youngest member of the Court ever appointed, at age 32.

Story was a great admirer and a jurisprudential adherent of Chief Justice John Marshall. Although Story had served in Congress as a Jeffersonian Republican, his decisions revealed a federalist bent. He consistently voted for a strong central government, against the supremacy of states' rights, and for the power of the Supreme Court to declare the law.

Although most of the great nationalist decisions of the Marshall Court bore Marshall's name, Story is said to have contributed his ideas to some of Marshall's most important opinions. Story has been called "John Marshall's strong right arm on the court."

In one important case, however, Story himself took up the nationalist banner because Marshall had disqualified himself. In *Martin v. Hunter's Lessee*, Story asserted the Supreme Court's superiority over state courts in interpreting federal law. Although state courts could consider constitutional questions, the Supreme Court had jurisdiction and final authority to decide them.

The Story and Marshall jurisprudence was the foundation for much to come. The Civil War vindicated and confirmed Story's view as the state secessionists were forced to yield to the union. The decisions establishing federal supremacy also presaged later victories of central authority over states' rights, such as the Warren Court's imposition of federal constitutional rights against the states.

Story also ardently opposed slavery. Story wrote the Court's opinion in *The Amistad*, a case popularized in modern times by the film of that name. In *The Amistad*, Story held that slaves brought unlawfully to the United States were to be freed.

Yet the power of the central government was a principle rooted in the Constitution and, therefore, even greater to Story than his hatred of slavery. In *Prigg v. Pennsylvania*, Story upheld the primacy of a federal slavery act against a state law that would have convicted a slave catcher for kidnapping. Story sided with constitutional principle at the expense of painful excoriation by abolitionists.

Story supported not only federal power against the states but also advocated uniform national common and statutory law. To that end, he declared that federal courts would apply a federal common law rather than the laws of the states. His decision, *Swift v. Tyson*, held sway for nearly a century, when the Court overturned it in *Erie Railroad v. Tompkins*.

Story is considered to have been one of the great justices. He was at Marshall's right hand as they laid the foundation for American constitutional law. His reputation was enhanced by long and distinguished service as a law professor at Harvard University, a post he held concurrently with his Court service. He also wrote nine highly regarded commentaries on the law, including a three-volume commentary on the Constitution. These works placed him beside James Kent as the foremost legal authors of the day.

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References and Further Reading

- Dunne, Gerald T. *Justice Joseph Story and the Rise of the Supreme Court*. New York: Simon and Schuster, 1970.
- Friedman, Lawrence M. *A History of American Law*. New York: Simon and Schuster, 1973.
- Miller, F. Thornton. "Joseph Story's Uniform, Rational Law." In *Great Justices of the Supreme Court*, edited by William D. Pederson and Norman W. Proviser. New York: Peter Lang, 1994.
- Newmyer, R. Kent. *Supreme Court Justice Joseph Story: Statesman of the Old Republic*. Chapel Hill: University of North Carolina Press, 1985.
- White, G. Edward. *The American Judicial Tradition: Profiles of Leading American Judges*. New York: Oxford University Press, 1976.

Cases and Statutes Cited

- The Amistad*, 40 U.S. 518 (1841)
- Erie Railroad v. Tompkins*, 304 U.S. 64 (1938)
- Martin v. Hunter's Lessee*, 14 U.S. 304 (1816)
- Prigg v. Pennsylvania*, 41 U.S. 539 (1842)
- Swift v. Tyson*, 41 U.S. 1 (1842)

See also **Abolitionists; Judicial Review; Marshall Court; Marshall, John; Taney Court**

STRICT LIABILITY

Strict liability refers to legal responsibility without fault. If a law holds X responsible for an injury she accidentally caused Y, when X could not reasonably have foreseen she would hurt Y, that law imposes "strict liability" on X. In some areas of law, strict liability is commonplace and widely accepted—for example, in civil lawsuits concerning personal injuries caused by defective products. In the criminal law, however, strict liability is a controversial exception to the rule that liability requires a blameworthy state of mind.

A common version of statutory rape, which criminalizes having sex with a person below the age of

consent, provides an example of criminal strict liability: the defendant is guilty even if he reasonably (but mistakenly) believed the individual was older than the age of consent. Other examples include felony murder, in which a defendant is guilty of murder for any death that results from the commission of a felony, and so called “public welfare offenses,” which impose strict liability in the business context and criminalize such things as accidentally selling adulterated meat or mislabeled drugs.

Most United States jurisdictions do have some strict liability crimes. Before the latter half of the nineteenth century, strict liability was largely limited to crimes in which the defendant was at least aware that he was doing something wrong, as in the example of felony murder. The strict liability offenses in which the defendant accidentally causes some harm while believing that he was engaging in innocuous conduct are a product of the last 150 years.

Strict liability has endured generations of academic criticism. Critics charge that strict liability is both unjust to those it punishes and ineffective in combating crime. Because the individual, by definition, could not have been expected to realize he might cause harm, the argument runs, he is not morally blameworthy. Moreover, critics reason, the threat of criminal punishment cannot deter a person who could not realize he was causing harm, and imprisonment to prevent future crimes is unnecessary in such circumstances.

Advocates of strict liability counter that strict liability can promote the greatest level of care and that people who commit strict liability crimes “assume the risk” by their conduct, be it engaging in sexual intercourse outside of marriage (in the case of statutory rape) or entering certain businesses involving closely regulated products (in the case of public welfare offenses). Strict liability defenders also contend that prosecutors can be trusted to use their discretion to pursue only those cases in which the defendant “really” deserves to be punished.

The Supreme Court has refused to declare strict liability unconstitutional in the criminal law, striking strict liability statutes only occasionally. The Court’s decisions do, however, follow a consistent pattern: when the legislature could properly criminalize the intentional conduct included in the crime, adding a strict liability element is constitutional. For example, imposing strict liability for selling alcohol to a minor is constitutional because the legislature could prohibit selling alcohol completely. On the other hand, strict liability is unconstitutional when the conduct could not be criminalized without the strict liability element. For example, the Court struck

down a statute that criminalized selling books containing obscene material even when the seller reasonably thought the books had no such contents. This result fits the rule, because a statute that criminalized selling books completely would not be constitutional.

ALAN C. MICHAELS

STROSSEN, NADINE (1950–)

Nadine Strossen, current president of the American Civil Liberties Union (ACLU) and constitutional lawyer, received her undergraduate degree from Harvard College in 1972, and she graduated from Harvard Law School in 1975. The ACLU elected Nadine Strossen to head the organization as its president in 1991, a post she still held as of 2004. Her election was seen as a return to the organization’s traditional emphasis on issues of civil liberties such as freedom of speech and freedom of the press. Strossen has repeatedly stressed that the organization’s top priority must be educating the public on these basic issues.

Founded in 1920, the ACLU promotes itself as America’s “guardian of liberty,” with the job of conserving the United States’s original civil values. The organization and Strossen’s presidency emphasized the Bill of Rights and the Constitution, particularly focusing on First Amendment rights, equal protection under the law, due process, and right to privacy. The ACLU works to extend rights to segments of population historically denied them and handles thousands of cases yearly throughout the United States.

When elected, Strossen not only became the youngest person to head the organization at age forty, but she also became the first woman to head the nation’s oldest and largest civil liberties organization. Strossen is also a professor of law at New York University and practices constitutional law with special interests in civil liberties and international human rights. The *National Law Journal* has twice named Strossen one of its “100 Most Influential Lawyers in America.”

Throughout her career, Strossen has been vocal on such intersecting issues as freedom of speech and women’s rights. In 1995, she wrote *Defending Pornography: Free Speech, Sex, and the Fight for Women’s Rights*, published by Scribner. The *New York Times* named it a Notable Book of 1995. In *Defending Pornography*, Strossen argued against “pro-censorship” feminist scholars such as Catharine MacKinnon and Andrea Dworkin, who call for the censorship of pornography as a violation of women’s rights. Strossen contends that the proponents of pornography’s

ensorship deliberately blur any distinction between erotica and pornography, terming all sexually explicit material as the same. Strossen argues that the Dworkin–MacKinnon model law should itself be considered censorship because its intent is ultimately to take material that fits its definition of pornography out of circulation.

Strossen contends that defending the freedom of sexual expression is essential for women’s rights advocates, and that while women need to protect themselves, they most need protection from governmental infringement on their freedom and autonomy, not protection from pornography. By equating sexual expression with gender discrimination, women’s equality is undermined by women being told they must choose between sexuality and a supposed “equality.” In the context of women’s rights, she argues that freedom of speech is consistently the strongest weapon for countering misogynist discrimination and violence. To counter the Dworkin–MacKinnon model, Strossen argues that from a women’s rights point of view, censoring pornography is damaging.

Strossen argues in *Defending Pornography* that regardless of the content of pornography and women’s opinion of it, it does more harm to women’s rights and free speech to censor pornography. Her argument defends the right of each individual to make one’s own decision about what to see—or what not to see—in the realm of sex. Strossen intended *Defending Pornography* as a response to her contention that the excessive media attention received by prominent feminists such as Dworkin and MacKinnon led people to believe all feminists must support the censorship of pornography. Ultimately, Strossen articulates that pornography means an expression intended to sexually arouse an individual, be it either print-based or visual, and that the Constitution protects such expression. Strossen also coedited the book *Speaking of Race, Speaking of Sex: Hate Speech, Civil Rights, and Civil Liberties*, in which her article “Regulating Racist Speech on Campus” appeared. Strossen expands on her argument that it is insulting to women, racial minorities, and ultimately, everyone, to argue that one must choose between freedom of speech and equal opportunity. She posits that the First Amendment’s free speech guarantee offers the greatest protection for women’s and minorities’ rights and safety. Free speech, under this argument, serves as an indispensable method to promote other rights and freedoms, with any regulation of speech potentially undermining both equality and free speech. The First and Fourteenth Amendments work as allies rather than antagonists, and equality is best served by continuing to apply traditional, speech-protective

precepts to racist and misogynist speech rather than creating specific legislation to circumscribe it.

MELISSA OOTEN

References and Further Reading

- Gates, Henry Louis, et al. *Speaking of Race, Speaking of Sex: Hate Speech, Civil Rights, and Civil Liberties*. New York: New York University Press, 1995.
- Harvey, Philip D. *The Government vs. Erotica: The Siege of Adam and Eve*. New York: Prometheus Books, 2001.
- Strossen, Nadine. *Defending Pornography: Free Speech, Sex, and the Fight for Women’s Rights*. New York: Scribner, 1995.

See also **American Civil Liberties Union; Dworkin, Andrea; MacKinnon, Catharine**

STUDENT ACTIVITY FEES AND FREE SPEECH

Most colleges and universities charge their students a mandatory activity fee, which is then used to support various student organizations and events. In *Rosenberger v. Rector & Visitors of University of Virginia* (1995), the U.S. Supreme Court held that the University of Virginia’s student activity fee fund constituted a type of “metaphysical” public forum that had been created to encourage diverse extracurricular expression. Having produced this forum, the university was bound by the First Amendment to distribute the funds within it without preferring one viewpoint to another. By funding all student publications except those that were overtly religious, the university in that case was found to have committed unconstitutional Viewpoint Discrimination.

When student activity fees are allocated in a viewpoint-neutral manner, dissenting students at public institutions have no First Amendment right to a rebate of the amount of their fees spent to finance speech they find objectionable. This was the Court’s holding in *Board of Regents of the University of Wisconsin System v. Southworth* (2000), where some conservative students had complained that the University of Wisconsin’s fee system forced them to support student organizations with which they disagreed. The Court ruled that those fee monies distributed by the student government association had been allocated in a viewpoint-neutral manner, and, therefore, that the dissenting students were not entitled to a rebate. However, the Court warned that funding decisions made pursuant to student referenda probably did not meet the viewpoint neutrality test,

stating that “[a]ccess to a public forum . . . does not depend upon majoritarian consent.”

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References and Further Reading

- Calvert, Clay, *Where the Right Went Wrong in Southworth: Underestimating the Power of the Marketplace*, Maine Law Review 53 (2001): 53–80.
- Cásarez, Nicole B. *Public Forums, Selective Subsidies, and Shifting Standards of Viewpoint Discrimination*, Albany Law Review 64 (2000): 501–581.

Cases and Statutes Cited

- Board of Regents of the University of Wisconsin System v. Southworth*, 529 U.S. 217 (2000)
- Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819 (1995)

See also **Universities and Public Forums; Viewpoint Discrimination in Free Speech Cases**

STUDENT SPEECH IN PUBLIC SCHOOLS

Overview

Constitutional Sources: The First and Fourteenth Amendments

The First Amendment to the United States Constitution, when applied to the states through the Fourteenth Amendment, prohibits state action that interferes with freedom of speech. State actors include state and local government entities and officials, such as public schools, school boards, and school administrators.

Constitutional limits on public school authority over students was established as early as 1943, when the United States Supreme Court decided in *West Virginia State Bd. of Education v. Barnette* that public school children could not be compelled to salute the American flag. Yet, case law also establishes that a public school is entitled to maintain order and accomplish its educational mission and thus may control the speech of its students more broadly than the state may regulate the speech of adults in a public forum away from campus.

Critical Values and Factors

In striking the balance between public school authority and the speech rights of students, the grade level of

the student speakers and listeners is relevant. Only students in higher education are deemed to be fully prepared to develop their capacities regarding the values most often advanced as justifications for freedom of speech: the search for truth in a robust marketplace of ideas, the use of speech to shape one's identity as an autonomous individual, and the exchange of ideas necessary for effective participation in community affairs and other democratic self-governance. In contrast, courts recognize that secondary schools, and even more so elementary schools, assume the responsibility of inculcating fundamental social values, a process that often requires stricter control of the style and substance of student speech.

Finally, regulation of speech will less likely conflict with First Amendment values if the regulation operates in a neutral manner, without respect to social, political, religious, or other ideological content or viewpoint. Indeed, religious speech often raises issues under both the First Amendment's free speech clause and its establishment of religion and free exercise clause. Satisfying the mandates of both branches of the religion clause typically requires a public school to adopt a neutral stance toward religious speech, such as by allowing a religious student group the same access to after-school meeting rooms as is available to other student groups, while refraining from sponsoring or providing special support for religious speech such as school prayer.

The Trilogy of *Tinker*, *Bethel*, and *Hazelwood*

Three Supreme Court decisions, issued between 1969 and 1988, provide general standards for the constitutional protection of student speech in public secondary schools, a convenient starting place for analyzing speech at all grade levels. A fourth decision, *Board of Education v. Pico*, addresses student receipt of information through the school library, an issue closely related to student speech but beyond the scope of this article.

Tinker Protecting Nondisruptive Student Speech

In *Tinker v. Des Moines Independent Community School District*, the Supreme Court ruled that the First Amendment protected the right of high school and middle school students to wear black armbands protesting the Vietnam War so long as this nonverbal speech did not materially and substantially disrupt the school's educational program or interfere with the rights of other students, such as rights to be secure

and to avert their eyes from the expression. *Tinker* is well known for its statement that teachers and students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”

Bethel: Regulation of Indecent Speech in a School-Sponsored Activity

In 1986, in *Bethel School District v. Fraser*, the Supreme Court found no constitutional violation when public school officials disciplined a high school senior for using humorous sexual innuendos in a speech nominating a classmate for an office in student government. Some argue that this decision represents little more than an application of the first branch of the *Tinker* standard to new facts: by causing boisterous reactions from some students, the nominating speech disrupted the school's efforts to provide students with a lesson in appropriate modes of communication in an educational program on self-government.

Bethel is better known, however, for its statement that public secondary school officials, in an effort to inculcate socially responsible behavior, can constitutionally regulate indecent student speech that it deems inappropriate, regardless whether the speech actually disrupts the educational program. This might be viewed as an application of the second branch of *Tinker* if the Court relied mainly on a finding that the speech violated the rights of young students in a captive audience to avoid sexually indecent speech. Many courts and commentators, however, interpret *Bethel* more broadly to recognize tiers or hierarchies of constitutionally protected speech in public schools, developing a less protective constitutional standard for the sexually indecent speech punished in *Bethel* than for the nonverbal political protest protected in *Tinker*.

Hazelwood: Pedagogic Control of School-Sponsored Student Speech

The third case in the trilogy, *Hazelwood School District v. Kuhlmeier*, however, later suggested that the critical factor in *Bethel* was the school's apparent association with the indecent speech: because the school in *Bethel* had sponsored the assembly as one of two alternative mandatory activities for students, the school assumed a responsibility to protect the sensibilities of the captive audience of children who attended, and the school might be viewed as having approved the student speech that took place. This language in *Hazelwood* has led some judges to

characterize *Bethel's* broader references to indecent language as nonbinding *dictum* and to conclude that the *Bethel* standards do not apply to independent student speech, not sponsored by the school.

In *Hazelwood*, decided in 1989, the Supreme Court found no constitutional violation in a high school principal's deleting two pages of a student newspaper that contained articles about divorce and teenage pregnancy. The court based its ruling on findings that the high school had maintained the newspaper as a nonpublic educational forum that presented school-sponsored student speech as a curricular offering. The school could regulate such speech in any manner reasonably related to legitimate pedagogic concerns, without meeting the *Tinker* test applicable to independent student speech.

Application of the Trilogy

General Standards and Policies

Most judges will be reluctant to engage in wide-ranging First Amendment review of public school decisions regarding curriculum, pedagogy, and the maintenance of order in educational programs. Unless school officials attempt to impose an official orthodoxy while suppressing competing ideas on important questions that warrant debate, courts likely will defer to the judgments of elected and politically accountable school board members and the professionals appointed to administer the schools.

Because of the different educational goals of higher education, however, First Amendment protections for student speech typically will apply with greater force in public colleges and universities than in secondary and, especially, elementary schools. The pedagogic goals of higher education include the development of each student's abilities to challenge or test accepted doctrine, to develop new theories or discover new information, and to critically evaluate and debate ideas on controversial issues. These pedagogic goals, in turn, lead to the maintenance of forums in which the First Amendment operates with significant force.

Elementary school children, on the other hand, are viewed as lacking substantial capacity to critically evaluate competing ideas on provocative topics. Instead, they require foundational instruction on basic skills, fundamental knowledge, and appropriate social values and behavior. Moreover, sensitive children may require protection from the uncivil speech of a few verbally aggressive classmates. These goals and

needs justify significant control of student speech in the classroom, on the playground, and in school assemblies.

Drawing strength from language in *Bethel*, some courts and commentators have treated secondary schools as an extension of elementary schools, emphasizing the continuing need to inculcate fundamental social values, and justifying significant control of student speech. Other commentators, taking strength from *Tinker*, have argued for broad First Amendment protection of nondisruptive student speech in secondary schools. They point out that freedom of speech is one of the fundamental values that should be inculcated, that high school should provide an effective introduction to the robust marketplace of ideas in higher education, and that secondary education constitutes the final academic instruction in democratic self-governance for students who do not attend college.

Although perfect consensus on the proper balance of values at every grade level is not possible, nearly all will agree that opportunities for constitutionally protected student speech increase with the increasing maturity of students and the sophistication of their course of study, as they progress through grade levels.

Limits to Freedom of Student Speech in the Classroom

The classroom is not an open forum for student speech but is a site reserved for teaching and learning, under the direction and control of the school and the instructor. For example, although the silent, nondisruptive protest in *Tinker* was constitutionally protected, in no grade level will a student have a constitutional right to disrupt the educational program, such as by loudly protesting United States foreign policy in the Middle East during the instructor's explanation of algebra in a math class or during a musical presentation at a school assembly.

Moreover, in any grade level an instructor may exercise pedagogic discretion to teach students to adopt modes or styles of expression that are appropriate for intellectual or professional discourse. For example, in a third-grade class in social studies or a graduate law school course in trial advocacy, an instructor could require students to state information or arguments in civil language, avoiding bigoted epithets, personal insults, or profanity, and the instructor could interrupt a student for violating this class rule, could lower the student's grade for substantial failure to adhere to the rule, and could even refer the student for disciplinary action for deliberate and repeated infractions that disrupt the educational program. In contrast, speakers in traditional public

forums, such as parks and street corners, would enjoy a broader right to use profane or uncivil language in protests or other speech.

Assuming that a student speaks in turn, on a relevant topic, and in a manner that comports with class rules of civility, the extent to which a public school instructor can control the substance of the ideas expressed may vary at different grade levels, partly because of the varying nature of academic inquiry at different ends of the grade spectrum. Although a college instructor could apply politically neutral standards to give a low grade to a student whose work reflected poor research and analysis, the First Amendment would not allow a public school to discipline or silence a student simply for expressing an unpopular viewpoint on a relevant topic, such as an argument against affirmative action in a classroom full of supporters of affirmative action programs. In contrast, it is conceivable that the First Amendment would permit a public elementary school instructor to suppress the relevant but dissenting views of a student if the content or viewpoint of student's views clashed with the instructor's inculcation of fundamental social values. Even there, however, courts are likely to draw a distinction between legitimate inculcation, on the one hand, and constitutionally impermissible indoctrination on matters of conscience.

Designated Open Forums

A public school or academic unit within the school is free to expand speech rights of students by designating a forum to be fully or partially open to speech. A college department of political science, for example, might maintain a "free speech bulletin board" on which the department invites students to post their opinions on any topic while enjoying the full measure of freedom of speech that the Constitution guarantees to adults in traditional public forums such as parks and street corners. The department could maintain complete control over its own official bulletin board, which it could reserve exclusively for its own speech, or it could dedicate a bulletin board to student speech while retaining restrictions on the speech. However, once it dedicated the "free speech" board as an open forum, it could not then censor a student's posting on that board unless the speech fell within a recognized exception to First Amendment protection, such as obscenity.

Similarly, as a means of furthering the intellectual growth, sense of responsibility, and leadership skills of qualified students, a state university may permit the student editorial staff to exercise final discretion over the content of the university's daily student

newspaper, allowing the students to follow or reject any guidance offered by their faculty or staff adviser. If it is apparent to all that the articles, editorial opinions, and decisions regarding advertising reflect the final judgments of the student editors and not of the school, the student editors might enjoy the same freedom from state control over the content of each edition as would any newspaper publisher in the community at large. As illustrated by *Hazelwood*, such designation of the school newspaper as an open forum for student editors would be less common in lower grades, where pedagogic goals more likely would call for greater supervision from faculty or staff; however, if a secondary school exercised pedagogic discretion to adopt the college model described previously, it presumably could surrender control of the editors' speech and could pave the way for a different constitutional outcome than the one reached in *Hazelwood*.

In addition, many colleges have designated an outdoor space, such as a campus lawn or square, as a suitable open forum for student speech. Other areas on campus, such as sidewalks between buildings, may have all the characteristics of traditional public forums and warrant full constitutional protection for student speech, even though not specifically designated to serve that purpose by school authorities. In such open forums, students presumably are free to voice even views that are offensive to others and even to convey their passion with uncivil language, so long as they avoid a few extreme forms of speech that are excluded from First Amendment protection, such as threats or obscenity, and so long as they avoid obstructing sidewalks, refrain from projecting their voices excessively into nearby buildings, and otherwise respect the rights of others to avoid the speech.

Conceivably, public elementary and secondary schools could likewise designate spaces on campus as open forums, free from the control of school authorities that would otherwise be permitted by the trilogy of Supreme Court cases. In light of the greater need to maintain order, protect the sensibilities of young student, and to inculcate basic social values, however, it is less likely that elementary or even secondary school authorities would designate an area in which student speech, without faculty guidance, would receive the fullest measure of constitutional protection. Moreover, in light of the closed nature of most elementary and secondary school campuses, and the restrictions on location and movement even of students, open spaces on such campuses would not assume the status of public forums absent designation by school authorities or other unusual circumstances.

School Uniforms and Dress Codes

Courts typically have upheld public elementary or secondary school policies that dictate a standard school uniform and are implemented for educational reasons, rather than a desire to suppress expression of ideas, particularly if the school permits students who object to the uniform to transfer to another public school that does not require a uniform. If students are permitted variation in clothing, however, dress codes that more selectively target the content or viewpoint of messages conveyed by garments, like the armband in *Tinker* or a T-shirt displaying a written slogan, raise more serious First Amendment issues.

Many courts have invoked language in *Bethel* to uphold public school policies that forbid lewd, vulgar, or otherwise indecent or plainly offensive speech, even though the speech is not school sponsored, and although such speech would be constitutionally protected in public areas off campus. On the other hand, if a T-shirt slogan conveys a political point without indecency or vulgarity, as did the arm band in *Tinker*, public school policies that seek to regulate the T-shirt will be governed by the *Tinker* standards and will be protected by the First Amendment unless the shirt would disrupt the educational program or violate the rights of other students to be secure or to avoid the speech.

These two generalizations, however, leave ample room for uncertainty and disagreement. Judges have disagreed, for example, about which standard—either an expansive interpretation of *Bethel* and *Hazelwood* or the more speech-protective rule of *Tinker*—applies to suppression of a T-shirt slogan that is neither indecent nor highly political but is simply inconsistent with the social values that the public school seeks to inculcate, such as respect for others or avoidance of under-age consumption of alcohol. Under one possible approach, courts would lean toward upholding such regulations in the lower grades, where the school's responsibility for inculcation is the strongest, and courts would apply the *Tinker* standard in the higher grades, where inculcation gives way to training in critical inquiry. At the college level, where the need to protect students from indecency is diminished, and the task of inculcating basic social values has largely been accomplished, the *Tinker* standard should apply and presumably would rarely justify suppression of silent messages conveyed on articles of clothing. Middle school and high school represent the transition points between the extreme ends of the spectrum, and they likely will continue to generate continued debate on the precise standards to apply to independent student speech such as expressive clothing.

College Hate Speech Codes

In the two decades after the mid 1980s, many universities adopted hate speech policies that prohibited certain hurtful speech associated with personal characteristics such as race, national origin, gender, sexual orientation, religion, age, and disability. When applied to speech in certain contexts at state colleges and universities, such as in open forums or relevant classroom discussion, the policies were typically found to violate the First Amendment if they regulated student speech on the basis of the ideological content or viewpoint of the speech or if they reached speech that was merely offensive to others. Such suppression of controversial views is not justified by constitutional or statutory mandates to provide equal educational opportunities.

On the other hand, a public university policy likely will be upheld if it (1) prohibits only speech that is generally subject to regulation under the First Amendment in the relevant context, including the public school contexts discussed previously, and (2) the policy either prohibits all such speech, regardless of its relationship to matters of personal identity or other ideological content or viewpoint, or it prohibits a subset of such speech, based not on its content or viewpoint but on the speaker's act of selectively directing the speech to members of defined groups. Thus, the First Amendment will permit a public school policy to prohibit students from selectively conveying credible threats of harm to members of a particular racial group.

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References and Further Reading

- Calleros, Charles R. *Reconciliation of Civil Rights and Civil Liberties after R.A.V. v. City of St. Paul: Free Speech, Antiharassment Policies, Multicultural Education, and Political Correctness at Arizona State University*, Utah Law Review 1992 (1992): 1205–1333.
- Dienes, C., Thomas Connolly, and Annemargaret Connolly. *When Students Speak: Judicial Review in the Academic Marketplace*, Yale Law and Policy Review 7 (1989): 343–395.
- Ingber, Stanley. *Socialization, Indoctrination, or the 'Pall of Orthodoxy': Value Training in the Public Schools*, University of Illinois Law Review 1987 (1987): 15–93.
- McCarthy, Martha. *Anti-Harassment Policies in Public Schools: How Vulnerable Are They?* Journal of Law and Education 31 (2002): 52–70.
- Pedzich, Joan. *Student Dress Codes in Public Schools: A Selective Annotated Bibliography*, Law Library Journal 94 (2002): 41–57.
- Pyle, Jonathan. *Speech in Public Schools: Different Context or Different Rights?* University of Pennsylvania Journal of Constitutional Law 4 (2002): 586–635.

Richards, Robert D., and Clay Calvert. *Columbine Fallout: The Long-Term Effects on Free Expression Take Hold in Public Schools*, Boston University Law Review 83 (2002): 1089–1140.

Symposium: *Do Children Have the Same First Amendment Rights as Adults?* Chicago-Kent Law Review 79 (2004) 3–313.

Weinstein, James A., *Constitutional Roadmap to the Regulation of Campus Hate Speech*, The Wayne Law Review 38 (1991): 163–247.

Cases and Statutes Cited

Bethel School District v. Fraser, 478 U.S. 675 (1986)

Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988)

Board of Education v. Pico, 457 U.S. 853 (1982)

Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969)

West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943)

See also Civil Rights Laws and Free Speech; Content-Based Regulation of Speech; Content-Neutral Regulation of Speech; Limited Public Forums; Low Value Speech; Marketplace of Ideas Theory; R.A.V. v. City of St. Paul, 505 U.S. 377 (1992); *Speech and Education; Threats and Free Speech; Time, Place, and Manner Rule; Wisconsin v. Mitchell*, 508 U.S. 476 (1993)

SUBPOENAS TO REPORTERS

“It is axiomatic, and a principle fundamental to our constitutional way of life, that where the press remains free so too will a people remain free” *Baker v. F & F Investment*, 470 F.2d 778 (2d Cir. 1972).

Although there are currently forty-nine states and the District of Columbia that recognize some type of privilege in which journalists are protected from disclosing information they receive, there is no explicit protection for reporters under federal law. The United States Supreme Court's decision in *Branzburg v. Hayes*, 408 U.S. 665 (1972), declined to quash grand jury subpoenas issued to journalists with a ruling that a reporter does not have a First Amendment protection to refuse a grand jury subpoena in an investigation.

However, the Court did state that Congress and states were free within First Amendment limits to determine whether a newsman's privilege is necessary. Subsequently courts in almost every jurisdiction around the country interpreted the Courts' opinion in establishing a balancing test in the protection of a free press under the First Amendment. As governmental policy has evolved since *Branzburg*, the guidance regarding the issuance of subpoenas to members

of the news media, for telephone records of the news media, or the indictment or arrest of members of the news media are now set forth in section 50.10 of title 28 of the Code of Federal Regulations.

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References and Further Reading

United States Attorney's Manual, Section 9-11.255—Grand Jury Subpoenas to Lawyers and Members of the News Media.

Cases and Statutes Cited

28 C.F.R. § 50.10

Baker v. F & F Investment, 470 F.2d 778 (2d Cir. 1972)

Branzburg v. Hayes, 408 U.S. 665 (1972)

SUBSTANTIVE DUE PROCESS

Substantive due process is a phrase describing constitutional limitations on the government, usually to secure rights not elsewhere identified in the Constitution. Coined in the mid-twentieth century in debates concerning the proper role of the courts, the phrase originally encoded a criticism of perceived judicial overreaching and even today is not always merely descriptive. Substantive due process is contrasted with “procedural due process,” the correlative phrase describing proper legal procedures. By the late twentieth century, substantive due process was divided into economic substantive due process, largely inactive, and noneconomic (or social) substantive due process, which although not uncontested is steadily expanding. All are rooted in the due process clauses of state and federal constitutions. The Fifth Amendment in the Bill of Rights prohibits the federal government from depriving any person of “life, liberty, or property, without due process of law,” and the Fourteenth Amendment, adopted after the Civil War, extends the same prohibition to the states. State constitutions contain similar limitations, sometimes using the older phrase “law of the land.” The current North Carolina Constitution, for example, carrying forward wording from the Declaration of Rights in the North Carolina Constitution of 1776, provides that “No person shall be . . . in any manner deprived of his life, liberty, or property, but by the law of the land.” The present New York Constitution actually has both due process and law-of-the-land clauses. Although suggestive, the constitutional phrases themselves are hardly self-explanatory, and a long history lies behind the current understandings.

Historical Background

Every legal system that deserves the name has some concept of proper procedure (“due process”), procedure according to settled legal forms (“the law of the land”), but the specific concept that eventually gained constitutional footing in the American legal system is deeply rooted in the English legal tradition. In Magna Carta (1215) the tyrannical King John was compelled by his rebellious barons to promise that “no free man shall be taken or imprisoned or disseised or outlawed or exiled, or in any way ruined, nor shall we go or send against him, except by the lawful judgment of his peers or by the law of the land.” At the time, the common law courts were still in the process of formation, and legislative and executive functions of government were not yet clearly distinguished; the concept of separation of powers lay in the distant future. Five hundred years later, when parliament and the courts were well established and English liberties were again threatened by an overreaching king, opponents of royal power took a renewed interest in medieval restraints on the government. Commenting on Magna Carta, Sir Edward Coke related the requirement to proceed only according to “the law of the land” to a phrase in a fourteenth-century statute requiring “due process according to the common law.” A zealot for the English legal tradition, Coke saw in due process a judicial restraint on king and parliament alike. By the eighteenth century, constitutional theorists like John Locke and lawyers like Sir William Blackstone had translated the medieval language of Magna Carta into the memorable trinity of “life, liberty, and property.” All the necessary ingredients were now at hand for the American constitution makers. Ironically, “law of the land” and “due process” eventually lost their currency in England, limited by the doctrine of parliamentary supremacy and superseded by the vaguer phrase “rule of law,” but they have flourished ever after in their new home.

Not only was due process a common law concept long before any American constitution, its jurisprudence was developed by American judges schooled in the common law way of doing things. Case by case, as the nation developed economically and socially, content was given to due process and to the rights it safeguarded: life and property, but above all liberty. The requisites of proper procedure, particularly criminal procedure from arrest and detention through trial and final punishment, were detailed in other constitutional provisions of considerable specificity, but the general guarantee of due process remained for abuses not specifically provided for; for example, a state statute that gave a magistrate a share of the fines

imposed in case of conviction. In *Tumey v. Ohio* (1928) a unanimous Supreme Court held that for a judge to have a financial interest in the outcome of a case “certainly violates the Fourteenth Amendment, and deprives a defendant in a criminal case of due process of law.” Characteristic of the time, the court did not bother to define the violation as either “procedural” or “substantive,” although by then the dichotomy (but not the labels) had emerged.

Economic Substantive Due Process: Liberty of Contract

Only a few years before *Tumey*, the Supreme Court had categorically declared in *Adkins v. Children's Hospital* (1923) that under the constitution “freedom of contract is the general rule and restraint the exception,” and invalidated a minimum wage law for working women in the District of Columbia. Statutes that imposed restrictions on freedom of contract were presumed unconstitutional unless proven otherwise. The authority for this remarkable constitutional doctrine was also the due process clause; this time, because federal law was involved, the due process clause of the Fifth Amendment. Two developments had made it possible: first, liberty had been given an expansive definition to include not only freedom from illegal confinement (freedom of motion), but also freedom to engage in economic activity (freedom of contract); second, the demands of due process had been enlarged to include not only how the government proceeded but also what it did. Just as important as what was taken—life or property or some version of liberty—was that nothing be taken without good cause. Even with proper procedures, the government had not only to seek constitutional ends but also to demonstrate to the judges, if necessary, that the chosen means were reasonably related to those ends. In this sense, due process had acquired substance.

The origins of substantive due process can be traced to the middle of the nineteenth century. There were scattered references in Supreme Court opinions, including the notorious *Dred Scott* Case (1857), but these incunabula were not themselves the source of later developments, rather an indication of what determined judges could do with the due process clause. More fruitful seedbeds were the state courts, particularly their decisions in the troublesome cases generated by state prohibition statutes. In *Wynehamer v. People* (1856), for example, New York's highest court found that a statute violated due process as applied to liquor in stock at adoption. In the Supreme Court itself more obvious sources were the

dissenting opinions of Justices Joseph P. Bradley and Stephen J. Field in the *Slaughterhouse Cases* (1873), listing a series of individual economic liberties supposedly protected from government interference. Although originally claimed to be incidents of American citizenship and protected by the privileges and immunities clause of the Fourteenth Amendment, the rights eventually found a home in the due process clause. In *Allgeyer v. Louisiana* (1897), the court first recognized freedom of contract as an aspect of liberty and held that no state could deprive any person of that freedom “without due process of law,” that is, unless it could show that the restriction was reasonably related to an acceptable government purpose. Because the court had earlier decided that a corporation was a “person” within the meaning of the due process clause, the result was to transform that clause into a virtual “Magna Carta for American business,” a particularly ironic result because the Fourteenth Amendment had originally been adopted to overturn the *Dred Scott* Case and secure the civil rights of newly freed slaves. The impact of substantive due process extended far beyond the relatively small number of statutes actually invalidated; the legitimacy of regulatory legislation in general was called into question and, by raising the threat of an eventual judicial veto, the difficulty of securing legislative passage was greatly increased.

Although applicable to restraints on all commercial activity, freedom of contract found its most contentious application in cases of attempted regulation of labor. The most notorious example, giving its name to an entire era of due process jurisprudence, was undoubtedly *Lochner v. New York* (1905), in which the Supreme Court declared unconstitutional a state statute limiting the working hours of bakers. The *Lochner* question, “Is this a fair, reasonable and appropriate exercise of the police power of the State, or is it an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty to enter into those contracts in relation to labor?” meant that much labor law was subject to searching judicial inquiry. Freedom of contract as protected by the due process clauses meant, for example, that neither the federal nor the state government could outlaw the so-called yellow dog contract, by which certain employers required their workers as a condition of employment to agree not to join a labor union. State courts, too, invoked the due process clauses to invalidate popular legislation. In *Ives v. South Buffalo Railway Co.* (1911), for example, New York's highest court held the state's new worker's compensation statute, one of the nation's first, unconstitutional.

Just as procedural and substantive due process are occasionally difficult to distinguish, so the line

between economic and noneconomic substantive due process is sometimes difficult to draw. In *Meyer v. Nebraska* (1923), the Supreme Court held that a state statute forbidding the teaching of foreign languages in primary schools violated due process, and in *Pierce v. Society of Sisters* (1925) it held that due process prevented a state from denying the right to operate private schools. Although at the time of their decision it was possible to analogize these cases to interference with the free market, it is also possible to see in them an emerging recognition of aspects of liberty other than freedom of contract: freedom of speech and association, freedom to acquire information, parental rights in educational decisions, and—of most consequence for the later development of the law of due process—“the right to be let alone,” better known today as the right to privacy.

Although tolerable during economic boom times and under pro-business political leadership, a constitutional guarantee of freedom of contract was to lead the Supreme Court into conflict with the new political leadership called forth by the economic depression of the 1930s. The result was a humiliation for the court, which belatedly acknowledged in *West Coast Hotel Co. v. Parrish* (1937) that, in fact, “the Constitution does not speak of freedom of contract.” The next year in *United States v. Carolene Products Co.* (1938) the court executed a *volte-face* and announced that it would henceforth presume the constitutionality of “regulatory legislation affecting ordinary commercial transactions,” but at the same time warned that it would not extend the presumption to restrictions on civil rights, thereby implicitly splitting the judicial concept of liberty into economic and noneconomic components. Thus was born the doctrine of “preferred freedoms,” the notion that some rights are entitled to more judicial protection than others.

Noneconomic Substantive Due Process: Liberty

Many who today acclaim the expansion of due process to protect privacy prefer not to recognize the relationship of modern law to the now discredited doctrine of freedom of contract, but noneconomic (or social) substantive due process is organically connected to its economic precursor. Case by case, the liberty protected by due process became successively liberty (or freedom) of contract and then a growing array of civil liberties, collectively described as the right to privacy. The connection is obscured by the fact that the Supreme Court, in keeping with its

constitutional about-face in the 1930s, acted for some time as if substantive due process had lost its vitality. In *Ferguson v. Skrupa* (1963), for example, the justices declared: “We emphatically refuse to go back to the time when courts used the due process clause ‘to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.’” So it is not surprising that two years later when the court in *Griswold v. Connecticut* (1965) invalidated state statutes outlawing the distribution of birth control materials to married persons, now recognized as a substantive due process decision, rationalized its holding instead by a complicated theory of privacy protected by the “penumbras,” or shadows, cast by a variety of rights enumerated in the Bill of Rights—notably not including the due process guaranteed by the Fifth Amendment.

A further complicating factor is illustrated by the use made in *Griswold* of the due process clause of the Fourteenth Amendment. Because the Bill of Rights applies only to action by the federal government and because it specifies a number of rights not included in the text of the Fourteenth Amendment, which applies only to state action, the due process clause of the Fourteenth Amendment has become a vehicle through which most of the Bill of Rights is applied to the states. The Fourteenth Amendment is said to “incorporate” the Bill of Rights, a doctrine that may be seen as a judicial response to the criticism that substantive due process is vague and standardless: reference to the rights enumerated in the Bill of Rights adds a degree of specificity. The decision in *Rochin v. California* (1952), for example, that use by state law enforcement officers of incriminating evidence obtained by pumping the stomach of an unwilling suspect violated due process because it “shocks the conscience” could now be explained more straightforwardly as a violation of the privilege against self-incrimination in the Fifth Amendment, applied to the states through the Fourteenth Amendment. When the only role of the due process clause of the Fourteenth Amendment is to incorporate parts of the Bill of Rights, due process is not substantive in the usual sense of that word; that is, it is not itself the source of the constitutional limitations. The incorporation doctrine has led to the rapid development of rights once protected by an undifferentiated due process; for example, the takings clause of the Fifth Amendment, prohibiting the government from taking private property for public purposes without just compensation, has been invoked in challenges to state regulations that would formerly have been scrutinized for deprivations of property without due process of law. Indeed, it may be that emptying due

process of much of what once was considered its content and leaving it as a residual category, invoked in only the most controversial cases, explains many of the difficulties surrounding its current use.

When a few years after *Griswold* its holding was extended to unmarried persons in *Eisenstadt v. Baird* (1972), now also recognized as a substantive due process decision, the result was technically justified as an application of the equal protection clause of the Fourteenth Amendment. The same law, it was held, must be applied to married and unmarried couples alike, but in explaining the court's decision, Justice William J. Brennan implicated issues beyond equality of treatment: "If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." Thus was the stage set for the abortion decision that soon followed—and for a more self-conscious development of substantive due process as a guarantee of the individual's noneconomic (or social) interests. All that was required for the latter was for the right of privacy to emerge from the shadows and be recognized as an aspect of liberty and for due process to recover its role not only as a guarantee of procedural fairness but also as a safeguard against "unwarranted" government action.

The year after *Eisenstadt*, in *Roe v. Wade* (1973), the court summarily held state laws banning almost all abortions "violative of the due process clause of the Fourteenth Amendment." A more comprehensive statement was attempted two decades later in *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992), largely reaffirming *Roe* and explaining that the liberty protected by due process included "personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education." To intrude into such personal decisions the state needed a compelling reason. An invitation to extend the list to include homosexual sexual activity ("gay rights") had been rejected in *Bowers v. Hardwick* in 1986, only to be accepted later in *Lawrence v. Texas* (2003), which overruled *Bowers* and held state sodomy laws unconstitutional. The guarantee of due process is not found only in the federal constitution nor is the development of substantive due process a monopoly of federal courts. In *Goodridge v. Department of Public Health* (2003), the Massachusetts Supreme Judicial Court, extending the reasoning in *Lawrence*, held that the state's refusal to recognize the marriage of same-sex couples was a violation of the due process protected by the state constitution's law-of-the-land clause. Due process, in the nineteenth century the watchdog of the free market, when freedom of

contract had created a zone around the individual of what we would today call, if not privacy, at least autonomy, had become in the twentieth century the guardian of autonomy in intimate relations.

Whether the liberty protected by due process will be extended to other personal matters remains to be seen. In 1977 in *Whalen v. Roe*, the Supreme Court rejected a challenge to state collection and storage of confidential medical information as not a violation of privacy where the state had reasonable grounds for creating the databank and took adequate measures to secure it from misuse, and twenty years later in *Washington v. Glucksberg* (1997) an argument to recognize the right of the terminally ill to physician assistance in the commission of suicide ("the right to die") was narrowly rejected. Economic interests retain some residual due process protections. In *BMW of North America, Inc. v. Gore* (1996) the court rejected excessive punitive damages, ostensibly because of a failure to give adequate notice, a violation of procedural due process, although some observers, including two dissenting justices, thought the case was better understood as a revival of economic substantive due process.

Objections to the latest iteration of substantive due process resemble those once voiced against freedom of contract. To textualists the results seem remote from the bare words of the constitution, as indeed they are. Due process encoded a whole tradition of constitutionalism, as well as a common law dynamic of development; the phrase has always required considerable judicial explication. More serious is the complaint that using due process to fill gaps left by enumerated rights, justifiable in the case of obvious procedural abuses like the self-interested judge, becomes, when extended to the recognition of unenumerated rights, an invitation to a judicial majority to write its own preferences into the constitution. Freedom of contract was to one generation of judges what the right to privacy is to another. The response must be to emphasize the cautious and incremental nature of the judicial development: from case to case the linkages are reasonably sound. The disagreement may depend on the exact point of departure. Relevant here is Justice Antonin Scalia's insistence, vehemently voiced in his dissenting opinion in *Lawrence*, that judges should be guided in their development of substantive due process by "history and tradition," rather than by "law-profession culture" with its tendency to "carry things to their logical conclusion." The disagreement, in other words, is not about whether there are unenumerated rights protected from arbitrary government action by the requirement of due process—constitutional democracy means limits on government, and rights enumerated in written

constitutions can never be comprehensive—but what exactly they are or should be.

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References and Further Reading

- Orth, John V. *Due Process of Law: A Brief History*. Lawrence: University Press of Kansas, 2003.
- Phillips, Michael J. *The Lochner Court, Myth and Reality: Substantive Due Process from the 1890s to the 1930s*. Westport, Conn.: Greenwood Press, 2001.
- Strong, Frank R. *Substantive Due Process of Law: A Dichotomy of Sense and Nonsense*. Durham: Carolina Academic Press, 1986.

Cases and Statutes Cited

- Adkins v. Children's Hospital*, 261 U.S. 525 (1923)
- Allgeyer v. Louisiana*, 165 U.S. 578 (1897)
- BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996)
- Bowers v. Hardwick*, 478 U.S. 186 (1986)
- Dred Scott Case*, 60 U.S. 393 (1857)
- Eisenstadt v. Baird*, 405 U.S. 438 (1972)
- Ferguson v. Skrupa*, 372 U.S. 726 (1963)
- Goodridge v. Department of Public Health*, __ N.E.2d __ (Mass. 2003)
- Ives v. South Buffalo Railway Co.*, 194 N.E. 431 (N.Y. 1911)
- Lawrence v. Texas*, __ U.S. __ (2003)
- Lochner v. New York*, 198 U.S. 45 (1905)
- Meyer v. Nebraska*, 262 U.S. 390 (1923)
- Pierce v. Society of Sisters*, 268 U.S. 510 (1925)
- Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992)
- Rochin v. California*, 342 U.S. 165 (1952)
- Roe v. Wade*, 410 U.S. 113 (1973)
- Slaughterhouse Cases*, 83 U.S. 36 (1873)
- Tumey v. Ohio*, 273 U.S. 510 (1928)
- United States v. Carolene Products Co.*, 304 U.S. 144 (1938)
- Washington v. Glucksberg*, 521 U.S. 702 (1997)
- West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937)
- Whalen v. Roe*, 429 U.S. 589 (1977)
- Wynehamer v. People*, 12 N.Y. 378 (1856)

SUMNER, CHARLES (1811–1874)

Charles Sumner—legendary Senator from Massachusetts, antislavery leader, and civil rights activist—was born in Boston on January 6, 1811. His parents, Charles Pinckney Sumner, a graduate of Harvard College who studied law under Josiah Quincy and became sheriff of Suffolk County in 1826, and Relief Jacob, a seamstress, were both descendants of Puritan settlers who arrived in Massachusetts Bay in the 1630s. They had nine children, including Charles and his twin sister Matilda. Sumner remained a bachelor until 1866 when he married Alice Mason Hooper, a wealthy young widow. The childless couple separated within a year and divorced in 1873.

Charles received his early education from an aunt who taught the Sumner children in their home. At the age of ten, he entered the Boston Latin School where he delighted in reading the classics. He attended Harvard College from 1826 to 1830. He was an average student and never ranked in the top third of his class. He had difficulty in mathematics but enjoyed public speaking. In 1831, Sumner entered Harvard Law School. He studied under Joseph Story and became the Supreme Court Associate Justice's favorite pupil. Completing his coursework in 1833, Sumner received his Bachelor of Laws and was admitted to the bar in 1834. In the same year, he visited the South for the first time and remarked on the harsh treatment of African Americans held in bondage in the nation's capital. During the next three years, he practiced law with his friend and associate George S. Hilliard, acted as a Federal Circuit Court Reporter, lectured at Harvard Law School, and edited *The American Jurist*. In late 1837, Sumner embarked on a twenty-month European tour.

Returning to America in 1840, Sumner signed a contract to edit twenty volumes of Francis Veysey's chancery reports and plunged into a wide range of civic activities. He joined forces with William Ellery Channing, the untiring Boston reformer, and became an outspoken advocate of penal reform and a leader in the city's antislavery movement. Sumner demanded that the federal government outlaw slavery in the District of Columbia and the territories, eliminate the coastal and interstate slave trade, and repeal the Fugitive Slave Law. He joined the Emigration Society, supported Horace Mann's drive for educational reform, and became involved in the American Peace Society. In 1845, he delivered a Fourth of July oration entitled "The True Grandeur of Nations" in which he called for international peace and the moral elevation of man.

In the mid-1840s, Sumner became an outspoken Conscience Whig and attacked fellow Whigs with ties to textile manufacturing, who failed to support the antislavery cause. He railed against alliances between "the lords of the lash" and "the lords of the loom." He denounced the annexation of Texas as a scheme to expand the power of slaveholders, and he opposed the Mexican War. As the leader of the Conscience Whigs in the late 1840s, he was instrumental in forging an alliance with Free Soilers and antislavery Democrats, which later contributed to his election to the United States Senate.

In 1849, Sumner pleaded his most famous legal case. In *Roberts v. City of Boston* (1849), he represented the parents of a five-year black student, Sarah Roberts, and challenged racial segregation in Boston's schools. Arguing that separate could not be equal and emphasizing

the adverse effects of segregated schools on both black and white children, Sumner presented arguments that were developed more than a century later in the landmark case of *Brown v. Board of Education* (1954).

In the early 1850s, Sumner took his antislavery campaign to the national stage. He attacked the constitutionality of the Compromise of 1850, including the new Fugitive Slave Law, which he considered a violation of the Fifth and Seventh Amendments guaranteeing life and liberty and the right to trial by jury. Elected to the United States Senate as a Free Soil senator in 1851, Sumner stepped up his attack on slavery by calling for the nullification of the Fugitive Slave Law. He emerged as a strong voice against any compromise on slaveholding, rejecting Stephen Douglas's "popular sovereignty" and the Crittenden proposal. Sumner's "Freedom National," "Crime Against Kansas," and "Barbarism of Slavery" speeches fueled an emotionally charged discourse against slavery. His branding of Senator Butler as the Don Quixote of slavery precipitated the infamous assault on him in the Senate by Senator Preston Brooks, Butler's cousin and fellow South Carolinian. Brook's caning of Sumner produced the campaign rhetoric "Bleeding Kansas Bleeding Sumner" in 1856. Despite an extended vacation, including time in Europe, Sumner never fully recovered from the physical and psychological effects of the attack by Brooks.

Appointed Chairman of the Senate Committee on Foreign Relations in early 1861, Sumner became a strong proponent of emancipation during the Civil War, arguing that freeing the slaves would mobilize support for the North in England and ensure peaceful relations with European powers. After President Lincoln's Emancipation Proclamation, he joined with Elizabeth Cady Stanton and Susan B. Anthony to push for a complete abolition of slavery through constitutional amendment. He headed the Senate Committee on Slavery and Freedmen and supported the Thirteenth, Fourteenth, and Fifteenth Amendments, although he did not have a hand in drafting them. Embracing a political philosophy of "equality before the law," he sought to remove restrictions on black testimony in federal courts and overturn the Supreme Court's Dred Scott decision. He protested against the segregation of streetcars in Washington, D.C., and demanded equal pay for African-American troops. An outspoken Radical Republican, Sumner opposed President Johnson's Reconstruction program and deplored the emergence of Black Codes in the South. He advocated congressional control of Reconstruction, advanced black suffrage as a condition for the reentry of seceded states, and sought to secure freedmen access to education and homesteads. He called for

the enfranchisement of African Americans in the North and as a condition for the entry of new states.

Sumner's stand on the "Alabama claims" against Britain and his opposition to President Grant's proposed annexation of the Dominican Republic led to his alienation from the administration and most Republicans. Removed as chairman of the Senate Committee on Foreign Relations in 1871, he devoted the remainder of his career to civil rights. After his fourth failed attempt to push a comprehensive civil rights bill through Congress, he left the Republican Party and supported Horace Greely in the 1872 presidential election, distancing himself from many long-time supporters, including African Americans. After an unsuccessful attempt to mend fences with Republicans in 1873, he tabled his "battle flags resolution" calling for the removal of the names of battles with fellow citizens from the Army's register, which resulted in his further alienation and a censure by the Massachusetts legislature. In his final years, he failed to obtain support for his civil rights bill, which he reintroduced in the Senate for the last time in December 1873. He demonstrated increasing sympathy for the political rights of women and supported Susan B. Anthony's call for extending the vote to women. One hour before his death in Washington on March 11, 1874, he urged onlookers, including Frederick Douglass, to work for the passage of his civil rights bill.

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References and Further Reading

- Donald, David Herbert. *Charles Sumner*. New York: Da Capo Press, 1996.
- Pierce, Edward Lillie. *Memoirs and Letters of Charles Sumner*. Miami, FL: Mnemosyne Pub. Co., 1969.
- Sumner, Charles. *The Selected Letters of Charles Sumner*, edited by Beverly Wilson Palmer. Boston: Northeastern University Press, 1990.
- . *The Works of Charles Sumner*. Boston: Lee and Shepard, 1870–1873.
- Taylor, Anne-Marie. *Young Charles Sumner and the Legacy of the American Enlightenment, 1811–1851*. Amherst: University of Massachusetts Press, 2001.

SUNDAY CLOSING CASES AND LAWS

Introduction

Sunday Closing Laws, also called "Blue Laws," regulate public and private conduct on Sundays. The legal and cultural significance of Blue Laws peaked in

early American history, when they mandated church attendance and prohibited activities including working, making contracts, playing sports, and traveling on Sundays. Vestiges of Sunday Closing Laws remain part of American law in many communities, commonly requiring businesses to close or otherwise refrain from selling alcoholic beverages or other products on Sundays.

Development of Sunday Closing Laws

Sunday Closing Laws are rooted in the Judeo-Christian religious commandment to keep the Sabbath day holy. The Christian Sabbath shifted from Saturday to Sunday during the reign of the Roman emperor Constantine, who was also the first to codify a Sunday Closing Law in A.D. 321. England instituted Sunday Closing Laws as early as the thirteenth century, from which early American Sunday Closing Laws drew their inspiration.

American colonists enacted Blue Laws soon after settlement. For example, beginning in 1650, the Plymouth Colony proscribed servile work, unnecessary travel, and the sale of alcoholic beverages on the “Lord’s day.” By the time of the Constitution’s adoption, each of the states had laws restricting activities on Sunday, many of which expressly stated their purpose was to promote Christian worship. After the Constitution’s ratification, Blue Laws took on a more secular tone. For example, a 1788 New York Blue Law omitted “Lord’s day” and substituted “the first day of the week commonly called Sunday.” In the nineteenth and early twentieth century, Blue Laws remained part of statutory law in every state but became decreasingly enforced.

Incorporation Doctrine and Sunday Closing Laws

Until the middle of the twentieth century, when the Bill of Rights became applicable to the states through the due process clause of the Fourteenth Amendment, courts deciding the legality of cases challenging Blue Laws were not obligated to address conflicts between state laws and the Constitution. However, the incorporation of the federal constitution to individual states changed the manner in which courts reviewed Sunday Closing Laws and resulted in the Supreme Court overturning state laws that violated the First Amendment. The first post-incorporation

challenges to Blue Laws were heard in a series of cases decided by the United States Supreme Court in 1961.

Sunday Closing Laws and the Supreme Court: Establishment Clause Cases

In the leading 1961 case, *McGowan v. Maryland*, the Supreme Court reviewed a Maryland statute that restricted the sale of some products on Sunday. The appellants were employees of a department store indicted for Sunday sales of items forbidden by the Maryland Law. The employees contended that the Maryland statute violated the First Amendment’s establishment clause, which forbids the government from making any law establishing a state religion (or, under some interpretations, it forbids preferential treatment of one religion over another). The *McGowan* appellants alleged the statute violated the establishment clause by promoting religions that celebrated a Sunday Sabbath over those that did not. The Court rejected this argument, reasoning that although historically Blue Laws had a religious motivation to effectuate concepts of Christian theology, “[i]n light of the evolution of our Sunday Closing Laws through the centuries, and of their more or less recent emphasis upon secular considerations, it is not difficult to discern that as presently written and administered, most of them, at least, are of a secular rather than of a religious character, and that presently they bear no relationship to establishment of religion . . .” The Supreme Court further reasoned that “the fact that this [prescribed day of rest] is Sunday, a day of particular significance for the dominant Christian sects, does not bar the State from achieving its secular goals. To say that the States cannot prescribe Sunday as a day of rest for these purposes solely because centuries ago such laws had their genesis in religion would give a constitutional interpretation of hostility to the public welfare rather than one of mere separation of church and State.” The reasoning from *McGowan*—that Sunday Closing Laws are valid protections of a secular interest in creating a universal day of rest—received support in a more recent case, *Estate of Thornton v. Caldor, Inc.* In that case, a state statute requiring employers to honor the Sabbath day of the employee’s choice, even if that day were not Sunday, was held invalid as having the primary effect of promoting religion by weighing the employee’s Sabbath choice over all other interests and therefore violated the establishment clause.

Sunday Closing Laws and the Supreme Court: Free Exercise Cases

In two cases decided on the same day in 1961 as *McGowan*, the Supreme Court also upheld Sunday Closing Laws as constitutional under the free exercise clause of the First Amendment, which requires a compelling government interest to restrict religious activities. In both *Braunfeld v. Brown* and *Gallagher v. Crown Kosher Market*, the adverse effect of the challenged Sunday Closing Laws were to force individuals who did not celebrate a Sunday Sabbath to keep their businesses closed on Sundays. In both cases, the Court held that the challenged Blue Laws were valid because they used the least restrictive means to meet the compelling government interest of creating a universal day of rest. The Court reasoned that because the fact that a person also opted to close their business on Saturdays for religious reasons is an economic disadvantage that was “solely an indirect burden on the observance of religion” and not a government regulation that restricted anyone’s ability to celebrate their religion.

Conclusion

Blue Laws were enacted in the United States as religiously based statutes designed to promote the Christian Sabbath. Despite the initially religious motivation behind Blue Laws, the United States Supreme Court has modernly upheld Sunday Closing Laws as constitutional because they support a valid secular purpose under the First Amendment’s free exercise clause by encouraging a universal day of rest. Likewise, the Supreme Court has also upheld Blue Laws on establishment clause grounds because the laws do not promote one religion over another.

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References and Further Reading

- Harris, George. E. *A Treatise on Sunday Laws: The Sabbath—the Lord’s Day, Its History and Observance: Civil and Criminal*. Rochester: Lawyers’ Co-operative Publishing Co., 1892 (reprinted 1980).
- Johns, Warren L. *Dateline Sunday, U.S.A.: The Story of Three and a Half Centuries of Sunday-law Battles in America*. Mountain View: Pacific Press Publishers Association, 1967.
- McCrosen, Alexis. *Holy Day, Holiday: The American Sunday*. Ithaca: Cornell University Press, 2000.

Cases and Statutes Cited

- Braunfeld v. Brown*, 366 U.S. 599 (1961) (plurality opinion)
- Estate of Thornton v. Calder, Inc.*, 472 U.S. 703 (1985)
- Gallagher v. Crown Kosher Market*, 366 U.S. 617 (May 29, 1961)
- McGowan v. Maryland*, 366 U.S. 420 (1961)
- Two Guys v. McGinley*, 366 U.S. 582 (1961)

See also **Establishment Clause (I): History, Background, Framing; Establishment Clause Doctrine: Supreme Court Jurisprudence; Establishment of Religion and Free Exercise Clauses; Free Exercise Clause (I): History, Background, Framing; Free Exercise Clause Doctrine: Supreme Court Jurisprudence; Incorporation Doctrine; Religion in the Workplace**

SUNDAY MAIL (1810–1830)

The opening of post offices on Sunday for the sorting and collection of mail led to a national debate about the relationship of the federal government to the Sabbath day. The argument, which raged from 1810 to 1830, involved whether the national government would exist as a secular commercial republic committed to a separation of church and state or as a Christian commonwealth.

The battle over Sunday mail began in Washington, Pennsylvania, in 1809. The town postmaster, Hugh Wylie, followed the widespread custom of sorting the mail and keeping the post office open on Sunday to allow churchgoers from neighboring towns to pick up their mail after attending church. In this day of primitive transportation and poor roads, many families only came to town on Sunday for church services. For keeping the post office open, the Pittsburgh synod of the Presbyterian Church expelled Wylie. The U.S. postmaster general, Gideon Granger, responded by persuading Congress in 1810 to pass legislation that opened all 2,300 post offices for seven days a week and moved mail every day.

Congress immediately began to receive petitions urging repeal of the law from Presbyterians, Lutherans, Episcopalians, Baptists, Congregationalists, and Unitarians. Granger and his successor, Return J. Meigs, were less committed to the post offices remaining open on Sunday than to the transportation of the mail on Sunday. However, the petitioners were unwilling to separate the two issues of Sunday opening and Sunday transportation.

To suspend mail movement on Sunday would damage commerce, as both Granger and Meigs argued. Merchants relied on the rapid, consistent transmission of market information from city to city

that could only be provided through the mails. In addition, relations with Great Britain, France, and Spain were strained at this time, and both men raised the national security argument. Granger and Meigs argued that public officials needed to be notified as quickly as possible about events that might affect their constituents. Foreign agents might outrace the federal government with sensitive news if Sunday mail transportation was stopped. Last, both postmasters mentioned the cost issue. Mail coaches often carried passengers with paid fares subsidizing mail transportation. If coaches were forced to stop on Sundays, passengers might find other transportation, and postal rates would therefore increase. The arguments convinced Congress to refuse repeal. All of the bills supporting repeal died by 1817 with no bill even coming to a vote.

In 1828, the General Union for the Promotion of the Christian Sabbath (GUPCS) launched a well-organized attack on the Postal Act of 1810. The group mobilized merchants to challenge the commercial argument for Sunday mail. It circulated more than 100,000 copies of an anti-Sunday mail talk delivered by the Reverend Lyman Beecher, a founder of the Union. GUPCS boycotted all companies that ran coaches, boats, or canal packets on Sunday, with New Jersey members once stopping a mail coach and forcing the driver to stay in town until Monday morning. Members also circulated petitions. By 1831, GUPCS supporters had sent 900 petitions to Congress with most containing twenty to fifty signatures.

The GUPCS members chiefly argued that moving and delivering the mail on Sunday violated God's will and that such sinful behavior threatened the future of the nation. The right of states to regulate their own affairs without federal interference was also raised, because religious issues were left in other respects to the states. Other GUPCS members insisted that the federal government lacked the constitutional power to authorize the violation of the Sabbath.

Defenders of Sunday mail repeated the commercial arguments in petitions to Congress. Many merchants, especially those far removed from the major seaports, wrote about delays in receiving the latest information on market fluctuations. They wanted to have an equal advantage with Boston and New York merchants. They argued that government should properly be concerned with worldly goods and not with otherworldly salvation.

Under strong pressure from the public, House and Senate committees formed to study the postal law. While the chairman of the House committee waffled on the subject, the head of the Senate committee swayed Congress to keep the law. General Richard

M. Johnson of Kentucky, a devout Baptist, wrote in the committee's 1829 report that congressional action to stop Sunday mail would be unconstitutional. Johnson reminded Americans that they had religious freedom and that government had no right to coerce the religious homage of anyone.

The invention of the telegraph in 1844 ultimately spelled the end of Sunday mail. It was now possible to get market information without using the mails. By the 1850s, postmaster generals were eliminating most Sunday movement of mail.

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References and Further Reading

Kramnick, Isaac, and R. Laurence Moore. *The Godless Constitution: The Case against Religious Correctness*. New York: W.W. Norton, 1996.

See also **Religion in "Public Square" Debate**

SUPREMACY CLAUSE IN ARTICLE VI OF THE CONSTITUTION

The supremacy clause is found in Article VI, clause 2, of the United States Constitution. It states: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, of which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Under the supremacy clause, any state law that conflicts with the Constitution or with a federal law or treaty made in pursuance of the Constitution is void. It also binds state judges to federal law.

During the debates over the Constitution, the supremacy clause stood at the forefront of the battles over federalism—the distribution of power between the federal and state governments. At issue, how the authority of the national government would be enforced against state interference. One proposal was premised on coercion, whereas another gave the national government a veto on state laws, both not easy sells to the states who were losing power. A third proposal was premised on the judiciary enforcing state laws, but there was a debate over whether it would be the sole responsibility of the federal courts or whether it would be split between the federal and state courts. Allowing state judges to have a role in enforcing federal law would help assuage some of the controversy of having a domineering federal judiciary enforcing national supremacy.

During the ratification debates, critics of the Constitution pointed to the supremacy clause as enhancing the powers of an omnipotent Congress. Critics cited Article I, Section 8, of the Constitution, which gave Congress the power to “make all Laws which shall be necessary and proper for carrying into Execution” its powers. Congress was free to pass any law, claim it was “necessary and proper,” and couch it in the supremacy clause as something “in pursuance” of the Constitution. The absence of a Bill of Rights confounded the problem, because Congress could deny the people their rights and freedoms contained in the state constitutions and bills of rights. Congress would be the sole judge of its own powers, and the supremacy clause would result in the annihilation of the states.

After ratification, Chief Justice John Marshall used the supremacy clause as a means to enhance national supremacy by means of the Supreme Court. In *McCulloch v. Maryland* (1819), the Court argued that the federal government had the constitutional right to create a Bank of the United States, which could not be subject to taxation by the states. In *Gibbons v. Ogden* (1824), the Court invoked the supremacy clause to chastise the states for not yielding to the supremacy of Congress’ power over interstate commerce. In *Worcester v. Georgia* (1832), the Court voided all of Georgia’s laws that were repugnant to the supremacy of the laws and treaties enacted by Congress in relation to the Cherokee Indians. When the Fugitive Slave Act was before the Court in *Ableman v. Booth* (1858), Chief Justice Roger Taney upheld the constitutionality of the Act and condemned the Wisconsin Supreme Court for interfering with the enforcement of federal laws.

The supremacy clause is at the heart of the Court’s recent federalism decisions denouncing Congress for ordering the states to enforce federal laws not made in pursuance of the Constitution. In *New York v. United States* (1992), the Court found the Low Level Radioactive Waste Policy Amendments of 1985, which commanded the states to enforce a federal regulatory program, unconstitutional. In *United States v. Lopez* (1995), the Court found that Gun-Free School Zones Act (1990), which forbade the possession of a firearm in a school zone, violated interstate commerce. In *Printz v. United States* (1997), the Court ruled that Congress could not force states to enforce the Brady Handgun Violence Protection Act by performing background checks on potential buyers. In *City of Boerne v. Flores* (1997), the Court struck down the Religious Freedom Restoration Act on the grounds that Congress had exceeded its powers to enforce the Fourteenth Amendment against the states.

The supremacy clause established the supremacy of federal laws and gave the courts the power to determine whether the federal and state governments were acting in accordance with the Constitution. In the early Republic, the Supreme Court used it as a means to promote national supremacy. The Court’s recent federalism cases show a different trend, which have the effect of promoting state supremacy.

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References and Further Reading

- Bailyn, Bernard, ed. *The Debate on the Constitution: Federalist and Antifederalist Speeches, Articles, and Letters During the Struggle Over Ratification*. 2 vols. New York: Literary Classics of the United States, 1993.
- Rakove, Jack. *Original Meanings: Politics and Ideas in the Making of the Constitution*. New York: Alfred A. Knopf, 1997.

Cases and Statutes Cited

- Ableman v. Booth*, 21 Howard 506 (1858)
- City of Boerne v. Flores*, 117 St. Ct. 2157 (1997)
- Gibbons v. Ogden*, 9 Wheaton (U.S.) 1 (1824)
- McCulloch v. Maryland*, 4 Wheaton 316 (1819)
- New York v. United States*, 505 U.S. 144 (1992)
- Printz v. United States*, 521 U.S. 898 (1997)
- United States v. Lopez*, 514 U.S. 549 (1995)
- Worcester v. Georgia*, 31 U.S. 515 (1832)

SUSPENDED RIGHT OF HABEAS CORPUS

Despite limitations placed on its availability by more recent legislation, the “Great Writ” remains our system’s fundamental safeguard for the individual’s protection against imprisonment without legal cause. The restriction on the suspension of the writ found in Article I, section 9, clause 2, of the Constitution of the United States provides that “[t]he privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion if the public safety may require it.” Although this provision applies only to the federal government, similar limitations on suspension of the writ now exist in state constitutions.

The inclusion of this provision within the limitations on the powers of the legislature would seem to suggest any authority to suspend the writ rests with Congress, not the executive. This logic is also consistent with the fact the writ typically issues to address unlawful detentions by the crown or executive. However, President Lincoln suspended the writ by executive order in several jurisdictions during the Civil

War. Chief Justice Taney, sitting as Circuit Justice in *Ex parte Merryman*, 17 Fed. Cas. 144 (no. 9487) (Cir. Ct. D. Md. 1861), held that if the executive acting alone could suspend the writ, it would undermine the writ's very purpose. Lincoln's action was ratified with limitations by an act of Congress in 1863. More than a hundred years later President Roosevelt approved suspension of the writ in Hawaii after the attack on Pearl Harbor. When the legality of the suspension reached the Supreme Court in *Duncan v. Kahanamoku*, 327 U.S. 304 (1946), the privilege had been restored two years earlier, and the court found this issue moot. Thus, this question has not been clearly resolved, and other precedents involving restrictions on liberty by the executive in time of war have been offered to support the executive's authority to suspend the writ. See, for example, *Korematsu v. United States*, 323 U.S. 214 (1944).

In *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), the Supreme Court stated, "The suspension of the privilege of the writ of *habeas corpus* does not suspend the writ itself." Under this interpretation the individual may petition for the writ, the writ can issue, and the court then decide whether the individual is allowed to proceed further. This approach seems to provide some safeguards for the individual in custody, but it must be noted it would only be available if the civil courts were open and operating.

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References and Further Reading

- Duker, William F. *A Constitutional History of Habeas Corpus*. Westport: Greenwood Press, 1980.
 Jackson, Jeffrey, *The Power to Suspend Habeas Corpus: An Answer from the Arguments Surrounding Ex parte Merryman*, 34 U. Baltimore Law Review 11 (2004).
 Rehnquist, William H. *All the Laws but One*. New York: Alfred A. Knopf, 1998.
 Sokol, Richard P. *Federal Habeas Corpus*. 2nd ed. Charlottesville: Michie, 1969.

Cases and Statutes Cited

- Duncan v. Kahanamoku*, 327 U.S. 304 (1946)
Ex parte Merryman, 17 Fed. Cas., 144 (no. 9487) (Cir. Ct. D. Md. 1861)
Ex parte Milligan, 71 U.S. (4 Wall.) 2 (1866)
Korematsu v. United States, 323 U.S. 214 (1944)

SWAIN v. ALABAMA, 380 U.S. 202 (1965)

In *Swain v. Alabama*, the U.S. Supreme Court addressed the question whether a conviction of a Negro by an all-white jury violated the equal protection clause of the Fourteenth Amendment. At issue:

did the state's systematic exclusion of persons from juries solely on the basis of race and color constitute a denial of the equal protection of the laws under the Constitution? Robert Swain was convicted and sentenced to death for rape by an all-white Alabama jury. In a five-to-four decision, the Court ruled (1) a criminal defendant is not constitutionally entitled to a proportionate number of his race on the jury or on the pool of potential jurors; (2) a prosecutor's use of preemptory challenges to exclude black jurors without cause was permissible, because the original intent of the challenge was to allow both the prosecution and the defense the opportunity to remove any juror regardless of race so as to constitute an impartial jury; (3) the fact that a Negro had never served on a criminal or civil jury in Talladega County was not indicative of invidious discrimination. Although the Court recognized that the exclusion of Negroes from this county was suspicious and subject to judicial scrutiny under the Fourteenth Amendment, the record was silent on whether the prosecutor alone was responsible for striking Negroes from the jury or whether defendants themselves invoked the preemptory challenge to exclude Negroes. This decision was overturned by the Court in *Batson v. Kentucky*, 476 U.S. 79 (1986).

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See also *Batson v. Kentucky*, 476 U.S. 79 (1986); **Equal Protection of Law (XIV); Jury Trial; Jury Trial Right; Race and Criminal Justice**

S. WARREN AND L. BRANDEIS, "THE RIGHT TO PRIVACY," 4 HARVARD L. REV. 193 (1890)

Samuel Warren and Louis Brandeis attempted to define a right to privacy long before the Supreme Court or other judicial bodies in the United States offered the concept any credibility. They defined privacy variously: the right to "an inviolate personality," the "immunity of the person," the right to "one's personality," "rights as against the world," or "the privacy of a private life." All of these were summed up in their simple label, "the right to be let alone." Warren and Brandeis conceived of a right to privacy that protected individuals from intrusion by other people or organizations. However, when their words began to be echoed in Supreme Court decisions, the right to privacy was treated as a bar to governmental intrusion. In that form, the right to privacy was eventually acknowledged by the Court in 1965 in *Griswold v. Connecticut*. It was, according to the Court, implied by provisions of various limitations on government listed in the Bill of Rights. This Warren and Brandeis

article is generally regarded as originating the concept in American common law, although Judge Thomas Cooley had also discussed a "right to be left alone" in civil law enforcement in his 1888 *The Law of Torts*.

Although the right to privacy would later become associated with aspects of family, education, marriage, procreation, sexual intimacy, and aspects of personal autonomy, in their article Warren and Brandeis argued for protection from publication of gossip in newspapers and unauthorized circulation of a person's portrait. Notably, their interest in writing this article derived from a perceived invasion of the privacy of Samuel Warren's family. Although no "right to privacy" was specifically authorized by Constitution or by statute, Warren and Brandeis argued that "liberty," as addressed in the Constitution, subsumed the "right to enjoy life," "to be let alone," and that the elasticity and adaptability of the common law could and should recognize the right to privacy in light of new technologies that progressively threatened one's solitude and private life.

Warren and Brandeis considered the viability of using existing legal concepts, such as defamation, libel, and slander or property rights, breach of trust, confidence or contract and trade secrets. All were found lacking the ability to protect, for example, from publication notes written in a personal diary, letters sent to friends, artistic works or photographs taken without one's knowledge. The law of defamation was found wanting, because it only addressed material value of, for example, loss of one's reputation. It could not, however, provide redress for a spiritual loss, for the loss of how one feels about oneself; it could not comprehend the anxiety that something might be published or the sense of relief when it was not. Similarly, property laws focused on material, rather than emotional, damages. Publication of one's private writing or artistic works or photographs could not properly be addressed under the law governing breach of trust, confidence, or contract, because it could not be applied to a stranger who has made no contract or accepted any trust. Nor could trade secret law apply, because that would require the assumption that confidence had been placed in the person who may have trespassed to obtain the exposed work.

Interestingly, Warren and Brandeis drew heavily on English court decisions, where various questions of publication of private materials without the consent of the author or artist had been raised and decided. A principle case on which they relied was that of *Prince Albert v. Strange* treating an instance when a catalog of etchings made for the personal enjoyment of the Prince and Queen Victoria had

been published. The English judges applied the common law principle of property law to protect the etchings from unauthorized publication. The difficulty lay, however, in the assessment of value to unpublished works by people of lesser note than the Queen of England and her husband. Indeed, very few examples were drawn from U.S. courts, primarily because there was no acknowledged right to privacy. Warren and Brandeis even reached beyond common law to note that France had passed a law according a limited right to privacy in 1868.

Warren and Brandeis proposed that American common law should likewise recognize a right to privacy as the "principle which protects personal writing and any other production of the intellect or the emotions." They asserted this right, but they also recognized limitations and prohibitions on it. The limits they listed were: (1) the publication did not involve a matter of public or general interest, (2) the publication would be privileged under the law of libel or slander, (3) privacy did not extend to oral publication in the absence of special damages, (4) privacy right ceased on publication, (5) the veracity of a statement is not a defense, and (6) the absence of malice is not a defense. They proposed that remedies for violations of the right to privacy would be through normal tort procedures or, when appropriate, the use of an injunction.

One year after publication of "The Right to Privacy," Justice Horace Gray of the U.S. Supreme Court cited the "inviolability of the person" to conclude that an alleged victim of an accident could not be forced to undergo surgical examination of her brain to determine the extent the head injuries that she had sustained. Later, when Louis Brandeis was himself a Supreme Court Justice, he relied on the "right to be let alone" in his dissenting opinion in *Olmstead v. U.S.* In that case of government wiretapping in connection with a criminal investigation, Brandeis argued that both Amendment Four's protection against illegal searches and seizures and Amendment Five's guarantee against self-incrimination implied a right to privacy, "the most comprehensive of rights and the right most valued by civilized man."

The Warren and Brandeis conception of a right to privacy survived in a broad sense of a sense of a "right to be let alone," but decisions of the U.S. Supreme Court adopted the term, first, in the context of search and seizure cases and, later, in matters of marriage, family, and procreation. The thrust of the Warren and Brandeis formulation was to protect individuals from intrusions by other private entities, whereas the Supreme Court has turned the concept to protect the individual from governmental invasions.

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References and Further Reading

Emerson, Thomas I., *Nine Justices in Search of a Doctrine*, Michigan Law Review 64 (1965): 219–234.
O'Brien, David M. *Privacy, Law and Public Policy*. New York: Praeger, 1979.

Cases and Statutes Cited

Griswold v. Connecticut, 318 U.S. 479 (1965)
Olmstead v. U.S., 277 U.S. 438 (1928)
Prince Albert v. Strange, 1 McN. & G. 23 (1849)

SWEARINGER v. UNITED STATES, 161 U.S. 446 (1896)

The Supreme Court reversed the conviction of Dan K. Swearingen, editor and publisher of the *Kansas Burlington Courier*, who ran afoul a federal law, strengthened in 1873 at the urgings of the newly formed Committee (later Society) for the Suppression of Vice as well as the Young Men's Christian Association, prohibiting the mailing of "every obscene, lewd, lascivious, or filthy book, pamphlet, picture, paper, letter writing, print, or other publication of an indecent character." Swearingen was indicted under this law, which became known as the Comstock Act (named after its author, Anthony Comstock) and charged with depositing in the post office copies of the *Courier* that contained an allegedly obscene article. The trial judge had instructed the jury that the newspaper article was obscene and thus not mailable under federal law; he then charged the jury to consider only whether there was evidence that Swearingen tried to use the post office to mail the newspaper with the offending article.

This case, although ostensibly about obscenity, also reflected the use of the law to squelch political opponents. Political turmoil and hard-hitting politics were common during the 1890s. In Kansas and throughout much of the West and South, farmers and their agrarian allies created "populist movements" and the new Populist Party, pitting themselves against the railroads. Throughout the decade the reformers, who were often successful at the polls, sought restrictions on intrastate rail operations, primarily in the form of maximum freight rates. Against this tumultuous backdrop, Swearingen, a populist, published an article attacking a foe.

This "red-headed mental and physical bastard," according to the *Courier's* article, had "slandered and maligned every Populist in the State, from the Governor down to the humblest voter." The article, among other things, went to say that the culprit "is known to every decent man, woman, and child in the

community as a liar, perjurer, and slanderer, who would sell a mother's honor with less hesitancy and for much less silver than Judas betrayed the Saviour . . . He is a contemptible scoundrel . . . pretending to serve Democracy and is at the same time in the pay of the Republican party. He has been known as the companion of negro strumpets . . . The sooner Populists and Populist newspapers snub him, quit him cold, ignore him entirely, the sooner will he cease to be thought of only as a pimp that any man can buy for \$1 or less."

The Supreme Court, by a five-to-four margin, disagreed the article was obscene. According to the majority, the article's "language is exceedingly coarse and vulgar, and, as applied to an individual person, plainly libelous" and then added, echoing the Hicklin Rule, "but we cannot perceive in it anything of a lewd, lascivious, and obscene tendency, calculated to corrupt and debauch the minds and morals of those into whose hands it might fall." In other words, crude language was not necessarily obscene. More specifically, the majority clarified that "obscene," "lewd," and "lascivious" in the federal statute referred to immorality and "sexual impurity" and that these words should be interpreted according to the common law offense for obscene libel. Blasphemous words or phrases were no longer considered obscene. Finally, the majority concluded that the words "obscene, lewd or lascivious" in the statute described one and the same offense, not different and distinct offenses.

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References and Further Reading

Bates, Anna Louise. *Weeder in the Garden of the Lord: Anthony Comstock's Life and Career*. Lanham, MD: University Press of America, 1995.
Beisel, Nicola Kay. *Imperiled Innocents: Anthony Comstock and Family Reproduction in Victorian America*. Princeton: Princeton University Press, 1997.

Cases and Statutes Cited

Swearingen v. United States, 161 U.S. 446 (1896)

SYMBOLIC SPEECH

Symbolic speech has developed as a separate category of speech under the First Amendment. The category can take many different forms, some of which are akin to "pure speech," such as when protestors tape a peace sign to a United States flag. Symbolic speech can also include forms of speech that verge into "conduct." For example, when an individual burns a United States flag (or, for that matter, a draft card) in protest of governmental policies, the burning can

constitute speech (in that it makes a statement regarding United States policies), but it can also involve “conduct” in the sense that the protestor is engaged in the “conduct” of burning the flag. Or, to take a more extreme example, if a protestor decides to blow up the White House to show his contempt for the president’s policies, the act of blowing up the White House involves conduct but can be done for speech purposes.

In applying the First Amendment’s speech protections to symbolic speech, the U.S. Supreme Court has been less inclined to sustain governmentally imposed restrictions on pure speech are more difficult to sustain and has generally been inclined to apply a stricter level of review to such speech. The United States Supreme Court’s approach to symbolic speech is revealed by its landmark decision in *Tinker v. Des Moines Independent School District*, 393 U.S. 503, 508 (1969). In that case, high school students wore black armbands to school to protest United States involvement in the Vietnam War. The Court viewed the armbands as symbolic speech and treated it as pure speech rather than conduct. As a result, the Court held that the students could not be disciplined for wearing the armbands absent proof that the wearing had caused substantial disruption to school activities. The Court found inadequate evidence of disruption.

By contrast, when symbolic speech tends toward conduct rather than pure speech, the Court has been somewhat more inclined to allow governmental restrictions. The prevailing test for evaluating restrictions on symbolic speech was announced in *United States v. O’Brien*, 391 U.S. 367 (1968). *O’Brien* applied a four-part test to evaluate the legality of restrictions on expressive conduct. Under that test, a governmental regulation is sufficiently justified, despite its incidental impact upon First Amendment interests, “if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on . . . First Amendment freedoms is no greater than is essential to the furtherance of that interest.”

A number of governmental restrictions have failed under the third prong of the *O’Brien* test—the requirement that the governmental interest in restricting speech must be “unrelated to the suppression of free expression.” In *Texas v. Johnson*, 491 U. S. 397 (1989), Johnson burned a United States flag outside the Republican National Convention to protest the policies of the Reagan administration and the policies of certain Dallas-based corporations. Johnson was convicted of desecrating a venerated object and fined

\$2,000. The prosecution was based on a statute which read as follows: “A person commits an offense if he intentionally or knowingly desecrates [a] state or national flag; ‘desecrate’ means deface, damage, or otherwise physically mistreat in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action.” The Court ultimately overturned Johnson’s conviction finding that the restriction was related to speech. By prohibiting “desecration” of the flag, the state was trying to particular viewpoints and conduct relating to the flag.

Even though the Court is more inclined to invalidate speech restrictions that are related to the suppression of free expression, the Court has not been overly inclined to inquire into governmental motives. For example, in the *O’Brien* case itself, Congress passed a law prohibiting the mutilation or destruction of Selective Service registration cards (aka, draft cards). The Court readily accepted Congress’ assertion that the motive underlying the prohibition was unrelated to expression and was instead motivated by a need to protect registration cards as part of the draft process. Although there was some evidence suggesting that Congress had passed the prohibition in an effort to prohibit protests (draft card burning protests), the Court refused to inquire into congressional motive.

Assuming that a speech restriction is unrelated to the suppression of free expression, the *O’Brien* test requires consideration of whether there is a “substantial” or “important” governmental interest underlying the restriction and whether the restriction is essential to that interest. In many cases, because the *O’Brien* test imposes less rigorous review than strict scrutiny (which requires that the governmental interest be “compelling” or “overriding” and that the governmental prohibition be the “least restrictive” means available to vindicate that interest), the test can often be met. In the case of the hypothetical protestor who wants to blow up the White House to show his contempt for the president’s policies, there is an “important” or “substantial” governmental interest in preventing the bombing, and the prohibition is essential to the vindication of that interest.

In *Texas v. Johnson*, the flag burning case, depending on how the governmental interest is characterized, it might be possible to satisfy the *O’Brien* standard. For example, if the governmental interest had been simply to prevent “arson,” and had it been articulated as part of a content-neutral ban on open fires in the city, the conviction might have been sustained. The government has an “important” or “substantial” interest in preventing open fires within the city limits of a city, that is unrelated to the suppression of free expression, and the ban on open fires is justified as part of that interest. In the actual case, the

SYMBOLIC SPEECH

government's case foundered, because the government was trying to protect the flag as a symbol and was actively trying to prevent it from being burned as part of speech protests.

Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984), further illustrates how the *O'Brien* test applies. In that case, the Community for Creative Non-Violence wanted to erect a tent city in a park in front of the White House. Although the United States Park Service was willing to permit the erection of the city, it was unwilling to allow the protestors to spend the night in the park. The Park Service claimed that overnight campers caused greater stress and degradation to the park. The Court upheld the Park Service's

position, noting that it was unrelated to the suppression of speech, that the position was undergirded by an important or substantial governmental interest (the protection of parks), and that the ban on overnight camping served that interest.

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References and Further Reading

Weaver, Russell L., and Donald E. Lively. *Understanding the First Amendment*. LexisNexis, 2003, pp. 180, 200.

Weaver, Russell L., and Arthur E. Hellman. *The First Amendment: Cases, Materials & Problems*. LexisNexis, 2002, pp. 375–396, 664–680.

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TAFT COURT (1921–1930)

In dealing with the jurisprudential legacy of the Taft Court, one is struck by great incongruities. On the one hand, the conservative nature of the Court's majority tended to favor business against government regulation, the status quo, and property rights, while opposing labor unions. On the other hand, the Court sustained national power, restricted property rights to accommodate the new idea of zoning, took a broad view of interstate commerce, and began the revolution in civil liberties through the process of incorporation.

The conservative, indeed the reactionary label often applied to the Taft Court stems in large measure from its treatment of labor and of state reform legislation. There is no question that the majority of the Taft Court justices held definite antilabor prejudices.

Labor leaders thought that they had won a major victory in the Clayton Act of 1914. Section 6 had explicitly declared that labor did not constitute a commodity or an article of commerce and that consequently the antitrust laws should not be interpreted to forbid unions from seeking their legitimate objectives. Section 20 prohibited federal courts from issuing injunctions or restraining orders in labor disputes unless necessary to prevent damage to property, and also forbade injunctions against peaceful picketing or primary boycotts.

The Supreme Court ruled on these sections in *Duplex Printing Press Company v. Deering* (254 U.S. 443, 1921). The case had arisen when unions boycotted a manufacturer's products in New York to enforce a strike in Michigan. Justice Mahlon Pitney

ruled that the law had not legitimized such secondary boycotts and that Section 6 had not provided a blanket exemption from the antitrust laws. Its wording only protected unions in lawfully carrying out their legitimate objectives; since secondary boycotts were unlawful, neither Section 6 nor Section 20 applied. Moreover, Pitney interpreted Section 20 to mean that injunctions could be issued not only against the immediate parties—the employer and his striking workers—but also to restrain another union from supporting the strikers.

The *Duplex* case came down immediately after *Truax v. Corrigan* (257 U.S. 312, 1921), in which the Court struck down a state anti-injunction statute. In this case, an Arizona restaurant owner had sought an injunction in state court against peaceful pickets, claiming the state law that denied him that injunction had deprived him of his property rights without due process of law. Chief Justice Taft agreed and declared the law unconstitutional as an arbitrary and capricious exercise of power and a highly injurious invasion of property rights.

Labor's supposed protection under the Clayton act suffered further erosion in the two *Coronado Coal* cases in 1925 (*Coronado Coal Co. v. United Mine Workers*, 268 U.S. 295). The United Mine Workers had been trying to unionize southern coal fields to prevent the ruination of northern mines by the cheaper southern coal. Following the standard set out in *U.S. v. E.C. Knight*, Chief Justice Taft ruled that coal mining did not constitute interstate commerce. A strike, as the simple withholding of labor,

could not be enjoined under the Clayton act. But a strike that aimed at stopping the interstate shipment of nonunion coal certainly fell within the proscriptions of the Sherman Act. Therefore, any labor activity that had the intent, and not just an incidental result, of interfering with interstate commerce violated the antitrust laws.

Two years later, in *Bedford Cut Stone Company v. Journeymen Stone Cutters Association*, the Court again showed how it could manipulate definitions to restrict labor. In conformity with their union's constitution, a handful of peaceful stonecutters refused to work on limestone cut by nonunion workers in the unorganized Bedford Cut Stone Company. The firm sought an injunction, but in order to enjoin the strikers, the lower court had to rely on the Sherman Act's restriction on secondary boycotts. The Supreme Court agreed with this approach and then justified it by turning a very local and limited strike into a burden on the stream of interstate commerce. Reasonable restrictions on trade caused by industry would be tolerated by the Court under the rule of reason, but the bench would disregard its own rule when asked to apply it to the clearly reasonable activities of a labor union.

Protective legislation also fell on judicial hard times, but even some conservatives protested when the majority resurrected the *Lochner* doctrine (*Lochner v. New York*, 198 U.S. 45, 1905) in *Adkins v. Children's Hospital* (261 U.S. 525, 1923). In striking down a federal statute establishing minimum wages for women in the District of Columbia, Justice Sutherland reaffirmed the paramount position of freedom of contract in economic affairs. Freedom, he declared, "is the general rule and restraint the exception; and the exercise of legislative authority to abridge it can be justified only by the existence of exceptional circumstances." Emancipated by the Nineteenth Amendment, women no longer had need for protective laws, but could work for whatever amount they freely chose to contract for, just like men.

The decision shocked the nation for the holding as well as for the reasoning behind it. Most people had assumed that after *Muller v. Oregon* (208 U.S. 412, 1908) and *Bunting v. Oregon* (243 U.S. 426, 1917), the Court had accepted the need to protect certain classes of society through the state's police power. Justice Sutherland ignored a decade of cases and went back to *Lochner*; even in the conservative 1920s, his opinion seemed overly reactionary. He launched into a vigorous attack on minimum wage legislation of any sort. Wages constituted the "heart of the contract" and could never be fixed by legislative fiat. Human necessities could never take precedence over economic rights, for "the good of society as a whole cannot be

better served than by the preservation of the liberties of its constituent members."

But this court, one most protective of property rights, also handed down the landmark ruling in *Euclid v. Ambler Realty* (272 U.S. 365, 1926). Among conservatives, property had always held a nearly sacred status, and the core of substantive due process had been the almost unlimited right of an owner to use and dispose of property. In 1917, the Court had struck down a local ordinance prohibiting blacks from living in certain areas but had done so not on equal protection grounds, but rather because the rule deprived people of their right to buy and sell property (*Buchanan v. Warley*, 254 U.S. 600, 1917).

During the first quarter of the twentieth century many municipalities enacted comprehensive land use or zoning plans in an effort to manage growth and sustain the aesthetic nature of the community. The codes varied, but nearly all of them included some limits on land use in certain areas and placed limits on the type and size of buildings that could be erected. A commercial establishment, for example, could not be built in an area designated for residential use. Land owners and developers challenged these codes on a variety of constitutional grounds, but state courts disagreed on their legitimacy. Eventually the challenge to the zoning ordinance of Euclid, Ohio, reached the high court in 1926.

The author of the six-to-three majority opinion upholding the zoning ordinance was George Sutherland, the same justice who had written *Adkins*. Justice Sutherland's opinion described the zoning act not as a deprivation of property but as an enhancement. Common law had long allowed for the abatement of nuisances even if doing so restricted property rights, since the end result would be the enhancement of value in all adjoining property. The fact that Euclid was undergoing rapid expansion could not be denied, and overcrowding as well as chaotic development would be harmful to all property owners. The justice may also have been influenced by the fact that when Ambler had bought the property the zoning ordinance had already been in effect, and this undermined the company's claim that its property had been taken without due process; he might have thought differently had the ordinance been passed after Ambler had purchased the land.

Ever since *Barron v. Baltimore* (7 Pet. 243, 1833), the Bill of Rights had been held to apply only to the federal government; although some people argued that the Fourteenth Amendment had extended those guarantees to the states, that view had not yet gained Court approval. In *Prudential Insurance Company v. Cheek* (259 U.S. 530, 1922), the Court reaffirmed that state infringement of civil liberties remained beyond

the control of the federal government or its courts. The Fourteenth Amendment, according to Justice Pitney, had not extended the Bill of Rights to the states. He thus denied Justice Brandeis's argument, made three years earlier in his dissent in *Gilbert v. Minnesota* (254 U.S. 325, 1920), that the liberty guaranteed by the Fourteenth Amendment went beyond property rights to include personal freedoms as well.

The first fruits of that dissent appeared in 1922, when the Court struck down a state statute that forbade the teaching of foreign languages in elementary schools. In *Meyer v. Nebraska* (262 U.S. 390, 1922), Justice McReynolds applied the *Lochner* doctrine, declaring that liberty denotes:

not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, to establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

To be sure, Justice McReynolds found property rights involved in the case, since the Nebraska law “materially” interfered “with the calling of modern language teachers.” But he also found the measure a violation of free speech. The goal of the legislature to foster “a homogeneous people with American ideals” was understandable in light of the recent war, but now “peace and domestic tranquility” reigned, and he could find no adequate justification for the restraints on liberty. Without using the exact words, the justice in effect applied the clear and present danger test and found the statute lacking.

Two years later, Justice McReynolds spoke for a unanimous Court in *Pierce v. Society of Sisters* (268 U.S. 510, 1925). The Ku Klux Klan had pushed through a law in Oregon requiring children to attend public schools, with the clear intent of driving the Catholic schools out of existence. Again, the justice found “no peculiar circumstances or present emergencies” to justify such an extraordinary measure. The law interfered with personal and property rights. “The child is not the mere creature of the State,” he wrote; “those who nurture him and direct his destiny have the right, coupled with the high duty, to prepare him for additional obligations.” Moreover, the law directly attacked the vested property rights of private and parochial schools. Justice McReynolds had only hinted at the constitutional foundation for parochial education in *Meyer*; he firmly established it in *Pierce*.

Justice McReynolds found the justification for *Meyer* and *Pierce* totally within the due process clause of the Fourteenth Amendment; he applied the

Lochner doctrine but intimated that other than property rights might be protected as well. Civil Liberties Union attorneys picked up on the justice's two school opinions and Justice Brandeis's *Gilbert* dissent and decided to challenge directly the traditional doctrine that the Bill of Rights did not apply to the states. Their opportunity came in *Gitlow v. New York* (268 U.S. 562, 1925).

The *Gitlow* case posed a challenge to New York's 1902 Criminal Anarchy Act. Benjamin Gitlow, a leading figure in the American Communist Party, had been convicted for publishing a radical newspaper, a “Left-Wing Manifesto,” and other allegedly subversive materials. If Fourteenth Amendment liberty reached as far as Justice McReynolds had suggested, his lawyer argued, then surely it would include the protection of the press and speech. Although the Court affirmed the conviction, Justice Sanford noted that “for present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgement by Congress—are among the fundamental personal rights protected by the due process clause of the Fourteenth Amendment from impairment by the States.” Thus, for the first time, the Supreme Court put forward what came to be known as the doctrine of incorporation, by which the Fourteenth Amendment “incorporated” the liberties protected in the Bill of Rights and applied them to the states.

In its dealings with free speech—even after agreeing that the First Amendment applied to the states as well—the Taft Court nonetheless continued to use the test of “clear and present danger” that Justice Holmes had enunciated in *Schenck v. United States* (249 U.S. 47, 1919). Although Holmes had tried in his dissent in *Abrams v. United States* (250 U.S. 616, 1919) later that year to make the test more speech protective, a majority of the Court always managed to find danger in the writings and speech of those on the Left. It remained for Louis Brandeis, in *Whitney v. California* (274 U.S. 357, 1927), to express what has become the bedrock principle of First Amendment jurisprudence: freedom of speech is a necessary component of democratic society.

Charlotte Anita Whitney, a niece of Justice Stephen J. Field and “a woman nearing sixty, a Wellesley graduate long distinguished in philanthropic work,” had been convicted under the California Criminal Syndicalism Act of 1919 for helping to organize the Communist Labor Party there. The law made it a felony to organize or knowingly become a member of an organization founded to advocate the commission of crimes, sabotage, or acts of violence as a means of bringing about political or industrial change. Miss Whitney denied that it had ever been

intended for the Communist Labor Party to become an instrument of crime or violence; nor was there any proof that it had ever engaged in violent acts. Nevertheless, the conservative majority, led by Justice Sanford, upheld the act as a legitimate decision by the California legislature to prevent the violent overthrow of society. The due process clause did not protect one's liberty to destroy the social and political order.

Because of technical issues, Justice Brandeis chose not to dissent; however, his concurring opinion, joined by Justice Holmes, provided an eloquent defense of intellectual freedom unmatched for its powerful reasoning in the annals of the Court. The majority, Justice Brandeis claimed, not only here but also in other speech cases, was operating on a totally inappropriate set of assumptions. They had measured the limits of free speech against potential danger to property, thus ignoring the benefits that free exchange of ideas conferred on society as a whole. He agreed that under certain circumstances a legislature could limit speech, but the proper test for exercising that power would be whether the words posed a clear and imminent danger to society, not just to property interests. Suppression of ideas worked a great hardship on society, and before that could be allowed, the Court had the responsibility of developing objective standards, a responsibility that it had thus far failed to meet. The justice made it quite clear that, like Justice Holmes, he did not fear ideas, and Americans need not do so either. Moreover, Justice Brandeis set out what would become the basis for first American jurisprudence.

Justice Brandeis saw free speech as an essential aspect of citizenship. Men and women had the duty in a democracy to be good citizens, which meant being informed on the issues confronting them. How could they make intelligent decisions about these matters if they lacked basic information about them? How could they judge whether one side or the other had the better argument unless they could hear both sides and then join in the debate? The fact that some viewpoints ran against the grain or disturbed popular sensibilities made no difference; history was replete with examples of unpopular ideas that had eventually gained public acceptance. The justice thus provided a positive justification for protection of speech: the necessity for the citizenry to be fully informed about issues and to be aware of all viewpoints. But he would not limit First Amendment protection to political speech alone; his opinion in *Whitney* clearly values speech as a cultural, social, and educational as well as a political value in a free society.

The criminal law provisions of the Bill of Rights, found in the Fourth through Eighth Amendments,

had also never been applied to the states, although many states had written some of these guarantees into their constitutions. In the 1920s, the Court for the most part preferred to leave the control of criminal justice in the hands of the states, although in the face of outright abuse of fair procedures, it was willing to extend federal standards and authority.

The decade had started with the *Silverthorne Lumber* decision (*Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 1920), in which an outraged Justice Holmes had chastised the Department of Justice for seizing books and papers from the suspects' office "without a shadow of authority." Six other members of the Court had joined in his expansion of the exclusionary rule, ensuring that the government could not benefit from illegally secured evidence. But the flood of cases in state and federal courts growing out of efforts to enforce the Nineteenth Amendment (Prohibition) led to some retreat from this position. In *Byars v. United States* (273 U.S. 28) and *Gambino v. United States* (275 U.S. 310) in 1927, the Court developed what came to be known as the "silver platter" doctrine: evidence obtained in an illegal state search would be admissible in a federal court so long as there had been no federal participation. The doctrine invited the abuses that followed; state law enforcement officials blatantly violated fair procedures (often in violation of their state laws) and then turned the evidence over to federal officers, who secretly knew about, and had often instigated, the illegal search. Not until 1960 did the Court abolish the silver platter doctrine in *Elkins v. United States* (364 U.S. 206, 1960).

Prohibition, in fact, became a law enforcement nightmare. Many Americans deliberately violated the law, and bootleggers applied the latest technology to their efforts to give a thirsty citizenry what it wanted. They used a relatively new invention, the automobile, to run illegal liquor into the country from Canada or from country stills into the cities. In December 1921, federal agents stopped a car outside Detroit, which, because of its proximity to Ontario, Canada, had become a major entrepot for imported liquor. The agents searched the car without a warrant and found sixty-eight quarts of whiskey and gin behind the upholstery. After conviction for violation of the Volstead Act, the defendants appealed to the Supreme Court, claiming that their Fourth Amendment rights had been violated.

By a seven-to-two vote, the Court upheld the conviction in *Carroll v. United States* (267 U.S. 132, 1925). Chief Justice Taft found the search reasonable because the agents had had probable cause; the defendants, all suspected of previous bootlegging operations, had been traveling on a road frequently used

by smugglers. Because of time constraints, the officers had been unable to get a warrant; if they had applied for one, the car would have been gone by the time it arrived. Thus, the Court carved the automobile exception out of the Fourth Amendment's requirement that no search or seizure take place without a warrant. When a warrant could be reasonably secured, Taft urged, it should be; otherwise, police did not need warrants to stop and search automobiles. The decision generated much criticism from legal scholars, but the *Carroll* doctrine is still the law.

Technology also gave the government new means to prosecute its fight against crime, including the ability to pry into the private affairs of a suspect without actually entering the premises. By a bare majority, the Court gave its blessing to the wire tapping of telephones in *Olmstead v. United States* (277 U.S. 438, 1928). Chief Justice Taft took a formalistic view of wire tapping that completely ignored the Fourth Amendment's intent. There had been no actual entry, but only the use of an enhanced sense of hearing, he claimed, and to pay too much attention to "nice ethical conduct by government officials would make society suffer and give criminals greater immunity than has been known heretofore."

The Taft opinion elicited dissents from Justices Butler, Holmes, and Brandeis. In a well-reasoned historical analysis, the generally conservative Justice Butler repudiated Taft's sterile interpretation of what the Fourth Amendment meant. Justice Holmes, in a comment that soon caught the liberal imagination, condemned wiretapping as "a dirty business." But the most impressive opinion came from Justice Brandeis, who forthrightly declared that he considered it "less evil that some criminals should escape than that the government should play an ignoble part.... If government becomes a lawbreaker, it breeds contempt for law."

The most noted and influential part of Justice Brandeis's dissent dealt with the question of privacy. The framers of the Constitution, Brandeis wrote, "sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights, and the right most valued by civilized man." That passage would be picked up and elaborated on until finally, in *Griswold v. Connecticut* (381 U.S. 419, 1965), the Court recognized privacy as a constitutionally protected liberty. Wiretapping remained legally permissible for many years, although Congress in 1934 prohibited admitting wiretapping evidence in federal courts. Not until 1967, in *Berger v. New York* (388 U.S. 41), did the Court finally bring wiretapping within the reach of the Fourth Amendment.

Although the Taft Court preferred to leave criminal matters to the states, occasionally it did interfere. One case is notable because it affected race relations, an area that the Court considered wholly within state authority. The racial tensions following World War I had led to a series of urban riots in the North and triggered a wave of lynchings in southern states. Lynching offended the Court as nonviolent forms of discrimination did not. In *Moore v. Dempsey* (261 U.S. 86, 1923), Justice Holmes ruled that a federal court should hear the appeal of five Negroes, convicted of first-degree murder by an Arkansas state court, where the constant threat of mob violence had dominated the proceedings. Such an atmosphere, he held, amounted to little more than judicially sanctioned lynching, and when state courts could not provide minimal procedural fairness, the federal courts had a clear duty to "secure to the petitioners their constitutional rights."

The Taft Court generally showed very little concern over issues of racial prejudice, whether it applied to African Americans or to Asians, and in several cases, such as *Ozawa v. United States* (260 U.S. 178, 1923) and *United States v. Bhagat Singh Thind* (261 U.S. 204, 1923), interpreted the Constitution as giving Congress full plenary power over who could immigrate and become an American citizen.

The superpatriotism of the decade manifested itself in the Court's denial of citizenship to aliens who, despite many exemplary qualities, happened to be pacifists. In a noted case, *United States v. Schwimmer* (279 U.S. 644, 1929), an older Quaker woman of unblemished character had refused to promise to bear arms in defense of the country and had denied naturalization as a result. The Court upheld the ruling and drew from Justice Holmes one of his most eloquent dissents. "If there is any principle of the Constitution," he declared, "that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought we hate." He failed to see how the country would suffer by taking as citizens people "who believe more than some of us do in the teachings of the Sermon on the Mount."

The indifference to the lack of fair procedure for aliens reflected in part the Taft Court's general attitude toward civil liberties and in part the growing public animus toward aliens and all things foreign. Few voices protested the Court decisions, for even the liberals of the time recognized a distinction between the *rights* of an American citizen and the *privileges* accorded to an alien. Civil liberties jurisprudence, as well as popular ideas on this subject, had not yet fully developed. It is not so surprising, then, that the Supreme Court showed a minimal concern in this area.

One case from this time that shocks the modern conscience and displays in full the Taft Court's indifference to individual liberties, dealt not with people of color or aliens or pacifists, but with a white southern girl, Carrie Buck. The eugenics movement that spread across the United States in the early twentieth century led a number of states to enact involuntary sterilization laws in efforts to "improve" the race. Virginia enacted such a law, and the superintendent of the State Colony for Epileptics and Feeble-Minded at Lynchburg decided to test its constitutionality.

The person he chose for his test case was eighteen-year-old Carrie Buck. A victim of rape, Buck had become pregnant, and the family with which she was living had her committed to the Lynchburg institution. There a relatively primitive IQ test showed her to have the intelligence of a nine-year-old. Her mother, Emma, also confined to the colony, tested out at eight years. After Buck gave birth to her daughter, an administrative panel recommended that she be sterilized. Her attorney, paid for by the institution, put on a weak defense, since he admittedly agreed with the sterilization policy. Nonetheless, he carried an appeal to the Supreme Court and there offered an equal protection argument; the law, he claimed, discriminated against people confined to institutions and denied them their "full bodily integrity." Justice Holmes, speaking for an eight-to-one Court in *Buck v. Bell* (274 U.S. 200, 1927), dismissed all of these arguments in a short, five-paragraph opinion, three paragraphs of which described the facts of the case. He dismissed the equal protection claim as "the usual last resort of constitutional arguments" and declared that "three generations of imbeciles are enough." Only Justice Butler dissented without opinion.

The case has had a bad odor about it ever since, but the worst aspect is that years later it turned out that Buck had not been feeble minded. She had advanced with her class grade by grade in public school until taken out to work in her foster home. Her final report card rated her as "very good—deportment and lessons." In her later years she had been active in reading groups and dramatics and, despite her very hard life, a social worker described her as an "alert and pleasant lady." There were no imbeciles at all among the three generations of Buck women.

The Court over which William Howard Taft presided from 1921 until 1930 left a mixed legacy. Its pro-business, anti-labor decisions have been for the most part discredited, with the exception of the broad stream-of-commerce interpretation it gave to congressional power under the commerce clause. The decisions involving substantive due process and freedom of contract that it used to justify these decisions led to a popular interpretation that the Court, like the other

branches of government in the 1920s, favored big business above all other interests. Following the Depression, however, liberal groups won control of the Congress and the White House, but the Four Horsemen clung to an outmoded legal classicism that eventually led to the constitutional crisis of 1937.

Yet even while protecting business interests, the Court slowly began the process of incorporation by which the Fourteenth Amendment "incorporated" the protections of the Bill of Rights and applied them to the states. Although the process did not progress very far in the 1920s, it laid the foundation for the great revolution in civil liberties that culminated during the Warren Court (1953–1969). The concern for individual liberties has been a major part of the Court's docket ever since.

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References and Further Reading

- Blasi, Vincent, *The First Amendment and the Ideal of Civil Courage: The Brandeis Opinion in Whitney v. California*, William & Mary Law Review 29 (1988): 653.
- Bodenhamer, David J. *Fair Trial: Rights of the Accused in American History*. New York: Oxford University Press, 1992.
- Cortner, Richard C. *The Supreme Court and the Second Bill of Rights*. Madison: University of Wisconsin Press, 1981.
- Post, Robert, *Defending the Life World: Substantive Due Process in the Taft Court Era*, Boston University Law Review 78 (1998): 1489.
- Ross, William G. *Forging New Freedoms: Nativism, Education, and the Constitution, 1921–1927*. Lincoln: University of Nebraska Press, 1994.
- Wiecek, William M. *The Lost World of Classical Legal Thought: Law and Ideology in America, 1886–1937*. New York: Oxford University Press, 1998.

Cases and Statutes Cited

- Abrams v. United States*, 250 U.S. 616 (1919)
- Adkins v. Children's Hospital*, 261 U.S. 525 (1923)
- Barron v. Baltimore*, 7 Pet. 243 (1833)
- Berger v. New York*, 388 U.S. 41 (1967)
- Buchanan v. Worley*, 254 U.S. 600 (1917)
- Buck v. Bell*, 274 U.S. 200 (1927)
- Bunting v. Oregon*, 243 U.S. 426 (1917)
- Byars v. United States*, 273 U.S. 28 (1927)
- Carroll v. United States*, 267 U.S. 132 (1925)
- Coronado Coal Co. v. United Mine Workers*, 268 U.S. 295 (1925)
- Duplex Printing Press Company v. Deering*, 254 U.S. 443 (1921)
- Elkins v. United States*, 364 U.S. 206 (1960)
- Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926)
- Gambino v. United States*, 275 U.S. 310 (1927)
- Gilbert v. Minnesota*, 254 U.S. 325 (1920)
- Gitlow v. New York*, 268 U.S. 562 (1925)
- Griswold v. Connecticut*, 381 U.S. 419 (1965)
- Lochner v. New York*, 198 U.S. 45 (1905)
- Meyer v. Nebraska*, 262 U.S. 390 (1922)

Moore v. Dempsey, 261 U.S. 86 (1923)
Muller v. Oregon, 208 U.S. 412 (1908)
Olmstead v. United States, 277 U.S. 438 (1928)
Ozawa v. United States, 260 U.S. 178 (1923)
Pierce v. Society of Sisters, 268 U.S. 510 (1925)
Prudential Insurance Co. v. Cheek, 259 U.S. 530 (1922)
Schenck v. United States, 249 U.S. 47 (1919)
Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920)
Truax v. Corrigan, 257 U.S. 312 (1921)
United States v. Bhagat Singh Thind, 261 U.S. 204 (1923)
United States v. E. C. Knight Co.
United States v. Schwimmer, 279 U.S. 644 (1929)
Whitney v. California, 274 U.S. 357 (1927)

TAFT, WILLIAM HOWARD (1857–1930)

William Howard Taft, the twenty-seventh president of the United States and chief justice of the U.S. Supreme Court, was born to Alphonso Taft and Louisa Maria Torrey in Cincinnati, Ohio. Taft, the only person to have been U.S. president and Supreme Court chief justice came from a politically involved family; Alphonso Taft served as secretary of war and attorney general during Ulysses S. Grant's presidency. Taft graduated second in his class from Yale University in 1878 and then graduated from the Cincinnati Law School in 1880. Shortly thereafter, he was admitted to the Ohio bar, began practicing law, and became involved in politics. In 1886, Taft married Helen Herron; the couple had three children.

Prior to his presidency and chief justice positions, Taft held numerous public offices. He served as collector for the internal revenue service; judge for the superior court of Ohio; federal circuit judge; solicitor general during Benjamin Harrison's presidency; president of the Philippine Commission; and secretary of war during Theodore Roosevelt's presidency. Taft and Roosevelt had a strong friendship that led to Roosevelt's support of Taft running in the 1908 presidential election against Democratic nominee William Jennings Bryan. Roosevelt had decided not to run, but expected Taft to continue reforms similar to his own. The Republican successor, however, changed the cabinet, and it soon became obvious that Taft and Roosevelt had different views of the scope of presidential power. Roosevelt believed in expanding the powers of the president, while Taft thought presidential authority, as granted in the Constitution, should be interpreted more narrowly.

This fundamental difference in constitutional interpretation of the presidential office caused the two to clash. Although Taft was committed to some of Roosevelt's reforms, such as conservation and regulatory changes, he did not expand his executive powers to accomplish the revisions. Overall, he was a hard worker and had multiple accomplishments as

president, such as the Mann–Elkins Act, passed in 1910, which regulated railroads, and he encouraged strong enforcement of antitrust laws. His foreign policy called for “dollar diplomacy,” which promoted American business to invest in Latin America and Asia, in order to foster the development of stable governments in those areas. Despite his efforts, the 1910 elections resulted in a Democratic majority in the House and a smaller Republican majority in the Senate. As time passed, Taft and Roosevelt became even more polarized from each other; a split in the Republican Party occurred when Roosevelt formed the Progressive Party in 1912. Taft lost the 1912 election to Democratic candidate Woodrow Wilson.

After his term as U.S. president, Taft taught at Yale as the Kent Professor of Constitutional Law, and wrote and lectured about his presidency and his views of presidential authority, which culminated in his 1916 book *Our Chief Magistrate and His Powers*. Staying active in politics, he became joint chairman of the National War Labor Board and was committed to the League to Enforce Peace. The former president also was active in the effort to ratify the Versailles Treaty.

Throughout his career, Taft possessed conservative views and held a deep regard for the separation of powers among the three branches of government and for federalism. This would become even more apparent when he served as chief justice of the U.S. Supreme Court from July 11, 1921, to February 3, 1930. The Taft Court was known for reorganizing the Court system with the passage of the Judges Act of 1922 and the Judges Act of 1925; favoring the protection of property rights, in *American Steel Foundries v. Tri-City Central Trades Council* (1921), *Truax v. Corrigan* (257 U.S. 312, 1921), and *United Mine Workers of America v. Coronado Coal Company* (268 U.S. 295, 1922); and favoring a broad application of the Interstate Commerce Clause in *Stafford v. Wallace* (1922) and *City of Chicago Board of Trade v. Olsen* (1923). In *Bailey v. Drexel Furniture Company* (1922), Taft and the court recognized limits of congressional authority when it overturned a law that taxed interstate commerce goods manufactured by children. Taft dissented, however, in the Court's ruling to overturn a minimum wage law for women in *Adkins v. Children's Hospital* (261 U.S. 525, 1923). In *Myers v. United States* (1926), the chief justice wrote the majority opinion, sanctioning the president's right to fire employees of the executive branch.

The Taft court ruled conservatively in civil liberty cases such as *Buck v. Bell* (274 US 200, 1927), which upheld a statute that enforced sterilization of the mentally handicapped, and *Olmstead v. United States* (277 U.S. 438, 1928), which permitted the tapping of

telephone lines of suspected violators of the *National Prohibition Law*. Particularly, Taft's majority opinion in *Olmstead* demonstrated his perception of the Fourth Amendment. The *Olmstead* case arose during Prohibition when authorities suspected Roy Olmstead of bootlegging. To gather evidence, federal agents placed wiretaps on telephone lines in the basement of Olmstead's office and on nearby streets. The information obtained from the taps served as evidence to convict Olmstead; the case went to the Supreme Court as possible violations of the Fourth and Fifth Amendments.

Relying on earlier Supreme Court rulings, Taft wrote that the wiretap did not violate the defendant's rights. He claimed that Olmstead voluntarily had phone discussions and therefore an infringement of the Fifth Amendment did not occur. Taft also believed in a strict understanding of the Fourth Amendment, in which an unlawful search and seizure could not be applied to information gathered solely from sight or hearing. Rather, a violation came from an unwarranted search and seizure of the body or physical property, which did not include phone lines. Although Taft acknowledged the ethical concerns of wiretaps, he declared that Congress could pass a law regarding such issues; until then the Supreme Court would follow the common law that accepted evidence even if it was obtained unethically. A 1967 ruling in *Katz v. United States* (389 U.S. 347, 1967) reversed the *Olmstead* decision.

Taft's most personally fulfilling years were when he was Supreme Court chief justice, but he retired from the position in part because of his ill health. A month after his retirement, he died in Washington, D.C., ending an impressive career as a public servant.

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References and Further Reading

- Anderson, Donald F. *William Howard Taft: A Conservative's Conception of the Presidency*. Ithaca, NY: Cornell University Press, 1973.
- Burton, David H. *Taft, Holmes, and the 1920s Court*. Madison, WI: Fairleigh Dickinson University Press, 1998.
- Burton, David H., ed. *The Collected Works of William Howard Taft*, 8 vols. Athens: Ohio University Press, 2001–2004.
- . *William Howard Taft: Confident Peacemaker*. Philadelphia: Saint Joseph's University Press, 2004.
- . *Taft, Roosevelt, and the Limits of Friendship*. Madison, WI: Fairleigh Dickinson University Press, 2005.
- Coletta, Paolo E. *The Presidency of William Howard Taft*. Lawrence: University Press of Kansas, 1973.
- Katz v. United States*, 389 U.S. 347 (1967).
- Olmstead v. United States*, 277 U.S. 438 (1928).
- Pringle, Henry F. *The Life and Times of William Howard Taft*. New York, Toronto: Farrar & Rinehart, Inc., 1939.

Taft, William Howard. *Present Day Problems*. New York, Dodd, Mead & Company, 1908.

———. *Four Aspects of Civic Duty*. New Haven, CT: Yale University Press, 1911.

———. *The Anti-Trust Act and the Supreme Court*. New York: Harper, 1914.

———. *The President and His Powers*. New York: Columbia University Press, 1967, 1916.

See also Bryan, William Jennings; *Buck v. Bell*, 274 U.S. 200 (1927); *Katz v. United States*, 389 U.S. 347 (1967); *Olmstead v. U.S.*, 277 U.S. 438 (1928); Wilson, Woodrow

TAFT–HARTLEY ACT OF 1947

Under the protections of the Wagner (National Labor Relations) Act of 1935 and its predecessor, the National Industrial Recovery Act of 1933, labor union membership soared from less than 3 million workers in 1932 to approximately 14.5 million by the end of World War II. These 14.5 million members composed over 35 percent of the nonagricultural civilian workforce—an all-time high in the history of American organized labor.

But the end of the war and the accompanying decreased demand for war-time goods precipitated sharp cuts to manufacturing wages and increased prices. Frustrated and resentful, America's workers turned to their unions for protection against inflation. The unions delivered. By November 1945, America began to experience one of the largest waves of strikes in its history. But the 1945 and 1946 strikes, in turn, fueled anti-union sentiments. Organized labor's enemies in the media and in Congress used the strike wave to blame the labor movement for the wage–price spiral plaguing the national economy.

Riding this sentiment, on June 23, 1947, Congress passed the Taft–Hartley Act over President Harry Truman's veto. Whereas the central purpose of the Wagner Act had been to encourage workers to form or join unions, Taft–Hartley marked a shift away from this policy to a more neutral posture. For example, the Act amended Sections 2 and 9b of the Wagner Act to exclude supervisors from the definition of “employee” and require separate representation for plant guards and the option of separate representation for professional employees. Particularly controversial provisions limited the right to strike by amending Section 8 of the Wagner act to prohibit secondary boycotts, jurisdictional strikes over work assignments, and strikes to force an employer to discharge an employee because of the refusal to join the union.

Other disputed provisions required union officials to sign affidavits attesting that they were not communists and permitted states to forbid, through

what is commonly known today as “right to work” legislation, agreements requiring union membership. Finally, the act separated the investigatory and prosecutorial functions of the National Labor Relations Board’s general counsel from the adjudicatory functions of the board and made collective bargaining agreements enforceable in federal district court.

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References and Further Reading

- Comment, Developments in the Law: The Taft–Hartley Act*, Harvard Law Review 64 (March 1951): 781–852.
- Hardin, Patrick, et al., eds. *The Developing Labor Law: The Board, the Courts, and the National Labor Relations Act*. 4th ed. Washington, D.C.: BNA Books, 2002.
- Taft–Hartley Symposium: *The First Fifty Years*, Catholic University Law Review 47 (Spring 1998): 763–1007.
- Zieger, Robert H., and Gilbert J. Gall. *American Workers, American Unions*. 3rd ed. Baltimore, MD: Johns Hopkins University Press, 2002.

Cases and Statutes Cited

- National Industrial Recovery Act* of June 16, 1933, c. 90, 48 Stat. 195
- Taft–Hartley (Labor–Management Relations) Act* of June 23, 1947, c. 120, 61 Stat. 136
- Wagner (National Labor Relations) Act* of July 5, 1935, c. 372, 49 Stat. 449

TAKINGS CLAUSE (V)

The notion that property ownership is essential for the enjoyment of political liberty has long been a fundamental tenet of Anglo-American constitutional thought. Reflecting this sentiment, many provisions of the Constitution and Bill of Rights pertain to the protection of the rights of property owners. Among the most important of these provisions is the Fifth Amendment, which provides in part: “nor shall private property be taken for public use, without just compensation.”

The origins of the takings clause can be traced to the English common law tradition. Magna Carta (1215) contained a prohibition on the king taking personal property without payment. Parliament also early recognized the compensation principle when property was taken for public use. William Blackstone, in his influential *Commentaries on the Laws of England* (1765–1769) stressed that private property could not be acquired for public use without the payment of full compensation.

Colonial Americans were strongly influenced by the English common law experience. Although their record was somewhat checkered, most colonies acknowledged the right of landowners to receive

compensation when government took property. During the Revolutionary era several states, notably Massachusetts, elevated the common law compensation principle to a constitutional norm in their state constitutions. The takings clause of the Fifth Amendment was also foreshadowed by legislation at the national level. The Northwest Ordinance of 1787 required that full compensation should be made when property was taken for public use. Thus, the takings clause did not break new ground, but gave constitutional status to a long-settled common law principle. Its place in the Fifth Amendment, coupled with guarantees of criminal procedure, underscores the close association of property rights with personal liberty in the minds of the framers.

Significantly, the Fifth Amendment takings clause became a model for later state constitutions. Similar language is contained in nearly every state constitution, and some require compensation when property is “damaged” as well as “taken” by governmental action. The takings clause and its state counterparts clearly reject the uncompensated confiscation of property as a legitimate exercise of governmental authority. Indeed, in *Gardner v. Village of Newburgh* (12 Johns, Ch. 162, N.Y. 1816) the distinguished jurist James Kent declared that the payment of compensation when private property was taken for public use was an indispensable principle derived from natural equity.

Eminent Domain

Eminent domain is the power of government to compel the owners of real or personal property to transfer such property to the government. It is among the most intrusive governmental powers because it entails taking property from persons against their will. Parliament in England long exercised the power of eminent domain for public projects. Following suit, governments in colonial America utilized eminent domain to facilitate the construction of roadways and public buildings through the acquisition of real and personal property. Moreover, colonial governments delegated eminent domain to private parties, such as gristmill operators, whose activities were viewed as encouraging economic growth.

The Constitution does not expressly grant the power of eminent domain to Congress. As early as *Vanhorne’s Lessee v. Dorrance* (2 U.S. 304, 1775), however, a federal circuit court insisted that eminent domain was an inherent power of government as an aspect of sovereignty. The Supreme Court expressly acknowledged in *Kohl v. United States* (91 U.S. 367,

1875) that state and federal governments could exercise the power of eminent domain in order to perform governmental functions. The takings clause of the Fifth Amendment implicitly recognized the existence of eminent domain by placing limits on its exercise. It mandates that government must acquire property for “public use” and then only upon the payment of “just compensation.”

Public Use

A vexing issue concerning the exercise of eminent domain is the requirement of the Fifth Amendment that private property must be taken for “public use.” Courts have repeatedly held that eminent domain does not empower government simply to take the property of one person and transfer it to a private party, even with the payment of compensation. Nonetheless, the public use limitation steadily eroded during the twentieth century by judicial deference to legislative determinations that a particular acquisition of property served the public interest. In *Berman v. Parker* (348 U.S. 26, 1954), for example, the Supreme Court sustained the taking of land for redevelopment by a private agency as part of the urban renewal project and equated the public use requirement with the police power.

The justices were also highly deferential to legislative assessments in *Hawaii Housing Authority v. Midkiff* (467 U.S. 229, 1984), which ruled that a state could authorize the transfer of land titles from landlords to tenants to alleviate the perceived evil of concentrated land ownership. As this indicates, the federal courts have largely treated the reasons for the exercise of eminent domain as a matter for legislative judgment. Such a permissive judicial attitude has virtually eliminated “public use” as a meaningful constraint on eminent domain at the federal level. Some state courts, however, have been more inclined to scrutinize the exercise of eminent domain. They occasionally strike down reliance on eminent domain on grounds that the planned acquisition is primarily for private gain not public benefit. The use of eminent domain to transfer property to private parties remains a highly contentious issue.

Emergence of Takings Jurisprudence

In *Barron v. Baltimore* (32 U.S. 243, 1833), the Supreme Court ruled that the Bill of Rights, including

the takings clause, applied only to the national government and did not bind the states. Before the Civil War, therefore, state courts, governed by state constitutional guarantees, took the lead in fashioning takings jurisprudence. During the antebellum era, the states regularly utilized eminent domain to foster economic development through improved internal transportation. Courts repeatedly sustained the delegation of eminent domain power to canal and railroad companies. Judges reasoned that such privately owned corporations were carrying out the public purpose of bettering transportation, thereby encouraging an open-ended definition of “public use.”

In the late nineteenth century, the Supreme Court began to address issues arising under the takings clause and, in the process, strengthened the constitutional protection afforded property owners. The justices held in *Pumpelly v. Green Bay Company* (80 U.S. 166, 1871) that the flooding of land as a result of governmental action constituted a taking even without a formal eminent domain proceeding to acquire title. This established the basis for the doctrine of inverse condemnation, which holds that a physical invasion of land by governmental action constitutes a compensable taking.

Drawing upon this concept, the Supreme Court in the twentieth century amplified the protection afforded owners against physical intrusion by government. In *United States v. Causby* (328 U.S. 256, 1946), the justices ruled that frequent military flights at low altitude over a farm destroyed its value and in effect appropriated the land. Furthermore, the justices declared in *Loretto v. Teleprompter Manhattan CATV Corp.* (458 U.S. 419, 1982) that any permanent physical occupation of private property authorized by government constituted a taking.

The Supreme Court gave a broad interpretation to the just compensation requirement in the leading case of *Monongahela Navigation Company v. United States* (148 U.S. 312, 1893), declaring that the compensation paid to owners must be a full and perfect equivalent for the property taken. In most situations this means that the measure of compensation is determined by the market value of the property. Of even greater significance was the seminal case of *Chicago, Burlington and Quincy Railroad Company v. Chicago* (166 U.S. 226, 1897), in which the justices unanimously held that the payment of just compensation when private property was taken for public use was an essential element of due process guaranteed by the Fourteenth Amendment. Accordingly, the just compensation norm became the first provision of the federal Bill of Rights to be applied against the states.

Regulatory Takings

By the late nineteenth century, property was increasingly understood to encompass not just title to a physical object but such beneficial characteristics as the right to possess, transfer, use, and derive profit. This understanding highlighted the question of the extent to which governmental actions, short of outright acquisition of title or physical invasion, might effectuate a taking for which compensation was constitutionally required. In particular, the spread of land use regulations posed the issue of whether a regulation could so diminish the value or usefulness of property as to be tantamount to a taking.

During the 1890s prominent commentators and jurists, such as David J. Brewer and Oliver Wendell Holmes, Jr., suggested that regulation of the use of property might so destroy its value as to constitute the practical equivalent of outright appropriation. These contentions anticipated the emergence of the regulatory takings doctrine, which achieved constitutional status in the famous case *Pennsylvania Coal Company v. Mahon* (260 U.S. 393, 1922). Speaking for the Supreme Court, Justice Holmes agreed that property could be regulated to some extent under the police power. But he cautioned that controls on land use that went “too far” would be treated as a taking of property.

It remained difficult to distinguish between appropriate restrictions on use and an unconstitutional taking. For decades after *Mahon* the Court was reluctant to apply the regulatory takings doctrine. For instance, the Court brushed aside takings objections and upheld the validity of comprehensive zoning ordinances in *Village of Euclid v. Ambler Realty Company* (272 U.S. 365, 1925). In the same vein, the justices in *Penn Central Transportation v. New York* (438 U.S. 104, 1978) validated the designation of Grand Central Terminal as a historic landmark by a six-to-three vote, despite the fact that this action caused a drastic drop in the value of the building. Establishing a framework for subsequent regulatory takings challenges, the Court in *Penn Central* engaged in an ad hoc inquiry, balancing the economic harm to the owner’s “investment-backed expectations” against the purpose served by the government’s action. This resulted in a muddled regulatory taking doctrine with no clear standards.

Starting in the 1980s, however, the Supreme Court took a fresh look at the question of regulatory takings and rendered a number of decisions that put some teeth into the doctrine. In the landmark case of *Nollan*

v. California Coastal Commission (483 U.S. 825, 1987) the Supreme Court, for the first time since the 1920s, invalidated a land use regulation. It held that a state agency could not impose conditions on the grant of a building permit when such conditions were unrelated to any problem caused by the proposed development. In *Dolan v. City of Tigart* (512 U.S. 374, 1994) the Court went a step further, insisting that there must be a rough proportionality between imposed building conditions and the burdens anticipated from the development. Moreover, Chief Justice William Rehnquist, writing for the Court, pointedly remarked that the takings clause of the Fifth Amendment was as much a part of the Bill of Rights as the First or Fourth Amendments.

The Supreme Court has also shown heightened concern about land use restrictions that dramatically diminished the value of property. In *Lucas v. South Carolina Coastal Council* (1992) the Court held that regulations that denied an owner all economically productive use of land constituted a taking notwithstanding the public interest advanced to justify the restraint. The Court treated a total deprivation of economic use as the practical equivalent of a physical appropriation of the land. The regulatory takings doctrine continues to evolve. For example, in *Eastern Enterprises v. Apfel* (524 U.S. 498, 1998) a plurality of the Court found that a congressional act that retroactively imposed financial liability on an employer effectuated a taking.

Purpose of Takings Clause

Like other provisions of the Bill of Rights, the takings clause serves as a vital guarantee of the rights of individuals against abuses of government power. As the Supreme Court explained in *Armstrong v. United States* (364 U.S. 40, 1960), the purpose behind the takings clause was “to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole” (p. 49). In other words, the takings clause prevents government from singling out individual owners to share a disproportionate burden of the cost of furnishing public goods. It reinforces the security of property ownership as a means to encourage economic growth as well as to provide a practical basis on which to safeguard other individual rights. It also attests to the important role of private property in the American constitutional order.

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References and Further Reading

- Eagle, Steven J. *Regulatory Takings*. 2nd ed. Charlottesville, VA: Lexis Publishing, 2001.
- Ely, James W., Jr. "That Due Satisfaction May Be Made": The Fifth Amendment and the Origins of the Compensation Principle." *American Journal of Legal History* 36 (1992): 1–18.
- . *The Guardian of Every Other Right: A Constitutional History of Property Rights*. 2nd ed. New York: Oxford University Press, 1998.
- Epstein, Richard A. *Takings: Private Property and the Power of Eminent Domain*. Cambridge, MA: Harvard University Press, 1985.
- Fischel, William A. *Regulatory Takings: Law, Economics and Politics*. Cambridge, MA: Harvard University Press, 1995.
- Gold, Andrew S., *Regulatory Takings and Original Intent: The Direct, Physical Takings Thesis "Goes Too Far,"* American University Law Review 49 (1999): 181–242.
- Treanor, William Michael, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, Yale Law Journal 94 (1985): 694–716.

Cases and Statutes Cited

- Armstrong v. United States*, 364 U.S. 40 (1960)
- Barron v. Baltimore*, 32 U.S. 243 (1833)
- Berman v. Parker*, 348 U.S. 26 (1956)
- Chicago, Burlington and Quincy Railroad Company v. Chicago*, 166 U.S. 226 (1897)
- Dolan v. City of Tigart*, 512 U.S. 374 (1994)
- Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998)
- Gardner v. Village of Newburgh*, 12 Johns. Ch. 162 (N.Y. 1816)
- Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984)
- Kohl v. United States*, 91 U.S. 367 (1875)
- Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)
- Monongahela Navigation Company v. United States*, 148 U.S. 312 (1893)
- Nollan v. California Coastal Commission*, 483 U.S. 825 (1987)
- Penn Central Transportation v. New York*, 438 U.S. 104 (1978)
- Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922)
- Pumpelly v. Green Bay Company*, 80 U.S. 166 (1871)
- United States v. Causby*, 328 U.S. 256 (1946)
- Vanhorne's Lessee v. Dorrance*, 2 U.S. 304 (1795)
- Village of Euclid v. Ambler Realty Company*, 272 U.S. 365 (1926)

TANEY COURT (1837–1864)

Roger Brooke Taney served as chief justice from 1837 to 1864. In that period the court heard relatively few cases that would be categorized as “civil liberties” cases today. The Bill of Rights did not apply to the states at this time and the federal government rarely interfered in the day-to-day lives of most people. Nevertheless, civil liberties issues reached the Court in a few significant cases, mostly, but not exclusively, involving slavery and the Civil War.

In Justice Taney’s first term as chief justice, the Court decided two cases that had civil liberties implications, although at the time they were not discussed in that way. *New York v. Miln* (1837) involved a New York statute that required every ship entering that state from abroad to provide the state with a list of all passengers, including their names, ages, and country of origin. In addition, the law required:

from every master of such vessel that he be bound with sureties in such sum as the mayor, &c., shall think proper, in a sum not to exceed 300 dollars, for every passenger, to indemnify and save harmless the mayor, &c., of the city of New York, and the overseers of the poor of the city from all expenses of the maintenance of such person, or of the child or children of such person, born after such importation; in case such person, child or children, shall become chargeable to the city within two years.

This law was aimed at regulating immigrants and the poor. *Miln*, the master of a ship that docked in New York, refused to comply with the law, arguing it violated the commerce clause. The Court upheld the law as a legitimate regulation of local “police powers” and ignored its implications for commerce. The case is usually seen as a modification of the commerce clause. However, the case also allowed for the local regulation of immigrants and, by implication, the exclusion of undesirable people. Counsel in the case argued that this law was consistent with state laws that prohibited free blacks from entering southern ports. In *Charles River Bridge Co. v. Warren Bridge Co.* (1837) the Court allowed Massachusetts to charter the Warren Bridge Company to construct a bridge that would compete with the existing Charles River Bridge. This case is usually seen as one involving the contracts clause of the Constitution. But, it can also be understood as an aspect of “takings” jurisprudence, in the sense that the Court did not see the construction of a competing bridge as “taking” property.

In *Permoli v. First Municipality of New Orleans* (1845) the Supreme Court reaffirmed that the First Amendment did not apply to the states. This case involved a local regulation in New Orleans that limited which churches could be used for funerals. *Permoli*, a Catholic priest, challenged the law on First Amendment grounds, but the Court refused to interfere, arguing that the amendment did not limit the states, but only the national government. This would remain the rule until the Fourteenth Amendment altered the Constitution after the Civil War.

Cases involving slavery raised a series of civil liberties questions for the Court. In *United States v. Amistad* (1841) the Court upheld the district court’s ruling that Africans illegally brought to the New

World as slaves had a right to revolt, and even kill those enslaving them, in order to gain their freedom. The Court's ultimate decision in the *Amistad* case turned on the interpretation of various treaties and had little impact on slavery or civil liberties. But, the case did stand for the principle that people had the right to vindicate their liberty if they were illegally held as slaves.

The implications of the *Amistad* ruling were not directed at American slavery. The Taney Court consistently upheld the rights of masters to recover fugitive slaves and denied the rights of alleged fugitive slaves to a due process hearing to determine their status. In *Prigg v. Pennsylvania* (41 U.S., 16 Pet., 539, 1842) the Court held that *Fugitive Slave Law of 1793* was constitutional and that alleged slaves were not entitled to a jury trial or any due process protections when being returned to a slave state. In addition, the Court held that the states were precluded from protecting the civil liberties and due process rights of fugitive slaves.

In *Jones v. Van Zandt* (1847) the Court held that whites did not need official "notice" to be liable for civil penalties if they helped a fugitive slave escape. In this case, an Ohio Quaker, John Van Zandt, had offered a ride to a group of slaves walking on a road in Ohio. Van Zandt claimed that he had no notice that these were slaves and thus he could not be liable for the value of the one slave who was never captured and returned to bondage. The Court disagreed and in effect nationalized the southern presumption that all blacks were slaves unless they could prove otherwise, even if found in a free state.

In *Dred Scott v. Sandford*, 19 How. (60 U.S.) 393 (1857), the Taney Court held that the Fifth Amendment to the Constitution prevented Congress from banning slavery in the federal territories because this amounted to an unconstitutional "taking" of private property. In his majority opinion Chief Justice Taney asserted that the Bill of Rights was applicable to all of the federal territories. The U.S. Supreme court would back away from this position in the *Insular Cases*, decided between 1901 and 1920.

The Supreme Court never attempted to interfere with President Lincoln's prosecution of the Civil War. In *Ex parte Merryman* (1862) Chief Justice Taney, acting in his capacity as circuit justice, issued a writ of habeas corpus, ordering that Merryman, a civilian, be released from military custody. By this time Lincoln has suspended habeas corpus in Maryland and the commanding general at Fort McHenry (where Merryman was in the brig) ignored Taney's order. The full Supreme Court never heard the case. In *Ex parte Vallandigham* (1864) the Court refused to hear the case of Clement Vallandigham, a Confederate

sympathizer in Ohio who was convicted by a military court for antiwar speeches. The Court claimed it had no jurisdiction to review the military trial. After the war, in *Ex parte Milligan* (1866) the Court would reverse this position, overturning the military conviction of Lambdin Milligan.

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References and Further Reading

- Curtis, Michael Kent. *Free Speech, "The People's Darling Privilege": Struggles for Freedom of Expression in American History*. Durham, NC: Duke University Press, 2001.
- Hyman, Harold M., and William M. Wiecek. *Equal Justice Under Law: Constitutional Development, 1835-1875*. New York: Harper and Row, 1982.
- Neely, Mark E. *The Fate of Liberty: Abraham Lincoln and Civil Liberties*. New York: Oxford University Press, 1991.

TAX EXEMPTIONS FOR RELIGIOUS GROUPS AND CLERGY

Every federal income tax law since 1894 has contained an exemption for religious organizations. The policy behind such tax breaks was the benefit to the general welfare provided by such charitable organizations. The current federal regulation concerning tax-exempt status is Internal Revenue Code § 501. Under this statute, religious organizations are treated similarly to charitable, scientific, or educational institutions.

An important aspect of the discussion of tax exemption and religious groups concerns the free exercise and establishment clauses of the First Amendment. The provision of a tax benefit to religious organizations raises the issue of whether this benefit violates the doctrine of separation of church and state. The U.S. Supreme Court in *Walz v. Commissioner* (397 U.S. 664, 1970) considered the implications of tax exemption for religious groups and concluded that the First Amendment neither requires tax exemptions for religious organizations nor forbids them. The only requirement in order to avoid violation of the establishment clause is the neutral administration of benefits to religious and secular organizations. Incidental benefit to a religious group is acceptable in the administration of a secular governmental interest. In *Texas Monthly v. Bullock* (109 S. Ct. 890, 1989) the Supreme Court reiterated this position when it held that exemption of religious publications from sales or use taxes violates the establishment clause because it was not applied equally to secular groups and the exemption was not founded on a valid state secular interest.

Numerous state and local governments have also established tax exemptions for religious organizations. Taxes from which groups may be exempt include sales and use taxes and property taxes. Religious groups in general receive a number of tax benefits from the federal, state, and local governments. The fundamental benefit to the organizations is the financial benefit of tax exemption. The Internal Revenue Code § 501 provides religious organizations with an exemption from income taxes. Since income is derived by the organization, it cannot be extended to other individuals, groups, or contractors associated with the organization. On the other hand, other taxes—such as use or sales taxes—may transfer to individuals acting on behalf of the organization.

Besides sales and use taxes, some states also exempt taxes for property owned by religious groups. Because not all religious organizations own property, the further limitation of tax exemption to churches acts as an additional criterion. While individual states differ on the extent of property tax exemption, some common requirements include incorporation, nature and use of the property, composition of religious group, and activities of the religious group.

Beyond financial benefits, religious organizations also receive numerous procedural benefits associated with their status as religious organizations. The majority of procedural benefits provided to religious organizations are limited to “churches,” a distinction referenced in numerous tax statutes. For example, churches are allowed to deduct property intended to be used for tax-exempt purposes within fifteen years as non-debt-financed property from otherwise unrelated business income subject to taxation. This is distinguished from other tax-exempt organizations, which are limited to a ten-year period. Notably, Congress and the Supreme Court have each refused to provide a useful definition of “church” with regard to the tax code. The Treasury Department has provided certain guidelines for a religious organization to qualify as a church; it restricts the “church” designation to religious groups whose duties include “the ministration of sacerdotal functions and the conduct of worship.” This definition, however, has not been universally applied by courts interpreting the federal tax regulations.

Likewise, clergy and other employees of religious groups are provided numerous substantive and procedural tax benefits under the federal tax code. These benefits are dissimilar from tax effects on members of other charitable organizations, even organization heads. Among the substantive benefits received by clergy are the exemption of the value of rental allowances or rental value of homes provided as part of their compensation and exemption from social security.

Church employees also receive numerous procedural benefits related to retirement plan requirements. Church retirement plans, for example, are exempted from normal minimum participation standards, vesting standards, or funding standards.

A major limitation on religious organizations regards political participation. Political activity can jeopardize a religious organization’s tax-exempt status. The Internal Revenue Code § 501(c)(3) states that “no substantial part of the activities” may be involved in influencing legislation and the organization may not participate in “any political campaign on behalf of (or in opposition to) any candidate.” This portion of the statute significantly limits religious organizations from engaging in protected free speech, though the Supreme Court in *Regan v. Taxation With Representation of Washington* (461 U.S. 540, 1983), held that free speech was not violated by the political limitations of § 501(c)(3).

As a practical matter, however, the Internal Revenue Service prefers not to revoke an organization’s tax-exempt status, but rather focuses on correction. An organization’s tax exemption is revoked only when there is a case of clear and unambiguous political activity and the organization fails to correct the error and safeguard against further political activity.

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References and Further Reading

- Brunner, *Taxation: Exemption of Parsonage or Residence of Minister, Priest, Rabbi, or Other Church Personnel*, 55 A.L.R.3d 356.
- Zitter, *What Constitutes Church, Religious Society, or Institution Exempt From Property Tax under State Constitutional or Statutory Provisions*, 28 A.L.R.4th 344.

Cases and Statutes Cited

- Regan v. Taxation with Representation of Washington*, 461 U.S. 540 (1983)
- Texas Monthly v. Bullock*, 109 S. Ct. 890 (1989)
- Walz v. Commissioner*, 397 U.S. 664 (1970)

TAXPAYER STANDING TO CHALLENGE ESTABLISHMENT CLAUSE VIOLATIONS

Ever since the famed decision of *Marbury v. Madison* in 1821, the Supreme Court and lower federal courts have exercised the power of judicial review—the power to review the actions of federal and state governments, and invalidate ones inconsistent with the Constitution. Yet lawyers know that the judiciary

is not some roving arbiter free to invalidate any government action found to be contrary to the Constitution. Instead, there are significant limits on the courts' ability to check the actions of the other organs of government. These limits come with quite different names—sovereign immunity, abstention, the political-question doctrine, the bar on advisory opinions—but they all have roots in the idea that the role of the courts in our constitutional system is limited.

One of this idea's more important manifestations lies in the doctrine of standing. The essence of standing is that only people who are personally injured by government action should have the right to challenge it in court. By contrast, plaintiffs cannot generally sue if the injury they are complaining about is a "generalized grievance." The Supreme Court first put flesh on this idea in the 1923 case of *Frothingham v. Mellon*, 262 U.S. 447. There, a plaintiff sued to stop the federal government from providing monetary grants to the states to reduce maternal and infant mortality. The grants were given pursuant to the Federal Maternity Act of 1921, which the plaintiff alleged to be unconstitutional under the Tenth Amendment. The plaintiff was a federal taxpayer and her taxes were being used to support this allegedly unconstitutional grant. But beyond that, she was largely unaffected by the grant program. The Court dismissed the case, stating that plaintiffs whose only injuries are shared generally by all citizens or all taxpayers do not have standing.

The general rule then is that taxpayer standing (or citizen standing) does not exist. But the establishment clause creates an exception to that general rule. This was the holding of the Supreme Court's 1968 decision in *Flast v. Cohen*, 392 U.S. 83. *Flast* was a challenge, brought by a taxpayer, to the federal government's provision of funds to private schools, religious and secular, under the Elementary and Secondary Education Act of 1965. The Court created a two-part test for taxpayer standing and explained why it was satisfied. First, there was in *Flast* (as there had been in *Frothingham*) a nexus between taxpayer status and the legislation challenged: in both cases, taxpayers were challenging Congress's use of their taxes under its Article I power to tax and spend for the general welfare. Second, there was in *Flast* (unlike *Frothingham*) a nexus between taxpayer status and the right being alleged. The Tenth Amendment, when it was passed, was not concerned with the rights of taxpayers. But the establishment clause, the Court reasoned, was. Indeed, one of the main purposes of the establishment clause was to prevent the government from forcing dissenting taxpayers to fund religious activity. Because both of those nexuses were shown, the *Flast* court thought standing established.

At the time, the *Flast* decision was seen as greatly expanding standing. But *Flast* was considerably narrowed in the 1982 case, *Valley Forge College v. Americans United*, 454 U.S. 464. The United States Department of Health, Education, and Welfare had given a seventy-seven acre tract of land to Valley Forge Christian College. A lawsuit was brought by taxpayer plaintiffs to stop the transfer as violating the establishment clause. In some respects, the facts of *Valley Forge* and *Flast* were quite similar; both involved government resources going to private religious groups. But the claims in *Valley Forge* were different in one key way, the Court reasoned. The plaintiffs in *Valley Forge* were not challenging the disposition of funds, but rather the disposition of property. Thus, the action was taken pursuant to Congress's power to dispose of government property in Article IV, § 3 of the Constitution, rather than Congress's power to tax and spend in Article I, § 8. The difference, the Court reasoned, meant that the taxpayers had not shown that first *Flast* nexus—the nexus between taxpayer status and the legislation challenged.

Many have taken issue with the logic of *Valley Forge*, questioning whether the distinction drawn in *Valley Forge* was sensible or self-serving. But no one doubts that *Valley Forge* was a marked departure from *Flast* in attitude and result. After *Valley Forge*, the rule now seems to be that taxpayer standing is allowed only when a taxpayer is challenging, under the establishment clause, a grant of government funds. Yet this exception should not be minimized. Narrow though it may be, it is still the reason why standing existed in the twenty-odd Supreme Court cases challenging government funds going to religious schools and organizations. Yet, the broader intimations of *Flast*—the suggestion that taxpayer standing might eventually be recognized for constitutional violations more generally—have been quieted, apparently for good.

One last point should be made. All the foregoing relates to the doctrine of federal taxpayer standing—that is, the rights of citizens to challenge actions of the federal government by virtue of their status as federal taxpayers. We have not yet said anything about state taxpayer standing doctrine—that is, the rights of citizens to challenge actions of state governments by virtue of their status as state taxpayers. These two doctrines are separate and distinct, even though courts and commentators often confuse them. The rules regarding state taxpayer standing are less articulated and more uncertain. The leading case is *Doremus v. Board of Education*, 342 U.S. 429, a 1952 case that denied state taxpayer standing to challenge a state statute requiring Bible readings in public schools because the readings did not involve the expenditure

of any funds. Although *Doremus* seems slightly more permissive than *Valley Forge* as regards standing, it may just be a matter of time before the two standards are unified.

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References and Further Reading

- Berg, Thomas C. *The State and Religion in a Nutshell*. 2nd ed., West Publishing Group, 2004.
- Chemerinsky, Erwin. *Constitutional Law: Principles and Policies*. New York: Aspen Law and Business, 1997, § 2.5.
- Staudt, Nancy C., *Taxpayers in Court: A Systematic Study of a (Misunderstood) Standing Doctrine*, Emory Law Journal 52 (2003): 6:771–847.
- Tribe, Laurence H. *American Constitutional Law*. 3rd ed. Minneapolis, MN: West Publishing Company, 2000.

Cases and Statutes Cited

- Doremus v. Bd. of Educ.*, 342 U.S. 429 (1952)
- Flast v. Cohen*, 392 U.S. 83 (1968)
- Frothingham v. Mellon*, 262 U.S. 447 (1923)
- Valley Forge College v. Americans United for Separation of Church and State*, 454 U.S. 464 (1982)

See also **Establishment Clause (I): History, Background, Framing; Establishment Clause Doctrine: Supreme Court Jurisprudence; *Flast v. Cohen*, 392 U.S. 83 (1968)**

TAYLOR v. ILLINOIS, 484 U.S. 400 (1988)

In *Taylor*, the Supreme Court held that a criminal defendant's rights to present a defense and to compulsory process could be forfeited by his attorney's failure to follow procedural rules.

During Taylor's trial for attempted murder, the prosecution presented several witnesses who testified that Taylor shot the victim, Bridges, during a brawl; Taylor called two witnesses who testified that Bridges's brother accidentally fired the shot. Midway through the trial, Taylor's attorney announced that he would call another witness, Wormley, who would testify that Bridges and his brother carried guns just before the incident. The judge refused to allow Wormley to testify because Taylor's attorney knew of Wormley before trial but had not listed him as a potential witness. Taylor was subsequently convicted.

The U.S. Supreme Court affirmed Taylor's conviction by a vote of six to three. The Court agreed, as it had in *Washington v. Texas* (388 U.S. 14, 1967) and *Chambers v. Mississippi* (410 U.S. 284, 1973), that

Taylor had a constitutional right to present defense witnesses. However, the Court concluded that the trial judge acted reasonably in excluding Wormley's testimony as a sanction for defense counsel's deliberate failure to disclose Wormley's existence until midtrial. The majority responded to the dissenters' complaint that it was unfair to punish Taylor for his attorney's misconduct by pointing out that defendants are often bound by their attorneys' tactical decisions. *Taylor* thus recognizes that a defendant's constitutional right to present a defense may be limited by reasonable procedural rules designed to assure the fairness of the trial process.

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References and Further Reading

- Westen, Peter, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, Harvard Law Review 91 (1978): 567.

Cases and Statutes Cited

- Chambers v. Mississippi*, 410 U.S. 284 (1973)
- Washington v. Texas*, 388 U.S. 14 (1967)

See also ***Chambers v. Mississippi*, 410 U.S. 284 (1973); Defense, Right to Present; *Washington v. Texas*, 388 U.S. 14 (1967)**

TAYLOR v. LOUISIANA, 419 U.S. 522 (1975)

The Sixth Amendment guarantees individuals the right to trial by a jury of their peers. Historically, however, individuals have been excluded from juries because of race, ethnicity, religion, gender, and other demographic attributes. In fact, it was not until 1975 in the case *Taylor v. Louisiana* that the Supreme Court declared that the exclusion of women on juries was unconstitutional.

Until *Taylor*, it was common for women to be excluded from jury service. In rare instances when women were included in jury pools, they were likely not chosen to serve. Opponents argued that grisly case details would corrupt women, that jury duty would interfere with their obligations as wives and mothers, and that they were too sympathetic and emotional to judge others' actions. Although the Civil Rights Act of 1957 mandated gender equality in federal jury systems, the Supreme Court upheld Florida's voluntary jury duty law in *Hoyt v. Florida*, 368 U.S. 57 (1961). The Court concluded that Florida's classification by gender in jury statutes was

reasonable because of women's social status and duties as wives and mothers.

In the 1975 *Taylor* case, the male appellant was convicted by a jury selected from a pool without any women, pursuant to Louisiana's requirement that women not be selected for jury service unless they filed a written declaration of their desire to serve. The Supreme Court held, however, that individuals could not be excluded from jury service or given automatic exemptions based solely on sex, thus overruling the prior *Hoyt* decision.

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References and Further Reading

- Alexander, Larry, Robert P. George, and Frederick Schauer, eds., *Developments in the Law: The Civil Jury*, Harvard Law Review 110 (1997).
- Garcia, Alfredo. "The Sixth Amendment in Modern American Jurisprudence: A Critical Perspective." In *Contributions in Legal Studies*, vol. 67. New York: Greenwood Press, 1992.
- Hinchcliff, Carole L., *American Women Jurors: A Selected Bibliography*, Georgia Law Review 20 (1986).
- Matthews, Burnita S., *The Woman Juror*, Women Lawyers Journal 15 (1927).
- Women Jurors in Federal Courts: Hearings before the Subcomm. No. 1 of the Comm. on the Judiciary of the House of Representatives*. 75th Cong, 1st Sess. 1–9, 24–26 (1937).

Cases and Statutes Cited

- Hoyt v. Florida*, 368 U.S. 57 (1961)
- Taylor v. Louisiana*, 419 U.S. 522 (1975)

See also **Jury Trial; Jury Trial Right; Sex and Criminal Justice**

TEACHER SPEECH IN PUBLIC SCHOOLS

It is a point of pride among residents of the United States that they have substantial freedom from governmental interference in matters involving speech and expression. When it comes to politics, economics, religion, the arts, social issues, general affairs of state, and most other topics, there are not many views that individuals are prohibited from expressing. Nor are there many constraints on the methods that individuals may employ to do that expressing. However, in some contexts the government has greater latitude to engage in actions that impose restrictions on the person's right to speak. One of these areas is that which encompasses speech by governmental employees—a group that the courts have concluded can be subjected to quite rigorous speech-curtailling policies. Teachers who work in public schools constitute a subgroup of

governmental employees that, perhaps more often than others, feel the pinch imposed by the squeeze of these government policies.

The authors of a prominent textbook on American public school law offer a concise explanation of the rationale behind this "government employee" exception to free speech rights (Alexander and Alexander, 2005). They write (p. 721):

Governmental agencies (or school districts) are charged by law with the responsibility for conducting governmental business. State agencies employ workers to perform assigned tasks as effectively and efficiently as possible. The precedent is well established that when an employee is paid a salary to work and contribute to an agency's effective operation and thereafter begins to do or say things that detract from the agency's effective operation, the government employer must have the power to prevent or restrain the employee from such acts or utterances.

The United States Supreme Court has decided a number of cases in which it has embedded this perspective into First Amendment free speech doctrine. This essay analyzes those cases pertaining to public school teachers and provides a thorough exposition of the carefully balanced and nuanced rules that they contain.

Historical Antecedents and General Principles

One of the earliest threats to the free speech interests of public school teachers were the loyalty oaths that many states imposed on government employees during the "red scare" and early "cold war" years of American history. Ever fearful of communist conspiracies to overthrow the U.S. government by force and violence—or by the more subtle and sinister means of indoctrinating American youth—public officials required that individuals occupying sensitive governmental positions swear that they were not affiliated with the Communist Party or any other subversive organization. Given their (presumed) ability to influence the impressionable young students in their charge, teachers were a prime target for such oaths.

However, the courts did not sit idly by and let state authorities run riot with loyalty oaths. For example, the Supreme Court intervened in several instances to protect teachers from oaths that failed the void-for-vagueness doctrine of the Fifth and Fourteenth Amendments' due process clauses (see *Baggett v. Bullitt*, 377 U.S. 360, 1964; *Cramp v. Board of Public Instruction*, 368 U.S. 278, 1961; *Keyishian v. Board of Education*, 385 U.S. 589, 1967). Due process requires

that laws be written with that minimum level of clarity necessary to allow individuals to make reasonably accurate assessments about what is legally permissible behavior. Moreover, the minimum level of clarity is generally ratcheted up if the laws touch upon fundamental constitutional rights—such as freedom of speech. Vague laws have many problems, but one of their most commonly encountered criticisms is that they impart chilling effects on individuals contemplating the exercise of fundamental rights. For these reasons, among others, the Supreme Court declared several loyalty oath schemes to be unconstitutional during the mid-twentieth century.

The Court also required government officials to tailor loyalty oath policies so that only those individuals who presented true threats to the public were excluded from government employment. For example, in *Weiman v. Updegraff* (1952), the Court declared a loyalty oath unconstitutional because it did not draw a distinction between actively involved members of a subversive organization, who knew that the group advocated the overthrow of the nation by force and violence, from inactive members who did not know what the group advocated and did not possess the intent to accomplish the group's subversive goals (also see *Elfbrandt v. Russell*, 384 U.S. 11, 1966). In contrast, the Court upheld loyalty oath programs that prohibited only knowing members of subversive organizations from serving as public school teachers (*Adler v. Board of Education*, 342 U.S. 485, 1952). The loyalty oath involved in *Adler*, however, was subsequently reconsidered and declared unconstitutional because it was unduly vague and did not limit its reach only to active members of subversive organizations who had the specific intent to overthrow the government (*Keyishian v. Board of Education*).

Even though the Supreme Court prevented school boards from imposing poorly designed loyalty oaths on teachers in some of the cases discussed earlier, it has never held that such oaths constitute per se violations of the Constitution. Moreover, the Court has long held the view that the administration of K through 12 public schools is something that should predominantly reside under the dominion of local authorities. Primary and secondary education is, for the most part, funded by local sources of revenue, and it has traditionally been a government service that residents of the community have structured to fit their needs. Indeed, few aspects of local politics have been more prominent, salient, and prone to conflict than those touching upon the education policy of communities.

The Supreme Court's recognition of the nation's long tradition of maintaining local control over the

operation of K through 12 education has been clearly articulated in extant case law. The best statement—and the perspective employed today in cases involving K through 12 public education—can be found in *Epperson v. Arkansas* (393 U.S. 97, 1968). In *Epperson*, the Court declared unconstitutional a state law that prohibited teachers in any state-supported school (including colleges and universities) from teaching or assigning books on the theory that humans evolved from “lower order” animals. In announcing its decision, the Court explained:

Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint.... By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values.

Justice Black, concurring in *Epperson*, explained that “[h]owever wise this Court may be or may become hereafter, it is doubtful that, sitting in Washington, it can successfully supervise and censor the curriculum of every public school in every hamlet and city in the United States.” Thus, cases brought to the courts by K through 12 public school teachers challenging school board actions on the grounds that they damage their free speech rights will, all things being equal, face greater hurdles to their success than will other government employees bringing free-speech-based challenges against their employers.

This judicial deference toward K through 12 institutions is frequently visible in cases involving teachers who assert that their First Amendment rights were violated when school administrators imposed punishments on them for engaging—while they taught their classes—in some form of expressive activity that the administrators disapproved. For example, the Fourth Circuit Court of Appeals concluded that a teacher could be reprimanded (in this case transferred) because she sponsored the performance of a play that school authorities subsequently deemed inappropriate for her students (*Boring v. Buncombe County Board of Education*, 136 F.3d 364, 4th Cir., 1998). The majority in *Boring* explained:

Someone must fix the curriculum of any school, public or private. In the case of a public school, in our opinion, it is far better public policy, absent a valid statutory directive on the subject, that the makeup of the curriculum be entrusted to the local school authorities who are in some sense responsible, rather than to the teachers, who would be responsible only to the judges, had they a First Amendment right to participate in the makeup of the curriculum.

Similarly, in *Kirkland v. Northside Independent School District*, 890 F.2d 794 (5th Cir. 1989), the fifth circuit held that a teacher could be dismissed because he failed to use an approved reading list in his high school history class. In short, courts have been unwilling to prevent school administrators from adopting a common curriculum or from punishing teachers who deviate from that curriculum while performing their teaching duties.

However, the First Circuit Court of Appeals has concluded that teachers are protected by the First Amendment when they employ teaching methods that they believe will best convey the approved curriculum. In *Keefe v. Geanakos* (1969), the first circuit concluded that a teacher could use an expletive as part of his classroom instruction because it was integrally related to the assigned reading (which had been selected by the teacher) and because the word could be found in several books in the school's library.

Nevertheless, other courts have been careful not to overextend the degree to which the First Amendment protects teachers who employ controversial teaching methods (*Mailloux v. Kiley*, 323 F. Supp. 1387, D. Mass., 1971). Because children are required by law to attend school, judges have been sensitive to the argument that students constitute a captive audience that teachers should not have the right to exploit for their own ideological purposes (*Mailloux v. Kiley*). Although courts have expressed concern with efforts by school boards to "cast a pall of orthodoxy over the classroom" (*Keyishian v. Board of Regents*), they are equally concerned with similar attempts made by teachers. To the extent that the Supreme Court has weighed in on these issues, it has concluded that administrators may generally adopt school policies that are "reasonably related to legitimate pedagogical concerns" (*Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 1988).

The Modern Approach

In *Epperson*, the Court declared the antievolution law unconstitutional because it was deemed to violate the establishment clause of the First Amendment. The Court did not reach the free speech issues that the case presented. That same year, however, the Court decided what is now widely considered the seminal case involving the scope of free speech rights of public school teachers: *Pickering v. Board of Education* (391 U.S. 563, 1968). Marvin Pickering was an Illinois school teacher who had sent a letter to a local newspaper that, in addition to containing some factual inaccuracies, was critical of the financial and budgetary

decisions of his school district's board of education and superintendent. The school board quickly dismissed Pickering and, at a subsequent hearing (required by state law), concluded that its decision was justifiable because his action was damaging to the smooth and efficient operation of the district's schools.

In overturning the school board's action, the Supreme Court concluded that teachers are, like other citizens, entitled to significant freedom from governmental regulation of their speech activities—even when the views expressed touch upon matters related to their employment. As the Court would note one year later, teachers—like students—do not forfeit their First Amendment rights when they enter the "schoolhouse gates" (*Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 1969). Nevertheless, Justice Marshall, writing for the Court in *Pickering*, explained that First Amendment cases present unique issues when they involve the employment related speech of government employees:

[T]he State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.

The Court concluded that Pickering's letter to the newspaper addressed matters of abiding public concern. As such, the Court argued that the proper resolution of the matter would be to balance the free speech rights of Pickering against the school board's interest in the efficient operation of the local public schools.

The Court argued that Pickering did not have a personal, intimate working relationship with the school board or the superintendent. Therefore, although his speech might have upset school administrators, it would not likely lead to the type of intra- or interoffice conflicts and disputes that could understandably hinder the efficient operation of the district's schools. Pickering's duties were in the classroom, not in the offices of the school board or superintendent. The outcome might have been different if Pickering had been a lower level policy-making administrator who worked directly for the board or the superintendent (see *Wilbur v. Mahan*, 3 F.3d 214, 7th Cir., 1993).

In addition, the Court rejected the school board's argument that Pickering could be dismissed because several inaccuracies in his editorial were damaging to the integrity and reputations of the superintendent and members of the school board. The administrators

argued that the damage to their public esteem would hinder their ability to govern the district's schools effectively. The Court was not convinced and instead held that Pickering's dismissal could only be justified if the district could demonstrate that he knew his statements were false or that he acted in reckless disregard of the truth (see *New York Times v. Sullivan*, 376 U.S. 254, 1964). Justice Marshall explained that the Court "unequivocally reject[s]" the idea that a teacher can be dismissed solely because he spoke publicly about a school-related matter of public concern in a manner that administrators considered too "critical in tone."

In its final analysis, the majority concluded that the free speech interests of Pickering substantially outweighed the administrative interests of the school district. Obviously, Pickering had significant interests (e.g., his job) that were threatened by the school board. But the Court also noted that the local community had a stake in giving Pickering ample latitude to express his views. Writing in *Pickering*, Justice Marshall explained that "[t]eachers are, as a class, the members of the community most likely to have informed and definite opinions as to how [schools should be run]. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal."

In subsequent cases the Supreme Court expounded on the law pertaining to the free speech rights of teachers by addressing questions that were not directly considered in *Pickering*. One of the most important of these was its decision in *Mt. Healthy City School District Board of Education v. Doyle* (429 U.S. 274, 1977). In *Mt. Healthy*, a unanimous Court held that a public school teacher has the burden of proving two things when he claims that a school board has imposed negative consequences (e.g., dismissal, demotion, reprimands, etc.) on him because of his expressive acts. First, the teacher must demonstrate that his speech is constitutionally protected and, second, that it was a "substantial" or "motivating factor" in the school board's decision to impose the negative consequences. If the teacher meets this burden, the school board must then be given the opportunity to demonstrate, based on the preponderance of the evidence, that it would have imposed the negative consequences on the teacher even if it had not included the teacher's expressive activity in its decision calculus.

Thus, *Mt. Healthy* represents the Court's conclusion that it is not enough simply to balance the free speech interests of the teacher against those of the school board. Instead, trial courts must engage in a systematic examination of the facts to determine whether the teacher's speech was the "but for" cause

of the school board's actions. While the teacher has to show that his expression was a "motivating factor" in the school board's decision to punish, the school board may be absolved if it can demonstrate that it did not constitute *the* motivating factor—the factor that, when added to the equation after all other factors had been incorporated, tipped the scale in favor of imposing negative consequences on the teacher. If the school board would have done what it did in the absence of the speech (i.e., the scale was tipped against the teacher before the speech factor was added to the equation), then there has not been a First Amendment violation.

One animating concern hovering over the *Mt. Healthy* Court's deliberations was the possibility that, under the *Pickering* balancing approach, a marginal employee who fears dismissal (or some other negative consequence from school administrators) could—in an effort to inoculate himself or herself constitutionally from negative treatment by administrators—engage in expression pertaining to an issue of public concern that was likely to anger school authorities. In other words, such an employee could attempt to use the First Amendment as a shield to deflect deserved negative personnel actions. Chief Justice Rehnquist, writing in *Mt. Healthy*, explained:

A borderline or marginal candidate should not have the employment question resolved against him because of constitutionally protected conduct. But that same candidate ought not be able, by engaging in such conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record, simply because the protected conduct makes the employer more certain of the correctness of its decision.

After *Mt. Healthy* the Court continued to clarify First Amendment law regarding free speech rights of public school teachers. Recall that in *Pickering* the Court had implied that teachers could bring First Amendment free speech challenges against their employers only if the teacher's speech touched upon issues of public concern. In *Connick v. Myers* (461 U.S. 138, 1983) the Court delineated between speech acts of public employees that are of public concern and those that are of private concern. In this case five members of the Court upheld the dismissal of an assistant district attorney who distributed a questionnaire to other attorneys working in her office. The Court concluded that the questionnaire did not address questions of public concern, but instead was directed at assessing the internal affairs of the district attorney's office. Because Connick's superiors considered the questionnaire an act of insubordination bordering on a "mini-insurrection," the Court concluded that her dismissal was legitimate.

The majority in *Connick* explained that, to be considered of public concern, a public employee’s speech must address something other than internal office disputes, conflicts, and other matters of employment that are predominantly of a personal nature. Justice White, writing for the majority, offered the following summary of the Court’s conclusion:

We hold only that when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee’s behavior.

The standard announced in *Connick* has general applicability to all free speech cases involving public employees. Therefore, the decision is of immediate relevance to the free speech rights of teachers (see *Seemuller v. Fairfax County School Board*, 878 F.2d 1578, 4th Cir., 1989; *Stroman v. Colleton County School District*, 981 F.2d 152, 4th Cir., 1993). It is clear, then, that after *Connick* the following four-part sequence should be followed in cases involving public school teachers who allege that they suffered adverse consequences at the hands of school administrators upset by their expressive acts (see *Daniels v. Quinn*, 801 F.2d 687, 4th Cir., 1986):

The teacher must demonstrate that the speech is of public concern (*Connick*) and that it is protected by the First Amendment (*Mt. Healthy*).

The teacher must demonstrate that the speech act was a “substantial” or “motivating factor” in the administration’s decision to treat the teacher in an adverse manner (*Mt. Healthy*).

The school board must be given the opportunity to demonstrate, based on the preponderance of the evidence, that the teacher’s speech act was not the “but for” cause of the negative consequences imposed on the teacher by the school board (*Mt. Healthy*). (If the school is successful at this stage in the four-part sequence, then there has not been a First Amendment violation and the court should rule in favor of the school board.)

If the school board is unsuccessful in step three, then (and only then) the court should employ the *Pickering* balancing test. As such, it should ask whether the free speech interests of the public school teacher outweigh the administrative interests of the school’s administration. The court should rule in favor of that party whose interests are most weighty.

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References and Further Reading

Alexander, Kern, and M. David Alexander. *American Public School Law*. 6th ed. Belmont, CA: Thomson West Publishing, 2005.

Cases and Statutes Cited

Adler v. Board Education, 342 U.S. 485 (1952)
Baggett v. Bullitt, 377 U.S. 360 (1964)
Boring v. Buncombe County Board of Education, 136 F.3d 364 (4th Cir. 1998)
Connick v. Myers, 461 U.S. 138 (1983)
Cramp v. Board of Public Instruction, 368 U.S. 278 (1961)
Daniels v. Quinn, 801 F.2d 687 (4th Cir. 1986)
Elfbrandt v. Russell, 384 U.S. 11 (1966)
Epperson v. Arkansas, 393 U.S. 97 (1968)
Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988)
Keyishian v. Board of Education, 385 U.S. 589 (1967)
Kirkland v. Northside Independent School District, 890 F.2d 794 (5th Cir. 1989)
Mailloux v. Kiley, 323 F. Supp. 1387 (D. Mass. 1971)
Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977)
New York Times v. Sullivan, 376 U.S. 254 (1964)
Pickering v. Board of Education, 391 U.S. 563 (1968)
Seemuller v. Fairfax County School Board, 878 F.2d 1578 (4th Cir. 1989)
Stroman v. Colleton County School District, 981 F.2d 152 (4th Cir. 1993)
Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969)
Wilbur v. Mahan, 3 F.3d 214 (7th Cir. 1993)

TEACHING “CREATION SCIENCE” IN THE PUBLIC SCHOOLS

Although the matter admits of some lingering dissent, it is nevertheless fairly well settled that the First Amendment’s establishment clause prohibits the presentation of any religion-based ideas or theories about life sciences in the science curriculum of public schools. In *Epperson v. Arkansas* (393 U.S. 97, 1968) and *Edwards v. Aguillard* (482 U.S. 578, 1987), the U.S. Supreme Court has disapproved of attempts to present various versions of creationism in the arena of teaching life sciences, leaving the field open to a doctrine universally known as the theory of evolution.

In the minds of many, the term “creationism” is usually associated with the belief that the account of the creation in Genesis is literally true. But the term has a much broader application. Creationism includes anyone who believes that God is responsible for making and sustaining the universe and all it contains, whether through myriad natural laws and agencies that He created and set in operation, through direct omnipotent intervention, or a combination of both. In its widest definition, all those who believe in the existence of a Creator God are properly labeled

creationists. Accordingly, creationists can be categorized into three general camps (of which there are many subcategories): (1) fundamentalist creationism; (2) generalist creationism; and (3) theistic evolutionism.

Fundamentalist creationism is known by many names to include “young Earth creationism” (holding that the age of the Earth is measured in thousands of years, not billions), “biblical creationism” (holding that the Bible is literally true), etc. Those who advocate the fundamentalist view claim scriptural literalism as the basis for their belief and attempt to transform the broad outline styled creation passages into a specific and detailed catechism. The general principles include the belief that the laws of nature, the galaxies, stars, planets, and all life were created directly by God in six 24-hour days, and that all living things have remained largely unchanged since that time. By far, fundamentalists are largest and most well organized of the creationist camps.

Generalist creationism takes a far more pragmatic view of the biblical passages on creation. Noting that Bible creation passages are sharply focused on the results of various broadly painted creation events and not on the mechanics of how things were done, generalists do not bind themselves to any particular view of how God created or developed life forms. To support this viewpoint, they point out the lack of specific scientifically styled details and that much of what is revealed is set out in thumbnail sketches of general events framed in accommodating anthropomorphisms and anthropopathisms—language understandable to the peoples of the ancient world.

Theistic evolutionism expands on the generalist view and holds that God uses the process of evolution to create and develop life forms. For theists, even if life came about as a step-by-step evolution of nature on God’s behalf, the so-called theory of evolution cannot ultimately rule out God or his sustaining activity as many evolutionists proclaim.

In terms of the creation/evolution controversy, the Supreme Court has only addressed the issue on two occasions. Its first application of the establishment clause did not occur until 1968, when the issue before the Court turned on what public schools could or could not include in their curriculum. In *Epperson* the Court weighed the constitutionality of a forty-year-old Arkansas state statute that made it unlawful to teach in public schools “the theory or doctrine that mankind ascended or descended from a lower order of animals” or “to adopt or use in any such institution a textbook that teaches [the theory of evolution].”

To better navigate the swiftly moving waters of the establishment clause, the Court has entertained a

number of analytical standards. The most well-known is the *Lemon* test set forth in *Lemon v. Kurtzman* (403 U.S. 602, 1971). *Lemon* established a three-pronged approach to assess the validity of a legislative statute or governmental action as related to the establishment clause: (1) The statute or governmental action must have a secular purpose; (2) the primary or principal effect of the statute or governmental action must neither advance nor inhibit religion; and (3) the statute or governmental action must not foster an excessive governmental entanglement with religion. All three prongs of the *Lemon* test must be met to hold the law constitutional.

The *Lemon* Court agreed that the establishment clause was intended to prevent “three main evils”—“sponsorship, financial support, and active involvement of the sovereign in religious activity.” Although the *Lemon* test has never been overturned by the Court, its fealty to the standard has waxed and waned over the years—sometimes as a function of ideological inclinations of the justices and sometimes simply in an effort to decide better where the line between church and state should be drawn or redrawn.

With little effort, the Supreme Court determined that the Arkansas Supreme Court was in error when it ruled that the state of Arkansas had the right to exclude the teaching of the theory of evolution as a constitutional “exercise of [a] state’s power[s] to specify the curriculum in its public schools.” Reversing the Arkansas Supreme Court, the Court specifically found that the real goal of the Arkansas statute was to protect a particular religious view by prohibiting the teaching of the theory of evolution. Accordingly, the Court easily struck down the antievolution statute as blatantly unconstitutional. Under the *Lemon* test, the purpose and effect of the statute clearly provided preference to a particular sectarian religious view contrary to the establishment clause’s requirement of neutrality.

As expected, the group that greeted *Epperson* with the most disdain was the fundamentalists. Their strategy to blunt *Epperson* was to promote a “balanced treatment” approach in the public classroom where their interpretation of the biblical story of creation, now renamed “creation science,” would be taught in conjunction with the theory of evolution. The misguided hope was that such a balanced treatment would provide equal time in the curriculum to both ideas and hence pass constitutional muster. This notion led a number of states to adopt so-called “balanced treatment” statutes.

In 1987, the Supreme Court considered balanced treatment in *Edwards*. In a rather straightforward

seven-to-two decision, the Court ruled that the Louisiana statute forbidding the teaching of the theory of evolution in public schools unless accompanied by instruction in creation science violated the first prong of the *Lemon* test; hence, the statute was unconstitutional under the establishment clause. Interestingly, the ruling did not turn on a determination of the actual merits of the theory of evolution versus creationism. Instead, the Court decided that, since the position that a supernatural being directly created humankind was a central belief of a “particular religious doctrine by those responsible for the passage of the Creationism Act,” the Louisiana act violated the secular purpose prong of the *Lemon* test.

Amplifying the pragmatism of *Epperson*, the *Edwards* majority went to great lengths to uncover the so-called religious motivations of the state legislators who enacted the statute, claiming that “we need not be blind in this case to the legislature’s preeminent religious purpose in enacting this statute.” The Court further indicated that the act would also fail the second prong of the *Lemon* test because its purpose “was to clearly advance the religious viewpoint that a supernatural being created humankind.”

In conclusion, if the goal of public education is to develop critical thinking apart from the dogma of religious beliefs, few can argue with the inherent soundness of the Supreme Court’s rulings. Indeed, no public school district teaches creationism. Not only should students be presented with the full flow of available knowledge based on objective reasoning, whether it is fact or theory, but it also is certainly not the function of the state to promote or indoctrinate students in a particular religious view. On the other hand, it remains to be seen whether the emerging idea of “intelligent design” will meet a similar judicial result. Without identifying any particular God of religion, intelligent design asserts that scientific studies clearly demonstrate the workings of a superior being—that is, God—in the creation and fabric of living things.

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References and Further Reading

- House, Wayne H., *Darwinism and the Law: Can Non-Naturalistic Scientific Theories Survive Constitutional Challenge?* Regent University Law Review 13 (2001).
 Morris, Henry M. *Biblical Creationism: What Each Book of the Bible Teaches about Creation and the Flood*. Green Forest, AR: Master Books, 2000.
 Ray, John. *The Wisdom of God Manifested in the Works of the Creation*. 1691.
 Bird, Wendell R., *Freedom of Religion and Science Instruction in Public Schools*, Yale Law Journal 87 (1978).

Cases and Statutes Cited

- Edwards v. Aguillard*, 482 U.S. 578 (1987)
Epperson v. Arkansas, 393 U.S. 97 (1968)
Lemon v. Kurtzman, 403 U.S. 602 (1971)

TEACHING EVOLUTION IN THE PUBLIC SCHOOLS

In *Walz v. Tax Comm’n*, 397 U.S. 664, 674 (1970), the Supreme Court signaled that the development of case law in the evolution/creationism debate would ensure that public science education would be protected from being “[entangled] with religion.” Interestingly, however, the developing case law in the debate has also apparently proven to be a tremendous boon for those who wish to hold inviolable the teaching of the theory of evolution to the total exclusion of all other ideas—scientific or otherwise—about the appearance and function of living things. Indeed, coupling the powerful influence exerted by the Darwinian paradigm with the inescapable religious history of the creationist movement, many are strongly persuaded that all future jurisprudence in this area will demonstrate an intransigent preference in favor of keeping the theory of evolution on its throne. With the recent development of the doctrine of intelligent design, this view is probably incorrect.

Although ideas excluding God from the creation and function of the universe and life have been proposed in philosophical settings from the time of Plato, it was not until the nineteenth century that the idea was encapsulated in a scientific cloak of respectability, particularly as it applied to living things. This first occurred in 1859, when the English naturalist Charles Darwin proposed his thought-provoking theory of evolution in a book entitled *The Origin of Species*.

The basic tenets of evolution are well known by scientists and laymen alike. Darwin’s theory of evolution has undergone some modifications over the years, but it essentially consists of two intertwined factors that, working together, purport to account for the appearance, interrelationship, and purposefulness of all living things. These two factors are (1) the random existence of favorable genetic mutations in life forms—that is, chance—and (2) the operation of a process called natural selection, or the survival of the fittest—that is, necessity. As incredible as it might seem, this simplistic formula has been used to account for absolutely every aspect of life one can imagine, ranging from such things as the shape of a bird’s wing to why people smile.

There is no doubt that Darwin’s theory of evolution is the most revolutionary scientific idea of the

modern era. Not only has it become the mantra for the profession of science, but concepts washed in “evolution speak” have pushed their way into the fabric of Western thinking. In the lexicon of scientific jargon the word can be used to acknowledge the phenomenon of change and to describe the mechanism for that change. On the mechanical side of this duality, the word “evolution” means that matter is self-developing through a material or natural process. Most evolutionists therefore conclude that an intelligent being (God) has nothing to do on any level with the development of living things. Since the time of Darwin, this is the way that the word has been used by evolutionists.

Paradoxically, the reading segment of America is now generally aware of the laundry list of reasons that the theory of evolution is currently under siege from inside and outside the scientific community; the greatest challenge, of course, is the fossil record. In the law, interpretation stops when the text is clear—*interpretation cessat in claris*. If one applies this maxim to the theory of evolution in the most generous light, the truth of the matter is that the text—that is, the fossil record—will never approach clarity, meaning that interpretation will never cease. But, if solid empirical evidence for Darwin’s claim is lacking, thoughtful students can hardly fail to pose the question, “What makes the theory of evolution such a successful idea?” Perhaps the best way to capture the power of evolution’s *Weltanschauung* (worldview) is to view the matter as a function of three interrelated factors.

The first reason that Darwinian thinking has been able to dominate the scene hinges on the fact that, to a degree, the theory of evolution is certainly correct and very provable under the strict criteria of the scientific method. There is no question that plants and animals can make gradual changes in form and function over time so that living things undergo limited degrees of modification under the agencies of mutation and natural selection. This process of limited change is commonly known as microevolution and objective studies have conclusively demonstrated it to be a fact of science. The real question is just how far the principle of microevolution can be stretched in order to justify the all-encompassing theory of evolution—that is, macroevolution. A general search of the literature reveals that attempts to answer that question through objective observation have fallen short.

The second reason that the theory of evolution maintains its hegemony is that it has been institutionalized as the dominant paradigm in the scientific community. Many eminent scientists complain that Darwinian evolution is so powerful a premise that newer information that has become available has not yet been able to affect the paradigm much, let

alone point the way to a new and more accurate dialectic. This situation is further exacerbated by the fact that the theory of evolution is generally presented as an unchangeable fact in classrooms, museum displays, books, academic journals, newspapers, radio, and television. Thus, since all information is heavily influenced by this paradigm, the theory of evolution is constantly reinforced by endless repetition. For example, the widely respected astrophysicist Sir Fred Hoyle (1915–2001) aggressively argued that education in the school system of any Western nation meant baptism into Darwinism as the way of thinking about life sciences. Furthermore, no alternative or modes of investigation outside the Darwinian paradigm are tolerated. If permitted at all, academic discussions are strictly limited to arguments between the various schools within Darwinian thought.

The final reason for evolution’s dominance revolves around the uncompromising attitude and, in many instances, “theological” fervor exhibited by some of its leading advocates. For lack of a better term, one might call them “Darwinian activists.” For this particular brand of Darwinist, it is not a matter of separating religious beliefs from the province of the natural sciences; for them it is taking the scientific idea, known as the theory of evolution, and making it the basis for an entire philosophy of life. Since their perception of reality demands that God does not exist, belief in the existence of God and acceptance of the theory of evolution are presented as mutually exclusive positions. Simply put, the argument proclaims that evolution excludes God; therefore, God does not exist. This movement is most commonly known as “evolutionism,” a materialistic philosophy totally antagonistic to the idea of God.

British zoologist Richard Dawkins of Oxford, perhaps the best known modern-day proponent of evolution, typifies this antireligious view where evolution is embraced as the central linchpin to a metaphysical philosophy antagonistic to God. Dawkins readily describes himself as an unapologetic atheist who desires to stamp out any notion that God is responsible for the design of life. In the name of evolutionism, he leads an unrelenting assault against all who question the theory of evolution. Dawkins writes: “The universe we observe has precisely the properties we should expect if there is, at bottom, no design, no purpose, no evil and no good, nothing but blind, pitiless indifference.”

In a very real sense, evolutionism is established in the minds of Darwinian activists as a new pseudo-religion, albeit in a secular and ideological form, with the theory of evolution serving as the creative centerpiece. Even if evolutionism is not a religion in the most common sense of the word, it clearly has parallel

dimensions: the claim to the absolute ultimate, the requirement of commitment by its followers, the fear of apostasy, the cadre of missionaries, and its role as providing the sole interpretation of the meaning of life.

On the one side, the theory of evolution attempts to explain life sciences only; on the other side, it exhibits all the components of a religion or, alternatively, an antireligion, causing many to question whether teaching the theory of evolution is a violation of the establishment clause. Questioning whether evolutionism has impermissibly violated the establishment clause's principle of neutrality in the sphere of public education is an issue that has been raised in the lower courts but never entertained by the Supreme Court.

The demands of evolutionism may also prove to be extremely counterproductive from a legal perspective; touting such an antireligious agenda clearly opens the door to judicial scrutiny under the establishment clause. The argument that the theory of evolution might one day qualify as a religious belief or an anti-religion (since it is not religiously neutral), as Justice Black put it in *Epperson v. Arkansas* (482 U.S. 578, 1987), is certainly a real possibility.

The starting point for assessing this challenge begins with the Court's struggle to articulate a legal definition of religion. A survey of Supreme Court cases regarding the definition of religion reveals that the Court uses the term to mean different things in different contexts. In *Torcaso v. Watkins* (367 U.S. 488, 1961), for instance, the Supreme Court recognized that some religions need not be based in a belief in the existence of a personal God when it said that neither a state nor the federal government can "aid those religions based on a belief in the existence of God as against those religions *founded on different beliefs*." Indeed, in a footnote, the *Torcaso* Court wrote: "Among religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, *Secular Humanism* and others" (emphasis added).

In *School District of Abington Township v. Schempp* (374 U.S. 203, 1963), the Supreme Court affirmatively included secular humanism as a religion, stating that "[t]he State may not establish a 'religion of secularism' in the sense of affirmatively opposing or showing hostility to religion, thus 'preferring those who believe in no religion over those who do believe.'" Then, in *Welsh v. United States* (398 U.S. 333, 1970), the Court stretched the definition of religious belief to the farthest reaches by stating that Congress "cannot draw the line between theistic or nontheistic religious beliefs on the one hand and secular beliefs on the other."

Thus, if secular humanism qualifies as a religion in the Supreme Court's broadly staked constitutional definition of religious beliefs, *a fortiori*, the argument can surely be made that the theory of evolution also qualifies as a religion since Darwinian activists brazenly tout the theory of evolution as the central principle of evolutionism or secular humanism.

Perhaps recognizing the problems associated with its expanded definition of religion, the Supreme Court has seemingly heeded the advice of Justice Black and simply refused to address the dilemma vis-à-vis the theory of evolution and the establishment clause. The lower federal courts have greeted this silence as a green light to halt any attacks on the theory of evolution.

Peloza v. Capistrano Unified School District (37 F.3d 517, 9th Circuit, 1994) best illustrates the concern. Peloza, a public high school biology teacher, sued his school district asserting that, because he was obliged to teach evolutionism to his students, he was engaged in an unconstitutional establishment of religion. In weighing Peloza's claim, the court found that evolution and evolutionism were synonyms to describe a scientifically accepted "*biological concept*" that related strictly to "higher life forms evol[ing] from lower ones." "Charitably read," the court concluded, "Peloza's complaint at most makes this claim: the school district's actions establish a state-supported religion of evolutionism, or more generally of 'secular humanism.'" Finding that neither the Supreme Court nor the ninth circuit had ever held that "evolutionism or secular humanism are 'religions' for Establishment Clause purposes," the court dismissed Peloza's complaint. Curiously, the court specifically acknowledged that an actionable claim might be made if one defined "'evolution' and 'evolutionism' as does [Mr.] Peloza as a concept that embraces the belief that the universe came into existence without a Creator ..." (emphasis added).

In *Wright v. Houston Independent School District* (366 F. Supp. 1208, S.D. Tex. 1972, affirmed per curiam, 486 F.2d 137, 5th Cir. 1973), high school students alleged that the school district and the State Board of Education violated the establishment clause because the teaching of evolutionary theory was tantamount to "lending official support to the religion of secularism." The Court rejected the claim, refusing to recognize secular humanism as a religion under the establishment clause. Similarly, in *Smith v. Bd. of Sch. Commissioners of Mobile County* (827 F.2d 684, 11th Cir. 1987), plaintiffs alleged that the school district was in violation of the establishment clause because it promoted secular humanism. The eleventh circuit refused to accept the district court's finding that secular humanism qualified as a religion for these purposes.

In *McLean v. Ark. Board of Education* (529 F. Supp. 1255, D.C. Ark. 1982), the federal district court also refused the argument, noting that “it is clearly established in the case law, and perhaps in common sense, that evolution is not a religion and that teaching evolution does not violate the establishment clause.”

Despite the holdings in the lower federal courts refusing to equate the theory of evolution as a religion or as a doctrine hostile to religion, the Supreme Court has never squarely addressed the issue and the argument continues to be advanced. Interestingly, in light of the continuing drum beat of Darwinian activists that the theory of evolution dismisses all religious beliefs and answers ultimate realities, the Supreme Court may ultimately be forced to fashion a remedy to protect neutrality in the public science class. Such actions might require excluding certain educational materials that advance atheistic interpretations, mandating that classes on the theory of evolution explicitly inform students that evolution cannot be used to discredit religious beliefs, or even allowing—in the words of one legal commentator—for “creationist positions” to be presented as a counterbalance.

In order to advance the argument that evolutionism is part and parcel of the theory of evolution, future legal challenges must clearly spell out and define what evolutionism entails. For certain, it is not difficult to show that evolutionism is not restricted to the quest to understand biological origins no matter where the truth will lead. Darwinian activists have provided an abundance of ammunition to those who would characterize it as a religion or an antireligion. Per *Peloza*’s guidance, evolutionism is a metaphysical concept that wholeheartedly embraces the belief that “the universe came into existence without a Creator.”

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References and Further Reading

- Ardrey, Robert. *The Hunting Hypothesis*. New York: Atheneum, 1976.
- Barton, David. *A Death-Struggle between Two Civilizations*. Regent University Law Review 13 (2001).
- Campbell, John A. “Intelligent Design, Darwinism, and the Philosophy of Public Education.” *Rhetoric and Public Affairs* 1 (1998).
- Crick, Francis. *The Astonishing Hypothesis*. New York: Simon, 1995.
- Darwin, Charles. *The Origin of Species by Means of Natural Selection*. New York: Random House, 1993.
- Dawkins, Richard. *River Out of Eden: A Darwinian View of Life*. New York: HarperCollins, 1995.
- Dennett, Daniel. *Darwin’s Dangerous Idea: Evolution and the Meanings of Life*. New York: Simon, 1995.
- Futuyma, Douglas J. *Science on Trial*. Sunderland, MA: Sinauer, 1995.

- Grant, Peter, and Rosemary Grant. “Natural Selection and Darwin’s Finches.” *Scientific American* (October 1991).
- Horgan, John. *The End of Science*. New York: Broadway, 1996.
- Hoyle, Fred. *The Origin of the Universe and the Origin of Religion*. Kingston, RI: Moyer Bell, 1993.
- Jaeger, Werner. *The Theology of the Early Greek Philosophers*. New York: Oxford University Press, 1997.
- Kuhn, Thomas S. *The Structure of Scientific Revolutions*, 3rd ed. Chicago: University of Chicago Press, 1996.
- Margenau, Henry, and Roy Abraham Varghese, eds. *Cosmos, Bios, Theos: Scientists Reflect on Science, God, and the Origins of the Universe, Life and Homo Sapiens*. Peru, IL: Open Court, 1992.
- Miller, Kenneth R. *Finding Darwin’s God: A Scientist’s Search for Common Ground between God and Evolution*. New York: HarperCollins, 1999.
- Purves, William K. *Life: The Science of Biology*. 5th ed. Sunderland, MA: Sinauer, 1998.
- Sagan, Carl. *The Demon Haunted World*. New York: Random House, 1995.
- Weiner, John. *The Beak of the Finch*. New York: Random House, 1994.

Cases and Statutes Cited

- Epperson v. Arkansas*, 393 U.S. 97 (1968)
- McLean v. Arkansas Board of Education*, 529 F. Supp. 1255 (D.C. Ark. 1982)
- Peloza v. Capistrano Unified School District*, 37 F.3d 517 (9th Cir. 1994)
- School District of Abington Township v. Schempp*, 374 U.S. 203 (1963)
- Smith v. Board of School Commissioners of Mobile County*, 827 F.2d 684 (11th Cir. 1987)
- Torcaso v. Watkins*, 367 U.S. 488 (1961)
- Walz v. Tax Commission*, 397 U.S. 664 (1970)
- Welsh v. United States*, 398 U.S. 333 (1970)
- Wright v. Houston Independent School District*, 366 F. Supp. 1208 (S.D. Tex. 1972), affirmed per curiam, 486 F.2d 137 (5th Cir. 1973)

TEN COMMANDMENTS ON DISPLAY IN PUBLIC BUILDINGS

There are hundreds of monuments and plaques with the Ten Commandments on them scattered around the United States. Many have been posted by government; others have been posted by private groups with government sanction. In the 1950s and 1960s the Fraternal Order of the Eagles (FOE), with the financial backing of the movie producer Cecil B. DeMille, erected hundreds of Ten Commandments monuments throughout the nation, usually on public land. The FOE did this to combat juvenile delinquency on the theory that placing these monuments on courthouse lawns would help young kids avoid criminal behavior. DeMille used the monuments to promote his movie,

The Ten Commandments, and sent the stars of the movie, Charlton Heston and Yul Brenner, to dedicate the monuments in various cities.

The issue of the posting of the Ten Commandments has been before the U.S. Supreme Court in three cases: *Stone v. Graham* (449 U.S. 39, 1981), *McCreary County, Kentucky v. American Civil Liberties Union of Kentucky* (125 S.Ct. 2722, 2005), and *Van Orden v. Perry* (125 S.Ct. 2854, 2005). In the first two cases the Court ordered the removal of Ten Commandments displays from public space. In the third case the court allowed a Ten Commandments monument to remain on a public space. In addition to these Supreme Court cases, there have been a number of lower court cases involving monuments and displays of the Ten Commandments.

In *Stone v. Graham* the Court summarily struck down a Kentucky statute that required the posting of the Ten Commandments in every classroom of every public school in the state. The copies of the Ten Commandments were purchased with private funds, but placed in public schools. In order to avoid the allegation that posting the Ten Commandments was an establishment of religion, the state placed below each plaque the following statement: "The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States." The state used the King James Bible translation of the Ten Commandments, which of course reflected Protestant theology.

In striking down this law the Supreme Court rejected Kentucky's claims of posting the commandments as secular and also rejected the assertion that the Ten Commandments are in fact the basis of Western legal codes or the common law. In a *per curiam* decision the Court held:

The pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature. The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact. The Commandments do not confine themselves to arguably secular matters, such as honoring one's parents, killing or murder, adultery, stealing, false witness, and covetousness. See Exodus 20: 12-17; Deuteronomy 5: 16-21. Rather, the first part of the Commandments concerns the religious duties of believers: worshipping the Lord God alone, avoiding idolatry, not using the Lord's name in vain, and observing the Sabbath Day. See Exodus 20: 1-11; Deuteronomy 5:6- 15.

The Court noted that it would be permissible to teach about the Ten Commandments as part of a history, comparative religion, or ethics course in

school but that posting the commandments amounted to an endorsement of them for religious purposes. The Court cited its decisions prohibiting prayer in public schools in summarily striking down the law. The Court did not order full arguments in the case because, for a majority of the justices, placing a religious text in a public school was obviously unconstitutional.

Justices Steward and Blackmun and Chief Justice Burger dissented, with a short statement, from the refusal of the Court to give the case a full hearing. It is not clear how they would have voted had there been a full hearing. The newest member of the Court at that time, Associate Justice William Rehnquist, wrote a longer opinion, essentially arguing that the Ten Commandments plaque did not violate the Constitution.

In 2005, the Court heard two more Ten Commandments cases. By this time only Chief Justice Rehnquist still remained from the Court that decided *Stone v. Graham*, and he was not chief justice. The result was a somewhat confusing pair of decisions. In *McCreary County* the Court considered the actions of county executives in Kentucky who, as the opinion of the Court noted,

put up in their respective courthouses large, gold-framed copies of an abridged text of the King James version of the Ten Commandments, including a citation to the Book of Exodus. In *McCreary County*, the placement of the Commandments responded to an order of the county legislative body requiring "the display [to] be posted in a very high traffic area of the courthouse."

The Court also noted that the impetus for these displays was a resolution of the state legislature, "in remembrance and honor of Jesus Christ, the Prince of Ethics." While the displays also included various patriotic documents, such as the Declaration of Independence and the preamble to the Kentucky Constitution, these documents were smaller in size than the Ten Commandments, and not central to the displays. By a five-to-four vote, the Court ordered the removal of the Kentucky displays.

On the same day the Court decided *Van Orden v. Perry*, which involved an FOE Ten Commandments monument on the grounds of the Texas State Legislature. In this case Justice Stephen Breyer changed his vote, to uphold the monument. The justice noted that the Texas monument was surrounded by numerous other statues and monuments and that it was not "sacred." He pointed out that, in addition to the text of the Ten Commandments, the Texas monument had various symbols, such as a Jewish star, a Catholic Chi-Rho, a pyramid with an eye in it, and an

American eagle. Justice Breyer found this to be a “borderline case” but allowed the monument to remain because of the circumstances where it is found—surrounded by other monuments (but it really is not) and not in any way “sacred.” The other four justices in the majority—Chief Justice Rehnquist and Justices Kennedy, Scalia, and Thomas—accepted the argument that the Ten Commandments did not offend the establishment clause because it was the source of American law.

The four justices who joined Justice Breyer in *Van Orden* ignored the fact that Protestants, Catholics, orthodox Christians, and Jews all use different organizational schemes and translations for the Ten Commandments. For example, the Protestant second commandment prohibits “graven images” while the Roman Catholic first commandment prohibits “idols.” Similarly, the Catholic fifth commandment says you shall not “kill,” while the Jewish sixth commandment says you shall not “murder.” The King James Bible, which was used for the monuments in *McCreary* and *Van Orden*, also used the term “kill,” but other modern Protestant translations used the word “murder.”

Similar differences occur throughout the commandments as they are organized and translated by different faiths. Thus, any Ten Commandments display must in effect endorse one faith or one religion and reject others. In addition, of course, the majority in *Van Orden* ignored the fact that an increasing number of Americans do not accept the Old Testament as a sacred text and thus for them the Ten Commandments have no religious value. The majority similarly ignored overwhelming evidence that the commandments are not the foundation of American law or common law, and that most of them could not be enacted into law under the U.S. Constitution. Indeed, many of the commandments are simply inapplicable to American law. It is hard to imagine, for example, how a law could require someone to “honor your father and mother” or how a law could prohibit someone from “coveting your neighbor’s house.”

The push for public displays of the Ten Commandments comes from fundamentalist religious groups and leaders who want the government to endorse their religious values. Such displays tend to polarize communities in an increasingly religiously diverse society.

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References and Further Reading

Finkelman, Paul, *The Ten Commandments on the Court-house Lawn and Elsewhere*, *Fordham Law Review* 73 (2005): 1477–1520.

TENNESSEE v. GARNER, 471 U.S. 1 (1985)

Can the police shoot an unarmed, fleeing felon and, if so, under what circumstances?

On October 3, 1974, around 10:45 p.m., a Memphis police officer encountered a suspect fleeing from the scene of a burglary. The suspect attempted to escape by climbing over a six-foot fence. Although it was dark, the officer, by using his flashlight, could see the suspect’s hands and was “reasonably sure” that the suspect was unarmed. The suspect failed to stop after the officer called out, “Halt, police.” Believing that the suspect would get away if he made it over the fence, the officer shot and killed the unarmed man.

The Court ruled that, unless the suspect poses an immediate threat to the officer or the public, a police officer cannot use deadly force to seize the suspect. The Court held that using deadly force to seize “an unarmed, nondangerous suspect” violates the Fourth Amendment. The Court expressly rejected the assertion that it must apply the common-law rule that allowed the use of whatever force was necessary to effect the arrest of a fleeing felon.

Three justices dissented, stating that the Fourth Amendment did not support the right of a burglary suspect to “flee unimpeded from a police officer who has probable cause to arrest, who has ordered the suspect to halt, and who has no means short of firing his weapon to prevent escape.”

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References and Further Reading

LaFave, Israel, and King, *Criminal Procedure*, 4th ed., Hornbook Series. Minneapolis, MN: Thompson/West, 2004, at § 2.9; § 2.9, n.5; § 3.1, n.41; § 3.5; § 3.5, n. 23.

Smith, Michael R., *Police Use of Deadly Force: How Courts and Policy-Makers Have Misapplied Tennessee v. Garner*, *Kansas Journal of Law and Public Policy* (Spring 1998) (7 SPG Kan. J.L. & Pub. Pol’y 100).

See also **Arrest; Seizures**

TERRORISM AND CIVIL LIBERTIES

Between 1993 and 2001, three major terrorist incidents in the United States resulted in government action with potentially significant impact on civil liberties. On February 26, 1993, Ramzi Yousef and others set off a truck bomb inside the World Trade Center, killing one person and injuring seven others; the attack caused much less damage than had been planned. On April 16, 1995, Timothy McVeigh, a Gulf War veteran, and Terry Nichols destroyed the

Murrah Federal Building in Oklahoma City with a massive truck bomb, killing 168 people. Finally, on September 11, 2001, nineteen terrorists hijacked four jet airplanes, killed the pilots, took over the controls, and crashed three of the planes into the World Trade Center in New York and the Pentagon in Washington, D.C. Passengers on the fourth plane fought back and forced the hijackers to crash that plane in Pennsylvania, short of its target, which was believed to have been the White House or the U.S. Capitol. Nearly three thousand people were killed, and thousands more were injured. The Federal Aviation Administration grounded all flights for the first time ever, the Dow Jones Industrial Index dropped 7 percent when it reopened after four days of being closed, and economic losses due to the attacks have been estimated at over \$100 billion.

Terrorism, particularly on the scale of the 9/11 attacks, can force the government and the people to reevaluate the balance between civil liberties and national security. It is commonly believed that in times of crisis the government, with the acquiescence of the courts, contracts civil liberties and that the lost liberties sometimes remain lost, even when the crisis has passed. Some dispute this account, pointing out that some crises have resulted in the expansion of civil liberties, such as the Civil War and World War II, which integrated the military.

The United States responded to these terrorist attacks in a number of ways, notably, by enacting the Antiterrorism and Effective Death Penalty Act of 1996 and the USA PATRIOT Act of 2001. These acts created new federal crimes aimed at preventing terrorism but that have also raised concerns that they infringe First Amendment rights. In addition, the government has taken actions that may infringe the right to equal protection, to assistance of counsel in criminal prosecutions, and to open access to court hearings.

Racial Profiling

The Constitution generally forbids the government from discriminating on the basis on race. Yet, because all nineteen of the 9/11 hijackers were citizens of four Middle Eastern nations (Saudi Arabia, Egypt, United Arab Emirates, and Lebanon) and Al Qaeda, the terrorist organization responsible for plotting the attacks, is believed to be made up of mostly Arab men, in the days immediately after the 9/11 attacks, a majority of Americans supported the use of racial profiling of Arab ancestry at airport security checkpoints and in other situations, though such support did drop off somewhat with the passage of time.

Pre-9/11 law allowed limited law enforcement use of race in traffic stops and border stops. Typical is *United States v. Brignoni-Ponce* (422 U.S. 873, 1975), in which the Supreme Court invalidated a traffic stop near the border that had been initiated solely because the defendants appeared to be of Mexican ancestry. The Court did conclude, however, that racial appearance might be one relevant factor among many because “[t]he likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor, but standing alone it does not justify stopping all Mexican Americans to ask if they are aliens.” Just one year later, in *United States v. Martinez-Fuerte* (428 U.S. 543, 1976), the Court upheld a border checkpoint stop initiated solely on the basis of the driver’s apparent Mexican ancestry. The difference between the two cases, the Court explained, was that the checkpoint stop was minimally intrusive and less likely to be threatening to drivers than being pulled over by a pursuing police car.

The use of race as a factor for airport searches would obviously implicate the civil liberties rights of those whose race is singled out—in this instance, those of Arab descent. Randall Kennedy analogizes this sort of racial profiling to “a type of racial tax” to be paid by a subset of persons for the benefit of the entire society. The sordid treatment of Japanese Americans during World War II, when over seventy thousand American citizens were first excluded from the West Coast and then interned at detention camps due to their race, serves as a reminder of the threat to civil liberties posed by racial classifications in the name of national security. *Korematsu v. United States* (323 U.S. 244, 1944), which upheld the exclusion order, is generally regarded as one of the worst decisions in Supreme Court history.

Of course, the government has yet to take any actions approaching the World War II exclusion and internment in responding to terrorism. Still, its actions do raise civil liberties concerns. First, the government instituted a registration program whereby visitors from specified countries must be photographed and fingerprinted upon entry to the United States and provide updated information to the government about their addresses and schooling or employment. The overwhelming majority of the specified countries are in the Middle East. Second, the FBI has, on a number of occasions since the 9/11 attacks, sought to conduct mass interviews of Arab Americans and Arab aliens in the country. While targeted interviews of such persons may be effective, a dragnet of persons based on their ethnicity without regard for more particularized facts may do nothing more than feed harmful stereotypes and waste government resources.

Freedom of Association

One of the civil rights guaranteed by the First Amendment is the right of free association—that is, freedom to choose with whom to associate. Because terrorists often attempt to blend in with civilians, there is a tendency for the government to respond to terrorism by cracking down on people who associate with causes seen as sympathetic to the terrorists.

In response to the 1993 attack on the World Trade Center and the 1995 bombing of the Murrah Federal Building, Congress enacted federal laws prohibiting the material support of terrorism. For example, 18 U.S.C. section 2339A makes it a federal crime for anyone to “provide material support or resources or conceal or disguise the nature, location, source, or ownership of material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out,” an act of terrorism. 18 U.S.C. section 2339B makes it a federal crime to “provide material support or resources to a foreign terrorist organization.”

The material support prohibitions undoubtedly help the government in fighting terrorism in a number of ways. First, they may be used for what Robert Chesney calls “preventive prosecution” to charge and convict persons who may be plotting terrorist acts without having to wait for the terrorist plot to develop to the point where it might be too late to stop. Second, the statutes deprive foreign terrorist organizations of funding and other resources and thus make it more difficult for such organizations to carry out future terrorism.

However, the same malleability of these statutes also raises civil liberty concerns. The term “material support or resources” is broad enough that it might arguably criminalize the mere fact of association, thereby depriving individuals of the right to be judged on their own culpability. This concern is especially acute when one considers that some of the designated foreign terrorist organizations do not limit themselves to engaging in terrorist activity, but also provide social services. Yet, a person who donates to such an organization, hoping to further its humanitarian ends, may be guilty of violating the material support prohibitions. Faced with such a possibility, people may choose to forgo making such donations, thereby censoring their association with groups whose nonviolent goals they would otherwise support.

Thus far, however, lower federal courts have generally not been persuaded that the material support prohibitions threaten First Amendment interests enough to rule those laws unconstitutional. One reason is that courts have tried to interpret the material

support prohibition laws narrowly, thus reducing the likelihood that persons will be convicted merely for unwitting association with a terrorist organization. On the other hand, there may still be an infringement of civil liberties, given that some people may choose to forgo associating with questionable organizations rather than risk prosecution.

Privacy

Although the Bill of Rights does not speak explicitly of the right to privacy, one way in which a right to privacy has been enshrined is in the Fourth Amendment, which, with exceptions, requires that government officials obtain a search warrant in order to conduct electronic surveillance (such as wiretaps) of persons. However, until 1978, there were no practical limits on the government’s ability to spy domestically on foreign powers.

The Foreign Intelligence Surveillance Act of 1978 (FISA) was the culmination of Congress’s effort to balance the government’s national security needs against the individual’s privacy rights. FISA established a Foreign Intelligence Surveillance Court that was empowered to handle applications for foreign surveillance warrants.

If the targets of foreign intelligence surveillance are purely foreign powers, FISA does not impose a warrant requirement on the government. If the target may be a U.S. citizen, however, the government must seek a warrant from the FISA court. Unlike traditional criminal investigation warrants, which required a showing of probable cause to believe that a crime had been or was being committed, a FISA warrant only required a showing of probable cause that the target of the surveillance was a foreign agent. However, the government official seeking the FISA warrant also had to certify that the purpose of the surveillance was to gather foreign intelligence information. Because this information could thus be obtained without a showing of probable cause that a crime has been or will be committed (which is the standard for obtaining a criminal search warrant), FISA warrants raised a concern that they might be used improperly by domestic law enforcement officers to obtain evidence that they would not be able to get using a criminal search warrant. What arose in the 1980s to address this perceived concern was often described as “the wall.” FISA warrants were limited to federal agents who were gathering foreign intelligence, not those working on criminal prosecutions.

After the 9/11 attacks, however, Congress determined that the wall unduly restricted necessary sharing

of information between government agencies. This perception was reinforced when the national 9/11 Commission issued its report, finding among other things that FBI counterintelligence agents and criminal investigation agents each had pieces of the 9/11 conspiracy but had not apprised one another of what they knew. The consequence was that no one put together all the pieces of the information, which might have led to an opportunity to capture one of the 9/11 hijackers and thereby unravel the plot.

The USA PATRIOT Act, among other things, “lowered” the wall by changing the required showing from “the purpose” to “a significant purpose” to gather foreign intelligence information. The government might have a significant purpose of gathering foreign intelligence information even as it has a primary purpose of gathering evidence for use in criminal prosecution; under the revision of FISA, such a dual purpose would not be prohibited. The government has argued in a July 2004 *Report from the Field: The USA PATRIOT Act at Work* that the lowering of the wall has enabled it to disrupt numerous terrorist plots and convict various persons of terrorism-related crimes (as well as nonterrorism criminals such as child pornographers) that it would not have been able to do in the past. At the same time, the lowering of the wall has again raised the possibility that criminal investigators may circumvent the traditional warrant requirement, thereby infringing to some degree the individual’s right against unreasonable searches.

Right to Counsel

The Sixth Amendment guarantees criminal defendants the right to assistance of counsel, which the Supreme Court has interpreted to mean effective assistance of counsel. Although sometimes seen derisively by the public as helping guilty defendants go free, defense attorneys play an important role in protecting civil liberties by holding prosecutors to their burden of proving guilt beyond a reasonable doubt.

One of the key tools for a defense attorney is the attorney–client privilege, which facilitates the attorney’s ability to represent the client by ensuring the client that any statements made with the purpose of seeking legal advice are protected from disclosure. The client can feel more at ease in admitting past crimes if he or she knows that no court can force the lawyer to testify as to such admissions.

In 1996, the federal Bureau of Prisons issued a regulation (28 C.F.R. section 501.3) titled “Prevention of Acts of Violence and Terrorism” that had an indirect impact on the right to counsel. Under this

regulation, the attorney general may direct a prison warden to implement “special administrative measures” that include potential monitoring of communications between the inmate and his or her attorneys. The monitoring is to be performed by government lawyers separate from the prosecution team so that the prosecutors will not have access to all communications between inmate and defense counsel, only (theoretically) those that involve potential future crimes or terrorism, which are not protected by the privilege.

Still, the prospect of having one’s communications with defense counsel monitored may have a chilling effect on those communications, leading inmates to censor themselves. In turn, that self-censorship may impair the quality of the legal advice the inmate receives.

A second way in which antiterrorism efforts can interfere with the right to counsel occurs when the government prosecutes a criminal defense attorney who represents terrorists on the theory that the attorney has conspired with his or her clients. In 2005, a jury convicted New York defense attorney Lynne Stewart of, among other things, helping her client, a convicted terrorist, communicate with his terrorist organization, the Islamic Jihad. Stewart may have merely been a zealous advocate for her client, or she may have crossed the line into criminal conduct by helping conceal the fact that he was passing instructions to his terrorist organization through Stewart’s translator; the jury believed the latter. Other defense attorneys representing suspected terrorists may tread more warily rather than risk prison time if they mistakenly cross the blurry line between zealous advocate and terrorism coconspirator. Yet, efforts by defense attorneys to make clear which side of the line they are on will likely impair the quality of the legal defense that they provide.

Open Courts

One of the principles of an open society is presumptively open access to court proceedings. As the Supreme Court explained in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), open trial proceedings assure the public that “proceedings [are] conducted fairly to all concerned.”

After the 9/11 attacks, the federal government detained thousands of aliens, mostly from Middle Eastern nations, on suspected immigration violations. A few were charged with crimes unrelated to the 9/11 attacks or even terrorism generally. Many more were sent to deportation hearings. Shortly thereafter, the

chief U.S. immigration judge issued a directive that closed deportation hearings in so-called “special interest” cases to the public and the press. Not only were visitors and family barred from the hearings, but the immigration judges also were forbidden even from “confirming or denying whether such a case is on the docket or scheduled for a hearing.”

In *North Jersey Media Group, Inc. v. Ashcroft* (308 F.3d 198, 3d Cir. 2002), the third circuit decided that deportation hearings could be closed to the public because there was no clear history of public access to such proceedings, unlike criminal trials; soon after, in *Detroit Free Press v. Ashcroft* (303 F.3d 681, 6th Cir., 2002), the sixth circuit reached the opposite conclusion. As of 2005, the Supreme Court had not considered the constitutionality of the closure of the deportation hearings. It is worth noting, however, that the special Alien Terrorist Removal Court created by Congress in 1996 to handle the deportation of suspected alien terrorists (but that has not been used as of 2005) has hearings that are open to the public.

In any event, immigration courts may not have had a clear history of open public access, but federal courts do. Yet, in the 2003 case of *M.K.B. v. Warden*, a district court and then an appellate court handled the entire matter in secret. Had the clerk of the Eleventh Circuit Court of Appeal not made a clerical mistake that disclosed the existence of the case, the public would not have learned about it. Ultimately, the Supreme Court declined to hear the case, so all that can be said about this case is that four judges (the trial judge and three appellate judges) were comfortable with concealing the existence of the case from the public. As Judge Keith wrote in the *Detroit Free Press* case, “Democracies die behind closed doors.”

Conclusion

Terrorism directed at a liberal democracy often uses the openness of society against itself; the temptation is to respond by reducing that openness so as to provide more security. Because the threat to national security, as exemplified by the megaterrorism of 9/11, can be palpable compared to the etherealness of “civil liberties,” we might expect the latter to lose out every time. The various issues discussed here do suggest that the government has attempted to make inroads on civil liberties in an effort to fight terrorism. At the same time, however, the record is not entirely one sided. Courts have narrowed the reach of the material support prohibition statutes, Congress added sunset provisions to parts of the USA PATRIOT Act (ensuring that those parts will need to be renewed), and the

government has not engaged in wholesale detentions of Arab Americans the way that it interned Japanese Americans during World War II.

TUNG YIN

References and Further Reading

- Chang, Nancy. *Silencing Political Dissent: How Post-September 11 Anti-Terrorism Measures Threaten Our Civil Liberties*. New York: Seven Stories Press, 2002.
- Chesney, Robert M., *The Sleeper Scenario: Terrorism Support Laws and the Demands of Prevention*, Harvard Journal on Legislation 42 (2005): 1–89.
- Cole, David, and James X. Dempsey. *Terrorism and the Constitution: Sacrificing Civil Liberties in the Name of National Security*. 2nd ed. New York: The New Press, 2002.
- Etzioni, Amitai. *How Patriotic Is the Patriot Act? Freedom Versus Security in the Age of Terrorism*. New York: Routledge, 2005.
- Heymann, Philip B. *Terrorism, Freedom, and Security: Winning without War*. Cambridge, MA: MIT Press, 2003.
- Kennedy, Randall. *Race, Crime, and the Law*. New York: Vintage, 1997.
- Miroff, Bruce, et al. *Debating Democracy: A Reader in American Politics*. 5th ed. New York: Houghton Mifflin, 2005: 118–141.
- The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks upon the United States*. Washington, D.C.: U.S. Government Printing Offices, 2004.
- Tushnet, Mark, ed. *The Constitution in Wartime: Beyond Alarmism and Complacency*. Durham, NC: Duke University Press, 2005.
- U.S. Department of Justice, Report from the Field: The USA PATRIOT Act at Work, available at http://www.lifeandliberty.gov/docs/071304_report_from_the_field.pdf (July 2004).

Cases and Statutes Cited

- Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2002)
- Korematsu v. United States*, 323 U.S. 244 (1944)
- North Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198 (3d Cir. 2002)
- United States v. Brignoni-Ponce*, 422 U.S. 873 (1975)
- United States v. Martinez-Fuerte*, 428 U.S. 543 (1976)
- Foreign Intelligence Surveillance Act of 1978*, Act of Oct. 25, 1978, 92 Stat. 1796
- Prevention of Acts of Violence and Terrorism*, May 17, 1996, 61 Fed. Reg. 25120-01
- Terrorism (USA PATRIOT) Act of 2001*, Act of Oct. 26, 2001, 115 Stat. 272
- Uniting and Strengthening America by Providing Appropriate Tools Requiring to Intercept and Obstruct Antiterrorism and Effective Death Penalty Act of 1996*, Act of Apr. 24, 1996, 110 Stat. 1215

See also **Airport Searches; Equal Protection of Law (XIV); Freedom of Association; Japanese Internment Cases; National Security; 9/11 and the War on Terrorism; *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); Right to Counsel; Right to Counsel (VI);**

United States v. Brignoni-Ponce, 422 U.S. 873 (1975);
United States v. United States District Court, 407 U.S.
 297 (1972); **Wiretapping Laws**

TERRY v. OHIO, 392 U.S. 1 (1968)

In *Terry v. Ohio*, the Supreme Court addressed the role the Fourth Amendment plays in street contacts between police officers and civilians. A police officer observed Terry and two other men acting suspiciously in a commercial area of Cleveland. Although the officer admittedly witnessed no crime, he believed that the men were “casing” a location for a robbery. He detained the men and patted them down for weapons. After he felt a firearm through Terry’s clothing, the officer removed Terry’s jacket in order to recover the gun. The trial court found the officer’s conduct permissible despite the plain absence of probable cause, given that it involved a mere “frisk” rather than a full-blown search.

The Supreme Court affirmed the ruling, ultimately finding the police conduct reasonable under the Fourth Amendment. The Court first recognized that a “stop and frisk” scenario is indeed a “seizure” under the Fourth Amendment and soundly rejected the argument that such an encounter is only minimally intrusive. In an attempt to balance the government’s interest in crime detection and officer safety against individual privacy interests, the Court carved out a narrow exception to the probable cause requirement when a “stop and frisk” is involved.

In what has since been coined a “*Terry* stop,” the Court held that when an officer can point to “specific and articulable facts” that support a reasonable belief that the suspect is armed and dangerous and that “criminal activity may be afoot,” a brief detention and pat-down are permissible. The lynchpin of the *Terry* Court’s analysis is reasonableness, and the Court emphasized that the officer’s conduct must be justified at its inception and reasonable in its scope. As the lone dissenter, Justice Douglas criticized the majority’s “water[ing] down of constitutional guarantees” in relaxing the Fourth Amendment’s requirement of probable cause.

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References and Further Reading

- Schwartz, Adina, “*Just Take Away Their Guns*”: *The Hidden Racism of Terry v. Ohio*, Fordham Urb. L. J. 23 (1996): 317.
 Weaver, Russell L., *Investigation and Discretion: The Terry Revolution at Forty (Almost)*, Penn. St. L. Rev. 109 (2005): 1205.

Williams, Gregory Howard, *The Supreme Court and Broken Promises: The Gradual but Continual Erosion of Terry v. Ohio*, How. L. J. 34 (1991): 567.

Cases and Statutes Cited

- Beck v. Ohio*, 379 U.S. 89 (1964)
Katz v. United States, 389 U.S. 347 (1964)
Mapp v. Ohio, 367 U.S. 643 (1961)
Preston v. United States, 376 U.S. 364 (1964)
Weeks v. United States, 232 U.S. 383 (1914)

See also **Arrest; Exclusionary Rule; Probable Cause; Search (General Definition); Seizures; Warrantless Search**

TEST OATH CASES

In 1862, the U.S. Congress passed a law requiring that all federal office holders take an oath declaring that they had “never voluntarily borne arms against the United States” or “voluntarily given ... aid, countenance, counsel, or encouragement” to those making war against the United States. After the Civil War, Congress extended the statute to cover lawyers practicing in federal courts. In 1865, Missouri amended its constitution to require that office holders, teachers, lawyers, officers of corporations, college professors, and even clergymen take a similar oath. The Missouri law was broader than the federal law and required that the oath taker swear that he or she had never expressed sympathy for the rebellion.

In *Cummings v. Missouri* (1867) the Supreme Court struck down the Missouri law as an ex post facto law, in violation of the Constitution; the same day, and on the same reasoning, the Court struck down the revised federal law in *Ex parte Garland* (1867). In both cases Justice Stephen Field spoke for a five-to-four majority, arguing that the laws were ex post facto because they punished actions after they had been taken that were not prohibited at the time they were taken. These test oaths were also seen as violating basic civil liberties because the law went into effect without a jury trial—or any trial at all—and the law required that the oath taker incriminate himself. For the federal law this was clearly a violation of the Fifth Amendment protection against self-incrimination. The majority in each case consisted of the four pre-Civil War Democrats still on the Court (Justices Wayne, Nelson, Grier, and Clifford) as well as Justice Field, who while appointed by Lincoln was increasingly at odds with the Republican Party on the nature and purpose of the war. The four dissenters in both cases were Lincoln appointees sympathetic to the union cause.

Cummings involved a Catholic priest who refused to take a test oath and was fined \$500 for acting performing his priestly functions. It is not clear whether he had in fact been a Confederate sympathizer. Garland, on the other hand, had been an attorney before the war, but then became a member of the Confederate Congress. At the end of the war he wanted to resume his law practice in federal court.

In his opinion in *Cummings* Justice Field asserted that the “disabilities created by the Constitution of Missouri must be regarded as penalties—they constitute punishment.” The same reasoning applied to the federal law with equal force. If the laws were “punishments,” then they were clearly *ex post facto* and unconstitutional because they were passed after the war ended and after the acts in question took place. The Missouri law, which barred oath takers who had expressed sympathies to the Confederate cause but not actually acted on those sympathies, was also problematic because it in effect made “thought” rather than “speech” or “action” a crime.

But were these “penalties” that “constitute punishment”? The four dissenters argued they were not. The test oaths did not lead to fines or jail time. They did not prohibit people from voting, as conviction for a felony would. The dissenters also understood that many of those who did want to take the test oath could have been tried for treason because they had made war against the United States. The dissenters saw the oaths not as a punishment, but as a way of preventing traitors from participating in the government.

These cases are generally seen as victories for civil liberties over vindictive legislatures. However, especially in the *Ex parte Garland*, an alternative analysis might suggest the case should have gone the other way. Before the war Garland had been a lawyer admitted to argue before the U.S. Supreme Court. He abandoned the United States and accepted a position in the Confederate government, which then proceeded to make war on the United States. Having taken an oath to support the U.S. Constitution, he then made war on that Constitution. Garland was not a conscript who fought in the Confederate army. He was Confederate by choice and a Confederate policymaker. As such, it might have been reasonable for Congress to conclude that his improper behavior, while not illegal, nevertheless made him unfit to practice law before the U.S. courts. In this way, the test oath could have been seen as a new measure of character and fitness similar to other character and fitness requirements of modern law practice. Similarly, since Garland had taken an oath to support the Constitution before the war, it could be argued

that prohibiting his later law practice was not an *ex post facto* rule, but rather the logical result of his violating the oath he took before the war.

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References and Further Reading

- Hyman, Harold M. *The Era of the Oath: Northern Loyalty Tests during the Civil War and Reconstruction*. Philadelphia: University of Pennsylvania Press, 1954.
 ———. *To Try Men's Soul: Loyalty Tests in American History*. Berkeley: University of California Press, 1959.

TEXAS MONTHLY, INC. v. BULLOCK, 489 U.S. 1 (1989)

Governments at all levels—federal, state, and local—exempt from time to time charitable organizations from the obligation of paying taxes. Churches, for example, are often exempted from paying property taxes with respect to property they own. Since these exemptions arguably amount to a benefit conferred by governments on religious organizations, they have been the basis for challenges under the establishment clause of the first amendment. *Texas Monthly* involved one such challenge. In the mid-1980s, Texas passed a law exempting religious periodicals from sales and use taxes. A nonreligious magazine, *Texas Monthly*, argued that the exemption violated the establishment clause. Justice William Brennan, writing for the Court's plurality, agreed that the exemption amounted to an unconstitutional establishment of religion. Justices Harry Blackmun and Sandra Day O'Connor concurred in this judgment.

As a preliminary matter, the Court considered whether *Texas Monthly* had standing to challenge the tax exemption. The state of Texas argued that it did not, since any relief that might plausibly be granted in the case would not amount to a refund of tax payments to the magazine. The Supreme Court, though, declined to rule on the issue of what remedy might follow a declaration that the tax exemption was unconstitutional. It was enough for standing that a live controversy existed concerning the magazine's claim for a refund.

After concluding that *Texas Monthly* magazine had standing to argue the unconstitutionality of the Texas statute, Justice Brennan turned to the establishment clause issue. According to his opinion, the constitutional defect in the Texas law did not reside in the mere fact of the tax exemption being awarded a religious publisher. Previously, in *Walz v. Tax Commission* (397 U.S. 664, 1970), the Court had upheld a

property tax exemption as applied to church property. But unlike the exemption at issue in *Walz*, which applied to a variety of charitable uses, the exemption in *Texas Monthly* applied only to religious periodicals. The law's defect was that it accorded favorable tax treatment to religious periodicals and only those.

The state of Texas argued in the case that the tax exemption was intended to accommodate the free exercise of religion, but the Court rejected this contention. Such exemptions require, at a minimum, according to the Court, a demonstration that a particular law actually burdens the free exercise of religion. In this case, the Court found no evidence that any believers had religiously based scruples against the payment of sales or use taxes for religious periodicals. Accordingly, it concluded that the tax exemption was not a permissible accommodation of religious belief or practice, but an impermissible form of favoritism toward religion not allowed by the establishment clause.

Justice Brennan explained on behalf of the plurality that the decision in the case was not intended to suggest that only accommodations of religion required by the free exercise clause were permitted by the establishment clause. Accommodation of religion would generally be permissible if aid provided to religious believers was also provided to a broad range of secular and religious recipients. Moreover, accommodation would be permitted when it removed an obstacle created by government to an individual's choice to engage in conduct protected by the free exercise clause. However, an accommodation might be prohibited if it required the imposition of a substantial burden on others as the cost of accommodating religious believers.

Justice Scalia, in an opinion joined by Chief Justice Rehnquist and Justice Kennedy, dissented from the judgment in the case. He argued that tax exemptions for religious entities were a long-standing practice and that nothing in the text of the Constitution, the decisions of the Court, or "the traditions of our people" supported the majority's conclusion.

In a subsequent decision, the Supreme Court revisited the issue of tax exemptions for religious organizations. In *Swaggart Ministries v. California Board of Equalization* (493 U.S. 378, 1990), Justice O'Connor wrote for a now unanimous Court. This time, relying in part on the *Texas Monthly* decision, the Court held that a California law taxing retailers for the sale and use of certain personal property did not violate the free exercise rights of a religious organization involved in such sales or amount to an impermissible establishment of religion.

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References and Further Reading

- Choper, Jesse H. *Securing Religious Liberty: Principles for Judicial Interpretation of the Religion Clauses*. Chicago: University of Chicago Press, 1995, pp. 121–133.
- McConnell, Michael W., *Accommodation of Religion: An Update and Response to the Critics*, *George Washington Law Review* 60 (1992): 695–712.
- Nowak, John E., and Ronald D. Rotunda. *Constitutional Law*. 7th ed. St. Paul, MN: Thompson-West, 2004, pp. 1408–1411.

Cases and Statutes Cited

- Jimmy Swaggart Ministries v. California Board of Equalization*, 493 U.S. 378 (1990)
- Walz v. Tax Commission*, 397 U.S. 664 (1970)
- See also Establishment Clause Doctrine: Supreme Court Jurisprudence; Sherbert v. Verner*, 374 U.S. 398 (1963); *Tax Exemptions for Religious Groups and Clergy; Walz v. Tax Commission of City of New York*, 397 U.S. 664 (1970)

TEXAS v. JOHNSON, 491 U.S. 397 (1989)

See Flag Burning

THEORIES OF CIVIL LIBERTIES

In the words of English jurist and professor of common law Sir William Blackstone, "Civil liberty, the great end of all human society and government, is that state in which each individual has the power to pursue his own happiness according to his own views and interest, and the dictates of his conscience, unrestrained, except by equal, just, and impartial laws." Justice Louis D. Brandeis, in dissent in *Olmstead v. U.S.*, 277 U.S. 438 (1928), while criticizing the majority's narrow interpretation of the Fourth Amendment, similarly declared that "the makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect.... They sought to protect Americans in their beliefs, their thoughts, their emotions, and their sensations. They conferred, as against the government, the right to be let alone."

Civil liberties are defined as freedoms from improper government action; they create a personal sphere of liberty around the individual citizen in which the individual is free from governmental restrictions. These restraints on government's power can be substantive (restraints on what the government shall and shall not have the power to do) or procedural (restraints on how the government is to act). In other words, substantive restrictions limit the ends of

government, whereas procedural restrictions limit the means of government.

While there may be general agreement as to the importance of civil liberties in a free society, the questions of where to draw the line between individual rights and the needs of the community are often difficult to resolve in specific (and controversial) cases. In the words of philosopher John Stuart Mill, "... though the proposition is not likely to be contested in general terms, the practical question, where to place the limits—how to make the fitting adjustment between individual independence and social control—is a subject on which nearly everything remains to be done" (Mill, 16).

The Role of Civil Liberties in a Free Society

The framers established a government of limited and enumerated powers that provided for majority rule while protecting minority rights. The American constitutional tradition was influenced by British philosopher John Locke, who, in his *Two Treatises of Government*, argued that individuals leave the state of nature and form a civil society in order to protect their life, liberty, and property, and that people have the right to dissolve government if it no longer meets their legitimate expectations. Justice William Brennan believed that the end of constitutional democracy is the promotion of human dignity and respect for the individual: "As augmented by the Bill of Rights and the Civil War Amendments, [the Constitution] is a sparkling vision of the human dignity of every individual. This vision is reflected in the very choice of democratic self-governance: the supreme value of a democracy is the presumed worth of each individual" (Brennan, "The Constitution of the United States: Contemporary Ratification").

An essential element of this constitutional democracy is the right to freedom of expression, especially political speech. Alexander Meiklejohn has argued persuasively that the First Amendment gives absolute protection to political speech (Meiklejohn, *Political Freedom*). Indeed, the freedom to speak, to publish, and to assemble with others for the purpose of expressing a point of view are at the core of what most Americans conceive as a democratic political system (Casper, 17).

Freedom of expression is necessary to promote individual liberty and human dignity. As Charles Fried explained:

Freedom of expression is properly based on autonomy: the Kantian right of each individual to be treated as an end in himself, an equal sovereign citizen of the

kingdom of ends with a right to the greatest liberty compatible with the like liberties of all others. Autonomy is the foundation of all basic liberties, including liberty of expression.... Our ability to deliberate, to reach conclusions about our good, and to act on those conclusions is the foundation of our status as free and rational persons" (Fried, in Stone et al., 233).

Moreover, freedom of expression is seen as the best way to expand human knowledge and to seek the truth in political debate. John Stuart Mill described a "marketplace of ideas," in which the free exchange and competition among ideas would best ensure that the truth would emerge. According to Mill, "The only way in which a human being can make some approach to knowing the whole of a subject is by hearing what can be said about it by persons of every variety of opinion and studying all modes in which it can be looked at by every character of mind. No wise man ever acquired his wisdom in any mode but this."

The idea that democracy is a means to an end rather than an end in itself and that majority rule must recognize minority rights is, perhaps, most eloquently articulated in the compulsory flag salute cases. In these cases, involving Jehovah's Witnesses and their religious objection to saluting the flag, the Court emphatically declared the importance of protecting individual liberty.

Justice Harlan Fiske Stone, dissenting in *Minersville School District v. Gobitis* (310 U.S. 586, 1940, at 602-3, 606-7), in which the majority of the Court upheld the Pennsylvania town's 1914 ordinance compelling students to salute the flag, declared:

The very fact that we have constitutional guarantees of civil liberties and the specificity of their command where freedom of speech and religion are concerned require some accommodation of the powers which government normally exercises, when no question of civil liberty is involved, to the constitutional demand that these liberties be protected against the action of the government itself.... The Constitution expresses more than the conviction of the people that democratic processes must be preserved at all costs. It also is an expression of faith and a command that freedom of mind and spirit must be preserved, which government must obey, if it is to adhere to that justice and moderation without which no free government can exist.

Justice Robert H. Jackson in *West Virginia Board of Education v. Barnette* (319 U.S. 624 at 638, 642, 1943), speaking for the majority in holding that West Virginia may not compel school children to salute the flag against their beliefs, explained:

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe

what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.... The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote, [for] they depend on the outcome of no elections.

Civil liberties play an essential role in protecting minority rights from the "tyranny of the majority."

Negative vs. Positive Rights

The distinction between negative and positive rights is often described as "freedom from" versus "freedom to." In other words, negative rights imply freedom from government interference, whereas positive rights imply affirmative obligations on the part of government to fulfill the right (such as entitlement programs, welfare, housing, and nutrition). The differences between negative and positive rights have been classically expounded by Charles Fried (Fabre, 40):

A positive right is a claim to something—a share of material goods, or some particular good like the attention of a lawyer or a doctor, or perhaps the claim to a result like health or enlightenment—while a negative right is a right that something not be done to one, that some particular imposition be withheld. Positive rights are inevitably asserted to scarce goods, and consequently scarcity implies a limit to the claim. Negative rights, however, the rights not to be interfered with in forbidden ways, do not appear to have such natural, such inevitable limitation. (Fried, 110)

Cecile Fabre argues that individuals have social rights to adequate minimum income, housing, health care, and education, and that those rights must be included in the constitution of a democratic state. Moreover, Fabre argues that a democratic majority should not be able to repeal these rights and that certain institutions, such as the judiciary, should be given the power to strike down laws passed by the legislature that are in breach of those rights (Fabre, *Social Rights under the Constitution*).

President Franklin Roosevelt's "Second Bill of Rights," set forth in his 1944 State of the Union message, includes the following examples of what could be deemed "positive rights":

the right to a useful and remunerative job in the industries or shops or farms or mines of the Nation; the right to earn enough to provide adequate food and clothing and

recreation; the right of every family to a decent home; the right to adequate medical care and the opportunity to achieve and enjoy good health; the right to adequate protection from the economic fears of old age, sickness, accident, and unemployment; the right to a good education. (Glendon, in Stone et al., 528)

The U.S. Supreme Court, however, has consistently declined to recognize constitutional welfare rights (Glendon, in Stone et al., 525). For example, in *Lindsey v. Normet*, 405 U.S. 56, 74 (1972), the Court ruled that there is no constitutional right to housing, and in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 30-31 (1973), the Court ruled that there is no constitutional right to education. Indeed, Judge Richard Posner of the U.S. Court of Appeals for the Seventh Circuit noted that the U.S. Constitution

is a charter of negative rather than positive liberties.... The men who wrote the Bill of Rights were not concerned that Government might do too little for the people but that it might do too much to them. The Fourteenth Amendment, adopted in 1868, at the height of laissez-faire thinking, sought to protect Americans from oppression by state government, not to secure them basic governmental services. (*Jackson v. City of Joliet*, 715 F.2d 1200, 1203, 7th Cir.1983)

However, David P. Currie points out that the U.S. Supreme Court has found "duties that can in some sense be described as positive" in negatively phrased provisions of the Bill of Rights (Currie, 872–880). For example, the Sixth Amendment guarantees the right to counsel, and, despite the fact that this appears to be a negative right (namely, that the government may not prevent a criminal defendant from having a lawyer), the Supreme Court has held that the Sixth Amendment imposes an affirmative duty on the part of government to provide legal assistance if the defendant cannot afford it (Currie, 874; *Gideon v. Wainwright*, 372 U.S. 335, 1963).

The Constitutional Basis for Civil Liberties in the United States

American revolutionary Thomas Paine declared that a constitution is "to liberty what a grammar is to language" (Pritchett, 1). The framers believed that a written constitution was necessary to guarantee a limited government and, therefore, to protect civil liberties. Indeed, the source of civil liberties is the Constitution, especially the first ten amendments, the Bill of Rights.

The lack of a Bill of Rights was seen by the Anti-Federalists to be a major defect of the original

Constitution. In *Antifederalist Paper No. 84*, “Brutus” argued that a Bill of Rights was as necessary for the federal constitution as it was for the states. Thomas Jefferson, writing to James Madison on the subject of the proposed Constitution, criticized the omission of a Bill of Rights. After listing the rights he thought should be included, Jefferson challenged the Federalists’ rationale for their omission and concluded that “a bill of rights is what the people are entitled to against every government on earth, general or particular, and what no just government should refuse, or resist on inference” (Levy, 26).

The Federalists countered that the Constitution was a Bill of Rights unto itself. It provided for the protection of specific liberties and the federal government that was created was one of limited and enumerated powers. Alexander Hamilton, in *Federalist No. 84*, explained that “the Constitution is itself, in every rational sense and to every useful purpose, a Bill of Rights.” Hamilton argued that the addition of a Bill of Rights would be “dangerous” as well as unnecessary because it “would contain various exceptions to powers not granted; and, on this very account, would afford a colorable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do? Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed?”

Despite the Federalists’ claim that there was no need for a Bill of Rights to be added to the Constitution, the original document did include provisions to protect selected civil liberties. For example, Article I, §9, provides that the writ of habeas corpus shall not be suspended and that Congress shall not pass any bills of attainder or ex post facto laws. Article III guarantees a jury trial in the state in which the crime was committed and limits treason to the life of the person convicted and not to the person’s heirs. Article VI, §3, bans religious tests as qualification for public office, and Article IV, §2, guarantees to citizens of each state of all privileges and immunities of citizens in the several states.

The Bill of Rights was adopted by the First Congress as a concession to the strong objections that the Anti-Federalists raised during the ratifying conventions. James Madison’s speech to the House of Representatives admonished Congress to “conform to their wishes, and expressly declare the great rights of mankind secured under this Constitution” (speech before the U.S. House of Representatives, 8 June 1789).

The Bill of Rights was originally interpreted to apply only to the federal government. State governments were believed to be closer to the people, and the state constitutions included their own bills of rights

(see Schwartz, 87–90, for a table listing the civil liberties expressly protected in the revolutionary declarations and constitutions of each state). In *Barron v. Mayor and Council of Baltimore*, 7 Pet. (32 U.S.) 243 (1833), Chief Justice John Marshall held that the Bill of Rights was applicable only to the federal government and that its provisions did not serve to limit the power of the state governments.

However, the passage of the Civil War amendments (the Thirteenth, Fourteenth, and Fifteenth Amendments) radically changed the protection of fundamental liberties. The Fourteenth Amendment declares: “No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

There is a long-standing debate regarding whether the framers of the Fourteenth Amendment intended that it would apply the Bill of Rights’ provisions to the states. In the *Slaughterhouse Cases*, 16 Wall. (83 U.S.) 36 (1873), the Supreme Court rejected the argument that the privileges or immunities clause was designed to apply the Bill of Rights to the states. However, through a gradual process of “selective incorporation,” the Supreme Court has held various provisions of the Bill of Rights applicable to the states through the due process clause of the Fourteenth Amendment (*Palko v. Connecticut*, 302 U.S. 319, 1937).

The first time the Supreme Court “incorporated” a provision of the Bill of Rights was in the case of *Chicago, Burlington, & Quincy Railroad Company v. Chicago*, 166 U.S. 226 (1897), in which the property protection of the Fifth Amendment was held applicable to the states. No further expansion of civil liberties through the Fourteenth Amendment occurred until 1925, when the Court held that the freedom of speech was “among the fundamental and personal rights and ‘liberties’ protected by the due process clause of the Fourteenth Amendment from impairment by the states” (*Gitlow v. New York*, 268 U.S. 652, 1925). Most of the provisions of the Bill of Rights have been applied to the states in this way.

Even after the Court held that provisions of the Bill of Rights could be made applicable to the state governments, the Justices differed in their understanding of the nature and the extent to which these amendments would be “incorporated.” Justice John Marshall Harlan I (dissent in *Hurtado v. California*, 110 U.S. 516, 1884) and Justice Hugo Black (dissent in *Adamson v. California*, 332 U.S. 46, 1946) were advocates of “total incorporation”—the idea that all provisions of the Bill of Rights should be made applicable to the states. Justice Benjamin Cardozo, in

Palko v. Connecticut, articulated the theory of “selective incorporation,” namely, that only those liberties in the Bill of Rights that are “so rooted in the history and conscience of our people as to be ranked fundamental” and “implicit in the concept of ordered liberty” should be incorporated. Other justices argued for “incorporation plus”—that even more rights and liberties than those expressly recognized in the Bill of Rights should be held applicable to the states, such as the unenumerated right to privacy. Some have called for “total incorporation plus,” such as Justices Frank Murphy and Wiley Rutledge (dissenting in *Adamson v. California*, 332 U.S. 46, 1946) while others have advocated “selective incorporation plus,” such as Justice Arthur Goldberg, Chief Justice Earl Warren, and Justice William Brennan (concurring in *Griswold v. Connecticut*, 391 U.S. 145, 1965).

Those few provisions that have not been incorporated include the Second Amendment protection of the “right of the people to keep and bear arms,” the Third Amendment limitation on the quartering of soldiers in private homes, the Fifth Amendment right to indictment by grand jury, the Seventh Amendment right to a jury trial in civil cases, and the Eighth Amendment right against excessive fines and bail.

Economic and Noneconomic Rights

The protection of economic rights is usually thought of in terms of “substantive due process,” a doctrine that prevailed during the *Lochner* era.

The origin of due process of law in the Anglo-American legal tradition dates back to the Magna Carta (1215), when King John consented to the barons’ demands for certain rights, such as the right to a trial by a jury of one’s peers. Americans are guaranteed due process of law in the Fifth and Fourteenth Amendments. The Fifth Amendment guarantees that “No person shall be ... deprived of life, liberty, or property without due process of law.” The Fourteenth Amendment guarantees “... nor shall any State deprive any person of life, liberty, or property, without due process of law.”

The principle behind “due process” is that government is forbidden to limit a person’s personal or property rights unless the government has done so through proper procedures. Initially conceived of as a procedural restriction on government’s authority, the concept of “procedural due process” can be thought of in terms of criminal procedure, or the rights of the accused. “Substantive due process” is the doctrine used by the Court to strike down economic regulation, such

as the right of a worker to offer his services to an employer without governmental restrictions upon the conditions of employment and the inviolability of an individual’s property from governmental regulation (Casper, 219).

The first time the Court struck down a state law on substantive due process grounds was in the case of *Allgeyer v. Louisiana*, 165 U.S. 578 (1897). Justice Rufus Peckham, in an opinion for a unanimous court, laid out a broad articulation of the “liberty of contract” that gave the case its special significance in the development of “substantive due process” (Sullivan and Gunther, 457). Justice Peckham explained:

The liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation; and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned.

The seminal case of this era was *Lochner v. New York*, 198 U.S. 45 (1905). At issue in the case was a New York law that limited the hours of employment in bakeries and confectionary establishments to ten hours a day and sixty hours a week. Justice Peckham again announced the opinion of the Court and held that the statute interfered with the liberty of contract between employers and employees: “the general right to make a contract in relation to ... business is part of the liberty of the individual protected by the Fourteenth Amendment.”

Justice Oliver Wendell Holmes, Jr., in dissent, accused the majority of deciding the case based on an economic theory that a large part of the country did not entertain: “the Fourteenth Amendment does not enact Mr. Herbert Spencer’s Social Statics.” Holmes declared that “a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state, or of laissez-faire. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the [Constitution].”

From the *Lochner* decision in 1905 to the mid-1930s, the Court invalidated a considerable number of laws on substantive due process grounds, such as regulations of prices, labor relations (including wages and hours), and conditions for entry into business

(Sullivan and Gunther, 466). The Court eventually repudiated *Lochner* and its progeny, and its name became synonymous with inappropriate judicial intervention in the legislative process (Sullivan and Gunther, 463).

However, there is a contemporary debate about whether the Court continues to adhere to the doctrine of “substantive due process” in the context of announcing unenumerated rights, such as the right to privacy (particularly in the area of reproductive freedom and abortion rights). The Court declared that the right to privacy, while not specifically provided for in the Bill of Rights, can be found in the “penumbras” of the First, Third, Fourth, Fifth, and Ninth Amendments (*Griswold v. Connecticut*, 381 U.S. 479, 1965). Justice William H. Rehnquist, in dissent in *Roe v. Wade*, 410 U.S. 113 (1973), in which the majority ruled that the constitutional right to privacy extended to a woman’s right to have an abortion, criticized the majority for espousing substantive due process in the *Lochner* tradition of passing on the wisdom of legislative policies and for engaging in “judicial legislation” by breaking up pregnancies into three trimesters with varying permissible restrictions (Pritchett, 320).

The Role of the U.S. Supreme Court in Protecting Civil Liberties

In the post-New Deal era, the Supreme Court has given more attention to the Bill of Rights and to the protection of civil liberties. Professor Robert G. McCloskey, in his seminal work, *The American Supreme Court*, defined three periods of the Supreme Court’s history: (1) from the founding of the Constitution through the Civil War, in which questions of federalism were predominant (e.g., nullification, slavery, and the national bank); (2) from the Civil War through 1937, in which questions of the relationship between business and government were predominant; and (3) from 1937 to the present, in which the Court indicated there would be a shift in emphasis from strict scrutiny of economic legislation to a strict scrutiny of regulations that touch on the Bill of Rights. “The Court, which had once been primarily occupied with the nation–state relationship, and some time later, with the business–government relationship, now became more and more concerned with the relationship between the individual and government” (McCloskey, 122).

The turning point for the Court was signaled by Justice Stone in Footnote Four in *U.S. v. Carolene Products*, 304 U.S. 144, 152 (1938). Since 1937, the

Supreme Court has relinquished its role as a socioeconomic review board and has assumed a new role, one more energetic in the protection of civil liberties. Civil liberties now occupy a “preferred position.” This phrase was first used by Chief Justice Stone in dissent in *Jones v. Opelika*, 316 U.S. 584 (1942):

The First Amendment is not confined to safeguarding freedom of speech and freedom of religion against discriminatory attempts to wipe them out. On the contrary, the Constitution, by virtue of the First and Fourteenth Amendments, has put those freedoms in a preferred position. Their commands are not restricted to cases where the protected privilege is sought out for attack. They extend at least to every form of taxation which, because it is a condition of the exercise of their privilege, is capable of being used to control or suppress it.”

The doctrine that civil liberties occupy a preferred position means that there would be a presumption of unconstitutionality instead of a presumption of constitutionality when dealing with liberties essential to the democratic process. The burden of proof would fall on the legislature to prove why the statute passes constitutional muster. This has also been called the “double standard,” insofar as the Court indicated that it would apply a stricter standard to laws challenged as infringing on individual rights than it used for those attacked as abridging economic rights (Biskupic and Witt, 7).

There is ample justification for granting civil liberties a “preferred position.” First, protection of civil liberties is in accordance with the Constitution and the tradition of Western civilization. The purpose of a written constitution is to prescribe what government can and cannot do and to limit the exercise of the government’s power in order to protect the liberty of the people. Civil liberties are vital in the maintenance of a democratic system of government. Second, the text of the Constitution implies that they will occupy such a preferred position. In particular, the language of the First Amendment declares in no uncertain terms: “Congress shall make no law ...” Finally, the Supreme Court is uniquely qualified to serve as the guardian of civil rights and liberties (see also Abraham, 22–28):

While there may be agreement that civil liberties occupy a preferred position, there are, nevertheless, competing approaches to the interpretation of provisions included in the Bill of Rights. Justice Hugo Black is known for his absolutist and literalist approach to the First Amendment. As Justice Black explained in *Smith v. California*, 361 U.S. 147 (1959): “I read ‘no law abridging’ to mean *no law abridging*. The First Amendment, which is the supreme law of the land, has thus fixed its own value on freedom of speech and press by putting those freedoms wholly ‘beyond the reach’ of federal power to abridge.

No other provision of the Constitution purports to dilute the scope of these unequivocal commands of the First Amendment. Consequently, I do not believe that any federal agencies, including Congress and this Court, have power or authority to subordinate speech and press to what they think are 'more important interests.'" Black argued that the "balance" sought by other justices in dealing with issues of expression was struck by the framers of the First Amendment in the eighteenth century. In declaring that "Congress shall make no law ... " the question of limits upon speech was answered once and for all: No laws infringing on the right to speak are consonant with the Constitution. (Casper, 29)

Black's absolutist-literalist position is in stark contrast to the balancing test favored by justices who believe that the case for freedom must be balanced against the case for order and security (Pritchett, 30–32). The clear and present danger test was a form of balancing. A balancing approach was also employed by the Court when upholding the power of congressional investigation of communist activity in *Barenblatt v. United States*, 360 U.S. 109 (1959), in which Justice John Marshall Harlan II explained that there must be a "balancing by the courts of the competing private and public interests at stake in the particular circumstances shown."

While *Carolene's* "Footnote Four" ushered in a new era of jurisprudence more attuned to the protection of civil liberties, especially during the Warren Court, justices have held contrasting positions regarding the role of the Supreme Court in protecting civil liberties. Two competing conceptions of the judicial role are "judicial activism"—the Supreme Court must play an activist role in protecting civil liberties from government interference—and "judicial self-restraint"—the unelected, politically unaccountable justices should play a restrained role in socioeconomic legislation as well as legislation infringing on civil liberties and must not set aside government action unless that action is unreasonable.

The Supreme Court plays a unique role as a bulwark in the protection of individual rights and liberties. Alexander Hamilton, in *Federalist No. 78*, believed that the courts would serve as "bulwarks of a limited constitution, against legislative encroachments" and that they would ensure the enforcement of the Constitution as the supreme law of the land. Likewise, James Madison, in his speech presenting the Bill of Rights to the First Congress argued that "If they are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment

upon rights expressly stipulated for in the Constitution by the declaration of rights" (speech before the U.S. House of Representatives, June 8, 1789).

Modern Challenges to Civil Liberties and the Bill of Rights

There is a need always to be vigilant in the protection of civil liberties. Even though the guarantees are written in the Constitution, the provisions must be interpreted and enforced by the courts. Chief Justice Charles Evans Hughes is reported to have said when he was governor of New York, "We are under a Constitution; but the Constitution is what the courts say it is" (Meiklejohn, 32).

The Supreme Court, in interpreting the Constitution, has not always lived up to its role as the "bulwark" of individual rights and liberties. For example, in the notorious *Dred Scott* decision (*Dred Scott v. Sandford*, 19 How., 60 U.S., 393, 1857), Chief Justice Roger Brooke Taney held that persons of African descent were "not included and were not intended to be included, under the word 'citizen' in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States." In *Korematsu v. United States*, 323 U.S. 214 (1944), the Court upheld the internment of Japanese Americans during World War II.

Moreover, a shift in personnel on the Court can limit or overturn prior rulings that provided for more expansive protection of civil liberties. For example, the right of a woman to choose whether to terminate her pregnancy that was announced in *Roe v. Wade* has been upheld by the Rehnquist Court only by the slimmest of majorities. With the appointments of new justices, *Roe* could be overturned. Indeed, the National Abortion Rights Action League (NARAL) made Supreme Court composition an issue in the 2000 presidential campaign, putting the slogan "It's the Supreme Court, Stupid" on signs and bumper stickers in order to remind voters that the next president might have the opportunity to appoint a Supreme Court justice who could in turn decide the fate of the *Roe* precedent. Other scholars have argued that even when the Court hands down well-intentioned pronouncements, it is ineffective in producing significant social reform (Rosenberg, *The Hollow Hope*).

Moreover, each generation faces new challenges and setbacks in the effort to protect civil liberties. Throughout American history there are numerous examples of restrictions on civil liberties, especially

during times of war: the Alien and Sedition Acts of 1798; censorship of the press, suspension of habeas corpus, and expropriation of property during the Civil War; the Espionage and Sedition Acts during World War I (see also Civil Liberties in World War I); the Smith Act; the actions of the House Un-American Activities Committee (HUAC); Japanese internment during World War II (see also Civil Liberties in World War II); the treatment of antiwar demonstrators during the Vietnam War; and security concerns in the aftermath of 9/11 and the War on Terror (see also Civil Liberties in Wartime). For obvious reasons, it has been said that “civil liberties and individual freedoms are one of the first casualties of war” (Linfield, 4).

Justice Thurgood Marshall noted that “history teaches us that grave threats to liberty often come in times of urgency, when constitutional rights seem too extravagant to endure” (*Skinner v. Railway Labor Executives Association*, 489 U.S. 602, 1989). In balancing the need for national security against the protection of civil liberties, the Court has tended to side with the government in restricting individual liberty. For example, regarding the freedom of speech, Justice Oliver Wendell Holmes, Jr., explained that “when a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right” (*Schenck v. United States*, 249 U.S. 247, 1919).

Chief Justice Rehnquist, in *All the Laws but One: Civil Liberties in Wartime*, explained that it would not be reasonable to believe that future wartime presidents would act differently than Presidents Lincoln, Wilson, or Roosevelt or that future Supreme Court justices would decide cases any differently than past justices had (Rehnquist, 224). In the post-9/11 era, national security concerns and the War on Terror are used to justify infringement on civil liberties. Consider, for example, the controversial enforcement of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001 (115 Stat. 272) and the detention of enemy combatants at Guantánamo Bay (see also Terrorism and Civil Liberties).

James Madison, in *Federalist No. 48*, expressed skepticism of the value of “parchment barriers” against “overbearing majorities.” American history has shown that we must be always on guard against infringements on individual rights and liberty, lest the Bill of Rights’ provisions become “mere parchment barriers.”

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References and Further Reading

- Abraham, Henry J., and Barbara A. Perry. *Freedom and the Court: Civil Rights and Liberties in the United States*. 7th ed. New York and Oxford: Oxford University Press, 1998.
- Brennan, William J. “The Constitution of the United States: Contemporary Ratification,” speech delivered at Georgetown University, 12 October 1985.
- Casper, Jonathan D. *The Politics of Civil Liberties*. New York: Harper & Row, 1972.
- Currie, David P., *Positive and Negative Constitutional Rights*, University of Chicago Law Review 53 (Summer 1986): 864.
- Fabre, Cecile. *Social Rights under the Constitution: Government and the Decent Life*. Oxford: Oxford University Press, 2000.
- Fried, Charles. *Right and Wrong*. Cambridge, MA: Harvard University Press, 1978.
- Hoffman, Ronald, and Peter J. Albert. *The Bill of Rights: Government Proscribed*. Charlottesville: University Press of Virginia, 1997.
- Levy, Leonard W. *Origins of the Bill of Rights*. New Haven, CT: Yale University Press, 1999.
- Linfield, Michael. *Freedom Under Fire: U.S. Civil Liberties in Times of War*. Boston: South End Press, 1990.
- McCloskey, Robert G., and Sanford Levinson. *The American Supreme Court*. 2nd ed. Chicago: University of Chicago Press (1960), 1994.
- Meiklejohn, Alexander. *Political Freedom*. New York: Oxford University Press, 1965.
- Mill, John Stuart. *On Liberty and the Subjugation of Women*. New York: Henry Holt, 1898.
- Pritchett, C. Herman. *Constitutional Civil Liberties*. Englewood Cliffs, NJ: Prentice Hall, 1984.
- Rehnquist, William H. *All the Laws but One: Civil Liberties in Wartime*. New York: Alfred A. Knopf, 1998.
- Rosenberg, Gerald N. *The Hollow Hope: Can Courts Bring about Social Change?* Chicago: University of Chicago Press, 1991.
- Schwartz, Bernard. *The Great Rights of Mankind: A History of the American Bill of Rights*. New York: Oxford University Press, 1977.
- Stone, Geoffrey R., Richard A. Epstein, and Cass R. Sunstein, eds. *The Bill of Rights in the Modern State*. Chicago: University of Chicago Press, 1992.
- Storing, Herbert J. *What the Anti-Federalists Were For*. Chicago: University of Chicago Press, 1981.
- Sullivan, Kathleen M., and Gerald Gunther. *Constitutional Law*. 14th ed. New York: Foundation Press, 2001.
- Urofsky, Melvin I. *The Continuity of Change: The Supreme Court and Individual Liberties, 1953–1986*. Belmont, CA: Wadsworth Publishing Co., 1991.

Cases and Statutes Cited

- Adamson v. California*, 332 U.S. 46 (1946)
- Allgeyer v. Louisiana*, 165 U.S. 578 (1897)
- Barenblatt v. United States*, 360 U.S. 109 (1959)
- Barron v. Mayor and Council of Baltimore*, 7 Pet. (32 U.S.) 243 (1833)
- Chicago, Burlington, & Quincy Railroad Company v. Chicago*, 166 U.S. 226 (1897)
- Dennis v. United States*, 341 U.S. 494 (1951)
- Dred Scott v. Sandford*, 19 How. (60 U.S.) 393 (1857)

Gideon v. Wainwright, 372 U.S. 335 (1963)
Gitlow v. New York, 268 U.S. 652 (1925)
Griswold v. Connecticut, 381 U.S. 479 (1965)
Hirabayashi v. United States, 320 U.S. 81 (1943)
Hurtado v. California, 110 U.S. 516 (1884)
Jackson v. City of Joliet, 715 F.2d 1200, 1203 (7th Cir.1983)
Jones v. Opelika, 316 U.S. 584 (1942)
Korematsu v. U.S., 323 U.S. 214 (1944)
Lindsey v. Normet, 405 U.S. 56, 74 (1972)
Lochner v. New York, 198 U.S. 45 (1905)
Minersville School District v. Gobitis, 310 U.S. 586 (1940)
Olmstead v. U.S., 277 U.S. 438 (1928)
Palko v. Connecticut, 302 U.S. 319 (1937)
Roe v. Wade, 410 U.S. 113 (1973)
San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973)
Schenck v. United States, 249 U.S. 47 (1919)
Skinner v. Railway Labor Executives Association, 489 U.S. 602 (1989)
Slaughterhouse Cases, 16 Wall. (83 U.S.) 36 (1873)
Smith v. California, 361 U.S. 147 (1959)
U.S. v. Carolene Products, 304 U.S. 144 (1938)
West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943)

See also: Absolutism and Free Speech; Alien and Sedition Acts (1798); Balancing Approach to Free Speech; Balancing Test; *Barron v. Baltimore*, 32 U.S. 243 (1833); Bill of Attainder; Bill of Rights: Structure; Brandeis, Louis Dembitz; Cardozo, Benjamin; *Carolene Products v. U.S.*, 304 U.S. 144, 152 (1938); Clear and Present Danger Test; Constitution of 1787; Douglas, William Orville; *Dred Scott v. Sandford*, 60 U.S. 393 (1857); Due Process; Due Process of Law (V and XIX); Ex Post Facto Clause; First Amendment and PACs; Fourteenth Amendment; *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Gitlow v. New York*, 268 U.S. 652 (1925); Goldberg, Arthur J.; *Griswold v. Connecticut*, 381 U.S. 479 (1965); Guantánamo Bay, Enemy Combatants, Post 9/11; Hamilton, Alexander; Harlan, John Marshall, the Elder; Harlan, John Marshall II; Holmes, Oliver Wendell, Jr.; House Un-American Activities Committee; Hughes, Charles Evans; *Hurtado v. California*, 110 U.S. 516 (1884); Incorporation Doctrine; Jackson, Robert H.; Japanese Internment Cases; Jefferson, Thomas; Jehovah's Witnesses and Religious Liberty; Jury Trial; Locke, John; Madison, James; Magna Carta; Marketplace of Ideas Theory; Marshall, John; Marshall, Thurgood; Meiklejohn, Alexander; Mill, John Stuart; Murphy, Frank; National Abortion Rights Action League (NARAL); 9/11 and the War on Terrorism; *Olmstead v. U.S.*, 277 U.S. 438 (1928); Paine, Thomas; Penumbra; Preferred Position; Privacy; Privacy, Theories of; Privileges and Immunities (XIV); Rehnquist, William H.; Religious Tests for Officeholding (Article VI, Cl. 3); Right of Privacy; Right to Counsel; Right to Counsel (VI); *Roe v. Wade*, 410 U.S. 113 (1973); Roosevelt, Franklin Delano; Rutledge, Wiley Blount, Jr.; *Schenck v. United States*,

249 U.S. 47 (1919); *Skinner v. Railway Labor Executives' Association*, 489 U.S. 602 (1989); *Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36 (1873); Smith Act; State Constitutions and Civil Liberties; Stone, Harlan Fiske; Substantive Due Process; Taney Court; Terrorism and Civil Liberties; Thirteenth Amendment; Treason; Warren Court; Warren, Earl; *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943) World War I, Civil Liberties in; World War II, Civil Liberties in

THEORIES OF CIVIL LIBERTIES, INTERNATIONAL

Comparing American perspectives on civil liberties with their international counterparts presents numerous problems. First, most American commentators understand civil liberties in terms of civil rights as identified in the American Bill of Rights. The relatively recent shift toward defining these issues as civil liberties reflects the influence of critiques of rights, many of which originate or are strongly grounded in international politics and law. Second, the idea of organizing a polity around a limited set of political or social liberties is largely an American construct. Internationally, civil liberties exist within the larger framework of international human rights, a conceptual system that powerfully shapes and informs the content of those liberties. Moreover, the theory of international human rights has largely absorbed a variety of theories about rights useful in understanding civil liberties. While these theories developed over the course of history, each contributing something to our understanding of civil liberties, they no longer stand as independent bases for political thought or action. Thus, in describing international theories on civil liberties, we are in some sense parsing the historic development of human rights of which American civil liberties are a significant part.

In identifying historically grounded theories of civil liberties, one might proceed through a careful study of the emergence of specific civil liberties. That would, however, limit the discussion of theoretical perspectives to those that already inhere within a specific set of identified civil liberties. This would also miss efforts to expand our definition of civil liberties to include liberties and rights recognized internationally. A better approach attempts to identify theories based upon a broader understanding that civil liberties reflect particular understandings of the relationship between the citizen and the state. Here, we can very briefly identify five significant approaches, each affecting civil liberties in particular

ways. We start with an Aristotelian understanding of the human as a political animal, successively move through a Lockean libertarianism, Montesquian fraternité, Marxist materialism, and international interests and then end with the rights of peoples.

The Right to Govern: Aristotle and the Political Animal

Among the oldest understandings of civil liberties stands the idea that the citizen should exercise the right of self-governance. As articulated by thinkers such as Aristotle in *Politics*, this original understanding of citizenship was extraordinarily limited: male property owners of the dominant ethnic group. It was not universalist in scope and was not strictly rights oriented, though some thinkers attempt to link it with modern human rights movements. Nonetheless, it moved beyond simple ideas of governance through force or power to rest upon an understanding of the state grounded in human nature (i.e., that “man is a political animal”) and structured by reason. As defined by Aristotle, a proper citizen is one who may participate in giving judgment and holding office, a position predicated upon the assumption that the individual possesses or is given the capacities and skills necessary to exercise those tasks (Bk III).

Under this approach, the state will protect certain civil interests insofar as they advance the goals of effective government. Thus, rights in private property are not protected because of any intrinsic interest of the individual property owner, but rather because protecting private property facilitates social coexistence and contributes to the creation of citizens capable of exercising the skills of self-governance. Under this approach, civil liberties such as free speech, freedom of conscience, and freedom of travel would be emphasized for their character-building features consonant with the development of a politically responsible individual. The right of free speech, the right of public assembly, the right to vote and equality (limited to the privileged “citizen”) would be protected as fundamentals necessary for self-governance.

The Libertarian Privilege: Locke and the American Revolution

A second approach to civil liberties, particularly identified with John Locke and the American Revolution,

views government with suspicion and elevates attention on the individual. Specifically, Locke and the American Revolution reflect efforts to counterbalance the totalitarian state through an enhanced understanding of the individual as a rights holder as against the state. Instead of focusing upon the social utility of a claimed civil liberty, this approach seeks to protect those rights possessed by individuals simply because they are human (i.e., natural rights.) Thus, the American Declaration of Independence (1776) speaks of “all men” being created equal and “endowed with certain inalienable Rights [including] Life, Liberty and the pursuit of Happiness.”

While this approach would protect some of the same civil rights as the Aristotelian, such as rights to private property, it is based upon an empowerment of the individual as against the state. Indeed, as argued in the Declaration of Independence, the state “derive [ed it’s] just powers from the consent of the governed,” whose rights predate and stand independent of the state.

In practice, this approach to civil liberties focuses on what Isaiah Berlin labeled the “negative” rights: protections of liberties such as due process of law, rights of counsel, and rights of equality and/or voting insofar as the right protects the interests of the individual.

L’Esprit: Rousseau and the French Revolution

Growing out of the same revolutionary ferment as that of the Americans, the French Revolution took a slightly different tack. While appreciative of the expanding liberties of the American Revolution, the French chose to focus not just on the individual, but upon the community. *Liberté, Égalité, Fraternité* reflects an approach to liberty grounded within the citizenry as social beings with individual and collective interests. Rather than simply viewing the individual in opposition to the state, Rousseau and other French thinkers urged the virtues of the collective wisdom (“*l’esprit*”) and authority of the people.

In some ways this represents a blending of the Aristotelian and Lockean approaches, balancing the Lockean focus on the individual with the Aristotelian concern with the political collective leavened with the belief in the affinity of the people. Thus, the French Declaration of the Rights of Man and the Citizen (1789) not only talks in terms of “the preservation of the natural and imprescriptible rights of man,” but also highlights the sovereignty of the nation, the idea

of law as “an expression of the general will” and the idea that citizens possess “rights and duties.”

This latter perspective, of rights and duties, over the years took on significant meaning as a challenge to the perceived selfishness of rights talk that focused only upon the individual. It was adopted by the Organization of American States as the focus of the American Declaration of the Rights and Duties of Man (1948).

This approach would continue the emphasis upon the civil liberties of the individual. What would change would be the understanding on how those liberties may be limited by the collective interests of the people. For example, while the United States tends to support a relatively absolutist position on free speech, limiting any restrictions on free speech to those that arise out of a clear and present danger, most countries allow limitations based on threats to social order, including restrictions on types of speech like hate speech.

Dialectic Materialism: Marx and the Industrial Revolution

Marx and the industrial revolution represented the first major challenge to the three foregoing theories of civil liberties by radically altering the terms of the argument. Specifically, Marx challenged the idea that governance and the relationship between the state and the citizen is or could ever be separate domains. At the simplest level, Marxists ask the question of whether an individual who lacks adequate food, health care, or housing could ever be deemed to possess or exercise any meaningful liberties. The need for necessities would compel these individuals to withdraw from political engagement or make them subject to easy manipulation by those able to provide them with those necessities.

Taking the analysis a step further, the lack of necessities and the subjection of the individual to the economic demands of capitalism not only disempowers, but also weakens the character of the common citizen identified as the working class. Following the Aristotelian approach, Marxism predicts that the political system will ultimately fail in molding individuals for the successful maintenance of the polity.

This Marxist challenge has forced the United States to grapple with the nature of the relationship between the individual and the state and the extent of state obligations to the individual. Specifically, if the

task of civil liberties is to protect the individual in the role as citizen participating in the self-governance of the state, then to what extent does the state have an obligation to address the economic rights of the individual? Some economic rights fit relatively easily within traditional Lockean understandings of civil liberties. The rights of workers to organize share libertarian and Aristotelian characteristics (i.e., supporting the negative rights of the individual to be left alone to manage his or her life along with the positive character enforcement of the individual seeking to organize as a way of asserting control over economics). Affirmative rights (what Berlin refers to as positive rights) to an adequate job and income are more difficult to fit within traditional understandings.

How is the state to address these affirmative rights or liberties? Affirmative rights require the state to act—to expend public resources for the benefit of individuals. Are these expenditures obligatory or are they political? That is, are they to be compelled by the individual (in the nature of an individual right) or are they simply the subject of political process, answering the demands of the majority? If so, how?

International Human Rights: The World War II Revolution

Throughout history, the relationship between a state and its citizens (including the issue of civil liberties) was exclusively a domestic concern. The horrors of the Holocaust caused a major reassessment of this position based upon the conviction that a state's mistreatment of its citizens represented a threat to international peace and security. This idea led to the inclusion of human rights within the United Nations Charter (1945) (e.g., Preamble, Art. 1 (3), etc.) and to the adoption of the Universal Declaration of Human Rights (1948) (UDHR), the International Covenant of Civil and Political Rights (1966) (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (1966).

The second innovation of this internationalist movement was the conception of human rights in the UDHR, of which civil liberties may be considered a part, as a unitary field—that the protection of civil liberties must also include the protection of the so-called economic, social, and cultural rights. As demonstrated by the subsequent promulgation and ratification of the ICCPR, the United States and a number of liberal Western states were able to resist

this effort. Nonetheless, the UDHR provides strong intellectual support for expanding civil liberties to embrace a larger range of human rights.

People's Rights: The Postcolonial Revolution

The final major theoretical enhancement to civil liberties emerged in the postcolonial world of the 1960s as expressed in the African Charter on Human and Peoples' Rights (1981), though it was foreshadowed in the League of Nations mandate system and the UDHR. Specifically, civil liberties had traditionally focused upon the relationship between the individual and the state. This postcolonial movement demanded that attention be paid to social collectives within the borders of the state or distinguishable from the state. The movement provides recognition of the rights of aboriginal peoples—as a people—within the border of a state, including their right to maintain their language and culture.

Clearly, the recognition of peoples' rights presents an enormous challenge to traditional civil liberties, which focus upon the rights of an individual in terms of how to conceptualize peoples' rights as a civil right (if applicable), but more importantly, how to coordinate the protection of civil liberties and peoples' rights. The former issue, conceptualizing peoples' rights, raises significant questions about who is the appropriate rights holder. Are peoples' rights vested within the collective or may the individual assert a personal interest in the peoples' right? If the right is limited to the collective, what if the collective does not have a collective leadership or organization?

Coordinating civil liberties and peoples' rights is potentially even more troubling. A peoples' right to maintain its culture or identity necessarily involves legislating or regulating the behavior of the collective to sustain that identity. For example, one cannot maintain a language unless one can assure its continued use in education, local government, etc. However, what happens when the exercise of a peoples' right, insofar as it exercises a state-like right, conflicts with the civil rights of a member of that community? This problem commonly arises out of conflicts between the protection of traditional culture and the rights of women to be free of sexual discrimination.

In the United States, issues surrounding peoples' rights not only arise in connection with aboriginal peoples, but may also arise around religious communities with strong ethnic identities. Given the strong

bias toward protecting the individual, these latter protections are generally very weak, if recognized at all.

Summary

The United States has a very strong tradition of civil liberties that is quite distinct from international approaches to this subject. Indeed, the United States often adopts an isolationist approach to international law and takes great pride in claiming the independence of its understanding of civil liberties and offering them as the progenitors of civil liberties for the rest of the world. Nonetheless, international theories have played a significant role in the recognition and development of civil liberties before their emergence in the United States and as they have evolved and continue to develop. Early theories, the Aristotelian and Lockean, contributed to their creation and how they were originally understood. The Rousseauists challenged the interpretation of civil liberties as rights and emphasized the aspect of a concomitant duty arising in connection with rights. Subsequent theories produced pressure to expand the types of rights to be protected to include social, economic, cultural, and peoples' rights.

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References and Further Reading

- African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).
- American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992).
- Aristotle, *Politics* (c. 335–323 BCE).
- Berlin, Isaiah. *Four Essays on Liberty*. New York: Oxford University Press, 1990.
- Charter of the United Nations, 59 Stat. 1031, T.S. 993, 3 Bevans 1153 (1945).
- Declaration of the Rights of Man and the Citizen (1789).
- International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966).
- International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966).
- Locke, John. *Two Treatises on Government* (1688).
- Rousseau, Jean-Jacques. *The Social Contract* (1762).
- Legal Instruments*
- Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948).
- U.S. Declaration of Independence (1776).

THEORIES OF FREE SPEECH PROTECTION

Perhaps more than any other area of American constitutional law, the First Amendment's protection of "the freedom of speech" has been dominated by theory. Specifically, it has been dominated by differing theoretical conceptions of what a well-functioning system of free expression should protect, what it should not protect, what evils it should guard against, and which institution (courts or legislatures) should generally decide these matters. Why has theory dominated free-speech controversies? Part of the answer surely lies in the fact that two other standard sources of constitutional meaning—text and history—offer so little guidance.

The text of the First Amendment is deceptively straightforward. It provides, "Congress shall make no law ... abridging the freedom of speech ..." Justice Hugo Black, who served on the Supreme Court from 1937 to 1971, famously viewed the First Amendment as an absolute command forbidding all government restrictions on speech. For Black, "no law" meant "no law." He explicitly rejected any approach that would "balance" free speech rights against government interests in speech regulation. "I believe that the First Amendment's unequivocal command that there shall be no abridgment of free speech and assembly shows that the men who drafted our Bill of Rights did all the 'balancing' that was to be done," he wrote in dissent in *Konigsberg v. State Bar of California* (366 U.S. 36, 1961). Yet even Justice Black did not rule in favor of all free-speech litigants; for example, he defined "speech" narrowly to mean spoken words.

The absolutist position has never prevailed for textual as well as practical reasons. As a matter of the text, neither the word "abridging" nor the phrase "the freedom of speech" is self-defining. They are terms of art that require interpretation. Does the government "abridge" speech when it selectively funds causes it favors? Or when it conditions the receipt of funds on the recipient's agreement not to speak? Is it within "the freedom of speech" to burn a flag or draft card? To dance in the nude at a commercial establishment? To libel another person? To commit perjury? These are not questions that can be answered authoritatively simply by reading the words of the First Amendment.

For practical reasons, too, the absolutist position has been unattractive. As Justice Felix Frankfurter, who served from 1939 to 1962, wrote in *Dennis v. United States* (341 U.S. 494, 1951): "Absolute rules would inevitably lead to absolute exceptions, and such exceptions would eventually corrode the rules." Free speech is not the only value in the Constitution,

and weighty public interests sometimes counsel in favor of restricting "speech." Once something is defined as within the freedom of speech, perhaps then it is protected. But whether it is defined that way requires some judgment beyond reciting the text.

That judgment could be informed by history—specifically by the intentions of those who drafted and ratified the First Amendment. Yet, perhaps surprisingly, history offers little guidance about what the First Amendment is supposed to mean. At a minimum, the Framers wanted to forbid the practice of censorship by government licensing. When the printing press was first developed, the Crown in England claimed a right to own and control it; any printed material had to be submitted beforehand to a royal censor for approval. It was criminal to publish without the king's imprimatur. This scheme remained in effect in England until 1694 and in the American colonies until 1725. Perhaps this was all that the First Amendment was meant to accomplish. On the other hand, why would Congress enact an amendment only to prevent an evil that had ceased to exist in the colonies sixty-five years before?

Another possible target of the Framers' concern was laws against "seditious libel." English criminal law had punished criticism of the king and government and had even punished speech that had a "seditious tendency." Some scholars have argued that the First Amendment was intended to abolish the common law of seditious libel in addition to barring licensing laws. Evidence against this view is the congressional passage of the Sedition Act of 1798, which banned "false, scandalous, and malicious writing" against the government. Those who objected to the act usually did so on federalism grounds, not free-speech grounds.

Almost no aspect of free-speech jurisprudence is based on the original meaning of the First Amendment. No justice on the Supreme Court has adopted an originalist understanding of free speech. Instead, decision making in free-speech cases has overwhelmingly relied on theorizing about what kinds of speech should enjoy protection in a free and democratic society. Several theories have dominated the development of First Amendment doctrine.

The first dominant theory is that the First Amendment is about the search for *truth*, political and otherwise, in a marketplace of ideas. The basic theory is that airing competing views will help society arrive at the truth on any given issue. Major early proponents of this "truth" theory were John Milton and John Stuart Mill. Milton argued that truth would win in any contest with falsehood. Mill argued that suppressing opinion was wrong, no matter whether the

opinion was true or false. If the suppressed opinion were true, Mill noted, society would lose the advantage of hearing it. If the suppressed opinion were false, he added, society would lose the advantage of the more complete view of truth that would come from its encounter with falsity.

The truth theory and its accompanying metaphor of a “marketplace of ideas” were enormously influential in the development of free-speech jurisprudence in the early twentieth century. In their classic First Amendment opinions, Justice Oliver Wendell Holmes, Jr., and Justice Louis Brandeis leaned heavily on the truth conception. Justice Holmes wrote in *Abrams v. United States* (250 U.S. 616, 1919):

[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market and that truth is the only ground upon which their wishes safely can be carried out. That is at any rate the theory of our constitution.

Eight years later, in *Whitney v. California* (274 U.S. 357, 1927), Justice Brandeis added his view that “freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth.”

Critics of the truth theory have pointed out that truth may not always win in the marketplace of ideas. Even when it does win, it may take a long time, during which a lot of harm will be done. Other critics have noted that the marketplace of ideas, like the marketplace of goods, may be flawed. It may suffer imperfections—like domination by monopolists or by wealthy and entrenched interests—that require government intervention and correction.

Judge Frank Easterbrook of the seventh circuit has rejected these criticisms of the truth conception as a basis for speech regulation. In *American Booksellers Ass’n v. Hudnut* (771 F.2d 323, 1986), a case in which Indianapolis argued that its antipornography ordinance was justified because pornography was effectively “unanswerable” in the marketplace of ideas, Easterbrook also rejected the truth conception. Citing Milton’s and Mill’s views, he wrote:

The metaphor [of the marketplace of ideas] is honored. The Framers undoubtedly believed it. As a general matter it is true. But the Constitution does not make the dominance of truth a necessary condition of freedom of speech.... A power to limit speech on the ground that truth has not yet prevailed and is not likely to prevail implies the power to declare truth.... Under the First Amendment, however, there is no such thing as a false

idea, so the government may not restrict speech on the ground that in a free exchange truth is not yet dominant.

Perhaps the leading theory of free speech in jurisprudence and in academic writing has been the *self-government* theory. Under this theory, free speech exists to help representative democracy function well by focusing on issues of public importance, including criticism of public policy and public officials. The role of free speech, in this view, is to inform democratic deliberation and decision making; it helps make citizens responsible and the republic better. The self-government theory might give less or no protection to perjury, libel, criminal solicitation or incitement, pornography, commercial advertising, and possibly hate speech that denigrates some groups. It has been advocated by many scholars on the Left (for example, Cass Sunstein) and the Right (for example, Robert Bork).

Under this view, political speech—speech intended to contribute to debate about public issues—should enjoy the highest level of First Amendment protection. Regulation of political speech is most harmful because it impairs the ordinary channels for political change. For example, if there are controls on commercial activity, it remains possible to argue that the controls should be lifted or changed. If government closes political argument, on the other hand, the democratic corrective is unavailable. Political deliberation is a precondition for debate about all other matters, like economics.

The self-government theory suffuses the case law on the freedom of speech. Judge Learned Hand, then a federal district judge, argued in *Masses Publishing v. Patten* (244 Fed. 535, S.D. N.Y. 1917) that “tolerance of all methods of political agitation” is “a safeguard of free government.” Justice Brandeis in *Whitney* argued that in government “the deliberative forces should prevail over the arbitrary”; that free speech is “indispensable to the discovery and spread of political truth”; that “public discussion is a political duty”; that such discussion “should be a fundamental principle of the American government”; that the key to “stable government ... lies in the opportunity to discuss freely supposed grievances and proposed remedies”; and that protecting speech involves believing in “the power of reason as applied through public discussion.”

In *Schneider v. State* (308 U.S. 147, 1939), a case striking down an antilittering ordinance that banned distributing leaflets, the Court held that public convenience was “insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions.” In *New York Times v. Sullivan* (376 U.S. 254, 1964), which announced new

restrictions on libel actions by public officials for criticism of their official behavior, the Supreme Court observed that “debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.” The Court even used a self-government rationale for its extension of free-speech protection to advertising in *Virginia State Pharmacy Board v. Virginia Citizens Consumer Council* (425 U.S. 748, 1976). The free flow of commercial information, argued the Court, is “indispensable to the formation of intelligent opinions as to how [the free enterprise system] ought to be regulated or altered.” Thus, “even if the First Amendment were thought to be primarily an instrument to enlighten public decision making in a democracy, we could not say that the free flow of information does not serve that goal.”

To the extent the self-government theory emphasizes protection for political speech, critics point out that it is hard to draw a line around “political speech.” Among other forms of speech that are not directly political, self-government theory might leave unprotected art, literature, and music. Much speech, not just rational debate, indirectly informs democratic decision making. Other critics complain that the self-government rationale for free-speech protection is reductionist, leaving out the role of speech as a tool of self-realization and personal development.

The third prominent theory is that free speech contributes to personal *autonomy*. Under this view, speech is valuable because it helps individuals achieve self-fulfillment, to develop in the way each person thinks best. Speech may also help people develop their capacity for rational decision making. The autonomy approach would give very broad and strict protection not only to political speech but also to art, literature, entertainment, and advertising.

The autonomy theory for protecting speech is also present in numerous decisions of the Supreme Court, though it is a less common theme in First Amendment jurisprudence than is the self-government theory. Though Justice Brandeis emphasized self-government in his *Whitney* concurrence, he also introduced the autonomy rationale. “Those who won our independence,” he wrote, “believed that the final end of the State was to make men free to develop their faculties.” *Stanley v. Georgia* (394 U.S. 557, 1969), which protected an individual’s right to possess otherwise constitutionally unprotected obscenity in the home, is perhaps the Court’s most full-throated defense of the autonomy theory. “The right to receive information and ideas, regardless of their social worth, [is] fundamental to our free society.... If the First Amendment means anything, it means that a State has no business

telling a man, sitting alone in his own house, what books he may read or what films he may watch.”

In *Cohen v. California* (403 U.S. 15, 1971), which struck down a disorderly conduct conviction for publicly wearing a jacket bearing an expletive, the Court observed that “one man’s vulgarity is another’s lyric.” This suggested the moral skepticism and individualism of free-speech law. The Court also noted that “our political system rests” on “the premise of individual dignity and choice.” The Court’s protection of commercial speech has leaned heavily on the value of advertising as a means of enhancing individual choice and has distrusted the regulatory approach of keeping citizens in the dark about commercial information for their own good. “There is an alternative to this highly paternalistic approach,” wrote the Court in the *Virginia Pharmacy* case. “That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them.”

One criticism of the autonomy rationale is that it is too broad. Former law professor and judge Robert Bork charges that if speech is meant to contribute to self-fulfillment there is no way to distinguish it from other activities that contribute to self-fulfillment, like trading stocks or having sex. There is no principled way to prefer one of these means of achieving self-fulfillment to another, argues Bork. Other critics point to problems with the concept of autonomy. The choices people make in life, they argue, are not wholly autonomous; individual choices are heavily influenced by the options people have, the options they think they have, the resources they command, and the environment in which their preferences develop. Yet another criticism of autonomy theory is that regulating speech might actually promote autonomy—for example, by ensuring that the citizen’s informational environment includes all relevant perspectives in a debate. Much advertising might be designed to overpower rational decision making by individuals and thus, on this view, could be regulated in order to prevent the subversion of the consumer’s autonomy.

Finally, there is a fourth theory of free-speech protection that emphasizes *distrust of government*. While the first three theories point to some affirmative good that may come from protecting speech (truth, good government, or individual autonomy) much free-speech doctrine and academic writing has emphasized this negative reason for strong protection of free speech. Distrust theory argues that even if speech has no positive value it ought not to be regulated because exercises of government regulatory power in this area are presumptively bad. This theory stresses the long

history of foolish and harmful regulation of speech, including infamous decisions to ban books and great works of art.

The distrust theory focuses on three distinct evils of government speech regulation: incompetence, entrenchment, and intolerance. First, free speech guards against *government incompetence*. Distrust theory doubts the state's ability to discover and implement the best informational environment for citizens and its ability to discover and implement what is true and what is false with respect to their best interests in the content of information they receive. It involves an appreciation of the fallibility of political leaders in displacing citizens as the best judges of their own interests.

Second, in the view of distrust theory, free speech guards against *government entrenchment*. A fear embedded in much of our free-speech jurisprudence is that government speech regulation, even when government is competent to discover some objective best interests of citizens' informational environment, will be driven by a desire of incumbents to entrench themselves and the policies they favor. Thus, when the state has adopted an anti-tobacco or anti-gambling public policy, it will not only seek to advance those policies by regulating conduct but will seek to do so through preventing contrary information from reaching the public. Restrictions on speech will insulate the substantive conduct regulations from criticism and democratic debate. Or speech restrictions will substitute for conduct regulation, advancing the state's policy through the especially sinister (because self-insulating) means of controlling information rather than conduct.

Finally, for distrust theory, free speech guards against *government intolerance*. When the government restricts speech, this view holds, it will likely do so to disfavor unpopular ideas. For example, it would be easy enough for the state, under the guise of saving voters from confusion, to regulate political parties in a way that benefits the dominant ones and disfavors the small, unpopular ones.

Critics of distrust theory doubt whether it is really true that government regulations have been more incompetent, harmful, or error prone in the area of speech than in other areas, like the regulation of economic markets. If they are right that government has been equally incompetent (or competent) in speech and nonspeech regulation, that would leave two choices. Perhaps neither speech nor markets should be strictly protected. Thus, the appropriate level of protection for either would be left to political resolution. This position is advocated by those who see imperfections in speech and economic markets

that need correcting. Alternatively, perhaps speech and markets should be strictly protected by the judiciary from government regulation. This approach is favored by libertarians.

The Supreme Court has never chosen a single theory of free-speech protection to guide its decisions. Each of the theories discussed here has appeared in First Amendment jurisprudence at different times and for different purposes. None by itself adequately explains all of free-speech law in the United States, but each gives insight into what has led to fairly robust protection overall for expression. Collectively, these theories offer a rich account of why speech is treated as a special civil liberty.

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References and Further Reading

- Baker, C. Edwin, *Scope of the First Amendment Freedom of Speech*, UCLA L. Rev. 25 (1978).
 Black, Hugo. *A Constitutional Faith*. 1961.
 Bork, Robert, *Neutral Principles and Some First Amendment Problems*, Ind. L. J. 1 (1971): 47.
 Cafee, Zechariah, Jr. *Free Speech in the United States*. 1941.
 Carpenter, Dale. *The Antipaternalism Principle in the First Amendment*, Creighton L. Rev. 579 (2004): 37.
 Coase, R. H. "The Market for Goods and the Market for Ideas." *Am. Econ. Rev.* 64 (1974).
 Garvey, John H., and Frederick Schauer. *The First Amendment: A Reader*. 2nd ed., 1996.
 Levy, Leonard. *Legacy of Suppression: Freedom of Speech and Press in Early American History*. 1960.
 Meiklejohn, Alexander, *The First Amendment Is an Absolute*, 1961 Sup. Ct. Rev. 245.
 Redish, Martin, *The Value of Free Speech*, U. Pa. L. Rev. 130 (1982): 591.
 Schauer, Frederick. *Free Speech: A Philosophical Enquiry*. 1982.
 Sullivan, Kathleen M., *Free Speech and Unfree Markets*, UCLA L. Rev. 42 (1995): 949.
 Sullivan, Kathleen M., and Gerald Gunther. *First Amendment Law*. 2nd ed. 2003.
 Sunstein, Cass R. *Democracy and the Problem of Free Speech*. 1993.

Cases and Statutes Cited

- Abrams v. United States*, 250 U.S. 616 (1919)
American Booksellers Ass'n v. Hudnut, 771 F.2d 323 (1986)
Cohen v. California, 403 U.S. 15 (1971)
Dennis v. United States, 341 U.S. 494 (1951)
Konigsberg v. State Bar of California, 366 U.S. 36 (1961)
Masses Publishing v. Patten, 244 Fed. 535 (S.D. N.Y. 1917)
New York Times v. Sullivan, 376 U.S. 254 (1964)
Schneider v. State, 308 U.S. 147 (1939)
Stanley v. Georgia, 394 U.S. 557 (1969)
Virginia State Pharmacy Board v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976)
Whitney v. California, 274 U.S. 357 (1927)

THEORIES OF PUNISHMENT

The Primary Civil Liberty Issue

When someone gives us a gift, we naturally express our thanks. We rarely ask, “Why?” In contrast, when someone intentionally hurts us, perhaps by use of violence, we naturally demand an explanation. We are apt to ask, “Why me? Why this? Did I deserve this?” We feel rightly aggrieved unless we receive a good justification.

When society convicts and punishes a person for a crime, it, too, intentionally hurts that individual. The conviction represents the community’s condemnation of the convicted person’s wrongdoing and, at least indirectly, of the person. The conviction stigmatizes the wrongdoer, a real if intangible harm. Moreover, a criminal conviction for a serious offense in the United States nearly always entails loss of liberty by imprisonment or, in the case of murder, potentially the ultimate deprivation of liberty, loss of life. These denials of liberty (which are imposed in our name, as members of the community) demand a justification.

Why do we intentionally hurt persons who commit crimes, by punishing them? This is the most critical civil liberty question regarding any criminal justice system. Generally speaking, two theories of punishment imperfectly seek to provide justification for the restrictions on civil liberties that arise in the criminal justice system: utilitarianism and retributionism (or “retributivism”).

Utilitarianism

The premise of classical utilitarianism, formulated by Jeremy Bentham in the nineteenth century, is that the goal of all laws is to maximize the net happiness of society. Laws should be enacted and enforced, as much as possible, to exclude all unpleasant events. To a utilitarian, crime is unpleasant and undesirable, but so is punishment. Ideally, neither crime nor punishment would exist in the world; since some persons are inclined to commit crimes, however, utilitarians believe that pain inflicted by punishment is justifiable if, but only if and to the extent that, it will result in a greater reduction of pain in the form of future crime.

According to Bentham, the mere threat of imposition of punishment—often by observing it inflicted on others—can significantly reduce crime because

humans are rational calculators. They seek to augment their happiness and avoid unpleasantness. Therefore, they will avoid committing crimes if they believe that the risk of apprehension, conviction, and ultimate punishment is greater than the foreseeable benefits to them from the intended crime. This form of utilitarianism is called “general deterrence.” Crime is also deterred directly by incarcerating a criminal because wrongdoers cannot commit crimes in the outside society during the period of incarceration (“specific deterrence by incapacitation”) and, if released, the individual may be deterred from further crime as a result of the memory of the prior unpleasant experience (“specific deterrence by intimidation”).

Another, more modern version of utilitarianism is commonly called “rehabilitation.” Like classical utilitarians, the goal of rehabilitationists is to reduce future crime, but they would do so by diagnosing the cause of the wrongdoer’s conduct (e.g., drug addiction, illiteracy, mental illness) and then curing the problem.

Retributionism

Some persons would argue that retributionism stems from biblical teachings of *lex talionis* (an eye for an eye). Immanuel Kant’s writings in the eighteenth century, however, are most commonly cited in philosophical support of retribution. In disrepute in the United States during the early and middle twentieth century, retributivism experienced a renaissance in the latter decades of the last century.

Retributionists consider punishment proportional to the seriousness of the offense morally required as a response to wrongdoing, even if it does not result in future reduction in crime. Retributivism is often justified as follows: Rules (laws) forbid various forms of injurious or morally objectionable conduct; compliance with these rules burdens each member of society who exercises self-restraint. This self-restraint in turn benefits everyone by promoting what Herbert Morris describes in *Persons and Punishment* as “noninterference by others with what each person values, such ... as continuance of life and bodily security.” Punishment of offenders is justified because the wrongdoer is a free rider by renouncing a burden imposed on all while benefiting from others’ self-restraint. Punishment helps return a moral equilibrium to society. By paying a debt to society through punishment, the wrongdoer may return to the community, back in moral balance with others.

Additional Civil Liberty Issues

Even if utilitarianism plausibly justifies restricting criminals' civil liberties, critics of the theory argue that it can also justify the intentional punishment of innocent persons. For example, assume that a murder occurs in a racially divided town. The victim is white and a rumor spreads that the killer is African American. Assume as well that as a result of racist activity in the community, a white mob threatens immediately to burn down the homes of black citizens and kill the inhabitants in order to exact revenge. The sheriff does not have adequate personnel to stop the mob, but is convinced that if he or she arrests a particular homeless African American for the crime and promises quick trial, the mob will be satisfied. Might a utilitarian sheriff determine that framing the innocent man is justified, since the pain to one innocent person will result in benefit to countless others who would have been victims of the mob?

Utilitarians commonly reject this suggestion by arguing that such hypothetical situations are unrealistic. They suggest, for example, that the sheriff could arrest the homeless man and release him later, prior to trial; even if the trial was held, there is too great a risk that the sheriff's conduct would later be discovered, which would result in counterutilitarian disrespect for the law. Despite these arguments, many utilitarians concede that, at least in theory, their philosophy allows for such an outcome.

A second concern regarding utilitarianism relates to practice, not theory. Many state legislatures in the late twentieth century enacted recidivist statutes ("three strikes" laws). These laws result in enhanced punishment of second- and third-time offenders; sometimes the third-time offender receives life imprisonment for any felony. Lawmakers justify these laws on the utilitarian ground that repeat offenders need this additional incapacitation because they have proven undeterrable. Utilitarians are themselves often critical of such legislation because the statutes are over- and underinclusive (some first-time offenders are far more likely to repeat than some repeat offenders); even when the right persons are incarcerated, such laws are often extreme (retaining persons in prison long past the age they are likely to re-offend, thus inflicting needless pain on them and costing the society for unnecessary incarceration).

Some civil libertarians are also concerned about rehabilitation theories. As humane as the concept sounds, a penal system that seeks to "treat" or "cure" offenders is demeaning to the dignity of such individuals—treating them as sick persons, unable to

make free-will choices—and ultimately oppressive because freedom is tied to cure, not to the proportionality of the crime or even the dangerousness of the offender.

Retributionism is free of the preceding civil liberty concerns. By definition, retributivism would never justify punishment of an innocent person, since the basis of punishment is prior wrongdoing. Recidivist laws are usually not defended on retributive grounds, since they almost always result in punishment disproportional to the most recent crime committed. Retribution is premised on the belief that people generally have free will and thus can be held responsible for their wrongdoing; therefore, the fear of some civil libertarians that rehabilitation can result in disproportional loss of liberty is ameliorated.

Retributivism is also subject to civil libertarian criticism. Utilitarians argue that any theory of punishment that justifies imprisonment or death, even though it will do no future good, promotes senseless cruelty. Whether one treats the issue as a constitutional question or simply one of good public policy in a secular, liberal democracy such as the United States, critics argue that government denial of individuals' freedom should not be justified in the absence of a compelling state interest. Prevention of future crime—the utilitarian goal—might be such a compelling state interest, but, it is claimed, retributionists offer nothing more tangible than a "balancing of the moral equilibrium."

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References and Further Reading

- Bayles, Michael D., ed. *Contemporary Utilitarianism*. Garden City: Anchor Books, 1968.
- Bentham, Jeremy. *An Introduction to the Principles of Morals and Legislation*. New York: Hafner Publishing Co., 1948.
- Binder, Guyora. *Punishment Theory: Moral or Political?* *Buffalo Criminal Law Review* 5 (2002): 321–371.
- Dolinko, David. *Three Mistakes of Retributivism*, *UCLA Law Review* 39 (1992): 1623–1657.
- Dressler, Joshua. *Understanding Criminal Law*. 3rd ed. New York: Lexis Publishing Co., 2001.
- Husak, Douglas N., *Retribution in Criminal Theory*, *San Diego Law Review* 37 (2000): 959–986.
- McCloskey, H. J. "Utilitarianism and Retributive Punishment." *Journal of Philosophy* 64 (1967): 91–110.
- Moore, Michael S. "The Moral Worth of Retribution." In *Responsibility, Character, and the Emotions*, edited by Ferdinand Schoeman, 179–219. Cambridge: Cambridge University Press, 1987.
- Morris, Herbert. "Persons and Punishment." *The Monist* 52 (1968): 475–501.
- Murphy, Jeffrie G. "Retributivism, Moral Education, and the Liberal State." *Criminal Justice Ethics* 4 (Winter/Spring 1995): 3–11.

Reiss, Hans, ed., and H. B. Nisbet, trans. *Kant's Political Writings*. Cambridge: Cambridge University Press, 1970.
 von Hirsch, Andrew. *Doing Justice: The Choice of Punishments*. Boston: Northeastern University Press, 1976.

See also **Bill of Rights; Structure; Capital Punishment; Capital Punishment: Executions of Innocents; Mandatory Minimum Sentences; Sentencing Guidelines; Theories of Civil Liberties**

THIRTEENTH AMENDMENT

The Thirteenth Amendment to the Constitution is remarkably compact. In one short sentence, it forever ended slavery in the United States: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." A second section added an entirely new concept to the American Constitution by declaring that "Congress shall have the power to enforce this article by appropriate legislation." No other amendment had explicitly enhanced the powers Congress. Rather, the Bill of Rights had limited the powers of Congress or was at best a declaration of how laws ought to be in the United States. But the Thirteenth Amendment was different, explicitly granting Congress powers of enforcement.

Equally significant, the amendment altered the traditional relationship between the states and the federal government. Under the Constitution of 1787 the states were free to define the status of all people within their jurisdiction. The only exception to this was that Congress retained the power to regulate the naturalization of aliens. But the Thirteenth Amendment dramatically altered the status of millions of Americans. For the first time in the history of the nation, the national government had the power to regulate the status of individuals within the nation.

The amendment grew out of secession and the Civil War. By the time President Abraham Lincoln took office seven states had formally seceded from the Union and declared they were now part of a new nation, the Confederate States of America. In his first inaugural address Lincoln tried to assure the South that he was not a threat to slavery. He noted:

Apprehension seems to exist among the people of the Southern States that by the accession of a Republican Administration their property and their peace and personal security are to be endangered. There has never been any reasonable cause for such apprehension. Indeed, the most ample evidence to the contrary has all the while existed and been open to their inspection. It is

found in nearly all the published speeches of him who now addresses you. I do but quote from one of those speeches when I declare that "I have no purpose, directly or indirectly, to interfere with the institution of slavery in the States where it exists. I believe I have no lawful right to do so, and I have no inclination to do so."

However, despite his pleas for peace and a return to the normal relations within the Union, the new Confederate nation moved forward and in April initiated hostilities against the United States by firing on Fort Sumter in the harbor of Charleston, South Carolina. Thus, the war began and four more slave states left the Union.

From the moment the war began, an increasing number of northerners wanted to make the conflict into a crusade against slavery. President Lincoln wisely ignored these demands, reiterating his view that he had no constitutional power to end slavery. More importantly, he understood that he could not move against slavery and hope to keep the southern border states—Maryland, Delaware, Kentucky, and Missouri—in the Union. Thus, shortly after the war began Lincoln quickly countermanded General John C. Fremont's attempt to end slavery in Missouri. Later, when a group of ministers told Lincoln he would have God on his side if he ended slavery, the president allegedly responded: "I would like to have God on my side, but I must have Kentucky."

In the first Confiscation Act, passed on August 6, 1861, Congress authorized the confiscation and emancipation of any slaves used by the Confederates for military purposes, such as building forts or transporting supplies. The Second Confiscation Act, passed July 17, 1862, declared that all slaves owned by persons participating in the rebellion would be emancipated. By this time Lincoln had already concluded that he could free slaves everywhere in the confederacy, under his power as commander in chief of the Army. In September 1862, he issued the preliminary Emancipation Proclamation, declaring that in one hundred days, he would free all slaves in the Confederacy unless the rebellious states returned to the Union. Of course Lincoln knew that this would not happen and so on January 1, 1863, Lincoln issued the Emancipation Proclamation, which freed slaves living within the Confederacy. This proclamation applied to the vast majority of American slaves, but did not affect slaves in loyal slave states of Maryland, Kentucky, Delaware, and Missouri, as well as parts of Virginia and Louisiana that were under the control of the United States.

From the moment he issued the proclamation, Lincoln was concerned about its constitutionality. Slavery was clearly protected by the Constitution. This was understood by almost all legal scholars and

THIRTEENTH AMENDMENT

politicians, North and South, at the beginning of the war. Virtually all legal scholars agreed that neither Congress nor the president had the power to end slavery in the states. The Supreme Court, in *Dred Scott v. Sandford* (60 U.S. 393, 1857) had emphatically supported this position as well, asserting slaves were a form of property explicitly protected by the Constitution. While Lincoln relied on the war power to issue the proclamation he was concerned that the Supreme Court would rule he lacked such powers. Indeed, as long as Roger B. Taney remained chief justice, the validity of the proclamation would be in doubt.

Lincoln feared that as soon as the war ended the Court would rule that the Emancipation Proclamation was unconstitutional. The *Dred Scott* precedent loomed large in this thinking. In that case Chief Justice Taney held that the Fifth Amendment to the Constitution prevented Congress from freeing slaves brought into the federal territories. If freeing a few slaves in the territories was an unconstitutional “taking” of private property without just compensation, then surely the Court might conclude that freeing millions of slaves during the war was also a taking.

Thus, in 1864 Senator Lyman Trumbull of Illinois, a longtime friend and political ally of the president, introduced the Thirteenth Amendment in Congress. This amendment would not only end slavery in the Confederate states, but also in the loyal slave states. By this time, however, slavery was virtually dead in those states and there was no chance that Kentucky or Missouri would leave the Union to join the crumbling Confederacy. In addition, by this time the U.S. Army had already brought freedom to hundreds of thousands of slaves in the Confederacy, and significant numbers of former slaves had been inducted into the army and were fighting to restore the Union and end slavery. Thus, Trumbull proposed his amendment to end slavery everywhere in the United States.

The Senate passed the amendment in December 1864 and sent it to the House. However, lame-duck House Democrats opposed the amendment and the Republicans in the House lacked the two-thirds majority to send the amendment on to the states. In his annual message, on December 6, 1864, Lincoln urged the House of Representatives to reconsider this vote and noted that the election results made clear that “the next Congress will pass the measure if this [Congress] does not.” Lincoln then successfully lobbied some northern Democrats to change their votes; on February 1, 1865, the House passed the amendment with the necessary two-thirds majority and it went to the states. On December 6, 1865, the amendment was ratified, and on December 15 Secretary of State William H. Seward announced this result to the nation.

As part of the price of losing the war, the legislatures of the former Confederate states ratified the amendment, although without much enthusiasm. The white leaders of these states—many of them former Confederate office holders and leaders—fully understood that their states would not be readmitted to the Union unless they ended slavery. The realists in the South must also have understood that it would be impossible to re-enslave the millions of now free people, especially since there were about one hundred fifty thousand black soldiers and veterans in the South who were armed and prepared to defend their newly acquired liberty. In the loyal slave states, however, there was no such necessity and Delaware stubbornly refused to ratify the amendment or end slavery on its own. Slavery did not end in that state until the amendment was ratified. In 1901, the state would symbolically ratify the Thirteenth Amendment and the other two Civil War amendments.

The language of the amendment was significant in three ways. First, it specifically empowered Congress to enforce the amendment with “appropriate legislation.” This open-ended language could have led to a massive federal intervention to preserve freedom. Second, the amendment was *not* limited to regulating government action. The Bill of Rights had limited the actions of the national government; the Fourteenth Amendment, which would be passed by Congress only a few months after the thirteenth was ratified, would limit state action. The Thirteenth Amendment, however, prohibited the *status* of slave, without regard to who or what created that status. Thus, under the amendment, Congress could limit state action or go after individuals who might try to enslave people. The third important part was tied to this last point. The limitation in the amendment went beyond chattel slavery, as it had been known in the antebellum South, and prohibited all forms of “involuntary servitude.” This could include coercive contract, debt peonage, and labor conditions that forced people to work against their will.

The meaning of the amendment was unclear at the time of its adoption. Some leaders believed it was narrowly confined to the antebellum system of slavery—the owning, buying, and selling of people. But many Americans and most Republicans (the authors and supporters of the amendment) thought it had a much broader reach. Republican leaders like Senator Charles Sumner of Massachusetts and Representative Thaddeus Stevens of Pennsylvania believed the amendment allowed them to secure black civil and political rights. Ultimately, the Supreme Court would accept some of this analysis, concluding that the amendment prohibited “badges of slavery,” such

as state-imposed limitations on property ownership, contracts, and mobility.

Many Republicans also believed that representative democracy was not possible if large portions of the population were disfranchised and no one in their community had any access to political power. These Republicans understood, as did most Americans at the time, that the franchise might not be available to everyone. Restrictions based on citizenship, wealth, age, and gender seemed appropriate, but they believed that a representative democracy could not exist if large portions of the population were excluded from the political process.

The amendment raises a series of civil liberties issues. On one hand, the Thirteenth Amendment can be seen as the single most important expansion of civil liberty in American history. It secured freedom for nearly four million Americans who had previously been held as slaves. The first step to civil liberty is in fact liberty itself, which is what the amendment gave many Americans. But the amendment did not, in the end, preserve the civil liberties of former slaves. It did not guarantee the freedom of speech or assembly or fair trials. Freedom would have been hollow without the ability to protect that freedom and to participate freely in the economy and in politics. As noted, some Republican leaders thought the amendment did this, but others clearly saw that it did not, and thus Congress soon sent the Fourteenth and Fifteenth Amendments to the states. Ironically, the Thirteenth Amendment can also be seen as a violation of the civil liberties of slave owners, in that it took their property from them. Such an analysis might seem perverse, but the former masters of the Confederacy were bitter about losing the vast amount of wealth their slaves represented.

In addition to prohibiting slavery—the actual owning of people—the Thirteenth Amendment banned “involuntary servitude,” which would later be extended to debt peonage, various kinds of contract labor, and coercing immigrants to work to pay off the cost of coming to the United States. In 1867, Congress passed the *Peonage Act* to abolish the historic system of peonage in the New Mexico Territory. However, the act applied to the entire nation. In the late nineteenth and early twentieth centuries southern states developed a coercive economic system—often called debt peonage—supported by the police and prosecutors, that forced people to remain on the land while keeping them in perpetual poverty. In *Clyatt v. United States* (197 U.S. 207, 1905) the Supreme Court upheld a prosecution of individuals who held blacks in semi-slavery. In *Bailey v. Alabama* (219 U.S. 219, 1911) the Court struck down a state law that allowed people to

be forced to work to pay off debts. The Court reached a similar conclusion in *United States v. Reynolds* (235 U.S. 133, 1914), which struck down Alabama’s criminal surety laws. As late as the 1930s, blacks were illegally held in peonage in the South.

An aspect of this part of the amendment that the framers did not anticipate would be harmful to the former slaves and their children. The amendment allowed involuntary servitude “as a punishment for crime whereof the party shall have been duly convicted.” In the late nineteenth century southern states would use law enforcement as a method of controlling black labor and reducing hundreds of thousands of free blacks to a form of slavery. Blacks would be convicted of small and frivolous crimes. When they could not pay their fines, they would be sold to employers, who would use them as free laborers until their fine was paid off by their labor. Alternatively, southern states sentenced poor people, usually but not always, blacks, to work as convict laborers, where their involuntary servitude enriched the state, rather than private parties.

In the mid-twentieth century, the court would find yet one more use for the amendment: to strike down discrimination in housing. In *Jones v. Alfred H. Meyer, Co.* (392 U.S. 409, 1968) the Court held that the refusal of a white-owned real estate company to sell a house to a black was a violation of the Thirteenth Amendment because it was private action that constituted a “badge of slavery.” Slaves could not own property, so to refuse to sell to blacks was a carryover from slavery. In the more recent years, immigrants have been held against their will to work in sweatshops, on rural farms, and in the sex and prostitution industries. To this day federal prosecutors use the Thirteenth Amendment and statutes passed to enforce it to prosecute people holding others in involuntary servitude.

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References and Further Reading

Hyman, Harold M., and William M. Wiecek. *Equal Justice under Law: Constitutional Development, 1835–1875*. New York: Harper and Row, 1982.

ten Broek, Jacobus. *The Antislavery Origins of the Fourteenth*. Berkeley: University of California Press, 1951.

Cases and Statutes Cited

Bailey v. Alabama, 219 U.S. 219 (1911)
Clyatt v. United States, 197 U.S. 207 (1905)
Dred Scott v. Sandford, 60 U.S. 393 (1857)
Jones v. Alfred H. Meyer Co., 392 U.S. 409 (1968)
United States v. Reynolds, 235 U.S. 133 (1914)

THOMAS, CLARENCE (1948–)

Clarence Thomas, the second African American to serve on the Supreme Court of the United States, was born in 1948 in the economically deprived town of Pin Point, Georgia. Abandoned by his father and given up by his mother, Thomas was raised by his maternal grandparents in a segregated society. Through hard work, sacrifice, and sheer force of will—his own and that of his grandfather—he graduated with honors from the College of the Holy Cross in Worcester, Massachusetts, and then from Yale Law School in New Haven, Connecticut. He held a number of government posts prior to being appointed in 1991—after a bitter confirmation battle—to the nation’s highest court, including the chairmanship of the U.S. Equal Employment Opportunity Commission. Justice Thomas is most famous for his civil rights opinions, especially those criticizing affirmative action. He has written a number of important civil liberties opinions as well.

Justice Thomas’s most significant free speech opinion is almost certainly his concurring opinion in the 1996 commercial speech case *44 Liquormart, Inc. v. State of Rhode Island* (517 U.S. 484, 1996), in which he called for the abandonment of the distinction in the level of judicial protection afforded to commercial and noncommercial speech. He wrote: “Nor do I believe that the only explanations that the Court has ever advanced for treating ‘commercial’ speech differently from other speech can justify restricting ‘commercial’ speech in order to keep information from legal purchasers so as to thwart what would otherwise be their choices in the marketplace.” Thomas reiterated his call for increased judicial protection of commercial speech in three subsequent cases: *Glickman v. Wileman Bros. & Elliot* (1997), *Greater New Orleans Broadcasting Association v. United States* (1999), and *Lorillard Tobacco Company v. Reilly* (2001). No other member of the Court has concurred in his reasoning.

Justice Thomas has taken an equally dramatic position in three cases involving political speech. In *Colorado Republican Federal Campaign Committee v. Federal Election Commission* (1996), *Nixon v. Shrink Missouri Government PAC* (2000), and *Federal Election Commission v. Colorado Republican Federal Campaign Committee* (2001), he called, in a series of dissenting and concurring opinions, for the overruling of *Buckley v. Valeo* (424 U.S. 1, 1976), the landmark Burger Court decision that, among other things, upheld *Federal Election Campaign Act* provisions limiting contributions by individuals to any single candidate for federal office. He insists that *Buckley* was a “flawed decision” riddled with “analytic fallacies” and that it was inconsistent with the framers’ position

that political speech is the “primary object” of First Amendment protection.

As Justice Thomas’s political speech opinions make plain, he is not afraid to call for the overruling of precedent. His one-paragraph concurring opinion in *Eastern Enterprises v. Apfel* (524 U.S. 498, 1998) is further proof. In that case Thomas joined the controlling opinion of the Court that the federal statute in question effected an unconstitutional taking. He wrote separately to suggest that the case could have been decided on the basis of the *ex post facto* clause because that clause should be applied in the civil context and not simply the criminal context. *Calder v. Bull*, which was decided in 1798 and was one of the early Court’s most important decisions, limited the clause to the criminal context, but Justice Thomas stated that he would be willing to overrule the more than two-hundred-year-old precedent.

The justice also has written powerful opinions in the areas of religious freedom and abortion. For example, he joined the Court’s opinion in *Rosenberger v. University of Virginia* (515 U.S. 819, 1995) striking down a state university’s policy that forbade student activities fees from being used to fund student groups engaged in religious activities. He wrote separately to make clear that, in light of his reading of history, the establishment clause of the First Amendment only forbids direct government aid to a favored religion.

With respect to abortion, Justice Thomas penned a strong dissent in the “partial birth” abortion case *Stenberg v. Carhart* (530 U.S. 914, 2000). He called that procedure “infanticide” and declared that *Roe v. Wade* (1973), the Burger Court’s polarizing abortion decision, was “grievously wrong.”

Justice Thomas was the most conservative member of the Rehnquist Court, and all of his major civil liberties opinions during his ten-plus years of service have generated strong reaction from other members of the Court, scholars, interest groups, and the press. However, his most controversial opinion was issued during his first term. The case, *Hudson v. McMillian* (1992), found the Court holding that a prisoner need not always suffer a “significant” injury to prevail on an Eighth Amendment’s cruel and unusual punishments claim. The justice did more than disagree with the Court’s conclusion: He spent eleven pages in the U.S. Reports explaining why, as a matter of constitutional text and history, the Eighth Amendment does not apply at all to the conditions of a prisoner’s confinement.

If one relied solely upon what his critics said that Thomas said in his *Hudson* dissent, one might be left with the impression that the justice would have personally taken a few swings at the prisoner in question

if he had been in the room when the guards assaulted him. Nothing could be further from the truth. Thomas condemned the mistreatment of prisoners in the strongest possible terms. He simply argued that state law and perhaps other provisions of the federal Constitution were where prisoners should turn for redress.

More recently, some commentators have begun to take seriously Justice Thomas's contributions to civil liberties jurisprudence. For example, famed liberal columnist and First Amendment icon Nat Hentoff, who had proclaimed during the justice's early years on the Court that "no new justice has ever done so much damage so quickly," now maintains that he is the Court's staunchest defender of the freedom of speech.

The vast majority of the justice's civil liberties opinions have been concurring and dissenting opinions. However, he has begun to persuade some of his colleagues on the Court, as he also has done with at least some of his former critics, of the power of his vision of the Constitution's civil liberties guarantees. Justice Thomas is still a relatively young Supreme Court justice and only time will tell how much he can shape this fundamental area of American law.

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References and Further Reading

- Gerber, Scott Douglas. *First Principles: The Jurisprudence of Clarence Thomas*. New York: New York University Press, 1999; expanded edition, 2002.
- Hentoff, Nat. "First Friend: Justice Clarence Thomas Has Written as Ardently in Defense of Free Speech as Liberal Icon William Brennan, Jr. Ever Did." *Legal Times*, 3 (July 2000): 62.

THORNBURGH v. ABBOTT, 490 U.S. 401 (1989)

For prisoners, the 1987–1989 period represented a watershed: the Supreme Court decided three cases—*Turner v. Safley* (482 U.S. 78, 1987), *O'Lone v. Estate of Chabazz* (482 U.S. 342, 1987), and *Thornburgh v. Abbott* (1989)—each of which employed a reasonableness test ill equipped to protect prisoners' First Amendment rights. *Thornburgh*, the last of the *Turner* trilogy of First Amendment cases, addressed prisoners' rights to receive publications prepared by and directly mailed from the civilian community. The *Thornburgh* plaintiffs challenged Federal Bureau of Prisons rules that permitted wardens to reject an entire publication if they found it "detrimental to the security, discipline, or good order of the institution or if it might facilitate criminal activity." The rules

contained two caveats: (1) a publication could not be rejected "solely because its content is religious, philosophical, political, social or sexual or because its content is unpopular or repugnant"; and (2) rejection triggered procedural safeguards.

In upholding the censorship rules, the Court applied the test first used in *Turner v. Safley* ("the *Turner* test"). This lax, deferential test uses the lowest degree of scrutiny by inquiring whether the rule or practice is "reasonably related to legitimate penological interests." Moreover, the test assumes the rule or practice is reasonable. The *Thornburgh* Court concluded the challenged rules satisfied the *Turner* test after it balanced four factors that bring the reasonableness standard into operation. First, the censorship rules were "rationally related" to "the legitimate objectives of prison security, order and discipline." Second, the availability of other publications provided an alternative means of free speech. Third, accommodating the asserted right to receive publications detrimental to safety would impair the rights of others. Finally, no "obvious, easy alternatives" to the challenged censorship rules existed at a "de minimis" cost.

The *Thornburgh* Court insisted that the "reasonableness standard is not toothless." In this regard, the majority opinion stressed that the Federal Bureau of Prisons rules in question required an individualized determination by the warden whether the publication constitutes "an intolerable risk of disorder ... [in] a particular prison at a particular time." The dissent thought differently, calling the test "a 'manipulable' reasonableness standard ... that too easily may be interpreted to authorize arbitrary rejections of literature addressed to inmates." Commentators largely agreed with the dissent. Application of the *Turner/Thornburgh* reasonableness standard by the federal courts of appeal has shown that its "teeth" are actually "false teeth" that can be effectively worn if the court so chooses.

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References and Further Reading

- Frankel, Geoffrey S., *Untangling First Amendment Values: The Prisoners' Dilemma*, *George Washington Law Review* 59 (August 1991): 1614–1646.
- Kuby, Ronald, and William M. Kunstler, *Silencing the Oppressed: No Freedom of Speech for Those Behind the Walls*, *Creighton Law Review* 26 (June 1993): 1005–1025.
- Levine, Samuel J., *Restricting the Right of Correspondence in the Prison Context: Thornburgh v. Abbott and Its Progeny*, *Fordham Intellectual Property, Media and Entertainment Law* 4 (March 1994): 891–927.
- Mannetta, Jennifer A. "The Proper Approach to Prison Mail Regulations: Standards of Review." *New England Journal on Criminal and Civil Confinement* 24 (Winter 1998): 209–248.

Mushlin, Michael B. *Rights of Prisoners*, 3rd ed., vol. 1. St. Paul, MN: West Group, 2002.
The Supreme Court, 1988 Term—Leading Cases, Harvard Law Review 103 (November 1989): 137, 239–249.

Cases and Statutes Cited

O'Lone v. Estate of Chabazz, 482 U.S. 342 (1987)
Turner v. Safley, 482 U.S. 78 (1987)

See also **Abortion; Akron v. Akron Center for Reproductive Services**, 462 U.S. 416 (1983); *O'Lone v. Estate of Chabazz*, 482 U.S. 342 (1987); **Prisoners and Freedom of Speech; Reproductive Freedom; Turner v. Safley**, 482 U.S. 78 (1987)

THORNBURGH v. AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, 476 U.S. 747 (1986)

After the decision in *Roe v. Wade*, 410 U.S. 113 (1973), there were a myriad of legislative responses to *Roe's* holding that the right of privacy encompasses a woman's right to decide whether to terminate her pregnancy. In these responses the states were attempting to determine which restrictions on or regulations of abortion were constitutionally valid. In 1982, the Pennsylvania Legislature enacted the abortion legislation that is the subject of *Thornburgh v. American College of Obstetricians and Gynecologists*. The plaintiffs, a variety of groups and persons interested in limiting restrictions on abortions, brought suit to enjoin the enforcement of the act.

Five members of the Court, with four dissenting, held that the six statutory provisions at issue were unconstitutional. In doing so the Court reaffirmed its holdings in *Roe v. Wade* and *Akron Center for Reproductive Health, Inc. v. City of Akron* (462 U.S. 416, 1983). The state of Pennsylvania defended the statutory provisions on the ground that, as allowed by these cases, the provisions were designed to protect maternal health and/or potential life. The Court, however, found that under the guise of protecting maternal health and potential life the state was attempting to intimidate women into continuing their pregnancies and such is not allowed by the Constitution.

The first two provisions that the Court invalidated concerned the giving of informed consent after the woman was provided with a variety of printed materials. The Court explained that the requirement that a woman's consent be voluntary and informed is proper and constitutional, but the state may not require the delivery of information designed to influence the woman's choice between abortion and childbirth.

The information that the Pennsylvania statute required to be given was designed to do this and therefore was unconstitutional.

The third and fourth provisions required that a physician report the basis for his determination that a fetus is not viable. The required report was to be detailed and to include personal information regarding the woman. The Court indicated that record-keeping and reporting designed to preserve maternal health is acceptable; however, the Pennsylvania statute went far beyond this goal. The Court felt that with such a provision in place a woman would be more reluctant to obtain an abortion because her identity might become public knowledge. Such a burden on the woman's right to choose is unacceptable.

The fifth provision set forth two independent requirements for postviability abortions. The first requirement demanded that a physician exercise the degree of care that he or she would be required to exercise if delivering a child as opposed to aborting it. The second requirement mandates that a physician use an abortion technique that provides the best opportunity for the unborn child to be aborted alive, unless such a technique would present a significantly greater medical risk to the pregnant woman. The Court invalidated both requirements because they required a trade-off between the woman's health and fetal survival and failed to require that the health of the pregnant woman be the physician's prime consideration.

Finally, the sixth provision required that a second physician be present during an abortion if there was a possibility that the unborn child could be viable. The second physician was to take control of the child and try to preserve the child's life and health. The Court found the provision to be unconstitutional because it did not contain an express or implied exception for situations when the woman's health was endangered by delay in the arrival of the second physician.

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Cases and Statutes Cited

Akron Center for Reproductive Health, Inc. v. City of Akron, 462 U.S. 416 (1983)
Roe v. Wade, 410 U.S. 113 (1973)

See also **Abortion; Privacy**

THREATS AND FREE SPEECH

Few areas of First Amendment law illustrate the importance of context as well as that of threatening statements. The rule is straightforward: There is no First Amendment protection for threats, a classic

example of an exception to the general rule of free speech. However, an alleged threat must be looked at in context to determine whether it is a “true” threat or just hyperbole, which is not excepted from free speech protection. In *Watts v. United States*, 394 U.S. 705 (1969), a speaker at an antiwar rally on the Washington Monument grounds, after noting his 1-A draft classification, said, “If they ever make me carry a rifle, the first man I want to get in my sights is LBJ.” A jury found this statement to threaten President Lyndon B. Johnson. The Supreme Court overturned the conviction, saying that, viewed in context, the statement was not a threat but a “crude, offensive” yet protected political statement.

The Supreme Court has also ruled that speech intended to have a coercive impact, such as urging a boycott, is protected speech and not a threat, even if it creates an uncomfortable or menacing environment (*NAACP v. Claiborne Hardware*, 458 U.S. 886, 1982). Thus, an anti-abortion group that asserts that there will be divine retribution for those who engage in abortion is speaking words protected by the First Amendment, as it is when it refuses to condemn the murder of abortion providers by people unaffiliated with their group. However, urging specific acts of violence against abortion providers or making statements that indicate approval of such acts and encouraging more of them in the future (noting possible targets) probably would be considered a threat and unprotected speech (see *Planned Parenthood v. American Coalition of Life Activists*, 244 F.3d 1007, 2001).

When political causes are involved, robust debate will be allowed notwithstanding the discomfort it may cause those who are verbally attacked or a more dispassionate audience. The policy is easily understood. Unless the threat exception to free speech is rigorously limited to direct and credible threats against specific targets, the exception could fairly easily become a convenient vehicle for prohibition of unpopular views under the guise of public protection or a justification for government punishment of strongly expressed unpopular opinions.

Conversely, no legitimate free speech purpose would be advanced by giving true threats—statements advocating imminent illegal conduct—First Amendment protection. True threats “encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals” (*Virginia v. Black*, 538 U.S. 343, 2003). In that case, the Supreme Court held that burning a cross constituted a true threat only when it could be shown that the burning was “used to intimidate.”

Relatively mild words may be considered threatening in a particular context. For example, an employer’s comments that unionization of its work force may cause the plant to close, in the context of an election to unionize, may be ruled a threat. The key to determining whether a true threat has been made is to focus on the question: “What did the speaker intend and the listener understand?” (*NLRB v. Gissel Packing Co.*, 395 U.S. 575, 1969). It is not the literal meaning of the words but their context that is paramount.

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References and Further Reading

NAACP v. Claiborne Hardware, 458 U.S. 886 (1982).
NLRB v. Gissel Packing Co., 395 U.S. 575 (1969).
Planned Parenthood v. American Coalition of Life Activists, 244 F.3d 1007 (9th Cir. 2001).
Virginia v. Black, 538 U.S. 343 (2003).
Watts v. United States, 394 U.S. 705 (1969).

THREE STRIKES/PROPORTIONALITY

In the early 1990s, growing public unease over high crime rates in the United States led many jurisdictions to adopt “three strikes” provisions targeting serious habitual offenders. Although sentencing enhancements for repeat offenders have been on the books throughout U.S. history, the new provisions were more comprehensive, prohibiting plea bargaining in almost all circumstances, imposing harsh mandatory minimum sentences, and eliminating probation and parole for certain repeat offenders. Three strikes laws vary considerably by jurisdiction, but the basic idea is that lengthy incarceration of offenders with one or more serious felony convictions removes from the population those individuals most likely to commit serious crimes in the future. By the mid-nineties, all fifty states and the federal government had some form of habitual offender statute. The most familiar provision was enacted in California in 1994 in the wake of two high-profile murders perpetrated by recidivist offenders. Although California’s three strikes law is harsher than most, the controversy over its constitutionality, effectiveness, and fairness has largely shaped the national debate over contemporary habitual offender provisions.

Constitutionality

The most significant constitutional challenge to three strikes provisions arises under the Eighth Amendment

prohibition against “cruel and unusual punishments.” Opponents of three strikes note that the harsh sentences imposed for an ordinary third felony will often be disproportionate to the gravity of that offense. For example, in *Lockyer v. Andrade* (538 U.S. 63, 2003), decided by the Supreme Court in 2003, the defendant’s “third strike” was the theft of approximately \$150 in videotapes from two Kmart stores. Because Andrade had previously been convicted of transporting marijuana and of various theft offenses, he was prosecuted under California’s three strikes law and sentenced to two consecutive terms of twenty-five years to life in prison. After serving a mandatory minimum of fifty years, Andrade would become eligible for parole at the age of eighty-seven.

In affirming Andrade’s sentence, the Court reviewed and clarified the proportionality dimension of its Eighth Amendment jurisprudence. In *Weems v. United States* (217 U.S. 349, 1910), the Court invalidated a sentence of fifteen years at hard labor for an offender who falsified a public document, observing that “it is a precept of justice that punishment for crime should be graduated and proportioned to desert.” In subsequent cases, the Court emphasized that reviewing courts should grant substantial deference to legislative authority and judicial discretion in setting criminal punishments. As a result, “successful challenges to the proportionality of particular sentences [should be] exceedingly rare.”

Thus, in *Rummel v. Estelle* (445 U.S. 263, 1980), the Court rejected a challenge to a repeat offender statute that resulted in a mandatory life sentence for a third felony fraud conviction. Among other things, the Court noted, the defendant would be eligible for parole in twelve years. In *Solem v. Helm* (463 U.S. 277, 1983), however, the Court invalidated a habitual offender provision that resulted in a life sentence without the possibility of parole for a nonviolent repeat offender convicted of check fraud. The Court identified three criteria relevant to its analysis: (1) the gravity of the offense and the harshness of the penalty; (2) the sentences imposed on other offenders in the same jurisdiction; and (3) the sentences imposed for similar offenses in other jurisdictions. Acknowledging that “a State is justified in punishing a recidivist more severely than it punishes a first offender,” the Court noted that a life sentence was “the most severe punishment the State could have imposed on any criminal for any crime.” Moreover, the defendant “could not have received such a severe sentence in 48 of the 50 States.”

In *Harmelin v. Michigan* (501 U.S. 957, 1991), the Court upheld a mandatory life sentence without the possibility of parole for possession of 672 grams of cocaine. Although the justices could not agree on a

single rationale, a majority of the Court effectively repudiated *Solem*’s three-part proportionality test. In a concurring opinion, Justice Anthony Kennedy argued that because the Eighth Amendment does not require strict proportionality between crime and sentence, reviewing courts should only make intra- and interjurisdictional comparisons after a threshold finding of “gross disproportionality.” In *Andrade*, the Court adopted Kennedy’s modified proportionality test and declined to compare Andrade’s sentence to those for other offenses in California or for similar offenses in other jurisdictions. Instead, invoking the principle of deference to state legislative and judicial decision making, the Court observed that Andrade’s life sentence, which included the possibility of parole after fifty years, represented a reasonable interpretation of the Court’s proportionality standard as set forth in *Rummel* and *Solem*. Under this extremely deferential standard, “the gross proportionality principle reserves a constitutional violation for only the extraordinary case.”

Policy Considerations

Even if three strikes provisions do not violate the Constitution, their effectiveness remains a source of heated controversy. Proponents point to plummeting violent crime rates in California following enactment of three strikes and conclude that it has achieved the goal of crime reduction. Critics, however, note that crime rates began falling before enactment of three strikes and that rates have not dropped more dramatically in California than in jurisdictions with milder sentencing provisions. In response to critics who contend that the high cost of incarcerating recidivists places a strain on the state budget, proponents maintain that these costs are easily offset by the economic and social gains associated with crime reduction.

Apart from these practical considerations, critics of three strikes argue that it is simply unfair to punish relatively minor felonies as severely as murder, rape, or kidnapping. In response, proponents point to greater selectivity in the application of three strikes laws to only the most deserving offenders. Thus, though support for three strikes remains strong—California voters turned back an effort to repeal the law in 2004—prosecutors have indeed become more selective in applying the law, largely reserving it for violent offenders with substantial criminal records. While this approach responds to the felt need for effective responses to violent crime and the traditional commitment to proportionality, critics contend that it

allows too much discretion for prosecutors and results in wide sentencing disparities within a single jurisdiction.

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References and Further Reading

- Ardaiz, James A., *California's Three Strikes Laws: History, Expectations, Consequences*, McGeorge Law Review 32 (Fall 2000): 1–36.
- Luna, Eric, *Foreword: Three Strikes in a Nutshell*, Thomas Jefferson Law Review 20 (Spring 1998): 1–89.
- Marion, Samara, *Justice by Geography? A Study of San Diego County's Three Strikes Sentencing Practices from July–December 1996*, Stanford Law and Policy Review 11 (Winter 1999): 29–47.
- Tonry, Michael. *Thinking about Crime*. New York: Oxford University Press, 2004.

Cases and Statutes Cited

- Harmelin v. Michigan*, 501 U.S. 957 (1991)
- Lockyer v. Andrade*, 538 U.S. 63 (2003)
- Rummel v. Estelle*, 445 U.S. 263 (1980)
- Solem v. Helm*, 463 U.S. 277 (1983)
- Weems v. United States*, 217 U.S. 349 (1910)
- California Penal Code §§ 667, 1170.12 (West 1999 & Supp. 2000)

See also **Cruel and Unusual Punishment (VIII); Mandatory Minimum Sentences; Proportionality Reviews**

TIBBS v. FLORIDA, 457 U.S. 31 (1982)

In *Burks v. United States*, 437 U.S. 1 (1978), the Supreme Court held that if an appellate court determined that there was insufficient evidence to sustain a conviction, the conviction could be reversed and the defendant could not be retried due to the double jeopardy clause.

In 1974, Florida indicted Delbert Tibbs for first-degree murder, felony murder, and rape. At trial, many issues were raised regarding the accuracy and truthfulness of the state's only witness, Cynthia Nadeau. Nadeau admitted to using drugs just before the crimes occurred. She was also confused on the time of day the crimes occurred. The jury, nonetheless, convicted Tibbs. On appeal, the Florida Supreme Court found many weaknesses in the state's case and called for a retrial. The trial court then dismissed the indictment due to the double jeopardy clause. The Florida Supreme Court discussed the distinction between insufficient evidence and weight of evidence. A reversal of conviction based on the weight of evidence "does not mean that acquittal was the only proper verdict. Instead, the appellate court sits as a

'thirteenth juror' and disagrees with the jury's resolution of the conflicting testimony." Therefore, a retrial was permitted under the double jeopardy clause.

The Supreme Court upheld the Florida Supreme Court, distinguishing between a retrial based on a weighing of the evidence and an appellate court finding that a defendant is not guilty beyond a reasonable doubt. A retrial is permitted only when the reviewing court has not made an independent determination that the evidence does not support a finding of guilt.

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Cases and Statutes Cited

Burks v. United States, 437 U.S. 1 (1978)

See also *Burks v. United States*, 437 U.S. 1 (1978); **Double Jeopardy: Modern History**

TILESTON v. ULLMAN, 318 U.S. 44 (1943)

In the 1920s and 1930s, birth control advocates worked unsuccessfully to repeal a Connecticut law banning the use of contraceptives and prohibiting doctors from giving assistance or counsel in their use. In 1940, the state supreme court rejected their legal challenge to the law in *State v. Nelson* (126 Conn. 412, 11 A.2d 856, 1940), which resulted in the closing of the few birth control clinics that had been opened briefly in the state.

Shortly after that loss, the advocates recruited Wilder Tileston, a quiet sixty-five-year-old Yale Medical School professor and private practitioner in New Haven, to help them with another lawsuit. Tileston found three patients for whom pregnancy would be very harmful or even fatal. Without naming the patients as parties, Tileston's lawyers filed suit in state court. They named as the defendant New Haven County State's Attorney Abraham S. Ullman. Tileston's complaint argued that the state law violated the Connecticut Constitution and the U.S. Constitution, including the Fourteenth Amendment, by depriving Tileston's patients of "life" without due process of law and by depriving Tileston of "property"—the privilege of practicing his profession as a doctor—without due process. The Connecticut Supreme Court, in a three-to-two decision, rejected Tileston's claims and advised that his patients abstain altogether from sex in order to avoid harmful pregnancy.

As the case reached the Supreme Court for oral argument in January 1943, the only claim under

consideration was the one based on the danger the Connecticut law posed to Tileston's patients. At oral argument, the justices were immediately skeptical of the likelihood of enforcement against Tileston's patients and of Tileston's attempt to defend the putative constitutional rights of his patients. Very little of the oral argument even addressed the substance of Tileston's appeal.

The Supreme Court unanimously dismissed the appeal on February 1, 1943, concluding that Tileston had no standing to assert the rights of his patients. In its very brief *per curiam* opinion, the Supreme Court noted that there were "no allegations asserting any claim under the Fourteenth Amendment of infringement of appellant's liberty or his property rights." The only basis for the Fourteenth Amendment claim was the law's threat to the life of Tileston's patients, obviously not to Tileston's life. Thus, the Court did not address the merits of Tileston's substantive due process claim.

After this defeat, birth control advocates in Connecticut continued for the next twenty-two years to urge the state legislature to repeal the anticontraceptives law. But the state legislature, disproportionately controlled by representatives from rural and heavily Catholic districts, rebuffed these attempts. Birth control advocates would also try again in the courts, reaching the Supreme Court in 1961 in *Poe v. Ullman* (367 U.S. 497, 1961) where they would once again lose on technical grounds.

Finally, in 1965, the Supreme Court heard the constitutional merits of their complaint against the Connecticut law in *Griswold v. Connecticut* (381 U.S. 479, 1965). In that decision, the Court held that the Connecticut law was indeed unconstitutional as a violation of the right to privacy.

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References and Further Reading

Garrow, David J. *Liberty & Sexuality: The Right to Privacy and the Making of Roe v. Wade*. New York: Macmillan, 1994, pp. 94–105.

Cases and Statutes Cited

Griswold v. Connecticut, 381 U.S. 479 (1965)
Poe v. Ullman, 367 U.S. 497 (1961)
State v. Nelson, 126 Conn. 412, 11 A.2d 856 (1940)
Tileston v. Ullman, 129 Conn. 84, 26 A.2d 582 (1942)

See also **Due Process**; *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Poe v. Ullman*, 367 U.S. 497 (1961); **Reproductive Rights**

TILTON v. RICHARDSON, 403 U.S. 672 (1971)

On numerous occasions the Supreme Court has addressed the constitutionality of government assistance to religious elementary and secondary schools. Less frequently litigated has been the constitutionality of assistance to religious colleges and other institutions of higher education. *Tilton v. Richardson* is the first of three cases where a closely divided Court struggled with the issue, concluding in each instance that the assistance in question did not violate the First Amendment.

In *Tilton*, the point of contention was federal legislation providing for building construction grants to institutions of higher education. Public and private colleges were eligible, as were secular and religiously affiliated institutions. However, religious institutions became ineligible if any part of a building was used for sectarian instruction or worship. These restrictions remained for twenty years.

Federal taxpayers sued, alleging violations of the establishment and free exercise clauses. They challenged grants to four Roman Catholic colleges to construct a music and drama building, science building, language laboratory, and two libraries. A four-justice plurality of the Court held that the assistance was in most respects constitutional. A fifth and deciding vote was supplied by Justice Byron White, who concurred separately.

The *Tilton* plurality followed the analysis in *Lemon v. Kurtzman* (403 U.S. 602, 1971), decided the same day. Congress's aim in expanding opportunities for students regardless of where they attended college was deemed an appropriate secular purpose. The plurality found that church-related colleges were less permeated with religion than were K through 12 schools, and college students were more critically minded and less subject to religious indoctrination. Furthermore, the assistance was a one-time, single-purpose event, and academic buildings were religiously neutral aid. However, the twenty-year restriction was shorter than a building's useful life. To prevent later diversion of the aid to an inherently religious use, the plurality required that the restriction remain over the life of the facility. In all other respects the establishment clause was not violated.

Plaintiffs also claimed that their federal taxes, a small part of which were appropriated to support higher education including religious colleges, caused them to suffer coercion in violation of the free exercise clause. However, because there was no evidence of how the tax burdened plaintiffs' exercise of religion—central to a *prima facie* case—the plurality held that

the action failed to state a claim under the free exercise clause.

The striking down of the twenty-year provision—while only a small and severable part of the overall legislation—was the first occasion for the Court to overturn a federal law as one contrary to the establishment clause. The Court faced two subsequent challenges involving aid to religious colleges. In *Hunt v. McNair* (413 U.S. 734, 1973), the Court upheld the issuance of tax-exempt revenue bonds for college buildings. The Court in *Roemer v. Maryland Board of Public Works* (426 U.S. 736, 1976; plurality opinion) sustained issuance of general educational grants to private colleges. Accordingly, *Tilton* helped set a pattern, not broken until the end of the century, in which the Court overturned most forms of direct aid to religious K through 12 schools while upholding assistance to religious colleges and universities.

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Cases and Statutes Cited

Hunt v. McNair, 413 U.S. 734 (1973)

Lemon v. Kurtzman, 403 U.S. 602 (1971)

Roemer v. Maryland Board of Public Works, 426 U.S. 736 (1976) (plurality opinion)

See also Establishment Clause Doctrine: Supreme Court Jurisprudence; Free Exercise Clause Doctrine: Supreme Court Jurisprudence; State Aid to Religious Schools; Taxpayer Standing to Challenge Establishment Clause Violations

TIME, INC. v. HILL, 385 U.S. 374 (1967)

Escaped convicts took the Hill family hostage in their home but later released them unharmed. Subsequently, a novel was written depicting considerable violence. The novel was made into a play and *Life* magazine (a subdivision of Time) wrote a story about the play, complete with pictures from scenes staged in the former Hill home, suggesting that the play was an accurate reenactment. N.Y. Civil Rights §§ 50-51 provide for liability when the name or portrait of a living person is used for advertising purposes without consent. Under the statute, the New York courts granted the family damages for a false portrayal of an experience they never suffered. Time, Inc. claimed that the courts' application of the statute denied it constitutional rights to freedom of speech and press.

On appeal, the U.S. Supreme Court, per Justice Brennan, held that absent proof that the publisher knew of the falsities or acted in reckless disregard of the truth, no liability would attach. The dissent

argued that a weaker standard should suffice to satisfy constitutional protections. The significance of the case is that it expanded the discussion of privacy into the constitutional arena, although it did not elevate it above freedom of speech or the press. Also, it extended the *New York Times v. Sullivan* (376 U.S. 254, 1964) malice standard, which had previously only been applied in defamation cases. A further interesting historical footnote was that Richard Nixon was the attorney representing the Hill family in the Supreme Court.

VINCENT J. SAMAR

References and Further Reading

Keck, Matthew C., *Cookies, the Constitution and the Common Law: A Framework for the Right of Privacy on the Internet*, Alb. L. J. Sci. & Tech. 13 (2002): 83.

Stohl, Matthew, *False Light Invasion of Privacy in Docudramas: The Oxymoron which Must Be Solved*, Akron L. Rev. 35 (2002): 251.

Cases and Statutes Cited

New York Times v. Sullivan, 376 U.S. 254 (1964)

TIME, PLACE, AND MANNER RULE

The First Amendment's guarantee of free speech means that the government, with very few exceptions, cannot restrict speech because of its content. The Supreme Court, however, has frequently held that reasonable time, place, and manner restrictions on speech are permissible. As the term suggests, such restrictions regulate when, where, and how speech occurs to minimize interference with important state interests. Such restrictions are valid if they are content neutral, serve a significant government interest, are narrowly tailored, and leave open adequate alternatives for expression.

The Court's time, place, and manner analysis is most commonly associated with the "public forum" doctrine, where the Court has often stressed that even within traditional public forums the state can impose reasonable time, place, and manner restrictions on speech. For example, in *Ward v. Rock against Racism* (491 U.S. 781, 1989), the Court held that New York City could require use of city-provided sound systems and technicians for concerts in Central Park to protect nearby residential privacy. Other time, place, and manner restrictions upheld by the Court have included restrictions on picketing on sidewalks adjacent to schools, restrictions on distributing literature or soliciting funds at a state fair, creation of a buffer zone

around an abortion clinic, and restrictions on placing campaign signs on public utility poles.

The Court's use of the time, place, and manner test is an appropriate balance between the rights of free speech and important state interests. By requiring that ample means of expression are available, the test permits restrictions that impose relatively minor burdens on speech while invalidating restrictions that are overly suppressive. Most importantly, the test requires that restrictions be content neutral, thus guarding against restrictions designed to distort debate or punish unfavorable views.

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References and Further Reading

Chemerinsky, Erwin. *Constitutional Law: Principles and Policies*. 2nd ed. New York: Aspen Law & Business, 2002.

Cases and Statutes Cited

Ward v. Rock against Racism, 491 U.S. 781 (1989)

TINKER v. DES MOINES SCHOOL DISTRICT, 393 U.S. 503 (1969)

Tinker represents the Supreme Court's broadest and most definitive opinion recognizing free speech rights for students in public schools below the university level. The case arose when three students were suspended from public junior high and high schools for wearing black armbands to protest the Vietnam War. In a strongly worded seven-to-two opinion, the Court held that the suspensions violated the students' First Amendment free speech rights. The Court held that wearing armbands to symbolically express antiwar views is akin to "pure speech," and therefore entitled to "comprehensive" First Amendment protection.

The major significance of the case is the Court's extension of comprehensive First Amendment protection to students who expressed their views at school during the school day. According to the Court, students at a public school possess many of the same free speech rights as adults, so long as they exercise those rights in a nondisruptive manner. The most famous quote from the Court's majority opinion underscores this point: "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." This view of the First Amendment also informed the Court's antiauthoritarian view of the general relationship between students and their schools in a state-operated school system:

In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.

The Court acknowledged some limits on student free speech. The key limitation is that the student speech may not "substantially interfere with the work of the school or impinge upon the rights of other students." The Court was careful to emphasize, however, that school authorities may not rely on an "undifferentiated fear or apprehension of disturbance" to overcome the students' right of free speech. According to *Tinker*, student speech cannot be suppressed simply because the speech is controversial and may instigate a verbal response from other students.

In recent years the Court has retreated somewhat from the strong free speech protection announced in *Tinker*. Later cases limit the *Tinker* rule in two important ways. First, in *Bethel School District v. Fraser* (478 U.S. 675, 1968), the Court upheld the authority of public school officials to sanction students who engage in what the officials deem "vulgar" expression. Second, in *Hazelwood School District v. Kuhlmeier* (484 U.S. 260, 1988), the Court held that school authorities can regulate student speech when necessary to pursue legitimate educational objectives. In that case the public school authorities were allowed to dictate the content of student contributions to the school newspaper.

The more important aspect of both cases is the Court's retreat from the broad principles of student speech articulated in *Tinker*. In contrast to statements made in *Tinker*, the Court expressed the opinion in *Fraser* that the First Amendment rights of students in the public schools "are not automatically coextensive with the rights of adults in other settings." Some commentators have argued that statements such as these cut the heart out of *Tinker*, although that decision continues to be cited as the definitive statement of student free speech rights when the speech occurs outside the official curriculum and does not include vulgar or obscene statements.

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References and Further Reading

Abrams, J. Marc, and S. Mark Goodman, *End of an Era? The Decline of Student Press Rights in the Wake of Hazelwood School District v. Kuhlmeier*, Duke L. J. (1988): 706.

Ingber, Stanley, *Socialization, Indoctrination, or the "Pall of Orthodoxy": Value Training in the Public Schools*, U. Ill. L. Rev. (1987): 15.

Nahmod, Sheldon H., *Beyond Tinker: The High School as an Educational Public Forum*, Harv. C.R.-C.L. L. Rev. 5 (1970): 278.

Cases and Statutes Cited

Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675 (1986)
Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260 (1988)

See also Academic Freedom; Bethel School District v. Fraser, 478 U.S. 675 (1986); *Campus Hate Speech Codes; Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988); *Student Speech in Public Schools; Teacher Speech in Public Schools; Urofsky v. Gilmore*, 216 F. 3d 401 (4th Cir. 2001)

TITLE VII AND RELIGIOUS EXEMPTIONS

The Civil Rights Act of 1964 was, and still is, an epic piece of legislation. Each of its chapters acts to protect victims of discrimination, although in different ways. Title II, for example, makes it illegal for places of public accommodation (like hotels, restaurants, and movie theaters) to discriminate on the basis of race, color, religion, and national origin; Title III prohibits the same sort of discrimination in public facilities run by state or local government (like courthouses or jails).

Title VII, known to lawyers as 42 U.S.C. § 2000e, was a pivotal part of the act. It broadly prohibits discrimination in public and private employment on the basis of race, color, religion, sex, and national origin. Employers that hire, fire, or harass people based on these criteria can face lawsuits by victims, as well as prosecution by the Department of Justice and the Equal Employment Opportunity Commission.

Title VII, however, does not apply across the board to all employers. It does not apply at all to foreign employers or employers with fewer than fifteen employees. Most significantly for our purposes, it does not apply fully to religious employers. While Title VII does bar religious employers from discriminating on the basis of race, sex, or national origin, it exempts religious employers from the ban on religious discrimination. Religious employers are therefore free to choose their employees along religious lines.

We turn now to the scope of the exemption, where two questions loom particularly large. First, to what types of employees does it apply? Does it apply only to a church's selection of ministers or does it apply more broadly to any personnel of a church? Second, to what types of employers does it apply? It certainly applies to churches and other similar religious bodies, but does it also apply to nonprofit corporations

loosely affiliated with those churches? What about for-profit corporations that want to take a religious attitude?

The first question has been definitively answered. The original 1964 act exempted religious employers only for employee positions that were religious. A church could use religious criteria in selecting a minister, but not in selecting a janitor. That, however, changed in 1972, when the act was amended to broaden the exemption. As a result of the change, religious employers are now free to use religious criteria in making employment decisions for all employees. This decision sparked some controversy. It was largely accepted that religious organizations needed the ability to choose their leaders. That was part and parcel of their right to exercise their religion freely. But giving them the right to use religious tests for all positions seemed to pit the religious liberty of religious organizations against the religious liberty of their run-of-the-mill employees, like janitors or secretaries, whose day-to-day duties were mostly secular. These arguments came before the Supreme Court in 1987, in *Corporation of Presiding Bishop v. Amos* (483 U.S. 327) when the 1972 exemption was challenged as violating the establishment clause. The Court unanimously upheld the broadened exemption. As a result, religious employers now can use religious criteria in choosing personnel, regardless of their station.

The second question is much more unclear. Under Title VII, an employer is entitled to the religious exemption if it can show it is a "religious corporation, association, educational institution, or society." What that means, however, is somewhat uncertain. On one hand, traditional religious organizations—churches, for example—are certainly exempt. On the other hand, for-profit corporations surely cannot escape religious discrimination suits by suddenly claiming to be exempt religious employers. Ultimately, the key issue courts examine is whether the purpose and character of the organization are really religious in nature. Churches, synagogues, and other traditional religious organizations are clearly religious and therefore exempt. Exempt also are subsidiaries of such organizations, provided the subsidiaries are owned, operated by, or closely affiliated with the parent religious organization. Thus, organizations closely related to the Catholic Church or the Salvation Army will likely be considered exempt religious employers, even if their work is considered secular to some. However, organizations that were not founded for religious purposes or that have mostly secular functions are not likely to be exempt. For-profit corporations are also not likely to be exempt.

The religious exemptions to Title VII have taken on renewed importance in recent years. Programs like

charitable choice now frequently provide religious organizations with government funds to do social-service work. To many, allowing religious organizations to discriminate using federal funds is morally and constitutionally problematic. Whether this argument will be successful in the courts or the Congress is not yet clear.

One last issue should be flagged. As we have said, Title VII only exempts religious employers from the ban on religious discrimination—not the bans on race or sex discrimination. How then is it possible that many established churches, including the Catholic and Mormon churches, many Protestant denominations, and schools of Judaism, Buddhism, and Islam, ordain only men? Is this not a violation of Title VII? The answer, somewhat surprisingly, is not to be found in Title VII. Instead, the missing piece of the puzzle is what is known as the “ministerial exemption,” which is thought to be constitutional in nature—an offshoot of the free exercise and establishment clauses.

Under this exemption, religious organizations have an absolute right to choose their leaders. Such decisions are not subject to Title VII at all. Thus, a church or synagogue cannot be sued on charges of race, gender, or religious discrimination when choosing its ministers. The scope of the “ministerial” exemption, like the Title VII exemption, is unclear. Certainly clergy qualify, but some cases read the ministerial exemption more broadly, going so far as to protect all those whose duties involve the spreading of religious ideas (such as school teachers or choir directors). One recent Supreme Court case, *Boy Scouts of America v. Dale* (530 U.S. 640, 2000), suggests perhaps that all nonprofits, religious or not, may have the same right to choose their leaders.

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References and Further Reading

- Berg, Thomas C. *The State and Religion in a Nutshell*. 2nd ed. St. Paul, MN: West Publishing Group, 2004.
- Brant, Joanne C., “Our Shield Belongs to the Lord”: *Religious Employers and a Constitutional Right to Discriminate*, *Hastings Constitutional Law Quarterly* 21 (1994): 4: 275–321.
- Green, Steven K., *Religious Discrimination, Public Finding, and Constitutional Values*, *Hastings Constitutional Law Quarterly* 30 (2003): 1:1–55.

Cases and Statutes Cited

- Corporation of Presiding Bishop v. Amos*, 483 U.S. 327 (1987)
- Boy Scouts of America v. Dale*, 530 U.S. 640 (2000)
- 42 U.S.C. § 2000e (Title VII)
- 42 U.S.C. § 604a (Charitable Choice)

See also Accommodation of Religion; Boy Scouts of America v. Dale, 530 U.S. 640 (2000); *Charitable Choice; Corporation of Presiding Bishop v. Amos*, 483 U.S. 327 (1987); *Discrimination by Religious Entities That Receive Government Funds; Equal Protection Clause and Religious Freedom; Establishment Clause Doctrine: Supreme Court Jurisprudence; Establishment of Religion and Free Exercise Clause; Free Exercise Clause Doctrine: Supreme Court Jurisprudence; Title VII and Religious Exemptions; Unconstitutional Conditions; Zelman v. Simmons–Harris*, 536 U.S. 639 (2002)

TONY AND SUSAN ALAMO FOUNDATION v. SECRETARY OF LABOR, 471 U.S. 290 (1985)

One important issue under the free exercise clause of the First Amendment has been the question whether the state can regulate the activities of religious organizations. Many, but not all, regulatory statutes provide exemptions from coverage for religious organizations. If no exemption is granted, does the regulation violate the free exercise clause?

One common area of governmental regulation is the employment relationship. The federal Fair Labor Standards Act (FLSA), for example, imposes certain minimum wage, overtime, and record-keeping requirements on enterprises engaged in commerce. The FLSA, however, expressly exempts from its coverage employees of religious organizations engaged in the noncommercial, religious work of their employer. But the FLSA does not expressly exempt employees of religious organizations engaged in commercial activities. Moreover, the Department of Labor has consistently interpreted the FLSA to cover such commercial activities so long as they are carried out for a “business purpose.”

In 1985, in *Tony and Susan Alamo Foundation v. Secretary of Labor*, the United States Supreme Court considered the question whether the FLSA applies to workers engaged in the commercial activities of a religious organization and if so, whether applying the FLSA in this manner violates the free exercise clause. In this case, the Department of Labor had brought suit against the Tony and Susan Alamo Foundation, a nonprofit religious corporation whose articulated purpose was to “establish, conduct and maintain an evangelistic church, and generally to do those things needful for the promotion of Christian faith, virtue and charity.” The Department of Labor claimed that the foundation had violated the minimum wage, overtime, and record-keeping provisions of the FLSA. As part of its work, the foundation

operated a wide array of commercial businesses, including hog farms, service stations, restaurants, and retail stores, staffed in large measure by approximately three hundred volunteer “associates,” most of whom had been drug addicts, derelicts, or criminals before their rehabilitation. The associates received no wages, but the foundation did provide them with food, clothing, shelter, and other benefits such as medical care.

The foundation resisted the litigation, arguing that the FLSA did not cover its associates because they were volunteers, not employees, and because these associates were engaged in religious activities exempt from the FLSA. The foundation also argued that application of the FLSA to its activities violated the free exercise clause of the First Amendment.

The U.S. Supreme Court unanimously found that the foundation’s associates were in fact employees since they engaged in the work of the foundation with the expectation of receiving substantial in-kind benefits in exchange for their labor. The Court further found that the associates engaged in commercial activities despite the foundation’s status as a tax-exempt, nonprofit organization. Significant to the Court was the fact that the foundation’s various businesses competed with nonreligious commercial enterprises. If the foundation’s various businesses were allowed to pay substandard wages, the Court concluded, they would have an unfair competitive advantage over their secular competitors. Thus, the Court held that the FLSA applied to the foundation’s associates.

The Court then addressed the constitutional question whether application of the FLSA to the commercial activities of religious organizations could be squared with the free exercise clause. The Court concluded that the FLSA’s minimum wage and overtime pay requirements did not infringe the associates’ free exercise rights because the associates were free to give their wages back to the foundation. Likewise, the Court concluded that the record-keeping requirements that the statute imposed on the foundation were not so onerous as to entangle the government excessively with religion.

In the years since the Supreme Court’s 1961 decision, Congress has continued to refuse to exempt the commercial activities of religious organizations from FLSA coverage while retaining an exemption for their employees engaged in noncommercial activities. At the same, courts have continued to maintain that FLSA coverage of the commercial activities of religious organizations does not violate the free exercise clause.

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References and Further Reading

- Bethel, Terry A., *Recent Labor Law Decisions of the Supreme Court*, Maryland Law Review 45 (1986): 170.
 Gregory, David L., *The First Amendment Religion Clauses and Labor and Employment Law in the Supreme Court, 1984 Term*, New York Law School Law Review 31 (1986): 1.

See also Accommodations of Religion; Exemptions for Religion Contained in Regulatory Statutes; Fair Labor Standards Act and Religion

TORCASO v. WATKINS, 367 U.S. 488 (1961)

Although Article VI of the U.S. Constitution provides that “no religious Test shall ever be required” for federal office-holding, individual states were not initially prohibited from maintaining religious tests (or professions of faith) as prerequisites to state office. Indeed, in the very early years of the Republic most states required some type of religious test. While the propriety of religious tests was contested and their prevalence eventually waned, many states retained religious tests—even if merely requiring the profession of a “belief in God”—well into the twentieth century. In *Torcaso v. Watkins*, the U.S. Supreme Court struck down all such state religious tests as unconstitutional under the First Amendment.

After the governor of Maryland appointed Roy Torcaso to the office of notary public, Torcaso went to the county clerk’s office to receive his commission. The clerk requested that he take an oath and subscribe to a declaration of his belief in God, as required by Article 37 of the Declaration of Rights of the Maryland Constitution (“[N]o religious test ought ever to be required as a qualification for any office of profit or trust in this State, other than a declaration of belief in the existence of God”). Torcaso declined to do so, and the clerk therefore refused to issue the commission. Seeking to obtain his commission, Torcaso petitioned for mandamus in Maryland state court against Clayton K. Watkins, clerk of the circuit court for Montgomery County, Maryland. After the Maryland courts refused to find Article 37 in violation of the state or federal constitutions, Torcaso appealed to the U.S. Supreme Court. In an opinion by Justice Black, the Court reversed and remanded.

Eliding the issue of whether Article VI applied to state as well as federal offices, the Court held that Maryland’s religious test violated “the First and Fourteenth Amendments to the Constitution of the United States.” Before reaching that conclusion, the Court noted the historical pedigree of religious tests

(carried from Europe to the American colonial experience) and also the movement in American law to abolish such tests. On a federal level, Article VI secured the goal of putting people “securely beyond the reach” of religious test oaths, and the First Amendment then provided additional religious freedom. *Cantwell v. Connecticut* (310 U.S. 296, 1940) and *Everson v. Board of Education* (330 U.S. 1, 1947) made the First Amendment’s free exercise clause and establishment clause applicable to the states via the Fourteenth Amendment, extending the religious freedom embodied there to state as well as federal government.

The Supreme Court rejected the view of the state courts that Maryland’s religious test could stand because *Zorach v. Clauson* (343 U.S. 306, 1952) had tempered *Everson*. Instead, the Court held that *Zorach* did not “intend to open up the way for government ... to restore the historically and constitutionally discredited policy of probing religious beliefs by test oaths” or limiting public office to individuals with a particular type of religious belief. The *Torcaso* Court thus held that “neither a State nor the Federal Government can constitutionally force a person ‘to profess a belief or disbelief in any religion.’” The Court then pushed this neutrality principle even farther, stating that government could not pass laws favoring religion over nonreligion or favoring theistic religions over nontheistic religions. (This latter statement led to a famous footnote in which the Court stated that “Buddhism, Taoism, Ethical Culture, Secular Humanism, and others” would qualify as “religions” that do not teach about an existence of God.) Applying this neutrality and lack of favoritism to the case at hand, the Court quickly dispensed with the argument that *Torcaso* was not harmed by Maryland’s religious test because he was not compelled to hold office; the Court countered that a lack of compulsion was no excuse for barring *Torcaso* by state-imposed, constitutionally impermissible criteria.

Torcaso did not state which part of the religion clause was violated by the Maryland statute, leaving it open to varying later interpretations. But it is likely best viewed as an establishment clause case, given its statements about the government’s inability to set up religious criteria for office holding and its approving quotation that “complete separation between the state and religion is best for the state and best for religion” (quoting a concurrence in *McCullum v. Maryland*, 333 U.S. 203, 1948). The principle of governmental neutrality among religions and between religion and nonreligion stated in *Torcaso* would later provide support for a number of other Supreme Court opinions, some of which were seen as favorable to religion and some of which were seen as hostile to religion.

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References and Further Reading

- Curry, Thomas J. *The First Freedoms: Church and State in America to the Passage of the First Amendment*. New York: Oxford University Press, 1986.
 Witte, John, Jr., *Religion and the American Constitutional Experiment*. 2nd ed. Westview (2005).

Cases and Statutes Cited

- Cantwell v. Connecticut*, 310 U.S. 296 (1940)
Everson v. Board of Education, 330 U.S. 1 (1947)
McCullum v. Board of Education, 333 U.S. 203 (1948)
Zorach v. Clauson, 343 U.S. 306 (1952)

See also ***Cantwell v. Connecticut*, 310 U.S. 296 (1940); Establishment of Religion and Free Exercise Clause; *Everson v. Board of Education*, 330 U.S. 1 (1947); Incorporation Doctrine; Nonpreferentialism; Test Oath Cases; *Zorach v. Clauson*, 343 U.S. 306 (1952)**

TRADEMARKS AND THE ESTABLISHMENT CLAUSE

Trademarks are words, names, symbols, devices, or any combination of these that serve to inform the public of the source or sponsorship of a good or service. Trademark infringement consists of using the same or a similar trademark in a way likely to confuse the relevant audience. Trademarks are usually considered a form of personal property and are protected by all of federal statutes, state statutes, and common law doctrines. Many names and symbols of religious organizations are trademarks. Repeatedly, parent church A is left by dissidents who form a competing church B. Both A and B claim to be the true embodiment of the church’s doctrine. Both want to use the same or similar trademarks.

Courts routinely decide such disputes even though the First Amendment bars government action “regarding an establishment of religion.” Courts decide by looking at religiously neutral doctrines of trademark, corporate, and property law. Because of the establishment clause’s bar on government entanglement with issues of religious doctrine, the courts refuse to consider which group has the stronger claim to represent the religious beliefs of the church, even though the relevant federal statute bars misleading advertising and false designations of origin (Title 17, United States Code, Section 1125). The reliance on corporate law commonly gives control to the established hierarchy of the church (*Purcell v. Summers*, 145 F.2d 979, 4th Cir., 1944).

However, both groups may be allowed to use the same term if the court decides the term is “generic”—that it is the common term for the good

or service, as opposed to the source of the good or service. For example, “Christian science” was held to be generic by the New Jersey Supreme Court, but “Church of Christ, Scientist” was not (*Christian Scientist Board v. Evans*, 510 A.2d 1347, N.J. 1987). Another court refused to clarify “Christian science” as generic and explained the *Evans* case as standing on the rule that two entities may be allowed to use the same word if additional words make public confusion unlikely—for example, by adding the word “independent” (*Christian Scientist Board v. Robinson*, 115 F. Supp. 607, W.D. N. Car., 2000).

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References and Further Reading

Annotation, Right of Charitable or Religious Association or Corporation to Protection against Use of Same or Similar Name by Another, American Law Reports 37 (1971): 277.

McCarthy, J. Thomas. *McCarthy on Trademarks*, vol. 1, section 9:02; vol. 2, chapter 12.

Cases and Statutes Cited

Christian Science Board of Directors v. Evans, 510 A.2d 1347 (N.J. 1987)

Christian Science Board of Directors v. Robinson, 115 F. Supp. 607 (W.D. N. Car. 2000)

Purcell v. Summers, 145 F.2d 979 (4th Cir. 1944)

See also Common Law or Statute; Establishment Clause (I): History, Background, Framing; Judicial Resolution of Church Property Disputes; Lemon Test

TRADITIONAL PUBLIC FORUMS

All recognize that citizens have a First Amendment right to speak. But what places are available for speech? If someone wants to proselytize a crowd of strangers in a public park or organize loud demonstrations on public streets, may the government restrict the speaker or regulate the marchers? May the government restrict distribution of leaflets on street corners because recipients litter the streets? Questions such as these are addressed under the First Amendment doctrine of the “public forum.”

Early in the twentieth century, while serving on the Massachusetts Supreme Judicial Court in a case upholding the conviction of a preacher for speaking on the Boston Common without a permit, Justice Holmes held that the government could forbid use of streets and parks much like a private homeowner could exclude unwanted guests from his or her property. Such an approach would grant the government unlimited power to restrict communications on public

property. However, beginning in the 1930s, the Supreme Court has held that certain public spaces known as “traditional” public forums—streets and parks—have “immemorially been held in trust” for the public to assemble and communicate.

Courts have followed two theories in cases involving traditional public forums. One theory is that the government is required to provide equal access to public places. The idea is that if the government permits public marches supporting breast cancer research, it must also permit marches criticizing the government’s incessant war-mongering. For example, in *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972), the Court invalidated a Chicago ordinance prohibiting picketing near schools but exempting peaceful picketing of any school involved in a labor dispute. In *Staub v. Baxley*, 355 U.S. 313 (1958), the Court overturned an ordinance that prohibited the solicitation of membership in dues-paying organizations without a permit from officials on the grounds that one’s First Amendment rights may not hinge “upon the uncontrolled will of an official.” Such decisions require that government act in a “content neutral” way toward speakers and demonstrators and protect against picking and choosing based on the message contained in one’s literature.

However, the equal access approach does not prevent the government from closing streets and parks to all demonstrations or public speakers. Thus, a second theory requiring presumptive mandatory access to streets and parks—traditional public forums—has continued to influence courts. For example, certain New Jersey municipalities forbade distribution of leaflets on public streets to curtail litter. The Supreme Court held this purpose insufficient to justify a total ban on literature distribution, particularly since the communities had other means of preventing litter—such as punishing those who actually throw papers on the street. Likewise, a municipality cannot forbid the display of advocacy signs on private residences on grounds that such signs contribute to visual blight: Residential signs posted during political campaigns provide an important outlet for citizens to communicate, and the government may not remove that “channel” of communication.

The fact that the government must permit access to certain property for communicative purposes does not mean that it may not impose restrictions on communication in the public forum. Indeed, unless the government property is a “traditional” forum, a different set of rules governs so-called “nontraditional” forums such as mailboxes and utility poles where literature might be posted, military bases, airports, and property immediately adjacent to post offices and jails.

Moreover, even within the “traditional” public forum, the government may regulate the “time, place, and manner” (TPM) of communications in the public forum. Such regulations must be issued without regard to the content of the communication; must serve important goals of the government and the means chosen must reasonably relate to the ends sought; and must leave open sufficient other outlets for the communications. The current Supreme Court has interpreted this doctrine in a relatively relaxed way and has approved many regulations that limit the scope of communicative activity.

For example, in one case, demonstrators sought to publicize the plight of the homeless by sleeping outdoors overnight in the middle of winter in a public park in Washington, D.C. The Court upheld National Park Service regulations that prohibited such camping as a reasonable “manner” regulation. In another case, the Minnesota State Fair prohibited the distribution of literature on fairgrounds, except from special booths. The Court upheld the partial ban as a reasonable “traffic” regulation that avoided congestion and inconvenient “bottlenecks” to pedestrian traffic.

The principle that reasonable TPM regulations will be upheld in public forum cases has been tested in several important abortion protest cases. In *Madsen v. Women’s Health Center*, 512 U.S. 753 (1994), after hearing evidence that demonstrators were preventing access to a medical clinic providing abortions, holding aloft images of bloodied fetuses, and employing amplification equipment that penetrated the clinic, a lower court had issued an injunction imposing limits on the demonstrators. The injunction established a thirty-six-foot “buffer zone” around the clinic, forbade the display of the images and use of sound equipment, and forbade approaching any patient within three hundred feet of the clinic.

In reviewing the injunction, the Supreme Court upheld the buffer zone limit, but only to the extent to which it protected actual entrances to the clinic. The court analyzed the image and sound regulation in light of the government’s interest in avoiding interference with the right to receive medical treatment. The noise injunction was upheld, since amplified voices interfered with surgical procedures and patient recovery. However, the image limitation was overturned; the Court reasoned that to protect patients the clinic could draw blinds. The ban on approaching others within three hundred feet was also overturned, since it was far broader than necessary to protect clinic patients.

In sum, the traditional public forum doctrine has generally protected access to streets and parks for communicative activity. However, courts have tended

to be much more deferential to governmental time, place, and manner regulations that appear to be reasonable. Although TPM regulations may effectively restrict the capacity of speakers to reach their intended audience (such as the fairgoers at the Minnesota State Fair), the current Court has concluded that those restrictions are a reasonable trade-off.

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References and Further Reading

- Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, Sup. Ct. Rev. (1965): 1.
 Post, *Between Governance and Management: The History and Theory of the Public Forum*, UCLA L. Rev. 34 (1987): 1713.
 Stone, *Fora Americana: Speech in Public Places*, Sup. Ct. Rev. (1974): 1287.

Cases and Statutes Cited

- Clark v. CCNV*, 468 U.S. 288 (1984)
Davis v. Massachusetts, 167 U.S. 43 (1897)
Hague v. C.I.O., 307 U.S. 496 (1939)
Heffron v. ISKON, 452 U.S. 640 (1981)
City of Ladue v. Gilleo, 512 U.S. 43 (1994)
Madsen v. Women’s Health Center, 512 U.S. 753 (1994)
Police Department of Chicago v. Mosley, 408 U.S. 92 (1972)
Schneider v. State, 308 U.S. 147, 163 (1939)
Staub v. Baxley, 355 U.S. 313 (1958)

See also **Content-Neutral Regulation of Speech; Holmes, Oliver Wendell, Jr.; Picketing; Prior Restraint; Time, Place, and Manner Rule**

TREASON

Treason, the only crime defined by the U.S. Constitution, has all but disappeared from the legal landscape. The framers of the Constitution may have started treason down this path. The bitter English experience with the misuse of treason charges for political purposes led them to define the crime narrowly and to make it difficult to prove. Only two acts constitute treason: levying war against the United States and adhering to an enemy of the United States, giving it aid and comfort. The framers drew this definition from the English law of treason, but omitted a third method of committing the crime—compassing or imagining the king’s death—that had proved most susceptible to politically motivated abuse. The framers also specified that treason could be proved only by a confession in open court or by the testimony of two witnesses to the same overt act.

The first cases to command judicial attention arose from ex-Vice President Aaron Burr’s plot to cleave the trans-Appalachian states from the nation,

conquer Mexico, and make from them a huge western empire. In *Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807), a case against one of Burr's associates, Chief Justice Marshall established that "levying war" meant involvement in actual hostilities against the United States (as opposed to preparation for such hostilities). In the treason trial of Aaron Burr, Marshall, sitting as a trial judge, applied the Constitution's two-witness requirement so rigorously as to make the treason case against Burr virtually impossible to prove. These early, restrictive precedents further pushed the crime of treason along its course toward desuetude.

Although the Supreme Court stated in the *Prize Cases*, 2 Black 635 (1863), that those who took up arms against the Union in the secessionist cause were traitors, few treason cases emerged from the Civil War, and many of those convicted of treason received pardons. John Brown, who in 1859 organized a raid on the federal arsenal at Harper's Ferry in hopes of triggering a slave insurrection, was the last person in the United States convicted and executed for treason against state (as opposed to federal) authority.

World War II produced a number of treason prosecutions, all of them charges that Americans gave the enemy aid and comfort. Two went to the Supreme Court, and the results were mixed. In *Cramer v. United States*, 325 U.S. 1 (1945), the Supreme Court read the treason clause's two-witness requirement very narrowly, holding that "every act, movement, deed, and word of the defendant charged to constitute treason must be supported by the testimony of two witnesses." On the other hand, in *Haupt v. United States*, 330 U.S. 631 (1947), the Court took a more permissive approach to "aid and comfort," holding that a father's provision of shelter and other minor sorts of support to his Nazi saboteur son met the constitutional test.

No conduct has been the basis of a treason charge in the United States since the end of World War II. This is not solely because of the narrowness of the crime's definition or the difficulty of proving it. It is also because Congress has filled the field that treason once occupied with other partly overlapping crimes: espionage, sedition, aiding enemy prisoners of war, offering material support to terrorists, and the like.

ERIC L. MULLER

See also 9/11 and the War on Terror; Proof beyond a Reasonable Doubt

TREASON CLAUSE

Treason is the criminal offense of attempting to overthrow the government of the state to which one owes allegiance. As set forth in Article III of the

Constitution, there are two ways in which this can be accomplished: by making war directly against the state or by materially supporting the state's enemies. Treason has been considered a crime of the worst order, since it constitutes a breaking of the social compact and a breach of one's allegiance to the state, the ultimate protector of the rights of citizens. The theory upon which treason was founded is that the government is greater than any individual and that being born into society creates a natural allegiance to the state. The long-standing punishment for breaking this trust, in England and later in the United States, is execution. In addition, the British punished treason by enacting a "corruption of blood," which would mean that any property passed along the hereditary lineage of the traitor would be seized. This punishment was expressly prohibited in the U.S. Constitution because it almost always punished innocent relatives who had committed no treason.

The treatment of treason in the U.S. Constitution draws on English legal and historic precedent. The crime of treason on British soil had a legacy of abuses because it was manipulated by rulers to punish severely many lesser crimes. Montesquieu warned that the crime of treason, if defined broadly, would cause any government to degenerate into arbitrary uses of power over its citizens. The British had experienced this problem, where in more tyrannical historic times, rulers had arbitrarily created constructive treasons. Effectively, a citizen who committed a misdemeanor could face the ultimate penalty for having constructively committed treason by failing to heed the rules of conduct of the land. This kind of law made it nearly impossible for citizens to know what they could and could not say or do. In response to these abuses, statutes were passed by Edward III requiring two lawful witnesses to testify or confession in open court, as well as an overt act taken toward the realization of a treasonous intent. Even after these statutes were enacted, abuses occurred periodically in England.

At the Constitutional Convention, the drafters were weary of the British experience and they sought to provide clarity in order to protect against similar abuses. First, the constitution provided a decisive definition of the crime (which paralleled portions of the British statutory definition). By limiting the definition of treason in the Constitution, it could not be expanded by legislative acts of law, effectively keeping treason out of politics where, as the British example made clear, there was potential for abuse by those in power. Next, the text provides the necessary evidentiary safeguards. To be convicted, the accused must confess or the government must produce two direct

witnesses of the traitorous behavior. Also, that behavior must be an “overt act,” not mere words. Citizens only rise to the level of treason if there is an intent as embodied in words, as well as some overt act to carry out that intent. Finally, the punishment was limited by confining it to the offender and not his heirs.

There is an inherent tension between a need to punish treason and allowing free speech. The First Amendment safeguards a right to question and criticize the government, while those same questions and criticisms coupled with overt acts taken to overthrow the government can constitute treason. It is telling that the constitutional framers omitted the British form of treason, which constituted mere plotting or imagining the death of the king. By requiring an overt act, the American definition would not punish mere thoughts or words alone. The line between what constitutes protected speech and what is treason is not always necessarily clear. Strictly defining treason and providing stringent evidentiary requirements, including an overt act, provide necessary protection for free speech and expression, while still allowing the government the ability to punish someone who truly does commit treason, as long as that person confesses or there are two government witnesses to the overt act.

One of the best known treason cases, the case of “Tokyo Rose” (*Iva Ikuko Toguri D'Aquino v. United States*, 192 F.2d 338, 9th Cir., 1951), occurred during World War II. Iva Toguri D'Aquino, an American citizen in Japan, worked as an announcer for a Japanese radio station as a prisoner of war. She worked on a radio show that was designed to reach the American troops with propaganda. She allegedly read on the air anti-American propaganda, including the claim that all the American ships had returned to the United States, leaving all U.S. troops stranded. When D'Aquino returned to the United States from Japan, press attention and public outcry largely drove her prosecutors to try her for treason. Called a traitor, D'Aquino denied the claims throughout her trial for treason. The government produced numerous witnesses, including two of her former supervisors who testified that she has given positions of American ships and had recited other anti-American propaganda. The witnesses later admitted that they had testified inaccurately and had been coached extensively by the prosecution before trial.

D'Aquino was found guilty and punished with a ten-year prison sentence, as well as a large fine. She was eventually pardoned in 1977 by President Gerald Ford, based on the apparent weaknesses in the prosecution's case that had since come to light. The Tokyo Rose case highlights the continued need for protections against abuse, as well as the imperfections in safeguards that have existed historically. Even so,

the American definition of treason has not been expanded at the hands of legislators, as has occurred in England, due to civil liberties concerns.

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References and Further Reading

Hurst, James W. *The Law of Treason in the United States*. Westport, CT: Greenwood, 1971.
Iva Ikuko Toguri D'Aquino v. United States, 192 F.2d 338, Ninth Circuit Court of Appeals, 1951.

Cases and Statutes Cited

Cramer v. United States, 325 U.S. 1 (1945)

TRIAL IN CIVIL CASES (VII)

Starting with the assumption that government ought to protect property and personal liberty, as outlined in the Constitution, the Founding Fathers were faced with the question of how best to achieve these ideals through the courts. The Framers had inherited trial by jury, a feature of British common law, and chose to retain it in the Bill of Rights of the Constitution as the best means to protect fundamental rights. There was consensus at the time that trial by jury should be applied in the United States, but there was debate over whether it ought to be included in the text of the Constitution. Although some argued that trial by jury ought to be established through the legislature, it was enacted in the Bill of Rights, which placed it on higher ground as a constitutional right that is inherent, and therefore its core cannot be undermined via ordinary legislation. The Seventh Amendment to the Constitution provides for the right to trial by jury in common law suits when the value in controversy is greater than \$20, a right that is therefore fundamental and cannot be revoked via normal legislation.

Generally, the role of the jury is to consider questions of fact, including the judgment of the credibility of testimony in court, while judges consider issues of law. Trial by jury, although it can be more costly and inefficient than trial by judge, allows its citizenry to retain power over the judicial branch through this fact-finding role. At the time of the framing of the constitution, proponents of jury trial in civil cases pointed out its virtues, including the fact that jury trial allows citizens to safeguard each other's well-being and that it protects liberty by limiting judicial despotism and arbitrary decision making, thereby enhancing the integrity of the judicial system. Trial by jury was viewed as a necessary check on the power of the government to take one's livelihood in civil and

criminal trials and one's freedom in criminal trials. Thus, the constitutional guarantee of juries in civil trials ensures that the rights of all are weighed not by the government, but by a neutral group of one's peers. The Founding Fathers viewed the jury in criminal and civil cases as a means to ensure fair and more legitimate proceedings and outcomes in the court system by checking prosecutorial and judicial despotism.

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References and Further Reading

- Abramson, Jeffrey. *We, the Jury: The Jury System and the Ideal of Democracy*. New York: Basic Books, 1994.
 Jonakait, Randolph N. *The American Jury System*. New Haven, Conn.: University Press, 2003.
 Lehman, Godfrey D. *We the Jury: The Impact of Jurors on Our Basic Freedoms: Great Jury Trials of History*. Amherst, NY: Prometheus Books, 1997.

TRIAL OF THE SEVEN BISHOPS, 12 HOWELL'S STATE TRIALS 183 (1688)

King James II (1685–1688) attempted to introduce Catholicism back into England during his reign. He wanted to extend to Roman Catholics a dispensation of the religious laws to provide Dissenters and other sects outside the Church of England the ability to carry out their religious practices. James created a new Declaration of Indulgence in April 1687, but later ordered the clergy to read the declaration in the London churches in mid-May 1688 and then outside London on two Sundays in June.

William Sancroft, Archbishop of Canterbury, along with other bishops and leaders of the London clergy decided on May 15 to petition the king, which they did (Sancroft absent) on May 18, 1688. The seven signers to the petition were William Sancroft, Thomas Ken of Bath and Wells, John Lake of Chichester, Jonathan Trelawny of Bristol, William Lloyd of St. Asaph, Francis Turner of Ely, and Thomas White of Peterborough. James was highly offended by the petition and held them for trial for publishing a false, malicious, and seditious libel. The trial took place on June 29 and 30, 1688.

The trial lasted just two days. The two main issues in the trial were critical of the king's dispensing and suspending power and the publication of the petition as a libel. The bishops denied the king had power to dispense or suspend legislative acts without consent of Parliament based on Parliament's condemnation of Charles II using the dispensing and suspending power in his declarations issued in 1662 and 1672. At first, counsel had to prove that the petition was actually written and handed by the bishops to the

king (which it eventually was). The King's Counsel argued the bishops could only present a petition in Parliament, but defense counsel countered that claim using historical records of redress to the kings. Although the petition was shown to be presented by the bishops to the king (and under English law considered libelous), the defense argued it was neither malicious because the bishops did not cause the events that led to their petitioning, nor libelous because they had the right to petition the king to redress grievances outside of parliament. It was not seditious because it was presented in private to the king. None of the justices supported the king's power to suspend the laws.

The Lord Chief Justice Wright and Judge Allibone supported the king's position that it was a libelous petition, while Justices Powell and Holloway sided with the defense. Disobeying the judicial instructions, the jury found the bishops not guilty. The jury's rejection was recognized as a great victory for a rejection of the king's suspending authority and an Englishman's right to petition the government, which was upheld in the 1689 parliamentary act of the Bill of Rights (1 W. & M. sess. 2 cap. 2). The *Bishops' Case* was cited as precedent in the important John Peter Zenger trial (1735) and later for the First Amendment right to petition the government for redress of grievances.

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References and Further Reading

- Havighurst, Alfred. *James II and the Twelve Men in Scarlet*, *Law Quarterly Review* 69 (1953): 4: 522–546.
 Macaulay, Thomas B. *History of England From the Accession of James the Second*, vol. 2. Charles Firth, ed. London: Macmillan & Co., 1914. pp. 990–1039.
 Miller, John. *James II*. New Haven, CT: Yale University Press, 2000.
 Spurr, John. *The Restoration Church of England, 1646–1689*. New Haven, CT: Yale University Press, 1991.

See also Seditious Libel

TRIBE, LAURENCE H. (1941–)

Noted constitutional scholar Laurence Tribe was born in China to Russian-Jewish parents in 1941. At the age of five he moved with his family from China to San Francisco. In 1962, he earned an A.B. in mathematics from Harvard College and four years later he earned a Juris Doctorate from Harvard Law School. From 1966 to 1967, he was a law clerk for California Supreme Court Justice Mathew Tobriner, and from 1967 to 1968, he clerked for U.S. Supreme Court Justice Potter Stewart. Tribe began his teaching career at Harvard Law School in 1968 and

since 1982 has been Ralph S. Tyler, Jr., Professor of Constitutional Law.

Professor Tribe's career also includes work as congressional advisor and Supreme Court advocate. He has given congressional testimony on topics such as maintaining a system of checks and balances while fighting global terrorism and the constitutional meaning of impeachment. He has argued numerous cases before the U.S. Supreme Court such as *Richmond Newspapers v. Virginia* (448 U.S. 555, 1980), *Pacific Gas & Electric Co. v. California Energy Resources Conservation & Development Commission* (1983), *Bowers v. Hardwick* (478 U.S. 186, 1986), *Rust v. Sullivan* (500 U.S. 173, 1991), *Vacco v. Quill* (521 U.S. 793, 1997), and *Bush v. Gore* (531 U.S. 98, 2000).

Richmond Newspapers v. Virginia (1980) focused on the First and Sixth Amendments. In this case the Court held that the public and the media have the right to attend criminal trials. Tribe argued the cause for the respondents in *Pacific Gas & Electric Co. v. California Energy Resources Conservation & Development Commission*, establishing that a state has the right to restrict nuclear power plants. He also argued for the constitutional right for homosexuals to engage in consensual sodomy, which the Court denied in *Bowers v. Hardwick*. The Court would later make the controversial decision to overturn this ruling in *Lawrence v. Texas* (123 S.Ct. 2472, 2003).

Tribe has appeared before the Court in other cases involving abortion and the right to die. In *Rust v. Sullivan* (1991), he argued, albeit unsuccessfully, that the Department of Health and Human Services had violated the First and Fifth Amendments of those who give and receive family planning services because it restricted recipients' ability to offer abortion-related services. The Court ruled the department was not in violation of the amendments and relegated the decision of dispersing funding to the department. In *Vacco v. Quill* (1997), Tribe challenged the constitutionality of New York's ban on physician-assisted suicide. The Court, using a rationality test, ruled that New York was not in violation of the equal protection clause.

Bush v. Gore (2000), the presidential election controversy over the legitimacy of Florida voting ballots, is another noteworthy case argued by Tribe before the Supreme Court. Attorneys for George W. Bush contended that the Florida Supreme Court had exceeded its authority by extending the certification deadline for questionable ballots to be counted. They also asked for an end to the voting recount. The Supreme Court ruled against another recount of the ballots, validating the contested recount as it stood with then Governor George W. Bush as the winner of the election.

Professor Tribe has written extensively on interpretation of the Constitution. In his book, *On Reading the Constitution* (1991), he offers a general format to the much-debated question of how to interpret the Constitution. He argues for an interpretation of the text using generative themes via constitutional conversation. Also, Tribe made contributions to the issue of interpreting the Constitution using the textualist approach in Justice Antonin Scalia's *A Matter of Interpretation: Federal Courts and the Law* (1997).

Tribe has also written on the issue of abortion in his book, *Abortion: The Clash of Absolutes* (1990). He believes that abortion is a constitutionally protected right. However, in this book, he examines the pro-choice and pro-life debates in an attempt to find strengths and weakness in both sides of the debate.

An established and highly sought-out legal scholar, Tribe has assisted in the drafting of constitutions for South Africa, Russia, the Czech Republic, and the Marshall Islands. His career includes that of author, attorney, Supreme Court advocate, and professor. His expertise and research interests span a wide range of topics such as constitutional law, abortion, federalism, free speech, privacy, church and state, and states' rights.

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References and Further Reading

- Goldman, Jerry. *Laurence H. Tribe Cases* (online). Chicago: Oyez—The United States Supreme Court Media. Chicago (retrieved 4 August 2003). Available from http://www.oyez.org/oyez/resource/legal_entity/990/cases.
 Harvard University. *Faculty: Laurence H. Tribe* (online). Cambridge: Harvard School of Law (retrieved 4 August 2003). Available from <http://www.law.harvard.edu/faculty/directory/facdir.php?id=74>.
 Tribe, Laurence H. *Abortion: The Clash of Absolutes*. New York: Norton, 1990.

Cases and Statutes Cited

- Bowers v. Hardwick*, 478 U.S. 186 (1986)
Bush v. Gore, 531 U.S. 98 (2000)
Lawrence v. Texas, 123 S.Ct. 2472 (2003)
Pacific Gas & Electric Co. v. California Energy Resources Conservation & Development Commission (1983)
Richmond Newspapers v. Virginia, 448 U.S. 555 (1980)
Rust v. Sullivan, 500 U.S. 173 (1991)
Vacco v. Quill, 521 U.S. 793 (1997)

TROP v. DULLES, 356 U.S. 86 (1958)

The constitutionality of a particular punishment is determined, in part, by whether it comports with the "evolving standards of decency." This concept, which is most commonly used today in death penalty cases,

was first enunciated by the U.S. Supreme Court in *Trop v. Dulles*.

After deserting his military unit for twenty-four hours and voluntarily returning, John Foster Dulles was convicted by military court martial of desertion from the U.S. Army during a time of war and sentenced to three years' hard labor, forfeiture of all pay, and a dishonorable discharge. In addition to the court martial sentence, Dulles was also stripped of his U.S. citizenship pursuant to a provision in the Immigration and Nationality Act (INA). In *Trop v. Dulles* the Supreme Court considered the scope of the "cruel and unusual" clause and determined that it is not static, but "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." Pursuant to this analysis, the Court held that the expatriation provision of the INA constitutes "cruel and unusual" punishment in violation of the Eighth Amendment because it involves the "total destruction of the individual's status in organized society."

The concept of "evolving standards of decency" has become particularly significant in recent years as it has guided the Supreme Court's decisions in cases finding that the execution of mentally retarded individuals and individuals under the age of eighteen at the time of the crime violates the Eighth Amendment.

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References and Further Reading

Atkins v. Virginia, 536 U.S. 304 (2002).

Heffernan, William C., *Constitutional Historicism: An Examination of the Eighth Amendment Evolving Standards of Decency Test*, American University Law Review 54 (2005): 1355.

Roper v. Simmons, 543 U.S. 551 (2005).

See also **Capital Punishment and Sentencing; Cruel and Unusual Punishment Generally**

TURNER BROADCASTING SYS., INC. v. FCC (TURNER I), 512 U.S. 622 (1994); 520 U.S. 180 (1997) (TURNER II)

From its humble origins as "community antenna television," a technological bridge for extending broadcast television signals into remote or mountainous communities, cable television came to pose a formidable competitive threat to FCC policies favoring free, local, over-the-air broadcasting. The 1968 case of *United States v. Southwestern Cable Co.* upheld the FCC's authority to regulate cable as a form of "interstate [or] foreign communication by wire or radio." In the ensuing decades, the FCC made multiple efforts

to protect local television stations, especially UHF and educational stations, against market erosion attributable to the rise of the cable industry. Most of these efforts—rules concerning the mandatory origination of programs by cable operators, the reservation of access channels on cable systems, distant signal and program exclusivity, and the "siphoning off" of premium feature films and sports events—became the subject of fierce litigation in the federal courts throughout the 1970s and 1980s.

Congress intervened in these disputes by passing the Cable Television Consumer Protection and Competition Act of 1992. Sections 4 and 5 of the 1992 Act imposed a "must-carry" regime that entitled local broadcast television stations to carriage on cable systems operating within their local markets. Upon request, a cable operator was required to carry the signal of a local broadcast station. The Act required most cable systems to set aside as much as a third of their channel capacity for the benefit of broadcast stations invoking their must-carry rights.

The constitutional question posed by this mandatory access scheme was whether the must-carry rules would be reviewed under the withering standard of *Miami Herald Publishing Co. v. Tornillo* (418 U.S. 241, 1974), which invalidated a right-of-reply statute as applied to a newspaper, or the more deferential standard of *Red Lion Broadcasting Co. v. FCC* (395 U.S. 367, 1969), which upheld the FCC's fairness doctrine, a right-of-reply system governing conventional radio and television broadcasters. As of 1994, no court had definitively determined whether cable operators should be treated like print journalists or like over-the-air broadcasters for First Amendment purposes.

In a pair of cases styled *Turner Broadcasting System, Inc. v. FCC*, the Supreme Court upheld the must-carry scheme. In *Turner Broadcasting I*, decided in 1994, the Court distinguished cable from broadcasting. Writing for the majority, Justice Anthony Kennedy reasoned that cable "does not suffer from the inherent limitations that characterize the broadcast medium," especially in light of "rapid advances in fiber optics and digital compression technology" and the minimal "danger of physical interference between two cable speakers attempting to share the same channel."

Turner I nevertheless rejected strict scrutiny. Two factors served to distinguish cable from print journalism, the medium historically associated with the most robust form of constitutional protection for free speech. First, "cable's long history of serving as a conduit for broadcast signals" minimized the danger "that cable viewers would assume that the broadcast stations carried on a cable system convey ideas or

messages endorsed by the cable operator.” Second, whereas a “daily newspaper ... does not possess the power to obstruct readers’ access to competing publications,” cable operators enjoy a substantial degree of “bottleneck, or gatekeeper, control” over the flow of television programming into subscribers’ homes. The Court thereupon prescribed the intermediate scrutiny test of *United States v. O’Brien* (391 U.S. 367, 1968) which upholds governmental regulation of speech in furtherance of important or substantial non-speech-related interests, with no greater restriction on expression than is essential to the accomplishment of the government’s objective.

In *Turner II*, decided in 1997, the Supreme Court applied the *O’Brien* test to a more complete factual record detailing Congress’s motivation in enacting the must-carry scheme. Speaking again through Justice Kennedy, the Court found that Congress had garnered “specific support for its conclusion that cable operators had considerable and growing market power over local video programming markets.” The must-carry regime, *Turner II* concluded, ensures that vulnerable local broadcasters would retain their audiences and their advertising revenues by virtue of being carried on the dominant cable systems within their markets.

In concert, *Turner I* and *Turner II* provide significant support for governmental efforts to structure mass media markets according to the presumed link between the ownership or operation of communicative facilities (such as cable systems and broadcast networks) and the diversity of viewpoints expressed on those facilities. When coupled with parallel cases such as the 1978 case of *FCC v. National Citizens Committee for Broadcasting* (436 U.S. 775 1978) which upheld an FCC ban on the common ownership of a radio or television broadcast station and a daily newspaper in the same market, the *Turner* cases strongly inform ongoing controversies over the “carry one, carry all” scheme for direct broadcast satellite, national media cross-ownership restrictions, and the battery of FCC rules governing horizontal and vertical integration within the cable industry.

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References and Further Reading

- Benjamin, Stuart Minor, *Proactive Legislation and the First Amendment*, Mich. L. Rev. 99 (2000): 281.
 Chen, Jim., *The Last Picture Show (on the Twilight of Federal Mass Communications Regulation)*, Minn. L. Rev. 80 (1996): 1415.
 ———, *Conduit-Based Regulation of Speech*, Duke L. J. 54.
 Yoo, Christopher S., *Vertical Integration and Media Regulation in the New Economy*, Yale J. on Reg. 19 (2002): 171.

———, *The Rise and Demise of the Technology-Specific Approach to the First Amendment*, Geo. L. J. 91 (2003): 245.

Cases and Statutes Cited

- FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978)
Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974)
Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969)
United States v. O’Brien, 391 U.S. 367 (1968)
United States v. Southwestern Cable Co., 392 U.S. 157 (1968)

See also *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969); *United States v. O’Brien*, 391 U.S. 367 (1968)

TURNER v. SAFLEY, 482 U.S. 78 (1987)

Turner v. Safley represents a benchmark in the Supreme Court’s movement toward greater deference to prison administrators. A class of prisoners had challenged regulations restricting inmate-to-inmate correspondence and inmate marriage. The appellate court applied a strict scrutiny standard and found both regulations unconstitutional, but the Supreme Court held that a less stringent reasonableness standard should be applied. The Court reasoned that the task of prison administration calls for the development of expertise in resource allocation and planning best suited to the legislative and executive branches.

The Court articulated four factors relevant to the question of whether a regulation is (reasonably) related to legitimate penological interests (*Turner v. Safley* at 89). First, courts should examine the nexus between the regulation and the governmental interest, which must be legitimate and neutral. Absent a rational, logical connection, the challenged policy is unconstitutionally arbitrary and capricious. The second and fourth factors focus on the availability of alternative practices that permit prisoners to exercise the right otherwise curtailed by the regulation. On the one hand, the existence of alternatives favors judicial deference since prisoners may engage in protected behavior through other means. On the other hand, their existence may indicate that the challenged regulation is an exaggerated response that fails the reasonableness test, particularly when the alternative fully accommodates the prisoner’s rights at *de minimis* cost to valid penological interests (*Turner v. Safley* at 91). Under this reasoning, the absence of alternatives may also show reasonableness. The third factor advises deference to the informed judgment of corrections

officials regarding the cost of accommodating a prisoner's constitutional right in terms of resource allocation and security concerns.

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References and Further Reading

- A Jailhouse Lawyer's Manual* 869-72, Colum. Hum. Rts. L. rev. ed., 5th ed. 2000.
 Zick, Timothy D., and Jeff Trask, *Annual Review, Twentieth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1989-90, VI. Prisoners' Rights: Prisoners' Substantive Rights*, Geo. L. J. 1253 79 (1991): 1253-1254.

Cases and Statutes Cited

- Bell v. Wolfish*, 442 U.S. 520 (1979)
Block v. Rutherford, 468 U.S. 576 (1984)
Jones v. North Carolina Prisoners' Union, 433 U.S. 119 (1977)
Pell v. Procunier, 417 U.S. 817 (1974)

See also **Cruel and Unusual Punishment (VII); Prisoners and Freedom of Speech**

TWO GUYS FROM HARRISON-ALLEN TOWN, INC. v. MCGINLEY, 366 U.S. 582 (1961)

See *Sunday Closing Cases*

TWO-TIERED THEORY OF FREEDOM OF SPEECH

One of the earliest approaches to First Amendment methodology was the "two-tiered" theory of freedom of speech, sometimes called the "categorical" approach. Under this theory speech is deemed to be protected unless it falls within some defined category of unprotected expression, such as obscenity, libel, or "fighting words." Speech falling into the list comprising the "lower tier" gets zero First Amendment protection.

The two-tiered theory is most famously associated with the Supreme Court's decision in *Chaplinsky v. New Hampshire* (315 U.S. 568, 1942). The critical passage from *Chaplinsky*, one of the most often quoted in the American free speech tradition, is:

There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

Chaplinsky remains an often cited opinion, and the preceding passage continues to have adherents among scholars and jurists. Nonetheless, as a working methodology, the simplistic two-tiered approach has largely been abandoned in modern First Amendment jurisprudence. We now extend ample First Amendment protection to speech in categories once deemed unprotected, such as speech that is lewd, profane, or libelous. Conversely, in certain circumstances, speech not falling within those categories is often subject to significant regulation. Most importantly, the primitive "all or nothing" approach to free speech problems has been displaced by a far more complex body of First Amendment law in which highly refined and specialized tests exist for specific types of speech regulation, such as libel, invasion of privacy, obscenity, threats, incitement, commercial speech, political campaign regulation, and so on.

RODNEY A. SMOLLA

References and Further Reading

- Smolla, Rodney. *Smolla and Nimmer on Freedom of Speech*. New York: Thomson/West, 2005, § 2:70.

Cases and Statutes Cited

- Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942)

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ULSTER COUNTY COURT v. ALLEN, 442 U.S. 140 (1979)

The three respondents, along with a young girl, were occupants of a vehicle stopped by the police for speeding. All four were convicted of illegal possession of two loaded firearms that were located in an open handbag, belonging to the girl, on the passenger side where the girl was sitting. Relying on a state statute, the trial court instructed the jury that they could (but need not) presume possession of the firearms by all the vehicle's occupants merely from the presence of the firearms in the vehicle. After two state appellate courts affirmed the convictions, the respondents filed a habeas corpus petition in federal district court that found that the mere presence of the respondents in the vehicle was not a sufficient basis for a jury to presume their possession of the firearms.

After a federal appellate court affirmed, the Supreme Court reversed the ruling, finding that the statutory presumption was constitutional as applied to the respondents and did not violate their right of due process. The Court reasoned that a permissive, as opposed to a mandatory, evidentiary presumption was constitutional provided that both a rational connection existed between the respondents' presence in the car and the presumption of possession and that their presence in the vehicle made their possession of the firearms more likely than not. Such evidentiary presumptions, however, arguably erode the constitutional right that every defendant be proven guilty not merely by a preponderance of the evidence

but by evidence proving guilt beyond a reasonable doubt.

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References and Further Reading

Dressler, Joshua. *Understanding Criminal Law*. 3rd ed. Newark: LexisNexis, 2001.
Robinson, Paul H. *Criminal Law*. New York: Aspen Publishers, Inc., 1997.

See also Francis v. Franklin, 471 U.S. 307 (1985); *Martin v. Ohio*, 480 U.S. 228 (1987); *Patterson v. New York*, 432 U.S. 197 (1977); *Proof beyond a Reasonable Doubt*; *Sandstrom v. Montana*, 442 U.S. 510 (1979)

UNCONSTITUTIONAL CONDITIONS

The unconstitutional conditions doctrine states that the government may not deny a discretionary benefit to someone because he or she chooses to exercise a protected constitutional right. For example, in *Speiser v. Randall* (1958), the Supreme Court held that California could not withhold property tax exemptions from those veterans who refused to sign Loyalty Oaths. Rejecting the *Right v. Privilege Distinction* advanced by the state, Justice Brennan wrote for the Court that "[t]o deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech." Although the state was not obligated to grant tax exemptions to veterans at all, it nevertheless could not condition receipt of that

benefit on the relinquishment of First Amendment rights.

Notwithstanding the Court's broad statements in *Speiser*, other cases have made clear that not all conditional government benefit programs raise unconstitutional conditions problems. In *Regan v. Taxation with Representation* (1983), for example, the Court upheld a tax code provision that denied certain tax benefits to those nonprofit organizations that engaged in lobbying. In his opinion for the Court, Justice Rehnquist characterized the law not as an unconstitutional penalty, but rather as a permissible nonsubsidy. Congress may allocate its funds as it desires, according to the Court and "is not required by the First Amendment to subsidize lobbying." Rehnquist noted that the result would have been different if the subsidy had applied in a viewpoint discriminatory manner.

In the abortion context, the Court used the penalty/nonsubsidy distinction in *Rust v. Sullivan* to uphold federal regulations forbidding federally funded family planning clinics from providing abortion counseling or referrals, while requiring those clinics to refer pregnant clients for prenatal care. Again writing for the Court, Justice Rehnquist stated that "the government is not denying a benefit to anyone, but is instead simply insisting that public funds be spent for the purposes for which they were authorized." In a controversial conclusion, the Court found that the federal regulations in question did not amount to viewpoint discrimination.

Many critics have observed that the penalty/nonsubsidy distinction is merely a question of semantics. Courts can reach either result by careful framing of the underlying issue. If the state's decision to provide conditional funding is described as a plan to encourage certain activities rather than others, it looks like a permissible selective subsidy. By characterizing the same decision as the exclusion of a particular recipient from an established program, it appears to be an unconstitutional penalty.

In unconstitutional conditions cases that involve state takings of private real property, the Rehnquist Court has applied a stricter "germaneness" analysis. For example, in *Nollan v. California* (1987), the Court invalidated a state requirement that, to procure a building permit to enlarge his house, a property owner grant a public easement across his private beach. The Court held that the condition constituted a taking for which the property owner was entitled to compensation, noting that the easement requirement was unrelated to any legitimate reason the state could have denied permit approval.

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References and Further Reading

- Berman, Mitchell N., *Coercion without Baselines: Unconstitutional Conditions in Three Dimensions*, Georgia Law Journal 90 (2001): 1–112.
 Smolla, Rodney A. *Free Speech in an Open Society*. New York: Alfred A. Knopf, Inc., 1992.
 Sullivan, Kathleen M., *Unconstitutional Conditions*, Harvard Law Review 102 (1989): 1415–1506.

Cases and Statutes Cited

- Nollan v. California Coastal Commission*, 483 U.S. 825 (1987)
Regan v. Taxation with Representation, 461 U.S. 540 (1983)
Rust v. Sullivan, 500 U.S. 173 (1991)
Speiser v. Randall, 357 U.S. 513 (1958)

See also **Government Funding of Speech; Right v. Privilege Distinction; Viewpoint Discrimination in Free Speech Cases**

UNDOCUMENTED MIGRANTS

Undocumented migrants are persons who have entered the United States without authorization, namely, a visa, or without presenting themselves for inspection by a federal agent at a port or place of entry. The term "undocumented migrants" also includes persons who entered the United States with a nonimmigrant visa, a visa that allows a noncitizen to visit, study, or work in the United States for a temporary period of time, but who stayed beyond the time authorized by the visa. Undocumented migrants are sometimes referred to as unauthorized migrants or illegal immigrants.

It is difficult to determine exactly how many unauthorized migrants currently live in the United States. Unauthorized migrants face detention, removal, or federal prosecution as a result of their status; thus, it is almost impossible to accurately count the population. Federal estimates based on the 2000 census placed the figure at 7 million with an estimated annual growth of approximately 350,000 per year. Other estimates report the unauthorized population to range from 9 million to 11 million. The total United States population is approximately 281 million; thus, the unauthorized population is a small percentage of the total population of the United States—approximately 2.5 percent using the federal government figures.

The undocumented population tends to be employed in the agricultural, manufacturing, hospitality, and construction industries. Employment and the search for higher wages continue to be the strongest reasons for undocumented migrants to enter the United States, although U.S. employers face stiff

federal civil and criminal penalties if they employ undocumented workers.

Undocumented migrants also enter the United States to flee economic, political, or natural disasters. Some of these persons may eventually qualify for permanent residency as refugees. Some of them may be granted temporary protected status until the emergency that caused them to leave their country of origin is remedied or resolved. Undocumented migrants also enter the United States to be close to relatives who are U.S. citizens or permanent resident aliens.

The United States currently limits authorized immigration to approximately 675,000 visas annually. These visas are awarded primarily on the basis of a close family relationship (approximately 480,000) or on the basis of an employment relationship (140,000). American immigration statutes grant U.S. citizens the benefit of an immigrant visa to their spouse, minor, unmarried and married children, and to the citizen's parents and siblings if the citizen is older than twenty-one. Permanent resident aliens are allowed the benefit of an immigrant visa for their spouse and minor or unmarried children. Family-based visas are subject to a per country cap as well. Because the number of eligible family beneficiaries is greater in some countries than the number of visas available each year, substantial backlogs build up in the various categories. In some cases, family beneficiaries may have to wait more than ten, sometimes even fifteen, years for their visa. Some of these persons in line for an immigrant visa may risk unauthorized status to be close to their family, while they wait for their visa number to come up. These undocumented migrants may be entitled to adjust their status to that of a permanent resident alien eventually.

Approximately 69 percent of unauthorized migrants come from Mexico. Most of the leading source countries for unauthorized migration to the United States are in Central or South America, with the exception of China. Significant numbers of unauthorized migrants reside in California, Texas, Illinois, Arizona, Georgia, and North Carolina.

American society has at times tolerated the presence of undocumented migrants. Increasingly, toward the latter half of the twentieth century amidst concern that the undocumented population was growing too quickly and taking away too many jobs from American workers, Congress enacted legislation to deter undocumented migration. Legislation enacted in 1986 dealt with undocumented migration in a variety of ways, including enhancing criminal sanctions, strengthening border controls, criminalizing the employment of undocumented workers and marriage fraud, and an amnesty program for undocumented workers to become permanent residents if they met

certain criteria. Amnesty programs have been favored in the past as a way to deal with undocumented persons who have resided and worked in the United States for a long period of time and who have established relationships with American citizens and American communities.

In the 1990s, however, with the increase in terrorist incidents targeting the United States both abroad and at home, the perception that undocumented migration posed a serious threat to national security led Congress to enact even more restrictive measures aimed at deterring undocumented migration. Increasingly, these measures made it easier to remove undocumented migrants and to curtail statutory benefits and protections. Some of these measures, like indefinite detention, curtailing of habeas corpus, and curtailing of judicial review of immigration administration decisions, also threatened to strip constitutional protections of undocumented migrants.

There is lively debate among economic and migration experts about the costs and benefits of undocumented migration, with some experts concluding that the costs of undocumented migration are too great to tolerate it, and others concluding that the benefits to the economy and the country as a whole far outweigh the costs. Undocumented migration is a global phenomenon, felt not just by the United States but also by most major Western countries. The attention paid to this controversial subject by Congress and the president is likely to increase in the years to come.

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References and Further Reading

- Barbour, William, ed. *Illegal Immigration*. San Diego, CA: Greenhaven Press, 1994.
- Borjas, George J. *Heaven's Door: Immigration Policy and the American Economy*. Princeton, NJ: Princeton University Press, 1999.
- Garcia, Juan R. *Operation Wetback: The Mass Deportation of Mexican Undocumented Workers in 1954*. Westport, CT: Greenwood Press, 1980.
- Johnson, Kevin R. *"The Huddled Masses" Myth: Immigration and Civil Rights*. Philadelphia: Temple University Press, 2004.
- Lozic, Charles P. *Illegal Immigration: Opposing Viewpoints*. San Diego, CA: Greenhaven Press, 1997.
- Medina, Maria I., *The Criminalization of Immigration Law: Employer Sanctions and Marriage Fraud*, *George Mason Law Review* 5 (1997): 671-731.
- Neuman, Gerald, *The Lost Century of American Immigration Law (1776-1875)*, *Columbia Law Review* 93 (1993): 1833.

Cases and Statutes Cited

- Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3349 (codified as amended at scattered sections of Title 8 of the United States Code)

Immigration Marriage Fraud Act of 1986, Pub. L. No. 99-639, 10 Stat. 3537 (codified as amended at scattered sections of Title 8 of the United States Code)
Immigration and Nationality Act of 1990
Personal Responsibility and Work Opportunity Reconciliation Act, Pub. L. No. 104-193, 110 Stat. 2105 (1996)
Anti-Terrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214 (1996)
Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (codified as amended in scattered sections of Title 8 of the United States Code)
USA PATRIOT Act of 2001, Pub. L. No. 107-56, 115 Stat. 272
REAL ID Act of 2005, Division B of the Emergency Supplemental Appropriations Act for Defense, The Global War on Terror and Tsunami Relief, Pub. L. No. 109-13, 119 Stat. 231, May 11, 2005

UNITED NATIONS SUBCOMMISSION ON FREEDOM OF INFORMATION AND OF THE PRESS

In the wake of World War II, world leaders believed that improving the free flow of information across borders and ensuring the security of war correspondents would help avert future conflicts. Thus, the nascent United Nations Economic, Social, and Cultural Organization created a Commission on Human Rights and Subcommittee on Freedom of Information and of the Press.

The subcommission met five times, beginning in 1947. It participated in drafting the free expression provisions of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. It also produced a draft international code of journalist ethics and a Statement of the Rights, Obligations, and Practices of a free press. Both obliged the media to report accurately, and the latter obliged nations to allow reporters free movement and the widest possible access to sources.

The subcommission laid the groundwork for the U.N. Conference on Freedom of Information, which assembled in 1948. The conference proposed a Convention on Freedom of Information, but the convention was never opened for signature.

Work on the subcommission ultimately broke down for the same reason that the convention failed. East and West could never agree on the proper role of government in supervising the practice of journalism. Western democracies, moreover, feared that the codification of permissible impositions on media—to protect national security, for example—would license oppression in the developing world. In 1952, the

United States and Union of Soviet Socialist Republics both opposed continuation of the subcommission.

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References and Further Reading

Hilding Eek. *Freedom of Information as a Project of International Legislation*. Uppsala, Sweden: Uppsala Universitets Årsskrift, 1953.

Cases and Statutes Cited

Final Act, U.N. Conf. Freedom Info., U.N. Doc. E/CONF.6/79 (1948)
International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171
Statement of the Rights, Obligations, and Practices to be Included in the Concept of Freedom of Information, UNESCO Subcomm'n Freedom Info. & Press, 2d Sess., U.N. Doc. E/CN.4/80 (1948)
Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (1948)

See also Chafee, Zechariah, Jr.; *Freedom of Expression in the International Context*; *Theories of Civil Liberties, International*

UNITED STATES v. 12 200-FT REELS OF SUPER 8MM. FILM, 413 U.S. 123 (1973)

This case was one of a trio of major decisions of which *Miller v. California* (1973) was pivotal that the Burger Court used to revamp the standards of when depictions or descriptions of sexual conduct or possession of these depictions or descriptions are protected by the First Amendment.

This case revisited the constitutionality of the federal law prohibiting the importation of obscene material with the difference that the importer claimed the material was for private or personal use. A federal district court in California summarily dismissed the forfeiture action brought by the government based on the lower court decision in *United States v. Thirty-Seven Photographs* before it was reversed by the Supreme Court. By a five-to-four margin, the Supreme Court vacated the dismissal and remanded the case for reconsideration in light of the standards set forth in *Miller*. Burger, joined by Blackmun, Powell, Rehnquist, and White, wrote the majority opinion. Douglas dissented as did Brennan who was joined by Marshall and Stewart.

Burger argues that as in *Thirty-Seven Photographs* there is no right to import obscene material even for private possession in one's home or the absence of

any stipulation of possible distribution in the future. *Stanley v. Georgia* (1969), he claims, did not depend on any First Amendment right to purchase obscene materials but on a right to privacy in one's residence. He draws attention to the concurrence by Brennan and two other justices who made the point of saying that *Miller* should have been disposed of on Fourth Amendment grounds irrespective of the character of the material in question. *Stanley*, then, did not rest on the First Amendment but on the right to privacy, which, as a corollary did not imply a right to receive or send obscene material outside the residence.

Burger dismisses what he refers to as the "seductive plausibility of single steps in a chain of evolutionary development of a legal rule" as the respondent tries to do with *Stanley* in an attempt to extend the right to private possession of obscenity beyond the home. Line drawing, "thus far, but not beyond," he notes, is commonplace in judicial decision making, and he adds that if "the precise, carefully limited holding of *Stanley*" included the importation of obscene material, it "would not be law today." There is no correlative right to buy, sell, give to others, or import obscene material. Nor is there a correlative right to transport it in interstate commerce as declared in *United States v. Orito* (1973), a companion case in the Burger Court reevaluation of the Court's obscenity jurisprudence.

Douglas's dissent offers historical documentation for his absolutist stance on the absence of any authority under the First Amendment to censor purported obscene material. Brennan simply refers to his dissents in *Miller* and in *Paris Adult Theatre I* for the reasons why he opposes the majority's decision.

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References and Further Reading

- Alexander, Donald. *The Politics of Pornography*. Chicago: University of Chicago Press, 1989.
- Hixson, Richard F. *Pornography and the Justices: The Supreme Court and the Intractable Obscenity Problem*. Carbondale, IL: Southern Illinois University Press, 1996.
- Mackey, Thomas C. *Pornography on Trial: A Handbook with Cases, Law, and Documents*. Santa Barbara, CA: ABC-CLIO, 2002.

Cases and Statutes Cited

- Miller v. California*, 413 U.S. 15 (1973)
- Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973)
- Stanley v. Georgia*, 394 U.S. 557 (1969)
- United States v. 12 200-Ft Reels of Super 8mm Film*, 413 U.S. 123 (1973)
- United States v. Orito*, 413 U.S. 139 (1973)

UNITED STATES v. THIRTY-SEVEN (37) PHOTOGRAPHS, 402 U.S. 363 (1971)

In this companion case to *U.S. v. Reidel* (1971), the Supreme Court considered the constitutionality of a federal statute prohibiting the importation of obscene photographs in light of *Stanley v. Georgia's* (1969) protection of the "mere private possession" of obscene material.

Customs agents seized photographs Luros had brought into the United States after a trip to Europe and turned them over for forfeiture proceedings. Luros counterclaimed before a three-judge federal court. The court ruled the federal statute was constitutionally invalid, first, because it lacked time limits within which forfeiture proceedings could be started as required by an earlier Supreme Court decision and, second, because it banned obscene material for private use contrary to the *Stanley* decision.

In a fractured vote, the Supreme Court reversed the lower court's decision and remanded it to the lower court. White wrote the opinion. Five justices joined Part I of White's opinion, which "read in" time limits that were absent from the statute to avoid striking it down. Part II of the decision addressed the challenge based on *Stanley* and attracted only three justices (Burger, Brennan, and Blackmun) for a plurality. Harlan and Stewart writing separately concurred with the judgment and Part I of White's opinion but declined to join Part I. Black, joined by Douglas, dissented. Marshall also dissented.

Most of White's opinion was taken up by Part I and the majority's justification for construing and enunciating a time schedule for forfeiture proceedings including judicial review under the federal statute. Part II is relatively brief as White relies on *Reidel* to assert by analogy that if Congress can prevent the mails from being used to distribute obscene literature then it also has the authority to remove from the "channels of commerce" obscene photographs being imported into the country. The private use or possession of obscene material under *Stanley* is of no matter, because "a port of entry is not a traveler's home." And, because customs officials routinely inspect luggage, the right to be left alone "neither prevents the search of...luggage nor the seizure of unprotected but illegal materials" in a traveler's private possession. *Stanley*, in other words, does not extend "to one seeking to import obscene materials from abroad, whether for private use or public distribution."

Marshall's dissent, published as part of the *Reidel* opinion, pointed out that the photographs were taken from Luros' luggage and that they were "in his purely private possession" and that they "threatened neither children nor anyone else." If and when some of the

photographs were published, Marshall argued, the government would have the opportunity to implement the law, because their publication would take place publicly through commercial distribution. The “magnitude of the threats” created by the photographs would “best be assessed when distribution actually occurs.” Justice Black’s more detailed dissent also referred obliquely to the issue of prior restraint that was implicit in the plurality opinion.

Taken in tandem, *Reidel* and *Thirty-Seven Photographs* were efforts by the Court, if not to rein in the genie that *Stanley* released from the bottle to at least clarify and reaffirm the Court’s support for *Roth* and the exception it made to the First Amendment’s protection of free speech and press.

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References and Further Reading

- Alexander, Donald. *The Politics of Pornography*. Chicago: University of Chicago Press, 1989.
- Hixson, Richard F. *Pornography and the Justices: The Supreme Court and the Intractable Obscenity Problem*. Carbondale, IL: Southern Illinois University Press, 1996.
- Mackey, Thomas C. *Pornography on Trial: A Handbook with Cases, Law, and Documents*. Santa Barbara, CA: ABC-CLIO, 2002.

Cases and Statutes Cited

- Stanley v. Georgia*, 394 U.S. 557 (1969)
- United States v. Thirty-Seven (37) Photographs (Luros, Claimant)*, 402 U.S. 363 (1971)
- United States v. Reidel*, 402 U.S. 351 (1971)

UNITED STATES v. 92 BUENA VISTA AVENUE, 507 U.S. 111 (1993)

This was one of four forfeiture cases decided during the 1992 term of the Supreme Court, all against the government. In *Buena Vista*, a drug trafficker had given his girlfriend \$240,000 to purchase a home for herself and her three children. When the government subsequently sought to forfeit her home as an asset “traceable” to illegal drug proceeds pursuant to 21 U.S.C. 881(a)(6), she asserted that the statute’s “innocent owner” defense applied, because she had no knowledge of the gift’s tainted origin. Justice Stevens’ plurality opinion is remembered for its holding that the statute’s innocent owner defense applies not only to someone who innocently purchases a tainted asset but also to someone who innocently receives it as a gift. This holding was effectively nullified by the Civil Asset Forfeiture Reform Act of 2000, which made the defense largely unavailable to the recipient of a gift.

Presumably Congress thought it was less important to protect such unwitting recipients than to deny a wrongdoer the opportunity to “launder” tainted assets by transferring them.

However, the case is also important because to reach its conclusion, the Court had to resolve other statutory ambiguities regarding the operation of forfeiture and the applicability of the common law “relation-back” doctrine. The government had argued, *inter alia*, that the claimant was not an owner at all (and thus not entitled to the statute’s innocent owner defense), because under the “relation back” forfeiture doctrine, the government became owner of the money at the time of the drug crime, and owner of any assets subsequently purchased with it. In rejecting this contention, the Court held that the government becomes owner only after a legal judgment of forfeiture; only after such a judgment does the relation back doctrine apply to retroactively vest the government’s title back to time of the crime. Because the government had not yet won a judgment, the claimant was an owner entitled to raise the defense. Both the statute’s innocent owner defense and the liberal interpretation applied in this case reflect some discomfort with the legal fiction that underpins civil forfeiture doctrine: that the inanimate object itself, not its owner, is the guilty party.

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References and Further Reading

- Department of Justice, *Asset Forfeiture Law and Practice Manual*, June 1998.
- Kessler, Steven L., *Civil and Criminal Forfeiture: Federal and State Practice* § 6.01, 1993.
- Smith, David B. *Prosecution and Defense of Forfeiture Cases*. Matthew Bender.

See also *Calero-Toledo v. Pearson Yacht Leasing Co*, 416 U.S. 663 (1974); *Civil Asset Forfeiture*

UNITED STATES v. AGURS, 427 U.S. 97 (1976)

In *Agurs*, the Supreme Court refined its test from *Brady v. Maryland* for deciding whether the due process clause requires a new trial when the government withholds exculpatory information from a criminal defendant.

Agurs, a prostitute, killed a customer, Sewell. At Agurs’ murder trial, her attorney unsuccessfully argued that she acted in self-defense after Sewell attacked her with a knife.

After her conviction, Agurs’ attorney discovered that Sewell had been convicted of assault and illegally carrying weapons. Agurs moved for a new trial,

arguing that the prosecution's failure to disclose Sewell's record violated *Brady*. The trial judge denied the motion, but an appellate court ordered a new trial.

The Supreme Court reinstated Agurs' conviction by a vote of seven to two. The Court first rejected the prosecution's argument that it must disclose information only when the defense specifically requests it and instead held that prosecutors must turn over exculpatory information even without a request. However, the Court ruled, failure to turn over "*Brady* material" requires a new trial only if disclosure reasonably likely would have changed the outcome of the trial. Because the jury knew that Sewell was carrying knives, the Court concluded that disclosure of his record likely would not have changed the outcome.

Agurs is important, because it defined both the prosecution's duty to disclose exculpatory information and the standard to be used when such information is withheld. In subsequent cases, including *Pennsylvania v. Ritchie* and *Arizona v. Youngblood*, the Court has further refined the *Brady* standard.

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References and Further Reading

Imwinkelried, Edwin, and Norman Garland. *Exculpatory Evidence*. 2nd ed. Michie, 1996.

Stacy, Tom, *The Search for Truth in Constitutional Criminal Procedure*, Columbia Law Review 91 (1991): 1369.

Cases and Statutes Cited

Arizona v. Youngblood, 488 U.S. 51 (1988)

Brady v. Maryland, 373 U.S. 83 (1963)

Pennsylvania v. Ritchie, 480 U.S. 39 (1987)

See also *Arizona v. Youngblood*, 488 U.S. 51 (1988); *Brady v. Maryland*, 373 U.S. 83 (1963); Due Process; Fourteenth Amendment

UNITED STATES v. ASH, 413 U.S. 300 (1973)

A right to counsel's presence during an eyewitness identification procedure exists to avert suggestive procedures and prevent convicting the innocent (*United States v. Wade*). In *United States v. Ash*, the Court decided this right would not generally extend to photographic identification procedures. Wade was already indicted when he was presented in person in a lineup with other individuals, and the eyewitness then chose him. *Ash*, too, had been indicted and had counsel appointed when his photo was included in an array of five photos displayed to eyewitnesses in pretrial interviews with the prosecutor. Ash argued his

UNITED STATES v. BALSYS, 524 U.S. 666 (1998)

counsel should have been notified and allowed to attend these interviews to avert suggestiveness. Although these post-indictment non-corporeal identification procedures occurred in the course of the Sixth Amendment's criminal prosecution, see *Kirby v. Illinois*, the majority held there was no right to counsel so long as the photographs were preserved for examination at trial. This was not a critical stage in the criminal prosecution necessitating the presence of counsel, because it could be accurately reconstructed by retention of the photos, the defendant's absence distinguished this from trial-like confrontations where counsel was required, and the prosecutor should be allowed to interview its witnesses before trial without defense counsel's presence. Dissenters urged suggestive influences may be subtly brought to bear by the method of presentation of the photos and that preserving the photos would not detect or avert such prejudice. Due process arguments may still be made regarding photographic identification procedures.

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References and Further Reading

American Law Institute. *A Model Code of Pre-Arrest Procedure, Proposed Official Draft and Commentary*. (1975): 419-458.

Grano, Joseph D., Kirby, Biggers, and Ash, *Do Any Constitutional Safeguards Remain against the Danger of Convicting the Innocent?* Michigan Law Review 72 (1985): 717-798.

Levine, Felice J., and June L. Tapp, *The Psychology of Criminal Identifications: The Gap from Wade to Kirby*, University of Pennsylvania Law Review 121 (1973): 1079-1131.

Moore v. Illinois, 434 U.S. 220 (1977).

Panel Discussion, *The Role of the Defense Lawyer at a Lineup in Light of the Wade, Gilbert, and Stovall Decisions*, Criminal Law Bulletin 4 (1968): 273-296.

Cases and Statutes Cited

United States v. Wade, 388 U.S. 218 (1967)

Gilbert v. California, 388 U.S. 263 (1967)

Kirby v. Illinois, 406 U.S. 682 (1972)

Manson v. Brathwaite, 430 U.S. 98 (1977)

See also Eyewitness Identification; Due Process; Lineups; Right to Counsel

UNITED STATES v. BALSYS, 524 U.S. 666 (1998)

This decision toes the line of cases declining to extend beyond U.S. borders certain civil liberties guaranteed by the Constitution. Aloyzas Balsys, a U.S. permanent resident, emigrated from Lithuania in 1961.

Thirty years later, the Justice Department's Office of Special Investigations came to suspect that during World War II Balsys had helped Nazis to persecute persons on account of race, religion, or political opinion. Balsys refused to reply to questions about this at an immigration hearing. He invoked the Fifth Amendment privilege against self-incrimination on the ground his answers might be used against him in a criminal trial—not in the United States, where the worst he faced was deportation, but in Lithuania, the country to which he would be deported. Resolving disagreement in courts below, justices held seven to two that witnesses might be compelled to testify in the United States even though a foreign prosecutor might use that testimony against them. Justice David Souter's majority opinion interpreted precedents to mean that the privilege binds only federal or state governments and not governments outside the United States. A concern underlying the privilege—that forced self-incrimination improperly harms human dignity—was said not to compel a different result. The Court held that an exception might occur if the United States were colluding with the foreign government; however, the extensive U.S.–Lithuania cooperation in Balsys' case did not rise to that level. At a time of increasing cross-border law enforcement cooperation, *Balsys* stands as an obstacle to assuring full protection of individual rights.

DIANE MARIE AMANN

References and Further Reading

- Amann, Diane Marie., *A Whipsaw Cuts Both Ways: The Privilege against Self-Incrimination in an International Context*, UCLA Law Review 45 (1998): 5: 1201–1295.
- , *International Decisions: United States v. Balsys*, American Journal of International Law 92 (1998): 4: 759–764.
- Seidmann, Daniel J., and Alex Stein. *The Right to Silence Helps the Innocent: A Game-Theoretic Analysis of the Fifth Amendment Privilege*, Harvard Law Review 114 (2000): 2: 430–510.

Cases and Statutes Cited

United States v. Balsys, 524 U.S. 666 (1998)

See also **Constitution Overseas**

UNITED STATES v. BRIGNONI-PONCE, 422 U.S. 873 (1975)

Two border patrol officers seated in their car late at night were watching cars drive by a border checkpoint that had been closed because of bad weather. The

officers pursued a car, stopped it, questioned, and arrested its three occupants when the officers learned two of them were undocumented aliens. The officers claimed that the only reason for the stop had been the occupants' Mexican appearance.

The driver was convicted of knowingly transporting illegal immigrants. He challenged his conviction on the grounds that the testimony of the undocumented aliens had to be suppressed because their seizure was illegal. The Court affirmed the lower court's reversal of the conviction reasoning that the Fourth Amendment prohibited random, roving patrol stops in areas near the border. The Court interpreted the Fourth Amendment to permit Border Patrol officers to briefly stop vehicles in areas near the border and question the occupants to determine whether they were legally in the United States if the officers had a reasonable suspicion that the vehicle was carrying undocumented aliens. The fact that the vehicle's occupants were of Mexican ancestry or appearance could be used as a factor to establish reasonable suspicion but could not alone justify the stop. Reasonable suspicion consists of specific facts, like the characteristics of the area, the usual patterns of traffic, previous experience with alien traffic, the proximity of the border, information about recent illegal border crossings, the driver's behavior, the vehicle itself, and the characteristics of the persons in the vehicle that establish the likelihood that the vehicle carries undocumented aliens.

The case is one of the first modern Supreme Court cases to deal with the issue of racial profiling.

M. ISABEL MEDINA

See also **Exclusionary Rule; Race and Criminal Justice; Race and Immigration; Noncitizens and Civil Liberties; Terry v. Ohio**, 392 U.S. 1 (1968), **Undocumented Migrants**

UNITED STATES v. CALANDRA, 414 U.S. 338 (1974)

The Fourth Amendment exclusionary rule directs that if evidence is seized in violation of a defendant's protection against unreasonable searches and seizures, it cannot be used at trial to prove his guilt. In *United States v. Calandra*, the Supreme Court considered whether the exclusionary rule should apply to grand jury investigations.

Federal agents searched Calandra's office and found a document that suggested Calandra might be receiving payments from an extortion victim. Calandra was subpoenaed to the grand jury to be questioned about that document. Although he

received “testimonial and use immunity,” he still refused to testify, asserting that the document had been seized illegally, and therefore to allow the government to use it to question him in the grand jury would violate his Fourth Amendment rights. After a hearing, a federal judge agreed with Calandra on both points.

On appeal, the Supreme Court held that the lower court never should have held the hearing in the first place, because the exclusionary rule does not apply to grand jury investigations. The Court gave two reasons: the nature of the exclusionary rule and the nature of the grand jury.

The main purpose of the exclusionary rule, the Court stressed, is to deter police misconduct. Therefore, if applying the rule in a particular case is unlikely to deter other police from acting similarly in another case, there is no sense in applying the rule. Because it is unlikely police would conduct an unlawful search merely to gather material to ask someone questions in a grand jury, applying the rule in such a case would have little deterrent effect on future police conduct.

Moreover, applying the rule to grand jury investigations could interfere significantly with the grand jury's ability to fulfill its historic role: to decide whether a crime has been committed and, if so, who should be charged. A grand jury, the Court stressed, has the authority to investigate pretty much anything it wants and to consider whatever evidence it considered relevant, even if that evidence would not be admissible at trial. Permitting a witness to challenge the evidence used to question him would slow the process down without any significant deterrent impact on future police misconduct. Thus the rule has no application during grand jury investigations.

CLIFFORD S. FISHMAN

References and Further Reading

Exclusionary Rule: *United States v. Calandra*, 414 U.S. 338 (1974); 65 *Journal of Criminal Law and Criminology* 460 (1974); Barone, Joseph J., *Calandra—The Present Status of the Exclusionary Rule*, 4 *Cap. University Law Review* 95 (1974–1975); Erb, John C., *An Unexcited View of United States v. Calandra*, *Chicago-Kent Law Review* 51 (1974–1975): 212; Marks, Thomas C. Jr., Mark A., Hanley, and Mark Thomas Luttier, *Personal Right to Exclusion—A Criticism of United States v. Calandra*, *Stetson Law Review* 9 (1979–1980): 309.

LaFave, Wayne R. *Search and Seizure: a Treatise on the Fourth Amendment*. 4th Ed. West, 2004, sections 1.6(a), 1.6(c), 1.7(b).

See also **Exclusionary Rule**

UNITED STATES v. CRUIKSHANK, 92 U.S. 542 (1876)

The aftermath of the American Civil War was marked by the passage of a series of constitutional amendments and federal laws designed to establish and preserve the civil rights of African Americans. Most significantly, the Fourteenth Amendment, ratified in 1868, provided for equal protection of the law for all American citizens and prohibited the deprivation of a citizen's “life, liberty, or property without due process of law.” Congress extended these protections in 1870 by passing the first Enforcement Act, which forbade two or more private citizens from depriving another citizen of his or her civil rights, making such conduct a felony under federal law.

These federal measures helped to stymie efforts to preserve the system of white supremacy that survived in the former Confederate states after the abolition of slavery. In reaction to these measures, white supremacists sought to preserve the southern racial caste system through state and local “Jim Crow” laws enforcing racial segregation and through the extralegal activities of paramilitary terror groups such as the Ku Klux Klan. Lynchings, or the enforcement of mob justice through public beatings and executions, became commonplace in many areas of the American South, in direct violation of the Enforcement Act.

Among the first persons charged with violating the Act was William J. Cruikshank, who along with approximately eighty co-conspirators was indicted for the lynching of two African-American men on April 13, 1873, for trying to vote in a local election. United States Attorney J. R. Beckwith had sought indictment of the co-conspirators on Federal charges, because the murder of an African American by a white person was not a crime under existing Louisiana law. The Federal Circuit Court for Louisiana convicted Cruikshank and the other defendants; after which the U.S. Supreme Court agreed to hear the case on appeal during the fall term of 1874. The prosecution, assisted by U.S. Attorney General Edwards Pierpont and Solicitor General Samuel F. Phillips, argued that the Fourteenth Amendment provided a basis for the 1870 Enforcement Act by giving the federal government the authority to prosecute violators of citizens' civil rights. The defense team, headed by David Dudley Field, countered that the Fourteenth Amendment only protected citizens against government violations of civil rights, not against the oppressive acts of private citizens. In October of 1875, the Court ruled unanimously that prosecution of the defendants under federal law was unconstitutional, because state law was primarily responsible for protecting citizens from each other.

As a result of the Court's decision, victims of civil rights abuses were left to seek protection from state courts, which were often uninterested in safeguarding the civil rights of southern blacks. The decision led to a variety of civil rights abuses, including a proliferation of state and local segregation laws, poll taxes and literacy tests designed to deny the vote to African Americans, and a continuation of racial intimidation and violence. Not until the passage of the federal civil rights legislation of the 1960s would African Americans receive full protection of their civil rights under federal law.

MICHAEL H. BURCHETT

References and Further Reading

- Foner, Eric. "The New View of Reconstruction." *American Heritage* 34 (October–November 1983): 6: 10–16.
- Neely, Mark E. *The Fate of Liberty: Abraham Lincoln and Civil Liberties*. New York: Oxford University Press, 1991.
- Nieman, Donald G. *Promises to Keep: African Americans and the Constitutional Order, 1776 to the Present*. New York: Oxford University Press, 1991.
- Tomlins, Christopher, ed. *The United States Supreme Court: The Pursuit of Justice*. New York: Houghton Mifflin, 2005.

Cases and Statutes Cited

Fourteenth Amendment to U.S. Constitution, USCA Cons. Amend. 14s 1
Enforcement Act, Act of May 31, 1870, c. 6, 16 Stat. 141

See also **Civil Rights Act of 1964; Federalization of Criminal Law; Freedom of Association; Thirteenth Amendment**

UNITED STATES v. DIONISIO, 410 U.S. 1 (1973)

The government, seeking to identify people overheard on a court-authorized wiretap, issued a subpoena directing Dionisio to appear before the grand jury and give a voice exemplar. In *United States v. Mara*, 410 U.S. 19 (1973), a companion case decided the same day, a subpoena required production of a handwriting exemplar. Dionisio and Mara each refused, claiming the subpoena violated their Fourth and Fifth Amendment rights. The Supreme Court upheld the subpoenas, ruling that unless they complied, they could be held in contempt of court.

The Fourth Amendment protects against unreasonable searches and seizures. The Court held that,

unlike a case where a suspect is forcibly taken into custody without probable cause to obtain an exemplar, there is nothing "unreasonable" about being subpoenaed: except in rare situations, everyone is required to comply with a subpoena to testify or produce physical evidence. Moreover, as the Court held in *Katz v. United States*, 389 U.S. 347 (1967) the Fourth Amendment protects only "reasonable expectations of privacy"; it does not objects or information that a person "knowingly exposes to the public." A person's voice and handwriting clearly fall into the latter, unprotected, category.

As to the Fifth Amendment, the Court reiterated its prior rulings in *United States v. Wade*, 388 218 (1967), involving lineups, and in *Schmerber v. United States*, 384 U.S. 757 (1966), involving a blood sample taken from a drunk driver, that the privilege against compelled self-incrimination only bars compelling "communications" or "testimony," not "physical characteristics." Because a person's voice and handwriting are physical characteristics, not "communications," the Court held, the Fifth Amendment does not protect a suspect from having to provide exemplars to the government.

CLIFFORD S. FISHMAN

References and Further Reading

- Etling, Sheryl B., *United States v. Dionisio—Fourth Amendment and Grand Jury Investigations*, UMKC Law Review 42 (1973–1974): 244.
- The Exclusionary Rule: *United States v. Dionisio*, 410 U.S. 1 (1973), *United States v. Mara*, 410 U.S. 9 (1973), *Journal of Criminal Law and Criminology* 64 (1973): 414.
- Harvard Law Review November, 1973 *The Supreme Court, 1972 Term 2. Applicability of Fourth Amendment to Grand Jury Subpoenas*, *Harvard Law Review* 87 (1973): 204.

Cases and Statutes Cited

United States v. Mara, 410 U.S. 19 (1973)
Katz v. United States, 389 U.S. 347 (1967)
United States v. Wade, 388 218 (1967)
Schmerber v. United States, 384 U.S. 757 (1966)

See also **Privacy; Self-Incrimination (V): Historical Background**

UNITED STATES v. EICHMAN, 496 U.S. 310 (1990)

See Flag Burning

**UNITED STATES v. GRIMAUD,
220 U.S. 506 (1911)**

The Forest Reserve Act of 1891, and subsequent amending Acts, gave the president the power to establish forest preserves. The Act included various statutes governing use of the forests and delegated to the Secretary of Agriculture the power to establish rules and regulations to further Congressional intent with respect thereto. Congress also set punishment for violations of the statutes or the regulations. Among the regulations subsequently promulgated by the secretary was a requirement that the grazing of more than six head of livestock within the forest required a permit.

Grimaud was indicted for grazing sheep on the Sierra Forest Reserve without a permit. He alleged that the Forest Reserve Act was an unconstitutional attempt by Congress to delegate its legislative powers to an administrative officer.

Determining the line that separates the power of the legislature to make laws from administrative authority to make regulations is difficult. The Court found that although grazing was prohibited through regulations established by the secretary rather than by Congress, such a determination was an administrative detail. After Congress has indicated its will, it can lawfully give others the “power to fill up the details” by establishing administrative rules and regulations to carry out that will.

The Court noted that the secretary could not make regulations for any and all purposes but only those that clearly relate to the matters authorized by Congress. A key factor in the decision was the fact that violation of the rules was made a crime and punishment fixed by Congress, not by the secretary.

The case resolved a longstanding conflict of authority within the lower federal courts and was a milestone in establishing the ability of Congress to regulate land use, and its authority to delegate to federal agencies rule-making ability in furtherance thereof.

STEPHEN WATKINS

References and Further Reading

Stern, Bill Steven, *Permit Value: A Hidden Key to the Public Land Grazing Dispute*, M.A. Thesis, The University of Montana, 1998 (available at: “<http://www.rangenet.org/directory/stern/thesis/index.html>”).

Cases and Statutes Cited

Forest Reserve (or “General Revision”) Act of 1891, 26 Stat. 1103; 16 U.S.C. 471
Organic Administration Act, 30 Stat. 34; 16 U.S.C. 473

See also **Due Process; Federalization of Criminal Law**

**UNITED STATES v. HAVENS,
446 U.S. 620 (1980)**

This opinion made it easier for the government to impeach defendants for false statements given during trial, allowing impeachment even based on statements given during cross-examination as long as the subject matter was “reasonably suggested” on direct examination. Havens and an acquaintance, both attorneys from Indiana, were stopped by customs returning to the United States from Peru. The other man was carrying cocaine that had been sewn into his shirt. He implicated Havens, whose luggage was searched without a warrant, revealing a T-shirt whose holes matched the patches in his accomplice’s shirt. During cross-examination at trial, Havens denied any knowledge of the cocaine or the shirt in his luggage, but these misstatements impeached his credibility and helped convict him of smuggling cocaine. The Court of Appeals reversed his conviction, charging that illegally obtained evidence—here gained without a warrant—could only be used to impeach a witness if it contradicts a defendant’s statement on direct examination. Although the Fourth Amendment protects citizens from illegal searches and seizures, the Court had already undermined that protection by allowing illegally seized evidence to be used at trial. The Supreme Court further relaxed the rule by allowing that a defendant’s statements during cross-examination can also be the basis for impeachment, even if the impeachment relies on illegally obtained evidence. The Court emphasized the underlying goal of seeking the truth in criminal trials, which overcame the procedural barriers set up by prior cases against using information gained during cross-examination. The dissenting opinion aptly cast this decision as part of a trend in the Court of undermining the rights of criminal defendants.

DAVID D. BURNETT

References and Further Reading

The Exclusionary Rule: Impeachment Exception Broadened to Include Statements First Elicited Upon Cross-Examination—United States v. Havens, DePaul Law Review 30 (1980): 225–242.

United States v. Havens: *Impeachment by Illegally Obtained Evidence*, Syracuse Law Review 32 (1981): 637–679.

Williams, Teresa Sigmon, *Recent Development: Criminal Law and Procedure—Evidence—Impeachment of Cross-Examination Response with Suppressed Evidence*, Tennessee Law Review 48 (1981): 721–740.

Cases and Statutes Cited

United States v. Havens, 446 U.S. 620 (1980)

See also **Administrative Searches and Seizures; Airport Searches; Arrest without a Warrant; Automobile Searches; Due Process in Immigration; Search (General Definition); Search Warrants; War on Drugs; Warrantless Searches**

UNITED STATES v. KAHRIGER, 345 U.S. 22 (1953)

Congress has no general power to police vice; that power belongs instead to the states. On the other hand, Congress can regulate, even prohibit, commerce across state lines, and Congress's power to tax is very broad indeed. Congress has long used taxes to discourage transactions it could not prohibit. In this case, a bookie complained of provisions of the Revenue Act of 1951 obliging those who took wagers to register with the federal government so that they might be taxed on that business. Where state law prohibited gambling, those registering risked state prosecution, while those refraining risked federal prosecution. The law made no exception for bookies who operated only locally. When Kahriger was prosecuted for failing to register, he argued successfully that the charges be dropped because the law amounted to abuse by Congress of its taxing power to achieve what the Constitution otherwise foreclosed. He relied heavily on *U.S. v. Constantine* (1935). In that case, the Court had concluded that a similar tax on liquor vendors was really a penalty beyond the scope of federal power after repeal of the Eighteenth Amendment and could not be sustained just because it took the form of a tax. By 1953, however, the Court had grown more receptive to federal solutions for national problems. The decision below in Kahriger's favor was reversed and the wagering excise provisions were upheld. *Constantine* was distinguished on the grounds that the tax in that case applied only to a business prohibited by state law, whereas the tax in this case applied to wagering without regard to its legality under state law. The Court preferred to follow its line of cases upholding federal taxes on the businesses of issuing private bank notes, *Veazie Bank v. Fenno* (1869), and selling margarine, *McCray v. United States* (1904), marijuana, *United States v. Sanchez* (1950), narcotics, *United States v. Doremus* (1919), or firearms, *Sonzinsky v. United States* (1937). As the Court now saw things, evidence that Congress intended to discourage a certain activity that it could not regulate does not make unconstitutional a tax proper in its form.

Kahriger also argued that compulsory registration violated his privilege against self-incrimination, but the Court took the view that registration amounted only to a declaration of intent to take wagers in the future, rather than a confession to taking them in the past. In *Marchetti v. United States* (1968), the Supreme Court changed its mind on this point, striking down the wagering tax because it coerced confession in violation of the Fifth Amendment.

JOHN PAUL JONES

References and Further Reading

Salzburg, Stephen, *The Required Records Doctrine: Its Lessons for the Privilege against Self-Incrimination*, University of Chicago Law Review 6 (1986): 53.
Steed, Thomas W., Jr., (Note) *Constitutional Law—Taxation—Federal Excise and Operational Tax on Wagering*, North Carolina Law Review 31 (1953): 467.

Cases and Statutes Cited

Marchetti v. United States, 390 U.S. 39 (1968)
McCray v. United States, 195 U.S. 27 (1904)
Sonzinsky v. United States, 300 U.S. 506 (1937)
United States v. Constantine, 296 U.S. 287 (1935)
United States v. Doremus, 249 U.S. 86 (1919)
United States v. Kahriger, 345 U.S. 22 (1953)
United States v. Sanchez, 340 U.S. 42 (1950)
Veazie Bank v. Fenno, 75 U.S. (8 Wall.) 533 (1869)

See also **Federalization of Criminal Law; Self-Incrimination (V): Historical Background**

UNITED STATES v. LEE, 455 U.S. 252 (1982)

When a person's religious beliefs are at odds with actions of their government, and the person is required to support the government through taxes, there may be conflict. In deciding these conflicts, courts must weigh the government's interest in the tax program against the burden on the individual's rights under the free exercise clause of the First Amendment.

Mr. Edwin Lee was a member of the Old Order Amish who owned a farming and carpentry business. Mr. Lee, and other members of the Old Order Amish, believed it is a sin to participate in a system of governmental insurance like social security. Because of that belief, Mr. Lee did not pay social security and employment taxes for himself or his employees. The IRS assessed back taxes against Mr. Lee, and Mr. Lee sued the IRS. Mr. Lee based his suit on the free exercise clause and a provision in the tax code that

allowed self-employed Amish an exemption from social security taxes under certain conditions.

The Supreme Court decided this case using the same analysis it had used in *Wisconsin v. Yoder*, when it ruled that Wisconsin's compulsory education laws unconstitutionally interfered with the free exercise rights of parents of Amish children. However, unlike in *Wisconsin*, in this case the Court did not require an accommodation on the part of the government. In a unanimous opinion, the Court ruled that there was no constitutional requirement for an exemption from social security taxes based on the free exercise clause. It also ruled that the existing statutory exemption only applied to the self-employed, not employers like Mr. Lee.

Without conducting an analysis of his religious beliefs, the Court accepted as a fact that forcing Mr. Lee to pay social security taxes interfered with his free exercise of religion. This followed the practice that the Court had previously articulated in *Thomas v. Review Bd. of Indiana Employment Security Div.* Then the Court analyzed the compulsory nature of the social security system. It determined that the government's interest in having a compulsory social security system was "very high." It likened social security taxes to income taxes and determined that the tax system could not function with different religious denominations challenging each use of taxes that violated their beliefs. A concurring opinion noted that it would not be difficult to provide the exemption, because it already existed in the tax code for self-employed Amish, but the remainder of the Court believed that providing exemptions on the basis of religious beliefs could undermine the social security system. Therefore, the constitution did not require an exemption. Later, in *Employment Div. Dep't of Human Res. of Or. v. Smith*, the Court ruled that there would be no constitutionally required exemption from generally applicable laws on the basis of the free exercise clause.

Although there was no constitutionally required exemption from social security taxes based on the free exercise clause, Congress was still free to expand the existing statutory exemptions. In 1988, Congress passed a law that provided the exemption to Amish employers and employees.

JAMES G. HARWOOD

References and Further Reading

Harwood, James G., *Religiously-Based Social Security Exemptions: Who Is Eligible, How Did They Develop, and Are the Exemptions Consistent with the Religion Clauses and the Religious Freedom Restoration Act (RFRA)?* Akron Tax Journal 17 (2002): 1: 1–22.

Cases and Statutes Cited

Wisconsin v. Yoder, 406 U.S. 205 (1972)

Thomas v. Review Bd. of Indiana Employment Security Div., 450 U.S. 707 (1981)

Employment Div. Dep't of Human Res. of Or. v. Smith, 494 U.S. 872 (1990)

UNITED STATES v. LEON, 468 U.S. 897 (1984)

The Fourth Amendment prohibits governmental officials from carrying out unreasonable searches and seizures. Under the Fourth Amendment exclusionary rule, evidence obtained by the government from an unconstitutional search will normally be excluded at the criminal trial.

In its landmark decision in *Mapp v. Ohio* (1961), the Supreme Court held that the Fourth Amendment exclusionary rule applies in state criminal proceedings. The Court in *Mapp* found that the exclusionary rule is necessary to deter police violations of the Fourth Amendment. The decision in *Mapp* generated intense controversy and debate. In *United States v. Leon* (1984), the Supreme Court created a significant exception to the exclusionary rule. Under *Leon*, if a law enforcement officer conducts a search in good faith reliance on a search warrant issued by a magistrate that is not based on probable cause, the exclusionary rule does not apply. An officer acts in good faith when reliance on the warrant is objectively reasonable. In the companion case of *Massachusetts v. Sheppard* (1984), the Court held that the *Leon* good-faith exception also applies when the warrant fails to describe the place to be searched with sufficient particularity.

The Court's opinion in *Leon* reads like a brief against the exclusionary rule. The Court adopted the view that the exclusionary rule is not mandated by the Fourth Amendment but is merely a judicially created remedy. Furthermore, there is great cost in applying the rule in that it impedes the truth-finding function and allows some guilty defendants to go free. As Justice Cardozo famously put it, the "criminal is to go free because the constable has blundered." On the "benefit" side of the cost-benefit analysis, the Court found no empirical evidence to support the deterrence rationale behind the exclusionary rule. To the extent deterrence supports the rule, it is designed to deter Fourth Amendment violations by law enforcement officers, not by magistrates.

The decision in *Leon* states that the good-faith exception does not apply when (1) the police officer did not have an objectively reasonable belief that the warrant was supported by probable cause; (2) the warrant was based on a police officer's affidavit that

knowingly or recklessly omitted or misstated material facts; (3) the execution of the warrant was unreasonable; or (4) the magistrate wholly abandoned his or her role as a neutral and detached magistrate, for example, by either “rubber stamping” police applications for warrants or by participating in the search.

The actual impact of *Leon* on the police and criminal prosecutions has probably not been great, because most searches are conducted without a warrant, for example, incident to a lawful arrest or with consent. Nevertheless, the decision is important because it revealed the Supreme Court’s distinctively negative attitude toward the exclusionary rule. Applying the rationale of *Leon*, the Court later held that the exclusionary rule does not apply when the officer’s search was based on his good faith reliance on a state statute later declared unconstitutional, *Illinois v. Krull* (1987) or on inaccurate law enforcement records attributable to an error by a court employee (*Arizona v. Evans*, 1995).

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References and Further Reading

LaFave, W., J. Israel, and N. King. *Criminal Procedure*. 4th ed. 2004.

Cases and Statutes Cited

Arizona v. Evans, 514 U.S. 1 (1995)
Illinois v. Krull, 480 U.S. 340 (1987)
Mapp v. Ohio, 367 U.S. 643 (1961)
Massachusetts v. Sheppard, 468 U.S. 981 (1984)
United States v. Leon, 468 U.S. 897 (1984)
Weeks v. United States, 232 U.S. 383 (1914)
Wolf v. Colorado, 338 U.S. 25 (1949)

See also *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971); **Exclusionary Rule; Probable Cause; Warrantless Searches**

UNITED STATES v. LOVASCO, 431 U.S. 783 (1977)

An individual charged with firearms violations sought dismissal of the indictment on the ground that the delay between the commission of the offense and the initiation of the prosecution—more than eighteen months—was both unnecessary and prejudicial to his defense and thereby deprived him of due process of law.

In a previous case, *United States v. Marion*, the United States Supreme Court held that only a formal charge or an arrest triggers an individual’s Sixth Amendment right to a speedy trial, and it stated that

statutes of limitation provide the primary protection against overly stale criminal charges. Nevertheless, it acknowledged that “the Due Process Clause has a limited role to play in protecting against oppressive delay.”

In *United States v. Lovasco*, the Court examined that role. It concluded that although prejudice to an individual’s defense generally is a necessary condition for a due process violation, it is not a sufficient condition; rather, the reasons for the delay are also relevant. The Court then held that prosecuting an individual after a delay caused by the government’s further investigation of the criminal transaction in question does not deprive that individual of due process, even though the lapse of time might have somewhat prejudiced the individual’s defense. The Court strongly implied that pre-accusation delay would deprive an individual of due process only when the government undertakes delay “solely to gain tactical advantage over the accused” or recklessly disregards an appreciable risk that delay would impair the accused’s ability to mount an effective defense.

DAVID S. RUDSTEIN

References and Further Reading

LaFave, Wayne R., Jerold H. Israel, and Nancy J. King. *Criminal Procedure*. 4th ed. St. Paul: Thompson-West, 2004, pp. 877–879.
Rudstein, David S., C. Peter Erlinder, and David C. Thomas. *Criminal Constitutional Law*. Newark and San Francisco: LexisNexis-Matthew Bender, 1990, 2004, pp. 11–48 to 11–56.

Cases and Statutes Cited

United States v. Marion, 404 U.S. 307 (1971)

See also **Speedy Trial**

UNITED STATES v. LOVETT, 328 U.S. 303 (1946)

The Bill of Attainder Clause of Article I of the Constitution prohibits any legislative act that inflicts punishment on an individual without judicial trial. In 1943, during the pre-Cold War anticommunist hysteria, the House Committee on American Activities, after hearings, determined that Lovett and two other federal employees were guilty of subversive activity. To force the executive branch to discharge these three employees, Congress adopted a rider to the Urgent Deficiency Appropriation Act of 1943, which denied the authority to pay salaries to these employees unless

they were reappointed with the advice and consent of the Senate.

In *Lovett*, the Supreme Court concluded that the statute was an unconstitutional bill of attainder. Writing for the majority, Justice Black identified three elements that distinguish bills of attainder from legitimate legislative acts. First, the statutes are specific in that they are designed to apply to particular individuals. Second, the statutes punish these individuals by excluding them from their chosen vocation. Finally, the statutes accomplish the punishment of the named individuals without a judicial trial. Relying on legislative history, the Court found that the statute in *Lovett* clearly involved such punishment because it amounted to a congressional statement finding certain individuals guilty of subversive activity and sentencing them to the exclusion from governmental service. The *Lovett* decision halted congressional efforts to punish individuals by name in statutes.

PATRICK H. HAGGERTY

References and Further Reading

Tribe, Lawrence H. *American Constitutional Law*. 2nd ed. Mineola, NY: Foundation, 1988, pp. 641–656.

See also **Bill of Attainder; World War II, Civil Liberties in**

UNITED STATES v. MILLER, 307 U.S. 174 (1939)

The Supreme Court's most recent and most important decision on the meaning of the Second Amendment, *United States v. Miller*, developed from the enactment of the National Firearms Act of 1934, the first federal regulation of private firearms. It taxed and required the registration of automatic weapons and sawed-off shotguns. In 1939, the Act was challenged under the Second Amendment in *Miller*.

The government indicted Miller and a co-defendant for transporting an unregistered sawed-off shotgun in interstate commerce. A lower court found that the Act violated the Second Amendment. By a unanimous opinion, the Supreme Court found that the sawed-off shotgun was not among the "arms" protected by the Second Amendment absent "evidence tending to show that" its use or possession "at this time has some reasonable relationship to the preservation or efficiency of a well-regulated Militia." The Court concluded that it was not "within judicial notice" that a sawed-off shotgun was a weapon that was "any part of the ordinary military equipment" or whose use "could contribute to the common defence." Without such

UNITED STATES v. MILLER, 425 U.S. 435 (1976)

evidence, the Court could not "say that the Second Amendment guarantees the right to keep and bear such an instrument."

Miller leaves open the question of whether the rights secured by the Second Amendment belong only to individuals, to the states, or to persons serving in state-organized militia units. Given widespread gun ownership and the demand for stricter gun controls, the debate over the rights secured by the Second Amendment will remain ongoing and lively.

PATRICK H. HAGGERTY

References and Further Reading

Kates, Don B., *Handgun Prohibition and the Original Meaning of the Second Amendment*, Michigan Law Review 82 (1983): 204–273.

Levinson, Sanford, *The Embarrassing Second Amendment*, Yale Law Journal 99 (1989): 637–659.

Tribe, Lawrence, *American Constitutional Law*. 3rd ed. New York, NY: Foundation, 2000, pp. 894–903.

Williams, David C., *Civil Republicanism and the Citizen Militia: The Terrifying Second Amendment*, Yale Law Journal 101 (1991): 551–615.

See also **Gun Control/Anti-Gun Control; National Rifle Association (NRA); Right to Bear Arms (II)**

UNITED STATES v. MILLER, 425 U.S. 435 (1976)

In *United States v. Miller*, the Supreme Court held that financial records possessed by third parties are not subject to Fourth Amendment protection. Federal agents issued subpoenas to banks for the financial records of the defendant. The defendant argued that the government needed a warrant to obtain the information. The Court concluded that the defendant lacked a reasonable expectation of privacy in the records because "the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities." As the Court reasoned: "The checks are not confidential communications but negotiable instruments to be used in commercial transactions. All of the documents obtained, including financial statements and deposit slips, contain only information voluntarily conveyed to the banks and exposed to their employees in the ordinary course of business."

The Court's reasoning in *Miller* suggests that if information is in the hands of third parties, an individual can have no reasonable expectation of privacy in that information, and accordingly, the Fourth Amendment does not apply. Three years later, in *Smith v. Maryland*, the Court used similar reasoning

to conclude that a list of telephone numbers that a person dialed was not protected by the Fourth Amendment, because the phone company had access to the information. This reasoning presents difficulties today because so much personal information is in the hands of third parties. People's information is maintained by stores, businesses, websites, employers, internet service providers, hospitals, and numerous other companies. If *Miller* applies this broadly, the government can learn a lot about a person's lifestyle, reading habits, political activity, and health with little limitation or judicial oversight.

DANIEL J. SOLOVE

References and Further Reading

- LaFare, Wayne R., Jerold H. Israel, and Nancy J. King. *Criminal Procedure*. 3d ed. 2000. pp. 144–145.
- Solove, Daniel J., *Digital Dossiers and the Dissipation of Fourth Amendment Privacy*, Southern California Law Review 75 (2002): 1083–1168.
- Swire, Peter P., *Financial Privacy and the Theory of High-Tech Government Surveillance*, Washington University Law Quarterly 77 (1999): 461.

Cases and Statutes Cited

Smith v. Maryland, 442 U.S. 735 (1979)

See also **Privacy; Search (General Definition)**

UNITED STATES v. O'BRIEN, 391 U.S. 367 (1968)

On the morning of March 31, 1966, David Paul O'Brien mounted the steps of the South Boston Courthouse where he burned his Selective Service registration certificate, or "draft card."

O'Brien's actions were not only a provocative form of protest but also a crime. After widespread publicity about draft card burnings, in August 1965, Congress amended the Selective Service Act to make criminally liable anyone who "knowingly destroys" or "knowingly mutilates" a draft card. O'Brien was convicted of violating these provisions of the Act over his objection that the 1965 Amendment violated his First Amendment right to protest the draft and the Vietnam War through the "symbolic speech" of draft-card burning.

The United States Supreme Court rejected O'Brien's First Amendment argument. In doing so, the Court described a test to determine whether regulation of symbolic speech, or, as it is more typically labeled today, "expressive conduct," is constitutionally permissible. In a seven-to-one opinion, Chief Justice Warren established that such regulation would

not be subjected to strict scrutiny, but would, instead, be upheld if it passed a four-part test. A regulation would be permissible if it: was within the "constitutional power of the Government"; it advanced "an important or substantial governmental interest"; that interest was not "the suppression of free expression"; and what incidental impact it had on free expression was no greater than necessary to accomplish the governmental interest. Applying the test to O'Brien's case, the Court upheld his conviction.

The O'Brien test, with its intermediate level of scrutiny, remains the standard by which the Court evaluates the regulation of such expressive conduct as nude dancing.

ROBERT N. STRASSFELD

References and Further Reading

- Chemerinsky, Erwin. *Constitutional Law: Principles and Policies*. 2nd ed. New York: Aspen Publishers, 2002. pp. 1026–1029.
- Foley, Michael S. *Confronting the War Machine: Draft Resistance during the Vietnam War*. Chapel Hill: University of North Carolina Press, 2003. pp. 20–26, 42–46, 281–282.
- Stone, Geoffrey R. *Perilous Times: Free Speech in Wartime from the Sedition Act of 1798 to the War on Terrorism*. New York: W.W. Norton & Co., 2004. pp. 471–477.

See also *Barnes v. Glenn Theatre Inc.*, 501 U.S. 560 (1991); **Draft Card Burning; Flag Burning; Intermediate Scrutiny Test in Free Speech Cases; O'Brien Content-Neutral Free Speech Test; *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981); Symbolic Speech**

UNITED STATES v. ONE BOOK ENTITLED "ULYSSES," 72 E. 2ND 705 (1934)

The legal regime organized around the Hicklin rule was successfully challenged in 1934 when a Second Circuit Court of Appeals panel by a vote of two to one affirmed a lower court's decision lifting a federal ban on importing James Joyce's controversial *Ulysses* into the United States. Judges Learned Hand and his cousin Augustus Hand, who wrote the opinion, made up the majority; Martin T. Manton wrote the dissent.

Thirty years earlier, though, Learned Hand, then a federal district court judge, issued an opinion *United States v. Kennerley* (209 F. 119 [SDNY 1913]) that foreshadowed his position in *Ulysses*. He complied with the Hicklin rule in *Kennerley* but wondered whether Hicklin coincided with the "understanding and morality of the present time." He complained in particular that because two pages of the book in question in *Kennerley* might tempt minds "open

to...immoral influences,” Hicklin required that the whole book be declared obscene. If courts continued to follow Hicklin, he wondered whether the rule would “reduce our treatment of sex to the standard of a child’s library.” In an intimation of the concept of “contemporary community standards” that would emerge in the 1980s, Hand asked, “[S]hould not the word ‘obscene’ be allowed to indicate the present critical point in the compromise between candor and shame at which the community may have arrived here and now?”

Two decades later, Hand’s urgings for a new rule were heeded by District Court Judge John M. Woolsey, when he ruled against the federal government’s motion to confiscate *Ulysses* under the 1930 Tariff Act. *Ulysses* had been a cause celebre for more than a decade. To take advantage of the book’s notoriety, its American publisher and his lawyer deliberately planned the book’s confiscation and the subsequent litigation so as to gain the most publicity and to enhance sales. Woolsey appraised *Ulysses* as a whole and refuted the Hicklin standard. According to Woolsey, the question should be whether “reading ‘Ulysses’ in its entirety” excites immorality by “its effect on a person with average sex instincts.”

Augustus Hand, charged with the responsibility for explaining the circuit’s ruling, dismissed *United States v. Bennett* (1879) that imported the Hicklin rule as not representing the law and distinguished *Rosen v. United States* (1896) as dealing with pictorial representations. *Ulysses*, first of all, was not obscene. “The book as a whole is not pornographic, and, while in not a few spots it is coarse, blasphemous, and obscene, it does not, in our opinion, tend to promote lust. The erotic passages are submerged in the book as a whole and have little resultant effect.” And, second, instead of the Hicklin rule, “the proper test of whether a given book is obscene is its dominant effect” and the “question in each case is whether a publication taken as a whole has a libidinous effect.”

ROY B. FLEMMING

References and Further Reading

- Gunther, Gerald. *Learned Hand: The Man and the Judge*. New York: Alfred A. Knopf, 1994.
- Moscato, Michael, and Leslie LeBlanc, eds. *The United States of America v. One Book Entitled Ulysses by James Joyce*. Frederick, MD: University Publications of America, 1984.
- Stevens, Kenneth R. “‘Ulysses’ on Trial.” in *Joyce in Texas*, edited by Dave Oliphant and Thomas Zigal. Austin, TX: Humanities Research Center, University of Texas, 1983.

Cases and Statutes Cited

- Rosen v. United States*, 161 U.S. 29 (1896)
- United States v. One Book Entitled “Ulysses,”* 72 E. 2nd 705 (1934)
- United States v. Kennerley* (209 F. 119 [SDNY 1913])
- United States v. Bennett*, 24 F.Cas. 1093 (1879)

UNITED STATES v. PLAYBOY ENTERTAINMENT GROUP, 529 U.S. 803 (2000)

In 1996, Congress passed telecommunications legislation including provisions aimed at regulating children’s exposure to adult, “sexually oriented” programming on cable television. The result was a law that significantly restricted the access of all viewers—adults and children—to these programs. A five-justice majority of the Court held that this violated the First Amendment because an alternative provision of the law, which required these programs to be blocked on a house-by-house basis, as requested by cable subscribers, was an efficient alternative for preventing children from viewing adult channels.

Section 505 of the law provided cable television operators with two options—to “fully scramble or otherwise fully block” access to adult channels, or confine transmission to between 10 p.m. and 6 a.m. Most operators chose the “time channeling” option; they could be held liable if scrambling did not prevent “signal bleed”—resulting in occasionally hearing or seeing portions of blocked programs. The Court observed that the effect was that “for two-thirds of the day no household in those service areas could receive the programming, whether or not the household or the viewer wanted to do so.”

The justices unanimously agreed that because Section 505 regulated the *content* of speech, it should be reviewed using strict scrutiny, requiring the government to show that a regulation furthers a compelling state interest and is the option that places the least restriction on the expression it regulates. However, five justices agreed that Section 505 did not pass this test because of the existence of Section 504 of the law, which only restricted a household’s access to adult programming on the consumer’s request. Cable consumers would be informed of this option either by mailings or advertisements on channels others than those showing the adult programming. The government argued that this was an ineffective alternative, because few consumers requested channel blocking. The Court concluded that the government failed to show that this was more likely to be the result of the ineffectiveness of notifying homeowners of this option than the absence of a pervasive problem of signal

bleed enabling children to see sexually explicit programs. Therefore, Section 504 was held to be an effective alternative that placed fewer restrictions on speech than Section 505.

The unanimous agreement to subject the legislation to strict scrutiny moves the Court away from its attempt, in *Denver Area Educational Telecommunications Consortium v. FCC*, to formulate different standards of judicial review for different types of media. In *Denver Area*, the Court reasoned that this would allow the law to accommodate rapid technological advances. *Playboy* instead accommodates the free speech choices of the media's consumers. As the Court explained: "Technology expands the capacity to choose; and it denies the potential of this revolution if we assume the Government is best positioned to make these choices for us."

Although, as the Court itself acknowledged technological advances will limit the impact of this decision, *Playboy* remains significant, because legislation regulating the content of broadcast media will need to be narrowly written to survive the strict scrutiny test.

HELEN J. KNOWLES

References and Further Reading

- Olufs, Dick W., III. *The Making of Telecommunications Policy*. Boulder, CO: L. Rienner, 1999, pp. 89–90, 148–151.
- Yoo, Christopher S., *The Rise and Demise of the Technology-Specific Approach to the First Amendment*, Georgetown Law Journal 91 (January 2003): 2: 245–356.

Cases and Statutes Cited

- Denver Area Educational Telecommunications Consortium v. FCC*, 518 U.S. 727 (1996)
- Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 136

See also **Cable Television Regulation; Content-Based Regulation of Speech**

UNITED STATES v. RAMIREZ, 523 U.S. 65 (1998)

In *United States v. Ramirez*, police were given reliable information that a dangerous escaped prisoner—Alan Shelby—was residing with Hernan Ramirez and that the Ramirez home had a stockpile of weapons in the garage, so they obtained a "no-knock" warrant, a warrant that allows police to enter a residence without first announcing themselves. While executing the search warrant, police smashed in the garage window and pointed a gun through it to deter occupants from

seizing the weapons. Awakened by the noise and believing he was being burglarized, Ramirez, a convicted felon, grabbed a weapon from his closet and fired it into the ceiling. Once Ramirez realized it was the police, he surrendered.

Ramirez was charged with being a felon in possession of a firearm, but the District Court and Ninth Circuit suppressed evidence on the ground that the police lacked the authority to destroy property (the garage window) while executing the no-knock warrant. The Supreme Court ruled that the search did not violate the Fourth Amendment. The Court relied on *Richards v. Wisconsin*, where the Court held that a no-knock entry is constitutional if the police have "reasonable suspicion" that knocking and announcing would cause injury or destruction of evidence. The Supreme Court determined that the destruction of property had nothing to do with the constitutionality of the no-knock search under *Richards*. *Ramirez* stands for the proposition that police do not need a higher justification or burden of proof if they destroy property when executing a "no-knock" warrant.

CODY STODDARD

References and Further Reading

- Hatcher, Susan, *Recent Developments*, American Journal of Criminal Law 25 (1998) 2:473–475.
- Hemmens, Craig, *I Hear You Knocking: The Supreme Court Revisits the Knock and Announce Rule*, UMKC Law Review 66 (1998): 3:559–602.
- Hemmens, Craig, and Chris Mathias, *United States v. Banks: The "Knock and Announce" Rule Returns to the Supreme Court*, Idaho Law Review 41 (2004): 1–36.

Cases and Statutes Cited

- United States v. Ramirez*, 523 U.S. 65 (1998)
- Richards v. Wisconsin*, 520 U.S. 385 (1997)

See also **Search (General Definition); Search Warrant**

UNITED STATES v. REIDEL, 402 U.S. 351 (1971)

The decision in this case was announced on the same day as the decision in *United States v. Thirty-seven (37) Photographs* (1971). Both cases emerged from challenges to federal laws based on the decision in *Stanley v. Georgia* (1969) that the Constitution protects the "private possession of obscene material" and that it also "protects the right to receive information and ideas...regardless of their social worth." Did *Stanley* mean, therefore, that federal laws prohibiting the mailing or importation of obscene material is

unconstitutional when only willing adults are involved?

Reidel operated a publishing firm and mailed a booklet, "The True Facts about Imported Pornography," to an adult older than twenty-one who, unbeknownst to Reidel, was a postal inspector responding to an advertisement Reidel placed in a newspaper. A search of Reidel's business uncovered other mailed copies that had been returned as "undelivered" with no indication of the identities, ages, or willingness of the potential recipients to accept the booklet.

Reidel was indicted on three counts of violating the same federal law that had been at the center of the *Roth* decision. A federal district court judge struck down the law as infringing on Reidel's constitutionally protected right to deliver the booklet as outlined in *Stanley v. Georgia*. In a seven-to-two decision, the Supreme Court reversed the lower court. White wrote the majority opinion.

White declared the district court ignored *Roth* and the "express limitations" on *Stanley's* reach. The decision was too sweeping: "To extrapolate from Stanley's right to peruse obscene material in the privacy of his own home a First Amendment right in Reidel to sell it to him would effectively scuttle *Roth*, the precise result that the *Stanley* opinion abjured." The "right to receive" in *Stanley* did not immunize the distribution of obscenity that *Roth* held was unprotected by the First Amendment. According to White, *Roth* "squarely placed obscenity and its distribution outside the reach of the First Amendment, and they remain there today." *Stanley*, he emphasized, did not overrule *Roth*, and "we decline to do so now."

Marshall's concurrence seeks to correct the "disingenuous" contention that Stanley's conviction was overturned only because his residence was searched. In fact, the justice states, the case pivoted on the whether the material in Stanley's possession was publicly displayed or intended to be distributed. As Marshall's opinion in *Stanley* states, "States retain broad power to regulate obscenity; that power simply does not extend to mere possession by the individual in the privacy of his own home." Marshall stresses that *Stanley* was an assessment of state interests used to legitimate government regulation of obscenity. The possibility of antisocial behavior and its consequences was rejected as one reason for these laws, whereas those that protect children or unwilling adults from being exposed to obscene material were permissible.

Marshall thus supports reversing the lower court in this case, because Reidel mailed or attempted to mail obscene material even though it could end up in the hands of underage youths or children. Despite his declared intentions not to do so and the absence of any evidence that children had received the booklets,

Marshall thought Reidel had not taken sufficient precautions to prevent this occurrence from happening. From Marshall's perspective, this was an important distinction compared with the companion case, *United States v. Thirty-Seven (37) Photographs*.

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References and Further Reading

- Alexander, Donald. *The Politics of Pornography*. Chicago: University of Chicago Press, 1989.
- Hixson, Richard F. *Pornography and the Justices: The Supreme Court and the Intractable Obscenity Problem*. Carbondale, IL: Southern Illinois University Press, 1996.
- Mackey, Thomas C. *Pornography on Trial: A Handbook with Cases, Law, and Documents*. Santa Barbara, CA: ABC-CLIO, 2002.

Cases and Statutes Cited

- Roth v. United States*, 354 U.S. 476 (1957)
- Stanley v. Georgia*, 394 U.S. 557 (1969)
- United States v. Reidel*, 402 U.S. 351 (1971)
- United States v. Thirty-Seven (37) Photographs (Luros, Claimant)*, 402 US 363 (1971)

UNITED STATES v. ROBINSON, 414 U.S. 218 (1973)

The Fourth Amendment requires that any seizure or search by law enforcement be reasonable, which generally requires a warrant or an exception to the warrant requirement. In *Chimel v. California*, the Supreme Court held that incident to a lawful arrest, the police may search the arrestee and areas within her control to secure any weapons that might be used for escape or to resist arrest. *United States v. Robinson* broadened police authority to search after a lawful custodial arrest.

Robinson was lawfully stopped and arrested for driving without a valid license. The officer searched Robinson and discovered a cigarette pack containing heroin in his coat pocket. Robinson was convicted of a narcotics offense. The Court of Appeals reversed, finding that an officer may only fully search an arrestee to uncover further evidence of the crime. If the officer believed the arrestee was armed, he could only perform a limited frisk of the person's outer clothing.

The Supreme Court disagreed, noting settled precedent that a search incident to a lawful arrest is an exception to the warrant requirement. Although the authority for such a search is based on the necessity to disarm or uncover evidence, the lawful arrest itself provides the authority for the search. The Court

established a bright-line rule that full searches are always reasonable.

The Court has consistently reaffirmed this rule in later cases, holding that as long as the custodial arrest was supported by probable cause, a full search incident to that arrest is valid.

MARGARET M. LAWTON

References and Further Reading

- Dressler, Joshua. *Understanding Criminal Procedure*. 3rd ed. LexisNexis Publishing, 2002, pp. 220–225.
- LaFave, Wayne R., Jerold Israel, and Nancy J. King. *Criminal Procedure: Criminal Practice Series*. St. Paul, MN: West Group, 1999, vol. 2, Chapter 3, sec. 5(b).
- Moskowitz, Myron. *A Rule in Search of a Reason: An Empirical Reexamination of Chimel and Belton*, Wisconsin Law Review 657 (2002): 657–697.

Cases and Statutes Cited

- Chimel v. California*, 395 U.S. 752 (1969)
- Knowles v. Iowa*, 525 U.S. 113 (1998)
- Terry v. Ohio*, 392 U.S. 1 (1968)

See also **Arrest without a Warrant; Automobile Searches; Stop and Frisk**

UNITED STATES v. SCHOON, 971 F.2D 193 (9TH CIR. 1991)

From the earliest days of our country's founding, civil disobedience has had a role in our political, social, and cultural debates. However, there continues to be debate over the proper role civil disobedience plays in our society.

In December 1989, thirty people gained admittance to the IRS office where they chanted "Keep America's tax dollars out of El Salvador" and splashed simulated blood throughout the office. Three individuals were arrested. At their bench trial, these individuals argued that their acts in protest of American involvement in El Salvador were necessary to avoid further bloodshed in that country and, therefore, requested that the jury be instructed on a necessity defense that even though they broke a minor law, their actions were justified because they tried to prevent a more serious harm. The district court precluded the necessity defense and the individuals appealed.

The Ninth Circuit distinguished indirect civil disobedience—violating a law or interfering with a governmental policy that is not, itself, the object of protest, with direct civil disobedience—protesting the existence of a law by breaking that law or by preventing the execution of that law in a specific

instance in which a particularized harm would otherwise follow it. The Court found that the necessity defense is per se inapplicable to cases involving indirect civil disobedience. The result of *Schoon* is that juries will never get the opportunity to determine whether indirect civil disobedience actions were just.

PATRICK H. HAGGERTY

References and Further Reading

- Bauer, Steven M., and Peter J. Eckerstrom, Note, *The State Made Me Do It: The Applicability of the Necessity Defense to Civil Disobedience*, Stanford Law Review 39 (1987): 1173–1200.
- Cavallaro, James L., Jr., Note, *The Demise of the Political Necessity Defense: Indirect Civil Disobedience and United States v. Schoon*, California Law Review 81 (1993): 351–385.
- Schulkind, Laura J., *Applying the Necessity Defense to Civil Disobedience Cases*, New York University Law Review 64 (1989): 79–112.

UNITED STATES v. SCHWIMMER, 279 U.S. 644 (1929)

Because the privilege of American citizenship is so highly regarded, the United States government has established certain requirements individuals must meet before becoming a naturalized citizen. In *U.S. v. Schwimmer*, Schwimmer (a female Hungarian academic) wished to gain citizenship but refused to consent to part of the required oath of allegiance because she was a pacifist. The oath required a declaration that she would take up arms in defense of the country when required by law. The district court denied Schwimmer's application for citizenship, and the Court of Appeals reversed. The Supreme Court granted *certiorari* to determine whether Schwimmer's application was improperly denied.

The Court ruled (eight to one) that Schwimmer's application was properly denied, relying on the government's interest in being able to compel military service of its citizens if necessary. Furthermore, the Court ruled that Schwimmer's pacifism could hinder her ability to promote nationalism, which would hurt the nation's safety and interests. Two years later, in *United States v. Macintosh*, 283 U.S. 605 (1931), the Court reaffirmed *Schwimmer* by denying a citizenship application because the individual would fight only in a morally justified war. In 1946, however, *Schwimmer* and *Macintosh* were overturned by *Girouard v. United States*, 328 U.S. 61 (1946), where the Court finally determined that individuals whose religious faiths prevented them from complying with the entire oath of allegiance could still attain citizenship. The Court

relied on America's tradition of religious tolerance, noting that fighting is just one of many ways individuals can support their country during war.

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References and Further Reading

- Brownstone, David, and Irene M. Franck. *Facts about Immigration*. New York: H.W. Wilson Company, 2005.
- NISBCO: National Interreligious Service Board for Conscientious Objectors at <http://www.nisbco.org>.
- Reardon, Nora H. "Derivative Citizenship of the United States—the Law, Procedure, and Practice in Its Determination, and in the Issuance of Documentary Evidence of Such Status." (Lecture, INS Course of Study for Members of the Service). Jan. 7, 1943.
- Tribe, Laurence H. *American Constitutional Law*. 3rd ed. New York: West Publishing Company, 1999.

Cases and Statutes Cited

- Girouard v. United States*, 328 U.S. 61 (1946)
- United States v. Macintosh*, 283 U.S. 605 (1931)
- United States v. Schwimmer*, 279 U.S. 644 (1929)

See also **Citizenship**

UNITED STATES v. SEEGER, 380 U.S. 163 (1965)

This case is important for two reasons. One, it was the first case in which the Supreme Court was asked to decide whether a statutory provision that exempts certain persons, because of their religious beliefs, from having to obey a law that other persons have to obey violates one of the religion clauses of the First Amendment. Two, in its opinion in the case, the Court enunciated an expansive, modern definition of "religion."

The provision challenged in the case was section 6(j) of the Universal Military Training and Service Act, which exempts from compulsory military service any person "who, by reason of religious training and belief, is conscientiously opposed to participating in war in any form." It also defines "religious training and belief" as "an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code."

The case arose when Daniel Seeger was indicted for refusing to submit to induction into the armed forces. His defense was that he was a conscientious objector to fighting and, therefore, should have been given an exemption from the draft on the basis of section 6(j) and alternatively that if the section did not apply to

UNITED STATES v. SEEGER, 380 U.S. 163 (1965)

him, it should be declared in violation of the free exercise and establishment clauses of the First Amendment. The trial judge held both that Seeger was not entitled to an exemption because he did not believe in a Supreme Being and that section 6(j) did not violate either of the religion clauses. When the case was appealed, however, the Second Circuit Court of Appeals, after noting that there were religions that did not believe in the existence of a Supreme Being, nullified the law on the grounds that it favored certain religions over others.

The Supreme Court agreed with neither of the lower courts. It held that under its interpretation of section 6(j), Seeger was entitled to an exemption from the draft. It thereby avoided having to deal explicitly with the constitutional issue raised by the Court of Appeals. In explaining the Court's interpretation of section 6(j), Justice Tom Clark, writing for the Court, asked, "Does the term 'Supreme Being' as used in §6(j) mean the orthodox God or the broader concept of a power or being, or a faith, 'to which all else is subordinate or upon which all else is ultimately dependent'?" His answer was the latter. He elaborated, "We believe that under this construction, the test of belief 'in a relation to a Supreme Being' is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption." This way of defining religion is now generally called a *functional* definition of religion.

Since the *Seeger* decision, some scholars have argued that Clark's definition of religion is the one that the Court either does or should use for the word "religion" in the First Amendment. In *Seeger*, however, the Court was defining only the word "religion" in section 6(j), and in a later case, *Wisconsin v. Yoder* (1972), the Court implied that the word "religion" in the First Amendment does not have a broad, functional meaning, but it was unclear on exactly what "religion" does mean.

Given that it was clearly not what Congress intended, why did the Court broadly define "religion" in section 6(j)? Apparently it believed that if the law contained a theistic definition of religion, it was unconstitutional. Justice William O. Douglas' concurring opinion indicated that he thought section 6(j), without a broad definition of "religion," violated the free exercise clause. Also, in *Welsh v. United States* (1970), a case similar to *Seeger*, Justice John M. Harlan's concurring opinion and Justice Byron White's dissenting opinion both clearly implied that a majority of the *Seeger* Court thought that section 6(j) violated either the free exercise or the establishment clause because it granted draft exemptions only

to *religious conscientious* objects and not to all *conscientious* objectors. In *Seeger*, the Court remedied this problem by broadly defining “religion.” Had it not done so, it might have felt compelled to nullify the draft exemption law, which would have eliminated, at least temporarily, exemptions from the draft during the Vietnam War and perhaps made the Court as unpopular as the war itself was.

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References and Further Reading

- Mansfield, John H. “Conscientious Objection—1964 Term.” in *Religion and the Public Order 1965*, edited by D. A. Giannella, 3–81. Chicago: University of Chicago Press, 1966.
- Rabin, Robert L., *When Is a Religious Belief Religious: United States v. Seeger and the Scope of Free Exercise*, Cornell Law Quarterly 51 (1966): 231–249.

Cases and Statutes Cited

- Welsh v. United States*, 398 U.S. 333 (1970)
- Wisconsin v. Yoder*, 406 U.S. 205 (1972)
- Universal Military Training and Service Act, 50 U.S.C. App. 456(j)

See also **Clark, Tom Cambell; Conscientious Objection, the Free Exercise Clause**

UNITED STATES v. TATEO, 377 U.S. 463 (1964)

During an individual’s trial for multiple offenses, the judge announced that if the jury convicted the accused, he would impose a life sentence on one charge and consecutive sentences on the others. In response, the accused pleaded guilty, and the judge discharged the jury and sentenced the accused to imprisonment for a term of years. The accused subsequently succeeded in having his conviction set aside on the ground that his guilty plea was involuntary. When the government sought to retry the accused for the original offenses, the trial court dismissed the charges, because it concluded that a new trial would place the accused twice in jeopardy for the same offenses in violation of the double jeopardy clause.

In *United States v. Tateo*, however, the United States Supreme Court held that a retrial would not constitute double jeopardy. The Court reiterated the rule that the double jeopardy provision does not preclude the government from retrying an individual whose conviction is set aside at his own behest because of an error in the proceedings leading to that conviction. More importantly, though, the Court articulated the current rationale underlying the rule:

first, granting immunity from punishment to an accused because of a defect in the proceedings leading to his conviction is too high a price for society to pay; and second, reviewing courts might be less zealous in protecting against the effects of errors at trial if they knew that reversing an individual’s conviction would bar the government from further prosecuting that individual.

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References and Further Reading

- LaFave, Wayne R., Jerold H. Israel, and Nancy J. King. *Criminal Procedure*. 4th ed., St. Paul: Thompson-West, 2004, pp. 1200–1201.
- Rudstein, David S. *Double Jeopardy: A Reference Guide to the United States Constitution*. Westport, CT: Praeger, 2004, pp. 98–106.

See also **Burks v. United States**, 437 U.S. 1 (1978); **Double Jeopardy: Modern History**

UNITED STATES v. THE PROGRESSIVE, INC., 467 F. SUPP. 990 (W.D. WIS. 1979)

One proposition the First Amendment stands for is that the government cannot, except in rare circumstances, prevent publication of harmful material; it must turn to after-publication remedies. Yet, in *United States v. The Progressive, Inc.*, a court was confronted with material so explosive that it did issue a prepublication injunction known as a prior restraint.

The subject of the injunction was an article titled “The H-Bomb Secret How We Got It, Why We’re Telling It” that explained the secret to building the hydrogen bomb. The author of the article, Howard Morland, claimed that all the information contained in his article came from the public domain and that he merely gathered that information together. His purpose in writing the article was to pierce the veil of secrecy that had been laid over nuclear weapons, thereby stimulating public debate. In response to arguments that his article was too dangerous to be published, Morland argued that his article did not provide a blueprint for building a hydrogen bomb and that the major barrier to building such a nuclear weapon was in the production phase, not the design phase. Thus, even though his article might arguably advance a non-nuclear nation’s understanding of the physics of the hydrogen bomb, it would not result in immediate nuclear proliferation.

Twice before, the Supreme Court had denied requests for prior restraints. In *Near v. Minnesota*

(1931), the Court struck down a Minnesota law that authorized public officials to force a publisher to prove, before publication, that it was printing defamatory material that was true and with good motives. The opinion rested in part on the key distinction between a prior restraint and subsequent punishment; thus, the Court expressly took no view on whether the publisher could be punished by a defamation lawsuit after having made his scurrilous remarks. The Court did, however, note in passing that “[n]o one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops.”

More recently, during the height of the Vietnam War, the Court in *New York Times v. United States* (1971) refused to enjoin the *Washington Post* and the *New York Times* from publishing excerpts from a secret U.S. government history of the war, despite the government’s claim that publication would cause irreparable damage. Each of the nine justices wrote a separate opinion, but the six in the majority were able to agree on a joint *per curiam* opinion stating that the government bore “a heavy burden” to show that a prior restraint was necessary and that the government failed to do so in that case.

However, the district court in *The Progressive* case agreed with the government that Morland’s article was too dangerous to be published. Although the court agreed with Morland that the article was probably not a blueprint, the court was concerned that the article might accelerate other nation’s developments of nuclear weapons. The court also rejected the notion that the public needed to understand the physics of nuclear weapons to debate their desirability.

Finally, the crux of the court’s reasoning came down to weighing of risks: “A mistake in ruling against *The Progressive* will seriously infringe cherished First Amendment rights,” but “[a] mistake in ruling against the United States could pave the way for thermonuclear annihilation for us all.” Put in such stark terms, the balance led the court to issue the injunction. However, six months after the district court issued the injunction, while the case was still on appeal, a newspaper published a letter that contained substantially the same content as Morland’s article, and the injunction was mooted. The *Progressive* subsequently published the article.

Ultimately, *The Progressive* can be seen as a cautious decision, perhaps overly so, in which a court conducted a form of balancing, by measuring the harm to civil liberties if the injunction were granted against the harm to society from the expected harm from the publication (that is, the likelihood of disaster times the magnitude of that disaster). Unfortunately,

this sort of cost–benefit balancing is likely to burden civil liberties, because the value inherent in having robust civil liberties is abstract, whereas the potential harm to be averted (nuclear proliferation in this instance, perhaps terrorism in other instances) is so horrendous that the expected harm is too much to bear, even if the likelihood of the outcome is quite small.

TUNG YIN

References and Further Reading

Alderman, Ellen, and Caroline Kennedy. *In Our Defense: The Bill of Rights in Action*. New York: William Morrow & Co., 1991.

Cases and Statutes Cited

Near v. Minnesota, 283 U.S. 697 (1931)

New York Times Co. v. United States (“The Pentagon Papers Case”), 403 U.S. 713 (1971)

See also **Absolutism and Free Speech; Freedom of Speech and Press: Nineteenth Century; Freedom of the Press: Modern Period (1917–Present); *Near v. Minnesota*, 283 U.S. 697 (1931); *New York Times Co. v. United States*, 403 U.S. 713 (1971); Prior Restraints**

UNITED STATES v. UNITED STATES DISTRICT COURT, 407 U.S. 297 (1972)

The Fourth Amendment has long been understood to require the government to secure a search warrant from a judicial officer before conducting a search. Electronic surveillance escaped this requirement until 1968, when Congress enacted a federal law requiring judge-issued warrants for “normal” electronic surveillance. The law, however, said that it was not meant to “limit the constitutional power of the President to protect the Nation against actual or potential attack or other hostile acts of a foreign power...[or] to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government.”

In *United States v. United States District Court* (1972), the government took the position that entirely domestic electronic surveillance was exempted from the statute’s warrant requirement if it were conducted for national security reasons. The defendants in the case were charged with conspiracy to destroy government property; one of them was also charged with bombing a CIA building in Detroit. Suspecting they had been the subjects of secret wiretaps, the defendants asked the trial court to force the government to

admit whether it had conducted electronic surveillance. If the government had wiretapped them, the defendants wanted the trial court to determine whether information obtained from the wiretap had tainted the indictment.

The government admitted that it wiretapped telephones used by the defendants but argued that the electronic surveillance was lawful because it was undertaken “to protect the nation from attempts of domestic organizations to attack and subvert the existing structure of the Government.” It argued that disclosure of the facts underlying the electronic surveillance would harm national security.

In an eight-to-zero vote (Justice Rehnquist did not participate), the Supreme Court rejected the government’s argument. Justice Powell’s majority opinion first concluded that the federal electronic surveillance law did not grant the president any new powers to conduct warrantless searches; rather, the text of the law clearly indicated only that it did not take any pre-existing power away from the president to protect national security. Turning to the question that the president had the preexisting authority to conduct warrantless electronic surveillance, the Court, citing *Katz v. United States* (1968), noted that the Fourth Amendment was not limited to physical searches.

The Court rejected the government’s argument that a warrant requirement would interfere too much with the president’s duty to protect domestic security and would jeopardize national security by risking the compromise of informants and other secret assets. The Court was especially concerned that unchecked authority to conduct warrantless electronic surveillance would tempt the Executive Branch to persecute political enemies in the guise of national security. The Court also noted that Congress had trusted federal judges to handle a variety of cases involving sensitive information, such as cases of “espionage, sabotage, and treason.”

Finally, the Court emphasized that its decision was narrow in scope, leaving unaddressed whether the government could conduct warrantless electronic surveillance of “foreign powers or their agents.”

Justice Douglas joined Justice Powell’s opinion but added a short concurrence that highlighted past and contemporaneous instances of the excesses of the government in the name of national security. Justice White agreed that the government had to turn over the contents of the electronic surveillance of the defendants but argued that the case could be resolved on statutory grounds without having to decide the scope of the Fourth Amendment.

Six years later, Congress enacted the Foreign Intelligence Surveillance Act of 1978 (FISA) to address the question left unresolved in *United States District*

Court regarding surveillance of foreign powers. Under FISA, the government can conduct electronic surveillance without a warrant for up to one year when the Attorney General certifies in writing that the surveillance is directed at communications solely between foreign powers and their agents, that it is unlikely that communications involving a “United States person” will be intercepted, and that there have been “minimization procedures” set forth that further reduce the chance that communications involving United States persons will be kept. Where communications involve a United States person as well as a foreign power or foreign agent, FISA requires that the government obtain a warrant from a special foreign intelligence court.

The significance of *United States District Court* lies in the Court’s conclusion that national security did not automatically trump the Fourth Amendment, as well as its prompting of Congress to pass the FISA.

TUNG YIN

References and Further Reading

Abrams, Norman. *Anti-Terrorism and Criminal Enforcement*. St. Paul, MN: West Group, 2003, pp. 390–407.

Banks, William C., *And the Wall Came Tumbling Down: Secret Surveillance after the Terror*, University of Miami Law Review 57 (2003): 1147.

Cases and Statutes Cited

Foreign Intelligence Surveillance Act of 1978, Act of Oct. 25, 1978, 92 Stat. 1783

Katz v. United States, 389 U.S. 347 (1968)

See also *Berger v. New York*, 388 U.S. 41 (1967); **Electronic Surveillance, Technological Monitoring, and Dog Sniffs**; *Katz v. United States*, 389 U.S. 347 (1968); **National Security; Search (General Definition); Search Warrants; Terrorism and Civil Liberties; Wiretapping Laws**

UNITED STATES v. VERDUGO-URQUIDEZ, 494 U.S. 259 (1990)

On discovering that a stateside warrant had been issued for alleged drug lord Rene Martin Verdugo-Urquidez, Mexican police arrested and delivered him to United States authorities. After his detention in San Diego, a joint U.S.–Mexico law enforcement team searched Verdugo-Urquidez’s properties in Mexico, uncovering evidence of possible drug trafficking. The U.S. Supreme Court ruled that the Fourth Amendment guarantee against unreasonable searches did not preclude this one, because Verdugo-Urquidez was a Mexican citizen without significant

voluntary ties to the United States and because the search was conducted in Mexico. Writing for the majority, Chief Justice Rehnquist held that the Fourth Amendment's text applied only to "the people": those with sufficient, voluntary connections to the United States, thereby distinguishing the phrase from the broader term "persons" used in the due process clause. Looking to the amendment's history, Rehnquist argued that the framers intended for its protections to extend only to domestic, not foreign, territory. Next, Rehnquist distinguished the instant case from *INS v. Lopez-Mendoza*, in which the Court assumed that the Fourth Amendment applied to undocumented immigrants in the United States. Rehnquist read *Lopez-Mendoza* to mean only that the exclusionary rule may not apply in civil deportation hearings but said nothing about the constitution's extraterritorial application. Significantly, *United States v. Verdugo-Urquidez* limits the Fourth Amendment rights of certain noncitizens subject to United States law whose property is based abroad. Whether these rights are even further reduced by extension of *Verdugo*'s reasoning to domestic searches and all noncitizens remains to be seen.

VICTOR C. ROMERO

References and Further Reading

- Neuman, Gerald L., *Whose Constitution?* Yale Law Journal 100 (1991): 909–991.
 Romero, Victor C., *Whatever Happened to the Fourth Amendment?: Undocumented Immigrants' Rights after INS v. Lopez-Mendoza and United States v. Verdugo-Urquidez*, Southern California Law Review 65 (1992): 999–1034.

Cases and Statutes Cited

INS v. Lopez-Mendoza, 468 U.S. 1032 (1984)

See also Aliens, Civil Liberties of

UNITED STATES v. WADE, 388 U.S. 218 (1967)

Because eyewitness identification is rife with risk of error, the Court in *United States v. Wade* and the companion case of *Gilbert v. California* held that charged persons were entitled to have counsel present when appearing in a lineup. The Court majority found suggestive influences were brought to bear on the witnesses making identifications in both cases, immediately before, and during the lineups conducted. Once subjected to such influences, eyewitnesses may

mistakenly identify the wrong individual and their in-court identification at trial may well be a fruit of this pretrial identification that the accused is helpless to subject to effective scrutiny at trial, as the suggestive influences may go undetected by the suspect, or if noted, the suspect's unsupported version of what happened may be disregarded in favor of the police's version. With counsel present at the lineup, such influences could be averted or at least detected, and a meaningful confrontation and cross-examination of the witness at trial could be ensured. Providing counsel at this critical stage in the criminal prosecution would thus avert mistaken convictions. The majority holds testimony about an out-of-court lineup must be excluded if counsel was not provided or effectively waived, and an in-court identification could be made only if the prosecution first proved by clear and convincing evidence that the witness' identification at trial flowed from a source independent of the tainted lineup. *Kirby v. Illinois* and *United States v. Ash* narrow this right to counsel. For additional due process controls, see *Manson v. Brathwaite*.

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References and Further Reading

- American Law Institute, *A Model Code of Pre-Arrest Procedure, Proposed Official Draft and Commentary*, (1975): 419–458.
 Grano, Joseph D., Kirby, Biggers and Ash, *Do Any Constitutional Safeguards Remain against the Danger of Convicting the Innocent?* Michigan Law Review 72 (1985): 717–798.
 Levine, Felice J., and June L. Tapp, *The Psychology of Criminal Identifications: The Gap from Wade to Kirby*, University of Pennsylvania Law Review 121 (1973): 1079–1131.
 Panel Discussion, *The Role of the Defense Lawyer at a Lineup in Light of the Wade, Gilbert, and Stovall Decisions*, Criminal Law Bulletin 4 (1968): 273–296.

Cases and Statutes Cited

- Gilbert v. California*, 388 U.S. 263 (1967)
Kirby v. Illinois, 406 U.S. 682 (1972)
Manson v. Brathwaite, 432 U.S. 98 (1977)
United States v. Ash, 413 U.S. 300 (1973)

See also Eyewitness Identification; Line-Ups; Right to Counsel

UNITED STATES v. WASHINGTON, 431 U.S. 181 (1977)

Respondent was subpoenaed to appear as a witness before a grand jury investigating the theft of a motorcycle. Before testifying, the respondent was told

among other things of his right to remain silent and his right to counsel. He was not, however, told that he might be a target of the investigation. Respondent's testimony was highly self-incriminating. On the basis of that testimony, he was indicted for the theft of the motorcycle. At trial, the court agreed with the respondent's efforts to suppress his grand jury testimony and quash the indictment. The Court of Appeals affirmed on the grounds that the prosecutor should have advised the respondent that he was a potential target of the grand jury investigation and that he should have been informed of his rights before being sworn in as a witness.

The Supreme Court reversed, holding that his grand jury testimony could be properly used against him in a later trial. Under the Court's analysis, knowing beforehand whether or not you are a potential target of a grand jury investigation "neither enlarges nor diminishes" the constitutional protections of the Fifth Amendment against compulsory self-incrimination. The Court went on to explain that in this case, the warnings that the respondent received before his testimony were enough to dispel "any possible compulsion to self-incrimination." The fact that the respondent voluntarily revealed the information does not allow him the advantages of the Fifth Amendment. The Court, however, did not say whether the warnings were constitutionally required.

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References and Further Reading

Israel, Jerold H., and Wayne R. LaFave. *Criminal Procedure in a Nutshell*. St. Paul, MN: West, 2001.

See also **Coerced Confessions/Police Interrogations; Miranda Warning; Self-Incrimination (V): Historical Background**

UNITED STATES v. WATSON, 423 U.S. 411 (1976)

Watson was suspected of possessing stolen credit cards. An informant met Watson at a restaurant to purchase the stolen credit cards. Watson was arrested without a warrant, and two stolen credit cards were found in his car pursuant to a consensual search.

At trial, Watson moved to suppress the credit cards claiming his warrantless arrest was illegal; the motion was denied and Watson was convicted.

Does the Fourth Amendment require a police officer to obtain a warrant before making a felony arrest in public on the basis of probable cause? The Court first looked to the Constitution and noted that nothing in the Fourth Amendment expressly

required the police to obtain a warrant before making a felony arrest.

The Court subsequently weighed the costs of requiring arrest warrants against the benefits of such a requirement and concluded that the costs outweighed the benefits. The reasoning for the decision was based on a theory that warrant requirements would result in excessive litigation over whether exigent circumstances existed at the time of arrest, whether the suspect was a flight risk, or whether obtaining a warrant under the circumstances was practicable. Therefore, Watson's warrantless arrest did not violate the Fourth Amendment.

The effect of the *Watson* decision is still felt today, because police officers are free to arrest for felony offenses in public on the basis of probable cause without a warrant. However, the Court recommended that, when practicable, officers might want to obtain a warrant to dissolve any doubts regarding the probable cause surrounding the arrest.

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References and Further Reading

LaFave, Wayne, Jerold Israel, and Nancy King. *Criminal Procedure*. 4th ed., St. Paul, MN: West, 2004, p. 344.

Saltzburg, Stephen, and Donald Capra. *Constitutional Criminal Procedure*. 7th ed., St. Paul, MN: West, 2004, p. 720.

Cases and Statutes Cited

Abel v. United States, 362 U.S. 217 (1960)

Brown v. Illinois, 422 U.S. 590 (1975)

Carroll v. United States, 267 U.S. 132 (1925)

Draper v. United States, 358 U.S. 307 (1959)

Gerstein v. Pugh, 420 U.S. 103 (1975)

Kurtz v. Moffitt, 115 U.S. 487 (1885)

Schneckloth v. Bustamonte, 412 U.S. 218 (1973)

United States v. DiRe, 332 U.S. 581 (1948)

See also **Arrest; Arrest Warrants; Arrest without a Warrant; *Carroll v. United States*, 267 U.S. 132 (1925); *Gerstein v. Pugh*, 420 U.S. 103 (1975); Probable Cause; *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973)**

UNIVERSITIES AND PUBLIC FORUMS

College and university campuses are often hotbeds of controversial speech, from student protests to cutting-edge research projects. Universities play an important role in the free exchange of ideas in America, yet tension often arises between the right of free expression and the need for the university to function effectively. The First Amendment states that "Congress shall make no law...abridging the freedom of speech..." and the Fourteenth Amendment extends

this prohibition on restrictions of free speech to state governments. Public universities, as part of the state government, are limited in the restrictions they can impose on free speech.

Public universities are able to limit speech under the First Amendment in two important ways. First, universities may restrict speech that is not protected by the First Amendment. This includes speech that aims to incite immediate violence, confrontational or threatening “fighting words,” obscenity, and defamation. Second, universities may restrict speech—to varying degrees—on the basis of the forum in which the speech occurs. There are three basic categories of forum: the traditional public forum, the limited public forum (sometimes called a “designated public forum”), and the nonpublic forum.

Traditional public forums are those that have traditionally or historically been opened up to the public for assembly or debate, including sidewalks, streets, or public parks. Limited public forums are areas that have not been traditionally opened for public expression but the university has expressly designated them as areas where expression is permitted. Unlike traditional public forums, limited public forums may be restricted to use by subsections of the public or for particular uses. Limited public forums are more common than traditional public forums on university campuses; they might include forums designated for use by student organizations or areas designated for academic and political, but not commercial, expression.

When a university places restrictions on a limited or a traditional public forum, courts review the restrictions under a standard of strict scrutiny to determine whether they are valid under the First Amendment. The strict scrutiny standard examines whether the restriction is narrowly tailored to achieve a compelling government interest. This is a very difficult barrier to surmount, and it typically limits the restrictions a university may place on the forum to time, place, and manner of speech restrictions. In this way, universities are able to regulate speech in traditional and limited public forums according to the way in which the speech is conducted, but not its content.

Universities often contain nonpublic forums (also referred to as “reserved” or “closed” forums). These are mediums that have been reserved for purposes other than speech by the public or a segment of the public; this category might include administrative offices and in some cases classrooms and university publications. Courts will uphold a university’s restrictions in nonpublic forums as long as the restriction is reasonably related to a legitimate government purpose. A university may cite interests such as the

efficient operation of the campus or the integrity of the university as a learning community as legitimate government interests. A nonpublic forum affords the university the opportunity to regulate on the basis of content, but the university is still obligated to make viewpoint-neutral decisions; that is, the university may restrict expression on a particular topic altogether, but it cannot restrict only one point of view regarding a given topic.

One of the most common areas in which universities impose restrictions on free expression is student newspapers or other university-sponsored student publications. The Supreme Court has never addressed the issue of whether a public university student publication is a public forum; however, the Court found that a high school newspaper was not a public forum, and therefore could impose reasonable restrictions on the publication, in *Hazelwood School District v. Kuhlmeier*. Lower courts, like the 7th Circuit in *Hosty v. Carter*, have relied on the *Hazelwood* decision, applying its framework to college newspapers. Therefore, it is likely that a university may impose viewpoint-neutral restrictions on student publications, as long as those restrictions are reasonably related to a legitimate university interest.

Restricting oral and written expression are the two most obvious ways in which a university might violate its students’ rights to free speech, but they are not the only ways. In *Rosenberger v. University of Virginia*, the Supreme Court found that the University violated students’ free speech rights by denying student activity funding to a student newspaper that promoted Christian beliefs. In that case, the Court held that the University’s restriction denying funding to publications that promote religious beliefs violated the principles governing limited public forums, because it discriminated on the basis of viewpoint. Similarly, in *Board of Regents v. Southworth*, the Court found that the First Amendment permits public universities to charge a student activity fee and use it to fund extracurricular activities, as long as the distribution of the funding is viewpoint neutral.

Although the limited restrictions on speech in public forums apply not only to students but also to professors and other university employees, it is important to remember that a public university may further restrict the rights of professors and university staff because they are public employees. The Supreme Court’s decision in *Pickering v. Board of Education* laid out the standards for evaluating the public employee’s First Amendment rights. In that case, the Court stated that when a public employee speaks on a matter of public concern, the university must balance the employee’s interest in commenting on the matter of public concern against the state’s interest, as an

employer, in promoting the efficiency of its public services.

When the speech of a professor at a public university is called into question under the First Amendment, courts may examine it both in terms of forum and as the speech of a public employee. In *Omoegbon v. Wells*, for example, the 7th Circuit Court of Appeals examined the First Amendment rights of a professor who alleged that the university tried to prevent him from participating in events in the African-American community under both a forum analysis and the public employee speech test.

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Cases and Statutes Cited

Board of Regents v. Southworth, 529 U.S. 217 (2000)
Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988)
Hosty v. Carter, 412 F.3d 731 (7th Cir. 2005)
Omoegbon v. Wells, 335 F.3d 668 (7th Cir. 2003)
Pickering v. Board of Education, 391 U.S. 563 (1968)
Rosenberger v. University of Virginia, 515 U.S. 819 (1995)

See also **Academic Freedom; Campus Hate Speech Codes; Content-Based Regulation of Speech; Content-Neutral Regulation of Speech; Disciplining Public Employees for Expressive Activity; Hazelwood School District v. Kuhlmeier**, 484 U.S. 260 (1988); **Limited Public Forums; Pickering v. Board of Education**, 391 U.S. 563 (1968); **Public Forum Doctrines; Public/Non-public Forums Distinction; Student Activity Fees and Free Speech; Traditional Public Forums**

UNIVERSITY OF WISCONSIN v. SOUTHWORTH, 529 U.S. 217 (2000)

In *University of Wisconsin v. Southworth*, the U.S. Supreme Court held that, provided they allocate funds in a viewpoint-neutral manner, public universities may use mandatory student fees to support expressive activities to which some fee payers object. The case arose when several students at the University of Wisconsin-Madison objected to the use of a portion of their fees to assist student organizations with whom they ideologically disagreed. The funds were distributed at the discretion of student government and occasionally by student referendum. Previously, the Supreme Court had found mandatory union and bar association dues to violate dues payers' First Amendment rights when used for expressive purposes not germane to issues of collective bargaining or regulation of the legal profession (*Aboud v. Detroit Board of Education*, *Keller v. State Bar of California*). Relying on such precedent, the students won in the

district court and court of appeals. But the Supreme Court distinguished the union and bar association contexts from a university environment. It concluded that courts ought not become involved in determining what is germane to a university's mission and acknowledged universities' interest in facilitating expression on a broad range of issues. Thus, the court decided that insisting that student fees be allocated by viewpoint-neutral criteria would better protect all interests. Because the parties had stipulated for purposes of the litigation that the Wisconsin method of fee allocation was viewpoint neutral, the court upheld the university with one exception. Allocating fees by referendum, the court suggested, might well not be viewpoint neutral.

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Cases and Statutes Cited

Aboud v. Detroit Board of Education, 431 U.S. 209 (1977)
Board of Regents of the University of Wisconsin System v. Southworth, 529 U.S. 217 (2000)
Keller v. State Bar of California, 496 U.S. 1 (1990)

See also **Academic Freedom; Forced Speech**

UROFSKY v. GILMORE, 216 F.3D 401 (4TH CIR. 2000)

The Virginia General Assembly in 1995 enacted a law prohibiting any state employee from using a state-owned computer to access Internet sites or files having "sexually explicit content." In those instances in which an employee had a legitimate, job-related reason to access such sites, he or she had to secure permission from the agency head, and his or her name would then be posted by the agency. Six professors in state colleges and universities challenged the law on the grounds that it unconstitutionally abridged the First Amendment right to free expression as well as the academic freedom.

The professors won in district court, *Urofsky v. Allen*, 995 F. Supp. 634 (E.D. Va. 1998), in which Judge Brinkelman wrote an extremely strong free-speech-protective opinion. A panel of the Fourth Circuit reversed this decision by a two-to-one vote in *Urofsky v. Gilmore*, 167 F.3d 191 (4th Cir. 1999), but the majority opinion failed to even address the main issues raised in the district court. As a result, the judges agreed to a rehearing *en banc*.

This opinion, although also upholding the law (which, in the meantime had been slightly modified after the earlier decisions), spelled out the reasons in a more coherent manner. Essentially, the majority of

judges held that state employees held limited First Amendment rights, relying on *United States v. National Treasury Employees Union*, 513 U.S. 454 (1995), which, as the dissent pointed out, gave government employees more rights than the Fourth Circuit recognized. The lead opinion by Judge Wilkins also declared that academic freedom belonged to the institution and not to individual faculty members, a point that Chief Judge J. Harvey Wilkins dismantled in his dissent.

Although the state won its case, in fact, the law has become a dead letter in the state's university system, with both administration and faculty ignoring it. It

did, however, form the basis for the dismissal of several dozen employees of the Department of Transportation in 2002 for accessing pornographic websites from state computers during working hours.

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Cases and Statutes Cited

United States v. National Treasury Employees Union, 513 U.S. 454 (1995)

Urofsky v. Allen, 995 F. Supp. 634 (E.D. Va. 1998)

Urofsky v. Gilmore, 167 F. 3rd 191 (4th Cir. 1999)

Urofsky v. Gilmore, 216 F. 3rd 401 (4th Cir. 2000)

V

VAGRANCY LAWS

Vagrancy is the principal crime in which the offense consists of being an aesthetically undesirable person rather than in having done or failed to do certain acts. The crime of vagrancy originated in fourteenth-century England with the passage of the first statute of laborers that restricted the movement of those persons who owned no land and were unemployed. The common law crime of vagrancy consisted of being without visible means of support, being without employment, or being able to work but refusing to do so. The concept of vagrancy followed colonists to America, and nearly all states enacted statutes embodying differentiations of the common law offense.

The definition of “vagrancy” differs from jurisdiction to jurisdiction and typically encompasses a myriad of misdemeanor offenses. Existing vagrancy statutes may be divided into essentially five categories: (1) statutes that make one a vagrant on the basis of his status or condition, such as poverty and absence of employment; (2) statutes that make one a vagrant for engaging in an activity considered innocuous, such as loitering; (3) statutes that make one a vagrant on the basis of reputation; (4) statutes that make one a vagrant for a condition generally obnoxious to the community standards, such as drunkenness and drug use; and (5) statutes that make one a vagrant for acts of conduct recognized in many jurisdictions as separate crimes, such as fortune telling and subversive activities.

Beginning in the 1960s vagrancy laws came under constitutional attack and were struck down by courts

as being unconstitutionally vague, overbroad, violating due process, exceeding the police power, and violating the equal protection clause. In light of the increasing judicial disapproval of vagrancy statutes, some states repealed such statutes in favor of laws that prohibit specific conduct. Although vagrancy laws still exist in different forms, vagrancy laws must balance both the interest of the state and the rights of the individual.

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References and Further Reading

- Dubin, Gary V. and Richard H. Robinson, Note, *The Vagrancy Concept Reconsidered: Problems and Abuses of Status Criminality*, New York University Law Review 37 (1962): 102–136.
- Lacey, Forrest W., *Vagrancy and Other Crimes of Personal Condition*, Harvard Law Review 66 (1953): 1203–1226.
- Ribton-Turner, C. J. *A History of Vagrants and Beggars and Begging*. London, England: Chapman and Hall, 1887.

VAGUENESS AND OVERBREADTH IN CRIMINAL STATUTES

Among the fundamental principles that underlie the enforcement of the criminal law are those embodied by the doctrines of void-for-vagueness and overbreadth. The first doctrine, which finds its source in the due process clause of the Fifth and Fourteenth Amendments, requires that a law be sufficiently

precise in its formulation so as to give people of ordinary intelligence sufficient warning that they may conduct themselves in a manner that will avoid criminal liability. Under the overbreadth doctrine, which is associated primarily with the First Amendment rights of speech and assembly, a statute can be invalidated if, in addition to proscribing activities that are not constitutionally prohibited, it applies to activities that are so protected. Although complementary, the two doctrines are analytically distinct, and each needs to be considered separately.

The allegation of unconstitutional vagueness was originally made in connection with a wide range of statutes targeting Communists, antiwar protesters, abortion providers, abortion protesters, and people who refused to take loyalty oaths. In recent years, the claim of unconstitutional vagueness has been made most frequently in the context of vagrancy laws. For example, a City of Jacksonville, Florida, ordinance that prohibited a person from being a "vagrant" (defined to include "rogues and vagabonds," "persons wandering or strolling around from place to place without any lawful purpose," and "habitual loafers") was held to be so imprecise as to violate the constitutional requirement of certainty.

Four rationales are said to underlie the void-for-vagueness doctrine. The first is the supposed unfairness of imposing criminal punishment on a defendant who is unaware that such conduct is prohibited. However, several scholars have argued that, in fact, the criminal law ordinarily provides that "ignorance of the law is no excuse" and that ascertaining the nature and extent of a particular penal statute frequently involves difficult questions of statutory interpretation. The second rationale is that vague statutes have the effect of unconstitutionally shifting the responsibility for defining what is criminal from the most representative branch, the legislature, to the least representative branch, the courts. In response to this claim, it has been argued that separation of powers doctrine requires only that courts refrain from creating common law crimes, not that they be limited in their ability to interpret vague statutes passed by the legislature. The third rationale is that vague statutes encourage arbitrary and discriminatory enforcement of the criminal law. And, indeed, statutes and ordinances that prohibit unspecified forms of "annoying" or "disorderly" conduct are precisely the kinds of laws that allow police and prosecutors unduly broad discretion in deciding whom to arrest and prosecute—powers that are often exercised to the detriment of the poor and minorities. The final rationale is that vague laws will tend to overdetter: A vague statute can "inhibit the exercise" of constitutional freedoms, leading

citizens to "steer far wider of the unlawful zone...than if the boundaries of the forbidden areas were clearly marked."

Closely related to the problem of vagueness is that of overbreadth. A statute is said to be overbroad if, in addition to proscribing activities that are constitutionally protected, it also sweeps within its coverage activities that are protected by one or another constitutional right (usually found in the First Amendment, although the doctrine has also been cited in abortion rights cases as well). A good example is an Alabama statute that prohibited picketing "for the purpose of hindering, delaying, or interfering with" business. In declaring the statute unconstitutional, the Court noted that a chilling effect on protected conduct might occur under a statute that does not "aim specifically at evils within the allowable area of state control but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of" constitutional rights.

The overbreadth doctrine is unusual in constitutional law in that it allows a defendant to challenge the validity of a statute or ordinance "on its face," rather than the more common "as applied." Plaintiffs are "permitted to challenge a statute not because their own rights of free expression are violated, but because...the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." As such, the overbreadth doctrine is said to provide "breathing space" for First Amendment freedoms. The void-for-vagueness and somewhat narrow overbreadth doctrines thus have at least one rationale in common. Like laws that are vague, laws that are overbroad may have a "chilling effect" on citizens' willingness to exercise their constitutional rights. In both cases, citizens will be unsure about whether a particular form of contemplated activity is likely to lead to criminal enforcement.

STUART P. GREEN

References and Further Reading

- Amsterdam, Anthony G., Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, University of Pennsylvania Law Review 109 (1960): 67–116.
- Batey, Robert, *Vagueness and the Construction of Criminal Statutes—Balancing Acts*, Virginia Journal of Social Policy and Law 5 (1997): 1–96.
- Fallon, Richard H., Jr., *Making Sense of Overbreadth*, Yale Law Journal 100 (1991): 853–908.
- Jeffries, John Calvin, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, Virginia Law Review 71 (1985): 189–244.
- Monaghan, Henry Paul, *Overbreadth*, Supreme Court Review (1981): 1–39.

See also *Abortion Protest Cases*; *Barenblatt v. United States*, 360 U.S. 109 (1959); *Chicago v. Morales*, 527 U.S. 41 (1999); *Kolender v. Lawson*, 461 U.S. 352 (1983); *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972); *Vagrancy Laws*

VAGUENESS DOCTRINE

Linguistically, defects of language include generality, ambiguity, and vagueness. A term is “general” when it refers to a class. “President” is general; “President George Washington” is singular. A term is “ambiguous” if its referent is twofold. “Bank” is verbally ambiguous because it possesses two referents (for example, deposit money or stand to fish). Syntactical ambiguity arises when a word may modify two referents in a sentence for example, “Humans alone laugh.” Does it mean when humans are alone (adverb), they laugh, or does it mean humans alone (adjective) laugh? Contextual ambiguity arises from the context of a situation (for example, “Teach my child a game.” For those who abhor gambling, “game” extends to jump rope, not dice. For those who relish gambling, “game” extends to dice. Thus, disambiguating “game” involves looking to the community). A term is “vague” if its meaning is uncertain, that is, the edges of the concept are “fuzzy,” as in day or night at dawn or dusk. Cicero in *Academica* 94 (Loeb ed.1951) observed: “[I]f we are asked...are yonder objects many or few...we do not know [when in] the addition or subtraction [of an object] to give a definite answer.” Thus, all concepts that admit of degrees (most do) are uncertain, not in their cores, but at their edges.

Constitutionally, “vagueness” means, not “fuzzy” edges, as in linguistics, but “no core meaning” at all in the context in which it is used. When a concept used in legislation lacks a core meaning, the statute is “void-for-vagueness.” The constitutional doctrine stems from Articles I and II that separate making laws from interpreting laws. If a law is meaningless (no core), a court must not add meaning; interpretation is exegesis, not eisegesis. Similarly, the Fifth and Fourteenth Amendments mandate that the government act with “due process,” which requires “fair notice.” A law lacks fair notice if ordinary citizens cannot determine the covered persons, conduct, or sanctions. Nevertheless, words may be definite if they have a well-settled legal or technical meaning. Vagueness is also a question of degree. “Condemned to the use of words, we can never expect mathematical certainty from our language” (*Grayned v. City of Rockford*, 408 U.S. 104, 110 [1972]). In addition, typical statutes are not vague because determining whether marginal or hypothetical cases fall within them is difficult. Generally, statutes are judges in

light of the conduct of the defendant who challenges them (“as applied”); he may not complain of their indefinite character in reference to the conduct of others. Courts also give a narrower reading to statutes that impose criminal sanctions, whereas those that grant civil benefits need not be as definite. Finally, statutes that require a showing of a state of mind may also be less definite. The void-for-vagueness doctrine is well-settled law in the Supreme Court. It played an essential part of substantive due process challenges to economic regulation in the nineteenth century, but they are no longer a mainstay of the Court’s docket.

The void-for-vagueness doctrine, however, plays a substantially different role in First Amendment jurisprudence. At the time of the Founders, the First Amendment solely protected against prior restraint (for example, “licensing books”), but a person was accountable for whatever he said or did (for example, “libel”) In the 1920s, the Supreme Court began the long process of extending free speech protections. Today, subject to limited categories (for example, “fighting words,” “obscenity,” or “true threats”), a person cannot be sanctioned—criminally or civilly—for speech or expressive conduct, as apposed to mere conduct, in particular based on its content (for example, “blasphemy” or “hate speech”). Only if a substantial danger exists of immediate harm may speech or expressive conduct be circumscribed (that is, “excitement”). In addition to these general free speech protections, the void-for-vagueness doctrine plays a unique role in protecting First Amendment freedoms. Here, challenges to statutes are not “as applied,” but to the “face” of a statute. A defendant (or a challenger, who is not currently charged with an offense, but reasonable fears that he might be charged) may *not* be able to claim constitutional protection for himself (for example, “a pornographer”). But if he (or a challenger) can point to a substantial number of other instances of speech or expressive conduct that *arguably* fall within the statute, it is unconstitutional “on its face.” It cannot serve as a basis for his sanctioning. Its general application is subject to an injunction by the court at the behest of a proper challenger. The Supreme Court teaches that such statutes—characterized either by no core meaning, fuzzy edges, or the impermissible exercise of governmental discretion—inhibit constitutionally protected speech or expressive conduct. Thus, they are constitutionally overbroad because they “chill” the exercise of rights guaranteed by the First Amendment. For example, the police may not condition the granting of a parade permit on the payment in advance of the cost of protecting the demonstrators from a hostile crowd (no “heckler’s veto”). In the face of such statutes, public speaking, writing, or otherwise communicating would not be

as fully robust as envisioned by our nation's "free market" in ideas that are necessary in the search for truth. We would not have the full measure of pamphleteering, parading, or public speaking. Accordingly, such statutes are void-for-vagueness, in the special sense in which the doctrine applies to the First Amendment. Thus, the modern Court uses a stricter version of the void-for-vagueness doctrine to protect civil liberties in the area of First Amendment freedoms; it also uses it as a tool to circumscribe low-level police-citizen contacts (for example, "loitering statutes") that might otherwise interfere with freedom of association or assembly.

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References and Further Reading

- Amsterdam, Anthony, *The Void for Vagueness Doctrine in the Supreme Court*, University of Pennsylvania Law Review 109 (1960): 67.
 Dickerson, Reed, *The Fundamentals of Legal Drafting*. 1965.
 Frankfurter, Felix, *Some Reflections on the Reading of Statutes*, Columbia Review 47 (1947): 527.
 Leech, Geoffrey. *Principles of Pragmatics*. 1983.
 Palmer, R. F. *Semantics*. 2nd ed. 1981.

Cases and Statutes Cited

- Jordan v. De George*, 341 U.S. 223, 230 (1951)
Kolander v. Lawson, 461 U.S. 352, 358-59 (1983)
Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. (1982)
Nash v. United States, 229 U.S. 373, 377 (1913)
Reno v. ACLU, 521 U.S. 844 (1997)
City of Chicago v. Morales, 527 U.S. 41 (1998)

VALENTINE v. CHRESTENSEN, 316 U.S. 52 (1942)

Valentine v. Chrestensen is often cited as evidence that for two hundred years the prevailing understanding was that the First Amendment did not apply to "commercial speech." In 1976, that understanding was definitively, and perhaps permanently, changed with the Supreme Court's decision in *Virginia Pharmacy*, that "commercial speech" was entitled to limited First Amendment protection. But in 1942, when the Court decided *Valentine*, it seemed self-evident to the Court that although government "may not unduly burden or proscribe" freedom of expression and opinion, "[w]e are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising." Chrestensen owned a former U.S. submarine, which he wanted to dock on the East River and charge a fee to the public for touring. He had an advertising handbill printed up about the ship. The New York police commissioner,

Valentine, advised Chrestensen that distributing his handbills would violate a provision of New York City's Sanitary Code. However, he was also informed that handbills "devoted to 'information or a public protest'" were exempted from the Code. So Chrestensen had new handbills printed up. On one side was the original information. On the other, a protest against the City Dock Department for refusing him wharfage facilities. The Commissioner restrained distribution of the new handbill as well, and Chrestensen brought suit alleging the restraint violated his rights under the First Amendment. As noted, this claim was summarily dismissed. It would take another thirty-four years before the Court was prepared to systematically revisit the question of First Amendment protection for what later came to be called "commercial speech."

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References and Further Reading

- Kozinski, Alex, and Stuart Banner, *Who's Afraid of Commercial Speech?* Virginia Law Review 76 (1990): 627.
 Post, Robert, *The Constitutional Status of Commercial Speech*, UCLA Law Review 48 (2000): 1.
 Redish, Martin, *The First Amendment in the Market Place: Commercial Speech and the Value of Free Expression*, George Washington Law Review 39 (1971): 429.
 Shiner, Roger A. *Freedom of Commercial Expression*. Oxford: Oxford University Press, 2003.

Cases and Statutes Cited

- Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976)

See also *Central Hudson Gas and Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980); *Commercial Speech*; *First Amendment and PACs*; *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976)

VANCE v. UNIVERSAL AMUSEMENT CO., INC., 445 U.S. 208 (1980)

The constitutionality of two Texas statutes were challenged by King Arts Theatre, which operated an indoor, adults-only motion picture theater, after the Dallas county attorney informed the operator's landlord that the county planned to initiate action that would declare the theater a public nuisance to prevent it from showing obscene films in the future. One statute authorized injunction suits by the state against alleged public nuisances; the other provided that certain "habitual uses" of premises constituted public nuisances, including the "commercial exhibition of obscene material," and could be enjoined.

Kings Arts Theatre filed suit in federal district court seeking an injunction and declaratory relief to forestall the county attorney's plans. A three-judge federal district court ruled the statutes constituted invalid prior restraint and granted declaratory but not injunctive relief. On appeal, a Fifth Circuit Court of Appeals panel reversed the lower court but a rehearing *en banc* by an eight-to-six vote reversed the panel's holding. The Supreme Court issued a five-to-four *per curiam* opinion affirming the *en banc* ruling, noting this was "an unusual obscenity case." Burger, joined by Powell, dissented separately as did White, who was joined by Rehnquist.

The ruling distinguishes the customary and accepted use of injunctions to prevent future conduct on the basis of findings of undesirable past or present conduct from the current case where an exhibitor found to have shown obscene films in the past is prohibited from showing films in the future that, however, have not yet been found to be obscene. The basis of the distinction is *Near v. Minnesota* (1931), which mandated special analysis when future conduct may be protected by the First Amendment. Because the Texas statute in question "authorizes prior restraints of indefinite duration on the exhibition of motion pictures that have not been finally adjudicated to be obscene," it imposed an invalid prior restraint on the operator's First Amendment rights. The Court also agreed with the *en banc* ruling that the statutes lacked guarantees of prompt reviews of preliminary findings of probable obscenity as required by *Freedman v. Maryland* (1965).

Burger's dissent argues the Court need not have reached the merits of the case, because the statutes had not been enforced and thus there was a "failure to present a real and substantial controversy." White disagrees with the Court for equating an injunction against showing unnamed, obscene films with prior restraint. For him, the Texas statute in question seemed "functionally indistinguishable from a criminal obscenity statute" and thus not constitutionally suspect.

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Cases and Statutes Cited

Freedman v. Maryland, 380 U.S. 51 (1965)

Near v. Minnesota, 283 U.S. 697 (1931)

Vance v. Universal Amusement Co., Inc., 445 U.S. 308 (1980)

VERNONIA SCHOOL DISTRICT v. ACTON, 515 U.S. 646 (1995)

In 1991, a seventh-grade student named James Acton wanted to play football at a grade school in Vernonia, Oregon. Before being allowed to play, however, the

school district required him and his parents to sign forms consenting to drug testing. James and his parents refused to sign the consent forms, and, as a consequence, James' school prohibited him from playing football. After James' school prohibited him from playing football, the Actons filed suit against the school district claiming *inter alia* that the district's Student Athlete Drug Policy (the "Drug Policy") violated James' Fourth Amendment right to be free from unreasonable searches and seizures. The case made its way to the U.S. Supreme Court where six of the nine justices decided that the Drug Policy was reasonable and hence constitutional.

In upholding the Drug Policy, the Court first made it clear that the Astate-compelled collection and testing of urine—as required by the Drug Policy, was a search that was subject to the Fourth Amendment's demand that government searches be reasonable. The Court then found that the search was reasonable by examining five factors.

The Court recognized that underlying the prohibition of unreasonable searches was a citizen's interest in protecting her privacy. Thus, the first factor that the Court considered was the nature of the privacy interest of the persons affected by the policy. The Court found that the athletes involved had a lower expectation of privacy than the average citizen for a variety of reasons. One, the athletes involved were minors, and minors traditionally are subject to the control of their parents and guardians. In addition, the athletes were in public school and, as the Court found in *New Jersey v. T.L.O.*, public schools may closely supervise and guide the children in its care. Thus, although the Court in *Tinker v. Des Moines Independent Community School District* found that children do not Ashed their constitutional rights at the schoolhouse gate, the rights of public school children are different from those of the general populace. Furthermore, given that schools routinely require students to submit to various medical procedures, students within the school environment have a lesser expectation of privacy than members of the population generally. Finally, student athletes have a lesser expectation of privacy than nonathletes because they shower and dress without any aspect of privacy and because by going out for the team they voluntarily subject themselves to greater intrusions on their privacy.

With regard to the second factor, the character of the intrusion on the students' privacy, the court found the intrusion to be negligible, because the students remain fully clothed and the males are only observed from behind, whereas the females are in stalls. Furthermore, the Court felt that the test itself was not very intrusive mainly because the urinalysis tested

only for certain drugs and only for the purpose of helping the student, rather than punishing the student. The third and fourth factors involve the nature and immediacy of the governmental concern that led to the enactment of the statute. Here the Court found that deterring drug use by schoolchildren was an important and, perhaps, compelling government interest. Furthermore, the concern was immediate because a large segment of the student body, particularly those involved in interscholastic athletics, was in a state of rebellion, that “[d]isciplinary actions had reached ‘epidemic proportions,’” and that the rebellion was being fueled by alcohol and drug abuse as well as by the student’s misperceptions about the drug culture.

The final factor examined by the Court concerned the efficacy of the means chosen to address the government’s concern. Here the Court found that a drug problem that is fueled in large part by the role model—the effect of athletes’ drug use—and that is of particular danger to such athletes will be effectively addressed by a program that ensures that athletes do not use drugs.

In *Vernonia*, the Court continued the trend of granting fewer constitutional protections to minors in school because of the nature of the minor’s place in society.

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Cases and Statutes Cited

New Jersey v. T.L.O., 469 U.S. 325 (1985)
Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969)

VICE PRODUCTS AND COMMERCIAL SPEECH

“Vice” activities tend to be the front line of battles over the freedom afforded commercial speech. Societal interests in reducing vice provide a weighty counter to commercial interests.

In 1967, the Federal Communications Commission forced broadcasters to run antismoking commercials, and in the 1980s, Oklahoma’s constitution was challenged because it banned alcohol advertising. These are but two illustrations of how government efforts to protect the public from vice can impinge on speech, both of which played important roles in the evolution of the commercial speech doctrine. This evolution, however, is best seen in a few Supreme Court decisions.

Posadas de Puerto Rico v. Tourism Company (1986) declared gambling casino advertising could be regulated because it might cause Puerto Rico’s citizens to gamble, leading to crime, prostitution, and corruption. Justice Rehnquist, writing for the Court, introduced his “greater-includes-the-lesser” argument, positing that the government’s greater power to ban gambling includes the lesser power to ban its advertising.

That logic arguably could be applied to almost any product, but it arose again in *U.S. v. Edge Broadcasting* (1993), a case about lottery advertising, with a more limited scope. The Court declared that the power to ban a vice included the power to ban its advertising. This later led to Rhode Island arguing commercial speech concerning vice products is unprotected, in *44 Liquormart v. Rhode Island* (1996), thereby permitting restrictions on alcohol advertising. But in the end the Court rejected that contention, declaring there is no vice exception to the First Amendment.

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References and Further Reading

Berman, Mitchell N., *Commercial Speech and the Unconstitutional Conditions Doctrine: A Second Look at “The Greater Includes the Lesser,”* Vanderbilt Law Review 55 (2002): 693–796.
 Hoefges, Michael, and Milagros Rivera-Sanchez, “Vice” Advertising under the Supreme Court’s Commercial Speech Doctrine: The Shifting Central Hudson Analysis, Hastings Communication & Entertainment Law Journal 22 (2000): 345–389.
 Richards, Jeff I., *Politicizing Cigarette Advertising*, Catholic University Law Review 45 (1996): 4: 1147–1212.

Cases and Statutes Cited

44 Liquormart v. Rhode Island, 517 U.S. 484 (1996)
Posadas de Puerto Rico Association v. Tourism Company of Puerto Rico, 478 U.S. 328 (1986)
U.S. v. Edge Broadcasting, 509 U.S. 418 (1993)

See also *44 Liquormart v. Rhode Island*, 517 U.S. 484 (1996); **Commercial Speech**; *Posadas De Puerto Rico Association v. Tourism Company of Puerto Rico*, 478 U.S. 328 (1986); Rehnquist, William H.

VICTIM IMPACT STATEMENTS

For every crime committed, there are at least two victims—society suffers a violation of its laws and the actual victim suffers an injury to person or property. Beginning with the “Victims’ Rights Movement” in the 1970s, the participation of the victim in the criminal justice system has increased. A victim impact

statement is designed to increase victim participation at the posttrial stage of the criminal justice process after a defendant has been found guilty.

Although victim impact statements vary from state to state, they generally refer to written or oral information about the impact of a crime on a victim and the victim's family and generally include a brief summary of the harm or trauma suffered by the victim as a result of the crime, the victim's reactions or objections to the proposed sentence, a concise statement of what outcome the victim would like and the reasons to support this opinion, and the overall effect of the crime had on the victim and the family.

Today, the use of victim impact statements is routine in our criminal justice system. However, the use of victim impact statements in capital cases remains controversial. Although the Supreme Court in *Payne v. Tennessee* found that the admission of victim impact statements in capital cases did not violate the constitution, the role of victim impact statements in capital cases continues to be debated.

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References and Further Reading

- Alexander, Allen, and Janice Harris Ward. *Impact Statements—A Victim's Right to Speak.... A Nation's Responsibilities to Listen*. National Center for Arlington, VA: Victims of Crime, 1994.
- Bandes, Susan. *Empathy, Narrative, and Victim Impact Statements*. University of Chicago Law Review 63 (1996): 361–412.
- National Center for Victims of Crime. *Statutory and Constitutional Protection of Victims' Rights: Implementation and Impact on Crime Victims, Final Report*, Arlington, Va., 1996.
- Talbert, Philip A., Comment, *The Relevance of Victim Impact Statements to the Criminal Sentencing Decision*, University of California–Los Angeles Law Review 36 (1988): 199–232.

Cases and Statutes Cited

Payne v. Tennessee, 501 U.S. 808 (1991)

See also **Victimless Crimes; Victims' Rights**

VICTIMLESS CRIMES

The term "victimless crime" is one that occurs more frequently in the rhetoric of civil and economic libertarianism than in the doctrine or theory of the criminal law. That is, there are no specific legal consequences that follow from a crime's being classified as "victimless," and criminal law theorists have for the most part eschewed the term. Nevertheless, the

suggestion that certain crimes are victimless, and should therefore be repealed or limited, raises profound questions about the proper limits of the criminal law. Although there is no consensus on exactly which crimes should be regarded as victimless, the category has, over time, been thought to include some or all of the following offenses: vagrancy, public drunkenness, drug possession, obscenity, public nudity, contraception, abortion, suicide, gambling, failing to wear a seatbelt or motorcycle helmet, and various consensual sexual activities such as adultery, bigamy, incest, prostitution, and homosexuality.

To understand what it is about the criminalization of victimless offenses that has provoked challenge, we need to recognize the importance of what theorists refer to as the "harm principle." Under this principle, which is associated most famously with the philosophers John Stuart Mill and Joel Feinberg, governmental power may be used only to prevent harm to others. A corollary of this is that the criminal law, the most serious kind of sanctions we have in a civil society, should be used only to prevent harms that are serious. Thus, assuming that we accept the premise of the harm principle, we can frame the problem presented by the criminalization of victimless offenses as that, which is raised by the criminalization of offenses that do not involve serious harms to others.

There are several ways in which supposedly victimless crimes might be thought to fail to satisfy the harm principle. First, although offenses such as suicide involve the potential for serious harm, such harm is caused to self rather than to others. Put another way, although suicide is not literally "victimless," it involves a victim who consents to the harm and in fact brings it on himself. Second, offenses such as vagrancy and public drunkenness involve harms that are diffuse and attenuated, and it is difficult to identify any particular victim or group of victims who are affected. Such crimes are better characterized as involving the *risk* of harm to others, rather than any actual harm. Third, offenses such as obscenity and nudity seem to involve not harm per se but rather something like "insult" or "offense" to sensibilities. In addition, some offenses may involve genuine harm to victims who are either unaware that they have been harmed or who are insufficiently motivated to swear out a complaint.

So what exactly is wrong with criminalizing acts that fail to satisfy the harm principle in such ways? As a matter of principle, the argument is that, in a liberal society like ours, people should be free to pursue their life paths with minimal coercive control by the government. Under such a view, the only circumstances in which the government should be

permitted to interfere with an individual's personal autonomy, particularly by means as intrusive as the criminal law, are when the individual causes or threatens to cause harm to other citizens.

Victimless crime statutes also pose a number of practical problems, many of which have been cited by civil libertarians seeking to challenge the validity of such laws. First, criminalizing conduct that is not harmful may result in an overuse of limited prosecutorial, judicial, and penal resources, and a consequent diversion of such resources from more important law enforcement priorities. Second, much victimless crime is private in nature and hard to detect. Its investigation may involve neighbors spying on neighbors, intrusive forms of surveillance, and the possibility of entrapment. Third, because the price of goods or services involved in supposedly victimless offenses such as drug possession and prostitution will be higher than it would be in a legal market, people who buy and sell such goods and services may engage in other, more serious forms of criminality to pay for a habit or protect turf. Fourth, because victimless crimes frequently occur without being observed publicly, there is more potential for official corruption and discriminatory enforcement (particularly against members of politically unpopular groups). Fifth, in some cases, such legislation may encourage societal intolerance for, and unfair stigmatization of, behaviors associated with certain minorities or other powerless groups. Finally, as a result of most or all these problems, the enactment and enforcement of victimless crime statutes is likely to lead to diminished respect for both the rule of law and the authorities that enforce the law.

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References and Further Reading

- Devlin, Patrick. *The Enforcement of Morals*. New York: Oxford University Press, 1965.
- Feinberg, Joel. *The Moral Limits of the Criminal Law*, 4 vols. Vol. 1. *Harm to Others* (1984); Vol. 2. *Offense to Others* (1985); Vol. 3. *Harm to Self* (1986); Vol. 4. *Harmless Wrongdoing* (1988). New York: Oxford University Press.
- Hart, H. L. A. *Law, Liberty & Morality*. Stanford, CA: Stanford University Press, 1963.
- Packer, Herbert. *The Limits of the Criminal Sanction*. Stanford, CA: Stanford University Press, 1968.
- Schur, Edwin M., and Hugo Adam Bedau. *Victimless Crimes: Two Sides of a Controversy*. Englewood Cliffs, NJ: Prentice-Hall, Inc., 1974.
- Wertheimer, Alan. *Victimless Crimes*, *Ethics* 87 (1977): 302–318.

See also **Abortion; Bowers v. Hardwick, 478 U.S. 186 (1986); Lawrence v. Texas, 539 U.S. 558 (2003); Mill, John Stuart; Obscenity; Sodomy Laws; Vagrancy Laws**

VICTIMS' RIGHTS

Origins

The victims' rights movement has both liberal and conservative roots. In the 1960s, women's groups and feminists focused on the plight of rape victims. Predominantly progressive, they brought attention to outmoded laws and attitudes toward rape and to the insensitivity of police, prosecutors, and the court system to rape victims. The modern victims' rights movement has its conservative origin in reaction to the Warren Court's expansion of procedural protections for defendants grounded in the Bill of Rights. Victims took the Court's language of rights and argued that victims' rights were needed to counterbalance the Court's excesses and the resulting failure to curb rising crime rates.

An important moment in shaping the conservative political focus of the modern victims' movement occurred in 1982, when President Ronald Reagan and Attorney General Ed Meese convened a President's Task Force on Victims of Crime. The Task Force helped to bring victims prominently into the criminal justice debate as symbols for and supporters of law-and-order policies.

The victims' rights movement cannot be understood without focusing on the stories of individual victims—stories of great tragedy—that are a powerful part of its message. Their stories often also involve insensitivity by the criminal justice system and include complaints that it is designed to protect perpetrators rather than innocent victims.

Conceptual Components

The victims' rights movement has three major components: (1) guaranteeing victim participation in criminal proceedings; (2) securing financial benefits and services for crime victims; and (3) achieving more certain and harsher punishment for perpetrators. Of these goals, only the first two are generally consistent with protecting civil liberties.

The participatory rights element seeks to provide victims with notice of proceedings and the right to be present and to be heard at them. This element also champions opportunities for victims to consult with prosecutors regarding whether to charge and to plea bargain with defendants. The second element, which may be termed the "victim assistance" component,

has led to restitution orders from perpetrators, which are required in virtually all jurisdictions and victim compensation programs funded from governmental resources. The third, "defendant damage," element of the movement includes restricting pretrial release, relaxing restrictions on admission of evidence against the accused, and requiring tougher sentencing practices. In these efforts, victims frequently become the allies of prosecutorial and conservative political forces that support a law-and-order agenda.

Successes of the Victims' Movement

The movement's greatest success is the increased level of respect and dignity given to victims in the criminal justice system. Prosecutors' offices now spend far greater time and energy than they had earlier in giving notice to victims and consulting with them about decisions in their cases. Victim counselors and advocates are now part of many court systems.

More controversial are a vast array of changes in criminal law enforcement that have made conviction more likely and punishment harsher. Many of these have been labeled by their supporters as part of victims' rights, and victim groups and victims of particularly notorious crimes have often been important to their passage. Tougher drunk driving laws represent one of the clearest examples of the impact of victim's groups, whereas mandatory minimum sentences have occasionally been the product of victim campaigns, as with California's Three Strikes law.

A major interest of the victims' rights movement has been the opportunity to describe at sentencing the harm caused by the crime. Although victim impact evidence was quickly accepted in non-death penalty cases, the major area of controversy involved such evidence in death penalty cases. In *Payne v. Tennessee* (1991), the Court reversed its decision of only a few years earlier that such evidence created a substantial risk of arbitrariness and concluded that the Eighth Amendment imposed no barrier to admission, giving the movement one of its biggest victories.

Finally, a greater focus on the interests of victims has been a contributing factor to the development of alternative ways of settling criminal cases. Viewing victims' interests as central to the criminal case means that mediation efforts are sometimes seen as alternatives to prosecutions, particularly for minor crimes. Some victims groups push further, seeking understanding and healing between victims and perpetrators in a movement called restorative justice.

Efforts to Amend the United States Constitution

The effort to amend the United States Constitution on behalf of crime victims began in 1982 with the President's Task Force on Victims of Crime. It proposed adding a sentence to the Sixth Amendment that would grant victims the right to be present and to be heard at all critical stages of judicial proceedings.

Supporters first worked to build political momentum by passing victims' rights amendments in the states, with great success. By 1990, five states had approved victims' rights; by 1995, twenty; and by 1999, thirty-one. In September 1995, the National Victims' Constitutional Amendment Network, representing the major victims' rights organizations, adopted proposed language for the amendment and began serious efforts to amend the United States Constitution. Since 1996, a victims' rights amendment has been introduced in every session of Congress, and in 2000, it was debated on the Senate floor before being withdrawn.

A recent version, Senate Joint Resolution 1 (2003), would guarantee victims of violent crime the right

- to reasonable notice of public proceedings and the release or escape of the defendant;
- to not be excluded from any public proceedings;
- to be reasonably heard at public release, plea, sentencing, reprieve, and pardon proceedings;
- and
- to adjudicative proceedings that duly consider victim's safety, interest in avoiding unreasonably delay, and claims to restitution from offenders.

The proposed amendment gives victims standing to enforce its provisions and grants Congress power to enact enforcement legislation. Significantly, the proponents have repeatedly defeated efforts to add a provision that it is not to be construed to deny or diminish the rights of the accused guaranteed by the Bill of Rights.

Proponents argue that only by enshrining victims' rights in the U.S. Constitution will victims be given full rights in the criminal process and thereby bring the system into essential balance. Opponents argue that the Bill of Rights protections are critical to guaranteeing fairness to defendants who, unlike victims, lack the political power to succeed in the political process. Their major conceptual objection is that the amendment begs the essential question of who is a true victim and whether the particular defendant is the responsible party: while the identity of the accused is clear at trial, whether the apparent victim should

have rights against the accused is only determined by the verdict. The most significant impact of the amendment would occur if it were seen as changing the fundamental concept of criminal trials from one in which the Constitution gives defendants procedural rights to guard against abuses of governmental power to a contest between a victim and a defendant both protected by constitutional rights, or if victims' rights simply enhance the power of the prosecution.

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References and Further Reading

- Bandes, Susan, *Empathy, Narrative, and Victim Impact Statements*, University of Chicago Law Review 63 (1996): 361–412.
- Beloof, Douglas E. *Victims in Criminal Procedure*. Durham, North Carolina: Carolina Academic Press, 1999.
- Braithwaite, John, *A Future Where Punishment Is Marginalized: Realistic or Utopian?* UCLA Law Review 46 (1999): 1727–1750.
- Cassell, Paul G., *Barbarians at the Gates? A Reply to the Critics of the Victims' Rights Amendment*, Utah Law Review (1999): 479–544.
- Fletcher, George P. *With Justice for Some: Victims' Rights in Criminal Trials*. New York: Addison-Wesley Publishing Company, 1995.
- Gerwitz, Paul, *Victims and Voyeurs at the Criminal Trial*, Northwestern University Law Review 90 (1996): 863–897.
- Henderson, Lynne N., *The Wrongs of Victim's Rights*, Stanford Law Review 37 (1985): 937–1021.
- Lamborn, LeRoy L., *Victim Participation in the Criminal Justice Process: The Proposals for a Constitutional Amendment*, Wayne Law Review 34 (1987): 125–220.
- Mosteller, Robert P., *The Unnecessary Victims' Rights Amendment*, Utah Law Review (1999): 443–477.
- , *Victims' Rights and the United States Constitution: An Effort to Recast the Battle in Criminal Litigation*, Georgetown Law Journal 85 (1997): 1691–1715.
- , and H. Jefferson Powell, *With Disdain for the Constitutional Craft: The Proposed Victims' Rights Amendment*, North Carolina Law Review 78 (2000): 371–397.
- Pizzi, William T., and Walter Perron, *Crime Victims in German Courtrooms: A Comparative Perspective on American Problems*, Stanford Journal of International Law (1996). 32: 37–64.
- President's Task Force on Victims of Crime. Final Report. Washington: Task Force, 1982.
- Shapiro, Bruce. "Victims and Vengeance: Why the Victims' Rights Amendment Is a Bad Idea." *The Nation*, Feb. 10, 1997: 11–19.
- Symposium: Victims and the Death Penalty: Inside and Outside the Courtroom*, Cornell Law Review 86 (2003): 257–581.

Cases and Statutes Cited

Payne v. Tennessee, 501 U.S. 808 (1991)

See also **Due Process**

VIDAL v. GIRARD'S EXECUTOR, 43 U.S. 127 (1844)

Stephen Girard, at his death, was probably the richest man in America. The bulk of his fortune, estimated at close to seven million dollars, he left to the City of Philadelphia to establish a school for "poor white male orphan" children. Additional monies were given for specified municipal improvements. Girard was very specific regarding the institution that would become known as Girard College. For instance, he spelled out in the most minute detail the dimensions of the cellars, planned so as to guarantee that no orphans could ever be housed there.

Two restrictions in the will, however, would prompt Supreme Court review. In the instant case, the controversy arose from the requirement that "no...minister of any sect...shall ever hold...any station...in the said college; nor...be admitted for any purpose...." Two twentieth century Supreme Court cases dealt with the exclusion of non-white orphans. In 1968, the Court ordered the admission of African-American orphans, concluding that the degree of governmental involvement in the college constituted "state action." Later, the college was opened to girls and to nonorphans.

Vidal was brought by what one story biographer, Gerald T. Dunne, dubbed Girard's "passed-over French relatives." They claimed Philadelphia lacked authority to administer the trust, the beneficiaries were not clearly defined, and the prohibition against ministers was antithetical to public policy.

Argument before the Supreme Court lasted for ten days, with Daniel Webster appearing on behalf of the unhappy relatives. Despite Webster's argument, one that caused "tears [to] pour from the eyes of sentimental observers"—critics dismissed it as merely a "speech" as opposed to the "argument" advanced by the attorneys representing the Girard estate—his friend, Justice Joseph Story, was unmoved as were his fellow justices, who according to Story, accepted his opinion without any revisions.

The opinion effectively reversed the Marshall Court's decision in the case of *Baptist Association v. Hart's Executors* (1819) in which Story had himself concurred. Charles Warren in his *The Supreme Court in United States History* explains that Story's shift resulted from the publication in 1827 of English precedents dating back to the reign of Elizabeth that had been unavailable in 1819. Their publication convinced Story that Marshall had been wrong in *Baptist Association* in stating there was no chancery jurisdiction. As to the claim that excluding clergy "is derogatory and hostile to the Christian religion, and so is void, as being against the common law and public policy of

Pennsylvania,” Story, while acknowledging “that the Christian religion is part of the common law” and that this is “a Christian country” held “there is nothing in the devise...inconsistent with the Christian religion....” Nothing prevented the orphans being taught the basics of Christianity. In fact, regular religious services were held on Sundays as soon as the College opened, but they were conducted by the president of Girard College, a layman.

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References and Further Reading

- Arey, Henry W. *The Girard College and Its Founder*. Philadelphia: C. Sherman, 1857.
- Dunne, Gerald T. *Justice Story and the Rise of the Supreme Court*. New York: Simon and Schuster, 1970.
- Hoffman, John N. *Girard Estate Coal Lands in Pennsylvania, 1801–1884*. Washington, D.C.: Smithsonian Institution Press, 1972.
- Swisher, Carl B. *The Taney Court 1836–1864*, vol. V of *History of the Supreme Court of the United States*. New York: Macmillan, 1974.
- Warren, Charles. *The Supreme Court in United States History*, Vol. Two. Boston: Little, Brown, and Company, 1922.

Cases and Statutes Cited

- Baptist Association v. Hart's Executors*, 17 U.S. 1 (1819)
- Brown v. Commonwealth of Pennsylvania*, 391 U.S. 921 (1968)
- Pennsylvania v. Board of Directors of City Trusts of the City of Philadelphia*, 353 U.S. 230 (1957 and 357 U.S. 570 (1958))

VIDEO PRIVACY PROTECTION ACT (1980)

Congress' role in protecting information privacy has, historically, been reactive rather than proactive. The Video Privacy Protection Act of 1980 (“VPPA” or “Act”) is a perfect example of this reactive role. Arising out of the failed nomination of Judge Robert Bork to the Supreme Court, the Act is one of the most privacy protective ever passed and, perhaps, one of the most narrow.

Bork's confirmation hearings were highly contentious and focused on many of the nominee's more controversial views related to the judicial function and Constitutional interpretation. As his hearings progressed, many began to search his personal background for information that would, it may be assumed, reflect poorly on his candidacy. In 1998, one reporter from a small Washington, D.C. paper, the *City Paper*, fell on the idea of obtaining Bork's video rental history. One may assume the reporter was not

interested in finding whether Bork rented *A Day at the Races*, but no scandalous materials were found, and the story may have ended there. However, politicians and interest groups on all sides of the political spectrum immediately denounced the story and called for legal action. In response to this outcry, Sen. Patrick Leahy introduced the VPPA and, in short order, it was passed into law.

In summary, the Act forbids the release of information related to the rental of “prerecorded video cassette tapes or similar audio visual material” without the customer's prior, written consent. The Act does not, by its express terms, extend beyond the protection of video rental records (despite initial drafts that included magazine subscriptions and other media). The VPPA does have some exceptions to this general ban. Disclosure of personally identifiable information will not violate the Act if made (1) to police officers pursuant to a valid warrant; (2) with the prior, written, and informed consent of the customer; (3) pursuant to a judicial subpoena (provided the customer is given the opportunity to be heard and oppose); and (4) in the ordinary course of business, including for debt collection, order fulfillment, or transfer of ownership of the store in question. Finally, video rental companies may release customer lists that identify name, address, and “genre” preferences, if such releases are solely for marketing or advertising purposes *and* the customer has been provided “clear and conspicuous” opportunity to opt out.

The Act authorizes the injured customer to sue any person who violates the Act. When a violation is established, the injured customer is entitled to damages of no less than \$2,500 and may be awarded punitive damages and attorney fees and costs. Early decisions held that anyone who discloses or uses video rental information might be held liable. As a result, liability was previously extended to police officers or other individuals who obtained protected information in violation of the Act (*Dirkes v. Borough of Runnemede* [1996]; *Camfield v. City of Oklahoma* [2001]). However, a recent decision has called into question this earlier expansive reading of the Act. In *Daniel v. Cantrell* (2004), the Sixth Circuit Court of Appeals determined that only video rental companies and their direct employees can “violate” the Act and, as a result, other persons are immune from suit.

Although the Act's protections are among the strongest in federal privacy law, it is unclear whether they continue to apply to new technologies. Most video rental services now rent, almost exclusively, DVDs and video games. The bare wording of the Act does not clearly encompass rentals of these new media, and no cases have, to date, been brought to test the

VIDEO PRIVACY PROTECTION ACT (1980)

VPPA's application to them. As new technologies emerge, including "on-demand" video and digital content, the limits of the VPPA will be probed and its apparent anachronism tested.

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Cases and Statutes Cited

Camfield v. City of Oklahoma, 248 F.3d 1214 (10th Cir. 2001)

Daniel v. Cantrell, 375 F.3d 377 (6th Cir. 2004)

Dirkes v. Borough of Runnemede, 939 F. Supp. 235 (D.N.J. 1996)

Video Privacy Protection Act, Act of Oct. 21, 1998, P.L. No. 100-618, 102 Stat. 3195

See also **Bork, Robert Heron; Congressional Protection of Privacy; Invasion of Privacy and Free Speech; Journalism and Sources; Privacy**

VIEWPOINT DISCRIMINATION IN FREE SPEECH CASES

Viewpoint discrimination is the term the Supreme Court has used to identify government laws, rules, or decisions that favor or disfavor one or more opinions on a particular controversy. For example, a government official who permitted "pro-life" proponents to speak on government property but banned "pro-choice" proponents because of their views would be engaged in "viewpoint discrimination." Courts may also describe this constitutional requirement by saying that government laws and decisions must be "viewpoint neutral." In recent decades, viewpoint discrimination has been distinguished from content or subject matter discrimination, which involves government regulation of an entire topic or subject, such as abortion, war, or sexual speech, either by punishing those who use this kind of speech (such as obscenity) or by completely excluding the subject from discussion on particular government property or in public forums.

Government laws and regulations that evince viewpoint discrimination generally receive the highest form of scrutiny under the free speech clause, because viewpoint discrimination threatens many of the purposes for protecting speech. For example, in *RAV v. City of St. Paul*, referring to Justice Holmes' argument that the free speech clause ensures a marketplace of ideas that can compete for acceptance by citizens seeking the truth, the Court noted that the government may improperly try to use content or viewpoint discrimination to drive certain ideas out of the marketplace. In addition, government suppression of controversial viewpoints threatens the role of free

speech in checking abusive government practices that might otherwise go unchallenged. Viewpoint discrimination also makes it difficult for citizens to engage in effective self-government by preventing them from hearing political speech that contradicts the government's position and prevents citizens from "blowing off steam" by expressing their views under the "safety valve" rationale for the free speech clause.

By contrast, the *RAV* Court argued that excluding whole subject matters or categories of speech, particularly from certain nonpublic areas of government property, does not quite raise "the same concerns of government censorship and the distortion of public discourse presented by viewpoint regulations." Therefore, the Court has more often upheld subject matter or content restrictions in limited public forums and nonpublic forums if no particular viewpoint is excluded by the government. For example, the Court has held that cities may impose zoning regulations on nonobscene sexual speech, *Young v. American Mini Theatres*, and may regulate indecent language in the media to protect children, *FCC v. Pacifica Foundation*, without violating the First Amendment.

On occasion, the Supreme Court has all but suggested that viewpoint discrimination is never permitted under the free speech clause; see *Perry Education Association v. Perry Local Educators' Association*. On other occasions, particularly before the Supreme Court's full elaboration of the public forum doctrine in cases such as *Perry Education Association*, the Court has discussed viewpoint discrimination under the rubric of content discrimination, see *Chicago Police Department v. Mosley* and *Carey v. Brown*, or suggested that content and viewpoint discrimination will be subjected to the same standard of inquiry. For example, in *Consolidated Edison Co. v. Public Service Comm'n*, involving the Commission's ban on utility bill inserts that commented on controversial public energy policy, the Supreme Court held, "[t]he First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic...."

However, viewing all of the Court's cases as a whole, it is more accurate to say that although content discrimination is permitted in many circumstances, especially in limited public and nonpublic government-owned forums, viewpoint discrimination is rarely permitted and is normally subjected to the strictest standards of scrutiny.

As a threshold matter, a reviewing court must determine whether a government decision constitutes viewpoint discrimination, which is not always an easy matter. The most debated cases on whether a

government content exclusion is actually viewpoint discrimination have been those in which a state has refused to extend privileges, such as funding or space, to religious groups. Usually, the government has denied space or funding because of its view that providing government assistance to a religious organization that wishes to worship or proselytize would violate the establishment clause. In at least three cases, the Court has held that providing government assistance or space to secular groups engaged in communicative acts while denying the same assistance to religious groups constitutes prohibited viewpoint discrimination. In *Lamb's Chapel v. Center Moriches Union Free School Dist.*, the Court held that a public school's decision to permit school property to be used for the presentation of many views about family issues and child rearing but not those of a religious group constituted viewpoint discrimination. In *Rosenberger v. Rector and Visitors of University of Virginia*, the Court found viewpoint discrimination when a state university refused to fund a student religious newspaper when it funded secular student communication forums in violation of the free speech clause. Most recently, in *Good News Club v. Milford Central School*, the Court held that a public school's refusal to permit a student group to gather for Christian education and worship in the school building after school hours, while providing the space to nonreligious community groups, violated the free speech clause. Consistent with these cases is *Widmar v. Vincent*, although in *Widmar*, the Court had characterized a university's refusal to provide meeting space for a student religious group as a "content-based exclusion," which is not permitted in public forums except for compelling reasons. In *Widmar*, as in the later cases, the University failed to show that its regulation was necessary and narrowly drawn to serve the compelling state interest in avoiding establishment clause violations.

By contrast, the Court has often determined that a government's decision to exclude certain speakers from public property does not constitute viewpoint discrimination, despite the fact that those groups are promulgating a message that contradicts the views of groups permitted to speak by the government. For example, in *Perry Education Association*, a rival teachers' union requested that it be permitted to put fliers about its views on teachers' rights and school interests in teachers' mailboxes, just as the recognized teachers' union was allowed to do.

In *Perry Education Association*, the Court held that in nonpublic forums, government officials' exclusions of speakers were required only to be reasonably related to the government interests and not to discriminate on the basis of viewpoint. Despite the fact

that the rival union wished to challenge many claims of the recognized teachers' union, the Court held that the school's exclusion of the rival union was not viewpoint discrimination. Rather, school officials had decided to permit and deny union speech on the basis of the status of the speaker: the recognized union had a role in the collective bargaining process and thus in school-related matters, whereas the non-recognized union had no official school role.

Similarly, in *Ark. Education Television Commission v. Forbes*, the Supreme Court refused to find viewpoint discrimination when a state agency operating public television stations excluded Congressional candidate Ralph Forbes from its televised candidate debates because the electorate did not evidence interest in his platform or candidacy. The Commission had made a decision to limit participation in the debates to "major party candidates or any other candidate who had strong popular support." Construing the "viewpoint neutrality" requirement in nonpublic forums to mean that a government actor "cannot grant or deny access to a candidate debate on the basis of whether it agrees with a candidate's views," the Court held that the Commission's decision was viewpoint neutral: Forbes was not excluded "because his views were unpopular or out of the mainstream" but because of "his own objective lack of support" among voters.

The fact that government excludes speakers because they may cause controversy is not sufficient to trigger the court's viewpoint discrimination rule. In *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, the Supreme Court upheld the Reagan administration's decision to prohibit groups from participating in its annual federal employee charitable giving campaign, the Combined Federal Fund, if they were "[a]gencies that seek to influence the outcomes of elections or the determination of public policy through political activity or advocacy, lobbying, or litigation...." Applying the *Perry Education Association* rule to conclude that the Fund was a nonpublic forum, the Court held that "[t]he First Amendment does not forbid a viewpoint-neutral exclusion of speakers who would disrupt a nonpublic forum and hinder its effectiveness for its intended purpose." In the Court's view, exclusion of these advocacy groups because their causes may be controversial to minimize workplace disruption caused by employee reactions to them and thereby ensure the fundraising effort's success did not constitute viewpoint discrimination.

Similarly, in *Hazelwood School Dist. v. Kuhlmeier*, the Court refused to hold that a public school could censor student newspaper articles without running afoul of the "viewpoint neutrality" requirement. The Court held that educators might ensure that students

“are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school.” As a result, student speech on “potentially sensitive topics” or advocacy of “drug or alcohol use, irresponsible sex, or conduct otherwise inconsistent with ‘the shared values of a civilized social order,’” could be excluded without running afoul of the viewpoint neutrality rule. Justice Brennan, in dissent, expressed the view that a school’s “‘mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint’... or an unsavory subject...does not justify official suppression of student speech in the high school.”

On the other hand, the Court has invalidated statutes on the basis of viewpoint discrimination even in cases in which the speech would otherwise be considered outside of the protection of the First Amendment. For example, in *RAV v. City of St. Paul*, the Court invalidated a statute that prohibited symbols such as a burning cross or swastika, which the speaker had reason to know would “arouse anger, alarm or resentment in others on the basis of race, color, creed, religion or gender.” Despite the fact that this statute was construed to reach only fighting words, which normally have received only rational basis scrutiny under *Chaplinsky v. New Hampshire*, the Court held that the state may not punish fighting words on the basis of the viewpoint they represent. The majority rejected the argument that the St. Paul law punished speech on the basis of the status of the victim, for example, because the speech was fighting words directed at certain persons or groups. Rather, the Court claimed that the law prohibited only fighting words with “messages of ‘bias-motivated’ hatred” and “racial supremacy,” while permitting fighting words favoring racial equality and racial harmony, in violation of the viewpoint discrimination rule.

By contrast, in *Virginia v. Black*, the Court upheld a cross-burning statute against a claim of viewpoint discrimination. The Court there used a narrow distinction it had created in *RAV*: fighting words and other “unprotected” speech can be prohibited “‘when the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable,’” because “‘no significant danger of idea or viewpoint discrimination exists.’” Thus, as the Court opined in *RAV*, it is not viewpoint discrimination to punish only the most prurient obscenity or the most serious threats, for example, threats against the president, because the reasons that obscenity and threats are not protected especially apply to the worst forms of obscenity and threat. The *Black* Court held that because threats or intimidations are not protected by the First Amendment,

and burning a cross with the intent to intimidate is a “particularly virulent form of intimidation,” the state could ban cross-burning without running afoul of the viewpoint discrimination rule.

In *Cornelius*, however, the Court did acknowledge the fact that when the government limits access to government property because of the possibility of disruption, the government’s action may call into question whether the regulation “is in reality a facade for viewpoint-based discrimination.” Thus, for example, the Court would be required to scrutinize whether, for example, the school district in *Perry Education Association* excluded the rival union because it did not like the rival union’s views about teacher’s rights and roles. In *City Council of Los Angeles v. Taxpayers for Vincent*, the Court also held that there was no evidence that the city ordinance proscribing private signs on public utility poles was directed at the viewpoints of the political candidate who tried to post them.

However, in many areas in which discretion is normally given to government officials, the Court will not probe deeply into whether the choices made by state actors constitute viewpoint discrimination. For example, teachers will be given broad discretion to determine what is educationally suitable for children of various ages, according to *Hazelwood*, without being heavily scrutinized by the Court. Similarly, the Court held that broadcasters have wide editorial discretion to make choices about how to represent diverse views on public programs, in *Ark Ed. TV*; and it seems that the Court will not probe deeply into whether their choices might actually constitute viewpoint discrimination. Moreover, in *National Endowment for the Arts v. Finley*, the Court held that the government’s duty to make discretionary aesthetic decisions permitted it to choose which work should be funded, even using such arguably vague criteria as “general standards of decency and respect for the diverse beliefs and values of the American public.”

The one significant exception to the general rule that viewpoint discrimination is subject to the highest scrutiny is in the area of government-funded programs. In *Rust v. Sullivan*, the Supreme Court held that the government may choose to subsidize programs that essentially convey a government-preferred point of view about a controversial public subject, while refusing to subsidize the contrary view. In *Rust*, medical providers challenged the so-called “gag rule” that prohibited providers receiving Title XX federal family planning funds from “engaging in abortion counseling, referral, and activities advocating abortion as a method of family planning.” The rule also required that such providers segregate Title XX projects from any abortion-related activities

through separated facilities, personnel, and accounting. Plaintiffs argued that this rule constituted quintessential viewpoint discrimination, because it prohibited them from advocating or discussing one method of birth control—abortion—while funding them to advocate other methods of birth control as well as childbirth.

In *Rust*, because of the Court's view that the Government could constitutionally "make a value judgment favoring childbirth over abortion and implement that judgment by the allocation of public funds," *Maher v. Roe*, the choice to allocate funds to support certain views on family planning but not views advocating or advising about abortions was not viewpoint discrimination. The Court held that the government "has merely chosen to fund one activity to the exclusion of another" and its ban on speech about abortion "simply ensure[s] that appropriated funds are not used for activities, including speech, that are outside the federal program's scope."

In *Legal Services Corporation v. Velazquez*, however, the Court reiterated an earlier limitation to general rule that the government may favor one viewpoint over another in the subsidies and grants it makes. The Court held that viewpoint discrimination is permissible in government subsidy cases when the government is itself the speaker, as well as cases in which the government uses private speakers to convey its own information pertaining to programs it subsidizes.

However, the *Velazquez* Court held that, consistent with *Rosenberger*, viewpoint restrictions are improper "when the [government] does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers." The regulation in *Velazquez* prohibited federally funded lawyers representing indigent clients from advising clients in cases involving welfare benefits or filing a lawsuit—speaking for their clients—in such cases, if the representation related to a legal or political challenge to existing statutes or regulations. The Court held, as in *Rosenberger*, that this was a program "designed to facilitate private speech" of the lawyer's "private, indigent client," under ethical strictures requiring that the lawyer exercise independent judgment for the client. It was not speech of the government or third-party speech subsidized by the government to promote a governmental message. Because the government was subsidizing "private speech," the Court invalidated the restrictions on legal representation because of their viewpoint discrimination.

Critics of the Court's recent viewpoint decisions have argued that viewpoint discrimination in federally subsidized programs is just as problematic as

viewpoint discrimination in other public forums. They claim that government should demonstrate neutrality toward political and social viewpoints at least when the government itself is not speaking. Because government so pervasively influences public life through its subsidy programs, courts' willingness to permit governments to choose whether to subsidize offensive or controversial speech invites government officials to control free speech through public funding. Whether the *Rust* decision's government funding exception to the general rule against viewpoint discrimination will hold in light of criticisms remains to be seen.

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References and Further Reading

- Greenawalt, Kent, *Viewpoints from Olympus*, Columbia Law Review 96 (1996) 697–709.
 Heins, Marjorie, *Viewpoint Discrimination*, Hastings Constitutional Law Quarterly 24 (Fall 1996), 99–169.
 Jacobs, Leslie Gielow, *Clarifying the Content-Based, Content Neutral and Content/Viewpoint Determinations*, McGeorge Law Review 34 (2003): 595–635.
 Redlich, Norman, John Attanasio, and Joel K. Goldstein, *Understanding Constitutional Law*. 3rd ed. New York, NY: Matthew Bender, 2004, pp. 652–658.

Cases and Statutes Cited

- Arkansas Education Television Commission v. Forbes*, 523 U.S. 666 (1998)
Carey v. Brown, 447 U.S. 455 (1980)
Chaplinsky v. State of New Hampshire, 315 U.S. 568 (1942)
City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1984)
Consolidated Edison Co. v. Public Service Comm'n of New York, 447 U.S. 530 (1972)
Cornelius v. NAACP Legal Defense and Educational Fund, Inc., 473 U.S. 788 (1985)
F.C.C. v. Pacifica Foundation, 438 U.S. 726 (1978)
Good News Club v. Milford Central School, 533 U.S. 98 (2001)
Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260 (1988)
Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384 (1993)
Legal Services vs. Velazquez, 531 U.S. 533 (2001)
Maher v. Roe, 432 U.S. 464 (1977)
National Endowment for the Arts v. Finley, 524 U.S. 569 (1998)
Perry Education Association v. Perry Local Educators' Association, 460 U.S. 37 (1983)
Police Dept. of the City of Chicago v. Mosley, 408 U.S. 92 (1972)
R.A.V. v. City of St. Paul, 505 U.S. 377 (1992)
Rosenberger v. Rector and Visitors of University of Virginia, 515 U.S. 819 (1995)
Rust v. Sullivan, 500 U.S. 173 (1991)
Virginia v. Black, 538 U.S. 343 (2003)
Widmar v. Vincent, 454 U.S. 263 (1981)
Young v. American Mini Theatres, Inc. 427 U.S. 50 (1976)

VINSON COURT (1946–1953)

On June 24, 1946, President Harry Truman appointed Fred Vinson to replace Chief Justice Harlan Stone after the death of Stone in April. Having served in every branch of the federal government at the time of his appointment, Vinson came to the Court with a broad experience rarely held by a Supreme Court justice. Vinson was born in Louisa, Kentucky, on January 20, 1890. He left Louisa after graduating high school to attend Centre College in Danville, Kentucky, where he completed both his undergraduate and law degree. On graduation, Vinson started his legal career in private practice. Later, he served as a Commonwealth Attorney for the state of Kentucky until he won a seat to the House of Representatives in 1924. As a congressman, Vinson distinguished himself on tax matters and in his skills as a negotiator. In 1938, President Franklin Roosevelt appointed him to the D.C. Circuit Court. However, in 1943, Vinson resigned his judgeship to work as the director of the newly created Office of Economic Stabilization. Subsequently, Vinson held positions as the director of Federal Loan Agency, the director of War Mobilization and Reconversion, and finally as the Secretary of Treasury. Vinson, who was fifty-six years old when called to succeed Stone, was widely respected in Washington and was considered by some as a potential presidential candidate.

Vinson assumed the chief justiceship at a time of disorder on the Supreme Court. He found a court torn by ideological and personal conflicts between the justices. The most public of which was between Justices Hugo Black and Robert Jackson over judicial ethics and who should succeed Stone as the Chief Justice. The dispute began in 1945 when Jackson argued that Black should have recused himself from the *Jewell Ridge* case, a case in which Black's former law partner, Crampton Harris, was involved. It continued into 1946, when Black is said to have threatened to resign if Jackson were elevated to the Chief Justice position as a replacement for Chief Justice Stone. At the time, Jackson had been serving as the chief prosecutor at the Nuremburg War Tribunal. When Truman appointed Vinson as Chief Justice, Jackson publicly criticized Black for his involvement in the *Jewell Ridge* case. The feud seemed to resolve itself publicly on Jackson's return from Nuremburg, but privately the feud continued to negatively influence the Court.

Another less public dispute but equally fractious was the ideological battles between Justice Black and Justice Felix Frankfurter concerning the role that judges should play in the American judicial system. Black was an advocate of the principle that judges

and courts had a duty to preserve individual liberties. Black felt that blind deference to government was to forfeit the responsibility a judge has to preserve the Constitution. Black believed in the literal meaning of the Constitution and that judges should look to the text to find definite rules with which to guide their analysis and interpretation. Frankfurter was an advocate for judicial self-restraint and the principle that public policy should be made by elected representatives rather than judges. Frankfurter consistently supported judicial caution and deference to Congress and the states. He believed in balancing the individual interest against the interests of society and that courts should be careful in finding too many prohibitions in the Constitution. These differences in judicial philosophy led to heated debates that would last the duration of the Vinson Court.

Although Vinson proved himself capable as a legislator and later as an administrator in the executive branch, his political skills proved less effective in managing the disputes between the justices. One of the most glaring examples of the divisions on the Court were the number of concurring and dissenting opinions written in the seven years that Vinson served as Chief Justice. Moreover, several of the justices, Frankfurter and Black in particular, openly challenged his authority to lead the Court and often questioned his ability to handle complex legal questions.

The disorder within the Court was mirrored by turmoil in the nation. The Vinson Court sat during a time in American politics that saw the nation struggling over the twin fears of a Cold War with the Soviet Union and a growing Communist influence within the nation. Facing a panic that threatened to spiral out of control, President Truman on March 27, 1947, ordered the implementation of a loyalty-security program that required all persons suspected of subversive activity to take a loyalty oath. The oath, among other terms, required that the individual swear not to take part in any anti-U.S. government or antidemocratic activities. Several months after the initiation of the loyalty-security program, the House Committee on Un-American Activities (HUAC) began a series of hearings to uncover a Communist plot to take over the movie industry. The hearings led to further investigations of Communist influences in the nation's labor unions, colleges, and government. These fears and actions led to policies that directly endangered individual rights.

At the same time, the increasing power of the African-American vote and the civil rights movement led President Truman to commission a review of the status of racial discrimination in the nation. The October 1947 report entitled "To Secure These

Rights,” reaffirmed the principle that each person, regardless of race, should have equal opportunity in education, employment, and housing. It also called for a strong federal government effort to eliminate segregation from American life. The report, however, angered white southerners and their supporters in Congress who effectively limited Truman’s efforts to implement the reforms to actions he could make without Congressional approval through his executive authority.

Under these circumstances, the Vinson Court’s record on civil liberties was quite mixed. The Court often upheld limitations on freedom of speech, due process, and the freedom of association, but on civil rights and issues of desegregation, the Court overturned several statutes that eventually lead to the rejection of the separate but equal policy in the landmark *Brown v. Board of Education* decision.

The Vinson Court’s first free speech, *Terminiello v. Chicago* (1949) led to a five-to-four decision overturning the conviction of an anti-Semitic defrocked Catholic priest whose speeches led to a riot by protestors. Police arrested Terminiello for disturbing the peace, even though it was his opponents who, in fact, disturbed the peace. Justice Douglas’s opinion upheld the right of speech even for people who are deemed hateful. Justice Robert Jackson, who had recently prosecuted Nazi leaders at the Nuremberg Trials, dissented, arguing that Terminiello’s anti-Semitic tirades did not constitute free discussion but rather were similar to the tactics of the Nazis in seizing power in Germany. He argued such speech constituted a clear and present danger to liberty and peace in America. Whatever the merits of Jackson’s arguments, this would be the last important free speech victory in the Vinson Court.

American Communications Assn. v. Douds. (1950) involved a provision of the Taft–Hartley Act that imposed certain restrictions on labor organizations that failed to file “non-Communist” oaths with the National Labor Relations Board. The union argued this violated the fundamental First Amendment guarantees of freedom of speech and assembly. According to the Court, Congress’ power to regulate commerce between the states allowed it to require the oaths that the Court found were reasonably related to the legitimate fear that Communist union leaders could burden commerce by organizing strikes and work stoppages. By an odd five-to-one vote the Court upheld this provision, with Justice Black dissenting and Douglas, Clark, and Minton not participating. Justices Frankfurter and Jackson concurred in the result on technical grounds but objected to the idea that Congress could impose a test on the beliefs and political views of labor leaders.

In 1951, the Court decided two free speech cases that reflected the growing anti-Communism in the nation and the decreasing support for political dissent. At the beginning of 1951, the Court upheld the conviction of Irving Feiner, who had been arrested after giving a speech on a street corner denouncing President Truman. Feiner had not advocated violence, but a crowd hostile to him threatened to attack him. In *Feiner v. New York* (1951), the Court, in effect, allowed the “heckler’s veto” to overrule the free speech rights of a nonviolent speaker. Most observers believe that Feiner’s leftist views influenced the Court.

In *Dennis v. United States* (1951), the Court went further. The issue in this case was whether sections of the Smith Act, which made it a crime merely to advocate the overthrow of the U.S. government, were constitutional. According to the Court, when the speech demonstrates, “a clear and present danger,” then government action is justified. The Court went on to say that the government does not need to wait until an attempt against it is made as long as an advocate for the overthrow of the government exists and there is the possibility that he may carry out his intentions. Indeed, the Court here expanded the power of government to suppress speech that presented no clear or present danger. Thus the Court upheld convictions of Communist Party leaders who merely advocated a communist state and taught about it but had taken no steps to start a revolution. A year later the Court upheld, by a vote of five to four, the conviction of Joseph Beauharnais, a white supremacist who had been prosecuted under an Illinois law prohibiting group libel. Although fearful of communism at the high point of the McCarthy era, the Vinson Court also feared fascism in the wake of World War II. Thus, it showed little respect for dissenting political views or notions that radical theories should be presented to the marketplace of ideas.

The Court had a mixed record on religious liberty and the establishment clause. In its first religion case, *Everson v. Board of Education of Ewing Township* (1947), the Vinson Court, in a five-to-four decision allowed a New Jersey school district to provide school busses for students attending parochial schools. Justice Hugo Black, quoting Jefferson’s famous letter to the Danbury Baptist Church, said that “the clause against establishment of religion by law was intended to erect a ‘wall of separation between Church and State.’” However, as Justice Robert Jackson noted in dissent, the decision did not in fact support that wall. Rather, the dissenters argued that by approving the use of state money to support parochial education, the court breached the wall. A year later, in *McCullom v. Board of Education* (1948), with Court

struck down the use of school facilities for “church schools.” Illinois allowed clergymen from various faiths to come into the school to conduct religious education. The school monitored this attendance while providing free facilities to the religious educators. In a concurring opinion Frankfurter supported this result but attacked the decision in *Everson*, declaring that “separation means separation, not something else.” He argued that American freedom depended on secular education for all people in the same schools and that “the public school must keep scrupulously free from entanglement in the strife of sects.” The issue of religion arose again in *Zorach v. Clauson* (1952). This case involved New York’s policy of allowing children to leave school early to go to “church schools” where they received religious education during the school day. Here the Court backed away from *McCullom*, allowing the policy. In writing an opinion for a six-to-three majority, Justice William O. Douglas noted that “we are a religious people whose institutions presuppose a Supreme Being.” Douglas found this program constitutional because the school did not instruct anyone in religion, and no religious instruction took place on school grounds. Critics argued that the school laws required all children to attend school for a certain number of hours and to allow some to leave for religious education was in itself an establishment. In *Niemotko v. Maryland* (1951), the Court overturned the convictions of Jehovah’s Witnesses who held meetings in public parks without permits. The Court ruled the city had denied permits because it did not approve of the religious views of the Witnesses, and this violated the free speech rights of Niemotko. Although not a religion case per se, this case did support religious free speech. In *Niemotko v. Maryland* (1951), the Court overturned the convictions of Jehovah’s Witnesses who held meetings in public parks without permits. The Court ruled the city had denied permits because it did not approve of the religious views of the Witnesses, and this violated the free speech rights of Niemotko. Although not a religion case per se, this case did support religious free speech. Indirectly, the Vinson Court also supported religious free exercise in *Ballard v. United States* (1946), where the Court reversed the conviction of Edna Ballard, a religious leader who had been convicted of fraud. Ballard did not win on free exercise grounds. Rather, the Court reversed because women had been systematically excluded from federal juries in California.

The Vinson Court was generally unsympathetic to the rights of the accused. *Ballard v. United States* (1946) was an exception to this. Thus, in *Brinegar v. United States* (1949), the Court upheld the search of

car without a warrant because the police alleged the car seemed to be “weighted down with something,” which turned out to be illegal liquor. More significantly, in *Adamson v. California* (1947), the Court refused to apply the Fifth Amendment’s prohibition on forced self-incrimination to the states. Justice Black vigorously dissented here, arguing that the entire Bill of Rights should be incorporated to the states.

One of the Vinson Court’s most important decisions was *Youngstown Sheet and Tube Co. v. Sawyer* (1952), which prevented President Truman from seizing and operating privately owned steel mills in the wake of steel workers strike during the Korean War. This case remains a major precedent for limiting the power of the executive, even in times of crisis, and preserving the Bill of Rights—in this case the Fifth Amendment—even in times of war.

The Vinson Court was very protective of civil rights and the civil liberties of minorities. In *Takahashi v. Fish and Game Commission* (1948), the Court overturned a California law that denied commercial fishing licenses to Japanese immigrants. Federal law prohibited Japanese immigrants from becoming naturalized citizens, and California used this to deny them other rights, such as commercial fishing licenses. The Court found that aliens legally in the United States had a right to earn a living, just as American citizens did. In *Oyama v. California* (1948), the Court prevented that state from seizing property purchased by a Japanese immigrant for his American-born son. Several cases illustrate the Vinson Court’s stance on desegregation. In *Shelley v. Kraemer* (1948), the issue was whether states could enforce private agreements to exclude persons from owning or using real estate on the basis of their race. The Court held that although the private agreements were not unconstitutional, state enforcement of such agreements were a violation of the equal protection clause of the Fourteenth Amendment.

In *Sweatt v. Painter*, the Court struck down the separate but equal education policy in Texas law schools when it found that the education that the petitioner would receive in a separate law school for African Americans would not be “substantially equal” to what he would receive at the University of Texas Law School. In *McLaurin v. Oklahoma State Regents*, the issue was whether the appellant, an African-American student, could be separated from his classmates in the classroom, library, and cafeteria on the basis of his race. The Court found that the Fourteenth Amendment required that the appellant’s admission into a state-supported graduate program guaranteed that he should receive the same treatment “at the hands of the State as students of other races.”

In *Terry v. Adams* (1953), the Court once again struck down an attempt by Texas Democrats to exclude blacks from their primaries. An earlier decision, *Smith v. Allwright* (1944), had prohibited the all-white primary. In response some Democrats, known as “Jaybirds” organized a private primary before the official one, which was only open to whites. All whites in the county then agreed to vote for whoever won that primary in the official primary a month later. In *Terry v. Adams*, the Court prohibited this practice, thus expanding the voting rights of blacks in Texas.

The Court had a chance to make a decision on the *Brown* case, hearing oral arguments in December 1952. However, disagreement among the justices on the legal basis in which to abolish segregation forced the Court to postpone making a ruling and order a reargument of the case on October 12, 1953. Then, with a little more than a month before rearguments could take place, Vinson died suddenly on September 8, 1953, of a heart attack. President Eisenhower promptly appointed California governor Earl Warren as his replacement, thereby ending the Vinson Court.

In addition to Justices Jackson, Black, and Frankfurter, the Vinson Court included Roosevelt appointees William Douglas, Stanley Reed, Frank Murphy, Wiley Rutledge, and Truman appointees Harold Burton, Tom C. Clark, and Sherman Minton.

The last important case decided by the Vinson Court was *Rosenberg v. United States* (1953), which most scholars consider one of the great miscarriages of American justice. The case involved Julius and Ethel Rosenberg, who had been convicted of espionage for allegedly giving the secret of the atomic bomb to the Soviet Union. They were sentenced to death, and when the sentences were carried out, they became the only civilians ever executed for peacetime espionage in American history. Justices Douglas, Frankfurter, and Black argued that their death sentence had been illegally imposed and that the law under which they were convicted was no longer in force. Chief Justice Vinson and five other members of the Court disagreed. Despite many problems with their trial, and serious doubts about whether they had in fact passed any secrets to the Soviet Union, Vinson and his colleagues allowed the executions to go forward. Scholars today debate the guilt or innocence of the Rosenbergs, but few scholars or legal experts defend the Court, which heard the case on June 17 and decided it on June 19 without a signed opinion or any full debate or discussion of the issues. Here the Vinson court reflected the anticommunist paranoia of the age rather than the traditions of careful consideration of law and principles of justice.

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References and Further Reading

- Belknap, Michal R. *The Vinson Court: Justices, Rulings and Legacy*. Santa Barbara, CA: ABC-CLIO, 2004.
 Murphy, Paul L. *The Constitution in Crisis Times, 1918–1969*. New York: Harper and Row, 1972.
 St. Clair, James E., and Linda C. Gugin. *Chief Justice Fred M. Vinson of Kentucky: A Political Biography*. Lexington, KY: University Press of Kentucky, 2002.
 Urofsky, Melvin, and Paul Finkelman. *A March of Liberty: A Constitutional History of the United States*. New York: Oxford University Press, 2002.

Cases and Statutes Cited

- American Communications Assn. v. Douds*, 339 U.S. 382 (1950)
Brown v. Board of Education, 347 U.S. 483 (1954)
Dennis v. United States, 341 U.S. 494 (1951)
Jewell Ridge Coal Corp. v. Local NO. 6167, et al., 325 U.S. 161 (1945)
McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950)
Shelley v. Kraemer, 334 U.S. 1 (1948)
Sweatt v. Painter, 339 U.S. 629 (1950)
 Labor Management Relations Act, Act of June 23, 1947, c. 120, 61 Stat. 136
 National Labor Relations Act (Wagner Act), Act of July 5, 1935, 49 Stat. 449
 Smith Act, Act of June 28, 1940, 54 Stat. 671

VINSON, FRED MOORE (1890–1953)

Fred Vinson was born on January 22, 1890, in the Kentucky hamlet of Louisa, and after seven years of service as chief justice of the United States, died on September 8, 1953. A graduate of Centre College and its law school, he served for six terms in the United States House of Representatives before being appointed to the U.S. Court of Appeals for the District of Columbia Circuit in 1938. He sat there and on the Emergency Court of Appeals as its chief judge, where he heard appeals from wartime economic regulation, until 1943. Vinson then assumed critical positions in the executive branch: director of economic stabilization, director of postwar reconversion efforts, and Secretary of the Treasury.

President Harry S. Truman nominated him to the Supreme Court in 1946, hoping that Vinson could soothe the animosities among the justices of that fractious Court. These hopes were disappointed: few people could have harmonized the postwar Court. But Vinson was a more formidable judge than his detractors concede. His extensive experience in all three branches of government left him with an abiding appreciation for the necessity of vigorous government, especially in the executive branch, to preserve American liberty. Hence as a judge he never voted to

hold a federal statute or an action of the executive branch unconstitutional.

Vinson wrote only a few noteworthy opinions, and nearly all of them involve civil liberties issues that were related directly or indirectly to the Cold War. His opinion in *American Communications Association v. Douds* (1950) sustained the anticommunist affidavit provisions of the Taft–Hartley Act of 1947. Writing for a plurality of the Court in *Dennis v. United States* (1951), Vinson upheld the Smith Act convictions of eleven national leaders of the Communist Party. Although in a dictum he endorsed the speech-protective readings of the clear-and-present-danger test by Justice Oliver Wendell Holmes in *Abrams v. United States* (1919) and Justice Louis D. Brandeis in *Whitney v. California* (1927), Vinson attenuated the relationship between substantive evil (overthrow of government by force) and speech protected by the First Amendment. To sustain prosecutions on the basis of organizing the Communist Party and teaching its doctrines, Vinson relied on a sliding-scale test devised by Chief Judge Learned Hand in the Court of Appeals below, which permitted prosecution of acts posing only remote dangers if the “gravity of the evil” was great enough. *Dennis* provided the foremost constitutional endorsement of the second Red Scare, but it was not Vinson’s only contribution in that line.

Vinson’s final opinion for the Court justified denial of stays of execution to Julius and Ethel Rosenberg, sustaining their capital convictions under the Espionage Act of 1917 as amended against persuasive constitutional and procedural objections. Throughout the contentious conference debates over their appeals, Vinson voted consistently to deny their petitions, and he used his position as chief justice to frustrate any possibility of delay in carrying out their death sentences.

Even when Cold War issues were not directly implicated, Vinson’s First Amendment opinions often retarded the cause of civil liberties and free expression. In *Terminiello v. Chicago* (1949), he dissented from a holding that protected the speech of a rabble-rousing anti-Semite. Two years later, in *Feiner v. New York* (1951), he wrote for the Court in sustaining the conviction of a leftist street ranter. His *Feiner* opinion, although of dubious authority today, remains significant for introducing the problem of the so-called heckler’s veto: the power of a hostile mob, backed by police, to quell speech by a speaker whose views were unwelcome to them. Vinson anticipated his *Dennis* opinion of that same year by suggesting that the First Amendment does not protect “incitement,” although neither opinion defined in any useful way what that vague concept meant.

The speaker whose topic was religion rather than politics fared better at Vinson’s hands. In two 1951 cases, Vinson overturned convictions of a Jehovah’s Witness and a Baptist minister, respectively, for conducting preaching in a public park or on city streets without first obtaining a permit on the grounds that the ordinances in question conferred excessive discretion on the permit-issuing authority (*Niemotko v. Maryland*, *Kunz v. New York*). He also condemned an ordinance that forbade door-to-door peddling of articles of commerce that included books (in this case, secular, nonpolitical reading materials) without prior consent by the homeowner (*Breard v. Alexandria* [1951]).

Dedicated as he was to a vision of civic freedom sustained by effective governmental power, Chief Justice Fred Vinson subordinated civil liberties concerns to pressures of the national-security state in the early Cold War.

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References and Further Reading

- Frank, John P., *Fred Vinson and the Chief Justiceship*, University of Chicago Law Review 21 (1954): 2: 212–246.
 Pritchett, C. Herman. *Civil Liberties and the Vinson Court*. Chicago: University of Chicago Press, 1954.
 St. Clair, James E., and Linda C. Gugin. *Chief Justice Fred M. Vinson: A Political Biography*. Lexington: University Press of Kentucky, 2002.
 Urofsky, Melvin I. *Division and Discord: The Supreme Court under Stone and Vinson, 1941–1953*. Columbia: University of South Carolina Press, 1997.

Cases and Statutes Cited

- Abrams v. United States*, 250 U.S. 616 (1919)
American Communications Association v. Douds, 339 U.S. 382 (1950)
Breard v. Alexandria, 341 U.S. 622 (1951)
Dennis v. United States, 341 U.S. 494 (1951)
Feiner v. New York, 340 U.S. 315 (1951)
Kunz v. New York, 340 U.S. 290 (1951)
Niemotko v. Maryland, 340 U.S. 268 (1951)
Whitney v. California, 274 U.S. 357 (1927)

VIRGINIA CHARTER OF 1606

Much of the settling of the New World by British colonists resulted from the efforts of mercantile companies seeking a profit, and they did so under royal charters. In 1606, King James I issued a charter to the Virginia Company of London, granting it the right to establish colonies between the thirty-fourth and forty-first parallels of the new continent. The London Company, as it was called, would have a governor and an advisory council of thirteen, located in London,

to direct the colony's affairs, although it could appoint local councils, also of thirteen men, to actually govern the colonies. The stockholders of the company were to assemble from time to time in a general court.

From the standpoint of liberties, the most important part of the charter declared that the settlers were to enjoy "all Liberties, Franchises and Immunities... as if they had been abiding and born within this our Realm of England." The idea that colonists would continue to have the rights of Englishmen was not new, however, but had been included in the Letters Patent Elizabeth I had given to Sir Humphrey Gilbert in 1578, which held that any person settling in colonies founded by Gilbert "shall and may have, and enjoy all the privileges of free denizens and persons native of England."

The importance of the charter, from the colonial viewpoint, is that at no point had they either given up or had taken from them the rights of Englishmen secured under Magna Carta and other documents of the English constitution. When the colonists rose up in rebellion a little over a century and a half later, they did so as Englishmen claiming the rights of Englishmen.

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References and Further Reading

Quinn, David B. *England and the Discovery of America*. New York: Knopf, 1974.

VIRGINIA DECLARATION OF RIGHTS (1776)

On May 15, 1776, immediately after passing a resolution favoring independence from Great Britain, the Virginia House of Burgesses turned to two additional items of business, writing a declaration of rights and a constitution for the soon-to-be independent commonwealth. The chief burden of writing the Declaration of Rights fell to George Mason, then forty years old, and the owner of Gunston Hall in Fairfax County. He had been the author of the "Fairfax Resolves" of 1774, in which he had attacked Great Britain for subverting the traditional rights of Englishmen. In the proposal he drafted for the Burgesses, Mason drew on such varied sources as the colonial charters, English law, and libertarian writers such as Locke, Milton, and Sidney. But none of these provided evidence for Mason's sweeping assertion that "all power is vested in, and derived from, the people." In its sum, Mason's draft relied heavily on a natural rights philosophy that upset many of the more conservative members of the assembly.

From the beginning, the Declaration of Rights was seen as separate from the state constitution, and there has been debate over whether the delegates saw it as a foundation necessary for the constitution, or in some ways superior to the constitution. But in any event, it is the first declaration of individual rights enacted by the newly independent states, and although incomplete, it would become a model for James Madison when he drafted the federal Bill of Rights thirteen years later.

The Declaration, adopted on June 12, had sixteen articles. The first stated that all men are "by nature equally free and independent, and have certain rights," and they enter into a social compact to protect these rights, including life, liberty, and property—a statement that Thomas Jefferson borrowed from later in the month in drafting the Declaration of Independence.

Articles II and III buttressed the first statement, noting that all power is vested in the people and that government is established by the people for their mutual protection and the protection of their rights.

The next several articles actually dealt more with the nature of government than with individual rights and may have been adopted as guides for the committee drafting the constitution. No one group of men are entitled to special privileges, but offices are open to all citizens; the legislative and executive powers of the government should be kept separate; election to government should be by free elections; there should be no taxation except by assent through free elections; and no officer of government should have the power to suspend representative government.

Articles VIII through X dealt with rights of the accused and provided that an accused shall know the charges against him; shall have the right to call witnesses on his behalf; and not be deprived of life or liberty except by due process of law. There is a right to a fair and speedy trial, and defendants could not be compelled to give evidence against themselves. Excessive bail should not be required, nor cruel and unusual punishments inflicted; and searches may not take place without specific warrants, general warrants being prohibited.

Article XI provided for jury trial in civil suits, whereas XII provided for freedom of the press. Article XIII held that a state militia, although important, should always be under the authority of the civil power. There was no reference in XIII to a right to own or carry arms.

Articles XIV and XV are hortatory in nature, urging that there never be more than one state government created within the borders of the commonwealth, and that the only way free government could survive was by "firm adherence to justice,

moderation, temperance, frugality, and virtue and by frequent recurrence to fundamental principles.”

The last article provided for the free exercise of religion, but did not disestablish the church and spoke of the “mutual duty of all to practice Christian forbearance, love, and charity towards each other.”

Strangely, there is no mention of freedom of speech, but in nearly all other aspects Mason’s work provided a template for both Jefferson in the Declaration of Independence and for Madison in the Bill of Rights, both of whom borrowed not only his ideas but his language as well.

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References and Further Reading

Sutton, Robert P. *Revolution to Secession: Constitution Making in the Old Dominion*. Charlottesville: University Press of Virginia, 1989.

VIRGINIA STATE BOARD OF PHARMACY v. VIRGINIA CITIZENS CONSUMER COUNCIL, INC., 425 U.S. 748 (1976)

Supreme Court decisions before the mid-1970s seemed to indicate that commercial speech does not receive First Amendment protection. The 1975 *Bigelow* case and the *Virginia State Board* case put those earlier decisions to rest. On First Amendment grounds, as applied to the states through the Fourteenth Amendment, the Court invalidated a state statute declaring it unprofessional conduct for a licensed pharmacist to advertise prices of prescription drugs.

The Court rejected a variety of proffered justifications for the statute. The justifications involved “the State’s protectiveness of its citizens [which] rests in large measure on the advantages of their being kept in ignorance.” The Court rejected this “highly paternalistic approach.”

Virginia State Board did not precisely define the differences between commercial and noncommercial speech. Nor did it delineate precisely how much First Amendment protection commercial speech receives. Subsequent cases, such as *Ohralik* and *Central Hudson*, established that commercial speech receives an intermediate degree of First Amendment protection, tested under a four-part analysis: (1) whether the speech relates to a legal activity and is not misleading, (2) whether the government has a substantial interest in restricting the speech, (3) whether the restriction effectively advances that interest, and (4) whether the restriction is broader than required to advance that interest.

Many subsequent decisions, such as the *Posadas*, *Fox*, *44 Liquormart*, *Greater New Orleans Broadcasting*, and *Lorillard* cases, have applied *Virginia State Board*—not always consistently. The precise contours of the commercial speech doctrine are not fully settled.

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References and Further Reading

Annotation, *Protection of Commercial Speech under First Amendment—Supreme Court Cases*, 164 American Law Reports Federal 1.

Symposium, *Nike v. Kasky and the Modern Commercial Speech Doctrine*, Case Western Reserve Law Review 54 (2004): 4: 965–1299.

Tribe, Laurence H. *American Constitutional Law*. 2nd ed., Mineola, NY: Foundation, 1988, pp. 890–904.

Cases and Statutes Cited

Bigelow v. Virginia, 421 U.S. 809 (1975)

Ohralik v. Ohio State Bar Ass’n, 436 U.S. 447 (1978)

Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557 (1980)

Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico, 478 U.S. 328 (1986)

Board of Trustees of State University of New York v. Fox, 492 U.S. 469 (1989)

44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996)

Greater New Orleans Broadcasting Ass’n, Inc. v. United States, 527 U.S. 173 (1999)

Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001)

See also *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983)

VIRGINIA v. BLACK 123 S. CT. 1536 (2003)

Cross burning is perhaps the most compelling domestic terror symbol in America. Law enforcement has sought authority to prosecute those who burn crosses to spread fear and harm. Such defendants have often sought First Amendment protection.

In *Virginia v. Black*, the Supreme Court parsed Virginia’s cross burning, locating its constitutional limits. Virginia’s half-century-old cross-burning statute proscribed the burning of a cross “with the intent of intimidating” another and providing that “[a]ny such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons.”

The Supreme Court granted *certiorari* on two related issues: whether the cross-burning statute violated the First Amendment as interpreted in *R.A.V. v. St. Paul* (the *R.A.V.* issue) and whether the statutory presumption that cross burning is “prima facie evidence” of the defendant’s intent to intimidate was unconstitutionally overbroad (the “overbreadth” issue).

Justice O'Connor's majority opinion upheld the statute on the *R.A.V.* issue; Justice Souter, joined by Kennedy and Ginsburg, dissented, doubting whether *this* statute, separate from other cross-burning statutes, was constitutional under *R.A.V.*

On the overbreadth issue, a majority view may have existed, if not a majority opinion. O'Connor, for a four-judge plurality, found the statutory presumption constitutionally invalid. Separately, Souter, Kennedy, and Ginsburg found the presumption invalid and indicative of their broader concern with the *R.A.V.* issue.

Under *Virginia v. Black*, a law may not punish cross burning per se but may punish intimidation crimes committed through targeted cross-burning—a “particularly virulent form of intimidation.”

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Cases and Statutes Cited

Va. Code. Ann. §18.2-423 (Michie 1991) (enacted in 1950).
The prima facie provision was added to the statute in 1968.
R.A.V. v. City of St. Paul, 505 U.S. 377 (1992)

VIRTUAL CHILD PORNOGRAPHY

See *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002)

VOID FOR VAGUENESS

A void for vagueness statute is one that does not fairly put a person on notice of prohibited versus permissible behavior. Subjecting an individual to criminal liability on the basis of a vague law may violate his or her right to due process; neither individuals nor the courts should have to guess at exactly what behavior the government is proscribing.

Certain categories of criminal statutes are frequently challenged pursuant to the void for vagueness doctrine. Chief among these are vagrancy statutes and statutes that purport to regulate speech (such as laws criminalizing hate speech). Laws that are subjective, either in language or in the type of behavior to be regulated, open themselves up to such a challenge.

When statutes are challenged as unconstitutionally vague, courts may find them entirely void. This occurs frequently when the vague law purports to regulate constitutionally protected conduct, such as freedom of speech or freedom of assembly. In other circumstances, courts may find that a vague law is

only unconstitutional as applied to the individual challenging the law. Such a situation occurs when the law proscribes identifiable criminal behavior as well as arguably permissible behavior. Of course, courts often find that statutes challenged under the void for vagueness doctrine are actually constitutional, either in whole or as applied. Over the years, the Supreme Court has developed this test: whether people of ordinary intelligence are on notice that their conduct is prohibited by law.

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References and Further Reading

Baggett v. Bullitt, 377 U.S. 360 (1964).
Coates v. City of Cincinnati, 402 U.S. 611 (1971).
Lanzetta v. New Jersey, 306 U.S. 451 (1939).
Reno v. ACLU, 521 U.S. 844 (1997).

See also **Defense, Right to Present; Due Process; Due Process of Law (V and XIV); Fighting Words and Free Speech; Fourteenth Amendment; Gang Ordinances; Hate Crimes; Hate Speech; Obscenity; Overbreadth Doctrine; Substantive Due Process; Vagrancy Laws; Vagueness Doctrine; Vagueness and Overbreadth in Criminal Statutes**

VOTING RIGHTS (COMPOUND)

The idea of one person, one vote is attractively simple. The concept that blacks and women as individuals deserved the right to vote as a matter of basic principle and personal respect holds great moral and logical weight. But what about the idea that voting rights given to groups are just as important as the rights given to individuals? After all, political power—defined in terms of actual effect on public policy—belongs to groups and not to individuals, insofar as individual voters can tell the government how to exercise its authority only when those individuals are aggregated into groups.

Viewing the right to vote as exclusively individual neglects the equally important facet of voting as a group-based right. Blacks and women needed the power to vote as individuals as a matter of dignity and respect. And as groups, blacks and women needed the right to vote as a matter of basic survival: Each group needed political power to obtain equal protection of the law and a fair share of the material benefits provided, as well as the burdens imposed, by the government.

A sophisticated understanding recognizes the essentially hybrid nature of constitutionally protected voting rights, and all political rights, in America. The group aspect highlights voting as the power and

ability to direct government decisions. The individual dimension underscores the need for respect—the ability to vote confers status on the individual and provides a forum for expressing one’s views.

The modern Supreme Court, unfortunately, has failed to fully recognize the group-based component present in voting rights. For example, since its seminal decision in *Shaw v. Reno* in 1993, the Court has repeatedly invalidated majority–minority voting districts when race is used too heavily as a factor in the drawing of district lines. In *Miller v. Johnson*, the Court justified its decision on the ground that “[a]t the heart of the Constitution’s guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class.” This idea assumes that line-drawing legislators should ordinarily be color blind. This reasoning focuses exclusively on the individual aspect of voting rights while ignoring the group component present in all political rights including voting rights.

Yet the idea that voting rights are hybrid in nature finds support in enactment of and the circumstances giving rise to the Fifteenth and Nineteenth Amendments. It also gains traction from ideas that underlie the decisions in more than 100 years of case law addressing the nature of political equality in a constitutional context.

These sources form a solid foundation to support the dual dimensions of voting rights. Each shows that the right to vote contains both an individual respect component and a group-based active component. By slighting one aspect of voting rights, the modern Court has been unable to resolve difficult constitutional questions in a coherent way and as a result has often built its doctrinal edifices on shaky ground.

Black Suffrage, Reconstruction, and the Fifteenth Amendment

To understand the Fifteenth Amendment, we must first ask why it was necessary—why, that is, the Fourteenth Amendment did not enfranchise the newly freed slaves. It is relatively clear by the text and historical accounts that the Reconstruction framers did not intend the Fourteenth Amendment’s Equal Protection, Due Process, or Privileges and Immunities Clauses to impact the right of states to regulate political rights at all, including the right to vote. Indeed, passage of the Fourteenth Amendment was made smoother because its backers explicitly eschewed the

Amendment’s application to voting, office-holding, jury service, and militia service—the four traditional components of so-called political rights. The Fifteenth Amendment, by contrast, passed not long before the Republican Congress lost power, explicitly takes on the political rights realm by declaring that “the right of the citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.”

The story of the Fifteenth Amendment involves the group dimension of the right to vote, as well as the individualistic component. Support for black suffrage certainly derived in part from the basic idea that blacks deserved the right to vote as individuals. Black Americans merited suffrage as a matter of personal dignity and self-respect, as well as to confer status as newly ordained citizens. Certainly the military service of black Americans in Union armies during the Civil War supported the argument that blacks, as individuals, *earned* the right to vote and should be rewarded for their loyalty and support with the franchise. Proponents also used a natural rights argument—the idea that every citizen has a natural right to vote as an essential characteristic of the country’s republican form of government. Supporters cited one of the United States’ most fundamental founding democratic principles: that the government derived its legitimacy from the consent of the governed.

Opponents contended that blacks were uneducated and unfamiliar with the political process. While conceding the factual truthfulness of those assertions, black voting advocates saw the ballot as a “great educator” and the right to vote as an incentive for self-improvement, education, and the development of political savvy.

In addition to the individualistic arguments, supporters also urged that the right to vote was necessary to ensure blacks’ collective right to self-defense. Pro-franchise Congressmen argued that extending voting rights to blacks translated into the power blacks would need to deflect the racially discriminatory legislative measures supported by some white southerners. At the time, the voice of blacks in the ballot box served as the strongest—and maybe even the only—means of opposition to white hegemony. Fifteenth Amendment advocates argued that if government didn’t empower blacks with the right to vote to facilitate self-protection, then the federal government would have to permanently assume the duty to protect blacks as a group for the indefinite future. All of these kinds of justifications assume, of course, that giving blacks the right to vote would result in the exercise of group political power.

Indeed, the Republicans, the party of Lincoln, well appreciated that they stood to benefit politically from extending the franchise to black Americans as a group. New black voters were expected to vote dependably Republican. Their votes could help Republicans suppress the dormant seeds of dissension and treason that threatened to sprout if the leaders of the Confederacy retained economic and political power.

Also, both proponents and opponents of black suffrage assumed black voters would support black candidates for office, although each group had distinct reactions to this possibility. Although motivated by partisan politics, these arguments also rely for their premise on the group-based aspect of voting and assume that giving blacks the right to vote would result in blacks exerting collective political power.

In fact, some Democrats who *opposed* extending the franchise to blacks explicitly relied on the group-based aspect of voting. These opponents argued that the very problem of political participation by blacks was their aggregate power rather than the individual participation of black persons. Even some Republicans who supported suffrage for blacks expressed concern about the possibility that blacks would inevitably demand, and be able to implement with their voting clout, complete equality with whites.

All these arguments in support of the Fifteenth Amendment that relied on the group dimension of voting—the recognition of racial voting patterns, the idea that black voters had a distinct voice that deserved to be heard, and the role of blacks voting as a racial bloc—do not deny the individual nature of voting rights. These group-based rationales supplement, rather than supplant, the more individualistic aspects of voting commonly associated with suffrage.

The Nineteenth Amendment

The women's suffrage movement, which started before the Civil War, culminated in the ratification of the Nineteenth Amendment in 1920. As with the Fifteenth Amendment, this movement for voting rights relied on arguments including natural rights and individual liberty, equal justice, and the nonfungibility of men and women.

Women started with the same rationales their male counterparts used when they stood up to the English rules and demanded political recognition in 1776. Originally, suffragists argued women were created equal to men and therefore had the same inalienable right to political liberty. This line of argument

emphasized the ways men and women were identical. Supporters focused on men and women's common humanity as the core of the argument for women's suffrage.

It didn't take long for suffragists to add another weapon to their arsenal—group-based arguments joined the natural rights rationale at the end of the nineteenth century. Suffragists argued that women constituted a distinct voting bloc from men; that women had a unique voice, distinct priorities, and perspectives; and that women needed the right to vote to express these views. Supporters demanded political power for women because of the way the woman's voice would influence government's actions for the better.

History offers several theories to explain the eventual shift from an individualistic, inalienable rights approach to the emphasis of group rights and political power. First, arguments suggesting inherent equality and similarity of all people became less effective as America experienced an influx of immigrants and growing heterogeneity.

Second, women began participating in the American economy in unprecedented numbers, and female workers were faced with dreary working conditions, questionable safety standards, and meager wages. Suffragists believed that stressing these unique policy problems facing women was the only way for women to combat these new realities.

Finally, the Progressive era was dawning and reform was in the air. Giving women the right to vote fit seamlessly with the goals of progressives: promoting equality, improving education, and making government more efficient and accountable. Ultimately, suffragists crafted arguments out of the same political amalgam used for expanding the franchise to unpropertied men 150 years earlier: a mixture of natural, individual, and dignitary rights that should be afforded to all citizens and adding a new collective voice as an instrumentally beneficial supplement to the existing order.

In particular, supporters of women's suffrage contended that female voters would add humanitarian sensibilities and heightened moral awareness to politics. Women would probably fight earnestly to protect women's interests in the workplaces, promote the welfare of children, and help achieve a proper legal status for women in the family. In the end, suffragists emphasized the social and economic differences between men and women to justify a move toward inclusion.

The humanitarian interests and moral sensitivity of women was featured prominently in the idea that women were a distinct group with a unique political

vision. Pro-suffrage legislators repeated the refrain of women's moral superiority over men. Representatives whose states allowed women to vote attributed recent political innovations in their jurisdictions to the extension of the franchise to women. The president himself admitted the country needed the influence of women to solve the problems present at the end of World War I.

Although these arguments envisioned an expanded political role for women, supporters of women's suffrage did not challenge traditional domestic gender-based roles, specifically a woman's role as homemaker. Indeed, the homemaker argument—that women needed the vote to fulfill their designated role as guardians of the home—was easily incorporated into the idea that men and women had different strengths and thus both needed to be heard at the ballot box.

If society accepted this argument, it was an easy leap to the idea that women also served as the primary caregivers to children. It wasn't that men lacked compassion or care for children, but they lacked the personal knowledge and political will to ensure the welfare of children. Legislators cited women's disproportionate support for child labor laws, interest in education and literacy, and special concern for issues surrounding education and literacy, as reasons for why their group voice needed to be heard.

As with blacks, women's suffrage was premised as well on the idea of group self-defense. Because they were a disadvantaged class, women needed the ballot to protect their own interests. This included the poor working conditions and low wages that afflicted many female workers. Reformers pointed to movements by women in New Zealand and Australia as empirical proof that women could enact change if given the chance at the ballot box.

Both opponents and proponents of women's suffrage recognized that trumpeting the idea that men and women were entirely fungible would weaken the arguments that women needed to and would, in fact, act as a group or that society as a whole would gain anything as a consequence of woman's suffrage. Opponents of the movement thus tried to invoke the original fungibility argument against suffragists, who responded by insisting that women had fundamentally different points of view, natures, and experiences.

Similar to the rationales found in support of black suffrage, these arguments shared a common theme: the voice of women would not be heard without the power of the ballot to back it up. Again, then, group-based arguments reinforced the individualistic arguments for women's suffrage, and even occasionally stole the spotlight.

Judicial Review of Voting and Electoral Regulations

The judicial decisions in political rights cases across a range of disputes usually emphasize, and sometimes acknowledge only, one or the other aspect of voting rights. That is, often each case is styled as involving only the individual rights *or* the group dimension of voting. Less commonly, a court may grapple with both dimensions in a single decision. Rarer still are decisions that offer a coherent explanation of how both aspects fit together in the context of answering constitutional questions. The judicial failure to be comprehensive and completely honest about the true complex nature of political rights results in an ambiguity in the case law.

Even rulings that seem to rest exclusively on individualistic grounds betray the importance of the group dimension. Take two seminal reapportionment cases, *Baker v. Carr* and *Reynolds v. Sims*, which, in fact, reveal the essential duality of voting rights even as they appear to focus solely on individual interests.

Baker and *Sims* both strongly uphold the notion of "one person, one vote" as an idea that emphasizes the individual right to be treated respectfully. At the same time, however, the Supreme Court also had on its mind how gerrymandering skewed legislative policy—concerns that focused on the impact of groups on legislative behavior. In these cases, both arguments happen to cut in favor the plaintiff. As a consequence, the tension between individuals and groups lurked in the background of these cases but was not acknowledged.

Sometimes, however, the individualistic and group dimensions of voting rights cut in opposite directions. For example, the so-called ballot access cases decided in the end of the twentieth century reflect a more complicated tension between the individual component of voting rights and its group-based counterpart. The tension exists because an individual candidate wants to use the ballot as his platform, and the individual voter wants a broad field of candidates to choose from, on the one hand, and groups of voters, on the other hand, want to make sure the ballot is not too complex or fragmented to serve as a method for aggregating sentiment and fashioning policy.

In their decisions, courts have recognized some need to respect the rights of the individual voter, as well as the candidate who may lack broad public support. Prohibiting access to the ballot to a less popular candidate may amount to a statement that his views and concerns aren't worthy of respect. But the courts have also viewed the problem through the

group lens, recognizing that political parties and other blocs view the ballot as a means to an instrumental end and not just a platform for expression. Limiting ballot access to candidates with some fair prospect of winning the election—which courts have said legislatures may do—makes sense only if one agrees that voting allocates political power to groups and not just to individuals.

Faced with competing perspectives, the Supreme Court has tended to prioritize the group dimension of voting rights in this line of cases. So, for example, the Court has upheld restrictions prohibiting minor candidates from cluttering up the ballot, including state refusals to count write-in votes and prohibitions against independent candidates affiliated with a political party during the year before a primary election.

However, not all restrictions have survived judicial review. The Court has struck down restrictions that impair the group dimension of political rights, including laws requiring an early filing deadline for independent candidates. The Court has also struck down substantial filing fees on the basis of the rationale that the requirement particularly disadvantages groups defined by economic class.

The central dispute in so-called vote dilution cases is not the right to vote, to have that vote counted, or to have an individual vote given the same nominal weight as all other ballots cast. Instead, the contention is that members of some racial groups are not able to elect representatives as easily as members of the racial majority. Vote dilution cases affect individuals only with respect to their membership of a particular group. Indeed, vote dilution cases would not exist without the recognition that racial minority groups constitute politically cohesive groups. But this recognition—which drives the vote dilution case law—seems to have been ignored altogether in the so-called racial redistricting cases like *Shaw* and *Miller* referred to near the outset of this entry.

Conclusion

An understanding of political rights that is broad enough to encompass both the individual and group nature of political equality stands in sharp contrast to the Court's tendency to offer a one-sided perspective. Constitutional doctrine that recognizes the hybrid nature of political rights more authentically reflects the political reality of the present, as well as the past. Groups, and the importance of group identity to the exercise of political rights, are a part of the American story. Just as there is something missing when the distinct voices of racial and gender groups are not

included in our legislatures and juries, our constitutional discourse is incomplete and distorted when group interests are ignored.

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References and Further Reading

- Equal Protection, Unequal Political Burdens, and the CCRI*, Hastings Constitutional Law Quarterly 23 (1996): 1019 (with E. Caminker) (symposium Issue on Proposition 209).
The Hybrid Nature of Political Rights, Stanford Law Review 50 (1998): 915 (with A. Brownstein).
Jury Service as Political Participation Akin to Voting, Cornell Law Review 80 (1995): 203.

VOTING RIGHTS ACT OF 1965

One of the two major pieces of civil rights legislation of the 1960s, the Voting Rights Act of 1965, used the power of the federal government to preempt state resistance, particular in the South, to blacks exercising their right to vote and enforce the Fifteenth Amendment to the U.S. Constitution.

During the era of Jim Crow and segregation, most Southern states enacted roadblocks (such as literacy tests, poll taxes, and other measures) to prevent blacks from voting. With the rise of the modern civil rights movement in the 1950s and 1960s, the disenfranchisement measures came under attack. Yet it was the public demonstrations by blacks and the violent reactions by whites who supported segregation that prompted the enactment of the Voting Rights Act.

With plans to march to the state capital of Alabama, black marchers were attacked at the Edmund Pettus Bridge in Selma, Alabama, by state troopers. With television cameras rolling, the attacks prompted outrage, particularly from President Lyndon B. Johnson. He responded by proposing a voting rights bill that would deny state attempts to abridge the right to vote. The resulting legislation denied the use of literacy tests in locations where black registration or voting had been less than 50 percent in 1964's presidential election. These areas included the states of Alabama, Georgia, Louisiana, Mississippi, South Carolina, and Virginia, as well as forty counties in North Carolina. In addition, the act gave the Attorney General the power to send in federal examiners into areas to ensure that eligible individuals were registered to vote or observers to oversee federal elections.

In addition, the act required that changes in voting practices (such as the drawing of district lines) in the states of Alabama, Alaska, Georgia, Louisiana, Mississippi, South Carolina, and Virginia, along

with counties or parts of Arizona, Hawaii, Idaho, and North Carolina had to be submitted for “pre-clearance,” or approval, from either U.S. Attorney General or to the U.S. District Court for the District of Columbia. On being challenged in court, the U.S. Supreme Court ultimately upheld the constitutionality of the act in *South Carolina v. Katzenbach*, 383 U.S. 301 (1966) by saying that “After enduring nearly a century of systematic resistance to the Fifteenth Amendment, Congress might well decide to shift the advantage of time and inertia from the perpetrators of the evil to its victims.”

With Congress passing extensions in 1972, 1975, and 1982 of the act, additional minorities were included under the protection of the federal government. Hispanic, Asian, and Native American citizens had protections added to prevent voting discrimination as well. The 1982 amendments included arrangements for areas to terminate, or “bail out” of, being covered by the act’s requirements. In 2007, some sections of the act, most notably section five dealing with “pre-clearance,” will be up for renewal by Congress.

The Voting Rights Act has been credited with being an instrumental force to increasing minority

participation in the democratic process, from voting to office holding. For example, in March 1965, only 6.7 percent of blacks in Mississippi were registered. By 1998, more than 70 percent of blacks were registered. In 2001, seven of the top ten states with the most elected black officials were in the South, with again Mississippi leading the nation with most elected black officials (892).

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References and Further Reading

- Davidson, Chandler, and Bernard Grofman, ed. *Quiet Revolution in the South: The Impact of the Voting Rights Act, 1965–1990*. Princeton: Princeton University Press, 1994.
- Kotz, Nick. *Judgment Days: Lyndon Baines Johnson, Martin Luther King, Jr., and the Laws that Changed America*. New York: Houghton-Mifflin, 2005.
- Lawson, Stephen F. *Black Ballots: Voting Rights in the South, 1944–1969*. New York: Columbia University Press, 1976.

Cases and Statutes Cited

- South Carolina v. Katzenbach*, 383 U.S. 301 (1966)



WACO/BRANCH DAVIDIANS

Events that many consider an atrocity began on February 28, 1993, when agents of the Bureau of Alcohol, Tobacco, and Firearms (BATF) allegedly attempted to serve a search warrant on the compound of a religious sect called the Branch Davidians outside Waco, Texas, and an arrest warrant for its leader, who went by the name David Koresh. While the agents were talking to Koresh at the front door, shots were fired; it is unclear by whom, although the Davidians suggested that it was done by some BATF agents around the corner, to kill some dogs. The agents at the door then thought they were being fired on, and began firing at the Davidians, and some of the Davidians returned fire. Koresh was hit in the side, although his wound was not fatal. The agents then attempted to break into the building, and four of them died in an unsuccessful assault, along with six Davidians, which featured automatic weapons fire from helicopters into the building where many children were housed. The agents then withdrew, and the situation became a standoff.

The Federal Bureau of Investigation Hostage Rescue Team (FBI HRT) then took over the scene, and engaged in a strange saga of negotiation and harassment that continued until they assaulted the compound fifty-one days later, on the morning of April 19, 1993. That assault brought a fire that destroyed the compound, killing most of the remaining Davidians, a total of eighty-two since the commencement of hostilities, but a few escaped and were

taken into custody. Koresh was one of those who died in the fire.

The government claimed that the Davidians started the fire, and killed themselves. It does appear that some of them did kill themselves to escape being burned alive, but evidence has since come to light that the government started the fire and deliberately sought to kill the Davidians rather than capture them alive.

Eleven of the surviving Davidians were tried in federal court in early 1994 in San Antonio, Texas. Many regard it as a political trial, fraught with judicial and prosecutorial misconduct. District Judge Walter P. Smith refused to let the defense team challenge the authority for the warrant or the evidence presented by the prosecution, or to make an argument for self-defense. When the defense team threatened to file an offer of proof that could bring a reversal on appeal, the judge offered them a deal to not do so if he would include a jury instruction that the jury could consider self-defense. The defense team, thinking that was the best deal they could get, and hoping that the jury would see through the prosecution's case, agreed to the deal.

The jury instructions, however, were cleverly worded to confuse the jury, led by foreperson Sarah Bain, into acquitting all the defendants on all criminal charges, but convicting them on what are only enhancements, "carrying a weapon during the commission of a crime." At first the judge ruled, correctly, that the defendants could not be convicted of an enhancement if they were acquitted of the crime, but

then, after an *ex parte* meeting with the prosecution, reversed his own ruling, and imposed long prison terms on those convicted of the enhancements, saying, "The law doesn't have to be logical." Subsequent appeals brought a reduction in some of the sentences, but not a reversal of the convictions.

Independent investigators continued to bring forward evidence of government misconduct. A critical piece of such evidence was a tape provided by a whistleblower, thought to have been acting at the behest of William Colby, former CIA director, of a forward-looking infrared (FLIR) camera on an aircraft over the compound during the final assault. Experts conclude that the tape showed two government tanks bulldozing the buildings from behind, out of sight of any news cameras, and two figures firing automatic weapons into the building, in a way that seemed to be trying to prevent anyone from getting out alive. Some Davidians were found to have been crushed under the tank treads. Also revealed from evidence gathered from the ruins by the Texas Rangers were undetonated incendiary grenades of a kind available only to the government. This evidence has been released as two documentary films and tapes available to the public, the first of which won an Emmy and was nominated for an Oscar.

Experts alleged that the tanks and troops used in the final assault were personnel of the Combat Applications Groups, popularly known as Delta Force, in violation of the Posse Comitatus Act that forbids the use of Army personnel for law enforcement. Some FBI agents, in casual conversation, not for attribution, have said that the "burn out" of the Davidians was intentional, to kill all of them, and that the main motive was budgetary. The standoff was costing the FBI too much money.

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References and Further Reading

- Constitution Society. *Waco: Massacre at Mount Carmel*. Updated April 19, 2003. <http://www.constitution.org/waco/mtcarmel.htm>.
- Gazecki, William, and Dan Gifford. *Waco—The Rules of Engagement*. DVD. Los Angeles: Distributed by Som-Ford Entertainment, 1997.
- Hardy, David T., and Rex Kimball. *This Is Not an Assault*. Philadelphia: Xlibris Corporation, June 2001.
- Kopel, David B., and Paul H. Blackman. *No More Wacos: What's Wrong with Federal Law Enforcement and How to Fix It*. Buffalo, NY: Prometheus Books, 1997.
- Reavis, Dick J. *The Ashes of Waco: An Investigation*. Syracuse, NY: Syracuse University Press, 1998.
- Thibodeau, David, and Leon Whiteson. *A Place Called Waco: A Survivor's Story*. New York: HarperCollins, 1999.

WAITE COURT (1874–1888)

From the time of his appointment by President Ulysses S. Grant to the position of chief justice of the U.S. Supreme Court in 1874, to his death in 1888, Morrison R. Waite presided over several critical areas of controversy in American civil liberties jurisprudence. Principal constitutional battlegrounds included the free exercise clause of the First Amendment, and the newly ratified Fourteenth Amendment (1868).

Interpreting the free exercise of religion guarantee fell to the Court for the first time in *Reynolds v. United States* in 1878. George Reynolds, a prominent member of the Church of Jesus Christ of Latter-Day Saints, the Mormon Church, was convicted for practicing polygamy in the Territories, contrary to federal law. In appealing to the Supreme Court, Reynolds argued that as an accepted doctrine of his church, "it was the duty of male members ... to practice polygamy," and that this duty was called for by various sources that the members thought to be of divine origin.

In upholding the Morrill Act of 1862, which forbade and punished polygamy practiced in the Territories, a unanimous Court, speaking through Chief Justice Waite, read the First Amendment as saying that "Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order." Waite reviewed the traditional condemnation of multiple marriages in modern Western society, and cited studies suggesting that "polygamy leads to the patriarchal principle, which, when applied to large communities, fetters the people in stationary despotism...." He concluded: "Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices."

Thus, it was early established by the Court that the free exercise of religion guarantee, while absolutely protecting religious thought, would generate a balancing test regarding activities carried out in the name of religion. Although the early test of polygamy was an easy one, given the hostile climate of public opinion toward the practice at the time, others less compelling would later challenge and divide the Court.

Such an issue was presented in *Employment Division, Department of Human Resources v. Smith* in 1990. There, the free exercise clause was tested against a state law that included the use of peyote as a prohibited mind-altering drug, resulting in Oregon's denial of unemployment benefits to persons who had been dismissed from their jobs because of their religiously inspired consumption of the drug as a sacrament.

Justice Antonin Scalia, for a sharply divided five-to-four majority, noted:

We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. On the contrary, the record of more than a century of our free exercise jurisprudence contradicts that proposition.... We first had occasion to assert that principle in *Reynolds v. United States*.

Although most of the leading constitutional issues of the late nineteenth century arose from changing economic realities, the problem of race relations stemmed from other sources. During Reconstruction, freedmen in the South had great difficulty integrating with the larger white community and the process generated both resentment of legal backlash. The Supreme Court was able to offer little help. An early post-Civil War challenge came to the Court in the guise of the new Civil Rights Act of 1875. It prohibited racial discrimination in the selection of juries and forbade segregation in inns, taverns, transportation facilities, and other public accommodations. Five separate suits challenged the public accommodations portions of the Act, and the Court reviewed them together as the *Civil Rights Cases* (1883). The decision, consistent with those in the *Slaughterhouse Cases* (1873) and *United States v. Cruikshank* (1876), was that, although the Fourteenth Amendment forbade discriminatory acts by states, it made no mention of discriminatory acts by private individuals or individually owned businesses. As the act did prohibit such discrimination, it was found to exceed the authority granted to Congress by the enforcement clause of the amendment and was therefore unconstitutional.

While the Fourteenth Amendment was passing into disuse in regard to the civil rights of freedmen, it was evolving into a potent check upon the economic regulatory activities of the states. The state governments' powers to promote, regulate, prohibit, or otherwise control economic activity were of three broad descriptions: taxation, eminent domain, and the police power. Prior to the Civil War, the only constitutional restraints on the exercise of those powers were contained in Article 1, Section 10, most notably the contract clause and the restrictions on the kinds of taxes that could be levied. As the Court's interpretation of the Fourteenth Amendment developed, however, the due process clause became another, and sometimes more significant restraint.

It was over the issue of property rights, and of controlling state regulatory excesses, that the Waite Court worked out its most important doctrine, that of

substantive due process. The first step in the development of the doctrine took place in the *Granger* cases of 1877. The Grange and other farmers' organizations were formed in the 1860s as social, educational, and marketing groups, and as they gained legislative control in some states, they enacted laws that imposed regulations on private businesses. In *Munn v. Illinois* (1877), the Court reviewed such legislation, particularly acts fixing the maximum prices charged by grain elevators in Chicago.

The Supreme Court, speaking through Chief Justice Waite, held that grain elevators, being "affected with a public interest," were subject to regulation under the state's police powers. The due process clause guaranteed procedural rights, and was therefore irrelevant to the case. Nevertheless, he cautioned that "under some circumstances" a regulatory statute might be so arbitrary as to be unconstitutional. With those seemingly mild words, Waite gave formal recognition to the concept of substantive due process, and with it he effectively gave to the Court a new weapon. Thus armed, the Court was able to referee the contest between big business and government regulation for the next sixty years, favoring one side or the other as times and circumstances seemed to warrant. A classic example of that economic tug-of-war can be seen in the 1905 case, *Lochner v. New York*.

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References and Further Reading

- Magrath, C. Peter. *Morrison R. Waite: The Triumph of Character*. New York: Macmillan, 1963.
 McCloskey, Robert G. *The American Supreme Court*. 2nd ed. Chicago: University of Chicago Press, 1994.
 Trimble, Bruce R. *Chief Justice Waite: Defender of the Public Interest*. New York: Russell & Russell, 1970.

Cases and Statutes Cited

- Civil Rights Cases*, 109 U.S. 3 (1883)
Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990)
Lochner v. New York, 198 U.S. 45 (1905)
Munn v. Illinois, 94 U.S. 113 (1877)
Reynolds v. United States, 98 U.S. 145 (1878)
Slaughterhouse Cases, 16 Wall. 36 (1873)
United States v. Cruikshank, 92 U.S. 542 (1876)

See also Civil Rights Act of 1875; Civil Rights Cases, 109 U.S. 3 (1883); *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872 (1990); *Mormons and Religious Liberty; Reynolds v. United States*, 98 U.S. 145 (1878); *Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36 (1873); *United States v. Cruikshank*, 92 U.S. 542 (1876)

WALKER, DAVID (1795/6/7–1830)

David Walker's birth date has been varyingly estimated as September 25 in 1795, 1796, or 1797 in Wilmington, North Carolina. He was born to a slave father and a "free black" mother. Under the prevailing law, having been born to a "free black" mother, David Walker was born free. Despite his free status, accounts of his early years indicate a difficult existence as was the norm for African Americans during that time period. Eventually, Walker became an early member of the newly formed African Methodist Episcopal (AME) Church—as a free black person, Walker was disallowed from worshipping in slave churches.

In 1826, after traveling throughout the country and witnessing the brutality of slavery, Walker settled in Boston, Massachusetts, and opened a used clothing store. This enterprise would play a significant role during his abolitionist efforts. Further securing his place within the African-American elite in Boston, in 1826, Walker married Eliza Butler—a member of a prominent local family.

David Walker began to publicly denounce southern slavery and northern racism. As such, he became the Boston agent for and frequently contributed to the nation's first African American newspaper, *Freedom's Journal* (a weekly paper published in New York City). He wrote about the South as follows:

If I remain in this bloody land, I will not live long. As true as God reigns, I will be avenged for the sorrows which my people have suffered. This is not the place for me—no, no I must leave this part of the country.... Go I must.

By 1828, Walker had become the best-known anti-slavery advocate in Boston.

During the fall of 1829, Walker published the first edition of his *Appeal, in Four Articles; Together With a Preamble, to the Coloured Citizens of the World, but in Particular, and Very Expressly, to Those of the United States of America* ("Appeal").

The *Appeal* called for self-determination, independence, and slave revolt:

[T]hey want us for their slaves, and think nothing of murdering us ... [T]herefore, if there is an attempt made by us, kill or be killed ... and believe this, that it is no more harm for you to kill a man who is trying to kill you, than it is for you to take a drink of water when thirsty.

Additionally, in a break from commonly held abolitionist views, Walker did not support the colonization of free African Americans to Africa or the Caribbean. Frederick Douglass stated that the *Appeal* "startled the land like a trumpet of coming justice."

To disseminate the *Appeal*, Walker gained the assistance of antislavery sailors traveling to the South—copies of the document would be sown into clothes purchased through his clothing store and later distributed to slaves, "free Blacks," and antislavery sympathizers in southern localities.

While African Americans—both slave and free—clamored to gain access to the document, slave owners recoiled from it. The pamphlet was proclaimed subversive. As such, the Georgia and Louisiana legislatures passed laws against the circulation of the *Appeal*, and violation punishable by imprisonment or death. To similar ends, the Georgia, Louisiana, and North Carolina legislatures made it a crime to teach a slave to read. In 1829, when copies of the *Appeal* first began to surface within the state, the Georgia state legislature met in secret and passed a bill making it a capital offense to circulate materials that might incite slaves to riot. The Georgia legislature offered a "reward" for the capture of David Walker—\$10,000 alive, and \$1,000 dead. In addition, a group of wealthy southerners offered a \$3,000 bounty for the severed head of David Walker.

The third edition of the *Appeal* was published in 1830. A scant two months later, David Walker was found dead on the doorstep of his clothing establishment. While folklore attributed his death to poisoning, some modern historians speculate the cause of death was tuberculosis.

Despite David Walker's *Appeal* being alternatively decried as "for a brief and terrifying moment..., the most notorious document in America" and being praised as "present[ing] the first sustained critique of slavery and racism in the United States by an African person ... [and] crystalliz[ing] the universal principles against slavery" along with "the most significant Black anti-slavery document in the antebellum period[.]" there are scant few references to Walker and his work. Despite David Walker's influence on abolitionists like Frederick Douglass, William Lloyd Garrison, and perhaps Nat Turner; and twentieth-century activists Malcolm X, and even Martin Luther King, Jr., unfortunately and notably, many of the major tomes on slavery fail to reference David Walker and his *Appeal* at all.

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References and Further Reading

- Britannica Concise Encyclopedia. *David Walker*. <http://www.concise.britannica.com/ebc/article?tocId=9382248>.
Finkelman, Paul, ed. *Slavery, Race and the American Legal System (1700–1872)*. Statutes on Slavery, the Pamphlet Literature, Series VII, Vols. 1 and 2. New York: Garland Publishing, Inc., 1988.

- Hinks, Peter P. *To Awaken My Afflicted Brethren: David Walker and the Problem of Antebellum Slave Resistance*. University Park: Pennsylvania State University Press, 1997.
- National Park Service. *Boston African-American National Historic Site, David Walker (c. 1785–1830)*. <http://www.nps.gov/boaf/davidwalker.htm>.
- Public Broadcasting System. *David Walker's 'Appeal' (1829)*. Africans in America, Resource Bank, Historical Document. <http://www.pbs.org/wgbh/aia/part4/4h2931.html>.
- . *Editorial Regarding David Walker's 'Appeal' (1831)*. Africans in America, Resource Bank, Historical Document. <http://www.pbs.org/wgbh/aia/part4/4h2929.html>.
- . *Richard Allen in Walker's 'Appeal' (1829)*. Africans in America, Resource Bank, Historical Document. <http://www.pbs.org/wgbh/aia/part3/3h101.html>.
- . *David Blight on Walker*. Africans in America, Resource Bank, Historical Document. <http://www.pbs.org/wgbh/aia/part4/4i2983.html>.
- . *Eric Foner on David Walker*. Africans in America, Resource Bank, Historical Document. <http://www.pbs.org/wgbh/aia/part4/4i2982.html>.
- . *William Scarborough on David Walker*. Africans in America, Resource Bank, Historical Document. <http://www.pbs.org/wgbh/aia/part4/4i2982.html>.
- . *David Walker (1796–1830)*. Africans in America, Resource Bank, Historical Document. <http://www.pbs.org/wgbh/aia/part4/4i2982.html>.
- Schwartz, Philip J. *Slave Laws in Virginia*. Athens: University of Georgia Press, 1996.
- . *Twice Condemned: Slaves and the Criminal Laws of Virginia, 1705–1865*. Union, NJ: Lawbook Exchange, 1998.
- Walker, David. *Appeal, in Four Articles; Together with a Preamble, to the Coloured Citizens of the World, but in Particular, and Very Expressly, to Those of the United States of America ("David Walker's Appeal")*. 3rd ed. Baltimore: Black Classic Press, [1830] 1993.

See also Abolitionist Movement; Abolitionists; American Anti-Slavery Society; Anti-Abolitionist Gag Rules; Slavery and Civil Liberties; State Constitutions Civil Liberties and

WALL OF SEPARATION

A “wall of separation” between church and state has been referenced in Western discourse for half a millennium. The figurative phrase was most famously used by President Thomas Jefferson (1743–1826) in a January 1802 letter to the Baptist Association of Danbury, Connecticut, as a representation of the U.S. Constitution’s First Amendment religion guarantees. This controversial trope has been embraced by proponents of a prudential and constitutional separation between the concerns of religion and the civil state and denounced by advocates of an expansive role for religion in civic life.

Although Jefferson is usually credited with coining the phrase, he was not the first to use it in a church–state context. The Dutch Anabaptist Menno Simons (1496–1561) used the metaphor in a 1548 missive explaining the Anabaptists’ insistence that the community of faith be entirely separated from the world. In his magnum opus, *Of the Laws of Ecclesiastical Polity*, Anglican theologian Richard Hooker (1554–1600) renounced the erection of “walles of separation” between the Church and the Commonwealth that would prevent a Christian prince from fulfilling his divine duty to protect the spiritual estate. Roger Williams (1603?–1683), the founder of Rhode Island and Providence Plantations, maintained in a 1644 tract that a “hedge or wall of separation between the garden of the church and the wilderness of the world” must be maintained to preserve the purity of Christ’s church from worldly corruptions. The dissenting Real Whig reformer, James Burgh (1714–1775), warned of corrupt ecclesiastical establishments that merely advanced their own profane interests and those of the civil state. Therefore, in his work *Crito* (1766, 1767), Burgh proposed building “an impenetrable wall of separation between things sacred and civil.”

In late December 1801, President Jefferson received a message from the Danbury Baptist Association congratulating him on his election to the “chief Magistracy in the United States” and celebrating his support for religious liberty. In his reply, Jefferson linked the “wall of separation” with the text of the First Amendment, thereby, in the minds of many Americans, transforming the metaphor into a constitutional principle. Jefferson wrote:

Believing with you that religion is a matter which lies solely between Man & his God, that he owes account to none other for his faith or his worship, that the legitimate powers of government reach actions only, & not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that *their* legislature should “make no law respecting an establishment of religion, or prohibiting the free exercise thereof,” thus building a wall of separation between Church & State.

Jefferson’s wall, as a matter of federalism, was erected between the national and state governments on matters pertaining to religion and not, more generally, between the church and all agencies of civil government. The “wall of separation” was a metaphoric construction of the First Amendment, which Jefferson said imposed its restrictions on the national government only. The wall delineated the constitutional jurisdictions of the national and state governments respectively on religious concerns, such as official proclamations for days of public prayer, fasting, and thanksgiving.

The term slipped into obscurity until it was rediscovered by the U.S. Supreme Court. In *Reynolds v. United States* (1879), a Mormon polygamy case, the Court reproduced the paragraph from the Danbury letter containing the metaphoric phrase. The metaphor's current fame dates to *Everson v. Board of Education* (1947), in which a divided Court upheld the constitutionality of state reimbursements to parents for money expended in transporting their children to and from parochial schools. The Court rejected the contention that the tax supported program constituted an establishment of religion in violation of the First Amendment. In separationist language dissonant from the holding, Associate Justice Hugo L. Black wrote for the majority:

Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another.... In the words of Jefferson, the [First Amendment] clause against establishment of religion by law was intended to erect "a wall of separation between church and State".... That wall must be kept high and impregnable. We could not approve the slightest breach.

The *Everson* Court also incorporated the First Amendment into the Fourteenth Amendment, thereby holding the nonestablishment provision of the First Amendment against the states. Insofar as the First Amendment erected a "wall of separation," that wall now separated church and state at both the national and state levels.

In *McCullum v. Board of Education* (1948), the following term, the Supreme Court confirmed the metaphor's influence in constitutional law, noting that the justices had "agreed that the First Amendment's language, properly interpreted, had erected a wall of separation between Church and State." In subsequent cases, several justices, most notably Associate Justice Potter Stewart in *Engel v. Vitale* (1962) (Stewart, J., dissenting) and then Associate Justice William H. Rehnquist in *Wallace v. Jaffree* (1985) (Rehnquist, J., dissenting), have criticized the judiciary's reliance on a metaphor not found in the U.S. Constitution as a substitute for constitutional text.

Since the mid-twentieth century, few phrases have had a greater influence on church-state law and policy or have generated more controversy than the "wall of separation." Bitterly debated is whether the trope clarifies or distorts constitutional principles governing the relationship between church and state.

The metaphor's proponents contend that it encapsulates an important constitutional principle. A wall prevents religious establishments and all other forms of government assistance for religious objectives, avoids conflict among denominations competing

for government favor, and facilitates the private, voluntary exercise of religion.

Opponents counter that reliance on an extraconstitutional metaphor as a substitute for First Amendment text distorts constitutional principles governing church-state relationships. Unlike the First Amendment, which imposes restrictions on civil government only (specifically on Congress), a wall is a bilateral barrier that inhibits the activities of both civil government and religion. The wall, critics say, exceeds constitutional requirements by inhibiting religion's ability to influence public life and policy.

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References and Further Reading

- Dreisbach, Daniel L. *Thomas Jefferson and the Wall of Separation between Church and State*. New York: New York University Press, 2002.
 Forum, *William and Mary Quarterly*, 3d ser., LVI (October 1999): 775-824.
 Hamburger, Philip. *Separation of Church and State*. Cambridge, Mass.: Harvard University Press, 2002.

Cases and Statutes Cited

- Engel v. Vitale*, 370 U.S. 421 (1962)
Everson v. Board of Education, 330 U.S. 1 (1947)
McCullum v. Board of Education, 333 U.S. 203 (1948)
Reynolds v. United States, 98 U.S. 145 (1879)
Wallace v. Jaffree, 472 U.S. 38 (1985)

See also **Application of First Amendment to States; Engel v. Vitale, 370 U.S. 421 (1962); Establishment Clause; Establishment of Religion and Free Exercise Clause; Everson v. Board of Education, 330 U.S. 1 (1947); Fourteenth Amendment; Incorporation Doctrine; Jefferson, Thomas; McCullum v. Board of Education, 333 U.S. 203 (1948); Mormons and Religious Liberty; Rehnquist, William H.; Reynolds v. United States, 98 U.S. 145 (1878); Stewart, Potter; Wallace v. Jaffree, 472 U.S. 38 (1985); Williams, Roger**

WALLACE v. JAFFREE, 472 U.S. 38 (1985)

In its 1962 and 1963 decisions in *Engel v. Vitale* and *Abington Township School District v. Schempp*, respectively, the Supreme Court ruled that the Establishment Clause of the First Amendment prohibits school-sponsored group prayer and similar devotional exercises in the public schools. These decisions were designed in part to protect the religious liberty of dissenting students and their parents. Many mainstream religious believers, however, found the decisions hostile to religion, and this position continues to

have substantial political support. Critics have pushed for a constitutional amendment, and they have urged the Court itself to overrule its decisions concerning prayer in public schools. These efforts have failed. Although privately initiated prayer is protected, even in the public schools, the Supreme Court has consistently reaffirmed that the schools themselves cannot sponsor or promote it.

Moment of silence statutes represent an alternative response to the Supreme Court's decisions, a response that tests the boundaries of the Court's constitutional doctrine. Adopted by more than half of the states, these statutes authorize moments of silence in the public schools, moments that may be used by religious students as a time for silent prayer. It was inevitable that these laws would be challenged, and the question of their constitutionality reached the Supreme Court in 1985. In a range of opinions, the justices in *Wallace v. Jaffree* confronted not only the moment of silence issue, but also broader questions concerning the proper meaning and application of the establishment clause.

Wallace arose as a challenge to each of three Alabama statutes concerning the public schools, one enacted in 1978, another in 1981, and the third in 1982. The 1978 statute authorized a period of silence "for meditation." The 1981 law separately authorized a period of silence "for meditation or voluntary prayer." The 1982 enactment authorized a prescribed spoken prayer, this in direct contravention of *Engel* and *Schempp*.

The challengers ultimately abandoned their attack on the 1978 statute. The district court upheld the 1981 statute and, remarkably, the 1982 statute as well. Disregarding the Supreme Court's incorporation doctrine, Judge W. Brevard Hand concluded that the Fourteenth Amendment did not incorporate the Establishment Clause for application against the states, and that Alabama therefore was free to ignore the Establishment Clause altogether. The court of appeals reversed, invalidating both the 1981 and the 1982 statutes, and the Supreme Court affirmed this ruling.

In accepting the case for review, the Supreme Court unanimously and summarily affirmed the court of appeals' invalidation of the 1982 statute authorizing spoken prayer. When the Court later issued its decision on the 1981 statute, moreover, Justice John Paul Stevens, speaking for the Court, chastised District Judge Hand for refusing to honor the Court's incorporation decisions. Justice Stevens did not meaningfully answer Judge Hand's historical arguments concerning the original understanding of the Fourteenth Amendment, but he did resoundingly reaffirm the Court's incorporation doctrine.

Even Justice William H. Rehnquist, in his dissenting opinion, accepted the incorporation issue as settled.

Unlike on the issues of incorporation and spoken prayer, the Court was deeply divided on the moment of silence issue. It invalidated Alabama's 1981 statute on a vote of six to three, but the justices' various opinions suggested that other moment of silence statutes were likely to survive constitutional scrutiny. Writing for a majority of five, Justice Stevens found that the Alabama statute's authorization of a moment of silence "for meditation or voluntary prayer" was "entirely motivated by a purpose to advance religion." As such, it violated the secular purpose requirement of the establishment clause, as set forth in the oft-cited constitutional test of *Lemon v. Kurtzman* (1971). Justice Stevens focused especially on the language and the sequence of the three enactments in Alabama. Given the 1978 law authorizing silent "meditation," Stevens argued that the 1981 statute was largely superfluous except for its "voluntary prayer" language. As a result, he concluded that the legislature had acted in 1981 with the constitutionally impermissible purpose of endorsing and promoting religion. Justice Stevens's conclusion also was supported by candid statements from the legislative sponsor of the 1981 law and by the fact that the Alabama legislature went on in 1982 to authorize a prescribed spoken prayer that was clearly unconstitutional.

In a separate opinion, Justice Sandra Day O'Connor concurred in the Court's judgment. Like Justice Stevens, she concluded that the Alabama law's peculiar legislative history rendered it infirm, but she emphasized that other moment of silence statutes would stand on a different footing. Justice Lewis F. Powell, Jr., who had joined the majority opinion, also submitted a concurrence in which he agreed that many moment of silence laws might well be constitutional. Along with Justice Rehnquist, Chief Justice Warren E. Burger and Justice Byron R. White each submitted a separate dissent.

The various opinions in *Wallace* indicate that the justices would have upheld many moment of silence laws. Justice Stevens's majority opinion itself suggested that a law not mentioning prayer would be constitutionally permissible. The five justices who wrote separate opinions, moreover, apparently would have approved many laws that do mention prayer. The three dissenters, of course, would have upheld even the Alabama law. Justices O'Connor and Powell would not, but they obviously regarded the Alabama legislative history as highly unusual. Absent such stark evidence of an exclusively religious motivation, Justice O'Connor clearly would have upheld a law explicitly stating that the period of silence could be

used for prayer as well as meditation or reflection, and Justice Powell probably would have joined her.

Although this issue has not returned to the Supreme Court, lower courts have read *Wallace* to permit moment of silence statutes as long as their legislative histories do not suggest the improper purpose of promoting or endorsing religion. In *Bown v. Gwinnett* (1997) *County School District*, for example, the Eleventh Circuit approved a Georgia statute requiring “a brief period of quiet reflection,” and in *Brown v. Gilmore* (2001), the Fourth Circuit upheld a Virginia statute requiring a “minute of silence” for students to “meditate, pray, or engage in any other silent activity.”

In his lengthy dissenting opinion in *Wallace*, Justice Rehnquist argued that the Supreme Court was wrong not only in rejecting the Alabama law, but also in its general approach to the Establishment Clause. Although he accepted incorporation, Rehnquist challenged the Court’s doctrine by focusing on the original understanding of the First Amendment. He claimed that properly interpreted, the First Amendment permits the government to favor religion as long as it avoids discrimination among competing religious sects. On this view, there is no need for subtle distinctions concerning the purpose or form of moment of silence laws, for the government is perfectly free to “characterize prayer as a favored practice.”

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References and Further Reading

- Davis, Derek. *Original Intent: Chief Justice Rehnquist and the Course of American Church/State Relations*. Buffalo, NY: Prometheus Books, 1991.
- Dellinger, Walter, *The Sound of Silence: An Epistle on Prayer and the Constitution*, *Yale Law Journal* 95 (1986): 1631–1646.
- Smith, Rodney K., *Now Is the Time for Reflection: Wallace v. Jaffree and Its Legislative Aftermath*, *Alabama Law Review* 37 (1986): 345–389.

Cases and Statutes Cited

- Abington Township School District v. Schempp*, 374 U.S. 203 (1963)
- Bown v. Gwinnett County School District*, 112 F.3d 1464 (11th Cir. 1997)
- Brown v. Gilmore*, 258 F.3d 265 (4th Cir. 2001)
- Engel v. Vitale*, 370 U.S. 421 (1962)
- Lemon v. Kurtzman*, 403 U.S. 602 (1971)

See also **Establishment Clause Doctrine: Supreme Court Jurisprudence; Establishment Clause (I): History, Background, Framing; Establishment of Religion and Free Exercise Clauses**

WALZ v. TAX COMMISSION OF THE CITY OF NEW YORK, 397 U.S. 664 (1970)

Many states and localities have long granted exemptions from property taxes to religious institutions. In *Walz v. Tax Commission*, the Court considered whether such exemptions violated the establishment clause and concluded that they did not.

In 1968, the State of New York granted property tax exemptions to a variety of groups, including literary, historical, educational, charitable, and religious organizations. In fact, all states granted some type of tax exemption to religious organizations at the time, and several had granted the exemptions for over 200 years. Frederick Walz owned property in New York City; therefore, he paid property taxes. He believed that the tax exemption for religious organizations caused him to indirectly support those religious organizations by paying a part of their share of taxes. He viewed this indirect contribution to the religious organizations as a violation of the establishment clause of the First Amendment. Walz sued but lost in the New York State courts. He appealed to the U.S. Supreme Court. Thirty-seven state attorneys general (including three future U.S. Senators), along with a number of religious organizations, submitted briefs in support of the tax exemptions. The Supreme Court held, by a vote of seven to one, that tax exemptions to churches do not violate the establishment clause of the First Amendment.

Chief Justice Burger wrote the opinion for the majority, in which he articulated the underlying principle of the First Amendment religion clauses: “[W]e will not tolerate either governmentally established religion or governmental interference with religion.” He reasoned that the legislative purpose of this exemption was not to advance religion or inhibit religion. Certain groups foster “moral and mental improvement” and “exist in a harmonious relationship to the community at large.” Religious groups, along with other charitable, literary, historical, and educational groups, provided a benefit to the community. Therefore, the groups were worthy of tax exemptions, as taxation would be burdensome to those groups. The tax exemptions were provided equally to each of these groups, and were not simply for the benefit of religious organizations. The tax exemptions were also neutral as applied to religious organizations. The statute did not identify specific religions or churches, but applied the exemption to all, equally. The statute had a secular legislative purpose and it neither advanced nor inhibited religion.

He also explained that the effect of such legislation did not cause “excessive entanglement” between religion and government. The danger of excessive

entanglement between religion and government would be greater if religious organizations were subject to tax appraisals, tax liens, and tax foreclosures, than if the religious organizations were simply exempted from taxes.

Justice Brennan wrote a concurrence in which he analyzed the statute to ensure that it did not serve “religious activities,” “religious purposes,” or “use religious means to serve governmental ends.” He reviewed a number of examples from the nation’s early history to demonstrate that the Founding Fathers approved of tax exemptions for religious organizations both before and after the Bill of Rights was drafted and ratified. If such tax exemptions did not offend the drafters of the Constitution, then such tax exemptions did not offend the Constitution. Justice Brennan also relied, in part, on the fact that many religious organizations also perform charitable and secular functions. The majority rejected this rationale as a basis for supporting the tax exemptions.

Justice Harlan wrote his own concurrence in which he based his support for the statute on “neutrality and voluntarism.” Laws must not favor one religion over another, or religion over nonreligion. Laws also must not encourage or discourage participation in religion. This law satisfied both tests of neutrality and volunteerism.

Justice Douglas wrote the dissent, in which he argued that a tax exemption is no different than a subsidy. Justice Douglas distinguished houses of worship from other charitable organizations that receive tax exemptions. He reasoned that since the government could fund the charitable organizations directly, the government could provide a tax exemption to them. Since government could not provide a direct subsidy to support a house of worship, it could not provide a tax exemption to that house of worship.

This case contributed the “excessive entanglement” analysis to the framework that the Court would use in the future to examine any government action under the establishment clause. The following year, when the Court decided *Lemon v. Kurtzman* (1971), it created the *Lemon* test. Under the *Lemon* test, in order for government action to comply with the establishment clause, the action must have a secular purpose; it must neither advance nor inhibit religion; and, it must cause no excessive entanglement between government and religion. In subsequent cases, the Court held that providing sales and use tax exemptions exclusively to religious organizations that sold materials violated the establishment clause.

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References and Further Reading

- Hamilton, Marci A., *Free? Exercise*, William and Mary Law Review 42 (2001): 823–861.
Jimmy Swaggart Ministries v. Board of Equalization of California, 493 U.S. 378 (1990).
McCreary County v. American Civil Liberties Union of Kentucky, 125 S.Ct. 2722 (2005).
Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989).
 Zelinsky, Edward A., *Are Tax “Benefits” for Religious Institutions Constitutionally Dependent on Benefits for Secular Entities?* Boston College Law Review 42 (2001): 805.

Cases and Statutes Cited

- Lemon v. Kurtzman*, 403 U.S. 602 (1971)

WAR ON DRUGS

According to conventional wisdom, the term “war on drugs” was coined by President Richard Nixon in the early 1970s, when he fingered drug use and traffic as “public enemy number one” and “declared all-out, global war on the drug menace.” Since then, every U.S. president (except Jimmy Carter) has deployed this phrase in political rhetoric, often as a rallying cry for law enforcement or new legislation. Strictly speaking, however, the drug war is not a “war” in the classic sense, but instead a state-sponsored metaphor used to emphasize the alleged seriousness of the underlying threat posed by banned substances, to describe government’s collective response to this contraband, and to generally reaffirm the righteousness of drug laws and their enforcement.

The drug war typically is associated with criminalization and harsh punishment for the production, transportation, sale, purchase, possession, and use of certain intoxicating and/or psychoactive substances. Law enforcement efforts have focused on common recreational drugs such as marijuana and cocaine, but prohibition extends to a variety of other drugs as well. As a matter of pharmacological classification, opium, morphine, and heroin are correctly termed “narcotics,” for instance, while cocaine is a “stimulant” and LSD is a “hallucinogen.” Nonetheless, drug legislation, government officials, and the general public frequently use the term “narcotic” to describe any illicit drug. Other substances are not considered targets of the war on drugs and instead fall outside the criminal law (for example, caffeine) or are subject to regulation rather than near total prohibition (for example, alcohol and tobacco).

In theory, the use of the criminal sanction has both supply-side and demand-side components. The former seeks to diminish the availability of drugs by

employing government resources to eliminate drug production, interdict drugs as they flow through distribution chains, and apprehend those who sell drugs to ultimate consumers. In contrast, the latter strategy aims to reduce the demand by deterring potential users from purchasing and consuming illegal drugs. Moreover, it should be kept in mind that certain government policies may not implicate the criminal justice system at all, such as drug treatment and abstinence programs or aerial eradication schemes using defoliants. Nonetheless, supply-side strategies backed by the criminal sanction have dominated drug war efforts.

The following will discuss the history and development of the war on drugs followed by the legal debate that it has inspired.

Historical Origins

For much of human history, drug production, distribution, and consumption were not matters for government regulation let alone prohibition. Instead, any controls were informal in nature, based on the force of social mores rather than legal restrictions. The exceptions were few and far between, marked by strict dictates and brutal punishment. Coffee was banned in sixteenth-century Egypt and the Ottoman Empire, for instance, and tobacco was forbidden in a handful of nations during the seventeenth century, enforced with corporal punishment and even death in, among others, czarist Russia. Likewise, Imperial China made numerous attempts to stamp out opium in the eighteenth and nineteenth centuries, culminating in a frenzy of state executions, while England occasionally applied exorbitant duties on gin to decrease alcohol sales and consumption. But in general, the pre-twentieth century norm throughout the world was the absence of legal constraints on drugs and drug-related activities.

The same can be said of the United States, with a few exceptions during the late nineteenth century and early twentieth century. Opiates and eventually cocaine were widely used in nineteenth-century America for a variety of medicinal purposes. These drugs were also available without a prescription by mail order or over the counter at grocery and general stores, while countless patent medicines were laced with opiates and popular beverages were spiked with cocaine, such as the aptly named Coca-Cola. Although Pennsylvania enacted the first drug control legislation in America, restricting the sale of morphine in 1860, only a handful of antidrug laws were in effect prior to the turn of the previous century, including local

bans on opium in San Francisco, California and Virginia City, Nevada, and state wide laws regarding cocaine in Illinois and opium in Idaho and Ohio.

Despite the relative dearth of drug laws in the nineteenth century, a number of factors coalesced around the turn of the century and provoked a campaign for national legislation. To begin with, there was lingering anxiety over the consequences from extensive use of narcotic drugs to treat the wounded during the Civil War, with many veterans supposedly coming home with the so-called “soldier’s disease,” addiction to opiates. Another concern was careless prescription of narcotics by medical professionals as cure-alls for nearly any disease or defect, as well as the aforementioned availability of drugs without prescription and their introduction into common goods and remedies—all of which allegedly produced inadvertent drug addiction among the general population.

The federal Pure Food and Drug Act offered one Progressive-era response to such concerns, requiring accurate labeling and full disclosure of ingredients to consumers, including potentially addicting substances such as opiates and cocaine. But the American Progressive movement, composed of a wide range of civic reformers and clergymen, saw the issue as more than one of good governance, transparency, and a fully informed public. The Progressive agenda also sought to shape the country’s morality by prohibiting social vices like gambling, prostitution, and not least of all, intoxicating substances. The consumption of alcohol, cocaine, opiates, and nicotine in whatever form was looked upon with disdain, seen as a primary cause of sloth, depravity, and even violent crime, and thus an impediment to the advancement of American society.

The seemingly benevolent paternalism of Progressives merged with less charitable values, including ethnocentric hegemony and racism. As detailed in sociologist Joseph Gusfield’s classic study, *Symbolic Crusade*, the antialcohol temperance movement was not merely a conflict between teetotalers and imbibers, but a cultural battle as well. The “rural, orthodox Protestant, agricultural, native Americans” were pitted against “the immigrant, the Catholic, the industrial worker, and the secularized upper class,” with the social status of the former degraded by the normalization of the drinking and saloon life of the latter. Temperance leaders sought public dominance of their abstemious qualities through a national alcohol ban backed by the criminal sanction.

Similar cultural struggles motivated the drive for legislation against opiates and cocaine, with the lifestyle of the drug user challenging the ascetic qualities and fabled work ethic of American Protestantism. But there were additional quasicultural and ethnocentric

factors at play, most notably, race-based animosity and fear. For instance, early drug laws in the American West were overtly racist, aimed at Chinese railroad workers and laborers who were easy scapegoats for local crime and other social ills. Likewise, Southern folklore claimed that African Americans were particularly susceptible to drug addiction, and when on cocaine, they were deemed impervious to certain weapons and prone to crime sprees, including the ultimate offense in the Deep South, the rape of white women.

International comity provided yet another rationale for antidrug legislation in the United States. Acquisition of the Philippine Islands after the Spanish-American War forced administrators of the new U.S. territory to evaluate both drug consumption on the archipelago and its involvement in opium smuggling. Around this time, China embarked on a massive antidrug campaign marked by brutal enforcement methods, with opium blamed for the empire's social and economic decline, and the narcotics trade considered a symbol of foreign intrusions on national sovereignty. Some U.S. officials saw this as a dual opportunity to quell Chinese anger over mistreatment of their citizens in the United States, which had led to a boycott of American imports, and also to address rampant drug smuggling in the Philippines. Moreover, American missionaries in the Far East supported the Chinese anti-opium efforts on religious and humanitarian grounds and were convinced that the United States had a moral obligation to help stamp out the evils of narcotics. Appropriately enough, the Episcopal bishop of the Philippines led the charge for a series of meetings with delegations from around the world, culminating in protocols calling upon all nations to ban the narcotics trade.

A final factor, and one that would be repeated in subsequent decades, was the rise of a singular figure with the necessary talents, political alliances, and sheer tenacity in support of antidrug efforts. This individual, Dr. Hamilton Wright, had been a U.S. delegate to the international meetings and authored the leading study on drug use and abuse in America. Although its methodology has since been discredited on numerous grounds, the study offered the conceptual foundation for a national response to drugs in the early twentieth century. Moreover, Wright became a chief negotiator and principal architect for federal legislation, forwarding a litany of reasons to provoke lawmakers to action or soothe any anxieties raised by the proposed bill. He deployed all of the aforementioned rationales in favor of antidrug legislation: America's international obligations and moral duties to support other countries, the need for Progressive-style regulation and paternal protection of innocent

victims, the rise of drug use and related crime in U.S. cities and the resulting threat to the dominant culture, and the deeply ingrained racial prejudice and race-based fear held by congressional delegations from certain geographic regions. Given the vehemence of his efforts and seemingly unprincipled collection of arguments, historians have questioned whether Wright was driving the antidrug movement toward success or instead the movement was propelling the "father of American narcotics laws" to the fame and fortune he desired.

But whatever the underlying motivation, the efforts led to the Harrison Act of 1914, named after the congressman who introduced the bill, Representative Francis Burton Harrison, although commentators have suggested that appellative credit should have gone to Wright or possibly Representative James Mann or Secretary of State William Jennings Bryan, who were the bill's main facilitators in the legislative and executive branches. Nonetheless, the title stuck and the Harrison Act remained the cornerstone of American narcotics regulation for more than a half-century. What changed, however, were the legislation's alleged goals. On its face, the Harrison Act had three purposes: (1) to uphold America's treaty commitments from previous international conclaves; (2) to regulate the marketing of opium and other drugs and to place the dispensing function in the hands of medical professionals; and (3) to provide revenue for the federal government. Toward these ends, the law demanded documentation of drugs from their arrival in the United States through their distribution to patients, while physicians and other permissible drug dispensers were required to be licensed with the government and pay a small tax.

In the words of drug scholar Edward Brecher, "It is unlikely that a single legislator realized in 1914 that the law Congress was passing would later be deemed a prohibition law." Yet that is precisely what happened. The entity entrusted with enforcement of the Harrison Act, the Internal Revenue Service of the U.S. Treasury Department, promulgated regulations that slowly converted the legislation from an orderly marketing and taxation scheme into a *de facto* ban backed by criminal sanction. In particular, federal law enforcement claimed that the act barred prescriptions to drug users solely to maintain their addiction. The lower courts rejected this tortuous statutory interpretation on a number of grounds, as did the U.S. Supreme Court in its 1916 decision, *United States v. Jin Fuy Moy*. Only a few years later, however, the Supreme Court reversed course in a pair of 1919 cases—*United States v. Doremus* and *Webb v. United States*—which affirmed, respectively, the constitutionality of the Harrison Act and the validity of

criminal prosecutions for prescribing and dispensing drugs to an addict.

The judicial flip-flop was inexplicable in terms of legal doctrine, but perfectly explainable as a matter of historical events. In the three-year interim, World War I had incited extreme nationalism that had no place for antisocial and economically counterproductive drugs and their addicts. Likewise, the Bolshevik Revolution generated a “red scare” throughout the nation, with drugs being associated with rebellion and addiction viewed as unpatriotic. Most of all, the temperance movement had finally achieved a nationwide ban on alcohol with the passage of the Eighteenth Amendment to the U.S. Constitution and the necessary enabling legislation known as the Volstead Act. American society embarked on a phase of intolerance against those who failed to conform to the dominant cultural norms, and a national prohibition on alcohol, opium, and other drugs was part and parcel of this dogmatic agenda. Alcohol prohibition would last almost fourteen years, and today is considered an abject failure by most commentators. Prohibition had only marginal effect on alcohol consumption but produced an enormous black market of smuggling and speakeasies, fostered unprecedented levels of graft and public corruption, and created a financial windfall for gangsters who, in turn, protected their illegal enterprises with lethal threats and violence. But while the first “drug war” would end with the passage of the Twenty-First Amendment in 1933, “America’s longest war” was only getting started.

Development and Current Status

During the initial years under the Harrison Act, the number of federal agents and associated budget resources remained relatively small, although enforcement efforts still produced a sizable yield in terms of criminal punishment. Within a decade and a half, nearly a third of inmates in federal prisons had been sentenced under the Harrison Act. Still, the extent of antidrug efforts during this period seems rather paltry by today’s standards. As with passage of the first national drug law, a number of factors would coalesce and eventually lead to the current drug war.

As Hamilton Wright had been necessary for passage of the Harrison Act, a singular individual was required to professionalize and intensify drug enforcement efforts. In 1930, Harry Anslinger became the director of the newly created Federal Bureau of Narcotics, the successor to the Narcotics Division of the Internal Revenue Service. “The father of the drug war” proved to be a relentless antidrug crusader,

disseminating the idea that drugs and drug addiction were unprecedented threats to American society that required concerted efforts for their elimination. By cultivating strong relationships with federal lawmakers, Anslinger was able to obtain virtually all of the Bureau’s desired funding and legislation. Moreover, he used his position to push for state legislation that paralleled federal law, and within a decade almost every American jurisdiction had adopted stiff antidrug regimes.

Among Anslinger’s many endeavors during his three decades at the helm of federal drug enforcement, his push to criminalize marijuana is probably the best known and most consequential. The resulting propaganda campaign forwarded the idea that shocking crimes were commonly committed under the influence of marijuana, with the drug creating “reefer madness” in its consumer. Similar to the race bating that supported the Harrison Act, Anslinger singled out marijuana use among minorities as causing both serious crime and interracial sexual relations. He then insisted that marijuana was quickly spreading among the children of respectable America and that similar violence and moral depravities were sure to follow. “You smoke a joint,” Anslinger hyperbolically claimed in congressional testimony, “you’re likely to kill your brother.” By 1937, antimarijuana efforts had inspired legal bans in most states and, for the first time, federal legislation. Like the Harrison Act, the Marijuana Tax Act was nominally a revenue and registration statute, requiring physicians and other permissible distributors to obtain licenses and pay small fees. But in a bit of *déjà vu*, Anslinger’s Narcotics Bureau issued few permits and effectively terminated medically prescribed marijuana, treating distribution of this drug as a federal crime carrying the possibility of substantial punishment.

During and after World War II, drug use and abuse remained stable and even possibly declined due to the war-related disruption of smuggling operations. Nonetheless, Anslinger and several leading federal lawmakers attempted to connect drugs to increased juvenile delinquency and, most importantly, the growth of organized crime. Apparently, mob bosses such as Salvatore “Lucky” Luciano became heavily involved in drug trafficking, creating syndicates modeled after the illegal enterprises of the alcohol prohibition era. Although the extent of Mafia involvement and resulting drug-related crime and violence can be disputed, the evocative claims made by the Federal Bureau of Narcotics provided the impetus for progressively more severe legislation during the postwar period. Moreover, the nation was immersed in the demagoguery of Senator Joseph McCarthy, with drugs considered un-American or, even worse,

part of a communist conspiracy against the United States. In 1951, Congress passed the Boggs Act, which both increased the potential punishment and set mandatory minimum sentences for drug crimes, and many states followed this lead with “little Boggs Acts” that provided lengthy sentences for drug offenders. Five years later, federal lawmakers enacted still harsher punishment under the Narcotics Control Act of 1956, raising the sentencing range for all drug offenses and authorizing the death penalty for the sale of heroin to a minor.

During the 1960s, a schism grew between those who pitied drug addicts and supported rehabilitation versus those who detested all drug offenders and favored harsh punishment. The former group was buttressed by a joint study from the American Bar Association and American Medical Association that suggested, among other things, experimental drug clinics for treating addiction. But the latter group dominated the federal government and pushed for further and stronger antinarcotics legislation. In 1963, the President’s Commission on Narcotic and Drug Abuse made a series of recommendations for reforming federal drug policy, although only a few of them came to fruition. As the Commission suggested, previously unregulated drugs came under federal control, including amphetamines, barbiturates, and eventually LSD. Likewise, in 1965 various drug issues were vested in the new Bureau of Drug Abuse Control within the Food and Drug Administration; the new agency’s period of influence would be short lived, however, as it was eliminated along with the old Federal Bureau of Narcotics in 1968 and replaced with a new multipurpose Bureau of Narcotics and Dangerous Drugs lodged in the Department of Justice. And although civil commitment and treatment had been authorized by Congress under the Narcotic Addict Rehabilitation Act of 1966, the statute’s implementation was so restricted as to have little practical effect on addicted populations and criminal law enforcement.

The turmoil in federal drug policy paralleled the cultural upheaval of the late 1960s. Recreational drug use became popular with American youth, particularly among so-called “hippies” and antiwar protesters. With acceptance if not outright endorsement of time-honored drugs such as marijuana and relatively newer ones such as LSD, the counterculture’s drug use symbolized opposition to government, the Vietnam War, and traditional social values. The apparent threat to established society was palpable, raising the anxieties among mostly older, more conservative Americans. Drugs were seen to be spreading from stereotypical users—minorities and the urban poor—to suburban youth. These fears were only compounded by the

rampant drug use by U.S. soldiers in Vietnam and the alleged wave of heroin addiction among returning war veterans.

In 1968, Richard Nixon was elected president in large part due to a “law and order” campaign that promised a national crackdown on crime. During his first year in office, President Nixon drew upon the conventional wisdom that there was a causal connection between crime and drugs, warning the American public of the “serious national threat” posed by illegal drugs and calling for a complete overhaul of federal law and coordination with state governments. The end result was the Comprehensive Drug Abuse Prevention and Control Act of 1970, a lengthy omnibus statute premised on Congress’s jurisdiction over interstate commerce rather than the power to tax and spend. It consolidated all previous federal drug provisions into a single scheme and, among other things, established the modern five-category approach (referred to as “schedules”) predicated on each drug’s alleged medical value and potential for abuse. While heroin, LSD, and even marijuana were placed in the strictest schedule with no accepted medical use, for instance, cocaine, opium, and amphetamines were placed in a somewhat more relaxed category. The law also set steep maximum punishments for drug crimes, ranging up to fifteen years of imprisonment, as well as enhanced penalties for repeat offenders and supposedly dangerous drug criminals. Moreover, many states had already enacted or would eventually adopt drug laws comparable to the federal approach. Some jurisdictions took even more drastic steps, including New York State’s notoriously harsh “Rockefeller Drug Laws,” which provided mandatory prison terms and even life sentences for drug crimes.

In 1971, President Nixon formally declared a war on drugs, and two years later, he merged the various antidrug forces into a “superagency,” the Drug Enforcement Administration (DEA), with broad authority over all aspects of illegal drug trade and use. But despite concerted efforts and Nixon’s own declaration that “we have turned the corner on drug addiction,” drugs continued to flow into and throughout the United States. Cocaine became particularly chic during the 1970s, and its popularity and media depictions continue to this day, along with criminal law enforcement efforts against this drug. And although the administration of President Jimmy Carter advocated decriminalizing marijuana, such proposals for federal drug law all but ended with the end of his term in office.

In the 1980s, President Ronald Reagan re-declared war on drugs, emphasizing aggressive drug enforcement and an abstinence campaign highlighted by the pithy phrase, “Just Say No.” These efforts seemed to

have little effect, as this decade witnessed, among other things, the rise of billion-dollar drug smuggling operations, the introduction and ensuing “epidemic” of crack cocaine, and the growth of cutthroat drug dealing by street gangs. The media publicized these stories with specificity, for instance, documenting the drug trafficking by Colombian cocaine cartels, the neonatal damage to “crack babies” caused by their mother’s cocaine consumption, and the lethal drug turf wars between “Crips” and “Bloods” in urban America.

In 1986, Congress responded to the perceived drug scourge and related crime by enacting lengthy mandatory minimum sentences for trafficking comparatively small quantities of illegal drugs; for instance, possession with intent to distribute as little as five grams of crack cocaine generated a five-year mandatory prison term. Federal lawmakers further extended the scope of mandatory drug minimums in 1988 by adding drug-related conspiracies to the predicate crimes. A year later, President George H.W. Bush re-declared war on drugs and created the Office of National Drug Control Policy to oversee the federal government’s antidrug efforts, with the head of this office typically referred to as the nation’s “drug czar.” Although President Bill Clinton was the first American chief executive to admit to experimenting with drugs (claiming that he “tried” but did not “inhale” marijuana), the Clinton administration sustained the drug war through the turn of the twenty-first century, including spending billions of dollars on eradication programs in foreign countries. Likewise, President George W. Bush has continued drug enforcement efforts since his election in 2000, and in light of the terrorist attacks the following year, the Bush administration has upped the ante by attempting to draw a connection between the drug war and the new “war on terrorism.”

A few statistics help provide context for understanding the extent of America’s war on drugs. In the late 1960s, the budget for the Federal Bureau of Narcotics was around \$6 million. Federal drug enforcement spending increased to over \$40 million in 1970 and to more than \$320 million in 1975. By the early 1980s, the federal drug control budget had well surpassed the billion-dollar mark, and in the year 2000, the budget soared to \$18.5 billion. By the late 1990s, conservative estimates placed state drug-related expenditures at over \$80 billion, or more than 13 percent of all state spending. Pursuant to their billion-dollar budgets, law enforcement agencies arrested over 1.5 million people for drug crimes in 2001, a number that has tripled since 1980, with 80 percent of drug arrestees nabbed for simple possession. Well over 100,000 jail inmates are being held for drug-related crime, and more than 300,000 individuals are

serving time for drug offenses in state and federal prisons. The average federal drug sentence is around 6.5 years, more than three times the mean punishment for those convicted of manslaughter. Almost half of the population admits to at least trying illegal drugs during their lifetime, with nearly 13 percent of all Americans admitting to drug use in the past year. One survey reported that nine out of ten high school seniors said they could obtain at least some controlled substance, while the street price of illegal drugs has actually decreased over the past two decades. Pursuant to the large demand and plentiful supply, Americans spent \$66 billion on illicit drugs in 1998 and more than \$63 billion the following year. Moreover, a 1992 study found that drugs and drug warfare cost society around \$98 billion per year, a figure that one might safely assume has increased substantially during the intervening years.

Legal Debate

Almost all legal challenges to drug regulations and their enforcement have failed over the past nine decades, leading some scholars to claim that the courts have created a “drug exception” to the Constitution. As mentioned above, the U.S. Supreme Court initially held in its 1916 *Jin Fuey Moy* decision that Congress had not intended “to make the probably very large proportion of citizens who have some preparation of opium in their possession criminal,” and as a result, mere drug possession was an insufficient predicate for conspiracy charges. But three years later the Court reversed course, holding in *Doremus* that the Harrison Act was constitutionally valid pursuant to Congress’s taxation power, while in *Webb*, it affirmed law enforcement’s interpretation of the act banning physicians from prescribing narcotics to their drug-addicted patients. And in its 1921 decision in *Minnesota v. Martinson*, the Supreme Court rejected a last jurisdictional challenge to drug regulation, concluding that a state could enact drug laws despite the existence of federal statutes covering the same topic. Since then, legal challenges to government’s power to enact drug regulations and denominate their violation a crime have uniformly failed. The one outlier, *Ravin v. State*, was a 1975 state case announcing that possession of marijuana by an adult for personal consumption in one’s home was protected under the Alaska Constitution and thus beyond the state’s police powers. It must be noted, however, that Alaska voters later approved a constitutional amendment that allowed the recriminalization of marijuana possession.

More focused challenges to drug laws or their enforcement have largely been unsuccessful as well. In 1962, criminalization opponents saw the Supreme Court's decision in *Robinson v. California* as a potentially robust limitation on drug punishment. In that case, the Court struck down a state statute that made it a crime to "be addicted to the use of narcotics" as violating the Eighth Amendment's ban on cruel and unusual punishment. "[N]arcotic addiction is an illness," Justice Potter Stewart opined, and "[e]ven one day in prison would be cruel and unusual punishment for the 'crime' of having a common cold." Six years later in *Powell v. Texas*, however, the Supreme Court upheld the crime of being intoxicated in public against an Eighth Amendment challenge, thereby clarifying *Robinson* as only barring so-called "status crimes" but not affecting offenses that criminalize conduct alone. Although an individual cannot be punished for drug addiction, he may be charged and sentenced for drug use, possession, sale, and so on. More recently, the Supreme Court addressed the issue of extreme punishment for drug crimes in *Harmelin v. Michigan*. In this 1992 case, the defendant was convicted of possessing more than 650 grams of cocaine and received a mandatory life sentence without the possibility of parole. Despite the fact that the sentence severity was only surpassed by the death penalty, the Court concluded that it was not cruel and unusual punishment under the Constitution.

Other substantive challenges to drug laws have likewise failed before the Supreme Court. In the 1990 case of *Employment Division v. Smith*, civil plaintiffs claimed that the denial of unemployment benefits because of their spiritual peyote use violated the First Amendment clause protecting the free exercise of religion. The Court rejected this claim, arguing that generally applicable drug regulations that have an incidental effect on religious practices are nonetheless constitutional. In 2001, the Supreme Court considered whether medical necessity might be a valid defense to federal drug laws. In that case, *United States v. Oakland Cannabis Buyers' Co-Op*, an organization established under state law to distribute marijuana to authorized patients for medical purposes was sued by U.S. officials to enjoin their operations. The group maintained that a common-law medical necessity defense should be read into the federal drug scheme, but the Court rejected this argument, holding that Congress's decision to place marijuana in the most restrictive schedule foreclosed any contention that the drug has currently accepted medical value.

Like substantive claims, almost all procedural challenges to drug law enforcement have been rejected by the courts. For instance, in a pair of 1989 cases, *Caplin & Drysdale v. United States* and *United States*

v. Monsanto, the Supreme Court upheld the pretrial asset forfeiture against drug defendants even though the funds were necessary to pay attorneys' fees or had already been transferred to their legal counsel. According to the Court, "there is a strong governmental interest in obtaining full recovery of all forfeitable [drug] assets, an interest that overrides any Sixth Amendment [right to counsel claim]." Similarly, in the 1987 case of *United States v. Salerno*, the Supreme Court upheld the federal Bail Reform Act, which permitted pretrial detention without bail for, among other things, certain drug crimes. And in 1996, the Court's decision in *United States v. Armstrong* rejected a discovery request to determine whether drug offenders were being selectively prosecuted based on their race, despite a showing that all crack cocaine cases closed during a calendar year in the relevant federal district involved African-American defendants.

Although drug enforcement has affected the full array of constitutional criminal procedure guarantees, in the words of one federal judge, the "*hors de combat* of the government's so-called War on Drugs" has been the search and seizure protections under the Fourth Amendment. This was particularly evident in a series of drug-related cases in the mid- to late-1980s. In *Oliver v. United States* (1984), the Supreme Court held that law enforcement can ignore "no trespassing" signs and hurdle locked fences to sneak onto the property surrounding homes in search of drugs, while in *United States v. Dunn* (1987) the Court acquiesced to DEA agents who jumped over a perimeter fence, several barbed wire fences, and an interior wooden fence to snoop for a drug lab within a rancher's barn. In *California v. Greenwood* (1988), narcotics agents were allowed to examine contents of garbage bags to uncover indicia of drug activity within the defendant's home. And in *California v. Ciraolo* (1986) and *Florida v. Riley* (1989), the Supreme Court held that law enforcement may fly in planes and helicopters, respectively, to detect marijuana cultivation on private property. In all of these cases, the justices concluded that no reasonable expectations of privacy had been implicated, meaning that such drug war-driven intrusions can be undertaken without judicial oversight and in the absence of a warrant or probable cause.

More recently, the 1998 case of *Minnesota v. Carter* scrutinized the actions of a police officer who peered through a small gap in an apartment's drawn window blind and witnessed a pair of house guests bagging up cocaine. In affirming the convictions, the Court held that the drug dealers had no Fourth Amendment protection because they were engaged in a "purely commercial" transaction, were in the

home for a relatively short period of time, and had no previous association with the resident. The Supreme Court has also tacitly acquiesced to the drug-related phenomenon of racial profiling, where law enforcement uses race as a proxy for drug crime which, in turn, leads to the detention and search of minority individuals in public places. In 1996, the Court held in *Whren v. United States* that police may stop vehicles for traffic violations without inquiry into their “subjective intentions,” regardless of signs that the officers were really pulling over minority motorists in pursuit of illegal drugs. Lower court cases, such as the 1992 decision in *United States v. Weaver*, have ignored or even explicitly allowed law enforcement’s use of race to determine whether an individual should be detained as a potential drug courier.

A final drug-related Fourth Amendment issue helps demonstrate the extent to which drug war prerogatives can trump individual privacy interests. Over the past decade and a half, the Supreme Court has had occasion to consider six drug testing regimes, each conducted in the absence of judicial warrants and probable cause. A pair of 1989 cases, *National Treasury Employees Union v. Von Raab* and *Skinner v. Railway Labor Executives’ Association*, upheld drug testing for, respectively, certain customs agents and railroad employees based on the allegedly minimal intrusions on privacy and “compelling” government interests at stake, namely, preventing “unsympathetic” customs agents from being involved in drug interdiction or carrying firearms and deterring train accidents resulting from intoxicated railroad workers. In contrast, two subsequent cases—*Chandler v. Miller* in 1997 and *Ferguson v. City of Charleston* in 2001—struck down drug testing programs. In *Miller*, a testing regime for political candidates was deemed to be largely “symbolic” and therefore failed to provide the type of justification for warrantless, suspicionless searches. *Ferguson* involved a program where certain maternity patients had their urine tested without their consent, and positive results were handed over to local officials for possible criminal prosecution—all of which made the regime look like traditional anti-drug policing and thus unconstitutional in the absence of valid search warrants. The Supreme Court, however, appears to have given carte blanche to drug test public school students. In the 1995 *Vernonia School District 47J v. Acton* case, the Court upheld a testing regime where all student athletes had to consent to urinalysis in order to play sports, arguing that those individuals who are tested have a substantially lower expectation of privacy, as students in general are “committed to the temporary custody of the State as schoolmaster” and student athletes in particular are subject to the “communal undress” of the gym

locker. But in the *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls* decision of 2002, the Supreme Court expanded its earlier reasoning in affirming a testing program for students participating in *any* extracurricular activity, whether it was band, choir, debate, or even the Future Homemakers of America.

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References and Further Reading

- Barnett, Randy E., *Bad Trip: Drug Prohibition and the Weakness of Public Policy*, Yale Law Journal 103 (1994): 2593–2630.
- Boaz, David, *A Drug-Free America—or a Free America?* University of California Davis Law Review 24 (1991): 617–636.
- Bonnie, Richard J., and Charles H. Whitebread, II. *The Marihuana Conviction: A History of Marihuana Prohibition in the United States*. Charlottesville: University Press of Virginia, 1974.
- Brecher, Edward M., et al. *Licit and Illicit Drugs: The Consumers Union Report on Narcotics, Stimulants, Depressants, Inhalants, Hallucinogens, and Marijuana—Including Caffeine, Nicotine, and Alcohol*. Philadelphia: Lippincott Williams & Wilkins, 1972.
- Bureau of Justice Statistics, U.S. Department of Justice. *Drugs and Crime Facts*. Updated July 11, 2005. <http://www.ojp.usdoj.gov/bjs/drugs.htm>.
- . *Sourcebook of Criminal Justice Statistics 2002*. <http://www.albany.edu/sourcebook/>.
- Courtwright, David T. *Dark Paradise: Opiate Addiction in America before 1940*. Cambridge, MA: Harvard University Press, 1982.
- Duke, Steven B., and Albert C. Gross. *America’s Longest War: Rethinking Our Tragic Crusade against Drugs*. New York: G.P. Putnam’s Sons, 1994.
- Finkelman, Paul, *The Second Casualty of War: Civil Liberties and the War on Drugs*, Southern California Law Review 66 (1993): 1389–452.
- Grinspoon, Lester, and James B. Bakalar. *Cocaine: A Drug and Its Social Evolution*. New York: Basic Books, 1978.
- . *Marihuana: The Forbidden Medicine*. New Haven, CT: Yale University Press, 1997.
- Gusfield, Joseph R. *Symbolic Crusade: Status Politics and the American Temperance Movement*. Urbana: University of Illinois Press, 1963.
- Hamowy, Ronald. *Dealing with Drugs: Consequences of Governmental Control*. San Francisco: Pacific Research Institute for Public Policy, 1987.
- Kaplan, John. *The Hardest Drug: Heroin and Public Policy*. Chicago: University of Chicago Press, 1983.
- Luna, Erik, *Drug Exceptionalism*, Villanova Law Review 47 (2002): 753–807.
- . *The Prohibition Apocalypse*, DePaul Law Review 46 (1997): 483–568.
- Morgan, H. Wayne. *Drugs in America: A Social History, 1800–1980*. Syracuse, NY: Syracuse University Press, 1981.
- Musto, David F. *The American Disease: Origins of Narcotic Control*. New York: Oxford University Press, 1999.
- . *Drugs in America: A Documentary History*. New York: New York University Press, 2002.

- Nadelman, Ethan. "Should We Legalize Drugs? History Answers: Yes." *American Heritage* (1993): 41–45.
- Ostrowski, James. *The Moral and Political Case for Drug Legalization*, Hofstra Law Review 18 (1990): 607–702.
- Rudovsky, David. *The Impact of the War on Drugs on Procedural Fairness and Racial Equality*, University of Chicago Legal Forum 1993 (1994): 237–274.
- Trebach, Arnold S. *The Heroin Solution*. New Haven: Yale University Press, 1982.
- Wisotsky, Steven. *Beyond the War on Drugs: Overcoming a Failed Public Policy*. Buffalo, NY: Prometheus Books, 1990.

Cases and Statutes Cited

- Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822 (2002)
- California v. Ciraolo*, 476 U.S. 207 (1986)
- California v. Greenwood*, 486 U.S. 35 (1988)
- Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617 (1989)
- Chandler v. Miller*, 520 U.S. 305 (1997)
- Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990)
- Ferguson v. City of Charleston*, 532 U.S. 67 (2001)
- Florida v. Riley*, 488 U.S. 445 (1989)
- Harmelin v. Michigan*, 501 U.S. 957 (1991)
- Minnesota v. Martinson*, 256 U.S. 41 (1921)
- Minnesota v. Carter*, 525 U.S. 83 (1998)
- National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989)
- Oliver v. United States*, 466 U.S. 170 (1984)
- Powell v. Texas*, 392 U.S. 514 (1968)
- Ravin v. State*, 537 P.2d 494 (Alaska 1975)
- Robinson v. California*, 370 U.S. 660 (1962)
- Skinner v. Railway Labor Executives' Association*, 489 U.S. 602 (1989)
- United States v. Armstrong*, 517 U.S. 456 (1996)
- United States v. Doremus*, 249 U.S. 86 (1919)
- United States v. Dunn*, 480 U.S. 294 (1987)
- United States v. Jin Fuey Moy*, 241 U.S. 394 (1916)
- United States v. Monsanto*, 491 U.S. 600 (1989)
- United States v. Oakland Cannabis Buyers' Co-Op*, 532 U.S. 483 (2001)
- United States v. Salerno*, 481 U.S. 739 (1987)
- United States v. Weaver*, 966 F.2d 391 (8th Cir. 1992)
- Vernonia School District 47J v. Acton*, 515 U.S. 646 (1995)
- Webb v. United States*, 249 U.S. 96 (1919)
- Whren v. United States*, 517 U.S. 806 (1996)
- See also* **Anslinger, Harry Jacob**; *Board of Education v. Earls*, 536 U.S. 822 (2002) (students); *California v. Greenwood*, 486 U.S. 35 (1988); *Chandler v. Miller*, 520 U.S. 305 (1997) (candidates); **Drug Testing**; *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872 (1990); *Harmelin v. Michigan*, 501 U.S. 957 (1991); **Mandatory Minimum Sentences**; *National Treasury Employee Union v. Von Raab*, 489 U.S. 656 (1989); *Robinson v. California*, 370 U.S. 660 (1962); *Skinner v. Railway Labor Executives' Association*, 489 U.S. 602 (1989); *Vernonia School District v. Acton*, 515 U.S. 646 (1995); **Victimless Crimes**

WARDEN v. HAYDEN, 387 U.S. 294 (1967)

When may the police enter a home without a warrant? May the government seize personal property and use it to convict its owner? Both questions arose in *Hayden*.

Witnesses saw an armed robber fleeing a crime scene and followed him to a home. While the robber was inside, police were notified and arrived within minutes. They found Hayden inside feigning sleep; they also found guns, ammunition, and clothing that matched those worn by the robber. These items were used to convict Hayden.

The Supreme Court held that under the Fourth Amendment a warrant was not required because the "exigencies" of the situation made it impractical to get one. A delay to get a warrant here could have endangered the lives of the officers and others. This "exigent circumstances" exception to the warrant requirement remains the law today.

The Court also held that the seizure of Hayden's clothing was reasonable. The Court rejected a Fourth Amendment "mere evidence" rule—which it had previously endorsed in *Gouled v. United States* (1921)—that stated the government could not seize personal property to use as evidence unless it was contraband or the fruit or instrumentality of a crime. The amendment protects privacy, the Court explained, and property interests were neither necessary nor sufficient for protecting privacy. The Court rejected the property-based conception of the Fourth Amendment it had previously endorsed in *Boyd v. United States* (1886), which would make personal property off limits even with a warrant.

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Cases and Statutes Cited

- Boyd v. United States*, 116 U.S. 616 (1886)
- Gouled v. United States*, 255 U.S. 298 (1921)
- See also* **Arrest without a Warrant; Plain View; Probable Cause; Seizures; Warrantless Searches**

WARRANT CLAUSE (IV)

In the American colonies before 1776, there did not exist any meaningful right to be secure against unreasonable search and seizure. By then, however, many colonists had come to believe that among the rights enjoyed by Englishmen was protection of their homes against intrusion by the Crown. Justice Felix Frankfurter would state that the abuses of the Crown in invading private homes "more than any other single

factor gave rise to American independence.” Within fifteen years after the Declaration of Independence, those beliefs had been translated into the Fourth Amendment.

In the centuries between Magna Carta and American independence, English political theorists wove together what one scholar has called the “appealing fiction that a man’s home is his castle.” That this idea had little basis in law or in fact mattered little, because gradually—despite practices that continuously showed the power of the Crown to search where it pleased—people began to believe it. In 1763, William Pitt rose before Parliament and declared that

The poorest man may, in his cottage, bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter, the rain may enter, but the King of England may not enter; all his force dare not cross the threshold of the ruined tenement.

By then the idea that a man’s home was his castle had penetrated deeply into popular thought and even into statements from the bench. As early as 1505 the chief justice of the King’s Bench had noted that “the house of a man is for him his castle and his defence.” Yet one century later, in the Court of Common Pleas, a judge declared that although a man’s house could not be searched by his neighbors, it could be in every instance in which the king was a party. Privacy meant nothing if the government sought to capture felons or find evidence of their criminality. The government could—and did—engage in general searches, where officers might go from house to house, entering as they pleased, and ransacking the contents in search of evidence, and all of this without any sort of court order.

During the fifteenth century, Tudor monarchs used a general warrant—that is, one that did not identify a particular place or even a particular person—in seeking out religious dissidents and their heretical books. Although some victims claimed that their rights had been violated, neither Crown nor courts paid that claim any heed. Moreover, the methods used by the Crown’s soldiers, including sledgehammers to break open walls and floors in search of hidden compartments, evoked no protest except from those whose homes had been damaged. And should evidence be found, it could be used to prosecute, even if it led to the death penalty. No conception of “illegally seized evidence” existed in either English law or practice.

The Puritan Revolution in the mid-seventeenth century did little to change things. In fact, after the Stuarts returned to power, the House of Lords issued dozens of general warrants in an effort to regain property that had been confiscated by the Puritans.

Parliament also authorized the use of general warrants to enforce a variety of laws, especially the wide range of tax measures, as well as those criminalizing particular activities, such as counterfeiting, poaching, or religious heresy.

Beginning in the late sixteenth century, however, some jurists and political philosophers began constructing a conceptual argument against general warrants. Robert Beale, the clerk of the Privy Council, linked the Magna Carta to the opposition to general warrants, especially to Chapter 39, which declared that no man should be condemned without proceedings by the law of the land. If the Crown could enter wherever and whenever it pleased, carrying off whatever evidence it pleased and then using it to condemn a man to prison or to death, how did this comport with the law of the land? The Magna Carta, a document the barons forced King John to sign so as to protect their holdings and lives, was being transformed into a more general shield for the gentry and middle classes. Sir Edward Coke, the lord chief justice, gave his authority to this interpretation of Chapter 39, declaring that it required the Crown to seek a specific warrant before a search. Coke, however, when he had been attorney general had used general warrants extensively, and probably changed his mind only after he had become a victim of a search and ransacking of his papers in 1621 ordered by King James I himself.

Yet despite this increasing sense that general warrants somehow violated individual rights, courts did little to undo their work, and manuals written in the seventeenth and eighteenth century for the use of judges of the peace and other judicial officers all held general warrants to be legal. The House of Commons, while damning general warrants as “against law and the liberties of the subject,” nonetheless authorized general warrants repeatedly. The writings of such legal luminaries as Beale, Coke, Overton, Penn, Hale, and even Sir William Blackstone, all condemned general warrants, yet appear to have had little effect in doing away with them. The Commons that heard Pitt declaim about the sanctity of a man’s home went on, as soon as he had finished speaking, to pass an excise bill containing provisions for the use of general warrants, and its cousin, the writ of assistance. The writ of assistance was a general warrant that commanded not only officers of the government, but all bystanders and neighbors as well, to join in and assist the search. It descended from the old “hue and cry,” in which all citizens had to join in the chase after a suspected criminal.

But despite the continuation in practice of the general warrant, the accumulating arguments against it began to coalesce into a coherent philosophy. The

triggering event, which turned abstract thought into real opposition, came with the arrest of John Wilkes, a member of Parliament, for his criticism of and insult to a speech by the king in 1763 in number 45 of Wilkes's journal, *The North Briton*. The secretary of state then issued a general warrant to find and arrest everyone connected with that issue, and to seize evidence related to it. Forty-nine people were arrested, and soon after the Crown commenced some two hundred prosecutions, all the while arresting people right and left on the flimsiest of charges, searching their houses, and confiscating all sorts of materials. Eventually some of the printers confessed their "crimes" and identified Wilkes as the author of the article. Officers broke down the doors of his house, confiscated his books and hundreds of pages of manuscript writings, all on a general warrant. The Commons voted that *North Briton* number 45 constituted seditious libel and expelled Wilkes from the body. In court he was convicted for criminal publications, outlawed, jailed, and fined.

The Crown, however, had caught a tiger by the tail. Wilkes filed suits for trespass against everyone connected with the general warrant, from the lowest clerks on up to ministers of state, and this led others who had been swept up in the persecution to file similar suits as well. The government had arrested almost two hundred people, and nearly all of them now filed suit. Libertarians in England rallied to Wilkes's defense, spurred on by his own writings, and he became a popular idol, the champion of constitutional liberties in both England and in the colonies. News about the various cases resulting from the suits of Wilkes and his followers filled the pages of American newspapers from Massachusetts to South Carolina.

In cases such as *Wilkes v. Wood* (1763) and *Huckle v. Money* (1763), juries found for the plaintiffs against government officials, and awarded punitive monetary damages out of all proportion to the amount of harm suffered. In the *Huckle* case, Chief Justice Charles Pratt, later Lord Camden, charged the jury saying: "To enter a man's house by virtue of a nameless warrant, in order to procure evidence, is worse than the Spanish Inquisition, a law under which no Englishman would wish to live an hour." He condemned the general warrant because it failed to specify the names of the suspects, and because it had not been issued on a complaint made by oath. Although not going so far as to void all general warrants, he insisted that they specify the places to be searched and the type of evidence to be seized.

Pratt also presided over the *Wilkes* lawsuit, and there he called a search by general warrant "totally subversive of the liberty of the subject," and ordered

the jury to return a verdict for Wilkes. The jurors did and awarded £1,000; in a second trial he won an additional £4,000 against the secretary of state who had issued the general warrant. All in all, the government had to pay out more than £100,000 in costs and judgments as a result of the attack on Wilkes and his allies. In order to avoid this payment, the Crown appealed to nation's highest criminal court, the King's Bench, only to have Lord Chief Justice Mansfield declare the government warrants illegal. Although the government kept persecuting Wilkes, its efforts were continuously thwarted by the courts.

Moreover, it led to one of the more remarkable documents in English political and legal thought, *An Enquiry into the Doctrine Lately Propagated Concerning Libels, Warrants, and Seizures of Papers* (1764) by an author calling himself "Father of Candor." The author, who may have been Lord Camden, chief justice of the Court of Common Pleas, condemned the general warrant as an instrument inconsistent with every idea of liberty. The book went through several editions, and was read on both sides of the Atlantic.

The Wilkes case and the literature resulting from it stirred up the colonies, who by the mid-1760s had already embarked on the road to independence. "Wilkes and Liberty" became a slogan that patriot leaders endlessly exploited. In New York, Alexander McDougall, a leader of the Sons of Liberty, was imprisoned for his attack on a bill to provide provisions for the king's troops. He labeled himself as an American Wilkes, and the Sons of Liberty kept up a constant series of protests on his behalf. Moreover, the writings of jurists such as Coke and Blackstone, as well as "Father of Candor," all made their way into the context of American political debate, and were well-known to patriot leaders by the time the Continental Congress met in Philadelphia.

Yet it should be noted that through most colonial history, general warrants had been the norm, and even after Englishmen began to complain about them, the colonists apparently tolerated—or ignored—they until the 1760s. The acceptability of the general warrant had crossed the Atlantic with the settlers, and it had been used by colonial governors and assemblies with the same zeal as had been shown by the Crown and Parliament. In Massachusetts, for example, general warrants had been used in the effort to eradicate Quakers from the colony. In the Southern states, general warrants existed well past the Revolution when used to hunt for runaway slaves or to put down slave rebellions. As late as 1749, the *Conductor Generalis*, the most popular manual in the colonies for use by judges of the peace and other law officers, listed only two specific warrants, one

WARRANT CLAUSE (IV)

for the search of a particular home and the other to find identifiable stolen goods. Otherwise, the general warrant should be used for enforcing excise taxes and other laws.

The colonists began to resist in the late 1750s and early 1760s when the imperial government, attempting to increase revenue to cover the costs of the seven-year war with France, passed a series of tax measures and attempted to enforce them. Local officers of the Crown then learned that Americans knew not only about Wilkes, but about other attacks on general warrants, and in fact, some people opposed warrants of any sort. In 1759 a sheriff in Maryland attempted to break into a house to serve a legitimate arrest warrant, only to be shot to death. Because of the extensive smuggling that existed up and down the Atlantic seaboard, most colonists either engaged in smuggling directly or indirectly, or were neighbors to someone who did. Thus one ship owner, reflecting his awareness of English theory, declared that

[m]y home is my castle, and so is my ship, and therefore I lay it down as fundamental law of Nations, that if the greatest officer of the King was to come with a thousand warrants against me for a crime whatsoever, if he offered to take me out of my castle, I can kill him, and the law will bear me out.

The law might not, but in all likelihood no jury of his neighbors would convict him. The colonists may not have come up with the sophisticated arguments of a Coke, Blackstone, or "Father of Candor," but they put those ideas into practice by resisting the execution not just of general warrants, but of all warrants.

What many historians see as a critical moment both in colonial history as well as in the development of arguments against a general warrant came in 1761. General warrants, like all English judicial writs, ran in the name of the king, and thus once issued remained in force so long as the monarch lived. George II died in 1760, and so customs officers in Boston had to apply to the courts for new writs. In Boston, merchants who opposed the writs of assistance that had been used to enforce custom duties and justify breaking and entering by customs officers looking for smuggled goods, hired James Otis to argue against the issuance of new writs.

In his argument, Otis wove together fiction and fact, much as did his English contemporaries, to argue that British law ever since Magna Carta made general warrants unlawful. He claimed that only specific warrants could be lawful, and may have been the first to make that claim. Moreover, Otis appealed to what he called a higher law, the law of the English Constitution and the law of Providence, which, he claimed, outweighed any statutes authorizing general

warrants. The fact that Parliament had issued general warrants only showed how depraved English authority had become, since in doing so Parliament had itself acted unlawfully.

Although the Massachusetts Superior Court rejected Otis's arguments and issued the new writs, public opinion clearly backed him. Many newspapers reported his arguments verbatim, and the colonial legislature, aware of the vehemence of the populace against the writs, yielded a little in enacting a new bill to authorize the writs. The new law restricted the life of a writ to one week, rather than the life of the sovereign, and required specificity. It had to include the name of the informer, the subject of the search, the nature of the goods sought, and the location where authorities believed the contraband to be hidden. Otis's speech also helped to inflame patriotic sentiment in the country, and while a majority of the colonists still had no desire to break from the mother country, it is apparent that they wanted the full protection of what they considered to be English liberty.

In the audience to hear Otis were two cousins, Samuel and John Adams, both of whom would play an important role in the Revolution. Many years later John Adams declared, "Otis was a flame of fire! Then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born." Otis's speech led to wide-scale resistance to searches, and often mobs would form to prevent officials from searching a house. Justices of the peace, who heretofore had freely given out general warrants now demanded that officers seeking a writ provide specific information. In 1765, the governor's council of Massachusetts ruled that justices of the peace could not issue writs of assistance.

When Parliament passed the Townshend Acts in 1767, it authorized issuance of writs of assistance to help enforce collection of the duties in the colonies. An officer armed with such a writ could search all houses in the daytime and all vessels at any time. Only the courts in Massachusetts and New Hampshire, where Crown-appointed judges presided, issued such writs; that provision went unenforced in all of the other colonies, and even in those two only a half-dozen or so writs actually led to seizures. Mob violence in effect nullified the writs, since every seizure made under a writ of assistance was quickly liberated by local mobs. When a schooner was seized for smuggling, for example, a mob prevented the officers from unloading its illegal cargo. The captain in charge retreated, and went to a court to get a writ. By the time he returned, the townspeople had unloaded the vessel and its cargo had disappeared. By 1768, the attorney general of England concluded that

colonial judges were refusing to issue writs because they believed them unconstitutional, and from that time until the Revolution writs of assistance practically disappeared from the colonies.

Otis's 1761 speech would be reprinted widely for the next fifteen years, and inspired several of the states when they wrote their new constitutions in 1776 and after. Virginia, the first state to draft a constitution and bill of rights after the Declaration of Independence, included a strong prohibition against general warrants, although it did not go as far as some would have hoped. A month later, Pennsylvania adopted its new constitution, and as opposed to the negative wording of the Virginia bill, it put forth the right of the people to be secure in their homes in positive terms. John Adams, who had been at Otis's speech, was one of the prime drafters of the Massachusetts Constitution of 1780, and its bill of rights included a prohibition against unreasonable search and seizure that, in particularity and in emphasizing the positive rights of the people, is the strongest of all the early state provisions. Other states also included some requirements for specific warrants, although all of them recognized that there were exceptions to the rule, such as when officers were in hot pursuit of a felon.

Not all states, however, abandoned the general warrant. Maryland, New York, North and South Carolina, and Georgia utilized general warrants during the Confederation period, primarily to enforce their import laws. Southern states, even those such as Virginia that forbade general warrants, nonetheless allowed their use in hunting runaway slaves.

The Philadelphia convention that drafted the Constitution did not include a Bill of Rights, because its members, including James Madison, did not believe one necessary. As Alexander Hamilton put it, the entire Constitution was a Bill of Rights. The lack of specific protections proved a central issue in the fight over ratification, and several states ratified on condition that a bill of rights be added to the Constitution at the first session of Congress. James Madison, who led the fight for ratification in Virginia and was one of the authors of *The Federalist*, agreed to this demand, and when the first Congress met in 1789, it was Madison who drafted the measures that became the Bill of Rights. What became the Fourth Amendment read:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

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References and Further Reading

- Dash, Samuel. *The Intruders: Unreasonable Searches and Seizures from King John to John Ashcroft*. New Brunswick, NJ: Rutgers University Press, 2004.
- Lasson, Nelson B. *The History and Development of the Fourth Amendment to the United States Constitution*. New York: AMS Press, 1988.
- Lovell, Colin Rhys. *English Constitutional and Legal History: A Survey*. New York: Oxford University Press, 1962.
- McWhirter, Darien A. *Search, Seizure, and Privacy*. Phoenix: Oryx Press, 1994.
- Polyviou, Polyvios G. *Search and Seizure: Constitutional and Common Law*. London: Duckworth, 1982.

Cases and Statutes Cited

- Huckle v. Money*, 95 Eng. Rep. 768 (1763)
- Wilkes v. Wood*, 98 Eng. Rep. 489 (1763)

WARRANTLESS SEARCHES

Although the Fourth Amendment to the U.S. Constitution does not specifically require a warrant as a predicate to a valid search or seizure, the U.S. Supreme Court has generally imposed a warrant "preference" (see *United States v. Chadwick* [1977]). In other words, the Court tends to presume that warrant-less searches are unconstitutional. Despite the warrant preference, the Court has upheld warrant-less searches in a variety of contexts. The Court's decisions are fully consistent with the literal language of the Fourth Amendment, which only prohibits "unreasonable" searches and seizures. In general, in deciding whether a warrantless search is permissible, the Court asks whether it is reasonable to proceed without a warrant.

Over the decades, the Court has sustained a variety of exceptions to the warrant requirement. One such exception is the so-called "automobile exception" to the warrant requirement. Under this exception, the police may search an automobile when they have probable cause to believe that it contains the fruits, instrumentalities, or evidence of crime. In *California v. Carney* (1985), the Court held that this exception to the warrant requirement is justified by the "diminished expectation" of privacy associated with automobiles (diminished, vis-à-vis, for example, homes), the fact that automobiles are mobile, and that probable cause to search a vehicle can arise unexpectedly. In defining the exception, the Court has held that the scope of the automobile exception can extend to any place in the vehicle that the police have probable cause to believe that the fruits, instrumentalities or evidence of crime can be found. In some cases, the exception will justify a search of the entire vehicle.

Warrantless searches have also been upheld at border crossings and airports. Border searches have generally been upheld on the basis that the United States has the right to control its borders and to prevent the introduction of contraband into the country. Airport searches have generally been upheld as consensual. In other words, by trying to avoid airplanes, passengers consent to searches of their persons and luggage.

Warrantless searches are also permitted under the search incident to legal arrest exception (see *Chimel v. California* [1969]). Under that exception, the police are entitled to search a suspect whom they have legally arrested because the person being arrested might have a weapon that he can use to effect escape, or may have evidence that could be destroyed. The search incident exception authorizes the police to conduct a search and to remove any weapons or evidence they find. However, given the justifications for the search, *Chimel* held the scope of the search should be limited to the area within the arrestee's "immediate control."

In recent decades, in addition to continuing recognize the traditional exceptions to the warrant requirement, including those listed above, the Court has created new exceptions using the so-called "need" versus "intrusion" test. Under this test, first articulated in the Court's decision in *Camara v. Municipal Court* (1967), the Court balances the "need" for the search against the level of "intrusion" caused by the search. Based on this balancing, the Court decides whether the police may search without a warrant. In *Camara*, the Court used this test to create a new exception for administrative inspections—inspections that are generally conducted by administrative officials (for example, food inspectors, elevator inspectors, mine inspectors) to determine whether individuals or businesses are in compliance with regulatory codes.

Perhaps the broadest use of the need versus intrusion test is in the so-called "stop and frisk" cases. The stop and frisk exception to the warrant requirement was first articulated in the Court's landmark holding in *Terry v. Ohio* (1968). In that case, the Court used the need versus intrusion test to hold that, when a police officer reasonably believes that criminal activity is afoot and that the suspects are armed and dangerous, the officer may "stop" the individuals (a seizure under the Fourth Amendment) to make inquiry. If the officer stops the individuals, and his questions fail to dispel his fears, the officer can conduct a limited pat down of the suspect (a search for Fourth Amendment purposes) to determine whether he is in possession of weapons. In *Terry*, the officer had reason to believe that the suspects were carrying weapons

in preparation for a holdup of a store. Since robbers usually carry weapons, the officer could reasonably conclude that the suspects were "armed and dangerous." The officer stopped the suspects and made inquiry, but did not receive satisfactory responses. At that point, the officer frisked the individuals and found that they were in possession of concealed weapons. The Court upheld the pat down as a valid stop and frisk. The need for the search (to intervene against suspects who appeared to be engaged in criminal activity and who appeared to be armed and dangerous) outweighed the intrusion (the pat-down).

In a series of subsequent cases, the Court has extended the "need versus intrusion" test and the "stop and frisk" exception to a variety of contexts and authorized a number of other warrant-less searches. For example, in *Maryland v. Buie* (1990), the Court found that when the police entered a house to arrest a felony suspect, they had reason to believe that other armed individuals might be present in the house. Under such circumstances, the Court held that the police were justified in making a protective sweep of the house in an effort to ensure "that the house in which a suspect is being, or has just been, arrested is not harboring other persons who are dangerous and who could unexpectedly launch an attack." The Court found that the "need" for the search (to protect the police against possible attack) justified the "intrusion" (a cursory inspection of the remainder of the house).

As the foregoing exceptions reveal, warrantless searches are a well-established part of police searches under the Fourth Amendment.

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References and Further Reading

- Weaver, Russell L., Leslie W. Abramson, John M. Burkoff, and Catherine Hancock. *Principles of Criminal Procedure*. St. Paul, MN: Thomson/West 2004.
- Weaver, Russell L., Leslie W. Abramson, Ronald Bacigal, John M. Burkoff, Catherine Hancock, and Donald E. Lively. *Criminal Procedure: Cases, Problems & Exercises*. 2nd ed. St. Paul, MN: Thomson/West, 2001.

Cases and Statutes Cited

- California v. Carney*, 471 U.S. 386 (1985)
Camara v. Municipal Court, 387 U.S. 523 (1967)
Chimel v. California, 395 U.S. 752 (1969)
Maryland v. Buie, 494 U.S. 325 (1990)
Terry v. Ohio, 392 U.S. 1 (1968)
United States v. Chadwick, 433 U.S. 1, 9 (1977)

See also **Privacy; Probable Cause; Stop and Frisk**

WARREN COURT (1953–1969)

Although the Warren Court is perhaps best remembered for cases holding racial segregation unconstitutional, as well as its reconfiguration of American politics in the reapportionment cases, it also undertook the most extensive reinterpretation of constitutionally protected rights in American history. The question that had deviled the Court since the 1920s—to what extent did the Fourteenth Amendment’s due process clause incorporate the Bill of Rights and apply them to the states—was now answered. By 1969 all of the major provisions of the first eight amendments applied to the states as well as to the federal government.

One needs to see the Warren Court decisions in the areas of civil liberties as closely related to those protecting civil rights. Some of the key speech and association decisions, such as *New York Times v. Sullivan* (1964), grew directly out of the civil rights conflict. Blacks also suffered greatly from the inequities of the criminal justice system, and justice for unpopular minorities accused of crime related closely to the Court’s overall search for a living Constitution that treated all citizens equally.

The First Amendment: Speech

The Warren Court was among the most speech protective in the nation’s history, and its major contribution to speech jurisprudence lay in the broad vision of the First Amendment that informed its decisions. In *Bates v. City of Little Rock* (1960), the Court held that First Amendment freedoms “are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference.”

Two related themes run throughout these cases. One was the debate over the preferred position of First Amendment rights advocated by Justices Black and Douglas; the other was whether these rights are “absolute” or require “balancing” with competing interests. For Black, the preferred position doctrine led naturally to the absolutist view, while Frankfurter, joined by John Marshall Harlan, advocated balancing. How difficult the issue could be was seen in *Konigsberg v. State Bar of California* (1961), a five-to-four opinion in which the Court sustained the state’s denial of bar admission to an applicant who had refused to answer questions on Communist Party membership. Harlan’s majority opinion carefully explored how society had differing interests, none of which could be allowed to override all others. While people had a right to say whatever they wished, in

some instances society had an equally compelling reason either to limit that speech or to punish the speaker if the speech had incited certain results. Harlan detailed a lengthy list of cases in which the Court had approved limits on speech to show that historically the Court had always balanced these various interests. Justice Black’s eloquent dissent acknowledged these cases, but he believed that, in the area of speech, any whittling away of liberty would lead to its eventual loss. Balancing required establishing criteria for evaluating the government’s intent as well as that of the speaker, which meant that the most important of all freedoms rested on the subjective judgment of courts. He believed it much better to take an absolutist stance.

“Overbreadth” became a key idea informing the Warren Court’s speech decisions. The doctrine acknowledged that speech and other First Amendment rights might be restricted, but required that the government show a compelling need to do so. Judges could thus use the test to keep interference as minimal as possible. It provided the balancers with a means to achieve the goals of the absolutists, while at the same time retaining flexibility to meet emergency situations.

In *Brandenburg v. Ohio* (1969), the Warren Court responded to the criminal syndicalism statutes that Holmes and Brandeis had protested against in the 1920s. Brandenburg, the leader of a Ku Klux Klan group, had been convicted for advocating terrorism as a means of political reform. In the *per curiam* opinion, the Court voided the statute because its overly vague definition of criminal activities unduly restricted both advocacy and the right to assembly. *Brandenburg* has been described as combining the best of Holmes, Brandeis, and Learned Hand, in that it makes freedom the rule and restraint the exception, permits restriction only where a clear connection between speech and legitimately proscribed actions can be established, and requires that the government spell out its rules clearly and in the least restrictive manner.

Overbreadth also proved a useful doctrine in the various Vietnam protest cases. In *Bond v. Floyd* (1966), for example, the Court ruled that black activist Julian Bond’s First Amendment rights had been violated by the Georgia House of Representatives, which had excluded him from membership because, it claimed, Bond could not conscientiously take the required oath to support the Constitution given his antiwar sentiments. In the unanimous opinion, Chief Justice Warren ruled that neither public officials nor private persons could be punished for their opinions if they did not violate the law. Expressing admiration for those who had the courage of their conviction did not constitute “counseling, aiding or abetting.”

Speech may take several forms, and the Court consistently ruled that symbolic speech also came under the First Amendment umbrella. In *Tinker v. Des Moines School District* (1969), the Court overturned the expulsion of three students for wearing black armbands to symbolize their opposition to the war. School officials claimed that the wearing of armbands interfered with proper discipline and might be disruptive. Justice Abe Fortas rejected this argument, and held that students do not lose their constitutional rights when they enter the schoolhouse. School officials had shown no proof that any disruption had occurred, and fear that a disturbance might occur could not justify repression.

Symbolism had its limits, however, as the Court made clear in *United States v. O'Brien* (1968). Four men had burned their draft registration cards at an antiwar rally, claiming that the card burning symbolized their opposition to the Vietnam War. The Court, according to the chief justice, refused to accept “the view that an apparently limitless variety of conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea.” The government had a legitimate interest in preserving the cards, since the draft played an important role in providing manpower for the nation’s defense.

The overbreadth doctrine, despite some whittling down during the 1970s, remains a core ingredient of First Amendment law; its importance lies not just in these few cases, but in its wider application. It is a present-oriented doctrine, requiring judges to look not at some horrid future possibility, but at what happened in a specific set of circumstances.

The First Amendment and the Press

As late as 1942, in *Chaplinsky v. New Hampshire*, a unanimous Court had confidently listed “fighting words,” obscenity, and libel as examples of expression outside First Amendment protection. The United States had long ago done away with the English common law on libel and defamation of character, in which the mere publication of a defamatory statement—whether true or not—could be punished. American law allowed the defendant to offer evidence of the truth of the statement, which, if accepted by judge or jury, served as a complete defense. All states, however, still permitted civil actions in tort for false or malicious statements, and wide gradations existed among the jurisdictions; the Supreme Court had, with few exceptions, left libel a matter for state law.

In this context the Warren Court handed down one of its most important First Amendment cases, *New*

York Times v. Sullivan, in 1964. An advertisement in the *Times* signed by dozens of clergy and civil rights advocates charged the police and city officials of Montgomery, Alabama, with unleashing “an unprecedented wave of terror” against blacks engaged in nonviolent demonstrations against discrimination. Sullivan, Montgomery’s police and fire commissioner, sued the newspaper and several of the black clergymen who had signed the ad, and won a \$500,000 judgment under Alabama law. Alabama law held publications “libelous per se” if the words tended “to injure a person [in] his reputation” or “to bring [him] into public contempt.” The statute retained many elements of the old common law, and although the defendant could offer truth as a defense, he had a heavy burden to prove.

The nexus between the First Amendment and civil rights could not have been clearer. If Alabama could force the *Times* to bankruptcy (and \$500,000 was an enormous judgment in the 1960s), it could insulate itself from public scrutiny of its treatment of blacks. Criticizing the South, or even just reporting what happened, could prove too expensive for news organizations.

In a unanimous decision, the Court found the statute “constitutionally deficient for failure to provide the safeguards for freedom of speech and of the press that are requirements” of the First Amendment. Justice Brennan’s opinion carefully explained that there is always a balancing test between unlimited speech and the legitimate interests of the state; in matters of public interest and concerning public officials, he struck that balance on the side of free speech, with the exception of “recklessly false statements” made with “actual malice.” The Court considered the case, Brennan wrote, “against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.” As Brennan wrote in another libel case, *Garrison v. Louisiana* (1964), “speech concerning public affairs is more than self-expression; it is the essence of self-government.” In effect, the Court proposed a strategy, which has governed ever since, that extended the line of protection past the constitutional minimum all the way to facts, even false facts, to encourage the debate that democracy deems valuable.

Within a few years of this case, the law of libel had been effectively nationalized. While states could still control the procedural aspects of actions for libel, the substantive criteria had to conform to the Court’s ruling in *Times* and subsequent cases. If speech dealt with public officials and their conduct, it came within

constitutional protection. In 1967, a majority of the Court applied the *Times* rule to public figures as well as to officials in *Curtis Publishing Co. v. Butts* and *Associated Press v. Walker*.

Obscenity

Obscenity, like libel, had long been considered outside First Amendment protection and subject to state control. The Supreme Court's first encounter with obscenity came in a little noticed case at the beginning of the 1956 term, *Butler v. Michigan*, in which Justice Frankfurter threw out a state statute as a violation of freedom of the press. The law banned books containing obscene, immoral, or lewd language for their potentially harmful effect on youth. "Surely this is to burn the house to roast the pig," wrote Frankfurter. The law "would reduce the adult population of Michigan to reading what is fit for children." Although the case put forward no judicial standards by which to judge the obscene, it did make clear that the older, Victorian values could not be sustained in a First Amendment challenge.

The following year the Court did try to establish a new standard in *Roth v. United States*. Justice Brennan, for a majority of the Court, noted that "obscenity is [historically] not within the area of constitutionally protected speech or press," but any idea having "the slightest redeeming social importance" could claim First Amendment protection. He drew a distinction between sex and obscenity, defining the latter as material "which deals with sex in a manner appealing to prurient interests." The Court rejected the earlier test for obscenity, developed in the 1868 English case of *Regina v. Hicklin*, which judged the material by the effect of selected passages on particularly susceptible persons. In its place the Court adopted a standard already in use in some American courts: "Whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interests."

Justices Douglas and Harlan in their separate opinions both pinpointed the key problem as being how to identify obscene material. The Brennan test, although more liberal and fairer than the *Hicklin* standard, still required subjective judgment as to whether the allegedly prurient material had any redeeming social value.

The determination of what constituted obscenity troubled the Court for the next two decades. As Justice Harlan noted in 1968, the subject had produced a variety of views "unmatched in any other course of

constitutional adjudication." Thirteen obscenity cases between 1957 and 1968 elicited a total of fifty-five separate opinions. The justices seemed preoccupied with the question of "What is obscenity?" instead of conducting the type of inquiry normal to First Amendment litigation, "What state interests justify restraint?" Brennan's flat-out "obscenity is not speech" put it into a separate category apart from the well-defined analyses that the Court developed in other speech issues. Not until the Burger Court refined the *Roth* test in 1973 did the justices finally confront the question of why the states had an interest in such controls.

The First Amendment: The Religion Clauses

The Court's libertarian reading of the First Amendment's freedom of expression infused new vigor into the Jeffersonian philosophy of the two religion clauses. The "wall of separation" formula had first been utilized by Justice Black in *Everson v. Board of Education* (1947), a strange five-to-four opinion in which Black had written an eloquent essay on the historical reasons for separation of church and state, going all the way back to the 1786 Virginia Statute for Religious Freedom. He quoted Jefferson that the clause had been intended to erect "a wall of separation between church and State," a wall, Black claimed, that had to be sustained; the Court "could not approve of the slightest breach." He then turned around and sustained a New Jersey statute allowing school districts to reimburse parents of parochial school students for costs in transporting them to class.

The first significant religion cases before the Warren Court came in 1961 and involved Sunday closing laws. In *McGowan v. Maryland*, the Court upheld a state law that required most retail stores to close on Sunday, but permitted a number of exceptions for resorts and entertainment businesses. The policy, long established not only in Maryland but elsewhere, had the support of Christian groups as well as established businesses who did not want to compete with newer and aggressive retailers offering longer hours of service. A strict reading of the First Amendment would have required the Court to strike down these laws, since, as Chief Justice Warren conceded, "the original laws which dealt with Sunday labor were motivated by religious forces."

The Court sidestepped the problem by claiming that over the years, the original religious purpose of the blue laws had given way to a secular rationale, and that therefore the laws bore "no relationship to establishment of religion as those words are used in

the Constitution.” The present purpose, according to Warren, “is to provide a uniform day of rest for all citizens.” Jewish merchants, however, objected to the Sunday laws on free exercise grounds as well. In *Braunfeld v. Brown* (1961), Orthodox Jewish merchants pointed out that under rabbinic law they could not keep their stores open on Saturday, and since Pennsylvania forbade them to do business on Sunday, they were in a cruel situation where they had either to violate their religious beliefs or suffer severe economic hardships. The chief justice again side-stepped the real issue by claiming, as in *McGowan*, that the Sunday laws served only a secular purpose. Laws that had a primarily secular purpose but that imposed an indirect burden on religion did not violate the Constitution.

Warren’s opinions in *McGowan* and *Braunfeld* elicited strong dissents from Justice Douglas and Brennan. According to Douglas, all blue laws were derived from the Fourth Commandment and not from the Constitution, and therefore all violated both the establishment and free exercise prohibitions. In a separate dissent in *Braunfeld*, Justice Brennan asked the questions that Warren had so carefully evaded, and yet that are essential in First Amendment cases. “What, then, is the compelling state interest which impels the state to impede appellants’ freedom of worship? What overbalancing need is so weighty in the constitutional scale that it justifies this substantial, though indirect, limitation of appellants’ freedom?”

The dissenters’ arguments had a surprisingly swift impact, for two years later the Court handed down a decision that in effect negated *Braunfeld*. A Seventh Day Adventist had been discharged from her job because she would not work on Saturday, her sabbath; she could not find other work because she would not accept any job requiring Saturday work. South Carolina rejected her claim for unemployment compensation because state law barred benefits to workers who failed, without good cause, to accept “suitable work when offered.” After the South Carolina Supreme Court upheld the denial of benefits, Sherbert appealed, claiming interference with her free exercise of religion. In *Sherbert v. Verner* (1963), the Court through Justice Brennan agreed with her.

Brennan applied the traditional analysis he had urged in his *Braunfeld* dissent—what compelling state interest required an infringement on religious freedom?—and he could not find any. He did not believe that granting benefits to Adventists on slightly different grounds than to Sunday worshipers constituted an establishment in favor of the Adventists. Rather, it ensured that the government would act

neutrally toward all groups and not penalize one because it had a different day of rest from the others.

By this case, the Court had already begun moving toward a more activist view of the religion clauses. In *Torcaso v. Watkins* (1961), it upheld an individual’s right not to believe in God by striking down test oaths in Maryland. Nearly all states had had some form of test oath prior to the Civil War, requiring an affirmation of religious belief, but most had either been wiped off the books or allowed to stagnate in the latter nineteenth century. Because the First Amendment had not applied to the states at that time, no cases testing such oaths had come before the Court prior to *Torcaso*, which in essence administered the coup de grace to a moribund practice.

Prayer, Bible Reading, and Evolution

Prayer in public schools, however, was far from moribund when the Court declared the practice unconstitutional in *Engel v. Vitale* (1962). The New York Board of Regents had prepared, for use in public schools, a “nondenominational” prayer which read: “Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our country.” The state’s highest court upheld the rule so long as the schools did not compel students to join in the prayer when parents objected. By a six-to-one vote (Justices Frankfurter and White did not participate), the Supreme Court held the practice “wholly inconsistent with the Establishment Clause.” The prayer, according to Justice Black, could not be interpreted as anything but a religious activity, and the establishment clause “must at least mean that it is no part of the business of government to compose official prayers for any group of American people to recite as a part of a religious program carried on by government.” Only Justice Stewart dissented. He considered that the practice did no more than recognize “the deeply entrenched and highly cherished spiritual tradition of our Nation.”

Not since *Brown* had the Court come under so much public criticism, much of it stemming from a misunderstanding of what the Court had said. Conservative religious leaders attacked the decision for promoting atheism and secularism. Southerners saw *Engel* as proof of judicial radicalism. “They put the Negroes in the schools,” Representative George W. Andrews of Alabama lamented, and “now they have driven God out.” Senator Robert C. Byrd of West Virginia summed up the feelings of many when he

complained that “someone is tampering with America’s soul.”

The Court had its champions as well as critics. Liberal Protestant and Jewish groups interpreted the decision as a significant move to divorce religion from meaningless public ritual and to protect its sincere practice. The National Council of Churches, a coalition of Protestant and Orthodox denominations, praised *Engel* for protecting “the religious rights of minorities,” while the Anti-Defamation League, a Jewish organization, applauded the “splendid reaffirmation of a basic American principle.”

One year later the Court extended the *Engel* reasoning in *Abington School District v. Schempp* (1963), ruling that the establishment clause prohibited required reading of the Bible. A Pennsylvania law provided for the reading of at least ten verses of the Bible each day, as well as the recitation in unison of the Lord’s Prayer. In striking down the requirement, Justice Clark spoke of the “wholesome neutrality” of the Constitution toward religion, and set forth specific standards by which to judge whether the government had violated the First Amendment. To “withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.”

Again, conservatives misinterpreted and attacked the Court’s decision, claiming that the justices had now expelled the Bible from school along with God. The Rev. Bill Graham professed that he was “shocked,” and claimed that “prayers and Bible reading have been a part of American public school life since the Pilgrims landed at Plymouth Rock.” Justice Clark, however, had made it quite clear that classes could still study the Bible as literature or as a religious document; it just could not be used for proselytizing purposes or in any manner that partook of a religious exercise.

A third case following *Engel* and *Schempp* also aroused the ire of religious conservatives. The conviction of John Scopes for teaching Darwin’s theory of evolution in 1927 had not reached the Supreme Court on appeal because the Tennessee high court had dismissed the case on a technicality. As a result, the antievolution statutes in Tennessee and other states had never been subjected to constitutional scrutiny. Finally, in *Epperson v. Arkansas* (1968), a unanimous Court, speaking through Justice Fortas, found the Arkansas antievolution statute in conflict with the establishment clause. “Arkansas did not seek to excise from the curricula of its schools and universities all discussion of the origin of man. The law’s effort was confined to an attempt to blot out a particular theory because of its supposed conflict with the Biblical account, literally read.”

Fourth Amendment: Search and Seizure

Aside from the desegregation rulings, few decisions of the Warren Court aroused such public debate as those nationalizing the Fourth, Fifth, and Sixth Amendments, and then expanding their reach. These three articles of the Bill of Rights deal with criminal procedure and protect against arbitrary action by government officers. The Warren Court not only made these protections applicable to the states through the Fourteenth Amendment’s Due Process Clause, but also fortified the rights of accused persons when confronted by the power of the state.

The Fourth Amendment expressed the Framers’ opposition to the offensive practices of the British prior to the Revolution, and it governs how police may carry out one of their major responsibilities, gathering evidence during the investigation of crimes. While it sets limits on what the police may do, the amendment recognizes the legitimacy of reasonable search and seizure and does not erect insurmountable obstacles to that process. To secure a warrant, investigating officers need merely show “probable cause” and spell out with some precision the places to be searched and the type of evidence sought.

The Vinson Court had taken the step of applying the Fourth Amendment to the states in *Wolf v. Colorado* (1949). But the justices split, six to three, over whether the exclusionary rule, which had been the remedy for federal violation of the warrant since 1914, should also apply to the states. In his majority opinion, Justice Frankfurter argued that the exclusionary rule, as a judge-made remedy, did not constitute part of the Fourth Amendment and therefore could not be imposed by federal courts on the states. Justice Murphy dissented, claiming that the Fourth Amendment made no sense without the exclusionary rule; he saw the rule as implicit in the amendment.

When the Warren Court came to consider this issue again in *Mapp v. Ohio* (1961), it adopted Murphy’s argument. To say that the Fourth Amendment applied to the states, wrote Justice Clark, but to deny the only means of enforcing it, “is to grant the right but in reality to withhold its privilege and enjoyment.” Clark noted the controversy over the exclusionary rule and admitted that in some cases the criminal might go free because the police had blundered. But a higher consideration existed, “the imperative of judicial integrity.” The government had to set an example of fidelity to the law, for if its officers ignored the law, the public would eventually do so as well.

Chief Justice Warren delivered the Court’s eight-to-one opinion in the other major Fourth Amendment

case decided during his tenure, *Terry v. Ohio* (1968). An experienced police officer observed three men who appeared to be “casing” a store. He stopped them and, dissatisfied with their answers to his questions, frisked them. He found revolvers on two of the men and arrested them. Counsel for the men claimed that because the officer had no warrant, he had no right to search them, and that the revolvers could not be introduced as evidence. In a long and rambling opinion, the chief justice upheld the police officer, ruling that if the police had reasonable grounds and needed to act promptly, they could stop and frisk suspects without a warrant.

Fifth Amendment: Self-Incrimination

Public controversy over the Warren Court’s criminal cases dwelt less on its Fourth Amendment decisions than on how it interpreted the Fifth and Sixth. The Fifth includes what has sometimes been called “the Great Right,” that no person “shall be compelled in any criminal case to be a witness against himself.” The privilege came under heavy criticism during the red scare of the 1950s, as witnesses refused to answer Senator McCarthy’s questions on grounds of possible self-incrimination. “Taking the Fifth” became associated with communists, and critics charged that a truly innocent person should not hesitate to take the stand and tell the truth in criminal trials or before investigating committees.

The Court had taken an expansive view of this right since the latter nineteenth century. In *Boyd v. United States* (1886) and *Counselman v. Hitchcock* (1892), it had expanded the privilege against self-incrimination to apply to any criminal case, as well as to civil cases where testimony might later be used in criminal hearings. In 1967, the Warren Court expanded the concept of a “criminal case” to include juvenile delinquency proceedings in *In re Gault*. The privilege is not absolute; persons may not refuse to be fingerprinted, to have blood samples, voice recordings, or other physical evidence taken, or to submit to intoxication tests—even though all these may prove incriminating. But at a trial, the accused has the right to remain silent, and any adverse comment on a defendant’s silence, by either judge or prosecutor, violates the constitutional privilege.

Although an accused person may not be forced to testify, he or she may voluntarily confess, and the confession may be used in evidence. The old common law rule against confessions obtained by torture, threats, inducements, or promises had been reaffirmed as part of constitutional law by the Court in

1884. In modern times, the question of voluntariness had been refined, with the Court relying on the due process clauses of the Fifth and Fourteenth Amendments to prohibit not only physical torture but psychological brutality as well.

Beginning in 1964, the Court tied the Fifth Amendment privilege to the Sixth Amendment’s right to counsel, on the grounds that only if the accused had been properly informed of his or her rights, including the right to remain silent, could an ensuing confession be admissible. The key case was *Massiah v. United States* (1964). The defendant had been indicted for violating federal drug laws; he had retained a lawyer, pleaded not guilty, and been released on bail. Federal agents trailed Massiah and electronically eavesdropped on a private conversation, thus securing incriminating evidence that led to his conviction at the trial. The Court, through Justice Stewart, threw the verdict out; once the accused had a lawyer, the police could not use anything he said unless he had been advised by counsel as to the effects of those words.

Later that year, the Court ruled that the Fifth Amendment’s privilege against self-incrimination applied to the states (*Malloy v. Hogan*). Shortly afterward, in *Escobedo v. Illinois*, the Court overturned the conviction of Danny Escobedo because police would not allow him to see the attorney he had asked for until after they had secured a confession to the crime.

In 1966, a seriously divided Court handed down the landmark ruling of *Miranda v. Arizona*. Chief Justice Warren finally gave police and the lower courts a clear test to help them determine voluntariness. A person had to be informed in clear and unequivocal terms of the constitutional right to remain silent, and that anything said could be used in court. In addition, the officers had to tell the suspect of the right to counsel and that if he or she had no money to hire a lawyer, the state would provide one. If the police interrogation continued without a lawyer present, the chief justice warned, “a heavy burden rests on the Government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and the right to counsel.” The four dissenters—Harlan, White, Stewart, and Clark—protested against replacing the flexible totality of circumstances approach with what they considered to be rigid and inappropriate rules.

The *Miranda* decision unleashed a storm of criticism of the Court for its alleged coddling of criminals, and some scholars shared the minority’s view that *Miranda* represented a radical break in which the Court had made a “new law and new public policy.” The more progressive police departments in the country, however, lost little time in announcing that they had been following similar practices for years, and

that doing so had not undermined their effectiveness in investigating or solving crimes. Felons who wanted to confess did so anyway; in other cases, the lack of a confession merely required more efficient police work to find and convict the guilty party. As to charges that the decision encouraged crime, Attorney General Ramsey Clark explained that “court rules do not cause crime.” Many U.S. attorneys agreed, and one commented that “changes in court decisions and procedural practice have about the same effect on the crime rate as an aspirin would have on a tumor of the brain.”

Sixth Amendment: The Right to Counsel

The right to counsel had been one of the first to be nationalized in *Powell v. Alabama* (1932). Ten years later, however, in *Betts v. Brady* the Court backed off, and declared that the Fourteenth Amendment had not incorporated the specific guarantees of the Sixth. A majority held that counsel for indigent defendants did not constitute a fundamental right essential to a fair trial. Rather, the justices would make a case—by—case inquiry into the totality of circumstances to see if the lack of counsel had deprived the defendant of a fair trial. Over the next twenty years, the Court heard many special circumstances and in most of the cases it determined that a lawyer should have been provided to ensure fairness.

In the great case of *Gideon v. Wainwright* (1963), a unanimous Court, speaking through Justice Black (who had dissented in *Betts*), did away with the cumbersome case—by—case adjudication and ruled that the presence of counsel was a fundamental right essential to a fair trial. The Court also took the unusual step of applying *Gideon* retroactively, so that states that had not originally provided counsel in felony cases now had to either retry the defendants properly, or, as often proved the case, with witnesses dispersed and evidence cold, let them go.

Gideon applied only to felony trials; not until 1972 did the Court expand the right to include misdemeanors as well. But in 1967, the Court did expand the right to counsel to include a far greater part of the criminal process. In *United States v. Wade*, the Court extended the right back to the lineup, ruling that the wording of the Sixth Amendment required the assistance of counsel from the time when the police investigation shifts from a general seeking after facts to an accusatory proceeding. The decision reflected the Court’s concern over growing evidence of the shoddiness and unreliability of police identification techniques. Later that year the Court extended the

right in the other direction, past the determination of guilt to the sentencing phase of a trial in *Mempa v. Rhay*.

The whole rationale behind the Warren Court’s decisions in criminal cases reflected the belief that exercise of constitutional rights ought not to depend on a person’s wealth or education. Poor people have the same rights under the Constitution as the rich, but often they do not know about them. In *Miranda* and other cases, the Warren Court basically said that all Americans, at a minimum, have to know they have rights, and that police cannot trick them into forfeiting those rights by withholding that information.

The Right to Privacy

The Court’s expansion of enumerated liberties encouraged litigation by parties with special interests hoping that the mantle of constitutional protection might spread even further. In the spring of 1965, the Court decided one of a handful of cases that can truly be said to have established a new area of constitutional law. In *Griswold v. Connecticut*, the Court resurrected substantive due process to establish a constitutionally protected right of privacy.

Various privacy rights existed within the common law, but often they were attached to property, such as in the old adage that “a man’s home is his castle.” In the United States, the law of privacy remained poorly defined; commentators believed that a right existed, but there was practically no case law on the subject.

The *Griswold* case involved an 1879 statute prohibiting the use of any drug or device to prevent conception and penalizing any person who advised on or provided contraceptive materials. New Haven officials prosecuted the executive director of the Connecticut Planned Parenthood League, along with one of the doctors in the League’s clinic who had prescribed contraceptives to a married person. Justice Douglas delivered one of the most creative and innovative opinions in his thirty—six years on the bench. Most of the references to privacy in earlier cases had relied on a liberty embodied in substantive due process, which in the mid—1960s still suffered from the bad odor of *Lochnerism*. Douglas did not want to invoke substantive due process, so he cobbled together justifications from various parts of the Bill of Rights. The amendments “have penumbras, formed by emanations from those guarantees that help give them life and substance.” These emanations together form a constitutionally protected right of privacy; and no privacy could be more sacred, or more deserving of protection from intrusion, than that of the marital chamber.

Justice Goldberg, joined by Brennan and the chief justice, concurred, relying on the rarely cited Ninth Amendment, which reserves to the people all non-enumerated rights. The right to privacy, Goldberg maintained, predated the Constitution, and the Framers intended that all such ancient liberties should also enjoy constitutional protection. Justice White concurred on due process grounds, while Justice Stewart dissented, claiming that the Court had exceeded the limits of judicial restraint. Stewart thought the statute “an uncommonly silly law,” but he could find nothing in the Bill of Rights forbidding it.

The dissent by Justice Black and Justice Harlan’s concurrence are of special interest because they illustrate two major theories of constitutional interpretation. Although Black advocated total incorporation of the Bill of Rights, he remained in many ways a strict constructionist; he would only incorporate those rights specified in the first eight amendments. He dismissed Goldberg’s Ninth Amendment opinion scornfully, declaring that “[e]very student of history knows that it was intended to limit the federal government to the powers granted expressly or by necessary implication.”

Justice Harlan did not fear the idea of substantive due process and based his concurrence on that theme. Due process, he claimed, reflects fundamental principles of liberty and justice, but these change over time as society progresses. The Court has the responsibility of reinterpreting phrases such as “due process” and “equal protection” so that the Constitution itself may grow with the times. Harlan saw Black’s view as too rigid; both the states and the federal government needed the flexibility to experiment in means to expand the protection of individual rights.

Douglas’s result—the creation of a constitutionally protected right to privacy—and Harlan’s substantive due process rationale established the basis for the expansion of autonomy rights in the 1970s. *Griswold* is the forebear of *Roe v. Wade* (1973) (the case that legalized abortion) and many other cases enlarging personal freedoms. *Griswold* became the launching pad for the new substantive due process and a progenitor of the fundamental interest interpretation of the due process clause.

Conclusion: Judicial Activism and Civil Liberties

The activism of the Warren Court upset many people, including some who sympathized with the goals of its decisions. Activism on behalf of any program, critics

charged, no matter how attractive, suffered from the same problems that had beset the Court during the *Lochner* era; judges ought to leave policy making to the political branches.

But one must always ask about any judicial opinion—did the Court get it “right”? In some cases it is hard to tell, but the Warren Court produced a string of great cases matched by no other court in our history, not even that of John Marshall. In *Brown v. Board of Education* (1954), it struck down Southern apartheid; in *New York Times v. Sullivan*, it established freedom of press as a central component of American democracy, and took the idea of freedom of expression further than it had ever gone before; despite the controversy engendered by *Engel v. Vitale* and *Abington School District v. Schempp*, the Court’s insistence on a wall of separation between church and state clearly mirrored the intention of the framers; *Gideon v. Wainwright* is one of the foundation stones of American constitutional history, while *Miranda v. Arizona* provided the prophylactic test for how police may treat persons suspected of crimes; *Griswold v. Connecticut* established a right that nearly all Americans hold dear, the right of privacy; while *Baker v. Carr* (1962) and *Reynolds v. Sims* (1964) redrew the political map of the United States to ensure democratic representation. Some of these cases have drawn intense criticism, yet no one denies their great and lasting impact on American life. Moreover, despite the pledges of conservative presidents to undo the activist record of the Warren Court, nearly four decades after Earl Warren retired, all of these landmark opinions are still in force.

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References and Further Reading

- Belknap, Michal R. *The Supreme Court Under Earl Warren, 1953–1969*. Columbia: University of South Carolina Press, 2004.
- Graham, Fred. *The Due Process Revolution: The Warren Court’s Impact on Criminal Law*. New York: Hayden, 1970.
- Kalven, Harry. *A Worthy Tradition: Freedom of Speech in America*. New York: Harper & Row, 1988.
- Marion, David E. *The Jurisprudence of Justice William J. Brennan, Jr.* Lanham, MD: Rowman & Littlefield, 1997.
- Newman, Roger K. *Hugo Black: A Biography*. New York: Pantheon, 1994.
- Powe, Lucas A., Jr. *The Warren Court and American Politics*. Cambridge, MA: Harvard University Press, 2000.
- Schwartz, Bernard. *Super Chief: Earl Warren and His Supreme Court*. New York: New York University Press, 1983.
- Simon, James F. *Independent Journey: The Life of William O. Douglas*. New York: Harper & Row, 1980.

- Urofsky, Melvin I. *The Continuity of Change: The Supreme Court and Individual Liberties, 1953–1986*. Belmont, CA: Wadsworth, 1991.
- . *Felix Frankfurter: Judicial Restraint and Individual Liberties*. Boston: Twayne, 1991.
- White, G. Edward. *Earl Warren: A Public Life*. New York: Oxford University Press, 1982.

Cases and Statutes Cited

- Abington School District v. Schempp*, 374 U.S. 203 (1963)
Associated Press v. Walker, 389 U.S. 28 (1967)
Baker v. Carr, 369 U.S. 186, 213 (1962)
Bates v. City of Little Rock, 361 U.S. 516 (1960)
Betts v. Brady, 316 U.S. 455 (1942)
Bond v. Floyd, 385 U.S. 116 (1966)
Boyd v. United States, 116 U.S. 616 (1886)
Braunfeld v. Brown, 366 U.S. 599 (1961)
Brown v. Board of Education, 347 U.S. 483 (1954)
Butler v. Michigan, 352 U.S. 380 (1957)
Chaplinsky v. New Hampshire, 315 U.S. 568 (1942)
Counselman v. Hitchcock, 142 U.S. 547 (1892)
Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967)
Engel v. Vitale, 370 U.S. 421 (1962)
Epperson v. Arkansas, 393 U.S. 97 (1968)
Escobedo v. Illinois, 378 U.S. 478 (1964)
Everson v. Board of Education, 330 U.S. 1 (1947)
Gideon v. Wainwright, 372 U.S. 335 (1963)
Griswold v. Connecticut, 381 U.S. 479 (1965)
In re Gault, 387 U.S. 1 (1967)
Konigsberg v. State Bar of California, 366 U.S. 36, 56 (1961)
Malloy v. Hogan, 378 U.S. 1 (1964)
Mapp v. Ohio, 367 U.S. 643 (1961)
Massiah v. United States, 377 U.S. 201 (1964)
McGowan v. Maryland, 366 U.S. 420 (1961)
Mempa v. Rhay, 389 U.S. 128 (1967)
Miranda v. Arizona, 384 U.S. 436 (1966)
New York Times Co. v. Sullivan, 376 U.S. 254 (1964)
Regina v. Hicklin, L.R. 2 Q.B. 360 (1868)
Reynolds v. Sims, 377 U.S. 533 (1964)
Roe v. Wade, 410 U.S. 113 (1973)
Roth v. United States, 354 U.S. 476 (1957)
Sherbert v. Verner, 374 U.S. 398 (1963)
Terry v. Ohio, 392 U.S. 1 (1968)
Tinker v. Des Moines School District, 393 U.S. 503 (1969)
Torcaso v. Watkins, 367 U.S. 488 (1961)
United States v. O'Brien, 391 U.S. 367 (1968)
United States v. Wade, 388 U.S. 218 (1967)
Wolf v. Colorado, 338 U.S. 25, 47 (1949)

WARREN, EARL (1891–1974)

Earl Warren grew up in Los Angeles, the son of Scandinavian immigrants. As a youth he worked for the Southern Pacific Railroad, and came to despise the power of what he called a faceless corporation that could fire men without notice and ignore the misfortunes of employees injured on the job. During his college years at Berkeley he showed his first taste for politics, and worked for the election of progressive Republican Hiram W. Johnson as governor. This

experience aligned Warren with the progressive wing of the Republican Party, a position he would occupy for the rest of his life.

Neither in college nor in law school did Warren show any aptitude for academic studies. At Boalt Hall, he refused even to speak in class, claiming that in order to earn a degree he did not have to participate in discussion, but only pass the exams. He did pass, and then for a short time was in private practice, which he disliked intensely. In World War I, he enlisted in the army, and although he did not go overseas, rose in the ranks to become a first lieutenant. After his discharge he held several minor posts in state and local governments in California before becoming deputy district attorney of Alameda County in May 1920. He would remain in public service the rest of his career.

The prosecutorial experience that Warren gained, first in Alameda and later as attorney general of California proved one of the decisive influences in his later judicial philosophy. Warren had no love of criminals or radicals, and during the 1920s and 1930s gained a statewide reputation for his vigorous and successful prosecution of corrupt politicians, bootleg liquor dealers, and the like. But he also cleaned up the sheriff's office in Alameda, successfully prosecuting the sheriff and more than a half-dozen deputies for corruption. He then went on to professionalize law enforcement in the county, providing extensive training for police officers, securing legislation establishing interjurisdictional cooperation, the introduction of scientific analysis of evidence, and the centralization of information. By the time he won his second full term as Alameda district attorney in 1934, Warren had become one of the best-known prosecutors in the country.

When considering the revolution in criminal justice that Warren oversaw during his years on the Supreme Court, it is easy to trace the philosophy if not the exact details to his years in California. On the Court only he and Hugo Black had any experience in criminal law, he as a prosecutor and Black both as a prosecutor and defense attorney. They knew from firsthand experience how the system actually worked, how important a lawyer could be in the different phases of arrest, indictment, trial, and appeal. They also knew how the system discriminated against the poor, that is, those who could not afford a lawyer and had no protection from the power of the state. They also knew that while the Fourth, Fifth, and Sixth Amendments protected defendants in federal courts, little of that protection existed at the state level.

Given his reputation as a civil libertarian while on the Court, there is little in his record in California to foreshadow his later position. He willingly prosecuted

radicals under California's syndicalism law (the same law that would be applied to Anita Whitney), and in 1936 engaged in out-and-out red baiting to prosecute four union members charged with killing a fifth worker aboard a freighter. He denounced the men as "radicals," and it appears that the evidence used against them came from warrantless wiretaps and confessions coerced by the police who refused the men a chance to talk with their lawyer.

So popular had Warren become that by 1938 he won the Republican, Democratic, and Progressive Party nominations for the office of state attorney general, and with support from business and other antilabor groups, easily beat his opponent by a margin of four to one. Once in office, Warren went through the same pattern he had shown in the county, reorganizing his office, upgrading the qualifications and training of state police, and vigorously prosecuting gambling, prostitution, and other activities associated with organized crime, as well as political corruption in state government. By the end of his tenure, California had one of the least politically corrupt governments in the union, and Warren and Thomas E. Dewey of New York shared the reputation as best state law enforcement officers.

But once again Warren's record on civil liberties left much to be desired. He continued his attacks on aliens, and supported legislative committee witch hunts aimed at alleged communists. He fought endlessly with Democratic Governor Culbert L. Olson, who not only pardoned World War I radical and labor agitator Tom Mooney, but also commuted the sentences of the four ship workers Warren had prosecuted in 1936. Warren took this as personal criticism of him, and declared that the men had been fairly tried and convicted, and in addition "they are also revolutionaries—and Communists." When Olson wanted to appoint law professor Max Radin, a civil libertarian, advocate of labor rights, and a frequent critic of Warren's, to the state supreme court, Warren helped defeat the appointment. As some observers noted, at that time Warren could not tell the difference between a communist and a person who backed the rights of labor or defended civil liberties.

Perhaps the greatest blot on Warren's record came during World War II, when he became one of the leading advocates of the internment of Japanese Americans living in California. Despite his later comment in his *Memoirs* that he "had no prejudice against the Japanese" except that spawned in the aftermath of Pearl Harbor, in fact Warren had joined nativist organizations and in nearly two decades of public life prior to the war had never shown any sympathy toward Japanese or Chinese Americans. But he did admit in his memoirs that the treatment of Japanese

Americans during the war was "regrettable," and that he was "conscience stricken" by the thought of little children in the internment camps.

Interestingly enough, in a decision he admitted ran counter to his support of the internment program, as attorney general Warren ruled that the state personnel board could not deprive state employees of Japanese descent of their civil service rights. While later repentant for his role in advocating and enforcing the internment, Warren nonetheless always maintained that during wartime government could restrict the rights of its citizens.

In 1942, Warren challenged Olson for the governorship, and easily defeated him; he then went on to win reelection in 1946, and for an unprecedented third term in 1950, both times by wide margins. Once again he set out to reform the administration of his office. He dismantled a secret system for taping conversations in the governor's office. He made a number of high-level appointments based on the ability of the person, often without even inquiring into their party affiliation. He sponsored a number of reforms, some of which antagonized powerful business interests and eroded his support among traditional Republicans. His record, however, won him a national reputation and he continued to enjoy enormous popular support in California.

Once again, however, his civil liberties record is mixed. He gave up red baiting, distanced himself from the red-scare tactics of Richard Nixon and Goodwin Knight in California, and even tried to protect academics in the state university system against oaths and indiscriminate firings for alleged radicalism. But he did endorse a regents' policy against the employment of communists, and after the Korean War signed a bill that imposed a loyalty oath on all state employees.

In 1948 he had run as Thomas Dewey's vice presidential candidate, and this made him one of the potential candidates for the Republican nomination in 1952. Supposedly he threw his support to Dwight D. Eisenhower in return for a promise of the first appointment to the Supreme Court. There is no evidence of any such deal, and according to Warren's *Memoirs*, Eisenhower initially considered him for a cabinet appointment. When that did not pan out, the president-elect called Warren and said, "I want you to know that I intend to offer you the first vacancy on the Supreme Court." In fact, in preparation for that position, Eisenhower invited Warren to become solicitor general; Warren accepted, and was packing his bags to come to Washington when Chief Justice Fred M. Vinson died. In late September 1953, Eisenhower gave Warren an interim appointment to the high court; the Senate ultimately confirmed him on March 1, 1954.

The constitutional mark left at the end of Earl Warren's term as the fourteenth chief justice of the U.S. Supreme Court reflected the tremendous changes in American society during the 1950s and 1960s. These changes involved a significant expansion in the rights and liberties of individuals in the name of securing the goals of social and political equality. Warren's judicial legacy is striking in two important respects. First, the decisions of the Court he led for fifteen years contributed substantially to the expansion of the constitutional rights of Americans and to the expansion of the role of the federal government in enforcing and protecting those rights. Second, his willingness to adapt and create legal doctrines to fit his ideological beliefs and commitments represented an enhanced role for the Supreme Court in superintending governmental decision making on an order of magnitude not seen since the New Deal. Especially significant during the time of Warren's stewardship was the Supreme Court's role in eradicating vestiges of public and private discrimination, in expanding the scope of protections for individuals accused of committing crimes, in ensuring the rights of free expression and religious freedom, and in improving the processes of representation and democracy in order to ensure a more responsive and effective government.

Historians' judgment that Earl Warren ranks with John Marshall as one of the two greatest chief justices in the Supreme Court's history is based on Warren's performance as a leader of the Court during a time of tremendous social and political controversy. While scholars have struggled to carve out from Warren's decisions a discernible judicial philosophy and jurisprudential compass, Warren has never been regarded as a great jurist, as a judge who has shaped the course of the law through his written opinions. One of Warren's biographers, G. Edward White, has argued that there is indeed a coherent jurisprudential line in Warren's judicial writings. Warren, White claims,

equated judicial lawmaking with neither the dictates of reason ... nor the demands imposed by an institutional theory of the judge's role, nor the alleged 'command' of the constitutional text, but rather with his own reconstruction of the ethical structure of the Constitution.

While this "ethicist" approach to judging pointed to particular judicial results—quite liberal results—it is less clear that such a description captures fully the structure of reasoning in Warren's decisions. Quite often, Warren's opinions are stolid and doctrinally underdeveloped. In other instances, notably *Brown v. Board of Education* (1954) and *Miranda v. Arizona* (1966), Warren relied on a body of empirical data and social science without explaining adequately the bases

of this approach and the link between the empirical evidence and the stated doctrine. Nevertheless, Earl Warren stands out as a great chief justice, one whom Justice William J. Brennan described as the "Super-chief," because of his performance as leader of the Court. Rather than exercising influence through an outpouring of carefully crafted judicial decisions, Warren was content to affect the course of the law chiefly through the powers of the office of chief justice and especially through his considerable interpersonal skills and political savvy. His most notable victories, namely *Brown*, *Baker v. Carr* (1962), and *Miranda*, reflect the work of a skillful judicial leader, one with a keen sense for politics as "the art of the possible."

Earl Warren's ability as a leader was tested immediately on his appointment to the Court. By the time of his arrival, the Court had heard arguments in a consolidated series of cases challenging the constitutionality of segregated public schools. The most ambitious of the claims raised by the appellants was the call for an overruling of *Plessy v. Ferguson* (1896), in which the Court had enunciated the doctrine of "separate but equal" and had upheld the constitutionality of segregated public facilities. At conference following the oral argument in the first case to reach the Court in the spring of 1953, the Court was divided. On taking office, Warren presided over re-argument in the case and then set out to manufacture a unanimous Court for the proposition that segregated public schools constituted an unconstitutional deprivation of the equal protection of the laws.

Scholars who have examined closely the decision-making process in the segregation cases agree that Warren played a pivotal role in securing assent by each justice to the ruling in *Brown*. This road to unanimity began with Warren's expressed view in the conference held after re-argument in the first segregation cases that *Plessy* should be overruled. He worked on securing a unanimous result through conversations with the fence-sitting justices and through circulation of the drafts of an opinion in the case. Warren's decision for the unanimous Court in *Brown* concentrated on taking the doctrinal legs out from under *Plessy*, relying on sociological data and on a forceful explication of the view, eloquently presented to the Court by National Association for the Advancement of Colored People lawyer Thurgood Marshall, that "separate is inherently unequal."

What is clear is that aside from whatever legal arguments could be crafted by either side, Warren cut straight to the heart of the matter—segregation was so morally wrong that it could not be tolerated by the Constitution. In all the decisions between *Brown* in 1954 and *Loving v. Virginia* in 1967, which struck down laws banning interracial marriage, Warren

secured a unanimous Court because he continued to emphasize the moral issues involved.

He did this again in what he considered the greatest achievement of the Warren Court—the reapportionment cases. Legislative apportionment in many ways represents the quintessential dispute over the proper role of the judiciary in ensuring fair representation. In 1946 Felix Frankfurter had warned against the judiciary getting involved in the “political thicket,” and called questions of apportionment nonjusticiable, since the courts could not devise a workable solution. In *Baker v. Carr* (1962), the Court decisively rejected this “political question” theory, and agreed that challenges to unfair apportionment schemes could be heard in the courts.

In 1964, the Supreme Court reached the merits of an apportionment scheme in the case of *Reynolds v. Sims*. Reynolds concerned an apportionment scheme in the state of Alabama in which the votes of residents of rural areas were accorded vastly more significance, because of their relative numerical weight, than voters in urban areas. The issue triggered Warren’s instincts for political fairness and equality. “How long should we have to wait?” Warren asked Alabama’s attorney who attempted to reassure the justices that Alabama would correct its representational flaws in time. Warren wrote the opinion for the Court, declaring that “legislators represent people, not trees or acres” and announcing the “one man, one vote” rule mandating that state legislative districts represent an equal number of constituents. Judicial intervention in the name of securing fair representation represented a key theme in Warren’s jurisprudence throughout his tenure.

The Court’s apportionment decisions provided both a precedent for judicial intervention into the political arrangements of states and a bright-line rule for the construction of all legislative districts except the U.S. Senate. To Warren, however, the effects of the reapportionment decisions were transformative in just the right way. The decisions represented the critical link in the Court’s efforts to limit the effects of race discrimination and the efforts to shut out minorities from effective participation in state political systems. Indeed, Warren opined that had the Court decided *Baker v. Carr* early on, the desegregation decisions would have proved unnecessary.

Judicial intervention in the name of securing fair representation represented a key theme in Warren’s jurisprudence throughout his tenure, and can be seen in two cases decided in Warren’s final term. In *Powell v. McCormack* (1969), the Court considered whether the decision by the House of Representatives to unseat Representative Adam Clayton Powell violated the Constitution. In his opinion for the Court, Chief

Justice Warren explained the limited power of the House to discipline its members, stressing the right of the people to elect their representatives. *Powell* was and remains a rare case in which the Court invalidated an internal decision of the legislature on what amounted to democratic “fairness” grounds.

In *Allen v. State Board of Elections* that same term, the Court endorsed a broad interpretation of Section 5 of the 1965 Voting Rights Act. Section 5 provided that the Department of Justice review any changes in state voting schemes prior to their taking effect. The Court, in an opinion written by Warren, rejected the view that the statute was limited to only those state rules prescribing who may register to vote. Warren wrote that the act “was aimed at the subtle, as well as the obvious, state regulations which have the effect of denying citizens their right to vote because of their race.” Accordingly, he interpreted the act to subject to federal review *any* state voting enactment that “altered the election law of a covered State in even a minor way.”

The most controversial area in which the Warren Court changed the balance between the individual and the state was in the area of criminal law and the rights of the accused. Reflecting his pre-Court commitment to fairness in law enforcement, Warren proved willing to look closely at police conduct and to consider whether the accused had been treated fairly. In *Watkins v. United States* (1957), for example, Warren wrote an opinion for the Court in which he held that Congress, acting through the House Un-American Activities Committee, had improperly held Watkins in contempt of Congress for failing to disclose certain information. Congress had failed, wrote Warren, to provide the defendant with “a fair opportunity to determine whether he was within his rights in refusing to answer.” Judicial redress for the failure of the government to provide a criminal defendant with due process would represent a common theme through Warren’s constitutional jurisprudence.

The most famous of these criminal procedure decisions were *Gideon v. Wainwright* (1963) and *Miranda v. Arizona* (1966). Clarence Earl Gideon had been convicted of a robbery and denied counsel in a Florida court. In an opinion written by Hugo Black reversing more than two decades of precedent, the Court applied the Sixth Amendment to the states and held that a defendant could not have a fair trial without benefit of an attorney.

Ernesto Miranda had been arrested and questioned without being advised as to his constitutional rights, including the right to have an attorney present for questioning. In his opinion for the majority, the chief justice elaborately reviewed historical and contemporary police practices, in an attempt to persuade

the reader that the so-called *Miranda* requirements would not unduly burden law enforcement officials. According to some scholars, *Miranda* was “the quintessential Warren opinion.” It was broad in scope, relied on a patched-together history, and made an impassioned plea for fairness rather than setting out a closely reasoned doctrinal story. It also imposed substantial restrictions on governmental conduct. While *Miranda* generated a storm of controversy at the time of the decision and for years afterward, Warren’s approach to constructing a code of police conduct in the arrest and interrogation situation has largely been vindicated; most regard the criminal process as substantially fairer as a result of *Miranda*.

Warren is given much less credit in the area of obscenity and the First Amendment. He usually followed the carefully constructed doctrinal rationales of his close ally and confidante, William Brennan. Warren voted to strike down a variety of government restrictions on freedom of expression and of religion, although in his early years he proved less than sensitive to the claims of minorities. There is a big difference between the early Warren who saw no restriction of free exercise by Sunday closing laws on Orthodox Jews, and the Warren who joined in the Court’s opinion requiring the states to accommodate the needs of Seventh Day Adventists.

When it came to government restrictions on allegedly obscene speech, however, Warren disagreed with the more liberal views of Black, Douglas, and Brennan. Warren believed strongly in what he called “a right of the government to maintain a decent society.” He thus gave the government great latitude to ban the circulation of allegedly pornographic materials. Warren emphasized in his obscenity opinions that the Court should defer to the local communities in their authority to combat obscenity and its effects. Warren’s struggle to carve out a special jurisprudence in the obscenity area was widely regarded as a failure, and it could not be reconciled with the Warren Court’s general commitment to freedom of expression.

Warren clearly placed his stamp on the Court’s expansive rights jurisprudence. The Court he led was committed to an expansive jurisprudence of rights protected by the Constitution. This approach, according to some scholars, reached its apotheosis in cases such as *Griswold v. Connecticut* (1965), in which the majority found a right to privacy in the penumbra of the Bill of Rights.

Earl Warren, while the author of some of the Court’s great opinions, played a far more important role through the leadership he provided. Many of the great cases he generously assigned to his colleagues, but there is little doubt that his masterful political skills played a key role in constructing the

majorities that struck down segregation, reapportioned the states, enhanced protection of speech and religion, and triggered the due process revolution in criminal procedure. For this he deservedly earned a reputation not only as a civil libertarian but also as the “Superchief.”

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References and Further Reading

- Belknap, Michal R. *The Supreme Court under Earl Warren, 1953–1969*. Columbia: University of South Carolina Press, 2004.
- Cray, Edward. *Chief Justice: A Biography of Earl Warren*. New York: Simon & Schuster, 1997.
- Ely, John. *Democracy and Distrust*. Cambridge, MA: Harvard University Press, 1980.
- Horwitz, Horwitz. *The Warren Court and the Pursuit of Justice*. New York: Hill & Wang, 1998.
- Powe, Lucas Scot. *The Warren Court and American Politics*. Cambridge, MA: Harvard University Press, 2000.
- Symposium: The Jurisprudential Legacy of the Warren Court*, Washington & Lee Law Review 59 (2002): 1055.
- Warren, Earl. *Memoirs of Chief Justice Earl Warren*. Garden City: Doubleday, 1977.
- White, G. Edward. *Earl Warren: A Public Life*. New York: Oxford University Press, 1982.

Cases and Statutes Cited

- Allen v. State Board of Elections*, 393 U.S. 544 (1969)
- Baker v. Carr*, 369 U.S. 186, 213 (1962)
- Brown v. Board of Education*, 347 U.S. 483 (1954)
- Gideon v. Wainwright*, 372 U.S. 335 (1963)
- Griswold v. Connecticut*, 381 U.S. 479 (1965)
- Loving v. Virginia*, 388 U.S. (1967)
- Miranda v. Arizona*, 384 U.S. 436 (1966)
- Plessy v. Ferguson*, 163 U.S. 537 (1896)
- Powell v. Texas*, 392 U.S. 514 (1968)
- Reynolds v. Sims*, 377 U.S. 533 (1964)
- Watkins v. United States*, 354 U.S. 178 (1957)

WARTIME LEGISLATION

The U.S. government has historically passed legislation and issued executive orders designed to protect national security in wartime. Such wartime legislation often restricts civil liberties in a manner not justified during peacetime. During times of war, however, the government’s rationale for these restrictions is the need to protect national interests in a time of crisis. Consequently, wartime legislation is frequently challenged in the judicial system. The courts have ordinarily taken one of three courses of action: upheld the legislation as justified in light of the national security crisis, thereby outweighing the restriction on individual liberties; struck down the legislation as unduly restrictive; or completely deferred to the judgment of the legislative and executive branches.

An early example is the Sedition Act of 1798, enacted pursuant to an impending war with France. The Sedition Act threatened imprisonment for those opposing or criticizing the president or Congress. Although the Supreme Court never ruled on the constitutionality of the Sedition Act, it is generally recognized that the act was an unconstitutional restriction on freedom of speech. In contrast, the Supreme Court upheld Executive Order 9066 in *Korematsu v. United States*, a case challenging Japanese internment in World War II. Despite overwhelming restrictions on liberty, the Court found the order justified due to potential security threats from Japanese Americans (although this decision has been widely criticized). Generally speaking, however, such restrictions on civil liberties are justified only in the face of an actual, imminent threat to national security.

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References and Further Reading

- Rehnquist, William H. *All the Laws but One: Civil Liberties in Wartime*. New York: Knopf, 1998.
 Stone, Geoffrey R. *Perilous Times: Free Speech in Wartime from the Sedition Act of 1798 to the War on Terrorism*. New York: W.W. Norton and Co., 2004.

Cases and Statutes Cited

- Korematsu v. United States*, 323 U.S. 214 (1944)
Korematsu v. United States, 584 F.Supp. 1406 (N.D. Cal. 1984)
 Sedition Act of July 14, 1798, ch. 74, 1 Stat. 596

See also Alien and Sedition Acts (1798); Communist Party; Freedom of Associations; Guantánamo Bay, Enemy Combatants, Post 9/11; Indefinite Detention; Jackson, Robert H.; Japanese Internment Cases; McCarran-Walton Act of 1952; Military Tribunals; National Security; National Security and Freedom of Speech; 9/11 and the War on Terrorism; Seditious Libel; World War I, Civil Liberties in; World War II, Civil Liberties in

WASHINGTON v. GLUCKSBERG, 521 U.S. 702 (1997)

In 1994, a group of plaintiffs sought a federal court declaration that the State of Washington's prohibition on assisted suicide was unconstitutional. Plaintiffs included four physicians who treat terminally ill patients, three gravely ill individuals, and a nonprofit organization that counsels people considering assisted

suicide. Under Washington law, aiding a suicide attempt is a felony punishable by up to five years in prison and a \$10,000 fine. The plaintiffs asserted "the existence of a liberty interest protected by the Fourteenth Amendment which extends to a personal choice by a mentally competent, terminally ill adult to commit physician-assisted suicide." The district court held that the Washington law violated the substantive component of the due process clause and the equal protection clause of the Fourteenth Amendment. Ultimately, the Ninth Circuit Court of Appeals affirmed on substantive due process grounds. The State appealed to the U.S. Supreme Court.

In a unanimous judgment, the Court reversed, holding that Washington's prohibition does not violate the due process clause. Writing for the Court, Chief Justice William Rehnquist noted that the fundamental liberty interests protected by the due process clause—marriage, procreation, and child rearing, for example—have been firmly rooted in American history and tradition. Within that tradition, however, assisted suicide has been consistently criminalized or otherwise discouraged for more than 700 years. As a result, "the asserted 'right' to assistance in committing suicide is not a fundamental liberty interest protected by the Due Process Clause." Rehnquist also distinguished the Court's holding in *Cruzan v. Missouri Department of Health* (1990), which presumed the right of a mentally competent individual to refuse life-sustaining medical treatment. He observed that the right to refuse treatment developed not from "abstract concepts of personal autonomy," but from the common-law rule that forced medication constitutes an unlawful battery. Thus, while the "decision to commit suicide with the assistance of another may be just as personal and profound as the decision to refuse unwanted medical treatment, ... it has never enjoyed similar legal protection." Applying traditional rational basis review, the Court noted the State's legitimate interests in the preservation of human life, in protecting the integrity and ethics of the medical profession, and in guarding against the possibility of voluntary and involuntary euthanasia.

Five justices filed concurring opinions, each suggesting that further information—about the practice of assisted suicide in other countries, the availability of palliative care for terminally ill patients, or application of the prohibition in different circumstances—could shift the balance between a patient's interests and the State's, possibly rendering the statute "an intolerable intrusion on [a] patient's freedom." All of the opinions, including the Court's, emphasized the need for further study and debate regarding the "morality, legality, and practicality, of physician-assisted

suicide.” In a companion case, *Vacco v. Quill* (1997), the Court also reversed a decision of the Second Circuit Court of Appeals, which had invalidated New York’s prohibition on assisted suicide on equal protection grounds.

MARY SIGLER

References and Further Reading

Dworkin, Ronald. “Assisted Suicide: What the Court Really Said.” *New York Review of Books* 44, no. 14 (1997).
Rawls, John, et al. “Assisted Suicide: The Philosophers’ Brief.” *New York Review of Books* 44, no. 5, March 27, 1997.

Cases and Statutes Cited

Cruzan v. Director, Missouri Department of Health, 497 U.S. 267 (1990)
Vacco v. Quill, 521 U.S. 793 (1997)
Washington Revised Code, Section 9A.36.060(1) et seq.

See also *Cruzan v. Missouri*, 497 U.S. 261 (1990); Equal Protection of Law (XIV); Privacy

WASHINGTON v. TEXAS, 388 U.S. 14 (1967)

In *Washington*, the Supreme Court held that the Sixth Amendment compulsory process clause and a criminal defendant’s right to present a defense required the abrogation of a state evidentiary rule that prevented the defendant from calling an alleged accomplice as a defense witness.

Charged with murder, Washington testified at his trial that it was his codefendant, Fuller, who fired the fatal shot. When Washington attempted to call Fuller as a defense witness, the prosecution successfully objected on the ground that state law barred codefendants from testifying in each other’s behalf. Prevented from calling Fuller, who would have testified that he indeed fired the fatal shot after Washington had fled the scene, Washington was convicted.

After the Texas state courts rejected his appeals, Washington appealed to the U.S. Supreme Court, which unanimously reversed the conviction. The Court first held that the compulsory process clause was a fundamental part of a defendant’s right to present a defense and, therefore, was essential to due process. The Court then held that these constitutional rights trumped a state rule barring codefendants from testifying for each other because such a rule was arbitrary and did not advance the truth-seeking function of a criminal trial. *Washington* thus stands for the

WATSON v. JONES, 80 U.S. (13 WALL.) 679 (1872)

important proposition that jurisdictions may not rely on arbitrary rules or procedures in order to exclude important defense evidence, a proposition the Court expanded in a series of later cases, including *Chambers v. Mississippi* (1973), *Webb v. Texas* (1972), and *Cool v. United States* (1972).

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References and Further Reading

Stacy, Tom, *The Search for Truth in Constitutional Criminal Procedure*, Columbia Law Review 91 (1991): 1369.
Westen, Peter, *The Compulsory Process Clause*, Michigan Law Review 73 (1974): 71.

Cases and Statutes Cited

Chambers v. Mississippi, 410 U.S. 284 (1973)
Cool v. United States, 409 U.S. 100 (1972)
Webb v. Texas, 409 U.S. 95 (1972)

See also *Chambers v. Mississippi*, 410 U.S. 284 (1973); Defense, Right to Present; Due Process; *Webb v. Texas*, 409 U.S. 95 (1972)

WATSON v. JONES, 80 U.S. (13 WALL.) 679 (1872)

On occasion, courts are called upon to adjudicate disputes between members of a religious organization, particularly disputes involving control of the organization’s property. For example, a local church may split into two factions over a theological issue and each faction may claim ownership of the church’s property. These cases pose serious difficulties for courts, as they raise concerns of judicial intrusion on the rights of the members of the religious organizations to define their own identity. The U.S. Supreme Court first addressed the question of the role of courts in resolving such property disputes in *Watson v. Jones*.

The *Watson* case arose when the Walnut Street Presbyterian Church in Louisville, Kentucky, divided over its denomination’s position on slavery. In May 1865, weeks after the conclusion of the Civil War, the General Assembly of the Presbyterian Church—the governing body of that church—instructed its local churches that when “when any person from the Southern States” should apply for membership or seek to serve as a missionary or minister, the church should determine whether such person was “guilty of voluntarily aiding the war of the rebellion” or of embracing the Southern Presbyterian church’s view that “the system of negro slavery in the South is a divine institution ... and that it is the peculiar mission of the Southern church to preserve that institution.”

The General Assembly directed that such persons should “be required to repent and forsake these sins before they could be received.” That directive helped precipitate a split in the Walnut Street church congregation, with each faction claiming exclusive use of the church property. Litigation ensued and the Kentucky state courts ruled in favor of the pro-slavery faction. But some antislavery church members who lived across the Ohio River in Indiana sued in federal circuit court, using their diversity of citizenship as a basis for federal jurisdiction. The federal circuit court ruled in their favor and the matter was appealed to the U.S. Supreme Court, which agreed with the federal circuit court.

The Court in *Watson* articulated several principles that would have a significant impact on subsequent jurisprudence pertaining to the judicial resolution of church property disputes. First, the Court concluded that if the property in question had been given to the church with the *express* condition that the property be “devoted to the teaching, support, or spread of some specific form of religious doctrine or belief,” then “it will be the duty of the court in such cases ... to inquire whether the party accused of violating the trust is holding or teaching a different doctrine, or using a form of worship which is so far variant as to defeat the declared objects of the trust.” But in many if not most instances, donors have not contributed church property with such an express condition. Absent the existence of an express trust, the Court determined that civil courts should not resolve the question whether there had been a departure from the doctrinal position of the original donor.

In taking this position, the Court rejected the English implied trust doctrine pursuant to which church property was deemed to be held in trust for the propagation of the particular religious doctrines of the church’s founders. Under this implied trust doctrine, civil courts, when called upon, had the responsibility to determine which group of contemporary church members maintained fidelity to those original religious doctrines—even if the founders had not expressly required such fidelity. The Court in *Watson* rejected this view that members of a church are impliedly bound to conform to the doctrines adhered to by the church founders and that civil courts must enforce that obligation—and that civil courts should determine whether there has been a substantial departure from such doctrines. The Court did not expressly rely on the First Amendment in reaching its conclusions, but it did note that “the structure of our government has, for the preservation of Civil Liberty, ... secured Religious liberty from the invasion of Civil Authority.”

The Court in *Watson* further held that absent an express condition, a civil court asked to resolve a church property dispute should examine the polity

structure of the church in question. If the church is one with a congregational polity, pursuant to which each local church independently governs its own affairs, then the conflict should be resolved in accordance with the principles that govern voluntary associations, such as majority rule. In such a case, therefore, the court should simply defer to the judgment of the majority, rejecting arguments that the majority has “changed in some respect their views of religious truth.” On the other hand, if the church in question is one with a hierarchical polity, as was the case with the Presbyterian Church, pursuant to which each local church is subordinate to a broader church structure, then the civil court must defer to the position taken by the church hierarchy and “accept such decisions as final.” In sum, the Court in *Watson* concluded that civil courts should resolve church property disputes by deferring to the judgment of the highest appropriate authority in the church structure—which will vary depending on whether the church has adopted a congregational or a hierarchical polity. Applying this principle, the Court ruled in favor of the antislavery faction because its views were consistent with the General Assembly of the Presbyterian Church.

The effect of the *Watson* decision was to limit the role of civil courts in the resolution of church property disputes. Although the *Watson* decision technically applied only to federal courts, the dictates of the decision have been widely followed by state courts confronted with similar disputes. In subsequent years, the Supreme Court has continued to rely on the framework established in *Watson*, although in *Jones v. Wolf* (1979) the Court concluded that civil courts resolving disputes over church property need not defer to the decisions of church authorities if the court can rely instead on authoritative documents that the court can interpret without having to make a religious judgment. Now, civil courts called upon to resolve disputes over church property can either defer to the highest authorities in the church structure, or apply neutral legal principles that do not require the court to make determinations about religious matters.

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References and Further Reading

- Gerstenblith, Patty, *Civil Court Resolution of Property Disputes among Religious Organizations*, American University Law Review 39 (1990): 513–72.
- Greenawalt, Kent, *Hands Off! Civil Court Involvement in Conflicts over Religious Property*, Columbia Law Review 98 (1998): 1843.
- Montgomery, Sarah M., *Drawing the Line: The Civil Courts’ Resolution of Church Property Disputes, The Established Church, and All Saints’ Episcopal Church*, Waccamaw, South Carolina Law Review 54 (2002): 203.

Cases and Statutes Cited

Jones v. Wolf, 443 U.S. 595 (1979)

See also **Judicial Resolution of Church Property Disputes**

WATTS v. UNITED STATES, 394 U.S. 705 (1969)

The U.S. Supreme Court has struggled with where to draw the line between free speech and personal safety. The Court has been reluctant to protect speech designed to advocate violence. In *Watts v. United States*, the Court held that the First Amendment does not protect “true threats” (as opposed to those implying action at an uncertain, future time) of violence.

In *Watts*, the petitioner (discussing the draft at a rally) stated, “If they ever make me carry a rifle, the first man I want to get in my sight is L.B.J.” He was convicted under a federal law making it a crime to threaten the president. Eventually, the Supreme Court granted certiorari to determine if Watts’s words were protected by the First Amendment. Although the Court emphasized that the law itself was constitutional, it only applied to “true threats”: Watts’s statement was mere political hyperbole and therefore protected.

In 2003, the Court revisited this issue in *Virginia v. Black*, which involved a Virginia statute making it a felony for anyone “with the intent of intimidating any person ... to burn ... a cross” on another’s property and mandating that such burning is prima facie evidence of an intent to intimidate. Petitioners, convicted of violating the statute, challenged its constitutionality on First Amendment grounds. In a plurality opinion, the Court held that the statute could ban cross burning with the intent to intimidate, as this constituted a “true threat” under *Watts*. However, the statute could not treat any cross burning as prima facie evidence of intent to intimidate.

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References and Further Reading

- Alonso, Karen. *Schenck v. United States: Restrictions on Free Speech*. Springfield, NJ: Enslow Publishers, 1999.
- Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).
- Fuson, Harold W. *Telling it All: A Legal Guide to the Exercise of Free Speech*. Kansas City, MO: Andrews and McMeel, 1995.
- Jasper, Margaret C. *The Law of Speech and the First Amendment*. Dobbs Ferry, NY: Oceana Publications, 1999.

O’Neil, Robert M., *Rights in Conflict: The First Amendment’s Third Century*, Law and Contemporary Problems 65 (2002): 7.

Cases and Statutes Cited

Virginia v. Black, 538 U.S. 343 (2003)

WEBB v. TEXAS, 409 U.S. 95 (1972)

In *Webb*, the Supreme Court held that a state trial judge violated a criminal defendant’s due process clause right to a fair trial by so thoroughly warning a defense witness about the dangers of perjury that the witness refused to testify. The Court thus effectively recognized that such gratuitous warnings could defeat a defendant’s right to present a defense.

Webb attempted to call a single witness, Mills, to testify in Webb’s defense during his burglary trial. The trial judge warned Mills, who was already serving a prison sentence, that he would face many additional years in prison if he committed perjury and that the judge would personally take the matter to the grand jury if he lied on the witness stand. After receiving these warnings, Mills, not surprisingly, declined to testify. Webb was then convicted and sentenced to twelve years in prison.

After his appeals were rejected by the Texas state courts, Webb appealed to the U.S. Supreme Court, which summarily reversed his conviction by a vote of seven to two. In reversing the conviction, the Court cited *Washington v. Texas* (1967) for the proposition that the due process clause guarantees a defendant the right to present witnesses in his favor. The Court concluded that the judge’s threatening remarks effectively deprived Webb of that right by driving his only witness off the stand. *Webb* thus establishes that a judge (or a prosecutor) may not use the threat of a perjury prosecution to intimidate a defense witness from testifying.

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References and Further Reading

- Green, Bruce, *Limits on a Prosecutor’s Communications with Prospective Defense Witnesses*, Criminal Law Bulletin 25 (1989): 139.

Cases and Statutes Cited

Washington v. Texas, 388 U.S. 14 (1967)

See also **Due Process**; *Washington v. Texas*, 388 U.S. 14 (1967)

WEBSTER v. REPRODUCTIVE HEALTH SERVICES, 492 U.S. 490 (1989)

The Supreme Court's decision in *Roe v. Wade* (1973) struck down abortion laws in 46 of the 50 states. Conservative opponents of the decision became concentrated in the Republican Party, whose leaders began to pledge to appoint justices would overturn the decision. After being elected in 1980, Ronald Reagan was able to replace three justices who were part of the original seven-to-two majority, and William Rehnquist (who dissented in *Roe*) was promoted to chief justice. The appointment of Anthony Kennedy created the strong possibility that the Court would vote to overturn *Roe*, and in *Webster v. Reproductive Health Services* the Reagan administration filed an amicus brief asking the Court to do so. The administration was not alone in filing a brief; with the potentially momentous stakes of the case clear to both pro-choice and pro-life activists, seventy-eight amicus briefs were submitted.

The case involved four provisions of a Missouri statute that were struck down by a federal district court as being inconsistent with *Roe v. Wade*: (1) a preamble that declared that life began at conception, (2) a prohibition on abortion counseling by public officials and a denial of public funds for abortions not related to the life of the mother, (3) a requirement that all abortions performed after the fifteenth week be performed in state hospitals, and (4) a requirement that doctors perform tests to determine if the fetus was viable. The U.S. Court of Appeals for the Eighth Circuit argued that the denial of public funding was constitutional under *Harris v. McRae* (1980), but otherwise affirmed the judgment of the district court.

The initial strategy of Chief Justice Rehnquist was to propose an opinion that would uphold the Missouri law and implicitly but not explicitly overrule *Roe*. Perhaps in an attempt to secure the crucial swing vote of Sandra Day O'Connor, Rehnquist proposed replacing the "trimester framework" of *Roe* with a standard that would permit any state regulation that reasonably furthered "the state's interest in fetal life," but argued that because the regulations of the Missouri law were constitutional under the new standard there was no need address the question of whether *Roe* remained good law. Rehnquist's strategy, however, failed, as it was widely recognized that the new standard would permit virtually any regulation of abortion. O'Connor, while willing to replace the "trimester framework," argued for a standard that would permit abortion regulations that did not constitute an "undue burden." Nor did the attempt to avoid overturning *Roe* directly fool *Roe*'s strong supporters on the Court. John Paul Stevens circulated a

memo angrily criticizing Rehnquist's opinion: "As you know, I am not in favor of overruling *Roe v. Wade*, but if the deed is to be done I would rather see the Court give the case a decent burial instead of tossing it out the window of a fast-moving caboose."

The ultimate result, then, was a divided court that left the status of *Roe* undecided. Rehnquist's plurality opinion—which was joined fully by only Kennedy and White—upheld the Missouri law while arguing that "[this] case ... affords us no occasion to revisit the holding of *Roe*." O'Connor filed a concurrence defending her "undue burden" standard, while arguing that the Missouri law did not conflict with the relevant precedents. Antonin Scalia filed an angry concurrence, arguing that *Roe* should be overturned explicitly, and that "[o]f the four courses we might have chosen today—to reaffirm *Roe*, to overrule it explicitly, to overrule it *sub silentio*, or to avoid the question—the last is the least responsible." Stevens joined the Court in upholding Missouri's denial of public funding (while arguing that the ban on counseling was moot because the plaintiffs had withdrawn their complaint), but otherwise dissented, arguing that the other abortion regulations were inconsistent with *Roe* and that the preamble was inconsistent with the establishment clause. Blackmun—joined by Marshall and Brennan—dissented bitterly, arguing that the Missouri law conflicted with his most famous opinion and that the plurality opinion would effectively overrule *Roe*. He concluded with a grim prognosis for the future of *Roe*: "For today, the women of this Nation still retain the liberty to control their destinies. But the signs are evident and very ominous, and a chill wind blows."

With another opponent of *Roe* in the White House, Blackmun's analysis of its prospects seemed persuasive to all sides of the debate surrounding the right to choose, but *Roe* proved more durable than its opponents hoped and its supporters feared. In 1992, the Court in *Planned Parenthood v. Casey* would explicitly affirm *Roe*, using O'Connor's "undue burden" analysis.

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References and Further Reading

- Craig, Barbara Hinkinson, and David M. O'Brien. *Abortion and American Politics*. Chatham, NJ: Chatham House, 1993.
- Garrow, David J. *Liberty & Sexuality*. Berkeley: University of California Press, 1998.
- Gorney, Cynthia. *Articles of Faith*. New York: Simon & Schuster, 1998.
- Greenhouse, Linda. *Becoming Justice Blackmun*. New York: Times Books, 2005.
- Lazarus, Edward. *Closed Chambers*. New York: Penguin, 1999.

Cases and Statutes Cited

Harris v. McRae, 448 U.S. 297 (1980)
Planned Parenthood v. Casey, 505 U.S. 833 (1992)
Roe v. Wade, 410 U.S. 113 (1973)

See also Abortion; Harris v. McRae, 448 U.S. 297 (1980);
Planned Parenthood v. Casey, 112 S.Ct. 2791 (1992);
 Reproductive Freedom; *Roe v. Wade*, 410 U.S. 113 (1973)

WEDDINGTON, SARAH RAGLE (1945–)

Sarah Weddington successfully argued *Roe v. Wade* (1973) before the U.S. Supreme Court in 1972. This landmark opinion, which protected a woman's right to choice in striking down a Texas antiabortion statute as a violation of the fundamental right to privacy, was one of the most significant and controversial decisions reached by the Court in the twentieth century. For this feat alone, she shall forever be known.

She argued the case at age twenty-six, just five years after graduating from law school, and was one of the youngest people to successfully argue a case before the Court. She was approached in 1969 by a group of University of Texas graduate students wondering if they could be charged as accomplices for telling women where they could get illegal abortions or where they could go out of state to get legal abortions. Weddington, one of only five women in her law school class, struggling to find work as a young female attorney, and with virtually no experience, asked the women why they had selected her. Informed that she was the only female attorney they knew, she agreed to their request that she represent them for free. Via friends and fellow attorneys, Weddington was referred to a Texas woman who wanted an abortion that the State of Texas made illegal. This woman would become known as Jane Roe, and Weddington filed her first contested case, albeit an historic class action suit on behalf of "all women who were or might become pregnant in the future and want the option of abortion."

Sarah Ragle Weddington was born in Abilene, Texas, in 1945, the daughter of Henry Doyle, a Methodist minister, and Lena Ragle, a teacher. Sarah graduated from high school in Canyon, Texas, at the age of sixteen, received her baccalaureate degree from McMurry College at the age of nineteen, and her J.D. from the University of Texas School of Law at the age of twenty-one.

In 1972, while litigating *Roe v. Wade*, Weddington became the first woman elected from Austin, Texas, to the Texas House of Representatives. Devoted to "women's issues," and serving three terms in the Texas House, she helped reform the Texas rape statutes, pass an equal credit bill for women, a pregnancy

leave bill for Texas teachers, and blocked antiabortion legislation. In 1974, she was a delegate to the Constitutional Convention held for the purpose of writing a new Texas constitution.

President Jimmy Carter appointed Weddington as general counsel for the U.S. Department of Agriculture in 1977. At age thirty-two, she was the youngest person and first woman to serve as general counsel of a cabinet-level department. From 1978 to 1981, she served as assistant to President Jimmy Carter, directing the administration's work on women's issues and appointments. From 1983 to 1985, she served as the first female director of the Texas Office of State-Federal Relations where she was the chief lobbyist for the State of Texas in Washington, D.C. The American Bar Association (ABA) made her the first woman appointed to the Joint Conference of Representatives of the ABA and AMA. Weddington was also a founding member of the Foundation for Women's Resources.

For these accomplishments, she has been recognized by numerous accolades and awards. Weddington was featured in 2003 in *TIME Magazine's* "80 Days that Changed the World" for the *Roe v. Wade* decision. *TIME Magazine* also named her as one of the "Outstanding Young American Leaders" in 1980. Dawn Bradley Berry profiled her in *The Fifty Most Influential Women in American Law* in 1996. In 1980, she received the highest honor of the Planned Parenthood Federation of America, the Margaret Sanger award. She was the recipient of the Leadership America's Hummingbird award for contribution toward the advancement of women's leadership 1998. In 2000 the *Texas Lawyer* named her as "One of the Most Influential Lawyers in the Twentieth Century." The American Association of University Women named her Speaking Out for Justice Award recipient in 2001.

Weddington holds honorary doctorates from McMurry University, Austin College, Hamilton College, and Southwestern University. She received the Distinguished Alumna Award from McMurry University in 1992. Also in 1992, Weddington authored a book, *A Question of Choice*, which profiles the history and aftermath of the *Roe v. Wade* decision.

Sarah Weddington continues to provide leadership for women via her Weddington Center and remains a nationally known attorney, lecturer, and professor at the University of Texas at Austin.

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References and Further Reading

Godwin, Michelle Gerise. "The Progressive Interview: Sarah Weddington." *The Progressive*, 64, August 8, 2000.
 Weddington Center. Home page. <http://www.weddington-center.com>.

Weddington, Sarah, *Law: The Wind Beneath My Wings, One Woman's Journey to Effectuate Change as an Attorney*, Thomas M. Cooley Law Review 20 (2003): 1.
———. *A Question of Choice*. New York: Putnam's, 1992.

Cases and Statutes Cited

Roe v. Wade, 410 U.S. 113 (1973)

WEEKS v. UNITED STATES, 232 U.S. 383 (1914)

In *Weeks v. United States*, the Supreme Court held that evidence seized during an illegal search by a federal law enforcement officer is inadmissible in a federal trial.

Two separate but related searches and seizures occurred. First, police officers went to defendant Weeks's home while he was absent and entered his home without his permission and without a warrant. They seized several letters and papers that incriminated Weeks in conducting an illegal lottery. The officers gave these items to the U.S. Marshal.

The Marshal later went to Weeks's home with police officers and searched Weeks's room, again without Weeks's knowledge or consent and without a warrant, and seized additional items.

After Weeks filed for a return of the items seized, the district court ordered a return only of those items not materially affecting the trial. The Supreme Court stated that the Fourth Amendment placed limitations and restraints on federal courts and officials, and to allow such documents to be seized without a warrant and used against the accused would be to render the Fourth Amendment useless and have the same effect as striking it from the Constitution.

The Supreme Court held that the warrant-less seizure of items by a federal officer was a violation of Weeks's Fourth Amendment rights. This created what has come to be known as the exclusionary rule. The Court did not address a remedy for the warrantless seizure by the police since, at that time, the Fourth Amendment only applied to federal officials.

SUZANNE L. DIAZ

See also **Exclusionary Rule; Fourteenth Amendment; Mapp v. Ohio**, 367 U.S. 643 (1961); **Search Warrants; Seizures; Wolf v. Colorado**, 338 U.S. 25 (1949)

WEEMS v. UNITED STATES, 217 U.S. 349 (1910)

Paul Weems, a disbursing officer of the Bureau of Coast Guard and Transportation of the U.S. government of the Philippines, received a sentence of fifteen

years of hard and painful labor, with chains worn at all times, civil penalties extending beyond his imprisonment, and a fine, for falsifying two entries showing wages paid out to employees. He challenged this sentence, which included loss in perpetuity of the right to hold office and to vote, and to be under surveillance for life, as violating the cruel and unusual punishment clause of the Eighth Amendment.

The Eighth Amendment's text forbids the federal government from imposing excessive bail or fines and cruel and unusual punishments. The Supreme Court held that the Philippine statute was both cruel in its excess for the crime of falsification and unusual because not one American jurisdiction punished a crime similarly. Moreover, the Philippine legislature imposed the same penalty for the much greater crime of counterfeiting currency, evidencing an exercise of unrestrained and arbitrary power. It therefore overturned Weems's conviction.

In historic language, Justice McKenna wrote that the vitality of the Constitution lay in its application to unforeseen events, and that it must speak in terms of how things presently are, not how they were once. Although this expansive view of the Bill of Rights as a living, breathing document was not fundamental to the *Weems* ruling, McKenna's language bolstered such future claims as a constitutional right to privacy and challenges to existing capital punishment jurisprudence.

REBECCA L. BARNHART

References and Further Reading

Granucci, Anthony F., *Nor Cruel and Unusual Punishments Inflicted: The Original Meaning*, California Law Review 57 (1969): 839–65.

Urofsky, Melvin I., and Paul Finkelman, eds. *Documents of American Constitutional and Legal History: From the Age of Industrialization to the Present*, Vol. 2. New York: Oxford University Press, 2002.

See also **Bill of Rights: Structure; Capital Punishment; Capital Punishment: Proportionality; Capital Punishment Held Not Cruel and Unusual Punishment under Certain Guidelines; Capital Punishment: Eighth Amendment Limits; Cruel and Unusual Punishment (VIII); Cruel and Unusual Punishment (Generally)**

WELCH, JOSEPH N. (1890–1960)

Joseph Welch was an accomplished trial lawyer and partner in the prestigious Boston law firm of Hale and Dorr, when he was appointed special counsel to the U.S. Army in 1954 during the Army–McCarthy hearings. Welch became a household figure during the

proceedings for his genial, courtly demeanor, which masked an incisive grasp of how to manipulate the drama that unfolded on the nation's television screens during the hearings. A native Iowan, Welch earned his law degree from Harvard Law School in 1917, and subsequently went into private practice in Boston, Massachusetts.

Senator Joseph McCarthy (R-WI) had gained extensive notoriety between 1950 and 1954 for his singled-minded and reckless pursuit of communists and security risks employed by the U.S. government. When Republicans took over the executive branch in 1953, however, McCarthy's charges, which had been welcomed when leveled at the Democratic administration, became politically inappropriate. McCarthy attacked the U.S. Army in early 1954 for harboring an alleged communist dentist. In the course of his investigation, the Senator imprudently leveled a personal attack on a decorated Army general, Ralph Zwicker, accusing him of "being unfit to wear the uniform." The Army retaliated with charges that McCarthy and his chief counsel, Roy Cohn, had improperly pressured the Army to provide special privileges to Cohn's friend and "unpaid committee consultant," Private G. David Shine.

The showdown over whether the Army had, in fact, used its treatment of Shine to blackmail McCarthy into dropping his charges against the Army exploded in April 1954 in hearings televised to the nation. Secretary of the Army Robert Stevens recruited Joseph Welch to present the Army's case. Well versed in the art of litigation, Welch was the perfect foil for McCarthy's glowering, sneering behavior. Welch, expertly directing the drama, responded to McCarthy's constant interruptions with detached amusement and, at times, biting sarcasm. In a wrangle with the senator over the origin of a doctored picture of the secretary of the army standing next to Shine, Welch opined that maybe it came from a pixie. When McCarthy demanded the definition of a pixie, the Boston attorney, in a response that was quintessential Welch, replied, "Mr. Senator ... a pixie is a close relative of a fairy."

Welch's interrogations during the hearings were masterful theatrical presentations. He never really intended to focus on the issues, believing rather that it was his duty to expose the ugliness of McCarthy's tactics. His most stirring performance, long credited with ending McCarthy's reign of terror, occurred when, during the questioning of Roy Cohn, the senator interrupted with the public denunciation of a lawyer in Welch's firm who at one time had been a member of the left-leaning National Lawyer's Guild that McCarthy characterized as the legal bulwark of

the Communist Party. Although an agreement had been negotiated to keep the young man's name out of the hearings, McCarthy persisted in haranguing Welch about the young attorney's background. Welch finally, with an air of rising desperation, pleaded, "Let us not assassinate this lad further, Senator. Have you no sense of decency, sir, at long last. Have you left no sense of decency?" Welch exited the hearing room to the sound of congratulatory applause. McCarthy had been fatally wounded by a man whom McCarthy had characterized earlier as "a very clever lawyer."

McCarthy would be condemned by the U.S. Senate later that year for "contempt and abuse of the Senate." Welch returned to private practice in Boston, emerging briefly in 1959 to play the trial judge in the movie, *Anatomy of a Murder*.

KAREN BRUNER

References and Further Reading

- Adams, John G. *Without Precedent: The Story of the Death of McCarthyism*. New York: W.W. Norton, 1983.
 Oshinsky, David. *A Conspiracy So Immense*. New York: Free Press, 1983.
 Reeves, Thomas. *The Life and Times of Joe McCarthy*. New York: Stein and Day Publishers, 1982.
 Welch, Joseph. "The Lawyer's Afterthoughts," *Life* 37, July 29, 1954, 96–110.

WELLS-BARNETT, IDA BELL (1862–1931)

The militant journalist and antilynching crusader was born into slavery as Ida Bell Wells in Holly Springs, Mississippi. She published under the name Wells-Barnett after her marriage. Her father was a skilled carpenter who designed the building that now houses the Ida B. Wells Museum in Holly Springs.

Wells attended classes at Rust College, a Methodist freedman's school in Holly Springs, and later attended summer school at Fisk University. She began to teach in rural Mississippi schools in 1878 when her parents died in the yellow fever epidemic. In 1881, she moved to Memphis, first teaching in county schools, and then from 1883 to 1891 in Memphis African-American schools.

In 1883 and 1884, she refused to move to smoking cars reserved for African Americans, and brought two lawsuits against the railroad. She won at the trial court level, but was bitterly disappointed when the Tennessee Supreme Court reversed on the pretext that the smoking car was "equal" to the first-class accommodations available for whites.

In Memphis, Wells wrote for African-American periodicals, and her growing reputation led to her election in 1887 as secretary of the National Press Association. She turned to journalism full time when she lost her teaching position due to her outspoken criticism of Memphis's policies towards African Americans. In 1889 she became co-owner and editor of the *Memphis Free Speech and Headlight*.

In 1892, Wells published editorials denouncing the lynching of three African-American businessmen in Memphis. She rejected the argument that lynching was a response to black rapists: "Nobody in this section of the country believes the old thread bare lie that Negro men rape white women. If Southern white men are not careful, they will overreach themselves and public sentiment will have a reaction: a conclusion will then be reached which will be very damaging to the moral reputation for their women." While she was out of town, white newspapers incited a mob to attack her office and made it impossible for her to return to Memphis.

From New York, Wells continued her antilynching crusade, publishing *Southern Horrors: Lynch Law in All Its Phases* (1892). Wells recognized that lynch law was the violent expression of broader cultural efforts to degrade the reputation of Negroes as a race by stereotyping black men as rapists. Her passionate prose and careful research exploded the mythology advanced to rationalize—and justify—lynching. She documented the fact that most lynchings did not involve charges of rape, and described numerous lynchings that resulted from consensual interracial relationships. She contrasted the brutal treatment of African Americans with the routine acquittal of whites who raped African Americans. Insisting that "the strong arm of the law" be brought to bear upon lynchers, she understood this would not occur until public opinion demanded such action. Meanwhile, noting that lynchings had been prevented by forceful resistance, she counseled that "a Winchester rifle should have a place of honor in every black home." Wells brought international attention to the problem of lynch violence, touring Scotland and England in 1893 and 1894.

Wells moved to Chicago in 1894, in part to be close to her future husband, Ferdinand Lee Barnett, a lawyer and publisher. There she continued her antilynching activism. In *A Red Record* (1895) and *Mob Rule in New Orleans* (1900), she recounted horrific lynchings in Texas and Louisiana, and amassed statistics of annual lynchings that documented the severity of the problem.

Proud of her race's achievements, Wells protested the exclusion of African Americans from the World's

Columbian Exposition in a pamphlet coauthored in 1893 with Frederick Douglass. Barnett exposed the scandalous violence against African Americans and celebrated the history of African-American accomplishments. In later years, Wells investigated and reported on race riots in Illinois and Arkansas. She petitioned the governor to deny reappointment to the sheriff who failed to prevent racial violence in Cairo, Illinois.

In 1895, Wells married Barnett. In the 1920s, both were active in Republican politics in Illinois. Barnett was the first African-American assistant state's attorney. Wells ran unsuccessfully in 1930 as an independent for the state senate. The couple had four children.

Wells's biographer Linda O. McMurray observes that few Americans "have more consistently refused to compromise with the evil of race prejudice." Wells opposed Booker T. Washington's accommodationism. She participated in forming many civil rights organizations, including the National Association for the Advancement of Colored People in 1910, although gender bias and Wells's refusal to compromise repeatedly conspired to prevent her from assuming leadership roles.

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References and Further Reading

- Bogues, Anthony. *Black Heretics, Black Prophets: Racial Political Intellectuals*. New York and London: Routledge, 2003.
- Green, Helen Taylor. *African American Criminological Thought*. Albany: State University of New York Press, 2000.
- McMurray, Linda O. *To Keep the Waters Troubled: The Life of Ida B. Wells*. New York: Oxford University Press, 1998.
- Schechter, Patricia. *Ida B. Wells-Barnett and American Reform 1880–1930*. Chapel Hill: University of North Carolina Press.
- Wells-Barnett, Ida B. *The Memphis Diary of Ida B. Wells-Barnett*. Edited by Miriam Decosta-Willis. Boston: Beacon Press, 1995.
- . *On Lynchings*. Salem, N.H.: Ayer 1987. [Reprint of Wells's three pamphlets on lynching: *Southern Horrors* (1892), *A Red Record* (1895), and *Mob Rule in New Orleans* (1900).]
- Wells-Barnett, Ida B., Frederick Douglass, Irvine Garland Penn, and Ferdinand L. Barnett. *The Reason Why the Colored American Is Not in the World's Columbian Exposition: The Afro-American's Contribution to Columbian Literature*. Edited by Robert W. Rydell. Urbana: University of Illinois Press, 1999.
- Wilkinson, Brenda Scott. *African American Women Writers*. New York: John Wiley, 2000.

See also **National Association for the Advancement of Colored People (NAACP)**

WEST VIRGINIA BOARD OF EDUCATION v. BARNETTE, 319 U.S. 624 (1943)

In *West Virginia Board of Education v. Barnette*, the U.S. Supreme Court found that the mandatory salute of the flag and the recitation of the Pledge of Allegiance in the public schools violated the First Amendment rights of those individuals—in this case Jehovah's Witnesses—who objected to the compelled expression on religious grounds. In one of the most famous, and eloquent, defenses of vibrant individual First Amendment freedom in the Court's history, Justice Robert Jackson famously asserted:

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

But to appreciate the significance of the *Barnette* decision, it is important to understand the precedent set just three years before, in *Minersville v. Gobitis* (1940), wherein the Court considered virtually the same facts, but ruled in the opposite direction.

Precedent: *Minersville v. Gobitis* (1940)

Gobitis involved a mandatory requirement that all public schoolchildren salute the flag or be disciplined for insubordination. The two children of Lillian and William Gobitis, Jehovah's Witnesses, refused to salute the flag, contending that the act amounted to worship of a graven image and thus violated the First Commandment. The lawsuit challenging the Minersville school board policy was successful at the district court level and on appeal. At the U.S. Supreme Court, however, Justice Felix Frankfurter argued for the Court that while "the affirmative pursuit of one's convictions about the ultimate mystery of the universe and man's relation to it is placed beyond the reach of law[.]" the "manifold character" of these relations may "bring his conception of religious duty into conflict with the secular interests of his fellowmen." He continued: "National unity" is the basis for "national security" and thus—in trademark Frankfurter fashion—if the government deemed that "the binding tie of cohesive sentiment" was best protected via the activity of a morning flag salute, then it was ultimately up to the *legislature* (not the Court) to draw such conclusions.

Impact of the *Gobitis* Decision: The Response in West Virginia

Following the Court's decision in *Gobitis*, the West Virginia legislature amended its statutes to require all schools therein to conduct courses of instruction in history, civics, and the state and federal constitutions for purposes of "teaching, fostering, and perpetuating the ideals, principles and spirit of Americanism, and increasing the knowledge of the organization and machinery of government." Moreover, the act required private, parochial, and denominational schools to also include courses of study akin to those of the public schools. Thus, under the direction of the West Virginia State Board of Education, specific courses of instruction were devised and the flag salute was made mandatory, with the provision that those students who refused to comply would be expelled. Interestingly and ironically—given that the United States was by now involved in World War II—the gesture toward the flag that students were expected to offer was identical (right arm extended straight, palm out) to the signature salute of members of the Nazi Party in Germany. Walter Barnette challenged the law in court on the behalf of his three children, and in a six-to-three ruling, the Court reversed course from its opinion just three years before and found the statute to be in violation of the First Amendment as applied to the states through the Fourteenth Amendment to the federal Constitution.

The Court's Decision

Writing for the majority, Justice Robert Jackson explained that the circumstances of this case went beyond ordinary civics; the flag salute and attendant pledge, in other words, took the situation into the realm of compelled *belief* and thus ran afoul of the Constitution. "Symbolism is a primitive but effective way of communicating ideas," he noted, and so the use of flag is thus a "short-cut from mind to mind" that, with the pledge, is used to instill loyalty and ultimately compels "affirmation of a belief and an attitude of mind." Moreover, Jackson argued, to accept the premise put forth by Justice Frankfurter in *Gobitis*—that the witnesses were free to pursue their cause through the *political* process—missed the point. "The very purpose of the Bill of Rights," he offered as a counter,

was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials, and to establish them as legal

principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

Significance

Barnette is significant for several reasons. For one thing, the legal doctrine of *stare decisis* (roughly, "let the decision stand") strongly discourages such an about-face as was evident in this opinion, especially a mere three years later. However, precedents are reassessed as conditions and circumstances warrant, and, as the United States was by then embroiled in fighting in Europe, it seems likely that the context of war figured prominently in the justices' reversal of course.

And yet, the war context did not lead the Court to *contract* free expression—as was the case in the World War I opinions (for example, *Schenck v. United States* [1919], *Abrams v. United States* [1919])—but rather facilitated an *expansion* of the domain of individual freedom. This expansion, it seems, is at least partly attributable to the nature of the enemy in World War II: the doctrine of National Socialism, specifically, but totalitarian regimes more generally. That is, the *Barnette* opinion portrays an understanding of political ideology that acknowledges the irony in fighting the forces of fascism and authoritarianism abroad, while mandating uniformity in thought, compelled belief, and lockstep loyalty on the home front. A truly free society, the Court instructed here, does not eradicate dissent, but rather relies on its tradition, values, and culture to generate genuinely felt loyalty among the citizenry.

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References and Further Reading

- Mainwaring, David. *Render unto Caesar*. Chicago: University of Chicago Press, 1962.
- Newton, Merlin Owen. *Armed with the Constitution: Jehovah's Witnesses in Alabama and the U.S. Supreme Court, 1939–1946*. Tuscaloosa: University of Alabama Press, 1995.
- Peters, Shawn Francis. *Judging Jehovah's Witnesses*. Lawrence: University Press of Kansas, 2002.
- Rotnem, Victor, and F. G. Folsom, Jr. "Recent Restrictions Upon Religious Liberty." *American Political Science Review* 36 (1942): 1053–1068.

Cases and Statutes Cited

- Abrams v. United States*, 250 U.S. 616 (1919)
- Minersville v. Gobitis*, 310 U.S. 586 (1940)
- Schenck v. United States*, 249 U.S. 47 (1919)

See also American Civil Liberties Union; Bill of Rights: Structure; Flag Salute Cases; Jehovah's Witnesses and Religious Liberty

WHISTLEBLOWERS

Many cases of fraud have been uncovered and successfully prosecuted because an employee was willing to report the abuse despite fear of retaliation, including wrongful dismissal, by the employer. These employees are commonly referred to as whistleblowers, and their legal foundations lie in the *qui tam* doctrine of English law which allowed individuals to bring action for the king. Whistleblower activity gained importance in the United States during the Civil War with the passage of the False Claims Act in 1863 that allows whistleblowers to receive a share of the civil penalties collected for fraud against the government. Yet legal protections for the rights of whistleblowers developed slowly. In 1986, the False Claims Act was amended to provide whistleblowers acting in good faith protection from retaliation. Most states and several industries have also enacted whistleblower protection laws, yet there is wide variance in both the protections offered and the requirements necessary to qualify for protection. Courts have provided federal, state, and local government whistleblowers protection under the Civil Rights Act of 1871, First and Fourteenth Amendments, and witness protection laws. Whistleblowers in the private sector have only recently received protections through the Sarbanes-Oxley Act. In 1989, Congress eased the whistleblower's burden of proof by establishing the "contributing factor test," which requires only that retaliation be a contributing factor in a discriminatory action, not the primary factor. Yet whistleblowers' rights often remain unprotected because the whistleblowers are uninformed or caught in myriad contradicting laws.

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References and Further Reading

- Barnett, Tim. *Overview of State Whistleblower Protection Statute*, Labor Law Journal 43 (1998): 440–448.
- Hamilton, James, and Ted Trautmann. *Sarbanes-Oxley Manual: A Handbook for the Act and SEC Rules*. Chicago: CCH Incorporated, 2003.
- Kohn, Stephen M. *Concepts and Procedures in Whistleblower Law*. Westport, CT: Quorum Books, 2001.
- Kohn, Stephen M., and Michael D. Kohn. *The Labor Lawyer's Guide to the Rights and Responsibilities of Employee Whistleblowers*. Westport, CT: Quorum Books, 1988.
- Kohn, Stephen M., Michael D. Kohn, and David K. Colapinto. *Whistleblower Law*. Westport, CT: Praeger, 2004.

- Lander, Guy P. *What Is Sarbanes–Oxley?* New York: McGraw-Hill, 2004.
- Ryan, David J., *The False Claims Act: An Old Weapon with New Firepower Is Aimed at Health Care Fraud*, *Annals of Health Law* 4 (1995): 127–150.

Cases and Statutes Cited

- Civil Rights Act, Act of 1871, c. 22, 17 Stat. 13
- False Claims Act, Act of March 2, 1863, c. 67, 12 Stat. 696
- Sarbanes–Oxley Act, Act of July 30, 2002, Pub. L. 107–204, 116 Stat. 745

See also **Freedom of Contract; Freedom of Speech: Modern Period (1917–Present)**

WHITE COURT (1911–1921)

The U.S. Supreme Court was guided by the leadership of Chief Justice Edward Douglass White from January 1911 to May 1921. A total of eleven justices served on the Court during what has been described by some as a time of transition in the Court's role in interpreting and applying the U.S. Constitution. Much of the Court's time was taken up with issues related to the growth and expansion of business—antitrust cases, regulation of commerce, and consideration of the rights of labor. At the same time, however, the Court issued rulings on a variety of social issues, including the reach of the national police power and the constitutionality of a number of Jim Crow policies. World War I raised issues concerning the expansion of the government's power during wartime, and gave the Court the opportunity to rule on circumstances under which civil liberties might be curtailed. It could be said that the White Court laid the groundwork for the broader role the Court would assume in subsequent decades.

Edward Douglass White, who had been appointed to the U.S. Supreme Court in 1894 by President Grover Cleveland, in 1910 became the first associate justice to be promoted to the chief justiceship. Selected by then-President William Howard Taft, he assumed the new role in January 1911, and presided for the next eleven years. The Court he led saw service by a total of twelve other justices, including John Marshall Harlan (1877–1911), Joseph McKenna (1898–1925), Oliver Wendell Holmes, Jr. (1902–1932), William R. Day (1903–1922), Horace Lurton (1909–1914), Charles Evans Hughes (1910–1916), Willis Van Devanter (1910–1937), Joseph R. Lamar (1911–1916), Mahlon Pitney (1912–1922), James McReynolds (1914–1941), Louis Brandeis (1916–1939), and John H. Clarke (1916–1922).

Much of the time during the early years of the White Court was consumed by cases concerning

government regulation of big business. The Court made final rulings in 1911 in two major antitrust cases begun several years earlier. Its ruling in *Standard Oil Company v. United States* (1911) was regarded as a turning point in interpretation of the Sherman Anti-Trust Act because it came down on the side of business by establishing the “rule of reason,” which decreed that only trusts that represented an unreasonable restraint of trade were to be considered in violation of the act. In a series of cases questioning the reach of the federal government in regulating interstate commerce, the White Court concluded that the Interstate Commerce Commission had broad powers, including the right to override competing state regulations under certain circumstances.

The White Court's rulings on issues related to labor provided some victories for workers, but as often sided with management. On the one hand, in upholding the Employers' Liability Law in 1912, the Court recognized that factory owners bore some responsibility for the safety and well-being of their workers. They made another step forward on behalf of labor when they approved the ten-hour day in *Bunting v. Oregon* (1917). On the other hand, White and his fellow justices handed labor some major defeats in cases such as *Coppage v. Kansas* (1915), when they outlawed state laws barring the use of yellow dog contracts, and in *Hammer v. Dagenhart* (1918) when they invalidated the federal Keating–Owen Child Labor Act.

Challenges to a number of pieces of Progressive legislation gave the White Court opportunities to weigh in on the reach of national police power, and the power of Congress to legislate for the health, safety, and welfare of citizens. *Hipolite Egg Co. v. United States* (1911) resulted in a ruling upholding the pro-consumer Pure Food and Drug Act of 1906. The Mann Act, which was passed to prevent the transport of women across state lines for immoral purposes (prostitution), was upheld by the Court in *Hoke v. United States* (1913), and its interpretation broadened in *Caminetti v. United States* (1917).

Although only limited challenges to the then-pervasive Jim Crow policies limiting the rights of African Americans were raised during the early decades of the twentieth century, the White Court was able to strike out against a few egregious policies. In *Bailey v. Alabama* (1911) and *United States v. Reynolds* (1914), the Court outlawed the use of a system of debt peonage in the southern states. In *Guinn and Beal v. United States* (1915), the Court required the abandonment of the use of the grandfather clause, an antiquated means of preventing blacks from voting. Two decisions in 1914 and 1917 endeavored to place restrictions on segregation as a factor in

WHITE COURT (1911–1921)

the sale of property, and in limiting access to rail transportation.

Government policy resulting from the entry of the United States into World War II raised a number of constitutional questions that eventually came before the White Court. Expansion of presidential and federal authority in areas such as implementation of a draft, regulation of means of transportation, and allocation of scarce resources all prompted questions. The White Court consistently upheld the authority of the federal government to do what it needed to do to prosecute the war effectively (*Selective Service Draft Law Cases* [1918], *Northern Pacific Railway v. North Dakota* [1919]), but also required Congress to be specific in outlining guidelines for the enforcement of the policies it established (*United States v. Cohen Grocery Store* [1921]). Several civil liberties issues arose as a result of the passage of the Espionage and Sedition Acts aimed at controlling criticism of the war effort. In a landmark decision in *Schenck v. United States* (1919), Justice Holmes approved restrictions on freedom of speech and press during wartime, establishing the “clear and present danger” doctrine as a guideline for determining when such restrictions were warranted. Subsequent decisions buttressed this ruling, although dissents by Holmes and Brandeis in *Abrams v. United States* (1919) laid out arguments that would provide the foundations for future defenses of broad protection for free speech.

Many of the White Court’s rulings reflected the thinking and the values and priorities of the times in which they were written. Although most did not establish long-term precedents in the areas under consideration, a number did establish foundations upon which future courts would build. The White Court era is not generally regarded as one of the most important in Supreme Court history, but its history does reflect many of the struggles besetting the nation and its judiciary as it moved toward accommodating itself to the rapid changes of the modern world.

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References and Further Reading

- Bickel, Alexander M., and Benno C. Schmidt, Jr. *The Judiciary and Responsible Government, 1910–21*. New York: Macmillan, 1984.
- Highsaw, Robert B. *Edward Douglass White*. Baton Rouge: Louisiana State University Press, 1981.
- Shoemaker, Rebecca S. *The White Court: Justices, Rulings, Legacy*. Santa Barbara, CA: ABC-CLIO Press, 2004.

Cases and Statutes Cited

- Abrams v. United States*, 250 U.S. 616 (1919)
- Bailey v. Alabama*, 211 U.S. 452 (1911)

- Bunting v. Oregon*, 243 U.S. 246 (1917)
- Caminetti v. United States*, 242 U.S. 470 (1917)
- Coppage v. Kansas*, 236 U.S. 1 (1915)
- Guinn and Beal v. United States*, 238 U.S. 347 (1915)
- Hammer v. Dagenhart*, 247 U.S. 251 (1918)
- Hipolite Egg Co. v. United States*, 220 U.S. 45 (1911)
- Hoke v. United States*, 227 U.S. 308 (1913)
- Northern Pacific Railway v. North Dakota*, 236 U.S. 585 (1919)
- Schenck v. United States*, 249 U.S. 47 (1919)
- Selective Draft Law Cases*, 245 U.S. 366 (1918)
- Standard Oil Co. v. United States*, 221 U.S. 1 (1911)
- United States v. L. Cohen Grocery Company*, 255 U.S. 81 (1921)
- United States v. Reynolds*, 235 U.S. 133 (1914)

See also **Brandeis, Louis Dembitz; Clear and Present Danger Test; Harlan, John Marshall, the Elder; Holmes, Oliver Wendell, Jr.; Interstate Commerce; McReynolds, James C.; Sherman Act; World War I, Civil Liberties in**

WHITE, BYRON RAYMOND (1917–2002)

Byron Raymond White’s path to Supreme Court Justice is that of a storybook tale. Born and raised in the farming community of Wellington in north-central Colorado, Byron White’s trajectory began as valedictorian of his high school class of six students. He attended the University of Colorado where he was president of the student body, and valedictorian of his university class; along the way, he earned ten varsity letters in football, basketball, and baseball. On the gridiron, Byron “Whizzer” White was also selected as a member of the 1937 All-American football team as a running back and punter and named runner-up for the collegiate football’s most prestigious award, the Heisman Trophy after leading his team to the Cotton Bowl.

After completing his undergraduate studies, Byron White was selected as a Rhodes Scholar in 1939 to attend Oxford, and later received his law degree from Yale, graduating at the top of his class; he also played three seasons of professional football being named Rookie of the Year and leading the league in rushing twice.

White’s law studies were interrupted by World War II, in which he served as a naval intelligence officer, which included investigating the sinking of PT Boat 109, the boat captained by future president of the United States, John F. Kennedy. White also survived two kamikaze attacks on ship *Bunker Hill* and then the attack on the *Enterprise*.

After graduating magna cum laude from Yale Law School, Byron White clerked for Chief Justice Fred Vinson of the U.S. Supreme Court before returning to Denver to practice law for fourteen years. White was

to become the first Supreme Court clerk to subsequently become a Supreme Court Justice himself.

While in private practice, he was chosen by Robert Kennedy to head the National Citizens for Kennedy Committee in the presidential campaign against Richard Nixon. Soon thereafter, he was asked to go to Washington, D.C., as a deputy attorney general of the United States. While in that position, he became involved in leading the federal marshals in the protection of the civil rights of the Alabama Freedom Riders in Montgomery, Alabama.

In 1961, President John Kennedy nominated Byron White, who was forty-four at the time, to the U.S. Supreme Court to succeed Justice Charles Evans Whittaker who left the Court due to illness. Justice White served in that capacity for thirty-one years from 1961 to 1993 as part of a Court that addressed some of the most momentous issues of the twentieth century that set the social and political agenda for the nation, ranging from cases on segregation within schools, school prayer, Fifth Amendment implications and *Miranda v. Arizona* (1966), the Watergate tapes, the Pentagon papers, abortion, consensual homosexual relations, and the constitutionality of the death penalty. White's judicial philosophy cannot be placed solely in any one category in that how he viewed an issue would often be as unpredictable and as varied as were the issues that came before the Court during this tumultuous period in American history.

As a critic of *Roe v. Wade* (1973) with a strongly worded dissent, White appeared to be critical of the substantive due process analysis, but then clearly recognized the right of privacy in *Griswold v. Connecticut* (1965) by striking down laws against contraception. White also authored the opinion in the now-defunct *Bowers v. Hardwick* (1986) upholding Georgia's antisodomy laws stating that "proscriptions against [sodomy] have ancient roots" and "sodomy was a criminal offense at common law and was forbidden by the laws of the original 13 states when they ratified the Bill of Rights."

Justice White's view on the death penalty varied over time; he joined five other justices in *Furman v. Georgia* (1972) striking down many state death penalty statutes, but later upheld a capital punishment sentence of death in *Gregg v. Georgia* (1976). Justice White also struck down a death sentence in *Coker v. Georgia* (1977), which had imposed a death sentence for a conviction of rape requiring that all punishments be proportional to the crime as prescribed by the Eighth Amendment.

While Justice White's jurisprudence spread across the jurisprudential spectrum from conservative to liberal, he also wrote one of the more poignant rulings in

United States v. Wade (1967) describing a criminal defense lawyer's duties: while law enforcement has "the obligation to convict the guilty and to make sure they do not convict the innocent," criminal defense counsel has no "comparable obligation to ascertain or present the truth."

Our system assigns [defense counsel] a different mission. He must be and is interested in preventing the conviction of the innocent, but, absent a voluntary plea of guilty, we also insist that he defend his client whether he is innocent or guilty.... If he can confuse a witness, even a truthful one, or make him appear at a disadvantage, unsure or indecisive, that will be his normal course.... In this respect, as part of our modified adversary system and as part of the duty imposed on the most honorable defense counsel, we countenance the required conduct which in many instances has little, if any, relation to the search for truth.

Upon his retirement in 1993 from the bench, President Bill Clinton appointed Ruth Bader Ginsburg to succeed White.

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References and Further Reading

- Bell, Bernard W., *Judging in Interesting Times: The Free Speech Clause Jurisprudence of Justice Byron R. White*, *Catholic University Law Review* 52 (2002–2003): 893.
- , *The Populism of Justice Byron R. White: Media Cases and Beyond*, *University of Colorado Law Review* 74 (2003): 1425.
- Hutchinson, Dennis J. *The Man Who Once Was Whizzer White: A Portrait of Justice Byron R. White*. New York: Free Press, 1998.
- Ides, Allan, *The Jurisprudence of Justice Byron White*, *Yale Law Journal*, 103 (1993–1994): 419.

Cases and Statutes Cited

- Bowers v. Hardwick*, 478 U.S. 186 (1986)
- Coker v. Georgia*, 433 U.S. 584 (1977)
- Furman v. Georgia*, 408 U.S. 238 (1972)
- Gregg v. Georgia*, 428 U.S. 153 (1976)
- Griswold v. Connecticut*, 381 U.S. 479 (1965)
- Miranda v. Arizona*, 384 U.S. 436 (1966)
- Roe v. Wade*, 410 U.S. 113 (1973)
- United States v. Wade*, 388 U.S. 218 (1967)

WHITNEY v. CALIFORNIA, 274 U.S. 357 (1927)

Whitney v. California is one of the half-dozen most important free speech cases ever decided by the U.S. Supreme Court. Its significance, however, lies less in the Court's actual decision than in the separate concurring opinion filed by Justice Louis D. Brandeis.

Brandeis's eloquent discourse on the meaning and importance of free speech in a democratic society has inspired civil libertarians ever since, and his First Amendment views occupy a prominent place in the firmament of American constitutional law.

Anita Whitney, suffragist and political radical, was convicted in 1920 under California's Criminal Syndicalism Act for her role—*de minimis*, as it turned out—in the formation of the Communist Labor Party in 1919. Such state "criminal syndicalism" statutes, which punished organization of or membership in an association advocating the use of violence to effect industrial or political change, proliferated in the years after U.S. entry into World War I. These statutes reflected the hostility to antiwar activism and fear of "alien" ideologies that inspired the infamous "red scare" of 1919–1920. Particularly in the western states, they were also a response to labor militancy, heralded by the increasing influence of the Industrial Workers of the World.

In affirming Whitney's conviction, the Supreme Court continued its pattern, first established in a series of cases in 1919, of upholding the constitutionality of state and federal statutes that punished seditious or subversive speech. In a series of dissenting opinions beginning in 1919, Justices Louis Brandeis and Oliver Wendell Holmes had unsuccessfully argued that the "clear and present danger" test, first devised in 1919 by Holmes as a way of reconciling First Amendment principles with government powers of self-preservation in times of war, barred the government from criminalizing speech in any but the most pressing circumstances. In his separate opinion (really a dissent, although labeled a concurrence for technical reasons) in *Whitney*, however, Brandeis went further and gave American free speech jurisprudence an impassioned theoretical and historical defense, rooted in venerable democratic principles.

Holmes had written eloquently in 1919 of the importance of allowing truth to emerge from an unfettered "marketplace" of ideas, but this image, like many deployed by Holmes, had coldly Darwinian overtones. Brandeis's more ebullient language in *Whitney* suggested that the exercise of free speech was essential to the health of a functioning deliberative democracy. To Brandeis, "[T]he greatest menace to freedom is an inert people.... [P]ublic discussion is a political duty." Thus, freedom of speech required the utmost protection, not only to safeguard the individual's thoughts and beliefs from governmental intrusion, but more importantly to make enlightened self-government possible. Brandeis's words reflected his admiration for the society of ancient Athens, in which he saw a democracy that rested on the virtue of a courageous citizenry.

In *Whitney*, Brandeis ascribed his majestic vision of free speech to the founders, a move as rhetorically effective as it was historically romantic:

Those who won our independence believed that the final end of the state was to make men free to develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary.... They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth.

Less noticed amid his soaring language was Brandeis's careful and extensive reshaping of Holmes's "clear and present danger" test, construing the words "clear," "present," and "danger" so restrictively as to establish an extraordinarily high threshold for the constitutionality of governmental prohibitions of or punishment for speech.

Brandeis's separate opinion in *Whitney* exerted no immediate legal authority; of the other justices, only Holmes joined his opinion. But, with the advent of a more liberal Supreme Court in the 1930s and 1940s and greater public consciousness about the importance of free expression, the First Amendment views of Holmes and Brandeis were transformed within a generation into settled law. The apotheosis of Brandeis's *Whitney* opinion came in the 1969 case of *Brandenburg v. Ohio*, in which the Court explicitly overruled the decision in *Whitney* and struck down Ohio's criminal syndicalism statute, based largely on the arguments advanced by Brandeis in his *Whitney* concurrence. The "clear and present danger" test has largely disappeared from free speech jurisprudence, replaced by more refined analyses addressed to a new and different set of free speech problems. But Brandeis's opinion in *Whitney* remains the central twentieth-century judicial text in the American free-speech canon.

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References and Further Reading

- Blasi, Vincent, *The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in Whitney v. California*, William & Mary Law Review, 29 (1988): 653–697.
- Cover, Robert M., *The Left, the Right, and the First Amendment: 1918–1928*, Maryland Law Review, 40 (1981): 349–388.
- Kalven, Harry, *A Worthy Tradition: Freedom of Speech in America*. New York: Harper & Row, 1988.
- Strum, Philippa. *Louis D. Brandeis: Justice for the People*. Cambridge, MA: Harvard University Press, 1984.

Cases and Statutes Cited

- Brandenburg v. Ohio*, 395 U.S. 444 (1969)

WILLIAM PENN'S CASE (1670)

In 1670, William Penn, then twenty-six years old and living in London, was charged with sedition against the Crown, and if found guilty would have been executed. Penn had objected to the so-called Conventicle Act, that prohibited any “tumultuous assembly,” meaning any religious gathering, from meeting outside the Church of England. In a deliberate challenge to the law, Penn preached a sermon at Grace Church in London, which officials dubbed a “tumultuous assembly,” and promptly arrested him.

At the time, defendants charged with a crime could not have a lawyer represent them, so Penn defended himself in the trial at the Old Bailey. The judges included the lord mayor of London, and twelve citizens of the city were chosen as jurors. Because Penn had a transcript made of the trial proceedings, and later published it, we have an idea of what happened.

The judges thought the trial would be simple. Did Penn preach at Grace Church? If he did (and the facts made it quite clear that he had), then he would be guilty and the case would be over. By law, the mere fact of his preaching, by definition, had caused a “tumultuous assembly.”

But the twelve jurors apparently did not like the law, nor how the judges treated Penn. Because of his ability to question the judges on fine points of law, the court locked Penn in the “bale dock,” where the jury could hear but no longer see him.

The jury reached a unanimous verdict: “Guilty of speaking in Grace Church.” But this was not what Penn had been charged with, and the lord mayor shouted at the jury, “Was it not an unlawful assembly? You mean he was speaking to a tumult of people there?” No, the jury replied, we did not find that.

The court was furious, and the bailiff told the jury:

Gentlemen, you will not be dismissed until you bring in a verdict which the court will accept. You shall be locked up, without meat, drink, fire and tobacco. You shall not think thus to abuse the court. We will have a verdict by the help of God or you shall starve for it.

But the charge only stiffened the jurors’ resolve, and after two days the court ended the trial without accepting the verdict. It fined the jurors and sent them to Newgate prison, where they were to remain until they paid their fines. But four of the jurors, led by the foreman, Edward Bushell, refused to give in. Nine weeks passed, and finally England’s high court intervened. The lord chief justice freed the jurors in response to Bushell’s application for a writ of habeas corpus, the first time that the High Court of Common Pleas had ever issued the writ.

The courage of the jurors changed English legal history, and helped to establish the independence of

the jury from domination by the Crown. In many ways, Penn’s case is one of the first recorded instances of “jury nullification,” where a jury refuses to find guilt because they disagree with the law.

In the colony that Penn founded in America, Penn reserved the death penalty only for murder and treason; at the time of his case, over two hundred different crimes in England, many of them political in nature, could warrant the death penalty. He also started the movement to free religious dissent from the label of sedition.

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References and Further Reading

Bushell's Case, 6 Howell's State Trials 999 (1670).
Dunn, Mary Maples. *William Penn, Politics and Conscience*. Princeton, NJ: Princeton University Press, 1967.

WILLIAMS, ROGER (1603–1683)

Roger Williams, clergyman, founder of Rhode Island, and one of the first proponents of religious toleration and separation of church and state, was born sometime between 1599 and 1603. The son of a merchant tailor, he was educated at Pembroke College, Cambridge. Although ordained as a clergyman in the Church of England, he agreed with the Puritans that the Reformation in England had not gone far enough to rid the church of its Romish errors. Shunned by the Church of England’s hierarchy, he sailed in 1631 to join John Winthrop and the Puritan settlers in Massachusetts. The colony welcomed him warmly, and offered him the pastorate of the first Puritan church in Boston. Although acknowledging the honor, he declined the invitation on the grounds that he believed the Puritans should break openly with the Church of England and go their separate way. He moved from Boston to New Plymouth and later to Salem, where he farmed, traded, and preached to the Indians, all the while growing more convinced that the civil authorities lacked any power to compel religious conformity. Only God could command men’s consciences, and for the state to force people to honor the Sabbath amounted to “forced worship,” which “stinks in God’s nostrils.”

These views challenged not only prevalent thought but the very legitimacy of established churches, so the Massachusetts elders put him on trial for heresy in 1635 and found him guilty. He and twenty of his followers then fled to what is now Bristol, Rhode Island, in the winter of 1636; that spring, with the gift of land from local tribes, Williams established a settlement he named Providence.

While Williams believed in freedom of individual conscience, one cannot label him as a liberal in the modern sense. He was a man of his own times, a devout Christian who, as much as John Cotton and the Puritan divines, wanted one true religion. Unlike Cotton, however, Williams did not believe that he had found that faith, and so long as he had not, then he could not impose his will on others or force them to believe and worship in a particular manner.

Williams laid out his design for Rhode Island in 1644, when he published *The Bloudy Tenent of Persecution, For Cause of Conscience, discussed in A Conference betweene Truth and Peace*. Williams envisioned a Christian commonwealth in which all religious persuasions would be allowed to practice freely, while the civil authority rested in a separate realm. No religious body would dominate the civil government, and the magistrates would act according to the dictates of their individual consciences. Such a commonwealth, Williams maintained, could tolerate a great range of individual beliefs, even those of Jews, Muslims, and the most radical Christians at the time, Quakers.

In one of his most famous idioms, in his *Letter to Providence* (1655), he wrote:

It hath fallen out sometimes, that both Papists and Protestants, Jews and Turks, may be embarked upon one ship: upon which supposal I affirm, that all the liberty of conscience, that ever I pleaded for, turns upon these two hinges—that none of the Papists, Protestants, Jews, or Turks, be forced to come to the ship's prayers or worship, nor be compelled from their own particular prayers or worship.

In fact, the charter issued to Williams for Rhode Island by Charles II in 1663 made clear that they envisioned a colony “pursuing, with peaceable and loyal minds, their sober, serious and religious intentions, of godly edifying themselves, and one another, in the holy Christian faith and worship.” Nonetheless, the charter did allow that no one would be molested or otherwise persecuted “for any differences in opinion in matters of religion.” But the charter then emphasized that the colonists had the authority to defend themselves, not only to protect their property and rights, but against “all the enemies of the Christian faith.” While Charles II stood prepared to allow a small number of dissidents in a faraway land relatively wide latitude in religious observances, and to forego having the Church of England established there, he and the royal government still saw Williams and Rhode Island as Christian, and commanded to stay that way.

Williams, a true Christian in his own beliefs, wanted to welcome Jews and others because, in the

end, he hoped to convert them to “the principles of Christianity and civility.” If Jews came to Rhode Island, Williams maintained, they would not be turned away, and neither would they be molested in their religious observances. They could never be full citizens, however, until they saw the light and converted to Christianity. Williams had a similar attitude toward Quakers, who had established a small settlement on Aquidneck Island (site of present-day Newport). In a tract entitled *George Foxx Digg'd Out of His Burrowes* (1676), Williams equated Quaker beliefs with Judaism and Catholicism as a means of discrediting the Friends' theology. God's grace, he wrote, “is a mystery which neither Jews nor Turks, Atheists or Papists, or Quakers know.”

Williams wanted to establish peace among the various Christian sects, and his references to Jews and Turks served as a simple rhetorical device. If even Jews and Muslims could live in peace, then so should the various Christian denominations be able to mute their differences for the sake of civil harmony. Governments had the right to impose and enforce rigorous standards for civil behavior, but they had no right to meddle in matters of conscience. Thus, when dealing with Catholics, whom Williams and many other Protestants believed could never be good citizens of a state because they owed their first allegiance to the Pope, the state could require that Catholics wear distinctive clothing and be prohibited from carrying arms, even while allowed to freely practice their religion. In modern terms, Jews, Muslims, Quakers, and other groups would enjoy *toleration* but not *liberty*.

Williams also articulated a basic principle that would be at the heart of the religious liberty that developed in the United States, the separation of church and state. So long as the state maintained an established church, there could be no freedom of religion for those who did not adhere to the teachings of that church. Dissenters might be tolerated, or even welcomed into the colony, but they would know that they would be taxed to support values contrary to their own, and at all times stood in peril that church aligned with state would move against their beliefs, their property, or even their lives.

In arguing for separation, Williams contributed a powerful metaphor that still carries enormous intellectual as well as constitutional significance, and which for many people is still a touchstone in their thinking about church–state relations:

When they have opened a gap in the hedge of or wall of separation between the garden of the church, and the wilderness of the world, God hath ever broken down the wall itself ... and made his garden a wilderness, as at this day. And that therefore if He will ever please to restore

His garden and paradise again, it must of necessity be walled in peculiarly unto Himself from the world.

For Williams, God's garden—the church—had to be protected against the secular world—the wilderness—or else its unique features would be destroyed. Where some people, such as Thomas Jefferson, wanted to keep church and state separate in order to protect the state from clericalism, Williams wanted separation in order to keep the church pure from the profane nature of the state and secular society.

The importance of separating church and state has always been clear to minorities, but over time people began to understand that such an alliance worked against the interests of both church and state, as well as against individual conscience. Without separation, not only could the church demand that the state enforce its orthodoxy, but the state could—as history had shown countless times—demand that the religious authorities enforce its programs as well. This vision of separation of church and state would remain as Roger Williams's greatest legacy.

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References and Further Reading

- Gausted, Edwin S. *Liberty of Conscience: Roger Williams in America*. Valley Forge, PA: Judson Press, 1999.
- Miller, Perry. *Roger Williams: His Contribution to the American Tradition*. Indianapolis: Bobbs-Merrill, 1953.
- Morgan, Edmund S. *Roger Williams, the Church and the State*. New York: Harcourt, Brace and World, 1967.

WILSON v. LAYNE, 526 U.S. 603 (1999)

Wilson v. Layne considered whether the presence of media during the execution of a search warrant violated the petitioner's Fourth Amendment rights. Also at issue was whether the police officers had qualified immunity.

In this case, the petitioner's son was the target of a national fugitive apprehension program in which U.S. Marshals worked alongside state and local police. Marshals invited two members of the media to accompany them as part of their ride-along policy, although the warrants did not mention media presence. While executing the warrant at the petitioner's home, a confrontation ensued between police and petitioner, while the photographer took numerous pictures. When the police learned that the son was not present, they departed. The petitioner sued.

The standard for bringing third parties along in executing search warrants is whether their presence was in aid of the warrant's execution. The Fourth Amendment requires that police actions in execution

of a warrant be related to the objectives of the authorized intrusion (*Arizona v. Hicks* [1987]).

Although the Court did not dispute the respondents' argument that bringing members of the media along served a legitimate law enforcement purpose, the standard is whether the presence of third parties furthers the purpose of the search. Because there was no such purpose, the Court held that the petitioner's rights were violated.

The Court then turned to whether the police officers were immune from liability. Whether an official with qualified immunity may be held personally liable "turns on the objective reasonableness of the action assessed in light of the legal rules that were 'clearly established' at the time it was taken" (*Anderson v. Creighton* [1987]). Because there was no controlling authority on this issue and the officers reasonably relied on the Marshal's ride-along policy, the legal rules were not "clearly established" and police were therefore entitled qualified immunity.

EMILY R. FROMSON

Cases and Statutes Cited

- Anderson v. Creighton*, 483 U.S. 635, 639 (1987)
- Arizona v. Hicks*, 480 U.S. 321, 325 (1987)

See also **Privacy; Freedom of the Press The Modern Period (1917–Present); Search (General Definition)**

WILSON, WOODROW (1856–1924)

Woodrow Wilson, the twenty-eighth president of the United States, is considered by some historians as the quintessential progressive, a man who opposed big business, favored laws that would help workers, fought against government favors to special interests, and nominated Louis D. Brandeis to the Supreme Court. Yet he was also the product of his southern upbringing, a man who approved segregation in the federal government workforce, applauded the movie "Birth of a Nation," and saw patriotism as overriding free speech and the right to dissent.

There is little in Wilson's career as a university professor, college president, or governor of New Jersey that involved civil liberties. One might argue that he did show signs of liberalism during his presidency of Princeton University, as he worked to lessen the grip of sectarianism on the school. He expanded the student body to include young men from all over the country and from many different religious persuasions, although no African American would be enrolled until the 1940s. He broke the grip of Presbyterianism on the faculty, drew in men of all Protestant

denominations, and appointed the first Catholic and the first Jew to the Princeton faculty. He tried, but failed, to dislodge the exclusive eating clubs and replace them with a more democratic quadrangle system.

During the 1912 campaign, Theodore Roosevelt endorsed women's suffrage, and Wilson, as did most southerners, opposed it. Wilson, two of whose daughters were suffragists, eventually came around to the idea, and provided critical support in getting the Nineteenth Amendment through both houses of Congress. Once inaugurated as president in March 1913, Wilson filled his cabinet with southerners who shared assumptions about the inferiority of the black race. Led by Postmaster Albert Burleson, they introduced segregation into their departments. Although Wilson did not initiate these discriminatory policies, he did not attempt to stop them, believing that the daily management of government agencies belonged in the hands of department heads. Strong protests by the National Association for the Advancement of Colored People succeeded in halting the effort, but the number and status of African Americans employed in the federal service fell drastically during Wilson's eight years.

Although Wilson tried to avoid American involvement in World War I, eventually the United States entered the war on the side of the Allies, and once the nation entered hostilities, the government launched the largest federal assault on civil liberties in the country's history. Although some Wilson biographers have placed the blame for these attacks on heavy-handed men like Burleson and Attorney General A. Mitchell Palmer, Wilson did nothing to stop them. In fact, his own attack on Republicans in the 1918 congressional election—an attack that backfired when he implied that Republicans had not been loyal supporters of the war—is a better reflection of a man who could not accept criticism of his policies, and often took the approach that if a person or organization did not support him and his policies, then they were enemies.

Ironically, the war to make the world safe for democracy triggered the worst invasion of civil liberties at home in the nation's history. Not all Americans supported entry into the war, and in fairness, initial calls to crack down on dissidents came from Theodore Roosevelt and conservatives in the Republican Party. But Wilson, most of his cabinet, and congressional Democrats quickly endorsed a legislative program designed to stifle dissent and punish leftist thinkers, especially if they were not yet full citizens and could be deported.

The government obviously had to protect itself from subversion, but many of the laws seemed aimed

as much at suppressing radical criticism of administration policy as at ferreting out spies. In the Selective Service Act, Congress authorized the jailing of people who obstructed the draft. The Espionage Act of 1917, aimed primarily against treason, also punished anyone making or conveying false reports for the benefit of the enemy, seeking to cause disobedience in the armed services, or obstructing recruitment or enlistment in the armed forces. The postmaster general received power in the Trading with the Enemy Act of 1917 to ban foreign language and other publications from the mails. The 1918 Sedition Act, passed at the behest of Western senators and modeled after Montana's statute to curb the Industrial Workers of the World, struck out at a variety of "undesirable" activities, and forbade "uttering, printing, writing, or publishing any disloyal, profane, scurrilous, or abusive language." Finally, the Alien Act of 1918 permitted the deportation of alien anarchists or those who believed in the use of force to overthrow the government.

It is certainly understandable that a government should wish to protect itself from active subversion, especially during wartime. But the evidence indicates that Wilson, preoccupied first with mobilization and then with peace making, gave little thought to the problem, and deferred to some of his conservative advisers, especially Postmaster General Albert Burleson, a reactionary who considered any criticism of the government unpatriotic. There is a suspicion that in coming down so hard on socialist newspapers, such as the *Milwaukee Leader*, Burleson intended to send a message to the larger, more middle-class journals that they should not get too far out of line.

The federal laws and similar state statutes caught radicals, pacifists, and other dissenters in an extensive web. The total number of indictments ran into the thousands; the attorney general reported 877 convictions out of 1,956 cases commenced in 1919 and 1920. Although the laws had been challenged early, the government had shown no desire to push for a quick decision on their constitutionality. As a result, some half-dozen cases did not reach the Supreme Court until the spring of 1919, after the end of hostilities.

These cases marked the beginning of a civil liberties tradition in American constitutional law. There had been no such tradition prior to the war, because neither the states nor the federal government had seriously restricted First Amendment rights. These cases also began the process of developing criteria for permissible limitations on speech; the dissents of Holmes and Brandeis initiated the counterprocess by which the courts ultimately became the defenders of civil liberties against the executive and legislative branches.

The speech and press cases of 1919–1920 foreshadowed the indifference to civil liberties that marked so much of the 1920s. With the peace, for example, thirty-two states enacted new sedition and criminal syndicalism laws to control supposedly dangerous ideas. But the worst outrage came with the Palmer raids, which triggered the great “red scare.”

The awkward transition from war to peace unsettled the American people. The Wilson administration, obsessed with foreign affairs after the 1918 armistice, made no effort to effect a smooth demobilization. The War Department, for example, canceled hundreds of contracts, throwing thousands of men out of work at the same time that the armed forces were discharging some 4,000 men a day from uniform. Industry used the end of the war as an excuse to cut wages or negate union recognition. As a result, some four million workers went out on strike in 1919, and by the end of the year, the public began to hear—and believe—rumors that radicals had instigated the strikes. Aside from economic strife, the summer of 1919 also witnessed bloody racial riots in both the North and South.

Attorney General A. Mitchell Palmer, a Pennsylvania Quaker and formerly a Progressive congressman, saw radical plots everywhere. He urged Congress to enact peacetime sedition laws, and he decided to deport radical aliens. In June 1919, Palmer installed the young J. Edgar Hoover as head of the new General Intelligence Division of the Bureau of Investigation, with orders to collect files on radicals. On November 7, 1919, agents began raiding the headquarters of suspected subversive groups, arresting people without warrants and paying little attention to basic procedural rights. In the largest raid, on January 2, 1920, agents arrested between four and six thousand people, and detained half of them in crowded jails for long periods of time. Later that month, the New York Assembly ousted five duly elected members because they were socialists.

Fortunately for the country, the red scare receded almost as quickly as it had come. Palmer overplayed his hand, and after the widespread disruptions he had predicted for May Day 1920 failed to materialize, his credibility—and his hopes for the Democratic presidential nomination—vanished. Acting Secretary of Labor Louis F. Post managed to slow down the deportations, while prominent conservatives such as Charles Evans Hughes, as well as church and civic leaders, spoke out against the high-handed abuse of civil liberties.

How much, if anything, Wilson knew about this is hard to say. Preoccupied with trying to get the Treaty of Versailles ratified, Wilson had gone on a long campaign tour to win over the American people,

and had suffered a serious stroke in September 1919. Incapacitated for several months, day-to-day decisions were either left in the hands of the cabinet or made by Wilson’s wife and his physician, Admiral Cary Grayson. But given his indifference to civil liberties during the war, and his hostility to criticism at all times, it is hard to say whether Wilson would have attempted to curb Palmer’s excesses. However laudable his vision of a world order may have been, Wilson’s record protecting the civil liberties of American citizens is atrocious.

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References and Further Reading

- Clements, Kendrick A. *The Presidency of Woodrow Wilson*. Lawrence: University Press of Kansas, 1992.
 Cooper, John Milton, Jr. *The Warrior and the Priest: Woodrow Wilson and Theodore Roosevelt*. Cambridge, MA: Harvard University Press, 1983.
 Link, Arthur S. *Woodrow Wilson: Revolution, War and Peace*. Arlington Heights, IL: AMH Publishing, 1979.

WIRETAPPING LAWS

For more than half a century, federal and state governments have struggled to protect communications privacy against private wiretappers and snoops, and to spell out when law enforcement officials should be permitted to wiretap and eavesdrop. In 1968, with these two goals in mind, Congress enacted Title III of the Omnibus Crime Control and Safe Streets Act (18 U.S.C. Section 2510 et seq.). States were authorized to pass similar statutes, and most, but not all, have done so. The statute has been amended and supplemented several times to reflect developments in communications technology, politics and national security. For example, the Electronic Communications Privacy Act of 1986 added “electronic communications” to the statute. Inevitably, however, technological advances quickly make aspects of the law outmoded.

Exceptions to General Ban

Title III and the 1986 Act make it a felony to intercept (that is, to electronically overhear, record, or download) a “wire communication” (that is, a phone conversation), an “oral communication” (that is, a face-to-face conversation), or an “electronic communication” (e-mail, use of the Internet, etc.). It is also a crime to knowingly use or disclose the contents of an unlawfully intercepted communication. Moreover,

anyone who violates the statute can also be sued for monetary damages by the victim.

There are, however, several significant exceptions to this general ban.

Law enforcement officials are permitted to intercept a communication on their own authority, so long as a participant consents in advance (18 U.S.C. Section 2511(2)(c)). Thus, undercover officers, and informants and crime victims acting with the police, can secretly tape record their telephone and face-to-face conversations with the targets of an investigation. Most state laws provide the same. Section 2511(2)(d) permits a private person to do the same, on her own, so long as her purpose is not to commit a crime or a tort. Some state laws provide likewise; others forbid non-law enforcement interceptions unless all participants consent.

Although the statutes are silent on the matter, most courts have agreed that a parent who is concerned about a child's welfare has the legal right to secretly monitor a child's phone calls and e-mails. A few courts have even held that the statute does not even apply where one spouse secretly records the other spouse's phone calls, although most courts reject this reading of the law.

The law recognizes various exceptions based on the technology used to transmit communications. These exceptions sometimes create strange inconsistencies. For example, it is unlawful for an employer to secretly monitor an employee's workplace phone calls unless the employer has a specific business justification for doing so. But the same employer, without any justification or excuse, may lawfully monitor all e-mails that employees send or receive on the company's system.

Law Enforcement Interception Orders

In *Katz v. United States* (1967), the Supreme Court held that wiretapping is a search and seizure subject to the Fourth Amendment, and in *Berger v. New York* (1968), it held that a judge could issue a wiretap warrant (known as an "interception order") only if the application for the order, and the order itself, complied with the Fourth Amendment requirements for a search warrant. Nevertheless, when Congress was debating whether to enact Title III, the issue was hotly debated. To forbid law enforcement wiretapping and eavesdropping altogether would virtually give immunity to some criminals. On the other hand, the surreptitious interception of voice, wire, and electronic communications is an extraordinary intrusion into privacy; if abused, it creates enormous potential

for political espionage, blackmail, and threats to the freedom of expression.

Title III represents an attempt to strike the right balance between these often conflicting interests. The statute permits law enforcement officials to seek and a judge to issue an order authorizing interception of a suspect's communications for up to thirty days; such orders may be renewed. But an order may be obtained only if the application and order comply with the constitutional requirements specified in *Berger*. Moreover, Congress also added several additional provisions intended to limit such surveillance and protect the privacy of those targeted.

For example, unlike a search warrant, which may be obtained to investigate any crime, an interception order may be obtained only to investigate certain serious felonies.

Next, before a federal agent may apply to a judge for an interception order, the application must first be approved by a high-level attorney in the Department of Justice. Similarly, a state application must be made or approved by a high state official (for example, the state attorney general or a district attorney) before it can be submitted to a judge.

An interception application, like a search warrant must show probable cause that evidence of a particular crime or type of crime will be found. An interception application, however, must also demonstrate that "ordinary investigative procedures have been tried and failed, or would be unlikely to succeed, or would be too dangerous." Thus, an interception order cannot be a first or routine step in an investigation.

The order must direct the agents to "minimize the interception of communications not otherwise subject to interception," that is, to avoid, if possible, hearing and recording conversations that do not relate to the crimes being investigated.

Once a search warrant has been executed, the list of what was seized becomes a public record. By contrast, intercepted communications may be disclosed only in court or for legitimate law enforcement purposes.

Other Statutes

The Foreign Intelligence Surveillance Act (FISA) (50 U.S.C. Section 1801 et seq.) regulates (among other things) the use of electronic surveillance to gather "foreign intelligence information." Although evidence obtained by FISA surveillance may be used in court, this has happened only rarely.

Title III (18 U.S.C. Section 2701 et seq.) also protects electronically stored e-mails and the like from unauthorized access, although such protection

is far less rigorous than that covering the actual interception of communications.

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References and Further Reading

- Alberti, Anthony. *Wiretaps: A Complete Guide for the Law and Criminal Justice Professional*. San Francisco: Austin and Winfield, 1999.
- Fishman, Clifford S., and Anne McKenna. *Wiretapping and Eavesdropping*. 2nd ed. St. Paul, MN: West Group, 1995, and 2005 supplement.
- Lapidus, Edith J. *Eavesdropping on Trial*. Rochelle Park, NJ: Hayden Book Company, 1974.
- Lyon, David. *Surveillance After September 11*. Malden, MA: Polity Press in association with Blackwell Publishers, 2003.
- O'Harrow, Robert, Jr. *No Place to Hide*. New York: Free Press, 2005.
- Parenti, Christian. *The Soft Cage: Surveillance in America from Slavery to the War on Terror*. New York: Basic Books, 2003.
- Stevens, Gina, and Charles Doyle. *Privacy: Wiretapping and Electronic Surveillance*. Huntington, NY: Nova Science, 2002.

Cases and Statutes Cited

- Berger v. New York*, 388 U.S. 41 (1967)
- Katz v. United States*, 389 U.S. 347 (1967)

See also *Berger v. New York*, 388 U.S. 41 (1967); **Electronic Surveillance, Technological Monitoring, and Dog Sniffs**; *Katz v. United States*, 389 U.S. 347 (1967); **Omnibus Crime Control and Safe Streets Act of 1968 (92 Stat. 3795)**; **Patriot Act**; **Privacy**

WISCONSIN v. MITCHELL, 508 U.S. 476 (1993)

Wisconsin v. Mitchell marked the first time that the Supreme Court upheld a bias crime statute. The defendant, Todd Mitchell, was a nineteen-year-old black man who directed and encouraged a number of young black men and boys to attack a fourteen-year-old white boy, Gregory Riddick. Mitchell selected Riddick solely on the basis of his race. Mitchell was convicted of aggravated battery for his role in the severe beating—a crime that carried a maximum sentence of two years under Wisconsin law. His crime also implicated the Wisconsin hate crime statute, which provided for the enhanced penalty of bias-motivated crimes. Under this statute, the potential penalty for an aggravated battery was increased by five years if the perpetrator of the assault selected his victim on the basis of the victim's race.

Mitchell challenged his conviction under the bias crime statute, claiming that the enhancement of his

prison term was a violation of his right to freedom of expression under the First Amendment. The Wisconsin Supreme Court reversed the conviction in an opinion announced the day after *R.A.V. v. City of St. Paul* (1992) was decided by the U.S. Supreme Court, and adopted much the same approach as did Justice Scalia for the majority of the Court in *R.A.V.* The Wisconsin court held that the penalty enhancement law “punishes the defendant’s biased thought ... and thus encroaches upon First Amendment rights.”

The U.S. Supreme Court upheld Mitchell’s sentence, including the enhanced portion. In defending its bias crime statute from constitutional attack, Wisconsin seized upon the precise form and content of that statute and the fact that the statute punishes discriminatory selection of a victim. This provided a key element in Wisconsin’s argument that its statute withstood the holding in *R.A.V.* Wisconsin contended that *R.A.V.* was concerned with the regulation of expression. The Wisconsin bias crime statute proscribed not expression but conduct—the conduct of intentional discriminatory selection of a victim.

The Supreme Court in *Wisconsin v. Mitchell* largely based its decision on a speech–conduct distinction. Writing for a unanimous Court, Chief Justice Rehnquist wrote that “whereas the ordinance struck down in *R.A.V.* was explicitly directed at expression (i.e., ‘speech’ or ‘messages’), the statute in this case is aimed at conduct unprotected by the First Amendment.”

Although scholars have criticized the speech–conduct distinction as deeply flawed, the distinction did form the basis of the Court’s decision in *Mitchell* to uphold the Wisconsin bias crime law. Following *Mitchell*, states have defended the constitutionality of bias crime laws by arguing that their statutes do not interfere with the expression of prejudicial ideas, and are addressed solely to the implementation of those views in conduct. States have asserted their ability to differentiate speech from conduct, and to protect the former while punishing the latter.

FREDERICK M. LAWRENCE

Cases and Statutes Cited

- R.A.V. v. City of St. Paul* (1992)

WISCONSIN v. YODER, 406 U.S. 205 (1972)

In the fall of 1968, authorities in New Glarus, Wisconsin, charged three Amish fathers—Wallace Miller, Jonas Yoder, and Adin Yutzy—with violating Wisconsin’s compulsory school attendance statute,

which required all children to attend school until they reached the age of sixteen. The district attorney alleged that the three Amish farmers had broken the law because, in keeping with their faith's traditions, they had stopped attending school once they turned fourteen.

The charges put the Amish in an awkward position. The defendants believed that they had done nothing wrong, but they were extraordinarily reluctant to resolve their disagreement with local authorities through litigation. The Amish have a long-standing aversion to "going to law," because it violates their faith's tradition of nonresistance. It was only after several months of indecision that Miller, Yoder, and Yutzy agreed to permit themselves to be represented by counsel in court.

William Ball, the attorney who defended the Amishmen, argued that application of the school attendance statute to the Amish violated their right to the free exercise of religion. To comply with the law, he claimed, the Amish would have to forsake their religious beliefs, which included a proscription against school attendance beyond the age of fourteen. Ball asserted that the First Amendment clearly protected the Amish from being forced to sacrifice their religious freedom. An argument focusing on parental rights formed the second prong of Ball's defense strategy. He claimed that the state's action was unconstitutional because it violated the right of the Amish defendants to direct the upbringing of their children. Ball insisted that two U.S. Supreme Court opinions supported the claims of the Amish in the Wisconsin school attendance case. The high court's opinion in *Sherbert v. Verner* (1963) provided strong judicial safeguards for religious liberty, and its ruling in *Pierce v. Society of Sisters* (1925) furnished stout protections for the rights of parents.

But not all judicial precedent favored Ball and his clients. Throughout the New Glarus case, the state of Wisconsin pointed out that Amish parents living in other states had made similar challenges to the constitutionality of school attendance laws, and they had lost each time. (In the most recent of these cases, resolved just two years before the Wisconsin case went to trial, the Kansas Supreme Court had ruled against an Amish father.) The state also referred to language in several U.S. Supreme Court opinions that explicitly acknowledged its right to enforce education regulations, including statutes mandating school attendance. Some of these passages appeared in the same opinions that Defense Attorney Ball cited to bolster his arguments in favor of the Amish.

Ball attempted to refute the state's claims by mounting an exhaustive defense. He brought in expert witnesses from as far away as Philadelphia to testify

on behalf of his clients. Their ranks included John Hostetler, the nation's leading scholarly authority on the Amish, and an expert on public school regulation from the University of Chicago. Although the state's case was far less impressive (Hostetler's testimony alone lasted longer), a judge found the three Amish men guilty of a misdemeanor and ordered them to pay a token fine of five dollars. But Ball and the New Glarus Amish had better luck when they appealed *Wisconsin v. Yoder* to the Wisconsin Supreme Court in 1971. With only one justice dissenting, it reversed the convictions of Miller, Yoder, and Yutzy.

To the consternation of the state legislature, which passed a resolution asking Attorney General Robert Warren to drop the case, the State of Wisconsin appealed this decision to the U.S. Supreme Court. Although his critics suggested otherwise, Warren was not bent on punishing Miller, Yoder, and Yutzy. He simply feared that an accommodation of the Amish might open the floodgates to a torrent of similar claims from members of other religious or secular groups. If that happened, he worried, the state's ability to regulate education—and thus ensure that all children received adequate schooling—might be swept away.

The U.S. Supreme Court handed down its ruling in *Wisconsin v. Yoder* on May 15, 1972. Citing the protections of religious liberty conferred by the First and Fourteenth Amendments, the justices affirmed the lower court's ruling in favor of Miller, Yoder, and Yutzy. The application of the compulsory attendance law to the New Glarus Amish was unconstitutional, Chief Justice Warren Burger wrote in the Court's majority opinion, in part because the record of the case amply demonstrated that its impact on their religious liberty was "not only severe, but inescapable, for the Wisconsin law affirmatively compels them, under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs."

Many observers have lauded Chief Justice Burger's opinion in *Wisconsin v. Yoder* as a signal moment for religious liberty. But some critics have insisted that the U.S. Supreme Court botched the case. A legion of scholarly observers has argued that the justices plainly flouted the First Amendment's establishment clause by conferring special judicial protections on members of a single religious faith. (It should be noted that the Supreme Court itself has not agreed with this particular line of criticism. In subsequent opinions, it generally has held that legislative or judicial accommodations of religious practices are consistent with the establishment clause.) Others have concluded that the high court, by focusing its attention on shielding the religious liberty of the Amish parents,

neglected the interests of those most affected by the outcome of the case—Amish children. And some commentators have faulted the justices for failing to recognize the importance of the state’s long-standing interest in furnishing and regulating education. It is perhaps a testament to *Yoder*’s complexity that debates over its merits have continued long after the opinion lost much of its vitality as judicial precedent. After chipping away at it for several years, the Supreme Court essentially demolished *Yoder*’s religious liberty holding in its controversial opinion in *Employment Division v. Smith* (1990). Although the justices distinguished this ruling from *Yoder* (they noted that the Amish case involved parents’ rights as well as religious liberty), *Smith* nonetheless sharply restricted protections for religious practice.

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References and Further Reading

- Kraybill, Donald. *The Riddle of Amish Culture*. Baltimore: Johns Hopkins University Press, 2001.
- Peters, Shawn Francis. *The Yoder Case: Religious Liberty, Education, and Parental Rights*. Lawrence: University Press of Kansas, 2003.
- Smith, Steven D., *Wisconsin v. Yoder and the Unprincipled Approach to Religious Freedom*, Capital University Law Review 25 (1996): 805.

Cases and Statutes Cited

- Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990)
- Pierce v. Society of Sisters*, 268 U.S. 510 (1925)
- Sherbert v. Verner*, 374 U.S. 398 (1963)

WITTERS v. WASHINGTON DEPARTMENT OF SERVICES FOR THE BLIND, 474 U.S. 481 (1986)

Public funding of religious education implicates the establishment clause of the First Amendment, but it also raises issues of religious liberty. Such funding might impair religious voluntarism by encouraging religious over nonreligious educational alternatives. It might also intrude on the conscience of taxpayers who object to supporting religious beliefs they do not share. Conversely, the denial of funding can raise competing concerns. It might discourage religious choices, or at least deny equal respect to religious decisions and thereby impair the value of religious neutrality. Influenced by these and other constitutional values, the Supreme Court sometimes has ruled that the establishment clause precludes the funding of religious education. Since the 1980s, however, it increasingly

has found such funding permissible. *Witters v. Washington Department of Services for the Blind*, decided in 1986, provides an early example of this trend. It also exemplifies, more specifically, the Court’s general approval of neutral funding programs that extend aid to religious schools or colleges only indirectly, as a result of private choice.

In preparation for a religious career as a pastor, missionary, or youth director, Larry Witters was attending a private Christian college in Spokane, Washington. Because he suffered from progressive blindness, he was eligible for special financial aid under the terms of a Washington statute designed to “assist visually handicapped persons to overcome vocational handicaps.” Noting the religious nature of his education, however, the Washington Commission for the Blind denied Witters any aid, asserting that it would be unconstitutional for the commission to use “public funds to assist an individual in the pursuit of a career or degree in theology or related areas.” Witters sued for relief, but the Washington Supreme Court ruled against him, citing the establishment clause.

In a unanimous decision, the U.S. Supreme Court reversed. Writing for the Court, Justice Thurgood Marshall emphasized that the program of funding was neutral and nondiscriminatory. It did not target religion for special advantage. Instead, the aid was broadly available to students pursuing various careers. In addition, the aid was not in the form of “direct subsidies” to religious institutions. Instead, it was paid to the disabled students themselves, who transmitted it to the colleges of their choice. Thus, any aid that flowed to religious institutions did so “only as a result of the genuinely independent and private choices of aid recipients,” thereby avoiding any implication that the state itself was sponsoring or promoting religion.

Justice Marshall also noted that “no more than a minuscule amount of the aid awarded” under this program flowed to religious education. This factor was not critical to the *Witters* decision, however, a point that the Supreme Court reiterated in its 2002 decision in *Zelman v. Simmons-Harris*. In *Zelman*, the Court approved a neutrally drawn school vouchers program, even though most of the voucher parents were choosing religious schools. The Court cited *Witters* as a relevant precedent, suggesting that *Witters* now stands for the broad proposition that states generally are free, if they wish, to include religious education in neutrally drawn programs of indirect funding.

At the same time, the Supreme Court has made it clear in another recent decision, *Locke v. Davey* (2004), that the constitutional doctrine of *Witters* and *Zelman* is permissive, not mandatory. According

to *Locke*, states—as a matter of state law—can maintain a stronger separation of church and state than that required by the establishment clause, and, in so doing, they have some discretion to exclude religious beneficiaries from funding programs even when the establishment clause would permit them to be included.

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References and Further Reading

Conkle, Daniel O. *Constitutional Law: The Religion Clauses*. New York: Foundation Press, 2003.
Nowak, John E., and Ronald D. Rotunda. *Constitutional Law*. 7th ed. St. Paul, MN: Thomson/West, 2004.

Cases and Statutes Cited

Locke v. Davey, 540 U.S. 712 (2004)
Zelman v. Simmons-Harris, 536 U.S. 639 (2002)

See also **Establishment Clause Doctrine: Supreme Court Jurisprudence; Establishment of Religion and Free Exercise Clauses**

WOLF v. COLORADO, 338 U.S. 25 (1949)

Dr. Wolf stood trial for conspiring with Mildred Cairo to perform an abortion. The prosecution sought to introduce Wolf's appointment book to show that Wolf and Cairo had been in contact. Wolf claimed that it had been seized in violation of Colorado law. The book was introduced over Wolf's objection and he was convicted.

Before the U.S. Supreme Court, Wolf's arguments relied on the 1914 case, *Weeks v. United States*. Here the Court created the exclusionary rule. Under this rule, illegally seized evidence could not be used in federal court. Wolf argued that the Fourteenth Amendment demanded that the rule be applied in state court as well.

In the Court's opinion, Justice Frankfurter wrote that the Fourth Amendment right to be free from illegal searches and seizures is "basic to a free society." Further, the states had an obligation, under the Fourteenth Amendment, to sanction the police when the police violated a citizen's rights. Frankfurter acknowledged that the exclusionary rule was one way to sanction the police for illegal searches and seizures, but he argued that this rule was not the only means to control such illegal activity and he declined to impose this approach on the states. The exclusionary rule was simply a judge-made remedy, not part of the Fourth Amendment. Further, he was persuaded by the fact that forty-seven states had considered the exclusionary rule and thirty had rejected it.

In 1961, *Wolf v. Colorado* was reversed by *Mapp v. Ohio*. *Mapp* applied the exclusionary rule to state courts.

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References and Further Reading

Friendly, Fred W., and Martha J.H. Elliott. *The Constitution—That Delicate Balance*. New York: McGraw-Hill, 1984.
Hall, Kermit L., ed. *The Oxford Companion to the Supreme Court of the United States*. New York: Oxford University Press, 1992.
Urofsky, Melvin I. *A March of Liberty—A Constitutional History of the United States*. New York: Alfred A. Knopf, 1988.

Cases and Statutes Cited

Mapp v. Ohio, 367 U.S. 643 (1961)
Weeks v. United States, 232 U.S. 383 (1914)

See also **Bill of Rights: Structure; Due Process; Exclusionary Rule; Incorporation Doctrine**

WOLMAN v. WALTER, 433 U.S. 229 (1977)

This case involved the perennial battle between those who believe the government may accommodate religion in a neutral way and those who fear that such accommodation opens the way for government establishment of religion.

In the 1970s, Ohio intended to provide non-public school pupils with (1) secular textbooks; (2) standardized testing, speech, hearing, psychological, therapeutic, career guidance, and remedial services; (3) instructional materials (such as maps) "incapable of diversion to religious use"; and (4) drivers and vehicles for secular field trips. Various anti-aid groups like the American Civil Liberties Union and Americans United for Separation of Church and State appealed to the Supreme Court, which pondered whether government could avoid endorsing religion while not discriminating against those who practice religion. The attempt to carve out neutral support for religious students ran afoul of "absolute separationists" who saw almost any form of aid to sectarian schools as eroding in the presumed absolute wall of separation between church and state.

Chief Justice Warren Burger and Justices Harry Blackmun, Lewis Powell, William Rehnquist, Potter Stewart, and Byron White concurred that state provision of secular books (provision 1) did not violate the First Amendment establishment clause. With William Brennan, Thurgood Marshall, and John Paul Stevens

dissenting, the Court thus upheld *Board of Education v. Allen* (1968), which allowed such provision.

As for provision 2, the plaintiffs and Court dissenters had two primary concerns: fear of government entanglement with religion, and that involved staff might seek to impose a religious influence while under state subsidy. Blackmun, writing for the majority, argued that, since non-public school personnel neither drafted nor received payment for administering state tests, there was no avenue for using tests for religious teaching, no requirement of state supervision that might give rise to excessive church-state entanglement, and thus no direct aid to religion. Eight justices also held that speech, hearing, and psychological diagnostic services did not violate the Establishment Clause. All justices except Brennan and Marshall held provision of therapeutic, guidance (excluding course selection), and remedial services permissible. Referring to *Board v. Allen*, *Roemer v. Maryland* (1976), and *Meek v. Pittenger* (1975), Blackmun noted the constitutionality of state provision of church-related schools with secular, neutral, or nonideological services, facilities, and materials.

This judgment contradicted that part of *Meek*, wherein state authorization of remedial and diagnostic services was ruled unconstitutional because teachers might fail to separate religious instruction from secular obligations, and state efforts to guard against non-neutral aid might result in excessive church/state entanglement. In *Wolman*, the Court distinguished between diagnostic services, with little educational content and minimal student contact, and teaching and counseling roles. The Court concluded that diagnostic staff working on private campuses would have little opportunity to proselytize. To ensure religious neutrality, remedial/diagnostic services would be provided off campus.

As for provisions 3 and 4, neutral accommodation of religion halted when it came to instructional materials and equipment. The Court ruled, with Burger, Rehnquist, and White dissenting, that the state could not provide instructional materials, since it was presumably impossible to separate secular from sectarian educational functions in church-related schools and since maps and tape recorders could not be isolated to student possession. Nor could the state fund field trips since teachers might be tempted to foster religion during trips. State supervision to guarantee religious neutrality would create excessive church/state entanglement—thus field trips failed constitutional muster.

The diverse opinions in *Wolman* revealed the divided character of the Court's establishment clause rulings since World War II. Strict separationists saw most of the Ohio statute unconstitutional.

Accommodationists Burger, Rehnquist, and White viewed none of the statute unconstitutional. They agreed, in *Committee for Public Education & Religious Liberty v. Nyquist* (1973), that "the Establishment Clause does not forbid governments ... to enact a program of general welfare under which benefits are distributed to private individuals, even though many of those individuals may elect to use those benefits in ways that 'aid' religious instruction."

The Court returned to neutral (nonendorsement) accommodation in recent cases, overruling portions of *Wolman* precluding aid. The Court ruled that the following did not violate the establishment cause: (1) tax breaks for church-related school tuition costs (*Mueller v. Allen* [1983]); (2) vocational scholarships including aid for private school students majoring in pastoral studies (*Witters v. Washington* [1986]); (3) state provision of sign language interpreters for religious school students (*Zobrest v. Catalina Foothills School District* [1993]); (4) government loans of "non-ideological" educational material and equipment to sectarian schools (*Mitchell v. Helms* [2000]); and (5) state vouchers subsidizing parents choosing private/religious schools for their children (*Zelman v. Simmons-Harris* [2002]).

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References and Further Reading

- Agostini v. Felton*, 521 U.S. 203 (1997).
- Alley, Robert. *The Constitution and Religion: Leading Supreme Court Cases on Church and State*. Buffalo, NY: Prometheus Books, 1999.
- Levy, Leonard. *The Establishment Clause*. New York: Macmillan, 1986.
- McConnell, Michael, John H. Harvey, and Thomas C. Berg. *Religion and the Constitution*. New York: Aspen Publishers, 2002.

Cases and Statutes Cited

- Board of Education v. Allen*, 392 U.S. 236 (1968)
- Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973)
- Meek v. Pittenger*, 421 U.S. 349 (1975)
- Mitchell v. Helms*, 530 U.S. 793 (2000)
- Mueller v. Allen*, 463 U.S. 388 (1983)
- Roemer v. Maryland Board of Public Works*, 426 U.S. 736 (1976)
- Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986)
- Zelman v. Simmons-Harris*, 536 U.S. 639 (2002)
- Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993)

See also Accommodation of Religion; Aid to Religion; American Civil Liberties Union; Americans United for Separation of Church and State; Burger, Warren E.;

Catholics and Religious Liberty; Establishment Clause (I): History, Background, Framing; First Amendment and PACs; Marshall, Thurgood; Powell, Lewis Franklin, Jr.; Rehnquist, William H.; Stevens, John Paul; Stewart, Potter; White, Byron Raymond

WONG SUN v. UNITED STATES, 371 U.S. 471 (1963)

James Toy and Wong Sun were arrested for the fraudulent and knowing transportation and concealment of heroine. Both were later convicted based on (1) statements made by Toy in his bedroom at the time of arrest; (2) heroin seized by agents from Johnny Yee; and (3) Toy and Sun's pretrial unsigned confessions. The court of appeals affirmed the convictions, although it found that the arrests of Toy and Sun were illegal because there was neither probable cause nor reasonable grounds for detention.

The U.S. Supreme Court reversed. The Court, while agreeing that Toy's arrest was illegal, found that statements made by Toy after his arrest were inadmissible against him including statements that led to the finding of heroin on Johnny Yee. Under the Court's analysis, the evidence was an "exploitation" of the original unlawful arrest. The Court went on to conclude that the unsigned confessions, although admissible at trial, were not enough to convict Toy because they could not be independently corroborated, and statements implicating Toy in Sun's confession were also inadmissible since they were not in furtherance of a conspiracy.

The Court found that although Sun's arrest was also unlawful, his unsigned confession was admissible at trial because while he may never have confessed but for the unlawful arrest any link between the arrest and the confession had been broken due to the fact that it was made voluntarily, after release from arrest and with Sun knowing of his rights to counsel and to remain silent.

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References and Further Reading

Israel, Jerold H., Yale Kamisar, and Wayne R. LaFare. *Criminal Procedure and the Constitution*. St. Paul, MN: West, 2005.

Taslitz, Andrew E., and Margaret L. Paris. *Constitutional Criminal Procedure*. Los Angeles: Foundation Press, 2003.

See also **Exclusionary Rule; Fruit of the Poisonous Tree**

WORLD WAR I, CIVIL LIBERTIES IN

Woodrow Wilson, like Thomas Jefferson over a century earlier, had hoped to ignore foreign affairs and concentrate on domestic reform. But Europe went to war in August 1914, and although the United States tried to avoid involvement, the country finally declared war on Germany in April 1917. The president therefore had to deal with war-related problems of enormous magnitude. Some of the constitutional problems raised during the Civil War appeared again during World War I, but in a far more extensive and worrisome manner, and the Wilson administration's record constitutes the greatest infringement on civil liberties up to that time.

The Draft Cases

Wilson had implicitly assumed that the decision to go to war belonged to the chief executive as commander-in-chief; once the nation entered the war, however, he explicitly assumed that he would receive an unusual degree of deference from Congress not only in managing the war but also in the proposals he would send to the legislature for enactment. In his war message, he told Congress that he would send them bills for the raising of and support of a larger army and navy and for the mobilization of the country's economic resources. Wilson hoped "that it will be your pleasure to deal with them as having been framed after very careful thought by the branch of Government upon which the responsibility of conducting the war and safeguarding the nation will most directly fall." The administration then began sending one sweeping bill after another to Congress, including an espionage measure allowing for large-scale government censorship of the press, the creation of a food administration, and a draft of young men for the army.

Despite their resentment at Wilson's high-handedness, members of Congress recognized that conscription would be necessary, and on May 17, 1917, Congress enacted Wilson's draft law, which opponents of the war immediately challenged. Lower courts expedited the various draft cases; men could not be allowed to die should the law be unconstitutional, nor could the government's mobilization be derailed if it were valid. Six suits, grouped together as the *Selective Draft Law Cases* (1918) came before the Court for argument in December 1917. All involved convictions for obstructing or resisting conscription.

Harris F. Taylor, the chief counsel for the defendants, berated Congress for expanding the executive

power. Wilson had already become a political dictator, Taylor charged, and his decision to commit American troops abroad—a power nowhere found in the Constitution—had plunged the country into a military dictatorship as well. Taylor claimed that the militia clause (Article I, Section 8) limited their use “to execute the Laws of the Union, suppress Insurrections and repel Invasions.” Militia troops could not be used, therefore, to prosecute foreign conflicts.

The Court handed down its decision the first week of January 1918; in almost summary fashion, it unanimously dismissed all the arguments raised against the law. Chief Justice White noted Congress’s explicit powers in Article I to “provide for the common Defence,” “to raise and support Armies,” “to provide and maintain a Navy,” and “to declare War.” “As the mind cannot conceive an army without the men to compose it,” White asserted, “on the face of the Constitution the objection that it does not give power to provide for such men would seem too frivolous for further notice.” The Court also made short shrift of the argument that the Constitution only allowed a volunteer army and did not authorize conscription. The chief justice noted that just as the government owed certain obligations to its citizens, so the people had reciprocal duties to the state, including rendering military service, which the government could compel. Beyond that, Congress could deploy the army anywhere it deemed necessary, even overseas.

Most Americans had expected the Court to sustain the draft law. It would have been difficult, declared one journal, “to conceive how any other view could ever have been seriously argued by anyone familiar with constitutional law or the Anglo—Saxon principles of free institutions.” A writer in a respected legal journal, anticipating the impatience later shown toward free speech, charged that those who had challenged the laws belonged to “that treacherous hostile propaganda with which we now know our country has been menacingly infiltrated.” Yet even if the antidraft arguments failed to persuade a single member of the Court, they did raise at least two issues that would eventually receive more serious attention.

First, the act allowed the president to delegate nearly all the tasks involved in selecting and processing the conscripts to local draft boards. The Court had held laws involving delegation of powers constitutional ever since the question first came before it in *Field v. Clark* (1892), but none of the previous statutes had been as vague in prescribing guidance or oversight. In the various war statutes, Congress merely set out general goals and gave the president carte blanche to carry them out. At some point, the Court would have to determine how much power Congress could

delegate and how much discretion the president could exercise.

A second issue involved the generous exemption from the draft that Congress allowed ordained ministers and theology students, as well as exemption from combat granted to members of some sects that opposed war on religious grounds. The Court shrugged off a challenge that this provision violated the First Amendment because it amounted to an establishment of religion. White casually derided the unsoundness of the claim as well as a collateral argument that the limited exemptions violated the free exercise clause. In the future, the Court would wrestle with the problem of conscientious objectors in a number of cases.

Women’s Suffrage

The Nineteenth Amendment reflected the progressive faith that greater participation in the political process would ensure better government, and its passage was also a result of the war. The drive to give women the right to vote had begun much earlier, of course, and had been articulated in the manifesto of the 1848 Seneca Falls Convention. Women activists such as Susan B. Anthony, Lucretia Mott, Elizabeth Cady Stanton, and Lucy Stone had labored diligently in the cause, but although they had effected some improvements in the legal status of women, the right to vote remained beyond their grasp.

Because suffrage had always been considered a matter of state power (even the Fourteenth and Fifteenth Amendments had left the primary control of voting to the states), women began by lobbying state legislatures for the ballot. The Wyoming Territory gave women the vote in 1869, but by 1900 only four states had granted women full political equality. The movement picked up steam during the Progressive era, especially after 1912 when Alice Paul, a Quaker and social worker, returned from an apprenticeship with the militant suffragists of England. Adopting the techniques she had learned in the mother country, she led a march in Washington on the day before Wilson’s inauguration to promote the new goal of the movement—a constitutional amendment. When unruly opponents broke up the parade, the suffragists suddenly had the publicity they needed. By 1916, the Republican Party had endorsed the amendment, and eleven states had given women the franchise.

Wilson, who had extremely traditional views about women, opposed giving them the vote. He refused to endorse the proposed amendment, insisting that

states should control the suffrage. But the president found himself in a rapidly shrinking minority. Under Alice Paul's leadership, the new Women's Party regularly picketed the White House, provoked arrests, and went on well—publicized hunger strikes in prison. When the United States entered the war, allegedly to save democracy, political wisdom dictated that one could not send Americans to fight and die for an ideal overseas while denying it to half the population at home. Wilson finally capitulated, and he went before Congress on September 30, 1918, to recommend a constitutional amendment. Congress had turned down similar proposals ever since Reconstruction, and the Senate now rejected the amendment again, once in 1918 and twice in 1919. With Wilson's backing, however, Congress finally approved the Nineteenth Amendment on June 4, 1919, and Tennessee became the thirty-sixth state to ratify on August 18, 1920, in time for women to vote in that fall's presidential election.

The Nineteenth Amendment doubled the number of eligible voters, but whether it had any qualitative effect on American politics is doubtful. Some reformers believed that the moral purity of women would lead to some sort of cleansing process, but nearly all studies show that women voted just about the same as men of comparable class and sector. In all, the presence of women at the polls neither destroyed family life nor purified the political process, but it did make American government more representative and took women one large step down the road to the elusive goal of equality.

Free Speech in Wartime

Ironically, the war to make the world safe for democracy triggered the worst invasion of civil liberties at home in the nation's history. The government obviously had to protect itself from subversion, but many of the laws seemed aimed as much at suppressing radical criticism of administration policy as at ferreting out spies. In the Selective Service Act, Congress authorized the jailing of people who obstructed the draft. The Espionage Act of 1917, aimed primarily against treason, also punished anyone making or conveying false reports for the benefit of the enemy, seeking to cause disobedience in the armed services, or obstructing recruitment or enlistment in the armed forces. The postmaster general received power in the Trading with the Enemy Act of 1917 to ban foreign language and other publications from the mails. The 1918 Sedition Act, passed at the behest of western senators and modeled after Montana's statute to

curb the Industrial Workers of the World, struck out at a variety of "undesirable" activities, and forbade "uttering, printing, writing, or publishing any disloyal, profane, scurrilous, or abusive language." Finally, the Alien Act of 1918 permitted the deportation of alien anarchists or those who believed in the use of force to overthrow the government.

It is certainly understandable that a government should wish to protect itself from active subversion, especially during wartime. But the evidence indicates that Wilson, preoccupied first with mobilization and then with peace making, gave little thought to the problem, and deferred to some of his conservative advisers, especially Postmaster General Albert Burleson, a reactionary who considered any criticism of the government unpatriotic. There is a suspicion that in coming down so hard on socialist newspapers, such as the *Milwaukee Leader*, Burleson intended to send a message to the larger, more middle-class journals that they should not get too far out of line.

The federal laws and similar state statutes caught radicals, pacifists, and other dissenters in an extensive web. The total number of indictments ran into the thousands; the attorney general reported 877 convictions out of 1,956 cases commenced in 1919 and 1920. Although the laws had been challenged early, the government had shown no desire to push for a quick decision on their constitutionality. As a result, some half-dozen cases did not reach the Supreme Court until the spring of 1919, after the end of hostilities.

These cases marked the beginning of a civil liberties tradition in American constitutional law. There had been no such tradition prior to the war, because neither the states nor the federal government had seriously restricted First Amendment rights. These cases also began the process of developing criteria for permissible limitations on speech; the dissents of Holmes and Brandeis initiated the counter-process by which the courts ultimately became the defenders of civil liberties against the executive and legislative branches.

The Speech Tradition before *Schenck*

Although modern speech jurisprudence begins with the Holmes opinions in *Schenck v. United States* (1919) and *Abrams v. United States* (1919), a jurisprudence of free speech did exist prior to 1919. Various writers and groups tried to put forward theories that would be speech-protective, but they had little success. One reason may have been their identity. The International Workers of the World, the feared and radical "Wobblies," put forward an extensive

rationale for speech completely free from any governmental regulation. Today we would find that rationale not very different from that put forward by contemporary jurists; before World War I only fellow radicals took the IWW seriously.

The scholar David Rabban has also identified what he terms a “lost tradition of libertarian radicalism,” which defended as a primary value individual autonomy against the power of church and state. This tradition reaches back before the Civil War in various movements, including abolitionism, labor reform, and women’s rights. With the arrival of the Comstock Acts in 1873 and 1876 to censor materials moving through the mails, the libertarian radicals organized in such groups as the National Defense Association (1878) and the Free Speech League (1902), the latter actively involved in defending those whose speech had been restricted, usually radicals such as Emma Goldman and Margaret Sanger. The leader of the Free Speech League, Theodore Schroeder, worked out a philosophy of free speech premised on the belief that everyone had a right to say whatever they wished, and that government had no business acting as a censor. Schroeder rejected earlier theories of speech and press that would allow governmental interference should the speech have a “bad tendency,” or which would allow publication but then provide punishment.

Despite the best efforts of the Free Speech League as well as writers like Schroeder and Ernst Freund, the overwhelming weight of judicial opinion before the war, in both federal and state jurisdictions, did little to recognize the notion that the First Amendment meant speech should not be curtailed. Speech, or at least the expression of unpopular or strange views, received little sympathy from the public at large or the men who sat on the bench.

Most judges relied on Sir William Blackstone, who in his *Commentaries* argued that the right of free speech precluded prior restraint (that is, the government could not stop a person from speaking or publishing ideas), but that the law could punish speakers and writers if their expressions tended to harm the public welfare. In the leading Supreme Court opinion of this time, *Patterson v. Colorado* (1907), Justice Holmes closely followed Blackstone’s analysis. Thomas Patterson could hardly be described as a radical. A U.S. Senator from Colorado and a newspaper publisher, he had actively supported a referendum that provided home rule for Denver. He became outraged when the Republican legislature enlarged the state supreme court and packed it with judges who overturned the results of the referendum. His newspapers carried editorials, cartoons, and letters ridiculing the court. The state attorney general brought criminal contempt proceedings against

Patterson on behalf of the supreme court, which in turn fined him and his publishing company \$1,000 without allowing him to prove truth as a defense.

Patterson appealed to the U.S. Supreme Court, but Holmes rejected all of his arguments about the nature of free speech. The First Amendment, Holmes declared, “prevents all previous restraints upon publications,” but allows “the subsequent punishment of such as may be deemed contrary to the public welfare.” Interestingly, Holmes dismissed the notion of truth as a defense. “The preliminary freedom extends to the false as to the true; the subsequent punishment may extend as well to the true as to the false.” The Court heard only a few other First Amendment cases before the wartime convictions reached it on appeal in 1919, and all of them essentially followed Blackstone as explained by Holmes in *Patterson*.

Clear and Present Danger

In the first case, *Schenck v. United States*, the secretary of the Philadelphia Socialist Party had been indicted for urging resistance to the draft. He had sent out circulars condemning conscription as despotic and unconstitutional and calling on draftees to assert their rights and refuse induction. Under the terms of the Espionage Act, Schenck had urged unlawful behavior. But did the Constitution’s guarantee of free speech protect him? Holmes attempted to develop a standard based on the common law rule of proximate causation, and he took a fairly traditional view of speech as a limited right. One could not, he pointed out, falsely shout “Fire!” in a theater. In a famous passage, Holmes attempted to define the limits of speech:

The question in every case is whether the words used are used in such circumstances and are of such a nature to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war, many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and no Court could regard them as protected by any constitutional right.

The “clear and present danger” test became the starting point for all subsequent free speech cases, and within a week, the Court sustained two other convictions under this rule. In *Frohwerk v. United States* (1919), a German-language newspaper had run articles attacking the draft and challenging the constitutionality of the war, whereas in *Debs v. United States* (1919), Holmes accepted a jury finding that

in a militant antiwar speech, Debs had intended interference with mobilization.

The three decisions, as well as the clear and present danger test, upset defenders of free speech, especially because they had come from a man they believed to be an ardent libertarian. Legal scholars such as Zechariah Chafee, Jr., Ernst Freund, and others attacked Holmes for his insensitivity to the larger implications of free speech. "Tolerance of adverse opinion is not a matter of generosity," Freund declared, "but of political prudence." In an influential article (later expanded into a book) titled "Free Speech in the United States," Chafee insisted that the framers of the First Amendment had more in mind than simple censorship. They intended to do away with the common law of sedition and make it impossible to prosecute criticism of the government in the absence of any incitement to lawbreaking. In none of these three cases could one argue that the defendants had been attempting to incite active lawbreaking; for Chafee, Learned Hand's test in *Masses Publishing Company v. Patten* (1917) made far more sense. Hand, then a district judge, displayed considerable solicitude for free speech in his opinion and would allow all but speech that directly incited unlawful action.

Holmes, stung by this criticism, agreed to meet with Chafee. The Harvard professor convinced Holmes that free speech served broad social purposes and that the national interest would suffer more from restrictions on speech than from some alleged and vague dangers posed by unpopular thought. Moreover, through a clever, if somewhat inaccurate reading of history, Chafee convinced Holmes that his phrase "clear and present danger" had not only historical roots, but actually was very speech protective. Chafee's missionary work bore fruit at the next term, when Holmes, along with Brandeis, began reformulating the clear and present danger test.

The Beginnings of the Free Speech Tradition

In *Abrams*, the defendants had distributed pamphlets in Yiddish and English criticizing the Wilson administration for sending troops to Russia in the summer of 1918. The government had no way to prove that such leaflets actually hindered the war with Germany, but a lower court judge found that they *might* have caused revolts and strikes and thereby diminished the number of troops available to fight the Germans. Seven members of the Court, led by Justice John H. Clarke, agreed that the government had provided sufficient proof to support this charge and that the

conviction could be sustained under the *Schenck* test of clear and present danger.

Both Holmes and Brandeis disagreed, and in an eloquent dissent, Holmes limned one of the great defenses of free speech. The "silly leaflets" hardly posed a danger to society, and the fact that the ideas expressed were unpopular or even considered dangerous made no difference:

When men have realized that time has come to upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment.

Holmes's dissent in the *Abrams* case is often seen as the beginning of the Court's concern with free speech as a key right in democratic society, and it put forward the notion of democracy resting upon a free marketplace of ideas. Some ideas might be unpopular, some might be unsettling, and some might be false. But in a democracy one had to give all ideas an equal chance to be heard, in the belief that the false, the ignoble, and the useless would be crowded out by the right ideas, the ones that would facilitate progress in a democratic manner. Only if society took the guaranty of the First Amendment seriously could that happen.

Four months later the Court announced its decision in *Schaeffer v. United States* (1920). All five defendants had been connected with a German—language newspaper in Philadelphia accused of publishing unpatriotic articles critical of the Allies and favorable to the Central Powers. McKenna, for the majority, did not mention clear and present danger, but used a more permissive standard, the "bad tendency" test. Did the words *intend* a proscribed action? If so, that would be enough to sustain the conviction.

Now Brandeis led the dissent. Although he had been uncomfortable with Holmes's arguments in *Schenck*, he had not been sure what other options the Court had. Chafee's article gave him his clue, and he had gladly joined Holmes in *Abrams*. With *Schaeffer* he entered the debate and helped refine clear and present danger so that it would serve more as a protection for free speech than as a license for government repression. He set forth the utility of free speech in a democratic society: Even though it could be abused, the benefits of untrammelled discourse far outweighed any inconvenience. Above all, basic rights should not be crippled because of wartime hysteria. An intolerant majority, he declared, "swayed by passion

or fear, may be prone in the future, as it has often been in the past, to stamp as disloyal opinions with which it disagrees. Convictions such as these, besides abridging freedom of speech, threaten freedom of thought and of belief."

The last of the major Espionage Act cases came down soon after: *Pierce v. United States* (1920) involved prosecution of three Socialists for distributing a strongly antiwar pamphlet. Justice Mahlon Pitney quickly disposed of the constitutional arguments, merely citing the string of cases from *Schenck* through *Schaeffer* to sustain the conviction. But he then went to great length to disprove the allegations made in the pamphlet, especially that the war had economic causes. Such a false view, he claimed, could not help but have an adverse, even if indirect, effect on the successful prosecution of the war. (Interestingly, six months earlier Woodrow Wilson had stated: "Who does not know that the seed of war in the modern world is industrial and commercial rivalry. This was a commercial and industrial war." By the *Pierce* opinion, the president could have been prosecuted under the Espionage Act!)

Brandeis, again joined by Holmes, entered a long and thorough dissent, claiming the government had failed to prove that the publication had posed any danger to the war effort. To urge men to better their lot by creating new laws and institutions could not be labeled a criminal act "merely because the argument presented seems to those exercising judicial power to be unfair in its portrayal of existing evils, mistaken in its assumptions, unsound in reasoning, or intemperate in language." The "falsity" of one's view, according to the interpretation of free speech Brandeis and Holmes advocated, had nothing to do with one's right to promote that view.

One other excess of the Espionage Act came before the Court later that term in the *Milwaukee Leader* case. Congress had given the postmaster general the authority to close the mails to any newspaper violating the act, and Albert Burleson had revoked the second-class mailing privileges of the socialist *Milwaukee Leader*. The government charged the paper with publishing false reports with the intent to hinder American military operations, obstruct recruiting, and aid the enemy. Speaking for the majority, Justice Clarke upheld the government's action and rejected the defense claim that the First Amendment's protection of a free press had been violated. The First Amendment, Clarke declared, is not intended "to serve as a protecting screen for those who while claiming its privileges seek to destroy it."

For Brandeis, whose dissent Holmes joined, the question did not involve distinctions between war

and peace, but the basic right of a free press. Even where Congress had previously declared certain materials unmailable, only issues containing that type of material had been excluded. Here the postmaster had banned all issues, becoming in effect "the universal censor." Freedom of the press could not be limited either directly or, as in this case, indirectly by denying the mailing privilege. "In every extension of governmental function," he warned, "lurks a new danger to civil liberty."

Despite the justifiable applause with which civil libertarians had greeted Holmes's *Abrams* dissent in 1919, by the end of the 1920 term Brandeis had emerged as the Court's most powerful defender of free expression. Holmes had the gift of generalization, of the quotable phrase, but the more stolid Brandeis built the foundation of future constitutional protection of free speech with facts, logic, and, on occasion, impassioned and eloquent language as well. Such an occasion arose in *Gilbert v. Minnesota* (1920), when Holmes went along with the majority in sustaining a conviction under a state sedition law that prohibited the teaching or advocacy of certain ideas. Gilbert had made a speech questioning American democracy, declaring that "if they conscripted wealth like they have conscripted men, this war would not last over forty—eight hours." His appeal claimed that the federal sedition law had preempted the field and that his conviction under state law violated his right to free speech. Justice McKenna, for the majority, denied that the state had no power, and said it "would be a travesty" to allow Gilbert to find protection within the Constitution.

Brandeis dissented along with White, although the chief justice's only objection was his belief that the federal law preempted the field. To Brandeis, the Minnesota law posed a far greater danger to speech than did the federal law, because it applied in peacetime as well as in wartime; it banned pacifism, among other ideas, for all time. Only the federal government had the power to curtail free discussion in the national interest; moreover, he believed that the personal protections ensured in the Bill of Rights should apply to the states as well as to the federal government. "I cannot believe that the liberty guaranteed by the Fourteenth Amendment," he told his colleagues, "includes only liberty to acquire and to enjoy property." Brandeis's dissent pointed the way to the future, in which the Bill of Rights would in fact be "incorporated" through the Fourteenth Amendment so as to limit state action. The majority had not foreclosed that possibility; it had just not reached the issue. Five years later, in *Gitlow v. New York* (1925), the Court began coming around to the Brandeisian point of view.

Beginnings of the American Civil Liberties Union

The restrictions on speech and press worried many people even during the war. Newspaper publishers and editors naturally worried about any restrictions on their right to print news or to editorialize, but they did not want to be seen in any way as unpatriotic. After all, nearly all of the major English-language papers and periodicals supported the war. But who would stand up for those who opposed war, whose opinions ran against the grain? The American Union Against Militarism, one of the nation's leading pre-war pacifist organizations established a National Civil Liberties Bureau in October 1917, and its members included social workers (many of them pacifists), Protestant clergy (also mainly pacifist), and conservative lawyers, most of whom supported the war but also venerated the Constitution and were outraged by what they saw as the administration's violations of free speech and due process. Albert DeSilver, an outspoken, pro-war patriot, declared that "my law-abiding neck gets very warm under its law-abiding collar these days at the extraordinary violations of fundamental laws which are being put over." Independently wealthy, DeSilver quit his law practice and devoted his time to helping the bureau defend radicals, often putting up the war bonds he had purchased for their bail.

During the war the bureau had plenty to keep it occupied as the Wilson administration attempted to muzzle the foreign-language press, close off the mails to dissidents, and punish antiwar speech. When the bureau printed a pamphlet explaining why it defended what it called "war's heretics," the postal service seized that as well, and it took nearly a year in court to force the release of the material.

The bureau represented the defendants in nearly all of the major cases that eventually made their way to the Supreme Court. The bureau and its head, Roger Baldwin, attacked the administration policies as a violation of old-fashioned American liberties, but the fact of the matter is that defense of the First Amendment, at least as we know it today, did not exist at the time. The tradition did not permit prior restraint of speech, but did allow the full strength of the government to come down on those whose views offended the majority. Unwittingly, perhaps, the bureau helped to convince Holmes and Brandeis, and later a majority of the Court, that a free society must allow even unpopular speech. After the war Baldwin transformed the bureau into the American Civil Liberties Union (ACLU) and would head it for more than two decades. Eventually the ACLU became the

chief defender of freedom of speech, and eventually expanded its activities into other areas of civil liberties and civil rights. In the conservative years of the 1980s it would be attacked repeatedly, but also would be imitated by many other groups working in the public interest on both liberal and conservative sides.

Red Scare

The speech and press cases of 1919–1920 provide a transition from the war to the decade that followed. On the one hand, the Court upheld the powers of the government, as it had on the draft and economic regulations; on the other, the decisions foreshadowed the indifference to civil liberties that marked so much of the 1920s. With the peace, for example, thirty—two states enacted new sedition and criminal syndicalism laws to control supposedly dangerous ideas, and many of the more notorious speech cases of the decade involved prosecution of people who held ideas different from those of the majority. In New York, the infamous Lusk Committee directed raids on the headquarters of allegedly radical groups, whose only "crime" had been to expound unpopular doctrines. But the worst outrage came with the Palmer raids, which triggered the great "red scare."

The awkward transition from war to peace unsettled the American people. The Wilson administration, obsessed with foreign affairs after the 1918 armistice, made no effort to effect a smooth demobilization. The War Industries Board, for example, closed shop on January 1, 1919, and its chairman, Bernard Baruch, had to lay out his own money so his aides could travel home. The War Department canceled hundreds of contracts, throwing thousands of men out of work at the same time that the armed forces were discharging some 4,000 men a day from uniform. Industry used the end of the war as an excuse to cut wages or negate union recognition. As a result, some four million workers went out on strike in 1919, and by the end of the year, the public began to hear—and believe—rumors that radicals had instigated the strikes.

Seattle Mayor Ole Hansen denounced the general strike of 60,000 workers in his city as a Bolshevik plot. The great four—month strike in the steel mills certainly had its share of radicals among the strike leaders. On September 9, 1919, most of Boston's police force went on strike. Governor Calvin Coolidge called up the National Guard to maintain order, broke the strike, and then refused to take the men back on the force. He gained national approval when he declared, "There is no right to strike against the public safety by anybody, anywhere, any time."

Aside from economic strife, the summer of 1919 witnessed bloody racial riots in both the North and South. In July, whites invaded the black section of Longview, Texas, looking for a black man who had been accused of a liaison with a white woman. A week later reports of black attacks on white women in the nation's capital brought out white mobs who rampaged for four days. But the worst came in the Chicago riots of late July, which left 38 people dead and 537 injured. Racial tensions continued over the next few years, and in 1921 another major race riot broke out in Tulsa, Oklahoma.

Attorney General A. Mitchell Palmer, a Pennsylvania Quaker and formerly a Progressive congressman, saw radical plots everywhere. He urged Congress to enact peacetime sedition laws, and he decided to deport radical aliens. In June 1919, Palmer installed the young J. Edgar Hoover as head of the new General Intelligence Division of the Bureau of Investigation, with orders to collect files on radicals. On November 7, 1919, agents began raiding the headquarters of suspected subversive groups, arresting people without warrants and paying little attention to basic procedural rights. In the largest raid, on January 2, 1920, agents arrested between four and six thousand people, and detained half of them in crowded jails for long periods of time. Later that month, the New York Assembly ousted five duly elected members because they were socialists.

Fortunately for the country, the red scare receded almost as quickly as it had come. Palmer overplayed his hand, and after the widespread disruptions he had predicted for May Day 1920 failed to materialize, his credibility—and his hopes for the Democratic presidential nomination—vanished. Acting Secretary of Labor Louis F. Post managed to slow down the deportations, while prominent conservatives such as Charles Evans Hughes, as well as church and civic leaders, spoke out against the high-handed abuse of civil liberties. It had been in this milieu of the “scare” that the Supreme Court had decided the Espionage Act cases, but by the end of January 1920, the justices signaled their displeasure at federal abuse of constitutionally protected rights in the case of *Silverthorne Lumber Company v. United States* (1920).

Two men had been arrested after indictment by a grand jury. The Justice Department, without a warrant, then ransacked their office, removing books, papers, and other documents. Holmes, writing for the Court, branded the government's action an “outrage” and blocked any use of the illegally seized material by the government in legal proceedings. Holmes's insistence that the documents “shall not be used at all” helped expand the “exclusionary rule” that the Court had first propounded in *Weeks v. United States*

(1914). In *Weeks*, *Silverthorne*, and other cases, the Court stressed two themes: the exclusionary rule provided the only effective means of protecting Fourth Amendment rights and judicial integrity required that the courts not sanction illegal search by admitting the fruits of this illegality into evidence.

Within a short time, liberal lower court judges picked up on the Holmes statement to block deportations based on illegally seized materials and overturn arrests carried out without proper warrants. In *Colyer v. Skeffington* (1920), federal judge George W. Anderson chastised the Justice Department for its “hang—first—and—try—afterward” techniques. “A mob is a mob,” he declared, “whether made up of government officials acting under instructions from the Department of Justice or of criminals, loafers, and the vicious classes.” Unfortunately, such common sense came too late to save hundreds of aliens from being illegally deported from the United States.

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References and Further Reading

- Chafee, Zechariah, Jr. *Free Speech in the United States*. New York: Harcourt, Brace, and Howe, 1920.
Milwaukee Publishing Co. v. Burleson, 255 U.S. 407 (1921).
 Murphy, Paul L. *World War I and the Origin of Civil Liberties in the United States*. New York: Norton, 1979.
 Polemberg, Richard. *Fighting Faiths: The Abrams Case, the Supreme Court, and Free Speech*. New York: Viking, 1987.
 Preston, William, Jr. *Aliens and Dissenters: Federal Suppression of Radicals, 1903–1933*. Cambridge, MA: Harvard University Press, 1963.
 Stid, Daniel. *The President as Statesman: Woodrow Wilson and the Constitution*. Lawrence: University Press of Kansas, 1998.
 Walker, Samuel. *In Defense of American Liberties: A History of the ACLU*. New York: Oxford University Press, 1990.

Cases and Statutes Cited

- Abrams v. United States*, 250 U.S. 616 (1919)
Colyer v. Skeffington, 265 Fed. 17 (D. Mass. 1920)
Debs v. United States, 249 U.S. 211 (1919)
Field v. Clark, 143 U.S. 649 (1892)
Frohwerk v. United States, 249 U.S. 204 (1919)
Gilbert v. Minnesota, 254 U.S. 325 (1920)
Gitlow v. New York, 268 U.S. 562 (1925)
Masses Publishing Co. v. Patten, 244 Fed. 535 (S.D.N.Y. 1917)
Patterson v. Colorado, 205 U.S. 454 (1907)
Pierce v. United States, 252 U.S. 239 (1920)
Schaeffer v. United States, 251 U.S. 466 (1920)
Schenck v. United States, 249 U.S. 47 (1919)
Selective Draft Law Cases, 245 U.S. 366 (1918)
Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920)
Weeks v. United States, 232 U.S. 383 (1914)

WORLD WAR II, CIVIL LIBERTIES IN

World War II had a lasting impact on civil liberties in the United States, accelerating the development of some and retarding others. The war implicated these issues: political speech under the First Amendment; immigration, naturalization, and deportation; treason and sedition; conscientious objectors; and the race-centered questions that would soon come to be known as “civil rights.”

This entry will treat the World War II era as beginning with the German invasion of Poland, September 1939, and concluding with Winston Churchill’s “Iron Curtain” speech, March 1946, to include some of the war’s later reverberations. This entry excludes discussion of Japanese internment and civil rights issues, which are covered elsewhere.

All three branches of the federal government, as well as the states, affected civil liberties during the war. The executive branch seemed to work at cross-purposes. Attorneys General Robert H. Jackson and Frank Murphy created a civil rights division in the Department of Justice. But President Franklin D. Roosevelt aggressively supported prosecution of Trotskyites, as well as Bundists and fascists. Congress for its part enacted the draconian Smith Act of 1940, a criminal-syndicalism statute that also banned organizing and belonging to groups seeking overthrow of government by force and violence. The House of Representatives created the Dies Committee, forerunner of the House Un-American Activities Committee, which harassed the American left.

The U.S. Supreme Court was similarly ambivalent about the freedom of political expression. In *Bridges v. California* (1941), which involved the immigrant leftist labor leader Harry Bridges, the Court required an “extremely serious” danger with an “extremely high imminence” before political discourse can be suppressed by states. A companion case, *Times-Mirror Co. v. California* (1940), held that the press cognate of the First Amendment’s freedom of speech clause similarly protects published expressions of political opinion, especially those in the news media. The speech-protective holding of *Bridges* was reaffirmed after the war in *Pennekamp v. Florida* (1946).

The Supreme Court’s most salient wartime contribution to speech doctrine had a long-term restrictive effect, however. In *Chaplinsky v. New Hampshire* (1942), Justice Frank Murphy invented the “categorization” doctrine, identifying entire categories of speech—“the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words”—as lying entirely outside the protection of the First Amendment. Where the clear and present danger test construed in *Bridges* evolved in a speech-protective

direction, the new categorization approach introduced an unwelcome potential, occasionally realized later, to repress speech solely on the basis of its abstract category, not its effect on the public peace.

Yet in concurrent prosecutions of Nazis and Bundists, the Court construed federal speech-repressive statutes strictly, limiting the power of prosecutors to suppress unpatriotic, racist, and anti-Semitic speech, even when it was clearly propaganda for the enemy (*Viereck v. United States* [1943], *Hartzel v. United States* [1944]). The Court extended Chief Justice John Marshall’s stringently narrow definition of treason (along with generous procedural protections for those accused of it), and rejected expansive definitions of sedition (*Cramer v. United States* [1945], *Haupt v. United States* [1947]).

Labor organizing activities, especially picketing, emerged as a new speech issue. By compelling management to negotiate with unions, the Labor-Management Relations Act (Wagner Act) of 1935 implicitly sanctioned union actions like meetings, hand-billing, parades, and picketing. These constituted communicative activities that Justice Felix Frankfurter would soon characterize as “speech plus”: expression of ideas combined with some physical act. Such physical acts, Frankfurter insisted, could be regulated by the state even if speech could not. Frankfurter’s speech-action dichotomy contained an ominous potential to suppress political communication.

The Court struck down a crude municipal attempt to obstruct all labor organizing activity in *Hague v. CIO* (1939). This decision is the leading precedent construing and protecting the seldom-invoked First Amendment right of assembly.

In *Thornhill v. Alabama* (1940), the Court created nearly absolute First Amendment protections for nonviolent picketing in labor disputes. But it steadily receded from *Thornhill* during and after the war, as Frankfurter’s emphasis on the non-speech components of union organization prevailed over the *Thornhill* approach treated all communication, whatever its form, as protected by the First Amendment. During and after the war, the Court adopted Frankfurter’s approach in upholding state power to regulate union action. States could ban “violent conduct” (*Milk Wagon Drivers Union v. Meadowmoor Dairies* [1941]) and secondary picketing (*Carpenters’ and Joiners’ Union v. Ritter Café* [1942]). By 1955, only an echo of *Thornhill*’s expansive protection for picketing remained. Yet in that same era, the Court continued *Hague*’s protection for union organizational activities that did not include picketing in *Thomas v. Collins* (1945), holding states to a stringent *Bridges*-like clear

and present danger standard when they attempt to regulate how workers may organize.

Property-related questions impacted Americans' civil liberties during the war. The War Powers Acts of 1941 and 1942, plus the Emergency Price Control Act of 1942, gave the president unprecedented powers to regulate and control the nation's economy. In addition to permitting wartime censorship, the statutes authorized wage, price, and rent controls, rationing, and bans on trading with the enemy, to be administered by new agencies with final appeal only to a special court created ad hoc for that purpose, the Emergency Court of Appeals.

The Supreme Court found all these economic control measures permissible in *Lockerty v. Phillips* (1943), *Yakus v. United States* (1944), and *Steuart v. Bowles* (1944). The Court sustained an increase in Congress's regulatory authority under the dormant commerce power in *Southern Pacific Co. v. Arizona* (1945). (The distantly related issue of wartime censorship, pervasive though it was, did not come before the Court directly in a major controversy.) After the war, in *United States v. Causby* (1946), the Court did sustain a Fifth Amendment-based challenge to the federal government's wartime activities, finding a compensable taking where military overflights interfered with the plaintiff's egg farm. But dicta suggested that nothing in the holding would interfere with civilian aviation, which sharply restricted the scope of property rights in airspace. Those who see property claims as an integral part of civil liberties have criticized the World War II decisions, although they concede the military necessity that lay behind them.

The powers of the federal government and the president have always expanded dramatically in wartime at the expense of the states, other branches of government, and sometimes of civil liberties. Previously, however, that inflation of power was temporary, and receded after the war. World War II was different. All of American society was regimented for prosecution of total war after 1941, yet the nation managed to avoid some of the extreme incursions on civil liberties experienced in World War I.

The growth of President Franklin D. Roosevelt's wartime power amounted to what Clinton Rossiter called a "constitutional dictatorship." FDR exploited the executive agreement in unprecedented ways, and was upheld in *United States v. Belmont* (1937) and *United States v. Pink* (1942). Under his powers as commander-in-chief of the armed forces, FDR created military tribunals to try German saboteurs. In *Ex parte Quirin* (1942), the Supreme Court upheld the powers of these military adjudicative bodies, despite the threat they posed to individual liberties, including habeas corpus. This partially eclipsed the hallowed

precedent of *Ex parte Milligan* (1866), which had mandated jury trial for civilians in civil courts. The Supreme Court refused to review war crimes tribunals for German and Japanese defendants (*In re Yamashita* [1946], *Homma v. Patterson* [1946]).

The most severe impact of military power on civilian society occurred in the territory of Hawaii, where the army imposed a regime of martial law and military rule that for a time entirely displaced civilian government, including its courts. The military governor suspended the writ of habeas corpus and created a system of military provost courts that had both criminal and civil jurisdiction. The quality of justice encountered there was far inferior to that in civilian courts: the judges were laymen, evidence was admitted that would have been inadmissible in civil courts, and sentences in criminal cases were harsh. Aside from these courts, the military government imposed censorship, regulated prices and wages, imposed curfews, and regulated labor relations to the advantage of management. In *Duncan v. Kahanamoku* (1946), the Supreme Court held that trials in the provost courts were illegal. *Duncan* affirmed the primacy of civilian over military rule, warning about the evils of unconstrained military government.

The constitutional status of aliens posed civil liberties problems during the war. Beliefs or activities tolerable in a citizen became cause for deportation of an alien or a naturalized citizen. But *Schneiderman v. United States* (1943) rebuffed the efforts of the federal government to denaturalize and deport a Russian-born American Communist whose only offense was party membership. For a few years afterwards naturalized citizens were immune from the excesses of the World War I era. That changed with the onset of the Cold War, however. In *Knauer v. United States* (1946), the Court upheld denaturalization on evidence not much more persuasive than in *Schneiderman's* case.

Aliens not naturalized were more vulnerable than citizens. Harry Bridges returned several times to the Court's docket thanks to persistent efforts of the federal government to deport him. Frustrated by the Supreme Court's refusal to countenance what amounted to a bill of attainder action by Congress that enabled Bridges's deportation, his opponents continued to seek his eviction through the early years of the Cold War, without success. He was the exception, though; most deportation efforts succeeded after 1947 if the target was a leftist.

Conscientious objectors posed a special problem in a conflict as widely popular as World War II. In the Selective Service Act of 1940, Congress had exempted from the military draft anyone "conscientiously opposed" to service "by reason of religious training and

belief.” Even when Jehovah’s Witnesses and pacifists got draft exemptions, though, they encountered administrative complications and state-imposed impediments, such as denial of admission to the bar. The Supreme Court sustained the state inhibitions and required that conscientious objector applicants exhaust all administrative processes, including showing up for induction, before they could resort to courts to contest their classification.

Religion provided the other major growth area for civil liberties during the war. With only one major exception (*Reynolds v. United States* [1878]), the Supreme Court had not construed the First Amendment’s religion clauses before World War II. In 1940, the Court “incorporated” the free exercise and establishment clauses (*Cantwell v. Connecticut*), meaning that the clauses’ provisions were now just as binding on the states as they were on the federal government. With that doctrine in place, the justices then dealt with the numerous free exercise issues churned up by the social impact of the war. (The Court’s first establishment clause case was not handed down until 1947.) Jehovah’s Witnesses generated nearly all free exercise controversies because of their religiously grounded refusal to salute the American flag and because their proselytizing techniques were obnoxious to their gentile neighbors.

In the tense atmosphere of 1940, refusal to salute the flag, even on sincerely held religious grounds, was deeply unpopular. Legislatures, school boards, and mobs tried to force the Witnesses to salute. Justice Frankfurter upheld the power of school boards to expel nonsaluting Witness children in a hyperpatriotic opinion, *Minersville School District v. Gobitis* (1940). He ignored the clear and present danger test that would have been applicable in speech cases, and instead balanced state legislative power against individual liberties, coming out as he usually did on the side of power against liberty. After *Gobitis*, mobs brutalized Witnesses and legislatures enacted more draconian measures to compel conformity.

When the Court revisited this issue in the 1943 case of *West Virginia Board of Education v. Barnette*, though, it reversed *Gobitis* and sustained Witness children in their conscientious refusal. It thereby extended broad protections to religious liberty for the first time. Rejecting Frankfurter’s deferential posture, Justice Robert H. Jackson instead deployed free speech doctrines to protect what was essentially religious freedom. He condemned the “coercive elimination of dissent.” Fundamental rights, including those guaranteed by the First Amendment, “may not be submitted to vote.” The “majestic generalities of the Bill of Rights” required judicial protection, to protect “the right to differ as to things that protect the heart

of the existing order.” (Frankfurter dissented in an opinion striking for its embittered self-pity.)

A long string of decisions extending from 1939 through 1946 sustained the freedom of Witnesses to promote their religious beliefs, no matter how offensive or annoying such proselytizing activity was to other denominations. Early decisions involving the Witnesses, like *Chaplinsky* (1942), were hostile to their freedoms. That changed too in 1943, when in five companion cases, *Murdock v. Pennsylvania* being the most important, the Court supported the rights of religious emissaries to go door-to-door preaching their doctrines. In other decisions, the Court limited administrative discretion to refuse permits for outdoor preaching. After 1946, the Court held states to strict scrutiny of all regulations that burdened religious freedom, thus greatly expanding the sphere of civil liberties in the religious context.

The overall impact of World War II on civil liberties confirmed two major long-term trends. First, the protection of personal liberty had become the primary responsibility of courts, rather than of legislatures or local communities. Second, the national government, rather than states or localities, became the principal arena where these issues were contested. Neither of these trends guaranteed that personal liberties would be immune from government intrusion, as the Cold War was soon to prove. But after the war, the struggle over civil liberties was judicialized, and the sites of contests over personal freedom were federal courts.

The major threat to personal freedoms during and after the war came from an expanded executive power within the federal government and from expanded federal power vis-à-vis the states. *Quirin* and the internment of Japanese-Americans were pivotal events here, laying the foundations of the national-security state that was to emerge after 1947. For the next generation, this growth came at the expense of civil liberties.

Offsetting this regressive innovation, however, was the remarkable expansion of liberties protected by the First Amendment. Compared with World War I, the Court from 1940 through 1946 was unusually solicitous of speech freedoms. From 1950 through 1957, it would regress, but the Justices then resumed the expansive trend, so that by 1968, political discourse enjoyed nearly absolute protection. This confirmed the “preferred position” of civil liberties suggested by then-Justice Harlan F. Stone before the war.

Finally, in religious matters the Supreme Court began developing doctrines under the free exercise clause that protected not only beliefs but religious practices of sects that were unwelcome to local majorities. In tandem with postwar developments under

the establishment clause, these innovations made federal courts the principal guardians of religious freedoms.

Although wars and fears of war had often proven inimical to personal freedoms in the past, World War II paradoxically produced a long-term expansion of freedom in American society.

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References and Further Reading

- Corwin, Edward S. *Total War and the Constitution: Five Lectures Delivered ... at the University of Michigan, March 1946*. New York: Knopf, 1947.
- Irons, Peter H. *Justice at War*. New York: Oxford University Press, 1983.
- Murphy, Paul L. *The Constitution in Crisis Times, 1918–1969*. New York: Harper & Row, 1972.
- Peters, Shawn F. *Judging Jehovah's Witnesses: Religious Persecution and the Dawn of the Rights Revolution*. Lawrence: University Press of Kansas, 2000.
- Pritchett, C. Herman. *Civil Liberties and the Vinson Court*. Chicago: University of Chicago Press, 1954.
- Simon, James F. *The Antagonists: Hugo Black, Felix Frankfurter and Civil Liberties in Modern America*. New York: Simon and Schuster, 1989.
- Urofsky, Melvin I. *Division and Discord: The Supreme Court under Stone and Vinson, 1941–1953*. Columbia: University of South Carolina Press, 1997.
- Urofsky, Melvin I. *Felix Frankfurter: Judicial Restraint and Individual Liberties*. Boston: Twayne, 1991.

Cases and Statutes Cited

- Bridges v. California*, 314 U.S. 252 (1941)
- Cantwell v. Connecticut*, 310 U.S. 296 (1940)
- Carpenters and Joiners Union v. Ritters Café*, 316 U.S. 708 (1942)
- Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942)
- Cramer v. United States*, 325 U.S. 1 (1945)
- Duncan v. Kahanamoku*, 327 U.S. 304 (1946)
- Ex parte Milligan*, 71 U.S. 2 (1866)
- Ex parte Quirin*, 317 U.S. 1 (1942)
- Hague v. CIO*, 307 U.S. 496 (1939)
- Hartzel v. United States*, 322 U.S. 680 (1944)
- Haupt v. United States*, 330 U.S. 631 (1947)
- Homma v. Patterson*, 327 U.S. 759 (1946)
- In re Yamashita*, 327 U.S. 1 (1946)
- Knauer v. United States*, 328 U.S. 654 (1946)
- Lockerty v. Phillips*, 319 U.S. 182 (1943)
- Milk Wagon Drivers Union v. Meadowmoor Dairies*, 312 U.S. 287 (1941)
- Minersville School District v. Gobitis*, 310 U.S. 586 (1940)
- Murdock v. Pennsylvania*, 319 U.S. 105 (1943)
- Pennekamp v. Florida*, 328 U.S. 331 (1946)
- Reynolds v. United States*, 98 U.S. 145 (1878)
- Schneiderman v. United States*, 320 U.S. 118 (1943)
- Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945)
- Steuart v. Bowles*, 322 U.S. 398 (1944)
- Thomas v. Collins*, 323 U.S. 516 (1945)
- Thornhill v. Alabama*, 310 U.S. 88 (1940)
- Times-Mirror Co. v. Superior Court*, 310 U.S. 623 (1940)

- United States v. Belmont*, 301 U.S. 324 (1937)
- United States v. Causby*, 328 U.S. 256 (1946)
- United States v. Pink*, 315 U.S. 203 (1942)
- Viereck v. United States*, 318 U.S. 236 (1943)
- West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943)
- Yakus v. United States*, 321 U.S. 414 (1944)
- Smith Act: Act of 28 June 1940, Chapter 439, 54 Stat. 670
- Wagner Act (National Labor Relations Act): Act of 5 July 1935, Chapter 372, 49 Stat. 449
- War Powers Acts: Acts of 18 December 1941, Chapter 593, 55 Stat. 838; 27 March 1942, Chapter 199, 56 Stat. 176
- Emergency Price Control Act: Act of 30 January 1942, Chapter 26, 56 Stat. 23
- Selective Training and Service Act: Act of 16 September 1940, 720, 54 Stat. 885

WRITS OF ASSISTANCE ACT

Writs of assistance were court-issued general warrants that permitted English customs officers to search for contraband within the ships, warehouses, and domiciles of suspected smugglers. Parliament first authorized the writs in 1660 and made them permanent in the 1662 Act for Preventing Frauds. A 1696 law extended the power to employ writs of assistance to customs officials in the American colonies, helping them to enforce the royal Navigation Acts. Customs officials in the colonies rarely requested writs of assistance, however, until the Seven Years War (1756–1763), when the superior courts of New Hampshire and Massachusetts issued them to help officials enforce British laws prohibiting trade with enemy nations—France and Spain, in this case.

In 1760, Massachusetts merchants sued royal customs collectors for abusing the writs, accusing them of trespass. In the following year their advocate, James Otis, testified in Massachusetts Superior Court against the constitutionality of the statutes themselves, arguing that they arbitrarily infringed on the privacy and property rights of British subjects. The court upheld the statutes' legitimacy, and the issue lay dormant for several years. In 1767, the Townshend Acts authorized customs officers throughout the colonies to use writs of assistance to enforce the collection of import duties. The law also provided that such writs could only be issued by the supreme court of each American province, and in nine colonies, judges, following the logic of James Otis's argument, routinely rejected applications for the writs as violations of the British Constitution. In the 1770s, five states outlawed them in their constitutions, and in 1789 the Fourth Amendment to the U.S. Constitution prohibited federal courts from issuing general warrants and officials from engaging in warrantless searches.

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References and Further Reading

Gipson, Lawrence Henry. *The Coming of the Revolution, 1763–1775*. New York: Harper & Row, 1954.
Smith, Maurice Henry. *The Writs of Assistance Case*. Berkeley: University of California Press, 1978.

Cases and Statutes Cited

Act for Customs Search Warrants, 1660, 12 Car. 2, c. 19
Act for Preventing Frauds and Regulating Abuses in His Majesty's Customs, 1662, 13 and 14 Car. 2, c. 11
Act for Preventing Frauds and Regulating Abuses in the Plantation Trade, 1696, 7 and 8 Gul. 3, c. 22

See also **General Warrants; Otis, James**

WYMAN v. JAMES, 400 U.S. 309 (1971)

When welfare rights activists wrote out their national agenda in the 1960s, putting a stop to unannounced home visits by government social workers was near the top of the list. Federal law did not require such visits, but many local jurisdictions conducted them, ostensibly to protect children from abuse and to monitor welfare fraud. California went so far as to sponsor early-morning mass raids upon welfare recipients' homes.

In contrast, New York City's practice, reviewed by the Supreme Court in *Wyman v. James*, was relatively mild. On May 8, 1969, Barbara James, a welfare recipient, received a letter indicating that a caseworker would visit her home a few days later. James phoned the worker to refuse access to her home, although she offered to arrange for a meeting elsewhere. When James continued to refuse access, New York City initiated proceedings to terminate her welfare payments.

Assisted by legal services lawyers, James challenged the termination as a violation of her Fourth Amendment right to be free of illegal search. The Supreme Court's six-to-three majority opinion, the first written by newly appointed Justice Harry A. Blackmun, upheld the City's position that the visit was not forced, since James could simply decline welfare altogether rather than submit to the inspections. The Court concluded that the government could use such warrantless searches to ensure that its welfare funds were being appropriately spent. In adopting this approach, the majority distanced itself from the Court's recent decision in *Goldberg v Kelly* (1970), which analogized welfare rights to property rights, thereby according welfare recipients greater control over their benefits. Unannounced home visits remain a part of welfare administration in some jurisdictions, and *Wyman* has also been cited to support

sweeps of public housing and drug testing of welfare recipients.

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References and Further Reading

Burt, Robert A., *Forcing Protection on Children and Their Parents: The Impact of Wyman v. James*, Michigan Law Review 69 (1971): 1259–1310.
Greenhouse, Linda, *Becoming Justice Blackmun*. New York: Henry Holt & Co., 2005.
Wasby, Stephen L., *Justice Blackmun and Criminal Justice: A Modest Overview*, Akron Law Review 28 (1995): 125–186.

Cases and Statutes Cited

Goldberg v. Kelly, 397 U.S. 254 (1970)

See also **Dandridge v. Williams, 397 U.S. 471 (1970); Privacy**

WYOMING v. HOUGHTON, 526 U.S. 295 (1999)

After stopping an automobile occupied by three individuals for traffic offenses, a policeman observed a hypodermic syringe in the driver's shirt pocket. When the driver admitted he used the syringe to take drugs, the officer gained probable cause to believe the car contained illegal drugs, and he searched the passenger compartment. On the rear seat, he found a purse belonging to one of the passengers. Inside the purse he discovered drug paraphernalia and methamphetamine.

When police have probable cause to believe an automobile contains contraband or evidence, they may conduct a warrantless search of that vehicle without violating the Fourth Amendment (*Carroll v. United States* [1925]). Such a search may include containers that might conceal the object of the search (*United States v. Ross* [1982]). In *Wyoming v. Houghton*, the U.S. Supreme Court clarified the permissible scope of such an automobile search. It held that a search is not limited to items belonging to the driver; rather, police may also search a container they know (or should know) belongs to a passenger, even if they do not suspect the passenger of criminal activity. The Court found no historical evidence admitting a distinction among containers based upon ownership. It also reasoned that passengers possess a reduced expectation of privacy with respect to property they transport in automobiles and that effective law enforcement would be appreciably impaired if police could not search a passenger's belongings when they

have probable cause to believe contraband or evidence of criminal wrongdoing is hidden in the vehicle.

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References and Further Reading

Dery, George M., III, *Improbable Cause: The Court's Purposeful Evasion of a Traditional Fourth Amendment Protection in Wyoming v. Houghton*, Case Western Reserve Law Review 50 (2000): 3: 547–597.

LaFave, Wayne R. *Search and Seizure: A Treatise on the Fourth Amendment*, Vol. 3. 4th ed. St. Paul, MN: Thompson-West, 2004.

LaFave, Wayne R., Jerold H. Israel, and Nancy J. King. *Criminal Procedure*. 4th ed. St. Paul, MN: Thompson-West, 2004.

Cases and Statutes Cited

Carroll v. United States, 267 U.S. 132 (1925)

United States v. Ross, 456 U.S. 798 (1982)

See also Automobile Searches; California v. Acevedo, 498 U.S. 807 (1990); *Carroll v. United States*, 267 U.S. 132 (1925); *Incorporation Doctrine; Probable Cause*

Y

YATES v. UNITED STATES, 354 U.S. 298 (1957)

Yates v. United States involved questions regarding the First Amendment. The ruling in *Yates* provided a further interpretation of a statute cited in *Dennis v. United States* (1951), a ruling that applied the Smith Act.

Sections 2 and 3 of the Smith Act banned the willful advising, teaching, or advocacy of the overthrow of any government in the United States by force or violence, and conspiring to do so. In *Dennis*, the Supreme Court allowed this act to survive by different interpretations of the “clear and present danger” test, despite the objections in support of free speech and free assembly found in the First Amendment. The Department of Justice’s interpretation of this ruling in the 1950s was that the Communist Party was an organization dedicated to the overthrow of the U.S. government by force or violence. Therefore, the Department felt that the Party’s leaders and members could be constitutionally punished. Fourteen Communist Party leaders were convicted under the Smith Act in a jury trial in the district court for the Southern District of California. The defendants appealed to the Supreme Court in *Yates v. United States*.

The Court was faced with questions as to whether the convictions were a violation of the First Amendment. The previous interpretation in *Dennis* left the interpretation of the Smith Act as an abstract principle. In a six-to-one decision, the Supreme Court reversed the convictions in *Yates* and remanded the case back to the district court for a retrial. The Supreme Court cited the need to clearly cite examples

of the advocacy of the overthrow of the U.S. government. Otherwise, speech and assembly were protected by the First Amendment. The Court clarified the Smith Act, distinguishing between the abstract principle of teaching the overthrow of government and the teachings of concrete action for the foreseeable overthrow of any government in the United States.

CAROL WALKER

References and Further Reading

- Kauper, Paul. *Civil Liberties and the Constitution*. Westport, CT: Greenwood Press, 1962.
- Pollack, Harriet, and Alexander Smith. *Civil Liberties and Civil Rights in the United States*. St. Paul, MN: West, 1978.
- Spicer, George. *The Supreme Court and Fundamental Freedoms*. 2nd ed. New York: Appleton-Century Crofts Press, 1967.

Cases and Statutes Cited

- Dennis v. United States*, 341 U.S. 494 (1951)

YOUNG v. AMERICAN MINI THEATRES, INC., 427 U.S. 50 (1976)

For the first time, the Supreme Court adopted an explicit secondary effects doctrine with regard to commercial establishments providing sexually oriented entertainment or selling sexually explicit material. Under the doctrine, governments may adopt policies to counter the adverse effects of adult entertainment such

as declining property values, increased crime, and prostitution, regardless of whether the entertainment would be obscene based on *Miller v. California* (1973).

The City of Detroit adopted two zoning provisions amending its Anti-Skid Row Ordinance to deter the negative neighborhood impacts created by concentrations of adult bookstores or movie theaters. Establishments exhibiting material depicting specific sexual activities or human “anatomical areas” as outlined by the ordinances therefore could not be located within 500 feet of a residential area or 1,000 feet of two other regulated uses that included such businesses as bars, pawnshops, pool halls, and shoeshine parlors.

American Mini Theatres operated two theatres that violated these requirements and challenged the constitutionality of the amendments. A federal district court judge upheld the ordinances but the Sixth Circuit Court of Appeals reversed, arguing the ordinances imposed prior restraint on protected speech and denied equal protection by classifying theaters according to the content of the films they exhibited. The Supreme Court, by a plurality, reversed the Circuit Court and upheld the constitutionality of the ordinances. Stevens (who replaced Douglas in December 1975) wrote the opinion and was joined by Burger, White, and Rehnquist. Powell, concurring with the judgment, developed his own rationale for the judgment. Stewart and Blackmun wrote separate dissents; each joined the other’s dissent, and Brennan and Marshall also joined both dissents.

Stevens dismissed the respondent’s argument that the ordinances were impermissibly vague. The only vagueness that he conceded existed was the amount of sexually explicit depictions of the kind specified in the ordinances that establish the “emphasis” of films or other material that affect the classification of a theater or bookstore as “adult.” This uncertainty, however, is limited and easily resolved in the state courts through “narrowing construction.” The circuit court’s concerns regarding prior restraint are in Stevens’s view also misplaced. The ordinances’ restrictions on the location of adult theaters or bookstores, which do not apply to other theaters or bookstores, are no different than other zoning and licensing requirements, and are “not sufficient reason for invalidating” the ordinances.

Although Detroit’s ordinances classified businesses according to the “adult content” of their entertainment, the laws did not run afoul of the Court’s rule that laws affecting protected speech must be content neutral. In the instance of obscenity, the “paramount obligation of neutrality” is not violated because the “regulation of the places where sexually explicit films may be exhibited is unaffected by whatever ... message a film may be intended to communicate....” Moreover, Stevens added, it is “manifest” that

society’s interest in protecting erotic materials with “some arguably artistic value” is of a lesser magnitude than its concerns for “untrammelled political debate.” It follows, he concluded, that the line drawn by the ordinances between theaters and bookstores according to the sexual emphasis of their business is justified by Detroit’s interest in preserving the quality of its neighborhoods.

Powell wrote a concurring opinion to explain his different approach to the case. In brief, Powell adopted the four-part test from *United States v. O’Brien* (1968) to determine whether Detroit’s ordinances, despite their “incidental impact upon First Amendment interests,” could nonetheless be justified under this test. One effect of this test is that as long as a law does not suppress expressive activity and is content neutral, intermediate and not strict scrutiny can be applied.

Powell’s approach gains a majority in *City of Renton v. Playtime Theatres, Inc.* (1986) with a very similar fact situation to *Young*. Powell’s concurrence also forms the core of the plurality’s decision in *Barnes v. Glen Theatre, Inc.* (1991), where it is extended beyond the zoning context, and in *City of Erie v. Pap’s A.M.* (2000). Both cases upheld ordinances requiring nude dancers to wear pasties and a G-string in order to combat the negative secondary effects associated with nude dancing in commercial establishments.

ROY B. FLEMMING

References and Further Reading

- Alexander, Donald. *The Politics of Pornography*. Chicago: University of Chicago Press, 1989.
- Hixson, Richard F. *Pornography and the Justices: The Supreme Court and the Intractable Obscenity Problem*. Carbondale, IL: Southern Illinois University Press, 1996.
- Mackey, Thomas C. *Pornography on Trial: A Handbook with Cases, Law, and Documents*. Santa Barbara, CA: ABC-CLIO, 2002.

Cases and Statutes Cited

- Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991)
- City of Erie v. Pap’s A.M.*, 529 U.S. 277 (2000)
- City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986)
- Miller v. California*, 413 U.S. 15 (1973)
- United States v. O’Brien*, 391 U.S. 367 (1968)

YOUNGER v. HARRIS, 401 U.S. 37 (1971)

Younger v. Harris creates an important exception to the federal enforcement of civil rights. *Younger* held that a federal court could not enjoin an ongoing state

criminal prosecution, even when the statute under which the prosecution was occurring violated federal constitutional rights. Instead, the federal court was required to “abstain” from hearing the case, and allow the constitutional issues to be addressed in the criminal proceeding. Subsequent cases have expanded the scope of this doctrine, generally called “*Younger* abstention.”

The case arose in 1966, when John Harris Jr. was passing out Progressive Party leaflets suggesting that a Los Angeles police officer had murdered a Watts resident, that local factories failed to employ Watts residents, and that people should take action. Harris was indicted for violating California’s antisyndicalism law. The law made illegal the advocacy of doctrines that sought the violent overthrow of industrial ownership or the political order; it was, in essence, anticommunism legislation. Shortly afterward, *Brandenburg v. Ohio* (1969) declared nearly identical legislation unconstitutional under the First and Fourteenth Amendments (see *Brandenburg v. Ohio*), but Harris did not have the benefit of that case. Harris unsuccessfully raised the statute’s unconstitutionality in the criminal proceedings. Facing an imminent trial, he turned to federal court. He sued the county prosecutor, Evelle Younger, seeking an injunction that prohibited Younger from prosecuting him.

A three-judge district court held the statute constitutionally vague and issued the injunction. Younger appealed. The Supreme Court held that the injunction should not have been issued. Writing for the Court, Justice Black focused on two reasons. First, retreating into history, the Court noted that injunctions were a remedy available only in equity. An injunction could not be issued if an adequate remedy existed in common law; in particular, equity did not issue injunctions against criminal proceedings. Second, Justice Black feared that federal injunctions against ongoing state proceedings would interfere

with “an even more vital consideration, the notion of ‘comity,’ that is, a proper respect for state functions....” Justice Black famously encapsulated, and capitalized, this argument by discussing the need to “remain loyal to the ideals and dreams of ‘Our Federalism.’” Justices Brennan and Marshall concurred. There were no dissents.

Later cases have defined the contours of *Younger* abstention. It has been extended to some civil proceedings, especially quasicriminal enforcement proceedings. *Younger* abstention also applies when the federal case is filed first, but the state case is filed shortly afterwards.

The idea that federal courts must decline to enforce federal constitutional rights seems counterintuitive. The constitutional right can be raised in the state proceeding, and thereafter the Supreme Court might hear the issue on certiorari. *Younger* also stated that a federal court need not abstain if the prosecution threatens an irreparable injury or if it is undertaken in bad faith. Nonetheless, *Younger* means that, in many cases, no federal court will hear a claim of federal constitutional violation.

Harris himself received his vindication in state court. In light of *Brandenburg*, a California court ordered him released from custody in 1971.

JAY TIDMARSH

References and Further Reading

Fallon, Richard H., Jr., Daniel J. Meltzer, and David L. Shapiro. *Hart & Wechsler’s The Federal Courts and the Federal System*. 5th ed. New York: Foundation Press; St. Paul, MN: Thomson/West, 2003.
Harris v. Younger, 281 F.Supp. 507 (C.D. Cal. 1968).
In re Harris, 97 Cal.Rptr. 844 (Cal. App. 1971).

Cases and Statutes Cited

Brandenburg v. Ohio, 395 U.S. 444 (1969)

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ZABLOCKI v. REDHAIL, 434 U.S. 374 (1978)

Zablocki v. Redhail is one of a handful of modern Supreme Court cases, the most famous being *Loving v. Virginia* (1967), exploring the constitutional right to marry. *Zablocki* stands out, however, because it provokes this central question: In what precise sense is marriage, by some accounts a purely positive creation of the state, a constitutional right?

In *Loving*, the Court held that a statute banning mixed-race marriages could not withstand the strict scrutiny required under the equal protection clause for classifications based on race. It then briefly added that the statute also violated due process by abridging the “fundamental freedom” to marry.

Zablocki concerned a challenge to a Wisconsin statute that forbade residents with support obligations to noncustodial minor children from marrying unless they could demonstrate, among other things, that they were complying with those obligations. Unlike *Loving*, *Zablocki* did not involve a “suspect class.” Nevertheless, the Court, in an opinion by Justice Marshall, still approached the case by way of its equal protection jurisprudence, relying this time on the “fundamental rights” prong of that doctrine. The Court, citing *Loving* and dicta in both older substantive due process cases and recent cases on the right to privacy, held that the freedom to marry was “fundamental” for equal protection purposes. It then subjected the statute to strict scrutiny and struck it down. Chief Justice Burger wrote a concurring opinion.

Justices Stewart, Powell, and Stevens concurred in the judgment. Justice Rehnquist dissented.

Although the Court held squarely that marriage was a fundamental right, it skirted the question whether that right was a basic entitlement, like the right to speech, or only a right of equal access, like the right to vote. Justice Stewart’s opinion faced this issue more directly. He argued that the case did not involve equal protection at all, but rather a liberty protected as a matter of substantive due process. This reading was subsequently confirmed, at least weakly and indirectly, in *Turner v. Safley* (1987).

Whatever the nature of the right to marry, there remains the problem of defining the scope of the right in view of the many restrictions to which marriage has traditionally been subject. The majority distinguished between incidental regulations, which would not require strict scrutiny, and rules that “interfere directly and substantially with the right to marry,” which would. Justice Stewart responded that there was no “right to marry” as such, in that the law could prohibit some marriages, but that “in regulating the intimate human relationship of marriage, there is a limit beyond which a State may not constitutionally go.” Justice Powell’s concurrence emphasized that the state “has an undeniable interest in ensuring that its rules of domestic relations reflect the widely held values of its people.”

The issues raised in *Zablocki* echo in contemporary debates about marriage. Most obviously, they are crucial to whether there might be a right to same-sex

marriage. More intriguingly, since some have argued that the government should abolish civil marriage entirely, or replace it with “civil unions” open to all, it now becomes a matter of more than theoretical interest whether marriage is the sort of entitlement to which persons could claim a right even as against an effort at its total, nondiscriminatory, abolition.

PERRY DANE

References and Further Reading

- Cain, Patricia A., *Imagine There's No Marriage*, Quinnipiac Law Review 16 (1996): 27.
- Dane, Perry. “The Intersecting Worlds of Religious and Secular Marriage.” In *Law and Religion: Current Legal Issues*, vol. 4, edited by Richard O'Dair & Andrew Lewis. New York: Oxford University Press, 2001.
- Nolan, Laurence C., *The Meaning of Loving: Marriage, Due Process and Equal Protection (1967–1990) as Equality and Marriage, from Loving to Zablocki*, Howard Law Journal 41 (1998): 245.
- Sunstein, Cass R., *The Right to Marry*, Cardozo Law Review 26 (2005): 2081.

Cases and Statutes Cited

- Loving v. Virginia*, 388 U.S. 1 (1967)
- Turner v. Safley*, 482 U.S. 78 (1987)

See also **Due Process; Equal Protection of Law (XIV); *Loving v. Virginia*, 388 U.S. 1 (1967); Privacy; Right of Privacy; Same-Sex Marriage Legalization; Substantive Due Process; *Turner v. Safley*, 482 U.S. 78 (1987)**

ZACCHINI v. SCRIPPS HOWARD BROADCASTING COMPANY, 433 U.S. 562 (1977)

This is the only U.S. Supreme Court right of publicity case. Unlike most such cases, unauthorized use of a person's identity for commercial purposes was not involved (see *White v. Samsung Electronics* [1993]).

Zacchini performed a “human cannonball” act. The entire act lasted fifteen seconds. A film clip of the act, unauthorized by Zacchini, was shown on a television news program. Zacchini sued, claiming misappropriation of his act, in violation of Ohio's right of publicity statute. The Ohio Supreme Court ruled that the First Amendment precluded recovery. The U.S. Supreme Court reversed that decision. It held that an unauthorized broadcasting of the performance “is similar to preventing petitioner from charging an admission fee” and that the First Amendment does not “immunize the media when they broadcast a performer's entire act without his permission.”

The Court considered the performance entertainment, not news. Zacchini's act was a form of intellectual property, “owned” by him. To make a living charging people to see him shot out of a cannon, he could not allow people to see it without charge on television; a similar situation occurs when owners of professional football games impose a “blackout” on local television broadcasts when the stadium is not sold out. The Supreme Court thus held that there was no First Amendment right to effectively eviscerate Zacchini's property interest in his act by filming and broadcasting it without his permission.

The Court also noted, however, that the media remained free to report “newsworthy facts about petitioner's act” so its decision did not infringe on freedom of the press. It said Zacchini did not “seek to enjoin the broadcast of his performance; he simply wants to be paid for it.” The case stands for the proposition that the right of publicity is a property interest that may be protected by the law but not if enforcement will interfere with First Amendment rights (see *Cardtoons, L.C. v. Major League Baseball Players Association* [1996]).

GERALD J. THAIN

Cases and Statutes Cited

- Cardtoons, L.C. v. Major League Baseball Players Association*, 95 F.3d (10th Cir. 1996)
- White v. Samsung Electronics*, 989 F.2d 1512 (9th Cir. 1993)

ZELMAN v. SIMMONS-HARRIS, 536 U.S. 639 (2002)

Zelman v. Simmons-Harris concerned a taxpayer challenge to an Ohio program that provides publicly funded scholarships or “vouchers” for students to use at private religious and nonreligious schools. Plaintiffs alleged that the transfer of public funds to religious schools through vouchers violates the establishment clause of the First Amendment to the U.S. Constitution by funding religious instruction and worship. Lower federal courts struck down the program on establishment clause grounds, but the U.S. Supreme Court reversed, ruling that a neutrally designed voucher program survives constitutional scrutiny.

Zelman v. Simmons-Harris arose in 1996 after the Ohio legislature enacted the Ohio Pilot Scholarship Program to provide publicly funded vouchers for lower-income children in the city of Cleveland that could be used at qualifying private and public schools. Because no public school district chose to

accept voucher students, the program resulted in the overwhelming bulk of the vouchers (96 percent) being used at religious schools, which at the time of litigation accounted for 82 percent of the participating private schools. Plaintiff taxpayers, represented by a coalition of education and civil rights groups including the National Education Association, the American Civil Liberties Union, Americans United for Separation of Church and State, and People for the American Way, initially challenged the program in state court, alleging violations to both the U.S. and Ohio Constitutions. After the Ohio Supreme Court struck down the program on state law grounds and the Ohio legislature reenacted a revised version of the program in 1999, the plaintiffs brought suit in federal court, prevailing on establishment clause grounds at the district court and court of appeals levels before losing at the Supreme Court.

The plaintiffs alleged that the Ohio Pilot Scholarship Program violated the establishment clause by providing public support for religious-based education at religious and parochial schools. They relied on various Supreme Court decisions from the 1940s to the 1980s holding unconstitutional public support for educational functions of religious schools. In contrast, the State of Ohio and intervenor parents, represented by the Institute for Justice, pointed to a more recent series of Supreme Court decisions upholding forms of indirect public aid for educational expenses that relied on the “private choices” of recipients to direct the public resources to religious schools.

A sharply divided Supreme Court ruled that the latter line of authority permitting indirect aid through private intermediaries controlled. Writing for a five-member majority, Chief Justice William Rehnquist highlighted two factors as being crucial to its holding that vouchers for private religious schools do not contravene the establishment clause: program neutrality and private choice. First, the Court held that eligibility under the scholarship program, both as to participating schools and student eligibility, was religiously neutral, meaning that the program neither favored religion nor created incentives for religious use. Examining the face of the statute rather than its effect in application, the Court emphasized that the scholarship was part of a general undertaking to provide educational services, that it conferred its benefit to a broad class of individuals without reference to religion, and that it permitted participation of all schools within the Cleveland and adjoining school districts, public and private alike. As Chief Justice Rehnquist wrote: “[G]overnment programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge.”

Second, the Court emphasized the element of *private choice*, finding that the public aid reaches religious schools

only as a result of genuine and independent choices of private individuals.... Where a government aid program ... provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause.

The Court found irrelevant the fact that 96 percent of the vouchers were redeemed at religious schools, holding that the “constitutionality of a neutral educational aid program simply does not turn on whether ... at a particular time, most private schools are [religious], or most recipients choose to use the aid at a religious school.” The Court found no evidence that the scholarship program failed to provide “genuine opportunities” for parents or coerced them into sending their children to religious schools.

Justice Sandra Day O’Connor, providing the crucial fifth vote for the majority, wrote a concurring opinion that disputed arguments by dissenting Justice David Souter that the aggregate amount of public funds flowing to the religious schools distinguished the case from earlier decisions upholding insubstantial amounts of aid. Justice Souter, writing a dissenting opinion for himself and three other justices, argued that the voucher program contravened the establishment clause by providing substantial aid to religious education and failing to offer truly genuine choices to eligible parents.

Zelman is a landmark case in religion clause jurisprudence on several levels. First, the decision authorized the use of publicly funded vouchers at private religious schools, a matter that had been highly controversial in education and legal circles for several decades. Although since 1983 the Court had intimated that programs providing aid based on neutral criteria and through private individuals were generally constitutional, the Court had never upheld such a large transfer of public monies for religious education. Furthermore, the earlier aid programs upheld had generally involved discrete forms of aid that had supplemented the secular side of religious school programs, rather than providing unrestricted aid that could be spent on religious education. For opponents of religious school funding, *Zelman* effectively undermined fifty years of establishment clause jurisprudence through the aegis of “private choice.”

Equally as significant as the specific holding, *Zelman* indicated a dramatic shift in the Court’s religion clause jurisprudence away from a model of no-aid separationism to one of neutrality toward

religion and religious institutions. Whereas for forty years the Court's apparent motif had been to treat religion distinctively with respect to general government benefits and burdens, sometimes requiring exemptions for religion from government regulations while denying religion the benefits of government support, neutrality theory instructs that government is to treat religious institutions and motivations in an evenhanded manner with nonreligious counterparts. Although neutrality theory as the substitute to separationism had been on the ascent for the decade prior to *Zelman*, the decision solidified its dominant position with the Court.

STEVEN K. GREEN

References and Further Reading

- Agostini v. Felton*, 521 U.S. 203 (1997).
 Bolick, Clint. *Voucher Wars*. Washington, D.C.: Cato Institute, 2003.
Committee for Public Education v. Nyquist, 413 U.S. 756 (1973).
 Green, Steven K., *The Illusionary Aspect of "Private Choice" for Constitutional Analysis*, Willamette Law Review 38 (2002): 549–577.
 Jeffries, John C., and James E. Ryan, *A Political History of the Establishment Clause*, Michigan Law Review 100 (2001): 279–370.
 Lupu, Ira C., and Robert W. Tuttle. *Zelman's Future: Vouchers, Sectarian Providers, and the Next Round of Constitutional Battles*, Notre Dame Law Review 78 (2003): 917–994.
Mitchell v. Helms, 530 U.S. 793 (2000).
Mueller v. Allen, 463 U.S. 388 (1983).
 Peterson, Paul E., ed. *The Future of School Choice*. Stanford, CA: Hoover Institution Press, 2003.
 Sugarman, Stephen D., and Frank R. Kemerer, eds. *School Choice and Social Controversy: Politics, Policy, and Law*. Washington, D.C.: Brookings Institution Press, 1999.
 Tushnet, Mark. *Vouchers After Zelman*, Supreme Court Review 2000 (2000): 1–39.
 Underkuffler, Laura S., *Vouchers and Beyond: The Individual as Causative Agent in Establishment Clause Jurisprudence*, Indiana Law Journal 75 (2000): 167–191.
Witters v. Washington Department of Services for the Blind, 474 U.S. 481 (1986).
Zobrest v. Catalina Foothills School District, 509 U.S. 1 (1993).

ZENGER TRIAL (1735)

The Zenger trial is a landmark in the history of civil liberties, although its impact on civil liberties has been disputed by scholars. John Peter Zenger was a German immigrant who arrived in New York City in 1710 and ultimately became a printer. In November 1733, Zenger began publishing the *New York Weekly Journal*, the first opposition newspaper in American history. The paper was founded after a group of

disgruntled politicians mounted a challenge to the administration of Sir William Cosby, the New York colony's new governor. This group included the former chief justice of the colony, Lewis Morris, the former acting governor, Rip Van Dam, and two leading lawyers, William Smith and James Alexander.

The controversy began in 1732 when Cosby arrived in New York some thirteen months after he had been appointed governor of the colony. During the interim Van Dam had been acting governor of the colony. When Cosby arrived, the legislature voted him a bonus equal to almost all of the salary that he would have been paid had he been in the colony for the previous year. In addition, there was a large accumulation of fees and other emoluments that were waiting for Cosby. Unsatisfied with this amount, Cosby demanded that Van Dam turn over half the salary he had collected while Cosby had been in England. Van Dam refused to do this, and Cosby then asked the New York Supreme Court to sit as an exchequer court so that he could sue Van Dam. Exchequer courts did not use juries or follow common law rules, and were thus seen as arbitrary tools of the government. When the case came before the Court, Chief Justice Morris summarily ruled that it could not sit as an exchequer court and dismissed the case. He then published his opinion, which Cosby correctly saw as an attack on him. A few days later, Cosby fired Morris and replaced him with James DeLancey, a young judge with little experience, but a reliable ally of Cosby.

Morris, Van Dam, and Van Dam's attorneys, Smith and Alexander, then organized an anti-Cosby political faction, and quickly won seats in the colonial legislature and the New York City government. They also hired Zenger to publish his paper, which continuously attacked Cosby and his administration. The *Weekly Journal* was humorous, satirical, and philosophical. The paper ridiculed Governor Cosby through innuendo and satire while at the same time reprinting high-level discourses on philosophy, political theory, and the lessons of history. The *Weekly Journal* also provided an articulate defense of the idea of a free press.

Cosby tried to have Zenger indicted for seditious libel, but no grand jury would bring an indictment, although one did order that certain issues of the paper be burned. Cosby was corrupt, venal, and obnoxious. Most New Yorkers hated him, and Zenger's paper had great popular support. Finally, in November 1734 the governor had Zenger arrested and jailed while the colony brought his paper before yet one more grand jury. Zenger could not afford the high bail that Chief Justice DeLancey demanded. His supporters, Morris, Van Dam, and Alexander, could

have posted the bail, but did not because they assumed that Zenger would be released in December when the grand jury ceased to sit. They were correct in understanding that the grand jury would not indict him. But, on the last day of the grand jury, the attorney general charged Zenger with seditious libel by information. This procedure avoided a grand jury indictment, but only allowed Zenger to be tried for a misdemeanor.

At the first hearing in the case, Zenger's attorneys, Smith and Alexander, challenged the right of DeLancey to sit as a justice because of the way he had been appointed. Shortly after this, DeLancey disbarred both men and appointed John Chambers, an ally of Cosby, to defend the printer. At the next stage of the proceedings, the sheriff brought in a list of potential jurors that included a number of Cosby's friends and people who did business with him, including his baker, tailor, shoemaker, and candlemaker. Even though he was an ally of Cosby, Chambers exposed these irregularities because he clearly wanted to win his case, as most lawyers do. In this sense, Chambers may have been the first "civil liberties lawyer" in America, defending a client he did not agree with in a free speech case.

The trial did not take place until August 1735. By this time, Zenger had been in jail for more than eight months. At the time, the legal issues in libel cases were divided between the judge and jury. The jury determined if the allegedly libelous paper was published or written by the defendant—that is, the jury determined the "facts" of the case. The judge decided if the paper or writing was actually libelous—the "law" of the case. Truth was not considered a defense to a libel charge, and in fact, English courts had asserted that the "greater the truth, the greater the libel" on the theory that true statements that undermined support for the government are more dangerous than false ones. The traditional defense to the libel charge was that the defendant was not the publisher, or that the defendant may have printed the offensive publication, but did not actually know what was in it.

As the trial opened, Zenger had a new attorney, Andrew Hamilton, of Philadelphia, the most famous lawyer in the colonies. Working from a brief written by James Alexander, Andrew Hamilton offered a surprise defense. Hamilton began by admitting that Zenger had published the newspapers, but argued that what he published was true, and therefore not libel. He then offered to prove the truth of everything in the paper. The prosecutor objected that truth was not a defense, and in the end the judge sustained this position but not before Hamilton was able to argue in court that truth ought to be a defense. The judge directed the jury to convict Zenger of publication,

since he had admitted that, and leave the issue of libel up to the judge. Hamilton told the jurors that they had the right to issue a general verdict of not guilty, which the judge could not overrule. The jurors followed Hamilton's advice, and Zenger was acquitted. A year later Zenger published *A Brief Narrative of the Tryal of John Peter Zenger*, which was, in fact, written by James Alexander.

The Zenger case has long stood as monument to a free press. Zenger criticized the government and a jury of citizens acquitted him of libel. But, in fact the long-term legal significance of the case is less certain. This was a decision by a jury in a colony distant from England. It had no value as a legal precedent, and was vigorously attacked by legal experts in England and some of the other colonies. Zenger was clearly guilty under the existing law of libel. His acquittal was a form of jury nullification, in that the jury knew that he was guilty under the law, but the jury did not like the law. A runaway jury in a faraway colony could not change the law of England.

However, as a political precedent and a historical precedent, the Zenger trial was enormously important. After Zenger's case, no governor in the American colonies ever dared to bring a libel case against a colonial printer. There was simply no hope of winning. By the time of the American Revolution, the Zenger case was etched in the minds of the patriots as an example of how arbitrary government could trample the liberties of Americans. A number of provisions of the Constitution and the Bill of Rights fight their roots in the Zenger case. The case highlighted the need for an independent judiciary that served during the good behavior, rather than at the pleasure, of the governor. Thus, the U.S. Constitution provides life terms for judges. The case underscored the value of grand jury indictment, to prevent the government from trying its enemies. The Fifth Amendment would do just that. Zenger sat in jail for over eight months because the politically motivated judge demanded such a high bail. The Eighth Amendment addressed that issue. Zenger's lawyers were disbarred because they insulted the judge. The Sixth Amendment right to counsel helps prevent that. The sheriff tried to stack the jury, but the Sixth Amendment provides for an impartial jury. Finally, of course, Zenger was prosecuted for publishing attacks on the governor; the First Amendment presumably prevents such prosecutions.

Zenger's demand that truth be a defense to libel is still part of American law. However, during the sedition crisis of 1798 Americans learned that truth was not always clear, and that one man's truth, especially in politics, was another's libel. Thus, in *New York Times Co. v. Sullivan* (1964), the Supreme Court

could find that the press could publish false statements about politics and not be subject to libel, as long as the false statements were not intentional or published with reckless disregard for the truth.

The history of Zenger—indeed what we might call the myth of Zenger as a great victory for freedom of the press—has served as a guidepost for advocates of liberty in England and the United States. Zenger published his narrative of the case in 1737. It was reprinted in England in 1765 during the controversy over free speech and press surrounding John Wilkes. During and immediately after the Revolution, printers republished the Zenger narrative. During the debates over the ratification of the Constitution opponents of the Constitution talked about Zenger's case in the context of the lack of a bill of rights. In 1799, during the sedition act crisis, Zenger's narrative was once again reprinted. It would reappear on the eve of World War II, and during the McCarthy witch-hunt days of the 1950s. In *New York Times v. Sullivan*, Justice Arthur Goldberg would cite Zenger's case for the idea that a free press was essential to a democracy. The modern court has also cited it for the importance of the right to counsel. The case and the Zenger *Narrative* remain a monument to the value of a vigorous press and fair trials in a free society.

PAUL FINKELMAN

References and Further Reading

Paul Finkelman, ed. *A Brief Narrative of the Tryal of John Peter Zenger*. New York: Brandywine Press, 1997.

Cases and Statutes Cited

New York Times Co. v. Sullivan, 376 U.S. 254 (1964)

ZENGER, JOHN PETER

See Zenger Trial (1735)

ZOBREST v. CATALINA FOOTHILLS SCHOOL DISTRICT, 509 U.S. 1 (1993)

In *Zobrest v. Catalina Foothills School District*, the U.S. Supreme Court continued the shift in its establishment clause jurisprudence that began in the mid-1980s by upholding the constitutionality of a government-funded interpreter assisting a deaf child in a religious school.

For the previous forty years, one of the most complicated and frequently litigated establishment clause

issues has been the constitutionality of government funding to religious schools. During the 1970s and the early 1980s, the U.S. Supreme Court struck down most forms of government financial assistance to religious schools. But during the late 1980s and early 1990s, the Court began to alter its jurisprudence in this area. The *Zobrest* case is one of a number of highly significant decisions in recent years in which the Court has permitted government aid to religious schools so long as the aid reaches the school by means of private choice and is “neutrally” available to religious and nonreligious schools alike.

The *Zobrest* case involved the Individuals with Disabilities Education Act (IDEA), a federal statute pursuant to which deaf children in certain circumstances are entitled to a state-provided interpreter who assists the child in school by translating the spoken word into sign language that the child is able to understand. James Zobrest, a deaf child, attended a Roman Catholic school in Arizona, but the state, charged with administering IDEA, refused to provide him with an interpreter on the grounds that to do so would violate the establishment clause. Zobrest sued. The U.S. Court of Appeals for the Ninth Circuit agreed with the state, finding that the interpreter “would act as a conduit for the religious inculcation of James—thereby, promoting James’s religious development at government expense,” which violated the establishment clause.

In a five-to-four decision, the Supreme Court reversed. Chief Justice William Rehnquist’s opinion for the majority did not analyze the case as simply government aid to a religious school. Rather, the majority emphasized the fact that the government-funded interpreter wound up in a religious school as a result of private choice. Rehnquist wrote,

By according parents freedom to select a school of their choice, the statute ensures that a government-paid interpreter will be present in a sectarian school only as a result of the private decision of individual parents. In other words, because the IDEA creates no financial incentive for parents to choose a sectarian school, an interpreter’s presence there cannot be attributed to state decisionmaking.

Zobrest marked an important shift in the Court’s jurisprudence. Whereas in a pair of 1985 cases, *Aguiar v. Felton* (1985), and *School District of Grand Rapids v. Ball* (1985), the Court, in five-to-four decisions, had disallowed state-funded teachers of secular subjects from working in a religious school, the Court in *Zobrest* permitted the state-funded interpreter to do that which the Court had denied eight years earlier. In subsequent cases, the Court would build on

the *Zobrest* precedent by allowing further government aid to religious schools, so long as that aid arrived by virtue of the decision of a private person. For example, when the Court sustained the constitutionality of the use of publicly funded school vouchers in religious schools in *Zelman v. Simmons-Harris* (2002), the *Zobrest* case served an important precedent.

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References and Further Reading

- Lindeman, Devora L., *Comment: Zobrest v. Catalina Foothills School District: Private Choices and Public Funding Under the Establishment Clause*, Rutgers Law Review 47 (1995): 839–904.
- Stiltner, Jeffrey W., Note: *Rethinking the Wall of Separation: Zobrest v. Catalina Foothills School District. Is the End of Lemon?*, Capital University Law Review 23 (1994): 823–861.

Cases and Statutes Cited

- Aguilar v. Felton*, 473 U.S. 402 (1985)
- School District of Grand Rapids v. Ball*, 473 U.S. 373 (1985)
- Zelman v. Simmons-Harris*, 536 U.S. 639 (2002)

See also Establishment Clause (I): History, Background, Framing; State Aid to Religious Schools

ZONING AND RELIGIOUS ENTITIES

The U.S. Constitution

The First Amendment to the U.S. Constitution states in pertinent part: “Congress shall make no law respecting an establishment of religion [establishment clause] or prohibiting the free exercise thereof [free exercise clause].” In effect, these clauses limit the constitutionally allowed scope of local regulation and decision making vis-à-vis religious structures, uses, and displays. In *Lemon v. Kurtzman* (1971), the U.S. Supreme Court devised a three-part test to determine whether a law or government action violated the establishment clause. The so-called *Lemon* test states that to be constitutional, a law or governmental action must (1) have a secular purpose that neither advances nor prohibits religion—commonly referred to as the purpose prong; (2) have a direct and immediate effect that neither advances nor inhibits religion—commonly referred to as the effect prong; and (3) avoid excessive entanglement with

religion—commonly referred to as the entanglement prong. Thus, to be constitutionally valid, a law or governmental activity must satisfy all three prongs.

Zoning Defined

Privately owned land is held subject to restrictions imposed by the state (through its police power), the common law, or other individuals (in some combination). One of the state’s restrictions is implemented via zoning ordinances. These ordinances are justified as protecting the health, safety, morals, or welfare of the public by restricting land use and development.

American modern zoning is a creation of the City Beautiful Movement in the 1890s—a movement of private citizens seeking to improve the appearance and comfort of their communities. In 1916, New York City passed the country’s first zoning ordinance. As a result, zoning spread to the entire United States throughout the 1920s and 1930s. A city’s ability to zone must be created by the state passing a “zoning enabling act.” The Standard Zoning Establishment Act (SZEa) and the New York City plan provided the template upon which most—if not all—fifty states first based their zoning enabling law(s). The SZEa was published in 1923 by the U.S. Department of Commerce. The first step is to adopt a comprehensive (or master) plan for the entire city. Under this plan, various uses within the city are determined and located/pinpointed within specified zones or zoning districts—fixed geographic areas in a somewhat checkerboard pattern. Examples of categories of use are single-family housing; multifamily housing; light industrial; retail; commercial; recreational/parks; agricultural; height, bulk, and area restrictions; and open space. The comprehensive plan serves as a present and future guide for development: it has been described “as a planning, thinking document.”

In general, three separate governmental bodies within a city effectuate zoning: the city council (the legislative body that can amend the zoning code and its ordinances); the planning commission (providing expert advice as part of the legislative process); and the board of zoning adjustment (a quasijudicial body that decides applications from individual landowners for relief from the zoning ordinances).

In 1955, the New Jersey State Supreme Court aptly stated that “the essence of zoning is territorial division in keeping with the character of the lands and structures and their peculiar suitability for particular uses, and uniformity of use within the division.”

In state courts, most of the cases involving both free exercise and land use arise from issues concerning zoning ordinances. Although the majority of state decisions hold that zoning may not ban churches from a particular residential area, in practice, churches are permitted in residential zones through the granting of a special permit. A key underlying question is whether a particular structure or activity at a particular location amounts to the exercise of religion.

The Supreme Court and Congress: A “Battle” over Religion

By 2005, the U.S. Congress and the U.S. Supreme Court had been in a rhetorical battle over the free exercise clause and government interference with or limitation of this right for approximately fifteen years. The first in what would lead to an exchange of actions (both judicial and legislative) was taken by the Court in its decision in the case of *Employment Division v. Smith* (1990).

The *Smith* case involved the firing of two men (Smith and Black, respondents) from their jobs as a result of their use of peyote (a cactus plant that when chewed or ingested has hallucinogenic effects)—which was considered a controlled substance. The respondents stated that they ingested the drug as part of a religious service and as a sacrament of their church, the Native American Church. The respondents later applied for unemployment compensation through the State of Oregon (petitioner) and were denied due to “work-related misconduct.” The Court ultimately held in the *Smith* case that it was not a violation of the free exercise clause for a state to determine that sacramental and ceremonial peyote use was in violation of its drug control laws, and therefore, deny unemployment compensation for firing for this drug use. Thus, neutral, generally applicable laws that—in application or enforcement—burden a person’s free exercise of religion, do not violate the free exercise clause. In addition, the refusal by the government to grant special accommodation to people who are incidentally burdened does not require strict scrutiny review. Prior to *Smith*, the Court had generally held that a law of general applicability may violate the free exercise clause where the law, as applied, (1) significantly burdens religious beliefs or practices, (2) is not justified by a compelling state interest, and (3) is not the least restrictive means available.

Congress responded by passing the Religious Freedom Restoration Act of 1993 (RFRA) (42 U.S.C.A.

sections 2000bb–2000bb-4); the act was signed into law by then-President Clinton. Congress’s findings stated that in *Smith*, “the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral towards religion.” Further, the purpose of this federal law was, in part, to “restore the compelling interest test ... and to guarantee its application in all cases where free exercise of religion is substantially burdened.” As a result, the act requires a compelling governmental interest and the least restrictive means. Notably, the RFRA applied retroactively (“this chapter applies to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993”).

In addition, as a direct reply to the *Smith* decision (and citing *Smith* in its findings), in 1994, Congress amended the American Indian Religious Freedom Act of 1978 (AIRFA) (42 U.S.C.A. section 1996a) to specifically exempt Indians who for “bona fide traditional ceremonial purposes in connection with the practice of traditional Indian religion” in relation to their religious sacrament use, possess or transport peyote from being prosecuted under federal drug laws.

Four years after the passage of RFRA, in *City of Boerne v. Flores* (1997), the Court struck down the provisions of RFRA as they apply to the states. This case involved the denial of a building permit (to expand and renovate the current church building) to the Catholic archbishop due to local historic preservation zoning ordinances (namely, the building had been designated a historic landmark). The Court held that (1) Congress had exceeded its enforcement powers in the passage of RFRA, (2) RFRA was a considerable congressional intrusion into State action, and (3) the Court found that there had been no pervasive religious bigotry requiring RFRA’s sweeping application. Justice Kennedy, writing for the majority, described RFRA as “the most demanding [strict scrutiny] test known to constitutional law.” Contrarily, religious leaders and supporters of RFRA stated that this action “left religious groups in general, and religious minorities most particularly, without the constitutional protections that have made religious experience in America so unique and remarkable.” In sum, the *Boerne* case has been labeled “the most important religious freedom case the Supreme Court has ever had to decide [to date].”

The first congressional response to *Boerne* came two years later. The Religious Liberty Protection Act of 1999 (RLPA) was passed by the House of Representatives (1999 U.S. H.B. 1691), but failed in the Senate (RLPA expired in committee). RLPA was

criticized as being too broad—in the same manner as RFRA.

In the next legislative session (the 106th Congress), the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) was introduced and ultimately passed by Congress and signed into law by then-President Clinton (PL 106-274, 114 Stat. 803; 42 U.S.C.A. sections 2000cc–2000cc-5). Based on congressional fact finding, the hearing record states that “churches in general, and new, small, or unfamiliar churches in particular, are frequently discriminated against on the face of zoning codes and also in the highly individualized and discretionary processes of land use regulation.” The “general rule” as stated in RLUIPA is that “no government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person including a religious assembly or institution” without demonstrating that the burden furthers a compelling governmental interest in the least restrictive way. It should be noted that RLUIPA purposely patterns RFRA, but is limited in scope/application to religious land uses and the free exercise of religion rights of institutionalized people. The limited scope is specified in section 2000cc(a)(2) to where

- (A) the substantial burden is imposed on a program or activity that receives Federal financial assistance...
- (B) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes...
- (C) the substantial burden is imposed in the implementation of a land use regulation...

The Christian Law Association in a post-RLUIPA publication titled, *A Major Threat to Churches: Zoning Law*,² advises that when appearing for a zoning hearing churches address the following issues: (1) whether the church will diminish the surrounding property values, (2) whether the church will cause excessive traffic for the community, (3) whether there be ample off-street parking for the church, and (4) whether the church will be operating a mission on church property.

As a way to ensure compliance with RLUIPA, some local jurisdictions have created and are utilizing the so-called Religious Land Use Plan (RLUP). In general, the RLUP seeks to explain legal principles, including RLUIPA, state and local zoning laws, and constitutional issues.

Challenges to zoning ordinances under RLUIPA are beginning to be litigated through the court system. As of May 2005, the Court had not taken up or decided on the constitutionality of RLUIPA's zoning-related provisions. Based on the fifteen-year

history of this debate, the Court will undoubtedly be heard on this issue once again.

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References and Further Reading

- American Atheists. *Flashline: Supreme Court Strikes Religious Freedom Restoration Act*, June 25, 1997. <http://www.atheists.org/flash.line/rfra2.htm>.
- Blaesser, Brian W., and Alan C. Weinstein, eds. *Land Use and the Constitution: Principles for Planning Practice*. Chicago: Planners Press, 1989.
- Boyer, Ralph E., Herbert Hovenkamp, and Sheldon F. Kurtz. *The Law of Property: An Introductory Survey*. 4th ed. St. Paul, Minn.: West Publishing, Co., 1991.
- Chemerinsky, Erwin. *Court Adds Class Actions, Religion to Docket*, Trial 41 (2005): 66–68.
- Christianity Today. “The End of Church Zoning Disputes?” *Christianity Today*, September 4, 2000. <http://www.christianitytoday.com/ct/2000/010/12.25.html>.
- Christian Law Association. *A Major Threat to Churches: Zoning Laws*. 1999–2001. http://www.christianlaw.org/zoning_threat.html.
- Connor, Susan Marie. *Zoning and Matters of Age: Tots, Teens, and Seniors*, Probate and Property January/February (2005): 61–66.
- Cutter v. Wilkinson, 349 F.3d 257 (6th Cir. 2003), cert. granted, 125 S.Ct. 308 (2004).
- Dukeminier, Jesse, and James E. Krier. *Property*. 5th ed. New York: Aspen Publishers, 2002.
- Hiller, Amanda. “Zoning of Religious Land Uses: The Impact of the Religious Land Use and Institutionalized Persons Act of 2000.” In *Trends in Land Use Law from A to Z: Adult Uses to Zoning*, edited by Patricia E. Salkin, 97–124. Chicago: American Bar Association, 2001.
- Johnson v. Martin, 223 F.Supp.2d 820 (USDC, W.D. Mich. 2002).
- Katobimar Realty Co. v. Webster, 20 N.J. 114 (1955).
- Mauk, John, and Wendy Smith. “Locals Risk Lawsuits over Church Zoning.” American City and County, 2004. http://www.americancityandcounty.com/mag/government_locals_risk_lawsuits.
- Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214 (11th Cir. 2004).
- Nolon, John R., and Jessica A. Bacher. *Westchester Day School v. Village of Mamaroneck*, April 21, 2004. <http://www.law.pace.edu/landuse/DaySchool.html>.
- Paisner, Michael. *Boerne Supremacy: Congressional Responses to City of Boerne v. Flores and the Scope of Congress's Article I Powers*, Columbia Law Review 105 (2005): 537–82.
- Pelham, Thomas G. “The Church Next Door: Zoning Religious Uses.” In *Sex, Religion and the Press: First Amendment Law for Local Government and Land Use Lawyers*. Tallahassee: The Florida Bar, 2000.
- Rathkopf, Arden H., and Daren A. Rathkopf. *The Law of Zoning and Planning*. Vol. 2. St. Paul, MN: Thomson/West, 2003, and 2004 supplement.
- Stein, Gregory M., *Early Land Use Cases, Continued Uncertainty*. Probate and Property January/February (2005): 38–43.
- Stoebuck, William B., and Dale A. Whitman. *The Law of Property*. 3rd ed. St. Paul, MN: West Group, 2000.

Willis, Clyde E. *Student's Guide to Landmark Congressional Laws on the First Amendment*. Westport, CT: Greenwood Press, 2002.

Young, Kenneth H. *Anderson's American Law of Zoning*. 4th ed., vol. 2. Deerfield, IL: Clark Boardman Callaghan, 1996, and 2004 supplement.

Cases and Statutes Cited

American Indian Religious Freedom Act Amendments of 1994, Pub. L. No. 103-344, 108 Stat. 3125 (1994), 42 U.S.C.A. section 1996a

City of Boerne v. Flores, 521 U.S. 507 (1997)

Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990)

Lemon v. Kurtzman, 403 U.S. 602 (1971)

Religious Freedom Restoration Act of 1993, 42 U.S.C.A. sections 2000bb–2000bb-4

Religious Land Use and Institutionalized Persons Act of 2000, PL 106-274, 114 Stat. 803; 42 U.S.C.A. sections 2000cc–2000cc-5

Religious Liberty Protection Act of 1999, 1999 United States House Bill No. 1691 (as passed by the U.S. House of Representatives; and later denied by the U.S. Senate)

See also Accommodation of Religion; Application of First Amendment to States; Compelling State Interest; Defining Religion; Drugs, Religion, and Law; Establishment of Religion and Free Exercise Clauses; State Constitution Distinctions

ZONING LAWS AND “ADULT” BUSINESSES DEALING WITH SEX

The authority of local governments to regulate the location and operation of commercial enterprises by means of zoning is well established. When the regulated business is engaged in expressive activity protected by the First Amendment, however, this authority may be called into question. And when the expression takes the form of sexually oriented but nonobscene “adult” books, videos, or dancing, significant tension can arise between First Amendment freedoms and community values.

In addition to specifying particular geographical areas in which sexually oriented businesses must operate, zoning codes commonly require such enterprises either to be separated by a certain distance from other, similar businesses (as well as from schools, homes, parks, and churches) or, alternatively, to be clustered together into sexually oriented “combat zones.” Either strategy will usually be upheld if the regulation has the primary purpose of preventing adverse community impacts, is not aimed at suppressing a certain type of communication (that is, is content neutral),

and does not unreasonably foreclose the public’s access to the protected expressive activity.

Standards of constitutionality in this field are somewhat tentative, in part because of the prevalence of highly fractionated Supreme Court cases decided by narrow majorities or pluralities. The Court was first asked to review a local zoning restriction of adult-oriented businesses in a 1976 case, *Young v. American Mini-Theaters, Inc.* In a plurality opinion authored by Justice Stevens, the Court upheld a Detroit ordinance requiring adult businesses to be separated by at least 1,000 feet from each other, and from residential properties. Oddly, the Stevens plurality applied the mid-level standard of review normally applied in equal protection cases not involving suspect classes, even though the ordinance had been challenged under the First Amendment. *American Mini Theaters* established that the Court would not afford adult entertainment the same degree of protection under the First Amendment as higher-valued forms of expression, such as political debate, but would nevertheless apply a meaningful level of scrutiny. This case also coined the doctrine of “secondary effects,” holding that local governments have a legitimate interest in controlling negative social activities and conditions that tend to accompany the operation of adult businesses.

The same rationale was applied to nude dancing establishments in *Schad v. Borough of Mount Ephraim*, a decision that yielded five different opinions, none of which commanded more than three votes; and was instrumental in *City of Renton v. Playtime Theatres, Inc.* The City of Renton’s zoning banned adult theaters from 95 percent of the city’s area. The Court upheld this ordinance because it was ostensibly aimed at mitigating negative secondary effects, although the city had not conducted a study to determine whether such effects were actually present. Finally, in 2003, a plurality of the Court upheld an adult-business dispersal ordinance in *City of Los Angeles v. Alameda Books, Inc.* But a four-justice dissent called for striking down such laws as impermissible regulation of expressive content, and Justice Kennedy’s concurrence emphasized that dispersing the secondary effects of adult businesses must not have the effect of reducing protected speech.

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References and Further Reading

Jelsema, Mindi M., *Note: Zoning Adult Businesses after Los Angeles v. Alameda Books*, St. Louis University Law Journal 47 (2003): 1117.

Mandelker, Daniel R., and John M. Payne. *Planning and Control of Land Development: Cases and Materials*. 5th ed. New York: Lexis, 2001.

Cases and Statutes Cited

City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425 (2002)

City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986)

Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981)

Young v. American Mini-Theaters, Inc., 427 U.S. 50 (1976)

See also **Content-Neutral Regulation of Speech; First Amendment and PACs**; *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981); *Young v. American Mini-Theaters, Inc.*, 427 U.S. 50 (1976)

ZONING LAWS AND FREEDOM OF SPEECH

Zoning laws, which regulate how real property may be developed and used, can affect freedom of speech for three types of land uses: signs and billboards, adult entertainment businesses, and religious uses, including worship or study in homes. Zoning regulation of the freedom of expression associated with religious uses is, however, normally discussed in the context of religious freedom, rather than freedom of expression.

Courts closely scrutinize zoning laws that seek to ban or impose restrictions on uses associated with expressive activities because such activities are protected under the First Amendment. First Amendment law is complex and the Supreme Court has not developed a single standard of scrutiny or analytical test for determining when a zoning law that regulates speech violates the Constitution. Rather, depending on the nature of the regulation under review, the Court will judge zoning regulation of speech using one of several different tests that apply standards ranging from intermediate to strict scrutiny.

Several factors play a major role in determining the standard of scrutiny that a court will apply to a given zoning regulation. Zoning laws that differentiate on the basis of the content of expression, or that seek to ban a type of expression entirely, or that impose the requirement that one obtain discretionary governmental approval prior to engaging in speech will be subject to the strictest judicial scrutiny. This treatment is illustrated by the bans on real estate signs and on lawn signs struck down in *Linmark Associates, Inc. v. Township of Willingboro* (1977) and *City of Ladue v. Gilleo* (1994), respectively. In contrast, regulations that, regardless of content, merely control

the “time, place, or manner” in which expression occurs, or which regulate commercial speech, or which merely require that one meet objective non-discretionary standards for a permit prior to engaging in “speech,” will be subject to some form of intermediate scrutiny. This treatment is illustrated by decisions upholding locational restrictions on adult entertainment businesses and commercial billboards in *City of Renton v. Playtime Theatres* (1986) and *Metromedia, Inc. v. City of San Diego* (1981), respectively.

While the strict scrutiny standard applied to content-based zoning regulations or to a content-neutral regulation that totally bans a distinct mode of expression is fairly straightforward, that is not the case when the Court applies intermediate, rather than strict, scrutiny. In these cases, the Court has applied slightly different versions of intermediate scrutiny depending on the focus of the zoning regulation. Thus, zoning regulations of commercial speech, such as business signs and commercial advertising billboards, as seen in *Metromedia*, and content-neutral “time, place or manner” zoning regulations of the location of adult entertainments businesses, as seen in *City of Renton*, are analyzed under slightly differing versions of intermediate scrutiny first announced in the *Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York* (1980) and *United States v. O'Brien* (1968) cases, respectively. Both tests focus, however, on whether the challenged zoning regulation has the effect of imposing only a minimal restriction on speech in an effort to advance a legitimate state interest that is unrelated to the suppression of lawful speech.

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References and Further Reading

Blaesser, Brian W., Alan C. Weinstein, and Daniel R. Mandelker. *Federal Land Use Law and Litigation*. St. Paul, MN: Thomson/West, 2005.

Mandelker, Daniel R., and Rebecca L. Rubin, eds. *Protecting Free Speech and Expression: The First Amendment and Land Use Law*. Chicago: ABA Publishing, 2001.

Cases and Statutes Cited

Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York, 447 U.S. 557 (1980)

City of Ladue v. Gilleo, 512 U.S. 43 (1994)

City of Renton v. Playtime Theatres, 475 U.S. 41 (1986)

Linmark Associates, Inc. v. Township of Willingboro, 431 U.S. 85 (1977)

Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981)

United States v. O'Brien, 391 U.S. 367 (1968)

ZORACH v. CLAUSON, 343 U.S. 306 (1952)

Thomas Jefferson wrote, in a famous letter in 1802, that the religious clause of the First Amendment was intended to create “a wall of separation” between church and state. *Zorach v. Clauson* is a significant case because the Court says that government must be separate from religion, but not hostile or unfriendly toward it.

The earliest cases on the topic were *Cochran v. Louisiana* (1930)—the state provided free textbooks to parochial school students on the same basis as it supplied books to public school students—and *Everson v. Board of Education* (1947)—a local school board subsidized the cost of public transportation for parochial school students on the same basis as public school students. In both cases, the Court reasoned that the primary beneficiaries were the students, not the church, so the wall of separation was not breached. The *Everson* decision has a comprehensive historical review of the establishment clause. *Everson* also holds that the First Amendment’s two religious proscriptions apply to the states because of the Fourteenth Amendment.

The next cases to reach the Supreme Court dealt with challenges to nonfinancial assistance to religious education programs—so-called “released time” programs. An Illinois statute allowed religious teachers to come into public schools during the school day once a week to provide religious instruction. Parents could request that their children attend such a religious class. Students without such parental consent would go elsewhere in the school for other activities. In the 1948 case of *McCullum v. Board of Education*, the Court struck down this program, saying that the combination of the use of tax-supported school buildings and the school system’s administration of attendance at these classes breached the required wall of separation.

In *Zorach v. Clauson*, the Court considered a New York program with one feature that differed from the Illinois arrangement. Here, parents could elect to have their children leave the public school forty-five minutes or an hour before the end of the school day to attend religious education classes at a religious institution. Students not participating in this program stayed in school for secular activities. The religious schools would report weekly about the attendance of students who were released to attend the religious classes.

The Supreme Court upheld the constitutionality of the New York program, distinguishing *McCullum* by pointing out that the religious instruction was taking

place outside the public schools, and that they saw no evidence that students were coerced to participate.

Justice Douglas said that the First Amendment separation of church and state should be absolute, but that meant only that there should be no interference with the “free exercise” of religion nor should there be an “establishment” of religion. He summarized this argument with an oft-quoted phrase: “We are a religious people whose institutions presuppose a Supreme Being.” Douglas saw no problem with a government program that “respects the religious nature of our people and accommodates the public service to their spiritual needs.”

Douglas’s decision is interesting because it anticipated many cases that have more recently arisen. Douglas argued that if the Court were to disallow the New York program, one might carry the concept of separation to its logical extreme:

Municipalities would not be permitted to render police or fire protection to religious groups. Policemen who helped parishioners into their places of worship would violate the Constitution. Prayers in our legislative halls; the appeals to the Almighty in the messages of the Chief Executive; ... “so help me God” in our courtroom oaths—these and all other references to the Almighty that run through our laws, our public rituals, our ceremonies would be flouting the First Amendment. A fastidious atheist or agnostic could even object to the supplication with which the Court opens each session: “God save the United States and this Honorable Court.”

Three justices dissented. Justice Black said that when the state used “its compulsory education laws to help religious sects get attendants presumably too unenthusiastic to go unless moved to do so by the pressure of this state machinery.... This is not separation but combination of Church and State.”

Justice Frankfurter dissented because he thought it was likely that teachers pressured students to participate in the released time programs. Frankfurter said that the majority opinion relied on the absence of evidence of coercion in upholding the program. However, he pointed out, the trial court had barred any testimony on the subject of coercion, saying it was not relevant to the constitutional issue. This meant that the majority opinion was based on a faulty premise.

Justice Jackson noted that no real educational activity occurred during the released time, in order to prevent the students who stayed in school from forging ahead of those who attended the religious programs. Compulsory attendance in a school where no meaningful education was occurring meant, said Jackson, meant that the school would serve “as a temporary jail for a pupil who will not go to Church.”

Released time programs were probably at their peak in popularity at around the time of the decision in *Zorach v. Clauson*, with 2 million students nationwide participating in such programs. These programs have steadily declined since then, but several organizations that promote released time estimate that today there are still about 250,000 students in released time programs, in 1,000 school districts.

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Cases and Statutes Cited

Cochran v. Louisiana State Board of Education, 281 U.S. 370 (1930)

Everson v. Board of Education, 330 U.S. 1 (1947)

McCollum v. Board of Education, 333 U.S. 203 (1948)

See also **Application of First Amendment to States; Establishment Clause (I): History, Background, Framing; Establishment Clause: Theories of Interpretation; Establishment of Religion and Free Exercise Clause; Pledge of Allegiance (“Under God”); Release Time from Public Schools (For Religious Purposes)**

ZURCHER v. STANFORD DAILY, 436 U.S. 547 (1978)

Zurcher v. Stanford Daily is a noteworthy U.S. Supreme Court decision calibrating First and Fourth Amendment values. *Zurcher* also illustrates interaction among the Court, Congress, and the states.

Zurcher arose from a protest occasioned by Stanford University Hospital dismissing two employees—a black janitor and a Chicano neurosurgeon. On April 9, 1971, when law enforcement officials attempted to remove demonstrators occupying the hospital’s administrative offices, nine police were injured by demonstrators wielding sticks and clubs. One of officers saw someone photographing the encounter. That person was a *Stanford Daily* staffer. On April 11, the *Daily* published a special edition covering the

confrontation including photographs the staffer had taken. Acting under a warrant, police searched the *Daily* offices. The warrant contained no assertion that members of the *Daily* staff were involved in unlawful acts at the hospital.

Zurcher contested the constitutionality of this “third-party” search.

Writing for a majority of five, Justice White sided with police chief James Zurcher. After observing that “[w]here ... materials sought to be seized may be protected by the First Amendment, ... requirements of the Fourth Amendment must be applied with ‘scrupulous exactitude.’” White concluded that “‘preconditions for a warrant ... afford sufficient protection against ... harms ... assertedly threatened by warrants for searching newspaper offices.’”

In 1980, responding to *Zurcher*, Congress adopted the Privacy Protection Act (PPA). The PPA states that

government may not search a newsroom for the purpose of obtaining work product or documentary materials relating to a criminal investigation or criminal offense, if there is reason to believe that the work product belongs to someone who will publish it in a public communication...

Nine states also expanded legal protection against such third-party searches.

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References and Further Reading

Bell, Bernard W., *Judge White and the Exercise of Judicial Power: The Populism of Justice Byron R. White: Media Cases and Beyond*, University of Colorado Law Review 74 (2003): 1425.

Marcus, Philip H., *Comment: A Fourth Amendment Gag Order—Upholding Third Party Searches at the Expense of First Amendment Freedom of Association Guarantees*, University of Pittsburgh Law Review 47 (1985): 257.

Meltzer, Daniel J., *Jurisdiction and Remedies: Congress, Courts, and Constitutional Remedies*, Georgetown Law Journal 86 (1998): 2537.

INDEX

A

A Book Named "John Cleland's Memoirs of a Woman of Pleasure"
v. Massachusetts, 1–2, 1118
Cain v. Kentucky and, 212
Ginzburg v. United States and, 689
Miller test and, 1012–1013
Mishkin v. New York and, 1023
Rabe v. Washington and, 1255
AACU. *See* Association of American Colleges and Universities
AASS. *See* American Anti-Slavery Society
AAUP. *See* American Association of University Professors
ABA. *See* American Bar Association
Abandonment, 963
ABC-TV, 661
Abington Township School District v. Schempp, 2–4, 90, 131–133, 408, 533
Becker amendment, 117–118
Board of Education v. Allen and, 155
Clark, T., and, 309
Engel v. Vitale and, 502
establishment clause and, 530
evolution and, 1619
free exercise and, 1246
“In God We Trust” and, 1067
Lemon test and, 533
non-preferentialism standard and, 1109
school prayer and, 1196
separationism and, 767
Stone v. Graham and, 1563–1564
Wallace v. Jaffree and, 1736
Warren Court and, 1757, 1760
Ableman v. Booth, 1589
Abolitionism, of capital punishment, 232–233, 239–242
Abolitionism, of slavery, 4–7
Anthony and, 65
Bingham and, 145
Constitution and, 7
early, 53
Emancipation Proclamation and, 924
First Amendment and, 4–5
free speech and, 648–649
gag rules and, 66, 648
Garrison and, 676
Giddings and, 681
Kendall and, 883–884
Lovejoy and, 935
Mott and, 519
Rush and, 1386, 1387
Stanton and, 519, 1522
timeline of, 7
Walker and, 1734
Abolitionist Synagogue, 1485

Aboud v. Detroit Board of Education, 7, 1515
forced speech and, 601–602
University of Wisconsin v. Southworth and, 1700
Abortion, 8–11. *See also* Partial birth abortion; *Roe v. Wade*
ABA and, 432–433
ACLU and, 50
AFLA and, 29–30
Akron v. Akron Center for Reproductive Health and, 34–35
ALI and, 433
AMA and, 432–433
Ashcroft and, 85
Bellotti v. Baird and, 281
Bigelow v. Virginia and, 330
Bray v. Alexandria Women's Health Clinic and, 180–181
Breyer and, 183
Burger Court and, 198–199
clinics, 34–35
coercion and, 1173
Colautti v. Franklin and, 324
commercial speech and, 330
Comstock and, 342
consent, 35
counseling, 673–674, 700, 712, 951
decisional privacy and, 828
dilation and evacuation, 10
dilation and extraction, 10
Doe v. Bolton and, 432–433
Douglas and, 445–446
due process clause and, 714
establishment clause and, 11–12
extremist groups and, 565
FACE Act and, 633–634
Falwell and, 575
federal funding of, 115–116, 746–747
Frisby v. Schultz and, 666
gag rules and, 672–674
government funding and, 951
Harris v. McRae and, 673, 1320, 1321, 1373
history of, 147
hospitals and, 1183
Hyde Amendment and, 1134
ICMCA and, 1061
implied rights and, 802
incest and, 951
indigents and, 115, 951
Internet and, 819–820
intrusion and, 836
Jackson Amendment and, 1134
Kennedy, A., and, 885
key cases, 1320–1322
Lambert v. Wicklund and, 905–906
laws, 8, 11–12
Lemon test and, 534
Madsen v. Women's Health Center, 948–949
Maher v. Roe and, 673–674, 725, 1320, 1321, 1324, 1388, 1389

INDEX

- Abortion (*cont.*)
 - marriage and, 966
 - McCorvey and, 987–988
 - Medicaid and, 12, 115–116, 746–747, 951, 1062
 - medical treatment and, 433
 - minors and, 34–35, 121–122, 250, 725, 905–906, 1284, 1321–1322, 1368–1369
 - NARAL and, 1061–1062
 - NOW and, 1068
 - O'Connor and, 1126
 - Operation Rescue and, 1133–1135
 - parental consent for, 250, 1173
 - parental notification and, 725, 905–906
 - personal autonomy rights and, 1533
 - physicians and, 324
 - picketing and, 1168–1169
 - Planned Parenthood of Central Missouri v. Danforth* and, 1172
 - Planned Parenthood v. American Coalition of Life Activists* and, 1653
 - Planned Parenthood v. Ashcroft* and, 1475
 - Poelker v. Doe* and, 1183
 - poverty and, 747
 - privacy and, 1225, 1542
 - privileges and immunities and, 1231
 - protests, 12–13, 66–67, 633–634
 - rape and, 951
 - Rawls on, 1273
 - regulation of, 324
 - religion and, 11–12
 - Rush and, 1367
 - Rust v. Sullivan* and, 672–674, 1322, 1324, 1387–1388, 1674
 - Scalia and, 1416
 - Simopoulos v. Virginia* and, 1475
 - spousal consent and, 1173
 - stem cell research and, 1552
 - Stenberg v. Carhart* and, 1287, 1288, 1554–1555
 - substantive due process and, 608
 - Thomas and, 1650
 - Thornburgh v. American College of Obstetricians and Gynecologists* and, 1652
 - Tribe and, 1668
 - as victimless crime, 1709
 - Victorian Age, 1368
 - viewpoint discrimination and, 1714, 1717
 - waiting periods, 35
 - Webster v. Reproductive Health Services* and, 1770
 - White, B., and, 1779
 - Wolf v. Colorado* and, 1790
- Abortion clinics, 34–35
 - McCorvey and, 988
- Abortion: The Clash of Absolutes* (Tribe), 1668
- Abrahamson, Shirley, 1545
- Abrams, Jacob, 13, 658
- Abrams v. United States*, 13–14, 1281, 1282, 1450
 - Brandeis and, 174
 - free speech and, 1794–1795
 - freedom of expression and, 1160, 1163
 - freedom of press and, 658
 - freedom of speech and, 644, 1642
 - Hand and, 736
 - Holmes and, 658, 771, 1795–1796
 - incitement of criminal activity and, 652–653
 - marketplace of ideas theory and, 962
 - Taft Court and, 1597
 - truth and, 994
- Vinson and, 1722
 - West Virginia State Board of Education v. Barnette*, 1776
 - White Court and, 1778
- Absolute disparity, 872
- Absolutism, 14–15
 - balancing test and, 100
 - royal, 505
 - states' rights and, 27
- Abstinence only, 148
- Abu Ghraib, 15–16
 - Amnesty International and, 60
 - War on Terror and, 1095
- Abuse
 - at Guantanamo Bay, 716
 - hostile environment harassment and, 777–778
 - marital, 795, 965
 - spousal murder and, 974–975
- Abuse of discretion, 1460
- Abzug, Bella, 677
- Academic freedom, 16–20, 1505–1506
 - censorship and, 1507
 - individual, 18–19
 - institutional, 19
 - in lower federal courts, 19–20
 - national security and, 1074
 - Scopes trial and, 1425
- Accademia delle Arte del Disegno, 1051
- Access
 - freedom of press and, 661–662
 - Internet, 821–822, 825
- Accommodation
 - history of, 22–23
 - modern standard of, 24
 - or religion, 22–24
 - theories of, 23
- Accomplices
 - confessions and, 24–25
 - felony murder, 236
 - proportionality and, 245
- Accountability, 62
- Accused
 - protections for, 1539–1540
 - rights of, 172, 1359–1361, 1363, 1764
 - Victim's Bill of Rights and, 1540
- Acevedo, Charles, 214–215
- Acevedo-Delgado v. Rivera*, 1515
- Ackerman, Bruce, 494
- Ackies v. Purdy*, 98
- ACLJ. *See* American Center for Law and Justice
- ACLU. *See* American Civil Liberties Union
- Acquired immune deficiency syndrome. *See* AIDS
- Acquittals. *See also* *Autrefois acquit*
 - jury nullification and, 869
- Act for Preventing Frauds of 1662
 - Writs of Assistance Act and, 1803
- Act of Settlement of 1701, 507
 - English Bill of Rights and, 503
 - Glorious Revolution and, 691
- ACT UP (AIDS Coalition to Unleash Power), 25–26
- Acton, James, 1707
- Acton, Lord John, 26–27, 150
- Actual malice standard, 27
 - New York Times Co. v. Sullivan* and, 403
 - public figures and, 1242–1243
 - public officials and, 1245

- Actus reus, 1185
- ADA. *See* Americans with Disabilities Act of 1990
- Adair v. United States*, 465
 - government intervention and, 928
- Adams, Abigail, 846
- Adams, John, 1750
 - Alien Acts and, 37–38
 - Bache and, 95–96
 - Biblical law and, 127
 - Boston Massacre and, 166, 308
 - compulsory process clause and, 344
 - Cushing and, 644
 - election of, 36
 - freedom of press and, 1206
 - Jefferson and, 845, 847
 - Kentucky Resolves and, 887
 - Madison and, 945
 - Marshall, J., and, 970
 - Otis and, 1139
 - People v. Croswell* and, 733
 - Sedition Act of 1798 and, 642–643
 - Virginia Resolves and, 887
- Adams, John Quincy
 - abolitionism and, 648
 - Calhoun and, 214
 - gag rules and, 66
 - Giddings and, 681
 - Jackson, A. and, 832
 - Petition Campaign and, 1156
 - right to petition and, 1353
 - slavery and, 1486
- Adams, Samuel, 1750
 - Constitutional Convention of 1787 and, 1264, 1265
 - Massachusetts Body of Liberties of 1641 and, 979
 - Otis and, 1139
- Adams Theatre Co. v. Keenan*, 1381–1382
- Adams v. Howerton*, 773
- Adams v. Texas*, 932
- Adams v. Williams*, 1444
 - Michigan v. Summers* and, 1006
- Adamson v. California*, 74
 - Bill of Rights and, 1632
 - Bingham and, 145
 - Black, H., and, 263
 - Brandeis and, 176
 - due process incorporation and, 607–608
 - Frankfurter and, 618
 - Griswold v. Connecticut* and, 713
 - incorporation doctrine and, 803
 - overturning of, 618
 - Vinson Court and, 1720
- Adarand Constructors, Inc. v. Peña*
 - Burger and, 205
 - Japanese internment and, 841
 - O'Connor and, 1127
 - race-based classifications and, 611
- ADC. *See* Aid to Dependent Children
- Addams, Jane, 256
- Adderly v. Florida*, 15
- Addington v. Texas*, 43
- ADEA. *See* Age Discrimination in Employment Act of 1967
- Adjudications
 - impartiality and, 799–800
 - juvenile, 396
- Adkins, Janet, 888
- Adkins v. Children's Hospital*, 465
 - due process and, 1580
 - freedom of contract and, 637
 - government intervention and, 928
 - Hughes Court and, 782
 - Taft Court and, 1596, 1601
- ADL. *See* Anti-Defamation League
- Adler v. Board of Education*, 17
 - free speech and, 1361
 - freedom of association and, 635
 - loyalty oaths and, 1612
- Administrative law, 183
 - judges, 799
- Administrative law judges (ALJs), 799
- Administrative Procedure Act of 1946 (APA), 799
 - FOIA and, 641
- Administrative process, 800
- Adolescent Family Life Act (AFLA), 29–30
 - Bowen v. Kendrick* and, 167
- Adoption
 - AFLA and, 29
 - child custody and, 279–280
 - consent and, 279
 - fathers and, 279–280
 - joint, 1398
 - notice of, 279–280
 - same-sex, 678, 1398–1399
 - second parent, 1398
 - veto, 279
- Adoption and Safe Families Act, 1463
- Adult bookstores
 - Pope v. Illinois* and, 1191
 - Schad v. Mt. Ephraim* and, 1418
 - zoning and, 1121
- Adult entertainment
 - secondary effects doctrine and, 1436
 - Vance v. Universal Amusement Co., Inc.* and, 1706–1707
 - Young v. American Mini Theatres* and, 1807
 - zoning and, 1121, 1820–1821
- Adultery
 - Bible and, 130
 - Hamurabi and, 1492
 - Kingsley International Pictures Corporation v. Regents of the University of New York* and, 891–892, 1042
 - Naim v. Naim* and, 1059
 - Patterson v. New York* and, 1150
 - punishments for, 1540
 - sexual orientation and, 1223
 - as victimless crime, 1709
- Advertising
 - alcohol, 614
 - antismoking, 1708
 - appropriation of name or likeness and, 77
 - Bolger v. Youngs Drug Products Corp.* and, 161, 331
 - Braun v. Soldier of Fortune Magazine* and, 659
 - campaign financing and, 219
 - Central Hudson Gas & Electric Corporation v. Public Service Commission of New York* and, 257
 - Central Hudson* test and, 331
 - commercial speech v., 330
 - corporate speech and, 650
 - drugs and, 114
 - e-mail, 820
 - forced speech and, 602
 - 44 Liquormart v. Rhode Island* and, 614

INDEX

- Advertising (*cont.*)
 - Ginzburg v. United States* and, 688–689
 - Internet and, 819–820
 - Johanns v. Livestock Marketing Association* and, 602
 - lawyers and, 910
 - legal services and, 114
 - misleading, 332
 - obscenity and, 956–957, 1012
 - parodies, 575, 787
 - political, 632
 - Posadas de Puerto Rico v. Tourism Company* and, 1191–1192
 - professional, 1235–1236
 - by professionals, 1235–1236
 - smoking, 332
 - taxes on, 714
 - Virginia Board of Pharmacy v. Virginia Citizens' Consumer Council* and, 330–331
- Advocacy
 - of action, 1488
 - free speech and, 1415
 - of ideas, 1488
 - illegal, 178
 - of violence, 1488, 1511
- Adware, 820
- AEDPA. *See* Antiterrorism and Effective Death Penalty Act of 1996
- Aeropagitica* (Milton), 1450
- AFDC. *See* Aid to Families with Dependent Children
- Affirmations
 - Constitutional Convention of 1787 and, 360
 - U.S. Constitution and, 352
- Affirmative action, 30–31
 - ADL and, 70
 - Breyer and, 184
 - Burger and, 206
 - Gratz v. Bollinger* and, 688, 1443
 - Kennedy, A., and, 886
 - Marshall, T., and, 972–973
 - O'Connor and, 1127
 - Regents of the University of California v. Bakke* and, 973, 1284
- Affirmative rights. *See* Positive rights
- Afghanistan invasion, 1295
 - Ashcroft and, 85
 - AUMF and, 1520
 - enemy combatants and, 1346–1347
 - extradition and, 563
 - Lindh and, 790
 - media access and, 996
 - U.S. Constitution and, 355
- AFL. *See* American Federation of Labor
- AFLA. *See* Adolescent Family Life Act
- AFL-CIO
 - creation of, 337
 - Goldberg and, 695
 - Nike v. Kasky* and, 332
- AFPS. *See* American Fund for Public Service
- African Americans, 1511. *See also* National Association for the Advancement of Colored People; Segregation
 - AASS and, 45–46
 - ABA and, 1571
 - ACLU and, 49
 - American Revolution and, 53
 - bail and, 1257
 - Baldus study and, 986
 - Beauharnais v. Illinois* and, 753
 - Bell and, 1773–1774
 - capital punishment and, 225–226, 228–229
 - choke holds on, 935
 - Civil Rights Act of 1866 and, 299
 - Civil Rights Act of 1875 and, 300
 - cocaine and, 424, 1257
 - in congress, 1277–1278, 1294
 - cross burning and, 382–383, 1271
 - Darrow and, 394
 - death penalty and, 1257–1258
 - DeWitt and, 418
 - Dred Scott v. Sandford* and, 451–452, 790
 - drugs and, 1745
 - Emancipation Proclamation and, 493–494
 - felon disenfranchisement and, 583–584
 - Fisher v. Hurst* and, 1391
 - Fugitive Slave Act and, 353
 - Harlan, I. and, 738
 - Helper and, 760
 - immigration and, 1259
 - incorporation doctrine and, 802
 - Internet access of, 821
 - interracial cohabitation and, 991
 - interstate commerce and, 827
 - Jackson, A. and, 833
 - as jurors, 1539
 - jury nullification and, 876
 - jury trials and, 877–878
 - juveniles, 1255, 1258
 - KKK and, 895, 1420
 - La Follette and, 901
 - Loving v. Virginia* and, 936
 - lynching and, 243, 1442
 - marriage laws and, 964
 - Marshall, T., and, 971
 - miscegenation laws and, 1022–1023
 - miscegenation statutes for, 936
 - Mormons and, 1037
 - NAACP v. Alabama* and, 1058
 - NAACP v. Button* and, 1058
 - Omosegbon v. Wells* and, 1700
 - orphans, 1712
 - parole and, 1257
 - peonage laws and, 770
 - picketing and, 1167
 - Plessy v. Ferguson* and, 1181
 - police and, 1256, 1257, 1258
 - political patronage and, 1190
 - as prisoners, 1463
 - in prisons, 1257
 - privileges and immunities and, 1230
 - prosecution of, 1257
 - punishment and, 1646
 - racial discrimination and, 1256, 1257
 - racial profiling and, 675
 - rape and, 1257
 - restrictive covenants and, 368–369, 1324
 - Rush and, 1387
 - Scottsboro trials and, 1427–1428
 - sit-ins and, 412
 - Southern Poverty Law Center and, 1501
 - Storey and, 1570
 - suffrage of, 1541

- Swain v. Alabama* and, 1590
 Universal Negro Improvement Association and, 1262
 Vinson Court and, 1718, 1720
 Voting Rights Act of 1965 and, 1729–1730
 voting rights and, 890, 1257, 1562, 1725, 1726–1727
 Walker and, 1734–1735
 War on Drugs and, 1256, 1257
 White Court and, 1777
 Wilson, W., and, 1784
 African Charter of Human and Peoples' Rights, 1640
 freedom of expression and, 637
 African Episcopal Church of St. Thomas, 1387
 African Methodist Episcopal (AME) Church, 1734
 African National Congress, 791
Afroyim v. Rusk
 dual citizenship and, 456
 expatriation and, 562
 Agamben, Giorgio, 1032
 Age Discrimination in Employment Act of 1967
 (ADEA), 71
Age of Federalism, The (Elkins and McKittrick), 643
Age of Reason II, The (Paine), 96
Age of Reason, The (Paine), 1143
 Agee, Philip
 CIA and, 730
 Intelligence Identities Protection Act and, 817
 Age-of-consent law, 1550
 gay and lesbian rights, 678
 Aggravating factors, 109, 231
 death penalty and, 227
 Georgia and, 232
 Godfrey v. Georgia and, 691
 jury nullification and, 870
 Zant v. Stephens and, 237
 Aggressive patrolling, 1446
 Agitators, 507
Agostini v. Felton, 31–32, 1527
 Burger Court and, 199
 government funding and, 542
 Hunt v. McNair and, 785
 Mitchell v. Helms and, 1024–1025
 reversal of, 33
 Souter and, 1496
 Agreement of the People, 505
 English liberties and, 507
 Agricultural Labor Relations Board, 275
 Agricultural Workers Organizing Committee (AWOC), 275
 Agriculture Adjustment Administration, 603
 Agriculture, forced speech and, 602
Aguilar v. Felton, 32–33, 1527
 Agostini v. Felton and, 31–32
 Board of Education, Kiryas Joel Village School District v. Grumet
 and, 157
 Burger Court and, 199
 establishment clause and, 537, 542
 probable cause and, 1235
 Zobrest v. Catalina Foothills School District and, 1816
Aguilar v. Texas, 1435
Ah Kow v. Numan, 586
Ahrens v. Clark, 1390–1391
 Aid and comfort, 1665
 Aid to Dependent Children (ADC), 965
 Aid to Families with Dependent Children (AFDC), 168, 1396
 abolishment of, 693
 Dandridge v. Williams and, 393
 Goldberg v. Kelly and, 692
 Shapiro v. Thompson and, 1466
 AIDS, 1400, 1406. *See also* HIV/AIDS
 ACT UP and, 25–26
 ADA and, 71
 assisted suicide and, 888
 Cohn and, 323
 drugs, 26
 gay and lesbian rights and, 677
 Helms Amendment and, 759
 prostitution and, 1463
 AIDS Coalition to Unleash Power. *See* ACT UP
 Aimster, 823
 Air Force
 free exercise clause and, 698–699
 Goldman v. Weinberger and, 852, 1007, 1303
 Reid v. Covert and, 1290–1291
 AIRFA. *See* American Indian Religious Freedom Act
 AIRFAA. *See* American Indian Religious Freedom Act
 Amendments
 Airports
 as nonpublic forums, 1245
 as public forums, 1663
 searches, 33–34
 speech regulations, 417
 warrants and, 1752
 AJC *See* American Jewish Committee
Ake v. Oklahoma, 235
Akron v. Akron Center for Reproductive Health, Inc., 9, 34–35, 1475
 abortion and, 673
 Eisenstadt v. Baird and, 484
 establishment clause and, 11–12
 Planned Parenthood v. Ashcroft and, 1174
 Thornburgh v. American College of Obstetricians and
 Gynecologists and, 1652
 Alabama
 Equal Justice Initiative and, 1499
 establishment clause and, 1737
 NAACP and, 1064
 NAACP v. Alabama and, 1057
 New York Times Co. v. Sullivan and, 1088, 1754
 prayer and, 1438
 voting in, 1729–1730
 Voting Rights Act of 1965 and, 1729
 Wallace v. Jaffree and, 1737
Alabama and Coushatta Tribes of Texas v. Trustees of Big Sandy
Independent School District, 1307
Alabama ex rel. Patterson, 1064
 Alabama Public Services Commission, 348
 Alamo Foundation, 571
 Alan Guttmacher Institute, 633
 Alaska
 civil liberties and, 1545, 1546
 marijuana and, 1744
 non-funding provisions in, 153
 personal autonomy rights and, 1533
 privacy and, 1531
 search and seizure in, 1532
 voting in, 1729–1730
 Alaskan Natives, 51
Alberts v. California, 1117
Albertson v. Subversive Activities Control Board, 1454
 Alcohol. *See also* Bootlegging; Liquor licensing
 abuse, 452–453
 automobile searches and, 91

INDEX

- Alcohol (*cont.*)
 - Breithaupt v. Abram* and, 181
 - checkpoints and, 1004
 - days of religious observance and, 399
 - DWI and, 469
 - Federal Railway Administration and, 452
 - Field and, 586
 - Hester v. United States* and, 763
 - intoxication defense and, 814
 - labeling, 332
 - McCarthy and, 985
 - moonshine, 1239
 - nudity and, 111
 - Olmstead v. United States* and, 1129
 - Powell v. Texas* and, 1193
 - pregnancy and, 1322
 - pricing, 332
 - Prohibition and, 1238–1239
 - Quinlan and, 1254
 - statutory religion-based exemptions and, 559–560
 - taxes on, 1684
 - War on Drugs and, 1739
- Alcohol advertising, 614
 - 44 Liquormart, Inc. v. Rhode Island* and, 1708
 - FCC and, 1708
- Alcohol testing
 - California v. Trombetta* and, 217
 - DWI and, 470
 - Jacobson v. Massachusetts* and, 836
- Alcorn College, 548
- Alcorta v. Texas*, 35
 - Napue v. Illinois* and, 1061
- Alexander, Clarence, 80
- Alexander, James, 1814
 - freedom of press and, 1202
 - Zenger and, 734
- Alford, Henry C., 1111
- Alger, Horatio, Jr., 248
- Alger, Jonathan, 221
- Ali, Muhammad
 - conscientious objection and, 350, 1474–1475
 - Covington and, 372
- ALI. *See* American Law Institute
- Alibis, of Sacco and Vanzetti, 1395–1396
- Alien(s). *See also* Immigrants; Noncitizens; Undocumented migrants
 - Bible and, 129
 - civil liberties of, 40–41
 - Congress and, 792
 - due process and, 798
 - due process protection for, 461
 - Fong Yue Ting v. United States* and, 600
 - Hoover and, 774
 - Hughes and, 783
 - Immigration and Naturalization Service v. Lopez-Mendoza* and, 798
 - INA and, 983
 - plenary power doctrine and, 893
 - rights of, 792
 - smuggling, 295
- Alien Act of 1798, 790, 945–946
- Alien Act of 1918
 - free speech and, 1794
 - noncitizens and, 1105–1106
 - Palmer and, 1144
 - Wilson, W., and, 1784
- Alien and Sedition Acts, 36–40, 1636
 - Adams, J. and, 642–643
 - Bache and, 96
 - Debs and, 400
 - Jefferson and, 846
 - Kentucky Resolves and, 887–888
 - national security and, 1072
 - naturalization and, 294
 - Virginia Resolves and, 887–888
 - White Court and, 1778
- Alien Contract Labor Act of 1885, 288
- Alien Enemies Act, 37
- Alien Friends Act, 37–38
- Alien Immigration Act, 1073
- Alien Land Use Cases*, 1107
 - Butler and, 209
- Alien Registration Act of 1940, 68. *See also* Smith Act of 1940
 - Biddle and, 134
 - freedom of association and, 635
 - Harisiades v. Shaughnessy* and, 737, 792
 - New Deal and, 1083
- Alire v. Jackson*, 809
- Alison D. v. Virginia M.*, 1407
- Alito, Samuel
 - appointment of, 11
 - ODWDA and, 1137
- ALJs. *See* Administrative law judges
- All deliberate speed formula, 619
- All Eyez on Me* (Shakur), 764
- All the Laws but One: Civil Liberties in Wartime* (Rehnquist), 646–647, 842, 1636
- Allegheny College, 394
- Allegheny County v. Greater Pittsburgh American Civil Liberties Union*
 - endorsement test and, 938
 - O'Connor and, 1126
- Allen, Teresa Carol, 709
- Allen v. Illinois*, 43
 - Estelle v. Smith* and, 544
- Allen v. State Board of Elections*, 1764
- Allgeyer v. Louisiana*
 - due process and, 1580
 - economic rights and, 478
 - Field and, 586
 - Peckham and, 1633
 - substantive due process and, 465, 1633
- Alliance of Baptists, 909
- Alligood, Clarence, 1501
- Allison, Robert, 1053
- Almeida-Sanchez v. United States*, 380
- “Alone Again (Naturally)” (O’Sullivan), 764
- Altgeld, John Peter, 394
- Althusser, Louis, 1032
- Alton Observer*, 1486
 - Lovejoy and, 935
- Alzheimer’s disease
 - physician-assisted suicide and, 888
 - Reagan and, 1553–1554
 - stem cell research and, 1551
- A&M Records v. Napster*, 1002
- AMA. *See* American Medical Association
- Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza*, 44
 - First Amendment and, 926

- Lloyd Corporation v. Tanner* and, 926
Marshall, T., and, 972
Amalgamated Woodworkers' International Union, 394
Amar, Akhil Reed
 Bingham and, 147
 exclusionary rule and, 957
Amaru, Tupac, 306
Amazon.com one-click system, 824
Ambach v. Norwick, 41, 44–45
Ambiguity, vagueness doctrine and, 1705
AME. *See* African Methodist Episcopal Church
Amerasia, 322
America Online (AOL), 45
 CDA and, 336
American Academy of Family Physicians, 1398
American Academy of Pediatrics, 1398
American Academy of Pediatrics v. Lungren, 1533
American and Foreign Anti-Slavery Organization, 46
American Anti-Slavery Society (AASS), 4, 45–46, 883, 1485
 Anthony and, 65
 Petition Campaign and, 1155–1156
American Association of People with Disabilities v. Hood, 1357
American Association of People with Disabilities v. Smith, 1357
American Association of University Professors (AAUP), 16, 1505
American Bar Association (ABA)
 abortion and, 432–433
 African Americans and, 1571
 Bork and, 165
 Burger and, 205–206
 Canons of Professional Ethics, 910
 on criminalization of civil wrongs, 382
 on discrimination, 228
 homosexuality and, 1405
 Judicial Canon 35 and, 662
 mandatory fees for, 602
 Model Code of Judicial Conduct, 859
 Model Code of Professional Responsibility, 910
 Model Rule of Professional Conduct, 1481
 In re Griffiths and, 812
 status offenses and, 1550
 Weddington and, 1771
American Birth Control League, 1411
American Booksellers Association, Inc., et al v. William H. Hudnut II, 46–47, 660, 943
 Dworkin and, 470
 free speech and, 1642
 pornography and, 1121
American Center for Law and Justice (ACLJ), 286
American Civil Liberties Union (ACLU), 47–50
 abortion and, 50
 ACLJ and, 286
 African Americans and, 49
 airport searches and, 33–34
 anticommunism and, 104
 attorneys and, 1059
 Baldwin and, 101–105
 Becker Amendment and, 118
 beginnings of, 1798
 Berhanu v. Metzger and, 1502
 CDA and, 336–337
 censorship and, 48, 1317–1318
 civil liberties and, 47
 death penalty and, 240
 DHS and, 416
 Emerson and, 498
 evolution and, 48
 formation of, 658
 founder of, 101
 Frankfurter and, 617
 Free Speech Committee, 498
 freedom of speech and, 47–48
 Gilmore and, 684
 Ginsburg and, 686–687
 Hardwick and, 168
 Hentoff and, 760
 Jews and, 852
 labor unions and, 48
 Lambda and, 904
 Lee v. Weisman and, 911
 Marshall, T., and, 971
 McCain-Feingold law and, 220
 Meese and, 997
 Meiklejohn and, 999
 Minersville School District v. Gobitis and, 591–593
 Miranda and, 1021, 1456
 Murphy and, 1047
 NAACP v. *Button* and, 1059
 Naier and, 307
 NARAL and, 1062
 New Deal and, 1083
 pornography censorship and, 942
 Quakers, 103
 religion and, 48–49
 religious school funding and, 1527
 Reno and, 1317–1318
 in *Reno v. ACLU*, 660, 663, 819, 1279, 1315–1317
 RICO and, 1334, 1335
 same-sex marriage and, 1402
 Scopes trial and, 103, 1425
 Smith Act and, 104
 Strossen and, 1573
 terrorism and, 50
 Watergate scandal and, 50
 Wolman v. Walter and, 1790
 women's rights and, 50
 Women's Rights Project, 686–687
 Zelman v. Simmons-Harris and, 1813
American Civil Liberties Union v. Capital Square Review and Advisory Board, 343
American Civil Liberties Union v. City of Stow, 371
American Civil Liberties Union v. Jennings, 219
American College of Obstetricians, 1554
American Colonization Society, 45
American Commonwealth, The (Bryce), 343
American Communication Association v. Douds, 51
 CPUSA and, 338
 Vinson and, 1722
 Vinson Court and, 1719
American Conservative Union, 219
American Convention on Human Rights
 data privacy and, 1223
 Declaration of Principles on Freedom of Expression and, 640
 freedom of expression and, 637
American Declaration of Human Rights and Duties of Man, 1639
 data privacy and, 1223
 Declaration of Principles on Freedom of Expression and, 640
 freedom of expression and, 637
 Inter-American Court and, 638
American Enterprise Institute, 166
American Family Association, 909

INDEX

- American Federation of Labor (AFL), 337. *See also* AFL-CIO
- KKK and, 897
- American Freedom and Catholic Power* (Blanshard), 56
- American Fund for Public Service (AFPS), 103
- American Heritage Dictionary of the English Language*, 608–609
- American Hospital Association, 166
- American Indian Religious Freedom Act (AIRFA), 51–52, 454, 1818
 - Lyng v. Northwest Indian Cemetery Protective Association* and, 939
 - Native Americans and, 1078
- American Indian Religious Freedom Act Amendments (AIRFAA), 501
- American Indians. *See* Native Americans
- American Jewish Committee (AJC), 852
- American Jewish Congress
 - AFLA and, 29
 - Becker Amendment and, 118
 - religious school funding and, 1527
- American Jurist, The*, 1584
- American Law Institute (ALI), 9
 - abortion and, 433
 - entrapment by estoppel and, 510
 - insanity defense and, 814
 - Model Code of Pre-Arrest Procedure of, 1444
 - Model Penal Code, 9, 196, 433, 510, 1320, 1329
 - sodomy and, 1405
- American Law Review*, 769
- American Legion, 593
- American Library Association
 - CDA and, 336
 - CIPA and, 825
 - national security and, 1074
- American Medical Association (AMA)
 - abortion and, 8, 432–433
 - Anslinger and, 64
 - Bowen v. American Hospital Association* and, 166
 - Committee on Ethics, 8
 - partial birth abortions and, 1554
 - PAS and, 1164
- American Newspaper Guild, 694
- American Peace Society, 1584
- American Protective League, 1518
- American Psychiatric Association (APA)
 - future dangerousness and, 110
 - homosexuality and, 1405
- American Psychological Association, 1405
- American Psychology/Law Society (AP/LS)
 - lineups and, 567, 925
- American Railway Union (ARU), 1472
 - Darrow and, 394
 - Debs and, 400
- American Republic
 - Bible and, 125–130
 - freedom and, 126–127
- American Revolution, 52–55, 1296, 1352
 - Baptists and, 108
 - bills of attainder and, 135
 - Burke and, 207
 - capital punishment and, 239
 - Cato and, 994
 - church property after, 291–292
 - economic rights and, 475–476
 - English Toleration Act and, 505
 - establishment clause and, 525
 - freedom of association and, 634
 - historical interpretation of, 54–55
 - Invalid Pensioners Act and, 844
 - Jews in, 851
 - liberty and, 135
 - lynching and, 242
 - Madison and, 943
 - Marshall, J., and, 969
 - Maryland Toleration Act and, 976
 - Mason and, 977
 - military chaplains and, 268
 - right to bear arms and, 1338–1339
 - right to petition and, 1352
 - slave marriages after, 964
- American Society of Newspaper Editors (ASNE), 661
- American Steel Foundries v. Tri-City Central Trades Council*, 1601
- American Sugar Refining Company, 1471
- American Supreme Court, The* (McCloskey), 1634
- American territories
 - grand juries in, 740
- American Tobacco Company, 1471
- American Union Against Militarism (AUAM), 1798
 - Baldwin and, 102
- American Veterans for Equal Rights, 1461
- American Woman Suffrage Association, 1522
- Americanism, 1280
- Americans for Democratic Action, 1269
 - Biddle and, 134
- Americans United for Separation of Church and State (Americans United), 56–57, 285
 - Dawson and, 397
 - Wolman v. Walter* and, 1790
- Americans with Disabilities Act of 1990 (ADA), 71
 - voting rights and, 1356
- AmeriCorps VISTA program, 422
- Amherst College
 - Marshall, T., and, 971
 - Meiklejohn and, 998
- Amici curiae, 457
- Amish, 57–58
 - autopsies and, 93
 - education and, 1541
 - statutory religion-based exemptions and, 560
 - taxes and, 629
 - Torcaso v. Watkins* and, 1044
 - United States v. Lee* and, 629, 1684
 - Wisconsin v. Yoder* and, 628, 1470, 1586, 1787
- Amistad, The, 1572
- Ammann, Jacob, 57
- Amnesty, for undocumented migrants, 1675
- Amnesty International, 59–60
 - chain gangs and, 263
- Amos, Christine, 1302
- Amphetamines, 1743
- Amsterdam, Anthony G., 60
 - Witherspoon v. Illinois* and, 240
- Anal intercourse. *See* Sodomy
- Anarchy, 67–69, 1395
 - Gitlow and, 1186
- Anatomy of a Murder* (movie), 1773
- Anders v. California*, 60–61
- Anderson v. Creighton*, 1783
- Andresen v. Maryland*, 1435
- Andrews, George W., 1756
- Andros, Edmond, 979

- Anglicans. *See* Church of England
- Anglo-American law
obscenity and, 1115
privileges and immunities and, 1230
- Anglo-Saxon law, 97
- Animal sacrifice, 289
- Annan, Kofi, 716
- Annapolis Convention, 944
- Anonymity, free speech and, 62–63
- Anonymous proxies, 63
- Anonymous remailers, 63
- Anslinger, Harry Jacob, 63–64, 1742
- Ansonia Board of Education v. Philbrook*, 1301
- Antebellum period, 6
- Antelope, The*, 342
- Anthony, Daniel, 64
- Anthony, Susan B., 64–65, 520, 1522
IWSA and, 256
marriage laws and, 964
Sumner and, 1585
women's suffrage and, 1793
- Anti-Anarchy Act, 689, 1395
- Anti-anarchy statutes, 67–69
- Anti-Cybersquatting Consumer Protection Act, 824
- Anti-Defamation League (ADL), 69–70
Becker Amendment and, 118
Engel v. Vitale and, 852
hate crime laws and, 750
Internet and, 819
Southern Poverty Law Center and, 1502
- Anti-discrimination laws, 70–71
Boy Scouts of America v. Dale and, 170, 1363, 1381
Kunstler and, 898
national security and, 789–790
- Anti-Federalism, 1205
- Antifederalist Paper No. 84*, 1632
- Anti-Federalists, 1264, 1267, 1314, 1340
Bill of Rights and, 140, 143, 1325, 1326, 1339–1340
confrontation clause and, 345
Madison and, 141, 1326
- Anti-gun control. *See* Guns
- Anti-Imperialist League, 1571
- Anti-Injunction Act, 867
- Anti-mask statutes
hate crime laws and, 749
KKK and, 897
- Antimiscegenation statutes, 406, 964. *See also*
Miscegenation laws
elimination of, 966
Loving v. Virginia and, 518, 1368
Warren and, 936
- Antinomianism, 61
- Antipolygamy laws, 72–73
- Antipornography ordinances
Dworkin and, 470
MacKinnon and, 942–943
- Antirape movement, 434
- Anti-Semitism
ADL and, 69
extremist groups and, 565
Order No. 11 and, 709
- Anti-Skid Row Ordinance, 1808
- Anti-Slavery Society
Douglass and, 448
Petition Campaign and, 1156
- Antisubversion laws, 134
- Anti-Syndicalism Act, 689, 1395
- Anti-syndicalism statutes, 67–69
- Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 233–234, 1623
habeas corpus and, 727
Muslims and, 1052–1053
USA PATRIOT Act and, 1148
- Antitrust laws
Breyer and, 183
Stevens and, 1555
- Antiwar movement
Kunstler and, 898
marriage and, 965
Mitchell and, 1026
- AOL. *See* America Online
- APA. *See* Administrative Procedure Act of 1946
- Apartheid
miscegenation laws and, 1022
race-based classifications and, 611
- AP/LS. *See* American Psychology/Law Society
- Apodaca, Robert, 73
- Apodaca v. Oregon*, 73
Harlan, I, and, 743
incorporation doctrine and, 803
- Apology* (Socrates), 1451
- Appeal* (Walker), 1734
- Appeal to Reason* (Debs), 400
- Appeals. *See also* Right of appeal
costs of, 710–711
double jeopardy and, 230
habeas corpus petitions and, 230
interlocutory, 868
late, 324–325
legal counsel and, 60–61
Sattazahn v. Pennsylvania and, 230
- Appellate review, automatic, 230
- Apple Computers, Inc. v. Doe*, 664
- Apportionment. *See* Reapportionment
- Apprendi, Charles, 76
- Apprendi v. New Jersey*, 76
Stevens and, 1558
- Appropriation of name or likeness, 77
Hustler Magazine v. Falwell and, 787
- Appropriations clause, 296
- Aptheker, Herbert, 77
- Aptheker v. Secretary of State*, 77–78
CPUSA and, 338
Goldberg and, 697
- Arab Americans. *See also* Muslims
after 9/11, 1259
detention of, 1626
FBI and, 50
racial profiling of, 1623
- Arabian Nights, The*, 649
- Arabs. *See also* Muslims
deportation of, 1625
detention of, 1625–1626
hate crimes on, 789–790
- Arbitrariness
Eighth Amendment and, 234
jury trials and, 875
mandatory death sentences and, 953
protections against, 236–237
- Arcara v. Cloud Books*, 363

INDEX

- Archer, Glen, 57
- Areopagitica* (Milton), 815
 - marketplace of ideas theory and, 962
- Argersinger v. Hamlin*, 1350, 1351
 - incorporation doctrine and, 803
- Aristide, Jean, 390
- Aristophanes, 163
- Aristotle, 1242
 - civil liberties and, 1026
 - civil rights and, 1638
- Arizona
 - Alien Land Law in, 1107
 - privacy and, 1531
 - Ricketts v. Adamson* and, 1333–1334
 - undocumented migrants and, 1675
 - voting in, 1729–1730
- Arizona v. Evans*, 1686
- Arizona v. Fulminante*, 78
- Arizona v. Hicks*, 78
 - plain view and, 1171
- Wilson v. Layne* and, 1783
- Arizona v. Roberson*, 209
- Arizona v. Youngblood*, 79
 - Brady v. Maryland* and, 173
 - California v. Trombetta* and, 217
 - United States v. Agurs* and, 1679
- Ark, Wong Kim, 293
- Arkansas
 - Alien Land Law in, 1107
 - evolution and, 1438
 - NAACP and, 1064
 - Rock v. Arkansas* and, 1366–1367
 - slavery and, 1485
- Arkansas Department of Corrections, 932
- Arkansas Educational Television Commission v. Forbes*, 1279
 - viewpoint discrimination and, 1715
- Arkansas National Guard, 187
- Arlington Heights v. Metropolitan Housing Development Corporation*, 611
- Armstrong, Herbert W., 366
- Armstrong v. United States*, 1533, 1605
- Army
 - McCarthy and, 984
 - polygamy and, 1034–1036
 - segregation, 418
- Army War College, 418
- Army-McCarthy hearings, 309, 984
 - Cohn and, 323
 - Welch and, 1772–1773
- Arnold, Thurman, 603
- Aronow v. United States*, 1067
- Arraignments, 79–80
 - prompt, 991
- Arrest(s), 80–81
 - illegal, 665–666
 - in-home, 976
 - Orozco v. Texas* and, 1137
 - probable cause and, 1234, 1444–1445, 1698
 - Salvation Army and, 1397
 - seizures and, 1444–1445
 - United States v. Watson* and, 1698
 - without warrants, 79, 82–83, 598
 - warrants and, 81, 1752
 - Wong Sun v. United States* and, 1792
- Arrest warrants, 81
 - arrests without, 79, 82–83, 598
 - Gerstein v. Pugh* and, 679
 - Monroe v. Pape* and, 1030
- Art
 - Bruce and, 188–189
 - censorship of, 1051–1052
 - fair use doctrine and, 572
 - free speech and, 1451
 - sexual expression as, 894
- Articles of Confederation, 55
 - Chase and, 274
 - criticism of, 357
 - double jeopardy in, 438
 - freedom of press and, 1205
 - Mason and, 978
 - Petition Campaign and, 1155
 - privileges and immunities and, 1230
- Articles of Confederation of the United Colonies of New England, 326–327
- Articles of War, 268
- Artificial insemination, 1398
 - lesbians and, 1400
- ARU. *See* American Railway Union
- Aryan Nations, 566
- ASA. *See* Association for the Study of Abortion
- As-applied challenge, 1024
- Ashcroft, John, 84–86
 - assisted suicide and, 87
 - FOIA and, 662
 - NRA and, 1071
 - ODWDA and, 1137
 - PAS and, 1166
 - surveillance and, 1519
 - TIPS and, 1520
- Ashcroft v. American Civil Liberties Union*, 660
 - Internet and, 819
 - Internet filtering and, 824–825
 - Miller test and, 1012
 - New York v. Ferber* and, 1092
 - obscenity and, 1125
 - sexually explicit materials and, 1120
- Ashcroft v. Free Speech Coalition*, 83–84, 252, 283, 284
 - Breyer and, 183
 - child pornography and, 283, 660
 - obscenity and, 1120, 1125, 1228
 - overbreadth doctrine and, 1139
- Ashcroft v. Tennessee*, 316
- Ashe v. Swenson*, 441
- Asian American citizenship, 293
- Asians
 - antimiscegenation statutes for, 936
 - immigration and, 1259
 - INA and, 796–797, 983
 - miscegenation laws and, 1022
 - Murphy and, 1047
- ASNE. *See* American Society of Newspaper Editors
- Assassination, 1260
 - CIA and, 258
 - of foreign leaders, 1519
 - of King, 890
 - of Lincoln, 924
 - of Long, 934
 - by Ray, 959
- Assault rifles, 1523

- Assembly. *See also* Open-air assembly
 - Salvation Army and, 1396
 - slavery and, 1483
- Assembly of God, 85
- Assisted suicide, 86–88. *See also* Euthanasia; Physician-assisted suicide
 - active euthanasia and, 547–548
 - Ashcroft and, 85
 - Kevorkian and, 888–889
 - legal context, 86–87
 - political context, 87–88
 - Scalia and, 1416
- Associated Press, 307
- Associated Press v. United States Department of Defense*, 800
- Associated Press v. United States District Court for the Central District of California*, 1428
- Associated Press v. Walker*
 - public figures and, 1242
 - Warren Court and, 1755
- Association Against the Prohibition Amendment, 1239
- Association for the Study of Abortion (ASA), 1061–1062
- Association of American Colleges and Universities (AACU), 1505
- Association. *See* Freedom of association
- Asylum, 88–89
- Atheism, 89–91
 - Bible reading and, 132
 - Communism and, 254
 - Warren Court and, 1756
- Atkins v. Virginia*, 224, 241, 386
 - Breyer and, 183
 - mental retardation and, 232
 - O'Connor and, 1127
 - Stevens and, 1558
- Atlantic Monthly*, 617
- Attica Correctional Facility, 898–899
- Attorney-client privilege, 708
- Attorneys
 - ACLU and, 1059
 - advertising and, 910
 - appointed, 125
 - Bradwell v. Illinois* and, 273
 - disciplining, 420
 - extrajudicial statements by, 420
 - Gentile v. State Bar of Nevada* and, 679
 - In re Griffiths* and, 812
 - ineffective assistance of counsel and, 810
 - judgeship of, 859
 - legal service, 1324
 - mandatory fees and, 602
 - NAACP v. Button* and, 1058
 - out-of-court statements of, 671
 - personal injuries and, 1236
 - private, 704
 - professional advertising by, 1235–1236
 - religious garb worn by, 1306
 - right to counsel and, 1345–1346
 - slaves and, 1483, 1484
- Attucks, Crispus, 166
- Atwater v. Lago Vista*, 1497
- AUAM. *See* American Union Against Militarism
- Audi, Robert, 1027, 1296
- Auditing, 286
- Augustine, Saint, 361
- Augustinian Fathers, 291
- AUMF. *See* Authorization for Use of Military Force
- Aurora*, 96
- Austin v. James*, 263
- Austin v. Michigan*, 201
- Austin v. United States*, 296
- Australia
 - same-sex unions in, 1404
 - women and, 1728
- Austria, judicial review in, 865
- Austrian Socialist party, 639
- Authoritarianism, 1295
- Authorization for Use of Military Force (AUMF), 1520
 - Hamdi v. Rumsfeld* and, 731
 - War on Terror and, 1094
- Autobiography* (Jefferson), 845
- Autobiography* (Mill), 1011
- Autobiography of Malcolm X* (Malcolm X), 1495
- Automobile searches, 91–92. *See also* Fourth Amendment; Vehicles
 - Carroll v. United States* and, 251
 - checkpoints and, 275–276
 - City of Indianapolis v. Edmond* and, 806
 - Delaware v. Prouse* and, 412
 - DWI and, 469
 - Florida v. Jimeno* and, 597
 - Florida v. White* and, 598
 - fruit of the poisonous tree and, 667
 - Illinois v. Krull* and, 793–794
 - Michigan Department of State Police v. Sitz* and, 1004
 - suspicionless, 412
- Automobiles. *See also* Vehicles
 - impoundment of, 92
 - Wyoming v. Houghton* and, 1804
- Autonomy
 - free speech and, 1451, 1643
 - privacy and, 1225
- Autopsies, 92–93
- Autrefois acquit*, 437
- Autrefois convict*, 437
- Autry, James, 1551
- Autry v. McKaskle*, 1551
- Aware Woman Center for Choice, 66
 - Operation Rescue and, 1134
- AWOC. *See* Agricultural Workers Organizing Committee
- Axson-Flynn v. Johnson*, 19
 - free exercise and, 1246
 - public schools and, 1246
- AZT, profiteering and, 26

B

- Bache, Benjamin Franklin, 95–96
- Backup copies, 822
- Backus, Isaac, 109, 1314
- Bad tendency test, 96–97, 1510
 - in 1930s, 659
 - Masses Publishing Company v. Patten* and, 980
- Bader, Celia, 684–685
- Bader, Nathan, 684
- Baehr v. Lewin*, 405, 1401
 - don't ask, don't tell policy and, 677
- Baehr v. Miike*, 1401
- Bagshaw, Elizabeth, 1134
- Bail, 97–99
 - 1689 English Bill of Rights and, 1537
 - African Americans and, 1257

INDEX

Bail (*cont.*)

- concept of, 97
- decisions, 98–99
- in drug cases, 1745
- excessive, 1207
- federal law and, 97–98
- Hispanics and, 1257
- history of, 97
- preventative detention and, 1207
- proportional punishment and, 1241
- reductions, 99
- schedules, 98
- Virginia Declaration of Rights and, 1723
- Zenger and, 1814–1815

Bail Reform Act of 1966, 97–98

Bail Reform Act of 1984, 98

- material witnesses and, 981

Bailey, Gamaliel, 1486

Bailey v. Alabama, 1649

- Holmes and, 770
- Hughes and, 783
- White Court and, 1777

Bailey v. Drexel Furniture Company, 1601

Bailyn, Bernard, 55

Bair v. Shippensburg University, 1188–1189

Baker, C. Edwin, 1449

Baker, Eric, 59

Baker v. Carr, 496

- Frankfurter and, 619–620
- Harlan, I. and, 742
- political question doctrine and, 868
- reapportionment and, 1275, 1276, 1728
- Warren and, 1763, 1764
- Warren Court and, 1760

Baker v. City of Fairbanks, 1545–1546

Baker v. F & F Investment, 1579

Baker v. Nelson, 1400

Baker v. State of Vermont, 1402, 1409

Bakery and Pastry Drivers Local v. Wohl, 1562

Bakeshop Act, 928

Bakke v. Regents of the University of California, 1443

Balanced treatment statutes, 1616

- Powell, Lewis, and, 1194

Balancing test, 99–100, 100–101, 1511

- exclusionary rule and, 798
- freedom of press and, 662
- Hamdi v. Rumsfeld* and, 731
- Vinson and, 414

Baldus, David C., 101, 229

- Baldus study and, 986

Baldus study, 101, 229

- McCleskey v. Kemp* and, 225, 986

Baldwin, Roger, 47, 101–105

- ACLU and, 1798

Baldwin, William, 102

Ball, William, 1788

Ballard, Guy, 1476

Ballard v. United States, 1720

Ballew v. Georgia, 105

Ballot initiatives, 105–106

Balsys, Aloyzas, 1679

Baltimore & Ohio Railroad v. United States, 604

Baltimore City Department of Social Services v. Bouknight, 106, 1455

Bancroft, George, 54

Bank(s)

- deposits, 1430
- McCulloch v. Maryland* and, 988
- NSEER and, 1053
- reasonable expectation of privacy and, 882
- taxes on, 988

Bank of the United States, 732

Banner, Stuart, 1309

Banning, Lance, 1263, 1264

Baptist Association v. Hart's Executors, 1712

Baptist Bible College, 575

Baptist College at Charleston, 785

Baptist Joint Committee on Public Affairs

- Becker Amendment and, 118
- Dawson and, 397
- Equal Access Act and, 356–357

Baptists, 107–109

- belief action and, 627
- Bill of Rights and, 141
- “Bloody Tenent, The” and, 153
- in colonial America, 525–526
- Dawson and, 397
- free exercise clause and, 624
- Jefferson and, 119
- King and, 889
- religious tests for office holding and, 1314

Barbeau v. British Columbia, 1403

Barbie dolls, 1414

Barbiturates, 1743

- PAS and, 1165

Barclay v. Florida, 109

Bare suspicion, 1433

Barefoote v. Estelle, 109–110

Barenblatt, Lloyd, 110

Barenblatt v. United States, 110–111

- civil liberties and, 1635

Barker v. Wingo, 1516–1517

Barnes v. Glen Theatres, Inc., 111

- content-neutral regulation and, 364
- O’Brien test and, 450
- Paris Adult Theatre v. Slaton* and, 1148
- United States v. O’Brien* and, 1114
- Young v. American Mini Theatres* and, 1808

Barnett, Randy, 1221

Barnette, Walter, 593, 1775

Barron, John, 112

Barron v. Mayor of City of Baltimore, 73, 112, 122, 176, 1596

- Bill of Rights and, 643, 1349, 1632
- incorporation doctrine and, 802
- Marshall Court and, 968–969
- Marshall, J., and, 970
- privileges and immunities clause and, 607
- takings clause and, 1604

Barrows v. Jackson, 1324–1325

Barsky v. Board of Regents, 780

Barta v. Oglala Sioux Tribe, 807

Bartkus, Alfonse, 112

Bartkus v. Illinois, 112–113

Bartlett, Donald L., 306

Bartnicki v. Vopper, 113

- news-gathering torts and, 661

Baruch, Bernard, 1798

Baseball, 858

Basfield, Titus, 145

Bastwick, John, 919

- Bataillon, Joseph F., 486
 Bates, Ruby, 1427
Bates v. State Bar of Arizona, 114
 lawyer advertising and, 910
 professional advertising and, 1235
 Warren Court and, 1753
 BATF. *See* Bureau of Alcohol, Tobacco and Firearms
 Baton Rouge, martial law in, 934
Batson v. Kemp, 986
Batson v. Kentucky, 114–115, 225
 Holland v. Illinois and, 769
 peremptory challenges in, 873–874, 877–878
 Swain v. Alabama and, 1590
 Battered woman's syndrome (BW), 1449, 1463
 of wives, 1465
Battle Hymn of the Republic, 190
 Battle of Bull Run, 146
 Baylor University, 397
Beal v. Doe, 115–116
 Beale, Robert, 1748
 Beard, Charles, 55
 Beasley, Myrlie, 549
 Beat culture, 188
 Beatles, The, 185
 Beatty, John, 845
 Beauharnais, Joseph, 116
Beauharnais v. Illinois, 14, 116–117
 group libel and, 715, 753
 hate speech and, 753
 obscenity and, 1117
 Beccaria, Cesare, 238–239
Beck v. Alabama, 235, 385
Beck v. Ohio, 679
 Becker Amendment, 117–118, 356
 Becker, Frank, 117
 school prayer and, 356
 Becket, Thomas à, 437
 Beckwith, J.R., 1681
Bedford Cut Stone Co. v. Journeymen Stone Cutters Association
 Brandeis and, 174
 Taft Court and, 1596
 Beecher, Henry Ward, 342, 649
 Beecher, Lyman, 1588
Beecher v. Wetherby, 342
 Beecher-Tilton Scandal, 649
 Behavioral Sciences Unit (BSU), 1236
 Beheadings, 566
 Belgium
 euthanasia and, 547
 same-sex marriage and, 1403
 Belgrade Conference on Human Rights, 693, 697–698
 Belief-action, 118–120, 1470
 free speech and, 1415
 Reynolds v. United States and, 627
Bell v. Burson, 463
Bell v. Wolfish, 202
 Bellah, Robert, 297–298
 Bellamy, Francis, 1177
 Pledge of Allegiance and, 1178
Belle Terre v. Boraas, 120–121
Beller v. Midendorf, 885
 Bellesiles, Michael, 720
 Bellingham, Richard, 978–979
 Bellis, Isadore, 121
Bellis v. United States, 121
Bellotti v. Baird, 9, 34, 121–122, 281
 Burger Court and, 198
 parental notification of abortion and, 725
 Benenson, Peter, 59
 Benevolent neutrality, 23
 Benham, Flip, 1135
Bennis v. Michigan, 213
 Bentham, Jeremy, 239
 Mill and, 1010
 punishment and, 1645
 Bentley, Elizabeth, 1270
Benton v. Maryland, 122–123
 Bullington v. Missouri and, 195
 double jeopardy clause and, 440
 incorporation doctrine and, 803
 procedural due process and, 463
 Stewart, P., and, 1559
Berea College v. Kentucky, 466
 Berenson, Lori, 306
 Berg, Alan, 1503
Berg v. State, 68
 Berger, Ralph, 123
Berger v. California, 345
Berger v. New York, 123
 Brandeis and, 177
 Taft Court and, 1599
 wiretapping and, 1786
 Berger, Warren
 in *United States v. Lee*, 58
 in *Wisconsin v. Yoder*, 58
 in *Wooley v. Maynard*, 702
Berhanu v. Metzger, 1502
Berkemer v. McCarty, 123–124
 Berkowitz, David, 1494
 Berlin, Isaiah, 1638
 Enlightenment and, 1027
Berman v. Parker, 120
 public use and, 1604
Bernal v. Fainter, 612
 Berrigan, Philip, 306
 Berry, Dawn Bradley, 1771
 Best interests of the child, 1398
 Bestiality, 1492
Bethel School District v. Fraser, 124, 1576
 First Amendment and, 284
 Tinker v. Des Moines School District and, 1658
Betts v. Brady, 125
 Frankfurter and, 618
 Gideon v. Wainwright and, 682, 1350
 Roberts, O., and, 1364
 Stone Court and, 1562
 Warren Court and, 1759
Beulah Mae Donald, as Executor of the Estate of Michael Donald, Deceased v. United Klans of America et al., 1501
 “Beyond Speech Codes: Harmonizing Rights of Free Speech and Freedom from Discrimination on University Campuses”
 (Coleman & Alger), 221
Bhandari v. First National Bank of Commerce, 129
 Bias crime, 1787
 Bias. *See* Judicial bias
 Bible, 1437
 Abington Township School District v. Schempp and, 1757
 in American law, 125–130
 Bryan and, 1426
 creationism and, 1616

INDEX

Bible (*cont.*)

defamation in, 402
Donahoe v. Richards and, 1293
Doremus v. Board of Education and, 1609–1610
 Douay, 132
 double jeopardy in, 439
Edwards v. Aguillard and, 377, 481
 establishment clause and, 132
 “eye for an eye” in, 1329
Genesis in, 1329
 homosexuality and, 1492
 in judicial proceedings, 861
 King James, 131, 1563, 1621
King James v. Douay, 1293
Leviticus 24 in, 1329
 literalism of, 376–377
 Oaths and, 1267, 1315
 public schools and, 131–133, 1197, 1292–1293, 1294
 Revised Standard, 132
 school prayer and, 356
 segregation and, 1442
 separationism and, 127
 Seventh Day Adventists and, 1461
 slavery and, 129
 Stanton and, 1523
State ex rel. Weiss v. District Board and, 1294
 study class, 132–133
 study clubs, 133
 in twentieth century, 127–128
 U.S. Constitution and, 352
 Warren Court and, 1756–1758
 Williams and, 153
 as word of God, 1425
 Bible reading, 356
 defiance of court bans on, 408–409
 Freund and, 665
 Lemon test and, 533
 Mozert v. Hawkins County Board of Education and, 1044
 in school, 2–4
 Bible wars, 1293–1294
 Biblical creationism, 1616
 Bickel, Alexander, 294
 on Goldberg, 697
 Biddle, Francis Beverley, 133–134
 New Deal and, 1083, 1084, 1085
Biddle v. Perovich, 1145–1146
 Big Bang theory, 1438
 Bigamy. *See* Polygamy
Bigelow v. Virginia
 commercial speech and, 257, 330
 Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc. and, 1724
 Bigotry, 163
 Bill for Establishing a Provision for Teachers of the Christian Religion, 425
 Bill for Establishing Religious Freedom, 90, 119, 425
 Bill of Rights. *See also* English Bill of Rights
 abolitionist movement and, 6
 Adamson v. California and, 1632
 adoption of, 139–142
 aliens and, 40
 Anti-Federalists and, 140, 143, 1325, 1326, 1339–1340
 Barron v. Mayor of City of Baltimore and, 643, 1349, 1351, 1632
 Bible and, 128
 Black, H., and, 1632

Cardozo and, 1632
 challenges to, 1635–1636
 Chase and, 274
Chicago, Burlington & Quincy Railroad v. Chicago and, 1632
City of Shreveport v. Levy and, 1311, 1312
 civil liberties and, 1631–1632
 civil trials and, 360
 Constitutional and, 357–361, 1263, 1264–1265, 1266, 1269
 creation of, 54, 139–140
 cruel and unusual punishment and, 383
 double jeopardy and, 438–439, 440
 enforcement power and, 613
 English tradition and, 505
 Federalism and, 1289, 1308, 1341, 1351, 1363
 Fourteenth Amendment and, 605–613
 free exercise clause and, 136, 623–624
 free speech law and, 815
Gittlow v. New York and, 1632
 Goldberg and, 1633
 Hamilton and, 1263–1264, 1266, 1268, 1306, 1308, 1326, 1340, 1344
 Henry and, 140, 142, 1340
 history of, 135–139
Hurtado v. California and, 1632
 ICRA and, 806–807
 incorporation doctrine and, 802–804
 incorporation of, 532–533, 606–607, 1632–1633
 Iredell and, 1315, 1325–1326
 Jefferson and, 846, 1632
 limitations of, 144
 Madison and, 1315, 1325, 1326–1327, 1340, 1348–1349, 1632, 1635, 1751
 Magna Carta and, 949
 Massachusetts Body of Liberties of 1641 and, 979
 Meese and, 997
 military law v., 1006
 Montesquieu and, 1031–1032
 Native Americans and, 1254, 1258
 New Hampshire Constitution of 1784 and, 1086
 noncitizens and, 1105–1106
 North Carolina Constitution of 1776, 1111
Palko v. Connecticut and, 1633
 Palmer and, 1280
 Pinckney and, 143, 1326
 privacy and, 1634
 procedural due process and, 462
 promises of, 145
 property ownership and, 476–477
 quartering of troops and, 1252
 ratification of, 141, 360, 642
 religion and, 135–136
 Rutledge, W. and, 1633
 Sherman and, 352, 1326
Slaughterhouse Cases and, 1632
 states and, 112, 968
 structure, 143–145
 trial by jury and, 1666
 Virginia Constitution of 1776 and, 508
 Virginia Declaration of Rights and, 1723–1724
 Warren and, 1633
 Wilson, J., and, 144, 1326
 Bills of attainder, 134–135, 297
 Constitutional Convention of 1787 and, 359
 corruption of blood and, 370
 Field and, 586

- substantive due process and, 464
- United States v. Lovett* and, 1686–1687
- U.S. Constitution and, 352
- Bingham, Charles, 1097
- Bingham, Hugh, 145–146
- Bingham, John, 145–147
 - Civil Rights Act of 1866 and, 299
 - incorporation doctrine and, 802
- Bingham, Thomas, 145–146
- Bioterrorism, compulsory vaccination and, 837
- Bipartisan Campaign Reform Act of 2002, 220
 - PACs and, 588
- Birch, John, 854
- Birmingham Post-Herald*, 1014
- Birney, James G., 5, 1486
- Birth, citizenship by, 293–294
- Birth control, 147–148. *See also* Contraception
 - banning of, 1541
 - Carey v. Population Services International* and, 281
 - Comstock Act and, 649
 - Comstock and, 342
 - Eisenstadt v. Baird* and, 1493
 - forms of, 147
 - Griswold v. Connecticut* and, 1582
 - marriage and, 965, 966
 - as obscenity, 1539
 - privacy and, 1542
 - Sanger and, 1410–1411
 - sexually explicit materials and, 1120
- Birth control pill, 8
- Birth mothers, 1407
- Birth of a Nation*, 896
- Bishop, Bridget, 1250
- Bivens v. Six Unknown Names Agents of Federal Bureau of Narcotics*, 148–149
 - implied rights and, 867
- Bivens, Webster, 148
- Black bag jobs, 775–776
- Black, Charles L., 294
 - Emerson and, 499
 - Gideon v. Wainwright* and, 1759
 - Poe v. Ullman* and, 1183
 - Warren Court and, 1753, 1759
 - Zorach v. Clauson* and, 1822
- Black Codes, 228
 - Civil Rights Act of 1866 and, 299
 - segregation and, 1442
 - Sumner and, 1585
- Black, Galen W., 500
- Black, Hugo L., 1560
 - Adamson v. California* and, 74
 - Adderly v. Florida* and, 15
 - Americans United and, 56
 - balancing test and, 100
 - Barenblatt v. United States* and, 110
 - Beauharnais v. Illinois* and, 14
 - Betts v. Brady* and, 125
 - Bill of Rights and, 1632
 - Bingham and, 145
 - Board of Education v. Allen* and, 155
 - Chambers v. Florida* and, 263–264, 783
 - Cox v. Louisiana* and, 15
 - criticism of, 551
 - Dawson and, 397
 - Dennis v. United States* and, 415, 655
 - Douglas and, 444
 - Engel v. Vitale* and, 502, 1298
 - establishment clause and, 550–551
 - Everson v. Board of Education* and, 75, 199, 549, 987, 1527
 - on forced confessions, 263
 - Frank and, 615
 - Frankfurter and, 617
 - freedom of expression and, 1159
 - Frisbie v. Collins* and, 665
 - Gideon v. Wainwright* and, 318, 682, 1016, 1373
 - Ginzburg v. United States* and, 688
 - Griswold v. Connecticut* and, 713
 - Hughes Court and, 782
 - incorporation doctrine and, 803–804
 - on Japanese internment, 496, 841
 - Katz v. United States* and, 882
 - Konigsberg v. State Bar of California* and, 14
 - Korematsu v. United States* and, 518, 839, 1365, 1374
 - McCullum v. Board of Education* and, 987
 - Meiklejohn and, 999
 - New York Times v. United States* and, 1089
 - obscenity and, 1118
 - privacy and, 1219
 - Roberts, O., and, 1365
 - Roosevelt, F., and, 1372–1373, 1374
 - on separationism, 533
 - Smith v. California* and, 1634–1635
 - Tinker v. Des Moines Independent Community School District* and, 15
 - Vinson Court and, 1718
 - wall of separation and, 1736
- Black market, 709
- Black Muslims, 455
- Black Panther Party
 - Branzburg v. Hayes* and, 179
 - COINTELPRO and, 1518
 - Hoover and, 776
 - Kunstler and, 898
- Blackballing, 150
- Blackledge v. Perry*, 149
- Blacklisting, 150–151
 - CPUSA and, 338
 - McCarthy and, 984–985
- Blackmail, 1450
- Blackmun, Harry A.
 - on abortion rights, 802
 - Board of Education v. Pico* and, 156–157
 - Bowers v. Hardwick* and, 169
 - Burger Court and, 198
 - Callins v. Collins* and, 224
 - ceremonial deism and, 259
 - City of Renton v. Playtime Theatres, Inc.* and, 1316, 1317, 1318
 - County of Allegheny v. ACLU* and, 42
 - on death penalty, 1393–1394
 - “In God We Trust” and, 1067
 - New York Times v. United States* and, 1090
 - New York v. Ferber* and, 1092
 - NLRB v. Catholic Bishop of Chicago* and, 1100
 - no endorsement test and, 1104
 - O'Connor and, 1126
 - Osborne v. Ohio* and, 1138
 - Pell v. Procunier* and, 1151
 - Philadelphia Newspapers, Inc. v. Hepps* and, 1158
 - Plyler v. Doe* and, 1182

INDEX

- Blackmun, Harry A (*cont.*)
Poelker v. Doe and, 1183
Pope v. Illinois and, 1191
 proportional punishment and, 1241
R.A.V. v. City of St. Paul and, 1271
Regents of the University of California v. Bakke and, 1284
Roe v. Wade and, 9, 1220–1221, 1320, 1322, 1367, 1368
Roemer v. Maryland Board of Public Works and, 1369–1370
Texas Monthly v. Bullock and, 1628–1629
Webster v. Reproductive Health Services and, 1770
Wolman v. Walter and, 1790
- Blackstone, Henry, 434
- Blackstone, William, 38, 127, 151, 1073, 1439, 1580, 1603, 1748, 1795
 civil liberties and, 1629
 corruption of blood and, 369
 Enlightenment and, 1027
 freedom of press and, 647, 658, 1204
 Holmes and, 770
 Jefferson and, 847
 licensing and, 815
 prior restraints and, 1075, 1209
 property ownership and, 475
 on sodomy, 169
- Blaine Amendment, 151–153, 1294, 1526
Mitchell v. Helms and, 930
 school prayer and, 356
- Blaine, James G., 151–152, 1294, 1526
- Blair Amendment, 1526
- Blair, Henry W., 356
- Blakeley v. Washington*, 76
 Scalia and, 1417
- Blameworthiness, 245
- Bland, Marie, 1142
- Blanshard, Paul, 56
- Blasphemy, 1115, 1202
 free speech law and, 815
- Blatchford, Samuel, 370
- Bleeding Kansas, 146
- Bloch, Emanuel, 1377–1378
- Blockburger* test, 441
Blockburger v. United States, 441
- Blockbuster, 1043
- Blockbusting, 1210
- Bloggers, 664
- Blom-Cooper, Louis, 59
- Blood, exemplars and, 558
- Blood samples, compulsory extraction of, 1421–1422
- Bloods gang, 1744
- Bloudy Tenent of Persecution, For Cause of Conscience, discussed in A Conference between Truth and Peace, The* (Williams, R.), 153–154, 1782
- Blow, Peter, 451
- Blue laws. *See also* Sunday closing laws
 Bible and, 127
- Blue wall of silence, 154
- Blume, John, 128
- BMW v. Gore*
 Breyer and, 183
 due process and, 1583
- B'nai B'rith, 69–70
- Board of Commissioners of Wyandotte Co. v. The First Presbyterian Church of Wyandotte*, 288
- Board of Directors of Rotary International v. Rotary Club of Duarte*, 1381
 freedom of association and, 636, 1382
 private discriminatory association and, 1226
- Board of Education, Island Trees Union Free School District No. 26 v. Pico*, 1065
- Board of Education, Kiryas Joel Village School District v. Grumet*, 31, 157–158
 establishment clause and, 530
 Satmar Hasidic Jews and, 852
 Souter and, 1496
- Board of Education of Cincinnati v. Minor*, 343
- Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*, 155–156, 1746
 drug testing and, 266, 453
- Board of Education of the Westside Community Schools v. Mergens*, 3, 154, 1299
 ACLJ and, 286
 EAA and, 133, 512
 Equal Access Act of 1984 and, 408–409
 equal access and, 535
- Board of Education of Westside Schools v. Mergens*
 religious speech and, 1229
 school prayer and, 1197
- Board of Education v. Allen*, 155, 1424, 1527
Mueller v. Allen and, 1045
Wolman v. Walter and, 1791
- Board of Education v. Minor*, 852
- Board of Education v. Pico*, 156–157, 163–164, 1575
 Powell, Lewis, and, 1195
- Board of Immigration Appeals, 773
- Board of Regents of the University of Wisconsin System v. Southworth*, 1574, 1699
 forced speech and, 602
 government speech and, 703
- Board of Regents v. Roth*, 609
- Board of Trustees of the University of Alabama v. Garrett*, 193
- Board of Trustees v. Fox*, 331
- Bob Jones University, 158–159
- Bob Jones University v. United States*, 23, 158–159
 free exercise clause and, 629
 freedom of association and, 636
- Bodily correction, 1202
- Boerhaave, Hermann, 1387
- Boggs Act, 1743
- Boggs, Lilburn, 1037
- Bolger v. Youngs Drug Products Corporation*, 160–161
 captive audiences and, 247
Central Hudson test and, 331
- Bolling v. Sharpe*
 Burton and, 208
 Japanese internment and, 841
 substantive due process and, 466–467
- Bolshevik Revolution, 1742
Abrams v. United States and, 13
 Palmer and, 1144
- Bolshevism
 Communist Party and, 339
 KKK and, 896
- Bond, Julian, 161–162
 Southern Poverty Law Center and, 1500
 Warren Court and, 1753
- Bond schedules, 98

- Bond v. Floyd*, 161–162
 - Warren Court and, 1753
- Bond v. United States*, 1430
- Bone marrow transplant, 1552
- Bonham's Case*, 798
- Bonnell v. Lorenzo*, 20
- Book(s)
 - banning, 162–164
 - Board of Education v. Pico* and, 163–164
 - burning, 162
 - on CIA, 730
 - Comstock Act and, 649
 - fair use doctrine and, 572
 - free speech and, 1451
 - obscenity in, 1488–1489
 - offensive, 156
 - in parochial schools, 155
 - removals, 162–164
 - Wolman v. Walter* and, 1790
- Book of Mormon*, 1035
- Bookmaking, 960
- Boorstin, Daniel, 1039
- Boos v. Barry*, 1436
 - content-neutral regulation and, 364
 - picketing and, 1168
 - public forum doctrines and, 1243
- Booth, John Wilkes, 146
 - Lincoln and, 924
- Bootlegging, 251
- Bordenkircher v. Hayes*, 164–165
 - guilty pleas and, 718
 - post-trial convictions and, 718
- Border control, 806
- Boring v. Buncombe County Board of Education*, 1612
- Bork, Robert, 165–166, 1642
 - Frank and, 616
 - on free speech, 1451
 - Kennedy, A., and, 885
 - Red Lion Broadcasting Co., Inc. v. FCC* and, 1279
 - Roe v. Wade* and, 1221
 - VPPA and, 1713
- Bosnia, 1295
- Boston Boy* (Hentoff), 760
- Boston Female Anti-Slavery Society, 5
- Boston Gazette*, 705
- Boston Globe*, 306
- Boston Massacre
 - Adams, J. and, 308
 - trial, 166
- Boston Strangler, 240
- Boston Tea Party
 - Adams, S., and, 979
 - Mason and, 977
- Boston University, 889
- Bouguereau, William, 1052
- Bouknight, Jacqueline, 106
- Bounds v. Smith*, 202
- Bourjaily v. United States*, 25
 - compulsory process clause and, 344
- Boutillier v. Immigration & Naturalization Service*, 773, 1405
 - gay and lesbian rights and, 676–677
- Bowen v. American Hospital Association*, 166–167
- Bowen v. Kendrick*, 29–30, 167
 - Bradfield v. Roberts* and, 172
 - Lemon* test and, 918
- Bowen v. Roy*, 168, 1470
 - free exercise clause and, 629, 939
 - Native Americans and, 1077
- Bowers, Michael, 168
- Bowers v. Hardwick*, 436, 1405, 1493, 1521, 1583
 - 168–170
 - Burger Court and, 199
 - family values movement and, 578
 - Griswold v. Connecticut* and, 713
 - Kennedy, A., and, 885, 1222
 - Lambda and, 904
 - Lawrence v. Texas* and, 909
 - O'Connor and, 1126
 - overruling of, 678
 - Paris Adult Theatre v. Slaton* and, 1148
 - Powell, Lewis, and, 1194
 - Rehnquist and, 1222
 - Scalia and, 1222
 - sexual orientation and, 1222
 - sodomy and, 677
 - Stevens and, 1558
 - Thomas and, 1222
 - Tribe and, 1668
 - White, B., and, 1779
- Bowers v. Texas*, 1194
- Bowers, William, 228
- Bown v. Gwinnett County School District*, 1029
- Boy Scouts of America, homosexuality and, 1497
- Boy Scouts of America v. Dale*, 170
 - freedom of association and, 304, 636, 1363, 1382
 - Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston* and, 786
 - private discriminatory association and, 1226
 - Title VII and, 1660
- Boy Spies of America, 1518
- Boyce Motor Lines, Inc. v. United States*, 464
- Boycotts
 - bus, 855
 - LOD and, 914
 - NAACP v. Claiborne Hardware* and, 302
 - picketing and, 1169
- Boyd v. United States*, 171, 1453, 1455
 - exclusionary rule and, 957
 - Fisher v. United States* and, 589
 - Hale v. Henkel* and, 730
 - Olmstead v. United States* and, 1129
 - PPA and, 1223
 - privacy and, 1218
 - Warden v. Hayden* and, 1747
 - Warren Court and, 1758
- Boykin, Edward, 172
- Boykin v. Alabama*, 172
 - guilty pleas and, 718
- Boynton v. Virginia*, 1443
- Boys from Brazil, The* (Levin), 313
- BP (British Petroleum), 331
- Bradbury, Ray, 162
- Bradfield v. Roberts*, 172–173
 - Fuller Court, 668
- Bradley, Joseph
 - Boyd v. United States* and, 171
 - Bradwell v. Illinois* and, 273
 - Civil Rights Cases* and, 301
 - Slaughterhouse Cases* and, 465
 - Wynehamer v. People* and, 1580

INDEX

- Bradwell v. Illinois*, 8, 273
- Brady Bill. *See* Brady Handgun Violence Protection Act
- Brady Campaign Against Handgun Violence, 721. *See also* Handgun Control, Inc.
- Brady Handgun Violence Protection Act, 721, 1589
- impact of, 722
- NRA and, 1070
- Brady, James, 721
- Brady, Robert, 774
- Brady, Sarah, 721
- Brady v. Maryland*, 35, 173
- California v. Trombetta* and, 217
- exculpatory evidence and, 899
- Giglio v. United States* and, 683
- Kyles v. Whitley* and, 899
- Napue v. Illinois* and, 1061
- United States v. Agurs* and, 1678
- Bragg v. Swanson*, 1188–1189
- Bram v. United States*
- Hopt v. Utah Territory* and, 777
- self-incrimination and, 1017
- Branch Davidian Church, 306, 1731–1732
- FBI standoff with, 1461–1462
- Brandeis, Louis D., 173–177, 1556, 1560
- Abrams v. United States* and, 14, 652–653
- assisted suicide and, 87
- Baldwin and, 101–102
- clear and present danger test and, 312, 771
- dissent and, 658
- Douglas and, 443, 446
- Fourteenth Amendment and, 176
- Frankfurter and, 617
- free speech and, 1598
- Freund and, 664
- hate speech and, 754
- Hughes Court and, 782
- legal realism and, 913
- Meiklejohn and, 999
- national security and, 1073
- New York ex rel. Bryant v. Zimmerman* and, 1087
- Olmstead v. United States* and, 802, 1129, 1368, 1521, 1629
- privacy and, 1218, 1590–1592
- Schaeffer v. United States* and, 1796
- Senn v. Tile Layers Protective Union* and, 175–176
- Stone and, 1564
- United States ex rel. Bilokumsky v. Tod* and, 1018
- Vinson and, 414, 1722
- Warren Court and, 1753
- White Court and, 1777
- Whitney v. California* and, 654, 771, 1642, 1779–1780
- Wilson, W., and, 1783
- Brandenburg, Clarence, 178
- Brandenburg test, 178, 655
- Brandenburg v. Ohio* and, 659
- gag orders and, 671
- incitement of criminal activity and, 659
- Brandenburg v. Ohio*, 14, 178, 1420, 1511–1512
- clear and present danger test and, 415
- DeJonge v. Oregon* and, 411
- exclusion and, 789
- group libel and, 715
- Hand and, 736
- Hess v. Indiana* and, 763
- incitement of criminal activity and, 655
- incitement test and, 401
- Masses Publishing Company v. Patten* and, 980
- national security and, 1073–1074
- obscenity and, 1118
- offensive speech and, 117
- Rice v. Paladin* and, 1332
- serious and imminent threat test and, 659
- syndicalism and, 68
- Warren Court and, 1753
- Whitney v. California* and, 1780
- Younger v. Harris* and, 1808
- Brando, Marlon, 898
- Brandon v. Board of Education*, 512
- Branti v. Finkel*, 178–179
- Erlod v. Burns* and, 493
- political patronage and, 1189
- Branzburg v. Hayes*, 179, 1319, 1415, 1579
- Burger Court and, 202
- Douglas and, 1561
- Emerson and, 499
- journalistic sources and, 859, 1319
- news gathering and, 994
- reporter's privilege and, 664
- shield laws and, 1473
- Braschi v. Stahl Associates Company*, 1407
- Braswell, Randy, 180
- Braswell v. United States*, 180
- Fifth Amendment privilege and, 706
- Braun v. Soldier of Fortune Magazine*, 659
- Braunfeld v. Brown*, 1470, 1587
- Frankfurter and, 619
- free exercise clause and, 543
- Orthodox Jews and, 851–852
- Warren Court and, 1756
- Brause v. Bureau of Vital Statistics*, 1401
- Bray v. Alexandria Women's Health Clinic*, 180–181
- Operation Rescue and, 1134
- Bray v. Ylst*, 277
- Breaking the Vicious Circle: Toward Effective Risk Regulation* (Breyer), 183
- Breard v. Alexandria*
- commercial speech and, 329
- Vinson and, 1722
- Brecher, Edward, 1741
- Brecht v. Abrahamson*
- harmless error and, 745
- Breedlove v. Suttles*
- Butler and, 209
- Harper v. Virginia State Board of Elections* and, 745–746
- Breen, Joseph, 756
- LOD and, 914
- Breithaupt v. Abram*, 181
- Bremer, Paul, 15
- Brennan, William J., Jr., 1495, 1545
- Adams Theatre Co. v. Keenan* and, 1381–1382
- Aguilar v. Felton* and, 32
- appointment of, 309
- Baker v. Carr* and, 620
- Board of Education v. Pico* and, 156
- A Book Named "John Cleland's Memoirs of a Woman of Pleasure"* v. *Massachusetts* and, 1–2
- burden of proof and, 1410
- Burger Court and, 198
- Calero-Toledo v. Pearson Yacht Leasing Co.* and, 213
- ceremonial deism and, 258
- City of Renton v. Playtime Theatres, Inc.* and, 1318–1319

- civil liberties and, 1630
- clergy in public office and, 921
- on community standards, 836
- Corporation of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos* and, 368
- Corporation of Presiding Bishop v. Amos* and, 270
- Eisenstadt v. Baird* and, 9, 483–484
- on electric chair, 485
- Francis v. Franklin* and, 615
- free exercise and, 1216
- Frontiero v. Richardson* and, 518, 521
- Furman v. Georgia* and, 223, 232
- Ginzburg v. United States* and, 688
- Hazelwood School District v. Kuhlmeier* and, 756
- “In God We Trust” and, 1067
- on incorporation of, 533
- Keyishian v. Board of Regents* and, 18
- legislative chaplains and, 267
- legislative prayer and, 915
- Lynch v. Donnelly* and, 288, 343, 861
- Maher v. Roe* and, 951
- Marsh v. Chambers* and, 967
- McCleskey v. Kemp* and, 229
- Miller v. California* and, 1012
- Mishkin v. New York* and, 685, 1023
- NAACP v. Button* and, 1058
- New York Times Co. v. Sullivan* and, 39, 660
- New York Times v. United States* and, 1090
- New York v. Belton* and, 1091
- NLRB v. Catholic Bishop of Chicago* and, 1100
- non-preferentialism standard and, 1109
- obscenity and, 1117
- on obscenity test, 659–660
- overbreadth doctrine and, 1139
- Paris Adult Theatre I v. Slaton* and, 851, 1283
- Philadelphia Newspapers, Inc. v. Hepps* and, 1158
- Poelker v. Doe* and, 1183
- Powell, Lewis, and, 1193
- prisoners and, 1216
- privacy and, 1219
- Redrup v. New York* and, 1282–1283
- Regents of the University of California v. Bakke* and, 1284
- Rhode Island v. Innis* and, 1331
- right to travel and, 801
- Roth v. United States* and, 1382–1383
- Rowan v. United States Post Office Department* and, 1384
- Sherbert v. Verner* and, 628
- stay of execution and, 1551
- Stewart, P., and, 1560
- Texas Monthly v. Bullock* and, 1628–1629
- Texas v. Johnson* and, 361, 590
- Trans World Airlines, Inc. v. Hardison* and, 1300
- United States v. Ash* and, 1344
- United States v. O'Brien* and, 1114
- viewpoint discrimination and, 1716
- Warren and, 1763, 1765
- Warren Court and, 1754
- Wolman v. Walter* and, 1790
- Brenner, Yul, 1621
- Brewer, David J.
 - Church of the Holy Trinity v. United States* and, 287–288, 342
 - Fuller Court and, 667
 - O'Neil v. Vermont* and, 739
 - Patterson v. Colorado* and, 740
 - takings clause and, 1605
- Brewer v. Williams*, 182
- Breyer, Stephen, 182–184
 - balancing and, 100
 - Bartnicki v. Vopper* and, 113
 - Board of Education v. Earls* and, 156
 - City of Littleton v. Z.J. Gifts D4, LLC* and, 926
 - Colorado Republican Federal Campaign Committee v. Federal Election Commission* and, 328
 - Miller-El v. Dretke* and, 874
 - Mitchell v. Helms* and, 1025
 - on PAS, 87
 - Ten Commandments and, 1621–1622
 - transnationalism and, 184
- Bribery
 - FECA and, 194
 - Prohibition and, 1239
 - XYZ Affair and, 37
- Brickner v. Normandy Osteopathic Hospital*, 128
- Bridenbaugh v. O'Bannon*, 398
- Bridge Whist Club, 1239
- Bridges, Harry, 1566, 1800, 1801
- Bridges v. California*, 1800
- Bridges v. Wixon*, 1566
- Brief Narrative of the Tryal of John Peter Zenger, A* (Zenger), 1815
- Briggs Initiative, 932
- Bright, Stephen, 1499
- Bright-line rule
 - fair use doctrine and, 572
 - Florida v. Royer* and, 598
 - Michigan v. Summers* and, 1006
 - Minnick v. Mississippi* and, 482
 - New York v. Belton* and, 1091
 - O'Connor and, 1126
 - United States v. Robinson* and, 1691–1692
- Brinegar v. United States*
 - probable cause and, 1234
 - Vinson Court and, 1720
- British Columbia, Canada, 1403
- British East India Company, 1010
- British Empire, 52–53
- British law. *See also* Common law
 - judicial review and, 865
 - libel and, 815
 - licensing under, 815
 - Magna Carta and, 950–951
- British Parliament
 - Burke and, 207
 - Charles I and, 505–506
 - Church of England and, 921
 - freedom of speech of, 916
 - Habeas Corpus Act of 1679 and, 726
 - Mason and, 977
- Broadcast Bureau, 185
- Broadcasters. *See also* Cable television; Radio; Television
 - equal time rules and, 1052
 - fairness doctrine and, 573
 - FCC v. League of Women Voters* and, 578
 - forced speech and, 601
 - freedom of speech and, 650–651
 - indecentcy and, 651
 - licensing of, 650
 - prior restraint and, 659
 - Prometheus Radio Project v. FCC* and, 580
 - regulation of, 184–185

INDEX

- Broadrick v. Oklahoma*, 1520–1521
 overbreadth doctrine and, 1139
- Bronson v. Kinzie*, 477
- Brookhart v. Janis*, 344
- Brooks, Preston, 1585
 Sumner and, 146
- Brooks v. Tennessee*, 185
- Brotherhood of Locomotive Firemen, 399–400
- Brotherhood of Railroad Trainmen v. Virginia ex. rel. Virginia State Bar*, 185–186
- Brown, Ed, 315
 Nixon, R. and, 1098
- Brown, H. Rap, 306
- Brown, Henry, 515
- Brown, John
 Douglass and, 448
 extremism and, 566
 Helper and, 759
 treason and, 1665
- Brown, Pat, 277–278
- Brown University
 Meiklejohn and, 998
 Meiklejohn Lecture of, 258
- Brown v. Allen*, 727–728
- Brown v. Board of Education*, 186–187, 1442, 1443, 1585
 ACLU and, 49
 Burton and, 208
 Civil Rights Act of 1964 and, 301
 Clark, T., and, 309
 Emerson and, 498
 equal protection and, 516–517
 Evers and, 548
 Frank and, 616
 Harlan, I. and, 741
 Harlan, II, and, 741
 Japanese internment and, 841
 Johnson, L., and, 855
Loving v. Virginia and, 936
 Marshall, T., and, 972
 miscegenation laws and, 1022
 NAACP and, 1063, 1571
Naim v. Naim and, 1060
Plessy v. Ferguson and, 1181
 Powell, Lewis, and, 1193
 protests and, 959
 race-based classifications and, 611
 stare decisis and, 1524
 Vinson Court and, 1719, 1721
 Warren and, 1763
- Brown v. Gilmore*
 moments of silence statutes and, v
Wallace v. Jaffree and, 1737
- Brown v. Gwinnett County School District*, 1737
- Brown v. Hot, Sexy and Safer Productions, Inc.*, 1246
- Brown v. Illinois*, 666–667
- Brown v. Kendall*, 1467
- Brown v. Legal Foundation of Washington*, 183
- Brown v. Li*, 19
- Brown v. Louisiana*, 604
- Brown v. Mississippi*, 187–188, 235, 1455
 Black, H., and, 263
 coerced confessions and, 315, 1018
 coercion after, 316–317
 procedural due process and, 463
 unchecked power and, 320
- Brown v. Ohio*, 441
- Brown v. Socialist Workers '74 Campaign* campaign finance reform and, 219
- Brown v. Vance*, 799
- Brown v. Walker*, 668
- Brown v. Woodland Joint Unified School District*, 163
- Bruce, Lenny, 188–189
 Kunstler and, 898
- Brussel, James A., 1236
- Bruton v. United States*, 25
 compulsory process clause and, 344
- Bruzilius, Anders, 686
- Bryan, Samuel, 1264
- Bryan v. United States*, 858
- Bryan, William Jennings, 189–190, 1426, 1601, 1741
 Darrow and, 395
 La Follette and, 903
 McReynolds and, 992
 Scopes trial and, 1425
- Bryant, Anita, 190
- Bryant v. Zimmerman*, 635
- Bryce, Lord, 343
- BSU. *See* Behavioral Sciences Unit
- Buccal cells, 430
- Buchanan, David, 191
- Buchanan, James, 663
- Buchanan v. Kentucky*, 191
- Buchanan v. Warley*, 191–192, 1442, 1596
Corrigan v. Buckley and, 368
 economic rights and, 479
 equal protection and, 516
 Storey and, 1571
- Buck, Carrie, 192–193, 772, 1600
- Buck v. Bell*, 192–193
 Brandeis and, 177
 Butler and, 209
 eugenic sterilization and, 545, 1319–1320
 Holmes and, 772
 Taft Court and, 1600, 1601
- Buckley, James L., 193–194
 campaign finance reform and, 219
- Buckley, John, 368
- Buckley v. Valeo*, 193–194, 328, 1190
 Burger Court and, 200
 campaign finance reform and, 219–220
 Marshall, T., and, 973
NAACP v. Alabama and, 1058
 PACs and, 588
 Thomas and, 1650
- Bucy, Pamela, 1335
- Buddhism, 1619
 Title VII and, 1660
- Buddhists, as prisoners, 1214
- Buffer zones, 66–67, 181
 injunctions and, 1211
Madsen v. Women's Health Center and, 949
 picketing and, 1168
 TPM and, 1664
- Bufford, Charles, 1187
- Buggery. *See* Sodomy
- Bugs. *See* Wiretapping
- Bulingham, Charles Culp, 735
- Bull Moose Party, 903
- Bullington v. Missouri*, 195
 resentencing and, 226

- Bullying, homosexuality and, 1398
- Bunting v. Oregon*, 1596
 - White Court and, 1777
- Burch v. Louisiana*, 803
- Burdeau v. McDowell*, 195
- Burden of proof, 195–197
 - Batson v. Kentucky* and, 225
 - Sandstrom v. Montana* and, 1410
- Bureau of Alcohol, Tobacco and Firearms (BATF)
 - Branch Davidian Church, 1731
 - Ruby Ridge and, 1384–1385
- Bureau of Catholic Indian Missions, 1253
- Bureau of Drug Abuse Control, 1743
- Bureau of Indian Affairs, 1253
- Bureau of Investigation, 774
- Bureau of Land Management, 51
- Bureau of Narcotics and Dangerous Drugs, 1743
- Bureau of Prisons, 1625
- Bureau of Prohibition, 64
- Bureau of Refugees, Freedmen and Abandoned Lands, 964
- Burger Court, 198–202
 - civil rights and, 1544, 1545
 - effect of, 206
 - Emerson and, 499
 - Francis v. Henderson* and, 325
 - habeas corpus and, 233–234, 727
 - judicial review and, 865
 - Marshall, T., and, 972
 - Rehnquist Court and, 1286–1287, 1288
 - Roe v. Wade* and, 198, 1367–1368
 - Wainwright v. Sykes* and, 325
- Burger, Warren, 203–206, 1416
 - Aguilar v. Felton* and, 32–33
 - bail and, 98
 - Bivens v. Six Unknown Names Agents of Federal Bureau of Narcotics* and, 149
 - Board of Education, Kiryas Joel Village School District v. Grumet* and, 158
 - Board of Education v. Pico* and, 157
 - Bowen v. Roy* and, 168
 - Bowers v. Hardwick* and, 169
 - Buckley v. Valeo* and, 194
 - Cain v. Kentucky* and, 212
 - Coker v. Georgia* and, 386
 - death of, 205
 - equal protection and, 517
 - First Amendment and, 206, 1299–1300
 - Hudson v. Palmer* and, 781
 - Hutchinson v. Proxmire* and, 788
 - legislative chaplains and, 267
 - Lemon test and, 918
 - Marsh v. Chambers* and, 966
 - Miami Herald Publishing Co. v. Tornillo* and, 1003–1004
 - Miller v. California* and, 1012–1013, 1283
 - New York Times v. United States* and, 1090
 - Nixon, R. and, 203–204, 1384
 - NLRB v. Catholic Bishop of Chicago* and, 1100, 1301–1302
 - nomination of, 204
 - obscenity and, 1118, 1124
 - Pell v. Procunier* and, 1151
 - Philadelphia Newspapers, Inc. v. Hepps* and, 1158
 - Planned Parenthood of Central Missouri v. Danforth* and, 1173
 - Powell, Lewis, and, 1194
 - on proportionality, 245
 - Rabe v. Washington* and, 1255
 - Regents of the University of California v. Bakke* and, 206, 1284
 - religious accommodation and, 23
 - on religious symbols, 938
 - retirement of, 10
 - Rowan v. United States Post Office Department* and, 1384
 - sexual orientation and, 1223
 - Wallace v. Jaffree* and, 1737
 - Walz v. Tax Commission* and, 1738–1739
 - Wisconsin v. Yoder* and, 628, 1788
 - Wolman v. Walter* and, 1790
 - Zablocki v. Redhail* and, 1811
- Burgh, James
 - Jefferson and, 847
 - wall of separation and, 1735
- Buritica v. United States*, 296
- Burke, Edmund, 207
- Burks, David, 207–208
- Burks v. United States*, 207–208, 1655
 - Hudson v. Louisiana* and, 781
- Burleson, Albert
 - free speech and, 1794
 - Wilson, W., and, 1784
- Burling, John, 842
- Burnett, Henry L., 146
- Burns Baking Company v. Bryan*, 209
- Burns v. Wilson*
 - military law and, 1007
- Burnside, Ambrose, 646
 - Ex parte Vallandigham* and, 552–553
- Burr, Aaron
 - Hamilton and, 733
 - Marshall, J., and, 970
 - treason and, 1664–1665
- Burroughs, Wellcome, 26
- Burroughs, William S., 1051
- Burson v. Freeman*
 - hate speech ordinances and, 657
 - Mills v. Alabama* and, 1014
- Burstyn v. Wilson*
 - Code of 1930 and, 756
 - obscenity and, 1123
- Burton, Harold, 208
 - Vinson Court and, 1721
- Burton, Richard, 1039
- Burton v. Wilmington Parking Authority*, 606
- Bush, George H.W.
 - Diversity Immigrant Visa Program and, 427
 - drugs and, 1744
 - Falwell and, 575
 - mandatory minimum sentences and, 954
 - NAACP and, 1064
 - NRA and, 1070
 - Public Health Service Act and, 674
 - Souter and, 1495
 - Supreme Court and, 1287
- Bush, George W., 1318
 - abortion and, 10–11
 - Amnesty International and, 60
 - Ashcroft and, 84
 - AUMF and, 731
 - birth control and, 148

INDEX

Bush, George W. (*cont.*)

- Charitable Choice and, 269
- Christian Coalition and, 285
- data privacy and, 1222
- DHS and, 415
- drugs and, 1744
- enemy combatants and, 495
- freedom of press and, 662
- Guantanamo Bay and, 716
- Hamdan v. Rumsfeld* and, 355
- HAVA and, 1356
- Intelligence Reform Bill and, 1053
- Lemon* test and, 918
- Lindh and, 790
- Log Cabin Republicans and, 933
- military law and, 1007
- military tribunals and, 1008
- O'Connor and, 1127
- ODWDA and, 1137
- PAS and, 1166
- Plame and, 817
- Protection of Lawful Commerce in Arms Act and, 722–723
- reporter's privilege and, 179
- same-sex marriage and, 1402
- Sherman Act and, 1472
- stem cell research and, 1553
- Supreme Court and, 1323
- terrorism and, 1519
- War on Terror and, 1094

Bush v. Gore, 1287. *See also* Election, general, of 2000

- Kennedy, A., and, 885
- New York Times v. United States* and, 1089
- O'Connor and, 1127
- Souter and, 1498
- Stevens and, 1558
- television and, 662
- Tribe and, 1668

Bush v. Lucas, 149

Bushell, Edward, 1781

Busing

- boycott, 855
- equal protection and, 517
- King and, 889
- limitations on, 1546

Butes, Joseph, 1461

Butler Bill, 1425

Butler, Nicholas Murray, 1564

Butler, Pierce, 209–210

- Constitutional Convention of 1787 and, 358
- Schwimmer v. United States* and, 1141
- Stone and, 1564

Butler v. McKellar, 208–209

Butler v. Michigan, 1382

- obscenity and, 1123
- Warren Court and, 1755

Buttino, Frank, 1317

Buxton, Thomas, 499

BW. *See* Battered woman's syndrome

Byars v. United States, 1598

Bybee, Jay S., 16

Byers, Patsy, 210

Byers v. Edmondson, 210

Byrd, Robert C., 1756

Byrnes, James, 316, 1561

- equal protection and, 516

C

Caban v. Mohammed, 279

Cable modems, 211

Cable News Network (CNN), 1076

Cable News Network, Inc. v. Noriega, 1076

Cable Privacy Protection Act, 347

Cable television

- balancing and, 99
- FCC licensing and, 663
- forced speech and, 601
- National Cable & Telecommunications Association v. Brand X Internet* and, 580
- obscenity and, 1124
- regulation, 211–212
- Turner Broadcasting Sys., Inc. v. Federal Communications Commission* and, 1669–1670
- United States v. Playboy Entertainment Group* and, 1689–1690

Cable Television Consumer Protection and Competition Act of 1992, 211–212, 1669

Cadwalader, George, 923

Café au Go-Go, 188

Caffeine, 1739

CAFRA. *See* Civil Asset Forfeiture Reform Act of 2000

Cagney, James, 775

Cain v. Kentucky, 212

Cairo, Mildred, 1790

Calder v. Bull, 212–213

- Chase and, 274
- ex post facto laws and, 553
- natural rights and, 1080
- Thomas and, 1650

Calero-Toledo v. Pearson Yacht Leasing Co., 213

Calhoun, John C., 214

- Jackson, A. and, 832

Califano v. Goldfarb, 687

California

- ballot initiatives and, 105
- civil liberties and, 1543, 1545
- death penalty and, 1545, 1546
- domestic partnership registration and, 1409
- free speech and, 1506, 1536
- grand juries in, 704
- homosexual discrimination and, 1405
- indigents and, 482
- informational privacy and, 1534
- prisons in, 1415
- privacy and, 1531
- Proposition 22 in, 1403
- same-sex adoption and, 1398
- same-sex marriage and, 1403–1404
- same-sex partners and, 1408
- search and seizure in, 1532–1533
- SLAPP and, 1481
- three strikes law and, 1653, 1654
- undocumented migrants and, 1675
- U.S. Constitution and, 1546
- Victim's Bill of Rights and, 1540
- Warren and, 1761–1762

California Criminal Syndicalism Act of 1919, 175, 1597

California Department of Alcoholic Beverage Control, 215–216

California Domestic Partnership Code, 1408

California Federal Savings & Loan Association v. Guerra, 1069

California First Amendment Coalition v. Woodford, 22

California Privacy Protection Act, 277

- California Supreme Court, 1402
- California v. Acevedo*, 92, 214–215
 - Scalia and, 1417
- California v. Byers*, 1455
- California v. Carney*, 91
 - warrants and, 1751
- California v. Ciraolo*
 - Florida v. Riley* and, 597
 - privacy and, 1220
- California v. Greenwood*, 215, 1532, 1745
 - reasonable expectation of privacy and, 882
- California v. Hodari D.*
 - Bible and, 128
 - Scalia and, 1417
- California v. LaRue*, 111, 215–216
- California v. Ramos*, 216
- California v. Stewart*, 1456
- California v. Trombetta*, 79, 217
- Call, The* (newspaper), 1410
- Callahan, William Washington, 1428
- Callender, James T., 733
- Callender, John, 274
- Callins v. Collins*, 224
- Callous indifference objection, 1439
- Calvert, Cecil
 - free exercise and, 622
 - Maryland Toleration Act and, 975
- Calvert, George, 975
- Calvert, Leonard, 975–976
- Calvert, Lord, 622
- Calvin, John, 1249
- Calvinism, 126
- Camara v. Municipal Court of the City and County of San Francisco*, 27–28, 217
 - searches and, 1752
- Cambridge Board of Health, 836
- Cambridge University, 26
- Camden, Lord, 459
- Cameras
 - Chandler v. Florida* and, 265
 - in court rooms, 218, 662
 - Estes v. Texas* and, 545
- Camfield v. City of Oklahoma*, 1713
- Caminetti v. United States*
 - Mann Act and, 955
 - White Court and, 1777
- Cammack v. Waihee*, 399
- Campaign financing
 - Bryan and, 189
 - Buckley v. Valeo* and, 193
 - Burger Court and, 200–201
 - corporations and, 632
 - disclosure, 218
 - Hatch Act and, 748
 - labor unions and, 218
 - Marshall, T., and, 973
 - reform, 218–220, 1452
 - Scalia and, 1417
- Campari Liqueur
 - advertisements for, 1413
- Campbell, John, 272, 1285
- Campbell v. Acuff-Rose Music, Inc.*, 1414
 - fair use doctrine and, 572
- Campbell v. Tammany Parish School Board*, 163
- Campbell v. Wood*, 384
- Camus, Albert, 240
- Can Spam Act, 820
- Canada
 - CIA v., 1270
 - Operation Rescue and, 1134
 - pacifists and, 1411
 - same-sex marriage and, 1403
- Canadian Charter of Rights and Responsibilities, 1403
- Canajoharie Academy, 64
- Canan, Penelope, 1480
- Canine sniffs. *See* Dogs, sniffing
- Canterbury Tales, The* (Chaucer), 649
- Cantrell v. Forest City Publishing, Co.*, 574
- Cantwell, Jesse, 782
- Cantwell, Newton, 222, 849
- Cantwell v. Connecticut*, 75, 116, 222, 1802
 - Covington and, 372
 - establishment clause and, 528
 - Fourteenth Amendment and, 989
 - free exercise clause and, 119, 625, 627–628
 - Hughes Court and, 782
 - incorporation doctrine and, 803
 - Jehovah's Witnesses and, 849–850, 1364
 - Roberts, O., and, 119, 222, 627–628, 782, 849, 1364
 - substantive due process and, 466
 - Torcaso v. Watkins* and, 1662
- Cantwell v. United States*, 654
- Canty v. Alabama*, 971
- Capari liquor, 787
- Capital punishment, 222–224, 384–385. *See also* Death penalty; Execution(s)
 - abolishment of, 223
 - African Americans and, 228–229
 - Amsterdam and, 60
 - Baldus Study and, 101
 - Barclay v. Florida* and, 109
 - Breyer and, 183
 - Bullington v. Missouri* and, 195
 - challenges for cause and, 873
 - Chessman and, 277–278
 - cruel and unusual punishment and, 231–232
 - Darrow and, 395
 - deterrent effect of, 240
 - developments, 223–224
 - DNA evidence and, 224
 - due process and, 234–235
 - due process limits and, 234–235
 - Eighth Amendment and, 223, 235–237, 1545
 - equal protection clause and, 228–229
 - errors, 932
 - Estelle v. Smith* and, 543
 - evolving standards of decency and, 1668–1669
 - exemptions, 246
 - expansion of, 239
 - extradition and, 563–564
 - for felony murder, 230–231
 - Fourteenth Amendment and, 223, 228
 - Francis v. Franklin* and, 615
 - Furman v. Georgia* and, 669
 - Gardner v. Florida* and, 675
 - Gilmore and, 684
 - Godfrey v. Georgia* and, 691–692
 - Gregg v. Georgia* and, 710
 - history of, 222–223, 238–242
 - incompetence to stand trial and, 235

INDEX

- Capital punishment (*cont.*)
innocents and, 237–238
Jurek v. Texas and, 866
jury nullification and, 870, 990
juveniles and, 224, 885
Kennedy, A., and, 885
late appeals and, 324–325
Lockett v. Ohio and, 931
lynching and, 242–243
Marshall, T., and, 973
McGautha v. California and, 989–990
mental defects and, 224
methods, 222, 243–244
mitigating factors and, 246, 990
O'Connor and, 1127
politics of, 238–242
Powell, Lewis, and, 1195
Prejean and, 1200
Proffitt v. Florida and, 1238
proportionality and, 245–246, 1241
proportionality review and, 1242
Pulley v. Harris and, 1249
race and, 224
racial discrimination and, 225–226, 228–229
rape and, 323
religion and, 239–240
resentencing and, 226–227
reversed, 232–233
right of appeal and, 230
Ryan and, 237, 1393
sentencing and, 227
slavery and, 225, 239
sodomy and, 1223, 1493
Sonnier and, 1200
states and, 1539, 1540
stay of execution and, 1550–1551
terrorism and, 233–234
treason and, 223
victim impact statements and, 1709
Weems v. United States and, 1772
White, B., and, 1779
- Capitalism
equality and, 609–610
laissez-faire, 1337
Meiklejohn and, 999
- Capitol Square Review and Advisory Board v. Pinette*, 246–247, 1314
cross burning and, 383
endorsement test and, 938
establishment clause and, 529
religious speech and, 1229
- Caplin & Drysdale v. United States*, 1745
- Capone, Al, 720
- Captive audience doctrine
FCC v. Pacifica Foundation and, 579
hostile environment harassment and, 778
vulgar speech and, 1248
- Carbon monoxide, 888
- Cardozo, Albert, 248
Bill of Rights and, 1632
preferred position rule and, 1199
- Cardozo, Benjamin N., 248–249
appointment of, 248
on exclusionary rule, 555
Hamilton v. Regents of the University of Southern California and, 74–75
on Hand, 735
on implied rights, 801
Palko v. Connecticut and, 75, 122, 617
penumbras and, 1153
Rauh and, 1269
- Cardozo Law School, 237
- Cardtoons, L.C. v. Major League Baseball Players Association*
Zacchini v. Scripps-Howard Broadcasting Co. and, 1812
- Care services, 29
- Carey v. Brown*
picketing and, 1167
viewpoint discrimination and, 1714
- Carey v. Population Services International*, 249–250, 281
contraceptive access and, 714
- Carhart, Leroy, 1554
- Carlin, George
FCC v. Pacifica Foundation and, 579, 1316
obscenity and, 1124
- Carmen Baby*, 1255
- Carnahan, Mel, 84
- Carnal Knowledge*, 850
- Carnegie Hall, 188
- Carolina Charter of 1663, 327
- Carpenters' and Joiners' Union v. Ritter's Café*, 1800
Frankfurter and, 618
Stone Court and, 1562
- Carpenters v. Scott*, 180
- Carr, Frank, 984
- Carroll, Charles, 273
- Carroll, Daniel, 359
- Carroll Doctrine, 251
- Carroll v. President & Commissioners of Princess Anne*, 1211
- Carroll v. United States*, 91, 214, 251
Florida v. White and, 598
Taft Court and, 1598
Wyoming v. Houghton and, 1804
- Carter, Jimmy
Baldwin and, 105
Ginsburg and, 687
Goldberg and, 693, 697–698
Johnson, L., and, 855
marijuana and, 1743
Weddington and, 1771
- Carter, Stephen, 1296
- Carter v. Kentucky*, 710
- Carver, Allen, 323
- Carver, Elnita, 323
- Casals, Pablo, 603
- Case, Belle, 901
- Case of the Officers of Excise* (Paine), 1143
- Cases and controversies, 1520
- Castells v. Spain*, 640
- Cat in the Hat, The* (Seuss), 1414
- CAT. *See* United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment
- Categorical approach, 252
- Categorization doctrine, 1800
- Catholic Church
Bible reading and, 131
“Bible wars,” 1293–1294
birth control and, 147
Blaine amendment and, 152
Burke and, 207
Committee for Public Education and Religious Liberty v. Nyquist and, 333

- Constitutional Convention of 1787 and, 1309
- cremation and, 93
- flag saluting and, 591
- Harris v. McRae* and, 747
- heresy and, 1452
- James II and, 1667
- KKK and, 896
- LaRocca v. Lane* and, 1306
- League of Decency and, 756
- McCorvey and, 988
- movies and, 1041
- Murray and, 1049–1050
- NLRB v. Catholic Bishop of Chicago* and, 537, 1100, 1301–1302
- Operation Rescue and, 1133
- Quick Bear v. Leupp* and, 1253–1254
- religious garb and, 1306
- religious incorporation of, 291
- religious liberty and, 253–255
- religious tests for office holding and, 1314
- Roe v. Wade* and, 1367, 1368
- same-sex marriage and, 1403–1404
- schools of, 1525
- Sisters of Charity and, 172
- Ten Commandments and, 1622
- Title VII and, 1660
- Catholics
 - LOD and, 914
 - Maryland Toleration Act and, 975–976
 - as prisoners, 1214
- Cato, 994
- Cato's Letters*, 1202
- Catt, Carrie Chapman, 256
- Catt, George, 256
- Caucasians
 - capital punishment and, 225–226
 - death penalty and, 1258
 - prosecution and, 1257
 - Regents of the University of California v. Bakke* and, 1284
- Causation, police power and, 1185
- Cauthen, James N.G., 1545
- CBS
 - Herbert v. Lando* and, 761
 - Kevorkian and, 888–889
- CBS, Inc. v. Democratic National Committee*, 663
 - Burger Court and, 202
- CBS, Inc. v. FCC*, 202
- CDA. *See* Communications Decency Act of 1996
- Cell 2455 Death Row* (Chessman), 277
- Celler, Emanuel, 118
- Censorship
 - AASS and, 46
 - abridged speech and, 1052
 - ACLU and, 48, 1317–1318
 - in *Beauharnais v. Illinois*, 116
 - CLB and, 102
 - in England, 506
 - FCC and, 185
 - freedom of press and, 1202
 - hate speech codes and, 221
 - Hays and, 755–756
 - Hazelwood School District v. Kuhlmeier* and, 756–757
 - Hentoff on, 760
 - hip-hop music and, 764–765
 - Kingsley International Pictures Corporation v. Regents of the University of New York* and, 892
 - LOD and, 914
 - Long and, 934
 - of mail, 46
 - movie ratings and, 1041–1043
 - of movies, 755–756, 1054–1055
 - museums and, 1051–1052
 - Mutual Film Corporation v. Industrial Commission of Ohio* and, 1054–1055
 - of pornography, 941–942, 1574
 - prior restraints and, 1075
 - with prisoners, 1217
 - prisons and, 1131
 - slavery and, 1485
 - Thornburgh v. Abbott* and, 1651
- Censure, of McCarthy, 985
- Census of the Manufactures, 346
- Census of the Population, 346
- Center for the Study of Sexual Minorities in the Military, 1461
- Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 100, 161, 257
 - Central Hudson* test and, 331
 - Cincinnati v. Discovery Network, Inc.* and, 293
- commercial speech and, 201
- low value speech and, 937
- zoning and, 1821
- Central Hudson* test, 201, 257, 331–332
 - 44 Liquormart v. Rhode Island* and, 614
- Central Intelligence Agency (CIA), 257–258
 - Abu Ghraib and, 16
 - brainwashing by, 1270
 - Canadian citizens v., 1270
 - CHAOS and, 1518
 - Haig v. Agee* and, 730
 - Intelligence Identities Protection Act and, 817
 - McCarthy and, 984
 - MERRIMAC and, 1518–1519
 - prior restraints and, 1076
 - RESISTANCE and, 1519
 - Snepp and, 1491
 - Snepp v. United States* and, 1212
 - spying and, 1518
 - War on Terror and, 1095
- Ceremonial deism. *See* Religious speech
- Certiorari, writ of
 - Berhanu v. Metzger* and, 1502
 - common law and, 458
 - Lawrence v. Texas* and, 909
 - Spano v. New York* and, 1504
 - stay of execution and, 1551
 - Supreme Court jurisdiction and, 868
 - United States v. Schwimmer* and, 1692–1693
 - Virginia v. Black* and, 1724–1725
- CFAA. *See* Computer Fraud and Abuse Act
- Chadha, Jagdish, 797
- Chadha v. United States*, 884
- Chae Chan Ping v. United States*, 40, 259–260, 791
 - Alien Registration Act of 1940 and, 792
 - due process and, 460
 - Fong Yue Ting v. United States* and, 600, 1259
- Chafee, Zechariah, Jr., 261–262, 498, 1796
 - clear and present danger test and, 311, 658
 - free speech laws and, 816
 - freedom of speech and, 642
 - Holmes and, 771
 - New Deal and, 1083

INDEX

- Chafee, Zechariah, Jr. (*cont.*)
 on Palmer raids, 261, 1281
 on seditious libel, 644
- Chain gangs, 263
- Chalifoux v. New Caney Independent School District*, 1307
- Challenges for cause, 873. *See also* Peremptory challenges
- Chambers, Ernest, 267
- Chambers, Leon, 264
- Chambers v. Florida*, 263–264, 316
 Griffin v. Illinois and, 711
 Hughes Court and, 782–783
 Marshall, T., and, 971
- Chambers v. Maroney*, 91
- Chambers v. Mississippi*, 264, 407
 Michigan v. Lucas and, 1005
 Taylor v. Illinois and, 1610
 Washington v. Texas and, 1767
- Chambers, Whittaker, 265
 Hiss and, 765
 HUAC and, 265, 780, 1376–1377
- Chandler et al v. Florida*, 218, 265
 Estes v. Texas and, 545
 freedom of press and, 662
- Chandler v. Miller*, 266, 1480
 drug testing and, 453, 1746
- Chandler, Walker L., 266
- Channing, William Ellery, 1584
- Chanukah
 County of Allegheny v. ACLU and, 42, 1313
- CHAOS, 1518
- Chaplains
 legislative, 267, 297, 966–967
 legislative prayer and, 914–915
 Marsh v. Chambers and, 861
 military, 268–269
- Chaplinsky v. New Hampshire*, 116, 1382
 categorization doctrine and, 1800
 fighting words and, 587, 1511
 free speech and, 1671
 Jehovah's Witnesses and, 849
 low value speech and, 937
 Murphy and, 1048
 obscenity and, 1116, 1117
 Stone Court and, 1562
 viewpoint discrimination and, 1716
 vulgar speech and, 1248
 Warren Court and, 1754
- Chapman, Leo, 256
- Chapman v. California*, 78
 harmless error and, 745
- Chappell v. Wallace*, 1007, 1303
 Goldman v. Weinberger and, 699
- Charitable Choice, 173, 269–271
 Christian Coalition and, 285
 discrimination and, 422
 provisions, 423
 sexual orientation and, 423
 staffing under, 422
- Charities
 Hernandez v. Commissioner of Internal Revenue and, 761
 Muslims and, 1053
 religion and, 703
- Charles I, king of England
 coerced confessions and, 1017
 English Revolution and, 505–506
 general warrants and, 678
 Lilborne and, 919
 overthrow of, 621
 Petition of Right and, 1157
- Charles II, king of England, 108, 1667
 English liberties and, 507
 establishment clause and, 525
 free exercise and, 622
 Massachusetts Body of Liberties of 1641 and, 979
 Quakers and, 1251
 Williams and, 1782
- Charter of Liberties and Privileges, 704
- Charter of the Forest, 950
- Charter of Virginia of 1609, 326
- Charters of Liberties, 437
 Quakers and, 1252
- Charters of Privileges of 1701, 623
- Chase Court, 271–273
- Chase, Salmon, 271–273
 “In God We Trust” and, 1066
- Chase, Samuel, 273–274
 Calder v. Bull and, 212
 Ellsworth Court and, 491
 Ex parte Milligan and, 552
 ex post facto clause and, 553–554
 Marshall Court and, 968
 Sedition Act and, 39
- Chase, Thomas, 273
- Chastisement, 434
- Chastity Act, 918
- Chaucer, Geoffrey, 163
- Chavez, Cesar, 274–275
- Chavez, Librado, 274
- Checkpoints, 275–276, 1433, 1446
 border, 1680
 City of Indianapolis v. Edmond and, 806
 DWI and, 470
 Michigan Department of State Police v. Sitz and, 1004
 profiling and, 1623
 search and seizure and, 1004
 seizures and, 1444
 Voting Rights Act of 1965 and, 1729
- Checks and balances, 945
- Chemerinsky, Erwin, 276–277
- Cheney, Dick, 860
- Cheney v. United States District Court*, 860
- Cherokee Nation, 807
- Chesney, Robert, 1624
- Chessman, Caryl, 240, 277–278, 1551
- Chevron v. Natural Resources Defense Council*, 1557
- Chic, 764
- Chicago and Southern Airlines v. Waterman Steamship Corp.*, 311
- Chicago, Burlington & Quincy Railway Co. v. Chicago*
 Bill of Rights and, 1632
 economic rights and, 478
 Fuller Court and, 667–668
 incorporation doctrine and, 803
 takings clause and, 1604
- Chicago Daily News*, 854
- Chicago Haymarket riot, 394
- Chicago, Milwaukee and St. Paul Ry. Co. v. Minnesota*, 464
- Chicago Police Department v. Mosley*, 1714
- Chicago Seven trial, 278
- Chicago Times*, 649
- Chicago Tribune*, 237

- Chicago v. Morales*, 278–279
- Child abuse
- cultural defense and, 391
 - Stanley v. Illinois* and, 281
 - victims of, 1417
- Child custody
- adoption and, 279–280
 - domestic violence and, 435
 - foster care and, 280–282
 - Harris v. Harris* and, 1491
 - mother's preference in, 1523
 - same-sex adoption and, 1399
 - same-sex partners and, 1407
- Child labor
- FLSA and, 571
 - Prince v. Massachusetts* and, 1208
- Child molestation, 758
- Child Online Protection Act (COPA), 1120
- American Civil Liberties Union v. Ashcroft* and, 660
 - Internet and, 819, 1316
 - obscenity and, 1125
- Child pornography, 282–283, 660
- computer-generated, 283, 284
 - Ginsberg v. New York* and, 685
 - Jacobson v. United States* and, 837
 - New York v. Ferber* and, 284, 1091
 - nonobscene, 283
 - obscenity and, 1119–1120, 1124
 - Osborne v. Ohio* and, 1521
 - overbreadth doctrine and, 1140
- Child Pornography Prevention Act of 1996 (CPPA), 83, 283
- obscenity and, 1120, 1125
- Child Protection Act of 1984, 283
- New York v. Ferber* and, 1091
- Child Protection and Obscenity Enforcement Act, 1092
- Child rearing, 1541. *See also* Child custody
- NOW and, 1069
 - personal autonomy rights and, 1533
 - privacy and, 1225
 - states and, 1540
- Child support
- same-sex adoption and, 1398, 1399
- Child Welfare League of America, 1398
- Children. *See also* Adoption; Juvenile(s)
- anti-child labor laws and, 474
 - born out of wedlock, 792
 - COPA and, 660, 819, 1318
 - custodial liberties of, 281–282
 - domestic violence and, 435
 - family unity for noncitizens and, 576
 - First Amendment and, 284
 - implied rights and, 801
 - Internet and, 819, 1120, 1557
 - of Jehovah's Witnesses, 1284
 - nonmarital, 585
 - NRA and, 1070
 - patriotism and, 592
 - protection for, 1541
 - In re Gault* and, 812, 1350–1351
 - religion and, 1284
 - religious education and, 1291–1292
 - sexually explicit materials and, 1120
 - testimony of, 976–977
- Children's Internet Protection Act (CIPA)
- Internet filtering and, 825–826
 - obscenity and, 1125
 - United States v. American Library Association* and, 660
- Children's Online Privacy Protection Act, 801
- Childs v. Duckworth*, 291
- Chimel v. California*, 284–285
- New York v. Belton* and, 1091
 - protective sweep and, 976
 - United States v. Robinson* and, 1691–1692
 - warrants and, 1752
- Chin Poy, 1132
- China
- drugs and, 1740
 - extradition and, 563
 - Nixon, R. and, 1098
 - War on Drugs and, 1740
- Chinese Americans
- Chinese Exclusion Act and, 259–260, 1259
 - Field and, 586
 - restrictive covenants and, 1324
- Chinese Exclusion Act, 259–260, 791, 1259, 1530
- Fong Yue Ting v. United States* and, 600
 - INA and, 796
 - Chinese Exclusion Case. See* *Chae Chan Ping v. United States*
- Chinese Exclusion Extension Act, 260
- Chinese nationals, citizenship denied to, 1259
- Chippewa Indians, 808
- Chisolm v. Georgia*, 844
- Choice Not an Echo, A* (Schlafly), 1421
- Choke holds, 935
- Choper, Jesse, 625
- Christian Broadcasting Network, 285
- school prayer amendment and, 356
- Christian burial speech, 182
- Christian Coalition, 4, 285–286
- Americans United and, 57
 - family values movement and, 577
- Christian Front, 69
- Christian Knights of the Ku Klux Klan v. District of Columbia*, 758
- Christian Law Association, 1819
- Christian Legal Society, 357
- Christian nation, 342–344
- Christian right, 4
- First Amendment and, 1296–1297
- Christian Scientist Board v. Evans*, 1663
- Christian Scientist Board v. Robinson*, 1663
- Christian Scientists, 559–560
- Christian socialism, 1035
- Christianity
- Christmas and, 1312, 1313
 - colonial charter and, 326–328
 - common law and, 1309
 - cremation and, 93
 - Department of Defense and, 268
 - fetus and, 1553
 - Henry and, 526
 - history of, 1035
 - KKK and, 896
 - marriage and, 963
 - Maryland and, 1538
 - Maryland Toleration Act and, 975–976
 - Ohio and, 1538
 - religious liberty and, 1309–1310
 - religious tests for office holding and, 1314, 1315
 - taxation and, 1309
 - Vidal v. Giard's Executor* and, 1712

INDEX

- Christianity (*cont.*)
 Williams, R. and, 1782
- Christian-Socialist Party, 640
- Christmas
 ACLU and, 49
Capitol Square Review and Advisory Board v. Pinette and, 246–247
 Christianity and, 1312, 1313
 coercion and, 1102
County of Allegheny v. ACLU and, 42, 1313
Lynch v. Donnelly and, 41, 536, 937–938, 1312–1313
 as national holiday, 398
 no endorsement test and, 1104
 trees, 938, 1194
Van Orden v. Perry and, 536
- Chuck D, 763–764
- Church(es)
 disestablishment of state, 425–426, 766
 doctrine, 61
 property, 291–292
 property disputes of, 861–863
 splitting of, 856–857, 862
 and state, separation of, 1274, 1289, 1299, 1308–1309, 1389–1390
Church & State, 56
 Church Committee, 1519
 Church, Frank, 1519
 Church of England, 1309
 British Parliament and, 921
 in colonial America, 622
 Cromwell and, 382
 English Toleration Act and, 504
 establishment and, 525, 531
 establishment of, 621
 Maryland Toleration Act and, 976
 prayer and, 1196
 Puritans and, 107, 1249
 Quakers and, 1251
 religious incorporation of, 291
 religious tests for office holding in, 1314
 Rogers and, 1781
 special status of, 623
 Church of Jesus Christ of Latter-day Saints. *See* Mormons
Church of Lukumi Babalu Aye v. Hialeah, 73, 289–290, 1496
 free exercise and, 627, 1246
 freedom of religion and, 368
 strict scrutiny test and, 626
 Church of Satan, 291
 Church of Scientology, 286–287
 free exercise clause and, 366–367
 Graham v. Commissioner of Internal Revenue and, 703
 IRS and, 761–762
Church of the Holy Trinity v. United States, 287–288, 343
 Church of the New Song (CNS), 290–291
 Churchill, Winston
 Stalin and, 150
 World War II and, 1800
Chy Lung v. Freeman, 1530
 CIA. *See* Central Intelligence Agency
Cicenia v. Lagay, 292
 CIFA. *See* Counterintelligence Field Activity
 Cincinnati revolt, 1070
Cincinnati v. Discovery Network, Inc., 292–293
Cinderella Career and Finishing Schools v. FTC, 799–800
 CIO. *See* Congress of Industrial Organizations
 CIPA. *See* Children's Internet Protection Act
Circuit City v. Adams, 1557
 Circuit riding, 843
 Circumcision, 1035
 Cisler, Lucinda, 1062
Citizens Against Rent Control v. Berkeley, 200–201
 Citizens' Savings and Loan Association of Cleveland, 927–928
 Citizens, spying on, 1518–1520
 Citizenship, 293–294. *See also* Denaturalization; Naturalization
 Alien Acts and, 37
 Ambach v. Norwick and, 44
 by birth, 1232
 Chinese nationals denied, 1259
 civil death and, 297
 communists and, 1390
 dual, 455–456
 expatriation and, 562
 family unity for noncitizens and, 576
 through fathers, 1465
 Fiallo v. Bell and, 585
 Immigration and Nationality Act (INA) and, 1669
 juries and, 872
 jury trials and, 875
 loss of, 413
 Nazis and, 1390
 pacifists and, 1141
 privileges and immunities and, 607, 1230
 revoking, 730
 slavery and, 451–452
 of states, 1482
 United States v. Schwimmer and, 1692–1693
 Citizenship clause, 293
 City Beautiful Movement, 1817
City of Boerne, Texas v. Flores, 52, 159–160, 1471, 1549, 1589
 copyright law and, 367
 enforcement power and, 613
 free exercise clause and, 630, 768, 1215
 Native Americans and, 1078
 O'Lone v. Estate of Shabazz and, 1131
 privileges and immunities and, 1233
 RFRA and, 501, 626, 630, 1304, 1305, 1307, 1818
 Scalia in, 1311
 statutory religion-based exemptions and, 560
City of Castle Rock v. Gonzalez, 282
City of Chicago Board of Trade v. Olsen, 1601
City of Chicago v. Morales
 gang ordinances and, 674–675
City of Cincinnati v. Discovery Network, Inc.
 Central Hudson test and, 331
 low value speech and, 937
City of Erie v. Pap's AM, 111, 523
 content-neutral regulation and, 364
 O'Brien test and, 450, 523
 United States v. O'Brien and, 1114
 Young v. American Mini Theatres and, 1808
City of Houston v. Hill, 588
City of Indianapolis v. Edmond, 806
City of Ladue v. Gilleo, 1821
City of Littleton v. Z.J. Gifts D4, LLC, 926
 FW/PBS, Inc. v. City of Dallas and, 670
City of Los Angeles v. Alameda Books, Inc., 1318, 1820
City of Los Angeles v. Lyons, 935
City of Newport, Kentucky v. Iacobucci, 216
City of Renton v. Playtime Theatres, Inc., 1318–1319, 1436, 1820
 Burger Court and, 201, 1318

- content-neutral regulation and, 364, 1318
- Court of Appeals, Ninth Circuit, in, 1318
- First Amendment and, 1316, 1318
- low value speech and, 937
- Rehnquist in, 1318
- Young v. American Mini Theatres* and, 1808
- zoning and, 669, 1121, 1318, 1821
- City of Richmond v. J.A. Croson Co.*
 - race-based classifications and, 611–612
- City of Richmond v. J.A., Croson Co.*
 - Kennedy, A., and, 886
- City of Shreveport v. Levy*, 1310
- City seals, 370–372
- Civic republicanism, 1028
- Civic virtue, 175
- Civil Asset Forfeiture Reform Act of 2000 (CAFRA), 213, 296, 1678
- Civil assets, forfeiture of, 295–296
- Civil disabilities. *See* Collateral consequences
- Civil disobedience
 - Operation Rescue and, 1134
 - United States v. Schoon* and, 1692
- Civil law, criminal law v., 380–381
- Civil liberties
 - abuse of, 36
 - ACLU and, 47
 - Alaska and, 1545, 1546
 - of aliens, 40–41
 - Ashcroft and, 84
 - Bible and, 128–129
 - Bill of Rights and, 1631–1632
 - blacklisting and, 150
 - Buchanan v. Warley* and, 192
 - Burger and, 206
 - California and, 1543, 1545
 - challenges to, 1635–1636
 - in Civil War, 923–924
 - classified information and, 311
 - in colonial America, 508
 - colonial charters and, 327–328
 - common law and, 335–336
 - constitutional basis of, 1631
 - Constitutional Convention of 1787 and, 357–358, 1263–1264, 1265, 1266, 1267, 1268
 - definition of, 1629–1630
 - deflection of, 150–151
 - democracy and, 1028
 - DHS and, 416
 - Diversity Immigrant Visa Program and, 427
 - double security of, 1544
 - in emergencies, 494–496
 - English tradition of, 505–508
 - Enlightenment and, 1026–1027
 - extremist groups and, 564–567
 - Florida and, 1545
 - Fourteenth Amendment and, 605
 - Harlan, II, on, 742
 - Hawaii and, 1545, 1546
 - Hentoff and, 760
 - history of, 52
 - immigration and, 1529
 - international, 1637–1640
 - justice and, 1272–1273
 - Lambert v. California* and, 905
 - Madison and, 139, 143
 - Magna Carta and, 1537
 - Marshall Court and, 968–969
 - Marshall, J., and, 1541
 - Massachusetts and, 1545
 - mental illness and, 1001
 - in military, 1006–1007
 - modern philosophy of, 1026–1028
 - national, 1537–1538
 - national security and, 1071
 - New Deal and, 1082–1085
 - New Jersey and, 1545
 - noncitizens and, 380–381, 1105–1107
 - O'Connor and, 1126
 - Oregon and, 1543, 1545
 - people's rights and, 1640
 - Petition Campaign and, 1154
 - property rights v., 1028
 - protections, 353–354
 - public health and, 836
 - public opinion and, 1543
 - punishment and, 1645
 - in ratification debate, 1263–1269
 - Rawls on, 1272–1273
 - Rehnquist on, 1289
 - Roberts, O., and, 1363–1364
 - Roosevelt, F., and, 1372, 1373–1374
 - Sherman and, 143
 - slavery and, 1483, 1484–1487, 1542
 - state constitutions and, 1535–1536, 1536–1544, 1544–1547
 - state courts and, 1682
 - Stone and, 1565
 - Stone Court and, 1561
 - Supreme Court and, 1543, 1544, 1634–1635
 - terrorism and, 790, 1622–1627
 - test oaths and, 1627
 - theories of, 1629–1640
 - threats to, 353
 - uniformity of, 1535
 - U.S. Constitution and, 353, 1536
 - USA PATRIOT Act and, 1150
 - Vinson and, 1721
 - Vinson Court and, 1719
 - void-for-vagueness and, 1706
 - in war, 84
 - Warren Court and, 1561, 1760
 - Wilson, J., and, 143
 - Wilson, W., and, 1374, 1784
 - for women, 1522
 - in World War I, 1792–1799
 - World War II and, 1800–1803
 - Zenger and, 1814–1816
- Civil Liberties Act of 1988, 1374
- Civil Liberties Bureau (CLB), 102
- Civil Liberties for Urban Believers v. Chicago*, 1308
- Civil Liberties University, 416
- Civil penalties. *See* Collateral consequences
- Civil procedure, 616
- Civil Procedure in Sweden* (Ginsburg & Bruzilius), 686
- “Civil Religion in America” (Bellah), 297–298
- Civil Right Act of 1871, 1030
- Civil rights
 - assisted suicide and, 87
 - Burger Court and, 1544, 1545
 - definition of, 994
 - Emerson and, 498

INDEX

Civil rights (*cont.*)

- Fourteenth Amendment and, 1542
- freedom of speech and, 301–304
- goal of, 301
- hate crime laws and, 749
- Hughes and, 783
- limits on, 40
- military discretion v., 1007
- picketing and, 1168
- police and, 1256
- positive vs. negative, 1631
- property rights and, 478
- protest movement and, 161–162
- Rehnquist Court and, 1544
- Warren Court and, 1544
- Younger v. Harris* and, 1808
- Civil Rights Act of 1865, 1442
 - Fourteenth Amendment and, 605
- Civil Rights Act of 1866, 299
 - Buchanan v. Warley* and, 191–192
 - economic rights and, 478
 - Fourteenth Amendment and, 514, 605
 - miscegenation laws and, 1022
 - privileges and immunities and, 1232
 - veto of, 146
- Civil Rights Act of 1871
 - Bray v. Alexandria Women's Health Clinic* and, 180
 - Burger Court and, 202
 - deprivation clause of, 181
 - enforcement power and, 613
 - hindrance clause of, 180–181
 - Operation Rescue and, 1134
 - whistleblowers and, 1776
- Civil Rights Act of 1875, 300, 515
 - Civil Rights Cases* and, 301
 - interstate commerce and, 826
 - miscegenation laws and, 1022
 - privileges and immunities and, 1232
- Civil Rights Act of 1957, 1610
- Civil Rights Act of 1964, 71, 300–301, 1659
 - ADL and, 70
 - Brown v. Board of Education* and, 186
 - Charitable Choice and, 270
 - commerce clause and, 827
 - Connor and, 348
 - Corporation of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos* and, 367, 629–630, 1302
 - Cox v. Louisiana* and, 372–373
 - equal protection and, 517
 - Freund and, 665
 - interstate commerce and, 826–827
 - marriage and, 965
 - McCleskey v. Kemp* and, 229
 - NOW and, 1068
 - political correctness and, 1188–1189
 - Powell, Lewis, and, 1195
 - privileges and immunities and, 1232
 - Title VI of, 423
 - Title VII statute, 422, 1284, 1299, 1300–1301, 1302, 1303
- Civil Rights Act of 1968
 - ADL and, 70
 - Clark, R., and, 306
- Civil Rights Cases*, 301, 1442
 - Civil Rights Act of 1866 and, 299
 - Civil Rights Act of 1875 and, 300
 - Fourteenth Amendment and, 515
 - Harlan, I, and, 738
 - interstate commerce and, 826
 - Patterson v. Colorado* and, 740
 - privileges and immunities and, 1232
 - state action and, 605–606
 - state action doctrine and, 1524
 - Waite Court and, 1733
- Civil Rights Memorial, 1500
- Civil rights movement, 302
 - Bible and, 127
 - Connor and, 347–348
 - cross burning and, 382–383
 - Hoover and, 776
 - injunctions and, 1210
 - jury nullification and, 869
 - KKK and, 897
 - marriage after, 965
 - NAACP v. Alabama* and, 828
 - New York Times Co. v. Sullivan* and, 330, 1088
 - Southern Poverty Law Center and, 1500
- Civil Rights Restoration Act of 1987, 71
- Civil trials. *See also* Torts
 - burden of proof and, 197
 - Constitutional Convention of 1787 and, 359–360
 - corruption of blood and, 369
 - federal court jurisdiction and, 867
 - group libel in, 715
 - juries for, 872
 - peremptory challenges and, 874, 878
 - right to jury and, 139
- Civil Union Act, 1402, 1403
- Civil unions
 - marriage v., 933
 - Zablocki v. Redhail* and, 1811
- Civil War, 1297
 - abolitionist movement and, 5
 - Acton and, 27
 - capital punishment and, 239
 - Chase Court and, 271
 - civil liberties in, 923–924
 - Civil Rights Act of 1866 and, 299
 - Civil Rights Cases* and, 301
 - Comstock and, 341
 - Dred Scott v. Sandford* and, 864
 - drugs and, 1740
 - economic regulation and, 473
 - Emancipation Proclamation, 494
 - emergency powers and, 495
 - equal protection and, 514
 - Ex parte Milligan* and, 551
 - felon disenfranchisement and, 583
 - Field and, 585
 - Fourteenth Amendment and, 605
 - freedom of speech and, 646–647
 - gun ownership before, 720
 - habeas corpus suspension and, 272, 352
 - Harlan, I, and, 738
 - Holmes and, 769
 - KKK and, 895
 - Lincoln and, 922–924
 - military chaplains and, 268
 - Mormons and, 1037
 - national security and, 1072
 - obscenity and, 1123

- privileges and immunities and, 1231
- whistleblowers and, 1776
- Civil War Amendments, 1630
- Civil wrongs, 381–382
- Civilian Conservation Corps, 965
- Civilian Exclusion Orders, 839
- Civilian review boards, 305
- Claffin, Tennessee, 342
- Claimed rights, 1416
- Clans, social groups and, 89
- Clansmen, The*, 896
- Clarendon, Assize of, 705
- Clark, Edward Kleagle Young, 774
- Clark, H.B., 127
- Clark, Ramsey, 305–308
 - Clark, T., and, 308
 - Johnson, L., and, 856
 - Miranda v. Arizona* and, 1759
- Clark, Tom, 305, 308–309
 - Abington Township School District v. Schempp* and, 2–4
 - Breithaupt v. Abram* and, 181
 - Douglas v. California* and, 443
 - Engel v. Vitale* and, 408, 502
 - Joseph Burstyn, Inc. v. Wilson* and, 1042
 - Manual Enterprises, Inc. v. Day* and, 956
 - on movies, 858
 - Redrup v. New York* and, 1282
 - Roth v. United States* and, 1–2
 - Sicurella v. United States* and, 1474
 - Smith Act of 1940 and, 414
 - United States v. Seeger* and, 1693
 - Vinson Court and, 1721
 - Wieman v. Updegraff* and, 17
- Clark v. Community for Creative Non-Violence*
 - content-neutral regulation and, 362
 - Marshall, T., and, 972
 - symbolic speech and, 1594
 - United States v. O'Brien* and, 1113
- Clark v. Jeter*, 613
- Clarke, John H., 107, 1796
 - Abrams v. United States* and, 13, 771
 - White Court and, 1777
- Class action litigation, 912
- Class of '74*, 523
- Classification systems, 252
 - race-based, 688
- Classified information, 310–311
- Clay, Cassius. *See* Ali, Muhammad
- Clay, Henry, 883
- Clay v. United States*, 350
- Clayton Act, 1595
- CLB. *See* Civil Liberties Bureau
- CLEAR Act. *See* Clear Law Enforcement for Criminal Alien Removal Act
- Clear and present danger test, 14, 311–312
 - in 1950s, 659
 - adoption of, 642
 - bad tendency test and, 96–97
 - balancing test and, 100–101
 - Brandenburg v. Ohio* and, 415, 655
 - Bridges v. California* and, 1800
 - Cardozo and, 249
 - Debs v. United States* and, 401
 - Dennis v. United States* and, 414, 655, 690
 - free speech theory and, 816
 - gag orders and, 671
 - Gitlow v. New York* and, 690
 - Hand on, 736
 - Herndon v. Lowry* and, 784
 - Holmes and, 771, 1510
 - Hughes Court and, 782
 - Masses Publishing Company v. Patten* and, 653
 - Meiklejohn and, 999
 - national security and, 1071
 - reformulation of, 771
 - Schenck v. United States* and, 652, 980
 - Terminiello v. Chicago* and, 654
 - Vinson and, 1722
 - Vinson Court and, 1719
 - White Court and, 1778
 - Whitney v. California* and, 654, 1780
 - World War I and, 1795–1796
 - Yates v. United States* and, 1807
- Clear Law Enforcement for Criminal Alien Removal (CLEAR) Act
 - Muslims and, 1053
- Cleborne v. Cleborne Living Center*
 - rational purpose test and, 610
- Cleland, John. *See* *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts*
- Clemency
 - felon disenfranchisement and, 583
 - Kennedy, A., and, 886
 - pardons and commutations and, 1145
- Clergy
 - benefit of, 166
 - disqualification statute, 989
 - "Memorial and Remonstrance" and, 947
 - in public office, 921–922, 989
 - training, 536
- Clergy-penitent privilege, 560
- Cleveland, Grover
 - Debs and, 400
 - La Follette and, 902
 - Sherman Act and, 1472
- Cleveland Survey, 1184
- Clickstream data, 820
- Clifford, Nathan, 928
- Clinton, Bill, 1399
 - AEDPA and, 728
 - Brady Bill and, 721
 - Breyer and, 182
 - CDA and, 336
 - Chavez and, 275
 - Clark. R., on, 307
 - death penalty and, 241
 - don't ask, don't tell policy and, 435–436
 - Executive Order No. 13007, 52
 - Ginsburg and, 687
 - impeachment of, 1288
 - Martin Luther King, Jr. Federal Holiday and Service Act, 891
 - Native Americans and, 1077
 - Operation Rescue and, 1134
 - Public Health Service Act and, 674
 - Reno, and, 1317–1318
 - RLUIPA and, 1308
 - Sister Souljah and, 765
 - stem cell research and, 1553
 - Whitewater investigation and, 706–707
- Clinton, Hillary, 764–765

INDEX

- Clinton v. Jones*
 - compulsory process clause and, 345
 - Stevens and, 1558
- Cloning, 313–314
 - law and, 314
 - stem cell research and, 1553
 - therapeutic, 1553
- Closed containers, 597
- Closed forums, 1699
- Closed-circuit television (CCTV)
 - technology monitoring and, 488
- Clothing
 - Goldman v. Weinberger* and, 629, 698–699, 852
 - jury trials and, 544
 - statutory religion-based exemptions and, 559–560
 - trial, 544
- Cloud, Morgan, 188
- Clubs
 - discriminatory policies of, 606
 - religious, 154
- Clyatt v. United States*, 1649
- CNN. *See* Cable News Network
- CNS. *See* Church of the New Song
- Coalition Provisional Authority, 15
- Cobbett, William, 1387
- Cobham, Lord, 757
- Coca-Cola, 1740
- Cocaine, 1743
 - African Americans and, 1257
 - cruel and unusual punishment and, 744
 - discriminatory laws and, 424, 1257
 - drug testing and, 453
 - Florida v. Jimeno* and, 597
 - Minnesota v. Dickerson* and, 1015
 - proportional punishment and, 1241
 - War on Drugs and, 1739
- Cochran v. Louisiana State Board of Education*, 1527
- Zorach v. Clauson* and, 1822
- Cockburn, Alexander, 1286
- Cockrill v. California*, 1108
- Code of Federal Regulations*, 1146
- Code of Hittites, 1492
- CODIS (Combined DNA Index System), 428
- Coerced confessions, 25, 187–188, 263–264, 314–321
 - Brown v. Mississippi* and, 1018
 - common law and, 1017
 - Edwards v. Arizona* and, 482
 - false confessions and, 573–574
 - Hardy v. United States* and, 1017–1018
 - law of, 1455
 - Leyra v. Denno* and, 919
 - Lynum v. Illinois* and, 940
 - Marshall, T., and, 971
 - Miranda v. Arizona* and, 1016
 - procedural due process and, 463
 - psychiatrists and, 919
 - slaves and, 1483
 - Ziang Sung Wan v. United States* and, 1018
- Coercion, 1101–1103. *See also* Torture
 - after *Brown v. Mississippi*, 316–317
 - Colorado v. Connelly* and, 328
 - deceit and, 320
 - establishment clause and, 531
 - eugenic sterilization and, 546
 - Illinois v. Perkins* and, 794
 - indirect, 319
 - interrogation and, 1005–1006
 - jailhouse informants and, 838
 - moments of silence statutes and, 1029–1030
 - permissible, 318–319
 - physical, 1455
 - Planned Parenthood of Central Missouri v. Danforth* and, 1173
 - Pledge of Allegiance and, 1178
 - prayer and, 1412, 1416
 - psychological, 316, 1455
 - school prayer and, 1196, 1198
 - of search consent, 1422
- Coercion test
 - application of, 540
 - establishment clause and, 530
- Coffee, 1740
- Coffee, Linda
 - McCorvey and, 987
- Coffin, William Sloan, Jr., 306
- Cohabitation
 - Edmunds Act and, 1039
 - interracial, 991
 - without marriage, 964
- Cohen, Benjamin, 1269
- Cohen, Dan, 322
- Cohen, Felix, 913
- Cohen, Morris, 913
- Cohen, Paul, 321
- Cohen v. California*, 321
 - Burger Court and, 201
 - captive audiences and, 247
 - FCC v. Pacifica Foundation* and, 579
 - fighting words and, 587
 - free speech and, 1643
 - Harlan, II, and, 742
 - offensive speech and, 117
 - vulgar speech and, 1248
- Cohen v. Cowles Media Co.*, 322
 - confidentiality and, 661
 - journalistic sources and, 859
- Cohens v. Virginia*
 - Marshall and, 970
 - Marshall Court and, 968
- Cohn, Al, 322
- Cohn, Avern, 343
- Cohn, Dora, 322
- Cohn, Roy, 322–323
 - Kaufman and, 883
 - McCarthy and, 984, 1773
- COINTELPRO. *See* Counter Intelligence Program
- Coit v. Geer*, 438
- Coke, Edward, 1440, 1580, 1748
 - Bonham's Case* and, 798
 - double jeopardy and, 437, 439
 - due process and, 456
 - English liberties and, 506
 - Jefferson and, 847
 - judicial review and, 863
 - on Magna Carta, 950
- Coker, Ehrlich Anthony, 323
- Coker v. Georgia*, 241, 246, 323, 385
 - disproportionality principle and, 236
 - Eighth Amendment and, 232

- invalidation of, 231
- proportionality and, 245, 246
- White, B., and, 1779
- Colautti v. Franklin*, 324
- Colby, William, 1732
- Cold War
 - ACLU and, 49
 - CIA and, 257
 - Communism and, 337–339
 - Communist Party and, 339
 - Fortas and, 603
 - McCarthy and, 985
 - Rauh and, 1269–1270
 - Truman and, 1377
 - Vinson and, 1722
- Cole, David, 33, 495
- on terrorism, 790
- Colegrove v. Green*, 1275, 1392
 - Frankfurter and, 619
 - Rutledge, W., in, 619, 1389
- Coleman, Arthur, 221
- Coleman, Roger, 324–325
- Coleman v. Thompson*, 324–325
 - habeas corpus restrictions and, 728
- Colgate v. Harvey*, 1232
- Collateral bar rule, 1210–1211
- Collateral consequences, 325–326
 - felon disenfranchisement and, 583
- Collateral estoppel, 441
 - duty to obey court orders and, 469
- Collateral sanctions. *See* Collateral consequences
- Collective bargaining
 - DHS and, 416
 - freedom of association and, 634
 - mandatory fees, 602
 - New Deal and, 1083
 - NLRB and, 1066
 - Wagner Act and, 635
- College of New Jersey, 1386
- College of Philadelphia, 1386
- College of William and Mary
 - Jefferson and, 845
 - Marshall, J., and, 969
- Colliflower v. Garland*, 807
- Collin v. Smith*, 117
- Colombia, 1744
- Colon, Chava, 1200
- Colonial America
 - capital punishment in, 238–239
 - civil liberties in, 508
 - Commentaries on the Laws of England* and, 645
 - extremist groups in, 564
 - habeas corpus in, 726
 - interracial marriage in, 936
 - jury trials in, 875
 - Puritanism in, 621–622
 - religion in, 525, 621–622
 - statutory religion-based exemptions in, 559
- Colonial charters, 326–328
- Colonial codes, 326–328
- Colorado
 - free speech and, 1536
 - Lucas v. Forty-Fourth General Assembly of Colorado* in, 1276
 - Republican Party, 328
- Colorado Republican Federal Campaign Committee v. Federal Election Commission*, 328
 - Thomas and, 1650
- Colorado River Water Conservation District v. United States*
 - federal court jurisdiction and, 868
- Colorado Supreme Court, 67
- Colorado v. Connelly*, 328–329
- Columbia Insurance Co. v. Seescandy.com*, 62–63
- Columbia Law School
 - Cardozo and, 248
 - Douglas and, 443
 - Ginsburg and, 686
 - Stone and, 782
- Columbia University
 - Chambers and, 265
 - Cohn and, 322
 - Experimental College and, 998
 - International Procedure Project, 686
- Colyer v. Skeffington*, 1799
- Coma, 1254
- Combat Applications Groups, 1732
- Combatant status review tribunals (CSRTs), 800. *See also* Military tribunals
 - Guantanamo Bay and, 716
 - War on Terror and, 1094
- Combined DNA Index System. *See* CODIS
- Combined Federal Fund, 1715
- Comedy, 188–189
- Commandeering principle, 167
- Commentaries on American Law* (Kent), 769–770
- Commentaries on the Common Law* (Coke)
 - in colonial America, 508
- Commentaries on the Constitution of the United States* (Story), 409
 - freedom of speech and, 645
 - privileges and immunities and, 1231
- Commentaries on the Laws of England* (Blackstone), 127, 151, 1073, 1603, 1795
 - Bowers v. Hardwick* and, 169
 - colonial America and, 645
 - freedom of press and, 658
 - Holmes and, 770
 - prior restraints and, 1075
 - property ownership and, 475
- Commerce. *See also* Interstate commerce
 - Magna Carta and, 949
 - Protection of Children Against Sexual Exploitation Act of 1977 and, 283
 - United States v. Carolene Products* and, 250
- Commerce clause
 - antidiscrimination laws and, 71
 - Civil Rights Act of 1964 and, 827
 - Edwards v. California* and, 482
 - expanse of, 475
 - federalization of criminal law and, 580
 - Freund and, 665
 - gender-motivated violence and, 435
 - Harlan, I., on, 739
 - RLUIPA and, 160
 - segregation and, 971
- Commerce Department, 1270
- Commercial purposes
 - appropriation of name and likeness for, 787
- Commercial speech, 329–333. *See also* *Central Hudson test*
 - 44 Liquormart v. Rhode Island* and, 614
 - abortion and, 331

INDEX

- Commercial speech (*cont.*)
 Bolger v. Youngs Drug Products Corp. and, 160–161
 Burger Court and, 201
 Cincinnati v. Discovery Network, Inc. and, 293
 definition of, 330
 low value speech and, 937
 Posadas de Puerto Rico v. Tourism Company and, 1191–1192
 professional advertising and, 1235
 protection from, 257
 Valentine v. Chrestensen and, 1706
 vice products and, 1708
 Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc. and, 1724
Commission for Public Education & Religious Liberty v. Nyquist, 1246–1247
 free exercise and, 1246
Commission of Customs
 National Treasury Employees Union v. Von Raab, 452
Commission on Civil Rights
 reauthorization of, 71
Commission on Obscenity and Pornography, 1115
 New York v. Ferber and, 1091
Commission on Pornography
 Miller test and, 1013
 New York v. Ferber and, 1092
Commission on Wartime Relocation and Internment of Civilians, 841
Commission on Wartime Relocations, 842
Commission to Investigate Organized Crime in Interstate Commerce
 Goldberg and, 694–695
Committee for Public Education and Religious Liberty v. Nyquist, 333–334, 1527
 Burger Court and, 199
 Lemon test and, 1527
 Wolman v. Walter and, 1791
Committee for Public Education and Religious Liberty v. Nyquist Liberty v. Nyquist
 free exercise and, 1246
Committee for Public Education and Religious Liberty v. Regan, 334–335
Committee for the Suppression of Vice, 1592
Committee of Style, 360
Committee on Academic Freedom and Academic Tenure
 1915 General Report of, 16
Committee on Detail, 139
Committee on Government Operations
 McCarthy and, 984
Committee on Un-American Activities
 New Deal and, 1084
Committee to Defend Reproductive Rights v. Myers, 1533
Committee to Re-Elect the President (CREEP)
 Nixon, R. and, 1099
Commodity Futures Trading Commission v. Shor
 Kennedy, A., and, 884
Common enemy rule
 California v. Ramos and, 216
Common law, 335–336. *See also* English law
 arrest and, 80
 Brandeis and, 1591
 Christianity and, 1309
 coerced confessions and, 1017
 conspiracy and, 350
 due process and, 458, 1580
 Enlightenment and, 1027
 freedom of contract and, 636–637
 group libel and, 715
 informed consent and, 389
 Internet privacy and, 821
 jury trials, 739
 Lilborne and, 920
 Magna Carta and, 950–951
 marital rape exemption and, 960
 marriage and, 963
 Marshall Court and, 968
 media access to judicial proceedings and, 995
 miscegenation laws and, 1022
 open fields and, 1133
 prerogative writs of, 458
 privacy and, 1225, 1759
 trial by jury and, 1666
 truth and, 887
 Warren and, 1591
Common Law, The (Holmes), 770
Common schools, 1525
Common Sense (Paine), 1143
Commons Journal
 English liberties and, 506
Commonwealth of Virginia v. Turner, 129
Commonwealth v. Alger, 1467, 1468
Commonwealth v. Baird
 Eisenstadt v. Baird and, 483
Commonwealth v. Blanding
 freedom of press and, 645
Commonwealth v. Davis
 Holmes and, 770
Commonwealth v. Dillon, 1017
 coerced confessions and, 314–315
Commonwealth v. Holmes
 obscenity and, 1122
Commonwealth v. Hunt
 freedom of association and, 634
 Shaw and, 1467
Commonwealth v. Kneeland, 1311
Commonwealth v. Sharpless
 obscenity and, 1122
Communication
 freedom of expression and, 1159
 verbal, 1437
Communications Act of 1934
 dial-a-porn services, 418
 FCC and, 579, 663
 FCC v. League of Women Voters and, 578
 Nardone v. United States and, 1061
 obscenity and, 1124
Communications Decency Act of 1996 (CDA), 336–337, 1120
 FCC and, 579
 Fifth Amendment and, 1316
 First Amendment and, 1316
 Frist/Fifth Amendment and, 337
 Internet and, 336–337, 819, 1315–1317
 obscenity and, 1124
 Reno and, 1317–1318
 Reno v. ACLU and, 660, 1315–1317
 Zeran v. America Online and, 45
Communism
 Baldwin and, 104
 Catholic Church and, 253–254
 Clark, T., and, 308
 Cold War and, 337–339

- Falwell and, 575
- freedom of expression and, 1051
- Gitlow v. New York* and, 689–690
- Hoover and, 775
- immigration and, 1280
- INA and, 983
- investigation of, 1454
- JBS and, 854
- McCarthy and, 984–985
- public schools and, 1611
- Rauh and, 1269–1270
- Russian Revolution and, 1280
- United Order v., 1036
- Communist Control Act, 635
- Communist Labor Party, 1597
 - Whitney v. California* and, 1780
- Communist Manifesto*, 689
- Communist Party, 339–340
 - Aptheker and, 77
 - Barenblatt and, 110
 - California Criminal Syndicalism Act of 1919 and, 175
 - Chambers and, 265
 - Clark, T., and, 309
 - clear and present danger test and, 312
 - Cohn and, 322
 - COINTELPRO and, 1518
 - Cramp v. Board of Public Instruction* and, 1361
 - DeJonge v. Oregon* and, 74, 411, 784
 - Dies and, 419
 - FBI and, 339, 1269, 1270
 - Hand and, 737
 - Harisiades v. Shaughnessy* and, 737
 - Harlan, II, and, 741
 - hearsay evidence and, 757
 - Herndon v. Lowry* and, 209, 249, 784, 1364
 - Hiss and, 265, 1376–1377
 - Hoover and, 339, 776, 1269
 - HUAC and, 780
 - INA and, 983
 - Kent v. Dulles* and, 886–887
 - in *Konigsberg v. State Bar of California*, 895
 - McCarthy and, 984–985
 - National Labor Relations Act and, 51
 - Palmer and, 1144
 - Rosenbergs and, 1377, 1378
 - Scottsboro trials and, 1427
 - Smith Act and, 1376, 1415, 1487–1488
 - Stromberg v. California* and, 782
 - Vinson and, 1722
 - Vinson Court and, 1719
 - Warren Court and, 1753
 - Whitney v. California* and, 1510
 - Yates v. United States* and, 1807
- Communist Party of the United States (CPUSA), 337–339
 - Dennis v. United States* and, 414, 446
 - Great Sedition Trial and, 1488
- Communist Party v. Subversive Activities Control Board*
 - freedom of association and, 635
- Communists
 - citizenship and, 1390
 - Hollywood blacklist and, 150
- Community Services Block Grant Act of 1998
 - Charitable Choice and, 269
- Community Services Organization (CSO), 274
- Community standards
 - Jenkins v. Georgia* and, 850
 - obscenity and, 825
 - Roth* test and, 836
- Commutations. *See* Pardons and commutations
- Compact theory, 887
 - Madison and, 946
- Company towns, 340
- Comparative analysis
 - Ginsburg on, 688
- Compassion in Dying, 1165
- Compassion in Dying v. Washington*
 - PAS and, 1165
- Compelled speech
 - Johanns v. Livestock Marketing Association* and, 602
- Compelling interest test
 - McDaniel v. Paty* and, 989
 - prisoners and, 1217
 - RFRA and, 630, 1549
- Compelling purpose test, 610–611
- Compelling state interest, 340–341
 - hostile environment harassment and, 778–779
- Compensation, 1541
- Competency to stand trial
 - capital punishment and, 543–544
 - death penalty and, 692
 - Dusky v. United States* and, 468
 - Estelle v. Smith* and, 543–544
 - Godinez v. Moran* and, 692
 - Jackson v. Indiana* and, 831–832
- Comprehensive Drug Abuse Prevention and Control Act of 1970, 1743
- Compulsory process clause, 264, 344–345
 - Cool v. United States* and, 407
 - Taylor v. Illinois* and, 407
 - Washington v. Texas* and, 407, 1767
- Compulsory school attendance, 1787–1788
 - Pierce v. Society of Sisters* and, 1170
- CompuServe
 - CDA and, 336
- Computer Fraud and Abuse Act (CFAA), 346
 - Adams v. Howerton* and, 773
 - privacy and, 821
- Computer Pornography and Child Exploitation Act, 1092
- Computers
 - child pornography and, 283, 660
 - libraries and, 660
- Comstock Act of 1873, 649
 - CDA and, 336
 - obscenity and, 956, 1054, 1116, 1123
 - Swearingen and, 1592
 - U.S. Constitution and, 353
- Comstock, Anthony, 147, 341–342, 1592
 - Beecher-Tilton Scandal and, 649
 - obscenity and, 1116, 1123
- Comstock law, 1410
- Comstock, Thomas Anthony, 341
- Concealed weapons, 1070
- Concerned Women for America
 - family values movement and, 577
 - Operation Rescue and, 1134
- Concurrence of mens rea
 - police power and, 1185
- Concurrent jurisdiction, 1547

INDEX

- Condoms
 - Bolger v. Youngs Drugs* and, 331
- Conductor Generalis*, 1749
- Confederate flags
 - political correctness and, 1188–1189
- Confederate States of America, 1647
- Conference on the Cause and Cure of War, 256
- Confessional Unmasked; Shewing the Depravity of the Romanish Priesthood, the Iniquity of the Confessional and the Questions Put to Females in Confession*, 1116
- Confessions, 1455. *See also* Coerced confessions
 - accomplices, 24–25
 - Arizona v. Fulminante* and, 78
 - Brown v. Mississippi* and, 187–188, 235
 - Colorado v. Connelly* and, 328–329
 - Crane v. Kentucky* and, 375
 - deceit and, 320
 - Dickerson v. United States* and, 419
 - enemy combatants and, 320–321
 - exclusionary rule and, 991
 - false, 573–574
 - force and, 1455
 - Fulminate v. Arizona* and, 320
 - guilty pleas and, 718
 - Hopt v. Utah Territory* and, 777
 - hypnosis and, 919
 - inadmissible, v, 319
 - injunctions and, 1213
 - jailhouse informants and, 838
 - Miranda and, v
 - Motes v. United States* and, 1040
 - Nix v. Williams* and, 1097
 - permissible, 318–319
 - promises and, 319
 - self-incrimination and, 920
 - torture and, 1758
 - unlawful detentions and, 991
 - unnecessary delay and, 952
 - voluntariness of, 375
 - voluntariness standard for, 992
 - voluntary, 831
 - Warren Court and, 1758
 - Wong Sun v. United States* and, 1792
- Confessions* (Augustine), 1495
- Confidential* (magazine), 1117
- Confidential informants
 - search warrants and, 1435
- Confidential information
 - disclosure of, 1491
- Confidentiality
 - Branzburg v. Hayes* and, 179, 1319
 - broken, 661
 - of journalistic sources, 859
 - journalists and, 322
 - reporter's privilege and, 663–664
 - Sunday Times v. United Kingdom* and, 639
- Confinement
 - competency to stand trial and, 831
- Confiscation Acts, 1647
- Confrontation clause, 264, 344–345, 345–346
 - closed-circuit television testimony and, 976–977
 - Davis v. Alaska* and, 396
 - Fuller Court and, 667
 - Lilborne and, 920
 - Lilly v. Virginia* and, 920
 - Maryland v. Craig* and, 976–977
- Congar, Yves, 254
- Congregationalism, 107
 - Baptists and, 108
- Congress
 - abolitionist movement and, 6
 - African Americans in, 1277–1278
 - aliens and, 792
 - appellate jurisdiction and, 866–867
 - chaplains in, 267
 - civil religion and, 297
 - classified information and, 310–311
 - commerce regulation and, 1684
 - Constitutional Convention of 1787 and, 357–360, 1263
 - constitutionality and, 1327–1328
 - criminal powers of, 581
 - death penalty and, 385
 - enforcement powers of, 160, 613
 - flag burning and, 590
 - freedom of speech of, 916–917
 - gun control and, 719–720
 - Hispanics in, 1277–1278
 - immigration and, 40–41, 1259
 - immunity of, 916
 - Indian Civil Rights Act and, 1258
 - interstate commerce and, 826–827
 - legislative chaplains and, 861, 966–967
 - legislative veto and, 797
 - limitations on, 541
 - lottery tickets and, 955
 - LSC created by, 1324
 - mandatory minimum sentences and, 954
 - McCulloch v. Maryland* and, 988
 - military and, 354–355
 - military tribunals and, 1008
 - negative rights and, 144
 - Ninth Amendment and, 1325, 1326, 1327, 1328
 - obscenity and, 955
 - overseas powers of, 354–355
 - PACs and, 588
 - plenary power of, 792
 - power of, 988
 - privacy protection and, 346–347
 - on right to counsel, 1346
 - right to petition and, 1352–1353
 - salary of, 142
 - size of, 142
 - staff of, 916–917
 - values of, 346
- Congress of Industrial Organizations (CIO), 337. *See also*
 - AFL-CIO
 - Communist Party and, 339
 - Goldberg and, 693–695
 - Hague and, 729
- Congress of Racial Equality (CORE)
 - Brown v. Board of Education* and, 959
- Congressional Record*
 - ERA and, 521
- Congressional Research Service
 - marriage and, 1406
- Congruence and proportionality test, 160
- Conley, Patrick T., 55
- Conn. DPS v. Doe*
 - Paul v. Davis* and, 1150
- Connally, John, 347–348

- Connally v. General Construction Co.*
substantive due process and, 464
- Connally v. Georgia*, 347–348
- Connecticut
birth control in, 1655–1656
Constitutional Convention of 1787 and, 1326
Petition Campaign and, 1155
Poe v. Ullman and, 1182
same-sex partners and, 1408
- Connick v. Myers*, 1508
government employees and, 674
government speech and, 702
public concern standard and, 982
teacher speech and, 1614–1615
- Connor, Eugene “Bull,” 348
- Conscience Whigs, 1584
- Conscientious objection, 349–350. *See also* Pacifism
CLB and, 102
definition of religion and, 409–410
Murphy and, 1048
Murray and, 1050
selective, 1050
Selective Service Act of 1940 and, 1801–1802
Sicurella v. United States and, 1474–1475
United States v. Macintosh and, 784
United States v. Seeger and, 1693–1694
Universal Military Training and Service Act of 1948 and, 1693
Vietnam War and, 1143
- Consciousness of guilt, 1396
- Conscription. *See* Draft
- Consent decree, 879
- Consent, to search, 1422
- Conservatism
Burger and, 205–206
Butler and, 209–210
JBS and, 854
Kennedy, A., and, 884–885
Roe v. Wade and, 4
- Consolidated Edison v. Public Service Commission*
captive audiences and, 247
viewpoint discrimination and, 1714
- Conspiracy, 350–351, 379–380
Bray v. Alexandria Women’s Health Clinic and, 180–181
Ex parte Milligan and, 551
theories, 854
- Constant, Benjamin, 1026
- Constantine, Roman emperor, 1586
- Constitution(s), 135–139. *See also* U.S. Constitution
Article IV in, 1275
Maryland, 137, 1309, 1310, 1311, 1312
Montana, 1352
New Jersey, 1310
New York, 1292, 1311
overseas, 354–355
ratification debate on, 1263–1269
Rehnquist on, 1288, 1289, 1290
Reid v. Covert and, 1291
religious liberty under eighteenth-century, 1308–1311
right to bear arms and, 1338
Roe v. Wade and, 1320–1322
slavery and, 138–139
state, 135–139
of states, 1535–1536
Texas, 908, 1328
Vermont, 135
of Vermont, 135
Virginia, 746, 1310
- Constitution, a Proslavery Document, The* (Phillips), 46, 1158
- Constitution of the Fifth Republic, 865
- Constitutional adjudication, 100
- Constitutional convention
Speech and Debate clause and, 916
- Constitutional Convention of 1787, 357–361, 1263–1269
Adams, S., and, 1264, 1265
Bill of Rights and, 357–361, 1263, 1264–1265, 1266, 1267, 1268, 1545
Chase and, 274
civil liberties and, 357, 1263–1264, 1265, 1266, 1267, 1268
Connecticut and, 1326
copyright clause and, 358
economic regulation and, 473
Federalism and, 1264, 1267, 1268, 1315, 1325
freedom of press and, 358, 1263, 1264, 1265
habeas corpus and, 358, 1263, 1265, 1266–1267
Hamilton, Alexander, and, 732, 1263, 1268
Hamilton and, 732
Henry and, 1266–1267
jury trial right and, 358, 1263, 1264, 1268
Madison and, 944
Massachusetts and, 1264, 1265–1266
militia and, 357–358
New York and, 1263, 1264, 1267–1268
North Carolina and, 1326
Pennsylvania and, 1264–1265, 1326
Pinckney and, 358, 1263, 1326
privileges and immunities and, 1230
Randolph, Edmund, and, 1266–1267
religion and, 1309
religious tests for office holding and, 358, 1315
Virginia and, 541, 1263, 1264, 1266–1267, 1340
Wilson, J., and, 1264, 1265, 1268
- Constitutional crisis of 1937, 784
- Constitutional liberties, unenumerated, 1497
- Constitutional rights, unarticulated, 1337
- Constitutional violations, 148–149
- Construction Construed and Constitutions Vindicated* (Taylor)
Jefferson and, 847
- Constructionism
Bork and, 165
Douglas and, 444
- Consumer protection laws
FCRA and, 569–570
- Consumer reports
FCRA and, 569–570
- Consumers’ League
ERA and, 520
- Contempt
civil, 706–707
criminal, 707
- Content neutrality, 656–657
hostile environment harassment and, 778
intermediate scrutiny test and, 818
protest injunctions and, 948
- Continental Congress
Chase and, 273
military chaplains and, 268
right to petition and, 1352
Rush in, 1386
- Contraband, automobile searches and, 92

INDEX

- Contraception, 8, 1410. *See also* Birth control; Birth control pill
equity, 1323
FDA and, 1323
Griswold v. Connecticut and, 712–713, 1320
hormonal, 1411
implied rights and, 802
marriage and, 1479
Murray and, 1050
NARAL and, 1062
obscenity and, 1116
penumbras and, 1153
personal autonomy rights and, 1533
“Plan B,” 1323
Poe v. Ullman and, 1182
privacy and, 9, 1219, 1225
reproductive rights and, 1321
rights, 87
Tilestone v. Ullman and, 1655–1656
as victimless crime, 1709
Warren Court and, 1759
- Contraceptives
access to, 714
Bolger v. Youngs Drug Products Corp. and, 160–161
Eisenstadt v. Baird, 483–484
Emerson and, 499
for minors, 250
parental consent for, 250
pill, 148
- Contract Labor Law of 1885, 1530
- Contract with the American Family, 285
- Contracts clause
Bronson v. Kinzie and, 477
Dartmouth College Case and, 477
Dartmouth College v. Woodward and, 969
economic rights and, 477
elimination of, 475
Home Building & Loan Association v. Blaisdell and, 474
Marshall Court and, 477, 968
Marshall, J., and, 477
Taney Court and, 477
- Contributing factor test, 1776
- Controlled Substances Act (CSA), 88, 1533
ODWDA and, 1137
- Conventicle Act, 1781
- Convention on Freedom of Information, 1676
- Convention on Torture, 16
Amnesty International and, 60
- Convention Parliament, 690
- Convictions. *See also* *Autrefois convict*
false, 1240
guilty pleas and, 718
post-trial, 718
reversals of, 831
wrongful, 925
- Conway, Thomas, 1386–1387
- Conyers, John, 890
- Cook County, Illinois, 1189
- Cook, Walter Wheeler
legal realism and, 913
- Cookies, 821
- Cool v. United States*, 407
Washington v. Texas and, 1767
- Cooley, Thomas, 1186–1187
economic rights and, 478
on First Amendment limitations, 645–646
freedom of press and, 1207
privacy and, 1218, 1591
- Coolidge, Calvin, 1798
eugenic sterilization and, 545–546
Hand and, 736
La Follette and, 904
- Coolidge, Edward H., Jr., 365
Coolidge v. New Hampshire, 365, 1435
plain view and, 1171
- Cooper, Henry Morgan, Jr., 73
Cooper v. Aaron
Marshall, T., and, 972
Cooper v. Eugene School District, 1306–1307
Cooper v. Oklahoma, 235
Cooper v. Pate, 291
- COPA. *See* Child Online Protection Act
- Coppage v. Kansas*, 465
government intervention and, 928
White Court and, 1777
- Copy-protection technology, 823
- Copyright
infringement, 822, 1001
Copyright Act of 1790, 484
Copyright Act of 1976
fair use doctrine and, 572
hip-hop music and, 764
limitations of, 572
- Copyright clause
Constitutional Convention of 1787 and, 358
Eldred v. Ashcroft and, 484–485
- Copyright law
Church of Scientology and, 366–367
fair use doctrine and, 572
free exercise clause and, 366–367
Metro-Goldwyn Mayer Studios v. Grokster and, 1001
religious ceremonies and, 366–367
- Copyright Term Extension Act of 1998 (CTEA), 484
- Copyrights
Digital Millennium Copyright Act, 817
Eldred v. Ashcroft and, 484–485
extension of, 484
First Amendment and, 485
first sale doctrine, 823
free speech clause and, 764
freedom of expression and, 1159
hip-hop music and, 763–764
intellectual property rights and, 816
Internet and, 211–212, 822–823
No Electronic Theft Act and, 823
royalties, 1001
SLAPP and, 1480
U.S. Constitution and, 352, 484
- Coram nobis cases, 842
- Corcoran, Thomas, 1269
- CORE. *See* Congress of Racial Equality
- Corfield v. Coryell*, 1231, 1355
- Cornelius v. NAACP Legal Defense & Education Fund, Inc.*
limited public forum and, 922
public forum doctrines and, 1244
religious organizations and, 699
viewpoint discrimination and, 1715
- Cornell University, 1272, 1317
Ginsburg and, 686
Meiklejohn and, 998
- Cornerstone principle, 1029

- Coronado Coal Co. v. United Mine Workers*, 1595
- Coronation Charter, 950
- Corporate speech, 650
- Corporation(s)
- campaign financing and, 218
 - Fifth Amendment and, 706, 730
 - free speech in, 632–633
 - freedom of association and, 634–635
 - freedom of speech and, 650
 - PACs and, 632
 - private v. religious, 292
 - self-incrimination and, 668, 740, 1453
- Corporation for Public Broadcasting (CPB)
- Christian Coalition and, 285
- Corporation of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 367–368, 1302
- Charitable Choice and, 270
 - neutrality in, 561
 - Title VII and, 1659
- Corporation of Presiding Bishop v. Amos*
- free exercise clause and, 629–630
- Corrections. *See also* Prisons; *specific agencies; specific institutions*
- racial discrimination and, 1257
- Corrigan, Irene, 192, 368
- Corrigan v. Buckley*, 368–369
- Brandeis and, 177
 - Buchanan v. Warley* and, 192
 - equal protection and, 516
- Corruption
- La Follette and, 901–902
 - police, 154
- Corruption of Blood, 297, 369–370, 1665
- Cosby, William, 644
- Hamilton and, 734
 - national security and, 1072
 - sedition libel and, 1440
 - Zenger and, 869, 1814
- Cosmology, 1011
- Costello, Frank
- Feiner v. New York* and, 582
- Costello v. United States*
- grand jury indictments and, 705
- Cotton, John, 61, 1782
- Massachusetts Bay Colony and, 978
- Cottrol, Robert, 721
- Coughlin, Charles, 69
- Council for Secular Humanism, The, 1438
- Council of Regensburg
- military chaplains and, 268
- Counsel. *See also* Right to counsel
- ineffective assistance of, 810–811
- Counseling, abortion and, 951
- Counselman v. Hitchcock*, 370, 1453, 1454
- grand juries and, 668
 - Warren Court and, 1758
- Counter Intelligence Program (COINTELPRO), 1518
- Counterintelligence Field Activity (CIFA), 1520
- Counts v. Cedarville School District*, 164
- County of Allegheny v. American Civil Liberties Union*, 41–43, 90
- ADL and, 69
 - Capitol Square Review and Advisory Board v. Pinette* and, 246–247
 - Chanukah and, 42, 1313
 - Christmas and, 42, 1313
 - civil religion and, 297
 - coercion and, 1102
 - coercion test and, 540
 - endorsement test and, 536, 538–539
 - “In God We Trust” and, 1067
 - Kennedy, A., and, 42, 529, 885–886, 1313
 - Lemon* test and, 529, 534, 538–539, 918, 1313
 - no endorsement test and, 1103
 - non-coercion standard and, 768
- County of Riverside v. McLaughlin*, 1361–1362
- County seals, 370–372
- Court injunctions, statutes v., 13
- Court martials, 1007
- Court of Appeals
- Supreme Court and, 868
- Court of Appeals, First Circuit
- Lee v. Weisman* and, 911
- Court of Appeals, Fourth Circuit
- Rice v. Paladin* and, 1331–1332
 - Wiccan prayer and, 915
- Court of Appeals, Ninth Circuit
- Child Pornography Prevention Act and, 83
 - in *City of Renton v. Playtime Theatres, Inc.*, 1318
 - Kennedy, A., and, 884
 - on religion, 1262
- Court of Appeals, Second Circuit
- Kaufman and, 883
 - Marshall, T., and, 972
- Court of Appeals, Seventh Circuit, 943
- Court of Appeals, Sixth Circuit, 1044
- Court of Appeals, Tenth Circuit
- City of Littleton v. Z.J. Gifts D4, LLC* and, 926
 - Snyder v. Murray City Corp.* and, 915
- Court of Common Pleas, 1748
- Court of High Commission, 1452
- Court of Justice, 865
- Court of Star Chamber, 1452
- Poulterer's Case* and, 350
- Court orders
- compliance with, 469
 - electronic surveillance and, 487
 - with notice, 487
 - penalties and, 469
- Court Reform and Criminal Procedures Act of 1970, 98
- Court rooms, journalists in, 662
- Court-packing plan
- Roosevelt, F., and, 864–865, 1269, 1372, 1390
- Courtrooms
- cameras in, 218
 - religious garb in, 1306
- Courts
- open, 1625–1626
 - U.S. Constitution and, 1635
- Courts, Gus, 548
- Courts of appeal, jurisdiction of, 868
- Courts of Indian Offenses, 51
- Covenants
- racially restrictive, 368–369, 1324–1325
- Covert Action Bulletin Board*
- Intelligence Identities Protection Act and, 817
- Coverture, 963
- Covington, Hayden, 372, 849
- Cox, Archibald, 165
- Cox, Elton, 373
- Cox v. Louisiana*, 15, 372–373
- entrapment by estoppel and, 510
 - picketing and, 1168

INDEX

- Cox v. New Hampshire*, 373–374
- Coy v. Iowa*, 374
 - Roman law and, 128
- CPB. *See* Corporation for Public Broadcasting
- CPPA. *See* Child Pornography Prevention Act
- CPUSA. *See* Communist Party of the United States
- Crack. *See* Cocaine
- Craig v. Boren*
 - ERA and, 521
 - gender and, 518
 - Ginsburg and, 687
 - middle scrutiny test and, 612
 - Stevens and, 1558
- Craig v. Missouri*
 - Marshall Court and, 968
- Cramer v. United States*, 1665, 1800
- Cramp v. Board of Public Instruction*, 1361, 1611
- Crampton v. Ohio*, 241
- Crandall, Reuben, 1486
- Crandall v. Nevada*, 801
- Crane Junior College, 693
- Crane v. Johnson*, 374–375
- Crane v. Kentucky*, 375, 1428
- CRAs. *See* Credit reporting agencies
- Crawford v. United States*, 345–346
- Crawford v. Washington*, 344–345
- Creation science. *See* Creationism
- Creationism, 3, 375–379, 480–481. *See also* Intelligent design
 - Biblical, 1616
 - Edwards v. Aguillard* and, 377, 481, 1615
 - Epperson v. Arkansas* and, 1615
 - fundamentalist, 1616
 - generalist, 1616
 - Genesis and, 1615
 - public schools and, 1615–1617
 - secular humanism and, 1438
 - theistic, 1616
 - Young Earth, 1616
- Creationism Act, 1617
- Creativity Movement, 566
- Crèche. *See* Nativity scenes
- Credit
 - FCRA and, 569–570
 - privacy of, 346
 - scores, 570
- Credit reporting agencies (CRAs)
 - FCRA and, 569–570
- CREEP. *See* Committee to Re-Elect the President
- Cremation, 93
- Crescent City Slaughter-House Company, 514, 1481
- Crescent Obscured, The* (Allison), 1053
- Crime(s)
 - categories of, 385–386
 - hate speech as, 752
 - Inchoate, 1420
 - jury trial right and, 875–876
 - overseas, 354
 - retribution and, 1328–1329
 - serious, 875–876
 - substantive, 1420
 - while on bail, 98
- Crime Control Act 1968, 1519, 1520
- Crime scenes, 428
- Criminal acts
 - corruption of blood and, 369–370
 - incitement of, 651–655
 - profits for, 1494–1495
- Criminal anarchism, 689
- Criminal Anarchy Act of 1902, 74
- Criminal Anarchy Act of 1912, 176
- Criminal Antitrust Penalty Enhancement and Reform Act, 1472
- Criminal codes, 67–68
- Criminal conduct
 - civil forfeiture and, 295
- Criminal conspiracy. *See* Conspiracy
- Criminal convictions
 - civil death and, 297
 - collateral consequences and, 325–326
- Criminal defendants. *See* Defendants
- Criminal intent, police power and, 1185
- Criminal justice
 - Burger and, 204
 - ethnicity and, 1256
 - Native Americans and, 1258
 - police and, 1256
 - race and, 1256–1258
 - sex and, 1463–1465
- Criminal Justice Act of 2003, 440
- Criminal justice agencies, 1258
- Criminal law
 - civil law v., 380–381
 - colonial charters and, 327
 - federalization of, 580–581
- Criminal procedural rights
 - Harlan, II, and, 742–743
- Criminal profiling, 1236–1237
- Criminal rights, 128
- Criminal Sentences: Law without Order* (Frankel), 1458
- Criminal statutes, 907
- Criminal surety laws, 1649
- Criminal Syndicalism Act, 1780
- Criminal syndicalism law, 1510
 - KKK and, 1511
- Criminal trials. *See also* Trials
 - entrapment defense in, 509–510
 - exclusionary rule and, 554
 - fee system of, 798–799
 - multidefendant, 24–25
 - prosecution of, 786–787
 - right of access to, 1336
- Criminology, 1236
- Crips, 1744
- Crisis, The* (magazine), 1063
- Crito* (Burgh), 1735
- Croly, Herbert, 736
- Cromwell, Oliver, 382
 - English Toleration Act and, 504
 - Lilborne and, 920
 - Maryland Toleration Act and, 976
 - New Model Army and, 507
- Crooker v. California*, 292
- Cross burning, 382–383
 - African Americans and, 382–383, 1271
 - City of Houston v. Hill* and, 588
 - fighting words and, 588
 - hate crime laws and, 749
 - hateful motivation for, 752
 - KKK and, 382–383, 753, 896–897
 - R.A.V. v. City of St. Paul* and, 382–383, 1271

- viewpoint discrimination and, 1716
 - Virginia v. Black* and, 382–383, 1513, 1724–1725, 1769
 - “Cross of Gold” (Bryan), 189
 - Cross-examination
 - compulsory process clause and, 344–345
 - of defendants, 1683
 - face-to-face, 345
 - Lilly v. Virginia* and, 920
 - limits on, 396
 - procedural due process and, 463
 - Sixth Amendment and, 1359–1360
 - Croswell, Harry, 733, 1207
 - Crow, Jim, 302
 - Crozier Theological Seminary, 889
 - Cruel and unusual punishment, 383–387. *See also* Eighth Amendment
 - 1689 English Bill of Rights and, 1537
 - Coker v. Georgia* and, 323
 - death penalty and, 1545
 - drugs and, 1745
 - electric chair as, 485–486
 - English Bill of Rights and, 503
 - evolving standards of decency and, 1669
 - Fuller Court and, 667
 - generally, 387
 - Harlan, II, and, 742
 - Harmelin v. Michigan* and, 744
 - Herrera v. Collins* and, 762
 - history of, 387–388
 - mandatory minimum sentences and, 954
 - Marshall, T., and, 973
 - McCleskey v. Kemp* and, 985–986
 - penitentiaries and, 1539
 - Powell v. Texas* and, 1193
 - proportional punishment and, 1241
 - Quinlan and, 1254
 - Solem v. Helm* and, 1494
 - South Dakota and, 1494
 - sterilization as, 1479
 - test for, 486
 - Thomas and, 1650
 - three strikes laws and, 1654
 - Virginia Declaration of Rights and, 1723
 - Weems v. United States* and, 1772
 - Cruel and unusual punishment clause
 - Amnesty International and, 60
 - capital punishment and, 231–232
 - execution and, 243–244
 - Furman v. Georgia* and, 241
 - Gregg v. Georgia* and, 231–232
 - Jurek v. Texas* and, 231–232
 - multiple punishments and, 442
 - Proffitt v. Florida* and, 231–232
 - Roberts v. Louisiana* and, 231–232
 - Woodson v. North Carolina* and, 231–232
 - Cruikshank, William J., 1681
 - Cruz v. Beto*, 291
 - free exercise and, 1214
 - O’Lone v. Estate of Shabazz* and, 1130
 - Cruz v. New York*, 344
 - Cruzan, Nancy, 86, 388–389
 - Cruzan v. Director, Missouri Department of Health*, 86, 388–389, 1416, 1533
 - euthanasia and, 547
 - O’Connor and, 1127
 - physician-assisted suicide (PAS) and, 1164
 - Rehnquist and, 1766
 - right to die and, 888
 - substantive due process and, 466
 - CSA. *See* Controlled Substances Act
 - CSO. *See* Community Services Organization
 - CSRTs. *See* Combatant status review tribunals
 - CTEA. *See* Copyright Term Extension Act of 1998
 - Cuba, interdiction and, 390
 - Cullom–Struble Bill, 72
 - Cultural defense, 390–391
 - Cultural interdiction, 389–390
 - Cummings v. Missouri*
 - Chase Court and, 272
 - Field and, 586
 - test oaths and, 1627–1628
 - Cummings v. Richmond County Board of Ed.*, 1181
 - Cupid’s Yokes* (Heywood), 649
 - Currency
 - Anthony and, 65
 - Hepburn v. Griswold* and, 465
 - “In God We Trust” and, 1066
 - politics and, 1190–1191
 - secularism and, 90
 - silver standard, 189
 - Curtilage, 1430
 - Curtis, Helen, 368
 - Curtis Publishing v. Butts*
 - public figures and, 1242
 - Warren Court and, 1755
 - Cusack, Ruth, 1062
 - Cushing, William
 - Adams, J., and, 644
 - Ellsworth Court and, 491
 - Jay Court and, 843
 - Cushing-Adams letters, 644
 - Custody. *See* Child custody
 - Customs offenses, 295
 - Customs Service, 415
 - Cutter v. Wilkinson*
 - ADL and, 70
 - O’Lone v. Estate of Shabazz* and, 1131
 - RLUIPA and, 160, 560, 1215, 1308
 - Cuyler v. Sullivan*, 810
 - Cyber Promotions v. America Online*, 45
 - Cybersquatting, 824
 - Czech Republic, 1668
- ## D
- Daddy’s Roommate* (Willhoite), 164
 - DADT. *See* Don’t Ask, Don’t Tell
 - Dainese v. Hale*, 342
 - Dalai Lama, 1035
 - Dale, James, 170
 - Daley, Richard
 - Chicago Seven and, 278
 - political patronage and, 1189
 - Dallek, Robert, 856
 - Damages, for defamation, 404
 - Dambrot v. Central Michigan University*, 1188–1189
 - Danbury Baptist Association, 766
 - Jefferson and, 847
 - Dandridge v. Williams*, 393
 - rational purpose test and, 610

INDEX

- Daniel v. Cantrell*, 1713
Daniels v. Quinn, 1615
Darrow, Clarence, 393–395
 Bryan and, 189
 peremptory challenges and, 873
 Scopes trial and, 1425
Darrow, Paul Edward, 395
Dartmouth College Case
 contract clause and, 477
 freedom of association and, 634
Dartmouth College v. Woodward
 Marshall Court and, 968
 Marshall, J., and, 969
Darwin, Charles, 376, 1505, 1617
 heredity and, 545
Darwinism, 376–377
Data
 mining, 1519
 privacy of, 1222–1223
Daugherty, Harry M., 1564
 Hoover and, 774
Daughters of Bilitis, 676, 1566
Daughters of Temperance, 64
Davey, Joshua, 929
David v. Beason, 586
Davidian Seventh Day Adventist, 1461–1462
Davidson, Jo, 904
Davis, Angela, 306
Davis, David, 271–272, 551–552
Davis, John W., 517
Davis, Rennie
 Chicago Seven and, 278
Davis, Samuel, 396
Davis v. Alaska, 396
Davis v. Bandemer, 1277
Davis v. Beason, 343, 396–397, 1476
 Fuller Court and, 668
Davis v. United States, 1457
Dawkins, Richard, 1618
Dawson, Joseph Martin, 397
Dawson v. State, 486
Day They Came to Arrest the Book, The (Hentoff), 760
Day, William R.
 Buchanan v. Warley and, 192
 Burdeau v. McDowell and, 195
 Mann Act and, 955
 White Court and, 1777
Daycare, 1421
De facto segregation, 1441, 1443
De jure segregation, 1441
De Libellis Famosis, 506, 1440
de Lubac, Henri, 254
de Medici, Cosimo, 1051
De minimis doctrine
 sampling and, 764
 in seizures, 1446
De Paul University, 276
de Tocqueville, Alexis, 375
 jury trials and, 875
 Mill and, 1010
DEA. *See* Drug Enforcement Agency
Dead Man Walking: An Eyewitness Account of the Death Penalty in the United States (Prejean), 1200
Deadly force. *See* Use of force
Dean and Gill v. District of Columbia, 1401
The Dearborn Independent, 69
DeArment v. Harvey, 571
Death
 autopsies and, 93
 civil, 297, 369
 Declaration of Death Act of New Jersey and, 561
 qualification, 191
Death, Doctor. *See* Kevorkian, Jack
Death penalty
 abolishment of, 233–234
 African Americans and, 1257–1258
 aggravating factors and, 227
 Amnesty International and, 59–60
 appeals, 684, 762
 Ashcroft and, 85
 Blackmun on, 1394
 Boykin v. Alabama and, 172
 Buchanan v. Kentucky and, 191
 California and, 1545, 1546
 California v. Ramos and, 216
 Caucasians and, 1258
 challenges, 233–234, 240–242
 commuted, 237
 competency to stand trial and, 692
 constitutionality of, 60, 669
 crimes for, 385–386
 cruel and unusual punishment and, 1545
 false confessions and, 573–574
 for felony murder accomplices, 236
 Fourteenth Amendment and, 989–990
 future dangerousness and, 110
 Godinez v. Moran and, 692
 Goldberg on, 696–697
 guided discretion statutes and, 717
 Herrera v. Collins and, 762
 Hughes Court and, 782–783
 Illinois, 1393
 legislation, 385
 Lockhart v. McCree and, 932
 mandatory, 952–953
 McCleskey v. Kemp and, 985–986
 mitigating factors and, 932
 modern, 224
 NAACP v., 1257
 prohibitions on, 236
 proportionality and, 231
 racial discrimination and, 1257–1258
 rape and, 232, 245, 385–386, 1329
 retribution and, 1329
 reversals, 242
 statutes, 227, 228
 Stevens and, 1558
 Stewart, P., and, 1560
 unconstitutionality of, 245
Death with Dignity Act, 1135–1137
Debate
 free and fair, 656
 freedom to, 262
Debs, Eugene, 399–400, 1282
 Darrow and, 394
 Debs v. United States and, 401
 Espionage Act of 1917 and, 652
 La Follette and, 903
 Debs v. United States, 401
 Abrams v. United States and, 13

- bad tendency test and, 97
- clear and present danger test and, 1795–1796
- Holmes and, 771
- incitement of criminal activity and, 652
- Debt
 - collection, 401
 - imprisonment for, 1541
 - peonage, 1649, 1777
 - servitude, 126
- Debtor's prisons, 401
- Deceit, 320
- Decency clause, 700–701
- Decent Interval* (Snepp), 1491, 1492
- Deception, 1016
- “Declaration and Resolves, The,” 54
- Declaration of Death Act of New Jersey, 561
- Declaration of Independence, 401–402, 1275, 1638
 - AASS and, 46
 - Bible and, 127
 - creation of, 54
 - displays of, 1621
 - Enlightenment and, 1026
 - equal protection and, 514
 - Franklin and, 621
 - free speech law and, 815
 - freedom of religion and, 847
 - Jefferson and, 845, 1338
 - Magna Carta and, 949
 - Mason and, 978
 - natural law and, 1080
 - quartering of troops and, 1252
 - Sherman and, 1472
 - slavery and, 451
 - state constitutions and, 1537
 - unalienable rights in, 135
 - Virginia Declaration of Rights and, 1723–1724
- Declaration of Indulgence, 1667
- Declaration of Principles of 1915* (AAUP), 1505
- Declaration of Principles on Freedom of Expression, 640
- Declaration of Rights, 691
- Declaration of Rights* (Mason), 1203
- Declaration of Sentiments*, 1522
- Declaration of Sentiments of 1848, 539
- Declaration on Religious Freedom, 254
- Declaratory Act, 977
- Deductive reasoning, 913
- Dees, Morris Seligman, Jr., 1500, 1502–1503
- Dees, William, 1414
- Defamation, 1699
 - actual malice standard and, 27
 - anonymity and, 62
 - common law and, 335–336
 - damages for, 404
 - false light invasion of privacy and, 574
 - First Amendment and, 1271
 - free speech and, 402–405, 815
 - Gertz v. Robert Welch, Inc.* and, 680
 - group libel and, 715
 - Hustler Magazine v. Falwell* and, 787
 - Milkovich v. Lorain Journal* and, 1009
 - Near v. Minnesota* and, 1081, 1694–1695
 - negligence and, 403
 - neutral reportage doctrine and, 1082
 - New York Times Co. v. Sullivan* and, 330, 680
 - Philadelphia Newspapers, Inc. v. Hepps* and, 1158
 - principles of, 402
 - public figures and, 1242
 - public officials and, 1245
 - SLAPP and, 1480
 - truth and, 404
- Defendant damage, 1711
- Defendants
 - categories of, 386
 - entrapment of, 509–510
 - false statements and, 1683
 - humanizing, 870
 - North Carolina v. Alford* and, 1111
 - public trials and, 1247
 - rights of, 1416
 - Scalia and, 1416
 - Souter and, 1497
 - United States v. Agurs* and, 1678–1679
 - Washington v. Texas* and, 1767
- Defending Pornography: Free Speech, Sex, and the Fight for Women's Rights* (Strossen), 1573
- Defense of Marriage Act (DOMA), 405–406, 677, 1399, 1401, 1403
 - debate about, 1406
- Defense, right to present, 406–408
- Definition-by-analogy test, 1215
- DeFunis v. Odegaard*, 447
- Degan, William, 1385
- Deity. *See* God
- DeJonge, Dirk, 411
- DeJonge v. Oregon*, 74, 411–412
 - Hughes and, 784
 - incitement of criminal activity and, 654
 - substantive due process and, 466
- DeLancey, James, 1814
 - Zenger and, 734
- Delano grape strike, 275
- Delaware
 - Declaration of Rights, 136
 - jury trials and, 137–138
 - Petition Campaign and, 1155
 - religion and, 1309
 - slavery and, 1647
- Delaware Charter of 1701, 327
- Delaware v. Prouse*, 412
 - checkpoints and, 276
- Delima v. Bidwell*, 740
- Delinquency, 1549–1550
 - proceedings, 813
- Delli Paoli v. United States*, 25
- Dellinger, David
 - Chicago Seven and, 278
 - Kunstler and, 898
- DeLong, James, 381
- Delta Force, 1732
- DeMille, Cecil B., 1620
- Democracy
 - Brandeis on, 175
 - civil liberties and, 1028
 - free speech and, 655–656, 1451
 - liberty v., 151
 - in modern period, 655–657
 - pluralism of, 1274
 - promoting, 44
 - religion and, 1274
 - theory, 655–657
 - wisdom and, 1451

INDEX

- Democratic National Committee, 1280
 - Red Lion Broadcasting v. FCC* and, 185
- Democratic Party
 - Hague and, 729
 - McReynolds and, 992
 - Operation Rescue and, 1134
 - Palmer and, 1280–1281
- Democratic Societies, 95
- Demonstrations. *See* Protests
- Denationalization, 413, 562. *See also* Expatriation
 - involuntary, 563
 - Trop v. Dulles* and, 385
- Denaturalization, 413
- Dennis, Eugene, 654
 - CPUSA and, 338
- Dennis v. United States*, 14–15, 68, 414–415, 737, 1511
 - categorical approach and, 252
 - Clark, T., and, 309
 - clear and present danger test and, 690
 - CPUSA and, 338, 339
 - Douglas and, 446
 - Frankfurter and, 618, 1641
 - freedom of association and, 635
 - HUAC and, 780
 - incitement of criminal activity and, 654–655
 - national security and, 1073
 - Smith Act and, 1488
 - Vinson and, 1722
 - Vinson Court and, 1719
 - Yates v. United States* and, 1807
- Denver Area Educational Telecommunications Consortium, Inc. v. Federal Communications Commission*, 99, 252, 1689
 - Breyer and, 183
- Denver Principles*, 25–26
- Deoxyribonucleic acid. *See* DNA
- Department of Agriculture
 - Estes and, 545
 - Hiss and, 765
- Department of Defense
 - Abu Ghraib and, 15
 - Flynt and, 599
 - homosexuals and, 435
 - military chaplains and, 268
 - military tribunals and, 1008
 - recognized religions and, 268
 - on religion in military, 1303–1304
 - security clearance and, 1270
- Department of Education, 285
- Department of Health and Human Services (HHS)
 - Bowen v. American Hospital Association*, 166
 - Griffin v. Wisconsin* and, 712
 - Rust v. Sullivan* and, 672–674, 1387
- Department of Health, Education, and Welfare (HEW)
 - Beal v. Doe* and, 115
 - Brown v. Board of Education* and, 186
- Department of Homeland Security (DHS), 415–416, 1259
 - airport searches and, 33–34
 - IMFA and, 795
- Department of Justice (DOJ)
 - Alien Registration Act and, 134
 - AP/LS and, 925
 - Ashcroft and, 84
 - Bork and, 165
 - Chemerinsky and, 276
 - drugs and, 1743
 - hate crimes statistics and, 751
 - Hiss and, 765
 - Hoover and, 774
 - Jackson, R. and, 833–834
 - King and, 890
 - Murphy and, 1047
 - ODWDA and, 1137
 - Radical Division of, 774
 - Reno and, 1317
- Department of Labor
 - Goldberg and, 695–696
 - Rauh and, 1269
- Department of the Navy v. Egan*, 311
 - national security and, 1071
- DePaul University, 693
- Deportation
 - Alien Acts and, 37–38
 - of Arabs, 1625
 - of Bridges, 1566
 - Detroit Free Press v. Ashcroft*, 1626
 - Fong Yue Ting v. United States* and, 600, 1530
 - Geary Act and, 260
 - Harisiades v. Shaughnessy* and, 737
 - history of, 790–791
 - ideological and security-based, 789–792
 - Immigration and Naturalization Service v. Chadha* and, 797
 - of legal residents, 1530
 - Marcello v. Bonds* and, 800
 - of noncitizens, 40, 1105–1106
 - North Jersey Media Group v. Ashcroft* and, 496
 - Palmer and, 1144
 - plenary power doctrine and, 893
 - Quakers and, 1251
 - Wilson, W., and, 1785
 - World War II and, 1800
- Depression
 - AFPS and, 103
 - Communist Party and, 339
 - CPUSA and, 337
 - economic rights and, 479
 - freedom of contract and, 637
 - Hoover and, 775
 - Hughes Court and, 782
 - marriage and, 964–965
 - movies and, 755
 - Murphy and, 1047
 - Prohibition and, 1239
 - substantive due process and, 466
- Deprivation, as coercion, 1455
- Der Deutscher Rechts-Schutz Verein, 912
- Derivative use immunity, 1454
- Dershowitz, Alan, 306, 416–417
- DeSalvo, Albert, 240
- Desegregation. *See also* Segregation
 - Marshall, T., and, 972–973
 - Powell, Lewis, and, 1193
- Deseret, 1039
- DeShaney v. Winnebago County Department of Social Services*, 282
- Design for Diversity, 220
- Designated public forums, 417, 1245, 1699
 - National Endowment for the Arts v. Finley* and, 1065
 - universities as, 1699
- DeSilver, Albert, 1798
- Desparecidos, 792
- Detached Memoranda* (Madison), 1109

- Detectaphone, 1429
 Detentions. *See also* Preventive detention
 Breyer and, 183
 extremist groups and, 567
 Guantanamo Bay and, 715–716
 habeas corpus and, 727
 Hamdi v. Rumsfeld and, 731, 1347
 illegal, 665–666
 indefinite, 804–805
 interrogations and, 316
 of material witnesses, 804–805, 981
 Michigan v. Summers and, 1006
 of noncitizens, 1105–1106
 pretrial, 804–805, 1419
 probable cause and, 1234
 tribal, 809
 unlawful, 800, 991
 under USA PATRIOT Act, 791–792
Detroit Free Press v. Ashcroft, 1626
 Deukmejian, George, 275
 Dewey, Thomas E., 1762
 DeWitt, John, 417–418
 Japanese internment and, 839
 misconduct of, 841–842
 suspect categories and, 518
 Dexter Avenue Church, 889
 DH. *See Dignitatis Humanae*
 DHS. *See* Department of Homeland Security
 DI. *See* Directorate of Intelligence
 Diagnostic and Statistical Manual (DSM), 1405
 Dial-a-porn services, 418
 obscenity and, 1124
 Dialectic materialism, 1639
 Diallo, Amadou, 154
 Dianetics, 286
Dianetics: The Modern Science of Mental Health (Hubbard), 286
 Dickens, Charles, 150, 307
 Dickerson, James, 1020
Dickerson v. United States, 419, 1287, 1457
 Harris v. New York and, 747
 Miranda v. Arizona and, 1017
 Miranda warnings and, 1020
 Omnibus Crime Control and Safe Streets Act of 1968 and, 992, 1132
 Souter and, 1497
 Dickinson College, 1387
 Dies Committee, 780, 1800
 New Deal and, 1083
 Dies, Martin, Jr., 419–420
 HUAC and, 780
 New Deal and, 1084
 Diet, free exercise in, 1215
 DiGerlando, Benedict, 524
Digest of Justinian, 439
 Digital communication. *See* Electronic communication
 Digital divide, 821–822
 Digital Millennium Copyright Act (DMCA), 817, 822–823
 Digital rights management (DRM), 816–817
 Digital video recorders (DVRs), 1002
Dignitatis Humanae (DH), 254–255, 1049
 Dillinger, John, 774
 Direct advocacy test, 653–654
 Brandenburg v. Ohio and, 655
 Director of National Intelligence (DNI), 257
 Directorate of Intelligence (DI), 257–258
 Directorate of Operations (DO), 257
 Directorate of Science and Technology, 258
 Directorate of Support (DS), 258
Dirkes v. Borough of Runnemede, 1713
 Dirksen, Everett, 356
 Disabled persons
 ADA and, 71
 voting rights for, 1355–1356
 Discipline
 for lawyers, 420
 protected speech and, 420–421
 for public employees, 420
Discourses Concerning Government (Sidney), 847
 Discovery Institute, 378
 Discovery Network, Inc., 292–293
 Discovery process
 in court proceedings, 421
 deadlines, 80
 Discrimination. *See also* Racial discrimination; Sexual discrimination
 ABA on, 228
 assisted suicide and, 87
 based on poverty, 711
 Boy Scouts of America v. Dale, 170, 1363, 1381
 Civil Rights Act of 1964, 300–301
 de jure, 30
 definition, 70
 EAA and, 512
 economic, 951
 Eisenstadt v. Baird and, 484
 employment, 303, 777–779
 Fourteenth Amendment and, 1468
 in housing, 1649
 with Indians, 1412
 interstate commerce and, 826
 invidious, 830, 936
 Jews and, 851
 Lamb's Chapel v. Center Moriches Union Free School District and, 906
 mandatory death sentences and, 953
 NOW and, 1068
 peremptory challenges and, 873–874
 Plyler v. Doe and, 1182
 political affiliation and, 1417
 pornography and, 1121
 private, 605
 private discriminatory association and, 1226
 privileges and immunities and, 1231
 prosecution, 423–424
 proving, 422–423
 public forums and, 1230
 purposeful, 114
 by religious entities receiving government funds, 422–423
 religious speech and, 1230
 restaurants and, 1443
 reverse, 1282–1283
 sexual orientation and, 1409
 Southern Poverty Law Center and, 1500
 Supreme Court on, 1278
 Title III and, 1659
 Title VII and, 1659
 U.S. Constitution and, 352
 in venire, 872
 viewpoint, 700–701
 voter, 746

INDEX

- Discrimination (*cont.*)
by voucher-funded schools, 1424
Warren and, 1763
- Discriminatory effect, 424
- Discriminatory purpose, 424
- Disestablishment movement, 425–426
- Disloyalty, dissent v., 39
- Disney. *See* Walt Disney Company
- Disproportionate test, 236, 384–385
- Dissent
Bache and, 96
in colonial America, 622
commercial speech and, 330
disloyalty v., 39
English Toleration Act and, 504
free speech and, 14
freedom of press and, 658
general warrants and, 678
national security and, 36, 658
public safety and, 1011
religious freedom and, 136
- District of Columbia, as “state,” 1391–1392
- Diversity, 30–31
Grutter v. Bollinger and, 612
Madison and, 944–945
- Diversity Immigrant Visa Program (DV lottery program), 426–427, 1259
goals of, 427
- Divine Right school, 931
- Divorce. *See also* Child custody
emerging laws, 964
Hazelwood School District v. Kuhlmeier, 1576
increase in, 965
Naim v. Naim and, 1059
no-fault, 1523
reform, 966
same-sex adoption and, 1399
self, 963
Stanton and, 1522–1523
states and, 1540
- Dixon, Thomas, 896
- DMCA. *See* Digital Millennium Copyright Act
- DNA, 430
cloning and, 313
data privacy and, 1222
dragnets, 430–431
innocence and, 432
photofits, 432
- DNA databases
cross-jurisdictional issues for, 432
problems with, 431–432
- DNA evidence, 428
capital punishment and, 224
collecting, 430, 431
contaminated, 429
destruction of, 429, 431
Herrera v. Collins and, 237
- DNA testing, 430–432
Arizona v. Youngblood and, 79
in courtrooms, 430
exemplars and, 558
fingerprints v., 431
flawed, 429
history of, 430
implications of, 432
information derived from, 432
innocence and, 428–429
mistakes, 429
post-conviction evidence and, 762
post-conviction statutes and, 428
uniformity of, 432
- DNI. *See* Director of National Intelligence
- Do not e-mail registry, 820
- Do not resuscitate order, 547
- DO. *See* Directorate of Operations
- Doctor-patient relationship, 1411
- Doctors. *See* Physicians
- Documenting Courage*, 1461
- Documents
production of, 171
protection for, 730
sealed, 1428–1429
- Doe v. Bolton*, 432–433
Burger Court and, 198
Colautti v. Franklin and, 324
Douglas and, 445–446
privileges and immunities and, 1231
Roe v. Wade and, 433, 1320, 1367
- Doe v. University of Michigan*, 221
- Doggett v. United States*, 1517
- Dogs, sniffing, 486–489
reasonable expectation of privacy and, 882
- Doherty, Henry L., 195
- DOJ. *See* Department of Justice
- Dolan v. City of Tigart*, 1605
- Dole, Bob, 933
- Dole v. Shenandoah Baptist Church*, 571
- Dollar diplomacy, 1601
- DOMA. *See* Defense of Marriage Act
- Domain names, 824
- Domestic partnerships, 1409
benefits, 1401
registration for, 1409
- Domestic violence, 433–435, 1465
activism against, 434–435
history of, 434–435
limitations on, 1540
- Dominican Republic, 1585
- Dominicans, religious incorporation of, 291
- Donahoe, Bridget, 1294
- Donahoe v. Richards*, 1294
- Donahue, Phil, 72
- Donald, Beulah Mae, 1501, 1503
- Donald, Michael, 1501
- Don’t ask, don’t tell (DADT), 435–436, 1460
gay and lesbian rights and, 677
Log Cabin Republicans, 933
- Doremus v. Board of Education*, 1609–1610
- Dorr v. United States*, 740
- Doty, Madeline, 103
- Double jeopardy, 122, 437–439
appeals and, 230
application of, 440–441
Ashe v. Swenson and, 441
Benton v. Maryland and, 440
in Bible, 439
Blockburger v. United States and, 441
Brown v. Ohio and, 441
Bullington v. Missouri and, 195
Burks v. United States and, 207–208, 1655

- creation of, 438–439
- Criminal Justice Act of 2003 and, 440
- in England, 440
- Fifth Amendment and, 1504
- grand juries and, 708
- guarantee against, 438–439
- guilty pleas and, 719
- Hetenyi v. Wilkins* and, 972
- history of, 437–438, 439–440
- Hudson v. Louisiana* and, 781
- incorporation doctrine and, 803
- international application of, 440
- jury nullification and, 869
- language of, 439
- Menna v. New York* and, 1000
- modern history of, 439–442
- Native Americans and, 441
- Palko v. Connecticut* and, 463
- resentencing and, 226
- Ricketts v. Adamson* and, 1334
- rights of accused and, 1360–1361
- Sattazahn v. Pennsylvania* and, 226–227
- Simpson and, 441
- Tibbs v. Florida* and, 1655
- United States v. Tateo* and, 1694
- DoubleClick, Inc., 821
- Douglas, Helen Gahagan, 1098
- Douglas, Stephen A., 922–923
- Douglas v. California*, 60–61, 442–443, 1345, 1350
 - suspect categories and, 518
- Douglas, William O., 443–447, 1560, 1585
 - Adler v. Board of Education* and, 17
 - Beauharnais v. Illinois* and, 116–117
 - Belle Terre v. Boraas* and, 120
 - Boykin v. Alabama* and, 172
 - Burger Court and, 198
 - on death penalty, 245
 - Dennis v. United States* and, 14–15, 415
 - Emerson and, 497
 - Endo v. United States* and, 840
 - Engel v. Vitale* and, 502
 - Follett v. Town of McCormick* and, 599
 - Fortas and, 603
 - Furman v. Georgia* and, 232
 - Gideon v. Wainwright* and, 682
 - Girouard v. United States* and, 1142
 - Gray v. Sanders* and, 1275
 - Griffin v. California* and, 710
 - Griswold v. Connecticut* and, 444, 499, 713, 1337
 - Harisiades v. Shaughnessy* and, 792
 - Harper v. Virginia State Board of Elections* and, 746
 - on Hughes, 782
 - Hughes Court and, 782
 - judicial philosophy of, 445
 - Keyishian v. Board of Regents* and, 18
 - Korematsu v. United States* and, 445, 1373
 - legal realism and, 913
 - Meiklejohn and, 999
 - New York Times v. United States* and, 14–15, 1089
 - obscenity and, 1118
 - Papachristou v. City of Jacksonville* and, 1144
 - penumbras and, 1153, 1154
 - Poe v. Ullman* and, 1183
 - privacy and, 1219
 - quartering of troops and, 1253
 - Rabe v. Washington* and, 1255
 - right to privacy and, 802
 - on right to travel, 1354
 - Roosevelt, F., and, 1373, 1374
 - Rosenbergs and, 1378
 - Ross v. Moffitt* and, 1380
 - Roth v. United States* and, 447, 1382
 - Rowan v. United States Post Office Department* and, 1384
 - Sherbert v. Verner* and, 349
 - Skinner v. Oklahoma* and, 518
 - sodomy and, 1405
 - Stevens and, 1555
 - Terminiello v. Chicago* and, 654
 - United States v. O'Brien* and, 450
 - United States v. Seeger* and, 1693
 - Vinson Court and, 1721
 - Walz v. Tax Commission* and, 1738–1739
 - Warren Court and, 1753
 - Whitehill v. Elkins* and, 18
 - Zorach v. Clauson* and, 343, 1719–1720, 1822
 - Douglass, Frederick, 7, 448, 1486, 1585
 - Anthony and, 65
 - Wells and, 1774
 - Douglass, Margaret, 1485
 - Dover School Board, 378
 - Dower, 1523
 - Down Beat*, 760
 - Downes v. Bidwell*, 740
 - Dr. Bonham's Case*, 863
 - Dr. Seuss, 1414
 - Dr. Seuss v. Penguin Books*, 1414
 - Draft, 1447. *See also* Conscientious objection; Selective Service Act of 1917
 - Baldwin and, 102
 - Bond and, 161
 - Debs and, 400
 - Murphy and, 1048
 - statutory religion-based exemptions and, 559–560
 - Vietnam War and, 449–450
 - Watts v. United States* and, 1769
 - World War I and, 1792–1793
 - Draft card burning, 363, 449–450, 1007, 1162, 1516
 - First Amendment and, 1688
 - United States v. O'Brien* and, 1113–1114, 1688
 - Vietnam War and, 1688
 - Dreadlocks, 1262–1263
 - Dred Scott v. Sandford*, 293, 451–452, 1484, 1487
 - Civil Rights Act of 1866 and, 299
 - due process and, 457, 1581
 - Emancipation Proclamation and, 493–494
 - exclusion and, 790–791
 - incorporation doctrine and, 803
 - judicial review and, 864
 - Lincoln and, 923
 - Plessy v. Ferguson* and, 1181
 - privileges and immunities clause and, 606–607
 - Second Amendment and, 721–722
 - substantive due process and, 464–465
 - Taney Court and, 1607, 1635
 - Thirteenth Amendment and, 1648
 - Dress codes
 - free exercise and, 1215
 - Goldman v. Weinberger* and, 698–699
 - in public schools, 1578–1579
 - Driver's license information, 662

INDEX

- Drivers Privacy Protection Act of 1994, 346, 662
Driving under the influence. *See* DUI
Driving while black (DWB), 1446
 racial profiling and, 1237
Driving while intoxicated. *See* DWI
DRM. *See* Digital rights management
Drug(s), 1684. *See also* Controlled Substances Act; War on Drugs;
 specific drugs
 abuse of, 452–453
 advertising and, 114
 African Americans and, 1745
 AIDS, 26
 airport searches and, 33
 bail and, 1745
 Bolshevik Revolution and, 1742
 Bruce and, 188–189
 Bush, G.H.W., and, 1744
 Bush, G.W., and, 1744
 checkpoints and, 276, 806
 China and, 1740
 civil forfeiture and, 295
 Civil War and, 1740
 collateral consequences and, 326
 Colombia and, 1744
 cruel and unusual punishment and, 744, 1745
 dogs and, 1569
 DWI and, 469
 Eighth Amendment and, 1745
 Employment Division, Department of Human Resources of Oregon
 v. Smith and, 454, 1263
 FBN and, 64
 Federal Railway Administration and, 452
 Federal Sentencing Guidelines on, 1257
 Florida v. Jimeno and, 597
 Florida v. White and, 598
 forfeiture and, 1745
 Fourth Amendment and, 1745
 free exercise clause and, 454–455
 gangs and, 1744
 Harrison Act and, 1741
 Helms Amendment and, 759
 Illinois v. Wardlow and, 1569
 incarceration and, 1463
 informants and, 793
 intoxication defense and, 814
 intravenous, 759
 IRS and, 1741
 Kyllo v. United States and, 899–900
 Lynum v. Illinois and, 940
 Michigan v. Summers and, 1006
 Native Americans and, 1078
 Nixon, R. and, 1743
 Ohio v. Robinette and, 1128
 paraphernalia, 1804
 Philippines and, 1741
 prison population and, 1213–1214
 probable cause and, 1235
 Progressive Era and, 1740
 proportional punishment and, 1241
 proportionality review and, 1242
 punishment and, 1743
 Quinlan and, 1254
 racism and, 424
 Rawlings v. Kentucky and, 1271–1392
 Reagan and, 1743–1744
 reasonable suspicion and, 1445
 religion and, 453–455
 religious ceremonies and, 24
 Robinson v. California and, 1366
 Roviaro v. United States and, 1384
 search and seizure and, 1745
 statutory religion-based exemptions and, 559–560
 treatment for, 1743
 United States v. 92 Buena Vista Avenue and, 1678
 United States v. Robinson and, 1691–1692
 United States v. Verdugo-Urquidez and, 1696
 as victimless crime, 1709
 Vietnam War and, 1743
 Virginia Board of Pharmacy v. Virginia Citizens' Consumer
 Council and, 331–332
 World War II and, 1742
 Wyoming v. Houghton and, 1804
Drug Enforcement Agency (DEA)
 of Detroit, 1237
 ODWDA and, 1137
 Oregon Death with Dignity Act and, 87
 profiling and, 1446
Drug testing, 452–453, 1434, 1534, 1746
 bail and, 98–99
 Board of Education v. Earls and, 266
 Chandler v. Miller and, 266, 1746
 DWI and, 470
 extracurricular activities and, 1746
 Ferguson v. Charleston and, 1746
 Kamisar and, 881
 mandatory, 266
 National Treasury Employees Union v. Von Raab and, 1076–1077
 pregnancy and, 28
 privacy and, 156, 1746
 probable cause and, 156
 in public schools, 155–156
 random, 453
 search warrants and, 156
 Skinner v. Railway Labor Executives' Association and, 1479–1480
 suspicionless, 452–453
 Veronia School District v. Acton and, 1707, 1746
Drunk driving
 Berkemer v. McCarty, 123–124
 California v. Trombetta and, 217
 checkpoints and, 276
 City of Indianapolis v. Edmond and, 806
 Michigan Department of State Police v. Sitz and, 1004
Dry Creek Lodge *v. Arapahoe and Shoshone Tribes*
 tribal courts and, 808–809
DS. *See* Directorate of Support
DSM *See* Diagnostic and Statistical Manual
Dual criminality, 563
Dual sovereignty, 113
DuBois, W.E.B., 1063
Duckworth *v. Eagan*, 1457
Due process, 456–460, 462–467. *See also* Fourteenth Amendment;
 Substantive due process
 abortion rights and, 714
 Adair v. United States and, 465
 Adkins v. Children's Hospital and, 465
 administrative, 692–693
 Alcorta v. Texas and, 35
 Algeyer v. Louisiana and, 1580
 aliens and, 798
 Allen v. Illinois and, 43

- Apprendi v. New Jersey*, 76
Arizona v. Youngblood and, 79
 bail and, 97
Blackledge v. Perry and, 149
BMW v. Gore and, 1583
Bowers v. Hardwick and, 169
Boykin v. Alabama and, 172
 Brandeis and, 176
Breithaupt v. Abram and, 181
Brown v. Mississippi and, 188
Calero-Toledo v. Pearson Yacht Leasing Co. and, 213
California v. Trombetta and, 217
Cantwell v. Connecticut and, 849
 capital punishment and, 234–235, 236
Chambers v. Mississippi and, 264
 coerced confessions and, 315, 317
 under colonial charter, 326–327
Colorado v. Connelly and, 328–329
 without compensation, 1033
 competency to stand trial and, 831
Coppage v. Kansas and, 465
 definition of, 456
DeJonge v. Oregon and, 411
 discriminatory prosecution and, 423
 dispositive, 457
Doe v. Bolton and, 433
 Douglas and, 444, 446
Douglas v. California and, 443, 1345, 1350
Dred Scot v. Sandford and, 1581
 economic regulation and, 473
 economic rights and, 478
Estelle v. Williams and, 544
 euthanasia and, 547
Everson v. Board of Education and, 549
 evidentiary errors and, 709
 exemplars and, 559
 Field and, 586
 Fifth Amendment and, 1240, 1580
 forced confessions and, 263–264
 Fourteenth Amendment and, 1544, 1582, 1726
 Fourth Amendment and, 1757
Francis v. Franklin and, 615
 Frankfurter and, 617–618
 free exercise clause and, 160
 Fuller Court and, 667
 gang ordinances and, 675
Gardner v. Florida and, 675
 GBMI and, 718
Giglio v. United States and, 683
Goldberg v. Kelly and, 692
Griffin v. Illinois and, 710–711
 Guantanamo Bay and, 355
 habeas corpus and, 726
Hamdi v. Rumsfeld and, 731, 800, 1347
 Harlan, I. and, 738–739
 Harlan, II. and, 742, 743–744
Herrera v. Collins and, 762
 Holmes and, 772
 ICRA and, 807
 immigration and, 40, 460–461
 incorporation doctrine and, 607–608, 1232
 inquisitorial, 457
 jailhouse informants and, 838
 Johnson, L., on, 855
 jurisdiction and, 460
 jury selection and, 872
 jury unanimity and, 743
 juveniles and, 990
Kent v. Dulles and, 886–887
 Ker-Frisbie rule and, 666
Kyles v. Whitley and, 899
Landon v. Plasencia and, 461
Lawrence v. Texas and, 436, 909
 laws and, 464
 legal realism and, 913
Leland v. Oregon and, 917
 limitations, 317
Lochner v. New York and, 465, 1580
 Magna Carta and, 456, 462, 631, 1352, 1580, 1633
 mandatory death sentences and, 952
Manson v. Braithwaite and, 1697
 material witnesses and, 981
McKeiver v. Pennsylvania and, 990
 McReynolds and, 993
 minorities and, 1256
 Missouri Compromise and, 464–465
 mistaken eyewitness identification and, 956
Mooney v. Holohan and, 1033
Moore v. East Cleveland and, 1033
Morehead v. Tipaldo and, 465
Mullaney v. Wilbur and, 1046
NAACP v. Alabama and, 801–802
Naim v. Naim and, 1059
Napue v. Illinois and, 1061
 as negative right, 1638
 noncitizens and, 380, 460, 1105
 notices and, 458
 orthodox rule and, 831
Papachristou v. City of Jacksonville and, 1145
Patterson v. New York and, 1150
 photographic identification and, 1679
Planned Parenthood of S.E. Pa. v. Casey and, 1583
 political appointees and, 799
 presumption and, 458
 pretrial detentions and, 1419
 preventative detention and, 1208
 privacy and, 1219, 1225, 1582
 privileges and immunities and, 1232
 procedural, 457, 462–463, 609, 952, 1580
 public schools and, 1002–1003
In re Oliver and, 407
In re Winship and, 813
 reasonable doubt and, 1240
 right to appeal and, 711
 right to counsel and, 125
Roe v. Wade and, 1583
Slaughterhouse Cases and, 273
 slavery and, 1483, 1484
 sodomy and, 1405
 state bills of rights and, 137–138
 states and, 459–460
 Stevens and, 1558
 substantive due process and, 608–609
Truax v. Corrigan and, 465
Turner v. Murray and, 235
Twining v. New Jersey and, 1018
 types of, 457
 unalienable rights and, 457–458
United States v. Lovasco and, 1686
 vagueness and, 1703–1705, 1705

INDEX

- Due process (*cont.*)
 - Virginia Declaration of Rights and, 1723
 - void-for-vagueness doctrine and, 1611–1612
 - Waite Court and, 1733
 - Warren Court and, 1757
 - Webb v. Texas* and, 1769
 - Wolf Packing Co. v. Court of Industrial Relations* and, 465
 - Wynehamer v. People* and, 1580
- DUI (driving under the influence), 469
 - blood samples and, 1421–1422
 - checkpoints and, 1446
 - search of, 1433
- Duke, David, 1064
- Dulles, John Foster, 1669
- Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 404–405
 - Burger Court and, 201–202
 - public concern standard and, 982
- Dunaway v. New York*, 1006
- Duncan v. Kahanamoku*, 1801
 - emergencies and, 494
 - habeas corpus and, 1590
 - Murphy and, 1048
- Duncan v. Louisiana*, 105, 468
 - due process incorporation and, 608
 - Harlan, II, and, 743
 - incorporation doctrine and, 803
 - jury trials and, 875, 990
 - Sixth Amendment, 871
 - Stewart, P., and, 1559
- Dunklin, Daniel, 1037
- Dunn v. Blumstein*, 973
- Dunne, Gerald T., 1712
- Dunster, Henry, 107
- Duplex Printing Press Company v. Deering*, 1595
- Duren v. Missouri*
 - Ginsburg and, 687
 - jury selection and, 872
- Dusky v. United States*, 468
 - Godinez v. Moran* and, 692
- Dutch Anabaptist Menno Simons, 1735
- Dutch Reformed, 291
- Dutton v. Evans*, 25
 - compulsory process clause and, 344
- DV lottery program. *See* Diversity Immigrant Visa Program
- DVDs
 - NC-17 rating and, 1043
 - VPPA and, 1713
- DVRs. *See* Digital video recorders
- DWB. *See* Driving while black
- DWI (driving while intoxicated), 469–470
- Dworkin, Andrea, 46, 470–471, 1573
 - free speech theory and, 816
 - MacKinnon and, 941–942
 - on obscenity, 660
 - pornography and, 1120–1121
- E**
 - “E pluribus unum,” 1067
 - EAA. *See* Equal Access Act
 - Eagle Eyes, 1520
 - Eagle Forum, 1421
 - National Right to Life Committee and, 1134
 - Eakin v. Raub*, 864
 - Earls, Lindsay, 156
 - East Side White Pride, 1502
 - Easterbrook, Frank H., 47
 - American Booksellers Association, Inc., et al v. William Hudnut II*, 1642
 - Eastern Enterprises v. Apfel*, 213
 - takings clause and, 1605
 - Thomas and, 1650
 - Eastern Orthodox Church, 93
 - Eastman, Crystal, 47, 102
 - Eastman, Max, 979
 - Eavesdropping. *See* Wiretapping
 - Ebenezer Baptist Church, 889
 - Eberhart, John Lee, 897
 - Echols Scholars Program, 998
 - ECHR. *See* European Court of Human Rights
 - Eclatarian faith, 290
 - Economic Espionage Act, 824
 - Economic Justice for All* (John Paul II), 1101
 - Economic League, 150
 - Economic regulation, 251, 473–475
 - Economic rights
 - political freedom and, 477
 - Roosevelt, F., and, 479, 1372
 - substantive due process and, 928
 - in U.S. Constitution, 475–480
 - ECPA. *See* Electronic Communications Privacy Act
 - Eddie Eagle Gun Safety Program, 1070
 - Edenfield v. Fane*, 331
 - Edmonson v. Leesville Concrete Co.*, 115
 - peremptory challenges in, 878
 - Edmunds Act of 1882, 72
 - unlawful cohabitation and, 1039
 - Edmunds-Tucker Act of 1887, 72
 - Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. United States* and, 908
 - Mormons and, 1039
 - Education
 - advancement of religion and, 1022–1025
 - Amish and, 628, 1541
 - Burger Court and, 199–200
 - as constitutional right, 1443, 1535
 - equal protection and, 516
 - establishment clause and, 1024
 - of foreign languages, 1002–1003
 - hate speech codes and, 220–221
 - implied rights and, 801
 - Jefferson and, 845
 - languages and, 801
 - middle scrutiny test and, 613
 - Mormons and, 1036
 - NAACP and, 971
 - Plyler v. Doe* and, 613
 - policies in, 157, 1505–1506
 - racial discrimination in, 971
 - records, 346
 - religion and, 1291–1292, 1306–1307, 1505
 - religious, 929–930
 - San Antonio Independent School District v. Rodriguez* and, 612
 - segregation and, 855, 1442
 - separate but equal and, 1541
 - state constitutions and, 1536
 - substantive due process and, 466
 - undocumented migrants and, 41
 - Education Amendments of 1972, 71
 - ERA and, 521

- Education Between Two Worlds* (Meiklejohn), 999
- Education Facilities Authority Act, 785
- Edward I, king of England, 350
- conspiracy and, 350
 - Magna Carta and, 950
- Edward III, king of England, 1665
- Edwards, Fred, 492
- Edwards v. Aguillard*, 3, 90, 411, 480–481, 1438, 1616–1617
- creationism/creation science and, 377, 481, 1615
 - Powell, Lewis, and, 1194
- Edwards v. Arizona*, 482, 1457
- Butler v. McKellar* and, 209
- Edwards v. California*, 482, 1354, 1466
- privileges and immunities and, 1232
- Edwards v. National Audubon Society*, 1082
- Edwards v. South Carolina*, 483
- Cox v. Louisiana* and, 373
 - picketing and, 1167
 - public forum doctrines and, 1243
- Edwards v. State*, 319
- EED. *See* Extreme emotional disturbance
- EEOC. *See* Equal Employment Opportunity Commission
- Effect test, 1423
- EGALE Canada Inc. v. Canada*, 1403
- Eighteenth Amendment
- federalization of criminal law and, 581
 - Olmstead v. United States* and, 1130
 - Prohibition and, 1238–1239
 - taxes and, 1684
- Eighth Amendment, 97, 387–388. *See also* Cruel and unusual punishment
- Amnesty International and, 60
 - arbitrariness and, 234–235
 - Barclay v. Florida* and, 109
 - Bowers v. Hardwick* and, 169
 - Bray v. Ylst* and, 277
 - Breyer and, 183
 - capital punishment and, 223, 234–235, 1545
 - chain gangs and, 263
 - Civil Asset Forfeiture Reform Act of 2000 and, 213
 - Coker v. Georgia* and, 323
 - cruel and unusual punishment and, 383–384
 - disproportionality principle and, 236
 - drugs and, 1745
 - electric chair and, 485–486
 - English Bill of Rights and, 503
 - Enmund v. Florida* and, 231
 - evolving standards of decency and, 1669
 - excessive fines and, 1447
 - execution methods and, 236
 - Furman v. Georgia* and, 232, 235, 241, 669
 - Gilmore and, 684
 - Gregg v. Georgia* and, 230, 710
 - Herrera v. Collins* and, 762
 - immigration and, 1530
 - incorporation doctrine and, 804
 - limitations under, 232
 - limits, 235
 - mandatory death sentences and, 953
 - mandatory minimum sentences and, 953
 - Marshall, T., and, 973
 - McCleskey v. Kemp* and, 985–986
 - McGautha v. California* and, 990
 - multiple punishments and, 442
 - negative rights and, 144
 - preventative detention and, 1207
 - Proffitt v. Florida* and, 1238
 - proportional punishment and, 1241
 - proportionality in, 744
 - proportionality review and, 1242
 - Pulley v. Harris* and, 1249
 - sentencing and, 227
 - Solem v. Helm* and, 1494
 - Stevens and, 1558
 - three strikes laws and, 1653–1654
 - victims' rights and, 1711
 - Weems v. United States* and, 1772
 - White, B., and, 1779
- Einhorn, David, 1485
- Einhorn, Ira, 563
- Eisenhower, Dwight D.
- Brown v. Board of Education* and, 186
 - Burger and, 204
 - JBS and, 854
 - Johnson, L., and, 855
 - McCarthy and, 984
 - Nixon, R. and, 1098
 - NRA and, 1070
 - Warren and, 317, 517, 1762
- Eisenmann, Charles, 1032
- Eisenstadt v. Baird*, 9, 169, 250, 483–484, 1493
- birth control and, 148
 - Burger Court and, 198
 - contraceptive access and, 714
 - Griswold v. Connecticut* and, 713, 1320
 - Paris Adult Theatre v. Slaton* and, 1148
 - privacy and, 1219
 - substantive due process and, 1582
- El Salvador, 1692
- Elderly, voting rights for, 1355–1356
- Eldred v. Ashcroft*, 484–485, 1414
- free speech clause and, 764
- Election(s). *See also* Campaign financing
- financing of, 194
 - judicial bias and, 860
 - PACs and, 588
 - press and, 1539
 - spending limits, 219
- Election Act Amendment of 1974, 1273
- Election, general, of 2000. *See also* *Bush v. Gore*
- Christian Coalition and, 285
 - felon disenfranchisement and, 583
 - Kennedy, A., and, 885
- Electoral College, 832
- Electric chair, 244
- as cruel and unusual punishment, 485–486
 - Eight Amendment and, 485
 - Glass v. Louisiana* and, 384
 - Louisiana ex. rel. Francis v. Resweber* and, 236
- Electronic communication, 816–817
- Bartnicki v. Vopper* and, 113
 - DHS and, 416
- Electronic Communications Privacy Act (ECPA), 346, 487–488, 821
- USA PATRIOT Act and, 1149
 - wiretapping and, 1785
- Electronic Freedom of Information Act, 662
- Electronic media, 663
- Electronic screening, 33–34

INDEX

- Electronic surveillance, 486–489, 1519. *See also* Wiretapping
domestic, 1695
Fourth Amendment and, 1519
Katz v. United States and, 1430
On Lee v. United States and, 1132
Nixon, R. and, 1099
NSA and, 1520
Omnibus Crime Control and Safe Streets Act, 1435
Omnibus Crime Control and Safe Streets Act of 1968 and, 1132
President and, 1695–1996
privacy and, 1220
terrorism and, 1624
United States v. United States District Court and, 1695–1996
USA PATRIOT Act and, 1149
warrantless, 1696
Warren Court and, 1758
- Electronic surveillance. *See* Wiretapping
- Electropsychometer, 286
- Elementary and Secondary Education Act (ESEA), 31, 1527, 1528
Aguilar v. Felton and, 31
- Eleventh Amendment
Chisolm v. Georgia and, 844
enforcement power and, 613
federal court jurisdiction and, 868
Fuller Court and, 668
judicial review and, 865
Elfbrandt v. Russell
freedom of association and, 635–636
loyalty oaths and, 1612
- Elizabeth I, queen of England
Mary Queen of Scots and, 621
- Elk Grove Unified School District v. Newdow*, 259, 490–491, 533
coercion test and, 540
Pledge of Allegiance and, 1177
- Elkins, Stanley, 643
Elkins v. United States, 1598
- Ellington, Yank, 315
- Ellis Island, 461
- Ellsberg, Daniel, 1075
New York Times v. United States and, 1089
Nixon, R. and, 1099
- Ellsworth Court, 491–492
- Ellsworth, Oliver, 140–141, 491–492, 1314
Bill of Rights and, 144
ex post facto laws and, 359
- El-Rahman, Omar Abd, 306
- Elrod, Richard, 492–493
political patronage and, 1189
Elrod v. Burns, 178, 492–493, 1388
political patronage and, 1189
- Ely, John, 30
natural law and, 1080
on substantive due process, 608–609
- E-mail. *See also* Online communication; Spam
advertising, 820
CIPA and, 825
mass, 45
USA PATRIOT Act and, 1149
wiretapping and, 1785
- Emancipation Proclamation, 6, 139, 228, 493–494, 1585, 1647
Dred Scott v. Sandford and, 452
Lincoln and, 924
Simpson and, 146
- Embryos
stem cell research and, 1552
- Emergencies
civil liberties in, 494–496
- Emergency Court of Appeals, 1801
- Emergency powers
habeas corpus and, 923
- Emergency Price Control Act of 1942, 1801
- Emerson, John, 451
- Emerson, Ralph Waldo
Garrison and, 676
- Emerson, Thomas Irwin, 497–499
- Eminem, 765
- Eminent domain
takings clause and, 1603–1604
- Emotional distress
Falwell and, 1414
First Amendment and, 811
Hustler Magazine v. Falwell and, 787
infliction of, 787
public figures and, 575, 599
- Employees
freedom of religion of, 543
government, 1513–1515
harassment and, 303–304, 777–779
NLRB and, 1066
Perry v. Sindermann and, 1260
political activity and, 1515
Rankin v. McPherson on, 420–421, 1260
religion and, 1299–1303
speech and, 982
whistleblowers and, 1776
wiretapping and, 1786
Zurcher v. Stanford Daily and, 1823
- Employers
NLRB and, 1066
NLRB v. Catholic Bishops of Chicago and, 1100–1101
O'Connor v. Ortega and, 1128
religious exemptions and, 1659–1660
technology monitoring and, 488–489
whistleblowers and, 1776
- Employers' Liability Law
White Court and, 1777
- Employment
collateral consequences and, 325
in criminal justice agencies, 1258
EEOC on, 1300
police, 1258
Employment Division, Department of Human Resources of Oregon v. Smith, 24, 52, 73, 159, 289, 500–501, 1263, 1303, 1304–1305, 1416, 1469, 1470–1471, 1478, 1548, 1732, 1818
Bowen v. Roy and, 159
copyright law and, 366
Corporation of Presiding Bishop v. Amos and, 367
equal protection clause and, 513
free exercise and, 1246, 1686
free exercise clause and, 119–120, 365, 454, 625–626, 630, 768, 1263
Jimmy Swaggart Ministries v. Board of Equalization and, 854
Native Americans and, 1078
neutrality in, 561
peyote and, 454, 1263, 1305
religion clauses and, 542
religious conduct and, 939
Scalia and, 1732–1733
statutory religion-based exemptions and, 560
strict scrutiny test and, 626
Wisconsin v. Yoder, 1788

- Employment Non-Discrimination Act (ENDA)
 gay and lesbian rights and, 677
 Log Cabin Republicans and, 933
- Employment Security Commission, 628
- Encryption
 anonymity and, 63
 copyright infringement and, 823
- ENDA. *See* Employment Non-Discrimination Act
- Endo, Mitsuye, 840
- Endorsement test, 536
 application of, 539–540
County of Allegheny v. ACLU and, 42–43
 establishment clause and, 530
Lemon test v., 918
 O'Connor and, 1127
 religious symbols and, 938
- Enemy Alien Bureau, 774
- Enemy Aliens* (Cole), 495
- Enemy combatants, 715–716
 Ashcroft and, 84
 Bush, G.H.W., and, 495
 coercive confessions and, 320–321
 detention of, 800
Ex parte Milligan and, 552
Hamdi v. Rumsfeld and, 731
 indefinite detention and, 805
 Japanese internment and, 842
 military law and, 1007
 military tribunals and, 1008
 Miranda warnings and, 1020
 War on Terror and, 1094
- Enforcement Act of 1870
 Civil Rights Act of 1866 and, 299
 Cruikshank and, 1681
 Fourteenth Amendment and, 1681
 lynchings and, 1681
- Enforcement power, 613
- Enfranchisement, 65
- Engel v. Vitale*, 2, 90, 408, 502–503
 ADL and, 69
 coercion and, 1101
 establishment clause and, 529
Lee v. Weisman and, 911
Lemon test and, 533
 National Council of Churches and, 1757
 non-preferentialism standard and, 1109
 prayer and, 117
 school prayer and, 502–503, 852, 1196, 1298
 separationism and, 767
Stone v. Graham and, 1563–1564
 wall of separation and, 1736
Wallace v. Jaffree and, 1736
 Warren Court and, 1756, 1760
- England
 Criminal Justice Act of 2003 of, 440
 double jeopardy in, 440
 freedom of press and, 1201
 obscenity and, 1122
 Petition of Right and, 1157
 polygamy in, 1330
 prior restraints and, 1209
 public trials and, 1247
 punishment and, 1329
Regina v. Hicklin, L.R. and, 1284–1285
Reid v. Covert and, 1291
 religious freedom in, 136
 right to bear arms and, 503, 508, 1338
 right to counsel and, 1348
 seditious libel and, 1439–1440
 Society for the Suppression of Vice in, 1285
 stem cell research and, 1554
 in Stuart period, 1439–1440
 tradition in, 505
 in Tudor period, 1439–1440
 vagrancy laws *and*, 1703
 Virginia Charter of 1606 and, 1722–1723
 War on Drugs and, 1740
- English Bill of Rights, 66, 143, 357, 503–504, 505
 English liberties and, 507–508
 right to bear arms and, 503, 508, 1338
- English Bill of Rights of 1689, 1537
 guns and, 721
- English Constitution, 462
- English Declaration of Rights of 1688, 387
- English Justices of the Peace Act, 1218
- English law, 128. *See also* Common law
 capital punishment and, 238
 general warrants and, 678
 insanity defense and, 814
 jury trials and, 875
 libel and, 643
 litigation under, 798
 marriage and, 963
 peremptory challenges under, 874
- English liberties, 506–507
- English Revolution, 505–506
- English Statute of Labourers of 1349, 1467
- English Toleration Act, 504–505
- Enhanced Computer Assisted Passenger Prescreening System, 34
- Enlightenment
 capital punishment and, 238
 civil liberties and, 1026–1027
 corruption of blood and, 369
 natural law and, 1079
 Penn and, 1152
 proportional punishment and, 1240
- Enmund v. Florida*, 191, 386
 Eighth Amendment and, 231, 232
 proportionality and, 245
- Ennis, Edward, 842
- E.N.O. v. L.M.M.*, 1408
- Enquiry into the Doctrine Lately Propagated Concerning Libels, Warrants, and Seizures of Paper, An*, 1749
- Entertainment Network, Inc. v. Lappin*, 22
- Entick v. Carrington*, 1218
- Entitlement, 609
- Entrapment, 509–510
 by estoppel, 510, 1260
Jacobson v. United States and, 837
Sorrells v. U.S. and, 1495
 theories of, 509
- Entrenchment, of government, 1644
- Enumerated rights, 1154
- Environment, 1480
- Environmental Protection Agency (EPA), 381
- EPA. *See* Environmental Protection Agency
- Epperson, Susan, 376
- Epperson v. Arkansas*, 366–377, 511, 1616
 books and, 163
 creation science and, 1615

INDEX

- Epperson v. Arkansas* (cont.)
 evolution and, 1003, 1612, 1619
 extant case law and, 1612
 free exercise and, 1246
Lemon test and, 534
Meyer v. Nebraska and, 1003
 public schools and, 1246
 religious neutrality and, 538
 secular purpose and, 1438
 Warren Court and, 1757
- Equal Access Act (EAA), 3, 133, 356–357, 408–409, 512–513, 1298
Board of Education of the Westside Community Schools v. Mergens and, 154
 establishment clause and, 535–537
 public forums and, 1229
 religious speech and, 1229
- Equal access principle, 535
- Equal Employment Opportunity Commission
 Title VII and, 1659
- Equal Employment Opportunity Commission (EEOC), 1300
- “Equal Justice in the Gatehouses and Mansions of American Criminal Procedure” (Kamisar), 881
- Equal Justice Initiative, 1499
- Equal Opportunity rules, 579–580
- Equal Pay Act, 686
- Equal protection, 513–518, 609–610
 Baldus Study and, 229
Batson v. Kentucky and, 114
 capital punishment and, 228–229
 clergy in public office and, 921
 compelling purpose test and, 610–611
 compelling state interest and, 340
 corporate speech and, 650
Crane v. Johnson and, 374–375
Dandridge v. Williams and, 393
 discriminatory prosecution and, 423
 Don’t ask, don’t tell and, 1460
Douglas v. California and, 442, 1345, 1350
Eisenstadt v. Baird and, 483–484
 euthanasia and, 547
 FCC and, 579–580
 Fourteenth Amendment and, 609–610, 1524, 1547, 1562, 1590, 1726
 gender and, 518
 Ginsburg and, 687, 688
Griffin v. Illinois and, 710–711
 Harlan, II, and, 743
Harper v. Virginia State Board of Elections and, 746
 history of, 514–515
 ICRA and, 807
 invidious discrimination and, 830
 Japanese internment and, 841
 juries and, 769
 jury selection and, 871, 872
 limitations, 610
Loving v. Virginia and, 936
 Marshall, T., and, 973
McCleskey v. Kemp and, 985–986
 mental defects and, 192–193
 noncitizens and, 1105
 O’Connor and, 1127
 Orthodox Jews and, 851–852
 peremptory challenges and, 877–878
Plessy v. Ferguson and, 225
 race-based classifications and, 611–612
 religion and, 1309–1310
 religious discrimination and, 422
 religious freedom and, 513
 right v. privilege under, 1358
Romer v. Evans and, 678, 909, 1371
 Rutledge, W., and, 1391
 same-sex marriage and, 1400
Shelley v. Kraemer and, 1468
 sliding scale theory of, 973
 state constitutions and, 1536
 substantive due process and, 466–467
Swain v. Alabama and, 1590
United States v. Virginia (VMI) and, 687
Vacco v. Quill and, 547
 voucher-funded schools and, 1424
 women and, 520
- Equal rights
 state constitutions and, 1546
 women’s movement and, 1400
- Equal Rights Amendment (ERA), 499, 519–522
 Falwell and, 575
 in Hawaii, 1401
 impact of, 521
Lawrence v. Texas and, 908–909
 NOW and, 1068
 Schlafly and, 1421
 states and, 521–522
 “Equal Rights Amendment, The: A Constitutional Basis for the Equal Rights for Women” (Emerson), 499
- Equal time rules, 1052
- Equal treatment, of religious groups, 1425
- Equality, 609–610
- Equifax, 569
- ERA. *See* Equal Rights Amendment
- Erie Railroad v. Tompkins*, 1572
- ERISA, 1408
- Ernst, Morris
 Baldwin and, 103
 Emerson and, 498
- Error
 Mill and, 1011
 writs of, 777
- Erwin, Sam, 695
- Erznoznik v. City of Jacksonville*, 523–524, 1318–1319
- Escobedo, Danny, 524, 1758
- Escobedo v. Illinois*, 524, 1021
 Goldberg and, 696
 informing of rights and, 1019
Kirby v. Illinois and, 892
Miranda v. Arizona and, 1016
 procedural due process and, 952
 right to counsel and, 318, 524, 1344
 Stewart, P., and, 1559
 Warren Court and, 1758
- ESEA. *See* Elementary and Secondary Education Act
- Espionage
 Cohn and, 322
 Hiss and, 765
 Hoover and, 775
 Intelligence Identities Protection Act and, 817
 Japanese internment and, 841–842
 proportionality review and, 1242
Rosenberg v. United States and, 1721
- Espionage Act of 1917, 1280, 1377, 1419–1420

- Abrams v. United States* and, 13
 Brandeis and, 174
 Chafee and, 261
 clear and present danger test and, 311, 1795
Debs v. United States and, 401
 free speech and, 1794
 freedom of association and, 635
 freedom of press and, 658
 Hand and, 736
 Holmes and, 770–771
 incitement of criminal activity and, 651–652
 La Follette and, 903
Masses Publishing Company v. Patten and, 979–980
 national security and, 1072
 New Deal and, 1084
 Palmer and, 1144
 passage of, 642
Pierce v. United States and, 1797
 prior restraints and, 1075
 repeal of, 658
 Vinson and, 1722
 Wilson, W., and, 1784
 Espionage Act of 1918, 652
 Espionage and Sedition Acts, 1636
 Esprit de corps, 1007
Essay on Human Understanding, An (Locke), 931
 Establishment clause, 2, 524–530, 1802
Abington Township School District v. Schempp and, 1757
 abortion and, 11–12
 AFLA and, 29
Aguilar v. Felton and, 32
 Alabama and, 1737
 Americans United and, 56
 application of, 528–530
 Bible reading and, 132
 bifurcated definition of religion and, 410–411
 Black, H., and, 550–551
Board of Education, Kiryas Joel Village School District v. Grumet
 and, 157
Board of Education of the Westside Community Schools v. Mergens and, 154
Board of Education v. Allen and, 1527
Bradfield v. Roberts and, 172
 Breyer and, 183
Brown v. Woodland Joint Unified School District and, 163
 Burger Court and, 199–200
Capitol Square Review and Advisory Board v. Pinette and,
 246–247
 ceremonial deism and, 258–259
 Charitable Choice and, 270
 Church of Scientology and, 366–367
Church of the Holy Trinity v. United States and, 288
Church of the Lukumi Babalu Aye v. City of Hialeah and, 289–290
 civil religion and, 297
 coercion and, 1101
 coercion test and, 540
Committee for Public Education and Religious Liberty v. Nyquist
 and, 333–334
Committee for Public Education and Religious Liberty v. Regan
 and, 334–335
*Corporation of Presiding Bishop of the Church of Jesus Christ of
 Latter-Day Saints v. Amos* and, 368
County of Allegheny v. ACLU and, 42
 in court and city seals, 370–371
 creationism and, 1616
 days of religious observance and, 398–399
 defiance of bans on school prayer and, 408–409
 defining religion and, 409–411
 doctrine, 531
 drafting of, 526–528
 EAA and, 535–537
 education and, 1024
 endorsement test and, 539–540
Engel v. Vitale and, 502–503
Epperson v. Arkansas and, 511
Estate of Thornton v. Caldor and, 543
Everson v. Board of Education and, 132, 549, 1527
 federalism and, 532–533
Flast v. Cohen and, 596, 1609
 free exercise clause v., 531, 540–542
 Fuller Court and, 668
Harris v. McRae and, 746
Hernandez v. Commissioner of Internal Revenue and, 761
 history of, 524–526, 531–532
Hunt v. McNair and, 785
 “In God We Trust” and, 1067
 incorporation and, 532–533
 interpretation of, 528–530, 538–540, 541
 Jefferson and, 847
Jones v. Wolf and, 856–857
 jurisprudence, 766–768
 Kennedy, A., on, 885–886
Lamb’s Chapel v. Center Moriches Union Free School District
 and, 907
Lee v. Weisman and, 911
 legislative chaplains and, 267
Lemon test and, 538–539, 918, 1548
Lemon v. Kurtzman and, 1563
 in *Locke v. Davey*, 929
 Madison and, 946
Marsh v. Chambers and, 966
McDaniel v. Paty and, 989
McLean v. Ark. Board of Education and, 1620
 “Memorial and Remonstrance” and, 550
 modern definitions of religion and, 411
 moments of silence statutes and, 1028–1029
Mueller v. Allen and, 1045
 neutrality in, 270
 no-coercion test and, 534–535
 non-funding provisions and, 153
 non-preferentialism standard and, 1108
 O’Connor and, 1126
 Orthodox Jews and, 851–852
Peloza v. Capistrano United School District and, 1619
Peyote Way Church of God, Inc. v. Thornburgh and, 454
 Pledge of Allegiance and, 490–491, 1177
 prayer and, 1412
 protections of, 143
 public forums and, 1229
 purpose of, 527–528
 regulation and, 537
 religion and, 1423, 1437, 1548
 religious discrimination and, 422
 religious institutional autonomy and, 537
 religious speech and, 1229
 religious symbols and, 937–938
 Scalia and, 1416
School District of the City of Grand Rapids v. Ball and, 1423
 school prayer and, 356, 1196, 1197
 schools and, 1548

INDEX

- Establishment clause (*cont.*)
 Smith v. Bd. of Sch. Commissioners of Mobile County and, 1619
 states and, 425, 491, 532–533
 statutory religion-based exemptions and, 559
 substantive due process and, 466
 Sunday closing laws and, 1586
 tax exemption and, 1607
 taxes and, 947–948
 taxpayers and, 1608–1610
 Ten Commandments and, 1622
 Texas Monthly v. Bullock and, 1628–1629
 trademarks and, 1662–1664
 United States v. Seeger and, 349–350
 “Virginia Statute of Religious Liberty” and, 550
 Wallace v. Jaffree and, 1736
 Walz v. Tax Commission and, 1738–1739
 Warren Court and, 1756
 Welsh v. United States and, 350, 1693
 Widmar v. Vincent and, 700
 Wisconsin v. Yoder, 1788
 Witters v. Department of Services and, 1789
 Wolman v. Walter and, 1790
 Zelman v. Simmons-Harris and, 1812
 Zobrest v. Catalina Foothills School District and, 1816
 zoning and, 1817
Estate of Thornton v. Caldor, 542
 Sunday closing laws and, 1586
Estelle v. Smith, 543–544
Estelle v. Williams, 544
Estes, Billie Sol, 218, 544–545
Estes v. Texas, 218, 265, 545
Estoppel, entrapment by, 510, 1260
Estrada, Juana, 274
Ethical Culture, 1619
Ethics
 cloning, 314
 DNA databases and, 432
Ethiopia, 1262
Ethiopian Zion Coptic Church, 455
Ethnic intimidation laws, 750
Ethnicity
 criminal justice and, 1256
 hate crimes and, 303
 hate speech and, 752–755
Euclid v. Ambler Realty Co., 120
 Taft Court and, 1596
Eugenic sterilization, 545–546
 Buck v. Bell and, 192, 1320
Eugenics, 545, 1426, 1600
 Buck v. Bell and, 192, 1320
 Holmes and, 772
 Nazis and, 546
Europe
 eugenic sterilization and, 546
 immigration and, 1259
 same-sex unions in, 1404
European Convention
 hearsay evidence and, 758
European Convention for the Production of Human Rights and
 Fundamental Freedoms
 data privacy and, 1223
 freedom of expression and, 637
European Convention on Human Rights
 European Court of Human Rights and, 638
European Convention on Nationality of 1997, 456
European Court of Human Rights (ECHR), 1223
 freedom of expression and, 637–640
 hearsay evidence and, 758
 Sunday Times v. United Kingdom and, 639
European Union Constitution
 double jeopardy and, 440
 judicial review and, 865
Euthanasia, 546–548. *See also* Assisted suicide
 active v. passive, 547–548
 Kamisar and, 881
 PAS and, 1164
 voluntary v. involuntary, 546–547
Evacuation Day, 785–786
Evanescence objection, 1433
 secular purpose and, 1439
Evangelism, of Salvation Army, 1397
Eve, George, 141
Evergreen State College, 998
Evers, Medgar Wiley, 548–549
Evers v. State, 548–549
Everson v. Board of Education, 56, 75, 131–132, 549–551, 1292, 1527
 Black, H., and, 199, 550–551
 Board of Education v. Allen and, 155
 Burger Court and, 199
 equal protection clause and, 513
 establishment clause and, 528
 Fourteenth Amendment and, 533
 Frankfurter and, 618
 incorporation doctrine and, 803
 jurisprudence and, 766
 Lemon test and, 918
 Mueller v. Allen and, 1045
 no endorsement test and, 1103
 non-preferentialism standard and, 1108
 religion and, 131–132, 1294, 1423
 Rutledge, W., in, 550, 1390
 separationism and, 533, 987, 1295, 1390
 substantive due process and, 466
 Torcaso v. Watkins and, 1662
 Vinson Court and, 1719
 wall of separation and, 1736
 Warren Court and, 1755
 Zorach v. Clauson and, 1822
Evidence. *See also* Exculpatory evidence
 blood samples as, 1421–1422
 Burks v. United States and, 1655
 defense, 1005
 destroyed, 79
 disclosure, 35
 in discovery process, 421
 DNA, 428–429
 evanescent, 1433
 exclusionary rule and, 554–558, 957
 exculpatory DNA, 429
 exemplars and, 558
 fruit of the poisonous tree and, 666–667
 good faith exception and, 556
 grand jury indictments and, 707
 hearsay as, 709
 Hudson v. Louisiana and, 781
 illegal search and seizure and, 557
 inadmissible, 1772
 of innocence, 237
 inventory of, 1435
 jailhouse informants and, 838

- On Lee v. United States* and, 1132
- material witnesses and, 981
- Nardone v. United States* and, 1061
- New York v. Belton* and, 1091
- New York v. Quarles* and, 1093
- Nix v. Williams* and, 1097
- polygraph, 407
- post-conviction, 762
- PPA and, 1223
- Rawlings v. Kentucky* and, 1271–1392
- search and seizure and, 1542
- seizure of, 80
- stolen, 195
- testimonial, 558
- treason and, 1665
- United States v. Robinson* and, 1691–1692
- Washington v. Texas* and, 1767
- Weeks v. United States* and, 1772
- Evidentiary errors, 709
- Evidentiary hearings
 - AEDAP and, 233–234
- Evidentiary insufficiency
 - Burks v. United States* and, 207–208
- Evidentiary rules
 - exculpatory evidence and, 264
- Evolution, 1505. *See also* Creationism
 - ACLU and, 48
 - Arkansas and, 1438
 - bans on, 511
 - creationism and, 375–379
 - Darrow and, 395
 - Edwards v. Aguillard* and, 3, 480–481
 - Epperson v. Arkansas* and, 480–481, 511, 1003, 1612, 1619, 1757
 - Lemon* test and, 534
 - public schools and, 1617–1620
 - religion and, 1438
 - secular humanism and, 1438
 - teaching, 376, 480–481
 - theory of, 1425
 - Torcaso v. Watkins* and, 1619
 - Warren Court and, 1756–1758, 1757
- Evolving standards of decency doctrine
 - Coker v. Georgia* and, 385, 388
 - Palmer v. Clarke* and, 486
 - Trop v. Dulles* and, 385, 1668–1669
- Ewing v. California*, 1494
 - mandatory minimum sentences and, 954
 - proportional punishment and, 1241
- Ex ante, 1434
- Ex officio, 1452–1453
 - Lilborne and, 919
- Ex parte Bollman*, 1665
- Ex parte Endo*, 1565
 - Douglas and, 445
 - emergency powers and, 496
 - Japanese internment and, 839–840
- Ex parte Garland*, 272
 - corruption of blood and, 369
 - Field and, 586
 - pardons and commutations and, 1145
 - test oaths and, 1627–1628
- Ex parte Lange*, 1111
- Ex parte McCordle*, 552
 - appellate jurisdiction and, 867
 - Chase Court and, 272
 - national security and, 1072
- Ex parte McDermott*, 68
- Ex parte Merryman*
 - emergency powers and, 495
 - habeas corpus and, 1590
 - Taney and, 923
 - Taney Court and, 1607
- Ex parte Milligan*, 271–272, 551–552, 1803
 - emergency powers and, 495
 - Field and, 586
 - Habeas Corpus Act of 1863, 1008–1009
 - habeas corpus and, 1590
 - military tribunals and, 496, 1008–1009
 - Taney Court and, 1607
- Ex parte Quirin*, 1562, 1566, 1801
 - military law and, 1007
 - military tribunals and, 496, 1008
- Ex parte Vallandigham*, 552–553, 646
 - habeas corpus petition and, 553
 - Taney Court and, 1607
- Ex parte Virginia*, 1525
- Ex parte Yerger*, 272
- Ex parte Young*
 - Eleventh Amendment and, 668
 - prospective relief and, 868
 - Santa Clara Pueblo v. Martinez* and, 808
- Ex post facto clause, 553–554
 - Calder v. Bull* and, 212
 - collateral consequences and, 325–326
 - Constitutional Convention of 1787 and, 359
 - Field and, 586
 - interpreting, 213
 - Mason and, 360
 - Megan’s Law and, 997
 - search warrants and, 1434
 - U.S. Constitution and, 140, 352
- Excessive entanglement, 1738–1739
- Excessive fines, 1447
- Exchequer rule, 745
- Exclusion
 - Chinese Exclusion Act and, 259–260, 1259
 - history of, 790–791
 - ideological and security-based, 789–792
 - noncitizens and, 40
 - plenary power doctrine and, 893
- Exclusionary rule, 554–558, 1772. *See also* Fifth Amendment
 - confessions and, 991
 - criticism of, 555
 - Fifth Amendment and, 557–558, 1454
 - Frankfurter and, 618
 - fruit of the poisonous tree and, 666
 - good faith exception of, 555–556
 - habeas corpus and, 556
 - Harris v. New York* and, 747–748
 - Holmes and, 772
 - illegal search and seizure and, 557
 - Illinois v. Krull* and, 793–794
 - Immigration and Naturalization Service v. Lopez-Mendoza* and, 798
 - impeachment exception of, 556
 - Kamisar and, 881
 - Kennedy, A., and, 884
 - Mapp v. Ohio* and, 957
 - McNabb v. United States* and, 991–992
 - Michigan v. DeFillipo* and, 1004

INDEX

- Exclusionary rule (*cont.*)
 - In re Griffiths* and, 812
 - Nix v. Williams* and, 1097
 - Pennsylvania v. Scott* and, 1152–1153
 - Powell, Lewis, and, 1195
 - Silverthorne Lumber Company v. United States* and, 772
 - United States v. Calandra* and, 1680–1681
 - United States v. Leon* and, 1685–1686
 - Wolf v. Colorado* and, 1790
 - Exculpatory evidence
 - California v. Trombetta* and, 217
 - Chambers v. Mississippi* and, 264
 - Giglio v. United States*, 683
 - Kyles v. Whitley* and, 899
 - withholding of, 899
 - Execution(s). *See also* Death penalty; Electric chair; Firing squad
 - Amnesty International and, 59
 - of Chessman, 278
 - description of, 485
 - by electrocution, 244
 - by firing squad, 244
 - by gas chamber, 244
 - by hanging, 243–244
 - humane, 242
 - of innocents, 237–238
 - by lethal injection, 244
 - methods, 236, 240, 243–244
 - Muslim extremists and, 566
 - public, 239
 - risks, 223
 - stay of, 1550–1551
 - in Texas, 242
 - types of, 384–385
 - Executive Order 9066, 418, 1766
 - emergency powers and, 496
 - Japanese internment and, 839
 - Murphy and, 1048
 - termination of, 841
 - Executive Order 9335, 308
 - Executive Order 9835, 635
 - Executive Order 10925, 30
 - Executive Order 12324, 390
 - Executive Order 12807, 390
 - Executive Order 13007, 52
 - Executive powers
 - Constitutional Convention of 1787 and, 360
 - enemy combatants and, 800
 - Hamdi v. Rumsfeld* and, 842
 - Jackson, A. and, 831–832
 - Jackson, R. and, 835
 - Madison and, 946
 - military tribunals and, 1008
 - selective service and, 1448
 - during wartime, 731, 1765
 - Youngstown Sheet & Tube Co. v. Sawyer* and, 835
 - Executive privilege, 310
 - Exemplars, 558–559
 - Exigencies, 1747
 - Exon, James, 336
 - Expatriation, 562–563. *See also* Denationalization
 - Trop v. Dulles* and, 1669
 - Expatriation Act of 1907, 562
 - Experian, 569
 - Experience and logic test, 1428
 - Experimental College, 998
 - Experimental College, The* (Meiklejohn), 998
 - Expert witnesses, 421
 - Express limitations, 1690–1691
 - Expression. *See also* Freedom of expression
 - forms of, 262
 - marketplace of ideas approach to, 961–962
 - media liability and, 996
 - regulation of, 656–657
 - Expressive conduct, 111
 - draft card burning and, 449–450
 - flag burning and, 1516
 - freedom of expression and, 1162–1163
 - nude dancing and, 1688
 - O'Brien* test and, 450
 - picketing and, 1166
 - of public employees, 420–421
 - Schenck v. United States* and, 652
 - symbolic speech v., 589–590
 - Extant case law, 1612
 - Extracurricular activities
 - Board of Regents v. Southworth* and, 1699
 - drug testing and, 156, 1746
 - Extradition, 563–564
 - political offense exception and, 563
 - Extreme emotional disturbance (EED), 1150
 - Extremism, 566
 - Extremist groups, 564–567
 - suicide and, 566
 - Eye for an eye, 1645
 - proportional punishment and, 1240
 - Eyewitness Evidence: A Guide for Law Enforcement*, 925
 - Eyewitness identification, 567–568
 - Kirby v. Illinois* and, 892
 - lineups, 925
 - Manson v. Brathwaite* and, 955–956
 - mistaken, 955–956
 - reliability of, 925
 - right to counsel and, 892
 - United States v. Wade* and, 892, 1679, 1697
 - wrongful convictions and, 925
 - “Eyewitness Identification Procedures,” 925
- ## F
- Fabela, Helen, 274
 - FACE Act. *See* Freedom of Access to Clinic Entrances Act
 - Facial features identification, 1222
 - Facial preference test, 761
 - FACTA. *See* Fair and Accurate Credit Transactions Act
 - Faction, 36–37
 - Factionalism, 1296–1297
 - Factual context, 762
 - Fair and Accurate Credit Transactions Act (FACTA), 570
 - Fair Credit Report Act (FCRA), 346, 569–570
 - Fair Labor Standards Act (FLSA), 1269
 - ministerial exemptions for, 571–572
 - National League of Cities v. Usery* and, 1289
 - religion and, 570–572
 - Stone and, 1565
 - Tony and Susan Alamo Foundation v. Secretary of Labor* and, 1660–1661
 - Fair use doctrine, 572
 - copyright and, 1414
 - free exercise clause and, 365–366
 - of intellectual property, 822–823

- metatags and, 823
- sampling and, 764
- FAIR v. Rumsfeld*, 1461
- Fairfax Covenant Church v. Fairfax County School Board*, 513
- Fairfax Resolves, 977
- Fairfax's Divisee v. Hunter's Lessee*, 969
- Fairman, Charles
 - Fourteenth Amendment and, 514
- Fairness doctrine, 184, 573
 - FCC v. League of Women Voters* and, 578
 - forced speech and, 601
 - overturning of, 579
- Faith, 1437
- Faith-based organizations (FBOs)
 - Charitable Choice and, 270–271
 - government funding of, 172–173
- Falbo v. United States*
 - Murphy and, 1048
- Fallon, Richard, 1139
- False Claims Act of 1863, 1776
- False light, 828
- False light invasion of privacy, 574–575
- Falsehoods, 36
- Falwell, Jerry, 575–576, 1413
 - emotional distress and, 811
 - Flynt and, 599
 - Hustler Magazine v. Falwell* and, 787–788
 - Islam and, 1053
 - Moral Majority and, 4
 - school prayer amendment and, 356
- Family
 - fundamental rights and, 608–609
 - law, 129–130
 - Prince v. Massachusetts* and, 1283
 - privacy and, 608–609, 1337
 - Rawls on, 1272
- Family Education Rights and Privacy Act, 346
- Family Research Council, 577
- Family unity for noncitizens, 576
- Family values movement, 577–578
 - Christian Coalition and, 285
- Fanaticism. *See* Extremist groups
- Faneuil Hall, 1158
- Fanny Hill*, 1118. *See also* Book Named “John Cleland’s Memoirs of a Woman of Pleasure” v. Massachusetts
- Farber, Daniel, 646
 - freedom of speech and, 651
- Fahrenheit 451* (Bradbury), 162
- Faretta v. California*, 1457–1458
- Farmer, Millard, 1200
- Farrakhan, Louis, 70
- Farrand, Max, 864
- Fascism, 253
- Father of Candor, 1749, 1750
- Fathers, adoption and, 279–280
- Faubus, Orval, 187
- Favorite Recipes of Home Economics Teachers* (Dees and Fuller), 1503
- Fay v. Noia*, 325
 - habeas corpus and, 727–728
 - overruling of, 728
- FBI HRT. *See* Federal Bureau of Investigation Hostage Rescue Team
- FBI. *See* Federal Bureau of Investigations
- FBI Story, The*, 775
- FBI, The*, 775
- FBN. *See* Federal Bureau of Narcotics
- FBOs. *See* Faith-based organizations
- FCC. *See* Federal Communications Commission
- FCC v. American Mini Theatres*, 1714
- FCC v. League of Women Voters of California*, 578
 - radio spectrum and, 663
- FCC v. National Citizens Committee for Broadcasting*, 1670
- FCC v. Pacifica Foundation*, 579, 1316
 - Burger Court and, 201
 - captive audiences and, 247
 - FCC and, 579, 1316
 - FCC v. League of Women Voters* and, 578
 - freedom of press and, 663
 - Joseph Burstyn, Inc. v. Wilson* and, 858
 - obscenity and, 1124
 - sexually explicit materials and, 1120
 - Stevens and, 1556
 - viewpoint discrimination and, 1714
 - vulgar speech and, 1248
- FCRA. *See* Fair Credit Report Act
- FDA. *See* Food and Drug Administration
- Fear of Freedom, The* (Biddle), 134
- FEC. *See* Federal Election Commission
- FECA. *See* Federal Election and Campaign Act
- Federal Advisory Committee Act
 - freedom of press and, 661–662
- Federal Aviation Administration, 1623
- Federal Bail Reform Act of 1984, 1207–1208
- Federal Baseball Club of Baltimore, Inc. v. National League Joseph Burstyn, Inc. v. Wilson* and, 858
- Federal Bureau of Investigation (FBI)
 - Arab Americans and, 50
 - background checks by, 1146
 - Baldwin and, 104
 - Bureau of Investigation and, 774
 - CIA and, 258
 - Clark, T., and, 308–309
 - Communist Party and, 339, 1269, 1270
 - CPUSA and, 338
 - criminal profiling and, 1236
 - extremist groups and, 567
 - General Intelligence Division leading to, 1280
 - Gold and, 1377
 - handgun background check and, 721
 - homosexuality and, 1317
 - Hoover and, 774–777, 1281, 1318
 - Japanese internment and, 841–842
 - Johnson, L., and, 856
 - Katz v. United States* and, 882
 - King and, 776
 - movies and, 774–775
 - Murphy and, 1047
 - National DNA Index System, 431
 - New Deal and, 1084
 - NWA and, 764
 - Reno and, 1317
 - Rosenbergs and, 1377
 - Ruby Ridge and, 1384, 1385
 - spying and, 1518
 - television and, 774–775
 - Waco standoff and, 1317
- Federal Bureau of Investigation Hostage Rescue Team (FBI HRT), 1731
- Federal Bureau of Narcotics (FBN), 64, 1742

INDEX

- Federal Communications Act, 1132
- Federal Communications Commission (FCC), 184–185, 579–580
 - alcohol advertising and, 1708
 - antismoking commercials and, 1708
 - cable television regulation and, 211–212
 - censorship and, 185
 - equal time rules and, 1052
 - establishment of, 663
 - fairness doctrine and, 573, 1669
 - FCC v. League of Women Voters* and, 578
 - FCC v. Pacifica Foundation* and, 579, 1316
 - forced speech and, 601
 - Japanese internment and, 841–842
 - licensing, 663
 - Nixon, R. and, 1099
 - obscenity and, 1124
 - Red Lion Broadcasting Co., Inc. v. FCC* and, 185, 579, 663, 1279–1280, 1354
 - Reno v. ACLU* and, 663, 1316
 - sexually explicit materials and, 1120
 - in *Turner Broadcasting System, Inc. v. FCC*, 100, 450, 601, 663, 1279–1280
 - wiretapping and, 1269
- Federal Corrupt Practices Act of 1925, 218
- Federal courts. *See also* Lower federal courts
 - jurisdiction of, 866–868
 - removal to, 1315
- Federal Crimes Act of 1790, 1349
- Federal Criminal Code: Past and Present* (Gainer), 381
- Federal Death Penalty Act, 230
- Federal district courts
 - jurisdiction of, 867–868
- Federal Election and Campaign Act (FECA), 193–194, 219, 1650
 - PACs and, 588
- Federal Election Campaign Act Amendments of 1974, 219
- Federal Election Commission (FEC), 193
 - installation of, 219
- Federal Election Commission v. Colorado Republican Federal Campaign Committee*, 1650
- Federal Election Commission v. National Conservative Action Committee*, 588
- Federal Emergency Management Administration (FEMA), 415
- Federal Fair Housing Act, 71
- Federal Farmer's essays, 1267
- Federal Firearms Act of 1938, 720
- Federal Interpleader Act of 1936, 261
- Federal Kidnapping Act, 665
- Federal Loan Agency, 1718
- Federal Loyalty Program
 - ACLU and, 49
 - CPUSA and, 338
- Federal Loyalty Review Board, 308
- Federal Marriage Amendment, 1402, 1403
 - Log Cabin Republicans and, 933
- Federal Maternity Act of 1921, 1609
- Federal Public Records Law. *See* Freedom of Information Act
- Federal Radio Commission, 663
- Federal Railway Administration, 452
- Federal Rules of Civil Procedure, 1481
- Federal Rules of Criminal Procedure, 79
 - grand jury indictments and, 705
 - guilty pleas, 718
 - Mallory v. United States* and, 952
- Federal Rules of Evidence
 - confrontation clause and, 344
 - grand jury indictments and, 707
- Federal Sentencing Guidelines, 1460
 - on drugs, 1257
- Federal territories, 1484
- Federal Theater Project, 780
- Federal Torts Claim Act (FTCA), 149
 - federal court jurisdiction and, 868
- Federal Trade Commission (FTC)
 - do not e-mail registry and, 820
 - FCRA and, 570
 - hip-hop music censorship and, 764–765
- Federalism. *See also* Anti-Federalists
 - Bache and, 95
 - Bill of Rights and, 140, 1325, 1326, 1339–1340
 - Chae Chan Ping v. United States* and, 40
 - Chase and, 274
 - Constitutional Convention of 1787 and, 1264, 1267, 1268, 1314, 1326
 - defeat of, 38
 - Ellsworth and, 491
 - establishment clause and, 532–533
 - freedom of press and, 1205
 - Harlan, II, and, 742
 - history of, 36
 - Jay and, 843
 - Kentucky and Virginia Resolves and, 887–888
 - Madison and, 944–945
 - Marbury v. Madison* and, 864
 - Marshall Court and, 968
 - Marshall, J., and, 970
 - privileges and immunities and, 1230
 - Rehnquist Court and, 1287–1289
 - Republicans v., 36
 - right to bear arms and, 1339–1340
 - Rush and, 1387
 - Sedition Act and, 38–39, 492, 643
- Federalist 10*, 1296
 - establishment and, 947
 - Madison and, 944–945
 - political parties and, 643
- Federalist 48*, 1636
- Federalist 51*
 - civil liberties and, 1028
 - Madison and, 945
- Federalist 54*, 476
- Federalist 74*, 1145
- Federalist 78*, 289, 1635
 - Hamilton in, 732
 - judicial review and, 864, 958
- Federalist 80*
 - privileges and immunities and, 1231
- Federalist 84*, 553, 1268, 1632
 - free speech laws and, 815
 - Hamilton in, 732
 - natural law and, 1080
 - Ninth Amendment and, 1096
- Federalist 85*, 732
- Federalist Papers*, 62, 943, 1268, 1544
 - economic rights and, 476
 - freedom of press and, 1205
 - Hamilton and, 732, 1268, 1340
 - impartiality and, 798–799

- judicial review and, 864
- Madison and, 1268, 1340
- Fee, John G., 1486
- Feinberg, Joel, 1709
- Feiner, Irving, 582–583
- Feiner v. New York*, 582–583
 - free speech and, 1512
 - heckler's veto and, 758
 - incitement of criminal activity and, 654
 - Vinson and, 1722
 - Vinson Court and, 1719
- Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*, 484–485
- Feldman, Noah, 528
- Fellow-servant rule, 586
- Fellowship on Reconciliation (FOR), 959
- Fell's Point Riot, 274
- Felonies
 - arrest warrants and, 81
 - murder, 230–231
 - proportionality review and, 1242
 - strict liability and, 1573
- Felons
 - disenfranchisement of, 583–584
 - DNA samples and, 428
 - juries and, 872
 - Lambert v. California* and, 905
 - privacy rights of, 712
 - registration of, 997–998
 - voting and, 1257
- FEMA. *See* Federal Emergency Management Administration
- Female offenders, 1463–1464
- Feminine Mystique, The* (Friedan), 1068
- Feminism
 - abortion and, 8
 - Dworkin and, 470–471, 942
 - first wave of, 8
 - MacKinnon and, 942
 - marital rape and, 961
 - NOW and, 1068–1069
 - pornography and, 304, 1120
 - Stanton and, 1522–1523
 - victims' rights and, 1710
- Feminist Majority Foundation
 - ERA and, 522
 - FACE Act and, 634
- Ferejohn, John, 494–495
- Ferguson, Adam, 847
- Ferguson v. Charleston*, 28, 1480
 - drug testing and, 1746
- Ferguson v. Georgia*, 407
- Ferguson v. Skrupa*, 1582
- Fetal remains, 35
- Fetal tissue research. *See* Stem cell research
- Fetus, life and, 1553
- Feudal system, 949–950
- Fiallo v. Bell*, 585, 1530
- Field, David Dudley, 585
 - proportional punishment and, 1241
 - United States v. Cruikshank* and, 1681
- Field, Stephen J., 585–586
 - Cummings v. Missouri* and, 1627
 - Ex parte Garland* and, 1627
 - O'Neil v. Vermont* and, 739
 - Wynehamer v. People* and, 1580
- Field v. Clark*, 1448
- draft and, 1793
- Fielden, Samuel, 649
- Fifteenth Amendment, 1522, 1726
 - Anthony and, 65
 - coerced confessions and, 315
 - in *Colgrove v. Green*, 619
 - Douglass and, 448
 - extremist groups and, 564
 - federalization of criminal law and, 581
 - grandfather clause and, 1571
 - KKK and, 896
 - noncitizens and, 1105–1106
 - private housing and, 1442–1443
 - privileges and immunities and, 1231
 - segregation and, 1442
 - voting rights and, 1358, 1726
- Fifth Amendment, Self-incrimination. *See also* Double jeopardy; Takings clause
 - adoption of, 438–439
 - Allen v. Illinois* and, 43, 544
 - Aptheker v. Secretary of State* and, 78
 - Arizona v. Fulminante* and, 78
 - bail and, 97
 - Baltimore City Department of Social Services v. Bouknicht* and, 106
 - Barron v. Baltimore* and, 73, 112
 - Bellis v. United States* and, 121
 - Benton v. Maryland* and, 440
 - blood samples and, 1422
 - Boyd v. United States* and, 171
 - Braswell v. United States* and, 180
 - Brooks v. Tennessee* and, 185
 - Burdeau v. McDowell* and, 195
 - capital punishment and, 234–235
 - CDA and, 337, 1316
 - Chambers v. Florida* and, 263
 - coerced confessions and, 315
 - coercion and, 831
 - communists and, 1758
 - corporations and, 706, 730
 - Corrigan v. Buckley* and, 368–369
 - Counselman v. Hitchcock* and, 370
 - Crandall v. Nevada* and, 801
 - discriminatory prosecution and, 423
 - double jeopardy and, 122, 437–439, 439, 1000, 1505
 - due process and, 456–457, 462–467, 1240, 1558, 1580
 - economic regulation and, 473
 - economic rights and, 476
 - Emancipation Proclamation and, 493
 - Estelle v. Smith* and, 543
 - exclusionary rule and, 554, 557–558, 1454
 - exemplars and, 558
 - eyewitness identification and, 568
 - Federal Bail Reform Act of 1984 and, 1207
 - Fisher v. United States* and, 180, 589
 - Frank and, 616
 - Fulminate v. Arizona* and, 320
 - gambling and, 1684
 - grand jury indictments and, 705
 - Griffin v. California* and, 710
 - Hester v. United States* and, 763
 - HUAC and, 780, 1270
 - ICRA and, 807
 - illegal search and seizure and, 557
 - interrogations and, 992

INDEX

- Fifth Amendment, Self-incrimination (*cont.*)
jailhouse informants and, 838
jury trial right and, 877
Kamisar and, 881
Kirby v. Illinois and, 892
Lilly v. Virginia and, 920
Mapp v. Ohio and, 957
Marchetti v. United States and, 1684
mass communications and, 580
McNabb v. United States and, 991–992
Menna v. New York and, 1000
Michigan v. Mosley and, 1005–1006
Miranda v. Arizona and, 318, 1016, 1331, 1345, 1351
Miranda warning and, 1017, 1020
Moran v. Burbine and, 1033–1034
negative rights and, 144
New York v. Quarles and, 1093
noncitizens and, 380, 1105–1106
occupational tax stamps and, 960
Ohio v. Robinette and, 1128
Olmstead v. United States and, 1129
penumbras and, 1153
Powers v. United States and, 1018
preventative detention and, 1207
privacy and, 1219
private police and, 1227
private property for public use and, 474
probable cause hearings and, 79–80
reasonable doubt and, 1240
Reid v. Covert and, 1291
right to remain silent and, 710
Rust v. Sullivan and, 1668
self-incrimination and, 1453
silence and, 710
slavery and, 1487
Smith v. United States and, 1415
Spano v. New York and, 1504
states and, 618, 772
takings clause and, 1484, 1582, 1603
test oaths and, 1627
in twentieth century, 1017–1018
United States v. Dionisio and, 1682
United States v. Lara and, 441
United States v. Washington and, 1697–1698
use/derivative use immunity and, 668
vagueness and, 1703–1705, 1705
Vinson Court and, 1720
Warren Court and, 1757–1758
White, B., and, 1779
Zenger and, 1815
- Fifty Most Influential Women in American Law, The* (Berry), 1771
- Fighting words doctrine, 587–588, 1271, 1511–1512, 1699
categorical speech and, 1671
Chaplinsky v. New Hampshire and, 849, 1800
hate speech and, 754
hate speech codes and, 221
Hess v. Indiana and, 763
hostile environment harassment and, 778
obscenity and, 1117
political correctness and, 1188–1189
Texas v. Johnson and, 590
viewpoint discrimination and, 1716
vulgar speech and, 1248
Warren Court and, 1754
- File sharing, 817
- Metro-Goldwyn Mayer Studios v. Grokster* and, 1001–1002
P2P, 823
- Filipinos, restrictive covenants and, 1324
- Filled milk, 1564
- Filmer, Robert, 505
- Films. *See* Movies
- Financial records, 1687–1688
- Finger v. State*, 814
- Fingerprinting
DNA testing v., 431
exemplars and, 558
probable cause and, 1445
- Firearms. *See* Guns
- Firing squad, 244
Wilkinson v. Utah and, 384
- First Amendment. *See also* Establishment Clause; Free exercise;
Free speech; Religion clauses
abolitionism and, 4–5
Abood v. Detroit Board of Education and, 7
abortion and, 11–12
abortion protests and, 12–13, 948–949
abridged speech and, 1052
absolutism and, 14–15, 100
absolutist interpretation of, 361–362
academic freedom and, 17–18, 1506
access to civil proceedings and, 1336
ACLU and, 286
ACLU and, 47, 48, 1573
Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza and, 44, 926
American Booksellers Association, Inc., et al v. William Hudnut II
and, 470
Americans United and, 56
anonymity and, 63
anti-abolitionist gag rules and, 66
antipornography ordinances and, 943
Antiterrorism and Effective Death Penalty Act of 1996 and, 1623
appropriation of name or likeness and, 77
atheism and, 89–90
balancing and, 99
Baldwin and, 103
Barenblatt v. United States and, 110
Beauharnais v. Illinois and, 116
Bishop's Case and, 1667
Blaine amendment and, 151–152
Board of Education v. Pico and, 156
Bond v. Floyd and, 162
Boos v. Barry and, 1436
Boy Scouts of America v. Dale, 170, 1363, 1381
Branti v. Finkel and, 178
Breard v. Alexandria and, 329
broadcast regulation and, 184
Brotherhood of Railroad Trainmen v. Virginia ex. rel. Virginia State Bar and, 186
Bruce and, 188
Buckley v. Valeo and, 194
Burger and, 206, 1299–1300
campaign financing and, 219
Cantwell v. Connecticut and, 222
categorical approaches and, 252, 1671
CDA and, 1316
Central Hudson Gas & Electric Corp. v. Public Service Commission of New York and, 257
Chafee and, 261–262
child pornography and, 282–283

- children and, 284
- Christian right and, 1296–1297
- Church of Scientology and, 286–287
- Church of the Lukumi Babalu Aye v. City of Hialeah* and, 289–290
- CIPA and, 825–826
- City of Boerne, Texas v. Flores* and, 159
- City of Renton v. Playtime Theatres, Inc.* and, 1316, 1317–1318
- Clark, T., and, 309
- clear and present danger test, 312
- clergy in public office and, 989
- CNS and, 290
- Code of 1930 and, 756
- coercion and, 1101–1103
- Cohen v. California* and, 321
- Colorado Republican Federal Campaign Committee v. Federal Election Commission* and, 328
- commercial speech and, 329
- confidentiality and, 322
- conscientious objection and, 349, 409–410
- content-based regulation of speech and, 361–362
- content-neutral regulation and, 363–364
- copyrights and, 365–366, 485
- corporate speech and, 650
- corporations and, 632
- Cox v. Louisiana* and, 372–373
- CPUSA and, 338
- cross burning and, 382–383
- damages and, 404
- Davis v. Beason* and, 396–397
- days of religious observance and, 398–399
- defamation and, 402, 1009, 1271
- DeJonge v. Oregon* and, 411
- designated public forums and, 417
- dial-a-porn services and, 418
- Don't ask, don't tell and, 1460–1461
- Douglas and, 445
- draft card burning and, 449, 1688
- drugs and, 454
- Edwards v. South Carolina* and, 483
- Eldred v. Ashcroft* and, 484–485
- Emerson and, 499
- emotional distress and, 811
- employment discrimination, 777
- Employment Division, Department of Human Resources of Oregon v. Smith* and, 454, 1263
- Epperson v. Arkansas* and, 376–377, 511
- equality and, 610
- Erznoznik v. City of Jacksonville* and, 523–524
- Espionage Act and, 1420
- establishment clause and, 524–530
- Everson v. Board of Education* and, 132
- evolution and, 377
- ex post facto laws and, 554
- extremist groups and, 565
- fair use doctrine and, 572
- Falwell and, 575
- family values movement and, 577
- FCC and, 579
- FCC v. League of Women Voters* and, 578
- FCC v. Pacifica Foundation* and, 579, 1316
- FECA and, 193
- fighting words doctrine and, 587, 754, 1271
- film ratings and, 1042–1043
- first principles, 656–657
- FLSA and, 570
- Flynt and, 599
- forced speech and, 600–602
- 44 Liquormart v. Rhode Island* and, 614
- Frankfurter and, 617, 618
- free exercise clause and, 22, 621, 1214, 1246, 1548, 1685
- free speech and, 1417, 1449, 1450, 1641–1644
- free speech theory and, 816
- freedom of expression and, 637
- freedom of press and, 1201, 1205
- gag rules and, 671–672, 673–674
- Gentile v. State Bar of Nevada* and, 679
- Girouard v. United States* and, 1142
- Good News Club v. Milford Central School* and, 699–700
- government funding of speech and, 700–701
- government speech and, 701–702
- Grosjean v. American Press Co.* and, 714–715
- group libel and, 715
- H. Rap Brown law, 353
- hate crimes and, 751–752
- hate speech codes and, 220–221
- Hazelwood School District v. Kuhlmeier* and, 756
- heckling and, 758
- Hentoff and, 1651
- Herbert v. Lando* and, 761
- Hess v. Indiana* and, 762–763
- Holmes, Oliver Wendell, on, 1280
- hostile environment harassment and, 778–779
- Houchins v. KQED, Inc.* and, 779
- HUAC and, 780
- Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston* and, 786, 1363
- Hustler Magazine v. Falwell* and, 787
- implied rights and, 801
- incorporation doctrine and, 803
- intellectual property and, 816–817
- intelligent design and, 378–379
- Internet and, 660, 819, 1315, 1316
- Internet filtering and, 825
- invasion of privacy and, 828–829
- Jamison v. Texas* and, 838
- Jehovah's Witnesses and, 848–850, 1542
- Jews and, 851–853
- Joseph Burstyn, Inc. v. Wilson* and, 858
- journalistic sources and, 859
- judicial bias and, 860
- jurisprudence, 252
- juveniles and, 604
- Kentucky and Virginia Resolves and, 887
- Keyishian v. Board of Regents*, 1514
- Kingsley International Pictures Corporation v. Regents of the University of New York* and, 892
- KKK and, 753–754
- Kleindienst v. Mandel* and, 893
- Kois v. Wisconsin* and, 894
- lawyers and, 420
- lawyers speaking about pending cases and, 420
- Lee v. Weisman* and, 911–912
- legislative prayer and, 915
- lewd speech and, 124
- libraries and, 164
- limitations, 599, 645–646, 862
- Locke v. Davey* and, 929–930
- low value speech and, 937
- LSC and, 1324
- Marshall, T., and, 973

INDEX

First Amendment (*cont.*)

- mass communications and, 580
- Masses Publishing Company v. Patten* and, 980
- McCullum v. Board of Education* and, 987
- media access and, 21
- media access to military operations and, 995–996
- Miami Herald Publishing Co. v. Tornillo* and, 1003
- Miller v. California*, 1012
- military chaplains and, 268–269
- military operations and, 995
- Milkovich v. Lorain Journal* and, 1009
- Miller test and, 1012–1013
- Mills v. Alabama* and, 1014
- Minersville School District v. Gobotis* and, 592, 1364
- minorities and, 1574
- Mitchell and, 1026
- moments of silence statutes and, 1028–1029
- Morrill Act of 1862 and, 1330
- movies and, 858
- Murphy and, 1048
- Murray and, 1049–1050
- Muslims and, 1053
- NAACP v. Alabama* and, 1057–1058
- NAACP v. Button* and, 1058
- National Endowment for the Arts v. Finley* and, 1065
- national security and, 1071, 1072, 1073
- Native Americans and, 1077
- Natural Born Killers* and, 210
- naturalization and, 294
- Near v. Minnesota* and, 1081
- negative rights and, 143
- negligence and, 403
- neutral reportage doctrine and, 1082
- New York Times Co. v. Sullivan* and, 330
- New York Times v. United States* and, 1089
- New York v. Ferber* and, 1092
- news-gathering privilege and, 708
- newsroom searches and, 1093
- Nike v. Kasky* and, 332
- NLRB v. Catholic Bishop of Chicago* and, 1100
- no endorsement test and, 1103
- noncitizens and, 1105–1106
- nudity and, 111
- Nuremberg Files and, 1172
- obscenity and, 1115–1116, 1117, 1118, 1123, 1125, 1228, 1271, 1382
- obstacles, 657
- O'Lone v. Estate of Shabazz* and, 1130
- Omosogbon v. Wells* and, 1700
- Operation Rescue and, 1134
- Osborne v. Ohio* and, 1138
- overbreadth and, 1704
- PACs and, 588
- Paris Adult Theatre v. Slaton* and, 1147
- parody and, 575
- patronage and, 492
- Patterson v. Colorado* and, 1795
- Pell v. Procunier* and, 1151
- penalty enhancement and, 750
- Perry v. Sindermann* and, 1260
- Petition Campaign and, 1155
- Philadelphia Newspapers, Inc. v. Hepps* and, 1158
- Pickering v. Board of Education* and, 1699
- picketing and, 1166, 1169
- Pledge of Allegiance and, 1178–1179
- political correctness and, 1188–1189
- political patronage and, 1189–1190
- Political speech and, 1650
- polygamy and, 1038
- Powell, Lewis, and, 1194
- PPA and, 1223, 1224
- preferred freedoms of, 216
- press and, 1353–1354
- prior restraints and, 1075, 1209
- prison interviews and, 1415
- prisoners and, 1216
- privacy and, 1219, 1225
- private discriminatory association and, 1226
- professional advertising and, 1235
- prohibition on prior restraints and, 151
- public concern standard and, 982
- public employees and, 420–421
- public forum doctrines and, 1243
- public forums and, 1229, 1663, 1698–1700
- public officials and, 1245
- public schools and, 163, 1508, 1576, 1614
- public trials and, 1247
- Quick Bear v. Leupp* and, 1253–1254
- Rankin v. McPherson* and, 1260
- rape and, 1261–1262
- Rastafarians and, 1262, 1263
- ratification of, 532
- Rawls on, 1272–1273
- red scare and, 1280–1282
- Redrup v. New York* and, 1282
- Rehnquist and, 1289, 1299–1300
- religion and, 766–768, 1262, 1263, 1291, 1294–1295, 1296–1298, 1299, 1302, 1303–1304, 1308, 1315, 1437, 1693, 1755–1756
- religion clauses of, 527
- religious neutrality and, 768
- religious speech and, 1229
- religious symbols and, 1312
- religious tests and, 1661
- reporter's privilege and, 663–664, 1319
- Rice v. Paladin* and, 1331–1332
- right to know and, 1351–1352
- right to petition and, 1352–1353
- right to reply and, 1353–1354
- RLUIPA and, 1308, 1548
- Roberts, O., and, 1363, 1364
- Roth* test and, 835–836
- Roth v. United States* and, 1382
- Rust v. Sullivan* and, 1668
- Rutledge, W., and, 766, 1389–1390
- Salvation Army and, 1397
- satire and parody and, 1413–1414
- School District of the City of Grand Rapids v. Ball* and, 1423
- school prayer and, 1196, 1496
- school vouchers and, 1424, 1528
- sealed documents and, 1428–1429
- secondary effects doctrine and, 1436
- Sedition Act and, 38
- seditious libel and, 1440
- selective service and, 1448
- sex and, 1820–1821
- sexual conduct and, 1676
- sexual orientation and, 786
- Sherbert v. Verner* and, 349–350
- shield laws and, 1473
- shopping centers and, 1474

- SLAPP and, 1480
Snepp v. United States and, 1491
 Son of Sam laws and, 1494–1495
Southeastern Promotions, Ltd. v. Conrad and, 1499
 speech vs. conduct and, 1515–1516
Stanley v. Georgia and, 1521
 state action doctrine and, 927
 state constitutions and, 1538–1539
 states and, 73–75
 Stevens and, 1556
Stone v. Graham and, 1563
 student speech and, 1575
 substantive due process and, 466
 symbolic speech and, 1593
 Taft Court and, 1597
 taxes and, 715
 teacher speech and, 1614
 teachers and, 1613
 Ten Commandments and, 1563
Texas v. Johnson and, 590
 threats and, 1652–1653
 time, place, and manner test and, 818, 1657
Tinker v. Des Moines School District and, 1658–1659
Tony and Susan Alamo Foundation v. Secretary of Labor
 and, 1660
United States v. Playboy Entertainment Group and,
 1689–1690
United States v. Reidel and, 1690–1691
United States v. Seeger and, 1693–1694
United States v. The Progressive, Inc. and, 1694
 universities and, 1698–1700
University of Wisconsin v. Southworth and, 1700
Urofsky v. Gillmore and, 1700–1701
 USA PATRIOT Act and, 1623
Valentine v. Chrestensen and, 1706
Vance v. Universal Amusement Co., Inc. and, 1707
 verbal communication and, 1437
 viewpoint discrimination and, 1714
 Vinson and, 1722
Virginia State Board of Pharmacy v. Virginia Citizens Consumer
Council, Inc. and, 1724
Virginia v. Black and, 1724–1725
 void-for-vagueness and, 1705
 vulgar speech and, 1248
 Waite Court and, 1732–1733
 wall of separation and, 1735
Wallace v. Jaffree and, 1736
Walz v. Tax Commission and, 1738–1739
 war and, 646–647, 946
 Warren Court and, 1560, 1753
Watson v. Jones and, 1768
Watts v. United States and, 1769
West Virginia State Board of Education v. Barnette
 and, 1775
 Wilson, W., and, 1784
Wisconsin v. Mitchell and, 1787
Wisconsin v. Yoder, 1788
Witters v. Department of Services and, 1789
Wolman v. Walter and, 1790
 women's rights and, 1574
Yates v. United States and, 1807
Zacchini v. Scripps-Howard Broadcasting Co. and, 1812
Zelman v. Simmons-Harris and, 1812
 zoning and, 1121, 1821
Zorach v. Clauson and, 1822
Zurcher v. Stanford Daily and, 1823
 First Continental Congress, 54
First Flag Salute Case, 782
First Frame of Government (Penn), 1152
 First freedom. *See* Establishment clause
First Freedom, The: The Tumultuous History of Free Speech in
America (Hentoff), 760
 First Law. *See* Stare decisis
First National Bank of Boston v. Bellotti
 corporate speech and, 650
 lobbying and, 632
First Restatement of Torts
 intrusion and, 828
 First sale doctrine, 823
 FISA. *See* Foreign Intelligence and Surveillance Act
 Fish Committee, 780
 Fisher, Fred, 985
Fisher v. Hurst, 1391
Fisher v. United States, 589, 1432, 1454, 1455
 Fifth Amendment and, 180
Fiske v. Kansas, 68, 74
 incorporation doctrine and, 804
 Fiss, Owen, 1451
 Flag burning, 589–591, 1162
 Congress and, 590
 content-neutral regulation and, 363–364
 expressive speech and, 1516
 fighting words and, 587
 Flag Protection Act of 1989 and, 590
 Kamisar and, 881
 Kennedy, A., and, 885
O'Brien test and, 450
 Scalia and, 1417
Street v. New York and, 587
Stromberg v. California and, 782
 symbolic speech and, 1593
Texas v. Johnson and, 361, 590, 1516
United States v. Eichman and, 1516
United States v. O'Brien and, 1114
 Flag Protection Act of 1989, 590
 content-neutral regulation and, 363–364
 Flag saluting, 591–596, 1802
 civil liberties and, 1630
 Frankfurter and, 619
 government speech and, 702
 Jehovah's Witnesses and, 848
Minersville School District v. Gobitis and, 1565
 religious freedom and, 1028
 Stone and, 1565
West Virginia State Board of Education v. Barnette and,
 593–596, 1775
Flagg Brothers v. Brooks, 606
 Flags
 desecration laws, 657
 Hughes and, 784
 red, 48
 saluting, 445
Stromberg v. California and, 782
 Flanagan, Edward, 1402
 Flanders, Ralph, 985
Flast v. Cohen, 56, 596
 establishment clause and, 1609
 federal court jurisdiction and, 867
Fleischfresser v. Dirs. of Sch. Dist. 200, 1247
 Fletcher, Andrew, 847

INDEX

- Fletcher v. Peck*, 112
economic rights and, 477
Marshall Court and, 968
Marshall, J., and, 969
- Flexner, Bernard, 102
- FLIR. *See* Forward-looking infrared camera
- Floating bubble, 1211
- Flores, P.F., 159
- Florida
abortion and, 1533
busing and, 1546
capital punishment in, 1238
civil liberties and, 1545
DWB and, 1237
Joseph v. State in, 1306
NAACP and, 1064
privacy and, 1531
same-sex adoption and, 1398, 1407–1408
search and seizure in, 1532–1533
- Florida Bar v. Went For It, Inc.*, 1236
lawyer advertising and, 910
- Florida Citrus Commission, 190
- Florida Star v. B.J.F.*, 596, 1261
- Florida v. Bostick*, 1444
Marshall, T., and, 973
- Florida v. Jimeno*, 597
- Florida v. Riley*, 597, 1745
- Florida v. Rodriguez*, 1444
- Florida v. Royer*, 598, 1444, 1445
- Florida v. White*, 598
- Flour scandal, 274
- Flower v. United States*, 1007
- Floyd, Charles, 774
- FLSA. *See* Fair Labor Standards Act
- Flynn, Elizabeth Gurley, 49
removal of, 104
- Flynt Distributing Company, 575
- Flynt, Larry, 598–599
emotional distress and, 811
Falwell and, 575
Hustler Magazine v. Falwell and, 787–788
- Flynt v. Rumsfeld*, 996
- FOE. *See* Fraternal Order of the Eagles
- FOIA. *See* Freedom of Information Act of 1966
- Foley v. Connelie*, 41, 44
- Follett, Lester, 599
- Follett v. Town of McCormick*, 599–600
Jimmy Swaggart Ministries v. Board of Equalization of California
and, 853
- Folsom v. Marsh*, 1414
- Fong Yue Ting v. United States*, 260, 600, 1530
Alien Registration Act of 1940 and, 792
Chae Chan Ping v. United States and, 600, 1259
- Food and Drug Administration (FDA)
ACT UP and, 26
Church of Scientology and, 287
contraception and, 1323
drugs and, 1743
- Food Lion, Inc., 661
- Food Lion, Inc. v. Capital Cities/ABC, Inc.*
news-gathering torts and, 661
- Footnote Four, 175
Frankfurter and, 617
- FOR. *See* Fellowship on Reconciliation
- Force Act of 1870, 1341
- Force Bill, 214
- Force of law, 1422
- Force. *See* Use of force
- Forced speech, 600–602
- Ford, Gerald
Church Committee and, 1519
Kennedy, A., and, 884
pardons and commutations and, 1145–1146
Stevens and, 1556
Tokyo Rose and, 1666
- Ford, Henry, 69
- Ford, Leland, 1085
- Ford v. Wainwright*, 386
competency to stand trial and, 468
- Fordham University
Kaufman and, 883
Mitchell and, 1025
- Foreign Agents Registration Act, 1084
- Foreign Intelligence and Surveillance Act (FISA), 346, 1519, 1520
electronic surveillance and, 487–488
national security and, 1071
terrorism and, 1624
United States v. United States District Court and, 1696
USA PATRIOT Act and, 1149
wiretapping and, 1786
- Foreign Intelligence Surveillance Court of Review, 1520, 1624
- Foremaster v. City of St. George*, 371
- Forensics, 1236
- Forest Reserve Act of 1891, 1683
- Forfeiture
Bible and, 130
civil, 442
civil asset, 295–296
in drug cases, 1745
innocent owner and, 213
as punishment, 442
rewards, 296
United States v. 92 Buena Vista Avenue and, 1678
- Forgotten Features of the Founding* (Hutson), 127
- Formalism, 913
- Forman v. United States*, 858
- Forsyth County v. The Nationalist Movement*, 758
- Fortas, Abe, 603–604
Burger Court and, 198
Epperson v. Arkansas and, 376–377
Gideon and, 603, 683, 1350
Kent v. United States and, 812
Mishkin v. New York and, 685
nomination of, 697
Redrup v. New York and, 1282
resignation of, 604
Warren Court and, 1754
- Fortas, Rachel, 603
- Fortas, Woolfe, 603
- 44 Liquormart, Inc. v. Rhode Island*, 216, 614
alcohol advertising and, 1708
Central Hudson test and, 332
low value speech and, 937
Posadas de Puerto Rico v. Tourism Company and, 1192
Thomas and, 1650
Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc. and, 1724
- Forum doctrine cases, 838
- Forum for Academic and Institutional Rights v. Rumsfeld*, 1363
- Forward-looking infrared (FLIR) camera, 1732

- Foster, Abby, 65
- Foster care
- child custody and, 280–282
 - Smith v. Organization of Foster Families* and, 1489–1490
- Foster, Stephen, 65
- Foster v. Illinois*, 1390–1391
- Foucault, Michel, 1240–1241
- Foundation for Women's Resources, 1771
- Four Horsemen, 1564
- Four-strikes statute, 1494
- Fourteenth Amendment, 73–74, 605–613, 1396. *See also*
- Citizenship clause; Due process; Equal protection;
 - Incorporation doctrine
- absolutism and, 14
 - academic freedom and, 1506
 - accommodation and, 22
 - Alcorta v. Texas* and, 35
 - Allen v. Illinois* and, 43
 - Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza* and, 44
 - Ambach v. Norwick* and, 44–45
 - antidiscrimination laws and, 71
 - Arizona v. Youngblood* and, 79
 - assisted suicide and, 86–87
 - Benton v. Maryland* and, 122
 - Bingham and, 145–146k
 - Blackledge v. Perry* and, 149
 - Blaine amendment and, 152
 - blood samples and, 1422
 - Brady v. Maryland* and, 173
 - Brandeis and, 176
 - Brewer v. Williams* and, 182
 - Buchanan v. Warley* and, 191
 - California v. Trombetta* and, 217
 - Cantwell v. Connecticut* and, 627, 849
 - capital punishment and, 223, 228, 234–235
 - Chambers v. Florida* and, 263
 - Chase Court and, 272–273
 - children born out of wedlock and, 792
 - City of Boerne, Texas v. Flores* and, 160, 560
 - City of Erie v. Pap's A.M.* and, 523
 - Civil Rights Act of 1866 and, 299
 - Civil Rights Act of 1875 and, 300
 - civil rights and, 1542
 - Civil Rights Cases* and, 301
 - coerced confessions and, 315, 1455
 - coercion and, 831
 - Cohen v. California* and, 321
 - compulsory process clause and, 345
 - compulsory vaccination and, 341, 836
 - Connally v. Georgia* and, 348
 - consent and, 1422
 - Cooley and, 478
 - corporate speech and, 650
 - Corrigan v. Buckley* and, 369
 - Cox v. New Hampshire* and, 373
 - Crane v. Johnson* and, 374–375
 - Crane v. Kentucky* and, 375
 - cross burning and, 382–383
 - death penalty and, 989–990
 - death-qualified juries and, 932
 - discrimination and, 1468
 - discriminatory prosecution and, 423
 - Doe v. Bolton* and, 433
 - Douglas and, 444, 446
 - Douglas v. California* and, 442, 1350
 - due process and, 456–457, 462–467, 607–608, 1544, 1558, 1582
 - Duncan v. Louisiana* and, 468
 - economic regulation and, 473
 - Edwards v. South Carolina* and, 483
 - Eisenstadt v. Baird* and, 483
 - Enforcement Act and, 1681
 - enforcement power and, 613
 - Epperson v. Arkansas*, 376
 - equal protection and, 513–518, 1524, 1547, 1562, 1590
 - establishment clause and, 532–533
 - Estelle v. Williams* and, 544
 - euthanasia and, 547
 - expatriation and, 562
 - extremist groups and, 564
 - federalization of criminal law and, 581
 - felon disenfranchisement and, 583
 - Field and, 585
 - free exercise and, 625, 1215
 - free speech and, 804
 - freedom of contract and, 637
 - Frisbie v. Collins* and, 665
 - Fulminate v. Arizona* and, 320
 - fundamental rights and, 612, 1329
 - Furman v. Georgia* and, 232, 669
 - gay and lesbian rights and, 885
 - gender-motivated violence and, 435
 - Gideon v. Wainwright* and, 318, 682
 - Gitlow v. New York* and, 690, 1003
 - grand juries and, 704
 - Griffin v. California* and, 710
 - Griffin v. Illinois* and, 710–711
 - Harlan, I, and, 738, 740, 742
 - Harper v. Virginia State Board of Elections* and, 745–746
 - Herrera v. Collins* and, 762
 - history of, 514–515
 - Holmes on, 770
 - Hughes and, 784
 - Hughes Court and, 781–782
 - implications of, 647
 - implied rights and, 801
 - incorporation doctrine and, 802–804
 - interpretation of, 147
 - interracial marriage and, 936
 - interstate commerce and, 826
 - jurisdiction and, 459
 - jury trials and, 73
 - juveniles and, 604
 - KKK and, 896
 - Klopper v. North Carolina* and, 893
 - Konigsberg v. State Bar of California* and, 895
 - Lawrence v. Texas* and, 436, 908, 1371
 - Lee v. Weisman* and, 911
 - Leland v. Oregon* and, 917
 - liberty and, 74, 1328
 - limitations of, 739
 - Lochner v. New York* and, 928
 - Loving v. Virginia* and, 936
 - Mapp v. Ohio* and, 957
 - Marshall, T., and, 973–974
 - McCleskey v. Kemp* and, 985–986
 - McCollum v. Board of Education*, 987
 - McCreary Count, Kentucky v. American Civil Liberties Union of Kentucky* and, 146–147
 - McDaniel v. Paty* and, 989

INDEX

- Fourteenth Amendment (*cont.*)
middle scrutiny test and, 612–613
miscegenation laws and, 1022–1023
Monroe v. Pape and, 1030
Mooney v. Holohan and, 1032–1033
multiple trials and, 112–113
Murdock v. Pennsylvania and, 549
Napue v. Illinois and, 1061
national security and, 1073
natural rights and, 1080
Nebbia v. New York and, 1081
Ninth Amendment and, 1097
noncitizens and, 1105–1106
North Carolina v. Pearce and, 1112
obscenity and, 1117
Palko v. Connecticut and, 1632
Papachristou v. City of Jacksonville and, 1145
PAS and, 1164
Paul v. Davis and, 1150
Pell v. Procunier and, 1151
physician-assisted suicide and, 888
Pickering v. Board of Education and, 1166
Pierce v. Society of Sisters and, 1170
Planned Parenthood v. Ashcroft and, 1173
Planned Parenthood v. Casey and, 1175
plenary power doctrine and, 1180
Plessy v. Ferguson and, 1181
Plyler v. Doe and, 1182
Poe v. Ullman and, 1183
police power and, 1185
Powell v. Alabama and, 1192
preferred position rule and, 1199
Prince v. Massachusetts and, 1208
privacy and, 1219
private police and, 1227
private schools and, 1548
on privilege, 1357
privileges and immunities and, 606–607, 1230, 1231–1232
public trials and, 1247
race-based classifications and, 611–612
racial classifications and, 30
rational basis test, 251
rational purpose test and, 610
reapportionment and, 1275
Rehnquist on, 1290
RFRA and, 160
right to counsel and, 125, 1344, 1349–1350
RLUIPA and, 1308
Roe v. Wade and, 9, 1320, 1367, 1368, 1372–1374
San Antonio School District v. Rodriguez, 1194
Schneekloth v. Bustamonte, 1422
Section 1, 605
Section 5, 24, 605
segregation and, 1442
self-representation and, 1457
separationism and, 767–768
Sherbert v. Verner and, 628
Slaughterhouse Cases and, 786, 1354, 1355, 1482
Smith v. Organization of Foster Families and, 1489
Smith v. YMCA and, 1501
sodomy and, 1400
Spano v. New York and, 1504
state action limitation of, 605–606
states rights and, 112
sterilization and, 1479
Sunday closing laws and, 1586
Taft Court and, 1597
Tileston v. Ullman and, 1655
Torcaso v. Watkins and, 1661
Troxel v. Granville and, 1003
in twentieth century, 1018
vagueness and, 1703–1705, 1705
Waite Court and, 1733
Washington v. Glucksberg and, 1766
West Virginia State Board of Education v. Barnette, 1775
Wilson v. United States and, 1017
Wisconsin v. Yoder, 1788
Wolf v. Colorado, 1790
- Fourth Amendment, 486, 1417. *See also* Search and seizure
administrative search and seizures and, 27–29
airport searches and, 33
Arizona v. Hicks and, 78
arrest and, 80
arrest warrants and, 81
automobile searches and, 91
bank deposits and, 1430
Bivens v. Six Unknown Names Agents of Federal Bureau of Narcotics and, 148–149
blood samples and, 1422
Board of Education v. Earls and, 155–156
Boyd v. United States and, 171
Brown v. Mississippi and, 187–188
Burdeau v. McDowell and, 195
California v. Acevedo and, 214–215
California v. Greenwood and, 215
Camara v. Municipal Court of the City and County of San Francisco and, 217
Carroll Doctrine and, 251
checkpoints and, 275–276
Chimel v. California and, 284–285
City of Indianapolis v. Edmond and, 806
Clark, T., and, 309
Connally v. Georgia and, 348
consent and, 1422
Coolidge v. New Hampshire and, 365
CPUSA and, 339
deportation and, 798
DNA dragnets and, 430
dog sniffs and, 489
drug testing and, 266, 1479–1480
drugs and, 1745
due process and, 1757
DWI and, 469–470
electronic surveillance and, 487, 1519
exclusionary rule and, 554, 793, 1680–1681
exemplars and, 558–559
eyewitness identification and, 567–568
Florida v. Jimeno and, 597
Florida v. Riley and, 597
Florida v. Royer and, 598
Frisbie v. Collins and, 665
garbage and, 1430
Gerstein v. Pugh and, 679
good faith exception and, 556
Griffin v. Wisconsin and, 452, 712
habeas corpus and, 556
Hester v. United States and, 763
incorporation of, 618
ISPs and, 416
jailhouse informants and, 838

- journalistic sources and, 859
- Katz v. United States* and, 881–882, 1430
- Kennedy, A., and, 884
- Kyllo v. United States* and, 900
- On Lee v. United States* and, 1132
- Mapp v. Ohio* and, 555, 956
- Marshall, T., and, 973
- McNabb v. United States* and, 991–992
- Michigan v. DeFillipo* and, 1004
- Michigan v. Summers* and, 1006
- Mincey v. Arizona* and, 1014
- Minnesota v. Olson* and, 1015
- national security and, 1071
- National Treasury Employees Union v. Von Raab* and, 1076–1077
- need vs. intrusion test and, 1752
- negative rights and, 144
- New Jersey v. T.L.O.* and, 1086
- newsroom searches and, 1093
- noncitizens and, 380
- obscenity and, 933
- O'Connor v. Ortega* and, 1128
- Ohio v. Robinette* and, 1128
- Olmstead v. United States* and, 1129
- open fields and, 1133
- Payton v. New York* and, 82, 1151
- penumbras and, 1153
- phone numbers and, 1430
- plain view and, 1171
- plenary power doctrine and, 1180
- police and, 1332–1333
- PPA and, 1224
- pre-indictment and, 79
- in prison, 781
- privacy and, 1218, 1219, 1220, 1225, 1429, 1532
- private police and, 1227
- probable cause and, 1234
- property and, 1429
- property law and, 1430
- property seizures and, 1447
- proportionality approach to, 1431
- reasonable suspicion and, 794–795
- reasonableness and, 1433
- Richards v. Wisconsin* and, 1332–1333
- Schneckloth v. Bustamonte* and, 1422
- search and seizure and, 1429, 1539, 1567
- search warrants and, 1433
- seizures and, 1444, 1567
- South Dakota v. Opperman* and, 1498
- standing doctrine and, 1432
- states and, 772
- technology monitoring and, 488–489
- Terry v. Ohio* and, 1627
- thermal imaging and, 1430
- United States v. Brignoni-Ponce* and, 1680
- United States v. Calandra* and, 1680–1681
- United States v. Dionisio* and, 1682
- United States v. Havens* and, 1683
- United States v. Leon* and, 1685–1686
- United States v. Miller* (1976) and, 1687–1688
- United States v. Robinson* and, 1691–1692
- United States v. United States District Court* and, 1696
- United States v. Verdugo-Urquidez* and, 380–381, 1696
- United States v. Watson* and, 1698
- USA PATRIOT Act and, 1149
- use of force and, 1622
- Veronia School District v. Acton* and, 1707
- Vinson Court and, 1757
- War on Terror and, 1095
- Warden v. Hayden* and, 1747
- warrant clause IV and, 1748
- warrantless arrests and, 82
- warrants and, 1751
- Warren Court and, 1757
- Weeks v. United States* and, 1772
- Wilson v. Arkansas* and, 1332–1333
- Wilson v. Layne* and, 1783
- wiretapping and, 123, 177, 1786
- Wolf v. Colorado* and, 1757, 1790
- Writs of Assistance Act and, 1803
- Wyman v. James* and, 1804
- Wyoming v. Houghton* and, 1804
- Zurcher v. Stanford Daily* and, 1823
- Fowler v. Rhode Island*, 289
- Fox, Leon, 316
- Fox's Libel Act, 1440
- Frame of Government, 508
- Framers, 357
 - economic regulation and, 473
 - economic rights and, 476
 - enforcement power and, 613
 - English Bill of Rights and, 503
 - Franklin and, 621
 - free exercise clause and, 623–625
 - habeas corpus, 924
 - judicial review and, 864
 - legislative prayer and, 915
 - Meese and, 997
 - Montesquieu and, 1031–1032
- France
 - Adams, J., and, 37
 - Jefferson in, 845–846
 - judicial review and, 865
 - quasiwar with, 945
 - Quasi-War with, 887
 - XYZ Affair and, 37
- France, Anatole, 307
- France v. United States*, 615
- Franchise, noncitizens and, 1107
- Francis v. Franklin*, 615
- Francis v. Henderson*, 325
- Frank, Jerome
 - Fortas and, 603
 - legal realism and, 913
- Frank, John P., 615–616
 - Emerson and, 498
- Frank, Leo, 69, 772
 - lynching of, 897
- Frank v. Mangum*, 772
- Frankel, Marvin, 1458
- Frankfurter, Felix, 616–620, 1560
 - Baker v. Carr* and, 1275
 - Baldwin and, 103
 - Beauharnais v. Illinois* and, 116
 - Brandeis and, 174
 - Butler v. Michigan* and, 1382
 - Chafee and, 261
 - clear and present danger test and, 312
 - Colegrove v. Green* and, 1275
 - Dennis v. United States* and, 1641
 - Douglas and, 445

INDEX

- Frankfurter, Felix (*cont.*)
Griffin v. Illinois and, 711
 on Hand, 735–736
 Harlan, II, and, 741
Hirabayashi v. United States and, 839
 Hughes Court and, 782
 incorporation doctrine and, 803–804
 on Japanese internment, 840
 legal realism and, 913
Mallory v. United States and, 952
Minersville School District v. Gobitis and, 592, 848, 1364, 1775
Monroe v. Pape and, 1031
 Murphy and, 1048
Naim v. Naim and, 1060
 New Deal and, 1083
 obscenity and, 1117, 1123
 on Palmer raids, 1281
Poe v. Ullman and, 1183
 Rauh and, 1269
 resignation of, 696
 Roberts, O., and, 1364–1365
 Rutledge, W., and, 1389
 selective incorporation and, 618
 on separationism, 987
 Supreme Court appointment of, 50
Sweezy v. New Hampshire and, 17–18
 Vinson Court and, 1718
 warrant clause IV and, 1747
 Warren Court and, 1753
West Virginia State Board of Education v. Barnette and, 595
Wieman v. Updegraff and, 17
Wolf v. Colorado and, 1790
Zorach v. Clauson and, 1822
- Franklin, Benjamin, 620–621
 atheism and, 90
 Bache and, 95
 Chase and, 273
 education and, 1525
 on extremism, 566
 freedom of press and, 1202
 Jefferson and, 845
 Paine and, 1143
 PAS and, 6
- Franklin College, 145–146
 Franklin, James, 621, 1202
Franks v. City of Niles, 399
 Fraser, Matthew N., 124
 Fraternal Order of the Eagles (FOE), 1620
 Fraternity of the Goat, 291
 Fraud
 religion and, 1476
 spam and, 820
 whistleblowers and, 1776
Frauds Exposed (Comstock), 341
Frazee v. Illinois Department of Income Security, 1477
 free exercise clause and, 629
Frazier v. Cupp, 320
 Free conscience, 1537, 1539
 Aristotle and, 1638
 religion and, 1538
 Free exercise, 92–93, 621–626, 1416, 1469, 1802
 application of, 625–626
 Bowen v. Roy and, 168
 Cantwell v. Connecticut and, 222
 Charles II and, 622
 Church of Scientology and, 366–367
 Church of the Holy Trinity v. United States and, 288
 Church of the Lukumi Babalu Aye v. City of Hialeah and, 289–290
 City of Boerne, Texas v. Flores and, 159, 768
 clergy in public office and, 921, 989
 CNS and, 291
 coercion and, 1101
 in colonial America, 622–623
 conscientious objection and, 349–350
 copyright law and, 365–367
 Davis v. Beason and, 396
 defining religion and, 410
 Diversity Immigrant Visa Program and, 427
 doctrine, 626–631
 drafting of, 527, 623–625
 drugs and, 454–455
 due process and, 160
 Employment Division, Department of Human Resources of Oregon v. Smith and, 454, 500, 1263, 1686
 Epperson v. Arkansas and, 511
 esprit de corps and, 1007
 establishment clause v., 531, 540–542
 Everson v. Board of Education and, 550
 First Amendment and, 1548, 1685
 FLSA and, 570–572
 framers and, 623–625
 Frankfurter and, 618–619
 Fuller Court and, 668
 God and, 860
 Graham v. Commissioner of Internal Revenue and, 703
 history of, 118–120, 621–623
 Hughes Court and, 782
 interpretation of, 625–626
 interpreting, 541
 Jones v. Wolf and, 856–857
 Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. United States and, 908
 limitations of, 513, 768
 Locke v. Davey and, 929
 LSD and, 455
 Lyng v. Northwest Indian Cemetery Protective Association and, 624, 939
 Madison and, 944
 military and, 698, 699
 modern definitions of religion and, 411
 Mozert v. Hawkins County Board of Education and, 163, 1044
 neutral laws and, 500
 non-funding provisions and, 153
 O’Lone v. Estate of Shabazz and, 1130
 Orthodox Jews and, 851–852
 polygamy and, 1038
 prisoners and, 1214–1216
 public lands, 939
 public schools and, 1246–1247
 Quinlan and, 1254
 religion and, 1475–1476
 religious ceremonies and, 454
 religious discrimination and, 422
 religious organizations and, 571
 Reynolds v. United States and, 454, 1330
 RFRA and, 630
 rights of conscience v., 624–625
 school prayer and, 1196
 school vouchers and, 1425
 sex education and, 1246

- Shelley v. Kraemer* and, 1470
- state bills of rights and, 136
- state college scholarships and, 536
- statutory religion-based exemptions and, 559
- Stone Court and, 1562
- substantive due process and, 466
- Sunday closing laws and, 1587
- Supreme Court and, 1587
- Waite Court and, 1732–1733
- Welsh v. United States* and, 350, 1693
- West Virginia State Board of Education v. Barnette* and, 656
- Free expression
 - bad tendency test and, 96
 - common law and, 336
 - Universal Declaration of Human Rights and, 1676
- Free love, 649
 - marriage and, 964
- Free needles programs, 759
- Free School Society, 1526
- Free Soilers, 1584
- Free speech, 1417. *See also* First Amendment; Protected speech;
 - Public forums; Speech regulations; Symbolic speech
 - abortion protests and, 12–13
 - absolutism and, 14–15
 - in academia, 1505
 - academic freedom and, 18
 - ACLU and, 47–48
 - Adler v. Board of Education* and, 1361
 - advocacy and, 1415
 - anonymity and, 62–63
 - anti-abortion protest and, 66–67
 - Aristotle and, 1638
 - arts and, 1451
 - autonomy and, 1643
 - balancing approach to, 99–100
 - belief and, 1415
 - Bible and, 129
 - Brandeis and, 174, 1598
 - Brandenburg* incitement test and, 178
 - buffer zone and, 67
 - Burger Court and, 200–202
 - Cantwell v. Connecticut* and, 222
 - captive audiences and, 247
 - Cardozo and, 249
 - cases, ripeness in, 1361
 - categorical approach to, 99, 252
 - Chafee and, 261
 - Cincinnati v. Discovery Network, Inc.* and, 292–293
 - civil rights laws and, 301–304
 - Cohen v. California* and, 321
 - commercial v. noncommercial, 160–161
 - company towns and, 340
 - content neutrality and, 948
 - content-based regulation and, 361–362
 - copyright law and, 764
 - corporations and, 650
 - Cox v. Louisiana* and, 372–373
 - defamation and, 402–405
 - Dennis v. United States* and, 414
 - dissent and, 14
 - distrust of government and, 1643–1644
 - Douglas and, 447
 - draft card burning and, 449
 - early history of, 642–647
 - employment discrimination issues and, 777–779
 - English Bill of Rights and, 507
 - English liberties and, 506
 - fair use doctrine and, 572
 - FCC and, 579
 - FCC v. League of Women Voters* and, 578
 - Feiner v. New York* and, 582, 1512
 - fighting words and, 587–588
 - flag burning and, 589–591
 - Fortas and, 604
 - Fourteenth Amendment and, 647
 - free conduct v., 1515–1516
 - free love and, 649
 - freedom of expression and, 1159
 - Fuller Court and, 668
 - Gentile v. State Bar of Nevada* and, 679
 - Gibson v. Florida Legislative Committee* and, 681
 - Gilbert v. Minnesota* and, 1797
 - GLIB and, 786
 - God and, 860
 - government and, 655–656
 - government employees and, 1513–1515
 - gun ownership and, 720
 - harassment and, 303–304
 - hate crimes and, 749–750, 751–752
 - hate speech ordinances, 750
 - Hazelwood School District v. Kuhlmeier* and, 757
 - heckling and, 758
 - Herndon v. Lowry* and, 784
 - Holmes and, 175, 770, 771
 - implied rights and, 801
 - incorporation doctrine and, 803, 804
 - infliction of emotional distress and, 811
 - intellectual influences on, 815–816
 - intellectual property and, 816
 - intelligent design and, 377
 - intermediate scrutiny test and, 818
 - Internet and, 819
 - Internet filtering and, 824–826
 - invasion of privacy and, 828–829
 - Jackson, R. and, 834–835
 - Kendall and, 884
 - KKK and, 897
 - Konigsberg v. State Bar of California* and, 895
 - La Follette and, 903
 - Lamb's Chapel v. Center Moriches Union Free School District* and, 906
 - legislators', 916–917
 - in limited public forums, 922
 - limits of, 771
 - literature and, 1451
 - Lovejoy and, 935
 - Madison and, 945–946
 - marketplace of ideas theory and, 962, 1449
 - Marshall, T., and, 972
 - Meiklejohn and, 999
 - Milkovich v. Lorain Journal* and, 1009
 - Mill and, 1010
 - Miller* test and, 1012–1013
 - in modern period, 651–657, 655–656
 - MPAA and, 1043
 - national security and, 1072–1074
 - during nineteenth century, 647–650
 - NLRB and, 1066
 - O'Brien* test and, 1113–1114
 - obscenity and, 1115, 1539

INDEX

- Free speech (*cont.*)
 overbreadth doctrine and, 1139
 Pickering v. Board of Education and, 1166
 picketing and, 1166
 political correctness and, 1188–1189
 pornography and, 47, 304, 943
 prisoners and, 1216–1217
 in private corporations, 632–633
 private property and, 926–927
 profanity and, 1506
 professional advertising and, 1235
 protected, 1556
 protection of, 1641–1644
 public concern standard and, 982
 Rawls on, 1272–1274
 religion and, 1505
 reputation and, 680
 Salvation Army and, 1396
 Schenck v. United States and, 47, 1281, 1282
 school vouchers and, 1425
 self-fulfillment and, 1449
 self-governance and, 994, 1449, 1642
 shopping centers and, 1474, 1536, 1544
 slavery and, 1483, 1484, 1485
 standing in, 1520–1521
 state constitutions and, 1536
 Stevens and, 1556
 student activity fees and, 1574–1575
 for students, 1506–1507
 substantive due process and, 466
 teachers and, 18–19
 Terminiello v. Chicago and, 1512
 theory, 648–650, 816
 threats and, 1652–1653
 Tony and Susan Alamo Foundation v. Secretary of Labor
 and, 1660
 two-tiered theory of, 1671
 United Public Workers v. Mitchell and, 1361
 United States v. Thirty-Seven Photographs and, 1678
 universities and, 1698
 unprotected, 1556
 U.S. Constitution and, 353
 viewpoint discrimination and, 1714–1717
 Vinson Court and, 1719
 violence and, 1509–1513
 vulgar speech and, 1248–1249
 during war, 262
 Warren Court and, 1753
 Watts v. United States and, 1769
 Whitney v. California and, 1779–1780
 in workplace, 1507–1508
 World War I and, 1794
 zoning and, 1821
Free Speech and Its Relation to Self-Government (Meiklejohn),
 999, 1451
Free Speech Coalition, 83
Free Speech for Me and Not for Thee: How the American Left and
 Right Relentlessly Censor Each Other (Hentoff), 760
Free Speech in the United States (Chafee), 261, 498
“Free Speech in Wartime” (La Follette), 903
Free Speech League, 1795
Free Thinkers Society, 1292
Freedman v. Maryland, 1042, 1499
 movie censorship and, 669
 prior restraints and, 1210
 prompt judicial review and, 926
 Vance v. Universal Amusement Co., Inc. and, 1707
Freedman’s Savings and Trust Company, 448
Freedom
 absolute, 262
 American Republic and, 126–127
 preferred, 216
Freedom and the College (Meiklejohn), 998
Freedom from Religion Foundation v. Thompson, 398
Freedom of Access to Clinic Entrances (FACE) Act, 181,
 633–634, 1172
 Internet and, 819–820
Freedom of Access to Clinic Entrances Act (FACE Act),
 66–67
Freedom of assembly, 634
 Aristotle and, 1638
 Cox v. Louisiana and, 372–373
 Cox v. New Hampshire and, 373
 Harlan, I, and, 740
 KKK and, 753–754
 North Carolina Constitution of 1776, 1111
 picketing and, 1166
 slavery and, 1484
 for students, 1506–1507
 substantive due process and, 466
Freedom of association, 75, 304, 634–636, 636, 1363
 Bell Terre v. Boraas and, 120
 Bible and, 129
 civil rights laws and, 304
 Douglas and, 446
 gang ordinances and, 675
 Gibson v. Florida Legislative Committee and, 681
 Harlan, II, and, 742
 implied rights and, 801
 NAACP v. Alabama and, 1057
 New York ex rel. Bryant v. Zimmerman and, 1087
 right to travel and, 886–887
 terrorism and, 1624
Freedom of conscience
 Rawls on, 1272–1273
 West Virginia Board of Education v. Barnette and, 782
Freedom of contract, 636–637
 Lochner v. New York and, 781–782
Freedom of expression, 1159–1164, 1507, 1630
 under colonial charter, 326–327
 communism and, 1051
 Douglas and, 446
 Emerson and, 498–499
 Freedman v. Maryland, 1042
 Harlan, II, and, 742
 in international context, 637–640
 in modern period, 655–657
 museums and, 1051–1052
 noncitizens and, 1105
 nude dancing and, 523
 privacy and, 1220
 Wisconsin v. Mitchell and, 1787
Freedom of Information Act of 1966 (FOIA), 310, 641
 ASNE and, 661–662
 DHS and, 415–416
 government operations information and, 20
 journalistic sources and, 859
 national security and, 1071
 sunshine laws and, 641–642
Freedom of Information Committee, 661

Freedom of press, 353, 1201–1207, 1353–1354. *See also*

Broadcasters
abolitionism and, 648
access and, 661–662
Bill of Rights and, 139
Blackstone on, 151
Burger Court and, 201–202
Constitutional Convention of 1787 and, 358, 1263, 1264, 1265
corporate speech and, 650
early history of, 642–647
electronic media and, 663
FCC v. League of Women Voters and, 578
Florida Star v. B.J.F. and, 596, 1261
Fortas and, 604
Fourteenth Amendment and, 647
Franklin and, 620–621
freedom of expression and, 1163
gag orders and, 631–632
Hamilton and, 733
Harlan, I., and, 739–740
Houchins v. KQED, Inc. and, 779
Hughes and, 784
incorporation doctrine and, 804
Jamison v. Texas and, 838
journalistic sources and, 859
libel and, 660–661
Lilborne and, 920
Long and, 934
Lovejoy and, 935
Madison and, 946
media access and, 994
media access to judicial proceedings and, 995
media access to military operations and, 995–996
media liability and, 996
Meiklejohn and, 1000
Miami Herald Publishing Co. v. Tornillo and, 1003
Miller test and, 1012–1013
Mills v. Alabama and, 1014
Mitchell and, 1026
in modern period, 658–664
Near v. Minnesota and, 1081
Nebraska Press Association v. Stuart and, 1082
during nineteenth century, 647–650
no prior restraint and, 647
North Carolina Constitution of 1776, 1111
palladium of liberty and, 137
Pittsburgh Press v. Human Relations Commission and, 330
prior restraints and, 659, 1209–1213
privacy v., 661
rape victims and, 596
reporter's privilege and, 663–664
right to fair trial and, 631–632, 662
Sedition Act and, 38
sexual expression and, 659–660
Sherman and, 360
slavery and, 1484
state bills of rights and, 137
Stewart, P., and, 1560–1561
Sunday Times v. United Kingdom, 639
taxes and, 715
U.S. Constitution and, 353–354
Virginia Declaration of Rights and, 1723
voire dire and, 632
Warren Court and, 1754
Zenger and, 1814–1816

Freedom of religion. *See also* Religious liberty

Anne Hutchinson trial and, 61–62
belief-action and, 119
Bible and, 129
Board of Education, Kiryas Joel Village School District v. Grumet and, 158–159
Church of the Lukumi Babalu Aye v. City of Hialeah and, 368
in colonial America, 508
under colonial charter, 326–327
colonial charters and, 327–328
copyright law and, 365–367
Declaration of Independence and, 847
dissent and, 136
in England, 136
equal protection clause and, 513
Follett v. Town of McCormick and, 599–600
Jamison v. Texas and, 838
Jefferson and, 845, 847
Jehovah's Witnesses and, 848–850
Judaism and, 851–853
Madison and, 624, 944
Maryland Toleration Act and, 975–976
McDaniel v. Paty and, 989
in military, 1303–1304
Minersville School District v. Gobitis and, 592
Murray and, 1049–1050
Muslims and, 1051–1052
New Hampshire Constitution of 1784 and, 1085
O'Lone v. Estate of Shabazz and, 1130
religion clauses and, 542
RLUIPA and, 160, 1307–1308
separationism v., 542
Souter and, 1496
states and, 1548–1549
West Virginia Board of Education v. Barnette and, 802, 1364
“Freedom of Speech” (Cato), 994
Freedom of Speech (Chafee), 261
Freedom of Speech in the United States (Zechariah), 642
sedition and, 644
Freedom of speech. *See* Free speech
“Freedom of the Press under the Burger Court”
(Emerson), 499
Freedom Riders, 348
Freedom rides, 959
Freedom's Fetters (Smith), 642
Freeman v. Hewitt, 1391
Free-market principles, individual privacy v., 346
Freer, Samuel, 733
Freiler v. Tangipahoa, 377
Fremont, John C., 146
Mormons and, 1038
slavery and, 1647
French Declaration of the Rights of Man and the Citizen, 846,
1204, 1638–1639
freedom of expression and, 637
French Parliament, 865
French Revolution
civil rights and, 1638–1639
Jefferson and, 846
Republicans and, 36
French Terror, 1051
Freud, Sigmund, 1035
Freund, Ernst, 1795, 1796
clear and present danger test and, 658
Holmes and, 771

INDEX

- Freund, Ernst (*cont.*)
 New Deal and, 1083
 police power and, 1187
Freund, Paul A., 664–665
Frick v. Webb, 1108
Fried, Charles, 1630
Friedan, Betty, 1062
 NOW and, 1068
Friedman, Milton, 1528
Friedman v. Board of County Commissioners, 371
Fries, John, 274
Frisbie v. Collins, 665–666
Frisby v. Schultz, 666
 picketing and, 1167
Frisking, 794–795, 1431, 1569–1570. *See also* Stop and frisk
 doctrine
 seizure and, 1444
 Terry v. Ohio and, 1627
Frivolous issues, 61
Frohwerk v. United States, 97
 Abrams v. United States and, 13
 clear and present danger test and, 1795
 freedom of press and, 658
 Holmes and, 771
 incitement of criminal activity and, 652
“From Establishment to Freedom of Public Religion” (Witte), 528
Frontiero v. Richardson, 1501
 ERA and, 521
 gender and, 518
 Ginsburg and, 687
 Powell, Lewis, and, 1194
Frost, Robert, 998
Frothingham v. Mellon, 596
 generalized grievance and, 1609
Fruit of the poisonous tree
 exclusionary rule and, 557, 666–667
 eyewitness identification and, 567–568
 Nix v. Williams and, 1097
FTC. *See* Federal Trade Commission
FTC v. Cement Institute, 799
FTCA. *See* Federal Torts Claim Act
Fuchs, Klaus, 1377
Fuck, 321
“Fuck the Police” (NWA), 764
Fuentes v. Shevin, 463
Fugitive Slave Act, 7, 353, 1484, 1585
 Constitutional Convention of 1787 and, 358–359
 personal liberty laws and, 1154
 repeal of, 452
 Sumner and, 1584
 Taney and, 1589
 Taney Court and, 1607
Fujii v. California, 1108
Fulgham v. State, 434
Full faith and credit clause, 406
 same-sex marriage and, 1401
Fuller Court, 667–668
Fuller, Melville, 667–668, 1017
 Quick Bear v. Leupp and, 1253
Fuller, Millard, 1503
Fullilove v. Klutznick, 205
Fulminate, Oreste, 320
Fulminate v. Arizona, 320
Fundamental Constitutions of Carolina, 438
Fundamental fairness, 608
Fundamental rights
 compelling state interest and, 340
 education and, 612
 explicit, 612
 family and, 608–609
 Fourteenth Amendment and, 612, 1328
 Fuller Court on, 668
 Goldberg and, 697
 selective incorporation of, 608
 substantive due process and, 464
 suspect categories and, 517–518
Fundamental creationism, 1616
Fundamentalists, 1425
Fundraising, NRA and, 1070
Funeral leave, ERISA and, 1408
Furman v. Georgia, 223, 225, 231, 385, 669, 684
 Amsterdam and, 60
 arbitrariness and, 236
 death penalty statutes after, 228
 Eighth Amendment and, 232, 234–235
 English Bill of Rights and, 503
 Fourteenth Amendment and, 232
 Gardner v. Florida and, 675
 Gregg v. Georgia and, 710
 guided discretion statutes and, 717
 mandatory death sentences and, 953
 McGautha v. California and, 990
 Powell, Lewis, and, 1195
 proportionality and, 245
 sentencing in, 227
 Stewart, P., and, 1560
 White, B., and, 1779
Future dangerousness, 109–110
 Estelle v. Smith and, 543
FW/PBS, Inc. v. City of Dallas, 669–670
 prompt judicial review and, 926
- ## G
- Gaffney, Edward, 128
Gag orders
 Burger Court and, 202
 conditions for, 632
 freedom of press and, 662
 injunctions and, 1213
 in judicial proceedings, 671–672
 Nebraska Press Association v. Stuart and, 631–632
 participant, 671
 Rust v. Sullivan and, 914
Gag rules, 672–674
 AASS and, 46
 on abolitionists, 648
 anti-abolitionist, 66
 anti-slavery, 302
 Giddings and, 681
Gage, Matilda Joslyn, 65
Gainer, Ronald L., 381
Gallagher v. Crown Kosher Super Market of Massachusetts, 1587
 Frankfurter and, 619
 Orthodox Jews and, 851–852
Gallatin, Albert, 37
Gallup Poll, death penalty and, 240
Galton, Francis, 545
Gambino v. United States, 1598
Gambling

- Fifth Amendment and, 1684
- IRS and, 960
- Katz v. United States* and, 882
- Marchetti v. United States* and, 1684
- Posadas de Puerto Rico v. Tourism Company* and, 1191–1192, 1708
- Revenue Act of 1951 and, 1684
- United States v. Kahriger* and, 1684
- as victimless crime, 1709
- Gandhi, Mahatma
 - Chavez and, 274
 - Garrison and, 676
 - King and, 889
 - nonviolence and, 412
- Gang ordinances, 674–675
- Gangs
 - Chicago v. Morales* and, 278–279
 - drugs and, 1744
 - incarceration and, 1463
 - Lanzetta v. New Jersey* and, 907
 - prison, 1257
- Gannett Co. v. DePasquale*, 1195
- Ganulin v. United States*, 399
- Garbage, 1430
 - California v. Greenwood* and, 215
 - reasonable expectation of privacy and, 882
- Garcetti v. Ceballos*, 421
 - public concern standard and, 982
- Gardner, George K., 592
- Gardner, James A., 1545
- Gardner v. Florida*, 235, 675–676
- Gardner v. Village of Newburgh*
 - economic rights and, 477
 - takings clause and, 1603
- Garland, Charles, 103
- Garland, Judy, 1567
- Garland v. Torre*, 663–664
- Garner, John Nance, 419
- Garner, Tyron, 908
- Garrett v. Estelle*, 21–22
- Garrison v. Louisiana*, 1754
- Garrison, William Lloyd, 5, 7, 676, 1485, 1486
 - AASS and, 45
 - Douglass and, 448
 - Petition Campaign and, 1155
 - Phillips and, 1158
- Garvey, Marcus, 1262
- Gas chamber, 240, 244
 - Gomez v. United States* and, 384
- Gates, Henry Louis, 754
- Gates, Lance, 793
- Gates, Sue, 793
- Gaudium et spes*, 254
- Gault, Gerald, 812
- Gay and Lesbian Advocates and Defenders (GLAD), 1401, 1402
 - Lamda and, 905
- Gay and lesbian rights, 676–678
 - ACT UP and, 26
 - Bryant and, 190
 - forced speech and, 601
 - Fourteenth Amendment and, 885
 - Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston* and, 170, 785–786, 1363–1364
 - immigration and, 773
 - Kunstler and, 899
 - Lambda and, 904
 - Lawrence v. Texas* and, 908–909, 1328–1329, 1338, 1369, 1371–1372
 - Log Cabin Republicans and, 932–933
 - movement for, 1400
 - Rawls on, 1272–1274
 - same-sex marriage and, 966
 - sodomy and, 885
- Gay Liberation Front, 1567
- Gay Men's Health Crisis, 25
- Gay Pride Parades, 1405
- Gay Teachers Association v. Board of Education*, 1409
- Gayanashgowa, 53
- Gaylor v. United States*, 1067
- Gays. *See* Homosexuals
- GBMI. *See* Guilty but mentally ill
- Geary Act, 260
- Gender
 - Anne Hutchinson trial and, 61–62
 - employment discrimination and, 777–779
 - equal protection and, 518
 - ERA and, 519–522
 - hate crimes and, 303, 748–751, 751–752
 - hate speech and, 752–755
 - jury selection and, 871
 - middle scrutiny test and, 612–613
 - private discriminatory association and, 1226
 - rape and, 1262
- General Accounting Office, 435–436
- General Advertiser*, 95
- General deterrence, 1645
- General Intelligence Division, 1280
- General Managers Association (GMA), 1472
- General Order No. 38, 552
- General Staff College, 418
- General Union for the Promotion of the Christian Sabbath (GUPCS), 1588
- General warrants, 1433, 1435, 1751
 - Otis and, 1138
 - probable cause and, 1234
 - Tudors and, 1748
 - Virginia Declaration of Rights and, 1723
- General Writ, 1589
- Generalist creationism, 1616
- Generality, vagueness doctrine and, 1705
- Generalized grievance, 1609
- Generic terms, in trademarks, 1662–1663
- Genesis*, 1329
 - belief in, 376
- Genetic disorders, 431
- Geneva Conventions of 1949, 1346
 - Abu Ghraib and, 16
 - Guantanamo Bay and, 60, 716
 - Hamdan v. Rumsfeld* and, 355
 - War on Terror and, 1094
- Genital mutilation, 1465
 - social groups and, 89
- Gentile Christianity, 1035
- Gentile, Dominic, 679
- Gentile v. State Bar of Nevada*, 420, 679
 - gag orders and, 671
 - injunctions and, 1213
- George Foxx Digg'd Out of His Burrovvves* (Williams), 1782
- George Washington University National Law Center, 878

INDEX

- Georgia
 - aggravating factors and, 232
 - Doe v. Bolton* and, 433
 - general warrants and, 1751
 - “In God We Trust” and, 1067
 - literacy tests and, 1729
 - primary election votes in, 1275
 - Reid v. Georgia* and, 1291–1292
 - self-incrimination and, 1453
 - undocumented migrants and, 1675
 - voting in, 1729–1730
- Georgia Act, 396
- Georgia Controlled Substances Act, 347
- Georgia House of Representatives
 - Bond and, 161–162
- Georgia v. McCollum*, 115
 - peremptory challenges in, 878
- Georgia v. Stanton*, 272
- Gerber, Henry, 1566
- German measles, 8
- German-American Bund, 69
- Germaneness analysis, 1674
- Gerry, Elbridge, 139–140, 1263, 1277
 - Bill of Rights and, 815
 - civil trials and, 359–360
 - Constitutional Convention of 1787 and, 359, 1263
 - judicial review and, 864
 - Ninth Amendment and, 1096
- Gerrymandering, 1277
- Gerstein v. Pugh*, 82, 679–680, 1362
 - Ker-Frisbie rule and, 666
 - probable cause and, 1234
- Gertz, Elmer, 403
- Gertz v. Robert Welch, Inc.*, 39, 403, 680
 - Burger Court and, 201–202
 - Emerson and, 499
 - false light invasion of privacy and, 574
 - Milkovich v. Lorain Journal* and, 1009
 - public figures and, 1243
- Gesell, Gerhard, 1075
 - New York Times v. United States* and, 1089
- Getty Images News Services v. Department of Defense*, 996
- Gettysburg Address, 922, 1275
 - civil religion and, 298
 - equal protection and, 514
- Giard College, 1712
- Gibbons v. Ogden*, 1589
 - Marshall, J., and, 970
 - plenary power doctrine and, 1179
- Gibson, John Bannister, 864
- Gibson v. Berryhill*, 800
- Gibson v. Florida Legislative Investigation Committee*, 681
- Giddings, Joshua, 681
- Gideon, Clarence, 682–683, 1764
 - Fortas and, 603
 - Miranda v., 1021
- Gideon v. Wainwright*, 682, 1021, 1544
 - Betts v. Brady* and, 618, 1350
 - Black, H., in, 318, 682, 1373
 - Boykin v. Alabama* and, 172
 - Douglas v. California* and, 442, 1350
 - Fortas and, 603, 683, 1350
 - Harlan, I, and, 740–741
 - Harlan, II, and, 741, 742
- incorporation doctrine and, 803
- Powell v. Alabama* and, 1192
- procedural due process and, 463, 1358
- right to counsel and, 318, 682, 683, 1346–1347
- Warren and, 317–318, 1562, 1764
- Warren Court and, 1759, 1760
- Giglio v. United States*, 683
- Gilbert, Humphrey, 1722–1723
- Gilbert v. California*
 - Kirby v. Illinois* and, 892
 - Stewart, P., and, 1559
 - United States v. Wade* and, 1697
- Gilbert v. Minnesota*, 1597
 - Brandeis and, 174–175, 176
 - free speech and, 1797
- Gilded Age
 - freedom of association and, 634–635
 - Salvation Army and, 1396, 1397
- Gillette v. United States*, 1143, 1304, 1305, 1474
 - conscientious objection and, 349–350
- Gilmore, Gary, 684
- Gilmore v. Taylor*, 407
- Gilmore v. Utah*, 230
- Ginsberg v. New York*, 684–685, 1316–1317
 - free speech and, 284
 - Miller test and, 1012
 - MPAA and, 1043
 - obscenity and, 1042, 1119
- Ginsburg, Douglas
 - Kennedy, A., and, 885
 - Stenberg v. Carhart* and, 1322–1324
- Ginsburg, James Steven, 686
- Ginsburg, Jane Carol, 686
- Ginsburg, Martin, 686
- Ginsburg, Ruth Bader, 685–688
 - ACLU and, 50
 - on equal protection clause, 688
 - on fair use doctrine, 572
 - Miller v. Johnson* and, 1278
 - National Endowment for the Arts v. Finley* and, 1065
 - Supreme Court appointment of, 50
 - United States v. Virginia* and, 518
 - Virginia v. Black* and, 1724–1725
 - White, B., and, 1779
- Ginzburg, Ralph, 1118
- Ginzburg v. United States*, 688–689, 1118, 1282
 - A Book Named “John Cleland’s Memoirs of a Woman of Pleasure” v. Massachusetts* and, 1–2
 - FW/PBS, Inc. v. City of Dallas* and, 670
 - Mishkin v. New York* and, 1023
- Girard, Stephen, 1712
- Girard Will* case, 634
- Girouard v. United States*, 1462
 - naturalization and, 1142
 - United States v. Schwimmer* and, 1692–1693
- Gitlow, Benjamin, 176, 653, 689–690, 1186
 - incorporation doctrine and, 804
- Gitlow v. New York*, 68, 74, 142, 689–690, 1281, 1282, 1510, 1797
 - Bill of Rights and, 1632
 - Brandeis and, 176
 - due process incorporation and, 607
 - Emerson and, 498
 - film licensing and, 1041
 - Fourteenth Amendment and, 1003
 - freedom of association and, 635

- freedom of press and, 658
- Harlan, I, and, 740
- incitement of criminal activity and, 653–654
- incorporation doctrine and, 803, 804
- McReynolds and, 993
- national security and, 1073
- police power and, 1186
- substantive due process and, 466
- Vinson and, 414
- Givhan v. Western Line Consolidated School District*, 982
- GLAD. *See* Gay and Lesbian Advocates and Defenders
- Glass v. Louisiana*, 485
- Glasser, Ira, 1334
- Glen Theatre, 111
- GLIB. *See* Irish-American Gay, Lesbian and Bisexual Group of Boston
- Glickman v. Wileman Bros. & Elliot*, 1650
- Global positioning system (GPS), 488
- Global War on Terror (GWOT), 16, 67
 - Amnesty International and, 60
 - Ashcroft and, 84
- Globe Newspaper Co. v. Superior Court*, 1336, 1337
- Glorious Revolution, 357, 506, 690–691, 1348
 - English Bill of Rights and, 503
 - English Toleration Act and, 504
 - Magna Carta and, 951
 - Maryland Toleration Act and, 976
- Glynn, Martin, 248
- G.M. Leasing v. United States*
 - Florida v. White* and, 598
- GMA. *See* General Managers Association
- G-Men, The*, 775
- Go Directly to Jail: The Criminalization of Almost Everything* (DeLong), 381
- Go-Bart Importing v. United States*, 209
- Gobitis, Lillian, 591
- God. *See also* Supreme being
 - belief in, office holding and, 1314–1315
 - judicial proceedings and, 860–861
- God and Man in Washington* (Blanshard), 56
- Godfrey v. Georgia*, 223, 241, 386, 691–692
- Godinez v. Moran*, 692
 - competency to stand trial and, 468
- Goesaert v. Cleary*, 1391
- Gold, Harold, 1281, 1377–1378
- Gold rush, 259
- Goldberg, Arthur J., 693–698
 - ambassadorship of, 697
 - Amsterdam and, 60
 - appointment of, 695–696
 - Bill of Rights and, 1633
 - Breyer and, 182
 - Burger Court and, 198
 - on death penalty, 240
 - Dershowitz and, 416
 - Griswold v. Connecticut* and, 713, 1225–1226
 - nomination of, 696
 - privacy and, 1226
 - resignation of, 696
 - Roth v. United States* and, 2
 - Warren Court and, 1760
 - Zenger and, 1816
- Goldberg v. Kelly*, 692–693
 - procedural due process and, 609
- Wyman v. James* and, 1804
- Golden Fleece of the Month Award, 788
- Goldman, Emma, 1795
 - Baldwin and, 102
 - Palmer and, 1144
- Goldman, Simcha, 698
- Goldman v. United States*, 1429
 - Olmstead v. United States* and, 1130
- Goldman v. Weinberger*, 23, 350, 698–699, 1303, 1470
 - free exercise clause and, 629
 - military law and, 1007
 - yarmulkes and, 852
- Goldsboro Christian Schools, Inc. v. United States*, 158–159
- Goldwater, Barry, 1287–1288, 1421
 - JBS and, 854
- Gomez v. United States*, 384
- Gomillion v. Lightfoot*, 1277
 - Frankfurter and, 619
- Gong Lum v. Rice*, 1442
 - Plessy v. Ferguson* and, 1181
- Gonzales, Alberto
 - Ashcroft and, 85
 - torture and, 16
- Gonzales v. Centro Espirita Beneficiente Uniao do Vegetal*, 455
- Gonzales v. Oregon*, 88
- Gonzales v. Raich*, 1557
- Good faith exception, 555–556
 - Illinois v. Krull* and, 793
 - Michigan v. DeFillipo* and, 1004–1005
 - United States v. Leon* and, 1685–1686
 - Younger v. Harris* and, 868
- Good Friday, 398–399
- Good News Club v. Milford Central School*, 417, 699–700, 1230, 1496
 - Breyer and, 183
 - EAA and, 133
 - equal access and, 535
 - Lamb's Chapel v. Center Moriches Union Free School District* and, 907
 - viewpoint discrimination and, 1715
- “Good Times” (Chic), 764
- Gooding v. Wilson*, 587
- Goodridge v. Department of Public Health*, 1402, 1583
 - gay and lesbian rights and, 678
 - GLAD and, 905
- Google, 823
- Goold, Thomas, 107–108
- Gore, Al, Jr.
 - gun control and, 719–720
 - O'Connor and, 1127
- Gorham, Nathaniel, 359
- Goss v. Lopez*, 282
- Gotti, John, 1335
- Gouled v. United States*, 1747
- Government
 - arbitrary, 138
 - Calder v. Bull* and, 212
 - Chafee on, 262
 - collateral consequences and, 325
 - constitutional amendments and, 142
 - distrust of, 1643–1644
 - entrapment by estoppel and, 510, 1260
 - entrenchment of, 1644
 - FBOs and, 270
 - incompetence of, 1644
 - intolerance of, 1644

INDEX

Government (*cont.*)

- labor unions and, 928
 - liberty and, 833
 - limitations, 145, 1580–1584
 - litigation against, 596
 - misbehavior, 145
 - Mormons and, 1036–1040
 - neutrality, 655–657
 - operations information, 20–21
 - Pickering v. Board of Education* and, 702, 1260
 - powers of, 38–39
 - public communications campaigns and, 701–702
 - regulation, 782
 - restrictions on, 112
 - secrets, 1212
 - seditious libel and, 1439
 - during war, 552
 - wrongdoing, 415
- Government funding
- abortion and, 672–674, 746–747, 951
 - equal access and, 535
 - Golden Fleece of the Month Award and, 788
 - for HIV/AIDS programs, 759
 - of legislative chaplains, 966–967
 - for parochial schools, 151–152, 549
 - parochial schools and, 542
 - of private organizations, 927
 - of religious organizations, 918, 929–930, 1045–1046
 - of religious schools, 785, 1024–1025, 1525–1529
 - of speech, 700–701
- Government Operations Committee, 322–323
- Government Printing Office, 984
- Government speech, 701–703
- employees and, 982
- GPS. *See* Global positioning system
- Gradual Abolition Act, 53
- Graduation
- prayers at, 1416
 - school prayer and, 1198
- Graham, Billy, 1757
- Becker Amendment and, 118
- Graham, Franklin, 1053
- Graham, Katherine, 703
- Graham v. Commissioner of Internal Revenue*, 703
- Graham v. Richardson*, 41, 294
- Graham-Levin-Kyl amendment, 1095
- Gramm-Leach-Bliley, 347
- Grammy Awards, 765
- Grand juries, 703–704
- Clarendon and, 705
 - in colonial America, 704–705, 740
 - Counselman v. Hitchcock* and, 668
 - exclusionary rule and, 1680–1681
 - Hale v. Henkel* and, 730
 - Hurtado v. California* and, 787
 - implied rights and, 801
 - incorporation doctrine and, 803
 - indictments, 705–708
 - investigations, 707–708
 - Menna v. New York* and, 1000
 - private lawyers and, 704
 - procedural due process and, 462–463
 - scope of, 707
 - secrecy of, 708
 - subpoenas and, 707–708
 - targets of, 706
 - transactional immunity and, 706
 - United States v. Calandra* and, 1680–1681
 - United States v. Washington* and, 1697–1698
 - veil of secrecy and, 706
 - venire and, 871
- Grand Rapids School District v. Ball*, 1527
- Americans United and, 56–57
 - establishment clause and, 700
 - Powell, Lewis, and, 1194
- Grandfather clause, 1571
- White Court and, 1777
- Granger, Gideon, 1587
- Grant, Jedediah, 1040
- Grant, Ulysses S.
- Bingham and, 147
 - Dominican Republic and, 1585
 - Douglass and, 448
 - education and, 1526
 - Morrison and, 1732
 - Order No. 11 and, 709
 - School Question and, 152
 - Simpson and, 146
- Grants, 1065
- Granzeier v. Middleton*, 398
- Grateful Dead, The, 185
- Gratz v. Bollinger*, 30–31, 1285, 1443
- Ginsburg and, 688
 - Kennedy, A., and, 886
 - O'Connor and, 1127
- Grau v. United States*, 1364, 1366
- Gravel v. United States*
- legislative free speech and, 916
- Gray, Fred D., 1501
- Gray, Horace, 1591
- Gray v. Maryland*, 344
- Gray v. Sanders*, 1275, 1279
- Grayned v. City of Rockford*
- overbreadth doctrine and, 1139
 - picketing and, 1167
 - vagueness and, 1705
- Grayson, Cary, 1785
- Great Awakening, 108
- Great Binding Law, 53
- Great Depression. *See* Depression
- Great Disappointment, 1461
- Great Dissenter. *See* Harlan, John Marshall, I
- Great Petition Campaign. *See* Petition Campaign
- Great Sedition Trail, 1488
- Great Society
- Fortas and, 604
 - Marshall, T., and, 973
- Great Writ. *See* Habeas corpus
- Greater New Orleans Broadcasting Association v. United States*, 1650
- Greater-includes-the-lesser argument, 1708
- Greely, Horace, 1585
- Green, Bob, 190
- Green v. Georgia*, 235, 709
- Greenawalt, Kent, 1309
- hate speech and, 754
- Greenberg, Clement, 1051
- Greene v. McElroy*, 1270
- Greenglass, David, 1377–1378
- Greenmoss Builders, 405

- Greenspun, H.M., 306
- Greer v. Spock*
- military law and, 1007
 - public forum doctrines and, 1244
- Gregg v. Georgia*, 223, 225–226, 241, 385, 710
- Amsterdam and, 60
 - arbitrariness and, 236
 - cruel and unusual punishment and, 231–232, 384
 - Eighth Amendment and, 24s
 - English Bill of Rights and, 503
 - Furman v. Georgia* and, 669
 - Godfrey v. Georgia* and, 691
 - guided discretion statutes and, 717
 - Jurek v. Texas* and, 866
 - Marshall, T., and, 973
 - McGautha v. California* and, 990
 - Powell, Lewis, and, 1195
 - proportionality and, 245
 - Stevens and, 1558
 - White, B., and, 1779
- Gregory, Thomas, 1518
- Gregory XVI, Pope, 253
- Grenada invasion
- Flynt and, 599
 - media access and, 995
- Griffin, Robert, 695
- Griffin v. Breckenridge*
- Bray v. Alexandria Women's Health Clinic* and, 180
- Griffin v. California*, 710
- Griffin v. Illinois*, 710–711, 1381, 1544
- Griffin v. Wisconsin*, 452, 712
- Griffith, D.W., 896
- Griffiths, Fre Le Poole, 812
- Griggs v. Duke Power Co.*, 301
- Grimké, Angelina, 302
- free speech and, 648–649
- Grimke, Frederick, 1207
- Grimké, Sarah, 302
- free speech and, 648–649
- Griswold, Erwin, 498
- Griswold, Estelle, 499
- Griswold Inn v. State*, 399
- Griswold v. Connecticut*, 9, 87, 250, 712–714, 1411, 1479, 1493, 1521, 1531, 1582
- birth control and, 147–148, 1320
 - Bork and, 165
 - Brandeis and, 177
 - Burger Court and, 198
 - common law and, 335–336
 - Douglas and, 444, 499, 713, 1337
 - Eisenstadt v. Baird* and, 484, 1324, 1368–1369
 - Emerson and, 499
 - euthanasia and, 547
 - Goldberg and, 697, 1225–1226
 - Harlan, II, and, 742–743
 - implied rights and, 802, 1320
 - incorporation doctrine and, 742
 - NARAL and, 1062
 - Ninth Amendment and, 1097
 - Paris Adult Theatre v. Slaton* and, 1148
 - penumbras and, 1153
 - Poe v. Ullman* and, 1183
 - precedent of, 714, 1320
 - privacy and, 1219–1220, 1225–1226, 1590
 - privileges and immunities and, 1232
 - quartering of troops and, 1253
 - right of privacy and, 336, 1337
 - Roe v. Wade* and, 1220, 1368, 1760
 - sex and, 1219–1220
 - Skinner v. Oklahoma* and, 713, 1320
 - Souter and, 1497
 - substantive due process and, 466, 608, 1634
 - Taft Court and, 1598
 - Tileston v. Ullman* and, 1656
 - Warren and, 1765
 - Warren Court and, 1759
 - White, B., and, 1779
 - zone of privacy and, 1003
- Grokster, 823, 1002
- Grosjean v. American Press Co.*, 714–715
- corporate speech and, 650
- Gideon v. Wainwright* and, 682
- Long and, 934
 - self-government and, 994
- Gross, Oren, 495
- Grove v. Mead Dist. No. 354*, 1246
- Gruber, Jacob, 1485
- Grutter v. Bollinger*, 19, 30–31, 1285
- ADL and, 70
 - Breyer and, 184
 - equal protection and, 517
 - Kennedy, A., and, 886
 - O'Connor and, 1127
 - Powell, Lewis, and, 1194
 - race-based classifications and, 612
 - Stevens and, 1558
- Guantanamo Bay, 715–716, 1636
- emergency powers and, 495–496
 - enemy combatants and, 1347
 - Hamdi v. Rumsfeld* and, 731, 842
 - indefinite detention and, 805
 - media access and, 996
 - national security and, 1071
 - torture in, 60
 - U.S. Constitution and, 355
 - War on Terror and, 1095
- Guernica* (Picasso), 1162
- Guest v. Leis*, 1224
- Guided discretion statutes, 717
- Guilt. *See also* Reasonable doubt
- adjudicating, 164
 - admission of, 164–165
 - beyond reasonable doubt, 831
- Guilty but mentally ill (GBMI), 717–718
- insanity defense and, 814
- Guilty pleas, 718–719
- Mabry v. Johnson* and, 941
 - North Carolina v. Alford* and, 1111
 - Santobello v. New York* and, 1413
 - United States v. Tateo* and, 1694
 - withdrawn, 719, 941
- Guinn and Beal v. United States*, 1571
- White Court and, 1777
- Gun Control Act of 1968, 720
- NRA and, 1070
- Gun-Free School Zones Act, 1589
- Gunn, Paul, 633
- Gunnerud v. State*, 1534
- Guns, 1684. *See also* Assault rifles
- Branch Davidian Church, 1731

INDEX

Guns (*cont.*)

- concealed, 1070
- control of, 719–723
- execution by, 244
- manufacturers of, 722–723
- McReynolds and, 993
- NRA and, 1070–1071
- Omnibus Crime Control and Safe Streets Act of 1968 and, 1132
- Operation Rescue and, 1134
- Orozco v. Texas* and, 1137
- ownership, 720
- pardons and commutations and, 1146
- Pennsylvania v. Scott* and, 1152
- protective pat-down searches, 794–795
- public policy and, 720–721
- Second Amendment and, 721–722
- stop and frisk and, 1567–1570
- United States v. Lovasco* and, 1686
- United States v. Miller* (1939) and, 1687
- United States v. Ramirez* and, 1690
- waiting period, 721

Gunther, Gerald, 736

GUPCS. *See* General Union for the Promotion of the Christian Sabbath

Gurfein, Murray, 1075

- New York Times v. United States* and, 1089

Gusfield, Joseph, 1740

Guterman, Leslie, 911

Gutmacher, Alan, 1062

GWOT. *See* Global War on Terror

H

H. Rap Brown law, 353

Habeas corpus

- AEDPA and, 233–234
- Butler v. McKellar* and, 208–209
- during Civil War, 272
- common law and, 458
- Constitutional Convention of 1787 and, 358, 1263, 1265, 1266–1267
- Eisenstadt v. Baird* and, 483
- Emancipation Proclamation and, 493
- Endo v. United States* and, 840
- exclusionary rule and, 556
- expansion of, 727–728
- federal court jurisdiction and, 867
- German saboteurs and, 1562
- Hamdi v. Rumsfeld* and, 842, 1346
- Herrera v. Collins* and, 762
- indefinite detention and, 805
- indigents and, 886
- ineffective assistance of counsel and, 810
- Jackson v. Virginia* and, 832
- Kennedy, A., and, 886
- KKK and, 896
- lawsuits, 727
- Lilborne and, 920
- Lincoln and, 1374
- Lincoln's suspension of, 923–924
- Lockhart v. McCree* and, 932
- Mabry v. Johnson* and, 941
- Magna Carta and, 726
- martial law and, 552
- McCleskey v. Kemp* and, 985–986

- modern history of, 727–728
- Mooney v. Holohan* and, 1032–1033
- Penn and, 1781
- Powell, Lewis, and, 1195
- relief, 727
- restrictions under AEDPA, 728
- Shaughnessy v. United States ex rel. Mezei* and, 1467
- suspension of, 352, 1589–1590
- terrorism and, 552
- tribal detention and, 809
- Ulster County Court v. Allen* and, 1672
- undocumented migrants and, 1675
- U.S. Constitution and, 352
- World War II and, 1801

Habeas Corpus Act of 1679, 726

Habeas Corpus Act of 1863, 1008

- Ex parte Milligan* and, 552

Habeas Corpus: Modern History, 867

Habeas corpus petitions

- appeals and, 230
- Betts v. Brady* and, 125
- Coleman v. Thompson* and, 325
- Counselman v. Hitchcock* and, 370
- Ex parte Milligan* and, 552
- Ex parte Vallandigham* and, 553
- Francis v. Franklin* and, 615
- Guantanamo Bay and, 716
- Rasul v. Bush* and, 35

Habitat for Humanity, 1503

Habitual Criminal Sterilization Act, 447

Habitual criminals. *See also* Recidivism

- sterilization of, 447, 1478–1479

Hacking, 825

Hague, Frank, 729–730

Hague v. Committee of Industrial Organizations, 729, 1800

- Butler and, 209
- Hague and, 729
- privileges and immunities and, 1232
- public forum doctrines and, 1243
- Roberts, O., and, 1364

Haig v. Agee, 311, 730

Haines v. Kerner, 202

Hair, 1498–1499

- public forum doctrines and, 1243

Hair, as dreadlocks, 1262–1263

Haiti, 389–390

Haldene Club, 110

Hale, Matthew, 961

Hale, Robert, 913

Hale v. Henkel, 121, 730

- Braswell v. United States* and, 180
- corporate self-incrimination and, 668

Hall, John, 273

Halleck, Henry, 709

Halpern v. Canada, 1403

Ham v. South Carolina, 873

Hamburger, Philip, 1309

Hamdan, Ahmed, 355

Hamdan v. Rumsfeld, 355

- emergency powers, 496
- Guantanamo Bay and, 716
- military tribunals and, 1009
- War on Terror and, 1095

Hamdi v. Rumsfeld, 731, 1347, 1348, 1520

- Bush G.W., and, 495–496

- emergency powers and, 495
- habeas corpus and, 842, 1347
- Korematsu v. United States* and, 842–843
- military law and, 1007
- right to counsel and, 731, 1347
- unlawful detentions and, 800, 1347
- War on Terror and, 1094
- Hamdi, Yaser Esam, 495, 731, 842, 1347, 1348
 - military law and, 1007
 - Miranda warnings and, 1020
- Hamerstrom, Ruby, 395
- Hamilton, Alexander, 732–734, 1264, 1632, 1635
 - Bill of Rights and, 140, 144, 732, 1326
 - Constitutional Convention of 1787 and, 732, 1263, 1268
 - corruption of blood and, 369
 - death of, 733–734
 - Federalist Papers* and, 732, 1268, 1339
 - Federalist*, *The* and, 944
 - Federalists and, 36
 - freedom of press and, 1206, 1207
 - Ginsburg and, 687
 - impartiality and, 798–799
 - on independent judiciary, 289
 - judicial review and, 864
 - McCulloch v. Maryland* and, 988
 - pardons and commutations and, 1145–1146
 - privileges and immunities and, 1231
 - Zenger and, 644
- Hamilton, Andrew, 734–735, 1815
 - free speech law and, 815
 - freedom of press and, 1202
- Hamilton, James, 734
- Hamilton, Margaret, 341
- Hamilton v. Regents of the University of Southern California*, 74–75
 - Hughes and, 784
- Hammer v. Dagenhart*, 1777
- Hammett, Dashiell, 323
- Hammond, James Henry, 6
- Hammond, John, 273
- Hammond, Matthias, 273
- Hamurabi, 1492
- Hand, Augustus
 - obscenity and, 1116
 - United States v. Bennett* and, 1689
 - United States v. One Book Entitled “Ulysses”* and, 1688–1689
- Hand, Learned, 735–737, 1281–1282
 - clear and present danger test and, 311–312, 414, 980
 - conspiracy and, 351
 - Dennis v. United States* and, 414, 655
 - direct advocacy test and, 653–654
 - on entrapment, 509
 - Harrison v. United States* and, 380
 - Masses Publishing Company v. Patten* and, 653, 979–980, 1642, 1796
 - national security and, 1073
 - obscenity and, 1116
 - on privacy, 1337
 - United States v. One Book Entitled “Ulysses”* and, 1688–1689
 - Vinson and, 1722
 - Warren Court and, 1753
- Hand, W. Brevard, 1737
- Handcuffs, 1445
- Handgun Control, Inc. (HCI), 721
- Handguns. *See* Guns
- Hands off doctrine, 1216
- Handyside v. United Kingdom*, 638
- Hanging, 243–244
 - Campbell v. Wood* and, 384
- Hanks, Nancy, 922
- Hannaball v. Spalding*, 438
- Hannegan v. Esquire, Inc.*, 700
- Hansen, Ole, 1798
- Happiness
 - free speech and, 1450
 - privileges and immunities and, 1231
- Harassment, 303–304. *See also* Sexual harassment
 - effect of, 778
 - hate speech codes and, 221
 - hostile environment, 777–779
 - quid pro quo, 778
 - telephone, 778
 - workplace, 303–304
- Hard labor, 384
- Hard Times* (Dickens), 150, 307
- Harden v. State*, 1490
- Harding, Warren G., 1372
 - Debs and, 400
 - Hays and, 755
 - Hoover and, 774
 - La Follette and, 903–904
- Hardison, Larry, 1300–1301
- Hardwick, Michael, 168–169
- Hardwick v. Bowers*, 855
- Hardy v. United States*, 1017–1018
- Harisiades v. Shaughnessy*, 737–738
 - Alien Registration Act of 1940 and, 792
- Harlan, James, 738
- Harlan, John Marshall, I, 738–741, 741–744
 - on Bakeshop Act, 928
 - Civil Rights Act of 1875 and, 1232
 - Civil Rights Cases* and, 301, 606
 - Cohen v. California* and, 1248
 - Fuller Court and, 667
 - Holmes and, 770
 - Hopt v. Utah Territory* and, 777
 - Jacobson v. Massachusetts* and, 341
 - on jury size, 743
 - Katz v. United States* and, 882
 - liberty and, 74
 - Marchetti v. United States* and, 960
 - Monroe v. Pape* and, 1031
 - obscenity and, 1116, 1117, 1121
 - penumbras and, 1153
 - Plessy v. Ferguson* and, 1181
 - privileges and immunities and, 1232
 - reasonable expectation of privacy and, 882
 - Roth v. United States* and, 2, 1382, 1383
 - Scales v. United States* and, 1415
 - on substantive due process, 466
 - vulgar speech and, 1248
 - White Court and, 1777
- Harlan, John Marshall, II, 1287
 - appointment of, 309
 - Baker v. Carr* and, 1275
 - Barenblatt v. United States* and, 110
 - Cain v. Kentucky* and, 212
 - Cohen v. California* and, 321
 - on compulsory vaccination, 836
 - defining religion and, 410
 - Douglas v. California* and, 443

INDEX

- Harlan, John Marshall, II (*cont.*)
 Gideon v. Wainwright and, 682
 Griffin v. Illinois, 711
 Hamilton v. Regents of the University of Southern California
 and, 75
 Konigsberg v. State Bar of California and, 895
 NAACP v. Alabama and, 635, 1057
 NAACP v. Button and, 1058
 New York Times v. United States and, 1090
 Poe v. Ullman and, 714, 1183
 Powell, Lewis, and, 1193
 reasonable doubt and, 1240
 Redrup v. New York and, 1282
 Sherbert v. Verner and, 628
 United States v. O'Brien and, 450
 Walz v. Tax Commission and, 1738–1739
 Warren Court and, 1753, 1760
 Welsh v. United States and, 350
Harlow v. Fitzgerald, 868
Harm principle, 1420
 Feinberg and, 1709
 Mill and, 1027–1028, 1709
 obscenity and, 1119
 police power and, 1185
 proportionality and, 245
Harmelin v. Michigan, 384, 744, 1494, 1745
 English Bill of Rights and, 503
 proportional punishment and, 1241
 three strikes laws and, 1654
Harmless error, 320, 745
 Arizona v. Fulminante and, 78
 Estelle v. Williams and, 544
Harmon Publishing, 292
Harmon v. Thornburgh, 452–453
Harper & Row Publishers v. Nation, 1414
Harper v. Virginia State Board of Elections, 745–746
 Douglas and, 447
 Harlan, II, and, 742
 Stewart, P., and, 1559
 suspect categories and, 518
Harriman, Averill, 697
Harris, Crampton, 1718
Harris, John, Jr., 1809
Harris, Kevin, 1385
Harris, Robert Alton, 1551
Harris v. City of Zion, 371
Harris v. Harris, 1491
Harris v. McRae, 9–10, 746–747
 abortion and, 673, 1320–1324, 1373
 Beal v. Doe and, 116
 Burger Court and, 198
 Hyde amendment in, 12
 Lemon test and, 534
 Maher v. Roe and, 951
 Roe v. Wade and, 1221
 Webster v. Reproductive Health Services and, 1770
Harris v. New York, 747–748, 1457
Harrisburg Six, 306
Harrison Act of 1914, 1741
Harrison, Benjamin, 1601
Harrison, Francis Burton, 1741
Harrison v. United States and, 380
Harry Potter (Rowling), 164
Hart-Scott-Rodino Antitrust Improvements Act, 1472
Hartzel v. United States, 1800
 New Deal and, 1084
Harvard Law Review
 Brandeis and, 176
 burden of proof and, 196
 Chafee and, 261
 Hand and, 735
 Holmes and, 658
 Scalia and, 1416
Harvard Law School
 Breyer and, 182
 Chafee and, 261
 Chemerinsky and, 276
 Dershowitz and, 416
 Frankfurter and, 616–617, 782
 Freund and, 664
 Ginsburg and, 686
 Hand and, 735
 Hiss and, 765
 Holmes and, 769–770
 Kennedy, A., and, 884
 Story and, 968
Harvard University, 1269, 1288
 Baldwin and, 102
 Baptists and, 107
 Biddle and, 133
 Chafee and, 658
 Dershowitz and, 416
 Hand and, 735
 Holmes and, 769
 Lasky and, 658
 Rawls and, 1272
Harvesting, of stem cells, 1552–1553
Hatch Act of 1939, 193, 748, 1515
 New Deal and, 1084
Hatch, Orrin, 1137
Hate crimes, 303, 751–752
 constitutionality and, 749–750
 hate speech v., 752
 homosexuality and, 1469
 laws, 748–751
 lynching and, 243
 on Middle Easterners, 789–790
 penalty enhancement and, 749–750
 politics and, 752
 statistics, 751
 Wisconsin v. Mitchell and, 1787
Hate Crimes Statistics Act of 1990, 751
Hate groups, 564
Hate speech, 303, 752–755
 codes, 220–221
 in colleges, 1579
 definition of, 752
 effect of, 754–755
 freedom of expression and, 1163
 group libel and, 752
 hate crimes and, 751, 752
 history of, 752–753
 injunctions and, 1211–1212
 Internet and, 819–820
 in modern times, 753–754
 ordinances, 657, 750
 political correctness and, 1188–1189
 R.A.V. v. City of St. Paul and, 362
 secondary effects doctrine and, 1436–1437
 Void-for-vagueness doctrine and, 1725

- Hateful motivation, 752
- Hatfield, Mark, 356
- Haudenosaunee, 53
- Haupt v. United States*, 1665, 1800
- Hauptmann, Bruno, 662
- HAVA. *See* Help America Vote Act
- Haverford College, 60
- Hawaii
 - AIRFA and, 51
 - busing and, 1546
 - civil liberties and, 1545, 1546
 - Constitution, 405
 - ERA in, 1401
 - Good Friday and, 398–399
 - martial law in, 1048
 - privacy and, 1531
 - same-sex marriage in, 405, 1401
 - search and seizure in, 1532
 - voting in, 1729–1730
- Hawaii Housing Authority v. Midkiff*, 1604
- Hawaii v. Mankichi*, 740
- Hawkins, Alfred E., 1427
- Hayburn's Case*, 844
- Hayden, Tom, 278
- Hayes, Paul Lewis, 165
- Hayes, Rutherford B., 738
- Haymarket rally, 649
- Haynsworth, Clement, 616
- Hays, Arthur Garfield, 103, 1426
- Hays, Bennie Jack, 1501
- Hays, Henry, 1501
- Hays Office, 755–756
- Hays Production Code of 1930, 755–756
 - LOD and, 914
- Hays, Will, 755–756
- Haywood, William, 394, 979
- Hazelwood School District v. Kuhlmeier*, 19, 163, 756–757, 1576, 1613, 1699
 - First Amendment and, 284
 - prior restraint and, 659
 - Tinker v. Des Moines School District* and, 1658
 - viewpoint discrimination and, 1715–1716
- H-bomb, 1694
- “H-Bomb Secret How We Got It, Why We’re Telling It, The” (Morland), 1694
 - injunctions and, 1212
- HCI. *See* Handgun Control, Inc.
- Heads of the Proposals Offered by the Army*, 456
- Health insurance
 - ERISA and, 1408
 - same-sex adoption and, 1398
 - same-sex marriage and, 1404
 - same-sex partners and, 1407
- Health of the mother, 1554
- Hearings, reasonable promptness and, 1018
- Hearsay, 757–758
 - exclusions, 758
 - Green v. Georgia* and, 709
- Hearsay exception
 - co-conspirator, 351
 - confrontation clause and, 345–346
- Hearsay Rule, 344
- Hearst Newspapers, 694
- Hearst, William Randolph, 64
- Heart of Atlanta Motel, Inc. v. United States*
 - Civil Rights Act of 1964 and, 300
 - racial discrimination and, 827
- Heath v. Alabama*, 440–441
- Heather Has Two Mommies* (Newman and Souza), 164
- Hebert, Claude, 1046
- Heckler’s veto, 758
 - Edwards v. South Carolina* and, 483
- Heckling, 758
- Heightened review, 612–613
- Helfeld, David, 498
- Helicopter surveillance
 - Florida v. Riley* and, 597
 - privacy and, 1220
- Hellman, Lillian, 1270
- Helms Amendment, 759
- Helms, Jesse, 759
- Helmsley, Leona, 306
- Help America Vote Act (HAVA), 1356
- Helper, Hinton, 759–760, 1485
- Hemlock Society, 1164
- Henderson, Russell, 1469
- Henderson v. Morgan*, 718
- Henderson v. United States*, 1443
 - Burton and, 208
- Henery v. City of St. Charles*, 757
- Henry, Aaron, 548
- Henry I, king of England, 437
 - Magna Carta and, 950
- Henry II, king of England, 437
- Henry III, king of England, 950
- Henry, Patrick
 - Baptists and, 108
 - Bill of Rights and, 140, 142, 1341
 - Christianity and, 526
 - Constitutional Convention of 1787 and, 1266–1267
 - free exercise clause and, 623
 - Madison and, 944
 - Mason and, 978
 - “Memorial and Remonstrance” and, 947
 - Ninth Amendment and, 1096
- Henry VIII, king of England, 1492
 - Church of England and, 621
 - freedom of press and, 1201
 - obscenity and, 1122
- Hentoff, Nat, 760, 1651
 - obscenity and, 1119
- Hepburn v. Griswold*, 465
- Hepps, Maurice, 1157
- Herbert, Anthony, 760–761
- Herbert v. Lando*, 760–761
 - Burger Court and, 202
 - journalistic sources and, 859
- Herdon v. Lowry*, 654
- Heresy
 - Anne Hutchinson trial and, 61
 - Catholic Church and, 1452
- Hernandez, Aileen, 1068
- Hernandez v. Commissioner of Internal Revenue*, 761–762
 - Church of Scientology and, 287
 - Jimmy Swaggart Ministries v. Board of Equalization of California* and, 853
- Hernandez v. New York*, 873–874
- Herndon v. Lowry*
 - Butler and, 209
 - Hughes and, 784

INDEX

- Herndon v. Lowry* (cont.)
 incitement of criminal activity and, 654
 Roberts, O., and, 1364–1365
- Herndon v. State of Georgia*
 Cardozo and, 249
- Heroin, 1743
Michigan v. Summers and, 1006
Wong Sun v. United States and, 1792
- Herrera v. Collins*, 224, 237, 762
- Hersh, Seymour, 1519
- Herzig-Yoshinaga, Aiko, 841
- Hess v. Indiana*, 762–763, 1511
- Hester v. United States*, 763, 1430
 open fields and, 1133
- Heston, Charlton, 1621
- Hetenyi v. Wilkins*, 972
- HEW. *See* Department of Health, Education, and Welfare
- Heywood, Ezra, 649
- HHS. *See* Department of Health and Human Services
- Hicklin, Benjamin, 1285–1286, 1386–1387
- Hicklin Rule, 1592
United States v. Bennett and, 1689
United States v. One Book Entitled “Ulysses” and, 1688–1689
- Hicklin trial, 659
- Higginbotham, Leon, 616
- Higher Education Facilities Act, 1528–1529
- Hijackers, 33
 criminal profiling and, 1237
- Hill, Anita, 616
- Hill v. Berkman*, 129
- Hill v. Colorado*, 13, 67
 abortion and, 1168
 content-based regulation and, 361
 content-neutral regulation and, 363
 picketing and, 1168
- Hill v. National Collegiate Athletic Association*, 1534
- Hill v. State*, 1490
- Hillard v. State*, 319
- Hinckley, John, Jr., 721
 insanity defense and, 814
- Hindrance clause. *See* Civil Rights Act of 1871
- Hindus, 1330
 marijuana and, 455
- Hines v. Davidowitz*, 1530
 national security and, 1071
 New Deal and, 1083
- HIPAA*, 347
- Hip-hop music, 763–765
 censorship and, 764–765
- Hipolite Egg Co. v. United States*
 White Court and, 1777
- Hippies, 1743
- Hippocratic oath, 547
- Hirabayashi, Gordon, 839
 litigation of, 841–842
- Hirabayashi v. United States*, 49
 Baldwin and, 104
 Douglas and, 445
 Japanese internment and, 839–840
 Stone and, 1565
 Stone Court and, 1562
- Hirico v. Slovakia*, 640
- Hispanics. *See also* Mexicans
 bail and, 1257
 in congress, 1277–1278
- Hernandez v. New York* and, 874
- Internet access of, 821
- juvenile, 1258
- Kunstler and, 899
- limited data on, 1256
- parole and, 1257
- police and, 1258
- political patronage and, 1190
- as prisoners, 1463
- racial discrimination and, 1256, 1257
- racial profiling and, 675
- San Antonio School District v. Rodriguez*, 1194
- as victims, 1464
- Hiss, Alger, 765
 Chambers and, 265
 Communist Party and, 265, 1377–1378
 HUAC and, 765, 780, 1377
- Historic preservation, 159
- History, as precedent, 967
- History of the United States* (Bancroft), 54
- “History of U.S. Decision-Making Process on Vietnam Policy, 1945–1967,” 1075
- History of Woman Suffrage* (Anthony, Stanton and Gage), 65
- Hit Man: A Technical Manual for Independent Contractors* (Feral), 211, 996
- “Hit Man” case. *See* *Rice v. Paladin Enterprises, Inc.*
- Hit slips, 615
- Hitler, Adolf
 ADL and, 69
 eugenic sterilization and, 546
- HIV/AIDS. *See also* AIDS
 ADA and, 71
 birth control and, 148
 Helms Amendment and, 759
 intravenous drugs and, 759
 Lamda and, 904
 Log Cabin Republicans and, 933
 transmission of, 759
- Hixson, Richard F., 1115
- H.L. v. Matheson*, 725–726
- Hmong
 autopsies and, 93
 cultural defense and, 391
- Hoasca, 455
- Hobbie, Paula, 1462
- Hobbie v. Unemployment Appeals Commission*, 1462, 1470
 free exercise clause and, 629
 unemployment benefits and, 629
- Hobbs Act, 1335
- Hodgson v. Minnesota*
 parental notification of abortion and, 725, 1368–1369
- Hoffa, Jimmy, 769
- Hoffa v. United States*, 769
- Hoffman, Abbie
 Chicago Seven and, 278
 Kunstler and, 898
- Hoke v. United States*
 Mann Act and, 955
 White Court and, 1777
- Hold rule, 1551
- Holidays. *See also* Religious holidays
 civil religion and, 297
 Jews and, 852
 King and, 890–891
Lynch v. Donnelly and, 937–938

- religious observance and, 398–399
- states, 398–399
- Thanksgiving, 399
- Holland, PAS and, 1165
- Holland v. Illinois*, 115, 769
 - challenges for cause in, 873
- Hollow Hope, The* (Rosenberg), 1635
- Hollywood 10
 - blacklist and, 150
 - HUAC and, 780
- Holmes Lectures, 736
- Holmes, Obadiah, 107
- Holmes, Oliver Wendell, Jr., 769–772, 1280–1282, 1358, 1510, 1556
 - Abrams v. United States* and, 14, 644, 652–653, 658, 787, 1281, 1282, 1795–1796
 - Biddle and, 133
 - Brandeis and, 174
 - Buck v. Bell* and, 192–193, 1320, 1324
 - Cardozo and, 249
 - clear and present danger test and, 311–312, 980
 - criticism of, 658, 771
 - Debs v. United States* and, 401, 652
 - dissent and, 658
 - on equal protection, 513–514
 - on eugenic sterilization, 545
 - on First Amendment, 1281
 - Frankfurter and, 617
 - on free speech limitations, 689
 - free speech theory and, 816
 - freedom of expression and, 1160, 1163
 - freedom of press and, 739–740
 - freedom of speech and, 175
 - Frohwerk v. United States* and, 658
 - Fuller Court and, 667
 - Gitlow v. New York* and, 690, 1281–1282
 - Hamilton and, 733
 - Hand and, 736
 - hate speech and, 752, 754
 - Hughes Court and, 782
 - legal realism and, 913
 - Lochner v. New York* and, 928, 1633
 - marketplace of ideas theory and, 962
 - Meiklejohn and, 999
 - Pennsylvania Coal Co. v. Mahon* and, 479
 - penumbras and, 1153
 - preferred position rule and, 1199
 - on protests in public places, 729
 - Schenck v. United States* and, 96–97, 652, 1281–1282, 1636
 - Schwimmer v. United States* and, 1141
 - Stone and, 1564
 - takings clause and, 1605
 - on truth, 994
 - United States v. Abrams* and, 312
 - Vinson and, 414, 1722
 - White Court and, 1777
 - Whitney v. California* and, 1780
- Holmes, Sherlock, 1236
- Holocaust, 1639
 - equal protection and, 516
 - West Virginia State Board of Education v. Barnette* and, 595
- Holt, Joseph, 146, 1440
- Holy Piby, The* (Rogers, A.), 1262
- Home Building & Loan Association v. Blaisdell*, 474
- Homefront Confidential: How the War on Terrorism Affects Access to Information and the Public's Right to Know*, 662
- Homeland Security Act
 - common law and, 336
 - DHS and, 415
 - FOIA and, 415–416
 - surveillance and, 1519
- Homma v. Patterson*, 1801
- Homosexuality. *See also* Don't Ask, Don't Tell; Gay and lesbian rights; Same-sex partners; Sodomy; Stonewall riot
 - American Psychological Association and, 1405
 - American Bar Association (ABA) and, 1405
 - APA and, 1405
 - Assyrians and, 1492
 - Bible and, 1492
 - Boy Scouts and, 1497
 - Boy Scouts of America v. Dale* and, 170, 304, 636, 1363, 1382
 - Bryant and, 190
 - Burger Court and, 199
 - Cohn and, 323
 - discrimination and, 1405
 - Falwell and, 575
 - family values movement and, 577
 - FBI and, 1317–1318
 - Garland, J. and, 1567
 - hate crimes and, 1469
 - as learned behavior, 1408
 - as mental illness, 1405
 - in military, 1405
 - NOW and, 1068
 - obscenity and, 1116
 - O'Connor and, 1126
 - opponents to, 1398
 - Paris Adult Theatre v. Slaton* and, 1148
 - pedophilia and, 1398
 - Powell, Lewis, and, 1194
 - private discriminatory association and, 1226
 - Rastafarians and, 1262
 - rational purpose test and, 610
 - religious conservatives and, 1406
 - Romer v. Evans* and, 610, 1371
 - sexual orientation and, 1222
 - sexually explicit materials and, 1120
 - Shepard and, 1469
 - SLDN and, 436
 - sodomy and, 1222
 - sodomy laws and, 169, 1398
 - state constitutions and, 1536
 - "The Perfect Moment" and, 1065
 - as victimless crime, 1709
 - White, B., and, 1779
- Homosexuals. *See also* Sexual orientation
 - adoption by, 678
 - Department of Defense and, 435
 - freedom of association and, 304
 - hate crime laws and, 748–751
 - immigration and, 773
 - Lawrence v. Texas* and, 908–909, 1328, 1329, 1338, 1369, 1371–1372
 - Log Cabin Republicans and, 932–933
 - marriage and, 936, 1023
 - in military, 435–436, 885
 - military discharges and, 436
 - Mullaney v. Wilbur* and, 1046
 - obscenity and, 956

INDEX

- Homosexuals (*cont.*)
 - privacy rights and, 714
 - same-sex marriage and, 773, 966
 - social groups and, 89
 - student groups, 512–513
- Honest ballot association, 1066
- Hooker, Evelyn, 1405
- Hooker, Richard, 1735
- Hoopa Valley Reservation, 52
 - Moore v. Nelson* and, 809
- Hoover, Herbert
 - Biddle and, 133
 - Brandeis and, 174
 - Cardozo and, 248
 - Hughes and, 784
 - Prohibition and, 1239
 - Roberts, O., and, 1363
- Hoover, J. Edgar, 774–777, 1500, 1799
 - Baldwin and, 104
 - Clark, R., and, 305–306, 306
 - Clark, T., and, 308–309
 - Communist Party and, 339, 775, 1269
 - CPUSA and, 338
 - extremist groups and, 567
 - FBI and, 774–777, 1269–1270, 1317–1318
 - King and, 306
 - Kunstler and, 898
 - Murphy and, 1047
 - New Deal and, 1084
 - Nixon, R. and, 1099
 - Palmer and, 774, 1144, 1280–1281
 - red scare and, 774, 1281
 - spying and, 1518
 - Wilson, W., and, 1785
- Hoover, John, 1483
- Hope House, 1201
- Hopkinson, Francis, 846
- Hopt v. Utah Territory*, 777, 1453
 - torture and, 1017
- Horiuchi, Lon, 1385–1386
- Horn, Lawrence, 1332
- Horn, Mildred, 1332
- Horton, James Edward, 1427
- Horton v. California*, 1171
- Horwitz, Morton, 697
- Hospitalization, involuntary, 1001
- Hospitals
 - abortion and, 1183
 - Bradfield v. Roberts* and, 172–173
 - Planned Parenthood v. Ashcroft* and, 1174
 - religious, 668
- Hostetler, John, 1788
- Hostile audiences, 1511–1512
- Hostile environment, 777–779
- Hosty v. Carter*, 1699
- Hot pursuit, 1433
 - arrest and, 1445
- Houchins v. KQED, Inc.*, 21, 779
 - Burger Court and, 202
- House Internal Security Committee, 780. *See also* House Un-American Activities Committee
- House Judiciary Committee, 780
- House of Commons, 150
- House of Lords Appellate Committee, 639
- House, Paul, 238
- House Select Committee to Investigate Tax-Exempt Foundations, 635
- House Un-American Activities Committee (HUAC), 780, 1454, 1636, 1800
 - ACLU and, 49
 - Baldwin and, 104
 - Barenblatt v. United States* and, 49
 - Biddle and, 134
 - Chafee and, 261
 - Chambers and, 265, 780, 1377
 - Clark, T., and, 308
 - CPUSA and, 337–338
 - Dies and, 419
 - Fifth Amendment and, 1270
 - Gitlow and, 690
 - hearsay evidence and, 757
 - Hiss and, 765, 780, 1377–1378
 - Nixon, R. and, 1098
 - Rauh and, 1270
 - Rosenberg and, 780, 1377–1378
 - United States v. Lovett* and, 1686–1687
 - Vinson Court and, 1718
 - Warren and, 1764
 - Warren court on, 1270
- Housing
 - ordinances, 1033
 - racially restrictive covenants and, 368–369, 1325
- Houston, Charles Hamilton, 1442
 - Marshall, T., and, 971
- Houston Police Department Crime Lab, 429
- Houteff, Victor, 1461
- “How Long?...Not Long?” (King), 890
- Howard University
 - affirmative action and, 30
 - Marshall, T., and, 971
- Howell, Leonard, 1262
- Howell’s state trials, 1667
- Hoyle, Fred, 1618
- Hoyt v. Florida*, 1610
- Hoyt v. Minnesota*, 212
- HUAC. *See* House Un-American Activities Committee
- Hubbard, L. Ron, 286
- Huckle v. Money*, 1749
- Huckleberry Finn* (Twain), 221
- Hudgens v. NLRB*, 44
 - intermediate scrutiny test and, 818
 - Lloyd Corporation v. Tanner* and, 927
 - Marshall, T., and, 972
- Hudson, Tracy Lee, 781
- Hudson v. Louisiana*, 781
- Hudson v. McMillan*, 1650
- Hudson v. Palmer*, 781
- Hue and cry, 1433
- Huger, Alfred, 883
- Hughes, Charles Evans, 783–784, 1364–1565
 - civil liberties and, 1028
 - coerced confessions and, 74
 - court of, 781–783
 - Missouri ex rel. Gaines v. Canada* and, 515
 - Near v. Minnesota* and, 784, 1364, 1366
 - prior restraint and, 659, 1075
 - Roberts, O., and, 1363, 1364
 - Stromberg v. California* and, 74, 1364, 1366
 - United States v. Macintosh* and, 349, 1142

United States v. McIntosh and, 409
 White Court and, 1777
 Hughes Court, 781–783
 judicial review and, 864–865
 Hughes, Howard, 306
 Hughes, John, 1526
 Hughes, Langston, 323
 Hughes, Mike, 150
 Human Intelligence (HUMINT), 257
 Human Life International, 1134
 Human rights
 international, 637–640
 “natural rights” as, 1325–1328
 Rawls on, 1274
 Human Rights Campaign, 1461
 Lawrence v. Texas and, 909
 Human sacrifice, 396–397
 Human trafficking, 1465–1466
 Humane Slaughter Act, 561
Humani Generis, 376
 Humanism, 395
 Hume, David, 377
 Jefferson and, 847
 HUMINT. *See* Human Intelligence
 Humphrey, Hubert H., 1098
 Johnson, L., and, 856
 Hungary, same-sex marriage and, 1403
Hunt v. Cromartie, 1278, 1279
Hunt v. McNair, 785, 1529
 Tilton v. Richardson and, 1657
 Hunt, Ward, 65
Hunter v. Underwood
 felon disenfranchisement and, 583
 Hurley, John J., 786
Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston, 170, 785–786, 1363, 1364
 private discriminatory association and, 1226
Hurtado v. California, 786–787
 Bill of Rights and, 1632
 grand juries and, 704
 grand jury indictments and, 708
 Harlan, I, and, 739
 incorporation doctrine and, 803
 penumbras and, 1153
 procedural due process and, 462–463, 1358, 1368
 substantive due process and, 464
 Hussein, Saddam
 Abu Ghraib and, 15
 Clark, T., and, 307
Hustler Magazine, 1413–1414
 Falwell and, 575
 Flynt and, 599
 Rehnquist on, 1288–1291
Hustler Magazine v. Falwell, 599, 787–788, 1414
 emotional distress and, 811
 vulgar speech and, 1248
 Hustler Publishing Company, 599
 Huston Plan, 1099
 Huston, Thomas Charles, 1099
 Hutchins, Robert Maynard, 497
 Hutchinson, Anne
 Puritans and, 1250
 trial of, 61–62
 Hutchinson, Ronald, 788
 Hutchinson, Thomas, 1139

Hutchinson v. Proxmire, 788, 1243
 Hutson, James, 127
Hutto v. Finney, 202
 Hybrid rights cases, 1478
 Hyde Amendment, 9, 1134
 Harris v. McRae and, 12, 746–747
 NARAL and, 1062
 Hyde, Anne, 690
 Hyde, Henry
 CDA and, 336
 ODWDA and, 1137
 school prayer amendment and, 357
Hylton v. United States, 274
 Ellsworth Court and, 492
 Hypnosis, confessions and, 919

I

I, A Woman, 212
 I Am movement, 1476
 “I Have a Dream” (King), 890
 nonviolent protest and, 959
 “I Need a Haircut” (Markie), 764
 ICCPR. *See* International Covenant of Civil and Political Rights
 Ice-T, 764
 ICMCA. *See* Illinois Citizens for the Medical Control of Abortion
 ICRA. *See* Indian Civil Rights Act
 Idaho
 Alien Land Law in, 1107
 voting in, 1729–1730
Idaho v. Wright, 344
 IDC. *See* Intelligent Design Creationism
 IDEA. *See* Individuals with Disabilities Education Act
 Identity registration, 1222
 Identity theft, 1222
 Ideology, exclusion and, 789–792
 IFIDA. *See* International Film Importers & Distributors of America
 Ignorance, 510
 coerced confessions and, 940
 “Ignorance of the law,” 1260
 ILD. *See* Industrial Labor Defense
 Illegitimacy, immigration and, 792–793
 Illinois
 death row, 1393–1394
 Good Friday and, 398–399
 privacy and, 1531
 religious education in, 1292
 Sparks-El v. Finley in, 1307
 undocumented migrants and, 1675
 Illinois Bar Association, 694
 Illinois Citizens for the Medical Control of Abortion (ICMCA), 1061
Illinois ex rel. McCollum v. Board of Education, 618
Illinois Law Review, 693
 Illinois National Guard
 Presser v. Illinois and, 722, 1342, 1344
 Illinois Sexually Dangerous Persons Act, 43
Illinois v. Allen, 777
Illinois v. Caballes, 882
Illinois v. Gates, 793, 1435
 probable cause and, 1235
Illinois v. Krull, 793–794, 1686
Illinois v. Perkins, 794

INDEX

- Illinois v. Wardlow*, 1445
 stops and, 1569
 Illuminati, 854
 IMFA. *See* Immigration and Marriage Fraud Amendments
 Immediatism, 4
 Immigrants. *See also* Alien(s); Noncitizens; Undocumented migrants
 categories, 427, 796
 diversity, 427
 illegal, 1433
 from Italy, 1395
 lynching and, 243
 Nineteenth Amendment and, 1727
 quotas for, 1069–1070
 Storey and, 1570
 Immigration. *See also* Deportation
 African Americans and, 1259
 after 9/11, 789, 1259
 Aliens Acts and, 37–38
 Asians and, 1259
 checkpoints and, 806, 1446
 Chinese Exclusion Act and, 259–260, 1259
 Communism and, 1377
 Congress and, 1259
 Diversity Immigrant Visa Program and, 426–427, 1259
 due process and, 40, 460–461
 eugenic sterilization and, 546
 Europeans and, 1259
 family unity for noncitizens and, 576
 Fiallo v. Bell and, 585
 homosexuality and, 773
 illegitimacy and, 792–793
 IMFA and, 795
 Immigration and Naturalization Service v. Chadha
 and, 797
 INA and, 983
 Kentucky Resolves and, 887–888
 from Latin America, 1259
 marriage and, 964–965
 Mexicans and, 1259
 NAACP and, 1259
 plenary power doctrine and, 893
 Plyler v. Doe and, 1182
 Quota and National Origin Act of 1921 on, 426
 Quota and National Origin Act of 1924 on, 426, 1259
 quotas, 796
 racial discrimination and, 1258–1260
 In re Griffiths and, 812
 regulation of, 1529–1531
 sex and, 1465–1466
 United States v. Balsys and, 1680
 U.S. Constitution and, 353
 USA PATRIOT Act and, 789–790
 Virginia Resolves and, 887–888
 Visa Waiver Program on, 1259
 World War II and, 1800
 Immigration Act of 1875, 1258–1259
 Immigration Act of 1917, 1280, 1282
 Immigration Act of 1918
 Palmer and, 1144
 Immigration Act of 1924, 1069
 eugenic sterilization and, 546
 Immigration Act of 1990, 426
 impact of, 427
 Immigration and Marriage Fraud Amendments
 (IMFA), 795
 Immigration and Nationality Act of 1965 (INA), 426, 983
 Amendments of 1965, 795–797
 citizenship and, 1669
 denaturalization and, 413
 Diversity Immigrant Visa Program and, 426
 exclusion provision of, 893
 family unity for noncitizens and, 576
 Kleindienst v. Mandel and, 893
 racial profiling and, 791
 Immigration and Naturalization Service (INS), 415
Immigration and Naturalization Service v. Cardoza-Fonseca, 88
Immigration and Naturalization Service v. Chadha, 797
Immigration and Naturalization Service v. Elias-Zacharias, 89
Immigration and Naturalization Service v. Lopez-Mendoza, 798
 Immigration law
 Congress and, 40–41
 Immigration Reform and Control Act of 1986 (IRCA), 427
 Imminent danger, 782
 Imminent harm, 1510, 1511
 Imminent threat doctrine, 1051
 Immortal Seven, 690
 Immunity. *See also* Official immunity doctrine; Privileges and immunities
 of Congress, 916
 derivative use, 1454
 due process and, 459–460
 federal sovereign, 868
 under FTCA, 868
 from punishment, 1694
 transactional, 668, 706, 1453, 1454
 United States v. Tateo and, 1694
 use/derivative use, 668
 Impartial decisionmaker, 798–800
 Impartiality, 798–800, 860. *See also* Judicial bias
 challenges for cause and, 873
 voire dire and, 873
 Impeachment
 of Clinton, B., 1288
 of defendants, 1683
 exception, 556
 Nixon, R. and, 1099–1100
Impending Crisis of the South, The: How to Meet It (Helper),
 759, 1485
 Imperialism
 American, 1571
 Bryan and, 189
 Implied consent theory
 DWI and, 470
 marital rape and, 960–961
 Implied rights, 801–802
 Implied trust doctrine, 862
 Watson v. Jones and, 1768
 Impoundment, 1447
 Improved Intelligence, 1149
 In favorem vitae, 234
 “In God We Trust,” 1066–1068
 coercion and, 1101
 no endorsement test and, 1104
In Harm’s Way (Dworkin & MacKinnon), 941
In re Adoption of A.W., J.W., and M.R. Minors, 1408
In re Baby Boy C., 280
In re Bate and O’Steen, 114
In re C.B.
 jury trials and, 990

- In re Debs*, 400
- In re DoubleClick, Inc. Privacy Litigation*, 801
- In re F.B.*, 1086
- In re Gault*, 282, 812, 1351
 - Fortas and, 604
 - In re Winship* and, 813
- In re Grand Jury Proceedings*, 707
- In re Griffiths*, 812
- In re Guantanamo Detainee Cases*, 1095
- In re Guardianship of Sharon Kowalski*, 1407
- In re Isserman*, 414
- In re Kemmler*, 223, 485
 - execution methods and, 236
 - Fuller Court and, 667
- In re May 1991 Will County Grand Jury Subpoena*, 1532
- In re Oliver*, 407
 - incorporation doctrine and, 803
- In re Quinlan*, 888
- In re Ross*, 342
- In re State of Alabama ex rel. James v. ACLU of Alabama*, 343
- In re Toboso-Alfonso*, 773
- In re Turner*, 272
- In re Washington Post Co.*, 1428
- In re Winship*, 282, 813, 1240, 1410
 - burden of proof and, 196
 - Jackson v. Virginia* and, 832
 - Leland v. Oregon* and, 917
 - Mullaney v. Wilbur* and, 1046
- In re Yamashita*, 1562, 1801
 - military tribunals and, 1008
- In seriatim opinions
 - Ellsworth Court and, 492
- In The Matter of Karen Quinlan*, 1254
- In vitro fertilization (IVF), 313
 - stem cell research and, 1552
- INA. *See* Immigration and Nationality Act
- “Inaugural Address at St. Andrews” (Mill), 1011
- Incarceration
 - arrest and, 80
 - civil death and, 297
 - debt collection and, 401
 - GBMI and, 717
 - of Miranda, 1021
 - Orozco v. Texas* and, 1138
 - reasonable promptness and, 1018
- Incest
 - abortion and, 951
 - Bible and, 130
 - Doe v. Bolton* and, 1320, 1324
 - Hamurabi and, 1492
 - sexual orientation and, 1223
 - as victimless crime, 1709
- Inchoate crimes, 1420
- Incitement of criminal activity, 651–655
 - Brandenburg* test and, 659
- Incitement test, 401
 - group libel and, 715
 - Hand and, 653, 737
 - national security and, 1071
- Incompetence, of government, 1644
- Incompetence to stand trial
 - capital punishment and, 237
- Incorporation doctrine, 73–74, 802–804, 1535, 1536. *See also*
 - Fourteenth Amendment
 - Douglas and, 444
 - due process and, 1232
 - Frankfurter and, 620
 - free speech and, 804
 - Harlan, I, and, 739
 - Harlan, II, and, 742
 - Hughes and, 784
 - Marshall, T., and, 973–974
 - McReynolds and, 993
 - Meese and, 997
 - privileges and immunities and, 1232
 - Rabe v. Washington* and, 803
 - selective, 618
 - selective incorporation and, 1153
 - selective v. total, 176
 - Sunday closing laws and, 1586
- Increased Information Sharing for Critical Infrastructure Protection, 1149
- Indecency
 - broadcasters and, 651
 - CDA and, 336–337
 - FCC v. Pacifica Foundation* and, 579
 - NEA and, 700–701
 - public, 111
- Independent contractors, 1515
- Independent counsel, 1417
- India, colonial, 1330
- Indian Affairs Committee, 901
- Indian Appropriation Act, 1253
- Indian Bill of Rights, 806–809
- Indian Civil Rights Act (ICRA), 806–809, 1258, 1411
- Indian Removal, 833
- Indian Rights Association, 1253
- Indiana
 - Davis v. Bandemer* in, 1277, 1278
 - Good Friday and, 398–399
- Indiana Law Journal*, 258
- Indiana University, 615
- Indians. *See* Native Americans
- Indictments
 - in colonial America, 705
 - function of, 708
 - grand jury, 703, 705–708
 - Hurtado v. California* and, 787
- Indifferentism, 1049
- Indigenous population. *See* Native Americans
- Indigents. *See also* Vagrancy
 - abortion and, 115, 951
 - appeals costs and, 710–711
 - Edwards v. California* and, 482
 - Gideon v. Wainwright* and, 682–683
 - habeas corpus and, 886
 - ineffective assistance of counsel and, 811
 - mental illness and, 1001
 - Powell v. Alabama* and, 1192
 - right to counsel of, 125
 - transport of, 482
- Indirect deductions, 900
- Individual freedom. *See* Personal freedom
- Individual rights
 - cocentric circles of, 446
 - Douglas and, 446
 - negligence standard and, 403
 - Supreme Court and, 1535–1536

INDEX

- Individuals with Disabilities Education Act (IDEA), 1527
 - Zobrest v. Catalina Foothills School District* and, 1816
- Industrial Labor Defense (ILD), 1427
- Industrial revolution, 1639
- Industrial Workers of the World (IWW), 68, 175
 - destruction of, 566
- Industrialization, 964–965
- Inevitable discovery, 1097
- Informants
 - coercion and, 794
 - hearsay evidence and, 757
 - Hoffa v. United States* and, 769
 - Illinois v. Gates* and, 793
 - jailhouse, 838
 - probable cause and, 793
- Information
 - freedom of expression and, 1159
 - media access to, 993–994
 - privacy and, 1225
- Informed consent, 389
- Infrared monitoring, 488
- Infringement
 - contributory, 823
 - copyright, 822, 1001
 - encryption and, 823
 - vicarious, 823
- Ingraham v. Wright*, 1195
- Inhabitants of Wilbraham v. Hampden County Commissioners*, 799
- Inherit the Wind* (film), 395
- Inherit the Wind* (play), 1426
- Inheritance
 - matrilineal, 963
 - same-sex adoption and, 1398
 - same-sex marriage and, 1401
- Initiatives, 1540
- Injunctions
 - City of Los Angeles v. Lyons* and, 935
 - Near v. Minnesota* and, 1081
 - prior restraints and, 1210–1213
 - privacy and, 1218
- Injunctions to Ensure Fair Trials, Protect Functioning of Governmental Offices, & Guard Privacy* (Snepp), 1212
- Innocence
 - capital punishment and, 237–238
 - conviction and, 1679
 - DNA and, 432
 - DNA testing and, 428–429
 - plea bargaining and, 719
- Innocence Project, 237, 428
- Innocence Protection Act, 428
- Innocent owner, 213
 - United States v. 92 Buena Vista Avenue* and, 1678
- Inouye, Daniel, 501
- INS. *See* Immigration and Naturalization Service
- INS v. Cardoza-Fonseca*, 88
- INS v. Delgado*, 1444
- INS v. Elias-Zacharias*, 89
- INS v. Lopez-Mendoza*, 1696
- Insanity
 - capital punishment and, 386
 - Colorado v. Connelly* and, 328–329
- Insanity defense, 813–815
 - Burks v. United States* and, 207–208
 - capital punishment and, 386
 - Colorado v. Connelly* and, 328–329
 - GBMI and, 717–718
 - irresistible impulse test and, 814
 - Leland v. Oregon* and, 917
 - mental illness and, 1000–1001
 - M’Naghten test and, 814
- Insiders, JBS and, 854
- Inspections, without search warrants, 217
- Instant messaging, 825
- Institute for Legislative Affairs, 1070
- Institutes* (Coke), 437
- Institutional identity, 121
- Insufficiency claims, 831
- Insular Cases*, 1607
 - Fuller Court and, 668
 - Harlan, I. and, 740
- Insults, 303
- Insurance. *See also* Health insurance
 - PAS and, 1165
- Intellectual individualism, 601
- Intellectual property
 - anonymity and, 62
 - backup copies of, 822
 - Church of Scientology and, 366–367
 - fair use of, 822
 - First Amendment and, 816–817
 - Internet and, 822–824
 - trademarks and, 823–824
 - Zacchini v. Scripps-Howard Broadcasting Co.* and, 1812
- Intelligence, 257–258
- Intelligence Community of the United States, 257
- Intelligence Identities Protection Act, 817
- Intelligence Project of Southern Poverty Law Center, 1500
- Intelligence Reform and Terrorism Prevention Act of 2004, 1053
 - USA PATRIOT Act and, 1149
- Intelligent design, 377–379, 1617. *See also* Creationism
 - secular humanism and, 1438
- Intelligent Design Creationism (IDC), 377–379
- Interaction of Biblical Religion and American Constitutional Law, The* (Gaffney), 128
- Inter-American Commission on Human Rights, 640
- Inter-American Court of Human Rights
 - freedom of expression and, 638
 - Rodríguez and, 640
- Interception orders, 1786
- Intercourse* (Dworkin), 470–471
- Intercredal cooperation, 1049
- Interdiction
 - Cuban, 390
 - slavery and, 390
- Intermediate scrutiny test, 449
 - Fourteenth Amendment and, 612–613
 - free speech and, 818
- Internal Revenue Code, 761
- Internal Revenue Service (IRS). *See also* Tax(es)
 - Board of Education, Kiryas Joel Village School District v. Grumet* and, 158
 - Christian Coalition and, 285–286
 - Church of Scientology and, 287, 761–762
 - drugs and, 1741
 - Fisher v. United States* and, 589
 - gambling and, 960
 - gay marriages and, 1401
 - Jackson, R. and, 833
 - Mathis v. United States* and, 981–982

- Narcotics Division of, 1742
- Nixon, R. and, 1099
- International Association of Machinists and Aerospace Workers, 1300
- International Committee of the Red Cross. *See* Red Cross
- International Convention on the Elimination of All Forms of Discrimination Against Women, 522
- International Council of Christian Churches, 118
- International Covenant of Civil and Political Rights (ICCPR), 1639
 - chain gangs and, 263
 - data privacy and, 1223
 - double jeopardy and, 440
 - freedom of expression and, 637–638
 - Universal Declaration of Human Rights and, 637–638
- International Covenant on Economic, Social and Cultural Rights, 1639
- International Criminal Court, 59
- International Film Importers & Distributors of America (IFIDA), 1042
- International Information Agency, 984
- International League for the Rights of Man, 105
- International Order of B'nai B'rith. *See* B'nai B'rith
- International Planned Parenthood Federation, 1411
- International Society of Krishna Consciousness, Inc. v. Lee*, 417
 - public forum doctrines and, 1243
- International Woman Suffrage Alliance (IWSA), 256
- International Workers of the World (IWW)
 - free speech and, 1794–1795
 - Masses Publishing Company v. Patten* and, 979
- Internet
 - access, 821–822, 825
 - advertising and, 819–820
 - anonymity and, 62
 - balancing and, 99
 - CDA and, 336–337, 819, 1316–1318
 - Christian Coalition and, 285
 - civil liberties and, 818–822
 - cookies, 821
 - COPA and, 819, 1318
 - copyrights and, 211–212
 - data privacy and, 1222
 - DHS and, 416
 - fair use doctrine and, 572
 - filtering, 824–826
 - First Amendment and, 660, 819, 1315, 1316
 - freedom of press and, 662
 - government funding of speech and, 701
 - hate speech and, 819–820
 - indecentcy on, 1557
 - intellectual property and, 822–824
 - National Cable & Telecommunications Association v. Brand X Internet* and, 580
 - obscenity and, 1120
 - pornography, 304, 819, 1701
 - PPA and, 1224
 - pranks, 45
 - privacy and, 820–821
 - Red Lion Broadcasting Co., Inc. v. FCC* and, 1279
 - Reno v. ACLU* and, 663, 1316–1317
 - sexual expression and, 660
 - tracing, 63
 - Urofsky v. Gillmore* and, 1700–1701
 - wiretapping and, 1785
- Internet service providers (ISPs)
 - DHS and, 416
 - DMCA and, 822
 - Internet tracing and, 63
 - safe harbors, 823
- Internment, 496. *See also* Japanese internment
- Interposition doctrine, 946
- Interpretation cessant in claris, 1618
- Interracial couples. *See also* Miscegenation laws
 - Bob Jones University and, 159
 - cohabitation and, 991
- Interrogations
 - coerced confessions and, 1455
 - coercion and, 1005–1006
 - deceit and, 320
 - detentions and, 316
 - Dickerson v. United States* and, 419
 - exclusionary rule and, 557–558
 - false confessions and, 574
 - Fifth Amendment and, 992
 - history of, 1017
 - length of, 319
 - Michigan v. Mosley* and, 1005–1006
 - Miranda rights and, 318
 - Miranda v. Arizona* and, 747–748, 1016, 1331, 1332, 1345, 1348, 1351
 - Monroe v. Pape* and, 1030
 - permissible coercion and, 318–319
 - police, 314–321
 - of prisoners, 981–982
 - probable cause and, 952
 - promises and, 319
 - Spano v. New York* and, 1504
 - undercover police and, 747–748
 - wiretapping and, 980–981
- Interrogators
 - deceit and, 320
 - number of, 319
- Interstate commerce, 826–827. *See also* Commerce
 - federalization of criminal law and, 581
 - La Follette and, 902
 - NLRB and, 1066
 - Taft Court and, 1595
 - white slavery and, 955
- Interstate Commerce Act
 - Henderson v. United States* and, 208
 - segregation and, 1443
- Interstate Commerce Commission
 - Baltimore & Ohio Railroad v. United States* and, 604
 - economic regulation and, 473
 - Mitchell v. United States* and, 782
 - White Court and, 1777
- Intimidation
 - coerced confessions and, 1455
 - cross burning and, 383
 - hate speech and, 754–755
 - jury, 772
 - statutes, 750
- Intolerable Acts
 - Chase and, 273
 - Franklin and, 621
 - Mason and, 977
- Intolerance, of government, 1644
- Intoxication defense, 814
- Intrusion, 827–828
 - abortion and, 836
 - Minnesota v. Olson* and, 1015

INDEX

- Intrusion (*cont.*)
 - sodomy and, 836
 - thermal imaging and, 900
- Invalid Pensioners Act, 844
- Inventory search, 1431
- Investigative stops. *See* Stops
- Invidious prejudice, 830
 - in jury selection, 873
- Inviolate personality, 1590
- Invisible Empire. *See* Ku Klux Klan
- Involuntary commitment, 43
- Involuntary servitude, 1649
- Inward looking, 1225
- Iowa State Agricultural College, 256
- Iowa Woman Suffrage Association, 256
- Iraq invasion of 2003
 - Abu Ghraib and, 15
 - Ashcroft and, 85
 - U.S. Constitution and, 355
- Iraqi insurgency, 16
- IRCA. *See* Immigration Reform and Control Act of 1986
- Iredell, James, 141, 1315
 - Bill of Rights and, 1325
 - in *Calder v. Bull*, 212–213
 - Ellsworth Court and, 491
 - Jay Court and, 843
- Ireland, 36
- Irish Republican Army (IRA)
 - extradition and, 563
- Irish-American Gay, Lesbian and Bisexual Group of Boston (GLIB), 786
- Irish-Protestant riots, 1286
- Irons, Peter, 839
 - DeWitt and, 841
- Irresistible impulse test, 814
- IRS. *See* Internal Revenue Service
- Islam, 1053
 - Department of Defense and, 268
 - Kunstler and, 899
 - Nation of, 70
 - Title VII and, 1660
- Islamic Jihad, 1625
- ISPs. *See* Internet service providers
- Israel
 - ADL and, 70
 - same-sex unions in, 1404
- Istook, Ernest, 357
- Iva Ikuko Toguri D'Aquino v. United States*
 - treason and, 1666
- "I've Been to the Mountaintop" (King), 890
- Ives, Irving, 695
- Ives v. South Buffalo Railway Co.*, 1581
- IVF. *See* In vitro fertilization
- IWSA. *See* International Woman Suffrage Alliance
- IWW. *See* Industrial Workers of the World
- Marshall, J., and, 970
- Mormons and, 1037
- Jackson, Howell E., 992
- Jackson, Robert H., 833–835, 1286, 1287, 1565, 1800
 - appointment of, 134
 - Dennis v. United States* and, 415
 - Everson v. Board of Education* and, 550
 - executive power and, 835
 - free speech and, 834–835
 - Harisiades v. Shaughnessy* and, 737–738
 - Harlan, II, and, 741
 - Korematsu v. United States* and, 839
 - Minersville School District v. Gobitis* and, 594
 - Murphy and, 1047–1048
 - New Deal and, 1083, 1085
 - Nuremburg War Tribunal and, 1718
 - religious freedom and, 1028
 - Stein v. State* and, 317
 - Vinson Court and, 1718
 - West Virginia State Board of Education v. Barnette* and, 222, 594–595, 656, 782, 849, 1630, 1775
 - Youngston Sheet & Tube Co. v. Sawyer* and, 495
 - Zorach v. Clauson* and, 1822
- Jackson v. Denno*, 831
 - Crane v. Kentucky* and, 375
- Jackson v. Indiana*, 831–832
- Jackson v. Metropolitan Edison Company*
 - state action limitation and, 606
- Jackson v. Virginia*, 832
- Jacobellis v. Ohio*, 835–836, 1560
 - A Book Named "John Cleland's Memoirs of a Woman of Pleasure"* v. *Massachusetts* and, 1–2
 - obscenity and, 1118, 1123
 - Pope v. Illinois* and, 1191
 - Stewart, P., and, 1118
- Jacobinism
 - decline of, 39
 - Federalists and, 36
- Jacobs, James, 722
- Jacobson, Henning, 836
- Jacobson v. Massachusetts*, 86, 836–837
 - compulsory vaccination and, 341
 - Holmes and, 772
- Jacobson v. United States*, 837
 - entrapment and, 509
- Jamaica, 1262
- James, Daniel, 156
- James I, king of England, 505, 1648
 - establishment of, 621
 - Puritanism and, 621
 - Virginia Charter of 1606 and, 1722–1723
- James II, king of England, 1667
 - English Bill of Rights and, 503
 - English liberties and, 507
 - Glorious Revolution and, 690
- James v. Illinois*, 556
- James, William, 735
- Jamestown, 238
- Jamison, Ella, 838
- Jamison v. Texas*, 838
- Japan, 1269
- Japanese
 - ACLU and, 49
 - exclusion of, 260
 - land ownership by, 1107

- Vinson Court and, 1720
- Japanese American Citizens League, 840
- Japanese American Evacuation Claims Act, 840–841
- Japanese Americans
 - ACLU and, 49
 - DeWitt and, 418
 - exclusion of, 260
 - internment of, 839, 1636
 - New Deal and, 1085
 - relocation of, 1562–1563
 - restrictive covenants and, 1325
 - Stone and, 1565
 - Stone Court and, 1562
 - Warren and, 1762
 - World War II and, 791, 1800
- Japanese Immigrant Case. See Yamataya v. Fisher*
- Japanese internment, 49, 260, 1636
 - Baldwin and, 104
 - Biddle and, 134
 - cases, 839–843
 - DeWitt and, 417–418
 - Douglas and, 445
 - emergency powers and, 495–496
 - government misconduct in, 841–842
 - habeas corpus suspension and, 352
 - Hoover and, 775
 - impact of, 842–843
 - Jackson, R. on, 835
 - Korematsu v. United States* and, 839–840, 1365, 1366, 1374, 1390
 - Murphy and, 1048
 - racial profiling and, 791
 - reaction to, 840–841
 - Reagan and, 1374
 - reparations for, 841–842
 - Roosevelt, F., and, 418, 839, 1372, 1373–1374
 - suspect categories and, 518
- Javits, Jacob, 306
- Jay Court, 491, 843–844
- Jay, John, 96, 491, 843–844
 - Federalist, The* and, 944
- Jayawickrama, Nihal, 640
- Jaycees
 - Roberts v. United States Jaycees* and, 304, 1363–1364, 1382
 - women and, 304, 1382
- Jay's Treaty, 36, 95–96
 - classified information and, 310
 - Ellsworth Court and, 491
- JB Pictures Inc. v. Department of Defense*, 995–996
- JBS. *See* John Birch Society
- JCAH. *See* Joint Commission on the Accreditation of Hospitals
- J.E.B. v. Alabama ex. rel. T.B.*, 115
 - middle scrutiny test and, 613
- Jefferson, Mildred, 1134
- Jefferson, Thomas, 844–848, 1441, 1792
 - Alien and Sedition Acts and, 40
 - atheism and, 90
 - Bank of the United States, 732
 - Baptists and, 119
 - belief-action and, 119, 627
 - Biblical law and, 127
 - bill of attainder and, 134–135
 - Bill of Rights and, 1632
 - capital punishment and, 239
 - clergy in public office and, 921
 - Declaration of Independence and, 402, 1339
 - disestablishment movement and, 425
 - Douglas and, 443
 - education and, 1525
 - Enlightenment and, 1026
 - equal protection and, 514
 - establishment clause and, 531
 - Franklin and, 621
 - free speech law and, 815
 - freedom of press and, 1206–1207
 - Hamilton and, 733
 - Judiciary Act of 1801 and, 274
 - Kentucky and Virginia Resolves and, 887
 - Locke and, 930
 - Madison and, 944
 - Marbury v. Madison* and, 958
 - Marshall Court and, 968
 - Mason and, 978
 - McCulloch v. Maryland* and, 988
 - Ninth Amendment and, 1095–1096
 - noncitizens and, 1105–1106
 - People v. Croswell* and, 733
 - Powell, Lewis, and, 1194
 - Republicans and, 36
 - Rush and, 847
 - Sedition Act and, 38, 39–40, 492, 647
 - separationism and, 90, 132, 766, 1309
 - slavery and, 138
 - Thanksgiving and, 532
 - trusts and, 634
 - unalienable rights in, 135
 - Virginia Declaration of Rights and, 1723–1724
 - Virginia Statute of Religious Freedom and, 526, 550, 623, 1331
 - wall of separation and, 1735
 - Williams, R. and, 1782
 - Zorach v. Clauson* and, 1822
- Jeffreys, Alec, 430
- Jehovah's Witnesses, 119
 - ACLU and, 48
 - attacks on, 593
 - beliefs of, 848
 - Cantwell v. Connecticut* and, 222, 627, 1364
 - children of, 1283
 - Covington and, 372
 - Cox v. New Hampshire* and, 373–374
 - draft and, 1048, 1474, 1802
 - First Amendment and, 1542
 - flag saluting and, 591–596, 1028, 1565, 1630
 - Follett v. Town of McCormick* and, 599–600
 - forced speech and, 600
 - Frankfurter and, 619
 - Jamison v. Texas* and, 838
 - Marsh v. Alabama*, 340
 - Minersville School District v. Gogitis* and, 591–593, 848, 1365, 1366, 1775
 - Nazis and, 591
 - Pledge of Allegiance and, 1177
 - Prince v. Massachusetts* and, 1208
 - religious freedom and, 848–850
 - Stone and, 1566
 - Stone Court and, 1561
 - taxation and, 1388, 1389
 - Thomas v. Review Board* and, 1477
 - Vinson and, 1722
 - Vinson Court and, 1720

INDEX

- Jehovah's Witnesses (*cont.*)
 West Virginia State Board of Education v. Barnette and, 593–596, 1775
- Jenkes, Frances, 726
- Jenkins v. Georgia*, 850–851
 Miller test and, 1013
- Jennings, Peter
 on Kunstler, 307
 Prejean and, 1200
- Jersey City, 729
- Jersild v. Denmark*, 640
- Jesuits
 banning of, 126
 religious incorporation of, 291
- Jewish Christians, 1035–1036
- Jewish Holy Scriptures, 132
- Jews. *See also* Judaism
 City of Shreveport v. Levy and, 1311, 1312
 Constitutional Convention of 1787 and, 1314
 KKK and, 896, 1420
 Magna Carta and, 950
 Maryland Toleration Act and, 975
 in military, 698, 1007, 1303–1304
 Order No. 11 and, 709
 Orthodox, 851–852, 1304
 as prisoners, 1214
 religious freedom and, 851–853, 1305–1306, 1310
 religious tests for office holding and, 1314
 restrictive covenants and, 1325
 Storey and, 1570
 on Supreme Court, 853
 U.S. Constitution and, 352
- Jim Crow laws, 71, 302, 1442, 1571
 Civil Rights Cases and, 301
 equal protection and, 515
 marches against, 958
 Plessy v. Ferguson and, 1181
 privileges and immunities clause and, 606–607
 race-based classifications and, 611
 United States v. Cruikshank and, 1681–1682
 Voting Rights Act of 1965 and, 1729
- Jimeno, Enio, 597
- Jimmy Swaggart Ministries v. Board of Equalization of California*, 23, 853–854
- Jobs, drug testing for, 1479–1480
- Johanns v. Livestock Marketing Association*
 forced speech and, 602
- John Birch Society (JBS), 854
 Dies and, 420
- John, Elton, 765
- John I, king of England
 double jeopardy and, 437
 Magna Carta and, 357, 949–950
- John Paul II, Pope, 255, 1101
- John XXIII, Pope
 Murray and, 1050
- Johnson, Andrew
 Civil Rights Act of 1866 and, 299
 Douglass and, 448
 impeachment of, 146
 Mormons and, 1038
 pardons and commutations and, 1145
- Johnson, Frank, 855
 Justice and, 879
- Johnson, Gregory, 590
- Johnson, Hiram W., 1761
- Johnson, Joey, 1516
- Johnson, Lyndon B., 856
 affirmative action and, 30
 campaign financing and, 219
 Civil Rights Act of 1964 and, 300
 Clark, R., and, 305
 Estes and, 544–545
 FOIA and, 641
 Fortas and, 603
 Goldberg and, 693, 696
 INA and, 796
 Justice and, 878
 King and, 890
 Marshall, T., and, 972
 Murray and, 1050
 New York v. Ferber and, 1091
 obscenity and, 1115
 Omnibus Crime Control and Safe Streets Act of 1968 and, 1132
 reapportionment and, 1276–1277
 Voting Rights Act of 1965 and, 959, 1729
- Johnson, Richard M., 1588
- Johnson, Samuel, 138
- Johnson, Sheri Lynn, 128
- Johnson v. Gila River Indian Community*, 809
- Johnson v. Louisiana*, 743
- Johnson v. Robison*, 1304, 1305
- Johnson v. United States*, 679, 1433
- Johnson v. Zerbst*, 1350, 1351
- Johnson, William
 Jefferson and, 848
 in *Satterlee v. Matthewson*, 213
- Johnson-Reed Act. *See* Immigration Act of 1924
- Joint Commission on the Accreditation of Hospitals (JCAH), 433
- Joint Committee on Social Action, and Conservative Judaism, 852
- Joint participation test, 45
- Joint trials, 351
- Jokes
 hate speech v., 754
 hostile environment harassment and, 778
- Jones, Ashton, 59
- Jones II. *See* *Jones v. Opelika*
- Jones, Robert, 1137
- Jones, Russell & Laura, 1271
- Jones v. Alfred H. Mayer Co.*
 Civil Rights Act of 1866 and, 299
 housing discrimination and, 1649
- Jones v. Georgia*, 872
- Jones v. Hallahan*, 1400
- Jones v. Opelika*, 593, 1390
 civil liberties and, 1634
 Follett v. Town of McCormick and, 599
 Frankfurter and, 619
 preferred position rule and, 1199
 Stone and, 1565
 Stone Court and, 1561
- Jones v. Van Zandt*, 1486–1487
 Taney Court and, 1607
- Jones v. Wolf*, 856–858
 establishment clause and, 537
 neutral principles doctrine and, 863
 Watson v. Jones and, 1768
- Joseph Burstyn, Inc. v. Wilson*, 858, 1042
- Mutual Film Corporation v. Industrial Commission of Ohio*
 and, 1055

- Joseph v. State*, 1307
- Journal of Church and State*, 397
- Journalists. *See also* Freedom of press; Reporter's privilege
- confidentiality and, 322
 - in court rooms, 662
 - FOIA and, 641
 - freedom of expression and, 640
 - information disclosure and, 1579
 - IRS and, 1099
 - in judicial proceedings, 662
 - libel and, 761
 - military operations and, 995
 - news-gathering torts and, 661
 - Pell v. Procunier* and, 1151
 - PPA and, 1223
 - press access and, 661
 - shield laws and, 1473
 - sources of, 859
 - subpoenas to, 1579
- Joyce, James, 48
- censorship and, 304
 - obscenity and, 659, 1116
 - United States v. One Book Entitled "Ulysses"* and, 1688–1689
- JSSA. *See* Jury Selection and Service Act
- Judaism. *See also* Jews
- Board of Education, Kiryas Joel Village School District v. Grumet* and, 157
 - in colonial America, 622
 - Department of Defense and, 268
 - Goldman v. Weinberger* and, 629
 - Humane Slaughter Act and, 561
 - statutory religion-based exemptions and, 561
 - Ten Commandments and, 1622
 - Title VII and, 1660
 - U.S. Constitution and, 352
- Judges
- administrative law, 799
 - duty, 1434
 - impartial, 798–800
 - Model Code of Judicial Conduct and, 859
 - payment of, 798–799
- Judicial activism
- Hand on, 736
 - judicial review and, 865
 - Justice and, 878
 - Miranda warning and, 1017
 - Warren Court and, 1760
- Judicial bias, 859–860
- invidious discrimination and, 830
- Judicial Canon 35, 662
- Judicial Code, 867
- Judicial federalism, 1544–1545
- Judicial legislation, 1634
- Judicial proceedings
- cameras in, 218
 - discovery materials in, 421
 - God in, 860–861
 - journalists in, 662
 - media access to, 995
 - open, 995
- Judicial records, access to, 21
- Judicial restraint
- Frankfurter and, 617, 782
 - Hand and, 736–737
 - judicial review and, 865
 - Kennedy, A., and, 885
 - Nebbia v. New York* and, 1081
- Judicial review, 863–866
- abroad, 865–866
 - access to, 926
 - Calder v. Bull* and, 213
 - Hayburn's Case* and, 844
 - history of, 863–865
 - Kennedy, A., and, 884
 - LSC and, 914
 - Marbury v. Madison* and, 958
 - Marshall Court and, 968
 - Marshall, J., and, 970
- Judicial rights, Bible and, 128
- Judiciary
- encroachment on, 864
 - independent, 289
- Judiciary Act of 1789
- bail and, 97
 - Barron v. Baltimore* and, 112
 - Ellsworth and, 491
 - Marbury v. Madison* and, 958
 - Marshall Court and, 968
 - writ of mandamus and, 864
- Judiciary Act of 1801, 274
- Jurek v. Texas*, 223, 241, 866
- cruel and unusual punishment in, 231–232
- Jurisdiction
- appellate, 866–867
 - concurrent, 1547
 - due process and, 460
 - of federal courts, 866–868
 - general federal question, 867
 - Marshall Court and, 968
 - of state courts, 1547
 - subject matter, 866
 - of Supreme Court, 868
- Jurisprudence
- Christian Nation and, 342–343
 - constitutional, 993
 - establishment clause doctrine and, 531–537
 - Meiklejohn and, 998
- Juries. *See also* Grand juries
- absolute disparity in, 872
 - Ballew v. Georgia* and, 105
 - bias of, 873
 - in capital cases, 710
 - capital punishment and, 240–241
 - capital sentencing and, 990
 - for civil trials, 359–360, 872
 - death-qualified, 932
 - deliberation of, 875
 - equal protection clause, 225
 - Fourteenth Amendment and, 1726
 - gender and, 871
 - grand v. petit, 704, 706
 - hung, 875
 - impartial, 769
 - incorporation doctrine and, 803
 - instructions, 407
 - intimidation of, 772
 - mandatory death sentences and, 952–953
 - Penn and, 1781
 - petit, 703

INDEX

- Juries (*cont.*)
qualifications for, 872
race and, 114, 871, 877–878
representative, 769
right to, 139, 1417
selection of, 871–874, 876, 1539
sequestered, 632
size of, 743
source lists for, 871–872
Taylor v. Louisiana and, 1610
unanimity of, 73, 743, 875
underrepresentation in, 872
U.S. Constitution and, 352–353
voir dire and, 873
voluntary confessions and, 831
women in, 855
- Jury nullification, 644, 869–871
capital punishment and, 870, 990
jury trial right and, 876–877
mandatory death sentences and, 952
- Jury selection, 871–875
challenges for cause and, 873
composing the venire, 871–873
preemptory challenges for, 873–874
voir dire for, 873
- Jury Selection and Service Act (JSSA), 871
- Jury source lists, 871–872
- Jury trials, 875. *See also* Civil trials; Joint trials; Judicial proceedings; Trials
access to, 20
adjudicating guilt and, 164
African Americans and, 877–878
bifurcated, 227, 231–232
bill of attainder v., 135
burden of proof and, 195–197
clothing and, 544
common law, 739
competency to stand, 831–832
extradition and, 563–564
jury nullification in, 869–871
juveniles and, 990
military, 551–552
multiple, 112–113, 122–123
overseas, 354–355
postponement of, 632
race and, 877–878
right to, 875–877
speedy, 76
state bills of rights and, 137–138
U.S. Constitution and, 352–353
venue of, 632
- Jury wheel, 872
- Just compensation, 1541
eminent domain and, 1604
- Just Say No, 1743
- Justice
liberties and, 1272–1273
morality and, 1329
Rawls and, 1272–1273, 1274
- Justice Delayed: The Record of the Japanese American Internment Cases* (Irons, ed.), 839
- Justice Department. *See* Department of Justice
- Justice, William Wayne, 878–879
- Justice Without Trial* (Skolnick), 1236
- Justiciability, 596
- Juvenile(s). *See also* Children; Delinquency; Minors
adjudications and, 396
African American, 1258
capital punishment and, 224, 885
due process and, 990
First Amendment and, 604
Fortas and, 604
Hispanic, 1258
incarceration
jury trials and, 990
obscenity and, 1119, 1123
O'Connor and, 1127
pretrial detentions of, 1419
proportionality review and, 1242
protection of, 1248
public trials and, 1248
In re Gault and, 812, 1351
In re Winship and, 813
records of, 812
rights for, 604
separation of, 1550
status offenses and, 813, 1549–1550
tried as adults, 990
Warren Court and, 1758
- Juvenile Courts and Probation* (Baldwin and Flexner), 102
- Juvenile Justice and Delinquency Prevention Act of 1974, 1550
- Juvenile Justice Project of Louisiana, 1499
- Juvenile justice system
race and, 1258
In re Gault and, 812, 1350–1351
In re Winship and, 813
- J. W. Hampton, Jr., & Co. v. United States*, 1024

K

- Kaleidoscope*, 894
- Kalven, Harry, Jr.
heckling and, 758
on *Stromberg v. California*, 784
- Kaminski, John P., 55
- Kamisar, Yale, 881
- Kandyland, 523
- Kanka, Megan, 997
- Kansas, Alien Land Law in, 1107
- Kansas State Board of Education, 378
- Kansas Supreme Court, 58
- Kansas v. Garber*, 58
- Kansas v. Hendricks*
Breyer and, 183
ex post facto laws and, 554
indefinite detention and, 804
mental illness and, 1001
- Kant, Immanuel, 1329, 1645
Meiklejohn and, 999
- Karcher v. Daggett*, 1277, 1279
- Karok Indians, 939
- Kashian v. Harriman*, 1481
- Kaskel, Cesar, 709
- Kassas, Mahmoud, 1143
- Kastigar v. United States*, 1454
use/derivative use immunity and, 668
- Katcoff v. Marsh*, 268–269
- Kate, The*, 342
- Katz, Charles, 882

- Katz v. United States*, 881–882, 1430, 1433, 1519
Florida v. Riley and, 597
Mincey v. Arizona and, 1014
Olmstead v. United States and, 1130, 1602
privacy and, 1220, 1682
United States v. United States District Court
and, 1696
wiretapping and, 1786
- Katzenbach v. McClung*
Civil Rights Act of 1964 and, 300
racial discrimination and, 827
- Katzenbach v. Morgan*, 613
- Kaufman, Irving Robert, 883, 1377, 1378
- KaZaA, 823
- Keating-Own Child Labor Act, 1777
- Kedroff v. St. Nicholas Cathedral*, 862
- Keefe v. Geanakos*, 1613
- Keenan, Nancy, 1062
- Kefauver, Estes, 694–695
- Kelleher v. Minshull*, 1531
- Keller v. State Bar of California*, 1700
- Kelley, Dean, 118
- Kelly, “Machine Gun,” 774
- Kelo v. City of New London*, 1557
- Kelsen, Hans, 865
- Kemp, Edward
Murphy and, 1047, 1048–1049
- Ken, Thomas, 1667
- Kendall, Amos, 6, 883–884, 1485
- Kennard, Clyde, 548–549
- Kennedy, Anthony M., 884–886
appointment of, 10
Ashcroft v. Free Speech Coalition and, 83–84
Board of Education, Kiryas Joel Village School District v. Grumet
and, 157
Bowers v. Hardwick and, 1222
child pornography and, 660
Church of the Lukumi Babalu Aye v. City of Hialeah
and, 289
City of Boerne, Texas v. Flores and, 160
coercion and, 1102
coercion test and, 540
County of Allegheny v. ACLU and, 42, 529, 1313, 1314
Harmelin v. Michigan and, 384
Hill v. Colorado and, 13
Lawrence v. Texas and, 908, 909, 1328
Lee v. Weisman and, 911
Lemon test and, 534
no-coercion test and, 535, 768
nomination of, 884
non-preferentialism standard and, 1110
O’Connor and, 1126
Osborne v. Ohio and, 1138
police power and, 1186
Power v. Ohio and, 878
proportional punishment and, 1241
Romer v. Evans and, 1222
Rosenberger v. Rector and Visitors of the University of Virginia
and, 1379–1380
on same-sex adoption, 678
same-sex marriage and, 1400
sexual orientation and, 1222
sexually explicit materials and, 1120
Solem v. Helm and, 1654
Stenberg v. Carhart and, 1322
- Turner Broadcasting System v. Federal Communications Commission* and, 1669
Virginia v. Black and, 1724–1725
Webster v. Reproductive Health Services and, 1770
- Kennedy, Edward
Breyer and, 183
Dees and, 1503
FACE Act and, 633
- Kennedy, John F.
affirmative action and, 30
assassination of, 720
Civil Rights Act of 1964 and, 300
Clark, R., and, 305
Connor and, 348
Estes and, 545
freedom rides and, 959
Freund and, 664–665
Goldberg and, 693, 695–696
immigration and, 1070
Johnson, L., and, 856
Marshall, T., and, 972
Meiklejohn and, 1000
Murray and, 1050
Nixon, R. and, 1098
NRA and, 1070
reapportionment and, 1276
White, B., and, 1779
- Kennedy, John Stewart, 288
- Kennedy, Randall, 1623
- Kennedy, Robert, 1779
assassination of, 720
Chicago Seven and, 278
Hoover and, 776
- Kennedy School of Government, 182
- Kennedy v. Meacham*, 291
- Kennedy v. Mendoza-Martinez*, 730
- Kent, James, 769–770, 1572
Gardner v. Village of Newburgh and, 477
People v. Freer and, 733
takings clause and, 1603
- Kent v. Dulles*, 886–887
Haig v. Agee and, 730
right to travel and, 801
- Kent v. United States*, 812
- Kentucky
expulsion of Jews in, 709
Good Friday and, 398–399
pardons and commutations and, 1146
slavery and, 1647
Stone v. Graham and, 1563
- Kentucky and Virginia Resolutions, 38
- Kentucky Habitual Criminal Act, 165
- Kentucky Resolutions, 646, 846, 887–888
federalization of criminal law and, 581
Madison and, 945–946
- Kenya, 972
- Ker v. Illinois*
Frisbie v. Collins and, 665
- Ker-Frisbie rule, 665–666
- Kessler v. Strecker*
Butler and, 209
- Kevorkian, Jack, 547, 888–889, 1165
- Key, Francis Scott, 1486
“In God We Trust” and, 1066
- Key man systems, 872

INDEX

- Keyes v. School District No. 1, Denver*
equal protection and, 517
- Keyhole* (magazine), 1117
- Keyishian v. Board of Regents*, 17–18, 163, 1514, 1613
- Elrod v. Burns* and, 492
- freedom of association and, 635–636
- loyalty oaths and, 1612
- teachers and, 1611
- Keynes, John Maynard, 545–546
- Kidd, Thomas I, 394
- Kidnapping
personal liberty laws and, 1154
- slavery and, 1572
- King Arts Theatre, 1706–1707
- King, Beverly, 1501
- King James Bible, 1621
- King, Martin Luther, Jr., 889–891, 1069, 1443, 1500
- assassination of, 720, 890, 959
- Bible and, 127
- Chavez and, 274
- Chicago Seven and, 278
- civil rights laws and, 302
- COINTELPRO and, 1518
- Connor and, 348
- Garrison and, 676
- Hoover and, 776
- injunctions and, 1210
- Kunstler and, 898
- marches and, 958–959
- New York Times Co. v. Sullivan* and, 330, 403
- nonviolence and, 412
- NRA and, 1070
- RICO and, 1335
- Son of Sam Law and, 361
- wiretapping of, 306, 776
- King, powers of, 126
- King, Rodney, 154, 1184
- race and, 878
- separate prosecutions and, 441
- King, The v. Perkins*, 438
- King, The v. Read*, 437
- King v. Smith*, 692
- King's Bench, 1748
- Kingsley Books v. Brown*, 1211
- Kingsley International Pictures Corporation v. Regents of the University of New York*, 891–892, 1042
- Joseph Burstyn, Inc. v. Wilson* and, 858
- “Kinsey Reports,” 1405
- Kirby v. Illinois*, 892, 1679
- right to counsel and, 1697
- Kirk v. Commonwealth*, 1491
- Kirkland v. Northside Independent School District*, 1613
- Kirtland Safety Society
Mormons and, 1036
- Kiryas Joel, 157–158
- Kissinger, Henry
New York Times v. United States and, 1089
- Nixon, R. and, 1098
- Kitchen Cabinet, 883
- Kitty Kat Lounge, 111
- Kitzmiller v. Dover Area School District*, 378–379
- KKK. *See* Ku Klux Klan
- Klanwatch, 1500
- Klein v. Commonwealth, State Employee's Retirement System*, 130
- Kleindienst v. Mandel*, 893, 1530
- due process and, 460
- INA and, 983
- Klopper v. North Carolina*, 893
- incorporation doctrine and, 803
- procedural due process and, 463
- Knauer v. United States*, 1801
- Knauff, Ellen, 461
- Knauff v. Shaughnessy*, 1467
- Knight, Goodwin
Chessman and, 278
- Warren and, 1762
- Knights of Labor, 400
- Knights of the Ku Klux Klan. *See* Ku Klux Klan
- Knoedler's Gallery, 342
- Knowles, James, 1501
- Know-Nothing Party, 1294
- Knox, Thomas, 1525
- Koenick v. Felton*, 398
- Kohane, Meir, 898
- Kohl v. United States*, 1603
- Kois v. Wisconsin*, 894
- Kolender v. Lawson*, 894
- Chicago v. Morales* and, 278–279
- Konigsberg v. State Bar of California*, 14, 895
- free speech and, 1641
- Warren Court and, 1753
- Kopel, David, 1187
- Korean War
military chaplains and, 268
- Youngstown Sheet & Tube Co. v. Sawyer* and, 495, 835
- Koreans, exclusion of, 260
- Korematsu, Fred, 496, 839–840
- Hamdi v. Rumsfeld* and, 842
- litigation of, 841–842
- Korematsu v. United States*, 49, 1635, 1766
- Baldwin and, 104
- Black, H., and, 518, 839, 1365, 1373
- Douglas and, 445, 1373
- emergency powers and, 495–496
- habeas corpus and, 1590
- impact of, 842–843
- Jackson, R. and, 835
- Japanese internment and, 839–840, 1365, 1373
- Murphy and, 1048
- profiling and, 1623
- Roberts, O., and, 1364–1365
- Rutledge, W., and, 1390
- Stone and, 1565
- Stone Court and, 1562
- suspect categories and, 518
- Warren on, 936
- Koresh, David, 1317
- Branch Davidian Church, 1731
- Clark, R., and, 306
- Korwar, Arati, 220
- Kotch v. Board of River Port Pilot Commissioners*, 1391
- Kovacs v. Cooper*, 362
- Kowalski, Sharon, 1407
- KQED, Inc., 779
- Kramer, Hilton, 1051
- Kramer, Larry, 25
- Krar, William, 565
- Kreisky, Bruno, 639
- Kreshik v. St. Nicholas Cathedral*, 862

Ku Klux Klan (KKK), 895–898, 1502. *See also* Cross burning;
 United Klans of America; White supremacists
 ACLU and, 49
 ADL and, 69
Brandenburg v. Ohio and, 178, 1420
Capitol Square Review and Advisory Board v. Pinette and,
 246–247, 1314
 Civil Rights Act of 1866 and, 299
 clear and present danger test and, 312
 COINTELPRO and, 1518
 Connor and, 348
 cross burning and, 382–383
 Dawson and, 397
 endorsement test and, 938
 establishment clause and, 529
 extremist groups and, 564
 forced speech and, 601
 freedom of association and, 635
 hate crime laws and, 749
 hate speech and, 753–754
 heckler's veto and, 758
 Hoover and, 774
New York ex rel. Bryant v. Zimmerman and, 1087
Pierce v. Society of Sisters and, 634
 public forums and, 1229
 religious speech and, 1229
 Southern Poverty Law Center and, 1500
United States v. Cruikshank and, 1681–1682
 U.S. Constitution and, 353
 Warren Court and, 1753
 Ku Klux Klan Act. *See* Civil Rights Act of 1871
Kuhn v. City of Rolling Meadows, 371
 Kunstler, Michael, 898
 Kunstler, William M., 306–307, 898–899
 Chicago Seven and, 278
Kunz v. New York, 1722
 Kutcher, James, 1270
Kyles v. Whitley, 35, 235, 899
 Napue v. Illinois and, 1061
Kyllo v. United States, 899–900, 1430
 plain view and, 1171
 privacy and, 1220
 reasonable expectation of privacy and, 882
 Scalia and, 1417
 Stevens and, 1557

L

La Follette, Robert Marion, 901–904
La Follette's Weekly, 903
 Labor laws
 anti-child, 474
 Bakeshop Act and, 928
 Goldberg and, 694
 Rauh and, 1269
 Labor organizers, 1395, 1467
 New Deal and, 1083
 permits and, 1562
 Labor practices
 Nike and, 332
 Wal-Mart and, 331
 Labor unions
 Abood v. Detroit Board of Education and, 7
 ACLU and, 48
 Baldwin and, 103

*Brotherhood of Railroad Trainmen v. Virginia ex. rel. Virginia
 State Bar* and, 186
 campaign financing and, 218
 Chavez and, 274–275
 conspiracy and, 351
 CPUSA and, 337
 Darrow and, 394
 Debs and, 400
 forced speech and, 601–602
 freedom of association and, 634–635
 government and, 928
 hearsay evidence and, 757
 KKK and, 897
 mandatory fees for, 601–602
 National Labor Relations Act and, 51
 picketing and, 1169
 Rauh and, 1269, 1270
 self-incrimination and, 1453
 Taft-Hartley Act and, 1602
Laborem Exercens, On Human Work (John
 Paul II), 1101
 Labor-Management Relations Act of 1935, 1800
 Lader, Lawrence, 1061–1062, 1062
Ladue v. Gilleo, 363
Lady Chatterley's Lover
 *Kingsley International Pictures Corporation v. Regents of the
 University of New York* and, 891–892
 Lafayette, Marquis de, 846
 LaFollette, Robert M., 1083
 McCarthy and, 984
Laird v. Tatum, 445
 Laissez-faire, 1633
 Lake, John, 1667
 Lamar, Joseph R., 1777
 Lambda Legal Defense & Education Fund, 904, 1402
 Lawrence v. Texas and, 908–909
 same-sex marriage and, 1401
Lambert v. California, 905
Lambert v. Wicklund, 905–906
 Lambert, Virginia, 905
Lambeth v. Board of Commissioners, 1067
Lamb's Chapel v. Center Moriches Union Free School District,
 906–907, 1299
 ACLU and, 286
 Kennedy, A., and, 885–886
 public forums speech and, 1229
 religious organizations and, 699–700
 religious speech and, 1229
 viewpoint discrimination and, 1715
 Land ownership, by noncitizens, 1107–1108
 Land Tax Act of 1694, 691
 Land use variance, 1480
 Landlords, hostile environment harassment and, 778
 Lando, Barry, 760
Landon v. Plasencia, 461
 Landrum, Phillip, 695
 Landrum-Griffin Act of 1959, 1270
 Goldberg and, 695
Langan v. Vincent's Hospital, 1408
 Languages
 education and, 801
 hate speech and, 752–755
 jury selection and, 874
 Meyer v. Nebraska and, 1002–1003
Lankford v. Idaho, 235

INDEX

- Lanzetta v. New Jersey*, 907
- LAPD. *See* Los Angeles Police Department
- Lariat, The*, 397
- Larkin v. Grendel's Den*, 530
- LaRocca v. Lane*, 1307
- LaRocca, Vincent, 1307
- LaRouche, Lyndon, 306
- Larson v. Valente*
 - coercion and, 1102
 - First Amendment and, 289
- Hernandez v. Commissioner of Internal Revenue* and, 761
- Las Vegas, 306
- Lasky, Harold, 307
 - clear and present danger test and, 658
- Lassiter v. Department of Social Services*, 281
- Lassiter v. Northampton County Board of Elections*, 1559
- "Last Fearsome Taboo, The: Medical Aspects of Planned Death" (Kevorkian), 888
- Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. United States*, 72–73, 342, 397, 908, 1476
 - Fuller Court and, 668
- Latin America
 - immigration from, 1259
 - INA and, 797
- Latinos. *See* Hispanics
- Lattimore, Owen, 322
 - Fortas and, 603
- Law
 - bible and, 125–130
 - colonial, 126
 - common v. statutory, 335–336
 - constitutional v. biblical, 126
 - English common, 127
 - military, 1006–1007
 - of Moses, 126
- Law & Order*, 305
 - Kunstler and, 307
- Law enforcement, 80–81
 - criminal profiling and, 1236
 - Warren and, 317–318
- Law Enforcement Assistance Administration (LEAA), 1132
- Law of the land, 1580
- Law of Torts, The* (Cooley), 1591
- Lawless action, imminent, 762–763
- Lawrence and Garner v. Texas*, 1222
- Lawrence, John Geddes, 908
- Lawrence v. Texas*, 170, 436, 908–909, 1328, 1338, 1399–1400, 1405, 1408, 1416, 1461, 1493, 1533, 1583
 - Bowers v. Hardwick* and, 199
 - Breyer and, 183
 - Eisenstadt v. Baird* and, 484
 - family values movement and, 578
 - gay and lesbian rights and, 678, 1273, 1372
 - intrusion and, 836
 - Kennedy, A., and, 885, 1328
 - Lamda and, 904
 - Miller test and, 1013
 - O'Connor and, 1126
 - Paris Adult Theatre v. Slaton* and, 1148
 - police power and, 1186
 - Romer v. Evans* and, 909, 1371
 - Scalia and, 1338, 1583
 - sodomy and, 1521
 - Souter and, 1497
 - Stevens and, 1558
 - substantive due process and, 466
- Laws
 - arbitrary, 464
 - content-based, 252
 - due process and, 464
 - neutral, 500
- Laws and Liberties of Massachusetts*, 55, 126
- Laws of Ecclesiastical Polity, Of the* (Hooker, R.), 1735
- Lawson, Edward, 894
- Lawson v. Commonwealth*, 1490
- Lawton v. Steele*, 1185
- Lawyer's Journey: The Morris Dees Story, A* (Dees), 1503
- Lawyers. *See* Attorneys
- Laxalt, Paul, 306
- Laycock, Douglas
 - establishment clause and, 527
 - Lemon test alternatives and, 534
- Layton, Frank, 1343
- LDF. *See* Legal Defense Fund
- LEAA. *See* Law Enforcement Assistance Administration
- League of Decency, 756
- League of Nations, 1640
 - Darrow and, 394
 - La Follette and, 903
- League of Women Voters
 - ERA and, 520
 - FCC v. League of Women Voters* and, 578
- League to Enforce Peace, 1601
- Leahy, Patrick
 - CDA and, 336
 - VPPA and, 1713
- Leary v. United States*, 455
- Least restrictive means test, 972
- Leavitt, Humphrey, 553
- Lee, Edwin, 1685
- Lee, George, 548
- Lee, Richard Henry
 - Bill of Rights and, 140
 - Constitutional Convention of 1787 and, 1263–1264
- Lee, Robert E., 911
- Lee v. Illinois*, 344
- Lee v. Weisman*, 3, 90, 357, 409, 911–912, 1412
 - coercion and, 1102
 - coercion test and, 540
 - Marsh v. Chambers* and, 915, 967
 - moments of silence statutes and, 1029
 - no-coercion test and, 535
 - Pledge of Allegiance and, 1179
 - religious neutrality and, 768
 - school prayer and, 1198
 - Souter and, 1496
- Lee v. Weisman*, 1416
 - non-preferentialism standard and, 1109
 - Pledge of Allegiance and, 1178
- Lefebvre, George, 151
- Left Wing Manifesto, The* (Gitlow), 653
- Legacy of Suppression* (Levy), 643
- Legal aid organizations, 913–914
- Legal Aid Society of New York, 912
- Legal certainty
 - Mt. Healthy City School District Board of Education v. Doyle* and, 1044–1045
- Legal counsel. *See also* Right to counsel
 - appeals and, 60–61

- Brotherhood of Railroad Trainmen v. Virginia ex. rel. Virginia State Bar* and, 186
 entitlement to, 60–61
 Legal Defense Fund (LDF), 1442
 death penalty and, 240
 Marshall, T., and, 515
 NAACP and, 971
Witherspoon v. Illinois and, 240
 Legal permanent residents (LPRs)
 family unity for noncitizens and, 576
 Legal realism, 912–913
 Cardozo and, 249
 Douglas and, 443
 Legal services
 advertising and, 114
 LSC and, 1324
 Legal Services Corporation (LSC), 913–914, 1324
 Legal Services Corporation Act, 913
Legal Services Corporation v. Velasquez, 913–914
 government funding of speech and, 701
 government speech and, 702
 viewpoint discrimination and, 1717
 Legion of Decency (LOD), 914
 movies and, 1041
 Legislation
 death penalty, 385
 national security and, 1765
 during wartime, 1765–1766
Lehman v. Shaker Heights, 247
Lehr v. Robertson, 279–280, 281
 Leibowitz, Samuel, 1427
 Leland, John, 108
 free exercise clause and, 623
Leland v. Oregon, 917
 Lemon test, 32, 918
 alternatives to, 534–535
 application of, 538–539
Board of Education v. Mergens and, 1298
Bowen v. Kendrick and, 167
 Burger and, 206
Committee for Public Education and Religious Liberty v. Regan
 and, 335
*Corporation of Presiding Bishop of the Church of Jesus Christ of
 Latter-Day Saints v. Amos* and, 367–368, 1302
 creationism and, 379, 1616
 criticism of, 534–535
 endorsement test v., 42–43
 entanglement prong, 367
 equal access v., 535
 establishment clause and, 1548
 establishment of, 528–529
Estate of Thornton v. Caldor and, 543
 Fortas and, 376–377
Hernandez v. Commissioner of Internal Revenue and, 761
Hunt v. McNair and, 785
Lee v. Weisman and, 911
 legislative chaplains and, 267
 legislative prayer and, 915
Lemon v. Kurtzman and, 533, 538, 1302, 1312, 1313, 1314, 1379
Lynch v. Donnelly and, 200, 528–529, 538–539, 1312–1313
Marsh v. Chambers and, 966
Mueller v. Allen and, 1045
 prongs of, 918
Rosenberger v. Rector and Visitors of University of Virginia
 and, 1379
 secular purpose prong of, 536
 separationism and, 533–535
Stone v. Graham and, 533, 538, 1314
Wallace v. Jaffree and, 1029
Walz v. Tax Commission and, 1738–1739
Lemon v. Kurtzman, 2, 32, 206, 267, 376–377, 1423, 1527, 1548.
See also Lemon test
 Americans United and, 56
 Burger Court and, 199
 coercion and, 1101
 establishment clause and, 542, 1563
Hunt v. McNair and, 785
Lee v. Weisman and, 911
 Lemon test and, 533, 538, 918, 1303, 1312, 1313
Mueller v. Allen and, 1045
 no endorsement test and, 1103
 non-preferentialism standard and, 1108
 Powell, Lewis, and, 1194
 school prayer and, 1197
 secular purpose and, 1438
Tilton v. Richardson and, 1656
Wallace v. Jaffree and, 1029, 1737
 zoning and, 1817
 Lend Lease Administration, 1269
 Length of delay, 1517
 Leniency, promises and, 319
 Lenin, Vladimir, 339
 Leo XIII, Pope, 1100–1101
 Leopold, Nathan, Jr.
 Darrow and, 395
 Goldberg and, 693
Les Amants (movie), 1560
 Lesbian and Gay Rights Project, 904
 Lesbian Avengers, 26
 Lesbian, gay, bisexual, and transgender (LGBT) movement, 677.
See also Gay and lesbian rights
 Lesbian rights. *See* Gay and lesbian rights
 Lesbians. *See* Homosexuals
 Lesbigo people, 676–677. *See also* Homosexuals
 L'espirit, 1638–1639
Letany (Bastwick), 919
 Lethal gas. *See* Gas chamber
 Lethal injection, 236, 242, 244
 “Letter from a Birmingham Jail” (King), 890
 nonviolent protest and, 959
Letter to Providence (Williams, R.), 1782
 Leukemia, stem cells and, 1552
 Leupp, Francis E., 1253
 Levellers, 507
 Levi, Edward, 1519
 Stevens and, 1556
 Levin, Joseph L., Jr., 1500, 1503
Levin v. Yeshiva University, 1409
 Levine, Samuel, 128
 Levison, Stanley, 776
Leviticus 24, 1329
Levitt v. Committee for Public Education, 334–335
Levitt v. PEARL, 1527
 Levy, Irving, 1269
 Levy, Leon, 1440
 Madison and, 643
 on seditious libel, 644
 Levying war, 1665
 Lewd speech, 124
 Lewis, C.S., 128

INDEX

- Lewis, Joseph, 1292
Lewis Publishing Co. v. Morgan, 62
Lewis v. Casey, 202
Lewis v. City of New Orleans, 587–588
Lewis v. Harris, 1402
Lewis v. United States, 1343
 Marchetti v. United States and, 960
Lex talionis, 1645
Leyra, Camilo, 919
Leyra v. Denno, 919
LGBT movement. *See* Lesbian, gay, bisexual, and transgender movement
Liability
 of gun manufacturers, 722–723
 media, 996
Libel, 36, 402. *See also* Seditious libel
 blasphemy and, 815
 categorical speech and, 1671
 damages for, 404
 defamation and, 815
 in England, 506
 English law and, 643
 Falwell and, 575
 Flynt and, 599
 Frankfurter and, 617
 free speech law and, 815
 freedom of press and, 660–661, 1202
 Garrison and, 676
 grand juries and, 705
 group, 715, 752
 hate speech and, 752–753
 Herbert v. Lando and, 760–761
 history of, 815
 Hustler Magazine v. Falwell and, 787
 journalists and, 761
 jury nullification and, 869
 malice and, 761
 Marshall, J., on, 970
 New York Times Co. v. Sullivan and, 39, 302, 1088
 obscenity and, 1117
 pre-Sedition Act of 1798, 733
 private torts v., 661
 public figures and, 788
 sedition and, 815
 Warren Court and, 1754
Libel Act of 1692, 506, 646
Liberal Party, of Canada, 1403
Liberalism
 Catholic Church and, 253–254
 Jefferson and, 846
 Rawls and, 1272
Liberation movements, 87
Liberator, The, 5, 7, 448, 1155, 1485
 AASS and, 45–46
 Garrison and, 676
Libertad v. Welch, 181
Libertarian Party, 266
Libertarian privilege, 1638
Liberté, Égalité, Fraternité, 1638
Liberty
 American Revolution and, 135
 arrests and, 80
 Bible and, 127
 Bill of Rights and, 945
 Burke and, 207
 Catholic Church and, 253–255
 colonial, 126
 in *Crandall v. Nevada*, 801
 democracy v., 151
 Fourteenth Amendment and, 74, 1328
 fundamental, 138–139, 143
 government and, 833
 Harlan, I. and, 74
 individual, 1026
 Jackson, A. and, 832
 Mill and, 1011
 natural v. civil, 1026
 palladium of, 137
 privileges and immunities and, 1231
 subjects of, 52–54
 substantive due process and, 1582
Liberty Bell, 127
Liberty of contract. *See* Freedom of contract
Liberty rights, natural rights as, 1326
Liberty Under the Soviets (Baldwin), 103
Liberty University, 575
Libraries
 CIPA and, 825
 computers and, 660
 First Amendment and, 164
 government funding of speech and, 701
 Internet filtering at, 824–826
 as nonpublic forums, 1245
 obscenity and, 1125
 school, 156
Licensing. *See also* Liquor licensing
 City of Littleton v. Z.J. Gifts D4, LLC and, 926
 film, 1041–1042
 Follett v. Town of McCormick and, 599–600
 free speech law and, 815
 gay and lesbian rights and, 677
 Hague v. C.I.O. and, 729
 history of, 815
 medical, 800
 sexually explicit movies and, 669–670
 tax, 1561
Licensing laws
 in England, 1439–1440
 freedom of press and, 1201
 prior restraints and, 1210
 private police and, 1227
Lieberman, Joseph, 764–765
Liebman, James, 1346
Life (magazine), 1657
Life, liberty, and property, 1537–1538
Likeness. *See* Appropriation of name or likeness
Lilborne (Lilburne), John, 128, 919–920
 freedom of press and, 1201
Lilly, Benjamin, 920
Lilly, Mark, 920
Lilly v. Virginia, 920
 compulsory process clause and, 344
Limited public forums. *See* Designated public forums
Lin, Maya, 1500
Lincoln, Abraham, 922–924, 1487
 assassination of, 146
 civil religion and, 298
 election of, 759
 Emancipation Proclamation and, 6, 452, 493–494, 924
 emergency powers and, 495

- equal protection and, 514
- Ex parte Milligan* and, 271, 551
- Ex parte Vallandigham* and, 552
- Field and, 586
- freedom of speech and, 646–647
- habeas corpus and, 923–924, 1374
- legacy of, 924
- no endorsement test and, 1104–1105
- Order No. 11 and, 709
- pardons and commutations and, 1145
- Phillips, W. and, 1158
- Simpson and, 146
- slavery and, 1647
- Lincoln, Thomas, 922
- Lincoln University, 971
- Lincoln-Douglas debates, 922–923
- Lincoln's Constitution* (Farber), 646
- Linde, Hans A., 1545
- Lindenmuller v. People*, 1311
- Lindh, John Walker
 - Miranda warnings and, 1020
 - terrorism and, 790
- Lindsay, John V., 760
- Lindsay, Vachel, 1145
- Lindsmith, Alfred, 64
- Line of Fire: the Morris Dees Story* (movie), 1503
- Line-Item Veto Act, 1417
- Lineups, 567, 925
 - United States v. Wade* and, 1697
 - Warren Court and, 1759
- Lingens, Peter, 639
- Lingens v. Austria*, 639
- Linmark Associates, Inc. v. Township of Willingboro*, 1821
- Lippmann, Walter, 736
- Liquor licensing
 - establishment clause and, 530
 - nude dancing and, 215–216
- Lisenba v. California*, 316
- Literacy tests
 - segregation and, 1442
 - Voting Rights Act of 1965 and, 1729
- Lithuania, 1679
- Litigation. *See also* Class action litigation
 - Brotherhood of Railroad Trainmen v. Virginia ex. rel. Virginia State Bar* and, 185–186
 - under English law, 798
 - federal, 1030–1031
 - Flast v. Cohen* and, 596
 - Fourth Amendment violations and, 148–149
 - media liability and, 996
 - municipal, 1030–1031
 - NAACP v. Button* and, 1058–1059
- Little, Joan, 1501
- Little Lindbergh Law, 277
- Little Rock School Board, 376
- Living the Bill of Rights: How to Be an Authentic American* (Hentoff), 760
- Livingston, Sigmund, 69
- Llanfear Pattern* (Biddle), 133
- Llewellyn, Karl, 913
- Illinois v. Wardlow*, 794–795
- Lloyd Corp. v. Tanner*, 44, 1544
 - Marshall, T., and, 972
- Lloyd Corporation v. Tanner*, 926–927
- Lloyd, William, 1667
- Loan Association v. Topeka*, 927–928
- Lobbying, 1674
 - Christian Coalition and, 285–286
 - free speech and, 632
 - gun control and, 719–720
 - NARAL and, 1062
 - NRA and, 1070
- Lochner era, 473
- Lochner v. New York*, 465, 928
 - due process and, 1580
 - economic regulation and, 473
 - economic rights and, 479
 - freedom of contract and, 637
 - Fuller Court and, 667
 - Hand on, 735
 - Holmes and, 770, 1633
 - Hughes and, 781–782
 - “laissez-faire” capitalism and, 1337
 - New Right and, 1086
 - preferred position rule and, 1200
 - privileges and immunities and, 1232
 - substantive due process and, 608, 1368, 1633
 - Taft Court and, 1596
 - Waite Court and, 1733
- Locke, John, 930–931, 1580, 1630
 - civil liberties and, 1638
 - double jeopardy and, 438
 - due process and, 462
 - emergencies and, 494
 - English liberties and, 507
 - Franklin and, 620–621
 - free speech law and, 815
 - individual liberty and, 1026
 - influence of, 54
 - Jefferson and, 845, 847
 - Mason and, 978
 - Mill and, 1010
 - natural law and, 1079–1080
 - natural rights and, 1357
 - New Hampshire Constitution of 1784 and, 1085
 - property ownership and, 475
 - religion and, 1309–1310, 1314
 - Virginia Declaration of Rights and, 1723
- Locke v. Davey*, 929–930, 1528
 - equal access and, 536
 - non-funding provisions and, 153
 - Rosenberger v. Rector and Visitors of the University of Virginia* and, 1379
 - scholarships and, 1425
 - separationism and, 767
 - Witters v. Department of Services* and, 1789
- Lockerty v. Phillips*, 1801
- Lockett, Sandra, 931
- Lockett v. Ohio*, 223, 236, 241, 246, 385, 931–932
 - mitigating factors and, 232
- Lockhart, A.L., 932
- Lockhart v. McCree*, 191, 932
 - challenges for cause in, 873
- Lockwood, Polly, 341
- Lockyer v. Andrade*, 384–385, 1494
 - Chemerinsky and, 277
 - three strikes law and, 6, 1654
- LOD. *See* Legion of Decency
- Loeb, James, 1269

INDEX

- Loeb, Richard
Darrow and, 395
Goldberg and, 693
Lofton v. Secretary of Department of Children and Family Services, 190
homosexual adoption and, 678
Log Cabin Republicans, 932–933
Logan, James, 734
Logan Valley Mall, 44
Lohman, Ann Trow Lohman, 342
Loitering, 674–675
Loitering statutes, 1706
Lo-Ji Sales, Inc. v. New York, 933
London Company, 1722–1723
London, Ephriam, 188
London School of Economics, 884
Lonergan, Bernard, 254
Loney v. Scurr, 291
Long, Huey Pierce, 934
Long Island Railroad, 102
Long Parliament, 506
Lopez v. United States, 127
Lord's Prayer
Abington Township School District v. Schempp and, 502, 1757
in school, 2–4
school prayer and, 1197
Loretto v. Teleprompter Manhattan CATV Corp., 1604
Lorillard Tobacco Company v. Reilly, 1650
Los Angeles Police Department (LAPD)
City of Los Angeles v. Lyons and, 935
jury nullification and, 869
Rampart scandal and, 277
Los Angeles Times, bombing of, 394
Lotteries
congressional regulation of, 955
France v. United States and, 615
interstate, 615
United States v. Edge Broadcasting and, 1708
Louima, Abner, 154
Louis XVI, king of France, 1143
Louisiana
Alien Land Law in, 1107
City of Shreveport v. Levy in, 1311
Creationism Act and, 1617
literacy tests and, 1729
Long and, 934
lynchings in, 1774
NAACP and, 1064
Plessy v. Ferguson and, 1181
privacy and, 1531
religion and, 1438
slaughterhouses and, 1481
United States v. Cruikshank and, 1681
voting in, 1729–1730
Louisiana Crisis Assistance Center, 1499
Louisiana ex rel Francis v. Resweber, 236
Louisiana Purchase, 845
Louisiana Railroad Commission, 934
Louisiana State University, 934
Louisville & Nashville Railroad Co. v. Mottley, 867
Lovejoy, Elijah, 5, 302, 935, 1486
death of, 648
Phillips and, 1158
Lovell v. Griffin
Cantwell v. Connecticut and, 849
prior restraints and, 1209
Loving, Mildred, 936
Loving, Richard, 936
Loving v. Virginia, 169, 518, 936, 1368, 1399
interracial cohabitation and, 991
Japanese internment and, 841
miscegenation laws and, 1023
Naim v. Naim and, 1059, 1060
Warren and, 1763
Zablocki v. Redhail and, 1811
Low Level Radioactive Waste Policy Amendments, 1589
Lowell v. City of Griffin, 222
Lower federal courts, 19–20
“Loyalty Among Government Employees” (Emerson & Helfeld), 498
Loyalty and Security Program, 1269
Loyalty oaths, 504–505
Adler v. Board of Education and, 1612
Elfbrandt v. Russell and, 1612
Keyishian v. Board of Regents and, 492, 1612
National Labor Relations Board and, 1719
political patronage and, 1189
Speiser v. Randall and, 1672
teachers and, 1611
vagueness and, 1703–1705
Vinson Court and, 1718
Warren and, 1762
Weiman v. Updegraff and, 1612
Loyalty program, 603
LPRs. *See* Legal permanent residents
LSC. *See* Legal Services Corporation
LSD, 1743
free exercise clause and, 455
War on Drugs and, 1739
Lubbock Civil Liberties Union v. Lubbock Independent School District, 512
Lucas, Roy, 1062
Lucas v. Forty-Fourth General Assembly of Colorado, 1276
Lucas v. South Carolina Coastal Council, 1605
Luciano, Salvatore “Lucky,” 1742
Lugar v. Edmondson, 606
Luggage, searches and, 1752
Lujan v. Defenders of Wildlife, 1520
Scalia and, 1417
Lundy, Benjamin, 1155
Lurton, Horace
McReynolds and, 992–993
White Court and, 1777
Lusk Committee, 1798
Lutherans, 291
Lynch, Charles, 242
Lynch Men, 5
Lynch v. Donnelly, 41–42, 90, 288, 343, 399, 937–938, 1439
Burger Court and, 200
Capitol Square Review and Advisory Board v. Pinette and, 246–247, 1314
ceremonial deism and, 258
Christmas and, 41, 536, 1314
Elk Grove Unified School District v. Newdow and, 490
endorsement test and, 536, 539
God and, 861
“In God We Trust” and, 1067
Lemon test and, 200, 528–529, 538–539, 918, 1313

- nativity scenes and, 1313
 - no endorsement test and, 1103
 - non-preferentialism standard and, 1109
 - O'Connor and, 1029, 1126, 1313
 - Powell, Lewis, and, 1194
 - Lynching, 240, 242–243, 1442
 - Bell and, 1773–1774
 - of Eberhart, 897
 - Enforcement Act of 1870 and, 1681
 - extremist groups and, 564
 - of Frank, 897
 - Frank v. Mangum* and, 772
 - Jim Crow laws and, 302
 - KKK and, 896–897
 - Lovejoy and, 1486
 - NAACP and, 1063
 - Petition Campaign and, 1157
 - United States v. Cruikshank* and, 1681–1882
 - Lyng v. Northwest Indian Cemetery Protective Association*, 939, 1470
 - free exercise clause and, 624, 629
 - Native Americans and, 1077
 - Lyng v. Northwest Indian Protective Association*, 52
 - Lynn, Barry, 57
 - Lynnum, Beatrice, 940
 - Lynnum v. Illinois*, 319, 940
 - Lyons, Adolph, 935
 - Lysergic acid diethylamide. *See* LSD
 - Lysistrata* (Aristophanes), 649
- M**
- M Squad*, 1030
 - Mabry, James, 941
 - Mabry v. Johnson*, 941, 1413
 - MacAndrews and Forbes Company, 730
 - MacArthur, General Douglas, 1269
 - MacDonald, R. St. J., 638
 - MacDougall v. Green*, 1392
 - Macintosh, Douglas Clyde, 1142
 - Mackenzie v. Hare*, 562
 - MacKinnon, Catharine A., 46, 941–943, 1573
 - Dworkin and, 470
 - Emerson and, 499
 - obscenity and, 660, 1125
 - pornography and, 1120–1121
 - MacPherson v. Buick Motor Company*, 249
 - MacReynolds, James Clark, 801
 - Mad Bomber, 1236
 - Madden, James Arnold, 73
 - Madden v. Kentucky*, 1232
 - Madison, James, 943–946, 1441, 1544, 1636
 - Alien and Sedition Acts and, 40
 - Anti-Federalists and, 141, 1326
 - atheism and, 90
 - Baptists and, 108
 - Bill of Rights and, 112, 140–142, 438, 945, 1325, 1326–1327, 1340, 1349, 1632, 1635, 1751
 - Cato and, 994
 - civil liberties and, 139, 143, 1028
 - clergy in public office and, 921–922
 - Constitutional Convention of 1787 and, 357–358, 1264
 - economic regulation and, 473
 - economic rights and, 476
 - election of, 526
 - establishment clause and, 531–532
 - Federalist 10* and, 643, 1296
 - Federalist Papers* and, 1268, 1340
 - First Amendment and, 766
 - free exercise clause and, 624
 - free speech and, 945–946
 - freedom of press and, 1205, 1206
 - Jefferson and, 845
 - Kentucky and Virginia Resolves and, 887
 - Marbury v. Madison* and, 864, 958
 - Marshall Court and, 968
 - McDaniel v. Paty* and, 989
 - “Memorial and Remonstrance” and, 550, 947–948
 - Ninth Amendment and, 1095–1096, 1325, 1326–1327
 - noncitizens and, 1105–1106
 - non-preferentialism standard and, 1109
 - plenary power doctrine and, 1180
 - on political parties, 643
 - Powell, Lewis, and, 1194
 - presidency of, 946
 - religion and, 541, 624, 1315
 - religious freedom and, 944
 - Republicans and, 36
 - Separate-Baptists, 526
 - Tenth Amendment and, 142, 1328
 - Virginia Declaration of Rights and, 1723–1724
 - Madison Ring, 902
 - Madsen v. Women's Health Center, Inc.*, 12, 66, 948–949
 - ACLU and, 286
 - injunctions and, 1211
 - Operation Rescue and, 1134
 - picketing and, 1168
 - TPM and, 1664
 - Mafia
 - Cohn and, 323
 - RICO and, 1334–1335
 - Magazines, free, 292
 - Magna Carta, 54, 143, 357, 949–951, 1748, 1750
 - civil liberties and, 1537
 - double jeopardy and, 437
 - due process and, 456, 462, 1352, 1580, 1633
 - English liberties and, 506
 - Griffin v. Illinois* and, 711
 - habeas corpus and, 726
 - jury trials and, 877
 - Lilborne and, 919
 - Massachusetts Body of Liberties of 1641 and, 978–979
 - Petition of Right and, 1157
 - property ownership and, 475
 - proportional punishment and, 1240
 - revision of, 950
 - takings clause and, 1603
 - Magnetometers, 33
 - Magnuson Act, 260
 - Maher v. Roe*, 951
 - abortion and, 673–674, 725, 1321
 - Burger Court and, 198
 - Harris v. McRae* and, 746
 - Poelker v. Doe* and, 1183
 - Roe v. Wade* and, 1221
 - viewpoint discrimination and, 1717
 - Maheu, Robert, 306
 - Mail
 - ensorship of, 46
 - Jacobson v. United States* and, 837

INDEX

- Mail (*cont.*)
Kendall and, 883–884
obscenity and, 956–957, 1116, 1410
Olmstead v. United States and, 1129
pornography and, 837
public forum doctrines and, 1244
- Mailer, Norman, 684
- Mailloux v. Kiley*, 1613
- Maine
Prohibition and, 1238
Supreme Judicial Court, 1294
- Maine, Henry, 1039
- Major Threat to Churches: Zoning Law, A*, 1819
- Majority, tyranny of, 1027–1028
- Majority-minority districts, 1277–1278
- Making Sense of Overbreadth* (Fallon), 1139
- Mala prohibita, 1185
- Malbin, Micahel, 527
- Malcolm, Joyce Lee
English Bill of Rights and, 503
on gun ownership, 721
- Malcolm X. *See* X, Malcolm
- Male captus bene detentus*. *See* Ker-Frisbie rule
- Malice, 403
defamation and, 680
Dun & Bradstreet, Inc. v. Greenmoss Builders
and, 405
Hutchinson v. Proxmire and, 788
infliction of emotional distress and, 811
libel and, 761
- Malinski v. New York*, 316–317
- Mallory, Andrew, 952
- Mallory v. United States*, 952
exclusionary rule and, 991
McNabb Rule and, 316
unnecessary delay and, 1018
- Malloy v. Hogan*, 1455
Adamson v. California and, 618
incorporation doctrine and, 803
procedural due process and, 463
self-incrimination and, 991–992
Stewart, P., and, 1559
Twining v. New Jersey and, 740
Warren Court and, 1758
- Malone, Dudley Field, 1426
- Malz, Earl M., 1545
- Man Versus the State, The* (Spencer), 928
- Mandamus, writs of
common law and, 458
Marbury v. Madison and, 864, 958
- Mandatory fees, 601–602
- Mandel, Ernest, 893
- Mandel v. Hodges*, 398
- Mandela, Nelson, 791
- Manhattan Project, 1377
- Mann Act, 954–955
White Court and, 1777
- Mann, Horace, 1584
school prayer and, 356
- Mann, James, 954, 1741
- Mann-Elkins Act, 1601
- Mansfield, Lord, 458
- Mansfieldization, 458
- Manslaughter, 1150
- Manson v. Brathwaite*, 955–956
- due process and, 1697
eyewitness identification and, 568, 925
- Manton, Martin T.
United States v. One Book Entitled “Ulysses” and, 1688–1689
- Manual Enterprises, Inc. v. Day*, 956–957
- Manual of Parliamentary Practice* (Jefferson), 846
- Mapp, Dollree, 957
- Mapp v. Ohio*, 181, 957, 1521, 1544
ACLU and, 49–50
Clark, T., and, 309
exclusionary rule and, 555, 618, 793
fruit of the poisonous tree and, 666
Harlan, II, and, 741
incorporation doctrine and, 803
Meese and, 997
Michigan v. DeFillipo and, 1004
procedural due process and, 463
United States v. Leon and, 1685–1686
Warren Court and, 1757
Wolf v. Colorado, 1790
- Mapplethorpe, Robert, 1065
- Marbury v. Madison*, 958
cruel and unusual punishment and, 383
Ellsworth Court and, 492
federal court jurisdiction and, 866
Hayburn’s Case and, 844
judicial review and, 864, 1608
Marshall Court and, 968
Marshall, J., and, 970
remedies and, 148
Sedition Act of 1798 and, 643
- Marbury, William, 958
judicial review and, 864
- Marcantonio, Vito, 1098
- Marcello v. Bonds*
deportation and, 800
ex post facto laws and, 554
- March on Washington, 959
King and, 890
- Marches, 958–959
- Marchetti, James, 960
- Marchetti v. United States*, 1684
Fifth Amendment and, 1684
- Mardian, Robert, 1089
- Margarine, 1684
- Margin of appreciation, 638–639
- Mariel Boatlift, 390
- Marijuana, 1743, 1745
Alaska and, 1744
Anslinger and, 64, 1742
California v. Acevedo and, 92
Carter and, 1743
Delaware v. Prouse and, 412
drug testing and, 453
Florida v. Riley and, 597
Florida v. Royer and, 598
free exercise clause and, 454
Kyllo v. United States and, 900, 1171
medically prescribed, 1742
plain smell and, 1171
privacy and, 1220
Rastafarians and, 454, 1262, 1263
search and seizure and, 763
Smith test and, 1263
South Dakota v. Opperman and, 1498

- War on Drugs and, 1739
- Marijuana Tax Act, 64, 1742
- Marine Corps, 305
- Maris, Albert B., 592
- Maritain, Jacques, 254
- Marital unities doctrine, 960–961
- Marketplace of ideas theory, 961–963, 1630
 - commercial speech and, 330–331
 - criticism of, 962–963
 - free speech theory and, 816
 - Hamilton and, 733
 - hate speech and, 754
 - Holmes and, 771
 - Hustler Magazine v. Falwell* and, 787
 - Mill and, 1010–1011
 - Whitney v. California* and, 1780
- Markie, Biz, 764
- Markonni, Paul, 1237
- Marley, Bob, 1262
- Marquette University, 983–984
- Marriage. *See also* Antimiscegenation statutes; Miscegenation laws; Polygamy
 - Bible and, 129
 - Christianity and, 963
 - civil, 678
 - civil unions v., 933
 - cohabitation without, 964
 - common law and, 963, 1403
 - constitutional framework for, 1399–1400
 - domestic violence and, 434–435
 - Dworkin and, 471
 - Edmunds-Tucker Act and, 1039
 - expatriation and, 562
 - Fiallo v. Bell* and, 585
 - history of, 963–966
 - illness and, 1400
 - IMFA and, 795
 - implied rights and, 801, 802
 - informal, 963
 - interracial, 936
 - laws, redefined, 964
 - lex celebrationis*, 406
 - Loving v. Virginia* and, 1763–1764
 - miscegenation laws and, 1022
 - mixed, 1541
 - modern laws, 965–966
 - Naim v. Naim* and, 1059
 - O'Lone v. Estate of Shabazz* and, 1130
 - partnership theory of, 1522–1523
 - as patriarchal institution, 1400
 - personal autonomy rights and, 1533
 - prisoners and, 1399, 1670
 - privacy and, 444
 - privileges of, 1399
 - as property, 960
 - rape in, 960–961
 - restrictions on, 1541
 - same-sex, 405–406, 677, 773, 905, 933, 936, 966, 1023, 1399–1410
 - Schlaflly and, 1421
 - serial, 963
 - slavery and, 964
 - sodomy and, 1493
 - spousal murder and, 974–975
 - state laws and, 1399
 - validity of, 795
 - Zablocki v. Redhail* and, 1811
- Marsh v. Alabama*, 44
 - company towns and, 340
 - Stone Court and, 1562
- Marsh v. Chambers*, 267, 966–967
 - Burger Court and, 200
 - legislative chaplains and, 861
 - legislative prayer and, 767, 915
 - Lemon* test and, 534
- Marshall Court, 967–969
 - contract clause and, 477
 - Story and, 1572
 - United States v. Reidel* and, 1690–1691
- Marshall Islands, 1668
- Marshall, John, 492, 968–969
 - Barron v. Mayor and Council of Baltimore* and, 73, 112, 1632
 - Batson v. Kentucky* and, 114–115, 874
 - Belle Terre v. Boraas* and, 120
 - civil liberty and, 1027, 1541
 - contract clause and, 477
 - Fletcher v. Peck* and, 477
 - Frazier v. Cupp* and, 320
 - judicial review and, 864
 - Marbury v. Madison* and, 864, 958
 - Marshall Court and, 967–969
 - McCulloch v. Maryland* and, 988
 - Ninth Amendment and, 1096
 - Olmstead v. United States* and, 1129
 - plenary power doctrine and, 1179
 - Plyler v. Doe* and, 1182
 - Poelker v. Doe* and, 1183
 - police power and, 1186
 - privacy and, 1220
 - Story and, 645, 1572
 - on substantive due process, 466
 - supremacy clause and, 1589
- Marshall, Lawrence, 237
- Marshall Mathers LP, The* (Eminem), 765
- Marshall, Thomas, 968
- Marshall, Thurgood, 970–974, 1442
 - Buckley v. Valeo* and, 194
 - Burger Court and, 198
 - Cable News Network, Inc. v. Noriega* and, 1076
 - Frank and, 616
 - Furman v. Georgia* and, 223, 225, 233
 - Ginsburg and, 687
 - Graham v. Commissioner of Internal Revenue* and, 703
 - ineffective assistance of counsel and, 810–811
 - judicial career of, 972–974
 - Legal Defense Fund and, 515
 - NAACP and, 1063, 1064
 - New York Times v. United States* and, 1090
 - New York v. Belton* and, 1091
 - newsroom searches and, 1093
 - NLRB v. Catholic Bishop of Chicago* and, 1100
 - obscenity and, 1123
 - Osborne v. Ohio* and, 1138
 - Perry v. Sindermann* and, 1260
 - Philadelphia Newspapers, Inc. v. Hepps* and, 1158
 - Police Department of Chicago v. Mosely* and, 361
 - Regents of the University of California v. Bakke* and, 1284
 - Rhode Island v. Innis* and, 1331
 - Sedma, S.P.R.L. v. Imrex Co., Inc.* and, 1335
 - Skinner v. Railway Labor Executives' Association* and, 1636

INDEX

- Marshall, Thurgood (*cont.*)
 - Stanley v. Georgia* and, 1521
 - Stewart, P., and, 1560
 - Strickland v. Washington* and, 1346
 - Trans World Airlines, Inc. v. Hardison* and, 1300
 - Witters v. Department of Services* and, 1789
 - Wolman v. Walter* and, 1790
- Marshall v. Jerrico*, 296
 - administrative process and, 800
- Marshall, Vivian, 974
- Martial law
 - in Baton Rouge, 934
 - emergencies and, 494
 - Ex parte Milligan* and, 272
 - habeas corpus and, 552
 - in Hawaii, 1048
- Martin, Luther, 988
 - Constitutional Convention of 1787 and, 1264
- Martin Luther King, Jr. Federal Holiday and Service Act, 891
- Martin v. Hunter's Lessee*, 1572
 - Marshall Court and, 968
 - Marshall, J., and, 969, 970
- Martin v. Ohio*, 974–975
- Martinez, Julia, 808, 1411–1412
- Martinez v. Southern Ute Tribe*, 807
- Marx, Karl, 1639
 - Communist Party and, 339
 - Mormons and, 1035
- Marx, Paul, 1133
- Mary II, Queen, 690–691
- Mary, of Modena, 690
- Mary Queen of Scots, 621
- Maryland
 - Christianity and, 1538
 - constitution, 137, 1309, 1310, 1311
 - DWB and, 1237
 - free exercise clause of, 622
 - general warrants and, 1751
 - Good Friday and, 398–399
 - prior restraints and, 1210
 - slavery and, 1647
- Maryland & Virginia Eldership of the Churches of God v. Church of God at Sharpsburg, Inc.*, 857
- Maryland Charter of 1632, 326
- Maryland Court of Appeals
 - Brady v. Maryland* and, 173
- Maryland Declaration of Rights of 1776, 623
- Maryland Toleration Act, 975–976
- Maryland v. Buie*, 976, 1752
- Maryland v. Craig*, 976–977
 - Coy v. Iowa* and, 374
 - Scalia and, 1417
- Maryland v. Garrison*, 1435
- Mascots, Native Americans as, 1188
- Mason City Republican*, 256
- Mason, George, 977–978, 1340
 - Bill of Rights and, 139–140, 815
 - civil trials and, 360
 - Constitutional Convention of 1787 and, 358–360, 1263
 - ex post facto laws, 360
 - freedom of press and, 1203
 - Locke and, 930
 - “Memorial and Remonstrance” and, 947
 - plenary power doctrine and, 1180
 - sumptuary laws and, 358–359, 360
- U.S. Constitution and, 359, 360
- Virginia Declaration of Rights and, 1723
- Mass communications, 580. *See also* Broadcasters
- Massachusetts
 - bill of rights, 137
 - busing and, 1546
 - civil liberties and, 1545
 - colonial law and, 126
 - Commonwealth v. Kneeland* in, 1311
 - Constitutional Convention of 1787 and, 1264, 1265–1266
 - Declaration of Rights, 139
 - free speech and, 1536
 - freedom of press and, 1204
 - gerrymandering in, 1277
 - jury trials and, 138
 - Know-Nothing Party in, 1294
 - open-air assembly and, 1397
 - personal liberty laws and, 1154
 - religion and, 1538
 - same-sex marriage and, 966, 1402, 1403
 - segregation and, 1441
 - slavery and, 139
- Massachusetts Bay Charter, 326
- Massachusetts Bay Colony, 55
 - Hutchinson and, 61–62
 - Massachusetts Body of Liberties of 1641 and, 978–979
 - obscenity and, 1115–1116
 - Williams and, 107
 - Winthrop and, 298
- Massachusetts Body of Liberties, 508
- Massachusetts Body of Liberties of 1641, 55, 387, 978–979
 - double jeopardy and, 438, 439–440
- Massachusetts Constitution, 109
- Massachusetts Human Rights Commission, 601
- Massachusetts Supreme Judicial Court, 1396
- Massachusetts v. Sheppard*
 - Kennedy, A., and, 884
 - Powell, Lewis, and, 1195
 - United States v. Leon* and, 1685–1686
- Masses Publishing Company v. Patten*, 979–980
 - clear and present danger test and, 653
 - free speech and, 1642
 - Hand and, 736
 - Hand, L. and, 1796
- Masses, The*, 979
 - Hand and, 736
- Massiah v. United States*, 980–981, 1345
 - Warren Court and, 1758
- Masturbation, 1492–1493
- Mather v. Roe*, 116
- Mathews v. Diaz*, 41
- Mathews v. Eldridge*, 461
 - administrative due process and, 693
 - Hamdi v. Rumsfeld* and, 731
 - procedural due process and, 609
- Mathis v. United States*, 981–982
- MATRIX. *See* Multi-State Anti-Terrorism Information Exchange
- Mattachine Society, 676–677, 1566
- Mattel v. Walking Mountain Productions*, 1414
- Matter of Acosta*, 89
- Matter of Interpretation: Federal Courts and the Law* (Scalia), 1668
 - English Bill of Rights and, 503
- Matter of Jacob*, 1408
- Matthews, Stanley
 - Hurtado v. California* and, 739

- Yick Wo v. Hopkins* and, 515
Maxwell v. Dow, 739
 Mayson, Frank, 1302
 Mayton, William, 1440
 Mazella, David, 1502
 Mazor, Lester J., 1544
McAuliffe v. Mayor of New Bedford, 1358, 1514
 Holmes and, 770
McCabe v. Atchison, Topeka & Santa Fe Railway Co., 783
 McCain, John
 Log Cabin Republicans and, 933
 War on Terror and, 1095
 McCain-Feingold law, 220. *See also* Bipartisan Campaign Reform Act of 2002
McCann v. Fort Zumwalt School District, 757
 McCardle, William, 272
 national security and, 1072
 McCarran Act of 1950
 CPUSA and, 338
 freedom of association and, 635
 McCarran-Walter Act of 1952. *See* Immigration and Nationality Act
 McCarthy era
 Scopes trial and, 1426
 Vinson Court and, 1719
 McCarthy, Eugene
 campaign finance reform and, 219
 McCarthy, Joseph, 983–985, 1773
 censure of, 985
 Clark, T., and, 308
 Cohn and, 322–323, 1773
 CPUSA and, 338
 Dies and, 419–420
 drugs and, 1742–1743
 Fortas and, 603
 Frankfurter and, 618
 free speech and, 1451
 Goldberg and, 695
 incitement of criminal activity and, 654–655
 JBS and, 854
 Kunstler and, 898
 Lattimore and, 603
 Middle and, 134
 morphine and, 64
 Shine and, 1773
 speech and debate clause and, 351
 McCarthyism, 983–985, 1454, 1510
 balancing and, 100
 categorical approach and, 252
 conspiracy and, 351
 CPUSA and, 338
 Dies and, 419–420
 freedom of association and, 635
 Harlan, II, and, 741
 incitement of criminal activity and, 654–655
 Kaufman and, 883
 Konigsberg v. State Bar of California and, 895
 Schrecker and, 150
 McClean, Edward, 774
 McClellan, John, 695
McCleskey v. Kemp, 101, 241, 985–986
 Baldus Study and, 225, 229
 race and, 224
 racial bias and, 237, 1258
 McCleskey, Warren, 985
McClesky v. Zant, 886
 McCleskey, Warren, 229
 McCloskey, Robert G., 1634
McCullum v. Board of Education, 356, 987, 1292
 Torcaso v. Watkins and, 1662
 wall of separation and, 1736
 Zorach v. Clauson and, 1822
 McCollum, Vashiti, 987
 McConnell, Michael, 23, 559, 621–625, 1296, 1311, 1312
 McConnell, Mitch, 220
McConnell v. Federal Election Commission, 1190
 Breyer and, 183
 McCain-Feingold law and, 220
 PACs and, 588
 Scalia and, 1417
 McCormack-Dickstein Committee, 1488
 HUAC and, 780
 McCorvey, Norma, 987–988
McCray v. United States, 1684
McCreary County, Kentucky v. American Civil Liberties Union of Kentucky
 ADL and, 69
 civil religion and, 297
 coercion and, 1102
 Fourteenth Amendment and, 146–147
 Lemon test alternatives and, 534
 Lemon test and, 536, 538
 O'Connor and, 1127
 religious neutrality and, 538
 Scalia and, 528
 Stone v. Graham and, 1564
 Ten Commandments and, 1621
McCulloch v. Maryland, 988, 1589
 Marshall Court and, 968
 Marshall, J., and, 970
 Ninth Amendment and, 1096
 Olmstead v. United States and, 1129
McCullom v. Board of Education, 1719–1720
 McDaniel, Paul, 989
McDaniel v. Paty, 989
 clergy in public office and, 921
 McDonald, Gable, 264
 McDougall, Alexander, 1749
 McDowell, J.C., 195
McGautha v. California, 223, 234–235, 241, 989–990
 Furman v. Georgia and, 669
 McGeorge College of the Law, 884
 McGovern, George, 1503
McGowan v. Maryland, 543, 1438–1439
 Sunday closing laws and, 1586
 Warren Court and, 1755
 McGranery, James, 322
 McHenry, James, 359
McIntyre v. Ohio Elections Commission, 62
McKastle v. Wiggins, 1458
McKeiver v. Pennsylvania, 990
 In re Gault and, 812
 McKenna, Joseph
 Mutual Film Corporation v. Industrial Commission of Ohio and, 1041, 1055
 Schaeffer v. United States and, 1796
 White Court and, 1777
 McKenna, William, 955
 McKenzie, Ben G., 1426

INDEX

- McKinley, William
 - Bryan and, 189
 - La Follette and, 902
 - national security and, 1073
- McKinney, Aaron, 1469
- McKinney, et al. v. Southern White Knights et al.*, 1502
- McKittrick, Eric, 643
- McLaughlin v. Florida*, 991
 - miscegenation laws and, 1023
- McLaurin v. Oklahoma*
 - equal protection and, 516
 - Plessy v. Ferguson* and, 1181
 - Vinson Court and, 1720
- McLean v. Ark. Board of Education*
 - establishment clause and, 1620
 - evolution and, 1620
- McMurray, Howard, 984
- McMurray, Linda O., 1774
- McNabb v. United States*, 316, 991–992
 - reasonable promptness and, 1018
 - Stone Court and, 1562
- McNabb-Mallory rule, 316
 - unnecessary delay and, 952, 991
- McNamara brothers, 394
- McNamara, Robert, 1088
- McPherson, Ardith, 1260
- McPherson, James, 1158
- McRae, Cora, 746
- McReynolds, James Clark, 992–993, 1597
 - Meyer v. Nebraska* and, 176
 - Pierce v. Society of Sisters* and, 176
 - Stone and, 1564
 - United States v. Miller* and, 1343
 - White Court and, 1777
- McVeigh, Timothy, 565, 1622–1623
 - AEDPA and, 728
 - Antiterrorism and Effective Death Penalty Act of 1996 and, 1052
- Means, Gaston B., 774
- Measure of a Man, The* (King), 890
- Media. *See also* Press
 - access, 21
 - access to information, 993–994
 - access to military operations, 995–996
 - appropriation of name or likeness and, 77
 - cameras in courtrooms and, 218
 - liability, 996
 - Nebraska Press Association v. Stuart* and, 1082
 - neutral reportage doctrine and, 1082
 - newsroom searches and, 1093–1094
 - obscenity and, 1124
 - prison access and, 21–22
 - rape and, 1261
 - reporter's privilege and, 1319
 - sealed documents and, 1428–1429
 - United States v. Playboy Entertainment Group* and, 1689–1690
 - Wilson v. Layne* and, 1783
 - Zacchini v. Scripps-Howard Broadcasting Co.* and, 1812
- Media Law Resource Center, 660
- Media Marketing Accountability Act of 2001, 764
- Medicaid
 - abortion and, 9, 12, 115–116, 746–747, 951
 - Beal v. Doe* and, 115–116
 - Harris v. McRae* and, 746, 1373
 - NARAL and, 1062
- Medical counseling
 - abortion and, 673–674, 700
 - right to, 712
- Medical leave, 1408
- Medical treatment
 - abortion and, 433
 - Crane v. Johnson* and, 374–375
 - euthanasia and, 547
 - faith based, 374–375
 - involuntary, 1131
 - pediatric, 29
 - personal autonomy rights and, 1533
 - religion and, 1267, 1268
 - right to refuse, 389, 1267
 - Rush and, 1386–1387
 - withholding of, 86
- Medina, Harold, 414
- Medina, Michael, 127
- Meek v. Pittenger*, 1423, 1527
 - Americans United and, 56
 - Burger Court and, 199
 - Mitchell v. Helms* and, 1024
 - Wolman v. Walter* and, 1791
- Meese, Ed, 1710
 - New York v. Ferber* and, 1092
 - obscenity and, 1115
- Meese, Edwin, 996–997
- Meetings, by Salvation Army, 1397
- Megan's Law, 554, 997–998
- Meigs, Return J., 1587
- Meiji restoration, 147
- Meiklejohn, Alexander, 998–1000, 1451, 1630
 - free speech theory and, 816
 - self-government, 994
- Meiklejohn Lecture, 258
- Melton, Gordon, 1262
- Members of the City Council of Los Angeles v. Taxpayers of Vincent*, 1716
 - overbreadth doctrine and, 1139
 - United States v. O'Brien* and, 1113–1114
- Memoirs* (Warren, E.), 1762
- Memoirs v. Massachusetts. See A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts*
- "Memorial and Remonstrance Against Religious Assessments" (Madison), 90, 766, 944, 947–948
 - Black, H., and, 550
 - clergy training and, 536
 - establishment clause and, 550
- Memorial Hospital v. Maricopa County*, 129
- "Memorial Remonstrance" (Madison), 531–532
- Mempa v. Rhay*, 1759
- Memphis Free Speech and Headlight*, 1774
- Mencken, H.L., 1426
 - obscenity and, 1121
- Mendel, Gregor, 376
 - heredity and, 545
- Menna v. New York*, 1000
- Mennonites, 1311
 - religious tests for office holding and, 1315
- Mens rea, 1523–1524
 - murder and, 231
 - police power and, 1185
- Menstruation, 1410
- Mental illness, 1000–1001
 - due process and, 855

- GBMI and, 717–718
- homosexuality as, 773
- insanity defense and, 813–814
- involuntary hospitalization and, 1001
- Riggins v. Nevada* and, 1336
- Robinson v. California* and, 1366
- Rush on, 1387
- Sell v. United States* and, 1336
- sex offenders and, 1001
- Mental retardation
 - Atkins v. Virginia* and, 232
 - capital punishment and, 224, 246, 386, 1669
 - due process and, 855
 - equal protection clause and, 192–193
 - false confessions and, 574
 - forced sterilization and, 772
 - Jackson v. Indiana* and, 831–832
 - O'Connor and, 1127
 - proportionality review and, 1242
- Merchandising, 77
- Mercitron, 1165
- Mercy killing. *See* Euthanasia
- Meredith, James
 - fighting words and, 587
 - Street v. New York* and, 589–590
- MERRIMAC, 1518–1519
- Merryman, John, 923
- Metatags, 823
- Methamphetamine, 1804
- Methodist Episcopal Church of America, 146
- Methodists, 291
- Metro-Goldwyn Mayer Studios (MGM), 1001
- Metro-Goldwyn Mayer Studios v. Grokster*, 1001–1002
- Metromedia, Inc. v. City of San Diego*, 1821
- Metropolitan Community Church of America, 1401
- Metropolitan Life Insurance Co. v. Ward*, 973
- Metzger, Thomas, 1502
- Metzl v. Leininger*, 398–399
- Mexican War, 922
- Mexicans. *See also* Hispanics
 - immigration and, 1259
 - restrictive covenants and, 1325
 - Rosales-Lopez v. United States* and, 873, 1376
- Mexico
 - Plyler v. Doe* and, 1182
 - undocumented migrants and, 1675
 - United States v. Brignoni-Ponce* and, 1680
 - United States v. Verdugo-Urquidez* and, 1696
- Meyer v. Nebraska*, 466, 1002–1003, 1582, 1597
- liberty and, 801
- McReynolds and, 176, 993
- penumbras and, 1153
- Pierce v. Society of Sisters* and, 1170
- private schools and, 712
- Mezei, Ignatz, 461
- MGM. *See* Metro-Goldwyn Mayer Studios
- MI5, 639
- MIA. *See* Montgomery Improvement Association
- Miami Herald Publishing Co. v. Tornillo*, 1003, 1279–1280
 - Burger and, 205
 - Burger Court and, 202
 - forced speech and, 601
 - freedom of press and, 663, 1354
 - Mills v. Alabama* and, 1014
 - Turner Broadcasting System v. Federal Communications Commission* and, 1669
- Michael H. v. Gerald D.*, 281
- Michelman, Kate, 1062
- Michigan
 - PAS and, 1165
 - personal liberty laws and, 1154
 - Michigan Department of State Police v. Sitz*, 1004
 - checkpoints and, 806
 - Michigan v. Chesternut*, 1444
 - Michigan v. Clifford*, 1433
 - Michigan v. DeFillippo*, 1004–1005
 - Michigan v. Long*
 - DWI and, 469
 - frisks and, 1570
 - Stevens and, 1557
 - Supreme Court jurisdiction and, 868
 - Michigan v. Lucas*, 1005
 - Michigan v. Mosley*, 1005–1006
 - Michigan v. Summers*, 1006
 - Michigan v. Tucker*, 1457
 - Mickens v. Taylor*, 810
- Mickey Mouse Act. *See* Copyright Term Extension Act of 1998
- Microbiology, 430
- Microsoft, 336
- Middle Ages, 1452
- Middle East, 1295
- MIDI, 764
- Military
 - chaplains, 268–269
 - civil liberties in, 1006–1007
 - Congress and, 354–355
 - conscientious objection and, 349–350
 - discharges, 436
 - discretion, 1007
 - don't ask, don't tell policy of, 435–436
 - free exercise and, 698
 - Goldman v. Weinberger* and, 698, 852
 - homosexuals in, 435–436, 885, 1405
 - Jews in, 1007, 1310, 1311
 - jurisdiction, 271–272
 - law, 1006–1008
 - media access to, 995–996
 - overseas, 353
 - policies, 435–436
 - Reid v. Covert* and, 1291
 - religion and, 1474–1475
 - religious freedom in, 1305
 - uniforms, 698–699
 - United States v. Schwimmer* and, 1692–1693
 - women in, 855
- Military bases
 - as nonpublic forums, 1245
 - as public forums, 1663
- Military Commission Instructions, 1009
- Military commission process, 355, 1347
- Military Extraterritorial Jurisdiction Act of 2000, 355
- Military Readiness Enhancement Act, 1461
- Military tribunals, 496, 1008–1010
 - civilians in, 552–553
 - Guantanamo Bay and, 716
 - history of, 1008
 - indefinite detention and, 805
 - justification of, 1008–1009
 - racial profiling and, 790

INDEX

- Military tribunals (*cont.*)
 - types of, 1008
- Militia Act of 1903, 1341
- Militias, 1448
 - Constitutional Convention of 1787 and, 357–358
 - draft and, 1793
 - Fourteenth Amendment and, 1726
 - NRA and, 1071
 - plenary power doctrine and, 1180
 - Presser v. Illinois* and, 722, 1342
 - right to bear arms and, 1342
 - Second Amendment and, 721
 - United States v. Miller* (1939) and, 1687
 - Virginia Declaration of Rights and, 1723
- Milk Wagon Drivers Union v. Meadowmoor Dairies*, 1800
- Milkovich v. Lorain Journal*, 1009
 - group libel and, 715
- Mill, John Stuart, 1010–1011, 1450, 1630
 - free speech theory and, 816
 - harm principle and, 1027–1028, 1709
 - individual liberty and, 1026
 - marketplace of ideas theory and, 962, 1010–1011
 - Montesquieu and, 1031–1032
 - obscenity and, 1119
 - truth theory and, 1641
 - writings of, 1010
- Miller, Arthur, 1270
- Miller, Henry, 1051
- Miller, Jack, 1343
- Miller, Judith, 1473
- Miller, Karen, 168
- Miller, Marvin, 1012
- Miller, Samuel F., 1482
 - Loan Association v. Topeka* and, 927
 - Slaughterhouse Cases* and, 272–273, 514
- Miller, Seaman, 288
- Miller test, 660, 1012
 - CIPA and, 825
 - obscenity and, 850–851
 - reformulation of, 851
- Miller, Tyisha, 154
- Miller v. California*, 46, 83–84, 1012–1013, 1521, 1676
 - Burger Court and, 201
 - New York v. Ferber* and, 1091, 1092
 - obscenity and, 660, 1118, 1124, 1282, 1316
 - overbreadth doctrine and, 1140
 - Paris Adult Theatre v. Slaton* and, 1147, 1148
 - Pope v. Illinois* and, 1191
 - Stewart, P., and, 1560
 - Young v. American Mini Theatres* and, 1808
- Miller v. Commonwealth*, 510
- Miller v. Johnson*, 1278
- Miller v. Standard Nut Margarine Co.*, 209
- Miller v. Texas*, 1342
- Miller v. Johnson*, 1726
- Miller, Wallace, 1787
- Miller, Warren, 1461
- Miller-El v. Cockrell*, 114
- Miller-El v. Dretke*, 874
- Millerites, 1461
- Milligan, Lambdin, 272, 551–552, 1008
- Milliken v. Bradley*
 - Burger and, 205, 206
 - equal protection and, 517
- Mills v. Alabama*, 1014
- Milosevic, Slobodan, 306
- Milton, John, 815, 1450
 - marketplace of ideas theory and, 962
 - truth theory and, 1641
 - Virginia Declaration of Rights and, 1723
- Mincey v. Arizona*, 1014
- Minersville School District v. Gobitis*, 501, 1802
 - Covington and, 372
 - Douglas and, 445
 - flag saluting and, 591–593, 1630
 - Frankfurter and, 619, 782, 1365
 - Jehovah's Witnesses and, 591–593, 848, 1367
 - overruling of, 834
 - Roberts, O., and, 1364
 - Stone and, 1565, 1630
 - West Virginia State Board of Education v. Barnette* and, 594, 1775
- Minimum wage, 1269
 - Adkins v. Children's Hospital* and, 465
 - equal protection and, 515
 - FLSA and, 570
 - Morehead v. Tipaldo* and, 465
 - for women, 479
- Minimum Wage Act, 928
- Mini-RFRAs, 1549
- Mink v. Salazar*, 1224
- Minnesota
 - gag law, 1364
 - same-sex partners and, 1407
 - sentencing guidelines and, 1458
 - Supreme Court, 1271, 1284
- Minnesota State Fair, 1664
- Minnesota v. Carter*, 1745
 - Breyer and, 183
 - Minnesota v. Olson* and, 1015
 - reasonable expectation of privacy and, 882
- Minnesota v. Dickerson*, 1015
 - plain view and, 1171
- Minnesota v. Martinson*, 1744
- Minnesota v. Olson*, 1015
- Minnick v. Mississippi*, 482
- Minor, John B., 992
- Minor v. Board of Education*, 356
- Minorities. *See also specific minority*
 - due process and, 1256
 - equal protection clause and, 513
 - First Amendment and, 1574
 - free speech and, 656
 - Plyler v. Doe* and, 1182
 - political patronage and, 1190
 - status offenses and, 1550
- Minors. *See also Children; Juvenile(s)*
 - abortion and, 34–35, 121–122, 250, 725, 905–906, 1321–1322, 1368–1369
 - Carey v. Population Services International* and, 249–250
 - child pornography and, 282–283
 - classes of, 122
 - execution of, 386
 - Internet and, 825
 - movies and, 1041–1043
 - obscenity protection for, 418
 - Planned Parenthood of Central Missouri v. Danforth* and, 905
 - pornography and, 684–685
 - privacy and, 250
- Minton, Sherman, 1721

- Miracle, The*, 858, 1042
- Miranda, Ernesto, 318, 1016, 1020–1022, 1456, 1764
 Frank and, 616
 release of, 1022
- Miranda v. Arizona*, 1016–1017, 1331, 1455, 1544
 ACLU and, 49–50
 Adamson v. California and, 618
 aftermath of, 1019–1020
 Berkemer v. McCarty and, 122–123
 Boykin v. Alabama and, 172
 Brown v. Mississippi and, 187
 Edwards v. Arizona and, 482
 Escobedo v. Illinois and, 524, 696
 Estelle v. Smith and, 543
 exclusionary rule and, 557–558
 exemplars and, 558
 facts of, 1019
 Fifth Amendment and, 318, 1331, 1345, 1351
 Frank and, 616
 Harlan, II, and, 741
 Harris v. New York and, 747–748
 Illinois v. Perkins and, 794
 jailhouse informants and, 838
 Kamisar and, 881
 Kirby v. Illinois and, 892
 Malloy v. Hogan and, 991–992
 Marshall, T., and, 971
 Mathis v. United States and, 982
 Meese and, 997
 Michigan v. Mosley and, 1005
 Miranda and, 1020–1021
 Miranda warning and, 1018–1020
 New York v. Quarles and, 1093
 Ohio v. Robinette and, 1128
 Omnibus Crime Control and Safe Streets Act of 1968
 and, 1132
 opinion of, 1019
 Orozco v. Texas and, 1137
 procedural due process and, 952
 Rhode Island v. Innis and, 1331
 scope of, 747–748
 self-incrimination and, 1456–1457
 Souter and, 1496
 Spano v. New York and, 1504
 Stewart, P., and, 1559
 Warren and, 317, 1763, 1764–1765
 Warren Court and, 1758–1759, 1760
 White, B., and, 1779
- Miranda warnings, 318, 1422, 1445, 1455
 Burger and, 205
 Butler v. McKellar and, 209
 Colorado v. Connelly and, 328
 exclusionary rule and, 557–558
 future of, 1020
 history of, 1017
 Miranda and, 1020–1021
 Miranda v. Arizona and, 1016, 1018–1020
 Moran v. Burbine and, 1033–1034
 Rehnquist and, 1286
 text of, 1016
 traffic stops and, 122–123
- Miriari vos*, 253
- Miscegenation laws, 406, 1022–1023, 1541. *See also*
 Antimiscegenation statutes
 interracial cohabitation laws and, 991
- McLaughlin v. Florida*, 991
- Naim v. Naim* and, 1059
 same-sex marriage and, 1023
- “Miscegenation: The Theory of the Blending of the Races Applied
 to the American White Man and Negro,” 1022
- Misdemeanors
 arrest warrants and, 81
 vagrancy laws and, 1703
 warrantless arrests and, 82
- Mishkin v. New York*, 1023
- A Book Named “John Cleland’s Memoirs of a Woman of
 Pleasure” v. Massachusetts* and, 2
- Ginzburg v. United States* and, 689
- Miller* test and, 1012
- variable concepts of obscenity in, 685
- Mississippi
 literacy tests and, 1729
 religion and, 1538
 same-sex adoption and, 1398–1399
 voting in, 1729–1730
- Mississippi University for Women v. Hogan*
 middle scrutiny test and, 612
 Powell, Lewis, and, 1195
- Mississippi v. Johnson*, 272
- Missouri
 Mormons in, 1036–1037
 self-governance and, 1540
 slavery and, 1155, 1647
- Missouri Compromise
 Calhoun and, 214
 due process clause and, 464–465
 judicial review and, 864
- Missouri ex rel Gaines v. Canada*, 515, 1442
 Butler and, 210
 Hughes and, 782, 784
 Plessy v. Ferguson and, 1181
- Missouri Pacific Railway Company v. Humes*, 586
- Missouri Pacific Railway Company v. Mackey*, 586
- Missouri v. Seibert*, 1457
- Mistretta v. United States*, 1023–1024
- Mistrials, 893
- Mitchell, John, 1025–1026
- Mitchell, Todd, 1787
- Mitchell v. Helms*, 422, 1024–1025, 1424, 1528
 ADL and, 69
 Americans United and, 57
 Breyer and, 183
 Burger Court and, 199
 Charitable Choice and, 270
 Locke v. Davey, 930
 private choice and, 536
 Souter and, 1496
 Wolman v. Walter and, 1791
- Mitchell v. United States*
 Hughes and, 782
 right to remain silent and, 710
 silence and, 710
- Mitigating factors
 capital punishment and, 246, 990
 ineffective assistance of counsel and, 810–811
 Jurek v. Texas and, 866
 Lockett v. Ohio and, 232, 932
 sentencing and, 227
- Mitochondrial disease, 313
- M.K.B. V. warden*, 1626

INDEX

- M.L.B. v. S.L.J.*, 281
 M'Naghten test, 814
Mob Rule in New Orleans (Wells), 1774
 MOBE. *See* National Mobilization to End the War in Vietnam
Mobile v. Bolden, 1277
 Model Code of Judicial Conduct, 859
 Model Code of Pre-Arrest Procedure, 1444
 "Model of Christian Charity, A" (Winthrop), 298
 Model Penal Code, 9, 433, 1320
 burden of proof and, 196
 Doe v. Bolton and, 9
 entrapment by estoppel and, 510
 proportional punishment and, 1241
 retribution and, 1329
 sodomy and, 1405
 statutory rape and, 1550
 Model State Emergency Health Powers Act, 837
Moll Flanders (Defoe), 649
 Moments of silence, 3, 409
 Lemon test and, 533
 statutes, 1028–1030
 Wallace v. Jaffree and, 530
 Money laundering, 295
 Money Laundering Abatement and Anti-Terrorist Financing Act of 2001, 1149
Monitor Patriot Co. v. Roy, 788
 Monkey trial. *See* Scopes Monkey Trial
 Monmouth Oil Company, 904
Monongahela Navigation Company v. United States, 1604
 Monopolies
 in baseball, 1555
 New State Ice Co. v. Liebmann and, 479
 protection from, 1541
 Sherman Antitrust Act and, 1471
 Slaughterhouse Cases and, 514
 slaughterhouses and, 1481
 Monroe, James
 Calhoun and, 214
 free exercise clause and, 624
 Monroe, James (II), 1030
 Monroe, Marilyn, 1117
Monroe v. Pape, 1030–1031
Monroe v. Soliz, 990
 Montana
 abortions and, 1533
 Alien Land Law in, 1107
 constitution, 1351
 privacy and, 1531
 search and seizure in, 1532
Montana v. Egelhoff, 407
 insanity defense and, 814
Montana v. Oakland, 1108
Monteiro v. Tempe Union High School District, 163
 Montesquieu, Charles, 1031–1032, 1185
 Jefferson and, 847
 Madison and, 944
 Montgomery Bus Boycott, 889
 Montgomery Improvement Association (MIA)
 King and, 889
 marches and, 958
 Montgomery, Olen, 1427
 Monticello, 845
 Moody, William H., 740
 Mooney, Tom, 1762
Mooney v. Holohan, 1032–1033
 Moore, Alfred, 491
 Moore, Alvin, 1021
 Moore, Carzell, 709
 Moore, Roy, 343
 Moore, Underhill, 913
Moore v. City of East Cleveland, 121, 281, 1033
 substantive due process and, 466, 608
Moore v. Dempsey, 1442
 Holmes and, 772
 procedural due process and, 463
 Taft Court and, 1599
Moore v. Nelson, 809
Moose Lodge no. 107 v. Irvis
 freedom of association and, 636
 state action limitation and, 606
 Mootness, 867
Mora v. McNamara, 1560
 Moral Majority, 4, 1413
 Americans United and, 57
 Falwell and, 575
 family values movement and, 577
 school prayer amendment and, 356
 Moral powers, 1272
 Moral suasion, 5
Morales v. Turman, 878–879
 Morality
 censorship and, 942
 Comstock and, 341–342
 family values movement and, 577
 fighting words and, 587
 hate speech and, 754–755
 Hustler Magazine v. Falwell and, 788
 justice and, 1329
 lynching and, 242
 Society for the Suppression of Vice on, 1285
Morals vs. Art (Comstock), 342
Moran v. Burbine, 1033–1034
 Moravians, 1314, 1315
Morehead v. New York ex. rel. Tipaldo, 465
 Butler and, 209
 Morehouse College, 889
 Morella, Constance, 633
 Morgan, J.P., 1280
 Morgan, Lewis, 733
Morgan v. Virginia, 971
 Morgentaler, Henry, 1134
Morrissey v. Brewer, 800
 Morland, Howard, 1694
 Mormon Battalion, 1038
 Mormons
 accommodation and, 22
 antipolygamy laws and, 72
 belief-action and, 118
 Corporation of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos and, 367–368, 1302
 Davis v. Beason and, 396–397
 Foremaster v. City of St. George and, 371
 free exercise and, 625, 1246
 Fuller Court and, 668
 government and, 1037–1040
 Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. United States and, 908
 persecution of, 1035

- police power and, 1185
- polygamy and, 964
- public schools and, 1246
- religious liberty and, 1034–1040
- Reynolds v. United States* and, 627, 1330–1331, 1476
- Title VII and, 1660
- Waite Court and, 1732–1733
- Morphine, 64
- Morrill Act of 1862, 72, 1330
 - polygamy and, 1038–1039
 - Waite Court and, 1732–1733
- Morrill, John, 382
- Morris, Herbert, 1645
- Morris, Lewis, 1814
- Morris, Richard B., 358
- Morrison v. Olson*, 1417
- Morrison v. Sadler*, 1402
- Morrow, Dwight, 998
- Morton, Oliver P., 551
- Mosaic law, 1035
- Moscowitz, Henry, 1063
- Mosely, Earl, 361
- Moses, law of, 126
- Mosk, Stanley, 1545
- Moss, John E., 661
- Most susceptible person standard, 1023
- Motes v. United States*, 1040
- Motes, Walter, 1040
- Motion Picture Association of America (MPAA), 1042–1043
- Motion picture industry
 - LOD and, 914
 - production codes, 1041
 - self-censorship, 1041
- Motorcycle helmets, 1709
- Mott, Lucretia, 519
 - marriage laws and, 964
 - women's suffrage and, 1793
- Mott, Stewart, 1062
- Mottos. *See also* "In God We Trust"
 - state, 702
- Moulson, Deborah, 64
- Movie Producers Production and Distribution Association (MPPDA), 755–756
- Movies, 858. *See also* Motion picture industry
 - adult, 201, 364, 669, 1318–1319
 - Carmen Baby* and, 1255
 - censorship of, 669–670, 755–756, 1041–1043, 1054–1055
 - City of Renton v. Playtime Theatres, Inc.* and, 201, 364, 669, 1318–1319
 - Class of '74* and, 523
 - Code of 1930 and, 755–756
 - copying, 823
 - copyright infringement and, 1001–1002
 - Depression and, 755
 - fair use of, 823
 - FBI and, 774–775
 - Hays and, 755–756
 - HUAC and, 780
 - I, A Woman* and, 212
 - Kingsley International Pictures Corporation v. Regents of the University of New York* and, 891–892
 - Lady Chatterly's Lover* and, 891
 - minors and, 1041–1043
 - Mutual Film Corporation v. Industrial Commission of Ohio* and, 1054–1055
 - Natural Born Killers* and, 210
 - obscenity and, 850–851
 - ratings of, 1041–1043
 - self-censorship of, 1041–1043
 - sexual activity in, 1041
 - sexually explicit, 669
 - VCRs and, 1001
 - zoning ordinances, 669
- Mozert v. Hawkins County Board of Education*, 1044
 - free exercise and, 1246
 - free exercise clause and, 163
 - public schools and, 1246
- MP3.com, 823
- MPAA. *See* Motion Picture Association of America
- MPPDA. *See* Movie Producers Production and Distribution Association
- Mt. Healthy City School District Board of Education v. Doyle*, 421, 1044–1045, 1514
 - teacher speech and, 1614
- Mueller v. Allen*, 1045–1046, 1528
 - Burger Court and, 199
 - equal access and, 535
 - establishment clause and, 529
 - Mitchell v. Helms* and, 1024
 - Powell, Lewis, and, 1194
 - Wolman v. Walter* and, 1791
- Mugler v. Kansas*, 465
- Mugwumps, 1570
- Muhammad, 1035
- Muir, Robert, Jr., 1254
- Mulatatoes, 1022
- Mullaney v. Wilbur*, 1046, 1410
 - Leland v. Oregon* and, 917
- Muller v. Oregon*, 1596
 - Brandeis and, 174
 - economic rights and, 479
- Multi-State Anti-Terrorism Information Exchange (MATRIX), 1519, 1520
- Munn v. Illinois*
 - economic rights and, 478
 - Field and, 586
 - Waite Court and, 1733
- Murder
 - accomplices, 236
 - of African Americans, 1681
 - cultural defense and, 391
 - false confessions and, 574
 - felony, 230–231
 - Francis v. Franklin* and, 615
 - Gilmore and, 684
 - guilty pleas, 718
 - Hopt v. Utah Territory* and, 777
 - intraracial, 101
 - mandatory death sentences and, 952–953
 - mens rea and, 231
 - Nebraska Press Association v. Stuart* and, 1082
 - Orozco v. Texas* and, 1137
 - PAS and, 1166
 - Patterson v. New York* and, 1150
 - Proffitt v. Florida* and, 1238
 - Prohibition and, 1239
 - proportional punishment and, 1241
 - punishment and, 1328–1329
 - race and, 225
 - Rice v. Paladin* and, 210, 659, 1332

INDEX

Murder (*cont.*)

- Ricketts v. Adamson* and, 1334
- right to counsel and, 1344
- self-defense and, 974–975
- slavery and, 1483
- spousal, 974–975
- Murdock v. City of Memphis*, 868
- Murdock v. Pennsylvania*, 1390, 1802
 - Follett v. Town of McCormick* and, 599
 - Fourteenth Amendment and, 549
 - Jimmy Swaggart Ministries v. Board of Equalization of California* and, 853
- Murphy, Frank, 1046–1049, 1633, 1757
 - Hirabayashi v. United States* and, 839
 - Hughes Court and, 782
 - Korematsu v. United States* and, 839, 1048
 - New Deal and, 1083
 - nomination of, v
 - obscenity and, 1116–1117
 - Vinson Court and, 1721
- Murphy v. Ramses*, 397
- Murphy v. Waterfront Commission*, 696
- Murphy, William, 1286
- Murray, Donald, 971
- Murray, John Courtney, 254, 1049–1051
- Murray, Pauli, 1068
- Murray, Robert, 1281
- Murray v. City of Austin*, 371
- Murray v. Curlett*, 117–118
- Murray v. Giarrantano*, 886
- Murray v. United States*, 557
- Murray, William, 847
- Murray's Lessee v. Hoboken Land and Improvement Company*, 462
 - substantive due process and, 464
- Museum of Modern Art, 1052
- Museums, 1051–1052
- Music. *See also* Hip-hop music; Reggae music
 - copying, 823
 - fair use doctrine and, 572, 823
 - FCC and, 185
 - lyrics, 764–765
- Musical instrumental digital interface. *See* MIDI
- Muslims. *See also* Arab Americans; Arabs; Islam
 - after 9/11, 1259
 - autopsies and, 93
 - extremist groups and, 566
 - freedom of religion and, 1052–1054
 - O'Lone v. Estate of Shabazz* and, 1130
 - as prisoners, 1214
 - Sunni, 1306
- Must-carry, 1669
- Muste, A.J., 760
- Mutiny Act, 691
- Mutual Film Corporation v. Industrial Commission of Ohio*, 1041, 1054–1055
 - Joseph Burstyn, Inc. v. Wilson* and, 858
- Muzzy v. Wilkins*, 425
- Myers, Caroline Rulon “Lonny,” 1062
 - NARAL and, 1061
- Myers v. Loudoun County Public Schools*
 - “In God We Trust” and, 1067
 - Pledge of Allegiance and, 1178
- Myers v. United States*, 1601
- Mystery of the Ages* (Armstrong), 366

N

- NAACP. *See* National Association for the Advancement of Colored People
- NAACP Legal Defense and Education Fund, Inc. (LDF), 1063
- NAACP v. Alabama ex rel. Patterson*, 62, 1057–1058
 - association and, 75
 - compelling state interest and, 340
 - due process and, 801–802
 - freedom of association and, 635, 743
 - Harlan, II, and, 742
 - incorporation doctrine and, 803
 - invasion of privacy and, 828
 - New York ex rel. Bryant v. Zimmerman* and, 1087
 - penumbras and, 1153
 - privacy and, 1220
 - private discriminatory association and, 1226
- NAACP v. Button*, 1058–1059
 - overbreadth doctrine and, 1139
 - public interest and, 972
- NAACP v. Claiborne Hardware*, 302
 - threats and, 1653
- NAC. *See* Native American Church
- Nadeau, Cynthia, 1655
- Nader v. General Motors Corp.*, 828
- NAF. *See* National Abortion Federation
- Naier, Aariah, 307
- Naim, Han, 1059
- Naim, Ruby, 1059
- Naim v. Naim*, 1059–1060
 - miscegenation laws and, 1022
- Naked Lunch* (Burroughs), 1051
- Namba v. McCourt*, 1108
- Name. *See* Appropriation of name or likeness
- Naming, of rape victims, 1261–1262
- Napster, 823, 1002
- Napue v. Illinois*, 35, 1061
 - Giglio v. United States* and, 683
- NARAL Pro-Choice America, 1062
- NARAL. *See* National Abortion Rights Action League
- Narcotic Rehabilitation Act of 1966, 1743
- Narcotics Control Act, 1743
- Narcotics. *See* Drugs
- Nardone v. United States*, 1061
- Narrative of the Life of Frederick Douglass, An American Slave* (Douglass), 7, 448
- Nash, Gary, 54
- Nassier, El Sayyid, 898
- Nathanson, Bernard, 1062
- Nation of Islam, 70
- National Abortion Federation (NAF), 633–634
- National Abortion Federation v. Operation Rescue*
 - hindrance clause and, 181
- National Abortion Rights Action League (NARAL), 1061–1063, 1635
- National Agricultural Workers' Union (NAWU), 274
- National Alliance, 566
- National American Woman Suffrage Amendment (NAWSA), 256
- National Anti-Slavery Standard*, 46
- National Association for Repeal of Abortion Laws, 1061
- National Association for the Advancement of Colored People (NAACP), 1063–1064, 1442, 1500
 - ACLU and, 49
 - Amsterdam and, 60
 - anonymity and, 62
 - Baldwin and, 103

- Beasley and, 549
- boycott by, 1511
- Brown v. Board of Education* and, 186, 959
- Buchanan v. Warley* and, 191
- death penalty and, 240, 1257
- education and, 971
- equal protection and, 515–517
- Evers and, 548
- Frank and, 616
- Frankfurter and, 617
- freedom of association and, 635
- Gibson v. Florida Legislative Committee* and, 681
- Gilmore and, 684
- Hughes and, 784
- immigration and, 1259
- KKK and, 897
- Legal Defense and Education Fund, 223, 616
- Marshall, T., and, 971
- Murphy and, 1047
- NAACP v. Alabama* and, 1057–1058
- NAACP v. Button* and, 1058
- Parks and, 776
- Plessy v. Ferguson* and, 1181
- Scottsboro trials and, 1427
- Storey and, 1571
- Wells and, 1774
- Wilson, W., and, 1784
- National Association of Evangelicals
 - Becker Amendment and, 118
 - Equal Access Act and, 357
- National Association of Theatre Owners, 1042
- National Broadcasting Co. v. United States*, 1279
 - freedom of press and, 663
- National Cable & Telecommunications Association v. Brand X Internet*
 - FCC and, 580
- National Center for State Courts, 206
- National Citizens for Kennedy Committee, 1779
- National Civil Liberties Bureau (NCLB), 47, 102
 - ACLU and, 1798
- National Commission on Law Observance and Enforcement, 1184, 1455
 - Prohibition and, 1239
- National Committee to Stop ERA, 520
 - Schlaflly and, 1421
- National Conference of Christians and Jews, 911
- National Council for Japanese American Redress, 842
- National Council of Churches (NCC)
 - Becker Amendment and, 118
 - Warren Court and, 1757
- National Council on Chuches, 357
- National Defense Act of 1916, 1342
- National Defense Association, 1795
- National Defense Authorization Act of 1994, 435
- National DNA Index System, 431–432
- National Education Association
 - ERA and, 520
 - religious school funding and, 1527
 - Zelman v. Simmons-Harris* and, 1813
- National Electronic Task Force Initiative, 1148
- National Endowment for the Arts (NEA), 1065–1066
 - indecentcy and, 700–701
- National Endowment for the Arts v. Finley*, 1065–1066
 - government funding of speech and, 700–701
 - viewpoint discrimination and, 1716
- National Endowment for the Humanities (NEH), 285
- National Era, The*, 1486
- National Family Planning and Reproductive Health Association, Inc. v. Sullivan*, 674
- National Farm Workers Association (NFWA), 274
- National Federation of Business, 520
- National Firearms Act of 1934, 720, 1523
 - McReynolds and, 993
 - United States v. Miller* and, 722, 1343, 1687
- National Firearms Registration and Transfer Record, 1523
- National Gazette, The*
 - Madison and, 945
- National Guard, 1342
- National Industry Recovery Act, 1602
- National Jewish Community Relationship Advisory Council (NJCRAC), 852
- National Labor Relations Act, 1269, 1602
 - Communist Party and, 51
 - Goldberg and, 694
 - NLRB and, 1066
 - NLRB v. Jones & Laughlin Steel Corp.* and, 474
 - picketing and, 1169
- National Labor Relations Board (NLRB), 51, 1066
 - Emerson and, 497
 - equal protection and, 515
 - Goldberg and, 694
 - loyalty oaths and, 1719
 - New Deal and, 1083
 - NLRB v. Catholic Bishop of Chicago* and, 1100
- National Lawyers Guild, 1773
 - Emerson and, 497
- National League of Cities v. Usery*, 1289
- National Lesbian and Gay Law Association, 909
- National March on Washington for Lesbian and Gay Rights, 1401
- National Marches for Women's Lives, 1069
- National Mobilization to End the War in Vietnam (MOBE), 898
- National motto. *See* "In God We Trust"
- National Negro Committee, 1063
- National NOW Conference, 522
- National Organization for Women (NOW), 1068–1069
 - ERA and, 520, 522
 - Operation Rescue and, 1134
 - Scheidler v. NOW* and, 181, 1335
- National origins quota system, 1069–1070
- National Park Service
 - AIRFA and, 51
 - TPM and, 1664
- National Political Congress on Black Women
 - Shakur and, 764
- National Prison Project
 - ACLU and, 50
- National Probation Association, 102
- National Prohibition Act
 - Brandeis and, 176–177
 - Olmstead v. United States* and, 1129
 - Prohibition and, 1239
 - search warrant and, 1364
 - Sorrells v. United States* and, 1495
- National Prohibition Law*, 1602
- National Recovery Administration, 497
- National Recovery Review Board, 395
- National Rifle Association (NRA), 1070–1071
 - Gun Control Act of 1968 and, 720
 - McCain-Feingold law and, 220
 - right to bear arms and, 1342

INDEX

- National Right to Life Committee
 - Eagle Forum and, 1134
 - Operation Rescue and, 1133–1134
- National security, 1071
 - antidiscrimination and, 789–790
 - classified information and, 310–311
 - dissent and, 36, 658
 - exclusion and deportation and, 789–792
 - free speech and, 1072–1074
 - indefinite detention and, 805
 - injunctions and, 1212–1213
 - legislation and, 1765
 - prior restraints and, 1074–1076
 - Schlafly and, 1421
 - United States v. United States District Court* and, 1696
 - West Virginia State Board of Education v. Barnette* and, 595
 - wiretapping and, 856
- National Security Act of 1947, 257
 - Intelligence Identities Protection Act and, 817
 - USA PATRIOT Act and, 1149
- National Security Agency (NSA), 1520
- National Security Council (NSC)
 - CIA and, 257
 - Meese and, 996–997
- National Security Entry-Exit Registration System (NSEER), 1053
- National Sex Offender Public Registry, 997
- National Treasury Employees Union v. Von Raab*, 1076–1077, 1480, 1746
 - drug testing and, 452–453
- National Victims' Constitutional Amendment network, 1711
- National War Labor Board, 1601
- National Woman Suffrage Association, 65, 1522
- National Women's Party, 520
- Nationalism
 - Marshall, J., and, 1557
 - Stevens and, 1557
- Nationality Act of 1965, 1070
- Naturalization Act of 1940, 562
- Native American Church (NAC), 24, 92–93, 807, 1818
 - AIRFAA and, 501
 - defining religion and, 410
 - Employment Division, Department of Human Resources of Oregon v. Smith* and, 500–501
 - peyote and, 454, 1263, 1305
- Native American Church v. Navajo Tribal Council*, 807
- Native Americans, 1411–1412
 - AIRFA and, 51
 - American Revolution and, 53
 - Bill of Rights and, 1254, 1258
 - citizenship clause and, 293
 - criminal justice and, 1258
 - cultural defense and, 391
 - double jeopardy and, 441
 - Employment Division, Department of Human Resources of Oregon v. Smith* and, 500–501, 630
 - free exercise and, 119–120, 626
 - Friedman v. Board of County Commissioners* and, 371
 - ICRA and, 806–809
 - Indian Civil Rights Act and, 1258
 - Indian Removal and, 833
 - Jackson, A. and, 832–833
 - La Follette and, 901
 - lynching and, 243
 - Lyng v. Northwest Indian Cemetery Protective Association* and, 629, 939, 1470
 - Madison and, 946
 - marriage and, 963
 - as mascots, 1188
 - miscegenation laws and, 1022
 - Mormons and, 1036–1037
 - police and, 1258
 - property and, 1538
 - Quick Bear v. Leupp* and, 1253–1254
 - racial discrimination and, 1256
 - religious liberty and, 1077–1079
 - religious practices of, 1470
 - RLUIPA and, 1308
 - Social Security and, 168
 - sovereign immunity of, 1411
 - sovereignty of, 807
 - Storey and, 1570
 - tribal courts of, 808–809
- Nativity scenes, 1439
 - County of Allegheny v. ACLU* and, 42, 1313
 - Lemon* test and, 918
 - Lynch v. Donnelly* and, 937–938, 1312, 1314
- Natural Born Killers*, 210
- Natural Law, 1079–1081, 1535
 - Locke and, 930
 - privacy and, 1225
- Natural rights
 - Declaration of Independence and, 401
 - freedom of contract and, 636–637
 - as human rights, 1325
 - as liberty rights, 1326
 - Locke and, 930–931, 1357
 - natural law and, 1080–1081
- Natural Theology* (Paley), 377
- Naturalization, 293–294
 - Gillette v. United States* and, 1143
 - Girouard v. United States* and, 1142
 - illegal, 413
 - pacifists and, 1141–1143
 - revocation of, 413
 - U.S. Constitution and, 353
- Naturalization Act of 1798, 37
- Naturalization Act of 1906, 1141
- Naturalization Act of 1952, 1141
- Naturalization Law of 1790, 796
- Nature*, 313
- Nature of the Judicial Process, The* (Cardozo), 248
- Nauvoo, 1037–1038
- Nauvoo Expositor*, 1038
- Navajo Nation
 - autopsies and, 93
 - ICRA and, 807
 - tribal courts and, 808
- Navajo Nation v. Crockett*, 808
- Navigation Acts, 1803
- Navy, homosexuals in, 885
- NAWSA. *See* National American Woman Suffrage Amendment
- NAWU. *See* National Agricultural Workers' Union
- Nazis. *See also* Neo-nazis
 - ACLU and, 50
 - Baldwin and, 103
 - book banning and, 162
 - citizenship and, 1390
 - Communist Party and, 339
 - eugenic sterilization and, 546
 - freedom of expression and, 639

- hate crime laws and, 749
- HUAC and, 780
- Jackson, R. and, 738, 834–835
- Jehovah’s Witnesses and, 591
- military law and, 1007
- miscegenation laws and, 1022
- Naier and, 307
- New Deal and, 1084
- United States v. Balsys* and, 1680
- NC–17 rating, 1043
- NCC. *See* National Council of Churches
- NCLB. *See* National Civil Liberties Bureau
- NEA. *See* National Endowment for the Arts
- Neal, John R., 1426
- Near, Jay, 784
- Near v. Minnesota*, 48, 74, 1081
 - Brandeis and, 176
 - Butler and, 209
 - Hughes and, 784, 1364
 - Hughes Court and, 782
 - incorporation doctrine and, 804
 - injunctions and, 1210, 1211
 - New York Times v. United States* and, 1089
 - obscenity and, 1116
 - prior restraint and, 659, 892, 1075, 1210
 - prohibition on prior restraints and, 151
 - United States v. The Progressive, Inc.* and, 1694–1695
 - Vance v. Universal Amusement Co., Inc.* and, 1707
- Nebbia v. New York*, 1081–1082
 - economic regulation and, 474
 - McReynolds and, 993
- Nebraska, 1554
- Nebraska Press Association v. Stuart*, 1082
 - Burger Court and, 202
 - freedom of press and, 631–632
 - gag orders and, 662, 671
 - injunctions and, 1213
- Necessary and proper clause
 - extension of, 581
 - federalization of criminal law and, 580
 - Hamilton and, 732
 - Reid v. Covert* and, 354–355
- Necessity, doctrine of, 923
- Need v. intrusion test, 1752
- Negligence standard
 - defamation and, 403
 - false light invasion of privacy and, 574
 - for private individuals, 403
 - in tort law, 1468
- NEH. *See* National Endowment for the Humanities
- Neighborhood Children’s Internet Protection Act, 825
- Neil v. Biggers*, 956
- Nemo tenetur, 1453, 1454
- Neo-Nazis
 - extremist groups, 565–566
 - hate speech and, 753
- Netherlands
 - euthanasia and, 547
 - same-sex marriage and, 1403
- Neufeld, Peter, 237
- Neumann, Franz, 1032
- Neutral principles doctrine
 - Jones v. Wolf* and, 863
 - Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church* and, 862–863
- Neutral reportage doctrine, 1082
- Neutrality, religious, 542, 768, 1662
 - in church property disputes, 862–863
 - Everson v. Board of Education* and, 550
 - Jones v. Wolf* and, 857
 - legislative prayer and, 967
 - religion clauses and, 551
 - statutory religion-based exemptions and, 561
- Neutrality test, 289
- Nevada Department of Human Resources v. Hibbs*, 613
- New Deal, 1372
 - Biddle and, 133
 - Butler and, 210
 - civil liberties and, 1082–1085
 - Clark, T., and, 308
 - Darrow and, 395
 - Dies and, 419
 - Douglas and, 443
 - economic regulation and, 474
 - economic rights and, 479
 - Edwards v. California* and, 482
 - equal protection during, 515
 - Fortas and, 603
 - “four horsemen” v., 1373
 - Frankfurter and, 617
 - freedom of association and, 635
 - Hiss and, 765
 - impartiality and, 799
 - Jackson, R. and, 833–834
 - judicial review and, 864–865
 - legal realism and, 913
 - Marshall, T., and, 973
 - Murphy and, 1047
 - Nebbia v. New York* and, 1082
 - Rauh and, 1269
 - Stone and, 1564
- New England, 107
- New England Anti-Slavery Society, 4
 - Garrison and, 676
 - Petition Campaign and, 1155
- New England Courant*, 621
- New England Watch and Ward Society, 342
- New Hampshire, 1266
 - forced speech and, 600
 - “In God We Trust” and, 1067
 - proportional punishment and, 1241
 - right of conscience and, 1538
 - same-sex adoption and, 1407–1408
- New Hampshire Constitution of 1784, 438, 1085–1086
- New Jersey
 - civil liberties and, 1545
 - constitution, 1310
 - DWB and, 1237
 - free speech and, 1536
 - jury trials and, 137
 - Petition Campaign and, 1155
 - Ryslik v. Krass* in, 1307
 - same-sex marriage and, 1404
 - school transportation and, 1548
- New Jersey State Crime Lab, 429
- New Jersey Supreme Court
 - Boy Scouts of America v. Dale* and, 170
 - Committee on Evidence, 25
- New Jersey v. T.L.O.*, 124, 282, 1086
- Veronica School District v. Acton* and, 1707

INDEX

- New Lights, 108
- New Mexico Territory, 1649
- New Model Army, 507
- New Paltz, New York, 1402
- “New Property, The” (Reich), 692
- New Reformation, 107
- New Republic*
 - Chafee in, 311
 - Frankfurter and, 617
 - Hand and, 736
 - Holmes and, 658
- New Right, 1086–1087
- New State Ice Co. v. Liebmann*
 - Brandeis and, 1557
 - economic rights and, 479
- New York
 - “Bible war” in, 1293
 - Comstock law of, 1410
 - Constitution, 1294, 1311
 - Constitutional Convention of 1787 and, 1263, 1264, 1267–1268
 - education in, 1526
 - foster care in, 1489
 - free conscience and, 1539
 - free textbooks and, 1548
 - general warrants and, 1751
 - LaRocca v. Lane* in, 1307
 - Lindenmuller v. People* in, 1311
 - Petition Campaign and, 1155
 - pretrial detentions and, 1419
 - Public School Society, 1293
 - religious education in, 1292–1293
 - Rockefeller Drug Laws and, 1743
 - same-sex partners and, 1409
 - SLAPP and, 1481
 - Valentine v. Chrestensen* and, 1706
- New York Bar, 248
- New York Board of Regents
 - Abington Township School District v. Schempp* and, 2
 - Miracle, The* and, 858
 - school prayer and, 408
- New York City College, 1378
- New York City Police Department, 154
- New York Civil Liberties Union
 - campaign finance reform and, 219
 - Hentoff and, 760
- New York ex rel Bryant v. Zimmerman*, 1087
- New York Herald Tribune*
 - reporter’s privilege and, 663–664
- New York Journal*, 1267
- New York Law School, 898
- New York Manumission Society, 732
- New York Milk Control Board, 1081
- New York Society for the Suppression of Vice
 - Comstock and, 342
 - obscenity and, 1123
- New York State Catholic Welfare Committee, 1042
- New York State Club Ass’n v. City of New York*, 1226
- New York State Education Department, 891
- New York State Liquor Authority, 123
- New York State Liquor Authority v. Bellanca*, 216
- New York Stock Exchange (NYSE), 26
- New York Supreme Court, 248
- New York Times*
 - Branzburg v. Hayes* and, 179
 - cloning and, 314
 - Mitchell and, 1026
 - shield laws and, 1473
 - TRO to, 1075
- New York Times Co. v. Sullivan*, 27, 184, 1088, 1441
 - actual malice standard and, 403
 - burden of proof and, 197
 - Burger Court and, 201–202
 - commercial speech and, 330
 - common law and, 336
 - defamation and, 402, 680
 - false light invasion of privacy and, 574
 - First Amendment and, 646
 - free speech and, 1642–1643
 - Herbert v. Lando* and, 761
 - libel and, 39, 302, 660
 - Lingens v. Austria* and, 639
 - Meiklejohn and, 999–1000
 - national security and, 1072
 - offensive speech and, 117
 - Pickering v. Board of Education* and, 1166
 - political advertising and, 632
 - public figures and, 1242
 - public officials and, 1245
 - Sedition Act and, 68
 - teacher speech and, 1614
 - Time, Inc. v. Hill* and, 1657
 - Warren Court and, 1753, 1754, 1760
 - Zenger and, 1815–1816
- New York Times Co. v. United States*, 14–15, 1088–1091
 - Burger Court and, 202
 - injunctions and, 1212
 - national security and, 1071
 - Near v. Minnesota* and, 659
 - Pentagon Papers and, 311, 658
 - prior restraints and, 1075
 - Sunday Times v. United Kingdom* and, 638–639
 - Vietnam War and, 1695
- New York Tribune*, 649
- New York v. Belton*, 1091
- New York v. Burger*, 28
- New York v. Ferber*, 83, 1091–1093
 - Burger Court and, 201
 - child pornography and, 284, 660
 - family values movement and, 578
 - First Amendment and, 282
 - obscenity and, 1119, 1124
 - Osborne v. Ohio* and, 1138
 - overbreadth doctrine and, 1140
- New York v. Miln*, 1606
 - police power and, 1184
- New York v. Quarles*, 1093, 1457
- New York v. United States*, 167, 1589
- New York Weekly Journal*, 644
 - Cosby and, 869
 - freedom of press and, 1202
 - national security and, 1072
 - sedition and libel and, 734
 - Zenger and, 1814
- New York World*, 646
- New Yorker, The*, 760
- New Zealand
 - same-sex unions in, 1404
 - women and, 1728
- Newdow v. United States Congress*
 - Pledge of Allegiance and, 1178, 1179

- New-England Courant*, 1202
- Newman, John Henry, 254
- News gathering
- Branzburg v. Hayes*, 994
 - grand juries and, 708
- News media. *See also* Press
- appropriation of name or likeness and, 77
 - cameras in courtrooms and, 218
- Newsom, Gavin, 1402
- Newspapers. *See also* Press
- newsroom searches and, 1093–1094
 - student, 1699
- Newsroom searches, 1093–1094
- Newsweek*, 416
- NFWA. *See* National Farm Workers Association
- Ng Fung Ho v. White*, 177
- NGRI. *See* Insanity defense
- Nguyen v. INS*, 1530
- Niagara Movement, 1063
- Nichol v. Arin Intermediate Unit 28*, 1307
- Nicholas II, Tsar, 339
- Nichols, Terry, 565, 1622–1623
- separate prosecutions and, 441
- Niebuhr, Reinhold, 298
- Niemotko v. Maryland*
- Vinson and, 1722
 - Vinson Court and, 1720
- Nike, 332
- Nike v. Kasky*, 332
- 9/11, 1519, 1623
- ACLU and, 50
 - airport searches and, 33–34
 - Arab Americans after, 1259
 - Ashcroft and, 84
 - balancing test and, 101
 - CIA and, 258
 - Dershowitz and, 416–417
 - DHS and, 415
 - emergency powers and, 495
 - extremist groups and, 564–567
 - FOIA and, 641
 - government operations information and, 21
 - Guantanamo Bay and, 715–716
 - immigration after, 789, 1259
 - Japanese internment and, 842
 - material witness detention and, 805
 - material witnesses and, 981
 - military law and, 1007
 - Miranda warnings and, 1020
 - Muslim civil rights and, 1052
 - Muslims after, 1259
 - national security after, 789
 - privacy and, 347
 - right to counsel and, 1346–1347
 - War on Terror and, 1094–1095
- Nineteenth Amendment, 1275, 1541, 1727–1728
- Catt and, 256
 - federalization of criminal law and, 581
 - noncitizens and, 1105–1106
 - voting rights and, 1356–1357, 1726
 - women's suffrage and, 520, 1794
- Ninth Amendment, 144, 459, 1095–1097
- Congress and, 1325, 1326, 1327, 1328
 - fundamental rights and, 697
 - incorporation doctrine and, 803, 804
 - Madison and, 1324, 1326–1327
 - natural rights and, 1080
 - plenary power doctrine and, 1180
 - police power and, 1185
 - privacy and, 1219, 1226
 - retained rights, 1325–1328
 - Roe v. Wade* and, 9, 1221
 - substantive due process and, 466–467
 - Warren Court and, 1760
- Nix v. Williams*, 1097–1098
- illegal search and seizure and, 557
- Nixon, Lawrence, 1571
- Nixon, Richard M., 1098–1100
- ACLU and, 50
 - Bork and, 165
 - Burger and, 203–204, 1384
 - campaign financing and, 219
 - CIA and, 258
 - drugs and, 1743
 - Frank and, 616
 - gag rules and, 672
 - HUAC and, 780
 - Johnson, L., and, 856
 - McCarthy and, 985
 - Mitchell and, 1025–1026
 - New York Times v. United States* and, 1089
 - obscenity and, 1115
 - Oval Office tapes and, 311
 - pardons and commutations and, 1145–1146
 - Powell, Lewis, and, 1193
 - Rehnquist and, 1286–1287, 1289
 - St. Clair and, 306
 - Stevens and, 1556
 - Time, Inc. v. Hill* and, 1657
 - War on Drugs and, 1739
 - Warren and, 1762
 - wiretapping of, 856
- Nixon v. Condon*, 210
- Nixon v. Herndon*, 1571
- Nixon v. Shrink Missouri Government PAC*, 1650
- Nixon v. Warner Communications, Inc.*, 21
- NJRAC. *See* National Jewish Community Relationship Advisory Council
- NLRB. *See* National Labor Relations Board
- NLRB v. Catholic Bishop of Chicago*, 1100–1101, 1301–1302
- establishment clause and, 537
- NLRB v. Gissel Packing Co.*, 1653
- NLRB v. Inland Steel Co.*
- Goldberg and, 694
- NLRB v. Jones and Laughlin Steel Corporation*, 1066
- economic regulation and, 474
- No contest plea, 1175
- No Cross, No Crown* (Penn), 1152
- No Electronic Theft Act, 823
- No endorsement test, 1102, 1103–1105
- No Equal Justice* (Cole), 33
- No knock warrants, 1690
- No trespassing signs, 1133
- Noah v. AOL Time Warner, Inc.*, 45
- Nobel Peace Prize
- King and, 890
 - Ryan nominated for, 1393
- No-coercion test, 768. *See also* Coercion
- Lemon* test alternatives and, 534–535
- Noerr-Pennington* doctrine, 1353

INDEX

- Nollan v. California Coastal Commission*, 1605, 1674
 Nolle prosequi with leave, 893
 Nolo contendere, 1175
 Noncitizens. *See also* Alien(s); Immigrants
 civil liberties of, 380–381, 1105–1107
 deportation and, 40
 due process for, 460
 exclusion and, 40, 789
 family unity for, 576
 Fong Yue Ting v. United States and, 600
 franchise and, 1107
 IMFA and, 795
 land ownership and, 1107–1108
 In re Griffiths and, 812
 Non-delegation doctrine, 1024
 Nondisclosure agreements, 659
 Nondiscrimination. *See* Discrimination
 Non-funding provisions, 152–153
 Non-Governmental Organizations (NGOs), 59
 Nonpartisan League, 174
 Non-preferentialism standard, 90, 767, 1108–1110
 Nonpublic forums, 1245
 Nonviolence, 412
 Nonviolent noncooperation, 889
 Noriega, Manuel, 1076
 Norman Conquest, 437
 Norris, Clarence, 1427
Norris v. Alabama, 1428
North Briton, The, 1749
 North Carolina
 Constitutional Convention of 1787 and, 1326
 general warrants and, 1751
 literacy tests and, 1729
 reapportionment in, 1278
 Ross v. Moffitt and, 1380–1381
 undocumented migrants and, 1675
 voting in, 1729–1730
 North Carolina Constitution of 1776, 1110–1111
North Carolina v. Alford, 1111
 guilty pleas and, 719
North Carolina v. Pearce, 1111–1112
 Blackledge v. Perry and, 149
 North Dakota, 1540
North Jersey Media Group v. Ashcroft
 deportation and, 496, 1626
North Star, 448
 Northern Ireland, 1295
Northern Pacific Railway v. North Dakota, 1778
Northern Pipeline Construction Co. v. Marathon Pipe Line
 federal court jurisdiction and, 867
 Northern Securities Company, 1472
 Northwest Ordinance of 1787
 equal protection and, 514
 property ownership and, 476
 Northwest Territory, 845
 Northwestern University, 1393
 capital punishment and, 237
 Chemerinsky and, 276
 Goldberg and, 693
 Hentoff and, 760
 Nosair, El Sayyid, 306
 Nostra aetate, 254
 “Notes on England” (Montesquieu), 1032
Notes on Virginia (Jefferson), 846
 Notices, due process and, 458
 Notification procedures, 997
Noto v. United States
 freedom of association and, 635
 Smith Act and, 1488
 Notorious B.I.G., 764
N.O.W. v. Scheidler
 Operation Rescue and, 1135
 NRA. *See* National Rifle Association
 NSA. *See* National Security Agency
 NSEER. *See* National Security Entry-Exit Registration System
 Nude dancing
 City of Erie v. Pap’s A.M. and, 523
 content-neutral regulation and, 364
 expressive conduct and, 1688
 freedom of expression and, 523
 liquor licensing and, 215–216
 overbreadth doctrine and, 1139
 Paris Adult Theatre v. Slaton and, 1148
 Schad v. Mt. Ephraim and, 1418
 secondary effects doctrine and, 1436–1437
 United States v. O’Brien and, 1114
 Young v. American Mini Theatres and, 1808
 Nudity, 111. *See also* Obscenity
 Erznoznik v. City of Jacksonville and, 523–524
 United States v. O’Brien and, 1114
 as victimless crime, 1709
 Nugent, John, 663
 Nullification, 214
 Jefferson and, 846
 Kentucky and Virginia Resolves and, 887
 Nuremberg Files, 819–820, 1172
 Nuremberg Trials, 354, 1718
 Biddle and, 134
 Jackson, R. and, 834
 NWA, 764
 NYSE. *See* New York Stock Exchange
- ## O
- Oaths. *See also* Loyalty oaths
 ex officio, 1452–1453
 in judicial proceedings, 861
 Lilborne and, 919
 public office, 425
 Quakers and, 1251
 self-incrimination and, 1452
 Test and Corporation Acts and, 504
 United States v. Schwimmer and, 1692–1693
 U.S. Constitution and, 352
 Objections, timeliness of, 544
 Objective reasonableness, 597
 O’Brien, David Paul, 363, 449, 1688
O’Brien test, 363–364, 449–450, 1113–1114
 Obscene Publications Act, 1286
 Obscenity, 1115–1122, 1699. *See also* Indecency
 adversary hearings and, 1435–1436
 advertising and, 1012
 art and, 1051
 Beecher-Tilton Scandal and, 649
 birth control as, 1539
 Board of Education v. Pico and, 156
 A Book Named “John Cleland’s Memoirs of a Woman of Pleasure” v. Massachusetts and, 1–2
 Bruce and, 188–189

- Burger Court and, 201
- Cain v. Kentucky* and, 212
- California v. Larue* and, 215–216
- on campuses, 1507
- Carmen Baby* and, 1255
- categorical speech and, 1671
- Comstock Act and, 353, 1054
- Comstock and, 341–342
- congressional regulation of, 955
- definition of, 660
- dial-a-porn services and, 418
- Douglas and, 447
- dress codes and, 1578
- Erznoznik v. City of Jacksonville* and, 523
- FCC and, 579
- First Amendment and, 1271, 1382
- Flynt and, 599
- Fourth Amendment and, 933
- free speech and, 815, 1539
- freedom of expression and, 1163–1164
- Ginsberg v. New York* and, 684–685, 1042, 1316
- Hair and, 1499
- Hess v. Indiana* and, 763
- Hicklin* trial and, 659
- in history, 1122–1125
- homosexuals and, 956–957
- hostile environment harassment and, 778
- identifying, 46
- injunctions and, 1211
- Internet and, 819
- Internet filtering and, 824–825
- Jacobellis v. Ohio* and, 835–836
- Jenkins v. Georgia* and, 850–851
- Kingsley International Pictures Corporation v. Regents of the University of New York* and, 892
- Kois v. Wisconsin* and, 894
- in *Lo-Ji Sales, Inc. v. New York*, 933
- MacKinnon and, 943
- mail and, 956, 1410
- Miller test and, 850–851, 1012–1013
- Miller v. California* and, 660, 1012–1013, 1283, 1317, 1521
- Mishkin v. New York* and, 1023
- One, Inc. v. Olesen* and, 677
- Oregon and, 1539
- Osborne v. Ohio* and, 1138
- Paris Adult Theatre v. Slaton* and, 1147, 1283
- Pope v. Illinois* and, 1191
- pornography and, 304, 660
- prior restraints and, 1209
- privacy and, 1220
- private possession of, 1228
- probable cause and, 933
- protection for minors, 418
- public nuisance and, 1706
- Redrup v. New York* and, 1282
- Regina v. Hicklin, L.R.* and, 1285–1286
- Reno v. ACLU* and, 1316
- Rosen v. United States* and, 1286
- Roth v. United States* and, 1382, 1383, 1521
- Smith v. California* and, 1488–1489
- Southeastern Promotions, Ltd. v. Conrad* and, 1499
- Stanley v. Georgia* and, 1521, 1677
- states and, 850
- Stewart, P., and, 1560
- strict liability and, 1573
- Swearingen v. United States* and, 1592
- test, 659–660
- 2 Live Crew and, 765
- Ulysses* and, 659
- United States v. Bennett* and, 1286
- United States v. One Book Entitled “Ulysses”* and, 1688–1689
- United States v. Orito* and, 1677
- United States v. Reidel* and, 1690–1691
- United States v. Thirty-Seven Photographs* and, 1676
- Vance v. Universal Amusement Co., Inc.* and, 1706–1707
- variable concepts of, 685
- as victimless crime, 1709
- vulgar speech and, 1248
- Warren and, 1765
- Warren Court and, 1755
- Washington Supreme Court and, 1255
- Observer, The*, 5
 - Amnesty International and, 59
- Obsta principiis, 171
- O’Callahan v. Parker*, 1007
- O’Connor, Sandra Day, 1126–1128, 1127
 - Agostini v. Felton* and, 31, 1527
 - Aguilar v. Felton* and, 33
 - appointment of, 10
 - Apprendi v. New Jersey* and, 76
 - balancing and, 100
 - Board of Education v. Mergens* and, 1298
 - Bowers v. Hardwick* and, 909
 - Burger Court and, 198
 - Cable News Network, Inc. v. Noriega* and, 1076
 - ceremonial deism and, 258–259
 - City of Boerne, Texas v. Flores* and, 768
 - City of Littleton v. Z.J. Gifts D4, LLC* and, 926
 - City of Los Angeles v. Alameda Books, Inc.* and, 1319
 - City of Renton v. Playtime Theatres, Inc.* and, 1318
 - coercion and, 1102
 - Corporation of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos* and, 368, 1302
 - Corporation of Presiding Bishop v. Amos* and, 630
 - Cruzan v. Director, Missouri Department of Health* and, 389
 - Edmonson v. Leesville Concrete Co.* and, 878
 - Elk Grove Unified School District v. Newdow*, 490, 1177
 - Employment Division, Department of Human Resources of Oregon v. Smith* and, 501
 - endorsement test and, 536, 539
 - Enmund v. Florida* and, 245
 - FW/PBS, Inc. v. City of Dallas* and, 670
 - Grutter v. Bollinger* and, 19, 517
 - Handi v. Rumsfeld* and, 731, 842–843
 - on Harlan, II, 741
 - “In God We Trust” and, 1067
 - Lynch v. Donnelly* and, 41–42, 200, 528–529, 1029, 1312–1314
 - Maher v. Roe* and, 1221
 - Mitchell v. Helms* and, 1025
 - moments of silence statutes and, 1029
 - National Endowment for the Arts v. Finley* and, 701, 1065
 - no endorsement test and, 1103
 - non-preferentialism standard and, 1108
 - ODWDA and, 1137
 - Osborne v. Ohio* and, 1138
 - partial birth abortion and, 1555
 - Philadelphia Newspapers, Inc. v. Hepps* and, 1158
 - Pledge of Allegiance and, 1177
 - Plyler v. Doe* and, 1182
 - Pope v. Illinois* and, 1191

INDEX

- O'Connor, Sandra Day (*cont.*)
 Powell, Lewis, and, 1193, 1195
 proportional punishment and, 1241
R.A.V. v. City of St. Paul and, 1271
 on religious symbols, 938
Reno v. ACLU and, 1316
 resignation of, 10–11, 1322, 1323
Roberts v. United States Jaycees and, 170
Roe v. Wade and, 1221
 same-sex marriage and, 1400
 school prayer and, 1197
Shaw v. Reno and, 1278
Stenberg v. Carhart and, 1287
Texas Monthly v. Bullock and, 1628–1629
Vacco v. Quill and, 87
Virginia v. Black and, 1724–1725
Wallace v. Jaffree and, 1737
 War on Terror and, 1094
Webster v. Reproductive Health Services and, 1770
Zelman v. Simmons-Harris and, 1813
O'Connor v. Donaldson, 1001
O'Connor v. Ortega, 1128
 O'Dell, Jack, 776
 O'Dell, Joseph, 429
 Odors, dog sniffs and, 489
 ODWDA. *See* Oregon Death with Dignity Act
 O'Dwyer, William, 582
 Offensive speech, 117
Bolger v. Youngs Drug Products Corp. and, 161
Cohen v. California and, 321
 Flynt and, 599
 government speech and, 702
 hostile environment harassment and, 778–779
 infliction of emotional distress and, 811
 Internet and, 819
 Office holding. *See also* Religious tests for office holding
 Fourteenth Amendment and, 1726
 multiple, 358
 Office of Economic Stabilization, 497
 Office of Homeland Security, 415
 Office of National Drug Control Policy, 1744
 Office Of Naval Intelligence, 841–842
 Office of Special Investigations, 1680
 Office of Strategic Services (OSS), 257
 Goldberg and, 694
 Office of Telecommunications Policy, 1416
 Office of the Special Rapporteur on Freedom of Expression, 640
 Official immunity doctrine, 868
Ogden v. Saunders, 213
 “Oh, Pretty Woman” (Orbison and Dees), 1414
 fair use doctrine and, 572
O'Hair v. Murray, 1067
O'Hare Truck Services, Inc. v. City of Northlake, 179
 political patronage and, 1189
 Scalia and, 1417
 Ohio
 Christianity and, 1538
 Good Friday and, 399
 personal liberty laws and, 1154
 Petition Campaign and, 1155
 Raley v. Ohio and, 510, 1260
 Supreme Court, 1260
 Ohio Court of Appeals, 1009
 Ohio Pilot Scholarship Program, 1812
Ohio v. Roberts
 compulsory process clause and, 344
 confrontation clause and, 345–346
Ohio v. Robinette, 1128–1129
 Ohl, Jessie, 395
Ohralik v. Ohio State Bar Association, 1235
 lawyer advertising and, 910
 Oklahoma, 1146
 Oklahoma City bombing, 565, 728, 1622–1623
 AEDPA and, 233
 extremist groups and, 565
 United States v. McVeigh and, 1428
 Oklahoma City Police Department Crime Lab, 429
Oklahoma v. Williamson, 343
 Old Lights, 108
 Old Pretender, 690
Olden v. Kentucky, 396
O'Leary v. County of Sacramento, 371
Oliver v. United States, 1532, 1745
 Hester v. United States and, 763
 privacy and, 1220
 Olmstead, Roy, 1129
Olmstead v. United States, 445, 1129–1130, 1429, 1521, 1591
 Brandeis and, 176–177, 1368, 1629
 Butler and, 209
 civil liberties and, 1629
 Holmes and, 772
 implied rights and, 801
 Katz v. United States and, 882
 overruling of, 123
 penumbras and, 1153
 privacy and, 1218
 right to privacy and, 772, 802, 1369
 Taft Court and, 1599, 1601–1602
 Olney, Richard, 1472
O'Lone v. Estate of Shabazz, 1130–1132, 1470, 1650
 free exercise and, 629, 1215
Olsen v. Drug Enforcement Administration, 455
 Olson, Culbert L., 1762
 Olympics, bombing of, 565
 Omnibus Crime Control and Safe Streets Act of 1968, 487, 992,
 1132, 1435, 1519
 USA PATRIOT Act and, 1149
 wiretapping and, 1785
 Omnibus Diplomacy Security and Antiterrorism Act of
 1986, 1148
Omoegbon v. Wells, 1700
 “On Civil Disobedience” (Thoreau), 847
On Crimes and Punishments (Beccaria), 238–239
On Lee v. United States, 1132–1133, 1429, 1430
 Douglas and, 445
On Liberty (Mill), 1011, 1027, 1450
On Reading the Constitution (Tribe), 1668
On the Subjection of Women (Mill), 1010–1011
 On-demand video, 1714
One, Inc. v. Olesen, 677
 Oneida Indian Nation, 809
 O'Neil, Patrick, 130
O'Neil v. Vermont
 Fuller Court and, 667
 Harlan, I, and, 739
 One-person, one vote, 1276
 Harlan, II, and, 741
 Online communication, 63
Only Words (MacKinnon), 943
 Ontario, Canada, same-sex marriage and, 1403

Open fields doctrine, 1133
 privacy and, 1220
 Open meetings law, 642
 Open-air assembly
 courts and, 1397
 by Salvation Army, 1397
 Operating while intoxicated. *See* OWI
 Operation Rescue, 12, 1133–1135
 Bray v. Alexandria Women's Health Clinic and, 180–181
 FACE Act and, 633
 Madsen v. Women's Health Center and, 66
 McCorvey and, 988
 NOW and, 1068
 Operation Save America, 1135
Opinion of the Justices
 “In God We Trust” and, 1067
 Opinions, binding v. persuasive, 459
 Opium, 1743
 War on Drugs and, 1740
 Oral intercourse, 1492–1493
 Orange, William of
 English Bill of Rights and, 503
 English liberties and, 507
 Glorious Revolution and, 690–691
 Magna Carta and, 949
 Orbison, Roy, 1414
 fair use doctrine and, 572
 Order No. 11, 709
 Oregon
 Alien Land Law in, 1107
 civil liberties and, 1543, 1545
 Cooper v. Eugene School District in, 1306–1307
 free speech and, 1536
 obscenity and, 1539
 PAS and, 1165–1166
 Pierce v. Society of Sisters and, 1170
 public schools and, 1548
 Oregon Death with Dignity Act (ODWDA), 87, 1135–1137
 Oregon National Guard, 899–900
Oregon v. Hass, 748
Oregon v. Mathiason, 318–319
O'Reilly v. New York Times Co., 1307
Organization for a Better Austin v. Keefe, 1210
 Organizations
 Civil Rights Act of 1964 and, 301
 government funding of, 927
 nonprofit, 761
 subversive, 681
 Organized crime
 Omnibus Crime Control and Safe Streets Act of 1968 and, 1132
 Philadelphia Newspapers, Inc. v. Hepps and, 1158
Origin of the Species by Means of Natural Selection, On the (Darwin), 545, 1617
 Originalism, 1086
Orloff v. Willoughby
 Goldman v. Weinberger and, 699
 military law and, 1006
Orozco v. Texas, 1137–1138
 Ortega, Magno, 1128
 Orthodox Jews
 autopsies and, 93
 Braunfeld v. Brown and, 1470, 1756
 Orthodox rule, 831

Osborn, Charles, 1155
Osborne v. Ohio, 283, 284, 1138
 obscenity and, 1119
 overbreadth doctrine and, 1139
 OSS. *See* Office of Strategic Services
 O'Sullivan, Gilbert, 764
Othello, 402
 Otis, James, 54, 1138–1139, 1750, 1751
 Ottoman Empire, War on Drugs and, 1740
 Outward looking, 1225
 Oval Office tapes, 311
 Overbreadth doctrine, 1139–1140, 1419, 1704. *See also* Vagueness
 Virginia v. Black and, 1724–1725
 Warren Court and, 1753–1754
 Overreaching, 875
 Overtime pay, 570
 Ovington, Mary White, 1571
 NAACP and, 1063
 Owen, Robert Dale, 649
 OWI (operating while intoxicated), 469
Oyama v. California
 land ownership and, 1107–1108
 Vinson Court and, 1720
 Oyer, 458
Ozawa v. United States
 Brandeis and, 177
 Taft Court and, 1599

P

P2P networks. *See* Peer-to-peer networks
Pace v. Alabama, 1059
Pacemaker Diagnostic Clinic of America, Inc. V. Instromedix, Inc., 884
Pacific Gas & Electric v. California Energy Resources Conservation & Development Commission
 Tribe and, 1668
 Pacifica Foundation, 579, 1316
 Pacifism
 Bond and, 162
 Catt and, 256
 free speech laws and, 816
 naturalization and, 1141–1143
 Quakers and, 1251
 United States v. Macintosh and, 784
 U.S. Constitution and, 353
 PACs. *See* Political action committees
 Padilla, Jose, 1020, 1346–1347
Padilla v. Hanft, 1095
 Page Act, 260
 Page Law of 1875, 1465
 Page School of International Relations, 603
 Paine, Thomas, 1143, 1387, 1631
 Bache and, 96
 conviction of, 646
 free speech law and, 815
 PAS and, 6
Palazzolo v. Rhode Island, 183
 Palestine Liberation Organization (PLO), 306
 Palestinian–Israeli conflict, 70
 Paley, William, 377
Palko v. Connecticut, 75, 1391
 Bill of Rights and, 1633
 Brandeis and, 176
 Cardozo and, 249

INDEX

- Palko v. Connecticut* (cont.)
 due process incorporation and, 607–608
 Fourteenth Amendment and, 1632
 Frankfurter and, 617–618
 implied rights and, 801
 incorporation doctrine and, 803
 overturning of, 122
 penumbras and, 1153
 preferred position rule and, 1199
 procedural due process and, 463
- Palmer, A. Mitchell, 1144, 1799
 Democratic Party and, 1281
 Frankfurter and, 617
 Hoover and, 774, 1281
 spying and, 1518
 Wilson, W., and, 1784, 1785
- Palmer Raids, 658, 1395, 1396, 1518
 Chafee and, 261, 1281
 Hoover and, 774, 1281
 red scare and, 1798
 Wilson, W., and, 1785
- Palmer v. Clarke*, 486
- Palmieri, Edmund L., 686
- Palmore v. Sidoti*, 281
- Pamphlets
Abrams v. United States and, 771
Bolger v. Youngs Drugs and, 331
 commercial, 838
 Comstock and, 342
 hate speech and, 753
Hill v. Colorado and, 361
Jamison v. Texas and, 838
Lee v. Weisman and, 911
 military law and, 1007
- Pandas and People*, 378
- Pandering
Ginzburg v. United States and, 688–689
Roth test and, 689
- Panel. *See* Venire
- Papachristou v. City of Jacksonville*, 1144–1145
- Papal Birth Control Commission, 1050
- Pape, Frank, 1030
- Pap's A.M., 523
- Parades
 forced speech and, 601
 gay and lesbian rights and, 785–786
 injunctions and, 1210, 1211–1212
 Neo-Nazis, 1211–1212
 by Salvation Army, 1397
- Paramount-Richards Theatres v. City of Hattiesburg*, 343
- Parchment barriers, 945–946
- Pardons and commutations, 1145–1147
 federal, 1145–1146
 felon disenfranchisement and, 583
 former, 437
 history of, 437
 state, 1146
- Parens patriae, 1001, 1283
 preventative detention and, 1208
- Parental consent
Planned Parenthood of Central Missouri v. Danforth
 and, 1173
Planned Parenthood v. Ashcroft and, 1174
- Parental Notification of Abortion Act, 906
- Parental rights
 adoption and, 279–280
 custodial liberties, 281
 incarceration and, 1463
Pierce v. Society of Sisters and, 1171
- Parents
 adoptive, 280
 foster, 281
 Protection of Children Against Sexual Exploitation Act of 1977
 and, 283
Paris Adult Theatre I v. Slaton, 1013, 1147–1148, 1283
 obscenity and, 1118, 1124
- Parker, John J., 1364
 in *Commonwealth v. Blanding*, 645
 NAACP and, 1064
West Virginia State Board of Education v. Barnette and, 593
- Parker, John M., 774
- Parker v. Levy*, 699
- Parkinson's disease, 1551
- Parks
 public forum doctrines and, 1243
 as public forums, 1663
- Parks, Rosa, 776, 1064
 King and, 889
- Parochial schools
 establishment clause and, 529
 government funding and, 542, 549
Wolman v. Walter and, 1527
- Parody
 copyright and, 1413
 fair use doctrine and, 572
 Falwell and, 575
 First Amendment and, 1413–1414
 Flynt and, 599
Hustler Magazine v. Falwell and, 787
 v. satire, 1414
 vulgar speech and, 1248
- Parole
 African Americans and, 1257
 Hispanics and, 1257
 race and, 1257
 revocation hearings, 1152
 revocation of, 800
- Parolees, search of, 1433
- Parsons v. State*, 814
- Partial birth abortion, 10
Stenberg v. Carhart and, 1554–1555
- Participation objection, 1439
- Partin, Edward, 769
- PAS. *See* Physician-assisted suicide
- Pasquino, Pasquale, 494–495
- Passive resistance
Brown v. Board of Education and, 949
 King and, 889
- Passport Bill
Shaughnessy v. United States ex rel. Mezei and, 1467
- Passports
Haig v. Agee, 730
Kent v. Dulles and, 886–887
- Pataki, George, 189
- Pat-down. *See* Stop and Frisk
- Pate, Macel, 575
- “Patent for Providence Plantations,” 327
- Patents
 business methods, 824
 intellectual property rights and, 816, 824

- Metro-Goldwyn Mayer Studios v. Grokster* and, 1001–1002
- Paterson, William
- Ellsworth Court and, 491
 - Jay Court and, 843
- Patient-physician relationship, 673
- Patients' rights, 1254
- Patriarcha* (Filmer), 505
- Patriarchy, 1400
- Patriot Act. *See* USA PATRIOT Act
- Patriotism, 595
- children and, 592
 - Federalists and, 37
 - flag saluting and, 592
 - Stone on, 593
- Patronage. *See* Political patronage
- Patterson, Haywood, 1427
- Patterson, John, 959
- Patterson, Thomas, 770, 1795
- national security and, 1073
- Patterson v. Alabama*, 49
- Patterson v. Colorado*, 151, 466, 770, 1795
- Fuller Court and, 668
 - Holmes and, 740, 770
 - Meiklejohn and, 999
- Patterson v. McClean Credit Union*
- Civil Rights Act of 1866 and, 299
- Patterson v. New York*, 1150
- Mullaney v. Wilbur* and, 1046
- Patterson, William, 477
- Paty, Selma Cash, 989
- Paul, Alice
- ERA and, 520
 - women's suffrage and, 1793–1794
- Paul v. Davis*, 1150–1151
- procedural due process and, 609
- Pauline Christianity, 1035
- Payne v. Tennessee*, 385
- victim impact statements and, 1709
 - victims' rights and, 1711
- Payton v. New York*, 81, 1151
- Fourth Amendment and, 82
- PBA. *See* Public Broadcasting Act of 1967
- Pearl Harbor attack
- DeWitt and, 418
 - emergency powers and, 496
 - Hoover and, 775
 - Japanese internment and, 839
- PEARL. *See* Public Education and Religious Liberty
- Pearl v. Reagan*, 1527
- Pearson, John J., 145
- Bingham and, 146
- Pearson v. Murray*, 1442
- Pease, Elizabeth, 681
- Peckham, Rufus Wheeler
- Allgeyer v. Louisiana* and, 1633
 - Bradfield v. Roberts* and, 172
 - France v. United States* and, 615
 - Lochner v. New York* and, 928
 - Maxwell v. Dow* and, 739
 - substantive due process and, 1633
- Pecos Independent and Enterprise*, 545
- Pedophilia, 1398
- Peer-to-peer (P2P) networks, 823, 1002
- Pell v. Procunier*, 21, 1151–1152, 1415
- Burger Court and, 202
 - media access and, 995
- Peloza v. Capistrano Unified School District*, 1619
- Peltier, Leonard, 306
- Pen register, 487
- privacy and, 1220
- Penalty enhancement
- for hate crimes, 749–751
 - Wisconsin v. Mitchell* and, 1787
- Pending cases, 420
- Penitentiaries. *See also* Prisons
- cruel and unusual punishment and, 1539
 - proportional punishment and, 1241
- Penitentiary movement, 239
- Penn Central Transportation v. New York*, 1605
- Penn, William, 327, 1152, 1781
- free exercise and, 623
 - Hamilton and, 734
 - jury nullification and, 869
 - Quakers and, 1251
- Pennkamp v. Florida*, 1800
- Pennsylvania
- Bible and, 126, 1757
 - Bill of Rights and, 1252
 - busing and, 1546
 - constitution of, 1264
 - Constitutional Convention of 1787 and, 1264–1265, 1326
 - freedom of press and, 1204
 - Nichol v. Arin Intermediate Unit 28* in, 1307
 - Petition Campaign and, 1155
 - religion and, 1538
 - sentencing guidelines and, 1458
 - Sunday mail and, 1587
 - U.S. Constitution and, 1252
 - War on Drugs and, 1740
- Pennsylvania Abolition Society, 6
- Pennsylvania Abortion Control Act, 10
- Planned Parenthood v. Casey* and, 1174
- Pennsylvania Charter of 1701, 327
- Pennsylvania Charter of 1781, 326
- Pennsylvania Coal Co. v. Mahon*
- economic regulation and, 474
 - takings clause and, 1605
- Pennsylvania Declaration of Rights, 440
- Quakers and, 1252
- Pennsylvania Railroad, 63
- Pennsylvania State Crime Lab, 429
- Pennsylvania v. Casey*, 1173
- Pennsylvania v. Ritchie*
- Brady v. Maryland* and, 173
 - United States v. Agurs* and, 1679
- Pennsylvania v. Scott*, 1152–1153
- Penry v. Johnson*
- Breyer and, 183
 - Estelle v. Smith* and, 544
- Penry v. Lynaugh*, 386, 1127
- Pentagon
- media access and, 995
 - terrorism and, 1623
- Pentagon Papers, 14–15, 311. *See also* *New York Times Co. v. United States*
- injunctions and, 1212
 - Mitchell and, 1026
 - national security and, 1071
 - New York Times Co. v. United States* and, 658, 1088

INDEX

- Pentagon Papers (*cont.*)
 - Nixon, R. and, 1099
 - White, B., and, 1779
- Penumbras, 1153–1154, 1582
- Peonage Act, 1649
- Peonage laws
 - Bailey v. Alabama*, 770
 - Hughes and, 783d
- People ex rel. Gallo v. Acuna*, 675
- People for the American Way, 285
- People v. Anderson*, 1545
- People v. Ardenarczyk*, 319
- People v. Croswell*, 96
 - freedom of press and, 1207
- People v. Croy*, 391
- People v. Defore*
 - Cardozo and, 249
 - exclusionary rule and, 555
- People v. Disbrow*, 1545
- People v. Flores*, 319
- People v. Flynn*, 128
- People v. Freer*, 733
- People v. Marrero*, 510
- People v. Moua*, 391
- People v. Onofre*, 904
- People v. Simmons*, 128
- People v. Woody*, 1078
 - peyote and, 454
- People's Party, 1472
 - Emerson and, 497
- People's rights, 1640
- Per curiam decisions
 - Kois v. Wisconsin* and, 894
 - New York Times v. United States* and, 1695
 - obscenity and, 1118
 - Poelker v. Doe* and, 1183
 - Stone v. Graham* and, 1563
- Peremptory challenges, 873–874. *See also* Challenges for cause
 - in *Batson v. Kentucky*, 877–878
 - Holland v. Illinois* and, 769
 - jury selection and, 825
 - jury trial right and, 876
 - race and, 114, 877–878
 - Sixth Amendment and, 115
 - Swain v. Alabama* and, 225
- Perez v. Brownell*, 562
- Perez v. Lippold*, 1443
- Perez v. Sharp*, 1022
- “Perfect Moment, The” (Mapplethorpe), 1065
- Performers, appropriation of name or likeness and, 77
- Perilous Times* (Stone), 37
- Perjury
 - Dees and, 1501
 - prosecutors and, 35
 - Webb v. Texas* and, 1769
- Permanent residents, 1108
- Permissible purpose, 570
- Permoli v. First Municipality of New Orleans*, 1606
- Perry Education Association v. Perry Local Educators' Association*, 417
 - limited public forum and, 922
 - public forum doctrines and, 1243
 - viewpoint discrimination and, 1714, 1715, 1716
- Perry, James, 1332
- Perry, Michael, 1296
- Perry, Troy, 1401
- Perry v. Sindermann*, 1260
- Persecution
 - definition of, 88
 - Quakers and, 1251
 - relief from, 89
- Persian Gulf War
 - media access and, 995
 - military chaplains and, 269
- Persian Letters* (Montesquieu), 1032
- Persistent vegetative state, 86
 - Cruzan v. Director, Missouri Department of Health* and, 389
- Personal autonomy rights, 1533–1534
- Personal freedom, 97
 - Bill of Rights and, 140
 - societal needs v., 100
 - state bills of rights and, 138–139
- Personal injuries
 - attorneys and, 1236
 - strict liability and, 1572
- Personal Justice Denied, 841
- Personal liberty laws, 1154, 1484
 - police power and, 1184–1185
- Personal recognizance bond, 98–99
- Personal responsibility, 890
- Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA), 1396
 - AFDC and, 693
- Personal security
 - Bible and, 127
 - Watts v. United States* and, 1769
- Personal-attack rule
 - fairness doctrine and, 573
- Persons and Punishment* (Morris, H.), 1645
- Persons living with AIDS (PWAs), 25–26
- Persuasion, 1160
- Pervasively regulated industries, 1432
- Peter, Paul and Mary, 185
- Peters, John, 1270
- Peterson v. Greenville*, 826–827
- Petit juries. *See* Juries
- Petition(s)
 - abolitionist, 5–6
 - dispositive due process and, 457
 - right to, 458, 1265, 1352–1353
- Petition Campaign, 1154–1157
- Petition of Rights, 54, 505, 1157
 - English liberties and, 506
- Peyote, 24, 159, 1416, 1745
 - ACLU and, 49
 - AIRFA and, 51–52
 - Employment Division, Department of Human Resources of Oregon v. Smith* and, 500–501, 630, 1263
 - free exercise clause and, 119–120, 454, 626, 1263
 - NAC and, 454, 1263, 1305
 - Native Americans and, 1078
- Peyote Way Church of God, Inc. v. Thornburgh*, 454
- Pfeffer, Leo, 1527
- Phagan, Mary, 897
- Philadelphia
 - “Bible war” in, 1294
 - Rush in, 1386, 1387
- Philadelphia Newspapers, Inc. v. Hepps*, 404, 1157–1158
 - group libel and, 715
- Philanthropist*, 1486

- freedom of press and, 648
- Philanthropist, The*, 5, 1155
- Philippines
 - Bryan and, 189
 - drugs and, 1741
 - Murphy and, 1047
 - Weems v. United States* and, 1772
 - World War II and, 1269
- Philipse, Frederic, 734
- Phillips, Samuel F., 1681
- Phillips, Wendell, 46, 1158–1159, 1486
- Photographic identification, 1679
- Phyllis Schlafly Report, 1421
- Physician license, suspension of, 1358
- Physician-assisted suicide (PAS), 86–87, 1164–1166, 1583. *See also*
 - Assisted suicide
 - Kevorkian and, 888–889
 - O'Connor and, 1127
 - ODWDA and, 1135–1137
 - Souter and, 1497
 - Vacco v. Quill* and, 1668, 1767
 - Washington v. Glucksberg* and, 1766
- Physicians
 - abortion and, 324
 - gag rules and, 672–674
 - licensing of, 800
 - ODWDA and, 1136
 - professional advertising by, 1235–1236
- Picasso, Pablo, 1162
- Pickering, Marvin, 1613
- Pickering, Thomas, 39
- Pickering v. Board of Education*, 420, 1166, 1507–1508, 1514
 - academic freedom and, 18
 - First Amendment and, 1699
 - government speech and, 702, 1260
 - political patronage and, 1189
 - public concern standard and, 982
 - teacher speech and, 1613, 1614
- Pickering, Lewis, 1440
- Picketing, 1166–1170. *See also* Protests
 - captive by, 1167
 - Chaplinsky v. New Hampshire* and, 1562
 - of foreign embassies, 1168
 - Frankfurter and, 618
 - Frisby v. Schultz* and, 666
 - hostile environment harassment and, 778–779
 - intention of, 926–927
 - Marshall, T., and, 973
 - NOW and, 1069
 - overbreadth and, 1704
 - Police Department of Chicago v. Mosley* and, 1663
 - residential, 666
 - Staub v. Baxley*, 1663
 - Stone Court and, 1562
 - targeted, 1167
 - Truax v. Corrigan* and, 465
- Pierce, Glenn, 228
- Pierce v. Society of Sisters*, 1170–1171, 1548, 1581
 - AJC and, 852
 - free exercise and, 1214
 - freedom of association and, 634–635, 801–802
 - McReynolds and, 176, 993, 1597
 - penumbras and, 1153
 - Prince v. Massachusetts* and, 1208
 - privacy and, 1003, 1220
 - private schools and, 712
 - substantive due process and, 466
 - Wisconsin v. Yoder*, 1788
- Pierce v. United States*
 - Brandeis and, 174
 - Espionage Act of 1917 and, 1797
- Pierrepont, Edwards, 1681
- Pinckney, Charles, 139
 - Bill of Rights and, 143, 1326, 1363
 - Constitutional Convention of 1787 and, 358, 1263, 1314, 1326
 - freedom of the press and, 360
 - religious tests for office holding and, 312, 359
- Pinckney, Henry L., 66
- Pine Ridge Reservation, 807
- Ping, Chae Chan, 260, 791
- Pinochet, August, 59
- Piracy, airplane, 33
- Pirate v. Dalby*, 129
- “Piss Christ” (Serrano), 1065
- Pitney, Mahon, 1595
 - Pierce v. United States* and, 1797
 - White Court and, 1777
- Pitt, William, 1748
- Pittsburgh Press v. Human Relations Commission*
 - commercial speech and, 330
 - injunctions and, 1211
- Pius IX, Pope, 253
- Plain hearing, 1171
- Plain smell, 1171
- Plain touch, 1171
- Plain view doctrine, 78, 1171–1172
 - in *Lo-Ji Sales, Inc. v. New York*, 933
- Plaintiffs, private, 404–405
- Plame, Valerie
 - Intelligence Identities Protection Act and, 817
 - reporter’s privilege and, 664
- “Plan B” contraception, 1323
- Planned Parenthood
 - birth control and, 147
 - eugenic sterilization and, 545–546
 - NARAL and, 1062
 - “Nuremberg Files” litigation and, 1172
 - Warren Court and, 1759
- Planned Parenthood Assn. of Kansas City v. Ashcroft*, 1173
- Planned Parenthood Federation of America, 1411
- Planned Parenthood League of Connecticut
 - Griswold v. Connecticut* and, 712, 1320
- Planned Parenthood of Central Missouri v. Danforth*, 9, 35, 250, 1172–1173
 - Bellotti v. Baird* and, 121
 - Lambert v. Wicklund* and, 905
 - Planned Parenthood v. Ashcroft* and, 1174
- Planned Parenthood of Kansas City v. Ashcroft*, 198
- Planned Parenthood of Southeastern Pennsylvania v. Casey*
 - Burger Court and, 198–199
 - due process and, 1583
 - Lawrence v. Texas* and, 909, 1338
 - Paris Adult Theatre v. Slaton* and, 1148
- Planned Parenthood v. American Coalition of Life Activists*
 - Internet and, 819–820
 - threats and, 1653
- Planned Parenthood v. Ashcroft*, 1173–1174, 1475
- Planned Parenthood v. Casey*, 10, 1174–1175, 1287, 1416, 1533
 - Colautti v. Franklin* and, 324
 - Kennedy, A., and, 885

INDEX

- Planned Parenthood v. Casey* (cont.)
 O'Connor and, 1126
Roe v. Wade and, 885, 1221, 1320, 1322, 1337, 1367–1369
 Souter and, 1497
 substantive due process and, 609
Webster v. Reproductive Health Services and, 1770
- Plato, 1242
 civil liberties and, 1026
- Plaut v. Spendthrift Farm, Inc.*, 867
- Playboy*, 1117
- Playboy Enterprises, Inc. v. Welles*, 823
- Plea bargaining, 164–165, 1175–1177
Boykin v. Alabama and, 172
 guilty pleas and, 719
 introduction of, 1539
Mabry v. Johnson and, 941
 racial discrimination in, 1257
Santobello v. New York and, 1413
 sentencing and, 1460
- Pledge of Allegiance, 1177–1179
Elk Grove Unified School District v. Newdow and, 490–491
 God and, 861
 government speech and, 702
 Jackson, R. and, 834
 no endorsement test and, 1103
West Virginia State Board of Education v. Barnette and, 1775
- Plenary power doctrine, 460, 1179–1181
 Congress and, 792
 immigration and, 797
Kleindienst v. Mandel and, 893
 police power and, 1185
- Plessy v. Ferguson*, 225, 229, 1181–1182, 1441, 1442, 1467
Buchanan v. Warley and, 192
Civil Rights Cases and, 301
 Emerson and, 498
 equal protection clause and, 228
 Fourteenth Amendment and, 515
 Fuller Court and, 667
 Harlan, I. and, 738
 Hughes and, 783
Korematsu v. United States and, 843
Naim v. Naim and, 1060
 overturning of, 741
 race-based classifications and, 611
 separate but equal doctrine and, 1017
 stare decisis and, 1524
 state action and, 606
 Warren and, 1763
- PLO. *See* Palestine Liberation Organization
- Plumbers, The, 1090
 Nixon, R. and, 1099
- Pluralism, 23, 944–945
- Plyler v. Doe*, 41, 1182
 middle scrutiny test and, 613
 Powell, Lewis, and, 1195
- POAU. *See* Protestants and Other Americans United for Separation of Church and State
- Pocock, J.G.A., 55
- Poe v. Ullman*, 1182–1183, 1497, 1656
 Harlan, II, and, 714, 741–743
 privacy and, 1219
 right to medical counseling and, 712
- Poelker v. Doe*, 116, 1183–1184
- Poetry, 894
- Pointer v. Texas*
 compulsory process clause and, 344
 incorporation doctrine and, 803
 procedural due process and, 463
- Poisons, religion and, 1490
- Poland Act of 1874, 72
- Police
 African Americans and, 1256, 1257, 1258
 arrests and, 80–81
 blue wall of silence and, 154
 checkpoints and, 275
 choke holds of, 935
 citizen complaints against, 1256
 civil rights and, 1256
 civilian review boards and, 305
 corruption, 154
 criminal justice and, 1256
 deadly force by, 1256
 DNA samples and, 431
 employment, 1258
 entrapment by, 509
 Fourth Amendment and, 1333
 gangs and, 278–279
 Hispanics and, 1258
 in-home arrests and, 976
 interrogations, 314–321
McAuliffe v. New Bedford and, 770
 McNabb-Mallory Rule and, 316
Miranda v. Arizona and, 1016
 Miranda warnings and, 1019–1020
Moran v. Burbine and, 1033–1034
 Native Americans and, 1258
 Omnibus Crime Control and Safe Streets Act of 1968 and, 1132
 private, 1227–1228
 race and, 1256
 racial profiling by, 1256
Rawlings v. Kentucky and, 1271–1272
 reasonable promptness and, 1018
Rhode Island v. Innis and, 1331
Rizzo v. Goode and, 1362
 undercover, 747–748, 794
 unwarranted searches and, 956
- Police Department of Chicago v. Mosely*, 361
 content-based regulation and, 362
 public forums and, 1663
- Police Department of Chicago v. Mosley*, 973
- Police investigation commissions, 1184
- Police power, 801, 1184–1188
 compulsory vaccination and, 836
 mental illness and, 1000–1001
 prohibition and, 1187
- Polis, 1026
- Political action committees (PACs)
Buckley v. Valeo and, 194
 corporations and, 632
 First Amendment and, 588
 NARAL and, 1062
- Political and Civil Rights in the United States*, 498
- Political animal, 1638
- Political appointees, 799
- Political cartoonists, 1414
- Political contributions, 1190
- Political correctness, 1188–1189
- Political Disquisitions* (Burgh), 847

- Political expression, 1162
- Political freedom, 477
- Political Freedom: The Constitutional Powers of the People* (Meiklejohn), 999, 1630
- Political offense exception, 563
- Political participation, 325
- Political parties
 - Branti v. Finkel* and, 178–179
 - Colorado Republican Federal Campaign Committee v. Federal Election Commission* and, 328
 - Madison and, 643, 945
 - U.S. Constitution and, 36
- Political patronage
 - Elrod v. Burns* and, 492
 - First Amendment and, 1189–1190
- Political prisoners, 59
- Political question doctrine, 868
- Political speech, 642
 - First Amendment and, 1650
 - freedom of expression and, 1162
 - hate speech v., 754
 - World War II and, 1800
- Political theory, 127
- Politics* (Aristotle), 1638
- Politics, hate crimes and, 752
- Polk, Leonidas, 1486
- Polkinghorne, John, 377
- Poll taxes, 1559
 - Voting Rights Act of 1965 and, 1729
- Pollak, Walter, 498
- Pollitt, Dan, 1269
- Pollock v. Farmers' Loan and Trust Company*, 586
 - economic rights and, 478–479
- Polygamy, 72–73
 - belief-action and, 118–119
 - Bible and, 129
 - Davis v. Beason* and, 396–397
 - in England, 1330
 - Field and, 586
 - First Amendment and, 1038
 - free exercise clause and, 1038
 - history of, 1034–1036
 - Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. United States* and, 908
 - marriage laws and, 964
 - Morrill Act and, 1038–1039
 - police power and, 1185
 - property rights and, 1039
 - racism and, 1331
 - religious liberty and, 1034
 - Reynolds v. United States* and, 627, 1330–1331
 - Smith and, 1038
 - statutes, 1039
 - statutory religion-based exemptions and, 560
 - U.S. Constitution and, 353
 - as victimless crime, 1709
 - voter registration and, 396–397
 - Waite Court and, 1732
- Polygraph evidence, 407
- Poodry v. Tonawanda Band of Seneca Indians*, 809
- Poor People's March, 1069
- Poore, Barbel, 191
- Pope v. Illinois*, 1191
 - Miller* test and, 1013
 - obscenity and, 1119
- Popular Front, 104
- Popular sovereignty, 1585
- Population control, 1062
- Pornography. *See also* Child pornography; Movies
 - American Booksellers Association, Inc. et al v. Hudnut* and, 46–47
 - Ashcroft and, 85
 - Ashcroft v. Free Speech Coalition* and, 83–84
 - banning, 660, 689
 - Burger Court and, 201
 - CDA and, 336
 - censorship of, 941–942, 1574
 - Christian Coalition and, 285
 - content-neutral regulation and, 364
 - defining, 46–47
 - Dworkin and, 470–471, 1120–1121
 - entrapment and, 509
 - Falwell and, 575
 - feminism and, 304, 1120
 - Flynt and, 599
 - free speech and, 304, 1450
 - free speech theory and, 816
 - Ginsberg v. New York* and, 684–685, 1316
 - Ginzburg v. United States* and, 689
 - government funding of speech and, 701
 - hardcore, 1023
 - hostile environment harassment and, 778
 - Internet, 304, 819, 1701
 - Internet filtering and, 825
 - Jacobson v. United States* and, 837
 - low value speech and, 937
 - MacKinnon and, 941–943, 1120–1121
 - mail and, 837
 - Miller* test and, 1012–1013, 1013
 - Mishkin v. New York* and, 1023
 - obscenity and, 660, 1117
 - Paris Adult Theatre v. Slaton* and, 1147
 - privacy and, 1220
 - as sexual discrimination, 942
 - Society for the Suppression of Vice on, 1285
 - Stewart, P., and, 1118
 - Strassen and, 1573–1574
 - United States v. One Book Entitled "Ulysses"* and, 1689
 - United States v. Reidel* and, 1690–1691
 - violence and, 942
 - Warren on, 836
 - World War I and, 1117
- Pornography and the Justices* (Hixson), 1115
- Pornography: Men Possessing Women* (Dworkin), 470
- Port Huron Statement, 278
- Porter, Anthony, 237, 1393
- Porter, Paul, 603
- Porterfield v. Webb*, 1108
- Portland, Oregon, same-sex marriage and, 1402
- Portsmouth, Rhode Island, 61
- Posadas de Puerto Rico v. Tourism Company*, 1191–1192, 1708
- Positive law, 1431
- Positive rights, 1639
- Posner, Richard, 842
- Posodas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 331
- Posse Comitatus Act, 1732
- Post, Amy, 65
- Post, Isaac, 65
- Post, Louis F., 1799
- Wilson, W., and, 1785

INDEX

- Post Office Act of 1836
 free speech and, 648
Post office. *See* U.S. Postal Service
Post, Robert, 1452
Postage stamps, 1067
Postal Act of 1810, 1588
Postconviction statutes, 428
Potter, Royston, 72
Poulos v. New Hampshire, 850
Poulterer's Case, 350
Pound, Dean Roscoe
 Brandeis and, 176
 on Palmer raids, 1281
Poverty
 abortion and, 747
 appeals costs and, 711
 digital divide, 821
 discrimination, 711
Powell, Adam Clayton, 1764
Powell, Leroy, 1193
Powell, Lewis F., 1193–1196
 Batson v. Kentucky and, 114
 Beal v. Doe and, 115
 Board of Education v. Pico and, 157
 Branzburg v. Hayes and, 179
 Burger Court and, 198
 City of Renton v. Playtime Theatres, Inc. and, 1318
 Coker v. Georgia and, 323, 385
 Committee for Public Education and Religious Liberty v. Nyquist
 and, 333
 on English Bill of Rights, 503
 Erznoznik v. City of Jacksonville and, 523–524
 Fiallo v. Bell and, 585
 Frontiero v. Richardson and, 521
 Hudson v. Louisiana and, 781
 Maher v. Roe and, 951
 McCleskey v. Kemp and, 229, 986
 Philadelphia Newspapers, Inc. v. Hepps and, 1158
 Planned Parenthood of Central Missouri v. Danforth
 and, 1173
 Plyler v. Doe and, 1182
 Pope v. Illinois and, 1191
 on proportionality, 245
 Regents of the University of California v. Bakke and, 19,
 1284–1285
 retirement of, 165
 school prayer and, 1197
 shield laws and, 1473
 United States v. United States District Court and, 1696
 Windmar v. Vincent and, 1298
 Wolman v. Walter and, 1790
Powell, Ozie, 1427
Powell v. Alabama, 49, 1192–1193, 1427
 Brandeis and, 176
 Butler and, 209
 Cardozo and, 249
 Duncan v. Louisiana and, 468
 Emerson and, 498
 Gideon v. Wainwright and, 682
 Harlan, I. and, 740
 incorporation doctrine and, 803
 ineffective assistance of counsel and, 810
 procedural due process and, 463, 1344, 1349
 right to counsel and, 1018
 Warren Court and, 1759
Powell v. McCormack, 1764
Powell v. Texas, 1193, 1745
Power
 blacklisting and, 150
 unchecked, 320
Powers v. Ohio, 115
 race of jury and, 878
Powers v. United States
 Fifth Amendment and, 1018
PPA. *See* Privacy Protection Act
Pratt, Charles, 1749
 Jefferson and, 847
Prayer. *See also* School prayer
 Alabama and, 1438
 Becker amendment and, 117
 Church of England and, 1196
 Engel v. Vitale and, 117
 First Amendment and, 532
 legislative, 767, 914–915, 966–967
 legislative chaplains and, 267
 mandatory, 1542
 moments of silence statutes and, 1029–1030
 nondenominational, 967
 public, 1416
 in public schools, 1412–1413
 Santa Fe Independent School District v. Doe and, 1412
 Scalia and, 1416
 Souter and, 1496
 Warren Court and, 1756–1758
Precedent. *See also* *Stare decisis*
 Douglas and, 443
 history as, 967
Precision of regulation, 1512
Preeson, Ann Brown, 734
Preferred position rule, 100–101, 1199–1200, 1582, 1634
Pregnancy. *See also* Birth control
 abortion and, 9
 AFLA and, 29
 Akron v. Akron Center for Reproductive Health and, 34–35
 Bowen v. Kendrick and, 167
 drug testing and, 28
 forced sterilization and, 772
 Hazelwood School District v. Kuhlmeier and, 756, 1576
 Roe v. Wade and, 1475
 with same-sex partners, 1407
 sex discrimination and, 71
 in South Carolina, 1320
 statutory rape and, 1550
 Unborn Victims of Violence Act on, 1322–1323
Pre-indictments, 79
Prejean, Sister Helen, 1200–1201
Prejudice
 gag orders and, 671
 Gentile v. State Bar of Nevada and, 679
 ineffective assistance of counsel and, 810
 invidious discrimination and, 830
 Strickland test and, 811
Prepublication clearance, of confidential information, 1491
Presbyterian Church, 1768
Presbyterian Church v. Mary Elizabeth Blue Hull Memorial
 Presbyterian Church, 857
 church property disputes and, 862–863
Prescriptive guidelines, for sentencing, 1459
Presentment, 703
President. *See also* Executive powers

- civil religion and, 297
- as commander-in-chief, 1520
- electronic surveillance and, 1695–1996
- in emergencies, 494–496
- military and, 354
- threats to, 1653
- United States v. United States District Court* and, 1695–1996
- Watts v. United States* and, 1512–1513, 1769
- President's Commission on Law Enforcement and the Administration of Justice, 11184
- President's Commission on Narcotic and Drug Abuse, 1743
- President's Task Force on Victims of Crime, 1710, 1711
- Press. *See also* Freedom of press; Journalists; Media; News media
 - access to information of, 993–994
 - elections and, 1539
 - First Amendment and, 74, 1353–1354
 - Grosjean v. American Press Co.* and, 714–715
 - Hoover and, 774–775
 - Lovejoy and, 5
 - reporter's privilege and, 1319
 - restraint of, 48
 - Richmond Newspapers v. Virginia* and, 995
 - Sedition Act and, 39
 - sources of, 859
 - Watergate scandal and, 1354
- Press clause. *See* Freedom of press
- Press Enterprise Co. v. Superior Court*, 1429
- Press Enterprise II, 1428
- Press interviews, in prisons, 1415
- Press releases, 330, 859
- Presser v. Illinois*, 1342
 - gun ownership and, 722
- Preston, Evelyn, 103
- Preston, Thomas, 166
- Presumption, 458
 - burden of proof and, 196
- Presumptive guidelines, for sentencing, 1459
- Pretrial hearings, 79–80
- “Pretty Woman” (Two Live Crew), 1414
- “Prevention of Acts of Violence and Terrorism,” 1625
- Preventive detention, 98, 1207–1208
- Preventive prosecution
 - terrorism and, 1624
- Preventive services, 29
- Price fixing, 730
 - Nebbia v. New York* and, 1081
- Price, Victoria, 1427
- Priests, religious garb of, 1307
- Prigg v. Pennsylvania*, 1484, 1486
 - personal liberty laws and, 1154
 - Story and, 1572
 - Taney Court and, 1607
- Primary penalties, collateral consequences v., 325–326
- Prime Time Live*, 661
- Prince Albert v. Strange*, 1591
 - privacy and, 1218
- Prince v. Massachusetts*, 1208–1209, 1283, 1390
- Princeton Theological Seminary, 935
- Princeton University, 1272
 - DeWitt and, 417
 - Harlan, II, and, 741
 - Madison and, 943
- Pring, George W., 1480
- Printz v. United States*, 167, 1589
- Prior restraint, 1209–1213
 - freedom of press and, 659
 - FW/PBS, Inc. v. City of Dallas* and, 670
 - national security and, 1074–1076
 - Near v. Minnesota* and, 892, 1694–1695
 - no, 647
 - nondisclosure agreements and, 659
 - prohibition on, 151
 - public forum doctrines and, 1243
 - United States v. The Progressive, Inc.* and, 1694
- Prison Justice Ministries' InnerChange Freedom Initiative, 1216
- Prisoners
 - Burger Court and, 202
 - of conscience, 59
 - disenfranchisement of, 583
 - First Amendment and, 1216
 - free exercise and, 1214–1216
 - habeas corpus and, 727
 - hands off doctrine and, 1216
 - interrogation of, 981–982
 - marriage and, 1399
 - Native Americans, 1079
 - O'Lone v. Estate of Shabazz* and, 1130
 - political, 59
 - Prejean and, 1200
 - as slaves, 1216
 - Thornburgh v. Abbott* and, 1651
 - Turner v. Safley* and, 1670–1671
- Prisons. *See also* Debtor's prisons; Incarceration; Penitentiaries
 - access to, 21–22
 - African Americans in, 1257
 - censorship and, 1131
 - chain gangs and, 263
 - CNS and, 290–291
 - conditions, 855
 - constitutional protection in, 291
 - discipline, 800
 - free exercise clause and, 629
 - gangs in, 1257
 - Houchins v. KQED, Inc.* and, 779
 - informants, 794, 838
 - Kunstler and, 898–899
 - as nonpublic forums, 1245
 - O'Lone v. Estate of Shabazz* and, 629
 - overpopulation, 953
 - pardons and commutations and, 1146
 - Pell v. Procunier* and, 1151
 - population growth of, 1213–1214
 - press interviews in, 1415
 - race and, 1257
 - rape in, 1120
 - Rastafarians in, 1262
 - reform, 878
 - religion and, 24
 - RLUIPA and, 1308
 - search and seizure in, 781
 - sentencing and, 1459
 - serious crimes and, 876
- Pritchett, C. Herman, 516–517
- Privacy. *See also* Intrusion
 - abortion and, 1542
 - appropriation of name or likeness and, 77
 - arrest warrants and, 81
 - Bill of Rights and, 1634
 - birth control and, 1542

INDEX

Privacy (*cont.*)

Brandeis and, 176–177, 1590–1592
Breyer and, 183
California v. Greenwood and, 215
captive audiences and, 247
Chemerinsky and, 277
congressional protection of, 346–347
consumer, 829
contraceptives and, 9
Cooley and, 1591
of data, 1222–1223
decisional, 169, 828
DHS and, 416
DNA testing and, 431
Don't Ask, Don't Tell and, 1460
Douglas and, 446
drug tests and, 156, 1479–1480, 1746
due process and, 1582
electronic surveillance and, 487–488
euthanasia and, 547
extremist groups and, 567
false light invasion of, 574–575
Falwell and, 575
family, 280–281, 608–609
felons and, 712
financial, 346
Florida Star v. B.J.F. and, 596, 1261
Florida v. Riley and, 597
Florida v. White and, 598
Fortas and, 604
freedom of expression and, 1163
freedom of press v., 661
free-market principles v., 346
Griswold v. Connecticut and, 444, 713, 1320, 1521, 1531
Harlan, II, and, 741–742
helicopter surveillance and, 597
homosexuals and, 714
implied rights and, 801, 802
information, 828, 1534
Internet and, 820–821
intrusion and, 827–828
invasion of, 828–829
jailhouse informants and, 838
Johnson, L., and, 856
Katz v. United States and, 882
Kyllo v. United States and, 900
Mapp v. Ohio and, 1521
marital, 444, 742
Megan's Law and, 997
minors and, 250
National Treasury Employees Union v. Von Raab and, 1076–1077
O'Connor v. Ortega and, 1128
Olmstead v. United States and, 772, 802, 1368
Paris Adult Theatre v. Slaton and, 1147
penumbras and, 1153
personal autonomy rights and, 1533–1534
Poe v. Ullman and, 743, 1183
Poelker v. Doe and, 1183
positive law and, 1430
probable cause and, 1234, 1431
probation and, 712
Quinlan and, 1254
reasonable expectation of, 882, 1015, 1220, 1430–1431
residential, 829
residential picketing and, 666

right to, 1003, 1336–1338, 1368
right to be left alone and, 828
Roe v. Wade and, 1336, 1337, 1368, 1475
scope of, 802
searches and, 83, 1429, 1532
seizures and, 598, 1532
sexual activity and, 714
sexual orientation and, 1221–1222
sodomy and, 1542
sodomy laws and, 168–169, 855, 1493
software, 820–821
in state constitutions, 1531
state constitutions and, 1546
states and, 1541
substantive due process and, 608, 928
tax stamps and, 960
technology monitoring and, 488–489, 1430–1431
telephones and, 488
terrorism and, 1624–1625
theories of, 1224–1226
United States v. Thirty-Seven Photographs and, 1677
vehicles and, 1751
Veronica School District v. Acton and, 1707
Warren and, 1590–1592
Warren Court and, 1759–1760
Weems v. United States and, 1772
wiretapping and, 113, 1786
Privacy Act of 1974, 346, 1519
national security and, 1071
sunshine laws and, 641
Privacy Protection Act (PPA), 1223–1224, 1823
journalistic sources and, 859
newsroom searches and, 1093
Privacy protection laws, 569–570
Privacy rights
 Buck v. Bell and, 193
 international, 63
Private bank notes, 1684
Private choice, 1528
equal access and, 535
 Mitchell v. Helms and, 536
 Zelman v. Simmons-Harris and, 1813
Private concerns, 404–405
Private discriminatory association, 1226–1227
Private law, 798–799
 Bible and, 129–130
Private police, 1227–1228
Private property
 Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza and, 44
 Aristotle and, 1638
 Bible and, 127, 130
 Buchanan v. Warley and, 191–192
 buffer zones and, 67
 company towns and, 340
 free speech and, 926–927
 interracial marriage and, 936
 New Hampshire Constitution of 1784 and, 1085
 protests and, 44
 for public use, 474
Private right
 Salvation Army and, 1397
Private schools, 1424–1425, 1547. *See also* Religious schools
 Fourteenth Amendment and, 1548
 right to, 712

- Private speech, 1717
- Privacy, 1217–1223
- Privilege
 - Fourteenth Amendment on, 1357
 - v. right distinction, 1356–1358
- Privileges and immunities clause, 606–607, 1396
 - citizenship and, 1230
 - Fourteenth Amendment and, 1726
 - Saenz v. Roe* and, 294
 - Slaughterhouse Cases* and, 273, 1354, 1355, 1482
- Privy Council, 108, 1748
- Prize Cases, 1665
- Probable cause, 1234–1235
 - arrest and, 81, 1444–1445, 1698
 - automobile searches and, 92
 - checkpoints and, 275
 - drug testing and, 156
 - exemplars and, 558–559
 - fingerprinting and, 1445
 - Florida v. Jimeno* and, 597
 - Florida v. White* and, 598
 - Gerstein v. Pugh* and, 679
 - hearings, 79–80
 - Illinois v. Gates* and, 793
 - Immigration and Naturalization Service v. Lopez-Mendoza* and, 798
 - informants and, 793
 - interrogations and, 952
 - Kolender v. Lawson* and, 894
 - in *Lo-Ji Sales, Inc. v. New York*, 933
 - Michigan v. DeFillipo* and, 1004
 - Minnesota v. Dickerson* and, 1015
 - New Jersey v. T.L.O.* and, 1086
 - newsroom searches and, 1093
 - noncitizens and, 380
 - obscenity and, 933
 - Payton v. New York* and, 1151
 - Pennsylvania v. Scott* and, 1152
 - privacy and, 1220, 1431
 - protective sweep and, 976
 - relaxing of, 1627
 - search and seizure and, 78
 - search warrants and, 83, 1433, 1434, 1435
 - search without, 148
 - seizures and, 1444, 1447
 - stop and frisk and, 1568
 - stops and, 1445
 - United States v. Leon* and, 1685–1686
 - United States v. Robinson* and, 1691–1692
 - United States v. Watson* and, 1698
 - Warren Court and, 1757
- Probation
 - privacy and, 712
 - race and, 1257
- Probation officers
 - Pennsylvania v. Scott* and, 1152
 - powers of, 1153
- Procedendo, 458
- Procedural rules, 324–325
- Procreation personal autonomy rights and, 1533
- Procurier v. Martinez*, 1449
 - free speech and, 1217
 - prisoners and, 1217
- Procurement rules, 270–271
- Prodigy, 336
- Production Code Administration, 756
- Production Code of 1930, 755–756, 1041–1042
- Profanity, 1115, 1506
- Professional Women's Clubs, 520
- Proffitt, Charles William, 1238
- Proffitt v. Florida*, 223, 1238
 - capital punishment and, 675
 - cruel and unusual punishment in, 231–232
 - right of appeal and, 230
- Profiling, 1236–1238. *See also* Racial profiling
 - criminal, 1236–1237
 - racial, 1237–1238
 - seizures and, 1446
 - United States v. Brignoni-Ponce* and, 1680
- Profiteering
 - of Burroughs Wellcome, 26
 - Order No. 11 and, 709
- Progressive Era, 1531
 - Baldwin and, 102
 - drugs and, 1740
 - freedom of association in, 635
 - immigration and, 1069
 - Nineteenth Amendment and, 1727
- Progressive Movement
 - La Follette and, 901
- Progressive movement
 - economic rights and, 479
 - eugenics and, 545
 - Hague and, 729
 - World War I and, 240
- Progressive Party
 - Feiner and, 582
 - La Follette and, 904
 - Younger v. Harris* and, 1808
- Progressive, The*, 1075
- Prohibition, 1238–1239. *See also* Nineteenth Amendment; Volstead Act
 - Darrow and, 395
 - guns and, 720
 - police power and, 1187
- Pro-Life Action League, 1134
 - FACE Act and, 633
- Pro-Life Action Network
 - Operation Rescue and, 1134
- Pro-life movement, 1421
- Prometheus Radio Project v. FCC*
 - FCC and, 580
- Promiscuity, 1464
- Promise of American Life, The* (Croly), 736
- Promise Scholarship Program, 929
- Promised Key* (Howell), 1262
- Promises, 319
 - confidentiality and, 322
 - promissory estoppel and, 322
- Promissory estoppel, 322
- Proof beyond a reasonable doubt, 1240
- Property
 - joint ownership of, 1541
 - marriage and, 963
 - marriage as, 960
 - miscegenation laws and, 1022
 - Native Americans and, 1538
 - privileges and immunities and, 1231
 - searches and, 1429
 - seizures of, 1447

INDEX

- Property (*cont.*)
slaves as, 1483, 1538
- Property rights. *See also* Private property; Public property
abortion protests and, 12
American Revolution and, 475–476
Brandeis and, 174
church disputes over, 861–863
church splitting and, 856–857
civil forfeiture and, 295
civil liberties v., 1028
civil rights and, 478
Fourth Amendment and, 1430
future of, 479
Lyng v. Northwest Indian Cemetery Protective Association
and, 629
Marshall Court and, 968
of minorities, 1468–1469
polygamy and, 1039
protection of, 475
racism and, 191–192
rational basis test and, 251
religion and, 291–292
segregation and, 1442
surveillance and, 1430
takings clause and, 667–668
U.S. Constitution and, 476–477
of women, 1522
women and, 434
- Proportionality
capital punishment and, 245–246
cruel and unusual punishment clause and, 387
of punishment, 1240–1242
death penalty and, 231
Harmelin v. Michigan and, 744
measuring, 246
moral, 246
- Proportionality reviews, 1242
Pulley v. Harris and, 1249
- Proportionality test
alteration of, 744
Fuller Court and, 668
- Proposition 22, 1403
- Prosecution
of African Americans, 1257
arrest v., 81
Caucasians and, 1257
discriminatory, 423–424
Napue v. Illinois and, 1061
racial discrimination and, 1256–1257
- Prosecutions, separate, 441
- Prosecutorial discretion, 954
- Prosecutorial Remedies and Other Tools to End the Exploitation of
Children Today Act of 2003, 84
- Prosecutors
elected, 786–787
perjury and, 35
plea bargains and, 1413
- Proselytization, 1663
Wolman v. Walter and, 1791
- Prospective relief, 868
- Prostitution
AIDS and, 1463
Bible and, 130
immigration and, 1465
Mann Act and, 955
as victimless crime, 1709
- Protected speech
Ashcroft v. Free Speech Coalition and, 83
classification systems and, 252
factual context and, 762
false light invasion of privacy and, 575
Mt. Healthy City School District Board of Education v. Doyle
and, 1044–1045
public employees and, 420
- Protection of Children Against Sexual Exploitation
Act of 1977, 283
- Protection of Lawful Commerce in Arms Act,
722–723
- Protective sweeps, 976
- Protest, David, 1393
- Protest movement
civil rights and, 161–162
surveillance of, 1519
- Protestant Episcopal Church, 108
- Protestantism, 1286, 1293
coercion and, 1102
Constitutional Convention of 1787 and, 1314
religious liberty and, 1309, 1310
religious tests for office holding and, 1314
Roe v. Wade and, 1367
in South Carolina, 136
state constitutions and, 1538
- Protestants
Bible reading and, 131
English Bill of Rights and, 503
English Toleration Act and, 504
Ten Commandments and, 1622
- Protestants and Other Americans United for Separation of Church
and State (POAU), 56
religious school funding and, 1527
- Protests, 412, 958–959. *See also* Flag burning; Marches; Picketing;
Sit-ins
abortion, 12–13
anti-abortion, 66–67, 633–634
Baldwin and, 103
Brown v. Board of Education and, 959
categorical approaches and, 252
Chicago Seven and, 278
civil rights laws and, 302
commercial speech and, 330
Connor and, 348
content-neutral regulation and, 363
Cox v. Louisiana and, 372–373
Edwards v. South Carolina and, 483
FACE Act and, 633–634
fighting words and, 587
First Amendment and, 948–949
Fortas and, 604
free speech theory and, 649
Hill v. Colorado and, 361
Holmes and, 771
illegality of, 1395
injunctions and, 1211
Internet and, 819–820
invasion of privacy and, 829
Jackson, R. and, 834
of King, 889–890
of Long, 934
military law and, 1007
nonviolent, 412, 949

- picketing and, 1166
- Police Department of Chicago v. Mosely* and, 361
- on private property, 926
- private property and, 44
- in public places, 729
- Sacco and Vanzetti and, 1395
- self-incrimination and, 1456
- Texas v. Johnson* and, 361
- Title VII and, 1660
- United States v. O'Brien* and, 1113
- United States v. Schoon* and, 1692
- Vietnam War, 48, 1456
- World War I and, 261, 651–652
- The Protocols of the Elders of Zion*, 69
- Provenzano v. Moore*, 486
- Providence, 382
- Providence Plantations, 525
- Providing for Victims of Terrorism, Public Safety Officers and Their Families, 1149
- Provincial Charter, 979
- Proxmire, William, 788
- Prudential Insurance Co. v. Benjamin*, 1392
- Prudential Insurance Company v. Cheek*, 1596
- Prune Yard Shopping Center v. Robins*, 1544
- Prurient, 1117
- Prurient appeal requirement
 - Mishkin v. New York* and, 1023
- PRWORA. *See* Personal Responsibility and Work Opportunity Reconciliation Act
- Psychiatrists
 - Ake v. Oklahoma* and, 235
 - Church of Scientology and, 286
 - coerced confessions and, 919
 - criminal profiling and, 1236
 - Rush and, 1386
- Psychological evaluation, 43
- Psychology, Church of Scientology and, 286
- Public Broadcasting Act of 1967 (PBA), 578
- Public buildings, Ten Commandments and, 1620–1622
- Public communications campaigns, 701–702
- Public concern standard, 982
- Public Education and Religious Liberty (PEARL), 1527
- Public Education Department, 50
- Public employees
 - Connick v. Myers* and, 674
 - disciplining, 420–421
 - doctrine, 18–19
 - expressive activity of, 420–421
 - government speech and, 702
 - Hatch Act and, 748
- Public Enemy, 763–764
- Public figures, 1242–1243
 - actual malice standard and, 27, 403
 - emotional distress and, 575, 599
 - invasion of privacy and, 829
 - libel and, 788
 - satire and parody of, 1413
 - vulgar speech and, 1248
- Public forum doctrine, 1657
 - picketing and, 1167
- Public forums. *See also* Closed forums; Designated public forums; Reserved forums
 - doctrine for, 1243–1244
 - equal access to, 1230
 - Hague v. C.I.O.* and, 729
 - limited, 922
 - religious speech and, 1229
 - traditional, 922, 1663–1664
 - universities and, 1698–1700
- Public function, 44
 - Cyber Promotions v. America Online* and, 45
 - state action and, 606
- Public health
 - civil liberties and, 836
 - Reynolds v. United States* and, 1283
- Public Health Service Act of 1970, 672
 - homosexuality and, 1405
 - Title X and, 674
- Public interest
 - broadcast regulation and, 184
 - NAACP v. Button* and, 972
- Public interest law firms, 1400
- Public interest standard, 579
- Public intoxication
 - Powell v. Texas* and, 1193
 - as victimless crime, 1709
- Public Law 601, 780
- Public nuisance, 674–675
 - obscenity and, 1706
- Public office
 - clergy in, 921–922, 989
 - collateral consequences and, 325
 - criminal prosecutors and, 786–787
 - drug testing and, 453
 - Jews and, 851
 - KKK and, 897
 - oaths for, 425
 - pardons and commutations and, 1146
 - religious tests for, 136, 140, 352, 358, 359, 426, 1044, 1314–1315
- Public officials, 1245–1246
 - criticism of, 96
- Public opinion, 1543
- Public passage, 373
- Public places
 - definition of, 83
 - nudity and, 111
 - protests in, 729
 - warrantless arrests in, 82
- Public policy
 - courts and, 1416, 1417
 - guns and, 720–721
- Public property
 - free exercise clause and, 939
 - religious speech on, 906–907
 - religious symbols on, 937–938, 1312–1314
- Public relations, 330
- Public safety
 - dissent and, 1011
 - emergencies and, 494
 - Harris v. New York* and, 748
- Public School Society, 1526
- Public schools
 - Becker amendment, 117
 - Bible and, 131–133, 1197
 - “Bible wars” in, 1293–1294
 - Board of Education, Kiryas Joel Village School District v. Grumet* and, 157–158
 - censorship in, 756–757

INDEX

Public schools (*cont.*)

creation science and, 1615–1617
 dress codes in, 1578–1579
 drug testing in, 155–156, 453
 EAA and, 512
Edwards v. Aguillard and, 377, 480–481
Elk Grove Unified School District v. Newdow and, 490–491
 endorsement test and, 938
 evolution and, 376–377, 1617–1620
 First Amendment and, 163, 1508, 1576
 foreign languages in, 1002–1003
 free exercise and, 1246–1247
 freedom of association and, 801–802
 gay teachers in, 932
Good News Club v. Milford Central School and, 699–700
 Jehovah's Witnesses and, 848–849
 Jews and, 852
Lamb's Chapel v. Center Moriches Union Free School District
 and, 906–907
Lee v. Weisman and, 911
 lewd speech in, 124
 libraries in, 156–157
 moments of silence statutes and, 1028–1030
 New York, 1293
 open forums and, 1577–1578
 Oregon and, 1548
Pierce v. Society of Sisters and, 1170
 Pledge of Allegiance and, 1177
 prayer in, 1196–1199
 release time from, 1291–1292
 religion and, 560, 1291–1294
 religious clubs in, 154
 religious garb in, 1306–1307
 religious instruction in, 987
San Antonio School District v. Rodriguez, 1194
 secular humanism and, 1437–1438
 separationism and, 767
 sex education in, 1246
 speech regulations, 417
 statutory religion-based exemptions and, 560
 student groups in, 513
 student speech in, 1575–1579
 teacher speech in, 1611–1615
 Ten Commandments in, 90
 textbooks and, 155
 undocumented migrants and, 1182
Veronica School District v. Acton and, 1707
Wallace v. Jaffree and, 1736
 “Public square” debate, religion in, 1295–1297
 Public use, takings clause and, 1604
 Public utilities, 1541
Public Utilities Commission v. Pollak
 captive audiences and, 247
 Douglas and, 446
 Public Utilities Holding Company Act, 1269
 Public welfare offenses, 1573
 Pueblo Indians, 1411–1412
 Puerto Rico
 citizenship clause and, 293
 Harlan, I, and, 740
 Posadas de Puerto Rico v. Tourism Company and, 1191–1192,
 1708
 restrictive covenants and, 1324
 Pulaski, Charles, 986
Pulley v. Harris, 1249

Pullman, George, 400
 Pullman Palace Car Company, 400
 strike at, 1472
Pumpelly v. Green Bay Company, 1604
 Punishment. *See also* Capital punishment; Cruel and unusual
 punishment
 bodily correction and, 1202
 corporal, 385
 drugs and, 1743
 England and, 1329
 “eye for an eye,” 1328
 immunity from, 1694
 multiple, 442
 murder and, 1328–1329
 pardons and commutations and, 1145–1147
 proportional, 1240–1242
 of Quakers, 1251
 retribution and, 1328–1330
 of speakers, 1509
 theories of, 1645–1647
 types of, 384–385
 United States v. Lovett and, 1686–1687
 victims' rights and, 1710
 War on Drugs and, 1739
Purcell v. Summers, 1662
 Pure Food and Drug Act, 1740
 White Court and, 1777
 Pure speech, juvenile rights and, 604
 Puritanism, 525, 1249–1250
 establishment of, 621–622
 Hutchinson trial and, 61
 Lilborne and, 919
 Puritans
 Baptists and, 107
 Church of England and, 107
 Maryland Toleration Act and, 975
 Winthrop and, 298
Purkett v. Elem, 114
 Pursuit of happiness, 1450
 Putnam, G.P.
 *A Book Named “John Cleland’s Memoirs of a Woman of
 Pleasure” v. Massachusetts* and, 1
 PWAs. *See* Persons living with AIDS
 Pythagoras, 1240, 1242

Q

al Qaeda
 emergency powers and, 496
 Guantanamo Bay and, 715–716
 Miranda warnings and, 1020
 network, 1346
 prisoners, 16
 USA PATRIOT Act and, 85
 Quakers
 ACLU and, 103
 capital punishment and, 238–239
 in colonial America, 622
 Penn and, 1152
 Petition Campaign and, 1155
 religious liberty and, 1251–1252
 religious tests for office holding and, 1314, 1315
 statutory religion-based exemptions and, 561, 1310
 U.S. Constitution and, 352
 Williams, R. and, 1782

Quanta cura, 253
Quantum Computer Services, 45
Quartering of troops, 1252–1253
Queer Nation, 26
Question of Choice, A (Weddington), 1771
Questioning. *See* Interrogations
Qui tam doctrine, 1776
Quick Bear, Reuben, 1253
Quick Bear v. Leupp, 1253–1254
Quill, Timothy, 1165
Quill v. Vacco, 1165
Quilloin v. Walcott, 279, 281
Quinlan, Karen Ann, 86, 1254
Quo warranto, 458
Quota and National Origin Act of 1921, 426
Quota and National Origin Act of 1924, 426, 1259
Quotas
immigration, 796
Jews and, 851
racial, 30–31

R

R. v. Butler, 46
Rabban, David, 1795
Rabe v. Washington, 1255–1256
A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. *Massachusetts* and, 1255
incorporation doctrine and, 803
Roth v. United States and, 1255
Race. *See also* Ethnicity
Capital punishment and, 224
Chase Court and, 271
citizenship and, 293–294
Civil Rights Act of 1875 and, 300
criminal justice and, 1256–1258
employment discrimination and, 777–779
ethnic intimidation laws and, 750
exclusion by, 791
gerrymandering and, 1277
hate crimes and, 303, 748–751, 751–752
hate speech and, 752–755
Immigration Act of 1875 and, 1258–1259
interracial cohabitation and, 991
invidious discrimination and, 936
juries and, 114, 769
jury nullification and, 869
jury selection and, 871
jury trials and, 877–878
juvenile justice and, 1258
lynching and, 243, 302, 896–897, 1063
McCleskey v. Kemp and, 224
murder and, 225
parole and, 1257
peremptory challenges and, 114, 876
police and, 1256
prisons and, 1257
probation and, 1257
Regents of the University of California v. Bakke and, 611, 1284–1285
research on, 1256
venire and, 877
Race-based classifications, 611–612
Rachel v. Walker, 451

Racial animus, 76
Racial bias
McCleskey v. Kemp and, 236, 1258
Turner v. Murray and, 235
Racial classifications
affirmative action and, 30
Fourteenth Amendment and, 30
Racial discrimination. *See also* Profiling; Racial profiling
African Americans and, 1256, 1257
Baldwin and, 103
Bob Jones University v. United States and, 629, 636
Burton and, 208
capital punishment and, 225–226, 228–229
chain gangs and, 263
Civil Rights Act of 1964 and, 300–301
civil rights laws and, 303
corrections and, 1257
death penalty and, 1257–1258
in education, 971
Freund and, 665
Hispanics and, 1256, 1257
immigration and, 1258–1260
interstate commerce and, 826–827
Jackson, R. and, 835
Japanese internment and, 841
King and, 889–891
McCleskey v. Kemp and, 985–986
miscegenation laws and, 406
Missouri ex rel. Gaines v. Canada and, 782
Mitchell v. United States and, 782
Moose Lodge no. 107 v. Irvis and, 636
Native Americans and, 1256
Palmore v. Sidoti and, 281
in plea bargaining, 1257
prosecution and, 1256–1257
race-based classifications and, 611–612
sentencing and, 228–229, 1257
traffic stops and, 1256
Vinson Court and, 1718
voting rights and, 959
Racial epithets, 221
Racial profiling, 1237–1238
civilian review boards and, 305
gang ordinances and, 675
INA and, 791
Japanese internment and, 791
of Middle Easterners, 789–790
military tribunals and, 790
Muslims and, 1053–1054
by police, 1256
terrorism and, 791–792, 1623
United States v. Weaver and, 1746
USA PATRIOT Act and, 789
Racism
abolitionists and, 1486
Board of Education, Kiryas Joel Village School District v. Grumet and, 158
Brown v. Board of Education and, 186
Brown v. Mississippi and, 187–188
capital punishment and, 101
Confederate flag and, 1188
Connor and, 348
DeWitt and, 418
DNA dragnets and, 431

INDEX

- Racism (*cont.*)
drugs and, 424
injunctions and, 1211
lyrics and, 765
Marshall, T., and, 971
McCleskey v. Kemp and, 985–986
Monteiro v. Tempe Union High School District
and, 163
Murphy and, 1048
Naim v. Naim and, 1060
polygamy and, 1330
property rights and, 191–192
restrictive covenants and, 368–369, 1325
segregation and, 1441
- Racketeer Influenced and Corrupt Organizations Act (RICO),
1334–1335
ACLU and, 1335
FACE Act and, 633
Operation Rescue and, 1134
Scheidler v. NOW and, 181, 1335
- Radical Division, 1144
- Radical Republicans, 146, 1442
- Radin, Max, 1762
- Radio
citizen's band, 488
fairness doctrine and, 573
freedom of press and, 663
ham, 488
indecentcy on, 1556–1557
spectrum, 663
- Radio Act of 1927, 663
obscenity and, 1124
- Rahner, Karl, 254
- Railroad Commission of Texas v. Pullman Co.*
federal court jurisdiction and, 868
- Railroads
Mormons and, 1038
Plessy v. Ferguson and, 1181
protection from, 1541
segregation and, 1442
- Rakas v. Illinois*, 83
- Raleigh, Walter, 757
- Raley v. Ohio*, 1260
entrapment by estoppel and, 510, 1260
- Rambler*, 26
- Ramirez, Hernan, 1690
- Rampart scandal, 277
- Ramsay, David, 54
- RAND Corporation, 1088
- Randolph, Edmund, 140, 1266–1267, 1315
Constitutional Convention of 1787 and, 1266–1267
- Randolph, John, 274
- Rankin v. McPherson*, 420–421, 1260
public concern standard and, 982
- Rankin, Walter, 1260
- Rap music. *See* Hip-hop music
- Rape, 1464
abortion and, 951
African Americans and, 1257
capital punishment and, 323
cultural defense and, 391
date, 758, 1464
death penalty and, 232, 245, 385–386, 388, 1329
DNA testing and, 430
First Amendment and, 1261–1262
forced sterilization and, 772
gender bias and, 1262
hearsay evidence and, 758
Mallory v. United States and, 952
mandatory death sentences and, 953
marital, 960–961
media and, 1261
Michigan v. Lucas and, 1005
military law and, 1007
New York v. Quarles and, 1093
prior sexual activity and, 1005
in prison, 1120
proportionality review and, 1242
reporting, 1261–1262
Scottsboro trials and, 1427–1428
sexually explicit materials and, 1120
statutory, 1550, 1572–1573
Supreme Court and, 1261, 1320
victims' rights and, 1710
of white women, 1741
- Rape shield statutes, 1464
- Rape victims
freedom of press and, 596
naming of, 1261–1262
- Rape-shield statute, 1005
- “Rapper's Delight” (Sugar Hill Gang), 764
- Rasmussen v. South Florida Blood Services*, 1534
- Rastafarians
First Amendment and, 1262, 1263
marijuana and, 454, 1262, 1263
religion and, 1262–1263
- Rasul v. Bush*, 355, 1391
Guantanamo Bay and, 716
indefinite detention and, 805, 1391
Stevens and, 1558
War on Terror and, 1094
- Ratification debate, 1263–1269
- Rating Appeals Board, 1042–1043
- Rational basis test, 251
gun control and, 722
police power and, 1185
- Rational purpose test, 610
- Rationality test, 216
- Rauh, Joseph L., Jr., 1269–1270
- Raulston, John T., 1426
- Rauschenbusch, Walter, 397
- R.A.V. v. City of St. Paul*, 303, 1271
content-based regulation and, 362
cross burning and, 382–383
fighting words doctrine and, 588, 754
hate speech codes and, 221, 657, 750
political correctness and, 1188–1189
Stevens and, 1556
viewpoint discrimination and, 1714, 1716
Virginia v. Black and, 1724–1725
Wisconsin v. Mitchell and, 1787
- Ravin v. State*, 1533, 1744
- Rawlings v. Kentucky*, 1271–1272
- Rawls, John Bordley, 1272–1274
- Ray, James Earl, 890
assassination by, 959
- Read, Lucy, 64
- Reagan Amendment, 356
- Reagan, Nancy, 1554
- Reagan, Ronald

- abortion and, 10
- assassination attempt on, 1260
- Bork and, 165
- Chavez and, 275
- Civil Liberties Act signed by, 1374
- drugs and, 1743–1744
- ERA and, 520
- Falwell and, 575
- family values movement and, 577
- Frank and, 616
- Hinckley and, 814
- interdiction and, 390
- Japanese internment and, 1374
- Kennedy, A., and, 884
- King and, 890
- Meese and, 996–997
- Moral Majority and, 4
- New Right and, 1086
- New York v. Ferber* and, 1092
- NRA and, 1070
- obscenity and, 1115
- O'Connor and, 1126
- Rehnquist and, 1287–1289
- Roe v. Wade* and, 1321
- Scalia and, 1415, 1416
- school prayer amendment and, 356
- shooting of, 721
- stem cell research and, 1553–1554
- Supreme Court and, 1287
- victims' rights and, 1710
- War on Drugs of, 452
- Webster v. Reproductive Health Services* and, 1770
- Reagan, Ronald, Jr., 1554
- Reapportionment, 1275–1278, 1728
 - 1963/1964 cases, 1275–1276
 - Baker v. Carr* and, 1275–1276
 - controversy, continuing, 1278
 - courts entry into, 1275
 - district boundaries in, 1276–1277
 - Fourteenth Amendment and, 1275
 - gerrymandering in, 1277
 - Gray v. Sanders* and, 1275
 - Johnson, L., and, 1276
 - Karcher v. Daggett* and, 1277
 - Kennedy, J., and, 1276
 - Lucas v. Forty-Fourth General Assembly of Colorado* and, 1276
 - majority-minority districts in, 1277–1278
 - Mobile v. Bolden* and, 1277
 - in North Carolina, 1278
 - Reynolds v. Sims* in, 1276
 - in Tennessee, 1275
 - Thornburg v. Gingles* and, 1277
 - Voting Rights Act of 1965 and, 1276
 - Warren and, 1764
 - Warren Court and, 1753
 - Wesberry v. Sanders* and, 1276
- Reasonable doubt
 - burden of proof and, 196
 - Francis v. Franklin* and, 615
 - Jackson v. Virginia* and, 832
 - jury nullification and, 870
 - Leland v. Oregon* and, 917
 - proof beyond, 1240
 - rights of accused and, 1360
 - Sandstrom v. Montana* and, 1410
 - self-defense and, 974–975
 - standards for, 1240
- Reasonable promptness, 1018
- Reasonable suspicion, 1431
 - criminal profiling and, 1236
 - Illinois v. Wardlow* and, 794–795
 - search warrants and, 1434
 - stops and, 1445, 1568
 - in *Terry v. Ohio*, 794–795
 - United States v. Brignoni-Ponce* and, 1680
 - United States v. Ramirez* and, 1690
- Reasonableness test, 28
 - Hazelwood School District v. Kuhlmeier* and, 757
- Reasonable-person-would-feel-free-to-leave test, 1568
- Reasoned judgment, 1497
- Recidivism, 1646. *See also* Three strikes law
 - four-strikes statute and, 1494
 - Megan's Law and, 997
- Reckless indifference, 231
- Reconstruction, 1733
 - amendments and, 1542
 - Chase Court and, 272
 - Civil Rights Act of 1866 and, 299
 - Civil Rights Act of 1875 and, 300
 - Civil Rights Cases* and, 301
 - cross burning and, 382–383
 - Dred Scott v. Sandford* and, 452
 - equal protection during, 515
 - Ex parte Milligan* and, 551
 - Fourteenth Amendment and, 605
 - hate crime laws and, 749
 - Joint Committee on, 146
 - jury trials in, 877
 - lynching during, 243
 - miscegenation laws and, 1022
 - privileges and immunities and, 1231
 - Republican Party and, 146
 - Sumner and, 1585
- Reconstruction Act, 1072
- Reconstruction Amendments, 1482
- Reconstruction Civil Rights Acts, 70
- Recording Industry Association of America (RIAA), 336
- Records of the Federal Convention of 1787, The* (Farrand), 864
- Red Cross, 15–16
- Red Lion Broadcasting Co. v. Federal Communications Commission*, 184–185, 858, 1279–1280, 1354, 1452
 - fairness doctrine and, 573
 - FCC and, 579
 - forced speech and, 601
 - freedom of press, 663
 - Turner Broadcasting System v. Federal Communications Commission* and, 1669
- Red Monday*, 780
- Red Record, A* (Wells), 1774
- Red scare, 1280–1282, 1377, 1798–1799
 - Americanism and, 1280–1281
 - Chambers and, 265
 - Clark, T., and, 308
 - Communist Party and, 339
 - emergency powers and, 496
 - extremism and, 566
 - First Amendment and, 1281
 - Frankfurter and, 617
 - freedom of association and, 635

INDEX

- Red scare (*cont.*)
 - freedom of press and, 658
 - Hoover and, 774, 1281
 - incitement of criminal activity and, 653–654
 - Meiklejohn and, 999
 - Palmer and, 1144
 - Schenck v. United States* and, 1281, 1282
 - Supreme Court's response to, 1281–1282
 - World War I and, 566, 1279–1282
- Redman, John, 1386
- Redrup v. New York*, 1282–1283
 - Cain v. Kentucky* and, 212
 - obscenity and, 1118
- Reed, John, 150
- Reed, Ralph, 285
- Reed, Stanley
 - Frankfurter and, 618
 - separationism and, 767
 - Vinson Court and, 1721
- Reed v. Reed*
 - ACLU and, 50
 - ERA and, 521
 - gender and, 518
 - Ginsburg and, 687
- Referenda, 1540
- Reflections on the Revolution in France* (Burke), 207
- Reformation
 - Amish and, 57
 - establishment clause and, 525
 - Rawls and, 1273–1274
- Refugee Act of 1980, 88
- Refugees, 88–89
 - Cuban, 390
 - Haitian, 389–390
 - INA and, 796
- Regan v. Taxation with Representation of Washington*, 1608, 1674
- Regents of the University of California v. Bakke*, 19, 1284–1285
 - ADL and, 70
 - affirmative action and, 1284–1285
 - Burger and, 206, 1284
 - equal protection and, 517, 1285
 - Japanese internment and, 841
 - Marshall, T., and, 973
 - Powell, Lewis, and, 19, 1193, 1285
 - race-based classifications and, 611, 1284–1286
- Regents of the University of Michigan v. Ewing*, 19
- Reggae music, 1262
- Regina v. Benjamin Hicklin*, 1285–1286, 1382
 - Miller test and, 1012
 - Mishkin v. New York* and, 1023
 - obscenity and, 1116, 1122
 - Warren Court and, 1755
- Regulated industries, 1432
- “Regulating Racist Speech on Campus” (Strossen), 1574
- Regulation
 - establishment clause and, 537
 - of interstate commerce, 826–827
- Regulation and Its Reform* (Breyer), 183
- Regulatory statutes
 - Breyer and, 183
 - religious exemptions for, 559–561
- Regulatory taking, 474
- Rehabilitation, 1645
 - collateral consequences and, 325
 - prison population and, 1213–1214
- Rehabilitation Act of 1973, 71
 - Bowen v. American Hospital Association*, 166
- Rehnquist Court, 1286–1287
 - Burger Court and, 1287
 - Bush v. Gore* and, 1287
 - civil rights and, 1544
 - Coleman v. Thompson*, 324–325
 - EAA and, 535
 - federalism of, 1289
 - habeas corpus and, 233–234
 - judicial review and, 865
 - Marshall, T., and, 972
 - Plyler v. Doe* and, 1182
 - Roe v. Wade* and, 1635
 - search warrants and, 1434
 - Warren Court and, 1287–1288
- Rehnquist, William, 1288–1291, 1416, 1636
 - All the Laws But One* and, 646–647
 - Ansonia Board of Education v. Philbrook* and, 1301
 - Ashcroft v. Free Speech Coalition* and, 84
 - on Blaine Amendment, 930
 - Bowen v. Kendrick* and, 167
 - Bowers v. Hardwick* and, 1222
 - Buckley v. Valeo* and, 194
 - California v. Larue* and, 215–216
 - career of, 1287
 - City of Renton v. Playtime Theatres, Inc.* and, 1316, 1318–1319
 - on civil liberties, 1289
 - Colorado v. Connelly* and, 329
 - on Constitution, 1288–1290
 - Cruzan v. Director, Missouri Department of Health* and, 86, 1766
 - death of, 11, 1287
 - Dickerson v. United States* and, 1287
 - education of, 1287
 - Elk Grove Unified School District v. Newdow* and, 490, 1177
 - First Amendment and, 1289, 1299–1300
 - Florida v. Jimeno* and, 597
 - on Fourteenth Amendment, 1290
 - on Goldberg, 697
 - habeas corpus and, 727
 - Hustler Magazine v. Falwell* and, 599, 787–788, 1290
 - “In God We Trust” and, 1067
 - on Internet filtering at libraries, 826
 - on Japanese internment, 842
 - Jenkins v. Georgia* and, 850
 - Lemon test alternatives and, 534
 - Locke v. Davey* and, 929
 - Madsen v. Women's Health Center* and, 948–949
 - Michigan Department of State Police v. Sitz* and, 1004
 - Miranda warnings and, 1287
 - Mueller v. Allen* and, 1045–1046
 - National League of Cities v. Usery* and, 1288
 - Nixon, R. and, 1287–1288
 - nomination of, 204, 1287, 1290
 - non-preferentialism standard and, 767, 1108–1110
 - Osborne v. Ohio* and, 1138
 - PAS and, 1165
 - Pell v. Procunier* and, 1151
 - Philadelphia Newspapers, Inc. v. Hepps* and, 1158
 - Planned Parenthood of Central Missouri v. Danforth* and, 1173
 - Pledge of Allegiance and, 1177
 - Pope v. Illinois* and, 1191
 - Posadas de Puerto Rico v. Tourism Company* and, 1192
 - Powell, Lewis, and, 1193

- preventative detention and, 1208
- proportional punishment and, 1241
- Rawlings v. Kentucky* and, 1394
- Reagan and, 1287–1289
- Regents of the University of California v. Bakke* and, 1284
- Reno v. ACLU* and, 1317
- robe worn by, 1287
- Roe v. Wade* and, 10, 1287, 1290, 1322
- Rust v. Sullivan* and, 672, 700, 702, 1388
- Stone v. Graham* and, 1563
- Ten Commandments and, 1621
- United States v. O'Brien* and, 1114
- United States v. Verdugo-Urquidez* and, 1696
- wall of separation and, 1736
- Wallace v. Jaffree* and, 1737
- Washington v. Glucksberg* and, 87, 1766
- Webster v. Reproductive Health Services* and, 1770
- Wolman v. Walter* and, 1790
- Zelman v. Simmons-Harris* and, 1813
- Zobrest v. Catalina Foothills School District* and, 1816
- Reich, Charles A., 692
- Reich v. Shiloh True Light Church of Christ*
- Reid v. Covert*, 354–355, 1291
- Reid v. Georgia*, 1291, 1445
- racial profiling and, 1237
- Reindeer rule, 42
- Relation back forfeiture doctrine, 1678
- Released time, 1822–1823
- Religion. *See also* Freedom of religion
 - abortion and, 11–12
 - academic freedom and, 1506
 - accessibility and, 1296
 - accommodation of, 22–24
 - ACLU and, 48–49
 - advancement of, 1024–1025
 - AFLA and, 29
 - Ashcroft and, 85
 - atheism and, 89–90
 - authoritarianism and, 1295–1296
 - autopsies and, 92–93
 - bifurcated definition of, 410–411
 - bills of rights and, 135–136
 - Burger Court and, 199–200
 - capital punishment and, 239–240, 1469–1471
 - Catholic Church and, 253–255
 - Charitable Choice and, 269–271
 - charitable contributions and, 703
 - children and, 1283
 - Christian nation and, 342–343
 - Church of Scientology and, 286–287
 - civil, 3, 297–298
 - claims of, 1437
 - coercion and, 1101–1103
 - in colonial America, 525, 621–622
 - colonial charters and, 326–328
 - conscientious objection and, 349–350, 409–410
 - Constitutional Convention of 1787 and, 358, 1263, 1264, 1309
 - Court of Appeals, Ninth Circuit, on, 1262
 - Cromwell and, 382
 - de Tocqueville and, 375
 - defining, 409–411, 530, 1437
 - Delaware and, 1309
 - democracy and, 1273
 - as divisive, 1296
 - draft and, 1793
 - drugs and, 453–455
 - education and, 1291–1292, 1306–1307
 - employees and, 1299–1303
 - employment discrimination and, 777–779
 - endorsement test and, 42–43, 536
 - equal protection and, 1309–1310
 - establishment clause and, 1416, 1548
 - establishment of, 409, 1262
 - Everson v. Board of Education* and, 131–132, 1294, 1423
 - evolution and, 1438
 - expanded concept of, 1477
 - factionalism and, 1296–1297
 - family values movement and, 577
 - First Amendment and, 74–75, 1262, 1263, 1291, 1294–1295, 1296–1298, 1299, 1302, 1303–1304, 1308, 1315, 1755–1756
 - FLSA and, 570–572
 - fraud and, 1476
 - free conscience and, 1538
 - free exercise and, 3, 1475–1476
 - fundamentalists in, 1425
 - government favoritism and, 1439
 - government funding of, 1423
 - hate crime laws and, 748–751
 - hate speech and, 752–755
 - historical practice and, 259
 - homosexuality and, 1406
 - hostility towards, 535
 - Indian, 51–52
 - Know-Nothing Party and, 1294
 - legislative chaplains and, 267
 - Lemon* test and, 32
 - Locke and, 1309–1310, 1314
 - Madison and, 541, 624, 1315
 - Massachusetts Body of Liberties of 1641 and, 979
 - medical treatment and, 1283–1284
 - medicine and, 374–375
 - minority sects and, 291
 - Mississippi and, 1538
 - modern definitions of, 411
 - national, 526–527, 767
 - neutrality towards, 23
 - non-preferentialism standard and, 1108
 - North Carolina Constitution of 1776, 1111
 - as not shared, 1295–1296
 - O'Connor and, 1126
 - ODWDA and, 1136
 - official references to, 938
 - pacifists and, 1141
 - Pledge of Allegiance and, 1179
 - poisons and, 1490
 - Prince v. Massachusetts* and, 1208
 - prisons and, 24
 - property rights and, 291–292
 - public school and, 2–4, 1291–1294
 - in “Public square” debate, 1295–1297
 - in public universities, 1297–1299
 - Puritans and, 1249–1250
 - Rastafarians and, 1262–1263
 - Rawls on, 1272–1274
 - Rhode Island and, 1309, 1312–1314
 - school prayer and, 356–357
 - secular humanism and, 1437
 - secular v. religious arguments and, 1295
 - selective service and, 1448
 - separationist jurisprudence and, 33

INDEX

Religion (*cont.*)

- sincerity and, 1476–1477
- slavery and, 1483
- South Carolina and, 1309–1311, 1314–1315
- state-sponsored, 254
- statutory exemptions for, 559–561
- Supreme Being and, 1693
- Supreme Court and, 766–768
- suspect classes and, 513
- Swaggart Ministries v. California Board of Equalization* and, 1629
- tax exemption and, 1629
- taxes and, 108–109, 766, 1607–1608
- teaching of, 1437
- unemployment benefits and, 629
- United States v. Ballard* and, 1476–1478
- United States v. Bauer* on, 1262
- United States v. Seeger* and, 1693–1694
- U.S. Constitution and, 352, 1330
- Vidal v. Girard's Executor* and, 1712
- violence and, 1295
- war and, 1273
- Warren Court and, 1755–1756
- Watson v. Jones* and, 1768
- in workplace, 1299–1303
- zoning and, 1817–1820
- Religion and the American Constitutional Experiment* (Witte), 527, 625
- Religion clauses, 540–542, 766–768. *See also* Establishment clause;
Free exercise
 - drafting of, 527
 - Elk Grove Unified School District v. Newdow* and, 490–491
 - freedom of religion and, 542
 - interpretation of, 541
 - neutrality of, 561
 - neutrality v. separationism, 551
- Religious belief
 - prisoners and, 1214
 - security of, 1475–1478
 - United States v. Seeger* and, 1693–1694
- Religious ceremonies
 - AIRFA and, 51–52
 - Bible reading as, 132
 - Church of the Lukumi Babalu Aye v. City of Hialeah* and, 627
 - City of Boerne, Texas v. Flores* and, 159
 - copyright law and, 366–367
 - drugs and, 24
 - Employment Division, Department of Human Resources of Oregon v. Smith* and, 630
 - free exercise clause and, 454
 - in judicial proceedings, 860–861
 - Native Americans and, 939
- Religious conduct
 - Cantwell v. Connecticut* and, 849–850, 1364
 - protection of, 939
 - states and, 849
- Religious content
 - in county and city seals, 370–372
 - County of Allegheny v. ACLU* and, 42, 1313
 - cross burning and, 382–383
- Religious corporations, 291
- Religious exercises, 2–4
- Religious Freedom Restoration Act (RFRA), 24, 49, 52, 71, 93, 159, 1305–1306, 1471, 1490–1491, 1549, 1589, 1818
 - Americans United and, 57
 - City of Boerne, Texas v. Flores* and, 501, 1305–1306
 - copyright law and, 366
 - Employment Division, Department of Human Resources of Oregon v. Smith* and, 501, 630
 - free exercise and, 1215
 - Gonzales v. Centro Espirita Beneficiente Uniao do Vegetal* and, 455
 - Native Americans and, 1078
 - O'Lone v. Estate of Shabazz* and, 1131
 - overturning of, 630
 - RLUIPA and, 1308
 - statutory religion-based exemptions and, 560
 - strict scrutiny test and, 626
 - striking down of, 160
- Religious garb, 1306–1307
- Religious holidays
 - days of, 398–399
 - displays, 42, 90
 - Lynch v. Donnelly* and, 41
- Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 160, 501, 1306, 1308, 1547–1548, 1819
 - Americans United and, 57
 - Clinton, B., and, 1306
 - First Amendment and, 1308
 - Fourteenth Amendment and, 1308
 - free exercise and, 630–631, 1215
 - Native Americans and, 1078, 1307, 1308
 - O'Lone v. Estate of Shabazz* and, 1131
 - prisons and, 1308
 - RFRA and, 1305–1306, 1308
 - statutory religion-based exemptions and, 560
 - strict scrutiny test and, 626
- Religious liberty
 - Amish and, 57–58
 - Christianity and, 1309, 1310
 - Church of Scientology and, 286–287
 - CNS and, 290–291
 - under eighteenth-century state constitutions, 1309–1312
 - Mormons and, 1034–1040
 - Native Americans and, 1077–1079
 - polygamy and, 1034
 - Protestantism and, 1309, 1310
 - Quakers and, 1251–1252
 - Salvation Army and, 1396–1398
 - snake-handling sects and, 1490–1491
 - Williams and, 1782
 - Wisconsin v. Yoder*, 1788
- Religious Liberty Protection Act (RLPA), 1306, 1308, 1818
- Religious motive test, 481
- Religious neutrality
 - Epperson v. Arkansas* and, 511
 - free exercise and, 1246
 - public schools and, 1246
 - Witters v. Department of Services* and, 1789
- Religious organizations
 - autonomy of, 537
 - church property disputes and, 861–863
 - discrimination by, 422
 - equal protection clause and, 513
 - establishment clause and, 528
 - extremist groups and, 564
 - FLSA and, 570–572
 - Fuller Court and, 668
 - Good News Club v. Milford Central School* and, 699–700
 - government funding of, 918, 929–930, 1045–1046
 - Hays and, 755
 - taxes and, 23, 761–762, 853–854

- Title VII exemptions for, 422, 1299–1303
- Tony and Susan Alamo Foundation v. Secretary of Labor* and, 1660–1661
- Watson v. Jones* and, 1767
- Religious proclamations, 532
- Religious Right
 - Americans United and, 57
 - Ashcroft and, 84
 - school prayer amendment and, 356
- Religious schools
 - equal access and, 535
 - FLSA and, 571
 - free textbooks to, 1526–1527
 - government funding of, 785, 1024–1025, 1525–1529
 - indirect aid to, 1424
 - Locke v. Davey* and, 929
 - Mueller v. Allen* and, 1045–1046
 - School District of the City of Grand Rapids v. Ball* and, 1423
 - school vouchers and, 929, 1424
 - state regulation of, 1547–1548
 - Tilton v. Richardson* and, 1656–1657
 - Zobrest v. Catalina Foothills School District* and, 1816
 - Zorach v. Clauson* and, 1822
- Religious speech, 90, 258–259
 - endorsement test and, 539
 - hate speech v., 754
 - in judicial proceedings, 861
 - Lamb's Chapel v. Center Moriches Union Free School District* and, 906–907
 - on public property, 1229–1230
- Religious symbols
 - challenges to, 536–537
 - First Amendment and, 532
 - Lynch v. Donnelly* and, 937–938
 - on public property, 1312–1314
 - Ten Commandments and, 862
- Religious Technology Center v. Lerma*, 824
- Religious tests for office holding, 136, 352, 526, 1315
 - belief in God and, 1315
 - Christianity and, 1314, 1315
 - in Church of England, 1310
 - Constitutional Convention of 1787 and, 358, 1314
 - elimination of, 426
 - Pinckney and, 312, 359
 - Test and Corporation Acts and, 504
 - Torcaso v. Watkins* and, 1661–1662
 - U.S. Constitution and, 140, 426, 1314–1315
- Religious tolerance, 1538
 - Madison and, 948
- Religious training, 409–410
- Remedies, state v. federal, 1030–1031
- Remington, William, 1270
- Remmers v. Brewer*, 290
- Removal, to federal courts, 1315–1316
- Removing Obstacles to Investigating Terrorism, 1149
- Reno, Janet, 1317–1318
 - ACLU and, 1316–1317
 - assisted suicide and, 87
 - CDA and, 1317–1318
 - Clinton, B., and, 1317, 1318
 - Department of Justice and, 1317
 - FBI and, 1317
 - ODWDA and, 1137
 - Waco standoff and, 1317
- Reno v. American Civil Liberties Union*, 1279, 1315–1317
 - CDA and, 337, 660, 1315–1317
 - FCC licensing and, 663, 1316
 - Internet and, 819, 1316–1317
 - obscenity and, 1125, 1317
 - O'Connor and, 1319
 - Rehnquist and, 1319
 - sexually explicit materials and, 1120
 - Stevens and, 1316, 1557
- Reno v. Flores*, 282
- Renshaw, Patrick, 1281
- Renteln, Alison Dundes, 455
- Renton v. Playtime Theatres, Inc.*
 - content-neutral regulation and, 364
 - zoning laws and, 669
- Reparations, for Japanese internment, 841–842
- Report from the Field: The USA PATRIOT Act at Work*, 1625
- Report on the Lawlessness in Law Enforcement*, 261, 1455
- Reporter's Committee for Freedom of the Press, 662
- Reporter's privilege, 1319
 - Branzburg v. Hayes* and, 179, 1319
 - freedom of press and, 663–664
- Reporters. *See* Journalists
- Reproductive rights. *See also* Abortion; Contraception
 - contraception and, 1320
 - current law, 1323–1324
 - future directions, 1323–1324
 - key abortion case and, 1320–1323
 - Rawls on, 1273
 - sterilization and, 1320
 - Supreme Court and, 1320
 - Unborn Victims of Violence Act and, 1323
- Reproductive Rights Project, 50
- Republican National Committee, 220
- Republican Party
 - Bingham and, 146
 - Burger and, 204
 - Christian Coalition and, 285–286
 - Colorado, 328
 - congressional powers and, 988
 - ERA and, 520
 - family values movement and, 577
 - Federalists v., 36
 - founding of, 945
 - history of, 36
 - KKK and, 895
 - La Follette and, 902
 - Lincoln and, 923
 - Log Cabin Republicans and, 932–933
 - Madison and, 945
 - Marshall Court and, 968
 - McCarthy and, 984
 - Mitchell and, 1026
 - Reconstruction and, 146
- Republican Party of Minnesota v. White*
 - Breyer and, 183
 - judicial bias and, 860
- Reputation, free speech and, 680
- Rerum Novarum, On the Condition of the Working Class* (Leo XIII), 1100–1101
- Res judicata, 459
- Resentencing, 226–227
- Reserved forums, 1699
- Residency
 - in California, 1396

INDEX

- Residency (*cont.*)
in Canada, 1403
Fong Yue Ting v. United States and, 600
welfare and, 1396
- RESISTANCE, 1519
Respublica v. Shaffer, 438
Restatement of the Law of Torts, 1218
Restell, Madame. *See* Lohman, Ann Trow Lohman
Restrictive covenants, 1468
Retail Credit Company, 569
Retribution, 1329–1330
punishment and, 1645
Reuther, Walter, 1269, 1270
Reveille, 934
Revenue Act of 1951, 1684
Revolution, 65, 1522
Revolution of 1688. *See* Glorious Revolution
Revolutionary Age, The, 689
Revolutionary Convention, 108
Revolutionary War. *See* American Revolution
Rex v. Hutchinson, 437
Reynolds, Gene, 1187
Reynolds, George, 72, 1038–1039, 1732
belief-action and, 118–119
Reynolds v. Sims
Harlan, II, and, 741, 742
reapportionment and, 1276, 1728
suspect categories and, 518
voting and, 746
Warren Court and, 1760
Reynolds v. United States, 22, 1283, 1305, 1330–1331, 1470, 1476, 1802
belief-action and, 118–119, 1331
Cantwell v. Connecticut and, 222
challenges for cause in, 873
conscientious objection and, 349
Davis v. Beason and, 396–397, 668
free exercise clause and, 454, 625, 627, 1331
Jehovah's Witnesses and, 849
Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. United States and, 908
police power and, 1185
public health and, 1283
religion clauses and, 766, 1305
statutory religion-based exemptions and, 560
Waite Court and, 1732–1733
wall of separation and, 1736
- RFRA. *See* Religious Freedom Restoration Act
- Rhode Island
religion and, 1306, 1309, 1312
Rogers, W. and, 1781
U.S. Constitution and, 1546
- Rhode Island charter of 1663, 327
free exercise clause of, 622
Rhode Island v. Innis, 1331
- RIAA. *See* Recording Industry Association of America
- Ribbentrop-Molotov pact, 1488
Rice v. Paladin Enterprises, Inc., 1332
Byers v. Edmondson and, 210
freedom of press and, 659
- Richards, David, 879
Richards v. Wisconsin, 1333, 1435
Stevens and, 1557
United States v. Ramirez and, 1690
- Richardson, Elliot, 165
- Richardson v. Ramirez*
Burger Court and, 202
felon disenfranchisement and, 583
- Richardson, William Merchant, 883
- Richmond Newspapers, Inc. v. Virginia*, 20, 1333–1334, 1336
judicial records and, 21
media access and, 995
open courts and, 1625
Powell, Lewis, and, 1195
right of access and, 994
Stewart, P., and, 1561
Tribe and, 1668
- Ricketts v. Adamson*, 1334
guilty pleas and, 719, 1334
- RICO. *See* Racketeer Influenced and Corrupt Organizations Act
- Riddick, Gregory, 1787
- Ride-along policy, 1783
- Ridge, Tom, 415
- Ridgely, Charles, 273
- Riggins v. Nevada*, 1336
- Right of access
Houchins v. KQED, Inc. and, 779
Richmond Newspapers v. Virginia and, 994
- Right of appeal
Boykin v. Alabama and, 172
capital punishment and, 230
Gilmore v. Utah and, 230
Proffitt v. Florida and, 230
- Right of conscience, 1538
- Right of Privacy Act, 856
- Right of the People* (Douglas), 445
- Right to be left alone, 828
- Right to bear arms, 1338–1343. *See also* Second Amendment
colonial experience and, 1339
Constitution and, 1339–1340
English Bill of Rights and, 503, 508, 1338–1339
Federalism and, 1340–1341
individualist view on, 1344
NRA and, 1343
old militia system and, 1342
rulings, 1343
Second Amendment and, 1338, 1343
Supreme Court and, 1342–1343
- Right to counsel, 125, 1343–1351. *See also* Sixth Amendment
ACLU and, 48
Brewer v. Williams and, 182
Brooks v. Tennessee and, 185
choice/effectiveness of attorneys and, 1345–1346
Cicenia v. Lagay and, 292
congress on, 1346
Douglas v. California and, 442, 1345, 1350
for enemy combatants, 1346–1348
English/American origins, 1348–1349
Escobedo v. Illinois and, 318, 524, 1019, 1345
eyewitness identification and, 568, 1679
Fourteenth Amendment and, 125, 1349–1350
Gideon v. Wainwright and, 318, 682, 683, 1346
grand juries and, 708
Hamdi v. Rumsfeld and, 731, 1347
Harlan, II, and, 742
Illinois v. Perkins and, 794
jailhouse informants and, 838
Kirby v. Illinois and, 892
Marshall, T., and, 973
Massachusetts and, 138

- Miranda v. Arizona* and, 318, 1016, 1331
modern, development of, 1349–1351
Moran v. Burbine and, 1033–1034
murder and, 1344
as negative right, 1638
9/11 and, 1347
novelty of, 144
Powell v. Alabama and, 1018, 1192
post/post-trial proceedings and, 1344–1345
procedural due process and, 463
In re Gault and, 812, 1351
Sixth Amendment and, 1344–1347, 1349–1351
terrorism and, 1625
United States v. Ash and, 1344
United States v. Wade and, 1344, 1697
Warren Court and, 1758
Wong Sun v. United States and, 1792
- Right to die. *See also* Euthanasia
Cruzan v. Director, Missouri Department of Health and, 388–389
Kevorkian and, 888
- Right to fair trial. *See also* Jury trials
Duncan v. Louisiana and, 468
Ex parte Milligan and, 551
freedom of press and, 631–632, 662
gag orders and, 631–632
for juveniles, 990
lawyers speaking about pending cases and, 420
Massiah v. United States and, 980–981
- Right to Financial Privacy Act, 346
- Right to know, 1351–1352
- Right to petition. *See* Petition(s)
- “Right to Privacy, The” (Brandeis and Warren), 176, 1218
- “Right to Privacy, The” (Gray), 1591
- Right to remain silent, 710. *See also* Miranda warnings
Moran v. Burbine and, 1033–1034
United States ex rel. Bilokumsky v. Tod and, 1018
- Right to reply, 1354
Miami Herald Publishing Co. v. Tornillo and, 1003
- Right to speedy trial, 893
- Right to vote. *See* Voting rights
- Right to work laws, 635, 1602–1603
- Right v. privilege distinction, 1357–1359, 1673
- Rights. *See also* Bill of Rights; Implied rights
claimed, 1416
conflict between, 1541
declarations of, 135
economic, 1633–1634
enumeration of, 802
essential, 945
fundamental v. nonfundamental, 460
informing of, 1019
negative, 143–144, 1638
noneconomic, 1633–1634
positive vs. negative, 1631
privacy v. associational, 828–829
procedural v. substantive, 460
unalienable, 135
unenumerated, 804
waiving, 172
- Rights of accused. *See* Accused
- Rights of conscience, 624–625
- Rights of Man, The* (Paine), 646, 1143
free speech law and, 815
- Rights of the British Colonies Asserted and Proved, The* (Otis)
Otis and, 1139
- Rikers Island, 912
- Ring v. Arizona*, 76, 231
Stevens and, 1558
- Ripeness
federal court jurisdiction and, 867
in free speech cases, 1361–1362
- Ritner, Joseph R., 145
- River Bridge Co. v. Warren Bridge Co.*, 1606
- Rivera v. Delaware*, 917
- Riverside v. McLaughlin*, 79, 82
- Rizzo v. Goode*, 1362–1363
- RLPA. *See* Religious Liberty Protection Act
- RLUIPA. *See* Religious Land Use and Institutionalized Persons Act of 2000
- Roadblocks. *See* Checkpoints
- Roane, Spencer, 847–848
- Roanoke Valley Christian Schools
FLSA and, 571
- Robbery
Prohibition and, 1239
proportionality review and, 1242
- Roberson, Willie, 1427
- Roberts, Benjamin, 1467
- Roberts, John, 11
- Roberts, Owen, 1364–1365
Beets v. Brady, 1364
Black, H., and, 1365
Cantwell v. Connecticut and, 119, 222, 627–628, 782, 849, 1364–1365
civil liberties and, 1364
economic regulation and, 474
First Amendment and, 1364
Frankfurter and, 1364, 1365
Hague v. C.I.O. and, 729, 1243
Hague v. Committee of Industrial Organizations and, 1364
Herndon v. Lowry and, 1364
Hoover, Herbert, and, 1364
Hughes, Charles Evans, and, 1364
Korematsu v. United States and, 1365
Minersville School District v. Gobitis and, 1364
Near v. Minnesota and, 1364
public forum doctrines and, 1243
Stromberg v. California and, 1364
West Virginia State Board of Education v. Barnette and, 1365
- Robert's Rules of Order*, 846
- Roberts, Sarah, 1441, 1467, 1584
- Roberts v. City of Boston*, 1441
Shaw and, 1467
Sumner and, 1584
- Roberts v. Louisiana*, 241
- cruel and unusual punishment in, 231–232
- Roberts v. Russell*
compulsory process clause and, 344
- Roberts v. United States Jaycees*, 170, 1363, 1382
freedom of association and, 304, 636, 1363
private discriminatory association and, 1226
- Robertson, James, 355
- Robertson, Marion G. *See* Robertson, Pat
- Robertson, Pat
Christian Coalition and, 4, 285
Islam and, 1053
school prayer amendment and, 356
- Robinson, Harriet, 451
- Robinson, James, 1139

INDEX

- Robinson v. California*, 1366, 1745
incorporation doctrine and, 803
Robinson v. City of Edmond, 371
Robinson-Patman Act, 1472
Rochin v. California, 1366–1367, 1582
 Breithaupt v. Abram and, 181
 Frankfurter and, 619
 incorporation doctrine and, 803–804
 Souter and, 1497
Rock v. Arkansas, 1367
Rock, Vickie, 1367
Rockefeller Drug Laws, 953, 1743
Rockefeller, John D., 1280
 Hughes Court and, 782
Rockefeller, Nelson
 Goldberg and, 697
 Kunstler and, 898–899
Rocky Mountain News, 1073
Roderick, Art, 1385
Rodríguez, Velásquez, 640
Roe, Jane, 987
 Weddington and, 1771
Roe No More, 988
Roe v. Wade, 8–11, 87, 193, 1367–1369, 1475
 ACLU and, 49–50
 Akron v. Akron Center for Reproductive Health and, 34
 Beal v. Doe and, 115
 Bellotti v. Baird and, 121
 Blackmun in, 9, 1320–1321, 1368–1369
 Burger Court and, 198, 1369
 Catholic Church and, 1368–1369
 Colautti v. Franklin and, 324
 commercial speech and, 330
 conservatism and, 4
 Constitution and, 1321
 Doe v. Bolton and, 433, 1320, 1368
 Douglas and, 445–446
 due process and, 1583
 Eisenstadt v. Baird and, 484
 euthanasia and, 547
 family values movement and, 577
 Fourteenth Amendment and, 9, 1320, 1367–1368, 1371, 1373
 Griswold v. Connecticut and, 499, 713, 1368, 1760
 Harlan, II, and, 743
 Harris v. McRae and, 746
 implied rights and, 802
 intrusion and, 836
 Kennedy, A., and, 1222
 Lambert v. Wicklund and, 905–906
 Lochner v. New York and, 928
 marriage and, 966
 McCorvey and, 987–988
 NARAL and, 1062
 Ninth Amendment and, 1097
 O'Connor and, 1126
 Operation Rescue and, 1133
 Paris Adult Theatre v. Slaton and, 1148
 Planned Parenthood of Central Missouri v. Danforth
 and, 1172
 Planned Parenthood v. Ashcroft and, 1173
 Planned Parenthood v. Casey and, 885, 1175, 1287,
 1337, 1369
 Poelker v. Doe and, 1183
 privacy and, 1003, 1220
 privileges and immunities and, 1231, 1232
 Protestantism and, 1367
 quartering of troops and, 1253
 Reagan and, 1321
 Rehnquist and, 10, 1287, 1290, 1322, 1634, 1635
 right of privacy and, 1336, 1337, 1368
 Souter and, 1496, 1497
 states and, 725, 1320, 1321, 1322
 states' reaction to, 725
 Stenberg v. Carhart and, 1322
 substantive due process and, 466, 608, 1367
 Supreme Court and, 8–11, 1320–1323, 1367–1369
 Thomas and, 1650
 *Thornburgh v. American College of Obstetricians and
 Gynecologists* and, 1652
 trimester framework of, 1770
 Warren Court and, 1760
 Webster v. Reproductive Health Services and, 1321, 1368, 1770
 White, B., and, 1779
Roemer v. Maryland Board of Public Works, 1370, 1529
 Burger Court and, 200
 Tilton v. Richardson and, 1657
 Wolman v. Walter and, 1791
Rogers, Athlyi, 1262
Rogers v. Bellei, 294
Rogge, John, 582
Rollins v. Proctor & Schwartz, 129
Rome Statute for the International Criminal Court, 638
Romer v. Evans, 1371–1372
 Breyer and, 183
 compelling purpose test and, 610
 equal protection and, 678, 1371
 family values movement and, 577
 homosexuality and, 610, 1371
 Kennedy, A., and, 885, 1222
 Lamda and, 904–905
 Lawrence v. Texas and, 909, 1371
 O'Connor and, 1126
 rational purpose test and, 610
 Scalia in, 1371
Rompilla v. Beard, 810–811
Roosevelt Court, 1564
Roosevelt, Eleanor, 1269, 1371
 Americans United and, 56
 Hoover and, 775
 Minersville School District v. Gobitis and, 782
 NAACP and, 1064
Roosevelt, Franklin D., 1372–1374, 1562, 1800. *See also* New Deal
 Baldwin and, 104
 Biddle and, 133–134
 Black, H., and, 1373–1374
 civil liberties and, 1372–1374
 Clark, T., and, 308
 Communist Party and, 339
 court-packing plan of, 864–865, 1269, 1373, 1389
 death of, 134
 Douglas and, 443, 1373–1374
 economic regulation and, 474
 economic rights and, 479, 1372
 equal protection and, 515
 Frankfurter and, 616
 Goldberg and, 694
 Hague and, 729
 Hand and, 737
 Hatch Act and, 748
 Hiss and, 765

- Hoover and, 775
- Hughes Court and, 782
- internment and, 496
- Jackson, R. and, 833
- Japanese internment and, 418, 839, 1373–1374
- judicial review and, 864–865
- military tribunals and, 1008
- Murphy and, 1047
- NAACP and, 1064
- New Deal and, 1082–1085, 1564
- powers of, 1801
- Rauh and, 1269
- Roosevelt, T., and, 1372
- Rutledge, W., and, 1389
- Soviet Union and, 150
- spying and, 1518
- Supreme Court and, 1373–1374
- suspect categories and, 518
- Vinson and, 1718
- Wilson, W., and, 134, 1372, 1374
- World War II and, 1372–1373
- Roosevelt, Theodore, 770
 - antitrust and, 1471–1472
 - birth control and, 147
 - on dual citizenship, 456
 - eugenic sterilization and, 545–546
 - Frankfurter and, 617
 - Hand and, 736
 - “In God We Trust” and, 1066–1067
 - La Follette and, 902–903
 - McReynolds and, 992
 - Roosevelt, F., and, 1372
 - Taft and, 1601
- Roper v. Simmons*, 224, 386
 - California v. Ramos* and, 216
 - Cardozo and, 248
 - Kennedy, A., and, 885
 - O'Connor and, 1127
 - proportionality and, 246
 - Stevens and, 1558
- Rorty, Richard, 1374–1375
- Rosales-Lopez v. United States*, 1376
 - voire dire and, 873
- Rose v. Clark*, 1410
- Rose v. Locke*, 1376
- Rosebud Reservation, 1253
- Rosen v. United States*, 1286, 1689
- Rosenberg espionage trial*, 322
 - Frankfurter and, 619
- Rosenberg, Ethel, 322, 1377–1378, 1721
 - Communist Party and, 1377, 1378
 - Douglas, William, and, 1378
 - electric chair and, 485
 - FBI and, 1377
 - HUAC and, 780, 1377
 - Kaufman and, 883, 1377–1378
 - Vinson and, 1722
- Rosenberg, Julius, 322, 1377–1378, 1721
 - Communist Party and, 1377, 1378
 - Douglas, William, and, 1378
 - FBI and, 1377
 - HUAC and, 780, 1377
 - Kaufman and, 883, 1377–1378
 - Vinson and, 1722
- Rosenberg v. Board of Education of the City of New York*, 163
- Rosenberg v. United States*, 1721
- Rosenberger v. Rector and Visitors of the University of Virginia*, 1298, 1379–1380, 1496, 1574
 - balancing and, 100
 - Breyer and, 183
 - Lamb's Chapel v. Center Moriches Union Free School District* and, 907
 - limited public forum and, 922
 - National Endowment for the Arts v. Finley* and, 1065
 - public forum doctrine and, 1229, 1244
 - religious organizations and, 699, 1379
 - religious speech and, 1229
 - student newspapers and, 1699
 - Thomas and, 1650
 - viewpoint discrimination and, 1715, 1717
- Rosenbloom v. Metromedia, Inc.*, 1243
- Rosie the Riveter, 965
- Ross v. Moffitt*, 1380–1381
- Rossiter, Clinton, 1801
- Rostker v. Goldberg*, 698
- Rostow, Eugene, 258
 - on Japanese internment, 840
- ROTC
 - conscientious objection and, 349
- Roth test
 - A Book Named "John Cleland's Memoirs of a Woman of Pleasure"* v. *Massachusetts* and, 1
 - Ginzburg v. United States* and, 688, 1282
 - Jacobellis v. Ohio* and, 835–836
 - pandering and, 689
- Roth v. United States*, 1382–1383, 1521
 - A Book Named "John Cleland's Memoirs of a Woman of Pleasure"* v. *Massachusetts* and, 1–2
 - Brennan in, 1382–1383
 - Cain v. Kentucky* and, 212
 - Douglas and, 447, 1382
 - First Amendment and, 1382
 - Ginzburg v. United States* and, 688
 - Harlan, I. in, 1382–1383
 - low value speech and, 937
 - Miller test* and, 1012–1013
 - Miller v. California* and, 1012
 - Mishkin v. New York* and, 685, 1023
 - obscenity and, 659–660, 1117, 1123, 1228, 1382–1383
 - Paris Adult Theatre v. Slaton* and, 1147, 1148
 - Pope v. Illinois* and, 1191
 - Rabe v. Washington* and, 1255
 - Stewart, P., and, 1560
 - United States v. Reidel* and, 1690–1691
 - Warren Court and, 1755
 - Warren in, 1382–1383
- Rousseau, Jean-Jacques
 - civil religion and, 297
 - civil rights and, 1638–1639
 - Meiklejohn and, 999
- Roviano v. United States*, 1384
- Rowan v. United States Post Office Department*, 1384–1385
 - captive audiences and, 247
 - solicitations and, 829
- Roy, Stephen, 168
- Royce, Josiah, 735
- Royer, Mark, 598
- Rubber stamp objection, 1439
- Rubin, Jerry, 278
- Rubin v. Coors Brewing Co.*, 332

INDEX

Ruby Ridge shootout, 1385–1386
 BATF and, 1385–1386
 extremist groups and, 565, 1385–1386
 FBI and, 1385–1386
Ruckelshaus, William, 165
Rudolph, Eric, 565
Rudolph v. Alabama, 240
 Goldberg and, 697
Ruiz v. Estelle
 Justice and, 878–879
Rule 801. *See* Hearsay Rule
Rule of law, 1386, 1580
 cultural defense and, 391
Rule of reason, 1777
Rules of Professional Conduct, 1481
Rules, standards v., 100
Rummel v. Estelle, 384
 English Bill of Rights and, 503
 three strikes laws and, 1654
Rumsfeld, Donald, 85–86
Rumsfeld v. Padilla, 1558
Runaway slaves, 1542
 personal liberty laws and, 1154
Running away, 1549
Runyon v. McCrary, 170, 281, 1548
 Civil Rights Act of 1866 and, 299
Rush, Benjamin, 239, 1386–1388
 free exercise and, 1214
 Jefferson and, 847
Russia
 extradition and, 563
 Tribe and, 1668
 War on Drugs and, 1740
Russian Revolution of 1917, 1280
 Communist Party and, 339
Russo, Anthony, 1089
Rust v. Sullivan, 1388
 abortion and, 1674
 gag rules and, 672–674
 government funding of speech and, 700–701
 government speech and, 702, 1388
 Legal Services Corporation v. Velasquez, 914
 Maher v. Roe and, 951
 Tribe and, 1668
 viewpoint discrimination and, 1716
Rutan v. Republican Party of Illinois, 179, 1389, 1515
 Elrod v. Burns and, 493, 1389
 political patronage and, 1189
 Scalia and, 1417
Rutgers University, 686
Rutgers v. Waddington, 732
Rutherford, Samuel, 847
Rutledge, John, 491
Rutledge, Wiley, 1389–1392, 1555, 1556, 1561
 Bill of Rights and, 1633
 Colgrove v. Green and, 619, 1391
 Commerce Clause Decisions and, 1391
 creative constitutional jurisprudence and, 1391–1392
 criminal cases and, 1390–1391
 equal protection and, 1391
 Everson v. Board of Education and, 550, 1390
 First Amendment and, 766, 1389–1390
 Frankfurter and, 1389
 Korematsu v. United States and, 1390
 as legal educator, 1389–1390

 Murphy and, 1048–1049
 Roosevelt, F., and, 1389
 Vinson Court and, 1721
 wartime decisions and, 1390–1391
 World War II and, 1390
Rwandan genocide, 306
Ryan, George, 224, 241, 1393–1394
 capital punishment and, 237, 1394
 pardons and commutations and, 1146
Ryslik v. Krass, 1307

S

Sabbath
 Estate of Thornton v. Caldor and, 543
 Frazee v. Illinois Department of Income Security and, 629
 free exercise clause and, 119
 Jewish, 851–852
 Sherbert v. Verner and, 628, 1044
 Thomas v. Review Board and, 629
 violations, 126
Sable Communications v. FCC, 418
 obscenity and, 1124
Sacco and Vanzetti trial, 1395–1396
 alibis of, 1395–1396
 Baldwin and, 103
 Frankfurter and, 617
Sacco, Nicola, 1395–1396
 Baldwin and, 103
Sacher v. United States, 414
Sacramento v. Lewis, 1497
Sacrilege, 1042
Sadomasochism, obscenity and, 1119
Saenz v. Roe, 294, 1355, 1396
 privileges and immunities and, 1233
Safe harbors, 823
Safe Streets and Crime Control Act
 Johnson, L., and, 856
 Omnibus Crime Control and Safe Streets Act of 1968 and, 1132
Saia v. People of State of New York, 834
Salazar regime, 59
Sale v. Haitian Centers Council, Inc., 390
Salem witch trials, 67
 Puritans and, 1250
Salon, 306
Salt Lake City, 1038
Salvation Army
 in America, 1397
 religious liberty and, 1396–1398
Same-sex marriage, 405–406, 677, 773, 905, 933, 936, 966, 1023,
 1404–1410, 1541
 adoption and, 1398
 Goodridge v. Department of Public Health and, 1583
 international developments with, 1403–1404
 legalization of, 1399–1404
 litigation and, 1400–1401
 miscegenation laws and, 1023
 societal influence by, 1404
 test cases for, 1401–1403
Same-sex partners
 adoption and, 678, 1398–1399
 as element of society, 1405–1406
 family unity for noncitizens and, 576
 hospitals and, 1406
 housing and, 1406

- legal recognition of, 1406–1409
- marriage and, 677
- Sampling, music, 763–764
- San Antonio Bar Association School of Law, 372
- San Antonio Independent School District v. Rodriguez*
 - fundamental rights and, 612
 - Powell, Lewis, and, 1194
 - suspect categories and, 518
- San Francisco, same-sex marriage and, 1402
- Sancroft, William, 1667
- Sandel, Michael, 1028
- Sandford, Eliza, 451
- Sandford, John, 451
- Sandstrom v. Montana*, 1410
 - Francis v. Franklin* and, 615
 - Mullaney v. Wilbur* and, 1046
- Sanford, Edward T., 74, 176
- Sanger, Margaret, 1410–1411, 1795
 - Baldwin and, 102
 - birth control and, 147
 - Comstock Act and, 353
 - eugenic sterilization and, 545–546
- Santa Clara Pueblo v. Martinez*, 1411–1412
 - ICRA and, 808–809
- Santa Clara v. Southern Pacific*, 650
- Santa Fe Independent School District v. Doe*, 3, 357, 409, 1412–1413, 1416
 - ACJL and, 286
 - ADL and, 69
 - Breyer and, 183
 - endorsement test and, 539, 938
 - Lee v. Weisman* and, 912
 - Lemon* test and, 538–539
 - school prayer and, 1198
- Santa Fe, New Mexico, same-sex marriage and, 1402
- Santayana, George, 735
- Santeria, 289
- Santobello v. New York*, 1413
- Santosky v. Kramer*, 280, 281
- Sarandon, Susan, 1200
- Sarbanes-Oxley Act
 - commercial speech and, 332
 - whistleblowers and, 1776
- Sarivola, Anthony, 320
- Satire
 - copyright and, 1413
 - First Amendment and, 1413–1414
 - v. parody, 1414
- Satmar Hasidim, 157, 852
- Sattazahn v. Pennsylvania*
 - appeals and, 230
 - resentencing and, 226–227
- Satterlee v. Matthewson*, 213
- Saturday Press*, 784
- Saudi Arabia, extradition and, 563
- Saunders, Janice, 1332
- Savage, David, 908
- Save Our Children, Inc., 190
- Sawyer, Philetus, 901–902
- Saxbe v. Washington Post*, 21, 1415
- Saypol, Irving, 1378
- SCA. *See* Synagogue Council of America
- Scales v. United States*, 1415
 - freedom of association and, 635
 - Smith Act and, 1488
- Scalia, Antonin, 1415–1418, 1668
 - appointment of, 10, 699
 - Barnes v. Glen Theatre, Inc.* and, 111
 - Bowers v. Hardwick* and, 909, 1222
 - City of Boerne, Texas v. Flores* and, 1311
 - coercion and, 1102–1103
 - Corporation of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos* and, 367
 - Cruzan v. Director, Missouri Department of Health* and, 389
 - Edwards v. Aguillard* and, 481
 - Elk Grove Unified School District v. Newdow*, 1177
 - Employment Division, Department of Human Resources of Oregon v. Smith* and, 501, 626, 1732–1733
 - establishment clause and, 528
 - on free exercise clause, 768
 - Griffin v. Wisconsin* and, 712
 - Hamdi v. Rumsfeld* and, 731
 - Harmelin v. Michigan* and, 744
 - Hill v. Colorado* and, 13, 361
 - judicial bias and, 860
 - Lawrence v. Texas* and, 1338, 1583
 - Lee v. Weisman* and, 911
 - Lemon* test alternatives and, 534
 - Madsen v. Women's Health Center* and, 949
 - National Endowment for the Arts v. Finley* and, 1065
 - no-coercion test and, 535
 - non-preferentialism standard and, 1110
 - Osborne v. Ohio* and, 1138
 - Pledge of Allegiance and, 1177
 - Pope v. Illinois* and, 1191
 - proportional punishment and, 1241
 - R.A.V. v. City of St. Paul* and, 362, 1271
 - on reasonable expectation of privacy, 882
 - Romer v. Evans* and, 1371
 - Rutan v. Republican Party of Illinois* and, 1389
 - same-sex marriage and, 1400
 - on separatism, 767
 - as textualist, 1417
 - Webster v. Reproductive Health Services* and, 1770
- Scandinavia, same-sex marriage and, 1403
- Scarlet letter, 384
- Schacht v. United States*, 364
- Schad v. Borough of Mount Ephraim*, 111, 1319, 1418–1419, 1820
 - overbreadth doctrine and, 1139
- Schaefer v. United States*, 1796
 - Brandeis and, 174
- Schall v. Martin*, 281, 1419
 - preventative detention and, 1208
- Scheck, Barry, 237
- Scheidler, Joseph, 1134
 - FACE Act and, 633
- Scheidler v. NOW*, 181, 1335
- Schenck, Charles, 651–652, 1419–1420
- Schenck v. Pro-Choice Network of Western New York*, 10, 12–13, 67
 - abortion and, 1168
 - buffer zones and, 181
 - Madsen v. Women's Health Center* and, 949
 - picketing and, 1168
- Schenck v. United States*, 1071, 1419–1421
 - Abrams v. United States* and, 13
 - bad tendency test and, 96–97
 - Brandeis and, 174
 - Brandenburg* incitement test and, 178
 - civil liberties and, 1636
 - clear and present danger test and, 311, 980, 1795

INDEX

- Schenck v. United States* (cont.)
Debs v. United States and, 401
 free speech and, 47, 1281, 1794–1795
 free speech limitations and, 689
 freedom of expression and, 1163
 freedom of press and, 658
 Hand and, 736
 Holmes and, 770–771, 1280, 1636
 incitement of criminal activity and, 651–652
Masses Publishing Company v. Patten and, 980
 national security and, 1073
Near v. Minnesota and, 1081
 political speech and, 642
 prohibition on prior restraints and, 151
 red scare and, 1280–1282
 Taft Court and, 1597
West Virginia State Board of Education v. Barnette
 and, 1776
 Schiavo, Terri, 86
 Schiffrin, André, 816
 Schiller, Herbert, 650
 Schine, G. David, 984
 Schlafly, Phyllis, 1421
 ERA and, 520
 Schlatt, Frank, 229
 Schlesinger, Arthur, 1269
Schmerber v. California, 181, 1421–1422, 1454, 1455
 DWI and, 470
 exemplars and, 558
 self-incrimination and, 1682
 Schmitt, Carl, 494
Schneckloth v. Bustamonte, 78, 1422–1423
Edwards v. Arizona and, 482
 Marshall, T., and, 973
 Schneider, Leonard. *See* Bruce, Lenny
Schneider v. Irvington, 838
Schneider v. New Jersey, 1364, 1642
Cantwell v. Connecticut and, 849
Schneiderman v. United States, 1566, 1801
 New Deal and, 1084
 Scholarships
 free exercise clause and, 536
Locke v. Davey and, 1425
 School(s). *See also* Public schools; Universities
 CIPA and, 825
 clubs, 154
 compulsory, 58, 628
 desegregation, 187
 establishment clause and, 1548
 evolution in, 376
 government funding and, 152, 155
 hostile environment harassment and, 778
 integrated, 972
 juvenile rights in, 604
 lewd speech in, 124
 libraries, 156
Missouri ex rel. Gaines v. Canada and, 782
 non-funding provisions, 152–153
 parochial, 31–33, 151–152
 prayer in, 2–4, 1496, 1542
 racial discrimination in, 158–159
 reform, 878
 religious, 31, 333–335
 segregation, 186–187, 281, 878, 1441
 Ten Commandments and, 1563
 testing and, 334–335
 U.S. Constitution and, 353
School District of the City of Grand Rapids v. Ball, 31, 1423–1424
Lemon test and, 32
 reversal of, 33
Zobrest v. Catalina Foothills School District and, 1816
 School of Architecture and Planning, SUNY, 899
 School prayer, 90, 1196–1199
Abington Township School District v. Schempp and, 2–4
 ACLU and, 49
 amendment permitting, 357
Board of Education of Westside Schools v. Mergens and, 1197
 Burger Court and, 200
 coercion and, 1101
 defiance of bans on, 408–409
Engel v. Vitale and, 502–503, 852, 1298
 Falwell and, 575
 Freund and, 665
 Johnson, L., and, 855
Lee v. Weisman and, 540, 911–912, 915
Lemon test and, 533, 538–539, 918
 New York Board of Regents and, 408
 no-coercion test and, 535
 public forums and, 1230
 religious speech and, 1230
Wallace v. Jaffree and, 409, 1736
 White, B., and, 1779
 School Question, 152
 School uniforms, 1578–1579
 School vouchers, 1424–1425, 1525. *See also* Private choice
 First Amendment and, 1528
 O'Connor and, 1127
 religious schools and, 929, 1424
Zelman v. Simmons-Harris and, 31–32, 167, 334, 1424, 1812
 Schrecker, Ellen, 150
Schriro v. Summerlin, 76
 Schroeder, Theodore, 1795
 Schumer, Charles, 633
 Schwartz, Joseph, 13
 Schwarzenegger, Arnold, 1403
Schweiker v. Chilicky, 149
 Schwimmer, Rosika, 1141
 Scinter, 685, 1488–1489
 Scientific research. *See* Technology
 Scientology. *See* Church of Scientology
 SCLC. *See* Southern Christian Leadership Conference
 Scofield, Edward, 902
 “Scope and Meaning of Police Power, The” (Bufford), 1187
 Scopes, John T., 48, 376, 1425–1427, 1757
 ACLU and, 103
 Bryan and, 189
 Scopes Monkey Trial, 1425–1427
 ACLU and, 48, 103, 376
 Bryan and, 189
 Darrow and, 395
Epperson v. Arkansas and, 511
 Scott Act, 260
 Scott, Coretta, 889
 Scott, Dred, 451–452
Scott v. Illinois, 1349–1350
 Scott, Walter, 383
 Scottsboro Boys, 1427–1428
 Emerson and, 498
Powell v. Alabama and, 1192
 Scottsboro Cases. *See* *Powell v. Alabama*

- SDS. *See* Students for a Democratic Society
- Seale, Bobby
Chicago Seven and, 278
Kunstler and, 898
- Sealed documents, in court proceedings, 1428–1429
- Search and seizure. *See also* Automobile searches; Forfeiture;
Fourth Amendment; Seizures
administrative, 27–29
airports, 33–34
arrest and, 80–81
authority, 81
automobile, 91–92
in *Barron v. Mayor of Baltimore*, 970
Bible and, 127
at borders, 1752
Boyd v. United States and, 171
California v. Acevedo and, 214–215
California v. Greenwood and, 215
Camara v. Municipal Court of the City and County of San Francisco and, 217
checkpoints and, 275–276, 1004
Chimel v. California and, 284–285
of closed containers, 597
consent to, 1422
Coolidge v. New Hampshire and, 365
definition of, 1429
drug testing and, 266
drugs and, 1745
DWI and, 469–470
electronic surveillance and, 487–488
emergency powers and, 496
evidence and, 1542
exclusionary rule and, 554–555
Florida v. Jimeno and, 597
Florida v. Riley and, 597
Florida v. Royer and, 598
Florida v. White and, 598
Fourth Amendment and, 1539
fruit of the poisonous tree and, 667
Fuller Court and, 668
good faith exception to, 1004–1005
Hester v. United States and, 763
illegal, 557
Illinois v. Krull and, 793–794
Immigration and Naturalization Service v. Lopez-Mendoza
and, 798
inventory, 1431
Kamisar and, 881
Katz v. United States and, 881–882
Kolender v. Lawson and, 894
in *Lo-Ji Sales, Inc. v. New York*, 933
luggage and, 1752
Mapp v. Ohio and, 956
marijuana and, 763
mass suspicionless, 430
Michigan v. Summers and, 1006
Mincey v. Arizona and, 1014
Minnesota v. Dickerson and, 1015
New Jersey v. T.L.O. and, 1086
New York v. Belton and, 1091
noncitizens and, 380–381
O'Connor v. Ortega and, 1128
Ohio v. Robinette and, 1128
open fields and, 1133
of papers, 1432
of parolees, 1433
pat-frisks and, 1015
Payton v. New York and, 1151
of pervasively regulated industries, 1432
plain view and, 1171
PPA and, 1224
in prison, 781
privacy and, 83, 598, 1430–1431
without probable cause, 148
probable cause and, 78, 1234, 1431
property-based definition of, 1429–1430
protective pat-down, 794–795
protective sweep and, 976
Rawlings v. Kentucky and, 1271
reasonable, 881–882
reasonable grounds for, 712
Reid v. Georgia and, 1291
rules for, 1431–1432
Schneekloth v. Bustamonte and, 1422
Silverthorne Lumber Company v. United States and, 772
state constitutions and, 1536
United States v. Ramirez and, 1690
United States v. Robinson and, 1691–1692
unreasonable, 555, 1751
unwarranted, 251
USA PATRIOT Act and, 1149
Vinson Court and, 1720
Virginia Declaration of Rights and, 1723
warrant clause IV and, 1747
warrantless, 28, 81, 91–92, 712, 794, 1014, 1417, 1751–1752
warrants and, 1429
Warren Court and, 1757–1758
Weeks v. United States and, 1772
- Search engines, 823
- Search warrants, 83, 1433–1436
administrative searches and, 28
application process for, 1434
automobile searches without, 91–92
California v. Acevedo and, 215
Camara v. Municipal Court of the City and County of San Francisco and, 217
Carroll v. United States and, 251
Chimel v. California and, 284–285
Connally v. Georgia and, 347–348
Coolidge v. New Hampshire and, 365
drug testing and, 156
duplicate original, 1434
electronic surveillance and, 487
elements of, 1434–1435
exceptions for, 1433
for felony drug crimes, 1557
Florida v. White and, 598
good faith exception and, 555–556
habeas corpus and, 556
Hester v. United States and, 763
Illinois v. Gates and, 793
inspections without, 217
insufficiency of, 1435
limits of, 1433
in *Lo-Ji Sales, Inc. v. New York*, 933
Mapp v. Ohio and, 956
Marshall, T., and, 973
Michigan v. Summers and, 1006
National Prohibition Act and, 1364
original, 1434

INDEX

- Search warrants (*cont.*)
 - PPA and, 1223
 - thermal imaging and, 900
 - United States v. Leon* and, 793, 1685–1686
 - United States v. Ramirez* and, 1690
 - United States v. United States District Court* and, 1695–1996
 - usefulness of, 1434
 - Wilson v. Layne* and, 1783
- Seatbelt(s)
 - law, 1497
 - as victimless crime, 1709
- Seattle Times Co. v. United States District Court for the Western District of Washington*, 1428
- SEC. *See* Securities and Exchange Commission
- Secession
 - compact theory and, 887
 - treason and, 1665
- Second Amendment
 - assumptions of, 143–144
 - Burger and, 205
 - collective view of, 721
 - Constitutional Convention of 1787 and, 357–358
 - Dred Scott v. Sandford* and, 721–722
 - English Bill of Rights and, 503
 - gun control and, 720–722
 - incorporation doctrine and, 804
 - Lewis v. United States* and, 1343
 - McReynolds and, 993
 - negative rights and, 144
 - NRA and, 1070–1071
 - Presser v. Illinois* and, 722, 1342
 - right to bear arms and, 1338, 1343–1349
 - Schlaflly and, 1421
 - United States v. Miller* (1939) and, 1687
- Second Continental Congress, 845
- Second Institutes* (Coke), 456
- Second Legal Tender Cases*, 465
- Second Reinstatement of Torts, The*
 - false light invasion of privacy, 574–575
 - intrusion and, 827
- Second Treatise on Government* (Locke), 462
 - emergencies and, 494
 - Jefferson and, 847
 - property ownership and, 475
- Second Vatican Council, 254–255
 - Americans United and, 57
 - Murray and, 1050
- Secondary effects doctrine, 364, 1436–1437, 1820
 - Young v. American Mini Theatres* and, 1807
- Secret Service, 415
- Secular humanism, 1619
 - public schools and, 1437–1438
- Secular purpose, 1438–1439
- Secularism
 - atheism and, 90
 - currency and, 90
 - religion of, 3
 - Warren Court and, 1756
- Securities and Exchange Commission (SEC), 443
- Sedgewick, Ellery, 617
- Sedition, 36
 - Brandeis and, 176
 - Ellsworth Court and, 491
 - free speech law and, 815
 - New Deal and, 1084
 - Paine and, 1143
 - Penn and, 1781
 - sedition libel and, 644–645
 - Taylor v. Mississippi* and, 595
 - World War II and, 1800
 - Zenger and, 1814
- Sedition Act of 1798, 36–40, 68, 1450, 1766. *See also* Alien and Sedition Acts
 - aftermath of, 647–648
 - Chase and, 273–274
 - Cooley on, 645
 - Ellsworth Court and, 491–492
 - Federalists and, 1441
 - free speech and, 642–643, 1641
 - freedom of press and, 1205–1207
 - Hamilton and, 733
 - Madison and, 945–946
 - Marshall Court and, 968
 - Marshall, J., and, 970
 - national security and, 1072
 - noncitizens and, 1105–1106
 - in practice, 39
 - repeal of, 660
 - review of, 643
 - theory of, 38–39
 - unconstitutionality of, 39
- Sedition Act of 1918, 1280
 - Chafee and, 261
 - free speech and, 1794
 - freedom of press and, 658
 - Masses Publishing Company v. Patten* and, 979
 - repeal of, 658
 - Wilson and, 1784
- Seditious libel, 644–645, 1439–1441
 - Cooley and, 645
 - in eighteenth century, 1440
 - freedom of press and, 1202
 - Hamilton and, 734
 - Jefferson and, 733
 - Kentucky Resolves and, 887–888
 - prior restraints and, 1209
 - Schenck v. United States* and, 1420
 - Virginia Resolves and, 887–888
- Sedmia, S.P.R.L. v. Imrex Co., Inc.*, 1334–1335
- See v. City of Seattle*, 27–28
- Seeger, Daniel, 1693
- Seekers, 153
- Seemuller v. Fairfax County School Board*, 1615
- Segregation, 1441–1444. *See also* Desegregation
 - after World War II, 972
 - army, 418
 - Board of Education, Kiryas Joel Village School District v. Grumet* and, 158
 - Brown v. Board of Education* and, 186
 - Burger and, 206
 - Burton and, 208
 - commerce clause and, 971
 - Connor and, 348
 - Corrigan v. Buckley* and, 368–369
 - Cox v. Louisiana* and, 372–373
 - de facto, 1441
 - de jure, 1441
 - Edwards v. South Carolina* and, 483
 - equal protection and, 515–516
 - Evers and, 548–549

- Frank and, 616
- Harlan, I. and, 738
- Helper on, 760
- Hughes and, 783
- Japanese internment and, 840
- Jews and, 852
- Johnson, L., and, 855
- Justice and, 878
- King and, 890
- KKK and, 897
- marches against, 958
- Marshall, T., and, 971–972
- NAACP and, 784, 1063
- NAACP v. Button* and, 1058
- Parks and, 1064
- race-based classifications and, 611
- Runyon v. McCrary* and, 281
- Shaw and, 1467
- sit-ins against, 959
- substantive due process and, 466–467
- Sweatt v. Painter* and, 616
- Voting Rights Act of 1965 and, 1729
- Warren Court and, 1753
- White, B., and, 1779
- White Court and, 1777–1778
- Seigenthaler, John, 959
- Seizures. *See also* Search and seizure
 - de minimus, 1446
 - definition of, 1444
 - probable cause and, 1447
 - of property, 1447
 - Warden v. Hayden* and, 1747
 - Wolf v. Colorado* and, 1790
- Sekulow, Jay, 286
- Selassie, Haile, 1262
- Select Commission on Immigration and Refugee Policy, 426
- Select Committee on Improper Activities in the Labor Management Field
 - Goldberg and, 695
- Select Committee to Study Government Operations with Respect to Intelligence Activities, 1519
- Selective Service. *See also* Draft
 - Bond and, 162
 - Rostker v. Goldberg* and, 698
 - women and, 698
- Selective Service Act of 1917, 1419, 1447–1448
 - draft card burning and, 1688
 - free speech and, 1794
 - national security and, 1074
 - Seventh Day Adventists and, 1462
 - Socialist Party and, 1419
- Selective Service Act of 1940, 1801–1802
- Selective Service Draft Law Cases*, 1447–1448, 1448, 1792, 1793
 - White Court and, 1778
- Self-defense, 1448–1449
 - Fifteenth Amendment and, 1726
 - Nineteenth Amendment and, 1728
 - spousal murder and, 974–975
- Self-fulfillment, 1449–1450
- Self-governance, 994, 1540–1541
 - civil liberties and, 1638
 - of communities, 1540
 - free speech and, 1449, 1450–1452, 1642
 - privileges and immunities and, 1230
- Self-incrimination
 - Allen v. Illinois* and, 43
 - Baltimore City Department of Social Services v. Bouknight* and, 106
 - Bible and, 128
 - bookmaking and, 960
 - Boykin v. Alabama* and, 172
 - Braswell v. United States* and, 180
 - Brewer v. Williams* and, 182
 - Brooks v. Tennessee* and, 185
 - coercion and, 794
 - compulsory registration and, 1684
 - confessions and, 920
 - corporations and, 668, 740
 - exclusionary rule and, 557–558
 - exemplars and, 558
 - Fisher v. United States* and, 589
 - Fortas and, 604
 - Frankfurter and, 618
 - Fuller Court and, 667
 - grand juries and, 668, 708
 - grand jury indictments and, 706
 - history of, 1452–1456
 - Hopt v. Utah Territory* and, 777
 - incorporation doctrine and, 618, 803
 - Lilborne and, 919, 920
 - Lilly v. Virginia* and, 920
 - Mathis v. United States* and, 981–982
 - Matthews on, 739
 - McNabb v. United States* and, 991–992
 - Michigan v. Mosley* and, 1005–1006
 - Miranda v. Arizona* and, 318, 1016
 - Miranda warnings and, 1017, 1456–1457
 - occupational tax stamps and, 960
 - police coercion and, 794
 - right to remain silent and, 710
 - Rock v. Arkansas* and, 407
 - silence and, 710
 - test oaths and, 1627
 - in twentieth century, 1017–1018
 - United States v. Kahriger* and, 1684
 - United States v. Washington* and, 1697–1698
 - Virginia Declaration of Rights and, 1723
 - Warren Court and, 1757–1758
- Self-realization theory, 1449
- Self-representation theory, 1457–1458
- Sell v. United States*, 1335–1336
- Sellin, Thorsten, 240
- Selling of the President, The* (McGinniss), 219
- Senate
 - ICRA and, 808
 - McCarthy and, 984
- Senate Committee on Slavery and Freedmen, 1585
- Senate Judiciary Committee, 165
- Senate Permanent Subcommittee on Investigations, 1454
- Senate Subcommittee on Internal Security, 1454
- Seneca Falls Women's Rights Convention, 65
 - women's suffrage and, 1793
- Senn v. Tile Layers Protective Union*, 175–176
- Sentencing. *See also* Eye for an eye
 - Apprendi v. New Jersey* and, 76
 - arbitrary, 236–237, 710
 - capital punishment and, 227, 1504–1505
 - discretion, 239
 - Eighth Amendment and, 227

INDEX

- Sentencing (*cont.*)
 - excessive, 1494
 - Furman v. Georgia* and, 675
 - guided discretion statutes for, 717
 - hate crime laws and, 749–750
 - juries and, 990
 - Kennedy, A., and, 886
 - life, 226
 - mandatory death, 952–953
 - mandatory minimum, 953–954
 - McGautha v. California* and, 989–990
 - mitigating factors and, 227
 - nondeath, 384–385
 - North Carolina v. Pearce* and, 1111–1112
 - plea bargaining and, 1176
 - prison population and, 1213–1214
 - proportionality of, 744
 - racial discrimination and, 228–229, 1257
 - for recidivism, 1494
 - Spaziano v. Florida* and, 1504–1505
 - victims and, 1711
- Sentencing Commission, 1459
- Sentencing guidelines, 1458–1459
 - for abuse of discretion, 1460
 - prescriptive, 1459
 - presumptive, 1459
 - voluntary, 1458–1459
- Sentencing Reform Act, 1459–1460
 - Mistretta v. United States* and, 1023–1024
- Separate but equal doctrine, 515–517, 1442
 - education and, 1541
 - Fuller Court and, 667
 - Marshall, T., and, 971
 - Plessy v. Ferguson* and, 1017, 1181
 - race-based classifications and, 611
- Separate-Baptists, 108
 - in colonial America, 526
- Separation of Church and State Now* (Dawson), 397
- Separation of powers doctrine, 1703–1705
- Separationism, 1274, 1289, 1299, 1308–1309, 1390
 - Americans United and, 56–57
 - Bible and, 127, 129
 - Bible reading and, 131–133
 - Burger Court and, 199
 - Catholic Church and, 253
 - civil religion and, 297–298
 - Committee for Public Education and Religious Liberty v. Nyquist* and, 333
 - Dawson and, 397
 - Everson v. Board of Education* and, 550, 1295, 1390
 - evolution of, 766
 - Falwell and, 575–576
 - family values movement and, 577
 - Frankfurter and, 618–619
 - freedom of religion v., 542
 - Hutchinson and, 62
 - Jefferson and, 90, 132, 766, 1309
 - Jews and, 852–853
 - Jimmy Swaggart Ministries v. Board of Equalization of California* and, 853–854
 - legislative history of, 767–768
 - legislative prayer and, 967
 - Lemon* test and, 533–535
 - Madison and, 944
 - McCullum v. Board of Education* and, 767
 - Mitchell v. Helms* and, 1024–1025
 - Murray and, 1049–1050
 - Quakers and, 1251
 - religion clauses and, 551
 - scope of, 767
- Separationist jurisprudence
 - Agostini v. Felton* and, 31
 - Aguilar v. Felton* and, 32
 - religion and, 33
- Serbian Eastern Orthodox Diocese v. Milivojevich*
 - establishment clause and, 537
- Watson v. Jones* and, 862
- Serious and imminent threat test. *See* *Brandenburg* test
- Sermon on the Mount, 58
- Serrano, Andres, 1065
- Servicemembers Legal Defense Network (SLDN), 1460–1461
 - homosexuality and, 436
- Settled doctrine, 967
- Settlement of 1689, 951
- Seven Bishops, 1667
- Seventeenth Amendment, 1275
- Seventh Amendment
 - limitations of, 144
 - trial by jury and, 1666
- Seventh Circuit Court of Appeals, 47
- Seventh-Day Adventists, 119, 1469
 - accommodation and, 22
 - free exercise clause and, 625
 - religious liberty and, 1461–1462
- Sherbert v. Verner* and, 628
- Warren and, 1765
- Warren Court and, 1756
- Seward, William H., 1293, 1526
 - Thirteenth Amendment and, 1648
- Sex. *See also* Obscenity
 - AFLA and, 29
 - age of consent and, 1550
 - Bowen v. Kendrick* and, 167
 - Carmen Baby* and, 1255
 - criminal justice and, 1463–1465
 - discrimination, 71
 - First Amendment and, 1676
 - Hays Office and, 755
 - immigration and, 1465–1466
 - obscenity and, 1115, 1117
 - premarital, 965
 - privacy and, 1219–1220
 - states and, 1540
 - Unites States v. One Book Entitled “Ulysses”* and, 1689
 - zoning and, 1820–1821
- Sex education
 - free exercise and, 1246
 - public schools and, 1246
- Sex offenders
 - collateral consequences and, 326
 - Conn. DPS v. Doe* and, 1150–1151
 - indefinite detention of, 804
 - Megan’s Law and, 554, 997
 - mental illness and, 1001
- Sexual abuse cases
 - of foster children, 1463
 - testimony in, 976–977
- Sexual activity
 - deviant, 676
 - interracial, 1022

- Lawrence v. Texas* and, 909, 1328, 1338, 1371
- minors and, 250, 283
- in movies, 1041
- prior, 1005
- privacy and, 714
- Sexual assault
 - DNA testing and, 428, 432
 - naming of victims of, 1261–1262
 - as speech, 943
- Sexual discrimination, 71, 1412, 1501
 - Board of Directors of Rotary International v. Rotary Club of Duarte* and, 636, 1381
 - Dworkin and, 470–471
 - Ginsburg and, 686–688
 - Mill and, 1010
 - pornography as, 942
 - Santa Clara Pueblo v. Martinez* and, 808
 - traditional cultures and, 1640
- Sexual expression
 - Bethel School District v. Fraser* and, 1576
 - content-based laws and, 252
 - freedom of press and, 659–660
 - Kois v. Wisconsin* and, 894
- Sexual extortion, 778
- Sexual harassment, 71
 - Civil Rights Act of 1964 and, 301
 - Emerson and, 499
- Sexual Harassment of Working Women* (McKinnon)
 - Emerson and, 499
- Sexual orientation
 - Charitable Choice and, 423
 - discrimination and, 1409
 - employment discrimination and, 777–779
 - hate crimes and, 303, 749–751, 751–752
 - hate speech and, 752–755
 - in military, 1460
 - murders and, 1469
 - parades and, 786
 - privacy and, 1221–1222
 - in same-sex adoption, 1398
- Sexual privacy, 1416
- Sexual revolution
 - marriage after, 965
 - obscenity and, 1123
- Sexually explicit materials. *See* Obscenity
- Sexually transmitted diseases, 1410
- Sgro v. United States*, 1435
- Shadowing, 828
- Shadwick v. Tampa*, 1435
- Shaffer v. Heitner*, 973
- Shakespeare, William, 402
- Shakur, Tupac, 764
- Shapiro v. Kentucky Bar Ass'n*, 1235
- Shapiro v. Thompson*, 1396, 1466
 - privileges and immunities and, 1233
 - right to travel and, 801, 1354
- Share Our Wealth, 934
- Sharon S. v. Superior Court of San Diego County*, 1408
- Shaughnessy v. United States ex rel. Mezei*, 461, 1467
- Shaw, Lemuel, 1467–1468
 - Inhabitants of Wilbraham v. Hampden County Commissioners* and, 799
- Shaw v. Reno*, 1278, 1279
 - Board of Education, Kiryas Joel Village School District v. Grumet* and, 157
- O'Connor and, 1127
 - voting rights and, 1726
- Shays' Rebellion
 - Jefferson on, 846
 - Marshall, J., and, 969
- Sheehan, Neil, 1089
- Sheen, Fulton J., 118
- Shelby, Alan, 1690
- Sheldon v. Sill*, 866
- Shelley v. Kraemer*, 1325, 1442–1443, 1468–1469
 - Buchanan v. Warley* and, 192
 - Burton and, 208
 - Corrigan v. Buckley* and, 369
 - equal protection and, 516, 1325
 - state action doctrine and, 1524
 - Vinson Court and, 1720
- Shelter facilities, 1550
- Shelton, Robert, 1501–1502
- Shelton v. Tucker*, 18, 62
 - free exercise and, 1246
 - public schools and, 1246
- Shenandoah Baptist Church, 571
- Shenandoah v. Halbritter*, 809
- Shepard, Matthew, 1469
- "Shepherd's Rod, The" (Houteff), 1461
- Sheppard v. Maxwell*, 420
 - gag orders and, 671
- Shepperd, Sam, 631
- Shepperd v. Maxwell*, 631
- Sherbert, Adeil, 1462, 1469
- Sherbert test*, 501
- Sherbert v. Verner*, 22–23, 159, 500, 1304–1305, 1462, 1469–1471
 - Bowen v. Roy* and, 168
 - conscientious objection and, 349–350
 - Employment Division, Department of Human Resources of Oregon v. Smith* and, 501
 - free exercise and, 1246
 - free exercise clause and, 119, 542, 625, 628, 939
 - Mozert v. Hawkins County Board of Education* and, 1044
 - statutory religion-based exemptions and, 560
 - Warren Court and, 1756
 - Wisconsin v. Yoder*, 1788
- Sherman Antitrust Act, 1471–1472
 - economic regulation and, 473
 - federalization of criminal law and, 581
 - freedom of association and, 635
 - Holmes on, 770
 - La Follette and, 901
 - McReynolds and, 992
 - White Court and, 1777
- Sherman, John, 1471
- Sherman, Roger, 139, 1314, 1472–1473
 - Bill of Rights and, 352, 1325
 - civil liberties and, 143
 - freedom of the press and, 360
 - personal freedom and, 140
 - quartering of troops and, 1252
 - religious tests for office holding and, 359
- Sherman v. Community Consolidated School District*, 1178, 1179
- Shield, Henry, 315
- Shield laws, 859, 1473
- Shields v. Utah Idaho Central Railroad*, 868
- Shine, G. David
 - Cohn and, 323
 - McCarthy and, 1773

INDEX

- Shocks the conscience test, 181
Souter and, 1497
Shoplifting, 1150
Shopping centers
free speech and, 1474, 1536, 1544
open-air assembly in, 1397
Shouting Fire: Civil Liberties in a Turbulent Age (Dershowitz), 416
Sibron v. New York, 1445
Sicurella v. United States, 1474–1475
Sidney, Algernon, 1357
Jefferson and, 847
Sierra Club v. Butz, 1480
Signal Corps, 984
Silard, John, 1269
Silence
period of, 409
as self-incrimination, 710
Silver Nugget, 306
Silver standard currency, 189
Silverman v. United States, 1429
Silverstein, Ken, 1503
Silverthorne Lumber Company v. United States, 1598, 1799
Holmes and, 772
Simmons, William Joseph, 896
Simon & Schuster v. Members of the New York State Crime Victims Board, 252, 1494–1495
content-based speech regulation and, 361
Simopoulos v. Virginia, 1475
Simpson, Matthew, 146
Simpson, O.J., 1414
cameras in courtrooms and, 218
Dershowitz and, 306, 416
double jeopardy and, 441
jury nullification and, 869
pretrial detention and, 805
Sims v. Georgia
Crane v. Kentucky and, 375
Sincerity, 1476–1477
Singer v. Hara, 1400
Singer v. United States, 1478
Singleton v. State, 1532
Sister Souljah, 765
Sisters of Charity, 172
Sit-ins, 412, 959
Sixteenth Amendment, 479
Sixth Amendment, 144. *See also* Compulsory Process Clause;
Confrontation Clause; Right to fair trial
absolute disparity and, 872
Apodaca v. Oregon and, 73
Apprendi v. New Jersey, 76
Ballew v. Georgia and, 105
Betts v. Brady and, 125, 1350
blood samples and, 1422
Brewer v. Williams and, 182
Buchanan v. Kentucky and, 191
cameras in courtrooms and, 218, 265
civil trials and, 872
colonial charters and, 327
compulsory process clause and, 344–345
confrontation clause of, 25, 345
counsel and, 1458
Coy v. Iowa and, 374
Crane v. Kentucky and, 375
cross-examination and, 1360
Davis v. Alaska and, 396
death-qualified juries and, 932
defense evidence and, 1005
Duncan v. Louisiana and, 468, 743
eyewitness identification and, 568
freedom of expression and, 1159, 1163
Gideon v. Wainwright and, 318, 603, 682
Goldberg and, 696
Holland v. Illinois and, 769
Illinois v. Perkins and, 794
ineffective assistance of counsel and, 810–811
jailhouse informants and, 838
jury selection and, 871
jury size and, 743
jury trial right and, 875–877, 877
Kirby v. Illinois and, 892
Klopfer v. North Carolina and, 893
lawyers speaking about pending cases and, 420
Lilly v. Virginia and, 920
Marshall, T., and, 973
Maryland v. Craig and, 976–977
Massiah v. United States and, 980–981
Michigan v. Lucas and, 1005
Miranda and, 1020
Miranda v. Arizona and, 1016
Moran v. Burbine and, 1034
Motes v. United States and, 1040
Nix v. Williams and, 1097
noncitizens and, 380
Ohio v. Robinette and, 1128
peremptory challenges and, 115
Powell v. Alabama and, 1192
private police and, 1227
Reid v. Covert and, 1291
right to counsel and, 1344–1347, 1349–1351, 1625
right to trial and, 1336
states and, 772
Stevens and, 1558
Stone Court and, 1562
Taylor v. Louisiana and, 1610
United States v. Booker and, 1024
United States v. Lovasco and, 1686
victims' rights and, 1711
Warren Court and, 1757, 1759
Washington v. Texas and, 1767
Zenger and, 1815
60 Minutes, 888–889
Skeptical scrutiny test, 687
Skinner v. Oklahoma, 1478–1479
Douglas and, 447
eugenic sterilization and, 545, 1320
Griswold v. Connecticut and, 713, 1320
Stone Court and, 1562
suspect categories and, 518
Skinner v. Railway Labor Executives' Association, 1479–1480, 1746
civil liberties and, 1636
drug testing and, 452–453
Marshall, J., and, 1636
National Treasury Employees Union v. Von Raab and, 1076–1077
Skolnick, Jerome, 1236
Skyjackers, 1237
Slander, 402
damages for, 404
SLAPP. *See* Strategic lawsuits against public participation
Slaughterhouse Cases, 74, 152, 1355, 1481–1483
Bill of Rights and, 1632

- Chase Court and, 271, 272–273
- due process incorporation and, 607
- economic rights and, 478
- Field and, 586
- Fourteenth Amendment and, 514, 1354–1355
- Hurtado v. California* and, 786
- incorporation doctrine and, 803
- penumbras and, 1153
- privileges and immunities and, 607, 1232, 1354–1355
- state action and, 606, 1354
- substantive due process and, 465
- Waite Court and, 1733
- Slave Codes, 238
- Slavery, 1483–1484. *See also* Abolitionism, of slavery; Fugitive Slave Act
 - AASS and, 45–46
 - abolishment of, 228
 - abolition of, 52
 - American Revolution and, 53
 - Bible and, 129
 - Calhoun and, 214
 - capital punishment and, 225, 239
 - Chase Court, 271
 - church splits and, 862
 - citizenship and, 451–452
 - civil liberties and, 1484–1487, 1542
 - civil rights after, 70
 - Constitutional Convention of 1787 and, 358–359
 - constitutions and, 138–139
 - Corrigan v. Buckley* and, 369
 - Declaration of Independence and, 402, 451
 - Douglass and, 448
 - Dred Scott v. Sandford* and, 451–452, 864
 - economic rights and, 478
 - Emancipation Proclamation and, 493–494, 924
 - family privacy and, 281
 - Fourteenth Amendment and, 605
 - free speech and, 648–649
 - Garrison and, 676
 - Harlan, I. and, 738–739
 - Helper on, 759–760
 - immediatism and, 4
 - interdiction and, 390
 - Jackson, A. and, 833
 - Jefferson and, 138, 845
 - Johnson, L., and, 138
 - Kendall and, 883–884
 - Lincoln and, 922–924
 - Lovejoy and, 1486
 - Madison and, 946
 - Mann Act and, 954–955
 - marriage and, 964
 - Massachusetts and, 139
 - Mormons and, 1037
 - murder and, 1483
 - Ninth Amendment and, 1096–1097
 - Northwest Territory and, 845
 - personal liberty laws and, 1484
 - Petition Campaign and, 1154
 - Phillips, W. and, 1158
 - Plessy v. Ferguson* and, 1181
 - privileges and immunities and, 606–607, 1230
 - regulation of, 1258
 - state bills of rights and, 138–139
 - Story and, 1572
 - Sumner and, 1585
 - Thirteenth Amendment and, 1647
 - U.S. Constitution and, 353
 - Watson v. Jones* and, 1767–1768
 - white, 954–955
- Slaves
 - prisoners as, 1216
 - reading and, 1734
 - runaway, 1542
- SLDN. *See* Servicemembers Legal Defense Network
- Sleep deprivation, 316
- Sliding-scale test
 - of equal protection, 973
 - Hand, L. and, 1722
 - Vinson and, 1722
- Slow-moving vehicles (SMVs), 58
- Smallpox, 341
- Smilie, John, 1265
- Smith Act of 1940, 49, 68, 1415, 1454, 1487–1488, 1510
 - ACLU and, 104
 - Brandenburg v. Ohio* and, 178
 - Clark, T., and, 309
 - Cohn and, 322
 - Communist Party and, 1377
 - CPUSA and, 338, 339
 - Debs v. United States* and, 401
 - Dennis v. United States* and, 414, 654–655
 - Hand and, 737
 - HUAC and, 780
 - INA and, 983
 - national security and, 1073
 - Vinson and, 1722
 - World War II and, 1800
 - Yates v. United States* and, 110, 1807
- Smith, Adam, 1329
 - Lochner v. New York* and, 928
 - Mill and, 1010
- Smith, Al, 500
 - Employment Division, Department of Human Resources of Oregon v. Smith* and, 500
 - Gitlow v. New York* and, 690
- Smith, Howard, 1488
- Smith, Hyrum, 1038
- Smith, J. Clay, Jr., 973
- Smith, James Morton, 642
- Smith, Jess, 774
- Smith, John Eldon, 228
- Smith, Joseph, Jr., 72, 1330
 - African Americans and, 1037
 - Mormons and, 1035
 - murder of, 1038
 - polygamy and, 1038
- Smith, Lamar, 548
- Smith, Ruth Proskauer, 1062
- Smith test, 1263
- Smith v. Allwright*, 1366, 1562, 1571
 - Vinson Court and, 1721
- Smith v. Bd. of Sch. Commissioners of Mobile County*
 - establishment clause and, 1619
 - evolution and, 1619
- Smith v. California*, 1488–1489
 - Black, H., and, 1634–1635
- Smith v. Daily Mail Publishing Company*, 113, 596
- Smith v. Doe*, 554
- Smith v. Goguen*, 363

INDEX

- Smith v. Maryland*, 1430, 1532
privacy and, 1220
reasonable expectation of privacy and, 882
United States v. Miller (1976), 1687
- Smith v. Organization of Foster Families for Equality and Reform*, 281, 1489–1490
- Smith v. YMCA*, 1501
- Smith, Walter P., 1731
- Smith, William, 1814
Jefferson and, 846
Zenger and, 734
- SMVs. *See* Slow-moving vehicles
- Snake-handling sects, 1490–1491
- SNCC. *See* Student Non-Violent Coordinating Committee
- Snepp, Frank, 1491
- Snepp v. United States*, 311, 1491–1492
Burger Court and, 202
injunctions and, 1212
nondisclosure agreements and, 659
prior restraints and, 1076
- Snider v. Cunningham*, 697
- Snowden v. Saginaw Chippewa Indian Tribe*, 808
- Snyder v. Massachusetts*, 1364
- Snyder v. Murray City Corp.*, 915
- Sobell, Morton, 1378
- Social contract theory
Bryan and, 189
Locke and, 930–931
Mill and, 1010
- Social Democratic Party, 400
- Social gospel, 397
- Social groups, 872
asylum and, 89
based on race, 991
categories of, 751
exclusion of, 789
hate crime laws and, 748–751
immigration and, 773
jury selection and, 872
- Social pressure, 600–601
- Social Security
benefits, 629
Butler and, 209
Native Americans and, 168
Thomas v. Review Board and, 1686
United States v. Lee and, 1685
- Social Security Act of 1935, 393, 1269, 1373
marriage and, 965
Medicaid and, 115
- Social value
Bible and, 127
A Book Named “John Cleland’s Memoirs of a Woman of Pleasure” v. Massachusetts and, 1–2
Roth test and, 835–836
- Socialist Party
clear and present danger test and, 1795
COINTELPRO and, 1518
Debs and, 399, 1281
Emerson and, 498
Gitlow v. New York and, 689–690
Mormons and, 1035
Schenck and, 1419
Schenck v. United States and, 652, 770–771
- Societal needs, personal freedom v., 100
- Society for Human Rights, 1566
gay and lesbian rights and, 676
- Society of American Artists
Comstock and, 342
- Society of American Law Teachers, 1461
- Society of Friends. *See* Quakers
- Society, retribution and, 1329–1330
- Socioeconomics
equal protection and, 609–610
rational purpose test and, 610
- Sociological jurisprudence, 443
- Socrates, 1451
- Sodomy, 676
Bible and, 130
Bowers v. Hardwick and, 1521
capital punishment and, 1223
criminality of, 1405
decriminalizing, 713
gay and lesbian rights and, 677, 885
Hardwick v. Bowers and, 855
homosexuality and, 1222
intrusion and, 836
Kennedy, A., and, 885
Lamda and, 905
Lawrence v. Texas and, 908, 1329, 1338, 1371, 1399–1400, 1521
obscenity and, 1116
O’Connor and, 1126
Paris Adult Theatre v. Slaton and, 1148
privacy and, 1542
punishments for, 1493
right to, 436
same-sex adoption and, 1398
sexual orientation and, 1222
Uniform Code of Military Justice and, 436
White, B., and, 1779
- Sodomy laws, 1492–1493
Bowers v. Hardwick and, 168–169
Burger Court and, 199
reform of, 1493
- Soft money, 220, 1190
- Software
Internet filtering, 825
Metro-Goldwyn Mayer Studios v. Grokster and, 1001–1002
privacy, 820–821
sharing, 822–823
- Sola scriptura, 129
- Soldier of Fortune Magazine*, 659
- Soldier’s disease, 1740
- Solem v. Helm*, 1494
English Bill of Rights and, 503
Harmelin v. Michigan and, 744
three strikes laws and, 1654
- Solicitations, 829
- Solomon Amendment, 1461
- Solorio v. United States*, 1007
- Son of Sam Law, 361, 1494–1495
- Sonnier, Elmo Patrick, 1200
- Sons of Liberty
Chase and, 273
Milligan and, 551
- Sony v. Universal City Studios*, 1001–102
- Sonzinsky v. United States*, 1684
- Sorrells v. United States*, 1495
- Sound trucks, 829
- Souter, David, 1495–1498
Agostini v. Felton and, 31

- balancing and, 100
- Board of Education, Kiryas Joel Village School District v. Grumet* and, 157
- Buck v. Bell* and, 193
- Employment Division, Department of Human Resources of Oregon v. Smith* and, 501
- on establishment clause, 527–528
- McCreary Count, Kentucky v. American Civil Liberties Union of Kentucky* and, 146–147
- Mitchell v. Helms* and, 1025
- non-preferentialism standard and, 1109
- O'Connor and, 1126
- PAS and, 1165
- proportional punishment and, 1241
- Rosenberger v. Rector and Visitors of the University of Virginia* and, 1379
- United States v. Balsys* and, 1680
- Virginia v. Black* and, 1724–1725
- Zelman v. Simmons-Harris* and, 1813
- South Africa
 - same-sex marriage and, 1403
 - Tribe and, 1668
- South America, same-sex unions in, 1404
- South Boston Allied War Veterans Council, 786
- South Carolina
 - ACLU and, 1059
 - Calhoun and, 214
 - general warrants and, 1751
 - literacy tests and, 1729
 - Padilla and, 1347
 - pregnancy in, 1322
 - privacy and, 1531
 - Protestantism in, 136
 - religion and, 1309, 1315
 - Seventh-Day Adventists and, 1462
 - Shelley v. Kraemer* and, 1469–1471
 - slavery and, 1485
 - voting in, 1729–1730
- South Carolina Exposition, The* (Calhoun), 214
- South Carolina State House, 483
- South Carolina v. Katzenbach*, 1559, 1730
- South Dakota, cruel and unusual punishment and, 1494
- South Dakota v. Opperman*, 1498, 1532
- Southeastern Promotions, Ltd. v. Conrad*, 1498–1499
 - public forum doctrines and, 1243
- Southern Center for Human Rights, 1499–1500
- Southern Christian Leadership Conference (SCLC)
 - Brown v. Board of Education* and, 959
 - Connor and, 348
 - King and, 889
- Southern Horrors: Lynch Law in All Its Phases* (Wells), 1774
- Southern Pacific Co. v. Arizona*, 1801
- Southern Poverty Law Center (SPLC), 1500–1504
 - chain gangs and, 263
 - criticism of, 1503–1504
 - fundraising for, 1503–1504
- Southern Prisoners' Defense Committee. *See* Southern Center for Human Rights
- Southern Railway Company, 208
- Southern Ute Tribe, 807
- Southern White Knights. *See* Ku Klux Klan
- Southwestern College, 603
- Sovereignty. *See* Self-governance
- Soviet Union
 - CPUSA and, 337
 - Hiss and, 765
 - Kaufman and, 883
 - La Follette and, 904
 - Nixon, R. and, 1098
 - recognition of, 150
 - Rosenbergs and, 1377–1378
- Spain
 - judicial review and, 865
 - same-sex marriage and, 1403–1404
- Spam, 45
 - blocking, 820
 - civil liberties and, 820
- Spanish-American War
 - DeWitt and, 417
 - Harlan, I. and, 740
 - Insular Cases* and, 668
- Sparks-El v. Finley*, 1307
- Spano v. New York*, 1504
- Spano, Vincent Joseph, 1504
- Spaziano v. Florida*, 1504–1505
- Speaking Freely: A Memoir* (Hentoff), 760
- Speaking of Race, Speaking of Sex: Hate Speech, Civil Rights, and Civil Liberties* (Strossen), 1574
- Special Commission to Study and Investigate Communism and Subversive Activities and Related Matters in the Commonwealth
 - CPUSA and, 337
- Special Investigations Unit, 1090
- Special needs cases
 - checkpoints and, 275
 - search warrants and, 1433–1434
 - seizures and, 1446–1447
- Special Subcommittee on Government Information
 - press access and, 661
- Special verdict, 1203
- Speck, Richard, 240
- Specter, Arlen, 165
- Speech. *See also* Commercial speech; Free speech; Hate speech; Obscenity; Protected speech; Religious speech; Student speech; Symbolic speech; Vulgar speech
 - abridged, 1052
 - as attempt, 1420
 - chilling, 99
 - government funding of, 700–701
 - injunctions and, 1211
 - Internet and, 819
 - low value, 937
 - marketplace of ideas approach to, 961–962
 - Meiklejohn and, 1000
 - sexual assault as, 943
- Speech and debate clause, 352
 - Hutchinson v. Proxmire* and, 788
 - legislators, 916
- Speech codes, 220–221, 303
 - in universities, 760, 1579
- Speech regulations
 - content-based, 361–362
 - content-based v. content-neutral, 363
 - content-neutral, 362–365
 - designated public forums and, 417
 - secondary effects doctrine and, 364
 - time, place, and manner, 362–363
- Speedy trials, 1516–1518
 - clock, 80

INDEX

- Speedy trials (*cont.*)
United States v. Lovasco and, 1686
United States v. Marion and, 1686
 Virginia Declaration of Rights and, 1723
- Speiser v. Randall*, 1672
- Spence v. Bailey*, 350
- Spence v. Washington*
 content-neutral regulation and, 363
 symbolic speech and, 589–591
- Spencer, Herbert, 928
- Spencer, John, 1526
- Spengelink, John, 228
- Spermicidal gels, 1411
- Spies v. Illinois*, 649
- Spike mike, 1429
- Spinal injuries, 1551
- Spinelli v. United States*, 1435
 probable cause and, 1235
- Spirit of the Laws, The* (Montesquieu), 1032–1033, 1185
 Jefferson and, 847
- Spitzer, Robert, 721
- Spock, Benjamin, 306
- Spooner, Lysander, 1158
- Spousal consent, 1173
- Springsteen, Bruce, 59
- Spycatcher* (Wright), 639
- Spying, on citizens, 1518–1520
- Spyware, 820
- Square Deal, 903
- St. Clair, James, 306
- St. Francis Mission Boarding School, 1253
- St. John's College, 998
- St. Louis Civic League, 102
- St. Louis Observer*, 1486
 Lovejoy and, 935
- St. Louis Times*, 935
- St. Patrick's Day, 785–786
- St. Paul College of Law, 204
- St. Paul Council on Human Relations, 204
- Stafford v. Wallace*, 1601
- Stalin, Joseph
 Baldwin and, 104
 Churchill and, 150
 Communist Party and, 339
- Stalking, 1465
 laws, 778
- Stamp Act, 54, 66
 Bible and, 127
 Chase and, 273
 freedom of press and, 1203
 Mason and, 977
 Otis and, 1139
- Stamp Act Rebellion
 Franklin and, 620
 grand juries and, 705
- Standard Oil, 1471
 Long and, 934
- Standard Oil Company v. United States*
 White Court and, 1777
- Standard Zoning Establishment Act (SZE), 1817
- Standards for Criminal Justice, 228
- Standards, rules v., 100
- Standby counsel, 1458
- Standing doctrine, 1417
 federal court jurisdiction and, 867
- Fourth Amendment and, 1432
- Stanford Daily, The*, 1224
- Stanford University, 1375
 Kennedy, A., and, 884
- Stanford v. Kentucky*, 241, 386
 Kennedy, A., and, 885
 O'Connor and, 1127
- Stanley, Robert, 1228, 1521
- Stanley v. Georgia*, 1449, 1521–1522
 family values movement and, 577–578
 free speech and, 1643
 Marshall, T., and, 972
 obscenity and, 1119, 1123, 1228
Osborne v. Ohio and, 1138
Paris Adult Theatre v. Slaton and, 1147
 police power and, 1186
 privacy and, 1220
United States v. 12,200 Reels of Super 8mm Film and, 1677
United States v. Reidel and, 1690–1691
United States v. Thirty-Seven Photographs and, 1677
- Stanley v. Illinois*, 279, 281
- Stanton, Edwin M., 146
 women's suffrage and, 1793
- Stanton, Elizabeth Cady, 519, 1522–1523
 Anthony and, 65
 marriage laws and, 964
 Sumner and, 1585
- Stanton, Henry B., 1522
- Staples, Harold, 1523
- Staples v. United States*, 1523–1524
- Star Chamber, 128, 506
 Lilborne and, 919–920
 obscenity and, 1122
- Star Spangled Banner* (Key), 1486
 “In God We Trust” and, 1066
- Stardust, 306
- Stare decisis, 1524
Bowers v. Hardwick and, 909
 Cardozo and, 248
 Douglas and, 443
 due process and, 459
 duty to obey court orders and, 469
West Virginia State Board of Education v. Barnette and, 595, 1776
- Stassen, Harold, 204
- State
 abridgement, 74
 peace, 1310–1311
- State action, 1469, 1524–1525
 First Amendment jurisprudence and, 927
 limitation, 605–606
- State Board of Censors, 934
- State constitutions, 1535–1536
 amendments to, 1546
 civil liberties and, 1536–1544, 1544–1547
 equal rights and, 1546
 freedom of press and, 1203–1204
 privacy and, 1546
- State Constitutions and the Protections of Individual Rights* (Brennan), 1545
- State courts, 1547
 civil liberties and, 1682
 federal courts v., 866
 Washington state, 1255
- State Department
 Hiss and, 765

- Subversive Activities Control Act and, 77
- State ex rel. Mapes v. District Court*, 1534
- State ex rel. Swann v. Pack*, 1490
- State ex. rel. Weiss v. District Board of School Dist. No. 8 of City of Edgerton*, 131, 1294
- State for Religious Freedom, 1194
- State mottos, government speech and, 702
- State of Florida v. Tommy Lee Andrews*, 430
- State of Washington, Singer v. Hara*, 406
- State Printing Board, 934
- State Street Bank & Trust v. Signature Financial Group, Inc.*, 824
- State Trials*, 646
- State University of New York (SUNY), 899
- State v. Boland*, 1532
- State v. Bullock*, 1532
- State v. Gaynor*, 907
- State v. Greene*, 319
- State v. Hodges*, 1307
- State v. Kaluna*, 1546
- State v. Limon*, 678
- State v. Mann*, 1483
- State v. Massey*, 1490
- State v. McBride*, 454
- State v. Moilen*, 68
- State v. Rothman*, 1532
- State v. Sawyer*, 1532
- State v. Tackitt*, 1532
- State v. Tanaka*, 1532
- State-assisted action test, 45
- Statements of Principles on Academic Freedom and Tenure of 1940* (AACU), 16, 1505–1506
- States
 - AEDPA and, 233–234
 - Bill of Rights and, 112, 968
 - bills of rights, 945
 - death penalty statute, 236, 245
 - debtor's prisons and, 401
 - due process and, 459–460
 - electric chair and, 486
 - ERA and, 521–522
 - establishment clause and, 491, 532–533
 - establishment of religion, 425
 - exclusionary rule and, 555
 - Federal Kidnapping Act and, 665
 - Fifth Amendment and, 618
 - First Amendment and, 73–75
 - freedom of association and, 634
 - Good Friday and, 398–399
 - grand juries and, 704
 - harmless error and, 745
 - holidays, 398–399
 - Holmes and, 772
 - judicial codes of conduct, 860
 - mandatory death sentences and, 952
 - marital rape laws in, 961
 - Megan's Law and, 997
 - miscegenation laws and, 1022–1023
 - non-funding provisions of, 152–153
 - obscenity and, 850
 - pardons and commutations and, 1146
 - police powers of, 801
 - property ownership and, 475–476
 - racial discrimination and, 826–827
 - religious conduct and, 849
 - retribution and, 1329
 - Roe v. Wade* and, 725, 1320, 1321, 1322
 - same-sex marriage and, 1399
 - school prayer and, 1196
 - sovereignty of, 844
 - speech and debate clause and, 917
 - sunshine laws and, 642
 - supremacy clause and, 1588
 - takings clause and, 667–668
 - tort law and, 402
 - welfare programs and, 1396
- States of exception, 1032
- States' rights
 - absolutism and, 27
 - Calhoun and, 214
 - Sedition Act and, 38
 - Stewart, P., and, 1559
- Stateside warrants, 1696–1697
- Status offenses, 813, 1549–1550
- Statute of limitations, 1504
- Statutes
 - common law and, 335–336
 - court injunctions v., 13
 - death penalty, 227, 228, 245
 - mandatory, 236
 - state, 17
- Staub v. Baxley*, 1663
- Stay of execution, 1550–1551
- Steagald v. United States*, 83
- Payton v. New York* and, 1151
- Steel Seizure Case. See Youngstown Sheet & Tube Co. v. Sawyer*
- Steele, James B., 306
- Steele, Richard, 1083
- Steffens, Lincoln, 903–904
- Stein v. State*, 317
- Stem cell research, 1551–1554
 - ethics of, 1553
 - politics of, 1553–1554
- Stenberg v. Carhart*, 10, 1287, 1416, 1554–1555
 - Breyer and, 183
 - Planned Parenthood v. Ashcroft* and, 1174
 - Roe v. Wade* and, 1322
 - Souter and, 1497
 - Thomas and, 1650
- STEP Act. *See* Street Terrorism Enforcement and Prevention Act
- Stephen, Fitzjames, 1329
- Sterilization, 1320. *See also* Eugenic sterilization
 - Buck and, 1600
 - Buck v. Bell*, 772, 1320
 - forced, 772
 - of habitual criminals, 1478–1479
 - Skinner v. Oklahoma* and, 713, 1320
- Stern, Isaac, 603
- Steuart v. Bowles*, 1801
- Steuenberg, Frank, 394
- Steve Jackson Games, Inc. v. United States Secret Service*, 1094
- Stevens, John Paul, 1555–1559
 - Ansonia Board of Education v. Philbrook* and, 1301
 - Apprendi v. New Jersey* and, 76
 - balancing and, 100
 - Bartnicki v. Vopper* and, 113
 - Bethel School District v. Fraser* and, 124
 - Bowers v. Hardwick* and, 169
 - Burger Court and, 198
 - City of Renton v. Playtime Theatres, Inc.* and, 1318
 - on commercial speech, 293

INDEX

- Stevens, John Paul (*cont.*)
44 Liquormart, Inc. v. Rhode Island and, 216
Gardner v. Florida and, 675
Hudson v. Palmer and, 781
Jurek v. Texas and, 866
Kyllo v. United States and, 900
Madsen v. Women's Health Center and, 949
Moore v. East Cleveland and, 1033
O'Connor and, 1126
Payton v. New York and, 1151
Philadelphia Newspapers, Inc. v. Hepps and, 1158
Planned Parenthood of Central Missouri v. Danforth and, 1173
proportional punishment and, 1241
R.A.V. v. City of St. Paul and, 1271
Regents of the University of California v. Bakke and, 1284
Reno v. ACLU and, 1316
Rhode Island v. Innis and, 1331
sexually explicit materials and, 1120
United States v. Eichman and, 590
vulgar speech and, 1248
Wallace v. Jaffree and, 1029, 1737
Webster v. Reproductive Health Services and, 11, 1770
Wolman v. Walter and, 1790
Zablocki v. Redhail and, 1811
- Stevens, Robert, 1773
- Stevens, Thaddeus, 146
Thirteenth Amendment and, 1648
- Stevenson, Adlai
Goldberg and, 697
- Steward Machine Co. v. Davis*, 209
- Stewart, Iain, 1032
- Stewart, Jimmy, 775
- Stewart, Lynne, 1625
- Stewart, Maria, 648
- Stewart, Potter, 1559–1561
Abington Township School District v. Schempp and, 2
Branzburg v. Hayes and, 179
Burger Court and, 198
Chimel v. California, 284–285
Coolidge v. New Hampshire, 365
on death penalty, 245
Engel v. Vitale, 502, 1298
Furman v. Georgia, 233
Godfrey v. Georgia, 691
Gregg v. Georgia, 223, 710
on Jewish Sabbath, 852
Katz v. United States and, 882, 1433
Kingsley International Pictures Corporation v. Regents of the University of New York and, 892
Lucas v. Forty-Fourth General Assembly of Colorado and, 1276
Meiklejohn and, 1000
Monroe v. Pape and, 1031
NAACP v. Button and, 1058
New York Times v. United States and, 1090
North Carolina v. Pearce and, 1112
obscenity and, 1118, 1123
Pell v. Procunier and, 1151
Planned Parenthood of Central Missouri v. Danforth and, 1173
Poe v. Ullman and, 1183
prison interviews and, 1415
privacy and, 1219
Redrup v. New York and, 1282
on reporter's privilege, 664
wall of separation and, 1736
Wolman v. Walter and, 1790
Zablocki v. Redhail and, 1811
- Stewart, Raymond, 315
- Stewart, Tom, 1426
- Stewart, William, 145
Bingham and, 146
- Stimson, Henry L., 617
- Sting, 59. *See also* Entrapment
- Stockton, Julia, 1387
- Stockton, Richard, 1387
- Stogner v. California*
Breyer and, 183
ex post facto laws and, 554
- Stone Court, 1561–1563
- Stone, Geoffrey R., 37
Sedition Act and, 39
- Stone, Harlan Fiske, 175, 1564–1566, 1802
equal protection and, 515
Girouard v. United States and, 1142
Hirabayashi v. United States and, 839
Hughes Court and, 782
martial law and, 494
Minersville School District v. Gobitis and, 591–593, 1630
preferred position rule and, 1199, 1200
on rational basis test, 251
spying and, 1518
United States v. Carolene Products Co. and, 515, 784
- Stone, Lucy, 1522
women's suffrage and, 1793
- Stone, Oliver, 210
- Stone, Sydel, 1563
- Stone v. Graham*, 3, 90, 1314, 1438, 1439, 1563–1564
Burger and, 206
Burger Court and, 200
Lemon test and, 533, 538, 1313
Ten Commandments and, 1314
- Stone v. Powell*
exclusionary rule and, 555
habeas corpus and, 556
habeas corpus restrictions and, 728
- Stonewall riot, 677, 1566–1567
- Stoolies, 757
- Stop and frisk doctrine, 275, 1015, 1431, 1445, 1567–1570. *See also*
Frisking; Stops
Florida v. Royer and, 598
need vs. intrusion test and, 1752
as seizure, 1627
Warren Court and, 1757
- Stop and identify statutes, 894
- Stops
intrusiveness of, 1568
seizures and, 1445–1446, 1568
- Storey, Moorfield, 1570–1571
Buchanan v. Warley and, 191
- Storrs Lectures, 248
- Storrs v. Holcomb*, 1401
- Story, Joseph, 409, 1572
establishment clause and, 532
freedom of speech and, 645
Marshall Court and, 968
personal liberty laws and, 1154
privileges and immunities and, 1231
Vidal v. Girard's Executor and, 1712
in *Wilkinson v. Leland*, 477
- Story of My Life, The* (Darrow), 394

- Stovall v. Denno*
eyewitness identification and, 925
mistaken eyewitness identification and, 956
- Stowe, Harriet Beecher, 7, 1486
- Straight 'Outta Compton* (NWA), 764
- Strategic lawsuits against public participation (SLAPP), 1480–1481
legislation against, 1481
- Stratton v. Watchtower*, 850
- Strauder v. West Virginia*, 225, 228
Buchanan v. Warley and, 191
jury selection and, 871
race-based classifications and, 611
- StreamCast, 1002
- Street Terrorism Enforcement and Prevention Act (STEP Act), 674–675
- Street v. New York*
fighting words and, 587
flag burning and, 589–591
Fortas and, 604
- Strength to Love* (King), 890
- Strengthening the Criminal Laws Against Terrorism, 1149
- Strickland* test, 810–811, 1345–1346
- Strickland v. Washington*, 241
ineffective assistance of counsel and, 810–811, 1346
Powell v. Alabama and, 1192
- Strict liability, 1572–1573
- Strict scrutiny test, 361
free exercise clause and, 625
gun control and, 722
RFRA, 626
RLUIPA and, 626
- Stride Towards Freedom* (King), 890
marches and, 958
- Strikes
Chavez and, 275
Clayton Act and, 1595–1596
Debs and, 399–400
extremism and, 566
Goldberg and, 694
at Pulman Palace Car Company, 1472
U.S. Constitution and, 353
- Stroman v. Colleton County School District*, 1615
- Stromberg v. California*, 48, 74
Butler and, 209
flag burning and, 590
Hughes and, 784, 1364
Hughes Court and, 782
- Strong, William, 514–515
- Strossen, Nadine, 1573–1574
pornography censorship and, 942
- Stroud v. United States*, 195
- Student activity fees
free speech and, 1574–1575
religious speech and, 1229
- Student Athlete Drug Policy, 1707
- Student groups
EAA and, 512
homosexual, 512–513
in public schools, 513
- Student newspapers, 1699
PPA and, 1224
Rosenberger v. University of Virginia and, 1699
viewpoint discrimination and, 1715
Zurcher v. Stanford Daily and, 1823
- Student Non-Violent Coordinating Committee (SNCC), 161, 959, 1500
King and, 890
- Student speech
disruptive, 1575–1576, 1577
in public schools, 1575–1579
Tinker v. Des Moines School District and, 1658–1659
- Students for a Democratic Society (SDS), 278
COINTELPRO and, 1518
- Students of the Seventh Seal, 1461–1462
- Sturges & Burn Mfg. Co. v. Beauchamp*, 1208
- Sturges v. Attorney General*, 483
- Sturges v. Crowninshield*, 968
- Subcommittee on Investigations, 984
- Subjective intentions, 1746
- Subordination, pornography and, 46
- Subpoenas
ad testificandum, 707
compulsory process clause and, 344–345
constraints on, 708
corporate documents and, 730
duces tecum, 707
electronic surveillance and, 487
grand juries and, 707–708
HUAC and, 780
journalistic sources and, 859
with notice, 487
to reporters, 1579–1580
United States v. Washington and, 1697–1698
- Substance Abuse and Mental Health Services, 269
- Substantive crimes, 1420
- Substantive due process, 457, 463–467, 608–609, 713, 928, 993, 1002–1003, 1580–1584
Allgeyer v. Louisiana and, 1633
economic rights and, 1633
Griswold v. Connecticut and, 1634
Lochner v. New York and, 1633
noneconomic, 1582
Peckham and, 1633
Pierce v. Society of Sisters and, 1171
Waite Court and, 1733
Warren Court and, 1759
Washington v. Glucksberg and, 1766
- Subversive Activities Control Act, 77
CPUSA and, 338
- Sugar Act, 54
Otis and, 1139
- Sugar Hill Gang, 764
- Suicide. *See also* Assisted suicide; Physician-assisted suicide
Branch Davidian Church, 1731
colonial charters and, 327
extremism and, 566
as victimless crime, 1709
- Suicide machine, 888
- Sullivan, Kathleen, 495
balancing and, 100
- Sullivan, L.B., 660, 1088
- Sulpicians, 291
- Summary View of the Rights of British America*, A (Jefferson), 845
- Summons, 589
- Sumner, Charles, 1441, 1442, 1584–1585
Brooks and, 146
Civil Rights Act of 1875 and, 300
equal protection and, 514

INDEX

- Sumner, Charles (*cont.*)
 - Storey and, 1571
 - Thirteenth Amendment and, 1648
- Sumner v. Sherman*
 - mandatory death sentences and, 953
- Sumptuary laws
 - Constitutional Convention of 1787 and, 358–360
 - Mason and, 358–359, 360
- Sund v. City of Wichita Falls, Texas*, 164
- Sunday closing laws, 543, 1438–1439, 1539, 1585–1587. *See also*
 - Blue Laws
 - Frankfurter and, 619
 - Warren Court and, 1755–1756
- Sunday mail, 1587–1588
- Sunday Times v. United Kingdom*
 - ECHR and, 638–640
- Sunset provisions, 1148
- Sunshine laws, 994
 - FOIA and, 641–642
 - freedom of press and, 662
 - government operations information and, 20
 - journalistic sources and, 859
 - Privacy Act of 1974 and, 641
- Sunstein, Cass, 1451, 1642
- Suntrust Bank v. Houghton Mifflin*, 1414
- SUNY. *See* State University of New York
- Supermajoritarian escalator, 494
- Supremacy clause, 41, 864, 1588–1589
 - personal liberty laws and, 1154
- Supreme Being, 1693. *See also* God
- Zorach v. Clauson* and, 1720
- Supreme Court
 - ACLU and, 50
 - appellate jurisdiction of, 668
 - Bush, G.H.W., and, 1287
 - Bush, G.W., and, 1323
 - civil liberties and, 1543, 1544
 - constitutionality and, 1328
 - court-packing plan for, 784, 864–865
 - on discrimination, 1278
 - first, 843–844
 - First Amendment and, 651
 - free exercise and, 1587
 - Hand and, 737
 - incorporation doctrine and, 1535
 - Jews on, 853
 - judicial review of, 958
 - jurisdiction of, 868
 - obscenity and, 1123
 - privacy and, 1218–1219
 - proportionality review and, 1242
 - public trials and, 1247
 - rape and, 1261, 1320
 - Rauh and, 1270
 - Rawls on, 1273
 - Reagan and, 1287, 1288
 - red scare response of, 1281–1282
 - religion and, 766–768
 - reproductive rights and, 1322–1324
 - retribution and, 1329
 - right to bear arms and, 1341–1342
 - Roe v. Wade* and, 8–11, 1320–1323, 1367–1369
 - Roosevelt, F., and, 1372, 1373, 1374
 - Sacco and Vanzetti and, 1396
 - Saenz v. Roe* and, 1396
 - same-sex marriage and, 1399
 - Sedition Act and, 39
 - substantive due process and, 1003
 - Sunday closing laws and, 1587
 - Washington Supreme Court and, 1255
 - Watkins and, 1270
 - Supreme Court Compendium, The*, 1416
 - Supreme Court in United States History, The* (Warren, C.), 1712
 - Supreme Court of California
 - in *Regents of the University of California v. Bakke*, 1284
 - Richmond Newspapers, Inc. v. Virginia* and, 884, 133
 - Traynor and, 884
 - Supreme Court of Canada, 46
 - Supreme Court of Minnesota, 1271, 1284
 - Supreme Court of Ohio, 1260
 - Supreme Court of Washington, 1255
 - Surveillance. *See also* Dogs, sniffing; Electronic surveillance;
 - Helicopter surveillance; Technology
 - CIFA and, 1520
 - by data mining, 1519
 - Eagle Eyes and, 1520
 - Florida v. Riley* and, 597
 - Homeland Security and, 1519
 - Hoover and, 775–776
 - intrusion and, 828
 - invasion of privacy and, 829
 - Kyllo v. United States* and, 899–900
 - PATRIOT Act and, 85
 - pen register, 487
 - TIPS and, 1520
- Survival Guide*, 1461
- Survival of the fittest. *See* Evolution
- Susan S. v. Israels*, 1534
- Suspect classification
 - compelling state interest and, 340
 - equal protection clause and, 513
 - fundamental rights and, 517–518
- Suspects
 - armed and dangerous, 1752
 - fair treatment of, 1455
 - questioning of, 1445, 1452–1453
 - unarmed, 1622
- Suspension clause, 495
- Sutherland, Arthur, 258
 - Powell v. Alabama* and, 1192
- Sutherland, George, 1141, 1595
- Stone and, 1564
 - United States v. Macintosh* and, 343
- Suttee, 396
 - Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. United States* and, 908
- Sutton, Percy, 1062
- Suyatt, Cecilia, 974
- Swaggart, Jimmy, 853–854
- Swaggart Ministries v. California Board of Equalization*, 853–854, 1629
- Swain, Robert, 1590
- Swain v. Alabama*, 114, 225, 1590
 - jury trials and, 877
 - peremptory challenges in, 873
- Swann v. Charlotte-Mecklenburg Board of Education*, 187, 1443
 - Burger and, 206
- Swann v. Charlotte-Mecklenburg School District*, 517
- Swearinger, Dan K., 1592
- Swearinger v. United States*, 1592

Sweatt, Heman Marion, 498
Sweatt v. Painter
Brown v. Board of Education and, 186
 Emerson and, 498
 equal protection and, 516
 Frank and, 616
Plessy v. Ferguson and, 1181
 segregation and, 972
 Vinson Court and, 1720
 Swedish Code of Judicial Procedure, 686
 Sweet, Ossian
 Darrow and, 394–395
 Murphy and, 1047
 Sweezy, Paul, 498
Sweezy v. New Hampshire, 17–18
 compelling state interest and, 340
 Emerson and, 498
Swift v. Tyson, 1572
 Switzerland, euthanasia and, 547
 Syllabus of Errors, 253
Symbolic Crusade (Gusfield), 1740
 Symbolic speech, 74, 1592–1594
 content-neutral regulation and, 363–364
 draft card burning and, 449–450
 establishment clause and, 531
 expressive conduct v., 589–591
 flag burning and, 589–591
 NAACP v. Alabama and, 1057
 national security and, 1074
 no endorsement test and, 1103
 O'Brien test and, 450
 Spence v. Washington and, 589–591
 Texas v. Johnson and, 590
 United States v. O'Brien and, 590, 1113
 Synagogue Council of America (SCA), 852
 Syndicalism, 67–69, 1761–1762
 criminal, 178
 DeJonge v. Oregon and, 411
 hate crimes and, 303
 incorporation doctrine and, 804
 Whitney v. California and, 1780
 World War II and, 1800
 Syracuse American Legion, 582
 Syracuse University, 582
System of Freedom of Expression, The (Emerson), 498
 SZEA. *See* Standard Zoning Establishment Act

T

Taft Court, 1595–1601
 Taft, William Howard, 1600, 1601–1602
 antitrust and, 1472
 Carroll v. United States and, 251
 Frankfurter and, 617
 Hand and, 735–736, 737
 La Follette and, 902–903
 Long and, 934
 Olmstead v. United States and, 1129
 Stone and, 1564
 Taft-Hartley Act of 1947, 218, 1602–1603
 CPUSA and, 338
 freedom of association and, 635
 Goldberg and, 694
 Vinson and, 1722
 Taguba, Antonio, 15
Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency
 Breyer and, 183
 economic regulation and, 474
Takahashi v. Fish and Game Commission, 1720
 Takings clause, 474–475, 1603–1606
 Breyer and, 183
 Douglas and, 444
 Dred Scott v. Sandford and, 1484
 Fifth Amendment and, 1582
 Fuller Court and, 667–668
 Pennsylvania Coal Co. v. Mahon and, 479
 Taliban
 Guantanamo Bay and, 715–716
 Hamdi v. Rumsfeld and, 842
 Lindh and, 790
 prisoners, 16
Tallahassee Democrat, 229
Talley v. California, 62
 Talmud, 93
Talton v. Mayes
 ICRA and, 807
 Taney Court, 1606–1607
 contract clause and, 477
 Dred Scott v. Sandford and, 790–791, 1635
 slavery and, 1487
 Taney, Roger B., 477, 1606
 Dred Scott v. Sandford and, 451, 1484
 Emancipation Proclamation and, 493
 Fugitive Slave Act and, 1589
 on gun ownership, 721–722
 judicial review and, 864
 Lincoln and, 923–924
 Tangipahoa Parish Board of Education, 377
Tanner v. Oregon Health Sciences University, 1409
 Taoism, 1619
 Tappan, Arthur, 45
 Tappan, Lewis, 45
 Targets, grand jury, 706
 Tariff Act of 1930, 1689
 Tariff of 1828, 214
 Tariff of Abominations, 832
 Tax(es)
 on advertisements, 714
 on banks, 988
 Christianity and, 1309
 for clergy salary, 947–948
 deductions, 1528
 disestablishment movement and, 425–426
 Flast v. Cohen and, 596
 foreign income and, 355
 free exercise and, 1685
 gambling and, 1684
 Harper v. Virginia State Board of Elections and, 745–746
 Hernandez v. Commissioner of Internal Revenue and, 761–762
 income, 479
 investigations, 981–982
 Jehovah's Witnesses and, 1390, 1561
 on knowledge, 715
 license, 599–600
 on liquor, 1684
 litigation and, 596
 Loan Association v. Topeka and, 927
 occupational, 960
 Otis and, 1138

INDEX

Tax(es) (*cont.*)

Pickering v. Board of Education and, 1166
poll, 745–746
privileges and immunities and, 1231
religion and, 108–109, 425–426, 766
for religious activities, 1423
religious deductions and, 1045–1046
religious organizations and, 23
same-sex marriage and, 1401
stamps, 960
of Tories, 53
United States v. Lee and, 629, 1685
Whiskey Rebellion and, 733

Tax exemptions

Amish and, 1685–1686
Board of Education, Kiryas Joel Village School District v. Grumet and, 158
Bob Jones University v. United States and, 629
Church of Scientology and, 287, 703
of churches, 1539
Committee for Public Education and Religious Liberty v. Nyquist and, 333
Follett v. Town of McCormick and, 599–600
Hernandez v. Commissioner of Internal Revenue and, 761–762
House Select Committee to Investigate Tax-Exempt Foundations and, 635
Jimmy Swaggart Ministries v. Board of Equalization of California and, 853–854
religion and, 539, 1607–1608, 1629
Swaggart Ministries v. California Board of Equalization and, 1629
Texas Monthly v. Bullock and, 1628–1629
of veterans, 1673
Walz v. Tax Commission and, 767, 1628–1629, 1738–1739

Taxing and spending clause, 160

Taxpayers

establishment clause and, 1608–1610
Witters v. Department of Services and, 1789
Zelman v. Simmons-Harris and, 1812

Taylor, Charles Allen, 1270

Taylor, Harriet, 1010

Taylor, Harris F., 1448, 1792–1793

Taylor, Jasper, 1040

Taylor, John, 847

Taylor, Telford, 80

Taylor v. Illinois, 407, 1610

compulsory process clause and, 345

Michigan v. Lucas and, 1005

Taylor v. Louisiana, 1610–1611

jury selection and, 871

Taylor v. Mississippi, 595

Teachers

academic freedom and, 16–17
Ambach v. Norwick and, 44
free speech and, 18–19, 1611–1615
as government employees, 1611

Teaching Tolerance, 1500

Teague v. Lane, 208

habeas corpus restrictions and, 728

Teamsters, 769. *See also* Labor unions

Teapot Dome oil field, 904

Technology

anonymity and, 63
commercial speech and, 330
internet and, 818–819
invasion of privacy and, 829

monitoring, 486–489

national security and, 1074

Telecommunications, 336–337

Telecommunications Act of 1996

Cable Act of 1992 and, 211–212

CDA and, 336–337

FCC and, 579

obscenity and, 1124

Telemarketers, 829

Telephone booths, surveillance of, 1430

Telephone calls, intrusion and, 828

Telephone Consumer Protection Act, 347

Telephone records, 1430

of journalists, 1580

privacy and, 1220

United States v. Miller (1976), 1688

Telephones

harassment, 778

privacy and, 488

reasonable expectation of privacy and, 882

Television. *See also* Broadcasters; Cable television

Army-McCarthy Hearings and, 309

cable, 1279

cameras in courtrooms and, 218

Chandler v. Florida and, 265

closed-circuit, 976

copyright infringement and, 1001–1002

in court rooms, 662

Estes v. Texas and, 545

fairness doctrine and, 573

FBI and, 774–775

McCarthy and, 984–985

satellite, 211

violence, 1317

Temperance movement, 65, 1387, 1740

Prohibition and, 1238

Stanton and, 1522

Temporary restraining order (TRO), 1075

Cable News Network, Inc. v. Noriega and, 1076

New York Times v. United States and, 1089

Temporary visitors, noncitizens v., 40

Ten Commandments

ACLU and, 49

Americans United and, 57

Christian nation and, 343

coercion and, 1101

court displays of, 1539

DeMille and, 1620

establishment clause and, 1622

FOE and, 1620

in judicial buildings, 861

King James Bible and, 1563

Lemon test and, 533, 536, 538

Montesquieu and, 1032

no endorsement test and, 1103

O'Connor and, 1127

public buildings and, 1620–1622

in public school, 90

Stone v. Graham and, 1314, 1439, 1563

Van Orden v. Perry and, 967

Ten Commandments, The, 1620–1621

Tennessee

Butler Bill and, 1425

Rose v. Locke and, 1376

snake-handling and, 1490

- State v. Hodges* in, 1307
- Tennessee v. Garner*, 1622
- Tennessee v. Lane*, 193, 1356
 - enforcement power and, 613
 - Stevens and, 1557
- Tennessee v. Scopes*, 376
- Tennessee Valley Authority (TVA), 133
- Tenth Amendment, 459
 - compulsory vaccination and, 340
 - Federal Maternity Act of 1921 and, 1609
 - incorporation doctrine and, 803
 - Madison and, 142, 1328
 - Naim v. Naim* and, 1059
 - Sedition Act and, 38
- Tenure, academic freedom and, 16–17, 1509
- Tenure of Office Act, 146
- Term limits, 1557
- Terminer, 458
- Terminiello, Arthur, 654
- Terminiello v. Chicago*, 834
 - fighting words and, 587
 - free speech and, 1512
 - incitement of criminal activity and, 654
 - Vinson and, 1722
- Terrace v. Thompson*, 1108
- Terri's Law, 87
- Terrorism
 - ACLU and, 50
 - AEDPA and, 728
 - after 9/11, 1519
 - airport searches and, 34
 - anti-anarchy legislation and, 68–69
 - capital punishment and, 233–234
 - civil forfeiture and, 295
 - civil liberties and, 790, 1622–1627
 - compulsory vaccination and, 837
 - emergency powers and, 496
 - extremist groups and, 565–567
 - habeas corpus and, 552
 - hearsay evidence and, 758
 - lone wolf, 565–566
 - material support for, 1624
 - military law and, 1007
 - military tribunals and, 1009
 - Muslims and, 1053–1054
 - racial profiling and, 791–792
 - U.S. Constitution and, 355
 - USA PATRIOT Act and, 1148–1150
- Terrorism Information and Prevention System (TIPS), 1520
- Terry, Randall
 - FACE Act and, 633
 - Operation Rescue and, 1134
- Terry v. Adams*, 1721
- Terry v. Ohio*, 33, 1431, 1445, 1627
 - criminal profiling and, 1236
 - DWI and, 469
 - Illinois v. Wardlow* and, 794–795
 - Michigan v. Summers* and, 1006
 - Minnesota v. Dickerson* and, 1015
 - need vs. intrusion test and, 1752
 - probable cause and, 894
 - protective sweep and, 976
 - racial profiling and, 1237
 - stop and frisk and, 1567–1568
 - Warren Court and, 1757–1758
- Test and Corporation Acts, 504
 - English Toleration Act and, 504
- Test oath cases, 1627–1628
 - Warren Court and, 1756
- Testify, failure to, 710
- Testimony
 - expert, 110
 - eyewitness identification and, 567–568
 - false, 1061
 - jailhouse informants and, 838
 - previous, 1040
 - self-incrimination and, 1453–1454
 - in sexual abuse cases, 976–977
- Tet Offensive, 697
- Teterud v. Gillman*, 291
- Texas
 - executions in, 242
 - lynchings in, 1774
 - NAACP and, 1064
 - newsroom searches and, 1094
 - Plyler v. Doe* and, 1182
 - school dress regulations in, 1307
 - undocumented migrants and, 1675
- Texas Constitution
 - Lawrence v. Texas* and, 908, 1328
- Texas Department of Community Affairs v. Burdine*, 197
- Texas Department of Corrections, 878–879
- Texas Education Agency, 878
- Texas Monthly v. Bullock*, 1628–1629
 - Blackmun and, 1628–1629
 - Brennan and, 1628–1629
 - establishment clause and, 530
 - Lemon* test and, 539
 - O'Connor and, 1628–1629
 - tax exemption and, 1607
- Texas Rangers, 1732
- Texas v. Johnson*, 361
 - content-neutral regulation and, 363
 - flag burning and, 590, 1516
 - Kennedy, A., and, 885
 - O'Brien* test and, 450
 - Scalia and, 1417
 - symbolic speech and, 1593
 - United States v. O'Brien* and, 1114
 - viewpoint neutrality and, 657
- Textile Workers Union v. Lincoln Mills of Alabama*, 695
- Thalidomide, 8
- Thanatron, 1165
- Thanksgiving Day, 399
 - establishment clause and, 532
 - proclamations, 767
- Thatcher, Margaret, 1086
- Thayer, James B., 196
- Theistic creationism, 1616
- Therault, Harry, 290
- Therault v. Carlson*, 290
- Therault v. Silber*, 290, 291
- Thermal imaging, 1430
 - Kyllo v. United States* and, 899–900
 - privacy and, 1220
 - reasonable expectation of privacy and, 882
 - technology monitoring and, 488
- Thiel v. Southern Pacific Co.*
 - venire and, 871

INDEX

- Third Amendment
 - Constitutional Convention of 1787 and, 358
 - negative rights and, 144
 - quartering of troops and, 1252, 1253
- Third parties
 - file sharing and, 823
 - financial records and, 1687–1688
 - information and, 1688
 - Payton v. New York* and, 1151
 - United States v. Miller* (1976) and, 1687–1688
 - Wilson v. Layne* and, 1783
 - Zurcher v. Stanford Daily* and, 1823
- Third Reich, 494
- Thirteenth Amendment, 71, 139, 228, 1524, 1647–1649
 - Chase Court and, 272
 - Civil Rights Act of 1875 and, 300
 - Civil Rights Cases* and, 301
 - Corrigan v. Buckley* and, 368–369
 - Dred Scott v. Sandford* and, 452, 864
 - Emancipation Proclamation and, 493–494
 - Espionage Act of 1917, 652
 - extremist groups and, 564
 - federalization of criminal law and, 581
 - Fourteenth Amendment and, 605
 - Harlan, I. and, 738
 - Holmes and, 770
 - marriage laws and, 964
 - noncitizens and, 1105–1106
 - Plessy v. Ferguson* and, 1181
 - privileges and immunities and, 1231
 - Slaughterhouse Cases* and, 1482
- Thomas, Clarence, 1650–1652
 - Bowers v. Hardwick* and, 1222
 - Central Hudson* test and, 257
 - coercion test and, 540
 - on cross burning, 382
 - Elk Grove Unified School District v. Newdow* and, 490–491, 1177
 - ex post facto laws and, 213
 - Hamdi v. Rumsfeld* and, 731
 - Hill and, 616
 - Hill v. Colorado* and, 13
 - on incorporation, 533
 - Lawrence v. Texas* and, 909
 - Mitchell v. Helms* and, 1025
 - NAACP and, 1064
 - National Endowment for the Arts v. Finley* and, 1065
 - non-preferentialism standard and, 1110
 - Pennsylvania v. Scott* and, 1153
 - Pledge of Allegiance and, 1177
 - privileges and immunities and, 1233
 - Rosenberger v. University of Virginia* and, 1298
- Thomas Road Baptist Church, 575
- Thomas v. Collins*, 1390, 1562, 1800
- Thomas v. Review Board of Indiana*, 23, 168, 1470, 1477
 - free exercise clause and, 629
 - social security and, 1686
 - unemployment benefits and, 629
- Thomas-Hill confirmation hearings, 616
- Thompson, Karen, 1407
- Thompson v. Oklahoma*, 386
 - Eighth Amendment and, 232
- Thoreau, Henry David
 - Garrison and, 676
 - Jefferson on, 847
 - Son of Sam Law and, 361
- Thornburg v. Gingles*, 1277
- Thornburgh v. Abbott*, 1651–1652
 - prisoners and, 1217
- Thornburgh v. American College of Obstetricians and Gynecologists, Pennsylvania Section*, 9, 1652
 - abortion and, 324
 - Colautti v. Franklin* and, 324
- Thornhill v. Alabama*
 - incitement of criminal activity and, 654
 - Murphy and, 1048
 - picketing and, 1169
- Threats
 - free speech and, 1652–1653
 - hostile environment harassment and, 778
- Three strikes law, 277, 1646, 1653–1655
 - crime reduction and, 1654
 - Lockyer v. Andrade* and, 386
 - policy considerations for, 1654–1655
 - prison population and, 1213–1214
 - proportional punishment and, 1241
- Thugs of India, 908
- Thurmond, Strom, 118
- TIA. *See* Total Information Awareness
- Tibbs, Delbert, 1655
- Tibbs v. Florida*, 1655
- Tiedeman, Christopher, 1187
- Tierney, Kevin, 394
- Tileston v. Ullman*, 1655–1656
 - right to medical counseling and, 712
- Tileston, Wilder, 1655
- Till, Emmet, 548
- Tillich, Paul, 410
- Tillinghast and Collins, 261
- Tillman Act of 1907, 193, 218
 - free speech in private corporations and, 632
- Tilton, Theodore, 649
- Tilton v. Richardson*, 1529, 1656–1657
 - Americans United and, 56
 - Hunt v. McNair* and, 785
- Tilton v. Roemer*, 200
- Time Film Corp. v. Chicago*, 1042
 - MPAA and, 1043
- Time, Inc. v. Firestone*, 1243
- Time, Inc. v. Hill*, 1657
 - Douglas and, 447
 - false light invasion of privacy and, 574
 - Fortas and, 604
- Time Magazine*
 - Coleman v. Thompson*, 324–325
 - Experimental College and, 998
 - on Hoover, 776
 - King and, 890
 - Murray and, 1050
- Time, place, and manner (TPM), 362–363, 1657–1658,
1664, 1821
 - First Amendment and, 818
 - intermediate scrutiny test and, 818
 - Perry Education Association v. Perry Local Educators' Association* and, 417
 - picketing and, 1167–1168
 - plenary power doctrine and, 1179
 - restrictions of, 1419
 - Turner Broadcasting v. F.C.C.*, 450
 - United States v. O'Brien* and, 1113

- Time shifting, 1001–1002
- Time Warner, Inc.
 - America Online and, 45
 - Natural Born Killers* and, 210
- Time-Life Corporation, 765
- Times Mirror Co. v. California*, 1800
- Timmendequas, Jesse, 997
- Tinker v. Des Moines Independent Community School District*, 15, 163, 282, 1575–1576, 1658–1659
 - Bethel School District v. Fraser* and, 124
 - First Amendment and, 284
 - Fortas and, 604
 - Hazelwood School District v. Kuhlmeier* and, 756
 - military law and, 1006
 - symbolic speech and, 1593
 - teacher speech and, 1613
 - Veronica School District v. Acton* and, 1707
 - Warren Court and, 1754
- TIPS. *See* Terrorism Information and Prevention System
- Tison v. Arizona*, 231, 241
 - proportionality and, 245
- Tithes, 1251
- Title III, discrimination and, 1659
- Title VII statute, 1659–1660
 - religious discrimination and, 422, 1299–1303
 - Trans World Airlines, Inc. v. Hardison* and, 1300
- To the American People: A Report upon the Illegal Practices of the United States Department of Justice*, 261
- Tobacco
 - price fixing, 730
 - War on Drugs and, 1739
- Todd, Dolley Payne, 944
- Todd, Mary, 922
- Tokyo Rose, 1666
- Toleration Act of 1649, 143, 508
 - Cromwell and, 382
 - Glorious Revolution and, 691
- Toleration Act of 1819, 426
- Tollett v. Henderson*, 1000
- Tolowa Indians, 939
- Tolstoy, Leo, 1039
- Tony and Susan Alamo Found. v. Secretary of Labor*, 570–571, 1660–1661
- Toomer v. Witsell*, 1231
- Torcaso, Roy, 1661
- Torcaso v. Watkins*, 119, 426, 1315, 1661–1662
 - evolution and, 1619
 - free exercise clause and, 626
 - McDaniel v. Paty* and, 989
 - Mozert v. Hawkins County Board of Education* and, 1044
 - Warren Court and, 1756
- Tories
 - American Revolution and, 53–54
 - freedom of press and, 1203
 - Glorious Revolution and, 690
 - Republicans and, 36
- Tornillo, Pat, 1003
- Torts
 - damages and, 404
 - defamation and, 402
 - free speech and, 1450
 - freedom of press and, 661
 - infliction of emotional distress and, 811
 - intrusion and, 827–828
 - libel v., 661
 - Mormons and, 1036
 - negligence and, 1468
 - news-gathering, 661
 - privacy and, 827–828, 1225
- Torture. *See also* Coercion; Confessions
 - Abu Ghraib and, 16
 - Amnesty International and, 59, 60
 - Ashcroft and, 85
 - Brown v. Mississippi* and, 315
 - CAT and, 89
 - chain gangs and, 263
 - Chambers v. Florida* and, 263
 - CIA and, 258
 - confessions and, 1758
 - convention against, 88–89
 - Dershowitz and, 416–417
 - extremist groups and, 567
 - false confessions and, 574
 - at Guantanamo Bay, 716
 - Hopt v. Utah Territory* and, 1017
 - proportional punishment and, 1241
 - sleep deprivation, 316
 - United States v. Toscanino* and, 666
 - Ziang Sung Wan v. United States* and, 1018
- Total Information Awareness (TIA), 1519
- Totality of circumstances test, 1504
- Totten v. United States*, 311
- Toward a General Theory of the First Amendment* (Emerson), 498
- Townshend Acts, 54, 1750
 - Boston Massacre and, 166
 - Writs of Assistance Act and, 1803
- Toy, James, 1792
- TPM. *See* Time, place, and manner
- Tracking beacons, 488
- Trade secrets, 824
- Trademarks
 - establishment clause and, 1662–1664
 - infringement on, 1662
 - intellectual property and, 816, 823–824
- Trading with the Enemy Act of 1917
 - free speech and, 1794
 - Wilson, W., and, 1784
- Traffic stops
 - Miranda warnings and, 122–123
 - racial discrimination and, 1256
- Traffic violations, 470
- Tranquility, 828–829
- Trans Union, 569
- Trans Union v. FTC*, 570
- Trans World Airways (TWA), 1300
- Trans World Airways, Inc. v. Hardison*, 1300–1301
 - labor unions and, 1301
- Transactional immunity, 1453, 1454
- Transparency, 20
- Travel, right to, 1354–1355
 - Aptheker v. Secretary of State* and, 697
 - freedom of association and, 886–887
 - implied rights and, 801
 - Kent v. Dulles* and, 887
 - Lambert v. California* and, 905
- Traynor, Roger, 884
- Treason, 1664–1665
 - bill of attainder and, 134
 - capital punishment and, 223

INDEX

- Treason (*cont.*)
Constitutional Convention of 1787 and, 359, 1263
death penalty and, 245
Ex parte Vallandigham and, 553
habeas corpus and, 731
Lilborne and, 920
Marshall, J., and, 970
Miranda warnings and, 102
pardons and, 1146
Poodry v. Tonawanda Band of Seneca Indians
and, 809
proportionality review and, 1242
test oaths and, 1628
World War II and, 1800
Treason clause, 1665–1666
Treasury Department
Jackson, R. and, 833
Prohibition and, 1239
Treaties, extradition, 563
*Treatise on the Constitutional Limitations Which Rest Upon the
Legislative Power of the United States of the American Union,
A* (Cooley), 1186
Treatise on the Limitations of Police Power in the United States
(Tiedeman), 1187
Treaty of Versailles
La Follette and, 903
Taft and, 1601
Wilson, W., and, 1785
Trelawny, Jonathan, 1667
Trial by jury, 73
Boston Massacre trial and, 166
Boykin v. Alabama and, 172
Constitutional Convention of 1787 and, 358
Crane v. Kentucky and, 375
North Carolina Constitution of 1776, 1111
Virginia Declaration of Rights and, 1723
waiving of, 1478
Trial, right to, 875–877
Constitutional Convention of 1787 and, 358, 1263,
1264, 1268
Dorr v. United States and, 740
Duncan v. Louisiana, 743
incorporation doctrine and, 803
jury selection and, 871
Reid v. Covert and, 1291
Trials. *See also* Civil trials; Joint trials; Judicial proceedings; Right
to fair trial; Speedy trials
access to, 20
adjudicating guilt and, 164
bifurcated, 227, 231–232
bill of attainder v., 135
burden of proof and, 195–197
in civil cases, 1666–1667
clothing and, 544
extradition and, 563–564
military, 551–552
multiple, 112–113, 122–123
Nebraska Press Association v. Stuart and, 1082
overseas, 354–355
postponement of, 632
press and, 1561
probate, 212
public, 1247–1248
speedy, 76, 1516–1518
state bills of rights and, 137–138
U.S. Constitution and, 352–353
venue of, 632
Tribal courts, 808–809
Tribe, Laurence, 169, 314, 1667–1668
free exercise clause and, 410
picketing and, 1168
Trickery. *See* Deceit
Triennial Act of 1694, 506
Glorious Revolution and, 691
Trilling, Lionel, 1051
Trimester framework, 1770
Roe v. Wade and, 1220
TRIPs, 824
TRO. *See* Temporary restraining order
Trop v. Dulles, 385, 1668–1669
cruel and unusual punishment clause and, 387
denationalization and, 384
expatriation and, 562
Trotskyite Socialist Workers Party, 1488
Troxel v. Granville, 279, 281
Fourteenth Amendment and, 1003
Souter and, 1497
substantive due process and, 466
Truancy, 1549
Truax v. Corrigan, 465, 1595
Taft and, 1601
Truax v. Raich
Hughes and, 783
True threat standard
group libel and, 715
Trujillo, Frank, 597
Truman, Harry S.
Americans United and, 56
Biddle and, 134
Burton and, 208
Clark, T., and, 308
classified information and, 310
Cold War and, 1377
CPUSA and, 338
Dawson and, 397
Feiner v. New York and, 582
Fortas and, 603
freedom of association and, 635
Loyalty and Security Program of, 1269
loyalty program of, 603
Taft-Hartley Act and, 1602
Vatican and, 56
Vinson and, 1721
Vinson Court and, 1718
Youngstown Sheet & Tube Co. v. Sawyer and, 835
Trumbull, Lyman
Civil Rights Act of 1866 and, 299
Thirteenth Amendment and, 1648
Trumpet of Conscience, The (King), 890
Trusts, 634
Truth
defamation and, 404
as defense, 887
free speech and, 1450
Holmes on, 994
marketplace of ideas theory and, 962–963
Mill and, 1011
rights of accused and, 1359–1361
in sentencing, 1458
theory, 1641

Truth, Sojourner, 520
 Truth teams, 1134
 Truth-in-advertising, 1450
 Tucker, C. DeLores, 764
 Tucker, Jerry, 1270
Tucker v. Texas, 1562
 Tudor, Mary, 621
 Tuition, 1233
 Tulane University Law School, 934
 Tule Lake camp, 840
Turney v. Ohio
 Connally v. Georgia and, 347–348
 due process and, 1580
 fee system and, 799
Turner Broadcasting System v. Federal Communications Commission, 100, 1279, 1669–1670
 FCC licensing and, 663
 forced speech and, 601
 O'Brien test and, 450
 Turner, Francis, 1667
 Turner, Stansfield, 1491
Turner v. Murray, 235
Turner v. Safley, 1399, 1651, 1670–1671
 free exercise and, 1215
 Native Americans and, 1079
 O'Lone v. Estate of Shabazz and, 1130, 1131
 Pell v. Procunier and, 1152
 prisoners and, 1217
 Zablocki v. Redhail and, 1811
Turner v. Williams, 668
 Turner, W. Fred, 683
Turtle Mountain Judicial Board v. Turtle Mountain Band of Chippewa Indians, 808
 Tushnet, Mark
 emergency powers and, 495
 on Marshall, T., 973
 Tushnet, Rebecca, 572
 TVA. *See* Tennessee Valley Authority
 TWA. *See* Trans World Airways
 Twain, Mark, 323
 Twenty-First Amendment
 California v. LaRue and, 216
 Prohibition and, 1238
 War on Drugs and, 1742
 Twenty-Fourth Amendment
 poll taxes and, 745–746
 on voting rights, 1359
 Twenty-Seventh Amendment, 142
 Twenty-Sixth Amendment, 581
 Twining, Albert C., 740
Twining v. State of New Jersey
 Chambers v. Florida and, 263
 due process clause and, 1018
 Frankfurter and, 618
 Fuller Court and, 667
 Harlan, I. and, 740
 incorporation doctrine and, 803
 overruling of, 740
 privileges and immunities clause and, 607
 procedural due process and, 463
 Twins, 313
Two Guys from Harrison-Allentown v. McGinley. *See* Sunday closing laws
 2 Live Crew, 1414
 censorship of, 765

 fair use doctrine and, 572
Two Treatises on Government (Locke), 507, 931, 1630
 Tyler, John, 214
 Tyndale, William, 128
 Tyranny
 individual liberty and, 1026
 Locke and, 931
 of majority, 1027–1028

U

UAW. *See* United Auto Workers
 UDHR. *See* Universal Declaration of Human Rights
 UFW. *See* United Farm Workers
 UFWOC. *See* United Farm Workers Organizing Committee
 Ullman, Abraham S., 1655
Ullmann v. United States, 1454
 Ullmann, William, 1454
Ulster County Court v. Allen, 1673
Ulster Gazette, 733
Ulysses (Joyce), 48
 censorship and, 304
 obscenity and, 659
 Umbilical cords, 1552
 UMW. *See* United Mine Workers Union
 Unalienable rights, 402. *See also* Natural rights
 due process and, 457–458
 Unarmed suspects, 1622
 Unborn Victims of Violence Act, 1323
Uncle Tom's Cabin (Stowe), 7, 1485, 1486
 Unconstitutional conditions, 1673–1674
 “Under God,” 259
 Underage liquor violations, 1549
 Understanding clauses, 1442
 Underwood, James Lowell, 1309
 Undocumented migrants, 1674–1676. *See also* Alien(s)
 education and, 41
 interdiction of, 390
 noncitizens v., 40
 Plyler v. Doe and, 1182
 Undue burden analysis, 1770
 Planned Parenthood v. Casey and, 1174
 Unemployment benefits
 Employment Division, Department of Human Resources of Oregon v. Smith and, 630
 Frazee v. Illinois Department of Income Security and, 629
 Hobbie v. Unemployment Appeals Commission and, 629
 religion and, 629
 religious accommodation and, 23
 Thomas v. Review Board and, 629
 Unenumerated constitutional liberties
 Souter and, 1497
 UNESCO. *See* United Nations Educational, Scientific and Cultural Organization
 Ungovernability, 1549
 Unicorn Killer, 563
 Uniform Code of Military Justice, 355
 Abu Ghraib and, 15
 sodomy and, 436
 Uniform Militia Act of 1792, 1341
 Uniform Rule of Naturalization, 294
 Uniform Trade Secrets Act, 824
 Union of Russian Workers
 Palmer and, 1144

INDEX

- Union Pacific Railway Co. v. Botsford*
privacy and, 1218
Unions. *See* Labor unions
Unique delay, 991
Unitarians
Baldwin and, 101
Maryland Toleration Act and, 975
United and Strengthening America by Providing Appropriate
Tools Required to Intercept and Obstruct Terrorism. *See* USA
PATRIOT Act
United Auto Workers (UAW)
ERA and, 520
Rauh and, 1269, 1270
strike by, 1269
United Farm Workers (UFW), 274
United Farm Workers Organizing Committee (UFWOC), 275
United Klans of America, 1501
bankruptcy of, 1502
United Mine Workers of America v. Coronado Coal Company, 1601
United Mine Workers Union, 1270, 1390
United Nations (UN)
Anslinger and, 64
birth control and, 148
Declaration of Human Rights, 254
Goldberg and, 693, 697
High Commissioner for Human Rights, 638
Hiss and, 765
International Criminal Court, 59
United Nations Charter, 1639
United Nations Commission on Human Rights, 638
United Nations Convention Against Torture and Other Cruel,
Inhuman or Degrading Treatment (CAT), 89
Guantanamo Bay and, 716
United Nations Convention of the Rights of the Child, 1223
United Nations Convention Relating to the Status of
Refugees, 88
United Nations Educational, Scientific and Cultural Organization
(UNESCO), 1676
Biddle and, 134
Naim v. Naim and, 1060
United Nations Human Rights Committee, 638
United Nations Protocol Relating to the Status of
Refugees, 88
United Nations Standard Minimum Rules for the Treatment of
Prisoners
chain gangs and, 263
United Nations Subcommittee on Freedom of Information and of
the Press, 1676
United Order, 1036
United Public Workers v. Mitchell
free speech and, 1361
Hatch Act and, 748
United States
prison population in, 1213–1214
same-sex unions in, 1404
seditious libel in, 1440
*United States Civil Service Commission v. National Association of
Letter Carriers*, 1515
Hatch Act and, 748
United States Code
fair use and, 1414
Title 50, 449
United States ex rel Bilokumsky v. Tod, 1018
United States ex rel. Knauff v. Shaughnessy, 460, 461, 1530
“United States is a Christian Nation, The” (Brewer), 343
United States Magazine and Democratic Review, 846–847
United States Steel, 1471
United States v. 92 Buena Vista Avenue, 1678
United States v. 12,200 Reels of Super 8mm Film, 1676–1677
United States v. Abrams, 312
United States v. Agurs, 1678–1679
Brady v. Maryland and, 173
exculpatory evidence and, 899
United States v. American Library Association, 99
Breyer and, 183
CIPA and, 660
government funding of speech and, 701
obscenity and, 1125
United States v. Amistad, 1606–1607
United States v. Armstrong, 1745
cocaine laws and, 423
United States v. Ash, 1679
Kirby v. Illinois and, 892
right to counsel and, 1344, 1697
United States v. Wade and, 1697
United States v. Awadallah, 1095
United States v. Bagley, 899
United States v. Bajakajian, 130
United States v. Ballard, 1476–1478
CNS and, 291
fallout from, 1477–1478
United States v. Balsys, 1679–1680
United States v. Bauer, 1262
United States v. Becker, 509
United States v. Belmont, 1801
United States v. Bennett, 1286, 1689
United States v. Bhagat Singh Thind, 1599
United States v. Bland, 1141
United States v. Booker, 76, 1460
Scalia and, 1417
Sixth Amendment and, 1024
Stevens and, 1558
United States v. Brignoni-Ponce, 380, 1680
checkpoints and, 275–276
profiling and, 1623
United States v. Butler, 782
United States v. Calandra, 1680–1681
United States v. Carolene Products Co., 48, 250–251, 1582
Brandeis and, 175
civil liberties and, 1634
economic rights and, 479
equal protection and, 515
Footnote Four and, 617, 1635
Frankfurter and, 617
free speech and, 654
freedom of expression and, 639
Hughes and, 784
preferred position rule and, 1199–1200
Stone and, 1564
substantive due process and, 466
suspect categories and, 518
United States v. Causby, 1801
Douglas and, 444
takings clause and, 1604
United States v. Chadwick, 1751
United States v. Clapox, 51
United States v. Cohen Grocery Store, 1778
United States v. Constantine, 1684
United States v. Coplon, 736
United States v. Crews, 568

- United States v. Cruikshank*, 1342, 1681–1682
Patterson v. Colorado and, 740
substantive due process and, 464
Waite Court and, 1733
- United States v. Curtiss-Wright Corp.*, 311
- United States v. Darby Lumber Company*, 1565
- United States v. Davis*, 33
- United States v. Dionisio*, 1682
grand jury indictments and, 705–706
- United States v. Doremus*, 1684
drugs and, 1741
- United States v. Drayton*, 1444
- United States v. Dunn*, 1745
- United States v. E.C. Knight*, 1471–1472
Taft Court and, 1595
- United States v. Edge Broadcasting*
lotteries and, 1708
- United States v. Edwards*, 98
- United States v. Eichman*, 1516, 1682. *See also* Flag burning
content-neutral regulation and, 363
Flag Protection Act of 1989 and, 590
- United States v. O'Brien* and, 1114
viewpoint neutrality and, 657
- United States v. Emerson*, 1343
English Bill of Rights and, 503
NRA and, 1071
- United States v. Fanfan*, 1460
- United States v. Gillette*, 1470
- United States v. Grace*, 1243
- United States v. Grimaud*, 1683
- United States v. Hammer*, 230
- United States v. Harvey*, 884
- United States v. Havens*, 1683–1684
impeachment exception and, 556
- United States v. Hubbell*
grand jury indictments and, 706
- United States v. Hudson and Goodwin*, 888, 1441
freedom of press and, 1207
Marshall Court and, 968
- United States v. Inadi*, 25
compulsory process clause and, 344
- United States v. James Daniel Good Real Property et al.*, 213
- United States v. Janis*
exclusionary rule and, 555
Powell and, 1195
- United States v. Jin Fuey Moy*, 1741, 1744
- United States v. Kahriger*, 1684
Marchetti v. United States and, 960
- United States v. Karo*, 882
- United States v. Katz*
Fourth Amendment and, 486
- United States v. Kauten*, 1477
- United States v. Kennerley*
obscenity and, 1116
United States v. One Book Entitled “Ulysses” and, 1688–1689
- United States v. Klein*, 867
- United States v. Knight Co.*
police power and, 1185
- United States v. Knotts*, 882
- United States v. Koch*, 455
- United States v. Lanza*, 440
- United States v. Lara*, 441
- United States v. Lee*, 23, 58, 159, 539, 1470, 1684–1685
Bowen v. Roy and, 168
free exercise clause, 629
- United States v. Lefkowitz*, 209
- United States v. Leon*, 1685–1686
good faith exception and, 555–556
Powell, Lewis, and, 1195
search warrants and, 793
- United States v. Levine*
obscenity and, 1116
- United States v. Lopez*, 33
commerce clause and, 827
- United States v. Lovasco*, 1686
- United States v. Lovett*, 1686–1687
- United States v. Macintosh*
Butler and, 209
Christian nation and, 343
conscientious objection and, 349
Hughes and, 784, 1142
United States v. Schwimmer and, 1141, 1692–1693
- United States v. Mara*, 1682
- United States v. Marchetti*, 1076
- United States v. Marion*, 1686
- United States v. Martinez-Fuerte*, 380, 1444, 1446
checkpoints and, 806
Michigan Department of State Police v. Sitz and, 1004
profiling and, 1623
- United States v. Martinez-Salazar*, 115
- United States v. McIntosh*, 409
- United States v. McVeigh*, 1428
- United States v. Miller*, 1430
gun control and, 722, 1343
McReynolds and, 993
reasonable expectation of privacy and, 882
- United States v. Miller* (1939), 1687
- United States v. Miller* (1976), 1687–1688
- United States v. Mississippi Valley Generating Co.*, 128
- United States v. Monsanto*, 1745
- United States v. Morrison*, 435
commerce clause and, 827
enforcement power and, 613
- United States v. National Committee for Impeachment*, 219
- United States v. National Treasury Employees Union*, 1514
Urofsky v. Gillmore and, 1700–1701
- United States v. Nelson*, 1343
- United States v. Nixon*, 311
Burger and, 205
compulsory process clause and, 345
- United States v. Noriega*, 1076
- United States v. Oakland Cannabis Buyers’ Co-Op*, 1745
- United States v. O'Brien*, 111, 449, 1113–1114, 1318, 1516, 1688
City of Erie v. Pap’s A.M. and, 523
content-neutral regulation and, 363–364
formula of, 1114–1115
intermediate scrutiny test and, 818
military law and, 1007
national security and, 1074
symbolic speech and, 590, 1593
Turner Broadcasting System v. Federal Communications Commission and, 1670
Warren Court and, 1754
Young v. American Mini Theatres and, 1808
zoning and, 1821
- United States v. One Book Entitled “Ulysses,”* 1688–1689
obscenity and, 1116
sexual expression and, 659
- United States v. One Package of Japanese Pessaries*, 147
- United States v. Orito*, 1677

INDEX

- United States v. Ortiz*, 380
United States v. Paramount Pictures, Inc., 858
United States v. Pink, 1801
United States v. Place, 882
United States v. Playboy Entertainment Group, 1689–1690
 cable companies and, 663
 obscenity and, 1124
United States v. Progressive, 1212
United States v. Ramirez, 1690
United States v. Rector, etc. of the Church of the Holy Trinity, 288
United States v. Reidel, 1677, 1690–1691
United States v. Reynolds, 72, 311
 criminal surety laws and, 1649
 Holmes and, 770
 White Court and, 1777
United States v. Robinson, 1691–1692
United States v. Ross, 1804
United States v. Salerno, 97, 1419, 1745
 Bail Reform Act of 1984 and, 98
 pretrial detention and, 805
 preventative detention and, 1208
United States v. Sanchez, 1684
United States v. Santana, 83
United States v. Scheffer, 407
United States v. Schoon, 1692
United States v. Schwimmer, 1692–1693
 Butler and, 209
 pacifists and, 1141
 Taft Court and, 1599
United States v. Seeger, 349–350, 1477, 1693–1694
 Clark, T., and, 309
United States v. Sokolow, 1237
United States v. Southwestern Cable Co., 1669
United States v. Stanley, 149
United States v. Tateo, 1694
United States v. Texas, 878
United States v. The Progressive, Inc., 1694
 prior restraints and, 1075
United States v. Thirty-Seven Photographs, 1676, 1677–1678
 United States v. Reidel and, 1690–1691
United States v. Toscanino
 Ker-Firshie rule and, 666
United States v. United Mine Workers, 1390–1391
 duty to obey court orders and, 469
United States v. United States District Court, 1519, 1695–1996
United States v. Ursery, 442
United States v. Verdugo-Urquidez, 355, 380–381, 1696–1697
United States v. Virginia (VMI)
 equal protection clause and, 687
 gender and, 518
 Ginsburg and, 687
United States v. Wade, 1697
 eyewitness identification and, 568, 925
 Kirby v. Illinois and, 892
 Omnibus Crime Control and Safe Streets Act of 1968 and, 1132
 right to counsel and, 1344
 United States v. Ash and, 1679
 Warren Court and, 1759
 White, B., and, 1779
United States v. Wallace, 345
United States v. Washington, 1697–1698
United States v. Watson, 81, 1698
 warrantless arrests and, 82
United States v. Weaver, 1746
United States v. White, 121
 reasonable expectation of privacy and, 882
United States v. Worrall, 274
 United Steelworkers of America, 1270
 Goldberg and, 693
United Steelworkers v. Weber, 206
 Universal Declaration of Human Rights (UDHR), 59, 307, 1274, 1639, 1640
 data privacy and, 1223
 freedom of expression and, 637, 638, 1676
 Prejean and, 1201
 Universal Military Training and Service Act of 1948
 conscientious objection and, 349–350, 1693
 United States v. O'Brien and, 1516
 United States v. Seeger and, 1693–1694
 Universal Negro Improvement Association, 1262
 Universities
 academic freedom and, 16–17
 as designated public forums, 1699
 hate speech codes in, 220–221, 1579
 political correctness and, 1188–1189
 public forum doctrines and, 1229, 1244, 1698–1700
 religion in public, 1297–1299
 religious speech and, 1229
 speech codes in, 303, 760
 tuition for, 1233
 University of Wisconsin v. Southworth and, 1700
 viewpoint discrimination and, 1715
 University of Alabama Law School, 855
 University of California, Berkeley, 996
 University of California, Davis, 1284
 University of California, Santa Barbara, 19
 University of Chicago, 1374
 Bork and, 165
 Clark, R., and, 305
 Freund and, 658
 University of Iowa, 1390
 University of Leicester, 430
 University of Michigan, 1285
 admissions policy, 19
 affirmative action and, 688, 886
 Darrow and, 394
 hate speech codes and, 220–221
 Kamisar and, 881
 Kevorkian and, 888
 University of Michigan Law School, 1047
 University of Minnesota
 Burger and, 204
 Butler and, 209
 Kamisar and, 881
 University of Mississippi, 548
 University of Missouri School of Journalism, 934
 University of New Hampshire, 17–18
 University of Pennsylvania, 1326, 1364–1365
 Amsterdam and, 60
 University of Southern California, 276–277
 University of Texas
 Clark, R., and, 305
 Clark, T., and, 308
 University of Texas School of Law
 Emerson and, 498
 Justice and, 878
 University of Virginia (UVA), 1298. *See also Rosenberger v. Rector and Visitors of the University of Virginia*
 Experimental College and, 998
 School of Law, 992

- separationism and, 767
- University of Wisconsin
 - Frank and, 615
 - hate speech codes and, 220–221
 - La Follette and, 902
 - Meiklejohn and, 998
 - stem cell research and, 1552
- University of Wisconsin v. Southworth*, 1700
- Unmarried couples, 576
 - birth control and, 148
- Unnecessary delay, 952, 991
 - Mallory v. United States* and, 1018
- Unprotected speech
 - categories of, 252
 - factual context and, 762
- Updegraph v. Commonwealth*, 343
- Urantia Foundation v. Maaherra*, 366
- Urgent Deficiency Appropriation Act of 1943, 1686–1687
- Urinalysis *See* Drug testing
- Urofsky v. Gillmore*, 19–20, 1700–1701
 - academic freedom and, 1508
- U.S. Army
 - public forum doctrines and, 1244
 - spying by, 1519
- U.S. Census Bureau, 90
- U.S. Coast Guard, 390
- U.S. Code, 336
- U.S. Constitution, 351–354
 - abolitionism and, 7
 - amendments to, 141–142
 - Article III of, 866–867
 - Article VI, 41, 1314–1315
 - Bible and, 127
 - Bill of Rights and, 139, 945
 - bills of attainder and, 134
 - Breyer and, 184
 - Burger and, 204
 - Calder v. Bull* and, 212–213
 - California and, 1546
 - civil liberties and, 1536
 - copyright protection and, 484
 - corruption of blood and, 369
 - courts and, 1635
 - criticisms of, 139–140
 - double jeopardy clause of, 438–439
 - Douglas and, 444
 - economic rights in, 475–480
 - emergency powers and, 495
 - English tradition and, 505
 - ex post facto laws and, 140, 553–554
 - federalization of criminal law and, 580–581
 - felon disenfranchisement and, 584
 - forced speech and, 601
 - Franklin and, 621
 - full faith and credit clause of, 406
 - general warrants and, 678
 - Hamilton and, 732
 - Harlan, I. and, 738
 - harmless error and, 745
 - interpretation of, 1415
 - judicial review and, 863–864
 - jurisdiction of, 353–354
 - mandatory death sentences and, 952–953
 - Maryland, 137
 - Mason and, 358–360
 - Massachusetts Body of Liberties of 1641 and, 979
 - Meese and, 997
 - military tribunals and, 1008
 - Minersville School District v. Gobitis* and, 593
 - Montesquieu and, 1031–1032
 - overseas, 354–355
 - political parties and, 36
 - privacy and, 1431
 - property ownership and, 476–477
 - ratification of, 360
 - religion and, 352, 1330
 - religious tests for officeholding and, 140, 426, 1315
 - Rhode Island and, 1546
 - slave trade provision of, 358–359
 - speech and debate clause, 352
 - Vermont and, 135
 - victims' rights and, 1711
 - zoning and, 1817
- U.S. Customs Bureau, 48
- U.S. Flag Code, 1178
- U.S. Forest Service
 - AIRFA and, 51
 - Lyng v. Northwest Indian Cemetery Protective Association* and, 939
- U.S. Information Agency, 323
- U.S. Marshals Service
 - Clark, R., and, 306
 - Ruby Ridge shootout and, 565, 1385–1386
- U.S. Postal Service
 - Bolger v. Youngs Drug Products Corp.* and, 160–161
 - Comstock Act and, 1054
 - Comstock and, 341
 - as nonpublic forums, 1245
 - World War I and, 353
- U.S. Postal Service v. Greenburgh Civic Association*
 - public forum doctrines and, 1244
- U.S. Sentencing Committee, 1458–1459
 - Breyer and, 183
- U.S. Term Limits v. Thornton*, 1557
- USA PATRIOT Act, 1148–1159, 1435, 1519, 1623, 1625, 1626
 - ACLU and, 50
 - Ashcroft and, 85
 - civil forfeiture and, 295
 - common law and, 336
 - criticism of, 790
 - data privacy and, 1222
 - detentions under, 791–792
 - Dred Scott v. Sandford* and, 790
 - emergency powers and, 496
 - extremist groups and, 567
 - FCRA and, 570
 - FISA and, 1149
 - freedom of press and, 662
 - immigration statutory scheme and, 789–790
 - INA and, 983
 - indefinite detention and, 805
 - internet privacy and, 821
 - Muslims and, 1053–1054
 - national security and, 1071, 1074
 - privacy and, 347
 - War on Terror and, 1094
- Use of force
 - AUMF and, 1520
 - Fourth Amendment and, 1622

INDEX

- Use of force (*cont.*)
 - in rape, 1464
 - in self-defense, 1448
 - with unarmed suspects, 1622
- Utah
 - Alien Land Law in, 1108
 - antipolygamy laws and, 72
 - same-sex adoption and, 1399
- Utilitarianism, 1272
- Utilitarianism* (Mill), 1010
- Utilitarianism, in punishment, 1645
- Utilities, 257
- Utility poles
 - as public forums, 1663
- UVA. *See* University of Virginia

- V**

- Vaccination, compulsory, 86, 341, 772
 - Jacobson v. Massachusetts* and, 836–837
- Vacco v. Quill*, 86–87, 1767
 - equal protection clause and, 547
 - O'Connor and, 1127
 - physician-assisted suicide and, 389
 - Tribe and, 1668
- VAEHA. *See* Voting Accessibility for the Elderly and Handicapped Act (VAEHA)
- Vagrancy. *See also* Indigents
 - laws, 1703
 - Papachristou v. City of Jacksonville* and, 1145
 - Prohibition and, 1239
 - as victimless crime, 1709
 - Void-for-vagueness doctrine and, 1725
- Vagueness doctrine, 1705–1706. *See also* Void-for-vagueness doctrine
 - in criminal statutes, 1703–1705
 - in *Kolender v. Lawson*, 894
 - Lanzetta v. New Jersey* and, 907
 - Papachristou v. City of Jacksonville* and, 1145
 - privileges and immunities and, 1231
 - sexually explicit materials and, 1120
 - vagrancy laws and, 1703
- Valenti, Jack, 1042
- Valentine v. Chrestensen*, 1706
 - commercial speech and, 329–330, 1364
 - low value speech and, 937
- Valentine's Day massacre, 720
- Valeo, Francis, 193–194
- Vallandigham, Clement, 552
 - free speech and, 649
 - Lincoln and, 646
- Valley Forge College v. Americans United*, 1609
- Valley Hospital Association v. Mat-Su Coalition for Choice*, 1533
- Van Buren, Martin, 1037
- Van Dam, Rip, 1814
- Van Devanter, Willis, 1564
 - White Court and, 1777
- Van Orden v. Perry*
 - ADL and, 69
 - Breyer and, 1621–1622
 - coercion test and, 540
 - O'Connor and, 1127
 - Stone v. Graham* and, 1564
 - Ten Commandments and, 967, 1621
- Vance v. Terranzas*, 562–563
- Vance v. Universal Amusement Co., Inc.*, 1706–1707
- Vanderbilt University, 992
- Vanhorne's Lessee v. Dorrance*
 - economic rights and, 477
 - eminent domain and, 1603
- Vanzetti, Bartolomeo, 1395–1396. *See also* Sacco and Vanzetti trial
 - Baldwin and, 103
- Vatican
 - Council, 26
 - Dawson and, 397
 - Truman and, 56
- Vaughn, Stephen, 1041
- V.C. v. M.J.B.*, 1408
- VCRs, 1001
- Veazie Bank v. Fenno*, 1684
- Vehicles. *See also* Automobile searches
 - frisk of, 1570
 - inventory of, 1498
 - New York v. Belton* and, 1091
 - Ohio v. Robinette* and, 1128
 - privacy and, 1751
 - racial profiling and, 1237–1238
 - search and seizure and, 1539–1540
 - search warrants and, 1433, 1751
- Veil of secrecy, grand juries and, 706
- Venire
 - composition of, 871–872
 - discrimination, 872
 - jury trial right and, 876
 - race and, 877
- VENONA project, 265
 - Hiss and, 765
- Verbal communication, 1437
- Verduo-Urquidez, Rene Martin, 1696
- Vermont
 - Civil Union Act and, 1402
 - constitution of, 135
 - Petition Campaign and, 1155
 - proportional punishment and, 1241
 - same-sex marriage and, 1401–1402
 - same-sex partners and, 1408
 - slavery and, 53
 - statehood of, 142
- Vermont Civil Union Act, 1408
- Vernonia School District 47J v. Acton*, 430, 1707–1708
 - Board of Education v. Earls* and, 156
 - Breyer and, 183
 - drug testing and, 453, 1746
- Veterans Administration, 1270
- Veto, legislative, 797
 - Kennedy, A., and, 884
- Viagra, 1323
- Vice
 - commercial speech and, 1708
 - United States v. Kahriger* and, 1684
- Vices of the Political System of the United States* (Madison), 944
- Victim assistance, 1710–1711
- Victim impact statements, 1708–1709
 - capital punishment and, 1709
- Victimless crimes, 1709–1710
- Victim's Bill of Rights, 1540
- Victims Compensation Board, 1494
- Victims of Crime Act of 1994, 1149
- Victims' rights, 1710–1712

- Victims' Rights Movement, 1708, 1710
 - successes of, 1711
- Victorian Age, 26
- Vidal v. Girard's Executors*, 342, 1712–1713
- Video games, 1713
- Video Privacy Protection Act (VPPA), 346, 1713–1714
- Videotaping, false confessions and, 574
- Viereck v. United States*, 1800
- Vieth v. Jubelirer*, 1417
- Vietnam War
 - ACLU and, 50
 - Aptheker and, 77
 - Bond v. Floyd* and, 161
 - Clark, R., and, 306
 - communism and, 338
 - conscientious objection and, 349–350, 1143
 - demonstrators against, 1636
 - draft and, 449–450
 - draft card burning and, 1688
 - drugs and, 1743
 - expressive conduct and, 1162–1163
 - fighting words and, 587
 - FOIA and, 641
 - Fortas and, 604
 - freedom of expression and, 1162–1163
 - Goldberg and, 697
 - Herbert and, 760
 - injunctions and, 1212
 - media access in, 995
 - military chaplains and, 268
 - national security and, 1074
 - New York Times v. United States* and, 1088, 1695
 - Nixon, R. and, 1098
 - protests, 48, 362–364, 756, 927
 - school protests of, 1575–1576
 - Stewart, P., and, 1560
 - Tinker v. Des Moines School District* and, 1658–1659
 - United States v. O'Brien* and, 1113–1114, 1516
 - Warren Court and, 1754
 - wiretapping and, 856
- Viewpoint discrimination, 1574
 - in free speech cases, 1714–1717
 - National Endowment for the Arts v. Finley* and, 1065
 - University of Wisconsin v. Southworth* and, 1700
- Viewpoint neutrality, 656–657
 - test, 1574, 1715
- Vignera v. New York*, 1456
- Viktora, Robert, 1271
- Village of Euclid v. Ambler Realty Company*
 - Butler and, 209
 - economic rights and, 479
 - takings clause and, 1605
- Villiard, Oswald Garrison, 1063
- Vineville Presbyterian Church, 857
- Vinson Court, 1718–1721
 - Brown v. Board of Education* and, 516–517
- Vinson, Fred M., 1718, 1721–1722
 - American Communication Association v. Douds* and, 51
 - death of, 186, 309, 517
 - Dennis v. United States* and, 414, 1511
 - Shelley v. Kraemer* and, 516
 - Sweatt v. Painter* and, 516
- Vinson v. Superior Court*, 1534
- Violence
 - after Brady Bill, 722
 - anti-abortion protests and, 634
 - extremist groups and, 564
 - free speech and, 1509–1513
 - gender-motivated, 434–435
 - guns and, 720
 - hate speech and, 754–755
 - Hays Office and, 755
 - Islam and, 1053
 - KKK and, 896–897
 - media liability and, 996
 - pornography and, 942
 - religion and, 1295
 - retribution and, 1329–1330
 - sexual, 942
 - television, 1317
 - Watts v. United States* and, 1769
- Violence Against Women Act of 1994, 71, 435
 - commerce clause and, 827
 - NOW and, 1068
- Violence Against Women: Civil Rights for Women Act, 435
- Violent Crime Control and Law Enforcement Act, 721
- Violent expression, 1509–1510
- Virgil v. School Board of Columbia County, Florida*, 163
- Virgin Islands v. Edinborough*
 - Bible and, 128
- Virginia
 - Constitutional Convention of 1787 and, 541, 1263, 1264, 1266–1267, 1339
 - freedom of press and, 1204
 - general warrants and, 1751
 - “In God We Trust” and, 1067
 - literacy tests and, 1729
 - NAACP and, 1064
 - NAACP v. Button* and, 1058
 - Naim v. Naim* and, 1059
 - religion and, 1538
 - same-sex partners and, 1409
 - self-governance and, 1540
 - snake-handling and, 1491
 - voting in, 1729–1730
- Virginia Assessment Controversy, 766
- Virginia Charter of 1606, 1722–1723
- Virginia Company Charter, 326
- Virginia Constitution, 508, 1311
 - Harper v. Virginia State Board of Elections* and, 746
 - ratification of, 978
- Virginia Convention of 1776
 - Madison and, 943
- Virginia Declaration of Rights, 108, 387, 1310, 1723–1724
 - due process and, 456–457
 - general warrants and, 678
 - Madison and, 526, 944
 - Mason and, 977–978
 - slavery and, 138
- Virginia House of Burgesses
 - Jefferson and, 845
 - Madison and, 947
 - Mason and, 977
- Virginia House of Delegates
 - Jefferson and, 845
 - Marshall, J., and, 970
- Virginia Military Institute, 1299
- Virginia Plan, 944
- Virginia Ratifying Convention, 541
 - Madison and, 944

INDEX

- Virginia Report
 - Jefferson and, 846
 - Madison and, 946
- Virginia Resolutions of 1798, 887–888
 - Jefferson and, 846
 - Madison and, 945–946
 - Marshall Court and, 968
- Virginia State Bar, 186
- Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 114, 161, 330–331, 1643, 1724
 - Burger Court and, 201
 - commercial speech and, 257, 329
 - low value speech and, 937
 - professional advertising and, 1235
- Virginia State Crime Lab, 429
- “Virginia Statute for Religious Liberty” (Jefferson), 526, 623, 1107, 1755
 - establishment clause and, 550
 - Jefferson and, 526, 623, 1331
 - Madison and, 943, 944
 - “Memorial and Remonstrance” and, 947
- Virginia v. Black*, 1513, 1724–1725
 - cross burning and, 382–383
 - group libel and, 715
 - threats and, 1653
 - viewpoint discrimination and, 1716
 - Watts v. United States* and, 1769
- Virtual child pornography. *See* Child pornography
- Virtual private networks (VPNs), 823
- Visas. *See also* Diversity Immigrant Visa Program
 - categories, 427 (*See also* Diversity Immigrant Visa Program)
 - Immigration and Naturalization Service v. Chadha* and, 797
 - INA and, 796–797, 983
 - noncitizens and, 1105–1106
 - undocumented migrants and, 1674–1675
- Vladeck, David, 331
- Voice exemplars, 558–559
- Voice over Internet Protocol (VOIP), 211–212
- Void-for-vagueness doctrine, 1611, 1703, 1705, 1725
 - City of Chicago v. Morales* and, 674–675
 - National Endowment for the Arts v. Finley* and, 1065
- VOIP. *See* Voice over Internet Protocol
- Voir dire, 871–874
 - challenges for cause in, 873
 - freedom of press and, 632
 - Hopt v. Utah Territory* and, 777
 - invidious prejudice in, 873
 - peremptory challenges in, 873–874
- Volpe, Justin, 154
- Volpp, Leti, 791
- Volstead Act, 1598
 - prisons and, 1239
 - Prohibition and, 1238
- Volte-face, 1582
- Voluntariness standard, 992
 - Miranda warnings and, 1020
- Omnibus Crime Control and Safe Streets Act of 1968 and, 1132
- Voluntary guidelines, for sentencing, 1458–1459
- von Bülow, Claus, 306, 416
- Vonnegut, Kurt, 1501
- Voodoo & Hoodoo* (Haskins), 164
- Voorhis, Jerry, 1098
- Voter registration lists
 - Davis v. Beason* and, 396–397
 - jury source lists v., 871–872
 - polygamy and, 396–397
- Voters
 - property requirements for, 1540
 - taxpayer requirements for, 1540
- Voting Accessibility for the Elderly and Handicapped Act (VAEHA), 1356
- Voting rights, 1725–1729. *See also* Reapportionment
 - ADA and, 1356
 - African Americans and, 890, 1257
 - Aristotle and, 1638
 - constitutional protection of, 1356–1357
 - for disabled people, 1356
 - for elderly, 1356
 - felon disenfranchisement and, 583
 - felony convictions and, 1257
 - Fifteenth Amendment on, 1358, 1726
 - Harper v. Virginia State Board of Elections* and, 745–746
 - HAVA and, 1356
 - judicial review of, 1728–1729
 - loss of, 384
 - NAACP and, 1063, 1064
 - Nineteenth Amendment on, 1359
 - O'Connor and, 1127
 - privilege v., 1358
 - racial discrimination and, 959
 - Reynolds v. Sims* and, 746
 - Twenty-fourth Amendment on, 1359
- Voting Rights Act of 1965, 1729–1730, 1764
 - ADL and, 70
 - Civil Rights Act of 1964 and, 300–301
 - Clark, R., and, 306
 - disabled people and, 1356
 - enforcement power and, 613
 - felon disenfranchisement and, 583
 - King and, 890
 - march on Washington and, 959
 - reapportionment and, 1275
- Voting Rights Project, 50
- VPNs. *See* Virtual private networks
- VPPA. *See* Video Privacy Protection Act
- Vulgar speech
 - Burger Court and, 201
 - captive audiences and, 247
 - free speech and, 1248–1249

W

- Waco standoff
 - extremist groups and, 565
 - FBI and, 1317
 - Reno and, 1317
- Wages, 1541. *See also* Minimum wage
 - Nineteenth Amendment and, 1727
- Wagner Act, 30, 1602, 1800
 - freedom of association and, 635
 - New Deal and, 1083
 - NLRB and, 1066
- Wainwright v. Sykes*, 728
- Wainwright v. Witt*, 191
- Waite Court, 1732–1733
- Waite, Morrison
 - Grant and, 1732
 - Reynolds v. United States* and, 627, 1185
- Waiting periods, for welfare programs, 1396, 1466
- Walerga Assembly Center, 840

- Walker, David, 1734–1735
 Walker, Matilda, 273
 Walker, Stephen A., 288
Walker v. Birmingham
 collateral bar rule and, 1210–1211
 duty to obey court orders and, 469
 injunctions and, 1210
Walker v. Ohio, 212
 Walking while black, 1446
 Wall of separation, 987, 1735–1736
 non-preferentialism standard and, 1109
 Warren Court and, 1755
 Wallace, George C., 1443
 Wallace, Henry, 1269
 Wallace, Mike, 760
Wallace v. Jaffree, 3, 89, 90, 409, 533, 1736–1738
 endorsement test and, 539, 938
 establishment clause and, 530
 free exercise and, 1246
 Lemon test and, 533, 538
 moments of silence statutes and, 1029
 non-preferentialism standard and, 1109
 public schools and, 1246
 school prayer and, 1197
 separationism and, 767–768
 wall of separation and, 1736
Wallach v. Riswick, 369
 Walling, William English, 1063
 Wal-Mart
 Central Hudson test and, 331
 labor practices and, 331–332
 NC–17 rating and, 1043
 Walnut Street Presbyterian Church, 862
Watson v. Jones and, 1767
 Walt Disney Company, 484
 Walz, Frederick, 1738
Walz v. Tax Commission, 1607, 1738–1739
 Committee for Public Education and Religious Liberty v. Nyquist
 and, 333
 establishment clause and, 529
 evolution and, 1617
 Hernandez v. Commissioner of Internal Revenue and, 762
 Lemon test and, 534
 separationism and, 767
 tax exemptions and, 1628–1629
 Walzer, Michael, 294
 War
 civil liberties in, 84
 crimes, 760
 declaration of, 354
 emergency powers during, 923
 Enemy Alien Act of 1798 and, 790
 executive powers during, 731
 First Amendment and, 646–647, 946
 with France, 887
 free speech during, 262
 government during, 552
 indefinite detention and, 805
 just, criteria, 1274
 military chaplains and, 268
 religion and, 1274
 War Department
 DeWitt and, 418
 Japanese internment and, 841–842
 Wilson, W., and, 1785
 War Industries Board, 1798
 War Mobilization and Reconversion, 1718
 War of 1812
 freedom of press and, 1207
 military chaplains and, 268
 War on Drugs, 452, 1739–1747
 African Americans and, 1256, 1257
 civil forfeiture and, 295
 criminal profiling and, 1237
 War on Terror and, 1744
 War on Terrorism, 1520, 1636
 airport searches and, 33–34
 Federalists and, 37
 government operations information and, 21
 indefinite detention and, 804–805
 military law and, 1007
 9/11 and, 1094–1095
 racial profiling and, 791
 War on Drugs and, 1744
War on the Bill of Rights and the Gathering Resistance, The
 (Hentoff), 760
 War Powers Acts, 1801
 War Relocation Authority
 emergency powers and, 496
 Endo v. United States and, 840
 Japanese internment and, 839
 WAR. *See* White Aryan Resistance
 Ward, Nathaniel, 978
Ward v. Illinois, 1119
Ward v. Monroeville, 799
Ward v. Rock Against Racism
 content-neutral regulation and, 363
 intermediate scrutiny test and, 818
 Marshall, T., and, 972
 National Endowment for the Arts v. Finley and, 1065
 public forum doctrines and, 1244
 speech regulations and, 417
 time, place, and manner test and, 1657
 United States v. O'Brien and, 1113
Ward v. Texas, 316
Warden, Md. Penitentiary v. Hayden, 171, 1747
Ware v. Hylton
 Chase and, 274
 Ellsworth Court and, 492
 Ware traders, 823
Warner v. City of Boca Raton, 1549
 Warrant clause IV, 1747–1751
 Warrants. *See also* Arrest warrants; Search warrants
 automobile exception for, 1751
 FISA and, 1624
 general, 678
 newsroom searches and, 1093
 open fields and, 1133
 Payton v. New York and, 1151
 plain view and, 1171
 presumption, 1433
 probable cause and, 1234
 Prohibition and, 1239
 rubber stamping of, 1686
 search, 1429
 stateside, 1696
 United States v. Watson and, 1698
 USA PATRIOT Act and, 1149
 Vinson Court and, 1720
 Warden v. Hayden and, 1747

INDEX

- Warren, Charles, 1712
- Warren Court, 1753–1761
- Burger Court v., 198
 - civil rights and, 1544
 - coerced confessions and, 317
 - compelling purpose test and, 610
 - criminal profiling and, 1236
 - enforcement power and, 613
 - Fay v. Noia* and, 325
 - felon disenfranchisement and, 583
 - First Amendment and, 1560
 - Freund and, 665
 - Goldberg and, 696
 - great dissenter of, 741
 - habeas corpus and, 233–234
 - Harlan, II, and, 741–742
 - on HUAC, 1270
 - judicial review and, 865
 - obscenity and, 1118
 - Rehnquist Court and, 1286–1287
 - victims' rights and, 1710
- Warren, E. Walpole, 288
- Warren, Earl, 1761–1765
- appointment of, 309
 - Baker v. Carr* and, 1275
 - Bill of Rights and, 1633
 - Bond v. Floyd* and, 162
 - Brennan and, 1765
 - Brown v. Board of Education* and, 186, 517
 - Burger and, 204
 - confessions and, 1455
 - Gideon v. Wainwright* and, 1016
 - “In God We Trust” and, 1067
 - Kennedy, A., and, 884
 - law enforcement procedures and, 317–318
 - Marshall, T., and, 972
 - Miranda v. Arizona* and, 317–318, 1019
 - Miranda warning and, 1017
 - Naim v. Naim* and, 1060
 - nomination of, 517
 - obscenity and, 1117, 1123
 - Peterson v. Greenville* and, 826–827
 - Poe v. Ullman* and, 712
 - preferred position rule and, 1199
 - privacy and, 1219
 - public figures and, 1242–1243
 - retirement of, 604
 - Reynolds v. Sims* and, 1276
 - Roth* test and, 836
 - Roth v. United States* and, 2, 1382–1383
 - United States v. O'Brien* and, 449
- Warren, Mercy Otis, 53–54, 1315
- Warren, Robert, 1788
- Warren, Samuel D.
- Brandeis and, 176
 - privacy and, 1218, 1590–1592
- Wartime legislation, 1765–1766
- Wartime Prohibition Act, 1238
- Washington, Booker T., 1774
- La Follette and, 901
- Washington, Bushrod
- Ellsworth Court and, 491
 - privileges and immunities and, 1231
 - on right to travel, 1355
- Washington Constitution, 929–930
- Washington, D.C.
- Petition Campaign and, 1155
 - slavery and, 1486
- Washington, Earl, Jr., 429
- Washington, George, 6, 1339, 1414
- Bache and, 95–96
 - Bank of the United States and, 732
 - Ellsworth Court and, 491
 - Jay Court and, 843
 - Marshall, J., and, 969
 - Mason and, 977
 - McCulloch v. Maryland* and, 988
 - military chaplains and, 268
 - pardons and commutations and, 1145
 - People v. Croswell* and, 733
 - political parties and, 36
 - Thanksgiving and, 532
- Washington Post*, 1026
- Washington, state of
- Alien Land Law in, 1107
 - free speech and, 1536
 - privacy and, 1531
 - Rabe v. Washington* and, 1255
 - same-sex marriage and, 1404
 - search and seizure in, 1532
 - Supreme Court, 1255
 - Washington v. Glucksberg* and, 1766
- Washington University, 1389
- Baldwin and, 102
 - Freund and, 664
- Washington v. Davis*, 114
- race-based classifications and, 611
 - racial discrimination and, 986
- Washington v. Glucksberg*, 86–87, 1583, 1766–1767
- Breyer and, 183
 - euthanasia and, 547
 - O'Connor and, 1127
 - ODWDA and, 1137
 - PAS and, 1165
 - physician-assisted suicide and, 389, 888
 - Souter and, 1497
- Washington v. Texas*, 407, 1428, 1767
- compulsory process clause and, 345
 - incorporation doctrine and, 803
 - Taylor v. Illinois* and, 1610
 - Webb v. Texas* and, 1769
- Watergate Prosecution Force, 182
- Watergate scandal, 1090
- ACLU and, 50
 - Bork and, 165
 - campaign financing and, 219
 - CIA and, 258
 - duty to obey court orders and, 469
 - FECA and, 194
 - FOIA and, 641
 - Hoover and, 776
 - Mitchell and, 1025–1026
 - Nixon, R. and, 1099–1100
 - pardons and commutations and, 1145–1146
 - press and, 1354
 - privacy and, 346
 - White, B., and, 1779
- Waters v. Churchill*, 421
- Waterville College, 935
- Watkins, Clayton K., 1661

- Watkins, John, 1270
- Watkins v. United States*, 110
- HUAC and, 780
- Warren and, 1764
- Watson v. Jones*, 1767–1769
- church property and, 857
- establishment clause and, 537
- property disputes and, 862
- Watts v. Indiana*, 316
- threats and, 1653
- Watts v. United States*, 1769
- President and, 1512–1513
- Ways and Means Committee, 901
- Ways of Love*, 858
- Wayte v. United States*, 423
- We Hold These Truths: Catholic Reflections on the American Proposition* (Murray), 1050
- Wealth of Nations* (Smith), 928
- Wealth redistribution, 479
- Weapons. *See* Guns
- Weaver, Randy, 1385–1386
- Weaver v. Palmer Bros. Co.*, 209
- Weaver, Vicki, 1385–1386
- Webb v. City of Republic*, 371
- Webb v. O'Brien*, 1108
- Webb v. Texas*, 1769
- Washington v. Texas* and, 1767
- Webb v. United States*, 1741
- Webster, Daniel
- education and, 1525
- Phillips, W. and, 1158
- Vidal v. Girard's Executor* and, 1712
- Webster v. Reproductive Health Services*, 10, 1770–1771
- abortion and, 673
- Beal v. Doe* and, 116
- Colautti v. Franklin* and, 324
- establishment clause and, 11–12
- Lemon test and, 534
- Maher v. Roe* and, 951
- NARAL and, 1062
- Planned Parenthood v. Casey* and, 1175
- Roe v. Wade* and, 1320, 1322, 1367–1369
- Wechsler, Herbert, 842
- Weddington, Sarah, 987, 1771–1772
- Wedge Strategy, 378
- Weekly*, 342
- Weeks v. United States*, 91, 284, 1772, 1799
- exclusionary rule and, 555, 772, 957
- Wolf v. Colorado* and, 1790
- Weems, Charlie, 1427
- Weems, Paul, 1772
- Weems v. United States*, 236, 1772
- corporal punishment and, 384
- English Bill of Rights and, 503
- proportionality standard and, 668
- three strikes laws and, 1654
- Weiman v. Updegraff*, 1612
- Weiner, Lee, 898
- Weinglass, Leonard, 278
- Weisberger v. Weisenfeld*, 687
- Weisman, Deborah, 911
- Welch, Joseph, 1772–1773
- McCarthy and, 985
- Welch, Robert, 854
- “Welcome to Monkey House” (Vonnegut), 1501
- Welfare programs
- AFDC and, 692
- Charitable Choice and, 269–271
- coerced confessions and, 940
- Dandridge v. Williams* and, 393
- Goldberg v. Kelly* and, 692–693
- LSC and, 913
- privileges and immunities and, 1233
- residency requirements for, 1396
- Shapiro v. Thompson* and, 1466
- states and, 1396
- waiting periods for, 1396
- Wyman v. James* and, 1804
- Welfare reform, 172–173
- Well-pleaded complaint rule, 867
- Wells, N. Douglas, 973
- Wells-Barnett, Ida Bell, 1773–1774
- NAACP and, 1063
- Welsh, Elliott, II, 350
- Welsh, Robert, 323
- Welsh v. United States*, 350, 1477
- evolution and, 1619
- United States v. Seeger* and, 1693
- White, B., and, 1693
- Weltanschauung, 1618
- Wesberry v. Sanders*, 1275
- West Coast Hotel Co. v. Parrish*, 1581
- economic regulation and, 474
- Stone and, 1565
- West Coast Hotel v. Parrish*, 928
- West Virginia State Board of Education v. Barnette*, 48, 222, 282, 445, 501, 1575, 1775–1776, 1802
- Bible and, 126
- Covington and, 372
- Douglas and, 445
- flag saluting and, 591, 593–596, 1365, 1630
- forced speech and, 600
- Frankfurter and, 619, 1365
- freedom of conscience and, 782
- freedom of religion and, 802, 1364
- freedom of speech and, 656
- government speech and, 702
- Intellectual individualism and, 601
- Jackson, R. and, 834, 1630
- Jehovah's Witnesses and, 849, 1364–1365
- Minersville School District v. Gabis* and, 1775
- penumbras and, 1153
- Pledge of Allegiance and, 1177, 1179
- Prince v. Massachusetts* and, 1208
- Roberts, O., in, 1364
- Stone and, 1565
- Stone Court and, 1561
- Westover v. United States*, 1456
- Westside Board of Education v. Mergen*, 907
- Weyl, Walter, 736
- Whalen v. Roe*, 1583
- What Does America Mean?* (Meiklejohn), 999
- “What Every Girl Should Know” (Sanger), 1410
- Where Do We Go From Here: Chaos or Community?* (King), 890
- Whigs
- Glorious Revolution and, 690
- grand juries and, 704
- Harlan, I. and, 738
- Kendall and, 883

INDEX

- While Circle League of America, 116
- Whiskey Rebellion
 - Chase and, 274
 - Hamilton and, 733
 - pardons and commutations and, 1145
- Whiskey Rebels, 95
- Whistleblowers, 1776–1777
- White Aryan Resistance (WAR), 1502
- White, Byron, 1778–1779
 - Board of Education v. Allen* and, 155
 - Bram v. United States* and, 1017
 - Branzburg v. Hayes* and, 179
 - Buckley v. Valeo* and, 194
 - City of Los Angeles v. Lyons* and, 935
 - City of Renton v. Playtime Theatres, Inc.* and, 1318–1319
 - Coker v. Georgia* and, 323
 - Committee for Public Education and Religious Liberty v. Regan* and, 335
 - Connick v. Myers* and, 702
 - Corporation of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos* and, 367
 - on cross burning, 382–383, 1271
 - Delaware v. Prouse* and, 412
 - Duncan v. Louisiana* and, 468
 - Furman v. Georgia* and, 233
 - Griswold v. Connecticut* and, 713
 - Hazelwood School District v. Kuhlmeier* and, 757
 - Herbert v. Lando* and, 761
 - Jackson v. Denno* and, 831
 - Kennedy, A., and, 696
 - McLaughlin v. Florida* and, 991
 - New York Times Co. v. Sullivan* and, 405
 - New York Times v. United States* and, 1090
 - NLRB v. Catholic Bishop of Chicago* and, 1100
 - obscenity and, 1119
 - Osborne v. Ohio* and, 1138
 - overbreadth doctrine and, 1140
 - Philadelphia Newspapers, Inc. v. Hepps* and, 1158
 - Plyler v. Doe* and, 1182
 - Pope v. Illinois* and, 1191
 - proportional punishment and, 1241
 - on proportionality, 245
 - Red Lion Broadcasting Co., Inc. v. FCC* and, 1279–1280
 - Regents of the University of California v. Bakke* and, 1284
 - sexual orientation and, 1222
 - United States v. O'Brien* and, 1114
 - Wallace v. Jaffree* and, 1737
 - Webster v. Reproductive Health Services* and, 1770
 - Welsh v. United States* and, 1693
 - Wolman v. Walter* and, 1790
- White Court, 1777–1778
- White, Edward, 1448
- White, Ellen G., 1461
- White, Ellen Harmon, 1461
- White, G. Edward, 1763
- White House Faith-Based & Community Initiatives
 - Charitable Choice and, 269
- White Slave Traffic Act. *See* Mann Act
- White supremacists, 565–566. *See also* White Aryan Resistance
 - Southern Poverty Law Center and, 1500
 - United States v. Cruikshank* and, 1681–1682
- White, Thomas, 1667
- White v. Davis*, 1534
- White v. Samsung Electronics*
 - Zacchini v. Scripps-Howard Broadcasting Co.* and, 1812
- White v. Texas*, 316
 - Marshall, T., and, 971
- Whitehill, Robert, 1265
- Whitehill v. Elkins*, 18
- Whites. *See* Caucasians
- White-Smith v. Apollo Company*
 - Metro-Goldwyn Mayer Studios v. Grokster* and, 1001
- Whitewater investigation
 - Clinton, B., and, 706–707
- Whitman, Walt
 - Papachristou v. City of Jacksonville* and, 1145
- Whitney, Charlotte Anita, 175, 1597, 1762
 - Whitney v. California* and, 1780
- Whitney v. California*, 68, 312, 1510, 1779–1780
 - Brandeis and, 175, 1560, 1597, 1642
 - clear and present danger test and, 654
 - Emerson and, 498
 - First Amendment protection and, 771
 - free speech and, 1642
 - Meiklejohn and, 999
 - national security and, 1073
 - New York ex rel. Bryant v. Zimmerman* and, 1087
 - overturning of, 178
 - Vinson and, 414, 1722
- Whittaker Chambers-Alger Hiss hearings, 1098
- Whittaker, Charles Evans
 - White, B., and, 1779
- Whittlesey, Elisha
 - Giddings and, 681
- WHO. *See* World Health Organization
- Whren v. United States*, 1746
 - DWI and, 470
 - Ohio v. Robinette* and, 1128
 - racial profiling and, 1237
- Why We Can't Wait* (King), 890
- Wiccans
 - Department of Defense and, 268
 - legislative prayer and, 915
- Wichita Falls Public Library, 164
- Wickard v. Filburn*, 1359
- Wickersham Commission, 1184, 1455. *See also* National Commission on Law Observance and Enforcement
 - Chafee and, 261
- Widmar v. Vincent*, 417
 - Burger and, 206
 - Burger Court and, 200
 - EAA and, 512
 - equal access and, 535
 - establishment clause and, 700
 - Lamb's Chapel v. Center Moriches Union Free School District* and, 907
 - public forum doctrines and, 1229, 1244
 - religious speech and, 1229
 - viewpoint discrimination and, 1715
- Wieman v. Updegraff*, 17, 1358
- Wife-beating. *See* Domestic violence
- Wiggins v. Smith*, 810–811
- Wilbur v. Mahan*, 1613
- Wilkerson v. Utah*, 223
- Wilkes, John, 1749
- Wilkes v. Wood*, 1749
- Wilkins, J. Harvey, 1701
- Wilkinson v. Leland*, 477
- Wilkinson v. Utah, 384

- William of Orange. *See* Orange, William of
- Williams College
Field and, 585
- Williams, Edward Bennett
McCarthy and, 985
- Williams, Eugene, 1427
- Williams, Ian, 306
Clark, R., and, 307
- Williams, R.G., 1485
- Williams, Robert F., 1545
- Williams, Roger, 61–62, 107, 327, 1309, 1781–1783
attacks on, 531
banishment of, 564
“Bloody Tenent, The” and, 153–154
conversion of, 153
free exercise and, 622
Providence Plantations and, 525
Puritans and, 1250
wall of separation and, 1735
- Williams, Terry v. Taylor*, 233–234
- Williams v. Florida*, 105, 407
Harlan, II, and, 743
incorporation doctrine and, 803
Michigan v. Lucas and, 1005
- Williamson, Hugh
civil trials and, 359
ex post facto laws and, 359
- Williamson v. Lee Optical*
rational purpose test and, 610
- Willie, Robert, 1201
- Willke, Jack
Operation Rescue and, 1133–1134
- Willkie, Wendell, 1084
- Wilson, James, 140–141
Bill of Rights and, 144, 1326
civil liberties and, 143
Civil Rights Act of 1866 and, 299
Constitutional Convention of 1787 and, 1264, 1265, 1268
Ellsworth Court and, 491
ex post facto laws and, 359
free speech laws and, 815
Jay Court and, 843
- Wilson v. Arkansas*, 1333
- Wilson v. Layne*, 1783
- Wilson v. Schillinger*, 1262
- Wilson v. United States*
right to counsel and, 1017
- Wilson, Woodrow, 1447, 1783–1785, 1792
Abrams v. United States and, 13
Brandeis and, 173
Bryan and, 189
civil liberties and, 1372–1374
La Follette and, 903
McReynolds and, 992–993
Roosevelt, F., and, 134, 1372–1374
Sherman Act and, 1472
Taft and, 1601
women’s suffrage and, 1793
World War I and, 1372–1374
- Windmar v. Vincent*, 1298
- Winship, Samuel, 813
- Winters v. New York*, 1123
- Winthrop, James, 1265–1266
- Winthrop, John, 298
free exercise and, 622
- Massachusetts Bay Colony and, 978
- Puritans and, 1249
- Wiretapping, 488, 1269. *See also* Electronic surveillance; Technology
Bartnicki v. Vopper and, 113
Brandeis and, 177
of CPUSA, 339
electronic surveillance and, 487
Fourth Amendment and, 123, 177
Hoffa v. United States and, 769
Holmes on, 772
Hoover and, 775–776
Internet privacy and, 821
interrogation and, 980–981
intrusion and, 828
Johnson, L., and, 856
Katz v. United States and, 882, 1519
of King, 306, 776
laws about, 1785–1787
On Lee v. United States, 445
Nixon, R. and, 1099
Olmstead v. United States and, 1129
Omnibus Crime Control and Safe Streets Act of 1968 and, 1132
privacy and, 1429
Prohibition and, 1239
reasonable expectation of privacy and, 882
Right of Privacy Act and, 856
statutes, 6
United States v. Coplon and, 736
United States v. Dionisio and, 1682
- Wirth, Tim, 328
- Wisconsin
bias crime law, 1271
constitution, 1294
Good Friday and, 398–399
personal liberty laws and, 1154
Supreme Court, 1294, 1333
- Wisconsin Idea, 902
- Wisconsin Supreme Court
Bible reading and, 131
- Wisconsin v. Constantineau*
procedural due process and, 609
- Wisconsin v. Miller*, 58
- Wisconsin v. Mitchell*, 1271, 1787
penalty enhancement and, 750
- Wisconsin v. Yoder*, 23, 58, 1283, 1470, 1548, 1693, 1787–1789
Bowen v. Roy and, 168
Burger and, 205
Burger Court and, 200
education and, 1586
free exercise clause and, 542, 625, 628
McDaniel v. Paty and, 989
Mozert v. Hawkins County Board of Education and, 1044
- Wise, Stephen, J., 852
- Witchcraft, 564
- Witherspoon v. Illinois*, 240
capital sentencing and, 932
- Withholding of removal, 89
- Withrow v. Larkin*
medical licensing and, 800
- Witnesses. *See also* Expert witnesses; Eyewitness identification
civil contempt, 707
detention, 804–805
due process and, 459
eyewitness identification lineups and, 925
grand juries and, 708

INDEX

- Witnesses (*cont.*)
 - material, 459, 981
 - procedural due process and, 463
 - protection of, 1247
 - public trials and, 1247
 - right to confront, 374
 - Taylor v. Illinois* and, 1610
 - treason and, 1665–1666
 - Webb v. Texas* and, 1769
- Witte, John, 527
 - establishment clause and, 528
 - free exercise clause and, 625
- Witters, Larry, 1789
- Witters v. Washington Department of Services for the Blind*, 1528, 1789–1798, 1791
 - Burger Court and, 200
 - equal access and, 535
 - Mitchell v. Helms* and, 1024
- Wobblies. *See* Industrial Workers of the World
- Wolcott, Oliver, 1326
- Wolf Packing Co. v. Court of Industrial Relations*, 465
- Wolf v. Colorado*, 181, 1790
 - Frankfurter and, 618
 - incorporation doctrine and, 803
 - procedural due process and, 463
 - Vinson Court and, 1757
- Wolff v. McDonnell*
 - Burger Court and, 202
 - prison discipline and, 800
- Wolff v. Rice*, 1195
- Wolfgang, Marvin, 1257
- Wolfson, Louis, 604
- Wolman v. Walter*, 1527, 1790–1792
 - Burger Court and, 199
 - Committee for Public Education and Religious Liberty v. Regan* and, 335
- Woman Rebel, The* (Sanger), 1410
- Woman's Christian Temperance Union, 256
- Woman's Peace Party, 256
- "Woman's World" (Catt), 256
- Women
 - AASS and, 46
 - American Revolution and, 53
 - anti-slavery and, 1156
 - Bradwell v. Illinois* and, 273
 - domestic violence and, 433–435
 - equal protection clause and, 520
 - immigration and, 1465
 - Jaycees and, 304, 1363
 - joint ownership by, 1541
 - in juries, 855, 871, 1539, 1610
 - Mann Act and, 954
 - middle scrutiny test and, 612–613
 - in military, 855
 - minimum wage for, 479
 - Nineteenth Amendment and, 1727
 - as offenders, 1463–1464
 - pornography and, 943, 1120–1121
 - property rights and, 434
 - Selective Service and, 698
 - self-defense and, 1449
 - sexual expression and, 1574
 - suffrage and, 1522
 - Taylor v. Louisiana* and, 1610
 - as victims, 1464–1465
 - victims' rights and, 1710
 - voting rights and, 1725
- Women of the Ku Klux Klan, 896
- Women's Equity Action League, 1068
- Women's groups, 755
- Women's Organization for National Prohibition Reform, 1239
- Women's Party, 1794
- Women's rights
 - ACLU and, 50
 - First Amendment and, 1574
 - Hutchinson and, 62
 - Mill and, 1010–1011
 - NOW and, 1068–1069
 - Powell, Lewis, and, 1194
 - privacy and, 1225
 - Roe v. Wade* and, 1220
 - Schlaflly and, 1421
 - Stanton and, 1522
 - Weddington and, 1771
- Women's Rights Convention, 520
- Women's rights movement, 1400
 - marriage after, 965
- Women's Rights Project, 50
- Women's State Temperance Society, 65
- Women's suffrage
 - Anthony and, 65
 - Bryan and, 189
 - Catt and, 256
 - early, 53
 - La Follette and, 901
 - Nineteenth Amendment and, 520
 - Wilson, W., and, 1784
 - World War I and, 1793–1794
 - Wyoming and, 1541
- Wong Sun, 1792
- Wong Sun v. United States*, 1792
 - illegal search and seizure and, 557
- Wong Wing v. United States*, 460
- Wong Yang Sung v. McGrath*, 600
- Wood, Gordon S., 55
- Woodby v. Immigration and Naturalization Service*, 41
- Woodhull and Claflin's Weekly*, 649
- Woodhull, Victoria
 - Comstock and, 342
 - free love and, 649
- Woodruff Manifesto, 72
- Woodruff, Wilford, 72
- Woodsmen of the World, 896
- Woodson v. North Carolina*, 223, 241, 385
 - cruel and unusual punishment in, 231–232
- Woodstock College, 1049
- Woodworth, George, 101
 - Baldus study and, 986
- Wooley v. Maynard*, 1067
 - government speech and, 702
 - West Virginia State Board of Education v. Barnette* and, 656
- Woolsey, John M., 1689
 - obscenity and, 1116
 - in *United States v. One Book Called "Ulysses,"* 659
- Woolworth's, 412
- Wooton, Paul, 774
- Worcester v. Georgia*, 1589
 - Marshall, J., and, 970
- Worcester v. Georgia*, 807
- Wordsworth, William, 1011

- Work ethic, 1740
- Worker's rights, 1395, 1541
- Workplace
 - free speech in, 1507–1508
 - harassment, 303–304, 777–779
 - religion in, 1299–1303
- Works Progress Administration (WPA)
 - Hatch Act and, 748
 - HUAC and, 780
- World Health Organization (WHO), 759
- World Trade Center, 1623
 - terrorism and, 1622
 - War on Terror and, 1094
- World Trade Organization (WTO), 824
- World War I
 - anti-war protestors, 261
 - Baldwin and, 102
 - civil liberties in, 1792–1799
 - clear and present danger test and, 311
 - Communist Party and, 339
 - conspiracy and, 351
 - Debs and, 400
 - Debs v. United States* and, 401
 - DeWitt and, 417–418
 - emergency powers and, 496
 - Espionage Act and, 1419
 - Espionage and Sedition Acts and, 1636
 - free speech and, 1794
 - Hoover and, 774
 - incitement of criminal activity and, 651–653
 - La Follette and, 903
 - Masses Publishing Company v. Patten* and, 979
 - Meiklejohn and, 998
 - military chaplains and, 268
 - Murphy and, 1047
 - national security and, 1072
 - NCLB and, 47
 - opposition to, 1395
 - pacifists and, 1141
 - Palmer and, 1144
 - pornography and, 1117
 - Progressive movement and, 240
 - red scare and, 566, 1280–1282, 1798
 - Socialist Party and, 1419
 - U.S. Postal Service and, 353
 - Wilson, W., and, 1374, 1784
- World War II
 - ACLU and, 49
 - Alien Registration Act of 1940 and, 68
 - alien registration during, 1530
 - Catholic Church and, 253
 - Chinese Exclusion Act and, 260
 - civil liberties in, 1800–1803
 - Communist Party and, 339
 - DeWitt and, 417–418
 - Douglas and, 445
 - drugs and, 1742
 - emergency powers and, 495–496
 - equal protection and, 515–516
 - Evers and, 548
 - Ex parte Milligan* and, 552
 - flag saluting and, 592
 - freedom of expression and, 637
 - habeas corpus suspension and, 352
 - Hoover and, 775
 - incitement of criminal activity and, 654–655
 - Japan and, 1269
 - Japanese Americans during, 791
 - Manhattan Project and, 1377
 - marriage after, 965
 - McCarthy and, 984
 - military chaplains and, 268
 - military law and, 1007
 - Murphy and, 1048
 - Nuremberg Trials and, 354
 - OSS and, 257
 - Philippines and, 1269
 - Rauh and, 1269
 - red scare and, 566
 - Roosevelt, F., and, 1372–1374
 - Rutledge, W., and, 1390
 - segregation after, 972
 - Stone Court and, 1561, 1562
 - Tokyo Rose and, 1666
 - Vinson Court and, 1719
- World Wide Web, 818–819. *See also* Internet
- Worldwide Church of God (WWCG), 366, 1300
- Worldwide Church of God v. Philadelphia Church of God*, 366
- Worth, Daniel, 1485
- WPA. *See* Works Progress Administration
- Wright, Andy, 1427
- Wright, Frances
 - free love and, 649
 - free speech and, 648
- Wright, Hamilton, 1741, 1742
- Wright, Peter, 639–640
- Wright, Roy, 1427
- Wright v. Houston Independent School District*, 1619
- Wright, Wade, 1427
- Writs of assistance, 54
 - probable cause and, 1234
- Writs of Assistance Act, 1803–1804
- WTO. *See* World Trade Organization
- WWCG. *See* Worldwide Church of God
- Wyatt v. Stickney*, 855
- Wylie, Chambers, 356
- Wylie, Hugh, 1587
- Wyman v. James*, 1804
- Wynehamer v. People*
 - due process and, 1580
 - economic rights and, 477
 - substantive due process and, 464
- Wyoming
 - Alien Land Law in, 1107–1108
 - homosexuality and, 1469
 - women's suffrage and, 1541, 1793
- Wyoming v. Houghton*, 1804–1805
 - Breyer and, 183
- Wythe, George, 969
- Wyzanski, Charles E., 735

X

- X, Malcolm, 1495
 - Kunstler and, 306, 898
 - Son of Sam Law and, 361
- Xenophobia, 36–37
 - Palmer and, 1144
- XYZ Affair, 37
 - Ellsworth Court and, 491
 - Marshall, J., and, 970

INDEX

Y

Yablonski, Jock, 1270
 Yahweh, 1035
Yakus v. United States, 1391, 1801
 Yale College
 Calhoun and, 214
Yale Law and Policy Review
 Emerson and, 499
Yale Law Journal
 ERA and, 521
 fair use doctrine and, 572
 Fortas and, 603
 Yale Law School
 Bork and, 165
 Douglas and, 443
 Emerson and, 497
 Fortas and, 603
 Frank and, 615
 Griffiths and, 812
 Kunstler and, 898
 Rostow and, 258
 Yale University, 1374
 Griswold v. Connecticut and, 712
 Yalta Conference, 765
 Yamashita, Tomoyuki, 1390
Yamataya v. Fisher
 due process and, 460
Yang v. Sturner, 93
 Yarmulkes
 Goldman v. Weinberger and, 852
 in military, 1007
 Yasui, Minoru, 839
 litigation of, 841–842
Yasui v. United States, 839–840
Yates v. United States, 68, 110, 1807
 Burks v. United States and, 858
 Clark, T., and, 309
 freedom of association and, 635
 Harlan, II, and, 741
 national security and, 1073
 Smith Act and, 1488
 Yee, Johnny, 1792
 Yellow dog contracts
 Adair v. United States and, 465
 Coppage v. Kansas and, 465
 White Court and, 1777
 Yellow fever, 1387
Yick Wo v. Hopkins
 discriminatory prosecution in, 423
 equal protection clause and, 228
 Fourteenth Amendment, 515
 Yippies, 898
 YMCA. *See* Young Men's Christian Association
 Yoder, Jonas, 1787
 Yoo, John Choon, 1096
 Young, Brigham, 72, 1330
 Mormons and, 1038
 polygamy and, 396
 Young Earth creationism, 1616
Young Lawyer for the New Deal: An Insider's Memoir of the Roosevelt Years (Emerson), 498
 Young Men's Christian Association (YMCA), 1592
 Comstock and, 341
 Young Republicans, 204

Young v. American Mini-Theatres, 1318, 1418, 1436, 1807–1808, 1820
 content-neutral regulation and, 364
 Stevens and, 1556
 viewpoint discrimination and, 1714
 zoning laws and, 669, 1121
Youngberg v. Romeo, 282
 Younge, Samuel, 161
 Younger abstention, 1809
 Younger, Evelle, 1809
Younger v. Harris, 1808–1809
 good faith exception and, 868
 Youngs Drug Productions Corporation, 160–161
Youngstown Sheet & Tube Co. v. Sawyer, 495
 executive powers and, 731
 Jackson, R. and, 835
 Vinson Court and, 1720
 Yousef, Ramzi, 1622
 Youth International Party, 278
 Yurok Indians, 939
 Yutzy, Adin, 1787
 YWCA, 520

Z

Zablocki v. Redhail, 1479, 1811–1812
Zacchini v. Scripps-Howard Broadcasting Co., 77, 1812
Zadvydas v. Davis, 460, 1530
 Breyer and, 183
 material witnesses and, 981
Zant v. Stephens, 237
 Zaps, 26
Zellman v. Simmons-Harris, 31–32, 167, 422, 1298, 1416, 1528, 1812–1814
 ADL and, 69
 Americans United and, 57
 Breyer and, 183
 Charitable Choice and, 270
 Committee for Public Education and Religious Liberty v. Nyquist and, 334
 government funding and, 542
 Locke v. Davey and, 929
 Mueller v. Allen and, 1045–1046
 non-funding provisions and, 153
 O'Connor and, 1127
 school vouchers and, 1424
 Souter and, 1496
 Witters v. Department of Services and, 1789
 Wolman v. Walter and, 1791
 Zobrest v. Catalina Foothills School District and, 1817
 Zenger, John Peter, 644, 705, 1440, 1814–1816
 Bishop's Case and, 1667
 free speech law and, 815
 freedom of press and, 1202, 1207
 Hamilton and, 734
 jury nullification and, 869
 national security and, 1072
 Zeno, James, 940
 Zeran, Ken, 45
Zeran v. America Online, 45
Ziang Sung Wan v. United States, 1018
 Zimbalist, Efrem, Jr., 775
 Zion, 1035
 Z.J. Gifts, 926

Zobrest, James, 1816

Zobrest v. Catalina Foothills School District, 31, 1416, 1527, 1528, 1816–1817

Wolman v. Walter and, 1791

Zoning

definition of, 1817

entertainment and, 1418

free speech and, 1821

obscenity and, 1121

religion and, 1817–1820

RLUIPA and, 630–631

Schad v. Mt. Ephraim and, 1418–1419

secondary effects doctrine and, 1436

sex and, 1820–1821

SLAPP and, 1480

Stevens and, 1556

Sutherland, G. and, 1596

Taft Court and, 1595

Zoning laws

Bell Terre v. Boraas and, 120–121

City of Littleton v. Z.J. Gifts D4, LLC and, 926

nudity and, 111

RLUIPA and, 630–631

sexually explicit movies and, 669

Zorach v. Clauson, 343, 356, 1293, 1822–1823

Frankfurter and, 618

no endorsement test and, 1103

Torcaso v. Watkins and, 1662

Vinson Court and, 1719–1720

Zurcher v. Stanford Daily, 1823

Burger Court and, 202

journalistic sources and, 859

newsroom searches and, 1093

PPA and, 1223

Zwicker, Ralph, 1773

Cohn and, 323

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